



Is There an Effective US Legal Remedy for Original Owners of Art Looted During the Nazi Era in Europe?

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Citation	Hayhow, Van L. 2015. Is There an Effective US Legal Remedy for Original Owners of Art Looted During the Nazi Era in Europe?. Master's thesis, Harvard Extension School.
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Is There an Effective US Legal Remedy for Original Owners of Art
Looted during the Nazi Era in Europe?

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A Thesis in the Field of History
for the Degree of Master of Liberal Arts in Extension Studies

Harvard University

November 2015

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Abstract

This research project attempts to answer the question of whether it is possible to design a system wherein the rights of current possessors and the rights of original owners or their descendants of art that may have been looted during the Nazi era in Germany can be fairly balanced to achieve results that would be both fair and economical to the parties involved. While it could be said that twenty years ago this issue was hardly noticed, and very few lawsuits or claims were made, in recent years a large number of lawsuits have been filed against museums and private individuals claiming that the defendants own art that was stolen from the original owners or were taken from them in forced sales designed to give a patina of legitimacy to what were thefts by other means. Museums and others have defended themselves, first claiming that not all sales of that era were fraudulent, and second, claiming that the claimants' claims should be denied as they were dilatory in making the claims and that the statutes of limitations have expired. While it is true that in many cases decades passed before such claims were filed, the reasons for this are also explored.

Two lawsuits have been chosen to serve as exemplars. One suit was brought against a private owner and the other against a museum. This was done to show the differences in the techniques and strategies used. The hypothesis was that there is no practical solution available to bring about the fair and just result most would seek. Complicating matters is that with the federal government and the fifty states, there are too many sources of law to easily bring together in a unified solution. While there are many plausible solutions, the most plausible is for the federal government to step in and set up a national system. At this time, the government lacks the will to act, leaving the parties with no solution.

[I]t is never too late to set the wheels of justice in motion.

- President Bill Clinton

I encourage Germany to deal with Nazi-looted art[calling the works] the last prisoners of World War II.

- Ronald S. Lauder

Who, after all, today speaks of the annihilation of the Armenians?

- Adolph Hitler, August 22, 1939

The pain of being hated unto death. For what was genocide except an expression of generalized hate?

- Michael J. Arlen *A Passage to Ararat*

Acknowledgements

The author would like to thank Professor Kevin Madigan for his work as thesis director and the course he taught, Professor Ostrowski for his format review and the courses he taught and the teaching assistant, Gail Gardner, not only for her work as a teaching assistant in Professor Ostrowski's courses but also for first suggesting this topic as a field of research.

Dedication

This thesis is dedicated to my wife, Carol whose love and support has never been in question, nor has it been needed or appreciated more than in the last few years. She is a rock.

Table of Contents

I.	Introduction.....	1
II.	Background of the Problem.....	5
III.	Looted Art Comes to the United States.....	23
IV.	A Painting Comes to the United States.....	39
V.	A Museum Faces a Challenge.....	62
VI.	Legal Analysts Weigh In.....	82
VII.	Is There a Solution?.....	90
VIII.	Bibliography.....	92

I

Introduction

During the rule of the Nazi party over Germany, Jews, among others, were systematically victimized. They were imprisoned without charges or crimes, their property was stolen, and their lives were taken. Many Jews tried to flee from Germany, often selling prized possessions, such as their artwork, to finance their escape and to start a new life outside of Germany. Wealthier Jews had acted, not just as collectors and dealers in art, but also, especially in the case of modern art, as patrons.¹ The sale of some art and the theft of enormous amounts of art by the Germans caused an increase in the art business in Europe. Some of this art found its way to the United States. After the end of World War II, there was little attention paid to this missing art. The reasons why the original owners and their descendants did not initially pursue return of their property are, in many cases, vague. In recent decades there have been a number of lawsuits filed by either original owners of art alleged to have been stolen during the war or their descendants. Many of the parties in possession of this disputed art claim that they purchased the art without knowledge that it may have been stolen. In many of these cases, decades had passed before the lawsuits were filed.

As noted, many lawsuits have been filed in recent years. Some of the defendants in these cases are museums, while others are individuals. Is there a possible solution that would

¹ Willi Kote, "Nazi-Looted Art: The Case of the Missing Perspective," *Judaism* 55, no. 3/4 (Fall/Winter 2006): 59.

be fair to all parties? Is there a way original owners of art can obtain legal redress? The problems these cases present are enormous. Decades have passed. Records have been lost and/or destroyed.² Witnesses have died. Art worth large sums of money can pass hands with only the most casual review of the provenance of the art in question. In traveling from Eastern and Central Europe to the United States, the art passed through various countries. Once in the United States, the art may well have passed through various states. Is there a remedy for original owners of the art? What country's law should apply? If the law of the United States applies, then which state's law should apply? Each state has statutes of limitations barring the commencement of lawsuits after a certain deadline. Which statutes should apply? What defenses should be available?³

The working hypothesis is that there is at the present time no workable solution in the United States that would allow original owners of art to recover their looted art. The enormous legal difficulties, combined with the factual issues, the destruction of records, the massive looting, the lapse of time, and the death of most of the original owners makes it likely that most original owners will not recover their art, even if it is found in the United States. The only possible solution is for the federal government to set up a binding arbitration model and, while there was hope for this at one time, it now seems the federal government lacks the will and the money to follow this path.

² In one case, which will be discussed later in this thesis, a German art gallery's records of an auction of art, seized from a Jewish-owned gallery with the support of the Gestapo, were destroyed in an Allied air raid.

³ As one obvious example of the conflict of laws between the United States and most countries in Europe, in the United States a thief cannot convey good title to the stolen item to a buyer, even if the buyer is acting in good faith. In Europe, a good faith purchaser can claim title over the original owner.

There has been a steady growth in interest in the question of Nazi-era looted art over the last twenty years. With some museums posting lists and photographs of art that may have been looted, including the Museum of Fine Arts, Boston, with the founding of the Art Loss Register in London (and others in other countries) and with the growth of the Internet there has been a growing recognition of the problem. The Internet, itself, provides families with a means to search for missing art. While the number of lawsuits is small in comparison to other categories of lawsuits, the legal and historical issues have drawn the attention of a great number of legal scholars and there exist a large number of scholarly articles on the issues raised by the looted art. The sources used in this research are primarily law review articles that expound on the various legal issues, with commentary on some of the lawsuits. In addition, two lawsuits have been chosen for study in detail. In one such lawsuit, the Museum of Fine Arts, Boston (MFA) when faced with a claim for the return of a painting alleged to have been stolen commenced its own action to quiet title. It relied upon an assertion of the expiration of the statute of limitations. In the other lawsuit, Ms. Maria Bissonette, an individual living in Providence, Rhode Island, put a painting up for sale in an auction to be run by a Cranston, Rhode Island auction house. The auction was cancelled when the Art Loss Register of London notified the auction house that there was a claim that the painting had been stolen. The Estate of Max Stern commenced an action to recover the painting.

Interestingly enough, neither case went to trial. The MFA prevailed on its summary judgment motion based on the statute of limitations while the Estate of Max Stern prevailed on its summary judgment motion on its evidence the painting had been stolen.⁴

⁴ A summary judgment motion is a filing with the court that states that on the undisputed facts (which must be set out in affidavits or established by the admission of the other party, and laid out with the motion) there is no material issue of fact for a trial and that, therefore, the moving party is

The issue is significant as these lawsuits raise serious issues of law and morality. As the value of modern art continues to grow, the financial stakes for original owners, museums, and private possessors of art continues to rise. The psychological toll on survivors and their families and their desire to keep some aspect of their prior life is a strong motivating factor in seeking recovery. These issues also draw strong emotional responses from the possessors of the art and seeking common ground has been very difficult. For example, museums and other possessors of the art (not all of which was looted) resent the implication that they turned a blind eye to the possibility of the art having been stolen. Finding common ground could alleviate these legal and psychological issues.

entitled to a judgment as a matter of law. If the court agrees that there is no material issue of fact in dispute, the court is obligated to render a decision under the facts as established in the motion. Unlike criminal cases, where a defendant can refuse to submit or agree to evidence, or to admit guilt, the parties to a civil action are only entitled to a trial if there is a legitimate dispute as to the material facts. A fact is material if it can change the outcome of the case, even if it is only in a minor way.

II

Background of the Problem

How the Jews of Central and Eastern Europe (and their art) found themselves in the path of the Nazis is, itself, an unusual story. Adolph Hitler became Chancellor of Germany in 1933 in spite of the fact the vote totals obtained by his Nazi party in the then most recent election had declined from prior elections. In the last elections before Hitler was made chancellor, the Nazi party received only one-third of the vote and actually lost a number of seats in the Reichstag, the German legislature.⁵ While these low vote totals would not seem to give Hitler much power, he soon ended the nascent German democracy and turned the government into a totalitarian regime. He did this by obtaining passage through the Reichstag of the Enabling Act, which transferred to the cabinet the Reichstag's legislative powers. As the cabinet was dominated by the Nazi Party and its sympathizers, democracy in Germany was dead and was not likely to be revived.⁶ That someone like Hitler could sit in the chancellor's chair in Germany, which had previously been occupied by people like Bismarck, is startling. As one professor has written: "The First World War made Hitler possible.... And without the trauma of war, defeat, and revolution... the demagogue would have been without

⁵Ian Kershaw, *Hitler: A Biography* (New York: W. W. Norton, 2008), 241

⁶ Kershaw, *Hitler*, 281-282

an audience....Without the war, a Hitler on the Chancellor's seat... would have been unthinkable.”⁷

The ending of the First World War, with the defeat of Germany, was a shock to the German populace. After all, by the start of 1918, the last year of the war, Germany's army seemed to be in control. Russia had been defeated and Germany had forced upon Russia an extremely harsh treaty of peace. Russia had agreed to give up large sections of its territory and German nobility and other leaders were angling over who was going to take over the new countries that would be created. With Russia defeated, a large number of troops were released from the eastern front and sent to the western front to participate in the final assault that the German leaders believed would end the war. For the French and British allies, the situations on the western front appeared especially grim. After all, the German army on the western front was inside France and no allied troops were close to being in Germany. With the influx of German troops from the eastern front, it seemed unlikely that the allied troops could prevail and stop the expected German offensive.

The only bright spot for the allies was the fact the United States had declared war on the axis powers in 1917 and had, therefore, joined the war on the side of the allies. But many thought, with the surrender of Russia and the influx of German troops on the western front, that the United States could not raise an army and transport it to Europe in time to help stop the coming German offensive. It was expected that Germany's offensive would force a surrender by France and Great Britain before the United States forces could bolster the allies. It did not work out that way, of course. The German offensive did occur, but it stalled and then was repelled by the combined forces of France, Great Britain, and the United States,

⁷ Kershaw, *Hitler*, 47.

which had mobilized its forces much faster than Germany anticipated it could. The German army generals went to the German government and asked the government to seek an armistice. While the German government was able to achieve an armistice, this result was, practically, no better than a surrender, as Germany's army had collapsed, against all expectations. The German diplomats went to the Versailles treaty conference hoping for favorable terms, but when the allies proposed terms that were, in fact, no better than terms that would have been offered if Germany had, in fact, surrendered, the German leaders were forced to accept them. The reason was simple: the German army was not capable of continuing the war.

The Versailles Treaty that resulted from the lengthy negotiations in Paris, France, was never accepted by the majority of the German public. The treaty required that Germany admit its guilt in starting the war and pay monetary reparations for the damages caused by the German offensive. While the treaty was certainly less onerous than the treaty imposed by Germany on Russia, earlier in the war, many people, even on the allied side, felt it was too harsh in its economic provisions and should be repudiated and renegotiated. One such person, on the allied side, was the British economist, John Maynard Keynes. He had gone to the Paris treaty negotiations as an advisor to the British government consulting on economic matters. He resigned his position due to his opposition to the economic provisions of the treaty, which he regarded as too onerous on Germany. He then wrote a book on the treaty attacking the role of the French and the United States in the negotiations, and, further, attacking the financial burden imposed on Germany.⁸ The book closed with a call to

⁸ John Maynard Keynes, *The Economic Consequences of the Peace* (Rockville MD: Serenity Publishers, 2004).

renegotiate the treaty, with special attention paid to the financial aspects concerning the reparations to be paid by Germany.

Keynes's book was enormously successful in both Great Britain and Germany. So popular did he become in Germany that in 1922 he was invited to give a speech in Hamburg. In the speech, he strongly urged the Germans to avoid paying reparations and endorsed Germany's policy of encouraging inflation as opposed to raising taxes. In the speech he also denigrated France's threat to occupy the Ruhr Valley if payments of reparations were not made.⁹ As is well known, Germany continued its policies of encouraging inflation, not raising taxes to have the money to pay reparations, and not paying reparations. The end result was that France did occupy the Ruhr Valley and the German economic policies resulted in hyper-inflation, which ultimately destroyed the German economy.¹⁰

As Germany moved into the 1920s the German people had a number of strongly felt grievances over the end of World War I. They resented the Versailles Treaty for its placement of blame on Germany for starting the war, they resented the fact what started as an armistice resulted in a treaty, essentially, of surrender. They resented its requirement of stiff payments of reparations, and many resented the fall of the autocratic government with the resulting imposition of a democratic government. Pan-Germanic Germans resented the fact Germans in Austria, Czechoslovakia, and Poland were not part of the post-World War I

⁹Niall Ferguson, *The Pity of War: Explaining World War I* (New York: Basic Books, 1999), 399-410.

¹⁰Ferguson's book, *The Pity of War*, with the obvious benefit of decades of hindsight, essentially eviscerates Keynes's position on these issues.

Germany. Still other Germans resented the loss of German colonies in Africa and others resented the limitations on the size of the German military forces.¹¹

There were, at least, two other factors that helped to poison the political atmosphere in Germany in the post-World War I period. First, like most, if not all of Europe, Germany had a history of anti-Semitism. For example, in 1880 an anti-Semitic group circulated a petition seeking the removal of all Jews in government positions, among other requests. The petition garnered approximately 250,000 signatures but was, apparently, shelved by the government in power at the time.¹² In addition, at the end of the war, apparently not wanting to admit that the German army had collapsed, the German generals and the right-wing of German politics, invented the charge that the army had been “stabbed in the back” by the home front. Given the anti-Semitism previously mentioned, the public perceived this charge as referring to the Jews of Germany.¹³

Hitler and the Nazis developed an unusual way of looking at their role in society. That is to say that they saw themselves looking to the past, sometimes the ancient past, while, at the same time they saw themselves looking to the future. They wanted to come across as a party that respected the past while still being the party of the future. They rejected most forms of modern religion (aside from their hatred of the Jews) and devoted themselves to the concepts of blood and soil. Yet, at the same time they used and developed modern

¹¹ Robert Alexander Clarke Parker, *The Second World War: A History* (New York: Oxford University Press, 1989), 1-3.

¹² Lucy S. Dawidowicz, *A Holocaust Reader* (West Orange, NJ: Behrman House, 1976), 25-30.

¹³ Kershaw, *Hitler*, 60.

technology. This dual outlook has been referred to as reactionary modernism.¹⁴ Technology was crucial to the Nazis' view of Germans and the society they wanted to create. The argument is that Germany, even before the rise of Hitler, never fully endorsed the enlightenment and never incorporated its ideas into German nationalism. As Herf states: "The unique combination of industrial development and a weak liberal tradition was the social background for reactionary modernism."¹⁵ This is not to say that Hitler and the Nazis did not embrace certain aspects of modernism. Certainly, Hitler understood that he would need German industrial strength to supply the German military forces. He also flew to many of his speaking engagements (which would have been unusual in the 1930s), including to the Nazi Party Nuremberg rally after he ascended to the chancellorship. But technology and industrial strength were always the key as Hitler intended from the beginning to start a war. In a conversation with his military leaders during November of 1939, Hitler stated: "Basically I did not organize the armed forces in order not to strike. The decision to strike was always in me."¹⁶

War was not the only way in which the Nazis believed in violence. It was infused into their party and regime. Fueling the violence of the Nazi regime was Hitler's belief in power and the positive virtue of violence. He believed that violence was a positive in its own right,

¹⁴ Jeffrey Herf, *Reactionary Modernism: Technology, Culture, and Politics in Weimar and the Third Reich* (New York: Cambridge University Press, 1984).

¹⁵ Herf, *Reactionary Modernism*, 10.

¹⁶ Jackson J. Spielvogel & David Redles, *Hitler and Nazi Germany: A History 6th ed.* (Upper Saddle River, NJ: Prentice Hall, 2010), 199.

showing the right to rule.¹⁷ He also did nothing to hide his extreme hatred of the Jews. He saw them as outsiders, and not as true Germans, and he blamed them for the loss by Germany in the Great War.¹⁸ While it is commonly said that Hitler was a racist, it is not as clear that people understand how literally that was true. Hitler saw races in humans as separate as animals are from one another. He also arranged humans into a pyramid. Of course he placed Aryans (which included, to a greater or lesser degree, Germans, Scandinavians and Greeks) at the top of the pyramid. He based this, in part, on the ancient civilizations of Greece and Rome. Lower in the rankings (for lack of a better term) were the Japanese who, while certainly not Aryan, had incorporated, at a very high rate, technology into their lives. As such, they deserved respect.¹⁹ The Jews, of course, under his racial theories, were at the bottom. Hitler considered them a parasitic race. He felt they created nothing. He also felt they had no state or culture of their own.²⁰

Hitler also believed that there were two laws of nature. One was a law of racial purity. He felt that violation of that law would lead to extinction for the Aryans. The other law was a form, however unsophisticated, of natural selection, meaning the elimination of the weak.²¹ These two laws would later serve as justification for the murder of the mentally ill and the Holocaust.

¹⁷ Philippe Burrin, *Nazi Anti-Semitism: From Prejudice to the Holocaust* (New York: New Press, 2004), 117-132.

¹⁸ Niall Ferguson, *The War of the World: Twentieth-Century Conflict and the Descent of the West* (New York: Penguin Books, 2006), 248-249.

¹⁹ The outcome of the 1905 Russo-Japanese war is one example of this.

²⁰ At that time, of course, the Jews did not have their own state. A lack of culture, on the other hand, would be harder for Hitler to make a case for.

²¹ Burrin, *Nazi Anti-Semitism*, 40-41.

Especially confounding in Hitler's view of science and technology was his view of the Jews in science. It is commonly known that Jews in Germany at that time were among the most successful scientists. How then could Hitler view Jews as parasitic? Part of the reason is that Hitler, like most reactionary modernists, was an irrationalist.²² The Nazis saw themselves as needing to separate themselves and their technology from Jewish abstraction and finance.²³

Hitler and the Nazis also wanted to change the relationship between Germany and religion. At first this would seem to be an extremely difficult task as the vast majority of Germans viewed themselves as Christians, whether belonging to the Roman Catholic Church or the Lutheran Church (or one of the many other Protestant denominations). The German census of 1939 indicated that 54% of Germans considered themselves Protestant and 40% considered themselves Roman Catholic.²⁴

Initially, the Roman Catholic Church resisted the Nazi rule more strongly than the Protestants did. In spite of their smaller numbers, the Nazis could view the Roman Catholics as a greater threat than the Protestants. The Roman Catholics had a stronger hierarchy and a political party, the Center Party, which could directly play a role in elections. On the other hand, the Catholic Church would want to maintain its position in society. The Catholic Church was partially removed from opposition when, on July 8, 1933, the Nazi government and the Catholic Church entered into a Reichs' Concordat. This agreement purported to

²² Herf, *Reactionary Modernism*, 13.

²³ Herf, *Reactionary Modernism*, 189-193.

²⁴ Robert P. Erickson & Susannah Heschel (editors), *Betrayal: German Churches and the Holocaust* (Minneapolis, MN: Fortress Press, 1999), 10.

guaranty the sanctity of the Catholic Church, but, in turn, the Church agreed to withdraw its clergy from politics.²⁵ This constituted a double tragedy for Germany as the Nazis never lived up to their agreement with the church and a possible, public opposition to the various Nazi policies was muted.

In the end the Protestants proved more problematic. Their very lack of organization became their strength as there was no one place for Hitler to go. The number of Protestant denominations was twenty- eight. This is not to say Hitler did not try. He attempted to form a German Protestant Church that would be under the control of the Nazi Party. Hitler chose Ludwig Müller as the person he wanted elected to the new post of Reich Bishop. His job was to unify the Protestant Church in support of Hitler. Muller won the election with the support of Hitler and the wing of the Protestant religion that already supported the Nazis. His election instigated a revolt lead by, among others, Martin Niemöller which resulted in the formation of what became known as the “Confessing Church” which opposed the Nazi government and its interference in the life of the Church.²⁶ It does seem clear that, eventually, Hitler wanted to eliminate the role of any Christian Church in Germany, seeing Christians as weak and divisive. At the end of the war, the Office of Strategic Services prepared a report for William Donovan in preparation for the Nuremberg Trials for German war criminals. This report stated that Hitler wanted to eliminate the Christian Churches from Germany.²⁷ In sum, Hitler certainly wanted to rid Germany of the Jews, but he also wanted to rid Germany of Christianity.

²⁵ David M. Crowe, *The Holocaust: Roots, History, and Aftermath* (Boulder, CO: Westview Press, 2008) 112.

²⁶ Kershaw, *Hitler*, 295-296.

²⁷ Office of Strategic Services, *Nazi Master Plan* (July 6, 1945).

Nazi ideology sought to create a new German society, without Jews or Christianity, based on loyalty to Hitler as the embodiment of the state and the German culture. They used many vehicles to accomplish their goals. These included mass spectacles, such as the mass rallies at Nuremberg, speeches in person and on radio and, especially, movies.²⁸ Joseph Goebbels was appointed by Hitler as head of the Ministry of Public Enlightenment and Propaganda. In that role, he was in charge of the propaganda arm of the Nazi government. As Professor Rentschler points out, when Dr. Goebbels took over the movie industry on behalf of the Nazis, he was operating as a Ministry of Illusion and not as a Ministry of Fear.²⁹ He was a master of propaganda. Jacques Ellul believed there were two major types of propaganda. There was propaganda of agitation (which sought to inspire direct and immediate action) and propaganda of integration (which sought to bind the audience to the provider of the propaganda).³⁰ Ellul also felt that the individual could never be left alone so that propaganda must be constant.³¹ Goebbels needed to use both forms of propaganda. He needed propaganda of agitation to help the Nazis come to power and propaganda of integration to consolidate their rule. He developed his “orchestra principle.” He said: “We do not expect everyone to play the same instrument...we only expect that people play according

²⁸ Eric Rentschler, *The Ministry of Illusion: Nazi Cinema and Its Afterlife* (Cambridge, MA: Harvard University Press, 1996), 217.

²⁹ Rentschler, *Ministry of Illusion*.

³⁰ Jacques Ellul, *Propaganda: The Formation of Men's Attitudes* (New York: Alfred Knopf Press, 1965), 70-74.

³¹ Ellul, *Propaganda*, 75.

to a plan.”³² Goebbels was extremely successful in drawing Germans, especially the youth, to the Nazi cause.

Hitler, a failed artist in Austria in his younger years, also had an abiding interest in art. He wanted Germany to dominate the art world of Europe. He thought of controlling art as part of the “projection of Nazi ideology and its obsession with ‘German Heritage.’ It stands as the cultural and aesthetic aspect of Hitler’s project of conquest.”³³ He intended to build a large museum of art in Linz, Austria, after Germany won World War II. But as strong as his interest in art was his taste in art was just as limited. He loathed most forms of modern art and wanted the German people to be protected from their influences. He also associated modern art with the Jews. This gave him two reasons to move against modern art.

Even though Hitler was new as chancellor, he used his authority to get the German legislature, the *Reichstag*, to pass the Enabling Act. This act passed all of the legislative powers of the *Reichstag* on to the cabinet, which was, of course, dominated by Hitler and the Nazis.³⁴ This was the first step on the path of Hitler’s establishing himself as a dictator and the Nazi Party as the only authorized party in Germany. More steps would follow. Jews were barred from the civil service and the professions, including law. Some of these laws had Orwellian names. For example, the law setting quotas for the number of Jewish students in

³² Rentschler, *Ministry of Illusion*, 20.

³³ Hector Feliciano, *The Lost Museum: The Nazi Conspiracy to Steal the World’s Greatest Works of Art*, (New York: Basic Books, 1997), 30.

³⁴ Kershaw, *Hitler*, 281-282.

schools was entitled the “Law against the Overcrowding of German Schools, and Institutions of Higher Learning.”³⁵

In 1935 came the Nuremberg laws. These laws forbade sexual relations between Jews and Aryans and even forbade an Aryan woman under the age of 45 from working in a Jewish household. In addition, and more importantly, the laws stripped non-Aryans of citizenship in Germany.³⁶ With the passage of the Nuremberg laws, Jews lost their citizenship and their ability to work in many professions, including the art field. Indeed, artists who were not allowed to join the National Chamber of the Arts, as established by the Nazis, were also not allowed to paint, even for their own pleasure.³⁷ These laws were among the early steps on the way to the Holocaust. Every step to the Holocaust was publicized in the United States.³⁸ Yet the reaction from many in the United States was minimal. Even groups that advocated boycotts of German goods, were themselves criticized for making the situation worse. Much of the American press was skeptical. The *New York Times*, for example, ran stories stating the official German account that the removal of Jews from Germany was relocations but would then run articles about ads in German newspapers for the goods of the Jews relocated.³⁹ The press seemed captured by a cycle of belief and disbelief.⁴⁰ Yes, we hear that

³⁵ Lucy S. Dawidowicz, ed., *A Holocaust Reader* (West Orange, NJ: Behrman House, 1976), 42.

³⁶ Kershaw, *Hitler*, 344-349.

³⁷ Dawidowicz, *A Holocaust Reader*, 35-53.

³⁸ Deborah Lipstadt, *Beyond Belief: The American Press and the Coming of the Holocaust* (New York: Free Press, 1986); Robert H. Azbug, *America Views the Holocaust 1933-1945: A Brief Documentary History* (Boston: Bedford/St. Martins, 1999).

³⁹ Lipstadt *Beyond Belief*.

⁴⁰ Lipstadt, *Beyond Belief*, 262.

the German government is doing horrible things, but we can't be sure as we don't trust the sources, or we can't get official confirmation. Nevertheless, every aspect of the harsh treatment of the Jews of Germany and East Europe and the coming of the Holocaust was publicized by the American press.

As Jews tried to flee from Nazi persecution, they were frequently forced to leave behind their possessions, including their artwork, if they possessed it. The Nazis hated modern art but would seize it from Jews, often making them sign away their rights to their art in return for passage out of Germany. Others were already in camps and would have to sign away their art before they were killed. It is estimated that the Germans looted twenty per cent of European art including theft and forced sales before World War II and the looting during the war.⁴¹

Why were Hitler and the Nazis so interested in art? Part of it may be Hitler's personal history. It is commonly known, as previously noted, that Hitler was a failed artist in his younger days in Austria. He and Herman Goering remained interested in art until their dying days. Indeed, in Hitler's last will and testament, written shortly before his suicide, he left all of his personal property to the Nazi Party. The only property specifically mentioned was his art collection.⁴²

In 1940, Hitler had given a written order to an art historian named Otto Kummel. The order directed Kummel to prepare a report for Hitler listing German artwork held outside of

⁴¹ Lynn H. Nicholas, *The Rape of Europa The Fate of Europe's Treasures in the Third Reich and the Second World War* (New York: Vintage Books, 1994)

⁴² Under the law of the United States, this would be referred to as a specific bequest. The general rule is the specific bequests take precedence over general bequests.

Germany since the beginning of the sixteenth century. The report, when completed, was contained in three volumes and included the complete history of each of the works, its then-present location and value. The report gave a rationale for why each of the listed items should be returned to Germany. Given Hitler's attitude towards modern art, it can be seen as unusual that the Kummel report included references to modern (i.e. degenerate) art. The report was, needless to say, extensive. While the report was never distributed, as the German authorities felt it would be too divisive in the conquered territories if made public, the report demonstrated the Nazis drive to dominate the culture of Europe.⁴³

Whatever Hitler's interest in art was, his taste in art was limited. Certain forms of art he despised. This included most, if not all, forms of modern art. He felt that the populace should be protected from its supposed pernicious influence. Starting in the 1920s he started to collect art. Part of his motivation was to start an art museum in Linz, Austria to be among the best in Europe. Part of his motivation for the location may well have been because he had lived in Linz during his youth. In his previously mentioned will, he instructed that the museum go forward. The Linz project was to start with a budget of \$85,000,000 in today's value in U. S. currency.⁴⁴

How did Hitler acquire this art? It has been estimated that he spent more money on art than anyone else in history did.⁴⁵ Purchasing art was not always required. Once the Jews lost their citizenship and, in many cases, their ability to pursue their professions, their art could be

⁴³ Feliciano, *The Lost Museum*, 24-30.

⁴⁴ Feliciano, *The Lost Museum*, 20-23.

⁴⁵ Kelly Diane Walton, "Leave No Stone Unturned: The Search for Art Stolen by the Nazis and the Legal Rules Governing Restitution of Stolen Art," *Fordham Intellectual Property and Entertainment Law Journal* 9 (1999), 549.

purchased at less than market value or, simply, stolen. For example, when Germany annexed Austria in March of 1938, in what became known as the *Anschluss*, agents of the Gestapo and the SS arrived in Austria and began searching for anti-Nazis and Jews. All of the extensive art collection of Louis de Rothschild was seized, along with his home, which was turned into the local office of the Gestapo. He later agreed to submit to the seizure of his art and home in Austria in return for safe passage for his brother (already held in a concentration camp) and himself out of Austria. A reasonable estimate of the value of the German seizures in Austria came to 93 billion Reich marks. Certain paintings were set aside for the personal review by Hitler for the Linz project.⁴⁶

Of course, in Germany proper, different methods would have been required. It should be understood that in the period just before and during the early part of Nazi rule in Germany, modern art was controversial. Many people hated it. The Nazi party played upon these feelings and mixed it with their constant message of anti-Semitism in an effort to destroy modern art in Germany. Along with the statutes previously mentioned, this propaganda was used to attack the Jewish holdings of modern art and their ability to make a living. For example, when the Nazi party in 1929 gained a foothold in the state of Thuringia, Dr. Wilhelm Frick was named the minister of the interior. He was so intent on doing away with what he denominated Judeo-Bolshevik influences that he ordered that Bauhaus murals be painted over, that music by Stravinsky not be played, and the *Three Penny Opera* not be performed. Many thought these actions extreme and he was fired in 1931. Two years later, in

⁴⁶ Peter Harclerode and Brendan Pittaway, *The Lost Masters: World War II and the Looting of Europe's Treasurehouses* (New York: Welcome Rain Publishers, 1999), 2-3.

1933, when Hitler obtained the position of chancellor, Frick was made national minister of the interior.⁴⁷

These policies of suppressing modern art were not always popular with the public. In 1937, Hitler ordered an exhibition of what he regarded as “noble” German art and, at the same time, an exhibition of what he regarded as “degenerate art.” These exhibitions were held, starting on July 17, in Munich, in connection with an anniversary meeting of the Reich Chamber of Culture. Hitler was in attendance. The next day was a Sunday and it was declared to be the day of German art. In connection with the opening of the show was a parade with 7,000 participants. Among the marchers were units of the SS, SA, and the army. The presence of such units in a march to honor art might be considered unusual in other places and times. However, Hitler had included in the definition of degenerate art any art that was deemed to be anti-war or which depicted war in a realistic, as opposed to a glorifying, way. The show was not well attended and Hitler purchased most of the art himself for the government.⁴⁸

The show of degenerate art drew large crowds in Munich in spite of the difficulties in attendance. The show was held in an old building formerly used to house plaster casts. Graffiti was written on the walls around the art in an effort to discourage the attendees from enjoying the art. Some paintings were labeled “Jewish Trash,” others as “Marxist Propaganda,” and still others as “Total Madness.” Some of the choices for inclusion in the show were surprising. For example, several paintings were included by Franz Marc. He had fought for Germany in the Great War, had earned the Iron Cross, and had been killed at

⁴⁷ Nicholas, *The Rape of Europa*, 9.

⁴⁸ Nicholas, *The Rape of Europa*, 18-20.

Verdun. The public came to the exhibit, two million strong, in Munich and a subsequent tour. No doubt, some of the attendees came to see art that they perceived as degenerate.⁴⁹ It seems likely many others came as this may have been their last chance to see modern art in Germany.

At the end of the tour of the degenerate art show the question arose as to what to do with this art. After all, the Nazis had ordered the close of the modern wing of any art museum in Germany. Given the Nazis determination that this art was degenerate, a domestic market was unthinkable. Many of the Nazi leaders did realize that this modern art had a market and value outside of Germany. If this art was seized, it could provide a source of income to the person who seized it. Goering, himself, seized paintings by Marc, Munch, Cezanne, and four van Goghs. As this art began to be sold there was a resulting boom in the art business in Europe. Goering and other Nazis (and others, of course, seeking to flee Europe) would sell these modern painting outside of Germany to raise money for their own purposes.⁵⁰

When Germany invaded Poland, without provocation, and started the European portion of World War II, the looting of art by Germany commenced on a scale unseen in modern times. The Poles, as a Slavic people, were not seen by Germans as equals but as an inferior “race.” Therefore, the Germans felt they could strip away the cultural heritage of Poland without regret or compunction. In fact, the German army formed special units to loot art and other materials from Poland. One such unit was a unit of the SS denominated Kommando Paulsen. The German army of this time often named ad hoc units after its commander. This unit was named after its commander, Peter Paulsen. Before the war,

⁴⁹ Nicholas, *The Rape of Europa*, 20-22.

⁵⁰ Nicholas, *The Rape of Europa*, 25.

Paulsen was a professor of prehistory at the University of Berlin. His units looted paintings, tapestries, antique furniture, library collections, coins, porcelain and, most importantly, an altarpiece that had been carved by a German sculptor, Veit Stoss, on a commission from the then King of Poland. The altarpiece was a gift from the King to the Cathedral at Krakow. One estimate of the looting from Poland includes approximately 14,000 paintings and 1,200 statues. The looted artwork included paintings by artists such as Rembrandt, Rubens, Raphael, and de Vinci.⁵¹

⁵¹ Harclerode and Pittaway, *The Lost Masters*, 8-11.

III

Looted Art Comes to the United States

Bizarrely, these seizures of art, as discussed in the last chapter, resulted in a boom in the art market for Europe, with the result that many of these paintings found their way to the United States. In spite of the Nazi's hatred of modern art, they seized it along with the older forms of art they did appreciate. The looting continued long after the Nazis had to have understood the war was lost. For example, the Einsatzstab Reichsleiter Rosenberg ("ERR"),⁵² one of the main looting groups in the German army, in its final report, written in July of 1944, stated they sent 120 train cars filled with art and antiquities from Paris to Germany.⁵³ Paris was retaken by the allied forces shortly thereafter, on August 25, 1944.⁵⁴ Rosenberg and the ERR stole for both Hitler and Goering. Rosenberg's role as leader of the ERR played a small role in his trial, conviction, and death penalty for war crimes during the Nuremberg trials.⁵⁵ Art and antiquities represented only part of the looting by the Nazis. It has been said that "Nazi Germany was one of history's greatest kleptocracies."⁵⁶

⁵² This group, like other ad hoc groups in the German Army, was named after its leader, Alfred Rosenberg.

⁵³ Feliciano, *The Lost Museum*, 120.

⁵⁴ Parker, *The Second World War*, 203.

⁵⁵ Joseph E. Persico, *Nuremberg: Infamy on Trial* (New York: Penguin Books, 1994), 388, 398.

⁵⁶ Williamson Murray and Allan R. Millett, *A War to be Won: Fighting the Second World War* (Cambridge, MA.: Belknap Press, 2000) 562.

Much of this looted art was lost and is still lost today. Much of it was taken back to the Soviet Union as reparations for the looting by the Germans early in the war during the German invasion of the Soviet Union. During the war, the British and U. S. governments learned of the looting of art and antiquities by the Germans. Each formed groups to attempt to locate and reclaim the art. The U. S. army recruited professors with knowledge of art and preservation. They were given military rank and uniforms to protect them if captured. The U. S. professors were formed into the Monuments, Fine Arts and Archives groups and became known, informally, as “Monuments Men.”⁵⁷ The art that they, and their British counterparts, recovered was generally stored in central locations and then, when the nation of origin was determined, it was turned over to national authorities with the expectation that these authorities would make the effort to find the original owners. Often, little was done, even in France. It wasn’t until the publication of Feliciano’s *The Lost Museum* that the French public became aware of how many looted pieces of art remained in French museums. The efforts of the British and American troops to protect and return looted art and antiquities show how civilization has changed its attitude towards looting. Looting originally referred to the taking of goods by victorious troops. It was considered a legitimate way to pay the troops. However the Hague Convention of 1907 made looting a war crime. After the experiences of World War II, the Hague Convention of 1954 explicitly added the theft of culturally significant items as part of the definition of looting.⁵⁸

⁵⁷ Harclerode and Pittaway, *The Lost Masters*, 83-85 and Robert M. Edsel with Bret Witter, *The Monuments Men: Allied Heroes, Nazi Thieves, and the Greatest Treasure Hunt in History*, (New York: Center Street, 2009).

⁵⁸ Stuart P. Green, “Looting, Law and Lawlessness,” *Tulane Law Review* 81(2007): 1129.

All of that being said, it cannot be denied that a certain amount of looted art made its way into the United States. Much of this art was purchased during or at the close of World War II. Before the purchase, or other acquisition, could be completed, the art would have traveled thousands of miles and crossed national borders (sometimes, multiple national borders) and state lines. If the art did not remain in New York, a center of the art world in the United States, the art would pass across multiple state lines. Many years would pass before litigation seeking the recovery of art alleged to have been looted during the Nazi era became common. When the litigation did become common the travel of the art to the place it was discovered became one of many entangling issues in resolving the questions of ownership and possession.

As noted, museums and private parties bought a large amount of art that had been looted but had found its way into America. When claims were made by original owners or their descendants, the claims were met with declarations that the purchasers could not have known that the art was looted during the war. How credible were those claims? After all, every step on the way to the Holocaust was publicized in the United States. Yet, it must be said, news of the Holocaust, and related stories, were not commonly believed. Some people felt that the stories were too overwhelming, too astonishing to believe. When stories came out that millions of people were being murdered in Europe, a substantial percentage of the people polled dismissed the story as a rumor.⁵⁹ The rise of fascist groups in the United States during the Great Depression and the early years of the war, lead many of America's leaders to downplay the role of Jews as victims in Europe for fear of increasing the public's interest in isolationism and defeating the Roosevelt administration's interest in aiding the allies.

⁵⁹ Lipstadt, *Beyond Belief*, 235.

Isolationist groups did grow in the United States during the depression and early war years. One of the largest women's movements of the 20th century was a group of isolationist organizations commonly and collectively referred to as the Mothers' Movement. The group sprang up after Germany invaded Poland in 1939. They were explicitly pro-Hitler and anti-Semitic. After the attack by Japan on the United States' naval base at Pearl Harbor, the membership did decline, but, unlike other isolationist groups, the Mothers' Movement did not disband. Rather, they continued to press for a negotiated settlement with Germany and Japan and did not recognize the necessity of the war against the axis powers even with the post-war exposure of the Holocaust.⁶⁰

There were, of course, isolationist groups that were not anti-Semitic or pro-Hitler. One such group was the Committee to Defend America First. This was one of the most active and successful isolationists groups. The chairman of America First was a retired army general, Robert Wood, who had been made chairman of the Sears-Roebuck Company. Part of what made America First so successful was their most popular speaker, Charles Lindbergh. Before Lindbergh joined America First, he was probably the most popular person in America. His fame originated from the fact he was the first person to make a successful, non-stop flight between New York and Paris, France.⁶¹ His speaking out on behalf of America First cost him his popularity. Never did he speak of the victims of Nazi Germany and, while he resigned his reserve commission in the United States Army over criticism he received in speaking in favor of isolationism, he never returned an air medal given to him by the German

⁶⁰ Glen Jeansonne, *Women of the Far Right: The Mothers' Movement and World War II* (Chicago: Chicago Press, 1996), 1-3.

⁶¹ An unusual fact about that flight is that the single-engine plane he was flying had no front window, the space being taken up with fuel tanks.

government on a trip to Germany in the 1930s. He became despised.⁶² As noted, the presence and activity of these isolationist and, sometimes, anti-Semitic groups hindered the Roosevelt administration's attempts to bolster the allies fight against Germany. It also resulted in the government practice of identifying victims of Nazi atrocities by their nationality as opposed to their religion.

The American press was also not especially helpful in identifying the actual victims of these atrocities. The *New York Times*, for example, as noted, would run stories following the German party-line referring to the removals of Jews as relocations, but would then also run stories about ads seeking to sell personal property belongings of Jews.⁶³ This pattern continued in the American press. Even when it was clear that reports indicated that the Nazis intended to murder the Jews of Europe, the press often ran these articles on the inside pages. They would use terms like "alleged," which would indicate skepticism over the accuracy of the stories. One of the more disturbing examples of this comes from the Protestant magazine, the *Christian Century*. For example, in an article in its December 9, 1942 issue, in the face of reports of mass murder, the magazine could not believe the reports as it could not be confirmed from official sources.⁶⁴ This is just one example. It shows the consistent approach the magazine took during the 1930s and 1940s. One historian, who reviewed their positions during this time, stated that the magazine was one of the more "strident skeptics regarding

⁶² A. Scott Berg, *Lindbergh* (New York: Berkeley Books, 1999), 411-430.

⁶³ Lipstadt, *Beyond Belief*, 139.

⁶⁴ Robert H. Abzug, *America Views the Holocaust 1933-1945: A Brief Documentary History*, (Boston: Bedford/St. Martins, 1999), 136-137.

the accuracy of the reports of Jewish persecution.”⁶⁵ These examples could be continued extensively. As Professor Lipstadt has stated the press seemed to be caught in a cycle of belief and disbelief.⁶⁶ Yes, the Nazis are doing awful things but we cannot be sure, because we do not trust the sources or it is too hard to believe.⁶⁷

It appears that the only two magazines that regularly warned the United States about the enormity of German crimes were the *Nation* and the *New Republic*. Neither magazine had a large circulation. When the end of the war came, with the exposure of the death camps, people acted in shock. The press acted as though it was unthinkable that a country as advanced as Germany could sink to such levels of depravity. Yet, the press did know. As just illustrated, every aspect of the coming to power of Hitler and the Nazis and their anti-Semitic program was there for anyone to see. And, if the press could see what was happening, so could the public. As Professor Lipstadt concluded, the press treated the lives of the Jews of Europe with apathy.

To a certain extent, so did the American purchasers of art from Europe in the 1930s and 1940s. After all, where did they think this art was coming from? Why did they think it was now coming on to the market and in such numbers? Why were they not dealing with the original owners of art? What did they think of the articles in the *New York Times* and other sources concerning the “relocations” of the Jews, especially combined with the articles about the sale of the Jews’ personal property? Part of the sense of denial on the part of purchasers

⁶⁵ Lipstadt, *Beyond Belief*, 23.

⁶⁶ Lipstadt, *Beyond Belief*, 262.

⁶⁷ It must have been hard to believe the enormity of the crimes. Even Associate Justice of the Supreme Court, Felix Frankfurter, after speaking to a person who had personal experience in the Warsaw ghetto and the death camp at Belzec, is reported to have said: “I know that what you have to say is true, but I don’t believe it.” Azbug, *America Views the Holocaust*, 210.

of art during this period is the very unusual way art purchases are made. Generally purchases of art are made privately and only cursory investigations are made into the provenance of the art that is to change owners. If one is to buy a house, the bank and/or the attorney for the buyer will insist on a title search; if you are buying a business, you audit the books under a confidentiality agreement. Yet, in the art world, art worth tens of thousands of dollars, or more, can pass through hands with only the most cursory investigation into the provenance. To anyone who is involved in the transfer of houses and businesses, this would be astonishing. Nevertheless, this seems to be the norm in the art business. When the Art Dealers Association of America filed a brief in one lawsuit in New York making the argument that “the ordinary custom in the art business was to make no inquiry into title and that the imposition of this would cripple the art business, the court summarily dismissed the contention.”⁶⁸ Given the informal nature of many art transactions, this ruling may have come something of a shock to the industry. So, it would appear that the informal nature of many art transactions, the fog of war abetted by the U. S. government, not wanting to exacerbate anti-Semitism and isolationism, the skepticism of the mainline press as to the ongoing atrocities in Europe, which was reflected in their reporting, and the fact a world war was ongoing, may have resulted in buyers of Nazi-era looted art not realizing how the art they purchased came on the market. For others, it provided convenient cover.

What to do with this art? Private parties and museums that had paid for this art were reluctant to return it, especially as decades had passed between the end of the war and the demands for return. In addition, much of the modern art had grown in value over the ensuing decades and a piece of art that might have been worth a few thousand dollars in 1945 might

⁶⁸ Walton, “Leave No Stone Unturned,” 549.

be worth many times that now. Further, the demands for return of the art were late in coming. Until thirty years or more after the end of the war, there were few claims or lawsuits filed. There are a number of reasons for this. Obviously, a great number of the people who attempted to flee and left their art behind or who surrendered their art while in the camps perished during the war. One recent estimate of Jewish Holocaust deaths placed the number between 4,700,000 and 7,500,000.⁶⁹ During the 1950s, Jews in the United States, including Holocaust survivors did not generally discuss the Holocaust. In part this was based on their desire to not be seen as victims; rather they wanted to be seen as strong and successful. There was also during this time a remarkable decline in anti-Semitic attitudes in the United States. For example, in 1946, the American Jewish Committee took an unpublished poll of gentiles asking if there was one group in America that was a threat to the country. Eighteen percent responded with the Jews. By 1954, the number so responding was around one percent.⁷⁰ As Jews became regarded by gentiles as no different, the Jews saw themselves as Americans as well as Jewish. They looked to heroes like Bess Myerson and Hank Greenberg as their role models. When they thought of the Warsaw uprising or the Holocaust, they thought of the survivors as victors over horror and not, necessarily, as victims. Even the survivors seemed to settle into life in the United States.⁷¹

Eventually, attitudes changed. As lawsuits began to be filed and as the survivors began to die off, the original owners that did survive, or their descendants, began to learn that

⁶⁹ David M. Crowe, *The Holocaust: Roots, History and Aftermath* (Boulder, CO: Westview Press, 2008), 447.

⁷⁰ Peter Novick, *The Holocaust in American Life* (New York: Mariner Books, 1999), 113.

⁷¹ Novick, *American Life*, 103-123.

their families' possessions, including their art, may have survived the war. What started as a trickle soon became something so much more. In addition, the international attention given to such issues as slave labor, unpaid insurance policies and Swiss bank accounts, all dating to the war years, gave impetus to making claims of restitution for all types of property, including art.

The American government increasingly became interested in the issue of restitution of looted property and other issues relating to unpaid insurance policies and dormant bank accounts. One representative of the United States government that had a continual role in the resolution of these issues was Stuart E. Eizenstat.⁷² Starting with a memo he wrote to President Carter suggesting the establishment of a Holocaust Museum in the United States, he became more and more involved in issues concerning the Holocaust and, more specifically, in issues of reparations for the victims of the various Nazi policies, including the issue of looted art. As he wrote: "One of the Holocaust's greatest ironies is that its most malevolent perpetrators fancied themselves a new cultural elite."⁷³

Of course, not all of the art that came to the United States was stolen. If a Jewish family with their art reached a temporary safe haven (such as France before the war began) or a permanent safe haven (such as Switzerland or the United States) their art was frequently sold at arm's length transactions to pay travel costs or the simple costs of living while establishing a new life. And so the art flowed into the United States. Museums and private

⁷² John Authers and Richard Wolffe, *The Victim's Fortune: Inside the Epic Battle Over the Debts of the Holocaust* (New York: HarperCollins, 2002).

⁷³ Stuart E. Eizenstat, *Imperfect Justice: Looted Assets, Slave Labor, and the Unfinished Business of World War II* (New York: Public Affairs, 2003), 187.

individuals acquired this art, often at low prices with little indication that any but the most cursory investigation was undertaken to ascertain the provenance of the art being acquired.

Much of Eizenstat's work involved working with the Swiss government and banks to provide an avenue for people to recover bank accounts that had been opened by Jews who were then murdered by the Nazis. However, he also was interested in restitution of looted art and antiquities. In his own book on his work on these issues he named the chapter on the looting of art as "The Barbarians of Culture."⁷⁴

As an official of the United States State Department, Eizenstat understood, perhaps as few others could, that these issues had international repercussions. It should go without saying that foreign countries and dignitaries would not care to be lectured by the United States and its officials. As such, the issue of the restitution of looted art needed to be addressed diplomatically.

In 1997, Eizenstat used a conference in Great Britain on Nazi-looted gold to stage his first effort to publicize the issue of stolen art. He chose Hector Feliciano, the author of *Lost Museum*, as his keynote speaker. Feliciano accused art dealers on both continents of poor conduct in documenting the provenance of the art being sold during the time period in question. His startling remarks apparently prompted some introspection and candor on the part of some of the delegations that had not previously taken a serious look at the issue of stolen art. At the close of this seminar, Eizenstat announced that he was forming a conference for Washington D. C. for 1998 that would focus on the issue of Nazi-looted art.⁷⁵

⁷⁴ Eizenstat, *Imperfect Justice*, 187.

⁷⁵ Eizenstat, *Imperfect Justice*, 190-191.

Eizenstat's work got an unexpected boost from two unlikely sources. The first involved the attempts to seize a painting by Egon Schiele, an Austrian artist. The painting, entitled *Portrait of Wally*, had been lent to New York's Museum of Modern Art for a show. It had been sent there by an Austrian entity known as the Leopold Foundation. The State of New York, through one of its district attorneys, attempted to seize the painting based on allegations it had been stolen during the Holocaust. New York state courts refused to enforce the subpoena on the grounds that a state law forbids such seizures when a piece of art had been loaned for a show. The federal government was not bound by such state laws and moved in to seize the painting.⁷⁶ The federal government acted under the provisions of the National Stolen Property Act⁷⁷ to intervene in the dispute. The Act makes it illegal to knowingly import stolen or converted property into the United States if the property has a value in excess of \$5,000. The Act allows the government to seize art and begin a forfeiture action merely on probable cause that the Act is being violated. The forfeiture action that results is an *in rem*⁷⁸ proceeding against the property itself. Any party claiming an ownership or possessory interest in the property can intervene and contest the seizure. At the hearing that results, the prosecution need only introduce evidence the Act was violated by bringing in a stolen item that meets probable cause. This standard is very low. After that any party contesting the seizure must introduce evidence by a preponderance of the evidence (or more likely than not, your 50.1% to 49.9% analysis) that the Act was not violated. Interestingly,

⁷⁶ Eizenstat, *Imperfect Justice*, 191-192.

⁷⁷ Title 18 United States Code Section 981.

⁷⁸ In other words, the case name listed the defendant as *Portrait of Wally*, not the foundation that sent the painting to the United States.

while this type of lawsuit alleges a criminal act (the theft of the item), it is a civil proceeding. What was at stake was ownership of *Portrait of Wally*, not jail time for the directors of the Leopold Foundation. The lawsuit took ten years and settled with Austria buying the painting for \$19,000,000 and other concessions, including a requirement to place a plaque wherever the painting is exhibited stating the true history of the provenance. One attorney involved in this litigation felt this lawsuit sent shockwaves throughout the art world and resulted in better recognition of the looting that went on.⁷⁹

Then, in February of 1998, the United States Congress House of Representatives House Banking Committee chaired by James Leach of Iowa, held hearings on Holocaust assets, including, of course, art. He extracted a promise from the representatives of The Association of Art Museum Directors (AAMD) that they would, within the very short period of four months, establish guidelines for museums to deal with Holocaust-looted art.⁸⁰ There were, roughly, 170 museums that belonged to the organization that made this promise. Of course, there were museums that did not belong to this organization and many more private individuals who would not be affected by this promise at all.

Eizenstat went forward with his plans for the 1998 conference in Washington. He attempted to come up with a set of principles that would be acceptable in the United States and in Europe. While the association of museums in the United States had come up with a useful set of guidelines to search for Holocaust-looted art, it became immediately obvious that European countries would be reluctant to have a foreign country's standards forced upon

⁷⁹ Howard N. Spiegler, *U. S. Experience: Portrait of Wally and the Leopold Museum*, www.Christies.com/pdf/services/2011/howard-n-siegler.pdf. 5-16.

⁸⁰ Eizenstat, *Imperfect Justice*, 192-193.

them. The AAMD had come up with usable standards. They felt that every museum should conduct an inventory of their art that was purchased during the time of the Nazi rule in Germany. When those were identified, the museum should do a careful check of the provenance of the art in question. If they felt there were problems, they should seek warranties from the party that sold or otherwise transferred the art to the museum. If there was a claim from an original owner, or the original owner's family, the matter should be resolved through arbitration.⁸¹

As previously noted, foreign countries were reluctant to comply with policies established in the United States. One reason was obvious. In the United States, most museums are private. In Europe, most museums are entities of the state. Ultimately, through strenuous negotiations, Eizenstat and others working with him achieved a major breakthrough. Their Washington Conference in 1998 achieved a remarkable agreement of all of the nations present, with the caveat that the nation's judicial system had to be taken into account. The result is what is known as the Washington Principles. The Washington Principles stated: (1) that Nazi-looted art should be identified, (2) records and archives on art should be open, (3) resources should be available to identify such art, (4) in determining whether art had been looted, museums should understand, under the circumstances, gaps in provenance and records, (5) art suspected of being looted should be publicized, (6) a central registry should be established, (7) original owners should be encouraged to make claims and provide information, (8) if original owners can be identified, efforts to resolve the issue should be made, and made quickly, (9) if they cannot be identified, a fair resolution should be sought, (10) commissions to resolve these issues should have a balanced membership, and

⁸¹ Eizenstat, *Imperfect Justice*, 193.

(11) nations should develop ways to resolve these disputes using alternative dispute mechanisms.⁸²

Eizenstat is, understandably, proud of his accomplishments. He stated: “The Washington Principles changed the way the art world did business.”⁸³ While there is much truth in this statement, unfortunately, it comes too late for many original owners of art or their ancestors.

While private parties seem to be unaffected by the new trends of openness of records and provenance training and research, the AAMD members are making some strides. A number of museums, including the Museum of Fine Arts, Boston, have been conducting archival research on art in their collections that came from Europe during the time in question and trying to establish a chain of title. When these museums find a piece of art that may have been looted they are creating web pages online seeking information about the works in question. The Internet itself is helping original owners of art seek out their missing art. While the Art Loss Register of London, and similar projects elsewhere, do not restrict their activities to Holocaust-looted art, they are active in attempting to provide information on all stolen art. So the Washington Principles have had a positive effect on the art world and how it responds to issues of stolen art.⁸⁴ Yet, in the very process of obtaining national and

⁸² U.S. Department of State, *Washington Conference Principles on Nazi-Confiscated Art*, <http://www.State.gov/p/eur/rt/hicst/122038.htm>.

⁸³ Eizenstat, *Imperfect Justice*, 199.

⁸⁴ Not everyone is enamored of the Washington Principles. One litigator believes the solution lies in the establishment of a mandatory registration system for the sale of art. He believes this could be done in Europe in the European Union and the United States by agreement. Owen Pell, *Holocaust-Looted Art: Lost But Not Forgotten*, University of Virginia School of Law, www.law.virginia.edu/html/alumni/uvalawyer/f02/opinion.htm.

international support for the principles developed, in part, by the AAMD, Eizenstat gave away an important point. With the 1998 conference about to close, and with no agreement with many countries as the Washington Principles, Eizenstat proposed a “chapeau.”⁸⁵ He suggested a new introductory paragraph that allowed each country to work under its own legal system. While this chapeau was used explicitly to give cover for the European countries allowing them to accept principles drawn up in the United States, the chapeau also gave cover to museums in the United States in fighting claims over art in their possession.

For example, when the Museum of Fine Arts, Boston (MFA) was faced with a claim to return art it conducted its own provenance research and, upon concluding that the art in question had not been looted, commenced an aggressive lawsuit, using all possible defenses and resources, to contest the claim. While the Washington Principles suggested that technical defenses not be used, the MFA used all defenses claiming that any defense is substantive and not technical. There was no consideration of alternative dispute mechanisms. The MFA’s decision was full-bore litigation.⁸⁶ On the other hand, the MFA has conducted archival research into art that may have been looted and has set up a website that lists art with problematic provenances relating to the Holocaust era. This shows the mixed legacy of the Washington Principles. The same institution, MFA, ignores the spirit of the Washington Principles while honoring other aspects of them.

Even Congress is not fully appreciative of the efforts in the United States to restore stolen art. On July 26, 2006, the House of Representatives Subcommittee on Domestic and International Monetary Policy, Trade and Technology of the Committee of Financial

⁸⁵ Eizenstat, *Imperfect Justice*, 198.

⁸⁶ This case will be discussed in a later chapter.

Services held a hearing to review the repatriation of Holocaust art held in the United States. The consensus was that a start had been made but that much more needed to be done. Interestingly, one of the witnesses before the subcommittee who shared this perspective was Eizenstat. He testified before the subcommittee:

The hearings will bring renewed attention to the restitution of art looted by Nazis during World War II, which, after a burst of activity in the late 1990's [sic] has lost momentum and threatens to fall off the pages of history, particularly abroad, where most nations lack the commitment shown by the American Association of Museums.

At a time when almost all other Holocaust-related restitution and compensation matters have been completed, or are nearing completion, Holocaust-era art recovery remains a major unresolved challenge.⁸⁷

On a more optimistic note, Timothy Rub, the then director of the Cleveland Museum of Art, who was speaking on behalf of the AAMD, testified that 100% of the membership of the AAMD that might have Holocaust-looted art had undertaken a provenance review of all such art and had committed to complete the review and make their provenance research available.⁸⁸ And, of course, certain museums, such as the MFA, make information available on their website.

⁸⁷ *House Hearing, 109th Congress: Review of the Repatriation of Holocaust Art Assets in the United States* (Washington, DC: U. S. Government Printing Office, 2007), 10.

⁸⁸ *House Hearing*, 24.

IV

A Painting Comes to the United States

Ms. Maria-Louise Bissonette was an elderly resident of Providence, Rhode Island, in 2003. She had been in possession, for many years, of a painting that she then desired to sell. The painting had been in the possession of her family since the 1930s. The artist was Franz Xaver Winterhalter. He was a German national born in Germany in 1805. Though he was German he spent much of his adult life in Paris, France, where he made his living as an artist. The painting in question was entitled (in translation) *The Girl from the Sabiner Mountains*. He painted it in oils on canvas. The painting does not have a specific date, but most likely he completed it early in his career. It is a genre painting and is of a type for which he received much recognition early in his career. It is unlikely to date from his mature years as a painter as he moved away from this style of painting and began to specialize in portraiture. He received enough praise for his work in portraiture that he began to receive commissions from the royalty of Europe. He became a favorite of Queen Victoria of England. He completed at least one hundred works for her, some of which are in the royal collection to this time.⁸⁹

There is an auction house in Cranston, Rhode Island, named Estates Unlimited. Steven Fusco is one of the principles. According to the materials they make available, they are interested in auctioning fine art and antiques. Bissonette went there and gave them

⁸⁹ Auktion 392, Lot 181.

possession of the painting in question and asked them to place the painting into an auction. Fusco and Estates Unlimited took the painting and intended to place it in an auction that they had scheduled for January 6, 2005. It would appear that they considered this a significant auction for Rhode Island. They sent out an advertising brochure to prospective attendees, which promoted the sale as “the first of its kind here in Rhode Island, an entire auction dedicated to the arts.”⁹⁰ The brochure noted absentee bidding, telephone bidding, and internet bidding would be accepted at the auction. While sellers sometimes exaggerate their wares, it certainly seems that Estates Unlimited regarded this auction as significant for Rhode Island and, of course, for their business. Given that the Winterhalter painting was the only painting shown on the front page of the brochure mailed to prospective bidders, the painting represented to Estates Unlimited an important draw to the auction.

Contrary to the actions of a number of other dealers in art, as previously discussed, Estates Unlimited was not unmindful of the issue of the provenance of the painting. When they entered into a contract with Bissonette, she agreed that she was the owner of the painting, was free to sell it, and had good title. To support her claim of legitimate provenance for the painting she showed the dealer photographs that she indicated showed her mother and step-father in their apartment in Germany with the painting hanging on the wall. With the consignment contract signed and, apparently satisfied by the photographs showing the painting in the possession of Bissonette’s mother and step-father, Estates Unlimited continued to work on the auction. And, of course, the painting was the featured attraction.⁹¹

⁹⁰ Estates Unlimited Brochure.

⁹¹ Fusco Affidavit.

As the auction was approaching, Estates Unlimited must have been excited about its prospects. Unfortunately, the day before the auction was scheduled to be held, they were contacted by the Art Loss Register of London, England, indicating that the Art Loss Register had received a complaint that the painting had been stolen. The claim came from the Estate of Max Stern, who had died in Montreal, Canada. The Estate was claiming that the painting belonged to the estate and a demand was being made that the painting be returned to Canada. When Estates Unlimited contacted Bissonnette, she insisted that the claim of the Stern Estate could not be valid. In so stating, she showed to the auction house a receipt from the Lempertz Gallery that showed that her step-father had purchased the painting at an auction conducted by that gallery. With this claim being made, Estates Unlimited took the obvious precaution and did not include the painting in the auction.⁹²

The parties did make efforts to resolve the case without resort to litigation. These negotiations were aided by the Holocaust Claims Processing Office of the New York State Banking Department. The Stern Estate had filed a claim with that office as well as with the Art Loss Register of London.⁹³ The negotiations were not successful. Bissonnette went to Estates Unlimited, when Fusco was not there, and retrieved the painting. She sent the painting to Germany with the apparent intent to file an action there seeking a judgment confirming her ownership of the painting.⁹⁴ This type of action, if filed in the United States,

⁹² Fusco Affidavit.

⁹³ The State of New York, as a center of commerce and art, set up this agency to aid in the recovery of Holocaust-looted assets. No connection to New York need be shown and no fee is charged for their services.

⁹⁴ One matter that is not clear from the record is whether the Stern Estate was ever made a party to the anticipated German lawsuit. As matters unfolded, this point became moot.

is known as an action to quiet title. When the Stern Estate learned that the painting had been shipped out of the country, they immediately commenced an action in the United States District Court for the District of Rhode Island.⁹⁵ The defendants named were both Estates Unlimited and Bissonnette. The case was assigned docket number C. A. 06-211ML.⁹⁶ The case was assigned to Chief Judge Mary Lisi.

This brief discussion raises the question of how *The Girl from the Sabiner Mountains*⁹⁷ came to the United States and how, previously, it came to be sold at an auction held by Lempertz. Even more importantly, it raises the question of how a legal action filed in 2006 in Providence, Rhode Island, can dispute the legitimacy of an auction held in Germany in the 1930s. To understand this, an understanding of the background of Dr. Max Stern is necessary. He was a German Jew, born into a very successful Jewish family that lived in Monchengladbach. His father and mother were named Julius and Selma. He also had two sisters, Hedi and Gerda. While Dr. Stern was growing up, his father operated a textile factory. When the business at the textile factory began to fall off, the family sold it. Julius Stern then moved the family to Dusseldorf where he opened an art gallery under the name of Galerie Stern. The father was an avid collector of art and this background helped make the Galerie Stern a success. The family had purchased a large building that contained the gallery

⁹⁵ The plaintiff was originally identified in the complaint as the Stern Estate. This is how the plaintiff will be referred to for simplicity sake, as the executors were later substituted as the properly named plaintiffs.

⁹⁶ Plaintiff's Complaint. All references to this lawsuit come from the docket of the case, which was copied from the clerk's office. The docket number indicates that the case was the 211th civil case filed in the court that year.

⁹⁷ This title is taken from the first paragraph of the complaint. Other translations were *The Girl from the Sabiner Mountain* and *The Girl from the Sabine Mountains*.

on the first floor and living quarters for the family upstairs. The family's taste in art was conservative, which also fit in with the taste of many in Germany at the time. They specialized in conservative painting styles that would have included landscapes and genre paintings. Very little modern art made it into the gallery although some works of Impressionism and post-Impressionism were carried in the inventory.⁹⁸

Dr. Stern was also interested in art and wished to carry on the family business. He spent five years studying outside of Dusseldorf ultimately receiving a doctorate degree in art history. He then spent several months in Paris, France, after which he returned to the gallery in 1928. When Hitler and the Nazi Party came to power in 1933, the health of Julius Stern went into sharp decline and he died in 1934. The Galerie Stern passed to Dr. Stern. Of course, this time period was also the Great Depression. To encourage business a number of galleries, including Galerie Stern, resorted to auctions instead of relying upon regular sales. As part of the Nazi move to eliminate Jews from the art world of Germany, the Nazi government prohibited art galleries that had Jewish owners from continuing with these auctions. To stay in business, Dr. Stern substituted exhibitions on a large scale. These exhibitions also came to a stop in 1935, when, on August 29, he received a notification from the president of the Reich Chamber for the Visual Arts that he was no longer authorized to continue his business. The notice gave him all of four weeks to sell or close the gallery. Dr. Stern did appeal the order to close or sell and the order was suspended during the time the appeal was pending.⁹⁹

⁹⁸ Auction 393, 7-10.

⁹⁹ Auktion 392, 11-12.

The appeal took a year to process. While he was waiting for an answer to his appeal, Dr. Stern began looking for a potential Aryan buyer to take over the gallery. He found two possible purchasers for the gallery but Reich Chamber rejected both. Dr. Stern's appeal of the order was also rejected. While the order was stayed for a short period of time the final letter ordering closure was also sent to the local Gestapo office to ensure compliance. Dr. Stern had no choice but to transfer the contents of the Galerie Stern to the Lempertz gallery. The contents were sold in auction 392. Dr. Stern did not receive any of the proceeds of sale as he surrendered any rights to them to acquire an exit visa for his mother (his two sisters having already left Germany). Dr. Stern left Germany in December of 1937.¹⁰⁰

Lempertz went forward with the auction. Unfortunately, little is known about how the auction was conducted and who purchased most of the items as their records were destroyed during the war. Indeed, at the time this lawsuit was filed, the Winterhalter painting was the only painting sold at the Martin Lempertz auction to come to light.¹⁰¹ The Winterhalter painting was lot 181. It was purchased by Dr. Karl Wilharm, the second husband of Countess Lilli Wilharm, Bissonnette's mother. The painting stayed in his possession until his death. At that time, possession of the painting passed to his wife, Countess Wilharm. At some point after World War II, Bissonnette moved to the United States. Her mother transferred possession of the painting to her and when Countess Wilharm died whatever claim the family had to the painting would now vest in Bissonnette. Her attempt to sell the painting, and her spiriting it out of the country instigated the Stern Estate commencement of this action. It is interesting to note that a review of the pleadings filed in the Rhode Island federal district

¹⁰⁰ Auktion 392, 13-14.

¹⁰¹ Others have since been recovered.

court demonstrate that the travel and provenance of the painting are among the only matters that the respective parties agreed upon. What they disagreed upon was the legal conclusions to be drawn from those facts.

As is commonly known, in civil cases in the United States, both parties may engage in alternative pleadings, meaning they can make claims and defenses that overlap, or even contradict one another. The only real restriction is that the attorney or attorneys signing the pleadings are representing to the court that they have made a reasonable investigation and have a good faith belief that there is factual support for the positions taken.

In its complaint, the Stern Estate sought replevin ordering the return of the painting, a declaratory judgment establishing the Estate's ownership of the painting, and damages for the theft of the painting and for its removal out of the state.¹⁰²

In turn, the defendant, Bissonette, filed a poorly worded defense.¹⁰³ In addition to denying many of the factual allegations, Bissonette alleged the priority of the action she was attempting to instigate in Cologne, Germany, which is where she had shipped the painting. She asked that German law apply. She also noted that Dr. Stern had filed a claim with the German government after World War II and had received compensation. This last defense would prove problematic for Bissonette as the Stern Estate turned this argument around,

¹⁰² Rhode Island General Laws, Section 9-1-2 provides that any victim of a crime has a civil action against the perpetrator and if the crime is larceny, the damages assessed shall be doubled unless the article is returned. The complaint alleged that the admitted removal of the painting from Rhode Island by Bissonette violated the National Stolen Property Act, 18 U. S. C. Sections 2314 and 2315.

¹⁰³ For example, in the answer Bissonette repeatedly stated she would “neither admit nor deny” allegation after allegation of the plaintiff. Under the Federal Rules of Civil Procedure an allegation that is not denied is taken as admitted unless the party alleges a lack of knowledge rendering the party unable to make a good faith response.

arguing that the compensation paid by the German government indicated that the auction at Martin Lempertz had been illegal. As affirmative defenses, Bissonnette alleged the statute of limitations and the doctrine of laches. As matters played out, these turned out to be her best arguments.

The answer filed by Estates Unlimited adopted a stance of bemused detachment and was much better pled. It essentially insisted that this was a title dispute between the Stern Estate and Bissonnette and argued that Estates Unlimited did not assist Bissonnette in any way in shipping the painting out of Rhode Island and into Germany.¹⁰⁴ In addition to some common affirmative defenses, used in most civil litigation, Estates Unlimited also pleaded the doctrine of laches and the statute of limitations.

Once the basic pleadings were completed, the legal skirmishing began. It was clear from the start that neither side wanted a trial and sought, therefore, a way to win without going to trial. It started with a motion by Bissonnette under Rule 12 of the Rules of Civil Procedure to dismiss or stay the lawsuit. The motion noted that the painting had been held in Germany for most of its existence and had been shipped to Germany prior to imposition of the lawsuit. The motion also noted that the plaintiff had no contact with the State of Rhode Island prior to the instigation of the lawsuit. The motion appears to invoke Rule 12(b)(3), which provides for dismissal of a lawsuit for “improper venue,” making a *forum non conveniens* argument.

One of the major problems with Bissonnette’s argument is that she not only lived within the venue of the district court, she actually lived within sight of it.¹⁰⁵ The objection

¹⁰⁴ See, for example, Answer of Estates Unlimited, Count IV, paragraph 73.

¹⁰⁵ Memorandum in Support of Plaintiff’s Objection to Motion to Dismiss.

noted that in addition to living in Rhode Island, she had brought the painting into Rhode Island and attempted to sell it in Rhode Island. It must be noted that, generally, *forum non conveniens* arguments are made on behalf of a defendant who has been sued in a jurisdiction that is far removed from where the defendant lives or does business. It would be unusual for a plaintiff to make such a *forum non conveniens* motion since the plaintiff chooses the forum when making a decision to file the complaint. Here the defendant, who lived in sight of the courthouse, was asking that the lawsuit be moved thousands of miles to a foreign country. Objectively, if such a motion was granted it would increase her costs and travel expenses.

The plaintiff also criticized Bissonnette's motion for stating that the key witnesses would be in Germany and then failing to identify any such witnesses.¹⁰⁶ Indeed, the plaintiff stressed that the only witnesses were in the United States and many of them in Rhode Island. The Estate also pointed out that the painting itself would have been in Rhode Island had Bissonnette not sent it out of the country. Further, the Estate argued that Rhode Island should act so that it would not become a haven for stolen art and redress the unlawful acts of bringing into the state stolen property and violation of state law.¹⁰⁷

Bissonnette's motion also argued for comity between nations and so attempted to get the court to stay the Rhode Island lawsuit while the German action was pending. The problem with that argument is that, first, it is not binding on United States courts to stay such actions and, in cases where a stay or dismissal may be warranted, it usually involves a definitive court decision or executive policy of the other country. Here, of course, there was

¹⁰⁶ Plaintiff's Objection to Motion to Dismiss, p. 10.

¹⁰⁷ Plaintiff's Objection to Motion to Dismiss, p. 9-10.

only a pending lawsuit and no judgment. Further hurting Bissonnette's argument is that her own initial disclosure filed with the court stated she did not believe there were any witnesses other than the parties to the lawsuit, given the age of the matter, except "there may [be] some individuals, in Germany, yet unknown, who may be found to have information."¹⁰⁸

The Stern Estate supported its objection to the motion to dismiss and/or stay with two affidavits. The first was by Anna B. Rubin of the New York State Holocaust Claims Processing Office. She indicated that the Estate had filed a claim with her office over a number of paintings including *The Girl from the Sabiner Mountains*. She said her office negotiated directly with Bissonnette, her husband, and attorney, including meeting them once in New York. She noted that her office felt it had an understanding that the painting would stay at Estates Unlimited until there was a resolution.¹⁰⁹ She attached to her affidavit a letter sent from her office to Bissonnette's then attorney that stated that the author felt that Bissonnette's actions in breaking the agreement and removing the painting from Estates Unlimited "reflect bad faith and are unprecedented in our experience."¹¹⁰

Finally, the Estate included with its objection an affidavit from Dr. Ulf Bischof. Dr. Bischof described himself as a practicing attorney in Germany since 2002. He indicated his specialty was looted art cases, that his thesis in law school was on looted art, and that he was publisher and editor of an art magazine in Germany that covered art and law. He stated that Germany has a strictly enforced statute of limitations for looted art cases of thirty years. He noted that the painting was sold in 1937 at an auction that was alleged to be a forced sale. He

¹⁰⁸ Initial Disclosure of Defendant Bissonnette, paragraph 1.

¹⁰⁹ Declaration of Anna Rubin.

¹¹⁰ Sherri North Cohen, Esq. to John J. Weltman, Esq., April 26, 2006.

stated claims of forced sale art in Germany would be barred by the thirty-year statute of limitations. He concluded by noting that this rule would be enforced in every court in Germany.¹¹¹

Bissonnette tried to counter this information with affidavits from attorneys, including her own, in Germany. These affidavits confirmed the information of Bischof that the thirty-year statute of limitations in Germany for stolen art would bar any successful lawsuit by the Estate in Germany for recovery of the painting.¹¹² Joachim Rosshoff's declaration also noted that under German law, a person who inherits property also gets the benefit of the statute of limitations.¹¹³ Bissonnette filed her own affidavit that had as an attachment a copy of the complaint that she filed in Germany and that her German attorneys had translated into English.¹¹⁴ While her efforts showed an increase in the quality of the legal work done on her behalf, it was not to be availing. Her admission that there were no known witnesses in Germany and that the German courts would not provide redress to the Stern Estate if the Estate proved that the painting was stolen were strong points against staying or dismissing the action.¹¹⁵ And, of course, the fact Bissonnette lived within sight of the courthouse made it difficult for her to argue that the forum of Rhode Island was not convenient.

¹¹¹ Declaration of Dr. Ulf Bischof.

¹¹² Declaration of Dr. Arno Saathoff.

¹¹³ Declaration of Joachim Rosshoff, Attorney

¹¹⁴ Defendant Maria-Louise Bissonnette's Affidavit. It is interesting to note, however, that nowhere in the records of this lawsuit is there any indication that the Stern Estate had been served with process in the German lawsuit.

¹¹⁵ It is interesting to note that all four German attorneys, two on each side of the motion, agreed that the statute of limitations in this type of case in Germany would be thirty years and that there was no exception that would take the case out of the statute.

The legal skirmishing continued. It appears that requests were made by the Estate to view the painting in Germany in order to evaluate its condition, to check for any deterioration, and to be sure that the manner of the storage was appropriate for a painting of that age. When this request was denied, the Estate filed a motion for preliminary injunction. This motion contained a request for a view of the painting as well. The injunction sought an order restraining Bissonnette from moving the painting from its then location without permission of the court.¹¹⁶ As the supporting memorandum filed with the motion noted, a party moving for a preliminary injunction must meet a four-part test, as follows: (1) the moving party must show they are likely to win the lawsuit, (2) the potential for harm that cannot be fixed if relief is denied, (3) the balance of hardships between the parties must favor the moving party, and (4) what effect, if any, will granting the injunction have on the public's interests.¹¹⁷ The Stern Estate bolstered its argument that under Rhode Island law a plaintiff in a replevin action need only show that it is entitled to immediate possession of the article in question. And using many of the factors already listed in the discussion of Bissonnette's motion to dismiss, it showed that Rhode Island law should apply under a choice of laws analysis. After all, Bissonnette lived in Rhode Island, the painting had been in Rhode Island until she sent it out of the country, she owned the painting in Rhode Island, and she tried to sell it in Rhode Island through Estates Unlimited. The potential harm was to the condition of the painting and there appeared to be no countervailing arguments.¹¹⁸

¹¹⁶ Plaintiff's Motion for Preliminary Injunction and Request for Expedited Review.

¹¹⁷ Plaintiff's Memorandum in Support of Preliminary Injunction, p. 4.

¹¹⁸ Plaintiff's Memorandum in Support of Preliminary Injunction, pp. 4-12.

The Estate showed the painting had been stolen through an affidavit and expert report of Lynn H. Nicholas, author of *The Rape of Europa*, one of the leading works on Holocaust looted art. Her affidavit was comprehensive, listing her educational background, including a bachelor's degree in romance languages from Oxford, her work for approximately fifteen years at the National Gallery of Art in Washington, her published work including *The Rape of Europa*, her testimony before Congress and her many other speaking engagements and included as attachments the U. S. Army declarations on what constituted looted assets.¹¹⁹ She concluded that the painting had been looted by the German government in 1937 when they forced Dr. Stern to transfer the contents of his gallery to the Martin Lempertz gallery for the auction. She stated: "The methods used by the Gestapo and the Nazis to force Dr. Max Stern to sell the painting and thereafter prevent him from using the proceeds from the sale amount to theft."¹²⁰

The ability of Bissonnette to respond to this motion was hampered by the fact her attorney was withdrawing from the case. Nevertheless, she did ultimately accede to the injunction. When she retained successor counsel, the Estate determined that it was time to move forward. With the Nicholas affidavit in hand, and strong arguments as to the choice of law result being Rhode Island, the Estate chose this time to file a motion for summary judgment.

Such a motion is filed under Rule 56 of the rules of civil procedure and asks the court to enter a judgment in favor of the moving party without a trial. While a defendant in a criminal trial is always entitled to a trial, neither party in a civil case is entitled to a trial. A

¹¹⁹ Declaration and Expert Report of Lynn H. Nicholas.

¹²⁰ Declaration and Expert Report of Nicholas, paragraph 4.

trial is only held in a civil case if there are material issues of fact in dispute that could affect the outcome. The issues could go to liability, damages, or both. Further, the allegations of the moving party and the opposition must be supported by materials under oath. Commonly, these materials consist of affidavits, sworn testimony at depositions and answers to interrogatories. Of course, if a party has admitted matters in pleadings or in response to requests for admissions these can be used as well. If the party opposing the motion for summary judgment does not demonstrate that there exists a material fact in issue, then the court is to enter a judgment without a trial. As Rule 56 states: “The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.”¹²¹ Here the Estate filed a motion with an enormous amount of supporting material. With new counsel, Bissonnette challenged the motion.

In addition to the motion for summary judgment, the Estate filed a twenty-six page memorandum, a statement of undisputed facts,¹²² an affidavit of Steven Fusco which included as exhibits all of the documents (consignment agreement, correspondence with the Art Loss Registry, etc.), concerning his dealings with Bissonnette and his own research into the provenance of the painting, and referenced the prior affidavits and declarations that had been filed in connection with Bissonnette’s motion to dismiss and the opposition thereto (including Bissonnette’s own affidavit and the affidavit and expert opinion of Nicholas).

Included with these materials was a catalog put together on the Martin Lempertz auction, as if

¹²¹ Federal Rules of Civil Procedure, Rule 56(a).

¹²² This is a statement of facts that are supported in the record by affidavit or admission and which the party believes the opposition cannot dispute. Given the persuasive nature of facts, themselves, in the hands of an experienced litigator this statement can be dispositive by itself.

the auction had been held by the Galerie Stern.¹²³ This document contained an extensive background of the Stern family and its running of the gallery. It included a photograph of each painting and gave the background of the artist and commented on the style of art represented by the painting.¹²⁴ Surprisingly, the memorandum also included a reference to the current Lempertz Gallery website listing that auction as part of its background.¹²⁵

The Stern Estate memorandum included an exhaustive summary of the provenance of the painting and the successful efforts of the German government to close down the Galerie Stern and to transfer its assets to the Matin Lempertz gallery. As the provenance of the painting, including its sale at the Matin Lempertz auction 392, is one of the few things the parties agreed upon, no further recitation is necessary. What the memorandum also laid out in some detail were the efforts made by Dr. Stern at the end of World War II to recover his art. As Dr. Stern was then living in Canada, he contacted the Canadian Military Mission and received their aid. Through this means he did recover some art. He also contacted the military authorities in the British zone of occupation. The British controlled the areas around Dusseldorf and Cologne, where both galleries were located prior to the war. As was referenced earlier, he sought restitution through the West German government in the early 1960s and did receive some monetary compensation.¹²⁶

¹²³ *Auktion 392: Reclaiming the Galerie Stern, Dusseldorf.*

¹²⁴ *Auktion 392.* This catalog also functioned to show the court the extent of the loss suffered by Dr. Stern when his Galerie Stern was ordered closed and the art transferred to the Matin Lempertz Gallery.

¹²⁵ Estate Summary Judgment Memorandum, p. 4.

¹²⁶ Estate Summary Judgment Memorandum, pp. 4-5.

Dr. Stern's efforts to recover his art collection went beyond government channels. He placed notices concerning his stolen art in art magazines in Canada and Germany. He and his wife traveled to Germany in a futile effort to locate his art. After his death, the Estate continued to search for his art by contacting the Art Loss Register of London, England, and a similar organization in Germany. The recitation of Dr. Stern's and the Estate's efforts to recover the inventory of the Galerie Stern turned out to be crucial to the resolution of the case. The reason for this is that Bissonnette's arguments concerning the validity of the sale of the painting at Auction 392 were unlikely to succeed.¹²⁷ That left, as Bissonnette's best legal argument, the doctrine of laches. When laches is argued the defendant is saying that the plaintiff delayed taking appropriate action to protect whatever rights the plaintiff had, that the defendant was prejudiced by the delay of the plaintiff and that, therefore, the plaintiff should be denied the relief the plaintiff is seeking. As this case is one in federal court due to diversity of citizenship, state law would define laches. As the Rhode Island Supreme Court stated: "The mere lapse of time does not constitute laches. It is where unexplained and inexcusable delay has the effect of visiting prejudice on the other party that the defense may be successfully invoked."¹²⁸ The Stern Estate listed the efforts to locate the paintings previously owned by the Galerie Stern to show that the passage of time since 1937 was not unreasonable. It was, in part, a preemptive strike against Bissonnette's best defense.

To establish a right to summary judgment on its replevin count the Estate needed to establish the following information: (1) it owned the painting; (2) it was taken from Dr. Stern

¹²⁷ Given that the final order to close the Galerie Stern was also sent to the local office of the Gestapo, presumably to ensure full cooperation, it is difficult to make out an argument that the transfer of the art to the Matin Lempertz Gallery was an arms-length transaction.

¹²⁸ *Pukas v. Pukas*. 247 A.2d 427, 429 (R.I. 1968).

illegally; (3) there had been a demand for return of the painting and a refusal to comply;¹²⁹ and (4) Bissonnette had no legal right to keep possession of the painting.¹³⁰ To substantiate ownership the Estate pointed out the provenance of the painting showing that it had been in the Galerie Stern and that Dr. Stern was the gallery's owner. To show it was seized illegally (in other words, stolen), they referenced an affidavit from Bissonnette herself recognizing that Dr. Stern had to give up his gallery because he was Jewish. Of course, the Nicholas affidavit with her expert opinion that the seizure of the Stern Galerie constituted theft was also referenced.¹³¹ Finally, the fact the Estate made a demand for the painting and that demand was refused resulted in this lawsuit. Bissonnette could not logically state she had no demand on her or that she had refused such demand when her admissions are clear that she shipped the painting out of the country after learning that the title was in dispute. This left the statute of limitations and laches as defenses for Bissonnette.

The Estate first argued against the defense of the statute of limitations. It argued that both replevin actions and conversion actions fall under Rhode Island's general, ten-year statute of limitations for civil actions not "otherwise specifically provided."¹³² The memorandum noted that for conversion actions, the state has always followed the demand

¹²⁹ The demand and refusal rule only applies in Rhode Island if replevin is sought against a third party who obtained the item lawfully. *Fuscellaro v. Industrial National Corp.*, 368 A.2d 1227, (R.I. 1977).

¹³⁰ Estate Summary Judgement Memorandum, p. 14.

¹³¹ The memorandum cites the case of *Menzel v. List*, 267 N.Y.S.2d 804 (N.Y. Sup. Ct. 1966). It is unclear as to why that case was cited as the facts are not similar, as the plaintiff in that case had left the painting in question in her apartment in Brussels, Belgium as the German army was approaching. Dr. Stern had his gallery taken in 1937, two years before the European portion of World War II started with the German invasion of Poland.

¹³² R. I. Cts. and Civ. Proc. Section 9-1-13(a).

and refusal rule. That is to say that the statute of limitations does not begin to run until the defendant refuses the demand to return the chattel, in this case the painting, in question.¹³³

As replevin and conversion claims seek the same relief, making the original owner whole, the Estate argued the demand and refusal rule should apply to replevin actions as well.

As for the defense of laches, the Estate argued that Bissonnette could not show prejudice. According to Bissonnette's own declaration filed with her motion to dismiss or stay the action, admitted that the painting had been displayed privately, in her home or in the home of her step-father and mother for over sixty years. The only exception to this was one exhibition in Germany in the 1950s.¹³⁴ The Estate also noted that with the destruction of records of the Lempertz establishment during the war there was no way for Dr. Stern to learn directly from them who purchased the inventory of the Galerie Stern.¹³⁵ The Estate concluded by saying Bissonnette could not show prejudice since between the time she acquired the painting and the demand for its return, her circumstances did not change. In other words, no known witnesses had died or otherwise become unavailable or further documents lost. The burden now shifted to Bissonnette to show the court that there existed at least one material issue of fact such that the court should deny the Estate's motion for summary judgment.

In opposing the Estate's motion for summary judgment, Bissonnette first filed a response to the Estate's statement of undisputed facts. She agreed with a number of the facts

¹³³ Estate Summary Judgement Memorandum, pp. 19-20.

¹³⁴ Affidavit of Bissonnette.

¹³⁵ Estate Summary Judgement Memorandum, p.23. The recitation of facts is necessary as whether laches is available or not in a given case is very fact specific. What are reasonable efforts? What constitutes prejudice to the defendant?

presented but also took exception to others. For example, she felt on the issue of due diligence, a claim should have been filed by the Estate with the Holocaust Claims Processing Office in New York earlier than 2005. While she conceded that Dr. Stern had advertised in Canadian and German art magazines for his lost art, Bissonnette noted that neither advertisement mentioned *The Girl from the Sabiner Mountains*. She argued that using those advertisements to show due diligence to find the painting in question was “disingenuous.”¹³⁶ In response to Dr. Stern’s post-war claim in Germany, Bissonnette noted that he sought property taken from 1939-1940, years after the Stern Galerie was seized by the German government. Additionally she noted that the painting did not appear on a list of looted art until the 1960s.¹³⁷ In other words, Bissonnette was trying to create the impression that the reasonable efforts had to be specific to the particular item in question. One practical problem with this position is that in the Galerie Stern inventory there were over 200 pieces of lost art. Finally, noting that Dr. Stern was, himself a dealer in art, she noted matters in the materials filed by the Estate that showed Dr. Stern was not, himself, always meticulous about provenance. This includes item 181 (the painting in question) in the catalog (*Auktion 392*), which has no reference to provenance or even a date for the painting. Bissonnette strongly took the position that the Estate had not shown sufficient information indicating that Dr. Stern had appropriately acquired the painting. She felt that it was “the plaintiff’s burden to

¹³⁶ Defendant, Maria-Louise Bissonnette’s Opposition to Plaintiff, Max Stern Estate’s Statement of Undisputed Facts and Additional Statement of Disputed Facts That Preclude Entry of Summary Judgment, pp. 2, 5.

¹³⁷ Bissonnette’s Opposition to Plaintiff’s Statement of Undisputed Facts, p. 3.

prove.”¹³⁸ While Bissonnette had other objections they were mostly intended to address the context of matters listed in the Estate’s submissions.

In addition, Bissonnette filed a memorandum in opposition to the Estate’s motion for summary judgment.¹³⁹ The memorandum opens with a concise history of the provenance of the painting and the instigation of the lawsuit. It states the facts the Estate must prove to prevail and agrees with the Estate’s position, previously stated, on that issue. The memorandum explicitly states it is relying upon the equitable defense of laches and the statute of limitations, although it goes on to state that there are issues of fact.¹⁴⁰ The bulk of the memorandum filed by Bissonnette emphasized the sporadic nature of Dr. Stern’s efforts to locate his paintings. While conceding that little could be done in the period between the seizure of the Stern Galerie and the end of World War II and while further conceding that as an individual, he could not do as much as a state or large organization could, she still found fault with his efforts and the later efforts of the Estate. Bissonnette goes on to claim that she was prejudiced by the delay. But the only prejudice she asserted was the fact she was “embroiled” in the lawsuit, that she was denied the opportunity to sell the painting, and that her family name was harmed.¹⁴¹ Of course, if the painting had been located earlier, it would have only meant that litigation against her, her mother, or her step-father would have

¹³⁸ Bissonnette’s Opposition to Plaintiff’s Statement of Undisputed Facts, p. 8.

¹³⁹ Defendant, Maria-Louise Bissonnette’s Memorandum of Law in Opposition to Plaintiff’s Motion for Summary Judgment.

¹⁴⁰ It is interesting to note that even with experienced counsel on both sides, issues get overlooked. For example, the defendant’s position that laches is an equitable defense is accurate. Yet, replevin and conversion, the principle claims for relief relied upon by the Estate are actions at law and are not claims in equity. As such, the Estate may well have argued that the laches defense was not available to Bissonnette but did not appear to do so. Jonathon S. Lynton, *Ballentine’s Legal Dictionary and Thesaurus* (Albany, NY: Lawyers Cooperative Publishing, 1995).

¹⁴¹ Bissonnette’s Memorandum in Opposition to Summary Judgment, p. 5.

commenced earlier. And once litigation was started it is unlikely any gallery would step in to sell it with the risk of liability if the case went against the Bissonnette family.

While the Stern Estate replied to the filing by Bissonnette, it was largely repetitive of what was said in the Estate's earlier pleadings and memorandums. On this basis, the materials were reviewed by Chief Judge Mary Lisi.

The judge issued a memorandum and decision. The first part covered technical legal issues establishing the basis upon which the court had jurisdiction over the lawsuit and then covered the general background of the provenance of the painting, Dr. Stern, and how the lawsuit came about. The judge noted that the Estate had argued that the choice of laws analysis indicated that the law of Rhode Island should apply. As Bissonnette did not challenge this position she accepted that the law of Rhode Island applied. The judge also agreed with the elements of a replevin action as stated by both parties. The judge regarded all defenses, except laches, to have been waived by Bissonnette for failure to argue them or to develop any basis factually for them. This included the state of limitations.

This left the doctrine of laches as the sole possible defense for Bissonnette. There the judge laid out the elements of laches, relatively consistent with what the parties had said. There must be a delay on the part of the party seeking the return of the item in question caused by negligence of the plaintiff¹⁴² and this delay must lead to prejudice to the defendant. In responding to Bissonnette's argument that much of Dr. Stern's efforts did not mention the painting in question, the judge noted that the German government had "seized the inventory in his gallery in gross" and that Dr. Stern searched for his paintings "in gross" as well. After reviewing in detail the efforts of Dr. Stern and the Estate to recover the lost collection of art,

¹⁴² The necessity of the negligence of the plaintiff is the part the judge added.

the facts of which were not disputed, the judge found the efforts to be reasonable. The judge also found no prejudice to Bissonnette. The judge granted summary judgment for the Stern Estate finding that it was the owner of the painting, that the painting was stolen, in effect, and that, therefore, possession by Bissonnette was not lawful. The judge ordered the writ of replevin to issue ordering the return of the painting from Germany.

The litigation was not, of course, over. Bissonnette had the right to appeal the decision of Judge Lisi to the First Circuit Court of Appeals. While the First Circuit normally sits in Boston, its jurisdiction covers Massachusetts, Rhode Island, New Hampshire, Maine and Puerto Rico. For the hearing of the Bissonnette appeal, the First Circuit actually sat in Providence, Rhode Island to help celebrate an anniversary of the building of the federal courthouse there.

It is axiomatic that an appeals court only hears matters that are preserved on the record below. For example, if Bissonnette wanted to appeal Judge Lisi's decision that all of her defenses except laches were waived for failure to create an appropriate record, Bissonnette would have to point to the record of the trial court. She could not attempt to bring in new material from outside the record in an effort to resuscitate her statute of limitations defense.

While the First Circuit has a number of judges, the court generally sits with a panel of three judges. One of the judges is given the task of writing the opinion which is then circulated among the other judges for their review and approval, or dissent. The panel consisted of Chief Judge Lynch and Judges Selya, from Rhode Island, and Lipez, from

Maine. Judge Selya was assigned to write the opinion. The oral argument was held on October 8, 2008, and the opinion issued November 16, 2008.¹⁴³

Judge Selya's decision¹⁴⁴ included a concise background of the provenance of the painting and also the background of the proceedings in the district court. The court first dealt with the trial court's dealing with the summary judgment motion, noting that appellate courts review grants of summary judgment *de novo*.¹⁴⁵ Judge Selya found no fault with the trial court's application of summary judgment procedure to this case. He agreed that, generally, a laches defense is so fact-specific that it prevents the grant of summary judgment. Nevertheless it is the party asserting that defense that has the burden of coming forward with evidence to support it. Here the appellate court, like the trial court, found fault with Bissonnette's defense. She did not explain what witnesses or documents might be available or how such could aid her defense. The court felt this was especially a fault where Bissonnette had conceded ownership of the painting in the Estate.¹⁴⁶ Finding the doctrine of laches defense not supported in the record, the appellate court affirmed the trial court's decision in favor of the Stern Estate.

The defenses of the statute of limitations and the doctrine of laches have been used to better effect in other cases. One such case will be discussed in the next chapter.

¹⁴³ The short time span between oral argument and issuing the decision indicates that the panel did not view the case as either difficult or contentious.

¹⁴⁴ *Vineberg v. Bissonnette*, 548 F.3d 50 (1st Cir. 2008).

¹⁴⁵ *Vineberg*, 548 F.3d at 55.

¹⁴⁶ *Vineberg*, 548 F.3d at 55-56.

A Museum Faces a Challenge

The Museum of Fine Arts, Boston (MFA) recently faced a dilemma. In some respects, as mentioned earlier, the MFA had acted in a way consistent with the Washington Principles. It had conducted a review of its holdings of art with an eye towards those that may have changed hands during the crucial period of the Nazi government of Germany. It created a website where it listed the pieces of art that it surmised may have had a problematic provenance because the art in question changed hands in Europe during Nazi rule in Germany. On the other hand, as this chapter will show, when faced with a claim that it, in its own decision, feels is unwarranted, it defended the case with what can only be described, in military terms, as a scorched earth policy. One of the sad and unfortunate aspects of the law in the United States is that, while the law itself may favor widows and orphans, the practical experience is that resources count. For example, in the Bissonnette case, discussed in the preceding chapter, it is clear that Bissonnette did not have the resources and experienced counsel that the Stern Estate did. The fact the pleadings filed by the original counsel representing Bissonnette were so poorly drafted is one, clear indication of that. In addition, of course, the Estate had the resources of the universities that were the beneficiaries of the Stern Estate. While, based on the facts of the case, it is clear the court reached the correct decision; her original counsel could have better represented Bissonnette. Successor counsel did the

best he could to repair the damage, but the damage had been done.¹⁴⁷ Bissonnette was at a clear disadvantage throughout the proceedings in that case.¹⁴⁸

In the case involving the MFA, the resources were very different. So were the strategies that were adopted. While the Stern Estate, as the original owner, filed the action in the federal district court in Rhode Island, here the MFA filed its own action against an heir of the original owners to quiet title to the painting in question after it had received a demand to return the painting to the heir. The MFA was represented by the firms of Sherin and Lodgen, an approximately forty-lawyer firm in Boston as local counsel, with their main counsel being Covington and Burling, an 850-lawyer firm with offices across the country and in several nations in Europe and Asia. The defendant, Dr. Claudia Seger-Thomschitz, was, in turn, represented by Todd and Weld, a medium-size firm in Boston as local counsel, and Byrne, Goldenberg and Hamilton, a firm based in Washington, DC, and which handles a large number of cases involving Holocaust-era looted art, as lead counsel. Clearly, while the MFA would have a clear advantage in resources and expertise, the parties would be more closely matched than in the Stern Estate versus Bissonnette case.

The MFA's complaint set out an extensive history of the painting in question, its provenance, what the MFA did after receiving the claim from Dr. Seger-Thomschitz, and why it concluded her claims were without merit.¹⁴⁹ The painting in question was *Two Nudes*

¹⁴⁷ Successor counsel, David Levy, Esq., worked at the Rhode Island Public Defender's Office for part of the time the author did and for a few months was his supervisor.

¹⁴⁸ For example, while Attorney Levy is considered by many to be one of the better trial lawyers in Rhode Island; his experience is almost exclusively in criminal trials, not civil trials.

¹⁴⁹ The Museum of Fine Arts, Boston Complaint for an Order Quieting Title to Property, Declaratory Judgement, and Injunctive Relief.

(*Lovers*). The artist was Oskar Kokoschka. He was a Czech national who fought for Austria in World War I. He painted and wrote poetry and plays. *Two Nudes* depicted a couple embracing and appears to portray the artist and his then lover, Alma Mahler, the widow of the composer, Gustav Mahler. The painting is done in an expressionistic style.

One of the main points of contention was a sale of the painting in 1939. At that point the painting had been owned by Dr. Oskar Reichel. He was an Austrian Jew who was placed into a perilous position in 1938 when Germany incorporated Austria in the *Anschluss*. The complaint alleges he sold the painting, in an arm's-length transaction, to an art dealer, Otto Kallir, who was also Jewish and also lived in Austria.¹⁵⁰ The complaint went on to allege that the parties had had prior dealings and, in fact, Dr. Reichel had lent the painting to Kallir on prior occasions with an agreement that if Kallir found a buyer willing to pay an agreed upon price, the painting could be sold.¹⁵¹

At any event, the parties agreed that the painting was sold to Kallir at a time when he had left Austria and set up a business in Paris, France. Kallir left Paris, and set up a gallery in New York. The New York gallery was originally intended to be the second location to the gallery in Paris. As the war approached, the Paris gallery was abandoned as Kallir was Jewish and understood he would have no role to play in Paris during the German occupation.¹⁵² The complaint goes on to allege that the painting was exhibited in New York and in 1945 it was sold twice, each time to another art gallery. Sometime in 1947 or 1948,

¹⁵⁰ MFA's complaint, paragraph one.

¹⁵¹ It is likely this information was included in the complaint to show, not only that Dr. Reichel was willing to sell the painting, but also to show that the transactions between the two parties were voluntary.

¹⁵² MFA's complaint, paragraphs 14-15.

Sarah Reed Blodgett purchased the painting and kept it in her homes in Michigan and Oregon. When she died in 1972, the painting was left in her will to the MFA, which completed its taking ownership of the painting in 1973. From then on, the painting has been displayed in the MFA or was loaned out to other museums.¹⁵³

The complaint then went on to examine the activities of the members of the Reichel family after the end of the war, Dr. Reichel having died during 1943 in Austria. The MFA notes that no direct member of the family made a claim for return of the painting. The complaint notes that members of the family did make application for return or compensation for other assets that the Nazis had stripped from them. Two of his sons lived for an extensive period after the war; one died in Illinois in 1979 and the other returned to Austria where he died in 1997. In addition, Kallir lived in New York until he died in 1978.¹⁵⁴ Perhaps concerned that the painting was owned for many years in private hands, the complaint also lists four shows the painting was exhibited at between 1945 and 1965 as well as fourteen shows the painting was exhibited at after the MFA acquired the painting.¹⁵⁵ These allegations were included in the complaint to show that, unlike the Bissonnette case, the painting was not sheltered away nor was there an absence of sources of information about the presence of the painting. In addition to all of this information the complaint noted that the painting had been mentioned, with its provenance, in several scholarly books.

The MFA also noted that in 2000, it had placed on its website all of the information it had about the painting, including its provenance. In 2003, the MFA listed the painting on

¹⁵³ MFA's complaint, paragraphs 16-18.

¹⁵⁴ MFA's complaint, paragraphs 19-23.

¹⁵⁵ MFA's complaint, paragraph 24-25.

another Internet portal run by the American Associations of Museums Nazi-Era Provenance Internet Portal. This portal provides anyone interested in a painting from the Nazi era a place to go to search for such a painting as the portal is searchable. Now, it is clear that these actions are entirely within the spirit and the letter of the Washington Principles. That being said, would everything the MFA did correspond with the Washington Principles? There are those who would say no.

In essence, the MFA's complaint sought a declaration that it owned the painting free and clear of any competing claims. The MFA sought to bar the claim of Dr. Seger-Thomschitz by arguing that her claim, if ever she had one, was barred by the Massachusetts statute of limitations of three years and that, in any event, her claim should also be barred because of her delay in seeking the painting, or laches.

Of course, Dr. Seger-Thomschitz filed her answer along with a counterclaim seeking a declaration that she was the lawful owner of the painting.¹⁵⁶ In her answer she drew an immediate distinction in the provenance of the painting. While she agreed that the painting had been transferred from Dr. Reichel to Kallir she denied the transfer constituted a legitimate sale. Rather, she alleged that the Nazis had already seized the painting as after their seizure of Austria, they required all Jews, including Dr. Reichel, to provide to them a list of all of the assets they owned. This list would include their artwork with the painting part of this list.¹⁵⁷ The answer went on to affirm her position that the painting was, in effect, stolen merchandise at the time it was sent to Kallir in Paris and as a result of that, no subsequent owner, including the MFA obtained good title to the painting. Throughout the

¹⁵⁶ Answer and Counterclaim.

¹⁵⁷ Answer, paragraph 1.

answer and counterclaim (which sought a declaration that Dr. Seger-Thomschitz was the rightful owner of the painting, among other relief) she alleged that the MFA had violated its fiduciary duties to the public as a tax-exempt organization in taking possession of the painting without looking into its provenance. To show that the painting was seized as of 1938 (and, therefore, prior to the transfer to Kallir) Seger-Thomschitz attached to her answer and counterclaim, as exhibit four, a document sent from the Reich Ministry of Economics, which stated in part:¹⁵⁸ “The enclosed coverage of Jewish property, now available for all of the Reich” which Seger-Thomschitz takes as showing that the Nazis regarded as seized all Jewish property listed in the documents of assets the Jews of Austria were then required to submit. The MFA did not agree with this interpretation as will be shown. And so, as it often happens, and as it did in the Stern Estate versus Bissonnette case, the issue often boils down to one dispute. In the Bissonnette case the principle issue was whether the Matin-Lempertz auction was a valid sale. Here, the parties were mostly separated by their respective views of whether the transfer of the painting from Dr. Reichel to Kallir was valid. Ultimately, the courts focused on the Massachusetts statute of limitations of three years.

And so, like the Stern Estate versus Bissonnette case, this case was decided on a motion for summary judgment filed by the MFA and which was objected to by Dr. Seger-Thomschitz. The MFA’s motion specifically listed the statute of limitations as the grounds it was relying upon for summary judgment. The result of this tactic is that certain issues, specifically including the legitimacy of the transfer of the painting from Dr. Reichel to Kallir,

¹⁵⁸ Answer, Exhibit 4 (this exhibit includes an English translation as well as a copy of the original document in German).

became irrelevant.¹⁵⁹ The motion stated: “This motion is made on the grounds that any claim by the Claimant against the Museum...is time-barred as a matter of law under the three year statute of limitations.”¹⁶⁰ The motion went on to note that Dr. Reichel’s son, Raimund Reichel, knew that his father owned the painting prior to 1939 and that his father had transferred the painting to Kallir. The MFA noted that Seger-Thomschitz based her claim on being the heir of Raimund Reichel and therefore was arguing that his knowledge should be imputed to her. The motion went on to note that Raimund Reichel never made a claim for the painting, or the other paintings transferred to Kallir, at any time after the end of World War II.¹⁶¹

Accompanying the motion was a voluminous amount of material. One of the key filings, as in the Stern Estate case, was the MFA’s statement of uncontested facts. When put together by an experienced litigator, these statements can have an enormous impact on the court as few things are as persuasive as a well-organized statement of unassailable facts. And, by focusing on the statute of limitations, as already noted, the MFA avoided the messy back-story, avoided discussing exactly how free was the transfer of the paintings, including the painting, to Kallir in 1938. After all, Kallir went to Paris, and then on to New York, for a reason. The Jews in Austria certainly knew how the Nazi government was going to work once the *Anschluss* and *Kristallnacht* occurred.

¹⁵⁹ Tactics like this, which circumvent the history of the times, anger some historians who feel that the history of the times was being shortchanged as will be discussed later.

¹⁶⁰ Museum of Fine Arts, Boston’s Motion for Summary Judgment Based on the Statute of Limitations, 2.

¹⁶¹ MFA’s Motion for Summary Judgment, 2.

The statement of uncontested facts went through, again, the extensive background and provenance of the painting. A number of paragraphs emphasize the relationship between Kallir and Dr. Reichel and the number of times Dr. Reichel gave paintings, including the painting in question, to Kallir to show at his gallery. These loans often included suggested prices in case any of the patrons at the shows at Kallir's gallery showed interest in purchasing one of the loaned paintings.¹⁶² The statement went on to note that the surviving members of the Reichel family¹⁶³ made many efforts to recover damages for the property that had been looted from the family but that none of these efforts included attempting to recover damages for the paintings Dr. Reichel transferred to Kallir when he was in Paris in 1938. Especially damaging to the Seger-Thomschitz claim were the actions of the son, Raimund. He had successfully fled to Argentina where he lived until 1982 when he returned to live out his final years in Austria. He frequently wrote to art historians about the "Kokoschka Room" in his parents' house where the painting and others by the artist were hung. As late as 1985, he wrote in a letter that his father was laughed at for supporting the artist and that the transfer to Kallir was easy as the paintings were considered degenerate art, apparently of little value. He mentions that he and one other brother each received \$125 for the sale of the paintings from Kallir. He also wrote: "Some years later I spoke with Kallier [sic] in N.Y. in his Galerie St. Etienne; he told me that he lost his shirt for it!"¹⁶⁴ The court could certainly take this information as a clear indication that the Reichel family did not consider the paintings transferred to Kallir as property stolen by the Nazi government. And while the court would

¹⁶² MFA's Statement of Uncontested Facts, 1-2.

¹⁶³ Dr. Reichel died in Austria in 1943 and one son was murdered in the death camps.

¹⁶⁴ MFA's Statement, 6-7.

likely ignore this information if it was shown that the painting was, in fact, stolen, or if it was shown that the statute of limitations had not expired, this type of information could make it easier, psychologically, for a judge or panel of judges to look past the history of the case and keep their analysis strictly limited to the legal issues.

Of course, this was not the only document filed in support of the MFA's motion for summary judgment. It filed a declaration under oath of Dr. Victoria Reed.¹⁶⁵ In her declaration she indicated that she had a master's degree and a doctorate in art history from Rutgers University and years of experience in provenance research having been employed by the MFA since 2003. She indicated that she is literate in German as well as English and other languages. She led the provenance research for the MFA that resulted once the MFA received the claim of Seger-Thomschitz. She further indicated that she spent over half of her time over eighteen months in this research and traveled to foreign countries to complete her research.

One interesting matter she did note is that over the years, the painting had been listed under differing names. Why that fact might have made any search by the Reichel family, or anyone claiming under them, more difficult is never dealt with in the MFA's materials. Her declaration included the full provenance revealed by her research. Included was the document that authorized a representative to accept a number of paintings to be transferred from Dr. Reichel to Kallir. The translated document reads in pertinent part: "I confirm with you that you entrust the Kokoschka pictures to me at the value of 800 Swiss francs. The prices listed next to the other pictures are your net prices in the event of a sale. With best

¹⁶⁵ Declaration of Dr. Victoria Reed in Support of Museum of Fine Arts, Boston's Motion for Summary Judgment Based on the Statute of Limitations.

regards and greetings.”¹⁶⁶ In addition, there was a note next to the listing of the Kokoschka paintings that they were sold. This does not sound like the language that would be used if the transfer was a forced transfer under orders to be enforced by the Gestapo as in the Stern Estate case. Yet, it still might be. After all, Dr. Reichel may well have regarded the art as under threat, if not actually seized, since he had previously filed the list of assets with the Nazi government. He may have been willing to settle for getting the art out of the country and to Paris and to someone he knew, but may have still preferred to keep the paintings absent the Nazi government of Austria. The fact the portrait that Kokoschka did of Reichel’s son was included seems unusual especially given the fact Kokoschka was living with the Reichels when the painting was done. If Dr. Reichel was the patron of Kokoschka as all of the materials would lead us to believe, then why would he sell the painting of his son done by the artist unless the circumstances, financially, personally or both, were dire? By focusing on the statute of limitations, the MFA avoided having to substantively deal with these issues.

Dr. Reed also documented the number of times the painting had been shown around the country and other countries as well. Also listed were the publications about the artist and this painting, some of which listed the provenance or where the painting was then owned.¹⁶⁷ Attached to her declaration were forty-six exhibits containing 182 pages of information.

The MFA also needed to dispute Dr. Seger-Thomschitz’s position that the artwork owned by Dr. Reichel was seized by the Nazi government at the time he was forced to submit to the government a list of his assets. The MFA needed an expert that could support its position that the various Austrian laws about restituting looted-art did not aid Dr. Seger-

¹⁶⁶ Reed Declaration, 10. The original document in German was unsigned.

¹⁶⁷ Reed Declaration, 17-22.

Thomschitz's position. For that purpose, the MFA retained as an expert witness Dr. August Reinisch, a German attorney. His credentials were beyond reproach, earning law degrees at both the University of Vienna and New York University and also earning an L.L.M. degree from New York University in International Legal Studies. Finally, he received a diploma from The Hague Academy of International Law.¹⁶⁸

His declaration considered the Austrian laws that Seger-Thomschitz had used in her pleadings. While he stated that the 1946 Nullity Act did declare that transactions during the Nazi regime were null and void, whether there was consideration or not, if they were designed to deprive people of their assets. However, he noted that this act was not self-executing and needed further acts to give it substance and a procedure. Since 1946, the courts and commentators have concluded that this act did not create an independent basis to recover looted art.¹⁶⁹ The Austrian government passed seven different restitution laws, some of which did not relate to tangible property. In sum, the deadline for filing claims under these laws expired in 1956 and has not been extended since that time. He also noted that the 1955 state treaty entered into by Austria, where it committed to returning looted items to citizens of foreign countries was also not an independent basis for making a claim. Rather, the same claim procedure just reviewed was intended to be the mechanism to implement the Treaty.¹⁷⁰ Similarly, the 1998 Art Restitution Law applies only to Austrian museums and not to anyone else. For his final assault on Seger-Thomschitz's efforts in using Austrian law to boost her

¹⁶⁸ Declaration of Dr. August Reinisch in Support of Museum of Fine Arts, Boston's Motion for Summary Judgment Based on the Statute of Limitations, 1.

¹⁶⁹ Reinisch Declaration, 4-5.

¹⁷⁰ Reinisch Declaration, 10-12.

chances of success, he noted that he had never heard of the idea of filing a declaration of your assets, as Dr. Reichel as a Jew was forced to do, meant that the assets were then considered seized. Further, he challenged the translation provided by Dr. Seger-Thomschitz. Dr. Reinisch felt that the proper translation would mean that the lists themselves, and not the items listed, would be available for the whole Reich.¹⁷¹

As an additional filing, the MFA also filed a memorandum supporting its motion for summary judgment.¹⁷² The memorandum repeated much of the history of the painting from the point of view of the MFA, noting yet again, that the family knew about the transfer from Dr. Reichel to Kallir and that no member of the family made a claim as to any of the paintings so transferred although they made claims over the years to other property that belonged to the family. The memorandum went to recount the number of times the painting was shown and the number of times it was written about. The memorandum notes that the jurisdiction of the court was invoked under the federal courts power to hear cases, based on state claims, when the parties have citizenship in different states.¹⁷³ As such, under the practice long established, the federal trial courts look to the law of the state for the underlying law, such as statute of limitations and choice of law provisions. Therefore, the MFA argued that the court had to apply the Massachusetts statute of limitations of three years. And, the MFA argued, if the Massachusetts three-year statute of limitations barred

¹⁷¹ Reinisch Declaration, 14-15.

¹⁷² Memorandum of Points and Authorities in Support of Museum of Fine Arts, Boston's Motion for Summary Judgment Based on the Statute of Limitations.

¹⁷³ 28 U.S.C. Section 1338. This statute codifies the provisions of Article 3, Section 2, of the United States Constitution.

recovery by Dr. Seger-Thomschitz, then the case was over.¹⁷⁴ The MFA argued strongly that all of the claims of Dr. Seger-Thomschitz came down, in essence, to conversion. Under Massachusetts law, it is well established that the statute of limitations for conversion is three years. In its memorandum, the MFA was arguing that all of the allegations in Dr. Seger-Thomschitz's counterclaim boiled down to a claim of conversion; that the painting had been seized from Dr. Reichel. Under Massachusetts law, which under diversity jurisdiction the federal district court was bound to follow, whatever claim she had expired decades ago.

The MFA continued to state that the discovery rule did not assist Dr. Seger-Thomschitz in her claims.¹⁷⁵ The MFA repeatedly pointed out that the Reichel family knew about the transfer to Kallir, that Kallir intended to sell the paintings so transferred and made no effort after the end of the war to retrieve those paintings in spite of the fact the family members did make efforts to reclaim other assets taken from them during the Nazi government period.¹⁷⁶ Finally, on this issue the MFA took the position that Dr. Seger-Thomschitz was herself on actual notice when she received notice from the Museum of Austria in the fall of 2003 that the Nazis had seized art belonging to Dr. Reichel. Yet, the MFA notes that Dr. Seger-Thomschitz did not retain an attorney in the United States until

¹⁷⁴ MFA's Memorandum in Support of its Motion for Summary Judgment, 9.

¹⁷⁵ A person, who steals items successfully and is also able to prevent discovery of his /her identity and location of the stolen items, does not get the benefit of the statute of limitations. The statute does not begin to run until the information is discovered, or with reasonable diligence, could have been discovered. The Isabella Stewart Gardner Museum has neither knowledge of the names of the thieves that undertook the 1990 robbery that remains unsolved nor any knowledge of the current location of the stolen art. If the art was discovered now, the statute of limitations would not prevent a successful suit to recover the paintings by the museum.

¹⁷⁶ MFA's Memorandum in Support of its Motion for Summary Judgment, 11-14.

2006 and did not assert a claim to the painting until later in 2007. These facts alone, in the MFA's view make the claim untimely.¹⁷⁷

Of course, Dr. Seger-Thomschitz replied. Her responses, while superficially well-drafted, did give off a sense of unreality and panic. For example, she argued that the court should ignore the Massachusetts statute of limitations and use the common law of the United States. She argued this on the basis of her allegations that the MFA had violated its obligations as a non-profit organization by accepting art that had been looted, citing 26 U.S.C. Section 501(c)(3). She argued that since the MFA had, in her opinion, violated its obligations as a charitable organization, that her claim was federal and that the court should apply a federal statute of limitations. This argument was never going to succeed. Federal courts in diversity cases are not to apply a federal common law, but the law of the state. The attempt to characterize her lawsuit as one to vindicate federal tax policy was never going to be successful.¹⁷⁸

Her second argument was that, if Massachusetts law did apply for the statute of limitations, the contract statute¹⁷⁹ should apply and not the conversion statute. The application of the contract statute of limitations would extend the period from three years to six years. Given the discussion above, this argument also does not appear promising, for if the court measures the start of the running after the end of the war, with the knowledge that the Reichel family members had, the six years would have expired decades before her claim was brought to the attention of the MFA and the courts. The application of the six-year

¹⁷⁷ MFA's Memorandum in Support of its Motion for Summary Judgment, 16-17.

¹⁷⁸ Memorandum of Points and Authorities in Opposition to Museum of Fine Arts, Boston's Motion for Summary Judgment Based on the Statute of Limitations, 2-12.

¹⁷⁹ M.G.L. ch. 260, Section 1.

statute would only assist Dr. Seger-Thomschitz if the court was convinced that the statute should not start to run until she was on some type of notice that paintings seized from Dr. Reichel were in the United States. Again, for the reasons previously stated this seemed extremely unlikely.

Dr. Seger-Thomschitz also filed a declaration by the historian, Dr. Jonathon Petropoulos. The purpose of his declaration appeared to be two-fold. One was to undercut the picture of the friendly relationship between Dr. Reichel and Kallir. The second was to point out that the declaration of assets signed by Dr. Reichel and given to the Nazi authorities had been kept classified by the Austrian government for many years after the end of the war and that even when these documents were declassified in 1993 it was for academic purposes only and was done without any real publicity. The lists were not fully declassified until 1998, but again without any real publicity. Dr. Petropoulos stated that he “did not believe that a person without some special training or experience in the narrow branch of history dealing with the Nazi persecution of the Jews in Vienna reasonably would be aware of Property Declarations or the purpose to which they might be applied.”¹⁸⁰ The apparent purpose of this inclusion was to offset the MFA’s statements about the Reichel family’s knowledge of the paintings and the declaration signed by Dr. Reichel. While Dr. Petropoulos is likely to be correct in his conclusion that archival research experience would be helpful in using the records, such a conclusion was unlikely to turn the argument on the statute in Dr. Seger-Thomschitz’s favor. As the MFA repeatedly pointed out, the family had actual knowledge of the transfer of the

¹⁸⁰ Affidavit of Jonathon Petropoulos in Opposition to Motion of Museum of Fine Arts, Boston’s Motion for Summary Judgment on the Statute of Limitations, 12.

paintings to Kallir and made no effort to recover them, one son even having had a conversation with Kallir.

The other purpose was to discredit Kallir. The purpose here was clearly to discredit the actions of Kallir throughout this period. Dr. Petropoulos stated that Kallir had been investigated for various activities during the war by the FBI, had a reputation of unethical business practices both during and after the war, had promised to help survivors recover art and failed to act and other activities. He stated that he had seen documents that “alluded” to Kallir’s Neue Galerie, after it was Aryanized, being used as an official collection point for art surrendered by Jews.¹⁸¹ It is clear that this attack on Kallir’s life was, as noted, intended to contradict the friendly relationship pictured by the MFA’s pleadings between Kallir and the Reichel family by implying that Kallir may have been running a fraud on the family.

The legal skirmishing continued with pleadings, motions, and oppositions being filed at a regular pace, even after the motion for summary judgment had had oral argument. On May 28, 2009, Judge Zobel handed down her written decision. As expected, the decision gave an extensive background of the case and the history of the painting. This included her recitation of the fact the surviving members of the Reichel family made no effort to claim any of the Kokoschka paintings. Nor did they contest the transfer of the paintings from Dr. Reichel to Kallir after the end of the war.¹⁸² Of course, the fact the judge emphasized these facts was ominous for Dr. Seger-Thomschitz’s case.

The court did go into a serious discussion of the summary judgment motion filed by the MFA, the objection to it, and the various other pleadings. As the court found as a matter

¹⁸¹ Petropoulos Affidavit, 9.

¹⁸² Slip Opinion, 7.

of law that Dr. Seger-Thomschitz's claims were based in replevin and tort, the court agreed with the MFA that the Massachusetts three-year statute of limitations applies. The judge held that this statute had expired prior to the lawsuit being filed. The judge noted that Dr. Seger-Thomschitz first learned she may have had an interest in looted art previously belonging to Dr. Reichel when she was notified by the Museums of Vienna that they wanted to return four such looted paintings (none by Kokoschka). The judge noted that the defendant's own pleadings noted she had hired an attorney in Austria to investigate any other possible sources of art. The declarations had been available since 1998 so that her Austrian attorney could have accessed it. Further the court noted that the painting in question was listed on the MFA's website, and others, and had been listed in several catalogues raisonnées of Kokoschka's works. The judge stated "the conclusion is inescapable that, in 2003, defendant knew or should have known of Reichel's previous ownership of the Painting...and the MFA's current ownership....Because she did not make a demand on the MFA until 2007, Seger-Thomschitz's claims are time-barred, even if the cause of action were tolled until 2003."¹⁸³ As far as the district court was concerned, the case was over. The actual judgment was entered on June 12, 2009. Dr. Seger-Thomschitz appealed.

Her appeal faced many, difficult obstacles in front of her. The trial judge took the facts as established by the record, including Dr. Seger-Thomschitz's own pleadings. The trial court gave her the benefit by assuming, without deciding, that the statute of limitations was tolled until 2003. This was the year that the museums in Austria sent her the letter advising her they had looted paintings that belonged to her as the only heir of Dr. Reichel. And she

¹⁸³ Slip Opinion, 20. Note that the court did not rule on the issue of whether the discovery rule stayed the action until 2003.

admitted that she hired an attorney in Austria to look into the question of missing art. Yet, her lawsuit against the MFA was not filed until 2007, a period in excess of the three-year statute of limitations. With the trial judge limiting the issues in the case, to just this one issue for decision, and with the facts that clear, the appeal of Dr. Seger-Thomschitz was practically hopeless. Her attorneys did what they could but the outcome was almost a foregone conclusion.

Appellate briefs were filed for both parties and oral argument was heard on June 7, 2010. The Court of Appeals for the First Circuit issued its decision on October 14, 2010.¹⁸⁴ Judge Kermit Lipez wrote the decision. There was no dissent. As is often the case when the district court decision was not published, the appeals court gave extensive factual background for the case as well as the travel of the case in the district court. The appeals court noted that given the posture of the case, it was not called upon to determine whether the transfer of the paintings from Dr. Reichel to Kallir was a valid, arms-length transaction. In any event the court did note that making that determination so many years after the event would not be easy.¹⁸⁵

In essence the appellate court reduced the case to the question of whether the “counterclaims, meritorious or not, are time-barred as a matter of law.”¹⁸⁶ The appeals court

¹⁸⁴ Museum of Fine Arts, Boston v. Seger-Thomschitz, 623 F.3d 1 (1st Cir. 2010).

¹⁸⁵ Even leaving aside Dr. Petropoulos’s harsh affidavit about Kallir, the MFA’s own materials cast doubt on the legitimacy of the transaction. To show that the Reichel family knew about the transaction and made no objection, it noted that one of the sons had a conversation with Kallir after the war in which Kallir claimed to have lost money buying the Kokoschka’s paintings. In other places in the MFA’s materials it notes that Kallir sent \$250 to the sons for the five paintings and sold the painting in question for \$1,500 alone. When you add in the money he received for selling the other paintings, it can hardly be said that Kallir lost money.

¹⁸⁶ Museum of Fine Arts, Boston v. Seger-Thomschitz, 623 F.3d at 6.

then went to apply the Massachusetts three-year statute for torts, as opposed to any other option, as the parties and the district court were now in agreement that that statute should apply. Dr. Seger-Thomschitz abandoned her argument about the six-year statute of limitations on appeal. The appellate court noted that the facts were not really in dispute and that she was on notice of missing art since 2003 when she received the letter from the museums in Austria. The court noted that by 2003 the full provenance of the painting was available on at least two websites, that a book was published in 2003 in Austria that included a picture of the painting, listed its full provenance, and included the 1938 declaration of property that Dr. Reichel had filled out. And the appellate court noted that the property declarations themselves were public records in 2003. The court went on to note that a party seeking the benefit of the discovery rule has the burden to show that their actions are reasonable. The court noted that in the district court proceedings, Dr. Seger-Thomschitz did not file an affidavit as to “what she was doing between 2003 and 2007, a curious omission, given that she is in the best position to account for the period.”¹⁸⁷ The appellate court concluded that the district court ruled correctly that her counterclaims were filed too late and that she had missed the statute of limitations. The remaining arguments of Dr. Seger-Thomschitz fared no better and the district court judgment dismissing the counterclaims was affirmed.

While it appears that both the cases discussed in detail in this and the last chapter were decided correctly under the law, the MFA case leaves the sense that history has been, if not ignored, at least by-passed. Should art looted during such terrible times and circumstances remain with the current holder? Should defenses like laches and the statute of

¹⁸⁷ Museum of Fine Arts, Boston v. Seger-Thomschitz, 623 F.3d at 9.

limitations be available in these cases? Given the obvious danger the Jews of Europe found themselves in, should not any transaction occurring during that time be viewed as suspect? Should not the current possessor of the art have the burden of showing that the art was acquired legally and not the result of a forced sale, however that is defined? These questions have been the subject of substantial debate among legal scholars and others, which will be discussed in the next chapter.

VI

Legal Analysts Weigh In

There have been a number of suggestions for how to resolve the contested issues in these cases. In some ways progress has certainly been made. The Washington Principles are, in part, being taken seriously by the museums that may have art with problematic provenances. Of course, the Washington Principles do not come in to play where the possessor of the art is a private individual. They are checking their collections for such art and publicizing on websites such art as the museums feel may have been looted. The State of New York has fewer problems than many states, as its statute of limitations for replevin cases does not start to run until there is a demand for return and a refusal of that demand. However, not many states have the same rule. California tried to extend the statute of limitations for Holocaust-looted art but the results were unfortunate. There have been calls for Congress to step in and establish a national, short-term system, outside of the courts. Details varied but the ideas generally were that it would be closer to an informal arbitration, then to an adversarial system like the courts. Every suggestion had its supporters and critics. How well did these work out?

In 1999, the State of California enacted legislation that attempted to give relief to slave workers during World War II and for possible beneficiaries of insurance policies that went unpaid. Litigation was commenced and was not resolved until the United States Supreme Court ruled that these statutes were unconstitutional, as they would interfere with

the President's right to conduct foreign affairs, noting that in the agreement between the United States and Germany, the United States agreed to file statements in any court action that the foreign policy interests of the country meant such claims should be made under the agreement.¹⁸⁸

While these statutes did not touch upon art, the implications are obvious. California did pass an act that the statute of limitations for claims to recover Holocaust-looted art could not be used as a defense as long as the action was started before the end of 2010. When an action was started in 2007 to recover Holocaust-looted art, the federal court struck down that statute as well, citing the cases just named. One law review comment criticized this decision and distinguished the other cases by noting those statutes sought directly to compensate victims of the war and this act only sought to regulate personal property within the state.¹⁸⁹ While this criticism of the court's decision appears justified, the court's adverse decision remains. Another critic, Graham O'Donoghue, notes that the statements of interest, when filed, do not provide an independent basis to dismiss the lawsuit. While it is correct that the United States did sign executive agreements with Germany, Austria, and France, these agreements did not purport to settle claims of individual United States citizens. He concludes that the courts should disregard the statements of interest when only the rights of private citizens are involved noting that the constitution mandates that Congress, not the executive

¹⁸⁸ Brannon P. Denning, "Case Comment", *American Journal of International Law* 97, no. 4 (Oct. 2003): 950-961.

¹⁸⁹ "Case Comment," *Harvard Law Review* 123, no. 5 (March 2010): 1377-1384.

branch, dictates the jurisdiction the federal courts will exercise.¹⁹⁰ Of course, even if the courts took this advice, it would still not aid those cases where the statute of limitations is the primary issue.

Some critics have asked why museums are not surrendering more readily art with a problematic provenance. It is clear that if a painting has been given to a museum or other institution, like a university, the institution is obligated to comply with the conditions, if any, of the gift. If the gift has been made as a charitable one, the state has a say in how it is disposed of.¹⁹¹ With these possible restrictions on the ability of an institution to let a piece of artwork go, the complications can multiply and result in years of litigation. Museum directors also believe they are keeping and displaying their art collections as a matter of a public trust and exploit this concept to justify using all legal resources in fighting against claims that they hold looted art. However the New York Board of Regents, which regulates nonprofit museums, has issued regulations allowing the deaccessioning of stolen art to the original owners. In addition, the American Association of Museums has adopted standards concerning Holocaust-looted art designed to keep its museums free of stolen art.¹⁹² It would appear that unless the gift documents-themselves-disallow deaccession, there is no legal obstacle for a museum to return looted art. As Goldstein and Weitz note, museums are using

¹⁹⁰ Graham O'Donoghue, "Precatory Executive Statements and Permissible Judicial Responses in the Context of Holocaust-Claims Litigation," *Columbia Law Review* 106, no. 5 (June 2006): 1119-1164.

¹⁹¹ Patty Gerstenblith, "Museums Face Legal Obstacles to Deaccessioning Works," *Cultural Heritage & Arts Review* (Fall/Winter 2010): 27-31.

¹⁹² Charles A. Goldstein and Yael Weitz, "Claim by Museums of Public Trusteeship and Their Response to Restitution Claims," *Art and Advocacy* 14 (Winter 2013): 2-7.

the concept of a public trust before a court has determined whether the museum obtained legal title.¹⁹³

Some critics of the museums tactics of using the defenses of the statute of limitations and laches are much harsher in their criticism. One noted that the use of these defenses should be barred in this type of litigation noting that it leaves stolen art stolen. He stated that “directors of institutions that permit or conceal such trafficking in stolen art should be criminally prosecuted.”¹⁹⁴ Dowd notes the obvious, but often overlooked, fact the art that was looted and brought into the United States during the Nazi-era in Germany was stolen and, as such, it was imported in violation of then existing federal criminal law. Given that fact, Dowd goes on to argue that even if statutes of limitations and laches can be used in the lawsuits they should not prevail over concepts of constructive trust and equitable tolling of these defenses. While Dowd makes strong, coherent arguments, what is missing is a means of implementation. Once again, the fact that there are fifty states and the federal government involved complicates the implementation of any policy. Further, any attempt to implement special laws for only Holocaust-looted art runs the risk that the laws will be struck down as California discovered in the two cases previously discussed.

Of course, the museums and their defenders have not taken these criticisms lightly. Two of the attorneys that represented the MFA in the case under review wrote an extensive

¹⁹³ Goldstein and Weitz, “Claim by Museums,” 4.

¹⁹⁴ Raymond J. Dowd, “Nazi Looted Art and Cocaine: When the Museum Directors Take It, Call the Cops,” *Rutgers Journal of Law & Religion* 14 (2013): 529.

article defending the museum's right to defend itself in any way it sees is fit.¹⁹⁵ Their defense starts out with an acknowledgement that there are many valid claims that United States museums have been holding art looted during the Holocaust. They state, without giving examples, that museums have returned paintings voluntarily when their provenance research revealed significant problems. They note that the American Alliance of Museums and the Association of Art Museum Directors have developed ethics codes for dealing with art that of that era. And they note that the museums are implementing the Washington Principles.

All of this has been noted. The question is where do they diverge from the critics of the museums? First they note that nothing in the Washington Principles prevents any holder of disputed art from invoking all of their rights under the law of their jurisdiction. Nor are there any such restrictions in the ethics codes. Therefore, they reject the criticisms of museums' use of filing declaratory judgment actions seeking to quiet title to art and attacking adverse claims to the art by using defenses such as laches and the statute of limitations. Further, they strongly disagree with those critics who charge that using laches and statutes of limitations is resorting to technical defenses and not allowing a full exploration of the issues through a trial. They note that courts often ameliorate the harsh rule of the statute of limitations by invoking the discovery rule.¹⁹⁶ They also do not believe that laches or statutes of limitations are technical, but rather protect substantive rights of parties. Given the long period of time that has passed since the end of World War II, the loss of much information over that time, the death of parties and witnesses, a museum starting a

¹⁹⁵ Simon J. Frankel and Ethan Forrest, "Museums' Initiation of Declaratory Judgment Actions and Assertion of Statutes of Limitations in Response to Nazi-era Art Restitution Claims – A Defense," *DePaul Journal of Art, Technology and Intellectual Property Law* 23 (2013): 279-337.

¹⁹⁶ Frankel and Forrest, "Declaratory Judgment Actions," 306.

declaratory judgement action and invoking laches and the statute of limitations may, rather, be preventing an injustice. In addition, they note that the existence of a claim against the museum creates a cloud on the title of the art in question.¹⁹⁷

While it is certainly true that laches and statutes of limitations can act to either create or prevent an injustice, their attitude is that the public and the claimants should trust the museums because they are the experts in provenance and are ethical. Even if this is true for the vast majority of museums and their employees, it does not answer the question of how the looted art came to rest in the museums in the first place. Where were their provenance experts and their ethics codes then?

Some have suggested that one way to help the courts in deciding these cases is to bring historians of the era into the litigation process, not as expert witnesses on either side, but as neutral sources of information on the Holocaust. Leora Bilsky, for example, notes that the settlements achieved in the class actions against German corporations and Swiss banks came as a result of lawsuits filed by private attorneys representing clients. Nevertheless, Bilsky posits that the role of historians working in commissions appointed to investigate the background of these issues were crucial in achieving the settlements. Obviously, the historians in these cases were not working for one side or the other.¹⁹⁸ She concludes that the prestige these commissions had, generated by their own backgrounds and the fact they were neutrally appointed helped parties accept their conclusions. Such a step in the United States

¹⁹⁷ Frankel and Forrest, “Declaratory Judgment Actions,” 306-309.

¹⁹⁸ Leora Bilsky, “The Judge and the Historian: Transnational Holocaust Litigation as a New Model,” *History and Memory* 24, no. 2 (Fall/Winter 2012): 117-156.

for the looted art cases would only be economically possible in the context of a nation-wide solution. And no such national program is anywhere being attempted.

Another possible solution to balance the rights of original owners and current possessors of Holocaust-era art is for every state to adopt the demand and refusal law. In New York, the statute of limitations does not begin to run until a demand is made for return of an item believed to have been stolen. The statute then runs for three years. One benefit of this rule is that it should allow the courts to avoid conflict of laws analysis as under the rule, the wrong does not commence until the demand is refused.¹⁹⁹ The problem here is that as elegant as the demand and refusal rule looks, only New York uses this rule and there is no movement in the other states to follow it. New York also puts the burden on the possessor of property suspected to be stolen to prove ownership, thus reversing the usual burden of proof. Given the decades that have passed, this may prove too onerous a burden in Nazi-looted art cases, but perhaps creating a rebuttable presumption of a forced sale for art that changed hands during the Nazi era would be more acceptable to both parties.²⁰⁰ Kreder ends her article with a draft of proposed legislation to create a United States commission to deal with Nazi-looted art invoking Congress's power under the interstate commerce clause of the constitution.

Kreder also decries the fact federal courts are dismissing so many cases on what she believes are technical grounds, such as laches and, especially, the statute of limitations. She

¹⁹⁹ Jennifer Anglim Kreder, "The New Battleground of Museum Ethics and Holocaust-Era Claims: Technicalities Trumping Justice or Responsible Stewardship for the Public Trust?" *University of Oregon Law Review* 88 (2009): 37-94.

²⁰⁰ Kreder, "The New Battleground," 83-84.

believes these decisions are based on a poor understanding of the historical period.²⁰¹ She is especially critical of the court's decision in the MFA case as she believes there was plenty of evidence that the transfer of the paintings from Dr. Reichel to Kallir was fraudulent and believes that that court's, and other courts', evaluation of the evidence of when a non-expert is on notice of a possible claim is unwarranted on the facts if the historical period is properly understood.²⁰²

Katherine Skinner, a law student, wrote an article proposing a commission be created by federal law as part of the Secretary of State's office. This commission would be given binding jurisdiction over claims for Nazi-looted art. They would have skilled staff a large budget such that the commission's staff would assist in provenance research thus saving both sides expenses. The decision of the commission would be final and binding on both parties, thus barring any appeals or subsequent lawsuits. The commission would accept claims for ten years only after which any claim that could have been submitted, but was not, would face dismissal if a court action was commenced. Skinner believes this system would protect both sides of the issue, both of whom she believes would be acting in good faith.²⁰³ While the specifics of her plan could be negotiated, the main problem with her model solution is that there does not appear to be any will in Congress to create such a commission.

²⁰¹ Jennifer Anglim Kreder. "Fighting Corruption of the Historical Record: Nazi-Looted Art Litigation," *Kansas Law Review* 61 (2012): 75-331.

²⁰² Kreder, "Fighting Corruption," 109-114, 132-133.

²⁰³ Katherine N. 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* 15, no. 3 (2013): 673-712.

VII

Is There a Solution?

The previous chapter discussed a number of ways that the issue of Holocaust looted art could be, and is, handled. Some, like Skinner and Kreder, suggest a national commission be established by Congress invoking, in part, its power over interstate commerce and, in part, the executive branch's authority over foreign affairs to create a nationwide solution to the issue. Original owners of art could take their information to federal prosecutors and investigatory agencies and seek the implementation of civil forfeiture proceedings. Federal courts could ignore the statements of interest filed by the executive branch. The states could adopt uniform statutes of limitations. The New York law of not starting the clock on the statute of limitations until there has been a demand and a refusal, tempered by the possible defense of laches, could be a solution.²⁰⁴ The museums could adopt all of the Washington Principles instead of picking and choosing those they are comfortable with and ignoring the rest. Museums and art dealers could also do more in publicizing the provenance of all of their holdings and use their national organizations to set up a national registry system for transfers of art. As this would be a private system access could be restricted to parties who could be vouched for to protect individual owners of art from theft. All of these things could be done. Or, things could just continue on as they are.

²⁰⁴ There is a uniform commercial code, a uniform corporations act, and a uniform partnership act, which have been passed by virtually all, if not all, of the states.

The latter is the most likely. There is simply not the will in the Congress or the state legislatures to create any of these possible solutions and there is no group capable of pressuring the legislators into action. The sad result will be that nothing substantive will be done in the future and the heirs of original owners will not be recovering their rightful property.

VIII

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