

FIGHTING CORRUPTION OF THE HISTORICAL RECORD: NAZI-LOOTED ART LITIGATION

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"For the first time in history, restitution may be expected to continue for as long as works of art known to have been plundered during a war continue to be rediscovered."

ARDELIA R. HALL, *THE RECOVERY OF CULTURAL OBJECTS DISPERSED DURING WORLD WAR II*, Dep't St. Bull. 337, 337 (1951).

Abstract

Judicial opinions comprise part of the historical record. Thus, judicial attention to historical context is important, because it will influence how future generations interpret historical events. Generalist judges often have difficulty facing and interpreting difficult historical facts. The recent wave of litigation concerning Holocaust-era art demonstrates the phenomenon particularly well. Modern day judges deciding motions to dismiss under the Twombly and Iqbal standards must determine which claims are "plausible." They bring their common sense to the decision-making process. The problem is that the Third Reich was a time and place where common sense did not reign. Nor was the international art market during or after World War II. Thus, some claimants' true narratives seem to be fantastical, rather than entirely plausible. This Article assesses the state of claims to Holocaust-era art, concludes that claims have been dismissed improperly because they did not reconcile with judicial notions of common sense, and recommends that judges actively seek the input of historians while remaining vigilant not to allow the historical record to become

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politicized and biased in the advocacy process.

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Introduction

Over the years, with a few praiseworthy exceptions, United States courts have dismissed many Nazi-looted art claims on technical grounds, resulting in distortion of the historical record.¹ This trend seems to reflect bias against these historical claims arising from lack of historical knowledge.² Tales of venerated institutions,³ such as the Museum of Modern Art (“MoMA”), acquiring what they knew or should have known was trafficked and laundered art may seem outrageous to those unaware of the infection of the market with art that had been stolen or extorted from Jews between 1933 and 1945.

¹ Attached as Appendix A to this Article is a chart entitled *Federal Holocaust-era Claims since 2004*, which is maintained at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1636295. Hereafter App. A.

² See *infra* Part I.

³ Rachel Dubin, *Museums and Self-Regulation: Assessing the Impact of Newly Promulgated Guidelines on the Litigation of Cultural Property*, 18 U. MIAMI BUS L. REV. 101, 101 (2010) (“As ethical guardians of the arts, museums are among the most trusted secular institutions in the United States.”).

Even when judges recognize the plausibility of the claims,⁴ attending to such claims requires judicial fortitude and dedication to sorting through emotionally difficult, complex factual evidence spanning many years.⁵ Regardless of difficulty and complexity, it is imperative that our courts cease the recent trend of dismissing Holocaust-era art cases on impermissible predicates.⁶ In such cases, courts often fail to recognize that they require the assistance of historians to appreciate how seemingly voluntary transactions in fact were the consequences of forced sales, usually with proceeds having been paid into blocked accounts, or a sale made under duress to secure flight from the Reich.⁷

This Article does not call for judges to ignore technical defenses such as statutes of limitation, which would require judges to act in contravention of currently applicable law.⁸ Instead, this Article seeks to shed light on which

⁴ See *Bakalar v. Vavra*, 619 F.3d 136, 146-47 (2d Cir. 2010) (recognizing there may be sufficient evidence to recognize a claim that a drawing was stolen by the Third Reich).

⁵ See, e.g., Ralph E. Lerner, *The Nazi Art Theft Problem and the Role of the Museum: A Proposed Solution to Disputes over Title*, N.Y.U. J. INT'L L. & POL. 15, 36 (1998) (“[A] matter involving a claim for an artwork stolen during World War II will take between seven and twelve years to resolve.”); Press Release, United States Attorney, Southern District of New York, United States Announces \$19 Million Settlement in Case of Painting Stolen by Nazi (July 20, 2010), available at <http://www.justice.gov/usao/nys/pressreleases/July10/portraitofwallysettlementpr.pdf> (last visited Sept. 3, 2010) (as recently as 2010, the case that launched the modern era of Nazi-looted art restitution was settled after twelve years).

⁶ See *infra* Part III.

⁷ See *infra* Parts II and III.

⁸ The author is of the opinion, in light of museums and collectors filing unfair declaratory judgment actions, the law should be changed, but this issue is beyond the scope of this Article.

claims and affirmative defenses actually are plausible when the true history of Holocaust-era spoliation and contemporaneous and post-war trafficking is taken into account. Part I details how judicial decision-making, especially under current plausibility pleading standards, is prone to bias against Holocaust-era art claims. Part II lays out essential historical facts necessary to determine whether a claim to Holocaust-era art is plausible. Part III analyzes the rash of federal court dismissals and demonstrates how improper dismissals could have been avoided via judicial notice of obvious historical facts and welcoming historians into the courthouse to understand allegations requiring more thorough explanation. Part IV concludes that federal judges should pay keen attention to history to guard against bias creeping into their opinions, which constitute public, historical records about the history of the Holocaust.

I. JUDICIAL DECISION-MAKING, BIAS AND PLAUSIBILITY PLEADING

What judges think of their function and task undoubtedly informs their understanding of their power or jurisdiction. Although judges should remain objective, judges are human and their experiences necessarily influence their opinions of whether certain claims are viable.⁹ Additionally, if a judge views the

⁹ Chris Guthrie, et al., *Inside the Judicial Mind*, 86 CORNELL L. REV. 777, 829 (2001):

Our study demonstrates that judges rely on the same cognitive decision-making process as laypersons and other experts, which leaves them

factual allegations of a complaint as implausible at first blush, then the judge may be more predisposed to grant a motion to dismiss the case on technical grounds, before the expensive, time-consuming discovery phase gets much traction.¹⁰ As posited in one study: “[O]ne would predict that an individual judge will be more likely to dispose of a case on procedural or technical grounds where he lacks particularly strong views or unique expertise in the substantive area of law at issue.”¹¹

One key procedural ground, of course, is a motion to dismiss pursuant to FED. R. CIV. P. 12(b)(6), and an axiomatic common law rule in the federal

vulnerable to cognitive illusions that can produce poor judgments. Even if judges have no bias or prejudice against either litigant, fully understand the relevant law, and know all the relevant facts, they might still make systematically erroneous decisions under some circumstances simply because of how they – like all human beings – think.

Accord LAWRENCE S. WRIGHTMAN, PSYCHOLOGY AND THE LEGAL SYSTEM 378 (2d ed. 1991) (relaying shocking admissions by two Texas judges about prejudices influencing their adjudications); Evan R. Seamone, *Judicial Mindfulness*, 70 U. CIN. L. REV. 1023 (2002) (discussing the influences of judges’ past experiences upon their decision-making).

¹⁰ See, e.g., Guthrie, et al., *supra* note 9, at 783 (“[J]udges make decisions under uncertain, time-pressured conditions that encourage reliance on cognitive shortcuts that sometimes cause illusions of judgment.”); LAWRENCE S. WRIGHTSMAN, JUDICIAL DECISION MAKING: IS PSYCHOLOGY RELEVANT? 12 (1999) (“Each justice is only human, and being human means sometimes making decisions that are self-serving or in other ways biased”).

¹¹ Jonathan R. Macey, *Judicial Preferences, Public Choices, and the Rules of Procedure*, 23 J. LEGAL STUD. 627, 632 (1994). See also RICHARD POSNER, OVERCOMING LAW 110 (Harvard University Press 1995) (positing that most judges are “ordinary judges” although “[s]ome judges have had political agendas”). But see Alexander Cooper, *Judges’ Self-Interest and Procedural Rules: Comment on Macey*, 23 J. LEGAL STUD. 647 (1993) (critiquing Macey’s analytical framework and positing that many judges seek to build their reputations in newsworthy cases); Mark Tushnet, *Policy Distortion and Democratic Debilitation: Comparative Illumination of the Countermajoritarian Difficulty*, 94 MICH. L. REV. 245, 260 (1995) (inherently critiquing Macey: “Although we have no good explanations of how the incentives judges face affect the norms they articulate . . .”).

system requires a federal judge ruling upon a motion to dismiss to accept all of a complaint's allegations as true.¹² Recent Supreme Court decisions should cause us to question whether the axiomatic rule still rings true, however.¹³ As recently stated by two scholars evaluating *Bell Atlantic Corp. v. Twombly*¹⁴ and *Ashcroft v. Iqbal*,¹⁵

[T]he Supreme Court's purpose in developing a more careful judicial review of pleadings was clear: More thorough review is necessary to protect against frivolous and purely speculative lawsuits. Such cases take a considerable toll on the judicial system, wasting scarce judicial resources, delaying justice for meritorious cases, and burdening defendants with "sprawling, costly, and hugely time-consuming" discovery.¹⁶

In today's post-*Twiqbal* climate, the standard in federal courts by which to determine whether a claim is viable appears to be set higher than it ever has

¹² See, e.g., Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308, 309 (2007). Accord *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 164 (1993).

¹³ See, e.g., Patricia W. Hatamyar, *The Tao of Pleading: Do Twombly and Iqbal Matter Empirically?*, 59 AM. U. L. REV. 553 (2010) (investigating the impact of recent Supreme Court pleading cases).

¹⁴ 550 U.S. 544 (2007).

¹⁵ 129 S. Ct. 1937 (2009).

¹⁶ Victor E. Schwartz & Christopher E. Appel, *Rational Pleading in the Modern World of Civil Litigation: The Lessons and Public Policy Benefits of Twombly and Iqbal*, 33 HARV. J.L. & PUB. POL'Y 1107, 1109 (2010) (quoting Twombly, 550 U.S. at 557-60).

been before.¹⁷ The Supreme Court in *Twombly* and *Iqbal* “has ushered in the era of so-called ‘plausibility pleading,’ . . . [which] has resulted in significant confusion as lower courts attempt to decipher its meaning and impact.”¹⁸ According to the Court, “[d]etermining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.”¹⁹ The standard has been extended to affirmative defenses by a number of courts as well,²⁰ and the time-bar affirmative defenses are key in Holocaust-era restitution cases.²¹ Predictably, the impact of *Twombly* and *Iqbal* has been disproportionately felt in those categories of claims where key evidence is uniquely in the hands of the defense – and will not be forthcoming unless and until it is compelled in the discovery phase.²² The new standard also skews results in claims that do not

¹⁷ *Id.* at 1143-1146. See generally Scott Dodson, *New Pleading, New Discovery*, 109 MICH. L. REV. 53 (2010); Robin J. Effron, *The Plaintiff Neutrality Principle: Pleading Complex Litigation in the Era of Twombly and Iqbal*, 51 WM. & MARY L. REV. 1997 (2010); Arthur R. Miller, *From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1 (2010); Adam N. Steinman, *The Pleading Problem*, 62 STAN. L. REV. 1293 (2010); Suja A. Thomas, *The New Summary Judgment Motion: The Motion to Dismiss under Iqbal and Twombly*, 14 LEWIS & CLARK L. REV. 15 (2010).

¹⁸ *Id.* at 1108-09.

¹⁹ *Iqbal*, 129 S. Ct. at 1950.

²⁰ Ryan Mize, Note, *From Plausibility to Clarity: An Analysis of the Implications of Ashcroft v. Iqbal and Possible Remedies*, 58 U. KAN. L. REV. 1245 (2010) (assessing lower court decisions applying plausibility pleadings to affirmative defenses as of 2010).

²¹ E.g., *infra* Part III.

²² See Rakesh N. Kilaru, Note, *The New Rule 12(b)(6): Twombly, Iqbal, and the Paradox of Pleading*, 62 STAN. L. REV. 905, 927 (2010) (discussing how in cases where intent is at issue plaintiffs

seem to comport with ‘common sense’ because they require a deeper level of knowledge to understand them.

Even before *Twombly* and *Iqbal*, many would presume at first blush that historical claims, such as claims to Holocaust-era assets, surely must be time-barred.²³ Such claims also are expensive, complicated and time-consuming,²⁴ but not more so than much other complex litigation such as the tobacco or Agent Orange cases.²⁵ Although our society has become accustomed to complex litigation,²⁶ there seems to be a societal bias against claims to recover

will have inherent difficulty at the pleading stage because “plaintiffs cannot get those documents without discovery, meaning they likely cannot get the documents at all”); A. Benjamin Spencer, *Plausibility Pleading*, 49 B.C. L. REV. 431, 481 (2008) (observing that under the new pleading standards “although discovery might reveal facts that prove liability, that opportunity is preemptively foreclosed and the investigation for supporting facts that the rules contemplate never occurs. Indeed, it is a greater shame that discovery is foreclosed ... in circumstances where the needed supporting facts lie in the exclusive possession of the defendants”).

²³ See, e.g., Eric A. Posner & Adrian Vermeule, *Reparations for Slavery and Other Historical Injustices*, 103 COLUM. L. REV. 689, 689 (2003) (“Victims of historical injustices who have no positive law claim against wrongdoers often seek reparations from governments, and occasionally they obtain them.”).

²⁴ See Monica Dugot, *International Law Weekend Panel on Litigating the Holocaust in U.S. Courts*, 12 ILSA J. INT'L & COMP. L. 389, 390 (2006) (“The emotional and financial costs associated with litigation are high. The legal costs can easily end up being a sizable percentage of the actual value of the work. Indeed, the legal costs can easily exceed the value of the work”); Lerner, *supra* note 5, at 36 (“[A] matter involving a claim for an artwork stolen during World War II will take between seven and twelve years to resolve.”); Marilyn Henry, *Holocaust Victims' Heirs Reach Compromise on Stolen Art*, JERUSALEM POST, Aug. 16, 1998, at 3 (Thomas Kline, a successful plaintiffs' attorney in the field, has stated: “I am almost at the point where I would say that if the art is worth less than \$3 million, give up.”). See generally HOWARD J. TRIENENS, LANDSCAPE WITH SMOKESTACKS: THE CASE OF THE ALLEGEDLY PLUNDERED DEGAS (2000) (describing financial realities of bringing a successful claim).

²⁵ See, e.g., Howard M. Erichson, *Coattail Class Actions: Reflections on Microsoft, Tobacco, and the Mixing of Public and Private Lawyering in Mass Litigation*, 34 U.C. DAVIS L. REV. 1, 9 (2000).

²⁶ *Id.* at 2-5.

art stolen or displaced during the Holocaust.²⁷ This societal bias has been vetted openly in recent years, as in the following quote:

There should now surely be a statute of limitations on this kind of restitution. If we were still in 1950 and the people who owned the Manet or the Monet were still alive, then it would surely be correct to give these paintings back, but not now and not to grandchildren and great-grandchildren. The world should let go of the past and live in the present.²⁸

Oftentimes, Jews seeking recovery of art – their own property – are unfairly criticized as being obsessed with money at the expense of the museum-going public.²⁹ Public criticism seems to spike after auction of a piece of art

²⁷ See Tony Paterson & David Cox, *German Crisis Meeting Called on Nazi Art Sales*, SUNDAY TELEGRAPH (London), Nov. 12, 2006, at 28, available at <http://www.telegraph.co.uk/news/worldnews/1533955/German-crisis-meeting-called-on-Nazi-art-sales.html> (last visited Sept. 3, 2010) (describing German museum community's publicly stated fears that its heritage is being "spirited away from public view and sold off for millions to private collectors" at the expense of the public's right to view the work); Alexander Pulte, *German Angst over Return of Kirchner Painting*, IFAR J., 2007, at 11; Michael Kimmelman, *Klimts Go to Market; Museums Hold Their Breath*, N.Y. TIMES, Sept. 19, 2006, at E1; Stevenson Swanson, *It's 'Our Mona Lisa'*, CHI. TRIB., July 14, 2006, at 1.

²⁸ See Sir Norman Rosenthal, Editorial, *The Time Has Come for a Statute of Limitations*, ART NEWSPAPER, Dec. 2008, at 30, available at www.theartnewspaper.com/article.asp?id=16627 (last visited Sept. 3, 2010). See also Ulrike Knöfel, *A Question of Morality: An End to Restitution of Nazi Looted Art?*, SPIEGEL ONLINE, Apr. 9, 2009, <http://www.spiegel.de/international/germany/0,1518,618400,00.html> (last visited Sept. 3, 2010) (Discussing Norman Rosenthal's opposition to restitution); *SPIEGEL Interview with British Art Expert: "We Must Live in the Present,"* SPIEGEL ONLINE, Apr. 9, 2009, <http://www.spiegel.de/international/germany/0,1518,618399,00.html> (last visited Sept. 3, 2010) (interviewing Norman Rosenthal regarding his opposition to the return of art stolen by the Nazis).

²⁹ See, e.g., Jennifer Anglim Kreder, *The Holocaust, Museum Ethics and Legalism*, 18 S. CAL. REV. L. & SOC. JUST. 1 (2008) (documenting such criticisms as harkening to stereotypes of "greedy Jews" and explaining non-financial motivations and symbolic value of restitution of Nazi-looted art [hereinafter "Kreder Ethics"]).

restituted from a public museum.³⁰ These criticisms reflect uninformed, knee-jerk bias divorced from consideration of history or law.³¹

These unfair criticisms have been roundly rejected elsewhere, and thus will not be the focus on this Article.³² Nonetheless, to quickly dispel the notion that such claims could not possibly be viable under separation of powers doctrines,³³ it should be noted here that such claims comport with executive policy, which has favored restitution since the war.³⁴ Diplomats from the State Department played a leading role³⁵ in securing public commitment by the forty-four nations that adopted the Washington Conference Principles on Nazi-Confiscated Art in December 1998.³⁶ Principles 1 and 2 of the Washington Principles, respectively, state that “[a]rt that had been confiscated by the Nazis

³⁰ See *supra* note 27.

³¹ *Id.*

³² See Kreder *Ethics*, *supra* note 29, at 9; Jennifer Anglim Kreder, *The New Battleground of Museum Ethics and Holocaust-Era Claims: Technicalities Trumping Justice or Responsible Stewardship for the Public Trust?*, 88 *Or. L. Rev.* 37 (2009) [hereinafter “Kreder Battleground”].

³³ See generally, e.g., John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 *HARV. L. REV.* 1939 (2011).

³⁴ E.g., U.S. Holocaust Assets Commission Act, 22 U.S.C. § 1621 (1998) (approved again in 2008 and supporting Holocaust-era restitution).

³⁵ See STUART E. EIZENSTAT, *IMPERFECT JUSTICE: LOOTED ASSETS, SLAVE LABOR, AND THE UNFINISHED BUSINESS OF WORLD WAR II* 187-204 (Public Affairs 2004) (Chapter 9 on looted art entitled “The Barbarians of Culture”).

³⁶ U.S. State Dep’t, Washington Conference Principles on Nazi-Confiscated Art, Dec. 3, 1998, available at <http://www.lootedartcommission.com/Washington-principles> (last visited Sept. 3, 2010). These Principles were reaffirmed in Vilnius, Lithuania, in 2000. Commission for Looted Art in Europe, Vilnius Forum Declaration, Oct. 5, 2000, available at <http://www.lootedartcommission.com/vilnius-forum> (last visited Sept. 3, 2010).

and not subsequently restituted should be identified” and “relevant records and archives should be open and accessible to researchers, in accordance with the guidelines of the International Council on Archives.”³⁷ Additionally, the Terezín Declaration, signed by forty-six countries, including the United States, emerged from the international conference hosted by the Czech Republic in June 2009.³⁸

Under the heading “Nazi-confiscated and Looted Art,” it states:

3. . . [W]e urge all stakeholders to ensure that their legal systems or alternative processes . . . facilitate just and fair solutions with regard to Nazi-confiscated and looted art, and to make certain that claims to recover such art are resolved expeditiously and *based on the facts and merits of the claims* and all the relevant documents submitted by all parties. Governments should consider all relevant issues when applying various legal provisions that may impede the restitution of art and cultural property, in order to *achieve just and fair solutions, as well as alternative dispute resolution*, where appropriate under law.³⁹

These recent declarations call for effective, fair, fact-based resolution of Nazi-looted art claims. Judicial attentiveness to what happened seventy to eighty years ago augments current executive efforts to resolve the “unfinished

³⁷ *Id.* at ¶¶ 1 and 2.

³⁸ See Terezín Declaration, June 30, 2009, available at http://www.holocausteraassets.eu/files/200000215-35d8ef1a36/TEREZIN_DECLARATION_FINAL.pdf (last visited Sept. 3, 2010).

³⁹ *Id.* at ¶ 3 (emphasis added).

business" of World War II and guards against assaults upon Truth and Memory.⁴⁰

To give credit when due, the Washington Principles were sparked in no small measure by Guidelines issued by the Association of American Museum Directors ("AAMD") in June 1998.⁴¹ Thus, it is quite shocking that U.S. museums are asserting statute of limitations and *laches* defenses, often as plaintiffs, in contempt of the Principles and distorting the historical record and law in the process.⁴² Museums that have filed declaratory judgments on technical grounds against claimants include the Boston Museum of Fine Arts, Detroit Institute of Arts, Toledo Museum of Art, MoMA and The Guggenheim.⁴³ The Norton Simon Museum of Art and MoMA also have raised technical defenses in response to claims.⁴⁴

⁴⁰ See DEBORAH E. LIPSTADT, DENYING THE HOLOCAUST: THE GROWING ASSAULT ON TRUTH AND MEMORY (San Val Inc 1999).

⁴¹ ASS'N OF ART MUSEUM DIRECTORS, REPORT OF THE AAMD TASK FORCE ON THE SPOILATION OF ART DURING THE NAZI/WORLD WAR II ERA (1933–1934) (1998) [hereinafter AAMD GUIDELINES], available at <http://www.aamd.org/papers/guideln.php> (last visited Sept. 3, 2010) ("AAMD has developed the following guidelines to assist museums in resolving claims, reconciling the interests of individuals who were dispossessed of works of art or their heirs together with the fiduciary and legal obligations and responsibilities of art museums and their trustees to the public for whom they hold works of art in trust."). See also PETER HARCLERODE & BRENDAN PITTAWAY, THE LOST MASTERS THE LOOTING OF EUROPE'S TREASUREHOUSES 229 (Welcome Rain Publishers 2000) (Describing passage of AAMD guidelines).

⁴² See Kreder *Battleground*, *supra* note 32.

⁴³ *Id.*

⁴⁴ See App. A, entries 5 and 6.

It also should be noted that the valuation of the art that deserves to be restituted to its true owners is far from trivial. The injustice resulting from the failure to restitution it is tremendous not just in symbolic terms.

According to Ronald Lauder [in 1998], a former U.S. ambassador to Austria and now chairman of the Museum of Modern Art in New York, “more than 100,000 pieces of art, worth at least \$10 billion in total, are still missing from the Nazi era.” Mr. Lauder believes that “because of these large numbers, every institution, art museum and private collection has some of these missing works.”⁴⁵

These numbers are grounded in historical data as it was understood back in 1998.⁴⁶ There is now reason to believe the amount of trafficking in Nazi-looted art into the United States is greater than previously estimated.⁴⁷

This Article will demonstrate how Holocaust-era art claims should be treated by judges, who should reject the recent trend of Holocaust-era dismissals. This trend seems to indicate that bias has infected our courts.⁴⁸ In recent years, collectors and museums – treasure houses of high culture and art and some of the most venerated (often undeservedly) institutions in the United States – have convinced federal judges to dismiss complex Holocaust-era art

⁴⁵ See, e.g., Marilyn E. Phelan, *Scope of Due Diligence Investigation in Obtaining Title to Valuable Artwork*, 23 SEATTLE U. L. REV. 631, 660 (2000) (citations omitted).

⁴⁶ *Id.*

⁴⁷ See *infra* Part IV.

⁴⁸ See *infra* Part III.

cases without addressing the merits.⁴⁹ This course prevented fact-finding in complete contravention of executive policy and museums' own ethics guidelines.⁵⁰ Moreover, as depicted in the chart entitled *Federal Holocaust-era Claims Since 2004* attached as Appendix A to this Article, some judges seem to presume that claims seventy years old simply cannot be viable.⁵¹

For example, in *Toledo Museum of Art v. Ullin*, a district court judge actually held that the statute of limitations ran in 1943, before the Allies had landed on the beaches of Normandy, let alone defeated the Wehrmacht and liberated survivors in death and work camps.⁵² The court applied Ohio law, under which it found that if the owner of the painting believed that the sale was wrongful, she could have sought recovery of the painting within the Ohio statute of limitations, by 1943.⁵³ The court considered fact that she did not do so to be evidence that she did not believe the sale of that painting was

⁴⁹ See *supra* notes 165-349 and accompanying text.

⁵⁰ E.g., Kreder *Battleground*, *supra* note 32.

⁵¹ See App. A. See also *infra* Part III.

⁵² Toledo Museum of Art v. Ullin, 477 F. Supp.2d 802 (N.D. Ohio 2006). (this case is contrary to Ohio's use of the demand and refusal principle, which coincides with the majority of U.S. jurisdictions). *Contra*, Houser v. Ohio Historical Soc'y, 380 N.E.2d 728 (Ohio Ct. App. 1977) (discussing that special circumstances can delay the presumption that demand was made within the time period of the statute of limitations).

⁵³ *Id.* at 807-808.

wrongful.⁵⁴ The court also noted that Ohio, unlike some other states, did not contain a provision excepting Nazi Holocaust cases from the statute of limitations.⁵⁵

In fact, so many courts seem to have subjected Nazi-era art cases to a presumption of invalidity to the point that since the landmark case of *Republic of Austria v. Altmann* in 2004⁵⁶ only one claimant has successfully recovered Nazi-looted art in federal court.⁵⁷ In *Altmann*, Ms. Maria Altmann, a now-deceased Holocaust survivor then in her eighties, prevailed against the claim of a foreign government that U.S. federal courts lack jurisdiction over a foreign sovereign that possesses Nazi-looted art.⁵⁸ The Supreme Court held that the Foreign Sovereign Immunity Act of 1976 (“FSIA”),⁵⁹ the sole means to acquire jurisdiction over a foreign sovereign in the courts of the United States, authorized a Holocaust victim to sue the Republic of Austria for failing to return

⁵⁴ *Id.* at 807.

⁵⁵ *Id.* at 806.

⁵⁶ *Rep. of Austria v. Altmann*, 541 U.S. 677 (2004) (where the Supreme Court ruled that the Republic of Austria could be sued in the United States under the Foreign Sovereign Immunities Act for its conduct that predated passage of the Act). The Act of State Doctrine also is beyond the scope of this Article. See generally Lucy Dunn Schwallie, Note, *Acts of Theft and Concealment: Arguments against the Application of the Act of State Doctrine in Cases of Nazi-looted Art*, 11 UCLA J. INT'L L. & FOREIGN AFF. 281 (2006).

⁵⁷ See *Vineberg v. Bissonnette*, 548 F.3d 50 (1st Cir. 2008) (the one successful case).

⁵⁸ *Altmann*, 541 U.S. at 697-702.

⁵⁹ 28 U.S.C. § 1605 (2006).

art to her as the sole survivor of her uncle, who was forced to flee Vienna after the 1938 *Anschluss*⁶⁰ of Austria, long before the passage of the FSIA.⁶¹ The Supreme Court ruled that because the expropriation was illegal when it occurred, the statutory “expropriation exception” abridged the blanket immunity that normally would have insulated the Republic of Austria from suit in the United States.⁶² Ms. Altmann was able to recover her property only after Austria offered to arbitrate the dispute in Vienna; it fought Ms. Altmann furiously but nonetheless lost.⁶³

Almost incredibly, Ms. Altmann was subsequently criticized in such prominent newspapers as the New York Times⁶⁴ for getting back her own property although the Republic of Austria had forced her family to make donations of some of the most valuable artwork in the world⁶⁵ in order to

⁶⁰ A rough translation of *Anschluss* is “annexation.” See generally ALFRED D. LOW, THE ANSCHLUSS MOVEMENT, 1931-38, AND THE GREAT POWERS (1985).

⁶¹ The FSIA was passed in 1976. 28 U.S.C.A. § 1330.

⁶² *Altmann*, 541 U.S. at 706-714.

⁶³ Stephen W. Clark, *World War II Restitution Cases*, SP035 A.L.I.-A.B.A. Continuing Legal Education 371 (2009). (“The parties submitted the matter to binding arbitration in Austria, under Austrian law. In January 2006, the three-person arbitration panel directed Austria to return all of the works to Mrs. Altman. Mrs. Altman and the other heirs sold one of the paintings, *Portrait of Adele I*, to the Neue Galerie in New York for \$135 million; the other four paintings brought a total of \$192 million when they sold at Christie’s in November 2006.”).

⁶⁴ See Kimmelman, *supra* note 27.

⁶⁵ Carol Vogel, *Lauder Pays \$135 Million, a Record, for a Klimt Portrait*, N.Y.TIMES, June 19, 2006, at E1.

secure *any* recovery of their significant assets after the war.⁶⁶ People lamented the “public’s loss” of the “Austrian Mona Lisa”⁶⁷ – despite the fact that the painting is now on display in the Neue Gallery in New York.⁶⁸

Since *Altmann*, federal courts have rejected the restitution claims in Nazi-looted art cases on procedural grounds such as a federal construction of a state statute of limitations or on the affirmative defense of laches, except in one case presenting egregious facts.⁶⁹ These cases – wrongly decided without the benefit of expert historians and often without deep understanding of the decisional law in this specialized area⁷⁰ – hinder victims of the Holocaust and their heirs from reclaiming their property located within the United States.⁷¹

Depriving Jewish claimants of full and fair hearings of these property and

⁶⁶ E.g., *Altmann*, 541 U.S. at 683; GERALD D. FELDMAN, REFLECTIONS ON THE RESTITUTION AND COMPENSATION OF HOLOCAUST THEFT PAST, PRESENT, AND FUTURE (Dean, et al., eds., 2007) (“... Austria, which was not only allowed but also encouraged by the Allies to consider itself the ‘first victim’ of National Socialist German expansion, and could thus, at least until recently, evade responsibility for its own role in Nazi crimes, including the spoliation of the Jews.”). See also RICHARD Z. CHESNOFF, PACK OF THIEVES 23 - 43 (2001).

⁶⁷ See Swanson, *supra* note 27. The author does not intend to imply in any fashion that subsequent public display is at all relevant to decide whether Holocaust survivors or their heirs seeking their own property deserve criticism for seeking restitution or for what they do with the property after restitution. They do not.

⁶⁸ E.g., Calev Ben-David, *A Priceless Piece of Artistic Justice*, JERUSALEM Post, June 30, 2006, at 12.

⁶⁹ See *Vineberg v. Bissonnette*, 548 F.3d 50 (1st Cir. 2008).

⁷⁰ E.g., *Bakalar v. Vavra*, 619 F.3d 136, 143-44 (2d Cir. 2010) (explaining why the district court in *Kunstsammlugen Zu Weimar v. Elicofon*, 536 F. Supp. 829, was wrongly decided).

⁷¹ *Id.*

inheritance claims in federal courts – the usual venue for diversity suits of this sort – violates the equality deemed inherent to the Due Process Clause of the Fifth Amendment.⁷² These cases are being dismissed despite that a significant amount of Nazi-looted art is being restituted out of court in accordance with the Washington Principles.⁷³ The litigated cases appear to reflect either a categorical refusal to permit fact finding or – worse – a *de facto* presumption that survivors' and heirs' claims to Nazi-looted art are invalid. The more complex a case, the more attentive the courts must be to details, but a bedrock principle of the judicial system is that in all cases the courts owe to litigants even-handed administration of justice.

II. NAZI AND WORLD WAR II HISTORY: THE KEY TO ASSESSING THE PLAUSIBILITY OF ART CLAIMS

In one of the most recently filed appeals of a dismissed Holocaust-era art case, the district court viewed itself as confronted “with a legal, not a

⁷² See, e.g., *Boiling v. Sharpe*, 347 U.S. 497, 499 (1954) (“[D]iscrimination may be so unjustifiable as to be violative of due process”); cf. *Neithamer v. Brennerman Prop. Svcs., Inc.*, 81 F. Supp. 2d 1, 5 (D.D.C. 1999) (“[D]ismissing a case at the summary judgment stage because a plaintiff cannot prove a defendant's suspicions would subject HIV-positive individuals to the very discrimination that Congress sought to prevent by denying them a remedy even when such discrimination existed.”).

⁷³ E.g., Thomas R. Kline, *Portrait of Notoriety*, WALL ST. J., July 27, 2010, at D7 (“Quietly . . . many [Nazi-looted art] cases are settled with little public notice.”).

historical, question.”⁷⁴ This view is a false dichotomy of the judicial function - judges readily look to history to interpret law, perhaps most notably the U.S. Constitution⁷⁵ because “[t]he linkage between past and present is especially central in law.”⁷⁶ Judges cannot be expected to know intimately the historical context of all cases that come before them, but they should not ignore widely accepted historical facts when deciding whether it is plausible that a seemingly voluntary transaction was, in fact, made under duress.⁷⁷

⁷⁴ *Grosz v. MoMA*, No. 09 Civ. 3706, 2010 WL 88003, at *22 (S.D.N.Y. Mar. 3, 2010).

⁷⁵ E.g. Amy Kapczynski, *Historicism, Progress, and Redemptive Constitution*, 26 CARDozo L. REV. 1041, 1042 (2005) (“[W]e must think historically if we want to think constitutionally.”); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989); ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* (Simon and Schuster 1997). See also G. Edward White, *The Arrival of History in Constitutional Scholarship*, 88 VA. L. REV. 485 (2002) (analyzing the “historical turn in constitutional scholarship”). Others give lesser import to historical underpinnings in interpreting the constitution, but virtually no one suggests it is irrelevant. E.g., RONALD DWORKIN, *FREEDOM’S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION* 1-38, 72-83 (Harvard University Press 1996); accord Ronald Dworkin, *The Arduous Virtue of Fidelity: Originalism, Scalia, Tribe, and Nerve*, 65 FORDHAM L. REV. 1249 (1997); BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* (Harvard University Press 1993); Bruce Ackerman, *A Generation of Betrayal?*, 65 FORDHAM L. REV. 1519 (1997); Lawrence Lessig, *Understanding Changed Readings: Fidelity and Theory*, 47 STAN. L. REV. 395 (1995). Others advocate other methods for interpreting the Constitution, including what could be termed “broad originalism.” See MICHAEL J. PERRY, *THE CONSTITUTION IN THE COURTS: LAW OR POLITICS?* (1995); Martin S. Flaherty, *History ‘Lite’ in Modern American Constitutionalism*, 95 COLUM. L. REV. 523 (1995); William M. Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782 (1995).

⁷⁶ Daniel A. Farber, *Adjudication of Things Past: Reflections on History as Evidence*, 49 HASTINGS L.J. 1009, 1030 (1998).

⁷⁷ Cf., e.g., *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 860-65 (1992) (engaging in extensive analysis of history to uphold *Roe v. Wade*); *Michael H. v. Gerald D.*, 491 U.S. 110, 122-23 (1989) (holding that liberty interest protected by due process clause is fundamental only if it is “rooted in history and tradition.”).

Judges even have the power to take judicial notice of widely known historical facts.⁷⁸ As discussed below, as to factual allegations that are less readily understandable, judges should welcome historians into the courthouse to explain whether more nuanced interpretations of facts are, in fact, plausible.⁷⁹ Because the Nazis used many tactics to mask involuntary transactions in a cloak of legality, documentation of such transactions should be viewed with a cynical, historically informed eye.⁸⁰

From their very first days in power in 1933, the Nazis stole and forced Jews to abandon their property to flee.⁸¹ As a matter of law, fleeing Jews cannot be deemed to have abandoned their property.⁸² The loss of their

⁷⁸ Toledo Museum of Art v. Ullin, 477 F.Supp.2d 802, 804 (N.D.Ohio 2006) (“In considering a motion to dismiss the Court may consider ‘materials in addition to the complaint if such materials are public records or are otherwise appropriate for the taking of judicial notice.’”) (*quoting* New England Health Care Employees Pension Fund v. Ernst & Young, LLP, 336 F.3d 495, 501 (6th Cir. 2003)).

⁷⁹ See *infra* Part III.

⁸⁰ *Id.*

⁸¹ RAUL HILBURG, THE DESTRUCTION OF THE EUROPEAN JEWS 640-641 (2003) (“When in the early days of 1933 the first civil servant wrote the first definition of ‘non-Aryan’ into a civil service ordinance, the fate of European Jewry was sealed”).

⁸² See Military Government Law 59; Bakalar v. Vavra, 619 F.3d 136 (2d Cir. 2010) (“Grunbaum never intended to pass title to the Drawing. On the contrary, the circumstances strongly suggest that he executed the power of attorney with a gun to his head.”); Vineberg v. Bissonnette, 548 F.3d 50 (1st Cir. 2008), *aff’d* 529 F. Supp. 2d 300, 307 (D.R.I. 2007) (describing how the victim “surrendered to the inevitable” and fled Germany without ever being able to recover the below market-value proceeds from an auction of his painting and concluding that the “relinquishment of his property was anything but voluntary”); Menzel v. List, 49 Misc.2d 300, 301-305 (N.Y. Sup. Ct. 1996), *modified as to damages*, 28 A.D.2d 516 (1st Dep’t 1967), *rev’d as to modification*, 24 N.Y.2d 91 (1969) (holding that no abandonment occurred and that “[t]he relinquishment here by the

property as they fled “for their lives was no more voluntary than the relinquishment of property during a holdup.”⁸³

Moreover, as laid bare below, the historical record leaves no serious doubt that – both during and immediately after the war – the influx of flight art flooding the market starting in 1933 and the Nazi practice of spoliation of Jewish treasures and “degenerate” art⁸⁴ was common knowledge among insiders of the art world.⁸⁵ Hitler, the failed artist, sought to eliminate Jewish culture from the Third Reich, including modern art, which he deemed to be “degenerate.”⁸⁶ The Nazis maintained “that Jews had intentionally duped the German people into embracing nontraditional aesthetic styles” and “that they had promoted modern art as a ploy to reap huge profits.”⁸⁷

Menzels in order to flee for their lives was no more voluntary than the relinquishment of property during a holdup.”).

⁸³ *Menzel*, 49 Misc.2d at 305.

⁸⁴ MICHAEL J. KURTZ, AMERICA AND THE RETURN OF NAZI CONTRABAND 13 (2006) *citing* JONATHAN PETROPOULOS, ART AS POLITICS IN THE THIRD REICH 7 (1996). *See also* Holocaust Victims Redress Act, Pub. L. No. 105-158, § 201(4), 112 Stat. 15, 17 (1998) (“The Nazis’ policy of looting art was a critical element and incentive in their campaign of genocide against individuals of Jewish and other religious and cultural heritage”); NORMAN E. PALMER, MUSEUMS AND THE HOLOCAUST 8 (2000).

⁸⁵ *See infra* Part II.

⁸⁶ *See* KURTZ, *supra* note 84.

⁸⁷ PETROPOULOS, *supra* note 84, at 54.

The Nazi regime's incentive to obtain the fine art of Jewish collects was to use the active fine art market to gain money to fund the government.⁸⁸ Additionally many Nazi leaders were fine art collectors and desired to obtain ownership of such pieces for the prestige that was associated with them, even though they were deemed by the government to be "degenerate" art.⁸⁹ In the Nazi government's attempt to acquire this art, it used meticulous documentation, and falsification of documents, to conceal the forced nature of the transactions.⁹⁰ This false documentation can hinder present day claims of art theft because it gives the transactions the superficial appearance of legitimacy.⁹¹ Additionally, Jewish families surrendered their valuables willingly, but under duress by offering their possessions to the Nazis as a bribe to avoid being taken to concentration camps.⁹²

On July 5, 1940, the *Einsatzstab Reichsleiter Rosenberg* ("ERR") was established to track down works of art owned by Jewish people, and seize this property, and transfer it to Germany.⁹³ In order to maintain the appearance of

⁸⁸ NORMAN PALMER, MUSEUMS AND THE HOLOCAUST 3 (2000).

⁸⁹ *Id.* at 3.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.* at 59.

⁹³ *Id.* at 7.

legality, the purported goal of this body was to seize the works for the purpose of safeguarding them.⁹⁴ The Nazi government also declared some art works to be “degenerate” and contrary to the German ideology. The Committee for the Assessment of Inferior Works of Art identified and destroyed many of these art works.⁹⁵ Other “degenerate” art was seized and sold overseas, to generate income for the Nazi government.⁹⁶ The looting of art was widespread and included German museums and non-Jewish private owners outside of Germany.⁹⁷ It is estimated that over three million art objects were looted by the Nazis from occupied countries.⁹⁸

Immediately after World War II, the Nuremberg Tribunal evaluated detailed evidence of coerced sales of art, and the plunder of art was declared a war crime and is so recognized today.⁹⁹ At Nuremberg, it was perfectly clear to

⁹⁴ Palmer *supra* note 74 at 7.

⁹⁵ *Id.* at 7-8.

⁹⁶ *Id.*

⁹⁷ *Id.* at 9.

⁹⁸ *Id.* at 11.

⁹⁹ “The Nazi War criminals were accused of ‘pillage and destruction’ of works of art, including both private and public property....The judgment of the Nuremberg trials stated: “... that it was supported by evidence that the territories occupied by Germany had been exploited in the most merciless way and that actually a systematic plundering of public and private property had taken place.” WILFRED FIEDLER, *Legal Issues Bearing on the Restitution of German Cultural Property in Russia, THE SPOILS OF WAR* 178 (Elizabeth Simpson ed., 1997).

the fact finders who had done what and to whom.¹⁰⁰ Shortly thereafter in Bonn and Vienna it was equally clear that, in order to rejoin the human family, Germany and Austria had to repudiate *all* spurious “transactions” of the entire Nazi era, including art “deals” that were really seizures.¹⁰¹ It is distressing that in a federal courtroom today what used to be as clear as day has now become as obscure as the Night and Fog.¹⁰²

We must insure that our federal courts do not endorse distortions of the historical record by granting motions to dismiss claims on statute of limitations and laches grounds, which impliedly accept that today’s claimants are at fault for not demanding their property back from some of the nations’ most powerful institutions even though the key to the claims – information – was inaccessible during the Cold War and too commonly still remains locked away, often by institutions right here in the United States.¹⁰³

¹⁰⁰ For example, Alfred Rosenberg, head of the infamous ERR art looting unit, was convicted and sentenced to death by hanging. *E.g.*, <http://www.law.umkc.edu/faculty/projects/trials/nuremberg/NurembergIndictments.html#Rosenberg> (last visited July 27, 2010).

¹⁰¹ *E.g.*, Restitution of Identifiable Property; Law No. 59, 12 Fed. Reg. 7983 (Nov. 29, 1947) (Military Government Law 59).

¹⁰² See Benjamin J. Pollock, *Out of the Night and Fog: Permitting Litigation to Prompt an International Resolution to Nazi-Looted Art Claims*, 43 Hous. L. Rev. 193 (2006).

¹⁰³ See Grosz v. MoMA, 2010 WL 88003, (MoMA refusing to provide access to provenance documents despite public statements to the contrary). See also *infra* notes 274-320, and accompanying text.

In 1998, MoMA director Glenn Lowry acknowledged in congressional testimony the "...rapacity of the Nazis and their collaborators," estimating that "tens of thousands" of pieces of art were stolen by the Nazis.¹⁰⁴ Lowry and other high profile museum directors swore in Congress that they would conduct open and transparent research to remedy this great injustice.¹⁰⁵

Another historian has stated: "The paintings came to America because for more than 10 years during and after the war there was no where else to sell them[.]"¹⁰⁶ Yet, since the 1998 promises in Washington and Terezín to open up archives, make them searchable, help claimants discover their property, and resolve claims fairly and equitably, fewer than forty paintings seem to have been restituted by U.S. museums.¹⁰⁷ Presumably more cash settlements have

¹⁰⁴ Glenn D. Lowry, Testimony Before the House Banking & Financial Services Committee, Feb. 12, 1998.

¹⁰⁵ Walter Robinson, *Musuems' Stance on Nazi Loot Belies Their Role in a Key Case*, BOSTON GLOBE, Feb. 13, 1998 available at <http://www.museum-security.org/reports/01698.html> (last visited Sept. 10, 2010).

¹⁰⁶ Adam Zagorin, *Saving the Spoils of War*, TIME, Dec. 1, 1997, at 87 (quoting Willi Korte, consultant on Holocaust losses to the Senate Banking Committee). See also Lucille A. Roussin, *Holocaust-era Looted Art: The Routes into the U.S.*, 5 IFAR Journal 36, 36 (2002) ("The market remained rationed until at least 1951. In the previous years heavy price rises could only be sustained by purely native or resident buyers in such protected areas as the U.S.A. In the early fifties it was still said that the cheapest thing you could buy was a work of art. . . Nor were the prices of the later fifties, particularly the prices of nineteenth and twentieth-century French art, altogether the 'coup de foudre' which the popular Press made them to be.") (quoting GERALD REITLINGER, *THE ECONOMICS OF TASTE* 220 (1961)). Professor Roussin has documented the importation process and how looted paintings entered the United States without investigation, including a shipment by the Galerie Fischer in Lucerne, Switzerland, which was known to have dealt with the Nazis. See *Id.*

¹⁰⁷ "There have been about 30 claims made on U.S. museums for Nazi-looted art in the last decade, a dozen of which resulted in the pieces being returned or in restitution, according to the

been quietly made.¹⁰⁸ Some museums have put forth a good faith effort to conduct and publicize provenance research needed to identify art that was “displaced” during the Holocaust;¹⁰⁹ other museums hide behind the expense of performing provenance research as an excuse not to do it.¹¹⁰ This excuse undoubtedly will gain more traction in the current economic climate.

Despite such excuses, some museums have managed to reach deep into their pockets, one presumes, to run to courts and initiate costly litigation to shut down claims before allowing claimants to research their archives – in blatant contradiction of promises made to Congress – and in the case of the MoMA, in blatant contradiction to its own web site, which states that its archives are open to “all serious researchers.”¹¹¹

The conclusion that there is almost no looted art in our institutions simply is not plausible. Without discovery of the documents necessary to fill in

American Association of Museums. Most cases are resolved through quiet compromise. Arbitration panels are becoming standard in Europe but haven’t caught on in the United States.” Mark Stryker, *The DIA and Toledo Museum of Art Could Lose a Van Gogh and a Gauguin Worth Millions in A Dispute with the Heirs of a Woman Who Sold the Works in the Nazi Era*, DET. FREE PRESS, March 19, 2006, at L1.

¹⁰⁸ Kline, *supra* note 73.

¹⁰⁹ E.g., Kurtz, *supra* note 84 at 13 (Franz Snyders’ stolen painting *Still Life with Fruit and Game* was once donated to the National Gallery of Art in 1990. Through curator Nancy Yeide’s extensive research effort, the gallery decided in November 2000 to return the painting).

¹¹⁰ *Id.*

¹¹¹ Kreder *Battleground*, *supra* note 32, at 61 (citing web page, a printout of which is on file with the author).

the gaps in the historical record, the claims cannot succeed and our courts are being used to distort Truth and Memory. The following is a rendition of the historical facts we do know, which should inform judicial decision-making in the field.

A. Inside the Reich

Judges faced with Nazi-era art claims should fully consider the historical reality of the Nazi era in Europe. The National Socialist platform, adopted as official German state policy as of 1933, was committed to driving Jews and other “enemies of the State” out of economic life.¹¹² The *Führerprinzip*¹¹³ demanded unquestioning loyalty to the concentrated power of a “unitary executive.”¹¹⁴ Both legislators and judges in Nazi Germany participated in the normalization of practices of State grand theft that were engineered to make involuntary transactions appear “ordinary and legal” from the very first weeks of the Nazi regime early in 1933,¹¹⁵ before the infamous racist Nuremberg laws

¹¹² See e.g., MARTIN DEAN, ROBBING THE JEWS (2010); INGO MÜLLER, HITLER'S JUSTICE: THE COURTS OF THE THIRD REICH (1991).

¹¹³ DAVID WELCH, THE THIRD REICH: POLITICS AND PROPAGANDA 107 (2002) (describing *Führerprinzip* as a mystical notion of a leader guiding the nations destiny and resulting in commands coming from a centralized leader rather than choices made by the people).

¹¹⁴ See FREDERICK L. SCHUMAN, THE NAZI DICTATORSHIP 120-30 (1972).

¹¹⁵ RICHARD Z. CHESNOFF, PACK OF THIEVES HOW HITLER AND EUROPE PLUNDERED THE JEWS AND COMMITTED THE GREATEST THEFT IN HISTORY 33-35 (2001) (“To give some legal fiction to its theft of Jewish property, the Nazis had promulgated a ‘Law for the Compensation of Damages Caused to the German Reich by Jews.’”). Bakalar v. Vavra, 619 F.3d 136, 138 (“Lawyers were everywhere and their influence was pervasive. Again and again, there was a need for legal justifications.”) (quoting RAUL HILBERG,

of “blood and honor” in 1935, and the final push to a “Final Solution.” As later observed by the U.S. Consul General in Vienna immediately after the *Anschluss* of Austria in March 1938: “There is a curious respect for legal formalities. The signature of the person despoiled is always obtained, even if the person in question has to be sent to Dachau in order to break down his resistance.”¹¹⁶ Therefore, State theft of Jewish owned art was disguised by the appearance of legality.

Quite problematic in the context of distinguishing voluntary from involuntary transactions is the imposition of the Flight Tax, which preexisted the Nazis’ rise to power but was turned to evil ends to persecute Jews even as they were trying to flee, and Nazis blocking of Jews’ bank accounts starting in 1940.

¹¹⁷ The flight tax confiscated much of a Jewish family’s wealth if they chose to flee Germany, this gave rise to the dilemma of whether a Jewish family should

PERPETRATORS VICTIMS BYSTANDERS: THE JEWISH CATASTROPHE, 1933-1945, 71 (1992)). The *Bakalar* court also cited the following sources with approval: HENRY FRIEDLANDER, *Nazi Crimes and the German Law*, in NAZI CRIMES AND THE LAW 16-17 (Nathan Stolzfus & Henry Friedlander, eds., 2008) (explaining widespread nature of the respect for legal formalities within the Reich); RICHARD LAWRENCE MILLER, NAZI JUSTIZ: LAW OF THE HOLOCAUST 1 (1995) (“[O]bedience to legal forms strengthened [the Reich’s] power. Upstanding citizens felt a moral obligation to submit to the law’s authority Resistance was immoral. If any citizens felt unease about a particular policy, their pained consciences were salved via display of a suitably stamped document in pursuance to a decree.”); Peter Hayes, *Summary and Conclusions*, in CONFISCATION OF JEWISH PROPERTY IN EUROPE, 1933-1945: NEW SOURCES AND PERSPECTIVES: SYMPOSIUM 143, 147 (2003) (“[T]he law “removed the question of the morality or legitimacy of the process.”).

¹¹⁶ WILLIAM L. SHIRER, THE NIGHTMARE YEARS, 1930-1940 30 (1992).

¹¹⁷ Ester Tisa Francini, et al., *Flight Goods – Stolen Goods: The transfer of cultural assets in and via Switzerland 1933-1945 and the question of restitution* 318 (Independent Expert Commission, Switzerland 2001). See generally HECTOR FELICIANO, THE LOST MUSEUM 155-164 (1997).

give up all their property for a chance of escape, or remain in Germany with the hope that their restrictions would dissipate with time.¹¹⁸ Beginning in 1940, the Nazi regime also blocked all payments into Jewish bank accounts and placed harsh restrictions on how much money the Jews could withdraw from their own accounts.¹¹⁹

From the very beginning of the Nazi era, law and jurisprudence became a strong component of justification of regulations that deprived “enemies of the State”¹²⁰ of their liberty and property, and these deprivations led, in turn, to mass murder.¹²¹ Indeed, the “legalized” grand larceny became a form of financing the mass murder.¹²² It is crucial for judges today to understand that Jews were systematically excluded from professions and forced to compile inventories to streamline the systematic despoliation of their property from 1933 to 1942 when Jews had little or no property left to rob, and when the

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ CHESNOFF, *supra* note 66, at 8 (“For Adolf Hitler and his most willing executioners, Jews were a cancer on society, a malignancy that had to be surgically but brutally excised with no anesthesia: The Jews of the world, declared Hitler, are ‘vermin.’”).

¹²¹ See, e.g., MÜLLER, *supra* note 104.

¹²² See e.g., DEAN, *supra* note 101; GÖTZ ALY, HITLER’S BENEFICIARIES: PLUNDER, RACIAL WAR, AND THE NAZI WELFARE STATE (2008); RICHARD J. EVANS, THE THIRD REICH IN POWER 322-411 (2005); DAVID CESARANI, BECOMING EICHMANN 67 (2004).

focus turned to “cost-efficient” mass murder in the death camps of occupied Poland.¹²³

It is a gross distortion of reality to suggest that the financial despair of Jews in 1933 during widespread, sporadic boycotts until the passage of the first Nuremberg law in 1935 resulted from a series of isolated private set-backs brought about by generalized, severe financial conditions akin to the Great Depression.¹²⁴

After the seizure of power in early 1933, the effects of a series of boycotts, discriminatory treatment, and specific legal measures rapidly undermined the position of Jewish business, employees, and professionals. Jews were not only excluded from government service, but state and Nazi Party initiatives progressively drove them out of many other trades and professions. Large numbers of Jews emigrated or ran into economic difficulties, so that more than half of all Jewish businesses were sold or liquidated by the summer of 1938.¹²⁵

In 1935, James McDonald resigned on moral grounds from his post as High Commissioner for Refugees.¹²⁶ McDonald detailed the economic devastation of German Jews and noted that many wanted to flee but could not

¹²³ See DEAN, *supra* note 101.

¹²⁴ See EVANS, *supra* note 111; AVRAHAM BARKAI, FROM BOYCOTT TO ANNIHILATION: THE ECONOMIC STRUGGLE OF GERMAN JEWS (2002). See also, *infra* notes 274-320.

¹²⁵ *Id.* at 18.

¹²⁶ *Text of Resignation of League Commissioner on German Refugees*, N.Y. TIMES, Dec. 30, 1935.

because of financial predation between 1933 and 1935.¹²⁷ High Commissioner McDonald's resignation was re-printed in the New York Times,¹²⁸ which brings us to the next issue: Did purchasers and recipients of donations of art know where it came from – and what could survivors or their heirs do about it?

B. Knowledge of Spoliation Outside the Reich Highly Relevant to Good Faith Purchaser Status under Foreign Law, the Statute of Limitations, Laches Defenses and Equitable Tolling

Some American museums would have us believe that the art world was oblivious to the infection of the market until 1998, but the story of the Nazis stealing more art than any regime in history, surpassing even Napoleon, was widely told – even front page news.¹²⁹ Theodore Rousseau, a former OSS officer who became a curator of paintings at the Metropolitan Museum of Art, thought it was “absurd” for U.S. museums to miss out on the fire sales: “[I]t’s absurd to let the Germans have the paintings the Nazi bigwigs got, often through forced sales, from all over Europe. Some of them ought to come here [to U.S.]

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ See DAVID ROXAN & KEN WANSTALL, THE RAPE OF ART (1965); Milton Esterow, *Europe Is Still Hunting Its Plundered Art*, N.Y. TIMES, Nov. 16, 1964, at 1; Otto D. Tolischus, *Hitler will Seize Property of Foes*, N.Y. TIMES, July 15, 1933, at 1; *German Fugitives Tell of Atrocities at Hands of Nazis*, N.Y. TIMES, Mar. 20, 1933, at 1, 5.

museums].”¹³⁰ In fairness, this quote seems to refer solely to the Nazis’ liquidation of “degenerate art” from Germany’s own museums.¹³¹

As early as 1933, the *New York Times* (and other periodicals) published articles documenting Nazi seizures of property written by critics of the Nazi regime.¹³² The *New York Times* decried: “To Be a Jew Is Held a Crime.”¹³³ As of January 1, 1936, Professor Karl Loewenstein wrote for the *Yale Law Journal*: “Jews are finally driven out even from the remaining nooks and crannies of economic life by the official economic boycott, more or less endorsed by the courts.”¹³⁴ “Obligations of contract, vested rights, the right to dispose freely of property, were superseded by political coordination. Legal titles were voided and property confiscated under the pressure of party members and officials.”¹³⁵ Judges in New York were presented with and understood these facts as early as 1936.¹³⁶

¹³⁰ LYNN NICHOLAS, THE RAPE OF EUROPA: THE FATE OF EUROPE’S IN THE THIRD REICH AND THE SECOND WORLD WAR 39 (1994).

¹³¹ See *Id.*

¹³² Otto D. Tolischus, *Hitler will Seize Property of Foes*, *N.Y. TIMES*, July 15, 1933, at 1.

¹³³ German Fugitives Tell of Atrocities at Hands of Nazis, *N.Y. TIMES*, Mar. 20, 1933, at 1, 5.

¹³⁴ Karl Loewenstein, *Law in the Third Reich*, 45 *YALE L.J.* 779, 797 (1936).

¹³⁵ *Id.* at 807.

¹³⁶ See *Holzer v. Deutsche Reichsbahn Gesellschaft*, 159 Misc. 830, 290 N.Y.S. 181 (N.Y. Sup. Ct. 1936), *aff’d sub nom.* 252 A.D. 729, 299 N.Y.S. 748 (N.Y. App. Div. 1937), *aff’d in part, modified in part*, 277 N.Y. 474, 14 N.E.2d 798 (1938).

In a 1938 letter to a Guggenheim Foundation curator, the famous artist Otto Nebel described the Nazis' plans to liquidate "degenerate art": "[T]he entire German museum collections in modern art are involved! ... I believe that one shouldn't help transform works of art into armaments – and that, after all, would be the end result. But that is my own opinion, and it needn't bother anyone."¹³⁷ Francis Henry Taylor, former Director of MoMA, condemned Nazi-looted art trafficking in the New York Times on September 19, 1943.¹³⁸

In 1943, the United States joined all Allied Powers in issuing the "London Declaration," warning anyone who acquired artworks that the Nazis were using false paperwork to fabricate provenances.¹³⁹ Two years later, the Roberts Commission, chaired by Supreme Court Justice Owen Roberts, issued written warnings to U.S. museums against acquiring stolen artworks and asked for cooperation in researching and returning artworks.¹⁴⁰ The American Commission for the Protection and Salvage of Artistic and Historic Monuments in War Areas publicized a circular in 1945 stating:

¹³⁷ JOAN M. LUKACH, HILLA REBAY: IN SEARCH OF THE SPIRIT IN ART 121 (G. Braziller 1983). See generally JONATHAN PETROPOULOS, THE FAUSTIAN BARGAIN (2000); PETROPOULOS, *supra* note 84.

¹³⁸ Francis Henry Taylor, *Europe's Looted Art: Can It Be Recovered?*, N.Y. TIMES, Sept. 19, 1943, at SM18.

¹³⁹ 8 DEP'T. ST. BULL. 21(1952).

¹⁴⁰ Letter from The American Commission For The Protection and Salvage of Artistic and Historic Monuments in War Areas to Museums, Art and Antique Dealers and Auction Houses, 1945 (on file with author).

It is, of course, obvious that no clear title can be passed on objects that have been looted from public or private collections abroad. We believe, therefore, that it is to the advantage of both public institutions and the trade, as well as for the good name of this Government and its armed forces, that any specific examples of looting of works of art or cultural materials be brought to light as soon as possible.¹⁴¹

Later on December 11, 1950, the U.S. State Department's Division of Libraries and Institutes also wrote to all museums, art dealers and auction houses asking for their help in spotting and returning artworks stolen from European public and private collections.¹⁴²

Moreover, the "Monuments Men" of the Monuments, Fine Arts and Archives Program sought tirelessly to secure tremendous caches of stolen art and restitute it to the countries of victims.¹⁴³ After their return from Germany, many became museum directors and academics in prestigious colleges and universities and told their stories.¹⁴⁴ After the war, the State Department and

¹⁴¹ *Id.*

¹⁴² Letter from Department of State to Universities, Museums, Art Dealers, and Booksellers, Dec. 11, 1950.

¹⁴³ See JAMES J. RORIMER, SURVIVAL: THE SALVAGE AND PROTECTION OF ART IN WAR (1950); HENRY LA FARGE, LOST TREASURES OF EUROPE (1946); CHARLES DE JAEGER, THE LINZ FILE: HITLER'S PLUNDER OF EUROPE'S ART (1981). Mr. Rorimer, who later became Director of the Metropolitan Museum, on March 14, 1944, met in person Rose Valland, who scrupulously documented Nazi looting through the Jeu de Paume in Paris at great risk to her life. ROBERT M. EDSLE AND BRETT WITTER, THE MONUMENTS MEN 134-35 (2009). Some art collectors told stories of having purchased looted art. WILLIAM S. PALEY, AS IT HAPPENED, A MEMOIR 107 (1979) (CBS Chairman).

¹⁴⁴ See *supra* note ____.

other agencies, governments and organizations issued warnings about looted objects infecting the market and publicized lists of stolen art and the identities of traffickers, including two names found in the provenance records in *Grosz v.*

The Museum of Modern Art, discussed below.¹⁴⁵ News stories ran in publications such as *The New Yorker*, which in 1947 published a series of three articles by the renowned cultural commentator Janet Flanner detailing the massive character of the Nazi practice of spoliation of Jewish and other “degenerate” art.¹⁴⁶ For example, on March 1, 1947, Flanner described how Walter Hofer, a Berlin art dealer, who “with Göring behind him, . . . could travel wherever he wished (usually in a Luftwaffe plane), compare markets, meet the bigwigs, and, above all, promise Nazi protection to those who were willing to exchange art for safety, dirt cheap.”¹⁴⁷ She continued: “It was Hofer who worked out the heartless, shifty, pseudo-legitimate, semi-blackmail technique that characterized Göring’s wartime art deals, as distinguished from Göring’s art thefts.”¹⁴⁸ Additionally, an October 4, 1954, a State Department report written

¹⁴⁵ See Part III, *infra*.

¹⁴⁶ Janet Flanner, *Annals of Crime: The Beautiful Spoils*, *THE NEW YORKER*, Feb. 22, 1947 at 31; Mar. 1, 1947 at 33; Mar. 8, 1947, at 38.

¹⁴⁷ Janet Flanner, *Annals of Crime: The Beautiful Spoils*, *THE NEW YORKER*, Mar. 1, 1947, at 34.

¹⁴⁸ *Id.* She also details how the Dutch art market, which “had been frozen by the fear of the war, but under Nazi heat it thawed out and had its biggest boom in modern times,” was infected by the expropriation of the large Jacques Goudstikker gallery after he attempted to flee, which contained art from Goudstikker’s own collection, as well as art owned in shares by many Jews who could not safely come to claim it after the Nazi takeover. *Id.* at 35. “Göring enjoyed first pick of the

by renowned art historian Ardelia R. Hall thanks the following museums for assisting in restituting manuscripts and art that had been taken from German municipal collections:

[T]he Smithsonian Institution, the Library of Congress, the Freer Gallery of Art, the National Gallery of Art, the Los Angeles County Museum, the University of Florida, the Art Institute of Chicago, the John Herron Art Institute of Indianapolis, the Museum of Fine Arts of Boston, the Fogg Museum of Art and the Busch-Reisinger Museum of Harvard University, the Detroit Institute of Arts, the Palace of the Legion of Honor Museum of San Francisco, the Duluth (Minnesota) Public Library, the Princeton University Library, the New York Public Library, the Frick Art Reference Library, the Morgan Library, the Cornell University Library, the Syracuse University Library, the Numismatic Society of New York, the Institute of Fine Arts of New York University, the Frick Collection, the New York Historical Society, the University of Pennsylvania Library, the Philadelphia Museum of Art, the Rhode Island School of Design,

Goudstikker stock." *Id.* She also described the role of Paris dealer Alois Miedl, who had traded with Göring to get his wife to safety in Switzerland, in trafficking through Switzerland, "where French moderns were prized and were accepted at face value." *Id.* at 38.

Moreover, after the war, the Dutch government, before eventually doing the right thing and restituting the Goudstikker collection in 2008, characterized the family's approach to restitution in *laches*-type language to justify retention of the collection:

As you can see, wrote Dutch Foreign Minister Hans van Mierlo, after the war, Jacques Goudstikker's widow, Mars. Goudstikker-Von Halben, chose consciously, and on the basis of expert legal and other advice, not to reclaim title to the paintings sold to Goering by her late husband's art dealership. Instead, she chose to keep the money she had received for them, but at the same time, elected to reclaim title to real estate and other property sold to Mr. Miedl.

GREGG J. RICKMAN, CONQUEST AND REDEMPTION 239 (2007).

the Museum of Williams College, the Museum of Houston (Texas), and Lawrence College.¹⁴⁹

The revival of interest in Holocaust-era assets in the 1990s after declassification of a number of archives,¹⁵⁰ which allowed some to begin the costly search for family and assets, does not negate the fact that the art world had contemporaneous knowledge about the massive infection of the market starting in 1933 and festering through today. Museums acquired or accepted donations of paintings being claimed today with knowledge that the paintings were – or very likely were – stolen directly from Jews or sold by Jews in duress conditions.¹⁵¹ Not caring does not equate to not knowing. The law dictates that such transfers were and are void.¹⁵² As succinctly stated by one student of the field, whose work was cited with approval by the United States Court of Appeals for the Second Circuit on this point: “[A]bsent other considerations an artwork stolen during World War II still belongs to the original owner, even if there have been several subsequent buyers and even if each of those buyers was

¹⁴⁹ Ardelia R. Hall, *U.S. Program for Return of Historic Objects to Countries of Origin, 1944-1954*, DEPT OF STATE BULL. 493, 496 (Oct. 4, 1954). See also *Id.* at 495 (“The recovery of these manuscripts and of other rare books and objects of art dispersed during or following World War II has been a part of United States Government policy.”).

¹⁵⁰ E.g., MICHAEL BAZYLER, HOLOCAUST JUSTICE: THE BATTLE FOR RESTITUTION IN AMERICA’S COURTS (2005).

¹⁵¹ E.g., MoMA acquired one of the Grosz paintings at issue in 1947, and another in 1954. *Grosz v. Museum of Modern Art*, 772 F.Supp.2d 473, 476 (S.D.N.Y. 2010). The Toledo Museum of Art acquired a tainted Kokoschka in 1947. See Kreder, *Battleground*, *supra* note 32, at 72 – 75.

¹⁵² E.g., Restitution of Identifiable Property; Military Government Law 59, 12 Fed. Reg. 7983 (Nov. 29, 1947) (Military Government Law 59). See also *Bakalar v. Vavra*, 619 F.3d 136 (2d Cir. 2010).

completely unaware that she was buying stolen goods.”¹⁵³ Thus, barring

application of a technical defense, claims to such art should succeed today.¹⁵⁴

In conclusion, some current possessors of this property, including some of the world’s most esteemed museums like MoMA, have argued that Jews and opponents of National Socialism were all able to engage freely in voluntary

transfer of property within the Third Reich after 1933.¹⁵⁵ This may have been

possible in some instances,¹⁵⁶ but was emphatically not true generally.¹⁵⁷

Additionally, as it was an almost futile effort to try to reclaim much art until

¹⁵³ Michelle I. Turner, Note, *The Innocent Buyer of Art Looted During World War II*, 32 VAND. J. TRANSNAT'L L. 1511, 1534 (1999), cited with approval by *Bakalar*, 619 F.3d at 141.

¹⁵⁴ For a discussion of the legal principles dictating restitution in such cases under U.S. law not included other sources cited throughout this Article, see Bert Demarsin, *Has The Time (Of Laches) Come? Recent Nazi-Era Art Litigation In The New York Forum*, 59 BUFF. L. REV. 621 (2011) (surveying Nazi-era artwork litigation in New York).

¹⁵⁵ See *supra* note 141, and accompanying text.

¹⁵⁶ See PALMER, *supra* note 84 at 7-9, 59-60; PETROPOULOS, *supra* note 84, at 60-61; Judy Dempsey, Germany Tracing Artwork and Its Nazi Past, INT'L HERALD TRIB., Dec. 22, 2008, available at <http://www.nytimes.com/2008/12/22/world/europe/22iht-letter.4.18871861.html?r=2> (last visited Sept. 3, 2010) (“There is the issue of enforced transactions of every sale of every Jewish collection that happened during the Nazi times,’ said [Sean] Rainbird, a former curator of the Tate Modern in London. ‘There were cases where individuals were allowed to take their collections out of the country, and there were some dealers, in a gesture of solidarity, who helped them and were dealing with them in an honest way.’”); Adam Zagorin, *Saving the Spoils of War*, TIME, Dec. 1, 1997, at 87 (discussing opposition to compensating claimants for works sold in the 1930s at what seemed to have been fair prices in that market and noting that the art market in New York “continued to function even as fighting raged in Europe”).

¹⁵⁷ E.g., Sydney M. Drum, Comment, *DeWeerth v. Baldinger: Making New York a Haven for Stolen Art?*, 64 N.Y.U. L. REV. 909, 944 (1989) (“Because stolen art work can be very valuable, may eventually filter into the open market, and may be handled by the shadowy institution of the art gallery, art owners may be victimized by international trading in stolen art. Original owners, however, have only a few fragmentary and little-known mechanisms by which to register or recover their stolen art objects,”) (cited with approval by *Bakalar*, 619 F.3d at 141).

recently,¹⁵⁸ how should statute of limitations and *laches* defenses be applied?

Furthermore, as discussed in Part II(C), *infra*, it seems that we have only begun to scratch the surface of the historical record to understand just how flimsy are most assertions of *bona fide* purchaser status by art world insiders.¹⁵⁹ In other words, cases to date have implicated only the most superficial level of evidence as to what buyers and those who accepted donations knew when they came to possess Nazi-looted art and courts should not continually give present-day possessors the benefit of the doubt in contravention of the standard application of FED. R. CIV. P. 12(b)(6)¹⁶⁰ If the entire industry was stacked against recovery, how should these doctrines be applied?

C. Going Forward in Our Courts and Pursuing Truth and Memory

The historical context outlined above should illuminate judges' views of the plausibility of claims and defenses in Holocaust art cases. The authors hope

¹⁵⁸ Michael J. Reppas II, *Empty "International" Museums' Trophy Cases of Their Looted Treasures and Return Stolen Property to the Countries of Origin and the Rightful Heirs of those Wrongfully Dispossessed*, 36 DENV. J. INT'L L. & POL'Y 93, 94 (2007) ("The dawn of the 21st Century has brought a fresh breeze to the stale and stagnant course of requests for looted property to be voluntarily returned and the invariable refusal by the international museums. The long held assumptions of nation-states and individuals that they are unable to challenge the museum's ownership of these treasures, has changed to a more confident and confrontational stance whereupon they now believe they can legally compel the museums to return their looted treasures.").

¹⁵⁹ See *Bakalar*, 619 F.3d at 148 (J. Korman concurrence) (describing how purported Swiss transaction was premised on obvious lack of title in supposed seller yet the trial judge enforced such title).

¹⁶⁰ *Id.* at 152.

that by reducing the level of skepticism infecting first impressions of these historic claims, this Article will serve to insure that the judicial branch augments executive policy laid out as early as 1951 in the Department of State Bulletin: “For the first time in history, restitution may be expected to continue for as long as works of art known to have been plundered during a war continue to be rediscovered.”¹⁶¹

Also still to be fully discovered is the full scope of trafficking in Nazi-looted art through Switzerland and into the United States – including into some of our most esteemed institutions.¹⁶² A report completed by art historian Laurie A. Stein was mentioned in the final report of the Bergier Commission, an Independent Commission of Experts established by the Swiss Parliament to study the role of Switzerland in trafficking during World War II.¹⁶³ The Bergier Report came out in March 2002.¹⁶⁴ It seems that Ms. Stein’s report has never been published, but in 2009 was given by the Swiss government to Raymond J.

¹⁶¹ Ardelia R. Hall, *The Recovery of Cultural Objects Dispersed during World War II*, DEP’T ST. BULL. 337, 337 (1951).

¹⁶² See generally Lucille A. Roussin, *The Price of Pictures*, 7 CARDOZO PUB. L. POL’Y & ETHICS J. 709 (2009).

¹⁶³ Laurie A. Stein’s name is found on the page 571 of the Final Report under the heading ‘Members, General Secretaries, Staff and Mandates of the ICE.

¹⁶⁴ Final Report of the Independent Commission of Expert Switzerland – Second World War, available at <http://www.uek.ch/en/index.htm> (last visited Sept. 9, 2010).

Dowd, a claimants' lawyer in the Bakalar and Grosz cases.¹⁶⁵ Ironically, Ms. Stein acted as an expert witness for MoMA in the *Grosz* litigation.¹⁶⁶ Ms. Stein's report indicates that research to date has only scratched the surface of the "extraordinary breadth of traffic in art to the United States that was occurring in the Nazi era."¹⁶⁷ Ms. Stein stated that "the myths of American museum directors and collectors purchasing art in the 1930's through Swiss sources, in order to rescue it from the National Socialists, need to be reconsidered."¹⁶⁸ She added: "It must be remembered that while Europe went to war, America was still conducting business as usual, even in the cultural arena – defining new museum collecting policies, mounting exhibitions, and building private collections from the best possible art available on the market."¹⁶⁹

The report focuses mostly on art channeled into U.S. museums via Nazi sales of degenerate art taken from German museums to auction in Switzerland

¹⁶⁵ Email from Raymond J. Dowd, Partner, Dunnington, Barthalow & Miller LLP to Jennifer A. Kreder, Professor of Law, Salmon P. Chase College of Law (Dec. 3, 2010, 14:39 EST) (on file with author).

¹⁶⁶ Corrected and Amended Expert Report of Laurie A. Stein, *Grosz*, 2009 WL 6485929 (S.D.N.Y. Sep. 29, 2009); Rebuttal Expert Report of Laurie A. Stein, *Grosz*, 2009 WL 6485931 (S.D.N.Y. Nov. 2, 2009); Partial Testimony of Laurie A. Stein, 2009 WL 6485927 (S.D.N.Y. Nov. 18, 2009).

¹⁶⁷ Laurie A. Stein, *The Path of Art from Switzerland To America from the late 1930's to the early 1950's: A Report of Research Results* (undated but commissioned for 2002 report) (on file with author).

¹⁶⁸ *Id.* at 3.

¹⁶⁹ *Id.*

(as advertised in the popular publication Art News in New York)¹⁷⁰ to raise foreign currency.¹⁷¹ Some art world insiders could not resist the temptation to scoop up a masterpiece for a bargain despite knowing that the net effect would be to “transform works of art into armaments.”¹⁷² Many of those masterpieces eventually would come to be sold or donated to U.S. museums.¹⁷³ There are some well-known institutions and people implicated by the report as having handled or ultimately received this art – MoMA, the Fogg Art Museum, Curt Valentin, “this country's most influential figure in the development of modern art,” and Joseph Pulitzer, Jr., to name just a very few recognizable individuals.¹⁷⁴

It is not a far stretch to read the report to support the hypothesis that the high-profile dealers and collectors who facilitated the transactions to the

¹⁷⁰ *Id.* at 5.

¹⁷¹ *Id.*

¹⁷² *Id.* at 11-20.

¹⁷³ *E.g., supra* notes 116-17 .

¹⁷⁴ Stein, *supra* note 157 at 9. See also Jane Wade papers, Archives of American Art, microfilm reel #2322, 1 July 2002. Frame 929, Nov. 14, 1936 Letter from Reich Chamber of Fine Arts (Reichskammer der bildenden Künste) to Curt Valentin, Re: Your letter of 22 September 1936 (translation and original on file with author) (“The President of the Reich Chamber of Fine Arts instructed me to tell you that it would be of no objection to him if you make use of your connections with the German art circle and thereby establish supplementary export opportunities, if [this is done] outside Germany. Once you are in a foreign country, you are free to purchase works by German artists in Germany and make use of them in America.”) (Swastika stamp after signature); Curt Valentin Letter to Mrs. Dailey, July 23, 1948 (“Indescribable what became of Germany. I wish I had not come. All bronzes by Matisse are cast in ten – and all are signed, and numbered. The one mentioned I pulled from under his own bed. I hope everything goes well with you. I hope the summer is fine. It’s raining over here ever since I came, no matter in which country I am hunting Art and people.”) (on file with author).

named museums likely are many of the same individuals who trafficked in Switzerland in art taken from Jews in forced and duress sales. This hypothesis is supported by another book that discusses the trafficking of degenerate art through Switzerland, Stephanie Barron's "DEGENERATE ART": THE FATE OF THE AVANT-GARDE IN NAZI GERMANY, which states in most relevant part:

On February 19 Fischer [the Swiss gallery that conducted auctions for the Nazis to raise foreign currency] received the first inquiry from abroad: Curt Valentin, writing from America, must have known of the impending sale from colleagues in Berlin. He had emigrated from Germany the year before and opened a New York branch of Buchholz's gallery (Buchholz being one of the four German dealers authorized by the National Socialists to sell 'degenerate' art). Quickly establishing himself as the leading dealer in German Expressionist art in America, Valentin would indeed become one of the most important bidders at the auction.¹⁷⁵

In sum, to highlight the breadth of the issue, Ms. Stein wrote: "The range and constancy of recently-arrived works being offered and acquired by Americans evidences that the United States became a welcoming homeland for confiscated and looted art, and Switzerland became probably the most important conduit country for the *rush of American art collecting during the*

¹⁷⁵ STEPHANIE BARRON & PETER W. GUENTHER, "DEGENERATE ART": THE FATE OF THE AVANT-GARDE IN NAZI GERMANY 137 (1991).

era.”¹⁷⁶ According to the report (first cited in 2002), “[i]t is clear that there was much more dealing between American-based buyers . . . either in front of the auction block or behind the scenes, than has been recognized up until now.”¹⁷⁷

¹⁷⁶ Laurie A. Stein, *The Path of Art from Switzerland To America from the late 1930’s to the early 1950’s: A Report of Research Results*, at 3 (emphasis added).

¹⁷⁷ *Id.* at 9 (emphasis added).

III. DISMISSAL OF HOLOCAUST-ERA ART CLAIMS DUE TO LACK OF JUDICIAL NOTICE OF KEY HISTORICAL FACTS

The recent wave of dismissals were grounded in three errors: (1) misapplication of the discovery rule triggering the statute of limitations;¹⁷⁸ (2) insufficient reliance upon historical evidence and historians to understand the context of the claims;¹⁷⁹ and (3) jurisdictional grounds (using that term a bit loosely) to include misinterpretation of the Foreign Sovereign Immunity Act of 1976 and federal preemption doctrine.¹⁸⁰ The third reason is beyond the scope of this article, but the other two will be addressed thoroughly below. Use of all three has distorted the historical record by precluding inquiry into what truly happened in regard to the paintings at issue and by the courts implicitly making incorrect and improper factual interpretations to reach their premature legal conclusions that the defenses were warranted under the circumstances.

¹⁷⁸ See *infra* Part III(A).

¹⁷⁹ See *infra* Part III(A).

¹⁸⁰ See *Westfield v. Germany*, 3:09-0204, 2009 WL 2356554 (M.D. Tenn. July 28, 2009) (ruling without even citing the seminal Bernstein case that Germany could not be sued under the FSIA for any of taking of property during war) (appeal noticed); *von Saher v. Norton Simon Museum of Art*, 578 F.3d 1016 (9th Cir., Aug. 19, 2009), *petition for cert. filed*, 78 USLW 3629 (Apr. 14, 2010) (No. 09-1254) (dismissing case under federal preemption principles). But see *Cassirer v. Kingdom of Spain*, 461 F. Supp. 2d 1157 (C.D. Cal. 2006), *aff'd in part, rev'd in part*, 580 F.3d 1048 (9th Cir. 2009), *reh'g en banc*, 2010 WL 3169570 (9th Cir. Aug. 12, 2010) (properly holding that Spain is subject to jurisdiction under the Foreign Sovereign Immunities Act for possessing Nazi-looted art).

A. Misapplication of the Discovery Rule and Related Time Bar Principles

In essence, the constructive discovery rule provides that, in certain cases, the statute of limitations will not begin to run until the claimant has, or should have, knowledge of the claim and the correct entity to sue.¹⁸¹ This rule “is highly fact specific and great discretion is left to judges to determine when to apply it.”¹⁸² “Generally, both actual and constructive notice are factual questions, determined by a jury.”¹⁸³ The constructive discovery rule has been adopted in regard to conversion and restitution cases throughout the United States with the following variants.¹⁸⁴

¹⁸¹ See generally, e.g., Lauren F. Redman, *A Wakeup Call for a Uniform Statute of Limitations in Art Restitution Cases*, 15 UCLA ENT. L. REV. 203 (2008); Patricia Youngblood Reyhan, *A Chaotic Palette: Conflict of Laws in Litigation Between Original Owners and Good-Faith Purchasers of Stolen Art*, 50 DUKE L.J. 955, 1005 n.258 (2001); see also Dunbar v. Seger-Thomschitz, 638 F. Supp. 2d 659, 662 (E.D. La. 2009) [hereinafter “Seger-Thomschitz I”] (“The period for liberative prescription begins to toll when the claimant reasonably should have discovered the injury.”) (citation omitted).

¹⁸² Redman, *supra* note 171, at 219.

¹⁸³ Schwartz v. Cincinnati Museum Association, Nos. 00-3494, 00-3495, 00-3496, 35 Fed. Appx. 128, 131 (6th Cir. Apr. 12, 2002) (*citing* Charash v. Oberlin College, 14 F.3d 291, 300 (6th Cir. 1994)). Coincidentally Oberlin College has refused to return a painting from the Grunbaum collection to his heirs. Raymond Dowd, *Nazi Looted Art at Oberlin College and Other U.S. Museums: Prague Conference on Holocaust-Era Assets*, (Aug. 14, 2009), available at <http://artstolenfromfritzgrunbaum.wordpress.com/tag/egon-schiele/>. (last visited Nov. 22, 2010).

¹⁸⁴ See generally, e.g., F. Redman, *supra* note 171; Reyhan, *supra* note 171. Claims may also be couched as quasi-contract or unjust enrichment. E.g., Dunbar v. Seger-Thomschitz, No. 09-30717, slip op. (5th Cir. Aug. 20, 2010) [hereinafter “Seger-Thomschitz II”]. See also Seger-Thomschitz I, *supra* note 171, at 662 (discussing civil law “innominate real action”); Museum of Fine Arts, Boston v. Seger-Thomschitz, No. 08-10097, 2009 WL 6506658, (D. Mass. 2009), at 9, 11 (mentioning constructive trust, disgorgement, restitution, unjust enrichment, estoppel, injunctive relief and replevin) [hereinafter “Seger-Thomschitz III”].

First, New York is alone in following the “demand and refusal” rule, which dictates that the limitations period begins to run only when the true owner demands the artwork’s return from the current possessor and is refused.¹⁸⁵ This rule may sound extreme, but it is greatly tempered by the applicability of the laches defense, whereby a plaintiff’s claim will be barred if the plaintiff unreasonably delayed bringing the claim and such delay caused the defendant to suffer prejudice.¹⁸⁶ Second, California law on this issue is muddled,¹⁸⁷ especially with the constitutionality of statutes extending the statute of limitations in Holocaust-era cases having been called into question.¹⁸⁸ The California legislature recently passed a bill signed by Governor Schwarzenegger on September 30, 2010, that would provide that the statute of limitations in certain Nazi-looted art cases would not begin to run until the claimant actually found the object.¹⁸⁹ Third, Louisiana follows civil law

¹⁸⁵ *E.g.*, Solomon R. Guggenheim Found. v. Lubell, 569 N.E.2d 426, 430 (N.Y. 1991).

¹⁸⁶ *E.g.*, *Lubell*, 569 N.E.2d at 430. .

¹⁸⁷ See Cal. Code Civ. Proc. § 338(c) (West 2007); *Orkin v. Taylor*, 487 F.3d 734, 741 (9th Cir. 2007) (discussing California statute of limitations in Holocaust-era case); *Nafziger v. Am. Numismatic Soc’y*, 49 Cal. Rptr. 2d 784, 786 (Ct. App. 1996); *Soc’y of Cal. Pioneers v. Baker*, 50 Cal. Rptr. 2d 865 (Ct. App. 1996); *Redman, supra* note ___, at 212 (“California has the most chaotic approach . . .”).

¹⁸⁸ *Am. Ins. Assoc. v. Garamendi*, 539 U.S. 369 (2003) (finding that California statute requiring reporting of unpaid Holocaust-era insurance policies was preempted by treaty); *Deutsch v. Turner Corp.*, 324 F.3d 692 (9th Cir. 2003) (slave labor claims preempted); *Steinberg v. Int’l Comm. On Holocaust Era Ins. Claims*, 133 Cal.App.4th 689 (Cal. Ct. App. 2005) (insurance claims preempted).

¹⁸⁹ A.B. 2765, 2010 Leg. (Cal. 2010).

prescription principles.¹⁹⁰ Fourth and finally, a wrong headed Michigan case recently decided the discovery rule did not apply at all, such that a claim to Nazi-looted art expired in 1938.¹⁹¹

Statutes of limitation exist to foster three primary goals: (1) to encourage plaintiffs to file suit promptly, “on the premise that those with valid claims will not delay in asserting them,”¹⁹² (2) to promote “the free trade of goods, by making sure that those who have dealt with property in good faith can enjoy secure and peaceful possession after a certain, specified time period,”¹⁹³ and (3) to protect defendants who may be prejudiced in defending claims because of the loss of evidence over time.¹⁹⁴ As demonstrated below,

¹⁹⁰ See Seger-Thomschitz II, at 576 (“[O]wnership of the painting, which had been open and continuous for well over ten years, fulfill[es] the requirements to establish ownership by acquisitive prescription under Louisiana law.”).

¹⁹¹ Detroit Inst. of Arts v. Ullin, 2007 WL 1016996, (E.D. Mich. Mar. 31, 2007).

¹⁹² Ralph E. Lerner, *The Nazi Art Theft and the Role of the Museum: A Proposed Solution to Disputes over Title*, 31 N.Y.U. J. INT'L L. & POL. 15, 17 (1998). See also NORMAN PALMER, MUSEUMS AND THE HOLOCAUST: LAW, PRINCIPLES AND PRACTICE 54-55 (2000); Suzette M. Malveaux, *Statutes of Limitations: A Policy Analysis in the Context of Reparations Litigation*, 74 GEO. WASH. L. REV. 68, 76 (2005).

¹⁹³ E.g., Lerner, *supra* note 193, at 17 (citing John G. Petrovich, *The Recovery of Stolen Art: Of Paintings, Statues and Statutes of Limitations*, 27 UCLA L. REV. 1122, 1127-28 (1980)). Additionally, the doctrine of adverse possession presents another nuance to the statute of limitations inquiry. E.g., Paulina McCarter Collins, *Has the “Lost Museum” Been Found? Declassification of Government Documents and Report on Holocaust Assets Offer Real Opportunity to “Do Justice” for Holocaust Victims on the Issue of Nazi-Looted Art*, 4 M.E. L. REV. 115, 130-131 (2002). Accord Patty Gerstenblith, *The Adverse Possession of Chattels*, 37 BUFF. L. REV. 119 (1989).

¹⁹⁴ E.g., Am. Pipe & Const. Co. v. Utah, 414 U.S. 538, 554 (1974) (noting that “statutory limitation periods are designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared.”). Accord Order of Railroad Telegraphers v. Railway Express Agency, 321 U.S. 342, 348-49 (1944); John H.

none of these goals is furthered by the recent wave of dismissals of Holocaust-era claims.

(1) *Dismissal of Holocaust-era art claims does not encourage prompt filing of complaints*

As for the first policy reason – that those with valid claims will act promptly – the courts are failing to recognize that heirs oftentimes are only now learning about their claims – or the ability to assert them with any chance of success. This is due in part because “[a]s governments release records, cases are filed which lead victims or their heirs to file more cases with the increasing public awareness putting pressure on governments to cooperate.”¹⁹⁵ Many archives and records remained sealed until the mid-1990s or later (or still are sealed); as information trickled out, many survivors knowledgeable about a family’s wartime assets had died.¹⁹⁶

In such cases, it is quite possible no one in the family remained with the requisite knowledge to “put two and two together” to claim a particular looted painting. It is not the case that the present-day claimants were fully informed

Merryman, *The Good Faith Acquisition of Stolen Art*, Stanford Law School Research Paper No. 1025515 (2007), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1025515 (last visited Nov. 22, 2010).

¹⁹⁵ Redman, *supra* note 171, at 211.

¹⁹⁶ For a good discussion of this problem for claimants of Holocaust-era art, See Leah J. Weiss, Note, *The Role of Museums in Sustaining the Illicit Trade in Cultural Property*, 25 CARDozo ARTS INT. L.J. 837, 866-869 (2007).

about their claims and had the ability to bring them but chose to do nothing about it for so long.¹⁹⁷

For example one successful claimant who never would have recovered her property but for happenstance is Ms. Altmann, the woman who claimed a number of master pieces by Gustav Klimt in Austria and won them back after her fight took her all the way to the U.S. Supreme Court.¹⁹⁸ After the war, Ms. Altmann was still quite young and haggling with Austria for restitution was handled by another family member on the continent who hired an Austrian lawyer.¹⁹⁹ By and large, Jews seeking restitution immediately after the war from

¹⁹⁷ In many cases, it simply was not politically feasible to reclaim the art. The *Portrait of Wally* case involved facts that would have had to have been confronted in the laches context had the case been a conversion/replevin case, rather than a civil forfeiture case. See Third Amended Compl. ¶ gg, *Portrait of Wally*, 2001 WL 34727703 (quoting handwritten note found upon victim's death: "I myself prevent a court case with the Belvedere (Museum for Modern Art in Vienna) as I was reinstated as the proprietor of the Gallery Würthle, Gallery exclusive for Modern Art, and as this it was not possible for me to quarrel with the Museum of Modern Art and tried to get my picture back by peaceful means."). The litigation was settled for the full value of the portrait in 2010. Press Release, United States Attorney, Southern District of New York, United States Announces \$19 Million Settlement in Case of Painting Stolen by Nazis (July 20, 2010), available at <http://www.justice.gov/usao/nys/pressreleases/July10/portraitofwallysettlementpr.pdf> (last visited Dec. 1, 2010);

Herrick, Feinstein LLP, Press Release: The United States of America, the Estate of Lea Bondi Jaray and the Leopold Museum Settle the Long-Standing Case Involving "Portrait of Wally" by Egon Schiele, available at <http://info.herrick.com/rs/vm.ashx?ct=24F76A15D4AE4EE0CDD881AFD42F921E91907ABFDA9818CF5AE175767CEAC80BDF416>. Other political persecutees have not been so fortunate. See e.g., Letter from George Grosz (a/k/a Biffin) to Oz from the Otto Schmalhausen Archive, Jan. 8, 1953 ("The Modern Museum exhibited a stolen picture of mine (I am powerless to do anything against it), they bought it from someone who stole it.") (English transl., on file with author). George Grosz was investigated by the Un-American Activities Committee.

¹⁹⁸ See *Republic of Austria v. Altmann*, 541 U.S. 677 (2004).

¹⁹⁹ *Id.* at 686 n.4.

Austria did not meet with much success.²⁰⁰ Because of the Austrian practice of extorting donations of Jews' property in exchange for restitution and export permits of their other property, the lawyer struck a deal – some recovery is better than no recovery in a system actively discriminating against persecuted refugees.²⁰¹ Ms. Altmann had no idea that she had any claim until the now-deceased journalist, Hubertus Czernin, sent her a package of historical documents he had unearthed.²⁰² By that time, she was the last surviving heir of Ferdinand Bloch-Bauer, from whom everything was taken during the war.²⁰³ We lose historical knowledge as survivors pass away each day.

A recent bill passed by the California requires a claimant's "actual notice" to trigger the limitations period reflects this reality.²⁰⁴ Naturally, the California Association of Museums opposed the bill, claiming that the "actual

²⁰⁰ *Id.* at 682-83.

²⁰¹ *Id.* at 705. Other countries have similarly abysmal restitution records. See István Fodor, *The Restitution Of Works Of Art In Hungary*, The Spoils of War 92 – 94 (Elizabeth Simpson ed., 1997); Jan P. Pruszyński, Poland: *The War Losses, Cultural Heritage, And Cultural Legitimacy*, The Spoils of War 49 - 52(1997); Pavel Jirásek, *Losses Of Cultural Property From The Territory Of The Czech Republic Due To World War II*, The Spoils of War 232 – 233 (1997).

²⁰² *Altmann*, 541 U.S. at 684.

²⁰³ *Id.* at 682-83.

²⁰⁴ A.B. 2765, 2010 Leg. (Cal. 2010). See also Sheppard Mullin, *California AB 2765: Stops the Clock for Recovery of Wrongfully Appropriated Works: The Ramifications for Museums, Owners, Collectors, and the Art Trade*, Art Law Gallery, (Oct. 11, 2010), available at <http://www.artlawgallery.com/2010/10/articles/museums-private-collectors/california-ab-2765-stops-the-clock-for-recovery-of-wrongfully-appropriated-works-the-ramifications-for-museums-owners-collectors-and-the-art-trade/> (last visited Nov. 21, 2010).

knowledge” standard is “vague and subjective” and noting the “great lengths” to which museums go to insure that what they acquire has “solid legal title.”²⁰⁵ Two responses are in order. First, the “actual knowledge” standard would not be any more vague and subjective than the constructive discovery rule currently in place throughout the country with relatively little variation.²⁰⁶ Second, as demonstrated in Part II, *supra*, discussing the acquisition of artworks by museums despite undeniable knowledge of the likelihood that those artworks were taken by Jews by force or duress, the California Association of Museums’ understanding of term “great lengths” likely stops far short of any honest concept of diligence.²⁰⁷ In fact, willful blindness has been the norm in the art world.²⁰⁸ This standard exists because “[w]hile art dealers protest that they are only protecting the desire of their wealthy clients to remain anonymous, and that they are under no legal duty to inquire into the sources of art work in which

²⁰⁵ Letter of Barbara Long, *et al.*, to Assemblyman Mike Feuer, Re: AB 2765 Civil actions: statutes of limitation: theft, Aug. 19, 2010, at 3, 6 (on file with authors).

²⁰⁶ See notes 171-174 *supra*, and accompanying text.

²⁰⁷ See *supra*, Part II(B).

²⁰⁸ E.g., *Bakalar v. Vavra*, 619 F.3d 136, 150 (2d Cir. 2010) (discussing testimony in *Menzel v. List*, 24 N.Y.2d 91, 98 (1969) by gallery owner “that to question a reputable dealer as to his title would be an ‘insult’”); *Id.* at 141 (noting “art dealers’ usual practice of not examining the sources of the art works in which they trade.”) (quoting Sydney M. Drum, Comment, *DeWeerth v. Baldinger, Making New York a Haven for Stolen Art*; 64 N.Y.U. L. REV. 909, 944 (1989)).

they trade, such anonymity removes illegitimate transactions from needed scrutiny.”²⁰⁹

(2) *Dismissal of Holocaust-era art claims does not ensure free trade and secure possession*

The second policy reason, promotion of free trade of goods, is largely premised on the concept of a good faith purchaser. As seen throughout the discussion below concerning the next policy reason, courts seem to presume that purchasers in the Holocaust assets context possessed good faith despite extraordinary evidence to the contrary.²¹⁰ Perhaps the best example of how far this has gone arose in *Detroit Inst. of Arts v. Ullin*, in which the court ruled against the heirs of a Holocaust victim, deciding that the discovery rule did not apply because Michigan policy favors market certainty in cases alleging commercial conversion.²¹¹ Almost unbelievably, the court expressly ruled that the claim accrued in 1938, meaning that the three-year Michigan statute of limitations expired in 1941 before the United States even landed on the beaches of Normandy and liberated survivors in death and work camps.²¹²

²⁰⁹ DRUM, *supra* note 198 at 912-13.

²¹⁰ See *infra* Part III.

²¹¹ Detroit Inst. of Arts v. Ullin, No. 06-1033, 2007 WL 1016996, at *1, *3 (E.D. Mich. Mar. 31, 2007).

²¹² *Id.*

When determining whether to strictly enforce the three-year statute of limitations or apply the discovery rule, courts “must carefully balance when the plaintiff learned of her injuries, whether she was given a fair opportunity to bring her suit, and whether defendant’s equitable interests would be unfairly prejudiced by tolling the statute of limitations.”²¹³ In this case, the court did not engage in this balancing test. Even though Mrs. Nathan, the original owner of the painting, was forced to sell six other paintings by the Nazi government and moved other property to Switzerland, the court did not even discuss the possibility that sale of the painting in question resulted from wartime duress.²¹⁴ Not only did the court ignore the duress element, but the court also did not address the fact that Mrs. Nathan’s heir denied that the sale of the painting in question even took place.²¹⁵ The court also determined that because she successfully sought restitution of other paintings after the war, and did not seek to claim this painting, the current claim should be barred.²¹⁶ Rather than obtaining more facts about the transaction surrounding the painting, the court

²¹³ Brennan v. Edward D. Jones & Co., 626 N.W.2d 917 (Mich. App. 2001) (citing Stephens v. Dixon, 449 Mich. 531, 536 (1995)).

²¹⁴ Detroit Inst. of Arts v. Ullin, No. 06-1033, 2007 WL 1016996, at *1, (E.D. Mich. Mar. 31, 2007).

²¹⁵ *Id.*

²¹⁶ *Id.*

decided that even if the discovery rule were to be applied, Mrs. Nathan did not exercise due diligence.²¹⁷

One scholar has explained so well why the market certainty rationale is inapposite to stolen art cases: “Where the law favors purchasers over owners, purchasers have little incentive to cautiously investigate an artwork’s title. Even galleries and auction houses have an incentive to ignore suspicious circumstances. This is especially problematic in an area where theft is so rampant.”²¹⁸

(3) *Dismissal of Holocaust-era art claims unduly protects defendants from loss of evidence over time*

Courts are heavily emphasizing the third policy reason – protection of defendants – in Holocaust-era cases. For example, the United States District Court for the District of Massachusetts granted the Boston Museum of Fine Arts’ summary judgment motion on statute of limitations grounds in the declaratory judgment action it filed against Dr. Seger-Thomschitz, heir of Dr. Oskar Reichel.²¹⁹ Dr. Reichel was a Jewish doctor, art collector and owner of a

²¹⁷ *Id.* at *3.

²¹⁸ Redman, *supra* note 171, at 212. Moreover, purchasers’ claims against middle-men, such as breach of warranty, run from the date of purchase. See Doss, Inc. v. Christie’s Inc., No. 08-10577, 2009 WL 3053713 (S.D.N.Y. Sept. 23, 2009).

²¹⁹ *Seger-Thomschitz III*, at 11.

Viennese gallery that was “moved out” of Vienna in February 1939, well after the *Anschluss* of Austria and after he was forced to submit property declarations to the Viennese Nazis, which included the Oskar Kokoschka painting in question, *Two Nudes (Lovers)*.²²⁰ The court characterized the loss of the painting innocuously as having been “transferred to an art dealer in Paris for sale.”²²¹

The art dealer was Otto Kallir, the most powerful influence on modern art collectors in the United States.²²² Shortly after the *Anschluss*, Kallir “transferred” his own Vienna gallery to his non-Jewish secretary²²³, opened the Galerie St. Etienne in Paris, and moved to the United States in August 1939 to open the New York branch of Galerie St. Etienne with the painting and other works.²²⁴ MoMA Chairman Alfred Barr helped sponsor Kallir’s immigration.²²⁵

²²⁰ *Id.* at 1-2.

²²¹ *Id.* at 2. *Accord id.* at 3 (“transferred” the painting in question with four other Kokoschka paintings).

²²² See Seger-Thomschitz III.

²²³ This was a typical practice Jews were forced to undergo in attempts to protect their property from Nazi-confiscation. See MARTIN DEAN, *The Seizure Of Jewish Property In Europe, ROBBERY AND RESTITUTION 38- 42* (Martin Dean et al. eds., 2007). But, questions have been raised whether Kallir was persecuted – or whether he was persecuted and later made a deal with the Nazis to broker transactions to bring them foreign currency. See notes ___ - ___, *supra*, and accompanying text.

²²⁴ E.g., Seger-Thomschitz III, at 2.

²²⁵ Letter from Alfred H. Barr, Jr., Director, The Museum of Modern Art, to Mr. Correa, June 30, 1942 (“This letter is to testify to the loyalty to the United States of an alien, Mr. Curt Valentin, now in this country. Mr. Valentin is a refugee from the Nazis both because of Jewish extraction and because of his affiliation with free art movements banned by Hitler. He came to this country in 1937, robbed by the Nazis of virtually all possessions and funds.”).

Barr wrote a letter painting a picture of Kallir having arrived a destitute, broken man,²²⁶ but that does not seem to coincide with his ability to maintain such an active trade during the war.²²⁷

Kallir's name has been central to a number of the recently filed cases, as historians explore newly accessed documents, causing some to question his prior reputation.²²⁸ The museum submitted letters to the court, which had been written in the 1980s by one of Dr. Reichel's sons, Raimund, to art historians who had reached out to him as they independently researched Kokoschka's work.²²⁹ Dr. Seger-Thomschitz argues that the letters indicate that Raimund had been told by Kallir that the paintings were entrusted to him by Dr. Reichel in 1938, perhaps before the March 12, 1938, *Anschluss*, instead of 1939.²³⁰ Dr. Seger-Thomschitz argued that correct interpretation of the letters, one of which states that Kallir had said that he "lost his shirt" in the Kokoschka deal,²³¹ indicates that without knowledge of Kallir's trafficking during the war and believing Kallir's

²²⁶ *Id.*

²²⁷ See *supra* note 226.

²²⁸ See *infra* notes 285-291.

²²⁹ See Seger-Thomschitz III, at 2 - 3.

²³⁰ *Id.*

²³¹ *Id.* at 3 (quoting 1985 letter).

false reputation as a persecutee instead of a collaborator, Raimund had been misled by Kallir into accepting a nominal \$250 for the painting after the war.²³²

Dr. Seger-Thomschitz was desperately trying to convince the court to toll the statute of limitations on various grounds, including that Kallir (and then the museum) had engaged in fraudulent concealment.²³³ In essence, the theory boils down to this: There were a number of Jewish dealers trafficking during the war while purporting to be persecutees, but because this was known to the museums who accepted donations from patrons of works known to have passed through those dealers' hands, the museums also have unclean hands and thus should be equitably stopped from asserting the statute of limitations. The court rejected the argument and found that there was "no evidence of bad faith, laches or unclean hands" on the museum's part.²³⁴

In reaching this conclusion, the court found that because the allegation that the illegitimacy of the transfer to Kallir was "not clear-cut, and all of the witnesses with first-hand knowledge of the transfer are now deceased," the museum did not engage in bad faith by asking the court to declare it the owner

²³² *Id.*

²³³ *Id.* at 10.

²³⁴ *Id.*

of the paintings.²³⁵ Incredibly, the court provided its sole justification of its holding as the fact that “[o]ther museums faced with similar claims in which the circumstances of a wartime transfer made the legitimacy of the transfer debatable have also refused to summarily return the artworks and, instead, sought declaratory judgments of ownership.”²³⁶ These facts demonstrate simply that multiple, venerated U.S. museums are duping courts into believing that the museums acted in good faith.

The court also blamed Dr. Seger-Thomschitz for failing to get access to the same information the museum had, stating that she “had the same opportunity to obtain this evidence” as had the museum.²³⁷ This simply is not true. To see its falsity, one need only acknowledge the fact that even when claimants have gone to court seeking judicial assistance to get documents to assert Holocaust-era claims, they have been shut down.²³⁸ Regardless of what one concludes about the merits of this particular case, it is ludicrous to suggest that any single person would have the same contacts and persuasive influence

²³⁵ Seger-Thomschitz III, at 6.

²³⁶ *Id.*

²³⁷ *Id.* at 10.

²³⁸ Peters v. Sotheby's, Inc., 34 A.D.3d 29, 821 N.Y.S.2d 61 (1st Dep't 2006) (denying request under New York's pre-action disclosure law to force identification of anonymous purchaser of painting claimed to be Nazi-looted art on limitations grounds). *But see* Alexander v. Spanierman Gallery, 33 A.D.3d 411, 822 N.Y.S.2d 506 (1st Dep't 2006) (ordering gallery to reveal name of buyer of stolen sculpture).

as one of the most prominent museums in the country to convince third parties to voluntarily produce information without a subpoena. The court granted the museum's summary judgment motion, which demands a standard much higher than plausibility – that “no genuine issue of material fact” exists.²³⁹ Is it plausible that the court drew all reasonable inferences in favor of the Dr. Seger-Thomschitz, as it was required to do?²⁴⁰ Dismissal of the case shut down that federal court as an avenue to compel production of documents relevant to this question by the museum and third parties who may have them – and the pursuit of Truth and Memory.

Moreover, the court effectively found that Dr. Thomschitz was insufficiently diligent to prevent a finding that the discovery rule triggered the statute of limitations to run before the case was filed.²⁴¹ Kallir sold the Kokoschka to another gallery in 1945, which transferred it to another where it was purchased by Sarah Reed Blodgett between December 1947 and April 1948,

²³⁹ FED. R. Civ. P. 56(c).

²⁴⁰ See *Matsushita Electrical Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1984); *Celotex v. Catrett*, 477 U.S. 317 (1986); *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962) (“On summary judgment the inferences to be drawn from the underlying facts ... must be viewed in the light most favorable to the party opposing the motion.”).

²⁴¹ See *Seger-Thomschitz III*, at 9. This is true despite the common understanding that only New Jersey applies a due diligence requirement to the discovery rule in art cases. See Bert Demarsin, *The Third Time is Not Always a Charm: The Troublesome Legacy of a Dutch Art Dealer -- The Limitation and Act of State Defenses in Looted Art Cases*, 28 CARDOZO ARTS & ENT. L.J. 255, 264-68 (2010).Accord O’Keefe v. Snyder, 83 N.J. 478 (N.J. 1980).

who bequeathed it to the museum in 1972.²⁴² Over the years, the spectacular painting has been included in a number of exhibitions across the United States; the catalogue for at least one of those exhibitions in 1948-49 listed Dr. Reichel as a prior owner; it has been included in three catalogue raisonnés²⁴³ of Kokoschka's works; at least two of those listed Dr. Reichel as the prior owner; other publications have mentioned the work and Dr. Reichel's prior ownership; the museum has utilized the painting in advertising and other publications; the museum has listed the painting's provenance since December 2000 on its web site; the Getty Provenance Index has included the painting's provenance since the late 1980s; and a book published in Vienna in 2003 included a picture of the painting, the provenance and the Reichel Nazi-era property declaration.²⁴⁴ The court concluded that these "easily discoverable"²⁴⁵ facts would have put the family on notice to assert the claim long ago.²⁴⁶

Dr. Seger-Thomschitz argued that it is excusable that Raimund in pursuing post-war restitution did not know of his father's claims to the

²⁴² *Id.* at 3. The museum's formal acquisition was complete in 1973. *Id.*

²⁴³ "A catalogue raisonné is a comprehensive catalog of artworks by an artist." *Id.* at 4 (citing DeWeerth v. Baldinger, 836 F.2d 103, 112 (2d Cir. 1987)).

²⁴⁴ Seger-Thomschitz III, at 4.

²⁴⁵ *Id.* at 9.

²⁴⁶ *Id.* at 8.

Kokoschka paintings because of the dispersal of the family resulting from Nazi persecution, including the murder of one of Dr. Reichel's sons in 1940 or 1941.²⁴⁷ Another son, Hans, fled Austria by June 1938.²⁴⁸ Raimund fled in March 1939.²⁴⁹ In November 1938, Dr. Reichel's art gallery, including its paintings, which were mostly by Romako, was liquidated because of his Jewish heritage.²⁵⁰ The family's apartment house was liquidated in 1941.²⁵¹ In January 1943, Dr. Reichel's wife, Malvine, was deported to Therenstadt where she survived the war and eventually joined Hans in the United States.²⁵²

The brothers' post-war restitution application included a notarized statement by Raimund asserting that "[a] large art collection [owned by my father] was sold by force: 47 pictures by the painter Anton Romako."²⁵³ No mention was made of the Kokoschka paintings,²⁵⁴ but Dr. Reichel died after his wife had been deported to Therenstadt and his sons had already fled; the

²⁴⁷ Amended Answer ¶ 46, at 29–30, Seger-Thomschitz III.

²⁴⁸ *Id.* ¶ 82, at 43.

²⁴⁹ *Id.* ¶ 46, at 29–30.

²⁵⁰ *Id.* ¶ 35, at 27.

²⁵¹ *Id.* ¶ 37, at 27.

²⁵² *Id.* ¶ 46, at 29–30.

²⁵³ Amended Answer, ¶ 20, at 6, Seger-Thomschitz III.

²⁵⁴ *Id.*

sons only had their own recollections to rely on and would not have known about the Kokoschka paintings due to their lack of access to the Austrian records that contained Dr. Reichel's Property Declaration—at least until the records were first made public in 1993.²⁵⁵ By that time, presumably, they were no longer actively trying to seek restitution of property – they got back what they could already and moved on.

Dr. Seger-Thomschitz herself was actually put on notice to investigate any remaining claims of Reichel's heirs when the Vienna Community Council for Culture and Science contacted her in late 2003 upon its own more recent review of Viennese public collections,²⁵⁶ which, the court determined, was, at the latest, the moment that the limitations period began to run based on Massachusetts's discovery rule.²⁵⁷ The letter stated that Vita Künstler, whom Kallir "had appointed as director of" his Vienna gallery, had delivered the Romako paintings, which had been listed on the Reichel property declaration to the Nazis and for which compensation to Dr. Reichel was placed into a blocked account.²⁵⁸ It concluded: "It is certain that these paintings involved art objects

²⁵⁵ *Id.* ¶¶ 85–90, at 44–45.

²⁵⁶ *Id.*

²⁵⁷ Seger-Thomschitz III, at 9.

²⁵⁸ First Amended Answer and Counterclaim, Exhibit 1, at 2, Seger-Thomschitz III. The First Amended Answer and Counterclaim also states that "once the Painting

from the property of Dr. Oskar Reichel and which, in connection with the power seizure by National Socialism, he had to sell due to his persecution as a Jew to the galleries mentioned . . .”²⁵⁹ Dr. Seger-Thomschitz argued that the path of the Romako paintings likely mirrored that of the Kokoschkas.²⁶⁰ However, the Answer and Counterclaim do not clearly allege that the proceeds of the sale, if any, of the Kokoschkas actually went into a blocked account.²⁶¹ Probably, it is not alleged because she cannot locate any documents to justify making the allegation without the power of court-mandated discovery behind her. Under FED. R. CIV. P. 11(b)(3), parties are prohibited from making “factual contentions” to a court unless they “have evidentiary support or, if specifically so identified,

was placed on Dr. Reichel’s Property Declaration—which the Nazis required all Jews to file—the Painting was effectively confiscated and owned by the Nazi[s].” First Amended Answer and Counterclaim, *supra*, ¶ 13, at 4. Such an argument could give legal force to Nazi confiscation policy. The fact that Dr. Reichel had to list the painting may be a relevant factor in determining whether the sale actually was a farce, yet it should not be determinative of his ability to legally transfer title.

²⁵⁹ *Id.*

²⁶⁰ *Id.*

²⁶¹ Counterclaim, Seger-Thomschitz III, *supra* note 259, ¶ 4, at 15–16 (“Indeed, in Dr. Reichel’s case in particular, preceding sales proceeds for his artworks had been placed in ‘blocked’ accounts accessible only to the Nazis. Upon information and belief, even if Kallir had made any payment to Dr. Reichel, the money would have ended up in a ‘blocked’ account and in exclusive Nazi hands.”). *See also id.* ¶ 52, at 32, ¶ 81, at 43.

will likely have evidentiary support after a reasonable opportunity for further investigation or discovery.”²⁶²

Dr. Seger-Thomschitz also was sued in a declaratory action filed in the U.S. District Court for the Eastern District of Louisiana by the current holder of *Portrait of a Youth (Hans Reichel)* (1910), another painting by Kokoschka.²⁶³ The facts are similar. The Fifth Circuit on August 20, 2010, ruled that the issues raised on appeal were not preserved below and thus could not be addressed, but noted: “Significantly, those members of the Reichel family with direct knowledge of the painting’s sale never sought its return.”²⁶⁴ The District Court granted the summary judgment motion of the present-day collector on grounds of Louisiana’s acquisitive prescription doctrine.²⁶⁵ The court found that the collector’s ownership was “open and continuous” because the collector “displayed the painting in her home, and Plaintiff loaned the painting for exhibitions at local and national galleries, further publicizing its location and its ownership.”²⁶⁶ The opinion provides no other details concerning the level of

²⁶² FED. R. Civ. P. 11(b)(3).

²⁶³ Seger-Thomschitz I, at 661.

²⁶⁴ Seger-Thomschitz II, at 3.

²⁶⁵ Seger-Thomschitz I, at 663.

²⁶⁶ *Id.*

public knowledge about the painting to reach its conclusion, but – again – it is missing the mark as to what would be reasonable for Holocaust survivors and their heirs who lost property to do. Opening of the archives and publication of some records on the internet fifty or more years after their persecution could not have been foreseen much before the mid-1990s. At what point after seeking some post-war restitution and reaching the point of futility could they justifiably conclude that no more restitution was possible? Moreover, the U.S. District Court for the Eastern District of Louisiana announced a due diligence requirement whereby Holocaust victims and their heirs will be barred unless in the aftermath of the war they successfully placed advertisements in publications and actively hunted down their art collections ever since.²⁶⁷ The court did not even seem to notice that only one jurisdiction in the country has imposed a due diligence requirement of any type on art recovery claimants.²⁶⁸ One wonders how many refugees had the funds in the post-war, pre-internet environment to finance such a potentially never-ending, never fruitful hunt for assets in multiple continents, much less for family members.²⁶⁹ There were a

²⁶⁷ *Id.*

²⁶⁸ See *O'Keefe v. Snyder*, 83 N.J. 478 (N.J. 1980). The *Seger-Thomschitz* lower court opinion correctly cited *O'Keefe* to support adopting what it failed to recognize as a novel legal standard. 638 F. Supp. 2d at 663. It also cited an inapposite case, *Autocephalous Greek-Orthodox Church of Cypress v. Goldberg and Feldman Fine Arts, Inc.*, 917 F.2d 278, 283 (7th Cir. 1990).

²⁶⁹ *Vineberg v. Bissonnette*, 548 F.3d 50 (1st Cir. 2008) (the claimant in this case had actively sought artworks after the war).

few refugees and heirs with thorough knowledge and documentation of their extensive art collections who were able to continue confronting the past to track down their property beyond the immediate post-war period, but that number is low.²⁷⁰ Moreover, once those heirs who had direct knowledge of art collections but accepted the futility of the search passed away, there was not necessarily anyone left with the requisite knowledge to conduct a search. As discussed above, heirs, such as Dr. Seger-Thomschitz, are learning about their claims today by happenstance.²⁷¹

Sadly, one federal court has used the fact that Congress conducted hearings in 1998 into wartime trafficking and the failure of post-war restitution *against* an heir, holding that public knowledge of the issue would have put a reasonable person on notice to investigate possible claims if members of his or her family were victims or survivors.²⁷² In *Toledo Museum of Art v. Ullin*, the U.S. District Court for the Northern District of Ohio granted a motion to dismiss the claim of heirs of Martha Nathan in a declaratory judgment action filed by

²⁷⁰ In addition to the estate in *Vineberg*, the heirs to the Goudsticker and Herzog collections managed to actively search after the war with varying degrees of success resulting from their decades of efforts. Carol Vogel, *An Art Trove, Looted by the Nazis and Recovered, is going on Sale - Culture - International Herald Tribune*, N.Y. TIMES, (Feb.22, 2007), available at <http://www.nytimes.com/2007/02/21/arts/21iht-heir.4677497.html?pagewanted=2> (last visited Nov. 21, 2010). Complaint, Herzog v. Republic of Hungary, 1:10-cv-01261 (D.D.C. July, 27 2010).

²⁷¹ See *supra* notes 204-247 and accompanying text.

²⁷² Toledo Museum of Art v. Ullin, 477 F.Supp.2d 802, 808 (N.D. Ohio 2006).

the Toledo Museum of Art.²⁷³ The museum convinced the court to foreclose the claim although Ms. Nathan fled Germany in 1938.²⁷⁴ She had to return to Germany briefly in 1939 and at that time was forced to sell some art, but the painting in question, *Street Scene in Tahiti*, was not among those paintings because it had been shipped previously to Switzerland.²⁷⁵ Some of her property was shipped to France and was later expropriated after the Nazi occupation.²⁷⁶ In December 1938, before the German occupation of France, she sold some of her artwork, including the painting in question, in Switzerland to three Jewish art dealers, two of whom she had known for quite some time, Justin Thannhauser, Alexander Ball and George Wildenstein, for approximately \$6,900.²⁷⁷

Implicit in the court's decision is a characterization of the sale as being fair, which constitutes an improper finding of fact on a motion to dismiss: "In short, this sale occurred outside Germany by and between private individuals who were familiar with each other. The Painting was not confiscated or looted

²⁷³ *Id.*

²⁷⁴ *Id.* at 803.

²⁷⁵ *Id.* at 804.

²⁷⁶ *Id.*

²⁷⁷ *Id.*

by the Nazis; the sale was not at the direction of, nor did the proceeds benefit, the Nazi regime.”²⁷⁸ This finding implies that the Nazis’ reach was limited to the borders of the Reich, which simply is not true. As recently recognized by the United States Court of Appeals for the Second Circuit, the Nazis pressured Jews to transfer property located outside the Reich in exchange for safety for themselves or others.²⁷⁹ The Second Circuit stated: “Of particular significance is the ordinance dated April 26, 1938, which required Jews to register their assets and which covered both those who sought to leave the Reich . . . and those who remained, with the Reich seeking to appropriate their domestically as well as their externally held assets.”²⁸⁰

Just a few months after the dealers purchased Ms. Nathan’s painting in Switzerland, in May 1939 the Toledo Museum of Art purchased the painting for U.S. \$25,000²⁸¹ – just as the Nazis were gearing up to invade Poland in

²⁷⁸ *Toledo Museum of Art*, 477 F. Supp.2d at 804.

²⁷⁹ *Bakalar v. Vavra*, 619 F.3d 136, 138 n.1 (2d Cir. 2010).

²⁸⁰ *Id.* (quoting Claims Resolution Tribunal: Deposited Assets Claims: Selected Laws, Regulation, and Ordinances Used by the Nazi Regime to Confiscate Jewish Assets Abroad, available at http://crt-ii.org/_nazi_laws/). The Court also cited ROBERT GALLATELY, BACKING HITLER: CONSENT AND COERCION IN NAZI GERMANY 124 (2001); Otto D. Tolischus, *Goering Starts Final Liquidation of Jewish Property in Germany*, N.Y. TIMES, Apr. 28, 1938, at 1.

²⁸¹ *Toledo Museum of Art*, 477 F. Supp. 2d at 804.

September.²⁸² The *Toledo* court blamed the Nathan heirs for not seeking restitution earlier because the museum “has had the Painting on display in Ohio and internationally since 1939 with Martha Nathan noted as prior owner.”²⁸³ Thus, the court was concluding that the heirs were less than diligent.

The judge may have unconsciously acted on a bias that a Jew would not have been forced to sell to Jewish art dealer.²⁸⁴ Another declaratory judgment action filed by the MoMA and The Guggenheim to shoot down the claims of Mr. Schoeps, heir to Paul Mendelssohn-Bartholdy, to paintings that passed through Thannhauser’s hands, alleged that it is simply implausible and counter to common sense to suggest that any Jewish art dealer would take advantage of another Jew.²⁸⁵ Some surely acted honorably as an act of solidarity,²⁸⁶ but it is likely that a few who were successful during the Nazi Reich, perhaps including

²⁸² See Otto D. Tolischus, *Hitler to Inspect Western Defenses*, N.Y. TIMES, May 13, 1939, at 22; Guido Enderis, *Nazis Say Axis Tie Will Be Unlimited*, N.Y. TIMES, May 9, 1939, at 8.

²⁸³ *Toledo Museum of Art*, 477 F. Supp. 2d at 804.

²⁸⁴ See generally *supra* notes 204-247 and accompanying text.

²⁸⁵ Complaint for Declaratory Relief ¶ 2, *Museum of Modern Art v. Schoeps*, 549 F. Supp. 2d 543 (S.D.N.Y. 2008) (No. 07 CV 11074), 2007 WL 5161566 [hereinafter Complaint, *Schoeps*].

²⁸⁶ See Zagorin, *supra* note 95, at 87; Judy Dempsey, *Germany Tracing Artwork and Its Nazi Past*, INT'L HERALD TRIB., Dec. 22, 2008, available at <http://www.nytimes.com/2008/12/22/world/europe/22iht-letter.4.18871861.html> (“There is the issue of enforced transactions of every sale of every Jewish collection that happened during the Nazi times,’ said [Sean] Rainbird, a former curator of the Tate Modern in London. ‘There were cases where individuals were allowed to take their collections out of the country, and there were some dealers, in a gesture of solidarity, who helped them and were dealing with them in an honest way.’”).

Thannhauser as alleged in *Museum of Modern Art v. Schoeps*²⁸⁷ and *Kallir*²⁸⁸ were not.²⁸⁹ The fact that they may have been later persecuted when the Nazis no longer had a need for them does not discount the possibility that they trafficked in looted art. The *Schoeps* case settled on the eve of trial,²⁹⁰ which should teach us a lesson as to what can happen in these cases if judges do not let their biases cloud their views of what is plausible and let cases proceed.

B. Improperly Granting Motions to Dismiss Prevent Discovery of Historical Facts Necessary to Develop Claims

One court has gone so far as to dismiss a claim in 2008 on the grounds that the statute of limitations was missed by just three months. *Grosz v. The Museum of Modern Art* was dismissed on the improper and incorrect factual theory that settlement communications triggered the limitations period under New York's "demand and refusal" rule despite the mandate in FED. R. EVID. 408,

²⁸⁷ According to Schoeps' Answer and Counterclaim: "Thannhauser trafficked in stolen and Nazi-looted art during his career as a dealer. Both during and after World War II, Thannhauser partnered with art dealers such as Nazi Cesar Mange de Hauke and Albert Skira, both of whom the U.S. State Department and others identified as traffickers in Nazi-looted art." Answer and Counterclaim ¶ 40, *Museum of Modern Art v. Schoeps*, 549 F. Supp. 2d 543 (S.D.N.Y. 2008) (No. 07 CV 11074 (JSR)), 2008 WL 1982812 (citing Maureen Goggin & Walter V. Robinson, *Murky Histories Cloud Some Local Art*, BOSTON GLOBE, Nov. 9, 1997, at A1). See also WILLIAM S. PALEY, *As It HAPPENED: A MEMOIR* 107 (1979).

²⁸⁸ See *supra* notes 204-247 and accompanying text.

²⁸⁹ *Museum of Modern Art v. Schoeps*, 549 F. Supp. 2d 543 (S.D.N.Y. 2008).

²⁹⁰ Christine Kearney, *NY Museums Settle in Claim of Nazi-looted Picassos*, REUTERS, Feb.2, 2009, available at <http://in.reuters.com/article/idINIndia-37796820090202>.

that such evidence be used only to *negate* a contention of undue delay.²⁹¹ The court made other improper factual conclusions as well.²⁹²

In this case, a German modernist artist later deemed to be an “enemy of the State,” George Grosz, fled Germany in January 1933, leaving his work with Jewish art dealer Alfred Flechtheim.²⁹³ Later, Flechtheim also fled. The Nazis aryanized Flechtheim’s galleries in November 1933.²⁹⁴ The museum acquired the works works Grosz left with Flechtheim, *Portrait of the Poet Max-Hermann Neisse (with Cognac)* (“Poet”), *Self-Portrait with Model* (“Model”) and *Republican Automations*, in 1947, 1954 and 1946, respectively.²⁹⁵

²⁹¹ *Grosz*, 2010 WL 88003 at 2–24; FED. R. EVID. 408.

²⁹² The Grosz heirs list all of the improper factual conclusions as follows: The disputed issues of facts include: whether or not MoMA refused the Grosz Heirs’ claims prior to April 12, 2006; whether or not Lowry was authorized by MoMA’s Board of Trustees to issue a refusal prior to April 12, 2006; whether or not the Lowry Letter to Jentsch was an inadmissible settlement communication; whether or not Jentsch understood the Lowry Letter to be a refusal, and even if he did, whether it was within the scope of Jentsch’s apparent authority to be notified of a refusal where the facts show that Lowry was in direct communication with the Grosz Heirs and Jentsch was not an attorney; and whether or not Lowry’s claims that he had no authority to refuse the Groszs Heirs claims, together with MoMA’s June 26, 2008 letter confirming that a refusal took place on April 12, 2006 lulled the Grosz Heirs into believing that the statute of limitations would expire on April 12, 2006 and whether the Grosz Heirs’ reliance on MoMA’s representations was reasonable warranting estoppel.” Brief for Appellant, *Grosz v. The Museum of Modern Art*, No. 10-257-cv (June 15, 2010).

²⁹³ *Grosz*, 2010 WL 88003, at 1.

²⁹⁴ ESTER TISA FRANCINI, ET AL., FLIGHT GOODS – STOLEN GOODS: THE TRANSFER OF CULTURAL ASSETS IN AND VIA SWITZERLAND 1933-1945 AND THE QUESTION OF RESTITUTION 318 (2001). See generally HECTOR FELICIANO, THE LOST MUSEUM 155-164 (1997).

²⁹⁵ *Grosz*, 2010 WL 88003, at 3-7.

First, Judge McMahon of the District Court of Southern District of New York improperly found that the statute of limitations began to run during settlement negotiations and prior to MoMA's refusal letter of April 12, 2006.²⁹⁶ Under New York law a "refusal" under the "demand and refusal" rule must be clear and "unqualified."²⁹⁷ The district court based its erroneous conclusion on this point isolated snippets of ongoing written and oral communications between Glenn Lowry, MoMA's Director, and Ralph Jentsch, an art historian hired by the Groszes to research their claims.²⁹⁸ Lowry repeatedly stated that he did not have authority to resolve the Grosz' claim until the MoMA Board could vote whether to adopt a report on the claim that would result from an internal investigation conducted by Nicholas Katzenbach , who was not a provenance researcher but rather served as United States Attorney General during the Lyndon B. Johnson administration.²⁹⁹ For example, in a January 16, 2006, letter Lowry wrote: "As I have told you many times, including at our meeting in early January, any decision on a matter like this must be considered

²⁹⁶ *Id.* at 7-14.

²⁹⁷ *E.g., Susi v. Belle Acton Stables, Inc.*, 360 F.2d 704, 713 (2d Cir. 1966) (*citing Everett v. Saltus*, 1836 WL 2711 (N.Y. Sup. Ct. 1836), *aff'd sub nom. Satus & Saltus v. Everett*, 1838 WL 3100 (N.Y. 1938)).

²⁹⁸ See *Grosz*, 2010 WL 88003, at 23 – 24.

²⁹⁹ *Id.*

by the Museum's Trustees."³⁰⁰ Lowry on April 12, 2006, sent Jentsch a letter stating that Katzenbach completed his report, which recommended that the claim be denied, and that the "Museum's Board of Trustees has unanimously decided to accept Mr. Katzenbach's report and to abide by its findings."³⁰¹ It is worth noting that Katzenbach's report is based solely on his assessment of the applicable statute of limitations – not on the factual truth of Nazi looting as called for by AAMD Guidelines, the Washington Principles and the Terezín Declaration.³⁰² In 2008, MoMA sent a letter to Grosz' newly hired counsel reconfirming the refusal date of April 12, 2006.³⁰³

This dismissal was improper. For one thing, under Rule 9(f) of the Federal Rules of Civil Procedure, a motion to dismiss on limitations grounds is appropriate only when the material averments of time and place in the complaint demonstrate that the claim is time-barred.³⁰⁴ For another, courts may not determine contested facts concerning when a statute of limitation

³⁰⁰ *Grosz v. MoMA*, Brief Amicus Curiae, No. 10-257-cv, at App. F, a-24, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1628670 (last visited Nov. 21, 2010).

³⁰¹ *Id.* at a-26.

³⁰² MoMA Meeting of the Board of Trustees Minutes, April 11, 2006, page 2 (on file with author).

³⁰³ Letter from Henry A. Lanman, Associate General Counsel of MoMA, to attorney David J. Rowland (on file with author).

³⁰⁴ *Matthew v. United States*, 452 F. Supp. 2d 433 (S.D.N.Y. 2006); *Gossard v. Gossard*, 149 F.3d 109 (10th Cir. 1995). *Accord Santana-Castro v. Toledo-Davila*, 579 F.3d 109 (1st Cir. 2009); *Bethel v. Jendoco Constr. Co.*, 570 F.2d 1168 (3d Cir. 1978); *Herron v. Herron*, 255 F.2d 589, 593 (5th Cir. 1958).

began to run on a motion to dismiss.³⁰⁵ This is particularly inappropriate before discovery begins on the subject.³⁰⁶ Even Judge McMahon herself referred to Lowry's words as "temporizing language almost certainly designed to entice plaintiffs to continue negotiating and to prevent the dispute from becoming public or escalating into litigation."³⁰⁷ Thus, even had the limitations period run, Lowry's "temporizing language" calls out for application of the equitable doctrines of tolling and estoppel.³⁰⁸

Second, the court made other erroneous and improper factual conclusions. The district court wrongly suggested – in ruling on this motion to dismiss – that the reason why Flechtheim went out of business was that he was in general financial distress, a distortion of the historical record.³⁰⁹ She stated: "These documents suggest that Flechtheim's liquidation was precipitated by his

³⁰⁵ E.g., *In re Issuer Plaintiff Initial Pub. Offering Antitrust Litig.*, 00 CIV 7804 (LMM), 2004 WL 487222 (S.D.N.Y. Mar. 12, 2004).

³⁰⁶ See *In re Saft*, 24 Misc. 3d 1214(A), 897 N.Y.S.2d 672 (N.Y. Sur. 2009) (*citing* *Estate of Davis v. Trojer*, 99 CIV. 11056(JSM), 2001 WL 1645916 (S.D.N.Y. Dec. 21, 2001)). It should be noted that in the letters Lowry offered potential shared ownership of one painting – even to withdraw MoMA's ownership claims. *Grosz*, at 12 ("In the spirit of friendship and recognition of the limitations on the present state of our knowledge about the provenance of the work, I suggested the possibility of shared ownership of [Poet] at our May 31 meeting.").

³⁰⁷ *Grosz*, at 13.

³⁰⁸ See generally Suzette M. Malveaux, *Statutes of Limitations: A Policy Analysis in the Context of Reparations Litigation*, 74 GEO. WASH. L. REV. 68 (2005); Eli J. Richardson, *Eliminating the Limitations of Limitations Law*, 29 ARIZ. ST. L.J. 1015 (1997).

³⁰⁹ *Grosz*, 2010 WL 88003, at 3-4.

acute financial troubles, going back as far as 1931, before the Nazis came to power... Notwithstanding his financial missteps, Fechtheim continued to consign Grosz's works on an ad hoc basis until his death in London in 1937."³¹⁰ This erroneous judgment is devoid of any citation to evidence in the record or acknowledgement of systematic boycotting and extortion of Jews to gain their property in and out of the Reich starting in 1933 and imposition of the Flight Tax, matters appropriate for judicial notice.³¹¹ Moreover, the massive Nazi theft of art is well documented not only as a general historical fact, but also as a specific fact about Flechtheim's galleries in Berlin and Dusseldorf in a 2001 report of the Independent Commission of Experts Switzerland (ICE), also known as Bergier Commission.³¹² The report found the Flechtheim gallery was raided and boycotted by the Nazis and was Aryanized.³¹³ The relevant excerpts are as follows:

As early as in March 1933 the Nazis raided an auction at the Duesseldorf branch (of the Flechtheim Galleries) which consequently had to be stopped.

³¹⁰ *Id.*

³¹¹ See *supra* Part II and notes 106-108.

³¹² Independent Commission of Expert Switzerland, *Switzerland, National Socialism and the Second World War- Final Report* (2001), available at <http://www.uek.ch/en/index.htm> (last visited Nov. 21, 2010).

³¹³ Ester Tisa Francini, et al., *Flight Goods – Stolen Goods: The transfer of cultural assets in and via Switzerland 1933-1945 and the question of restitution* 318 (2001).

[* * * *]

A few days later an attack article appeared in the “Volksparole” (“People’s Word”) under the headline “Misguided Patronage: How Flechtheim and Kaesbach Made German Art.” The boycott drove the company to the brink of ruin. The branches in Berlin and Duesseldorf were “aryanized” in November 1933; subsequently Flechtheim was expelled from the Reich Chamber of Culture.

Due to the boycott measure and the negative press in connection with the “aryanization” of Galerie Flechtheim, Alex Voemel [who took over the Flechtheim Galleries] was faced with a large amount of debt and attempted to satisfy creditors by “payment in kind” i.e., the pledging of works of art from the storage and private collection of Flechtheim. (Emphasis added).³¹⁴

Flechtheim’s estate was later sold via a sham auction in the Netherlands, which MoMA alleged was a perfectly legal transaction.³¹⁵ The works later passed through Curt Valentin.³¹⁶ Again, Valentin was the partner of Karl Buchholz, one of Goebbels’ four authorized dealers for the sales of art deemed “degenerate” by the Nazis.³¹⁷ Buchholz was listed as a “red flag” name

³¹⁴ See Docket No. 55, Objections to Order of the Magistrate Judge at Exhibit M.

³¹⁵ MoMA Answer, *Grosz v. The Museum of Modern Art*, No. 10-257-cv (June 15, 2010).

³¹⁶ The Museum of Modern Art Archives, <http://moma.org/learn/resources/archives/EAD/Valentinf> (last visited Aug. 31, 2010). *See also* notes 164-165, *supra* and accompanying text.

³¹⁷ *See supra* notes 164 and 165, and accompanying text.

in the 1946 Final Report issued by the U.S. War Department's Art Looting Investigation Unit.³¹⁸

MoMA's proposed experts advanced theories that Flechtheim or his wife gifted *Poet* to Charlotte Weidler or that she received it as an inheritance.³¹⁹ MoMA's experts opined, based on their review of documents never even made available to the Grosz heirs in the course of litigation, that Weidler had an "anti-Nazi reputation."³²⁰ The Grosz heirs' historian unearthed a letter from Weidler from Berlin to the Carnegie Institute, dated October 30, 1939, after the Nazi invasion of Poland, which states: "They are nice in the Propoganda Ministry and they told me again that they are much interested in the Carnegie Institute and because your sales will bring dollars in this country."³²¹

The dismissal of the Grosz case cannot be squared with the standards announced in *Twombly* and *Iqbal*. To the contrary, the massive Nazi theft of art

³¹⁸ OSS Art Looting Investigation Unit Reports, 1945-1946, Records of the American Commission for the Protection and Salvage of Artistic and Historic Monuments in War Areas, RG 239/Entries 74-75/Boxes 84, 84A, 85, 85A (United States National Archives Microfilm publication M1782, 2001), available at <http://www.lootedart.com/alii-long> (searchable format). See generally Nancy H. Yeide, *The Plunder of Art as a War Crime: The Art Looting Investigatin Unit Reports and the Hermann Goering Art Collection*, 8 RUTGERS J. L. & RELIGION 13 (2007).

³¹⁹ *Grosz*, Corrected and Amended Expert Report of Laurie A. Stein, 2009 WL 6485929 (S.D.N.Y. Sep. 29, 2009).

³²⁰ *Id.*

³²¹ Letter from Charlotte Weidler to Homer Saint-Gaudens at Carnegie Institute Department of Fine Arts, Oct. 30, 1939.

is well documented not only as a general historical fact, but also as a specific fact about Flechtheim's galleries in Berlin and Dusseldorf.³²² There is also a powerful historical consensus about the Nazi program of selling stolen artwork to American collectors and museums.³²³ It is further acknowledged that the chief obstacle complicating provenance research is that the Nazis went out of their way to disguise their grand larceny as though it was only a series of open transactions between willing sellers and buyers.³²⁴ Under New York law, the burden of demonstrating title lies with the present day possessor.³²⁵ In the light of such uniform scholarly consensus and the burden of proof, the district court should have held that the Complaint satisfies the *Twombly-Iqbal* standard of plausibility.

Moreover, it is fundamental policy to encourage communication for negotiation and settlement purposes.³²⁶ Precisely in order to secure meaningful negotiations, courts should toll the state statute of limitations for the duration

³²² Independent Commission of Expert Switzerland, *Switzerland, National Socialism and the Second World War- Final Report* (2001), available at <http://www.uek.ch/en/index.htm> (last visited Nov. 21, 2010).

³²³ See *supra* Part II.

³²⁴ AMY NEWMAN, THE NUREMBERG LAWS INSTITUTIONALIZED ANTI-SEMITISM 79 (1999). *Accord, e.g.,* HECTOR FELICIANO, THE LOST MUSEUM AND THE NAZI CONSPIRACY TO STEAL THE WORLD'S GREATEST WORKS OF ART 6-7 (Tim Bent, et al., trans., 1997).

³²⁵ *Bakalar*, 619 F.3d at 141-42 citing Solomon R. Guggenheim Found. v. Lubell, 77 N.Y.2d 311 (1991).

³²⁶ *E.g., Rein v. Socialist People's Libyan Arab Jamahiriya*, 568 F.3d 345, 352 (2d Cir. 2009).

of negotiation and settlement discussions.³²⁷ In addition to complying with fundamental policy applicable to all litigation, such a course also furthers the Washington Principles³²⁸ and Terezín Declaration.³²⁹ This precedent to the contrary is lamentable. The country that led the way in organizing worldwide support for the Washington Principles now has a very large number of federal judicial precedents that distort historical remembrance and even encourages – in fact dictates – that parties run to the courthouse instead of negotiate in good faith over the restitution of Holocaust-era assets that were unlawfully seized during the height of genocidal cruelty. Lowry’s language indicating that MoMA wanted to continue to work toward a just and fair solution and setting up an agreement to continue research for years and share ownership forever in no way put Jentsch or the Grosz heirs on notice that MoMA had “refused” to continue working toward an agreement. This cooperation in search of a just and fair solution, instead of litigation, is exactly what the Washington Principles, Terezín Declaration, and AAMD Guidelines encourage.

³²⁷ “... [T]he parties to a litigation seem to have a legitimate interest in keeping an action alive while negotiating a settlement. The statute of limitation is tolled while an action is pending.” Yasuhei Taniguchi, *Good Faith and Abuse of Procedural Rights in Japanese Civil Procedure*, 8 TUL. J. INT'L & COMP. L. 167, 180 (2000). See also Stephanie Cuba, Note, *Stop the Clock: The Case to Suspend the Statute of Limitations on Claims for Nazi-Looted Art*, 17 CARDOZO ARTS & ENT. L.J. 447 (1999).

³²⁸ See *supra* notes 36-44 and accompanying text.

³²⁹ *Id.*

The court likely was prone to make these legal errors because it also wrongly denied discovery into documents relevant to MoMA's claimed chain of title for the Paintings.³³⁰ The Grosz heirs' appellate brief lays out the issue nicely:

From May 2009 through December 2009, document discovery and depositions, including expert discovery and discovery of foreign legal experts was completed, with the exception of outstanding disputes over MoMA's refusal to permit inspection of provenance documentation of Nazi-era artworks in its collection from Flechtheim's inventory and from Valentin.

Although MoMA also has numerous artworks in its collection that came from Flechtheim's inventory (1933-1937), MoMA has refused to share these documents with the Grosz Heirs.

As reflected in MoMA's proposed expert testimony, MoMA's theory of the case is that the post-March 1933 sales of Flechtheim's inventory were legal, that the Dutch sales of Flechtheims' estate. During discovery, the Grosz Heirs tried to explore MoMa's documents related to Flechtheim's inventory and into artworks acquired through Valentin and were blocked. In stark contrast, MoMA's proposed experts had free reign of MoMA's documents during discovery.

* * *

It is standard, and indeed required practice in provenance research to research all items in a lost art collection to understand the provenance of other works emanating from the

³³⁰ Brief for Appellant, Grosz v. The Museum of Modern Art, No. 10-257-cv (June 15, 2010).

same source.³³¹ MoMA's website shows five artworks that were in Flechtheim's inventory in 1933. The Grosz Heirs have been denied discovery into the provenance of all of these artworks.³³²

Finally, the court was completely uninformed as to how the allegations should be viewed and shut down discovery into the full factual context to correctly understand the allegations. The Grosz heirs' appellate brief has it absolutely correct: "Based on the historical events at the time – how Nazis systematically hounded Jews inside and outside of Germany for money and to liquidate their German assets by threatening to murder or deport their families – the district court should have permitted the Grosz Heirs discovery into documents that would permit an adversarial testing of MoMA's claimed provenance paths for the Paintings."³³³ Moreover, the judge's manner of dealing with the discovery dispute seems to have been oddly emotional, such as where she noted that additional letters to the court by the parties would be placed in the trash.³³⁴ She also criticized some of the evidence pointed to by the

³³¹ See generally AAMD's Provenance Guide. See also Petropolous Declaration in *Grosz* ("correspondence dated 8 December 1938 from Curt Valentin to Alfred Barr regarding Barr's apparent request to make acquisitions of artworks from the Nazi Reich Ministry of People's Enlightenment and Propaganda (DBM 03405-03406). It has been represented to me that some of Barr's correspondence to Valentin is missing from The MoMA's files, as well as any written response from Barr.").

³³² Brief for Appellant, *Grosz v. The Museum of Modern Art*, No. 10-257-cv (June 15, 2010).

³³³ *Id.*

³³⁴ Decision and Order Denying Plaintiff's Motion for Reconsideration, *17, *19 ("At the time these letters were flying back and forth, the Court had already done considerable work on the

Grosz heirs' as "rank hearsay"³³⁵ even though there is absolutely no requirement in any rule that a complaint must rely solely on admissible evidence.³³⁶

In conclusion, it was improper to dismiss the case by divorcing it from historical context and forbidding inquiry into the context via discovery. As Katzenbach noted: "After many years crucial documents are missing and the thousands of pages of records and correspondence reviewed often do not provide clear answers."³³⁷ As Judge McMahon herself noted: "Matters of provenance are notoriously complicated, and the circumstances under which the Paintings made their way to MoMA (as alleged by Plaintiffs) made the museum's investigation difficult."³³⁸ Ownership decisions, even those made on "technical" grounds like the statute of limitations, turn on context-sensitive facts that require historical analysis to come to an informed conclusion. These issues are not appropriately decided upon a motion to dismiss filed early in the

motion to dismiss, based solely on the record submitted in June 2009. The Court had reached tentative conclusions and was in the process of drafting an opinion. I had no inclination to start the process over.") The judge also indicated that she would be throwing the parties' correspondence "in the trash." Dec. 2, 2009, letter with notations.

³³⁵ *Grosz*, 2010 Westlaw 88003, at *5.

³³⁶ See *supra* Part I.

³³⁷ *Grosz*, Docket No. 15, Ex. E.

³³⁸ *Grosz*, 2010 WL 88003 at *20.

case. Courts should allow the full light of history to illuminate a record to determine whether a Holocaust-era art complaint is plausible and should survive a motion to dismiss. More specifically, because provenance evidence is highly relevant to the resolution of disputes over rightful ownership, courts should not treat such evidence as confidential or privileged, or – as the district court did in this case – “rank hearsay” unworthy of supporting an allegation in a complaint filed before the discovery process even begins. Doing so is not only improper as a matter of procedure, but it endorses a false view of historical reality and distorts the historical record.

C. Obstacles to Claims That Survive a Motion to Dismiss

Even surmounting a motion to dismiss or motion for summary judgment does not guarantee a survivor or heir success, however. *Bakalar v. Vavra* was a dispute between the heirs of Fritz Grunbaum and David Bakalar, who filed an action for declaratory judgment, tortious interference with contractual relations, and slander of title in regard to *Seated Woman with Bent Left Leg (Torso)*, a drawing by Egon Schiele.³³⁹ As a prominent Jewish entertainer in

³³⁹ *Bakalar v. Vavra*, No. 05 Civ. 3037(WHP), 2008 WL 4067335, at *1 (S.D.N.Y. Sept. 2, 2008); Complaint for Declaratory Relief ¶¶ 71–89, *Bakalar v. Vavra*, No. 05 Civ. 3037(WHP), 2008 WL 4067335, (S.D.N.Y. Sept. 2, 2008).

Vienna with a significant art collection, Fritz Grunbaum was arrested eight days after the March 12, 1938, *Anschluss*.³⁴⁰ He was shipped to Dachau Concentration Camp where he was forced to sign a power of attorney certificate, before he died on January 14, 1941, to provide his wife, Elisabeth, with the legal power to claim Fritz's assets and file property declarations in accordance with Nazi law.³⁴¹ "In a report dated four days after the execution of the power of attorney, Franz Kieslinger, an appraiser for the Nazis with the Viennese auction house Dorotheum – which was a 'prime selling point of loot[ed] art in Austria' . . . – conducted an appraisal of the 449 artworks that Grunbaum kept in his apartment. . ."³⁴² Before being arrested and shipped off to her death in the Minsk Concentration Camp in October 1942, Elisabeth was forced to sign an inventory in accordance with the power of attorney, which adopted Kieslinger's exact valuation on the art collection.³⁴³ Later she was

The tortious interference and slander of title claims have since been voluntarily dismissed.

³⁴⁰ *Bakalar*, 2008 WL 4067335, at *3.

³⁴¹ *Id.*

³⁴² *Bakalar v. Vavra*, 619 F.3d 136, 138 (2d 2010).

³⁴³ *Id.* at 4.

forced to sign Fritz's death certificate, which stated that "there is no estate . . . [and] in the absence of an estate, there are no estate-related proceedings."³⁴⁴

Fritz's artworks were acquired by Eberhard Kornfeld, a partner in the Swiss art gallery Gutekunst & Klipstein founded by Otto Kallir.³⁴⁵ The gallery is known to have sold artworks seized by the Nazis.³⁴⁶ It sold the Schiele drawing, approximately six months after purchasing it in 1956, to a New York gallery, which subsequently sold it to Mr. Bakalar in 1963.³⁴⁷

After a trial on the merits, the court found that Bakalar's title traced back to a sale by Fritz Grunbaum's sister-in-law Mathilde Lukacs, whom the court found received the painting as a gift from Elisabeth, then sold it to Kornfeld.³⁴⁸ Although adopted as factual truth by the trial court, Kornfeld's testimony and the evidence of the 1956 sale have been questioned by Jonathan

³⁴⁴ *Bakalar*, 2008 WL 4067335, at *4.

³⁴⁵ See *supra* Part V.C.

³⁴⁶ Vivian Endicott Barnett, Rereading the Correspondence: Rebay and Kandinsky, in *ART OF TOMORROW: HILLA REBAY AND SOLOMON R. GUGGENHEIM* 86, 99 (2005).

³⁴⁷ *Bakalar*, 2008 WL 4067335, at *1. Interestingly, in an attempt to certify a defendant class of present-day possessors of Fritz Grunbaum's art, the Grunbaum heirs sought discovery from Galerie St. Etienne, Sotheby's, and Christie's, to identify owners or possessors of artworks previously belonging to Fritz Grunbaum and provenance documents for those artworks, an attempt which the trial court disallowed. *Bakalar v. Vavra*, 237 F.R.D. 59, 65 (S.D.N.Y. 2006).

³⁴⁸ *Bakalar*, 2008 WL 4067335, at *2.

Petropolous, a prominent historian who has thoroughly researched Nazi-era trafficking who was hired by the Grunbaum heirs.³⁴⁹ Under the trial court's theory, the power of attorney signed by Fritz Grunbaum in Dachau must have given Elisabeth the power to make a valid gift of the painting to his sister-in-law in Nazi Vienna—after Fritz died intestate and shortly before Elisabeth was shipped off to her death.

Luckily the United States Court of Appeals for the Second Circuit vacated and remanded the opinion.³⁵⁰ The Court of Appeals found the district court erred under New York law in its choice of law analysis (New York law should have controlled, not Swiss) and by placing the burden of proof as to title on the claimant.³⁵¹ The court noted past case law that stressed the reasons earlier New York law “place[d] the [onerous]³⁵² burden of investigating the provenance of a work of art on the potential purchaser,”³⁵³ particularly the need to prevent New York, the largest art market in the world, from fostering illicit

³⁴⁹ See Supplemental Expert Opinion, Bakalar v. Vavra, 2008 WL 4067335 (S.D.N.Y. Sept. 2, 2008) (No. 05 Civ. 3037(WHP)) (admitted into the Record by the Second Circuit in March 2009) (on file with author).

³⁵⁰ Bakalar v. Vavra, 619 F.3d 136 (2d Cir. 2010).

³⁵¹ *Id.* at 147-152.

³⁵² *Id.* at 148-149.

³⁵³ *Id.* at 143 (quoting Solomon R. Guggenheim Found. v. Lubell, 77 N.Y.2d 311, 320 (1991)). The court also noted that the New York legislature rejected a bill to change New York law on this point. *Id.* at 146 - 148.

trafficking in stolen art.³⁵⁴ The Court of Appeals found that the trial court erred in concluding that the “Grunbaum heirs had failed to produce ‘any concrete evidence that the Nazis looted the Drawing or that it was otherwise taken from Grunbaum.’”³⁵⁵ The court continued: “Our reading of the record suggests that there may be such evidence, and that the district judge, by applying Swiss Law, erred in placing the burden of proof on the Grubaum heirs in this regard.”³⁵⁶ The court did not provide detailed analysis of the factual record.

The court went on to endorse the lower court’s denial of discovery related to the potential certification of a defendant class of possessors of artworks from the Grunbaum collection, finding that Judge Pauley did not engage in any abuse of discretion.³⁵⁷ The case is not out of the woods yet, however. The court also noted that “should the district judge conclude that the Grunbaum heirs are entitled to prevail on the issue of the validity of Bakalar’s

³⁵⁴ *Id.* See also *id.* at 144 (quoting Elicofon, 536 F.Supp. 846 noting that this New York policy serves “as a means to preserve the integrity of transactions and prevent the state from becoming a marketplace for stolen goods”).

³⁵⁵ *Bakalar*, 619 F.3d, at 147 (citing *Bakalar*, 2008 WL 4067335, at *8).

³⁵⁶ *Id.* at 147.

³⁵⁷ *Id.*

title to the Drawing, the district judge should also address the issue of laches.”³⁵⁸

Judge Korman wrote a separate concurrence to address this issue, finding that the risks of writing *dicta* were outweighed by the need to direct the lower court judge to correctly interpret the factual evidence of Nazi-looting.³⁵⁹ He provided the following summary:

Grunbaum was arrested while attempting to flee from the Nazis. After his arrest, he never again had physical possession of any of his artwork, including the Drawing. The power of attorney, which he was forced to execute while in the Dachau concentration camp, divested him of his legal control over the Drawing. Such an involuntary divestiture of possession and legal control rendered any subsequent transfer void.³⁶⁰

Highly compelling is Judge Korman’s critique of the district court’s findings of fact in support of the present-day possessor’s argument “that

³⁵⁸ *Id.* at 147.

³⁵⁹ *Id.* at 148.

³⁶⁰ *Id.* Judge Korman distinguished this scenario from a bailment scenario where title could potentially pass to a subsequent good faith purchaser for value. *Id.* at 21-23. Judge Korman correctly pointed out that the lower court erred in applying U.C.C. § 2-403(1), which could only apply in voidable title bailment scenarios. *Id.* at 23. Because the power of attorney signed by Grunbaum was involuntary, “any subsequent transfer was void and not merely voidable.” *Id.* Judge Korman found *Vineberg v. Bissonnette*, 548 F.3d 50 (1st Cir. 2008), *aff’g* 529 F. Supp. 2d 300, 307 (D.R.I. 2007), the only successful Nazi-looted art case in U.S. courts since 2004, to be analogous. *Id.* at 149-150.

someone in the Grunbaum family more likely than not exported the Drawing from Vienna.”³⁶¹ Judge Korman clarified as follows:

The district judge merely speculated that “[t]he Drawing could have been one of the 417 drawings Elisabeth Grunbaum *possibly* exported . . . in 1938,” or that the Drawing “could have been one of three drawings Lukacs’s husband exported,” or that “it could have been” one of the three watercolors exported by Lukacs’s brother-in-law. These scenarios, based on pure speculation, do not constitute findings by a preponderance of the evidence that what “could have” happened actually did happen.³⁶²

Judge Korman also challenged Bakalar’s claim on appeal that there is no “direct evidence that all of the Schiele art sold by Lukacs had once belonged to Fritz Grunbaum,” or that “the Drawing belonged to Fritz Grunbaum prior to or during the war.”³⁶³ Judge Korman stated that “there is significant circumstantial evidence that this artwork had belonged to him.”³⁶⁴ Judge Korman pointed out that the underlying theories of the case had assumed as much, including deposition testimony of Kornfeld and the trial testimony of Jane Kallir, Otto

³⁶¹ *Bakalar*, 619 F.3d, at 151.

³⁶² *Id.* (emphasis in original) (internal citation omitted).

³⁶³ *Id.*

³⁶⁴ *Id.*

Kallir's daughter and the current director of Galerie St. Etienne.³⁶⁵ The 2005 Sotheby's auction record that triggered the entire litigation stated as much as well.³⁶⁶ Bakalar's initial complaint even admitted as much.³⁶⁷

IV. CONCLUSION: COURTS SHOULD HEED HISTORY AND WELCOME HISTORIANS

Once courts understand the plausibility of the allegation that an artwork was stolen or subject to a forced sale during the Nazi era, it is likely that courts will still need assistance to evaluate the particular facts surrounding the legal claims and defenses surrounding the particular artwork at issue. There is a risk that lawyers and judges lacking expertise in historical research who rely on "law-office history" will misinterpret facts.³⁶⁸ On the other hand, in the view of one scholar, "[J]udges] need advocates, and in some instances historians, to present the history. The likelihood that the courts will produce credible decisions rooted in history increases dramatically when the effort is a partnership between the

³⁶⁵ *Id.*

³⁶⁶ *Id.* at 139.

³⁶⁷ *Bakalar*, 619 F.3d, at 139.

³⁶⁸ Jeffrey S. Sutton, *The Role of History in Judging Disputes about the Meaning of the Constitution*, 41 TEX. TECH. L. REV. 1173, 1185 (2009).

bench and bar, as opposed to an effort by one judge and one star-crossed law clerk..”³⁶⁹

Historians are increasingly being asked to offer their testimony in American courts as expert witnesses.³⁷⁰ Historians have participated in cases adjudicating a wide variety of claims such as “gay rights, gender discrimination, voting rights, tobacco litigation, naturalization proceedings against defendants suspected of failing to disclose ties to organizations hostile to the United states, and Native-American hunting and fishing rights.”³⁷¹ The use of their testimony, like the testimony of all expert witnesses, is subject to admittance pursuant to the requirements set forth in Rule 702 of the Federal Rules of Evidence.³⁷² Even assuming the evidentiary hurdle is overcome, historical explanations are subtle and complex interpretations of human experience; therefore, the historical

³⁶⁹ *Id.* at .1188

³⁷⁰ *Id.* at 1184-87.

³⁷¹ Maxine D. Goodman, *Slipping Through The Gate: Trusting Daubert and Trial Procedures to Reveal the ‘Pseudo-Historian’ Expert Witness and to Enable the Reliable Historian Expert Witness-Troubling lessons from Holocaust-Related Trials*, 60 BAYLOR L. REV. 824, 826 (2008). A “pseudo-historian” “is presented to the court as an expert but instead of offering fact-based history instead relays propaganda.” *Id.* at 826 – 827.

³⁷² E.g., Martin, *infra* note 358.

method is at odds with the needs of the court, which ultimately requires categorical, definitive conclusions.³⁷³

Although historians have been very useful in Nazi-looted art litigation, there is some risk to the historical record when an historian in our adversarial system is forced to reduce his or her research into “sound bites”³⁷⁴ or cloaks advocacy as objective scholarship.³⁷⁵ This article does not address proposed reforms to attempt to combat this problem inherent to the use of any expert in our adversarial courts,³⁷⁶ but simply posits that judges contemplating whether a

³⁷³ See Jonathan D. Martin, *Historians at the Gate: Accommodating Expert Historical Testimony In Federal Courts*, 78 N.Y.U. L. REV. 1518, 1535, 1538 (2003).

³⁷⁴ *Id.* at 1542-49.

³⁷⁵ Matthew J. Festa, *Applying the Usable Past: The Use of History in Law*, 38 SETON HALL. L. REV. 479 (2008); Jennifer Mnookin, *Expert Evidence, Partisanship, and Epistemic Competence*, 73 BROOK. L. REV. 1009 (2008); Justin P. Murphy, *Expert Witnesses at Trial: Where Are the Ethics?*, 14 GEO. J. LEGAL ETHICS 217 (2000).

³⁷⁶ Many proposed reforms, such as those calling for panels of experts and sole reliance upon court-appointed experts would have practicality problems in the historical analysis of Holocaust-era expropriation and forced sales because of the small number of historians truly expert in the field. See Michael Connolly, *Special Masters, Court-Appointed Experts and Technical Advisors in Federal Court*, 76 DEF. COUNS. J. 77 (2009) (calling for court appointment); Sophia Cope, *Ripe for Revision: A Critique of Federal Rule of Evidence 706 and the Use of Court Appointed Experts*, 39 GONZ. L. REV. 163 (2004) (offering critique of oft-advocated reform); Jan Beyea & Daniel Berger, *Scientific Misconceptions among Daubert Gatekeepers: The Need for Reform of Expert Review Procedures*, 64 SUM LAW & CONTEMP. PROBS. 327 (2001) (calling for courts to form teams or panels of scientific reviewers akin to the academic peer review publication process); Anthony Champagne, et al., *Are Court-Appointed Experts the Solution to the Problems of Expert Testimony*, 84 JUDICATURE 178 (2001) (calling for court-appointment of experts).

But see Robert L. Hess, II, *Judges Cooperating with Scientists: A Proposal for More Effective Limits on the Federal Trial Judge's Inherent Power to Appoint Technical Advisors*, 54 VAND. L. REV. 547 (2001); N.E.H. Hull & Peter Charles Hoffer, *Historians and the Impeachment Imbroglio: In Search of a Serviceable History*, 31 RUTGERS L.J. 473 (2000) (calling for Congress to appoint historians to special committees attending to issues of great public importance where understanding historical context is key).

particular artwork was looted, the ability of owners to reclaim their property and the ability of purchasers to claim good faith purchaser status under foreign law should be informed by history – and reliance on one or more historians may assist in developing the requisite knowledge to accurately assess the plausibility of the parties' claims and defenses.³⁷⁷

At the same time, courts listening to expert historians must be open-minded because historical analysis, like much other science, "is not perfect and often research is highly subjective and built on a series of assumptions and inferences used to find errors and inconsistencies . . ."³⁷⁸ On the other hand, judges contemplating inconsistent interpretations of events proffered by opposing expert historians should not to allow "junk history" to infect the historical record contained within judicial decisions.³⁷⁹ Applying ordinary

³⁷⁷ See generally Reuel E. Schiller, *The Strawhorsemen of the Apocalypse: Relativism and the Historian as Expert Witness*, 49 HASTINGS L.J. 1169, 1176 (1997) (exposing the theory that historians are under so much attack outside of court that their credibility already comes under intense scrutiny in court); David E. Bernstein, *Expert Witnesses, Adversarial Bias, and the (Partial) Failure of the Daubert Revolution*, 93 IOWA L. REV. 451 (2008) (calling for courts to appoint neutral experts); Beyea & Berger, *supra* note 361, at 336.

³⁷⁸ Beyea & Berger, *supra* note 361, at 336.

³⁷⁹ Cf. *id.* (referencing judges' difficulties in making "good decisions of admissibility between competing experts" which has allowed "junk science" to "become lasting pieces of our law"); Jeffrey L. Harrison, *Reconceptualizing the Expert Witness: Social Costs, Current Controls, and Proposed Responses*, 18 YALE J. ON REG. 253 (2001) (noting that the adversarial system allows for hired gun experts and generates significant social cost).

evidentiary safeguards should help combat this problem,³⁸⁰ as should certain safeguards appropriate when considering testimony from social scientists.³⁸¹ When considering testimony from historians, courts should pay heed to whether the purported scholar treated sources with skeptical reservation, did not automatically disregard contrary evidence, was balanced in her treatment of the evidence and did not cherry-pick, highlighted speculations, did not omit any part of a relevant document, weighed the authenticity of everything, not just the accounts in contradictions, and considered the motives of all historical actors.³⁸²

As described above, almost every Nazi-looted art claim since 2004 has been dismissed on technical grounds, most commonly the statute of limitations.³⁸³ But how are the courts determining whether the claimants

³⁸⁰ See generally Miles J. Vigilante, *Screening Expert Testimony after Kumho Tire Co. v. Carmichael*, 8 J. L. & Pol'y 543 (2000) (discussing evidentiary standards regularly applicable to experts); see also Stephen D. Easton, *That Is Not All There Is: Enhancing Daubert Exclusion by applying "Ordinary" Witness Principles to Experts*, 84 NEB. L. REV. 675 (2006) (advocating for use of heightened safeguards such as would be applied to non-expert witnesses).

³⁸¹ See Wendie Ellen Schneider, *Case Note, Past Imperfect*, 110 YALE L.J. 1531 (2001).

³⁸² *Id.* at 1540; cf. Saul Cornell, *Heller, New Originalism, and Law Office History: "Meet the New Boss, Same as the Old Boss"*, 56 UCLA L. Rev. 1095 (2009) (critiquing the majority opinion written by Justice Scalia as having engaged in faulty historical analysis to announce "new originalism"); Saul Cornell, *Originalism on Trial: The Use and Abuse of History in The District of Columbia v. Heller*, 69 OHIO ST. L.J. 625 (2008) (accusing Justice Scalia of having failed to employ standards of acceptable historical scholarship in utilizing "atypical texts" and dismissing or ignoring influential countervailing historical scholarship).

³⁸³ See also *Grosz v. MoMA*, Brief Amicus Curiae, No. 10-257-cv, at App. B, a-7, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1628670 (last visited Nov. 21, 2010).

should be given a chance to be heard? The courts usually rely on the evidence such as sales record of the art submitted by the museums and Nazi-looted art possessors when dismissing the cases. But what if the evidence is falsified documents no matter how it looks legal on its face?

From the confiscation process within the Reich evolved a complex system of mutual consultation between officials, a system that also incorporated private institutions such as banks and insurance companies within the network.³⁸⁴ The system developed for the phase of emigration was thereby adapted for the confiscation of the property of German Jews deportees.³⁸⁵ Its goal was to achieve the most complete exploitation of Jewish property by enforcing “legal confiscation” under the Eleventh Decree, itself an extension of previous denaturalization and confiscation policies.³⁸⁶ The very scale of the measures taken to seize and distribute Jewish property demonstrates both widespread knowledge of the deportations and the crucial “legal” aspect of the Final Solution.³⁸⁷

³⁸⁴ See Dean *supra* note 101

³⁸⁵ *Id.*

³⁸⁶ *Id.*

³⁸⁷ *Id.*

We cannot expect the judges to understand all aspects of the complicated history behind Nazi-looted art. Even the expert historians in the fields require an extensive period of time to complete any successful provenance research. However, the judges in this country need to understand why they should welcome historians as expert witnesses in Nazi-looted art cases; how the history should never be overlooked in these cases, and how the historians sometimes are the only ones best able to accurately analyze documentation from the relevant period of time in the context of the undocumented contemporary events and motivations of the players. What at first does not seem to comport with common sense may do so once one is fully informed.