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COVER: PABLO PICASSO (Spanish, 1881-1973). *The Scallop Shell*: “*Notre Avenir est dans l’air*,” spring 1912. Enamel and oil on canvas. Leonard A. Lauder Cubist Collection. Ph. MMA. © 2015 Estate of Pablo Picasso/ARS NY.

RESTITUTION ROULETTE: A COMPARISON OF U.S. AND EUROPEAN APPROACHES TO NAZI-ERA ART LOOTING CLAIMS

THOMAS R. KLINE*

In the United States, the film *Woman in Gold* and the discovery of the Gurlitt trove of well over a thousand works of art in Munich captured the imagination of the public as nothing has done in recent memory concerning restitution of Nazi-era looted art. Even well-educated Americans had been unacquainted with the full scope of Nazi art spoliation and had no basis for comprehending how theft on such a grand scale could have occurred, or how such a large cache of possibly looted artwork could still exist today. Nor could many Americans understand why, when found, the art would not immediately be restituted to victims of the Nazis from whom it was presumably stolen, thus raising questions about the fairness, efficiency and consistency of the resolution process. The public's desire to understand the complexities of Nazi art looting and post-War restitution has never been greater and this curiosity has brought with it increased scrutiny to current restitution efforts in Europe and the United States.

“With no end in sight to Nazi-era art looting claims, these problems cry out for attention and trans-national as well as national solutions.”

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Restitution claims have, if anything, grown in complexity in recent years and have become more difficult to resolve. Approaches on both sides of the Atlantic have led to uncertainty and unpredictable outcomes. Because the circumstances surrounding restitution and the governing law are so different in the United States and in Europe, however, any discussion of these issues needs to start with a comparison between them regarding Nazi-era art restitution.¹ Given the limitations of space and in the interest of clarity, the discussion will necessarily entail broad generalizations and must be, to some degree, superficial.

Significant factual and legal differences between Europe and the United States affect the handling of restitution claims, such as the absence of good faith purchaser rules in the United States and more stringent statutes of limitations in Europe. At the same time, national organizations in Europe have been more active in intervening in these cases and in developing special rules, particularly with regard to art held by government entities. American museum associations, which play some of the roles cultural ministries do in Europe, have, in my opinion, all but abandoned the field of Nazi-looted art claims. In the end, claimants, on the one hand, and museums and collectors, on the other, suffer from a lack of uniformity or consensus on standards for what facts provide the basis for a strong claim or defense,

¹ In this article, I am not giving legal advice, merely providing a general overview of issues. I present here only my own views; I do not speak for any clients or organizations.

creating legal uncertainty and unpredictable outcomes. Museums, collectors and claimants also suffer from a shortage of resources for conducting the provenance research that is at the heart of addressing these claims. With no end in sight to Nazi-era art looting claims, these problems cry out for attention and trans-national as well as national solutions.

FACTUAL UNDERPINNINGS

Among the most significant factual differences between the U.S. and Europe are that European museums are, for the most part, government institutions; whereas in the U.S., museums are generally privately owned and operated. In fact, the U.S. federal government owns only the Smithsonian Institution and the National Gallery, although many U.S. museums are owned by state and local governments. The U.S. federal government has comparatively little authority or control over private, state and locally owned cultural institutions. European governments, on the other hand, have both greater authority and, generally, special cabinet offices (Ministries of Culture) dedicated to overseeing cultural institutions.

The 1998 Washington Conference on Holocaust-Era Assets and the resulting Washington Principles challenged signatory governments and museums in their countries to reexamine their collections for Nazi-looted art that was not restituted in the War's aftermath.² In response, European and American museums renewed their immediate post-War efforts to deal responsibly with art that may have been looted. European governments faced the problem of art returned to them by the Western Allies — often by “the Monuments Men” — that was not subsequently restituted to the original owners but was simply integrated into the national museum structure.

In Europe, addressing this problem typically required the passage of special legislation and the creation of administrative bodies to deal with

² U.S. Dept. of State Bureau of European and Eurasian Affairs, “Washington Conference Principles on Nazi-Confiscated Art” (1998) <http://www.state.gov/p/eur/rt/hlcst/122038.htm> (accessed 7 March 2015).

potential claims for hundreds or even thousands of unrestituted pieces. For example, the Ekkart Committee in the Netherlands determined that the post-War Dutch restitution standards and procedures had left many artworks returned to The Netherlands in government hands that could possibly still be restituted if surviving claimants could be identified.³ In response, the Dutch Government encouraged art restitution claimants to come forward and also set up the Advisory Committee on the Assessment of Restitution Applications for Items of Cultural Value and the Second World War (generally known as the “Restitutions Committee”) to evaluate such claims and to advise the Ministry for Education, Culture and Science on how to decide them.

“Significant factual and legal differences between Europe and the United States affect the handling of restitution claims, such as the absence of good faith purchaser rules in the United States and more stringent statutes of limitations in Europe.”

Other European countries have established special legal standards and procedures for handling claims of Nazi-era art looting; created commissions to hear such claims outside of the normal legal system; and provided museums with assistance in conducting provenance research.⁴ France, for example, established the “Commission for the Compensation of Victims of Spoliation resulting from the anti-Semitic legislation in force during the Occupation,” which has heard 877 disputes involving Nazi-era artworks (although only two disputes resulted in physical restitution of the art).⁵ Germany created the Limbach Advisory Commission (“*Beratenden Kommission*”) to review

³ The Ekkart Committee, “Origins Unknown Advisory Committee Final Recommendations” (2004) <http://www.herkomstgezocht.nl/eng/rapportage/content.html> (accessed 8 March 2015).

⁴ See Evelien Campfens, “Impression of the Symposium ‘Fair and Just Solutions’” (Dec. 3, 2012) http://www.restitutiecommissie.nl/en/impression_of_the_symposium_fair_and_just_solutions.html (accessed 14 November 2014).

⁵ *Id.*

and make recommendations in cases involving museums, libraries, archives and other public institutions, provided both parties to a dispute agree to the review.⁶ Austria created a Provenance Research Commission and also changed the applicable law to facilitate return of art looted during the Nazi era.⁷

“We have seen no such developments in the U.S. In fact, at a recent conference in the Hague ..., [the] then U.S. Special Envoy for Holocaust Issues ... made clear that the State Department would not be creating any kind of U.S. Commission to deal with Nazi-era art looting claims.”

We have seen no such developments in the U.S. In fact, at a recent conference in The Hague hosted by the Dutch Ministry of Education, Culture and Science, then-U.S. Special Envoy for Holocaust Issues, Ambassador Douglas Davidson, made clear that the State Department would not be creating any kind of U.S. Commission to deal with Nazi-era art looting claims.⁸ The decision may flow naturally from the fact that the U.S. did not suffer Nazi occupation and art looting, and has no museum collections of looted art returned to the government after the end of the War. Based on official government action, in fact, we have only stray pieces from Europe, such as the remainder of 8,000 artworks

⁶ Advisory Commission, *Lost Art*, <http://www.lostart.de/Webs/EN/Kommission/Index.html> (accessed 8 March 2015). Several federal German agencies and offices, including the Prussian Cultural Heritage Foundation, the Cultural Foundation of the States, the Office for Provenance Research, the Minister of State in the Federal Chancellery and the Representative for Cultural and Media Affairs, have combined efforts to support and conduct provenance research of art with a suspect Nazi era history. See *Provenance Research in Germany: Recent Results and Future Outlook*, Kulturpolitische Themen, <http://www.kulturstiftung.de/aufgaben/kulturpolitische-themen/ns-verfolgungsbedingt-entzogenes-kulturgut/provenance-research-in-germany-recent-results-and-future-outlook/> (accessed 8 March 2015).

⁷ Commission for Provenance Research, <http://www.provenienzforschung.gv.at/index.aspx?ID=1&LID=2> (accessed 8 March 2015).

⁸ Catherine Hickley, “Nazi-Loot Panel Hopes Fade in U.S., Forcing Court Action,” *Bloomberg News* (Nov. 28, 2012), <http://www.bloomberg.com/news/2012-11-29/nazi-loot-panel-hopes-fade-in-u-s-forcing-court-action.html> (accessed 14 November 2014).

considered Nazi propaganda seized by the U.S. Army at the end of the War and constituted as the Defense Department’s War Art Collection (much of it since returned); as well as a manuscript from 1236 A.D. on vellum, a document from East Prussia whose ownership is disputed between Germany and Poland, with no end in sight to Library of Congress custody.⁹ Because of the absence of a national collection built on Nazi loot, no thoroughgoing re-structuring of the legal system was thought necessary. Nonetheless, through purchases (and in the case of museums, donations) and lack of diligence concerning provenance, American museums and collectors received and possess many works of art that may have changed hands in Europe during the Nazi era.

To address this problem, however, the U.S. has no Ministry of Culture, as do most European countries, and thus, no central government authority for funding, administration, policy-making or oversight of cultural institutions. Most financial support for privately owned museums comes from private donors, including foundations, while state and local governments provide financial support for the museums they own. Each museum sets its own policies and practices guided by the ethical standards set by two major museum associations: the American Alliance of Museums (AAM) and the Association of Art Museum Directors (AAMD). It fell to these associations to encourage U.S. museums to comply voluntarily with the Washington Principles.

In this regard, around 1998, consistent with the Washington Principles’ call for museums “expeditiously to achieve a just and fair solution, recognizing this may vary according to facts and circumstances surrounding a specific case,”¹⁰ AAM and AAMD established museum guidelines setting out

⁹ See Interagency Working Group, *Records of the Office of the Assistant Legal Advisor for Educational, Cultural, and Public Affairs 1945-1997* (Record Group 59), <http://www.archives.gov/iwg/declassified-records/rg-59-state-department/rg-059-general-records-2.htm> (accessed 14 November 2014).

¹⁰ U.S. Dept. of State Bureau of European and Eurasian Affairs, “Washington Conference Principles on Nazi-Confiscated Art” (1998) <http://www.state.gov/p/eur/rt/hlcst/122038.htm> (accessed 7 March 2015).

best practices for documenting and publicizing objects that may have been the subject of Nazi confiscation and for responding to claims.¹¹ At the same time, the AAM established an Internet portal that families of theft victims and their researchers could use to locate artworks that may have changed hands in Europe during the Nazi era.¹² It is generally understood and accepted that the guidelines do not create legal obligations or establish mandatory rules for museums to follow, but rather are intended to “facilitate the ability of museums to act ethically and legally as stewards” through “serious efforts” on a “case by case basis.”¹³ The Washington Principles, which provide the background for the guidelines, do, however, at least in the view of one federal Court of Appeals, embody the policy of the U.S. government with regard to restitution of art potentially looted by the Nazis.¹⁴ Nonetheless, the extent to which AAM and AAMD are continuing to encourage American museums to abide by the guidelines and to provide them with needed support, and to provide the public with transparent accounting for museum practices in this regard has become a controversial subject that will be discussed below.

VASTLY DIFFERENT LEGAL LANDSCAPES

There are also significant legal differences between the United States and continental Europe that impact restitution, bearing in mind that we are

¹¹ American Alliance of Museums, Standards Regarding the Unlawful Appropriation of Objects During the Nazi Era, <http://www.aam-us.org/resources/ethics-standards-and-best-practices/collections-stewardship/objects-during-the-nazi-era> (accessed 14 November 2014); Association of Art Museum Directors, Report of the AAMD Task Force on the Spoliation of Art during the Nazi/World War II Era (1933-1945) (June 4, 1998) <https://aamd.org/standards-and-practices> (accessed 7 March 2015).

¹² See American Alliance of Museums, The Nazi Era Provenance Internet Portal Project, <http://www.nepip.org/> (accessed 8 March 2015).

¹³ *Toledo Museum of Art v. Ullin*, 477 F.Supp.2d 802, 808 (N.D. Ohio 2006) (discussing the non-binding nature of the guidelines and holding that use of the Internet portal does not constitute a waiver of any rights to any Nazi-era paintings museum may own).

¹⁴ *Von Saher v. Norton Simon Museum of Art at Pasadena*, 754 F.3d 712, 720-721 (9th Cir. 2014), cert. denied, 135 S.Ct. 1158 (Jan. 20, 2015).

again speaking in broad generalities. In the United States, property law is a local — not federal — matter and most cases are resolved on the basis of state law,¹⁵ whereas claims in European countries are generally governed by national law. Thus, restitution claims in the U.S. are decided under state law that varies, sometimes widely, from jurisdiction to jurisdiction; while in Europe there is more uniformity because each country’s national law applies.

One very significant difference between American and European law is the availability of a good faith purchaser defense in several European countries, which can create title in someone who purchases an item for value without notice of the true owner’s claim to the property. In some cases, the good faith purchaser’s title even becomes incontestable after a period of years.¹⁶ The dominant rule in U.S. restitution cases, on the other hand, is that a thief does not acquire and cannot pass good title to stolen property.¹⁷ Nor can one who obtains artwork from a thief — even if acquired in utmost good faith — receive title to the object or pass good title to a subsequent purchaser.¹⁸ Hence, a good faith purchaser is protected from claims brought by original owners — to some extent — under European law, but is vulnerable under U.S. law.

Litigants have made the argument that a good faith purchase in Europe should be respected in

¹⁵ *Von Saher v. Norton Simon Museum of Art at Pasadena*, 592 F.3d 954, 969 (9th Cir. 2010) (explaining that state law applied to the ownership dispute between private parties regardless of non-binding U.S. federal policy concerning Nazi-era art and restitution).

¹⁶ See Deborah A. DeMott, “Artful Good Faith: An Essay on Law, Custom, and Intermediaries in Art Markets,” in: *Duke Law Journal* (2012) pp. 607-643, here 632 (noting that under French law, a good faith purchaser acquires title after five years and under Swiss law, a good faith purchaser also acquires title after five years).

¹⁷ *Bakalar v. Vavra*, 619 F.3d 136, 140 (2d Cir. 2010); *Menzel v. List*, 267 N.Y.S.2d 804, 819 (Sup. Ct. 1966), modified on other grounds, 279 N.Y.S.2d 608 (1967), mod. rev’d, 298 N.Y.S.2d 979 (1969); see also Robin Morris Collin, “The Law and Stolen Art, Artifacts, and Antiquities,” in: *Harvard Law Journal* 36 (1993) pp. 17- 44, here 22 (“Common law jurisdictions [like the United States] ... follow the principle *nemo dat quod non habet*. Thus, no one who traces title through a thief may defeat the ownership claims of the rightful owner in an action for replevin.”)

¹⁸ See *Bakalar*, 619 F.3d at 140 (“[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 completely unaware that she was buying stolen goods.”).

the U.S. under choice of law principles, but that defense has mostly failed. In *Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg and Feldman Fine Arts, Inc.*, the U.S. Court of Appeals for the Seventh Circuit upheld the trial court's decision to apply Indiana law, as opposed to Swiss law, in a suit to recover mosaics stolen from a Greek-Orthodox Church in the Turkish-occupied area of Cyprus.¹⁹ The court noted that although Switzerland was the place where the conversion of the mosaics took place because the buyer acquired them there, Switzerland's contacts with the case were too attenuated to justify the application of Swiss law.²⁰ Since the defendants were Indiana residents, the purchase money came from Indiana bank accounts, and the mosaics were promptly shipped to Indianapolis, Indiana law applied and the defendants could not rely on the Swiss good faith purchaser rule to provide title. Relying on *Cyprus v. Goldberg*, U.S. courts have mostly refused to apply the European good faith purchaser rule in analyzing Nazi-era art looting claims primarily because an analysis of competing interests generally points to the forum as the jurisdiction with the greater interest in the outcome of the case as compared to the jurisdiction where the sale took place.²¹

STATUTES OF LIMITATIONS

Although statute of limitations periods, which bar plaintiffs from bringing untimely claims, are much shorter in the U.S. (three to six years) as compared to the longer European limitations periods, several

limited exceptions can allow claims to remain alive today. For example, New York applies a "demand and refusal rule," under which the statute of limitations does not begin to run against a good faith possessor until the true owner has demanded her property and the wrongful possessor refuses to return it.²² Other states, like California, have variations of "the discovery rule," which delays commencement of the limitations period until the owner discovers or should have discovered that her property was stolen.²³

In the U.S., the doctrine of laches may also bar a claim on timeliness grounds. If the court believes the claimant delayed unreasonably in making the claim and that delay caused prejudice to the current possessor, the court can apply this equitable defense to deny an otherwise viable ownership claim.²⁴ Passage of time alone, even a long period, is insufficient to support a laches defense; the party raising the defense must prove it has been prejudiced by the delay. As one court articulated, "proving prejudice requires more than the frenzied brandishing of a cardboard sword; it requires at least a hint of what witnesses or evidence a timely investigation might have yielded."²⁵

In a case involving Edgar Degas' *Landscape with Smokestacks* (FIG. 1), a court refused to apply laches to dismiss a case without a full exploration of the facts at a trial on the merits.²⁶ It was the first case in the United States in decades in which the court said that a claim based on Nazi-era art looting could still be alive in the mid-1990s, in spite of the passage of roughly 50 years since the end of the War. The parties settled the dispute after the court ruled that the case could go forward to

¹⁹ 917 F.2d 278, 286 (7th Cir. 1990).

²⁰ *Id.* at 287.

²¹ See *Schoeps v. Museum of Modern Art*, 594 F. Supp. 2d 461, 466 (S.D.N.Y. 2009) (Even though the painting at issue was purchased in Switzerland, New York law governed the museum's good faith purchaser defense because, among other reasons, the disputed painting was immediately transported to New York after the sale, had been in New York for over 70 years, and had become the property of a major New York cultural institution that was also a party to the action.). Likewise, in *Bakalar v. Vavra*, 619 F.3d 136, 142-146 (2d Cir. 2010), the Court of Appeals conducted an interest analysis under New York choice of law rules and — reversing the trial court — held that New York law governed a sale that took place in Switzerland primarily because of New York's greater interest "in preventing the state from becoming a marketplace for stolen goods." *Id.* at 146 (citation omitted.).

²² *Solomon R. Guggenheim Found. v. Lubell*, 569 N.E.2d 426, 77 N.Y.2d 311, 318 (N.Y. 1991).

²³ *Von Saher v. Norton Simon Museum of Art at Pasadena*, 592 F.3d 954, 969 (9th Cir. 2010).

²⁴ *Vineberg v. Bissonnette*, 529 F. Supp. 2d 300, 309 (D.R.I. 2007), *aff'd*, 548 F.3d 50 (1st Cir. 2008).

²⁵ *Vineberg v. Bissonnette*, 548 F.3d 50, 58 (1st Cir. 2008).

²⁶ See Barbara J. Tyler, "The Stolen Museum: Have United States Art Museums Become Inadvertent Fences for Stolen Art Works Looted by the Nazis in World War II?," *Rutgers Law Journal* 30 (1999) pp. 441-471, here 454.

trial.²⁷ The case stands as a reminder that laches is not necessarily a strong defense in seemingly old restitution cases, since the laches defense requires close scrutiny of the facts, and cases are rarely dismissed on this grounds before trial; at trial, the current possessor carries the burden of proof to establish that he was harmed by unreasonable delay on the part of the claimant.



FIGURE 1. EDGAR DEGAS. *Landscape with Smokestacks*, 1890. Monotype pastel. Art Institute of Chicago, purchased from the collection of Friedrich and Louise Gutmann, and gift of Daniel C. Searle.

Another important difference between U.S. and European legal systems is the ease or difficulty required for a claimant to hire an attorney to take on a Nazi-era art restitution case. In some European countries, the losing party pays the attorneys’ fees of the prevailing party and attorneys representing the claimant are forbidden from earning a fee that is contingent on the outcome of the case. These rules can make it harder for a claimant who is not wealthy to sue a museum or collector because of the actual and potential financial costs. (Of course, in a loser-pays jurisdiction, a current possessor may be encouraged to settle a potentially meritorious case promptly, to avoid the risk of losing the object *and* paying the claimant’s attorney’s fees.)

In the U.S., on the other hand, a claimant can bring a case if he or she can find a lawyer willing to take a risk. Additionally, as long as the case is

²⁷ See CNN, “Case over painting stolen by Nazis settled” (August 14, 1998), www.cnn.com/US/9808/14/looted.art/ (accessed 14 November 2014). See also Sharon Flescher, “Amicable Settlement in Dispute Over Degas Monotype Pastel,” *IFAR Journal*, Vol. 1, no. 3, Autumn 1998, p. 7.

not frivolous, the claimant is generally not at risk of having to pay the possessor’s fees, even if the claim fails. Further, attorneys may take a case on a contingency fee basis with hopes of a potentially large reward for success. In sum, obtaining representation for a Nazi-era art restitution claimant would appear to be substantially easier in the U.S. than in Europe.

For these reasons, particularly differences in statutes of limitations, restitution litigation based on claims of Nazi-era looting is a greater threat in the U.S. Some observers believe that a Nazi-era art looting claim will not settle unless the claimant has a credible threat of litigation. To foster fairness, some European countries — but not the U.S. — have created special commissions to address claims. These commissions generally have jurisdiction only over government-owned property, not artwork found in private hands.

LEGAL DEVELOPMENTS

Recent developments in U.S. restitution cases include:

- the rejection of the good faith purchaser defense based on choice of law principles,
- the limited availability of the “forced sale” argument,
- the growth of time-based limitations defenses, both statute of limitations and laches; and
- the use of statutory relief, like the National Stolen Property Act, which allows the federal government to bring a forfeiture action.

The good faith purchaser defense has been greatly weakened in the United States by the case of *Bakalar v. Vavra*, in which the court rejected this defense with regard to an Egon Schiele drawing (**FIG. 2**) that had originally changed hands in Switzerland.²⁸ The court felt that New York



FIGURE 2. EGON SCHIELE. *Seated Woman with Bent Left Leg (Torso)*, 1917. Gouache and black crayon. The subject of a long and unsuccessful ownership claim against David Bakalar.

²⁸ 619 F.3d 136, 141 (2d Cir. 2010).

State had a greater interest than Switzerland in having its laws applied, particularly New York's rule that a thief cannot pass title to a good faith purchaser.²⁹ As a court in a different case eloquently stated, the American policy behind the rule is that it "gives greater protection to an object's true owner than to its good-faith purchaser, because doing otherwise would encourage illicit trafficking in stolen art."³⁰

The basic U.S. rule in replevin or recovery cases is that the claimant's proof of ownership and theft establishes wrongful possession by the holder. There have been very few U.S. cases in which the claimant sought to establish theft through a so-called "forced sale" compelled by the Nazis. One, however, was *Vineberg v. Bissonnette*, in which the court ruled that the Nazis had "stolen" the painting *Girl from the Sabine Mountains* because it was part of the gallery stock of a Jewish dealer in Germany — Max Stern — who had been ordered to sell off his inventory.³¹ In another "forced sale" case, a court ruled that a jury *could* possibly find — based on the meager evidence presented and informed by the historical realities of Nazi-era Germany — that a transfer of two Picassos was made under duress and therefore void.³² The court allowed the case to go forward, reasoning that a jury might find that the owner of the paintings gifted them to his wife, who was considered "Aryan" under German law, because of threats and economic pressure he allegedly faced from the Nazi government.³³ The case settled, however, before trial. Although "forced sale" claims may possibly work in some U.S. courts, it is not a commonly-successful litigation avenue.

²⁹ *Id.* at 144-145 ("The tenuous interest of Switzerland ... must yield to the significantly greater interest of New York ... in preventing the state from becoming a marketplace for stolen goods.")

³⁰ *Sotheby's Inc. v. Shene*, No. 04 Civ. 10067(TPG), 2009 WL 762697 (S.D.N.Y. March 23, 2009).

³¹ 529 F. Supp. 2d 300, 307-08 (D.R.I. 2009), *aff'd*, 548 F.3d 50 (1st Cir. 2008).

³² *Schoeps v. Museum of Modern Art*, 594 F. Supp. 2d 461, 466 (S.D.N.Y. 2009).

³³ *Id.*

Even with mitigating doctrines under U.S. law, issues related to the passage of time, statute of limitations and the related doctrine of laches (delay by claimant causing prejudice to possessor) are the predominant issues seen in Nazi-era art restitution claims. Passage of time and the resulting prejudice (i.e., laches) was the basis for the ultimate decision against the claimant in *Bakalar*³⁴ and also in a lawsuit brought by the Museum of Fine Arts, Boston, against a claimant concerning Kokoschka's painting *Two Nudes*.³⁵ In this case, like several others we have seen in the United States, the museum believed the claim of Nazi-era looting was weak, but the court, while appearing to agree with the museum on this point, nonetheless ruled in the museum's favor *only* on the basis of statute of limitations.

Another time-related issue is the doctrine of adverse or prescriptive possession. Under this doctrine, after a period of years, a person who has wrongfully possessed property openly and notoriously may acquire good title to the property. In the U.S., the doctrine has been traditionally limited to land ownership disputes, but some courts have been willing to apply it to art ownership disputes.³⁶ In a case from New Orleans, the court found that the possessor of a 1910 painting by Oskar Kokoschka acquired title by acquisitive prescription under Louisiana state law by virtue of openly and continuously possessing the painting for well over ten years.³⁷ The court did not find it controlling that the original owner allegedly sold the painting under duress during the Nazi era.³⁸

³⁴ *Bakalar v. Vavra*, 819 F. Supp. 2d 293, 305 (S.D.N.Y. 2011).

³⁵ *Museum of Fine Arts, Boston v. Seger-Thomschitz*, 623 F.3d 1, 8 (1st Cir. 2010).

³⁶ *Dunbar v. Seger-Thomschitz*, 638 F. Supp. 2d 659, 663 (E.D. La. 2009), *aff'd*, 615 F.3d 574 (5th Cir. 2010) (applying Louisiana law); *but see O'Keeffe v. Snyder*, 83 N.J. 478, 497, 416 A.2d 862, 872 (1980) (holding that the statutes of limitation and the application of the discovery rule were more appropriate in determining ownership, rather than the doctrine of adverse possession).

³⁷ *Dunbar*, 638 F. Supp. 2d at 662-663. Louisiana state law is based on the Napoleonic Code, not Anglo-American common law, making it unique in this regard.

³⁸ *Id.*

One U.S. federal law that particularly deserves mention with regard to recovering Nazi-era looted artwork is the National Stolen Property Act, under which the federal government can seize and forfeit stolen artwork worth more than \$5,000 that moves across state lines for purpose of sale.³⁹ Even possession can be challenged. The United States Department of Homeland Security used this law to seize and return to Poland two hunting scenes by Julian Fałat.⁴⁰ I briefly assisted the Polish Ministry of Culture and Heritage in trying to settle these cases. In both, the possessors refused to enter into a reasonable compromise settlement agreement; in one case even refusing to speak with us. After a long period of frustration, the Ministry approached the U.S. Department of Homeland Security, which seized both paintings and returned them to Poland, leaving the possessors with nothing.

SOFT LAW

At a Prague conference in 2009, 46 countries reaffirmed the Washington Principles in adopting the Terezin Declaration, which renewed the call on governments and museums to “facilitate just and fair solutions with regard to Nazi confiscated and looted art.”⁴¹ We sometimes refer to the Washington Principles and the Terezin Declaration as soft law because the signatory countries agreed not to enact the provisions into positive law, but rather intended that these statements would encourage museums and others to apply the doctrines, particularly to publicize items that could have changed hands during the Nazi era and to pursue “just and fair” solutions to claims based on Nazi-era looting. In the U.S., these principles are honored in negotiations according to the good will of the participants, but doing so is viewed as voluntary and the prin-

ciples generally have little or no role in the decision of court cases. We like to think that museums, and perhaps even private owners, will only assert defenses based on the passage of time when they believe the claim of Nazi-era looting is weak and will not do so when they believe the claim is well founded, but this is not always the case. At least one prominent museum attorney, general counsel to The J. Paul Getty Trust, argues that museums should utilize statutes of limitations and laches defenses because they are “designed to stabilize property rights and encourage resolution of claims when evidence and witnesses are more readily available.”⁴²

“Litigants have made the argument that a good faith purchase in Europe should be respected in the U.S. under choice of law principles, but that defense has mostly failed.”

UNCERTAINTY ABOUNDS

Here is my own, highly subjective status report on restitution matters in the United States. Although there have been complaints by claimants’ representatives,⁴³ I find it difficult to see any distinctive pattern in the decided cases; each case has different facts and there are variations in the controlling state law. Nonetheless, claimants’ representatives complain that the courts are favoring the holders, particularly because several cases have been decided against the claimants on the basis of timeliness: statute of limitations or laches. Museums see no such pattern. From my own experience, I see no pattern with regard to rulings on statutes of limitations or laches and can say that the courts considering *Girl from the Sabine Mountains* were open-minded in considering an unprecedented claim (unprecedented at least in the U.S.) of theft based on a forced sale.

³⁹ 18 U.S.C. § 2314-2315.

⁴⁰ *United States v. One Julian Falat Painting Entitled “Off to the Hunt” and One Julian Falat Painting Entitled “The Hunt,”* Civil Action No. 10 Civ 9291 filed Dec. 13, 2010; 18 U.S.C.A. § 2314 (2013); Jennifer Anglim Kreder, “Executive Weapons to Combat Infection of the Art Marker,” *Washington University Law Review* 88(2011) pp. 1353-1365, here 1356.

⁴¹ Terezin Declaration, June 30, 2009. <http://www.state.gov/p/eur/rls/or/126162.htm> (accessed 24 April 2015).

⁴² Stephen W. Clark, “Nazi Era Claims and Art Museums: The American Perspective,” *Collections: A Journal for Museum and Archives Professionals*, Vol. 10, no. 3, Summer 2014, pp. 349, 353.

⁴³ See, e.g., Jennifer Anglim Kreder, Essay, *Guarding the Historical Record from the Nazi-Era Art Litigation Tumbling Toward the Supreme Court*, 159 U. PA. L. REV. PENNUMBRA 253 (2011), <http://www.pennumbra.com/essays/04-2011/Kreder.pdf>.

The two American museum associations (AAM and AAMD) appear to have turned their attention to other issues and abandoned the field of Nazi-era art looting. Standards for museums have not been clarified or updated since 2001,⁴⁴ and financial resources for provenance research have not been provided to museums that need the assistance.⁴⁵ The Nazi-Era Provenance Internet Portal (www.nepip.org) created by the AAM has been allowed to become outdated.

“... it is not surprising that we see a wide variety of approaches and resolutions. ... The current situation can be called restitution roulette.”

As a result, although some of the largest, most prominent and wealthiest museums have been able to make a sincere effort, for example by digitizing records concerning their collections and posting them online,⁴⁶ the same cannot be said of the smaller and medium sized-museums. The art market follows a similar pattern. It was reported some time ago that only Sotheby's, Christie's and the Dorotheum in Vienna take issues of Nazi-era art looting with sufficient seriousness.⁴⁷ The same can

⁴⁴ In 2001, AAM revised its 1998 Nazi-Era Provenance guidelines (<http://www.aam-us.org/resources/ethics-standards-and-best-practices/collections-stewardship/objects-during-the-nazi-era>). Also in 2001, AAMD supplemented its guidelines, adding a one-sentence Addendum: “It should be the goal of member museums to make full disclosure of the results of their ongoing provenance research on those works of art in their collections created before 1946, transferred after 1932 and before 1946, and which were or could have been in continental Europe during that period, giving priority to European paintings and Judaica.” (<https://aamd.org/standards-and-practices>.) AAMD also issued a position paper in 2007. (https://aamd.org/sites/default/files/document/Nazi-looted%20art_clean_06_2007.pdf.) In spite of these efforts and AAMD's 2001 Addendum, neither AAM nor AAMD has provided for comprehensive accounting by museums or for systematic reporting to the public on museum compliance with guidelines, although the AAMD has recently made some efforts in this regard, including creating an object registry of resolved claims. (<https://aamd.org/object-registry/resolution-of-claims-for-nazi-era-cultural-assets/browse>.)

⁴⁵ AAM and AAMD also need to find ways to provide greater financial support for provenance research at small and medium sized museums. While some efforts are underway to train the next generation of provenance researchers, American museums need resources to hire researchers to study their collections, publicize the results and respond to claims.

⁴⁶ “The American Art Collaborative (AAC) is a consortium of 14 museums in the U.S. committed to establishing a critical mass of LOD [Linked Open Data] on the subject of American Art.”

⁴⁷ Yael I. Friedman, “The Road to Restitution,” *ArtInfo, Financial Times*, <http://www.blouinartinfo.com/news/story/31924/the-road-to-restitution> (accessed 24 April 2014).

still be said today. In 2014, a smaller auction house in the U.S. listed for sale papers and photographs of a Holocaust survivor, apparently having failed to check the material with the family. When challenged, the auction house withdrew the material from sale and the balance of the story remains as yet unfinished.⁴⁸

Private owners and claimants, as well, have not followed any particular pattern with regard to claims and settlements. Both are free to be as unreasonable as they want, at their own peril. The primary risk for each is, of course, loss of the object, perhaps coupled with negative publicity. Private negotiations and settlements are generally unpublished, unless the settlement is revealed through an auction sale or public restitution.

RESTITUTION ROULETTE

When we take into account the multitude of laws governing Nazi-era art restitution in the U.S. and the lack of any meaningful centralized guidance or leadership concerning claims, it is not surprising that we see a wide variety of approaches and resolutions. If we then include the variety of laws in European countries and the way they differ from those in the U.S., we move from a patchwork of approaches to a crazy quilt. The current situation can be called restitution roulette because the likely outcome of a claim depends on so many factors other than whether the object was looted by the Nazis. Perhaps in a decentralized democracy some variation in approaches would be expected, however, the current situation is daunting for claimants and possessors alike.

But my own view is that we in the United States would benefit from clearer and more uniform standards for Nazi-era art looting claims to help us approach negotiations and settlements in a well-informed way. We need better mechanisms and resources for collecting information on claims, so many of which never come to court. Is it too much to hope that AAM and AAMD might play a role in this?

⁴⁸ Jennifer Schuessler, “Survivor Who Hated the Spotlight,” *The New York Times* (Nov. 10, 2014) <http://www.nytimes.com/2014/11/11/arts/survivor-who-hated-the-spotlight.html> (accessed 7 March 2015).