

INTEGRATING CULTURAL PROPERTY LAW DOCTRINE
INTO THE NAZI-LOOTED ART RESTITUTION LEGAL
FRAMEWORK

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“The honor and rights of families, the lives and private property of citizens, as well as religious convictions and practices will be respected. Private property will not be confiscated.” Hague Convention (II) on the Laws and Customs of War on Land, Article 46, October 18, 1907.¹

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¹ Hague Convention (IV) on the Laws and Customs of War on Land art. 46, Oct. 18, 1907, 75 U.N.T.S 287.

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I. INTRODUCTION

The Second World War ended nearly eight decades ago, and yet, its many injustices continue to haunt descendants of Holocaust survivors and victims. As time marches forward, and information about this dark chapter of history becomes declassified, these descendants can uncover the fate of their families and their belongings.² As a result, many are more recently able to make claims for restitution and reparations. Nevertheless, some are still seeking answers as to the whereabouts of their family's most prized possessions.

Nazi-looted property restitution efforts, however, are plagued by “politically radioactive” litigation and problematic legal frameworks.³ This Note introduces the reader to the following: (i) the history of Nazi art looting; (ii) the legal measures that seek to address such a displacement of art; and (iii) the problems descendants of Holocaust survivors and victims face as they seek to recover their artworks and cultural property. The scope of this Note is limited to Dutch and U.S. histories, legal frameworks, solutions, and difficulties. Therefore, this Note serves as a comparative analysis of the two countries' laws. Such an analysis was prompted by the promulgation of a significant restitution policy in the Netherlands in June 2021. This Note concludes with a suggestion for the adoption of this key Dutch restitution reform into the United States legal framework for Nazi-looted art restitution.

II. HISTORICAL BACKGROUND

The Nazi regime pillaged and plundered those they conquered at an exceptional scale and with methodical ruthlessness. From the dawn

² Jennifer Anglim Kreder, *Analysis of the Holocaust Expropriated Art Recovery Act of 2016*, 20 CHAP. L. REV. 1 (2017).

³ STUART E. EIZENSTAT, *IMPERFECT JUSTICE: LOOTED ASSETS, SLAVE LABOR, AND THE UNFINISHED BUSINESS OF WORLD WAR II* 17 (2003).

of his reign on January 30, 1933, Hitler prioritized art⁴ and the seizure of cultural property, especially from the Jews.⁵ The Nazis succeeded in robbing Germany and its occupied territories of artistic wealth while simultaneously introducing Nazi ideology.⁶ This success had devastating consequences. The quantity of art theft by the Nazi regime and its allies during this period was enormous, surpassing the sum of all the Napoleonic Wars combined.⁷ It is estimated that around 20% of European art was pillaged, valued at a total of over \$2.5 billion, by 1945 (\$34 billion today).⁸

The Nazi regime favored art that aligned with the aesthetic and social ideals of Hitler's National Socialism.⁹ This compulsory style of art, collected by high-ranking Nazi officials, harked back to the art of ancient Greece and Rome.¹⁰ The Nazi agenda also directed the pillaging of modern art, but not for reasons of admiration.¹¹ Modern art was known as Degenerate Art, or *Entartete Kunst*, by the standards of the Nazi regime.¹² They used the phrase Degenerate Art, usually encompassing contemporary painting, because it did not support Hitler's aesthetic. This description delineated art, usually contemporary painting, that did not support Hitler's aesthetic. The Nazi regime drew a parallel between modernism and mental illness, driving the destruction or international sale of such art when discovered during Nazi confiscation.¹³ The sale of such art served to raise funding for the Nazi

4 MARY M. LANE, *HITLER'S LAST HOSTAGES: LOOTED ART AND THE SOUL OF THE THIRD REICH* 87 (2019).

5 MARTIN DEAN, *ROBBING THE JEWS: THE CONFISCATION OF JEWISH PROPERTY IN THE HOLOCAUST, 1933-1945* 258 (2008).

6 Kreder, *supra* note 2, at 3.

7 HECTOR FELICIANO, *THE LOST MUSEUM: THE NAZI CONSPIRACY TO STEAL THE WORLD'S GREATEST WORKS OF ART* 23 (Tim Bent & Hector Feliciano trans., 1997).

8 Mark I. Labaton, *Restoring Lost Legacies*, L.A. LAW. 34, 34-41 (2018).

9 Elzbieta Matynia, *Reviewed Work: Hitler and the Artists by Henry Grosshans*, 91 AM. J. SOCIO. 1281, 1281 (1986) (reviewing HENRY GROSSHANS, *HITLER AND THE ARTISTS* (1983)).

10 *Id.* at 1280-82.

11 Kelly Diane Walton, *Leave No Stone Unturned: The Search for Art Stolen by the Nazis and the Legal Rules Governing the Restitution of Stolen Art*, 9 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 549, 554 (1999).

12 *Id.*

13 *Degenerate Art: Online Exhibition, Jul 19 2017-Feb 29, 2020*, MUSEUM OF MOD. ART, <https://www.moma.org/calendar/exhibitions/3868> [<https://perma.cc/8EAD-VDVJ>] (last visited Feb. 21, 2023).

military.¹⁴ En masse, the goals of the Nazi regime endangered all forms and genres of art.

It is worth noting that not all Nazi-looted art was owned by Jewish families and collectors prior to the Holocaust. Nazis ravaged collections wherever art could be found.¹⁵ Yet, with the inclusion of art pillaging in Hitler's Final Solution, or *die Endlösung der Judenfrage*, the greatest injustice was inflicted upon Jews.¹⁶ This ideology aimed to "promote [and return to Germany] what in their view were examples of superior art and culture" and to exterminate the Jewish people by annihilating Jewish culture.¹⁷

Nazi art pillaging often took the form of forced sales, duress sales, or outright confiscation and expropriation. These methods helped to create a legal subterfuge, as sales included some semblance of paperwork, and confiscations were supported by various anti-Semitic laws.¹⁸ To art professionals outside of the Nazi regime, "the advent of Nazism and the bizarre goings-on of its art establishment were regarded at first as a passing phenomenon which would require some minor adjustments in international dealings."¹⁹ It is unclear to what degree the international art world was aware that much of the work they were buying at this time was Nazi-looted, yet few investigated the question as purchases proceeded.²⁰

A. *The Netherlands*

Hitler's invasion of the Netherlands began in May 1940.²¹ The out-of-date and ill-prepared Dutch Army made desperate efforts to hold off the German forces, but their attempts were in vain.²² The

¹⁴ Van L. Hayhow, *Is There an Effective US Legal Remedy for Original Owners of Art Looted During the Nazi Era in Europe?* (Nov. 2015) (M.A. thesis, Harvard Extension School) (on file with Harvard DASH).

¹⁵ See generally ROBERT M. EDSEL, *SAVING ITALY: THE RACE TO RESCUE A NATION'S TREASURES FROM THE NAZIS* (2013) (demonstrates the extent of Nazi art looting from Gentiles).

¹⁶ Sue Choi, *The Legal Landscape of the International Art Market After the Republic of Austria v. Altmann*, 26 NW. J. INT'L L. & BUS. 168 (2005).

¹⁷ *Id.*

¹⁸ See LYNN H. NICHOLAS, *THE RAPE OF EUROPA* 12-15 (1994).

¹⁹ *Id.* at 27.

²⁰ Hayhow, *supra* note 14, at 32.

²¹ *World War II: Summary, Combatants & Facts*, HISTORY.COM (Oct. 29, 2009), <https://www.history.com/topics/world-war-ii/world-war-ii-history> [<https://perma.cc/N4NR-VUU5>].

²² NICHOLAS, *supra* note 18, at 83.

Nazis took control of the Netherlands in just four days.²³ By the end of the month, Nazi leaders set up an office in the center of The Hague,²⁴ where lists of enemy property, including Jewish-owned art and cultural property, were made.²⁵

The persecution of the Jewish population of Holland took effect through a slow, but careful process of “registration, isolation and deportation.”²⁶ Between 1940 and 1943 the administrative leader, or *Reichskommissar*, of the Netherlands issued thirteen decrees designed to deprive Dutch Jews of their assets by eliminating their ownership rights.²⁷ Almost immediately, Dutch Jews sold their possessions as a way to raise funds for the means of escape and immigration or protection.²⁸ The attack on Dutch Jewish art collections began in earnest in 1941.²⁹ In March, Jewish art dealers were denied control over their businesses, and their remaining assets were liquidated.³⁰ The following year, all Dutch Jews were made to wear a yellow star to denote Jewishness.³¹ Shortly thereafter, the Regime began the deportation of Jewish citizens to concentration camps.³² Jewish homes were then ransacked by anyone from government leaders to their neighbors.³³

The riches of the Dutch art pillage were bountiful for the Germans. As discussed above, the Dutch Old Masters and Romantic landscapes were sought after by German officials and consumers, as the styles conformed with the national aesthetic.³⁴ Prospective buyers took out newspaper ads seeking these stolen works of art.³⁵ High-ranking Nazi officials and famed art collectors, such as Hermann Goering and Hans Posse, descended on the plentiful art trade and amassed huge collections of stolen Dutch artworks.³⁶ As Jews were cast to a cruel

²³ *Id.*

²⁴ *Id.* at 98.

²⁵ *Id.*

²⁶ Evelien Campfens, *Bridging the Gap Between Ethics and Law: The Dutch Framework for Nazi-Looted Art*, 25 *ART ANTIQUITY & L.* 1, § 1.1 (2020).

²⁷ Wouter Veraart, *Two Rounds of Postwar Restitution and Dignity Restoration in the Netherlands and France*, 41 *LAW & SOC. INQUIRY* 956, 959 (2016).

²⁸ Chana Arnon, *Jewish Resistance in Holland: Group Westerweel and Hachshara*, 49 *JUDAISM* 449, 455 (2000).

²⁹ Campfens, *supra* note 26, at 3.

³⁰ *Id.*

³¹ NICHOLAS, *supra* note 18, at 101.

³² Campfens, *supra* note 26, at 3.

³³ *Id.*

³⁴ See Matynia, *supra* note 9, at 1280-82; Walton, *supra* note 11, at 549-624.

³⁵ NICHOLAS, *supra* note 18, at 103.

³⁶ *Id.* at 104.

fate, a buying frenzy ensued. At one point, an estimated 4.5 million Reichsmarks³⁷ a day flooded Dutch banks.³⁸

B. *The United States*

Although in a different manner, the United States was also complicit in this international European art scheme. Nazi art abductions caused what legal scholar Van L. Hayhow describes as a “bizarre” phenomenon in the U.S. art market.³⁹ The Nazis looted an estimated 650,000 artworks and auctioned off a great number of the pieces, which saturated the global art market.⁴⁰ Throughout the period of looting, the stolen art Hitler considered to be degenerate was sold, especially to U.S. collectors, to serve the means of fundraising to support the Nazi military.⁴¹ Priceless pieces of art were being sold for fractions of their true market value.⁴² Experts estimate that 100,000 or more pieces of Nazi-looted art came to the United States through these liquidations, with an estimated worth of over \$7 billion today.⁴³ Since approximately 1937, Nazi-looted art has been hanging on the walls of U.S. homes, galleries, and museums.⁴⁴ Today, modern good-faith purchasers are buying and profiting off the fruit of a mass systematic disenfranchisement by the Nazi Regime.

III. DUTCH LEGAL FRAMEWORK FOR NAZI-LOOTED ART RESTITUTION

The devastation of the Second World War had a pronounced presence in Holland, as reflected in the population of Dutch Jews. Over three-quarters of Dutch Jews were murdered in the Holocaust.⁴⁵ Dutch government officials claimed that the Germans, not the Dutch, were responsible for the death, destruction, and dispossession of the Dutch Jewish Community.⁴⁶ It is apparent, however, that after the War, the central objective of the burgeoning Dutch governments was to retain

³⁷ The Reichsmark was the German currency from 1925 to 1948. *Reichsmark*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/reichsmark> [<https://perma.cc/FES9-7QQT>] (last visited Jan. 13, 2022).

³⁸ NICHOLAS, *supra* note 18, at 103.

³⁹ Hayhow, *supra* note 14, at 23.

⁴⁰ Labaton, *supra* note 8, at 36.

⁴¹ Hayhow, *supra* note 14, at 23.

⁴² *Id.* at 18-19.

⁴³ Labaton, *supra* note 8, at 36.

⁴⁴ NICHOLAS, *supra* note 18, at 16.

⁴⁵ Veraart, *supra* note 27.

⁴⁶ *Id.*

as much of the “desirable” stolen art in their national collection possible.⁴⁷

A. Restitution Policy in the Immediate Postwar Years

The exiled Dutch Government had begun preparations for a legal and economic restoration of the Netherlands even before the fall of the Third Reich.⁴⁸ From London, on September 17, 1944, the Government promulgated the Dutch Decree on the Restoration of Legal Relations (“Decree E100”).⁴⁹ The decree established the Council for Restoration of Rights (“the Council”) and possessed the exclusive authority to “declare null and void, modify, or revive ‘any legal relations that originated or were modified during enemy occupation of the [Netherlands].’”⁵⁰ The Dutch government set a July 1, 1951 deadline for claimants to file petitions for restitution to the Council.⁵¹ After this date, original owners would no longer be able to make demands for restitution of looted property.⁵² Decree E100 further permitted the Council to dispose of property of “unknown owners” should the owner not make themselves known prior to September 30, 1950.⁵³ These deadlines and bureaucratic red tape were unrealistic at best and an extension of the Nazi’s anti-Semitic agenda at worst.

At the end of 1945, the Netherlands Art Property Foundation and the Recovery Payments and Recuperations Good Office, or the *Stichting Nederlands Kunstbezit* (“SNK”), was established to reclaim Dutch art possessions in the Netherlands.⁵⁴ A great majority of the objects located by SNK were not returned to their prewar owners but became a part of the *Nederlands Kunstbesitz Collectie* (the “NK Collection”).⁵⁵ It is estimated that the NK Collection retained some 4,000

⁴⁷ Campfens, *supra* note 26.

⁴⁸ Veraart, *supra* note 27.

⁴⁹ *Id.*

⁵⁰ *Von Saher v. Norton Simon Museum of Art at Pasadena*, 897 F.3d 1141, 1142 (9th Cir. 2018).

⁵¹ *Id.* at 1145.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ STRIVING FOR JUSTICE, RAAD VOOR CULTUUR 10 (Dec. 2020), <https://www.raadvoorcultuur.nl/documenten/adviezen/2020/12/07/striving-for-justice> [<https://perma.cc/6AKF-KYUF>].

⁵⁵ Elisabeth Alexandrovski, *The Restitution of Nazi-Looted Art in the Netherlands and Germany—a Case Study of the Adelsberger Art Collection* 18 (July 1, 2019) (M.A. thesis, Universiteit van Amsterdam) (on file with Universiteit van Amsterdam Bibliotheek) (available at <https://perma.cc/8LMD-GL6A>).

Nazi-looted objects.⁵⁶ A majority of these looted objects remain with the NK Collection today.⁵⁷ For these reasons, the postwar restitution efforts have been described as “formalistic, bureaucratic[,] cold, [and] callous”⁵⁸

B. *Restitution Policy in the 1990s*

In the 1990s, issues around the restitution of property rights in Nazi-loot gained renewed global attention. As a result, the NK Collection was under increasing scrutiny.⁵⁹ In response to the public’s suspicions, the Dutch Restitutions Committee (“Restitutions Committee”) was established to advise on decisions concerning claims for Holocaust-era restitution.⁶⁰ The Committee gave claimants a forum in which they could assert and provide evidence supporting their claims. The founding decree of the Restitutions Committee criticized the narrow approach of postwar restitution, “. . . which was infused with egalitarianism such that every individual was treated the same regardless of the atrocities endured during World War II”⁶¹ At the time of its establishment, the Restitutions Committee was progressive and was meant to provide a more pro-claimant procedure than that which was historically established.⁶²

The Restitutions Committee continues to provide a forum for claimants today. As promulgated, the Committee has two central functions. The first is to issue advisory recommendations to the Minister of Education, Culture, and Science on applications for restitution.⁶³ The Committee’s second duty is to issue binding opinions on ownership disputes between claimants and current possessors.⁶⁴ Since its establishment, the Committee’s functions have been modified, but it continues to perform these basic functions.

In 2007, the Netherlands Restitutions Committee promulgated the Regulations for Opinion Procedure, which somewhat altered its

⁵⁶ Tabitha I. Oost, *From “Leader to Pariah”? On the Dutch Restitutions Committee and the Inclusion of the Public Interest in Assessing Nazi-spoliated Art Claims*, 28 INT’L J. CULTURAL PROP. 55, 59 (2021).

⁵⁷ *Id.*; Veraart, *supra* note 27, at 967-68.

⁵⁸ Alexandrovski, *supra* note 55.

⁵⁹ Oost, *supra* note 56, at 60.

⁶⁰ Campfens, *supra* note 26.

⁶¹ Oost, *supra* note 56, at 60.

⁶² *Id.* at 59.

⁶³ See *Besluit Adviescommissie Restitutieverzoeken cultuurogoderen en Tweede Wereldoorlog* [Decree Establishing the Restitutions Committee], St crt. 2001, 248.

⁶⁴ *Id.* art. 2.

second function of issuing opinions on ownership disputes between prewar owners and private individuals.⁶⁵ The newly introduced regulatory guidelines considered public interest an essential element of the Restitutions Committee's assessments on binding decisions.⁶⁶ Based on the decree, claims relating to the Restitutions Committee's second function were to be assessed by a balance of interests test between the work's former and current owners, resulting in a binding decision.⁶⁷ Thus, the former owners' claims are weighed against possible good-faith acquisitions by a current owner and the subjective general significance of an artwork to the public interest.

This legal framework came under scrutiny after the Restitutions Committee's decision in the case of the heirs of the Jewish businessman, Richard Semmel.⁶⁸ Semmel, a prolific German-born entrepreneur and art collector, sold much of his collection under coercion in 1933.⁶⁹ Bernardo Strozzi's *Christ and the Samaritan Woman at the Well* is one of such works.⁷⁰ The Semmel heirs attempted but failed to reclaim this work.⁷¹ The Restitutions Committee concluded that the objects claimed by the Semmel heirs were too significant to the collection they were a part of to be returned.⁷² The decision also cited the Semmel heirs "weak emotional link to the claimed objects."⁷³ This application of the Regulations for Opinion Procedure Rules set a precedent for the Restitutions Committee to be less flexible and maintain a

⁶⁵ Reglement inzake adviesprocedure in het kader van artikel 2, tweede lid, en artikel 4, tweede lid, Besluit adviescommissie restitutieverzoeken cultuuroederen en Tweede Wereldoorlog, 2007 [Regulations for Opinion Procedure under Article 2, Paragraph 2 and Article 4, Paragraph 2 of the Decree Establishing the Advisory Committee on the Assessment of Restitution Applications for Items of Cultural Value and the Second World War] (Neth.).

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ Oost, *supra* note 56, at 64.

⁶⁹ Catherine Hickley, *Dutch Museum Settles with Jewish Businessman's Heirs on Painting Sold in Nazi era, Defying Government Panel*, THE ART NEWSPAPER (Apr. 19, 2021), <https://www.theartnewspaper.com/2021/04/19/dutch-museum-settles-with-jewish-businessmans-heirs-on-painting-sold-in-nazi-era-defying-government-panel> [https://perma.cc/LPE7-GQH3].

⁷⁰ *See id.*

⁷¹ *Id.* Although the Semmel heirs were unable to reconstitute *Christ and the Samaritan Woman at the Well* through the Restitutions Committee, the Museum de Fundatie in Zwolle later independently agreed to pay €200,000 in compensation for the piece.

⁷² *Id.*

⁷³ Tabitha I. Oost, *Restitution Policies on Nazi-Looted Art in the Netherlands and the United Kingdom: A Change from a Legal to a Moral Paradigm?*, 25 INT'L J. CULTURAL PROP. 139, 169 (2018).

less pro-claimant disposition under the new framework. The Restitutions Committee had complete discretion on the treatment of individual claims,⁷⁴ which continued to support the true underlying goal of protecting the size and value of the NK collection.

Lastly, it is important to mention the 2016 Dutch Heritage Act, which set in place government policies to preserve Dutch cultural heritage in the manner already distinguished in the Semmel decision.⁷⁵ The Dutch Heritage Act established a committee tasked with determining the indispensability and irreplaceability of objects in public collections.⁷⁶ During debate on the Heritage Act, a minister indicated that “a recommendation from the [Restitutions Committee] would constitute a guiding principle in the assertion of the discretionary power.”⁷⁷

Since the Restitutions Committee’s founding over two decades ago,⁷⁸ the Committee has heard 163 cases involving 1,620 works of art.⁷⁹ Policies that developed from 2001 onwards have created a moving target as to the evidentiary standard claimants had to meet to obtain restitution, which is reflective of the Dutch government’s conflicting interests and misapplication of traditional personal property legal theory. The ever-evolving standard has been scrutinized and criticized by the Dutch public.⁸⁰ A report from December 2020 suggested that the guidelines and policies had grown “overcomplicated and ineffective.”⁸¹ This outrage helped to usher in a fundamentally different and more pro-claimant policy change in 2021.

C. A Fundamental Policy Shift

Today, enduring claims to Nazi-looted art in most European countries, occupy “a ‘grey category’ where positive [personal

⁷⁴ Oost, *supra* note 56, at 60.

⁷⁵ *Id.* at 67.

⁷⁶ Erfgoedwet [Heritage Act], Stb. 2015, 511 (Neth.).

⁷⁷ Oost, *supra* note 56, at 67.

⁷⁸ Taylor Dafoe, *In a Major Policy Change, the Dutch Government Will Give Nazi-Looted Art to Jewish Institutions if Heirs Cannot Be Found*, ARTNET NEWS (June 29, 2021), <https://news.artnet.com/art-world/dutch-government-overhauling-restitution-procedures-1984606> [<https://perma.cc/HF9U-3DAJ>].

⁷⁹ Nina Siegal, *Dutch Panel for Looted Art Claims Must Change Course, Report Finds*, N.Y. TIMES (Dec. 7, 2020), <https://www.nytimes.com/2020/12/07/arts/netherlands-looted-art-report.html> [<https://perma.cc/GL8F-ZS5T>].

⁸⁰ *Id.*

⁸¹ *Id.*

property] law is at odds with ethical norms.”⁸² Generally, this legal framework relies on three specific personal property principles:

(i) valid transfer of property requires delivery pursuant to a valid title by a person who has the right to dispose of the property; (ii) the acquirer who purchases an object in good faith is protected, and (iii) the application of the statute of limitations can effect a transfer of title to the property even if the possession is not in good faith.⁸³

For historical reasons, these principles are becoming increasingly burdensome to justice.⁸⁴

As described, the Dutch government’s treatment of Holocaust-era art restitution claims has been based on those traditional principles governing the restitution of specific personal property.⁸⁵ In June 2021, however, the Dutch government made a progressive change in the legal framework of Nazi-looted art restitution, shifting away from traditional principles of restitution of specific personal property.⁸⁶ The government announced an overhaul to its restitution policy and an investigation into the NK Collection.⁸⁷ Now, in cases where no heirs are identified, or pieces otherwise deemed “heirless art,” artwork believed to have been looted by Nazis will be transferred to a Jewish cultural heritage institution.⁸⁸

This policy has also ushered in bureaucratic changes that reveal a new, heightened level of administrative transparency. The government will store all data related to the investigation of heirless art in a public database.⁸⁹ This will help potential heirs identify works. In addition, the Restitutions Committee’s online help desk has been updated,⁹⁰ thus diminishing some bureaucratic red tape and technological barriers. Perhaps most importantly, the Restitutions Committee was

⁸² Campfens, *supra* note 26, at 1.

⁸³ *Id.* at 15.

⁸⁴ See discussion *supra* Sections II.A., III.A.

⁸⁵ See *supra* text accompanying notes 45-86.

⁸⁶ Letter from Ingrid van Engelshoven, Minister of Educ., Culture, & Science, to Parliament (June 25, 2021) (on file with the Government of the Netherlands); see also *More Looted Art to be Returned to Rightful Owners*, GOVERNMENT.NL NEWS (June 25, 2021), <https://www.government.nl/latest/news/2021/06/25/more-looted-art-to-be-returned-to-rightful-owners> [<https://perma.cc/QAT2-D3J3>].

⁸⁷ Letter from Ingrid van Engelshoven, *supra* note 86.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Restitutions Committee Procedure*, RESTITUTUIONS, <https://www.restitutie-commissie.nl/en/procedure/> [<https://perma.cc/6EBM-LEK7>] (last visited Feb. 27, 2023).

instructed to “actively approach potential claimants,” a progressive development from the historical passive claims-based approach.⁹¹ The active approach procedure is unique to the Netherlands and has the potential to revolutionize the legal framework by shifting the burden off of the claimants.⁹² The 2007 balance of interest test, however, was not addressed.⁹³ That is, as policy stands, the Committee will continue to arbitrarily weigh the importance of the claimed art to the institution possessing it against the claimant’s interests.⁹⁴

In a statement following the announcement of the Netherlands’ new Nazi-looted art restitution guidelines, the Dutch Minister of Culture reemphasized that its policy is that whenever possible, items will be returned to the “individuals to whom they rightfully belong.”⁹⁵ The true meaning of the Minister’s words, however, is clouded by the 2007 Dutch Heritage Act. Nonetheless, this policy change may have a significant impact on claimants.

D. *Analysis of New Rules and Regulations*

Until the most recent Dutch policy, the Netherlands, their European counterparts, and the United States have almost exclusively tested claims for the restitution of Nazi-looted art as specific personal property.⁹⁶ This recent policy change introduces principles of cultural property restitution into the Restitutions Committee’s analysis of claims. Although “cultural property” is a term that lacks a clear legal definition,⁹⁷ it is generally agreed that it is a concept with commercial connotations, referring to specific personal property law with the purpose to protect heritage for the enjoyment of future generations.⁹⁸ Article 1 of the 1970 UNESCO Convention attempts to describe cultural property as “property which, on religious or secular grounds, is specifically designated by each state as being of importance for archeology, prehistory, history, literature, art or science and belongs to a number of categories that are specifically set out in the same article.”⁹⁹

91 Letter from Ingrid van Engelshoven, *supra* note 86.

92 *Id.*

93 *See supra* note 65 and accompanying text.

94 *Id.*

95 Letter from Ingrid van Engelshoven, *supra* note 86.

96 *See supra* notes 82-86 and accompanying text.

97 IRINI A. STAMATOUDI, CULTURAL PROPERTY LAW AND RESTITUTION: A COMMENTARY TO INTERNATIONAL CONVENTIONS AND EUROPEAN UNION LAW 4 (Evangelos Kyriakidis ed., 2011).

98 *Id.* at 6.

99 *Id.* at 11.

This is somewhat similar to the Dutch policy revision,¹⁰⁰ the contemporary cultural property law rejects the connection between ownership and restitution.¹⁰¹ This ideological development is due to a modern emphasis on the morality of powerful states and past human rights abusers.¹⁰² Under such thinking, restitution is a legal mechanism for obtaining justice and upholding legitimacy in matters relating to cultural heritage.¹⁰³ This principle is applied in the Netherlands' policy to transfer heirless art to Jewish cultural institutions.¹⁰⁴ The Dutch policy change does not abandon principles of specific personal property, however, which is clear in the instructions to the Restitutions Committee to actively approach potential claimants.¹⁰⁵

In 2009, the Republic of Austria amended its 1998 Art Restitution Law, or *Kunstrückgabegesetz*, to broaden the scope of its application.¹⁰⁶ Under the amended Art Restitution Law, the Austrian Restitutions Committee is instructed to transfer heirless art to the Austrian National Fund for Victims of National Socialism ("National Fund").¹⁰⁷ If the National Fund is unable to identify an heir, it then sells the heirless objects and donates the proceeds to victims of Nazi persecution.¹⁰⁸ Oftentimes, the artworks are sold back to the museums that previously housed them.¹⁰⁹ This is a way for museums to pay damages while still preserving their collections. The circular nature of this policy serves as a facade to true justice for claimants. While the Austrian Art Restitution Law may appear to be similar to the June 2021 Dutch policy, the Dutch policy is distinct in that it more closely resembles cultural property law. The Dutch policy uniquely proclaims to return heirless art to Jewish Cultural Institutions, while the Austrian National Fund is merely a solution for tidying up artworks with dubious provenances.

¹⁰⁰ See *supra* text accompanying notes 86-95.

¹⁰¹ STAMATOUDI, *supra* note 97 at 16.

¹⁰² Elazar Barkan, *Making Amends: A New International Morality?*, in WITNESSES TO HISTORY: A COMPENDIUM OF DOCUMENTS AND WRITINGS ON THE RETURN OF CULTURAL OBJECTS 78 (Lyndel V. Prott ed., 2009).

¹⁰³ *Id.*

¹⁰⁴ See *supra* text accompanying notes 86-95.

¹⁰⁵ See *supra* text accompanying note 95.

¹⁰⁶ *Functions of the National Fund Concerning Art Restitution*, ART DATABASE, kunstdatenbank.at/about-us [https://perma.cc/99FV-6568] (last visited Jan. 25, 2023).

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

IV. APPLICATION OF POLICY AND A SUBSEQUENT RESTITUTIONS COMMITTEE DECISION

There has been an immediate effect on claimants in the Netherlands. Following the announcement of the policy, the Stedelijk Museum in Amsterdam independently returned *Painting with Houses* to the Lewenstein heirs contrary to an earlier ruling on the fate of the piece.¹¹⁰ Additionally, the Restitutions Committee has issued an advisory decision subsequent to the policy change, yet it is unclear how and if the decision was influenced.¹¹¹

A. *Painting with Houses*

Painting with Houses is a 1909 landscape by Wassily Kandinsky that had been hanging on the walls of the Stedelijk Museum for nearly eight decades.¹¹² Siblings Robert Lewenstein and Wilhelmine Lewenstein owned the piece until 1940, at which time it was lost “involuntary as a result of circumstances directly related to the Nazi regime.”¹¹³ The family was forced to sell the painting for the modern-day equivalent of \$1,600 in order to survive the Holocaust.¹¹⁴ The family’s loss was at the gain of the Amsterdam City Council and the Stedelijk Museum, that acquired the piece at an infamous Nazi auction of artworks.¹¹⁵ Following the end of the war, the Lewensteins and their heirs pursued restitution for lost valuables, including *Painting with Houses*. Today *Painting with Houses* is valued at \$22 million.¹¹⁶

The Lewenstein heirs opened a claim with the Restitutions Committee for *Painting with Houses* in 2013.¹¹⁷ In 2018, an Amsterdam

¹¹⁰ Angelica Villa, *Amsterdam to Restitute Kandinsky Painting to Heirs After Years-Long Dispute*, ARTNEWS (Aug. 30, 2021, 12:50 PM), <https://www.artnews.com/art-news/news/amsterdam-restitutes-wassily-kandsinky-painting-1234602572/> [<https://perma.cc/U5ET-2FAV>].

¹¹¹ DaFoe, *supra* note 78.

¹¹² Villa, *supra* note 110.

¹¹³ Applicants v. Amsterdam City Council, RC 3.141, Advisory Committee on the Assessment of Restitution Applications for Items of Cultural Value and the Second World War [Restitutions Comm.], (Oct. 18, 2018), <https://www.restitutiecommissie.nl/en/recommendation/bild-mit-hausern-by-wassily-kandinsky/> [<https://perma.cc/R38M-PM8L>].

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ BINDING OPINION REGARDING THE DISPUTE ABOUT RESTITUTION OF THE PAINTING PAINTING WITH HOUSES BY WASSILY KANDINSKY, CURRENTLY IN THE POSSESSION OF AMSTERDAM CITY COUNCIL, RC 3.141, RESTITUTIONS COMM. (Oct.

District Court ruled that because the painting was sold, not stolen or confiscated, before it was auctioned the Lewenstein heirs did not have a claim.¹¹⁸ Thus, the Committee concluded that the interest of the Stedelijk Museum and Amsterdam City Council outweighed the interest of the claimants.¹¹⁹ The court said that although the sale did not happen in isolation of the Nazi regime, it has “to have been caused to an extent by the deteriorating financial circumstances of the Lewensteins during World War II.”¹²⁰ As for the museum’s acquisition, the Committee found that “the mere fact that at a sale in October 1940 the City Council purchased a work that came from a Jewish owner does not mean that this transaction did not take place in good-faith.”¹²¹

Despite the clear evidence of injustice, in late 2020, a court in Amsterdam upheld the 2018 ruling that rejected the restitution of *Painting with Houses* to the Lewenstein heirs.¹²² The judge cited the binding advice of the Restitutions Committee.¹²³ This decision was a major cause for concern for Dutch and other European restitution efforts, and it violated the 1998 Washington Principles, which are discussed in detail below.¹²⁴ In reaction to the holding, James Palmer, founder of Mondex Corporation, a company that helps families recover Holocaust-era assets, emphasized that “[i]f this court decision is left unchallenged then Dutch restitution policy will effectively be non-existent, and important looted art in The Netherlands will likely never be restituted.”¹²⁵

Following the announcement of the policy overhaul, the Stedelijk Museum, however, surrendered *Painting with Houses* to the Lewenstein heirs.¹²⁶ This was an independent decision by the

22, 2018), https://www.restitutiecommissie.nl/en/recommendations/recommendation_rc_3141.html#anchor-7 [<https://perma.cc/85GQ-5GKR>].

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² Villa, *supra* note 110.

¹²³ *Id.*

¹²⁴ *See infra* text accompanying note 161.

¹²⁵ *Dutch Court Refuses to Return Painting to Jewish Heirs*, ASSOCIATED PRESS (Dec. 16, 2020), <https://apnews.com/article/international-news-museums-amsterdam-netherlands-154f31d925d8f62e038c31df448bfe41> [<https://perma.cc/TA99-2JSZ>].

¹²⁶ Mike Corder, *Amsterdam to Return Kandinsky Work to Pre-war Owners’ Heirs*, BLOOMBERG (Aug. 27, 2021, 11:21 AM), <https://www.bloomberg.com/news/articles/2021-08-27/amsterdam-to-return-kandinsky-work-to-pre-war-owners->

organization, without a new ruling from the Restitutions Committee.¹²⁷ The implications of the Stedelijk Museum's decision will have a far-reaching impact for heirs seeking to reclaim WWII-era looted art from private institutions.¹²⁸ It is significant that the decision was made in light of the new policy, without command from the Restitutions Committee, setting an example for similar institutions in the Netherlands and elsewhere.

B. *Adelsberger (II)*

Following the Stedelijk Museum's independent decision in December 2021, the Restitutions Committee issued a reconsideration of a claim made by the heirs of Abraham Adelsberger (hereinafter "Adelsberger II") for two works, *Mountainous Landscape* and *Landscape*, both by A.H. von Stadler.¹²⁹ In 2009, the Adelsberger heirs submitted an application for the restitution of the paintings, which was at first rejected by the Restitutions Committee.¹³⁰ This is not the first attempt for restitution of works by the Adelsberger heirs, as the family has made other claims, some of which have been successful.¹³¹ Additionally, the Abraham Adelsberger Art Research Project is ongoing at the Free University of Berlin, which aims to identify and reconstruct Adelsberger's art collection.¹³²

Abraham Adelsberger was a successful German tin toy manufacturer prior to the war, amassing a wealth of some forty-five to fifty million Euros.¹³³ As a result, the Adelsberger family was able to assemble an extraordinary art collection at the family home on the Sigenastaße 4 in Nuremberg.¹³⁴ Their collection consisted of porcelain,

heirs#:~:text=The%20Hague%2C%20Netherlands%20(AP),sold%20at%20auction%20in%201940 [https://perma.cc/DCQ3-88ZV].

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Restitutions Committee's Advice: Return Artworks to Jewish Heirs*, RESTITUTIONS COMM. (Dec. 30, 2021), <https://www.restitutiecommissie.nl/en/news/rc-advice-return-artworks-to-jewish-heirs/> [https://perma.cc/AQG5-3V8J].

¹³⁰ *Abraham Adelsberger Art Research Project (AAARP)*, FREIE UNIVERSITÄT BERLIN (July 7, 2019), <https://www.geschkult.fu-berlin.de/e/khi/forschung/projekte/drittmittelprojekte/adelsberger-projekt/index.html> [https://perma.cc/N6H3-9HJS].

¹³¹ Alexandrovski, *supra* note 55, at 47.

¹³² FREIE UNIVERSITÄT BERLIN, *supra* note 130.

¹³³ Alexandrovski, *supra* note 55, at 47.

¹³⁴ *Id.*

decorative artworks, and nineteenth-century German, Flemish, and Dutch paintings.¹³⁵ In 1929, the family faced a period of economic hardship, and Adelsberger took out a number of loans, secured by art, from the Darmstadter Bank (later taken over by Dresdner Bank.).¹³⁶ When the Nazis came to power, the Dresdner Bank sold Adelsberger's home and belongings.¹³⁷ The Adelsberger family fled to Amsterdam from Germany for safety after Kristallnacht, which took place on November 9, 1938.¹³⁸ Despite arrests and some family members' deportation to a death camp, the family survived the Holocaust.¹³⁹ As for many survivors, this dark period was painful to discuss. Further eclipsing this history, archives of what happened to the Adelsberger family remained undiscovered for many years.¹⁴⁰ For these reasons, the Adelsberger family art restitution efforts were delayed until decades after the works were lost.¹⁴¹

In its 2009 decision, the Restitutions Committee reasoned that "ownership and circumstances of the loss of possession had not been established sufficiently clearly."¹⁴² More recently, the Adelsberger heirs supplemented the evidence with documents from the family archive, which provided a more of a substantive basis for a restitution claim.¹⁴³ In its most recent advisory decision, the Committee also considered it sufficiently plausible that the original owner, who was Jewish, lost possession of these artworks due to the Nazi regime in the Netherlands.¹⁴⁴ It is unclear from the Committee's reasoning how, if at all, the new policy affected this decision.¹⁴⁵ This lack of clarity frustrates an analysis of the effects of the regulatory policy, as it is unclear whether the Committee took it into consideration when reevaluating the Adelsberger II claims. Further, this leaves open the question of

¹³⁵ *Id.* at 53.

¹³⁶ Tine Nehler, *The Bavarian State Painting Collections are Restituting a Work of Nazi-looted Art to the Community of Heirs of its Former Owner, Alfred Isay*, lootedart.com (May 21, 2021), <https://www.lootedart.com/news.php?r=UUI1O3610601> [https://perma.cc/8QN6-YMPL].

¹³⁷ Alexandrovski, *supra* note 55, at 50.

¹³⁸ *Id.*

¹³⁹ *Id.* at 53.

¹⁴⁰ Nehler, *supra* note 136.

¹⁴¹ Alexandrovski, *supra* note 55, at 53.

¹⁴² RESTITUTIONS COMMITTEE, *supra* note 129.

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

whether the Committee will reevaluate other binding decisions that were decided against claimants.

V. UNITED STATES LEGAL FRAMEWORK FOR NAZI-LOOTED ART RESTITUTION

Although thousands of miles from the front lines of World War II, the United States was essential to the Nazi's art liquidation scheme.¹⁴⁶ Experts estimate that 100,000 or more pieces of Nazi-looted art came to the United States with a total estimated worth of over \$7 billion today.¹⁴⁷ U.S. dealers and collectors took advantage of the low price of the artwork, at a high cost to the rightful owners. Since 1937, Nazi-looted art has been hanging on the walls of U.S. homes, galleries, and museums.¹⁴⁸ This conflicts with, and shows a blatant disregard for the U.S. jurisprudence's accepted common law rule that no one, not even a good faith purchaser for value, can obtain good title to stolen property.¹⁴⁹ While a good faith purchaser can obtain good title of fraudulently obtained property,¹⁵⁰ the pillaging methods of the Nazi regime were of theft, not of fraud. Further, for museums in violation of these principles, they are also in violation of the standards of the American Alliance of Museums ("AAM") and the Association of Art Museum Directors ("AAMD").¹⁵¹ Under the accreditation requirements of the AAM and the membership agreement of the AAMD, museums must follow guidelines of inquiry into and research on provenance information of these sorts of artworks.¹⁵²

During the war, and for around five years following, the United States, via the State Department and Office of the Military Government of Germany, exerted some efforts to restore art looted from Europe.¹⁵³ Moreover, in the immediate postwar period, there were a few

¹⁴⁶ See discussion *supra* Section II.B.

¹⁴⁷ Labaton, *supra* note 8, at 36.

¹⁴⁸ NICHOLAS, *supra* note 18, at 16.

¹⁴⁹ Amended Complaint, Meyer v. Bd. of Regents of the Univ. of Okla., No. 13 Civ. 3128 (S.D.N.Y. 2015).

¹⁵⁰ U.C.C. § 2-403 (AM. L. INST. & UNIF. L. COMM'N 1977).

¹⁵¹ *Recommended Procedures for Providing Information to the Public about Objects Transferred in Europe during the Nazi Era*, AM. ALL. OF MUSEUMS, <https://www.aam-us.org/wp-content/uploads/2018/01/nepip-recommended-procedures.pdf> [<https://perma.cc/BD79-LFXP>] (last visited Mar. 5, 2023).

¹⁵² *Id.*

¹⁵³ HOLOCAUST-ERA LOOTED ART: A WORLD-WIDE PRELIMINARY OVERVIEW, CLAIMS CONFERENCE, WORLD JEWISH RESTITUTION ORG. (2009), <https://www.claimscon.org/forms/prague/looted-art.pdf> [<https://perma.cc/AD3T-2JHV>].

press reports aiming to shed light on this issue.¹⁵⁴ During this time, however, there was no concentrated effort to provide legal remedies for claimants. The subsequent chronology of art restitution in the United States revealed that these efforts were woefully inadequate.

For almost half a century after the war, there was virtually no effort in the United States to resolve the issues surrounding Nazi-looted artwork. In fact, the first successful case of Nazi-looted art restitution in the United States did not occur until the 1998 settlement of Degas' *Landscape with Smokestacks*.¹⁵⁵ The same year, New York District Attorney Robert M. Morgenthau seized a Nazi-looted work, *Portrait of Wally* by Egon Schiele, when on loan from an Austrian Museum to the Museum of Modern Art.¹⁵⁶ This seizure shocked the art world.¹⁵⁷

Thus, during the 1990s the government found and faced a new interest in the issue of Nazi-looted artworks. The Holocaust Victims Redress Act of 1998 expressed that "all governments should undertake good faith efforts to facilitate the return" of Nazi-looted property.¹⁵⁸ The Act authorizes appropriation for archival research to assist restitution of looted and extorted assets from Holocaust victims.¹⁵⁹ In addition, following a series of congressional hearings, the United States and forty-four signatory governments endorsed the Washington Principles, a cornerstone set of non-binding principles on Nazi-looted art, in an effort to solve some of the issues surrounding Nazi-looted art.¹⁶⁰

¹⁵⁴ Francis Henry Taylor, *Europe's Looted Art: Can it be Recovered?*, N.Y. TIMES (Sept. 19, 1943), <https://timesmachine.nytimes.com/timesmachine/1943/09/19/83942852.html?pageNumber=164> [<https://perma.cc/FBK2-54J3>].

¹⁵⁵ NICHOLAS M. O'DONNELL, A TRAGIC FATE: LAW AND ETHICS IN THE BATTLE OVER NAZI-LOOTED ART 36 (2017).

¹⁵⁶ Kreder, *supra* note 2, at 9-10.

¹⁵⁷ *Id.*

¹⁵⁸ Holocaust Victims Redress Act, Pub. L. No. 105-158 (1998).

¹⁵⁹ *Id.*

¹⁶⁰ *See infra* notes 161-170.

A. *The Washington Conference on Holocaust-Era Assets*

In 1998, the Washington Principles¹⁶¹ were promulgated at the Washington Conference on Holocaust Era Assets.¹⁶² The conference, attended by delegates from forty-four countries, was held to address issues of the restitution of art confiscated during World War II.¹⁶³ While this was held as an international conference, it is important to note that it took place in the United States and was supported by U.S. advocates.¹⁶⁴ The conference resulted in a mutually agreed upon, non-

¹⁶¹ *Washington Conference Principles on Nazi-Confiscated Art*, U.S. DEP'T STATE (Dec. 3, 1998), <https://www.state.gov/washington-conference-principles-on-nazi-confiscated-art/> [<http://perma.cc/QLG8-J4CH>] [hereinafter *Washington Conference Principles*]. The Washington Principles are as follows:

1. Art that had been confiscated by the Nazis and not subsequently restituted should be identified.
2. Relevant records and archives should be open and accessible to researchers, in accordance with the guidelines of the International Council on Archives.
3. Resources and personnel should be made available to facilitate the identification of all art that had been confiscated by the Nazis and not subsequently restituted.
4. In establishing that a work of art had been confiscated by the Nazis and not subsequently restituted, consideration should be given to unavoidable gaps or ambiguities in the provenance in light of the passage of time and the circumstances of the Holocaust era.
5. Every effort should be made to publicize art that is found to have been confiscated by the Nazis and not subsequently restituted in order to locate its pre-War owners or their heirs.
6. Efforts should be made to establish a central registry of such information.
7. Pre-War owners and their heirs should be encouraged to come forward and make known their claims to art that was confiscated by the Nazis and not subsequently restituted.
8. If the pre-War owners of art that is found to have been confiscated by the Nazis and not subsequently restituted, or their heirs, can be identified, steps should be taken expeditiously to achieve a just and fair solution, recognizing this may vary according to the facts and circumstances surrounding a specific case.
9. If the pre-War owners of art that is found to have been confiscated by the Nazis, or their heirs, cannot be identified, steps should be taken expeditiously to achieve a just and fair solution.
10. Commissions or other bodies established to identify art that was confiscated by the Nazis and to assist in addressing ownership issues should have a balanced membership.
11. Nations are encouraged to develop national processes to implement these principles, particularly as they relate to alternative dispute resolution mechanisms for resolving ownership issues.

¹⁶² Hayhow, *supra* note 14, at 31.

¹⁶³ *Washington Conference Principles*, *supra* note 161.

¹⁶⁴ *Id.*

binding set of principles for dealing with Nazi-looted art.¹⁶⁵ The Washington Principles were intended to be an international standard to be used for museums and collectors in connection with claims for the restitution of Nazi plundering.¹⁶⁶ These guidelines were to be a consensus of genuine, but unenforceable principles among participating nations' cultural institutions, with the understanding that their legal systems differed. At its conclusion, eleven principles were suggested as a standard that should be applied when dealing with Holocaust-Era assets.¹⁶⁷

One should not dismiss the effort and good intentions of the Washington Principles and its signatories; they do not, however, begin to resolve the issues surrounding restitution. As these principles are non-binding, museums in the United States and abroad were notorious for picking and choosing which of these standards they would follow and when, often with negative consequences for those who are trying to recover Nazi-looted artworks.¹⁶⁸ These principles "depend entirely on the good faith of their adherents."¹⁶⁹ Due to the inadequacies of the Washington Principles, policy addressing Nazi-looted assets continues to be written and enacted.¹⁷⁰ As it stands, the United States treats Holocaust art restitution as a personal property issue and has yet to adopt a cultural property law-based progressive policy as enacted in the Netherlands.

B. *The Holocaust Expropriated Art Recovery Act*

As discussed, the Washington Principles were only a set of non-binding principles.¹⁷¹ Scholars, legislatures, and claimants in the United States have continued to search for codified solutions to the issues the Washington Principles tried, but failed, to solve. In the United States, like in the majority of European jurisdictions, Nazi-looted art restitution claims are treated as personal property.¹⁷²

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ Hayhow, *supra* note 14, at 90.

¹⁶⁹ O'DONNELL, *supra* note 155, at 58.

¹⁷⁰ *See, e.g.*, Holocaust Expropriated Art Recovery Act, S. Res. 2763, 114th Cong., 162 CONG. REC. 7330 (2016) (enacted).

¹⁷¹ *Washington Conference Principles*, *supra* note 161.

¹⁷² Katharine J. Namon, *The Restitution of Nazi-Looted Art in the United States: A Legal and Policy Analysis* 27, 84 (May 2022) (B.A. thesis, Trinity College), <https://digitalrepository.trincoll.edu/theses/961/> [<https://perma.cc/7ZZG-VHCB>].

Solutions in large part are focused on the most apparent consequences of the circumstance: circumventing issues of statutes of limitations.¹⁷³

In 2016, President Obama signed the bipartisan Holocaust Expropriated Art Recovery Act (hereinafter "HEAR Act").¹⁷⁴ The HEAR Act's drafters intended for "this legislation [to] ensure that the rightful owners and their decedents [sic] can have their claims properly adjudicated."¹⁷⁵ The HEAR Act is a delayed legislative response to unsuccessful Nazi-looted art restitution claims made throughout the past half-century. The legislation attempts to revive previous claims and enable future claims through the application of equitable principles.¹⁷⁶ The goal of this legislation is to relinquish the bar on the claimants that diminishes the opportunity to litigate their case on its merits due to varying statutes of limitations.¹⁷⁷ Prior to this legislation, the statute of limitations on Nazi-looted art was different in each state.¹⁷⁸

The HEAR Act creates a uniform six-year statute of limitations for cases involving Nazi-looted art in the United States,¹⁷⁹ thus eliminating one choice of law problem U.S. courts initially dealt with in Nazi-looted art cases. The HEAR Act covers civil claims or causes of action for the recovery of Nazi-looted artwork or certain other properties lost between January 1, 1933, and December 31, 1945, because of Nazi persecution.¹⁸⁰ These sorts of cases must now be commenced within six years after the claimant's actual discovery of the identity and location of the artwork or other property, and the claimant must retain a possessory interest in the artwork or property.¹⁸¹ The HEAR Act further expanded the concept of discovery to include the identity and location of the art or property in question. Further, the act

¹⁷³ *Id.*

¹⁷⁴ S. Res. 2763, 114th Cong., 162 CONG. REC. 7330 (2016) (enacted).

¹⁷⁵ Press Release, The U.S. House of Representatives, Goodlatte and Nadler Introduce Legislation to Help Recover Art Confiscated During the Holocaust (Sept. 22, 2016), <http://www.commartrecovery.org/hear-act> [<https://perma.cc/F3S4-TK7N>].

¹⁷⁶ Rachel Sklar, *Holocaust-Era Art Restitution Claims: Is the HEAR Act a Game Changer?*, 12 REV. DE DERECHO PRIVADO 159 (2017).

¹⁷⁷ S. Res. 2763, 114th Cong., 162 CONG. REC. 7330 (2016) (enacted).

¹⁷⁸ Katherine Keener, *Dissecting the HEAR Act: The US's Law Streamlining Restitution of Art Stolen during WWII*, ART CRITIQUE (Jan. 13, 2020), <https://www.art-critique.com/en/2020/01/a-closer-look-at-the-hear-act-and-restitution/> [<https://perma.cc/4CFJ-578H>].

¹⁷⁹ S. Res. 2763, 114th Cong., 162 CONG. REC. 7330 (2016) (enacted).

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

reinstates cases previously dismissed on grounds of statute of limitations.¹⁸² The changes this bill made expire on December 31, 2026.¹⁸³

The ramifications of this law have been critiqued by lawyers and scholars in the field. Some argue that the Act will have unintended adverse effects, as the legal costs of bringing forth a claim are very high.¹⁸⁴ Thus, the HEAR Act favors wealthier claimants.¹⁸⁵ The HEAR Act, further, does not provide a forum for heirs to make claims, as does the Dutch Restitutions Committee.

Others disagree.¹⁸⁶ Many restitution cases in the United States had been dismissed or lost due to a lack of evidence or an expired statute of limitations.¹⁸⁷ The extended statute of limitations may give claimants a better opportunity to collect evidence in support of their claim, which would give courts a better opportunity to make decisions based on the merits of the claims. Thus, it follows that the HEAR Act will help to restore the United States' credibility in the arena of restitution of Nazi-looted cultural property, as it fulfills the intention of the Washington Principles' commitment to the righting of injustice.¹⁸⁸

C. *The Justice for Uncompensated Survivors Today Act*

President Trump signed the bipartisan Justice for Uncompensated Survivors Today (hereinafter "JUST Act") Act into existence in early 2018.¹⁸⁹ The JUST Act requires the Department of State to report to Congress the laws and enforceable policies of the Washington Principle signatories regarding the identification and restitution of Nazi-looted art.¹⁹⁰ These reports assess "the nature and extent of national laws and enforceable policies of covered countries regarding the identification and the return of or restitution for wrongfully seized or transferred Holocaust era assets" as well as whether the signatory complies with the Washington Principles.¹⁹¹ These policies include:

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ Sklar, *supra* note 176, at 184.

¹⁸⁵ *Id.*

¹⁸⁶ Kreder, *supra* note 2, at 23.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ Justice for Uncompensated Survivors Today (JUST) Act of 2017, Pub. Law No. 115-171.

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

(A) The return to the rightful owner of wrongfully seized or transferred property, including religious or communal property, or the provision of comparable substitute property or the payment of equitable compensation to the rightful owner; (B) the use of the Washington Conference Principles on Nazi-Confiscated Art and the Terezin Declaration in settling claims involving publicly and privately held movable property; (C) the restitution of heirless property to assist needy Holocaust survivors; (D) and progress on the resolution of claims for U.S. citizen Holocaust survivors and family members.¹⁹²

This legislation has a similar purpose to the earlier HEAR Act, as it too is intended to help solve broad issues regarding Nazi-looted cultural property. The JUST Act has good intentions, but functionally, it is merely another non-binding recital of those good intentions. This bill does not delegate any government, branch, group, or individual enforcement power, but it only requires the Department of State report to Congress.¹⁹³ This foundational weakness has been a source of critique among scholars.

VI. DISCUSSION OF A CLAIM IN THE UNITED STATES AND POTENTIAL FOR APPLICATION OF DUTCH REGULATORY POLICY

There is potential for the adoption and application of a policy similar to the new Dutch regulatory policy in the United States. Such an amendment to current law would reframe Nazi-looted art policy as a mixture of cultural property and specific personal property law, as in the Netherlands. The following section describes an instance in which such an application would be beneficial in the interest of justice.

A. *The Goudstikker Heirs: Adam and Eve*

Jacques Goudstikker was born into a prominent and wealthy Jewish art-dealing family in Amsterdam.¹⁹⁴ Goudstikker grew up around his family's business, and following the First World War, he began to rise as an exemplary collector and noted figure within the art world amassing some 1,400 works of art.¹⁹⁵ Goudstikker has been regarded

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ NICHOLAS H. J. HALL & JACQUES GOUDSTIKKER, IMPORTANT OLD MASTER PAINTINGS FROM THE COLLECTION OF JACQUES GOUDSTIKKER (Christie's ed., 2007).

¹⁹⁵ *Id.*

as the most important Dutch dealer of Old Master paintings in the interwar period.¹⁹⁶ The breadth of his collection is memorialized in a small black notebook he kept throughout his lifetime.¹⁹⁷

In May 1940, just as the Nazi invasion of the Netherlands began, Goudstikker and his family fled, finding passage on the *SS Bodegraven*.¹⁹⁸ While on the boat, Goudstikker had an accident; he fell and fatally broke his neck.¹⁹⁹ When he died, he was carrying his black inventory notebook, which his widow recovered after his death.²⁰⁰ This catalogue was later essential to his heir's multitude of restitution efforts.²⁰¹

In February 2006, the Goudstikker heirs successfully reclaimed 200 pieces of their collection from the Dutch government in one of the largest restitutions of Nazi-looted art to date.²⁰² Two central works of Goudstikker's collection, however, were not recovered at that time. Goudstikker acquired Lucas Cranach the Elder's 1530 paintings, *Adam and Eve* ("the Cranachs"), at an auction in Berlin held by the Soviet government in 1931.²⁰³ Before fleeing the Netherlands, Goudstikker was forced to sell the Cranachs to the famed Nazi leader, Hermann Goering.²⁰⁴ The paintings were then intercepted and given to the Dutch government after the war by the Monuments Men,²⁰⁵ a group of people who volunteered for service in the Monuments, Fine Arts, and Archives program of the Civil Affairs and Military Government

¹⁹⁶ Peter C. Sutton, *An Appreciation of the Taste of Jacques Goudstikker, in IMPORTANT OLD MASTER PAINTINGS FROM THE COLLECTION OF JACQUES GOUDSTIKKER* (Christie's ed., 2007).

¹⁹⁷ Karen Rosenberg, *Tale of Return, Vividly Illustrated*, N.Y. TIMES (Mar. 19, 2009), https://www.nytimes.com/2009/03/20/arts/design/20goud.html?_r=1&ref=design&pagewanted=all [https://perma.cc/25M6-5E6E].

¹⁹⁸ *Id.*

¹⁹⁹ *Timeline: The Legal Battle over Cranach's Adam and Eve*, THE ART NEWSPAPER (July 31, 2018), <https://www.theartnewspaper.com/analysis/cranach-s-adam-and-eve-timeline-of-a-decade-long-legal-battle> [https://perma.cc/H93T-EU6U].

²⁰⁰ Rosenberg, *supra* note 197.

²⁰¹ *Id.*

²⁰² Alan Riding, *Dutch to Return Art Seized by Nazis*, N.Y. TIMES (Feb. 7, 2006), <https://www.nytimes.com/2006/02/07/arts/design/dutch-to-return-art-seized-by-nazis.html> [https://perma.cc/5VP8-NT34].

²⁰³ THE ART NEWSPAPER, *supra* note 199.

²⁰⁴ *Id.*

²⁰⁵ *Id.*

Sections of the Allied armies.²⁰⁶ In 1966, the Dutch government sold the pair of paintings to a Russian collector, George Stroganoff-Scherbatoff.²⁰⁷ Then, in 1971, they were sold by Stroganoff-Scherbatoff to the Norton Simon Museum in Pasadena, California.²⁰⁸ The Cranachs have been on display since the museum's opening in 1975.²⁰⁹

Goudstikker's heir and daughter-in-law, Marie Von Saher, has been working to recover these paintings for over a decade.²¹⁰ Von Saher argues that the pieces were improperly given to Stroganoff-Scherbatoff by the Dutch government and should be returned to her as the rightful heir to the Goudstikker collection.²¹¹ In 2016, a court in California decided that "the Dutch State acquired ownership of the Cranach paintings pursuant to Royal Decree E133, and thus that Norton Simon has 'good title' to the Cranachs."²¹² Von Saher appealed the decision on the grounds that the court disregarded the prior rulings on external restitution and findings that contravene the Dutch government's own determinations and findings.²¹³ The decision of the lower court was later affirmed by the Ninth Circuit, which further held that the policy's underlying act of state doctrine is supported by its application to bar von Saher's claim.²¹⁴ In 2019, the Supreme Court denied von Saher's petition for writ of certiorari.²¹⁵

B. *Proposal for Adoption of Similar Policy in the United States*

If the United States adopted a legal framework that fused cultural property doctrine with traditional personal property restitution, it is possible the Norton Simon Museum would be compelled to follow a course of action similar to the Stedelijk Museum. Such precedent

²⁰⁶ ROBERT M. EDSSEL & BRET WITTER, *THE MONUMENTS MEN: ALLIED HEROES, NAZI THIEVES, AND THE GREATEST TREASURE HUNT IN HISTORY 2* (2013).

²⁰⁷ THE ART NEWSPAPER, *supra* note 199.

²⁰⁸ Rosenberg, *supra* note 197.

²⁰⁹ Kate Brown, *Following an 11-Year Legal Battle, Cranach's Nazi-Looted Adam and Eve Paintings Will Remain at a California Museum*, ARTNET NEWS (July 31, 2018), <https://news.artnet.com/art-world/lucas-cranach-ruling-1326245> [<https://perma.cc/A69R-FQG9>].

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² Von Saher v. Norton Simon Museum of Art at Pasadena, 897 F.3d 1141, 1148 (9th Cir. 2018).

²¹³ *Id.* at 1141.

²¹⁴ *Id.*

²¹⁵ *Von Saher*, 897 F.3d 1141, *cert. denied* 139 S. Ct. 2616 (May 29, 2019) (No. 18-1057).

would be central to continuing efforts by claimants for Nazi-looted art restitution in the United States. While the Cranachs are not heirless art, the works are displaced similarly to Lewenstein's *Painting with Houses*. Such statutory solutions, however, would be functionally different from those of the Netherlands. The United States does not have a forum analogous to the Restitutions Committee, and it is important to consider the implications of such an absence. This discrepancy reflects the particular histories of each country, a fact that also begs consideration.

Without a forum such as the Restitutions Committee, Congress would have to propose and pass a policy that directly addresses museums, art collections, and the courts. Ideally, this policy should demand the return of heirless art to Jewish cultural institutions, and further, it should provide a more concrete framework for courts to implement when determining the fate of Nazi art restitution claims. While such demands would better conform practices to the Washington Principles,²¹⁶ they would be difficult to implement in the United States as compared to the Netherlands for several reasons.

The Netherlands was occupied by Nazi Germany, and its postwar government was conspiratorial in the many crimes of the Third Reich.²¹⁷ As a result, the NK Collection is traceably impacted by Nazi looting and war crimes. The circumstance in the United States is markedly different. The wartime and postwar U.S. art market was less traceably complicit in the Nazi art scheme. Thus, such a strict application of cultural property restitution, as in the Netherlands, could be seen as disregarding the varying evidentiary standards for claimants that United States case law has set.

Alternatively, a policy that demands a more active inquiry into and transparency about the provenance of museum collections and artworks for sale could be better suited to the U.S. situation. As the Restitutions Committee was instructed to "actively approach potential claimants,"²¹⁸ Congress should compel museums in the United States to perform an inquiry into their collection's provenance and do the like. Such demand from lawmakers would require a penalty should the institutions fail to comply. Any artwork that does not have a true, clear, and legally sound wartime provenance, and can be proven to have been imported from Europe, would then be handed over to Jewish cultural institutions, as named in the enacted policy. Such a course of

²¹⁶ See *infra* notes 161-170 and accompanying text.

²¹⁷ See *infra* Section A(II).

²¹⁸ Letter from Ingrid van Engelshoven, *supra* note 86.

action is essential to justice for Nazi-looted art in America and is imminent as the Holocaust fades further into history.

VII. CONCLUSIONS

As discussed at the outset of this Note, new legal challenges arise in Nazi-looted art restitution cases as time moves from World War II and the Holocaust. The central purpose of this Note is to compare the policy frameworks of Dutch and U.S. Nazi-looted art law. The key findings of this analysis reveal that the Dutch Nazi-looted art restitution efforts and the Restitutions Committee are best adapting to temporal challenges by merging specific property law with pillars of cultural property law. As determined, the Dutch government's approach will better suit the problems associated with Nazi-looted art in the future and will help to restore justice to the families and heirs of Holocaust victims. Another research aim of this Note is the application of the new Dutch policies to the precedent set in the United States. It can be determined that with the adoption of the Dutch policy, justice would be better done in United States courts.

There are a few limitations to this Note which leave the subject open to further study and development. It is important to note that this study did not directly confront the many legal and ethical debates about Nazi-looted art restitution that favor the defendants. These arguments include, but are not limited to, the victimization of good-faith buyers and the public's access to these artworks.²¹⁹

This Note leaves open several areas for further inquiry and analysis. An area of analysis left largely unaddressed is the effects of the absence of a Restitutions Committee in the United States. The Netherlands and many of its European counterparts have such bodies that have provided forums outside of the courts to pursue claims. This Note also briefly suggests that there is a comparative analysis between Austria's amended Art Restitution Law and the Dutch Policy that is open to further study.

The Note's main contribution to this well-studied area of law is a comparative analysis of the new Dutch policy, current United States statutory law, and precedent of Nazi-looted art restitution cases. At its core, this Note assembles and organizes research for future academic use. Further, and most centrally, this Note recommends a combination

²¹⁹ Associated Press, *New York Museums to Disclose Artwork Looted by Nazis*, SPECTRUM LOCAL NEWS (Sept. 16, 2022), spectrumlocalnews.com/nys/central-ny/human-interest/2022/09/16/new-york-museums-to-disclose-artwork-looted-by-nazis- [https://perma.cc/WB3P-7HBV].

of cultural property and specific property law as policy in the United States.