
The Restitution of Holocaust Looted Art and Transitional Justice: The Perfect Storm or the Raft of the Medusa?

Thérèse O'Donnell*

Abstract

This article considers the legal difficulties associated with restituting Holocaust-looted art. Can such claims provide platforms for examining the associated cultural implications of both the looting and restitution programmes? Notwithstanding its centrality to Nazism and the Holocaust, looting's reversal was not a post-war Allied priority. Consequently, looting's painful after-effects leave a sense of unfinished business. Restitution traditionally envisages a high profile for law and, in particular, courts. Taken together with restitution's importance within reconciliation processes, this highlights that these cases are clearly located within transitional justice discourse. For example, property restoration is entwined with reconstitution of individual and group identities. The article concludes that restitution is crucial to successful completion of transitional justice processes. However, law's role must be re-imagined beyond the current adversarial/judicial paradigm which fails within its own limited understandings of restitution and hampers rather than enhances reconciliation processes.

* Senior Lecturer in Law, Strathclyde University Law School. This article grew from a paper given at a Roundtable Conference, 'Spoliation in Times of War: Contemporary Issues, the Law and Initiatives to Achieve Redress', at the Lauterpacht Centre for International Law and was developed during generously supported (British Academy and Carnegie Trust) sabbatical leave. I am indebted to those who offered comments on earlier drafts. In particular, I must thank Dino Kritsiotis, Dominic McGoldrick, Istvan Pogany, Strathclyde University colleagues and Raymond Carragher. Email: therese.odonnell@strath.ac.uk.

1 Introduction¹

Cultural artefacts looted during the Nazi reign are considered the last ‘prisoners of war’.² Unfortunately restitution is bedevilled by ‘politically radioactive’³ litigation. Nevertheless, for societies implicated in Nazism and victims thereof, restitution is integral to the transitional project and is Europe’s unfinished business. As noted during parliamentary debates on the UK Holocaust (Return of Cultural Objects) Act 2009, restitution affords some justice,⁴ legally or financially drawing one line under the Nazi era.⁵ Since fourth century BC Athens, restitution has been key to the legitimacy of successor societies. They undertake responsibility for past wrongs,⁶ (re)assume a place in the international community,⁷ and deftly side-step collective guilt.

This article examines both the problematic legal framework confronting claims concerning Nazi looted artworks and anxieties about invoking ‘restitution’ in a genocidal context. Section 2 considers such restitutions as broader studies in transitional justice. Nazi looting programmes dehumanized those deemed unworthy of ownership. Restitution is a mechanism for survivors and heirs to reinstate status. Section 3 considers the legal context of these claims. First, it analyses the 1940s context, in particular the keynote 1943 Allied Declaration and its enforcement difficulties. Secondly, the contemporaneous, fraught legal landscape is considered. Inconsistent jurisprudence on statutes of limitations and good-faith purchasing highlight how litigation offers little to claimants. Additional goals of reconciliation are even more remote. Section 4 considers whether alternative dispute resolution offers brighter prospects for restitution schemes which reconcile key actors, as regards both each other and the past. The inter-disciplinary models of the New York Holocaust Claims Processing Office and the UK Spoliation Advisory Panel (emboldened by the 2009 legislation) display law’s untapped potential to be a more effective handmaiden of reconciliation.

This article’s foreground is rooted in the context of looted art, but it investigates wider issues regarding court-centred law consistently discussed in sociology of law. Fundamentally, what is restitution’s role in reconciliatory transitional justice? Secondly, is restitution law important or effective in the transitional context? The conclusion is that restitution is central to reconciliatory transitional

¹ For laws facilitating looting see Petropoulos, ‘German Laws and Directives Bearing on the Appropriation of Cultural Property in the Third Reich’, in E. Simpson (ed.), *The Spoils of War World War II and its Aftermath* (1997), at 106; I. Pogany *Righting Wrongs in Eastern Europe* (1998), Ch. 2.

² Fedoruk, ‘Ukraine: The Lost Cultural Treasures and the Problem of Their Return’, in Simpson, *supra* note 1, at 72; Henson, ‘The Last Prisoners of War: returning World War II art to its rightful owners – can moral obligations be translated into legal duties?’, 51 *DePaul L Rev* (2002) 1103; Parker, ‘World War II and Heirless Art: unleashing the final prisoners of war’, 13 *Cardozo J Int’l & Comp L* (2005) 661.

³ S.E. Eizenstat, *Imperfect Justice* (2003), at 17.

⁴ Louise Ellman MP, HC Public Bill Committee Debs, 10 June 2009, col. 14.

⁵ Count Lambsdorff, ‘The Evolution and Objectives of The Holocaust Restitution Initiatives’ (Symposium on Holocaust Restitution), 25 *Fordham Int’l LJ* (2001) 145, at 171 and 175 (hereinafter ‘Symposium’).

⁶ N. Kritz (ed.), *Transitional Justice* (1995), at p. xxxvii.

⁷ E. Barkan, *The Guilt of Nations* (2000), at 22–23.

justice, but law's potential is hampered by paradigmatic, adversarial, judicially-effected restitution. Incoherent and inconsistent settlements leave parties dissatisfied. Little space exists for considering wider cultural implications of seizure programmes and restitution. However, with creative re-thinking, restitution law can fulfil its reconciliatory potential.

Restitution's place in transitional justice is classically configured in former conquerors' atonements for colonial pasts to indigenous peoples. Optimally, restitution recognizes historical wrongs while facilitating wider discussions of historical context. Restitution's conceptual development evidences its growth as a moral trend, although in reality restitution projects are 'social treaties' embodying negotiated standards of justice.⁸ Nevertheless, looted art restitution casts light upon: the self-identity of Nazi perpetrators and associates; their view of victims; survivors' views of their own pasts and the place of relics within those pasts; the role of heirs, and how law facilitates or hampers the reversal of thefts which foreshadowed mass murder.

Interest in Holocaust restitution claims rose in the 1990s⁹ due to many fiftieth commemorative anniversaries.¹⁰ Survivors' attendance at such events cohered activism and arrested processes of decaying memory.¹¹ Research was aided by increased archival access and the internet.¹² Swiss gold and banking scandals aided consciousness-raising.¹³ States' anxieties regarding past complicities encouraged national legislation and (limited) diligence in returning Holocaust assets.¹⁴ Further impetus arose from the establishment of the World Jewish Congress Commission for Art Recovery, and the 1998 Washington Principles effectively internationalized the US Association of Art Museum Directors' principles. Extremely high-profile claims attracted attention.¹⁵ For example, in 2000 the US National Gallery returned a painting (ironically donated by a former Jewish refugee¹⁶) the provenance details of which recorded the notorious

⁸ *Ibid.*, at 309, 316–318 and 348.

⁹ See the Holocaust litigation timeline in M.J. Bazyler and R.P. Alford (eds.), *Holocaust Restitution* (2006), at pp. xiii–xviii; Singer, 'Why Now?', 20 *Cardozo L Rev* (1998) 421.

¹⁰ Y.M. Bodemann on Germany's 'epidemic of commemorating' in *Jews, Germans, Memory* (1996).

¹¹ J. Elster, *Closing the Books* (2004), at 223.

¹² 2000 Vilnius Declaration Principles 5 and 6; see also www.nationalmuseums.org.uk/spoliation.html.

¹³ W. Slany, 'US Department of States, US and Allied Efforts to Recover and Restore Gold and Other Assets Stolen or Hidden by Germany During World War II: Preliminary Study', US State Dept. report (1997); Halberstam, 'Framing the Issues', 20 *Cardozo L Rev* (1998) 443.

¹⁴ D'Amato, 'Justice, Dignity, and Restitution of Holocaust Victims' Assets', 20 *Cardozo L Rev* (1998) 427; Andrieu, 'Two Approaches to Compensation in France: restitution and reparation', in M. Dean, C. Goschler, and P. Ther (eds), *Robbery and Restitution* (2008), at 134.

¹⁵ Such claims included, e.g., the Silberberg claims concerning a van Gogh from the Foundation for Prussian Cultural Heritage in Germany and a Pissarro from the Israel Museum; the Littmann claims (see www.claims.state.ny.us/pr030617.htm), *Warin v. Wildenstein and Co.* (mediaeval Christian manuscripts), *Bennigson* 2004 WL 803616; *Alsdorf*, 2004 WL 2806301 (concerning a Picasso).

¹⁶ McCarter Collins, 'Has the "Lost Museum" Been Found? Declassification of Government Documents and Report on Holocaust Assets Offer Real Opportunity to "Do Justice" For Holocaust Victims on the Issue of Nazi-Looted Art', 54 *Maine L Rev* (2002) 115, at 115–118.

Paris-based collaborator Karl Haberstock.¹⁷ Thus, this ‘perfect storm’ of events¹⁸ allowed the Holocaust looted art restitution movement to come into its own.

2 Restitution

A Looted Holocaust Art’s Restitution as a Study in Transitional Justice

Existing studies regarding property restitution and transitional justice often focus on post-communist societies¹⁹ where states expropriated property. They speak less to claims emerging from a nationally heterogeneous diaspora, where properties commonly reside with museums or individuals (often good faith purchasers). Goering’s salted away masterpieces²⁰ are a fragment of the story. In Hamburg alone, more than 100,000 private individuals acquired formerly Jewish-owned objects.²¹ Ordinary Germans may have been unaware of death camps. However, Aryanization’s public and widespread nature renders claims of ignorance regarding Nazism’s discriminatory nature unsustainable.²² A widened field of relevant actors comprising Nazi perpetrators and passive beneficiaries emerges. Addressing the consequences of (loosely-termed) Aryanizing social processes is crucially important to reconciliatory transitional justice. Notwithstanding its relationship with mass murder, restitution endured oversight by historians due to the former’s thematic dominance.²³ Restitution has drawn accusations of exploitation from both Jewish and non-Jewish quarters. However, property return, while important, is not transitional studies’ sole focus. Restitution processes uncover narratives about the past, revealing various prioritized considerations. Such examinations are not mere inconclusive problematizations. Future atrocities and their post-hoc legal genealogy will probably reflect those of the Holocaust (criminal trials, preservation of historical memory, and compensation/restitution). Signposting concerns and obstacles potentially offers resources for the crafting of creative solutions.²⁴

Different cases tell different stories. Although reinforcing Holocaust restitution’s impetus,²⁵ insurance and Swiss bank account cases were class actions. Individual

¹⁷ J. Petropoulos, *Art as Politics in the Third Reich* (1996).

¹⁸ Bazylar and Alford, ‘Introduction’, in Bazylar and Alford (eds), *supra* note 9, at 3. US initiatives included legislative action (the Holocaust Victims Redress Act 1998 and the Stolen Artwork Restitution Act 1998), Congressional hearings, and a Presidential Advisory Commission on Holocaust Assets, available at: <http://govinfo.library.unt.edu/pcha/lawsinfo.htm>.

¹⁹ P.E. Quint, *The Imperfect Union* (1997); Cepl, ‘A Note on the Restitution of Property in Post-Communist Czechoslovakia’, 7 *J Communist Studies* (1991) 368.

²⁰ Merkers salt mine in Thuringia held 400 tons of artwork: Eizenstat, *supra* note 3, at 12.

²¹ Bajohr, ‘Expropriation and Expulsion’, in D. Stone (ed.), *The Historiography of the Holocaust* (2005), at 54; F. Bajohr, *Aryanisation in Hamburg* (2002).

²² Sturman, ‘Germany’s Re-examination of its Past through the Lens of the Holocaust Litigation’, in Bazylar and Alford, *supra* note 9, at 217.

²³ Bajohr, *supra* note 21, at 52.

²⁴ Dugot, ‘The Holocaust Claims Processing Office’, in Bazylar and Alford, *supra* note 9, at 279.

²⁵ M.J. Bazylar, *Holocaust Justice* (2003), at 209.

stories, while seeping from surrounding reports, often disappear. Art collections, unlike gold, are not commingled. Individually pursued looted art litigation allows (albeit limited) space for chronicling a unique piece's looting, its post-war Odyssey, its return, and the claimant's history. Clearer investigation of what 'restitution' means to claimants is possible. Restitution's attractiveness for western liberal societies lies in its privileging of capitalistic, property-based understandings of rights. However, this potentially ignores complex questions regarding cultural identity.²⁶ Nevertheless, if art ownership projects group and individual identities, then undoing the art looting process allows discussion of complex questions about cultural identities of victims, perpetrators, and beneficiaries. Restitution's revelatory capacity is clear but is limited by court-bound adversarialism.

Without becoming prematurely enmeshed in micro narrative, Maria Altmann's claim (principally concerning Klimt's *Adele Bloch Bauer I*, discussed subsequently) revealed the shortcomings and complications of litigation within domestic and international law regimes, ultimately revealing arbitral resolution's attractiveness.²⁷ Austria's paradoxical role post-*Anschluss* was examined. The Altmanns previously received \$21.9 million from a banking-claim fund, but the iconic 'Klimt claim' garnered widespread attention. Unlike the class action's facelessness, this case was individualized, illuminating understandings of national identity.²⁸ The Austrian Gallery's defence stressed the perils of re-locating the paintings to a discombobulating US context and their centrality to its standing as a national gallery – Klimt's depiction as quintessentially Austrian was stressed. However, as an early modernist artist, Klimt's relationship with the Jewish Adele Bloch-Bauer highlights that Jewish acculturation of, and contribution to, Western European artistic culture is indisputable.²⁹ Nazism's art-looting as a simultaneously dehumanizing and self-advancing programme is also revealed.

Although further historical evidence of looting is intrinsically valuable, such phenomena must be comparatively analysed and classified.³⁰ However, no legal meta-framework exists. Sometimes there is too much law; at other times legal voids exist. Adversarialism can be counter-productive. Disputes can appear as between two victims, raising extremely sensitive questions as to definitions of victims, survivors, or heirs. Questions arise whether such claims are inherently or inevitably about grand narratives involving family quests or simply about regaining property. Do surrounding narratives sometimes suggest that this latter imperative diminishes the

²⁶ Barkan, *supra* note 7, at 318.

²⁷ *In the arbitral case of Maria V. Altmann and Others v. the Republic of Austria*, available at: www.adele.at/Schiedsspruch/award.pdf; *Altmann v. Republic of Austria*, 142 F Supp 2d 1187 (C.D.Cal., 2001), 317 F 3d 954 (9th Cir. 2002); *Republic of Austria v. Altmann*, 541 US 677 (2004).

²⁸ J. Cuno, *Who Owns Antiquity?* (2008). See Poland and Israel's unpleasant exchanges regarding Bruno Schulz's frescoes: Hornstein, 'A Strange Case of Holocaust Art: the Historical and Cultural Property Debate Over Who "Owns" Bruno Schulz', 1 *Columbia J East European L* (2007) 142, at 149–153.

²⁹ C. Schorske, *Fin-de siècle Vienna* (1981); D. Edmonds and J. Eidinow, *Wittgenstein's Poker* (2001), at 65–66, 72–73.

³⁰ Bajohr, *supra* note 21, at 59–60.

'righteousness' of the claim? Despite earlier noting that lessons can be learned, clearly Holocaust claims models cannot be uncritically mapped onto the experiences of other oppressed groups seeking legal and financial recognition. Assorted claims reflect opportunities arising in particular political times. An indispensable and restrictive narrative of 'restitution suffering' would fatally entrap subsequent restitution claims. Nevertheless, Holocaust claims contribute to a 'new discursive terrain of repair',³¹ creating a site of political and legal resources.

B Rethinking Restitution and Restitution's Purpose

Numerically, Nazi kleptocracy³² equalled all Napoleonic plunder³³ including 600,000 artworks looted from public and private collections in Europe and the USSR.³⁴ In Germany alone, US forces recovered 10.7 million art and cultural objects worth an estimated \$5 billion. During the Nuremberg trial of Alfred Rosenberg (head of Einsatzstab Reichsleiter Rosenberg (ERR), a major looting body) looting qualified as a crime against humanity and a war crime.³⁵ However, property actions were 'appropriately postponed' for healing opportunities.³⁶ Restitution's restorative goal perhaps felt more apt at the twentieth century's conclusion.³⁷

During the 1950s compensation negotiations, the Germans termed their strategy *Wiedergutmachung* ('making whole' or 'making good again'). However, Holocaust claims usurp 'spoils of war' models³⁸ – Auschwitz and Treblinka cannot be financially evaluated.³⁹ Any sense of the Holocaust's commodification or diminution⁴⁰ fragments victim groups. Indeed in the 1951 Israeli Knesset Menachim Begin scorned that the murdered were effectively seeking compensation from murderers.⁴¹ *Wiedergutmachung's* use was specifically rejected in the 1990s by senior officers of the Conference on Jewish Material Claims Against Germany.⁴² Upon signing the 1998 Holocaust Victims

³¹ Woolford and Wolejszo, 'Collecting on Moral Debts: reparations for the Holocaust and Porajmos', 40 *L & Soc'y Rev* (2006) 871, at 898.

³² Petropoulos, 'Postwar Justice and the Treatment of Nazi Assets', in J. Petropoulos and J.K. Roth (eds), *Gray Zones* (2005), at 325.

³³ Feliciano, 'The Great Culture Robbery: the Plunder of Jewish-owned Art', in A. Beker (ed.), *The Plunder of Jewish Property during the Holocaust* (2001), at 166.

³⁴ J. Petropoulos, 'Written Comments for House Banking Committee Hearing of 10 February 2000', available at: <http://financialservices.house.gov/banking/21000pet.shtml>.

³⁵ IMT Charter, 82 UNTS 279, Art. 6, later re-emphasized as a 'grave breach' in Art. 147 Geneva Convention IV 1949, 75 UNTS 87, and Arts 53 and 85 of Additional Protocol I, 1125 UNTS 3.

³⁶ Weil, 'The American Legal Response to the Problem of Holocaust Art', 4 *Art, Antiquity & Law* (1999) 285, at 287.

³⁷ *Chorzow Factory Case*, PCIJ Series A No. 17, at 47.

³⁸ Greenfield, 'The Spoils of War', in Simpson, *supra* note 1, at 38.

³⁹ Eizenstat, *supra* note 3, at p. ix.

⁴⁰ Bazyler and Alford, *supra* note 9, at 13.

⁴¹ Eizenstat, *supra* note 3, at 14. See also Taylor, 'Where Morality Meets Money', in Bazyler and Alford, *supra* note 9, at 163–164; and generally J. Authers and R. Wolffe, *The Victims' Fortune* (2002).

⁴² See www.claimscon.org/?url=successor_org; Taylor, *supra* note 41, at 167; Rabbi Miller, 'The Conference on Jewish Material Claims Against Germany', 20 *Cardozo L Rev* (1998) 579.

Redress Bill, President Clinton also distinguished between making whole any suffering and hastening restitution.⁴³ Traditional civil/property law concepts of restitution must therefore be 'dramatically' reconfigured 'in precedent and principle' to be relevant in this context.⁴⁴

Notwithstanding this article's focus on meta-narratives of personal and communal reconstitution, some claimants may simply seek property return (a blurrier concept with heirs). Without diminishing legal entitlement, anxieties persist that Holocaust claims are unseemly, involving undue profits, grave robbing, blood money,⁴⁵ a 'Holocaust industry',⁴⁶ and fantasies of Jewish wealth. Terrors of provoking anti-Semitic backlashes are realistic. The Swiss press published anti-Semitic cartoons during the banking negotiations. In light of the Swiss experience, Austria's Jewish community leader, Paul Grosz, stressed the importance of understating the success of Austrian art restitution.⁴⁷ Such 'insidious and Orwellian' myths blame victims, reinforce prejudices, and ironically reward anti-Semitic beneficiaries.⁴⁸ Anxieties cannot pre-empt claims but negotiators must safeguard against media exploitation while issuing reminders that 'life [or indeed death] does not have an "Undo button"'.⁴⁹

C The Wider Objectives of Restitution

Restitution cannot provide a whitewashing voucher,⁵⁰ nor overlook reconciliatory objectives involving truth-finding and healing processes.⁵¹ Restitution and reconciliation must be mutually supportive. Unlike apportioned compensatory awards, art claims (often of only symbolic⁵² value) seek the actual object's return. Behind every looted piece lurks the Holocaust narrative.⁵³ 'Holocaust survivors' were ordinary people too, with families, homes, possessions, jobs, social lives and positions. Restitution can re-humanize,⁵⁴ resurrecting stories, 'dissipating shadows created by

⁴³ See www.presidency.ucsb.edu/ws/index.php?pid=55479.

⁴⁴ Cotler, 'The Holocaust, Thefticide, and Restitution: a Legal Perspective', 20 *Cardozo L Rev* (1998) 601, at 602.

⁴⁵ Symposium, *supra* note 5, at 147.

⁴⁶ N. Finkelstein, *The Holocaust Industry* (2003); see critiques in Berenbaum, 'Is the Memory of the Holocaust Being Exploited?', *Midstream*, Apr. 2004, available at: www.midstreamthf.com/200404/feature.html; Bazylar, *supra* note 25, at 286–297; Feldman, 'Reflections on the Restitution and Compensation of Holocaust Theft', in Dean *et al.*, *supra* note 14, at 261.

⁴⁷ Eizenstat, *supra* note 3, at 195, 284, 302–303, 328, and 340; Berenbaum, *supra* note 46, at 48.

⁴⁸ Cotler, *supra* note 44, at 609–610.

⁴⁹ Elster, *supra* note 11, at 167; Cowen, 'How Far Back Should We Go?', in J. Elster (ed.), *Retribution and Reparation in the Transition to Democracy* (2006).

⁵⁰ Bazylar and Alford, 'Introduction', in Bazylar and Alford, *supra* note 9, at 1.

⁵¹ Symposium, *supra* note 5, at 147.

⁵² Curran, 'Competing Frameworks for Assessing Contemporary Holocaust-Era Claims', 25 *Fordham Int'l LJ* (2001) 107; German social psychologist H. Welzer, 'Vorhanden/Nicht-Vorhanden. Über die Latenz der Dinge', in P. Hayes and I. Wojak (eds), '*Arisierung*' im Nationalsozialismus (2000), at 287.

⁵³ Cotler, *supra* note 44, at 602–603.

⁵⁴ Singer, *supra* note 9, at 426.

years of oblivion'.⁵⁵ Such personal reconstitution⁵⁶ regains some pre-Holocaust, pre-survivorhood life. Studying Nazi looting programmes offers insights into the route to Auschwitz. However, restitution cases offer perspectives on the road *from* Auschwitz, notwithstanding the impossible restoration of life.⁵⁷ The 2005 UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law define restitution as also encompassing dignity, worth, identity, and family. One Holocaust Hungarian survivor told how, post-round-up, she put on her father's earlier gift of a swimming costume. At the concentration camp, she reluctantly removed it, relinquishing her secure, old life. Restitution can re-establish an almost unbelievable historical lineage – it puts the swimming costume back on. Although the restituted object may be a relic of the past, it reifies, and allows for the veneration of a culture which tyranny sought to make disappear. Former camp inmates emerge with something other than their victimization,⁵⁸ moving from being among history's objects to history's subjects.⁵⁹ Socio-historically these claims utilize micro-accounts to throw light on major historical events and vice versa. Indeed, re-examining collective responsibility was an explicit motivating force behind various initiatives in 1990s Austria, including the 1995 law establishing the National Fund of the Republic of Austria for Victims of National Socialism and the 1998 establishment of the Independent Historical Commission.⁶⁰

A further restitutive aspect is these claims' capacity indirectly to try the Holocaust. Art looting drew upon Nazi propaganda, portraying Jews as subverting the body-cultural of Aryan society. Jewish attachment to bohemian 'degenerate' art was caricatured as evidencing them as agents of corrupting decadence, stressing their 'outsider' marginalization from mainstream European society.⁶¹ Distorting images of wealthy avariciousness parodied Jewish collectors of established artists. Such 'pretentious and rapacious usurpers of the highest values in Western European culture' had no right to life or to proprietorial association with 'great treasures of European civilization'.⁶² Foreshadowing genocide, looting is recast as 'thefticide',⁶³ emphasizing its criminality. This parallels discussions in Ana Filipa Vrdoljak's article and civil tort litigation regarding human rights violations taken under the 1789 US Alien Tort Statute.⁶⁴

⁵⁵ Feliciano, *supra* note 33; H. Feliciano, *The Lost Museum* (1997), at 244.

⁵⁶ *Ibid.*, generally.

⁵⁷ Cotler, *supra* note 44, at 623.

⁵⁸ Barkan, *supra* note 7, at 24.

⁵⁹ H. Arendt, *Origins of Totalitarianism* (1994).

⁶⁰ Lessing and Azizi, 'Austria Confronts Her Past', in Bazyler and Alford, *supra* note 9, at 228–229; see also www.en.nationalfonds.org/.

⁶¹ Petropoulos, *supra* note 17, at 54, 250.

⁶² Feliciano, *supra* note 33, at 165.

⁶³ Cotler, *supra* note 44, at 601–602.

⁶⁴ *Filartiga v. Pena-Irala*, 630 F 2d 876 (2d Cir. 1980).

D Ethnicity, Identity and Thefticide

Restitution claims highlight the inter-meshing of law, ethnicity, and identity. For pre-war Jews, art collecting was partially an indicator of Jewish assimilation into Western European, Christian society, with its attendant economic hierarchy and social values. Artistic patronage hierarchically ranks below more significant assimilation-indicators like entering universities and professions, adopting local languages as mother tongues, inter-marriages, and baptisms. Nevertheless, as a bourgeois pursuit, art collecting projected particular group identities,⁶⁵ reinforcing images of assimilation.⁶⁶ No mere passive enjoyers of a received body of Christian culture, Jews like Gustav Mahler actively contributed to and influenced the liberal arts. In the thriving pre-war Parisian art market, Jews, notably Paul Rosenberg (Picasso and Braque expert, divested of 300 paintings), the Bernheim-Jeunes (impressionist and post-impressionist specialists), and the Wildensteins, significantly participated as collectors and dealers.⁶⁷ Vienna too was an artistic hub, and Austrian Jewish collectors were testing subjects for Nazi confiscation policies. Over 400 'Aryanizing' anti-Jewish property measures created an 'almost inescapable legal net'.⁶⁸ Actual assimilation was dismantled at a pen's stroke. Denounced for centuries as perfidious, with loyalty to faith trumping loyalty to state,⁶⁹ it was paradoxically the operation of Nazi laws which created Jewish 'simulated' assimilation. Jews were left powerless but apparently wealthy, exposing their vulnerability as legally constructed parasites.⁷⁰ Ironically, it is only by emphasizing the legally sanctioned discriminatory treatment of their apparently assimilated ancestors that heirs (with a strong but differentiated sense of ethnic identity) can seek restitution.

As Title II of the US 1998 Holocaust Victims Redress Act notes, looting and racial annihilation shared a pathology of domination, subjugation, and extermination.⁷¹ This ideological nexus characterized Jewish property as 'property stolen from the people' (*geraubtes Volksvermögen*). Looting constituted appropriate compensation for supposed pre-1933 sufferings.⁷² Himmler's commissioning of museums comparing 'degenerate' work and Aryan achievements sought to emphasize gulfs

⁶⁵ P. Bourdieu, *Distinction: A Social Critique of the Judgement of Taste* (1984).

⁶⁶ Edmonds and Eidinow, *supra* note 29, at 65; S. Beller, *Vienna and the Jews, 1867–1938* (1989); R.S. Wistrich, *The Jews of Vienna in the Age of Franz Joseph* (2006); Stalzer, 'Jewish Intellectuals and Artists and their Contribution to the Cultural and Intellectual History of Vienna', available at: www.virtualvienna.net/jewish_vienna/modules.php?name=News&file=article&sid=17.

⁶⁷ Feliciano, *supra* note 33, at 166–168; Hamon, 'Spoliation and Recovery of Cultural Property in France, 1940–94', in Simpson, *supra* note 1, at 63; generally the French Mattéoli government report, *Mission d'étude sur la spoliation des Juifs de France* (2000).

⁶⁸ Petropoulos, *supra* note 17, at 84.

⁶⁹ B. Bauer, *The Jewish Question* (1843); Marx, 'On the Jewish Question', published in *Deutsch–Französische Jahrbücher* (1844); D. Seymour, *Law Antisemitism and the Holocaust* (2007).

⁷⁰ See Arendt's paralleling with de Tocqueville's study of doomed French aristocracy, *supra* note 59, at 4.

⁷¹ Falconer, 'When Honor Will Not Suffice: the need for a legally binding international agreement regarding ownership of Nazi-looted art', 21 *U Pennsylvania J Int'l Economic L* (2000) 383, at 395–396, citing D. Roxan and K. Wanstall, *The Rape of Art* (1964), at 22.

⁷² Bajohr, *supra* note 21, at 59.

between culturally consecrated Aryan ideals and ‘valueless expressions of the *Untermenschen*’.⁷³ Inevitably the ‘degenerate’ exhibitions enjoyed better attendance and greater critical acclaim than artistically limited Nazi *homages* to Aryan ruralism. Perhaps Bourdieu’s positing of opposites between bourgeois and ‘intellectual’ tastes, between ‘rose-coloured spectacles and dark thoughts . . . the social optimism of people without problems and the anti-bourgeois pessimism of people with problems’ is instructive here.⁷⁴

Looting was simultaneously revelatory of Aryan self-identity. Nazi leaders exploited the expressive power of art,⁷⁵ in terms both of exhibiting commitment to Nazi ideology and Nazism’s proclaimed cultural instincts.⁷⁶ Indeed Alfred Rosenberg, Hitler’s Ideological Delegate, headed the looting programme. Hitler’s proposed Nazi showpiece,⁷⁷ the *Hohe Schule* in (the intended new Austrian capital) Linz would cement the Austro-German bond in defiant ethnic triumphalism.⁷⁸ Ironically its composition depended upon confiscated private Jewish collections. Nevertheless, looting’s importance in strengthening perverted Germanism is explicit in a 1939 Himmler decree. Pre-existing ‘penetration[s] of the East by the German Cultural urge’⁷⁹ justified reclamation of ‘genuinely Aryan’ works. Indeed Rosenberg’s Nuremberg defence argued that many French ‘safeguarded’ works actually stemmed from painters of German origin (e.g. Cranach was lauded as quintessentially Aryan⁸⁰) or were ‘German spirit’ influenced.⁸¹ *Altmann* would revisit the issue of artworks’ ethnicity.

Looting both presaged, and resulted from, genocide. Representing a key development in Hilberg’s increasingly intensifying stages leading towards annihilation,⁸² looting reified the negation of those deemed unworthy of treasures.⁸³ Consciously or unconsciously ‘economic liquidation foreshadowed physical liquidation’.⁸⁴ As thefticide, it is genocide’s only reversible aspect, dubiously even reaching the standard of symbolic victory.⁸⁵ However, restitution may contribute to reconstitution of pre-war identity or memory. Vast libraries detailing Jewish culture, Yiddish texts, synagogues’ religious objects, crucial chronicles of Jewish life and religious ritual, were taken,

⁷³ Petropoulos, *supra* note 17, at 252; L. Nicholas, *The Rape of Europa* (1995), at 146.

⁷⁴ Bourdieu, *supra* note 65, at 292.

⁷⁵ Petropoulos, *supra* note 17, at 47–50, 287.

⁷⁶ Plaut, ‘Loot for the Master Race’, 178 (9) *The Atlantic Monthly* (1946) 1, available at: www.theatlantic.com/past/docs/unbound/flashbks/nazigold/loot.htm; Nuremberg Supp. B, at 1137–1138.

⁷⁷ McCarter Collins referring to both Nicholas and Feliciano, *supra* note 16, at 124.

⁷⁸ Plaut, ‘Hitler’s Capital’, 178(4) *The Atlantic Monthly* (1946) 1, at 1, available at: www.theatlantic.com/past/docs/unbound/flashbks/nazigold/hitler.htm.

⁷⁹ See http://avalon.law.yale.edu/subject_menus/nca_vol1.asp, Chap. XIV, ‘The Plunder of Art Treasures’.

⁸⁰ Bazyler, *supra* note 25, at 249.

⁸¹ Plaut, *supra* note 76.

⁸² R. Hilberg, *The Destruction of the European Jews* (1985).

⁸³ Bourdieu, *supra* note 65, at 280. For pioneering discussions of Nazi Jewish economic exclusion see H. Genschel, *Die Verdrängung der Juden aus der Wirtschaft im Dritten* (1966).

⁸⁴ Cotler, *supra* note 44, at 607.

⁸⁵ Falconer, *supra* note 71, at 396.

particularly in Eastern Europe. If every major institution is anchored by its monuments, as the Vilnius Declaration notes, they become crucial to rebirth.⁸⁶ Restituting individually and communally-held property frustrates Nazi attempts 'to impose a homogenous and limited cultural view on the world'.⁸⁷

Having established the centrality of restitution to post-Holocaust reckoning, this article now considers the relevant legal frameworks.

3 Legal Context

Legal regulation of Holocaust looted art is paradoxical: sometimes too much law, at other times none. *Altmann* and *Bondi* reveal labyrinths whereby law's volume diminishes its substantive value for claimants. Briefly, immediate post-war restitution was resolved by inter-state peace treaties, casting aside private restitution. Looting's protagonists were criminally convicted, but this said little about restitution. Legal difficulties are considered from two perspectives: first, the historical context and legal resources available in the 1940s and, secondly, the legal context confronting later, private claims.

A Historical Legal Context – inter-state model

Even in the 19th century, post-war restitution had legal standing. Post-Napoleonic defeat, the Louvre was sacked and objects returned to places of origin. This model focused on inter-state resolution and continued (see the Treaties of Versailles, Saint-Germain, and Trianon⁸⁸) until the 1940s. Only armed conflict law criminalized, and thus 'personalized', wartime plunder. The American Civil War's Lieber Code acknowledged, as an indicator of civilization (Article 22), the sacredness of private property (Article 37). Title to public property requisitioned during occupation remained in abeyance (Article 31). Receipts were required, enabling spoliated owners to obtain indemnity (Article 38) hinting at private legal recourse. Unauthorized destruction of property, pillaging, and sacking were punishable by death (Article 44) – criminal not restitutive. The 1907 Hague Convention Concerning the Laws and Customs of War on Land and Annexed Regulations also forbade private property's confiscation (Article 46) and pillage (Article 47). Property of municipalities, institutions dedicated to religion, charity, and education, the arts and sciences, even where state property, was to be treated as private (Article 56). Seizure of such institutions, historic monuments, works of art and science was forbidden and subject to legal redress (Article 56). Compensation was provided for. However, such laws pertained to occupying powers and were thus irrelevant as regards the 1930s plunder of *German Jews'* property.⁸⁹ Further, although the US Holocaust Victims Act 1998 emphasizes

⁸⁶ Eizenstat, *supra* note 3, at 45.

⁸⁷ Feliciano, *supra* note 33, at 175.

⁸⁸ 112 BFSP 1, 112 BFSP 317, and 113 BFSP 486.

⁸⁹ Looting was paradoxically legal under the Nuremberg laws and illegal under unrepealed general theft laws: Curran, in Symposium, *supra* note 5, at 159; A. Barkai, *From Boycott to Annihilation* (1989).

Articles 47 and 56, Congress clearly envisaged restitution being undertaken by governments in good faith, rather than out of obligation.

1 *The 1943 Allied Declaration*

Once looting's scale emerged, the Allies produced the Inter-Allied Declaration against Acts of Dispossession Committed in Territories under Enemy Occupation or Control. They reserved all rights to declare invalid any transfers of, or dealings in, any property, rights, and interests which were/had been situated in occupied/Axis-controlled⁹⁰ territories or which belonged to persons, including juridical persons, resident in such territories. Open looting, plunder, and sham transactions were covered, thus permitting veils of apparent legality to be stripped. Ostensibly the Declaration remains available,⁹¹ but its potency is debatable. Although the Declaration announced, rather than created, a general norm of restitution⁹² this is indisputable only in inter-state terms. Its non-binding form indicates the main signatories' hesitancy regarding enforceable obligations. Subsequently, Chapter VI of the 1944 Final Act of the Bretton Woods Conference outlined detail on looted property's control and restitution. Neutral countries were instructed to undertake immediate measures preventing any dispositions or transfers of property taken from occupied countries or citizens. Special attention was given to art disposals and transfers. Nevertheless, the Yalta and Potsdam conferences focussed upon reparation and compensation – classically inter-state – as embodied in the Crimean Conference Protocol. This is partially explicable by Jewish suffering not yet being the *leitmotif* for World War II atrocities.⁹³ The Declaration thus reflected contemporary international law, with only agreement for inter-state co-operation.⁹⁴ Promised trickle-down effects (whereby states would take up individual cases) remained unrealized. Survivors' expectations that their new states of residence would honour national constitutional guarantees⁹⁵ (including rights to peaceful enjoyment of property) and diligently pursue restitution were disappointed. Even if states had been more diligent they would have acted via inter-state restitution, not private, international, claims. Such overall non-compliance with the Declaration puts in doubt its customary law status.

Some belated improvement of claimants' positions seemed imminent with the 2009 UNESCO Draft Declaration of Principles Relating to Cultural Objects Displaced in Connection with World War II. Principle III required states which had been responsible for losses either to return objects (if still hosting them) or, if no longer being location states, to search for them and negotiate for their return. Moreover, Principle VI's demand

⁹⁰ E.g., Safrian, 'Expediting Expropriation and Expulsion: The Impact of the Vienna Model on Anti-Jewish Policies in Nazi Germany, 1938', 14 *Holocaust & Genocide Studies* (2000) 390.

⁹¹ Prott, 'Principles for the Resolution of Disputes Concerning Cultural Heritage Displaced During the Second World War', in Simpson, *supra* note 1, at 225, 227.

⁹² W.A. Kowalski, *Art Treasures and War* (1998), at 40.

⁹³ Barkan, *supra* note 7, at 6.

⁹⁴ Garrett, 'Time for a Change? Restoring Nazi-Looted Artwork to its Rightful Owners', 12 *Pace Int'l L Rev* (2000) 367, at 390–391.

⁹⁵ Frumkin, 'Why Won't Those SOBs Give Me My Money?', in Bazylar and Alford, *supra* note 9, at 92.

that receiving states should exercise due diligence to identify persons/entities entitled to the object or their successors indicated a focus moving beyond inter-state relationships. For Tullio Scovazzi this shows the rule prohibiting war booty being understood as an application of an emerging principle of non-exploitation of the weakness of another subject, including private individuals, to make a cultural gain. The inability to achieve more than a 'taking note' of these empowering provisions lends a Sisyphean impression to such efforts.

Post-war, the Allies undertook property forfeiture initiatives. JCS Order 1067 (April 1945) contained key features of US post-war occupation policy. Its denazification provisions provided for property seizure from senior Nazi organizations and persons. US Military Government (MG) Law No. 52 echoed these provisions and applied them to people residing outside Germany. It blocked property transferred under duress, wrongful acts, and confiscation. MG could seize, take title to, and manage or control such properties. Control Council Law No. 10 clarified that sanctions for those criminally convicted included restitution of property wrongfully acquired. Although central to Allied judicial strategy,⁹⁶ forfeiture envisaged proceeds contributing to German reparations, not private restitution. Further, it is unclear that all 1,700 so-called Major Offenders' properties were extracted. Nuremberg convicts lost assets, but their families kept property. Like most denazification practices, penalties seemed harshest on the least blameworthy.⁹⁷ MG Law No. 59⁹⁸ required Germans to report certain property. However, as a compromise (keeping the Germans onside while avoiding floods of cultural property to manage) it was to be turned in only if held by war criminals.⁹⁹ Such initiatives do little to solidify restitution's customary status. Even the modern 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, which actually envisages recourse for private citizens,¹⁰⁰ directs Holocaust claimants towards other recovery routes.¹⁰¹ A customary legal status for private restitution claims is dubious.

The Allies were operating in a chaotic environment without any international legal precedent for private restitutions. Democratic reconstitution of Germany and Austria and developing Cold War worries inevitably deprioritized restitution.¹⁰² Attempts were made to restore properties to rightful owners, but those of uncertain origin were taken to special Central Fine Art Collecting Points. Between 1946 and 1952 Munich's Central Collecting Point restituted 48,751 objects to legitimate foreign owners.¹⁰³

⁹⁶ Petropoulos, *supra* note 32, at 327.

⁹⁷ O'Donnell, 'Executioners, Bystanders and Victims: collective guilt, the legacy of denazification and the birth of twentieth century transitional justice', 25(4) *Legal Studies* (2005) 627.

⁹⁸ US developed, it influenced British and French practice, ultimately becoming West German law. Inconsistent interpretation led to criticism of it: Woolford and Wolejszo, *supra* note 31, at 878. Kurtz, 'The End of the War and the Occupation of Germany, 1944–52. Laws and Conventions Enacted to Counter German Appropriations: the Allied Control Council', in Simpson, *supra* note 1, at 112.

⁹⁹ Kurtz, 'Inheritance of Jewish property', 20 *Cardozo L Rev* (1998) 625, at 638.

¹⁰⁰ Providing due diligence was exercised: Art. 3, 34 *ILM* (1995) 1322.

¹⁰¹ Art. 10(3).

¹⁰² McCarter Collins, *supra* note 16, at 127.

¹⁰³ Gattini, 'Restitution by Russia of Works of Art Removed from German Territory at the End of the Second World War', 7 *EJIL* (1996) 67, at 67–68.

The unpalatable task of determining between forced sales and rightful possession fell to recuperation commissions in recipient nations.¹⁰⁴ Legitimate purchases were the property of the FRG. Apparently heirless property was returned to the state of citizenship, sometimes in error.¹⁰⁵

2 Austria

In 1945, Jewish owners with Austrian nationality, having automatically lost citizenship and endured persecution by Nazis and fellow citizens, suddenly had their treasures classified as ‘Austrian’ and integral to Austria’s cultural heritage. Administering bureaucrats were ‘highly passive or even resenting’.¹⁰⁶ Austria required Allied coaxing between 1946 and 1949 to pass seven laws to restore Nazi-seized Jewish property; denounced as ‘full of loopholes, with inadequate worldwide notice and short claims periods’, they were unsympathetically applied by Austrian courts.¹⁰⁷ Claimants had difficulties in proving ownership. Jewish survivors had to apply for Austrian citizenship, requiring a permanent residence there. Austrian authorities decided which artworks were permitted to be exported, regardless of the owners’ nationalities. Export licences were granted to families for the majority of their collections on condition that valuable works were offered in lieu to the Austrian authorities – a ‘restitution compromise’¹⁰⁸ since denounced as extortion.¹⁰⁹ Although international treaties stress the importance of cultural artefacts to national identity, this does not envisage blackmail. The Lederer case involved a famous Klimt excluded from such an export licence. The Austrian Chancellor himself had to start negotiations to buy it from Lederer in the 1970s.¹¹⁰

In 1945 Chancellor Renner saw Jewish property restitution as contributing to a fund with shares being individually distributed. Intended to hinder a massive return of exiles, it constituted national protectionism. The Austrian Foreign Office’s legal department refused to accept legal obligations regarding Jewish claims, since it was not considered the legal successor to the Nazi regime.¹¹¹ Undoubtedly Austria’s rhetoric of occupation and its anxieties about revelations of complicity in organized plunder explained its ambivalence towards restitution. However, 1995 legislation gave the Austrian Jewish community ownership over Nazi looted ‘heirless treasures’ held in storage since 1945. Major auction houses auctioned off the works to benefit

¹⁰⁴ Nicholas, ‘World War II and the Displacement of Art and Cultural Property’, in Simpson, *supra* note 1, at 44.

¹⁰⁵ See *Von Saher v. Norton Simon Museum of Art at Pasadena*, 592 F 3d 954 (9th Cir. 2010) (the Goudstikker claim); Kaye, ‘Looted Art: What can and should be done’, 20 *Cardozo L Rev* (1998) 657, at 659, 660; and Kaye, ‘Avoidance and Resolution of Cultural Heritage Disputes: recovery of art looted during the Holocaust’, 14 *Willamette J Int’l L & Dispute Resolution* (2006) 243.

¹⁰⁶ Rathkolb, ‘From “Legacy of Shame” to the Auction of “Heirless” Art in Vienna’, available at: www.museum-security.org/ww2/Legacy-of-Shame.html.

¹⁰⁷ Eizenstat, *supra* note 3, at 281.

¹⁰⁸ Rathkolb, *supra* note 106.

¹⁰⁹ Falconer, *supra* note 71, n. 202.

¹¹⁰ Rathkolb, *supra* note 106.

¹¹¹ *Ibid.*

Holocaust survivors and their heirs. Austria's modern restitution initiatives perhaps indicate the overcoming of its existential lie of being National Socialism's first victim. Indeed, the General Settlement Fund received more than 20,000 applications and the Austrian Arbitration Panel for *In Rem* Restitution (deciding restitutions of publicly-owned property) has received 2,200 to date.¹¹²

Overall, despite rich material, looting's underlying narratives were unaddressed. There was no desire to analyse the morality/illegality of seizures. Austria's post-war practices evidence begrudging restitution, implying further disrespect for, and exploitation of, survivors. Despite relevant actors having been fellow nationals, no discussion of the inter-twined histories of victims, perpetrators, and bystanders occurred. 'Successful' restitutions simply assumed that partial refunds were required. 'Unsuccessful' restitutions left claimants feeling further victimized. Those in exile sometimes felt disappointed and alienated when refuge states failed to pursue claims. Arguably, the post-war 'justice terrain' at this point was too fragile, and multi-faceted notions of post-traumatic justice too nascent, to cope with problematizing restitution. Despite programmes of inter-state restitution and Germany's compensation payments, private restitution remained 'live'. Concluding otherwise would perversely imply that either it is too late for restitution and the time has come to bury the past or restitution occurred and the past was redressed – ultimately no one is responsible.¹¹³ Expropriation continued post-1945.¹¹⁴

B Legal Context: Post-1940s

Litigants' obstacles did not diminish over time. The 1943 Declaration required state legislative enactment¹¹⁵ and withered on the vine.¹¹⁶ Under the 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict, signatories could take enforcement against violators. The associated protocol stressed post-war property return. However, it was state focussed with no dispute settlement mechanism, and was non-retroactive. Without countenancing private restitution, it simply reinforced states' obligations to negotiate. Article 13 of the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property obliges states to ensure earliest possible restitutions of illicitly exported cultural properties and to admit actions for recovery of lost or stolen cultural property brought by or on behalf of rightful owners. Article 7(b) prohibits the import of cultural property stolen from museums or similar institutions. However,

¹¹² Bajohr, *supra* note 21, at 61; W. Shirer, *The Rise and Fall of the Third Reich* (1960); Garscha, 'Repressing both the Crimes and Their Punishment: War Crimes Trials before the Austrian Peoples Courts of the Immediate Post War Period and Austrian Politics of Memory' (2002), available at: www.nachkriegsjustiz.at/service/archiv/en_garscha_bologna2002.php; B. Simma and H.-P. Folz, *Restitution und Entschädigung im Völkerrecht: Die Verpflichtungen der Republik Österreich nach 1945 im Lichte ihrer außenpolitischen Praxis* (2004).

¹¹³ Cotler, *supra* note 44, at 609.

¹¹⁴ Berenbaum, 'Confronting History', in Bazylar and Alford, *supra* note 9, at 44.

¹¹⁵ Prott, *supra* note 91, at 226.

¹¹⁶ Fedoruk, *supra* note 2, at 76.

since negotiations were envisaged being made through diplomatic offices it relies on states acting on behalf of claimants. Further, the 1970 Convention fails to address cultural properties looted from, or possessed by, private individuals. It is simply a broad remedial measure aimed at preserving member states' cultural heritages.¹¹⁷ As noted, claimants are not aided by the 1995 UNIDROIT Convention and therefore continue to crowbar claims into existing general legal mechanisms. Kafkaesque proceedings have involved private international law, statutes of limitations, state immunity, criminal law, and complicated jurisdictional rules.¹¹⁸ Two case examples, those involving the late Austrian Jewish art dealer Lea Bondi¹¹⁹ and Maria Altmann, highlight claimants' difficulties.

1 *Portrait of Wally*

In 1998 the Austrian Leopold Museum lent Egon Schiele's 'Portrait of Wally' to New York's Museum of Modern Art (MoMA). Bondi's heirs demanded MoMA hold the work pending resolution of their claim. MoMA refused, citing contractual obligations under an anti-seizure statute. The New York District Attorney subpoenaed the art as stolen property and prolonged, intensive litigation ensued. US customs authorities intervened, alleging the illegal import of stolen property. MoMA, joined by an *amicus* brief submitted by nine major museums and two museum associations, moved for dismissal. Concerns arose over the future of anti-seizure statutes and international museum co-operation. The court judged the art as no longer stolen once in Allied custody. Realizing that this effectively legitimized all stolen Holocaust property subsequently passing through Allied hands, the court spectacularly reconsidered. After years of tortuous litigation, the case concluded, practically on the trial's eve, in July 2010 with settlement terms including the payment of US\$ 19 million by the museum to Lea Bondi's estate.¹²⁰

2 *The Altmann Case*

*Altmann v. Austria*¹²¹ revealed a legal 'swamp'.¹²² Adele Bloch-Bauer owned six Gustav Klimt paintings, including 'Adele Bloch-Bauer I'. She bequeathed them to her

¹¹⁷ Garrett, *supra* note 94, at 381–382; Falconer, *supra* note 71, at 389.

¹¹⁸ *Bennigson v. Alsdorf*, *supra* note 15; Burris and Schoenberg, 'Reflections on Litigating Holocaust Stolen Art Cases', 38 *Vanderbilt J Transnat'l L* (2005) 1041, at 1042 and 1048–1049.

¹¹⁹ *US v. Portrait of Wally*, 105 F Supp 2d 288 (SDNY 2000); *US v. Portrait of Wally*, 2000 WL 1890403, (SDNY 28 Dec. 2000); *Portrait of Wally*, 2002 US Dist. LEXIS 6445 (SDNY 2002).

¹²⁰ See www.theartnewspaper.com/articles/%3Ci-Portrait-of-Wally-i-case-settled-for-19m/21273; Spiegler, 'Recovering Nazi-looted Art: Report from the Front Lines', 16 *Connecticut J Int'l L* (2001) 297, at 310–312; Spiegler, 'Portrait of Wally: The US Government's Role in Recovering Holocaust Looted Art', in Bazzyler and Alford, *supra* note 9, at 280; Bazzyler, *supra* note 25, at 226–238; Esterow, 'The Law is an Ass', *ART-NEWS*, Sept. 2000, at 192.

¹²¹ Schoenberg (Altmann's attorney), 'Whose Art is it Anyway?', in Bazzyler and Alford, *supra* note 9, at 288; Bazzyler, *supra* note 25, at 240; Prof. J. Petropoulos' expert's report in the case, available at: www.bslaw.com/altmann/Klimt/Petropoulos.pdf.

¹²² Yonover, 'The "Last Prisoners Of War": Unrestituted Nazi-Looted Art', 6 *J L & Social Challenges* (2004) 81, at 88.

husband, Ferdinand Bloch, when she died in 1925, requesting that he leave them to the Austrian Gallery in Vienna upon his death. Bloch fled Austria post-*Anschluss*, abandoning his property, dying in 1945 in Switzerland. He left his estate to surviving nieces and nephews. The gallery acquired the paintings and, despite post-war claims by surviving relatives, claimed good title. This belied internal gallery anxieties regarding shortcomings in title.¹²³ The Austrian Federal Monument Agency also insisted the Klimts be donated to the Gallery in return for an export licence for other works. Fifty years later prohibitive Austrian filing fees hindered Ms Altmann (Ferdinand's niece and a US resident) suing in Austria. The Austrian authorities' attitude somewhat contradicted other simultaneous Austrian initiatives. These sought compatible,¹²⁴ if not uniform, understandings of history between *Anschluss* victims and modern Austrian institutions, a decent transitional outcome. Ultimately Ms Altmann sued both Austria and the gallery in California. The issue quickly became one of foreign sovereign immunity's technicalities,¹²⁵ with Austria losing in the Supreme Court. However, the actual restitution question was referred back to trial. Ultimately the matter was resolved by private arbitration under Austrian inheritance law. It concluded that Adele's testatory term represented only a request to Ferdinand, not an obligation. The litigation lasted approximately six years.

3 Statutes of Limitations¹²⁶

In stolen property claims, Jewish law does not generally recognize time-bars.¹²⁷ Nevertheless, a 'feast of unreason' regarding statutes of limitations and due diligence rules is apparent.¹²⁸ Decisions on when statutory periods commence are regularly left to judicial discretion.¹²⁹ A period often begins once a plaintiff discovers or, exercising reasonable diligence, should have discovered an artwork's whereabouts. However, pre-Internet research was difficult and records existed in various languages and in libraries, offices, and homes throughout Europe.¹³⁰ Two major, expert books (Lynn Nicholas' *The Rape of Europa* and Hector Feliciano's *The Lost Museum*) were not

¹²³ 2001 proceedings, *supra* note 27, at n. 8.

¹²⁴ Hornstein, *supra* note 28, at 187.

¹²⁵ Balfe, 'Case Comments: Retroactive application of Foreign Sovereign Immunities Act allows claims for pre-enactment conduct – Austria v Altmann 124 S. CT. 2240 (2004)', 28 *Suffolk Transnat'l L Rev* (2005) 359; Goodman, 'The Destruction of International Notions of Power and Sovereignty: The Supreme Court's Misguided Application of Retroactivity Doctrine to the Foreign Sovereign Immunities Act in Republic of Austria v Altmann', 93 *Georgetown LJ* (2005) 1117.

¹²⁶ Kaye, 'Cultural Property Theft During War: Application of the Statute of Limitations', in M. Briat and J.A. Freedberg (eds), *Legal Aspects of International Trade in Art* (1996), at 199, 220; Cuba, 'Stop the Clock: the case to suspend the statute of limitations on claims for Nazi-looted art', 17 *Cardozo Arts & Entertainment LJ* (1999) 447; Lerner, 'The Nazi Art Theft Problem and the Role of the Museum: a proposed solution to disputes over title', 31 *NYU J Int'l L and Politics* (1998) 15.

¹²⁷ Resnicoff, 'The Jewish Perspective on the Theft of Artworks Stolen During World War II', 10 *DePaul-LCA J Art & Entertainment L* (1999–2000) 67, at 70.

¹²⁸ Schwartz, 'The Holocaust', 20 *Cardozo L Rev* (1998) 433, at 438.

¹²⁹ See generally Henson, *supra* note 2.

¹³⁰ McCarter Collins, *supra* note 16, at 141.

published until the 1990s.¹³¹ The US imposed a time-limit on property recovery by Executive Orders in 1941 and 1942 which stated that ‘any property within the United States owned or controlled by a designated enemy country or national thereof could be transferred . . . to the Alien Property Custodian (operating within the Executive Office of the President) as . . . necessary for the national interest’. Many missed the deadline of spring 1955.¹³² Arguably, statutes of limitation should be legislatively suspended until the unique practical difficulties surrounding Holocaust claims dissipate.¹³³

Goodman v. Searle (1996)¹³⁴ concerned a Degas painting purchased in 1932 (and sent abroad in 1939) by Friedrich and Louise Gutmann, Dutch Jewish converts to Christianity, who died in concentration camps. Their children’s post-war attempts to locate the artwork were unsuccessful. In 1994 a grandson, Simon Goodman, discovered the painting in the US ownership of pharmaceutical magnate Daniel Searle, who had purchased it in 1987 for \$850,000. Searle refused the demand for return, citing statutory limitations, claiming that with greater diligence the family could have made the discovery well before 1987 (via published books and exhibits). The claimants maintained that they had immediately reported losses to Allied forces and government officials throughout Europe, Interpol, art experts, and the International Foundation for Art Research. Indeed, Searle had employed provenance experts from the Art Institute of Chicago who missed that a previous owner was Hans Wendland, a key Nazi art fence.¹³⁵ Ultimately the parties settled at the last moment, after four years, agreeing to shared ownership. The settlement barely covered the Goodman’s litigation expenses.¹³⁶ An accompanying notice poignantly indicated the painting’s ultimate transfer to the museum.¹³⁷

Due diligence (itself an uncertain standard) imposes onerous duties on inexperienced, under-resourced claimants, ignoring their anxieties regarding prejudiced backlashes and regularly intoned warnings of failure. Due diligence seems unpalatable and circumstantially inappropriate, operating as a ‘moral makeweight’,¹³⁸ reinforcing notions of ‘survivor duties’. Diligence’s antonym implies neglect, unhappily echoes ‘lambs to slaughter’, and effectively blames victims – not the *raison d’être* of limitations statutes. By contrast ‘demand and refusal’ rules stall commencement of limitations periods until owners make demands for return which the possessor refuses. In *Menzel v. List*,¹³⁹ a Nazi-seized Chagall painting was re-discovered in 1962. The owner had

¹³¹ *Rosenberg v. Seattle Art Museum v. Knoedler-Modarco, Inc.*, 42 F Supp 2d 1029 (WD Wash. 1999), motion for reconsideration granted, 70 F Supp 2d 1163 (WD Wash. 1999), vacated on reconsideration, 124 F Supp 2d 1207 (WD Wash. 2000); Spiegler, ‘Front Lines’, *supra* note 120, at 301; Bazzyler, *supra* note 25, at 222–226; and Perkins, ‘The Seattle Art Museum: A Good Faith Donee Injured in the Restoration of Art Stolen During World War II’, 34 *John Marshall L Rev* (2001) 613, at 614–615.

¹³² McCarter Collins, *supra* note 16.

¹³³ Cuba, *supra* note 126, at 450.

¹³⁴ Spiegler, *supra* note 120, at 302–303; Bazzyler, *supra* note 25, at 215–221.

¹³⁵ Bazzyler, *supra* note 25, at 218.

¹³⁶ Their other claim relating to a Botticelli also settled: Kaye, *supra* note 105, at 659.

¹³⁷ Yonover, *supra* note 122, at 88.

¹³⁸ Weil, *supra* note 36, at 292–293.

¹³⁹ 267 NYS 2d 804 (NY Sup. Ct. 1966).

purchased it in 1955 in the US and argued that the action accrued either upon theft in Brussels in 1941 or in 1955. The court held that the cause of action arose 'not upon the stealing or the taking, but upon the defendant's refusal to convey the chattel upon demand'.

However, demand and refusal rules have been harshly interpreted if the demand is not timeously made. *DeWeerth v. Baldinger* concerned a Monet painting¹⁴⁰ allegedly taken from a German woman's collection by American soldiers. In 1981 the painting was located, a demand made, and a claim filed. However, it was held that the demand was not timeously made because search efforts, between 1957 and 1981, were insufficient.¹⁴¹ Demand and refusal thus received a due diligence ingredient, which had been resisted in earlier cases.¹⁴² In *Guggenheim Foundation v. Lubell*,¹⁴³ a Chagall gouache stolen from the museum in the 1960s was located in Ms Lubell's possession in August 1985. Lubell refused the museum's 1986 demand for return, citing both a statute of limitations and the equitable defence of laches. The statute of limitations had expired since the theft with no effort being taken by the Guggenheim to obtain the painting's return. The motion was granted and the action dismissed. However, the New York Court of Appeals held that the due diligence argument was more relevant to laches than statutory limitation, and so Lubell needed to demonstrate prejudice due to the museum's delay in demanding return.¹⁴⁴ It further concluded that the federal court of appeals in the *DeWeerth* case should not have imposed a duty of reasonable or due diligence on the original owners for the purposes of the statute of limitations.

Rejecting *DeWeerth's* hybrid approach seems sensible, as finding otherwise virtually anoints illicit trafficking once periods expire. This appears a pragmatic, equitable approach for Nazi-plundered art claims.¹⁴⁵ *DeWeerth* ostensibly ignored the research responsibilities of well-off, time-rich purchasers.¹⁴⁶ Purchasing is voluntary; victimhood is not.¹⁴⁷ However, that fixes upon moments of acquisition when art world practices were below today's standards and beyond individual purchasers' control. Sometimes demand and refusal may seem as unrealistic, as unfair, as statutory cut-offs. Shifting burdens onto wronged original owners who were Holocaust survivors seems unsustainable, but is it so in the case of heirs?

¹⁴⁰ 38 F 3d 1266 (2d Cir. 1994), cert. denied 513 US 1001 (1994).

¹⁴¹ McCarter Collins, *supra* note 16, at n. 131.

¹⁴² *Kunstsammlungen zu Weimar v. Elicofon*, 678 F 2d 1150 (2d Cir. 1982).

¹⁴³ *Solomon R. Guggenheim Foundation v. Lubell*, 569 NE 2d 426 (NY 1991); McCarter Collins, *supra* note 16, at 134. See also Hawkins and Rothman *et al.*, 'A Tale of Two Innocents: Creating an Equitable Balance Between the Rights of Former Owners and Good Faith Purchasers of Stolen Art', 64 *Fordham L Rev* (1995) 49, at 54–64.

¹⁴⁴ See *Vineberg v. Bissonette*, 2007 WL4571154 DRI, regarding prejudice; *Matter of Flamenbaum*, File No. 328416 (30 Mar. 2010), available at: www.nylj.com/nylawyer/adgifs/decisions/040510riordan.pdf, illustrates successful invocation of the laches defence.

¹⁴⁵ Although see Lerner, *supra* note 126, at 25–27.

¹⁴⁶ *Ibid.*

¹⁴⁷ Henson, *supra* note 2, at 1150.

Somewhat controversially, on 30 September 2010, California Governor Arnold Schwarzenegger approved draft bill A.B.2765.¹⁴⁸ This legislation authorizes a civil action against a museum, gallery, auctioneer, or dealer for the recovery of fine artworks that were unlawfully taken or stolen (including a taking or theft by means of fraud or duress) to be commenced within six years of the actual discovery by claimants or their agents of the identity and whereabouts of the artwork and information or facts which are sufficient to indicate that the claimant has a claim for a possessory interest in the artwork. The provisions apply to pending and future actions commenced on or before 31 December 2017, and include any actions that were dismissed based on the expiration of statutes of limitation in effect prior to the date of the enactment of the bill if, prior to that date, the judgment in the action was not final or the time for filing an appeal from a decision on that action had not expired, provided that the action concerns a work of fine art which was taken within 100 years prior to the date of the bill's enactment.

The legislation arose from a 2009 ruling by the US Ninth Circuit Court of Appeals striking down a 2002 California law relaxing the statute of limitations for actions by owners or heirs trying to recover artworks stolen during the Holocaust.¹⁴⁹ This claim has been set down for the US Supreme Court, which, in October 2010, made a 'Call for the Views of the Solicitor General'. The Court may regard the 2002 law as unconstitutional and force the claimant to amend the action to proceed under the 2010 law, or uphold the 2002 law with parties consequently arguing the merits at district court level. Thus, even laws designed to ameliorate problems faced by plaintiffs may present their own difficulties.

4 Criminal Context

Thefticide's criminal context may arrest time-limits. The IMT denounced looting as constituting war crimes and crimes against humanity (Rosenberg was convicted of both). Thus, looting becomes non-prescriptible, given Article 1 of the 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity. However, the US is a non-participant (as are many 'market' nations), and the treaty envisages only state responsibility and individual criminal responsibility. Further, although crimes committed in occupied territories (including Austria) are covered, it will not assist dispossessed German Jews because the IMT considered international law insufficiently crystallized to cover pre-1939 German confiscations.¹⁵⁰ The missed opportunity presented by the aforementioned UNESCO 2009

¹⁴⁸ See <http://leginfo.ca.gov/cgi-bin/waisgate?WAISdocID=05101614027+3+0+0&WAISaction=retrieve> and <http://latimesblogs.latimes.com/culturemonster/2010/09/schwarzenegger-norton-simon-museum-holocaust-art.html>.

¹⁴⁹ See the Goudstikker claim, *supra* note 105. See also *Orkin v. Taylor*, 487 F.3d 734 (9th Cir, 2007).

¹⁵⁰ Although Control Council Law No. 10 did not require a 'war nexus' for crimes against humanity, there was tribunal disagreement regarding this omission's significance: see the *Einsatzgruppen* (*US v. Otto Ohlendorf et al.*, 4 CCL No. 10 Cases 411 (1948)), *Flick* (*US v. Friedrich Flick*, 6 CCL No. 10 Cases 1187 (1947)), *Ministries* (*US v. von Weizsaecker et al.*, 13 CCL No. 10 Cases 112 (1949)) and *Justice* (*US v. Alstoetter et al.*, 3 CCL No. 10 Cases 954 (1947)) cases.

Draft Declaration (which covered the dispossessed of both occupied and non-occupied peoples) is yet again striking. Rather than providing a basis for private claims, criminal categorization may simply render statutes of limitation inapplicable.

5 Disparities in Rules Relating to Good-Faith Purchasers

The exclusion of good title passing in illicit circumstances is common-law based.¹⁵¹ Such good faith purchasers can pursue sellers for breaches of title warranty, fraud, and negligent misrepresentation. However, the civilian tradition countenances good title passing eventually, and such jurisdictions witnessed significant looted art transacting/laundrying.¹⁵² However, despite civil-law participants, the principle of good faith eventually passing was omitted from the 1943 Declaration. This potentially implies its disavowal (even as far as neutral countries were concerned).¹⁵³ Unfortunately, the Declaration's impotence makes such optimism misplaced. Obstacles multiply, with inconsistent approaches among civilian jurisdictions. Nevertheless, the Declaration's existence doubts straightforward good faith 'trumps'. This is reinforced by the fact that a 1947 looting list published by the French Bureau Central des Restitutions was widely distributed in Europe and the US to experts, art dealers, and museums, and warned potential buyers that such illegally acquired property 'could not be sold commercially without seriously involving . . . liability'.¹⁵⁴

6 Human Rights Law

The 1950 European Convention on Human Rights and Fundamental Freedoms (ECHR), guaranteeing various property rights, appears claimant-friendly. For example, civil limbs of Article 6 may be activated if prohibitive filing fees render an action merely theoretically available. Given the ECHR's partial horizontalization in the UK via the Human Rights Act 1998, claimants could pursue other individuals. However, Article 1, Protocol No. 1's generality and difficulties regarding retroactivity¹⁵⁵ dilute the ECHR's utility. Conceivably, artwork looted pre-ECHR is a violation which continues into the 'active' period of ECHR jurisdiction.¹⁵⁶ In the quite different context of post-war Czechoslovakian expropriations under the Beneš decrees, the Grand Chamber in *Prince Hans-Adam II of Liechtenstein v. Germany* acknowledged that 'possessions' include claims where applicants arguably had 'legitimate expectations' of obtaining effective enjoyment of property rights. However, hopeful recognition of old property rights' survival, long since impossible to exercise effectively, was excluded.¹⁵⁷

¹⁵¹ Spiegler, *supra* note 120, at 299. Due diligence can defeat the rule: Bazylar, *supra* note 25, at 212.

¹⁵² Sykes, 'Recovery of Stolen and Looted Works of Art: London December 10 1998', 4(1) *Art, Antiquity and Law* (1999) 81, at 82.

¹⁵³ Kowalski, *supra* note 92, at 41.

¹⁵⁴ Hamon, *supra* note 67, at 64.

¹⁵⁵ App. No. 343/57, *Nielsen v. Denmark*, Comm. Dec., (1958–1959) 2 Yrbk 412.

¹⁵⁶ App. No. 214/56, *De Becker v. Belgium*, Comm. Dec., (1959–60) 2 Yrbk (ECHR) 214.

¹⁵⁷ App. No. 42527/98, 11 BHRC (2001) 526. See also App. No. 39794/98, *Gratzinger and Gratzingerova v. Czech Republic*, 35 EHRR (2002) CD202.

Continuing violations were distinguishable from instantaneous acts with lasting effects.¹⁵⁸ Czechoslovakia's expropriation occurred in 1945. Consequently, the Court was not competent *ratione temporis* to examine the expropriation or its continuing effects. This was distinguishable from the UN Human Rights Committee's Views that post-Communist restitution applications were admissible since claims were about discrimination in the application of later restitution programmes rather than focussing upon the original seizures.¹⁵⁹

These later cases offer two conclusions. First, individuals continuously sought their property but this endeavour was fraught with legal difficulty and uncertainty. Secondly, key actors were manifestly not on a discursive terrain. Restitution has the capacity and potential to facilitate reconciliation and holistic discussions of intertwined histories, but court-conducted, *ad hoc* restitution litigation appears incoherent in black-letter terms and offers little to transitional projects geared at re-understanding history.

7 Changing the Normal Legal Framework

The Association of American Museum Directors suggested that normal legal defences be resisted in Holocaust claims. Specialized legal changes (e.g., amending the Holocaust Victims Redress Act) could diminish litigation obstacles while highlighting restitution's moral imperative. However, this implies a privileging of Holocaust claims over those of other art-theft victims,¹⁶⁰ thus raising questions regarding equal protection under law. Exclusive legal rights are not unknown. Congress removed defences to claims brought by the Cherokee and Sioux Nations solely for the unique predicament of the Native Americans.¹⁶¹ While presumably only Native Americans could bring claims regarding US land, Jews were not looting's sole victims. Ostensibly it seems constitutionally untenable to allow Jewish victims' claims while denying identical non-Jewish claims. However, Jewish looting's intertwining with genocide perhaps justifies different treatment. Practically, however, if looting was racially motivated would this be presumed if involving Jewish victims (thus excluding defences) but require proof if involving other groups? Now discredited allegations that Roma and Sinti were targeted for supposed criminal tendencies (rather than ethnic origins) initially operated to exclude their eligibility to compensation.¹⁶² There are two options for lawmakers – a wide or narrow principle. If a wide principle regarding all war

¹⁵⁸ Gattini, 'A Trojan Horse for Sudeten Claims? On Some Implications of the Prince of Liechtenstein v Germany', 13 *EJIL* (2002) 513, at 527. See also App. No. 33071/96, *Malhous v. Czech Republic*, available at: www.echr.coe.int/

¹⁵⁹ Macklem, 'Rybná 9, Praha 1: Restitution and Memory in International Human Rights Law', 16 *EJIL* (2005) 1, at 9–10.

¹⁶⁰ Cuba, *supra* note 126, at 447, 469; Weil, *supra* note 36, at 299; and Walton, 'Leave no stone unturned: the search for art stolen by the Nazis and the legal rules governing restitution of stolen art', 9 *Fordham Intell Prop Media & Entertainment LJ* (1999) 549, at 600.

¹⁶¹ Cuba, *supra* note 126, at 484, discussing *US v. Sioux Nation of Indians*, 448 US 371 (1980).

¹⁶² Woolford and Wolejszo, *supra* note 31, at 880, 886–887.

victims' entitlement to restitution is sought then, constitutionally, it is unacceptable to give Nazi victims rights above other war victims.¹⁶³ A narrower principle concentrates on recognizing the enormity of the Jewish Holocaust via legal amendment. This is implied by the 2009 Terezin Declaration and exemplified by the UK Holocaust (Return of Cultural Objects) Act 2009.¹⁶⁴ The downside of such an approach implies that future victim-groups must surpass Holocaust-paradigmatic standards of suffering. As discussed later on, this may lead to counter-productive, unpalatable, impossible judgments.

C Legal Context Options – An International Treaty?

Claims have proliferated without any corresponding development in governing legal frameworks. Consequently some argue for an international treaty because, bound only by honour,¹⁶⁵ states are indifferent. Formalism promises procedural and substantive clarity. Multilateral treaties could provide uniform, nationally-implemented codes,¹⁶⁶ reify demand and refusal rules, or offer steers on time-bars,¹⁶⁷ and create an artwork registry.¹⁶⁸ A treaty could embed cultural restitution principles and provide a bespoke, expert, binding forum via its own dispute resolution mechanism.

However, treaties envisage inter-state frameworks and continue to elide secondary rules of state responsibility with remedying primary breaches of international law. Ostensibly, individuals could pressure their own state if it was lax in negotiating on their behalves. Alternatively individuals could force 'foreign' states hosting artworks to conduct ownership investigations. However, claimants remain at arm's length, at the mercy of state actors acting haltingly or not at all. The road to Hell is often paved with good conventions.¹⁶⁹ Treaties also militate against international law trends favouring principles of compliance (via soft law) rather than rule-breach. Indeed, bespoke soft law instruments (Washington Principles, Vilnius Declaration, Terezin Declaration 2009) represent soft law, perhaps more suited to lower-key Alternative Dispute Resolution (ADR) than courts. Although such approaches have shortcomings (the Madrileno Thyssen-Bornemisza Museum doubted the Washington Principles' power over private museums or Spanish law¹⁷⁰), given the false promise of treaties, alternative resolution methods merit investigation.

¹⁶³ Weil, *supra* note 36, at 297.

¹⁶⁴ HC Debs, 15 May 2009, vol. 492, cols. 1169–1170. The Museum Association's Code of Ethics (2007) considers claims regarding objects from other periods.

¹⁶⁵ Falconer, *supra* note 71, at 425–426.

¹⁶⁶ Henson, *supra* note 2, at 1153–1156; Cuba, *supra* note 126, at 487.

¹⁶⁷ Lerner, *supra* note 126, at 35.

¹⁶⁸ Garrett, *supra* note 94, at 394.

¹⁶⁹ Attributed to B.V.A. Röling.

¹⁷⁰ Eizenstat, 'The Unfinished Business of the Unfinished Business of World War II', in Bazylar and Alford, *supra* note 9, at 308; Chamberlain, 'Claude Cassirer v Kingdom of Spain: the US Foreign Sovereign Immunity Act in relation to the Cassirer case', 11(4) *Art, Antiquity and Law* (2006) 371. Both Spain and the Thyssen-Bornemisza Collection Foundation have been held subject to US jurisdiction under the FSIA's expropriation exception, No. 06-56325, 06-56406 (9th Cir., 12 Aug. 2010).

D Courts as Narrative Sites

Some doubt that courts are ‘guardians of justice for the downtrodden’,¹⁷¹ maintaining that Holocaust settlements are attained despite judges, with ‘vulture’¹⁷² lawyers using elderly Holocaust survivors as ‘props’.¹⁷³ Ostensibly cases simply focus on establishing ‘legal peace’ regarding specialized claims rather than historical research.¹⁷⁴ However, the 2005 UN Basic Principles on Remedies and Reparations, previously mentioned, stress the importance of fact verification, public disclosure of the truth, apologies, and acceptance of responsibility. Litigation’s didactic capacity to reinforce and enhance memory is repeatedly emphasized, but this is not uncomplex.¹⁷⁵ More truthfully, law often simply poses as closure.¹⁷⁶ Law’s eternal dilemma is that ‘the existential character of the evil overtakes law’s capacity to address it, while . . . law’s capacity to address it requires us to banalize the evil’.¹⁷⁷ Courts cope dubiously with the complex needs and desires of claimants whose cases raise profound historical, ethical, moral, legal questions. Procedures are cumbersome, miring claims in legal quicksand. Further, law’s self-referential nature produces a *court* record, but ‘the historical record is a wild card’.¹⁷⁸ Sometimes useful, sometimes not, this judicial capacity to produce an invulnerable historical narrative of ‘truth’ concluding in ‘justice’ is concerning.¹⁷⁹ Courts establish rights to particular chattels, saying nothing about related cultural implications.¹⁸⁰ Recently companies/institutions have commissioned research on their own histories. Such research could itself be restitutive if it prompted admissions of complicity in Nazi misdeeds (although historians are not state prosecutors).¹⁸¹ Traditional routes of laws, courts, and litigation can be supported by complementary models of justice. Truth and reconciliation models are useful for contextualizing human rights atrocities. Similar functions could be performed in restitution’s context by invoking alternative methods such as arbitration and mediation. The New York Holocaust Claims Processing Office and the UK Spoliation Advisory Panel models are discussed below.

¹⁷¹ Neuborne, ‘A Tale of Two Cities’, in Bazylar and Alford, *supra* note 9, at 73–74.

¹⁷² Kent, ‘It’s Not About Money: a survivor’s perspective on the German Foundation initiative’, in *ibid.*, at 210.

¹⁷³ Eizenstat, *supra* note 3, at 77–78.

¹⁷⁴ Even relations between claimants and commissioned historians sour: *Feliciano v. Rosenberg*, No. 602612/2001 (NY Sup. Ct. 14 Feb. 2003) (dismissed).

¹⁷⁵ Barkan and Weisberg, in Symposium, *supra* note 5, at 162–164.

¹⁷⁶ Curran, in *ibid.*, at 165.

¹⁷⁷ Cotler, *supra* note 44, at 603.

¹⁷⁸ Bloxham, ‘The Holocaust in the Courtroom’, in Stone, *supra* note 21, at 398.

¹⁷⁹ Curran, *supra* note 176, at 160–162.

¹⁸⁰ Pruszyński, ‘Poland: the war losses. Cultural Heritage and Cultural Legitimacy’, in Simpson, *supra* note 1, at 50.

¹⁸¹ Feldman, ‘The Historian and Holocaust Restitution: Personal Experiences and Reflections’, 23 *Berkeley J Int’l L* (2005) 347, at 354–356.

4 Alternative Methods¹⁸²

A Key Advantages

Litigation is gladiatorial, expensive, time-consuming, and unpredictable.¹⁸³ Evidential issues precipitate distasteful chases around Europe to establish different historical scenarios. Cost-spreading of class actions is not available.¹⁸⁴ Negotiation, conciliation, and mediation are attractive, subject-appropriate, and are endorsed by the US Association of Art Museum Directors. In the context of good-faith purchasers,¹⁸⁵ a 'battle between two victims' means that initial injustices lead to 'aftergrowths' of injustice.¹⁸⁶ Current owners are rarely the original takers or share that ideology. Alternatives could allow no-fault consensual returns¹⁸⁷ with accompanying acknowledgement of the initial seizure's wrongfulness. Confidentiality could protect auction houses'/ museums' reputations.¹⁸⁸ Indeed, even in the context of inter-state disputes over representative national treasures, the UNESCO Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in case of Illicit Appropriation has accepted the addition of mediation and conciliation to its mandate, recently adopting rules and procedures in this connection.¹⁸⁹

Art world experts might constitute more suitable panels than courts and, along with a title registration scheme, might even create positive economic incentives for desirable behaviour.¹⁹⁰ Unshackled from 'rancorous'¹⁹¹ courtrooms and procedures, the historical context of an item's seizure can be examined. The New York Holocaust Claims Processing Office (HCPO) utilizes inter-disciplinary experts, drawing upon diverse legal, historical, economic, and linguistic backgrounds. This facilitates detailed art-historical research and an understanding of looting's economic history, social and business context. Unlike lawyers, the HCPO pursues claims where investigative expense outstrips artworks' value, and focuses on all restitution avenues outwith the court system. The North Carolina Museum of Art held 'Madonna and Child in a

¹⁸² Pell, 'The Potential for a Mediation/Arbitration Commission to Resolve Disputes Relating to Artworks Stolen or Looted During World War II', 10 *DePaul-LCA J Art and Entertainment L* (1999) 27; and Pell, 'Using Arbitral Tribunals to Resolve Disputes Relating to Holocaust-Looted Art', in *The Permanent Court of Arbitration/Peace Palace Papers: Resolution of Cultural Property Disputes* (2004).

¹⁸³ Sykes, *supra* note 152, at 81.

¹⁸⁴ Bazzyler, *supra* note 25, at 254.

¹⁸⁵ Weil, *supra* note 36, at 290.

¹⁸⁶ J.S. Mill, *Principles of Political Economy* (1987), at 220.

¹⁸⁷ See generally N. Palmer, *Museums and the Holocaust* (2000), at 105–109.

¹⁸⁸ Keim, 'Filling the Gap Between Morality And Jurisprudence: The use of binding arbitration to resolve claims of restitution regarding Nazi-stolen art', 3 *Pepperdine Dispute Resolution LJ* (2003) 295, at 312, n. 137.

¹⁸⁹ Rec. No. 4 of Sept. 2010, available at: <http://unesdoc.unesco.org/images/0018/001896/189639E.pdf> and Draft Rules and Procedures, available at: <http://unesdoc.unesco.org/images/0018/001834/183433e.pdf>.

¹⁹⁰ Pell, 'Holocaust Looted Art: Lost but Not Forgotten', available at: www.law.virginia.edu/home2002/html/alumni/uvalawyer/f02/opinion.htm, although see Bazzyler, *supra* note 25, at 260.

¹⁹¹ Dugot, *supra* note 24, at 273–277, 279.

Landscape' by Lucas Cranach the Elder. Presented with evidence of a 1940 forced sale from a Viennese collector, the museum returned the painting to his heirs for whom Monica Dugot, the HCPO's Deputy Director, negotiated. The impressed heirs sold it back to the Museum below market price as a 'partial donation'.¹⁹² No lawyers were needed. Further, a French Prime Ministerial Edict (10 September 1999) established the Draï Commission.¹⁹³ Membership was drawn from the judiciary, academics, and 'qualified persons', assisted by special investigating rapporteurs. The Edict stressed the Commission's non-judicial nature, emphasizing its pragmatism.¹⁹⁴

The oft-stressed didacticism of Holocaust litigation overlooks claimants' wish for anonymity. Desires to assert rights to objects, their familial importance, and the significance of their return, should not presume publicity. Indeed, in Israel, survivor-claimants who were keen to fit into an agenda of Zionist nation-building¹⁹⁵ often retreated from 'victimhood', both in World War II's aftermath and decades later.¹⁹⁶ Retreating from lachrymose theories of Jewish identity,¹⁹⁷ the imperative was resurrection, not death. Perhaps a privately negotiated settlement might be of assistance in such cases. Indeed the low-key approach of the UK Holocaust (Return of Cultural Objects Act) 2009, discussed below, was praised for effecting justice without furthering 'victim culture'.¹⁹⁸

B Identity of Claimants

If living victims criticize compensation negotiations as 'resolution by remote control',¹⁹⁹ heirless property produces further complications.²⁰⁰ In June 2008, an exhibition entitled 'Looking for Owners' opened at the Parisian Musée d'Art et d'Histoire du Judaïsme exhibiting 53 works the pre-war owners of which remain untraced. If owners/heirs remain untraceable, how should museums proceed in order to avoid charges of unjust enrichment? Leaving aside valuation controversies, good-faith owning museums could make contributions to Holocaust restitution funds. Auctions of artworks may raise proceeds for funds. Again, ADR may offer fora more suitable for resolving such thorny issues.

Potential conflicts between Holocaust victims and victim-representative NGOs arise regarding both *locus standi* and post-settlement asset distribution.²⁰¹ The World

¹⁹² Eizenstat, *supra* note 3, at 201–202; Spiegler, *supra* note 120, at 297; Bazyler, *supra* note 25, at 249.

¹⁹³ (Draï) Commission for the Compensation of Victims of Spoliation Resulting from the Anti-Semitic Legislation in Force during the Occupation, available at: www.civs.gouv.fr/spip.php?rubrique39.

¹⁹⁴ See its Art. 6; Anglade, 'Art, Law and the Holocaust: The French Situation', 4 *Art, Antiquity & Law* (1999) 301, at 308.

¹⁹⁵ Ignoring the potentially Faustian intertwining with reparations: Barkan, *supra* note 7, at 5 and 24.

¹⁹⁶ Zuckerman, 'The Holocaust Restitution Enterprise', in Bazyler and Alford, *supra* note 9, at 323.

¹⁹⁷ I. Schorsch, *From Text to Context* (2003), at 376.

¹⁹⁸ HLDebs., 10 July 2009, vol. 712, col. 905 (Lord Haskel).

¹⁹⁹ Frumkin, *supra* note 95, at 95.

²⁰⁰ Sh'ma special edition, June 2002, available at: www.shma.com/2002/06.

²⁰¹ Swift, 'Holocaust Litigation and Human Rights Jurisprudence', in Bazyler and Alford, *supra* note 9, at 54–58.

Jewish Restitution Organization (a subsidiary of the World Jewish Congress)²⁰² works in conjunction with the German Claims Conference (GCC), whose work is described as ‘the collective accomplishment of world Jewry’.²⁰³ The GCC was appointed the legal successor to unclaimed Jewish property, including that of dissolved Jewish communities and organizations. Thus, Jewish assets still unclaimed after filing deadlines did not simply remain with modern owners or revert to Germany. The GCC is mandated to use the proceeds from such properties (by sale or compensation) to fund organizations and institutions which assist needy Holocaust survivors and engage in related research, education, and documentation. A clearer *cy pres* approach might be developed, whereby proceeds of sale impossible to distribute on an individual claims basis are distributed instead for the benefit of ‘class members’. NGOs could bid for assets.²⁰⁴ *Cy pres* models have hitherto been effected judicially, but could be enacted legislatively. Indeed the Austrian National Fund was legally assigned the responsibility for disposing of heirless artworks transferred from public property for the benefit of Nazi victims.²⁰⁵ This complemented the Fund’s other work in subsidizing projects providing aid and support to victims or communities which suffered severe Nazi persecution, and in supporting scholarly and scientific research into the Nazi period.²⁰⁶ Utilizing such approaches in mediatory or arbitration fora might semi-formalize fairly flexible procedures, alleviating concerns regarding discretion. It would also complement the mixing of moral and legal authority evident in the work of bodies such as the UK Spoliation Advisory Panel.

However the NGO ‘proxy’ approach is not unproblematic, since NGOs cannot automatically derive legal representational rights from Holocaust deceased.²⁰⁷ Difficulties also arise between Jewish/non-Jewish claimants²⁰⁸ and from intra-Jewish group strife. Livid ‘intergenerational rivalries’ reveal that some survivors believe funds should be distributed solely to those who actually suffered during the Holocaust (regardless of definitional difficulties).²⁰⁹ Others consider that funds should be spent (usually via NGOs) to ensure the existence of all Jewish people. This entire debate fundamentally questions group identity, social organization and hierarchy, and a group’s capacity to limit certain sub-groups’ autonomy. It is not new. Debates regarding successor/trusteeship organizations were aired around World War II’s end,²¹⁰ as were the

²⁰² See also the Commission for Art Recovery at www.comartrecovery.org/.

²⁰³ Miller, *supra* note 42, at 580–581.

²⁰⁴ Swift, *supra* note 201, at 55; although see ‘eligibility limits’ in *In Re Holocaust Victim Assets Litigation*, 424 F 3d 169 (2d Cir. 2005).

²⁰⁵ Jordan, ‘Bittersweet Victories for Jews as Property is Returned’, *Christian Science Monitor*, 1 Nov. 1996, 1.

²⁰⁶ Lessing and Azizi, *supra* note 60, at 229–230.

²⁰⁷ Swift, *supra* note 201, at 54.

²⁰⁸ Authers and Wolffe, *supra* note 41, at 230–240.

²⁰⁹ Bazylar, *supra* note 25, at 271–275.

²¹⁰ Ultimately, under Reg. 3 to MG Law No. 59, the Jewish Restitution Successor Organization (JRSO) was recognized as the successor for heirless Jewish property covered by MG59: Kurtz, *supra* note 99, at 625, 629–630, 639; N. Robinson, *Indemnification and Reparations* (1944); S. Moses, *Jewish Post-War Claims* (1944); S. Goldschmidt, *Legal Claims Against Germany* (1945).

possibilities of using auction proceeds.²¹¹ Defining victimhood is tricky. Some Chasidic and ultra-Orthodox Jewish organizations (reflecting pre-war tensions between Western European *Krawattenjuden* and Eastern European *Kaftanjuden*²¹²) claim primacy over funds on the basis that their communities were decimated.²¹³ Indeed, who is an heir? Certain claims have been made by remote relatives. In the case of Silberberg, it was his daughter-in-law. In relation to 'Dead City III' by Egon Schiele, the claimants are the widows of the sons of the victim's cousin. In neither case are they blood relatives (although imposing such restrictions would be completely unpalatable).²¹⁴ Ultimately, such regrettable intra-victim disputes should not torpedo well-intended, socially-worthy programmes of asset distribution. Indeed indigent Holocaust survivors²¹⁵ are identified as a key priority in the 2009 Terezin Declaration.

Debates also continue regarding the relationship between the Jewish diaspora and Israel.²¹⁶ Israeli Foreign Minister Moshe Sharett explicitly referred to Israel as rights-bearer of the slaughtered in his 1951 Four Powers note.²¹⁷ Paranoid fantasies of Jewish cosmopolitanism's power are unattractive, but so too are essentialist ideas of Jewishness. Even in restitution's early days Israel's primacy in receiving heirless property was debated.²¹⁸ Ultimately, however, the 1951 debate revolved round whether it was moral to accept German reparations, not Israel's presumed position as negotiator or recipient.²¹⁹ This arguably exemplified commitments to collective solidarity by the relevant actors.²²⁰ Perhaps Jewish organizations began seeing themselves more in national than religious terms,²²¹ with the negotiations simultaneously emboldening Israel's confidence and statehood.

Compensation is often considered forward-looking and utilitarian;²²² restitution backward-looking and rights-based. However, restitutive general funds are particularly attractive if involving communal property where notions of collective or community rights inhere in the original ownership. It is appealingly circular that community property be redistributed to reconstitute communities. It chimes with the Vilnius Declaration and Council of Europe Resolution 1205, being in tune with broader

²¹¹ Dr Philipp Auerbach, Germany's leading government authority on Holocaust compensation; see also Petropoulos, *supra* note 32, at 332–334.

²¹² Edmonds and Eidinow, *supra* note 29, at 79–80.

²¹³ Bazylar, *supra* note 25, at 273–274.

²¹⁴ *Ibid.*, at 212.

²¹⁵ See generally Lash and Kamin, 'Poor Justice: Holocaust Restitution and Forgotten, Indigent Survivors', in Bazylar and Alford, *supra* note 9, at 315.

²¹⁶ Zuckerman, 'The Holocaust Restitution Enterprise: An Israeli Perspective', in *ibid.*, at 326, 329; Bazylar, *supra* note 25, at 277; Berenbaum, 'Let Us Not Fight over the Yerusha', available at: www.shma.com.

²¹⁷ Government of Israel 1951, Note of 12 Mar. See also S. Moses, *Die Jüdischen Nachkriegsforderungen* (1944), referred to in Barkan, *supra* note 7, at 4–5.

²¹⁸ Kurtz, *supra* note 99, at 643.

²¹⁹ Hornstein, *supra* note 28, at 181.

²²⁰ Woolford and Wolejszo, *supra* note 31, at 873.

²²¹ Barkan, *supra* note 7, at 9.

²²² Elster, *supra* note 11, at 174. However, compensation perhaps works most appropriately in the context of state compensation to former private owners (Pogany, *supra* note 31, at 150) rather than in the context of property which has only ever been privately owned.

reformative and restorative goals of transitional justice. Indeed in the late 1940s, Jewish Cultural Reconstruction Inc. effected the transfer of 'unidentifiable' cultural properties, held by OMGUS, to be used to perpetuate Jewish art and culture.²²³

C UK Spoliation Advisory Panel (SAP)

Established in April 2000, the SAP operates under the auspices of the UK Department for Culture, Media, and Sport. It considers claims from anyone (including heirs) who lost possession of a cultural object during the Nazi era (1933–1945) where the object is now possessed by a UK national collection or one established for the public benefit. The SAP may advise on claims regarding items in private collections at the joint request of claimants and owners.²²⁴ To date, the SAP has reported ten times. While considering legal-title issues, the SAP's function is not to determine legal rights and its findings are not binding. Its proceedings take place in confidence. Attempting to bridge apparent dichotomies between morality and law,²²⁵ the SAP considers both the moral strength of the claimant's case and an institution's moral obligations. The first claim concerned a Tate-held Jan Griffier the Elder painting. The Tate had good legal title but the SAP upheld the claim on its moral strength, and awarded an *ex gratia* payment.²²⁶ The SAP decides on the balance of probabilities while recognizing claimants' specific difficulties. Without being pro-claimant, the SAP seeks solutions equitable to both claimants and institutions.²²⁷ In fact, the SAP provided the model for the equivalent Dutch Restitution Committee to which 119 restitution applications have been made to date.²²⁸ Deaccessioning difficulties,²²⁹ whereby divestiture of museum collections was barred by trust terms²³⁰ or by safeguarding legislation,²³¹ resulted in claims being upheld, but with *ex gratia* payment awards, not restitutions. In June 2008 the SAP provided for an *ex gratia* payment to be made to a claimant in relation to a piece of fine porcelain barred from disposal due to section 3 of the British Museums Act 1963.²³²

²²³ Kurtz, *supra* note 99, at 640.

²²⁴ See its constitution and terms of reference at www.culture.gov.uk/images/publications/SAPConstitutionandTOR09.pdf.

²²⁵ Schwartz, *supra* note 128, at 435.

²²⁶ <http://webarchive.nationalarchives.gov.uk/+http://www.culture.gov.uk/images/publications/galleriesspoliation.pdf>.

²²⁷ See Report of the Spoliation Advisory Panel in respect of three Rubens Paintings now in the possession of the Courtauld Institute of Art, London, available at: http://webarchive.nationalarchives.gov.uk/+http://www.culture.gov.uk/reference_library/publications/3665.aspx.

²²⁸ See www.restitutiecommissie.nl/en/over_de_restitutiecommissie.html.

²²⁹ Range, 'Deaccessioning and its Costs in the Holocaust Art Context: The United States and Great Britain', 39 *Texas Int'l LJ* (2004) 655.

²³⁰ See Report of the Spoliation Advisory Panel in respect of a painting now in the possession of Glasgow City Council, available at: http://webarchive.nationalarchives.gov.uk/+http://www.culture.gov.uk/reference_library/publications/4604.aspx.

²³¹ Lerner, *supra* note 126, at 16.

²³² See 'Spoliation Advisory Panel rules that two fine pieces of porcelain – acquired in good faith by the British Museum and the Fitzwilliam Museum – were looted during the Nazi era', available at: http://webarchive.nationalarchives.gov.uk/+http://www.culture.gov.uk/reference_library/media_releases/5193.aspx.

In a claim regarding a 12th century manuscript held by the British Library, the SAP recommended it be returned to Italy²³³ in the short term via a loan and that legislation ultimately be amended to permit full restitution. Attempts to read in additional exceptions to the statutory rules were unsuccessful.²³⁴ Such difficulties were ameliorated by the Holocaust (Return of Cultural Objects) Act 2009, which enables relevant board trustees to transfer an object from specified bodies established by statute, such as the British Library and the British Museum. Indeed the legislation has allowed the SAP to recommend actual restitution of the aforementioned Italian medieval manuscript.²³⁵ The advisory panel must have recommended the transfer and the Secretary of State (and Scottish Ministers in the case of Scotland) must approve that recommendation. The ultimate transfer decision remains with the trustees. The ‘power to return’ does not override any trust or condition subject to which an object is held. The Act is not retrospective and it expires ten years from its passage, some 74 years after World War II’s end, providing certainty for the public collections concerned. Twenty disputed articles are estimated to be in British collections,²³⁶ although the legislation may prompt more claims. Of course, if whole families were exterminated, good and bad faith purchasers alike retain secure possession.²³⁷ The SAP cannot investigate *ex proprio motu*. However, the art world has clearly assumed moral duties. Special exhibitions, explanatory labels, and provenance notes may not compensate for harm done, but they humbly recognize tainted possession.

5 Conclusion

Contemporary liberal societies, accepting their inter-generational responsibilities, increasingly acknowledge and apologize for past injustices.²³⁸ The Holocaust restitution movement is within this phenomenon’s vanguard. Other restitution campaigns concerning Japanese World War II crimes, the Roma Holocaust, dispossessed Palestinians, Armenian genocide victims, and African-American slavery represent the legal aftergrowth of Holocaust restitution’s initiative.²³⁹ However, the reality of this ‘legal launching pad’ is disputable.²⁴⁰ If restitution litigation falsely suggests that slavery’s implications have been addressed, re-directing energies and resources towards current injustices against African Americans might be better. Pursuing litigation

²³³ See http://webarchive.nationalarchives.gov.uk/+http://www.culture.gov.uk/reference_library/publications/3733.aspx.

²³⁴ *Attorney-General v. British Museum Trustees* [2005] Ch 397, relying upon *Snowden, Re* [1970] Ch 700. See Mason, ‘Statutory Obligation v Moral Obligation in the World of Charity’, 9 *Art, Antiquity and Law* (2006) 101.

²³⁵ See www.culture.gov.uk/images/publications/Benevento_5119_HC448_7-9.pdf.

²³⁶ Andrew Dismore MP, HC Debs, 26 June 2009, vol. 494, col. 1050.

²³⁷ Weil, *supra* note 36, at 297.

²³⁸ Barkan, *supra* note 7, at 314–315.

²³⁹ Bazzyler, *supra* note 25, at 307; Bazzyler, ‘The Holocaust Restitution Movement in Comparative Perspective’, 20 *Berkeley J Int’l L* (2002) 11.

²⁴⁰ Neuborne, *supra* note 171, at 74; *Cato v. US*, 70 F 3d 1103 (9th Cir. 1995).

apparently eschews lessons from Holocaust restitution, instead recreating them in an economy of suffering. Holocaust restitution's prototypical and paradigmatic nature is problematic. Any attempts to associate with the Holocaust's extremities often pale in comparison, simultaneously privileging the Holocaust's uniqueness.²⁴¹ Restitution's power depends upon its capacity to provide processes for negotiating rivalries and recognizing identities,²⁴² not providing specific solutions.

Attributing national character to objects both legitimizes export controls on objects and fuels desires for repatriation.²⁴³ Yet diaspora claims appear antithetical to models which contemplate only governments and individuals as agents. This may explain the (not uncontroversial) collapsing of group identity and statehood within Israel's quasi-diplomatic protection claim.²⁴⁴ Unpleasant debates based on supposition and anecdote as to victims' self-identity arise, yet the impact of Nazi racial laws lays bare how complex and surprising this often was for victims. In *Altmann's case*, it is clear that Klimt was Austrian, Adele Bloch-Bauer probably considered herself Austrian, possibly Jewish. Dying in Swiss exile in 1945, Ferdinand undoubtedly considered himself Jewish, but still Austrian? Maria apparently refers to herself as Jewish American. What then is the appropriate national or cultural context of the paintings? It is unlikely to be clarified by litigation.

Property restitution may represent a final stage in the Holocaust's legal reckoning while simultaneously acknowledging that perpetrators cannot establish moral virtue by '[buying] a just and ethical past'.²⁴⁵ At worst, restitution is coupled or confused with or substitutes for responsibility.²⁴⁶ Its dark legacy becomes that no one is responsible.²⁴⁷ However, rather than a conclusion in itself, restitution should be a component in a process of recognition.²⁴⁸ Distinctions must be drawn between previous actors' guilt and contemporary actors' current, but differentiated, responsibility. After all, *Wiedergutmachung* has some relationship with *Vergangenheitsbewältigung* (overcoming the past).²⁴⁹ States have variously sought to balance the disparity²⁵⁰ of holding ill-gotten gains while displaying a Durkheimian rejection of the past. Law can construct legal spaces for the expression of collective memory, providing frameworks in which individual memory operates. As Macklem notes, law memorializes the past via:

principles, rules and procedures that invest moments in history with normative significance . . . Investing a minority's collective memory with legal significance strengthens its capacity to sustain its collective identity.²⁵¹

²⁴¹ Woolford and Wolejszo, *supra* note 31, at 895–896.

²⁴² Barkan, *supra* note 7, at 320.

²⁴³ Merryman, 'Two Ways of Thinking About Cultural Property', 80 *AJIL* (1986) 831.

²⁴⁴ See Hornstein's discussions, *supra* note 28, at 179–180.

²⁴⁵ Fogelman, in Symposium, *supra* note 5, at 167.

²⁴⁶ Elster, *supra* note 11, at 166.

²⁴⁷ Cotler, *supra* note 44, at 609; Sturman, *supra* note 22, at 224.

²⁴⁸ Barkan, in Symposium, *supra* note 5, at 170.

²⁴⁹ Lillteicher, 'West Germany and the Restitution of Jewish Property in Europe', in Dean *et al.*, *supra* note 14, at 109.

²⁵⁰ Eichwede, 'Models of Restitution (Germany, Russia, Ukraine)', in Simpson, *supra* note 1, at 216.

²⁵¹ Macklem, *supra* note 159, at 13–14.

This chimes well with the optimal models of restitution advocated herein. Ideally restitution's narrative provides common discursive platforms for victims and perpetrators (including those inheriting a legal relationship with perpetrators) to recount their histories in a similar way, acknowledging the unbridgeable nature of those histories.²⁵² It is only appropriate that art, a medium so devoted to expression, should transcend its existence as a mere object.

²⁵² Barkan, *supra* note 7.