

## **Plunder and Provenance: Using Restitution to Correct a Market Defect**

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### **ABSTRACT**

*The secondary art market is experiencing a market failure caused by Nazi-looted art without legal title. Legal and market responses are inadequate and create illiquidity. The prevailing methodology entrenches existing inefficiencies by not utilizing the potential to rehabilitate Nazi-looted art. Economic research does not address Nazi-looted art, and the legal, ethical, and moral discussions are not considering the economic effect of Nazi-looted art on the market. Existing proposals lack a distributive aspect and are inefficient as they remain anchored in the bilateral structure of current possessor versus original owner and a zero-sum framework. This Article closes the existing gap in the literature and recommends compensated restitution as a market solution to the toxic asset of Nazi-looted art. The Article's central contribution to the restitution debate is the proposed creation of the Holocaust Expropriated Art Restitution Fund (HEAR Fund), which removes Nazi-looted art from the market and increases liquidity through restitution. The HEAR Fund captures and utilizes currently ignored private information, allowing it to contribute to social utility. Uncertainty is eliminated, and the artwork reenters the market with legal title. The Fund has two functions: a database and efficient information infrastructure for provenance research and acquiring works for restitution. It creates an efficient solution to the Nazi-looted art problem by increasing the utility of all art market actors and implements the long-standing executive policy of the United States government on Nazi-looted art bringing justice to the victims of Nazi dispossession. Restitution is structuralized by treating comparable situations equally, adding fairness and justice to the process, and compensation ensures the participation of current possessors.*

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*A restituted painting “serves as evidence of continuity and symbolic communication”<sup>1</sup> with those lost and the past.*

## INTRODUCTION

Nazi-looted art<sup>2</sup> is a pervasive problem in the art market that neither the law nor the market has adequately addressed.<sup>3</sup> Transactions in Nazi-looted art<sup>4</sup> fail to transfer legal title to the buyer, create inefficiencies, and lead to time-consuming and costly litigation. The law does not fairly and equitably address the singular event of politically- and economically- motivated acts of looting by the National Socialist German Workers (Nazi) Party during the Third Reich<sup>5</sup> in Germany and occupied territories. Aiming to resolve the conflicting interests of the original owner<sup>6</sup> and the (possibly good-faith) possessor in the traditional property law framework of chattel theft, without acknowledging the art-specific and historical significance of Nazi looting, creates inconsistency and uncertainty.<sup>7</sup>

This Article shows how market and legal mechanisms do not enforce or support the moral and equitable choices manifested in the Washington Conference Principles on Nazi-confiscated art<sup>8</sup> and the Holocaust Expropriated Art Recovery Act of 2016 (HEAR

1. WERNER MUESTERBERGER, *COLLECTING: AN UNRULY PASSION* (2014).

2. The term Nazi-looted art as used herein refers to artwork or other property as defined in Section 4(2) of the Holocaust Expropriated Art Restitution Act of 2016, which the original owners were despoiled of as a result of the organized looting, theft, forced sale, or other form of persecution by the National Socialist Party from January 1, 1933, to December 31, 1945. In this context, the term Nazi-looted art refers to unrestituted Nazi-looted art. While technically still Nazi-looted art, a work can enter the market with clear title following restitution since the return to the original owner allows the subsequent purchaser to obtain title.

3. The exact number of Nazi-looted artworks is unknown, but in 2019 it was estimated that 100,000 of 600,000 stolen paintings are still missing. Stuart E. Eizenstat, *Art Stolen by the Nazis is Still Missing. Here’s How We Can Recover It*, WASHINGTON POST (Jan. 2, 2019, 6:06 PM) [https://www.washingtonpost.com/opinions/no-one-should-trade-in-or-possess-art-stolen-by-the-nazis/2019/01/02/01990232-0ed3-11e9-831f-3aa2c2be4cbd\\_story.html](https://www.washingtonpost.com/opinions/no-one-should-trade-in-or-possess-art-stolen-by-the-nazis/2019/01/02/01990232-0ed3-11e9-831f-3aa2c2be4cbd_story.html) [<https://perma.cc/3XS4-MQK9>] [[https://web.archive.org/web/20230104151616/https://www.washingtonpost.com/opinions/no-one-should-trade-in-or-possess-art-stolen-by-the-nazis/2019/01/02/01990232-0ed3-11e9-831f-3aa2c2be4cbd\\_story.html](https://web.archive.org/web/20230104151616/https://www.washingtonpost.com/opinions/no-one-should-trade-in-or-possess-art-stolen-by-the-nazis/2019/01/02/01990232-0ed3-11e9-831f-3aa2c2be4cbd_story.html)].

4. While not addressed in this paper, the discussed solution is likely applicable and may later extend to other large-scale looting or art with title issues such as unprovenanced antiquities.

5. The national German territory governed by the Nazi party from 1933 to 1945 was known as the “German Reich” or “Third Reich” and was sometimes referred to as the “Thousand-Year Reich.”

6. In the interest of readability, this Article refers to the “original owner”—this term, however, includes heirs and descendants where applicable.

7. Complex issues and forensic difficulties led Norman Palmer to ask whether civil litigation was appropriate since no one “other than a state, a state-supported party, an oil company, or a private individual of enormous wealth, could seriously contemplate litigation.” Andrew Kenyon & Simon Mackenzie, *Recovering Stolen Art—Australian, English and US Law on Limitations of Action*, 30 U.W. AUSTL. L. REV. 233, 248 (2001) (citing Norman Palmer, *Recovering Stolen Art*, 47 CURRENT LEGAL PROBS. 215, 218 (1994)).

8. The Washington Conference Principles consist of eleven principles formulated in a non-binding declaration concluding the Washington Conference on Holocaust-Era Assets in November 1998. *Washington Conference Principles*, U.S. DEPT OF STATE (Dec. 3, 1998) <https://www.state.gov/washington-conference-principles-on-nazi-confiscated-art> [<https://perma.cc/65CA-L3UR>] [<https://web.archive.org/web/20221011172238/https://www.state.gov/washington-conference-principles-on-nazi-confiscated-art>].

Act).<sup>9</sup> It adds to the existing economic and legal literature by examining Nazi-looted art market models and analyzing the interplay between disclosure mechanisms, intermediation, adverse selection, market efficiency, and liquidity.

Market efforts to address Nazi-looted art led to a market failure by creating an illiquid asset class of Nazi-looted art and Covered Objects.<sup>10</sup> Art market actors respond to provenance issues leading to title defects by conducting provenance research to counter uncertainty and asymmetric information. Provenance<sup>11</sup> research is essential in determining whether the current holder of Nazi-looted art or a Covered Object owns the work or is a mere possessor. Establishing an unbroken chain of title transfers is essential for such works. Property entitlements to personal moveable property are typically the right to exclusive possession, the right to exclusive use, and rights of acquisition and conveyance. The property holder is often referred to as the owner, which can be a misnomer. Possession does not signify whether the possessor has a right to hold the item or not. The right of possession legitimizes physical possession, but it can be separated from actual physical possession. The right of property is the right that is superior to and defeats all other claims. Different people may hold these three rights,<sup>12</sup> but legal title unites possession, the right of possession, and the right of property in the same person.

Auction houses and museums create an illiquid asset class by not accepting objects lacking a full provenance for consignment or donation. The current possessor loses utility as he cannot sell the work. This is exacerbated by the fact that even the perception of title risk<sup>13</sup> can have the same impact as actual title risk. After becoming the subject of litigation between the Warhol Foundation and a former bodyguard of

9. The HEAR Act, advertised as finally ensuring that claims involving artwork lost because of persecution during the Nazi era would be resolved on the merits, standardized the statute of limitations period for claims in U.S. state and federal courts to a universal six-year limitations period until January 1, 2027. Holocaust Expropriated Art Recovery (HEAR) Act of 2016, Pub. L. No. 114-308, § 5, 130 Stat. 1524, 1526–28 (codified as amended at 22 U.S.C. § 1621 (2016)).

10. Incorporating existing standards, this Article uses the American Alliance of Museums' definition of "Covered Objects," encompassing any work of art acquired after 1932 "that underwent a change of ownership between 1932 and 1946, and that [was] or might reasonably be thought to have been in continental Europe between those dates." *Standards and Professional Practices—Unlawful Appropriation of Objects During the Nazi Era*, AM. ALL. OF MUSEUMS, <https://www.aam-us.org/programs/ethics-standards-and-professional-practices/unlawful-appropriation-of-objects-during-the-nazi-era> [https://perma.cc/M7RP-PD9E] [https://web.archive.org/web/20221011174151/https://www.aam-us.org/programs/ethics-standards-and-professional-practices/unlawful-appropriation-of-objects-during-the-nazi-era].

11. The term "provenance" generally refers to the documented chronology of ownership, including dates and methods of transfer, custody, and the locations where the work was kept, exhibited, or sold. Documented provenance can also provide reassurance regarding an artwork's value and "provides a verifiable public certification of authenticity." CLARE MCANDREW, *THE ART ECONOMY: AN INVESTOR'S GUIDE TO THE ART MARKET* 95 (2007).

12. For example, imagine C steals D's heirloom which had been in the family for generations but was stolen centuries earlier (though this fact is now forgotten by all) from E. B then buys it in good faith from C, and A steals it from B. In this hypothetical, A has the possession, B has an apparent right of possession (as evidenced by the purchase), D has the absolute right of possession (being the best claim that can be proven), and the heirs of E, if they knew it, have the right of property, which they cannot prove.

13. See generally, A. J. G. TIJHUIS, *TRANSNATIONAL CRIME AND THE INTERFACE BETWEEN LEGAL AND ILLEGAL ACTORS: THE CASE OF THE ILLICIT ART AND ANTIQUITIES TRADE* (2006).

Elizabeth Taylor,<sup>14</sup> the painting *Liz* (1964) by Andy Warhol, failed to attract a single bid at auction.<sup>15</sup>

Furthermore, the current approach does not bring justice to the original owner as it stops short of returning the object and restoring title.

Information requires efficient information conduits and a persuasive infrastructure to permeate a market. Existing market initiatives,<sup>16</sup> while commendable, fall short by keeping information private, resulting in inefficiency and utility loss. Missing incentives for restitution of Nazi-looted art and Covered Objects render them illiquid despite their rehabilitation potential. Capturing such works and restoring title is critical for these artworks to re-enter the legitimate stream of commerce, increasing value and

14. *Andy Warhol Found. for the Visual Arts, Inc. v. Augusto Bugarin and Tagliatella Galleries*, Index No. 160437/2014 (N.Y. Sup. Ct. Oct. 24, 2014). After the court initially blocked the sale of the painting, the parties settled and two Warhol nephews supported Bugarin's claim that the painting was gifted to him. 'Liz Taylor Painting Was a Gift! Warhol's Nephews Oppose Warhol Foundation Allegations, REVOLVER WARHOL GALLERY, <https://revolverwarholgallery.com/liz-taylor-painting-was-a-gift-warhols-nephews-oppose-warhol-foundation-allegations> [<https://perma.cc/7Z7M-CYPJ>] [<https://web.archive.org/web/20230104153821/https://revolverwarholgallery.com/liz-taylor-painting-was-a-gift-warhols-nephews-oppose-warhol-foundation-allegations>].

15. Lawrence M. Shindell, *Provenance and Title Risks in the Art Industry: Mitigating These Risks in Museum Management and Curatorship*, 31 MUSEUM MGMT. AND CURATORSHIP 406, 408 (2016). See also Blake Gopnik, *The Warhol that Failed to Sell*, ARTNET (May 13, 2016), <https://news.artnet.com/market/christies-auction-warhol-basquiat-flunks-art-history-101-495518> [<https://perma.cc/AZ5Q-Z65Q>] [<https://web.archive.org/web/20221011184159/https://news.artnet.com/market/christies-auction-warhol-basquiat-flunks-art-history-101-495518>].

16. For example, umbrella organizations such as the Association of Art Museum Directors and the International Council of Museums issued guidelines on ethics, standards, and professional practices regarding acquisitions. See, e.g., *New Acquisitions of Archaeological Material and Works of Ancient Art*, ASS'N OF ART MUSEUM DIRS., <https://aamd.org/object-registry/new-acquisitions-of-archaeological-material-and-works-of-ancient-art/more-info> [<https://perma.cc/F52N-PF9L>] [<https://web.archive.org/web/20230104155526/https://aamd.org/object-registry/new-acquisitions-of-archaeological-material-and-works-of-ancient-art/more-info>]; *Resolutions of Claims for Nazi-Era Cultural Assets*, ASS'N OF ART MUSEUM DIRS., <https://aamd.org/object-registry/resolution-of-claims-for-nazi-era-cultural-assets/more-info> [<https://perma.cc/P6R7-FEMM>] [<https://web.archive.org/web/20230104160322/https://aamd.org/object-registry/resolution-of-claims-for-nazi-era-cultural-assets/more-info>]; *ICOM Code of Ethics for Museums*, ICOM, <https://icom.museum/wp-content/uploads/2018/07/ICOM-code-En-web.pdf> [<https://perma.cc/DNN7-F2YC>] [<https://web.archive.org/web/20230104160440/https://icom.museum/wp-content/uploads/2018/07/ICOM-code-En-web.pdf>]. Individual museums are also conducting research projects regarding their holdings, and the Museum of Fine Arts in Boston established a curator of provenance position in 2010. See, e.g., *Selected Museum Provenance Research Projects in the US and Abroad*, The Met Museum, <https://www.metmuseum.org/about-the-met/provenance-research-resources/museum-provenance-research-projects> [<https://perma.cc/NCA5-2HST>] [<https://web.archive.org/web/20230104160654/https://www.metmuseum.org/about-the-met/provenance-research-resources/museum-provenance-research-projects>]. Additionally, some auction houses have adopted Guidelines for Nazi-era Art Restitution Issues. See generally *Christie's Guidelines for Dealing with Nazi-era Art Restitution Issues*, CHRISTIE'S (June 2019), <https://www.christies.com/pdf/services/2010/christies-guidelines-for-dealing-with-restitution-issues.pdf> [<https://perma.cc/XYM4-DN8R>] [<https://web.archive.org/web/20221011230319/https://www.christies.com/pdf/services/2010/christies-guidelines-for-dealing-with-restitution-issues.pdf,%20last>]. The Responsible Art Market Initiative (RAM), formed in Geneva in 2015, publishes an Art Transaction Due Diligence Toolkit addressing Nazi-looted art. RAM, *Art Transaction Due Diligence Toolkit*, RESPONSIBLE ART MARKET, <http://responsibleartmarket.org/guidelines/art-transaction-due-diligence-toolkit> [<https://perma.cc/G3GR-6SS6>] [<https://web.archive.org/web/20221011234435/http://responsibleartmarket.org/wp/wp-content/uploads/2018/01/RAM-DUE-DILIGENCE-web.pdf>].

the possibility of capturing the premium buyers are willing to pay for restituted artworks.

The central contribution of this Article to the restitution debate is the proposed establishment of a Holocaust Expropriated Art Restitution Fund (“HEAR Fund”) to remove Nazi-looted art and Covered Objects from the art market. The HEAR Fund’s mission is to capture existing information and incentivize restitution by compensating the current possessor. Transcending zero-sum solutions and engaging market actors is the most efficient method of resolving the existing systemic market failure. A central repository for provenance information and the artworks themselves adds fairness and predictability, replacing the existing “restitution roulette.”<sup>17</sup>

The proposal builds on the fact that it is not efficient for the original owner, the seller, or the buyer to conduct the necessary provenance research. The HEAR Fund has two components. First, a database and efficient information infrastructure for provenance research for Nazi-looted art. The second component is the acquisition and restitution function, removing Nazi-looted art, i.e., artworks with clouded title or without title, from the art market.

The HEAR Fund incentivizes auction houses and museums to continue their rigorous provenance research practices and allows them to monetize their efforts by selling or licensing their information and knowledge to the HEAR Fund. It incentivizes possessors of Nazi-looted art to come forward by compensating them for the artwork sold to the HEAR Fund. It brings justice to the original owners or heirs who will benefit from institutional knowledge and uniform decision-making by the HEAR Fund as the repository for Nazi-looted art. The HEAR Fund helps the United States government implement its long-standing executive policy regarding the restitution of Nazi-looted art. It is distributive in its cost allocation by dispersing the cost of provenance research and restitution across a broader demographic instead of making the current possessor or the original owner the sole cost-bearer.

Despite the economic challenges high-value Nazi-looted artworks pose, the transactional justice approach is superior to litigation and alternative dispute resolution processes, which exclude many original owners from seeking restitution by being cost-prohibitive. The public and transparent database must fit within the European General Data Protection Regulation (“GDPR”) framework. Existing carve-outs should enable the HEAR Fund database to operate as envisioned. Its reliance on voluntary participation is a limitation of the HEAR Fund, and it will not prevail against an unwilling possessor of Nazi-looted art. However, compensating the possessor is a strong incentive to overcome resistance and encourage participation.

The Introduction outlines the market failure in the secondary art market caused by Nazi-looted art and introduces a new solution to the restitution debate. *Part I* provides the context and background of the plunder by the Nazis and explains the significance of provenance research. *Part II* presents an overview of the scope and scale of the information asymmetry in the market and demonstrates the art market’s information failure by discussing two common scenarios. *Part III* introduces the proposed

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17. Thomas R. Kline, *Restitution Roulette: A Comparison of U.S. and European Approaches to Nazi-Era Art Looting Claims*, 16 No. 3 IFARJ. 56, 62 (2015).

transactional solution to the systemic information deficits and situates it in the existing legal and market conditions. It explains the proposed HEAR Fund and its mission to purchase and remove Nazi-looted art from the market. In conclusion, it outlines the scope of the HEAR Fund, its mechanisms for dealing with temporary and permanent uncertainty, and financing mechanisms.

## I. PLUNDER, PROVENANCE & PREMIUM

*Part IA* outlines the National Socialists' political program for the economic destruction of the Jewish population. *Part IB* explains the process and importance of provenance research. *Part IC* illustrates the economic impact of Nazi-looted art in the market by providing an example of the premium paid for a restituted artwork.

### A. PLUNDER—THE WAR ON CULTURE AS PART OF THE POLITICAL PROGRAM

Looting is different from theft. Property rights as a legal mechanism to encourage production and protect products by maximizing the costs of theft and minimizing the costs of protecting the property cannot properly address looting. Nazi-looted art<sup>18</sup> is even further distinguishable from other forms of bounty and war spoils. In most conflicts, outside forces perpetuate the injustice, and the “victim State and the offending State”<sup>19</sup> are different entities. The atrocities of the Nazi regime were initiated and committed from within and by a State against its people under the cover of law.<sup>20</sup> The despoliation of Jews and other persecuted groups was not incidental—it was central to the regime's scheme of dehumanizing its victims. The loss of identity transcending the material loss associated with theft<sup>21</sup> is particularly pertinent in light of the connection between the loss of property, loss of rights, and loss of life.<sup>22</sup>

The seizure of art served several purposes: to achieve a purely Aryan and Germanic Reich, all so-called degenerate art needed to be removed and destroyed or sold for profit<sup>23</sup> to cleanse German culture from “Jewish trash,” “total madness,” and “barbarous methods of representation.”<sup>24</sup> Secondly, Hitler pursued his ambition to create the

18. See generally LYNN H. NICHOLAS, *THE RAPE OF EUROPA: THE FATE OF EUROPE'S TREASURES IN THE THIRD REICH AND THE SECOND WORLD WAR* (1994). For a historical analysis, see also JONATHAN GEORGE PETROPOULOS, *THE FAUSTIAN BARGAIN: THE ART WORLD IN NAZI GERMANY* (2000).

19. Jhiela C. Mirdamadi, *Too Little, Too Late: Dunbar v. Seger-Thomschitz and the Ongoing Challenge Posed by Prescriptive Periods in Holocaust-Era Art and Cultural Property Restitution Matters*, 17 *ART ANTIQUITY* L. 69, 76 (2012).

20. Much of it would later extend to occupied territories. For the problem of the domestic takings rule as addressed by the United States Supreme Court, see *Fed. Republic of Germany v. Philipp*, 141 S. Ct. 703 (2021).

21. DAS GESCHÄFT MIT DER RAUBKUNST: FAKTEN, THESEN, HINTERGRÜNDE 10 (Matthias Frehner ed., 1998); see generally Matthias Frehner, „Das Wird Toll und Immer Toller”—*Der Grösste Kunstraub der Geschichte*, in *id.* at 79–86.

22. See the French prosecutor's summary during the Nuremberg trials in MICHAEL SALTER, *U.S. INTELLIGENCE, THE HOLOCAUST AND THE NUREMBERG TRIALS: SEEKING ACCOUNTABILITY FOR GENOCIDE AND CULTURAL PLUNDER* 717 (2009).

23. Owen C. 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 & ENT. L.* 27, 31–32 (1999).

24. NICHOLAS, *supra* note 18, at 21–22.

*Führermuseum* in his hometown of Linz, Austria as a lasting tribute to The Thousand-Year Reich<sup>25</sup> and himself,<sup>26</sup> exemplifying German cultural superiority.<sup>27</sup> Thirdly, the looting and dispossession of Jewish property was the economic prong in his plan to eliminate and extinguish the Jewish race through economic ruin.<sup>28</sup> Ordinances required all Jews to provide detailed reports of their property and subjected the property to being “secured in accordance with the dictates of the German economy.”<sup>29</sup> Art collections were legally seized based on the Ordinance for the Registration of Jewish Property, the Ordinance for the Attachment of the Property of the People’s and State’s Enemies, and the Ordinance for the Employment of Jewish Property.<sup>30</sup> Profits and foreign currency obtained by selling “degenerate” and looted art fueled the German economy and financed the war effort and mass murder.<sup>31</sup> It is estimated that almost ten percent of the total 1938–1939 government budget—approximately 1.5 billion Reichsmark—was stolen from Jews.<sup>32</sup> “The objects are symbols of a terrible crime; recovering them is an equally symbolic form of justice.”<sup>33</sup>

There is no universal narrative for Nazi-looted art. Sometimes a government cover-up followed wild looting to legitimize it after the fact. The confiscation of degenerate art is a prime example of such post-looting legitimization. Initially based on a Führer decree, the seizures were legitimized by a May 1938 law authorizing confiscation without compensation and passing title to the Reich, enabling it to sell the seized artworks.<sup>34</sup> Other times, the looting was the consequence of a law. Each Nazi-looted object has to be viewed and examined individually based on where and when it was looted. The looting trajectory was different in western European countries like France

25. David Gold, *Is There Any Way Home? A History and Analysis of the Legal Issues Surrounding the Repatriation of Artwork Displaced During the Holocaust*, 21 ENT. ARTS & SPORTS L.J. 12, 12 (2010).

26. See Julia Parker, *World War II & Heirless Art: Unleashing the Final Prisoners of War*, 13 CARDOZO J. INT’L COMP. L. 661, 665 (2005).

27. Shira T. Shapiro, *How Republic of Austria v. Altmann and United States v. Portrait of Wally Relay the Past and Forecast the Future of Nazi Looted Art Restitution Litigation*, 34 WM. MITCHELL L. REV. 1147, 1151 (2008).

28. See generally Jonathan George Petropoulos, *Art As Politics: The Nazi Elite’s Quest for the Political and Material Control of Art* (1991) (Ph.D. dissertation, Harvard University) (ProQuest).

29. Jonathan Petropoulos, *German Laws And Directives Bearing On The Appropriation Of Cultural Property In The Third Reich*, in THE SPOILS OF WAR 106, 107 (Elizabeth Simpson ed., 1997).

30. See Kelly Diane 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 & ENT. L.J. 549, 554 (1998) and Stephanie Cuba, *Stop the Clock: The Case To Suspend the Statute of Limitations on Claims for Nazi-Looted Art*, 17 CARDOZO ARTS & ENT. L.J. 447, 471–72.

31. MARTIN DEAN, *ROBBING THE JEWS: THE CONFISCATION OF JEWISH PROPERTY IN THE HOLOCAUST, 1933–1945*, 220–21 (Cambridge Univ. Press 2008).

32. GÖTZ ALY, *HITLER’S BENEFICIARIES: PLUNDER, RACIAL WAR, AND THE NAZI WELFARE STATE* 48 (Jefferson Chase trans., 2007).

33. MICHAEL R. MARRUS, *SOME MEASURE OF JUSTICE: THE HOLOCAUST ERA RESTITUTION CAMPAIGN OF THE 1990S* 40 (2009) (quoting Eric Gibson, *De Gustibus: The Delicate Art of Deciding Whose Art It Is*, WALL ST. J. (July 16, 1999)).

34. Gesetz über Einziehung von Erzeugnissen entarteter Kunst [Act on the Confiscation of Works of Degenerated Art], May 31, 1938, REICHSGESETZBLATT, Teil I [RGLB I] at 612 (Ger.) (“Works of degenerate art, which have been seized in museums and in public collections before the commencement of this act . . . , may be confiscated in favor of the Reich without compensation if these works have been, at the time when they were seized, the property of private nationals of the Reich or of domestic juristic persons.”).



and the Netherlands under Nazi control, where people had time to adjust to the new circumstances and possibly retain records. The Nazis saw Slavs as racially inferior, and these prejudices led to indiscriminate looting and destruction in Eastern European countries in contrast to meticulous recordkeeping of takings in Western Europe. Different ideologies<sup>35</sup> drove the manner, intention, and pace of looting in countries like Poland and Hungary and manifested itself in marked characteristics.<sup>36</sup>

In the immediate post-war years, survivors tried to find their families and a way back to life.<sup>37</sup> Surviving owners of Nazi-looted art were not always able to confront the horrors they lived through and also faced ongoing anti-Semitism. When the widow of the prominent Dutch art dealer Jacques Goudstikker returned to The Netherlands in 1946 and tried to reclaim his art collection, she, like many others, faced enmity and bureaucracy, making a recovery difficult. Despite filing a timely claim and having the necessary paperwork to prove her ownership, she could not recover her husband's collection.<sup>38</sup>

Even though attempts to locate and recover Nazi-looted art followed on the heels of World War II, post-war conditions in Europe, such as lack of resources and incomplete information and communication made restitution efforts difficult. The focus shifted from what should be done to what could be achieved most easily. With the cold war, Nazi-looted art was out of sight, and the matter was dormant for decades. Until the mid-1990s, only a handful of mostly unsuccessful lawsuits related to the Holocaust were filed in the United States.<sup>39</sup> After the fall of the Berlin Wall, archives in the East became available for the first time since World War II, essential documents were declassified, and the reunification of the two German states prompted a re-engagement with the restitution question.<sup>40</sup>

Compared to immovable property, the movement of artworks is challenging to trace and reconstruct, and restitution of nonfungible moveable property is a complex issue. Unlike bank accounts or insurance policies, art is not fungible, and each looted art

35. The [de]spoliation of Jews in the German Reich escalated over many years while similar devastation occurred in occupied territories within months. Sidney Jay Zab Ludoff, *Estimating Jewish Wealth*, in *THE PLUNDER OF JEWISH PROPERTY DURING THE HOLOCAUST: CONFRONTING EUROPEAN HISTORY* 48 (Avi Beker ed., 2001). For a country-by-country survey in Eastern Europe, see Laurence Weinbaum, *Defrosting History: The Restitution of Jewish Property in Eastern Europe*, in *id.* at 93–107.

36. MICHAEL J. KURTZ, *NAZI CONTRABAND: AMERICAN POLICY ON THE RETURN OF EUROPEAN CULTURAL TREASURES, 1945–1955* 268 (1985). See also DEAN, *supra* note 31, at 173–221.

37. It is important to remember that while the fighting ended in 1945, the aftermath continued much longer with the last Displaced Persons Camp closing in 1957. *Displaced Persons Camps*, YAD VASHEM, <https://www.yadvashem.org/articles/general/displaced-persons-camps.html> [https://perma.cc/3SSP-QNF3] [<http://web.archive.org/web/20221011230903/https://www.yadvashem.org/articles/general/displaced-persons-camps.html>].

38. Lawrence M. Kaye, *Avoidance and Resolution of Cultural Heritage Disputes: Recovery of Art Looted During the Holocaust*, 14 WILLAMETTE J. INT'L L. & DIS. RES. 243, 248 (2006).

39. See ROGER P. ALFORD & MICHAEL J. BAZYLER, *HOLOCAUST RESTITUTION: PERSPECTIVES ON THE LITIGATION AND ITS LEGACY* xiii (2006). See generally Michael J. Bazylar, *From Lamentation and Liturgy to Litigation: The Holocaust-Era Restitution Movement as a Model for Bringing Armenian Genocide-Era Restitution Suits in American Courts*, 95 MARQ. L. REV. 245 (2011).

40. MICHAEL MARRUS, *SOME MEASURE OF JUSTICE: THE HOLOCAUST ERA RESTITUTION CAMPAIGN OF THE 1990s*, 75–81 (2006).

restitution case is a one-on-one dispute.<sup>41</sup> As demonstrated by the Paul Rosenberg collection,<sup>42</sup> even artworks belonging to the same owner have entirely different fates, and each case has to be proven individually. The post-war trajectory of Nazi-looted art to its current possessor can be decisive for the outcome of a restitution claim. As a matter of fairness and justice, it is not reasonable that circumstances out of the original owner's control should determine the outcome of his claim. It is unjust to the current possessor that whether he acquired good title depends on what country a previous purchase occurred in, with widely different outcomes. None of the common justifications for good faith acquisition<sup>43</sup> or statutes of limitations (incentivizing owners to protect against theft and speedily pursue recovery)<sup>44</sup> apply to Nazi-looted art: extra precautions against theft could not have prevented the spoliation.

## B. PROVENANCE

The importance of provenance research<sup>45</sup>—reconstructing the path of the artwork from its creation to its current possessor—is not limited to legal implications. Provenance research is essential for art historians and provides insights into the developments of collecting and taste.<sup>46</sup> Establishing an unbroken chain of title transfer is crucial and central in determining whether the current holder of Nazi-looted art or a Covered Object is the owner or a mere possessor. A basic understanding of the art market's development and collecting trends concerning European art is indispensable

41. The proposed solution also addressed the individual litigation problem as further discussed *infra* at III A.

42. The heirs of Paris art dealer Paul Rosenberg have successfully pursued numerous restitution claims aided by Rosenberg's meticulous records. See, e.g., Benjamin Sutton, *The Famed Jewish Art Dealer Who Fought to Retrieve 400 Stolen Works from the Nazis*, ARTSY (Jan. 14, 2019), <https://www.artsy.net/article/artsy-editorial-famed-jewish-art-dealer-fought-retrieve-400-stolen-works-nazis> [<https://perma.cc/VBN8-9LSN>] [<https://web.archive.org/web/20221011232529/https://www.artsy.net/article/artsy-editorial-famed-jewish-art-dealer-fought-retrieve-400-stolen-works-nazis>]. The same is true for the collection of the Jewish collector Fritz Grünbaum as discussed *infra*.

43. Several European jurisdictions in the civil law system allow for good faith acquisition. In the U.S., the “*nemo dat quod non habet*” rule makes it impossible for a purchaser or possessor to ever obtain title to a stolen object, regardless of their good faith.

44. See Alan Schwartz & Robert E. Scott, *Rethinking the Laws of Good Faith Purchase*, 111 COLUM. L. REV. 1332, 1332 (2011), pointing out that “[a]n owner will take optimal precautions to prevent theft if she is faced with the loss of her goods; and a purchaser will make an optimal investigation into his seller's title if faced with the loss of the goods. An owner and a buyer cannot both be faced with the full loss, however. This presents a problem of ‘double moral hazard’ and it cannot be solved in a first-best efficient way.”

45. See generally NANCY H. YEIDE, KONSTANTIN AKINSHA, & AMY WALSH, *THE AAM GUIDE TO PROVENANCE RESEARCH* (American Ass'n of Museums 2001); *PROVENANCE: AN ALTERNATE HISTORY OF ART* (Gail Feigenbaum & Inge Reist eds., 2012). See also links to databases and bibliography of relevant works at the Museum of Modern Art, *Provenance Research Project*, MOMA, <https://www.moma.org/collection/provenance> [<https://perma.cc/L323-JNFW>] [<http://web.archive.org/web/20221018041426/https://www.moma.org/collection/provenance>] (last visited Oct. 31, 2022); resources listed by LOOTED.ART.COM, <https://www.lootedart.com/research-resources> [<https://perma.cc/9VBC-G7M2>] [<https://web.archive.org/web/20221226135219/https://lootedart.com/research-resources>], and IFAR's Provenance Guide, *Provenance Guide*, IFAR, [https://ifar.org/provenance\\_guide.php](https://ifar.org/provenance_guide.php) [<https://perma.cc/JBM6-M3GM>] [[http://web.archive.org/web/20220901062425/https://www.ifar.org/provenance\\_guide.php](http://web.archive.org/web/20220901062425/https://www.ifar.org/provenance_guide.php)].

46. AAM GUIDE, *supra* note 45, at 1.

for provenance research. Knowledge of the Nazis' war on culture and related looting<sup>47</sup> is essential to picking up on clues and drawing the necessary conclusions.

Tracing ownership history is no easy feat, and provenance research rests on three main pillars:<sup>48</sup> (1) the object itself (if available) and the information it provides; (2) primary resources, and (3) secondary resources. Access to the object and as many primary and secondary resources as possible dramatically increases the chances of determining the object's provenance. The original owner, by default, lacks possession of the physical object. Panels and canvases should be removed from the frame and examined carefully for beveling, cradling, remounting, relining, restretching, and possible reductions in size.<sup>49</sup> The front of the painting can show a signature, inscriptions, or other distinctive markings, all of which need to be recorded carefully. Information on the verso<sup>50</sup> includes custom and dealer stamps; auction, collector, and museum labels; exhibition stickers; transport labels; and wax seals. Other objects such as books, furniture, photographs, or prints pose their own challenges and problems.<sup>51</sup>

Finding the transfer of ownership documentation is often complicated, challenging, and time- and resource-intensive. Bills of sale, contracts, wills, receipts, and other primary resources such as records or inventory books may not have been produced at the time or may have been destroyed (on purpose or through acts of war or nature), lost, or are inconclusive.<sup>52</sup> Often, multiple secondary resources, such as exhibition catalogues, monographs, publications, auction catalogues,<sup>53</sup> catalogues raisonné, business and insurance records, telephone books, correspondence and wills, newspaper advertisements, library<sup>54</sup> and museum<sup>55</sup> archives, card catalogues, and online databases<sup>56</sup> can provide the relevant clue. Provenance researchers must rely on primary and secondary sources without blindly trusting any record, as sources may contain mistakes and omissions. A basic understanding of art and collecting history as well as

47. See AAM GUIDE, *supra* note 45, at 37–135 for detailed U.S. and European resources, red flags, and numerous case studies.

48. See AAM GUIDE, *supra* note 45, at 17 for the case study *Portrait of James Hay* and *id.* at 30 for the case study *Holbein, Sir Bryan Tuke*.

49. AAM GUIDE, *supra* note 45, at 12.

50. See generally Tom Rooth, *5 Things You Can Learn From the Back of a Painting*, CHRISTIE'S (June 9, 2022), <https://www.christies.com/features/What-you-can-learn-from-the-back-of-a-painting-6359-1.aspx> [<https://perma.cc/6MKV-GP98>] [[https://web.archive.org/web/20221011235248/https://www.christies.com/features/8-things-you-can-learn-from-the-back-of-a-painting-10293-1.aspx?sc\\_lang=en](https://web.archive.org/web/20221011235248/https://www.christies.com/features/8-things-you-can-learn-from-the-back-of-a-painting-10293-1.aspx?sc_lang=en)].

51. Christian Fuhrmeister & Meike Hopp, *Rethinking Provenance Research*, 11 GETTY RES. J. 213, 217 (2019).

52. AAM GUIDE, *supra* note 45, at 9.

53. See, e.g., *German Sales Catalogs, 1930–1945*, GETTY, [http://www.getty.edu/research/tools/provenance/german\\_sales.html](http://www.getty.edu/research/tools/provenance/german_sales.html) [<https://perma.cc/3CEJ-F5CD>] [[https://web.archive.org/web/20221011235741/http://www.getty.edu/research/tools/provenance/german\\_sales.html](https://web.archive.org/web/20221011235741/http://www.getty.edu/research/tools/provenance/german_sales.html)] (last visited Oct. 31, 2022).

54. See, e.g., *World War II-Era Provenance Research*, THE FRICK COLLECTION, <https://www.frick.org/art/provenance> [<https://perma.cc/UBQ8-Z5AW>] [<https://web.archive.org/web/20221012000223/https://www.frick.org/art/provenance>] (last visited Oct. 31, 2022).

55. If they are well maintained, institutional files should contain some or all of the following files and information: conservation, curatorial, donor and registrar. See AAM GUIDE, *supra* note 45, at 15.

56. See *id.*

political history, genealogy, and law is required for this interdisciplinary research.<sup>57</sup> It took the heirs of the collectors Max and Rosy Fischer and the museum holding a painting by Ernst Ludwig Kirchner with several different titles ten years to reconstruct its history and discover its provenance. A historical postcard depicting the dunes at Grünau and a woodcut by the artist showing the site provided the final clue that the work was indeed *Sandberge bei Grünau (Sand Hills (Bei Gruenau))*.<sup>58</sup> In the case of *Portrait de jeune femme assise (Portrait of a seated woman)* by Thomas Couture, the crucial clue was a minuscule hole in the canvas reported by the original owner in her restitution claim at the end of the war.<sup>59</sup>

This overview shows that provenance research goes beyond the due diligence requirement of checking one or numerous stolen art databases. A listing on such databases requires conducting provenance research, and the original owner needs sufficient documentary evidence to prove his ownership of the artwork. Obstacles to implementing the Washington Principles calling for the identification and publication of Nazi-looted art include insufficient funding, time limitations, lack of coordination, data privacy barriers, restrictive regulations and permissions, insufficient dissemination of results, and object-based research instead of more proactive systematic collections-based research.

An overarching architecture and vision are needed.<sup>60</sup> However, unfortunately, “the status quo is characterized not by cutting-edge research and excellence but by a state of incrustation that is crumbling here and there.”<sup>61</sup> Financial restrictions cause further shortcomings, like results not being available in English or omitted footnotes. While new technology like blockchain<sup>62</sup> is not the fix-all solution to provenance it sometimes

57. AAM GUIDE, *supra* note 45, at 141.

58. See *Sand Hills in Grünau (Translation) Bei Gruenau (Primary Title)*, VA. MUSEUM OF FINE ARTS, <https://www.vmfamuseum/piction/6027262-65198775> [<https://perma.cc/HA3L-96V>] [<https://web.archive.org/web/20221012000701/https://vmfamuseum/piction/6027262-65198775>] (last visited Oct. 31, 2022).

59. See *Project Gurlitt Identifies Painting by Thomas Couture as Nazi-Looted Art*, GERMAN LOST ART FOUND. (Oct. 25, 2017), [https://www.kulturgutverluste.de/Content/02\\_Aktuelles/EN/Press-releases/2017/17-10-25\\_Gurlitt-Couture-nazi-looted-art.html](https://www.kulturgutverluste.de/Content/02_Aktuelles/EN/Press-releases/2017/17-10-25_Gurlitt-Couture-nazi-looted-art.html) [<https://perma.cc/7EWF-4SQS>] [[https://web.archive.org/web/20221012001008/https://www.kulturgutverluste.de/Content/02\\_Aktuelles/EN/Press-releases/2017/17-10-25\\_Gurlitt-Couture-nazi-looted-art.html](https://web.archive.org/web/20221012001008/https://www.kulturgutverluste.de/Content/02_Aktuelles/EN/Press-releases/2017/17-10-25_Gurlitt-Couture-nazi-looted-art.html)].

60. Christian Welzbacher recognized in 2012 that: “Only the bundling of resources and capacities—or to put it another way, an end to the currently promoted academic short-windedness—will result in [...] ‘plunder and restitution’ being researched in the necessary depth, that is to say independently of academic fashion and political differences and guided instead by scientific imperatives.” Christian Welzbacher, *Kunstschutz, Kunstraub, Restitution. Neue Forschungen zur Geschichte und Nachgeschichte des Nationalsozialismus*, H/SOZ/KULT (Dec. 13, 2012), <https://www.hsozkult.de/literaturereview/id/forschungsberichte-1296> [<https://perma.cc/F8HP-2GDU>] [<https://web.archive.org/web/20221014163027/https://www.hsozkult.de/literaturereview/id/forschungsberichte-1296>] (author’s English translation).

61. Fuhrmeister & Hopp, *supra* note 51, at 222.

62. Blockchain is an innovative approach to governance based on a decentralized system recording transactions in a ledger with information preserved in all computers participating in the network. Any change necessitates recording a new transaction to enter additional or correcting information. Blockchain has permeated the art market in different variations. See, e.g., Noah Sandberg, *Artory Collaborates with Christie’s on an Industry First: Registration of Major Art Collection Sale with Secure Blockchain Technology*, BUSINESS WIRE (Oct. 11, 2018, 11:21 AM), <https://www.businesswire.com/news/home/20181011005616/en/Artory-Collaborates-Christie%E2%80%99s-Industry-Registration-Major-Art> [<https://perma.cc/QYR7-DV8N>]

is hailed to be, finding structures to link metadata and existing documentation is an important next step.<sup>63</sup> Provenance research must move out of the art history corner it has been relegated to for so long and must be recognized as the interdisciplinary project it is, involving historians, jurists, and information technology specialists necessary to establish a trustworthy infrastructure based on the FAIR principles<sup>64</sup>—findability, accessibility, interoperability, and reusability. Borrowing from legal document review platforms to build synergies is another avenue ripe for exploration.<sup>65</sup>

### C. PREMIUM

Despite the widespread reporting on the extent of Nazi looting in Europe during and after the war, due diligence standards in the art market were lax and willfully ignorant for decades. As late as the 1990s, major museums accepted donations or acquired works with missing or dubious provenance.<sup>66</sup> Since the 1998 Washington Conference on Holocaust-Era Assets, the art market has become more sensitive to and responsible in its dealings with Nazi-looted art.

In 2014, two Schiele paintings previously owned by Fritz Grünbaum, a Viennese cabaret performer and art collector who died in the Dachau concentration camp, came to auction.<sup>67</sup> The gouache and black crayon on paper, *Sitzende mit angezogenem linken Bein (Torso) (Seated Woman With Bent Left Leg (Torso))*, was the subject of lengthy and

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[<https://web.archive.org/web/20221014164125/https://www.businesswire.com/news/home/20181011005616/en/Artory-Collaborates-Christie%E2%80%99s-Industry-Registration-Major-Art>]; see also *The Barney A. Ebsworth Collection Sale—A Landmark for the American Art Market*, CHRISTIE'S (Dec. 12, 2018), <https://www.christies.com/features/Barney-Ebsworth-Collection-results-9552-3.aspx> [<https://perma.cc/A97Y-PJ57>] [<https://web.archive.org/web/20221014164606/https://www.christies.com/features/Barney-Ebsworth-Collection-results-9552-3.aspx>].

63. Fuhrmeister & Hopp, *supra* note 51, at 226.

64. See generally Mark D. Wilkinson et al., *The FAIR Guiding Principles for Scientific Data management and Stewardship* (Mar. 15, 2016), <https://www.nature.com/articles/sdata201618#citeas> [<https://perma.cc/U4HW-UDAJ>] [<https://web.archive.org/web/20221014164935/https://www.nature.com/articles/sdata201618>].

65. See the Getty Research Institute's project Provenance Research Reaches across Getty in the Digital Age with Sandra van Ginhoven, which explores new approaches to digitalization of research and knowledge production. Judith Barr, *Provenance Research Reaches Across Getty in the Digital Age* (Apr. 8, 2020), <https://www.getty.edu/news/provenance-research-reaches-across-the-getty-in-the-digital-age> [<https://perma.cc/T2GF-ZS27>] [<https://web.archive.org/web/20230105141159/https://www.getty.edu/news/provenance-research-reaches-across-the-getty-in-the-digital-age>].

66. In 1994, the Met accepted the donation of a Monet without researching its provenance. See Walton, *supra* note 30, at 573. For the acquisition of *Wheat Field with Cypresses* by Vincent Van Gogh in 1998, despite a gap in ownership from 1939 (in the collection of a Jewish collector in Berlin) to 1951 see Judith H. Dobrzynski, *Tracing a Van Gogh Treasured by the Met*, N.Y. TIMES (Feb. 11, 1998), <https://www.nytimes.com/1998/02/11/arts/tracing-a-van-gogh-treasured-by-the-met.html> [<https://perma.cc/4WZK-HEJY>] [<https://web.archive.org/web/20221014165554/https://www.nytimes.com/1998/02/11/arts/tracing-a-van-gogh-treasured-by-the-met.html>].

67. See Eileen Kinsella, *Sotheby's and Christie's Split on Response to Nazi Victim's Art*, ARTNET (Oct. 27, 2014), <https://news.artnet.com/market/sothebys-and-christies-split-on-response-to-nazi-victims-art-145218> [<https://perma.cc/42G4-25D3>] [<https://web.archive.org/web/20221014170029/https://news.artnet.com/market/sothebys-and-christies-split-on-response-to-nazi-victims-art-145218>].

contentious litigation in *Bakalar v. Vavra*.<sup>68</sup> A federal court in New York ruled against the Grünbaum heirs, denying their claim for restitution based on the equitable laches defense. The claimants' undue delay in seeking restitution prevented a recovery.<sup>69</sup> The court, however, also found that the current possessor David Bakalar could not prove he had good title. Despite a pre-sale estimate of \$1,200,000–\$1,800,000, the work sold for \$1,325,000.<sup>70</sup>

The next day another Schiele work, the watercolor *Stadt am blauen Fluss (Krumau)* (*Town on the Blue River*), sold at auction. It was also part of Fritz Grünbaum's collection and shared an uncertain provenance.<sup>71</sup> Had a restitution claim been litigated, it would likely have shared a similar fate to *Seated Woman With Bent Left Leg*. Christie's sales announcement omitted reference to Grünbaum's sister-in-law Mathilde Lukacs<sup>72</sup> and instead listed Schenker & Co., Vienna (1938) in the provenance immediately following Mr. Grünbaum.<sup>73</sup> The work was subject to a restitution agreement, publicized in the pre-sale announcement and advertising: "The present work is being offered for sale pursuant to a settlement agreement between the consignor and the Grünbaum Heirs. This resolves any dispute over ownership of the work and title will pass to the buyer." The realized price of \$2,965,000 greatly exceeded the pre-sale estimate of \$800,000–

68. *Bakalar v. Vavra*, 550 F. Supp. 2d 548 (S.D.N.Y. 2008); *Bakalar v. Vavra*, 500 F. App'x 6 (2d Cir. 2012). The case was a declaratory action brought by the current possessor Bakalar to quiet title. This approach is not unusual in litigation dealing with Nazi-looted art. See *Toledo Museum of Art v. Ullin*, 477 F. Supp. 2d 802 (N.D. Ohio 2006); see also *Detroit Inst. of Arts v. Ullin*, No. 06-10333, 2007 WL 1016996 (E.D. Mich. Mar. 31, 2007).

69. The district court found that Vavra and Fischer's "ancestors were aware of—or should have been aware of—heir potential intestate rights to Grünbaum's property," and that the ancestors "were not diligent in pursuing their claims to the Drawing." *Bakalar v. Vavra*, 819 F. Supp. 2d 293, 305–6 (S.D.N.Y. 2011), *aff'd*, 500 F. App'x 6 (2d Cir. 2012).

70. For final price, see *Impressionist & Modern Art Evening Sale / Lot 66*, SOTHEBY'S, <http://www.sothebys.com/en/auctions/ecatalogue/2014/impressionist-modern-art-evening-sale-n09219/lot.66.html> [<https://web.archive.org/web/20221014172342/http://www.sothebys.com/en/auctions/ecatalogue/2014/impressionist-modern-art-evening-sale-n09219/lot.66.html>], and *Art Auction Result for Egon Schiele*, FINDARTINFO.COM, <http://www.findartinfo.com/english/list-prices-by-artist/1/54696/egon-schiele/page/2.html> [<https://perma.cc/9Y9K-HWNY>] [<https://web.archive.org/web/20230105143930/http://www.findartinfo.com/english/list-prices-by-artist/1/54696/egon-schiele/page/2.html>].

71. See *The Lost Collection of Fritz Grünbaum*, COLLECTION GRÜNBAUM, <http://www.collectiongruenbaum.com/wp-content/uploads/2016/09/JK-742.pdf> [<https://perma.cc/2TMV-ECTS>] [<https://web.archive.org/web/20221017004459/https://www.collectiongruenbaum.com/>]; but see Kate Lucas, *As Two Schieles Sell at November Auctions, Debate Continues Over Holocaust-Era Restitution Issues*, GROSSMAN LLP (Dec. 2, 2014), <http://www.grossmanllp.com/as-two-schieles-sell-at-november-auctions-debate-continues> [<https://perma.cc/P854-H4CT>] [<https://web.archive.org/web/20221014173521/https://www.grossmanllp.com/as-two-schieles-sell-at-november-auctions-debate-continues>].

72. The question of whether and how Grünbaum's sister-in-law Mathilde Lukacs-Herzl came into possession and later sold some of his collection to Swiss dealers remains a matter of debate.

73. See *Live Auction 2888 Impressionist & Modern Evening Sale / Lot 7*, CHRISTIE'S (Nov. 4, 2014), <http://www.christies.com/lotfinder/Lot/egon-schiele-1890-1918-stadt-am-blauen-fluss-5840850-details.aspx> [<https://perma.cc/S3UH-9DGL>] [<https://web.archive.org/web/20221014173857/https://www.christies.com/lot/lot-egon-schiele-1890-1918-stadt-am-blauen-fluss-5840850/>]; but see David D'Arcy, *What Makes a Sale a Restitution?*, ART NEWSPAPER (Nov. 5, 2014), <https://www.lootedart.com/news.php?r=QX52V6406191> [<https://perma.cc/LA6Q-TVPC>] [<https://web.archive.org/web/20221014174342/https://www.lootedart.com/news.php?r=QX52V6406191>] (for the view that Christie's controversial sale announcement rewrote history).

\$1,200,000, thus suggesting that the market values legal title and is willing to pay a premium to remove any specter of clouded title.<sup>74</sup>

The recent sale of Claude Monet's *La mare, effet de neige*, previously owned by Richard Semmel and subject to a settlement agreement also exceeded its high estimate in May 2022, supporting this hypothesis.<sup>75</sup>

## II. DEFECTS IN THE ART MARKET

*Part II.A* introduces the scope and scale of information deficits in the art market, *Part II.B* outlines the three categories of information deficits and *Part II.C* introduces the Lemon Market and discusses two case studies illustrating existing market failures.

### A. NAZI-LOOTED ART AND SYSTEMIC INFORMATION DEFICITS

Information deficits are part of every economic transaction, either as a unilateral lack of information (asymmetric information)<sup>76</sup> or mutual lack of information (uncertainty). The international community continues to wrestle with Nazi-looted art at international conferences.<sup>77</sup> The U.S. government addressed the issue through legislation, such as the Holocaust Victims Redress Act,<sup>78</sup> the Nazi War Crimes Disclosure Act in 1998,<sup>79</sup> the HEAR Act of 2016,<sup>80</sup> and the Justice for Uncompensated

74. Many factors influence the final hammer price, and this assumption should not be overstated. However, a representative at a major New York auction house confirmed in a personal interview with the author that buyers are willing to pay a premium and works with a restitution agreement generally achieve higher prices.

75. See the auction result for Lot C at *CLAUDE MONET (1840–1926): La Mare, Effet De Neige*, CHRISTIE'S (May 11, 2022) [https://www.christies.com/lot/lot-6368782?ldp\\_breadcrumb=back&intObjectID=6368782&from=salessummary&lid=1](https://www.christies.com/lot/lot-6368782?ldp_breadcrumb=back&intObjectID=6368782&from=salessummary&lid=1) [<https://perma.cc/G4UX-2ULJ>] [[https://web.archive.org/web/20220605150738/https://www.christies.com/lot/lot-6368782?ldp\\_breadcrumb=back&intObjectID=6368782&from=salessummary&lid=1](https://web.archive.org/web/20220605150738/https://www.christies.com/lot/lot-6368782?ldp_breadcrumb=back&intObjectID=6368782&from=salessummary&lid=1)] and the Christie's press release *Christie's Announces Monet's La Mare, Effet De Neige*, CHRISTIE'S (Apr. 13, 2021), [https://www.christies.com/presscenter/pdf/10451/REL\\_MONET\\_10451\\_1.pdf](https://www.christies.com/presscenter/pdf/10451/REL_MONET_10451_1.pdf) [<https://perma.cc/TJ8N-G8NT>] [[https://web.archive.org/web/20221015073642/https://www.christies.com/presscenter/pdf/10451/REL\\_MONET\\_10451\\_1.pdf](https://web.archive.org/web/20221015073642/https://www.christies.com/presscenter/pdf/10451/REL_MONET_10451_1.pdf)].

76. The high level of fragmentation in the art market fosters asymmetric information, which in turn leads to high transaction costs. MCANDREW, *supra* note 11, at 13.

77. See, e.g., Vilnius International Forum on Holocaust-Era Spoliated Cultural Assets 2000: *Vilnius Forum Declaration 5 October 2000*, LOOTEDART.COM, <https://www.lootedart.com/MFV7EE39608> [<https://perma.cc/5CYC-CR97>] [<https://web.archive.org/web/20230105151717/https://www.lootedart.com/MFV7EE39608>]; *2009 Terezin Declaration on Holocaust Era Assets and Related Issues*, U.S. DEP'T OF STATE, <https://www.state.gov/prague-holocaust-era-assets-conference-terezin-declaration> [<https://perma.cc/4BH2-6LGW>] [<https://web.archive.org/web/20221028093140/http://www.state.gov/prague-holocaust-era-assets-conference-terezin-declaration>]; and the 2018 international conference *20 Years Washington Principles: Roadmap for the Future*, GER. LOST ART FOUND., [https://www.kulturgutverluste.de/Content/01\\_Stiftung/EN/Event-review/2018/Program-20-Years-Washington-Principles-Roadmap-to-the-Future.pdf?\\_\\_blob=publicationFile&v=2](https://www.kulturgutverluste.de/Content/01_Stiftung/EN/Event-review/2018/Program-20-Years-Washington-Principles-Roadmap-to-the-Future.pdf?__blob=publicationFile&v=2) [<https://perma.cc/FZ2L-VF8M>] [[https://web.archive.org/web/20230105152431/https://www.kulturgutverluste.de/Content/01\\_Stiftung/EN/Event-review/2018/Program-20-Years-Washington-Principles-Roadmap-to-the-Future.pdf?\\_\\_blob=publicationFile&v=2](https://web.archive.org/web/20230105152431/https://www.kulturgutverluste.de/Content/01_Stiftung/EN/Event-review/2018/Program-20-Years-Washington-Principles-Roadmap-to-the-Future.pdf?__blob=publicationFile&v=2)].

78. Holocaust Victims Redress Act (HVR), Pub. L. No. 105-158, 112 Stat. 15 (1998).

79. Nazi War Crimes Disclosure Act, Pub. L. No. 105-246, 112 Stat. 1859 (1998).

80. HEAR Act of 2016, *supra* note 9.

Survivors Today (JUST) Act of 2017.<sup>81</sup> The European Union addressed the topic in the Council of Europe Resolution 1205 on Spoliated Jewish Cultural Property (1999) “Looted Jewish Cultural Property.”<sup>82</sup> National governments<sup>83</sup> grapple with the problem in cultural patrimony<sup>84</sup> and good faith purchase<sup>85</sup> legislation and institutions respond to the change in perception and attitude by creating provenance research professorships<sup>86</sup> and provenance curator positions.<sup>87</sup>

Despite these laudable efforts, the inherent logic of the art market penalizes the disclosure of information. As in any market, moral hazard<sup>88</sup> bars the direct transfer of information between market participants, as each party has reasons to withhold or exaggerate information. Search and transaction costs can make independent verification economically or factually impossible. The expert, whose commission is based on the work’s quality and price, authenticates a masterpiece if he has reasonable grounds to do so.<sup>89</sup> The auctioneer or dealer is happy since he can make a profit from the sale. The seller makes money, and the buyer is excited to see a masterpiece appear on the market. None of the art market constituents, short of the buyer’s appraiser, is interested in exposing the work as a forgery or loot, and appraisers explicitly assume good title. There is little incentive to disclose information that would or could expose the work as a forgery or Nazi-looted art. Resistance to information sharing is not

81. Justice for Uncompensated Survivors Today (JUST) Act of 2017, Pub. L. 115-171, 132 Stat. 1288 (2018).

82. Resolution on Looted Jewish Cultural Property, EUR. PARL. ASS. RESOLUTION 1205 (1999).

83. ARTS COUNCIL ENGLAND, RESTITUTION AND REPATRIATION: A PRACTICAL GUIDE FOR MUSEUMS IN ENGLAND (2022).

84. Kulturgutschutzgesetz [KGSG] [Cultural Property Protection Act], July 31, 2016, BUNDESGESETZBLATT [BGBl.] at 1914 (Ger.). The German Cultural Property Protection Act makes special provision for the deletion from the registry if “it has been established with final and binding effect or through final agreement between the stakeholders that the former owner was deprived of the cultural property between 30 January 1933 and 8 May 1945 due to National Socialist persecution and that the cultural property should be exported from the federal territory in order to reconstitute it to former original owners or their legal successors living outside the federal territory.” *Id.* § 13(2).

85. See Marc-André Renold, *Cross-Border Restitution Claims of Art Looted in Armed Conflicts and Wars and Alternatives To Court Litigations*, DIRECTORATE GENERAL FOR INTERNAL POLICIES POLICY DEPARTMENT C: CITIZENS’ RIGHTS AND CONSTITUTIONAL AFFAIRS (2016) [https://www.europarl.europa.eu/RegData/etudes/STUD/2016/556947/IPOL\\_STU\(2016\)556947\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2016/556947/IPOL_STU(2016)556947_EN.pdf), [<https://perma.cc/6W7M-WNCB>] [[https://web.archive.org/web/20220901053652/https://www.europarl.europa.eu/RegData/etudes/STUD/2016/556947/IPOL\\_STU\(2016\)556947\\_EN.pdf](https://web.archive.org/web/20220901053652/https://www.europarl.europa.eu/RegData/etudes/STUD/2016/556947/IPOL_STU(2016)556947_EN.pdf)] discussing the Swiss Federal Law on the International Transfer of Cultural Property, 20 June 2003, RO 2005 1869.

86. Fuhrmeister & Hopp, *supra* note 51, at 216.

87. See, e.g., Museum of Fine Arts Boston—Monica S. Sadler Curator for Provenance, Art of Europe. *Ownership Resolutions*, MFA BOSTON, <https://www.mfa.org/collections/provenance/ownership-resolutions> [<https://perma.cc/3DNG-22MF>] [<https://web.archive.org/web/20230105153501/https://www.mfa.org/collections/provenance/ownership-resolutions>]; Derek Fincham, *A New Museum Position: Curator of Provenance*, ILLICIT CULTURAL PROP. (Dec. 13, 2011), <http://illicitculturalproperty.com/a-new-museum-position-curator-of-provenance> [<https://perma.cc/U82J-R3BC>] [<https://web.archive.org/web/20230105153220/http://illicitculturalproperty.com/a-new-museum-position-curator-of-provenance>].

88. Richard Brealey, Hayne E. Leland & David H. Pyle, *Informational Asymmetries, Financial Structure, and Financial Intermediation*, 32 J. OF FINANCE No. 2 371, 371 (1977).

89. See Raul Jauregui, *Rembrandt Portraits: Economic Negligence in Art Attribution*, 44 UCLA L. REV. 1947, 1964 (1996).



unique to the art market, and information holders “who are privy to special information are generally thought to be unwilling to signal that information to the market.”<sup>90</sup>

An exact measure via empirical data or mathematical capture concerning the actual number of items looted by the Nazis<sup>91</sup> and the still existing artworks subject to a restitution claim is impossible. However, enough historical evidence exists to corroborate the continuing existence of Nazi-looted art and justify a scholarly exploration of the issue. According to some reports, over three million objects were separated from their owners during the Third Reich.<sup>92</sup> Other estimates approximate that the Nazis controlled “one-fifth of all Western art then in existence”<sup>93</sup> or as much as a quarter of all artworks in Europe,<sup>94</sup> with an estimated worth of over \$2.5 billion in 1945<sup>95</sup> (roughly \$39 billion in 2022).<sup>96</sup> Marc Masurovsky, the Co-Founder of the Holocaust Art Restitution Project, estimates that ten to fifteen million cultural objects were taken across nineteen countries (including drawings, antiquities, collectibles, and furniture).<sup>97</sup> According to Masurovsky, the number of cultural objects still missing on, or with access to, the art market is believed to be in the six-figure range, with paintings accounting for around ten to fifteen percent of looted objects.<sup>98</sup>

Not every looted artwork is a masterpiece housed in a museum or sold for millions of dollars at auction, and the high-profile cases making headlines are not necessarily representative. Countless individuals lost works that were valuable to them for non-monetary reasons. The costs of pursuing a restitution claim are high. Lawyers specializing in art claims suggest that “if the artwork is worth less than three million dollars, the work should be given up” rather than having the heirs expend “exorbitant sums on retrieval efforts.”<sup>99</sup> The fact that not all claims are pursued further impedes the possibility of obtaining an accurate assessment of how many works of art may be subject

90. Stephen A. Ross, *Disclosure Regulation in Financial Markets: Implications of Modern Finance Theory and Signaling Theory*, 5 ISSUES FIN. REG. 177, 178 (1979).

91. See generally NORMAN PALMER & LEILA ANGLADE, *MUSEUMS AND THE HOLOCAUST: LAW, PRINCIPLES AND PRACTICE* 6–12 (IAL 2001).

92. Andrew Kenyon & Simon Mackenzie, *Recovering Stolen Art: Australian, English and US Law on Limitations of Action*, 30 UW AUSTL. L. REV. 233, 234 (2001) (citing RICHARD Z. CHESNOFF, *PACK OF THIEVES: HOW HITLER AND EUROPE PLUNDERED THE JEWS AND COMMITTED THE GREATEST THEFT IN HISTORY* (1999)). Estimates vary. See PALMER & ANGLADE, *supra* note 91 (giving a succinct overview of looting by Nazi and other armed forces during the period 1933–1945).

93. Howard N. Spiegler, *Recovering Nazi-Looted Art: Report from the Front Lines*, 16 CONN. J. INT’L L. 297, 298 (2000).

94. David Wissbroecker, *Six Klimts, a Picasso, & a Schiele: Recent Litigation Attempts To Recover Nazi Stolen Art*, 14 DEPAUL-LCA J. ART & ENT. L. 39, 40 (2004).

95. Kaye, *Avoidance and Resolution*, *supra* note 38, at 244.

96. DOLLARTIMES, <http://www.dollartimes.com/inflation/inflation.php?amount-1&year-1945> [https://web.archive.org/web/20221031225753/https://www.dollartimes.com/inflation/inflation.php?amount-1&year-1945] (last visited Oct. 20, 2022) (assuming standard inflation over the intervening period, rather than the estimated increase in the value of art, which may in some cases have outpaced inflation).

97. See Marc Masurovsky, *Holocaust Art Restitution Project*, ARTTACTIC (Dec. 21, 2012) <https://arttactic.com/podcasts/page/38> [https://perma.cc/2L7U-6XYR] [https://web.archive.org/web/20230105155430/https://arttactic.com/podcasts/page/38].

98. *Id.*

99. Barbara J. Tyler, *Stolen Museum: Have United States Art Museums Become Inadvertent Fences for Stolen Art Works Looted by the Nazis in World War II?*, 30 RUTGERS L. J. 441, 445 (1998) (citing Marilyn Henry, *Recovering Looted Art: A Rich Man’s Game*, JERUSALEM POST, Apr. 3, 1998, at 17).

to restitution. Estimates about Nazi-looted art's total value vary from at least \$10 billion<sup>100</sup> to \$250 billion.<sup>101</sup>

The number of living original pre-war owners is declining, and so is the number of living initial post-war possessors; however, the problem of Nazi-looted art without title remains. Different curatorial tastes and interests or the inability of heirs to agree on their disposition bring artworks to the market for the first time in decades. The number of Nazi-looted works coming to the market is increasing and will likely continue to grow in the future,<sup>102</sup> expanding the toxic asset pool of title-less artwork. In addition, the digitalization of archives and records is providing more and easier access to relevant information.

The Federal Bureau of Investigation's Art Crime Team has seen an upward trend in their investigations concerning Nazi-looted art.<sup>103</sup> According to Monica Dugot, the former International Director of Restitution at Christie's, the auction house has been involved in the resolution of over 200 Nazi-looted art claims since 1998, and roughly a quarter of them occurred during the past five years.<sup>104</sup> About twenty percent of these claims concerned artworks with a market value of less than \$10,000.<sup>105</sup> Lucian Simmons, Vice Chairman Restitution at Sotheby's, reported that the auction house consistently deals with fifteen to twenty restitution claims a year.<sup>106</sup>

Growing availability and accessibility of information also call past assessments into question. Based on new information, a work vetted and cleared in the past may now be problematic. In one such instance, Renoir's *Deux Femmes Dans Un Jardin* was returned to the granddaughter of the pre-war owner Alfred Weinberger in New York in

100. Marilyn E. Phelan, *Scope of Due Diligence Investigation in Obtaining Title To Valuable Artwork*, 23 SEATTLE U.L. REV. 631, 660 (1999) (quoting Ronald Lauder).

101. See generally Walton, *supra* note 30.

102. "Boston College's Social Welfare Institute estimates that of the \$41 trillion that it projects will pass intergenerationally by 2052, between \$4 and \$6 trillion will represent art and antique assets." RAMSAY H. SLUGG, HANDBOOK OF PRACTICAL PLANNING FOR ART COLLECTORS AND THEIR ADVISORS 16 (2019). "In our experience, most of the inherited works of art and collectibles are sold." *Profit or Pleasure? Exploring the Motivations Behind Treasure Trends*, BARCLAYS, <http://www.enograf.com/media/pdf/Profit%20ili%20zadovoljstvo%20-%20kompletan%20izvestaj.pdf> [<https://web.archive.org/web/20221031232048/http://www.enograf.com/media/pdf/Profit%20ili%20zadovoljstvo%20-%20kompletan%20izvestaj.pdf>] (last visited Oct. 31, 2022).

103. Christopher McKeogh, FBI, Art and Antiquities Crimes, Due Diligence: A Symposium on Vetting Works of Art, Event with Association of Professional Art Advisors at Christie's (Jan. 25, 2019) (explaining that the Federal Bureau of Investigation mostly becomes involved in the investigation of Nazi-looted art at the request of a foreign government, auction houses, or other art market intermediaries or attorneys for victims and/or their heirs) (personal notes on file with author).

104. Monica Dugot, International Director of Restitution at Christie's, Due Diligence: A Symposium on Vetting Works of Art, *supra* note 103.

105. Nicholas O'Donnell, *When Will We Get There? The World Gathers in London To Consider the State of Restitution of Nazi-Looted Art*, SULLIVAN LAW ART L. REP. (Sept. 15, 2017, 5:13 PM), <https://blog.sullivanlaw.com/artlawreport/when-will-we-get-there-the-world-gathers-in-london-to-consider-the-state-of-restitution-of-nazi-looted-art> [<https://perma.cc/7WQG-MRE9>] [<https://web.archive.org/web/20221102001035/https://blog.sullivanlaw.com/artlawreport/when-will-we-get-there-the-world-gathers-in-london-to-consider-the-state-of-restitution-of-nazi-looted-art>].

106. Author interview with Lucian Simmons, Worldwide Head of Restitution Dep't, Sotheby's, in New York, N.Y. (Mar. 25, 2019) (notes on file with author).

September 2018.<sup>107</sup> An international auction house sold it as recently as 2005—before the Einsatzleiter Reichsleiter Rosenberg (“ERR”) archives were digitized and available online. The ERR archives are a meticulous repository of plundered and stolen artworks—records often include photographs and detailed descriptions.<sup>108</sup> For the Weinberger family, the ERR records provided a vital and, until recently, missing piece of information regarding the Renoir’s provenance. A systematic investigation and linking of these and other records and archives have yet to occur.

## B. TYPES OF INFORMATION DEFICITS

The information deficits associated with Nazi-looted art can arise from three causes: asymmetric information, temporary uncertainty, or permanent uncertainty, also referred to as ambiguity.

### 1. Asymmetric Information

In the case of asymmetric information, the seller knows that the artwork is looted. If the artwork is listed on any stolen art database, withholding this information and purporting to transfer title to the buyer is apparent fraud. In these cases, the buyer merely purchases possession and the option to hang the work on his wall and enjoy it. He also acquires an illiquid asset and the risk of a lawsuit. The economics of possession without ownership—at least in a world with transaction costs—depend on the initial statutory assignment of rights and liability. Under U.S. law and the *nemo dat quod non habet* rule, title of stolen property remains with the pre-theft owner. The law makes it impossible for a later purchaser to obtain title, regardless of his good faith. The seller can only sell the buyer the property entitlement he has—possession but not title. Economic theory breaks the property entitlements down into four components: (1) use (U), (2) disposition (D) (such as earning income from loaning the good or using it as collateral), (3) transfer (T), and (4) exclusion of others (E). The standard assumption for a purchase transaction is that the purchase price (X) includes the complete bundle of property entitlements, including title. Buyer (B) is willing to pay X for the property, i.e., the artwork, only if Seller S can transfer all property rights to B.  $X = U + D + T + E$ . Since S, under U.S. law, does not have title to the looted artwork, he cannot transfer it to B. B, despite paying X, only receives  $U + D + E - T$ . Since the right to transfer

107. See Meagan Flynn, *Nazis Stole a Jewish Man’s Renoir Painting in 1941. Now It’s Been Returned To His Only Living Heir*, WASH. POST (Sept. 14, 2018, 6:19 AM), <https://www.washingtonpost.com/news/morning-mix/wp/2018/09/13/nazis-stole-a-jewish-mans-century-old-renoir-painting-in-1941-now-its-been-returned-to-his-only-living-heir> [https://perma.cc/N9EN-LR22] [https://web.archive.org/web/20200317023100/https://www.washingtonpost.com/news/morning-mix/wp/2018/09/13/nazis-stole-a-jewish-mans-century-old-renoir-painting-in-1941-now-its-been-returned-to-his-only-living-heir].

108. *The Einsatzstab Reichsleiter Rosenberg (ERR) Photographic Albums at the National Archives and Records Administration*, NAT’L ARCHIVES, <https://www.archives.gov/research/holocaust/international-resources/nara/err> [https://perma.cc/47K6-BWCD] [https://web.archive.org/web/20230105164232/https://www.archives.gov/research/holocaust/international-resources/nara/err]; see also *ERR Card File and Photos*, FOLD3, <https://www.fold3.com/publication/857/err-card-file-and-photos> [https://perma.cc/U7ZQ-Q8RH] [https://web.archive.org/web/20230105164502/https://www.fold3.com/publication/857/err-card-file-and-photos].

(having title and actual ownership) may also influence use, disposition, and exclusion rights, B, in this case, is paying  $X = U^* + D^* + E^* - T$ . B is receiving much less than he bargained for.

What are the consequences of acquisition of possession without title? The original owner's strong property right and protection under the *nemo dat quod non habet* rule is not as robust or economically meaningful as it initially appears. The current good-faith possessor does not have and cannot obtain title. However, she is not defenseless in protecting and shielding her possessory entitlement. The statute of limitations and the equitable defenses estoppel and laches can bar the original owner and holder of the title entitlement from enforcing ownership and retrieving property possession. The thief's inability to pass title is irreconcilable with the unenforceability of the original owner's claim culminating in the permanent disintegration and separation of the symbiotic relationship of title and possession.<sup>109</sup> It creates a perpetual disconnect between the property right and its legal enforceability. The owner cannot enforce his property claim and obtain an enforceable title. Nevertheless, this does not give the current possessor all property rights. The object is divorced from the property right of title in perpetuity.<sup>110</sup>

These artworks have limited to no resale utility value on the legitimate market. The current possessor may be able to exclude others by prevailing in a lawsuit, thereby giving him de facto exclusive rights. However, he did not receive the complete bundle of property rights. This defect depresses the value and leaves a permanent moral specter attached to the work. Many European jurisdictions try to avoid this permanent disconnect by allowing a good-faith purchaser to obtain title under certain circumstances, even from a thief.<sup>111</sup> A good-faith purchase reconciles the statute of limitations with ownership and reunites the entire bundle of property rights in one person. The concept ensures legal certainty and avoids leaving both parties with unsatisfactory outcomes. Depending on the route of a Nazi-looted work, foreign jurisdictions' laws and legal doctrines can implicate litigation before a U.S. court, if applicable, based on a conflict of law analysis.

The seller withholding information from the buyer is a classic case of information asymmetry. The issue is whether incentives exist for the seller to disclose his bad information. This depends on several factors, including trust and knowledge offered by market participants (dealers or auction houses) and technology (stolen art databases or Blockchain technology).

109. While the U.S. legal system has accepted this permanent separation, most civil law countries, driven by a desire for legal certainty and legal peace (*Rechtsfrieden*)—paired with a general sense of justice—have chosen a different route. See RESTITUTION AND MEMORY: MATERIAL RESTORATION IN EUROPE 3 (Dan Diner & Gotthart Wunberg eds., 2007).

110. See generally KLAUS MATHIS, EFFICIENCY INSTEAD OF JUSTICE?: SEARCHING FOR THE PHILOSOPHICAL FOUNDATIONS OF THE ECONOMIC ANALYSIS OF LAW, 51–84 (2009).

111. Bürgerliches Gesetzbuch [BGB] [Civil Code], § 937, para. 2 (acquisition by prescription) (Ger.).

## 2. Temporary Uncertainty

In the case of temporary uncertainty, neither the seller nor the buyer is aware of the work's provenance, and neither party knows that the object is Nazi-looted art. However, provenance research can determine that the artwork has been looted.<sup>112</sup> The current seller may have acquired the work as a good-faith purchaser without knowledge of the work's dark past. In this case, the seller, and the owner or heirs are often both referred to as innocent parties.<sup>113</sup>

Due diligence and research can reveal that the work was looted, leading to two related questions that need to be answered separately. First, is it worth finding out? And secondly, who should bear the cost of the expensive and time-consuming provenance research? Provenance research is costly in two ways: the actual monetary expense of paying for provenance research and the opportunity cost of not being able to afford another artwork based on the choice to spend resources on provenance research.

The statutory distribution of property entitlements suggests a clear answer to the first question. Standard transaction assumptions typically include obtaining ownership and title to the purchased object, indicating that this information is essential and worth obtaining. However, uncertainty needs to be distinguished from risk in determining the value of the information. Uncertainty is a "random variation according to an unknown probability law."<sup>114</sup> Risk concerns an arbitrary deviation from a known quantity.

The risk of discovering Nazi-looted art needs to be assigned. The determination also addresses whether economies of scale are possible and which party is in the best position to avoid the cost (least cost avoider). Economic decisions are made on the margins, and risk assignment depends on the probability and amount of loss. Provenance research will either confirm that the painting was looted or, if inconclusive, move it from temporary uncertainty to the ambiguity category. If the provenance research reveals that the work was not looted, the possessor has legal title and can achieve a better price than he would have with unclear provenance.

## 3. Ambiguity (Permanent Uncertainty)

Permanent uncertainty is the third category a painting may fall into. In these cases, despite best efforts and investigation, it is impossible to fully and reliably establish the ownership chain. Artworks with provenance gaps fall into this category. It is impossible to determine *ex ante* whether the uncertainty is temporary or permanent, and research will determine the final classification. However, irresolvable ambiguity will impact the economic analyses of these cases.

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112. See *infra* Section III.C.1.b for further discussion of unclear provenance.

113. "While there is no question that the Nazis and their collaborators did engage in inhumane behavior and some appropriately were punished at Nuremberg, there is equally no reason to think that innocent, good faith purchasers, nearly sixty years later, are proper parties to now punish." Stephan J. Schlegelmilch, *Ghosts of the Holocaust: Holocaust Victim Fine Arts Litigation and a Statutory Application of the Discovery Rule*, 50 CASE W. RES. L. REV. 87, 112 (1999).

114. Truman F. Bewley, *Knights Decision Theory and Econometric Inferences*, 146 J. ECON. THEORY 1134, 1134 (2011).

### C. THE LEMONS MARKET AND NAZI-LOOTED ART

This part introduces the Lemons Market and discusses the model in two case studies: the auction house and the museum as intermediaries and art market actors.

As pointed out by George Akerlof in his seminal paper, *The Market for "Lemons": Quality Uncertainty and the Market Mechanism*,<sup>115</sup> the problem of discerning quality or value is inherent in commerce, and the inability to do so leads to a market failure. The ability to counter misinformation, deceptive perceptions, and information asymmetries is essential for trade to function efficiently. Without countermeasures, such communication failures have economic costs. Akerlof relied on the used car market, a perfect example of information asymmetry, to illustrate a Lemons Market as an example of a market failure.

The car market is characterized by a significant information gap, leading to a substantial price gap between the primary and secondary car markets. When the buyer purchases the car from the manufacturer or a dealership, neither party has superior knowledge of whether it will be a lemon. Akerlof did not need to clearly define what he meant by quality to prove his point.

Art is not a regular commodity as it does not depreciate through wear and tear over time. On the contrary, some artworks become infinitely more valuable with time. Thus, the secondary art market does not operate like other "used" good markets. However, there are certain similarities. For instance, direct purchase from the artist in the primary art market usually eliminates concerns about authenticity, theft, or looting.

The quality of a painting can attach to multiple features and is not necessarily correlated to price. Numerous benchmarks determine the quality of art, including but not limited to ownership and exhibition history (provenance), comparables, the market in general, and the depth of the potential buyer pool. Art historic quality or -value does not necessarily translate to economic value, and many factors influencing quality determination are highly subjective.

For the purpose of this Article, legal title<sup>116</sup> will serve as proxy for good quality in applying the Lemons model to the art market. Clouded title<sup>117</sup> and no title<sup>118</sup> represent inferior or bad quality.

115. George A. Akerlof, *The Market for "Lemons": Quality Uncertainty and the Market Mechanism*, 84 Q. J. ECON. 488, 495 (1970). See also generally Roger A. McCain, *Markets for Works of Art and "Markets for Lemons,"* in *ECON. POL'Y FOR THE ARTS* 122 (William S. Hendon et al. eds., 1980).

116. Legal title to property includes the full bundle of unrestricted property rights, such as the right to use, consume, hold, exhibit, pledge as collateral, donate, sell, or otherwise dispose of the property. "Clear legal title goes to the heart of the value of art objects and questions of liability." Shindell, *supra* note 15, at 407. Contrary to real estate, there is no public registry of art (although it has been suggested by Burton and Kreder). See generally Bruce W. Burton, *In Search of John Constable's The White Horse: A Case Study in Tortured Provenance and Proposal for a Torrens-Like System of Title Registration for Artwork*, 59 FLA. L. REV. 531, 535-6 (2007); Jennifer Anglim Kreder, *Reconciling Individual and Group Justice With the Need for Repose in Nazi-Looted Art Disputes: Creation of an International Tribunal*, 73 BROOK. L. REV. 155 (2007).

117. The term "clouded title" describes indeterminate or non-traceable provenance. It can be a simple case of missing information or any document, claim, unreleased lien, or encumbrance that might invalidate or impair the title as an indication of looted or stolen art or make the title doubtful.

118. No title is the equivalent of looted or, more generally, stolen art.

Memorialized provenance is the only documented evidence chain involving title transfers customary in the art market. However, while provenance ideally includes relevant title information, it is not synonymous with title.<sup>119</sup> It is a listing of ownership, custody, and location of artwork in chronological order from its creation to the present day. Provenance is like a painting's passport in that it records location changes.<sup>120</sup> Its usefulness in proving ownership is coincidental, while its primal purpose is to present circumstantial, contextual, and historical evidence of the work's creation.

In a Lemons Market, the buyer cannot correctly assess a painting's title through independent research before the purchase, whereas the seller possesses additional information with regard to his ownership or possession. Sellers with legal title have no mechanisms to credibly disclose this fact to buyers, which causes them to hold on to their paintings, while sellers with clouded or no titles sell them to ill-informed buyers. The price set by the uninformed and risk-averse buyer leads to adverse selection by forcing paintings with legal title out of the market, eventually leading to a market collapse. As a result, the quality of paintings as measured by title on the market will be below average.

According to Akerlof, the Lemons Market phenomenon exists in the art market if the buyer cannot independently verify title. The fact that the perception of title risk can be as real as the actual risk,<sup>121</sup> as discussed earlier, suggests that the art market is indeed a Lemon Market. Nazi-looted art is only one example of a title defect, but the many other manifestations are beyond the scope of this Article.<sup>122</sup>

Contrary to the used car seller, a painting seller does not necessarily have superior information about the painting's quality. Not having made the necessary inquiries when acquiring<sup>123</sup> the artwork, he may be unaware that he is not the owner but merely the possessor of Nazi-looted art. The buyer can obtain the necessary provenance information by consulting a looted art database or enlisting an intermediary's experience and expertise.<sup>124</sup> Information and search costs can make it economically

119. The legal title concept is defined under personal and real property law covering an array of legal and factual questions that determine whether a possessor has attained full legal and equitable ownership against anyone else's interests. See Shindell, *supra* note 15, at n.5.

120. The fact that provenance is based on physical possession shows that it is not identical to ownership or legal title but merely a mechanism that can aid in determining and reconstructing legal title. Complete provenance without any gaps can still hide questions of valid legal title.

121. See TIJHUIS, *supra* note 13. For title, see generally Rebecca Korach Woan, *True Art Ownership*, FINANCIAL ADVISOR (May 3, 2010), <https://www.fa-mag.com/news/true-art-ownership-5414.html> [<https://perma.cc/C84G-637Z>] [<https://web.archive.org/web/20221011015051/https://www.fa-mag.com/news/true-art-ownership-5414.html>].

122. According to the art title insurer ARIS Title Insurance Corporation, Nazi-looted or stolen art in general only represents twenty-five percent of title risks. Seventy-five percent of title risks are "traditional liens and encumbrances (outside the sphere of traditional art industry due diligence)." See ARIS, RISK MANAGEMENT FOR INDIVIDUALS (2016), [https://d1hks021254gle.cloudfront.net/wp-content/uploads/sites/9/2017/01/ARIS-Individual-Collectors-Brochure\\_2017.pdf](https://d1hks021254gle.cloudfront.net/wp-content/uploads/sites/9/2017/01/ARIS-Individual-Collectors-Brochure_2017.pdf) [<https://perma.cc/L2P8-JZC7>] [[https://web.archive.org/web/20221011015446/https://d1hks021254gle.cloudfront.net/wp-content/uploads/sites/9/2017/01/ARIS-Individual-Collectors-Brochure\\_2017.pdf](https://web.archive.org/web/20221011015446/https://d1hks021254gle.cloudfront.net/wp-content/uploads/sites/9/2017/01/ARIS-Individual-Collectors-Brochure_2017.pdf)]. For a list of legal title risks see Shindell, *supra* note 15.

123. Acquisition does not necessarily involve a purchase as possession could have been transferred by exchange, gift, or inheritance, for example.

124. An auction house, dealer, or provenance researcher often acts as an intermediary.

inefficient or practically impossible<sup>125</sup> for the buyer to distinguish between good and bad quality. In Akerlof's model, information asymmetry is based on experience, whereas in the art market, it is expertise rather than personal experience<sup>126</sup> that causes an information deficit or asymmetry.

In Akerlof's Lemons Market, the market value reflects average product quality, and different quality cars sell at the same price. The question in this context is whether Nazi-looted art sells at the same price as works with legal title. The aforementioned example of the two Schiele works sold at auction within days of each other is only an illustration; further empirical evidence is needed to verify the assumptions set forth herein. They are simplifications equating quality with clear title and tying price to title.

Absent other examples, *Sitzende mit angezogenem linken Bein (Torso) (Seated Woman With Bent Left Leg (Torso))* and *Stadt am blauen Fluss (Krumau) (Town on the Blue River)* show, that at least in this case good and bad quality artworks did not sell at the same price. The market made a clear distinction, and market value did not reflect average product quality.

Akerlof also implicitly assumes no transaction costs to discovering X as the price for an average quality car. However, buyers' and sellers' search efficiency is very low for unique goods like paintings. The seller can provide the information to multiple buyers and price search costs into the purchase price. The buyer does not share his search information, and he does not recoup his search costs via the purchase price.

The searcher does not know the identity of potential buyers or sellers, and according to George J. Stigler, the search cost "must be divided by the fraction of potential buyers (or sellers) in the population which is being searched."<sup>127</sup> Assuming less than one person in a random selection of a thousand people is a potential buyer, this means that the cost of a personal search for a seller of a Schiele painting, for example, increases more than a thousand-fold per price quotation. The inefficiency of a personal search is a powerful inducement to localize transactions or use a more modern method of identifying potential buyers or sellers. The use of intermediaries such as dealers or auction houses to identify potential buyers and sellers is the art market equivalent of advertising (which can be expensive for works with few potential buyers compared to the advertising medium's circulation).<sup>128</sup>

A further unspoken assumption in Akerlof's model is the presupposition of disparity—the reasonably high risk of the buyer eventually discovering he bought a lemon. Comparable to used cars, artworks carry unforeseen risks that materially affect quality as defined here. They include, but are not limited to, missing or incomplete provenance and risks concealed from buyers through the use of intermediaries and the potential substitution of their reputation and reliability for that of the seller. The personalization of transactions based on trust is a soft approach widespread in the art

125. Factual inability is not limited to buyers but can also apply to sellers.

126. For the distinction between a lemons and a gems setting, see generally Giuseppe Dari-Mattiacci, Sander Onderstal, & Francesco Parisi, *Inverse Adverse Selection: The Market for Gems* 12 (Amsterdam Ctr. L. & Econ., Working Paper No. 2010-04, 2011).

127. George J. Stigler, *The Economics of Information*, 69 J. POL. ECON. 213, 216 (1961).

128. *Id.*



market that mitigates inefficiencies. So is the equilibration of profits in furtherance of a long-term economic relationship.<sup>129</sup>

As noted earlier, verifying provenance information is a complex and intricate process.<sup>130</sup> Most models differentiate between the information available to both parties in a transaction and information exclusive to one party. The idiosyncrasy in the Nazi-looted art model is that information is not necessarily private. However, it is an unobservable variable to the other party. The temporary uncertainty model has two equally un- or under-informed parties, and the question is who is the better search cost avoider.

An art market intermediary's central function is to establish compatibility between the potential consumers'<sup>131</sup> subject characteristics and the object characteristic of the artwork<sup>132</sup> in its arsenal.<sup>133</sup> The intermediary's success depends on experience, art and market knowledge, personality, relationships, and other factors to achieve such compatibility.<sup>134</sup>

### 1. The Auction House

The following section summarizes three fundamental functions that the auction house as an intermediary fulfills: gatekeeper, transaction cost specialist, and agent. The Article then turns to the specifics of the auction market and Nazi-looted art.

#### *a. The Auction House as Intermediary*

The art market intermediary is a key figure in the distribution and information channel between the supplier/seller and the demander/buyer and acts as a gatekeeper.<sup>135</sup> The auction house decides what information and artworks enter the market. The high-end major auction houses analyzed herein only accept about ten percent of all objects offered for consignment<sup>136</sup> and apply minimum value

129. Stuart Plattner, *A Most Ingenious Paradox: The Market for Contemporary Fine Art*, 100 AM. ANTHROPOLOGIST 482, 490 (1998).

130. Identifying red-flag names of dealers and collectors who collaborated with the Nazi Regime in the provenance requires art-historical and historical knowledge, and verifying provenance requires access to and knowledge of numerous databases. Even in cases of a complete and unbroken provenance chain, knowledge and expertise in various legal systems can be required to ascertain whether the current possessor has title to the artwork. Based on these complexities and the high information and search costs, it is inefficient for both the seller and the buyer to obtain and verify provenance information.

131. The intermediary (auction house, gallery, dealer) influences the demander through exhibitions, consultation, and marketing.

132. The intermediary can only influence this in the primary market by guiding the artist and his work through negotiations and price setting.

133. MANUELA LANDWEHR, *KUNST UND ÖKONOMISCHE THEORIE [ART AND ECONOMIC THEORY]* 277–78 (1998).

134. *Id.* at 278.

135. Kurt Lewin introduced the gatekeeper concept in connection with his channel theory for food chain supply and it has since been applied to other socio-economic channels where goods, information, and persons circulate. KURT LEWIN, *FIELD THEORY IN SOCIAL SCIENCE: SELECTED THEORETICAL PAPERS* 176 (Dorwin Cartwright ed., 1951).

136. Simmons, *supra* note 106.

thresholds.<sup>137</sup> It is difficult or impossible for unknown consignors to place works as most high-end auction houses deal almost exclusively with existing clients or solicited consignors.<sup>138</sup> The auction house intermediaries are homogenous; access to specific artwork or information is limited if the gatekeeper does not open the gate. A buyer buying a painting at a well-known gallery or auction house purchases the physical object and intangible assets such as reputational value based on his association with the intermediary.

The art market transmits information via an insider information network, causing high search and information costs for outsiders such as potential buyers, sellers, and even artists. To remain competitive, intermediaries must add value to the transaction by lowering transaction costs or adding utility. To maximize their utility, intermediaries are efficient and experts in reducing transaction costs. Intermediaries minimize direct contact between the upstream and downstream market actors and the cost per contact. According to the Baligh-Richartz effect,<sup>139</sup> a single intermediary significantly reduces the requisite number of contacts between buyers and sellers. For example, a gallery representing five artists is in contact with five potential buyers. Without the gallery, twenty-five (five times five) individual contacts are required if each potential buyer contacts every artist before his purchase decision. With the gallery as an intermediary, only ten (five plus five) contacts are necessary since the potential buyer can view all artists' works at the gallery. The potential buyer does not have to travel to each artist's or seller's home at the auction house, and standard consignment and purchase agreements reduce contractual costs.

Intermediaries also mitigate counterparties' uncertainty routed in ignorance and asymmetrical information. A buyer's uncertainty regarding the authenticity and quality of a painting influences the investment decision. The low transaction frequency in the art market makes it inefficient for the buyer or the seller to reduce uncertainty by obtaining the necessary information. The expense of search costs in terms of time, money, and effort is too high. Having the intermediary, such as a gallery or an auction house, vet and approve the work allows the buyer to overcome his ignorance and uncertainty (assuming he has sufficient trust in the intermediary's judgment).<sup>140</sup> Intermediaries act as information centers with their expertise and a high volume of transactions. They can realize economies of scope<sup>141</sup> and scale<sup>142</sup> based on the availability and repeated use of information from prior research and expertise.

Based on the intermediaries' information advantage, the buyer or seller is required to involve an intermediary. However, the information advantage itself induces further information asymmetry. Uncertainty about the quality and characteristics of the intermediary replaces market data uncertainty, making the intermediary market a Lemon Market. The principal cannot observe and properly assess behavioral

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137. *Id.* (stating the minimum value is around \$5,000).

138. *Id.*

139. See Helmy H. Baligh & Leon E. Richartz, *An Analysis of Vertical Market Structures*, 10 MGMT. SCI. 667, 670 (1964).

140. McCain, *supra* note 115, at 130–135; LANDWEHR, *supra* note 133, at 286.

141. Economies of scope lower the average cost of a product by producing more types of products.

142. Economies of scale reduce the cost per unit by increasing the number of units produced.

uncertainty before the transaction. Hidden information such as quality uncertainty (leading to adverse selection) and hidden action such as moral hazard are components of this uncertainty.

The buyer of the intermediary's services cannot observe whether the intermediary possesses the necessary quality and price information to prevent a bad purchase. He cannot assess *ex-ante* whether the intermediary will recognize a forgery or a painting as an unsuitable investment object.<sup>143</sup> The principal uses the intermediary agent precisely because of his superior insider information. However, the principal has no way of ensuring that the agent uses this information to maximize the principal's utility.<sup>144</sup>

The intermediary as the agent is not the ultimate risk-bearer, which affects his choices and behavior, leading to moral hazard. Risk mitigation efforts can lead to perverse incentives, inducing the agent to act carelessly.<sup>145</sup> The agent intermediary's search and brokering activities are non-observable. The principal cannot assess whether results are based on agent conduct or exogenous risk. Best efforts and bad luck can produce the same results as poor efforts and good luck.<sup>146</sup> The seller's use of an intermediary combines "two inextricable elements, risk-sharing and differential information."<sup>147</sup>

A competitive market incentivizes the intermediary to reduce agent-related information asymmetry to survive.<sup>148</sup> Signaling, self-regulating, screening, and attaining and maintaining trust and reputation curtail agent-related information asymmetry. These are the same evasive avoidance tactics that the sellers of average or above-average used cars in Akerlof's Lemon Market use. Intermediaries have additional means to *signal* their efficiency. They must relay credible information that allows the principal to draw reliable conclusions about the intermediary's non-observable characteristics, such as expertise and competence.<sup>149</sup> The economic agent uses observable actions to assure the principal of the quality and value of his intermediary services.<sup>150</sup>

The information insider network and the intermediaries' homogeneity cause screening to play a negligible role in the art market as an uncertainty reduction tool. Trust and reputation are the most important measures to reduce uncertainty in the art market. The insider information network and long-term relationships curtail opportunistic behavior. The opportunity loss incurred by consistent reliability, goodwill, and fairness only pays off if the intermediary maintains its position in the

143. LANDWEHR, *supra* note 133, at 291.

144. KENNETH JOSEPH ARROW, *THE ECONOMICS OF AGENCY* 1, 5 (Stan. Univ. Ctr. of Rsch. on Org. Efficiency ed., 1984).

145. *Id.* at 4.

146. Klaus Spremann, *Reputation, Garantie, Information*, 58 ZEITSCHRIFT FÜR BETRIEBSWIRTSCHAFT 613, 615 (1988).

147. ARROW, *supra* note 144, at 13.

148. *Id.*

149. See generally Michael A. Spence, *Job Market Signaling*, 87 Q.J. ECON. 355-74 (1973).

150. Karl-Gustaf Löfgren, et al., *Markets with Asymmetric Information: The Contributions of George Akerlof, Michael Spence and Joseph Stiglitz*, 104 SCANDINAVIAN J. ECON. 195, 199 (2002).

market long-term and can reap the economic fruits of the established reputation.<sup>151</sup> In Hohfeld's bifurcated system of opposites, incentives require the possibility of punishment as a backstop to be effective. The punishment's goal is to diminish the agent's utility so severely that the mere threat induces the agent to choose a sufficiently high level of effort and diligence out of self-interest.<sup>152</sup> The agent needs to possess something of worth, which the punishment can destroy. Reputation acts as collateral for the demander, forcing the intermediary to behave diligently since the principal can otherwise destroy the collateral.<sup>153</sup> As an auction house lawyer testified in a deposition in connection with the sale and reimbursement of a forged Frans Hals painting, "[i]t is a question of reputation that has a much broader impact than the value of this one painting."<sup>154</sup>

*b. The Auction House and Nazi-looted Art*

As the seller's intermediary, the auction house mitigates information deficits. Best practices and standards for Nazi-looted art have evolved, and due diligence procedures at major auction houses have improved over the past decades.<sup>155</sup> Only time will tell if this is a race to the top, with smaller and local auction houses following suit and adhering to similarly strict standards. Unfortunately, the other outcome is a race to the bottom. If works of questionable provenance are offered through auction houses with low standards, works are pushed underground, making it more difficult for owners and heirs to locate them.

Auction houses are well-positioned to request comprehensive provenance information from the potential seller or consignor. Prominent houses have well-educated, trained staff to verify such information and conduct independent research. In addition to utilizing existing databases, these intermediaries maintain valuable proprietary in-house databases.<sup>156</sup> The auction house conducts independent research

151. LANDWEHR, *supra* note 133, at 296.

152. Spremann, *supra* note 146, at 619.

153. The collateral's function in this scenario is not to improve the principal's position. Its sole purpose is to possibly be destroyed to penalize the agent. *Id.*

154. Jonathan Browning, *Sotheby's Drags Christie's into Fight Over Fake Old Master*, BLOOMBERG (Oct. 25, 2018, 9:51 AM), <https://www.bloomberg.com/news/articles/2018-10-25/sotheby-s-drags-rival-christie-s-into-fight-over-fake-old-master> [<https://perma.cc/7DWU-XJJM>] [<https://web.archive.org/web/20221027222209/https://www.bloomberg.com/news/articles/2018-10-25/sotheby-s-drags-rival-christie-s-into-fight-over-fake-old-master>].

155. See Walton, *supra* note 30, at 569 (giving examples of Sotheby's stating that a work indeed had been stolen by the Nazis, and that it had even been listed in the official "Catalog of French Property Stolen between 1939–1945" published by the French government and the Carnegie Museum of Art in Pittsburgh removing a work from viewing as both sides attempted to show provenance records claiming rightful ownership).

156. "It should be noted that numerous databases today are restricted from public access. Some companies (e.g., Sotheby's auction house) have created their own databases which are used for the tracing of 'questionable' art works, but these are not accessible to the public because they contain sensitive information. Some governments, such as the French, do not permit public access to their databases of looted art for various legal reasons (most commonly, protection of privacy of claimants)." Konstantin Akinsha, *The Temptation of the "Total" Database*, in RESOLUTION OF CULTURAL PROPERTY DISPUTES 159–161 (Int'l Bureau of the Permanent Ct. of Arbitration ed., 2003).

by using institutional knowledge and consulting archives and other sources. While previous sales information is important, it can be inaccurate and is often disregarded. The time spent checking databases and conducting provenance research depends on several factors, including the consignor's identity and importance, the work's appeal to the auction house, and the auction cycle timing.

One of two requirements must be met for the artwork to be cleared and put up for sale. Either the provenance has been fully reconstructed, and the consignor has title, or there is no indication suggesting that the painting was looted. The decision to include it in a sale is case-specific, and the fact that the artwork was the object of a lawsuit is not necessarily determinative.<sup>157</sup> On the other hand, the auction house may decline the consignment if the research uncovered potential issues. Legal considerations are not the only factor—the saleability of the work, public relations exposure, and ethical concerns also affect the decision.<sup>158</sup>

Nazi-looted art can be uncovered in one of two ways. First, the consignor's documentation could contain relevant information. This is a case of asymmetric information as the consignor likely knows that the work was looted. Alternatively, in the case of temporary uncertainty, provenance research uncovers that the work was looted. Once this has been established, the next steps depend on whether there is a known claim for the work.

In the case of a known claim, the auction house will not return the work to the consignor and retains the work until the consignor and the claimant reach an agreement. According to an auction house representative, the resolution rate for valid claims is very high.<sup>159</sup> When the conflicting parties cannot reach a resolution, the auction house may be holding a work—and paying for its insurance and storage fees—for a long time.<sup>160</sup> A claimant may also contact the auction house once a lot is put up for sale if his information is not previously available to the auction house.<sup>161</sup> It is not uncommon for claims to relate to prior auction sales from the 1980s and 1990s. The auction house will contact the consignor and buyer on behalf of the claimant to facilitate a resolution. If a claim is made shortly before a lot is auctioned or following its sale, the auction house holds the sale's proceeds until the consignor and the claimant reach a resolution—exposing the auction house to potential lawsuits by the consignor.

If there is no known claimant, practices differ. One auction house does not offer the Nazi-looted artwork for sale and returns it to the consignor.<sup>162</sup> While this keeps the looted work off the auction block, nothing prevents the consignor from selling it through a different channel. The auction house also falls short of its gatekeeper function

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157. Simmons, *supra* note 106.

158. *Id.*

159. The resolution rate for valid claims at one auction house is around ninety percent, and a restitution agreement often attracts a premium once the work is put up for sale. *Id.*

160. Where appropriate, the auction house may file an interpleader to get the competing claims resolved. Maggie Hoag, Deputy General Counsel, Americas at Christie's, Panel at Cardozo Law School's Symposium: From Consignment to the Auction Block (Mar. 25, 2019), <https://larc.cardozo.yu.edu/cgi/viewcontent.cgi?article=1058&context=flyers-2018-2019> [https://web.archive.org/web/20221101132042/https://larc.cardozo.yu.edu/cgi/viewcontent.cgi?article=1058&context=flyers-2018-2019].

161. Simmons, *supra* note 106.

162. *Id.*

since the compiled provenance information is not disseminated to the wider market. Another auction house outlines a different procedure in its guidelines which includes considering alternatives with the consignor, such as donating the work to a museum or “offering the object for sale publicly with sufficient publicity to record its (intended or actual) sale and allow potential claimants to come forward.”<sup>163</sup> If the auction house is not satisfied and cannot get comfortable based on the provided information and its independent research in time for a scheduled sale, it rejects the work and returns it to the consignor. Alternatively, the work can be included in a later sale after additional research.

For asymmetric information, the intermediary, through its search and information-accumulation function, prevents the auction market from being a Lemon Market in two ways. First, if the research determines that the artwork was looted or likely looted, the auction house does not sell it (or sells it with sufficient publicity to alert buyers of the issue). It acts as a gatekeeper and eliminates bad quality (artworks without title) from the auction market. Some intermediaries contact the potential claimant (the prewar owner or heirs) whenever possible.<sup>164</sup> Secondly, if the auction house determines that the artwork is of average or good quality (a possible restitution issue has been decided by a court,<sup>165</sup> or the work has clean and marketable title), its findings are published in the catalogue and other pre-sale advertisements. It allows the buyer to verify the information that is inefficient for them to search on their own. The auction house eliminates information asymmetry and thereby prevents adverse selection.

Despite these results, the examined system of returning Nazi-looted art to the consignor absent a known claim or returning the artwork in cases of ambiguity has three shortcomings:

- (1) Resolving the temporary uncertainty creates asymmetric information and the potential for a Lemon Market at a lower level or private deal.
- (2) The compiled provenance information remains siloed, undisclosed, and unknown to potential buyers and claimants.
- (3) The auction house is not compensated for its search costs and does not monetize its research efforts and results.

The auction house typically has a contractual relationship based on agency law with the seller in the form of a consignment agreement. However, where the validity of title is concerned, its economic interest aligns with that of the purchaser. The research conducted by the auction house is entirely incidental to its main purpose, which is selling. There is no reimbursement mechanism to recover the incurred research costs (when the work is returned to the consignor) or the costs of holding a disputed work.

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163. *Christie's Guidelines for Dealing with Nazi-era Art Restitution Issues*, CHRISTIE'S (June 2009), <https://www.christies.com/pdf/services/2010/christies-guidelines-for-dealing-with-restitution-issues.pdf> [<https://perma.cc/7WKR-QTKD>] [<https://web.archive.org/web/20221014220802/https://www.christies.com/pdf/services/2010/christies-guidelines-for-dealing-with-restitution-issues.pdf>] (The guidelines mention a public list of such objects which the author has not been able to locate. It is not clear that such a list exists.).

164. *Id.*

165. See the example of the Schiele work *Seated Woman with Bent Left Leg* discussed *supra* at Part I.C.

These sunk costs are only monetized via the reputation and brand protection that the auction house maintains by only selling works with legal title.

These shortcomings result in inefficiencies further discussed in *Part III*, where the HEAR Fund is introduced as a solution to these inefficiencies.

## 2. The Museum

This section discusses the donor-museum relationship, which more closely resembles the seller-buyer relationship in Akerlof's model than the intermediated auction relationship. It discusses several voluntary and enforcement disclosure mechanisms before examining donations of Nazi-looted art to museums.

### *a. Disclosure Mechanisms*

Markets with information asymmetry and deficiency are prone to fraud. Efficient resource allocation requires accurate and optimal information. Incentives for voluntary disclosure by the market can optimize information availability. Enforcement of civil and criminal prohibitions against fraud and specialized bodies to oversee regulations can compel disclosure.

Frank H. Easterbrook and Daniel R. Fischel<sup>166</sup> analyzed the efficiency of securities regulation by modeling the market without regulatory intervention and concluded that mandatory disclosure has its merits.<sup>167</sup> They found that sellers of high-quality products have several options and incentives to counter the buyer's Lemons assumption. Sellers can identify themselves through *self-induced voluntary disclosure* and obtain  $X + Y$  if the buyer can verify the information. The self-interest model, however, does not eliminate the buyers' duplicative inspection efforts, and low-quality sellers can mimic the disclosure of ascertainable facts while making bogus statements about matters that the buyers cannot verify.

The information playing field can also be leveled by allowing a *third party to review* and certify the presented information's accuracy. Another method suggested by Easterbrook and Fischel is having *skin in the game*. However, warranting information by making *legally enforceable promises* such as warranties and guarantees has a greater impact. Enforced informational warranties eliminate search and verification costs for buyers and certification costs for sellers. Such promises are not a true market mechanism, but a hybrid backed by legislative and executive measures.

Douglas Skinner<sup>168</sup> conducted an empirical analysis of voluntary disclosure practices of ninety-three exchange-listed firms and found a low overall disclosure frequency.<sup>169</sup> Firms frequently disclosed negative news linked to the "asymmetric loss function due

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166. See generally, Frank H. Easterbrook & Daniel R. Fischel, *Mandatory Disclosure and the Protection of Investors*, 70 VA. L. REV. 669 (1984).

167. The SEC's "routinization of disclosure reduces the number of paths to the marketplace" and it might not be the best or only game in town. *Id.* at 671.

168. Douglas J. Skinner, *Why Firms Voluntarily Disclose Bad News*, 32 J. ACCT. RSCH. 38 (1994).

169. *Id.*

to legal liability.<sup>170</sup> Voluntary disclosure of bad news is driven by the firm's motivation to get ahead of the wave and avoid or limit large drops in stock price on the earnings announcement dates and the potential of shareholder suits accompanying such a decline.<sup>171</sup>

A firm's disclosure affects two very different audiences: its stockholders and its competitors. Therefore, the motivation for voluntary disclosure differs for positive and negative news. The firm voluntarily discloses positive news to distinguish itself from its competitors and positively impact its share price.<sup>172</sup> It voluntarily discloses negative news to preempt legal liability and reputational costs.<sup>173</sup>

The market's unspoken inference that silence must indicate bad news<sup>174</sup> assumes a disclosure culture and expectancy level based on experience justifying the inference.<sup>175</sup> Transactions in the art market remain rooted in the customs and traditions of the seventeenth century. Disclosure practices and expectations are changing based on the art market's increasing commodification and financialization. However, confidentiality concerns continue to prevail.

John C. Coffee points out that "information has many characteristics of a public good,"<sup>176</sup> which typically means that it is underprovided. In his view, a mandatory disclosure system improves allocative efficiency. As discussed, provenance research has a high financial and temporal expenditure cost. Once the information is disclosed and shared, free riders can enjoy its benefits without contributing to its discovery. It is also impossible to easily verify the information's credibility and accuracy, and unscrupulous disclosers may pass bad information as good information.<sup>177</sup>

The concept of self-regulation has come under attack in the for-profit sector following massive environmental and financial failures in the aftermath of self-

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170. *Id.* at 57.

171. *Id.* at 39–42. The majority of 10b-5 cases occur after a firm announces missed earnings on a mandatory disclosure date. Early disclosure of bad news makes it more difficult for shareholders to argue that information was withheld and also limits damages.

172. *Id.* at 58.

173. *Id.* at 39, 58.

174. Robert E. Verrecchia, *Discretionary Disclosure*, 5 J. ACCT. & ECON. 179, 192 (1983).

175. Skinner, *supra* note 168, at 43. *See also* Verrecchia, *supra* note 174, at 192 (linking the disclosure of news to a constant proprietary cost of disclosure) ("An equilibrium threshold level of disclosure is a point below which a manager's motivation to withhold information is consistent with traders' conjecture as to how to interpret that action.")

176. John C. Coffee Jr., *Market Failure and the Economic Case for a Mandatory Disclosure System*, 70 VA. L. REV. 717, 722 (1984).

177. Brealey, *supra* note 88, at 383 (explaining that this leads to a lemons market). *See also* Löfgren et al., *supra* note 150, at 199.



regulation.<sup>178</sup> Successful self-regulation<sup>179</sup> requires a strong government position and consensus<sup>180</sup> on behavior standards. Indirect governmental involvement requires strong demand (and threat) of governmental action<sup>181</sup> and sufficient governmental resources (and interest) to monitor compliance with the self-regulation guidelines and sanction violations.<sup>182</sup>

Outside pressure also plays an important role, and some argue that self-regulation aiming to achieve a public goal—here, the voluntary disclosure of information—works best (or only works) in combination with a robust regulatory regime.<sup>183</sup> Self-regulatory efforts created in a regulatory void, often to maintain that void, are usually unsuccessful.<sup>184</sup> They typically do not go beyond “window-dressing” and are merely cosmetic, deflect criticism, or ingratiate certain stakeholders.<sup>185</sup>

James Wilson explored how the New England fresh fish market deals with uncertainty.<sup>186</sup> The traders face quality uncertainty and small numbers bargaining problems, comparable to the relatively inaccurate and slow dissemination of information in the art market. Fresh fish transactions are missing three important pieces of information unknown to one or both parties when making the deal. Current market prices, applicable product quality standards, and the daily catch’s actual quality are unknowable until the fish is offloaded and inspected.<sup>187</sup> Similar uncertainty exists

178. Then SEC Chairman Christopher Cox changed his tune when he announced that “[t]he last six months have made it abundantly clear that voluntary regulation does not work.” Press Release, SEC, Chairman Cox Announces End of Consolidated Supervised Entities Program (Sept. 26, 2008), <https://www.sec.gov/news/press/2008/2008-230.htm> [https://perma.cc/LK32-J7LZ] [https://web.archive.org/save/https://www.sec.gov/news/press/2008/2008-230.htm]. See also generally EDWARD I. BALLEISEN, *THE PROSPECTS FOR EFFECTIVE COREGULATION IN THE UNITED STATES: A HISTORIAN’S VIEW FROM THE EARLY TWENTY-FIRST CENTURY* (2009).

179. See generally Jodi L. Short & Michael W. Toffel, *Coerced Confessions: Self-Policing in the Shadow of the Regulator*, 24 J. L. ECON. & ORG. 45 (2007) and Jodi L. Short & Michael W. Toffel, *Making Self-Regulation More than Merely Symbolic: The Critical Role of the Legal Environment*, 55 ADMIN. SCI. Q. 361 (2010).

180. See generally CRIME IN THE ART AND ANTIQUITIES WORLD: ILLEGAL TRAFFICKING IN CULTURAL PROPERTY 11 (Stefano Manacorda & Duncan Chappell eds., 2011) for the lack of consensus.

181. The American Alliance of Museums, for example, adopted its AAM Code of Ethics for Museums in response to a proposal by the Financial Accounting Standards Board to require museums to include their collections at fair market value in their financial statements. *AAM Code of Ethics for Museums*, AMERICAN ALLIANCE OF MUSEUMS, <https://www.aam-us.org/programs/ethics-standards-and-professional-practices/code-of-ethics-for-museums> [https://perma.cc/9AZH-JKYD] [https://web.archive.org/web/20221021205217/https://www.aam-us.org/programs/ethics-standards-and-professional-practices/code-of-ethics-for-museums] (last visited Nov. 1, 2022). See Mark S. Gold, *Monetizing the Collection: The Intersection of Law, Ethics, and Trustee Prerogative*, in *THE LEGAL GUIDE FOR MUSEUM PROFESSIONALS* 127 (Julia Courtney ed., 2015). See generally Erin Thompson, *Successes and Failures of Self-Regulatory Regimes Governing Museum Holdings of Nazi-Looted Art and Looted Antiques*, 37 COLUM. J.L. & ARTS 379 (2013).

182. See Jodi L. Short, *Self-Regulation in the Regulatory Void: “Blue Moon” or “Bad Moon”?*, 649 ANNALS AM. ACAD. POL. & SOC. SCI. 22, 24 (2013).

183. *Id.* at 31.

184. *Id.* at 24.

185. See John W. Meyer & Brian Rowan, *Institutionalized Organizations: Formal Structure as Myth and Ceremony*, 83 AM. J. SOCIO. 340 (1977).

186. James A. Wilson, *Adaptation to Uncertainty and Small Numbers Exchange: The New England Fresh Fish Market*, 11 BELL J. ECON. 491 (1980).

187. *Id.* at 493.

for Nazi-looted art or Covered Objects with missing provenance information and potential claims.

The solution to possible inequities and inefficiencies in the fish market is a highly personal, long-term, consumer solution in the form of bilateral agreements with reciprocation over time.<sup>188</sup> Accounts are adjusted to reflect new information concerning past transactions, requiring an ongoing relationship with multiple transactions. In the art market, transaction frequency is not high enough to enable a reciprocal adjustment over time, even if a museum has a long-term relationship with a donor. The museum also cannot offset a loss from the restitution of Nazi-looted art against a later donation and accompanying charitable tax deduction by the donor.

According to Phillip Nelson, information can be obtained through experience or expertise.<sup>189</sup> Consumers gather price or quality information through search.<sup>190</sup> Search is limited by the ceiling of maximized expected utility and is abandoned once the marginal expected cost of search exceeds its marginal expected return.<sup>191</sup> Search through expertise—provenance research—is cost- and labor-intensive. Obtaining information through experience can maximize utility<sup>192</sup>—acquiring Nazi-looted art or a Covered Object and risking a later claim. Limited enforcement weakens claims.<sup>193</sup> The experience approach applies, in particular, to less expensive artworks where search is inappropriate. The consumer evaluates the quality by purchasing the work or accepting the donation in the case of the museum. Information through experience is less likely in the museum-donor context based on the assumption that museum-quality work typically is of substantial value, but the concept nevertheless applies.

The museum-donor relationship is comparable to the bazaar economy explored by Clifford Geertz.<sup>194</sup> Both are “walled, ethnically heterogeneous, and quite traditional.”<sup>195</sup> Discussing the Sefrou Bazaar, Geertz might as well be describing the art market when he says, “information is poor, scarce, maldistributed, inefficiently communicated, and intensely valued.”<sup>196</sup> The two most essential tools in information gathering in the peasant marketing system are *clientelization* and bargaining. Donors and museums establish continuing relationships based on mutual trust to counteract information deficiencies. Similar to the bazaar economy, “the possibilities for bargaining along non-

188. *Id.* at 491. Wilson points out that product quality tends to fall to the lowest acceptable level.

189. See Phillip Nelson, *Information and Consumer Behavior*, 78 J. POL. ECON. 311 (1970). Nelson’s definition of search differs and is slightly narrower than Stigler’s definition. It is limited to the utility evaluation of each option. See generally Stigler, *supra* note 127.

190. See *id.*

191. Nelson, *supra* note 189, at 313.

192. “For tuna fish there is no effective search alternative open. At the low price of experience, there is insufficient demand for specialized establishments selling tastes of various brands of tuna fish.” See *id.* at 312.

193. Despite strong protection of ownership rights under U.S. law, claimants in litigation often face the defenses of statute of limitations and laches. The potential outcome in court influences private negotiations or other resolution attempts as well.

194. Clifford Geertz, *The Bazaar Economy: Information and Search in Peasant Marketing*, 68 AM. ECON. REV. 28 (1978).

195. *Id.* at 28.

196. See *id.* at 29.

monetary dimensions,<sup>197</sup> like restrictions on the donation or naming rights, are of enormous importance in the donor-museum relationship.

*b. The Museum and Nazi-looted Art*

Why do collectors donate paintings to museums instead of maximizing their utility and economic profit through a sale? Aside from receiving a tax deduction, a collector's donating instead of selling forgoes economic profits and advancing his private economy. However, he rationalizes his decision by affirming his identity as the owner of a Veblen good advancing public cultural heritage<sup>198</sup> and his social and cultural standing in the community. The public display of one's name on a museum wing<sup>199</sup> may be more gratifying than monetary compensation or ownership. However, provenance gaps or unsellable works add another motivational layer.

For example, Donor A has limited information about a painting she inherited. The only paperwork she has shows that her father purchased the painting around 1978 from a gallery in New York and does not list previous owners. Donor A knows that in 1978 the gallery told her father it had purchased the painting at an auction in Switzerland in 1943, but the gallery had no records. She keeps this information private and obtains an insurance appraisal to sell the painting. The auction house rejects the consignment because its provenance research cannot determine the painting's prior ownership. Donor A decides to donate the work to the Metropolitan Museum of Art (Met) and take a charitable deduction.

According to Article III of its Constitution, the Met's trustees manage, preserve, and protect the Met's property and have exclusive power to manage and conduct the museum's affairs.<sup>200</sup> Trustees are subject to the duty of care,<sup>201</sup> the duty of loyalty,<sup>202</sup> and the duty of obedience.<sup>203</sup> They accept or decline gifts or bequests under the Met's Collection Management Policy (CMP).<sup>204</sup> The CMP contains provenance guidelines

197. *See id.* at 31.

198. Plattner, *supra* note 129, at 484.

199. For naming rights, *see* Linda Sugin, *Competitive Philanthropy: Charitable Naming Rights, Inequality, and Social Norms*, 79 OHIO ST. L.J. 121 (2018).

200. METROPOLITAN MUSEUM OF ART, CHARTER, CONSTITUTION, BY-LAWS 8–10 (1963).

201. N.Y. NOT-FOR-PROFIT CORP. LAW § 717 (McKinney 2015). The duty of care requires trustees or directors of a not-for-profit corporation to discharge the duties of their positions in good faith, with the degree of diligence, care, and skill that an ordinarily prudent person would exercise under similar circumstances in like positions.

202. *Id.* at §§ 715–716 and case law.

203. *See* *Manhattan Eye, Ear & Throat Hospital v. Spitzer*, 186 Misc. 2d. 126, 152 (NY Sup. Ct. 1999) (“It is axiomatic that the Board of Directors is charged with the duty to ensure that the mission of the charitable corporation is carried out. This duty has been referred to as the ‘duty of obedience.’”). The duty of obedience requires the trustees to be true to the organization's mission and to ensure that their actions do not violate federal, state, or local laws and regulations.

204. *Collection Management Policy of the Metropolitan Museum of Art*, METROPOLITAN MUSEUM OF ART (Sept. 13, 2022), <https://www.metmuseum.org/about-the-met/policies-and-documents/collections-management-policy> [<https://perma.cc/MN54-X5MZ>] [<https://web.archive.org/web/20221018171336/https://www.metmuseum.org/-/media/files/about-the-met/policies-and-documents/collections-management-policy/Collections-Management-Policy.pdf>].

for acquisitions, including donations, and specific guidelines for “works that were likely to have been in German-occupied Europe between 1933 and 1945.”<sup>205</sup>

The Met conducts research “prudent or necessary to resolve the Nazi-era provenance of the work.”<sup>206</sup> Like the auction house, the Met cannot independently verify whether the painting was looted, regardless of Donor A’s honesty or dishonesty. However, based on the CMP, the Met “in the absence of evidence of unlawful appropriation” may accept the donation.<sup>207</sup> It remains to be seen whether a 2022 New York law<sup>208</sup> requiring museums to label any art looted during the Holocaust prominently will lead to changes in the Met’s CMP.

The Internal Revenue Service (IRS) requires a qualified appraisal<sup>209</sup> for a charitable deduction.<sup>210</sup> IRS Publication 561 provides guidance on the appraisal and the determination of fair market value.<sup>211</sup> Appraisal organizations and the IRS adopted Uniform Standards of Professional Appraisal Practice (USPAP) standards to align the appraiser’s responsibilities with those of a title abstractor. USPAP standards are the mandated standard set by the IRS for the appraisal of tangible personal property.<sup>212</sup>

Contrary to the Met’s CMP, IRS guidelines do not address Nazi-looted art and Covered Objects. While a painting without legal title is worth nothing, USPAP valuations are based on two decisive assumptions: clear legal title and authenticity. Appraisers do not and cannot<sup>213</sup> independently investigate or verify legal title.<sup>214</sup> Appraisers need to explicitly identify the “extraordinary assumptions” and “hypothetical

205. *Id.* at § IV.E.2.

206. *Id.* at § IV.E.2a.

207. *Id.*

208. 2022 N.Y. Sess. Laws Ch. 491 (A. 3719-A) (An act to amend the education law, in relation to notice of art stolen during the Nazi era in Europe).

209. See The Pension Protection Act of 2006 (PPA), Pub. L. No. 109-280, § 170(f)(11)(E), 120 Stat. 780, 1085, which codified the definition of a qualified appraiser and what it means to have a qualified appraisal.

210. 26 U.S.C. § 170.

211. *Publication 561: Determining the Value of Donated Property*, IRS (Jan. 19, 2022), <https://www.irs.gov/pub/irs-pdf/p561.pdf> [<https://perma.cc/6AJG-8XA5>] [<https://web.archive.org/web/20221009162355/https://www.irs.gov/pub/irs-pdf/p561.pdf>], and *Publication 526: Charitable Contributions*, IRS (Feb. 24, 2022), <https://www.irs.gov/pub/irs-pdf/p526.pdf> [<https://perma.cc/5UVC-EURR>] [<https://web.archive.org/web/20220930231601/https://www.irs.gov/pub/irs-pdf/p526.pdf>]. See generally Ronald D. Spencer, *Trouble Valuing Donated Art for Tax Purposes*, 1 No. 3 SPENCER’S ART L. J. (2010), <http://www.artnet.com/magazineus/news/spencer/spencers-art-law-journal-2-16-11.asp> [<https://perma.cc/F3LE-4P3S>] [<https://web.archive.org/web/20221028161809/http://www.artnet.com/magazineus/news/spencer/spencers-art-law-journal-2-16-11.asp>].

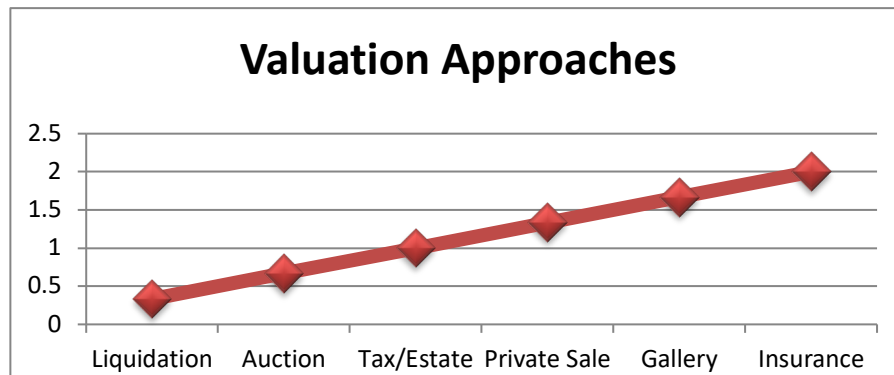
212. *What is USPAP?*, THE APPRAISAL FOUND., [https://www.appraisalfoundation.org/imis/TAF/Standards/Appraisal\\_Standards/Uniform\\_Standards\\_of\\_Professional\\_Appraisal\\_Practice/TAF/USPAP.aspx?hkey=a6420a67-dbf4-41b3-9878-fac35923d2af](https://www.appraisalfoundation.org/imis/TAF/Standards/Appraisal_Standards/Uniform_Standards_of_Professional_Appraisal_Practice/TAF/USPAP.aspx?hkey=a6420a67-dbf4-41b3-9878-fac35923d2af) [<https://perma.cc/78UL-TSCJ>] [[https://web.archive.org/save/https://www.appraisalfoundation.org/imis/TAF/Standards/Appraisal\\_Standards/Uniform\\_Standards\\_of\\_Professional\\_Appraisal\\_Practice/TAF/USPAP.aspx?hkey=a6420a67-dbf4-41b3-9878-fac35923d2af](https://web.archive.org/save/https://www.appraisalfoundation.org/imis/TAF/Standards/Appraisal_Standards/Uniform_Standards_of_Professional_Appraisal_Practice/TAF/USPAP.aspx?hkey=a6420a67-dbf4-41b3-9878-fac35923d2af)].

213. Most professional indemnity insurance policies will not permit an appraiser to render an opinion on legal title, see Larry Shindell and Filippo Petteni, *In the Frames*, STEP J. (Dec. 1, 2013), <https://www.step.org/step-journal/step-journal-decjan-2013-14/frame> [<https://perma.cc/F2R5-P7BR>] [<https://web.archive.org/web/20221028162413/https://www.step.org/step-journal/step-journal-decjan-2013-14/frame>].

214. See Korach Wonan, *supra* note 121.

conditions” on which they based the value. It is irrational to expect appraisers to do more than react to red flags.<sup>215</sup>

Valuation approaches vary based on the underlying market assumptions. Longer marketing periods typically correlate with a higher valuation. The general hierarchy is liquidation, auction, tax/estate, private sale, gallery, and insurance. Insurance valuations are the highest valuations, typically at one to two times fair market value.



Therefore, assuming legal title, the appraiser will issue an appraisal of the painting valued at  $X + Y =$  fair market value, represented by “1” on the y-axis in the graph above. Absent a dispute with the IRS, Donor A will receive a charitable deduction based on the Painting’s fair market value of  $X + Y$ .

According to Akerlof, consumers rationally respond by discounting all goods when they cannot distinguish between high-quality and low-quality goods.<sup>216</sup> This, however, is not the case in the current scenario. The Met’s CMP, absent clear evidence to the contrary, does not discount works with provenance gaps compared to a fully provenanced work with clear and clean title. Should the donated painting become subject to a claim later, the museum suffers a loss to its collection or a financial loss.<sup>217</sup>

The second cost of dishonesty is that legitimate businesses or sellers of high-quality goods are driven out of existence. While anecdotal evidence suggests that problematic

215. For details on the appraisal process, see Judith L. Pearson, *Establishing Clear Title to Works of Art*, WEALTHMANAGEMENT.COM (Mar. 25, 2015), <https://www.wealthmanagement.com/art-auctions-antiques-report/establishing-clear-title-works-art> [<https://perma.cc/9ZAK-XPLL>] [<https://web.archive.org/web/20221014003535/https://www.wealthmanagement.com/art-auctions-antiques-report/establishing-clear-title-works-art>]. Based on the limitations of provenance set forth above and the frequent lack of transactional documentation and gaps in information, an appraiser cannot certify a provenance in a way an abstractor of real estate would be able to verify title.

216. Akerlof, *supra* note 115, at 495.

217. See Press Release, Met Museum, *Settlement Reached on Monet’s Garden at Argenteuil* (Aug. 22, 2001), <https://www.metmuseum.org/press/news/2001/argenteuil-settlement> [<https://perma.cc/CB9T-3MEW>] [<https://web.archive.org/web/20221014003819/https://www.metmuseum.org/press/news/2001/argenteuil-settlement>].

works may be overrepresented in the donation market, there is no evidence that fully provenanced works with clear and clean title are not being donated.<sup>218</sup>

In the donor-museum scenario, asymmetrical information does not lead to buyer uncertainty. The Met accepts the donation like any other work with legal title. The IRS<sup>219</sup> grants a charitable deduction at fair market value based on the assumption of legal title. Nor is there adverse selection. Donor A cannot sell<sup>220</sup> the painting regardless of whether or not she conceals information.<sup>221</sup> In either case, she will donate it, suggesting that no lemon problem exists in this scenario, regardless of whether the museum accepts the donation or not.

### III. TRANSACTIONAL APPROACH TO NAZI-LOOTED ART

*Part III* lays out the Article's key proposal—establishing a fund that purchases and removes Nazi-looted art from the art market and situates the fund in the existing legal and market conditions. *Part III.A* provides a brief overview of the existing legal landscape. *Part III.B* outlines the structure of the HEAR Fund and its benefits. *Part III.C* explains the scope of the HEAR Fund and its mechanisms for dealing with temporary and permanent uncertainty. *Part III.D* outlines the importance of the HEAR Fund being

218. See Alyssa Buffenstein, *The 14 Most Generous Museum Donations of 2016*, ARTNET (Dec. 26, 2016) <https://news.artnet.com/art-world/the-most-generous-museum-donations-of-2016-778256> [<https://perma.cc/UD83-HH6P>] [<https://web.archive.org/web/20221014003953/https://news.artnet.com/art-world/the-most-generous-museum-donations-of-2016-778256>] and Daniel Grant, *Want to Donate Your Collection to a Museum? Read This First*, OBSERVER (Dec. 23, 2016) <http://observer.com/2016/12/art-collection-donation-advisers-lawyers-talk-how> [<https://perma.cc/EV23-YXPR>] [<https://web.archive.org/web/20221014004205/https://observer.com/2016/12/art-collection-donation-advisers-lawyers-talk-how>].

219. The Art Advisory Panel of the Commissioner of Internal Revenue consists of up to twenty-five volunteers who are nationally prominent art museum directors, curators, scholars, art dealers, auction house representatives, and appraisers. *Art Appraisal Services*, IRS, <https://www.irs.gov/appeals/art-appraisal-services> [<https://perma.cc/MU96-NPHE>] [<https://web.archive.org/web/20230106164241/https://www.irs.gov/appeals/art-appraisal-services>] (“The Panel members, up to 25 renowned art experts, serve without compensation.”). Whether it would issue a discounted valuation based on the unverifiable provenance is disregarded here. The Internal Revenue Manual at 4.48.2 and 8.18.1.3 only requires that a case selected for an examination that includes a single work of art or cultural property valued at \$50,000 or more must be referred to the IRS office of Art Appraisal Services for possible review by the Panel. “During Fiscal Year 2021, the Panel reviewed 112 items with an aggregate taxpayer valuation of \$155,816,250 on twenty-seven taxpayer cases. The average claimed value for an item reviewed by the Panel was \$1,391,217. The Panel recommended accepting the value of thirty-nine items or thirty-five percent of the items presented. It adjusted the values of seventy-three items or sixty-five percent. On the seventy-three items adjusted, the Panel recommended total net adjustments of \$16,806,838 to the claimed values, an eleven percent increase.” *Publication 5392: The Art Advisory Panel of the Commissioner of Internal Revenue*, IRS (May 2022), <https://www.irs.gov/pub/irs-pdf/p5392.pdf> [<https://perma.cc/6Y8D-HEUE>] [<https://web.archive.org/web/20221014004747/https://www.irs.gov/pub/irs-pdf/p5392.pdf>]. As far as the author can tell, there is no breakdown whether the adjustments were for estate or charitable deduction purposes. One could argue that the IRS' interest is assessing a higher fair market value for estate tax purposes since it is the cost basis for the assessed taxes.

220. The model assumes that all participants avail themselves of all available information and adhere to existing market practices. A sale through a less reputable auction house or through a private deal to a buyer forgoing any due diligence or undeterred by the incomplete provenance is disregarded.

221. It is irrelevant whether Donor A knows about the 1943 auction purchase in Switzerland, or whether her father was a good faith purchaser himself and had no knowledge of the 1943 auction purchase in Switzerland.

transparent, public, and indefinite to address systemic inefficiency and liquidity issues. It discusses the procedures to achieve this, building on previously suggested models. *Part III.E* concludes with a brief overview of financing mechanisms to fund the HEAR Fund. It acknowledges challenges posed by high-value restitutions and recommends accessing the capital markets by issuing Masterpiece Bonds as a risk mitigation solution.

#### A. THE EXISTING LEGAL LANDSCAPE

The legal concepts of *nemo dat quod non habet*, statutes of limitations, and laches create a perpetual disconnect between the property right and the legal enforceability of a claim arising from that right. Barring the owner from enforcing a property claim while simultaneously denying title to the current possessor permanently divorces the object from the title property right, creating orphaned artworks that cannot be sold and purchased legally. The current possessor can exclude others by prevailing in a lawsuit, thereby obtaining *de facto* exclusive rights, but the buyer will not receive the full bundle of property rights. This depresses the work's economic value and attaches a permanent moral specter.

There has been no shortage of well-intentioned but unimplemented proposals to assist restitution efforts by claimants of Nazi-looted art. Most proposals remain anchored in the bilateral structure of restitution as a zero-sum game. One party takes home the painting, and the other is left empty-handed.<sup>222</sup>

In 2016, the federal government, acting under its constitutional authority<sup>223</sup> to conduct foreign affairs<sup>224</sup> (and therefore unencumbered by the constitutional objections which blocked previous state attempts),<sup>225</sup> enacted the Holocaust Expropriated Art Restitution (HEAR) Act.<sup>226</sup> Despite its best intentions, it does not

222. One notable exception to this approach is the pre-trial settlement over *Landscape with Smokestacks* (*Paysage avec Fumée des Cheminées*) by Edgar Degas in *Goodman v. Searle*, Docket No. 1:96-cv-06459 (N.D. Ill. Filed Oct 03, 1996). ALFORD & BAZYLER, *supra* note 39, at xv. See also Ron Grossman, *Battle Over War-Loot Degas Comes To Peaceful End*, CHI. TRIB. (Aug. 14, 1998, 12:00 AM), <https://www.chicagotribune.com/news/ct-xpm-1998-08-14-9808140105-story.html> [https://perma.cc/F45C-K78W] [https://web.archive.org/web/20230106165513/https://www.chicagotribune.com]. See generally HOWARD J. TRIENENS, *LANDSCAPE WITH SMOKESTACKS: THE CASE OF THE ALLEGEDLY PLUNDERED DEGAS* (Northwestern Univ. Press 2000).

223. See William L. Charron, *The Problem of Purely Procedural Preemption Presented by the Federal HEAR Act*, 2018 PEPP. L. REV. 19 (2018) for the HEAR Act's possible violation of the Tenth Amendment by only providing preemption to state causes of action on a procedural basis without the creation of a binding and substantive federal right or cause of action.

224. *Movesian v. Victoria Versicherung AG*, 670 F.3d 1067, 1071 (9th Cir. 2012) (*en banc*), *cert. denied* 569 U.S. 1029 (2013).

225. The California legislature made numerous attempts to support and aid Holocaust victims and their heirs. For a detailed overview and discussion of the California legislative attempts, see Rajika L. Shah, *The Making of California's Art Recovery Statute: The Long Road To Section 338(c)(3)*, 20 CHAP. L. REV. 77, 88–117 (2017).

226. For legislative history, see also Jason Barnes, *Holocaust Expropriated Art Recovery (HEAR) Act of 2016: A Federal Reform To State Statutes of Limitations for Art Restitution Claims*, 56 No. 3 COLUM. J. TRANSNAT'L L. 593, 611–616 (2018).

give claimants a clear remedy to use and rely on in their restitution efforts and did not “end an enduring injustice for Holocaust victims and their families.”<sup>227</sup>

The HEAR Act’s central provision extends the limitation period for civil claims to recover any artwork lost during the covered period because of Nazi persecution to six years. The clock starts running with the claimant’s actual discovery of the artwork’s identity and location and his possessory interest in the artwork.<sup>228</sup>

Under “Findings,” the HEAR Act explicitly refers to specific cases, and Section 2(7) mentions *Von Saher v. Norton Simon Museum of Art* in its justification of federal legislation. Ironically, the HEAR Act did not tip the scales of justice in the claimant’s favor in the *Von Saher* case, and the daughter-in-law of the Dutch art dealer Jacques Goudstikker was unable to recover the *Adam and Eve* diptych by Lucas Cranach the Elder from the Norton Simon Museum.<sup>229</sup>

The HEAR Act raises more questions than it answers. The definition of “lost” contained in the initial bill<sup>230</sup> was removed, leaving the highly controversial question of how to treat forced sales up to the courts. Section 5(a), the heart of the statute, was significantly weakened by the removal of the preclusion of equitable defenses (including laches).<sup>231</sup> This elimination adds uncertainty<sup>232</sup> to the HEAR Act and is contrary to its primary motivation to assist claimants. The amendments made in September 2016<sup>233</sup> also included an “exception that bars claims known on or after January 1, 1999,”<sup>234</sup> potentially requiring complex choice-of-law analysis. Arguably the most problematic amendment is the sunset provision.<sup>235</sup> It significantly weakens the statute’s impact by enabling current possessors to wait for its expiration before trying to sell Nazi-looted art. As outlined in the testimony of the President of the Commission for Art Recovery,

227. *HEAR Act Signed Into Law*, COMM’N FOR ART RECOVERY (Mar. 7, 2018), <https://web.archive.org/web/20210603110941/http://www.commartrecovery.org/hear-act>.

228. HEAR Act, *supra* note 9.

229. In July 2018, after more than a decade of litigation, the Ninth Circuit ruled that the act-of-state doctrine barred von Saher’s claim for the return of the paintings and affirmed that the Norton Simon Museum was the legal owner of *Adam and Eve*. *Von Saher v. Norton Simon Museum of Art*, 897 F.3d 1141 (9th Cir. 2018). The U.S. Supreme Court denied the writ of certiorari on May 20, 2019. *Marei von Saher, Petitioner v. Norton Simon Museum of Art at Pasadena, et al.*, SUP. CT. OF THE U.S., <https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/18-1057.html> [<https://perma.cc/CVM9-M4K2>] [<https://web.archive.org/web/20230106170619/https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/18-1057.html>].

230. “[T]he term ‘unlawfully lost’ includes any theft, seizure, forced sale, sale under duress, or any other loss of an artwork or cultural property that would not have occurred absent persecution during the Nazi era.” Holocaust Expropriated Art Recovery Act, S. 2763, 114th Cong. § 4 (as introduced in Senate, Apr. 7, 2016).

231. See Rachel Sklar, *Holocaust-Era Art Restitution Claims: Is the HEAR Act a Game Changer?*, LARC @ CARDOZO L. 159, 194 (2018) (describing proposed amendment to bar defendants from invoking laches defense).

232. See Barnes, *supra* note 226, at 635. The HEAR Act aimed to introduce a bright-line rule with “actual discovery” but essentially may allow constructive discovery through the equitable defense of laches. Additional uncertainty may be introduced by this due to the reversal of the burden of proof.

233. See S. 2763 Amendment, *supra* note 223.

234. See S. Rep. No. 114-394, at 7 (2016). See also Barnes, *supra* note 226, at 631.

235. The “Act shall cease to have effect on January 1, 2027.” HEAR Act, *supra* note 9, at § 5(g).



Dr. Agnes Peresztegi,<sup>236</sup> the HEAR Act may extinguish claims which could have received more favorable treatment in some jurisdictions—for example, New York state’s demand and refusal rule.<sup>237</sup>

The HEAR Act falls short in several ways. Given the complexity and expense of obtaining information from archives,<sup>238</sup> extending the statute of limitations from three to six years does not provide a realistic timeframe for claimants to obtain the information necessary to pursue a claim. If claimants are to have their day in court to settle or litigate these cases on the merits,<sup>239</sup> there is no reason not to remove statutes of limitations for these types of cases altogether. The main argument for limitations statutes—the loss of evidence—can affect either party. The desired goal of legal certainty is already weakened by the permanent divorce of title from the property by the *nemo dat quod non habet* rule. Therefore, the question is why the law should shield current possessors without legal title from an enforceable claim after three years, six years, or at all.<sup>240</sup> Dr. Peresztegi’s testimony succinctly sums up the HEAR Act’s shortcomings in this regard:

The Committee should consider that the HEAR Act would not achieve its purpose of enabling claimants to come forward if it eliminates one type of procedural obstacle in order to replace it with another. To cite some concerns: narrowing the definition of looted art, shifting the burden of proof unnecessarily in some instances to the claimant; and generally adding or confirming other procedural obstacles. Cases related to Holocaust looted art should only be adjudicated on the merits.<sup>241</sup>

The following brief overview does not discuss the specifics of each claim or legal issue, as the details are irrelevant to this Article’s analysis. Out of the eight cases invoking the HEAR Act, so far the claimants have succeeded in one, failed in three, and

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236. *Holocaust Expropriated Art Recovery Act: Hearing on S. 2763 Before the Subcomms. on the Constitution, Subcommittee on Oversight, Agency Action, Fed. Rts. and Fed. Courts*, 114th Cong. 1 (2017) [hereinafter Subcommittee Hearing] (testimony of Agnes Peresztegi, President, Commission for Art Recovery).

237. The sunset rule may, in effect, preserve such a claim if a claimant decides not to proceed under the HEAR Act and simply waits for its expiration. However, there is the danger that the work is sold or otherwise disappears during the waiting period, and the claimant may no longer know where to make his demand after January 1, 2027.

238. Obtaining such information is a complex undertaking and can require travel and/or engaging the services of researchers and translators, as well as finding and retaining lawyers.

239. See Subcommittee Hearing, *supra* note 236, and related text.

240. See generally Cuba, *supra* note 30, at 447 (calling for a suspension of the statute of limitations for Nazi-looted art). See also Jennifer Anglim Kreder et al., *Legal and Ethical Problems in Art Restitution: CLE Materials*, SSRN 22 (2008), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1098348](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1098348) [https://perma.cc/9LAQ-4DQ7] [https://web.archive.org/web/20221101183727/https://papers.ssrn.com/sol3/papers.cfm?abstract\_id=1098348] (customary international law in turn affects all civil actions and some commentators hold the opinion that courts should consider “a relaxed standard for application of statutes of limitations and laches in cases involving property looted during World War II.”).

241. Subcommittee Hearing, *supra* note 236, at 2.

four cases are still pending. *Reif v. Nagy*,<sup>242</sup> a case involving two Schiele works, *Woman in a Black Pinafore* and *Woman Hiding Her Face*, is the only case to date under the HEAR Act resolved in favor of the heirs of the original Jewish owner, Fritz Grünbaum.

As mentioned earlier, the heir of the Dutch art dealer Jacques Goudstikker sought restitution of the *Adam and Eve* diptych from the Nortoan Simon Museum.<sup>243</sup> The parties had disagreed on many issues, including the statute of limitations, pre-emption by the foreign affairs doctrine, and good-faith purchase. Several iterations of the state of California extending its statutes of limitations were tested during the course of the lawsuit, which eventually also invoked the HEAR Act. In the end, the HEAR Act, however, did not save von Saher's claim.

In *Zuckerman v. Metropolitan Museum of Art*, a case involving the painting *The Actor* by Pablo Picasso donated to the Met in 1952, the New York district court never reached the HEAR Act but granted the defendant's motion to dismiss based on the plaintiff's failure to show the work was not sold but lost due to duress.<sup>244</sup> The Second Circuit, on appeal in an unusual ruling, held that the claim was barred by the laches doctrine.<sup>245</sup>

A federal case<sup>246</sup> in the District of Columbia against the German government involved the allegedly forced sale of a valuable collection of medieval Christian relics known as the *Guelph Treasure (Welfenschatz)*. The case reached the United States Supreme Court with a question under the Foreign Sovereign Immunities Act (FSIA). The Court vacated the lower court's decision and remanded the case, holding that the domestic takings rule is incorporated in the FSIA's expropriation exception (28 U.S.C. § 1605(a)(3)) because the taking of its own nationals' property by a foreign national does not violate international law.<sup>247</sup> On remand, the District Court denied plaintiffs' Motion for Leave to File a Second Amended Complaint to add "allegations about Nazi German's policies with regard to nationality, and specific allegations about the nationality of the specific victims."<sup>248</sup> In August 2022, the complaint was dismissed and the court held that the plaintiffs failed to preserve their argument that the sale of the *Welfenschatz* is not subject to the domestic takings rule because the Consortium members were not German nationals at the time of the sale.<sup>249</sup>

The currently pending cases include the matter of *Estate of Kainer v. UBS AG*,<sup>250</sup> an ownership and inheritance dispute over the Edgar Degas painting *Danseuses*. It involves the question of whether the HEAR Act only applies to claims for the physical return of Nazi-looted art or if it also applies to claims for monetary damages. The court declined

242. *Reif v. Nagy*, 106 N.Y.S.3d 5 (1st Dep't 2019). The works are part of the same Grünbaum collection previously litigated in *Bakalar v. Vavra*, 819 F. Supp. 2d 293 (S.D.N.Y. 2011), *aff'd*, 500 F. App'x 6 (2d Cir. 2012).

243. See information in *supra* note 229.

244. *Zuckerman v. Metro. Museum of Art*, 307 F. Supp. 3d 304, 319–21 (S.D.N.Y. 2018).

245. *Zuckerman v. Metro. Museum of Art*, 928 F. 3d 186, 193–97 (2d Cir. 2019).

246. *Philipp v. Fed. Republic of Germany*, 894 F.3d 406 (2018). See also NICHOLAS M. O'DONNELL, *A TRAGIC FATE: LAW AND ETHICS IN THE BATTLE OVER NAZI-LOOTED ART* 319–20 (2017) for a brief reference by the plaintiff's lawyer in his book.

247. *Fed. Republic of Germany v. Philipp*, 141 S. Ct. 703 (2021).

248. *Alan Philipp v. Stiftung Preussischer Kulturbesitz*, No. 15-cv-00266-CKK (D.D.C. July 26, 2021).

249. *Alan Philipp v. Stiftung Preussischer Kulturbesitz*, No. 15-cv-00266-CKK (D.D.C. Aug. 25, 2022).

250. *Estate of Kainer v. UBS AG*, No. 650026/13, 2017 WL 4922057 (N.Y. Sup. Ct., Oct. 31, 2017).

to address whether the HEAR Act can revive “plaintiffs’ action against Christie’s for aiding and abetting breach of fiduciary duty and conversion” at the motion to dismiss stage.<sup>251</sup> The New York case is currently stayed pending a final determination in the ongoing European proceedings that the plaintiffs are Kainer’s lawful heirs with exclusive rights to *Danseuse*.<sup>252</sup>

The Camille Pissarro painting *Rue Saint-Honoré, après-midi, effet de pluie* at the Spanish art foundation Thyssen-Bornemisza Collection is the object of dispute in *Cassirer v. Thyssen-Bornemisza Collection Found.*<sup>253</sup> This case also reached the United States Supreme Court on a writ of certiorari with the question of what choice-of-law rule should be applied in an FSIA case raising non-federal claims. The Court held that the forum State’s choice-of-law rule should be applied and vacated the lower court’s decision relying on a rule deriving from federal common law.<sup>254</sup> The oral argument at the U.S. Court of Appeals for the Ninth Circuit took place on December 23, 2022.<sup>255</sup>

Amedeo Modigliani’s painting *Seated Man With a Cane* has been the object of numerous lawsuits in federal and state courts in New York. In the 2018 case,<sup>256</sup> the court rejected the defendant’s contention that a choice of law analysis displaced the HEAR Act. In May 2018, Judge Bransten denied the defendant’s motion to dismiss and ruled that New York law applied to the case.<sup>257</sup> The defendant also contends that *Seated Man With A Cane* is not the same painting that Stettiner owned.<sup>258</sup> The case is currently stayed pending the appointment of a successor representative of the Estate of Oscar Stettiner due to the death of the former representative George W. Gowen.<sup>259</sup>

The long-standing dispute *de Csepel v. Republic of Hungary*<sup>260</sup> chronicles a family’s recovery efforts of works seized by the World War II-era Hungarian government and its Nazi collaborators. In June 2017, the Court of Appeals for the District of Columbia Circuit<sup>261</sup> held that de Csepel’s claim satisfied the FSIA’s expropriation exception and

251. *Id.*, at \*15; *Case Digest Summary, Estate of Kainer v. UBS AG*, N.Y.L.J. 23, 29 (Nov. 27, 2017), <https://www.law.com/newyorklawjournal/almID/1511331787NY65002613/?slreturn=20221001145754> [<https://web.archive.org/web/20221101185947/https://www.law.com/newyorklawjournal/almID/1511331787NY65002613/?slreturn=20221001145946>].

252. *Kainer*, 2017 WL 4922057, at \*15.

253. *Cassirer v. Thyssen-Bornemisza Collection Found.*, 862 F.3d 951 (9th Cir. 2017).

254. *Cassirer v. Thyssen-Bornemisza Collection Found.*, 142 S. Ct. 1502 (2022).

255. Please see the court docket.

256. *Gowen v. Helly Nahmad Gallery, Inc.*, 77 N.Y.S.3d 605 (N.Y. Sup. Ct. 2018).

257. *Gowen*, 77 N.Y.S.3d, *aff’d.*, *Gowen v. Helly Nahmad Gallery, Inc.*, 95 N.Y.S.3d 62 (2019).

258. Catherine Hickley, *New Evidence Cited in Restitution Claim for Panama Papers Modigliani*, THE ART NEWSPAPER (Jan. 9, 2020), <https://www.theartnewspaper.com/2020/01/09/new-evidence-cited-in-restitution-claim-for-panama-papers-modigliani> [<https://perma.cc/8V97-98LE>] [<https://web.archive.org/web/20230106174311/https://www.theartnewspaper.com/2020/01/09/new-evidence-cited-in-restitution-claim-for-panama-papers-modigliani>].

259. See Joint Motion, *Gowen v. Helly Nahmad Gallery, Inc.*, No. 2020-03128 (N.Y. App. Div., June 4, 2021).

260. *De Csepel v. Republic of Hungary*, 859 F.3d 1094 (D.C. Cir. 2017), *reh’g denied*, No. 16-7042 (D.C. Cir. Oct. 4, 2017). The Herzog collection of Old Master paintings included artists such as El Greco, Courbet, and Lucas Cranach. For background and analysis, see generally BRUCE L. HAY, NAZI-LOOTED ART AND THE LAW 239–251 (2017) and O’DONNELL, *supra* note 246, at 255–282.

261. “Given that Congress enacted the Holocaust Expropriated Art Recovery Act for the very purpose of permitting claims like these to continue despite existing statutes of limitations, ‘justice’ quite obviously requires that the family be given leave to amend their complaint.” *De Csepel*, 859 F.3d at 1110. The court

granted the plaintiffs leave to amend their claim in light of the HEAR Act. Following numerous appeals<sup>262</sup> and a writ of certiorari, defendants' motion to dismiss and cross motions for summary judgment by both parties are currently pending at the U.S. District Court for the District of Columbia.<sup>263</sup>

This cursory overview illustrates that the HEAR Act does not live up to its primary purpose: "(1) To ensure that laws governing claims to Nazi-confiscated art further United States policy as set forth in the Washington Conference Principles on Nazi-Confiscated Art, the Holocaust Victims Redress Act, and the Terezin Declaration."<sup>264</sup> Proposals focused on arbitration or mediation broaden the array of possible solutions involving more creative settlements not prefaced on a "winner takes all" concept. However, even alternative dispute resolution mechanisms often remain locked in a rights or power-based approach.<sup>265</sup> The latest such solution is a new Court of Arbitration for Art dedicated to art-related disputes under the aegis of the Netherlands Arbitration Institute.<sup>266</sup> In any case, it, like other non-litigation proposals, requires flexibility and amenability to compromise from the involved parties. The same is true for contract solutions like restitution agreements facilitated by an auction house. As suggested by Burton:

Any viable reform must provide a mechanism to sort out the massive ownership snarls arising out of World War II. Additionally, an element of any serious proposal must include a mechanism to establish a lasting provenance for art objects, and in doing so, offer maximum justice for all innocent parties.<sup>267</sup>

## B. THE HEAR FUND

Depending on the weight attached to restitution as a value in itself, the interest-based approach proposed in this paper is a positive-sum game, or at least a win-win. It also addresses the illiquidity and information deficit created by existing approaches. Auction houses and museums returning Nazi-looted art or Covered Objects to the current possessor leave dubious title questions unresolved. Such works either find their way to a less diligent sub-market and perpetuate the issue through subsequent transactions. Alternatively, they are deemed unsellable and create a liquidity issue. The

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rejected the defendant's claim for a form of equitable estoppel to deny plaintiffs leave to amend their complaint.

262. In 2022, the Court of Appeals dismissed Hungary from the case but allowed the Hungarian National Asset Management Inc. to be added as a defendant. *De Csepel v. Republic of Hungary*, No. 20-7047 (D.C. Cir. 2022).

263. Please see the court docket.

264. HEAR Act, *supra* note 9 § 3(1).

265. See also Grant Strother, *Resolving Cultural Property Disputes in the Shadow of the Law*, 19 HARV. NEGOT. L. REV. 335, 366 (2014) (arguing that "cultural property dispute resolution would benefit from a shift away from a rights and power focus").

266. See *Court of Arbitration for Art, CAFA*, <https://www.cafa.world/cafa> [<https://perma.cc/4RZQ-4N4Q>] [<https://web.archive.org/web/20221007062724/https://www.cafa.world/cafa>] (last visited Nov. 1, 2022). The author could not find any information on pending or resolved arbitrations or mediations.

267. Burton, *supra* note 116.

HEAR Fund addresses this misallocation of resources and yields social gains.<sup>268</sup> Based on a transient quality assessment, the Fund releases currently trapped liquidity. It captures and removes works without full legal title from the market. The quality is improved through restitution and other mechanisms allowing the works to reenter the market with clear title. This is important as even legal decisions granting restitution seem to fall short of this.<sup>269</sup>

The HEAR Fund is an insurance solution similar to the Troubled Asset Relief Program (TARP) created by the U.S. government<sup>270</sup> and the Torrens land registration system employed by a handful of U.S. states. Historically, art, like land, was not intended for resale. Under the feudal system, land was not part of commerce, and transferring ownership was difficult.<sup>271</sup> Art was initially commissioned by a state, the church, or aristocrats and sales were stigmatized.<sup>272</sup> Land title reform addressed the technicalities and legal difficulties restricting land transfer by substituting simple business rules governing other commerce areas.<sup>273</sup> A seller, buyer, or provenance researcher faces circumstances similar to those encountered by a researcher of a public registry for land deeds: “Each searcher, as a rule, worked for himself and each buyer had a different attorney, so that the same title was searched over and over again.”<sup>274</sup>

The HEAR Fund will act as a quality control mechanism for the art market and offers quality approval similar to the Food and Drug Administration or the Occupational Safety and Health Administration. Evaluating and managing uncertainty arising from future unknown risks is a key issue for Nazi-looted art, especially in ambiguous cases. High transaction costs, as well as disruptions and distortions to the market, complicate the issue.

Several reform objectives, as well as components of the proposed Fund, are not new concepts. However, the specific combination of the components set forth in this Article

268. See JAMES HEILBRUNN & CHARLES M. GRAY, *THE ECONOMICS OF ART AND CULTURE* 203 (Cambridge Univ. Press 2001).

269. The Appellate Division in *Reif v. Nagy* noted, “[i]t is important to note that we are not making a declaration as a matter of law that plaintiffs established the estate’s absolute title to the Artworks. Rather, we are adjudicating the parties’ respective superior ownership and possessory interests. We find that plaintiffs have met their burden of proving superior title to the Artworks.” *Reif v. Nagy*, 106 N.Y.S.3d 5, 24 (1st Dep’t 2019).

270. Following the financial crisis and economic fallout in 2007/2008, TARP sought to tackle the subprime mortgage crisis and strengthen the battered financial sector by purchasing so-called toxic assets from banks and other financial institutions. *About TARP*, U.S. DEPT OF THE TREASURY, <https://home.treasury.gov/data/troubled-assets-relief-program/about-tarp#:~:text=TARP%20is%20the%20Troubled%20Asset,the%20financial%20crisis%20of%202008> [<https://perma.cc/3C6C-2LMG>] [<https://web.archive.org/web/20230106175704/https://home.treasury.gov/data/troubled-assets-relief-program/about-tarp>].

271. JOHN J. HOPPER & WALTER FAIRCHILD, *A SKETCH OF THE TORRENS SYSTEM OF LAND TITLE REGISTRATION AND ITS APPLICATION IN OTHER COUNTRIES AND ESPECIALLY IN THE STATE OF NEW YORK* 8 (Eagle Press 1916).

272. See also Helen Rees, *Art Exports and the Construction of National Heritage in Late-Victorian and Edwardian Great Britain*, in 31 *ECONOMIC ENGAGEMENTS WITH ART* 187, 201 (Neil de Marchi & Craufurd D. W. Goodwin eds., Duke Univ. Press 1999) for the “self-restraint over the disposition of inherited property that had underpinned the English estates system” and the Settled Land Act of 1882, which opened the door for divestment of land or heirloom property.

273. HOPPER, *supra* note 271, at 9.

274. *Id.* at 11.

makes the HEAR Fund unique. The HEAR Fund advances several objectives. It provides a measure of justice by restituting Nazi-looted art to the original owner. It ensures procedural fairness for both innocent parties<sup>275</sup> through monetary compensation.<sup>276</sup> Restitution provides clear legal title and removes ambiguous artwork from the market, promoting marketplace stability and transparency.

The HEAR Fund can be set up as a contractual solution, a market solution, or a legal solution. It can also be conceived as a combination of the three. A contractual solution is a bilateral agreement between the transacting parties. The transaction takes place between the current possessor and the original owner. Restitution or other settlements already capture this scenario, rendering the HEAR Fund unnecessary as a contractual solution. As a market solution, it can either be adopted through market design or unilaterally by one of the transacting parties. The third category is a legal solution, introducing the HEAR Fund or parts of it through legislation or regulation.<sup>277</sup> The U.S. government can create the HEAR Fund to strengthen its commitment to its executive policy on Nazi-looted art restitution. Theoretically, the HEAR Fund can also be conceived as an international treaty, along the lines of the Washington Principles, but with binding effect and national implementation. It is superior to the Washington Principles since its binding solutions and established procedures can achieve just and fair solutions. Public perception of justice depends on case law based on thorough reasoning and a visible *ratio decidendi*.<sup>278</sup> The HEAR Fund can function equally effectively as a marketplace solution or a public-private joint venture.

275. See *infra* Part IV.C.1.a for a discussion of bad faith possessors.

276. The concept of monetary compensation for the possessor in case of restitution is not new or unique. See e.g., *UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects*, UNIDROIT (June 24, 1995), <https://www.unidroit.org/instruments/cultural-property/1995-convention> [<https://perma.cc/3FMG-27M8>] [<https://web.archive.org/web/20221020224048/https://www.unidroit.org/instruments/cultural-property/1995-convention>]. The UNIDROIT Convention specifies that “[t]he possessor of a stolen cultural object required to return it shall be entitled, at the time of its restitution, to payment of fair and reasonable compensation provided that the possessor neither knew nor ought reasonably to have known that the object was stolen and can prove that it exercised due diligence when acquiring the object.” *Id.* at art. 4. What differentiates the compensation in connection with the proposed Fund is the source of the compensation.

277. The Native American Graves Protection and Repatriation Act (NAGPRA), Pub. L. No. 101-601, 104 Stat. 3048 (1990) (codified at 25 U.S.C. §§ 3001–13 (2002)), for example, requires that federal agencies and institutions receiving federal funding return specific cultural items. It also mandates the compilation of inventories of affected cultural items and sharing such inventories with potential claimants. NAGPRA also provides grants for the consultation, documentation, and repatriation of covered cultural items. The Washington Principle and the HEAR Act missed a chance to institute similar regulations.

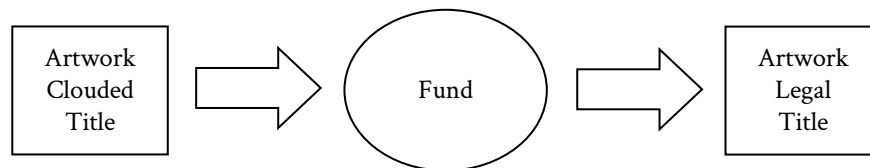
278. “In his seminal text ‘Legitimacy through Procedure’ (*Legitimation durch Verfahren*) Niklas Luhmann, the leading German legal sociologist, identifies the sociological function of procedure—to achieve legitimacy. Legitimacy, from a purely sociological point of view means, that a decision is accepted by the majority of the public to an extent that critiques decide to become silent so that there is no longer a dispute.” See Matthias Weller, *Key Elements of Just and Fair Solutions*, 1 *Kunstrechtsspiegel* 15, 18 (2015).

### C. SCOPE OF THE HEAR FUND

#### 1. Initial Fund Set Up

Initially, the HEAR Fund will capture Nazi-looted art or ambiguous works current possessors are divesting through consignment to an auction house or donation to a museum.

##### a. Nazi-looted Art held by Auction Houses and Museums



Initially, the Fund will cooperate with the auction houses and museums currently holding Nazi-looted art subject to an ownership conflict. These art market actors have become embroiled in disputes being caught between the consigning or donating possessors and valid claims by original owners. The possessor already indicated his divestment intention, and it is safe to assume that compensation is the only obstacle standing in the way of restitution. The auction houses and museums have strong incentives to cooperate with the HEAR Fund. It eliminates storage and insurance costs and allows them to extract themselves from contentious relationships with consignors and donors.

Since the HEAR Fund's main goal is to achieve and facilitate restitution, it must include asymmetric information cases. The overall restitution goal prevails over possible objections to compensating a bad faith possessor. The current possessor not being the original thief or party to any sham transaction separating the artwork from its original owner is a mitigating circumstance, and other safeguards can be implemented. In the worst-case scenario, the possessor knowingly received stolen goods. The best-case scenario is that he was genuinely unaware. In case of strong evidence that the possessor had private information and possessed the work in bad faith, the compensation he receives, for example, can be adjusted to reflect this.

The legal system favors the current possessor. Nonetheless, the desirability of doing the right thing combined with compensation is more appealing to the possessor than protracted and expensive litigation, securing his possession at the cost of negative publicity and legal fees. Any eventual sale remains subject to the specter of clouded title regardless of a favorable court decision, and sales prices can be disappointing.<sup>279</sup> The present value of future sale proceeds, legal fees, and risk aversion makes a buy-out offer from the HEAR Fund the preferred option for a bad-faith possessor.

Similar considerations apply to good-faith possessors in the temporary uncertainty category. The HEAR Fund's immediate compensation—based on a formula to be

279. See auction result for Egon Schiele, *Sitzende mit angezogenem linken Bein (Torso) (Seated Woman with Bent Left Leg (torso)* (painting), *supra* Part II.C; see *Art Auction Result for Egon Schiele*, *supra* note 70.

determined<sup>280</sup>—must be evaluated against the time delay and risk at auction. Despite record-level auction results making headlines, there is no guarantee of achieving a price exceeding the reserve price or the work selling at all. The number of unsold lots can be as high as thirty percent depending on the auction.<sup>281</sup> It not only impacts the consignor's immediate liquidity: because works that initially fail to sell typically are considered "burned," impacting subsequent sales attempts,<sup>282</sup> it also affects the realization of desired liquidity in the future. The separate question of whether and how much the issue of a clouded title and negative publicity impacts the availability of a guarantee is an interesting question that exceeds this Article's scope. Besides, any litigation is costly, and the initial sales decision likely was motivated by a need for cash.<sup>283</sup> These circumstances make a HEAR Fund buy-out an appealing option for the current possessor.

*b. Nazi-looted Art Returned to Consignor or Donor*

The second category of Nazi-looted art captured by the HEAR Fund are works the auction house determined are Nazi-looted art without a known claimant or with unclear provenance. Returning the work to the current possessor and not disclosing the compiled provenance information is inefficient and produces social waste.

The possessor can sell the Nazi-looted art through another channel and work with defective title continues circulating on the market. The second inefficiency is that the provenance information remains siloed at the auction house and, at best, continues to be used internally. If the provenance information and documentation are provided to the possessor, disclosure is unlikely as it minimizes his chances of a successful transaction. It creates another case of information asymmetry. Lastly, subsequent interested parties acting diligently must replicate research efforts, duplicate costs, and incur sunk cost to obtain and confirm the already existing information.

The HEAR Fund steps in and purchases the work from the current possessor with the discussed benefits. The possessor divests the Nazi-looted artwork without the veil of impropriety and does not have to hide the existing provenance information to achieve a sale.

In the absence of data and uniform treatment, divergent models acknowledging and inclusively framing risk are necessary to develop public policy. Missing data is a twofold issue: First, how much Nazi-looted art exists and can enter the commerce stream is unknown. Second, the future risk of artwork in the ambiguity category is uncertain—provenance cannot be fully ascertained with presently available and accessible

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280. The exact determination of such a formula exceeds the scope of this article. It could be based on how the IRS calculates the value for the income tax deduction for donated artwork. *IRS Publication 526: Charitable Contributions*, *supra* note 211, at 20.

281. Orley Ashenfelter & Kathryn Graddy, *Auctions and the Price of Art*, 41 J. ECON. LIT. 763, 779 (2003).

282. Ashenfelter and Graddy note that the future value of bought-in items is negatively affected. They are "burned," yielding thirty percent less at a future sale than a previously sold work. *Id.* at 773–74.

283. According to insiders, many—if not most—sales are motivated by one of the four Ds: Death, Disaster, Debt, or Divorce.



information. Such artwork does not have clear legal title, nor can it be labeled as Nazi-looted art.

Earlier ambiguity was associated with factual impossibility. The category definitions are clarified here, but the categorizations remain unchanged. The main problem is that the delineation is fluid and only assessable ex-post. Any eventually-resolvable information deficit is considered temporary uncertainty regardless of how long it takes to resolve the uncertainty. This leaves only truly ambiguous cases in the permanent uncertainty category.

*i. Temporary Uncertainty*

As the initial step, the HEAR Fund removes the identified Nazi-looted art with unknown original owners or unknown provenance from the market. Subsequently, it continues research efforts, publicizes the work and available provenance information, and monetizes that information as described below. By definition, works only remain in this category temporarily. At some point, further research or claimants coming forward moves the Nazi-looted art into the category of having a known claimant. In that case, the work can be restituted to the original owner and enter the market with clean title. Since the market typically is willing to pay a premium for a restituted work, the original owner has market incentives to disclose the work's provenance. As additional safeguards and to ensure the information travels with the work and does not become sequestered in an information silo again, disclosure provisions can be built into the restitution agreement between the HEAR Fund and the original owner. The works not exiting the temporary uncertainty category through this avenue move into the permanent uncertainty category.

A further distinction is necessary at this point. Additional research can reveal the original owner, but there may not necessarily be a claimant if the original owner did not have any descendants or heirs or if they cannot be located. Such works can be treated similarly to works in the ambiguity category.

*ii. Ambiguity (Permanent Uncertainty)*

These are artworks with provenance gaps where, despite best efforts and investigation, the ownership chain cannot be fully and reliably established, leaving clouded title as the best-case entitlement. Legal title to such work does not exist due to factual impossibility. Evolving industry standards in the market are increasingly demanding full provenance for potentially Nazi-looted art. This leads to such works being unsellable, creating a liquidity issue for the possessor and the market.<sup>284</sup> Any Covered Object without a clear provenance is an illiquid asset. Generally, collectors or investors who want to utilize their artworks as collateral purchase title insurance for their collection. Title insurance is not available for Covered Objects. Possessors looking

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284. Eve M. Kahn, *Does My Family Own a Painting Looted by Nazis?*, N.Y. TIMES (Apr. 5, 2016), <https://www.nytimes.com/2016/04/10/arts/design/does-my-family-own-a-painting-looted-by-nazis.html> [https://perma.cc/6RNG-XE7G] [https://web.archive.org/web/20221017201820/https://www.nytimes.com/2016/04/10/arts/design/does-my-family-own-a-painting-looted-by-nazis.html].

for a deduction on their tax return for donating the work to a museum will not purchase a Covered Object due to the uncertainty of a museum accepting it as a donation.

As with the other categories, the HEAR Fund will acquire such works as a first step and remove them from a potential illicit market.<sup>285</sup> Since further research will not move the works into one of the other categories, the HEAR Fund's research aspect is negligible. The compensation for these works can be discounted and serve as a floor bid for illiquid assets.

Depending on the art's historical importance and other qualities, the Fund can monetize the work as discussed below.

## 2. Expanding the Reach of the Fund

The high-end auction and museum market is a good starting point for the HEAR Fund. However, the HEAR Fund's overall mission is removing Nazi-looted art from the market and restituting as many artworks as possible. A necessary step includes making provenance research accessible and affordable to the largest possible group of possessors holding Covered Objects. The high-end auction market only captures a small fraction of Nazi-looted art or Covered Objects. Reasons for this curtailment are threshold values for accepting consignments (around \$5,000), limited sales categories, and limited clientele.<sup>286</sup> Together with a requisite minimum value of the artwork to justify litigation, these barriers exclude a large section of possessors of Nazi-looted art or Covered Objects.

The HEAR Fund reaches this group by offering provenance research services. Provenance investigation by the Fund, rather than individual researchers, has several advantages.<sup>287</sup> The HEAR Fund's institutional knowledge,<sup>288</sup> and economies of scale will allow it to operate more economically and efficiently than an individual provenance researcher. As demonstrated, provenance research can be inefficient and cost-prohibitive for less valuable works. The HEAR Fund's distributive character and fee structure make it affordable and economical, encouraging utilization. In addition, provenance research will not be a sunk cost for the possessor if research shows that the object is Nazi-looted art or a Covered Object as the HEAR Fund will purchase and retribute the work as described.

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285. While not addressed in this article, the Fund can be expanded, or a similar fund can be envisioned for unprovenanced antiquities.

286. Most consignments are with existing clients or solicited consignors. LEWIN, *supra* note 135.

287. Provenance research and the sharing of results have been curtailed by the Regulation (EU) 2016/679 of 27 Apr. 2016, on the Protection of Natural Persons with Regard To the Processing of Personal Data and on the Free Movement of Such Data, and Repealing Directive 95/46/EC (General Data Protection Regulation), 2016 O.J. (L 119) 1, and the respective national implementation acts. It has been suggested that the German implementation act, for example, should carve out significant privileges for data processing in provenance research. See Matthias Weller, *Kunst und Eigentum: Aktuelle Konflikte*, No. 7 ZUM 484 (2018).

288. The HEAR Fund incentivizes auction houses and museums to continue rigorous provenance research practices and allows them to monetize their efforts by selling or licensing their information and knowledge to the HEAR Fund.

If the provenance research reveals that the possessor has legal title, the HEAR Fund will issue a certificate to that effect<sup>289</sup> and publicize the provenance information. To prevent information siloing, the HEAR Fund's records will be available and accessible.<sup>290</sup> The Fund will require warranties from the possessor to disclose the received provenance information and the legal title certificate in future sales. The certificates—combined with the emerging blockchain registration of provenance permeating the art market—will create a sustainable information infrastructure. The importance and use of these certificates will increase over time, and the HEAR Fund must protect itself and insure against changing circumstances and mistakes.

As outlined, the HEAR Fund sufficiently incentivizes all possessors of Nazi-looted art and Covered Objects to come forward and have their artwork investigated. First, in cases of clear provenance, the possessor receives documentation showing that he is the owner and can monetize this information in a sale. Suppose the work turns out to be Nazi-looted art. Without the HEAR Fund, the possessor is stuck in a zero-sum duopoly. He can reconstitute the work and suffer financial loss. Alternatively, he can keep the work, an illiquid asset, and suffer reputational damage. The HEAR Fund allows him to do the right thing by restituting the work and compensates him for giving up possession. The third benefit is that restitution removes the cloud from the title and eliminates problematic works from the market. Following the restitution, the artwork enters the stream of commerce with legal title.

#### D. HEAR FUND PROCEDURES

Ideally, members of The Presidential Advisory Commission on Holocaust Assets, including its research staff,<sup>291</sup> will be part of the HEAR Fund enabling it to tap into and take advantage of existing expertise and knowledge. Following the criteria established by the Court of Arbitration for Art for its arbitrators and mediators,<sup>292</sup> the HEAR Fund will include private practice lawyers, judges, and law professors with significant experience in the chain of title of art or cultural property (including heritage/patrimony/restitution) and art transactions via private sales or auctions. The HEAR

289. See *infra* Part III.D. For existing certifications, see Artory, offering certificates to use as anonymous evidence of ownership during transactions, *How it Works*, ARTORY, <https://www.artory.com/how-it-works> [<https://perma.cc/TJB6-PJNT>] [<https://web.archive.org/web/20221017201942/https://www.artory.com/how-it-works>] (last visited Nov. 1, 2022), and The Art Loss Register, *Search*, ART LOSS REGISTER, <https://www.artloss.com/search> [<https://perma.cc/BF77-RB4R>] [<https://web.archive.org/web/20221017202156/https://www.artloss.com/search>] (last visited Nov. 1, 2022).

290. This may necessitate contractual provisions requiring the possessor who gets to take advantage of the discounted fee to consent to disclosure requirements.

291. The research staff are Helen Junz, Marc Masurovsky, and Dr. Jonathan Petropoulos. PRESIDENTIAL ADVISORY COMM'N ON HOLOCAUST ASSETS IN THE U.S. RSCH. STAFF, <https://govinfo.library.unt.edu/pcha/researchstaff.htm> [<https://perma.cc/K9WU-HZVF>] [<https://web.archive.org/web/20221017202251/https://govinfo.library.unt.edu/pcha/researchstaff.htm>] (last visited Nov. 1, 2022).

292. CAfA Pool of Arbitrators, CAFA, <https://www.cafa.world/arbitration/pool> [<https://perma.cc/9ERD-RTC3>] [<https://web.archive.org/web/20221017202528/https://www.cafa.world/arbitration/pool>]; *Arbitration*, CAFA, <https://www.cafa.world/arbitration/arbitrators> [<https://perma.cc/8R6H-3EN9>] [<https://web.archive.org/web/20211028052448/https://www.cafa.world/arbitration/arbitrators>].

Fund will not be limited to U.S. members but consists of an international panel of art historians, historians, and jurists to add impartiality and market credibility.

To comprehensively address inefficiency and liquidity in the market, the HEAR Fund must be transparent, public, and indefinite. The main shortcomings of previous restitution mechanisms were insufficient registration and statute of limitations. Time restrictions on the resolution of Nazi-looted art only prolong the adverse effects on the art market, current possessors, and original owners. The HEAR Fund will benefit and build on existing experience and efforts. Lessons learned from national spoliation committees and the Gurlitt Task Force<sup>293</sup> show that a robust, comprehensible, and transparent decision-making process is essential for justice. Confidential decisions in sealed settlements and alternative dispute resolution do not promote predictability and justice. A strong fact-finding role of the HEAR Fund is essential. “If the fact-finding activity of the institutions takes place with full impartiality and independence, this is a fair and efficient way of dealing with problems of insufficient evidentiary support.”<sup>294</sup>

Current possessors are incentivized to share essential information or documentation in their possession as there is no downside to sharing this information. If it is “bad” news, i.e., the work is indeed Nazi-looted art, the possessor is compensated. If it is “good” news, i.e., the work is not Nazi-looted art, the HEAR Fund issues an ownership certificate, enhancing the work’s value and facilitating future sales.

The HEAR Fund builds on earlier suggestions in the literature,<sup>295</sup> calling for an international tribunal<sup>296</sup> or mediation/arbitration commission<sup>297</sup> and legally binding international agreements.<sup>298</sup> In 2001, the Presidential Advisory Commission’s final report on Holocaust Assets in the United States<sup>299</sup> recommended establishing a

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293. The Schwabing Art Trove Taskforce was set up in November 2013 following the discovery of a large number of artworks in possession of Cornelius Gurlitt, the son of the art dealer Hildebrand Gurlitt, a member of the Commission for the Exploitation of Degenerate Art. See generally *Gurlitt Provenance Research Index*, GERMAN LOST ART FOUND., <https://www.kulturgutverluste.de/Webs/EN/ProjectGurlitt/Gurlitt-Provenance-Research/Index.html> [<https://perma.cc/7N6V-ZJWD>] [<http://web.archive.org/web/20221017202705/https://www.kulturgutverluste.de/Webs/EN/ProjectGurlitt/Gurlitt-Provenance-Research/Index.html>]. As of December 28, 2018, the task force had reviewed all 1,039 items in the Gurlitt Provenance Research Project. The task force employed a traffic light system for its review. It consulted relevant literature, requested information from museums, and released a list of archives it contacted. Despite the impressive number of 109 archives and the high caliber of members on the task force, 650 of the 1039 works reviewed are currently labeled yellow, i.e., “Provenance during the period between 1933 and 1945 is not entirely clear; there are gaps in the provenance.” As of March 19, 2019, seven works had been restituted. Only twenty-eight works had been cleared as green—i.e., “proven or highly likely not to be Nazi-looted art.” Hans Das, *Claims for Looted Cultural Assets: Is There a Need for Specialized Rules of Evidence*, in *RESOLUTION OF CULTURAL PROPERTY DISPUTES* 193, 224 (Permanent Court of Arbitration/Peace Palace Papers, V. 7, Kluwer Law International (1st ed. 2003)).

294. Das, *supra* note 293, at 248.

295. See generally CHRISTA ROODT, *PRIVATE INTERNATIONAL LAW, ART AND CULTURAL HERITAGE* 227 (Edward Elgar Publishing 2015) for an overview.

296. See generally Jennifer Anglim Kreder, *Reconciling Individual and Group Justice With the Need for Repose in Nazi-Looted Art Disputes: Creation of an International Tribunal*, 73 *BROOK. L. REV.* 155 (2007).

297. See generally Pell, *supra* note 23.

298. See generally Kelly Ann Falconer, *When Honor Will Not Suffice: The Need for a Legally Binding International Agreement Regarding Ownership of Nazi-Looted Art*, 21 *U. PA. J. INT’L ECON. L.* 383, 424–26 (2000).

299. PRESIDENTIAL ADVISORY COMM. ON HOLOCAUST ASSETS IN THE U.S., *PLUNDER AND RESTITUTION: THE U.S. AND HOLOCAUST VICTIMS’ ASSETS* (Dec. 2000), <https://govinfo.library.unt.edu/>

foundation to promote education and research. As a neutral third-party institution, the HEAR Fund achieves many of the previously proposed objectives from the bottom up instead of waiting for ambitious, complex, and time-consuming comprehensive legislative changes or international agreements. The potential downside of voluntary participation becomes an asset. Incentives and voluntariness are attractive to market actors, thus encouraging participation. Through its acceptance in the marketplace, the HEAR Fund will establish itself as the exclusive means of resolving Nazi-looted art issues.

Under standard rules applicable to claims commissions and international tribunals, the HEAR Fund will enjoy significant freedom in weighing the evidence before it.<sup>300</sup> The rights and interests of the current possessor are protected by compensating the relinquishment of possession. Evidence standards can therefore be more relaxed than those typically applicable in litigation. The HEAR Fund can rely on presumptions and inferences.<sup>301</sup> Allowing the Fund to draw inferences, such as finding that the facts “make the charge probable with the assistance of reasoning,”<sup>302</sup> is a useful tool based on the difficulty or impossibility of producing provenance evidence. Numerous countries have appointed commissions to investigate the relevant period,<sup>303</sup> and additional independent historical research established the patterns and procedures employed in the looting of art.

These findings are public and allow for presumptions upon which the HEAR Fund can rely. Ownership determinations are made solely on the merits to reach final and sustainable solutions. As case law shows, applying limitation statutes and laches<sup>304</sup> can lead to marketable title. However, the market does not necessarily accept a court’s decision when it comes to artworks.<sup>305</sup>

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pcha/PlunderRestitution.html/html/Recommendations.html [https://perma.cc/WLF6-3ZJU] [http://web.archive.org/web/20221017202819/https://govinfo.library.unt.edu/pcha/PlunderRestitution.html/html/Recommendations.html].

300. Das, *supra* note 293, at 224.

301. A presumption is a “conclusion drawn from known facts about unknown facts.” *Id.* at 235.

302. *Id.* at 237.

303. See, e.g., *Bergier Commission: Independent Commission of Experts Switzerland, Second World War (ICE)*, LOOTED ART, <https://www.lootedart.com/infobycountry> [https://perma.cc/KY8P-8UQT] [https://web.archive.org/web/20221013172124/https://www.lootedart.com/infobycountry], (last visited Oct. 13, 2022). See also *Information by Country*, LOOTED ART, <https://www.lootedart.com/MFEU4O92059> [https://perma.cc/MV2F-Z3EF] [https://web.archive.org/web/20221013172348/https://www.lootedart.com/MFEU4O92059], (last visited Nov. 1, 2022) (compiling links to information from numerous countries that participated in the 1998 Washington Conference on Holocaust-Era Assets).

304. For discussion of statutes of limitations and equitable defenses, see generally Lawrence M. Kaye, *Looted Art: What Can and Should Be Done*, 20 CARDOZO L. REV. 657 (1998); Steven A. Bibas, *The Case Against Statutes of Limitations for Stolen Art*, 103 YALE L.J. 2437 (1993); and Lauren F. Redman, *A Wakeup Call for a Uniform Statute of Limitations in Art Restitution Cases*, 15 UCLA ENT. L. REV. 203 (2008).

305. Patricia Cohen, *Ruling on Artistic Authenticity: The Market vs. the Law*, N.Y. TIMES (Aug. 5, 2012), <https://www.nytimes.com/2012/08/06/arts/design/when-judging-arts-authenticity-the-law-vs-the-market.html> [https://perma.cc/F5EU-UWWH] [https://web.archive.org/web/20230106181956/https://www.nytimes.com/2012/08/06/arts/design/when-judging-arts-authenticity-the-law-vs-the-market.html]; Valerie Medelyan, *Saws Who?: The Futility of Authenticating Art in the Courtroom*, 36 HASTINGS COMM. & ENT. L.J. 1 (2014).

Scholars focused on the original owners' obligation to register Nazi-looted art on a looted art database<sup>306</sup> neglect to acknowledge important distinctions between Nazi-looted art and stolen art. First, art market actors, such as auction houses or museums, based on the institutional knowledge of Nazi-looted art, in most cases have superior information compared to the original owner or his heirs.<sup>307</sup> Secondly, the argument that such a requirement encourages the owner to take better precautions to deter theft is not applicable in the Nazi-looted art context.

The HEAR Fund achieves solution uniformity by focusing on the original dispossession, including forced sales,<sup>308</sup> and disregarding certain lock jurisdictions.<sup>309</sup> It creates consistent solutions and achieves legal egalitarianism through uniform standards regardless of a particular work's trajectory. Treating equal situations in the same manner ensures equality in the restitution of Nazi-looted art. It allows for cohesive decisions regardless of whether the object went through title laundering or whether the current possessor holds the object in Italy or the United States. Rigorous documentation of the provenance research and results<sup>310</sup> makes it verifiable and avoids duplication.

The voluntariness of the possessor's participation and compensation for Nazi-looted art or a Covered Object eliminates or mitigates potential hardship imposed on the current possessor by the procedures. Visibility of the provenance research and the ownership certificate for the current possessor, if the work is cleared, provide significant benefits to the marketplace in the form of economic efficiency and fairness.<sup>311</sup> The ownership certificate can draw on the existing framework of title insurance policies for artworks and existing Torrens practices.

#### E. FUNDING THE HEAR FUND

The HEAR Fund will provide an efficient and just solution to possessors who seek information. Provenance as public good requires subsidies. This Article outlines various possible financing mechanisms without setting forth a fully formed model. A combination of two or more will likely be the HEAR Fund's most sustainable income resource. The HEAR Fund will also minimize risk by obtaining co-insurance from a large re-insurer in the marketplace.

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306. See generally Ralph E. 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. & POL. 15 (1998); Redman, *supra* note 304.

307. Dealers with well-documented records of their inventory, such as Paul Rosenberg and Jacques Goudstikker, are the exception to the general rule.

308. There is no clarity on how courts and the market treat forced sales, which creates inconsistency and uncertainty.

309. Some jurisdictions end up functioning as "locks," which ultimately clean title and determine the legal significance of a transaction. Roodt, *supra* note 295, at 30.

310. See Weller, *supra* note 278, at 484 (proposing ways to document provenance within GDPR framework).

311. See Burton, *supra* note 116, at 582.

## 1. Fees

Typically, fees bear a correlation to the services provided. The underlying assets' value is a possible correlation, similar to commission-based fees. Hourly-based compensation ties the fee to the difficulty of the assigned task or the time necessary to complete it. Provenance research is complex and resource-intensive, and fees must reflect the HEAR Fund's distributive role.

The HEAR Fund's most direct and obvious revenue avenue is a user-based fee for its provenance research service. However, the user fee needs to be low enough to attract the desired audience of Nazi-looted art or Covered Object possessors and make the service appealing to that demographic and, therefore, will not be cost-covering.

As discussed earlier, certain auction houses and museums already conduct their own (extensive) provenance research. The research is a sunk cost if the consignment or donation is ultimately declined due to title issues, aside from the credibility and goodwill created for accepted works.

Like fees charged to a seller of an unsold lot, auction houses and museums can charge a universal research fee unrelated to the acceptance of the work. The provenance research fee for all examined works can be a fixed amount or a percentage payable by the seller unless the work sells at auction, at which point the fee can be imposed on the buyer. Similarly, a museum can charge every donor a provenance research fee for objects offered for donations, regardless of whether the donation is accepted or rejected. This fee can be offset for successful donations against a possible provenance research tax discussed *infra* at Part III.E.2.

A provenance research fee is an insurance principle removing the burden of loss from the individual possessor of Nazi-looted artwork and distributing it across the entire class of artwork sellers or donors. Auction houses and museums are incentivized to support the HEAR Fund with a provenance research fee based on the benefits and savings it provides to the market.<sup>312</sup>

## 2. Taxes

As compulsory fees levied on specific subjects, taxes typically finance government activities. The U.S. government has documented its commitment to the restitution of Nazi-looted art through several pieces of legislation. The U.S. Holocaust Assets Commission Act of 1998, in particular, allocated funds to further this goal.<sup>313</sup> The government incentivizes art donations to museums by allowing deductions at the

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312. Auction houses similarly funded the Art Loss Register. See Lucian J. Simmons, *Provenance and Auction Houses*, in RESOLUTION OF CULTURAL PROPERTY DISPUTES, *supra* note 156, at 93 ("In June 1998, together with Aon Insurance, Sotheby's took the decision to lead the financial sponsorship of the Art Loss Register's (ALR) Holocaust Initiative to enable all Holocaust claims to be registered on the ALR database free of charge. As a result, since 1998, Sotheby's worldwide catalogs have been reviewed by the ALR, both in respect of recently stolen property, and art seized during the Holocaust.")

313. The Presidential Advisory Commission on Holocaust Assets in its Final Report favored using tax-deductible donations to fund a federal foundation to research the provenance of Nazi-looted art and Covered Objects. See PRESIDENTIAL ADVISORY COMM., *supra* note 291.

appraised market value at the time of the donation.<sup>314</sup> Imposing a provenance tax on this constituency is a reasonably targeted and tailored approach.

The donor's compensation is a deduction against his taxable income. This deduction can be reduced by a certain percentage amount, earmarking the additional tax revenue earned through the reduction for the HEAR Fund. To encourage the HEAR Fund's use for provenance research and increase the legal title certificate's utility, works with such a certificate can receive a higher deduction.<sup>315</sup>

Fund revenue from U.S. taxes can be segregated from other fund income and reserved for compensation of U.S. possessors. Alternatively, the HEAR Fund can operate as a non-governmental organization with government funding sourced from the reduced deduction.

### 3. Other Income

Provenance research resources and grants currently allocated to specific museums can be allocated more efficiently to the HEAR Fund. Examples of public-private collaboration and funding abound in the restitution arena. For example, following pressure from class-action lawsuits filed in the United States seeking financial compensation for former slave and forced laborers, the German government and industry established the Remembrance, Responsibility, and Future Foundation.<sup>316</sup> The foundation entered into a settlement with the claimants primarily financed by industry contributions. A conglomerate of arts-related and Holocaust survivor-related charitable foundations and federal agencies funded the Nazi-Era Provenance Internet Portal.<sup>317</sup>

The HEAR Fund is well-placed to receive financial support from European governments and non-governmental organizations like the World Jewish Congress Commission for Art Recovery. Another revenue source could be lottery proceeds<sup>318</sup> allocated to the HEAR Fund.

314. See generally JOHN E. CONKLIN, *ART CRIME* 21 (Praeger 1994). Tax laws and the Internal Revenue Service in the United States determine the value of artworks for estate tax purposes and in the context of tax deductions granted when they are donated. Federal tax law between 1952 and 1986 drew more collectors into the market, and with increased competition, the prices in the market also increased. Until 1986, donors could hold on to their art during their lifetime and "claim a federal tax deduction based on the market value of the art at the time they donated it, even if that amount was significantly more than they had originally paid." *Id.* The 1986 Tax Reform Act altered this and was a considerable disincentive to donations in the United States. Yielding to the museum lobby, Congress enacted a temporary change that reinstated the prior practice of allowing deductions at the appraised market value at the time of donation. This modification was made permanent by a tax law signed by President Clinton in 1993. *Id.*

315. See Burton, *supra* note 116, at 593 for intended consequences. This might be double-dipping—if the certificate increases the fair market value, the deduction is already increased.

316. See REMEMBRANCE, RESPONSIBILITY AND FUTURE FOUND., <https://www.stiftung-evz.de/en> [<https://perma.cc/E6VL-GS5A>] [<https://web.archive.org/web/20221013185523/https://www.stiftung-evz.de/en>] (last visited Nov. 1, 2022).

317. See NAZI-ERA PROVENANCE INTERNET PORTAL, <http://www.nepip.org> [<https://perma.cc/9J9W-9GLJ>] [<https://web.archive.org/web/20221013185942/http://www.nepip.org>] (last visited Nov. 1, 2022).

318. See *About Us*, N.Y. LOTTERY, <https://nylottery.ny.gov/about-us> [<https://perma.cc/Z7VD-YWW6>] [<https://web.archive.org/web/20221013185657/https://nylottery.ny.gov/about-us>] (last visited



The HEAR Fund could generate income by loaning acquired but unrestituted works to museums, corporations, or even private collectors for a fee. The loans can be structured as renewable short-term loans or include a recall provision if the original owner is identified. Exhibitions could include the HEAR Fund's entire collection or curated smaller, more targeted exhibits displaying works by a specific artist or theme. Such exhibitions could travel and charge entry fees. Pro bono joint ventures with, for example, an art fair donating exhibition space to the HEAR Fund are an attractive option. Similarly, museums can donate temporary exhibition space to aid efforts to find original owners.<sup>319</sup> The possibilities of arranging exhibitions with private dealers, auction houses, universities, and charitable organizations to make the works accessible to a larger public and generate revenue for the HEAR Fund are endless.

A certificate for heirless Nazi-looted art would make the works marketable again, allowing them to be sold subsequently and legitimately enter the market.<sup>320</sup> Defining this category ex-ante is difficult as a practical matter. It essentially imposes a statute of limitations on the HEAR Fund's provenance research for acquired objects. Contractual safeguards can protect claimants surfacing after the sale. The HEAR Fund could use call options<sup>321</sup> to repurchase work at the purchase price for restitution. Alternatively, the purchase can be structured as a long-term loan with a later purchase option.<sup>322</sup>

The value of restituting artwork to the original owner may far exceed the artwork's monetary value – not every work is worth millions of dollars. The HEAR Fund's mission includes the capture and restitution of lower-value Nazi-looted art for which litigation is too costly.

Nonetheless, some Nazi-looted art is highly valuable, and restituting a multi-million dollar work of Nazi-looted art can quickly wipe out the HEAR Fund's resources. In addition to the co-insurance mentioned above, the HEAR Fund could issue Masterpiece Bonds, a high-yield debt instrument similar to a catastrophe bond (cat bond), to raise money in the case of the buy-out and restitution of a high-value Nazi-looted artwork. The Masterpiece Bond transfers risk from the HEAR Fund to the financial markets. As the risk carrier, the HEAR Fund enters into an insurance agreement with a company formed for this purpose, known as a special purpose vehicle (SPV). Bondholders invest and provide capital to the SPV in return for interest. Defined trigger events establish the conditions under which the HEAR Fund, as the issuer, receives a deferral or forgiveness of the principal's repayment.

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Nov. 1, 2022), ("contributing \$3.59 billion in Lottery Aid to Education for FY2020-2021 to help support education in New York State").

319. See Birgit Katz, *The Louvre Puts Nazi-Looted Art in Public Eye in Effort to Find Rightful Heirs*, SMITHSONIAN MAG. (Feb. 13, 2018), <https://www.smithsonianmag.com/smart-news/louvre-launches-new-galleries-nazi-looted-art-180968130> [<https://perma.cc/MGZ6-AMCV>] [<https://web.archive.org/web/20221013190412/https://www.smithsonianmag.com/smart-news/louvre-launches-new-galleries-nazi-looted-art-180968130>].

320. This can mirror existing processes for the sale of heirless assets, with the proceeds benefitting holocaust survivors.

321. In return for the call right, the buyer can receive a discount on the purchase price.

322. The time period can be determined following the time frames for copyright protection or some other formula.

A claim for Nazi-looted artwork worth more than X million USD can be a defined trigger. A Masterpiece Bond essentially insures the unknown based on actuarial risk and probability models similar to a cat bond. Financial markets have modeled hurricane risks and issued cat bonds for a decade.<sup>323</sup> There is no reason sophisticated actuarial analysis cannot be applied to the art market. Some art market actors, such as art lenders and insurers, operate proprietary databases conducting sophisticated analyses of public auction data. Models for the risk of Nazi-looted artwork exceeding a certain monetary threshold may not exist. However, this does not mean that appropriate experts cannot build them, given access to the relevant information.

#### IV. CONCLUSION

This Article contributes to the restitution debate by exposing the current methodology's systemic information and liquidity defects. It examines information asymmetries and uncertainty and shows that it is inefficient for the buyer, the seller, or the original owner to conduct the necessary provenance research to eliminate the information deficits. Its final contribution is the proposed creation of a fund that removes Nazi-looted art from the market, provides informational efficiency, and restitutes Nazi-looted artworks to the original owners. The HEAR Fund has two components: a database and efficient information infrastructure for provenance research and the acquisition and restitution of Nazi-looted art to remove artwork without legal title from the market. By restoring legal title through restitution or the discussed certificate, the HEAR Fund acts as quality assurance for the art market and restores liquidity to Nazi-looted art and Covered Objects. The Fund does not address or eliminate all obstacles facing original owners or their heirs in their quest for restitution. However, it removes several impediments by consolidating Nazi-looted art in one location, allowing the database and the restitution process to profit from institutional knowledge and economy of scale. The HEAR Fund enables the U.S. government to implement its long-standing executive policy regarding the restitution of Nazi-looted art. It is distributive in its cost allocation by employing multiple financing mechanisms across a broader demographic instead of making the current possessor or the original owner the cost bearer.

The HEAR Fund encourages auction houses and museums to continue their rigorous provenance research practices and allows them to monetize their efforts by selling or licensing their information and knowledge to the HEAR Fund. It incentivizes Nazi-looted art possessors to come forward by compensating them for work purchased by the Fund. Voluntary participation combined with compensation increases the HEAR Fund's market credibility. And last but not least, it brings justice to the original owners who benefit from the HEAR Fund's institutional knowledge and uniform decision-making as the central repository for Nazi-looted art.

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323. See Harry White, *Modeling Fundamentals: So You Want To Issue a Cat Bond*, VERISK, <https://www.air-worldwide.com/Publications/AIR-Currents/2016/Modeling-Fundamentals-So-You-Want-to-Issue-a-Cat-Bond> [<https://perma.cc/9FWA-NEB9>] [<https://web.archive.org/web/20221013190958/https://www.air-worldwide.com/publications/air-currents/2020/modeling-fundamentals-so-you-want-to-issue-a-cat-bond>] (last visited Nov. 1.2022) (Figure 1, illustrating the number of new cat bond issuances by year).