

SPLITTING IMAGES:
SHARED-VALUE SETTLEMENTS IN NAZI-ERA ART RESTITUTION CLAIMS

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I. INTRODUCTION

World War II had an extensive and lasting impact on the population of Europe. The Nazi conquest affected many families in many different ways, but for Europeans who loved art—and especially Jewish Europeans who loved art—one particular tragedy of the war was the Nazi looting, on an unparalleled scale, of Europe’s art treasures. By various means, Hitler’s forces took artwork from its rightful owners throughout Europe and, by the war’s end, hundreds of thousands of works had been stolen from museums and individuals.¹

The public has only recently begun to fully grasp the scope of Hitler’s crimes, thanks in part to increased academic focus on the subject.² Nazi-era art restitution cases have also been attracting more attention from the media.³ But another reason that awareness of this tragic episode of World War II history has grown is that the last decade has seen a significant rise in restitution claims made by victims of the war.⁴ These victims are often Holocaust survivors or, increasingly, their heirs.⁵ Their claims form a part of

¹ *Infra* Part II.

² See Constance Lowenthal, *Recovering Looted Jewish Cultural Property*, in PERMANENT COURT OF ARBITRATION/PEACE PALACE PAPERS, RESOLUTION OF CULTURAL PROPERTY DISPUTES 139, 298 (2004) (noting that there have been “scholarly work and journalistic investigations” during the last fifteen years, but that the scope of Nazi art theft is still not completely understood); Stephan J. Schlegelmilch, Note, *Ghosts of the Holocaust: Holocaust Victim Fine Arts Litigation and a Statutory Application of the Discovery Rule*, 50 CASE W. RES. L. REV. 87, 88 (1999) (describing the impact of two books published in the 1990s on the topic of Nazi art theft).

³ See Alan Riding, *An Essay: Foot Dragging on the Return of Art Stolen by the Nazis*, N.Y. TIMES, May 18, 2004, at E1 (“Everywhere, it would seem, there is awareness that private collections and museums own Nazi-tainted art.”).

⁴ For an example of a recent, high-profile claim—and American museums’ resistance to it—see Alan Feuer, *In a Suit, an Aristocratic Past and the Fate of Two Picassos*, N.Y. TIMES, Dec. 18, 2007, at B1.

⁵ E.g., Howard N. Spiegler, *Recovering Nazi-Looted Art: Report from the Front Lines*, 16 CONN. J. INT’L L. 297, 302 (2001); Emily J. Henson, Comment, *The Last Prisoners of War: Returning World War II Art to Its Rightful Owners—Can Moral Obligations Be Translated into Legal Duties?*, 51 DEPAUL L. REV. 1103, 1147 (2002). See also Carol Vogel, *Lauder Pays \$135 Million, a Record, for a Klimt Portrait*, N.Y. TIMES, June 19, 2006, at E1 (chronicling a restitution action brought by Maria Altmann, a Holocaust survivor).

the larger Holocaust restitution movement, which has been both visible and successful in the past decade.⁶ Indeed, several of the claims that have been litigated in the past five years have involved extremely valuable artwork.⁷ Some of it has been worth millions of dollars, which has made for eye-catching headlines. Claims have engendered more claims, and there is widespread agreement that their numbers will continue to grow.⁸

However, while they have garnered media attention, Nazi-era art restitution cases have also generated significant controversy.⁹ For restorative justice reasons, and because of the larger successes of the Holocaust restitution movement, there is overwhelming public support for returning artwork stolen during World War II to its rightful owners.¹⁰ But in some cases, the mechanics of litigation have created barriers to effective restitution. Litigating these claims is often complex and expensive, so successful litigants can find themselves owing their attorneys significant fees.¹¹ Frequently, Holocaust survivors and their heirs are forced to turn around and auction away the very property they just recovered to pay those fees, and when representation is on a contingent fee basis and the recovered artwork is valued in the tens of millions or hundreds of millions of dollars, fees can be astronomical.¹² Such high litigation costs are clearly a problem. If the purpose of restitution claims is to return stolen artwork to its rightful owners,

See *infra* notes 41-46 and accompanying text for an explanation of why Jewish art owners were particularly targeted during World War II.

⁶ Schlegelmilch, *supra* note 2, at 91.

⁷ See *infra* notes 107-113 and accompanying text.

⁸ See, e.g., Raymond J. Dowd, *Federal Courts and Stolen Art: Our Duty to History*, FED. LAW., July 2008, at 4, 8 (“Famous cases of claimants tracking down heirlooms abound, and the caseload should soon increase.”); Carol Kino, *Stolen Artworks and the Lawyers Who Reclaim Them*, N.Y. TIMES, Mar. 28, 2007, at H28 (noting that “barely a week seems to go by without news of another [restitution] case,” in part because of “a climate newly sensitive to such claims”).

⁹ Reporters have alternately lionized and questioned the lawyers and plaintiffs who have brought these claims. Compare Kino, *supra* note 8 (recognizing the work of art lawyers), with Kelly Crow, *The Bounty Hunters*, WALL ST. J., Mar. 23, 2007, at W1 and Michael Kimmelman, *Klimts Go to Market; Museums Hold Their Breath*, N.Y. TIMES, Sept. 19, 2006, at E1 (both articles criticizing the behavior of Holocaust art claimants and lawyers).

¹⁰ See Barbara J. Tyler, *The Stolen Museum: Have United States Art Museums Become Inadvertent Fences for Stolen Art Works Looted by the Nazis in World War II?*, 30 RUTGERS L.J. 441, 501 (“[T]here is worldwide interest in dealing with the problem today.”); Lowenthal, *supra* note 2, at 139 (“[P]ublic awareness and some sympathy for the effort have been revived in the years since 1990.”).

¹¹ See *infra* Part IV.

¹² See, e.g., Carol Vogel, *Inside Art*, N.Y. TIMES, Nov. 9, 2007, at E32 (listing the value of a recovered painting at \$135 million); Carol Vogel, *Recovered Artworks Heading to Auction*, N.Y. TIMES, Feb. 22, 2007, at E1 [hereinafter Vogel, *Recovered Artworks*] (estimating that a lot of recovered paintings would fetch up to \$35 million at auction).

that purpose is undermined by litigation costs to the extent they prevent full recovery. Reducing the costs generated by litigation would tremendously increase the value claimants could recover.

The goal of this paper is to demonstrate that the most economically efficient course of action in Nazi-era art restitution claims is almost always to share value by settling. However, art restitution claims are for ownership of a unique asset, and because parties often see disputes over indivisible works as winner-take-all propositions, the option of settlement is sometimes overlooked.¹³ Thus, many of these claims are litigated, even though litigation is less efficient.

However, there are more ways to share value than parties might realize. This paper provides several examples of how shared-value arrangements might be structured in art restitution cases, with the hope of creating a more efficient restitution framework, and hence returning more value to the rightful owners of stolen art or their heirs. Part II provides a brief history of the Nazis' theft of artworks during World War II. Part III contains a description of some of the historical attempts made to help return stolen pieces, but advances the proposition that more needs to be done. Part IV argues that policy theorists have frequently overlooked the impact of litigation costs, but that reducing transaction costs is critical to ensuring that claimants can actually retain possession of their art and continue to enjoy it. Part V proposes negotiated settlement as an alternative to litigation that could reduce transaction costs, and establishes that economic theory would suggest settling nearly all of these claims. But, because parties view works of art as indivisible assets, settlement occurs less often than makes economic sense. Therefore, Part VI outlines five types of settlement that would enable parties to functionally split the value of a piece of art between them. The purpose of this paper is not to advocate for one approach over another. Rather, its goal is to suggest several possible options which might be appropriate depending on the circumstances of a claim.

II. HISTORICAL BACKGROUND

Even before the end of World War II, it was clear to the world that the Nazis' depredations during the war had radically and irreversibly changed the physical, economic and political landscape of Europe. Entire cities had been destroyed, economies had been devastated, countries had ceased to exist and the early episodes of what would become the Cold War had already begun to

¹³ See *infra* Part V.B.

take place.¹⁴ But what would be revealed more gradually was that the war had also—and to an equally devastating extent—changed Europe’s cultural landscape. By 1945, the Nazis had stolen much of the continent’s artwork, carrying out the greatest art theft in human history.¹⁵

In a mere twelve years, the time between Hitler’s rise to power and the collapse of the Third Reich, “as many works of art were displaced, transported and stolen as during the entire Thirty Years War or all the Napoleonic Wars.”¹⁶ Wartime pillaging of cultural property was certainly not a Nazi invention: it predated Hitler’s regime by millennia.¹⁷ Sadly, it has outlived him to play a role in many conflicts since.¹⁸ But the devastating scope of his regime’s theft, its “systematic approach, and involvement at the highest levels was unmatched in history.”¹⁹ A commentator recently called the “sheer volume” of stolen art “staggering.”²⁰

The Third Reich carried out these acts with grim efficiency.²¹ Nazis organized “military groups and empowered government branches with staffs of art historians and other scholars to assist with the looting campaign.”²² A specialized unit, the Einsatzstab Reichsleiter Rosenberg (ERR), did the majority of the looting.²³ Its task was twofold. First, it found and took

¹⁴ See WILLIAM L. SHIRER, *THE RISE AND FALL OF THE THIRD REICH 1139–40* (Simon & Schuster 1959) (describing the aftermath of the war); 6 *ENCYCLOPEDIA BRITANNICA* 43 (1969) (“[The] ‘cold war’ was . . . clearly incipient in the closing years of World War II.”).

¹⁵ Spiegler, *supra* note 5, at 298.

¹⁶ HECTOR FELICIANO, *THE LOST MUSEUM* 23 (Hector Feliciano trans., BasicBooks 1997).

¹⁷ Schlegelmilch, *supra* note 2, at 92 (providing examples of art pillaging from the Roman conquests, the Assyrian Empire and Old Testament accounts); Anne-Marie Rhodes, *On Art Theft, Tax, and Time: Triangulating Ownership Disputes Through the Tax Code*, 43 *SAN DIEGO L. REV.* 495, 501 (2006) (“Hitler, of course, did not invent the wartime looting of artworks.”).

¹⁸ See, e.g., Norman Palmer, *Statutory, Forensic and Ethical Initiatives in the Recovery of Stolen Art and Antiquities*, in *THE RECOVERY OF STOLEN ART* 1, 1–2 (Norman Palmer ed., 1998) (describing cultural theft in subsequent conflicts).

¹⁹ Rhodes, *supra* note 17, at 501.

²⁰ Spiegler, *supra* note 5, at 298.

²¹ See generally Dowd, *supra* note 8, at 4 (describing the “legal structure” the Nazis put in place to systematically dispossess Jews of their property). The same article notes that in 1939, nearly ten percent of Germany’s budget came from property stolen from Jews. *Id.*

²² Henson, *supra* note 5, at 1106.

²³ Initially, as he often did, Hitler divided this task between three competing groups: the Wehrmacht, the German diplomatic corps, and the ERR, which took orders directly from Nazi Party leader Alfred Rosenberg. FELICIANO, *supra* note 16, at 35. But eventually, following a power-play by Reichmarschall Hermann Goering, see JOHN E. CONKLIN, *ART CRIME* 218–19 (Praeger Publishers 1994) (explaining Goering’s control over the ERR), the ERR became the Third Reich’s primary vehicle for seizing and confiscating art in Europe, FELICIANO, *supra* note 16, at 35.

artworks the Nazis wanted.²⁴ Second, it aimed to rid the German empire of so-called “degenerate art.”²⁵ Even with a staff of sixty, the ERR was eventually overwhelmed by the number of stolen pieces it had to process.²⁶ Nazi theft continued to grow throughout the war.²⁷

By war’s end, Nazi forces “had seized or coerced the sale of one-fifth of all Western art then in existence.”²⁸ Hundreds of thousands of paintings and other works of art were taken, in addition to “millions of books, manuscripts, and other cultural artifacts.”²⁹ It is estimated that the Nazis’ plunder would be worth approximately \$20.5 billion dollars in today’s values.³⁰ France, the cultural capital of the world, was particularly targeted. One-third of the art in private hands there was stolen.³¹ Loot leaving France for Germany filled more than one hundred railroad cars.³² Only half of those pieces have ever been recovered.³³ More than 100,000 objects remain missing worldwide.³⁴

The Third Reich’s ravages were not “a mere incident of war, but an official Nazi policy,” an imperative of the regime directed by Hitler himself.³⁵

²⁴ Kelly Ann Falconer, Comment, *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, 394 (2000).

²⁵ *Id.* “Degenerate” art encompassed several types of art Hitler despised, including modern art, FELICIANO, *supra* note 16, at 20, and art by Jewish artists or depicting Jewish subjects, Henson, *supra* note 5, at 1105. Though the initial purpose in seizing “degenerate” art was to destroy it, Henson, *supra* note 5, at 1106, Nazi authorities soon realized its value in the marketplace and held enormous auctions where stolen art was sold to American, British and Belgian collectors and the proceeds reinvested in more “acceptable,” in other words Germanic, art, Schlegelmilch, *supra* note 2, at 94.

²⁶ FELICIANO, *supra* note 16, at 108.

²⁷ *Id.* at 35.

²⁸ Spiegler, *supra* note 5 at 298

²⁹ FELICIANO, *supra* note 16, at 16. Estimates of the number of stolen artworks range from 240,000, Sue Choi, Comment, *The Legal Landscape of the International Art Market After Republic of Austria v. Altmann*, 26 NW. J. INT’L L. & BUS. 167, 167 (2005), to 650,000, Crow, *supra* note 9.

³⁰ Spiegler, *supra* note 5, at 299 (citing Michael J. Bazylar, *Nuremberg in America: Litigating the Holocaust in United States Courts*, 34 U. RICH. L. REV. 1, 161 (2000)).

³¹ FELICIANO, *supra* note 16, at 3–4 (describing Paris as “the world’s center of art” and as the city where the leading artists and collectors “worked, traded, and lived”).

³² SHIRER, *supra* note 14, at 945–46 (“[S]ome 137 freight cars loaded with 4,172 cases of art works . . . made the journey from the West to Germany up to July 1944.”).

³³ Choi, *supra* note 29, at 170. Museums have recently mounted exhibitions of unclaimed artworks in the hope of reuniting them with their owners. Steven Erlanger, *Stolen Art on Display in a Search for Owners*, N.Y. TIMES, Feb. 20, 2008, at E1.

³⁴ Crow, *supra* note 9.

³⁵ Spiegler, *supra* note 5, at 298. *See also* Tyler, *supra* note 10, at 447 (“At Hitler’s direction, the Third Reich looted and hoarded family collections and museums alike in fulfilling Hitler’s covetousness for fine art.”); FELICIANO, *supra* note 16, at 4 (“If Hitler . . . had not been interested in the arts, Nazi art looting

The fact that Hitler made acquiring art a priority of first importance was peculiar among the dictators of his time.³⁶ But this idiosyncrasy was deeply indicative of Hitler's personal and ideological inclinations. Personally, Hitler was an art lover.³⁷ He was a failed artist, twice rejected from Vienna's Academy of Fine Arts, and once from its School of Architecture.³⁸ But his fascination with art remained, and it was truly a tragic day, for both the victims of his madness and the art world, when the "combination of art lover and lunatic" came to power in Germany.³⁹ A significant part of the Nazis' looting was driven simply by Hitler's craving for a personal art collection.⁴⁰

But Hitler was driven by more than greed. His artistic ambitions also played an important role in the Nazi agenda. When he came to power, "his revolution was not only political and economic. It was above all cultural."⁴¹ This cultural agenda included making Germany the artistic capital of Europe.⁴² But the Nazis also made culture an element of the Final Solution.⁴³ Jews owned most of the artwork that the Nazis stole.⁴⁴ And Hitler associated

would certainly not have been a war priority . . .").

³⁶ See FELICIANO, *supra* note 16, at 21 (explaining that Hitler was the only dictator of his time to "involve himself as much in the aesthetic details of his empire . . . as in political or military matters").

³⁷ See *id.* at 17 ("Since his teenage years, Hitler was drawn to the arts.").

³⁸ *Id.* at 18.

³⁹ Tyler, *supra* note 10, at 446–47.

⁴⁰ SHIRER, *supra* note 14, at 946 (attributing much of the theft to "a case merely of avarice, of the personal greed of Hitler and Goering). Cf. FELICIANO, *supra* note 16, at 20 (characterizing Hitler as "coveting" a stolen Vermeer for his personal collection); Rhodes, *supra* note 17, at 500 (describing how Hitler had "first choice" among looted artworks"). Hitler was not alone: "much of the German high command sought out . . . art for their own personal collections." Schlegelmilch, *supra* note 2, at 93.

⁴¹ Rhodes, *supra* note 17, at 499 (citing LYNN H. NICHOLAS, *THE RAPE OF EUROPE: THE FATE OF EUROPE'S TREASURES IN THE THIRD REICH AND THE SECOND WORLD WAR* (1994) (internal quotations omitted)).

⁴² Matthew Lippman, *Art and Ideology in the Third Reich: The Protection of Cultural Property and the Humanitarian Law of War*, 17 DICK. J. INT'L L. 1, 1–2 (1998) (describing how "Hitler aspired to centralize and to consolidate artistic property in order to establish Germany as the cultural capital of the Western World"). Hitler was particularly fascinated with French culture, and desired "not to annihilate it but to capture it," FELICIANO, *supra* note 16, at 16, and for Berlin to supplant Paris in beauty and culture, see *id.* at 17 (quoting Hitler as saying that Paris was beautiful, but that "Berlin must be made far more beautiful . . . when we are finished in Berlin, Paris will be but a shadow"). This may explain why Nazi theft in France was especially egregious. Many of the pieces stolen as part of this plan were transported to Linz, Hitler's Austrian hometown, where he was designing a grand museum to house works representing "[e]very European master of painting and sculpture" or at least those that Nazi ideology recognized as such. *Id.* at 21; see also CONKLIN, *supra* note 23, at 218 (describing Hitler's plans for Linz).

⁴³ Jennifer Anglim Kreder, *Reconciling Individual and Group Justice with the Need for Repose in Nazi-Looted Art Disputes*, 73 BROOK. L. REV. 155, 160 (2007).

⁴⁴ Tyler, *supra* note 10, at 442 n.5. It is true that some of the greatest collections in Europe belonged to

“degenerate art” with the Jewish culture he wanted to destroy.⁴⁵ Because stealing their art was part of Hitler’s violence against European Jews, returning it is an important part of undoing the Nazis’ harm.⁴⁶ This undeniable connection between Hitler’s art theft and the Holocaust has played an important role in the recent rise in Nazi-era art restitution litigation, along with legislative and judicial efforts to make those claims easier to bring. It is to these developments we now turn.

III. HISTORICAL SOLUTIONS HAVE BEEN INADEQUATE

In spite of the magnitude of the atrocities the Nazis committed during World War II, efforts to redress the harm suffered by individuals were in many respects slow in coming.⁴⁷ It is only in the last fifteen years that there has been any serious effort to return stolen art to its rightful owners.⁴⁸ And, while solutions have been proposed in the United States and internationally,

Jews. *See generally* FELICIANO, *supra* note 16, at 3 (chronicling the wartime theft of the collections of five French Jewish families—the Rothschilds, the Paul Rosenbergs, the Bernheim-Jeunes, the David-Weills, and the Schlosses—known for their “size and importance”). For example, the Rothschilds owned at least 5,000 works before the war. *Id.* at 44. Rosenberg, a dealer, had exclusive contracts with Picasso and Braque. *Id.* at 56. The Bernheim-Jeunes, “one of the oldest art dealership dynasties in France,” had represented many of the most important impressionist and post-impressionist painters in Europe, including Monet, Seurat, Cézanne, Van Gogh and Matisse. *Id.* At 75–78. However, mere happenstance does not explain the extent of their loss. It was “during Hitler’s rise to power that his admiration for the great painters and his anti-Semitism were bonded together.” *Id.* at 18.

⁴⁵ FELICIANO, *supra* note 16, at 160 (citing JONATHAN PETROPOULOS, *ART AS POLITICS IN THE THIRD REICH* 54 (1996)) (describing how Hitler accused Jews of promoting “modern art as a ploy to reap huge profits”). It might initially seem insensitive to consider the Nazis’ art theft alongside the human suffering they inflicted during the Holocaust, Kreder, *supra* note 43, at 159, but Hitler’s ideology did not make that distinction. The Nazis wanted to “eradicate a race by extinguishing its culture as well as its people,” which gives stolen “works of art a unique resonance.” Spiegler, *supra* note 5, at 312 (quoting Bazzyler, *supra* note 30, at 165). *See also* Warren Hoge, *The Saturday Profile: A Curator of Lost Memories*, N.Y. TIMES, May 25, 2002, at A4 (telling the story of visiting a family for whom a painting was “all that remained of the[ir] murdered parents”).

⁴⁶ Spiegler, *supra* note 5, at 312 (quoting Bazzyler, *supra* note 30, at 165) (stating that, because stolen art pieces are “symbols of a terrible crime . . . recovering them is an equally symbolic form of justice”).

⁴⁷ The United States provides a good example of this phenomenon. Images of the Holocaust were broadcast around the world soon after the end of World War II, but the topic was not the subject of significant public discourse until the 1970s. *See* SAMANTHA POWER, *A PROBLEM FROM HELL: AMERICA AND THE AGE OF GENOCIDE*, 72–73 (Perennial 2003) (noting that, because American Jews initially did not want to be seen as victims and because other Americans were “uncomfortable with the topic of extermination,” it was only in the 1970s “that Americans became prepared to discuss the horrors” of the Holocaust). The response to art theft was even slower. *See* HOWARD J. TRIENENS, *LANDSCAPE WITH SMOKESTACKS: THE CASE OF THE ALLEGEDLY PLUNDERED DEGAS* xiii (2000) (stating that “it was not until the 1990s that attention was focused on the Nazi looting of Jewish property during World War II”).

⁴⁸ *Cf.* Lowenthal, *supra* note 2, at 151 (describing the slow development of art-restitution law and scholarship).

these approaches have generally not been successful.

a. Past Proposals: Goals and Shortcomings

The international community began to take limited steps to create avenues of recovery for stolen art even before war's end. The United States eventually followed. Even private parties have tried to help enable restitution. However, none of these solutions adequately addressed the need for speedy, cost-effective recovery.

i. International Treaties and Agreements

During the war, Allied forces were governed by provisions in the Allied Declaration of 1943, which imposed "state-to-state responsibility" for the return of displaced cultural property.⁴⁹ In 1946, faced with the scope of the task—as well as looting by their own troops—the United States, France, and the United Kingdom agreed to control missing works by establishing collection points throughout Europe.⁵⁰ But this haphazard system was ineffectual.⁵¹ It was reorganized by the 1952 Bonn Convention for the Settlement of Matters Arising out of the War and the Occupation, but with little success.⁵²

The first standing international agreement governing restitution claims was the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 1954.⁵³ It was meant to "add teeth" by providing for criminal penalties.⁵⁴ However, it only applied to the military.⁵⁵ It hence became essentially a "mothball" convention with limited utility to today's

⁴⁹ Lyndel V. Prott, *Responding to World War II Art Looting, in* RESOLUTION OF CULTURAL PROPERTY DISPUTES, *supra* note 2, at 113, 133. During the War, European legal theorists had also advocated for post-war property restitution. POWER, *supra* note 47, at 38.

⁵⁰ ISABELLE FELLRATH GAZZINI, CULTURAL PROPERTY DISPUTES: THE ROLE OF ARBITRATION IN RESOLVING NON-CONTRACTUAL DISPUTES 39 (2004).

⁵¹ There are at least two reasons the Allied agreement was unsuccessful. First, this system ultimately returned works to states more often than to individuals. And second, the Allies had ineffectual controls to prevent many items from passing through auction houses, with little effort expended to pursue the return of works to their owners. Prott, *supra* note 49, at 134.

⁵² This agreement allowed claims by individuals as well as by states, but it soon expired, and its effectiveness has been questioned. See GAZZINI, *supra* note 50, at 39–44.

⁵³ Prott, *supra* note 49, at 134.

⁵⁴ Claudia Caruthers, Comment, *International Cultural Property: Another Tragedy of the Commons*, 7 PAC. RIM L. & POL'Y J. 143, 149 (1998).

⁵⁵ Lisa J. Borodkin, Note, *The Economics of Antiquities Looting and a Proposed Legal Alternative*, 95 COLUM. L. REV. 377, 388 (1995).

claimants.⁵⁶ A supposedly more comprehensive solution to Holocaust claims and other cultural pillaging was proposed sixteen years later in the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property of 1970.⁵⁷ The UNESCO Convention applies more broadly than the 1954 Hague Convention and focuses on remedies.⁵⁸ But, like its predecessors, it has been criticized for its limited enforceability.⁵⁹ The enforcement problems also made it politically unpalatable for many states.⁶⁰ Consequently, the Convention received a cool reception in the major art-trading countries. The United States did not ratify it until 1983, and even then remains in the minority.⁶¹ England, Switzerland, Germany, Japan, the Netherlands, and France, for example, have never ratified.⁶²

Because by 1995—a quarter-century after its creation—many countries had still not adopted the UNESCO Convention, the International Institute for the Unification of Private Law authored yet another treaty.⁶³ The Unidroit Convention on Stolen or Illicitly Exported Cultural Objects created private causes of action and harmonized substantive rules governing claims.⁶⁴ But it is almost useless for Nazi-era claims, because it was written with a fifty-year statute of limitations, precluding any claims from 1945 and earlier.⁶⁵ From the outset, it was also evident that an international consensus on its provisions

⁵⁶ Caruthers, *supra* note 54, at 149. The convention was invoked during the Iran-Iraq War, *id.*, and the Persian Gulf War of 1991, Borodkin, *supra* note 55, at 388, but was never used to resolve Holocaust claims.

⁵⁷ Prott, *supra* note 49, at 134.

⁵⁸ Borodkin, *supra* note 55, at 389. Unlike the Hague Convention, which only applied to the military, the UNESCO Convention allows nations to enter into agreements enabling them to bring claims for stolen art and antiquities in foreign jurisdictions.

⁵⁹ GAZZINI, *supra* note 50, at 47 (stating that the Convention only provides “extremely limited, counterproductive, when not altogether inappropriate,” means of enforcement).

⁶⁰ See Borodkin, *supra* note 55, at 389 (“[D]espite [its] theoretical appeal . . . as an international remedial agreement, it is politically infeasible.”). The Convention’s “decentralised [sic], cumbersome enforcement mechanism” implies that, to abide by its terms, states would have to “establish an administrative machinery of untenable proportion”—a problem for an agreement whose “implementation . . . rest[s] entirely upon States’ goodwill.” GAZZINI, *supra* note 50, at 45–46.

⁶¹ See Tyler, *supra* note 10, at 464 (describing the United States’ adoption of the UNESCO convention); Borodkin, *supra* note 55, 389 (noting that “the United States and Canada are the only major art-importing nations that have joined the Unesco [sic] Convention”).

⁶² Borodkin, *supra* note 55, at 389.

⁶³ Tyler, *supra* note 10, at 464.

⁶⁴ Prott, *supra* note 49, at 135.

⁶⁵ Tyler, *supra* note 10, at 465. The fact that the effective time frame of the Convention so neatly precludes World War II claims raises questions regarding the Institute’s commitment to resolving them.

would be slow to coalesce.⁶⁶

Binding agreements have failed to gain traction, so the international community has turned toward nonbinding resolutions. The 1998 Washington Conference on Holocaust-Era Assets focused on “procedures to be adopted by states to facilitate the resolution” of Nazi-era disputes.⁶⁷ Because of the difficulty the Conference had establishing a uniform approach, participants had to be satisfied with “general goals and guidelines” encouraging claimants to “come forward.”⁶⁸ These guidelines have no legal effect.⁶⁹ A subsequent conference, the Vilnius International Forum on Holocaust Era Looted Cultural Assets, in 2000, did little more than reiterate the resolutions from the Washington Conference.⁷⁰ There has been no more significant progress on the international scene.⁷¹

The effectiveness of the international response to Nazi art looting has been sharply criticized.⁷² By and large, “international treaties have done little to resolve the present problem.”⁷³ And, under their watch, the international market for stolen art is indeed “thriving” in many parts of the world.⁷⁴ Recognizing this, commentators have articulated a variety of proposals designed to address some of the shortcomings of international agreements. Many have emphasized the need to provide more robust enforceability.⁷⁵

⁶⁶ Borodkin, *supra* note 55, at 391.

⁶⁷ Prott, *supra* note 49, at 135. One suggestion to come out of the Conference was “publishing lists of stolen or wrongfully appropriated cultural property, searching for possible owners and returning to appropriate bodies where successors in title could not be identified.”

⁶⁸ Kreder, *supra* note 43, at 170–71.

⁶⁹ Benjamin E. Pollock, Comment, *Out of the Night and Fog: Permitting Litigation To Prompt an International Resolution to Nazi-Looted Art Claims*, 43 HOUS. L. REV. 193, 204–05 (2006).

⁷⁰ *See id.* at 205.

⁷¹ *See* Kreder, *supra* note 43, at 174 (noting that, although the 2000 Vilnius Conference called for periodic meetings to discuss the progress of restitution efforts, none have occurred).

⁷² One author has noted that, “more often than not, the Washington Principles are ignored.” Lawrence M. Kaye, *Avoidance and Resolution of Cultural Heritage Disputes: Recovery of Art Looted During the Holocaust*, 14 WILLAMETTE J. INT’L L. & DISP. RESOL. 243, 245 (2006). Compounding the limited usefulness of their flaccid provisions is the fact that the 1970 UNESCO and 1995 UNIDROIT agreements are binding in the United States only on some, federally-funded art museums. Caruthers, *supra* note 54, at 152.

⁷³ Schlegelmilch, *supra* note 2, at 98; *see also* Falconer, *supra* note 24, at 391.

⁷⁴ Caruthers, *supra* note 54, at 158 (commenting on the current international regime’s ineffectiveness at restraining the stolen-art trade in Southeast Asia).

⁷⁵ For instance, one author recently proposed “a binding, international agreement” consisting of a “legally binding title registration and clearing system” complementing an “independent, international commission . . . to manage claims and resolve disputes.” Pollock, *supra* note 69, at 230–31. *See also* Falconer *supra* note 24, at 426 (proposing “a legally binding international agreement to settle claims over Nazi-looted art”).

Others have advocated for resolution through binding international arbitration.⁷⁶ The Permanent Court of Arbitration, which has been in existence for more than a century, has been identified as a potential forum.⁷⁷ Suggestions about how arbitration might interface with national courts have varied.⁷⁸

Yet as attractive as binding international solutions might be in the long term, they have major drawbacks in the short term. First, many of the authors who have proposed international solutions have glossed over the fact that they are based on consent—either from individual litigants or from their governments.⁷⁹ International arrangements are often scuttled by the non-participation of one or two key countries.⁸⁰ And binding international agreements governing stolen art have a fifty-year track record of failure, which is acknowledged even by their advocates.⁸¹ But, especially in the context of Holocaust-era restitution claims, the biggest problem is speed. Setting up mandatory arbitration or binding international protocols is an undertaking of significant magnitude.⁸² The process takes time. And time is

Similarly, another author proposes “an international tribunal with compulsory jurisdiction to resolve all [Nazi-era art] disputes and clear title to the artwork.” Kreder, *supra* note 43, at 157.

⁷⁶ E.g. GAZZINI, *supra* note 50, at xxiv; Ian Barker, *Thoughts of an Alternative Dispute Resolution Practitioner on an International ADR Regime for Repatriation of Cultural Property and Works of Art*, in ART AND CULTURAL HERITAGE: LAW, POLICY AND PRACTICE, 483, 483 (Barbara T. Hoffman ed., 2006); Brooks W. Daly, *Arbitration of International Cultural Property Disputes: The Experience and Initiatives of the Permanent Court of Arbitration*, in ART AND CULTURAL HERITAGE, *supra*, 465, 465; Owen C. Pell, *Using Arbitral Tribunals To Resolve Disputes Relating to Holocaust-Looted Art*, in RESOLUTION OF CULTURAL PROPERTY DISPUTES, *supra* note 2, at 307, 324. In addition to some of its well-known benefits, arbitration has been a favored solution because of the enforceability of its awards across jurisdictions and its confidentiality—an especially important consideration when it comes to works of art. Barker, *supra*, at 483–84. By virtue of its uniformity, arbitration has also been advanced as a way of “restoring some certainty in the cultural property market.” GAZZINI, *supra* note 50, at xxv.

⁷⁷ Daly, *supra* note 76, at 465; Pell, *supra* note 76, at 324.

⁷⁸ Compare Pell, *supra* note 76 (advocating arbitration as the preeminent solution), with GAZZINI, *supra* note 50, at xxv (presenting arbitration as “an interesting option to complement traditional national court adjudication”).

⁷⁹ See Palmer, *supra* note 18, at 268, 279 (arguing that international agreements need consent, either from the sparring parties (in the case of arbitration) or of their governments (for binding international agreements) to be workable at all).

⁸⁰ Barker, *supra* note 76, at 484 (providing the examples of the Kyoto Protocol and the International Criminal Court). Moreover, agreements often have to be followed up with domestic legislation to be fully enforceable. *Id.*

⁸¹ See, e.g., Kreder, *supra* note 43, at 163, 174 (discussing the failure of other international agreements to reach meaningful results).

⁸² Pollock, *supra* note 69, at 230 (pointing out that binding agreements require buy-in not only from governments, but also from “museums, auction houses, and dealers both at home and abroad”).

an important factor: “as the lifespan of remaining generations of Holocaust survivors nears its end, pressing time constraints create urgency.”⁸³ Resolving claims can depend on highly individualized facts that only survivors can provide.⁸⁴ Therefore, though many authors have advocated for international agreements, it is simply unrealistic to rely on them in the short term to provide justice for survivors—and given their historical performance, it may be foolish to rely on them in the long term too.

ii. Private Initiatives

The international community’s inability to create a workable solution for victims of Nazi art theft is likely the main reason we have seen a different approach to the problem emerge. A number of private databases, mostly online, can now help survivors locate their artworks and warn potential buyers of suspicious provenances.⁸⁵ An exemplary organization is the Art Loss Registry, developed voluntarily in the early 1990s by a consortium of auction houses, banks and finance companies.⁸⁶ The Registry has been quite successful at reuniting stolen art with its owners, taking credit for the return of works by Monet, Bonnard, Sisley, Pissarro and others.⁸⁷ It is now considered a “necessary first stop in any art transaction.”⁸⁸ Some museums, on their own accord, have also begun to “publicly identify artworks in their collection with gaps in provenance between 1933 and 1945,” on their own websites or in concert with other museums.⁸⁹ All told, there are now more than a dozen privately-operated online databases available for survivors to search.⁹⁰

⁸³ Shira Shapiro, Note, *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, 1149 (2008).

⁸⁴ *Id.* at 1174. See generally Jill Schachner Chanen, *A Bitter Fruit*, A.B.A. J., Oct. 2008, at 16, 16 (describing the need for speedy resolution in Holocaust-related claims when claimants were all between 70 and 104 years old).

⁸⁵ See Julian Radcliffe, *The Work of the International Art and Antiques Loss Register*, in THE RECOVERY OF STOLEN ART, *supra* note 18, at 189, 191 (explaining art databases’ dual purposes of alerting buyers and enabling recovery by victims).

⁸⁶ *Id.* at 190–91. Though it was originally conceived to cover stolen art broadly, *id.*, in 1998 the Registry established a dedicated section of its site listing still-missing works from World War II. Kreder, *supra* note 43, at 210.

⁸⁷ *Id.*

⁸⁸ Jill Schachner Chanen, *Art Attack: Ownership of Paintings and Other Objects of Value Is Being Challenged on a Number of Legal Fronts*, A.B.A. J., Dec. 2006, at 50, 52.

⁸⁹ Spiegler, *supra* note 5, at 301–02. See also Elizabeth Olson, *Web Site Goes Online To Find Nazi-Looted Art*, N.Y. TIMES, Sept. 8, 2003, at E4 (discussing the American Association of Museums’ new stolen-art website).

⁹⁰ Estimates of the total number of sites vary. Compare Crow, *supra* note 9 (identifying fourteen) with

Although they have produced some success stories, these databases are no panacea. As private initiatives, funding can often present challenges.⁹¹ Their proliferation has also led to a “Tower of Babel” problem, with families having “to search through 20, 30 or 40 Web sites to recover their work.”⁹² And, like international arbitration, private registries are dependent on parties’ willingness to adopt them. Despite the generally favorable reception they have received from museums, many private galleries remain reticent to use them, out of fear they will raise “red flags” regarding the provenance of their works during the critical 1925–1945 period.⁹³ While these databases “are essential for restitution of Nazi-looted art,” it is clear that “more needs to be done.”⁹⁴

iii. Domestic Legislation

The same year as the Washington Conference, Congress passed the Holocaust Victims Redress Act of 1998, which authorized millions of dollars of federal funding for research “to assist in the restitution of assets looted . . . from victims of the Holocaust.”⁹⁵ Congress also passed the United States Holocaust Commissions Act of 1998, which created the Presidential Advisory Commission on Holocaust Assets in the United States.⁹⁶ These two pieces of domestic legislation initially seemed promising for American claimants, but the actual results they produced are unclear. Noting that the Commission was created with the “authority and expertise to evaluate and examine the claims of [Holocaust] survivors and their heirs to art objects located . . . in the United States,” commentators hoped that it would be the primary vehicle for

Olson, *supra* note 89 (estimating their number to be between twenty and forty).

⁹¹ See Olson, *supra* note 89 (describing the funding problems of the American Association of Museums’ site); Radcliffe, *supra* note 85, at 190–91 (attributing the Art Loss Registry’s slow start to poor funding).

⁹² Olson, *supra* note 89 (internal quotations omitted). Searching through that many websites is time-consuming, but the major problem is the cost. Most of these websites are for-profit enterprises, and having to pay a user fee thirty times or more might generate a significant burden for claimants. See Steven A. Bibas, Note, *The Case Against Statutes of Limitations for Stolen Art*, 103 YALE L.J. 2437, 2462 n.144 (1994) (describing Art Loss Register’s fee-based services and the danger of excessive use fees on similar sites).

⁹³ See Robin Pogrebin, *Lauder’s Openness Is Sought on Artwork*, N.Y. TIMES, Oct. 18, 2007, at E1 (criticizing a New York City gallery owner for not participating in online registries).

⁹⁴ Kreder, *supra* note 43, at 211.

⁹⁵ Holocaust Victims Redress Act, Pub. L. 105-158, 112 Stat. 15, 17 (1998).

⁹⁶ U.S. Holocaust Assets Commission Act of 1998, Pub. L. No. 105-186, 112 Stat. 611. See generally Lauren F. Redman, *A Wakeup Call for a Uniform Statute of Limitations in Art Restitution Cases*, 15 UCLA ENT. L. REV. 203, 222–23 (2008) (discussing the Act).

returning stolen art to heirs.⁹⁷ But instead, the Commission merely authored a report containing some recommendations, along with the exhortation that “Congress continue working on the issue.”⁹⁸ The report “broke little new ground,” and has been called “a lost opportunity.”⁹⁹ To date, not one of its recommendations has been followed.¹⁰⁰

b. 1995–Present: The Surge in Claims

Despite the paucity of legal developments enabling restitution claims, other factors have caused a definite surge in Holocaust-era art restitution claims in the past fifteen years. More of these claims are now being brought than ever before.¹⁰¹ The earliest impetus for the current wave of claims was provided by the collapse of the Soviet Union. The Cold War prevented access to key records and documents concerning Nazi looting located in Eastern Bloc countries.¹⁰² But the opening up of Eastern Europe shed new light on the whereabouts of many stolen pieces.¹⁰³ Furthermore, many of the Allied records from World War II were classified for many years. It is only as those records have been unsealed that some individuals and organizations have been able to begin to track down their stolen works.¹⁰⁴ As claims began to generate publicity, they attracted the interest of writers and researchers, whose activity contributed to the growing awareness of the Nazi plunder and the continuing

⁹⁷ E.g., Tyler, *supra* note 10, at 467, 470 (placing the burden for returning art “solely on the shoulders” of the Commission).

⁹⁸ Henson, *supra* note 5, at 1156. See also Redman, *supra* note 96, at 223 (discussing the Commission’s recommendations). The recommendations included establishing a foundation promoting research and education, requiring federal agencies to search their records, and adopting legislation “remov[ing] impediments to restitution.” *Id.*

⁹⁹ Ralph Blumenthal, *Panel on Nazi Art Theft Fell Short, Experts Say*, N.Y. TIMES, Mar. 3, 2003, at E1.

¹⁰⁰ Redman, *supra* note 96, at 223. To be fair, the Commission—established in 1998—had to work against the clock of an expiring administration; even Commission members recognize that they ran out of time. Blumenthal, *supra* note 99.

¹⁰¹ For example, on behalf of successful claimants, Sotheby’s sold a total of thirty-eight restituted works in 2006. It had sold none a decade earlier. And this trend is expected to continue. Crow, *supra* note 9.

¹⁰² Leah J. Weiss, Note, *The Role of Museums in Sustaining the Illicit Trade in Cultural Property*, 25 CARDOZO ARTS & ENT. L.J. 837, 866–67 (2007).

¹⁰³ Schlegelmilch, *supra* note 2, at 97 n.60 (quoting Lynn H. Nicholas, *Introduction to THE SPOILS OF WAR: WORLD WAR II AND ITS AFTERMATH* 47, 47 (1997)) (“With the end of the Cold War and the opening up of Eastern Europe, it has become apparent that large numbers of works of art previously thought to be lost are, in fact, stored in repositories in countries of the former Soviet Union.”). On the other hand, some families who had hoped their works were just “behind the Iron Curtain” realized that they “had entered the international art market” and began to search for them in “museums, galleries, private collections or auction houses.” Hoge, *supra* note 45.

¹⁰⁴ Spiegel, *supra* note 5, at 301.

availability of restitution. Several books about Holocaust art theft alerted survivors of the whereabouts of their lost art.¹⁰⁵ For example, a journalist's work set in motion the restitution of the most valuable painting ever sold.¹⁰⁶

Indeed, one of the main reasons for the rise in claims during the last decade was the skyrocketing art market.¹⁰⁷ More valuable art has made it more worthwhile for claimants to bring recovery suits.¹⁰⁸ And claimants are seeing results. In 2007, the sale of five restituted paintings alone grossed a combined \$327 million for the descendants of a Holocaust victim.¹⁰⁹ One of those paintings, Gustav Klimt's portrait *Adele Bloch-Bauer I*, set the record for the highest price ever paid for a painting.¹¹⁰ Other recovered paintings were sold that year for \$38 million and \$24 million.¹¹¹ It is estimated that at least \$700 million of Nazi-looted art has been restituted since 2002.¹¹² These prices attract headlines and hence claimants.¹¹³ Cases generate more cases.

These claims have also derived an important benefit from the Holocaust

¹⁰⁵ See Weiss, *supra* note 102, at 867–68 (explaining that one of the factors “contributing to the increase in claims for Holocaust looted art include[s] the publicity surrounding books on the subject, such as *The Rape of Europa* and *The Lost Museum*” which has generated interest generally within Jewish communities and has “forc[ed] the public to recognize the prevalence of looted artwork as an unresolved issue from World War II”). See generally Crow, *supra* note 9 (noting how several recent books on Nazi theft criticized the art world for its previous lack of due diligence relating to the issue of stolen artwork and tying “the renewed interest in restitution” to the publication of those books).

¹⁰⁶ Lauren Fielder Redman, *The Foreign Sovereign Immunities Act: Using a “Shield” Statute As a “Sword” for Obtaining Federal Jurisdiction in Art and Antiquities Cases*, 31 FORDHAM INT’L L.J. 781, 784 (2008).

¹⁰⁷ Even in the current economic crisis, markets for older artworks have seemed to fare well: the economy’s major impact has been on contemporary art, “particularly the kind made by the young and untested.” Kelly Crow, *London’s Frieze Prepares for a Chill*, WALL ST. J., Oct. 10, 2008, at W1. But cf. Alexandra Peers, *The Fine Art of Surviving the Crash in Auction Prices*, WALL ST. J., Nov. 20, 2008, at D7 (noting that the crisis in the art market may be expanding, as evidence by the poor results of a recent modern and contemporary art auction in New York).

¹⁰⁸ See Crow, *supra* note 9 (“As art prices reach further uncharted territory, lawyers are accepting jobs that wouldn’t have paid off in the past. Top cases yield nine-figure payouts.”). See also Chanen, *supra* note 88, at 52 (noting that disputes which would once have settled become worthwhile when the “painting is worth \$100,000 or \$200,000”).

¹⁰⁹ Weiss, *supra* note 102, at 868.

¹¹⁰ Vogel, *supra* note 5. The record set by *Adele Bloch-Bauer I* was short-lived, however. A few months after the sale, Jackson Pollock’s *No. 5, 1948* was sold to a private buyer for a reported \$140 million. Carol Vogel, *A Pollock Is Sold, Possibly for a Record Price*, N.Y. TIMES, Nov. 2, 2006, at E8.

¹¹¹ Weiss, *supra* note 102, at 868. The second figure is converted from British Pounds using the 2007 average exchange rate of 1 USD = 0.49988 GBP. FXHistory Historical Currency Exchange Rates, www.oanda.com/convert/fxhistory.

¹¹² Kreder, *supra* note 43, at 178–79.

¹¹³ Redman, *supra* note 106, at 783 (Stating the cases themselves are generating public interest and precedent, which generate more cases).

restitution movement, and the public's "attitudes about restorative justice."¹¹⁴ Since 1995, litigation efforts have compensated former slaves and forced laborers, owners of pilfered bank accounts, and persons displaced by the war.¹¹⁵ There is an "emerging idea that something . . . should be done to rectify," the wrongs of the Holocaust.¹¹⁶

c. The Status Quo: Domestic Litigation and Its Drawbacks

Many claimants therefore find themselves in an odd position. On one hand, market factors have made bringing claims much more worthwhile. But on the other hand, fifty years of resolutions and legislation have not made claims any easier to bring. Hence, they have to proceed the same way as decades ago: having to resort to the domestic litigation system. Without a workable, comprehensive scheme—either nationally or internationally—for resolving Nazi-era art restitution disputes, the only viable option for many survivors in the United States is to shoehorn their claims into existing federal causes of action,¹¹⁷ or to negotiate a maze of conflicting and inadequate state laws.¹¹⁸ This situation is far from ideal, because litigating Holocaust-era stolen-art claims in the United States presents claimants with several challenges. First, they have to locate the artwork.¹¹⁹ They also have to establish the right to make a claim—often a "difficult and complicated task."¹²⁰ And even if claimants can assemble a sufficient record, the age of

¹¹⁴ Redman, *supra* note 106, at 785.

¹¹⁵ Burt Neuborne, *Preliminary Reflections on Aspects of Holocaust-Era Litigation in American Courts*, 80 WASH. U. L. Q. 795, 799, 802–03 (2002).

¹¹⁶ Redman, *supra* note 106, at 785.

¹¹⁷ Authors have proposed a variety of ways to reinterpret existing statutes. Candidates include the National Stolen Property Act, Borodkin, *supra* note 55, at 394, *but see* Tyler *supra* note 10, at 456 (calling this solution "inadequate"); RICO, Borodkin, *supra* note 55, at 396; and the Hobbs Act, *id.* at 397.

¹¹⁸ Some states have statutes explicitly allowing art restitution actions. Borodkin, *supra* note 55, at 398. Otherwise, state actions could potentially be brought under theories of replevin, Tyler, *supra* note 10, at 456–57; laches, Borodkin, *supra* note 55, at 397–99; or under the Uniform Commercial Code, Tyler, *supra* note 10, at 457. However, state actions are greatly complicated by varying statutes of limitations for these types of claims. For an argument in support of standardization, see Schlegelmilch, *supra* note 2, at 105–114.

¹¹⁹ Spiegler, *supra* note 5, at 302. This has become somewhat easier to do than it had been in the past. *See supra* notes 85–90 and accompanying text. But even though "slowly, but surely, stolen art is coming to light" for the families of Holocaust victims, art remains "highly mobile, easy to conceal, and difficult to trace." Pollock, *supra* note 69, at 206. Building a successful claim still requires searching through multitudes of records, Spiegler, *supra* note 5, at 301–02, and claimants are faced with many museums that have remained tight-lipped about their collections' provenances, *see* Kaye, *supra* note 72, at 256 (commenting on the high non-participation rate in a recent survey of museums' potentially stolen holdings).

¹²⁰ Kaye, *supra* note 72, at 256. Many claims are asserted by heirs or descendants, who may have trouble

these claims may raise the additional problem of statute-of-limitations issues.¹²¹ In recent years, several Holocaust-era restitution claims have been dismissed by American courts solely because the limitations period had expired.¹²² A final problem with litigating these claims is peculiar to artwork: public trials can be harmful to the artwork itself.¹²³ To the extent that part of an artwork's value is the certainty of its provenance, questioning its history casts doubt on its merchantability, as well as on the "credibility, reliability and repute of the parties involved" in its acquisition.¹²⁴

There is no question that domestic litigation has some major shortcomings.¹²⁵ But Congress has failed to enact legislation creating a uniform federal cause of action, and the international community's solutions have been ineffectual. For now, claimants bringing claims in the United States are best off looking to the courts for relief. However, there are ways to maximize value in the current system that, as of yet, have not been fully explored. Creating value in the current system, then, will be the focus of the remainder of this paper.

IV. ART CLAIMS IN AMERICAN COURTS: LITIGATION COSTS CREATE BARRIERS TO RECOVERY

The best option for parties seeking restitution for artworks stolen during World War II is still the courts. But claimants must overcome serious roadblocks before obtaining a judgment, or, for that matter, before even being heard. Several authors have rightly recognized this fact and have focused on improving the current litigation system in order to make claims easier to

gaining access to the family records, insurance documentation, old photographs and other material that can factually establish ownership. *Id.* Those claimants are also unlikely to have meaningful personal knowledge about the artwork's ownership and provenance, Spiegler, *supra* note 5, at 302, and may only have a vague notion of what the piece even looks like. Indeed, many second- and third-generation heirs may be "entirely unaware of what their ancestors once owned and the legal rights . . . that are attached to it." Henson, *supra* note 5, at 1147.

¹²¹ Kaye, *supra* note 72, at 258. The applicable legal rules vary greatly from jurisdiction to jurisdiction: some apply a "demand and refusal rule" under which "the limitations period does not begin to run against a good-faith purchaser until the owner makes a demand for the property and the possessor refuses." Spiegler, *supra* note 5, at 304. But a majority of states apply the so-called "discovery rule" which "impose[s] a duty of diligence on the plaintiff by requiring him or her to establish having taken affirmative steps to locate the property in order to withstand dismissal on statute of limitations grounds." *Id.* at 304–05.

¹²² For an account of one of these cases, see Linda Greenhouse, *Elizabeth Taylor To Keep Van Gogh*, N.Y. TIMES, Oct. 30, 2007, at E2.

¹²³ GAZZINI, *supra* note 50, at 56.

¹²⁴ *Id.* at 56–57.

¹²⁵ See, e.g., *id.* at 52–53 (pointing out that, while domestic courts worldwide are often the most convenient forum in which to litigate art-restitution claims, they suffer from shared drawbacks).

bring.¹²⁶ Their proposals could have positive results, but are limited in an important respect. They all focus on getting claims through the courts. However, getting claims through the system—and even all the way to resolution—may not be enough. The scholarly emphasis on removing barriers to litigation reveals a lack of appreciation that making litigation more *possible* does not necessarily make it *preferable*. Even though authors have proposed rules to help claimants’ actions be successful, they have overlooked what happens after the claims have been resolved. Under the prevailing regime, the mechanics of the litigation system themselves can greatly diminish plaintiffs’ recovery, or even bar it completely.

Litigating Holocaust-era stolen-art claims is “prohibitively” expensive.¹²⁷ Plaintiffs must first track down the missing work.¹²⁸ And once they locate it, they must assemble enough evidence to show ownership, which is often difficult and costly.¹²⁹ These actions can take years to litigate—some have lasted a decade or longer.¹³⁰ And longer suits generate higher costs.¹³¹

¹²⁶ Some scholars have advocated for special statute-of-limitations rules, but there is a lack of agreement about what those rules should be. *Compare, e.g.,* Schlegelmilch, *supra* note 2, at 91; *with* Redman, *supra* note 96, at 204. Some authors prize victims’ rights. One, stressing that “uniformity in the area of art restitution is essential,” proposes amending the Holocaust Victims Redress Act to provide a uniform, nationally-applicable standard, and even suggests suspending the limitations period altogether. Redman, *supra* note 96, at 204, 223. Another strongly recommends the so-called “demand-and-refusal” rule as the stronger protection for claimants. Spiegler, *supra* note 5, at 305. For a description of the rule, see *supra* note 121. But other authors emphasize the need for good-faith purchasers’ eventual repose. They reject the victims-rights approaches and argue for various formulations of the “discovery rule,” which is less favorable for claimants but, they contend, provides more flexible protections for both sides of a dispute. *E.g.,* Choi, *supra* note 29, at 196; Schlegelmilch, *supra* note 2, at 113. For a description of the discovery rule, see *supra* note 121. Other authors focus on overcoming claimants’ evidentiary challenges and suggest shifting the burden of proving title from claimants to current possessors. Henson, *supra* note 5, at 1150. In light of the status of the “involuntary art theft victim” in relation to the “wealthy and sophisticated voluntary buyer and collector of valuable art,” Henson believes that “shifting the burden of proving good title . . . is necessary to transform society’s moral obligation to survivors of the Holocaust into a legal duty.” *Id.* at 1156. Still others bemoan the conflicting patchwork of rules across jurisdictions, and propose a private right of action under the Holocaust Victim Redress Act. Redman, *supra* note 96, at 204. This author’s suggestion comes despite her recognition that, to date, none of the Act’s recommendations have been followed. *Id.* at 223.

¹²⁷ Bazzyler, *supra* note 30, at 183. *See also* GAZZINI, *supra* note 50, at 57–58 (enumerating some of the costs of a typical art restitution action).

¹²⁸ *See* Dowd, *supra* note 8, at 8 (“[I]t has become extremely expensive to research these questions, involving, as it does, hiring expensive historians in multiple jurisdictions to search for the needle in the proverbial haystack.”).

¹²⁹ *See supra* notes 119–121 and accompanying text.

¹³⁰ *See, e.g.,* Kino, *supra* note 8 (mentioning a stolen-art case that has been in the courts since 1994).

¹³¹ *See* GAZZINI, *supra* note 50, at 58 (describing the costs incurred during the “years until a final decision is issued”).

Therefore, plaintiffs, even successful ones, end litigation with significant expenses. In fact, some experts say that “claimants must be prepared to spend at least \$100,000 in costs just to begin litigation.”¹³² Lawyers who specialize in art claims have suggested 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.”¹³³ This contention seems astounding, but actual results have confirmed its veracity. For example, a Connecticut claimant recently recovered a number of stolen works, worth about \$22 million. But in the process, the claimant had incurred astronomical fees, owing a foreign attorney \$10.4 million—in addition to what the claimant owed her American counsel.¹³⁴ And even parties that settle may fall victim to these costs. One recent settlement was reportedly “just enough to cover the costs of litigation.”¹³⁵

Claimants in these cases bear a very heavy financial burden if they decide to litigate, and might not have the financial means to bear it.¹³⁶ Class-action status, which has often been a way of spreading the burden in other types of Holocaust-era litigation, is unavailable because of the uniqueness of each claim. In art claims, one individual must absorb the entire expense.¹³⁷ Hence, the most viable option for many claimants is to seek representation on a contingent-fee basis.¹³⁸ Though a one-third cut is standard, attorneys’ fees can be higher than fifty percent.¹³⁹ For example, the heirs to *Adele Bloch-Bauer I* recently sold four other recovered paintings for \$192 million but had to pay their attorney \$100 million.¹⁴⁰ Clearly, contingent-fee arrangements do not dispense with the problem of high transaction costs. Those costs are merely deferred until later. For lawyers and auction houses, art restitution has

¹³² Tyler, *supra* note 10, at 444.

¹³³ *Id.* at 444–45.

¹³⁴ Vogel, *Recovered Artworks*, *supra* note 12.

¹³⁵ Spiegler, *supra* note 5, at 303 (discussing the Goodman litigation described *infra* notes 205–210 and accompanying text).

¹³⁶ Henson, *supra* note 5, at 1147–48.

¹³⁷ Compare Neuborne, *supra* note 115, at 799 (describing a settlement between several Swiss banks and a class of Holocaust survivors) with Weiss, *supra* note 102, at 870 (explaining that art claims are unique and class-actions are therefore inappropriate).

¹³⁸ Crow, *supra* note 9.

¹³⁹ *Id.* This is not to say that the fees are unjustified: art-claims are certainly expensive to bring and require specialized knowledge. See *supra* note 117–124 and accompanying text. But even though a high contingent fee may be a *justified* dispute-resolution cost, it is not always a *necessary* cost.

¹⁴⁰ Crow, *supra* note 9.

become a “mini-industry.”¹⁴¹

Some might be opposed to the emergence of art restitution as a mini-industry—and the high legal fees that have come with it—on moral grounds.¹⁴² But claimants face a much more practical problem. At the end of litigation, a successful plaintiff will recover artwork, a physical asset. However, the claimant will owe fees, either to an attorney or to investors. Unless the claimant is independently wealthy, she will most likely have to turn around and auction her artwork to cover her obligations.¹⁴³ And the fact that the public witnesses the heirs of Holocaust victims immediately selling their forbearers’ precious artwork casts claimants in a bad light, whether deserved or not.¹⁴⁴ The status quo risks destroying the general goodwill which claimants have so far enjoyed and which has been such an important part of the restitution movement.¹⁴⁵

In the end, even though efforts have been made in the current regime to make Nazi-looted art easier to recover, the art remains difficult to keep because of the transaction costs of litigation. This situation is not ideal. Not only does the impact of litigation costs undermine the restorative-justice reasons for making these claims easier to bring (because claimants recover some money, but have to give up their artwork), but costs may discourage claims from being brought in the first place. Parties think about the cost of litigation before it begins, and will not begin litigation if it is not economically justified.¹⁴⁶ Because of the high economic toll litigation costs imposes on plaintiffs, “Holocaust artwork restitution efforts have yielded far fewer results than efforts to reconstitute other assets, such as property and financial holdings.”¹⁴⁷ Reducing litigation costs is critical to ensuring that claimants are actually able to retain possession of their art.¹⁴⁸

¹⁴¹ *Id.*; Redman, *supra* note 106, at 781.

¹⁴² *Cf.* Crow, *supra* note 9 (quoting a defense litigator who criticized art-lawyers’ techniques).

¹⁴³ *Id.* Recently, there were rumors that Christie’s lent money to cover a claimant’s legal fees in anticipation of auctioning off her recovery. Vogel, *Recovered Artworks*, *supra* note 12. If true, this is particularly demonstrative of the revolving door from lawsuit to auction.

¹⁴⁴ For a particularly scathing criticism of the actions of one heir, see Kimmelman, *supra* note 9.

¹⁴⁵ See *supra* note 10 and accompanying text (describing the widespread public support for Holocaust restitution).

¹⁴⁶ See Davida H. Isaacs, *The Highest Form of Flattery? Application of the Fair Use Defense Against Copyright Claims for Unauthorized Appropriation of Litigation Documents*, 71 MO. L. REV. 391, 443 (2006) (“Where the transaction costs associated with seeking restitution are greater than the amount the harmed party can be expected to obtain from a lawsuit, the injured party will deem it economically inefficient to sue in order to obtain restitution.”).

¹⁴⁷ Weiss, *supra* note 102, at 870.

¹⁴⁸ *Cf.* Isaacs, *supra* note 146, at 443 (noting that “society as a whole obtains a benefit from increasing the

V. REDUCING TRANSACTION COSTS: SETTLEMENT IS UNDEREMPLOYED

Traditionally, one of the primary ways parties have fought litigation costs is by settling claims. Whether that is an option for Holocaust-era art claimants is a question worth considering in detail. Its answer reveals the key to creating value for survivors and their heirs.

a. Holocaust Art Claims Should Be Settling

Settlements are often much less expensive than litigation.¹⁴⁹ The decision to litigate, to settle or not to bring a claim at all is a decision any potential claimant must make, and is dictated by the economics of each particular situation. Fundamentally, whether the parties end up going to trial depends on the returns they expect from litigation compared to the returns they can achieve through negotiated settlement.¹⁵⁰

A plaintiff contemplating litigation must account for several considerations, expressed below as variables.¹⁵¹ The plaintiff's "threat point" in negotiations is his expected return should he go to trial.¹⁵² For our purposes, that quantity is equal to the value of a court-awarded judgment, J , times his expectation of winning a case, W , net of the legal costs he will incur going to trial, L .¹⁵³ Thus, the plaintiff's threat point is:

number of parties that can obtain restitution," a number which can be increased by lowering transaction costs).

¹⁴⁹ For arguments that settlements are generally less expensive, see, e.g., RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 588–89 (5th ed. 1998); James N. McNally, *Lessons Learned in the Court of Appeals Settlement Program*, 79 MICH. B.J. 488, 488 (2000) ("Settlements bring higher satisfaction among litigants and can be a cheaper, quicker alternative to litigation."); A.C. Pritchard, *Markets as Monitors: A Proposal To Replace Class Actions with Exchanges as Securities Fraud Enforcers*, 85 VA. L. REV. 925, 952 (1999) (arguing that, if plaintiffs withstand a motion to dismiss, settlement is generally cheaper than litigation). However, settlement is not universally a less expensive option. See, e.g., Robert J. Rhee, *A Price Theory of Legal Bargaining: An Inquiry into the Selection of Settlement and Litigation Under Uncertainty*, 56 EMORY L.J. 619, 624 (2006) (proposing a theory under which "litigation can offer a cheaper cost of resolution than settlement"); Lisa C. Thompson, *International Dispute Resolution in the United States and Mexico: A Practical Guide to Terms, Arbitration Clauses, and the Enforcement of Judgments and Arbitral Awards*, 24 SYRACUSE J. INT'L. L. & COM. 1, 16 n.113 (1997) (describing how drawn-out settlement negotiations can "become more expensive than had parties initially started with traditional litigation"). Parties must decide which is cheaper based on the economics of their claim.

¹⁵⁰ Jean O. Lanjouw & Josh Lerner, *The Enforcement of Intellectual Property Rights: A Survey of the Empirical Literature* 2 (Nat'l Bureau of Econ. Research, Working Paper No. 6296, 1997), available at <http://www.nber.org/papers/w6296>.

¹⁵¹ Lanjouw and Lerner's model was validated with empirical data from patent litigations, *id.*, but can apply more broadly.

¹⁵² *Id.* at 2–3.

¹⁵³ *Id.* at 3. Lanjouw and Lerner's model has an additional variable, Y , equal to the plaintiff's expected income given the damage he has incurred, but it is specifically applicable to patent, and not restitution

$$WJ - L \qquad \text{sum (1)}$$

At any negotiated proposal above this sum, the plaintiff will settle (having received more than he could expect at trial); proposals below will make him litigate.¹⁵⁴ The defendant's expected value of a trial is the product of w , his assessment of the plaintiff's likelihood of prevailing, and $-j$, the loss he will incur with an unfavorable judgment, minus l , his litigation costs, or:

$$-wj - l \qquad \text{sum (2)}$$

In an art restitution case, $J=j$ axiomatically. Whatever artwork the defendant loses is gained by the plaintiff. The total value of a trial for both parties is therefore:

$$\begin{aligned} & \text{sum (1) + sum (2)} \\ & = \\ & j(W - w) - (L + l) \qquad \text{sum (3)} \end{aligned}$$

If we assume that no transaction costs are incurred in a settlement, the total value across both parties of a settlement is zero (because whatever the defendant loses the plaintiff gains).¹⁵⁵ Thus the net surplus achieved by both parties settling is the total value of settlement minus the total value of litigation:

$$\begin{aligned} & 0 - \text{sum (3)} \\ & = \\ & -j(W - w) + (L + l) \qquad \text{sum (4)} \end{aligned}$$

claims, and ultimately is not a factor in their analysis. *See id.* We will use uppercase letters for the plaintiff and lowercase for the defendant. In the case of art-restitution claims, the model assumes a negative value for litigation costs, L , because attorneys' fees are generally not recoverable in replevin actions absent a contractual provision to the contrary. M. L. Cross, Annotation, *Recovery of Attorneys' Fees As Damages by Successful Litigant in Replevin or Detinue Action*, 60 A.L.R.2D 945 (1958).

¹⁵⁴ *See* Lanjouw & Lerner, *supra* note 150, at 3.

¹⁵⁵ *See id.* (making this simplifying assumption). Another way to look at this is that whatever the plaintiff forgoes the defendant retains. Clearly, parties will incur some transaction costs even in settlement. In fact, those costs can be significant if negotiations are drawn out, as they sometimes are. *See supra* note 135 and accompanying text (describing the high costs incurred in a settlement that took four years to reach). However, the economic model assumes that parties will settle as soon as possible, and hence that their transaction costs will be so much lower than they would have been had the dispute gone to trial as to make them negligible.

Economic theory posits that parties should settle whenever that surplus is positive,¹⁵⁶ so it follows that they will settle whenever:

$$j(W - w) \leq (L + l) \quad \text{inequality (5)}$$

We can draw several conclusions about parties' litigation behavior from inequality (5). First, the more parties agree on the plaintiff's likelihood of winning the case, the more likely the case is to settle. If the parties agree perfectly, that is, $W=w$, they will always settle.¹⁵⁷ Secondly, the size of the stakes j , which here is the value of the disputed artwork, is directly determinative of a settlement's likelihood.¹⁵⁸ If the anticipated value of j is sufficiently large, it will dwarf $(L + l)$ —the combined litigation costs—and the parties will go to trial.¹⁵⁹ And a large j may lead to trial even when the parties have very similar assessments of a plaintiff's success.

This model is informative for Holocaust-era art restitution cases. If these claims were to follow the economic settlement model, the vast majority of them would settle. The stakes are sometimes quite large, with some disputed paintings valued in excess of \$100 million.¹⁶⁰ But many pieces are worth much less. For instance, a Matisse at the center of a suit against the Seattle Art Museum, which eventually settled, was worth approximately \$2 million.¹⁶¹ Another disputed work was valued at \$487,500.¹⁶² Some suits involve paintings valued at less than \$200,000.¹⁶³ Compared to litigation costs for both parties (L and l) that are frequently in the millions of dollars,

¹⁵⁶ *Id.* 4.

¹⁵⁷ *See id.* *See also* A. MITCHELL POLINSKY, AN INTRODUCTION TO LAW AND ECONOMICS 109 (2d ed. 1989) (concurring that, if "the parties agree about the plaintiff's probability of prevailing at trial," then there is always a range of settlements "that can make both of them better off; the size of this range is determined by the sum of their litigation costs").

¹⁵⁸ *See* Lanjouw & Lerner, *supra* note 150, at 4.

¹⁵⁹ *See supra* notes 127–135 and accompanying text (discussing the costs of bringing claims). There is certainly some correlation between the valuation of a piece and the costs involved in its recovery. Claimants to an expensive piece are likely to hire more specialized representation, and defendants may engage in a more vigorous defense. But some costs, like researching provenance databases, are fixed. In fact, to the extent that well-known paintings' origins tend to be well-documented, it is possible that researching the history of a more obscure painting might be *more* expensive. Experts estimate that it costs \$100,000 just to begin litigation, Tyler, *supra* note 10, at 444, presumably a fixed cost. For a piece worth \$200,000, settlement would seem by far the best option.

¹⁶⁰ *See supra* note 140 and accompanying text.

¹⁶¹ Felicia R. Lee, *Seattle Museum To Return Looted Work*, N.Y. TIMES, June 16, 1999, at E4.

¹⁶² *See* Rhodes, *supra* note 17, at 506 (reporting the average of two assessments, which is how the parties agreed to value the painting).

¹⁶³ *See* Chanen, *supra* note 88, at 52 (discussing litigation involving paintings worth less than \$200,000).

these values suggest settlement.¹⁶⁴

Furthermore, plaintiffs and defendants frequently have similar assessments of a claimant's likelihood of success, that is, W is often close to w . There may be some uncertainty about how a court will apply legal rules to determine ownership, but in many claims, there is strong evidence of who owned the artwork before World War II. For instance, several books have been written describing the history of specific stolen works.¹⁶⁵ Some heirs have photographs of the pieces taken by their ancestors.¹⁶⁶ Perhaps most surprisingly, provenance can often be conclusively established by Nazi records themselves. Hitler's forces kept detailed records of what they took and from whom it was taken.¹⁶⁷ Reliable ownership evidence is especially likely to be available for valuable pieces.¹⁶⁸ Therefore, the higher the value of j , the more likely W and w are to converge—suggesting settlement. Conversely, if W and w are divergent, j is most likely low—again suggesting settlement.¹⁶⁹ Economic theory, then, would lead us to expect that many—if not most—of these cases settle.

b. The Evidence: Settlements Happen Less Often than They Should

Empirical evidence contradicts the theoretical result. Claimants should be avoiding high transaction costs in art restitution claims by settling but, by and large, they are not.¹⁷⁰ The author of a recent multi-year academic study of major American art restitution cases reports that less than one-third of the cases were settled out of court.¹⁷¹ This ratio is starkly lower than the average

¹⁶⁴ Even though plaintiffs are often represented on a contingent fee basis, meaning that L is proportional to j , many defendants are not.

¹⁶⁵ *E.g.*, FELICIANO, *supra* note 16.

¹⁶⁶ *Id.* at 8.

¹⁶⁷ *Id.* at 22. *See also* Henson, *supra* note 5, at 1107 (“[The Nazis] meticulously inventoried, catalogued, and photographed” whatever they looted.”); Sarah K. Mann, Note, *What's a Survivor To Do? An Inquiry into Various Options and Outcomes for Individuals Seeking Recovery of Nazi-Looted Art*, 5 LOY. U. CHI. INT'L L. REV. 191, 193 (2008) (pointing out the irony that it was Nazi thieves who likely saved famous artwork from destruction and built a record for future claimants).

¹⁶⁸ FELICIANO, *supra* note 16, at 55.

¹⁶⁹ *Cf.* TRIENENS, *supra* note 47, at 87–96 (discussing the settlement of a claim over a painting worth less than \$500,000, and how one of the major impediments to settlement was uncertainty about whether the painting had been stolen).

¹⁷⁰ Of course, some claims do settle. This is especially the case when claimants have a particularly damning record against the current possessor. *See, e.g.*, Lee, *supra* note 161 (describing how the Seattle Art Museum's board of trustees voted quickly and unanimously to return Matisse's *Odalisque* after its World War II theft was documented in Hector Feliciano's book).

¹⁷¹ GAZZINI, *supra* note 50, at 61. *But cf. id.* n.95 (noting that many of the cases that settled did so recently). This suggests that, though still not as often as theory would predict, some parties are beginning to find ways for their claims to be concluded out of court.

settlement rate for American litigation, which is estimated between ninety and ninety-eight percent.¹⁷² This fact has led some authors to doubt the efficacy of settlement.¹⁷³ Even though some pieces of looted art “have been returned to victims . . . through some type of dispute resolution besides litigation, most people seeking restitution of looted art are left with no choice other than the judicial system.”¹⁷⁴

Information asymmetry might be to blame for the low settlement rate;¹⁷⁵ so might risk aversion or strategic behavior.¹⁷⁶ But it is far more likely that this low settlement rate is caused by something particular to these claims. Unlike the dollar award in a personal-injury case or the amount owed for a shipment of 1000 widgets in a contract dispute, which are almost infinitely-divisible sums of money, the parties in restitution cases are contesting the ownership of a piece of art—a single, indivisible asset.¹⁷⁷

Disputes over possession of indivisible objects are considered especially difficult to settle. So-called “indivisibles” create a “serious stumbling block to negotiations and may even cause them to break down entirely.”¹⁷⁸

¹⁷² For a claim that the rate is at least ninety percent, see Russell Korobkin & Chris Guthrie, *Psychology, Economics and Settlement: A New Look at the Role of the Lawyer*, 76 TEX. L. REV. 77, 84 (1997) (estimating the rate at “more than ninety” percent). Some authors report a ninety-six percent figure. *E.g.*, RICHARD A. POSNER, *ECONOMIC ANALYSIS OF THE LAW* 597 (7th ed. 2007) (reporting the rate for “all civil cases in state courts”); Katie M. McVoy, Note, “*What I Have Feared Most Has Now Come To Pass*”: Blakely, Booker, and the Future of Sentencing, 80 NOTRE DAME L. REV. 1613, 1623 (2005). And others report a rate of ninety-eight percent. *E.g.*, Michael H Baniak et al., *IP Litigation in the 21st Century*, 6 NW. J. TECH. & INTELL. PROP. 293, 97 (2008). *But see* POSNER, *supra*, 597 (reporting that this rate is only for automobile accident claims).

¹⁷³ See Redman, *supra* note 96, at 222 n.188 (concluding that, while settlement is “a lofty goal,” it is “highly impractical”). And many of the so-called settlements that have actually occurred were effectively “nuisance” suits, making them “little better than ransoms.” Borodkin, *supra* note 55, at 403. For example, rather than suing in American courts for their return, a German church whose artifacts had been stolen during World War II chose to pay a “finder’s fee” of more than \$3 million to the heirs of the thief. *Id.* at 403–04.

¹⁷⁴ Redman, *supra* note 96, at 222 n.188.

¹⁷⁵ See Lanjouw & Lerner, *supra* note 150, at 4 (describing the impact of information asymmetry on parties’ decision to settle).

¹⁷⁶ See POLINSKY, *supra* note 157, at 111 (analyzing the effect of risk aversion on a party’s settlement decision and explaining that strategic behavior, where parties hold out to gain a reputation as a “tough bargainer,” may keep parties from reaching settlements even in cases where they should).

¹⁷⁷ See H. Peyton Young, *Dividing the Indivisible*, 38 AM. BEHAV. SCIENTIST 904, 904 (1995) (including paintings in a list of “indivisibles”). Young’s definition of indivisibility is useful: “[W]hen we say that something is indivisible, we usually mean that it is difficult or costly to divide, not that it cannot be divided.” *Id.*

¹⁷⁸ *Id.* See also Paul H. Brietzke & Teresa L. Kline, *The Law and Economics of Native American Casinos*, 78 NEB. L. REV. 263, 293 n.114 (1999) (stating that “sub-optimal” bargains are especially likely to occur “when the parties want the same indivisible object”); Paul J. Geller, *When the Walls Come Crumbling*

Settlements are shared-value arrangements, where both parties forgo part of their claim to secure an outcome that benefits them both. The parties accept less than one hundred percent of what they claim in exchange for something greater than zero percent.¹⁷⁹ But if an object cannot be divided, then a party either gets all of it or none of it, and this holds true whether at trial or in settlements.¹⁸⁰ People who believe that their only possibilities are getting everything or getting nothing at all cannot come to a negotiated agreement, because neither side will be willing to go home empty-handed. Bargains over apparently indivisible objects like artwork often fail because indivisibility creates a “psychological barrier that leads the claimants to think in zero-sum terms.”¹⁸¹ As soon as parties see a dispute as “zero-sum” or “win-lose” rather than “win-win,” the “value creation” they could otherwise enjoy by compromising disappears completely.¹⁸² Not considering any alternatives in

Down: A Call for ADR in the CIC, CONSTRUCTION LAW., Jan. 1993, at 12, 16 (contending that objects that are “totally indivisible” often “preclude compromise”); Witek Gierulski, 65 SASK. L. REV. 181, 211 (2002) (arguing that, in the context of some landlord-tenant disputes, the apparent indivisibility of the tenant’s property presents a barrier to settling rent disputes); Kate Greene, *International Responses to Secessionist Conflicts*, 90 AM. SOC’Y INT’L L. PROC. 296, 307 (1996) (remarks of Tom Farer) (describing some situations in which the need to “divide the indivisible” makes negotiated settlements difficult); Diane E. Hoffman, *Mediating Life and Death Decisions*, 36 ARIZ. L. REV. 821, 867 (1994) (noting that end-of-life decisions often “appear to be unsuitable for mediation by virtue of the fact that the object of the dispute—the life of the patient—is indivisible” because “[w]here there is only a single issue on the table and no real alternatives [sic], there is a question of the suitability of mediation for the dispute”).

¹⁷⁹ 15A AM. JUR. 2D *Compromise and Settlement* § 1 (2008) (“[Settlement] involves an agreement that a substituted performance is acceptable instead of what was previously claimed to be due; thus, each party yields something and agrees to eliminate both the hope of gaining as much as he previously claimed and the risk of losing as much as the other party previously claimed.”).

¹⁸⁰ See Frank E. A. Sander & Lukasz Rozdeiczner, *Matching Cases and Dispute Resolution Procedures: Detailed Analysis Leading to a Mediation-Centered Approach*, 11 HARV. NEGOT. L. REV. 1, 12 tbl.2 (2006) (“[I]n a dispute over the ownership of an indivisible object, the judge will usually be limited to awarding the object to one side.”). See also TRIENENS, *supra* note 47, at 93 (stating that, in court, art-restitution claims are “winner-take-all” propositions).

¹⁸¹ Young, *supra* note 177, at 904. For a discussion of the perceived indivisibility of art, see Schlegelmilch, *supra* note 2, at 91 (stating that, unlike “fungible items such as gold or money, each piece of art is unique”).

¹⁸² GAZZINI, *supra* note 50, at 63. See also Glenn Cohen, *Negotiating Death: ADR and End-of-Life Decision-Making*, 9 HARV. NEGOT. L. REV. 253, 271 (2004) (pointing out that one of the main objections to using ADR in end-of-life situations is the implied “assumption of binary resolution,” but that discovering the “range of options between the two positions” that lies “[b]eneath the surface” of these disputes enables ADR to be used to achieve superior results); Jon Elster, *Solomonic Judgments: Against the Best Interests of the Child*, 54 U. CHI. L. REV. 1, 39–40 (1987) (discussing how departing from the “winner-take-all principle” that normally governs toward forms of compromise may be preferable in child-custody disputes). Likewise, art cases are often seen as “winner-take-all propositions” with no possibility of compromise. See Choi, *supra* note 29, at 191 (arguing that, though this is currently the case, restitution claims can settle). See also Young, *supra* note 177, at 907 (mentioning a hypothetical dispute over fine art

between successful recovery or complete failure may be the primary source of variance between the settlement rate of Holocaust-era restitution claims and what is economically efficient.

VI. MAXIMIZING UTILITY BY SHARING VALUE IN HOLOCAUST-ERA ART RESTITUTION CLAIMS

In the previous sections, we saw that Holocaust-era art claimants face the burden of tremendously high transaction costs if they choose to use the litigation system to recover their artworks. Reducing those costs is a very effective way to maximize the value they are able to recover. The most accessible way for parties to reduce costs is to reach a negotiated settlement, but settlement is often overlooked as an option because of the perception that an indivisible art object cannot be shared. If parties had options for sharing value at their disposal, in other words, ways to split their apparently indivisible assets, they could avoid litigation more often. The final section of this paper will demonstrate that a seemingly indivisible, single piece of art can actually offer a wealth of different, divisible, value propositions. This, in turn, can create numerous deal points for parties wishing to settle. Enabling settlement allows parties to share the disputed asset's value, maximize its overall utility, and hence enjoy a larger portion of the value of their claimed art.¹⁸³

Parties still incur some litigation costs when they settle, but the costs are usually much lower than the cost of going to trial.¹⁸⁴ It is true that settling has drawbacks. For instance, a widely-reported agreement may engender nuisance suits from plaintiffs with “tangential and weak cases.”¹⁸⁵ Some survivors also appreciate the fact that restitution cases can help document the atrocities of the Holocaust.¹⁸⁶ But because settlement terms are often not reported, plaintiffs who settle may be unable to contribute to this record. Settlements also do not create valid legal precedent, which some claimants

as an example of the indivisibility problem).

¹⁸³ Negotiated settlement is often used in other litigation contexts as a way to reduce costs. POLINSKY, *supra* note 157, at 109 (stating that most non-Holocaust suits “are settled out of court for an obvious reason—settlements save the cost of litigation”). *See also* POSNER, *supra* note 172, at 598 (explaining how settlement “economizes on transaction costs”).

¹⁸⁴ POLINSKY, *supra* note 157, at 109 n.68.

¹⁸⁵ Schlegelmilch, *supra* note 2, at 117.

¹⁸⁶ *See* Neuborne, *supra* note 115, at 830 (“[A]nother reason for bringing [restitution cases is] to speak to history—to build a historical record that could never be denied.”); *see also* Susan Hodara, *Show Will Feature Paintings Looted by Nazis*, N.Y. TIMES, July 1, 2007, § 14CN, at 2 (reporting an exhibition of Holocaust-era recovered art that was “intended ‘to put [their] story in the context of the Holocaust’”).

might consider a drawback.¹⁸⁷ Still, in most cases, it would seem that plaintiffs would accept these drawbacks in order to avoid the astronomical costs of litigating.

But settlements may be hard to reach. Because settling requires compromise and works of art can sometimes be seen as indivisible, these disputes may not be conducive to compromise. In reality, this unitary, undividable view of the value of a piece of artwork is simplistic. In disputes like Holocaust-era art claims, parties often “fail to recognize that there are many ways of dividing a seemingly indivisible object that allows *everyone* to get a reasonable portion of the pie.”¹⁸⁸ A cultural property suit is not necessarily a “yes or no” dispute, but rather may involve “a multitude of elements, values and appreciation.”¹⁸⁹ The more parties can be made to understand that one piece of artwork contains many distinct types of value, the more they will be amenable to settling their disputes by sharing value among each other.¹⁹⁰

a. Ways to Divide the Indivisible

Oxford Economist Peyton Young describes eight ways to create divisible property rights in indivisible goods, or, in his terms, to “divide the indivisible.” First, goods can be divided physically—a painting can be split in two. Second, property rights can be assigned by a lottery, like a coin toss. Third, the item can be held in common for use by both parties. Fourth, it can be denied to both parties and destroyed or given to a museum, which Young calls “subtraction.” Fifth, it can be shared by rotating possession between the parties. Sixth, it can be sold, and the money divided between the parties. Seventh, value can be shared by “compensation,” where one claimant pays the other for exclusive possession. Eighth, value can be sold by “unbundling attributes,” and establishing separate entitlements to these different attributes.¹⁹¹ The first three approaches are so impracticable in the art restitution context that they cannot be seriously advocated.¹⁹² But there are at

¹⁸⁷ GAZZINI, *supra* note 50, at 63. This would especially be true for claimants who are interested in the broader Holocaust-restitution movement and see their claims as important building blocks for others.

¹⁸⁸ Young, *supra* note 177, at 904.

¹⁸⁹ GAZZINI, *supra* note 50, at xxiv.

¹⁹⁰ See Young, *supra* note 177, at 905 (“[T]he key to advancing . . . negotiations is to find some way to convert an indivisible object into divisible forms of rights and entitlements . . .”).

¹⁹¹ *Id.* at 907–08. Young speaks only generally about what it means to talk about the “attributes” of indivisible goods. Part of the purpose of this section is to define those attributes for stolen art more concretely.

¹⁹² Physical division would mean literally cutting a painting in two or dividing a

least five viable ways to share value in Holocaust art claims.

b. Subtraction

“Subtracting” disputed property means denying it to both parties.¹⁹³ That can be done either by destroying the property or by donating it to a third party. For example, a child-custody dispute between parents can be resolved by having the child live with grandparents.¹⁹⁴ Similarly, an art dispute could be resolved by a museum donation. Clearly, destroying the disputed piece is not a preferable solution for Holocaust-era art disputes.¹⁹⁵ But a conceivable resolution would have the sparring parties donate the piece to a museum,

sculpture by weight. The work would be rendered worthless beyond the market value of the piece’s materials. Physical division of “indivisible” assets is typically wasteful, and this is especially true with art. *Id.* at 907. A lottery would also be unwise. Theorists have recommended this approach in many contexts, but it has generally been rejected in practice. *Id.* For a particularly bold (though well-argued) recommendation, see Elster, *supra* note 182, at 40–43 (recommending that child-custody disputes be resolved by coin toss). Elster points out two principal arguments in support of coin tossing—simplicity and objective fairness. Randomized settlement “has the virtue of being simple and automatic, thus sparing . . . pain of custody litigation. . . . Less damage will be imposed on fewer children.” In addition, “awarding custody by the flip of a coin is fair to the parents, in that the procedure safeguards the important values of equal treatment and equal opportunity.” *Id.* To be fair, Elster is also realistic about the problems inherent in using random chance to determine such an important outcome. Randomization “appeals to intuitions about equal treatment and equal worth,” but it can “violate rights-based and needs-based considerations.” *Id.* at 43. Among other reasons why lotteries are often disfavored, randomization can often seem “frivolous and even morally wrong,” especially in the case of very valuable goods. Young, *supra* note 177, at 907. The other drawbacks Young mentions are envy and regret. *Id.* Given the important restorative-justice undertones to Holocaust art claims, it is unlikely that any party would accept to resolve them by chance. Holding in common is not likely to be a successful solution either. A common-holding agreement would have to give both parties equal access to the disputed piece. If the claimant and current possessor lived in the same apartment building, we could hang the piece in the common stairway leading to their apartments. *Id.* If they belonged to the same country club, it could go over the fireplace in the clubhouse. But, for most disputes, it is difficult to picture how holding in common could be practically implemented. So, like physical division and lottery, common holding seems unworkable. But all other options are viable.

¹⁹³ Greene, *supra* note 178, at 307.

¹⁹⁴ Young, *supra* note 177, at 907, 909.

¹⁹⁵ This is especially true for very valuable or famous pieces like *Adele Bloch-Bauer I*. Public sentiment might judge its destruction a criminal act.

perhaps as a joint gift in both of their names.¹⁹⁶ This kind of arrangement would ensure that the current possessor could not continue to enjoy his ill-gotten artwork. There might also be favorable tax consequences, and the donation would certainly be a public-image boon for both the current possessor and the claimant.

On the other hand, it is hard to see why most parties would choose this solution over others. It might work if both parties were very altruistic or very involved in the arts, and preferred seeing the piece in a museum, where it could be enjoyed by the public. Or, if the current possessor were a tobacco company or Wall Street bank wanting to improve its image, donation might be favored as a means to that end. If the parties were bitterly antagonistic toward each other, and were more interested in seeing the other side *not* get possession than in recovering the piece themselves, they might agree to a “subtraction” solution. But to many parties, subtraction might seem like an unnecessary deprivation. In most of the other value-sharing approaches, both sides give up some value, but keep some too. Here, both sides give it all away. It is an option worth considering, but it will probably not be best in most disputes.

c. Rotating Possession: Time Shares

Rotation is essentially a form of time-share, where the parties agree that each side will be able to fully enjoy the property during a limited, predetermined time period. Dividing property through rotation is sometimes disfavored.¹⁹⁷ It is not frequently used in art claims, but it is common in other kinds of disputes, like child custody, for example.¹⁹⁸ And, when it is used outside of the dispute-resolution context, fractional ownership has worked both for real property, such as vacation timeshares, and for personal property, such as fractional private jet ownership.¹⁹⁹ Some art galleries even offer

¹⁹⁶ This approach was originally advocated by the current possessor in the *Goodman v. Searle* dispute, but the claimant rejected the proposal. TRIENENS, *supra* note 47, at 87.

¹⁹⁷ See Henry Hansmann & Reinier Kraakman, *Property, Contract and Verification: The Numerus Clausus Problem and the Divisibility of Rights*, 31 J. LEGAL STUD. 373, 375 (2002) (stating that “[t]he benefits of partial property rights are often low and the costs of verifying those rights are generally high,” so property law accordingly “takes an unaccommodating approach to all but a few basic categories of partial property rights”—and rotation is not usually among those categories).

¹⁹⁸ See Young, *supra* note 177, at 908–09 (asserting that rotation is a common solution in child-custody battles but that art claimants might prefer to sell a disputed painting and divide the proceeds than to agree to rotating possession). The child-custody example also shows that the parties do not necessarily have to share equally under a rotation method; sometimes one parent has the child on the weekend while the other has her during the week. *Id.*

¹⁹⁹ For a description of the NetJets fractional jet ownership program, see generally Angie Boliver, *Square*

fractional ownerships of new artists' works.²⁰⁰

Rotation might be appropriate for Holocaust-era art claims.²⁰¹ The parties could agree that the painting would hang in the claimant's apartment for one year and in the current possessor's the next. If the situation warranted it, the period of rotation could be event-based rather than fixed. For example, if the current possessor were a museum, the parties could agree that the claimant would keep it at home, but that it would be sent to the museum when it was needed for a special exhibition.²⁰² Since both sides could have full enjoyment of the painting, albeit temporarily, a rotation scheme might be attractive and save the parties from litigation.

On the other hand, there are drawbacks to this approach. Rotation might be a much a more efficient alternative to litigation for the purposes of establishing initial ownership between the claimant and current possessor, but could become a genuine problem if the parties eventually want to transfer the piece to a third party. A split-rights regime, for some claimants, may also be much less equitable. If a claimant has incontrovertible evidence of entitlement to the full ownership of a piece, and can recover it with minimal litigation costs, sharing ownership for part of the year with a wrongful current possessor will be unattractive, and one side might not feel that the other deserves to keep the piece any longer.²⁰³ Finally, rotation creates problems specific to art. Valuable art is fragile and easy to steal, which makes it quite expensive to transport.²⁰⁴ An agreement which requires an expensive piece to

Pegs in a Round Hole? The Effects of the 2006 Cape Town Treaty Implementation and Its Impact on Fractional Jet Ownership, 72 J. AIR L. & COM. 529, 538–39 (2007). In the program, individuals and companies can buy part interests in a private aircraft (generally at least one-eighth). *Id.* When there are scheduling conflicts between the owners of one aircraft, fractional owners can resort to an “interchange agreement” that allows them to use aircraft owned by other program participants. *Id.*

²⁰⁰ *E.g.*, ArtLab: Art to Buy and Borrow, <http://www.artlab-gallery.co.uk> (last visited Oct. 30, 2008).

²⁰¹ The closest any reported negotiation has come to creating a time-sharing arrangement was a settlement between the Yale Art Gallery and a Holocaust survivor's heir, where the claimant was given possession of the painting for ten years, after which the title passes back to the museum. Daniel Range, *Deaccessioning and Its Costs in the Holocaust Art Context: The United States and Great Britain*, 39 TEX. INT'L L.J. 655, 672 & n.165 (2004).

²⁰² To prevent the museum from gaming the agreement by having a dozen “special exhibitions” a year, the parties could agree on some maximal usage—for instance, whenever the painting was needed for an exhibition but for no more than four months a year.

²⁰³ For example, a successful claimant, after having been asked if she would loan several pieces back to the museum that lost the suit, recently said: “[T]hey asked, ‘Would you loan them to us again?’ And I said: ‘We loaned them for 68 years. Enough loans.’” Sharon Waxman, *A Homecoming, in Los Angeles, for Looted Klimts*, N.Y. TIMES, Apr. 6, 2006, at E1.

²⁰⁴ See Holly Hubbard Preston, *The Fine Art of Shipping Art*, INT'L HERALD TRIB., Apr. 29, 2006, at 19 (noting that damage, theft and regulation make art expensive to ship, so that sending a piece across the country can cost more than \$10,000).

be regularly shuttled back and forth might generate significant costs over the long term.

d. Sale and Division

A fairly obvious way to share value is simply to sell the piece to a third party and share the proceeds, which has probably been the most commonly-used method in those Holocaust-era claims that have settled. An example of a sale-and-division settlement is the *Goodman v. Searle* dispute.²⁰⁵ In 1987, Daniel Searle purchased a Degas pastel, *Landscape with Smokestacks*, for \$850,000 after the Art Institute of Chicago gave it a “clean bill of health.”²⁰⁶ Seven years later, while the painting was on loan to the Metropolitan Museum of Art in New York, heirs of Friedrich and Louise Gutmann, who were killed in the Holocaust, saw photos of the work and recognized it as having belonged to their grandparents.²⁰⁷ They brought suit in 1996, but settled on “the eve of trial” in 1998.²⁰⁸ The settlement agreement provided that neither side would recover the painting: instead, each party would transfer his or her ownership interest to the Art Institute of Chicago—Searle through a donation and the Goodmans through sales.²⁰⁹ Each side recognized the ownership interest of the other, and by “both triangulating their interests to create ownership in a new third party,” they resolved their dispute.²¹⁰

While it is easy to implement, this approach also carries a set of problems. Selling a piece to a third party can be criticized as a form of undue “monetization” of the Holocaust—a criticism sometimes leveled at survivors who seek financial recovery for their losses.²¹¹ And survivors and heirs who have sold artwork to third parties in the past decade have often been denigrated for a second reason. These claims are often made against museums, and if the work is sold to a third party, it is no longer available for

²⁰⁵ For a synopsis of the litigation, see Rhodes, *supra* note 17, at 504–05. For a full account, see generally TRIENENS, *supra* note 47.

²⁰⁶ Rhodes, *supra* note 17, at 504.

²⁰⁷ *Id.* at 504–05.

²⁰⁸ *Id.* at 505.

²⁰⁹ *Id.*

²¹⁰ *Id.* at 506.

²¹¹ Neuborne, *supra* note 115, at 827. Some of that criticism might be mitigated if the costs of litigation were more broadly understood, but that has not been the norm. See Kimmelman, *supra* note 9 (criticizing a recovered art sale but not mentioning litigation costs); Carol Vogel, *Returned Klimts To Be Sold at Christie's*, N.Y. TIMES, Aug. 7, 2006, at E1 (noting that none of the heirs to several Klimt paintings were “in a position to keep” them but not explaining that this was partly due to litigation costs).

the public to enjoy.²¹² This “reverse migration” has caused widespread lament as high-profile pieces “come off the walls” and “come to rest in private collections.”²¹³ Some authors have argued that this criticism is unfair.²¹⁴ But it is a fact that removing a famous painting from public view imposes a significant externality on museum-going art lovers. The art world has reacted, and “seems to be on the cusp of a . . . backlash to restitution of Nazi-looted art—with survivors being criticized for auctioning . . . art on the grounds that such sales are harmful to the public’s interest in enjoying art.”²¹⁵ Public sentiment alone may act as a strong disincentive to parties considering settling by selling a piece and sharing the proceeds.²¹⁶ Still, this method is appealing in its simplicity.

e. Compensation: Money To Extinguish the Claim

Another value-sharing approach Young’s framework suggests is for the claimant to agree, in exchange for money, to extinguish his claim against the piece. An example of this type of settlement was the recent resolution of a dispute over Picasso’s *Femme en Blanc*. The dispute over the painting’s ownership arose in 2002.²¹⁷ After initial negotiations failed, the heir initiated “extensive” litigation.²¹⁸ But, after a four-year battle, the *Femme en Blanc* dispute was resolved by a \$6.5 million settlement check the current possessor paid the heir to “extinguish his claim.”²¹⁹ This type of resolution has not been tremendously successful in the United States, but it has worked better in other jurisdictions.²²⁰

²¹² See generally Kimmelman, *supra* note 9.

²¹³ Crow, *supra* note 9.

²¹⁴ See Kreder, *supra* note 43, at 195 (criticizing the backlash).

²¹⁵ *Id.* at 215.

²¹⁶ No one wants to be individually targeted by a *New York Times* editorial, but this is exactly what happened to the heirs of Ferdinand Bloch-Bauer in the Kimmelman article, *supra* note 9.

²¹⁷ That year, the woman in whose home it had hung since she purchased it in 1975 sought to sell it through a Los Angeles art dealer. Chanen, *supra* note 88, at 50. However, checks into its history revealed that it had possibly been stolen during World War II from a German woman, whose heir promptly sought its return. Kaye, *supra* note 72, at 266–67.

²¹⁸ *Id.* at 267.

²¹⁹ Chanen, *supra* note 88, at 50.

²²⁰ See, e.g., Kaye, *supra* note 72, at 252 (emphasizing that “the Goudstikker family has been less successful in resolving claims against U.S. and Canadian museums, which have been less cooperative than their Western European counterparts when presented with claims, and often coming up with reasons and excuses to avoid the issue”). For instance, in 2004, an art museum in Germany, though at first skeptical of their claim, eventually paid the heirs of Jacques Goudstikker, a prominent Amsterdam art dealer before World War II, “an undisclosed sum . . . which recognized the historical injustice but permitted the piece to

This outcome illustrates one way to settle claims, but also of some of the drawbacks of this method. In the end, parties shared value through the money transfer—the heir to *Femme en Blanc* recovered between sixty-five and eighty percent of the painting’s value—so, in other words, it was not an “all or nothing” outcome.²²¹ However, that settlement would have been far more value-maximizing if it had occurred at the beginning of litigation rather than four years in. The plaintiff’s legal fees were not reported, but, given the fact that the litigation was complex and that the plaintiff was represented by a lawyer who charges contingent fees of more than fifty percent, they were probably large enough to have significantly reduced his recovery.²²²

Furthermore, while it succeeds in sharing value, the sole focus of this approach is on sharing a work’s *monetary* value. As the *Femme en Blanc* litigation shows, this focus, if it leads to settlement at all, may result in a post hoc solution that is far from ideal. In that case, the plaintiff demanded a payment from the outset—essentially saying “pay me some money and I’ll go away.”²²³ The current possessor understandably (though possibly wrongly) resisted, litigation ensued, and four years later the parties reached a settlement similar to the original demand, only eroded by legal fees.²²⁴ In the *Femme en Blanc* negotiation, the parties could have reached a settlement sooner if they had accounted for the financial and non-financial value of the painting. And earlier settlement would have given them more value.

f. Unbundled Attributes

Many of the drawbacks of the other methods can be avoided by using the last method, which is sharing value by unbundling attributes of the seemingly indivisible artwork. The key to unbundling the value of disputed pieces is understanding what comprises their value. The economic value of a piece of art is defined by its aesthetic characteristics, because supply and demand

remain on public display.” *Id.* at 250.

²²¹ Mann, *supra* note 167, at 204–05.

²²² E. Randol Schonberg represented the plaintiffs, Donald S. Burris, *Reflections on Litigating Holocaust Stolen Art Claims*, 38 VAND. J. TRANSNAT’L L. 1041, 1047 (2005), and Mr. Schonberg has charged others fees above fifty percent, *see* Crow, *supra* note 9 (providing dollar amounts for paintings recovered and legal fees charged).

²²³ Kaye, *supra* note 72, at 267.

²²⁴ Mann, *supra* note 167, at 204. This settlement approach may be especially vulnerable to strategic behavior on the part of defendants, who may see even valid claims as nuisance suits, since they are essentially presented with a demand for money. Moreover, even if such settlement demands succeed at the outset, to some they smell of opportunism. The heirs who bring these claims may be accused of blackmail or of seeking financial gain from their relatives’ loss. *See* Neuborne, *supra* note 115, at 827–28 (including these two dangers in a list of issues raised by Holocaust-era litigation).

patterns for art are “directly connected” to artistic values.²²⁵ The “aesthetic component of art is *decisive* on its economic comprehension.”²²⁶ Accordingly, exploring what makes up the aesthetic value of a piece of art can help us understand its economic value. And, because the aesthetic value of a single piece of art is comprised of multiple different aesthetic concepts, understanding aesthetics can also help us unbundle that economic value.

Early philosophers considered aesthetic “value” to be objective.²²⁷ Aesthetic value was considered a real property of a thing, rather than a “transactional product that essentially depended on the subjective experience of the beholder.”²²⁸ This view prevailed for at least two millennia, but from about 1500 onward, the objective view gradually gave way to a more subjective approach to aesthetics.²²⁹ The view that aesthetic value is

²²⁵ See Michael Hutter & Richard Shusterman, *Value and the Valuation of Art in Economic and Aesthetic Theory*, in HANDBOOK OF THE ECONOMICS OF ART AND CULTURE 200 (Victor A. Ginsburgh & David Throsby eds., 2008). For example, art that requires significant technical skills to produce will be valued as such aesthetically, *infra* note 239, but will also be scarce and hence valuable in the market.

²²⁶ Mark A. Reutter, *Artists, Galleries and the Market: Historical, Economic and Legal Aspects of the Artist-Dealer Relationship*, 8 VILL. SPORTS & ENT. L.J. 99, 113 (2001).

²²⁷ Both Plato and Aristotle saw aesthetic properties of value like beauty or utility as “objectively inhering” in objects. See Hutter & Shusterman, *supra* note 225, at 172–74. This agreement came despite the contrast between Platonic and Aristotelian views of the societal merits of the arts. See *id.* (“If art’s most obvious, general, and traditionally affirmed values can be summed up under the categories of pleasure and use, Plato recognized the pleasures but deemed them base and corruptively dangerous, just as he argued that art had negative utility in the cognitive, psychological, ethical, and socio-political spheres, while Aristotle defended the legitimacy of art’s pleasures and their positive value.”).

²²⁸ *Id.* at 174.

²²⁹ The transition lasted more than two hundred years, from Locke to Wittgenstein. For a narrative of the transition from objective to subjective views of aesthetics, see generally *id.* at 174–91. Late-seventeenth-century philosophers like Locke and Shaftsbury still maintained a “realist” theory of beauty but became more nuanced about how that beauty was perceived. See *id.* 174–75 (describing the conflict between Shaftsbury’s Platonic, “realist” theory of beauty and his Lockean convictions about cognition that led him to articulate the idea of a “special faculty of taste”—which Shaftsbury thought was a function of one’s social class). Hume (1711–1776) regarded the judgment of taste and beauty in art as “clearly subjective” but still sought to determine an objective standard for how one should exercise that subjectivity—i.e., what made someone a good art critic. *Id.* at 176. Kant (1724–1804) held that aesthetic judgments “are essentially subjective” and instead focused on the proper attitude required to make those judgments, behavior which according to him, remained governed by an “objective principle” of “universal assent.” *Id.* at 181. But by the latter part of the nineteenth century, many leading philosophers had adopted an almost purely subjective, utility-based view of the value of art. Hegel (1770–1831) found art’s “highest value in its promotion of the spiritual truth” of ideas, not in “the mere experience of beauty.” *Id.* 185–86. Schopenhauer found that “[a]rt’s supreme value is in revealing the human Will.” *Id.* 186. And Nietzsche (1844–1900) argued that the “power of art and beauty” derives “from ‘the excitement of the will.’” *Id.* The work of Wittgenstein (1889–1951) marked the completion of the move to pure subjectivity: he “introduced even more particularity and variability into the evaluation of artworks,” arguing that “the concepts of aesthetics, such as art and beauty, were especially vague and ambiguous.” *Id.* 191.

subjective is now firmly preeminent, and has important ramifications for the valuation of individual pieces. At best, any collective assessment of an artwork's value is based on consensus of many different observers, rather than on any objective standard.²³⁰ But, however subjective valuation might be, there is only a limited number of different *kinds* of value.²³¹ Though different people might assign different values to the same piece, they evaluate it by referring to a limited number of value concepts.

A recent survey of philosophical literature identified ten different types of value an artwork can embody. A piece's value can be in its moral or religious vision.²³² It can be in the value of its expressiveness.²³³ It can be in its communicative power.²³⁴ Art is often prized for its social and political value.²³⁵ Its cognitive value can be important.²³⁶ It can provide experiential

Wittgenstein "argued that our aesthetic evaluations were of significantly different kinds that could not be reduced to a single form," so that the primary significance of our aesthetic evaluations is their embeddedness in "shared ways of life"—in other words, in the fact that our evaluations are what give evaluative terms like "beauty" their meaning. *Id.*

²³⁰ See Vanessa Gamponia Ellermann, *An Attorney's Guide to the Valuation of Art and Antiques*, 11 J. CONTEMP. LEGAL ISSUES 275, 275 (1997) ("True artistic value (the value from an aesthetic or art-historical perspective) . . . is determined by an art-world consensus. Although artistic and fair market value seldom vary greatly, they seldom agree entirely because both the art world and the market have access to imperfect information, and neither are immune to fads and trends."). In the absence of "an experiencing subject," artworks are "dead and meaningless." *Id.* And that value is not intrinsic to the artwork, but rather is a function of its use. See RICHARD SHUSTERMAN, PRAGMATIST AESTHETICS: LIVING BEAUTY, RETHINKING ART 47 (1970) ("Although the intrinsic ends of art are sometimes identified with its material end products . . . , these products have no artistic value divorced from their (actual and potential) use-value in aesthetic experience.").

²³¹ Hutter & Shusterman, *supra* note 225, at 197.

²³² *Id.* Art's "power to edify and spiritually uplift" can form part of its value, and even if its moral vision is not fully acceptable to the appraiser, it can be esteemed for its "reasonable, mature and coherent" content. *Id.*

²³³ *Id.* "Advocates of expression theories of art, such as Croce (1970) and Collingwood (1958), argue that the artist begins with an unclear feeling or sense of what she wishes to express, and it is only through art that the expression acquires clarity and distinction," and it is as "a superb matrix for such expression" that art is valued. *Id.*; cf. ROBERT STECKER, ARTWORKS: DEFINITION, MEANING, VALUE 293 (1997) (stating that literature is "better placed than . . . any other art form to articulate the intentional content of emotions" and that this emotion-centered value is crucial to the individuation of literature).

²³⁴ Hutter & Shusterman, *supra* note 225, at 197 ("[S]haring of feelings and ideas between artists and their public is part of artistic value."). See also *id.* at 185 (quoting Hegel's view that art's "highest task . . . is revealing to consciousness and bringing to utterance the Divine Nature, the deepest interests of humanity, and the most comprehensive truths of the mind. It is in works of art that nations have deposited the profoundest intuitions and ideas of their hearts").

²³⁵ *Id.* at 198 (postulating that art "provides an attractive repository of ideas and ideals that build social unity and stability" but also, "[t]hrough its imaginative dimension, . . . [it] inspire[s] new visions of social and political order").

²³⁶ *Id.* ("[A]rt has undeniable value in effectively communicating a wide variety of truths

value.²³⁷ And, of course, art provides aesthetic value.²³⁸ Some people might appreciate a piece's technical value.²³⁹ Others might care about its historical value.²⁴⁰ Finally, some works have "artistic cult value."²⁴¹ Authors have also noted pieces' ability to signal their owners' position or superior taste as another form of value.²⁴² The value an individual places on a particular piece depends both on which of these forms of value he prioritizes, and on how well the piece measures up to that form of value. Furthermore, multiple forms of value can coexist in the same piece of art. The more varieties of economic value that are present in a single work, the more that piece's economic value increases.²⁴³ Because aesthetic value both defines economic value and is

Because emotion has a strong bodily dimension, art's emotional power makes the truths it expresses more powerful and convincing . . ."). Cf. STECKER, *supra* note 233, at 280–93 (discussing the cognitive value of literature, and concluding that literature can be especially powerful at "presenting conceptions to the imagination"—even familiar ideas like lust, reason or the law).

²³⁷ Hutter & Shusterman, *supra* note 225, at 198. The experiential value of a piece of art includes its entertainment value—"the entertaining pleasure and distraction it provides as a pastime"—but also includes "experiential rewards that *are not* primarily pleasurable;" avant-garde works, for instance, can produce shock or outrage that "we recognize as valuable without their being pleasant or enjoyable." *Id.* (emphasis added).

²³⁸ *Id.* at 198–99 (stating that the "formal or design values embodied in art," such as "unity, harmony, complexity, balance, intensity [and] dramatic tension" are distinguished as "distinctively *aesthetic* values in contrast to artistic values"). Cf. STECKER, *supra* note 233, at 270–71 (contrasting aesthetic and artistic value in literature).

²³⁹ See Hutter & Shusterman, *supra* note 225, at 199 (describing "art-technical" value as value relating to "the skill, technique or technical innovation displayed by an artwork").

²⁴⁰ *Id.* at 199. This may include its role in explaining a particular school or tradition: "Though some viewers find Picasso's *Demoiselles d'Avignon* a very unattractive painting, its artistic value in terms of art-historical value (as the harbinger of cubism) cannot be denied." *Id.*

²⁴¹ *Id.* (affirming that "through a history of appreciation and dissemination, a particular artwork [like the *Mona Lisa*] becomes identified as a hallowed locus of artistic genius and a paradigm of self-representation," the "strength of this aura" gives value to reproductions of the original, and the reproductions in turn reinforce the original's cult status). See also *id.* at 193 (citing philosopher Pierre Bourdieu's opinion that "[a]rtworks that have been admired for centuries become established as icons of culture and genius whose worth cannot easily be contested").

²⁴² Reutter, *supra* note 226, at 119 ("Aside from the pure investor and the true collector, there is also a class of buyers who, in addition to purchasing art for its aesthetic or investment value, want to profit from art as a status symbol. These buyers also like to derive a personal and social plus-value from their investment in art. They believe that possessing art may make them more interesting and enhance their personal prestige.").

²⁴³ Hutter & Shusterman, *supra* note 225, at 200. This relationship is so direct that one author has gone so far as to say that in some parts of the art world "it has become virtually impossible to separate aesthetic from economic concerns." See Michael J. Clark, *The Perfect Fake: Creativity, Forgery, Art and the Law*, 15 DEPAUL-LCA J. ART & ENT. L. 1, 11 (2004) (discussing the contemporary art market). Clark contends that the "[c]urrent-day obsession with the sale value of a particular artwork evinces this intermingling of aesthetic and monetary criteria of judgment, almost certainly to the detriment of our relation with artworks

itself composed of divisible types of value, aesthetic value is the basis for sharing the economic value of a seemingly indivisible piece between several parties. This realization can provide a powerful way to encourage settlement or other shared-value approaches in Holocaust-era art disputes.

For instance, if the current possessor is a museum and the claimant is a Holocaust survivor or heir, we could imagine several shared-use arrangements based on distributing different types of value to both parties. The “communicative power” of art describes the message it sends from the artist to the public, so communicative value is only realized through public display.²⁴⁴ In one scheme, the museum could keep the painting for display, in order to retain its communicative power. But, if the claimant especially prizes the piece’s historical value as a reminder of the Holocaust and of his ancestors, the museum would agree as part of the settlement to include a plaque describing the painting’s history or discussing World War II art theft. In a second settlement scheme, where the claimant valued the painting’s signaling value but the museum wanted to share its expressiveness with others, it could be transferred to him but then kept at the museum on permanent or extended loan, with the museum recognizing the loan next to the piece (“loan from the collection of . . .”), by holding a special exhibit in the claimant’s honor, or, in the case of an especially valuable piece, by naming a wing in his honor. In a third possibility, where the claimant placed an especially high premium on the painting’s cognitive value (perhaps it reminds him of his ancestral home or of lost relatives), he could recover the painting, but the museum could retain its artistic cult value by keeping the rights to royalties from its reproductions.

“Unbundling” approaches are very flexible and can share value in a number of ways. Unfortunately, of the few Holocaust-era art claims that have

themselves,” to such an extent that “[w]orks of art appear on the front pages of major newspapers not as a consequence of their aesthetic virtues . . . but only when their sale value rockets skyward.” *Id.*; see also *supra* note 107 and accompanying text (describing recent trends in the art market). An editorial in a leading art magazine complained that “as nonchalant about art and money as we have become, we still try to make that separation [between aesthetics and economics]. We still assume that a price tag is one thing and a critical evaluation is another thing entirely. They are not.” See Olav Velthuis, *Symbolic Meanings of Prices: Constructing the Value of Contemporary Art in Amsterdam and New York Galleries*, 32 *THEORY & SOC’Y* 181, 207 (2003) (quoting journalist Carter Ratcliff). However, the strength of the connection between aesthetic value and price has been debated by others. See, e.g., *id.* at 207–08 (“By listening to the way art dealers talk when they deal with prices and by observing what they do when they market art, I found that prices tell rich stories about the caring role dealers want to enact, about the identity of collectors, about the status of artists, and the artistic value of art.”); Holger Bonus & Dieter Ronte, *Credibility and Economic Value in the Visual Arts*, 21 *J. CULTURAL ECON.* 103, 104 (1997) (attributing an artwork’s economic value more to its “credibility” with the public than to its aesthetic properties).

²⁴⁴ *Supra* note 234.

settled in the United States, unbundling has undoubtedly been the least popular method. The only example of this type of settlement is a dispute over the ownership of a German Renaissance painting, *Madonna and Child in a Landscape* by Lucas Cranach the Elder, settled in 2000 by the North Carolina Art Museum.²⁴⁵ Instead of litigating, “the museum returned the painting to the heirs . . . who then sold the painting to the museum at well under market price, provided the museum initiate an educational program about the painting.”²⁴⁶ That this settlement was apparently quite amicable makes the lack of additional examples even more surprising. Indeed, the claim was resolved quickly, and the painting was able to stay on view for the public to continue to enjoy its expressiveness, its aesthetic value, and its communicative power. But the rightful owners were compensated for their loss and will now be able to enjoy the piece’s historic value by sharing their story with future visitors to the North Carolina Art Museum.²⁴⁷ Recognizing that the value of the painting was more than just financial helped both parties reach a value-maximizing solution while incurring minimal transaction costs. But this settlement is the only known time that unbundling has truly taken place. Given the benefits of shared-use settlements, this low frequency is more likely attributable, at least in most cases, to parties’ ignorance of the multiple facets of value presented by a single piece of art. If parties consider the entire value of an artwork to be its estimated auction price, they will most likely resort to one of the other options. But if they can be made to understand that art can be valuable in other ways—like in its storytelling ability in the North Carolina case—parties will have more bargaining points and may be able to reach a better settlement.

For most parties, sharing value by sharing the aesthetic qualities of a painting is likely to be the most efficient and just way to settle Holocaust-era stolen art disputes. This method has been essentially unused and could greatly increase parties’ likelihood of settling, and hence increase the value that deserving claimants can recover. But some might prefer the other methods discussed in this section. Subtraction, rotating possession, sale and division, and compensation techniques have all been employed successfully in the past for stolen art claims. Increased use of any of these methods may provide many Holocaust survivors or their heirs with more efficient, cost-

²⁴⁵ Emily Yellin, *North Carolina Art Museum Says It Will Return Painting Tied to Nazi Theft*, N.Y. TIMES, Feb. 6, 2000, § 1, at 22.

²⁴⁶ Weiss, *supra* note 102, at 869.

²⁴⁷ Compared to other Holocaust-era claims, restitution was very quick. Less than a year elapsed between the time the museum was notified that the painting might have been stolen and the announcement of the settlement. Yellin, *supra* note 245.

effective and timely ways to resolve their claims and regain what is rightly theirs.

VII. CONCLUSION

Because of technological advances, market changes, and a renewed interest in restorative justice for Holocaust survivors, the past decade has seen a sharp rise in art restitution claims relating to the Nazis' theft of art during World War II. With the rise of those claims has come an increased awareness of the practical difficulties facing survivors as they try to recover their artwork. Statutes of limitations, conflicting laws, and evidentiary challenges have exposed the need for more streamlining in the dispute resolution process. Accordingly, many authors have proposed international solutions to these claims. However, international consensus has been slow in coming, and, given the eventual passing of all direct survivors of the Holocaust, resolving their claims in a timely manner is essential. Therefore, survivors who want speedy resolution must resort to the only means currently available, which is national litigation.

But litigating in the United States presents claimants with a serious roadblock. The cost of getting claims through the courts is so high that it either keeps them from being brought altogether or, if they are brought successfully, may force claimants to sell their newly-acquired work to cover attorney fees. Litigation costs can prevent claimants from ever enjoying the full value of what was once rightfully theirs.

Furthermore, negotiated settlements, which are the primary tool parties use to reduce litigation costs, are underutilized because parties view the assets as indivisible. Resolving this impasse has two components. First, parties must realize that the value of a piece of art is far more than its sticker price at auction. Both the current possessor and the claimant, in many cases, value the piece differently from each other—what may be important to one is less important to the other. Second, to the extent that we can encourage parties to account for the multifaceted value of a piece of art in their dispute resolution solutions, those solutions will achieve both more efficient and more equitable results, and hence be more attractive to potential litigants. And if we can craft approaches that avoid the courtroom, we can return the value that would otherwise be lost to litigation costs back to the parties.

This paper proposes five cost-reducing settlement approaches, all of which will often be superior to litigating from an efficiency standpoint. The best solutions are the ones that recognize an inherently divisible value proposition in a piece of stolen art. Furthermore, these solutions do not rely on the enactment of legislation or the ratification of treaties. They are available right now. The purpose of this paper, then, has not been primarily to

advocate for one approach over the other, but instead to show that there is much unexploited value in the current system, and that it is ready to be tapped.