
THE HOLOCAUST, MUSEUM ETHICS AND LEGALISM

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*I had dreamed, we had always dreamed, of something like this,
in the nights of Auschwitz; of speaking and not being listened to,
of finding liberty and remaining alone.*

PRIMO LEVI, THE TRUCE 47 (1966).

Abstract:

The “Holocaust art movement” has led to significant and controversial restitutions from museums. This article focuses on two emotionally driven claims to recover a suitcase stolen from a murdered man and watercolors a woman was forced to paint for Josef Mengele to document his pseudo-scientific theories of racial inferiority and his cruel medical experiments. Both claims are asserted against the Auschwitz-Birkenau State Museum in Poland, which has refused to return the objects. These claims provide insightful case studies for examining the emotional and ethical aspects of such disputes. Drawing from a number of disciplines, this article demonstrates the inadequacy of the dominant frameworks influencing the cultural property field, which are grounded in property law, morality and utilitarianism, for evaluating the Holocaust-related claims. This article also demonstrates that the International Council of Museums (“ICOM”)

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Code of Ethics provides a useful construct for evaluating the claims. ICOM Principle 6.7, which calls on museums “to promote well-being,” should be the guiding light for museums deciding whether to return Holocaust-related objects. The article concludes that the Auschwitz-Birkenau State Museum’s refusal to return the objects is faulty ethically, counter to its mission and reflective of the inadequacy of Poland’s approach to post-war restitution.

TABLE OF CONTENTS

I. INTRODUCTION.....	2
II. THE INADEQUACY OF PROPERTY LAW, MORALITY AND UTILITARIANISM.....	6
III. THE PURPOSE OF MUSEUMS	13
IV. THE AUSCHWITZ-BIRKENAU STATE MUSEUM.....	15
V. THE CLAIMS	21
A. Dina Gottliebowa Babbitt and the Watercolors.....	21
B. Michel Levi-Leleu and the Suitcase	23
VI. THE MUSEUM’S RESPONSES	25
A. Context and Access	29
B. Preservation	32
C. Authenticity	33
VII. CONCLUSION.....	39

I. INTRODUCTION

When one thinks of a dispute concerning a museum and the Holocaust, Nazi looting is what typically comes to mind.¹ There has been a flood of recent litigation concerning Nazi-looted art.² Additionally the value of the

¹ For widely accepted histories of Nazi looting and the impact on the international art market ever since, see the following sources: MICHAEL J. KURTZ, *AMERICA AND THE RETURN OF NAZI CONTRABAND: THE RECOVERY OF EUROPE’S CULTURAL TREASURES* 15 (2006); NORMAN PALMER, *MUSEUMS AND THE HOLOCAUST: LAW, PRINCIPLES AND PRACTICE* 7–8 (2000); JONATHAN PETROPOULOS, *THE FAUSTIAN BARGAIN: THE ART WORLD IN NAZI GERMANY* (2000); PETER HARCLERODE & BRENDAN PITTAWAY, *THE LOST MASTERS: WORLD WAR II AND THE LOOTING OF EUROPE’S TREASUREHOUSES* (1999); LYNN H. NICHOLAS, *THE RAPE OF EUROPA: THE FATE OF EUROPE’S TREASURES IN THE THIRD REICH AND THE SECOND WORLD WAR* (1994); JONATHAN PETROPOULOS, *ART AS POLITICS IN THE THIRD REICH* 54 (1996); HECTOR FELICIANO, *THE LOST MUSEUM: THE NAZI CONSPIRACY TO STEAL THE WORLD’S GREATEST WORKS OF ART* (2d ed. 1997).

² For a sampling of post-2000 cases, see *Austria v. Altmann*, 541 U.S. 677 (2004); *Orkin v. Taylor*, 487 F.3d 734 (9th Cir.), *cert. denied*, 128 S. Ct. 491 (2007); *Dunbar v. Seger-Thomschitz*, No. 2:08-cv-00711-ILRL-ALC (E.D. La. filed Jan. 22, 2008); *Museum of Fine Arts, Boston v. Seger-Thomschitz*, No. 1:08-cv-10097-RWZ (D. Mass. filed Jan. 22, 2008); *Museum of Modern Art v. Schoeps*, No. 1:07-cv-11074-JSR (S.D.N.Y. filed Dec. 7, 2007); *Jorisch v. Lauder*, No. 1:07-cv-09428-JFK (S.D.N.Y. filed Oct. 22, 2007); *von Saher v. Norton Simon Museum of Art at Pasadena*, No. CV 07-2866-JFW (JTLx),

art comes to mind for many. One Klimt painting restituted in 2006 was worth \$135 million—close to the highest value ever paid for any work of art.³ One expert estimated that \$700 million of art was restituted between 2001–2006.⁴ Regardless of these eye-popping figures, litigation simply is too expensive for most claimants to pursue because most art (or other culturally significant objects) is not so extremely valuable.⁵ Moreover, the emotional toll endured by a survivor or heirs litigating a claim should not be underestimated.⁶ As stated by one Holocaust survivor speaking about litigation against a Swiss bank:

I respect the fact that the world is making a statement, but in my heart, this demeans the whole Holocaust. It takes attention away from the Germans for their cruelty and for the murders they committed and focuses it on the Swiss banks and on the Swiss gold. For me, this is very painful.⁷

2007 WL 4302726 (C.D. Cal. Oct. 18, 2007); *Malewicz v. City of Amsterdam*, 517 F. Supp. 2d 322 (D.D.C. 2007); *Detroit Inst. of Arts v. Ullin*, No. 06-10333, 2007 WL 1016996 (E.D. Mich. Mar. 31, 2007); *Toledo Museum of Art v. Ullin*, 477 F. Supp. 2d 802 (N.D. Ohio 2006); *Bakalar v. Vavra*, No. 05 Civ. 3037 (WHP), 2006 U.S. Dist. LEXIS 55438 (S.D.N.Y. Aug. 10, 2006); *Max Stern Estate v. Bissonnette*, No. 06-211 (ML) (D.R.I. filed May 8, 2006); *United States v. One Oil Painting Entitled "Femme en Blanc" by Pablo Picasso*, 362 F. Supp. 2d 1175 (C.D. Cal. 2005); *Alsdorf v. Bennigson*, No. 04C5953, 2004 WL 2806301 (N.D. Ill. Dec. 3, 2004); *United States v. Portrait of Wally*, 105 F. Supp. 2d 288 (S.D.N.Y. 2000); *Rosenberg v. Seattle Art Museum*, 42 F. Supp. 2d 1029 (W.D. Wash. 1999); *Schoeps v. Andrew Lloyd Webber Art Found.*, No. 116768/06, 2007 N.Y. Misc. LEXIS 7681 (N.Y. Sup. Ct. Nov. 19, 2007); *Peters v. Sotheby's Inc.*, 34 A.D.3d 29 (N.Y. App. Div. 2006); *Bennigson v. Alsdorf*, No. B168200, 2004 WL 803616 (Cal. Ct. App. Apr. 15, 2004) (unpublished); *Warin v. Wildenstein & Co.*, 297 A.D.2d 214 (N.Y. App. Div. 2002); *Wertheimer v. Cirker's Hayes Storage Warehouse, Inc.*, No. 105575/00, 2001 WL 1657237 (N.Y. Sup. Ct. Sept. 28, 2001). See also *Patty Gerstenblith & Lucille Roussin, Art and International Cultural Property*, 42 INT'L LAW 729 (2008) (2007 cases and settlements); *Stephen W. Clark, Selected World War II Restitution Cases*, SL077 A.L.I.-A.B.A. 541 (2006) (earlier cases and settlements).

³ Carol Vogel, *Lauder Pays \$135 Million, a Record, for a Klimt Portrait*, N.Y. TIMES, June 19, 2006, at E1 (describing sale of Klimt restituted to Maria Altmann from the Belvedere Gallery in Austria).

⁴ Anna Schumann, *Tech Museum Brings Study of Stolen Art and Law Together*, DAILY TOREADOR, Nov. 20, 2006, available at <http://media.www.dailytoreador.com/media/storage/paper870/news/2006/11/20/News/Tech-Museum.Brings.Study.Of.Stolen.Art.And.Law.Together-2469101.shtml?sourcedomain=www.dailytoreador.com&MIHost=media.collegepublisher.com> (quoting Marc Masurovsky, co-founder of the Holocaust Art Restitution Project).

⁵ Thomas Kline, a successful attorney in the field, reportedly stated: "I am almost at the point where I would say that if the art is worth less than \$3 million, give up." Marilyn Henry, *Holocaust Victims' Heirs Reach Compromise on Stolen Art*, JERUSALEM POST, Aug. 16, 1998, at 3.

⁶ E.g., Monica Dugot, *International Law Weekend Panel on Litigating the Holocaust in U.S. Courts*, 12 ILSA J. INT'L & COMP. L. 389, 390 (2006) ("The emotional and financial costs associated with litigation are high.").

⁷ Alicia Appleman-Jurman & Bernard Caron, *The Claimants Speak: Insurance Claims of Holocaust Victims and Their Heirs*, 20 WHITTIER L. REV. 61, 62 (1998).

* * * * *

I will not apply for any pieces of gold that ever belonged to my family. I cannot do it because I have to live with myself.⁸

* * * * *

We do not want our parents' teeth. We do not want anything connected with the shameful murder of our families. We simply do not want them. What we want is justice.⁹

For some survivors or their heirs, however, the financial and emotional costs of litigation pale in comparison to their need to reclaim what belonged to them or their family—regardless of the property's economic value.¹⁰ Some promised their parents that they would pursue recovery such that “it becomes almost a sacred duty.”¹¹

[B]eliev[ing] they owe it to the memory of their family to pursue a measure of justice, and that the recovery of property, particularly that which demonstrates the education and taste of their forebears, allows present and future generations to connect to an ancestral world that was disrupted and destroyed by Hitler.¹²

Psychologically, reclaiming sentimental objects owned before the war provides a connection back to the peaceful pre-war past and a sense of “rootedness.”¹³ Shortly before her death, French philosopher Simone Weil described “rootedness” during the war as:

To be rooted is perhaps the most important and least recognized need of the human soul A human being has roots by virtue of his real, active, and natural participation in the life of a community which preserves in living shape certain particular treasures of the past and certain particular expectations for the future.¹⁴

⁸ *Id.* at 63.

⁹ *Id.* at 64.

¹⁰ “The claimant’s initial decision to make a claim—whether to pursue restitution of a material object—is usually based on deep emotion. Many feel reluctant because they can never be compensated for the unspeakable suffering, the loss of home and the lives of family members who perished.” Constance Lowenthal, *Recovering Looted Jewish Property*, in RESOLUTION OF CULTURAL PROPERTY DISPUTES 139, 139 (International Bureau of the Permanent Court of Justice ed., 2004).

¹¹ *Id.* at 139–40.

¹² *Id.* at 139.

¹³ Telephone interview with Eva Fogelman, social psychologist and psycho-therapist specializing in treatment of Holocaust survivors, in New York, N.Y. (Feb. 21, 2008) (on file with author).

¹⁴ SIMONE WEIL, THE NEED FOR ROOTS: PRELUDE TO A DECLARATION OF DUTIES TOWARD MANKIND 43 (Arthur Wills trans. 1995). Weil also stated in regard to private property that it is “a vital need for the soul,” and declared that when the law does not protect the feeling of appropriation man develops in regard to private property, “men are continually exposed to extremely painful spiritual wrenches.” *Id.* at 34–35. See also Carla Lessing, *The Vanished Communal Heritage of Holocaust Survivors*, 76 J. OF JEWISH COMMUNAL SERVICE 1 (1999), available at

Many writers maintain that moral considerations should trump legal defenses in displaced art cases.¹⁵ When speaking to the delegates representing forty-four nations and other organizations at the 1998 Washington Conference concerning Nazi-looted art, esteemed diplomat and Holocaust scholar, Stuart Eizenstat, stated:

We can begin by recognizing this as a moral matter—we should not apply the ordinary rules designed for commercial transactions of societies that operate under the rule of law to people whose property and very lives were taken by one of the most profoundly illegal regimes the world has ever known.¹⁶

Defining the parameters of the moral considerations is not as easy as so many would presume. The Principles promulgated at the 1998 Washington Conference,¹⁷ as reinforced in 2000 in Vilnius,¹⁸ call for nations to reach “just and fair” solutions, but lack instructions for determining what is “just and fair” in difficult cases.¹⁹

This article focuses on emotionally driven claims to low-cost objects asserted against the Auschwitz-Birkenau State Museum in Poland (also referred to as “the Museum”) as case studies to examine the emotional and

http://www.adl.org/hidden/separation/hc_9-1_vanished_heritage.asp (describing how the loss of cultural heritage constituted a “complete break with their pre-Holocaust lives and thus lost the basic sense of security, belonging and identity their communities had provided”).

¹⁵ E.g., Daniel Range, Comment, *Deaccessioning and Its Costs in the Holocaust Art Context: the United States and Great Britain*, 39 TEX. INT’L L.J. 655, 665–66 (2004) (“[T]o truly assist claimants in recovering their art objects, the discussion needs to be taken out of an exclusively legal context and elevated to a moral and political level.” (quoting Monica Dugot, *The Holocaust Claims Processing Office’s Handling of Art Claims*, 25 FORDHAM INT’L L.J. 133, 137 (2001))); accord Julia Parker, Note, *World War II & Heirless Art: Unleashing the Final Prisoners of War*, 13 CARDOZO J. INT’L & COMP. L. 661, 694–95 (2005); Emily J. Henson, Note, *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 (2002).

¹⁶ Stuart E. Eizenstat, “In Support of Principles on Nazi-Confiscated Art,” Presentation at the Washington Conference of Holocaust-Era Assets, Dec. 3, 1998, available at http://www.state.gov/www/policy_remarks/1998/981203_eizenstat_heac_art.html (last visited Feb. 1, 2008).

¹⁷ U.S. Dep’t of State, Washington Conference Principles on Nazi-Confiscated Art (Dec. 3, 1998), <http://www.state.gov/p/eur/rt/hlcst/23231.htm> [hereinafter Washington Principles].

¹⁸ Nations met again in 2000 to build upon the Washington Principles in Vilnius, Lithuania, under the auspices of the Parliamentary Assembly of the Council of Europe. http://www.lootedartcommission.com/lootedart_councilofeuropa.htm (last visited Feb. 1, 2008). The Vilnius Forum generated a declaration expressing continued support of the Washington Principles without significantly refining them or expanding upon them. <http://www.lootedartcommission.com/vilniusforum> (last visited Feb. 1, 2008).

¹⁹ Washington Principles ¶ 8 (“If the pre-War owners of art that is found to have been confiscated by the Nazis and not subsequently restituted, or their heirs, can be identified, steps should be taken expeditiously to achieve a just and fair solution, recognizing this may vary according to the facts and circumstances surrounding a specific case.”).

ethical aspects of such unique disputes. Claims to low-cost objects have not received the amount of academic or media attention as have claims to multi-million-dollar artworks.²⁰ Understanding the low-dollar-value claims, perhaps even more so than listening to testimonials by survivors who want to claim valuable assets, can improve understanding about why the Holocaust art movement should not be conceived primarily in terms of property rights.²¹

Drawing from a number of disciplines, Section II demonstrates the inadequacy of property law, moral and utilitarian approaches to the claims and argues for framing the discussion according to the International Council of Museums (“ICOM”) Code of Ethics (“Code”). Section III defines the purposes of museums generally. Section IV examines the purpose and evolution of the Auschwitz-Birkenau State Museum specifically. Section V analyzes the claims. Section VI analyzes the Museum’s refusal to return the objects in question. Section VII concludes that the Museum’s position is ethically faulty, counter to its mission and reflective of Poland’s inadequate approach to post-war restitution.

II. THE INADEQUACY OF PROPERTY LAW, MORALITY AND UTILITARIANISM

Since the Washington Conference, the well-intended discussion of what is “just and fair” has centered around property law, morality and utilitarianism, but none of those frameworks has provided a solution to the problem.²² First, property law alone—even if modified—cannot provide an adequate framework for analyzing a claim to a low-cost object lost during the Holocaust because its only true value is emotional.²³ As stated by

²⁰ *E.g.*, Eli M. Rosenbaum, *Art Wars: International Art Disputes Presentation*, 31 N.Y.U. J. INT’L L. & POL. 139, 141 (1998) (expressing frustration that press and academia focus primarily on property rights instead of human cost, especially all that “glitters” instead of “the most important assets that were taken”).

²¹ See Michael J. Kurtz, *Looted Art: Resolving a Dilemma: The Inheritance of Jewish Property*, 20 CARDOZO L. REV. 625, 654 (1998) (arguing that legal framework is inadequate); Robert Schwartz, *The Limits of the Law: A Call for a New Attitude Toward Artwork Stolen During World War II*, 32 COLUM. J. L. & SOC. PROBS. 1, 10–11 (1998) (same). *Cf.* Price v. United States, 707 F. Supp. 1465, 1473 (S.D. Tex. 1989) (awarding Hitler’s watercolors to heirs of his personal photographer), *rev’d by* 69 F.3d 46, 51 n.8 (5th Cir. 1995) (reversing because the watercolors could be used as icons to revive Nazism).

²² See sources cited *supra* notes 15, 21.

²³ *Cf.* DAVID FRASER, LAW AFTER AUSCHWITZ: TOWARDS A JURISPRUDENCE OF THE HOLOCAUST 8 (2005) (stating that the natural law and positivism debates about the Holocaust “hardly stand up to practical scrutiny” or “advance the real issues” and that “law may be incapable of judging the Holocaust”). For key works bearing on the legal positivism and natural law debates, see RONALD DWORKIN, LAW’S EMPIRE 299 (1986); Richard Posner, 1997 *Oliver Wendell Holmes Lecture: The*

Daniel Shapiro, “repatriation claims ultimately come down to emotions and beliefs—not things.”²⁴ He also pointed out: “Repatriation claims are like festering wrongs in need of remedies; they are personal affronts . . . that survive from generation to generation.”²⁵

The injury is akin to the emotional distress suffered by the residents of Skokie, Illinois, which also was irremediable legally because of First Amendment jurisprudence.²⁶ When law would not prevent neo-Nazis from marching in a Jewish neighborhood heavily populated with Holocaust survivors, it allowed the marchers to reenact the abuse many residents suffered and to inflict new emotional wounds.²⁷ As stated by Catherine MacKinnon in comparing the Skokie case with pornography jurisprudence and articulating the law’s message to the suffering members of society denied legal remedies: “Accept the freedom of your abusers. This best protects you in the end. Let it happen. You are not really being hurt.”²⁸ There is a strong parallel to Professor MacKinnon’s analysis when the law via statutes of limitation, statutes of repose or the doctrine of laches denies relief to Holocaust survivors or their heirs seeking to reclaim property being displayed by museums or held by collectors without consent. The law reinforces the victimization and thefts suffered at the hands of the Nazis.²⁹ When de-

Problematics of Moral and Legal Theory, 111 HARV. L. REV. 1637 (1998); H. L. A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958). For a history of the debate, see generally Rodger D. Citron, *The Nuremberg Trials and American Jurisprudence: The Decline of Legal Realism, the Revival of Natural Law, and the Development of the Legal Process Theory*, 2006 MICH. ST. L. REV. 385 (2006).

²⁴ Daniel Shapiro, *Repatriation: A Modest Proposal*, 31 N.Y.U. J. INT’L L. & POL. 95, 105 (1998).

²⁵ *Id.* at 100. Shapiro also describes cultural property disputes as “more akin to legal concepts in the area of personal injury law than to traditional concepts of property law.” *Id.* at 99.

²⁶ See generally *Village of Skokie v. Nat’l Socialist Party of Am.*, 366 N.E.2d 347 (Ill. App. Ct. 1977), *aff’d in part and rev’d in part* by 373 N.E.2d 21 (Ill. 1978).

²⁷ “The judges who upheld the right of Nazis to march, ignored that the march (and the symbols) reenacted the original experience of abuse.” Vera Ranki, *Holocaust History and the Law: Recent Trials Emerging Theories*, 9 CARDOZO STUD. L. & LITERATURE 15, 26 (1997).

²⁸ CATHERINE A. MACKINNON, *ONLY WORDS* 105–06 (1993).

²⁹ Legal literature a few years ago made similar points in regard to Native American mascots in sports; the literature debated, among other things, whether an action for intentional infliction of emotional distress should be used to eliminate offensive use of the mascots. See Brian R. Moushegian, *Native American Mascots’ Last Stand? Legal Difficulties in Eliminating Public University Use of Native American Mascots*, 13 VILL. SPORTS & ENT. L.J. 465 (2006); Kristine A. Brown, *Native American Team Names and Mascots: Disparaging and Insensitive or Just a Part of the Game?*, 9 SPORTS LAW. J. 115 (2002); Robert M. Jarvis, *Hi-Jinks at the Ballpark: Costumed Mascots in the Major Leagues*, 23 CARDOZO L. REV. 1635 (2002); Catherine E. Smith, *Intentional Infliction of Emotional Distress: An Old Arrow Targets the New Head of the Hate Hydra*, 80 DENV. U. L. REV. 1 (2002); Rebecca Tsosie, *Reclaiming Native Stories: An Essay on Cultural Appropriation and Cultural Rights*, 34 ARIZ. ST. L.J. 299 (2002); Aaron Goldstein, Note, *Intentional Infliction of Emotional Distress: Another Attempt at Eliminating Native American Mascots*, 3 J. GENDER RACE & JUST. 689 (2000); Kim Chandler Johnson,

mands for return of the objects are denied, new emotional wounds are inflicted.³⁰ In many cases where the present-day possessors had no knowledge that the objects were stolen, perhaps that is the correct legal answer; however, many scholars have debated the correct resolution where there are “two victims”—the original owners and subsequent *bona fide* purchasers.³¹ Nonetheless, the law does not provide a means to redress these newly inflicted wounds—and it likely never will.

Second, as in the debates about whether doctors and scientists should use the data obtained from cruel experiments Nazi doctors conducted,³² moral philosophy does not provide an adequate framework.³³ The moral compass of many individuals points in favor of using the data despite the horrendous manner in which it was collected.³⁴ Such a position trivializes both the initial torture, as well as the victims’ present-day refusal to consent to use of the data.³⁵ As so eloquently stated by one victim regarding arguments in favor of using the data, its use would be “like building on top of

Eliminating Indian Stereotypes from American Society: Causes and Legal and Societal Solutions, 20 AM. INDIAN L. REV. 65 (1996); Nell Jessup Newton, *Memory and Misrepresentation: Representing Crazy Horse*, 27 CONN. L. REV. 1003 (1995). On the other hand, other literature focuses on the intellectual property issues to discuss how tribes could benefit economically from such use. Cameron Smith, Note, *Squeezing the Juice® out of the Washington Redskins®: Intellectual Property Rights in “Scandalous” and “Disparaging” Trademarks after Harjo v. Pro-Football, Inc.*, 77 WASH. L. REV. 1295 (2002); Terence Dougherty, *Group Rights to Cultural Survival: Intellectual Property Rights in Native American Cultural Symbols*, 29 COLUM. HUM. RTS. L. REV. 355 (1998); Robert C. Denicola, *Institutional Publicity Rights: An Analysis of the Merchandising of Famous Trade Symbols*, 62 N.C. L. REV. 603 (1984).

³⁰ See cited sources *supra* notes 23–25 and accompanying text.

³¹ See, e.g., Dugot, *supra* note 6, at 390–91.

³² See generally THE NAZI DOCTORS AND THE NUREMBERG CODE: HUMAN RIGHTS IN HUMAN EXPERIMENTATION (George J. Annas & Michael A. Grodin, eds., 1992); Tessa Chelouche, *Ethics and Human Experimentation During the Holocaust: The Rise and Fall of Informed Consent*, 18 HEALTH LAW. 23 (2006); Tessa Chelouche, *Some Ethical Dilemmas Faced by Jewish Doctors During the Holocaust*, 24 MED. & L. 703 (2005); Fionnuala Ni Aolain, *Rethinking the Concept of Harm and Legal Categorization of Sexual Violence During War*, 1 THEORETICAL INQUIRIES L. 307 (2000); George J. Annas, *Mengele’s Birthmark: The Nuremberg Code in United States Courts*, 7 J. CONTEMP. HEALTH L. & POL’Y 17 (1991). For documents from the proceedings of the Nuremberg “Doctors Trial,” see *United States v. Brandt et al.*, in *Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10*, 1 (1949).

³³ Cf., e.g., Peter Mostow, “*Like Building on Top of Auschwitz*”: *On the Symbolic Meaning of Using Data from the Nazi Experiments, and on Non-Use As a Form of Memorial*, 10 J.L. & RELIGION 403, 404, 411 (1994) (“The question raised by the Nazi data cannot be answered satisfactorily by testing the strength of competing moral maxims or by weighing costs and benefits.”).

³⁴ See generally, e.g., Erwin Deutsch, *The Protection of the Person in Medical Research in Germany*, 18 MED. & L. 77 (1999). See also Paul Farmer & Nicole Gastineau Campos, *New Malaise: Bioethics and Human Rights in the Global Era*, 32 J.L. MED. & ETHICS 243 (2004).

³⁵ E.g., Mostow, *supra* note 33.

Auschwitz.”³⁶ Use of the data would destroy the symbolic meaning of refusing to use it.³⁷

Moral pronouncements are largely unhelpful in guiding museums to resolve claims because moral positions vary tremendously. For example, there was public backlash against restitution by an Austrian museum of Klimt masterworks³⁸ and restitution by a German museum of a Kirchner painting.³⁹ The backlash escalated when the newly declared owners put the paintings up for auction.⁴⁰ Many argued it was immoral to demand restitution of the paintings simply to auction them for money, while others felt that a successful claimant with clear property title should not be criticized for doing what he or she wished with the property.⁴¹ Finally, morality fails to provide a useful framework for museums analyzing restitution claims because museums are bound by professional ethics codes and fiduciary obligations to the public not to remove objects from their collections—known as deaccessioning—without a reason supported by the ethics codes, discussed in detail below.⁴²

Third, the utilitarian extra-legal frameworks dominating the cultural property field concerning where an object will do the most “good” for humanity also provides no answers because they heavily reflect the unique nature of archeology and the antiquities market.⁴³ For example, the Uni-

³⁶ *Id.* at 403.

³⁷ *Id.*

³⁸ Michael Kimmelman, *Klimts Go to Market; Museums Hold Their Breath*, N.Y. TIMES, Sept. 19, 2006, at E1; Stevenson Swanson, *It's "Our Mona Lisa": The World's Most Expensive Painting, a Klimt Portrait Once Seized by the Nazis, Goes on Display in New York*, CHI. TRIB., July 14, 2006, at 1.

³⁹ Alexander Pulte, *German Angst over Return of Kirchner Painting*, 9 IFAR J. 11, 15 (2007); Matthias Weller, *About Nazi-Confiscated Art: The Return of Ernst Ludwig Kirchner's Berliner Straßenszene—A Case Study*, KUNSTRSP 2007, Feb. 2007, at 51.

⁴⁰ See sources cited *supra* note 39.

⁴¹ See sources cited *supra* note 39. The attorney for Ms. Altmann in the Klimt dispute, E. Randol Schoenberg, had this to say concerning a large restitution to the Rothschild family from Austria, which also was criticized when the items went to auction for approximately \$90 million:

Rich Austrians hawk their property all the time, but Jews can't? . . . What do you do when you've inherited ten suits of armor and a collection of old Roman coins and you're living in a small apartment? One of the possibilities is that you call Christie's and have the biggest single collection sale that there's been, and then we can put the money in more valuable things than suits of armor. It's always a matter of putting yourself in the person's shoes. You can't understand the Rothschild's [*sic*] position if you're an Austrian who thinks they're rich, greedy Jews.

Josh Kun, *The Art of Memory*, L.A. MAG., Oct. 2006, at 1.

⁴² Patty Gerstenblith, *Acquisition and Deacquisition of Museum Collections and the Fiduciary Obligations of Museums to the Public*, 11 CARDOZO J. INT'L & COMP. L. 409 (2003) [hereinafter Gerstenblith, Acquisition].

⁴³ Key works in the field: Patty Gerstenblith, *Controlling the International Market in Antiquities: Reducing the Harm, Preserving the Past*, 8 CHI. J. INT'L L. 169 (2007) (analyzing scope of “public interest” in archeological knowledge); Roger W. Mastalir, *A Proposal for Protecting the “Cultural” and*

versal Museum Statement signed in 2003 by a consortium of the world's most prestigious "universal museums," which exhibit objects from many different cultures, encapsulates the cultural property utilitarian argument.⁴⁴ The collections of the "universal museums" are educational because seeing objects of one culture juxtaposed with objects of another culture allows museum-goers to draw comparisons and contrasts between the two.⁴⁵ The Statement responds to the reparations movement, which advocates returning many cultural objects to their source nations to cut profitability out of archeological looting, and the Statement posits that restitution requests concerning objects acquired during the colonial era are fundamentally different than those concerning recently looted object.⁴⁶ The Statement provides, in part: "We should . . . recognize that objects acquired in earlier times must be viewed in the light of different sensitivities and values, reflective of that earlier era."⁴⁷ The Statement does not instruct museums to refuse all repatriation requests by any means; it calls for a case-by-case determination in light of the benefit to humanity of "universal museums."⁴⁸

A utilitarian approach supporting retention of objects that had been stolen from Holocaust survivors because public knowledge is enhanced by the display of the objects would be inadequate because it ignores the intense suffering felt by those who were victimized by the Nazi regime under the aegis of the criminal, racist policies then in force. That suffering was tremendous and cannot be ignored. A utilitarian argument could even be made to support restitution because restitution symbolizes a public stand against genocide. Many museums have been receptive to strong claims to Nazi-looted art – returning it unconditionally without requiring a survivor to file suit in a significant number of cases – despite public backlash to the

"Property" *Aspects of Cultural Property Under International Law*, 16 FORDHAM INT'L L.J. 1033 (1993) (promoting a "best interest of the object" standard); John H. Merryman, *Two Ways of Thinking About Cultural Property*, 80 AM. J. INT'L L. 831 (1986) (seminal work dichotomizing cultural nationalism/internationalism); Paul M. Bator, *An Essay on the International Trade in Art*, 34 STAN. L. REV. 275, 306 (1982) (landmark work providing that "Art is a good ambassador."); John H. Merryman, *Cultural Property Internationalism*, 12 INT'L J. CULTURAL PROP. 11, 18–19 (2005); John H. Merryman, *The Free International Movement of Cultural Property*, 31 N.Y.U. J. INT'L L. & POL. 1 (1998); Patty Gerstenblith, *The Public Interest in the Restitution of Cultural Objects*, 16 CONN. J. INT'L L. 197 (2001); John H. Merryman, *The Nation and the Object*, 3 INT'L J. CULTURAL PROP. 61, 70 (1994). For general history about the problem of plundered antiquities and the international trade in them, see, e.g., KARL E. MEYER, *THE PLUNDERED PAST* (1973).

⁴⁴ INT'L COUNCIL OF MUSEUMS, DECLARATION ON THE IMPORTANCE AND VALUE OF UNIVERSAL MUSEUMS (2004), http://icom.museum/pdf/E_news2004/p4_2004-1.pdf [hereinafter UNIVERSAL MUSEUM DECLARATION].

⁴⁵ See sources cited *supra* note 38.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

restitution in some instances.⁴⁹ Thus, a utilitarian framework leads to no answers for how a museum should analyze a claim to an object asserted by a Holocaust survivor or his or her heirs.

Nonetheless, established criteria for evaluating claims would be useful for museums. This Article focuses on correctly determining what is “just and fair” in light of the foundational and ethical principles governing museums, the institutions most directly affected by the Washington Principles. It posits that the ICOM Code supplies a useful construct for evaluating claims but that renewed discussion is necessary to guide museums applying the relevant provisions.⁵⁰ The factor that should primarily determine whether a museum should reconstitute an object from its collection that had been taken from a Holocaust victim is the need “to promote well-being” required by ICOM Principle 6.7.⁵¹

The Code authorizes restitution to relieve the public’s suffering—regardless of the existence of a legal duty to do so—so long as the restitution is legal.⁵² Where this thesis most significantly departs from previous work concerning repatriation of cultural objects to groups or nations where no individual could assert a property right⁵³ is that it is not premised on group identity, but on highly particularized suffering felt by an individual claimant from whom the specific object in question was taken—or his or her close descendent suffering actual emotional pain as a result of the

⁴⁹ See sources cited *supra* notes 38–41.

⁵⁰ International Council of Museums, ICOM Code of Ethics for Museums, 2006, <http://icom.museum/ethics.html> (last visited Oct. 30, 2008). The Code Principles and Sub-Principles will hereinafter be referred to as “ICOM Principle X.” The American Association of Museums and Association of American Museum Directors have adopted parallel ethics codes, respectively available at <http://www.aam-us.org/museumresources/ethics/coe.cfm> and <http://www.aamd.org/about/>.

⁵¹ Cf. Susan Tiefenbrun, *The Failure of the International Laws of War and the Role of Art and Story-Telling As a Self-Help Remedy for Restorative Justice*, 12 TEX. WESLEYAN L. REV. 91, 94–95, 124 (2005) (discussing how the humanist and international humanitarian movements push for the “humanization of the laws and customs of war” through “restorative justice,” which is “concerned with meeting the victim’s needs, rather than revenge and retaliation”). See generally Christopher Kutz, *Justice in Reparations: The Cost of Memory and the Value of Talk*, 32 PHIL. & PUB. AFF. 277 (2004) (describing reparations paid to promote public healing).

⁵² Principle 2.13 provides: “The removal of an object or specimen from a museum collection must only be undertaken with a full understanding of the significance of the item, its character (whether renewable or non-renewable), legal standing, and any loss of public trust that might result from such action.”

⁵³ See generally Thomas T. Ankersen & Thomas K. Ruppert, *Defending the Polygon: The Emerging Human Right to Communal Property*, 59 OKLA. L. REV. 681 (2006) (describing group claims to communal property and maintaining that group rights to communal property should be regarded as human rights); John Moustakas, Note, *Group Rights in Cultural Property: Justifying Strict Inalienability*, 74 CORNELL L. REV. 1179 (1989) (describing claims to group property and asserting that such property should be regarded as inalienable); John H. Merryman, *Thinking About the Elgin Marbles*, 83 MICH. L. REV. 1881 (1985) (maintaining that cultural nationalism overly relies on “sentimentality”).

loss.⁵⁴ While returning an object could never relieve all of the intense suffering of a Holocaust victim,⁵⁵ restitution of certain objects would prove therapeutic and alleviate pain.⁵⁶ While the day may never come when art collecting will “do no harm” in the sense of a doctor’s Hippocratic oath,⁵⁷ the public will benefit from returning symbolically valuable objects to Holocaust victims to help heal deep-rooted loss and pain, with museums reciprocally benefitting from increased public trust in them.⁵⁸ The alleviation of pain, not utilitarian principles, should be a guiding light in applying the Code to Holocaust-related claims.

⁵⁴ One could conceptualize this article’s thesis as a third “emotional individualism” dimension to Professor Merryman’s cultural nationalism/internationalism rubric.

⁵⁵ Eva Fogelman, *et al.*, *The Evolution and Objectives of the Holocaust Restitution Initiatives*, 25 *FORDHAM INT’L L.J.* 145, 149 (2001) (quoting German President Rau: “We all know that no amount of money can really compensate the victims of crime. We all know that the suffering inflicted upon millions of women and men cannot be undone.”); Lance Morrow, *The Justice of the Calculator*, *TIME*, Feb. 24, 1997, at 45 (quoting Elie Wiesel: “If all the money in all the Swiss banks were turned over, it would not bring back the life of one Jewish child. But the money is a symbol. It is part of the story. If you suppress any part of the story, it comes back later, with force and violence.”).

⁵⁶ See cited sources *supra* notes 10–14 and accompanying text; Fogelman, *supra* note 55, at 146 (“Psychologically speaking, victims need validation for their suffering and their losses in order to begin a healing process. This validation needs to come particularly from the perpetrators, but also from the bystanders.”). *Accord* Tiefenbrun, *supra* note 51, at 96; Stephanos Bibas & Richard A. Bierschback, *Integrating Remorse and Apology into Criminal Procedure*, 114 *YALE L.J.* 85 (2004). Literature concerning monetary restitution to Holocaust survivors since World War II is particularly illuminating. For example, as stated by one scholar: “The aim of restitution, which involves voluntary negotiations and agreements (often a result of political pressure), is to resolve historical differences through the construction of a shared past.” Pamela Bruzzese, *Distributing the Past: Jewish Cultural Property in Lithuania*, 31 *N.Y.U. J. INT’L L. & POL.* 145, 158 (1998) (citing Elazar Barkan, *Payback Time: Restitution and the Moral Economy of Nations*, 11 *TIKKUN* 52, 54 (1996)). Restitution serves to legitimize victims’ experience. *E.g., id.* Apart from monetary compensation, even the public debates about *how* to compensate victims in recent years provide validation for Holocaust victims’ suffering. Symposium Transcript, *The Evolution and Objectives of the Holocaust Restitution Initiatives*, 25 *FORDHAM INT’L L.J.* 145, 146 (2001); *cf.* Lorie M. Graham, *Reparations, Self-Determination, and the Seventh Generation*, 21 *HARV. HUM. RTS. J.* 47, 76 (2008) (describing multiple theories about the objectives of reparations); Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 *HARV. C.R.-C.L. L. REV.* 323, 397 (1987) (suggesting that reparations require “the formal acknowledgment of historical wrong, the recognition of continuing injury, and the commitment to redress, looking always to the victims for guidance”); Tim Johnston, *Australia to Apologize to Aborigines*, *N.Y. TIMES*, Jan. 31, 2008, at A10 (describing objectives of restitution to Australian Aborigines).

⁵⁷ The modern Hippocratic Oath, *available at* http://www.pbs.org/wgbh/nova/doctors/oath_modern.html. See also HIPPOCRATES, OF THE EPIDEMICS, BOOK 1, § II, 5 (original approx. 400 B.C.E.) (Francis Adams, trans. 1994), *available at* <http://classics.mit.edu/Hippocrates/epidemics.html>.

⁵⁸ See *infra* Section III; *cf.* ELAZAR BARKAN, *THE GUILT OF NATIONS: RESTITUTION AND NEGOTIATING HISTORICAL INJUSTICES XXIII, XXIV*, 8–12 (2000) (describing how apologies and restitution were necessary for Germany to reenter the international political realm).

III. THE PURPOSE OF MUSEUMS

It is unlikely that one could develop a definition of a museum that would satisfy all interested parties.⁵⁹ The purpose of a museum is most commonly understood to be to educate the public.⁶⁰ For example, as stated by the American Association of Museums (AAM) in its 1992 report entitled *Excellence and Equity: Education and the Public Dimension of Museums*: “The commitment to education as central to a museum’s public service must be clearly expressed in every museum’s mission and pivotal to every museum’s activities.”⁶¹ The museum-going public seems to expect the same. In May 2001, the AAM released the results of a survey stating that Americans view museums as “one of the most important resources for educating our children and as one of the most trustworthy sources of objective information.”⁶²

Although the concept of a museum has changed and more types of museums exist today than ever before,⁶³ the quintessential museum remains one that displays objects and educates the public about them.⁶⁴ James Cuno, President and Director of the Art Institute of Chicago, stated: “Acquiring, preserving, and providing access to works of art is the basis for

⁵⁹ EDWARD P. ALEXANDER, *MUSEUMS IN MOTION: AN INTRODUCTION TO THE HISTORY AND FUNCTIONS OF MUSEUMS* 14 (1979) (describing a museum as “in fact a modern hybrid, bred with mingled characteristics of the cathedral, the royal palace, the theater, the school, the library, and according to some critics, the department store”); Michael Kimmelman, *Museums in a Quandary: Where Are the Ideals?*, N.Y. TIMES, Aug. 26, 2001, at E1 (“Museums are at a crossroads and need to decide which way they are going. They don’t know whether they are more like universities or Disneyland, and lurch from one to the other.”); Roberta Smith, *Memo to Art Museums: Don’t Give Up on Art*, N.Y. TIMES, Dec. 3, 2000, at 2:1 (stating that American art museums nowadays seem to “want to be anything but art museums”).

⁶⁰ E.g., James N. Wood, *The Authorities of the American Art Museum*, in *WHOSE MUSE?: ART MUSEUMS AND THE PUBLIC TRUST* 105 (James Cuno ed., 2004).

Philosophers of the Enlightenment believed that the political and moral freedom of man could be effected through education: both through the arts, “the sons of genius” and the sciences, “the daughters of reason.” The new public museum [after the French Revolution] was the creation of the state and its aim was education.

Id.

⁶¹ American Association of Museums, *Excellence and Equity: Education and the Public Dimension of Museums* 5 (Ellen Cochran Hirzy ed., 1992) [hereinafter AAM, *Excellence*].

⁶² James Cuno, *Introduction*, in *Whose Muse?: Art Museums and the Public Trust* 18 (James Cuno ed., 2004) [hereinafter Cuno, *Introduction*] (“The AAM-commissioned survey generalized on museums of all sorts, from aquariums to history museums to children’s museums to (we suppose) art museums.”).

⁶³ See sources cited *supra* note 59.

⁶⁴ John Walsh, *Pictures, Tears, Lights, and Seats*, in *Whose Muse?: Art Museums and the Public Trust* 101 (James Cuno ed., 2004) (“I believe that [museums] will be meeting their most serious obligation when they are creating an audience that looks hard at works of art and has strong responses to them.”).

an art museum's contract with the public and the foundation of the trust that authorizes that contract."⁶⁵ The concept of "access" incorporates "knowledge about and a deeper appreciation of the object" that cannot be duplicated by text-based learning in schools and universities.⁶⁶ Access serves to change viewers, "to alter their experience of the world, to sharpen and heighten their sensitivities to it, to make it come alive anew for them, so they can walk away at a different angle to the world."⁶⁷

Many criticize museums today for engaging in social activism rather than focusing on education of the public about objects.⁶⁸ In 1992, the AAM published *Excellence and Equity*, which stated:

Museums perform their most fruitful public service by providing an educational experience in the broadest sense: by fostering the ability to live productively in a pluralistic society and to contribute to the resolution of the challenges we face as global citizens. [Museums must] help to nurture a humane citizenry equipped to make informed choices in a democracy and to address the challenges and opportunities of an increasingly global society[.]⁶⁹

Respected members of the American museum community, such as Philippe de Montebello, the esteemed Director of the Metropolitan Museum of Art in New York (Met) for the last thirty years,⁷⁰ and Cuno, both of whom come from U.S. fine arts backgrounds, lament such statements by their representational body.⁷¹ They maintain that museums (at least art museums) should remain true to their roots—acquiring and providing access to and education about authentic objects.⁷² Nonetheless, even Cuno states that the object of art museums and the basis of the public's faith in them is that:

In museums people can experience a sense of place and be inspired, one object at a time, to pursue the ideal of objectivity and be led from beauty to justice by a lateral distribution of caring. This is the object of art mu-

⁶⁵ James Cuno, *The Object of Art Museums, in Whose Muse?: Art Museums and the Public Trust* 52 (James Cuno ed., 2004) [hereinafter Cuno, *Object*].

⁶⁶ *Id.*

⁶⁷ *Id.* at 73. Cuno derives the "different angle" concept from poet Peter Sacks. *Id.* at 52.

⁶⁸ See sources cited *supra* note 59.

⁶⁹ AAM, *Excellence*, *supra* note 61, at 7, 9.

⁷⁰ Charles McGrath, *Twilight of the Sun King*, N.Y. TIMES, July 29, 2007, at 2:1.

⁷¹ E.g., Philippe de Montebello, *Art Museums, Inspiring Public Trust, in WHOSE MUSE?: ART MUSEUMS AND THE PUBLIC TRUST* 155–56 (James Cuno ed., 2004); Cuno, *Introduction*, *supra* note 62, at 19–20.

⁷² Cuno, *Object*, *supra* note 65, at 52; de Montebello, *supra* note 71, at 155.

seums; perhaps even the *poetics* of art museums. If only one object at a time.⁷³

IV. THE AUSCHWITZ-BIRKENAU STATE MUSEUM

In contrast to the Met and the Art Institute of Chicago, the governmentally-run Auschwitz-Birkenau State Museum in Poland seems to embrace a more socially active purpose.⁷⁴ As Polish Prime Minister Jerzy Buzek stated on June 7, 2000 at the inauguration of the Museum's current International Council, an "advisory and promotional" Polish governmental agency comprised of international experts on the Holocaust and concentration camps:⁷⁵

I believe that working together to preserve for posterity the tragic heritage of the Nazi policy of the extermination of the Polish people and the destruction of the Jewish people will serve the cause of reconciliation and mutual understanding, and that the ongoing cooperation among experts, researchers, and people who enjoy public esteem and trust will contribute to overcoming stereotypes and prejudices by bearing shared witness to the truth about those horrible times.⁷⁶

Despite this statement about the Museum's mission, the Museum seems to be undergoing a conflict about its purpose similar to that undergone by American art museums. Some history about Auschwitz and Birkenau is necessary to understand this assessment and its current significance.

The arrival of the first transport of Polish political prisoner deportees to the Auschwitz camp on June 14, 1940 marks the beginning of its gruesome modern history.⁷⁷ The Museum's web site accurately explains subsequent history under the Nazi regime:

Over the following years, the camp was expanded and consisted of three main parts: Auschwitz I, Auschwitz II-Birkenau, and Auschwitz III-Monowitz. It also had over 40 sub-camps. At first, Poles were imprisoned and died in the camp. Afterwards, Soviet prisoners of war, Gyp-

⁷³ Cuno, *Object*, *supra* note 65, at 73.

⁷⁴ The Auschwitz-Birkenau State Museum web site does not set forth a mission statement *per se*, which may violate Principles 1.1 and 1.2. Auschwitz-Birkenau Memorial and Museum Website, <http://www.auschwitz.org.pl> (last visited Sept. 12, 2005); ICOM Principles 1.1, 1.2.

⁷⁵ Press Release, International Auschwitz Council, *Address of the Prime Minister Jerzy Buzek*, (June 7, 2000), available at http://www.auschwitz.org.pl/html/eng/muzeum/rada_muzeum.html [hereinafter Press Release, *Address*].

⁷⁶ *Id.*

⁷⁷ E.g., LAURENCE REES, *AUSCHWITZ: A NEW HISTORY* (2005); see also DEBORAH DWORK & ROBERT JAN VAN PELT, *AUSCHWITZ: 1270 TO THE PRESENT* (1996) (an excellent history of both the town and the camp).

sies,^[78] and prisoners of other nationalities were also incarcerated there. Beginning in 1942, the camp became the site of the greatest mass murder in the history of humanity, which was committed against the European Jews as part of Hitler's plan for the complete destruction of that people.

The majority of the Jewish men, women and children deported to Auschwitz were sent to their deaths in the Birkenau gas chambers immediately after arrival. At the end of the war, in an effort to remove the traces of the crimes they had committed, the SS began dismantling and razing the gas chambers, crematoria, and other buildings, as well as burning documents.

Prisoners capable of marching were evacuated into the depths of the Reich. Those who remained behind in the camp were liberated by Red Army soldiers on January 27, 1945.⁷⁹

Upon suggestion by two former detainees at Auschwitz, the Polish parliament established the Museum by statute on July 2, 1947.⁸⁰ It includes the Auschwitz I and Auschwitz II-Birkenau (Birkenau) concentration camps.⁸¹ Auschwitz I has been the site of various exhibitions since 1947, and the present permanent exhibition there has remained largely the same since 1955.⁸² Auschwitz I housed primarily Polish prisoners.⁸³ Approximately 74,000 Poles were murdered there.⁸⁴

Even more horrific numbers were tallied in Birkenau, "the epicenter of the Holocaust," where nearly 960,000 Jews were murdered "and hundreds of thousands more suffered from starvation, slavery, abuse, and disease."⁸⁵ Regarding Birkenau, the Museum's web site states:

In view of the exceptional nature of the site of the Birkenau camp, which is above all a cemetery, no exhibitions have been situated there since the establishment of the Museum. An effort has been made to preserve the site in a state close to the original. The only large new element in this

⁷⁸ This term has a pejorative connotation. *E.g.*, Andrew Woolford & Stefan Wolejszo, *Collecting on Moral Debts: Reparations for the Holocaust and Porajmos*, 40 LAW & SOC'Y REV. 871, 871 n.1 (2006). Wherever possible, this article will use the term "Roma and Sinti" in place of "gypsies."

⁷⁹ LukeTravels.com, Auschwitz-Birkenau Concentration Camp in Poland, <http://www.luketravels.com/auschwitz> (last visited Feb. 1, 2008); *accord, e.g.*, REES, *supra* note 77.

⁸⁰ Dz.U. Nr 52, poz. 265 (July 2, 1947) (Pol.).

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ Deborah Dwork & Robert Jan van Pelt, *The Future of Auschwitz: The Politics of a Strategy for Auschwitz-Birkenau*, 20 CARDOZO L. REV. 687, 687 (1998) [hereinafter *Dwork & van Pelt*].

part of the site is the International Monument to the Victims of the Camp, unveiled at a 1967 ceremony.⁸⁶

Accordingly, Auschwitz I is the site of the main tourist facilities and permanent exhibition.⁸⁷ However, the Museum inaccurately characterizes the sanctity of Birkenau as the sole reason for the lack of facilities there. From 1945 to 1947 during the chaos and civil war of post-war Poland, “Birkenau, the largest single site for the extermination of European Jews, suffered neglect and even plunder.”⁸⁸ Not even today “has the site received the care and protection that one might associate with a cemetery.”⁸⁹ Instead, it has “suffered from decades of neglect.”⁹⁰ That neglect extends beyond inadequate physical maintenance to inadequate reverence and remembrance:

Most visitors do not know and do not quite learn that the Jews were murdered at Birkenau. The exhibits about the Holocaust are in the wrong place: the heartbreaking collections of artificial limbs, suitcases, spectacles, toothbrushes, and shoes were moved from Birkenau to Auschwitz I after the war.⁹¹

The Museum has undergone an identity crisis in recent years, which is partially understandable, regarding exactly how it should commemorate the victims of the atrocities that occurred on the sites.

⁸⁶ Auschwitz-Birkenau Memorial and Museum, <http://www.auschwitz.org.pl/new/index.php?language=EN&tryb=stale&id=426> (last visited Feb. 1, 2008). The monument was erected as a consequence of a twelve-year effort by the International Auschwitz Committee (IAC), “an organization for former prisoners of the camp from across Europe” formed in 1955. JONATHAN HUENER, *AUSCHWITZ, POLAND, AND THE POLITICS OF COMMEMORATION, 1945–1979* xix (2003).

⁸⁷ Dwork & van Pelt, *supra* note 85, at 687–88.

⁸⁸ HUENER, *supra* note 86, at xviii; *accord* Dwork & van Pelt, *supra* note 85, at 687.

⁸⁹ HUENER, *supra* note 86, at xv.

⁹⁰ *Id.*

⁹¹ Dwork & van Pelt, *supra* note 85, at 687–88. The first murders by gas within the vast Auschwitz complex, including its subcamps, was on the Auschwitz I camp when in 1941 Zyklon-B was tested on 600 Soviet prisoners of war and 250 other prisoners. HUENER, *supra* note 86, at 15–17; *see also* MICHAEL SHERMER & ALEX GROBMAN, *DENYING HISTORY: WHO SAYS THE HOLOCAUST NEVER HAPPENED AND WHY DO THEY SAY IT?* 156 (2000) (citations omitted). “The gas chamber attached to Crematorium I operated for another year, but with the advent of the Nazi plans for the ‘final solution of the Jewish question’ in late 1941, the bulk of the gassing operations at Auschwitz was moved to Birkenau.” HUENER, *supra* note 86, at 16; *accord* Robert Jan van Pelt, *A Site in Search of a Mission, in ANATOMY OF THE AUSCHWITZ DEATH CAMP* 93–156 (Yisrael Gutman & Michael Berenbaum eds., 1994); *see also* DWORK & VAN PELT, *AUSCHWITZ*, *supra* note 77. Huener’s analysis conflicts slightly with the Museum web site, which states that the “first gas chamber” was the “little red house” at Birkenau. *See* Auschwitz-Birkenau Memorial and Museum, <http://www.auschwitz-muzeum.oswiecim.pl> (last visited Feb. 1, 2008).

Poles and Jews have long held conflicting views about the significance of Auschwitz and about the most appropriate way to commemorate the nearly 1.1 million people who were murdered there:

960,000 Jews,
74,000 Poles,
21,000 Roma and Sinti,
15,000 Soviet prisoners of war, and
12,000 other gentile prisoners.⁹²

Because of the diverse nature of the extensive number of victims who perished or suffered at Auschwitz, its history is extremely complex and the recollection of the camp's history since 1941 has been influenced by the perspectives of those studying it, commemorating it, or attempting to invoke the tragic mystique⁹³ of it for other reasons.⁹⁴ In sum, "as the primary site for Poland's commemoration of its wartime dead, Auschwitz and the public manifestations of memory there were inevitably infused with both patriotic zeal and political agendas."⁹⁵ Consequently, the site's history has often been exploited by aligning its history with "a prevailing ideology or by evoking one commemorative message and, by extension, one memorial narrative at the expense of another."⁹⁶ For example, from 1947 to 1954, the "ideological imperatives of Stalinism began to color and determine the site's representation of the past."⁹⁷ Thus:

"Hitlerites" became "fascists," the Shoah^[98] was further neglected although not actively excluded from the memorial landscape, employees and exhibitions at the museum were subjected to strict state censorship and review, while the Second World War, as well as postwar international tensions, were represented at the site as struggles between Western imperialist and Soviet-led socialist camps.⁹⁹

⁹² Dwork & van Pelt, *supra* note 85, at 687 (formatting altered).

⁹³ GIORGIO AGAMBEN, REMNANTS OF AUSCHWITZ: THE WITNESS AND THE ARCHIVE 34–39 (Daniel Heller-Roazen trans., 1999).

⁹⁴ *E.g.*, MAURICE HALBWACHS, THE COLLECTIVE MEMORY 45 (Francis J. Ditter, Jr. and Vida Yazdi Ditter trans., 1980) (describing how institutionalized memory consciously or unconsciously selectively reflects present needs).

⁹⁵ HUENER, *supra* note 86, at 3.

⁹⁶ *Id.* at xvi.

⁹⁷ *Id.* at xviii.

⁹⁸ The Shoah is the mass murder of European Jews by the Nazis during WWII. THE AMERICAN HERITAGE COLLEGE DICTIONARY 1281 (4th ed. 2002).

⁹⁹ HUENER, *supra* note 86, at xviii; *see also* JAMES E. YOUNG, THE TEXTURE OF MEMORY: HOLOCAUST MEMORIALS AND MEANING 3 (1993) (analyzing how memorials may become "invest[ed]" with specific and often inappropriate meanings by governments and social groups).

A more recent example stems from the 1995 commemoration of the fiftieth anniversary of the liberation of Auschwitz. Polish President Lech Walesa initially refused to acknowledge the Holocaust of Jews at the site—preferring instead to focus solely on the murder of Poles.¹⁰⁰ Another poignant example arises from the collapsed discussions between Polish governmental authorities and a Commission of Experts on Auschwitz to join Auschwitz and Birkenau into one museum district.¹⁰¹ The Commission was appointed after Jewish groups convinced the administration to rethink a previously approved plan to “develop Auschwitz into a ‘world class memorial,’ a center for meetings and conferences supported by the usual infrastructure of luxury hotels.”¹⁰²

Progress came to a halt because of controversy over the presence of religious symbols at Auschwitz and Birkenau.¹⁰³ Religious symbols—both crosses and Stars of David—would have to be removed altogether to alleviate controversy and move forward.¹⁰⁴ This was impossible, however, because of large crosses erected on private property, now belonging to a Catholic church, next to the former SS headquarters at Birkenau.¹⁰⁵ Thus, all crosses could not be removed and were highly visible to all visitors to Birkenau, the epicenter of the Jewish Holocaust.¹⁰⁶

At this point, members of the Commission “ceased to take part in the process because [they] lost confidence that it [could] guarantee a future for Auschwitz [they] would endorse or could support.”¹⁰⁷ Subsequently, the local government created a development plan that seems to have been driven more by concern for “practical commercial, industrial, housing, and transportation needs of the local taxpayers,”¹⁰⁸ than concern for thoughtful preservation of the sites.¹⁰⁹ The visitor center is located across from the entrance from Auschwitz.¹¹⁰ Birkenau remains on the outskirts and often goes unmentioned during one’s visit.¹¹¹ The crosses remain and a new

¹⁰⁰ Dwork & van Pelt, *supra* note 85, at 688; accord Barbara Demick, *At Auschwitz, Healing Gestures at the Official Remembrance, Walesa at the Last Minute Acknowledged the Singular Devastation of European Jews*, PHILA. INQUIRER, Jan. 28, 1995, at A1; Jane Perlez, *Survivors Pray at the Crematories of Auschwitz*, N.Y. TIMES, Jan. 27, 1995, at A3.

¹⁰¹ See Dwork & van Pelt, *supra* note 85, at 688.

¹⁰² *Id.*

¹⁰³ *Id.* at 690.

¹⁰⁴ *Id.* at 690–91.

¹⁰⁵ *Id.* at 691.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 691–92.

¹¹⁰ *Id.*

¹¹¹ *Id.*

“forest of crosses close to the camp entrance”¹¹² have been erected by “nationalist Catholics”¹¹³—ostensibly to commemorate the mass held at Birkenau in 1979 by Pope John Paul II.¹¹⁴ “Seen by Jews as an aggressive desecration of the largest Jewish graveyard in the world, the crosses have severely exacerbated tensions between Poles and Jews.”¹¹⁵

In 2006, the Museum issued its first public, annual “Report.”¹¹⁶ In the Introduction, Director Dr. Cywiński states in the first line: “It is not easy to say what Auschwitz means now. Ordinary words do not fit this place. Today, it is called a memorial, a cemetery, a monument, a museum. Yet those words fail to convey the entire significance—so difficult to comprehend and articulate—of Auschwitz.”¹¹⁷ Dr. Cywiński states: “Our main task is, obviously, to protect and conserve the original camp relics, to conduct scholarly research, and to develop educational programs.”¹¹⁸ In regard to the conservation of moveable cultural objects at the site, the Report mentions that there are “about 2,000 works of art in the Museum that originated in the camp, and about 4,000 of postwar provenance,” in addition to “archival documents, everyday utensils, [and] photographs.”¹¹⁹

In conclusion, like American art museums, the Auschwitz-Birkenau State Museum has undergone an identity crisis. The Auschwitz Museum’s mission—and foundational purpose as stated by Prime Minister Buzek in 2000—was education for the purpose of insuring that the Holocaust would be remembered and commemorated such that it would recur “never again.”¹²⁰ In 2006, the Museum’s first-ever public report shifted its conception of its purpose. It heavily emphasizes the importance of preserving

¹¹² *Id.* at 692.

¹¹³ *Id.* “According to the leaflets these right-wing Polish Catholics distribute [at least in 1997] at the site, the time has come ‘to wage merciless war on Jewish-communist-masonry, the biggest enemies of the Polish state.’” *Id.* (citing *Polish Catholic Indicted for Instigating Auschwitz Cross Dispute*, JERUSALEM POST, Mar. 2, 1999, at 5).

¹¹⁴ *Id.*

¹¹⁵ *Id.*; accord HUENER, *supra* note 86, at xx. Additionally, “Fucking Jewish dogs go to hell” was reportedly painted along a path bordering a wall along the road leading from Auschwitz to Birkenau immediately prior to the 2000 March of the Living. Anti-Semitism Worldwide 1999/2000: Poland, <http://www.tau.ac.il/Anti-Semitism/asw99-2000/poland.htm> (last visited Feb. 1, 2008). A Jewish cemetery in Krakow has been repeatedly vandalized, including by painting crosses on tombstones, in recent years. *E.g., id.*

¹¹⁶ AUSCHWITZ-BIRKENAU MEMORIAL, PANSTWOWE MUZEUM, SPRAWOZDANIE REPORT (2006), http://www.telaviv.polemb.net/files/ogolny-pliki/auschwitz_raport.pdf (“2006 Report”).

¹¹⁷ *Id.* at 5.

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 25.

¹²⁰ Beth Schwartzapfel, *Never Again, Again*, FORWARD, Oct. 4, 2006, available at <http://www.forward.com/articles/never-again-again/> (explaining the history of the phrase).

camp relics. This shift can be directly attributed to the pressure experienced in 2006 because of claims to objects by two Holocaust survivors.

V. THE CLAIMS

Two restitution claims refused by the Museum provide useful case studies to further understanding of the emotional and ethical aspects of Holocaust claims and how property law, morality, and utilitarianism are inadequate to deal with such disputes.¹²¹

A. DINA GOTTLIEBOVA BABBITT AND THE WATERCOLORS

In January 1942 in Czechoslovakia, the name of Dinah Gottliebova's (now Dina Babbitt) mother, Johanna, appeared on a list of Jews scheduled for deportation to the Theresienstadt concentration camp.¹²² Dina signed up so that her mother would not be alone.¹²³ Despite the grief and death around her in the camp, Dina found her first love, Karel Klinger, there.¹²⁴ In 1943, Dina and her mother were transferred to Auschwitz-Birkenau.¹²⁵ It was there, because of her arts training and her painting of a mural of Snow White in the children's barracks with smuggled paints, that Dr. Josef Mengele discovered her and forced her over the next months to paint Roma and Sinti to document his pseudo-scientific theories of racial inferiority and his medical experiments.¹²⁶ She remembers having painted between nine and eleven portraits of Roma and Sinti, whom she grew to know during the painting sessions.¹²⁷ One of the women Dina painted was Celine, who had just lost her baby to starvation and illness in 1944.¹²⁸ Both women were in their early twenties, and Dina "dragged out the work for a week, double the

¹²¹ A claim by Richard Immerglick, son of artist Ralph Immerglick who painted a picture of his other son who perished while interned in the Krakow ghetto, has been asserted against the Jewish Historical Institute of Warsaw. Ralph Immerglick also perished. The museum has refused to honor the claim. E-mail from Charles Goldstein, Counsel, Commission for Art Recovery, to Jennifer Anglim Kreder, Associate Professor of Law, Salmon P. Chase College of Law (Apr. 30, 2008, 21:17 EST).

¹²² Ron Grossman, *Artwork Saved Her from Death in Holocaust*, CHI. TRIB., Oct. 22, 2006, at C4; Steve Friess, *History Claims Her Artwork, But She Wants It Back*, N.Y. TIMES, Aug. 30, 2006, at E1.

¹²³ Grossman, *supra* note 122.

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ Friess, *supra* note 122.

¹²⁸ Larry Gordon, *Art or a Part of History?*, L.A. TIMES, Nov. 29, 2006, at A1.

usual time, to slip Celine rare pieces of white bread.”¹²⁹ Mengele had Dina sign all of the paintings.¹³⁰

In January 1945, as Soviet troops closed in on Auschwitz, Dina and Johanna were forced on a death march and were interned in two more camps before the end of the war.¹³¹ It was because of her artistic talent that Dina was able to secure better treatment for herself and her mother, who was slated for gassing on the date Mengele discovered Dina.¹³² This morbid happenstance allowed them both to survive the war; Karel did not.¹³³ Nor did Celine nor any of those Dina painted—almost all Roma and Sinti in Auschwitz perished.¹³⁴ “[Dina] and her mother were among the 27 Czechoslovak Jews to survive from their group of more than 5,000.”¹³⁵

After the war, the newly-created Museum bought seven of the watercolors from two survivors in the 1960s and 1970s; the whereabouts of the other watercolors are unknown.¹³⁶ In 1973, a Museum employee recognized Dina’s signature in a book of illustrations from her successful post-war career as a cartoonist and animator.¹³⁷ The Museum contacted her, and she borrowed money to travel to Auschwitz again with a case to carry home her paintings.¹³⁸ She was dismayed when the Museum refused to give them to her: “I just couldn’t understand why they wouldn’t give them to me. I feel helpless against these people. It sounds like a stupid cliché, but it’s part of my soul, part of my being, part of me that they have.”¹³⁹ Over the years, various parties have intervened on her behalf, including former U.S. Ambassador Stuart Eizenstat,¹⁴⁰ State Department Special Envoy for Holocaust Issues, J. Christian Kennedy,¹⁴¹ the U.S. Congress,¹⁴²

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ Friess, *supra* note 122.

¹³² Gordon, *supra* note 128.

¹³³ Grossman, *supra* note 122.

¹³⁴ Friess, *supra* note 122.

¹³⁵ *Id.*

¹³⁶ Gordon, *supra* note 128.

¹³⁷ *Id.*; see also Marilyn Henry, *Santa Cruz Woman Trying to Recover Auschwitz Art*, JERUSALEM POST SERVICE, May 28, 1999, available at http://www.jewishsf.com/content/2-0/module/displaystory/story_id/11354/edition_id/217/format/htmo/displaystory.html.

¹³⁸ Friess, *supra* note 122.

¹³⁹ Paul Arendt, *Auschwitz Painter Fights For Her Death Camp Portraits*, GUARDIAN, Sept. 5, 2006, at 23; see also Friess, *supra* note 122 (“They are definitely my own paintings; they belong to me, my soul is in them, and without these paintings I wouldn’t be alive, my children and grandchildren wouldn’t be alive.”).

¹⁴⁰ Friess, *supra* note 122.

¹⁴¹ Gordon, *supra* note 128.

¹⁴² H.R. RES. 162, 106th Cong. (1st Sess. 1999).

lawyers,¹⁴³ museum curators and directors,¹⁴⁴ and artists.¹⁴⁵ At times, both sides seemed willing to compromise, but they are now at an impasse.¹⁴⁶ Ms. Babbitt feels today, as she ages with heart disease: “All my rights, all my human rights, all my power has been taken away from me, exactly like when I was still an inmate in the camp.”¹⁴⁷ She tried to explain her feelings:

Every single thing, including our underwear, was taken away from us. . . . Everything we owned, ever. My dog, our furniture, our clothes. And now, finally, something is found that I created, that belongs to me. And they refuse to give it to me. This is why I feel the same helplessness as I did then.¹⁴⁸

B. MICHEL LEVI-LELEU AND THE SUITCASE

Pierre Levi was a Paris diamond dealer who had his family use the name Leleu in an attempt to hide their Jewish heritage from the Nazi and Vichy regimes during World War II.¹⁴⁹ The last time he saw his wife and two sons, Michel and Étienne, was in 1942 after they fled their Paris residence on the Boulevard de la Villette, and he hid them in Haute-Savoie.¹⁵⁰ Michel was three years old at the time.¹⁵¹ In April 1943, Pierre was arrested at the Avignon railroad station and deported.¹⁵² He passed through the Orgeval and Drancy transit camps in France and arrived at Auschwitz on July 31, 1943 bearing the prisoner reference “48 Gruppe 10,” according to official Nazi records.¹⁵³ The records do not reveal what happened there-

¹⁴³ Fifty attorneys and legal scholars signed a petition urging restitution. Press Release, David S. Wyman Institute for Holocaust Studies, *50 Lawyers Plead for Auschwitz Art: “Let Her Paintings Go”* (Mar. 22, 2007) (on file with author) [hereinafter Wyman].

¹⁴⁴ Friess, *supra* note 122 (describing 2006 letter signed by “13 artists, art dealers and museum curators, including a former executive director of the United States Holocaust Memorial Museum”).

¹⁴⁵ 400 museum artists signed a petition urging restitution. Frank Moldstad, *Dina Babbitt’s Quest*, ANIMATION ARTIST, Nov. 30, 2003, available at <http://animationartist.digitalmedianet.com/articles/viewarticle.jsp?id=85805>; see also George Gene Gustines, *Comic-Book Idols Rally to Aid a Holocaust Artist*, N.Y. TIMES, Aug. 9, 2008, at B7.

¹⁴⁶ Grossman, *supra* note 122.

¹⁴⁷ Tom Jagninski, *Congress Aiding Holocaust Survivor Recover Paintings*, ISRAEL FAXX, Jan. 10, 2002, available at 2002 WLNR 4909392; see also Maria Hegstad, *Berkley Wants Artwork Returned*, LAS VEGAS REV. J., Jul. 29, 2006, at 4B (quoting Babbitt’s daughter: “My mother’s feeling is that the Polish government is still holding her freedom hostage.”).

¹⁴⁸ Friess, *supra* note 122.

¹⁴⁹ Alan Riding, *The Fight Over a Suitcase and the Memories It Carries*, N.Y. TIMES, Sep. 16, 2006, at B9.

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.*

after, he was never heard from again, and one can surmise that he perished in the infamous death camp.¹⁵⁴

By February 2005, Michel was a sixty-six-year-old retired engineer who changed his surname to Levi-Leleu since the war by combining his original surname and the name he used in hiding.¹⁵⁵ That month Michel visited an exhibit at the Paris Foundation for Remembrance of the Shoah on loan from the Auschwitz-Birkenau State Museum.¹⁵⁶ The exhibit, like a number at Holocaust memorials around the world, contained a pile of suitcases that belonged to those who perished and suffered at the Auschwitz death camp.¹⁵⁷ As evidenced by many photographs, “Jews rounded up in France during World War II . . . were frequently encouraged to pack a suitcase, presumably to deceive them into believing that they were headed for internment or labor camps, not death.”¹⁵⁸ Michel spotted a battered suitcase bearing the name Pierre Levi, the street of his childhood Paris residence, “Boulevard de la Villette,” and Pierre’s prisoner reference, “48 Gruppe 10.”¹⁵⁹

Michel’s immediate emotional reaction was that he “didn’t want it to repeat the journey that it had already made to Auschwitz.”¹⁶⁰ The French Foundation convinced the reluctant Polish Museum to extend the loan for a “long term period” in order to “persuade the family into not demanding its restitution.”¹⁶¹ Rather than wait for the Museum to recall the suitcase to Poland, in December 2005, Mr. Levi-Leleu filed a lawsuit in Paris and blocked the return of the suitcase until the court could rule as to its ownership.¹⁶²

¹⁵⁴ See, e.g., HUENER, *supra* note 86, at 16 (describing how Jewish deportees were unloaded at the rail dock in Birkenau and selected for registration for work or, much more commonly, immediate death after betrayal into believing that the gas chambers were showers).

¹⁵⁵ Riding, *supra* note 149; see also Mariusz Lodkowski, *Battle Over Suitcase from Auschwitz*, SUNDAY TIMES, Aug. 13, 2006, at 25 (“In 1945 the authorities informed Levi-Leleu’s family that he had been recognised as someone who had ‘lost his life for France.’”).

¹⁵⁶ Riding, *supra* note 149.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* (quoting Michel Levi-Leleu).

¹⁶¹ *Id.*

¹⁶² *Id.* The court is expected to make a ruling May 2008, but the Museum has refused the author’s requests for the court documents. E-mail from Teresa Świebocka, Deputy Museum Director, Auschwitz-Birkenau State Museum, to Megan Mersch, Research Assistant for Prof. Jennifer Kreder, Salmon P. Chase College of Law (Dec. 20, 2007) (on file with author). It seems to have provided them to a Polish reporter, however. See Lodkowski, *supra* note 155 (Krakow-based reporter describing the Museum’s “court papers”). The Museum stated in its 2006 Report:

The most bitter pill to swallow is the fact that neither the Levi-Leleu family nor their [*sic*] legal representative ever made any sort of attempt to contact the Museum. They did not an-

The Auschwitz-Birkenau Museum has defended its opposition to Michel Levi-Leleu's claim on a number of grounds discussed below.

VI. THE MUSEUM'S RESPONSES

The Museum has chosen to hide behind legal arguments while proclaiming that the lawsuit "is difficult and extremely painful" for it.¹⁶³ It justifies its misplaced reliance on legalism by claiming that Mr. Levi-Leleu did not engage in negotiations before filing suit and that it "did not want" the lawsuit.¹⁶⁴ Meanwhile, the Museum admits that it only agreed to extend the loan so that the Paris museum would help it "persuade the family into not demanding . . . restitution."¹⁶⁵ The Museum seems to pride itself on the fact that it has dissuaded every survivor to date who has demonstrated an interest in claiming objects from pursuing them (presumably the Museum intended to exclude Ms. Babbitt's non-legal claim from this self-assessment).¹⁶⁶ It mentions in both the 2006 Report and the 2007 Statement that Museum now has been sued for the first time—and blames Mr. Levi-Leleu for its plans to be more restrictive about loans in the future.¹⁶⁷ It seems that the Museum's belief "that such difficult questions should be the subject of negotiations and dialogue" turns on its ability to persuade the claimant that the object should remain there.

In regard to the suitcase, the Museum denies that it ever belonged to Pierre Levi despite all of its identifying markings.¹⁶⁸ It claims that the markings in conjunction with records in the Museum's archives "can not give us 100% that Pierre Levi, a relative of the claimants from Paris, arrived at the camp with this particular suitcase."¹⁶⁹ While ignoring the fact that Pierre Levi's prisoner reference is printed on the suitcase, the Museum justifies its ridiculous denial on the ground that several dozens of individuals arrived at the camp from different countries at different times with the surname of "Levi," which was spelled three different ways in various re-

swer any of the letters written in this matter by the Museum director's office, chairman Wladyslaw Bartoszewski of the International Auschwitz Council, or the Polish minister of foreign affairs.

2006 Report, *supra* note 116, at 31.

¹⁶³ Igor Bartoski, Head of the Collection Dept, Auschwitz Memorial, 2007 Statement ("2007 Statement") (on file with author).

¹⁶⁴ 2006 Report, *supra* note 116, at 31 ("Confronted by a fait accompli, the Museum had to defend itself."); 2007 Statement, *supra* note 163, at 1.

¹⁶⁵ 2007 Statement, *supra* note 163, at 2.

¹⁶⁶ *Id.* at 3.

¹⁶⁷ 2006 Report, *supra* note 116, at 31; 2007 Statement, *supra* note 163, at 4.

¹⁶⁸ 2007 Statement, *supra* note 163, at 3–4.

¹⁶⁹ *Id.* at 3.

cords.¹⁷⁰ Even though the same Paris street of Pierre Levi's address is printed on the suitcase, the Museum states that the inscription "can not constitute the key evidence proving that the suitcase arrived from Paris, but can only be a tip (on many surviving suitcases appear labels of companies and travel agencies from various European countries)."¹⁷¹ Dismissing the overwhelming evidence, the Museum describes Mr. Levi-Leleu's claim as "highly dubious."¹⁷²

In regard to Ms. Babbitt's watercolors, the Museum does not deny that she painted them, but maintains that they "never belonged to the painter, just as the Arbeit macht frei gate is not subject to restitution to the blacksmiths who made it on SS orders, or photographs of prisoners to the other prisoners who were employed as photographers."¹⁷³ In its 2006 Statement, the Museum asserted:

In the light of law, the rightful owner of the seven Gypsy portraits is the Auschwitz-Birkenau State Museum. In what regards the author property rights, they belong to Ms. Gottliebova. The Museum being the rightful owner, but without the property rights, is allowed to use them within the limits of permissible public use of protected artifacts, determined in regulation regarding author rights and relative rights.¹⁷⁴

Although the translation of this particular paragraph seems off a bit, reading it in context with the remainder of the statement makes clear that the Museum is asserting the work-for-hire copyright doctrine to support its retention of the watercolors.¹⁷⁵ The Museum also has asserted that because the works were created pursuant to Dr. Mengele's orders, they are not "art," and therefore not subject to restitution.¹⁷⁶ In 1980, one Museum of-

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² 2006 Report, *supra* note 116, at 31.

¹⁷³ *Id.*

¹⁷⁴ Press Release, Auschwitz-Birkenau State Museum, *Museum's Position on Issue of Portraits, Made in Auschwitz Concentration Camp by Dinah Gottliebova-Babbitt on Orders of SS Doctor Josef Mengele* (2006), http://www.auschwitz.org.pl/html/eng/aktualnosci/news_big.php?id=1125 (emphasis in original) [hereinafter Press Release, 2006].

¹⁷⁵ See generally Jane C. Ginsburg, *Conflicts of Copyright Ownership between Authors and Owners of Original Artworks: An Essay in Comparative and International Private Law*, 17 COLUM.-VLA J.L. & ARTS 395 (1993) (surveying international and United States law regarding the holder of copyrights for commissioned artworks).

¹⁷⁶ Caille Millner, *The Art of Stealing*, S.F. CHRON., Oct. 24, 2006, at B6. For discussion of the legal arguments, see 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 17.01[B][1] (2005) (discussing evolution of Berne Convention since 1886); Maciej Slusarek, *Protecting Intellectual Property in Poland*, Euro-Link for Lawyers Conference (Oct. 17, 2003), available at http://www.worldlink-law.com/pdf/intellectual_property_poland.pdf (last visited Feb. 1, 2008); Kristen J. Messer, *Two Sides of the Same Coin: The Memory of the Holocaust at War with a Survivor*, 35 N. KY. L. REV. (forthcoming 2008), available at

ficial even went so far to state in a letter to Ms. Babbitt that only Dr. Mengele, who died in 1979, would have a claim on the paintings, “and he wasn’t likely to exercise it.”¹⁷⁷ Leaving aside the abrupt insensitivity of the response, no court could adopt the copyright argument because, among other reasons,¹⁷⁸ doing so would trump intellectual property law over the universal prohibition against slave and forced labor.¹⁷⁹

Regardless of the obvious lack of legal merit of the work-for-hire copyright defense in this dispute, the Museum’s refusal to return either the watercolors or suitcase should be viewed in light of the Museum’s purpose and the relevant ICOM Principles. As stated in 2000 by Polish Prime Minister Buzek, the purpose of the Museum is to: (1) “preserve for posterity” evidence of Nazi genocidal policy; (2) “serve the cause of reconciliation and mutual understanding,” and (3) generate “ongoing cooperation among experts, researchers, and people who enjoy public esteem and trust” to “overcom[e] stereotypes and prejudices.”¹⁸⁰ ICOM Principle 6.7 (Use of Collections from Contemporary Communities), which falls under the umbrella of “Respect for Communities Served,” is most directly implicated by the claims.¹⁸¹ It provides:

Museum usage of collections from contemporary communities requires respect for human dignity and the traditions and cultures that use such material. Such collections should be used to promote human well-being, social development, tolerance, and respect by advocating multisocial, multicultural and multilingual expression.¹⁸²

http://works.bepress.com/context/jennifer_kreder/article/1001/type/native/viewcontent.

¹⁷⁷ Grossman, *supra* note 122. A subsequent Museum Director, Krystyna Oleksy, retreated from this position, but nonetheless dismissed Ms. Babbitt’s claim on the ground “that she was never interested in the museum . . . that she just wanted to use us.” Dora Apel, *The Auschwitz Memorial Museum and the Case of the Gypsy Portraits*, 2 OTHER VOICES, Mar. 2002, <http://www.othervoices.org/2.2/apel/>.

¹⁷⁸ E.g., Maura McDermott, *Auschwitz Museum Won’t Yield Watercolours Painted for Josef Mengele to Their Creator*, RELIGIOUS NEWS SERVICE, Dec. 11, 2006, available at <http://www.idebate.org/roma/newsarticle.php?id=699> (“In most cases, artists—even in prisons—own their work, says Patrick Boylan, chair of the International Council of Museums’ legal affairs committee.”).

¹⁷⁹ See generally, e.g., Colleen Enache-Brown & Ari Fried, *Universal Crime, Jurisdiction and Duty: The Obligation of Aut Dedere Aut Judicare in International Law*, 43 MCGILL L.J. 613 (1998) (describing the universal crime of using slave and forced labor).

¹⁸⁰ Press Release, *Address*, *supra* note 75. Admittedly, this is contrary to the self-serving 2006 Report’s over-emphasis on preservation of objects.

¹⁸¹ ICOM Principle 6.7.

¹⁸² *Id.*; see also ICOM Principle 4.3.

Human remains and materials of sacred significance must be displayed in a manner consistent with professional standards and, where known, taking into account the interests and beliefs of members of the community, ethnic or religious groups from whom the objects originated. They must be presented with great tact and respect for the feelings of human dignity held by all peoples.

It seems that Principle 6.7 likely was drafted with religious objects used by indigenous peoples in mind. Admittedly, it is a bit awkward to think of the contemporary Jewish community “using” the watercolors or battered suitcase. Nonetheless, display in a Holocaust museum is “use.” Thus, displaying these objects without the consent of Ms. Babbitt and Mr. Levi-Leleu demonstrates a lack of “respect for human dignity” and a failure to “promote human well-being.” The Museum likely would argue that because Principle 6.7 contemplates “advocating multisocial, multicultural and multilingual expression,” it contemplates retention and display of objects in a manner that is respectful—not restitution.¹⁸³ This argument, however, is undermined by Principle 6.5, which provides: “Where museum activities involve a contemporary community or its heritage, acquisitions should only be made based on informed and mutual consent without exploitation of the owner or informants. Respect for the wishes of the community involved *should be paramount*.”¹⁸⁴ Additionally, ICOM Resolution 4 passed in 2007 “urges ICOM members to support and initiate actions leading to physical repatriation, wherever applicable.”¹⁸⁵ Here, the Museum hides behind its advisory body, the International Council, which technically made the decision not to reconstitute the objects, as representing the Jewish community.¹⁸⁶ The widespread condemnation of its decision speaks otherwise.¹⁸⁷

Because the Museum has taken a legalistic stance, it likely would maintain that Principle 6.5 is not violated because neither Ms. Babbitt nor Mr. Levi-Leleu are the “owners” of the objects and thus their “informed and mutual consent” is not required. Also, because Principle 6.5 deals with acquisitions, the Museum might argue that the deaccessioning principles

Id. ICOM Principle 2.5 provides that “human remains and material of sacred significance should be acquired only if they can be housed securely and cared for respectfully . . . in a manner consistent with . . . the interest and beliefs of members of the community, ethnic or religious groups from which the objects originated” ICOM Principle 2.5.

¹⁸³ ICOM Principle 6.7.

¹⁸⁴ ICOM 6.5 (emphasis added).

¹⁸⁵ ICOM, *Preventing Illicit Traffic and Promoting the Physical Return, Repatriation and Restitution of Cultural Property*, Res. 4.1 (Aug. 24, 2007).

¹⁸⁶ The “governing body” has responsibility for deaccessioning under ICOM Principle 2.14. ICOM Principle 2.14. This raises issues similar to those after the war concerning the World Jewish Restitution Organization. See generally Menachem Z. Rosensaft & Joana D. Rosensaft, *Holocaust Restitution: Reconciling Moral Imperatives with Legal Initiatives and Diplomacy in The Early History of German-Jewish Reparations*, 25 *FORDHAM INT’L L.J.* 1 (2001).

¹⁸⁷ See sources cited, *supra* notes 140–145, 178 and accompanying text; Gordon, *supra* note 128; H.R. RES 162, *supra* note 142; Wyman, *supra* note 143; Moldstad, *supra* note 145; McDermott, *supra* note 178; see also Principle 6: “Museums work in close collaboration with the communities from which their collections originate as well as those they serve.” The Code clarifies that “[i]t is important therefore that museum policy is responsive to this possibility.”

more directly apply to these situations where the museum is already in possession of the items. As discussed below, even in these circumstances, Principle 2.13 (Deaccessioning from Museum Collections) supports restitution of the objects.¹⁸⁸ The Museum's retrenchment behind legal arguments demonstrates an overemphasis of legality over ethics and a missed opportunity to reach out to the survivor community and revive public trust in the Museum, which has been widely criticized for mishandling a variety of sensitive situations in recent years.

A. CONTEXT AND ACCESS

The Museum's strongest argument is that the artifacts should remain in the place where they will have the biggest impact on the world's view of the Holocaust.¹⁸⁹ Former Museum Director Jerzy Wroblewski insists that: "Everything which was created in Auschwitz ought forever to remain in this place. Nowhere else will these works have the same impact on visitors as when they are seen on the grounds of the former camp. It is here that they shout loudest."¹⁹⁰ The Museum argues that the artifacts provide rare and important evidence of the Nazi genocide and should not be removed from the Museum's collection.¹⁹¹ While at the camp, the artifacts speak "with a totally different voice than in any other place," serving documentary and educational functions about the murder of 1.1 million people.¹⁹²

As for Ms. Babbitt's paintings in particular, they are some of the relatively few objects that document the plight of the Roma and Sinti at the hands of the Nazis.¹⁹³ The Museum asserts that even the Roma people who survived and their descendants share the viewpoint that the portraits should remain in Auschwitz.¹⁹⁴ Well before the twentieth century, those labeled "Gypsies" comprised a group diverse in culture, level of assimilation into mainstream society, geographic location, language, religion, and appear-

¹⁸⁸ ICOM Principle 2.13.

¹⁸⁹ Millner, *supra* note 176.

¹⁹⁰ Jagninski, *supra* note 147.

¹⁹¹ Arendt, *supra* note 139.

¹⁹² Gordon, *supra* note 128. *But see* Merryman, *Thinking About*, *supra* note 53, at 1912 ("It is not self-evident that something made in a place belongs there, or that something produced by artists of an earlier time ought to remain in . . . the territory occupied by their cultural descendants, or that the present government of a nation should have power over artifacts historically associated with its people or territory.").

¹⁹³ Arendt, *supra* note 139.

¹⁹⁴ Press Release, Auschwitz-Birkenau State Museum, *This Time the US Congress* (May 25, 2001), http://www.auschwitz.org.pl/new/index.php?tryb=news_big&language=EN&id=129 [hereinafter Press Release, May 25, 2001].

ance.¹⁹⁵ It is in part because of the lack of uniformity among the surviving group—and prejudice—that it has not met with as much success as the Jewish community in obtaining post-war collective reparations.¹⁹⁶ In light of the highly fractured identity of the Roma and Sinti people, which has increased since the war,¹⁹⁷ and the impossibility of knowing whether those individuals painted by Ms. Babbitt were culturally a part of the Polish group of Roma and Sinti who now have aligned with the Museum's position, the argument that the Polish Roma's desires should be a factor in deciding the watercolors dispute seems quite weak.¹⁹⁸

It is often stated that the “restitution movement” will lead to “bare walls.”¹⁹⁹ Despite the present trend to reconstitute communally-owned objects to groups though, there has been little negative impact on museum vitality.²⁰⁰ Even art restituted to individuals without immediate charitable intentions will most often find its way back to a museum—either by later donation, loan, or sale.²⁰¹ The Museum's argument in the present context

¹⁹⁵ See István Pogány, *Minority Rights and the Roma of Central and Eastern Europe*, 6 HUM. RTS. L. REV. 1, 14 (2006); Woolford & Wolejszo, *supra* note 78, at 901 n. 1; JERZY FICOWSKI, *THE GYPSIES IN POLAND: HISTORY AND CUSTOMS* 49 (Interpress Publishers 1989).

¹⁹⁶ See, e.g., Woolford & Wolejszo, *supra* note 78, at 886. See generally BETWEEN PAST AND FUTURE: THE ROMA OF CENTRAL AND EASTERN EUROPE (Will Guy, ed. 2001); Barry A. Fischer, *No Roads Lead to Rom: The Fate of the Romani People under the Nazis and in Post-War Restitution*, 20 WHITTIER L. REV. 513, 516 (1999); Kirsten Martins-Heuß, *Reflections on the Collective Identity of German Roma and Sinti (Gypsies) After National Socialism*, 4 HOLOCAUST & GENOCIDE STUD. 193, 194 (1989) (citing DONALD KENRICK & GRATTAN PUXON, *THE DESTINY OF EUROPE'S GYPSIES* 184 (1972)). See also, e.g., Michael Kimmelman, *In Hungary, Roma Get Art Show, Not a Hug*, N.Y. TIMES, Feb. 6, 2008, at E1 (describing Roma as “Europe's most despised” minority in modern Europe and the recent rise of a right-wing extremist group, the “Hungarian Guard”).

¹⁹⁷ See Pogány, *supra* note 195, at 16–18.

¹⁹⁸ Cf. *Bonnichsen v. United States*, 217 F. Supp. 2d 1116, 1138, 1165–67 (D. Or. 2002) (rejecting restitution of “Kennewick Skeleton” to coalition of tribes because of lack of scientifically acceptable evidence demonstrating actual biological relationship between 9,000-year-old skeleton and any particular tribe required by NAGPRA).

¹⁹⁹ Compare Tony Paterson & David Cox, *German Crisis Meeting Called on Nazi Art Sales*, TELEGRAPH, Nov. 13, 2006, available at <http://www.telegraph.co.uk/news/worldnews/1533955/German-crisis-meeting-called-on-Nazi-art-sales.html> (describing German museum community's publicly stated fears that its heritage is being “spirited away from public view and sold off for millions to private collectors” at the expense of the public's right to view the work), with Gerstenblith, *Acquisition*, *supra* note 42, at 438–39 (relating that according to Cuno only four restitutions of Nazi-looted art by U.S. museums have resulted in the claimants taking possession).

²⁰⁰ See cited sources *supra* note 53.

²⁰¹ E.g., John Follain, *Trader of Lost Art*, SUNDAY TIMES, Sept. 24, 2006, available at <http://stolenvermeer.blogspot.com/2006/09/sunday-times-september-24-2006-feature.html> (quoting Clemens Touissant, a Nazi-looted researcher of some controversy, as stating that repatriated “works go back on show sooner or later—the Klimt never went into a bank vault, it's already on show in New York.”); Association of Art Museum Directors Newsletter, *Art Museums and Private Collectors*, and

misrepresents Mr. Levi-Leleu's and Ms. Babbitt's intentions because both want the objects to remain in museums—just not in Auschwitz-Birkenau where Ms. Babbitt was victimized and witnessed so much pain and Pierre Levi was murdered.²⁰² Ms. Babbitt's intention is for the art to be displayed in a museum in the United States, her current place of residency.²⁰³ Mr. Levi-Leleu desires that the suitcase would remain “in France as the property of Auschwitz . . . as powerful symbolic testimony.”²⁰⁴ He stated:

I'm not asking that they give it back to me and I'll put it in a cupboard. I want it to be seen by the people who visit the memorial. . . .²⁰⁵ I am not trying to empty the Auschwitz museum. And I regret what's happening. It's lamentable that, after what happened to the father, the son should have to fight for the suitcase to remain in France.²⁰⁶

The Museum's position is counter to its own actions. Most obviously, Mr. Levi-Leleu only saw the suitcase because it was on loan to a Paris Holocaust museum.²⁰⁷ The creation of other Holocaust museums in the world has depended on loans from the Museum, including suitcases.²⁰⁸ The Museum also has lent Ms. Babbitt's watercolors to other museums in Poland and abroad.²⁰⁹ The Museum would not have made such loans had it not felt that the objects would have “spoken” in a meaningful way to museum-goers in other locations. In fact, because not everyone can or will travel to Poland, the Museum has increased its effectiveness in achieving its mission because it has increased the number of people educated about the Holocaust and Auschwitz-Birkenau in a way not possible via text books.

Further, the Museum's arguments are counter to the ICOM Code. Principle 6.2 (Return of Cultural Property) contemplates return of an object to “a country or people of origin.” Because Ms. Babbitt and Mr. Levi-

the Public Benefit, Jan. 2007 (“More than 90% of the art collections held in public trust by America's art museums were donated by private individuals.”).

²⁰² Larry Gordon, *Auschwitz Artist Seeks Closure*, L.A. TIMES, Dec. 6, 2006, at A34; Riding, *supra* note 149.

²⁰³ Gordon, *Auschwitz*, *supra* note 202; Friess, *supra* note 122.

²⁰⁴ Charles Bremner & Roger Boyes, *Son Sues Auschwitz for Father's Suitcase*, TIMES, Aug. 12, 2006, at 42, available at <http://www.timesonline.co.uk/article/0,,13509-2308928,00.html>.

²⁰⁵ *Id.*

²⁰⁶ Riding, *supra* note 149.

²⁰⁷ The Museum attempts to downplay the significance of this fact by describing its initial reluctance to make the loan. 2007 Statement, *supra* note 163, at 2.

²⁰⁸ See EDWARD T. LINENTHAL, PRESERVING MEMORY: THE STRUGGLE TO CREATE AMERICA'S HOLOCAUST MUSEUM 210–11 (1995) (“As a result of the agreement between [the two museums], suitcases, umbrellas, can openers, small mirrors, toothbrushes, clothes brushes, prisoners' jackets and trousers, shoes, parts of bunkbeds, bowls, tables, twenty Zyklon-B cans, four artificial limbs, and nine kilograms of human hair were brought to the museum in Washington.”).

²⁰⁹ Press Release, May 25, 2001, *supra* note 194.

Leleu are individuals, the Museum could argue that their requests are not controlled by this Principle. In these unique circumstances the remainder of Principle 6.2 should influence the way in which the first sentence is be read.²¹⁰ It states that the decision of whether to return objects “should be undertaken in an impartial manner, based on scientific, professional and humanitarian principles”²¹¹ Additionally, deaccessioning objects to another museum is given favorable treatment under Principle 2.15 (Disposal of Objects Removed from the Collections),²¹² which is consistent with the claimants’ intentions.²¹³ The Museum’s insistence on retaining its entire collection above the humanitarian goal of helping to heal the intense pain of two Holocaust survivors is a mistake. The Museum would continue to serve the scientific goal of documenting the Holocaust without these few objects.

B. PRESERVATION

ICOM Principle 2 states that “[m]useums that maintain collections hold them in trust for the benefit of society and its development.” Further, “[m]useums have the duty to acquire, preserve and promote their collections as a contribution to safeguarding the natural, cultural and scientific heritage.”²¹⁴ The argument has been made that the Auschwitz-Birkenau State Museum should not retain the watercolors or suitcase because they are not on permanent display,²¹⁵ but this argument does not reflect the realities of museum management. Not all objects, especially those as fragile

²¹⁰ Cf. Council of Europe Convention, *Framework Convention for the Protection of National Minorities*, § I Art. 3(1) (1995) (“Every person belonging to a national minority shall have the right freely to choose to be treated or not to be treated as such”). The shipment from the Ukraine to Israel of wall frescoes painted by Bruno Schultz, a Polish and Jewish poet who had rejected his faith, at the command of a Nazi officer implicated similar issues. See Alison B. Hornstein, Note, *A Strange Case of Holocaust Art: The Historical and Cultural Property Debate over Who “Owns” Bruno Schulz*, 1 COLUM. J. E. EUR. L. 142, 151, 162–64 (2007); Dinitia Smith, *Debating Who Controls Holocaust Artifacts*, N.Y. TIMES, July 18, 2001, at E1; see also JERZY FICOWSKI, REGIONS OF THE GREAT HERESY: BRUNO SCHULZ—A BIOGRAPHICAL PORTRAIT (Theodosia Robertson trans. & ed., W.W. Norton & Co., 2003) (documenting life of Schulz).

²¹¹ ICOM Principle 6.2. ICOM Principle 6.3 states that where conditions for return of an object are met that a museum “take prompt and responsible steps to co-operate in its return.”

²¹² ICOM Principle 2.15.

²¹³ See cited sources *supra* notes 202–205 and accompanying text. This is irrelevant under a property rights approach. See Jennifer Anglim Kreder, *Reconciling Individual and Group Justice with the Need for Repose in Nazi-Looted Art Disputes: Creation of an International Tribunal*, 73 BROOK. L. REV. 155, 195 (2007).

²¹⁴ ICOM Principle 2.

²¹⁵ See Riding, *supra* note 149.

as watercolors, can be properly cared for on permanent display.²¹⁶ The Museum seems to have satisfied its preservation obligations.²¹⁷

This is not to say, however, that the Museum's stewardship justifies its current retention of the objects.²¹⁸ It can not be fairly said that the public has a right to the enjoyment of the objects—they were stolen from genocide victims. If anything, the public has been enriched by being able to learn from the objects for so many years without permission of the owners.²¹⁹ Even though the Museum took care of the objects for many years, this cannot outweigh Ms. Babbitt's claim to the fruits of her indescribably agonizing labor under Josef Mengele or Mr. Levi-Leleu's claim to what was stolen from his murdered father.

C. AUTHENTICITY

In regard to Ms. Babbitt's paintings, many have suggested that the Auschwitz-Birkenau State Museum should display high quality reproductions.²²⁰ The Museum maintains that displaying reproductions would be a terrible mistake.²²¹ Although ICOM Principle 4.7 might allow use of permanently marked replicas, as discussed below, the Museum's refusal is supported by highly regarded directors of art museums in the United States – although their primary focus was protesting the commercialization of art museums.²²² The Museum's position on this point reflects many important considerations although it is undermined by its own prior acts.

²¹⁶ *E.g.*, Press Release, May 25, 2001, *supra* note 194.

²¹⁷ ICOM Principles 2.18, 2.21, 2.23, 2.24, 3.

²¹⁸ Cf. Molly L. McIntosh, Note, Exploring Machu Picchu: an Analysis of the Legal and Ethical Issues Surrounding the Repatriation of Cultural Property, 17 DUKE J. COMP. & INT'L L. 199, 203 (2006). *But see* UNIVERSAL MUSEUM DECLARATION, *supra* note 44 (“Over time, objects . . . acquired—whether by purchase, gift, or partage—have become part of the museums that have cared for them, and by extension part of the heritage of the nations which house them.”).

²¹⁹ Paterson & Cox, *supra* note 199 (quoting Ronald Lauder: “Remember how [the art] got [in the museums] in the first place The owners were either killed or sent to Auschwitz. German museums were only too ready to buy this stuff.”).

²²⁰ See sources cited *supra* note 148.

²²¹ Press Release, Auschwitz-Birkenau State Museum, Dina Gottliebova—Further Developments (1999), available at http://www.auschwitz.org.pl/html/eng/aktualnosci/news_big.php?id=240.

²²² It is likely that even these directors would approve of display of reproductions clearly identified as such when necessary to preserve original fragile objects. See E-mail from John H. Merryman, Sweitzer Professor of Law and Affiliated Professor of Art, Emeritus, Stanford Law School, to Jennifer Anglim Kreder, Associate Professor of Law, Salmon P. Chase College of Law (July 14, 2008, 14:54 PST) (on file with author). Nonetheless, for the other reasons described below, reproductions of the watercolors should not be used.

James N. Wood, former director and president of the Art Institute of Chicago and current president and CEO of the J. Paul Getty Trust,²²³ proposes that a key to maintaining the integrity of a museum, and hence the public's trust in it, is the "expert distinction between the original and the reproduction."²²⁴ This sentiment was echoed by Glenn D. Lowry, Director of the Museum of Modern Art in New York, who stated that public trust in museums requires the preservation of "the presumption that all of the objects displayed or collected by art museums have been legally acquired and are genuine."²²⁵ de Montebello echoes the same sentiment and expands on it:

[P]robity should be found . . . embedded in our mission, our thoughts, and in our intellectual approach. Authenticity, too, remains at the core of public trust. For starters and quite simply because, since what we promise is authenticity, that is what our public expects to find within our walls. *So there must never be any question of a reproduction, a simulacrum,*^[226] *taking the place of an original work of art.*²²⁷

For example, de Montebello believes the widely-supported restoration of the Bamiyan Buddhas destroyed by the Taliban in Afghanistan in 2001²²⁸ is fundamentally ill-conceived.²²⁹ Because no large original pieces of the site exist, de Montebello believes that reconstruction would amount to further desecration because "[i]t would be no more authentic than displays at theme parks and thus, an egregious betrayal of authenticity."²³⁰ de Montebello's experience of standing before Diego Velázquez's *Las Meninas* at the Prado in Madrid, Spain, also makes the point.²³¹ Part of the painting's power derives from the viewer's "complete trust in the fact

²²³ Press Release, The J. Paul Getty Trust, James N. Wood, Former Director and President of the Art Institute of Chicago, Named President of the J. Paul Getty Trust (Dec. 4, 2006), *available at* http://www.getty.edu/news/press/center/ceo_appt_james_wood120406.html.

²²⁴ Wood, *supra* note 60, at 111; *see generally* Cuno Introduction, *supra* note 62, at 18 (pondering whether art museums differ from most museums because the public must rely on experts to establish authenticity).

²²⁵ Glenn D. Lowry, A Deontological Approach to Art Museums and the Public Trust, in *WHOSE MUSE?: ART MUSEUMS AND THE PUBLIC TRUST*, *supra* note 60, at 143 (quoting philosopher Andreas Huyssen: "[A]rt museums are one of the few places in our hyper-mediated world that still offer authentic experiences based on real objects.>").

²²⁶ A simulacrum is defined as: (1) an image or representation; or (2) an unreal or vague semblance. *THE AMERICAN WORLD HERITAGE COLLEGE DICTIONARY* 1293 (4th ed. 2002).

²²⁷ de Montebello, *supra* note 71, at 152 (emphasis added).

²²⁸ *See, e.g.*, Martin Bailey, Bamiyan Buddhas May Be Rebuilt, *ART NEWSPAPER*, Mar. 1, 2002, *available at* <http://www.forbes.com/collecting/2002/03/06/0306connguide.html>.

²²⁹ de Montebello, *supra* note 71, at 152.

²³⁰ *Id.*

²³¹ *Id.* at 153.

that this object, and not another, not its clone . . . is the object before which Philip IV himself stood in admiration some 350 years ago.”²³²

Philippe de Montebello points to one other example to drive home his point: the fact that Bill Gates, founder and CEO of Microsoft, chose to pay millions of dollars for the original Leicester Codex by Leonardo da Vinci, instead of paying someone to create an excellent facsimile, to commemorate Microsoft’s creation of Corbis, a digital archive of artwork.²³³ Perhaps Stephen Jay Gould, former Harvard paleontologist (now deceased) said it best: “[A]uthenticity stirs the human soul.”²³⁴

Authenticity for the Auschwitz-Birkenau State Museum poses a unique and serious issue, especially in light of Holocaust deniers’ manipulation of the Museum’s reconstruction of crematoria at Auschwitz I after the war.²³⁵ As stated by Joyce Carol Oates writing about September 11: “Amnesia seeps into the crevices of our brains, and amnesia heals. The present tense is a needle’s eye through which we thread ourselves—or are threaded—and what’s past is irremediably past, to be recollected only in fragments.”²³⁶ The Museum preserves those fragments of the Holocaust, which is essential in light of the rise of Holocaust denial worldwide and particularly in Central Europe and Poland.²³⁷

Thus, the value of an object’s authenticity supports the Museum’s arguments that reproductions should not replace the watercolors or suitcase. It must be noted, however, that the Museum has used a replica of a child’s suitcase.²³⁸ After a 1984 warehouse fire the Museum made a replica of Hana Brady’s suitcase, which was put on display in the Tokyo Holocaust Centre without disclosure of its replica status.²³⁹ The Museum revealed the true status only after Lara Brady, Hana’s niece, noticed discrepancies between the suitcase on display and the suitcase in a photograph of Hana’s

²³² *Id.*

²³³ *Id.* at 153–54.

²³⁴ *Id.* at 162–63.

²³⁵ E-mail from Robert Jan van Pelt to Author (Dec. 20, 2007) (on file with author).

²³⁶ Wood, *supra* note 60, at 114 (quoting Joyce Carol Oates, *Words Fail, Memory Blurs*, *Life Wins*, N.Y. TIMES, Dec. 31, 2001, at A11).

²³⁷ TED GOTTFRIED, *DENIERS OF THE HOLOCAUST* 12–13, 20, 38–39 (2001); *see also* DEBORAH LIPSTADT, *HISTORY ON TRIAL: MY DAY IN COURT WITH A HOLOCAUST DENIER* (2006) (concerning David Irving trial in Austria); Michael Kimmelman, *Simmering Anti-Semitism Mars a Vibrant Hungary*, N.Y. TIMES, May 7, 2008, at E1. *See generally* SHERMER, *supra* note 91; DEBORAH LIPSTADT, *DENYING THE HOLOCAUST: THE GROWING ASSAULT ON TRUTH AND MEMORY* (1993).

²³⁸ Rosemary McLoughlin, *In the Case of . . .*, STORY WRITING & ART COMPETITION, <http://www.dva.gov.au/vic/services/swac/2007/writing/mcloughlin.htm>.

²³⁹ *Id.*

friend holding Hana's suitcase after the war.²⁴⁰ "The family and the Center assert that even as such, the replica's contribution to the cause of human rights and peace education is not lessened by its lack of authenticity."²⁴¹

Nonetheless, authenticity is more complex than the object being an original; it also requires that a museum have acquired the artwork legally.²⁴² The statute of limitations has probably run on Ms. Babbit's claims, regardless of whether any court ever hears the dispute,²⁴³ because she has had knowledge of her claim since 1973 and presumably could have filed suit since the end of Communist rule in Poland in 1989.²⁴⁴ Similarly, the civil law statute of repose that would apply to Mr. Levi-Leleu's suit in Paris, assuming the Museum has raised the defense, likely has expired.²⁴⁵ Nonetheless, the expiration of the time period in which a claimant may bring suit is an entirely different matter than whether the original acquisition was legal.²⁴⁶ Presumably, in the chaos of post-war Poland, the preservation of economically low-value objects at the Auschwitz camp was legal, although some may disagree because the intent was to acquire stolen private property and the fruits of slave labor stolen from inmates.²⁴⁷

²⁴⁰ Posting of Heidi Estrin, *Hana's Suitcase*, to The Sydney Taylor Book Award, <http://sydneytaylorbookaward.blogspot.com/2008/04/hanas-suitcase.html> (Apr. 9, 2008, 17:50).

²⁴¹ *Id.*

²⁴² Cf. ICOM Principles 4.5, 6.4, 7; Lowry, *supra* note 225; ICOM Principle 2.11 (acquisition of unprovenance object whose source is within same country); ICOM Principle 3.4 (acquisition of unprovenanced object that may "have such an inherently outstanding contribution to knowledge that it would be in the public interest to preserve it").

²⁴³ A U.S. court possibly could hear the suit. See *Austria v. Altmann*, 541 U.S. 677 (2004).

²⁴⁴ See generally Jennifer Anglim Kreder, *The Choice Between Civil and Criminal Remedies in Stolen Art Litigation*, 38 VAND. J. TRANSNAT'L L. 1199 (2005); John H. Merryman, *The Good Faith Acquisition of Stolen Art* (Stanford Law Sch. John M. Olin Program in Law and Economics Working Paper No. 364, 2007), available at <http://ssrn.com/abstract=1025515>. The European Court of Human Rights may have jurisdiction to hear the claims. See *Pikielny v. Poland*, App. No. 3524/05, Eur. Ct. H.R. (2007) (written comments by The Helsinki Foundation for Human Rights); Lauren Elkin, *Lawsuit Filed in Polish Restitution Case Could Set Precedent for Restitution*, JEWISH NEWS WEEKLY, Feb. 24, 2005; Messer, *supra* note 176, at 8–9; Susanne Starecki, *Remedying Past Abuses of Governmental Power: Legal Accountability for the 1968 Events in Poland*, 26 HASTINGS INT'L & COMP. L. REV. 479, 499–501 (2003). See generally TAKING A CASE TO THE EUROPEAN COURT OF HUMAN RIGHTS (Philip Leach ed., 2d ed. 2005); Doris Marie Provine, *How Rights Evolve: The Case of Non-Discrimination in the European Court of Human Rights*, in COURTS CROSSING BORDERS: BLURRING THE LINES OF SOVEREIGNTY 85–104 (Mary L. Volcansek & John F. Stack, Jr. eds., 2005) (providing background on the evolution of the case of non-discrimination in the European Court of Human Rights); Laurence R. Helfer, *Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime*, 19 EUR. J. INT'L L. 125 (2008) (describing current problems in the Court).

²⁴⁵ See Kreder, *supra* note 244, at 1203, 1221, 1236.

²⁴⁶ Cf. FRASER, *supra* note 23, at 430 (discussing statute of limitations and legality concerning Eugenic sterilizations).

²⁴⁷ See also ICOM Principle 2.2 (acquiring only objects with valid title).

The legal and social culture in post-war (and then Communist) Poland did not have the same sense of property rights shared by Western capitalist culture.²⁴⁸

Nonetheless, present legal barriers to claims should not guide the Museum's decision. Poland and forty other nations signed Resolution 1205 of the Council of Europe concerning Nazi-looted property, which provides in relevant part:

3. Subsequent expropriation and nationalisation of Jewish cultural property, whether looted or not, by communist regimes was illegal, as was similar action in countries occupied by the Soviet Union.

[. . .]

12. Bodies in receipt of government funds which find themselves holding looted Jewish cultural property should return it. . . .²⁴⁹

Paragraph 13 calls for reform of legal barriers to restitution, including statutory limitations, restrictions on alienability, immunity for museum officials from breach of duty actions, and export controls. This sentiment is echoed in 2001 ICOM Resolution 8.²⁵⁰ Museums as holders of objects in trust for the public,²⁵¹ must deaccession objects “only . . . with a full understanding of the significance of the item, its character (whether renewable or non-renewable), legal standing, and any loss of public trust that might result from such action.”²⁵² The items in question are non-renewable because they personalize those who perished at Auschwitz. One watercolor preserves the memory of Celine and the name and identifying marks on the suitcase and on the few similar suitcases are “one of the few proofs of the death of individual people in KL Auschwitz.”²⁵³ Contrary to the Museum's position, however, the Museum will be more effective if it returns

²⁴⁸ See generally Dariusz Stola, *The Polish Debate on the Holocaust and the Restitution of Property*, in *ROBBERY AND RESTITUTION: THE CONFLICT OVER JEWISH PROPERTY IN EUROPE* 240–55 (Martin Dean et al. eds., 2007); Marek Jan Chodakiewicz & Dan Currell, *The Problem of Property Restitution*, in *POLAND'S TRANSFORMATION: A WORK IN PROGRESS* 159–193 (Marek Jan Chodakiewicz et al. eds., 2003); William R. Youngblood, *Poland's Struggle for a Restitution Policy in the 1990s*, 9 *EMORY INT'L L. REV.* 645 (1995).

²⁴⁹ Commission for Looted Art in Europe, Council of Europe Resolution 1205, <http://www.lootedartcommission.com/council-of-europe> (last visited Feb. 1, 2008).

²⁵⁰ ICOM, 2001 Resolution 8 (July 6, 2001), available at <http://icom.museum/resolutions/eres01.html>.

²⁵¹ E.g., Gerstenblith, *Acquisition*, *supra* note 42, at 416.

²⁵² ICOM Principle 2.13. See also American Association of Museums, Guidelines Concerning the Unlawful Appropriation of Objects During the Nazi Era, Nov. 1999, amended Apr. 2001, at 7 (Paragraph 4(f) authorizes museums to “waive certain available defenses.”), http://aam-us.org/museumresources/ethics/upload/ethicsguidelines_naziera.pdf.

²⁵³ 2007 Statement, *supra* note 163, at 2.

these objects. Hiding behind fragile legal claims does significant damage to the public's trust in the Museum.

Returning these two objects will help reconcile the severely troubled relationship between the Jewish and Polish communities.²⁵⁴ Fears of “opening the floodgates”²⁵⁵ for demands of repatriation for large numbers of objects are exaggerated—particularly in light of the fact that the Museum has been able to convince every potential claimant save Ms. Babbitt and Mr. Levi-Leleu to give the Museum permission to retain any objects subject to claim.²⁵⁶ Frankly, the Museum's alarmist response smacks of the “greedy” and “vengeful” stereotype of Jews,²⁵⁷ which the Museum should be striving to defeat. We must not forget that individual suffering is what is at stake, not just the symbolism of the two objects.²⁵⁸

Present calls to simply substitute reproductions for the originals risk damaging the public trust in the Museum, which depends on the public's faith in the authenticity of the Auschwitz site and objects for legitimacy. This is particularly difficult for the Auschwitz-Birkenau State Museum because of the disturbingly high rates of anti-Semitism and Holocaust-denial worldwide, in Central Europe and Poland in particular. The originals are proof that these atrocities occurred. Nonetheless, the Museum's cost-benefit analysis concerning whether to return the objects must not forget the human element.²⁵⁹ Additionally, ICOM Principle 2.15 tilts the balance because the objects will eventually be housed in another museum.²⁶⁰ In conclusion, the mere fact that the objects are irreplaceable does not mean they should not be returned.²⁶¹

²⁵⁴ See *supra* Section V; cf. ICOM Principle 6.6 (“When seeking funds for activities involving contemporary communities, their interests should not be compromised.”).

²⁵⁵ See 2006 Report, *supra* note 116, at 31; see also Friess, *supra* note 122 (quoting Polish Ambassador to the United States Przemyslaw Grudzinski: “Nearly every item left or contributed to the museum ... could be claimed by a rightful owner as personal property.”).

²⁵⁶ See 2007 Statement, *supra* note 163.

²⁵⁷ See FRASER, *supra* note 23, at 231, 257, 281, 283, 285, 291 (discussing the War Crimes Act and Britain's reaction to prosecutions under it).

²⁵⁸ *Id.* at 199.

²⁵⁹ Cf. *id.* at 421 (“[A] cold-hearted cost/benefit analysis also allowed the [Nazi and Tuskegee] experiments to be justified on the grounds that society as a whole . . . would benefit from the scientific knowledge to be gained.”).

²⁶⁰ See ICOM Principle 2.15.

²⁶¹ Many artifacts returned pursuant to NAGPRA will be destroyed through religious use as intended. *E.g.*, Jack F. Trope, *The Native American Graves Protection and Repatriation Act*, 24 ARIZ. ST. L.J. 35 (1992).

VII. CONCLUSION

In looking at the Babbitt and Levi-Leleu disputes, a few things are apparent—even obvious. First, neither claimant is motivated by financial considerations in any way. Second, each claimant is driven by intense emotional needs. Third, the Auschwitz-Birkenau State Museum will remain the primary monument in the world to those who perished in the Holocaust, with or without the claimed objects. Although the suggestion to display reproductions poses an insurmountable hurdle for the Museum, simply returning the artifacts does not. The objects, like others lent by the Museum to other museums of martyrdom, will continue to be used in a way that promotes the Museum's educational mission.

Fear of “opening the flood gates” seems to be the true reason for the Museum's refusal.²⁶² This fear is quite irrational—not all Holocaust survivors or their heirs feel the same way as Ms. Babbitt and Mr. Levi-Lelou, including Jan Liwacz, the artisan who was forced to hand-craft the “Arbeit macht frei” gate, perhaps the most recognized symbol of the camp and its cruel atrocities.²⁶³ Jacques Markiel has even agreed to restore the huge sculptures of coal miners he was forced to create in the 1940s.²⁶⁴ The Museum should be reassured that it has been able to convince every other camp survivor or heir except Ms. Babbitt and Mr. Levi-Leleu to relent in their pursuit of objects at the camp. Moreover, the sad truth is that there are fewer living survivors each year who would assert a claim.

The Museum's position—assuredly unconsciously—reflects the inadequacy of Polish restitution since World War II and the fall of the Iron Curtain in 1989. Poland's efforts at post-war restitution have been notoriously deficient.²⁶⁵ Immediately after the war, many Jews who attempted to return to their hometowns in Poland to reclaim property quite often met with severe anti-Semitism.²⁶⁶ Post-war Poland experienced rampant “ban-

²⁶² See Friess, *supra* note 122 (quoting Przemyslaw Grudzinski, Polish Ambassador to the United States: “Nearly every item left or contributed to the museum . . . could be claimed by a rightful owner as personal property.”).

²⁶³ Cf. Press Release, 2006, *supra* note 174.

²⁶⁴ *Statues Saved from Destruction*, MEMORIAL AND MUSEUM: AUSCHWITZ-BIRKENAU, June 29, 2007, available at http://www.auschwitz.org.pl/new/index.php?tryb=news_big&language=EN&id=1310.

²⁶⁵ Restitution in other Eastern bloc countries far outpaces that in Poland albeit not uniformly in all areas. E.g., Anna Gelpert, *The Laws and Politics of Reprivatization in East-Central Europe: A Comparison*, 14 U. PA. J. INT'L BUS. L. 315, 318 (1993) (discussing legislative histories of restitution initiatives and their legal mechanisms in the Czech Republic, Slovakia, Hungary and Poland).

²⁶⁶ E.g., JAN T. GROSS, FEAR: ANTI-SEMITISM IN POLAND AFTER AUSCHWITZ (2006) [hereinafter FEAR]; JAN T. GROSS, NEIGHBORS: THE DESTRUCTION OF THE JEWISH COMMUNITY IN JEDWABNE,

ditry, bloody political battles, and a widespread ethnic hatred,” which led to many Jewish deaths and emigration.²⁶⁷ There was a second wave of Jewish purges in 1968, which resulted in more Jewish emigration.²⁶⁸

Emigrants’ property was deemed abandoned.²⁶⁹ In the 1960s, Poland signed a number of treaties with Western governments to resolve the claims for far below market value—assuming a true market.²⁷⁰ With a Communist regime firmly in place in Poland, accepting some compensation seemed like the only alternative to never receiving anything.²⁷¹ Having accepted compensation bars any present-day attempt to re-open the issue in Polish courts.²⁷²

In 2004, there was a significant movement to prevent Polish entrance into the European Union because of its inadequate restitution policies, but those efforts failed.²⁷³ Partially in response to this level of negative international attention, Poland made efforts to return some communal property to religious groups, but has made no effort to reconstitute individuals’ private property despite a restitution bill introduced into parliament in July, 2005, and never voted upon.²⁷⁴ Additionally, Polish legislation restricts the rights of those living outside of Poland to claim property.²⁷⁵ Deeply ingrained

POLAND (2001); Jan T. Gross, *A Tangled Web: Confronting Stereotypes Concerning Relations Between Poles, Germans, Jews, and Communists*, in *THE POLITICS OF RETRIBUTION IN EUROPE*, 74–129 (Istvan Deak et al. eds., 2000) (Gross’ work “has unleashed a storm of controversy about Polish complicity in the crimes of the Shoah and has challenged assumptions—common in Poland for decades—about Poles as an exclusively ‘victim’ people.” HUENER, *supra* note 86, at 2.).

²⁶⁷ Stola, *supra* note 248, at 246. See also John J. Hartman, *Polish-Jewish Relations and the Holocaust: A Psychohistorical Perspective*, in *I REMEMBER EVERY DAY . . . THE FATES OF THE JEWS OF PRZEMYSIL DURING THE SECOND WORLD WAR* (John J. Hartman & Jacek Krochmal eds., 2002); MICHAEL C. STEINLAUF, *BONDAGE TO THE DEAD: POLAND AND THE MEMORY OF THE HOLOCAUST* (1997).

²⁶⁸ Starecki, *supra* note 244, at 486–87 (“In the aftermath of [student demonstrations in] March of 1968, the Jewish purges began: the army fired Jewish officers; Jewish doctors lost their jobs; universities expelled and banned Jewish students; and the government fired Jewish state officials.”).

²⁶⁹ *Id.* at 500; see also Gross FEAR, *supra* note 266, at 39–47 (describing the takeover of Jewish property by Polish neighbors).

²⁷⁰ *E.g.*, Stola, *supra* note 248, at 248.

²⁷¹ *Id.*

²⁷² *Id.*; see also *Poland v. Garb*, 542 U.S. 901 (2004), *on remand to* 440 F.3d 579 (2d Cir. 2006) (dismissing class action against Poland for property restitution).

²⁷³ See Ambassador Edward B. O’Donnell, Special Envoy for Holocaust Issues, *Compensation and Restitution for Victims of the Holocaust*, Remarks at the Claims Conference Board of Directors (Jul. 11, 2006), available at <http://www.state.gov/p/eur/rls/rm/69488.htm>.

²⁷⁴ See BUREAU FOR DEMOCRACY, HUMAN RIGHTS, AND LABOR, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 2005: POLAND, available at <http://www.state.gov/g/drl/rls/hrrpt/2005/61668.htm>.

²⁷⁵ Starecki, *supra* note 244, at 493.

anti-Semitism is one reason for Poland's abysmal restitution record, which violates Council of Europe Resolution 1205.²⁷⁶

It also is possible that the Polish position reflects the intense negotiations with the German government concerning the return by Poland of German library collections taken by Soviet soldiers from Berlin to the East.²⁷⁷ The archives contain, for example, an original Mozart manuscript for his Piano Concerto No. 27 in B-flat Major.²⁷⁸ Emotions are running high in this diplomatic impasse, which has lasted over fifteen years.²⁷⁹ For example, "A recent article in Germany's *Frankfurter Allgemeine Zeitung* referred to the manuscripts from the Prussian State Library as "the last German prisoners of war."²⁸⁰ Poland points to the massive destruction of Polish cultural property during the war to justify its refusal to return the library archives to Germany—it views the materials as restitution for what was lost.²⁸¹ Perhaps the Polish position against restitution of the watercolors and suitcase is complicated by its position against restitution to Germany.

The Auschwitz-Birkenau State Museum needs to change its overly legalistic approach to an ethical one to invigorate the public trust in it. The Museum should use the ICOM Code to guide its conduct with an emphasis on Principle 6.7, which calls for "respect for human dignity" and use of collections "to promote human well-being." As de Montebello stated in regard to the "close correlation between public trust and a museum's reputation":

[A] nick on either one constitutes a serious breach of both. In essence, a museum should have zero tolerance for even a single derisory comment from a credible source occasioned by even a single wayward step away from its mission, and to that end, every effort should be made to assure the absolute integrity of all we do.²⁸²

²⁷⁶ Stola, *supra* note 248, at 250. See also sources cited *supra* notes 248 and 266— and accompanying text (describing Polish anti-Semitism and Council of Europe Resolution 1205).

²⁷⁷ *Germany and Poland Bicker over Cultural Treasures Evacuated from Berlin During War*, INT'L HERALD TRIB., Aug. 15, 2007 available at <http://www.iht.com/articles/ap/2007/08/16/europe/europe/EU-GEN-Poland-Libraries-Treasures.php>. See also Kate Connolly, *Germany Issues Catalogue of Missing Art Works in Push for Return of War Booty*, GUARDIAN (Aug. 2, 2007), available at <http://www.guardian.co.uk/world/2007/aug/02/secondworldwar.germany>.

²⁷⁸ *Germany*, *supra* note 277.

²⁷⁹ *Id.*

²⁸⁰ *Id.*

²⁸¹ See *id.*

²⁸² de Montebello, *supra* note 71, at 151–52.

If the Museum decides to return Ms. Babbitt's watercolors and Pierre Levi's suitcase, it could begin the difficult process of regaining the public's trust and restoring its reputation and integrity as the primary Holocaust memorial in the world.

Restitution would validate two survivors' suffering and provide a very important salve to help them in their healing. Although return of a few objects will not completely heal intense emotional injuries, such a symbolic gesture is important. As elegantly stated by another scholar about the impact of Auschwitz upon its victims:

[Sixty] years after the collapse of the National Socialist regime we realize that its effects are still pernicious, that the disaster has not run its course. . . . People say, "Let's get on with life," as if the Holocaust and other Nazi crimes against humanity had been dealt with, and were no longer—if they had ever really been—a part of life.²⁸³

Obviously, two people who decide to exert so much energy for a few inexpensive objects are not motivated by financial considerations. Dismissing their claims as unimportant would amount to the equivalent of saying: "Get on with it." Artists have understood the close emotional connection of Ms. Babbitt to her watercolors and supported her in the pursuit of them.²⁸⁴ Similarly, one can understand Mr. Levi-Leleu's horror at the idea that his father's suitcase could be forced to again journey from Paris to Auschwitz. Intense emotional need is the only explanation for their behavior.²⁸⁵ Returning these objects would help Ms. Babbitt and Mr. Levi-Leleu reconnect with their pasts before the trauma they suffered to create a sense of continuity and rootedness, described by French philosopher Simone Weil during the war as "perhaps the most important and least recognized need of the human soul."²⁸⁶

²⁸³ Geoffrey H. Hartman, *Is an Aesthetic Ethos Possible? Night Thoughts After Auschwitz*, 6 *CARDOZO STUD. L. & LITERATURE* 135, 135 (1994).

²⁸⁴ See Friess *supra* note 122 (describing letter signed in 2006 by "thirteen artists, including a former executive director of the United States Holocaust Museum), see also Moldstad, *supra* note 145 (explaining that four hundred museum artists signed a petition urging restitution).

²⁸⁵ See, e.g., MARTHA MINOW, *BREAKING THE CYCLES OF HATRED* 28 (2002) ("The past continues to torment because it is not the past. These places are not living in a serial order of time but in a simultaneous one, in which the past and present are a continuous, agglutinated mass of fantasies, distortions, myths, and lies.") (quoting Michael Ignatieff) (citation omitted).

²⁸⁶ See Weil, *supra* note 14, at 43. The following poem by Auschwitz survivor Charlotte Delbo may help illustrate the disconnect felt by survivors for those of us who have not experienced it.

I'm back from another world
to this world
that I didn't leave
and I don't know
which is real
tell me have I come back

In conclusion, the Museum should listen to the voices of Ms. Babbitt, Mr. Levi-Lelou, the restitution psychology experts, esteemed museum directors, the artists—and even the lawyers—and return the largely symbolic objects that should never have been taken away—even if the law would not force the restitution.²⁸⁷ Doing so would not only be the just and fair solution required by the Washington (and Vilnius) principles, but also would help to restore the public trust in the Museum. As stated by perhaps premiere Auschwitz historian: “A museum can influence the public’s understanding of the past only insofar as the knowledge and expertise of its creators and sponsors is respected.”²⁸⁸

from that other world?
As for me
I’m still there
and I’m dying
back there
every day a bit more
I die again
the death of all those who died
and I no longer know what’s real
in this world
from the other world-back-there
now
I no longer know
when I’m dreaming
and when
I’m not dreaming.

Charlotte Delbo, *Une Connaissance Inutile 183–84* (1970), reprinted in Lawrence L. Langer, *Admitting the Holocaust 105–06* (1995).

²⁸⁷ Press Release, May 25, 2001, *supra* note 194 (asserting that the objects may not be exported under Polish law). If so, the Museum should secure a waiver from the appropriate governmental agency. Failure to do so is shameful and in violation of Council of Europe Resolution 1205 and ICOM 2001 Resolution 8. Cf. *United States v. Portrait of Wally*, 105 F. Supp. 2d 288 (S.D.N.Y. 2000) (discussing 1998 amendments in Austrian law to remedy post-war denials of export permits to Holocaust victims reclaiming property); Claims Conference: Conference on Jewish Material Claims Against Germany, *Polish Prime Minister Commits to Restitution Legislation*, http://www.claimscon.org/index.asp?url=news/tusk_031208 (Mar. 11, 2008) (“The Prime Minister of Poland, Donald Tusk, committed yesterday at a meeting with Jewish organizations in New York that the Polish government will soon address the issue of private property restitution.”); Howard Reich, *Czechs to Keep Art Taken by Nazis*, CHI. TRIB., Mar. 22, 2002 (describing Czech refusal to grant export permit for Nazi-looted art restituted to survivor).

²⁸⁸ HUENER, *supra* note 86, at 25.