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Black Lives Matter and the Push for Colonial-Era Cultural Heritage Restitution

Kathryn Speckart
Catholic University of America (Student), speckart@cua.edu

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Cover Page Footnote

J.D. Candidate, Catholic University of America, Columbus School of Law, Class of 2023. I thank Thomas R. Kline, Of Counsel, Schindler Cohen & Hochman, who gave his invaluable insights and feedback, based on his decades of experience litigating cultural property claims. I also thank Susanna F. Fischer, Associate Professor of Law, Columbus School of Law, for her vitally helpful comments that are also incorporated into this article.

BLACK LIVES MATTER AND THE PUSH FOR COLONIAL-ERA CULTURAL HERITAGE RESTITUTION

Kathryn G. Speckart⁺

The influence of the Black Lives Matter movement extends into U.S. museums in the form of calls for “decolonization” of collections comprised of art and artifacts from Africa and other colonized areas. As a result, the accompanying legal and ethical questions surrounding these artifacts now figure prominently in the museum industry. This Comment analyzes why the current U.S. cultural heritage law framework does not accommodate colonial-era African artifacts. This is due to few of these artifacts being subject to legal claims under current laws, African artifacts not having protection as a special classification, and the lack of enforcement mechanisms in museum ethical codes.

To achieve lasting change consistent with the Black Lives Matter movement, there is a need for positive legislation in the United States, coupled with strong museum association guidance, that would compel museums to inventory African art and artifacts in their collections, to publicize this information, and to follow a set of guidelines for considering the return of these items, where appropriate, to their communities and countries of origin. This proposed solution is based upon museum industry standards as well as aspects of existing special legislation for Native American objects and Nazi-era looted artworks proven to produce beneficial results.

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I. INTRODUCTION

*There was an injustice perpetrated 130 years ago. It's time to close that cycle, so that the people who own this culture, these cultural artifacts, can get them back, be able to see them, study them, learn about them.*¹

This injustice invoked by Enotie Ogbebor—a Nigerian artist and prominent voice for the restitution of African artifacts from foreign museums—was the systematic looting and taking of indigenous African art and sacred artifacts perpetrated by European colonizing armies and colonial officials in the late 19th century.²

The late 1800s saw the European abolition of the international slave trade and the rise of industrialized Western economies.³ Economic demands provided a strong impetus for Western European countries to conquer and plunder African

1. Nick Roll, *Whose Art Is It? US Museums Reexamine Their African Collections*, CHRISTIAN SCI. MONITOR (Aug. 9, 2021), <https://www.csmonitor.com/layout/set/print/USA/Society/2021/0809/Whose-art-is-it-US-museums-reexamine-their-African-collections> (emphasis added).

2. *Id.*

3. See Ehiedu E. G. Iweriebor, *The Colonization of Africa*, N.Y. PUBLIC LIBR., <https://wayback.archive-it.org/11788/20200109141010/http://exhibitions.nysl.org/africanaage/essay-colonization-of-africa.html> (last visited Sept. 29, 2021).

nations for raw materials.⁴ Exacerbating the human devastation of European colonization in Africa, conquering armies looted indigenous peoples' cultural artifacts and treasures, taking the hoards to their home countries.⁵

European powers as well as many individual looters placed these artifacts in state museum collections or sold them into private hands, resulting in many of these artifacts finding their way into U.S. museums via the global art market.⁶ Classified as “spoils of war,” “personal trophies,” or simply a “straight up donation,” the presence of these artifacts in U.S. museum collections today gives rise to legal and ethical questions over 100 years later.⁷

Although the United States government did not directly colonize Africa, many U.S. museums now hold significant African collections donated by benefactors and private collectors or purchased directly from dealers with private funds.⁸ Until recently, the manner in which artifacts from Africa's colonial past left the continent and entered U.S. museum collections was not openly debated in the public square.⁹

The Black Lives Matter (BLM) movement harnessed the power of a social media hashtag and mobilized people in the United States and around the world in support of civil rights for people of African descent.¹⁰ Emerging in 2013 after the acquittal of Trayvon Martin's killer in Florida, the movement and its associated organization has wielded significant pressure upon governmental and

4. See generally Report from Jas. A. Smith to the Secretary of State (Nov. 20, 1907), in PAPERS RELATING TO THE FOREIGN RELATIONS OF THE UNITED STATES, WITH THE ANNUAL MESSAGE OF THE PRESIDENT TRANSMITTED TO CONGRESS, 1907, 814, 823 (Gov't Printing Off., 1910), <https://history.state.gov/historicaldocuments/frus1907p2/d216> (“The policy of the administration, therefore, is to extract the riches of the country at the lowest possible cost, and with the result that the profits accruing therefrom go to swell the dividends of the Europeans interested, and neither the country nor its inhabitants receive any corresponding benefit.”).

5. *Id.*

6. See Nosmot Gbadamosi, *Is It Time to Repatriate Africa's Looted Art?*, FOREIGN POL'Y (July 28, 2020, 6:00 AM), <https://foreignpolicy.com/2020/07/28/time-repatriate-africa-looted-art-artifacts-cultural-heritage-benin-bronzes-nigeria-ghana-europe-british-museum/#>.

7. Olivia McEwan, *How the Labels in the British Museum's Africa Galleries Evade Responsibility*, HYPERALLERGIC (June 29, 2021), <https://hyperallergic.com/659691/british-museum-africa-galleries-labels-evade-responsibility/>; Roll, *supra* note 1.

8. See *Museums in the United States with Collections of African Art*, SMITHSONIAN LIBRS., <https://library.si.edu/libraries/african-art/african-art-collections> (last visited Sept. 12, 2021); see also *African Art*, THE CLEVELAND MUSEUM OF ART, <https://www.clevelandart.org/art/departments/african-art> (last visited Jan. 15, 2023); *Collections: Art of Africa*, BROOKLYN MUSEUM, <https://www.brooklynmuseum.org/opencollection/collections/21> (last visited Jan. 15, 2023).

9. See Inside Story, *Should Stolen African Art Be Returned?* AL JAZEERA, at 22:35–22:52 (Oct. 29, 2021), <https://www.aljazeera.com/program/inside-story/2021/10/29/should-stolen-african-art-be-returned> (Chika Okeke-Agulu, Professor of African and African Diaspora Art History at Princeton University, states that U.S. institutions are “playing the ostrich” in this debate).

10. Nathalie Baptiste, *Origins of a Movement: A New Book Charts the Rise and Resilience of Black Lives Matter*, NATION (Feb. 9, 2017), <https://www.thenation.com/article/archive/origins-of-a-movement/> (“But while [BLM] arose in a moment of disappointment and grief, it has for the past four years also helped to inaugurate a new era in the struggle for racial justice.”).

private institutions to enact policies promoting the rights of African Americans.¹¹ The BLM movement's influence on social policies includes areas such as the environment, policing practices, and broad economic concerns affecting African Americans.¹²

The BLM movement's influence extends to the museum world. This pressure comes in the form of calls for more diverse staff as well as the “decoloniz[ation]” of collections comprised of art and artifacts from Africa and other colonized areas.¹³ Museum decolonization is an active process, notably implemented in some museums with Native American collections, that challenges long-held assumptions, “dismantl[ing] systems of thoughts that place[] the straight white man as standard.”¹⁴ Returning objects to their people or places of origin is a key aspect of decolonization.¹⁵

In the context of museums with African art collections, calls for decolonization mean returning “artifacts stolen by people who took colonial violence and racial superiority as a given.”¹⁶ The continued presence of looted African artifacts in museum collections, after the industry has largely accepted the notion of decolonization, has been criticized as a “gaping moral contradiction.”¹⁷ The BLM movement challenges museums to publicly acknowledge “acts of colonial violence” and the “extent of their brutality,”

11. See generally *Black Lives Matter Movement*, HOW. UNIV. L. LIBR., <https://library.law.howard.edu/civilrightshistory/BLM> (last visited Sept. 12, 2021).

12. See generally Alanis Allen, *Black Lives Matter in the Climate Movement*, YALE PROGRAM ON CLIMATE CHANGE COMM'N (Sept. 2, 2020), <https://climatecommunication.yale.edu/news-events/black-lives-matter-in-the-climate-movement/>; see, e.g., Cory James, *Black Lives Matter Movement Shifts From Protest To Policy With Efforts To Hold Officers Accountable For Wrongdoing*, CBS N.Y. (May 25, 2021, 6:39 PM), <https://newyork.cbslocal.com/2021/05/25/black-lives-matter-police-reform-policies/>; see also Jamillah Bowman Williams et al., *#BlackLivesMatter—Getting from Contemporary Social Movements to Structural Change*, 12 CALIF. L. REV. ONLINE 1, 2, 23–24 (June 2021), <https://www.californialawreview.org/blacklivesmatter-getting-from-contemporary-social-movements-to-structural-change>.

13. Nancy Kenney, *Exclusive Survey: What Progress Have US Museums Made on Diversity, After a Year of Racial Reckoning?*, ART NEWSPAPER (May 25, 2021), <https://www.theartnews.com/2021/05/25/exclusive-survey-what-progress-have-us-museums-made-on-diversity-after-a-year-of-racial-reckoning>; Gbadamosi, *supra* note 6.

14. Elisa Shoenberger, *What Does It Mean to Decolonize a Museum?*, MUSEUM NEXT (May 11, 2021), <https://www.museumnext.com/article/what-does-it-mean-to-decolonize-a-museum/>; see also *What Does Decolonization Mean?*, ABBE MUSEUM, <https://www.abbemuseum.org/blog/2016/01/what-does-decolonization-mean.html> (last visited Jan. 15, 2016).

15. Michèle Rivet, *Decolonization and Restitution: Moving Towards a More Holistic and Relational Approach*, 8 MUSEUM WORLDS 204, 206–08 (2020) (“We need to understand how claims of restitution could provide the basis for relationship-building that could support other aspects of museum decolonization.”).

16. Gbadamosi, *supra* note 6.

17. Dr. Errol Francis, *Reflections on Black Lives Matter, Decolonisation, and What Museums Can Do Next*, CULTURE&, <https://www.cultureand.org/news/reflections-on-black-lives-matter-decolonisation-and-what-museums-can-do-next-dr-errol-francis/> (last visited Jan. 17, 2022).

thereby connecting these artifacts to a continuum of injustice toward Black African communities.¹⁸ As a result, the accompanying legal and ethical questions surrounding these artifacts now figure prominently in the museum industry.¹⁹

To achieve lasting change consistent with the Black Lives Matter movement, there is a need for positive legislation in the United States, coupled with strong museum association guidance, that would compel museums to inventory African art and artifacts in their collections, to publicize this information, and to follow a set of guidelines for considering the return of these items, where appropriate, to their communities and countries of origin.

This Comment first summarizes the current approach in the United States to the issue of cultural heritage restitution.²⁰ This includes responses to formal legal claims, compliance with obligations under special legislation, and provenance research initiatives rooted in museum industry ethical codes. Next, this Comment analyzes why this current framework does not accommodate colonial-era African artifacts. This is due to few of these artifacts being subject to legal claims under current laws, African artifacts not having protection as a special classification, and the lack of enforcement mechanisms in museum ethical codes.²¹ Finally, this Comment proposes a legislative solution, motivated by the BLM movement's pressure on U.S. museums, that compels museums to review their collections for colonial-era African artifacts with suspect provenance. This proposed solution is based upon museum standards as well as aspects of current special legislation for Native American objects and Nazi-era looted artworks proven to produce beneficial results. The proposal includes the publication of detailed artifact inventories, provenance research, community consultations, extended statutes of limitations, and restitution in appropriate cases.

18. *Id.*

19. *See, e.g.*, Press Release, Northwestern Now, Black Lives Matter Movement and the Global Call to Repatriate African Objects Held in Western Museums (Aug. 4, 2020), <https://news.northwestern.edu/stories/2020/08/black-lives-matter-movement-and-the-global-call-to-repatriate-african-objects-held-in-western-museums/?fj=1>.

20. For the purposes of this article, the term “restitution” is used to encompass both the specific meanings and goals of restitution, and repatriation of cultural heritage. *See generally* Charity Gates, *Who Owns African Art? Envisioning a Legal Framework for the Restitution of African Cultural Heritage*, 3 INT’L COMP. POL’Y & ETHICS L. REV. 1131, 1138–39 (2020).

21. The Smithsonian Institution commenced an Ethical Returns Working Group to “examin[e] past collecting standards through a moral rather than legal lens.” *See* Peggy McGlone, *Why the Smithsonian is Changing Its Approach to Collecting, Starting with the Removal of Looted Benin Treasures*, WASH. POST (Jan. 6, 2022, 6:00 AM), https://www.washingtonpost.com/entertainment/museums/smithsonian-collecting-policy-overhaul/2022/01/05/36998dd8-6819-11ec-b0a7-13dd3af4f70f_story.html. The result of the Working Group may provide practical ethical guidance on this issue, not currently found in museum association ethical codes. *Id.*

II. CULTURAL HERITAGE RESTITUTION FRAMEWORK

The United States' approach to cultural heritage restitution is *ad hoc*, drawing upon an assortment of relevant foreign and domestic laws and ethical guidelines. Museums are free to set their own institutional policies regarding the acquisition, loan, and care of such artifacts subject to legal requirements and industry guidelines.²² Extensive and costly provenance research—separate from the initial due diligence research performed at the acquisition stage—into an artifact's source is primarily set in motion by a formal legal claim for restitution or a well-funded initiative founded in professional, ethical guidelines.²³ As a result, museums must either be compelled to respond to outside ownership claims, or have sufficient resources and internal initiative to divert staff from more public-facing roles to the research that is requisite for a program of restitution.²⁴

A. Formal Claims—International Framework

1. UNESCO and CPIA

A fundamental law governing the movement of international cultural heritage is the 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (UNESCO Convention).²⁵ The UNESCO Convention's purpose is "to provide a common framework among nations for alleviating abuses in the international trade of cultural property."²⁶ There are key provisions prohibiting state parties from importing stolen documented cultural property (such as from museums and religious institutions) and undocumented archeological or ethnological material that can be tied to a serious condition of pillage in the source country.²⁷ This framework is not retroactive; therefore, the year 1970 provides a bright line that factors heavily when a museum is faced with a formal claim of restitution of a purportedly stolen artifact.²⁸ The force of the year 1970 also has taken on an

22. *AAM Code of Ethics for Museums*, AM. ALL. OF MUSEUMS (2000) <https://www.aam-us.org/programs/ethics-standards-and-professional-practices/code-of-ethics-for-museums/>.

23. WALTER G. LEHMANN, *MUSEUM ADMINISTRATION: LAW AND PRACTICE* 447 (2020) ("In addition to information on ownership, the provenance of a work includes information on its creation, exhibition, loan, publication and other aspects of the work's history.").

24. *See infra* Sections III.B, IV.

25. *See* Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, Nov. 14, 1970, 823 U.N.T.S. 231 [hereinafter 1970 UNESCO Convention]; *see also* Alexander Herman, *Fifty Years On, Unesco's Convention Against Illicit Trafficking of Cultural Artifacts Still Shines Bright*, ART NEWSPAPER (Nov. 13, 2020), <https://www.theartnewspaper.com/2020/11/13/fifty-years-on-unesco-convention-against-illicit-trafficking-of-cultural-artifacts-still-shines-bright>.

26. MARIE C. MALARO & ILDIKO P. DEANGELIS, *A LEGAL PRIMER ON MANAGING MUSEUM COLLECTIONS* 87 (3d ed. 2012).

27. *See* 1970 UNESCO Convention, *supra* note 25, at 240, 242.

28. *See* Herman, *supra* note 25.

ethical dimension due to the museum profession's broad incorporation of this date into industry ethical codes for acquisitions.²⁹

Unlike countries that treat the UNESCO Convention as self-implementing, the United States Government created a unique implementation scheme.³⁰ The 1983 Convention on Cultural Property Implementation Act (CPIA) specifically implements Article 7(b) regarding the illicit import of documented stolen cultural property.³¹ The legislation also implements Article 9 (pillaging of undocumented archaeological materials) via the creation of bilateral agreements between the United States and UNESCO Convention state parties.³² The statutorily created Cultural Property Advisory Committee (under the auspices of the U.S. Department of State) reviews requests for direct cooperation with stemming the illicit export of relevant artifacts from their country of origin and their importation into the United States, and makes recommendations to the Assistant Secretary of State for Education and Culture for decision.³³ Bilateral agreements under CPIA are not enforceable retroactively from their date of entry and must be renewed every five years.³⁴ Thus, the CPIA did not implement a blanket import restriction covering artifacts from all UNESCO Convention state parties, but rather a “case-by-case system of import controls triggered by an application from a foreign government”³⁵ Notably, since the passage of the CPIA in 1983, Mali and Nigeria are the only Sub-Saharan African nations to hold bilateral agreements for cultural property protection with the United States.³⁶

29. *See id.*

30. Patty Gerstenblith, *ART, CULTURAL HERITAGE, AND THE LAW* 851 (4th ed. 2019).

31. *See* 19 U.S.C. § 2607 (2018).

32. *See* 19 U.S.C. § 2602(a)(2)(A) (“[T]he President may enter into a bilateral agreement with the State Party to apply the import restrictions set forth”). The CPIA only implemented Articles 7(b) and 9 of the 1970 UNESCO Convention. *See Get the Facts: What is the Effect of the 1983 Cultural Property Implementation Act?*, CULTURAL PROP. NEWS, <https://culturalpropertynews.org/get-the-facts/#what-is-the-effect-if-the-1983-cultural-property-implementation-act> (last visited Mar. 17, 2022).

33. *See* Gerstenblith, *supra* note 30, at 848–49. The Committee evaluates requests based upon whether the applicant's cultural patrimony is in jeopardy of pillage, whether the party has made reasonable efforts at protection, and whether import restrictions would, in fact, deter more pillage and are consistent with the interests of the international community. *See* 19 U.S.C. § 2602(a)(1)(A)–(D).

34. “Import restrictions listed below shall be effective for no more than five years beginning on the date on which the agreement enters into force with respect to the United States.” 19 C.F.R. § 12.104(g).

35. MALARO & DEANGELIS, *supra* note 26, at 91.

36. As of 2022, twenty-five countries hold cultural property protection bilateral agreements with the United States, 4 have emergency designations, and 2 presently have expired agreements. *See* Bureau of Educ. & Cultural Affs., *Current Agreements and Import Restrictions*, U.S. DEP'T OF STATE, <https://eca.state.gov/cultural-heritage-center/cultural-property-advisory-committee/import-restrictions> (last visited Oct. 18, 2022).

2. National Stolen Property Act

In addition to the obligations formed under bilateral agreements with UNESCO Convention state parties, foreign patrimony or ownership laws may have effect in U.S. jurisdictions through application of the 1934 National Stolen Property Act (NSPA).³⁷ The Act prohibits the transportation of stolen “goods, wares, merchandise, securities or money” valued over \$5,000 across state or national boundaries for purposes of sale.³⁸ Because the NSPA is a criminal statute, the defendant must know that the item(s) was stolen.³⁹ U.S. jurisdictions do not decide whether a foreign patrimony law will qualify as an enforceable ownership law—thus deeming the artifact as “stolen” for the purpose of a prosecution under the NSPA—until a claim comes to trial.⁴⁰ This approach creates uncertainty in the art market, museums, and collector communities as to the application of the statute in the cultural property context.⁴¹

There have been a handful of cultural heritage claims under NSPA. A seminal case involved antiquities dealer Patty McClain and her co-defendants, who were charged under the NSPA for transporting pre-Columbian artifacts from Mexico into the United States, selling these artifacts to the Mexican Cultural Institute in San Antonio, and for conspiracy to undertake these actions.⁴² The Fifth Circuit Court of Appeals reversed their convictions under the NSPA due to the Court’s inability to determine exactly when the artifacts were exported from Mexico (and therefore if they were stolen); but the court confirmed their conspiracy convictions.⁴³ The holding of *McClain* (sometimes referred to as the *McClain* Doctrine), continues to have import.

We hold that a declaration of national ownership is necessary before illegal exportation of an article can be considered theft, and the exported article considered “stolen”, within the meaning of the [NSPA]. Such a declaration combined with a restriction on exportation without consent of the owner (Mexico) is sufficient to bring the NSPA into play.⁴⁴

37. See National Stolen Property Act of 1934, 18 U.S.C. §§ 2314–2315 (2018).

38. *Id.* § 2314.

39. See *id.* If the knowledge element required for criminal prosecution cannot be proven, the government may turn to civil forfeiture, with a basis in various provisions of the U.S. Code, to recover the purportedly stolen artifact. See Kate Fitz Gibbon, *National Stolen Property Act: Primary U.S. Cultural Property Law*, CULTURAL PROP. NEWS (Nov. 26, 2018), <https://culturalpropertynews.org/national-stolen-property-act-primary-us-cultural-property-law/>.

40. See Fitz Gibbon, *supra* note 39.

41. See *id.*

42. See *United States v. McClain*, 545 F.2d 988, 991–93 (5th Cir. 1977).

43. See *id.* at 1003–04, n.36.

44. *Id.* at 1000–01.

The distinction the Court makes here is that an illegally exported artifact is not necessarily stolen property under the NSPA. If that were the case, “the meaning of the term ‘stolen’ would be stretched beyond its conventional meaning.”⁴⁵

As the principal federal statutory means of protecting international cultural heritage in the United States, the application of CPIA and NSPA to the problem of looted cultural heritage has been criticized as creating a conflicting and outdated legal framework.⁴⁶ These criticisms primarily stem from the fact that the CPIA only protects the cultural property of UNESCO Convention state parties who have bilateral agreements in place with the United States—presently only 25 countries.⁴⁷ By contrast, NSPA protects “any foreign state’s cultural property—not just the cultural property of those states parties to the 1970 UNESCO Convention—as long as a court determines that the state has enacted a valid patrimony law” and that the state actually owns the object.⁴⁸ Foreign countries may opt to rely on seizure of the object or criminal prosecution under NSPA due to the broader sweep of the statute, than rely on CPIA—a civil statute enacted exclusively for cultural heritage protection.⁴⁹

3. State Statutes

A plaintiff seeking return of cultural property may opt to file a civil claim for replevin under a state property statute.⁵⁰ The United States follows the common law rule that “a thief cannot convey good title” even to a good faith purchaser.⁵¹ In order to repossess personal property through a replevin claim, “the plaintiff ‘must establish that the defendant is in possession of certain property of which the plaintiff claims to have a superior right.’”⁵² Whether a party files a replevin claim versus initiating a criminal charge through the federal government under the NSPA is a strategic fact-specific decision, often driven by the high cost of litigation.⁵³

45. *Id.* at 1001–02; *see also* Lauren Henderson, Comment, *The Duryodhana Dilemma: United States v. A 10th Century Cambodian Sandstone Sculpture and a Proposed Code of Ethics-Based Response to Repatriation Requests for Auction Houses*, 163 U. PA. L. REV. 249, 270 (2014).

46. *See generally* Henderson, *supra* note 45, at 271.

47. *See* Katherine D. Vitale, *The War on Antiquities: United States Law and Foreign Cultural Property*, 84 NOTRE DAME L. REV. 1835, 1846, 1859 (2009); *see also* *Import Restrictions*, *supra* note 36. In addition to bilateral agreements, the United States utilizes temporary emergency actions that similarly establish import restrictions on a designated list of threatened objects, per 19 U.S.C. § 2603.

48. Vitale, *supra* note 47, at 1859, 1861.

49. *Id.* at 1861; *see also* Gerstenblith, *supra* note 30, at 841–42.

50. *See* Republic of Turk. v. Christie’s, Inc., No. 17-cv-3086 (AJN), 2021 U.S. Dist. LEXIS 169215, at *2 (S.D.N.Y. Sep. 7, 2021) (alleging “New York state law claims of conversion and replevin” in plaintiff’s second amended complaint).

51. Gerstenblith, *supra* note 30, at 544.

52. *Republic of Turk.*, 2021 U.S. Dist. LEXIS 169215, at *18–19.

53. *See generally* Adam Goldberg, *Reaffirming McClain: The National Stolen Property Act and the Abiding Trade in Looted Cultural Objects*, 53 UCLA L. REV. 1031, 1039 (2006) (“[A]bsent

State-based statutes of limitations control a party's ability to bring a replevin claim. Statutes of limitations are time periods set by law in which a party to the suit must file their claim.⁵⁴ A benefit of a statute of limitations includes relief from "extended periods of uncertainty" that "make it more difficult ultimately to determine true ownership because evidence has faded"⁵⁵ Rules for statutes of limitation vary by state, both in the length of the time the statute runs as well as when the cause of action accrues.⁵⁶ Accrual rules determining when the statute of limitations begins to run "are often left to courts to establish because they are not addressed in state statutes."⁵⁷

Because stolen art and artifacts are often difficult to locate, courts may apply equitable doctrines to "delay accrual of the cause of action out of a concern for fairness to the original owner."⁵⁸ Growing calls for a uniform statute of limitations led to federal legislation temporarily protecting claims of artwork suspected of being looted during the Nazi era.⁵⁹ There are additional calls to apply a similar scheme nationwide, covering stolen art generally.⁶⁰

B. Formal Claims—Special Legislation

Outside of the statutory framework provided by CPIA, NSPA, and state stolen property statutes, additional federal special legislation targets specific classes of artifacts and has a domestic and international impact on cultural heritage. The 1990 Native American Graves Protection and Repatriation Act (NAGPRA) requires federal agencies and museums receiving federal funding to inventory their holdings of Native American human remains and sacred objects and report their findings to the National Park Service.⁶¹ For claims against artwork looted and stolen during the Nazi occupation of Europe (1933–1945), the Holocaust

facts allowing for a claim of conversion or replevin, a foreign nation has few options available when seeking to recover cultural objects from within the United States.”).

54. See generally *Statute of Limitations*, BLACK'S LAW DICTIONARY (11th ed. 2019).

55. MALARO & DEANGELIS, *supra* note 26, at 72.

56. Fallon S. Sheridan, Note, *The Sunset of the Holocaust Expropriated Art Recovery Act of 2016 and the Rise of the Demand and Refusal Rule*, 89 FORDHAM L. REV. 2841, 2847 (2021); see also Gillian Flynn, *The Recovery of Stolen Cultural Property in the State of Maryland*, 38 UNIV. BALT. L. F. 103, 112–13 (2008) (comparing the length of Maryland, New York, California, and Ohio statutes of limitations and the applicable rules for accrual of the cause of action).

57. Sheridan, *supra* note 56, at 2848; see also *Accrue*, BLACK'S LAW DICTIONARY (11th ed. 2019).

58. Gerstenblith, *supra* note 30, at 556. Equitable doctrines covering statutes of limitations include actual discovery of the artwork (*Naftzger v. Am. Numismatic Soc'y*, 49 Cal. Rptr. 2d 784, 787 (1996)), constructive discovery (*O'Keeffe v. Snyder*, 416 A.2d 862, 870, 872 (N.J. 1980)), demand and refusal (*Menzel v. List*, 246 N.E.2d 742, 743, 745 (N.Y. 1969)), and laches—whether a party has slept on their rights (*Solomon R. Guggenheim Found. V. Lubell*, 569 N.E.2d 426, 427, 431 (N.Y. 1991)).

59. See Holocaust Expropriated Art Recovery Act of 2016, Pub. L. No. 114–308, § 3(2), 130 Stat. 1524, 1526 (codified at 22 U.S.C. § 1621 note).

60. See generally Sheridan, *supra* note 56, at 2871–72.

61. 25 U.S.C. §§ 3001–3013; 43 C.F.R. § 10.2(c).

Expropriated Art Recovery Act of 2016 (HEAR Act) provides claimants with temporary relief from state statutes of limitations that had barred heirs of victims of the Nazi regime from filing stolen property claims in U.S. courts.⁶²

1. Native American Graves Protection and Repatriation Act

Prior to the enactment of NAGPRA, earlier twentieth-century legislation—specifically the 1906 Antiquities Act and the 1979 Archaeological Resources Protection Act—did not protect Native American human remains from rampant excavation and misuse.⁶³ Rather, the federal government had “broad authority to permit the excavation and removal of these remains, provided that ‘the examinations, excavations, and gatherings are undertaken for the benefit of reputable museums, universities, colleges, or other recognized scientific or educational institutions’”⁶⁴ In addition, state laws barring excavation and taking of Native remains were underenforced.⁶⁵

In the wake of highly publicized events fueling public outcry against the mishandling and misappropriation of Indian remains, including the public realization that 18,500 Native American human remains were being held at the Smithsonian, a “concerted national effort” for targeted legislation began.⁶⁶ Concurrent with this public pressure, the impending 500th anniversary of Christopher Columbus’s 1492 arrival in the Americas prompted public questioning of the meaning of the anniversary and its legacies of cultural oppression.⁶⁷ In this environment of shifting public attitudes, Congress passed the National Museum of the American Indian Act in 1989 (containing a mandate similar to NAGPRA for collection inventories and repatriation provisions), and NAGPRA in 1990.⁶⁸

NAGPRA requires federal agencies and museums receiving federal funding to inventory their relevant holdings of Native American material, identify geographic and cultural tribal affiliations of the items, and report their findings to the National Park Service.⁶⁹ What follows is a process of review,

62. See Holocaust Expropriated Art Recovery Act of 2016 § 2(6).

63. See Jack F. Trope & Walter R. Echo-Hawk, *The Native American Graves Protection and Repatriation Act: Background and Legislative History*, 24 ARIZ. ST. L.J. 35, 42 (1992).

64. Steven J. Gunn, *Indian Law: The Native American Graves Protection and Repatriation Act at Twenty: Reaching the Limits of Our National Consensus*, 36 WM. MITCHELL L. REV. 503, 509 (2010).

65. See *id.* at 511.

66. See Trope & Echo-Hawk, *supra* note 63, at 54–55; see also Gunn, *supra* note 64, at 508–09.

67. See Ron McCoy, *Is NAGPRA Irretrievably Broken?*, CULTURAL PROP. NEWS (Dec. 19, 2018), <https://culturalpropertynews.org/is-nagpra-irretrievably-broken/>.

68. See Trope & Echo-Hawk, *supra* note 63, at 56–57.

69. 25 U.S.C. § 3003(a); see also 25 U.S.C. § 3003(b)(1)(C).

consultations with affiliated tribes on the disposition of the remains and artifacts, and public notice.⁷⁰

Although the statute targeted federal museums and other institutions receiving federal funds, the legislation caused a generational shift in attitudes and practices industry wide.⁷¹ Prior to NAGPRA's enactment, Senator Daniel Inouye of Hawai'i, then-chairman of the Select Committee of Indian Affairs, plainly described pre-NAGPRA attitudes:

In cases where Native Americans have attempted to regain items that were inappropriately alienated from the tribe, they have often met with resistance from museums and have not had the legal ability or financial resources to pursue the return of the goods. It is virtually only in instances where a museum has agreed for moral or political reasons to return the goods that tribes have had success in retrieving property.⁷²

Such attitudes of resistance by museums with respect to Native American human remains and sacred objects have largely since faded from the museum industry.⁷³

Despite the administrative burden, many museums have made genuine efforts at compliance, although at a much slower pace than originally envisioned.⁷⁴ The National Park Service has recently publicized proposed updates to the legislation, making adjustments to the Act's text to achieve "consistency and less ambiguity" and simplifying statutory processes "to better align with legislative intent."⁷⁵ Per this intent, NAGPRA aims to undo historic legacies of racism against Native Americans, and already has had a significant impact.⁷⁶

2. HEAR Act and Nazi Looted Art

In the aftermath of World War II, initial efforts toward restitution of artwork looted by the Nazis soon took a back seat to the pursuit of accountability for the mass genocide.⁷⁷ Decades of Cold War geopolitical posturing followed, further

70. See *Native American Graves Protection and Repatriation Act: Compliance*, NAT'L PARK SERV. (JAN. 21, 2021), <https://www.nps.gov/subjects/nagpra/compliance.htm>.

71. See generally *20 Years and Counting: Interview with James Pepper Henry Museum*, AM. ALL. OF MUSEUMS (Nov. & Dec., 2010), <https://www.aam-us.org/programs/peer-review/20-years-and-counting/> ("If you look at the first three quarters of the 20th century, there wasn't a good relationship between the academic community and the Native community. Now that's changing.").

72. 136 CONG. REC. 35,678 (1990).

73. See *20 Years and Counting*, *supra* note 71.

74. See Alexandra Eynon, *The Public Values of Repatriation in the Native American Graves Protection and Repatriation Act*, 38 YALE L. & POL'Y REV. 229, 258–59 (2019).

75. *43 CFR 10 Draft NAGPRA Regulations, Overview of Changes, July 2021*, NAT'L PARK SERV., <https://www.nps.gov/subjects/nagpra/upload/NAGPRA-Draft-Regulations-Overview-of-Changes.pdf> (last visited Oct. 24, 2021).

76. See 136 CONG. REC. 35,678 (1990) ("[T]he bill before us today is not about the validity of museums or the value of scientific inquiry. Rather, it is about human rights."); See also *20 Years and Counting*, *supra* note 71.

77. See Sophie Gilbert, *The Persistent Crime of Nazi-Looted Art*, ATLANTIC (Mar. 11, 2018), <https://www.theatlantic.com/entertainment/archive/2018/03/cornelius-gurlitt-nazi-looted->

sidelining the question of stolen art restitution.⁷⁸ Given the low standards for diligence at the time of purchase, much of this artwork “passed through many different hands without a trace,” making it hard for the true owners to locate their family’s property, especially in the years prior to the internet age.⁷⁹ The problem of simply locating a stolen work of art is exacerbated by “provenance records [that] may have been destroyed or altered to reflect a purchase history more favorable to one of the possessors post-theft.”⁸⁰ Even if the family managed to locate their long-since stolen artwork, courts often dismissed their claims without hearing the merits due to the time bars of statutes of limitations.⁸¹

During the decades between the end of World War II and the 1990s, “widespread amnesia,” or lack of public awareness, about the plight of Jewish families trying to locate their stolen artwork prevailed.⁸² Lynn Nicholas’ popular 1994 book, *The Rape of Europa*, reignited public memory and spurred conversations about the continuing injustices suffered by families of Nazi victims.⁸³ Two high-profile and highly publicized legal actions on the heels of this book resulted in significant public pressure on the U.S. Government to address the present harms resulting from past Nazi plundering of cultural heritage.⁸⁴

art/554936/; see also Jennifer Anglim Kreder, *Analysis of the Holocaust Expropriated Art Recovery Act of 2016*, 20 CHAP. L. REV. 1, 2–6 (2017) (giving an overview of Hitler’s views on art and the Nazis’ targeted use of and plundering of art).

78. See Gilbert, *supra* note 77.

79. Jennifer Anglim Kreder & Virginia Leigh Schell, *The Constitutionality of the Hear Act: Empowering American Courts to Return Holocaust-Era Artwork and Honor History*, 30 DEPAUL J. ART, TECH. & INTELL. PROP. L. 1, 12–13 (2020); see also Kreder, *supra* note 77, at 1 (“[E]vidence regarding people’s uniquely identifiable belongings, such as cultural property and art, have recently become searchable.”).

80. Kreder & Schell, *supra* note 79, at 13.

81. See, e.g., *Toledo Museum of Art v. Ullin*, 477 F. Supp. 2d 802, 809 (N.D. Ohio 2006); *Detroit Inst. of Arts v. Ullin*, No. 06-10333, 2007 U.S. Dist. LEXIS 28364, at *12 (E.D. Mich. Mar. 31, 2007).

82. MALARO & DEANGELIS, *supra* note 26, at 123.

83. See *The Rape of Europa: Historical Perspective*, PBS, <https://www.pbs.org/therapeofeuropa/about/> (last visited Sept. 12, 2021).

84. In the 1996–97 *Goodman, et al v. Searle* litigation, Nick Goodman, an heir of Holocaust victims and owners of an Edgar Degas landscape, sued Chicago-based art collector Daniel C. Searle to recover the landscape that Searle had purchased in good faith 10 years prior to the filing of the claim. See HOWARD J. TRIENENS, *LANDSCAPE WITH SMOKESTACKS: THE CASE OF THE ALLEGEDLY PLUNDERED DEGAS* 11, 15 (2000). “Two days after the filing of the complaint in New York, two lengthy newspaper articles appeared, one in the *Los Angeles Times* . . . and one in the *Washington Post* . . .” *Id.* at 28–29. The dispute settled on the eve of trial. *Id.* at 93–94. In a separate case, *United States v. Portrait of Wally*, the Leopold Museum in Austria loaned the painting *Portrait of Wally* by Austrian artist Egon Schiele to New York’s Museum of Modern Art for exhibit from October 8, 1997 to January 4, 1998. *United States v. Portrait of Wally*, 663 F. Supp. 2d 232, 246 (S.D.N.Y. 2009). After the exhibit ended, the New York District Attorney’s Office issued a subpoena for the painting, purporting it to have been stolen by Nazi officials in 1939. *Id.* The subpoena was quashed, but the U.S. Government later issued a seizure warrant for the painting and initiated a forfeiture action on September 22, 1999. *Id.* The U.S. Government

The official response came in the form of the 1998 Washington Conference Principles, a “non-binding agreement adopted by 44 countries . . . promot[ing] provenance research on works of art confiscated by the Nazis that . . . have ended up in art collections around the world.”⁸⁵ Specifically, institutions with art collections were to “identify” art suspected of being looted and “publicize” their findings, and true owners “should be encouraged to come forward and make known their claims.”⁸⁶ In the United States, museum associations incorporated these standards into their codes of ethics, with the expectation of further “engaging museums in restitution efforts.”⁸⁷ However, despite these good faith efforts, museums facing claims from families continued to utilize procedural arguments to maintain possession of contested works of art.⁸⁸ State parties to the 1998 Washington Conference gathered again in Terezin, Czech Republic, to reaffirm and intensify national commitments to “just and fair solutions regarding cultural property.”⁸⁹ However, subsequent rulings against claimants on procedural grounds proved that the “renewed commitment [in Terezin] by the federal government to ensure that these claims were adjudicated on the merits” was not applied in practice.⁹⁰

alleged “that the Leopold imported and/or intended to export *Wally* knowing it was stolen or converted[.]” in violation of the National Stolen Property Act. *Id.* See also Marilyn Henry, *A Whimper, Not a Bang*, JERUSALEM POST (Sept. 12, 2009), <https://www.lootedart.com/news.php?r=NTTJLF299641>.

85. Elizabeth Campbell, *The Washington Principles 20 Years Later: Some Progress, But Not Enough*, UNIV. OF DENVER CTR. FOR ART COLLECTION ETHICS (Jan. 6, 2019), <https://liberalarts.du.edu/art-collection-ethics/news-events/all-articles/washington-principles-20-years-later-some-progress-not-enough>.

86. *Washington Conference Principles on Nazi-Confiscated Art*, U.S. DEP’T OF STATE (Dec. 3, 1998), <https://www.state.gov/washington-conference-principles-on-nazi-confiscated-art/>. The Principles include a provision for alternative dispute resolution mechanisms. *Id.* The 1998 settlement agreement between the family of Dutch Holocaust victims and the owner of the Degas monotype “was lauded as a model” for resolving claims by the lead U.S. diplomat at the Washington Conference. See Lee Rosenbaum, *Nazi Loot Claims: Art With a History*, WALL ST. J. (Jan. 14, 1999, 12:14 AM), <https://www.wsj.com/articles/SB91627239331703500>.

87. MALARO & DEANGELIS, *supra* note 26, at 124–25.

88. For example, in the cases cited *supra* at note 81, heirs of Martha Nathan claimed ownership of artwork held by the Toledo Museum of Art and the Detroit Institute of Art. Both museums had followed AAM’s updated ethical guidelines and publicized artwork in their holdings that could be traced to Europe during the Nazi era. The Nathan family heirs contacted the museums because of these publications. Both museums sought declaratory judgements to quiet title. Both courts ruled against the family citing the bar of state statute of limitations and characterized the sale of artwork by Martha Nathan as voluntary rather than coerced by the Nazis. See, e.g., Kreder & Schell, *supra* note 79, at 16–18. See also *Toledo Museum of Art v. Ullin*, 477 F. Supp. 2d 802, 803, 805–06, 809 (N.D. Ohio 2006); *Detroit Inst. of Arts v. Ullin*, No. 06-10333, 2007 U.S. Dist. LEXIS 28364, at *1, *2–*4, *6, *12 (E.D. Mich. Mar. 31, 2007).

89. Office of the Special Envoy for Holocaust Issues, *2009 Terezin Declaration on Holocaust Era Assets and Related Issues*, U.S. DEP’T OF STATE, <https://www.state.gov/prague-holocaust-era-assets-conference-terezin-declaration/> (last visited Mar. 31, 2022).

90. Kreder & Schell, *supra* note 79, at 22.

In the wake of one of these rulings, *Von Saher v. Norton Simon Museum of Art*, Congress took action to ease the burden of differing statutes of limitations that frequently barred claims for the return of Nazi-era looted art.⁹¹ British actor Dame Helen Mirren (who played Maria Altmann in the 2015 film *Woman in Gold*) testified before the Senate Judiciary Committee on June 7, 2016, and humanized the decades-long struggle of many families to be reunited with their stolen art.⁹² Ambassador Ronald Lauder’s testimony before the same committee provided a sharp rebuke to procedural bars invoked by museums in the past.⁹³ The Senate Judiciary Committee report noted that any state effort to override these statutory time bars in favor of a Nazi-era art claim would conflict with the “Federal Government’s exclusive authority over foreign affairs, including its authority to resolve war-related claims.”⁹⁴ Congress concluded that new legislation was needed to define “[a] Federal limitations period, appropriately tailored to the unique circumstances of Holocaust-era claims” that would “guarantee that the United States fulfills the promises it has made to the world.”⁹⁵ In addition, new legislation would “ensure that [Nazi-era] claims . . . are not unfairly barred by statutes of limitations but are resolved in a just and fair manner.”⁹⁶

The HEAR Act provides a uniform and temporary federal statute of limitations for Nazi-era stolen art restitution claims.⁹⁷ A claim “may be commenced not later than 6 years after the actual discovery by the claimant”⁹⁸ The HEAR Act sweeps in preexisting claims and contains a looming sunset clause—January 1, 2027—when claims will revert “to any applicable

91. See Holocaust Expropriated Art Recovery Act of 2016, Pub. L. No. 114–308, § 2(7), 130 Stat. 1524, 1525 (codified at 22 U.S.C. § 1621 note); see also *Von Saher v. Norton Simon Museum of Art*, 592 F.3d 954, 957 (9th Cir. 2009) (affirming the lower court’s holding that California’s extension of the statute of limitations for claims of Holocaust-era art infringes on the national government’s exclusive foreign affairs powers.).

92. See S. 2763, *the Holocaust Expropriated Art Recovery Act—Reuniting Victims with Their Lost Heritage: Hearing on S. 2763 Before the S. Subcomm. on the Const., Subcomm. on Oversight, Agency Action, Fed. Rts. and Fed. Cts.*, 114th Cong. 1 (June 7, 2016) (statement of Dame Helen Mirren), <https://www.judiciary.senate.gov/imo/media/doc/06-07-16%20Mirren%20Testimony.pdf> (“Portraying Maria Altmann opened my eyes to mankind’s capacity for indifference . . .”).

93. See S. 2763, *the Holocaust Expropriated Art Recovery Act—Reuniting Victims with Their Lost Heritage: Hearing on S. 2763 Before the S. Subcomm. on the Const., Subcomm. on Oversight, Agency Action, Fed. Rts. and Fed. Cts.*, 114th Cong. 2 (2016) (statement of Ronald S. Lauder), <https://www.judiciary.senate.gov/imo/media/doc/06-07-16%20Lauder%20Testimony.pdf> (“There are museums here in the United States that have been waiting out the clock to pass the Statute of Limitations. This also forces claimants to spend enormous amounts of money on legal fees—another strategy to make them give up. This is not justice.”).

94. S. REP. NO. 114-394, at 5 (2016).

95. *Id.*

96. *Id.* at 6.

97. See generally Kreder & Schell, *supra* note 79, at 26–33 (providing a detailed analysis of each provision of the HEAR Act).

98. Holocaust Expropriated Art Recovery Act of 2016, Pub. L. No. 114–308, § 5(a), 130 Stat. 1524, 1526 (codified at 22 U.S.C. § 1621 note).

Federal or State statute of limitations or any other Federal or State defense at law relating to the passage of time.”⁹⁹ Although not without some dispute, an equitable defense of laches is still available for a party to a suit under the HEAR Act.¹⁰⁰ The HEAR Act does not provide a substantive solution to the problem of ownership claims over Nazi-era looted art—courts must continue to resolve each claim on the merits.¹⁰¹ Each claim requires a fact-intensive inquiry that has produced mixed results since the Act came into force.¹⁰²

III. MUSEUM ASSOCIATION ETHICAL GUIDELINES

A. Codes of Ethics and Trustee Fiduciary Duties

The two primary U.S.-based museum professional associations are the American Alliance of Museums (AAM) and the Association of Art Museum Directors (AAMD).¹⁰³ AAM promotes best practices among U.S. museums generally, advocates for the profession, and operates standards-based programs including museum accreditation.¹⁰⁴ AAMD has a similar role for a more exclusive membership (“persons who serve as directors of art museums”) that serves a broader geographic area (“in the United States, Canada, and Mexico”).¹⁰⁵

Both organizations promulgate model codes of ethics that most member museums incorporate into their institutional policies.¹⁰⁶ Trustees of museums

99. *Id.* at § 5(g); *see generally* Sheridan, *supra* note 56 at 2843–44 (exploring the implications of the sunset provision in the HEAR Act).

100. *See* Holocaust Expropriated Art Recovery Act of 2016 § 5(a) (“Notwithstanding any other provision of Federal or State law or any *defense at law* relating to the passage of time”) (emphasis added); *see also* Zuckerman v. Metro. Museum of Art, 928 F.3d 186, 196 (2d Cir. 2019), *cert. denied*, 140 S. Ct. 1269 (2020).

101. Simon J. Frankel, *The HEAR Act and Laches After Three Years*, 45 N.C. J. INT’L L. 441, 451, 455 (2020).

102. *See, e.g.*, Cassirer v. Thyssen-Bornemisza Collection Found., 862 F.3d 951, 981 (9th Cir. 2017) (granting relief from the statute of limitations but reversing on substantive grounds based on the court’s choice of law analysis.); *see, e.g.*, Zuckerman, 928 F.3d at 197 (finding that the HEAR Act did not preempt the defendant’s laches defense); *see, e.g.*, Reif v. Nagy, 106 N.Y.S.3d 5, 22–24 (2019) (relying on a broad interpretation of the purpose of the HEAR Act in finding for the plaintiff and rejecting the defendant’s laches defense).

103. *See A World of Connections*, AM. ALL. OF MUSEUMS, <https://www.aam-us.org/> (last visited Nov. 24, 2021); *see* ASS’N OF ART MUSEUM DIRECTORS, <https://aamd.org/> (last visited Nov. 24, 2021).

104. *See Accreditation & Excellence Programs*, AM. ALL. OF MUSEUMS, <https://www.aam-us.org/programs/accreditation-excellence-programs/> (last visited Nov. 24, 2021); *About AAM*, AM. ALL. OF MUSEUMS, <https://www.aam-us.org/programs/about-aam/> (last visited Nov. 24, 2021).

105. *Membership*, ASS’N OF ART MUSEUM DIRS., <https://aamd.org/about/membership> (last visited Nov. 24, 2021).

106. *See Researching the Provenance of a Work of Art*, ART INST. OF CHI., <https://www.artic.edu/library/discover-our-collections/research-guides/researching-the-provenance-of-a-work-of-art> (last visited Nov. 24, 2021); *See Provenance Research*, DENVER ART MUSEUM, <https://www.denverartmuseum.org/en/provenance-research> (last visited Apr. 1, 2022).

are bound to these ethical codes primarily through their fiduciary duties of loyalty and care.¹⁰⁷ Although museum association ethical codes alone are not legally enforceable, they provide an industry standard against which to measure a museum board's actions or inaction.¹⁰⁸ Even so, trustees are generally immune from penalty for failure to root out provenance issues within their museum's *existing* collection—a process vital to restitution efforts—because association ethical codes are relatively lax on this specific issue.¹⁰⁹

B. Provenance: New Acquisitions and Existing Collections

AAM and AAMD's ethical codes do not effectively deal with the question of restitution due to the absence of rigorous provenance standards applied to *existing* collections. Both policies mention a duty to perform provenance research on existing collections to root out ownership issues, but this is largely in the context of artwork suspected of changing hands in Europe during the Nazi era (1933–1945), making the work's provenance suspect.¹¹⁰ Both policies also emphasize responsive and respectful resolution of claims of ownership of art and artifacts from third parties.¹¹¹ AAM's code does not have an enforcement mechanism (although, AAM can withdraw accreditation, a step hardly ever taken); however, AAMD has regularly applied its enforcement mechanism (sanctions) in the context of (mis)use of funds from deaccessioned artwork, not in the context of disputed title to art or artifacts.¹¹² It is not surprising, therefore,

107. RESTATEMENT OF THE L., CHARITABLE NONPROFIT ORGS. § 2.01 cmt. b (AM. L. INST. 2022) (“It is well settled that members of the board of a charity are fiduciaries with respect to the charity.”).

108. See, e.g., *Rockwell v. Trs. of the Berkshire Museum*, No. 1776CV00253, 2017 Mass. Super. LEXIS 208, at *4 (Nov. 7, 2017); see N.M. STAT. ANN. § 9-4A-20(B) (2005).

109. See *infra* Section III.B.

110. See *Unlawful Appropriation of Objects During the Nazi Era*, AM. ALL. OF MUSEUMS, <https://www.aam-us.org/programs/ethics-standards-and-professional-practices/unlawful-appropriation-of-objects-during-the-nazi-era/> (last visited Nov. 24, 2021) (“[M]useums should make serious efforts to allocate time and funding to conduct research on covered objects in their collections whose provenance is incomplete or uncertain.”); see also *Art Museums and the Identification and Restitution of Works Stolen by the Nazis*, ASS’N OF ART MUSEUM DIRS. (May 2007), https://aamd.org/sites/default/files/document/Nazi-looted%20art_clean_06_2007.pdf (“Has the museum identified . . . all objects in its collection that underwent a change of ownership between 1933 and 1945, and that were in continental Europe between those dates? Has the museum made it a priority to conduct provenance research on those objects . . .”).

111. AM. ALL. OF MUSEUMS, *supra* note 22 (“[C]ompeting claims of ownership . . . should be handled openly, seriously, responsively and with respect for the dignity of all parties involved.”); *Introduction to the Revisions to the 2008 Guidelines on the Acquisition of Archaeological Material and Ancient Art*, ASS’N OF ART MUSEUM DIRS. 7 (Jan. 29, 2013), <https://aamd.org/sites/default/files/document/AAMD%20Guidelines%202013.pdf> (“[T]he museum should respond promptly and responsibly and take whatever steps are necessary to address this claim, including, if warranted, returning the Work . . .”).

112. See *Professional Practices in Art Museums*, ASS’N OF ART MUSEUM DIRS. 18 (2011), <https://aamd.org/sites/default/files/document/2011ProfessionalPracticesinArtMuseums.pdf>; see also Mark S. Gold & Stefanie S. Jandl, *Why the Association of Art Museum Directors’s Move on*

to find a “general reluctance” on the part of museums to actively research potential ownership issues in their existing collections and respond to provenance inquiries.¹¹³

Complicating this dynamic between current ethical standards and questions of legal ownership of existing collections are the changing standards over time with respect to provenance. Frequently it was the case that curators of earlier generations brought in new acquisitions under less rigorous provenance standards and “without a real paper trail.”¹¹⁴ The art and antiquities market long operated under a “sold as seen” ethos, allowing many pieces with suspect provenance to land in museum collections.¹¹⁵ Only in recent years has the museum profession widely rejected this outdated custom where “[t]he issue of ‘Where did you get this?’ was not discussed.”¹¹⁶ However even today, rigorous provenance research (whether for a new acquisition or for an artifact within the existing collection) may not result in definite answers of legal ownership history.¹¹⁷

Few U.S. museums carry out an active program of provenance research for existing collections absent a formal claim of ownership.¹¹⁸ For museums with provenance research programs, dedicated funding is the key to the program’s success.¹¹⁹ Most museums do not have the resources to divert existing staff or

Deaccessioning Matters So Much, ART NEWSPAPER (May 18, 2020), <https://www.theartnewspaper.com/2020/05/18/why-the-association-of-art-museum-directorss-move-on-deaccessioning-matters-so-much>.

113. Peter Whoriskey & Malia Politzer, *Denver Art Museum Announces Return of Four Artifacts to Cambodia after Pandora Papers Coverage of Indicted Art Dealer*, WASH. POST (Oct. 17, 2021, 4:12 PM), <https://www.washingtonpost.com/business/2021/10/16/denver-museum-cambodia-pandora-papers/>.

114. Randy Dottinga, *Art Museums Struggle with Provenance Issues*, CHRISTIAN SCI. MONITOR (Apr. 2, 2008), <https://www.csmonitor.com/The-Culture/Arts/2008/0402/p13s01-alar.html>.

115. Tom Christopherson, *Art Law and the Art Market: Disclosure or Discretion?*, SOTHEBY’S INST. OF ART, <https://www.sothebysinstitute.com/news-and-events/news/art-law-and-the-art-market-disclosure-or-discretion> (last visited Nov. 24, 2021); *see also* Dottinga, *supra* note 114.

116. Hugh Eakin, *The Downfall of the Getty Curator Marion True*, NEW YORKER, Dec. 10, 2007.

117. Even with rigorous research, an artwork’s documentation may simply not exist, has been long lost, previous clients may require confidentiality or refuse to provide documentation, or brokers may be reluctant to reveal their sources due to market competition. *See* Jane A. Levine, *The Importance of Provenance Documentation in the Market for Ancient Art and Artifacts: The Future of the Market May Depend on Documenting the Past*, 19 DEPAUL J. ART, TECH. & INTELL. PROP. L. 219, 229–31 (2009).

118. *See, e.g., Provenance Research*, MUSEUM OF FINE ARTS BOS., <https://www.mfa.org/collections/provenance> (last visited Nov. 24, 2021).

119. *See Wish You Were Here: African Art and Restitution*, UNIV. MICH. MUSEUM OF ART, <https://umma.umich.edu/exhibitions/2021/wish-you-were-here-african-art-and-restitution> (last visited Sept. 12, 2021) (“Lead support for this exhibition is provided by the University of Michigan Office of the Provost and the Michigan Council for Arts and Cultural Affairs.”); *Mellon African Art Initiative*, FOWLER MUSEUM UCLA, <https://fowler.ucla.edu/mellon-african-art-initiative/> (last

hire additional staff to dedicate the time necessary for this research. Public calls for museum decolonization—from BLM and others—makes this dilemma of securing dedicated resources for provenance research even more urgent.

C. *European Museum Pressure*

Recent steps taken by European museums may serve as a source of pressure on U.S. museums to apply higher ethical standards to African artifacts in their holdings. In 2017, French President Emmanuel Macron announced his government would work toward returning artifacts taken during France's colonial rule in Africa.¹²⁰ The publication of the officially commissioned Sarr-Savoy report in 2018 propelled these efforts forward by offering a policy and legal framework for restitution of artifacts in French museums.¹²¹ In November 2021, France returned 26 artifacts to Benin, taken when France invaded the former Kingdom of Dahomey in 1892.¹²² Earlier in 2021, Germany announced that the country would return its share of the Benin Bronzes looted by British soldiers in 1897.¹²³ Most U.S. museums have not taken similar significant actions, although there are recent examples of shifting attitudes among major U.S. museums.¹²⁴

visited Sept. 12, 2021) (“[T]he Fowler Museum at UCLA was awarded a \$600,000 grant from The Andrew W. Mellon Foundation to conduct collaborative interdisciplinary research on the Museum’s African art collection. . .”).

120. See Anna Codrea-Rado, *Emmanuel Macron Says Return of African Artifacts Is a Top Priority*, N.Y. TIMES (Nov. 29, 2017), <https://www.nytimes.com/2017/11/29/arts/emmanuel-macron-africa.html>.

121. See CCP Staff, *Savoy–Sarr Report on African Art Restitution: A Summary*, CULTURAL PROP. NEWS (Jan. 30, 2019), <https://culturalpropertynews.org/the-savoy-sarr-report-for-president-macron-a-summary/>; see also Felwine Sarr & Bénédicte Savoy, *The Restitution of African Cultural Heritage. Toward a New Relational Ethics*, 4, 5 (Nov. 2018), http://restitutionreport2018.com/sarr_savoy_en.pdf.

122. See Lucien Libert & Christian Lowe, *France Officially Signs Over Artworks Taken From Ex-Colony Benin*, REUTERS (Nov. 9, 2021, 4:04 PM), <https://www.reuters.com/world/france-officially-signs-over-artworks-taken-ex-colony-benin-2021-11-09/>.

123. See Rachel Treisman, *Germany Will Repatriate Benin Bronzes, Plundered From Africa In The 19th Century*, NPR (Apr. 30, 2021, 2:01 PM), <https://www.npr.org/2021/04/30/992496264/germany-will-repatriate-benin-bronzes-plundered-from-africa-in-the-19th-century>.

124. See Peggy McGlone, *Smithsonian to Give Back Its Collection of Benin Bronzes*, WASH. POST (Mar. 8, 2022, 6:00 AM), <https://www.washingtonpost.com/arts-entertainment/2022/03/08/smithsonian-benin-bronzes-nigeria-return/>; see also Hannah McGivern, *US Museums Return Trove of Looted Treasures to Nigeria*, CNN (Oct 13, 2022), <https://www.cnn.com/style/article/benin-bronzes-us-museums-tan/index.html>.

IV. ANALYSIS: HOW THE CURRENT FRAMEWORK LACKS AN EFFECTIVE REMEDY

*“We see 26 artifacts. There are others, no?”*¹²⁵

The framework for art and artifact restitution is a complex mix of federal and state laws and ethical guidelines that also implicate U.S. foreign relations. Unfortunately, this framework does not provide a durable solution for African artifacts taken during nineteenth-century European colonial rule. The UNESCO Convention and the bilateral agreements under the CPIA govern the import and export of cultural heritage between member nations and the United States.¹²⁶ Even though the U.S. Government does not retroactively enforce import bans under the CPIA, U.S. museums generally abide by the year 1970—the date of the UNESCO signing—as a “threshold” date of export when considering the acquisition of foreign cultural heritage.¹²⁷ This rule does not benefit claimants to colonial-era African artifacts that primarily left the source country during the nineteenth century, destined for European collections and the global art market. In addition, Mali and Nigeria are currently the only sub-Saharan countries with CPIA bilateral agreements in place with the United States.¹²⁸ Therefore, almost all sub-Saharan African countries can neither request import bans in the United States if they are currently concerned about the illicit flow of cultural property from their country, nor find a solution for many of the colonial-era artifacts that left their country of origin long ago.

African states are also unlikely to prevail on a claim under the NSPA against colonial-era looted artifacts now in the United States. For the NSPA to have effect in a cultural property claim, the source country must have a national ownership law in place concurrent with an export ban that applies to the artifact in question.¹²⁹ In the late nineteenth century, many African nations fell under forced colonial rule, losing their independent sovereignty. European occupiers could export these artifacts to their home countries at will.¹³⁰ Thus, under the current framework, a formerly colonized nation would not meet the threshold test for the NSPA to apply unless its European occupier implemented a national

125. Jennifer Hassan, *France Looted Treasures from West Africa 130 Years Ago. Now 26 Prized Artifacts Are Going Back to Benin*, WASH. POST (Oct. 26, 2021, 9:29 AM), <https://www.washingtonpost.com/world/2021/10/26/france-benin-artifacts-abomey-return/> (noting a Benin-based curator’s hope that France’s efforts will “spark other cultural institutions to reevaluate collections of colonial-era artifacts.”).

126. See *supra* Section I.A.1.

127. See *Introduction to the Revisions to the 2008 Guidelines*, *supra* note 111; see also 19 C.F.R. § 12.104(g).

128. See *Import Restrictions*, *supra* note 36.

129. See *United States v. McClain*, 545 F.2d 988, 1000–01 (5th Cir. 1977).

130. See *Iweriebor*, *supra* note 3.

patrimony law “combined with a restriction on exportation without consent” of the source country.¹³¹

Similarly, African nations are unlikely to prevail if they were to file a stolen property claim for replevin under a state statute. Statutes of limitations purposefully require parties to bring claims in a timely manner to prevent protracted disputes.¹³² Because more than 100 years have passed since the looting transpired, this approach is not feasible. African nations are also unlikely to prevail against a laches defense if a court were to dismiss the statute of limitations bar and hear the case.¹³³ Many U.S. museums hold at least a portion of their African collections out to the public.¹³⁴ For many years, it has been common for museums to display a significant amount of their collection online.¹³⁵ Hence, the defendant institution would likely prevail on a laches defense by pleading that the source country has unreasonably delayed their claim, prejudicing the defendant by the loss of documents and witnesses or by its change in position in acquiring the object without knowledge of the claim.¹³⁶

The NAGPRA framework also does not completely resolve the question of how to restitute colonial-era looted African artifacts. NAGPRA’s moral basis is founded on righting the wrongs directly committed by the United States Government and federal institutions against Native Americans.¹³⁷ Therefore, NAGPRA’s statutory requirements and procedures are based upon the unique relationships and histories between tribes and federal institutions.¹³⁸ While there are aspects of this human rights centered legislation that may apply to the question of restitution of African artifacts, the statute itself lacks direct applicability to the hostile European occupation and looting of African nations and the subsequent dispersion of African cultural heritage throughout the world.

Similarly, the HEAR Act framework does not provide a complete solution for colonial-era looted African artifacts. Even if statutes of limitations were not an issue and the defense of laches was not applicable, there is still the problem of spotty or completely lacking provenance records.¹³⁹ Looted African artifacts were not taken under conditions similar to many pieces of art during the Nazi

131. See *McClain*, 545 F.2d at 1000–01.

132. See MALARO & DEANGELIS, *supra* note 26, at 72.

133. See Gerstenblith, *supra* note 30, at 600-01.

134. See, e.g., *Arts of Africa*, MUSEUM OF FINE ARTS, HOUSTON, <https://emuseum.mfah.org/groups/arts-africa-oceania-and-americas> (last visited Jan. 15, 2022).

135. See Ken Johnson, *No Detail Goes Unnoticed When Art Is a Click Away*, N.Y. TIMES (Jan. 29, 2015), <https://www.nytimes.com/2015/01/30/arts/design/art-museums-are-increasingly-adding-their-collections-online.html>.

136. See, e.g., *Zuckerman v. Metro. Museum of Art*, 928 F.3d 186, 190 (2d Cir. 2019), cert. denied, 140 S. Ct. 1269 (2020). This was also the result in the *Stargazer* litigation. See *Republic of Turkey v. Christie's Inc., et al.*, No. 21-2485, slip op. at 24 (2d Cir. 2023).

137. 136 CONG. REC. 35,678 (1990).

138. Trope & Echo-Hawk, *supra* note 63, at 60

139. See, e.g., Kreder & Schell, *supra* note 79, at 13.

regime in Europe.¹⁴⁰ Many families, galleries, and Nazi officials kept inventories and sales receipts that decades later provided vital evidence of provenance, albeit not often complete.¹⁴¹ African artifacts from the colonial era are often undocumented until their appearance decades later in a western gallery catalog or private collection.¹⁴² Rigorous research would be required due to this lack of documentation and may not result in a complete history. The lack of a clear ownership history weakens the source country's claim to stolen property in U.S. courts.¹⁴³

Museum association codes of ethics also do not produce solutions to the question of restitution of colonial-era looted African artifacts. Ethical codes create the expectation that museums will research their own existing collections to root out questionable ownership of artifacts.¹⁴⁴ However, in practice, this expectation is primarily applied to Nazi-era art or in response to a third-party claim directed at the museum.¹⁴⁵ Codes of ethics implore museums to do more than the legal minimum in all areas of museum management. AAM states, “[m]useums and those responsible for them must do more than avoid legal liability, they must take affirmative steps to maintain their integrity so as to warrant public confidence.”¹⁴⁶ A court may look to best industry practices, including ethical codes, to determine if museum board members exercised their best judgment in managing the artifact collection—including researching the provenance of existing collections.¹⁴⁷ Courts are highly deferential to trustee decisions, however, if best practices are in fact being followed.¹⁴⁸ Therefore,

140. See Salome Kiwara-Wilson, *Restituting Colonial Plunder: The Case for the Benin Bronzes and Ivories*, 23 DEPAUL J. ART, TECH. & INTELL. PROP. L. 375, 384–85, 405 (2013).

141. See, e.g., TRIENENS, *supra* note 84, at 37–52.

142. See, e.g., *Mellon African Art Initiative*, *supra* note 119.

143. See generally *Republic of Turkey v. Christie's Inc., et al.*, No. 21-2485 (2d Cir. 2023). The U.S. District Court ruled that Turkey was unable to establish “by a preponderance of the evidence that the Idol was found within and exported from the boundaries of modern-day Turkey after 1906 while the Decree was in effect,” thus setting a high standard for proof of ownership of undocumented objects claimed to have been stolen out of the ground. *Id.* at 10–11. The Court of Appeals criticized this holding as placing too high a burden on the claimant, saying that Turkey only needed to make “a ‘threshold showing’ of an ‘arguable claim’ of ownership.” *Id.* at 14. The Court of Appeals did not address whether Turkey had met this standard, affirming the District Court’s laches decision, holding that defendants had been prejudiced by Turkey’s unreasonable delay in bringing its claim. *Id.* at 25.

144. See *supra* Section II.B.

145. See *supra* notes 110 and 111.

146. *AAM Code of Ethics for Museums*, *supra* note 22.

147. *Rockwell*, 2017 Mass. Super. LEXIS 208, at *29 (“The Attorney General cites no case, statute, or AGO policy in support of the proposition that, to be reasonable, corporate board decisions must follow the professional ethics of the field.”).

148. See RESTATEMENT OF THE L., CHARITABLE NONPROFIT ORGS. § 2.03 cmt. d (Am. L. Inst. 2022) (“The business judgment rule . . . provides that if a fiduciary makes a decision in good faith, the fiduciary should not be subject to further review for breach of the duty of care as long as the elements of the business judgment rule . . . are met.”).

restitution with any class of artifacts is most likely to result due to enforcement of the present cultural heritage legal framework where it applies—and it does not in the case of colonial-era looted African art.

Although most museums embrace the ideals stated in the associations' codes of ethics, museums more likely than not need to be compelled to commence work on provenance review of existing collections. The Black Lives Matter movement has catalyzed an accounting among museums, forcing an ethical and moral response to this issue.¹⁴⁹ However, the histories behind NAGPRA and HEAR show that waiting for a comprehensive ethical and moral response likely will not suffice.¹⁵⁰ In advancing the NAGPRA legislation, Senator Inouye noted past resistance from museums: "I do not anticipate that this legislation will result in a wholesale raid on museum collections, as I have heard previous versions of this bill characterized."¹⁵¹ Prior to the vote on the HEAR Act, Ambassador Ronald Lauder in his Senate testimony took aim at the museum community's lack of affirmative steps in resolving Nazi-era looted art claims, stating: "Stalling claims is an abuse of the system. Sadly, there are museums that feel no need to uphold the Washington Principles. Many other institutions do the very least that is required and not much more."¹⁵² Thus, an ethical code alone is unlikely to spur a museum to research its existing collection for artifacts taken during African colonial rule and to repatriate those it identifies. Similarly, the present cultural heritage legal framework is inadequate to fully address this class of artifacts and their unique history of displacement among U.S. museums.

V. COMMENT: PROPOSED LEGISLATIVE SOLUTION

Under the current framework, a formal legal claim for art and artifacts taken from Africa during the colonial era is unlikely to prevail because this unique restitution question is not fully addressed in existing law or museum policy. Societal changes wrought by the Black Lives Matter movement may have lasting impact through influencing special legislation in the United States crafted for this purpose. Such legislation should specifically compel museums to inventory African art and artifacts in their collections, to publicize their findings, and to follow a set of guidelines facilitating the return of these items, where appropriate, to their communities and countries of origin. This approach follows the legal and ethical examples set by France and Germany and comports with the intent of U.S. museum ethical codes.

149. See McGlone, *supra* note 21 ("Colonial-era acquisitions have received extra attention because of the racial reckoning that has pressed museums to be more diverse, equitable and inclusive.").

150. See *supra* Sections I.B.1 and I.B.2.

151. 136 CONG. REC. 35,678 (1990).

152. See Statement of Ronald S. Lauder, *supra* note 93, at 2.

A. Societal Pressure Preceding Domestic Legislation

The impetus for the Black Lives Matter movement and its accompanying societal pressures are analogous to the precedents that led to special cultural heritage legislation found in the NAGPRA and HEAR Acts. The societal pressure predating NAGPRA was rooted in normalized assertions of white superiority over native peoples since the nation's founding. An effect of this power differential was the framing of native culture and sacred rites as curiosities and sources of entertainment.¹⁵³ These attitudes allowed for a long history of mistreatment and neglect of collections of native artifacts and remains both by federal and private institutions. Slowly, the extent of this problem entered the public consciousness. Native voices used these societal and political shifts to call for change. The 1990 NAGPRA legislation compelled museum participation in repatriation. The result a few decades later is a framework, not without imperfections, that has brought about needed change.

The societal pressures behind the HEAR Act are also rooted in a long history of mistreatment and unjust results for Holocaust victims and their families. For decades, a lack of public awareness of the scale of cultural heritage theft by the Nazi regime compounded the human tragedy. The 1990s saw a somewhat rapid change in public attitudes and increased awareness of the problem of statutory procedural rules blocking families from claiming what was rightfully theirs. In this environment of high-profile court rulings, settlements, and international pledges of action, advocates seized the political moment while utilizing celebrity star power to advance favorable legislation. The HEAR Act legislation does not directly compel museums to return artwork suspected of changing hands in Europe during this era. However, the statute does temporarily lower the bar for claimants to find a hearing on the merits of their claims and invokes a shared duty among institutions to help find solutions to this long-standing issue.¹⁵⁴

In a similar vein of tragic history, the Black Lives Matter movement protests the long history of mistreatment of people of African descent and systemic racism. The Black Lives Matter movement is a twenty-first century call for more than just basic civil rights. It expands further into society, rebuking colonial-era looting and dispersion of African cultural heritage by white-majority nations that is evident in western museums.¹⁵⁵ This political moment and societal shift in awareness of the issue, brought to the forefront of the public consciousness by the BLM movement, may be capitalized upon through allies in Congress and the

153. See Trope & Echo-Hawk, *supra* note 63, at 40.

154. See Holocaust Expropriated Art Recovery Act of 2016, Pub. L. No. 114-308, § 2(8), 130 Stat. 1524, 1525 (codified at 22 U.S.C. § 1621 note) (“[I]t is the sense of Congress that the private resolution of claims by parties involved, on the merits and through the use of alternative dispute resolution . . . will yield just and fair resolutions in a more efficient and predictable manner.”).

155. See Karen Attiah, *If U.S. Museums Say Black Lives Matter, Then They Should Return Africa's Stolen Art*, WASH. POST (May 12, 2021, 3:35 PM), <https://www.washingtonpost.com/opinions/2021/05/12/if-us-museums-say-black-lives-matter-then-they-should-return-africas-stolen-art/>.

increasing numbers of advocates within the museum community. This pressure could build the political will for museum association and/or legislative change directed at this class of artifacts in U.S. museums. Although there may be a lack of consensus as to the urgency, leaders in the field can help create a lasting program of restitution.¹⁵⁶

B. Useful Elements of Existing Legislation

Elements of existing special cultural heritage legislation may be useful in crafting legislation specifically aimed at colonial-era looted African art. For example, a key aspect of NAGPRA that could apply to similar legislation for African artifacts is the requirement for publicized inventories. Per the statute, institutions receiving federal funding must inventory their holdings of Native American human remains and associated funerary objects and create a summary of other cultural items.¹⁵⁷ This work is not done in isolation—institutions must accomplish these tasks in consultation with tribes to determine the cultural affiliation of the items. Both the tribe and the National Park Service must receive the completed inventories and summaries.¹⁵⁸ Upon receiving a request for repatriation, museums must act “expeditiously” to evaluate and honor that request.¹⁵⁹ The statute also creates an independent review committee, penalties for noncompliance, and the availability of federal grants to tribes and museums to carry out NAGPRA’s mandate.¹⁶⁰ This mandate was appropriate for the scale and extent of the issue involved. The elements of required inventories, summaries, consultations, and publication may be scaled to appropriately apply to the unique issue of colonial-era looted African artifacts in U.S. museum collections.

NAGPRA is also instructive because it is a law that attempts to move beyond the constraints of western-style ownership of objects. The statute acknowledges that some objects may not trace directly to a modern-day tribe and allows for a category of “culturally unaffiliated” objects.¹⁶¹ Similarly, many of the African artifacts in question “belong to groups of people whose allegiances predate the national borders drawn up by European powers . . . making it difficult to

156. See McGlone, *supra* note 21; see also Catherine Hickley, *UCLA’s Fowler Museum to Reach Out to Nigeria About Returning Its Benin Bronzes*, ART NEWSPAPER (Apr. 14, 2021, 11:51 AM), <https://www.theartnewspaper.com/2021/04/14/uclas-fowler-museum-to-reach-out-to-nigeria-about-returning-its-benin-bronzes>.

157. 25 U.S.C. §§ 3003–3004.

158. See *Native American Graves Protection and Repatriation Act: Compliance*, *supra* note 70; *Native American Graves Protection and Repatriation Act: Inventories of Human Remains*, NAT’L PARK SERV., <https://www.nps.gov/subjects/nagpra/inventories-of-human-remains.htm> (last visited Oct. 24, 2021).

159. 25 U.S.C. § 3005.

160. 25 U.S.C. §§ 3006–3008.

161. 43 C.F.R. § 10.11(c).

determine ownership based simply on matters of national identity.”¹⁶² Approaching the issue from this lens—communities over national or individual ownership—has allowed NAGPRA to become a successful mechanism of repatriation and even spark long-term partnerships and education programming between tribes and museums.

In terms of relief from statutes of limitations, the HEAR Act provides an influential example of Congress facilitating a just resolution to a complex cultural heritage legal issue. The Act’s federal statute of limitations period is tailored to the specific problems encountered by heirs of victims of the Nazi regime trying to reclaim their property. A similar *just resolution* approach to crafting a fair timeline for bringing claims is needed for African artifacts. The various state statutes of limitations present significant procedural and legal barriers to proving rightful ownership for formerly colonized nations and communities.¹⁶³ New legislation should also explicitly state the goal, as the HEAR Act does, to find “just and fair resolutions in a more efficient and predictable manner.”¹⁶⁴

As with Nazi-era looted art and Native American objects, colonial-era looted African art poses provenance challenges.¹⁶⁵ Since most museums do not have the resources to self-fund such a mandate, new legislation should include grants for expert provenance research and a public digital interface for publication of inventoried collections and their existing provenance histories.¹⁶⁶ In the event of disputes between a claimant and an institution, new legislation should include a dispute resolution mechanism that facilitates the avoidance of extensive and expensive litigation.¹⁶⁷ In addition, unlike NAGPRA, the HEAR Act includes a sunset clause.¹⁶⁸ New legislation should follow NAGPRA’s pattern and allow the restitution process as much time as needed to arrive at just resolutions.

162. Robin Scher, *Back to Where They Once Belonged: Proponents of Repatriation of African Artworks Take Issue with the Past—and Present and Future*, ARTNEWS (June 26, 2018, 10:00 AM), <https://www.artnews.com/art-news/news/back-belonged-proponents-repatriation-african-artworks-take-issue-past-present-future-10550/>.

163. Kiwara-Wilson, *supra* note 140, at 407.

164. Holocaust Expropriated Art Recovery Act of 2016, Pub. L. No. 114–308, § 2, 130 Stat. 1524, 1524 (codified at 22 U.S.C. § 1621 note).

165. *See generally* Gunn, *supra* note 64, at 509; *see also* Kreder & Schell, *supra* note 79, at 12–13.

166. *See, e.g., Native American Graves Protection and Repatriation Act: Grants*, NAT’L PARK SERV., <https://www.nps.gov/subjects/nagpra/grants.htm> (last visited Jan. 17, 2022); *see also supra* Section III.B. As an example of grant opportunities incorporated into repatriation legislation, *see* 25 U.S.C. §§ 3001–3013; 43 C.F.R. § 10.2(c).

167. *See, e.g., Native American Graves Protection and Repatriation Act: Review Committee*, NAT’L PARK SERV., <https://www.nps.gov/subjects/nagpra/review-committee.htm> (last visited Jan. 17, 2022); Holocaust Expropriated Art Recovery Act of 2016 § 2(6)–(8).

168. Holocaust Expropriated Art Recovery Act of 2016 § 5(g). Although the NAGPRA regulations do not contain a sunset clause, there is a notification deadline requiring an institution to repatriate designated artifacts within 90 days of a valid request. *See* 43 C.F.R. § 10.10(a)(3).

C. Goals and Legislative Intent

The goals and legislative intent of NAGPRA and the HEAR Act resonate with the goals and potential legislative intent of new legislation crafted for colonial-era African artifacts. The existing pieces of legislation are aimed at rectifying past wrongs inflicted upon a certain group of people. The goals are to return treasured artifacts and sacred materials to their rightful place and in the process marshal the participation of the museum community in this effort.¹⁶⁹ Ultimately, this legislation lightens the burden of the victims having to continually navigate a legal system of rules structured against them. Although the impetus for each piece of legislation may arise from different starting points (NAGPRA: fulfilling obligations to Native Americans, HEAR: fulfilling historical and foreign policy obligations), the intent is similar: provide a legal remedy for injustices where prior remedies either did not exist or fell short. The BLM movement's push for restitution by museums has a similar goal of rectifying past wrongs—simply put, museums should not keep “stolen things.”¹⁷⁰ The BLM movement has already proven influential in motivating local governments to act and change laws where needed with respect to public cultural symbols.¹⁷¹ This perceptible “shift in government thinking” may lead to the development of federal legislation intended to address colonial-era looted African art and affected communities.¹⁷²

VI. CONCLUSION: RECTIFY THE PAST

*“[N]egotiation about the status and ownership of these objects ought to begin sooner rather than later, and until there is a lot of pressure put on the institutions or the private collections that have them, they’re not going to do anything.”*¹⁷³

Here, Princeton University Professor of African and American Diaspora Art Chika Okeke-Agulu notes the status quo of the current legal framework for cultural heritage restitution in the United States—one that is not structured to fully address claims of colonial-era looted African art. Ethical codes promulgated by U.S. museum associations likewise have not been adequately applied to this class of artifacts. Professor Okeke-Agulu's voice adds to the urgency and intensity already felt from the Black Lives Matter movement. This

169. See 136 Cong. Rec. 35,678 (1990) (“This legislation is designed to facilitate a more open and cooperative relationship between native Americans and museums.”); see also Holocaust Expropriated Art Recovery Act of 2016 § 3(2) (“To ensure that claims to artwork and other property stolen or misappropriated by the Nazis . . . are resolved in a just and fair manner.”).

170. Roll, *supra* note 1.

171. See, e.g., Debbie Elliott, *Confederate Monuments are Removed as Americans Consider How to Remember the Past*, NPR (Dec. 30, 2021, 5:07 AM), <https://www.npr.org/2021/12/30/1069027408/confederate-monuments-are-removed-as-americans-consider-how-to-remember-the-past>.

172. Gbadamosi, *supra* note 6.

173. Jason Patinkin & Carol Guensburg, *Scholar Vows to Step Up Fight to Repatriate African Artifacts*, VOA (July 13, 2020, 5:53 PM), https://www.voanews.com/a/africa_scholar-vows-step-fight-repatriate-african-artifacts/6192713.html.

may provide the necessary societal and political pressure, as was necessary prior to the enactment of NAGPRA and the HEAR Act, to spur new legislation and to encourage museum associations to address these concerns even without legislation. Federal legislation should not only provide a legal and moral path forward, but also acknowledge the difficult history of these artifacts and the life and meaning they hold for the communities of their creators. Ultimately, it is about rectifying past wrongs and gaining allies in the effort.¹⁷⁴

174. See Press Release, *United States Announces \$19 Million Settlement in Case of Painting Stolen by Nazi*, U.S. Att’y S. Dist. N.Y. 3 (July 20, 2010), <https://www.justice.gov/archive/usao/nys/pressreleases/July10/portraitofwallysettlementpr.pdf> (“A seven-decade-old injustice was made right today by this settlement. . . . We are proud that this case has caused those who deal in art to be extremely vigilant about works caught up in the Holocaust and to join us in trying to rectify the past.”).