THEODORE ROOSEVELT AMERICAN INNS OF COURT

HOLOCAUST ART RESTITUTION – LEGAL AND ETHICAL ISSUES
April 15, 2019

Group Members:
Hon. Leonard Austin
Michael Berger
Emily Franchina
Douglas Good
Debora Nobel
Russell Tisman

Guest Speakers:
Raymond Dowd
Robyn Tisman

PROGRAM

Introduction to Provenance Research, World War II and Degenerate Art
Robyn Tisman

Nuremberg Laws, Lost Art Registries and Holocaust Restitution Projects
Douglas Good

The Washington Principles on Nazi-Confiscated Art
Michael Berger

The HEAR Act and Statute of Limitations
Russell Tisman

The Woman in Gold- The Story of Adele Bloch-Bauer
Debora Nobel

The Complexities of Art Reclamation Litigation – The Grunbaum Case
Raymond Dowd

Question/Answer Period

JUSTICE LEONARD B. AUSTIN is a graduate of Georgetown University in 1974 and Hofstra University School of Law in 1977. Justice Austin engaged in the private practice of law until his election to the Supreme Court Bench in the Tenth Judicial District in 1998. He was reelected in 2012.

In his private practice, Justice Austin focused primarily on complex commercial litigation, matrimonial and family matters, personal injury and real estate matters. In 1980-81, he served as counsel to the Speaker of the New York State Assembly. In that capacity, he was assigned as counsel to the Agriculture and Commerce and Industry Committees.

Upon his election to the Bench, Justice Austin was assigned to a Dedicated Matrimonial Part in Suffolk County (1999) and a Matrimonial and Commercial Part in Nassau County (2000). In October 2000, and continuing until his elevation to the Appellate Division, Justice Austin presided in a Commercial Part. He was selected to serve as the Chairman of the Commercial Division Rules Committee and authored the first Uniform Commercial Division Rules (22 NYCRR 202.70). Since 2014, he has been a member of the Chief Judge's Commercial Division Advisory Council.

In March 2009, Justice Austin was appointed to the Appellate Division for the Second Judicial Department by Governor David Paterson.

Justice Austin is currently a member of the Pattern Jury Instructions Committee. He has served on the Office of Court Administration's Matrimonial Practice and Commercial Division Curriculum Committees. He is a member of the New York State, Florida, Nassau County, Suffolk County, and New York State Women's Bar Associations. Additionally, he served as the President of the American College of Business Court Judges, the Presiding Member of the Judicial Section of the New York State Bar Association and the President of the Theodore Roosevelt American Inn of Court.

Over the years, Justice Austin has authored several articles dealing with Consumer Class Actions, Equitable Distribution and New York City's Forfeiture Law. He is a frequent lecturer in the fields of appellate, commercial and matrimonial law and practice. Since 2002, he has been an Adjunct Professor of Law at the Maurice A. Deane School of Law at Hofstra University.

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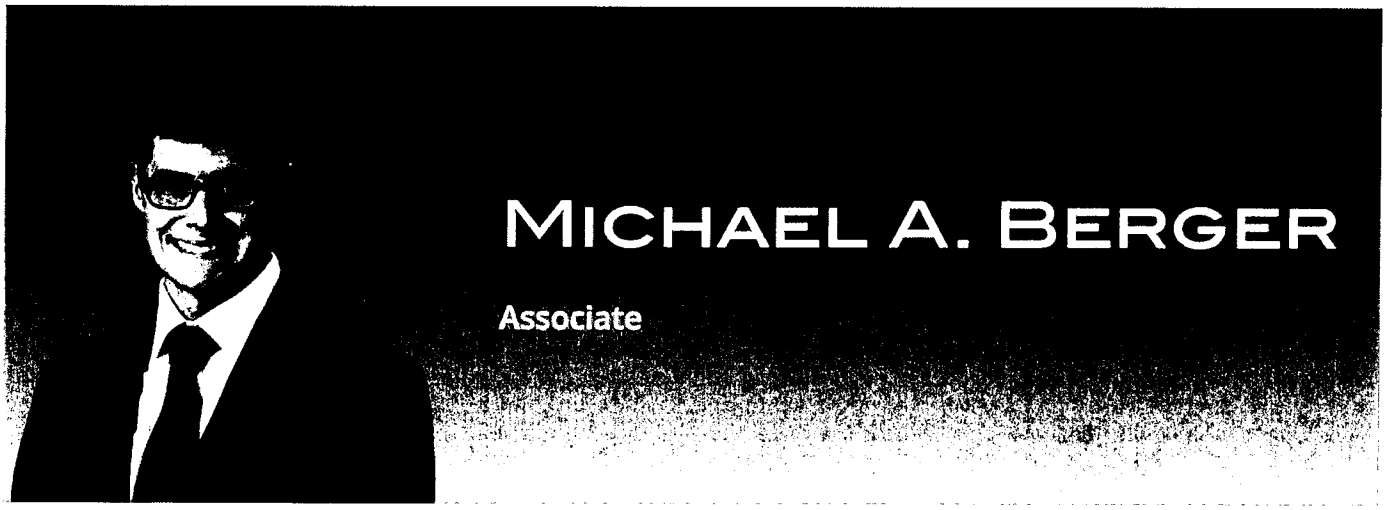

Michael A. Berger is an associate in the Firm's Employment and Labor practice group. He concentrates his practice on counseling and defending employers on various employment and labor law issues, including wage and hour, discrimination and retaliation.

Mr. Berger is admitted in New York, New Jersey and the U.S. District Courts for the Southern, Eastern and Western Districts of New York.

Immediately prior to joining our Firm, Mr. Berger was an associate at a Long Island-based labor law firm. Prior to that, he was an associate at a New York City firm.

Mr. Berger served as a legal fellow to the Hon. Sandra L. Sgroi, Appellate Division, Second Department; a volunteer at Nassau/Suffolk Law Services: Volunteer Lawyers Project; a legal intern at the Law Reform Advocacy Clinic at his law school and at the New York State Office of the Attorney General; and as a law clerk to the Hon. Joseph A. Zayas, Supreme Court of the State of New York, Criminal Term.

Mr. Berger earned his J.D. from the Maurice A. Deane School of Law at Hofstra University, where he was a Book Review Editor for the Journal of International Business and Law. In 2013, he published a Note and Book Review. Mr. Berger received his B.A. from the University of Pittsburgh, College of Arts & Sciences.

PRACTICE AREAS

- Employment & Labor
- Litigation

EDUCATION

- Maurice A. Deane School of Law, Hofstra University, J.D., 2013
- University of Pittsburgh, College of Arts & Sciences, B.A., 2010

ADMISSIONS

- New York State Bar
- New Jersey State Bar
- United States District Courts for the Southern, Eastern and Western Districts of New York

PROFESSIONAL AFFILIATIONS AND ACCOMPLISHMENTS

- Theodore Roosevelt American Inn of Court
- Nassau County Bar Association

Raymond J. Dowd

Raymond J. Dowd is a member of Dunnington's litigation and arbitration, intellectual property, advertising, art and fashion law and international practice areas. He has served as lead counsel in high-stakes, high-profile litigations and arbitrations in New York for over two decades. His book Copyright Litigation Handbook (Thomson Reuters/Westlaw) has received critical acclaim. Acting as a fiduciary by serving on non-profit boards has shaped his practical problem-solving approach and perspective.

Business disputes form the core of Mr. Dowd's practice. He works with a lean, experienced team, including trusted experts, to contain, avoid, minimize, and settle disputes. Matters often involve foreign law and conflict-of-laws principles, service or discovery in foreign jurisdictions. Mr. Dowd regularly represents television broadcasters in disputes relating to brand protection and content distribution in the United States, particularly anti-piracy work. Ground-breaking litigation to recover artworks lost during World War II has gained *amicus curiae* support from Holocaust survivors and heirs.

Mr. Dowd represents individuals, corporations, non-profits and governments in a wide range of matters. Trust and estates matters include contested probate proceedings through trial and disputes involving, trusts, heirship and decedents' estates. Contested matters include copyright and trademark disputes, shareholder actions, business dissolutions, contract disputes, licensing disputes and contested audits or accounting proceedings, including bench and jury trials, arbitrations and administrative proceedings, emergency applications for injunctive relief, quashing subpoenas, obtaining, enforcing and collecting judgments. Sample representations:

CTC Network v. Actava (SDNY) – Obtained permanent injunction blocking unauthorized broadcasts of Russian-language internet protocol television (IPTV) on behalf of Russian broadcaster;
Matter of Flamenbaum (NY Court of Appeals – Surrogate's Court Nassau County) – Represented the Republic of Germany in appeals from an estate accounting proceeding, obtained judgment returning 1200 B.C. tablet excavated from the Temple of Ishtar;
Reif v. Nagy (NY County Supreme – Commercial Division – Appellate Division First Department) – Obtained emergency seizure, successfully recovered Nazi-looted Egon Schiele artworks for heirs of Dachau Concentration Camp victim from London-based art dealer;
Energy Conservation Group v. Applied Underwriters (Queens County Supreme – Commercial Division) — Obtained temporary and preliminary restraining orders blocking arbitration and obtained an order compelling a $1.4 million bond against insurer;
Cartagena v. J.W. Thompson (SDNY) — Achieved dismissal of copyright infringement action in favor of

arbitration via pre-answer motion on behalf of a non-signatory to the arbitration agreement;

Bakalar v. Vavra (SDNY – Second Circuit) – Tried first-ever Holocaust-era art litigation in U.S. federal court; prevailed on appeal on significant conflict-of-laws question on New York, Swiss and Austrian law on stolen art;

Chum Ltd. v. Lisowski (SDNY) — Obtained summary declaration in trademark infringement and unfair competition action that mark FASHION TELEVISION is generic, then prevailed in bench trial for broadcaster of FASHIONTV channel;

Matter of Doris Duke (NY Court of Appeals – Appellate Division, First Department – Surrogate's Court New York County) — Removed Duke's butler Bernard Lafferty and United States Trust Company of New York as Co-Executors of the estate of American Tobacco heiress Doris Duke in then-largest estate ever probated in New York; later upheld New York's first-ever honorary testamentary pet trust resulting in $100,000 trust for Doris Duke's dogs;

Gleason v. Gerson (NY County Supreme)— Removed incumbent City Councilman from ballot and uncovered campaign misconduct;

Gleason v. Scopetta/City of New York (Second Circuit – EDNY) — Obtained reversal of ruling on stolen FDNY medical records on question of "state action"; asserted private right of action under Americans With Disabilities Act medical records confidentiality provision; obtained judgment under 42 U.S.C. §1983 for disabled, retired New York City firefighter;

Matter of Anonymous Child (Surrogate's Court NY County) — Finalized adoption for adoptive mother in contested adoption of sister's child in the wake of September 11, 2001 attacks.

Mr. Dowd also assists individuals, art owners, dealers and corporations with trademark and transactional work, including international licensing and distribution. He lectures regularly on art law and copyright law. In 2006, he co-founded the annual day-long Art Litigation and Dispute Resolution Institute at New York County Lawyers' Association featuring the top judges and practitioners in art law.

Mr. Dowd has served as President of Network of Bar Leaders (2013-2014); General Counsel of the Federal Bar Association (2010-2011); FBA Vice President for the Second Circuit (2006-2012); FBA Board of Directors (2011-2016); The Federal Lawyer Magazine Editorial Board; FBA Government Relations Committee; FBA President of Southern District of New York Chapter (2006-2008); New York County Lawyers' Association Board of Directors (2003-2006); National Arts Club Second Vice President, Chair Audit Committee (2016-Present); Co-Chair of Fordham Law School's International Law Affinity Group (2016-Present); Village of Westhampton Beach Conservation Advisory Council (2014-Present).

Mr. Dowd is a member of the Copyright Society of the U.S.A.; New York State Bar Association, Commercial and Federal Litigation Section and Intellectual Property Law Section, Fellow, New York State Bar Foundation; Sustaining Lifetime Fellow, Foundation of the Federal Bar Association.

Mr. Dowd is admitted to practice law in New York State, the U.S. District Courts for the Southern and Eastern Districts of New York, U.S. Court of Appeals for the First, Second, Fifth, Ninth and Tenth Circuits, U.S. Supreme Court, U.S. Tax Court and U.S. Court of International Trade.

Mr. Dowd earned a Bachelor of Arts from Manhattan College in International Studies cum laude and a Juris Doctor from Fordham University School of Law, serving as Articles Editor for the Fordham International Law Journal.

Mr. Dowd is fluent in French and Italian.

New posts from Mr. Dowd's Copyright Litigation Blog:

Video: From Murder To Museums – Abraham Lincoln, Adolf Hitler and the Hunt For Nazi-Looted Art In America

From Murder To Museums: The Pursuit of Nazi Looted Art – August 16 Southampton NY

Pleading Copyright Infringement: What To Do When Registering Your Copyrights After Starting A Lawsuit?

Eighth Circuit: Copyright & Trademark Infringement To Publish Modified Public Domain Materials

Second Circuit: Iron Man Soundtrack Copyright Infringement Litigation Can Proceed On Work-for-Hire Question

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Emily F. Franchina, Esq.
Franchina Law Group, LLC

Emily brings a record of almost 30 years of distinguished service to the elder law community.

A graduate from the Maurice A. Deane School of Law at Hofstra University she has played leadership roles as the chair of the NYSBA Young Lawyers and the General Practice sections and served as Vice President of the 10th Judicial District. She is the Chair of the Committee on Judicial nominations and is beginning her sixth term as Chair of the Fellows of the NY Bar Foundation, the charitable arm of the NYS Bar Association.

As a member of the Nassau County Bar Association she served on the Executive Committee for seven years and was the fifth female President in the Association's 107 year history. Emily has served as Chair of the Elder Law, Social Services and Health Advocacy, Surrogate's Court Estates and Trusts committees. In 2006 Emily was honored with the distinguished service award by the Associations's WE CARE charitable fund.

Committed to the community as well, Emily was President of the Mineola-Garden City Rotary, served on the Advisory board of St. Johnlands Nursing facility and the Long Island Alzheimer's foundation.

Named three times as one of Long Island's Most Influential Women, she received the Juliette Low Award of Distinction from the Girl Scouts of Nassau County and the Annual Business Leadership Award from the Advancement for Commerce Industry and Technology. In 2016 she received the Outstanding Women in Law honor from Hofstra. For the past five years Emily was named a New York Super Lawyer in Elder Law.

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EDUCATION

- New York University (J.D., 1971)
- Columbia College (B.A., 1967)

PRACTICE AREAS

- Commercial Litigation
- Corporate Governance
- Employment

PUBLICATIONS

- SIXTEEN RUSKIN

Douglas Good has extensive experience in trial and appellate advocacy, as well as substantial experience in alternative dispute resolution. He has handled many cases involving restrictive covenants, unfair competition and theft of trade secrets in trial and appellate courts, as well as employment discrimination matters. He has handled a diverse assortment of cases – again, both in trial and appellate courts – prominent among them are shareholder and partnership disputes, creditors' rights matters (including defense of lender liability claims), health law, RICO, real property, and civil rights disputes, among others.

Douglas is certified as a mediator in the Commercial Division of the Supreme Court of Nassau County, and leads the firm's Mediation Services Group.

DEBORA G. NOBEL

Debora G. Nobel specializes in the area of medical malpractice, and was a defense litigator for 38 years. She currently practices independently as local counsel to several medical malpractice firms. Prior to becoming an attorney, she served as the Acting Director of the Office of Health Systems Management of the New York State Department of Health, which administered the Medicaid Program in New York City.

Ms. Nobel has a Master's Degree in Health Policy and Administration from New York University Wagner School of Public Service (1974) and a J.D. from New York Law School (Night Division 1979).

Ms. Nobel previously held the office of Secretary of the Theodore Roosevelt American Inn of Court and continues to serve as a Board member.

Robyn Tisman is an independent art advisor and historian specializing in Modern, Postwar, and Contemporary Art. Her career spans more than a decade working with artists, galleries, museums, and cultural institutions in both America and overseas. In addition to her work as an historian and provenance researcher, Robyn is a USPAP compliant fine art appraiser. She holds both her Bachelor's and Master's degrees from Northwestern University, and post-graduate certificates in Art Business and in Fine Art Appraisal from NYU.

Robyn's research interests include practical methods for integrating the arts and entertainment in social impact programming and cultural diplomacy, its practical applications, and the power we wield as communities and civil society to shape perceptions. Other research includes issues pertaining to Holocaust Era Art Restitution, and a critical re-examination of the avant-garde and rise of Post-Modernism in mid-Century NYC and Los Angeles. She remains steadfast in her belief that art is one of the most important tools we have to explore our shared humanity.

Among her favorite projects, Robyn counts working with artist Steve Balkin (One of Warhol's *Thirteen Most Beautiful Boys*) to further document his cultural impact as an early producer of Fluxus Happenings and a documentary photographer of the 1960s and '70s New York Art World. She also works with Contemporary artists to develop and produce exhibitions.

Robyn currently splits her time between NYC and Los Angeles, where she has worked on television productions for Warner Bros. and Twentieth Century Fox Television. In addition, Robyn has had the privilege of consulting for notable Art world entities such as The Roy Lichtenstein Foundation and The Chrysler Museum of Art. She can be reached at (917) 826-0408, and is most accessible via e-mail: robyntisman1@gmail.com.

Photograph courtesy of Bjorn Bolinder, Find the Light Photography

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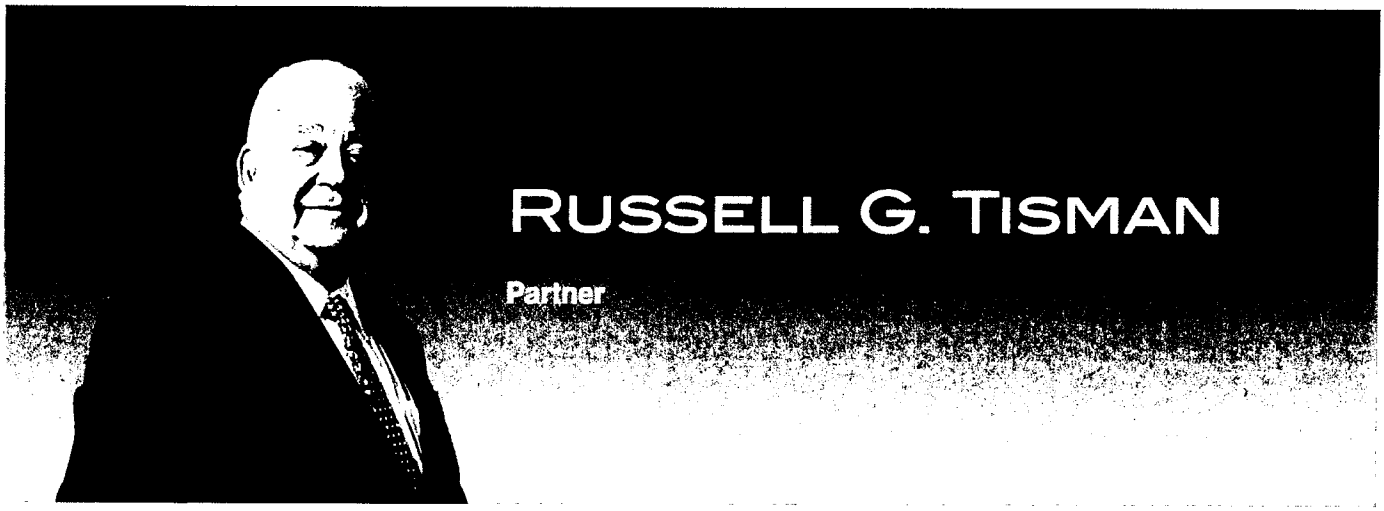

Russell G. Tisman specializes in complex corporate, commercial, defense, employment, labor, personal injury, and Surrogate's Court litigation. He has tried cases and argued appeals in federal and state courts and administrative agencies throughout the United States, and in arbitration and other alternate dispute resolution fora. Mr. Tisman also actively counsels management and human resource professionals on employment and labor matters. He represents public companies, privately held businesses, insurers, financial institutions, and individuals in all types of business-related disputes, in addition to representing individuals, insurance carriers, and businesses in personal injury litigation.

Mr. Tisman commenced practice in 1977 with a multinational, Wall Street law firm. From 1980 to 1987, he was Senior Litigation Counsel of ITT Corporation, where he was responsible for employment litigation system-wide and commercial, antitrust, and product liability defense litigation. In 1985, ITT awarded him an outstanding professional achievement award. Mr. Tisman was a founding member and head of the litigation and employment and labor practices of Groman, Ross & Tisman, P.C., which joined the Firm in 2006.

He has published articles in various journals including the *Journal of the American Corporate Counsel Association*, and the *National Law Journal*, *the Suffolk Lawyer,* and treatise sections on litigation and employment topics, including chapter updates for BNA's Employment Discrimination Law treatise. He has lectured on employment and litigation law and alternative dispute resolution before both local and national audiences.

Mr. Tisman actively serves as an arbitrator and mediator in commercial and employment disputes. He has been a court-appointed arbitrator and an arbitrator for the American Arbitration Association and NAM. Mr. Tisman has been recognized for his volunteer efforts on behalf of Live On New York, formerly the New York Organ Donor Network.

He has been AV-Rated by Martindale Hubbell for more than 25 years. Mr. Tisman was honored by the Nassau County Bar Association for distinguished career, professional achievement, expertise, and leadership in the field of Labor and Employment. He repeatedly has been named a *New York SuperLawyers* commercial litigator, and has been selected by

Long Island Business News as one of Long Island's leading employment and labor lawyers in its "*Who's Who in Law*" edition, and as a Legal Eagle by *Long Island Pulse Magazine*, among other honors.

PRACTICE AREAS

- Bankruptcy & Corporate Restructuring
- Employment & Labor
- Litigation

EDUCATION

- Ohio State University College of Law, 1977
- Northwestern University, B.A., 1973

ADMISSIONS

- New York State Bar

PROFESSIONAL AFFILIATIONS AND ACCOMPLISHMENTS

- American Bar Association
- Association of the Bar of the City of New York
- Nassau County Bar Association (employment and labor committee)
- Theodore Roosevelt American Inn of Court (Board Member)
- Harboring Hearts (Board Member)
- Past President of the Lawyers Club of Huntington
- Has served on committees of the Mid-Island YJCC
- Has served on the Northwestern University Alumni Association (Past President of the Long Island Alumni Club)
- Has served as Regional Co-Director of Northwestern's Alumni Admission Council
- Past Benefit chair of the Harboring Hearts charity's annual benefit

MOSCOU FALTISCHEK ATTORNEYS NAMED AS NEW YORK METROPOLITAN AREA SUPER LAWYERS FOR 2017 *(Press Releases)*

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- A Modest Proposal to Resolve the E-Discovery Crisis *(Commercial Litigation)*
- Does Bankruptcy Discharge Sexual Harassment Debts? *(Commercial Litigation)*
- The Rule Against Perpetuities Lives On *(Alerts, Commercial Litigation)*
- Restrictive Covenants – Enforceable Beyond A

A partner at Ruskin Moscou Faltischek, P.C., he is chairman emeritus of the firm's Litigation Department and member of the Employment Law and Corporate Governance Practice Groups. He also serves as the firm's General Counsel, with responsibility for all legal and compliance issues encountered by the firm. He chairs the firm's Practice Management Committee, which, among other things, deals with ethical issues and conflicts of interest.

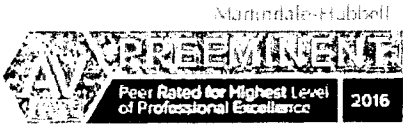
Douglas is a past president of the Nassau County Bar Association, a fellow of the American Bar Foundation and the New York Bar Foundation, as well as a member of the Federal Bar Council. He has served as a member of the House of Delegates of the New York State Bar Association, the State Bar's Nominating Committee and the President's Committee on Access to Justice. He continues to serve the State Bar as a member of the Committee on Standards of Attorney Conduct (COSAC). He is currently the Chair of the Nassau County Bar Association's Judiciary Committee, which screens candidates for judicial office. He has lectured before the American, New York State and Nassau County Bar Associations on topics including professional ethics, corporate and not-for-profit governance and a variety of litigation topics, and has been published in various legal and business journals.

Written Agreement? *(Articles, Employment)*

- Ten Ways to Get Ahead of Business Lawsuits *(Commercial Litigation)*
- Sarbanes-Oxley Opens Pandora Box for Personal Civil Liability *(Articles, Corporate Governance)*

He has served as chairperson of the Board of Directors of Nassau/Suffolk Law Services Committee, Inc. for many years. While at the firm, he has been an assistant adjunct professor at the New York University Institute of Paralegal Studies. Prior to joining Ruskin Moscou Faltischek, P.C., Douglas was the executive director of the Legal Aid Society of Rockland County, Inc.

Douglas J. Good



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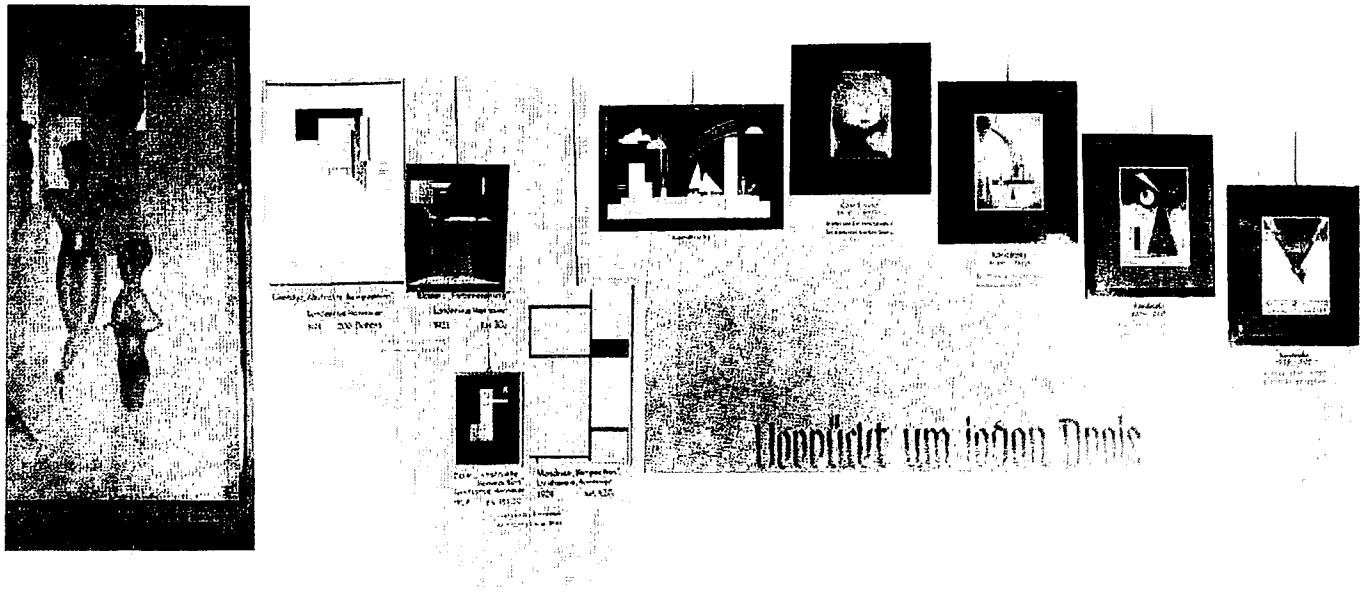


"Degenerate Art"

The Fate of the Avant-Garde in Nazi Germany

Stephanie Barron

with contributions by

Peter Guenther
Andreas Hüneke
Annegret Janda
Mario-Andreas von Lüttichau
Michael Meyer
William Moritz
George L. Mosse
Christoph Zuschlag

LOS ANGELES COUNTY MUSEUM OF ART ■ HARRY N. ABRAMS, INC., PUBLISHERS, NEW YORK

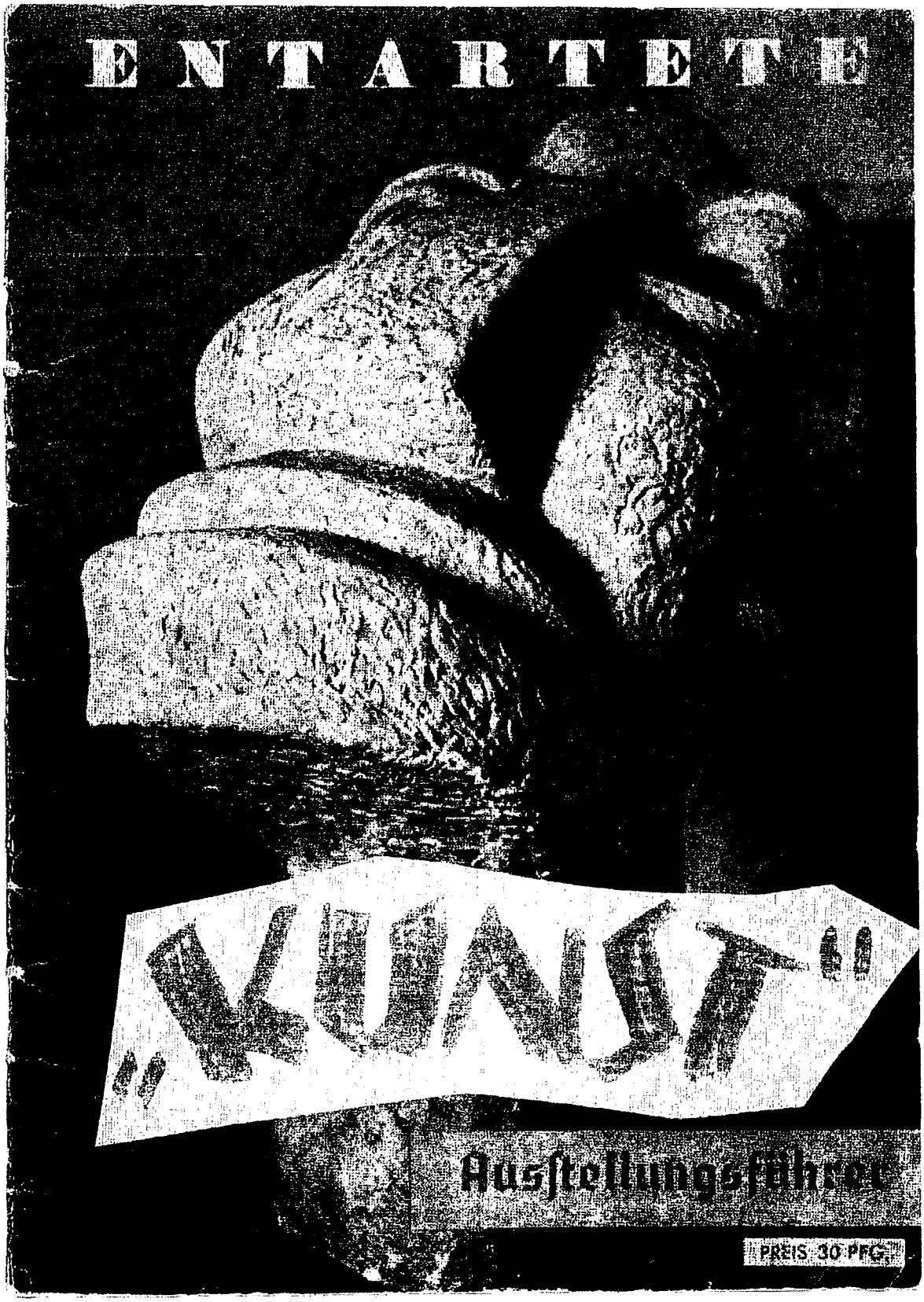


Figure 1
Cover of the exhibition guide for *Entartete Kunst*, 1937, image: Otto Freundlich, *Der neue Mensch* (The new man), 1912, plaster cast, height 139 cm (54⅞ in.), location unknown

STEPHANIE BARRON

1937

Modern Art and Politics in Prewar Germany

In 1937 the National Socialists staged the most virulent attack ever mounted against modern art with the opening on July 19 in Munich of the *Entartete Kunst* (Degenerate art) exhibition, in which were brought together more than 650 important paintings, sculptures, prints, and books that had until a few weeks earlier been in the possession of thirty-two German public museum collections. The works were assembled for the purpose of clarifying for the German public by defamation and derision exactly what type of modern art was unacceptable to the Reich, and thus "un-German." During the four months *Entartete Kunst* was on view in Munich it attracted more than two million visitors; over the next three years it traveled throughout Germany and Austria and was seen by nearly one million more. On most days twenty thousand visitors passed through the exhibition, which was free of charge; records state that on one Sunday—August 2, 1937—thirty-six thousand people saw it.[1] The popularity of *Entartete Kunst* has never been matched by any other exhibition of modern art. According to newspaper accounts, five times as many people visited *Entartete Kunst* as saw the *Grosse Deutsche Kunstausstellung* (Great German art exhibition), an equally large presentation of Nazi-approved art that had opened on the preceding day to inaugurate Munich's Haus der Deutschen Kunst (House of German art), the first official building erected by the National Socialists.

The thoroughness of the National Socialists' politicization of aesthetic issues remains unparalleled in modern history, as does the remarkable set of circumstances that led to the complete revocation of Germany's previous identification of its cultural heroes, not only in the visual arts but also in literature, music, and film. When the National Socialists assumed power in 1933, one of their first acts was an attack on contemporary authors; widespread book-burnings in which thousands of volumes were destroyed in public view announced the new policy toward the arts. The *Entartete Kunst* exhibition was only the tip of the iceberg: in 1937 more than sixteen thousand examples of modern art were confiscated as "degenerate" by a committee empowered by Joseph Goebbels, Adolf Hitler's second-in-command and since March of 1933 Reichsminister für Volksaufklärung und Propaganda (Reich minister for public enlightenment and propaganda). While some of the impounded art was earmarked for *Entartete Kunst* in Munich, hundreds of works were sold for hard currency to foreign buyers. Many of the "dregs," as Goebbels called them, were probably destroyed in a spectacular blaze in front of the central fire department in Berlin in 1939.[2]

The National Socialists rejected and censured virtually everything that had existed on the German modern art scene prior to 1933. Whether abstract or representational, the innocuously beautiful landscapes and portraits by August Macke, the expressionistically colored paintings by the popular Brücke artists Ernst Ludwig Kirchner, Emil Nolde, and Karl Schmidt-Rottluff, the biting social criticism of Max Beckmann, Otto Dix, and George Grosz, or the efforts of the Bauhaus artists to forge a new link between art and industry—all were equally condemned. The Gesetz zur Wiederherstellung des Berufsbeamtentums (Professional civil service restoration act) of April 7, 1933, enabled Nazi officials to dismiss non-Aryan government employees from their jobs. In that year alone more than twenty museum directors and curators, all of whom worked for state institutions, were fired.

Artists were forced to join official groups, and any "undesirables" were dismissed from teaching posts in the academies and artistic organizations. No matter what their political attitudes, artists who worked in abstract, Cubist, Expressionist, Surrealist, or other modern styles came under attack: Nolde, who was actually an early member of the National Socialist party, saw his own work declared "degenerate." Willi Baumeister and Beckmann were dismissed from their positions at the Frankfurt Städelschule (Municipal school); Dix, Paul Klee, and Max Pechstein were fired from the academies in Dresden, Düsseldorf, and Berlin, respectively. The Preussische Akademie (Prussian academy) in Berlin lost many important artists, including Ernst Barlach, Rudolf Belling, Dix, Ludwig Gies, Karl Hofer, Kirchner, Oskar Kokoschka, Käthe Kollwitz, Max Liebermann, Ludwig Mies van der Rohe, Pechstein, and Bruno Taut. Most of the artists who were persecuted were not Jewish; on the contrary, of those mentioned above only Liebermann was Jewish, and of the 112 artists included in *Entartete Kunst* only 6 were Jews. Any artists who were mentioned or whose work was illustrated in any of the well-publicized books on contemporary art by Ludwig Justi or Carl Einstein or in avant-garde periodicals such as *Das Kunstblatt* (The art paper), *Die Aktion* (Action), or *Der Sturm* (The storm) were easy

targets for the National Socialists. In 1979 Berthold Hinz produced evidence that Einstein's *Die Kunst des 20. Jahrhunderts* (The art of the twentieth century) was in fact used as a guide by many of the National Socialists in defining who and what was modern, and consequently "un-German" and to be vilified.[3] With the swift imprint of the censor's stamp they outlawed an entire generation of modernism.

While the focus of *"Degenerate Art": The Fate of the Avant-Garde in Nazi Germany* is on events in the visual arts, these can be seen as indicative of prohibitions in the wider spectrum of the cultural arena. It is worthwhile to look at the various areas that came under the jurisdiction of the Reichsministerium für Volksaufklärung und Propaganda. In November 1933 Goebbels established *Reichskammern* (Reich chambers) of film, music, radio broadcasting, press, theater, and writers, in addition to the fine arts (fig. 2). Each of the heads of these chambers had under him (there were no women) seven departments incorporating further subdivisions. The Reichskammer der bildenden Künste (Reich chamber of visual arts), for example, was divided into departments of 1) administration, 2) press and propaganda; 3) architecture, landscape architecture, and interior design; 4) painting, sculpture, and graphic arts; 5) commercial illustration and design; 6) art promotion, artists' associations, and craft associations; and 7) art publishing, sales, and auctioneering.

What becomes apparent is the microscopic attention the Nazi hierarchy accorded the observation and regulation of all aspects of cultural life in the Reich. The government established procedures whereby it decided what and who was acceptable or undesirable. Exclusion was tantamount to permanent disbarment. One can only wonder at the disproportionate amount of bureaucratic organization, paperwork, rules, and regulations that was aimed at an area of society that was economically, politically, and militaristically unthreatening. Obviously the National Socialists perceived the cultural life of the citizens of the Reich to be extremely important and worthy of such intensive concern. This elevation of art to such a major role in a totalitarian society was without historical precedent, other than in the Soviet Union. Hellmut Lehmann-Haupt wrote in the early 1950s, "Such complete monopolization of the entire creative potential of a people, of every aesthetic instinct, such subjugation of every current of its productivity and its capacity for artistic experience to the purposes of the leaders of collective society does not exist before the present century"[4] Although Hitler had a personal interest and involvement with art, due to his unsuccessful career as a painter in Vienna, Lehmann-Haupt argues convincingly that the preoccupation of the National Socialists with culture far transcended Hitler's own frustrated flirtation with art.[5]

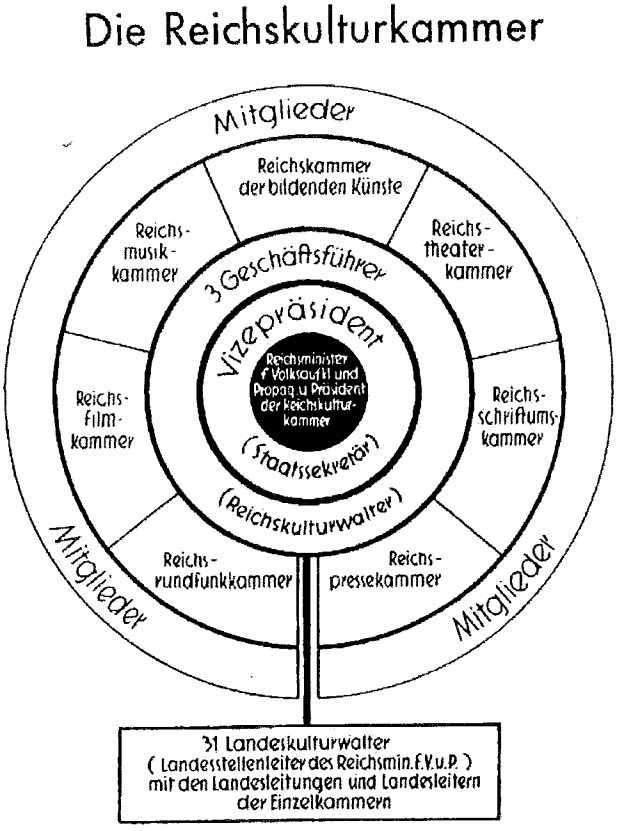


Figure 2
Organizational chart of the Reichskulturkammer (Reich chamber of culture), illustrating its division into chambers of radio broadcasting, film, music, visual arts, theater, literature, and journalism

Degeneracy and Nazi ideology in the 1920s and 1930s

The *Grosse Deutsche Kunstausstellung* and *Entartete Kunst* did not occur as isolated incidents. The issues raised, the fusion of political and aesthetic themes, and the use of the term *entartet* to designate supposedly inferior racial, sexual, and moral types had been in the air for several years (*Entartet*, which has traditionally been translated as "degenerate" or "decadent," is essentially a biological term, defining a plant or animal that has so changed that it no longer belongs to its species. By extension it refers to art that is unclassifiable or so far beyond the confines of what is accepted that it is in essence "non-art.")

The events leading up to 1937 had their roots in German cultural history long before the National Socialist party was formed. The year 1871 marked both the emergence of the German empire and the publication of Charles Darwin's *The Descent of Man*, a book later used to justify German racism. As a unified country Germany became prone to an intense nationalism that manifested itself quite often as a belief in the natural superiority of the Aryan people. The myth of the blond, blue-eyed Nordic hero as the embodiment of the future of Western civilization was promoted in the writings of several European authors of the early twentieth century, including Count Gobineau, Houston Stewart Chamberlain, Hans Günther, and Alfred Rosenberg. In the decade between 1910 and 1920 the concept of racism had achieved popularity in the middle class. By the 1920s certain authors argued that racial characteristics and art were linked and attempted to "prove" that the style of a work of art was determined by the race of the artist.[6]

This period in German history also saw the efflorescence of modern art, literature, film, and music created by individuals who would be labeled "degenerate" in the 1930s. German art virtually exploded in a series of events in Berlin, Dresden, and Munich. The emergence of the artists' groups Die Brücke (The bridge) and Der Blaue Reiter (The blue rider), the publication of important radical periodicals to which artists contributed, and the intense response by artists and writers to the cataclysmic events of the First World War characterized the first phase of German Expressionism. These artists and writers were also drawn to the exotic: the carvings and wall hangings of African and Oceanic peoples that the Brücke artists saw in the Dresden Völkerkunde-Museum (Ethnographic museum), for example, or the art of the insane that served as inspiration for the poetry and prose of such esteemed authors as Hugo Ball, Alfred Döblin, and Wieland Herzfelde. In the wake of the war avant-garde German art came increasingly into conflict with the nationalistic realism that was more easily understood by the average German. The country had experienced a humiliating defeat and had been assessed for huge war reparations that grievously taxed its already shaky economy. Movements such as Expressionism, Cubism, and Dada were often viewed as intellectual, elitist, and foreign by the demoralized nation and linked to the economic collapse, which was blamed on a supposed international conspiracy of Communists and Jews. Many avant-garde artists continued their involvement in Socialism during the turbulent Weimar era and made their sentiments known through their art. This identification of the more abstract art movements with internationalism and progressive politics created highly visible targets for the aggressive nationalism that gave birth to the National Socialist party, even as institutions such as the Bauhaus school moved into the cultural mainstream and German museums exhibited more and more avant-garde work.

Concurrent with important artistic developments, pseudoscientific treatises such as Max Nordau's *Entartung* (Degeneration) of 1892 were enjoying renewed popularity.[7] Nordau, himself a Jew, wrote a ponderous text vilifying the Pre-Raphaelites, Symbolism, Henrik Ibsen, and Émile Zola, among others, as he sought to prove the superiority of traditional German culture. In 1895 George Bernard Shaw had written a brilliant and scathing review of Nordau's book,[8] one of several responses provoked internationally. Unfortunately, the criticism had little impact on the architects of Nazi ideology. *Entartung* and other racist works took the widely accepted view that nineteenth-century realistic genre painting represented the culmination of a long tradition of true Aryan art. Even before they obtained a majority in the Reichstag (Parliament), disgruntled theorists and polemicists had written and spoken of how "good German art" was being overrun by "degenerates, Jews, and other insidious influences." The avant-garde artist was equated to the insane, who in turn was synonymous with the Jew: the nineteenth-century founders of German psychiatry felt that the Jew was inherently degenerate and more susceptible than the non-Jew to insanity.[9] As Sander Gilman has pointed out, the classifications of "degenerate" and "healthy" appeared for the first time in the late nineteenth century; by the late 1930s they were fairly standard in discussions about the avant-garde and the traditional.[10]

Opposition to the wave of avant-garde activities in German museums had begun in the 1920s with the founding of the Deutsche Kunstgesellschaft (German art association), which had as its goals a "common action against the corruption of art" and the promotion of an "art that was pure German, with the German soul reflecting art." They attacked exhibitions of the works of Beckmann, Grosz, and other proponents of "Kulturbolschewismus" (art-Bolshevism). In 1927 Rosenberg, the chief architect of Nazi cultural policy, founded the Kampfbund für deutsche Kultur (Combat league for German culture), which had the same goals as the Deutsche Kunstgesellschaft. It was at first an underground organization, but with the rise of National Socialism it worked openly with the party leadership. In 1930 Rosenberg wrote *Der Mythus des 20. Jahrhunderts: Eine Wertung der seelisch-geistigen Gestaltenkämpfe* (The myth of the twentieth century: An evaluation of the spiritual-intellectual confrontations of our age), in which he denounced Expressionism and other modern art forms: "Creativity was broken because it had oriented itself, ideologically and artistically, toward a foreign standard and thus was no longer attuned to the demands of life."[11]

In 1929 the state of Thuringia elected Wilhelm Frick, a member of the Nazi party, as representative to the Reichstag. Frick was named Innenminister (Minister of the interior) for Thuringia. His actions gave a foretaste of what the Nazi seizure of power would mean: he began by replacing most department heads, issuing new cultural policies, and even encouraging the dismissal of Walter Gropius and the entire twenty-nine-member faculty of the Bauhaus in Weimar, which was located within his jurisdiction.

Frick appointed Paul Schultze-Naumburg, an architect and racial theorist, to replace Gropius. In 1925 Schultze-Naumburg had published an attack on the Bauhaus, *Das ABC des Bauens* (The ABCs of building), and in 1928 he wrote *Kunst und Rasse* (Art and race), which would have a far-reaching influence in the Nazi scheme against modernism. Exploiting the popularity of Nordau's treatise, Schultze-Naumburg attacked modern art as "entartet." He juxtaposed examples of modern art and photographs of deformed or diseased people to suggest that they were the models for the elongated faces of Amedeo Modigliani, the angular physiognomies of Schmidt-Rottluff, and the florid faces of Dix (figs. 3–4). He railed particularly against the Expressionists, who he felt represented the inferior aspect of modern German culture.

Heidelberg had become a center for the study of art produced by schizophrenics as a means of access to the central problems of mental illness. In 1922 psychiatrist Hans Prinzhorn had published his study *Bildnerei der Geisteskranken* (Image-making by the mentally ill), which was based on material he had assembled: he examined more than 5,000 works by 450 patients to demonstrate that the art of the insane exhibited certain specific qualities.[12] The study received serious attention far beyond the medical profession. Although we have no evidence that Hitler, the failed artist, read or even knew of Prinzhorn's book, the attention devoted to it was so widespread that it is more likely than not to have reached him. Thus, it is not surprising that Schultze-Naumburg's methodology of comparing the works of insane artists to avant-garde art was seized upon as a further way to "prove" the "degeneracy" of modern art. The technique of comparison for the purpose of denigration and condemnation thus became a basic tool of the Nazi campaign. In 1933 in Erlangen one of the many precursors of *Entartete Kunst* included thirty-two paintings by contemporary artists shown with works by children and the mentally ill.[13] The same technique was used on several pages in the illustrated brochure published to accompany *Entartete Kunst* as it traveled around Germany (pp. 383, 385, 387, 389).

There emerged in 1934 some confusion about the "official" attitude toward the Expressionists, artists such as Barlach and Nolde in particular. Some factions saw this art as truly German and Nordic, with roots in the Gothic era. Goebbels initially sided with these proponents, in fact, he surrounded himself with examples of Barlach's sculpture and Nolde's painting; he saw the spirit and chaos of Expressionism as analogous to the spirit of Nazi youth. At extreme odds with him was Rosenberg, who sought to promote *völkisch* art (art of and for the German people) over any type of modern aesthetic. Goebbels and Rosenberg took opposing sides in their speeches and writings, neither yet sure of the Führer's opinion.[14] When Hitler appointed Rosenberg early in 1934 to supervise all "intellectual and ideological training," he gave him a rank equal to Goebbels's in his role as president of the Reichskulturkammer (Reich chamber of culture). The ideological tug-of-war continued well into the year, until the controversy required Hitler's intervention. In September, at the party rally in Nuremberg, Hitler spoke of the dangers of artistic sabotage by the Cubists, Futurists, Dadaists, and others who were threatening artistic growth, but he also cautioned against excessively retrograde German art. Thus, neither Expressionism nor the conservative *völkisch* art received his blessing. Nazi-approved art would be based exclusively on German racial tradition. Henceforth, all forms of modernism, including art criticism, were outlawed.

The unusual methodology employed by the Nazis in the *Entartete Kunst* exhibition entailed the gathering of works of art for the specific purpose of defamation. Never before had there been such an effort; perhaps only Soviet Russia in the years following the revolution of 1917 offers a parallel for the efflorescence of modernism and its immediate repudiation by the government in power. The late-nineteenth-century French Salons des Réfusés, in which art outside the academic tradition could be seen, were state-sanctioned opportunities for the avant-garde to emerge. By contrast, the Nazis exhibited works contrary to their "approved" art in order to condemn them. There was no chance for an alternative voice to be heard.

Figures 3–4
Juxtaposition of works of "degenerate" art by Karl Schmidt-Rottluff and Amedeo Modigliani and photographs of facial deformities, from Paul Schultze-Naumburg, *Kunst und Rasse*, 1928.

As early as 1933 the seeds had been sown for the approach used in the Munich exhibition four years later. In that year the *Deutscher Kunstbericht* (German art report), under Goebbels's jurisdiction, published a five-point manifesto stating "what German artists expect from the new government." Much of the content of the manifesto was generated by artists outside the mainstream avant-garde who felt that the art world had passed them by. They sought revenge on a modern art that was becoming increasingly identified with Germany in the international art world. The manifesto laid the groundwork for the events in 1937:

- All works of a cosmopolitan or Bolshevist nature should be removed from German museums and collections, but first they should be exhibited to the public, who should be informed of the details of their acquisition, and then burned.
- All museum directors who "wasted" public monies by purchasing "un-German" art should be fired immediately.
- No artist with Marxist or Bolshevist connections should be mentioned henceforth.
- No boxlike buildings should be built [an assault on Bauhaus architecture].
- All public sculptures not "approved" by the German public should be immediately removed [this applied especially to Barlach and Wilhelm Lehmbruck].

The attack on the museums

Prior to the outbreak of the First World War, museums, art dealers, and periodicals in Germany were greatly attuned to avant-garde activities in Europe and were avid advocates for the most recent developments. Museum curators and directors had responded eagerly to Impressionism and Post-Impressionism. In 1897 the Nationalgalerie in Berlin became the first museum in the world to acquire a painting by Paul Cézanne, and the Museum Folkwang in Essen was among the earliest public supporters of the work of Paul Gauguin and Vincent van Gogh. Herwarth Walden, with his gallery and publication *Der Sturm*, was a staunch supporter of Expressionism, Cubism, Futurism, and the Russian avant-garde.

In 1949 Paul Ortwin Rave, who had become a curator at the Berlin Nationalgalerie in the 1930s, wrote the first book describing the artistic situation under the Nazi regime, *Kunstdiktatur im Dritten Reich* (Art dictatorship in the Third Reich), which contained his eyewitness account of the *Entartete Kunst* exhibition.[15] What emerges from his description of the activities of German museums from 1919 through 1939 is a picture of a country filled with museums actively committed to modern art, to its acquisition and display. Alexander Doerner in Hannover, Gustav Hartlaub and Fritz Wichert in Mannheim, Carl Georg Heise in Lübeck, Ludwig Justi in Berlin, Alfred Lichtwark in Hamburg, Karl Ernst Osthaus in Hagen, Max Sauerlandt in Halle and later in Hamburg, Alois Schardt in Halle, Georg Swarzenski in Frankfurt, and Hugo von Tschudi in Berlin and later in Munich were among the museum directors who proselytized for contemporary art. They were responsible for acquiring, often directly from the artists, major works by Barlach, Beckmann, Lyonel Feininger, Erich Heckel, Kirchner, Lehmbruck, Macke, Franz Marc, Nolde, Pechstein, Christian Rohlfs, and Schmidt-Rottluff, as well as artists of the earlier generation, Lovis Corinth, Liebermann, and Max Slevogt. They were not only committed to contemporary German art but also acquired in significant quantity important works by foreign Impressionists and Post-Impressionists Cézanne, Gauguin, van Gogh, Édouard Manet, Claude Monet, Auguste Renoir, and Paul Signac and the art of contemporary foreigners such as James Ensor, Wassily Kandinsky, El Lissitsky, Henri Matisse, Piet Mondrian, and Pablo Picasso.

The exhibitions they organized, which frequently traveled, helped to define artistic trends and were important signs to foreign museums and dealers of the healthy state of contemporary art in Germany. Important international exhibitions in Cologne in 1912, Dresden in 1919, and Düsseldorf and Hannover in 1928 exposed new German art to a wider public. Contemporary German art was shown in Florence, London, New York, Paris, Pittsburgh, and Stockholm. In 1931 Alfred Barr, Jr., traveled in Germany to prepare his *Modern German Painting and Sculpture* for the fledgling Museum of Modern Art in New York. He was so impressed by what he saw in the museums that he made a point in his catalogue of citing the contemporary collecting policies of German public institutions:

However much modern German art is admired or misunderstood abroad, it is certainly supported publicly and privately in Germany with extraordinary generosity. Museum directors have the courage, foresight and knowledge to buy works by the most advanced artists long before public opinion forces them to do so. Some fifty German Museums, as the lists in this catalogue suggest, are a most positive factor both in supporting artists and in educating the public to an understanding of their work.[16]

After visiting a New York gallery showing of works of modern German art in 1939 the reviewer for the *New York World-Telegram* wrote: "One's first reaction on seeing them is of amazement that such early examples of work by men who were later to become world famous should have been purchased by museums in Germany so many years ago."[17]

The Nationalgalerie in Berlin housed the most representative collection of contemporary German art. On October 30, 1936, immediately following the close of the Summer Olympics, Goebbels ordered the gallery's contemporary rooms to be closed to the public. From Annegret Janda's essay in this volume we learn how this most visible forum for modern art was a battleground in which a succession of museum directors engaged in a struggle to reorganize and protect the collection, to preserve some aesthetic dignity, and even to continue to acquire contemporary art with dwindling funds. After coming to power the National Socialists began a systematic campaign to confiscate modernist works from public museum collections. Hitler saw an attack on modernism as an opportunity to use the average German's distrust of avant-garde art to further his political objectives against Jews, Communists, and non-Aryans. The charge of "degeneracy" was leveled at avant-garde practitioners of music, literature, film, and visual art, and their works were confiscated to "purify" German culture. In 1933 the earliest exhibitions of "degenerate" art were organized to show the German people the products of the "cultural collapse" of Germany that would be purged from the Third Reich. Confiscated works were assembled into *Schreckenskammern der Kunst* (chambers of horror of art) whose organizers decried the fact that public monies had been wasted on these modern "horrors" and implied that many of the works had been foisted on the museums by a cabal of Jewish art dealers. These precursors to the *Entartete Kunst* exhibition in Munich in 1937 sprang up throughout Germany, often featuring works from the local museums (see Christoph Zuschlag's essay in this catalogue). *Entartete Kunst* was not the only anti-modernist exhibition to occur in 1937. The Institut für Deutsche Kultur- und Wirtschaftspropaganda (Institute for German cultural and economic propaganda), a section of Goebbels's ministry, organized the *Grosse antibolschewistische Ausstellung* (Great anti-Bolshevist exhibition; fig. 5), which ran in Nuremberg from September 5 to September 29 and then traveled to several other venues, and orchestrated the tour of the NSDAP's exhibition *Der ewige Jude* (The eternal Jew; fig. 6) from Munich to Vienna, Berlin, Bremen, Dresden, and Magdeburg from late 1937 to mid-1939.

The Kunsthalle Mannheim: An example

The situation in Mannheim was typical of that of many other German museums out of the spotlight of Berlin; one could just as easily have chosen the Landesmuseum in Hannover, the Kunstsammlungen in Dresden, the Museum Folkwang in Essen, or the Staatliche Galerie Moritzburg in Halle.[18]

Between 1909 and 1923 Fritz Wichert, the director of the Kunsthalle Mannheim, purchased several key examples of French and German Impressionism and German Expressionism, including paintings by Alexander Archipenko, Beckmann, Corinth, Kirchner, and Liebermann. Sally Falk's donations of works by Lehmbruck and Ernesto de Fiori provided the nucleus for a growing collection of sculpture.[19]

Wichert's successor was Gustav Hartlaub, whose tenure extended from 1923 until 1934, when he was forced to resign. He was responsible for most of the exhibitions and major acquisitions of Expressionist and modern art that made Mannheim a center for those who wanted to see current art in Germany (figs. 7–8). The files of the Kunsthalle yield an interesting picture of the volume and velocity of these purchases and exhibitions and of Hartlaub's voracious interest in contemporary art, including the Fauves, Die Brücke, Der Blaue Reiter, Neue Sachlichkeit (New objectivity), and other examples of German and non-German avant-garde art:

1924–25	Exhibition: *Deutscher Werkbund "Die Form"* Acquisition: Grosz, *Grosstadt*
1925–26	Exhibitions: *Edvard Munch; Neue Sachlichkeit* Acquisitions: Marc Chagall, *Blaues Haus;* Dix, *Die Witwe;* Grosz, *Max Hermann-Neisse;* Kirchner, *Stilleben*
1927–28	Exhibitions: *James Ensor; Wege und Richtungen der Abstraktion* Acquisitions: Baumeister, *Tischgesellschaft;* Robert Delaunay, *St. Severin;* Ensor, *Masks and Death;* Oskar Schlemmer, *Frauentreppe*
1928–29	Exhibition: *Max Beckmann* Acquisitions: Beckmann, *Pierrette und Clown, Das Liebespaar;* Chagall, *Rabbiner;* André Derain, *Landscape*
1929–30	Acquisition: Heinrich Hoerle, *Melancholie*
1930–31	Exhibitions: *Bauhaus; Neues von Gestern* Acquisition: Jankel Adler, *Zwei Mädchen*
1931–32	Exhibitions: *Oskar Kokoschka; Georg Minne*
1932–33	only graphics
1933–34	nothing major
1934–35	only graphics

As early as the mid-1920s museums had felt the cold wind of censorship. In 1925 Hartlaub's *Neue Sachlichkeit* exhibition traveled to the Chemnitz Kunsthütte, where the director, Dr. Schreiber-Wiegand, asked Hartlaub to make some changes in the catalogue:

We are most grateful to you for your permission to use your introduction to the catalogue, but with regard to our special art-political conditions,

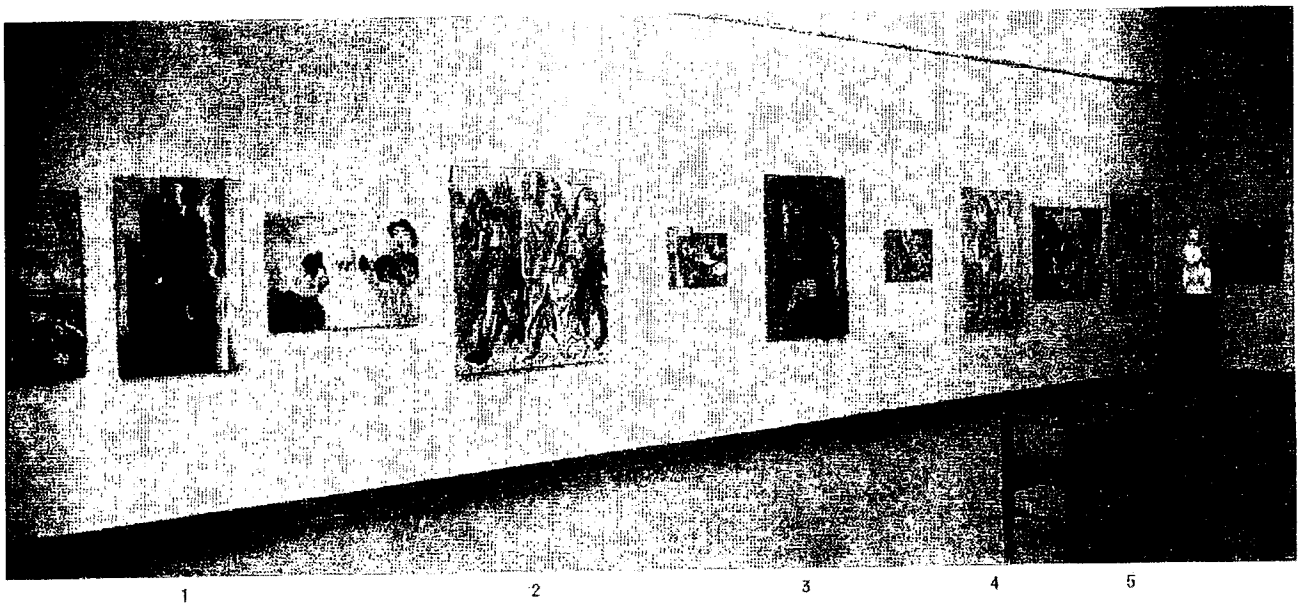


Figure 7
Gallery in the Kunsthalle Mannheim during the defamatory exhibition *Kulturbolschewistische Bilder* (Images of cultural Bolshevism), 1933; work later in *Entartete Kunst*. 1. Schlemmer, *Frauentreppe*; 2. Beckmann, *Christus und die Ehebrecherin*; 3. Hoerle, *Melancholie*; 4. Adler, *Mutter und Tochter*; 5. Baumeister, *Tischgesellschaft*

I have one request. Since in the attacks on our collecting activities these [works] are regarded as "Bolshevism in art," might we change a few words in three paragraphs? On page 1 could we simply leave out the word "Katastrophenzeit" [catastrophic time], and maybe on the next page express the sentence a little less controversially? I would like to avoid any problems . . . [I] ask for your friendly understanding of our local situation. You yourself know how everything now is affected by political conditions and [those who] want to kill everything that does not please them. This includes Expressionism, of course, especially my purchases of pictures by Schmidt-Rottluff, Kirchner, and Heckel.[20]

Hartlaub obliged so that the exhibition and catalogue could proceed as planned. By the early 1930s, however, his own freedom was increasingly hampered. During the last year of his directorship Mannheim was the scene of public protests against some of his acquisitions, including Chagall's *Rabbiner* (Rabbi; fig. 118), which was the subject of a window display in the town incorporating the sign, "Taxpayer, you should know how your money was spent." In 1934 Hartlaub became the first museum director to be fired by the National Socialists. Other directors who soon joined the ranks of those dismissed by the Nazis included Heise in Lübeck; Justi in Berlin; Sauerlandt, then director of the Hamburg Museum für Kunst und Gewerbe; Schreiber-Wiegand in Chemnitz; and Swarzenski in Frankfurt.

On two separate occasions, July 8 and August 28, 1937, the Kunsthalle Mannheim was visited by the special committee empowered by Goebbels to confiscate examples of "degenerate" art from German museums. Mannheim was one of their most successful stops: they seized over six hundred works by artists such as non-Germans Chagall, Delaunay, Derain, Ensor, and Edvard Munch and Germans Beckmann, Corinth, Grosz, Lehmbruck, Nolde, and Schlemmer. Most of these masterworks are lost; a few, fortunately, have been reacquired by the Kunsthalle, and others are dispersed in public and private collections.

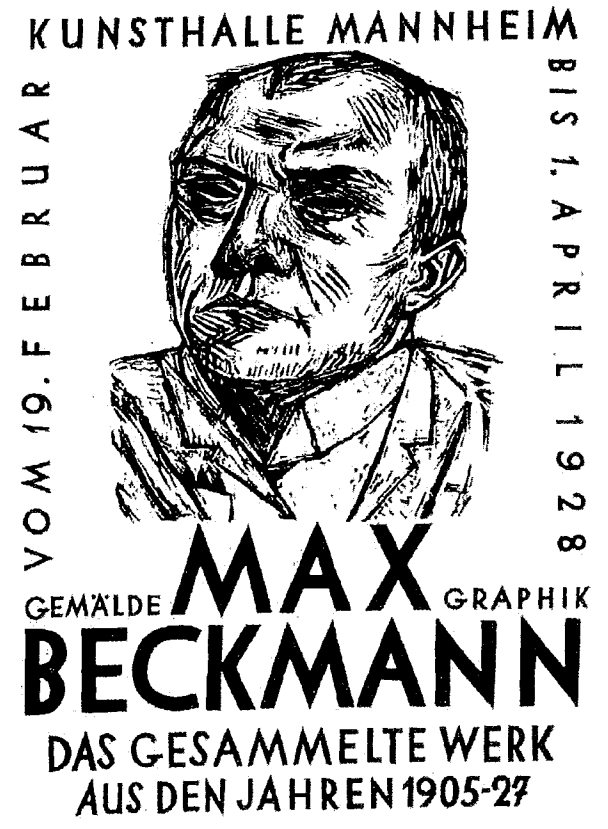


Figure 8
Poster for an exhibition of paintings and graphic works by Max Beckmann, Kunsthalle Mannheim, 1928

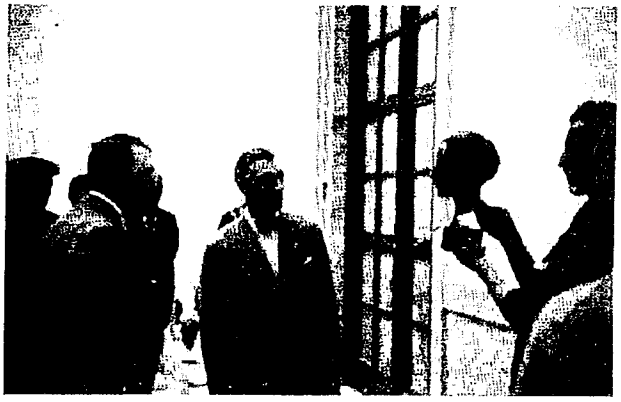
The "Grosse Deutsche Kunstausstellung," 1937

On October 15, 1933, at the ground-breaking ceremony for the Haus der Deutschen Kunst, Hitler said he was laying the "foundations for this new temple in honor of the goddess of art." The architect, Paul Troost, insisted from the beginning that the building was to be a representative structure for the new German art. Due to the expensive materials used and the monumental scale of the rooms the building attracted enormous attention. Hitler announced that it was the first new building worthy to take its place among the immortal achievements of the German artistic heritage.[21] (It was also in this speech that he delivered the ultimatum that the National Socialists would give the people four years time to adjust to the cultural policies of the new government.)

The year 1937 represents both a nadir and zenith for the National Socialists in terms of their campaign against modern art. Hitler evidently concurred with Troost that the Haus der Deutschen Kunst should display contemporary art; in fact, he planned to use an exhibition of approved German art as a chance to further shape cultural policy.[22] To find the art to fill the spacious new halls the National Socialists staged an open competition chaired by Adolf Ziegler, president of the Reichskammer der bildenden Künste. The competition was open to all German artists, and approximately fifteen thousand works were submitted. Much to the frustration of the organizers they were provided with no clear guidelines for the selection of works to be included in the exhibition. Goebbels and Hitler himself participated in the selection (figs. 9–10), and Goebbels noted in his diary, "The sculpture is going well, but the painting is a real catastrophe at the moment. They have hung works that make us shudder. . . . The Führer is in a rage."[23] Hitler added some artists who had previously been rejected and threw out the work of several who had been judged acceptable. He abhorred "unfinished work," which subsequently became a criterion in the selection process. Eventually, nine hundred works were chosen from which the final selection would be made.

On July 18 in Munich, Hitler presided over the opening, held with great pomp and ceremony, of the Haus der Deutschen Kunst and its inaugural exhibition of approved art. The *Grosse Deutsche Kunstausstellung* (fig. 11) brought together over six hundred paintings and sculptures that were intended to demonstrate the triumph of German art in the Third Reich. Hitler announced:

> *From now on we are going to wage a merciless war of destruction against the last remaining elements of cultural disintegration. . . . Should there be someone among [the artists] who still believes in his higher destiny—well now, he has had four years' time to prove himself. These four years are sufficient for us, too, to reach a definite judgment. From now on—of that you can be certain—all those mutually supporting and thereby sustaining cliques of chatterers, dilettantes, and art forgers will be picked up and liquidated. For all we care, those prehistoric Stone-Age culture-barbarians and art-stutterers can return to the caves of their ancestors and there can apply their primitive international scratchings.*[24]



Figures 9–10
Heinrich Hoffmann's candid photographs of Adolf Hitler and Adolf Ziegler choosing sculpture for inclusion in the *Grosse Deutsche Kunstausstellung* (Great German art exhibition), Munich, 1937.

Figure 11
Hoffmann's photograph of a gallery in the *Grosse Deutsche Kunstausstellung*, Josef Thorak's sculpture *Kameradschaft* (Comradeship; fig. 27) can be seen against the far wall.

The *Grosse Deutsche Kunstausstellung* was the first of eight annual exhibitions, from 1937 to 1944, mounted in the Haus der Deutschen Kunst in the Nazis' attempt to present the best of German artistic creation, a continuation of the exhibitions that had formerly taken place in the Munich Glaspalast (Glass palace), which had burned to the ground in 1931. There was a tradition in several German cities of staging annual open competitive exhibitions for local artists in which all the works of art were for sale; they were characterized by the display of distinctly conservative and traditional art, which entertained a consistently loyal public. In this respect the *Grosse Deutsche Kunstausstellungen* were no different, except that they were larger, less parochial, and actively sponsored by the government. Installation photos and film footage indicate that the art was arranged by category—landscapes, portraits, nudes, military subjects—in the way commodities would be sold in separate areas in a market. The sales opportunities were fairly promising, and this alone may have convinced some artists to embrace National Socialist policies, since without their approval it was virtually impossible to sell contemporary art in Germany. Many of the purchases were used to decorate public buildings and offices. Several of the buyers were among the Nazi elite, who purchased the works for their official residences.[25]

At the time of each opening there occurred an elaborate pageant on the "Tag der Deutschen Kunst" (German art day). Participants wore historical costumes and created floats featuring models of well-known works of art that were driven through the streets of Munich. The opening ceremonies attracted anywhere from 400,000 to 800,000 visitors. In his inaugural speech in 1937 Hitler announced that, "When we celebrated the laying of the cornerstone for this building four years ago, we were all aware that we had to lay not only the cornerstone for a new home but also the foundations for a new and genuine German art. We had to bring about a turning point in the evolution of all our German cultural activities." The 1937 pageant was centered around the theme, "Zweitausend Jahre Deutsche Kultur" (Two thousand years of German culture). Hundreds of thousands of spectators watched the spectacle of a parade of more than three thousand costumed participants and four hundred animals. Immediately following this overblown performance thousands of uniformed soldiers marched through the streets, as if to provide the ultimate marvel. The official National Socialist newspaper, the *Völkischer Beobachter*, described the events in glowing words: "Today we sat as spectators in the theater of our own time and saw greatness" (July 19, 1937).

In the *Grosse Deutsche Kunstausstellung* the Nazis sought to promote mediocre genre painting as mainstream art, the most recent achievement in a continuum of centuries of German art. It was meant to wipe out any hint of the modernism, Expressionism, Dada, New Objectivity, Futurism, and Cubism that had permeated the museums, galleries, journals, and press since 1910. The National Socialists sought to rewrite art history, to omit what we know as the avant-garde from the history of modern art.

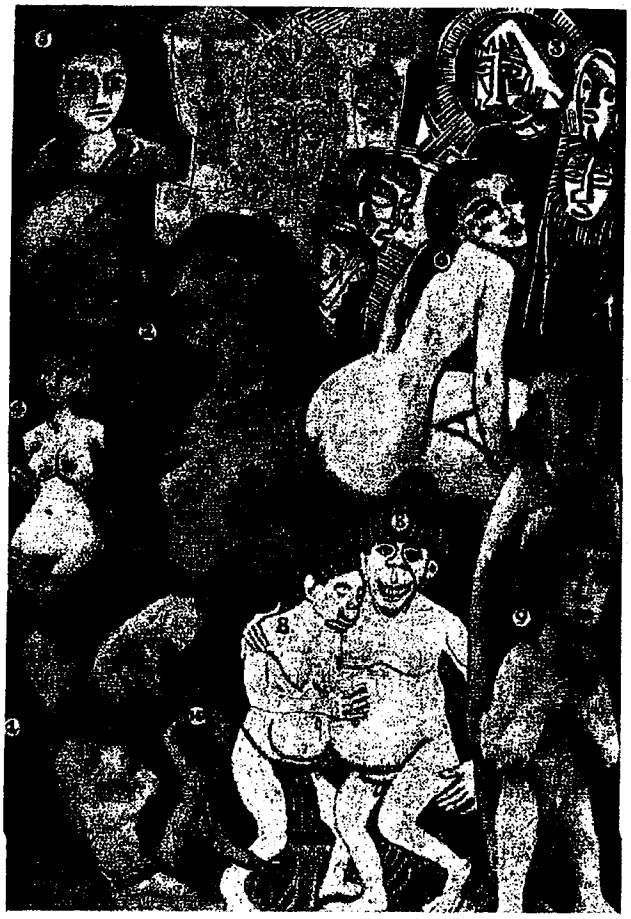


Figure 12.
Collage of "Expressionist art of the [Communist] school," from Wolfgang Willrich, *Säuberung des Kunsttempels*, 1937; work later in *Entartete Kunst*: 1. Nolde, *Christus und die Sünderin*; other work: 2. Nolde; 3. Schmidt-Rottluff; 4. Mueller; 5. Hofer; 6. Pechstein; 7. Klee; 8. Rohlfs; 9. Kirchner; 10. Beckmann.

The situation was slightly different for sculpture. Guidelines were more difficult to observe, artists' motives more difficult to judge. Sculptors were apt to discover that some examples of their work were championed by the National Socialists and others lumped with "degenerate" art. One artist's work was inadvertently included in both the *Grosse Deutsche Kunstausstellung* and *Entartete Kunst*: Belling's *Boxer Max Schmeling* was on view in the Haus der Deutschen Kunst, while his *Dreiklang* (Triad) and *Kopf* (Head) were branded "degenerate" next door. Georg Kolbe and Gerhard Marcks had some of their earlier Expressionist works confiscated from German museums, yet their contemporary images found favor with the Nazi elite, and they continued to work openly (although two of Marcks's works were in *Entartete Kunst*). Even Arno Breker, the Nazis' sculptor of choice, saw one of his early sculptures confiscated. More conservative sculpture in the tradition of Aristide Maillol and Auguste Rodin had a significant following before the Nazis came to power and continued to be appreciated under Hitler's regime.

Figure 13
Collage of "degenerate" art from the Stadtmuseum Dresden, from Willrich, *Säuberung des Kunsttempels*; work later in *Entartete Kunst*: 1, Dix, *Kriegskrüppel*; 3, Voll, *Schwangere Frau*; 4, Segall, *Die ewigen Wanderer*; 5, Schwitters, *Merzbild* (sideways); 6, Kokoschka, *Die Heiden*; other work: 2, Eugen Hoffmann.

The campaign against modern art in museums

Goebbels issued a decree on June 30, 1937, giving Ziegler and a five-man commission the authority to visit all major German museums and select works for an exhibition of "degenerate" that was to open in Munich at the same time as the *Grosse Deutsche Kunstausstellung*:

> *On the express authority of the Führer I hereby empower the president of the Reichskammer der bildenden Künste, Professor Ziegler of Munich, to select and secure for an exhibition works of German degenerate art since 1910, both painting and sculpture, which are now in collections owned by the German Reich, individual regions, or local communities. You are requested to give Prof. Ziegler your full support during his examination and selection of these works.*[26]

The directive went on to define works of "degenerate" art as those that either "insult German feeling, or destroy or confuse natural form, or simply reveal an absence of adequate manual and artistic skill." To have the *Grosse Deutsche Kunstausstellung* and *Entartete Kunst* on view simultaneously would underscore the triumph of official art over "degenerate" art. This was to be a far more ambitious action than any of the small exhibitions mounted since 1933.

Ziegler's commission was made up of individuals who, as critics of modernism, were well suited to their task; among them were Count Klaus von Baudissin, an SS officer who during his brief tenure as director of the Museum Folkwang in Essen had already cleared the museum of "offensive" examples of modern art, and Wolfgang Willrich, author of *Säuberung des Kunsttempels* (Cleansing of the temple of art), a racist pamphlet whose methods of excoriation of modern art (figs. 12–13) played an important role in the concept and content of the *Entartete Kunst* exhibition. The other members were commissioner for artistic design Hans Schweitzer, art theoretician Robert Scholz, and art teacher and polemicist Walter Hansen.

According to Rave, in the first two weeks of July about seven hundred works were shipped to Munich from thirty-two museums in twenty-eight cities. Museums in Berlin, Bielefeld, Bremen, Breslau, Chemnitz, Cologne, Dresden, Düsseldorf, Erfurt, Essen, Frankfurt, Hamburg, Hannover, Jena, Karlsruhe, Kiel, Königsberg, Leipzig, Lübeck, Mannheim, Munich, Saarbrücken, Stettin, Stuttgart, Ulm, Weimar, Wiesbaden, and Wuppertal were purged of their holdings of Expressionism, Futurism, Constructivism, Dada, and New Objectivity. At the Kunsthalle Mannheim, for example, the commission selected eighteen paintings, five sculptures, and thirty-five graphic works, which were shipped immediately to Munich.

The commission revisited most of the museums later in the summer and selected additional works, so that a total of approximately sixteen thousand paintings, sculptures, drawings, and prints by fourteen hundred artists were confiscated and shipped to Berlin to await final disposal. The commission overstepped its authority and seized works created prior to 1910, as well as those by non-German artists. The plundering continued until 1938 and was finally "legalized" retroactively under a law of May 31, 1938, that stated that "products of degenerate art that have been secured in museums or in collections open to the public before this law went in to effect . . . may be appropriated by the Reich without compensation."

The works not included in *Entartete Kunst* and those from the second round of confiscations were sent to Berlin and stored in a warehouse on Köpenicker Strasse where they were inventoried. Those of "international value" that could be sold outside Germany for substantial sums were later weeded out and sent to another storage facility at Schloss Niederschönhausen. Goebbels created another commission, for the "disposal of confiscated works of degenerate art," which was to decide which works were to be sold for foreign currency and at what prices. This group included Ziegler, Schweitzer, and Scholz, with the addition of Franz Hofmann, Carl Meder, Karl Haberstock, and Max Taeuber. The work of this commission and its effect are discussed later in this volume in essays by Andreas Hüneke and myself.

"Entartete Kunst"

On July 19, 1937, Ziegler opened the *Entartete Kunst* exhibition across the park from the *Grosse Deutsche Kunstausstellung*, in a building formerly occupied by the Institute of Archeology. The exhibition rooms had been cleared, and temporary partitions were erected on which the objects were crowded together in a chaotic arrangement (figs. 14–16), which is not surprising when one considers that the art was confiscated, shipped to Munich, and installed in less than two weeks. The paintings, some of which had had their frames removed, were vaguely organized into thematic groupings, the first time Expressionist works were presented in this way. While the first rooms were tightly grouped according to themes—religion, Jewish artists, the vilification of women—the rest of the exhibition was a composite of subjects and styles that were anathema to the National Socialists, including abstraction, antimilitarism, and art that seemed to be (or at least to be related to) the work of the mentally ill. (The specific organization of the works in Munich is discussed in this volume by Mario-Andreas von Lüttichau, who has painstakingly recreated the installation and inventory of the exhibition.) Directly on the wall under many of the works were hand-lettered labels indicating how much money had been spent by each museum to acquire this "art." The fact that the radical postwar inflation of the 1920s had led to grossly exaggerated figures—in November 1920 a dollar was worth 4.2 billion marks!—was conveniently not mentioned. Quotations and slogans by proscribed critics and museum directors and condemnatory statements by Hitler and other party members were scrawled across the walls. Since every work of art included in *Entartete Kunst* had been taken from a public collection, the event was meant not only to denigrate the artists but also to condemn the actions of the institutions, directors, curators, and dealers involved with the acquisition of modern art.

Entartete Kunst was to have been on view through the end of September, but the astonishing attendance prompted the organizers to extend the run until the end of November. Plans were also made to circulate the exhibition to other German cities, with Berlin as the first stop. The leaders of the various *Gaus* (regions into which Germany had been divided by the National Socialists for administrative reasons) vied for the opportunity to present the exhibition, but only the most important were accorded the chance. *Entartete Kunst* in varying configurations ultimately traveled to thirteen German and Austrian cities through April of 1941. (The tour is discussed and documented in Zuschlag's essay.) Shortly before the show closed in Munich, Ziegler's office appointed Hartmut Pistauer as the exhibition coordinator. It was his job to make the arrangements for each venue, supervise the installation, and greet any important party visitors at the opening (fig. 17) on behalf of the Propagandaministerium (Ministry of propaganda).[27]

Figure 14
Detail of the Dada wall in Room 3 of *Entartete Kunst*, Munich, 1937; work by Klee and Schwitters.

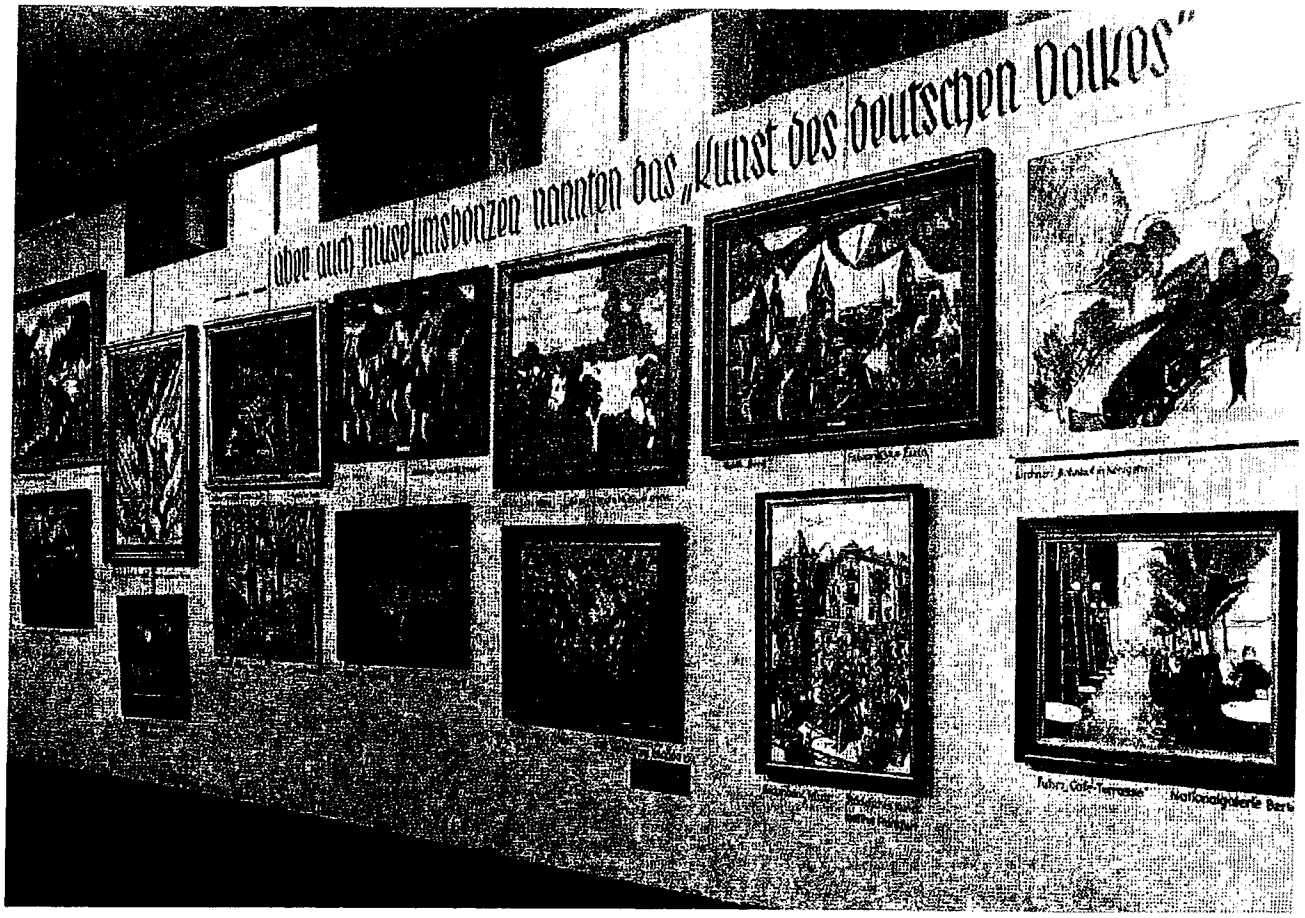


Figure 15
View of a portion of the south wall in Room 5, work by Beckmann, Fuhr, Kirchner, Mueller, Nolde, Rohlfs, and Schmidt-Rottluff

Figure 16
View of a portion of the south wall of Room 3, work by Baum, Belling, Campendonk, Dexel, Felixmüller, Eugen Hoffmann, Klee, and Nolde

Figure 17
Hartmut Pistauer (in dark suit, center) leads Nazi party officials through the Düsseldorf venue of *Entartete Kunst*, 1938; work by Gies and Nolde can be seen in the background

When *Entartete Kunst* opened in Munich, no catalogue was available. Shortly before the exhibition closed in November, a thirty-two page booklet was published to accompany the touring presentation. This *Ausstellungsführer* (exhibition guide) stated the aims of the exhibition and reproduced excerpts from Hitler's speeches condemning the art and the artists that produced it (a facsimile and translation by David Britt are presented in this volume). Some of the same quotations that were used on the walls in Munich found their way into the booklet, and Schultze-Naumburg's technique of juxtaposition was prominently featured: images of art by the mentally ill from the Prinzhorn Collection were placed next to photographs of works by Rudolf Haizmann, Eugen Hoffmann, Klee, and Kokoschka, with captions such as, "Which of these three drawings is the work of . . . an inmate of a lunatic asylum?" Although not all the works illustrated in the booklet were included in *Entartete Kunst*, all were by artists who were represented in the exhibition. The cover featured *Der neue Mensch* (The new man), a famous sculpture (later destroyed) by the Jewish artist Otto Freundlich, with the words *Entartete "Kunst"* partly obscuring the image (fig. 1). By printing *Kunst* to look as if it had been rudely scrawled in red crayon and by enclosing it in quotation marks, the National Socialists clearly made the point that although they considered this material degenerate, they certainly did not consider it art.

One of the inevitable questions about the *Entartete Kunst* exhibition concerns its purpose. Why did the National Socialists go to such an effort to mount, publicize, and circulate it? What did they hope to gain? One explanation at least offers itself. If the Nazis had merely confiscated and destroyed the art, it would have been the cultural equivalent of creating a martyr. By staging *Entartete Kunst* they were able to appeal to the majority of the German people who must have considered most modern art incomprehensible and elitist. To all modernists, not just those represented in *Entartete Kunst*, the Nazis sent the message that such art would no longer be tolerated in Germany, an official position that, thanks to the cleverly manipulated complicity of the German people, had the force of a popular mandate.

One thing that emerges from any examination of the cultural activities in Germany under the National Socialists is that, despite every attempt to provide rigorous definitions of "healthy" and "degenerate" art and to remove all traces of the latter from public view, the actions against modern visual arts (as well as those against literature, music, and film) were enormously problematic and contradictory. Ultimately, however, the brilliant flowering of modernism in Germany that had begun in the early years of the century came to a halt in 1937 with the opening of *Entartete Kunst* and the *Grosse Deutsche Kunstausstellung*. Artists, writers, filmmakers, poets, musicians, critics, and intellectuals of all disciplines were forced to take drastic action, either to emigrate or to resort to a deadening "inner immigration." Much of the confiscated art was destroyed or has vanished, and many of the most powerfully creative artists of Germany's golden era were broken in spirit, forced to flee, or killed. But the art, the documents, and the memories that have survived enable us to reconstruct the era and ensure that, in the end, the National Socialists failed—the modern art of Germany was not and will never be eradicated. Collectively, the works of art and the pieced-together fragments of history remind us that art may be enjoyed or abhorred but it is a force whose potency should never be underestimated.

It is ironic that some of the issues raised by an examination of these events should have such resonance today in America. Newspaper articles on public support for the arts and the situation facing the National Endowment for the Arts emphasize an uncomfortable parallel between these issues and those raised by the 1937 exhibition, between the enemies of artistic freedom today and those responsible for organizing the *Entartete Kunst* exhibition. Perhaps after a serious look at events that unfolded over half a century ago in Germany, we may apply what we learn to our own predicament, in which for the first time in the postwar era the arts and freedom of artistic expression in America are facing a serious challenge. ■

Notes

1. Hildegard Brenner, *Die Kunstpolitik des Nationalsozialismus* (Reinbek: Rowohlt, 1963), 109.

2. While all accounts from the immediate postwar era confirm this event, first reported by Paul Ortwin Rave in 1949 (*Kunstdiktatur im Dritten Reich* [Hamburg: Gebrüder Mann]), more recent works by authors including Georg Bussmann and Eckhardt Klessman have questioned whether there was in fact such a wholesale destruction of works of art; see Bussmann, "'Degenerate Art': A Look at a Useful Myth," in *German Art in the 20th Century: Painting and Sculpture 1905–1985* (exh. cat., London: Royal Academy of Arts, 1985), 113–24; and Klessmann, "Barlach in der Barbarei," *Frankfurter Allgemeine Zeitung*, December 13, 1983, literary supplement. In Sofie Fohn's recently published account of her and her husband's art exchanges with Berlin in the late 1930s she challenged the Nazis' contention that approximately five thousand works were burned on March 20, 1939, and suggested that only the frames may have been destroyed in the fire; see Carla Schultz-Hoffmann, ed., *Die Sammlung Sofie und Emanuel Fohn: Eine Dokumentation* (Munich: Hirmer, 1990), 27.

3. Carl Einstein, *Die Kunst des 20. Jahrhunderts* (Berlin: Propyläen, 1926, 2d ed. 1928, 3d ed. 1931, Leipzig: Reclam, 1988), Berthold Hinz, *Art in the Third Reich* (New York: Random House, 1979), 24.

4. Hellmut Lehmann-Haupt, *Art under a Dictatorship* (New York: Oxford University Press, 1954), 3.

5. Ibid., 45–46.

6. In 1909 Julius Langbehn published *Rembrandt als Erzieher* (Rembrandt as teacher) and in 1928 his *Dürer als Führer* (Dürer as leader), completed by Momme Nissen, was issued posthumously; these two immensely popular books made strong appeals to German nationalism in art.

7. For a particularly helpful analysis of Nordau's book see George L. Mosse's introduction to the 1968 English edition (Max Nordau, *Degeneration* [New York: Howard Fertig, 1968]).

8. George Bernard Shaw, "The Sanity of Art: An Exposure of the Current Nonsense about Artists Being Degenerate," in *Major Critical Essays* (London: Constable and Company, 1932; St. Clair Shores, Mich.: Scholarly Press, 1976), 281–332.

9. See Theodor Kirchhoff, *Handbook of Insanity for Practitioners and Students* (New York: William Wood, 1893), and Richard M. Goodman, *Genetic Disorders among the Jewish People* (Baltimore: Johns Hopkins University Press, 1979), 421–31. The term *corruzione* (corruption) had been used by the seventeenth-century Italian critic Giovanni Pietro Bellori in an attack on Vasari and Michelangelo.

10. Sander Gilman, "Madness and Representation: Hans Prinzhorn's Study of Madness and Art in Its Historical Context," in *The Prinzhorn Collection* (exh. cat., Champaigne, Ill.: Krannert Art Museum, 1984), 7–14; idem, "The Mad Man as Artist: Medicine, History, and Degenerate Art," *Journal of Contemporary History* 20 (1985): 575–97.

11. Alfred Rosenberg, *"Race and Race History" and Other Essays*, ed. Robert Pois (New York: Harper and Row, 1970), 154.

12. Hans Prinzhorn, *Bildnerei der Geisteskranken: Ein Beitrag zur Psychologie und Psychopathologie der Gestaltung* (Berlin: Julius Springer, 1922), published in English as *Artistry of the Mentally Ill: A Contribution to the Psychology and Psychopathology of Configuration*, trans. Eric von Brockdorff (New York: Springer, 1972).

13. See Table 1 in Christoph Zuschlag's essay in this volume.

14. Hildegard Brenner, Barbara Miller Lane, and George L. Mosse have described the conflict and power struggle between Rosenberg and Goebbels over modern art, particularly German Expressionism and Italian Futurism; see Lane, *Architecture and Politics in Germany 1918–45* (Cambridge: Harvard University Press, 1968); Brenner, "Art in the Political Struggle of 1933–34," in Hajo Holborn, ed., *From Republic to Reich: The Making of the Nazi Revolution* (New York: Pantheon, 1972), 395–434; and Mosse, *Nazi Culture: Intellectual, Cultural, and Social Life in the Third Reich* (New York: Schocken Books, 1981).

15. Paul Ortwin Rave, *Kunstdiktatur im Dritten Reich*, rev. ed., ed. Uwe M. Schneede (Berlin: Argon, 1987), 103–4.

16. Alfred Barr, Jr., *Modern German Painting and Sculpture* (exh. cat., New York: Museum of Modern Art, 1933), 7–8. Barr also indicated which German museums collected examples by each artist.

17. "European Works at Buchholz," *New York World-Telegram*, September 30, 1939.

18. Hans-Jürgen Buderer, *"Entartete Kunst": Beschlagnahme-Aktionen in der Städtische Kunsthalle Mannheim 1937*, Kunst + Documentation, no. 10 (exh. cat., Mannheim: Städtische Kunsthalle Mannheim, 1987). I am grateful to Dr. Manfred Fath, director of the Kunsthalle Mannheim, for permission to examine museum files related to the "degenerate" art action.

For recent publication on the special situation in other museums mentioned see the following: Essen: Paul Vogt, ed., *Dokumente zur Geschichte des Museum Folkwang 1912–1945* (Essen: Museum Folkwang, 1983); Halle: Andreas Hüneke, *Die faschistische Aktion "Entartete Kunst" 1937 in Halle* (Halle: Staatliche Galerie Moritzburg, 1987); Hannover: *Beschlagnahme-Aktion im Landesmuseum Hannover 1937* (exh. cat., Hannover: Landesmuseum Hannover, 1983).

In addition to the acknowledgments I have made elsewhere in these notes, I would like to thank Markus Kersting of the Städtische Galerie in Frankfurt for providing data on the purchases of Georg Swarzenski and to Hans Göpfert of the Staatliche Kunstsammlung Dresden for details on the collecting and exhibitions there in the 1920s and 1930s. Contemporary articles in the journals *Museum der Gegenwart* and *Die Kunst für Alle* also provided much background information.

19. Buderer, *"Entartete Kunst,"* 8.

20. Ibid., 11.

21. Hinz, *Art of the Third Reich*, 163.

22. Rave, *Kunstdiktatur*, 54.

23. *Die Tagebücher von Joseph Goebbels: Sämtliche Fragmente*, ed. Elke Fröhlich (Munich: G. K. Saur, 1987), pt. 1, vol. 3, 166.

24. Adolf Hitler, speech at the opening of the Haus der Deutschen Kunst, Munich, July 18, 1937; cited and translated in Lehmann-Haupt, *Art under a Dictatorship*, 76–77.

25. Jonathan Petropoulos, "Art as Politics: The Nazi Elite's Quest for the Political and Material Control of Art" (Ph.D. diss., Harvard University, 1990).

26. Joseph Goebbels, decree sent to all major museums, June 30, 1937; a copy is preserved in the archives of the Bayerische Staatsgemäldesammlungen, Munich, Akt 712a, 12.7.1937, Nr. 1983; cited in Mario-Andreas von Lüttichau, "'Deutsche Kunst' und 'Entartete Kunst': Die Münchner Ausstellungen 1937," in Peter-Klaus Schuster, ed., *Die "Kunststadt" München 1937: Nationalsozialismus und "Entartete Kunst"* (Munich: Prestel, 1987), 92.

27. I am indebted to Christoph Zuschlag who first brought Pistauer and his role in *Entartete Kunst* to my attention.

IFAR® International Foundation for Art Research

Provenance Guide

Introduction

Provenance research was once the province of art scholars dealing primarily with issues of attribution and authenticity. But recent legal claims by heirs of Holocaust victims whose art works were looted or otherwise misappropriated by the Nazis, and claims by foreign "source" countries for objects they believe were exported in violation of patrimony or export laws, have raised awareness of the need for provenance research in regard to due diligence in acquiring works of art. Provenance research is often painstaking and not easy to do, and not every work has a discoverable provenance.

What Is Provenance?

The word provenance derives from the French provenir meaning "to originate". Although the term is sometimes, incorrectly, used synonymously with "provenience," the latter is an archaeological term referring to an artifact's excavation site or findspot, whereas the provenance of a work of art is a historical record of its ownership. A work's provenance comprises far more than its pedigree, however; it is also an account of changing artistic tastes and collecting priorities, a record of social and political alliances, and an indicator of economic and market conditions influencing the sale or transfer of the work of art. It also provides valuable information about the attribution of an object. Provenance research is by nature interdisciplinary. While it generally begins with art historical resources, provenance research often leads to other historical or genealogical materials. This interdisciplinary nature is particularly evident in World War II-Era provenance research.

What information should one look for when conducting provenance research? An ideal provenance provides a documentary record of owners' names; dates of ownership; methods of transference, i.e. inheritance, or sale through a dealer or auction; and locations where the work was kept, from the time of its creation by the artist until the present day. Unfortunately, such complete, unbroken records of ownership are rare, and most works of art contain gaps in provenance; indeed, it is more common for an object to have an incomplete ownership history than a complete one.

Essentially a kind of detective work, provenance research must be approached with creativity, persistence, attention to detail, and the ability to think outside of the box. And like detective work, provenance research can be difficult and time-consuming. Often, the difficulties researchers encounter involve the state of extant records. Many archives have suffered damage, destruction, or dispersal due to wars or natural disasters, and the records of smaller or short-lived galleries have not always been preserved. Moreover, private owners may not have saved purchase records, particularly for works of lesser monetary value, and sometimes no records of transfer were created in the first place. Even those records that do exist may not be reliable: they may provide unclear, inadequate, conflicting, or incorrect information. Sometimes records document collections as a whole, rather than individual items within it. Thus, once an item is removed from that collection, it may become difficult or impossible to track its subsequent owners or to identify it as formerly belonging to a particular collector.

Tracing an object's ownership history may be further complicated by the variety of means by which the transfer of ownership took place. The object may have been commissioned; or purchased, whether from an exhibition or directly from the artist; or traded by the artist for supplies or another art object; or otherwise transferred by sale, gift, or inheritance, to name a few methods.

Complicating the situation even further is the fact that forgers are notorious for creating false documents, thereby intentionally confusing the historical record. Published provenance information must be critically evaluated and not simply accepted. Each piece of information must be independently corroborated, as incorrect provenance information is often repeated from one secondary source to the next. If information from a secondary source cannot be confirmed, the provenance researcher must note this and record the source of the information.

Researching Provenance

I. Why is Provenance Research Important?

For Authenticity: Provenance can bolster claims of a work's authenticity. Inventory records of an object's presence in a particular collection or in the artist's studio provide strong evidence of a work's authenticity. As noted, art forgers often falsify provenance information - forging receipts of sale, ownership marks, dealers' records, exhibition labels, and collectors' stamps. For this reason, provenance history is seldom accepted as the sole proof of authenticity.

For Valuation: As a factor in establishing authenticity, a complete or distinguished ownership history may have a positive impact on the value of a work of art. Conversely, the absence of a documented provenance may raise questions about the attribution or authenticity of a work, particularly in the case of an artist whose life and work are well documented.

For Ownership: An established provenance can also help document proof of ownership if legal title is contested. Transaction records and other proofs of sale or transfer of ownership may help determine the legitimacy of a sale or provide a defense in repatriation and restitution claims. In some cases, the presence of a "red-flagged" name in the provenance may indicate that an artwork was stolen, subjected to a forced sale, or otherwise misappropriated during the Nazi Era, thus warranting further research. See the Art Law & Cultural Property section of IFAR's Website for examples of legal cases where provenance, or lack thereof, was a factor.

II. Getting Started

An invaluable tool for the new and experienced provenance researcher alike is The AAM Guide to Provenance Research (Nancy Yeide, et al.; Washington, D.C.: American Association of Museums, 2001). The guide is divided into two parts. The first explains how to conduct basic provenance research and also includes appendices with useful bibliographic and archival information. The second part specifically concerns World War II-Era provenance research, addressing the period between 1933 and 1945. It provides an overview of provenance issues from this era, as well as an introduction to Nazi-Era collecting activities. It discusses archival resources in the United States and in Europe relating to looting and post-War restitution. Helpful appendices include a bibliography on looting and restitution; lists of names associated with looting during the Nazi Era; a list of wartime and post-War interrogation reports; and codes used by the Einsatzstab Reichsleiter Rosenberg (ERR) in their confiscation of collections. World War II-Era provenance research will be discussed in Part V of this guide.

The first steps in conducting provenance research on a specific object are to gather whatever information is available from the object itself, and second, to examine the object file of the institution in which the object is held. The object itself is the most important primary resource and a valuable source of provenance information. The medium and support of the painting or work on paper must be determined, and the front and back examined for any inscriptions, dates, or other distinctive marks; any alterations to dimensions or changes in support should be noted.

Other information can be gleaned from exhibition stickers, seals, dealers' and collectors' marks, and transport and customs stamps, all of which are often found on the backs of paintings.

Useful provenance information may also be found in institutional and collection records:

- Registrarial records, which generally contain information on the acquisition, loan, sale, and transport of a work of art
- Curatorial records, which contain research on and correspondence relating to the work of art
- Conservation files, which may include X-rays, infrared photographs, and technical and condition reports
- Other institutional archival material, which may contain additional exhibition history for the object, bequest or gift information, and other donor correspondence beyond that in registrarial files

When dealing with institutional records it is crucial to document your sources:

- Make careful note of the medium and support materials; dimensions; signatures, dates, and inscriptions; current and past attributions; and variations in title
- Determine whether there have been any significant changes to the condition, support or size of the object
- Obtain a photograph of both the front and the back of the object so that you can later compare it to illustrations in published sources and other photographic documentation
- Compile a list of any exhibitions and publications in which the work has appeared
- Record what is known about the provenance and include the source of each piece of information; note any gaps in ownership history, as well as any previous version of the object and its provenance
- Note the previous owners of the object; you will want to try to contact them or their heirs. Even if they no longer have any records, their recollections could be helpful in adding to the provenance
- Make a list of all leads to pursue through library and archival research or written correspondence

Once a provenance has been established, it needs to be recorded. Provenance information should be presented in a clear, organized, and complete manner. A provenance may be organized in list or in paragraph form, and the sequence of ownership should be given in either chronological or reverse chronological order. Owners should be distinguished from dealers or auction houses. The source of information about each owner or transaction should be documented in footnotes or, if the information is brief, in parentheses.

In the format used by many museums and auction houses, punctuation indicates transfers. A semicolon indicates that the work passed directly between two owners, and a period is used to separate two owners if a direct transfer did not occur or is not known to have occurred. The life dates of the owners, if known, are enclosed in brackets or parentheses. Uncertain information is indicated by the terms "possibly" or "probably" and explained in footnotes. Dealers, auction houses, or agents are sometimes enclosed in parentheses to distinguish them from private owners.

Below is a sample provenance, in list form, from a major auction house sale of an eighteenth-century Venetian painting:

Acquired by Peter William Baker M.P. (d. 1815) shortly after he moved into Ranston House, near Blandford, Dorset, in 1779;
Thence by descent to Mrs. W.H. Gibson Fleming;
By whom sold London, Sotheby's, 23 March 1960, lot 36, for 20,000£ to Leggatt (the previous lot was its pendant, and sold for 32,000£ to L. Koetser);
Mrs. Nora Prince-Littler, Chestham Park, Henfield, Sussex;
Her deceased sale, London, Christie's, 2 December 1977, lot 73;
Anonymous sale ("The Property of a Lady"), London, Christie's, 11 April 1986, lot 54;
There purchased by Lord and Lady Forte

III. General Provenance Research

A. Art Historical Resources

General provenance research should begin with library research and the consultation of art historical resources. Library research should stem from the information collected from the object itself (see discussion above) and the institution's files. Start by checking all citations to published references, sales, and exhibition catalogues. Try to go back to the original source, as there may have been references overlooked or inaccurately recorded by previous researchers. Make photocopies of every reference when possible. When checking citations, be aware of other versions of the object that exist or have existed in the past. Carefully document the provenances, size, support, and inscriptions for each other version; when possible, document each with a photocopy or photograph. Also note pendants or related works. Since such works often have shared early provenances, a published reference to the provenance of the pendant may provide clues to the provenance of your work.

Look for references to the artist to whom the object is currently attributed, as well as all previous attributions. You can use the Bibliography of the History of Art, Grove Dictionary of Art (available both online and in print), and the biographical dictionaries by Thieme-Becker and Bénézit to locate references. Resources such as monographs, catalogues raisonnés, exhibition catalogues, scholarly journal articles, and photo archives, for example those at the Frick and Witt libraries, should all be checked for references to the object in question. When no published resources exist for a particular artist, try to determine whether a scholar or graduate student is currently researching that artist by consulting lists or abstracts of recent dissertations or dissertations in progress.

A good place to begin your research is by consulting the artist's catalogue raisonné. This is a detailed compilation of an artist's work and often includes some provenance information, exhibition history, publication references, attributions, current owners, and identifying features of the work, such as dimensions, inscriptions and condition. To discover whether a catalogue raisonné for a specific artist exists or if there is a catalogue raisonné currently in preparation, you can conduct a search of IFAR's Catalogues Raisonnés Database on this Website. It is best to begin with the most recent catalogue raisonné if more than one exists, but consult earlier publications as well.

While still worth consulting, monographs are generally less useful than catalogues raisonnés in documenting the current locations of paintings, since they may be based on secondary sources and are generally not focused on objects.

Exhibition catalogues document the owner and location of an object at a specific time. Some catalogues list lenders as a group, separated from their loaned work; even so, these lists can be cross-referenced and corroborated with other references. Provenance information in exhibition

catalogues generally comes from the lender, and should therefore be confirmed. Exhibition catalogue essays may include useful information about past owners.

Photo archives, containing actual photographs of works of art, as well as clippings from sale and exhibition catalogues, are valuable resources for the provenance researcher. These images can be useful in documenting whether a work has been altered, restored, or cut down. This information is particularly helpful in identifying works by artists who executed many versions of the same subject, where the issue is often whether the work in question is the same as another work. Annotations on the mounts or backs of the photographs can be very helpful, sometimes listing the owner or former owners, exhibitions where the work was shown, and bibliography. Often the annotations can provide insights into the ideas and opinions of the dealer or scholar from whom the photographs were acquired. As with all citations, these annotations should be independently confirmed.

The most important photo archives are as follows:

- Archives of American Art, Smithsonian Institution, Washington, D.C.
- Frick Art Reference Library Photoarchive, New York
- Getty Research Institute, Los Angeles
- Louvre and Musée d'Orsay documentation centers, Paris
- National Gallery of Art, Washington, D.C.
- PHAROS: The International Consortium of Photo Archives
- Rijksbureau voor Kunsthistorische Documentatie (RKD) The Hague
- Villa I Tatti, Florence
- Witt Library, Courtauld Institute of Art, London
- Zentralinstitut für Kunstgeschichte, Munich

The following is a list of general art historical resources useful for conducting provenance research:

Art History Research Centre (defunct, last updated 2007)

Art History Resources on the Web

Art Museum Image Consortium (AMICO) (consortium dissolved in 2005; content no longer updated)

Artcyclopedia

ArtSource (compilation of online art and architecture resources)

ARTstor DIGITAL LIBRARY (subscription-based)

Art UK (artworks in UK public collections)

Bibliography of the History of Art (BHA) and Répertoire International de la Littérature de l'Art (RILA) (content no longer updated; covers material published from 1975 to 2007)

CAMEO (Conservation and Art Materials Encyclopedia Online)

FirstSearch (includes Arts & Humanities Search and Art Abstracts)

FRESCO – Frick Research Catalog Online (includes all Arcade libraries: MoMA, Brooklyn Museum, Frick Art Reference Library)

Frick Photoarchive

Getty Research Institute Research Tools

Getty Vocabularies (includes the Art and Architecture Thesaurus; the Cultural Objects Name Authority; the Getty Thesaurus of Geographic Names; and the Union List of Artist Names)

The History of Art Virtual Library

International Bibliography of Art (IBA) (covers material from 2008-present)

Joconde (database of art in the collections of 75 French museums)

Metropolitan Museum of Art Collections Database

Mother of All Art and Art History Links Page

Museum of Fine Arts, Boston Collections Database

New York Public Library – Research Collections

Oxford Art Online (fee-based; includes Grove Art Online; Bénézit Dictionary of Artists; The Oxford Companion to Western Art; Encyclopedia of Aesthetics; The Concise Oxford Dictionary of Art Terms)

PHAROS (Consortium of 14 photo archives image database)

Rijksbureau voor Kunsthistorisches Documentie (RKD) (database portal for information on Dutch art)

Rijksmuseum Collection Index

Smithsonian Institution Research Information System (SIRIS)

Thomas J. Watson Library (Metropolitan Museum of Art)

Web Gallery of Art – Virtual Museum and Searchable Database

B. Researching Collectors and Dealers

Once research has been conducted on the artist in question, the next step is to determine when and from whom a collector acquired the work. It is also important to identify ancestors or heirs of the collector who also may have owned the object at some point. When reading biographical resources, take note of any dates of the collector's life, including birth, marriage and death, as well as dates of collecting activity and any information about when the collector owned the object. If exact dates cannot be determined, try to identify the general period of collecting activity.

There are several resources helpful for identifying major collectors and obtaining bibliographical references. For works of art produced from the 16th to early-20th century, as well as by less prominent artists, an excellent resource is the Getty Provenance Index, a series of searchable databases comprising Archival Inventories, Sale Catalogs, Payments to Artists, Dealer Stock Books, and Public Collections. The Archival Inventories database includes inventories and other documents from city, state and national archives from the period 1550-1840, while the Sale Catalogs database comprises auction catalogues from Belgium, France, Germany, Great Britain, the Netherlands, and Scandinavia from 1650-1840. The Public Collections database contains the descriptions and provenances of paintings by artists born before 1900 in British and American public institutions.

Other institutions have a significant amount of information on collectors as well: the documentation centers of the Centre Pompidou, Louvre, and Musée d'Orsay, for instance. The Getty Collectors Files comprise approximately 20,000 folders containing information on dealers, collectors, and other art institutions from the Middle Ages to the present. These files, which are available only on-site in Los Angeles, although the catalogue can be searched online, contain such documents as genealogical references, photocopies of inventories and sale records, articles, and other biographical materials.

Frits Lugt's *Les marques de collections de dessins & d'estampes* (originally published in 1921 and also available online) compiles the collectors' marks found on works on paper and identifies the collector associated with each mark.

Some subscription-based Internet resources for researching individual collectors include the De Gruyter Saur World Biographical Index (WBIS online), which provides basic biographical information about the individuals it includes. *Grove Art Online* includes more than 2,000 articles on collectors, patrons, and dealers, in addition to artists. Both the *Grove Dictionary* and the Saur biographical indexes are also available in book form and can be found in the reference sections of libraries. Other print resources useful in gathering information about collectors include national biographical dictionaries, encyclopedias, *Who's Who, The Titled Nobility of Europe, Burke's Peerage,* and *The Social Register.* During the nineteenth and twentieth centuries, major collectors often published catalogues of their collections. These publications include catalogue entries that often cite the object's provenance, and may help to identify the dealers and collectors from whom an individual acquired a work of art.

Articles on collectors can be found in the *Gazette des Beaux Arts, Oud Holland, Apollo, Connoisseur,* the *Oxford Journal of Collecting,* and other journals that include cumulative indexes. There are also monographic studies of individual collectors; these rarely go into detail, but sometimes describe the history of the collection, identifying sources and analyzing the collector's taste. Finally, auction sales catalogues devoted to a single collector often include biographical introductions.

The transfer of a painting from one owner to another often involves a dealer or a public auction. Although such information should be included in a provenance, it is often omitted from catalogues raisonnés, exhibition catalogues, and occasionally even from sales catalogues. Therefore, the only way to confirm that a work of art passed through the hands of a dealer is to ask the dealer or to check a dealer's files. Dealer files are recorded in varying degrees of completeness, and the records of defunct galleries and dealers can be difficult to find. However, a growing interest in the history of collecting has encouraged the preservation, and in some cases, digitization, of dealer files. Information about galleries still in existence can be obtained by the contacting the dealer directly, but not all dealers make their files accessible. Archives of defunct galleries can be found, among other places, at the:

- Archives of American Art, Washington, D.C.

- Getty Research Institute, Los Angeles
- Museum of Modern Art, New York
- Rijksbureau voor Kunsthistorische Documentatie, The Hague
- Zentralarchiv des internationalen Kunsthandels, Cologne

The Archives of American Art, headquartered in Washington, D.C. but with research centers in other U.S. cities, is home to numerous collections, including those of dealers and galleries, some of which have been fully digitized and are available online. These include the Betty Parsons Gallery, the Irving Blum Gallery, and Jacques Seligmann & Co. Non-digitized and unmicrofilmed records at the Archives of American Art must be viewed in Washington, D.C. The Getty Research Institute also has vast holdings of gallery and other dealer records, several of which, including the records of the Knoedler Gallery, Alphonse Wyatt Thibaudeau, and Goupil & Cie, have been digitized.

C. Auction Records

Auction records are generally easy to track and are useful resources for tracing periodic appearances of individual works of art. When digitized, they are searchable by a variety of parameters: title of the work, artist, medium, etc. Privacy concerns may prevent the auction house from divulging the names of sellers and buyers unless the information is printed in the catalogue, but it may be willing to forward a letter of inquiry.

When searching auction records, certain points should be kept in mind. First, library copies of auction catalogues, especially older ones, sometimes contain useful handwritten notations - often by a dealer or collector who attended the sale - indicating the buyer of a particular object. Therefore, it may be helpful to check multiple copies of the same catalogue if buyer information is lacking. Second, it is important to keep possible variations in title and/or description and dimensions in mind when performing auction record searches. A work may be cut down or measured with or without its frame or mat. Finally, when looking for a particular object, it is worthwhile to search for artists to whom the object *might* have been attributed, even if erroneously. The following is a list of the most frequently used auction record search tools, some of which are fee-based (but may be available in research libraries):

artnet Fine Arts Auction Database (fee-based)

Artprice (fee-based)

Artvalue (fee-based database for international auction house results)

Blouin Art Sales Index (fee-based)

British Sales 1680-1800 (joint project of the Getty Research Institute and the National Gallery, London)

Christie's

Invaluable

Répertoire des catalogues de ventes publiques (fee-based online version of Frits Lugt's répertoires of auction catalogues)

Sotheby's

There are also print resources that are helpful in general provenance and auction research. Among the most well-known resources is Frits Lugt's *Répertoire des catalogues de ventes publiques intéressant l'art ou la curiosité* (4 vols.; La Haye: M. Nijhoff, 1938-1987). The *Répertoire*, which is now available online (see link above), lists more than 100,000 art sales catalogues dating from 1600 to 1925 from libraries in Europe and the United States. All catalogues are listed in chronological order, and the date, location, provenance of each property, type of objects sold, number of lots, library in which the catalogue may be consulted, and details of any annotations in the catalogue are all provided. A similar, but less comprehensive, resource is the Bibliothèque Forney's *Catalogue des catalogues de ventes d'art* (1972).

World War II/ Holocaust-Era Looted Art Provenance Research

I. Art Looted During World War II

From 1933 through the end of World War II in 1945, the Nazi regime was responsible for the confiscation, sale, looting, and destruction of millions of artworks and other items of cultural property from public and private collections throughout Nazi-occupied Europe. The scale of the systematic looting was unprecedented. Most items were stolen or taken forcibly from the private collections of Jews and other Holocaust victims. Objects were also taken from public collections in occupied lands. Some of the stolen works entered the collections of Nazi officials; others were intended for Hitler's planned museum in Linz; and still others were sold or traded for cash or other artworks. The *AAM Guide to Provenance Research* provides a historical overview of the Nazis' art "collecting" activities on pages 42-44. A more detailed examination of the subject can be found in Lynn H. Nicholas' *Rape of Europa* (1994), which provides the most comprehensive overview of Nazi art policy. In *Art as Politics in the Third Reich* (1996), Jonathan Petropoulos examines the rivalries between Nazi leaders and agencies, and his *The Faustian Bargain* (2000) discusses in detail the careers of several prominent Nazis associated with the arts. In *The Lost Museum* (1995 in French and 1997 in English), Hector Feliciano focuses on Nazi looting in France, while Konstantin Akinsha and Grigorii Kozlov concentrate on the Soviet repositories of looted art in *Beautiful Loot* (1995).

II. Restitution

The United States was closely involved with the effort to protect art in Europe during the war, and in the recovery and restitution of looted art after the war. In 1943, President Roosevelt established the American Commission for the Protection and Salvage of Artistic and Historic Monuments in War Areas, known as the Roberts Commission. The Commission advised the military on the location of art and other cultural property in war areas and protected those monuments whenever possible. Representatives from prominent American institutions served on the Commission, and art historians also became officers of the Monuments, Fine Arts and Archives program attached to the Allied military forces in Europe. These "Monuments Men," as they were known, worked at collecting points where loot was inventoried, catalogued and returned to countries of origin after the war.

Post-War Allied policy called for the restitution of confiscated works to the countries where their pre-War owners resided for return by those governments to the rightful owners. Although the majority of these works were eventually returned to their owners or heirs, an untold number were not. Some remained in government collections, were resold on the art market, or were otherwise dispersed. Still other works have never been found and were presumably destroyed during the war.

In the 1990s, the unresolved issue of unrestituted art re-emerged; it became clear that many objects misappropriated during the Nazi Era without subsequent restitution - with neither the return of the object nor payment of compensation to the original owner or legal heir - had made their way into museums and private collections. Claims were made by heirs of Holocaust victims, and in some cases the victims themselves, for artworks once belonging to their collections.

The increased awareness of World War II-Era art looting can be attributed in part to the appearance of a number of scholarly publications on the subject, including the publications cited above. Research for these publications was facilitated by the declassification in the United States of wartime archival documents and the opening of archival resources in Europe following the fall of the Berlin Wall and the breakup of the Soviet Union.

III. Guidelines and Legislation

In 1998, the Washington Conference on Holocaust-Era Assets, organized by the United States State Department, laid down principles for the identification of unrestituted artworks confiscated by the Nazis, free access to records and archival materials, and the publication of artworks known to have been stolen by the Nazis. Forty-four countries signed on. In 1999, the American Association of Museums (AAM) issued Standards Regarding the Unlawful Appropriation of Objects During the Nazi Era for its member museums to identify and publicize possibly looted artworks in their collections. In 2000, based on an agreement reached by the AAM, the Association of Art Museum Directors (AAMD), and the Presidential Advisory Commission on Holocaust Assets in the United States (PCHA), the AAM published the Recommended Procedures for Providing Information to the Public about Objects Transferred in Europe During the Nazi Era. Museums were to examine works in their collections that were created before 1946, acquired after 1932, underwent a change of ownership during 1933-1945, and/or may have been in Continental Europe during that time period. It should be noted, however, that gaps in provenance do not necessarily indicate that the works were, in fact, looted.

Both the guidelines and the recommended procedures acknowledge the difficulty of the research required, and both are based on the fundamental truth that the very nature of World War II provenance research is interdisciplinary. It requires knowledge not only of art history, but also of politics, the history of collections, and the locations of archival materials. Other sets of guidelines, declarations, and legislation relating to Nazi-Era provenance research include:

AAMD – Report of the Association of Art Museum Directors Task Force on the Spoliation of Art during the Nazi/World War II Era (1998)

Art Dealers Association of America Guidelines Regarding Art Looted during the Nazi Era (2006)

Federal Law on Cultural Valuables Displaced to the U.S.S.R. as a Result of World War II and Located on the Territory of the Russian Federation (1998)

Presidential Advisory Commission on Holocaust Assets in the United States (2000)

Terezin Declaration (2009)

U.S. State Department – Holocaust Issues

Vilnius International Forum on Holocaust-Era Looted Cultural Assets (2000)

IV. First Steps in World War II-Era Provenance Research

There are numerous reasons for provenance gaps in any given time period. Nevertheless, checking for a gap in known ownership during the period from January 1933, when Hitler came to power, until the end of the war in 1945, is the first step in the prioritization of Holocaust-Era provenance research. The next step is to evaluate the gap. Was the object in Continental Europe during the pertinent time period? For example, a gap between 1933 and 1938, the year of the Anschluss with Austria, is more significant if associated with Germany or Austria than it is with England or France. The invasion of Poland in 1938 led to increased Nazi confiscations of art there, while the fall of Holland and France in 1940 led to escalated looting activities in those

countries. That said, these dates are not absolute, as claims have been made even on objects that left their collections in the early- or mid-1930s and may have been sold under duress.

Another step should be the identification of so-called "red-flagged" names within provenances. The most frequently cited source for these names is the Office of Strategic Services (OSS) Art Looting Investigation Unit's (ALIU) *Biographical Index of Individuals Involved in Art Looting,* which can be found in Appendices H and I of the *AAM Guide to Provenance Research.* The ALIU list, created after the war, includes the name of virtually every person interrogated, investigated or mentioned during the unit's investigation into art looting. Most of the individuals on the list were middlemen who, while associated with looting activities, would not be considered "owners" or "possessors" of looted art. While the presence of a name from the ALIU list in a provenance indicates that further research is necessary, the list must be used judiciously. What matters is *when* an individual on the list was associated with a particular object. For instance, Hans Wendland, perhaps the most notorious dealer associated with the smuggling of looted art from France to Switzerland, had a legitimate pre-War business in Paris. That said, certain names on the ALIU list should always raise a red flag, and Appendix I in the *AAM Guide* contains a selection of the most important names to be aware of and the known archival documentation of their activities.

There are two types of "red-flagged" names, however. The ALIU list represents only the looting side. The provenance researcher should also be aware of the names of collectors whose collections are known to have been looted. There are several places to begin when researching victims' names. A good starting point is the list of collections confiscated by the ERR in France and elsewhere. See Appendix K in the *AAM Guide* for a list of collection codes used by the ERR, and the digitized *Cultural Plunder by the Einsatzstab Reichsleiter Rosenberg* for items looted from particular collections. See also, for France, the list of names in the *Répertoire des biens spoliés en France durant la guerre, 1939-1945* (see bibliography below).

A. Case Study: The Provenance of Degas' *Landscape with Smokestacks*

The provenance of Edgar Degas' *Landscape with Smokestacks*, a monotype pastel executed in 1890, which was the subject of a highly publicized legal dispute (Goodman and Gutmann v. Searle), illustrates some of the complex issues that can surround an object's ownership history. In 1987, Daniel Searle, a noted collector and member of the Board of Trustees of the Art Institute of Chicago, purchased the work from Emile Wolf. Eight years later, Searle received an ownership claim from the heirs of Holocaust victims Friedrich and Louise Gutmann.

When Searle purchased the work through a New York dealer, it came with a seemingly excellent provenance that went back to the artist himself and did not raise concerns for him or for the curators at the Art Institute who advised him on his purchase:

PROVENANCE: Atelier Degas (Vente IV, July 2-4, 1919, no. 45, ill.); Nunes et Fiquet, Paris; L. Wolff, Hamburg ; Collection of S.S. (Vente Galerie Georges Petit, Paris, June 9, 1932, no. 5); Lutjens Collection, Holland; Hans Wendland, Paris; Hans Fankhauser, Basel; Emile Wolf, New York (since 1951).

The painting had been in Degas' possession at the time of his death, and was sold in the fourth posthumous sale of his collection in 1919. At the time of Paul-André Lemoisne's 1946 catalogue raisonné, *Degas et son oeuvre,* the last ownership transaction was a 1932 sale at the Galerie Georges Petit in Paris. Although not noted in that provenance, it was Gutmann who purchased the painting at the 1932 sale. Helmut Lutjens, who was listed as the buyer at the 1932 sale in the provenance provided to Searle, was in fact the Amsterdam director of the Paul Cassirer Gallery who bid on Gutmann's behalf.

In 1939, Gutmann, from his home in the Netherlands, sent the painting along with several other works from his collection to the gallery of Paul Graupe in Paris for safekeeping. A 1945 letter to

Gutmann from the Graupe firm confirms that the painting, as well as eleven other objects from Gutmann's collection, was sent from the Graupe gallery to the Wacker-Bondy storage facility in Paris.

In October 1942, after the fall of France, the ERR confiscated works from the Wacker-Bondy facility, but *Landscape with Smokestacks* was not one of the works recorded on the ERR cards. In fact, there is no extant ERR documentation that proves that the Degas *Landscape* was confiscated from Wacker-Bondy.

So what happened to the Degas *Landscape*? One possibility is that it was sold before the Germans confiscated works from Wacker-Bondy; indeed, another transaction proves that not every Gutmann object held at the storage facility was still there when the ERR arrived in 1942, and there is additional evidence that was interpreted by Searle during the legal arguments to support the suggestion that the *Landscape* was sold voluntarily prior to the ERR's arrival.

The next names in the provenance are Hans Wendland and Hans Fankhauser, Wendland's brother-in-law. Today Wendland is a highly recognizable "red-flagged" name; he was described by the Office of Strategic Services after the war as "probably the most important individual engaged in quasi-official looted art transactions in France, Germany, and Switzerland." However, when Searle acquired the painting in 1987, Wendland's association with looted art was not well known.

While there is no evidence to prove it, *Landscape* could have been transferred from the ERR to Wendland for sale in Switzerland, or as Searle's attorney suggested, Graupe could have sold the painting to Wendland before the ERR arrived at Wacker-Bondy. Indeed, Graupe and Wendland knew each other from at least the early 1930s and were known to have jointly owned art that was part of the shipment of works from Graupe to Wacker-Bondy. On the eve of the trial in 1998, the case was settled out of court, so the disputed facts were never adjudicated. The monotype pastel remains in the collection of the Art Institute of Chicago.

The important lessons for the provenance researcher from this ownership claim are that all available archival materials must be consulted; as much information as possible must be gathered about all of the individuals named in a provenance; documentary evidence may be open to interpretation; and, despite exhaustive research, absolute documentary proof of looting—or clear title—may not materialize.

V. Resources for World War II-Era Research

A. The National Archives and Records Administration

The primary source in the United States for the documentation of the looting of art during World War II is the National Archives and Records Administration (NARA) in College Park, Maryland. NARA holds some 15 million pages of documents relating to Holocaust-Era assets. Materials referring to specific works of art, however, constitute a relatively small percentage of that documentation.

The most important record groups at NARA for tracing art provenance include:

- American Commission for the Protection of and Salvage of Artistic and Historic Monuments in War Areas (RG239); Department of State (RG59)
- Foreign Service Posts of the Department of State (RG84).
- Office of Strategic Services (RG226)

- U.S. Occupation Headquarters, World War II, Office of the Military Governor, United States (RG260)

NARA also holds the records of the Einsatzstab Reichsleiter Rosenberg (ERR) which confiscated Jewish property in Nazi-occupied France and Belgium. The collections of the ERR are documented by meticulously catalogued inventory cards, organized by codes assigned to the families from whom the objects were looted. The ERR also photographed many of the confiscated objects, and some of these photographs are at the National Archives.

Other records available at the National Archives and which have been digitized are those relating to: the Linz Museum Project; Munich Central Collecting Point Property Cards for Linz Objects; the Goering Collection; Nazi shipping records; complete or partial lists of confiscated collections; salt mines and other Nazi repositories of art; Roberts Commission Files and individual claims files. Records relating to restitution include those of the Munich Central Collecting Point; the Wiesbaden Central Collecting Point; and the Marburg Central Collecting Point.

NARA's 1999 publication, *Holocaust-Era Assets: A Finding Aid to Records at the National Archives at College Park,* compiled by Greg Bradsher and also available online, is crucial for locating and understanding the materials held there. Both versions of the *Finding Aid* deal with all types of assets, not only art, but real estate, gold, insurance, and cultural property as well. Many of the NARA documents have been digitized and are available at Fold3. The NARA records comprise the records of the Wiesbaden Collecting Point and those created by Ardelia Hall, the State Department's post-War Fine Arts and Monuments Adviser. The NARA International Research Portal for Records Related to Nazi-Era Cultural Property, which contains records dating from 1939 to 1961, including seizure orders, inventories and images of looted objects, field reports, claim forms for seized property, and interrogation reports of art dealers, draws from the archives of eleven participating institutions.

B. Selected Digitized Resources/Databases

American Alliance of Museums Nazi-Era Provenance Internet Portal (launched in 2003, this registry lists objects from more than 170 participating museums that were or could have been in continental Europe during the Nazi era and contain gaps in their known provenance)

Art Loss Register (private fee-based database of lost and stolen art, antiquities, and collectibles; its services include item registration, search and recovery services for collectors, the art trade, insurers, and law enforcement agencies)

Collection Schloss: Archives et Patrimonie (catalogue of non-restituted works of art stolen from the Schloss Collection in France during the war)

Cultural Plunder by the Einsatzstab Reichsleiter Rosenberg [ERR]: Database of Art Objects at the Jeu de Paume (searchable illustrated database of the registration cards and photographs produced by the Einsatzstab Reichsleiter Rosenberg, containing more than 20,000 art objects taken from Jews in German-occupied France and, to a lesser extent, Belgium; searchable by object and by owner; a Claims Conference project)

Cultural Values – the Victims of War (Ministry of Cultural Affairs of the Russian Federation) [contains an illustrated catalogue of lost Russian cultural objects, organized by site, and a list of returned items]

Datenbank entartete Kunst (sponsored by Berlin's Free University, this database documents the fate of more than 21,000 artworks condemned as "degenerate" by the Nazis and seized from German museums in 1937)

Datenbank "Sammlung der Sonderauftrages Linz" (database established by the Deutsches Historisches Museum listing works of art purchased or confiscated by the Nazis for Hitler's planned museum in Linz)

Datenbank zum "Central Collection Point München" (searchable database of the Collecting Point property cards documenting objects recovered and processed through the Munich Central Collecting Point after the war)

Herkomst Gezocht/Origins Unknown (digitized version of the Nederlandsch Kunstbezit archive, which contains thousands of records of art objects stolen from the Netherlands)

Internet Catalogue of Polish Wartime Losses

Kunst-Datenbank des Nationalfonds (information on art and cultural objects that may have been seized by the Nazis and are today located in Austrian museums and collections)

Lootedart.com (run by the Commission for Looted Art in Europe; contains an Information Database, which includes laws and policies, reports, publications, archival records, and current cases from forty-nine countries, and an Object Database, which lists the details of over 25,000 missing, looted, and/or identified objects from over fifteen countries)

Lost Art Internet Database (administered by the *Koordinierungsstelle Magdeburg,* Germany's main office for documenting lost cultural property, this database lists unclaimed art held in German institutions and facilitates the registration of cultural assets that were relocated, transported, or confiscated during World War II)

Restitution-Art (Czech Republic Ministry of Culture's database of works of art in Czech collections that come or may come from victims of the Holocaust)

Anlaufstelle Raubkunst, Bundesamt für Kultur (Government sponsored Internet portal with links to museums conducting research on their collections and other World War II-Era provenance resources. The website will be available in 4 languages.)

Site Rose Valland – Musées Nationaux de Récupération (searchable database of approximately 2,000 unrestituted objects currently in the possession of French national museums)

Spoliation of Works of Art during the Holocaust and World War II Period (searchable database of the lists maintained by almost 50 British museums of objects with incomplete provenances from 1933-1945)

Zentralinsitut für Kunstgeschichte (Central Institute for Art History) [includes the auction catalogues of Münchener Kunstversteigerungshaus Adolf Weinmüller and online access to the business records of Galerie Heinemann, Munich]

C. Hardcopy Publications/Resources

Bernhard, Marianne. *Verlorene Werke der Malerei in Deutschland in der Zeit von 1939 bis 1945 zerstörte und verschollene Gemälde aus Museen und Galerien*. Munich: F.A. Ackermann, 1965. (lists works missing from German museums after the war)

British Committee on the Preservation and Restitution of Works of Art, Archives, and Other Material in Enemy Hands. *Works of Art in Austria (British zone of occupation): Losses and Survivals in the War.* London, 1946.

British Committee on the Preservation and Restitution of Works of Art, Archives, and Other Material in Enemy Hands. *Works of Art in Germany (British zone of occupation): Losses and Survivals in the War.* London, 1946.

British Committee on the Preservation and Restitution of Works of Art, Archives, and Other Material in Enemy Hands. *Works of Art in Greece, the Greek Islands and the Dodecanese: Losses and Survivals in the War.* London, 1946.

British Committee on the Preservation and Restitution of Works of Art, Archives, and Other Material in Enemy Hands. *Works of Art in Italy: Losses and Survivals in the War.* London, 1945.

British Committee on the Preservation and Restitution of Works of Art, Archives, and Other Material in Enemy Hands. *Works of Art in Malta: Losses and Survivals in the War. London, 1946.*

Catalogue of Paintings Removed from Poland by the German Occupation Authorities during the Years 1939-1945. Warsaw: the Ministry, 1950.

A Catalogue of the Works of Art from the Collection of the Kunsthalle Bremen Lost during Evacuation in the Second World War. Bremen: Kunsthalle Bremen, 1997.

Chefs-d'oeuvre récupérés en Allemagne: novembre - décembre, 1948. Brussels: Éditions de la Connaisance, 1948.

Dokumentation der kriegsbedingt vermissten Kunstwerke des Mecklenburgischen Landesmuseums. Schwerin: Staatliches Museum Schwerin, 1998-2005.

Elen, Albert J. *Missing Old Master Drawings from the Franz Koenigs Collection Claimed by the State of The Netherlands.* The Hague: SDU Publishers, 1989.

Haase, Günther. *Die Kunstsammlung des Reichsmarschalls Hermann Göring: eine Dokumentation: mit 40 Fotos und Faksimiles sowie einem Dokumentenanhang.* Berlin: Edition q, 2000.

List of Photographs of Cultural Objects Made at Wiesbaden Central Collecting Point by Photo-Marburg, Oct. 1945 to Sept. 1946. 1945-1946.

Ministère des Affaires Étrangères. *Collection Schloss: oeuvres spoliées pendant la deuxième guerre mondiale non restitutées (1943-1998).* Paris: Ministère des Affaires Étrangères, 1998.

Missing Art Works of Belgium. Brussels: Office belge de l'économie et de l'agriculture, 1994-.

Plaut, James S. *Activity of the Einsatzstab Rosenberg in France.* Washington, D.C.: Office of Strategic Services, Art Looting Investigation Unit, 1946.

Répertoire des biens spoliés en France durant la guerre, 1939-1945. 4 vols. Plus supplements. Berlin: Impr. nationale, 1947- [list of property removed from France during the War]

Roditi, Edouard, ed. *Checklist of the More Important Paintings Missing from the BerlinMuseums.* 1949.

Rousseau, Theodore. *The Goering Collection.* Washington, D.C.: Office of Strategic Services, 1945.

Vermisste Kunstwerke des Historischen Museums Dresden. Dresden: Staatliche Kunstsammlungen, 1990.

Vermisste Zeichnungen des Kupferstich-Kabinettes Dresden. Dresden: Staatliche Kunstsammlungen, 1987.

D. Additional Web-based World War II-Era Provenance Resources

Museum Security Network - WWII and Looted Art Resources

National Gallery of Art World War II Resources (includes the photographic archives of the Munich Central Collecting Point Archive)

United States Holocaust Memorial Museum (International List of Current Activities Regarding Holocaust-Era Assets)

IFAR Art Law & Cultural Property Database; Case Law: World War II-Era/Holocaust-Related Art Loss (summaries of U.S. and international civil and criminal cases relating to art believed to have been looted or otherwise misappropriated during and after World War II)

IFAR Section on Professional Guidelines (list of ethical standards and professional guidelines, including those pertaining to World War II-Era looting, enacted by various professional arts groups)

E. Organizations that Facilitate WWII-Era Research, Claims, and Restitution

Bundesamt für zentrale Dienste und offene Vermögensfragen (conducts provenance research on works of art involved in unresolved property issues)

Commission for Art Recovery (established in 1997 to spur efforts to restitute art seized, confiscated, or otherwise wrongfully taken during the war)

Commission for Looted Art in Europe (lists looting and restitution-related news and press releases and contains information about CLAE claimants' cases)

Conference on Jewish Material Claims Against Germany (organization dedicated to providing a measure of justice for victims of the Holocaust; conducts, together with the World Jewish Restitution Organization, a comprehensive program aimed at the restitution of Jewish-owned art and cultural property lost and stolen during the Holocaust)

European Shoah Legacy Institute (seeks systematic solutions on an international level leading to the restitution of art and Jewish cultural assets stolen by the Nazis; provides social welfare to Holocaust survivors; promotes Holocaust research and education)

Holocaust Art Restitution Project (founded in 1997, this organization documents the cultural property losses suffered by Holocaust victims and conducts research into the fate of stolen and misappropriated cultural property)

Holocaust Claims Processing Office, New York State Department of Financial Services (provides institutional assistance to individuals seeking to recover artwork that was lost, stolen, or forcibly sold between 1933 and 1945)

ICOM (International Council of Museums) (Spoliation of Jewish Property [international resources concerning the spoliation of Jewish cultural property during World War II)

World Jewish Congress (an international organization whose mission is to address the interests and needs of Jews and Jewish communities throughout the world)

World Jewish Restitution Organization (consults and negotiates with national and local governments to reach agreements and ensure legislation concerning the restitution of property to the Jewish people and conducts archival research on Jewish property)

F. Records Collections

German Sales 1930 – 1945 [index of digitized German and Belgian auction catalogues; German Sales 1901 - 1929 (forthcoming)]

Grosse Deutsche Kunstausstellung (GDK) (over 100,000 images documenting the Nazi-sponsored GDK, an annual art exhibition that documents the artistic tastes of the Third Reich)

Mémorial de la Shoah, Center of Contemporary Jewish Documentation (archives containing collections of more than thirty million documents)

Project for the Documentation of Wartime Losses [posted in 1998, this now defunct but still accessible site digitized the records of the Art Looting Investigation Unit (ALIU)]

G. Selected Museum-based Provenance Projects

Art Gallery of Ontario, Toronto - Spoliation Research; Provenance Research;

Art Institute of Chicago

British Museum, London

Clark Art Institute, Williamstown

Cleveland Museum of Art

The Detroit Institute of Art

Freer and Sackler Galleries, Washington, D.C.

The J. Paul Getty Museum, Los Angeles

Guggenheim Museum, New York

Hood Museum of Art, Dartmouth College

The Jewish Museum, New York

Metropolitan Museum of Art, New York

Museum of Fine Arts, Boston

Museum of Modern Art, New York

Musée des Beaux-Arts de Montréal

National Gallery, London

National Gallery of Art, Washington, D.C.

National Gallery of Canada, Ottawa

Philadelphia Museum of Art

Princeton University Art Museum

Seattle Art Museum

Toledo Museum of Art; Toledo Museum Provenance Research Project

Vizcaya Museum and Gardens, Miami

Antiquities

I. Antiquities and Cultural Patrimony

Both the provenance (ownership history) and provenience (findspot) of a work of art are critical to the study of archaeological artifacts/antiquities. Knowing the findspot and detailing the object's position within the site and its proximity to other documented items helps researchers identify the culture from which the object originated, its function, and probable date. Looters, however, often destroy archaeological sites and cause damage to movable, as well as immovable objects.

The looting and illicit export of antiquities from their countries of origin pose threats to the cultural heritage of many nations, as well as to archaeological sites. In recent years, several international agreements, most notably the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, have been adopted to address these threats. Similarly, many countries have enacted patrimony laws to vest ownership of antiquities—found or as yet unfound—in the State. Many countries have also enacted legislation to restrict export of archaeological objects (See the Art Law & Cultural Property section of IFAR's Website for more information).

These agreements and laws are rarely retroactive. Therefore, the enactment date of a national ownership law or an international or bilateral agreement may be significant in determining legal ownership of cultural property. Therefore, a documented provenance, including the date the object left its country of origin, its ownership and publication history, and its means of acquisition, are crucial for a current owner to demonstrate legal title and the ethical acquisition of the objects.

The United States became a party (with reservations) to the 1970 UNESCO Convention in 1983, with the passage of the Cultural Property Implementation Act (CPIA). Under the CPIA, countries that are signatories to the 1970 UNESCO Convention and whose cultural property is in jeopardy of pillage may ask the U.S. to restrict the importation of designated types of threatened objects as of a certain date. Such bilateral agreements last for five years, but are renewable under the CPIA, so long as the cultural property remains in jeopardy of pillage and a recommendation for renewal is

made by the Cultural Property Advisory Committee, housed in the U.S. State Department. The types of restricted objects are listed in the Federal Register. Once the import restriction is put in place, an owner or importer must be able to prove that an object imported from that country left that country before the date the restriction went into effect. This puts additional pressure on owners to do appropriate provenance research.

In 2008, new guidelines for the Association of Art Museum Directors (AAMD) in the United States and Canada adopted the threshold date of 1970 - the date of the UNESCO Convention and not the date of 1983 when the U.S. became a State Party to the Convention - for applying more stringent acquisition standards for archaeological objects. Member museums were given a mandate to

undertake provenance research to substantiate that an object was "outside its country of probable modern discovery before 1970 or was legally exported after 1970."

In addition to IFAR's own Art Law & Cultural Property Website, which has the most extensive information and legislation on this subject, we are listing below a few other resources for information about laws and provenance research concerning antiquities and other cultural objects:

Association of Art Museum Directors (AAMD) – Object Registry

American Bar Association (ABA) – Art and Cultural Heritage Law Committee

Archaeological Institute of America

Art-Law Centre (Switzerland)

Chinese Historical and Cultural Project (CHCP) – Chinese Cultural Heritage Site

Federal Office of Culture (Switzerland)

Heritage Law Bibliography

Heritage Watch

HG.org Legal Resources– Art and Cultural Property Law

Illicit Antiquities Research Centre (Cambridge, UK) [digitized articles on the illicit trade in antiquities from 1997-; defunct since 2007, but still available for viewing]

Institute of Art and Law

International Council of Museums (ICOM) – Art and Cultural Heritage Mediation

International Council of Museums (ICOM) Red List

International Foundation for Art Research (IFAR) – Art Law & Cultural Property Database (ALWI) [summaries of international cultural property legislation from more than 120 countries, including links to the full legislative texts in their original language and English translation (fee based)]

Kluwer Law Online

Lawcrawler

Lawyers' Committee for Cultural Heritage and Preservation (LCCHP)

Legal Protection of Cultural Property – A Selective Resource Guide

Lexis-Nexis (fee-based legal search engine)

Oriental Institute - Lost Treasures from Iraq

Restitution Worldwide

Saving Antiquities for Everyone (SAFE) (cultural heritage advocacy Web portal)

UNESCO - Protecting our Heritage and Fostering Creativity

UNESCO – National Cultural Heritage Laws Database

UNESCO – World Heritage List

U.S. Department of State – Cultural Heritage Center of the Bureau of Educational and Cultural Affairs

U.S. Department of State – Iraq Cultural Heritage Initiative

Westlaw (fee-based legal search engine)

II. Web Resources for Art Theft

The Art Loss Register

ARTIVE

Carabinieri – Comando Carabinieri per la Tutela del Patrimonio Culturale

FBI Art Theft

International Foundation for Art Research (IFAR)

Interpol – Works of Art

Los Angeles Police Department Art Theft Detail

Museum Security Network

National Stolen Art File

Object ID

Saztv – Art Theft – World's Most Wanted Art

Bibliography and Other Resources

I. General Provenance Research

International Foundation for Art Research. "Provenance & Due Diligence," special double issue of *IFAR Journal,* Volume 3, nos. 3&4, 2000. [proceedings of an IFAR/NYU conference]

Pearson, David. *Provenance Research in Book History: A Handbook*. London: The British Library, 1994.

Yeide, Nancy, et al. *The AAM Guide to Provenance Research*. Washington, D.C.: American Association of Museums, 2001.

II. World War II-Era Art Looting

Akinsha, Konstantin and Grigorii Kozlov, with Sylvia Hochfield. *Beautiful Loot: The Soviet Plunder of Europe's Art Treasures*. New York: Random House, 1995.

Bazyler, Michael J. *Holocaust Justice: The Battle for Restitution in America's Courts*. New York: New York University Press, 2003.

Bazyler, Michael J. and Roger P. Alford. *Holocaust Restitution: Perspectives on the Litigation and its Legacy.* New York: New York University Press, 2006.

Edsel, Robert M. *The Monuments Men: Allied Heroes, Nazi Thieves, and the Greatest Treasure Hunt in History.* New York: Center Street, 2009.

Edsel, Robert M. *Rescuing Da Vinci: Hitler and the Nazis Stole Europe's Great Art: America and her Allies Recovered It.* Dallas: Laurel Publishing, 2006.

Edsel, Robert M. *Saving Italy: The Race to Rescue a Nation's Treasures from the Nazis.* New York: W. W. Norton & Company, 2013.

Feliciano, Hector. *The Lost Museum: The Nazi Conspiracy to Steal the World's Greatest Works of Art*. New York: Basic Books, 1997 (publ. in French, 1995).

Kurtz, Michael J. *Nazi Contraband: American Policy on the Return of European Cultural Treasures, 1945-1955.* New York & London: Garland Publishing, 1985.

Morozzi, Luisa. *Treasures Untraced: An Inventory of the Italian Art Treasures Lost during the Second World War.* Rome: Instituto poligrafico e zecca dello stato, 1995.

Müller, Melissa. *Lost Lives, Lost Art: Jewish Collectors, Nazi Art Theft, and the Quest for Justice.* New York: Vendome Press, 2010.

Nicholas, Lynn H. *The Rape of Europa: The Fate of Europe's Treasures in the Third Reich and the Second World War.* New York: Knopf, 1994.

Petropoulos, Jonathan. *Art as Politics in the Third Reich.* Chapel Hill, NC: University of North Carolina Press, 1996.

Petropoulos, Jonathan. *The Faustian Bargain: The Art World in Nazi Germany*. New York: Oxford University Press, 2000.

Simpson, Elizabeth, ed. *The Spoils of War: World War II and its Aftermath: The Loss, Reappearance and Recovery of Cultural Property*. New York: Harry N. Abrams, Inc., 1997.

Smyth, Craig Hugh. *Repatriation of Art from the Collecting Point in Munich after World War II. Background and Beginnings, with Reference Especially to the Netherlands*. Maarssen, The Hague: Gary Schwartz; Montclair, NJ: Abner Schram, 1988.

Wechsler, Helen J. *Museum Policy and Procedures for Nazi-Era Issues.* Washington, D.C.: American Association of Museums, 2001.

Yeide, Nancy. *Vitalizing Memory: International Perspectives on Provenance Research.* Washington, D.C:. American Association of Museums, 2005. (proceedings of an AAM conference)

III. Antiquities and Cultural Property Issues

Brodie, Neil, Morag Kersel, Christina Luke & Kathryn Walker Tub, eds. *Archaeology, Cultural Heritage, and the Antiquities Trade*. Gainesville, FL: University Press of Florida, 2006.

Cuno, James. *Who Owns Antiquity?* Princeton, NJ: Princeton University Press, 2008.

Darraby, Jessica L. *Art, Artifact, Architecture and Museum Law*. Eagan, MN: Thomson Reuters/West, 2008.

Felch, Jason and Ralph Frammolinio. *Chasing Aphrodite: The Hunt for Looted Antiquities and the World's Richest Museum*. Boston: Houghton Mifflin Harcourt, 2011.

Gerstenblith, Patty. *Art, Cultural Heritage, and the Law: Cases and Materials*. Durham, NC: Carolina Academic Press, 2008 (second edition).

Gibbon, Kate Fitz. *Who Owns the Past? Cultural Policy, Cultural Property, and the Law*. New Brunswick, NJ: Rutgers University Press, 2005.

Hoffman, Barbara T., ed. *Art and Cultural Heritage: Law, Policy and Practice*. New York: Cambridge University Press, 2006.

Merryman, John Henry and Stephen K. Urice. *Law, Ethics and the Visual Arts*, 5th ed. The Netherlands: Kluwer Law International BV, 2007.

Miles, Margaret M. *Art as Plunder: The Ancient Origins of Debate about Cultural Property*. New York: Cambridge University Press, 2008.

O'Keefe, Patrick J. *Trade in Antiquities: Reducing Destruction and Theft*. London: UNESCO, 1997.

Richman, Jennifer R. and Marion P. Forsyth. *Legal Perspectives on Cultural Resources*. Lanham, MD: Alta Mira Press, 2004.

Waxman, Sharon. *Loot: The Battle over the Stolen Treasures of the Ancient World*. New York: Times Books, 2008.

From: Charles Harrison and Paul Wood, Art in Theory: 1900-2000: An Anthology of Changing Ideas, Blackwell, 2003, pp. 439-441.

Adolf Hitler, "Speech Inaugurating the "Great Exhibition of German Art"" (1937)

[...] That flood of slime and ordure which the year 1918 belched forth into our lives was not a product of the lost war, but was only freed in its rush to the surface by that calamity. Through the defeat, an already thoroughly diseased body experienced the total impact of its inner decomposition. Now, after the collapse of the social, economic, and cultural patterns which continued to function in appearance only, the baseness already underlying them for a long time, triumphed, and indeed this was so in all strata of our life.

[...] On (these) cultural grounds, more than on any others, Judaism had taken possession of those means and institutions of communication which form, and thus finally rule over public opinion. Judaism was very clever indeed, especially in employing its position in the press with the help of so-called art criticism and succeeding not only in confusing the natural concepts about the nature and scope of art as well as its goals, but above all in undermining and destroying the general wholesome feeling in this domain....

Art, on the one hand, was defined as nothing but an international communal experience, thus killing altogether any understanding of its integral relationship with an ethnic group. On the other hand its relationship to time w as stressed, that is: There was no longer any art of peoples or even of races, but only an art of the times. [...]

According to such a theory, as a matter of fact, art and art activities are lumped together with the handiwork of our modern tailor shops and fashion industries. And to be sure, following the maxim: Every year something new. One day Impressionism, then Futurism, Cubism, maybe even Dadaism, etc. A further result is that even for the most insane and inane monstrosities thousands of catchwords to label them will have to be found, and have indeed been found. If it weren"t so sad in one sense, it would almost be a lot of fun to list all the slogans and clichés with which the so-called "art initiates" have described and explained their wretched products in recent years....

Until the moment when National-Socialism took power, there existed in Germany a so-called "modern art," that is, to be sure, almost every year another one, as the very meaning of this word indicates. National-Socialist Germany, however, wants again a "German Art," and this art shall and will be of eternal value, as are all truly creative values of a people. Should this art, however, again lack this eternal value for our people, then indeed it will mean that it also has no higher value today.

When, therefore, the cornerstone of this building was laid, it was with the intention of constructing a temple, not for a so-called modern art, but for a true and everlasting German art, that is, better still, a House for the art of the German people, and not for any international art of the year 1937, '40, '50 or '60. For art is not founded on time, but only on peoples. It is therefore imperative for the artist to erect a monument, not so much to a period, but to his people. For time is changeable, years come and go. Anything born of and thriving on a certain epoch alone would perish with it. And not only all which had been created before us would fall victim to this mortality, but also what is being created today or will be created in the future.

But the National-Socialists know only one mortality, and that is the mortality of the people itself: Its causes are known to us. As long as a people exists, however, it is the fixed pole in the flight of fleeting appearances. It is the being and the lasting permanence. And, indeed, for this reason, art as an expression of the essence of this being, is an eternal monument[...].

Art can in no way be a fashion. As little as the character and the blood of our people will change, so much will art have to lose its mortal character and replace it with worthy images

expressing the life-course of our people in the steadily unfolding growth of its creations. Cubism, Dadaism, Futurism, Impressionism, etc., have nothing to do with our German people. For these concepts are neither old nor modern, but are only the artifactitious stammerings of men to whom God has denied the grace of a truly artistic talent, and in its place has awarded them the gift of jabbering or deception. I will therefore confess now, in this very hour, that I have come to the final inalterable decision to clean house, just as I have done in the domain of political confusion, and from now on rid the German art life of its phrase-mongering.

"Works of art" which cannot be understood in themselves but, for the justification of their existence, need those bombastic instructions for their use, finally reaching that intimidated soul, who is patiently willing to accept such stupid or impertinent nonsense—these works of art from now on will no longer find their way to the German people.

All those catchwords: "inner experience," "strong state of mind," "forceful will," emotions pregnant with the future," "heroic attitude," "meaningful empathy," "experienced order of the times," "original primitivism," etc. - all these dumb, mendacious excuses, this claptrap or jabbering will no longer be accepted as excuses or even recommendations for worthless, integrally unskilled products. [...]

I have observed among the pictures submitted here, quite a few paintings which make one actually come to the conclusion that the eye shows things differently to certain human beings than the way they really are, that is, that there really are men who see the present population of our nation only as rotten cretins; who, on principle, see meadows blue, skies green, clouds sulphur yellow, and so on, or, as they say, experience them as such. I do not want to enter into an argument here about the question of whether the persons concerned really do or do not see or feel in such a way; but, in the name of the German people, I want to forbid these pitiful misfortunates who quite obviously suffer from an eye disease, to try vehemently to foist these products of their misinterpretation upon the age we live in, or even to wish to present them as "Art."

No, here there are only two possibilities: Either these so-called "artists" really see things this way and therefore believe in what they depict; then we would have to examine their eyesight-deformation to see if it is the product of a mechanical failure or of inheritance. In the first case, these unfortunates can only be pitied; in the second case, they would be the object of great interest to the Ministry of Interior of the Reich which would then have to take up the question of whether further inheritance of such gruesome malfunctioning of the eyes cannot at least be checked. If, on the other hand, they themselves do not believe in the reality of such impressions but try to harass the nation with this humbug for other reasons, then such an attempt falls within the jurisdiction of the penal law.

This House, in any case, has neither been planned, nor was it built for the works of this kind of incompetent or art criminal....

[...] No, I say. The diligence of the builder of this House and the diligence of his collaborators must be equaled by the diligence of those who want to be represented in this House. Beyond this, I am not the least bit interested in whether or not these "also rans" of the art world will cackle among themselves about the eggs they have laid, thereby giving to each other their expert opinion.

For the artist does not create for the artist, but just like every one else he creates for the people.

And we will see to it that from now on the people will once again be called upon to be the judges of their own art....

I do not want anybody to have false illusions: National-Socialism has made it its primary task to rid the German Reich, and thus, the German people and its life of all those influences which are fatal and ruinous to its existence. And although this purge cannot be accomplished in one day, I do not want to leave the shadow of a doubt as to the fact that sooner or later the hour of liquidation will strike for those phenomena which have participated in this corruption.

But with the opening of this exhibition the end of German art foolishness and the end of the destruction of its culture will have begun.

From now on we will wage an unrelenting war of purification against the last elements of putrefaction in our culture. [. . .]

Background

Antisemitism and the persecution of Jews were central tenets of Nazi ideology.

In their 25-point party program published in 1920, Nazi Party members publicly declared their intention to segregate Jews from "Aryan" society and to abrogate their political, legal, and civil rights.

Nazi leaders began to make good on their pledge to persecute German Jews soon after their assumption of power. During the first six years of Hitler's dictatorship, from 1933 until the outbreak of war in 1939, Jews felt the effects of more than 400 decrees and regulations that restricted all aspects of their public and private lives. Many of these were national laws that had been issued by the German administration and affected all Jews. But state, regional, and municipal officials, acting on their own initiatives, also issued many exclusionary decrees in their own communities. Thus, hundreds of individuals in all levels of government

throughout the country were involved in the persecution of Jews as they conceived, discussed, drafted, adopted, enforced, and supported anti-Jewish legislation. No corner of Germany was left untouched.

The first major law to curtail the rights of Jewish citizens was the Law for the Restoration of the Professional Civil Service of April 7, 1933, which excluded Jews and the "politically unreliable" from civil service. The new law was the German authorities' first formulation of the so-called Aryan Paragraph, a regulation used to exclude Jews (and often, by extension, other "non-Aryans") from organizations, professions, and other aspects of public life. This would become the foundation of the Nuremberg Race Laws of 1935, which defined Jews not by religious belief but by ancestral lineage and which formalized their segregation from the so-called Aryan population.

In April 1933, German law restricted the number of Jewish students at German schools and universities. In the same month, further legislation sharply curtailed "Jewish activity" in the medical and legal professions. Subsequent decrees restricted reimbursement of Jewish doctors from public (state) health insurance funds. The city of Berlin forbade Jewish lawyers and notaries to work on legal matters, the mayor of Munich forbade Jewish doctors from treating non-Jewish patients, and the Bavarian interior ministry denied admission of Jewish students to medical school.

At the national level, the Nazi government revoked the licenses of Jewish tax consultants, imposed a 1.5 percent quota on the admission of "non-Aryans" to public schools and universities, fired Jewish civilian workers from the army, and in early 1934, forbade Jewish actors to perform on the stage or screen. Local governments also issued regulations that affected other spheres of Jewish life: in Saxony, Jews could no longer slaughter animals according to ritual purity requirements, effectively preventing them from obeying Jewish dietary laws.

Government agencies at all levels aimed to exclude Jews from the economic sphere of Germany by preventing them from earning a living. Jews were required to register their domestic and foreign property and assets, a prelude to the gradual expropriation of their material wealth by the state. Likewise, German authorities intended to "Aryanize" all Jewish-owned businesses, a process involving the dismissal of Jewish workers and managers as well as the transfer of companies and enterprises to non-Jewish Germans, who bought them at prices officially fixed well below market value. By the spring of 1939, such efforts had succeeded in transferring most Jewish-owned businesses in Germany into "Aryan" hands.

The Nuremberg Race Laws formed the cornerstone of Nazi racial policy. Their introduction in September 1935 heralded a new wave of antisemitic legislation that brought about immediate and concrete segregation. German court judges could not cite legal commentaries or opinions written by Jewish authors, Jewish officers were expelled from the army, and Jewish university students were not allowed to sit for doctoral exams.

In 1937 and 1938, German authorities again stepped up legislative persecution of German Jews. They set out to impoverish Jews and remove them from the German economy by requiring them to register their property and preventing them from earning a living. The Nazis forbade Jewish doctors to treat non-Jews and they revoked the licenses of Jewish lawyers. In August 1938, German authorities decreed that by January 1, 1939, Jewish men and women bearing first names of "non-Jewish" origin had to add "Israel" and "Sara," respectively, to their given names. All Jews were obliged to carry identity cards that indicated their Jewish heritage, and, in the autumn of 1938, all Jewish passports were stamped with an identifying letter "J."

Following the *Kristallnacht* pogrom (commonly known as "The Night of Broken Glass") on November 9-10, 1938, Nazi legislation barred Jews from all public schools and universities, as well as from cinemas, theaters, and sports facilities. In many cities, Jews were forbidden to enter

designated "Aryan" zones. The government required Jews to identify themselves in ways that would permanently separate them from the rest of the population. As the Nazi leaders quickened preparations for their European war of conquest, the antisemitic legislation they enacted in Germany and Austria paved the way for more radical persecution of Jews.

The following list shows 29 of the more than 400 legal restrictions imposed upon Jews and other groups during the first six years of the Nazi regime.

1933

March 31
Decree of the Berlin City Commissioner for Health suspends Jewish doctors from the city's social welfare services.

April 7
The Law for the Restoration of the Professional Civil Service removes Jews from government service.

April 7
The Law on the Admission to the Legal Profession forbids the admission of Jews to the bar.

April 25
The Law against Overcrowding in Schools and Universities limits the number of Jewish students in public schools.

July 14
The Denaturalization Law revokes the citizenship of naturalized Jews and "undesirables."

October 4
The Law on Editors bans Jews from editorial posts.

1935

May 21
The Army Law expels Jewish officers from the army.

September 15
The Nuremberg Race Laws exclude German Jews from Reich citizenship and prohibit them from marrying or having sexual relations with persons of "German or German-related blood."

1936

January 11
The Executive Order on the Reich Tax Law forbids Jews to serve as tax consultants.

April 3
The Reich Veterinarians Law expels Jews from the profession.

October 15
The Reich Ministry of Education bans Jewish teachers from public schools.

1937

April 9
The Mayor of Berlin orders public schools not to admit Jewish children until further notice.

1938

January 5
The Law on the Alteration of Family and Personal Names forbids Jews from changing their names.

February 5
The Law on the Profession of Auctioneer excludes Jews from the profession.

March 18
The Gun Law bans Jewish gun merchants.

April 22
The Decree against the Camouflage of Jewish Firms forbids changing the names of Jewish-owned businesses.

April 26
The Order for the Disclosure of Jewish Assets requires Jews to report all property in excess of 5,000 Reichsmarks.

July 11
The Reich Ministry of the Interior bans Jews from health spas.

August 17
The Executive Order on the Law on the Alteration of Family and Personal Names requires Jews bearing first names of "non-Jewish" origin to adopt an additional name: "Israel" for men and "Sara" for women.

October 3
The Decree on the Confiscation of Jewish Property regulates the transfer of assets from Jews to non-Jews in Germany.

October 5
The Reich Ministry of the Interior invalidates all German passports held by Jews. Jews must surrender their old passports, which will become valid only after the letter "J" has been stamped on them.

November 12
The Decree on the Exclusion of Jews from German Economic Life closes all Jewish-owned businesses.

November 15
The Reich Ministry of Education expels all Jewish children from public schools.

November 28
The Reich Ministry of the Interior restricts the freedom of movement of Jews.

November 29
The Reich Ministry of the Interior forbids Jews to keep carrier pigeons.

December 14
The Executive Order on the Law on the Organization of National Work cancels all state contracts held with Jewish-owned firms.

December 21
The Law on Midwives bans all Jews from the profession.

1939

February 21
The Decree concerning the Surrender of Precious Metals and Stones in Jewish Ownership requires Jews to turn in gold, silver, diamonds, and other valuables to the state without compensation.

August 1
The President of the German Lottery forbids the sale of lottery tickets to Jews.

THE HOLOCAUST

THE HOLOCAUST

Restriction: *n*, a limiting condition or measure

One of the first acts of the Nazi party, the one that began the Holocaust, was to start bringing in legislation against the Jews. Slowly, the freedom and rights of the Jews were removed under Nazi rule as the dehumanisation process continued.

Most of the rules the Nazi party introduced, both in Germany and other occupied countries such as Holland and Poland, would not have a large impact alone, but, together, they removed almost all the privileges and freedom of the Jews.

Some major laws that came into play during the Nazi rule are, chronologically:

(http://www.historyplace.com/worldwar2/holocaust/h-bookburn.htm)

July 14, 1933 - Jewish immigrants stripped of their German citizenship.

September 29, 1933 - Jews can no longer own land.

October 4, 1933 - Jews cannot be newspaper editors.

January 24, 1934 - Jews cannot join trade unions.

May 17, 1934 - Jews cannot have health insurance.

July 22, 1934 - Jews can no longer gain qualifications.

(http://www.historyplace.com/worldwar2/holocaust/h-becomes.htm)

May 21, 1935 - Jews cannot serve in the military.

June 26, 1935 - Women with 'hereditary illnesses' can be forced to have an abortion.

September 15, 1935 - Nuremberg Race Laws passed. These stop Jews from marrying anyone 'of German blood'.

January 1936 - Jews are not allowed to teach German children, or become accountants or dentists. They are denied tax reductions and allowances for children.

(http://www.historyplace.com/worldwar2/holocaust/h-eternal.htm)

April 26, 1938 - Jews have to register all belongings with the Nazi Government.

July 6, 1938 - Jews cannot trade anymore.

July 23, 1938 - Jews over 15 years old must own an identity card and have it with them at all times.

July 25, 1938 - Jews cannot practice medicine.

September 27, 1938 - Jews cannot be involved in any jobs to do with law.

October 5, 1938 - Jewish passports to be stamped with letter 'J'.

November 15, 1938 - Jewish children cannot attend school with Germans.

December 3, 1938 - All Jewish businesses to be 'Aryanised' - handed over to Germans without compensation, and all stock to be sold below value.

February 21, 1939 - Jews cannot own gold or silver

April 30, 1939 - Jews cannot be tenants and must live in 'Jewish' homes.

July 4, 1939 - Jews cannot be involved in Government.

September 1, 1939 - Jewish curfew enforced - must be inside by 8:00pm in winter and 9:00pm in summer.

September 23, 1939 - Jews cannot own radios.

(http://www.historyplace.com/worldwar2/holocaust/h-rsha.htm)

October 1939 - Use of euthanasia on sick and disabled legalised.

October 26, 1939 - Jews aged 14 to 60 are forced to workl.

November 23, 1939 - Yellow stars must be worn by Jews over age 10.

Law for the Protection of German Blood and German Honour

Moved by the understanding that purity of German blood is the essential condition for the continued existence of the German people, and inspired by the inflexible determination to ensure the existence of the German nation for all time, the Reichstag has unanimously adopted the following law, which is promulgated herewith:

Article 1

1. Marriages between Jews and citizens of German or related blood are forbidden. Marriages nevertheless concluded are invalid, even if concluded abroad to circumvent this law.
2. Annulment proceedings can be initiated only by the state prosecutor.

Article 2

Extramarital relations between Jews and citizens of German or related blood are forbidden.

Article 3

Jews may not employ in their households female citizens of German or related blood who are under 45 years old.

Article 4

1. Jews are forbidden to fly the Reich or national flag or display Reich colours.
2. They are, on the other hand, permitted to display the Jewish colours. The exercise of this right is protected by the state.

Article 5

1. Any person who violates the prohibition under Article 1 will be punished with prison with hard labour [Zuchthaus].
2. A male who violates the prohibition under Article 2 will be punished with prison [Gefängnis] or prison with hard labour.
3. Any person violating the provisions under Articles 3 or 4 will be punished with prison with hard labour for up to one year and a fine, or with one or the other of these penalties.

Article 6

The Reich Minister of the Interior, in co-ordination with the Deputy of the Führer and the Reich Minister of Justice, will issue the legal and administrative regulations required to implement and complete this law.

Article 7

The law takes effect on the day following promulgation, except for Article 3, which goes into force on 1 January 1936.

Reich Citizenship Law

The Reichstag has unanimously enacted the following law, which is promulgated herewith:

Article 1

1. A subject of the state is a person who enjoys the protection of the German Reich and who in consequence has specific obligations toward it.
2. The status of subject of the state is acquired in accordance with the provisions of the Reich and the Reich Citizenship Law.

Article 2

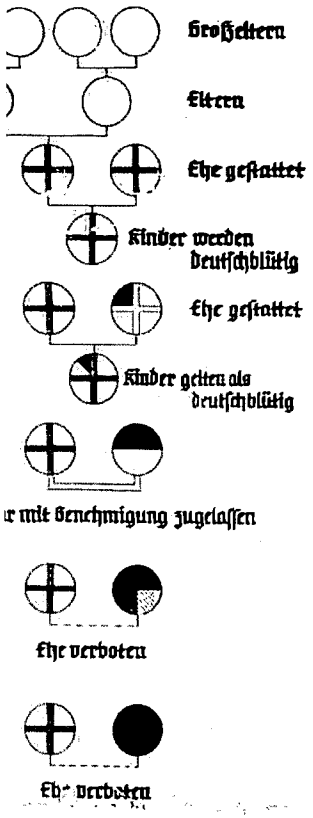
1. A Reich citizen is a subject of the state who is of German or related blood, and proves by his conduct that he is willing and fit to faithfully serve the German people and Reich.
2. Reich citizenship is acquired through the granting of a Reich citizenship certificate.
3. The Reich citizen is the sole bearer of full political rights in accordance with the law.

Article 3

The Reich Minister of the Interior, in co-ordination with the Deputy of the Führer, will issue the legal and administrative orders required to implement and complete this law.

Die Nürnberger Gesetze

eutschblütiger



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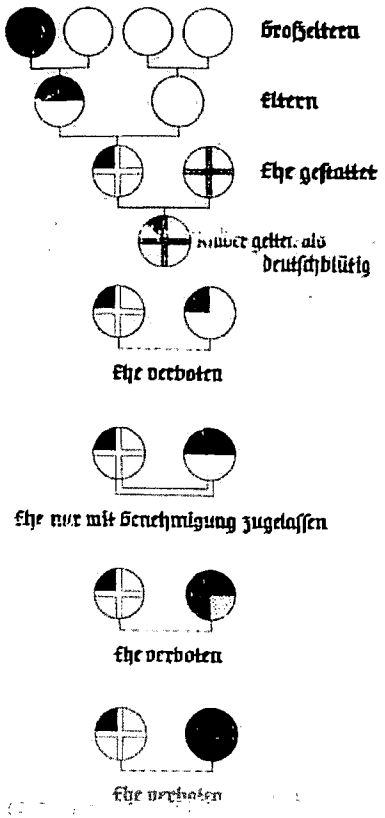

Mischling 1. Grades

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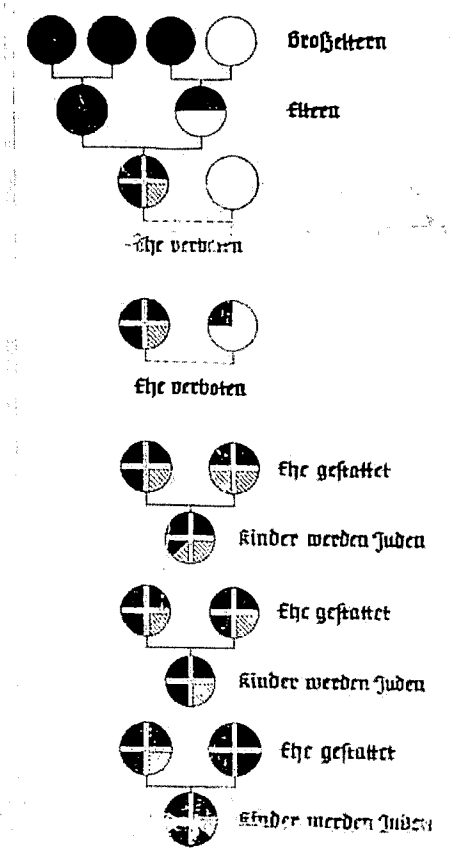

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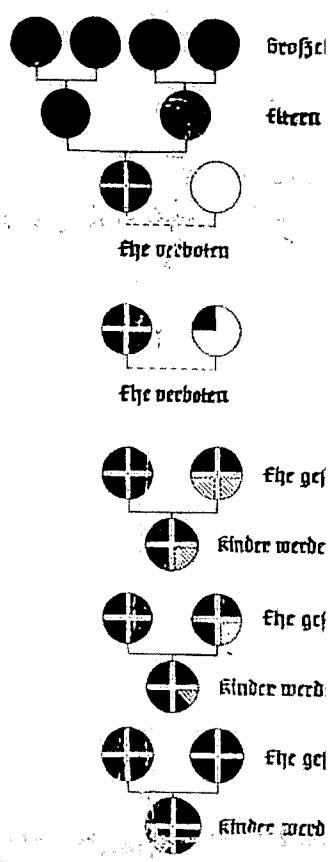

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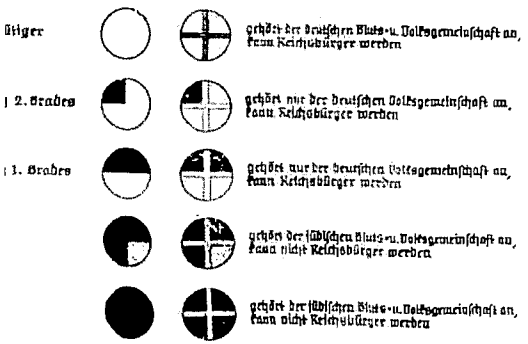
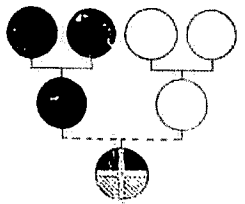
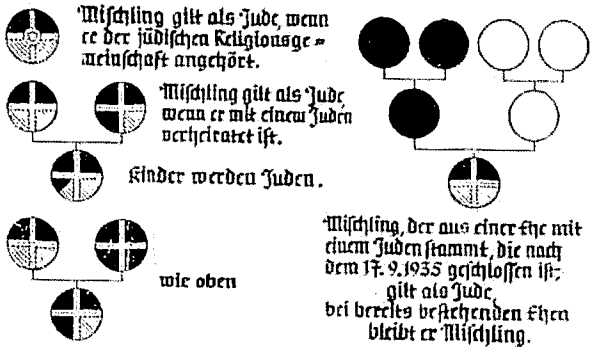




Mischling, der aus verbotenem außerehelichen Verkehr mit einem Juden stammt und der nach dem 31. Juli 1936 außerehelich geboren wird, gilt als Jude.

Sonderfälle bei Mischlingen 1. Grades



Mischling, der aus einer Ehe mit einem Juden stammt, die nach dem 17. 9. 1935 geschlossen ist, gilt als Jude, bei bereits bestehenden Ehen bleibt er Mischling.

Reichsbürgergesetz vom 15. 9. 19.

1. Verordnung vom 14. 11. 1935

Das Reichsbürgerrecht ist in jedem einzelnen Falle von der Verleihung abhä

Gesetz zum Schutze des deutschen Blut und der deutschen Ehre vom 15. 9. 19.

1. Verordnung vom 14. 11. 1935

Bestehende Ehen bleiben unberührt

Reichsgesetzblätter I
Nr. 100 vom 16. 9. 1935
Nr. 125 vom 16. 11. 1935

Smithsonian.com

A 1938 Nazi Law Forced Jews to Register Their Wealth—Making It Easier to Steal

Eighty years ago, the edict marked a turning point in the Nazi party's efforts to push Jews out of the German economy

Undated photo of a Jewish store in Vienna with anti-Semitic slogans daubed on walls and store windows. Austrian authorities took more than 40 years to launch serious efforts at returning Jewish property plundered by the Nazis. (AP Photo/Dokumentationsarchiv des Oesterreichischen Wiederstandes)

By Lorraine Boissoneault
smithsonian.com
April 26, 2018

The new law came mere weeks after the *Anschluss*, Nazi Germany's annexation of Austria. On April 26, 1938, the "Decree for the Reporting of Jewish-Owned Property" issued by Hitler's government took effect, requiring all Jews in both Germany and Austria to register any property or assets valued at more than 5,000 *Reichsmarks* (around $2,000 in American currency of the period, or $34,000 today). From furniture and paintings to life insurance and stocks, nothing was immune from the registry. By July 31 of that year, German finance officials had collected paperwork from some 700,000 Jewish citizens—7 billion *Reichsmarks*-worth of wealth ripe for state-sanctioned theft known as "aryanization."

"Aryanization was essentially a gigantic, trans-European trafficking operation in stolen goods," writes historian Götz Aly in Hitler's Beneficiaries: Plunder, Racial War, and the Nazi Welfare State. As Nazi-occupied territory grew from Austria to Poland to more of Eastern Europe, so, too, did the number of Jewish families the Nazis could steal from. Jews had faced discrimination in Germany—and much of Europe—before the April 1938 edict, but that new law marked a turning point. One legal advisor for the Nazi Ministry of Economics deemed it the "forerunner to a complete and definitive removal of Jews from the German economy."

When Adolf Hitler first came to power in 1933 thanks to the Enabling Act that gave him and his ministers all legislative control, the German economy was still reeling from the Great Depression. Hitler committed his government to two main economic policies: military armament and *Autarky*, or economic self-sufficiency. By promoting the use of German coal and putting taxes towards the military, Hitler steered his country towards a thriving economy. But even as the nation's financial state recovered, he needed more money for the military, and so he created a fictional private enterprise to underwrite promissory notes, writes historian Aly. Somehow that fake money had to be made real so that various government entities, like the military, would actually have the capital to function without bringing down the economy, and that's where Jewish wealth came to play.

Hitler espoused a virulent form of anti-Semitism that offered German citizens an enemy to rally around. He held Jews responsible for Germany's military humiliation in World War I and also encouraged the belief that Jews grew wealthy through theft from Aryans. "The robbery part [of Hitler's decree] is embedded in this ideology that these people are parasites who attach themselves to us, and they live by sucking our blood, and we are entitled to punish them and take it all back," says Peter Hayes, professor emeritus of history and German at Northwestern University and the author of How Was It Possible? A Holocaust Reader.

What's more, Nazi ideology held that Jews were particularly wealthy citizens of Germany, despite the reality that the majority of Jewish families fell somewhere in the middle class, Hayes says. Not only would the 1938 edict return wealth to non-Jewish citizens, whom Nazis considered to be the rightful owners, it would also encourage more Jews to leave the country, another of Hitler's goals at that point. (The decision to pursue the wholesale extermination of Jews, known as the "Final Solution," wouldn't come for several more years, in late 1941.)

Following the April 1938 property registry, Jewish citizens faced an increasing number of economic laws that chipped away at their livelihood. They lost allowances and exemptions for having children, and were forced into the highest tax bracket regardless of their income, writes historian Martin Thurau. From there, many Jewish-owned firms were falsely charged with tax evasion going back to the 1920s, on which they were forced to pay arrears.

For those Jews with the means to leave the country, legally emigrating meant relinquishing 50 percent of one's monetary assets, and then exchanging the rest of the remaining *Reichsmarks* for the currency of whatever country would be the final destination. "By late 1938, they were allowing Jews to keep only 8 percent of what their *Reichsmarks* were worth in the foreign country," Hayes says—which only made it harder to find a safe haven, since the Jewish refugees couldn't take any of their savings with them.

And to make matters more dire, where would they even emigrate to?

"The way I formulate this is, American immigration policy toward Jews was awful, except in comparison to every other nation on the globe," Hayes says. While the U.S. placed ever stricter laws on immigration, limiting the number of Jews who could enter the country, Canada only took around 5,000 Jewish immigrants in total, and Britain only temporarily allowed greater numbers following the November 1938 *Kristallnacht* pogroms before returning to a postwar policy that excluded Jews.

Whether Jewish citizens stayed in Germany and Austria or left, they were doomed to lose much, if not all, their property. Just under half of those assets went directly to the German state. According to Hayes, in the national budget for 1938-1939, an entire 5 percent came solely from wealth confiscated from Jews. The rest of the assets went to non-Jewish citizens, in the form of houses, businesses and goods sold for vastly less than their value.

This left Jewish citizens without means of supporting themselves, without homes, and without any connection to their previous lives. As historian Lisa Silverman writes of the edict's effect in Austria, "The failure of law to protect their property was one of the first steps toward the erasure of both the present and future identities of Austrian Jews."

And ordinary citizens were more than willing to participate in the looting of Jewish property. "When the Nazis wipe out the Jewish inhabitants of a village in eastern Poland [later in the war], one of the first things they would do is distribute all the property to the locals," Hayes says. "This was a way of winning popular support. It created a complicity between the occupiers and the occupied, and a common interest, and the Nazis exploited that."

Business owners benefitted as much as private individuals. Companies like Neckermann, which sold mail-order goods and vacation packages, and Evonik, a manufacturing group formerly known as Degussa, bought businesses formerly owned by Jewish people. The ability to consolidate power made them leaders of their industries, and implicit partners with the Nazi government. Each of these transactions were legal, and many were meticulously recorded.

By the end of the war, around 6 million Jews had been murdered in the Holocaust. For the survivors, the challenges posed by returning to their homes varied from country to country. While France and Germany relied on their records to return property and make some form of reparations for businesses lost and assets seized over the course of decades, other countries proved more reluctant to offer restitution. In Austria, for example, "the government felt no obligation to compensate claimants" because the country considered itself a victim of Nazi Germany, writes Silverman. The Dutch government didn't begin offering compensation for stocks stolen from Jewish citizens in World War II until 2000, after years of calls for investigations into the matter. The record is even worse for Eastern European countries like Poland, Romania and Hungary.

For Hayes, the lesson to be learned from the April 1938 law and all that followed is how deeply the anti-Semitic Nazi ideology penetrated different levels of society in countries across Europe. "It's troubling to watch how they slowly tightened the screws on people, and the ways in which a state can make one's life miserable and make you feel like you are up against this giant machine."

But even more appalling, he says, is they way in which property was valued more highly than lives. "It is remarkable that the killing of people was the easy part of what the Nazis did," Hayes says. "They could do it fast, they could do it cheap, but then they spent ages on the property, keeping records of it, processing it. It's remarkable that people are easier to liquidate than property."

About Lorraine Boissoneault

Lorraine Boissoneault is a contributing writer to *SmithsonianMag.com* covering history and archaeology. She has previously written for *The Atlantic, Salon, Nautilus* and others. She is also the author of Website:

The Decree for the Reporting of Jewish Owned Property (1938)

On April 26th 1938 the Nazis issued the Decree for the Reporting of Jewish Owned Property, requiring all Jews to submit an inventory of property with a value in excess of 5000 *Reichsmarks*:

On the basis of the Decree for the Execution of the Four Year Plan of 18 October 1936 (RGBl I, 887) the following is hereby decreed:

Article 1
1. Every Jew... shall report and evaluate in accordance with the following instructions his entire domestic and foreign property and estate on the day when this decree goes into force. Jews of foreign citizenship shall report and evaluate only their domestic property

2. The duty to report holds likewise for the non-Jewish marital partner of a Jew.

3. Every reporting person's property must be given separately.

Article 2
1. Property in the sense of this law includes the total property of the person required to report, irrespective of whether it is exempt from any form of taxation or not.

2. It does not include movable objects used by the individual or house furnishings as far as the latter are not luxury objects.

Article 3
1. Every part of the property shall be valued according to the usual valuation it has on the effective date of this regulation.

2. No report is necessary when the total worth of the property to be reported does not exceed 5000 marks.

Article 4
The report is to be presented on an official form by June 20th 1938, to the administrative official responsible at the place of residence of the reporting individual. When such a report is not possible by this date the responsible official can extend the period. In such case, however, an estimate is to be presented by June 30th 1938, together with a statement of the grounds of delay.

Article 5
1. The reporting individual must report, after this decree goes into force, to the responsible office, every change of said individual's total property as far as it exceeds a proper standard of living or normal business transactions.

2. The reporting requirement applies also to those Jews who were not required to report on the effective date of this regulation but who have acquired property exceeding 5000 Reichsmarks in value, after this date...

Article 7

The Deputy for the Four Year Plan is empowered to take such necessary measures as may be necessary to guarantee the use of the reported property in accord with the necessities of German economy.

Article 8

1. Whoever wilfully or negligently fails to comply with this reporting requirement, either by omitting it, or making it incorrectly, or not within the time specified, or whoever acts contrary to any instruction... shall be punishable by imprisonment and by a fine or by both of these penalties, in particularly flagrant cases of wilful violation the offender may be condemned to hard labor up to ten years. The offender is punishable notwithstanding that the action was in a foreign country...

Berlin, 26 April 1938
The Deputy for the Four Year Plan
Goering, General Field Marshal
The Reich Minister of the Interior
Wilhelm Frick

The Nuremberg Laws (September 15, 1935)

Geman Führer Adolf Hitler at the Nuremberg Party Congress on September 15, 1935 announced three new laws that were to be cornerstones of German racist policies and the supression of Jews and other non-Aryans. These decrees became known as the Nuremberg Laws. They were decrees which in NAZI Germany had the force of law forbidding contacts between Aryan Germans and Jews, espcecially marriage and srtipping Jewsof German citizenship. The first 1935 decree established the swastika as the official emblem of the German state. The second established special conditions for German citizenship that excluded all Jews. The third titled "The Law for the Protection of German Blood and German Honor" prohibited marrige between German citizens and Jews. Marriages violating this law were voided and extra-marital relations prohibited. Jews were prohibuted from hiring female Germans under 45 years of age. Jews were also prohibuted from flying the national flag. The first three Nuremberg Laws were subsequently supplemented with 13 further decrees, the last issued as late as 1943, as the NAZIs constantly refined the supression of non-Aryans. These laws affected millions of Germans, the exact number depending n precisely how a Jew was defined. That definition was published November 14, 1935. The NAZIs defined a Jew as anyone who either 1) had three or four racially full Jewish grandparents, 2) belonged to a Jewish religious community or joined one after September 15 when the Nuremberg Laws came into force. Also regarded as Jews was anyone married to a Jew or the children

Figure 1.--After the passage of the Nuremberg Laws it was important to classify people. Germans got Bescheinigung with information about their ancestry. To get important jobs you needed proof of Aryan parentage going back centuries. Jews were identified and classified. There were different levels, full Jews and Mixed Mischlinge First and Second class. I do not at this time know the detsails of the classification and regustration process. This Jewish child is being photographed as part of that process. The photograph was taken in Cologne during 1938, perhaps after Kristallnacht.

of Jewish parents. This included illegtimate children of even the non-Jewish partner. There appears to have been no serious public objection to these laws. [Davidson, p. 161.]

Nuremberg 1935 Party Congress: The Rally of Freedom

Geman Führer Adolf Hitler commonly used the annual Nuremberg NAZI Party Rallies (Reichsparteitag) to make important announcements. The Party Rallies are sometimes call conventions or congresses, but this seems a misnomer as the assembled party members did not debate policy, but were there to hear what the leadership told them about Party policy which in 1933 becanme givernment policy. The 1935 Party Congress was particularly important. Hitler had already taken major steps earlier in the year. after making Germany's secret armament program public and reinstituting conscription (a major violation of the Versailles Treaty). The 1935 Party Rally was called the Rally for Freedom (Reichsparteitag der Freiheit). Here 'Freedom' refered to the reintroduced of conscription (compulsory military service) and German 'liberation' from the restrictions of the Treaty of Versailles. Hitler also used the Rally to put the new Wehrmacht on display to the public. He also announced three new laws (September 15). Leni Riefenstahl used the occassion to shot one of her films at the rally, "Tag der Freiheit: Unsere Wehrmacht". Hitler then announced thrre new laws which he decreeded. The first was the Flag Law which replaced the Weimar red, black, and yellow banner with the red flag containing a white circle and black swastica device. Hitler also announced two other new laws that were to be the cornerstones of German racist policies that came to define the Third Reich and layed the legal foundation for the supression of Jews and other non-Aryans . These decrees became known as the Nuremberg Race Laws. Such decrees in NAZI Germany had the force of law.

The Nuremberg Laws

The Laws announced by Hitler stripped Jews of their citizenship. They also prohibited marriage and sexual relations between Germans and Jews. The Nuremberg Laws redefined German

citizenship and established legal program for "the Protection of German Blood and German Honor". Depriving Jews of citizenship at a single stroke, deprived them of a range of civil rights. The Laws prohibitied many basic contacts between Aryan Germans and Jews, espcecially marriage. They stripped Jews of German citizenship and which enabled the NAZIs to use the laws and judicial system to supress the countries Jews. There were three different laws. The subsequent laws and regulations directed at Jews would use the Nuremberg Law as their legal foundation. [Gilbert, pp. 79-80.]

First Decree: Flag Law

The first 1935 decree established the swastika as the official emblem of the German state. This included the official change of the national flsg from the Weimar republican tricolor to the swastical banner. Jews were forbidden to display it. Such displys of citizenship were for "a national of Germany or kindred blood".

Second Decreee: Reich Citizenship Law

The second law, the Reich Citizenship Law, established special conditions for German citizenship that emphazized race. Jews were specifically excluded as being "not of German blood". Jews were thus stripped of their German citzenship. This effectively denied them a range of civil rights, including the right to vote. This essentially formalized unofficial and local measures already taken against Jews, giving them the full force of law and the German state. Hitler made a point of stressing the consistency of this legislation with the Party programme, which demanded that Jews should be deprived of their citizenship rights. The Nuremburhg Laws would serve as the legal basis for expelling the remaining Jewsish children from the public schools.

Third Decree: German Blood and Honor

The third decree titled "The Law for the Protection of German Blood and German Honor" was another major step in formalizing NAZI racial policies. The Law prohibited marrige (Staatsangehörige) between German citizens and Jews. Marriages violating this law were voided and extra-marital relations prohibited. Marriages abroad were not recognized. Stragely, one provision concerned existing marriages, "Proceedings for annulment may be initiated only by the Public Prosecutor." Jews were prohibuted from hiring female Germans under 45 years of age, although implementation of this provision wasdelasyed a few months. . Jews were also prohibuted from flying the national flag, but could display the 'Jewish colors'. Violations of the provisions would result in fines, inprisonment, and/or hard labor.

The Reichstag

Since the Reichstag Fire (March 1933), the German Parliament no longer had a permanent seat. It normally met in the Kroll Opera House (Krolloper). For the 1935 Party Rally it met in Nuremberg (September 15). Hitler anniounced the three new laws which as a result are known as the Nuremberg Laws. Hitler introducing the laws and their alleged motivation before they were actually read and proposed for adoption by Hermann Göring in his position as the President of the Reichstag. Hitler explained, " .... Bitter complaints have come in from countless places citing the provocative behavior of Jews .... a certain amount of [conspiratorial] planning was involved....[To prevent] vigorous defensive action by the [Aryan] people, we have no choice but to contain the problem through legislative measures....it may be possible, through a definitive secular solution, to create a basis on which the German people can have a tolerable relationship with the Jews. ... This law is an attempt to find a legislative solution....if this attempts fails, it will be necessary to transfer [the Jewish problem] ... to the National Socialist Party for a final solution by law (endgültige Lösung)." Of course the term 'final sollution' would be a term used

extensively by NAZIS after the outbreak of World War II. The measures submitted by Hitler were unanimously adopted by the Reichstag. Notably during the 12 years of the Third Reich, the Nazi rule, the Reichstag only passed four laws, the Nuremberg laws were two of them. [We are not entirely sure about the Flag Law.]

Further decrees

The first three Nuremberg Laws were subsequently supplemented with 13 further decrees, the last issued as late as 1943, as the NAZIs constantly refined the supression of non-Aryans. The laws were also the basis for a steady string of regulations which made it more and more difficult for Jews to live in Germany. Laws aimed at Jews began soon after Hitler seized power (1933). One of the first was the Law for the Restoration of the Professional Civil Service which banned "non-Aryans" from the civil-service. There was aroblem though. There was no clear legal method of defining precisely who was Jewish. As a result, a number of Jews were to evade the full force of the new laws. This included people of mixed race as well as Jews who had converted to Christianity. Thus for the NAZIs to target those they wanted to (individuals of Jewish ancestry), laws were needed identifying just who was Jewish. The Nuremberg Laws were an important step, but definitions were needed. These laws affected millions of Germans, the exact number depending precisely how a Jew was defined. That definition was not specified in the Nuremberg laws, but was defined shortly after in a separate decree (November 14, 1935). The NAZIs defined a Jew as anyone who either 1) had three or four racially full Jewish grandparents, 2) belonged to a Jewish religious community or joined one after September 15 when the Nuremberg Laws came into force. Also regarded as Jews was anyone married to a Jew or the children of Jewish parents. This included illegtimate children of even the non-Jewish partner. A wide range of restrictiions followed. Jews eventually had to use separate seats in buses and parks which were painted yellow. Eventually they were excluded from public parks

altogether. Eventually beginning in early 1939 Jews were tottaly prohibited from from owning businesses and eventually both children and adults required to wear a yellow Star of David on their clothing so they could be easily identified (1942).

Impact

The Nuremberg Laws are perhaps most remembered for their racial provisions. For many Jews it was the legal change in their status that had the greatest impact. Jews employed by the Governmebnt and prominent institutions had been dismissed by 1935. The Nuremberg Laws provided the legal basis for the NAZIs to take the next fundamebntal step against the Jews, confiscating their property. After the Nuremberg Laws were promulgated, a steady series of regulations were enacted to make it impossible for Jews to make a living in Germany and to confiscate their business and other assetts which they had acquired through a process of Aryanization.

Public Reaction

Germany

There appears to have been no serious public objection to these laws within Germany. [Davidson, p. 161.] Of course NAZI domination of the new media meant that there was no public debate and discussion.

Sources

Davidson, Eugene. *The Unmaking of Adolf Hitler* (Univesity of Missouri: Columbia, 1996), 519p.
Gilbert, Martin. *A History of the Twentieth Century* Vol. 2 1933-54 (William Morrow and Company, Inc.: New York, 1998), 1050p.

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STEVEN SPIELBERG FILM AND VIDEO ARCHIVE, UNITED STATES HOLOCAUST MEMORIAL MUSEUM

LEGISLATING THE HOLOCAUST: On September 15, 1935, Hermann Göring (center) stood in front of a special session of the Nazi Reichstag attended by Adolf Hitler (bottom right) to decree one of what came to be known as the Nuremberg laws.

The Day Evil Became the Rule of Law

By HARRY REICHER

Seventy years ago this month, Hermann Göring stood up in front of a special Reichstag session in Nuremburg and read out the Law for the Protection of German Blood and Honor. The decree was one of what came to be known as the Nuremberg laws, which peremptorily and ruthlessly wrought fundamental changes to the place of Jews in German society and formed an important step on the way to the Holocaust.

Under the Nazis, law was debased beyond recognition. It became a tool of hatred and viciousness — the very antithesis of everything normally connoted by the notion of law: justice, goodness, fairness, due process, protection of the individual against the *excesses* of government, even morality.

Seven decades after the enactment of the Nuremburg laws, it is sobering to recall that legislation was exploited, side by side with force, to propel the German genocide machine.

The Law for the Protection of German Blood and Honor sought to effect a strict separation between Jews and Aryans by outlawing marriages between them, prohibiting extramarital relations and the employment by Jews of female German subjects who are of childbearing age. At the same time, the Reich Citizenship Law stripped Jews of the right to citizenship and, with it, all the protections and political rights that accompany citizenship in a society — including the right to vote.

The legal schema formed by the Nuremberg laws was completed by the first ordinance to them, of November 14, 1935. The ordinance defined a Jew. The fulcrum around which the legal system revolved was constituted. A Jew was, first and foremost, someone who was descended from at least three grandparents who belonged to the Jewish religious community. Being dealt with in a definitional ordinance of this magnitude delivered a massive psychological blow to the Jewish community, by defining them legally to be separate and inferior. All subsequent legislation dealing with Jews harked back to this definition.

The Nuremberg laws arose directly out of the two limbs to the Nazi racial ideology, so far as Jews were concerned. The primary obsession was with racial purity, and Jews were seen as the worst polluters of Aryan blood. Thus any contact that could lead to such pollution was outlawed. In addition, Jews were regarded as diabolically clever outsiders who insinuate themselves into a society, identify and take over the key levers of control and then steer the society toward Bolshevism. For that reason, their influence in society had to be extirpated, beginning with the fruits of citizenship.

The Nazis went to extraordinary lengths to "legalize" their massive assault on Jews. By legislative means — among others, of course — Nazi Germany discriminated against, ostracized and dehumanized the Jews. In the 12-year period of Nazi rule, something of the order of 2,000 laws was directed solely, specifically and directly at the Jews. The subjects covered by those laws were breathtaking: They ranged from depriving Jews of the right to work and earn a living, expropriating their property and throwing them out of the educational system, to absurd minutiae such as the ban on buying milk from a cow owned by a Jew.

In all this, the Nuremberg laws stood at the apex, as the implamentation of the core of the regime's ideology. The lessons to be learned from the Nazis' ability to legislate evil resonate into the 21st century.

First, law is inherently neutral. Used with wisdom and compassion, it can accomplish the greatest good. But if a legal system falls into the wrong hands, it can become the instrument of the greatest barbarities.

Second, constitutional separation of powers is important. The Nazis were able to legislate with impunity because there was no institution in the governmental framework to scrutinize what they were doing. The führer principle by which all legislative, executive and judicial power was aggregated in a small number of hands — and ultimately in one set of hands, Adolf Hitler's — was the very antithesis of American-style separation of powers, with its built-in system of checks and balances. The strongest guarantee of individual freedoms is ultimately a diffusion of power.

Third, within the separation of powers, the there is a need for an independent judiciary. It is imperative that courts are capable of measuring legislative action against an objective constitutional standard and, if warranted, being prepared to tell the government that it has gone too far.

Fourth, there is the fragility of democracy itself. Hitler was elected lawfully and then proceeded to destroy the very system that brought him to power, using legislation as part of that process. Can the need for vigilance be more urgently underscored?

And lastly, the plans and the threats of despots and would-be despots must be believed, for only then is there a chance that preventative action will be taken. The Nazis made no secret of their plans. From the intention to work within the system in order to come to power so that they could overturn the system itself, to the use of poison gas to kill Jews, it was all there in explicit terms.

If one had been the legal counsel to the Nazi Party when it came to power in 1933, and had been given the task of preparing a legislative program to implement the party's underlying ideology, a review of "Mein Kampf" would have yielded the very sort of legislation that was promulgated in the following years. That is why the Nuremberg laws were, in a sick, perverse way, so logical.

Harry Reicher, a member of the United States Holocaust Memorial Council, teaches law and the Holocaust at the University of Pennsylvania Law School.

13

Appendix G
WASHINGTON CONFERENCE PRINCIPLES ON NAZI-CONFISCATED ART

In developing a consensus on non-binding principles to assist in resolving issues relating to Nazi-confiscated art, the Conference recognizes that among participating nations there are differing legal systems and that countries act within the context of their own laws.

I. Art that had been confiscated by the Nazis and not subsequently restituted should be identified.

II. Relevant records and archives should be open and accessible to researchers, in accordance with the guidelines of the International Council on Archives.

III. Resources and personnel should be made available to facilitate the identification of all art that had been confiscated by the Nazis and not subsequently restituted.

IV. In establishing that a work of art had been confiscated by the Nazis and not subsequently restituted, consideration should be given to unavoidable gaps or ambiguities in the provenance in light of the passage of time and the circumstances of the Holocaust era.

V. Every effort should be made to publicize art that is found to have been confiscated by the Nazis and not subsequently restituted in order to locate its pre-War owners or their heirs.

VI. Efforts should be made to establish a central registry of such information.

VII. Pre-War owners and their heirs should be encouraged to come forward and make known their claims to art that was confiscated by the Nazis and not subsequently restituted.

VIII. 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.

IX. If the pre-War owners of art that is found to have been confiscated by the Nazis, or their heirs, can not be identified, steps should be taken expeditiously to achieve a just and fair solution.

X. Commissions or other bodies established to identify art that was confiscated by the Nazis and to assist in addressing ownership issues should have a balanced membership.

XI. Nations are encouraged to develop national processes to implement these principles, particularly as they relate to alternative dispute resolution mechanisms for resolving ownership issues.

PL 114-308, December 16, 2016, 130 Stat 1524

UNITED STATES PUBLIC LAWS

114th Congress - Second Session

Convening January 06, 2016

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stricken material by ~~Text~~.

PL 114–308 [HR 6130]
December 16, 2016
HOLOCAUST EXPROPRIATED ART RECOVERY ACT OF 2016

An Act To provide the victims of Holocaust-era persecution and their heirs a fair opportunity to recover works of art confiscated or misappropriated by the Nazis.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

<< 22 USCA § 1621 NOTE >>

This Act may be cited as the "Holocaust Expropriated Art Recovery Act of 2016".

<< 22 USCA § 1621 NOTE >>

SEC. 2. FINDINGS.

Congress finds the following:

(1) It is estimated that the Nazis confiscated or otherwise misappropriated hundreds of thousands of works of art and other property throughout Europe as part of their genocidal campaign against the Jewish people and other persecuted groups. This has been described as the "greatest displacement of art in human history".

(2) Following World War II, the United States and its allies attempted to return the stolen artworks to their countries of origin. Despite these efforts, many works of art were never reunited with their owners. Some of the art has since been discovered in the United States.

(3) In 1998, the United States convened a conference with 43 other nations in Washington, DC, known as the Washington Conference, which produced Principles on Nazi-Confiscated Art. One of these principles is that "steps should be taken

expeditiously to achieve a just and fair solution" to claims involving such art that has not been restituted if the owners or their heirs can be identified.

(4) The same year, Congress enacted the Holocaust Victims Redress Act (Public Law 105–158, 112 Stat. 15), which expressed the sense of Congress that "all governments should undertake good faith efforts to facilitate the return of private and public property, such as works of art, to the rightful owners in cases where assets were confiscated from the claimant during the period of Nazi rule and there is reasonable proof that the claimant is the rightful owner.".

(5) In 2009, the United States participated in a Holocaust Era Assets Conference in Prague, Czech Republic, with 45 other nations. At the conclusion of this conference, the participating nations issued the Terezin Declaration, which reaffirmed the 1998 Washington Conference Principles on Nazi-Confiscated Art and urged all participants "to ensure that their legal systems or alternative processes, while taking into account the ***1525** different legal traditions, facilitate just and fair solutions with regard to Nazi-confiscated and looted art, and to make certain that claims to recover such art are resolved expeditiously and based on the facts and merits of the claims and all the relevant documents submitted by all parties.". The Declaration also urged participants to "consider all relevant issues when applying various legal provisions that may impede the restitution of art and cultural property, in order to achieve just and fair solutions, as well as alternative dispute resolution, where appropriate under law.".

(6) Victims of Nazi persecution and their heirs have taken legal action in the United States to recover Nazi-confiscated art. These lawsuits face significant procedural obstacles partly due to State statutes of limitations, which typically bar claims within some limited number of years from either the date of the loss or the date that the claim should have been discovered. In some cases, this means that the claims expired before World War II even ended. (See, e.g., Detroit Institute of Arts v. Ullin, No. 06–10333, 2007 WL 1016996 (E.D. Mich. Mar. 31, 2007).) The unique and horrific circumstances of World War II and the Holocaust make statutes of limitations especially burdensome to the victims and their heirs. Those seeking recovery of Nazi-confiscated art must painstakingly piece together their cases from a fragmentary historical record ravaged by persecution, war, and genocide. This costly process often cannot be done within the time constraints imposed by existing law.

(7) Federal legislation is needed because the only court that has considered the question held that the Constitution prohibits States from making exceptions to their statutes of limitations to accommodate claims involving the recovery of Nazi-confiscated art. In Von Saher v. Norton Simon Museum of Art, 592 F.3d 954 (9th Cir. 2009), the United States Court of Appeals for the Ninth Circuit invalidated a California law that extended the State statute of limitations for claims seeking recovery of Holocaust-era artwork. The Court held that the law was an unconstitutional infringement of the Federal Government's exclusive authority over foreign affairs, which includes the resolution of war-related disputes. In light of this precedent, the enactment of a Federal law is necessary to ensure that claims to Nazi-confiscated art are adjudicated in accordance with United States policy as expressed in the Washington Conference Principles on Nazi-Confiscated Art, the Holocaust Victims Redress Act, and the Terezin Declaration.

(8) While litigation may be used to resolve claims to recover Nazi-confiscated art, it 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 such as mediation panels established for this purpose with the aid of experts in provenance research and history, will yield just and fair resolutions in a more efficient and predictable manner.

<< 22 USCA § 1621 NOTE >>

SEC. 3. PURPOSES.

The purposes of this Act are the following:

(1) To ensure that laws governing claims to Nazi-confiscated art and other property further United States policy as set forth in the Washington Conference Principles on Nazi- ***1526** Confiscated Art, the Holocaust Victims Redress Act, and the Terezin Declaration.

(2) To ensure that claims to artwork and other property stolen or misappropriated by the Nazis are not unfairly barred by statutes of limitations but are resolved in a just and fair manner.

<< 22 USCA § 1621 NOTE >>

SEC. 4. DEFINITIONS.

In this Act:

(1) ACTUAL DISCOVERY.—The term "actual discovery" means knowledge.

(2) ARTWORK OR OTHER PROPERTY.—The term "artwork or other property" means—

(A) pictures, paintings, and drawings;

(B) statuary art and sculpture;

(C) engravings, prints, lithographs, and works of graphic art;

(D) applied art and original artistic assemblages and montages;

(E) books, archives, musical objects and manuscripts (including musical manuscripts and sheets), and sound, photographic, and cinematographic archives and mediums; and

(F) sacred and ceremonial objects and Judaica.

(3) COVERED PERIOD.—The term "covered period" means the period beginning on January 1, 1933, and ending on December 31, 1945.

(4) KNOWLEDGE.—The term "knowledge" means having actual knowledge of a fact or circumstance or sufficient information with regard to a relevant fact or circumstance to amount to actual knowledge thereof.

(5) NAZI PERSECUTION.—The term "Nazi persecution" means any persecution of a specific group of individuals based

on Nazi ideology by the Government of Germany, its allies or agents, members of the Nazi Party, or their agents or associates, during the covered period.

<< 22 USCA § 1621 NOTE >>

SEC. 5. STATUTE OF LIMITATIONS.

(a) IN GENERAL.—Notwithstanding any other provision of Federal or State law or any defense at law relating to the passage of time, and except as otherwise provided in this section, a civil claim or cause of action against a defendant to recover any artwork or other property that was lost during the covered period because of Nazi persecution may be commenced not later than 6 years after the actual discovery by the claimant or the agent of the claimant of—

(1) the identity and location of the artwork or other property; and

(2) a possessory interest of the claimant in the artwork or other property.

(b) POSSIBLE MISIDENTIFICATION.—For purposes of subsection (a)(1), in a case in which the artwork or other property is one of a group of substantially similar multiple artworks or other property, actual discovery of the identity and location of the artwork or other property shall be deemed to occur on the date on which there are facts sufficient to form a substantial basis to believe that the artwork or other property is the artwork or other property that was lost.

***1527**

(c) PREEXISTING CLAIMS.—Except as provided in subsection (e), a civil claim or cause of action described in subsection (a) shall be deemed to have been actually discovered on the date of enactment of this Act if—

(1) before the date of enactment of this Act—

(A) a claimant had knowledge of the elements set forth in subsection (a); and

(B) the civil claim or cause of action was barred by a Federal or State statute of limitations; or

(2)(A) before the date of enactment of this Act, a claimant had knowledge of the elements set forth in subsection (a); and

(B) on the date of enactment of this Act, the civil claim or cause of action was not barred by a Federal or State statute of limitations.

(d) APPLICABILITY.—Subsection (a) shall apply to any civil claim or cause of action that is—

(1) pending in any court on the date of enactment of this Act, including any civil claim or cause of action that is pending on appeal or for which the time to file an appeal has not expired; or

(2) filed during the period beginning on the date of enactment of this Act and ending on December 31, 2026.

(e) EXCEPTION.—Subsection (a) shall not apply to any civil claim or cause of action barred on the day before the date of enactment of this Act by a Federal or State statute of limitations if—

(1) the claimant or a predecessor-in-interest of the claimant had knowledge of the elements set forth in subsection (a) on or after January 1, 1999; and

(2) not less than 6 years have passed from the date such claimant or predecessor-in-interest acquired such knowledge and during which time the civil claim or cause of action was not barred by a Federal or State statute of limitations.

(f) RULE OF CONSTRUCTION.—Nothing in this Act shall be construed to create a civil claim or cause of action under Federal or State law.

(g) SUNSET.—This Act shall cease to have effect on January 1, 2027, except that this Act shall continue to apply to any civil claim or cause of action described in subsection (a) that is pending on January 1, 2027. Any civil claim or cause of action commenced on or after that date to recover artwork or other property described in this Act shall be subject to any applicable Federal or State *1528 statute of limitations or any other Federal or State defense at law relating to the passage of time.

Approved December 16, 2016.
LEGISLATIVE HISTORY—H.R. 6130 (S. 2763):

SENATE REPORTS: No. 114–394 (Comm. on the Judiciary) accompanying S. 2763.
CONGRESSIONAL RECORD, Vol. 162 (2016):

Dec. 7, considered and passed House.

Dec. 9, considered and passed Senate.

End of Document

2015 Federal House Bill 6130 Federal One Hundred Fourteenth Congress - Second Session

FEDERAL BILL TRACKING

TITLE: Holocaust Expropriated Art Recovery Act of 2016

AUTHOR: Primary sponsors:Rep. Goodlatte, Bob R-VA-6; Co-sponsors:Rep. Nadler, Jerrold D-NY-10*,Rep. DeSantis, Ron R-FL-6*,Rep. Maloney, Carolyn B. D-NY-12*,Rep. Lamborn, Doug R-CO-5*,Rep. Boyle, Brendan F. D-PA-13*,Rep. Lance, Leonard R-NJ-7*,Rep. Griffith, H. Morgan R-VA-9*

SUMMARY: Holocaust Expropriated Art Recovery Act of 2016

STATUS:
09/22/2016 INTRODUCED IN HOUSE
09/22/2016 REFERRED TO THE HOUSE COMMITTEE ON THE JUDICIARY.
10/11/2016 (H) REFERRED TO THE SUBCOMMITTEE ON THE CONSTITUTION AND CIVIL JUSTICE.
12/07/2016 MR. GOODLATTE MOVED TO SUSPEND THE RULES AND PASS THE BILL.
12/07/2016 CONSIDERED UNDER SUSPENSION OF THE RULES. (CONSIDERATION: CR H7330-7333)
12/07/2016 DEBATE - THE HOUSE PROCEEDED WITH FORTY MINUTES OF DEBATE ON H.R. 6130.
12/07/2016 ON MOTION TO SUSPEND THE RULES AND PASS THE BILL AGREED TO BY VOICE VOTE. (TEXT: CR H7330-7331)
12/07/2016 MOTION TO RECONSIDER LAID ON THE TABLE AGREED TO WITHOUT OBJECTION.
12/08/2016 RECEIVED IN THE SENATE, READ TWICE.
12/10/2016 PASSED SENATE WITHOUT AMENDMENT BY VOICE VOTE. (CONSIDERATION: CR S7128-7131)
12/12/2016 MESSAGE ON SENATE ACTION SENT TO THE HOUSE.
12/15/2016 PRESENTED TO PRESIDENT.
12/16/2016 SIGNED BY PRESIDENT.
12/16/2016 BECAME PUBLIC LAW NO: 114-308.

End of Document

894 F.3d 406
United States Court of Appeals,
District of Columbia Circuit.

Alan PHILIPP, et al., Appellees,
v.
FEDERAL REPUBLIC OF GERMANY and
Stiftung Preussischer Kulturbesitz, Appellants.

No. 17-7064
|
Consolidated with 17-7117
|
Argued May 2, 2018
|
Decided July 10, 2018

Synopsis

Background: Legal successors of estates of consortium members of three art dealer firms in Germany brought action against Federal Republic of Germany and agency that administered museum where collection of medieval relics and devotional art was exhibited, alleging defendants were in wrongful possession of collection because its sale was coerced as part of Nazi persecution of Jewish sellers. Following denial in part of defendants' motion to dismiss, 2017 WL 1207408, defendants filed interlocutory appeal and moved to certify for immediate appeal the order in its entirety and to stay further proceedings. The United States District Court for the District of Columbia, No. 1:15-cv-00266, Colleen Kollar-Kotelly, J., 253 F.Supp.3d 84, certified action.

Holdings: The Court of Appeals, Tatel, Circuit Judge, held that:

[1] application of expropriation exception to sovereign immunity, under Foreign Sovereign Immunities Act (FSIA), and exercise of subject matter jurisdiction over successors' action was appropriate;

[2] successors were not required to exhaust remedies in German courts, as matter of international comity, before bringing action against Germany and agency; and

[3] successors' state law replevin, conversion, unjust enrichment and bailment claims did not conflict with, and were not preempted by, multinational conference establishing principles which encouraged nations to develop alternative dispute resolution mechanisms for resolving issues, as well as follow-up agreement also urging alternative dispute resolution.

Affirming and remanding.

West Headnotes (5)

[1] International Law
⁘ Extent and effect of immunity

The Foreign Sovereign Immunities Act's expropriation exception requires that: (1) rights in property taken in violation of international law are in issue; and (2) there is an adequate commercial nexus between the United States and the defendant. 28 U.S.C.A. § 1605(a)(3).

1 Cases that cite this headnote

[2] International Law
⁘ Extent and effect of immunity

Allegations that consortium members of three German art dealer firms, the sellers of collection of medieval relics and devotional art, were targeted by Nazi Germany because they were Jewish sellers in possession of property of particular interest to Nazi regime, that taking of property drove them out of ability to make a living and was in furtherance of genocide of Jewish people during Holocaust, and that consortium members were particularly vulnerable to persecution because of their ownership of collection and because of their prominence and success, were sufficient for legal successors of estates of consortium members to state taking by forced sale of property that itself constituted genocide violative of international law, as required for application of expropriation exception to sovereign immunity, under

Foreign Sovereign Immunities Act (FSIA), and exercise of subject matter jurisdiction over successors' action against Federal Republic of Germany and agency that administered museum where collection of medieval relics and devotional art was exhibited, alleging they were in wrongful possession of collection. 28 U.S.C.A. § 1605(a)(3).

1 Cases that cite this headnote

[3] **International Law**

Extent and effect of immunity

The Foreign Sovereign Immunities Act's expropriation exception's requirement that there is an adequate commercial nexus between the United States and the defendant is satisfied only when the property at issue is present in the United States. 28 U.S.C.A. § 1605(a)(3).

Cases that cite this headnote

[4] **International Law**

Extent and effect of immunity

Legal successors of estates of consortium members of three German art dealer firms were not required to exhaust remedies in German courts, as matter of international comity, before bringing action against Federal Republic of Germany and agency that administered museum where collection of medieval relics and devotional art was exhibited, alleging defendants were in wrongful possession of collection because its sale to former State of Prussia was coerced as part of Nazi persecution of Jewish sellers; nothing in text of Foreign Sovereign Immunities Act's (FSIA) expropriation exception required exhaustion before bringing suit. 28 U.S.C.A. § 1605(a)(3).

2 Cases that cite this headnote

[5] **Bailment**

Actions Between Bailor and Bailee

Conversion and Civil Theft

What law governs

Implied and Constructive Contracts

Unjust enrichment

International Law

Property and confiscation thereof in general

Replevin

Nature and scope of remedy

In action brought by legal successors of estates of consortium members of three German art dealer firms against Federal Republic of Germany and agency that administered museum where collection of medieval relics and devotional art was exhibited, alleging defendants were in wrongful possession of collection because their sale to former State of Prussia was coerced as part of Nazi persecution of Jewish sellers, successors' state law replevin, conversion, unjust enrichment and bailment claims did not conflict with, and were not preempted by, multinational conference establishing principles which encouraged nations to develop alternative dispute resolution mechanisms for resolving issues, as well as follow-up agreement also urging alternative dispute resolution; although claims related to collection were already adjudicated through German advisory commission created to hear such claims and commission determined there was not compulsory sale of collection, that determination was non-binding, and neither principles nor agreement required that alternative mechanisms be exclusive or otherwise take an explicit position in favor of or against litigation of claims to Nazi-confiscated art.

Cases that cite this headnote

***408** Appeals from the United States District Court for the District of Columbia (No. 1:15-cv-00266)

Attorneys and Law Firms

Jonathan M. Freiman argued the cause for appellants. With him on the briefs were Benjamin M. Daniels, David R. Roth, and David L. Hall.

Nicholas M. O'Donnell argued the cause and filed the brief for appellees.

Gary A. Orseck, Ariel N. Lavinbuk, Daniel N. Lerman, and D. Hunter Smith were on the brief for amicus curiae David Toren in support of appellees.

Before: Tatel, Griffith, and Wilkins, Circuit Judges.

Opinion

Opinion for the Court filed by Circuit Judge Tatel.

In this case, the heirs of several Jewish art dealers doing business in Frankfurt, Germany in the 1930s seek to recover a valuable art collection allegedly taken by the Nazis. Defendants, the Federal Republic of Germany and the agency that administers the museum where the art is now exhibited, moved to dismiss, claiming immunity from suit under the Foreign Sovereign Immunities Act. They also argued that the heirs failed to exhaust their remedies in German courts and that their state-law causes of action are preempted by United States foreign policy. The district court rejected all three arguments and denied the motion to dismiss. For the reasons set forth below, we largely affirm.

***409 I.**

Because this appeal comes to us from the district court's ruling on a motion to dismiss, "we must accept as true all material allegations of the complaint, drawing all reasonable inferences from those allegations in plaintiffs' favor." *de Csepel v. Republic of Hungary*, 714 F.3d 591, 597 (D.C. Cir. 2013) (internal quotation marks omitted). Viewed through that lens, the complaint relates the following events:

In 1929, three Frankfurt-based firms owned by Jewish art dealers joined together into a "Consortium" and purchased "a unique collection of medieval relics and devotional art" called the Welfenschatz. First Amended Compl. (FAC) ¶ 1, *Philipp v. Federal Republic of Germany*, 248 F.Supp.3d 59 (D.D.C. 2017) (No. 1:15-cv-00266); *see id.* ¶¶ 34–35. The treasure—or "schatz"—acquired its name due to its association with the House of Welf, an ancient European dynasty. *See id.* ¶ 30. Dating primarily from the eleventh to fifteenth centuries, the several dozen pieces that make up the Welfenschatz were housed for generations in Germany's Brunswick Cathedral. *See id.* After displaying the Welfenschatz throughout Europe and the United States and selling a few dozen pieces, the Consortium placed the remainder of the collection, which at that time retained about eighty percent of the full collection's value, into storage in Amsterdam. *Id.* ¶¶ 41, 78.

The heirs allege that "[a]fter the [1933] Nazi-takeover of power in Germany, ... the members of the Consortium faced catastrophic economic hardship," *id.* ¶ 10, and in 1935, following "two years of direct persecution" and "physical peril to themselves and their family members," *id.* ¶ 145, the Consortium sold the Welfenschatz to the Nazi-controlled State of Prussia for 4.25 million Reichsmarks (the German currency at the time), *id.* ¶¶ 145–160, "barely 35% of its actual value," *id.* ¶ 12. "Standing behind all of this was [Hermann] Goering," *id.* ¶ 73, "Prime Minister of Prussia at that time," *id.*, a "notorious racist and anti-Semite," *id.* ¶ 74, and "legendary" art plunderer, *id.* ¶ 75. Goering "seldom if ever" seized outright the art he desired, preferring "the bizarre pretense of 'negotiations' with and 'purchase' from counterparties with little or no ability to push back without risking their property or their lives." *Id.* The Welfenschatz was then shipped from Amsterdam to Berlin, *see id.* ¶ 157, where Goering presented it to Adolf Hitler as a "surprise gift," *id.* ¶ 179 (quoting *Hitler Will Receive $2,500,000 Treasure*, Balt. Sun, Oct. 31, 1935, at 2). All but one of the Consortium members then fled the country. *See id.* ¶¶ 163, 170–171. The remaining member died shortly after, officially of "cardiac insufficiency," *id.* ¶ 163, but "rumors" circulated that he was "dragged to his death through the streets of Frankfurt by a Nazi mob," *id.* ¶ 166.

"After the war, [the Welfenschatz] was seized by U.S. troops," *id.* ¶ 181, and eventually turned over to appellant Stiftung Preussischer Kulturbesitz (SPK), a German agency formed "for the purpose ... of succeeding to all of Prussia's rights in cultural property," *id.* ¶ 184; *see id.* ¶¶ 181–84. The Welfenschatz is now exhibited in an SPK-administered museum in Berlin. *Id.* ¶ 26(iv).

In 2014, appellees, Alan Philipp, Gerald Stiebel, and Jed Leiber, heirs of Consortium members, sought to recover the Welfenschatz, and they and the SPK agreed to submit the claim to a commission that had been created pursuant to the Washington Conference Principles on Nazi–

Confiscated Art, *id.* ¶ 220, an international declaration that "encouraged" nations "to develop ... alternative dispute resolution mechanisms" for Nazi-era art claims, *id.* ¶ 197 (quoting ***410** U.S. Dep't of State, Washington Conference Principles on Nazi-Confiscated Art ¶ 11 (1998) [hereinafter Washington Principles]). Known as the German Advisory Commission for the Return of Cultural Property Seized as a Result of Nazi Persecution, Especially Jewish Property, *id.* ¶ 205, the Advisory Commission concluded "that the sale of the Welfenschatz was not a compulsory sale due to persecution" and it therefore could "not recommend the return of the Welfenschatz to the heirs," Advisory Commission, *Recommendation Concerning the Welfenschatz (Guelph Treasure)* (Mar. 20, 2014), Appellants' Supp. Sources 7; *see also* FAC ¶ 221.

Seeking no further relief in Germany, the heirs filed suit in the United States District Court for the District of Columbia against the Federal Republic of Germany and the SPK (collectively, "Germany"), asserting several common-law causes of action, including replevin, conversion, unjust enrichment, and bailment. *See* FAC ¶¶ 250–304. They sought the return of the Welfenschatz "and/or" 250 million dollars, *id.* Prayer for Relief, a "conservative estimate[ ]" of its value, *id.* ¶ 33. Germany moved to dismiss, arguing that it enjoyed immunity from suit under the Foreign Sovereign Immunities Act (FSIA), that international comity required the court to decline jurisdiction until the heirs exhaust their remedies in German courts, and that United States foreign policy preempted the heirs' state-law causes of action. The district court rejected all three arguments and, aside from a few uncontested issues, denied the motion to dismiss. *Philipp*, 248 F.Supp.3d at 87.

Germany appealed the district court's FSIA determination as of right. *See Owens v. Republic of Sudan*, 531 F.3d 884, 887 (D.C. Cir. 2008) ("[W]hen ... a denial [of a motion to dismiss] subjects a foreign sovereign to jurisdiction, the order is 'subject to interlocutory appeal.' " (quoting *El–Hadad v. United Arab Emirates*, 216 F.3d 29, 31 (D.C. Cir. 2000))). On Germany's motion, the district court certified the other two issues for interlocutory appeal, *Philipp v. Federal Republic of Germany*, 253 F.Supp.3d 84 (D.D.C. 2017), and this court granted Germany's petition to present them now, Per Curiam Order, *In re Federal Republic of Germany*, No. 17-8002 (D.C. Cir. Aug. 1, 2017). Reviewing *de novo*, we address Germany's immunity, comity, and preemption arguments in turn.

II.

[1] Under the FSIA, foreign sovereigns and their agencies enjoy immunity from suit in United States courts unless an expressly specified exception applies. 28 U.S.C. § 1604. The heirs assert jurisdiction under the statute's "expropriation exception," *see id.* § 1605(a)(3), which "has two requirements": that " 'rights in property taken in violation of international law are in issue,' " and that "there is an adequate commercial nexus between the United States and the defendant[ ]," *de Csepel v. Republic of Hungary*, 859 F.3d 1094, 1101 (D.C. Cir. 2017) (quoting 28 U.S.C. § 1605(a)(3)). Germany "bears the burden of proving that [the heirs'] allegations do not bring [the] case within" the exception. *Phoenix Consulting Inc. v. Republic of Angola*, 216 F.3d 36, 40 (D.C. Cir. 2000).

A.

As to the expropriation exception's first requirement, we explained in *Simon v. Republic of Hungary*, 812 F.3d 127 (D.C. Cir. 2016), that although an "intrastate taking"—a foreign sovereign's taking of its own citizens' property —does not violate the international law of takings, *id.* at 144, an intrastate taking can nonetheless subject a foreign sovereign and its instrumentalities to jurisdiction in the United States ***411** where the taking "amounted to the commission of genocide," *id.* at 142. This, we explained, is because "[g]enocide perpetrated by a state," even "against its own nationals[,] ... is a violation of international law." *Id.* at 145. In so holding, we adopted the definition of genocide set forth in the Convention on the Prevention of the Crime of Genocide. *Id.* at 143. "[A]dopted by the United Nations in the immediate aftermath of World War II," *id.*, the Convention defines genocide, in relevant part, as "[d]eliberately inflicting" on "a national, ethnical, racial or religious group ... conditions of life calculated to bring about its physical destruction in whole or in part," Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention), art. 2, Dec. 9, 1948, 78 U.N.T.S. 277.

In *Simon*, "survivors of the Hungarian Holocaust," 812 F.3d at 134, alleged that in 1944–45 Hungary "forced all

Jews into ghettos, ... confiscating Jewish property" in the process, *id.* at 133, and then "transport[ed] Hungarian Jews to death camps, and, at the point of embarkation, confiscate[d] [their remaining] property," *id.* at 134. Assuming the truth of these allegations—like here, the case came to us from a ruling on a motion to dismiss—we held that because the allegations of "systematic, wholesale plunder of Jewish property ... aimed to deprive Hungarian Jews of the resources needed to survive as a people ... describe[d] takings of property that are *themselves* genocide within the legal definition of the term," *id.* at 143–44 (internal quotation marks omitted), they "fit[ ] squarely within the terms of the expropriation exception," *id.* at 146.

A year later, in *de Csepel v. Republic of Hungary*, 859 F.3d 1094 (D.C. Cir. 2017), we considered claims by the heirs of a Jewish collector whose art was seized by the "Hungarian government and its Nazi collaborators," *id.* at 1097. We held, among other things, that plaintiffs could pursue their "bailment" claim for return of the art. *Id.* at 1103. The case, we explained, was "just like *Simon*." *Id.* at 1102. "Here, as there, Hungary seized Jewish property during the Holocaust. Here, as there, plaintiffs bring 'garden-variety common-law' claims to recover for that taking." *Id.*

[2] In today's case, the heirs argue that, after *Simon* and *de Csepel*, "[i]t is beyond serious debate that Nazi Germany took property in violation of international law by systematically targeting its Jewish citizens to make their property vulnerable for seizure." Appellees' Br. 27. The district court agreed, concluding that, "like in *Simon*, the taking of the Welfenschatz as alleged in the complaint bears a sufficient connection to genocide such that the alleged coerced sale may amount to a taking in violation of international law." *Philipp*, 248 F.Supp.3d at 71. Germany disagrees, insisting that "[t]he allegations here have little in common with the *Simon* allegations except that they happened under Nazi rule." Appellants' Br. 35. According to Germany, four differences between this case and *Simon* compel a different result.

First, Germany argues that unlike in *Simon*, where the Nazis confiscated "food, medicine, clothing, [or] housing," here they seized art. *Id.* at 40. Although *de Csepel* also involved a seizure of art, we had no need to decide then whether *Simon* applied because the Hungarian government had conceded that the seizure there was genocidal, see *de Csepel v. Republic of Hungary*, 169 F.Supp.3d 143, 164 (D.D.C. 2016). Thus, we are asked for the first time whether seizures of art may constitute "takings of property that are themselves genocide." *Simon*, 812 F.3d at 144 (emphasis omitted). The answer is yes.

Congress has twice made clear that it considers Nazi art-looting part of the Holocaust. ***412** In enacting the Holocaust Victims Redress Act, which encouraged nations to return Nazi-seized assets, Congress "f[ound]" that "[t]he Nazis' policy of looting art was a critical element and incentive in their campaign of genocide against individuals of Jewish ... heritage." Holocaust Victims Recovery Act, Pub. L. No. 105-158, § 201, 112 Stat. 15, 15 (1998). And in the Holocaust Expropriated Art Recovery Act (HEAR Act), which extended statutes of limitation for Nazi art-looting claims, Congress again "f[ound]" that "the Nazis confiscated or otherwise misappropriated hundreds of thousands of works of art and other property throughout Europe *as part of their genocidal campaign* against the Jewish people and other persecuted groups." Holocaust Expropriated Art Recovery Act of 2016, Pub. L. No. 114-308, § 2, 130 Stat. 1524, 1524 (emphasis added).

In this case, moreover, the Welfenschatz was more than just art. As Germany acknowledges, "the Consortium bought [the Welfenschatz] not for pleasure or display, but as business inventory, to re-sell for profit." Appellants' Br. 12. By seizing businesses' inventory—like the other economic pressures alleged in the complaint, such as the "boycott of Jewish-owned businesses," FAC ¶ 58, and "exclu[sion]" of Jews from certain professions, *id.* ¶ 120—the Nazis "dr[ove] Jews out of their ability to make a living," *id.* ¶ 61, and thereby, in the words of the Genocide Convention, "inflict[ed] ... conditions of life calculated to bring about [a group's] physical destruction in whole or"—at the very least—"in part," Genocide Convention art. 2(c).

Second, Germany argues that whereas *Simon* involved a "forcible deprivation" of property, Appellants' Br. 40, this case involves only a "forced sale ... for millions of Reichsmarks," *id.* at 42. For purposes of this appeal, however, Germany concedes that the forced sale qualifies as a "tak[ing]," *id.* at 28 n.12, and it offers no reason why a taking by forced sale cannot qualify as a genocidal taking. Indeed, the heirs' allegations—allegations that, we repeat,

we must accept as true at this stage of the litigation—support just that conclusion. According to the complaint, Goering "routinely went through the bizarre pretense of 'negotiations' with and 'purchase' from" powerless counterparties. FAC ¶ 75. In addition, the heirs allege, the Nazis made it impossible for Jewish dealers to sell their art on the open market. Jewish art dealers' "means of work" were "effectively end[ed]," and "[m]ajor dealers' collections were liquidated because they could not legally be sold." *Id.* ¶ 120. "Jewish art dealers ... lost" even "their Jewish customers," because, as a result of the crippling economic policies, "there was no money left to buy art." *Id.* ¶ 124. "By spring of 1935," the heirs allege, "the exclusion of Jews from ... German life ... had become nearly total. The means by which German art could be sold by Jewish dealers had effectively been eliminated." *Id.* ¶ 138. It was within that context, the heirs allege, that the Nazis pressured the Consortium to sell the Welfenschatz for well below market value. *Id.* ¶ 139. "The Consortium had," the heirs allege, "only one option." *Id.* ¶ 145. Fearful of losing the entire value of their property, or worse, the Consortium acquiesced. *Id.* ¶ 139.

Third, Germany claims that "conditions for Hungarian Jews in 1944–45"—the period of time at issue in both *Simon* and *de Csepel*—"were far different from conditions for German Jews nearly a decade earlier, in the summer of 1935." Appellants' Br. 40 n.23. The sale of the Welfenschatz, Germany points out, predated "the Nuremberg Laws, ... the Decree on the Elimination of the Jews from Economic Life ... , and ... the mass murder of German Jews." *Id.*

***413** In *Simon*, however, we explained that the "Holocaust proceeded in a series of steps." *Simon*, 812 F.3d at 143. " 'The Nazis ... achieved [the Final Solution] by first isolating [the Jews], then expropriating the Jews' property, then ghettoizing them, then deporting them to the camps, and finally, murdering the Jews and in many instances cremating their bodies.' " *Id.* at 144 (alterations in original) (quoting Complaint ¶ 91, *Simon v. Republic of Hungary*, 37 F.Supp.3d 381 (D.D.C. 2014) (No. 1:10-cv-1770)). Although the events at issue in *Simon* occurred at the later steps of the Holocaust, *i.e.*, ghettoization and deportation, and the events at issue here occurred at the earlier steps, *i.e.*, isolation and expropriation, both are "steps" of the Holocaust, *id.* at 143. And, as the heirs allege, those earlier steps began as early as 1933, more than two years before the Nazis seized the Welfenschatz. Specifically, the heirs allege that the Nazis rose to power in the early 1930s by "blam[ing] Jews for any and all economic setbacks," FAC ¶ 48, and once in power, "encourage[d]" the "boycotts of Jewish businesses [that] spread in March and April 1933, just weeks after Hitler's ascension," *id.* ¶ 58. Moreover, the 1933 "found[ing] [of] the Reich Chamber of Culture," which "assumed total control over cultural trade" and excluded Jews, "effectively end[ed] the means of work for any Jewish art dealer in one stroke." *Id.* ¶ 120. The heirs also allege that outright violence against German Jews began several years before the seizure, including that "[b]y the spring 1933, ... the murder of Jews detained [in the Dachau concentration camp] went unprosecuted." *Id.* ¶ 59.

Moreover, in two statutes dealing with Nazi-era art-looting claims, Congress has expressly found that the Holocaust began in 1933. In the first statute—the very section of the FSIA at issue here—Congress provided jurisdictional immunity for certain art exhibition activities, 28 U.S.C. § 1605(h), but created an exception for art taken during the "Nazi[ ] era," defined as beginning in January 1933, *id.* § 1605(h)(2)(A). In the second, the HEAR Act, Congress again defined January 1933 as the beginning of the Nazi era. HEAR Act § 4 (defining "covered period" as "beginning on January 1, 1933").

The heirs' position finds further support in a timeline on the website of the United States Holocaust Memorial Museum, which Germany itself cites for its observation that the taking of the Welfenschatz predated the Nuremburg Laws. *See* Appellants' Br. 40 n.23. That same timeline demonstrates that, by the time of the taking in 1935, the Nazi government had already opened the Dachau concentration camp, excluded Jews from all civil-service positions, and organized a nationwide boycott of Jewish-owned businesses.

Fourth, emphasizing that the definition of genocide includes an "*intent* to destroy," Genocide Convention art. 2(c) (emphasis added), Germany argues that this case differs from *Simon* because unlike there, where the plaintiffs alleged that the takings were "*aimed* to deprive Hungarian Jews of the resources needed to survive as a people," *Simon*, 812 F.3d at 143, here the heirs allege that the Nazis wanted the Welfenschatz because it was "historically, artistically and national-politically valuable," FAC ¶ 111. Elsewhere in the complaint, however, the heirs make clear that "[the

Nazis] took the collection from [the Consortium] in order to 'Aryanize' [it]." *Id.* ¶ 25(iv). More specifically, the heirs allege that "the collection was wrongfully appropriated not least because [the Consortium members] were regarded as state's enemies for holding the iconic Welfenschatz," *id.* ¶ 25(ii), that "the Gestapo[ ] opened files on the members of the Consortium because of their ownership of the Welfenschatz ***414** and their prominence and success," *id.* ¶ 67, and that "Prussian interest in the Welfenschatz was ... revived ... [once] the Consortium was ... vulnerable," *id.* ¶ 68. In short, the heirs have sufficiently alleged that in seizing the Welfenschatz the Nazis were motivated, at least in part, by a desire "to deprive [German] Jews of the resources needed to survive as a people." *Simon*, 812 F.3d at 143.

Finally, unable to demonstrate that this case falls outside *Simon*'s reach, Germany warns that allowing this suit to go forward will "dramatically enlarge U.S. courts' jurisdiction over foreign countries' domestic affairs" by stripping sovereigns of their immunity for any litigation involving a "transaction from 1933–45 between" a Nazi-allied government and "an individual from a group that suffered Nazi persecution." Appellants' Br. 42–43. But as we have just explained, our conclusion rests not on the simple proposition that this case involves a 1935 transaction between the German government and Jewish art dealers, but instead on the heirs' specific—and unchallenged—allegations that the Nazis *took* the art in *this* case from *these* Jewish collectors as part of their effort to "drive[ ] [Jewish people] out of their ability to make a living." FAC ¶ 61. Because Germany has failed to carry its burden of demonstrating that these allegations do not bring the case within the expropriation exception as defined and applied in *Simon*, the district court properly denied Germany's motion to dismiss.

B.

[3] In *Simon* we held that, with respect to foreign states (but not their instrumentalities), the expropriation exception's second requirement—"an adequate commercial nexus between the United States and the defendant[ ]," *de Csepel*, 859 F.3d at 1101—is satisfied only when the property is present in the United States. *Simon*, 812 F.3d at 146. Because the *Simon* plaintiffs had offered but a "bare, conclusory assertion" to that effect, we dismissed the Republic of Hungary from the action. *Id.* at 148. We faced the same issue in *de Csepel* because the art at issue there was not in the United States. *de Csepel*, 859 F.3d at 1107. Bound by *Simon*, we again dismissed the Republic of Hungary. *Id.*

Relying on *Simon* and *de Csepel*, Germany argues that because the Welfenschatz is in Berlin, not the United States, the Federal Republic of Germany must be dismissed. Although the heirs initially urged us to "reverse course on th[is] question," Appellees' Br. 34, as they acknowledged at oral argument, this panel is bound by *Simon* and *de Csepel*, Oral Arg. 50:14–40. Accordingly, on remand, the district court must grant the motion to dismiss with respect to the Federal Republic of Germany —but not the SPK, an instrumentality for which the commercial-nexus requirement can be satisfied without the presence of the Welfenschatz in the United States. *See de Csepel*, 859 F.3d at 1007 (explaining that "an agency or instrumentality loses its immunity if" the agency or instrumentality owns or operates the property at issue and is engaged in commercial activity in the United States).

III.

In *Simon*, we left open the question whether a court, despite having jurisdiction over an expropriation claim, "nonetheless should decline to exercise [it] as a matter of international comity unless the plaintiffs first exhaust domestic remedies (or demonstrate that they need not do so)." *Simon*, 812 F.3d at 149. In arguing that the answer to that question is yes, Germany does not claim, as it did in the district court, that we should defer to the ***415** Advisory Commission's refusal to recommend the return of the Welfenschatz, *see Philipp*, 248 F.Supp.3d at 81. Instead, Germany argues that the heirs must "exhaust [their] remedies against [Germany] in [its] courts before pressing a claim against it elsewhere." Appellants' Br. 65. " '[B]ypass[ing] [its] courts,' " Germany insists, would "undermine [its] 'dignity [as] a foreign state.' " *Id.* at 68 (quoting *Republic of Philippines v. Pimentel*, 553 U.S. 851, 866, 128 S.Ct. 2180, 171 L.Ed.2d 131 (2008)). The district court rejected this argument, as do we.

The key case is the Supreme Court's decision in *Republic of Argentina v. NML Capital, Ltd.*, —— U.S. ——, 134 S.Ct. 2250, 189 L.Ed.2d 234 (2014), where Argentina claimed immunity from post-judgment discovery as a matter of international comity. The Court rejected that

claim because nothing in the FSIA's plain text provided for such immunity. *Id.* at 2255. As the Court explained, although courts once decided on a case-by-case basis whether to grant foreign states immunity as matter of international comity, "Congress abated the bedlam in 1976, replacing the old executive-driven, factor-intensive, loosely common-law-based immunity regime with the [FSIA]'s 'comprehensive set of legal standards governing claims of immunity in every civil action against a foreign state.' " *Id.* (quoting *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 488, 103 S.Ct. 1962, 76 L.Ed.2d 81 (1983)). "[A]fter the enactment of the FSIA," the Court continued, "the Act—and not the pre-existing common law—indisputably governs the determination of whether a foreign state is entitled to sovereign immunity." *Id.* at 2256 (quoting *Samantar v. Yousuf*, 560 U.S. 305, 313, 130 S.Ct. 2278, 176 L.Ed.2d 1047 (2010)). Going forward, "any sort of immunity defense made by a foreign sovereign in an American court must stand on the Act's text. Or it must fall." *Id.*

Acknowledging that nothing in the text of the FSIA's expropriation exception requires exhaustion, Germany argues that applying *NML Capital* here "confuses immunity from jurisdiction with non-immunity common-law doctrines." Appellants' Reply Br. 38. The FSIA, Germany points out, operates as a pass-through, "granting jurisdiction yet leaving the underlying substantive law unchanged." *Id.* at 39 (quoting *Owens v. Republic of Sudan*, 864 F.3d 751, 763 (D.C. Cir. 2017)). As Germany emphasizes, FSIA section 1606 provides that foreign states not entitled to immunity, "shall be liable in the same manner and to the same extent as a private individual under like circumstances." *Id.* at 38 (quoting 28 U.S.C. § 1606). According to Germany, "exhaustion is a non-jurisdictional common-law doctrine," that, like forum non conveniens, " 'remains fully applicable in FSIA cases.' " *Id.* at 39 (quoting *Price v. Socialist People's Libyan Arab Jamahiriya*, 294 F.3d 82, 100 (D.C. Cir. 2002)).

[4] Germany's effort to circumvent *NML Capital* fails for several reasons. To begin with, although a different provision of the FSIA, its terrorism exception, conditions jurisdiction on the claimant "afford[ing] the foreign state a reasonable opportunity to arbitrate the claim," 28 U.S.C. § 1605A(a)(2)(A)(iii), no such requirement appears in the expropriation exception, and we have long recognized "the standard notion that Congress's inclusion of a provision in one section strengthens the inference that its omission from a closely related section must have been intentional," *Agudas Chasidei Chabad of U.S. v. Russian Federation*, 528 F.3d 934, 948 (D.C. Cir. 2008). Moreover, far from demonstrating that the FSIA leaves room for an exhaustion requirement, the very FSIA provision that Germany relies on, ***416** section 1606, forecloses that possibility. By its terms, that provision permits only defenses, such as forum non conveniens, that are equally available to "private individual[s]," 28 U.S.C. § 1606. Obviously a "private individual" cannot invoke a "*sovereign's* right to resolve disputes against it." Appellants' Br. 68 (emphasis added).

To be sure, the Seventh Circuit, in a case similar to *Simon*, required the plaintiffs—survivors of the Hungarian Holocaust and the heirs of other victims—to "exhaust any available Hungarian remedies or [show] a legally compelling reason for their failure to do so," *Fischer v. Magyar Allamvasutak Zrt.*, 777 F.3d 847, 852 (7th Cir. 2015). In doing so, the court distinguished *NML Capital*, holding that "defendants need not rely on ... the FSIA," but may "invoke the well-established rule that exhaustion of domestic remedies is preferred in international law as a matter of comity." *Id.* at 859. The Seventh Circuit drew that "well-established rule" from a provision of the Third Restatement of Foreign Relations Law of the United States, but as this court has explained, that "provision addresses claims of one state against another," *Agudas Chasidei Chabad of U.S. v. Russian Federation*, 528 F.3d 934, 949 (D.C. Cir. 2008). Confirming that interpretation, the tentative draft of the Fourth Restatement explains that "the rule cited by the [Seventh Circuit] applies by its terms to 'international ... proceedings,' " Restatement (Fourth) of Foreign Relations Law of the United States § 455 Reporters' Note 9 (Am. Law Inst., Tentative Draft No. 2, 2016)—*i.e.*, "nation vs. nation litigation," *Chabad*, 528 F.3d at 949; *see also Agudas Chasidei Chabad of U.S. v. Russian Federation*, 466 F.Supp.2d 6, 21 (D.D.C. 2006) ("[T]his court is not willing to make new law by relying on a misapplied, non-binding international legal concept."). And as we explained above, the FSIA, Congress's "comprehensive" statement of foreign sovereign immunity, which "is, and always has been, a 'matter of grace and comity,' " *NML Capital*, 134 S.Ct. at 2255 (quoting *Verlinden*, 461 U.S. at 486, 103 S.Ct. 1962), leaves no room for a common-law exhaustion doctrine based on the very same considerations of comity.

In so concluding, we have considered the contrary position advanced by the United States in an amicus brief recently filed before a different panel of this court, where it argued that "[t]he fact [that] the FSIA itself does not impose any exhaustion requirement for expropriation claims ... does not foreclose dismissal on international comity grounds." Brief of United States as Amicus Curiae at 14–15, *Simon v. Republic of Hungary*, No. 17-7146 (D.C. Cir. June 1, 2017). This position, of course, is flatly inconsistent with *NML Capital*, a case the government fails to cite, relying instead on non-FSIA cases, *see id.* at 15. Accordingly, nothing in the government's brief alters our conclusion that the heirs have no obligation to exhaust their remedies in Germany.

Germany protests that, as a "staunch U.S. ally," it "deserves the chance to address [the heirs'] attacks" in its own courts. Appellants' Br. 77. As the Court made clear in *NML Capital*, however, such "apprehensions are better directed to that branch of government with authority to amend the [FSIA]." *NML Capital*, 134 S.Ct. at 2258.

IV.

This brings us, finally, to Germany's argument that the heirs' state-law causes of action—replevin, conversion, unjust enrichment, and bailment—conflict with, and thus are preempted by, United States foreign policy. In support, Germany cites the Washington Principles, which "encouraged" ***417** nations "to develop ... alternative dispute-resolution mechanisms for resolving ownership issues," Washington Principles ¶ 11, as well the Terezin Declaration, a follow-up agreement also urging alternative dispute resolution. According to Germany, "letting [the heirs] press [the] same claims" they already presented to the Advisory Commission "again in a U.S. court" may cause signatories to the Washington Principles to "question whether [they] should follow the [ ] Principles," thereby "undermin[ing] the considerable diplomatic effort that the U.S. devoted to them." Appellants' Br. 56–57.

Germany relies principally on two cases, *American Insurance Association v. Garamendi*, 539 U.S. 396, 123 S.Ct. 2374, 156 L.Ed.2d 376 (2003), and *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 120 S.Ct. 2288, 147 L.Ed.2d 352 (2000). In *Garamendi*, the Supreme Court began by reiterating the basic rule that "at some point an exercise of state power that touches on foreign relations must yield to the National Government's policy, given the 'concern for uniformity in this country's dealings with foreign nations' that animated the Constitution's allocation of the foreign relations power to the National Government in the first place." *Garamendi*, 539 U.S. at 413, 123 S.Ct. 2374 (quoting *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 427 n.25, 84 S.Ct. 923, 11 L.Ed.2d 804 (1964)). Applying that rule to the facts of the case before it, the Court found California's attempt to regulate Holocaust-era insurance claims preempted by "the foreign policy of the Executive Branch, as expressed principally in ... executive agreements with Germany, Austria, and France." *Id.* In those executive agreements, the United States had "promised to use its 'best efforts, in a manner it considers appropriate,' to get state and local governments to respect [an internal dispute resolution process] as the exclusive mechanism.' " *Id.* at 406, 84 S.Ct. 923 (quoting Agreement Concerning the Foundation "Remembrance, Responsibility and the Future," Ger.-U.S., July 17, 2000, 39 I.L.M. 1298, 1300). In particular, the United States agreed that in any case involving Holocaust-era insurance claims, it would submit a statement " 'that U.S. policy interests favor dismissal on any valid legal ground.' " *Id.* (quoting Agreement Concerning the Foundation "Remembrance, Responsibility and the Future," 39 I.L.M. at 1304). Acknowledging that the executive agreements contained no preemption clause, the Court nonetheless concluded that the "express federal policy and the clear conflict raised by the [California] statute ... require[d] state law to yield." *Id.* at 425, 84 S.Ct. 923.

Similarly, in *Crosby*, the Court found Massachusetts's regulation of commerce with Burma to be "an obstacle to the accomplishment of Congress's full objectives under [a] federal Act" that imposed some economic sanctions on Burma and gave the President discretion to impose more. 530 U.S. at 373, 120 S.Ct. 2288. The Massachusetts law, the Court explained, by "imposing a different, state system of economic pressure against the Burmese political regime," could "blunt the consequences of discretionary Presidential action," *id.* at 376, 120 S.Ct. 2288.

[5] This case is very different. Although the Washington Principles and Terezin Declaration both "encourage[ ]" nations "to develop ... alternative dispute resolution mechanisms for resolving ownership issues," Washington Principles ¶ 11, neither requires that the alternative

mechanisms be *exclusive* or otherwise "takes an explicit position in favor of or against the litigation of claims to Nazi-confiscated art." Brief of United States as Amicus Curiae at 18, ***418** *Saher v. Norton Simon Museum of Art at Pasadena*, 131 S.Ct. 3055 (2011) (No. 09-1254), 564 U.S. 1037, 131 S.Ct. 3055, 180 L.Ed.2d 885, 2011 WL 2518833, at *18. Unlike in *Garamendi*, where the President promised to seek "dismissal on any valid legal ground," 539 U.S. at 406, 123 S.Ct. 2374 (internal quotation marks omitted), or in *Crosby*, where the state law at issue "blunt[ed]" the force of discretion Congress had explicitly granted the President, 530 U.S. at 376, 120 S.Ct. 2288, here, as the district court explained, there is no "direct conflict between the property-based common law claims raised by Plaintiffs and [United States] foreign policy," *Philipp*, 248 F.Supp.3d at 78.

Indeed, far from adopting, as in *Garamendi*, an "express federal policy," 539 U.S. at 425, 123 S.Ct. 2374, of disfavoring domestic litigation of Nazi-era art-looting claims, the United States has repeatedly made clear that it *favors* such litigation. Congress, as explained above, *see supra* at 411–12, recently extended statutes of limitation for Nazi-era art-looting claims, *see* HEAR Act § 4, and the FSIA exempts them from the jurisdictional immunity otherwise afforded certain art collections temporarily exhibited in the United States, *see* 28 U.S.C. § 1605(h)(1)–(3).

V.

For the foregoing reasons, we affirm the district court's denial of the motion to dismiss, except that on remand, the district court must, as required by *Simon* and *de Csepel*, grant the motion to dismiss with respect to the Federal Republic of Germany.

So ordered.

All Citations

894 F.3d 406

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862 F.3d 951
United States Court of Appeals,
Ninth Circuit.

David CASSIRER; Ava Cassirer; United Jewish Federation of San Diego County, a California non-profit corporation, Plaintiffs-Appellees
v.
THYSSEN-BORNEMISZA COLLECTION FOUNDATION, an agency or instrumentality of the Kingdom of Spain, Defendant-Appellant
David Cassirer; Ava Cassirer; United Jewish Federation of San Diego County, a California non-profit corporation, Plaintiffs-Appellants,
v.
Thyssen-Bornemisza Collection Foundation, an agency or instrumentality of the Kingdom of Spain, Defendant-Appellee.

No. 15-55550
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15-55977
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No. 15-55951
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Argued and Submitted December 5, 2016
Pasadena, California
|
Filed July 10, 2017

Synopsis
Background: Alleged owners of painting brought action against Spanish **art** foundation, seeking to recover painting that Nazis allegedly extorted from their great-grandmother as a condition to issuing her an exit visa out of Germany during World War II. The United States District Court for the Central District of California, No. 2:05-cv-03459-JFW-E, John F. Walter, J., 153 F.Supp.3d 1148, entered summary judgment for foundation. Alleged owners appealed.

Holdings: The Court of Appeals, Bea, Circuit Judge, held that:

[1] owners' cause of action was timely under **Holocaust Expropriated Art Recovery Act** (HEAR);

[2] Spanish law, rather than law of California, governed foundation's claim that it acquired ownership of painting through adverse possession;

[3] foundation's defense of acquisition of prescriptive title through usucaption, under Spanish Civil Code, was not foreclosed by **Holocaust Expropriated Art Recovery Act** (HEAR);

[4] genuine issue of material fact precluded summary judgment on foundation's assertion that it acquired painting through acquisitive prescription, in accordance with Spanish Civil Code;

[5] under German law, original owner's acceptance of settlement agreement relating to painting did not foreclose claims brought against foundation by alleged owners; and

[6] Spain's Historical Heritage Law did not prevent foundation from acquiring prescriptive title to painting.

Reversed and remanded.

West Headnotes (20)

[1] **Federal Civil Procedure**
Discretion of Court

Trial courts have broad discretion to permit or deny discovery.

Cases that cite this headnote

[2] **Federal Courts**
Summary judgment

The Court of Appeals reviews an appeal from summary judgment de novo. Fed. R. Civ. P. 56.

Cases that cite this headnote

[3] **Federal Courts**
What law governs and choice of law in general

The Court of Appeals reviews a district court's choice of law analysis de novo.

Cases that cite this headnote

[4] **Federal Courts**
⚖Questions of Law in General

A district court's interpretation of foreign law is a question of law reviewed de novo by the Court of Appeals.

1 Cases that cite this headnote

[5] **Limitation of Actions**
⚖Injuries to property

Under **Holocaust Expropriated Art Recovery Act** (HEAR), cause of action brought by alleged owners of painting against Spanish **art** foundation, seeking to recover painting that Nazis allegedly extorted from their great-grandmother as a condition to issuing her an exit visa out of Germany during World War II, accrued under discovery rule at time when owners learned from a client that painting was in Spanish museum. **Holocaust Expropriated Art Recovery Act** of 2016 (HEAR), H.R. 6130.

1 Cases that cite this headnote

[6] **Sales**
⚖Extent of title or interest acquired from transferor in general
Sales
⚖Lost, Stolen, or Damaged Goods

Under California law as well as common law, thieves cannot pass good title to anyone, including a good faith purchaser.

Cases that cite this headnote

[7] **Adverse Possession**
⚖What law governs

Under common law choice of law rules, the law of Spain, rather than law of California, governed Spanish **art** foundation's claim that it acquired ownership of painting through adverse possession, as Spain had most significant relationship to painting and parties; although California possessed strong interest in protecting rightful owners of fine **arts** who were dispossessed of their property, fact that Spain would apply its own property laws to adjudicate claim suggested important Spanish interest would be served by applying Spanish law, Spain provided foundation public funds to purchase **art** collection including the painting, the foundation had possessed painting for over 20 years and displayed it in museum, and Spain had dominant interest in determining whether painting was transferred to foundation via acquisitive prescription, because painting was bought in Spain and had remained in Spain. Restatement (Second) of Conflict of Laws §§ 6, 9, 222, 246.

Cases that cite this headnote

[8] **International Law**
⚖Property and confiscation thereof in general

In action brought by alleged owners of painting against Spanish **art** foundation, seeking to recover painting that Nazis allegedly extorted from their great-grandmother as a condition to issuing her an exit visa out of Germany during World War II, the foundation's defense of acquisition of prescriptive title through usucaption, under Spanish Civil Code, was not foreclosed by **Holocaust Expropriated Art Recovery Act** (HEAR); defense based on Spanish Civil Code was defense on merits that foundation acquired title to painting based on Spain's property laws, HEAR did not bar claims based on substantive law that vested title in possessor, but instead addressed when a suit could be commenced, and created statute of

limitations that applied notwithstanding any defense at law relating to passage of time. **Holocaust Expropriated Art Recovery Act** of 2016 (HEAR), H.R. 6130.

1 Cases that cite this headnote

[9] **Federal Courts**
In general; necessity

The Court of Appeals may consider a new argument on appeal which presents a pure issue of law even though it was not raised below.

Cases that cite this headnote

[10] **Federal Civil Procedure**
Particular Cases

Genuine issue of material fact as to whether Spanish **art** foundation knew painting was stolen from its original owner when foundation purchased painting from subsequent owner precluded summary judgment on foundation's assertion, in defense of claim brought by owner's great-grandchildren seeking **recovery** of painting, that it acquired painting through acquisitive prescription, in accordance with Spanish Civil Code.

Cases that cite this headnote

[11] **Federal Courts**
Theory and Grounds of Decision of Lower Court

If a district court's order granting a motion for summary judgment can be sustained on any ground supported by the record that was before the district court at the time of the ruling, the Court of Appeals is obliged to affirm the district court. Fed. R. Civ. P. 56.

4 Cases that cite this headnote

[12] **Sales**
International issues

Under common law choice-of-law rules, Spanish property law governed effect of conveyance of painting from its owner to Spanish **art** foundation; painting was in Spain when foundation and owner entered into acquisition agreement, because foundation had held painting as part of prior loan agreement, and under Spanish Civil Code, Spain would apply its own property laws to decide effect of conveyance. Restatement (Second) of Conflict of Laws §§ 245.

Cases that cite this headnote

[13] **Sales**
Extent of title or interest acquired from transferor in general

Under New York law, a thief cannot pass good title.

Cases that cite this headnote

[14] **Federal Civil Procedure**
Particular Cases

Genuine issue of material fact as to whether subsequent owner of painting was a good faith possessor of the painting under Swiss law precluded summary judgment on owner's assertion, in defense of claim brought by prior owner's great-grandchildren seeking **recovery** of painting, that he had lawful title to painting, under Swiss law, before transferring it to Spanish **art** foundation.

Cases that cite this headnote

[15] **Federal Civil Procedure**
Particular Cases

Assuming California law applied to dispute, genuine issue of material fact as to reasonableness of any delay by alleged owners of painting or their great-grandmother, the painting's original owner, in seeking to recover painting that Nazis allegedly extorted from grandmother as a condition to issuing her an exit visa out of Germany during World War II precluded summary judgment on Spanish **art** foundation's claim that alleged owners' claims of ownership were barred by laches under California law.

Cases that cite this headnote

[16] **Equity**
Prejudice from Delay in General

Under California law, to establish laches, a defendant must prove both an unreasonable delay by the plaintiff and prejudice to itself.

Cases that cite this headnote

[17] **Federal Civil Procedure**
Matters Affecting Right to Judgment

Under California law, because the application of laches depends on a close evaluation of all the particular facts in a case, it is seldom susceptible to resolution by summary judgment. Fed. R. Civ. P. 56.

Cases that cite this headnote

[18] **Compromise and Settlement**
Matters included

Under German law, acceptance of settlement agreement by original owner of painting, that Nazis allegedly extorted from her as a condition to issuing her an exit visa out of Germany during World War II, did not foreclose claims brought against Spanish **art** foundation by owner's great-grandchildren seeking to recover painting; agreement between owner, an **art** appraiser, an heir and German government, which stated it settled all mutual claims among parties, did not constitute waiver of physical restitution by owner, as none of parties had possession of painting or knowledge of its whereabouts, and great-grandchildren still possessed property right at issue.

Cases that cite this headnote

[19] **International Law**
Property and confiscation thereof in general

Spain's Historical Heritage Law, which created comprehensive program for ensuring that cultural artifacts were maintained in Spain for viewing by future generations of Spaniards, did not prevent Spanish **art** foundation from acquiring prescriptive title to painting that Nazis allegedly extorted from its owner as a condition to issuing her an exit visa out of Germany during World War II; Law's provisions were designed to prevent churches and state institutions from losing title to historical heritage property, and was not to be interpreted to prevent foundation, a state institution, from asserting title to painting through acquisitive prescription.

Cases that cite this headnote

[20] **Treaties**
Construction and operation of particular provisions

Spain's laws of adverse possession do not violate Article 1 of Protocol No. 1 of the European Convention on Human Rights, which

guarantees the right to the protection of property.

Cases that cite this headnote

*954 Appeal from the United States District Court for the Central District of California, John F. Walter, District Judge, Presiding, D.C. No. 2:05-cv-03459-JFW-E

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Before: Consuelo M. Callahan, Carlos T. Bea, and Sandra S. Ikuta, Circuit Judges.

OPINION

BEA, Circuit Judge, with whom Judge Callahan concurs. Judge Ikuta concurs except as to Sections III.C.1.iii.b and III.C.1.iv:

In 1939 Germany, as part of the "Aryanization" of the property of German Jews, Lilly Neubauer ("Lilly")[1] was forced to "sell" a painting by Camille Pissarro (the "Painting"), a French Impressionist, to Jackob Scheidwimmer ("Scheidwimmer"), a Berlin **art** dealer. We use quotation marks around "sell" to distinguish the **act** from a true sale because Scheidwimmer had been appointed to appraise the Painting by the Nazi government, had refused to allow Lilly to take the Painting with her out of Germany, and had demanded that she sell it to him for all of $360 in Reichsmarks, which were to be deposited in a blocked account. Lilly justifiably feared that unless she sold the Painting to Scheidwimmer she would not be allowed to leave Germany. The district court found, and the parties agree, that the Painting was forcibly taken from Lilly.

The history of how the Cassirer family came to own the Painting, as well as the application of the Foreign Sovereign Immunity **Act** ("FSIA") which resulted in recognition of our jurisdiction to deal with the claims to the Painting, are detailed in our earlier en banc opinion.[2] What primarily concerns us now is the sale of the Painting by the Baron Hans Heinrich Thyssen-Bornemisza (the "Baron") to the Thyssen-Bornemisza Collection ("TBC") in 1993, its display at TBC's museum in Madrid ever since, and what effect, if any, that possession has had on the claims of title by the parties to this action.

In short, in this third appeal to this Court, we are called upon to decide whether the district court correctly granted summary judgment to TBC based on TBC's claim that it acquired good title to the Painting through the operation of Spain's law of prescriptive acquisition (or "usucaption") as a result of TBC's public, peaceful, and uninterrupted possession in the capacity as owner of the Painting from 1993 until the Cassirers filed a petition

requesting the return of the Painting in 2001. Second, although not ruled upon by the district court, we consider whether the Baron's purchase of the Painting, and his possession of it for years, vested him with good title under Swiss law—title he could validly pass to TBC in the 1993 sale. Third, we consider TBC's arguments that the Cassirers' claims are barred by laches or ***956** by Lilly's acceptance of a post-war settlement agreement with the German government. Finally, we consider the Cassirers' arguments that Spain's Historical Heritage Law and the European Convention on Human Rights prevent TBC from acquiring prescriptive title. Ultimately, we reverse the order which granted summary judgment and remand for further proceedings.

I. FACTS AND PROCEDURAL HISTORY[3]

A. The 1958 Settlement Agreement

After the Nazis forced Lilly to sell the Painting to Scheidwimmer in 1939, Scheidwimmer then forced another Jewish collector, Julius Sulzbacher ("Sulzbacher"), to exchange three German paintings for the Painting. Sulzbacher was also seeking to escape Nazi Germany. After the Sulzbacher family fled Germany, the Gestapo confiscated the Painting.

After the war, the Allies established a process for restoring property to the victims of Nazi looting. Military Law No. 59 ("MGL No. 59") authorized victims to seek restitution of looted property. In 1948, Lilly filed a timely claim against Scheidwimmer under MGL No. 59 for restitution of, or compensation for, the Painting. Sulzbacher also filed claims under MGL No. 59 seeking restitution of, or compensation for, the Painting and the three German paintings. In 1954, the United States Court of Restitution Appeals ("CORA") published a decision confirming that Lilly owned the Painting.

Although they knew Lilly was the owner of the Painting, Lilly, Sulzbacher, and Scheidwimmer believed the Painting was lost or destroyed during the war. In 1957, after the German Federal Republic regained its sovereignty, Germany established a law governing claims relating to Nazi-looted property known as the Brüg. Lilly then dropped her restitution claim against Scheidwimmer and initiated a claim against Germany for compensation for the wrongful taking of the Painting. Grete Kahn, Sulzbacher's heir, was also a party in this action.

The parties to the action against Germany were unaware of the location of the Painting and only two of the German paintings originally owned by Sulzbacher were still available for return. In 1958, the parties reached a settlement agreement (the "1958 Settlement Agreement"). This agreement provided that: (1) Germany would pay Lilly 120,000 Deutschmarks (the Painting's agreed value as of April 1, 1956); (2) Grete Kahn would receive 14,000 Deutschmarks from the payment to Lilly; and (3) Scheidwimmer would receive two of Sulzbacher's three German paintings.

B. The Painting's Post-War History

After the Nazis confiscated the Painting from Sulzbacher, it allegedly was sold at a Nazi government auction in Dusseldorf. In 1943, the Painting was sold by an unknown consignor at the Lange Auction in Berlin to an unknown purchaser for 95,000 Reichsmarks. In 1951, the Frank Perls Gallery of Beverly Hills arranged to move the Painting out of Germany and into California to sell the Painting to collector Sidney Brody for $14,850. In 1952, Sydney Schoenberg, a St. Louis art collector, purchased the Painting for $16,500. In 1976, the Baron purchased the Painting through the Stephen Hahn Gallery in New York for $275,000. The Baron kept the Painting in Switzerland as part of his collection until ***957** 1992, except when it was on public display in exhibitions outside Switzerland.

C. TBC's Purchase of the Painting

In 1988, Favorita Trustees Limited, an entity of the Baron, and Spain reached an agreement that the Baron would loan his art collection (the "Collection"), including the Painting, to Spain. Pursuant to this agreement, Spain created TBC[4] to maintain, conserve, publicly exhibit, and promote the Collection's artwork. TBC's initial board of directors had five members acting on behalf of the Spanish government and five members acting on behalf of the Baron and his family. Spain agreed to display the Collection at the Villahermosa Palace in Madrid, Spain, and to restore and redesign the palace as a museum (the "Museum"). After the Villahermosa Palace had been restored and redesigned as the Museum, in 1992, pursuant to the loan agreement, the Museum received a number of paintings from Favorita Trustees Limited, including the Painting, and the Museum opened to the public. In 1993, the Spanish government passed Real Decreto-Ley 11/1993, which authorized and funded the purchase of the

Collection. Spain bought the Collection by entering into an acquisition agreement with Favorita Trustees Limited. The Real Decreto-Ley 11/1993 classified the Collection as part of the Spanish Historical Heritage, which made the property subject to the provisions of the Spanish Historical Heritage Law. TBC paid the Baron $350 million for the Collection. The estimated value of the Collection at that time was somewhere between $1 billion and $2 billion.

In 1989, after the 1988 loan agreement, Spain and TBC investigated title to the works in the Collection. In 1993, Spain and TBC did a second title investigation in connection with the purchase agreement.

D. Procedural History

In 2000, Claude Cassirer, a photographer, learned from a client that the Painting was in the Museum. TBC does not dispute that Mr. Cassirer had "actual knowledge" of the Painting's location by 2000. On May 3, 2001, the Cassirer family filed a petition in Spain seeking the return of the Painting. After that petition was denied, in 2005, Claude Cassirer filed this action in the United States District Court for the Central District of California seeking the return of the Painting.[5]

As noted above, this case has been before this Court in two prior appeals. After the second remand to the district court, TBC filed a motion for summary adjudication. TBC moved for summary adjudication of the following issues:

> (1) Plaintiffs' predecessor-in-interest, Lilly, waived her rights to the Pissarro Painting in the 1958 Settlement Agreement; (2) the Court lacks jurisdiction because any "taking in violation of international law" has already been remedied by Germany; and (3) the tenets of U.S. policy on Nazi-looted **art** require honoring the finality of the 1958 Settlement Agreement.

In a written order, the district court denied TBC's motion on the grounds that Lilly did not waive her right to physical restitution by accepting the Settlement Agreement, which also meant that the court retained jurisdiction under the FSIA ***958** and the Cassirers' claims do not conflict with federal policy. TBC filed an interlocutory appeal of that portion of the order which denied TBC's claim of sovereign immunity, as to which the district court denied TBC a certificate of appealability on the grounds that TBC's attempted interlocutory appeal was frivolous and/or waived because of this Court's decision in 2010, which determined that the district court could properly exercise jurisdiction pursuant to the FSIA. The district court thereby retained jurisdiction of the case pursuant to *Chuman v. Wright*, 960 F.2d 104, 105 (9th Cir. 1992). TBC now cross-appeals the district court's order denying its motion for summary adjudication based on the 1958 Settlement Agreement.

After its summary adjudication motion was denied, TBC moved for summary judgment on the grounds that it had obtained ownership of the Painting pursuant to Spain's law of acquisitive prescription as stated in Spain Civil Code Article 1955 ("Article 1955"). The Cassirers filed a motion for summary adjudication asking the court to hold that California law, not Spanish law, governs the merits of the case. The district court granted summary judgment in favor of TBC and denied the Cassirers' motion for summary adjudication. The district court concluded that Spanish law governed TBC's claim that it owned the Painting pursuant to acquisitive prescription and that TBC owned the Painting because TBC had fulfilled the requirements of Article 1955. Before the district court, the Cassirers argued that their claims were timely pursuant to California Code of Civil Procedure § 338(c)(3)(A) ("§ 338(c)(3)(A)"), California's special statute of limitations for actions "for the specific **recovery** of a work of fine **art** brought against a museum ... in the case of an unlawful taking or theft[.]" California enacted § 338(c)(3)(A) in 2010, five years after the Cassirers filed suit, but § 338(c)(3)(A) states that it applies to cases that are pending, *see* Cal. Civ. Proc. Code § 338(c)(3)(B). The district court held that, since TBC had acquired ownership of the Painting under Spanish law prior to the California legislature's enactment of § 338(c)(3)(A), retroactive application of that special statute of limitations would violate TBC's due process rights.

The district court entered judgment in favor of TBC. The Cassirers timely appealed.

[10]TBC cross-appealed the summary judgment order to the extent that it did not address two arguments advanced in TBC's motion for summary judgment. First, that the Baron had acquired ownership of the Painting under Swiss law through prescriptive acquisition and had subsequently conveyed good title to TBC. Second, that the Cassirers' claims are barred by the equitable defense of laches. TBC also cross-appealed "any interlocutory decisions or orders adverse to [TBC]" and the motions filed by TBC that were denied as moot by the district court following the district court's entry of judgment.[6]

***959** This Court consolidated the parties' appeals. In summary, the following appeals on the merits are before this Court: (1) the Cassirers' appeal of the order which

granted summary judgment in favor of TBC on the grounds that under applicable Spanish law, TBC acquired title to the Painting by prescriptive acquisition (usucaption), (2) TBC's appeal of the order which denied TBC's motion for summary adjudication, based on the assertion that Lilly waived her ownership rights to the Painting pursuant to the 1958 Settlement Agreement and that the district court lacked jurisdiction under the FSIA, (3) TBC's cross-appeal of the summary judgment order in its favor, for failure to consider and rule upon its claim under Swiss law and its defense of laches.

II. JURISDICTION AND STANDARD OF REVIEW

The FSIA, 28 U.S.C. § 1330(a), gave the district court jurisdiction. 28 U.S.C. § 1291 gives this Court jurisdiction over this appeal.

[2] [3] [4]This Court reviews an appeal from summary judgment de novo. *Jones v. Union Pac. R.R. Co.*, 968 F.2d 937, 940 (9th Cir. 1992). This Court reviews a district court's choice of law analysis de novo. *Abogados v. AT&T, Inc.*, 223 F.3d 932, 934 (9th Cir. 2000). A district court's interpretation of foreign law is a question of law that this Court reviews de novo. *Brady v. Brown*, 51 F.3d 810, 816 (9th Cir. 1995). "In determining foreign law, the court may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence." Fed. R. Civ. P. 44.1.

III. ANALYSIS

A. The Cassirers' claims are timely within the statute of limitations recently enacted by Congress to govern claims involving art expropriated during the Holocaust.

Before the district court, the parties and the district court agreed that California, as the forum, supplied the statute of limitations for the Cassirers' claims. California Code of Civil Procedure § 338(c)(3)(A) requires that "an action for the specific **recovery** of a work of fine **art**" brought against a museum in the case of an "unlawful taking" be commenced within "six years of the actual discovery by the claimant" of the "identity and whereabouts of the work of fine **art**" and "[i]nformation or facts that [were] sufficient to indicate that the claimant ha[d] a claim for a possessory interest in the work of fine **art** that was unlawfully taken or stolen." Cal. Civ. Proc. Code § 338(c)(3)(A)(i)–(ii). The primary issue below was whether retroactive application of § 338(c)(3)(A), which was passed in 2010, five years after the Cassirers filed suit, would violate TBC's due process rights. The district court held that, since TBC "acquired ownership of the Painting under Spanish law prior to [the] California Legislature's retroactive extension of the statute of limitations" and the Cassirers' claims were time barred before the legislature passed § 338(c)(3)(A), retroactive application of § 338(c)(3)(A) would violate TBC's due process rights. On appeal, TBC contends that retroactive application of § 338(c)(3)(A) would violate its due process rights.

[5]However, while these appeals were pending before us, Congress passed, and ***960** the President signed, the **Holocaust Expropriated Art Recovery Act** of 2016 ("HEAR"), H.R. 6130. For the reasons stated below, we conclude that HEAR supplies the statute of limitations to be applied in this case in federal court and that the Cassirers' claims are timely under this law.

HEAR states:

> Notwithstanding any other provision of Federal or State law or any defense at law relating to the passage of time, and except as otherwise provided in this section, a civil claim or cause of action against a defendant to recover any artwork or other property that was lost during the covered period because of Nazi persecution may be commenced not later than 6 years after the actual discovery by the claimant or the agent of the claimant of—(1) the identity and location of the artwork or other property; and (2) a possessory interest of the claimant in the artwork or other property.

Id. § 5(a). Thus, HEAR creates a six-year statute of limitations period that commences on the date of actual

discovery of the artwork's location by the claimant. *Id.* § 5(a). Lilly suffered the taking of the Painting in 1939, which is during the "covered period" of HEAR (January 1, 1933, and ending on December 31, 1945). *See id.* § 4(3). The six-year statute of limitations applies to any claims that are pending on the date of HEAR's enactment, which was December 16, 2016, including claims on appeal such as the Cassirers'. *See id.* § 5(d)(1) ("Subsection (a) shall apply to any civil claim or cause of action that is ... pending in any court on the date of enactment of this **Act**, including any civil claim or cause of action that is pending on appeal....").

Viewing the facts in the light most favorable to the Cassirers, as we must on an appeal from an order which granted summary judgment, *Am. Int'l Grp., Inc. v. Am. Int'l Bank*, 926 F.2d 829, 831 (9th Cir. 1991), the Cassirers acquired actual knowledge of the Painting's location in 2000 when Claude Cassirer learned from a client that the Painting was in the Museum.[7] After the Cassirer family's 2001 petition in Spain was denied, the family filed this action on May 10, 2005. Since the lawsuit appears to have been filed within six years of actual discovery, the Cassirers' claims are timely under the statute of limitations created by HEAR.

B. This Court applies the Second Restatement of the Conflict of Laws to determine which state's substantive law applies in deciding the merits of this case. The Second Restatement directs this Court to apply Spain's substantive law.

[6]Although Congress has directed federal courts to apply HEAR's six-year statute of limitations for claims involving **art expropriated** during the **Holocaust**, HEAR does not specify which state's substantive law will govern the merits of such claims. Under California law, thieves cannot pass good title to anyone, including a good faith purchaser. *Crocker Nat'l Bank v. Byrne & McDonnell*, 178 Cal. 329, 332, 173 P. 752 (1918). This is also the general rule at common law. *See Kingdom of Spain*, 616 F.3d at 1030, n.14 (quoting Marilyn E. Phelan, *Scope of Due Diligence Investigation in Obtaining Title to Valuable Artwork*, 23 Seattle U. L. Rev. 631, 633–34 (2000)) ("One who purchases, no matter how innocently, from a thief, or all ***961** subsequent purchasers from a thief, acquires no title in the property. Title always remains with the true owner."). This notion traces its lineage to Roman law (*nemo dat quod non habet*, meaning "no one gives what he does not have").[8]

But the application of our choice of law jurisprudence requires that we not apply such familiar rules, under the circumstances of this case. As we shall see, Spain's property laws will determine whether the Painting has passed to TBC via acquisitive prescription.

This Court has held that, when jurisdiction is based on the FSIA, "federal common law applies to the choice of law rule determination. Federal common law follows the approach of the Restatement (Second) of Conflict of Laws." *Schoenberg v. Exportadora de Sal, S.A. de C.V.*, 930 F.2d 777, 782 (9th Cir. 1991) (citations omitted). The district court recognized this precedent, but believed that language from this Court's decision in *Sachs v. Republic of Austria*, 737 F.3d 584, 600 n.14 (9th Cir. 2013) (en banc), *rev'd on other grounds by OBB Personenverkehr AG v. Sachs*, —— U.S. ——, 136 S.Ct. 390, 193 L.Ed.2d 269 (2015), called *Schoenberg*'s holding into question.

Sachs does not clearly overrule the *Schoenberg* precedent. In *Sachs*, the plaintiff had been injured trying to board a train in Austria operated by a railroad ("OBB") that was owned by the Austrian government. *Id.* at 587. The district court granted OBB's motion to dismiss on the grounds of a lack of subject-matter jurisdiction, holding that OBB was immune from suit under the FSIA. *Id.* Sitting en banc, this Court reversed and held that it had subject matter jurisdiction pursuant to the commercial-activity exception to sovereign immunity in the FSIA. *Id.* at 603. In footnote 14 of the *Sachs* opinion, this Court held that California law governed the plaintiff's negligence claim. *Id.* at 600 n.14. This Court assumed that California law applied because the railroad ticket was purchased in California and Sachs' action was brought in California. *Id.* ("[W]e think it is a permissible view of Supreme Court precedent to look to California law to determine the elements of Sachs's claims [ ]" without engaging in a formal choice of law analysis.). However, this Court then cited *Schoenberg* and took into consideration the Second Restatement choice of law test. *See id.* ("Even if we should make a separate conflicts analysis under the Restatement, that conflicts analysis supports the same conclusion that California law applies to Sachs's claims."). Since *Sachs* did not expressly overrule *Schoenberg* and the Supreme Court has not overruled or effectively overruled *Schoenberg*, we must apply *Schoenberg* to determine which state's substantive law applies. *See Miller v. Gammie*, 335 F.3d 889, 896–900 (9th Cir. 2003). And, as noted above, *Schoenberg* instructs us to apply the Second Restatement. To the extent *Sachs* calls into doubt the need to apply the Second Restatement in certain FSIA cases, *Sachs* is distinguishable because in *Sachs* the plaintiff purchased her railroad ticket in California, *Sachs*, 737 F.3d at 587, while in this case TBC purchased the Painting in Spain

and claims to have acquired ***962** prescriptive title by possessing the Painting in Spain. Therefore, we apply *Schoenberg* and the Second Restatement.[9]

The Second Restatement includes jurisdiction-selecting rules and a multi-factor inquiry in Section 6, which provides choice of law factors that a court should apply in the absence of a statutory directive to decide the applicable rule of law. In addition to considering any specific jurisdiction-selecting rule, a court is supposed to apply the Section 6 factors to decide which state has *the most significant relationship* to the case.[10] These factors are:

> (a) the needs of the interstate and international systems, (b) the relevant policies of the forum, (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue, (d) the protection of justified expectations, (e) the basic policies underlying the particular field of law, (f) certainty, predictability and uniformity of result, and (g) ease in the determination and application of the law to be applied.

Second Restatement § 6(2). These factors are not listed in order of importance. Second Restatement § 6, cmt. C. Instead, "varying weight will be given to a particular factor, or to a group of factors, in different areas of choice of law." *Id.*

Chapter 9 of the Second Restatement is focused on the choice of law considerations most relevant to property cases. Section 222 sets forth how the general choice of law principles stated in § 6 are applicable to real and personal property:

> The interest of the parties in a thing are determined, depending upon the circumstances, either by the "law" or by the "local law" of the state which, with respect to the particular issue, has the most significant relationship to the thing and the parties under the principles stated in § 6.

Second Restatement § 222. This general principle is "applicable to all things, to all interests in things and to all issues involving things. Topic 2 (§§ 223–243) deals with interests in immovables and Topic 3 (§§ 244–266) with interests in movables." Second Restatement § 222, cmt. a. Section 222 thus clarifies the subject of the § 6 "most significant relationship" inquiry: A court should consider which state "has the most significant relationship *to the thing and the parties* under the principles in § 6."[11] Second Restatement § 222 (emphasis added). Moreover, the commentary to § 222 notes the following about this "most significant relationship" inquiry:

> In judging a given state's interest in the application of one of its local law rules, the forum should concern itself with the question whether the courts of that state would have applied this rule in the decision of the case. The fact that these courts would have applied this rule may indicate that an important interest of ***963** that state would be served if the rule were applied by the forum.

Second Restatement § 222, cmt. e. In addition, the commentary to § 222 clarifies that "[i]n contrast to torts, protection of the justified expectations of the parties is of considerable importance in the field of property." Second Restatement § 222, cmt. b (citation omitted).

The Second Restatement also has a specialized rule for a claim of acquisition by adverse possession or prescription of an interest in chattel. Second Restatement § 246 states, "Whether there has been a transfer of an interest in a chattel by adverse possession or by prescription and the nature of the interest transferred are determined by the local law of the state where the chattel was at the time the transfer is claimed to have taken place." The Second Restatement provides the following rationale for this rule:

> The state where a chattel is situated has *the dominant interest* in determining the circumstances under which an interest in the chattel will be transferred by adverse possession or by prescription. The local law of this state is applied to determine

> whether there has been such a transfer and the nature of the interest transferred.

Second Restatement, § 246, cmt. a (emphasis added).

[7]After considering these sections of the Second Restatement and the relevant interests at stake, we conclude that this Court ought to apply Spanish law to decide whether TBC has title to the Painting. Although some of the § 6 factors suggest California law should apply, on balance, these factors indicate Spanish law should apply because Spain is the "state which, with respect to the particular issue, has the most significant relationship to the thing and the parties under the principles stated in § 6." Second Restatement § 222. We note at the outset that the courts of Spain would apply their own property laws to adjudicate TBC's claim that it owns the Painting because Spain uses a law of the situs rule for movable property. *See* Civil Code Article 10.1, Ministerio de Justicia, *Spain Civil Code* 4 (2009) (English translation). As the commentary to § 222 notes, the fact that Spain would apply its own law suggests that an important interest of Spain may be served by applying Spanish law.

Also, as the district court recognized, the situs rule furthers the needs of the international system by encouraging certainty, predictability, and uniformity of result. Considering the relevant policies of "interested states," Spain's interest in having its substantive law applied is significant. In a highly publicized sale, Spain provided TBC public funds to purchase the Collection, including the Painting. TBC, an instrumentality of Spain, has possessed the Painting for over twenty years and displayed it in the Museum. In terms of protecting justified expectations, the 1993 Acquisition Agreement between TBC and the Baron states that English law governs the purchase of the Collection. But, the legal opinion provided by TBC's counsel stated that, under English law, Spanish law would govern the effect of the transfer. The Cassirers do not dispute this reading of English law.

Cutting in favor of the choice of California law is the fact that the forum, California, has a strong interest in protecting the rightful owners of fine **arts** who are dispossessed of their property. In fact, as noted in Part III.A, California has created a specific statute of limitations for cases involving an unlawful taking or theft of fine **art**. We also acknowledge that it is more difficult for a federal court to discern, determine, and apply Spanish law than California law.

***964** Factor 6(e), which requires a court to consider the basic policies underlying property law, is arguably inconclusive. The property laws of both Spain and California seek to create certainty of title, discourage theft, and encourage owners of stolen property to seek return of their property in a timely fashion. Although these states have chosen different rules for movable property, both sets of rules further the basic polices underlying property law.

On the other hand, § 246 indicates that Spain has the "dominant interest" in determining whether the Painting was transferred to TBC via acquisitive prescription because the Painting was bought in Spain and has remained in Spain. The Cassirers' arguments to the contrary are not persuasive. First, the Cassirers argue there is a bad faith exception to the law of the situs rule when an adverse possessor acquired property "which was known or should have been known to have been stolen." However, since the Cassirers rely only on a 1980 English court decision in support of this proposition, the argument is unpersuasive. Second, the Cassirers argue that the law of the situs rule is "outdated (not revised in 45 years), and is now inconsistent with modern choice of law principles." However, the Cassirers cite cases in which courts have abolished the law of the situs rule for *tort actions*. As a district court stated when applying § 246 in a stolen **art** case:

> The refusal by the New York Court of Appeals to apply the "place of injury" test in the tort field does not dictate a different result here. This is because the choice of law rule advanced in the cited cases and adopted in Section 246 of the Restatement incorporates the concept of the "significant relationship."

Kunstsammlungen Zu Weimar v. Elicofon, 536 F.Supp. 829, 846 (E.D.N.Y. 1981) (citation omitted).

In sum, after applying the Second Restatement § 6 factors and the law of the situs rule of § 246, we conclude that Spanish law governs TBC's claim that it is the rightful owner of the Painting.

The Cassirers argue in a letter submitted to this Court pursuant to Federal Rule of Appellate Procedure 28(j) that

we should not apply Spain's law because of HEAR. According to the Cassirers, HEAR indicates that the application of Spain's substantive law in this case would be "truly obnoxious" to federal policy. However, HEAR does not specify which state's rules of decision should govern the merits of claims involving **art expropriated** during the **Holocaust**. HEAR simply supplies a statute of limitations during which such claims are timely. Thus, HEAR does not alter the choice of law analysis this Court uses to decide which state's law will govern TBC's claim of title to the Painting based on acquisitive prescription.

C. The district court erred in deciding that, as matter of law, TBC had acquired title to the Painting through Article 1955 of the Spanish Civil Code because there is a triable issue of fact whether TBC is an *encubridor* (an "accessory") within the meaning of Civil Code Article 1956.[12]

1. An *encubridor* can be a knowing receiver of stolen goods.

After correctly determining that Spanish substantive law applied, the district court granted summary judgment in favor of ***965** TBC based on the district court's analysis of Spain's law of acquisitive prescription. Summary judgment is proper when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). As noted above, we view the evidence "in the light most favorable to the party opposing the motion," here, the Cassirers. *Am. Int'l Grp.*, 926 F.2d at 831.

The district court concluded that TBC had acquired title to the Painting because TBC had fulfilled the requirements of Article 1955, which states in relevant part, "Ownership of movable property prescribes by three years of uninterrupted possession in good faith. Ownership of movable property also prescribes by six years of uninterrupted possession, without any other condition." Ministerio de Justicia, *Spain Civil Code* 220 (2009) (English translation). Possession is defined in Civil Code Article 1941, which states, "Possession must be in the capacity of the owner, and must be public, peaceful, and uninterrupted." Ministerio de Justicia, *Spain Civil Code* 219 (2009) (English translation).

[8]As an initial matter, we reject the Cassirers' argument that TBC's defense of acquisition of prescriptive title through usucaption based on Article 1955 is foreclosed by HEAR. HEAR addresses when a suit may be commenced and creates a six-year statute of limitations that applies "notwithstanding any defense at law relating to the passage of time." HEAR § 5(a). Because of the time periods mentioned in Article 1955, TBC's defense based on Article 1955 could be at first glance considered "a defense at law relating to the passage of time." However, TBC's Article 1955 defense is a defense on the merits: that TBC has *acquired title to the Painting based on Spain's property laws*. *See* Article 1955 ("*Ownership* of personal property prescribes by ...") (emphasis added), Ministerio de Justicia, *Spain Civil Code* 220 (2009) (English translation). Read in context, HEAR's § 5(a) language that the six-year statute of limitations applies "notwithstanding any defense at law relating to the passage of time" is meant to prevent courts from applying defenses that would have the effect of shortening the six-year period in which a suit may be commenced. HEAR does not bar claims based on the substantive law that vests title in a possessor, that is, the substantive law of prescription of title. Therefore, HEAR does not foreclose the possibility that TBC is entitled to summary judgment because TBC has acquired title to the Painting via Article 1955.

Read alone, Article 1955 would seem to vest title in one who gained possession, even absent good faith, after six years, so long as the possession was in the capacity as owner, public, peaceful, and uninterrupted. TBC took possession of the Painting in the capacity of an owner in 1993. TBC's claim was not challenged until the Cassirers' petition was filed in 2001. Although the Cassirers argue otherwise, TBC has established the "public" element because it is undisputed TBC publicly displayed the Painting in the Museum as part of the permanent collection it owned. Also, information about the Painting's location appeared in multiple publications between 1993 and 1999, the relevant six-year period. The parties agree TBC's possession was peaceful from 1993 until 1999. Finally, TBC's possession was uninterrupted during this time period. Thus, Article 1955, read in isolation, would seem to bar the Cassirers' action for **recovery** of the Painting.

But the very next article in the Spanish Civil Code, Article 1956, modifies how acquisitive prescription operates. Article 1956 reads:

> ***966** Movable property purloined or stolen may not prescribe in the possession of those who purloined

> or stole it, or their accomplices or accessories [*encubridores*], until the crime or misdemeanor or its sentence, and the action to claim civil liability arising therefrom, should have become barred by the statute of limitations.

Ministerio de Justicia, *Spain Civil Code* 220 (2009) (English translation). Therefore, as to any principals, accomplices, or accessories (*encubridores*) to a robbery or theft, Article 1956 extends the period of possession necessary to vest title to the time prescribed by Article 1955 *plus* the statute of limitations on the original crime and the action to claim civil liability. *See* Spanish Supreme Court decision of 15 July 2004 (5241/2004).

The Cassirers argue that TBC is an accessory (*encubridor*) to the theft of the Painting because TBC knew the Painting had been stolen when TBC acquired the Painting from the Baron. For the crime of *encubrimiento* (accessory after the fact) and the crime of receiving stolen property, the two crimes the Cassirers argue TBC committed when it purchased the Painting from the Baron in 1993, the criminal limitations period is five years, 1973 Penal Code Articles 30, 113, 546(bis)(a) and 1995 Penal Code Articles 131, 298, and the civil limitations period is fifteen years, Judgment of January 7, 1982 (RJ 1982/184) and Judgment of July 15, 2004 (no. 5241/2004). Thus, if Article 1956 applies, including the six-year period from Article 1955, TBC would need to possess the Painting for twenty six years after 1993, until 2019, to acquire title via acquisitive prescription. Since the Cassirers petitioned TBC for the Painting in 2001 and filed this action in 2005, *if Article 1956 applies*, TBC has not acquired prescriptive title to the Painting.[13]

Article 1956 extends the time of possession required for acquisitive prescription only as to those chattels (1) robbed or stolen from the rightful owner (2) as to the principals, accomplices or accessories after the fact ("*encubridores*")[14] with actual knowledge of the robbery or theft.

The parties agree the first requirement is satisfied because the forced sale of the Painting by Scheidwimmer and the Nazis is a misappropriation crime within the meaning of Article 1956. As for the second requirement, no one claims that TBC had any hand in that forced sale; TBC is not a principal or accomplice to the 1939 misappropriation of the Painting.

The primary dispute between the parties is whether TBC is an accessory (*encubridor*) as that term is used in Article 1956. The district court accepted TBC's interpretation of Spanish law and found that TBC was not an *encubridor*. The district court decided that the term "*encubridor*" in Civil Code Article 1956 should be defined by reference to the Penal Code that was in effect when TBC acquired the Painting. In 1993, Article 17 of the Penal ***967** Code of 1973 (the Penal Code then in effect) defined *encubridor* to include only persons who, after the commission of the underlying crime, **acted** in some manner to aid those who committed the crime avoid penalties or prosecutions.[15] Before the district court, the Cassirers argued that TBC was an *encubridor* because TBC concealed the looting of the Painting to prevent the 1939 crime from being discovered. The district court held that TBC was not an *encubridor* within the meaning of Article 1956 because "there is absolutely no evidence that the Foundation purchased the Painting (or performed any subsequent **acts**) with the intent of preventing Scheidwimmer's or the Nazis' criminal offenses from being discovered." The district court concluded that, since Article 1956 did not apply, TBC had acquired title to the Painting under Article 1955.

On appeal, the Cassirers offer a new reason TBC is an Article 1956 accessory [*encubridor*]: According to the Cassirers, TBC knowingly received stolen property when TBC acquired the Painting from the Baron. The Cassirers advocate using the definition of *encubridor* from the 1870 Spanish Penal Code, which was in force when Article 1956 of the Civil Code was enacted in 1889. Article 16 of the 1870 Penal Code stated:

> Those who, with knowledge of the perpetration of the felony, and not having participated in it as perpetrators or accomplices, intervene after its execution in any of the following modes, are guilty of concealment: ...
> 2. By obtaining benefit for themselves, or aiding the perpetrators to benefit from the effects of the crime.[16]

That definition of *encubridor* includes one who knowingly benefits himself from stolen property. The Cassirers argue that the 1889 legislature had the 1870 Penal Code definition in mind when the legislature enacted Article 1956. Article 1956 has not been modified since 1889.

[19]TBC asserts that the Cassirers' new argument on appeal, that TBC is an *encubridor* based on the 1870 Penal Code definition because TBC, knowing of the theft, received the stolen painting, is "waived" because the Cassirers not did present it below. However, the Cassirers' new argument asks this Court to interpret the term "*encubridor*" in Article 1956. To do so, this Court must interpret the relevant sources of Spanish law. Therefore,

the meaning of *encubridor* is a pure issue of law. Under this Court's precedent, we may consider a new argument on appeal which presents a pure issue of law even though it was not raised below. *In re Mercury Interactive Corp. Sec. Lit.*, 618 F.3d 988, 992 (9th Cir. 2010).

For the reasons stated below, we agree with the Cassirers that the term "*encubridor*" in Article 1956 has the meaning that ***968** term was given it in the 1870 Penal Code. We thus conclude that a person can be *encubridor* within the meaning of Article 1956 if he knowingly receives and benefits from stolen property.[17]

Since our jurisprudence requires us to apply Spanish substantive law, it stands to reason we should apply Spanish rules of statutory interpretation. Article 3.1 of the Spanish Civil Code ("Article 3.1") states, "Rules shall be construed according to the proper meaning of their wording and in connection with the context, with their historical and legislative background and with the social reality of the time in which they are to be applied, mainly attending to their spirit and purpose."[18] Ministerio de Justicia, *Spain Civil Code* 1 (2009) (English translation).

i. Proper Meaning of Wording

To determine the definition of "*encubridor*" in Article 1956, Article 3.1 first directs us to consider the "proper meaning of [its] wording." As noted above, dictionaries contemporary to the 1889 Civil Code shed little light on any legal meaning for the term *encubridor*. The 1884 Diccionario de la Lengua Castellana, Real Academia Española defines "*encubridor*" as one who practices "*encubrimiento*," which in turn is defined as "the action and effect of hiding a thing or not manifesting it."[19] The 1888 General Etymological Dictionary of the Spanish Language by the prestigious linguist Eduardo Echegaray mirrors the definition of the Real Academia.[20] Neither discusses the meaning of *encubridor* in legal terms or as used in the law. There is no mention of such elements as whether to be an *encubridor* the person need have knowledge of a prior crime or be motivated by a desire to help others or only himself.

Of course, if an *encubridor* hides the chattel, he cannot fulfill the open, public display of the chattel, in the capacity of an owner, which Article 1955 requires for usucaption. Does it follow that if he displays the chattel sufficiently to satisfy usucaption possession he is not an *encubridor*? Certainly, TBC displayed the Painting to the public and **acted** as the owner of the Painting.

This logic could be accepted if the word *encubridor* was used in Spanish law to mean only a person who conceals or hides or fails to manifest. But that is not what has been found to be the case, as we will see when we apply the second rule of interpretation prescribed by Article 3.1.

ii. Context

Second, Article 3.1 instructs us to determine the meaning of a rule "in connection with the context." "*Encubridor*" in Article 1956 is used in a legal context. Hence, what does *encubridor* mean in Spanish law?

Both parties agree that the Penal Code is the proper place to look for the legal meaning of the term *encubridor*. However, while the Cassirers urge this Court to use the 1870 Penal Code definition, which includes ***969** a receiver of stolen goods who **acts** for his own benefit, TBC urges this Court to use the 1973 Penal Code definition, which TBC claims excludes such a receiver. Under the 1973 Penal Code, only accessories after the fact **acting** in aid of the perpetrators or accomplices of the original crime are expressly declared *encubridores* under Article 17.1.

iii. Historical and Legislative Background

These conflicting positions require us to go to the third canon of interpretation stated in Article 3.1: "the historical and legislative background."

a. Definition of "*encubridor*" in the 1870 Penal Code

Looking to "the historical and legislative background" of Article 1956, we conclude that the term "*encubridor*" should be construed consistently with the definition of "*encubridor*" in the 1870 Penal Code. The parties agree that the content of the term "*encubridor*" in the Civil Code should be determined by reference to the Penal

Code. The 1870 Penal Code was in effect when Article 1956 of the Civil Code was enacted in 1889, and Article 1956 has not been amended since its enactment. Under the 1870 Penal Code, "[t]hose who, with knowledge of the perpetration of a crime," intervene after its execution "[b]y obtaining benefit for themselves, or aiding the perpetrators to benefit from the effects of the crime" are *encubridores*. Thus, if the 1870 Penal Code definition of "*encubridor*" applies for Civil Code Article 1956, an *encubridor* includes someone who knowingly benefits from stolen property, including a person who knowingly receives stolen property.

However, TBC claims that the Law of May 9, 1950 ("1950 Law") removed from the Penal Code's definition of *encubridor* a person who, with knowledge of the theft or robbery which produced the stolen chattel, took the chattel into his possession solely for his own benefit and not for the benefit of the perpetrators of the theft or robbery and that this law changed the definition of "*encubridor*" in Civil Code Article 1956 as well. There are two reasons this is not so.

First, Article 3.1's instruction to evaluate a statute's "historical and legislative background," Ministerio de Justicia, *Spain Civil Code* 1 (2009) (English translation), refers to the history that occurred before Article 1956 was enacted in 1889, not subsequent developments. Although the Spanish legislature modified *the Penal Code* through the 1950 Law, it did not alter *the Civil Code*, including Article 1956. Therefore, the 1870 Penal Code provides the pertinent definition of the term "*encubridor*" in Article 1956.

b. The 1950 Law

Second, even if the 1950 Law should affect how we interpret the term "*encubridor*" in Article 1956, we reject TBC's suggestion that the enactment of the 1950 Law changed the definition of "*encubridor.*" True, in its enactment of Article 17.1, the 1950 Law *eliminated Article 16.1* of the 1870 Penal Code and that portion of the definition of *encubridor* that included an accessory after the fact **acting** for his own benefit. The 1950 law enacted Article 17.1, which restricted *encubridor* to include only accessories after the fact **acting** on behalf or in aid of the original thieves and accomplices. But the 1950 Law did not eliminate altogether from the Penal Code the 1870 definition of *encubridor* that included a person **acting** for his own benefit, motivated by lucre.

First, the 1950 Law recited in its preamble an intention *not* to change the venerable law regarding accessories: "[I]t does not seem prudent to radically change this institution, that is now in ***970** Division I of the common Criminal Code, a penalizing law that is a homogeneous piece mounted on a venerable and correct classic. And it does not seem advisable until one day the general lines of our old Code are changed, if need be." Second, *it simply moved the 1870 definition of encubridor elsewhere* in enacting the new statute that made it a crime to receive goods known to be stolen. Article 2 of the 1950 Law created the crime of receiving stolen property as Article 546(bis)(a) of the Penal Code with the title "Del encubrimiento con ánimo de lucro y de la receptación" (meaning "Regarding **acting** as the accessory [*encubrimiento*] with the purpose of obtaining profit or receiving stolen property [*receptación*]"). Thus, *encubrimiento* in the Penal Code was *still* described as including **acting** as an accessory by receiving stolen goods for one's own benefit.

The preamble to the 1950 Law in fact also states that the purpose of the law is procedural: to allow independent criminal prosecutions for receivers of stolen goods even when the principals of, or accomplices to, the theft or robbery cannot be located. Under Spanish law at the time, accessories after the fact could not be charged by themselves. They were subject only to a joint proceeding in which they were joined as defendants with principals and accessories, if any.

The language of Article 546(bis)(a) of the Penal Code, as adopted at the time, reflects the fact that receiving stolen goods had long been considered a form of *encubrimineto* (**acting** as an accessory):

> Who with knowledge of the commission of a felony against property takes advantage for himself of the product of the [felony], will be punished with minor jail and fined from 5,000 to 50,000 pesetas. In no case can a sentence which deprives one of liberty exceed that established *for the felony concealed* ["*al delito encubierto*"].

Specifically, the use of the adjective "*encubierto*" to describe the activities of a receiver of stolen goods **acting** for his own benefit implies that the receiver is himself an

encubridor. Thus, the historical and legislative background of the term *encubridor* in the Spanish Penal Code suggests that someone who knowingly receives and benefits from stolen property can qualify as an *encubridor* for purposes of Civil Code Article 1956.

iv. Social Reality at Time of Enactment

Turning to the fourth canon in Article 3.1, this Court should consider "the social reality of the time" in which Article 1956 is to be applied. In 1993, when TBC acquired the Painting, the crime of receiving property known to be stolen and the crime of **acting** as accessory after the fact of theft by possessing such property were interchangeable in practice. This fact is demonstrated by the Judgment 1678/1993 of July 5 (RJ 1993/5881) that is cited in the amicus brief of Comunidad Judía de Madrid and Federación de Comunidades Judías de España. In that case, the appeal to the Supreme Court of Spain was on the basis of what we call a "variance" between the indictment and the crime of conviction. The appellant had been *accused of receiving stolen goods*, but was *convicted of being an accessory after the fact*. The Spanish Supreme Court found that the perpetrator's actions in receiving stolen jewelry to sell and keep the proceeds were sufficiently laid out in the accusatory pleading to allow the defendant to mount an adequate defense to the charge of being an accessory after the fact, even if he was convicted of a crime strictly not charged. There was no mention of the defendant **acting** in aid of the persons who had committed the original jewelry theft. ***971** As the court stated, "Thus then, we must say that here we find ourselves before two homogeneous felonies, with identity of rights protected and in fact adjudged, and as the sentence imposed was less [than that of the crime laid out in the accusation] it is clear that the principle of [fair notice] accusation was lawfully respected."

The Spanish Supreme Court also recognized the interchangeability of the crimes of receiving stolen goods and of being an accessory after the fact (*encubridor*) in Judgment 77/2004, of 21 January (RJ2004/485).[21] In this case, a boat was stolen in Germany and the defendant knew it was stolen. After trying to sell the boat to a good faith purchaser, the defendant was accused of being a receiver of stolen goods (*receptador*) by accusatory pleading, but then was convicted under Article 17.1 as an accessory after the fact (*encubridor*). The court found no fatal "variance" between the accusatory pleading under Article 546(bis)(a) and the conviction under Article 17.1 because the defendant was given fair notice of all the "points" on which conviction would depend at trial, and hence could mount a complete defense. According to the Supreme Court, both crimes require (1) knowledge of the prior felony and the stolen nature of the goods in question and (2) possession of those goods by the accused. Again, there was no mention that the defendant **acted** as an accessory after the fact by concealing, in aid of the boat's thief.

Our conclusion that the terms "accessory motivated by lucre" and "receiver of stolen goods" are interchangeable and have been preserved in the Spanish Penal Code following the 1950 Law is not novel. This seems to have been the interpretation given that portion of the 1950 Law by Cuello Calón in his annual report on criminal law: "*Anuario*: Annual of Penal Law and Penal Sciences (1951), modifications introduced in the Penal Code as to accessory [liability] by the Law of 9 May, 1950."[22] As Calón states, "Better fortune [as to the survival of the terms after the 1950 law] has occurred to the so-called '*receptación*' or '*encubrimiento*' for both expressions are used as synonyms by the new law."[23]

In sum, after applying the four methods of interpretation set forth in Article 3.1, we conclude that the meaning of *encubridor* (accessory after the fact) in the 1889 Civil Code is that of the 1870 Penal Code and that later legislation has not changed that meaning. Thus, an Article 1956 *encubridor* can be someone who **acts** as accessory after the fact of the crime committed, and who **acts** for his own benefit—to gain lucre. A detailed reading of the 1950 Law tells us this meaning of *encubridor* was not intended to be changed nor was in fact ***972** changed by that Law. That law rearranged the concept of an accessory after the fact **acting** for his own benefit into the receipt of stolen goods for procedural convenience: to allow prosecution of the suspect without the necessity of a joint prosecution of the principals and accomplices, if any, of the underlying crime. But a knowing receiver of stolen goods could still be prosecuted as an accessory after the fact to the theft even if he benefited only himself. The meaning of "*encubridor*" is considered interchangeable with "*receptador*" (receiver of goods known to be stolen) as shown by the title and text of Article 2 of the 1950 Law. Also, this reading of the Law of May 9, 1950, is confirmed by Spanish Supreme Court decisions which describe the two terms as interchangeable and homogeneous. Last, this homogeneity is recognized by the official annual report written by Cuello Calón contemporaneously with the adoption of the 1950 Law.

2. TBC has not established, as a matter of law, that it did not have actual knowledge the Painting was stolen property.

Assuming Article 1956 applies to someone who knowingly benefits from stolen property, TBC has not established as a matter of law that it acquired title to the Painting through acquisitive prescription. Clearly, TBC benefited from having the Painting in its museum. As for the required actual knowledge element of Article 1956, we review the evidence proffered by the Cassirers with all inferences in their favor as required by our summary judgment rules, to see if the Cassirers have produced sufficient evidence to create a triable issue of fact that TBC knew the Painting had been stolen from its rightful owner(s) when TBC acquired the Painting from the Baron.

Dr. Jonathan Petropoulos, the Cassirers' expert and a professor of European History who has published on the subject of Nazi art looting, declared that numerous so-called "red flags" would have indicated to TBC (and to the Baron) that the Painting was stolen.[24] The provenance information given by the Stephen Hahn Gallery to the Baron in 1976 did not mention a previous owner, only the gallery Durand-Ruel in Paris, where the painting was said to have been exhibited in 1898 and 1899.[25] The Painting contained a partial label on the back that said "Berlin" and part of two words "Kunst–und Ve ..." that may be German for "art and publishing establishment" ("Kunst und Verlagsanstalt"). This label may be from the Cassirers' art gallery. Although this label was on the back of the Painting, the Painting had no documentation showing a voluntary transfer of the Painting out of Berlin. Also, according to Dr. Petropoulos, Pissarro paintings were "immediately suspect" because they were favored by European Jewish collectors and often looted by the Nazis. Dr. Petropoulos noted that the French Ministry of Culture in 1947 published a compendium of French cultural losses during World War II that includes forty-six works by Pissarro that were looted by the Nazis and have yet to be recovered. The CORA decision confirming Lilly's rightful ownership of the Painting had been published and made available to the public.[26]

***973** How TBC purchased the Painting also provides some evidence that TBC knew the Painting was stolen. While TBC held the collection on loan, in an official publication in 1992, *Modern Masters* by Jose Alvarez Lopera, TBC published incorrect provenance history that stated the Baron had acquired the Painting through the Joseph Hahn Gallery in Paris when in fact the Baron purchased the Painting through the Stephen Hahn Gallery in New York. The Cassirers argue that TBC sought to conceal the Painting's provenance because the Stephen Hahn Gallery sold at least one other work looted by the Nazis. Also, when investigating the Baron's collection, TBC's lawyers decided to assume the Baron acquired his collection in good faith. By assuming good faith, *TBC chose to investigate only artwork that was acquired by the Baron after 1980.* One possible inference is that TBC knew the Painting was stolen and did not want to create documentation that reflected this history.

TBC paid $338 million for the Baron's Collection that included the Painting when the Collection's estimated value was between one and two billion dollars. Although TBC offers a number of innocent explanations for this below-market price, this fact may indicate that TBC knew the Painting and other works in the collection were stolen. William Smith, an expert in 16th to 20th century European paintings who filed a declaration on behalf of the Cassirers, opined that the Painting was sold *to the Baron* at a discount of 41.2%–50% of the estimated gallery retail price. TBC argues that the Baron did not purchase the Painting at a suspiciously low cost, but we must consider this clash of evidence in the light most favorable to the Cassirers. TBC's knowledge of the below-market price the Baron acquired the Painting for may also suggest TBC knew the Painting was stolen.

[10]In conclusion, when all of the evidence is considered in the light most favorable to the Cassirers, the Cassirers have created a triable issue of fact whether TBC knew the Painting was stolen from Lilly when TBC purchased the Painting from the Baron. TBC acquired the Painting for its own benefit, and TBC may have known the Painting was stolen. If so, TBC can be found by the trier of fact to be an *encubridor* who could not have acquired title to the Painting through acquisitive prescription until 2019 since an Article 1956 *encubridor* can be someone who knowingly benefits from the receipt of stolen property. Therefore, the district court erred in granting summary judgment on the grounds that, as a matter of law, TBC acquired the Painting through acquisitive prescription.[27]

D. TBC is not entitled to summary judgment based on its claim that the Baron had lawful title to the Painting under Swiss law.

[11]In TBC's cross-appeal of the summary judgment order, TBC argues that "it is the lawful owner of the Painting because ***974** [TBC] purchased the Painting in a lawful conveyance from a party (the Baron) who had valid title to convey." Since the district court granted summary judgment in favor of TBC on the basis of Spanish law, the district court did not consider TBC's argument that the

Baron gained lawful title before transferring the Painting to TBC. Nonetheless, "if the district court's order can be sustained on any ground supported by the record that was before the district court at the time of the ruling, we are obliged to affirm the district court." *Jewel Cos., Inc. v. Pay Less Drug Stores Nw. Inc.*, 741 F.2d 1555, 1564–65 (9th Cir. 1984) (citing *Calnetics Corp v. Volkswagen of Am., Inc.*, 532 F.2d 674, 682 (9th Cir. 1976)).

[12]We begin our analysis by considering which state's law governs the effect of the conveyance from the Baron to TBC. As noted in Part III.B, based on the principles set forth in the Second Restatement of the Conflict of Laws, this Court should apply Spanish property law to adjudicate TBC's claim that it is the rightful owner of the Painting. Also, § 245 of the Second Restatement states, "The effect of a conveyance [from the Baron to TBC] upon a pre-existing interest in a chattel of a person [Cassirer] who was not a party to the conveyance will usually be determined by the law that would be applied by the courts of the state where the chattel was at the time of the conveyance." The Painting was in Spain when TBC and the Baron entered into the acquisition agreement on June 21, 1993, because TBC had held the Painting as part of the prior loan agreement. As noted in Part III.B, Spain uses the law of the situs rule for movable property. *See* Civil Code Article 10.1, Ministerio de Justicia, *Spain Civil Code* 4 (2009) (English translation). This means Spain would apply its own property laws to decide the effect of the conveyance from the Baron to TBC. Thus, the Second Restatement directs us to apply Spanish law to determine whether TBC acquired ownership of the Painting via the 1993 acquisition agreement.

Under Spanish law, a consensual transfer of ownership requires title and the transfer of possession. *See* Civil Code Article 609, Ministerio de Justicia, *Spain Civil Code* 83 (2009) (English translation). As noted, when the acquisition agreement was entered into, possession of the Painting had already been transferred to TBC pursuant to the loan agreement. Therefore, *if the Baron had good title to the Painting* when he sold it to TBC, then TBC became the lawful owner of the Painting through the acquisition agreement.

TBC argues that the Baron had good title to convey because the Baron acquired good title to the Painting either through the Baron's purchase of the Painting in 1976 from the Stephen Hahn Gallery in New York or through Switzerland's law of acquisitive prescription. Since Spain applies the law of the situs for movable property, Spanish law would look to New York law to determine the effect of the 1976 conveyance in New York, and Swiss law to determine whether the Baron acquired title to the Painting when he possessed it in Switzerland between 1976 and 1992.

[13]Under New York law, "a thief cannot pass good title." *See Bakalar v. Vavra*, 619 F.3d 136, 140 (2d. Cir. 2010) (citing *Menzel v. List*, 49 Misc.2d 300, 267 N.Y.S.2d 804 (N.Y. Sup. Ct. 1966)). "This means that, under New York law, ... absent other considerations an artwork stolen during World War II still belongs to the original owner, even if there have been several subsequent buyers and even if each of those buyers was completely unaware that she was buying stolen goods." *Id.* (internal quotation marks omitted). Here, even if the Stephen Hahn Gallery ***975** (the gallery from which TBC alleges the Baron purchased the Painting) had no knowledge that the Nazis stole the Painting, the conveyance did not confer good title on the Baron under New York law.

As noted, TBC also argues that the Baron acquired title to the Painting through the Swiss law of acquisitive prescription. Under Swiss law, to acquire title to movable property through acquisitive prescription, a person must possess the chattel in good faith for a five-year period. Swiss Civil Code Article 728. The Baron completed the five-year period of possession between 1976 and 1981. Even though the Baron exhibited the Painting during a tour of Australia and New Zealand in 1979 and 1981, TBC's Swiss law expert stated that this exhibition abroad "did not create a legally relevant interruption, since the Painting was bound to return to [Switzerland]." In briefing to this Court, the Cassirers do not dispute that the Baron possessed the Painting for a sufficient amount of time.

However, the Baron acquired title through acquisitive prescription only if he possessed the Painting *in good faith*. The Cassirers assert there is a triable issue of fact as to whether the Baron possessed the Painting in good faith. Swiss law presumes good faith. *See* Swiss Civil Code Article 3.1. But good faith can be rebutted by showing that a person "failed to exercise the diligence required by the circumstances." *See* Swiss Civil Code Article 3.2. According to Dr. Wolfgang Ernst, TBC's Swiss law expert, the finding of good faith or bad faith in an individual case is considered to be an issue of fact.

In determining whether a purchaser **acted** in good faith or not, the Swiss Supreme Court has considered factors such as: (1) whether the purchaser should have considered the stolen or looted origin of the object at least as a possibility; (2) the fact that specific circumstances, such as war, required a high degree of attention; and (3) the general public knowledge of the circumstances in which the works of **art** were taken from their legitimate owners.

See Paul Rosenberg v. Theodore Fisher et al., Swiss Supreme Court June 3, 1948. Thus, a good faith purchaser is one who is *honestly and reasonably* convinced that the seller is entitled to transfer ownership.

[14]After reviewing the record developed before the district court, we conclude that there is a triable issue of fact as to the Baron's good faith. As noted in Part III.C, the Stephen Hahn Gallery from which the Baron purchased the Painting sold at least one other work looted by the Nazis. William Smith, the Cassirers' expert in European paintings, stated that the $275,000 price the Baron paid for the Pissarro in 1976 "was approximately half of what would have been expected in a dealer sale, and that there is no reasonable explanation for this price other than dubious provenance."[28]

Furthermore, Dr. Jonathan Petropoulos' "red flags" analysis of the Painting's background provides some evidence that suggests the Baron did not possess the Painting in good faith.[29] To recap these alleged ***976** "red flags," the Nazis looted many Pissarro paintings, which were a favorite among European Jewish collectors. Moreover, the Painting had a torn label on the back from a gallery in Berlin (the Cassirers' gallery), but no documentation showing a voluntary transfer of the Painting out of Berlin. The published CORA decision identified Lilly's ownership of the Painting. Also, Dr. Petropoulos stated that Ardelia Hall and Ely Maurer at the United States State Department collected CORA decision reports and warned museums, university art facilities, and art dealers about looted artworks entering the United States and that, had the Baron contacted these individuals about the Painting, the CORA decision would have been discovered. When the Baron purchased the Painting, the Stephen Hahn Gallery provided minimal provenance information: no previous owner was mentioned, only the gallery Durand-Ruel in Paris, where the painting was said to have been exhibited in 1898 and 1899. Dr. Petropoulos states that the Baron's "highly distinguished cohort of experts" failed to "undertake a serious investigation" to determine the provenance of the Painting. Another expert for the Cassirers, Marc-André Renold, a professor at the University of Geneva Law School who specializes in international art law, stated that he "would have expected someone of the Baron's sophistication to have undertaken a more diligent search into the provenance of the Painting."

This evidence indicates there is a triable issue of fact whether the Baron was a good faith possessor under Swiss law. Therefore, we cannot affirm the district court's grant of summary judgment on the basis that, as a matter of law, the Baron acquired title to the Painting under Swiss law.[30]

E. TBC is not entitled to summary judgment based on its laches defense.

TBC also argues in its cross-appeal of the summary judgment order that the Cassirers' claims are barred by laches. TBC raises its laches argument under California law. Since the district court granted summary judgment on the basis of Spanish law, the district court did not consider TBC's laches defense. As noted above, we also conclude that Spanish law applies.

[15] [16] [17]However, even if California law applied, this Court has stated: "To establish laches a defendant must prove both an unreasonable delay by the plaintiff and prejudice to itself. Because the application of laches depends on a close evaluation of all the particular facts in a case, it is seldom susceptible to resolution by summary judgment." *Couveau v. Am. Airlines, Inc.*, 218 F.3d 1078, 1083 (9th Cir. 2000) (per curiam) (citations omitted). There is at least a genuine dispute of material fact as to whether any delay was unreasonable. After the war, Lilly sought physical restitution of the Painting, but her unsuccessful efforts involving litigation lasting a decade ended with the 1958 Settlement Agreement. Thus, Claude Cassirer could have reasonably believed the Painting was lost or destroyed in the war.

Thus, TBC is not entitled to summary judgment based on its laches defense.

***977 F. Lilly's acceptance of the 1958 Settlement Agreement does not foreclose the Cassirers' claims.**

In TBC's appeal of the district court's order denying its motion for summary adjudication on the grounds that Lilly waived her ownership rights to the Painting in the 1958 Settlement Agreement, TBC repeats the same arguments that the district court rejected. As noted in Part I.A, the 1958 Settlement Agreement was between Lilly, Scheidwimmer (the Nazi art appraiser), Grete Kahn (the heir of the other Jewish victim, Sulzbacher), and the German government. The Settlement Agreement provided that: (1) Germany would pay Lilly 120,000 Deutschmarks (the Painting's estimated value as of April 1, 1956); (2) Grete Kahn would receive 14,000 Deutschmarks from the payment to Lilly; and (3) Scheidwimmer would receive the two German paintings. Grete Kahn expressly waived

any right to restitution of the Painting. However, Lilly did not expressly waive her right to physical restitution. Instead, as for Lilly, the Settlement Agreement just notes that the settlement settles "all mutual claims among the parties." The whereabouts of the Painting was unknown, no party possessed it.

Neither party has expressly argued which sovereign's law should be used to interpret the Settlement Agreement. However, the district court applied German law, and the parties do not contest this conclusion on appeal. Accordingly, any choice-of-law issue has been waived, *Martinez-Serrano v. I.N.S.*, 94 F.3d 1256, 1259 (9th Cir. 1996), and we apply German law in interpreting the Settlement Agreement.

[18]TBC argues that Lilly's acceptance of the Settlement Agreement defeats the Cassirers' claims for three reasons. First, TBC argues that Lilly implicitly waived her right to seek physical restitution when she accepted the Settlement Agreement. Second, TBC argues the Settlement Agreement remedied and resolved the "taking in violation of international law," and pending litigation of a claim involving a taking is required for FSIA jurisdiction. Third, TBC argues that federal policy on Nazi-looted **art** requires honoring the finality of the Settlement Agreement.

In support of its first argument, TBC notes that the Settlement Agreement states that it "settles all mutual claims among the parties." However, Lilly knew that none of the parties had possession of the Painting or knowledge of its whereabouts, and the agreement purported to settle claims only *among the parties*. Also, the Settlement Agreement expressly waives Grete Kahn's right to physical restitution, but not Lilly's.

The district court noted that the Bundesgerichtshof (Germany's Supreme Court) recently issued a ruling favorable to the Cassirers' interpretation of the Settlement Agreement. In that case, the Nazis misappropriated a valuable poster collection belonging to a German Jew, Dr. Sachs. *Peter Sachs v. Duetsches Historisches Museum,* BGH, Mar. 16, 2012, V ZR (279/10) (Ger.). In 1961, Dr. Sachs accepted a settlement agreement through the same program that Lilly had used, the Brüg, and Dr. Sachs' settlement agreement stated that it provided "compensation for all claims asserted in this proceeding." When Dr. Sachs' son discovered the posters still existed and were being held by the German Historical Museum in East Berlin, he sought physical restitution. The German high court ordered the German Historical Museum to return the poster collection even though Dr. Sachs had accepted his settlement agreement. The German Supreme Court held that Dr. Sachs' claim for physical restitution was not waived by accepting his settlement agreement because his property was considered ***978** lost at the time he accepted the payment. The court also held that Sachs' right to physical restitution was not waived because he had not made an "unambiguous **act**" renouncing the right.

The *Sachs* precedent is on all fours with Lilly's case. Therefore, Lilly too did not waive her right to physical restitution of the Painting by accepting the 1958 Settlement Agreement. Two other sources of German law support this conclusion. First, Germany's Commissioner of the Federal Government for Matters of Culture and the Media has stated that, for claims of restitution of artwork in which an earlier payment under the Brüg was provided, "earlier compensation payments are not an obstacle to the return of cultural assets, provided that the amount paid earlier is reimbursed[.]" Second, the Cassirers provided a declaration from a German attorney specializing in restitution law who stated his expert opinion that the Settlement Agreement did not waive Lilly's right to physical restitution.

TBC cites to the District Court of Munich's decision acknowledging the 1958 Agreement as evidence Neubauer waived her ownership rights to the painting. But this decision undermines, rather than advances, TBC's argument. The District Court of Munich specifically noted that Lilly "*only waived the restitution claim against Scheidwimmer* as a result of the settlement of 2.28.1958" (emphasis added). Thus, the German court acknowledged that Lilly waived any claims against Scheidwimmer, who was determined not to have possession of the Painting, but it noted that was the only claim Neubauer waived. This further supports our conclusion that Lilly did not waive her right to physical restitution of the Painting.

TBC's second argument is that the Settlement Agreement remedied and resolved the "taking in violation of international law," which means this Court does not have subject matter jurisdiction under the FSIA **expropriation** exception to sovereign immunity, 28 U.S.C. § 1605(a)(3). This section states that a foreign government's sovereign immunity is abrogated when:

> Rights in property taken in violation of international law are in issue and ... that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or

> instrumentality is engaged in a commercial activity in the United States.

28 U.S.C. § 1605(a)(3). According to TBC, the Settlement Agreement deprives this court of jurisdiction under the FSIA because the Settlement Agreement provided Lilly compensation for the loss of the Painting, and therefore no right in property is still at issue because the Settlement Agreement resolved the taking in violation of international law.

TBC is wrong because one of the Cassirers' "rights in property taken in violation of international law" remains at issue. As explained above, the 1958 Settlement Agreement did not extinguish Lilly's right to physical restitution of the Painting. Therefore, the Cassirers still have a property right (physical restitution) that remains at issue.

TBC's third argument starts from the premise that this Court has recognized that U.S. federal policy favors respecting the finality of appropriate actions taken in foreign countries to restitute Nazi-confiscated artwork. *See Von Saher v. Norton Simon Museum of Art at Pasadena*, 754 F.3d 712, 721 (9th Cir. 2014). According to TBC, allowing the Cassirers to continue their suit would "disregard" the German restitution proceedings and therefore conflict with federal policy. However, this argument mistakenly assumes Lilly waived her right to seek physical restitution of the ***979** Painting when she accepted the Settlement Agreement and that Germany considers the Settlement Agreement to have extinguished her claim to physical restitution.

G. Spain's Historical Heritage Law does not prevent TBC from acquiring prescriptive title to the Painting.

[19]The Cassirers make yet another new argument on appeal: TBC could not have acquired title to the Painting through acquisitive prescription because of Spain's Historical Heritage Law ("SHHL"). TBC argues that the Cassirers' new argument based on the SHHL is also waived because it too was not argued below. However, this argument is also not waived because this Court may consider pure issues of law on appeal even when not raised below. *Mercury*, 618 F.3d at 992.

The SHHL law creates a comprehensive program for ensuring that cultural artifacts (including buildings, artwork, and archeological artifacts) are maintained in Spain for viewing by future generations of Spaniards. *See* Preliminary Title, General Clauses. The Painting was designated part of Spain's historical heritage in Real Decreto-Ley 11/1993, which also authorized and funded the purchase of the Collection.

Article 28 of the SHHL contains restrictions on the transfer of movable property that is part of the Spanish Historical Heritage. Article 28 has three parts. Article 28.1 states, "Movable property declared of cultural interest and included in the General Inventory that is in the possession of ecclesiastical institutions ... may not be transferred, whether with consideration or as a gift, or ceded to individuals or commercial entities. Such property may only be transferred or ceded to the State, to entities that are a creation of Public Law, or to other ecclesiastical institutions." Article 28.2 and 28.3 state:

> 2. Movable property that forms part of the Spanish Historical Heritage may not be transferred by the Public Administration, except for transfers between public administrative entities and as provided for in articles 29 and 34 of this Law.
>
> 3. The property that this article refers to will not be subject to the statute of limitations. Under no circumstance shall the provisions of Article 1955 of the Civil Code be applied to this property.

According to the Cassirers, SHHL Article 28.3 prevents TBC from using Civil Code Article 1955 to acquire title to the Painting.

The phrase in Article 28.3, "[t]he property that this article refers to" references property described in Article 28.1 and 28.2. Article 28.1 regulates "movable property" that has two qualities. First, that property must be "declared of cultural interest and included in the General Inventory [.]" Second, that property must be "in the possession of ecclesiastical institutions, in any of their facilities or branches[.]" Article 28.1 prohibits ecclesiastical institutions from transferring that property to individuals or commercial entities. Article 28.2 regulates "movable property that forms part of the Spanish Historical Heritage." Article 28.2 prohibits public administrations from transferring this property, except via specific transfers authorized by Articles 29 and 34.

Read in context, *Article 28.3 constitutes an additional limitation on the ability of ecclesiastical institutions and state institutions to alienate movable property of Spanish historical heritage.* Article 28.3 prevents churches or state entities from losing title to historical heritage property

through the expiration of the statute of limitations, which confers a substantive right under Spanish law, or through Article 1955 acquisitive prescription. Therefore, churches and state institutions cannot ***980** evade the restrictions on transfer described in Articles 28.1 and 28.2 by allowing a private individual to take possession of the regulated property for the statutory period. Article 28.3 also preserves public access to historical heritage property in case churches or state administrations carelessly fail to take or maintain possession of that property in a timely fashion. Since Article 28.3 is designed to prevent churches and state institutions from losing title to historical heritage property, the provision should not be interpreted to prevent TBC, a state institution, from asserting title to the Painting through acquisitive prescription.

H. The district court correctly found that the application of Article 1955 to vest TBC with title to the Painting would not violate the European Convention on Human Rights.

As a last salvo, the Cassirers argue, "[a]sssuming Spanish law strips the Cassirers' ownership of the Painting, the law is void under Article 1 of Protocol 1 ("Article 1") of the European Convention on Human Rights (the "Convention")." Spain is a party to the Convention, including Protocol 1. The Convention is supreme over Spanish domestic law. Article 1 of Protocol 1 states:

> Every natural or legal person is entitled to the peaceful enjoyment of his possession. No one shall be deprived of his possession except in the public interest and subject to the conditions provided for by law and by general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

In *Case of J.A. Pye (Oxford) Ltd and J.A. Pye (Oxford) Land Ltd v. The United Kingdom*, 46 EHRR 1083 (2007) ("*Pye*"), a British court had awarded title through adverse possession to land on which the Grahams had grazed their animals for twelve years after the grazing agreement with neighboring real estate developers had expired. *Pye* ¶ 10–22. The former landowners asked the European Court of Human Rights ("ECHR") to review this decision, and the ECHR, sitting en banc, ruled that the prescriptive acquisition did not violate Article I. Specifically, the court held that the application of Britain's adverse possession law amounted to a permissible "control of use" of land within the meaning of the second paragraph of Article 1. *Pye* ¶ 66. The court also held that this adverse possession law was legitimate and in the "general" (public) interest. *Pye* ¶ 75. The court further considered whether the decision struck a fair balance between "the demands of the general interest and the interest of the individuals concerned." *Pye* ¶ 75. After considering many factors, including the fact that English adverse possession laws are long established and support reasonable social policies, the ECHR concluded that the British court decision did strike a fair balance. *Pye* ¶ 75–85. The court noted that "the State enjoys a wide margin of appreciation" in setting rules for its property system unless these rules "give rise to results which are so anomalous as to render the legislation unacceptable." *Pye* ¶ 83.

[20]The district court correctly applied *Pye* and correctly concluded that "Spain's laws of adverse possession do not violate [Article 1]." As in *Pye*, the operation of Spain's acquisitive prescription laws is a permissible "control of use" of property under Article I that serves the general ***981** or public interest by ensuring certainty of property rights.

Finally, deciding that TBC has acquired title to the Painting through acquisitive prescription would have struck a "fair balance" between "the demands of the general interest and the interest of the individuals concerned." Admittedly, the *Pye* decision was close (ten to seven), and some of the factors considered by the *Pye* court do not favor TBC's position that Spain's acquisitive prescription laws strike a "fair balance." Nonetheless, Article 1955 is over a century old and supports reasonable social policies, including providing a level of protection for possessors. Spain's acquisitive prescription laws are not so anomalous as to render them unacceptable under the European Convention on Human Rights. But they must be taken as a whole and when one applies Article 1956, as we must, there is a triable issue of fact whether title in the Painting vested in TBC.

IV. CONCLUSION

The district court correctly determined that Spain's substantive law determines whether TBC can claim title to the Painting via acquisitive prescription. However, we conclude that the district court interpreted Spain Civil

Code Article 1956 too narrowly. An *encubridor* within the meaning of Article 1956 can include someone who, with knowledge that the goods had been stolen from the rightful owner, received stolen goods for his personal benefit. Since there is a genuine dispute of material fact whether TBC knew the Painting had been stolen when TBC acquired the Painting from the Baron, the district court erred in granting summary judgment in favor of TBC on the basis of Spain's law of acquisitive prescription since the longer period for an *encubridor* to acquire title had not yet run when the Cassirers brought this action for restitution of the Painting. At the same time, we conclude that TBC's other arguments for affirming the grant of summary judgment that are raised in TBC's cross-appeals are without merit. Finally, we conclude that the Cassirers' other arguments against applying Article 1955 in this case are without merit. Given these holdings, we **REVERSE** and **REMAND** to the district court for proceedings consistent with this opinion.

All Citations

862 F.3d 951, 17 Cal. Daily Op. Serv. 6667, 2017 Daily Journal D.A.R. 6777

Footnotes

1 In our two prior opinions, this Court has referred to Lilly Neubauer, the great-grandmother of Plaintiffs David Cassirer and Ava Cassirer, as "Lilly." *See Cassirer v. Kingdom of Spain*, 616 F.3d 1019 (9th Cir. 2010) (en banc); *Cassirer v. Thyssen-Bornemisza Collection Foundation*, 737 F.3d 613 (9th Cir. 2013).

2 *Kingdom of Spain*, 616 F.3d at 1023–24.

3 As noted above, much of the factual history of this case is described in *Kingdom of Spain*, 616 F.3d at 1023–24. We include only such factual background as necessary to explain our decision in this case.

4 TBC is an agency or instrumentality of the Kingdom of Spain, which this Court previously recognized in *Cassirer v. Kingdom of Spain*, 616 F.3d 1019, 1027 (9th Cir. 2010).

5 Claude Cassirer died in 2010. David and Ava Cassirer, his children, and the United Jewish Federation of San Diego County succeed to his claims. Collectively, we refer to these plaintiffs as "the Cassirers."

6 These motions are TBC's Motion for Certification and TBC's Motion for Review and Reconsideration of the Magistrate Judge's Discovery Order. The motion for certification, which asked the district court to certify for interlocutory appeal TBC's claims relating to the 1958 Settlement Agreement are moot since we consider those claims in this opinion. In TBC's discovery motion, TBC sought reversal of the magistrate judge's denial of TBC's motion to compel production of thirteen letters between Lilly and her attorney. The motion is no longer moot in light of our decision in this opinion to reverse and remand this case. However, the district court did not consider this motion on the merits, and trial courts have "broad discretion" to permit or deny discovery, *Hallett v. Morgan*, 296 F.3d 732, 751 (9th Cir. 2002) (quoting *Goehring v. Brophy*, 94 F.3d 1294, 1305 (9th Cir. 1996)). Therefore, we will allow the district court to consider this discovery motion in the first instance on remand. *See Bermudez v. Duenas*, 936 F.2d 1064, 1068 (9th Cir. 1991) (remanding to the district court to consider in the first instance a discovery motion that was denied as moot after a grant of summary judgment).

7 Of course, the date of acquisition of actual knowledge is a fact subject to proof, and possible rebuttal, in proceedings before the district court.

8 Spanish law has some similar provisions. "Possession of movable property acquired in good faith is equivalent to title. Notwithstanding the foregoing, any person who has lost movable property or has been deprived of it illegally may claim it from its possessor." Civil Code Article 464, Ministerio de Justicia, *Spain Civil Code* 66 (2009) (English translation). However, the Spanish Civil Code must be read in its entirety, including those articles which provide that title to chattels may pass through qualified, extended possession, such as Article 1955.

9 The district court concluded that under *both* the Second Restatement and California's choice of law test (known as the governmental interest or comparative impairment test), Spain's substantive law applies to this case. Since we conclude that the Second Restatement test applies because *Schoenberg* controls, we do not apply California's choice of law test. We note that the courts in *Schoenberg* and *Sachs* both did not apply the forum's choice of law test. *Schoenberg*, 930 F.2d at 782–83; *Sachs*, 737

F.3d at 600 n.14.

10 For this reason, the Second Restatement's approach is often called the "most significant relationship" test.

11 In addition to citing § 6 in the text itself, the commentary to § 222 also clarifies that "the principles stated in § 6 underlie all rules of choice of law...." Second Restatement § 222, cmt. b.

12 In interpreting Spanish law, we have relied on the record below, submissions from the parties and amici, and our own independent research. *See* Federal Rule of Civil Procedure 44.1 ("In determining foreign law, the court may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence.")

13 The Cassirers also argue that TBC has not acquired title because, under Spanish law, there is no statute of limitations for a crime against humanity and a crime against property during armed conflict. Since resolving this claim would not change the result in this case, we decline to decide this issue.

14 When Article 1956 was adopted in 1889, the contemporary dictionary meaning of *encubridor* was "one who covers something up." *See* 1884 Diccionario de la Lengua Castellana, Real Academia Española. The 1888 General Etymological Dictionary of the Spanish Language by the prestigious linguist Eduardo Echegaray mirrors the definition of the Real Academia. No legal meaning appears in the dictionaries. However, in an official translation of Article 1956 from Spain's Ministry of Justice, "*encubridores*" is translated as "accessories."

15 Article 17 of the 1973 Spanish Criminal Code defines *encubridores*:

> [T]hose who, aware of the perpetration of a punishable offense, without having had involvement in it as principals or accessories, are involved subsequent to its execution in any of the following ways:
> 1. Aiding and abetting the principals or accomplices to benefit from the felony or misdemeanors.
> 2. Hiding or destroying the evidence, effects or instruments of the felony or misdemeanor, to prevent it being discovered.
> 3. Harboring, concealing, or aiding the escape of suspected criminals....

16 "Son encubridores los que, con conocimiento de la perpetracion del delito, sin haber tenido participacion en él como autores ní cómplices, intervienen con posterioridad á su ejecucíon de alguno de los modos siguientes. Aprovechándose por si mismos ó auxiliando á los delincuentes para que se aprovechen de los efectos del delito."

17 Article 1956 requires that the *encubridor* must have actual knowledge the chattel was the product of robbery or theft. *See* Spanish Supreme Court decision of 23 December 1986 (RJ 1986/7982).

18 "Las normas se intepretarán según el sentido propio de sus palabras, en relación con el contexto, los antecedentes históricos y legislativos, y la realidad social del tiempo en que han de ser aplicadas, atendiendo fundamentalmente al espíritu y finalidad de aquellas."

19 **Encubridor**: Que encubre. **Encubrir**: Ocultar una cosa ó no manifestarla.

20 **Encubridor, ra:** Que encubre alguna cosa. Usase también como sustantivo. **Encubrir:** Ocultar una cosa ó no manifestarla.

21 In 1995, the Penal Code was updated and the crime of receiving stolen goods was moved to Article 298 of the Penal Code. Of note, in specifying sentencing, Article 298 retains the language used in the old Article 546(bis)(a), "Under no circumstances whatsoever may a sentence of imprisonment be imposed that exceeds that set for the felony concealed." In Spanish, "En ningún caso podrá imponerse pena privativa de libertad que exceda de la señalada al delito encubierto." This was the same language that was used in Article 546(bis)(a) in force from 1950 to 1995.

22 Anuario de Derecho Penal y Ciencias Penales (1950), Modificaciones introducidas en el Codigo penal en materia de encubrimiento por la Ley de 9 de Mayo, 1950, p. 346, Eugenio Cuello Calón ("Anuario, 1950"). *See also* Cuello Calón, *Derecho Penal* 672 (C. Camargo Hernandez rev. 18th ed. 1981) (explaining that concealment is a crime separate and distinct from the original theft and robbery which provided the stolen chattel).

23 "Mejor suerte ha cabido a la llamada 'receptación o encubrimiento, con ánimo de lucro' pues ambas expresiones son usadas

como sinónimas por la nueva ley."

24 TBC started investigating the Baron's collection in 1989. Thus, TBC had time to discover these red flags before the 1993 purchase.

25 Julius Cassirer, who was Lilly's father-in-law, bought the Painting from Paul Durand-Ruel in Paris in 1898.

26 Dr. Petropoulos provided some evidence that suggests TBC may have been aware of this decision: the CORA decision was cited in a 1974 book about Allied restitution laws published by a prestigious German publisher that received reviews in English language periodicals.

27 The Cassirers make a similar argument that TBC "purloined" the Painting within the meaning of Article 1956 and therefore could not have acquired the Painting through acquisitive prescription. In support of this argument, the Cassirers cite Spanish authorities suggesting the term "purloin" in Article 1956 can include knowing receipt of stolen goods. Therefore, whether interpreting "*encubridor*" or "purloin," the Cassirers' argument turns on whether someone who receives and benefits from goods known by him to be stolen is delayed in taking prescriptive title because of Article 1956.

28 Although TBC's expert, Dr. Ernst, stated that he was "not aware of any evidence that this price was conspicuously low so as to indicate eventual problems regarding the provenance/title situation[,]" we must view this conflict of evidence in the light most favorable to the non-moving party, the Cassirers.

29 As Dr. Petropoulos declared, "In my opinion, if the Baron and TBC did not in fact know of the faulty provenance of the Painting and the high likelihood that they were trafficking in Nazi looted **art**, they were willfully blind to this risk and ignored very obvious 'red flags' that no reasonable buyer would have ignored."

30 The triable issue of fact whether the Baron held the Painting in good faith is another reason TBC cannot establish as a matter of law that the Baron acquired title to the Painting through the 1976 conveyance from the Stephen Hahn Gallery. Even if the Painting was purchased in Switzerland and the conveyance was governed by Swiss law, under Swiss law, only a good faith purchaser can acquire title to a chattel through a conveyance. *See* Swiss Civil Code Article 936 ("A person that has not acquired a chattel in good faith may be required by the previous possessor to return it at any time.").

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Gowen v Helly Nahmad Gallery, Inc.
2019 NY Slip Op 01350
Decided on February 26, 2019
Appellate Division, First Department
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This opinion is uncorrected and subject to revision before publication in the Official Reports.

Decided on February 26, 2019
Sweeny, J.P., Manzanet-Daniels, Webber, Oing, Singh, JJ.

650646/14 8501 8500

[*1]George W. Gowen, etc., Plaintiff-Respondent,

v

Helly Nahmad Gallery, Inc., et al., Defendants-Appellants.

Aaron Richard Golub, Esquire, PC, New York (Nehemiah S. Glanc of counsel), for appellants.

Landrigan & Aurnou, LLP, White Plains (Phillip C. Landrigan of counsel), for respondent.

Order, Supreme Court, New York County (Eileen Bransten, J.), entered on or about May 9, 2018, which, insofar as appealed from as limited by the briefs, denied defendants' motion to dismiss on grounds of forum non conveniens, unanimously affirmed, with costs, and so much of an order, same court and Justice, entered on or about May 9, 2018, as denied

defendants' motion to vacate the decision of the special master, unanimously affirmed, with costs.

In this action seeking return of a painting allegedly looted by the Nazi-occupied French government, the motion court did not improvidently exercise its discretion in denying the motion to dismiss the complaint on the ground of forum non conveniens (*see Swaney v Academy Bus Tours of N.Y., Inc.*, 158 AD3d 437 [1st Dept 2018]; *see also Islamic Republic of Iran v Pahlavi*, 62 NY2d 474, 478-479 [1984], *cert denied* 469 US 1108 [1985]). In weighing the relevant factors, the court correctly observed that plaintiff and several defendants maintained residences in New York (*see OrthoTec, LLC v Healthpoint Capital, LLC*, 84 AD3d 702, 703 [1st Dept 2011]). Although defendants suggest that France is the more appropriate forum, they also argued below, and submitted expert affidavits in support of the position, that this action would be time-barred in that jurisdiction, an important factor to consider (*see Highgate Pictures v De Paul*, 153 AD2d 126, 128-129 [1st Dept 1990]). This Court observes that retaining this action would not be particularly burdensome; New York has previously entertained actions concerning Nazi looting of art during World War II (*see generally Reif v Nagy*, 149 AD3d 532 [1st Dept 2017]). That the originals of some documents are located abroad does not require dismissal, and it is noted that the key documents have already been translated for the court (*see OrthoTec* at 703). In light of the foregoing, defendants failed to meet their heavy burden of establishing that the action should be dismissed on forum non conveniens grounds (*see Banco Ambrosiano, S.P.A. v Artoc Bank & Trust*, 62 NY2d 65, 74 [1984]).

The motion court also correctly denied defendants' motion to vacate the directives of the special master appointed to oversee discovery (see CPLR 3104; *see also Those Certain Underwriters at Lloyds, London v Occidental Gems, Inc.*, 11 NY3d 843, 845 [2008]). While the estate's sole heir was not purely a nonparty (*see Stutz v Guardian Cab Corp.*, 273 AD 4 [1st Dept 1947]; *Duhnin v Herbst*, 193 AD 906 [2d Dept 1920]), it was not an improvident exercise of discretion for the referee to direct that his deposition would be held in France, particularly in light of the limited nature of his knowledge, that he had not been born when the painting at issue was confiscated and that he was a toddler at the time of Stettiner's death (*see also Wygocki v Milford Plaza Hotel*, 38 AD3d 237 [1st Dept 2007]; *Allen v Crowell-Collier Publ. Co.*, 32 AD2d [*2]897 [1st Dept 1969]; *Beauchamp v Marlborough-Gerson Gallery*, 29 AD2d 937 [1st Dept 1968]).

We have considered the parties' remaining contentions and find them unavailing.

THIS CONSTITUTES THE DECISION AND ORDER

OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: FEBRUARY 26, 2019

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PUBLICATIONS

Holocaust Art Restitution Litigation in 2009

January 2010 – *Art & Advocacy, Volume 5*
Yael Weitz

Introduction

Several Holocaust-era art restitution cases decided in 2009 brought to the forefront the myriad of issues that drive such litigation, including the Act of State doctrine, international comity, laches, choice-of-law and the Foreign Sovereign Immunities Act. Although not all the cases present a favorable outcome for the plaintiff, each provides an important addition to the field as a whole. This article highlights some of the year's most significant art restitution cases and their outcomes.

Sotheby's, Inc. v. Shene

In *Sotheby's, Inc. v. Shene*, 2009 U.S. Dist. LEXIS 23596 (S.D.N.Y. 2009),[1] a dispute arose about the title to a volume of drawings and etchings known as the Augsburger Geschlechterbuch, which was created in Germany in the sixteenth century. From at least 1858 to 1945, the book was stored in the collections of the Staatsgalerie Stuttgart, located in Germany. After World War II, the Staatsgalerie discovered that the book was missing and assumed that it had been destroyed. In 2001, however, Shene purchased the volume at a private auction, and then gave it to Sotheby's to sell. During its investigation of the book's provenance, Sotheby's discovered that the book had likely been stolen by a United States Army Captain during World War II. Sotheby's brought an interpleader action against Shene and the German state of Baden-Wurttemberg, which came to possess the Staatsgalerie, to determine the book's proper title.

With few exceptions, courts in the United States adhere to the proposition that "[a] good-faith purchaser of a stolen object is not considered to have valid title to the object, because a purchaser cannot acquire good title from a thief."[2] Even if an individual purchases an object without knowing it was stolen, the title to the object remains with the true owner and does not transfer to the good-faith purchaser. Baden-Wurttemberg presented considerable evidence demonstrating its ownership of the book. For example, each page of the book was stamped with the Staatsgalerie's insignia, and evidence demonstrated that the Captain who had likely taken the book was stationed in Waldenburg, where the book was stored. Also, the Captain had told his family that although soldiers often burned books and other objects, he had "rescued" some of the books. Based on this evidence, the court determined that Baden-Wurttemberg owned the book at the time it was taken by the Captain, and because the Captain could not pass valid title of the book to any subsequent purchaser, Baden-Wurttemberg was the legal owner.

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Von Saher v. Norton Simon Museum of Art at Pasadena

In 2002, the California legislature enacted a law extending the statute of limitations for claims for the recovery of Nazi-looted artwork brought in the state of California against museums and galleries. In *Von Saher v. Norton Simon Museum of Art at Pasadena*, 578 F.3d 1016 (9th Cir. 2009),[3] that statute was held an unconstitutional violation of the federal government's foreign affairs power. The Ninth Circuit concluded that by enacting legislation extending the statute of limitations for claims for the recovery of Nazi-looted art, without limiting its scope solely to museums and galleries actually located in California, the state legislature had enacted legislation that does not address a traditional state interest and that conflicts with the federal government's exclusive power to resolve war.

Von Saher, heir of the noted Jewish art dealer Jacques Goudstikker, brought an action against the Norton Simon Museum of Art and the Norton Simon Art Foundation to recover a pair of life-size paintings of Adam and Eve by Cranach the Elder that were looted from Goudstikker's gallery by Hermann Göring when the Nazis invaded the Netherlands. The Norton Simon Museum of Art and/or the Norton Simon Art Foundation had come into possession of the paintings around 1971. The defendants moved to dismiss the complaint, arguing that the statute is unconstitutional, and the district court granted the defendants' motion on the grounds that the statute is facially unconstitutional under the foreign affairs doctrine. The Ninth Circuit affirmed, and denied rehearing and rehearing en banc.[4] The matter has been stayed pending a petition for writ of certiorari in the Supreme Court.

The Ninth Circuit determined that even though the California statute does not conflict with any specific federal statute, treaty or policy, and thus conflict preemption is inapplicable, because it could apply to museums and galleries outside of California, the legislature's interest in enacting the statute was not to protect its residents and regulate its art trade, but to create a "worldwide forum for the resolution of Holocaust restitution claims," which the court held was not a "traditional state function." Having found that California was not exercising a traditional state function, the panel went on to analyze whether the statute conflicts with the field of foreign affairs and determined that it does, because its intent was to rectify wartime wrongs. The court, however, did not rule out the possibility that the plaintiff could bring her case under the California Civil Practice Code, which provides a three-year statute of limitation for such claims. Accordingly, the court granted the plaintiff leave to amend her complaint, giving her a second chance to bring her claim.

Dunbar v. Seger-Thomschitz

In *Dunbar v. Seger-Thomschitz*, 638 F.Supp.2d 659 (E.D. La. 2009), the plaintiff had been in possession of an Oskar Kokoschka painting for ten uninterrupted years. Under Louisiana prescription laws, a party in possession of movable property for ten years becomes the owner of that property, even where the possession was acquired in bad faith. Where the injury relates to stolen art, however, the court must consider whether the claimant diligently tried to recover her art. In this case, the plaintiff sought to preempt the defendant's claim that the painting was looted by the Nazis and should be returned to her by seeking a judgment declaring the plaintiff to be the owner.

The court held that the plaintiff had acquired valid title to the work under Louisiana law and rejected the defendant's argument that Louisiana prescription laws should be supplanted to ensure better compliance with the goals of the Holocaust Victims Redress Act, § 202, 112 Stat. at 17-18. The Act provides that "all governments should undertake good faith efforts to facilitate the return of the private...property, such as works of art, to their rightful owners in cases where assets were confiscated from the claimant during the period of Nazi rule."

Museum of Fine Arts, Boston v. Seger-Thomschitz

At issue in *Museum of Fine Arts, Boston v. Seger-Thomschitz*, 2009 U.S. Dist. LEXIS 58826 (D. Mass. 2009), is the title to another painting by Oskar Kokoschka. The defendant, who is the same defendant in Dunbar, made a demand for the painting on the Museum of Fine Arts, Boston, claiming that she was the sole heir of the true owner, who lost the painting to Nazi looting. The Museum responded by bringing an action seeking a declaratory judgment affirming its ownership, as did the plaintiff in Dunbar.

In a motion for summary judgment, the Museum argued that the defendant's claim should be time barred under the Massachusetts statute of limitations, which provides that where circumstances exist so that the plaintiff could not have reasonably known that she has been harmed by another, the three-year statute of limitations begins to run only when the first event occurs that would put a reasonable person on notice to inquire into the possible injury. The court granted summary judgment, finding that the defendant's family had sufficient notice of possible injury since the 1940s, and the action was, therefore, not timely.

Bakalar v. Vavra

Bakalar v. Vavra, 2008 U.S. Dist. LEXIS 66689 (S.D.N.Y. 2008), is a New York case currently on appeal before the Second Circuit. In Bakalar, the court held that Swiss law, not New York law, should govern the case. Pursuant to Switzerland's laws, where a person purchases art in good faith, the purchaser acquires valid title to the art even if it was stolen at the time of the transfer.

The plaintiff in Bakalar brought an action seeking judgment declaring that he was the rightful owner of an Egon Schiele drawing in order to stave off the defendants' claim that they were the heirs of the true owner, a Jewish art collector who was arrested by the Nazis. New York's choice-of-law analysis provides that the validity of a transfer is governed by the law of the state where the property is located at the time of the transfer. The drawing had been sold by a Swiss gallery to a New York gallery in 1956. Upon that fact, the court determined that Swiss law should apply. The fact that the artwork's presence in Switzerland was fleeting before its ultimate transfer to New York was not dispositive for the court. Since the New York gallery had purchased the drawing in good faith in Switzerland, it had obtained good title; and the plaintiff, who had purchased the drawing from the New York gallery, prevailed.

Schoeps v. The Museum of Modern Art

The court's decision in Bakalar stands in direct contrast to a later decision, *Schoeps v. The Museum of Modern Art*, 2009 U.S. Dist. LEXIS 5647 (S.D.N.Y. 2009). The dispute in Schoeps centered around two Picasso paintings that were in the possession of the Museum of Modern Art and the Solomon R. Guggenheim Foundation. The claimants alleged that the paintings were transferred by their ancestor as a direct result of Nazi duress, and that the subsequent transfer of one of the paintings, which was being held in Switzerland at the time of the transfer, should be governed by New York law since New York was the location of the ultimate purchaser. Under New York law, this transfer could not pass valid title to the purchaser because the painting was stolen property at the time of the transfer.

To determine choice of law in a contract dispute, New York courts apply an interest analysis, which includes the following five factors: 1) the place of contracting, 2) the place of negotiation, 3) the place of performance, 4) the location of the subject matter of the contract, and 5) the domicile or place of business of the contracting parties. Using this analysis, the court determined that New York law should apply. The court made this determination even though the transfer occurred in Switzerland, a fact that would normally cause the court to apply Switzerland's laws. The court found that New York had a more significant relationship to the matter than Switzerland did, and denied the museum's summary judgment motion. The case did not, however, proceed to trial. The parties settled

the case in a private agreement, despite the court's request that the terms of the settlement be made public.

Vineberg v. Bissonnette

Vineberg v. Bissonnette, 548 F.3d 50 (1st Cir. 2008), involved the disputed ownership of a painting looted by the Nazis from a Jewish gallery owner. In the years following World War II, the gallery owner and his heirs had taken a variety of measures to attempt to locate lost works. Unbeknownst to the gallery owner or his successors, since being purchased from the Nazis in the 1930s, the painting had remained in a private collection and was publicly exhibited only once. In 2005, when the defendant, who had inherited the painting from the purchaser, proposed to auction the painting, the heirs of the gallery owner learned of the painting's whereabouts and demanded its return.

In the litigation that followed, the lower court granted summary judgment in favor of the heirs, finding that they had pursued their claim to the painting diligently, and that the defendant had failed to demonstrate any evidence of prejudice as a result of a delay in bringing the claim. The appellate court easily affirmed the lower court's finding in favor of the plaintiffs.

Cassirer v. Kingdom of Spain

Art restitution cases often involve litigation against foreign governments or museums owned by such governments. Consequently, the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. § 1605, often becomes key to a case's outcome. Under the FSIA, foreign states are immune from the jurisdiction of United States courts. There are, however, exceptions. One such exception, called the "expropriation exception," provides that where property has been taken in violation of international law, a foreign state will not be immune where the rights to such property are at issue.

In *Cassirer v. Kingdom of Spain*, 580 F.3d 1048 (9th Cir. 2009), the court considered for the first time whether the expropriation exception should apply where the foreign state involved in the litigation was not the entity that expropriated the property in violation of international law.[5] Cassirer involved a dispute over the ownership of a painting that the plaintiff alleged was taken from his grandmother by the Nazis in violation of international law in 1939. After a series of transfers, some documented and others not, the painting was sold to Baron Hans-Heinrich Thyssen-Bornemisza, whose art collection was purchased by Spain in 1993.

The court held that the expropriation exception applied to the transfer despite the fact that Germany, not Spain, was responsible for the looting. The court also held that the FSIA does not require exhaustion of domestic remedies in every case; rather, exhaustion should be considered on a case-by-case basis. Accordingly, the appellate court remanded the case to the lower court to determine whether an exhaustion requirement should be applied.

Chabad v. Russian Federation

Chabad v. Russian Federation, 528 F.3d 394 (D.C. Cir. 2008), which was decided in late 2008, involved the allegedly unlawful taking by the Soviet Union of religious books, manuscripts and documents that comprise the textual basis for the teachings and traditions of Agudas Chasidei Chabad of the United States. The materials at issue were taken from Chabad on two occasions. The first occurred when the Russian government seized a portion of the materials during the October Revolution in 1917. The second occurred when Nazi forces seized another portion of the materials during the German invasion of Poland. In 1945, the Soviet military commandeered the materials and brought them to Moscow. In the years after World War II, Chabad leaders made several efforts to recover the materials and eventually brought suit.

Chabad argued that the expropriation exception to the FSIA precluded the defendant's immunity from suit under the FSIA. Chabad also argued that under the circumstances of the case, it was not required to exhaust Russian domestic remedies before bringing the action in the United States. The court agreed with the plaintiff on both grounds and added that the remedy provided under Russian law would be inadequate. Under Russian law, a successful claimant gets the right to buy its own property back from Russia, but the law provides no rules for calculating the property's value. Thus, the court held that Russia would not be shielded from suit under the FSIA.

Freund v. Republic of France

In the third case to tackle the issue of sovereign immunity, *Freund v. Republic of France*, 2008 U.S. Dist. LEXIS 105432 (S.D.N.Y. 2008), Holocaust survivors and their heirs sued for compensation for the expropriation of their property that occurred during their deportation from France to Nazi concentration camps. The plaintiffs sued three defendants: 1) the agents that operated the trains during the deportation, 2) the Republic of France for providing civil servants to run the holding camps, and 3) the bank where the proceeds of the confiscations were allegedly deposited.

In its examination of the defendants' FSIA defense, the court had to determine whether the expropriation exception should apply. The exception, in addition to requiring the property to have been taken in contravention of international law, provides that the property has to be present in the United States in connection with a commercial activity, carried on in the United States by the foreign state. 28 U.S.C. §1605(a)(3).

The court determined that neither of the agencies fell under the scope of the exception because either they were not engaged in a commercial activity in the United States or the expropriated property was not present in the United States. Since neither agency was covered by the exception to the FSIA, the court held that France was outside the scope of the exception as well. Based on this analysis, the FSIA applied and the court lacked jurisdiction to hear the matter.

Westfield v. Federal Republic of Germany

The final case to discuss the issue of foreign sovereign immunity is *Westfield v. Federal Republic of Germany*, 2009 U.S. Dist. LEXIS 65133 (M.D. Tenn. 2009). Westfield involved the alleged looting of an art and tapestry collection by the Nazi regime. The plaintiff argued that Germany should be considered a successor to the Nazi government, and therefore should be held liable for the theft. Germany argued that the FSIA should apply.

Central to the dispute was whether the seizure of the art collection constituted "commercial activity" within the meaning of the expropriation exception. The plaintiff argued that Germany's act of converting the artwork was done in furtherance of the "commercial activity" of selling the art on the private art market, and that this act had a "direct effect in the United States" because the owner had intended to transfer the art to the United States. The court rejected the plaintiff's argument, stating that although the theft was "ineffably horrendous," no commercial activity was involved. An act that is unique to a sovereign power cannot be considered a commercial act. Thus, the court determined that it lacked jurisdiction to hear the case under the FSIA.

Conclusion

The year 2009 was a noteworthy year for cases involving the restitution of Nazi-looted art. Despite the amount of time that has passed since World War II, the restoration of Holocaust-era artwork remains important to the individuals who lost their works. The cases above

demonstrate this continued effort and present an overview of some of the more significant issues in the field as a whole.

[1] Later proceeding at *Sotheby's, Inc. v. Shene*, 2009 U.S. Dist. LEXIS 30714 (S.D.N.Y. Apr. 9, 2009).

[2] *See Sotheby's, Inc. v. Shene*, 2009 U.S. Dist. LEXIS 23596, *7 (S.D.N.Y. 2009).

[3] Herrick, Feinstein LLP represents the plaintiff in this action.

[4] Affirmed in part and reversed in part by *Von Saher v. Norton Simon Museum of Art* at Pasadena, 2010 U.S. App. LEXIS 1019 (9th Cir. Cal. 2010).

[5] Rehearing en banc granted by *Cassirer v. Kingdom of Spain*, 2009 U.S. App. LEXIS 28751 (9th Cir. Dec. 30, 2009).

Resources

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

Thérèse O'Donnell*

Abstract

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

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1 Introduction[1]

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

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

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

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

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

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

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

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

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

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

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

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

Interest in Holocaust restitution claims rose in the 1990s[9] due to many fiftieth commemorative anniversaries.[10] Survivors' attendance at such events cohered activism and arrested processes of decaying memory.[11] Research was aided by increased archival access and the internet.[12] Swiss gold and banking scandals aided consciousness-raising.[13] States' anxieties regarding past complicities encouraged national legislation and (limited) diligence in returning Holocaust assets.[14] Further impetus arose from the establishment of the World Jewish Congress Commission for Art Recovery, and the 1998 Washington Principles effectively internationalized the US Association of Art Museum Directors' principles. Extremely high-profile claims attracted attention.[15] For example, in 2000 the US National Gallery returned a painting (ironically donated by a former Jewish refugee[16]) the provenance details of which recorded the notorious

[8] *Ibid.*, at 309, 316–318 and 348.

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

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

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

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

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

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

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

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

Paris-based collaborator Karl Haberstock.[17] Thus, this 'perfect storm' of events[18] allowed the Holocaust looted art restitution movement to come into its own.

2 Restitution

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

Existing studies regarding property restitution and transitional justice often focus on post-communist societies[19] where states expropriated property. They speak less to claims emerging from a nationally heterogeneous diaspora, where properties commonly reside with museums or individuals (often good faith purchasers). Goering's salted away masterpieces[20] are a fragment of the story. In Hamburg alone, more than 100,000 private individuals acquired formerly Jewish-owned objects.[21] Ordinary Germans may have been unaware of death camps. However, Aryanization's public and widespread nature renders claims of ignorance regarding Nazism's discriminatory nature unsustainable.[22] A widened field of relevant actors comprising Nazi perpetrators and passive beneficiaries emerges. Addressing the consequences of (loosely-termed) Aryanizing social processes is crucially important to reconciliatory transitional justice. Notwithstanding its relationship with mass murder, restitution endured oversight by historians due to the former's thematic dominance.[23] Restitution has drawn accusations of exploitation from both Jewish and non-Jewish quarters. However, property return, while important, is not transitional studies' sole focus. Restitution processes uncover narratives about the past, revealing various prioritized considerations. Such examinations are not mere inconclusive problematizations. Future atrocities and their post-hoc legal genealogy will probably reflect those of the Holocaust (criminal trials, preservation of historical memory, and compensation/restitution). Signposting concerns and obstacles potentially offers resources for the crafting of creative solutions.[24]

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

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

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

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

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

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

[22] Sturman, 'Germany's Re-examination of its Past through the Lens of the Holocaust Litigation', in Bazyler and Alford, *supra* note 9, at 217.

[23] Bajohr, *supra* note 21, at 52.

[24] Dugot, 'The Holocaust Claims Processing Office', in Bazyler and Alford, *supra* note 9, at 279.

[25] M.J. Bazyler, *Holocaust Justice* (2003), at 209.

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

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

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

[26] Barkan, *supra* note 7, at 318.

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

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

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

[30] Bajohr, *supra* note 21, at 59–60.

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

B *Rethinking Restitution and Restitution's Purpose*

Numerically, Nazi kleptocracy[32] equalled all Napoleonic plunder[33] including 600,000 artworks looted from public and private collections in Europe and the USSR.[34] In Germany alone, US forces recovered 10.7 million art and cultural objects worth an estimated $5 billion. During the Nuremberg trial of Alfred Rosenberg (head of Einsatzstab Reichsleiter Rosenberg (ERR), a major looting body) looting qualified as a crime against humanity and a war crime.[35] However, property actions were 'appropriately postponed' for healing opportunities.[36] Restitution's restorative goal perhaps felt more apt at the twentieth century's conclusion.[37]

During the 1950s compensation negotiations, the Germans termed their strategy *Wiedergutmachung'* ('making whole' or 'making good again'). However, Holocaust claims usurp 'spoils of war' models[38] – Auschwitz and Treblinka cannot be financially evaluated.[39] Any sense of the Holocaust's commodification or diminution[40] fragments victim groups. Indeed in the 1951 Israeli Knesset Menachim Begin scorned that the murdered were effectively seeking compensation from murderers.[41] *Wiedergutmachung*'s use was specifically rejected in the 1990s by senior officers of the Conference on Jewish Material Claims Against Germany.[42] Upon signing the 1998 Holocaust Victims

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

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

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

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

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

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

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

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

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

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

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

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

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

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

C *The Wider Objectives of Restitution*

Restitution cannot provide a whitewashing voucher,[50] nor overlook reconciliatory objectives involving truth-finding and healing processes.[51] Restitution and reconciliation must be mutually supportive. Unlike apportioned compensatory awards, art claims (often of only symbolic[52] value) seek the actual object's return. Behind every looted piece lurks the Holocaust narrative.[53] 'Holocaust survivors' were ordinary people too, with families, homes, possessions, jobs, social lives and positions. Restitution can re-humanize,[54] resurrecting stories, 'dissipating shadows created by

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

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

[45] Symposium, *supra* note 5, at 147.

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

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

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

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

[50] Bazyler and Alford, 'Introduction', in Bazyler and Alford, *supra* note 9, at 1.

[51] Symposium, *supra* note 5, at 147.

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

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

[54] Singer, *supra* note 9, at 426.

years of oblivion'.[55] Such personal reconstitution[56] regains some pre-Holocaust, pre-survivorhood life. Studying Nazi looting programmes offers insights into the route to Auschwitz. However, restitution cases offer perspectives on the road *from* Auschwitz, notwithstanding the impossible restoration of life.[57] The 2005 UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law define restitution as also encompassing dignity, worth, identity, and family. One Holocaust Hungarian survivor told how, post-round-up, she put on her father's earlier gift of a swimming costume. At the concentration camp, she reluctantly removed it, relinquishing her secure, old life. Restitution can re-establish an almost unbelievable historical lineage – it puts the swimming costume back on. Although the restituted object may be a relic of the past, it reifies, and allows for the veneration of a culture which tyranny sought to make disappear. Former camp inmates emerge with something other than their victimization,[58] moving from being among history's objects to history's subjects.[59] Socio-historically these claims utilize micro-accounts to throw light on major historical events and vice versa. Indeed, re-examining collective responsibility was an explicit motivating force behind various initiatives in 1990s Austria, including the 1995 law establishing the National Fund of the Republic of Austria for Victims of National Socialism and the 1998 establishment of the Independent Historical Commission.[60]

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

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

[56] *Ibid.*, generally.

[57] Cotler, *supra* note 44, at 623.

[58] Barkan, *supra* note 7, at 24.

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

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

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

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

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

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

D *Ethnicity, Identity and Thefticide*

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

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

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

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

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

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

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

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

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

[72] Bajohr, *supra* note 21, at 59.

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

Looting was simultaneously revelatory of Aryan self-identity. Nazi leaders exploited the expressive power of art,[75] in terms both of exhibiting commitment to Nazi ideology and Nazism's proclaimed cultural instincts.[76] Indeed Alfred Rosenberg, Hitler's Ideological Delegate, headed the looting programme. Hitler's proposed Nazi showpiece,[77] the *Hohe Schule* in (the intended new Austrian capital) Linz would cement the Austro-German bond in defiant ethnic triumphalism.[78] Ironically its composition depended upon confiscated private Jewish collections. Nevertheless, looting's importance in strengthening perverted Germanism is explicit in a 1939 Himmler decree. Pre-existing 'penetration[s] of the East by the German Cultural urge'[79] justified reclamation of 'genuinely Aryan' works. Indeed Rosenberg's Nuremberg defence argued that many French 'safeguarded' works actually stemmed from painters of German origin (e.g. Cranach was lauded as quintessentially Aryan[80]) or were 'German spirit' influenced.[81] *Altmann* would revisit the issue of artworks' ethnicity.

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

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

[74] Bourdieu, *supra* note 65, at 292.

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

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

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

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

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

[80] Bazyler, *supra* note 25, at 249.

[81] Plaut, *supra* note 76.

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

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

[84] Cotler, *supra* note 44, at 607.

[85] Falconer, *supra* note 71, at 396.

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

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

3 Legal Context

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

A *Historical Legal Context – inter-state model*

Even in the 19th century, post-war restitution had legal standing. Post-Napoleonic defeat, the Louvre was sacked and objects returned to places of origin. This model focused on inter-state resolution and continued (see the Treaties of Versailles, Saint-Germain, and Trianon[88]) until the 1940s. Only armed conflict law criminalized, and thus 'personalized', wartime plunder. The American Civil War's Lieber Code acknowledged, as an indicator of civilization (Article 22), the sacredness of private property (Article 37). Title to public property requisitioned during occupation remained in abeyance (Article 31). Receipts were required, enabling spoliated owners to obtain indemnity (Article 38) hinting at private legal recourse. Unauthorized destruction of property, pillaging, and sacking were punishable by death (Article 44) – criminal not restitutive. The 1907 Hague Convention Concerning the Laws and Customs of War on Land and Annexed Regulations also forbade private property's confiscation (Article 46) and pillage (Article 47). Property of municipalities, institutions dedicated to religion, charity, and education, the arts and sciences, even where state property, was to be treated as private (Article 56). Seizure of such institutions, historic monuments, works of art and science was forbidden and subject to legal redress (Article 56). Compensation was provided for. However, such laws pertained to occupying powers and were thus irrelevant as regards the 1930s plunder of *German* Jews' property.[89] Further, although the US Holocaust Victims Act 1998 emphasizes

[86] Eizenstat, *supra* note 3, at 45.

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

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

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

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

1 The 1943 Allied Declaration

Once looting's scale emerged, the Allies produced the Inter-Allied Declaration against Acts of Dispossession Committed in Territories under Enemy Occupation or Control. They reserved all rights to declare invalid any transfers of, or dealings in, any property, rights, and interests which were/had been situated in occupied/Axis-controlled[90] territories or which belonged to persons, including juridical persons, resident in such territories. Open looting, plunder, and sham transactions were covered, thus permitting veils of apparent legality to be stripped. Ostensibly the Declaration remains available,[91] but its potency is debatable. Although the Declaration announced, rather than created, a general norm of restitution[92] this is indisputable only in inter-state terms. Its non-binding form indicates the main signatories' hesitancy regarding enforceable obligations. Subsequently, Chapter VI of the 1944 Final Act of the Bretton Woods Conference outlined detail on looted property's control and restitution. Neutral countries were instructed to undertake immediate measures preventing any dispositions or transfers of property taken from occupied countries or citizens. Special attention was given to art disposals and transfers. Nevertheless, the Yalta and Potsdam conferences focussed upon reparation and compensation – classically inter-state – as embodied in the Crimean Conference Protocol. This is partially explicable by Jewish suffering not yet being the *leitmotif* for World War II atrocities.[93] The Declaration thus reflected contemporary international law, with only agreement for inter-state co-operation.[94] Promised trickle-down effects (whereby states would take up individual cases) remained unrealized. Survivors' expectations that their new states of residence would honour national constitutional guarantees[95] (including rights to peaceful enjoyment of property) and diligently pursue restitution were disappointed. Even if states had been more diligent they would have acted via inter-state restitution, not private, international, claims. Such overall non-compliance with the Declaration puts in doubt its customary law status.

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

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

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

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

[93] Barkan, *supra* note 7, at 6.

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

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

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

Post-war, the Allies undertook property forfeiture initiatives. JCS Order 1067 (April 1945) contained key features of US post-war occupation policy. Its denazification provisions provided for property seizure from senior Nazi organizations and persons. US Military Government (MG) Law No. 52 echoed these provisions and applied them to people residing outside Germany. It blocked property transferred under duress, wrongful acts, and confiscation. MG could seize, take title to, and manage or control such properties. Control Council Law No. 10 clarified that sanctions for those criminally convicted included restitution of property wrongfully acquired. Although central to Allied judicial strategy,[96] forfeiture envisaged proceeds contributing to German reparations, not private restitution. Further, it is unclear that all 1,700 so-called Major Offenders' properties were extracted. Nuremberg convicts lost assets, but their families kept property. Like most denazification practices, penalties seemed harshest on the least blameworthy.[97] MG Law No. 59[98] required Germans to report certain property. However, as a compromise (keeping the Germans onside while avoiding floods of cultural property to manage) it was to be turned in only if held by war criminals.[99] Such initiatives do little to solidify restitution's customary status. Even the modern 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, which actually envisages recourse for private citizens,[100] directs Holocaust claimants towards other recovery routes.[101] A customary legal status for private restitution claims is dubious.

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

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

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

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

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

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

[101] Art. 10(3).

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

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

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

2 *Austria*

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

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

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

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

[106] Rathkolb, 'From "Legacy of Shame" to the Auction of "Heirless" Art in Vienna', available at: www.museum-security.org/ww2/Legacy-of-Shame.html.

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

[108] Rathkolb, *supra* note 106.

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

[110] Rathkolb, *supra* note 106.

[111] *Ibid.*

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

Overall, despite rich material, looting's underlying narratives were unaddressed. There was no desire to analyse the morality/illegality of seizures. Austria's post-war practices evidence begrudging restitution, implying further disrespect for, and exploitation of, survivors. Despite relevant actors having been fellow nationals, no discussion of the inter-twined histories of victims, perpetrators, and bystanders occurred. 'Successful' restitutions simply assumed that partial refunds were required. 'Unsuccessful' restitutions left claimants feeling further victimized. Those in exile sometimes felt disappointed and alienated when refuge states failed to pursue claims. Arguably, the post-war 'justice terrain' at this point was too fragile, and multi-faceted notions of post-traumatic justice too nascent, to cope with problematizing restitution. Despite programmes of inter-state restitution and Germany's compensation payments, private restitution remained 'live'. Concluding otherwise would perversely imply that either it is too late for restitution and the time has come to bury the past or restitution occurred and the past was redressed – ultimately no one is responsible.[113] Expropriation continued post-1945.[114]

B *Legal Context: Post-1940s*

Litigants' obstacles did not diminish over time. The 1943 Declaration required state legislative enactment[115] and withered on the vine.[116] Under the 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict, signatories could take enforcement against violators. The associated protocol stressed post-war property return. However, it was state focussed with no dispute settlement mechanism, and was non-retroactive. Without countenancing private restitution, it simply reinforced states' obligations to negotiate. Article 13 of the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property obliges states to ensure earliest possible restitutions of illicitly exported cultural properties and to admit actions for recovery of lost or stolen cultural property brought by or on behalf of rightful owners. Article 7(b) prohibits the import of cultural property stolen from museums or similar institutions. However,

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

[113] Cotler, *supra* note 44, at 609.

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

[115] Prott, *supra* note 91, at 226.

[116] Fedoruk, *supra* note 2, at 76.

since negotiations were envisaged being made through diplomatic offices it relies on states acting on behalf of claimants. Further, the 1970 Convention fails to address cultural properties looted from, or possessed by, private individuals. It is simply a broad remedial measure aimed at preserving member states' cultural heritages.[117] As noted, claimants are not aided by the 1995 UNIDROIT Convention and therefore continue to crowbar claims into existing general legal mechanisms. Kafkaesque proceedings have involved private international law, statutes of limitations, state immunity, criminal law, and complicated jurisdictional rules.[118] Two case examples, those involving the late Austrian Jewish art dealer Lea Bondi[119] and Maria Altmann, highlight claimants' difficulties.

1 *Portrait of Wally*

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

2 *The Altmann Case*

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

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

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

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

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

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

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

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

3 *Statutes of Limitations*[126]

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

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

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

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

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

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

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

[129] See generally Henson, *supra* note 2.

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

published until the 1990s.[131] The US imposed a time-limit on property recovery by Executive Orders in 1941 and 1942 which stated that 'any property within the United States owned or controlled by a designated enemy country or national thereof could be transferred . . . to the Alien Property Custodian (operating within the Executive Office of the President) as . . . necessary for the national interest'. Many missed the deadline of spring 1955.[132] Arguably, statutes of limitation should be legislatively suspended until the unique practical difficulties surrounding Holocaust claims dissipate.[133]

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

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

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

[132] McCarter Collins, *supra* note 16.

[133] Cuba, *supra* note 126, at 450.

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

[135] Bazyler, *supra* note 25, at 218.

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

[137] Yonover, *supra* note 122, at 88.

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

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

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

However, demand and refusal rules have been harshly interpreted if the demand is not timeously made. *DeWeerth v. Baldinger* concerned a Monet painting[140] allegedly taken from a German woman's collection by American soldiers. In 1981 the painting was located, a demand made, and a claim filed. However, it was held that the demand was not timeously made because search efforts, between 1957 and 1981, were insufficient.[141] Demand and refusal thus received a due diligence ingredient, which had been resisted in earlier cases.[142] In *Guggenheim Foundation v. Lubell*,[143] a Chagall gouache stolen from the museum in the 1960s was located in Ms Lubell's possession in August 1985. Lubell refused the museum's 1986 demand for return, citing both a statute of limitations and the equitable defence of laches. The statute of limitations had expired since the theft with no effort being taken by the Guggenheim to obtain the painting's return. The motion was granted and the action dismissed. However, the New York Court of Appeals held that the due diligence argument was more relevant to laches than statutory limitation, and so Lubell needed to demonstrate prejudice due to the museum's delay in demanding return.[144] It further concluded that the federal court of appeals in the *DeWeerth* case should not have imposed a duty of reasonable or due diligence on the original owners for the purposes of the statute of limitations.

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

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

[141] McCarter Collins, *supra* note16, at n. 131.

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

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

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

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

[146] *Ibid.*

[147] Henson, *supra* note 2, at 1150.

Somewhat controversially, on 30 September 2010, California Governor Arnold Schwarzenegger approved draft bill A.B.2765.[148] This legislation authorizes a civil action against a museum, gallery, auctioneer, or dealer for the recovery of fine artworks that were unlawfully taken or stolen (including a taking or theft by means of fraud or duress) to be commenced within six years of the actual discovery by claimants or their agents of the identity and whereabouts of the artwork and information or facts which are sufficient to indicate that the claimant has a claim for a possessory interest in the artwork. The provisions apply to pending and future actions commenced on or before 31 December 2017, and include any actions that were dismissed based on the expiration of statutes of limitation in effect prior to the date of the enactment of the bill if, prior to that date, the judgment in the action was not final or the time for filing an appeal from a decision on that action had not expired, provided that the action concerns a work of fine art which was taken within 100 years prior to the date of the bill's enactment.

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

4 *Criminal Context*

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

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

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

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

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

5 *Disparities in Rules Relating to Good-Faith Purchasers*

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

6 *Human Rights Law*

The 1950 European Convention on Human Rights and Fundamental Freedoms (ECHR), guaranteeing various property rights, appears claimant-friendly. For example, civil limbs of Article 6 may be activated if prohibitive filing fees render an action merely theoretically available. Given the ECHR's partial horizontalization in the UK via the Human Rights Act 1998, claimants could pursue other individuals. However, Article 1, Protocol No. 1's generality and difficulties regarding retroactivity[155] dilute the ECHR's utility. Conceivably, artwork looted pre-ECHR is a violation which continues into the 'active' period of ECHR jurisdiction.[156] In the quite different context of post-war Czechoslovakian expropriations under the Beneš decrees, the Grand Chamber in *Prince Hans-Adam II of Liechtenstein v. Germany* acknowledged that 'possessions' include claims where applicants arguably had 'legitimate expectations' of obtaining effective enjoyment of property rights. However, hopeful recognition of old property rights' survival, long since impossible to exercise effectively, was excluded.[157]

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

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

[153] Kowalski, *supra* note 92, at 41.

[154] Hamon, *supra* note 67, at 64.

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

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

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

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

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

7 Changing the Normal Legal Framework

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

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

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

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

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

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

victims' entitlement to restitution is sought then, constitutionally, it is unacceptable to give Nazi victims rights above other war victims.[163] A narrower principle concentrates on recognizing the enormity of the Jewish Holocaust via legal amendment. This is implied by the 2009 Terezin Declaration and exemplified by the UK Holocaust (Return of Cultural Objects) Act 2009.[164] The downside of such an approach implies that future victim-groups must surpass Holocaust-paradigmatic standards of suffering. As discussed later on, this may lead to counter-productive, unpalatable, impossible judgments.

C *Legal Context Options – An International Treaty?*

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

However, treaties envisage inter-state frameworks and continue to elide secondary rules of state responsibility with remedying primary breaches of international law. Ostensibly, individuals could pressure their own state if it was lax in negotiating on their behalves. Alternatively individuals could force 'foreign' states hosting artworks to conduct ownership investigations. However, claimants remain at arm's length, at the mercy of state actors acting haltingly or not at all. The road to Hell is often paved with good conventions.[169] Treaties also militate against international law trends favouring principles of compliance (via soft law) rather than rule-breach. Indeed, bespoke soft law instruments (Washington Principles, Vilnius Declaration, Terezin Declaration 2009) represent soft law, perhaps more suited to lower-key Alternative Dispute Resolution (ADR) than courts. Although such approaches have shortcomings (the Madrileno Thyssen-Bornemisza Museum doubted the Washington Principles' power over private museums or Spanish law[170]), given the false promise of treaties, alternative resolution methods merit investigation.

[163] Weil, *supra* note 36, at 297.

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

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

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

[167] Lerner, *supra* note 126, at 35.

[168] Garrett, *supra* note 94, at 394.

[169] Attributed to B.V.A. Röling.

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

D *Courts as Narrative Sites*

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

[171] Neuborne, 'A Tale of Two Cities', in Bazyler and Alford, *supra* note 9, at 73–74.

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

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

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

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

[176] Curran, in *ibid.*, at 165.

[177] Cotler, *supra* note 44, at 603.

[178] Bloxham, 'The Holocaust in the Courtroom', in Stone, *supra* note 21, at 398.

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

[180] Pruszyński, 'Poland; the war losses, Cultural Heritage and Cultural Legitimacy', in Simpson, *supra* note 1, at 50.

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

4 Alternative Methods[182]

A *Key Advantages*

Litigation is gladiatorial, expensive, time-consuming, and unpredictable.[183] Evidential issues precipitate distasteful chases around Europe to establish different historical scenarios. Cost-spreading of class actions is not available.[184] Negotiation, conciliation, and mediation are attractive, subject-appropriate, and are endorsed by the US Association of Art Museum Directors. In the context of good-faith purchasers,[185] a 'battle between two victims' means that initial injustices lead to 'aftergrowths' of injustice.[186] Current owners are rarely the original takers or share that ideology. Alternatives could allow no-fault consensual returns[187] with accompanying acknowledgement of the initial seizure's wrongfulness. Confidentiality could protect auction houses'/museums' reputations.[188] Indeed, even in the context of inter-state disputes over representative national treasures, the UNESCO Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in case of Illicit Appropriation has accepted the addition of mediation and conciliation to its mandate, recently adopting rules and procedures in this connection.[189]

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

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

[183] Sykes, *supra* note 152, at 81.

[184] Bazyler, *supra* note 25, at 254.

[185] Weil, *supra* note 36, at 290.

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

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

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

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

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

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

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

The oft-stressed didacticism of Holocaust litigation overlooks claimants' wish for anonymity. Desires to assert rights to objects, their familial importance, and the significance of their return, should not presume publicity. Indeed, in Israel, survivor-claimants who were keen to fit into an agenda of Zionist nation-building[195] often retreated from 'victimhood', both in World War II's aftermath and decades later.[196] Retreating from lachrymose theories of Jewish identity,[197] the imperative was resurrection, not death. Perhaps a privately negotiated settlement might be of assistance in such cases. Indeed the low-key approach of the UK Holocaust (Return of Cultural Objects Act) 2009, discussed below, was praised for effecting justice without furthering 'victim culture'.[198]

B *Identity of Claimants*

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

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

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

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

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

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

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

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

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

[199] Frumkin, *supra* note 95, at 95.

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

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

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

However the NGO 'proxy' approach is not unproblematic, since NGOs cannot automatically derive legal representational rights from Holocaust deceased.[207] Difficulties also arise between Jewish/non-Jewish claimants[208] and from intra-Jewish group strife. Livid 'intergenerational rivalries' reveal that some survivors believe funds should be distributed solely to those who actually suffered during the Holocaust (regardless of definitional difficulties).[209] Others consider that funds should be spent (usually via NGOs) to ensure the existence of all Jewish people. This entire debate fundamentally questions group identity, social organization and hierarchy, and a group's capacity to limit certain sub-groups' autonomy. It is not new. Debates regarding successor/trusteeship organizations were aired around World War II's end,[210] as were the

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

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

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

[205] Jordan, 'Bittersweet Victories for Jews as Property is Returned', *Christian Science Monitor*, 1 Nov. 1996, 1.

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

[207] Swift, *supra* note 201, at 54.

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

[209] Bazyler, *supra* note 25, at 271–275.

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

possibilities of using auction proceeds.[211] Defining victimhood is tricky. Some Chasdic and ultra-Orthodox Jewish organizations (reflecting pre-war tensions between Western European *Krawattenjuden* and Eastern European *Kaftanjuden*[212]) claim primacy over funds on the basis that their communities were decimated.[213] Indeed, who is an heir? Certain claims have been made by remote relatives. In the case of Silberberg, it was his daughter-in-law. In relation to 'Dead City III' by Egon Schiele, the claimants are the widows of the sons of the victim's cousin. In neither case are they blood relatives (although imposing such restrictions would be completely unpalatable).[214] Ultimately, such regrettable intra-victim disputes should not torpedo well-intended, socially-worthy programmes of asset distribution. Indeed indigent Holocaust survivors[215] are identified as a key priority in the 2009 Terezin Declaration.

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

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

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

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

[213] Bazyler, *supra* note 25, at 273–274.

[214] *Ibid.*, at 212.

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

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

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

[218] Kurtz, *supra* note 99, at 643.

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

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

[221] Barkan, *supra* note 7, at 9.

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

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

C *UK Spoliation Advisory Panel (SAP)*

Established in April 2000, the SAP operates under the auspices of the UK Department for Culture, Media, and Sport. It considers claims from anyone (including heirs) who lost possession of a cultural object during the Nazi era (1933–1945) where the object is now possessed by a UK national collection or one established for the public benefit. The SAP may advise on claims regarding items in private collections at the joint request of claimants and owners.[224] To date, the SAP has reported ten times. While considering legal-title issues, the SAP's function is not to determine legal rights and its findings are not binding. Its proceedings take place in confidence. Attempting to bridge apparent dichotomies between morality and law,[225] the SAP considers both the moral strength of the claimant's case and an institution's moral obligations. The first claim concerned a Tate-held Jan Griffier the Elder painting. The Tate had good legal title but the SAP upheld the claim on its moral strength, and awarded an *ex gratia* payment.[226] The SAP decides on the balance of probabilities while recognizing claimants' specific difficulties. Without being pro-claimant, the SAP seeks solutions equitable to both claimants and institutions.[227] In fact, the SAP provided the model for the equivalent Dutch Restitution Committee to which 119 restitution applications have been made to date.[228] Deaccessioning difficulties,[229] whereby divestiture of museum collections was barred by trust terms[230] or by safeguarding legislation,[231] resulted in claims being upheld, but with *ex gratia* payment awards, not restitutions. In June 2008 the SAP provided for an *ex gratia* payment to be made to a claimant in relation to a piece of fine porcelain barred from disposal due to section 3 of the British Museums Act 1963.[232]

[223] Kurtz, *supra* note 99, at 640.

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

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

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

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

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

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

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

[231] Lerner, *supra* note 126, at 16.

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

In a claim regarding a 12th century manuscript held by the British Library, the SAP recommended it be returned to Italy[233] in the short term via a loan and that legislation ultimately be amended to permit full restitution. Attempts to read in additional exceptions to the statutory rules were unsuccessful.[234] Such difficulties were ameliorated by the Holocaust (Return of Cultural Objects) Act 2009, which enables relevant board trustees to transfer an object from specified bodies established by statute, such as the British Library and the British Museum. Indeed the legislation has allowed the SAP to recommend actual restitution of the aforementioned Italian medieval manuscript.[235] The advisory panel must have recommended the transfer and the Secretary of State (and Scottish Ministers in the case of Scotland) must approve that recommendation. The ultimate transfer decision remains with the trustees. The 'power to return' does not override any trust or condition subject to which an object is held. The Act is not retrospective and it expires ten years from its passage, some 74 years after World War II's end, providing certainty for the public collections concerned. Twenty disputed articles are estimated to be in British collections,[236] although the legislation may prompt more claims. Of course, if whole families were exterminated, good and bad faith purchasers alike retain secure possession.[237] The SAP cannot investigate *ex proprio motu*. However, the art world has clearly assumed moral duties. Special exhibitions, explanatory labels, and provenance notes may not compensate for harm done, but they humbly recognize tainted possession.

5 Conclusion

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

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

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

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

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

[237] Weil, *supra* note 36, at 297.

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

[239] Bazyler, *supra* note 25, at 307; Bazyler, 'The Holocaust Restitution Movement in Comparative Perspective', 20 *Berkeley J Int'l L* (2002) 11.

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

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

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

Property restitution may represent a final stage in the Holocaust's legal reckoning while simultaneously acknowledging that perpetrators cannot establish moral virtue by '[buying] a just and ethical past'.[245] At worst, restitution is coupled or confused with or substitutes for responsibility.[246] Its dark legacy becomes that no one is responsible.[247] However, rather than a conclusion in itself, restitution should be a component in a process of recognition.[248] Distinctions must be drawn between previous actors' guilt and contemporary actors' current, but differentiated, responsibility. After all, *Wiedergutmachung* has some relationship with *Vergangenheitsbewältigung* (overcoming the past).[249] States have variously sought to balance the disparity[250] of holding ill-gotten gains while displaying a Durkheimian rejection of the past. Law can construct legal spaces for the expression of collective memory, providing frameworks in which individual memory operates. As Macklem notes, law memorializes the past via:

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

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

[242] Barkan, *supra* note 7, at 320.

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

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

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

[246] Elster, *supra* note 11, at 166.

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

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

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

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

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

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

[252] Barkan, *supra* note 7.

SUPREME COURT OF THE STATE OF NEW YORK - NEW YORK COUNTY

PRESENT: CHARLES E. RAMOS **PART** 53

Justice

REIF, TIMOTHY

INDEX NO. 161799/2015

MOTION DATE

-V-

NAGY, RICHARD

MOTION SEQ. NO. 008

MOTION CAL. NO.

The following papers, numbered 1 to ____, were read on this motion to/for ____

Notice of Motion/Order to Show Cause - Affidavits - Exhibits ..... No(s) ____

Answering Affidavits - Exhibits ..... No(s) ____

Replying Affidavits ..... No(s) ____

Upon the foregoing papers, it is ordered that this motion is

granted in accordance with the accompanying memorandum decision.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S): ____

DATED: 4/4/2018

CHARLES E. RAMOS J.S.C.

1. CHECK ONE : [XX] CASE DISPOSED [ ] NON-FINAL DISPOSITION

2. CHECK AS APPROPRIATE : MOTION IS: [XX] GRANTED [ ] DENIED [ ] GRANTED IN PART [ ] OTHER

3. CHECK IF APPROPRIATE : [XX] SETTLE ORDER [ ] SUBMIT ORDER

[ ] DO NOT POST [ ] FIDUCIARY APPOINTMENT [ ] REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION

----------X

TIMOTHY REIF and DAVID FRAENKEL,
as Co-Executors of the
ESTATE OF LEON FISCHER,
and MILOS VAVRA,

Plaintiffs and Counterclaim
Defendants,

Index No. 161799/2015

-against-

Mot. Seq. No. 008
Mot. Seq. No. 009

RICHARD NAGY, RICHARD NAGY LTD.,
Artworks by the Artist Egon Schiele
known as WOMAN IN A BLACK PINAFORE,
and WOMAN HIDING HER FACE,

Defendants and Counterclaim
Plaintiffs.

----------X

C.E. Ramos, J.S.C.:

It is sad to note that this case, involving the determination of title to two works of art by the artist, Egon Schiele, is directly concerned with the most tragic event of our time, the Nazi Holocaust. The works are *Woman in a Black Pinafore* and *Woman Hiding her Face* (Artworks). In motion sequence numbers 008 and 009, each side has moved for summary judgment.

Background

The plaintiffs are Milos Vavra, and the co-heirs and co-executors of the estate of Leon Fischer, Timothy Reif and David Fraenkel. The District Court Innere Stadt Vienna has declared Messrs. Vavra and Fischer to be heirs of Franz Friedrich ("Fritz") Grunbaum (Dowd Aff., Ex. 1, September 12, 2002 Certificate of Heirship).

Mr. Grunbaum was a cabaret performer of Jewish Viennese descent living in Austria at the time of the *Anschluss*, and was a vocal critic of the Nazis. Mr. Grunbaum became a victim of Nazi persecution who was arrested in 1938 and murdered in the Dachau Concentration Camp in 1941 (Dowd Aff., Ex. 3, Fritz Grunbaum Death Certificate). Prior to his arrest, Mr. Grunbaum was a prolific art collector who owned hundreds of works of art, including many by Schiele.

A series of Nazi-era documents reveal the gut-wrenching process by which Mr. Grunbaum's property was looted. On April 26, 1938, the Nazis passed the "Decree Regarding the Reporting of Jewish Property," which required all Jews to declare property valued at or over 5,000 Reichmarks. The goal was for the Nazis to seize the property to fund their war machine. As part of enforcing the decree, the Nazis coerced Mr. Grunbaum to execute a Power of Attorney to his wife, enabling her to complete Jewish Property Declarations on his behalf while he was at the concentration camp (Dowd Aff., Ex. 1, July 16, 1938 Power of Attorney; Ex. 1, 1938 and 1939 Jewish Property Declarations; Ex. 33, 1939 Statement of Property).

Franz Kieslinger, a Nazi official, appraised Mr. Grunbaum's property, revealing that it consisted of over four hundred works of art, eighty-one of which were Schiele works (Dowd Aff., Ex. 1, April 27, 1938 Kieslinger Inventory). The completion of the looting was documented in 1939 Jewish Property Declarations,

which were stamped "Erledigt" (completed) and "Gesperrt" (blocked), indicating that Mr. Grunbaum's property had been spoliated (Dowd Aff., Ex. 1, 1939 Jewish Property Declarations). The authenticity of these documents is undisputed.

The defendants, Richard Nagy and Richard Nagy Ltd., are currently in possession of the Artworks. Mr. Nagy is a professional art dealer, and director of Richard Nagy Ltd., a private company headquartered in London, England (Dowd Aff., Ex. 1, Annual Return of Richard Nagy Limited). Defendants assert that they have good title to the Artworks stemming from Mr. Grunbaum's sister-in-law, Mathilde Lukacs, who sold fifty-four works, including the Artworks, to a gallery in Switzerland. That gallery, called Gutekunst & Klipstein (the Gallery), then owned by Eberhard Kornfeld, subsequently advertised the works in a catalogue for sale (Sale Catalogue) in 1956 (Dowd Aff., Ex. 6, 1956 Gutekunst & Klipstein Catalogue).

Defendants owned a half share in *Woman in a Black Pinafore* from 2004 until 2011, when Mr. Nagy returned it due to provenance issues (Dowd Aff., Ex. 9, October 21, 2011 Letter from Richard Nagy to Thomas Gibson Fine Art). Defendants re-purchased that half share (Dowd Aff., Ex. 10, December 9, 2013 Letter from Richard Nagy to Thomas Gibson Fine Art), as well as a full share in *Woman Hiding her Face*, in or after December of 2013 (*Id.*; Dowd Aff., Ex. 4, December 18, 2013 Art Sale and Transfer Agreement).

In an e-mail dated November 13, 2015, plaintiffs' attorney made a demand to defendants to return the Artworks to plaintiffs (Dowd Aff., Ex. 1, November 13, 2015 E-mail from Raymond Dowd to Richard Nagy). The demand was refused, and this action followed. This Court has halted any sale of the Artworks pending resolution of the case.

In motion sequence numbers 007 and 008, the parties have all moved for summary relief, each side contending that there are no triable issues of fact. In that regard, this Court agrees with them, but only one side can prevail.

Discussion

This dispute is governed by New York law. In *Bakalar v Vavra*, 619 F3d 136 [2d Cir 2010], a dispute relating to Nazi-looted art formerly belonging to Mr. Grunbaum, the Second Circuit rejected the Southern District's application of the law of the situs in favor of the interest analysis. "The law of the jurisdiction having the greatest interest in the litigation is applied and the facts or contacts which obtain significance in defining State interests are those which relate to the purpose of the particular law in conflict" (*Id.*, at 144) (citation and quotation marks omitted). In New York, a thief cannot pass good title, as New York refuses to become a marketplace for stolen artwork (*Solomon R. Guggenheim Found. v Lubell*, 77 NY2d 311, 320 [1991]). New York's overwhelming interest in preserving the

integrity of its market warrants the application of New York law (*Bakalar v Vavra*, 619 F3d, at 145).

A motion for summary judgment will be granted once a movant has made a *prima facie* showing of entitlement to judgment as a matter of law, and furnished sufficient evidence to eliminate any triable issues of material fact (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]). Plaintiffs move for summary judgment on their claims for replevin and conversion.

An action for replevin requires the plaintiff to show legal title or a superior right of possession (*In re Flamenbaum*, 27 Misc3d 1090, 1096 [NY Sur Ct, Nassau Cty 2010], *rev'd*, 95 AD3d 1318 [1st Dept 2012], *aff'd*, 22 NY3d 962 [2013]). Relatedly, an action for conversion requires the plaintiff to prove that the property is in the unauthorized possession of another who acted to exclude the plaintiff's rights (*Republic of Haiti v Duvalier*, 211 AD2d 379, 384 [1st Dept 1995]).

This case must be viewed in context. In 2016, Congress passed the Holocaust Expropriated Art Recovery Act of 2016 (HEAR Act). The two purposes of the HEAR Act are:

> (1) To ensure that laws governing claims to Nazi-confiscated art and other property further United States policy as set forth in the Washington Conference Principles on Nazi-Confiscated Art, the Holocaust Victims Redress Act, and the Terezin Declaration, and
> (2) To ensure that claims to artwork and other property stolen or misappropriated by the Nazis [during the Holocaust] are not unfairly barred by statutes of limitations but are resolved in a just and fair manner.

(HEAR Act, Pub L No 114-308, at § 3 [2016]). In pursuit of these aims, the HEAR Act extended the statute of limitations in which a claim may be brought to six years from the time that the artwork's identity and location, and the claimant's possessory interest, are discovered (*Id.*, at § 5[a]). Previously, CPLR § 214[3] limited the timeliness of actions for the return of Nazi-looted art to three years from the time that the true owner demanded the return of the chattel, and the good faith purchaser refused to return it (*Menzel v List*, 49 Misc2d 300, 304-5 [1966], *modified*, 28 AD2d 516 [1st Dept 1967], *rev'd as to modific.*, 24 NY2d 91 [1969]). The HEAR Act applies to artworks that were looted between January 1, 1933 and December 31, 1945 (*Id.*, at § 4[4]).

Before Congress adopted the Washington Conference Principles on Nazi-Confiscated Art (Principles) in the HEAR Act, the Principles, dated December 3, 1998, were endorsed by forty-four governments, including the United States, on December 3, 1998. Significantly, the Principles aim to assist in resolving issues surrounding Nazi-confiscated art:

> In establishing that a work of art had been confiscated by the Nazis and not subsequently restituted, consideration should be given to unavoidable gaps or ambiguities in the provenance in light of the passage of time and the circumstances of the Holocaust era (Washington Conference Principles on Nazi-Confiscated Art, at ¶ 4 [1998]).

The HEAR Act also adopts the Holocaust Victims Redress Act of 1997, which provides:

> all governments should undertake good faith efforts to facilitate the return of private and public property, such as works of art, to the rightful owners in cases where assets were confiscated from the claimant during the period of Nazi rule and there is reasonable proof that the claimant is the rightful owner (Holocaust Victims Redress Act, Pub L No 105-158, Title II, at § 202 [1997]).

The HEAR Act compels us to help return Nazi-looted art to its heirs (HR Rep Vol 162, No 176, at H7332 [Dec. 7, 2016]) ("This legislation will help restore artwork and heritage stolen by the Nazis during the Holocaust to the rightful owners or heirs."). As this Court has previously explained,

> The enactment was based on a Congressional finding that victims of Nazi persecution and their heirs have faced significant procedural obstacles, due in part to State statutes of limitation, to lawsuits brought in the United States to recover misappropriated artworks and other property, and that relief is necessary due to the unique and horrific circumstances of the Holocaust and the difficulty of documenting claims (*Estate of Kainer v UBS AG*, No. 650026/2013, 2017 NY Misc Lexis 4153, at *43-44 [NY Sup Ct, Oct 30, 2017]).

The act was only made into law in 2016. To the extent that defendants rely on judicial findings relating to claims or defenses articulated in *Bakalar v Vavra*, 819 FSupp2d 293 [SDNY 2011] (*Bakalar*), such discussion is irrelevant.

There is no triable issue of fact as to whether the Artworks belonged to Mr. Grunbaum before World War II. Although defendants attempt to dispute this, even the Gallery on which defendants rely as the source of their provenance has confirmed that Mr. Grunbaum had owned the works. An e-mail sent from Mr. Kornfeld's namesake gallery, Galerie Kornfeld, to Dover Street Gallery in

2004 states that all Schieles from the Sale Catalogue had the same provenance stemming from Mr. Grunbaum:

> collection Fritz Grunbaum
> Elisabeth Grunbaum-Herzl (widow)
> Mathilde Lukacs-Herzl (sister of Elisabeth)

(Dowd Aff., Ex. 26, September 23, 2004 E-mail from Wolf von Weiler to Dover Street Gallery). Defendants' Answer with Counterclaims (Answer) also states that the Artworks have the "identical provenance" of the drawing that the Southern District found to have been owned by Fritz Grunbaum in *Bakalar* (Dowd Aff., Ex. 2, Answer, at ¶ 2). Defendants repeatedly refer to this decision in their Answer, as well as their failed collateral estoppel motion (Mot. Seq. No. 003). Defendants therefore cannot simultaneously argue that Mr. Grunbaum never owned the Artworks.

In the HEAR Act, the Principles, and the Holocaust Victims Redress Act, we are instructed to be mindful of the difficulty of tracing artwork provenance due to the atrocities of the Holocaust era, and to facilitate the return of property where there is reasonable proof that the rightful owner is before us (Holocaust Victims Redress Act, Title II, at § 202). We accept that the Artworks were the property of Mr. Grunbaum, and that the entirety of Mr. Grunbaum's property was looted by the Nazis during World War II. As the heirs to Mr. Grunbaum, plaintiffs have made a threshold showing that they have an arguable claim of a superior right of possession to the Artworks, and that the Artworks are in the unauthorized possession of another who is acting to exclude

plaintiffs' rights. Plaintiffs have therefore established to this Court's satisfaction that they have a *prima facie* case of both replevin and conversion.

Confronted with plaintiffs' *prima facie* case, the burden of proof shifts to defendants to establish they have a superior claim to the Artworks, or to at least raise a triable issue of fact (*Zuckerman v City of New York*, 49 NY2d 557 [1980]). This they are unable to do. "The burden of proving that the painting was not stolen property rests with [the possessor]" (*Solomon R. Guggenheim Found. v Lubell*, 77 NY2d, at 321). "[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" (*Zuckerman v City of New York*, 49 NY2d, at 562).

Defendants have neither presented evidence nor raised a triable issue of fact to show that Mr. Grunbaum voluntarily transferred the subject artworks during his lifetime. Although the Nazis confiscated Mr. Grunbaum's artworks by forcing him to sign a power of attorney to his wife, who was herself later murdered by the Nazis, the act was involuntary (*Menzel v List*, 49 Misc 2d 300, at 305) ("The relinquishment here by the Menzels in order to flee for their lives was no more voluntary than the relinquishment of property during a holdup ... The court finds, accordingly, as a matter of law, that there was no

abandonment."). A signature at gunpoint cannot lead to a valid conveyance.

New York protects the rightful owner's property where that property had been stolen, even if the property is in the possession of a good faith purchaser for value (*Solomon R. Guggenheim Found. v Lubell*, 77 NY2d, at 317). A thief cannot convey good title (*Id.*). While defendants argue that they purchased the Artworks in good faith, title remains with the original owner or his heirs absent a valid conveyance of the works (*Id.*). As defendants have not shown that Mr. Grunbaum ever voluntarily transferred the Artworks to Ms. Lukacs, they cannot credibly allege that she owned them (*Gruen v Gruen*, 68 NY2d 48, 53 [1986]).

Moreover, any evidence to suggest that Ms. Lukacs possessed good title to the Artworks is absent from the record. Mr. Kornfeld's deposition testimony in *Bakalar*, reveals that he, an experienced art dealer, apparently did not request Ms. Lukacs to provide identification and confirm provenance when he purchased the Artworks from her (Jamberdino Aff., Ex. I, Expert Report of Laurie A. Stein, at 38-39). He also failed to list her name in the Sale Catalog to show the provenance of the Artworks. In addition, his testimony is inconsistent as to how he found out that the works in the Sale Catalog once belonged to Mr. Grunbaum.

In a single deposition, Mr. Kornfeld testified that he did not learn about Mr. Grunbaum until the late 1990s, and that he

had never heard of Mr. Grunbaum (Dowd Aff., Ex. 19, Declaration and Expert Report of Jonathan Petropoulos, at 24). Neither of these statements appears to be true, as the 1956 Sale Catalogue listed the provenance for the painting *Dead City III* as stemming from Mr. Grunbaum (*Id.*). Mr. Kornfeld also testified that all works in the Sale Catalogue had the same provenance (*Id.*). Interestingly, German and Swiss governmental reports have listed Mr. Kornfeld as someone who trafficked in Nazi-looted art (*Id.*, at 26). Defendants have not disputed any of these facts, and have failed to meet their burden of showing that the Artworks were not stolen, or that there is a question of fact necessitating trial.

Defendants' Answer presented eighteen defenses: (1) collateral estoppel based on *Bakalar*, (2) failure to state a claim, (3) laches, (4) defendants' good faith acquisition, (5) lack of standing based on *Bakalar*, (6) lack of subject matter and personal jurisdiction, (7) international comity, (8) statute of limitations, (9) applicability of the foreign law of Austria, Switzerland and the United Kingdom, (10) adverse possession, (11) lack of prejudice to plaintiffs by any of defendants' alleged actions, (12) failure to exhaust remedies, (13) lack of injuries, (14) waiver, (15) failure to join necessary parties, (16) injuries were caused by third parties, (17) dereliction and abandonment, (18) the future right to assert additional defenses. The defenses are grouped and analyzed below.

The third and eighth defenses relate to the timeliness of plaintiffs' complaint. Plaintiffs discovered the Artworks at Mr. Nagy's booth at the Salon Art + Design Show at the Park Avenue Armory in New York City in November of 2015. Plaintiffs' attorney subsequently made a demand for defendants to return the property on November 13, 2015, which was refused (Dowd Aff., Ex. 1, November 13, 2015 E-mail from Raymond Dowd to Richard Nagy). Seeing that plaintiffs filed the present action in 2015, the action is timely under the three-year statute of limitations in CPLR § 214[3] (*Solomon R. Guggenheim Found. v Lubell*, 77 NY2d, at 317-18).

Moreover, the HEAR Act expanded the timeliness for actions to recover Nazi-looted artwork to six years from "the actual discovery by the claimant" of the "identity and location of the artwork" and of "a possessory interest of the claimant in the artwork" (HEAR Act, § 5[a]). Congress has also instructed that actions brought within six years will be timely, "[n]otwithstanding … any defense at law relating to the passage of time" (*Id.*). Although defendants argue that the HEAR Act is inapplicable, this argument is absurd, as the act is intended to apply to cases precisely like this one, where Nazi-looted art is at issue. Since plaintiffs discovered the Artworks in November of 2015, their action is timely under the HEAR Act (*Maestracci v Helly Nahmad Gallery, Inc.*, 155 AD3d 401, 404-5 [1st Dept 2017]). The statute of limitations and laches defenses fail.

Defendants' laundry list of other defenses are also unsuccessful, as briefly discussed below. The first and fifth defenses of collateral estoppel and lack of standing based on *Bakalar* are improper. As already noted, the Southern District's decision in *Bakalar* was issued before Congress enacted the HEAR Act, and its reasoning is inapplicable to this case. We have also already denied defendants' collateral estoppel motion. The second defense of failure to state a claim does not apply, as plaintiffs have stated a *prima facie* case. The fourth defense that defendants acquired the Artworks in good faith is inapplicable, because a thief cannot convey good title (*Menzel v List*, 49 Misc 2d 300, at 315). The seventh and ninth defenses relating to international comity and the applicability of foreign law are irrelevant, as we have already stated that New York law applies under the interest analysis (*Solomon R. Guggenheim Found. v Lubell*, 77 NY2d, at 320). The remaining sixth, and tenth through eighteenth defenses are conclusory and were not adequately pleaded (*Kronish Lieb Weiner & Hellman LLP v Tahari, Ltd.*, 35 AD3d 317, 319 [1st Dept 2006]). Bare legal conclusions are insufficient to raise an affirmative defense (*Robbins v Growney*, 229 AD2d 356, 358 [1st Dept 1996]).

It is worth noting that questions regarding the validity of title have affected the market value of the Artworks. Mr. Nagy is a Schiele expert. In 1998, the art world was put on notice of

potential provenance issues with Schiele artworks when the New York County District Attorney issued a subpoena to the Museum of Modern Art to seize two Schiele works, even though the Court of Appeals ultimately held that the works could not be subject to seizure because they were on exhibit from abroad (*People v Museum of Modern Art (In re Grand Jury Subpoena Duces Tecum)*, 93 NY2d 729 [1999]). In or around June or July of 2004, defendants paid 91,140.00 British Pounds (£) for a half share of *Woman in a Black Pinafore* (Dowd Aff., Ex. 39, June 23, 2004 Invoice from Thomas Gibson Fine Art to Richard Nagy), a steep discount from the amount between £350,000 and £450,000 that Sotheby's estimated it would sell for the day prior.

The Art Loss Register and plaintiffs' attorney, Raymond Dowd, wrote to Mr. Nagy on numerous occasions in 2004 and 2005, informing Mr. Nagy that Mr. Grunbaum's heirs were searching for works that belonged to his estate (Dowd Aff., Ex. 7, June 8, 2005 Letter from Sarah Jackson to Richard Nagy; Ex. 23, August 10, 2004 Faxed Letter from Antonia Kimbell to Julia Theill; Ex. 24, September 8, 2004 Letter from Antonia Kimbell to Julia Theill; Ex. 27, September 27, 2004 Faxed Letter from Sarah Jackson to Caroline Schmidt; Ex. 28, October 11, 2005 Letter from Raymond Dowd to Richard Nagy). Mr. Nagy even returned his half share of *Woman in a Black Pinafore* in 2011 due to provenance issues (Dowd Aff., Ex. 9, October 21, 2011 Letter from Richard Nagy to Thomas Gibson Fine Art), before buying it back in 2013 following the

decision in *Bakalar* (Dowd Aff., Ex. 8, February 24, 2005 Letter from Thomas Gibson Fine Art to Richard Nagy; Ex. 10, December 9, 2013 Letter from Richard Nagy to Thomas Gibson Fine Art). To his credit, evidence indicates that Mr. Nagy inquired regarding the provenance of *Woman in a Black Pinafore* with Sotheby's (Dowd Aff., Ex. 25, September 28, 2004 E-mail Chain Sent from Caroline Schmidt to Thomas Gibson), and the Art Loss Register before it was shipped to him, though the findings were not conclusive (Dowd Aff., Ex. 23, August 10, 2004 Faxed Letter from Antonia Kimbell to Julia Theill; Ex. 24, September 8, 2004 Letter from Antonia Kimbell to Julia Theill; Ex. 27, September 27, 2004 Faxed Letter from Sarah Jackson to Caroline Schmidt; Ex. 29, August 10, 2004 Letter from Antonia Kimbell to Richard Nagy).

On December 18, 2013, Mr. Nagy purchased *Woman Hiding her Face* for $1.5 million from the Estate of Doris Rubin, six years after her death (Dowd Aff., Ex. 4, December 18, 2013 Art Sale and Transfer Agreement). Potential ownership claims by Grunbaum heirs were acknowledged in the Art Sale and Transfer Agreement, which required the seller to obtain a title insurance policy (*Id.*, at ¶ 10). That same day, Mr. Nagy entered into a resale agreement with Michael Goddard of Baltic Partners Limited in the Cayman Islands (Dowd Aff., Ex. 11, December 18, 2013 Letter from Baltic Partners Limited to Richard Nagy). Mr. Goddard agreed to pay $1.5 million to Mr. Nagy, and in return Mr. Nagy acquired exclusive rights to remarket the work for no less than $2.5 million, insured on an

all risk basis (*Id.*). These facts show that Mr. Nagy did not pay full value for *Woman Hiding her Face*, and that defendants were aware of the Artworks' Nazi provenance and plaintiffs' claims.

As plaintiffs have succeeded in this action, we must deny defendants' motion for summary judgment on their counter-claims for declaratory judgment and slander of title.

Accordingly, it is hereby

ORDERED that plaintiffs' motion for summary judgment on replevin and conversion claims is granted. The parties are directed to settle an order on notice vesting title in Mr. Grunbaum's estate, and denying defendants' motion.

Dated: April 4, 2018

J.S.C.
CHARLES E. RAMOS

Vor Ausfüllung des Vermögensverzeichnisses ist die beigefügte Anleitung genau durchzulesen!

Zur Beachtung!

1. **Wer hat das Vermögensverzeichnis einzureichen?**
   Jeder Anmeldepflichtige, also auch jeder Ehegatte und jedes Kind für sich. Für jedes minderjährige Kind ist das Vermögensverzeichnis vom Inhaber der elterlichen Gewalt oder von dem Vormund einzureichen.
2. **Bis wann ist das Vermögensverzeichnis einzureichen?**
   Bis zum 30. Juni 1938. Wer anmelde- und bewertungspflichtig ist, aber die Anmelde- und Bewertungspflicht nicht oder nicht rechtzeitig oder nicht vollständig erfüllt, **setzt sich schwerer Strafe (Geldstrafe, Gefängnis, Zuchthaus, Einziehung des Vermögens) aus.**
3. **Wie ist das Vermögensverzeichnis auszufüllen?**
   Es müssen sämtliche Fragen beantwortet werden. Nichtzutreffendes ist zu durchstreichen. Reicht der in dem Vermögensverzeichnis für die Ausfüllung vorgesehene Raum nicht aus, so sind die geforderten Angaben auf einer Anlage zu machen.
4. Wenn Zweifel bestehen, ob diese oder jene Werte in dem Vermögensverzeichnis aufgeführt werden müssen, sind die Werte aufzuführen.

44614

Verzeichnis über das Vermögen von Juden

nach dem Stand vom 27. April 1938

des/der Grünbaum Franz Friedr. (Fritz) (Zu- und Vorname), Schauspieler u. Schriftsteller (Beruf oder Gewerbe)

in Wien IV. (Wohnsitz oder gewöhnlicher Aufenthalt), Rechte Wienzeile Straße, Platz Nr. 29

Angaben zur Person

Ich bin geboren am 7. April 1880.

Ich bin Jude (§ 5 der Ersten Verordnung zum Reichsbürgergesetz vom 14. November 1935, Reichsgesetzbl. I S. 1333)

und — deutscher [1]) — ..... — Staatsangehörigkeit [1]) — ~~staatenlos [1])~~.

Da ich — Jude deutscher Staatsangehörigkeit [1]) — ~~staatenloser Jude [1])~~ — bin, habe ich in dem nachstehenden Vermögensverzeichnis **mein gesamtes inländisches** und **ausländisches** Vermögen angegeben und bewertet [1]).

Da ich Jude fremder Staatsangehörigkeit bin, habe ich in dem nachstehenden Vermögensverzeichnis mein **inländisches** Vermögen angegeben und bewertet [1]).

Ich bin verheiratet mit Elisabeth geb. Herzl (Mädchenname der Ehefrau)

Mein Ehegatte ist der Rasse nach — jüdisch [1]) — ~~nichtjüdisch [1])~~ — und gehört der mosaischen Religionsgemeinschaft an.

Angaben über das Vermögen

I. Land- und forstwirtschaftliches Vermögen (vgl. Anleitung Ziff. 9):

Wenn Sie am 27. April 1938 land- und forstwirtschaftliches Vermögen besaßen (gepachtete Ländereien u. dgl. sind nur aufzuführen, wenn das der Bewirtschaftung dienende Inventar Ihnen gehörte):

Lage des eigenen oder gepachteten Betriebs und seine Größe in Hektar? (Gemeinde — Gutsbezirk — und Hofnummer, auch grundbuch- und katastermäßige Bezeichnung)	Art des eigenen oder gepachteten Betriebs? (z. B. landwirtschaftlicher, forstwirtschaftlicher, gärtnerischer Betrieb, Weinbaubetrieb, Fischereibetrieb)	Handelte es sich um einen eigenen Betrieb oder um eine Pachtung	Wert des Betriebs RM	Bei eigenen Betrieben: Wenn der Betrieb noch Anderen gehörte: Wie hoch war Ihr Anteil? (z. B. 1/4)
1	2	3	4	5

II. Grundvermögen (Grund und Boden, Gebäude) (vgl. Anleitung Ziff. 10):

Wenn Sie am 27. April 1938 Grundvermögen besaßen (Grundstücke, die nicht zu dem vorstehend unter I und nachstehend unter III bezeichneten Vermögen gehörten):

Lage des Grundstücks? (Gemeinde, Straße und Hausnummer, bei Bauland auch grundbuch- und katastermäßige Bezeichnung)	Art des Grundstücks? (z. B. Einfamilienhaus, Mietwohngrundstück, Bauland)	Wert des Grundstücks RM	Wenn das Grundstück noch Anderen gehörte: Wie hoch war Ihr Anteil? (z. B. 1/4)
1	2	3	4

[1]) Nichtzutreffendes ist zu durchstreichen.

Heftrand

Case 1-15) MT. 162

III. Betriebsvermögen (vgl. Anleitung Ziff. 11 und 12)

a) Wenn Sie am 27. April 1938 Inhaber eines **Gewerbebetriebs** waren (vgl. Anleitung Ziff. 11):

Bezeichnung des Betriebs (Firma), Ort der Geschäftsleitung und Art des Betriebs (z. B. Maschinenfabrik, Lebensmittelhandlung, Gastwirtschaft, Tischlerei)	Gesamtwert des Betriebs nach Abzug der Betriebsschulden? RM	Wenn der Betrieb noch Anderen gehörte: Wie hoch war Ihr Anteil? (z. B. 1/4)
1	2	3

Außer den Angaben in den Spalten 1 bis 3 ist die Berechnung des „Gesamtwerts des Betriebs" in einer Anlage im einzelnen zu erläutern

b) Wenn Sie am 27. April 1938 **an offenen Handelsgesellschaften, Kommanditgesellschaften oder ähnlichen Gesellschaften beteiligt waren:**

α) Um welche Gesellschaften handelt es sich? (Bezeichnung des Betriebs, Firma, Ort der Geschäftsleitung) .....

β) Wie hoch war Ihr **Anteil**? ..... Wie hoch war der **Wert** Ihres Anteils? ..... RM

c) Wenn Sie am 27. April 1938 Vermögen besaßen, das **der Ausübung eines freien Berufs** diente (vgl. Anleitung Ziff. 12):

α) Art des freien Berufs? Schauspieler u. Schriftsteller
(z. B. Augenarzt, Rechtsanwalt, Architekt, Kunstmaler)

β) Wo wurde der freie Beruf ausgeübt? Wien
(Gemeinde, Straße, Hausnummer)

γ) Welchen Wert hatte das dem freien Beruf gewidmete Reinvermögen am 27. April 1938? ... 720 RM Bücher

[Eine Aufstellung dieses Vermögens, aufgegliedert insbesondere nach Inventar (z. B. Instrumente, Bibliothek) und Außenständen, ist beizufügen. Wenn Sie den freien Beruf zusammen mit anderen Personen ausübten, ist in der Aufstellung das gemeinschaftliche Vermögen aufzuführen und der Wert Ihres Anteils hieran anzugeben.]

IV. Sonstiges Vermögen, insbesondere Kapitalvermögen (vgl. Anleitung Ziff. 13 bis 21):

Welchen Wert hatte das Ihnen am 27. April 1938 gehörige sonstige Vermögen (ohne Abzug von Schulden), und zwar:

a) Festverzinsliche Wertpapiere einschl. Schuldbuchforderungen und Sachwertanleihen (z. B. Anleihen oder Schuldverschreibungen von Staaten und Gemeinden, Obligationen von Industriegesellschaften, Pfandbriefe, Steuergutscheine usw.),

Wertpapiere mit Dividendenertrag (z. B. Aktien, Kuxe und Genußscheine, Reichsbankanteilscheine, Reichsbahnvorzugsaktien),

Geschäftsanteile an inländischen und ausländischen Unternehmen? (z. B. Anteile an Gesellschaften mit beschränkter Haftung, — Name der Gesellschaft, Ort der Geschäftsleitung ist anzugeben) — vgl. Anleitung Ziff. 14 —.

Bezeichnung des Wertpapiers usw. *[Wird ein Bankauszug beigefügt, aus dem sich die Angaben zu den Sp. 1 bis 5 vollständig ergeben, so genügt die Ausfüllung der Sp. 5 unter Hinweis auf den Bankauszug]*	Zinssatz [1])	Nennbetrag des gesamten Besitzes an dem in Sp. 1 bezeichneten Wertpapier usw.	Kurswert gemeiner (Verkaufs-) Wert in Prozenten oder für ein Stück o. dgl.	Wert für den in Sp. 3 angegebenen Nennbetrag RM	Bemerkungen
1	2	3	4	5	6
Treffinganleihe		1 St. à 500 RM		336·50	
"		5 " a 100 RM		338·75	
7 St. ostd. Bäderlose 1923/II		a 7·52		33·—	

[1]) Nur bei festverzinslichen Werten anzugeben, nicht z. B. bei Aktien, Kuxen, Anteilen an Gesellschaften mit beschränkter Haftung.

Fortsetzung

b) Verzinsliche und unverzinsliche Kapitalforderungen jeder Art an Inländer oder Ausländer? (z. B. Hypotheken, Grundschuldforderungen, Darlehen, Einlagen als stiller Gesellschafter, solche Ansprüche auf Gehälter, Löhne, Zinsen und ähnliche Beträge, die am 27. April 1938 bereits fällig, jedoch noch nicht ausgezahlt waren, Tilgungsfonds, die zugunsten des Steuerpflichtigen angesammelt sind u. dgl.). — vgl. Anleitung Ziff. 15 —

[Spareinlagen, Bankguthaben, Postscheckguthaben und sonstige laufende Guthaben sind nicht hier, sondern nachstehend zu c anzugeben.]

Art der Forderung (z. B. Hypothek, Darlehen)	Name und Anschrift des Schuldners	Nennbetrag der Forderung	Zinssatz [1]	Vertragliche Laufzeit bis [2]	Bemerkungen (z. B. über Umrechnung einer ausländischen Währung)
1	2	3	4	5	6

c) Zahlungsmittel, Spareinlagen, Bankguthaben, Postscheckguthaben und sonstige laufende Guthaben? (vgl. Anleitung Ziff. 16) bei Österr. Credit-Anstalt, Filiale Wien VII ..... 917·93 RM

Die Beträge in ausländischer Währung und die angewandten Umrechnungssätze sind im einzelnen ggf. auf einer Anlage, anzugeben.

d) Geschäftsguthaben bei Erwerbs- und Wirtschaftsgenossenschaften? (vgl. Anleitung Ziff. 17) ..... RM

Name der Genossenschaft, Ort der Geschäftsleitung: .....

VI

e) Noch nicht fällige Ansprüche aus Lebens-, Kapital- oder Rentenversicherungen, zu berechnen mit $^2/_3$ der eingezahlten Prämien oder Kapitalbeiträge oder mit dem Rückkaufswert? (vgl. Anleitung Ziff. 18) ... . RM

Name der Versicherungsgesellschaft: Riunione adriatica Wien,

Nr. des Versicherungsscheins: 358742/743a, 358252/253a = Dollar 1725 a 2489 = 42.935·26

Viktoria 1285140 " 933 " " 2322·73

45257·99

f) Altenteilsrechte, Nießbrauchsrechte und sonstige Rentenrechte? (vgl. Anleitung Ziff. 19): Welchen Wert hatte die einjährige Nutzung? ..... RM. Seit wann stehen Ihnen die Nutzungen zu?

Seit ..... 19..... Bis wann stehen Ihnen die Nutzungen zu? Bis ..... 19.....

(Falls das Recht mit dem Ableben einer Person erlischt, sind auch Tag, Monat und Jahr der Geburt dieser Person anzugeben.)

Welchen Kapitalwert hatte das Recht? ..... RM

g) Gegenstände aus edlem Metall, Schmuck- und Luxusgegenstände, Kunstgegenstände und Sammlungen? (vgl. Anleitung Ziff. 20) Bilder u. Graphik lt. angeschl. Schätzung .... 5791 RM

h) Edelmetalle, Edelsteine und Perlen? Schmuck " " " ..... 750 RM

VI

i) Anderes nicht unter a bis h fallendes »sonstiges Vermögen«? (vgl. Anleitung Ziff. 21) ..... 6541 RM

(z. B. Urheberrechte, geschützte und nicht geschützte Erfindungen, solche Gewerbeberechtigungen, die nicht vom Berechtigten selbst ausgeübt werden.)

Art der Gegenstände und Errechnung ihres Werts sind hier anzugeben. .....

Bezüglich Urheberrechten s. bezüglich Verfügungen s. Bemerkungen Punkt VI

.....

.....

.....

[1] Einschließlich eines etwa vereinbarten Verwaltungskostenbeitrags. — [2] Bei Festzeithypotheken ist der Zeitpunkt einzusetzen, an dem die Rückzahlung frühestens verlangt werden kann, bei Kündigungshypotheken (ohne feste Mindestlaufzeit) ist die Kündigungsfrist anzugeben.

V. Abzüge, soweit sie nicht das Betriebsvermögen (oben Abschnitt III) betreffen

(Schulden und Lasten dürfen nur insoweit abgezogen werden, als sie bei Beginn des 27. April 1938 bereits bestanden. Sie sind nachstehend im einzelnen aufzuführen.)

a) Schulden (vgl. Anleitung Ziff. 22):

Art der Schuld (z. B. Hypotheken-, Darlehnschuld)	Name und Anschrift des Gläubigers	Nennbetrag der Schuld	Zinssatz [1]	Vertragliche Laufzeit bis [2]	Bemerkungen (z. B. über Umrechnung einer ausländischen Währung)
1	2	3	4	5	6

b) Altenteilslasten, Nießbrauchslasten und sonstige Rentenlasten (vgl. Anleitung Ziff. 23): Welchen Wert hat die einjährige Leistung? ..... RM. Seit wann sind die Leistungen zu entrichten? Seit ..... 19.....

Bis wann sind die Leistungen zu entrichten? (Falls die Leistungen bis zum Ableben einer Person zu entrichten sind, sind auch Tag, Monat und Jahr der Geburt dieser Person anzugeben.) Bis ..... 19..... Welchen Kapitalwert hatte die Last? ..... RM.

VI. Bemerkungen:

Zu i Als Librettist einiger Operetten vereinnahmte L. Grünbaum im Jahre 1937 lt. Steuerfassion an Verlagstantièmen RM 460.— als Mitglied d. Autorengesellschaft " 2762.66

Zu e Ende Mai 1938 hat L. L. Grünbaum die hier angeführten Versicherungen an seine Gattin Elisabeth Grünbaum cediert, was mit Schreiben vom 14. Juli 38 der Vermögensverkehrsstelle mitgeteilt wurde.

Ich versichere, die vorstehenden Angaben **nach bestem Wissen und Gewissen** gemacht, insbesondere mein Vermögen in diesem Vermögensverzeichnis **vollständig angegeben zu haben.** Soweit Werte in diesem Vermögensverzeichnis angegeben sind, bin ich von der Anleitung, die dem Vordruck zu diesem Vermögensverzeichnis beigelegen hat, nicht abgewichen.

Wien, 1. August 1938

Elisabeth Grünbaum für Frank Friedr. Grünbaum
(Unterschrift des Anmeldepflichtigen oder der an seiner Stelle zur Abgabe des Vermögensverzeichnisses verpflichteten Person)

lt. Vollmacht v. 16. Juli 1938.

Vermögensverzeichnisse ohne Unterschrift gelten als nicht abgegeben

[1] Einschließlich eines etwa vereinbarten Verwaltungskostenbeitrags. — [2] Bei Festzeithypotheken ist der Zeitpunkt einzusetzen, an dem die Rückzahlung frühestens verlangt werden kann; bei Kündigungshypotheken (ohne feste Mindestlaufzeit) ist die Kündigungsfrist anzugeben.

2190. 38. HC

Seitung

Document No. 1 (four pages)

[Handwritten entries are printed in italics]

Page 1 of 4)

"Verzeichnis über das Vermögen von Juden"
(Inventory of the property of Jews)

for Franz Friedrich Grünbaum, Actor and Writer, residing in Vienna, IV, Rechte Wienzeil 29

This is an inventory of personal property of Jews as required by the Reichsvermögensamt (property office). It is divided into the following categories:

I. Farm and Forest Property
II. Real Estates (Land, Buildings)

Page 2 of 4

III. Commercial Property (Books 720 RM)
IV. Other Property, especially Capital with subcategories for
a) Bonds, Stocks et cetera 336.5 RM, 338.75 RM, 33 RM

Page 3 of 4

b) Mortgage, Liens et cetera
c) Bank Accounts
(Österreichische Creditanstalt, Branch Vienna VI: 317.93 RM)
d) Commercial Accounts
e) Life Insurance Policies
(Riunione adriatica Vienna, Policy Nr. 358742/743a, 358252/253a
Dollar 17250 @ 2489 = 42.935.29;
Viktoria, Policy Nr. 1285140, Dollar 933 = 2,322.73)
f) Retirement plans
g) Objects made from precious metals, Jewelry, Objet d'Art and Collections:
Paintings and Prints as according to enclosed appraisal: 5,791 RM
h) Precious metals, jewels, pearls
Jewelry: 750 RM
i) Other
Regarding Copyrights and regarding Insurance Policies, see Notes Section VI

Page 4 of 4

V. Debts and other Obligations
VI. Notes
re.i As librettist for several operettas, F. Grünbaum had an income according to his tax assessment for the year 1937 of RM 460 in publishers royalties and as member of the author's society of 2,762.66 RM.

re.e At the end of may 1938, F.F. Grünbaum wrote the insurance policies given hereunder over to his wife Elisabeth Grünbaum, notice of which was given in a letter dated July 14, 1938 to the Vermögensverkehrsstelle.

signed on August 1, 1938 in Vienna by Elisabeth Grünbaum on behalf of Franz Friedrich Grünbaum by power of attorney issued July 16, 1938.

V e r z e i c h n i s

über das Vermögen des Franz Friedrich Israel G r ü n b a u m, derzeit in Schutzhaft im Konzentrationslager Weimar-Buchenwalde, nach dem Stande vom 30. Juni 1939 unter Hinweis auf die Vermögensanmeldung vom 27.April 1938 und die anlässlich der ersten Einreichung in der Centralstelle für jüdische Auswanderung anfangs Februar 1939 erstattete Veränderungsanzeige :

1.)	Bargeld	RM 1826.-
2.)	Wertpapiere, unverändert 7 Stück österr. Baulose	" 33.-
3.)	Bilder und Graphik	" 5791.-
4.)	Bücher	" 720.-
	zusammen	RM 8370.-

Die Differenz zwischen obiger Summe und der der Vermögensanmeldung nach dem Stande vom 27.April 1938 erscheint gerechtfertigt durch

1.) Bezahlung der Reichsfluchtsteuer in der Höhe von ..... RM 17.250.-

2.) der Judenvermögensabgabe im Ausmasse v. " 8.800.-

für mich und meine Gattin Elisabeth Sara Grünbaum .

Die in der Vermögensanmeldung angeführten Versicherungspolizzen der Riunione Adriatica di Sicurta und der Victoria zu Berlin wurden wie bereits angegeben an meine Gattin zediert, was der Vermögensverkehrsstelle am 15. Juli 1938 angezeigt worden ist.

Der Schmuck im Werte von 750 RM laut Vermögensanmeldung wurde am 31.März 1939 abgeliefert; Entgelt hiefür habe ich bis zum heutigen Tage nicht erhalten.

./.

3

Der mir gehörige Bargeldbetrag verminderte sich durch die Bemessungsgebühr der Centralstelle für jüdische Auswanderung per RM 1000.- , Geldsendungen meiner Gattin an mich in das Konzentrationslager zwischen 30. Jänner und 30. Juni 1939 per RM 720.-, für Visagebühren,etc. per RM 179.- auf die eingangs angegebene Höhe von RM 1826.-

Bargeld und Wertpapiere sind mit Sicherungsanordnung der Devisenstelle Wien Zl. 858/38-90 vom 3.August 1938 sichergestellt worden; es durfte seither über diese Werte nur mit Bewilligung der Devisenstelle Wien verfügt werden.

Document No. 5 (two pages)

Inventory

of the property of Franz Friedrich Israel Grünbaum, currently in protective custody in the concentration camp Weimar-Buchenwald, as of June 30, 1939, with reference to the Declaration of Property submitted April 27, 1938 and the notice of change given in the beginning of February 1939 on the occasion of the first submission to the central office for Jewish emigration.

1.) Cash: RM 1826.00
2.) Stocks and Bonds, unchanged: 7 Austrian Baulose: RM 33.00
3.) Paintings and Prints: RM 5,791.00
4.) Books: RM 720

Total: RM 8370.00

The Difference between the above sum and the Property Declaration of April 27, 1938 appears justified by
1.) Payment of Reichsfluchtsteuer (Emigration tax) to the sum of RM 17,250.00

2.) Jewish Property Levy of RM 8,800.00
for me and my wife Elisabeth Sara Grünbaum.

The Insurance policies listed in the Property Declaration with Riunione Adriatica di Sicurta and the Viktoria Berline were written over to my wife as per previous notice to the Vermögensverkehrsstelle on July 15, 1938.

The Jewelry valued at RM 750 according to the Property Declaration were handed over on March 31, 1939; I have not received compensation for these to this day.

The Cash sum that I own was diminished by the assessment of the central office for Jewish emigration of RM 1000, Moneys sent to me by my wife to the concentration camp between January 30 and June 30 of RM 720, for visa fees etc. of RM 179 from the initial sum in the beginning, to RM 1826.

Cash and Stocks were confiscated by the Devisenstelle Wien on August 3, 1938 and could be used since then only with permission by this office.

88a

B 9b

	1	2	J	3
Nummer	Beruf	Wohnsitz	Alter	Staat
44614	231	703	58	02

I.

I				II			III a			III b			III c		IV	V		
2		E	1	2			2	4		4	2		2					
Lage	Fläche	5	Wert	Lage	6	Wert	Lage	Art	Wert	Art	Lage	Wert	Lage	Wert	Wert	Wert	L.	P.
													703	1	53		32	20

II.

a	b	c	d	e	f_1	f_2	g	h	i	Va	Vb	L.	P.
7		3		453			65					31	10

III.

Art	Wert	Art	Wert	Art	Wert	Art	Wert	Art	Wert	Art	Wert	Art	Wert	L.	P.
1014	10	1904	7											39	47

44614

Wien, 1. Aug. 1938.

An die

Vermögensverkehrsstelle

Wien I

Rk Staat
Ci/Hdk.
214.094

Zufolge Aufforderung vom 27. Juli d. J. übersende ich beiliegend das Vermögensverzeichnis meines Mannes, des in Schutzhaft befindlichen Schauspielers u. Schriftstellers Franz Friedrich (Fritz) Grünbaum, von dem ich in der Zwischenzeit eine Vollmacht erhalten habe.

Elisabeth Grünbaum
Wien IV. Rechte Wienzeile 29.

3 Beilagen
3 Vermögensverzeichnisse

6

Document No. 11 (one page)

Vienna 1 August 1938

To the
Vermögensverkersstelle

In accordance with your request dated July 27 of this year I am sending enclosed the Property Inventory of my husband in protective custody, the actor and writer Franz Friedrich Grünbaum, from whom I have in the meantime been given power of attorney.

Elisabeth Grünbaum
Wien IV, Rechte Wienzeile 29

enclosed:
Property Inventory

44614

Dachau, 16.Juli 1938 -

V O L L M A C H T ,

mit welcher ich, gefertigter Franz Friedrich (genannt Fritz) G r ü n b a u m , Schauspieler in Wien, IV., Rechte Wienzeile 29, derzeit Dachau, meine Ehefrau Elisabeth G r ü n b a u m , Wien IV., Rechte Wienzeile 29 , ermächtige, für mich das gesetzlich vorgeschriebene Vermögensbekenntnis einzubringen und alle für dessen Rechtswirksamkeit nach den gesetzlichen Vorschriften erforderlichen Erklärungen und Unterschriften für mich abzugeben und mich überhaupt in allen meinen Angelegenheiten rechtswirksam zu vertreten . Ich ermächtige sie gleichzeitig auch , diese Vollmacht im gleichen oder eingeschränkten Umfang auf eine andere Person nach ihrem freien Ermessen zu übertragen . -

- - - - - - - - - - - - - - - - Fritz Grünbaum m.p. - - - - - - - -

Abschrift stimmt mit dem mir vorliegenden, ungestempelten Originale, welches aus einem Bogen besteht , vollkommen überein . -

- - - Wien, am sechsundzwanzigsten Juli Eintausendneunhundertachtunddreissig . -

Ges.Geb. 1.20 RM.

Dr. HANS WALLNER ÖFFENTLICHER NOTAR WIEN-WIEDEN

Öffentl. Notar

7

Document No. 2 (one page)

(full translation)

Dachau, July 16, 1938

Power of Attorney

by which I, the undersigned G\Franz Friedrich (known as Fritz) Grunbaum, actor in Vienna, IV. Rechte Wienzelle 29. currently Dachau, empower my spouse Elisabeth Grunbaum, Vienna IV., Rechte Wienzelle to submit on my behalf the Vermogensbekenntnis [declaration/statement of property] as required by law, and to provide any signatures or other declarations that may be required in order to ensure that it complies with the law, and generally to act on my behalf in all matters. At the same time I also empower her, to transfer this power of attorney in whole or in part onto another person of her own free choosing.

Fritz Grunbaum m.p.

This copy agrees completely with the unstamped original before me, which consist of a single sheet. ---------- Vienna, on the twenty-sixth July Nineteen thirty eight.

Gen. Geb. [fee] 1.20 RM [signed and stamped] Dr. Hans Wallner

44614

West 27.4.38

Herr Franz Friedrich (Fritz) Grünbaum Wien

1 gold. Zip Etui, moosguill.	RM	350	—
1 " Dunhill Feuerzeug	"	100	—
1 " Uhrkette	"	80	—
1 " Taschenuhr, Vacheron & Constantin"	"	220	—
	RM	750	—

Wien 28. Juli 1938

Carl Brunner

KOMMERZIALRAT
CARL BRUNNER
GER. BEEID. SACHVERST. u. SCHÄTZMEISTER
Inh. d. Fa. M. HÜBNER, Juwelier
WIEN I., KOHLMARKT 16

JUWELIER
M. HÜBNER
WIEN I.
KOHLMARKT 16

8

Document No. 6 (one page)

April 27, 1938

Appraisal addressed to Franz Friedrich (Fritz) Grünbaum

List of items (cigarette case, Dunhill lighter, chain, watch)

signed: Carl Brunner, Appraiser and Jeweler, Vienna July 28, 1938

Dr. FRANZ KIESLINGER
PERCHTOLDSDORF N.Ö.
HOCHSTRASSE 133

S c h ä t z u n g s g u t a c h t e n .

Über den Kunstbesitz des Herrn Franz Friedrich Grünbaum, in Wien IV., Rechte Wienzeile 29, nach dem gemeinen Wert vom 1. Jänner 1938 beziehungsweise (unverändert) vom 27. April 1938.

P.Z.	Gegenstand	Schätzwert in R.Mark.
	A) Herrenzimmer.	
1.	E. Schiele, der Selbstseher, Oel, Lw.	300.--
2.	" Frauenportrait, Oel, Lw.	200.--
3.	" Stadt am Fluss	25.--
4.	" Kleine Landschaft mit Bäumen	20.--
5.	" Schiffe im Hafen	15.--
6.	M. Oppenheimer, (Mopp) Bläserquintett	30.--
7.	Russisches Ikon auf Goldgrund, Fragment	20.--
8.	Französisches Aquarell, modern, Mädchen in Landschaft skizze	10.--
9.	Franz, Aquarell, Modern, Landschaft mit Häuserzeile und wolkigem blauen Himmel	30.--
10.	C. Harpignis, Landschaft mit entlaubten Bäumen, Aquarell	10.--
11.	P. Signac, Fluss mit grossem Bett, Stadt im Mittelgrund aquarellierte Zeichnung	40.--
12.	Holzstatuette, Reste von alter Fassung, Barok, deutsch Christus, stark beschädigt	30.--
13.	Holzstatuette, Engel, spanisch um 1600	30.--
14.	" heiliger Franziskus, Ob.Oest. um 1600	50.--
15.	E. Orlik, Dschunken am Fluss, frabige Radierung	8.--
16.	F. von Stuck, Zentaur, aquarellierte Zeichnung	200.--
17.	Egger-Lienz, 2 Soldaten vor Gebirgslandschaft, Aquarell	60.--
18.	E.Huber, Dalmatinischer Marktplatz	30.--
19.	" Dalmatinische Stadt mit Meeresbucht	30.--
20.	Willy Nowak, Strasse bei Nacht, linksverne Wagen, Aquarell	25.--
21.	Viktor Tischler, Landschaft, Oel, Lw.	20.--
22.	H. Canal, Landschaft mit Mühle bei Mondenschein, Oel.Lw.	20.--
23.	Zwei Initialen aus illuminierten Codices a) aus grossem Missale mit Noten b) kleines Gebetbuch, Holzschnitt von Dürrer, Aufl. Druck	45.--
	Transport R.M.	1.248.-

Dr. FRANZ KIESLINGER
PERCHTOLDSDORF N.Ö.
HOCHSTRASSE 133

P.Z.	Gegenstand	Schätzwert in R.Mark
	Transport	1248.--
24.	Stefano della Bella, Radierungen, 20 Stück,	15.--
25.	a Rembrandt-Radierungen, 4 Stück, spätere Drucke, b Kreis des Rembrandt, Gelehrter.	250.--
26.	Ein Konvolut deutscher Radierungen, 13 Blatt Penez, 3 Beham, 2 Lucas v.Leyden, 1 H.Hopfer, 1 Urs Graf, (Neudruck) 1 Schongauer (nach ihm ?) 1 Aldegraver, 1 Altdorfer	180.-
27.	3 Kupferstiche von Dürer, Auferstehung (Duplette der Bremer-Kunsthalle, stark beschnitten), Bartholomäus, das monstreuse Schwein	100.-
28.	1 Konvolut, 2 Niellä, 3 holländische Radierungen, 1 Schrotblatt	9.--
29.	7 Blatt Kupferstiche Beham	40.--
30.	1 Konvolut: 1 Farbholzschnitt a.e.Livre d'Heure; 4 franz. Stiche (2 Callot, Bemarne, Delacroix) 6 italienische Stiche (Tiepolo, Castiglione, Reni), 2 Radierungen Ostade, 2 ditto. Karel Dujardin, 2 ditto. Bega, 1 Kupferstich von Goltzius, 1 Radierung von Dietricy 1 Radierung von Rees	15.--
31.	23 zeitgenössische Radierungen	10.--
32.	Zeitgenössische Graphik, Orlik, Pechstein, Liebermann u.a. 21 Stück	15.--
33.	Druckgraphik von Dore und Daumier 9 Blatt	20.--
34.	Zeitgenössische Graphik 10 Blatt (Kollwitz, Harta, Tischler etc.	15.--
35.	5 Blatt grosse Graphiken, Münzer, Mopp, Klinger, Faistauer Kriehuber)	10.--
36.	12 Kupferstiche des 17. und 18. Jahrhunderts und 3 Handzeichnungen, 1 nach Carracci und 2 Blatt 19 Jh. deutsch	20.--
37.	Grosse Handzeichnungen von Schiele 55 Blatt mit Farben	1200.--
37a	20 Bleistiftzeichnungen und 1 Radierung v.Schiele	300.--
38.	Zeitgenössische Aquarelle und Zeichnungen (Schatz, Vitasek Kokoschka, Mopp, Gütersloh etc) 24 Blatt	30.--
39.	Zeitgenössische Zeichnungen u.Aquarelle, grosse Formate (Mopp, Faistauer, Kolik, etc. 18 Blatt	90.--
40.	2 grosse Kokoschka, weibliche Köpfe, Hdz.	50.--
41.	Tötel Blatt, Englisch, 2 Kutscherstudien	15.--
42.	Reproduktion nach Gesamme, Lithogr.	10.--
43.	Deckenentwurf, Aquarell, ital. 18. Jh.	30.--
44.	2 franz. Blätter, Art des Gavarni Mädchen mit Kind 18.Jh.	20.--
45.	Ital. Barokzeichnung, Mitte des 18.Jh. Deckenentwurf	12.--
46.	1 Konvelut von 3 Handz. Calame, Israels, Tiroler Barokmaler	30.--
47.	1 " Zeichnungen des 18.u.19.Jh., (die wichtigeren Zuschreibungen falsch, wie Gaugein, Chodowieski etc.) 20 Blatt	80.--
	Transport R.M.	3.814.--

10

Dr. FRANZ KIESLINGER
PERCHTOLDSDORF N.Ö.
HOCHSTRASSE 133

P.Z.	Gegenstand	Schätzwert in R.Mark
	Transport R.Mk	3.814.--
48.	15 franz. Zeichnungen, darunter Doré Meissonier, Rodin, Degars, angebl. Corot, Constable (?) Gavarni Courbet, 2 Guys, Daubigny.	400.--
49.	Konvolut, geringere Zeichnungen des 19.Jh. 14 Blatt	35.--
50.	Kleines Altwiener Aquarell, Art des Treml, bäuerliche Prozession, gerahmt,	30.--
51.	Konvolut, 32 kleine Zeichnungen und Aquarelle, zumeist Altwiener-Meister, Thomas Ender, Pettenkofen, Makkart etc. aber auch Spitzweg, Schwind (?)	400.--
52.	Konvolut mittelgrosser Zeichnungen, darunter Pettenkofen, Gauermann, Kaufmann, ein unwichtiges Blatt von Menzl, Corinth, Liebermann, drei bescheidene Blätter von Spitzweg, Knaus, Habermann, 20 Blatt	250.--
53.	Eine Mappe enthaltend 6 Blatt Aquarelle und Zeichnungen darunter ein Hedler (?)	160.--
	B) Speisezimmer.	
54.	1 Knabenportrait v. Erasmus, Engerth, Oel. Lw.	200.--
55.	Kleines Oelbild, Waldrand mit Staffage von Stockmann	20.--
56.	Molnar, Stilleben, Oel.Lw.	20.--
57.	Epstein, Selbstportrait, Zeichnung,	15.--
58.	Robert Russ, Wiesenlandschaft,	30.--
59.	Willroider, Landschaft, Oel.	20.--
60.	Burghard Walde, Tiroler Bäuerin, Oel	25.--
61.	Leopold Karl Müller, Studie aus Kairo, Oel	60.--
62.	5 Biedermeier Portraitsminiaturen, 1 Stich, 1 Glückwunschkarte, 1 Silhuette,	100.--
63.	2 ganz kl. Oelbildchen, Landschaft und Fellachenknabe	20.--
64.	Moll,Bauernmädchen, Art des Bartels,	80.--
65.	2 Robert Schleich, Heuwagen und Schafherde, zus.	70.--
66.	1 dekoratives Oelbildchen,	10.--
	C) Schlafzimmer.	
67.	Angebl. Kriehuber, Praterbäume,	20.--
68.	Genrebild undeutlich signiert, Mann in Bibliothek	12.--
	R.Mark	5.791.-

In Worten:Fünftausendsiebenhunderteinundneunzig Reichsmark.
Obige Gegenstände in 68 Teilposten,Gesamtschätzbetrag von 5791 Mark wurden von mir am heutigen Tag nach dem gemeinen Wert wie oben geschätzt. Wien, am 20. Juli 1938.

Dr. Kurt Kieslinger

EXPERTE DES DOROTHEUMS
für mittelalterliche Kunst
M. MITGLIED DES INST. FÜR
ÖSTERR. GESCHICHTSFORSCHUNG
WIEN

11

General Administration
Archive of Austria

National Socialist Department for
the Movement of Goods

Document No. 4 (1 of 4)

Dr. Franz Kieslinger
Hochstrasse 133
Perchtoldsdorf, Lower Austria

Appraisal

of the art collection of Franz Friedrich Grunbaum, in Vienna IV, Wienzeile 29 recording as current value as of January 1, 1938 (without change) as of April 27, 1938.

Item No.	Object	Estimated Value RM
A. Parlor		
1.	E. Schiele The Self-Seers, oil on canvas	300
2.	" Portrait of a Woman, oil on canvas	200
3.	" Town by a River (Dead City)	25
4.	" Small Landscape with Trees	20
5.	" Ships in the Harbor	15
6.	M. Oppenheimer, (Mopp) Woodwind Quintet	30
7.	Russian icon on gold background, fragment	20
8.	French watercolor sketch of a girl in a landscape	10
9.	French watercolor, contemporary, landscape with houses and cloudy blue sky	30
10.	C. Harpignis, landcsape with leafless trees, watercolor	10
11.	P. Signac, river with large boat, town in middle distance, drawing with watercolor	40
12.	Wooden statuette of Christ, remains of old frame, baroque, German, badly damaged	30
13.	Wooden statuette of an angel, Spanish, ca 1600	30
14.	St. Francis, Upper Austria, ca 1600, wooden statuett	50
15.	E. Orlik, Junks in a River, color etching	8
16.	E. von Stuck, Zentauer, drawing with watercolor	200
17.	Egger Lienz, two soldiers in a mountain landscape, watercolor	60
18.	E. Huber, Market square in Dalmatia	30
19.	E. Huber, Seaside town in Dalmatia	30
20.	Willy Nowak, Street by night with car, watercolor	25
21.	Viktor Tischler, Landscape, oil on canvas	20
22.	H. Canal, landscape, mill in moonlight, oil on canvas	20
23.	Two initials from illustrated codices: a) large missal with notation b) print of Durer woodcut from small prayer book	45
	Subtotal	1,248

Item	Object	Estimated Value RM
	Subtotal	1,248
24.	Stefano della Bella, Etchings, 20 pieces	15
25.	a.Rembrandt Etchings, 4 pieces, later prints [from plate] b. Circle of Rembrandt, Scholar	250
26.	Group of German Etchings, 13 Sheets Pencz 3 Beham, 2 Lucas v. Leyden, 1 H. Hopfer, 1 Urs Graf (print), 1 Shongauer (aft. Shong.?), 1 Aldegraver, 1 Altdorfer	180
27.	3 Engravings by Durer, Resurrection (double of the the Bremer Kunsthalle, heavily trimmed), Bartholomew The monstrous Pig	9
28.	1 Group, 2 Nielle, 3 Dutch Etchings, 1 Schrotblatt	
29.	7 Copper engravings Beham	
30.	1 Group: 1 color woodcut from a Book of Hours; 4 French engravings (2 Callot, Demarne, Delacroix); 6 Italian engravings (Tiepolo, Castiglione and Reni); 2 Etchings Ostade; 2 Etchings Karel Dujardin, 2 Etchings Beta, 1 Kupferstich von Goltzius, 1 Etching by Ditricy, 1 Etching by Roos	15
31.	23 Contemporary etchings	10
32.	Contemporary prints, Orlik, Pechstein,Liebermann et al (21)	15
33.	Intaglio prints by Dore and Daumier (9 works)	20
34.	Contemporary prints 10 items: Kollwitz, Harta, Tischler etc.)	15
35.	5 Large prints, Munzer, Mopp, Klinger, Faistauer, Kriehuber	10
36.	18 Copper Engravings from the 17th and 18th century and 3 drawings, 1 after Carracci and 2 works German, 19th century	20
37.	Large drawings by Schiele, 55 works colored a. 20 drawings and 1 print from Schiele	1,200
38.	Contemporary watercolors and drawings (Schatz, Vitasek, Kokoschka, Mopp, Gutersloh etc.) 24 works	300
39.	Contenporary watercolors and drawings, large format, 1 Mopp Faistauer, Kolik, 18 works)	30
40.	2 Large Kokoschka drawings of femal heads	90
41.	Work by Totel, English, 2 studies of Coachmen	50
42.	Reproduction after Cezanne, lithgraph	15
43.	Ceiling design Italian 18th century	18
44.	2 French B Girl with child 18th century	30
45.	Italian Baroque drawing, celing design, mid 18th century	20
46.	1 Group of 3 drawings Clame, Israels, Tyrolean Baroque painters	12
47.	1 Group of drawings from the 18th and 19th century (the most important attributions ??? from Gauguin, Chodowieski etc. 20 works	30
	Subtotal	80
		3,814 RM

Item	Object	Estimated Value	RM
		Subtotal	3,814 RM
48.	15 French drawings among them Dore, Meisonnier, Rodin, Degars[?], alleged Corot, Constable (?) Gavarni, Courbet, 2 Guys, Daubigny		400
49.	Group of drawings of minor value, 19th century, 14 works		30
50.	Small waterolor of old Vienna, in the manner of Term, a procession in the cvountry		30
51.	Group of 32 small drawings and watercolors, mostly old Vienna, master Thomas Ender, Pettenkofen, Makkart etc. and others Spitzweg, Schwind (?)		400
52.	Group of medium sized drawings, Pettenkofen, Gauernvan, Kaufman, 1 unimportant work from Menzl, Corinth, Lieberman, 3 modest works from Spitzweg, Knaus, Haberman, 20 works.		250
53.	One portfolio containing 6 watercolors and drawings amongst them one Hodler.		150
(B)	Dining Room		
54.	One portrait of a boy by Erasmus, Engarth, oil on canvas		200
55.	Small oil painting, forest edge with staffage by Stockmann		20
56.	Molnar, still life, oil on canvas		20
57.	Epstein, self-portrait		15
58.	Robert Russ, Meadow Landscape		30
59.	Willroider, landscape, oil on canvas		20
60.	Burghard Walde, Tyrolean peasant woman, oil		25
61.	Leopold Karl Muller, Study of Cairo, oil on canvas		60
62.	5 Biedermeier miniature portraits, 1 engraving, 1 card, 1 silhouette		100
63.	2 very small oil paints , landscape and Egytian boy		20
64.	Holl, peasant girl, manner of Bartels		80
65.	2 Robert Schleich, Haywagon and Flock of Sheep together		70
66.	1 small, decorative oil painting	10	
(C)	Bedroom		
67.	Paint of Prater trees, attributed to Krienhuber		20
68.	Gesso painting, illegible signature, Man in Library		12
		R. Mark	5,791

In words: Five Thousand Seven Hundred and Ninety One Reichsmark.

Above items in 68 individual parts. Total estimated valu of 5,791 Mark was estimated by me according to current values as above on this day. Vienna. July 20, 1938.

[signed] Dr. Franz Kieslinger

32437

Vermögensbekenntnis.

Diese Erklärung ist für jene Personen abzugeben (bei Minderjährigen die Eltern, oder deren Bevollmächtigte) die in den Personenkreis fallen, der durch die Kundmachung 102 vom 26. April 1938, betreffs der Anmeldung des jüdischen Vermögens erfaßt wurde. Bei der Ausfertigung des Bekenntnisses hat sich der Meldende genau an die umseitige Erläuterung zu halten. Zum Unterschied von der Vermögensanmeldung, sind hier in den einzelnen Rubriken, **nur die Endziffern** des jeweiligen Vermögensbestandteils einzusetzen.

Zu- und Vorname: Frau Friedr. Sara Grünbaum geb. 7.4.1880

derzeitige Anschrift: 4 Redlewiesenzeile dezt. Weimar-Buchenwald

		Vom Einreicher auszufüllen		Raum für Bemerkungen der Dienststelle
		Stand v. 27. April 1938	Stand von heute	
		Wert in RM	Wert in RM	
I.	Land- und Forstwirtschaftlicher Besitz	Keines	Keines	
II.	Grundvermögen (Grund — Boden Gebäude)	Keines	Keines	
III.	Betriebsvermögen	Keines	Keines	
IV.	Sonstiges Vermögen (Bargeld, Guthaben Wertpapiere Geschäftsguthaben) (siehe Anmerkung)	Rm 56.047.22	Rm 8.370.-	
V.	Schulden und Lasten	Keine	Keine	19. Juli 1939
		Beschlagnahmt, von wem?	Wert in RM	Wo befinden sich die Werte?
VI.	Gesperrtes Vermögen	Bargeld + Wertpapiere sind durch Sicherungsbescheid der Devisenstelle gesperrt. Verfügung darüber nur mit Genehmigung der Devisenstelle		

Erledigt durch Geldbeschlagnahme

Ich versichere, die vorstehenden Angaben nach bestem Wissen und Gewissen gemacht zu haben. Von der umseitigen Erläuterung bin ich nicht abgewichen.

Wien, am Juli 1939.

Frau Friedr. Sara Grünbaum
Elisabeth Sara Grünbaum
Unterschrift.

Form. 96. 20.000. 12. 38. U.

12

ELISABETH GRUNBAUM 3

CONFESSION OF PROPERTY

Elisabeth Grunbaum, born April 28, 1898,
Actual address: Vienna 19, Kaasgraben 15.
Stamped on the right side: July 19, 1939.
Another stamp: "Erledigt" - Finished.
A third stamp: "Gefperrt"? -blocked by the Department for the Movement of Goods.
June 1939.

(boxes)

1. Farm land: None
2. Land (real estate property) 7,851.57 RM Slovakia
3. Business possessions: none
4. Other possessions (cash, stocks etc.)
   1938: 20,866; 1939: 4,311 RM; Slovakia crowns 6,030.70
5. debts: none (in 38 or 39)
6. blocked property: official administrator is the only one authorized to use. The Department for foreign currency has blocked cash and stocks. When the Grunbaums want to use it they have to ask permission.

Dated: June 1939 [signed] Elisabeth Sara Grunbaum

Erläuterung zur Ausfertigung des Vermögensbekenntnisses.

Der Meldende hat im Bekenntnis nur sein eigenes Vermögen anzugeben. Für Ehegatten (auch nicht jüdische) und jüdische Kinder ist eine besondere Meldung einzureichen. Vermögen, das aus einer Erbschaft, oder aus einem Vermächtnis zu erwarten ist, muß auch dann gewertet werden, wenn die Eigentumsübertragung noch nicht erfolgt ist.

Anzumelden ist das gesamte Vermögen:

a) nach dem Stand vom 27. April 1938
b) nach dem Stand am Tage der Einreichung.

Juden deutscher Staatsangehörigkeit und staatenlose Juden, haben ihr gesamtes in- und ausländisches Vermögen anzumelden.

Juden fremder Staatsangehörigkeit, haben ihr inländisches Vermögen anzugeben.

Gegenstände die ausschließlich zum persönlichen Gebrauch des Meldenden bestimmt sind, soweit es sich nicht um Schmuck-, Kunst- oder Luxusgegenstände handelt, sind nicht anzugeben.

Jeder Vermögensbestandteil ist mit dem gemeinen Wert, den er am 27. April 1938, bzw. am Tag der Einreichung hat, zu bewerten. In die einzelne Sparte ist nur die jeweilige Endziffer der Vermögensgruppe einzusetzen.

Zu I) Zum land- und forstwirtschaftlichen Vermögen gehört auch das Weinbauvermögen, das gärtnerische Vermögen und das der Fischzucht, Teichwirtschaft, Binnenfischerei usw. gewidmete Vermögen.

Zu II) Hierunter fallen alle Grundstücke.

Zu III) Hierunter fällt jeder gewerbliche Betrieb und das Vermögen, das der Ausübung eines freien Berufes dient.

Zu IV) Hierunter fallen alle Werte und Güter, die nicht unter den vorherigen Gruppen untergebracht wurden. Dazu gehören: Wertpapiere, Anteile, Kapitalsforderungen, Zahlungsmittel, Einlagen, Guthaben und noch nicht fällige Versicherungsansprüche (Rückkaufswert), Schmuck, Kunst- u. Luxusgegenstände, Urheberrechte, Patente, Erfindungen, Konzessionen u. a.

Nießbrauchrechte, Renten, Pensionen und Gehälter sind kapitalisiert anzugeben. Der Wert auf die Lebenszeit einer Person beschränkten Nutzung, bestimmt sich nach dem Alter. Als Wert wird angenommen bei einem Alter

				bis	zu	15	Jahren	das	18	fache,
von	mehr	als	15	„	„	25	„	„	17	„
„	„	„	25	„	„	35	„	„	16	„
„	„	„	35	„	„	45	„	„	15	„
„	„	„	45	„	„	55	„	„	13	„
„	„	„	55	„	„	65	„	„	10	„
„	„	„	65	„	„	75	„	„	7	„
„	„	„	75	„	„	80	„	„	5	„
„	„	„	80	Jahren	das				3	„

des Wertes der einjährigen Nutzung. Immerwährende Nutzungen sind mit dem Achtzehnfachen, Nutzungen und Gehälter von unbestimmter Dauer mit dem Neunfachen ihres Jahreswertes anzusetzen.

Zu V) Hier sind anzuführen, Hypotheken, Grund- und Darlehensschulden, der Kapitalswert von Alimentationen u. a. wiederkehrende Leistungen zu berechnen nach Punkt IV Absatz 2.

Zu VI) Hier ist der Wert der gesperrten Vermögensteile anzuführen. Anzuzeigen ist ferner, von wem Werte gesperrt wurden, und wo sich diese Werte befinden.

Im übrigen findet bei der Ausfertigung des Bekenntnisses die Anleitung die zur Ausfüllung des Vermögensverzeichnisses maßgebend war, sinngemäße Anwendung.

explanations to fill out the form

A2

44614

F 5738

Franz Friedrich
Grünbaum

4. Kanzlei Wiengasse 29

(03.1.27)

17

4461477

DOROTHEUM
Wien, I. Spiegelgasse 16

Nº. 31677
11044

Öffentliche Ankaufsstelle

nach § 14 der Verordnung über den Einsatz des jüdischen Vermögens.

Von: Friedrich Franz Israel u. Elisabeth Sara Grünbaum, Wien, 19., Hofzeile 27.

wurden am heutigen Tage nachstehende ablieferungspflichtige Wertgegenstände angekauft:

Laufende Nr.	Gegenstand	Ankaufspreis Reichsmark	Anmerkung
1.	1 Schnur Perlen mit Goldschliesse 3 Brillanten 7 gr	200.—	B III
2.	1 Ring mit 1 Brillant 1 Perle 4 gr Platin	200.—	B III
3.	1 Platin Armbanduhr mit Brillante n I.W.C. Werk besch	170.—	B III
4.	1 goldgl. Herrenremontoir Vacheron 18 krt	120.—	W
5.	1 Zigarettendose 1 k Kette 1 Angehänge 128 gr Gold 1 Feuerzeug mit Gold 30 gr	222.—	B I
	Summe:	912.—	
	abzüglich 10%	91.20	
		820.80	

Wien, am 9. November (37.3.) 1939

Kaufmann

Mayer

14

BWB/Do 276 - 3500 IX 39 - SP 4556

Document No. 9 (one page)

Receipt issued by
Dorotheum

Public Buyer's Office
under Paragraph 14 of the order regarding the use of Jewish property

The following valuables as articles required to be relinquished were bought from Franz Friedrich Israel and Elisabeth Sara Grünbaum on this day:

1 Pearl necklace, 1 ring, 1 Platine wristwatch, 1 watch, 1 cigarette case

Vienna, November 9, 1939

Vom. II 20/8.

22. JULI 1938

Wien, 15. Juli 1938.

An die

Vermögensverkehrsstelle

Wien I

Strauchgasse 1.

Mein Gatte, der Schauspieler Franz Friedrich Grünbaum befindet sich seit 22. März in Schutzhaft, d. Zw. derzeit in Dachau SK, Block 6, Stube 4.

Ich ersuche daher höfl. ihm die Frist zur Einbringung des Verzeichnisses über das Vermögen von Juden bis nach seiner Rückkehr zu erstrecken.

Elisabeth Grünbaum

V.

IV. Rechte Wienzeile 29.

1.)Einreicher aufgefordert, Häftling zur Bestellung eines Bevollmächtigten zu veranlassen.
(Frist 20.Aug-1938.)
2.)Z.d.A.
Wien, 27.Juli 1938.

Vermögensverkehrsstelle
im Ministerium für Wirtschaft und Arbeit
Eing. 13. JUL. 1938
Zahl: 214094
Abt.: Recht | Blg.: 0

ELISABETH 2

Elisabeth Grunbaum writes in her own hand requesting more time for her husband FF Grunbaum to fill out the property statement.

AT THE TOP OF THE PAGE, IN ANOTHER HAND: Form II, August 20

Vienna, July 15, 1938

PROPERTY STATEMENT

1 Strauchgasse
Vienna I

My husband, the actor, Franz Friederic Grunbaum, is, for the moment, in protective custody since March 22, in Dachau 3 K, Block 6, Room 4.

I ask you to give him more time until he returns to fill in the form concerning the property of Jews.

Signed

Elisabeth Grunbaum
29 Rechte Wienzeile
Vienna IV

To: The departmemt of movement of goods,
Strauchgasse 1, Vienna 1.
Stamped July 22, 1938

A typed note below states:
1. The person who wrote the letter asks for the prisoner: She should choose a representative and authorize him to do this by Aug. 20, 1938.
2. Zda:
Vienna, July 27, 1938.

(This may refer to the power of attorney, Doc. TK, which she acquired on July 16, 1938).

Stamped: Department for the Movement of Goods: Arrived July 18, 1938.
File 214094.
Law Dept.
No additional sheets.

Dr. LUDWIG ROCHLITZER
RECHTSANWALT
WIEN I., FÜHRICHGASSE 10
TELEPHON R-23-203
POSTSPARKASSEN-KONTO 148.339

WIEN, am 31. Jänner 1939

Sehr geehrte gnädige Frau !

Auf Ihre Anfrage teile ich Ihnen als über Ihr und Ihres Mannes Vermögen von der Devisenstelle Wien beauftragter Verwalter mit, dass das Honorar des Herrn Dr. Alexander Bayer, München, incl.

Spesen und Reiseauslagen	ca	RM 3000.-
mein Honorar	"	2500.-
die Spesen (Telefon, Reisen etc)	"	600.-
zusammen .		RM 6100.-

betragen.

Weiters haben Sie die Friedhof-Rechnung per " 238.-

und etliche kleinere Rechnungen zu begleichen,

sodass Ihr Debet mit . . . . . RM 6500.-

anzusetzen ist. Zu weiteren Auskünften bin ich selbstverständlich jederzeit gerne bereit.

Hochachtungsvoll

Dr. Ludwig Rochlitzer

Frau
Elisabeth Grünbaum

Wien 19.
Hofzeile 27

29

ELISABETH GRUNBAUM 1

January 31, 1939

Dr. Ludwig Rochlitzer
Rechamswalt
Fuhrichgasse 10
Vienna 1

Dear Mrs. Grunbaum:

You asked me and I tell you what you owe me and Dr. Alexander Bayer, Munich.

Expenses and travels	
My fee	3000 RM
My expenses (telephone, travel)	2500 RM
	600 RM
Total	6100 RM
Furthermore, the cemetery bill is about	238 RM
And with several smaller bills, the total is	6500 RM.

For further information I am here for you at any time.

Best regards,

[signature] Ludwig Rochlitzer

The Department for Foreign Exchange appointed me to deal with the whole property of the Grunbaums. I will help you if you need further information. Dr. Ludwig Rochlitzer.

EDITOR'S COMMENT:
This letter reveals that somebody - Rochlitzer - was the official person in charge of the property of the Grunbaums: they could not use any money, they could not sell anything, they could not sell the pictures. He was made the administrator or trustee. Elisabeth Grunbaum could not do anything with her own possessions.

Bettina Walzer, historian

10 A 26/02 i 124

EINANTWORTUNGSURKUNDE

Der Nachlaß des am 14.1.1941 ohne Hinterlassung einer letztwilligen Anordnung verstorbenen, zuletzt in 1040 Wien, Rechte Wienzeile 29 wohnhaft gewesenen **Friedrich** x) Franz **GRÜNBAUM, geboren am 7.4.1880** wird den nachbenannten Erben deren aufgrund des Gesetzes abgegebene **unbedingte Erbserklärung** zu Gericht angenommen wurde, wie folgt eingeantwortet:

a) Milos **VAVRA**, geb. 2.10.1941, Perucka 13/61, Praha 2, Tschechische Republik, zu **1/2**

b) Leon **FISCHER**, geb. 23.8.1941, 205 East 77 th Street, New york 10021, USA, zu **1/2**

Bezirksgericht Innere Stadt Wien
1011 Wien, Riemergasse 4
Abt. 1, am

Wilhelm Geistler
Rechtspfleger
Für die Richtigkeit der Ausfertigung
der Leiter der Geschäftsabteilung

x) amtlich berichtigt bzw.
ergänzt lt. B. v. 12.9.2002,
10 A 26/02 i - 26

Bezirksgericht Innere Stadt Wien
1011 Wien, Riemergasse 4
Abt. 10, am 12.9.2002

Margit Pichler
Rechtspflegerin
Für die Richtigkeit der Ausfertigung
der Leiter der Geschäftsabteilung

Diese Ausfertigung ist ~~wird~~ rechtskräftig seit 31. 10. 2002

Bezirksgericht Innere Stadt Wien
1011 Wien, Riemergasse 4
Abt. 1, am 31. 10. 2002

Margit Pichler
Rechtspflegerin
Für die Richtigkeit der Ausfertigung
der Leiter der Geschäftsabteilung

SEIT 1849

HOERNER BANK

AKTIENGESELLSCHAFT

TRANSLATION OF AN AUSTRIAN DOCUMENT

10 A 26/02 i

CERTIFICATE OF HEIRSHIP

The estate of **Friedrich GRÜNBAUM, born on April 7, 1880**, deceased on January 14,

x) Franz

1941 without leaving a Last Will and Testament, having last resided at 1040 Vienna, Rechte Wienzeile 29, was devolved as follows to the heirs specified below, whose **unconditional declaration of acceptance of inheritance** made in accordance with the law was accepted by the court:

a) Milos **VAVRA**, born on October 2, 1941, Perucka 13/61, Praha 2, Czech Republic

taking a **½ share**

b) Leon **FISCHER**, born on August 23, 1941, 205 East 77th Street, New York 10021, USA,

taking a **½ share.**

Stamp: District Court Innere Stadt Vienna
1011 Vienna, Riemergasse 4
Dept. 1, dated (*illegible figures*) 2002

Stamp: Wilhelm Geistler
Law Officer
For correctness of the copy
Head of Department: (*illegible signature*)

x) officially corrected and amended according to decision of September 12, 2002, 10 A 26/02 i – 26

District Court Innere Stadt Vienna
1011 Vienna, Riemergasse 4
Dept. 10, dated September 12, 2002

Stamp: Margrit Pichler
Law Officer
For correctness of the copy
Head of Department (*s: Pichler*)

Stamp: This exemplified copy is effective since October 31, 2002.

District Court Innere Stadt Vienna
1011 Vienna, Riemergasse 4

Dept. 1, dated October 31, 2002

Stamp: Margrit Pichler
Law Officer
For correctness of the copy
Head of Department (*s: Pichler*)

Translation Made and Confirmed by:
Hoerner Bank Aktiengesellschaft

Thomas Meyer
November 05, 2014 (Me/Kr)

NAZI LOOTED ART AND COCAINE: WHEN MUSEUM DIRECTORS TAKE IT, CALL THE COPS

Raymond J. Dowd[1]

I. INTRODUCTION

When Congress passed the Holocaust Victims Redress Act of 1998, the museum community urged Congress not to provide a federal remedy for Holocaust victims and their families to retrieve stolen artworks in the United States because state law afforded adequate legal remedies to true owners of stolen art. In the almost fifteen years that followed, U.S. museums have asserted two "technical defenses" that avoid considering cases on the merits of the question of whether or not artworks with a "red flag" European provenance was actually stolen. The two defenses asserted are statutes of limitations and laches. Where these defenses are successfully asserted in an actual case of Nazi looting, these defenses leave artworks stolen, usually from Jewish murder victims, in the hands of our nation's great museums and private collections. Since the donor has not paid taxes based on the fair market value of a donation of artwork that could not, in fact, be sold on the open market and has left the public with the consequences, directors of institutions that permit or conceal such trafficking in stolen art should be criminally prosecuted.

This article argues that statutes of limitations and laches defenses ought not be available in cases of stolen artworks of European provenance that entered the United States after 1932 and that were created prior to 1946. This is so for two main reasons. *First*, such artworks are deemed contraband under applicable federal law and were transported into this country, bought and sold all in violation of criminal laws. State law should not be used as a vehicle to transmute such stolen artworks into something legal. Museum directors have always known that acquiring a work with an undocumented provenance is problematic and were specifically

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1. Partner, Dunnington Bartholow & Miller LLP in New York City. The author was lead trial counsel in Bakalar v. Vavra, 619 F.3d 136 (2d Cir. 2010), *aff'd*, No. 11-4042-cv, 2012 U.S. App. LEXIS 21042 (2d Cir. Oct. 11, 2012), *cert. denied*, No. 12-1160, 2013 U.S. LEXIS 3506 (Apr. 29, 2013). The first Holocaust-era art trial in U.S. history and represented the heirs of George Grosz in *Grosz v. Museum of Modern Art*, 403 Fed. Appx. 575 (2d Cir. 2010).

warned by the U.S. government not to make undocumented acquisitions in the case of European artworks entering the U.S. after 1932 that were created prior to 1946. If a museum director asserted statutes of limitations or laches when caught with a kilo of cocaine, such defenses would not pass the laugh test. Accordingly, because permitting stolen artworks to now fall into the hands of those who have concealed this stolen property from the true owners for so many years is unfair and violates public policy, these defenses should not be available in civil actions for replevin of stolen Holocaust-era artworks.

Second, the world was watching as Jews were pillaged during the Holocaust, and this pillaging was publicly documented while practically an entire population was subjected to genocide making the legal fictions necessary for statutes of limitations and laches untenable. In the years following World War II, as the *New York Times* reported on its front page, the U.S. State Department aggressively pursued stolen artworks in the United States, recovering almost 4,000 works and sending warning to all museums, art dealers and colleges not to acquire such artworks with undocumented provenance. In the wake of World War II, eleven nations forced Europe to adopt the world's strictest privacy laws to avoid another Hitler. The unintended consequence is that survivors of the murdered millions have been frozen out of records that might help them track assets for decades. Both statutes of limitations and laches require that the victims inappropriately be blamed for this state of affairs. Public policy and equity demand that a constructive trust be imposed on these assets and that the stolen property be returned. Accordingly, statutes of limitations and laches should not be available as a matter of historical fact, and to the extent they may be, the equitable remedy of a constructive trust and principles of equitable tolling would trump them. Asserting such defenses requires denying the realities of the Holocaust.

This article concludes that the museum community has betrayed its 1998 promises to Congress and has acted in bad faith. By retaining property it knows to be stolen, by concealing provenance documentation, and by accusing Holocaust victims, their kin and their lawyers of greed, the museum community has actively advanced hurtful anti-Semitic stereotypes and has betrayed the public trust. Aside from falsifying the historical record and putting America's international reputation at stake, permitting donations of stolen artworks lets America's wealthy dodge obligations to pay taxes, hurting our schools, roads and health care system. Accordingly, donating stolen artworks to museums is not a victimless

crime. It is time for U.S. Attorneys and state prosecutors to stop letting wealthy tax-dodgers trafficking stolen property off the hook. Federal prosecutors, in particular, should start bringing cases under the National Stolen Property Act, 18 U.S.C. § 2314 and the Racketeer-Influenced and Corrupt Organizations Act ("RICO").

Part I of this article describes how Hitler and Nazis despoiled Jews of their property, particularly artworks and how this spoliation resulted in a tremendous number of stolen artworks ending up in U.S. museums. Part II of this article describes awareness of the U.S. public of such looting and describes government activities to warn purchasers that they would not take good title to such stolen artworks in the postwar period. Part III describes the international art market in the Post-War period shaped by a strong dollar and U.S. tax treatment of art. Part IV describes D.A. Robert Morgenthau's seizure at New York's Museum of Modern Art in 1998 and the resulting legislation and diplomacy, culminating in the Washington Conference Principles (1998) and the Terezin Declaration (2009) in which the U.S. and over forty countries agreed to have Nazi art looting cases decided on the merits. Part V discusses the museum and collector community's litigation strategies to deprive claimants of all remedies under state law. Part VI argues that technical defenses are reliance on legal fictions not applicable as a matter of history and to the extent that such defenses have been used to launder stolen artworks are preempted by the National Stolen Property Act and concludes that the Department of Justice ought to make prosecuting such crimes a national priority.

II. NAZI SPOLIATION CREATING THE PROBLEM OF STOLEN ARTWORKS IN U.S. MUSEUMS

From 1933 through 1945, Jews in countries occupied by the Nazis were robbed through an ingenious and sophisticated system of duress that combined threats of violence with indirect confiscations, such as confiscatory foreign exchange rates used to despoil Jews hoping to flee.[2] In 1943, a commission headed by Supreme Court Justice Owen Roberts was created to protect works of cultural value in Allied-occupied areas of Europe.[3] On November 16,

2. MARTIN DEAN, ROBBING THE JEWS: THE CONFISCATION OF JEWISH PROPERTY IN THE HOLOCAUST: 1933-1945 (2010).

3. LYNN H. NICHOLAS, THE RAPE OF EUROPA: THE FATE OF EUROPE'S TREASURES IN THE THIRD REICH AND THE SECOND WORLD WAR 234 (1995).

1964, the *New York Times* published a front-page story by Milton Esterow titled "Europe is Still Hunting Its Plundered Art." The article reported that the State Department and other government agencies had recovered 3,978 stolen art objects found in the United States between 1945 and 1962.

In 1998, Congress passed the Holocaust Victims Redress Act of 1998. Congress made the following findings with respect to works of art:

> (1) Established pre-World War II principles of international law, as enunciated in Articles 47 and 56 of the Regulations annexed to the 1907 Hague Convention (IV) Respecting the Laws and Customs of War on Land, prohibited pillage and the seizure of works of art.
>
> (2) In defiance of the 1907 Hague Convention, the Nazis extorted and looted art from individuals and institutions in countries it occupied during World War II and used such booty to help finance their war of aggression.
>
> (3) The Nazis' policy of looting art was a critical element and incentive in their campaign of genocide against individuals of Jewish and other religious and cultural heritage and, in this context, the Holocaust, while standing as a civil war against defined individuals and civilized values, must be considered a fundamental aspect of the world war unleashed on the continent.
>
> (4) In the aftermath of the war, art and other assets were transferred from territory previously controlled by the Nazis to the Union of Soviet Socialist Republics, much of which has not been returned to rightful owners.[4]

Congress further stated, "It is the sense of the Congress that consistent with the 1907 Hague Convention, all governments should undertake good faith efforts to facilitate the return of private and public property, such as works of art, to the rightful owners in cases where assets were confiscated from the claimant during the period of Nazi rule and there is reasonable proof that the claimant is the rightful owner."[5]

---

4. Holocaust Victims Redress Act, Pub. L. No. 105-158, § 201, 112 Stat. 15 (1998).

5. Holocaust Victims Redress Act § 202.

Nazi art looting was the greatest theft of cultural treasures in human history and today, by the accounts of museum directors themselves, U.S. museums are chock-full of under-documented works that may have been looted by Hitler.[6] In understanding how we have arrived at this quandary, it is important to revisit the history of Nazi Germany. Few understand how central art was to Hitler's thinking and how important a tool it was to achieve his aims. While many have heard the anecdote that Adolph Hitler was a failed artist, few appreciate the extent to which art and cultural policy figured in his plan for the Third Reich.[7] Indeed, from the summer of 1933, shortly after Hitler seized power from the Reichstag, Nazis held exhibitions of "degenerate art" in German museums.[8] To entice the viewing public, Nazis put banners outside the museum exhibitions labeled "forbidden to minors." Actors were hired to mock the "degenerate artworks." Artworks of the mentally insane or children were displayed next to Modernists. Thus, Hitler and Nazism relied, from the outset, on art as a lynchpin for waging an aggressive anti-Semitic and anti-Modern cultural campaign. Nazis eventually stripped German museums of these "degenerate" artworks, ostensibly to purge German museums of the art Hitler hated.

Following World War II, European nations enacted the world's strictest privacy laws at the behest of the Allies to govern access to records relating to Nazi persecutees.[9] Paradoxically, these privacy laws, intended to prevent the rise of another Hitler, had the unintended consequence of depriving populations of displaced survivors of information regarding who their relatives are and what they owned. Litigation commenced in U.S. courts together with U.S. diplomatic efforts finally forced Western European nations to con-

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6. *See, e.g.*, Graham W.J. Beal, *Establishing Continuous Ownership Records*, DETROIT INST. ARTS, http://www.dia.org/art/provenance.aspx (last visited May 13, 2013).

7. JONATHAN PETROPOULOS, ART AS POLITICS IN THE THIRD REICH (1996).

8. Christoph Zuschlag, *An "Educational Exhibition": The Precursors of Entartete Kunst and Its Individual Venues, in* "DEGENERATE ART": THE FATE OF THE AVANT-GARDE IN NAZI GERMANY (Stephanie Barron ed., 1991).

9. *See* Bonn Agreement of 1955 (establishing International Tracing Service to govern access to personal information of Nazi persecutees); Press Release, U.S. Holocaust Memorial Museum, United States Holocaust Memorial Museum, Welcomes Decision to Open International Tracing Service Archives in Germany (May 18, 2006), *available at* http://www.ushmm.org/museum/press/archives/detail.php?category=07-its&content=2006-05-18.

front Nazi pasts, to start to open up records, and to engage in restitution and compensation efforts.[10]

In 2006, James Cuno, director of the American Association of Museum Directors ("AAMD"), confessed that "the amount of research to be undertaken on the tens of thousands of works of art [in U.S. museums] that, by definition, may have Nazi-era provenance problems is significant, requiring large allocations of staff time and money...."[11] According to the website of the Detroit Institute of the Arts, over 600,000 objects were looted by the Nazis, with an estimated twenty percent of the items still missing, and with much of that having found its way into U.S. museums.[12] Many major U.S. museums have set up Provenance Research Projects on their websites, detailing the importance of checking provenance of artwork that changed hands from the 1933-1945 time period.[13]

The Museum of Fine Arts Boston alone has approximately 1,600 European paintings and 21,000 works of European sculpture and decorative art; since 1998 the museum claims to have been working to identify objects that might have been seized or improperly sold during the Nazi-era.[14] The Museum of Modern Art owns approximately 800 paintings created before 1946 and acquired after 1932 that could have been from Europe during the Nazi-era.[15] Finally, the Cleveland Museum of Art has 373 works of art in their

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10. *See* STUART E. EIZENSTAT, IMPERFECT JUSTICE: LOOTED ASSETS, SLAVE LABOR, AND THE UNFINISHED BUSINESS OF WORLD WAR II (2003).

11. *Hearing Before the Subcomm. on Domestic and Int'l Monetary Policy, Trade & Tech. of the H. Comm. on Banking and Fin. Servs.*, 109th Cong. (July 27, 2006) (testimony of James Cuno, President, Ass'n of Art Museum Dirs.,) (transcript *available at* http://financialservices.house.gov/media/pdf/072706jc.pdf).

12. Beal, *supra* note 6.

13. For examples of major U.S. museums that have undertaken research regarding their works' provenance, *see e.g.*, *Provenance Research Project*, ART INST. CHICAGO, http://www.artic.edu/aic/collections/provenance (last visited May 3, 2013) (Art Institute of Chicago); *The Provenance Research Project*, MoMA, http://www.moma.org/collection/provenance/ (last visited May 3, 2013) [hereinafter *MoMA Provenance Research Project*] (Museum of Modern Art); *Provenance Research*, PHILADELPHIA MUSEUM OF ART, http://www.philamuseum.org/research/98-108.html (last visited May 3, 2013) (Philadelphia Museum of Art); Beal, *supra* note 10 (Detroit Institute of Arts); *Provenance Research*, CLEVELAND MUSEUM OF ART, http://www.clevelandart.org/research/in-curatorial/provenance-research (last visited May 3, 2013) [hereinafter *CLEVELAND MUSEUM OF ART Provenance Research Project*] (Cleveland Museum of Art).

14. *Nazi-Era Provenance Research*, MUSEUM OF FINE ARTS BOSTON, http://www.mfa.org/collections/provenance (last visited May 3, 2013).

15. *MoMA Provenance Research Project*, *supra* note 11.

European paintings collection and eighty-six sculptures that either have gaps in their provenance or that were known to have been confiscated by the Nazis during their time of power.[16] No museum in the United States has published original academic research on the Nazi-era art in its collections so that its statements regarding its own collections may be subjected to peer review. Thus, the museums' self-serving conclusions about the provenance of objects in these collections are worthless as an academic matter because proper and ethical historical research requires peer review.[17] The museum practice of hiding research behind attorney-client privilege and continuing to extract extortive settlements from families of Holocaust victims or to defeat their claims based on legal fictions is a criminal and academically dishonest practice that must come to an end.

III. SUCCESSFUL U.S. EFFORTS TO WARN THE DOMESTIC PUBLIC THAT IT WOULD UNDO INVOLUNTARY TRANSACTIONS IN ARTWORKS IN NAZI-OCCUPIED TERRITORIES PRECLUDES THE POSSIBILITY THAT PURCHASES OF HOLOCAUST-ERA ARTWORKS WERE "INNOCENT"

Persons purchasing artworks with European provenance that entered the United States after 1932 that were created prior to 1946 cannot be considered "innocent" or good faith purchasers because the U.S. government's public education campaign and media coverage were so thorough as to preclude the possibility that an art purchaser was unaware of the realities of Holocaust-era art looting. As one scholar noted:

> The Allies were well aware of the thefts taking place in Nazi Europe and did take action during and after the war to identify, locate, and recover Nazi looted assets. This was done to keep the Nazi war machine from using the looted assets to acquire items it needed to continue the war and to provide restitution to those who had lost property. During the course of tracking, recovering,

16. CLEVELAND MUSEUM OF ART Provenance Research Project, supra note 11.

17. See Statement on Standards of Professional *Conduct*, AM. HIST. ASS'N (June 8, 2011), http://www.historians.org/pubs/Free/ProfessionalStandards.cfm.

> and restituting the looted assets some 30 agencies of the US Government created well over 30 million pages of records.[18]

The United States has long warned the public that it would undo coerced Nazi-era transactions. The London Declaration of January 5, 1943, signed by the United States and seventeen other nations, served as a "formal warning to all concerned, and in particular persons in neutral countries," that the Allies intended "to do their utmost to defeat the methods of dispossession practiced by the governments with which they [were] at war...." [19] After the Allied victory over the Third Reich in 1945, the United States reaffirmed the commitment of the 1943 London Declaration by requiring European nations to repudiate all purported transactions in art stolen by the Nazis between 1933 and 1945 and to draft laws mandating return of all property stolen from Nazi persecutees. After the Allies withdrew from Europe in the 1950's at the start of the Cold War, Western Europe largely ignored those commitments to assist the return of hundreds of thousands of stolen artworks to the rightful, legal owners.

The U.S. worked diligently to restore stolen artworks to their true owners for years thereafter. In 1951, a U.S. State Department bulletin proclaimed: "For the first time in history, restitution may be expected to continue for as long as works of art known to have been plundered during a war continue to be rediscovered."[20] In 1954, once the State Department made clear that federal courts should provide a forum for restitution of property stolen or obtained by Nazi duress, the Second Circuit stripped Nazi Germany of sovereign immunity. In so doing, the court cited a crucial letter of the Legal Adviser:

> This Government has consistently opposed the forcible acts of dispossession of a discriminatory and confiscatory nature practiced by the Germans on the countries or people subject to their controls.... The policy of the Executive, with respect to claims asserted in the United States for the restitution of identifiable

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18. Greg Bradsher, *Turning History into Justice: Holocaust-Era Assets Records, Research, and Restitution March 1996-March 2001*, War and Civilization Lecture University of North Carolina-Wilmington, North Carolina (Apr. 19, 2001)

19. Von Saher v. Norton Simon Museum of Art at Pasadena, 592 F.3d 954, 961-62 (9th Cir. 2009).

20. Ardelia R. Hall, *The Recovery of Cultural Objects Dispersed During World War II*, 25 DEP'T. ST. BULL. 337, 339 (1951).

> property (or compensation in lieu thereof) lost through force, coercion, or duress as a result of Nazi persecution in Germany, is to relieve American courts from any restraint upon the exercise of their jurisdiction to pass upon the validity of the acts of Nazi officials.[21]

Thus, the U.S. government specifically put the federal judiciary on the task of returning property stolen from Holocaust victims. In addition to government efforts in issuing warnings and providing remedies to Holocaust victims, in the postwar period the media kept ordinary U.S. citizens well aware that the Nazi regime was a kleptocracy and in particular Hitler's art looting campaign received great play in the U.S. press. For example, in September 1946, James Plaut, a "Monuments Man" published the first of two articles entitled "Loot for the Master Race" in Atlantic Monthly magazine.[22] In 1947, Janet Flanner published a three-part series on Nazi art looting in the *New Yorker* magazine that was later republished as a book.[23] In 1964, the *New York Times* ran a front-page article titled "Europe Still Chasing Its Looted Treasure."

In sum, in the period following World War II, U.S. government initiatives, together with media coverage put the educated U.S. population engaged in the business of acquiring artworks on notice of the Holocaust, Nazi art looting practices, and the systematic spoliation of Jews such that an ordinary purchaser knew that acquiring an artwork with European provenance that entered the United States after 1932 but was created before 1946 was a "red flag." Thus as a simple factual matter, the "good faith purchaser" defense would not be available to anyone purchasing artworks with a European provenance that entered the United States after 1932 and that had been created prior to 1946. The reason is that such purchases were neither innocent nor made in good faith.

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21. Bernstein v. N.V. Nederlandsche-Amerikaansche, Stoomvaart-Maatschappij, 210 F.2d 375, 376 (2d Cir. 1954) (quoting Jack B. Tate). *See also Jurisdiction of U.S. Courts Re Suits for Identifiable Property Involved In Nazi Forced Transfers*, 20 DEP'T ST. BULL. 592, 592-93 (1949).

22. James S. Plaut, *Loot for the Master Race*, ATLANTIC MONTHLY (1946), *available at* http://www.theatlantic.com/past/docs/unbound/flashbks/nazigold/loot.htm.

23. ROBERT M. EDSEL, THE MONUMENTS MEN: ALLIED HEROES, NAZI THIEVES AND THE GREATEST TREASURE HUNT IN HISTORY (2010).

IV. THE POSTWAR INTERNATIONAL ART MARKET AND PRO-MUSEUM U.S. TAX LAWS CREATED INCENTIVES FOR PURCHASING STOLEN ART AND DONATING IT TO MUSEUMS

In understanding the motives of wealthy Americans who would come to engage in the purchase and sale or donation of stolen art on a massive scale, an understanding of the tax laws creating a perverse incentive for this crime is indispensable. Two legislative inducements contained in the United States tax law created the explosion of the museum in the Twentieth Century.[24] First, the Payne-Aldrich Tariff Act of 1909 added imports of original artworks more than twenty years old to the duty-free list.[25] Second, charitable deductions were allowed at the fair market value of the artwork, regardless of the amount that was paid for the work.[26]

During the postwar period, hundreds of thousands of objects were donated to museums with little oversight. The system of high net worth individuals getting tremendous tax breaks was well chronicled in CHASING APHRODITE: THE HUNT FOR LOOTED ANTIQUITIES AT THE WORLD'S RICHEST MUSEUM.[27] During this period, U.S. museums did not scrutinize the provenance of the works they acquired. Since stolen artworks cost the least, and donating them to U.S. museums avoided any scrutiny of the artworks' provenance and greater financial benefit, there is a greater incentive to purchase and donate stolen artworks than there is to purchase and donate legitimate artworks.

The problem is trafficking in such stolen artworks has always been a violation of federal and state criminal laws. With respect to the interstate transport of stolen art, in 1948, Congress passed the National Stolen Property Act, 18 U.S.C. § 2314 ("the NSPA"). The NSPA provides:

> Whoever transports, transmits, or transfers in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud;

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24. KARL MEYER, THE ART MUSEUM: POWER, MONEY, ETHICS (1979)

25. *Id.*

26. *Id.* (explaining how a combination of high taxes at the end of World War II and the charitable deduction made it more attractive for taxpayers at the 80% rate to give artworks to museums, rather than donate them).

27. JASON FELCH & RALPH FRAMMOLINO, CHASING APHRODITE: THE HUNT FOR LOOTED ANTIQUITIES AT THE WORLD'S RICHEST MUSEUM (2011).

> Shall be fined under this title or imprisoned not more than ten years, or both. [....][28]

Additionally, in the years since World War II, international sanctions against confiscation of works of art have been amplified through such conventions as the 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, which forbids the illegal export of art work and calls for its earliest possible restitution to its rightful owner.[29]

Stolen art in the United States and around the world is an immense problem. Worldwide trade in stolen art and smuggled antiques—which in recent years has exceeded $7 billion per year—is considered, other than drug trafficking, the most lucrative criminal activity in existence.[30] The Federal Bureau of Investigation established an Art Crime Team in 2004. The Federal Bureau of Investigation, Department of Justice, U.S. Immigration and Customs Enforcement, and Interpol all are working to stifle the multi-billion-dollar industry.

Thus, the U.S. has had a Jekyll-and-Hyde policy towards stolen art. Our tax laws have incentivized wealthy art patrons to uncritically collect it and to donate it to our museums, taking a "don't-look-a-gift-horse-in-the-mouth" approach. Yet our common law and stated public policy treats stolen property as contraband, favors true owners and treats traffic in and concealment of stolen property as a crime. The failure of federal and state prosecutors to pursue museum directors has led to our museums being filled with stolen artworks, with the public fisc being drained for activities that ought not to be supported by charitable donations, and with our museums transformed into the international scofflaws of the international movement to restitute property stolen during World War II, as further outlined below.

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28. 18 U.S.C. § 2314 (2013).

29. 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 (1972), *reprinted in* 1 THE PROTECTION OF MOVABLE CULTURAL PROPERTY: COMPENDIUM OF LEGISLATIVE TEXTS 357 (UNESCO 1984)

30. Ralph Lerner & Judith Bresler, ART LAW: THE GUIDE FOR COLLECTORS, INVESTORS, DEALERS, & ARTISTS 1, xvii (3d ed. 2005).

V. THE MORGENTHAU SEIZURE AT THE MOMA AND THE INTERNATIONAL CONSENSUS TO HAVE NAZI-ERA CASES RESOLVED ON THE MERITS

In the wake of District Attorney Morgenthau's seizure of Egon Schiele's *Portrait of Wally* and *Dead City III* at New York's Museum of Modern Art, the international community reeled from the scandal. As a result of the seizure of these paintings, on loan from the Leopold Museum in Austria, many began to question the provenance of artwork bought and sold during the Nazi-era throughout Europe hanging in museums and personal collections. These revelations, and the two cases that emerged, this case and *United States v. Portrait of Wally*,[31] led to a change in the Austrian Restitution Law. "In 1998 the Austrian Parliament passed a law requiring restitution for Jews whose property was plundered during the Nazis' reign. It was passed after the Leopold Museum in Vienna had spent more than a decade fighting an effort by Jewish heirs to reclaim two paintings by Egon Schiele."[32]

In the wake of the Morgenthau seizure, the U.S. State Department organized the Washington Conference on Nazi-Confiscated Art, which led to the adoption of the Washington Conference Principles which led to many countries—including Austria, Germany, and Great Britain—to form restitution commissions, open up archives, and encourage solutions based "on the merits" rather than by using technical defenses such as statutes of limitations.[33] In the decade that followed the adoption of the Washington Conference Principles, U.S. museums have refused to grant free and open access to archives and have failed to publish acquisition information for artworks with a European provenance entering the United States after 1932 but created prior to 1946.[34] At the Prague Conference on Holocaust-Era Assets in 2009, the U.S. delegation demonstrated a sincere effort by Secretary of State Hillary Clinton to bring U.S. museums into a consensual, non-litigious

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31. 2002 WL 553532 (S.D.N.Y. Apr. 12, 2002).

32. Patty Cohen, *Vienna Jewish Museum Chided Over Nazi Loot*, N.Y. TIMES (Feb. 20, 2013), http://www.nytimes.com/2013/02/21/arts/design/jewish-museum-in-vienna-said-to-lag-in-restitution.html?pagewanted=all&_r=0.

33. Bureau of European and Eurasian Affairs, *Washington Conference Principles on Nazi-Confiscated Art*, U.S. DEP'T OF STATE (Dec. 3, 1998), http://www.state.gov/p/eur/rt/hlcst/122038.htm.

34. *Nazi-Era Stolen Art and U.S. Museums: A Survey*, CLAIMS CONFERENCE (July 25, 2006), http://www.claimscon.org/forms/U.S._Museum_Survey_Report.pdf.

process for restituting stolen artworks. The continual stonewalling on the part of U.S. museums, however, has had a deleterious effect on the efforts of the Jewish diaspora to reclaim property throughout the world.[35]

In 1998 Congress passed the Holocaust Victims Recovery Act ("HRVA").[36] In enacting the HVRA, Congress concluded that no federal remedy was necessary to effectuate restitution of stolen art in the United States because pre-existing state law remedies sufficed.[37] As the Ninth Circuit observed:

> [T]he legislative intent was to encourage state and foreign governments to enforce existing rights for the protection of Holocaust victims. The sponsor and primary champion of the legislation, Representative Jim Leach (R-IA), believed that existing law would suffice to restitute Nazi-stolen artworks to their Nazi-era owners.
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> * * *
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> Finally, . . . there can be no doubt—as this case amply demonstrates—that *state law provides causes of action for restitution of stolen artworks* . . . .[38]

The legal scheme initiated by the Executive and relied upon by Congress is for the federal judiciary to diligently enforce the restoration of stolen artworks to the true owners using common law. Indeed, U.S. museums claimed that they were capable of self-regulating:

When public awareness of Nazi-Looted art increased during the 1990's Congress considered enacting legislation to set standards for returning stolen art. Museum directors, however, testified that they could better handle the subject themselves, resulting in codes of ethics promulgated by [the Association of American Museum Directors and American Association of Museums]....[39]

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35. Jennifer Kreder, *The New Battle ground of Museum Ethics and Holocaust-Era Claims: Technicalities Trumping Justice or Responsible Stewardship for the Public Trust?*, 88 OR. L. REV. 37 (2009).

36. Holocaust Victims Recovery Act, Pub. L. No. 105-158, 112 Stat. 15 (2998).

37. Orkin v. Taylor, 487 F.3d 734, 739-41 (9th Cir. 2007).

38. *Id.* (emphasis added) (citing *Holocaust Victims' Claims: Hearing Before the H. Comm. On Banking and Fin. Servs.*, 105th Cong. 2d Sess. (1998)).

39. Emily Graefe, *The Conflicting Obligations of Museums Possessing Nazi-Looted Art*, 51 B.C. L. Rev. 473 (2010).

Accordingly, the current legal scheme initiated by the Executive and relied upon by Congress is for the federal judiciary to diligently enforce the restoration of stolen artworks to the true owners using the traditional common law and equitable remedies available in state law. In addition to the common law remedy of replevin, the remedy of a constructive trust may be applied any time a person has been unjustly enriched at the expense of another.[40] It is critical to note that museums themselves argued for the effectiveness of state law remedies in returning stolen artworks to true owners.

VI. 1998-2013 MUSEUMS AND COURTS BETRAY THE PROMISES OF WASHINGTON AND TEREZIN

After Congress acted in 1998, federal courts nationwide have adopted constructive notice doctrines having the effect of frustrating the workings of traditional common law restitutionary remedies and denying redress to claimants of artworks stolen in the Nazi-era.[41] This nullification of the common law and principles of equity has taken several forms.

In 1998, Congress was correct in believing that the common law provides remedies for restitution of stolen property, since traditional common law would give claimants a jury trial on whether they had notice or should reasonably have discovered the whereabouts of Nazi-looted artworks.[42] After the adoption of the Washington Principles, however, museums suing Holocaust victims persuaded the courts to dismiss ownership claims pursuant to Rule 12(b)(6) by imputing to the victims constructive notice of Nazi-era

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40. Bernard E. Gegan, *Constructive Trusts: A New Basis for Tracing Equities*, 53 ST. JOHN'S L. REV. 593 (1979).

41. In jurisdictions that follow the discovery rule for accrual of statutes of limitations of conversion claims, both actual and constructive notice are factual questions, determined by a jury. *See e.g.,* Schwartz v. Cincinnati Museum Ass'n, 35 F. Appx. 128, 131 (6th Cir. 2002) (Ohio law); Museum of Fine Arts, Boston v. Seger-Thomschitz, 623 F.3d 1, 9 (1st Cir. 2010) (Massachusetts law).

42. *See* Jennifer Anglim Kreder, *Guarding the Historical Record From the Nazi-era Art Litigation Tumbling Toward the Supreme Court,* 159 U. PA. L. REV. PENNUMBRA 253 (2011).

transactions.[43] To be sure, not all federal courts have been hostile to claimants alleging Nazi theft or duress.[44]

It is fair, however, to note the growing tendency among federal judges to impute knowledge of Nazi-era transactions to persecuted victims and to observe that this tendency is itself contrary to the common law principle that such questions are reserved for the jury and must be pleaded and proven. Some federal judges have overlooked the dictates of the common law—with the Fifth Circuit notably permitting Louisiana law to launder title to stolen art.[45]

In one example of a federal court using constructive notice to trigger a statute of limitations, *Toledo Museum of Art v. Ullin*, the district court, in considering a museum's quiet title action against heirs of a Jewish Nazi persecutee, dismissed the heirs' counterclaims pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, even though the court acknowledged that the defendants disputed the existence of a sale or that they had knowledge of the artwork's location and provenance.[46] The district court imputed an earlier constructive notice date because the Toledo Museum's possession of the artwork was "easily discoverable."[47]

In an even more problematic instance, in *The Detroit Institute of Arts v. Ullin*, a carbon copy of the Toledo case brought against the same heirs on the same day in retaliation for coming forward under the Washington Principles, the district court determined that the discovery rule did not apply since it was a "commercial conversion" case, so Michigan's statute of limitations started running in 1938, the time of the alleged forced transaction.[48] As Pro-

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43. *See, e.g.*, Toledo Museum of Art v. Ullin, 477 F. Supp. 2d 802 (N.D. Ohio 2006); Detroit Inst. of Arts v. Ullin, 2007 WL 1016996 (E.D. Mich. Mar. 31, 2007); *Orkin*, 487 F.3d at 739 -741.

44. *See, e.g.*, Bakalar v. Vavra, 619 F.3d 136 (2d Cir. 2010) (vacating trial court's dismissal under Swiss law and remanding for findings under New York law); Vineberg v. Bissonnette, 548 F.3d 50 (1st Cir. 2008) (granting summary judgment on Nazi duress sale); Schoeps v. Museum of Modern Art, 594 F. Supp. 2d 461 (S.D.N.Y. 2009) (denying museum's motion for summary judgment and finding genuine issue of fact as to whether museum had unclean hands due to knowledge of misappropriation).

45. The Fifth Circuit has permitted Louisiana's prescriptive laws to launder title to allegedly stolen property located in Louisiana. Dunbar v. Seger-Thomschitz, 615 F.3d 574 (5th Cir. 2010), *cert. denied*, 131 S. Ct. 1511 (2011). Louisiana grants title to a holder of stolen property after ten years of possession under the doctrine of acquisitive prescription. *See id.*

46. *Toledo Museum of Art*, 477 F. Supp. 2d at 802.

47. *Id.* at 806-08.

48. *Detroit Inst. of Arts*, 2007 WL 1016996, at *3.

fessor Kreder observes, "A consequence of the suit is that the painting remains on display as if Ms. Nathan had been perfectly free to engage in fair commercial transactions while on the run from a genocidal regime."[49]

In an additional example of courts adopting problematic constructive notice doctrines, the Ninth Circuit, in affirming a dismissal pursuant to Rule 12(b)(6) a claim based on a coerced sale by Jewish heirs to a painting in California, the Ninth Circuit observed, "Had the Orkins investigated any of those publicly-available sources, they could have discovered both their claim to the painting and the painting's whereabouts long before the 2002 internet rumor was posted."[50]

In *Bakalar v. Vavra*, the Second Circuit Court of Appeals imputed knowledge of "potential intestate rights" to long-dead Jewish heirs to strip them of inheritance rights.[51] This imputation of knowledge has no basis in common or civil law systems and is at odds with U.S. Supreme Court precedent which requires that heirs receive written notice and an opportunity to be heard before being deprived of property rights.[52] The U.S. Supreme Court recently denied a petition for certiorari on this case, the first Holocaust-era art case ever to be tried in a federal court, over seventy-five years after the end of World War II.[53] Even though the heirs of Jewish cabaret performer Fritz Grunbaum had proven legal rights to artworks stolen from Grunbaum after he was imprisoned and murdered in the Dachau Concentration Camp, the Second Circuit used the doctrine of laches to award the artwork to a wealthy Massachusetts art collector.

In sum, the trend of federal courts' constructive notice doctrines nullifying traditional common law restitutionary remedies contrary to the expectations of the Executive and Congress is widespread. Scholars agree that the problem of Nazi-looted art is a significant challenge for U.S. museums. By issuing decisions denying the return of Nazi-Looted art, "the judiciary is undermining the executive's ability to continue to lead the world movement

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49. Kreder, *supra* note 38, at 261.

50. *Orkin*, 487 F.3d at 738.

51. Bakalar v. Vavra, No. 11-4042-cv U.S. App. LEXIS 21042 (2d Cir. Oct. 11, 2012). The author served as trial and appellate counsel to defendants Leon Fischer and Milos Vavra.

52. *See* Petition for Writ of Certiorari, Vavra v. Bakalar, 569 U.S. ___ (Apr. 29, 2013) (No. 12-1160), *available at* http://www.scribd.com/doc/132869479/ Vavra-v-Bakalar-Cert-Petition-Nazi-Looted-Art-At-US-Supreme-Court.

53. Vavra v. Bakalar, 569 U.S. ___ (Apr. 29, 2013) (No. 12-1160).

toward securing a modicum of justice for Holocaust survivors affected by the 'unfinished business' of World War II."[54] As set forth below, this is a tremendous problem that this Court ought to address.

This is particularly problematic in light of an engaged U.S. foreign policy seeking to get other countries to return art treasures looted during the Holocaust. Keeping in mind the Washington Conference Principles on Nazi-Confiscated Art, and considering the experience acquired since the Washington Conference, we urge all stakeholders to ensure that their legal systems or alternative processes, while taking into account the different legal traditions, facilitate just and fair solutions with regard to Nazi-confiscated and looted art, and to make certain that claims to recover such art are resolved expeditiously and based on the facts and merits of the claims and all the relevant documents submitted by all parties. Governments should consider all relevant issues when applying various legal provisions that may impede the restitution of art and cultural property in order to achieve just and fair solutions, as well as alternative dispute resolution, where appropriate under law.

VII. WHY THE ASSERTION OF TECHNICAL DEFENSES WITH RESPECT TO NAZI-LOOTED ART IS INCONSISTENT WITH HISTORY AND PUBLIC POLICY AND WHY PERSONS ASSERTING THEM OUGHT TO BE PROSECUTED

Are these stolen artworks innocuous? Or ought they to be treated like cocaine, a controlled substance? Given the taxpayer subsidies of museum activities and the drain on the public fisc created by this trafficking, I think the case for treating these stolen artworks more like cocaine – a controlled substance, is compelling, particularly where, as here, museums clearly knew better and have been actively engaged in falsifying the historical record. To add insult to injury, museums now complain of a lack of sufficient funds to research the provenance of these stolen artworks acquired at the expense of other taxpayers.

Even though museums promised at the Washington Conference and again at Terezin to conduct research and open up their files, they are simply not producing any professional research that is subject to peer-review.

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54. Kreder, *supra* note 38, at 270.

When a museum successfully asserts the "technical" defenses of statutes of limitations or laches, it simply means that the museum has vindicated its right to possess potentially stolen property. With respect to artworks stolen from Jewish families during the Nazi-era, possession of such works ought to be viewed as a badge of shame by a museum. Yet, as the cases of *Toledo Museum of Art v. Ullin* and *Detroit Institute of the Arts v. Ullin* show, museum directors suing Jewish families to assert such defenses are not subjected to any public opprobrium.

Should we celebrate the fact that a museum director in Detroit or Toledo outsmarted a Jewish family and got to keep ill-gotten gains? To understand why that should not be the case, it is important to understand what "statutes of limitations" are in most states and what the doctrine of laches is.

A. Why Statutes of Limitations Should Not Be Asserted Against Claims to Stolen Holocaust-Era Artworks

In all states in the United States except New York, statutes of limitations accrue on the date that a fictive reasonable person, exercising ordinary diligence, ought to have discovered his claim. So in the case of stolen art, the court asks the hypothetical question: when should a reasonable person have discovered his claim to a stolen artwork? But as set forth below, this resort to a legal fiction to trigger a statute of limitations against a family of a murdered Holocaust victim is objectively unreasonable and unfair for a number of reasons.

In the case of the Holocaust, this is an unfairly loaded question for two main reasons. *First,* it is unreasonable to consider that families of Jews murdered in Europe would be combing the collections of museums in the various United States. Many families were murdered wholesale, with individual family members cast to the winds, far from familiar languages, far from family records, and often thrown into hostile new environments. In the wake of World War II, Europe enacted the world's strictest privacy laws to prevent another Hitler from coming along. But sealing family and property records had the unintended consequence of preventing Jews from tracing their own families and assets.

So even though a particular artwork might be hanging publicly in the finest museum in Toledo, Ohio, this does not mean that the family owning the work could reasonably have ascertained that the work was theirs. Thus, stolen art hanging in plain sight may be seen to trigger a statute of limitations where such application is

simply not reasonable in light of the particular facts of the Holocaust. To ask the family of a Viennese murdered Jew to comb the collections of every single museum in the world is not a "reasonable" task undertaken by a "reasonable" person.

Second, it is unreasonable and unfair to ask the persons who have been wrongfully deprived of property to search it out when the possessor is in a much better position to track the artwork's provenance. Where a purchaser buys an artwork lacking provenance documentation, this puts the acquirer on notice of a potential problem. Where provenance is traced, the possessor can easily contact a family to determine whether the artwork is sold voluntarily. Thus, from the moment of acquiring an artwork that entered the United States after 1932 that was created prior to 1946, the possessor has both the legal duty and the unique practical ability to seek out the true owners. That is why the common law places the burden of ascertaining that property is not stolen on the acquirer. If a museum or other possessor is suing families of Holocaust victims, it simply means that museums are trying to shift the consequences of their own bad acts onto the victims, all in a way that offends basic common law principles.

For the foregoing reasons, resorting to the legal fictions necessary to invoke statutes of limitations against families of Holocaust victims is unfair and unreasonable.

B. Why Laches Should Not Be Available in Cases Involving Nazi-Looted Artwork

Laches is a doctrine of equity that is invoked to avoid an unfair result required by law. Federal courts have been using the laches doctrine to permit possessors of stolen art to launder it. This is unfair and unreasonable for a number of reasons. Laches is applicable where a person, knowing of a claim, unreasonably fails to assert it, and that failure causes a true owner to be prejudiced. Laches should not apply to claims for Nazi-looted art for a number of reasons.

First, laches requires that a possessor of stolen art be prejudiced. Prejudice in this context means that the possessor of the stolen artwork needed to have lost a potentially viable legal claim. But since a good faith purchaser of stolen artwork can never have taken good title, a possessor of such artwork is not prejudiced. Case law interpreting laches is clear that mere passage of time or lost evidence is not sufficient to create the prejudice laches requires.

Second, as set forth in Section I, the world was on notice of facts making a purchase of artwork without proper provenance a risky venture, particularly in the context of artworks entering the United States after 1932 that were created prior to 1946. Thus, the equities run against the possessor who acquired the artwork without going back and ascertaining that there was a solid chain of title. Equity should not save those with unclean hands or those who acted stupidly. Where the purpose of a transaction was to shield income from tax authorities through subterfuge, equity ought to undo it.

C. Why Statutes of Limitations and Laches Defenses In Holocaust-Era Art Cases Violate Public Policy

In every state of the union following World War II it was a crime to receive, transport and conceal stolen property. If persons are permitted to lauder stolen property by asserting statutes of limitations and laches, it violates public policy and rubber-stamps wrongdoing. There is no public policy favoring ex-Nazis or persons who financed their wrongdoing. To the extent that individuals or institutions trafficked in stolen property or have been engaged in concealing the stolen property for decades, this is criminal activity that ought to be punished. As a matter of equity, a constructive trust ought to be impressed and the property returned.

Voiding the "discovery rule" permitting accrual of state statutes of limitations to launder stolen art has precedent in legislative history and the actions of federal officials in opposing changes to New York's statutes of limitations. New York's demand-and-refusal rule was preserved in part at the request of the federal government to carry out the important federal policy of fighting the traffic in stolen art. New York rejected less protective measures at the behest of the U.S. State Department, the U.S. Department of Justice, and the U.S. Information Agency:

> Governor Cuomo vetoed the measure . . . on advice of the United States Department of State, the United States Department of Justice and the United States Information Agency. In his veto message, the Governor expressed his concern that the statute "[did] not provide a reasonable opportunity for individuals or foreign governments to receive notice of a museum's acquisition and take action to recover it before their rights are extinguished." The Governor also stated that he had been advised by the State Department that the bill, if it went into effect, would have caused New York to become "a haven for cultural property stolen abroad

> since such objects [would] be immune from recovery under the limited time periods established by the bill."
>
> The history of this bill and the concerns expressed by the Governor in vetoing it, when considered together with the abundant case law spelling out the demand and refusal rule, convince us that that rule remains the law in New York and that there is no reason to obscure its straightforward protection of true owners by creating a duty of reasonable diligence.[55]

Thus, it is clear that by extension, applying the "discovery rule" to accrue statutes of limitations in stolen art cases violates clearly expressed federal policy that should trump any state law countervailing interests in protecting holders of stolen property in that state's territory. Further, given the historical record showing the relative ease of a purchaser to verify provenance and the extreme difficulty or impossibility of Holocaust victims to get at the truth of the provenances behind even publicly-displayed artworks, it is wrong and unfair to apply laches in the context of Nazi-looted art. The postwar American art-buying public knew that it was trafficking in contraband. Museum directors accepted problematic artworks with full knowledge that the provenance was problematic at a time when families could have been found, documents recovered, and the truth much more easily ascertained. Where museums have such a privileged role in our society, it is truly criminal to permit them to profit from this type of wrongdoing, which, as in the story of Edgar Allen Poe's "The Purloined Letter" has escaped detection based on a careful calculation by the museum community of the public's ignorance and credulity.[56]

VIII. CONCLUSION

The museum community has betrayed its 1998 promises to Congress and has acted in bad faith by using the courts to deprive Holocaust victims and their families of effective remedies to recovering stolen art. By retaining property it knows to be stolen, by concealing provenance documentation, and by accusing Holocaust victims, their kin and their lawyers of greed, the museum community has actively advanced hurtful anti-Semitic stereotypes and

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55. Solomon R. Guggenheim Found. v. Lubell, 77 N.Y.2d 311, 318-19 (N.Y. 1991) (citations omitted).

56. Edgar Allen Poe, *The Purloined Letter* (1845), *available at* http://xroads.virginia.edu/~hyper/poe/purloine.html.

has betrayed the public trust. Aside from falsifying the historical record and putting America's international reputation at stake, permitting donations of stolen artworks lets America's wealthy dodge its obligations to pay taxes, hurting our schools, roads and health care system, so this is not a victimless crime. It is time for Federal prosecutors to stop letting wealthy tax-dodgers off the hook and to start bringing cases under the National Stolen Property Act and RICO.

Although the federal courts were tasked by the Executive branch in the 1950's with the job of undoing Nazi-era spoliations in aid of civil litigants in the *Bernstein* case, federal courts have forgotten this task and instead have recently taken an activist role to deprive Holocaust victims of rights and remedies that ought to have been guaranteed under state law by misapplying state law and by applying perverted notions of equity based on untenable legal fictions that inappropriately place the responsibility for post-World War II trauma and damage on Holocaust victims and their families. The problem of Nazi-looted art in U.S. museums and private collections is a major one that continues to be an important drain on taxpayers, and it should become a law enforcement priority. Due to decades of neglect in enforcement, possessors of stolen property have become emboldened to assert the "technical" defenses of statutes of limitations and laches. As set forth above, these defenses violate U.S. public policy when used to launder stolen art. Additionally, these defenses rely on legal fictions that are inappropriate given the historical realities of the Holocaust, a crime broadcast to the entire U.S. population. Federal prosecutors should use the National Stolen Property Act and RICO against museums involved in laundering stolen property, with priority to be given to artworks looted by the Nazis.

RAYMOND J. DOWD

Federal Courts and Stolen Art in 2011: A Crisis for Americans

On Oct. 6, 2010, I met former District Attorney Robert Morgenthau, who is now of counsel at Wachtell Lipton Rosen & Katz, at the Museum of Jewish Heritage: A Living Memorial to the Holocaust in New York City. A founder of the museum, Morgenthau told me about his battle to find support among the Jewish establishment to memorialize the Holocaust and the opposition he encountered. He described how many people would just prefer to forget.

We had just toured an exhibit on the Morgenthau family that recounted the political awakening experienced by Henry Morgenthau Sr. when he was the U.S. ambassador to the Ottoman Empire (1913–1916). When Ambassador Morgenthau protested the Armenian genocide, he was asked by both the Turks and the U.S. State Department why he cared, since he was a Jew. His response: "I am an American." He quit his post and toured the United States to speak out against the tragedy.

In the July 2008 issue of *The Federal Lawyer*, I wrote a column introducing many readers to the issue of Nazi-looted art confronting U.S. federal courts. In the two years that have elapsed, more cases have been filed, and some circuit courts of appeal have spoken. During that time, my quest to obtain the return of artworks looted by the Nazis from Fritz Grunbaum, an Austrian Jewish cabaret artist who was interned and murdered in the concentration camp at Dachau, has led me to give lectures at the Jewish Museum in Berlin, at Yad Vashem in Jerusalem, at universities and synagogues, and to chapters of the Federal Bar Association.

Fascinated by my interest, many ask me if I am Jewish. My background is Irish Catholic, but the real response, like that of Henry Morgenthau Sr., is that this is an issue that all Americans should care about. I am an American. If our museums contain stolen property, it poisons all our lives and teaches our children the opposite of what we all believe in. The public is not "educated," "elevated," or "enlightened" by being exposed even to the greatest artwork that belongs in a private Jewish living room. Prosecutors should be pursuing cases involving stolen art just as diligently as they pursue cases involving stolen cars. We don't ask the religion of the car's owner before arresting the thief and returning the car.

Why are these cases involving people who have long been dead hitting our federal courts only now? Here are a few reasons:

- Entire families were murdered and unable to trace relatives for decades.
- Children were shipped to foreign countries and lost their language skills.
- At the urging of the Allies, Europe enacted the world's strictest privacy laws to prevent another Hitler, but in fact preventing Jewish families from being able to trace one another.
- Many countries, particularly republics in the former Soviet Union, had property and genealogy records completely sealed.
- Only this year have millions of concentration camp records been made accessible through Yad Vashem and the U.S. Holocaust Memorial Museum.
- Tracing artworks takes decades, and many remain hidden or "hide in plain sight" with key provenance records concealed from user-friendly public inspection.

What has changed over the last two years? On Sept. 2, 2010, in *Bakalar v. Vavra*, 2010 WL 3435375 (2d Cir. Sept. 2, 2010), the Second Circuit vacated the trial judge's application of Swiss law to give a Swiss purchaser the title to an Egon Schiele artwork stolen from Fritz Grunbaum. I had lost the first federal Holocaust-era art trial in U.S. history based on the application of Swiss law and then spent a year of my life preparing and arguing the successful appeal. Even though this case was an important victory, the issue is now to be reconsidered by the district judge, who will be applying New York law this time, and the litigation, which commenced in 2005, shows no signs of ending.

But much more is happening. On Oct. 4, 2010, the U.S. Supreme Court invited the acting solicitor general to file briefs expressing the view of the United States in *von Saher v. Norton Simon Museum of Art*, 2010 WL 3834227. In *von Saher*, the Ninth Circuit struck down California's extension of its statute of limitations to permit Holocaust survivors and their survivors to file art claims as a violation of the executive branch's power to conduct foreign policy.

In *Cassirer v. Kingdom of Spain*, 616 F.3d 1019

(9th Cir. 2010) an en banc panel of the Ninth Circuit determined that a suit against Spain to recover a Nazi-looted artwork was not barred by the Foreign Sovereign Immunities Act, even though Spain had not stolen the artwork but had merely acquired it. In *Dunbar v. Seger-Thomschitz*, 615 F.3d 574 (5th Cir. 2010), the opposite result was reached, based on the application of the Louisiana law of acquisitive prescription and a different set of facts.

What can we expect from this new wave of litigation? First, the issue has started to move into the public eye and out of an apparent cultural amnesia. In September 2009, Robert Edsel, a Texas oilman-turned-art detective, published *The Monuments Men: Allied Heroes, Nazi Thieves, and the Greatest Treasure Hunt in History* (Center Street). PBS has aired the film *The Rape of Europa*. Popular culture is starting to revisit the topic of Nazi art looting—a subject that was very much in the public eye in 1945 and 1946—and articles are filling the pages of such U.S. publications as *National Geographic*, *Atlantic Monthly*, and *The New Yorker*.

In 1943, a commission headed by Supreme Court Justice Owen Roberts was created to protect works of cultural value in Allied-occupied areas of Europe. In 1950 and 1951, the U.S. State Department distributed bulletins warning museums, art dealers, colleges, and libraries not to acquire artworks of European provenance without ascertaining the chain of title. As everyone knew then, if a work of art came from Europe and the previous owner was unknown, the chances were pretty good it had been stolen from a Jew. On Nov. 16, 1964, the *New York Times* published a front-page story by reporter Milton Esterow titled "Europe is Still Hunting Its Plundered Art." The article reported that the State Department and other government agencies had recovered 3,978 stolen art objects found in the United States between 1945 and 1962.

Another change in the past two years has been a growing interest among scholars in the property crime aspect of the Holocaust. Until very recently, Holocaust historians have remained resolutely focused on the issue of genocide and mass murder. But in the wake of the 2006 publication in Germany of historian Goetz Aly's *Hitler's Beneficiaries: Plunder, Racial War and the Nazi Welfare State* (Henry Holt, 2007), scholars have started to examine the profit motives for the greatest crime in human history. An extremely important addition to the scholarship in this area is historian Martin Dean's *Robbing the Jews: The Confiscation of Jewish Property in the Holocaust: 1933–1945* (U.S. Holocaust Memorial Museum, 2009).

Unfortunately, American historians and legal scholars have shown little serious interest in publishing works on Nazi art looting, with several outstanding exceptions such as publications by Professor Jonathan Petropoulos of Claremont McKenna College and Professor Jennifer Kreder of the Salmon P. Chase Law School in Northern Kentucky. Law reviews reflect a growing interest among law students; again, however, with a few exceptions, the topic is not treated seriously or systematically in the nation's law schools.

An additional change in the past two years has been a systematic backlash from U.S. museums. In the wake of D.A. Morgènthau's seizure of Egon Schiele's *Portrait of Wally* and *Dead City* at New York's Museum of Modern Art, the international community reeled from the scandal. In response, the U.S. State Department organized the Washington Conference on Nazi-Confiscated Art, which led to the adoption of the Washington Principles (available at www.state.gov/www/regions/eur/981203_heac_art_princ.html).

Following adoption of the Washington Principles in December 1998, many countries—including Austria, Germany, and Great Britain—formed restitution commissions, opened up archives, and encouraged solutions based "on the merits" rather than by using technical defenses such as statutes of limitations. In the United States, however, museums repeatedly sued Jewish heirs for declaratory judgments, claiming laches and conducting psychological warfare, accusing claimants and their attorneys of laziness and greed.

In the decade that followed the adoption of the Washington Principles, U.S. museums have refused to grant free and open access to archives and have failed to publish acquisition information for artworks with a European provenance entering the United States after 1932 but created prior to 1946. Works on paper and sculptures have been completely neglected. The American Association of Museums has thus far failed to condemn such tactics.

In 2009, I was invited to participate in a panel of legal experts discussing the topic of legal obstacles to restitution at the Prague Conference on Holocaust-Era Assets. Amid self-congratulatory presentations by museums and auction houses, I was treated like the skunk at the tea party. The U.S. delegation, led by Special Envoy Stuart Eizenstat, included representatives of U.S. museums, demonstrated a sincere effort by Secretary of State Hillary Clinton to bring U.S. museums into a consensual, nonlitigious process for restituting stolen artworks.

The Prague Conference culminated in 46 countries signing the Terezin Declaration at the infamous concentration camp at Theriesenstadt. www.holocausteraassets.eu/files/200000215-35d8ef1a36/TEREZIN_DECLARATION_FINAL.pdf. The declaration had no impact on U.S. museums, however. The continual stonewalling on the part of U.S. museums has had a deleterious effect on the efforts of the Jewish diaspora to reclaim property throughout the world. Ambassador Stuart Eizenstat continues to lead an effort to create a U.S. restitution commission under the auspices of the State Department. I attended a conference in Washington, D.C., this spring at which Eizenstat spoke and was astonished to see this career

SIDEBAR *continued on page 20*

HOGAN *continued from page 19*

Judge Hogan combined his love of teaching with his love for trial work and his enthusiastic support for the next generation of lawyers, many of whom have gone on to practice in federal court.

Reflecting on his role as a judge, Judge Hogan advised, "Don't be overly impressed with the robe. The job belongs to the public. It is just my privilege to occupy the space for a time." He said it's important for a judge to be humble. "You may appear impressive, but there have been and will be times when you are the least gifted lawyer in the courtroom."

Judge Hair believes that commonsense and the ability to reduce the complex to the easily understandable are among Judge Hogan's greatest skills. When asked which of his accomplishments he's most proud of, he replies: "That all my children are good parents and good examples for our grandchildren. That I have managed to obtain the trust of my colleagues on and off the bench. ... That I married the right girl. That I excel at cutting the grass, washing and waxing cars, power washing decks, and painting fences."

In addition to his work as a federal magistrate judge, Judge Hogan has been an active member of both professional and community organizations. He is a member of the Cincinnati, Ohio State, and Federal Bar Associations and a former president of the Potter Stewart Inn of Court. For more than 20 years, Judge Hogan has been a trustee of Central Clinic, a provider of behavioral health and forensic services, and has served as chair of the clinic's board. He has served as a knothole baseball coach and a member of his church's education commission and is currently the chair of the Building Maintenance and Grounds Committee of a community condominium project near Lake Cumberland, Ky., where he enjoys boating and golfing in his spare time.

"Sometimes we are judged by what is said and not said about us," says Judge Helmick. "In my 36 years of knowing Judge Hogan, I've never heard an unkind word spoken of him. That is quite an accomplishment in this day of instant feedback and blogging." Indeed, Judge Hogan's life's work demonstrates that the universal praise for him as an outstanding jurist, lawyer, husband, and father is well-deserved. **TFL**

Laura Welles Wilson and Karen Litkovitz were both career law clerks to Magistrate Judge Hogan.