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.
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> (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.
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> (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.
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> (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]

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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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> 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

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.