

## Recovering Looted Jewish Cultural Property

*Constance Lowenthal* \*

### I. OBSTACLES FACING CLAIMANTS

Seventy years after Hitler's accession to power, Jewish communities and Jewish families are benefitting from a renewed interest in redressing the injustices of the Third Reich. Particularly in the last twelve years, growing public awareness has resulted from historic political events, legal developments, and publications (both scholarly and journalistic). In response, governments, museum associations and official groups have tried to establish guidelines for dealing with claims, which have become more widely publicized and more frequent.

The situation faced today by a claimant seeking the recovery of art taken from his or her family by the Nazis is therefore much better than at any time since the first decade after World War II. Given the difficulties of marshaling evidence and ascertaining facts seventy years later, this may seem strange, particularly as the art has probably changed hands in a number of legitimate transactions in the interim. However, public awareness and some sympathy for the effort have been revived in the years since 1990.

Certain aspects of the recovery process remain the same. The claimant's initial decision to make a claim – whether to pursue restitution of a material object – is usually based on deep emotion. Many feel reluctant because they can never be compensated for the unspeakable suffering, the loss of home and the lives of family members who perished. Others believe they owe it to the memory of their family to pursue a measure of justice, and that the recovery of property, particularly that which demonstrates the education and taste of their forebears, allows present and future generations to connect to an ancestral world that was disrupted and destroyed by Hitler. Undoing this element of the Nazis' actions can bring some satisfaction. Some claimants see the decision as a simple pursuit of justice, having promised their parents long ago that they would energetically pursue recovery, so that it becomes an almost sacred duty.

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## RESOLUTION OF CULTURAL PROPERTY DISPUTES

Many Holocaust survivors did not want to look back at an all-too-painful past. It has been left to their children, now middle-aged or older, to take up the search. However, the road ahead in the hunt for family art is a long one, and may lead nowhere. Unless the searchers are sophisticated about the art world and the movement of art in the open market, they cannot imagine what complications await them. In my experience, many claimants make this decision without knowing what it will entail.

Even among the most committed, there is a tragic lack of understanding of what is involved. By way of example, a man now in his seventies is hoping to find the furniture taken from his family's apartment in Paris when his mother was young, as he had promised her before she died. He knows the exact address and the date the apartment was looted, but his descriptions of the items are almost generic, and one cannot necessarily find an eighteenth-century style lady's writing table, inlaid and with ormolu mounts. Or, rather, many can be found, but the description, lacking measurements or a photograph, is too general – it matches too many desks. If the item survived, it may have suffered sun bleaching and acquired other condition problems. In another example, an elderly woman who saw paintings in her uncle's Paris apartment when her family stayed there on their way from Germany to the United States (when she was twelve years old), believes she should be able to find and recover the paintings based on his name and address and the subject of the pictures as she remembers them. Having heard of the Nazis' efficiency and good record keeping, she believes that the officials of various governments she has written to for decades are hiding essential information from her when they say they cannot help. She is frustrated and angry; no one explained to her that her lack of detailed information about the paintings was an insurmountable problem.

As in all recoveries of movable property, the ability to uniquely identify a work of art as yours is essential. The most successful recovery efforts have been those of the families of art dealers or those who were extremely wealthy, who had published collection catalogs, detailed records and sometimes photographs, and who may have been able to prepare for their departures. Those whose families fled or were deported have much less to go on.

Paintings are more easily identified, but artists frequently painted the same subjects over and over, and the question becomes whether the claimant has sufficient information to prove that a particular Flemish still life of flowers with a black background is the one that belonged to his or her family. In the absence of measurements and photographs, most people's descriptions of prints,

drawings, porcelain, furniture, and even illuminated manuscripts simply fall short.

Should the family be fortunate to have sufficient descriptions to identify their art, then the next hurdle is locating it. In the years after World War II, Paul Rosenberg tracked down art that was taken by the Nazis from his gallery – first in a train loaded with loot found in France that never reached Germany, and then in the collection of Emil Bührle in Zurich (which Rosenberg recovered only through a lawsuit). In the 1990s, Rosenberg’s heirs found a Monet painting in an exhibition at the Museum of Fine Arts in Boston, to which it had been lent by the museum in Caen. They also located a Matisse painting at the Seattle Art Museum, a bequest in the 1990s from donors who acquired it more than forty years earlier. Some years ago, a Rosenberg Degas pastel portrait was advertised by a German auction house, but after receiving the Rosenbergs’ letter, the auction house notified the consignor, who withdrew it. The Degas has not surfaced since.

On the positive side, claimants seeking their family collections benefit from the post-War growth of publication of museum exhibition catalogs and art books; if the artist is prominent, the painting may be depicted in a book. However, the plaintiffs in *Goodman v. Searle*,<sup>1</sup> Nick and Simon Goodman, say that their father Bernhard spent years searching in vain for the family’s Degas monotype (a unique type of print rather than a painting) *Landscape with Smokestacks*. They say he was not permitted to utilize the specialist libraries in London since he lacked the academic credentials they require of readers. With the resources in those libraries, the Degas could have been located twenty years earlier. If an art book has been recently published and the current owner is listed in it, the painting may have been found, but if the owner is not named in the book, the author may be reluctant to become involved on behalf of the claimant, even by forwarding a letter to the unnamed owner. If the painting is located in a historic auction catalog, however, some major auction houses will send on such a letter to the buyer.

Those claimants who seek to recover their families’ looted art must also face the possibility that some of the art the Nazis confiscated was destroyed in the War and can never be found.

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1. *Goodman v. Searle*, No. 96 – C6459 (N.D.Ill.), filed July 17, 1996 and settled on the eve of trial in August 1998.

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Attempting to locate art by searching the Internet has really only become a reality in the last few years. The American Association of Museums (“AAM”) launched an Internet portal in September, 2003.<sup>2</sup> This resource will allow potential claimants to search the websites of many U.S. museums simultaneously.

When art has entered a private collection, it is very difficult to find it. It is not unusual for art to change hands only once in a generation or two. Collectors acquire art with the intention of keeping it; if they bequeath it to their children it may remain hidden from the potential claimant for at least another generation. When art changes hands, however, a claimant may learn of its whereabouts. The success record of the Art Loss Register is transaction-based. A painting by Pissarro formerly owned by Gerta Silberberg was sold in New York in the 1960s to a couple who, as far as I am aware, had no indication that there might be a problem, as they bequeathed it to the American Friends of the Israel Museum (“Friends”) in honor of Teddy Kolleck, the former mayor of Jerusalem. Mrs. Silberberg only became aware of and claimed the painting in the late 1990s, after the Friends received the bequest and lent the Pissarro to the Israel Museum. As mentioned above, the Matisse painting looted from Paul Rosenberg’s gallery that surfaced in Seattle belonged for over forty years to the couple who bequeathed it to the museum.

Suppose, however, that the claimant does have a sufficiently detailed description of the item in question and has located the current possessor. If the owner is a private individual, the laws of his jurisdiction apply to any attempt to recover. In the context of this volume, I do not need to set out the variety of rules in different jurisdictions governing the permissibility of bringing a lawsuit. Nor do I need to explain the time and expense faced by litigants. After a lawsuit is filed, plaintiffs are likely to have to overcome defenses such as the applicability of statutes of limitation; the length of time during which the family may have made little effort to pursue its search; and the rights of a purchaser in good faith, who had no knowledge of the painting having been illegally transferred during the period of the Third Reich.

If the art is in a museum, I believe that a claimant’s chances are now, due to specific events, greater than at any time in the last fifty years. In the next Part,

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2. *At* <http://www.nepip.org> (visited Dec. 2003). *See* Press Release, AAM Launches Nazi-Era Provenance Internet Portal (Sep. 8, 2003), *at* <http://www.aam-us.org/pressreleases.cfm?mode=list&id=55> (visited Dec. 2003).

I will narrate the developments in this area that have served to raise public awareness.

## II. GROWTH IN PUBLIC AWARENESS

### *A. Developments in Russia*

A signal event was the revelation in two articles in *Art News* in 1991 and 1992, courageously researched and written by Konstantin Akinsha and Gregorii Kozlov, that many works of art believed destroyed in World War II had actually been shipped back to Russia with the Red Army. This news rocked the art world, and – as it played out in the new era of Gorbachev’s *Glasnost* (openness) – the Hermitage and the Pushkin Museum acknowledged that they had secretly stored art taken from Germany in 1945. The world was finally made aware of the fate of the gold of Troy from Berlin and Degas’ *Vicomte Le Pic and his Daughters Crossing Place de la Concorde*, as well as numerous post-Impressionist and Old Master paintings that were widely believed to have been destroyed in a fire in Berlin in 1945. Art missing from collectors of Jewish ancestry in Hungary also surfaced in Russia, including significant works.

These events became widely known, especially when, after the dissolution of the Soviet Union, the two museums decided to exhibit the works: the Hermitage with a major catalog “Hidden Treasures Revealed”<sup>3</sup> (which was produced quickly but with a level of scholarship that demonstrated the extent of research by a few trusted curators); the Pushkin Museum with a hand list in an exhibition entitled, somewhat self-servingly, “Twice Saved.” The revelations were the subject of magazine articles and television shows; U.S. museums organized trips to St. Petersburg to visit the exhibition; and in Germany, of course, they were especially significant.

Good Neighborliness treaties between Germany and the Soviet Union were signed in 1990–1991,<sup>4</sup> and Germany and the Russian Federation set up bilateral

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3. ALBERT KOSTENEVICH, *HIDDEN TREASURES REVEALED: IMPRESSIONIST MASTERPIECES AND OTHER IMPORTANT FRENCH PAINTINGS PRESERVED BY THE STATE HERMITAGE MUSEUM, ST. PETERSBURG* (Harry N. Abrams, New York 1995).

4. Treaty between the Federal Republic of Germany and the Union of Soviet Socialist Republics on Good-Neighborliness, Partnership and Cooperation, Bonn, Nov. 9, 1990; Agreement between the Government of the Federal Republic of Germany and the Government of the Russian Federation on Cultural Cooperation, Moscow, Dec. 16,

committees to work towards mutual returns of artwork. During the 1990s, the Russian Duma's attempts to nationalize all this "trophy art" were vetoed twice by Boris Yeltsin, and were eventually enacted in modified form.

*B. An Example from Germany*

In the early 1990s, the issue of art taken in World War II received a fair amount of attention, especially in the United States and Germany, with the surfacing of a luxury Carolingian Gospel manuscript with a jewel-encrusted cover that had been missing from Quedlinburg since the War. Anonymous sellers from Texas had, through middlemen, sold this manuscript and two others to the *Kulturstiftung der Länder*, and the newly reunified Germany was repatriating the books for almost USD 3 million. I, among others, questioned Germany's decision to buy back stolen objects. Investigators William Honan (of the New York Times) and Willi Korte tracked down the secretive sellers – a brother and sister hailing from a small town in Texas. The Quedlinburg Church sued them for the remainder of the precious relics and medieval liturgical objects that their deceased brother had stolen in 1945 while he served in the Army unit that was charged with guarding its treasures. The suit was settled with the works of art returning to Germany and the final payment on the manuscripts forgiven. The Internal Revenue Service pursued the sellers but settled for a paltry payment, and prosecutors attempted, unsuccessfully, to charge the sellers for knowingly handling stolen property.

*C. Role of the Allied Monuments and Fine Arts Archive Section*

We are all deeply indebted to Lynn H. Nicholas, whose book "The Rape of Europa: The Fate of Europe's Art Treasures in the Third Reich and the Second World War,"<sup>5</sup> first appeared in 1994 and was translated into eight languages. In her opening chapter, Nicholas follows the dispersal at an infamous auction in Lucerne in the spring of 1939 of works by artists the Nazis regarded as "degenerate." These works, deemed unworthy of German museums, had been taken from those institutions, often against the directors' wishes.

Our understanding of the scope of Nazi art looting during the War owes a great deal to Nicholas' book. After the War, the Allies investigated Nazi art

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1992.

5. LYNN H. NICHOLAS, *THE RAPE OF EUROPA: THE FATE OF EUROPE'S ART TREASURES IN THE THIRD REICH AND THE SECOND WORLD WAR* (Knopf, New York 1994).

“collecting” and confiscations. Partly because the Nazis kept such thorough records and partly because Rose Valland (the courageous Louvre curator who worked alongside the Germans who cataloged confiscated art and shipped it to the Reich) had made notes each evening, the Allies largely uncovered the art shipments to Germany and found art in remote alpine hiding places. The activities of the Allied Monuments, Fine Arts & Archives (“MFAA”) section – finding, gathering, protecting, and returning art – are well told in “The Rape of Europa.” Captured records of the *Einsatzstab Reichsleiter Rosenberg* (“ERR”) helped each national office to return property to the individuals who owned it before the War (although of course, many owners had been murdered by the Nazis or fled to distant countries.) On the whole, the Allies returned art to countries from the countries where they believed it had been looted. A notable departure from this policy – giving a group of Old Master drawings (including important works by Albrecht Dürer) to Prince Georg Lubomirski – is still causing problems today.<sup>6</sup>

In the ten years following the end of World War II, several former members of the MFAA section wrote memoirs. Their work necessarily focused on art that was found in well over one thousand hiding places in Germany, Austria, and Czechoslovakia. Any works the Nazis had confiscated but failed to send to the Reich were the business of the government of the country where the art was found, such as France, The Netherlands and Belgium. These early publications<sup>7</sup> emphasized the investigations, storage, and restitution work of the MFAA.<sup>8</sup>

In the United States, at least, anyone interested in this heroic cultural salvage work was given a fine image of the Allied effort, and I believe this impression is still accurate. I say “Allied effort” because although the majority of the MFAA (“Monuments Men”) were Americans, without British participation (especially Douglas Cooper’s almost single-handed investigation in Switzerland), it would have been much more difficult to unravel the intricacies of the transactions that resulted in purchases by Swiss nationals and to find the looted art that wound up in Switzerland. In their writings, the former Monuments Men concentrated on their own actions and did not attempt to address the broader issue of confiscations in pre-War Germany or in annexed Czechoslovakia and Austria before the invasion of Poland. The art and antiques

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6. *Id.* at pp. 429–431.

7. See, e.g., James Plaut, *Loot for the Master Race*, in *THE ATLANTIC MONTHLY* (1946); JAMES RORIMER, *SURVIVAL* (Abelard, New York 1950).

8. See also the series of articles by Janet Flanner in *THE NEW YORKER*, reprinted in JANET FLANNER, *MEN AND MONUMENTS* (Harper, New York 1957).

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taken by the Nazis and sold in “Jew auctions” for the benefit of the Reich were not the business of the Monuments Men.

In addition to the publications that appeared in the decade after the War’s end, there was a continued awareness, at least in academic circles and in museums in the United States, that these thefts and returns had taken place. This awareness was neither public nor systematic, but personal. Members of the MFAA had been active in art and architecture before they entered the service, and many of them eventually took posts at major museums and universities.

### *D. Early Litigation*

Interest in the issue subsided from about 1960. During these decades, the art trade paid little attention to provenance gaps that might indicate complications stemming from Nazi art thefts.

In the United States, there were a number of replevin cases involving art taken by the Nazis. This kept the issue alive among a small group of concerned attorneys in the arts. The items that were the subject of lawsuits in the United States included the following:

- *Menzel v. List*:<sup>9</sup> a painting by Cagoule (1960s);
- *Kunstsammlungen zu Weimar v. Elicofon*:<sup>10</sup> a pair of Dürer portraits (1980s);
- *DeWeerth v. Baldinger*:<sup>11</sup> a Monet painting (late 1980s);
- *University of Kassel v. Chatalbash*:<sup>12</sup> illuminated manuscript pages (1990s);
- *Czartoryski-Borbon v. Turcotte*:<sup>13</sup> a Jan Mostaert portrait (mid-1990s);
- *Goodman v. Searle*:<sup>14</sup> a Degas landscape in monotype (late 1990s); and

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9. *Menzel v. List*, 49 Misc. 2d p. 300, 267 N.Y.S. 2d p. 804 (Sup. Ct. 1966), *modified as to damages*, 28 A.D. 2d p. 516, 279 N.Y.S. 2d p. 608 (1967), *rev’d as to modifications*, 24 N.Y. 2d p. 91, 246 NE 2d p. 742, 298 N.Y.S. 2d p. 979 (1969) (U.S.).

10. *Kunstsammlungen zu Weimar v. Elicofon*, 536 F. Supp. p. 829 (E.D.N.Y. 1981); *aff’d* 678 F.2d p. 1150 (2d Cir. 1982) (U.S.).

11. *DeWeerth v. Baldinger*, 658 F. Supp. p. 688 (S.D.N.Y. 1987), *rev’d*, 836 F.2d p. 103 (2d Cir. 1987); 804 F. Supp. p. 539 (S.D.N.Y. 1992), *rev’d*, 28 Fed. R. Serv. 3d (Callaghan) p. 1231 (2d Cir. 1994), *amended opinion filed after petition for rehearing*, 38 F.3d p. 1266 (2d Cir. 1994), *cert. denied*, 15 S. Ct. p. 512 (1994) (U.S.).

12. *University of Kassel v. Chatalbash*, D. Mass., filed April 18, 1997 (U.S.).

13. *Czartoryski-Borbon v. Turcotte*, N.Y.L.J., Apr. 28, 1999 (N.Y. Sup. Ct. 1999) (N.Y. Sup. Ct. 1999); 264 A.D. 2d p. 545; 697 N.Y.S. 2d p. 228 (N.Y. App. Div. 1999), appeal withdrawn (U.S.).

14. *Supra* note 1.

– *Rosenberg v. Seattle Art Museum*:<sup>15</sup> a Matisse *Odalisque* (late 1990s).

*E. Activities of Individuals*

One man, Ely Maurer, a deputy legal advisor in the United States Department of State, facilitated several returns from the United States over a period of fifty years.<sup>16</sup> Through his interventions, two tiny fifteenth-century panels by Pollaiuolo were returned to the Uffizi Gallery in Florence. They were found in California in the possession of a German officer who had served in Italy, returned to Germany, and later emigrated. Maurer remained committed – often in the face of the art world’s collective memory loss – to the principle of returning art to those who had owned it prior to World War II.

Among the growing number of authors since Lynn H. Nicholas, at least two other writers have made important contributions. Hector Feliciano’s *Le Musée disparu: Enquête sur le pillage des oeuvres d’art en France par les Nazis*,<sup>17</sup> is an account of the looting of several important Jewish collections in France under the occupation. The book’s influence was enhanced by the personal persuasiveness of its author, who seemed to be ubiquitous – on television, giving newspaper interviews and lectures, and appearing on panels – when the book was first published. As a gadfly to the French government, he called them to account for a virtually forgotten group of more than two thousand works of art that were returned to France after the War and placed in a government trust after France failed to find the pre-War owners. Jonathan Petropoulos’ “Art as Politics in the Third Reich”<sup>18</sup> appeared around the same time. Based on the author’s dissertation, it is more scholarly than the journalistic “Lost Museum,” and examines a very different aspect of Nazi looting: the underlying theories and the fierce competition for art treasures among the high command, following Hitler’s passionate pursuit of particular kinds of art.

In 1994, an international group of working experts, the *Koordinierungsstelle der Länder für die Rückführung von Kulturgütern* (Coordination Office of the

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15. *Rosenberg v. Seattle Art Museum*, 70 F. Supp. 2d p. 1163 (W.D. Wash. 1999) (U.S.).

16. He died at his State Department desk in 1997, in his late eighties.

17. HECTOR FELICIANO, *LE MUSÉE DISPARU: ENQUÊTE SUR LE PILLAGE DES OEUVRES D’ART EN FRANCE PAR LES NAZIS* (Austral, Paris 1995); published in the United States as HECTOR FELICIANO, *THE LOST MUSEUM: THE NAZI CONSPIRACY TO STEAL THE WORLD’S GREATEST WORKS OF ART* (1997).

18. JONATHAN PETROPOULOS, *ART AS POLITICS IN THE THIRD REICH* (University N.C. Press 1996).

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German Federal States for the Return of Cultural Treasures), was formed in Bremen.<sup>19</sup> This group started out dealing with the Russian-German dispute over art taken back to the Soviet Union by the Red Army. It held periodic meetings and publishes a newsletter with relevant material called “The Spoils of War.” It is now an established office in Magdeburg related to the German government; it maintains databases of objects of relevant interest.

### *F. Lead-up to the Washington Conference Principles*

In 1995, a three-day international symposium in New York, *The Spoils of War: World War II and its Aftermath: The Loss, Reappearance, and Recovery of Cultural Property*, brought together forty-eight specialists from more than a dozen countries. Published under the same title,<sup>20</sup> the proceedings are a very useful introduction to the issues and a snapshot of the state of discussion in the mid-1990s. Its appendices reprint many relevant treaties and agreements.

Following the London Conference in late 1997 concerning the fate of the gold taken by Nazis from European central banks, the same forty-one governments who met in London (plus a few others) came together in Washington, D.C. the following year. The Washington Conference on Holocaust-Era Assets of 1998 was the first large international governmental meeting to address the unfinished business of art that was forcibly transferred as a result of Nazi policies.<sup>21</sup> The conference adopted non-binding guidelines or principles (“Washington Principles”)<sup>22</sup> regarding the appropriate responses of governments and national art collections to claims stemming from Nazi depredations.

### *G. Later Developments*

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19. See <http://www.claimscon.org/index.asp?url=artworks> (visited Dec. 2003). See also Michael Franz, *Four Levels and a Database: The Work of the Koordinierungsstelle für Kulturgutverluste and www.lostart.de*, Part III, in this volume at p. 170.

20. *THE SPOILS OF WAR: WORLD WAR II AND ITS AFTERMATH: THE LOSS, REAPPEARANCE, AND RECOVERY OF CULTURAL PROPERTY* (Elizabeth Simpson ed., Harry N. Abrams, New York 1997).

21. Washington Conference on Holocaust-Era Assets, Nov. 30 to Dec. 3, 1998, Washington, D.C., Department of State, 1999.

22. Principles on Nazi-Confiscated Art, Washington Conference on Holocaust-Era Assets, reproduced as Annex IX in this volume.

It is probably around this time that people began to understand that Nazi art theft was a crime at Nuremberg and that the Nazis' confiscations in subjugated countries were not "traditional" taking of spoils. The legal framework was different after The Hague Convention of 1954.<sup>23</sup> People also began to understand that the taking of art from Jewish families was part of a policy of genocide.

In June 1997, the New York State Banking Department established a Holocaust Claims Processing Office primarily to help claimants deal with restitution of bank accounts and insurance policies; it has since also occupied itself with art claims. In early September 1997 in Washington, Ori Soltes, Marc Masurovsky, and Willi Korte founded the Holocaust Art Restitution Project. Later that month, the World Jewish Restitution Organization established the Commission for Art Recovery under the auspices of the World Jewish Congress, with Ronald S. Lauder as chairman. I was asked to direct it.

In 1999 the Commission for Looted Art in Europe was established in the United Kingdom, directed by Anne Webber. Other government offices and panels have been set up by governments in several countries, including the United Kingdom, Switzerland, and Belgium.

In the last days of 1997, two families lodged claims with the Museum of Modern Art in New York for two different paintings by Egon Schiele. Both were on loan from the Leopold Foundation in Vienna, and the Manhattan District Attorney subpoenaed both pictures for a criminal investigation in the early days of January 1998, setting off a course of litigation that is still in progress.

The Schiele seizure was dramatic, and there was constant coverage and investigative reporting in Vienna that revealed the unpleasant practices of Austrian museum leaders after the War. Numerous Jewish survivors whose collections were still in Austria and who did not wish to live the rest of their lives in a country that had repudiated and persecuted them found that the officials who had custody of their art would only release the property if the exiles "donated" specified items to the national collections.

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23. Convention for the Protection of Cultural Property in the Event of Armed Conflict, The Hague, May 14, 1954, 249 U.N.T.S. p. 240, reproduced as Annex III in this volume. See Lyndel V. Prott, *Responding to World War II Art Looting*, in this volume at p. 113.

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A new law introduced by Austria's then Minister of Culture, Elisabeth Gehrler, was passed in the summer of 1998.<sup>24</sup> This set up a new procedure through which claimants might recover art that museum officials had strong-armed from families. For example, the Austrian branch of the Rothschilds had to leave over nine hundred items – ranging from a Frans Hals painting to coins, medals, and furniture – in order to take out the rest. Under the Gehrler law, the family applied to the new office and relatively quickly received their numerous items (hardly insignificant). Since none of the family lives today in the grand style that had been theirs before the War, they sold the recovered property at Christie's for USD 90.7 million. That seems to have startled Austria, and subsequent applicants have had a harder time, although there has been a steady trickle of successful applications. Austria denied Maria Altmann, an eighty-seven year-old United States citizen and an heir of Ferdinand Bloch-Bauer, the return of several highly important paintings by Gustav Klimt. Rather than seek redress in the Austrian courts, where she would have to post an enormous bond commensurate with the many millions of dollars that the paintings are worth, Mrs. Altmann sued the Republic of Austria in a California court. Thus far, her right to pursue her claim there has survived Austria's challenges.<sup>25</sup>

Within weeks of the January 1998 galvanizing Schiele subpoena *contretemps*, the Association of Art Museum Directors ("AAMD"), an organization comprised of the directors of the leading art museums in North America, formed a task force. A few months later, at its June 1998 meeting, the AAMD adopted guidelines for dealing with the problem of provenance research and how to react to claims should they arise.

Other museum groups followed in Great Britain, Switzerland, and Germany. The Netherlands – wishing to avoid being criticized as France had been by Hector Feliciano<sup>26</sup> – had already set up a government office to research the national collection of works returned to Holland after the War and placed in a trust after most returns had been completed. The American Association of Museums ("AAM") also adopted guidelines and went further: it developed an Internet portal to enable a claimant to use one website address and search

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24. *Bundesgesetz über die Rückgabe von Kunstgegenständen aus den Österreichischen Bundesmuseen und Sammlungen*, BGBl. I Nr. 181/1998 (Federal Law concerning the Return of Works of Art from Austrian Federal Museums and Collections), Federal Law Gazette I No. 181/1998.

25. In September 2003, the U.S. Supreme Court agreed to review the question of whether in this case a foreign sovereign can be sued in U.S. courts.

26. FELICIANO, *supra* note 17, p. 213.

United States museums for their missing art. Its Nazi-Era Provenance Internet Portal Project was launched in September 2003.<sup>27</sup>

Although art dealers have asked me “When will it end?,” I am of the view that we are only in the early days of this phase of renewed interest.

### III. HISTORICAL BACKGROUND

In spite of the scholarly work and journalistic investigations of the last fifteen years, I believe that the scope of Nazi art confiscations is incompletely known. To understand the range of Nazi art thefts, one must start in the first years of Hitler’s power. Taking art from Jews began early. The campaign to deprive Germany’s Jewish citizens of their rights and property began soon after 1933. In the twisted racial theories of Nazi thought, the transfer of property from Jews in Germany to the State was justified by the supposed bleeding of the German people and their economy by Jews. The property was taken into State custody – described as “safeguarding” (by which the Reich meant “in partial payment for the debt Jews owed Germans”). I am sorry to say that many writers today do not seem to understand the racist theory underlying the Third Reich’s use of this word, and they repeat it as if it signified a benign taking-into-custody.

The looting of property from Jewish citizens was an aspect of the systematic stripping of rights, freedoms, and eventually the lives of people the Nazis judged to be Jewish, partly Jewish, or of Jewish ancestry. As the situation in Germany became more dangerous for Jews, many of them (art owners among them) gave up all their possessions in order to be permitted to flee. These works of art were ruled to be “abandoned,” and therefore State property; and they were auctioned to the highest bidder. The proceeds went to one or another Nazi agency or fund. Until two years ago (that is sixty-nine years after Hitler’s rise to power), such financial records were classified for a period of eighty years and were sealed to all researchers except the families involved.<sup>28</sup> When this law

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27. *Supra* note 2.

28. *Gesetz Über die Sicherung und Nutzung von Archivgut des Bundes (Bundesarchivgesetz BArchG), vom 6. Jan. 1988 (BGBl I S.62), zuletzt geändert durch das Gesetz, vom 13. März, 1992* [Federal law concerning archives].

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was modified in 2002,<sup>29</sup> it became possible for the first time for historians to go to the German archives to look for records of the “Jew auctions” and perhaps learn the names of the families whose property was sold, the amount of proceeds that went to various government agencies, and to learn the identities of buyers. In some cases, the buyers were museums where the works of art are today. For art bought by others, it may be possible to trace its ownership if the first buyers are identified. Historians may also begin to document in some detail Nazi Germany’s wholesale looting of its Jewish populations.

No one outside Germany has written extensively on these takings of cultural property. Research into the scope of Nazi art confiscations inside Germany before the War was a difficult matter until the 2002 modification of the German archives law, since researchers could not see the pertinent records. One German historian who has written about the art sold at “Jew auctions” is Anja Heuss.<sup>30</sup>

Another German historian, Wolfgang Dressen, has also worked in the area of Nazi dispersals of confiscated property.<sup>31</sup> Wolfgang Dressen organized an exhibition of stolen documents at a church in Düsseldorf in the late 1990s. These auction records were not about art but about neighborhood sales of everyday items: for example, the child-size furniture from a Jewish orphanage (the buyer was the Lutheran orphanage) or the household effects (bedding and kitchen equipment) of the deported Jews who had lived in the area. It is an inescapable conclusion that the ordinary citizens who bought these items knew where the goods came from.

Before September 1939 – when Hitler’s armies invaded Poland – Europe was not at war. Anyone could travel to Germany, buy at these auctions, and export the art anywhere in the world. When World War II began, embargoes were soon put in place, and foreigners were no longer able to buy at German or

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29. This new law, the *Gesetz Über die Sicherung und Nutzung von Archivgut des Bundes (Bundesarchivgesetz BArchG) vom 6. Jan. 1988 (BGBl I S.62) zuletzt geändert durch Art. 1 G. v. 5.6. 2002 I,1782*, reduces the period of protection from 80 to 60 years, and further makes available information from before May 23, 1949 (from the Third Reich) if that information is going to be used for research purposes.

30. Anja Heuss, *Die Vernichtung jüdischer Sammlungen in Berlin*, in *DAS GESCHÄFT MIT DER RAUBKUNST, FAKTEN, THESEN, HINTERGRUND*, VERLAG NEUE ZÜRCHER ZEITUNG (Matthias Frehner ed., 1998).

31. Wolfgang Dressen, *Betrifft Aktion 3: “Deutsche verwerten jüdische Nachbarn,” Dokumente zur Arisierung*, Ausstellung in Stadtmuseum Düsseldorf, Oct. 29, 1998–Oct. 1, 1999, Aufbau Verlag, Berlin (1998).

Austrian auctions. It may now be possible to compile a comprehensive list of these works of art now that the archives law has been modified and the records may be consulted by researchers. It is important to recognize that confiscated art sold before 1939 was freely dispersed and that the objects could have been exported. While many works may have been bought locally, those that were exported could be found anywhere today. After the annexation of Czechoslovakia and Austria, similar policies brought about similar auctions; in Hungary, allied with Germany, Adolf Eichmann, with the enthusiastic participation of the Arrow Cross Party and the Szálasi government, was in charge of organizing such activities.

However, if the heirs of a German-Jewish collector retain counsel or travel to the city where their family once lived, they may be able to find in the municipal archives the list of possessions that the Third Reich required Jews to file. If they know that their families' possessions were sold at a "Jew auction," they may also be able to get those records and begin to trace their art from the list of buyers. Of course many archives were burned in the bombing of Germany during the War. These lists, in differing amounts of detail, can provide the basis for searching in publications to find the present location of the works of art.

But how will you locate the art you can identify and demonstrate belonged to your family? Museums rarely publish their entire inventory, but in the last five years, some museums have begun the research process of combing through their holdings to identify art that has a gap or a suspicious name in its ownership history. Items with gaps in provenance (documented ownership history) are posted on the museum's own website, or in cooperative sites on the Internet.<sup>32</sup>

#### IV. COMMISSION FOR ART RECOVERY

At the Commission for Art Recovery, we had two very different reactions in Germany to claims against museums there brought on behalf of the heirs of Gustav and Clara Kirstein; one claim was at the Sprengel Museum in Hannover and the other at the museum in Leipzig. The city council of Hannover, when the

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32. See, e.g., <http://www.culture.gouv.fr/documentation/mnr/pres.htm>; <http://nationalmuseums.org.uk/index.php?pageID=spoliation>; <http://www.nepip.org>; <http://www.nepip.org>; <http://www.lostart.de> (all visited Jan. 2004).

## RESOLUTION OF CULTURAL PROPERTY DISPUTES

claim eventually came before it, voted unanimously to return the painting in question, and its physical delivery was not hindered. In Leipzig, Kirstein's home, we met with many objections. The claim was for works by Max Klinger, a Leipzig artist and the subject of a major exhibition there in the early 1990s; in that show's catalog we found the Kirstein name acknowledged in over eighty provenances. After it was agreed that the works would be returned to the heirs, and after a public ceremony in Berlin when the Lord High Mayor of Leipzig symbolically returned the works to one of the heirs, the city continued to delay for several months while it tried to bypass the Commission for Art Recovery and buy the art from the heirs. The heirs simply did not want to sell to the city where in 1933, as Kirstein's niece Thekla Stein Nordwind told me in May 2000, the mayor had cut Gustav Kirstein in the street; Kirstein, a publisher of art books, an art patron, and a friend of the museum, was deprived early in 1933 of his half of a thriving publishing company.

I believe the officials in Leipzig (formerly the German Democratic Republic ("GDR")) found the idea of taking responsibility for redressing the injustices of the Holocaust to be a novelty. Furthermore, in arguing to the Commission for Art Recovery (in May 2000) that the Kirstein works should stay in the Leipzig museum, the museum officials emphasized the greater good that came from making the works available for student seminars rather than dispersing them by sale. The idea that these works were stolen private property seemed to surprise them. After much difficulty, eventually the art was turned over to representatives of the heirs. Recently, I learned that the same museum in Leipzig possesses many works by Max Liebermann from the Kirstein collection. In all the negotiations for the Klingers, neither the museum nor the city acknowledged that they had these unpublished Liebermanns, although we inquired in writing on behalf of the heirs. This behavior is unacceptable. I believe that the attitudes behind it are formed in part from decades of East German communist teachings about private property. Also, for forty years, the official "line" had been that the citizens of the GDR were anti-fascists and were not responsible for the Holocaust.

Like all curators, the Leipzig staff felt possessive about the art they had held for many years. Like all fiduciaries, the city of Leipzig had to have good evidence to give up any assets of the museum. I also think they hated the idea that the art might find its way to the auction block. There were strong emotions on both sides of the table.

When families recover art today, it is most likely that the heirs are a group and that it will be impossible to divide the art, so it is sold because money can

be divided. This does not mean that the emotional satisfaction of recovering ancestral property is any less. The Kirstein heirs were pleased that in each Sotheby's auction catalog, a short biography of Gustav and Clara Kirstein appeared and that the role they played in the cultural life of their city was recognized. What the Nazis had attempted to rub out forever was returned to memory.

In two other countries, claims brought against public museums by the Commission for Art Recovery have been resisted and negotiations with government offices have failed.

In Hungary, the Commission for Art Recovery has had to answer every possible defense against the claim of Martha Nierenberg, who is seeking the return of paintings she inherited from her grandfather, the prominent art collector Mór Lipót Herzog. Her attorneys had been negotiating without result with the Hungarian government for more than four years when the newly formed Commission for Art Recovery agreed to help her. With this assistance, she sued two government museums,<sup>33</sup> and in November 2000, she won in trial court. But the government appealed, and appeals move slowly; in late November 2002, the higher court returned the case to the lower court for clarification of several factual issues. It may well take ten years for Mrs. Nierenberg (who is now elderly) to resolve this claim.

The Commission for Art Recovery has also had difficulty with the Spanish government in a claim for the return of a Camille Pissarro painting to Claude Cassirer. The painting came to Spain in recent years with the Spanish government's purchase of the Thyssen-Bornemisza Collection. The government also donated the Palacio de Villahermosa and renovated it. Through lawyers in Spain, we negotiated for well over a year. Although this dispute began after the Washington Conference and Spain had subscribed to the Washington Principles articulated there, the argument was raised that Baron Thyssen was a good faith purchaser. Be that as it may, the painting is now part of a foundation inextricably linked to the government, and the good faith of Baron Thyssen seems irrelevant to the claim.

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33. The Magyar Nemzeti Múzeum and the Szépáveszeti Múzeum.

V. CONCLUSIONS

There are still many challenges. The obstacles facing claimants are numerous and diverse in spite of the growth of interest and the increased availability of information. Claims against individuals are governed by the laws in the jurisdiction where the art is found today. Given the duration and cost of litigating ownership after a disputed transfer more than sixty years ago, lawyers are more often counseling their clients to settle, with or without mediation. Governments like Hungary and Spain are forcing claimants with very strong cases and substantial evidence to go to court.

In recent years, museums in the United Kingdom and the United States have returned art taken as a result of Nazi actions or policies to pre-War owners' families. At least one painting has been returned from a museum in Switzerland. In some cases (in the United States as well as in the United Kingdom), settlements have been reached, leaving the art in the museum. Often the museum will agree to acknowledge on the painting's label the troubled ownership history of the art. France and The Netherlands have both returned art that they have held since it was sent to them after the War from the Central Collecting Point in Munich.

A wider implementation of the Washington Principles would be most helpful. At the negotiating level, an understanding of the Principles and the need to abide by them is too often lacking.

Although claims are now settled more frequently than before, the underlying legal regimes have not changed, and sometimes a long and expensive lawsuit is the only way to make a current possessor stop stonewalling. Both sides in a replevin matter are well advised to understand their positions under law before trying to negotiate. The variety of laws that could apply is staggering. In addition to laws of inheritance, conflict of laws, statutes of limitation, transfer of ownership under communist regimes, one may also have to litigate the meaning of post-War treaties (for example, whether Hungary was truly in compliance when it settled War claims with the United States).

In summary, my perception is that despite the huge increase in attention and knowledge about Nazi art looting, too many current possessors – including public museums in some countries – resist claims with every means at their disposal. They force claimants either to abandon their pursuit of justice or to devote additional expenditures of time, money, and energy to their quest for cultural property unjustly taken from their families.