Lincoln, Napoleon and Hitler Walk into a Bar:

Does the 1907 Hague Convention on Land Warfare Require Signatory Countries to Open Courts to Claims for Restitution of Nazi-Looted Art? *A Meditation on Cassirer v. Thyssen-Bornemisza Foundation* and Why a European Directive Could Fix This Horrible Mess

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Article 47 of the 1899 and 1907 Hague Conventions on Land Warfare forbids pillage. Article 56 requires "legal proceedings" for seizures of artworks. Following World War II, using statutes of limitations and acquisitive prescription, many Hague Convention signatories closed their courts to Nazi-era claims to recover pillaged and seized artworks. This article argues that closing courts to "legal proceedings" violates the Hague Convention, defeats its goal of taking the profit motive out of wars of aggression, and rewards concealment and laundering of stolen property. In the United States, Congress passed the Holocaust Victims Redress Act of 1998 (the "HVRA") to apply the 1907 Hague Convention to claims involving Nazi-looted art. The Holocaust Expropriated Art Recovery Act of 2016 (the "HEAR Act") reopened U.S. courts and extended statutes of limitations by six years for past and future claims to artworks and cultural property lost as a result of Nazi persecution. The author argues that the U.S. Congress approach should be emulated by all signatory nations because it is required by the Hague Convention. Hague Convention compliance could be best achieved by a directive from the European Parliament requiring reopening courts to such claims.

■ Abraham Lincoln, Napoleon Bonaparte and Adolf Hitler had divergent perspectives on remedies for looting private cultural property during wartime. Lincoln, horrified, entirely forbade looting through the 1864 Lieber Code, enacted during the civil war among the United States. Napoleon Bonaparte lusted for loot, a legitimate aim of war in his era, crafting civil codes to enable warring armies to guard booty after a reasonable respite. Hitler obliterated his enemies with an aim to ensuring that no survivor would exist to ever achieve restitution.

Confronted with statutory bars frustrating the ability of Holocaust victims to recover Nazi-looted artworks wartime loot, how would each man react? Lincoln: never! Napoleon: 20 years! Hitler: what looting? Our current legal systems, still under the influence and inspiration of these men, are today a schizophrenic patchwork of inconsistencies.

In 1899, at the invitation of the Russian Czar, world leaders congregated at the Hague for a convention. That convention adopted Lincoln's vision and baked the Lieber Code's ban on looting artworks into an international agreement that would change wars forever. No more wars of aggression, no more pillage and seizure of artworks. Would the new Twentieth Century succeed in taking the profit out of war? It's still an open question. And a messy one.

The 1907 Hague Convention Respecting the Laws and Customs of War on Land, 36 Stat. 2277 (Oct. 18, 1907) (the "1907 Hague Convention"), was modelled on and adopted Lincoln's view on cultural property and requires signatories to adopt legislation providing for legal proceedings to resolve ownership claims to artworks lost as a result of Nazi persecution. The 1907 Hague Convention (and its 1899 predecessor) forbids wars of aggression and then served as the legal underpinning for the Nuremberg trials that led to the execution of Nazi leaders.[1] Article 47 of the 1907 Hague Convention forbids Napoleonic-style pillage. Appropriately implemented, Hague Convention Article 56 would thwart Hitler's goal of erasing Nazi depredations and all traces of Jewish victims from the historical record by providing that "[a]ll seizure of … works of art and science is forbidden, and should be made the subject of legal proceedings."[2]

Article 56 ended the "spoils of war" doctrine that governed the Napoleonic era as a matter of international law. But legislation of European Member States never got the message, conti-

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1 At Nuremberg, the International Military Tribunal convicted individual Nazis of crimes for violating the 1907 Hague Convention. *See* Oona Hathaway & Scott Shapiro, *The Internationalists: How A Radical Plan to Outlaw War Remade the World*, 290–91 (Simon & Schuster 2018).

2 *Id.* at 2307, 2309, Hague Convention 1907.

nuing to apply pre-existing statutes of repose even to wartime loot in the post-World War II era. Unfortunately, Article 56 was not appropriately implemented post-1945. Cold War priorities slammed the courthouse doors shut to mainly Jewish families seeking to recover artworks. Many Nazi-looted artworks remain untraced, many victim families remain untraced, and many Nazi heirs continue to profit from and publicly celebrate their ill-gotten gains. The legal and moral questions raised by a collective refusal to examine the teeth of certain gift horses have, and will have, future resonance for the certain trove of cultural property that will continue to flood the art market in the wake of all wars of aggression rendered illegal by the 1907 Hague Convention.

This paper consists of six parts. In the Introduction, I set the stage by briefly describing the current legal clash of the visions of Lincoln, Napoleon and Hitler in the case of the Cassirer family trying to use U.S. legal proceedings to retrieve Nazi-looted art from a Spanish museum that uses a Napoleonic-style prescription defense. In Part I, I describe the U.S. approach to compliance with the 1907 Hague Convention by reopening its courts to Nazi-looted art claims by extending its statutes of limitations. In Part II, I discuss Europe's lack of compliance with the 1907 Hague Convention's Requirement of "Legal Proceedings" with courts closed to private claims since the 1950's. In Part III, I discuss Spain laundering Nazi-looted art through the Thyssen-Bornemisza Foundation: Napoleon and Hitler trumping the vision of Lincoln and frustrating the Hague Convention's goal of taking profit out of war. In Part IV, I discuss New York's rejection of the spoils of war doctrine and embrace of *caveat emptor*. In Part V, I discuss how *caveat emptor* is consistent with doctrines of acquisitive prescription that never traditionally applied to stolen artwork. In Part VI, I argue that New York's rejection of the spoils of war doctrine and affording common law remedies of replevin and disgorgement under a trust *ex maleficio* doctrine should provide a model for how national legal systems should treat claimants of Nazi-looted artworks consistent with international law.

I conclude that, based on basic notions of fairness together with the history and background of the 1907 Hague Convention and the post-war failure to trace, retrieve and restitute Nazi-looted art, the 1907 Hague Convention signatories should reopen their domestic courts to comply with Articles 47 and 56 of the Hague Convention (as the United States did in 2016). Once open for business, *caveat emptor* and the return of stolen property should be the rule, not the exception. The best way to reach this result in Hague Convention signatory countries would be for the European Parliament to pass a directive reopening the courts and guaranteeing effective restitutionary remedies based on *caveat emptor*.

Introduction: The Cassirer Family Walks Into a Bar With Lincoln, Napoleon and Hitler in a Fistfight

On January 9, 2024, a Ninth Circuit Court of Appeals ruling grabbed international headlines when it ruled against descendants of Holocaust victims – the true owners of *Rue St. Honore, après-midi, effet de pluie* by Camille Pissarro.[3] The Ninth Circuit decided that a museum in Spain could keep art stolen by the Nazis. One judge wrote that the decision was "at odds" with her "moral compass," that Spain should have voluntarily relinquished the Pissarro, but that the court could not order compliance with Spain's promises to return Nazi-looted artworks made when it signed the Washington Conference Principles on Nazi-Confiscated Art or the Terezin Declaration on Holocaust Era Assets.[4]

Why? The Napoleonic doctrine of acquisitive prescription cut off the family's remedy. Here we see the heir to a Nazi fortune finding a Napoleonic defense in a judicial system in the nation that gave birth to Lincoln.

The *Cassirer* court applied the Spanish law of acquisitive prescription to vest title in the government of Spain in Nazi-looted art acquired from a member of a family engaged in dealing arms to the Nazis, trafficking in Nazi-looted art, and who was aware of "red flags" in acquiring the artwork, establishing a lack of good faith under Swiss law.[5] Although the Ninth Circuit found Spain to be "irresponsible" in failing to investigate the stolen artwork's provenance, the Ninth Circuit found acquisitive prescription to be applicable because the Cassirer family failed to prove that Spain had "actual knowledge" that the artwork was stolen.[6] Although the *Cassirer* court noted the immorality of Spain's behavior, it concluded that it was powerless to grant the Cassirer family a legal remedy.

Spain relied on its domestic law of acquisitive prescription. In civil law countries like Austria, Germany, France and Spain, acquisitive prescription permits a purchaser to gain legal title to stolen artwork by possessing it for a certain number of years. Ordinarily, a claimant opposing acquisitive prescription bears the burden of proving that the possessor had actual knowledge that the artwork was stolen. Here, the Cassirer family was unable to prove that Spain had actual knowledge the Pissarro was stolen, so lost the case.

To understand how this situation arose, we must first explore the current clash between the U.S. approach and the European approaches to providing private civil remedies to Holocaust victim families to recover stolen artworks. My article *"Nazi Looted Art and Cocaine: When Museum Directors Take It, Call The Cops."*[7] argued that statutes of limitations and laches defenses should not be available in cases of stolen artworks of European provenance created prior to 1946 that entered the United States

3 *See Cassirer v. Thyssen-Bornemisza Collection Foundation*, 89 F.4th 1226 (9th Cir. 2024); see Petition for a Writ of Certiorari filed 6/12/2024, available at https://tlblog.org/wp-content/uploads/2024/12/Cassirer-cert-petition.pdf.

4 Id. at 1246 (Callahan, J., concurring).

5 824 F. App'x 452 (9th Cir. 2020) and 862 F.3d 951 (9th Cir. 2017).

6 824 F. App'x 452 at 457.

7 14 Rutgers Journal of Law & Religion 529 (2013), available at https://www.lootedart.com/web_images/pdf2/2013%20Vol.%2014%20Dowd.pdf ("*Cocaine*").

after 1932. This is so because such artwork is identifiable by its nature as potentially the proceeds of a massive crime. It is a category of property that may be checked for provenance before a purchaser spends money. Its transport, receipt and concealment has always been a crime.

Cocaine argued that such artworks, like cocaine, are contraband that cannot be transmuted into legitimate property through defenses designed to protect innocent purchasers. States in the U.S. are "buyer beware" jurisdictions that require diligence in acquiring property. The common law rule is that *no one can take good title from a thief*. *Cocaine* argued that U.S. law enforcement authorities should retrieve and return stolen artworks even where the civil law system failed claimants. In 2016, the U.S. Congress passed the HEAR Act, opening up U.S. courts to claims to Nazi-looted artworks.

But Europe's courts are largely closed to private claims for Nazi-looted art. European Member States' cutting off Holocaust victims' rights to recover Nazi-looted artworks using statutory bars (or "statutes of repose"), such as statutes of limitations or statutes permitting acquisitive prescription of stolen property, is inconsistent with Article 56 of the Hague Convention. The assumption of "innocent purchaser" baked into statutes of repose is inapplicable to Nazi-looted art because the relevant class of purchasers were subject to the doctrine of *caveat emptor* ("buyer beware") and had notice that European artworks created prior to 1946 that were in Europe after 1933 were potentially looted.

This article rejects the argument that providing remedies to families of Holocaust victims seeking to recover Nazi-looted art violates anyone's constitutional or human rights. This article concludes that Lincoln's vision should prevail over Hitler's and that European Member States should be directed by the European Union to provide private civil remedies to claimants consistent with the plain language of Article 56 of the Hague Convention. The *Cassirer* court could have and should have imposed a constructive trust – *ex maleficio* – and ordered the stolen artwork returned.

I. The U.S. Approach to Compliance with the 1907 Hague Convention: Reopening Its Courts to Prospective and Past Claims to Nazi-Looted Art in 2016

In 2016, the U.S. Congress unanimously passed the Holocaust Art Recovery Act (the "HEAR Act"), which expressly cited compliance with obligations under the 1907 Hague Convention as a rationale. The HEAR Act expanded statutes of limitations to six years following (1) claimants having a possessory interest in artworks and (2) claimants having knowledge of the actual location of the artwork. The HEAR Act resuscitated claims that were time-barred by statutes of limitations prior to 1999. Baked into the U.S. approach is a *caveat emptor* approach that a diligent purchaser is in the best position to avoid risks by diligent investigation into the provenance of a potentially stolen artwork.

The U.S. approach is consistent with the ancient *nemo dat quod non habet* – the purchase of a possession from someone who has no ownership right to it also denies the purchaser any ownership title – or the "*nemo dat* rule." The *nemo dat* rule is reflected in the common law maxim that *„no one can take good title from a thief".* In the United States, the common law does not recognize adverse possession of a chattel (personal property).

In 1950, the United States complied with its treaty obligations under Article 56 by the State Department sending a circular letter to American museums, art dealers and colleges warning against acquiring Nazi-looted art and urging cooperation in returning such artworks to their country of origin.[8]

The U.S. Executive Branch has demonstrated determination to return Nazi-looted artworks to true owners has remained consistent over multiple presidential administrations of both political parties. Congress' determination to demand international compliance with Article 56 of the 1907 Hague Convention and to preserve the U.S. victory in World War II of defeating Nazism and depriving war profiteers of their spoils is reflected in U.S. domestic law.

In 1998, under the Clinton Administration, Congress legislated in the Holocaust Victims Redress Act (the "HVRA") that "the same international legal principles applied among states"– specifically ***including*** Hague Convention Article 56 – "should be applied to art and other assets stolen from victims of the Holocaust."[9] Thus, Congress sought to create effective legal remedies in U.S. courts for the return of Nazi-looted artworks pursuant to Article 56 of the 1907 Hague Convention and continues to advocate around the world for other countries to open up their legal systems to permit the return of Nazi-looted art.

Under the Obama Administration, Congress' unanimous passage of the HEAR Act demonstrated a powerful bipartisan American commitment to respecting U.S. treaty obligations to return Nazi-looted artworks to true owners.

Under the Trump Administration, Congress passed the Justice for Uncompensated Survivors Today Act (the "JUST Act"), Public Law No: 115-171 (5/09/2018) requiring the U.S. State Department to monitor the progress of countries in opening their courts to provide justice to uncompensated Holocaust survivors, including the return of Nazi-looted artworks and to report progress to Congress.[10]

8 *See* Letter to Museums, Art and Antique Dealers and Auction Houses, 12/10/1945, *reprinted in* 16 Dept. of State Bull. at 358–60 (2/23/1947).

9 *See* Pub. L. No. 105-158, § 201(1), (2) and (5), 112 Stat. 15, 17 (2/13/1998).

10 *See* Justice for Uncompensated Survivors Today (JUST) Act of 2017, Pub. L. No. 115-171 (2018), available at https://www.congress.gov/bill/115th-congress/senate-bill/447.

Yet, despite these efforts, in the wake of World War II, hundreds of thousands of cultural objects changed hands and ended up in the hands of Nazis, Nazi accomplices, or Holocaust profiteers. Collective amnesia and denial set in. This result is immoral, inequitable, and a violation of traditional tenets of common law, civil law and applicable international law.

"Where there is a thief in the chain of title, no one can take good title" is an ancient common law maxim that – if respected in the circumstances of Nazi depredations of owners of artworks leading to World War II – would lead to a workable and common-sense *caveat emptor* legal framework for cultural property restitution cases arising from thefts, losses or involuntary sales of unique artworks occurring after the execution of the Hague Convention of 1907, which outlawed pillage, and the Kellogg-Briand Pact of 1928, which outlawed wars of aggression and emphasized individual responsibility for criminal acts. The world was on notice of Nazi art looting and the persons acquiring the artworks – a luxury product – came from the most educated and privileged echelons of society. *Caveat emptor* – the requirement to be diligent in checking provenance and to lose your money if you are wrong – is also consistent with traditional acquisitive prescription, a Roman law doctrine that did not apply to stolen property and had a requirement of good faith possession.

II. Europe's Lack of Compliance with the 1907 Hague Convention's Requirement of "Legal Proceedings": Courts Closed to Private Claims Since the 1950s

European states currently have statutes that recognize title in stolen chattels through acquisitive prescription. However, statutes of acquisitive prescription are based on the premise that persons acquiring the chattel do not have notice that it might be stolen property. Artworks are unique luxury items generally traceable to their source of creation. Artworks are generally purchased by elites who are educated or wealthy (or both).

Spain's example in the *Cassirer* case demonstrates that European Member States have adopted a flawed legal approach. The European member state approach is to close the courthouse doors on the flawed assumption that purchasers of Nazi-looted art were "innocent purchasers" who paid good value. This flawed approach is illustrated in a November 2017 European Parliament report by Rapporteur Pavel Svoboda, *Cross-border restitution claims of looted works of art and cultural goods*, based on an externally commissioned study by Prof. Dr. Matthias Weller, EBS Law School of the EBA University of Economics and Law, Wiesbaden, Germany.[11]

The 2017 European Parliament Report found that private law mechanisms for claimants were weak, unavailable or uncertain. The 2017 European Parliament Report recommended, based on Weller's study, that European Union legislative action would be available for future transactions in Nazi-looted art only. The 2017 European Parliament Report concluded that EU legislative action with regard to fully completed transactions and/or legal relations fully established in the past would not comply with the European Convention on Human Rights, the EU Charter of Fundamental Rights and national constitutional guarantees in the Member States.[12]

The 2017 European Parliament Report's approach relies on amnesia. The historic reality is that most purchasers of European artworks after 1932 that were created prior to 1946 were aware of Nazi depredations. Even if they were not, the rule of *caveat emptor* has always placed the burden of researching provenance on a person acquiring unique, traceable luxury goods like artworks. The law should not reward those who are pure of heart, but empty of mind. The historic reality demonstrates that the "innocent purchaser" fiction underlying the doctrine of acquisitive prescription is not applicable to cases of Nazi-looted art. Indeed, in the *Cassirer* case, Spain knew that it had a duty to research the provenance of the artwork before acquiring it. Spain was on notice that the artwork could be stolen.

In sum, the approach of the U.S. Congress to permit Holocaust victim families to exercise legal rights to personal property stolen from murder victims by permitting an opportunity to pursue private civil remedies is in direct conflict with the 2017 European Parliament Report's approach. By deciding to let sleeping dogs lie, the European Parliament has permitted Holocaust victim families to be stripped of personal property rights by hostile private law regimes in Member States in contravention of Article 56 of the Hague Convention.

Substituting the word "cocaine" for "artwork" helps the average reader understand the baseless nature of the contention that any Member State has granted a constitutional right to possession of stolen property taken from murder victims during a war occurring in the 20th century. Nazi-looted art is contraband, stolen and remains stolen. Any purchasers acquiring it were subject to *caveat emptor* and on inquiry notice of its stolen nature.

A strict and uniform application of the doctrine of *caveat emptor* for these cases is consistent with the historical circumstances of such transfers and is consistent with the 1907 Hague Convention forbidding pillage, the Kellogg-Briand Pact's aim of making wars of aggression illegal. It is also consistent with the U.S. enactment of the HEAR Act, which should serve as a model for international procedural jurisprudence opening the courthouse doors to victims who have been frustrated by civil litigation impediments. Many judges and legal systems have a baked-in prejudice against opening old lawsuits and continu-

11 https://www.europarl.europa.eu/RegData/etudes/STUD/2017/610988/EPRS_STU(2017)610988_EN.pdf ("2017 EU Report").

12 *Id.* at 5.

ally invent legal fictions to impose a *de facto* "finders keepers" system – letting the thieves and accomplices keep the loot, no matter what the law actually says, as the *Cassirer* court did. This judicial subversion of the Allied victory in World War II – aside from being morally wrong – will ultimately discredit the judicial system, destroy public confidence in our museums, and continue to encourage an international trade in stolen art that undermines the stability of our legal and financial systems.

III. Spain Laundering Nazi-Looted Art through the Thyssen-Bornemisza Foundation: Napoleon and Hitler Trumping the Vision of Lincoln and Frustrating the Hague Convention's Goal of Taking Profit out of War

Because purchasers of Nazi-looted art were reasonably aware of the "red flag" circumstances of World War II, it is unfair and unjust to give thieves or their transferees a windfall or a legal shield to protect them from having stupidly or credulously purchased stolen art – as the *Cassirer* court did. When a chattel, such as a work of art, has been stolen and resold to a good-faith purchaser, the original owner has a cause of action for replevin.[13] Replevin is a lawsuit to repossess personal property wrongfully taken or detained by the defendant.[14]

As Europe rebuilt after World War II and industriously crafted civil codes, it failed to craft exceptions for stolen property appropriate to deal with the question of Nazi-looted art, which, having been looted by thieves, could never give title that would vest. Nor could the traditional Roman law doctrine of acquisitive prescription help transfer loot to thieves, their cronies, or their spawn, because acquisitive prescription did not apply to stolen property and could only apply to property acquired in good faith without knowledge of potential clouds on title.

However, a historical haze descended on Europe during the Cold War, when Western leaders found it politically expedient to ignore the plight of Holocaust victim families despoiled of all assets. Holocaust victims finding stolen artworks and seeking returns through civil litigation have – despite a few bright spots – almost uniformly been treated with disrespect and contempt. Western European legal systems enacted civil codes that mostly closed off the ability of claimants to recover stolen property in either public or private hands and permitted stolen artworks to enter public collections using legal norms developed in peacetime circumstances. As a post-World War II fog provided cover, tens of thousands of stolen artworks entered the United States and the U.K., fetching the highest auction prices, many ending up in museums and private collections.

By permitting Spain to retain a stolen artwork, the *Cassirer* court reached the wrong result. As one author noted:

> *Relying on rigid rules around limitation or prescription periods and past purchases in good faith, the law often favours the object's current possessor. But this legal preference for the status quo might prevent us from engaging appropriately with larger issues around inequity, historical injustice and inherited trauma.*[15]

IV. New York's Rejection of the Spoils of War Doctrine and Embrace of a *Caveat Emptor* Approach

But the common law doesn't favor holders of stolen property. Nor does the plain text of many civil codes. Despite this, museums almost never lose in local courts. This result may speak more to the provincial biases of judges to let sleeping Nazi dogs lie than to the actual rule of law. The general rule at common law is that thieves cannot pass good title to anyone, including a good faith purchaser.[16] This notion traces its lineage to Roman law *nemo dat quod non habet*, meaning "no one gives what he does not have."[17]

> *The maxim of caveat emptor embodies an ancient rule of the common law. It is based on the principle that the purchaser buys at his own risk unless the seller gives an express warranty, or unless the law implies a warranty from the circumstances of the case or the nature of the thing sold, or unless the seller be guilty of fraudulent misrepresentation or concealment in a material inducement to the sale. Under it, the buyer is put upon his guard and must stand the loss of an imprudent purchase unless the soundness of the thing bought is warranted by the seller. It applies to sales of personalty where the buyer has an opportunity to inspect the goods and the seller is guilty of no fraud. *** In Slaughter's Adm'r v. Gerson, 13 Wall. 379, 385 (20 L.Ed. 627), the court, speaking of the doctrine of caveat emptor, said:*
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> *" * * * Where the means of information are at hand and equally open to both parties, and no concealment is made or attempted, the language of the cases is, that the misre-*

13 Fallon S. Sheridan, *The Sunset of the Holocaust Expropriated Art Recovery Act of 2016 and the Rise of the Demand and Refusal Rule*, 89 Fordham L. Rev. 2841, 2847 (2021).

14 Black's Law Dictionary (11th ed. 2019).

15 Alexander Herman, *Restitution: The Return of Cultural Artefacts* (Lund Humphries 2021).

16 *Cassirer v. Thyssen-Bornemisza Collection Found.*, 862 F.3d 951, 960–61 (9th Cir. 2017) (quoting Marilyn E. Phelan, *Scope of Due Diligence Investigation in Obtaining Title to Valuable Artwork*, 23 Seattle U. L. Rev. 631, 633–34 (2000)) ("One who purchases, no matter how innocently, from a thief, or all subsequent purchasers from a thief, acquires no title in the property. Title always remains with the true owner."); *Crocker Nat'l Bank v. Byrne & McDonnell*, 178 Cal. 329, 332, 173 P. 752 (1918) (California law); *Solomon R. Guggenheim Foundation v. Lubell*, 77 N.Y.2d 311 (1991); *Bakalar v. Vavra*, 619 F.3d 136, 140 (2d Cir. 2010); *Menzel v. List*, 49 Misc.2d 3000, 267 N.Y.S.2d 804 (N.Y. Sup. Ct. 1966) (New York law).

17 *Cassirer v. Thyssen-Bornemisza Collection Found.*, 862 F.3d 951, 961 (9th Cir. 2017).

presentation furnishes no ground for a court of equity to refuse to enforce the contract of the parties. The neglect of the purchaser to avail himself, in all such cases, of the means of information, whether attributable to his indolence or credulity, takes from him all just claim for relief."[18]

Caveat emptor is the rule that should apply to possessors of Nazi-looted art now seeking to unload stolen property, whether through sale or charitable donation, because those recipients were best situated to investigate provenance before purchasing or accepting the property. *Caveat emptor* should also apply to those museums that purchased or accepted donations of stolen property. Because purchasers of Nazi-looted art and museum directors and curators can be presumed to have knowledge of daily headlines in the world's newspapers, it is clear that they knew that Nazi-era European artworks of unclear provenance risked having been looted. Because the purchasers or recipients were in the best position to ask questions before buying the artworks, there is no reason that the law should protect them from their laziness or stupidity. Under the common law, "equity aids the vigilant, not those who sleep on their rights."[19]

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.[20] Spoliation of Germany's Jews was rejected by New York's legal system. New York courts rejected the application of Nazi laws to despoil Jews well prior to the U.S. entry into World War II. In *Holzer v. Deutsche Reichsbahn Gesellschaft*, a case that started in 1936 and was decided by the New York Court of Appeals in 1938, New York courts denied the Deutsche Reichsbahn sovereign immunity and allowed a victim plaintiff to seize its office furniture:[21]

So, here, whereas it would be offensive to the German government, with which we are at peace, to presume to control or dictate or regulate the policies of the German government within the borders of Germany, we are nevertheless not obligated by the law of comity to enforce the law of Germany when its enforcement is sought here contrary to our every sense of justice and liberty and morality.

In announcing this result we are not "looking for trouble." It is Reichsbahn that is asking us to recognize and apply the German law to an action pending here, and we answer: "Let us see whether our public policy enables us to do what you ask."

*In so doing we are in no wise seeking to interfere with the internal affairs of Germany. We are not at the moment concerned with the conscience of Germany, but with our own. We are but applying our public policy to an action pending here because the policy of Germany so shockingly conflicts with ours. It is not a gratuitous insult to resist an unsavory influence. * * **

Reichsbahn's answer admits "that in the month of April, 1933, after the coming into power of the present German Government, the plaintiff was seized and incarcerated by the agents of that Government." (¶ 10) Further, Reichsbahn admits that (¶ 11) "a policy was adopted by the German Government in respect of so-called non-Aryans which required the elimination of certain classes of persons of Jewish or partly Jewish blood from leading commercial, industrial and transportation enterprises, including said defendant, and that the plaintiff became subject to such policy by reason of the fact that he is of Jewish blood and was within said classes of persons when his aforesaid hiring and his employment thereunder were duly terminated pursuant to the laws of Germany."

*More, paragraph 12 admits that "the plaintiff became unable to continue his services *** when he was imprisoned, and thereafter."*

Such, asserts Reichsbahn, is the law of Germany. A human being is discharged from his employment because of his religion and jailed. And we are called upon to sanction the act. I say that our public policy does not compel us to give the act reinforcement. To give recognition to such conduct – though it pass for law in Germany – would lacerate our conscience, traduce our Declaration of Independence, rend asunder our Constitutions, Federal and State, antagonize our traditions, mock our history, and outrage our whole philosophy of life.[22]

Thus, unlike the *Cassirer* court, New York's *Holzer v. Deutsche Reichsbahn* court had the legal reasoning, courage, and intellectual and moral strength in 1936 to reject Nazi spoliation of Jews. U.S. policy has consistently been that courts should undo Nazi acts of spoliation. In 1998, Congress passed the Holocaust Victims Redress Act of 1998, making 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.

18 *Cudahy Packing Co. v. Narzisenfeld*, 3 F.2d 567, 570–71 (2d Cir. 1924).

19 *Ivani Contr. Corp. v. City of New York*, 103 F.3d 257, 259 (2d Cir. 1997).

20 Martin Dean, *Robbing the Jews: The Confiscation of Jewish Property in the Holocaust: 1933–1945* (U.S. Holocaust Memorial Museum, 2009).

21 *Holzer v. Deutsche Reichsbahn Gesellschaft*, 160 Misc. 597 (Supreme Court, N.Y. Co., Special Term 1936).

22 *Holzer v. Deutsche Reichsbahn Gesellschaft*, 159 Misc. 830, 840 (Sup. Ct. 1936), aff'd 252 A.D. 729 (1st Dept. 1937), *aff'd in part, mod. in part*, 277 N.Y. 474 (1938).

(2) In defiance of the 1907 Hague Convention, the Nazis extorted and looted art from individuals and institutions in countries it occupied during World War II and used such booty to help finance their war of aggression.

(3) The Nazis' policy of looting art was a critical element and incentive in their campaign of genocide against individuals of Jewish and other religious and cultural heritage and, in this context, the Holocaust, while standing as a civil war against defined individuals and civilized values, must be considered a fundamental aspect of the world war unleashed on the continent.

(4) In the aftermath of the war, art and other assets were transferred from territory previously controlled by the Nazis to the Union of Soviet Socialist Republics, much of which has not been returned to rightful owners.[23]

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."[24]

The *Cassirer* court's approval of Spain's acquiring Nazi-looted art is not only inconsistent with the 1907 Hague Convention, it perpetuates the discredited "spoils of war" doctrine. The General Treaty for the Renunciation of War of 27 August 1928 ("the Kellogg-Briand Pact") stated as follows:

Article I. The High Contracting Parties solemnly declare in the names of their respective peoples that they condemn recourse to war for the solution of international controversies and renounce it as an instrument of national policy in their relations with one another.

Article II. The High Contracting Parties agree that the settlement or solution of all disputes or conflicts of whatever nature or of whatever origin they may be, which may arise among them, shall never be sought except by pacific means.

At the Nuremberg Trials, the Allies argued, successfully, that the Kellogg-Briand Pact rendered leaders of a state individually liable for criminal conduct of their state.[25] Consistent with this logic, leaders and citizens of states engaging in trafficking the criminal spoils of a war of aggression ought to be criminally liable and responsible for disgorgement. Austria's duty to disgorge Nazi-looted art is an ongoing obligation that it has largely failed to honor. The Austrian State Treaty of 1955, Article 26, Clause 1 provides:

Property, Rights and Interests of Minority Groups in Austria.

1. In so far as such action has not already been taken, Austria undertakes that, in all cases where property, legal rights or interests in Austria have since 13th March, 1938, been subject of forced transfer or measures of sequestration, confiscation or control on account of the racial origin or religion of the owner, the said property shall be returned and the said legal rights and interests shall be restored together with their accessories. …

The *Cassirer* court's conclusion that it could not provide a legal remedy to effectuate the return of Nazi-looted art is inconsistent with the U.S. view of traditional common law remedies, including replevin. In 1998, Congress passed the Holocaust Victims Recovery Act ("HRVA") (Pet. App. 101a-102a). In enacting the HRVA, Congress concluded that no federal remedy was necessary to effectuate restitution of stolen art in the United States because pre-existing state law remedies of replevin sufficed. 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.

** * **

Finally, … there can be no doubt – as this case amply demonstrates – that state law provides causes of action for restitution of stolen artworks.… Holocaust Victims' Claims, Hearing before the House Committee on Banking and Financial Services, 105th Cong., 2d Sess. (1998).[26]

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 1990s, Congress considered enacting legislation to set standards for returning stolen art. Museum directors, however, testified that they could better handle the subject

23 Public Law No. 105–158 Section 201, Findings S. 1564 (105th): Holocaust Victims Redress Act, 105th Congress, 1997-1998.

24 Id. § 202.

25 Hathaway & Shapiro, *The Internationalists* (Simon & Schuster 2017) at 282–284.

26 *Orkin v. Taylor*, 487 F.3d 734, 739–741 (9th Cir. 2007).

themselves, resulting in codes of ethics promulgated by [the Association of American Museum Directors and American Association of Museums] …"[27]

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The *Cassirer* court's conclusion that Spain was not aware of the possibility that a Nazi armament dealer's family was selling Nazi-looted artworks is implausible. 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. 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 Adolf Hitler was a failed artist, few appreciate the extent to which art and cultural policy figured in his plan for the Third Reich.[28] Indeed, from the summer of 1933, shortly after Hitler seized power from the Reichstag, Nazis held exhibitions of "degenerate art" in German museums.[29] 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.

Before acquiring a decedent's property, to ensure clean title, Spain should have located the Cassirer family, not vice versa. When considering the argument that claims by families of Holocaust victims are tardy, (putting aside the factual argument that entire families were murdered and displaced), Europe's draconian privacy laws conspired to block families from even finding each other, much less tracking down stolen property, the records of which were often rendered inaccessible due to government bureaucracy and privacy laws. Following World War II, European nations enacted the world's strictest privacy laws at the behest of the Allies. 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 were and what they owned. Litigation commenced in U.S. courts together with U.S. diplomatic efforts finally forced Western European nations to confront Nazi pasts, to start to open up records, and to engage in restitution and compensation efforts.[30]

There is no common law presumption that lost decedent's property should stay where it is found. Under the common law and the law of decedents' estates in many countries, transactions involving a decedent's property are presumed void or voidable by a person unless the possessor recipient can show evidence of a proper chain of title, such as a sale or an inter vivos gift. Under New York law, to make a valid inter vivos gift there must exist the intent on the part of the donor to make a present transfer; delivery of the gift, either actual or constructive to the donee; and acceptance by the donee.[31] Also under New York law, the proponent of a gift has the burden of proving each of these elements by clear and convincing evidence.[32]

Under the common law principle of *caveat emptor*, where a person claiming title to a chattel can make out a prima facie case to title, the evidentiary burden of showing title shifts to the possessor. This has been observed to be a "harsh" result, but the only one that protects true property owners and the public from traffic in stolen property.[33]

This "harsh" result is the only one consistent with the 1907 Hague Convention or the Kellogg-Briand Pact of 1928. Kellogg-Briand's outlawing of wars of aggression put a silver bullet into the heart of the spoils of war doctrine in a formal way. Because wars of aggression after 1928 were formally illegal under international law, spoils of war also became illegal. In *The Internationalists*, scholars Oona A. Hathaway and Scott J. Shapiro argue that the Kellogg-Briand Pact of 1928 ended the reign of Hugo Grotius as the father of international law, who had granted the heads of nation-states a legal "license to kill":

[Grotius] was the great apologist of war. As the leading Interventionist, he recast the mass killings of human beings as a justified moral and legal procedure. He also provided states with a new framework and language for legitimating wars. Rulers could now deny that they were fighting for their own rights. They could declare that they were fighting for the natural rights of their own citizens.[34]

27 Emily Graefe, *The Conflicting Obligations of Museums Possessing Nazi-Looted Art*, 51 B.C. L. Rev. 473 (March 2010).

28 Jonathan Petropoulos, *Art as Politics in the Third Reich* (University of North Carolina Press 1996).

29 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" (Barron, Stephanie ed., Harry N. Abrams 1991).

30 *See* Stuart E. Eizenstat, *Imperfect Justice: Looted Assets, Slave Labor, and the Unfinished Business of World War II* (Public Affairs, 1/7/2003).

31 *Gruen v. Gruen*, 68 N.Y.2d 48, 53 (1986).

32 *Gruen v. Gruen*, 68 N.Y.2d 48, 53 (1986).

33 *Solomon R. Guggenheim Foundation v. Lubell*, 77 N.Y.2d 311 (1991).

34 Hathaway & Shapiro, *The Internationalists* (Simon & Schuster 2017) at 97.

The very public outlawing of pillage in 1907 and wars of aggression in 1928 meant that the Nazis and German citizens were on actual or constructive notice that any plunder from property stolen from Jews would violate international law.

Nor was Nazi looting limited to acts of overt theft. It was clear that Nazi plundering took place in the form of apparently "legal" transactions. The world's free nations formally pledged to undo all of these seemingly "legal" acts of Nazi depredation in the *Inter-Allied Declaration Against Acts of Dispossession Committed in Territories Under Enemy Occupation or Control,* London, January 5, 1943 (the "London Declaration"):

> *The Governments of the Union of South Africa; the United States of America; Australia; Belgium; Canada; China; the Czechoslovak Republic; the United Kingdom of Great Britain and Northern Ireland; Greece; India; Luxembourg; the Netherlands; New Zealand; Norway; Poland; the Union of Soviet Socialist Republics; Yugoslavia; and the French National Committee:*
>
> *Hereby issue a formal warning to all concerned, and in particular to persons in neutral countries, that they intend to do their utmost to defeat the methods of dispossession practised by the Governments with which they are at war against the countries and peoples who have been so wantonly assaulted and despoiled.*
>
> *Accordingly, the Governments making this Declaration and the French National Committee reserve all their rights to declare invalid any transfers of, or dealings with, property, rights and interests of any description whatsoever which are, or have been, situated in the territories which have come under the occupation or control, direct or indirect, of the Governments with which they are at war, or which belong, or have belonged to persons (including juridical persons) resident in such territories. This warning applies whether such transfers or dealings have taken the form of open looting or plunder,* ***or of transactions apparently legal in form, even when they purport to be voluntarily effected.***[35]

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. In the postwar period, Hitler's art looting campaign received great play in the U.S. press. In 1947, Janet Flanner published a three-part series in *The New Yorker* magazine that was later republished as a book called Men and Monuments.[36] 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; ...*
>
> *Shall be fined under this title or imprisoned not more than ten years, or both. [….]*[37]

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 artwork and calls for its earliest possible restitution to its rightful owner.[38]

After the Allies withdrew from Europe in the 1950's at the start of the Cold War, Western Europe largely ignored the commitment in the London Declaration to assist the return of hundreds of thousands of stolen artworks to the rightful, legal owners. At least at the U.S. State Department level, the U.S. worked diligently to restore stolen artworks to their true owners for years thereafter. In 1951, a U.S. State Department bulletin optimistically 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."[39] 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 property (or compensation in lieu thereof) lost through force, coercion, or duress as a result of Nazi perse-*

35 https://www.lootedartcommission.com/inter-allied-declaration (last accessed 1/10/2025).

36 Janet Flanner, The Beautiful Spoils, The New Yorker, 3/8/1947, p. 38, https://www.newyorker.com/magazine/1947/03/08/the-beautiful-spoils-3 (last accessed 1/10/2025). Later published in: Janet Flanner, Men and Monuments (New York: Harper & Row, 1957).

37 18 U.S.C. § 2314.

38 HRVA § 201(2).

39 Ardelia R. Hall, *The Recovery of Cultural Objects Dispersed During World War II*, 25 Dept. St. Bull. 337, 339 (1951).

cution 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.[40]

After World War II, the U.S. worked diligently to restore stolen artworks to their true owners for years thereafter.

Again, the relentless front-page publicity of Nazi art looting militates against the good faith purchaser defense or the doctrine of laches. For example, on Nov. 16, 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 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 blindly purchasing artworks with a European provenance or missing paperwork that entered the United States after 1932 that had been created prior to 1946, because such purchases were not innocent or made in good faith.

V. *Caveat Emptor* Is Also Consistent with Doctrines of Acquisitive Prescription Not Available under Common Law Because Acquisitive Prescription Never Traditionally Applied to Stolen Artworks or Artworks Acquired under Dubious Circumstances.

Consistent with applying *caveat emptor* in cases of Nazi-looted art, the traditional doctrine of acquisitive prescription barred thieves or their accomplices from ever obtaining title to property that was stolen or acquired through violence.

"[T]he running of prescription is suspended absolutely in one case, – stolen things. Stolen things and property taken possession of by violence can never be acquired by adverse possession by the thief or wrongful ejector, who are forever barred from obtaining prescriptive title no matter how long is their possession."[41]

Further, a person seeking acquisition through prescription had a traditional requirement of demonstrating good faith and open possession:

The last requisite of every prescription in both Roman and Modern law is good faith on the part of the possessor. To possess by force, or secretly, or upon sufferance is not possession in good faith. In other words the possession must be peaceable, and open or public. So too in English law use which is by sufferance or secret will not establish a prescriptive law.[42]

Scholars have noted that modern civil law systems tend to favor persons claiming to be bona fide purchasers to promote commercial certainty.[43] Under modern Spanish law of acquisitive prescription, someone who knowingly receives and benefits from stolen property (encubridor) is treated as a thief.[44] In *Cassirer,* the Spanish law of acquisitive prescription was applied to defeat California's rule that *no one can take good title from a thief*.[45] In *Cassirer*, the trial court permitted Spain to acquire title where it had failed to investigate the provenance of the artworks and where the Baron who sold the collection to Spain came from a family that supplied armaments to the Nazis, collected Nazi-looted artworks, and who had knowledge from a torn label on the back of the artwork that the artwork had been at the Cassirer's looted art gallery in Berlin. The trial court required the Cassirer family to show that the Baron had actual knowledge that the artwork was stolen (despite the finding that both the Baron and Spain had acted irresponsibly).

In *Cassirer*, neither the Baron nor Spain possessed the good faith traditionally required by the doctrine of acquisitive prescription. However, had the traditional doctrine of acquisitive prescription's requirement of good faith been correctly applied, the result of the *Cassirer* case would have been that the Cassirer family prevailed: an outcome consistent with the doctrine of *caveat emptor*.

40 *Bernstein v. N.V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij, 210 F.2d 375, 376 (*2d Cir. 1954) (quoting Jack B. Tate); *Jurisdiction of U.S. Courts Re Suits for Identifiable Property Involved In Nazi Forced Transfers*, 20 Dept. State Bull. 592, 592–93 (1949).

41 Charles P. Sherman, *Acquisitive Prescription – Its Existing World-Wide Uniformity*, Yale Law Journal, Vol. 21, Issue 2, 147 at 150 (1911–12) (discussing Roman and modern law).

42 Id. at 152.

43 Jennifer Kreder, *Reconciling Individual and Group Justice with the Need for Repose In Nazi-Looted Art Disputes: Creation of An International Tribunal*, 73 Brooklyn L. Rev. 155, 200 (2007) (contrasting common law and civil law systems).

44 *Cassirer v. Thyssen-Bornemisza Collection Found.*, 862 F.3d 951, 970 (9th Cir. 2017) ("Thus, the historical and legislative background of the term *encubridor* in the Spanish Penal Code suggests that someone who knowingly receives and benefits from stolen property can qualify as an *encubridor* for purposes of Civil Code Article 1956.").

45 Case No. (19-55616) Docketed 5/11/2021, https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/20-1566.html (last accessed 1/10/2025).

VI. New York's Rejection of the Spoils of War Doctrine and Affording Common Law Remedies of Replevin and Disgorgement to Germany's Vorderasiatisches Museum in the *Matter of Flamenbaum* Case Should Provide a Model for How National Legal Systems Should Treat Claimants of Nazi-Looted Artworks Consistent with International Law

The New York Court of Appeals' 2013 decision in *Matter of Flamenbaum* provides a model for how Cassirer should have treated Spain's claim to ownership of Nazi-looted art.[46] In Flamenbaum, Germany successfully asserted a replevin claim to an ancient Assyrian tablet found in the safe deposit box of a Jewish decedent who had survived the Auschwitz concentration camp. The family claimed ownership under the "spoils of war" doctrine, arguing that the decedent could have acquired the tablet from a Russian soldier in East Berlin. The court concluded that "allowing the [Flamenbaum family] to retain the tablet based on a spoils of war doctrine would be fundamentally unjust." The decision, in full, below:

> *In this probate proceeding, the Vorderasiatisches Museum in Berlin, Germany (the Museum), seeks to recover a 3,000-year-old gold tablet from the estate of Riven Flamenbaum (the Estate). The tablet was first discovered prior to World War I by a team of German archaeologists excavating at the foundation of the Ishtar temple in Ashur, Iraq. The tablet dates back to the reign of Assyrian King Tukulti-Ninurta I (1243–1207 BCE) and bears an inscription written in Assyro-Babylonian language and Middle-Assyrian cuneiform script. The tablet was shipped to the Berlin Museum (now the Vorderasiatisches Museum) in 1926. The Museum's inventory book catalogs the arrival of the gold tablet and provides a description and a sketch. In 1939, the Museum was closed because of World War II, and objects from Ashur were put in storage. In 1945, at the end of the war, the gold tablet was missing.*
>
> *The tablet resurfaced in 2003, when it was discovered among the possessions of the decedent, a resident of Nassau County and a Holocaust survivor. When Hannah K. Flamenbaum, the decedent's daughter and executor of the Estate, petitioned to judicially settle the final account, she listed a "coin collection" as an asset of the Estate. Israel Flamenbaum, the decedent's son and Hannah's brother, filed objections to the accounting, wherein he claimed that the value of the coin collection was understated "and includes one item identified as a 'gold wafer' which is believed to be an ancient Assyrian amulet and the property of a museum in Germany." Israel also notified the Museum about the tablet, and the Museum responded that the gold tablet is part of its Assyrian collection and had been missing since the end of World War II.*
>
> *The Museum thereafter filed a notice of appearance and claim with the Surrogate's Court, Nassau County, to recover the tablet. The Surrogate held a hearing, at which the Museum's director, Dr. Beate Salje, was the sole witness to testify. Dr. Salje testified that the tablet, along with many other objects, disappeared from the Museum sometime near the end of World War II. Russian troops removed some objects at the end of the war, brought them to Russia, and then back to the Museum in 1957. Dr. Salje stated that she did not know if the tablet was taken by Russian troops, German troops, or people who came to the Museum to take refuge.*
>
> *The Museum also submitted the report of Dr. Eckart Frahm, Assistant Professor of Assyriology at Yale University. As explained by Dr. Frahm, a 1983 article written by A.K. Grayson, entitled Antiquities from Ashur: A Brief Description of Their Fate with Special Reference to the Royal Inscription, published in the Annual Review of the Royal Inscriptions of Mesopotamia Project, stated that "Professor H.G. Güterbock [a professor at the Oriental Institute of the University of Chicago] in a private communication told [Grayson] of having seen a gold tablet … which was in the Berlin Museum before the war … in the hands of a dealer in New York in 1954." There is an entry in the Museum's record that reads "[s]een by Güterbach 1954 in New York," and underneath it says "Grayson." This entry is undated, and nothing in the record indicates when the Museum first learned that the tablet was reportedly sighted in 1954.*
>
> *After the hearing, Surrogate's Court determined that, although the Museum met its prima facie burden of proving legal title or superior right of possession to the tablet, its claim was barred by the doctrine of laches because the Museum had failed to either report the tablet's disappearance to the authorities or list the tablet on any international stolen art registries. This inaction, according to the court, prejudiced the Estate's ability to defend against the Museum's claim to the tablet.*
>
> *The Appellate Division, among other things and as relevant here, reversed the Surrogate's Court order on the law, granted the Museum's claim for the return of the tablet, and remitted the matter to Surrogate's Court for further proceedings (see Matter of Flamenbaum, 95 A.D.3d 1318, 945 N.Y.S.2d 183 [2d Dept.2012]). The Appellate Division concluded that the Estate had not established that the Museum failed to exercise reasonable diligence to locate the tablet, or that the Museum's inaction had prejudiced the Estate. That court granted the Estate's motion for leave to appeal pursuant to CPLR 5602(b)(1) and certified the following question: "Was the decision and order of this Court dated May 30, 2012, properly made?" We now affirm and answer the certified question in the affirmative.*

46 *In re Flamenbaum*, 22 N.Y.3d 962, 963–66 (2013).

We agree with the Appellate Division that the Estate failed to establish the affirmative defense of laches, which requires a showing "that the museum failed to exercise reasonable diligence to locate the tablet and that such failure prejudiced the [E]state" (95 A.D.3d at 1320, 945 N.Y.S.2d 183, citing Solomon R. Guggenheim Found. v. Lubell, 77 N.Y.2d 311, 321, 567 N.Y.S.2d 623, 569 N.E.2d 426 [1991]; see also Sotheby's, Inc. v. Shene, 2009 WL 762697, 2009 U.S. Dist LEXIS 23596 [S.D.N.Y., Mar. 23, 2009, Griesa, J., No. 04–Civ–10067 (TPG)]). While the Museum could have taken steps to locate the tablet, such as reporting it to the authorities or listing it on a stolen art registry, the Museum explained that it did not do so for many other missing items, as it would have been difficult to report each individual object that was missing after the war.

Furthermore, the Estate provided no proof to support its claim that, had the Museum taken such steps, the Museum would have discovered, prior to the decedent's death, that he was in possession of the tablet (compare Peters v. Sotheby's Inc., 34 A.D.3d 29, 37–38, 821 N.Y.S.2d 61 [1st Dept.2006], lv. denied, 8 N.Y.3d 809, 834 N.Y.S.2d 90, 865 N.E.2d 1257 [2007] [laches barred claim where owner had actual knowledge of the identity of the party in possession but did not demand return of the property]). As we observed in Lubell, in a related discussion of the defense of statute of limitations, "[t]o place the burden of locating stolen artwork on the true owner and to foreclose the rights of that owner to recover its property if the burden is not met would … encourage illicit trafficking in stolen art" (77 N.Y.2d at 320, 567 N.Y.S.2d 623, 569 N.E.2d 426).

Additionally, the Estate failed to demonstrate "the essential element of laches, namely prejudice" (Matter of Barabash, 31 N.Y.2d 76, 82, 334 N.Y.S.2d 890, 286 N.E.2d 268 [1972]). While the Estate argued that it had suffered prejudice due to the Museum's inaction, there is evidence that at least one family member (decedent's son) was aware that the tablet belonged to the Museum. And, although the decedent's testimony may have shed light on how he came into possession of the tablet, we can perceive of no scenario whereby the decedent could have shown that he held title to this antiquity.

The "spoils of war" theory proffered by the Estate—that the Russian government, when it invaded Germany, gained title to the Museum's property as a spoil of war, and then transferred that title to the decedent—is rejected. The Estate's theory rests entirely on conjecture, as the record is bereft of any proof that the Russian government ever had possession of the tablet. Even if there were such proof, we decline to adopt any doctrine that would establish good title based upon the looting and removal of cultural objects during wartime by a conquering military force (see Menzel v. List, 49 Misc.2d 300, 305–308, 267 N.Y.S.2d 804 [Sup.Ct.N.Y.County 1966], mod. as to damages, 28 A.D.2d 516, 279 N.Y.S.2d 608 [1st Dept.1967], revd. as to modification, 24 N.Y.2d 91, 298 N.Y.S.2d 979, 246 N.E.2d 742 [1969]). Allowing the Estate to retain the tablet based on a spoils of war doctrine would be fundamentally unjust.

The *Flamenbaum* court's fundamental rejection of any doctrine that would establish good title based on the looting and removal of cultural objects during wartime by a conquering military force is fundamentally at odds with the *Cassirer* court's approval of Spain's acquisition of Nazi-looted art. It is also consistent with *Holzer v. Reichsbahn's* 1938 rejection of Nazi acts of spoliation. It is also consistent with the U.S. State Department's policy as expressed in the *Bernstein* case of relieving any limitations on the U.S. courts to undue Nazi acts of spoliation. The Flamenbaum family painted the most sympathetic image of "innocent" holders – a Jewish family of New Yorkers mourning a deceased Holocaust survivor. Yet, despite the extraordinarily sympathetic holders of the golden tablet, the *Flamenbaum* court upheld the rights of the spoliation victim – the German museum, based on fundamental notions of justice.

Conclusion: Because Leaving Stolen Property in the Hands of Wrongdoers and Their Beneficiaries Would Reward Criminal and Deceptive Actions, Impressment of a Common Law Trust *Ex Maleficio* Is Appropriate to Effectuate the Goals of International Law

Leaving the spoils of World War II in the hands of wrongdoers is the wrong result for the civilized nations that spilled blood to fight Nazism and undo the physical and cultural annihilation of the Jews and others attempted by the Nazi regime. As argued above, the world was on notice that Hitler and the Nazis were despoiling Holocaust victims from the outset. Thieves, accomplices of thieves and receivers of stolen property have received massive financial benefits at the expense of a murdered population despoiled not only of their property, but of their culture as embodied in the artworks torn from them. Permitting wrongdoers to retain stolen property or to permit those who purport to be of "empty mind but pure of heart" to retain the proceeds of the criminal Nazi enterprise is morally wrong and inconsistent with equity, law and good conscience.[47] Wrongdoers and their beneficiaries have erected legal fictions to hide their ill-gotten gains and will continue to do so.

As the logic of the *Flamenbaum* case shows, common law courts can provide restitutionary remedies. As argued in Point II above, restitution is consistent with traditional notions of acquisitive prescription because holders of Nazi-looted art cannot claim to lack notice of the "red flags" attached to any potentially looted Nazi-era European artwork.

47 Raymond J. Dowd, *Nazi Looted Art and Cocaine: When Museum Directors Take It, Call The Cops*, 14 Rutgers Journal of Law & Religion (2013) at 529.

To achieve the bold vision of the Flamenbaum court of rejecting "any doctrine that would establish good title based upon the looting and removal of cultural objects during wartime by a conquering military force" would require repudiation of "technical defenses" such as laches, statutes of limitations, bona fide purchaser defenses, or acquisitive prescription.

Fortunately, the common law has an ancient remedy that fits the bill. Imposition of a constructive trust would be the appropriate solution. Although it didn't say it outright, in effect, the *Flamenbaum* court's holding may be interpreted to have achieved just such a result. A constructive trust is the formula through which the conscience of equity finds expression; when the property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest, equity converts him into a trustee.[48]

A constructive trust (trust *ex maleficio*) is a trust that arises contrary to intention and against an unwilling person.[49] The trust arises against a person or entity who, by fraud (actual or constructive) by duress, by abuse of confidence, or by commission of a wrong or other form of unconscionable conduct, artifice, concealment, or questionable means, either has obtained or holds the legal right to property which, in equity and in good conscience, it ought not to hold and enjoy.[50] Thus, a constructive trust may be imposed when property has been acquired under such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest therein.[51] A constructive trust will be erected whenever necessary to satisfy the demands of justice.[52] Equity will interfere with the property rights of the holder of legal title where the owner, in good conscience, may not retain the beneficial interest in it.[53]

Since a constructive trust is merely, in the phrase coined by Justice Cardozo, "the formula through which the conscience of equity finds expression," its applicability is limited only by the inventiveness of those who find new ways to enrich themselves unjustly by grasping what should not belong to them.[54]

Art collectors, museum directors and curators are drawn from the most privileged and educated segments of society. They have collectively failed to exercise diligence and have trafficked in Nazi-looted artworks on an industrial scale. Even today, museums refuse to comment on the provenances of works in other museums, exercising discipline over a code of academic Omertà that puts the mafia to shame.

On December 6, 2024, the Cassirer family filed a petition for a writ of certiorari to the U.S. Supreme Court to ask the Court to decide the question of whether Spain may retain Nazi looted art under the doctrine of acquisitive prescription. This author urges that this is an opportunity for not only the U.S. Supreme Court but the entire world to take the 1907 Hague Convention's prohibition on looting artworks seriously. The European Union should follow the U.S. Congress' lead by opening up courts by extending statutes of limitations. To avoid that reopening the courts leads to a lack of a remedy, the legislatures and courts should adopt the *Flamenbaum* court's approach by embracing equitable remedies that subvert the spoils of war doctrine and return Nazi-looted artworks to rightful owners.

In conclusion, based on basic notions of fairness together with the history and background of the 1907 Hague Convention and the postwar failure to trace, retrieve and restitute Nazi-looted art, the 1907 Hague Convention signatories should reopen their domestic courts to comply with Articles 47 and 56 of the Hague Convention (as the United States did in 2016). Once open for business, *caveat emptor* and the return of stolen property should be the rule, not the exception. The best way to reach this result in Hague Convention signatory countries would be for the European Parliament to pass a directive. ■

48 *Toobian v. Golzad*, 193 A.D.3d 778, 147 N.Y.S.3d 61 (2d Dept. 2021).

49 106 N.Y. Jur. 2d Trusts § 162, citing *Macy v. Burchill*, 248 N.Y. 637 (1928); *Equity Corporation v. Groves*, 294 N.Y. 8 (1945); *Lightfoot v. Davis*, 198 N.Y. 261, 91 N.E. 582 (1910).

50 106 N.Y. Jur. 2d Trusts § 162, citing *In re Ticketplanet.com*, 313 B.R. 46 (Bankr. S.D.N.Y. 2004) (applying New York law); *Simonds v. Simonds*, 45 N.Y.2d 233 (1978).

51 106 N.Y. Jur. 2d Trusts § 162, citing *Dee v. Rakower*, 112 A.D.3d 204, 976 N.Y.S.2d 470 (2d Dept. 2013); *Beatty v. Guggenheim Exploration Co.*, 225 N.Y. 380 (1919).

52 106 N.Y. Jur. 2d Trusts § 162, citing *Simonds v. Simonds*, 45 N.Y.2d 233, 408 N.Y.S.2d 359, 380 N.E.2d 189 (1978); *Latham v. Father Divine*, 299 N.Y. 22, 85 N.E.2d 168, 11 A.L.R.2d 802 (1949); *Arlotta Const. Co. v. Leone*, 133 N.Y.S.2d 23 (Sup. 1954).

53 106 N.Y. Jur. 2d Trusts § 162, citing *Sharp v. Kosmalski*, 40 N.Y.2d 119 (1976).

54 106 N.Y. Jur. 2d Trusts § 162, citing *Beatty v. Guggenheim Exploration Co.*, 225 N.Y. 380, 122 N.E. 378 (1919); *Simonds v. Simonds*, 45 N.Y.2d 233, 408 N.Y.S.2d 359, 380 N.E.2d 189 (1978); *Katzman v. Aetna Life Ins. Co.*, 309 N.Y. 197, 128 N.E.2d 307 (1955); *Meinhard v. Salmon*, 249 N.Y. 458, 164 N.E. 545, 62 A.L.R. 1 (1928); *Janke v. Janke*, 47 A.D.2d 445, 366 N.Y.S.2d 910 (4th Dept. 1975), order aff'd, 39 N.Y.2d 86, 385 N.Y.S.2d 286, 350 N.E.2d 617 (1976).