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"Resolving Stolen Art Theft Claims"

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Thomas R. Kline, has represented numerous governments and quasi-governmental institutions, as well as museums, churches, and private families, in the recovery of stolen art or cultural objects. His clients have included the Kunsthalle Bremen and the heirs of Friedrich and Louise Gutmann in the cases referred to in this article.

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The world is awash in an ocean of stolen art and cultural property coming from innumerable sources, including looting associated with warfare and military occupations, pilfering from archeological sites, and even mundane stealing from museum and private collections. Most looted works are not famous, although many could be identified as stolen through a modest amount of research. The art world, however, has ferociously resisted the notion that buyers of art—or dealers, auction houses, and other facilitators of art sales—should be required to conduct such independent research of title as would be routine in other significant transactions, such as buying a house or car. To this day, therefore, looted and otherwise stolen objects enter and circulate freely through the "ask me no questions and I'll tell you no lies" methods of the art market.

As a result of vast amounts of stolen art and a no-questions-asked method of doing business in the art world, many looted objects have come to the United States, most moving quietly as part of seemingly legitimate international art transactions. Once here, in fact, these looted objects have continued to move through the art market, some coming to rest in the hands of prominent collectors and our most prestigious museums. For example, in July 1997, New York's Metropolitan Museum admitted it had conducted no inquiry when it received a donation of a Monet now subject to a claim of having been looted by the Soviets at the end of World War II. In October 1998, the Seattle Museum of Art made a similar admission that it had done no more than obtain its donors' bill of sale from their purchase of a Matisse (which the Museum recently admitted had been looted by the Nazis) when it received the painting by donation.

The volume of art looted by the Nazis during the Holocaust alone is enormous, estimated to include, for example, one-third of all art in private hands in France at the time, and worth, in total, more than all of the art then in the United States. If one adds the opportunistic looting by Allied soldiers and the organized "trophy taking" by Soviet authorities, the World War II losses as a whole are staggering.

To appreciate the magnitude of Holocaust thefts, one must start from an understanding that it was Nazi Germany's policy to steal art from its conquered subjects who were considered to be culturally inferior -- particularly from Jews. Before very long, Nazi looting led to a lively commerce in looted art, and a distribution of stolen works far beyond the ability of postwar efforts to undue.

Nazi policy gave the looting and destruction of art high priority because the definition and propagation of a Germanic culture and the suppression of other cultures was central to Nazi dogma. ("It is a mistake to think that the national revolution is only political and economic. It is above all cultural," said an early Nazi leader.) Particularly subject to Nazi whims was modern art (including Impressionist works) and art by Jews, all of which was collectively rejected as "degenerate."

Nazi Germany advanced Hitler's cultural policies by assigning government institutions the responsibility of carrying out a highly-structured art theft program. As early as the mid-1930s, Nazi economic pressure on Jews within Germany resulted in forcing many families to auction off their art in order to survive. Art looting, facilitated by anti-Jewish legislation, began in earnest after Kristallnacht, in November 1938, when Germany's persecution of Jews moved to a high level. In May 1940, with the invasion of Western Europe, the German government created the "Kunstschutz," or German Art Commission, to

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oversee all matters related to fine arts in Nazi-occupied countries. After the outbreak of the war, looting activities were conducted under color of authority in occupied countries, often with the assistance of local officials.

With the occupation of northern France, art confiscations were initially directed by the German military command and the German embassy in Paris. Later, the German government created the infamous Einsatzstab Reichsleiter Rosenberg, or "ERR," named for its founder, the Nazi ideologue Alfred Rosenberg. According to U.S. government accounts, in France the ERR "was charged primarily with the location, confiscation and removal to Germany of collections owned by Jews."

The Germans insisted that Jewish property was beyond the protection afforded to French citizens when the Vichy government revoked Jewish citizenship en masse. Nazi authorities took the work of the ERR with deadly seriousness, supporting their efforts with a host of government institutions, including the German Army, the German Art Commission (Kunstschutz), the security police (Sicherheitsdienst or SD), and the foreign currency police (Devisenschutzkommando). At the end of 1941, the German government created M-Action ("M" for "moebel," the German word for furniture) primarily to confiscate Jewish household effects, including art, in the occupied countries of Western Europe to be used by German occupation personnel in Eastern Europe.

Commerce in Nazi-looted art developed from the looseness of the German art confiscation operation, particularly the competition among Nazi leaders to build personal collections, the disreputable character of many of the looters, and the incredible volume of thefts, far outpacing the looters' ability to maintain accurate inventories. Much of the stolen art was earmarked for Hitler's Führer art museum which he planned to build in his home town of Linz, Austria. At the same time, Goering and other Nazi leaders were amassing enormous personal art collections, which they strictly limited to art of the sort approved by Hitler—19th-century romantic landscapes and Old Masters paintings, particularly works by non-Jewish German artists.

Trade developed, too, from Nazi confiscation of "degenerate" works that could not be shipped back to Germany. Before very long, a barter commerce developed in which looted "degenerate" works art could be exchanged for acceptable pieces that could be included with the art intended for German leaders. The "degenerate" pieces were then free to be exported from occupied territories for eventual reentry into the art market. This commerce was conducted to the profit of a handful of unscrupulous dealers with impeccable Nazi credentials and high level connections that allowed them to move freely through Germany and occupied territories.

The Nazi art theft program was carried out by highly credentialed art historians and museums officials, with previously respected art dealers conducting some of the looting as well as the smuggling and trading in looted art. And, just as in other areas of their special endeavors, Jews and others deemed to be of less than human caliber suffered disproportionately at their hands. In light of these massive art looting programs and the cottage industry they spawned, it should be unsurprising that the volume of art taken by the Nazis and recycled into the art market is potentially enormous.

After the war, much looted art was returned to the country in which the Nazi looting had occurred by concerted efforts of the Allied governments. However, just as the Allies ultimately lost interest in war crimes prosecutions and turned their attention to Cold War competition, the return of looted art became a victim of the breakdown of cooperation. Also, the deaths of so many owners (necessitating the creation of the euphemism "heirless" property), the broad distribution of the art across the occupied and neutral nations of Europe, the Germans' occasionally sporadic record-keeping practices, and, more significantly, the unavailability of many wartime records, many stolen objects were never found, and many of those that were located could not be returned to their true owners. It is because of the breakdown of these post-war efforts that governments in France, Austria, and Holland are, even today, struggling with looted art held in national collections.

The U.S. art market was totally unprepared for the onslaught of looted art that began arriving during or soon after the close of the war and may have peaked in the 1950s. With much of Europe in ruins and the United States postwar economy booming, it was natural for art to move in this direction and for New York to begin to rival London and Paris as a center of the art trade. As well, many refugee art dealers reestablished their businesses in the United States or elsewhere in the Americas during and after the war, bringing with them relationships with dealers who had remained behind in Europe. In

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another supreme irony, it was perfectly natural for looted art, along with other artwork, to follow the path of refugee dealers, many themselves Jewish. Lack of government regulation and, indeed, government indifference fueled the flow of Nazi loot to the United States.

The art market was, particularly at that time, a disaster waiting to happen. Generally, business in the art world has typically been done on a basis of personal trust, and no questions are asked about the history of an object. Dealers pass objects from one to another in search of a buyer or join together in brokering a deal. As a matter of business etiquette—ironically known as "dealer's ethics"—a buyer's dealer is forbidden to ask the seller's dealer about the identity of the seller. Thus, information provided at the time of sale about the history of ownership or possession—known as a provenance—has generally been extremely scanty and of limited use in protecting buyers. Most typically, buyers and sellers have concerned themselves with questions of authenticity (and its close cousin, the market value of works of similar kind by the same artist) and have not asked questions about title.

Recently, with the spate of claims against dealers, collectors, and museums, efforts have been made in a number of quarters to face squarely the obligation of art dealers, auction houses, buyers, and recipients of gifts to be diligent. For example, [after being] found to be selling a painting they had been specifically advised was claimed to have been stolen by the Nazis, Sotheby's has launched a serious effort to verify provenances on objects offered for sale. As a consequence, Sotheby's has been able, on its own initiative, to prevent the sale of several paintings from collections known to have been looted, in order to allow the principals to try to come to agreement about the fate of the artwork. Additional resources are becoming available to assist dealers and art buyers in verifying whether a would-be seller has title to an art object.

Strangely enough, the law generally leaves art-theft victims to their own devices, forcing them, in effect, to find and recover their own art. A recent inquiry from a country of the former Soviet Union to the U.S. State Department concerning the recovery of artwork looted by the Nazis that had found its way into the collections of several prominent American museums yielded the reply that the country should hire a private attorney.

More recently, however, U.S. law enforcement—particularly Customs—has taken a more active role, especially where an object is being offered for sale. In one recent case, U.S. Customs seized more than two hundred drawings stolen from Baku, a hoard that included thirteen drawings that had found their way to Baku after having been stolen from the Kunsthalle Bremen in Germany at the close of World War II. The seizure eventually led to the criminal conviction of a lawyer from Azerbaijan for criminal conspiracy for her role in trying to sell the drawings back to the Bremen Museum.

Building on this success, U.S. Customs has just seized a painting by Egon Schiele entitled "Portrait of Wally" which had been on loan by an Austrian government foundation to the Museum of Modern Art in New York and is claimed by a Jewish family from Austria. Customs also filed suit, asking that the painting, if it is proven to be stolen property, be forfeited to the U.S. government. The painting was the subject of protracted—and heavily reported—proceedings in New York State Court, which ultimately decided to quash a subpoena issued for the painting by the New York City District Attorney. The District Attorney's subpoena foundered on a New York State law that exempted artwork from judicial seizure, if it was in the state only for purposes of a museum exhibition. Now that Customs' seizure order insures that "Portrait of Wally" will stay in this country, the heirs of the original owner have filed their own lawsuit asking for return of the painting—perhaps a gratuitous act, since the lawsuit brought by Customs invites all interested parties to come forward and make their claims.

Despite their currency, these cases remain the exception, and not the rule. If a claim for the return of stolen art or cultural property located in the United States—whether the theft be from the Holocaust or otherwise—cannot be settled between the parties, it can only be resolved through private litigation over who has superior rights to the object. In fact, a civil lawsuit to determine ownership typically follows a government seizure of stolen art, after resolution of any criminal charges that may be brought, since only a court has the power to decide between conflicting claims to ownership of property.

Such cases essentially pit one claim to ownership against another. In resolving these issues, the driving force in this country is the Anglo-American principle that a thief cannot pass title to an object. Likewise, under U.S. law, one who takes an object from a thief receives and can pass on to a subsequent purchaser no greater rights than the thief had in the object. In short,

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a good faith acquisition of a work of art, in the sense that the current possessor did not know the object was looted when he acquired it, is not sufficient to confer title on the possessor.

Thus, any claim to recover a stolen object must begin with some proof that the claimant owned the object, or was at least in quiet possession of it, and then lost the object without the claimant's consent. Thefts, as might be expected, occur with few witnesses and little, if any, documentation, so it is not necessary for the theft victim to be able to specify the exact circumstances of the theft. Theft is normally established through circumstantial evidence, such as by establishing that the object was put in storage or left behind when the owner fled, and later the object disappeared. In such cases, the court may be asked to consider whether the departure was voluntary, or was an abandonment of the property. Jews who fled the oncoming Nazis would certainly qualify as owners who had not voluntarily relinquished control of their property.

One such Holocaust claim was settled recently between the heirs of Paul Rosenberg and the Seattle Art Museum, concerning the painting "Odalisque" by Henri Matisse. Rosenberg, an art dealer of legendary integrity in pre-war Paris, fled the Nazis losing most of his collection. Given his thorough records, however, much was recovered after the War, but not this Matisse.

Only through the most unlikely of encounters did the Rosenberg heirs learn that their painting was in the Seattle museum's collection. In making their claim, the Rosenberg heirs could demonstrate that the painting had been in Paul Rosenberg's possession before the War and was, in fact, listed by France as stolen in its postwar claims on Germany. Nonetheless, the museum at first refused to return the painting, because it wanted to sue Knoedler & Company, the dealer who had sold the painting to the family that had donated it to the museum.

The museum, however, came under heavy criticism and commissioned a study of the history of the painting by Ori Soltes of the Holocaust Art Restitution Project, a research institute in Washington, D.C. Based on Mr. Soltes's exhaustive research and his meticulous recitation of the obvious—that the painting had been stolen by the Nazis and never returned to the family after the War—the museum ultimately agreed to return the work to the Rosenberg heirs, and take its chances in litigation with the dealer. The museum's fears turned out to be justified since, in the latest development, their claims against Knoedler & Company were dismissed.

If the best-of-the-best of art theft victims, that is, the heirs of a leading art dealership with impeccable pre-war records and evidence of thorough postwar recovery efforts, gets an almost two-year runaround from a distinguished institution like the Seattle Art Museum, what is the fate of the average Holocaust victim (or other World War II claimant) whose family has, perhaps, limited records or photographs of pre-war ownership, no Nazi document proving theft beyond a scientific certainty, or who lacked the resources to conduct a world-wide search for their art after the War? The early returns are in, and the news is not good for claimants.

Most dramatic of the recent cases falling into this category pitted the heirs of Friedrich and Louise Gutmann—once well-known art collectors and themselves the heirs of a German Jewish banking family—against Daniel Searle, the retired chairman of the G.D. Searle Corporation, concerning a pastel by Edgar Degas known as "Landscape with Smokestacks." The Gutmanns, trusting in their parents' conversion to Christianity, moved only at the last minute to protect their property and, taking the same approach to their personal safety, were arrested, deported to the camps and killed. Anything from their collection that the Gutmanns had not sent to New York or to England was looted by the Nazis or taken through forced sales.

The Gutmanns' children (Bernard Goodman in England and Lili Gutmann in Italy) survived the war and searched tirelessly for the looted art, first working with postwar claims organizations and later continuing their efforts on their own. In 1995, when they located "Landscape with Smokestacks" through an exhibition catalogue and made claim on Daniel Searle, they learned that his bill of sale traced his possession back to Hans Wendland, one of the most notorious Nazi dealers trading in looted art.

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Searle himself had conducted no title inquiry at the time of his purchase, instead relying on curators of the Art Institute of Chicago who later testified they hadn't heard that the Nazis engaged in art looting. Nonetheless, Searle dug in his heels, seeking to vindicate his right to keep the pastel. Although he insisted that there was evidence the Gutmanns had sold the painting during the War, Searle's principal defense was that the painting had been both exhibited and published before he acquired it, and should have been found sooner by the Gutmann heirs.

After Searle—having spent more than a millions dollars developing his defense—lost a motion for summary judgment to have the case decided in his favor as a matter of law, the dispute was settled by the parties to avoid a jury trial and further expense. Under the terms of the settlement, the Degas landscape went to the Art Institute of Chicago, half as a sale by the Gutmann heirs and half as a donation by Searle, with the museum paying the heirs half the appraised value of the pastel. The case, which could have been settled on these terms without any litigation, is frequently cited as a negative example of litigation running out of control, and also as a model for future balanced settlements.

Other World War II claimants have run into the same lack of sympathy experienced by the Gutmann heirs. For example, the university library claiming Flemish paintings stolen by an American, after obtaining a signed confession of the thief, still found that the current possessor insisted on receiving a financial settlement. The Association of Art Museum Directors has encouraged their member museums to review their collections for Nazi loot, but the policy came short of recommending the return of looted art, and little, if anything, has come from it. Likewise, the U.S. State Department has endorsed similar lukewarm guidelines for handling looted art claims that recommended "a just and fair solution," but fell short of calling for restitution.

The World Jewish Congress has created a Commission for Art Recovery, but CAR, as it is known, foreswears assisting individual claimants with litigation in the U.S. and has focused most of its efforts to date on developing data bases of looted art to assist with researching claims and on conducting dialogues with European countries that hold collections of unreturned Nazi loot. European governments in countries that suffered under German occupation—and Germany itself for that matter—have begun to confront this latter issue by assessing their national collections, and by addressing claims to Russia concerning trophy art. The Seattle Museum of Art's return of "Odalisque" to the Rosenberg family and the recent receptiveness of German museums to Jewish claims based on auctions that occurred between 1933 and 1938, when Jews in Germany were pressured into selling their property at low prices, remain the best news for Holocaust art claimants. However, unless the atmosphere in which these claims are handled continues to improve, we can only expect continuing controversy each time a work resurfaces that is claimed to have been stolen.