

## EXAMINING THE POLICY IMPLICATIONS OF THE *CASSIRER* DECISION

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### INTRODUCTION: THE IMPORTANCE OF ‘COMITY’

The recent decision in the California federal court case of *Cassirer v. Thyssen-Bornemisza Collection Foundation*,<sup>1</sup> concludes with a question that is really more of a starting point for legal and philosophical discussion: if a work of art is now known to have been stolen by Nazis, is it morally ‘just and fair’ to allow a current, good faith owner of the art to keep it if the relevant national and international laws direct such an outcome?

This question puts a spotlight on legal rule-making. Laws are organisational constructs for societies. Laws are also based on public policy choices. When a society is relatively small, the local community standards that drive policy choices can be relatively monolithic and thus easy to implement.

But when the ‘society’ to be regulated expands to a national or international size, the sensibilities and public policies can and often do diverge. The doctrine of ‘comity’, or respect for the laws and judgments of our neighbours, has been conceived for an international society to harmonise its various, constituent rules.<sup>2</sup> Comity is based on the public policy choice that it would be better to co-exist peacefully with our neighbours by tolerating their occasionally divergent standards, than to insist upon our own sense of moral and legal absolutism.<sup>3</sup>

In the United States, application of comity rests upon an inquiry into whether a foreign law or judgment has been the product of what we consider to have been basic ‘due process’, which is part of our Bill of Rights.<sup>4</sup> If one of our international neighbours has enacted a law or decreed a ruling in a manner that does not offend our national sense of procedural due process – even though the end result may not be viewed as substantively ‘desirable’ according to our preferences – then comity operates to credit that foreign law or ruling in the name of good relations (and, ultimately, peace).<sup>5</sup> It is difficult to argue against the importance and value of comity as a public policy.

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1 *Cassirer v. Thyssen-Bornemisza Collection Found.*, No. CV 05-3459-JFW (Ex) (C.D. Cal. 30 April 2019) (‘ECF No. 621’).

2 William L. Charron, ‘A Comity Of Error: Analyzing New York’s Choice of Law Rules in Stolen Art Cases’, 250 *N.Y.L.J.* 102 (2013); see also *In re Maxwell Commc’n*, 93 F.3d 1036, 1053 (2d Cir. 1996) (“[I]t should be remembered that the interest of the system as a whole – that of promoting ‘a friendly intercourse between sovereignties’ – also furthers American self-interest, ...”) (citations omitted).

3 See e.g., *Hilton v. Guyot*, 159 U.S. 113, 163-64 (1985).

4 U.S. CONST. AMEND. V.; see also *Hilton*, 159 U.S. at 163.

5 See, e.g., *Hilton*, 159 U.S. at 163-64; *Maxwell*, 93 F.3d at 1053; *Warin v. Wildenstein & Co.*, No. 115143/99, 2001 WL 1117493 (Sup. Ct. 4 Sept. 2001), *aff’d*, 297 A.D.2d 214, 746 N.Y.S.2d 282 (1st Dep’t 2002) (“If New York statutes and caselaw were held to always be an expression of fundamental public policy, there would be no point in engaging in a conflicts of law analysis ...”).

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As discussed below, the decision in *Cassirer* is based on the doctrine of comity. The case pits two innocent parties against one another: one (the family of the victim of Nazi looting) advocating from the basic policy principle that theft is wrong; and the other (the current owner of the formerly stolen art) arguing from the policy principle that people should not be dispossessed of property that they acquired through good faith and lawful conduct. Such cases present zero-sum outcomes: one side will win, and the other side will equally lose.

Different societies and jurisdictions balance these competing interests through different legal rules and public policies. In the United States, it is generally held that even a good faith possessor of formerly stolen property may not retain the property and must reconstitute it to the victim of the theft (or that victim's successor).<sup>6</sup> In *Cassirer*, however, the laws of Switzerland and Spain dictated the result, and those countries are not as reflexively inclined to negate good faith commercial transactions. The court in *Cassirer*, in an exercise of comity, applied and respected the laws of Switzerland and Spain in reaching its result. The decision is thorough and well-reasoned, and, from this author's perspective, is correct ... meaning that it is also 'just and fair'.

### THE FACTS AND OUTCOME IN *CASSIRER*

*Cassirer* concerns a painting by Camille Pissarro known as *Rue St Honoré, après-midi, effet de pluie* (the 'Painting').<sup>7</sup> It is undisputed that Nazis looted the Painting from Lilly Cassirer Neubauer ('Lilly') through a forced, below-market sale in Germany in 1939.<sup>8</sup> The Painting is owned today by the Thyssen-Bornemisza Collection Foundation ('TBC'), which is an agency of the Kingdom of Spain.<sup>9</sup>

The record reflected the following specific lineage of the Painting after its theft from Lilly in 1939:

- Later in 1939, the Nazi dealer who forced Lilly to sell the Painting traded it with a Jewish owner of other art (Julius Sulzbacher) in another forced, below-market trade for three different paintings. The Gestapo later confiscated the Painting from Sulzbacher.<sup>10</sup>
- In 1943, an unknown purchaser bought the Painting at an auction in Berlin.<sup>11</sup>
- In 1951, the Frank Perls Gallery of Beverly Hills acted as a dealer to sell the Painting to an art collector in Los Angeles named Sidney Brody.<sup>12</sup>
- In 1952, Brody consigned the Painting back to the Frank Perls Gallery, which placed it on further consignment with the M. Knoedler Gallery in New York City. Knoedler, which had conducted diligence to determine if the Painting could have been looted during the war, and had justifiably found no evidence of Nazi theft or prior ownership by Lilly (because of the absence of records), sold the Painting to an art collector in St. Louis, Missouri named Sydney Schoenberg.<sup>13</sup>
- In 1976, the Schoenberg estate consigned the Painting with the Stephen Hahn

6 E.g., *Cassirer*, ECF No. 621; *In re Flamenbaum*, 22 N.Y.3d 962 (2013).

7 *Cassirer*, ECF No. 621.

8 *Id.* at 1.

9 *Id.*

10 *Id.* at 3.

11 *Id.*

12 *Id.*

13 *Id.* at 4.

Gallery in New York City, which sold it to a Swiss art collector named Baron Hans Heinrich Thyssen-Bornemisza. The Baron was aware of the problem of Nazi looting and, while he retained experts to evaluate the Painting, he did not conduct diligence into the Painting's provenance. The Baron thus did not investigate the significance of partial and apparently torn gallery labels on the verso (back) of the Painting, including a partial label from the Cassirer Gallery in Berlin, which had operated between 1898 and 1901 (i.e., about four decades before the Painting was stolen from Lilly).<sup>14</sup>

- An assistant of the Baron mistakenly and unintentionally recorded his purchase of the Painting under a different title (of another Pissarro painting) and from a different 'Hahn Gallery' located in Paris. Later publications noting this work within the Baron's collection (under the Painting's correct title) identified the 'Hahn Gallery' in Paris as the source.<sup>15</sup>
- In 1988, the Baron loaned the Painting to the Kingdom of Spain. In connection with this transaction, Spain retained Swiss counsel to offer an opinion as to whether the Baron had good title to the Painting, which Swiss counsel concluded did exist (relying, in part, on the Baron's erroneous records).<sup>16</sup>
- In 1993, TBC (on behalf of Spain) acquired the Painting from the Baron. An heir of Lilly noticed the Painting at a museum displaying TBC's collection in 2000. Demand for return of the Painting was made in 2001 and refused, leading to commencement of the *Cassirer* case in 2005.<sup>17</sup>

The Court noted at the outset of its analysis that, were California law to apply, then the case would easily be resolved in favour of Lilly's estate, without any need to examine TBC's (or anyone else's) *bona fides*, because, "[u]nder California law and common law, thieves cannot pass good title to anyone, including a good faith purchaser."<sup>18</sup>

Nevertheless, conflict of law analysis – rooted in comity – directed application of Spanish laws, not the laws of California.<sup>19</sup> The key question under Spanish laws was whether TBC and its predecessor acted in good or bad faith when they acquired the Painting.

There were two, alternative ways in which TBC could have acquired good title to the Painting in 1993 under Spanish law, notwithstanding the Nazis' theft of the Painting from Lilly in 1939. First, if the Baron had acquired good title in 1976 (according to the local laws of Switzerland, where the Baron acquired the Painting), then Spain would respect his sale of that title to TBC in 1993, regardless of TBC's own awareness of the possibility that the Painting had previously been stolen.<sup>20</sup>

The Court concluded that the Baron did not acquire good title under Swiss law because he had failed to exercise reasonable "diligence required by the circumstances" into whether the Painting had been stolen.<sup>21</sup> In particular, the Court found that the presence of partial

14 *Id.* at 4-5.

15 *Id.* at 7-8.

16 *Id.* at 9.

17 *Id.* at 19.

18 *Id.* at 20; see also *Flamenbaum*, 22 N.Y.3d at 965 (explaining under New York law that if compelling evidence of theft exists, then stolen art must be restituted to the victim even if the victim unduly delayed in bringing suit).

19 *Cassirer*, ECF No. 621 at 20.

20 *Id.* at 29

21 *Id.* at 21.

and torn labels on the verso of the Painting (which the Court likened to the filing off of a serial number from a stolen gun), combined with the Baron's awareness of Nazi looting and the further fact that Pissarro paintings were favoured by the Nazis, rendered the Baron's lack of diligence into the Painting's provenance unreasonable as a matter of Swiss law.<sup>22</sup> Significantly, the Court noted that the unlikelihood that the Baron *could have* learned of Lilly's role in the provenance of the Painting, and of Nazi theft, had he conducted any diligence, was immaterial under Swiss law; the Baron's failure even to try rendered his acquisition the product of 'bad faith' as a matter of Swiss law.<sup>23</sup>

Because the Baron did not acquire good title in 1976 under Swiss law, the laws of Spain next required the Court to consider whether TBC independently acquired good title under Spain's laws of acquisitive prescription.<sup>24</sup> This required the Court to examine TBC's good faith and, specifically, whether TBC acted with 'actual knowledge' or 'wilful blindness' to the fact of prior theft.<sup>25</sup> Although the Court found reasons for TBC to have had 'suspicions' of theft in 1993, Spanish law requires a higher showing – of criminal awareness and indifference to theft – which the Court found not to exist (either by TBC or by its Swiss counsel hired to investigate the Baron's title, or, for that matter, by the Baron himself).<sup>26</sup> Accordingly, the Court concluded that TBC acquired good title to the Painting in 1993 under Spanish law.<sup>27</sup>

In a parting shot, however, the Court noted that the outcome under Spanish law appeared to be inconsistent with Spain's commitment to abide by the Washington Principles on Nazi-Confiscated Art (the 'Washington Principles'), which were agreed upon by 44 States in 1998, and reaffirmed in 2009 through the Terezín Declaration.<sup>28</sup>

The Washington Principles are:

based upon the moral principle that art and cultural property confiscated by the Nazis from Holocaust (Shoah) victims should be returned to them or their heirs, in a manner consistent with national laws and regulations as well as international obligations, in order to achieve just and fair solutions.<sup>29</sup>

The Washington Principles are aspirational, not legal, and are thus non-binding.<sup>30</sup> After finding in favour of Spain (TBC) as a matter of Spanish law, the Court expressed regret that it "cannot force the Kingdom of Spain or TBC to comply with its moral commitments."<sup>31</sup>

### **THE REAL QUESTION POSED BY THE COURT IS WHETHER SPAIN'S RELEVANT COMMERCIAL LAWS ARE 'JUST AND FAIR'**

Asking whether TBC's legal victory in *Cassirer* is a 'just and fair' result is really asking whether, in 2019, the application of foreign commercial laws (under the doctrine of comity) to the circumstances of the Holocaust is an appropriate legal and moral outcome.

In trying to answer this question, it must first be acknowledged that the Washington Principles do not provide actual legal authority for a court to apply. There is no world court that exists

22 *Id.* at 20-21.

23 *Id.* at 25.

24 *Id.* at 26.

25 *Id.* at 27-28.

26 *Id.* at 28-29.

27 *Id.* at 28.

28 *Id.* at 33-34.

29 *Id.* at 33 (quoting Washington Principles).

30 *Id.*

31 *Id.* at 34.

to determine what the propitious language of the Washington Principles means. Those principles are meant to influence the *specific and local laws* of each signatory, individually.

There are examples of States enacting laws specifically providing for the restitution of Nazi-looted property to Jewish victims. For example, shortly after the Second World War, Austria enacted the Nullification Act of 1946,<sup>32</sup> which creates a presumption of Nazi-theft in respect of any transaction of property by a Jewish owner in Austria from the time of the *Anschluss* (in March 1938) until the end of the war.<sup>33</sup>

The United States, however, has never enacted a similar law (i.e., a law that creates a presumption of Nazi theft around any transaction involving a European Jew during the time of the Second World War). In 2016, the United States enacted the Holocaust Expropriated Art Recovery ('HEAR') Act, which recites the Washington Principles as a motivating factor but which creates only a nationwide statute of limitations over claims of Nazi-looted property, not a presumption of theft that would void transactions *ab initio*.<sup>34</sup>

The United States, like most countries, relies today on its general commercial codes and common law to govern claims of Nazi-looted art. Despite the Washington Principles, there is no 'Holocaust Era Commercial Code'.

Asking whether there 'should be' such a code, either nationally or internationally, is a reasonable question. There can be no legitimate dispute that Nazi looting of art from Jewish victims is repugnant. Theft of all kinds is repugnant, but there is something particularly horrifying about the Nazis' effort to erase the footprint of Judaism forever from the world, including through their systematic raiding of Jewish possessions and rewriting of provenance to disregard Jewish ownership of art. This is unquestionably a matter worthy of special legislative consideration.

Nevertheless, where most countries (including the United States) have not seen fit as a public policy matter to enact laws creating presumptions of Nazi theft, it is difficult to conclude that any case that does not start with a presumption of theft and end with an award of restitution to the plaintiff by the defendant is morally unjust. The cases must turn on applications of governing commercial laws, which also requires our courts to respect the operation of foreign laws under the doctrine of comity.

In *Cassirer*, the primary application of Swiss law would have led the Court to direct restitution under the circumstances.<sup>35</sup> TBC prevailed because of the secondary application of Spanish law, which requires a showing of actual awareness of theft by the acquirer. The result in *Cassirer* might be described as unfair and unjust if one is prepared to find Spain's general commercial rules regarding the transfer of title to be unfair and unjust. In the absence of such an indictment, however, the result in *Cassirer* should be seen as legally correct.

32 Federal Law Gazette 106/1946.

33 See *Bakalar v. Vavra*, 619 F.3d 136, 140 (2d Cir. 2010) (discussing Austrian Nullification Act, which is enforced through a series of Austrian Restitution Acts; the 'Third Restitution Act', governing claims against private persons, expired in the 1950s); see also Austrian Nullification Act, Act No. 106/1946, § 1 (Austria); Third Restitution Act, BGB No. 54/1947.

34 Holocaust Expropriated Art Recovery ('HEAR') Act of 2016, Public Law No.114-308, 114<sup>th</sup> Cong. (2016); see also William L. Charron, 'The Problem of Purely Procedural Preemption Presented by the Federal HEAR Act', (2018) *Pepp. L. Rev.* 19.

35 The decision in *Cassirer* to credit and apply Swiss law is at odds with the Second Circuit's decision in *Bakalar v. Vavra*, 619 F.3d 136 (2d Cir. 2010) ('*Bakalar I*'). As this author (who argued the *Bakalar* case) has previously noted, the choice of law analysis in *Bakalar I*, which rejected application of Swiss law in a generally similar context under New York's choice of law rules, is erroneous and should be re-examined. Charron, 'A Comity of Error', (2013) 250 *N.Y.L.J.* 102.

Moreover, because laws that meet our basic notions of due process are accepted as embodiments of reasonable public policy choices, the legally correct outcome in *Cassirer* should also be accepted as morally fair and just. Where no legislature within the United States has seen fit to decree something like a ‘Nullification Act’, it is not the place of our judges and courts to do so – or to override otherwise applicable foreign rules – through the common law.

## CONCLUSION

There is a negative connotation that good faith possessors of allegedly (or, in the case of *Cassirer*, actual) Nazi-looted art who prevail in the courts are the beneficiaries of ‘technical defences’ only, which renders their judgments ‘unfair’ and ‘unjust’.<sup>36</sup> That is a superficial denunciation. Good faith possessors who prevail in the courts do so because the relevant laws, and their important underlying policies which themselves are not decried as unjust, favour their positions.

A good faith possessor who prevails on the basis of a statute of limitations or laches defence succeeds as a matter of due process: the passage of too much time, and the corresponding loss of evidence necessary to reasonably prove or disprove a claim beyond the point of speculation, renders a ruling in favour of the claimant too procedurally problematic and unfair.

Likewise, a good faith possessor who prevails on the basis of a choice of law ruling and comity, like TBC, succeeds justly. The policy reasons behind such a decision may not accord with sentiments behind the Washington Principles, but those reasons are no less important and worthy.

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<sup>36</sup> See, e.g., HEAR Act, Pub. L. No: 114-308, 114<sup>th</sup> Cong. (2016).