

18-00634-cv

IN THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

LAUREL ZUCKERMAN, as Ancillary Administratrix of the Estate of Alice Leffmann,
Plaintiff-Appellant,

v.

THE METROPOLITAN MUSEUM OF ART,
Defendant-Appellee.

On Appeal From the United States District Court
for the Southern District of New York
Hon. Judge Loretta A. Preska

BRIEF OF *AMICI CURIAE* NATALIA INDRIMI, PROFESSOR GUIDO ALPA, AND AVV. RENZO GATTEGNA IN SUPPORT OF PLAINTIFF-APPELLANT

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INTEREST OF AMICI CURIAE

Natalia Indrimi, Executive Director of the Centro Primo Levi (“CPL”), a New York based organization, Professor Guido Alpa, and Avv. Renzo Gattegna, file this brief as *Amici Curiae* in support of Plaintiff-Appellant.¹

Ms. Indrimi has devoted her career to the examination and preservation of Italian Jewish history, including through the scholarly examination of the Shoah in Fascist Italy. She holds a degree in Philosophy from the University of Rome La Sapienza, and, for over 30 years, has curated exhibits, contributed to academic projects, and developed international partnerships focusing on the rich traditions of Italian Jewish life. As Executive Director of CPL, Ms. Indrimi focuses on, *inter alia*, questions of history and memory, including with regard to 20th century totalitarianism and on documenting the lives, achievements, and debacles of Italian Jews in the United States who fled Fascist persecution.

Guido Alpa is an Italian jurist and Professor of Law at the University of Rome La Sapienza and Visiting Professor of Law at Columbia Law School. He holds a

¹ *Amici curiae* certify that no counsel for either party authored this brief in whole or in part, and that no person or party, other than *amici* or their counsel, made a monetary contribution to the preparation or submission of this brief, and that no person other than amici or their counsel contributed money intended to fund the preparation or submission of this brief. Counsel of record for the parties have consented to the filing of this brief.

graduate degree in law from the University of Genoa as well as a number of honorary degrees and academic awards, and is the author of treatises on Italian law, including on foreign and transnational law. Avv. Renzo Gattegna is an Italian lawyer and former president of the Union of Italian Jewish Communities, an organization which continues to represent Jews in Italian and foreign tribunals and advocate for secularism in Italian institutions, while strenuously advocating against ideological extremism and isolation of Jews from Italian society.

Amici have a substantial interest in the outcome of this litigation because the decision of the District Court disregards the well-documented historical record reflecting the open and notorious terror inflicted on Jews in Italy, especially refugees like the Leffmanns, and how that terror pervaded Holocaust-era transactions like the one at issue here.

PRELIMINARY STATEMENT

The District Court erred in reducing the Leffmann family’s case to a question of “ordinary” economic duress. By treating this case as nothing more than a garden-variety commercial transaction, the District Court made fundamental and deeply flawed historical assumptions about art looting during the Holocaust, including forced sale transactions like the sale of Pablo Picasso’s *L’acteur* (“The Actor”) (the “Painting”). Because forced sales were uniquely opposite to ordinary commercial transactions, the basic principles of contract law assumed by the District Court did not exist when the Leffmanns sold the Painting (the “Sale”), their last valuable asset, to finance their flight from Fascist Italy on the eve of World War II.

By treating the Sale as an ordinary transaction between voluntary commercial parties, the District Court ignored how the Nazi campaign to render Jews stateless, destitute refugees—including by relentlessly itemizing, taxing, and seizing Jewish assets—forced Jews to sell huge quantities of personal property. As such, the very nature of Holocaust-era forced sales was radically different from the type of property transfer to which basic assumptions of contract/duress—economic autonomy and freedom of choice—would otherwise apply. These were not circumstances of economic “bad luck,” “tough choices,” or “buyer’s remorse.” Rather, these were uniquely discriminatory circumstances visited upon Jews because they were Jewish.

Thus, the finding below that the Sale was not induced by an “illegal threat” involving the buyer and seller placed the Sale in a contextual vacuum that ignores irrefutable historical facts demonstrating the opposite: The systemic violation of fundamental legal norms during the Holocaust tainted every aspect of the Sale.

The District Court also erred by assuming that the Leffmanns had “reasonable alternatives” to the Sale. This assumption again ignores well-documented history showing that the Leffmanns, having been systematically severed from all sectors of German society, would have recognized the same pattern evolving in Italy. Jews under Nazi/Fascist rule were stripped of their property, opportunities for employment, and protections at law, thereby foreclosing the types of “reasonable alternatives” available in any “normal” society.

In short, the Leffmanns sold their last valuable asset not as an act of free will, but out of the will to survive. If there was a choice to be made, it was illusory, especially when the State was the captor to whom ransom had to be paid. Having already fled Germany, the Leffmanns reasonably understood that it was either ransom their property for the possibility of freedom, or be trapped in a country trying to expel foreign Jews into a world rapidly closing its borders. A legal standard that regards these historical facts as evidence of choice would be so manifestly and grossly unjust as to shock the conscience.

ARGUMENT

The Plaintiff-Appellant has presented the record and applicable law, and those arguments will not be repeated.

I. THE HOLOCAUST WAS NOT “INDISCRIMINANT,” BUT WAS DESIGNED TO LEAVE JEWS IDENTIFIABLE, SEGREGATED, AND IN PERIL.

The Nazi regime murdered six million men, women, and children simply because they had Jewish blood. For each victim, death was only the final step in a State-administered process of exclusion, expropriation, and extermination. The Nuremberg proceedings and subsequent historical research have established beyond purview the unique evil encompassed by the Holocaust. From 1933 to 1945, the Nazis wielded the rule of law as a tool of oppression, enacting over 400 decrees and regulations aimed at eradicating “Jewish corruption” from all spheres of life in Germany and German-controlled Europe.² This coopting of law to illegal purposes infected all transactions involving Jews and Jewish property, including the Sale at issue here.

² *United States v. Goering*, Judgment, 6. F.R.D. 69, 79–82, 126–30 (Int’l Military Trib. at Nuremberg 1946) [hereinafter Nuremberg Judgment]; Raphael Lemkin, *Axis Rule in Occupied Europe* 25–31, 75–90 (Joseph Perkovich ed., 2d ed. 2008); United States Holocaust Mem’l Museum, *Anti-Jewish Legislation in Prewar Germany*, Holocaust Encyclopedia (Aug. 18, 2015), <http://www.ushmm.org/wlc/en/article.php?ModuleId=10005681>.

A. The Nazis stripped Jews of all legal vestiges of personhood, including their property.

The Leffmanns lived in Germany until 1937.³ Under Nazi rule, Jews were stripped of all identity, except that of “enemy.” In Germany, Jewish citizenship was revoked and Jews were later declared stateless, thereby forfeiting all protections at law, including as to their property.⁴ Unlike a “normal” society, Jews had no rights under law, and thus had no right to invoke normal processes by which the State might protect their person or property, nor could they readily seek legal redress from the courts.⁵ To the contrary, Jews ceased to exist as citizens in the eyes of German law; they had become, at best, “hostages” in a country that was once their own.⁶ As Jews, they were identifiable, segregated, and in peril.

From the beginning of the Third Reich, ordinary German Jews like the Leffmanns witnessed firsthand the terror of this reality. Processions of prominent

³ Joint Appendix (“A-__”), at A-33.

⁴ Hector Feliciano, *The Lost Museum* 40 (Hector Feliciano and Tim Bent trans., 1997) [hereinafter Feliciano]; Götz Aly, *Hitler’s Beneficiaries* 91 (Jefferson Chase trans., 2007) [hereinafter Aly].

⁵ See generally Karl Loewenstein, *Law in the Third Reich*, 45 Yale L.J. 797 (1936). Judges in New York also understood these facts as early as 1936. See *Holzer v. Deutsche Reichsbahn-Gesellschaft*, 290 N.Y.S. 181 (N.Y. Sup. Ct. 1936), *aff’d sub nom*, 299 N.Y.S. 748 (1st Dep’t 1937), *modified in part*, 277 N.Y. 474 (1938).

⁶ David Cesarani, *Final Solution: The Fate of the Jews 1933-1949*, 117 (2015) [hereinafter Cesarani].

prisoners were led through streets lined with spectators to nearby concentration camps.⁷ Many of the early camps—located in the middle of German towns—were spectacles of degradation and abuse for all to see.⁸ Screams and shots could be heard in the night, and guards boasted of torture and even murder.⁹ Whispers spread across Germany with news about crimes in local camps.¹⁰ By the mid-1930s, even the judiciary had succumbed to “Himmler’s vision of unrestrained police power” and coordinated with the *Geheime Staatspolizei* (the “Gestapo”) to fill new and ever-expanding camps with prisoners.¹¹

Initially, the Nazis unleashed a campaign of forced Jewish emigration, using fear to “encourage” and ultimately compel hundreds of thousands of German Jews to flee.¹² By 1937, Nazi “deJewification” strategy was intent on “eliminating the

⁷ Nikolaus Wachsmann, *KL: A History of the Nazi Concentration Camps* 64 (2015).

⁸ *Id.* at 65.

⁹ *Id.*

¹⁰ *Id.* at 66–70. In 1933, hundreds of articles appearing in foreign newspapers described the “shocking” appearance of prisoners. *Id.* at 71.

¹¹ *Id.* at 95–96, 99.

¹² Cesarani at 118 (“[B]lackmail and threatening letters proliferated.”); United States Holocaust Memorial Museum, *Obstacles to Immigration: Emigration from Germany*, Holocaust Encyclopedia, <https://www.ushmm.org/wlc/en/article.php?ModuleId=10007455>.

economic basis for Jewish existence”¹³—a concept that served the dual purpose of forcing Jews from Germany and steering them to poorer regions “where they could not regroup and pose a threat to the Third Reich.”¹⁴ To facilitate their elimination from the economy, Jews were required to register their assets with the State—whether located within Germany *or abroad*—which registries then assisted in future confiscation of those assets.¹⁵

Of the hundreds of anti-Jewish measures initiated by the Reich, those aimed at Jewish property created “an almost inescapable legal net which the Nazis used to snare their victims.”¹⁶ Jewish businesses and assets (including cultural property) were subject to forced sale to “Aryan” trustees for a fraction of their value.¹⁷ The proceeds were then paid into blocked bank accounts to which Jews had no access, and which ultimately were seized by the State.¹⁸ The best chance of saving Jewish

¹³ Cesarani at 127.

¹⁴ *Id.* at 127, 133–34.

¹⁵ Lynn H. Nicholas, *The Rape of Europa* 39 (1995) [hereinafter Nicholas]; Aly at 42, 48.

¹⁶ Jonathan Petropoulos, *Art as Politics in the Third Reich* 84 (1996) [hereinafter *Art as Politics*].

¹⁷ Richard Z. Chesnoff, *Pack of Thieves* 8–9 (2001) [hereinafter Chesnoff]; Jonathan Petropoulos, *The Faustian Bargain* 27 (2000) [hereinafter *Faustian Bargain*]. See also Nicholas at 104; Aly at 41–44.

¹⁸ See Nicholas at 104; Aly at 183–85, 195, 284.

property from seizure was to transfer it to someone of Aryan status for safekeeping, but that option became increasingly unfeasible. Instead, it is well-documented that Jews were forced to sell their remaining valuables at steep discounts “in fear of imminent expropriation.”¹⁹

In the years leading up to the war, Jews would be allowed to escape, but only by buying their way out. Those too poor to emigrate or who could not find a destination willing to receive them ultimately were forcibly relocated to ghettos, and then to death or concentration/labor camps.²⁰ For Jews, economic liquidation was a portent of physical liquidation; a signpost of eventual genocide.²¹

For those prepared to flee, the Nazis imposed a “Reich Flight Tax” which forced Jews to relinquish almost all of their property to layers of Nazi bureaucrats.²²

¹⁹ Cesarani at 161 (citing extensive examples).

²⁰ *Id.* at 163–65; Nuremberg Judgment at 127–28.

²¹ Irwin Cotler, *The Holocaust, Thefticide, and Restitution: A Legal Perspective*, 20 Cardozo L. Rev. 601, 607–09 (1998). U.S. courts have recognized that “taking of [property] was part of the genocide of the Jewish people during the Holocaust and, accordingly, violated international law” regardless of “the fact that there was money exchanged” *Philipp v. Fed. Republic of Germany*, 248 F. Supp. 3d 59, 70–72 (D.D.C. 2017); *see also* Holocaust Victims Redress Act, Pub. L. No. 105-158, § 201(4), 112 Stat. 15, 17 (1998) (“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”).

²² *See* Chesnoff at 21–22; *Faustian Bargain* at 66; United States Holocaust Mem’l Museum, *Documentation Required for Emigration from Germany*,

To satisfy the State-mandated exit fees, Jews sold possessions “which in normal times they would never have let go.”²³ Even then, the regulatory maze and repressive exchange rate left Jews fleeing Germany with almost nothing.²⁴ As one American diplomat recorded:

There is a curious respect for legalistic formalities. The signature of the person despoiled is always obtained, even if the person in question has to be sent to Dachau in order to break down his resistance. The individual, moreover, must go through an endless series of transactions in order to liquidate his property and possessions, and proceed abroad penniless. He is not permitted to simplify matters by making everything over en bloc to the state.²⁵

The color of law thus certified a system of mass extortion—or “thefticide”²⁶—that served to strip so-called “enemies of the state” of their liberty and property.²⁷ This

<http://www.ushmm.org/m/pdfs/20020516-documentation-required-emigration-germany.pdf>.

²³ Nicholas at 31.

²⁴ The Nazis continually reduced the amount of currency Jews could take abroad. The exchange rate of the Reichsmark was at all times extremely unfavorable and the loss in value enormous, but by 1938, this penalty had reached ninety percent. Susanne Heim, *The Question of Jewish Refugees, in Int’l Holocaust Remembrance Alliance, Bystanders, Rescuers, or Perpetrators?*, 2 IHRA Series 25, 31 (2016); Cesarani at 133.

²⁵ Nicholas at 39.

²⁶ See Cotler, *supra* note 21, at 602 (using the term “thefticide” to describe what was “the greatest mass theft on the occasion of the greatest mass murder in history”).

²⁷ See, e.g., Martin Dean, *Robbing the Jews* (2008); Richard J. Evans, *The Third Reich in Power* 332–411 (2005); David Cesarani, *Becoming Eichmann* 67 (2004); Ingo Müller, *Hitler’s Justice: The Courts of the Third Reich* (1991). See also

process, experienced first-hand by the Leffmanns, was designed to terrorize and, as evidenced by the flood of refugees, was wildly successful.

Throughout the Holocaust, including the period at issue here, State-sanctioned exploitation of the Jewish plight was open, notorious, and pervasive. As Professor Karl Loewenstein wrote for the Yale Law Journal in 1936, rules of law no longer protected or applied to the Jews:

Jews are finally driven out even from the remaining nooks and crannies of economic life by the official economic boycott, more or less endorsed by the courts. . . . Obligations of contract, vested rights, the right to dispose freely of property, were superseded by political coordination. Legal titles were voided and property confiscated under the pressure of party members and officials.²⁸

The historical record leaves no doubt that property extorted from Jews through forced sales—including sales of so-called “flight art” used to finance escape—flooded the market.

It was common knowledge among art dealers, auction houses, and the international art trade that, while the Nazis were otherwise busy liquidating Jewish assets, art could be acquired directly from fleeing Jews.²⁹ It also is well-documented

Vineberg v. Bissonnette, 529 F. Supp. 2d 300, 305 (D.R.I. 2007), *aff'd*, 548 F.3d 50 (1st Cir. 2008) (recognizing that “the Nazi party took art from Jewish citizens as part of a systematic plan to rob Jewish citizens of their property, their identity and, ultimately, their lives”).

²⁸ Loewenstein, *supra* note 5, at 797, 807.

²⁹ Nicholas at 27–30; *Art as Politics* at 7.

that Jewish-owned artwork was prized by the Nazis,³⁰ who competed fiercely to obtain Jewish property.³¹ But it was not just the Nazis who engaged in the frenzy; the art world was headed for a boom, fueled by a cascade of art which Jews were compelled to sell.³² The Reich relied on a network of dealers to orchestrate off-the-books transactions to evade import-export restrictions and/or conceal the provenance of acquired works.³³ These dealers manipulated competing bureaucrats, orchestrating bounties for information on Jewish-owned art and obtaining a percentage of the work's value.³⁴ Oftentimes, dealers sidestepped the Nazis entirely by extorting art directly from Jews by threatening to report their collections to the Germans.³⁵

³⁰ See, e.g., Nicholas at 9–10, 41–49; Feliciano at 37–38; *Faustian Bargain* at 55.

³¹ See Nicholas at 46; Feliciano at 4-5, 39; *Faustian Bargain* at 37, 55; see also Alfred Rosenberg, *Birthday Letter to Hitler*, Apr. 16, 1943, <http://avalon.law.yale.edu/imt/015-ps.asp> (describing the success of his department's art seizure squads in occupied territories).

³² Nicholas at 31, 39.

³³ See, e.g., Feliciano at 116–17, 126–27; *Faustian Bargain* at 85–87, 102–03.

³⁴ See Feliciano at 70–71.

³⁵ This practice became so prevalent that the Reich issued decrees reminding the public that, legally, all now “ownerless” property belonged to the Third Reich. *Faustian Bargain* at 28–29.

B. Fascist Italy was no safe haven for Jews fleeing Nazi persecution.

As the Leffmanns escaped Germany in 1937,³⁶ anti-Semitism spread like a contagion across Europe, and with it came an inexorable sense of fear, especially for Jews fleeing Nazi persecution.³⁷ To the extent it had ever been a relative safe haven, the situation in Fascist Italy began to change quickly.³⁸ The first weeks of 1938

³⁶ A-35.

³⁷ In the words of Italian historian, Michele Sarfatti:

1938 was “a crucial and terrible year for European Judaism.” At its start, only Nazi Germany had anti-Jewish legislation; at its close, such legislation had become one of the continent’s defining characteristics. In rapid succession came the announcement (30 December 1937) and then the promulgation (21 January 1938) of the Romanian anti-Semitic laws, followed by the announcement of the Italian (16 February) and Hungarian (5 March) decrees, as well as the German annexation of Austria (12 March), which in itself was a portent of the extension of Nazi anti-Jewish legislation. The virtually simultaneous nature of these events was not the result of some sort of coordination . . . [b]ut it does signal that the “anti-Jewish question” had come to a head, a phenomenon that most onerously affected the Jewish refugees, constantly growing in number as a consequence of the proliferation of the decrees calling for their expulsion and the revocation of their citizenship, in addition to the economic hardships promoted against them by various governments.

Michele Sarfatti, *The Jews in Mussolini’s Italy: From Equality to Persecution* 122 (John and Anne C. Tedeschi trans., 2006) [hereinafter Sarfatti].

³⁸ Historians have dispelled the notion of Italy as a safe haven: “In a spate of studies, many of them based on a little-publicized Italian government report commissioned in 1999, researchers have uncovered a vast wartime record detailing a systematic disenfranchisement of Italy’s Jews, beginning in the summer of 1938, shortly before the Kristallnacht attacks in November.” Paul Vitello, *Scholars Reconsidering Italy’s Treatment of Jews in the Nazi Era*, N.Y.

brought State-mandated identification and census of Jews, then “Aryanization” of Jewish property, expulsion of Jews from government and the press, adoption of a legal definition of “Jew” as distinctly *other*, and the openly-reported drafting of decisive racial legislation that was soon to come.³⁹

Although some have said that Mussolini espoused a more benign brand of anti-Semitism,⁴⁰ no German Jew on the run could have doubted where this now familiar legal process would end. While it may have been “the product of mindless and cynical opportunism,”⁴¹ Mussolini’s anti-Semitism was no less terrifying than Hitler’s.⁴² By February 1938, Italian newspapers and radio were ablaze with anti-

Times, Nov. 4, 2010, <https://www.nytimes.com/2010/11/05/nyregion/05italians.html>.

³⁹ This process culminated during the “second phase” of 1938, with discriminatory laws debuted in September, the *Dichiarazione sulla razza* (“Declaration on Race”) announced in October, and definitive legislation adopted in November. Sarfatti at 121.

⁴⁰ See, e.g., Renzo De Felice, *The Jews in Fascist Italy: A History* 219, 236 (2001) [hereinafter De Felice]; Mary Felstiner, *Refuge and Persecution in Italy, 1933-1945*, 4 Simon Wiesenthal Cent. Annual (Martha Humphreys & Sybil Milton trans.) [hereinafter Felstiner]; Meir Michaelis, *Mussolini and the Jews: German-Italian Relations and the Jewish Question in Italy, 1922-1945*, 58–61 (1978) [hereinafter Michaelis]; Ruth Ben-Ghiat, *We Are Evidently Aryans*, Slate, Jan. 20, 2017, http://www.slate.com/articles/life/fascism/2017/01/jews_in_fascist_italy_and_anti_semitism_in_italy_that_saw_itself_as_a.html.

⁴¹ Susan Zuccotti, *The Italians and the Holocaust* 40 (1987) [hereinafter Zuccotti].

⁴² See Felstiner (noting that the Fascist press generally reflected Nazism).

Jewish rhetoric, some calling for more aggressive steps to eradicate the “Jewish peril.”⁴³ By March, along with the majority of States still accepting Jewish refugees, Italy slammed its doors to continued immigration in the wake of the Germany’s annexation of Austria.⁴⁴ Jews in Italy had become wide-awake to “the spread of an appreciable and painful . . . anti-Semitism”; a specter of what they perceived as “a preordained and broadly organized scheme, which is not satisfied with simple intimidation, but aims for concrete results.”⁴⁵

During the first nine months of 1938—*i.e.*, the months leading up to the Sale—the corrosive measures implemented against the Jews by Italy’s Fascist government were among Europe’s “most draconian, after Germany’s, and contained certain specific provisions which were . . . even harsher than corresponding measures” employed by the Nazis.⁴⁶ The approximately five thousand Jews who

⁴³ *Id.* at 34–35; Michaelis at 59.

⁴⁴ See Dorothy Thompson, *Refugees: A World Problem*, Foreign Affairs, Apr. 1938, at 375–87; *No Man’s Land for the Jews*, Feb. 22, 1939 (on file at JDC N.Y. Archives). In July 1938, delegates from thirty-two countries met in Evian, France to discuss the refugee crisis. Despite expressing sympathy for Jews fleeing persecution, most countries gathered at the Evian Conference, including the United States and Britain, refused to open their borders to the growing masses of displaced Jewish refugees. Heim, *supra* note 24, at 35–38.

⁴⁵ Sarfatti at 123 (quoting letter written by Gino Luzzatto, and Italian Jew, in January 1938).

⁴⁶ *Id.* at 124–25.

had fled Germany, including the Leffmanns, could see what was coming.⁴⁷ Legitimizing their heightened sense of fear and uncertainty in Italy, the situation in Italy for *foreign* Jews was especially precarious. Since the formation of the Rome-Berlin Axis in 1936,⁴⁸ a German-Italian Police Agreement had allowed for the exchange of information about and identification of German Jews residing in Italy, as well as for their interrogation, arrest, and/or extradition.⁴⁹

The reality of this arrangement became clear with the arrest of at least 500 German Jews whose names had been among those provided by the Gestapo for surveillance in anticipation of Hitler's trip to Italy in May 1938.⁵⁰ Over the course of Hitler's one-week visit, a joint Italian-German police force undertook violent "security measures" against Jews in Italy. Most notably, a large-scale raid in Florence—where the Leffmanns lived at the time⁵¹—fell most heavily on Jewish refugees, many of whom were taken away and imprisoned.⁵² In a striking recollection, Robert Kempner, himself a German Jew expelled by the Reich, noted

⁴⁷ *See id.* at 117–19.

⁴⁸ Michaelis at 100.

⁴⁹ De Felice at 232–33; Felstiner.

⁵⁰ Felstiner; *see also Press Hails Hitler to Rally Italians*, N.Y. Times, Apr. 28, 1938.

⁵¹ *See* A-42.

⁵² Felstiner.

that “the prisoners had the feeling of being kept as hostages and paradoxically had to hope that their tormentor [Hitler] would return to Germany unharmed.”⁵³

Hitler’s departure from Italy did little to calm the groundswell of anti-Jewish diktats from the Fascist and Nazi governments. By then, Hermann Göring had formally weaponized the asset inventory system, first by requiring German Jews—including those living abroad—to declare all valuables still in their possession by June 30,⁵⁴ and then prohibiting Jews from selling “objects made from precious metals, jewelry and works of art with a value over RM 1,000” as of December 3.⁵⁵ Together, these orders ensured that any valuable property Jews had left not only would be subject to enforced registration and sequestration by the Reich, but also would be rendered nearly worthless because, come December, that property could not be sold. The pressure was unfathomable; German Jews seeking to escape had but one option—to sell, and sell quickly.

Publication of the “Manifesto of Racial Scientists” that July further compounded the existing state of terror by signaling Italy’s official adoption of Nazi

⁵³ *Id.* at 11.

⁵⁴ *Anmeldung des Vermögens von Juden*, RGBI I, 414 (Apr. 26, 1938). Property registered in accordance with the order would “be secured in accordance with the dictates of the German economy.” *Id.*

⁵⁵ *Verordnung über den Einsatz des jüdischen Vermögens*, RGBI I, 1709 (Dec. 3, 1938).

racial policy.⁵⁶ Social segregation then made quick progress, and the “Ghetto legislation” fell more harshly on the small population of Jews in Italy than it had in Germany.⁵⁷ Like the Leffmanns, any German-Jewish refugees attempting to liquidate their last items of value in the shadow of Göring’s edicts would have to sell to someone they knew, and for whatever price was offered. Without legal rights in their property, power to bargain freely, time to spare, or the ability to seek redress in court, no Jew was in a position to freely choose a buyer or obtain fair terms. The Germans came to call these “sales” *Notverkauf*—bailout; ransom.⁵⁸

Validating the Leffmanns’ urgent sale of the Painting and flight from Italy,⁵⁹ Mussolini’s anti-Jewish program reached its apex in September 1938. Following a pattern the Leffmanns would have recognized from Germany, the Fascist government announced that foreign Jews could no longer reside in Italy and would be required to leave within six months;⁶⁰ those who had been naturalized were

⁵⁶ Sarfatti at 128; Ben-Ghiat, *supra* note 40.

⁵⁷ *Statement on the Position of Italian Jewery*, Counsel for German Jewery, Jan. 1, 1939 (on file at JDC N.Y. Archives) [hereinafter Counsel Report].

⁵⁸ *Notverkauf*, Pons, <https://en.pons.com/translate/german-english/Notverkauf> (literally meaning “bailout” or “emergency/forced sale”).

⁵⁹ *See* A-43.

⁶⁰ Zuccotti at 36; Felstiner; *see also Italy Exiles Jews Entering Since ’19*, N.Y. Times, Sept. 2, 1938.

stripped of their citizenship, and over 10,000 foreign Jews were forcibly exiled.⁶¹ By October, all German Jews were required to carry passports marked with the infamous red “J Stamp” issued by the Reich, further limiting their ability to move freely across borders in search of refuge.⁶²

At that time, those who did leave were legally allowed to take with them only 2,500 lire and thus “had to emigrate almost destitute.”⁶³ By January 1939, Jews had been all but eliminated from normal economic outlets in Italy. As in Germany, Jews could no longer own real estate, businesses, or interest in any “industry for the importance of national defense.”⁶⁴ As in Germany, the Fascist government required Jews to register all property owned in Italy and abroad, and as in Germany, all Jewish-owned property was then subject to expropriation by the State.⁶⁵

⁶¹ Zuccotti at 41.

⁶² Rejection of German Jews at the Swiss border, for example, was a daily occurrence. Jewish refugees could only enter Switzerland if they paid the required fee—called “a bail”—in exchange for a *temporary* permit. For German Jews not immediately turned away, the “J Stamp” on their passports rendered it impossible to avoid paying the “bail.” See Salomé Lienert, *Swiss Immigration Policies 1933–1939*, in Int’l Holocaust Remembrance Alliance, *Bystanders, Rescuers, or Perpetrators?*, 2 IHRA Series 25, 43, 46–48 (2016).

⁶³ Counsel Report.

⁶⁴ *Id.*

⁶⁵ *Id.*

Capturing the Jews' distinct lack of free will in the face of the advancing Holocaust, Primo Levi observed:

[I]f we wanted to live, if we wished in some way to take advantage of the youth coursing through our veins, there was indeed no other recourse than self-imposed blindness; . . . We could also, in the abstract, throw everything away and escape and be transplanted to some remote, mythical country, chosen from among the few that kept their frontiers open: Madagascar, British Honduras. But to do this one needed a lot of money and a fabulous capacity for initiative—and I, my family, and our friends had neither one nor the other.⁶⁶

Levi became famous for bearing witness to the horrors that confronted those who did not escape.⁶⁷ This fate, shared by thousands of Jews during the Holocaust, was what would have confronted the Leffmanns had they not made the Sale in order to finance their flight from Italy in June 1938.⁶⁸

⁶⁶ Primo Levi, *The Periodic Table* 54 (Raymond Rosenthal trans., 1995).

⁶⁷ Primo Levi's most famous memoir depicts the sobering reality of life and death at Auschwitz. In this and much of his work, Levi meditates on the psychological consequences of the Holocaust, of which degradation of free will is a recurring theme. See, e.g., Primo Levi, *Survival in Auschwitz* 98 (Stuart Woolf trans., 1996) (“[H]ere in the [camp] there are no criminals nor madmen; no criminals because there is no moral law to contravene, no madmen because we are wholly devoid of free will, as our every action is, in time and place, the only conceivable one.”).

⁶⁸ See A-44–46.

II. THE DISTRICT COURT INCORRECTLY ASSUMED THAT FUNDAMENTAL PRINCIPLES INHERENT TO ORDINARY COMMERCIAL TRANSACTIONS APPLIED TO THE SALE.

Critical to any normal commercial transaction is the assumption that “the right of private contract is no small part of the liberty of the citizen” and that contracts entered into freely and voluntarily will be enforced.⁶⁹ It is from this premise that the District Court’s decision about the Sale in Fascist Italy then incorrectly advances. In stark contrast to ordinary commercial settings, as shown above, the Holocaust represented a uniquely opposite reality—one completely devoid of the fundamental principles underlying the law of contract as applied by the District Court. Indeed, sales of Holocaust-era flight art were the antithesis of economic liberty and individual autonomy, arising instead from a State-manufactured reality that eliminated both free will and reasonable alternatives.⁷⁰

⁶⁹ *Baltimore & Ohio S.W.R. Co. v. Voight*, 176 U.S. 498, 505 (1900); *see also Diamond Match Co. v. Roeber*, 106 N.Y. 473, 482 (1887) (“It is clear that public policy and the interests of society favor the utmost freedom of contract, within the law, and require that business transactions should not be trammelled by unnecessary restrictions.”).

⁷⁰ See Emily J. Henson, *The Last Prisoners of War: Returning WWII Art to Its Rightful Owners—Can Moral Obligations Be Translated Into Legal Duties?*, 51 DePaul L. Rev. 1103, 1150 (2002) (comparing “the status of the involuntary art theft victim to the status of the wealthy and sophisticated voluntary buyer and collector of valuable art”).

A. The “threat” of economic, social, and cultural death to Jews was manifestly illegal and taints every aspect of the Sale.

The District Court’s finding that the Sale was not induced by an “illegal threat” (because that threat was not directly imposed by the Defendant museum or the immediate buyers of the Painting) entirely misses the point. Duress implies that “fear is the motive that coerces the will.”⁷¹ It exists where “a person makes an improper threat that induces a party who has no reasonable alternative to manifesting his assent,”⁷² irrespective of whether that threat is exercised by one who is party to the contract or one who is not.⁷³

In a “normal” society, privileges and rights accorded for the private benefit of their possessor—such as freedom of contract—are denied when they serve as a means of extortion.⁷⁴ At common law, if a party has “notice of the duress, the

⁷¹ 3 Samuel Williston, *Law of Contracts* § 1603 (1920) [hereinafter Williston].

⁷² *Introductory Note*, Restatement (Second) of Contracts §§ 174–177 (Am. Law Inst. 1981) [hereinafter Restatement]. Under New York law, the elements of economic duress are: (1) a threat (2) which is unlawfully made, and (3) causes involuntary acceptance of terms (4) because the circumstances permit no other alternative. *Interpharm Inc. v. Wells Fargo Bank, N.A.*, 655 F.3d 136, 142 (2d Cir. 2011).

⁷³ *See* Restatement § 175(2) (“If a party’s manifestation of assent is induced by one who is not a party to the transaction, the contract is voidable by the victim unless the other party to the transaction in good faith and without reason to know of the duress either gives value or relies materially on the transaction.”).

⁷⁴ Robert L. Hale, *Bargaining, Duress, and Economic Liberty*, 43 Colum. L. Rev. 620–21 (1943) [hereinafter Hale].

transaction will be voidable against him, though the duress was not his act.”⁷⁵ As this Court also recognized: “The doctrine of economic duress is grounded in the principle that courts will not enforce an agreement in which one party has unjustly taken advantage of the economic necessities of another and thereby threatened to do an unlawful injury.” *Interpharm Inc. v. Wells Fargo Bank, N.A.*, 655 F.3d 136, 142 (2d Cir. 2011) (internal quotation marks omitted).

There is no question that insiders of the art trade were on notice of what was happening. As Professor Loewenstein stated, the economic disintegration of Jews under Nazi/Fascist rule rendered the entire system unlawful, as “obligations of contract, vested rights, the right to dispose freely of property, were superseded by political coordination.”⁷⁶ Holocaust-era flight sales were irreparably tainted by the patent illegality of State-sponsored racial persecution and dispossession of Jewish property.⁷⁷ Even early statements of common law duress—requiring threats “such

⁷⁵ Williston § 1625.

⁷⁶ Loewenstein, *supra* note 5, at 807; *see also* Hannah Arendt, *The Origins of Totalitarianism* 288 (1966) (describing the situation as encompassing “lawlessness organized by the police”).

⁷⁷ The illegality of Nazi policies during the Holocaust is well-established:

With respect to Crimes Against Humanity, . . . [t]he policy of terror was certainly carried out on a vast scale, and in many cases was organized and systematic. The policy of persecution, repression and murder of civilians in Germany before the war of 1939, who were likely to be hostile to the Government, was most ruthlessly carried out. The

as to put a brave man in fear” or “sufficient to overcome the will of a person of ordinary firmness”⁷⁸—are satisfied by the terror experienced by the Leffmanns in Germany and Italy, which deprived them of any real freedom to refuse the Sale.⁷⁹

B. The notion of “reasonable alternatives” under Nazi and Fascist rule was illusory.

The law of duress, applied in “normal” circumstances, treats an illegal threat as only part of the equation. The threat does not amount to duress if the victim has a reasonable alternative and fails to take advantage of it. The quintessential “reasonable alternative,” however, either takes the form of an available legal remedy⁸⁰ or assumes equitable market functions and the availability of alternative sources of funding.⁸¹ But, the goal of the law being one of practicality, this standard

persecution of Jews during the same period is established beyond all doubt.

Nuremberg Judgement at 131. *See also Bakalar v. Vavra*, 619 F.3d 136, 149 (2d Cir. 2010) (Korman J., concurring); *Schoeps v. Museum of Modern Art*, 594 F. Supp. 2d 461, 466 (S.D.N.Y. 2009).

⁷⁸ *See* Williston § 1603.

⁷⁹ John Dalzell, *Duress by Economic Pressure II*, 20 N.C. L. Rev. 341, 356–58 (1942) [hereinafter Dalzell].

⁸⁰ Restatement § 175, *illustration 1*.

⁸¹ *See id.* illustrations 5–7.

must take into account the exigencies confronting the victim.⁸² Here, the District Court erred by ignoring the total absence of legal remedies or equitable market functions with respect to German Jews in Italy during 1937–1938.

As shown above, Jews—especially German Jews like the Leffmanns—had no adequate legal remedies and had no sources of alternative funding because they were being stripped of *all* rights in property against a looming date certain.⁸³ It has long been understood that, where the law does not recognize an individual’s rights in property, it cannot prevent injury or provide redress, and thus offers no “reasonable alternative.”⁸⁴ Similarly, Jews fleeing persecution had no ability (or expectation) to subsequently rescind (or ratify) sales of flight art.⁸⁵

⁸² *Id. comment b*; Williston § 1605.

⁸³ This belies the District Court’s supposition that the Leffmanns could live indefinitely off other assets. *See Zuckerman v. Metropolitan Museum of Art*, 2018 U.S. Dis. LEXIS 20183, at *37 (S.D.N.Y.2018).

⁸⁴ Williston § 1620; Dalzell at 341, 367. *See, e.g., Snyder v. Rosenbaum*, 215 U.S. 261, 265–66 (1909); *Swift v. United States*, 111 U.S. 22, 28–29 (1884); *United States v. Ellsworth*, 101 U.S. 170, 173–74 (1880); *Van Dyke v. Wood*, 60 A.D. 208, 212 (N.Y. 1901).

⁸⁵ *See* Williston § 1623 (“No acts can constitute a ratification which were done while the fear or undue influence which operated to induce the original transaction is still effective.”).

C. The circumstances of the 1938 Sale shock the conscience.

The terror stalking the Leffmanns as they fled from country to country is irrefutable. By ignoring this historical context, which supplanted ordinary legal and economic conditions, the District Court rendered a result that shocks the conscience. The holding below effectively equates a Holocaust-era flight sale with a “hard bargain” faced by people “down on their luck.” But the Leffmanns were not the Joads from Steinbeck’s *The Grapes of Wrath*. Where, as here, a transaction of necessity occurs within a system *designed* to terrorize and discriminate against a particular party, the New York Court of Appeals long ago recognized that the law does not turn a blind eye:

[There are] phases of public policy which are as enduring and immutable as the law of gravity. One of them is that, as applied to the law of contracts, courts of justice will never recognize or uphold any transaction which in its object, operation or tendency is calculated to be prejudicial to the public welfare. That sound morality and civic honesty are corner stones of the social edifice is a truism which needs no re-enforcement by argument.⁸⁶

The anti-Semitic policies of Nazi Germany and Fascist Italy were *per se* prejudicial to the public welfare. Whether viewed as duress or unconscionability,⁸⁷ the

⁸⁶ *Veazey v. Allen*, 173 N.Y. 359, 368 (N.Y. 1903). New York courts have been willing to hold that substantive unconscionability alone may be sufficient. *See, e.g., Brower v. Gateway*, 2000, 246 A.D.2d 246, 254 (N.Y. 1998).

⁸⁷ *Hale* at 622; *see also* Restatement § 176; U.C.C. § 2-302(1) (Unif. Law Comm’n 1977).

inequitable economic position foisted upon the Leffmanns was indelible and cannot be reconciled with the dictates of public policy.⁸⁸

CONCLUSION

For the foregoing reasons, the decision of the District Court should be reversed.

Respectfully submitted,

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⁸⁸ Dalzell at 379.

CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(A)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and 29(d) because this brief contains 6,300 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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