

Ius Commune Conference Maastricht November 25-26 2021

Moving Cultural Goods Across Space and Time: Discussing The Changing Ideas, Laws and Actual Circulation of Cultural Goods

Subtheme 1: The Return of Art

Buyer Beware and Trusts *Ex Malificio*: Traditional Common Law Protections For Owners Of Stolen Or Lost World-War II Era Artworks Should Be The International Norm, Not Letting Thieves And Accomplices Keep The Loot

Raymond J. Dowd, partner Dunnington Bartholow & Miller LLP, adjunct professor Fordham University School of Law<sup>1</sup>

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. 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. *Caveat emptor* 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.

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

---

<sup>1</sup>The author advocated for the HEAR Act and acted as lead trial counsel representing the successful claimants in *Matter of Flamenbaum* and *Reif v. Nagy* (and the unsuccessful claimants in *Bakalar v. Vavra* and *Grosz v. MoMA*).

States and the U.K., fetching the highest auction prices, many ending up in museums and private collections.

Thus, the greatest 20<sup>th</sup> century robbery – that preceded and accompanied history’s greatest murder – the Holocaust --- persists.<sup>2</sup> In a case that was recently granted certiorari review by the U.S. Supreme Court, the Ninth Circuit Court of Appeals in *Cassirer v. Thyssen-Bornemisza Collection Foundation*, 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.<sup>3</sup> 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.<sup>4</sup> 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.

This paper argues that artworks transferred during the Nazi period and now claimed by families of Holocaust victims should not be subject to ordinary good faith purchaser, acquisitive prescription or laches defenses because the world was on notice of the acts of the Nazis and the recipients took possession under circumstances warranting *caveat emptor* under the common law and barring good faith possession under acquisitive prescription doctrines. The relevant facts have been obscured for decades by a massive traffic in stolen artworks. A remedy of replevin should be available through impressment of a trust *ex maleficio*: a classic common law remedy that ought to be available against holders of stolen World War II-era artwork to avoid a gross historical injustice. The world was on notice of Nazi depredations. Any purchasers of artworks of “red flag” provenance --- artworks in Europe created prior to 1946 transferred after 1933 --- paid a bargain price for a bloodstained object that assumed the risk that the true owner might one day emerge. Museums slyly gave tax breaks to wealthy patrons in exchange for donations. Today, stolen art blots the reputations of museum worldwide.

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 continually 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

---

<sup>2</sup> Although this paper focuses on Nazi-looted art and events in the 20<sup>th</sup> century, the approach advocated herein may provide a framework for such cases as Benin Bronzes. Hicks, Dan, *The British Museums: The Benin Bronzes, Colonial Violence and Cultural Restitution* (Pluto Press 2020).

<sup>3</sup> 824 F. App’x 452 (9<sup>th</sup> Cir. 2020) and 862 F.3d 951 (9<sup>th</sup> Cir. 2017).

<sup>4</sup> 824 F. App’x 452 at 457.

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.

This paper makes the following arguments: *First*, the *Cassirer* court reached the wrong result under common law principles because buyer beware --- *caveat emptor* --- and the remedy of replevin in cases of Nazi looted art is consistent with traditional common law principles and international law. The good faith purchaser defense is not appropriate due to the public nature of Nazi art looting. *Second*, *caveat emptor* is also consistent with doctrines of acquisitive prescription not available under common law because acquisitive prescription did not traditionally apply to stolen artworks or artworks acquired under dubious circumstances due to its requirement of good faith and transparency. *Third*, constructive notice doctrines or erroneous application of the New York's laches doctrines used to despoil Holocaust victims of stolen property by applying a "finders keepers" rule are repugnant to common law and civil law traditions, neither of which permit acquisition of stolen property. New York's common law remedies of replevin and disgorgement granted 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. *Finally*, impressment of a trust *ex maleficio* in cases of Nazi-looted art is appropriate to effectuate the goals of justice and international law.

I. The *Cassirer* Court Reached The Wrong Result Under Common Law Principles Because Buyer Beware --- *Caveat Emptor* --- And The Remedy of Replevin In Cases of Nazi Looted Art Is Consistent With Traditional Common Law Principles And International Law

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.<sup>5</sup> Replevin is a lawsuit to repossess personal property wrongfully taken or detained by the defendant.<sup>6</sup>

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.<sup>7</sup>

---

<sup>5</sup> 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).

<sup>6</sup> Black's Law Dictionary (11<sup>th</sup> ed. 2019).

<sup>7</sup> Herman, Alexander, *Restitution: The Return of Cultural Artefacts* (Lund Humphries 2021).

But the common law doesn't favor holders of stolen property. Despite this, museums almost never lose in local courts. This result may speak more to the provincial biases of judges than the rule of law. The general rule at common law is that thieves cannot pass good title to anyone, including a good faith purchaser.<sup>8</sup> This notion traces its lineage to Roman law *nemo dat quod non habet*, meaning "no one gives what he does not have."<sup>9</sup>

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:

\* \* \* 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 misrepresentation 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.<sup>10</sup>

*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."<sup>11</sup>

---

<sup>8</sup> *Cassirer v Thyssen-Bornemisza Collection Found.*, 862 F3d 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).

<sup>9</sup> *Cassirer v Thyssen-Bornemisza Collection Found.*, 862 F3d 951, 961 (9th Cir 2017).

<sup>10</sup> *Cudahy Packing Co. v Narzisenfeld*, 3 F.2d 567, 570-71 (2d Cir 1924).

<sup>11</sup> *Ivani Contr. Corp. v City of New York*, 103 F3d 257, 259 (2d Cir 1997).

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.<sup>12</sup> 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:<sup>13</sup>

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,

---

<sup>12</sup> Martin Dean, *Robbing the Jews: The Confiscation of Jewish Property in the Holocaust: 1933-1945* (U.S. Holocaust Memorial Museum, 2009).

<sup>13</sup> *Holzer v. Deutsche Reichsbahn Gesellschaft*, 160 Misc. 597 (Supreme Court, N.Y. Co., Special Term 1936).

antagonize our traditions, mock our history, and outrage our whole philosophy of life.<sup>14</sup>

Thus, unlike the *Cassirer* court, New York's *Holzer v. Deutsche Reichsbahn* court had the legal reasoning, courage, and intellectual and moral strength in the 1930's 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 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.
- (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.<sup>15</sup>

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."<sup>16</sup>

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:

---

<sup>14</sup> *Holzer v Deutsche Reichsbahn Gesellschaft*, 159 Misc 830, 840 (Sup Ct 1936), affd, 252 AD 729 (1st Dept 1937), affd in part, mod in part, 277 N.Y. 474 (1938).

<sup>15</sup> Public Law No. 105-158 Section 201, Findings S. 1564 (105<sup>th</sup>): Holocaust Victims Redress Act, 105<sup>th</sup> Congress, 1997-1998.

<sup>16</sup> *Id.* § 202.

*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.<sup>17</sup> 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 interest in Austria since 13<sup>th</sup> 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 HVRA, 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. *Orkin v. Taylor*, 487 F.3d 734, 739 -741 (9th Cir. 2007). 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 reconstitute 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).

*Orkin*, 487 F.3d at 739 -741 (emphasis supplied). The legal scheme initiated by the Executive and relied upon by Congress is for the federal judiciary to diligently enforce the restoration of

---

<sup>17</sup> Hathaway & Shapiro, *The Internationalists* (Simon & Schuster 2017) at 282-284.

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 1990's Congress considered enacting legislation to set standards for returning stolen art. Museum directors, however, testified that they could better handle the subject themselves, resulting in codes of ethics promulgated by [the Association of American Museum Directors and American Association of Museums]....”

Graefe, Emily, *The Conflicting Obligations of Museums Possessing Nazi-Looted Art*, 51 B.C. L. Rev. 473 (March 2010). As the Ninth Circuit observed:

[In enacting the HVRA, 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 reconstitute Nazi-stolen artworks to their Nazi-era owners.

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 Adolph Hitler was a failed artist, few appreciate the extent to which art and cultural policy figured in his plan for the Third Reich.<sup>18</sup> Indeed, from the summer of 1933, shortly after Hitler seized power from the Reichstag, Nazis held exhibitions of “degenerate art” in German museums.<sup>19</sup> 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

---

<sup>18</sup> Petropoulos, Jonathan, *Art as Politics in the Third Reich* (University of North Carolina Press 1996).

<sup>19</sup> Zuschlag, Christoph, ‘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).

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 are 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.<sup>20</sup>

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.<sup>21</sup> Also under New York law, the proponent of a gift has the burden of proving each of these elements by clear and convincing evidence.<sup>22</sup>

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.<sup>23</sup>

This "harsh" result is the only one consistent with the 1907 Hague Convention or the Kellogg-Briand Pact of 1928. Kellogg-Briand's outlawing 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 war, 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.<sup>24</sup>

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.

---

<sup>20</sup> See Eizenstat, Stuart E., *Imperfect Justice: Looted Assets, Slave Labor, and the Unfinished Business of World War II* (Public Affairs, January 7, 2003).

<sup>21</sup> *Gruen v Gruen*, 68 N.Y.2d 48, 53 (1986).

<sup>22</sup> *Gruen v Gruen*, 68 N.Y.2d 48, 53 (1986).

<sup>23</sup> *Solomon R. Guggenheim Foundation v. Lubell*, 77 N.Y.2d 311 (1991).

<sup>24</sup> Hathaway & Shapiro, *The Internationalists* (Simon & Schuster 2017) at 97.

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 of 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.**<sup>25</sup>

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*.<sup>26</sup> 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. [...]<sup>27</sup>

---

<sup>25</sup> <https://www.lootedartcommission.com/inter-allied-declaration> (last accessed 11/21/2021).

<sup>26</sup> [New Yorker cite]

<sup>27</sup> 18 U.S.C. § 2314.

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 art work and calls for its earliest possible restitution to its rightful owner.<sup>28</sup>

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, 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." Hall, Ardelia R., *The Recovery of Cultural Objects Dispersed During World War II*, 25 Dept. St. Bull. 337, 339 (1951). 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 persecution 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.<sup>29</sup> 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

---

<sup>28</sup> HRVA §201(2).

<sup>29</sup> *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 Dep't State Bull. 592, 592-93 (1949).

United States after 1932 that had been created prior to 1946 because such purchases were not innocent or made in good faith.

II. *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.”<sup>30</sup>

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 user which is by sufferance or secret will not establish a prescriptive law.<sup>31</sup>

Scholars have noted that modern civil law systems tend to favor persons claiming to be bona fide purchasers to promote commercial certainty.<sup>32</sup> Under modern Spanish law of acquisitive prescription, someone who knowingly receives and benefits from stolen property (*encubridor*) is treated as a thief.<sup>33</sup> As mentioned previously, the U.S. Supreme Court recently granted certiorari in *Cassirer v. Thyssen-Bornemisza* case where the Spanish law of acquisitive

---

<sup>30</sup> Sherman, Charles P., *Acquisitive Prescription --- Its Existing World-Wide Uniformity*, Yale Law Journal, Vol. 21, Issue 2, 147 at 150 (1911-12)(discussing Roman and modern law).

<sup>31</sup> Sherman, *Acquisitive Prescription* at 152.

<sup>32</sup> Kreder, Jennifer, *Reconciling Individual and Group Justice with the Need for Repose In Nazi-Looted Art Disputes: Creation of An International Tribunal*, 73 Brookly L. Rev. 155, 200 (2007)(contrasting common law and civil law systems).

<sup>33</sup> *Cassirer v Thyssen-Bornemisza Collection Found.*, 862 F3d 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.”)

prescription was applied to defeat California's rule that no one can take good title from a thief.<sup>34</sup> 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 applied, the result of the *Cassirer* case would have been that the Cassirer family prevailed: an outcome consistent with the doctrine of *caveat emptor*.

III. 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 the Cassirer case should have treated Spain's claim to ownership of Nazi looted art.<sup>35</sup> 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 decedant 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 archeologists 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

---

<sup>34</sup> Case No. (19-55616) Docketed May 11, 2021.  
<https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/20-1566.html> (last accessed 11/21/2021)

<sup>35</sup> *In re Flamenbaum*, 22 N.Y. 3d 962, 963-66 (2013).

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.

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 Impression 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.<sup>36</sup> 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 resitutionary 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.

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

---

<sup>36</sup> Dowd, Raymond J., *Nazi Looted Art and Cocaine: When Museum Directors Take It, Call The Cops*, 14 Rutgers Journal of Law & Religion (2013) at 529.

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.<sup>37</sup>

A constructive trust (trust ex maleficio) is a trust that arises contrary to intention and against an unwilling person.<sup>38</sup> 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.<sup>39</sup> 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.<sup>40</sup> A constructive trust will be erected whenever necessary to satisfy the demands of justice.<sup>41</sup> 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.<sup>42</sup>

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.<sup>43</sup>

---

<sup>37</sup> *Toobian v. Golzad*, 193 A.D.3d 778, 147 N.Y.S.3d 61 (2d Dep’t 2021).

<sup>38</sup> 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).

<sup>39</sup> 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).

<sup>40</sup> 106 N.Y. Jur. 2d Trusts § 162 citing *Dee v. Rakower*, 112 A.D.3d 204, 976 N.Y.S.2d 470 (2d Dep’t 2013); *Beatty v. Guggenheim Exploration Co.*, 225 N.Y. 380 (1919).

<sup>41</sup> 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).

<sup>42</sup> 106 N.Y. Jur. 2d Trusts § 162 citing *Sharp v. Kosmalski*, 40 N.Y.2d 119 (1976).

<sup>43</sup> 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.*

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.

In early 2022, the U.S. Supreme Court will review the *Cassirer* question to decide the question of whether Spain may retain Nazi looted art under the doctrine of acquisitive prescription. This author urges that not only the U.S. Supreme Court but the entire world 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.

# # #

---

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 Dep't 1975), order aff'd, 39 N.Y.2d 786, 385 N.Y.S.2d 286, 350 N.E.2d 617 (1976).