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Jessica Grimes
Roger Williams University School of Law

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Forgotten Prisoners of War: Returning Nazi-Looted Art by Relaxing the National Stolen Property Act

Jessica Grimes*

A de facto confiscation of a work that arose out of a notorious exercise of man’s inhumanity to man now ends with the righting of that wrong through the mundane application of common law principles. The mills of justice grind slowly, but they grind exceedingly fine.

- Judge Bruce M. Selya¹

Never had works of art been so important to a political movement and never had they been moved about on such a vast scale, pawns in the cynical and desperate games of ideology, greed and survival. Many were lost and many are still in hiding.

- Lynn Nicholas, Rape of Europa²

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* Juris Doctor, Roger Williams University, School of Law, 2010; A.M. University of Chicago, 2006; B.A. Boston College, 2005. The author would like to extend her thanks to her editors for their assistance and to her family and friends for their support, suggestions and patience.


The year is 1934, just one year after Adolf Hitler and his National Socialist Party rose to power in Germany. Although the party enacted notoriously invasive laws in later years, Hitler’s anti-Semitic policies were already gaining momentum through prohibitions on Jewish ownership of businesses. To regulate this “Aryanization” of business, the Nazi party required professionals to apply for membership to professional regulatory “chambers,” contingent upon possessing “German” qualities. For example, art dealers applied for membership to the Reichskulturkammer (the Reich Chamber for the Fine Arts), lorded over by Joseph Goebbels. In that same year, Max Stern – a young German Jew – inherited the Gallerie Stern from his father, a successful art gallery located in Düsseldorf, Germany. Although Stern applied for the appropriate membership, the Chamber denied his application because he did not “possess the necessary qualities or reliability to promote German culture properly for the German people and nation.” Accordingly, on September 13, 1937, Stern received an order to sell his inventory immediately through a Reich Chamber approved dealer. Two months later, Stern sold his entire collection through the Lempertz Auction House at prices far below the fair market value. Fortunately, Stern himself escaped Nazi Germany; however, his art collection was not as lucky.

As recent as 2007, the Stern Estate listed more than two hundred of the Lempertz auction paintings in an art restitution claim filed with the Holocaust Claims Processing Office.

Approximately seventy years later, in 2003, a painting of a young woman surfaced at Estates Unlimited, a Cranston, Rhode Island auction house, when a German baroness living in Providence, Rhode Island removed the work from her personal collection. The painting, an oil work by Franz Xaver

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4. See id.
5. See id.
6. See id.
7. See id.
8. See Vineberg, 548 F.3d at 53.
10. See Fitzpatrick, supra note 3, at A7.
Winterhalter, had been purchased by Baroness Maria-Luise Bissonnette’s stepfather, Dr. Karl Wilharm, at the 1937 Lempertz auction for 4,140 Reichmarks.\(^\text{11}\) When Bissonnette brought the painting to Estates Unlimited, Winterhalter’s *Girl from the Sabiner Mountains* valued between $67,000 and $93,000.\(^\text{12}\) To help defray escalating medical costs, Bissonnette scheduled the painting to be auctioned on January 6, 2005.\(^\text{13}\) However, shortly before that date, the Stern Estate learned about the sale of Winterhalter’s work in Rhode Island and subsequently pursued the newly resurfaced work.\(^\text{14}\) After three years of litigation and another journey to Germany (where the painting is currently located), the Stern Estate finally possesses legal title to *Girl from the Sabiner Mountain*. Additionally, pursuant to the litigation, the Stern Estate is equipped with a novel rule equating a coerced sale to theft, a legal theory by which the Estate may pursue the remaining Lempertz works.\(^\text{15}\)

Although the Stern Estate has been lucky, so to speak, in its recent attempts to recover looted art,\(^\text{16}\) most true owners and their

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\(^\text{11.}\) See id.; see also German Notes, Weimar Republic (1923-1938), http://web.archive.org/web/20071021083828/germannotes.com/weimar.shtml (last visited Oct. 16, 2009) (suggesting an approximation of the Reichmarks-U.S. Dollar exchange would be that 1 RM equals 0.25 U.S. Dollars; therefore the purchase price of 4,140 RM would have equaled about 1,035 U.S. Dollars in 1937).


\(^\text{13.}\) Id.

\(^\text{14.}\) See Vineberg v. Bissonnette, 529 F. Supp. 2d 300, 304 (D.R.I. 2007). The Stern Estate learned of the auction through the Art Loss Register, which is the largest private database in the world of lost and stolen cultural artifacts. See id. at 304 n.6. The Art Loss Register was established in London in 1976 and has been instrumental in recovering more than $350 million worth of stolen items since its inception. See Art Loss Register, History and Business, http://www.artloss.com/content/history-and-business (last visited Oct. 3, 2009).

\(^\text{15.}\) See Katie Mulvaney, *Court Affirms Painting was “Stolen” by Nazis*, PROVIDENCE J., Nov. 20, 2008, at A1, available at 2008 WLNR 22167947.

\(^\text{16.}\) See Holocaust Claims Processing Office, supra note 9. The Stern Estate has been very successful with its restitutions of looted art. In 2007, Nicholas Neufchatel’s *Portrait of Jan van Eversdyck* (1580) was returned to the estate from a private collection in Spain. See also Max Stern Art Restitution Project, http://maxsternproject.concordia.ca (last visited Oct. 3, 2009). The project aims to create a traveling art exhibit of the restituted works called “Auktion 392: Reclaiming the Gallerie Stern, Düsseldorf.”
heirs have not been as fortunate. According to Ronald Lauder, Chairman of the Museum of Modern Art in New York, “more than 100,000 pieces of art, worth at least $10 billion in total, are still missing from the Nazi era.” Even though sixty-four years have passed since the close of the Second World War, suits for restitution claims are increasing rather than decreasing. Due to the scope of Nazi looting, the extremely public nature of recent World War II art restitution litigation, and technological steps put forth by museums and private institutions, the probability of future claims is not only foreseeable, but also inevitable.

The Nazi party, between its rise to power in 1933 and the Reich’s demise, confiscated one-fifth – twenty percent – of all Western art then in existence. By 1944 (the year of the Allied liberation of France), one-third of all private art located within French borders had been looted by German troops. The success of these Nazi pillages relied upon an immense and systematic policy to recoup cultural artifacts the German government claimed had been stolen from them and to blockade what were labeled “degenerate” works of art.” “German” art included the works of the “Old Masters” – “pure” works produced by Vermeer, Bruegal, and Rembrandt, among others. These were the artists “whom Hitler found most culturally valuable,” and who, as such, promoted “what in [his] view were examples of superior art and culture.” Hitler’s expressed appreciation for these non-Jewish artists was thus a part of his larger plan to “eradicate the Jewish race by annihilating its culture.” Thus, one of Hitler’s first steps to recapture an Aryan culture was to collect these works from

20. See id. at 38; see also NICHOLAS, supra note 2, at 22-23 (describing ways the Nazis’ plan to steal Jewish artwork was carried out).
21. See Choi, supra note 17, at 168.
22. Id.
23. Id.
24. Id.
conquered nations and to remove non-German art (labeled degenerate art) from German national collections.25

From 1935 through 1939, Hitler confiscated private art owned by Jews living within the Reich pursuant to the abovementioned Jewish business laws.26 By enacting laws like the April 26, 1938 decree requiring Jews to report personal assets, “Jewish-owned assets were first nationalized, then privatized.”27 Thus, either through confiscation or forced auctioning of Jewish owned galleries (like Gallerie Stern), members of the Reichskulturkammer (Reich Chamber of Culture) began sorting through private Jewish collections. After sorting, the stolen works were sent to state institutions or given to high ranking members of the Nazi Party. Conversely, “degenerate” works were meticulously catalogued for future sale abroad.28 “Degenerate” works included art with a Jewish subject, artist, or art whose subject matter was critical or offensive to the Reich.29 Artists of such “Judeo-Bolshevist” art included Kandinsky, Chagall, Matisse, Picasso, and Van Gogh.30

Although Nazi looting alone displaced millions of cultural artifacts, after the war these “unsung victims” were further subject to Allied looting by American and Soviet Union troops.31 Historians suggest Soviets confiscated upwards of 2.5 million art

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25. See id. For example, Hitler himself ordered the immediate removal of 16,000 works of degenerate art from the walls of state museums.


28. See NICHOLAS, supra note 2, at 9, 22-24.

29. See Choi, supra note 17, at 168.


objects, books and archival documents from Germany after the war.\textsuperscript{32} It is possible Soviet leaders viewed this confiscation as both an opportunity to impose a penalty on the Nazis, and to recover cultural artifacts equivalent to those taken during the war.\textsuperscript{33} Likewise, American soldiers participated in the immense cultural theft after the fall of the Reich. For example, the Comb of King Henry I was recently discovered in 1992 in Whitewright, Texas.\textsuperscript{34}

This rampant theft has made it difficult for owners of cultural artifacts or their ancestors to obtain their stolen goods. Additionally, claimants face complex international laws, intricate and unfavorable statutes of limitations, and national confidentiality regulations blocking access to "private" information.\textsuperscript{35} And as years pass it becomes infinitely more difficult for an original owner to successfully establish ownership over a looted work of art. Thus, this Comment urges that sixty plus years of uncertainty in the law must come to an end, and permit all parties involved (both current possessors and original owners) the opportunity to arrive to an efficient and just solution. To accomplish this goal, the National Stolen Property Act should be amended to better incorporate the spirit of the recent First Circuit holding in \textit{Vineberg v. Bissonnette}.\textsuperscript{36} Doing so would create criminal sanctions for the possession of cultural property

\begin{footnotesize}
\begin{itemize}
\item[32.] \textit{See id.} at xviii.
\item[33.] \textit{See id.} at 32.
\item[34.] \textit{See id.} at 42. Akinsha references the policy of the Nazis to store cultural artifacts in mine shafts during the war (to avoid the potential of bombings in the cities). After the war, Americans and other Allied forces stripped these mines looking for treasures to bring home. The Comb was taken by an American soldier, Lieutenant Joe Tom Meador, from one of these mine shafts. \textit{Id.}
\item[36.] \textit{Vineberg}, 548 F.3d at 50.
\end{itemize}
\end{footnotesize}
that is or is reasonably believed to have been sold as the result of a transaction occurring times of violent conflict. Part I analyzes the recent decision in Vineberg v. Bissonnette and ultimately posits that all current owners of Nazi-era art should be on constructive notice that the artwork they possess may have been coercively sold. Part II looks at contemporary cases filed by museums to quiet title to artworks voluntarily sold and argues that current possessors should have the evidentiary burden to prove a sale was both valid and voluntary. Part III describes the National Stolen Property Act and endorses it as an appropriate vehicle for current possessors to research thoroughly questionable provenance as it will likely provide protection against future legal challenges. This comment ultimately concludes an amendment to the NSPA will best serve the goal of efficient restitution.

I. Vineberg v. Bissonnette: Coerced Sale is Theft

In late 2007, the estate of Max Stern, a German Jew, brought a replevin\(^3\) action against the descendant of a high ranking member of the Strum Abteilung (commonly known as the Storm Troopers, an arm of Hitler’s private security forces) who had an “Old World” title of “Baroness” to recover an allegedly stolen painting, Girl from the Sabiner Mountains.\(^3\) Sounding more like a Hollywood blockbuster than a civil action, the Rhode Island District Court determined the painting was unlawfully taken from Stern and that the “methods used by the Gestapo and the Nazis to force Dr. Max Stern to sell the [P]ainting . . . amount to theft.”\(^3\) Additionally, although Baroness Bissonnette acquired the painting “through no wrongdoing on her part,” her “predecessor-in-interest” acquired the painting through the forced sale, and thus “did not acquire good title.”\(^4\) Consequently, Bissonnette did not validly possess the painting because of the well-settled common-law tradition that a thief cannot pass good title.

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37. Replevin is “[a]n action for the repossession of personal property wrongfully taken or detained by the defendant, whereby the plaintiff gives security for and holds the property until the court decides who owns it.” Black’s Law Dictionary 1302 (7th ed. 1999).
38. See Fitzpatrick, supra note 3, at A7.
40. See id. at 308.
A. What is a Coerced Sale?

American courts, as well as international courts, almost invariably return an artwork to an original owner if the court finds the work has been “looted” by Nazis.41 “Nazi-looted” art refers to those works confiscated by the Nazi Party without any compensation regardless of motivation behind the theft. Where there has been no compensation, American courts easily categorize the Nazi confiscation into a familiar legal schema of burglary and theft, and therefore apply familiar principles to the foreign wrongdoing.42 However, where no confiscation or looting has occurred, it is more difficult to identify and rectify the wrong. Under “normal,” non-conflict situations, courts presume a transfer of an item for compensation is valid.43

Although the court does not provide a definition of what entails a “coerced sale,” a close examination of the facts of Vineberg provides an illustration of circumstances of a compensated sale that could amount to theft. The court acknowledges “it is clear that Dr. Stern’s relinquishment of his property was anything but voluntary.”44 As mentioned, the Girl from the Sabiner Mountains was originally located in the Gallerie Stern, a reputable art gallery located in Düsseldorf, Germany.45 Shortly after the rise of the Nazi Party, a “review” of Dr. Stern’s gallery indicated that he “lacked the requisite personal qualities to be a suitable exponent of German culture.”46 Consequently, the Reich Chamber for the Fine Arts “sent letters to Dr. Stern demanding he liquidate his inventory and gallery” following the prohibition on Jewish ownership decrees issued in the same year (1935).47 On September 13, 1937, “Dr. Stern received a final order to sell his inventory immediately through a dealer approved by

41. See generally Stephen W. Clark, World War II Restitution Cases, LEGAL ISSUES IN MUSEUM ADMINISTRATION 79 (ALI/ABA 2008).
42. See id. (listing recent restitution cases and their more straight-forward results).
43. See, e.g., Toledo Museum of Art v. Ullin, 477 F. Supp. 2d 802, 806 (N.D. Ohio, 2006) (finding no racial persecution where a sale occurred by a Jewish woman to Jewish merchants and implying a presumption of validity).
44. Vineberg, 529 F. Supp. 2d at 308.
45. See id. at 302-03.
46. Id. at 300, 304.
47. Id. at 302.
the Reich Chamber. Pursuant to the demand, Dr. Stern consigned hundreds of works from his inventory and personal collection to the Lempertz Auction House, located in Cologne, Germany. About one month later, in mid-November, Lempertz auctioned off the items, including *Girl from the Sabiner Mountains*. According to the undisputed record, the Stern works were sold for an amount far below market value. Soon after the Nazi Party forced Dr. Stern to auction his works, he fled Germany; Dr. Stern never received the proceeds from the auction.

To establish a superior right to rightful possession of goods in a replevin suit, the Stern Estate had to show that: "(1) it [was] the lawful owner of the Painting, (2) the Painting was taken from Dr. Stern, unlawfully, that is without his permission, and (3) Defendant is in wrongful possession of the Painting." Here, the district court relied heavily on a 1964 German restitution court decision stating that: (1) *Girl from the Sabiner Mountains* was included in the list of auctioned works in the 1937 sale; and (2) the list of market value of the paintings indicated that it was sold. Furthermore, the German court awarded Dr. Stern compensation for the lost art in 1964, effectively concluding that Dr. Stern was the true owner of the painting. Consequently, the district court found that the Stern Estate was the "lawful owner of the painting."

The 1964 decision additionally held the Lempertz auction was a "distress[ed] sale to which [Dr. Stern] was forced [to participate in] for reasons of persecution." The district court looked to American law next and discovered that two years after the

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48. *Id.*
49. *Id.* at 303.
50. *Id.*
51. *Id.*
52. *Id.* Both parties concede that even if he were compensated, it has been suggested that Dr. Stern "had to turn over the funds and several paintings from his personal collection . . . to secure an exit visa for his mother." *Id.* at 303 n.4.
53. *Id.* at 306.
54. See *id.*
55. *Id.* at 307.
56. *Id.*
57. *Id.*
German restitution court issued its opinion, a New York case found similarly:

[The] Nazi party could not convey good title to art taken during [the] war because [a] seizure of art during wartime constituted "pillage, or plunder . . . [which is the] taking of private property not necessary for the immediate prosecution of [the] war effort, and is unlawful." 58

Therefore, because the auction was racially motivated and was not "absolutely necessary" to the war effort, the court held the painting was unlawfully taken from Dr. Stern. 59 Additionally, by so holding, the court determined that the forced sale perpetrated by the Nazi Party equated to theft. 60 Furthermore, the First Circuit gave further guidance in the determination of what constituted a "forced sale" by suggesting that the racial nature of the transfer is conclusive. 61 Affirming the district court's holding, Circuit Judge Selya indicated the auction resulted in "a de facto confiscation of a work of art that arose out of a notorious exercise of man's inhumanity to man." 62

B. Purchasers are on Notice that Nazi-Era Transfers are Presumed Involuntary

The Vineberg decision effectively expanded the category of works eligible for protection in American courts as "Nazi-confiscated" art. 63 For example, it provided, at the very least, the Stern Estate is free to pursue all works auctioned in the 1937 Lempertz Auction as if they were in fact stolen from him. Thus, even if the original owner received a sum for a sale of art, this decision suggests the sum will not impede a claim for restitution of Nazi-looted art. If other jurisdictions follow the First Circuit's approach, all transfers of art that occurred in the Reich between

58. Id. at 307 (quoting Menzel v. List, 267 N.Y.S. 2d 804, 811 (N.Y. Sup. Ct. 1966)).
59. See id. at 308.
60. See id. at 307 ("The Nazi party's actions in this instance are therefore properly classified as looting or stealing.").
61. Id.
62. Vineberg, 548 F. 3d at 58 (emphasis added).
1933 and 1946 will now have an additional provenance question blurring current possessors' ownership interest. Therefore, Vineberg effectively puts current possessors of Nazi-era art on notice that prior owners may have a claim for restitution if an involuntary transfer occurred during the Nazi Regime.

Although American courts have not yet settled on a definition of forced sale, it is clear it should be a fact specific analysis. Certain indicators can provide great guidance to a court. First, an analysis of the selling price of a work of art is highly informative; if a work is sold far below the fair market value of the work, the question of duress and coercion should be addressed. Second, an investigation of the relationship between the seller and purchaser should be undertaken. The court should consider factors like race, oppression and extreme bargaining power differentials. Third, the circumstances surrounding the sale must be meticulously examined. In fact, the court should undertake a particular investigation for all transfers of ownership occurring within a territory during a time of violent conflict. Unless proven otherwise, the court should presume these transfers are "involuntary sales." Hence, a heightened burden would fall upon the possessor to prove the sale was in fact voluntary despite the potential effects the conflict-driven period might have on the original owner's state of mind at the time of sale.
II. BURDEN ON CURRENT POSSESSORS TO DEMONSTRATE THAT A VOLUNTARY SALE OCCURRED

Before Vineberg, "if a museum or other owner of Holocaust art could show a credible chain of ownership (provenance), its title was presumed to be good and unassailable." After the First Circuit affirmed Vineberg, however, an owner of Holocaust era art within the First Circuit's jurisdiction must not only demonstrate provenance, but also all transfers within that chain were voluntarily made. Based upon the emerging trend, courts seem to be heading towards a presumption that wartime transfers of cultural property are presumed involuntary where there is evidence of racial persecution, duress or coercive governmental action. Under this case law, for a museum or current possessor to quiet title to a potentially Nazi-looted work, it can bring a declaratory judgment action to demonstrate the questionable prior sale was indeed voluntary.

A. Current Owners Can Quiet Title by Proving a "Voluntary Sale"

In 2006, the Toledo Museum of Art brought a claim to quiet title to a Paul Gauguin painting, Street Scene in Tahiti, which was counterclaimed by Claude George Ullin. The museum continuously possessed the painting since its purchase in 1939 from a group of European art dealers. The painting was previously owned by Martha Nathan, a German Jew, who sold the painting in 1938 to the above European art dealers. Although

64. Id.
65. See, e.g., Museum of Modern Art v. Schoeps, 549 F. Supp. 2d 543 (S.D.N.Y., 2008); Detroit Institute of Arts v. Ullin, No. 06-10333, 2007 WL 1016996 (E.D. Mich. 2007); Toledo Museum of Art v. Ullin, 477 F. Supp. 2d 802 (N.D. Ohio 2006). Although these cases do not expressly create a presumption, the court's propensity to decide these matters procedurally suggests that the facts of these cases — no Nazi coercion, voluntary sales to Jewish merchants — demonstrate a willingness to grant declaratory judgment for the museum. The cases, however, also indicate a particular attention to the facts and ask if there were a voluntary sale. Thus, it seems these courts would have found evidence of an involuntary sale persuasive against the grant of a declaratory judgment.
67. See id.
68. See id.
the Nazi government required Nathan to turn over several paintings from her personal collection, the Gauguin painting safely evaded Nazi ownership and Nathan relocated to France in 1937. A year and a half after moving to France, and before German occupation, Nathan sold the Gauguin to three prominent Jewish art dealers, two of whom knew her well. The sale price, although below fair market value, was 30,000 Swiss Francs.

The district court observed:

In short, this sale occurred outside of Germany by and between private individuals who were familiar with each other. The Painting was not confiscated or looted by the Nazis; the sale was not at the direction of, nor did the proceeds benefit, the Nazi Regime.

Additionally, the court acknowledged the museum did not "try to hide its possession of the Painting and . . . Nathan knew better than anyone the facts surrounding her own purported sale." Although the court did not ask whether a voluntary sale had occurred, the court willingly granted the museum's declaratory action holding the sale was valid and absent Nazi persecution.

Ullin pursued a separate action against the Detroit Institute of Arts for ownership of Vincent Van Gogh's *Les Besheurs* (The Diggers), another work sold by Nathan in 1938. Like the sale of Gauguin's *Street Scene in Tahiti*, Nathan sold *Les Besheurs* after living in France for over one year and almost two years before Nazi occupation. However, unlike *Toledo Museum of Art v. Ullin*, the Michigan court based its opinion on an "intentional abandonment of a known right:" the three-year statute of limitations barred Ullin's restitution claim.

The most recent declaratory judgment case, *Museum of Modern Art v. Schoeps*, further indicates if a museum brings suit

69. See id. at 804.
70. See id. at 804-05.
71. See id. at 805.
72. Id.
73. Id. at 807.
74. See id. at 809 ("Based on the foregoing, Defendants can prove no set of facts that entitle them to relief.").
75. Detroit Institute of Arts, 2007 WL 1016996, at *1.
76. See id.
77. See id. at *3-4.
to quiet title over a painting sold voluntarily during the Nazi Regime it will be held to be a valid sale. 78 Paul von Mendelssohn-Bartholdy sold the two Picassos at issue, Boy Leading a Horse 79 and Le Moulin de la Galette, 80 before his death in 1935 to Justin K. Thannhauser, a prominent art dealer who was both German and Jewish. 81 “According to the museums’ court documents, ‘there was no restraint of [von Mendelssohn-Bartholdy’s] freedom of movement, his right to serve as a director of the bank, or his ability to transfer artwork or other assets.’ ” 82 The court, not deciding on factual grounds, determined that vis-à-vis Schoeps, the museums’ claim to ownership was superior and dismissed Schoeps’ motion to dismiss. 83

Although the above controversies deal with a museum attempting (successfully) to quiet title to a “Holocaust work” by proving the sale was voluntary, some commentators fear this may instead burden claimants. As commentator Raymond J. Dowd has noted, “[l]itigants are now in the anomalous position of having to prove that the Holocaust really happened, and that a family member’s ‘sale’ of assets to the local Nazi-approved art dealer was not a voluntary, arms-length transaction.” 84 Nevertheless, the presence or absence of Nazi persecution upon the “seller,” continues to be an important factual distinction and determinative of whether a sale was voluntary or coerced. 85

78. See Schoeps, 549 F. Supp. 2d at 549 (defendant’s motion to dismiss denied because collector sold the Picasso paintings shortly before his death during Nazi’s rise to power in Germany).
81. See id. Thannhauser was also the dealer that Martha Nathan sold her works to in France. See Detroit Institute of Arts, 2007 WL 1016996, at *1; see also Toledo Museum of Art v. Ullin, 477 F. Supp 2d at 805.
82. Yip and Spencer, Untouched by Nazi Hands, but Still..., supra note 63.
83. See Schoeps, 549 F. Supp 2d at 549.
85. In 2008, the Museum of Fine Arts in Boston, MA filed an action against an Austrian woman purporting to be the true owner of two Oskar Kokoschka works currently in the permanent collection of the museum. A determinative factor will be whether a sale to a longtime business associate
III. The National Stolen Property Act Should Be Amended to Advance the Rationales of Vineberg and Subsequent Case Law

The National Stolen Property Act (hereinafter “NSPA” or “the Act”) is the best mechanism to encourage efficient and prompt restitution of works stolen by, or coercively sold to, the Nazi Party during World War II. The Act provides a useful framework to, after amendment, criminally sanction current possessors for possession of cultural artifacts they know or have reason to know has been stolen. However, as it exists now, the NSPA is insufficient to appropriately consider the realities of stolen artwork, and in particular, those items looted during times of war. The American courts, as evidenced by the recent Vineberg decision and the declaratory judgment cases discussed above, have consistently broadened the scope of traditional restitution law to find equity for true owners of cultural property stolen during the Holocaust. Additionally, public opinion indicates there is a “changing attitude about restorative justice” and that “something can and should be done to rectify, at least in part, the atrocities of the Holocaust.”

This act is the appropriate vehicle for Holocaust art restitution amendment and, despite a sixty-five year delay, will help promote the timely dispensation of justice.

A. The National Stolen Property Act

The NSPA, enacted in 1948, reads, in pertinent part:

[W]hoever receives, possesses, conceals, stores . . . any goods, . . . which have crossed a State or United States boundary after being stolen, unlawfully converted, or taken, knowing the same to have been stolen, unlawfully converted, or taken; . . . [s]hall be fined under this title or imprisoned not more than ten years, or both.87

will be determined to be a voluntary sale where the Nazis ordered a liquidation of assets. The factual circumstances show that “neither the paintings nor their proceeds ever passed through Nazi hands.” See Yip and Spencer, Untouched by Nazi Hands, but Still..., supra note 63.


Essentially, the Act criminalizes the knowing possession of a "stolen" good which has been transported in interstate or international commerce.\textsuperscript{88} American courts acknowledge the NSPA has a "broad purpose" and should be broadly construed.\textsuperscript{89} Thus, the language of the NSPA applies to any situation where "[property was] stolen in another country,"\textsuperscript{90} even if "the rightful owner of the stolen property is foreign."\textsuperscript{91} Furthermore, the Fifth Circuit decided in United States v. McClain that the NSPA, and in particular the word "stolen," should be construed broadly so as "to meet the object and purpose of the NSPA to protect owners attempting to recover stolen property."\textsuperscript{92}

Originally, Congress enacted the NSPA "to coordinate federal and state prosecution of the illegal interstate movement of fraudulent securities, counterfeit money, and stolen goods."\textsuperscript{93} Recently, however, attorneys began using the NSPA to prosecute illegal importation of cultural property into the United States.\textsuperscript{94} This change in the application of the law is tied to the Cultural Property Implementation Act, by which Congress ratified the United Nations Educational, Scientific, and Cultural Organization Convention of 1982 ("UNESCO Convention").\textsuperscript{95} The Cultural Property Implementation Act prohibits the importation into the United States of any article of stolen cultural property from a UNESCO signatory state.\textsuperscript{96} Violations of this act result in the seizure, forfeiture, and return of the cultural property to the country of origin.\textsuperscript{97} Consequently, after the ratification of the

\textsuperscript{88} Id.
\textsuperscript{90} United States v. Greco, 298 F.2d 247, 251 (2d Cir. 1962).
\textsuperscript{91} United States v. Schultz, 333 F.3d 393, 402 (2d Cir. 2003).
\textsuperscript{93} Graham Green, Evaluating the Application of the National Stolen Property Act to Art Trafficking Cases, 22 HARV. J. ON LEGIS. 251, 251 (2007).
\textsuperscript{94} See id.
\textsuperscript{97} Morrow, supra note 95, at 254.
UNESCO Convention, prosecutors began utilizing the NSPA as an “enforcement arm of the [Cultural Property Implementation Act].”

1. What Constitutes “National Stolen Property”?

The NSPA does not provide a definition for “stolen,” and as such has been broadly interpreted by American courts. The Second Circuit suggests looking to a common law definition of “stolen” is insufficient because “stolen’ has no accepted common-law meaning.” The court, however, has held “NSPA applies to property that is stolen from a foreign government,” and the court will not treat that property “any differently from property stolen from a foreign museum or a private home.” Furthermore, the court acknowledged that “goods that belong to a person or entity and are taken from that person or entity without its consent are ‘stolen.’” The interpretation of the word “stolen,” however, has never meant a coerced sale, and thus, the NSPA’s statutory protections would not apply to works forced into auction by political and military bodies, like the Nazi Party or other wartime transfers. Consequently, the NSPA currently offers no relief for such victims as Dr. Max Stern.

The term “national property” is best informed by the phrase “cultural property,” which refers to objects that have “artistic, archaeological, ethnological or historical interest” or value. Furthermore, both terms suggest that the property is “vital to a nation’s collective cultural identity” and therefore, “the specific object . . . is thus best appreciated within the context of its place of origin.” This underlying concept informs the Act’s prohibition of illegal importation of this cultural property.

98. See id. at 255.
99. See Betts, supra note 92, at 79 (summarizing case law dealing with the term “stolen” as it relates to national patrimony laws and how they apply in the United States).
101. Id. at 416.
102. Id. at 410.
103. Id. at 399.
105. Morrow, supra note 95, at 251.
2. Criminal Sanctions Dependant on “Knowing” Mens Rea

A violation of the NSPA occurs when an offender receives and possesses an item, “knowing the same to have been stolen, unlawfully converted, or taken.” Some courts interpret this to mean that “the prosecution ha[s] to show that . . . defendants either knew that the items were stolen or that possessing or removing the objects violated [another nation's] law.” Furthermore, United States v. Schultz demonstrates that the “only knowledge requirement in the NSPA is knowledge that the goods were 'stolen, unlawfully converted, or taken.” Therefore, defendants may argue that they did not know the objects were stolen, but cannot argue that they did not know the NSPA governed their actions or that they were not privy to another nation's property law.

Because the NSPA is a specific intent crime, it cannot, as the Act currently exists, apply to situations where an item has questionable provenance with gaps during time of war and a possessor knows of those gaps. In effect, even if the possessor may believe or suspect an artifact may have been stolen and continues to possess without researching the provenance defect, no liability arises because he is not “knowingly” in possession of a stolen good. Therefore, as currently drafted, the Act does not provide incentive to research provenance either prior to or after a purchase to guarantee good title. This high evidentiary burden for the prosecution is inconsistent with the purpose and scope of the NSPA as outlined by Congress. In fact, this burden hinders rather than aids the efficient return of cultural artifacts to the true owner.

B. Amendment

Any amendment to the NSPA must consider the evolving understanding of the nature of the Nazi Party and the transactions that occurred during the Third Reich. It also must take into account the vast amount of research that has already been conducted about the Nazi art-looting, and the current and

107. Morrow, supra note 95, at 256.
108. Schultz, 333 F.3d at 411 (emphasis in original).
109. See id.
future efforts of the worldwide art community to thoroughly document all Holocaust provenance questions.

In 2004, the Commission for Looted Art in Europe was called on to undertake a study “establishing a common cataloguing system,” “developing common principles regarding access to public or private archives,” “identifying common principles on how ownership or title is established,” and contemplating the creation of a “cross-border coordination administrative authority to deal with disputes on title of cultural goods.” The United States took similar steps at the urging of the European community, Holocaust survivors, and museum boards at the Washington Conference in 1998 and through subsequent federal legislation. In particular, the American Association of Museums and the museum community currently hold itself to “develop and implement policies and practices” addressing “the possibility that an object in a museum’s custody might have been unlawfully appropriated as part of the abhorrent practices of the Nazi regime.”

Instead of creating new legislation, which may be ineffective, this Comment posits that the NSPA can be easily amended to incorporate evolving traditions and sentiments and, thus, be a more effective tool for true owners. The two areas of the NSPA ripe for amendment are broadening the act to include coercive transfers as “stolen” national property and imputing knowledge of the current possessor because wartime transfers of title are presumed invalid.

1. Wartime Involuntary Transfers Should be “Stolen” Under NSPA

In 1998, the United States Holocaust Assets Commission Act established the Presidential Advisory Commission on Holocaust

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Assets in the United States (hereinafter “PCHA”). The PCHA’s sole goal is “conduct[ing] a thorough study and develop[ing] a historical record of the collection and disposition of... [works of art],... if such assets came into the possession or control of the Federal Government... at any time after January 30, 1933.” 113 The PCHA study indicated that Congress should amend the NSPA to be current with available research.114 In particular, the PCHA recommended that the NSPA be amended to eliminate the defense that Holocaust art loses its status as stolen property when “it [is] recovered by law enforcement or military authorities, or when title [is] transferred in a country whose laws provide that stolen property loses its status as such when a sale or transfer occurs.” 115 Thus, it would appear there is room to argue that the word “stolen” should be interpreted broadly enough to include coerced sales during times of war.

Often, when applying the NSPA, courts look to whether the object was legally owned by an entity before it was stolen.116 By looking to the last legal owner and how he or she was dispossessed of his or her interest in the object, courts can equitably determine whether the object was stolen. This frequent analysis technique demonstrates that “stolen” is not and should not be a clear-cut determination. Furthermore, courts agree that “stolen” should be construed as broadly as possible to provide for the most equitable resolution when dealing with war-looted art.117

As stated above, the Rhode Island District Court ultimately held that the “[N]azi party’s actions [in forcing Stern to auction his works] were therefore properly classified as looting or theft.” 118 In so many words, the court equated coerced sales with stealing. Thus, if the court is willing to equate these two actions for the purposes of Holocaust art citing equity and evolving public opinion, Congress should make for similar provisions within the

115. Id.
117. See id. at 1040-41.
NSPA.

2. Relaxation of *Mens Rea* Consistent with Act and Public Opinion

In its current state, the NSPA permits a bona fide purchaser of Holocaust looted art protection from criminal sanctions because he does not possess the requisite *mens rea* to be guilty under its provisions.\(^{119}\) In practice, just because the bona fide purchaser can claim ignorance as to the prior provenance of the item, a true owner could be out of luck. "Knowing" possession often requires too stringent an evidentiary burden for true owners of Nazi-looted art to recover their lost possessions. Equity dictates certain steps be undertaken due to the nature of a Nazi-looted art restitution claim. In addition to the manner the artwork was taken from Jewish owners during the Third Reich, true owners must overcome legal hurdles – such as choice of law, statutes of limitation and sovereign immunity – as well as research hurdles. Additionally, the artwork may have been transferred numerous times, further blurring the line between theft and bona fide purchase. These hurdles already make it nearly impossible to track down a looted work. Furthermore, "the artwork is likely to have appreciated in value in the past seventy years to further complicate any possible resolution between the original owner and the good faith purchaser."\(^{120}\) Thus, incentive to "do the right thing" seems to plunge as value climbs.

In light of these hurdles, the *mens rea* requirement should be relaxed to include those who reasonably know or should know they are in possession of Nazi-looted objects. Current possessors should be on notice that works with provenance gaps occurring between 1933 and 1945 in Europe may have been stolen by the Nazi Party, regardless of whether the item was in fact confiscated or forcibly sold. The "requirement of a heightened level of proof under the NSPA frustrates enforcement of the law, and concomitantly, the attainment of the law's goals of deterrence, punishment, and return."\(^{121}\) By relaxing the *mens rea* to a negligence standard, the NSPA better accomplishes its purpose –

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\(^{120}\) Choi, *supra* note 17, at 170.

\(^{121}\) Morrow, *supra* note 95, at 261.
achieving equity for those who have lost a piece of their history and deterring willful ignorance of purchasers. Ultimately, this high burden upon purchasers encourages a high societal demand for good faith purchasing and due diligence.

3. Adequate Due Diligence Provides Immunity

If failure to comply with the NSPA leads to the “stick” of criminal prosecution, then the “carrot” in this amendment application would be immunity. Bona fide purchasers should be able to shield themselves from liability in this context if they perform adequate due diligence. Therefore, the NSPA should be further amended to provide a safe harbor provision for performing this “good behavior.”

A bona fide purchaser can demonstrate due diligence by actively pursuing research over all objects, but in particular, those with questionable provenance. As earlier referenced, there are many resources for the good faith purchaser to determine whether he or she is receiving good title to an object. With the advent and rise of the Internet Age, these resources are not only available to all purchasers, but records are quickly being coordinated across borders. Although due diligence and good faith will shield purchasers, willful ignorance should no longer be a luxury, and certainly not a defense when dealing with these “forgotten prisoners of war.”

4. Amendment Would Encourage Efficient Satisfaction of Claims

By amending the NSPA to restitute those hurt by political and military actions, the United States would set an international standard by which oppressed peoples can recover their lost property. Consequently, instead of following the flailing attempts to restitute this art initiated since the end of the war, the United States can set an example with aggressive legislation for other nations debating this dilemma to follow.

Equity and public sentiment already illustrate the citizenship of the United States wants “restorative justice,” but this amended legislation would result in the dynamic goals of swifter justice and clearing the cloud of questionable provenance hanging over thousands of works. The “mills of justice” may generally grind
slowly, but sixty-five years is too long. The time has come for vigorous and commanding legislation.

C. Other Possibilities

Since the end of World War II, numerous scholars, politicians, attorneys and victims have navigated the murky waters of repatriation and restitution. The problem of Holocaust restitution has been tackled through national and international law, through local acts and international conventions. Although ideas abound and concern to complete the task drive diplomats and politicians to develop comprehensive restitution, each idea has failed for lack of jurisdiction, for lack of cooperation, or for lack of scope.

Recent attempts to reform restitution as it pertains to Holocaust art include, most notably, the 1970 United Nations Education, Scientific and Cultural Organization Convention on Cultural Property (hereinafter the “UNESCO Convention”) and the 1995 Convention on Stolen or Illegally Exported Cultural Objects hosted by the United Nations International Institute for the Unification of Private Law (hereinafter the “UNIDROIT Convention”). UNESCO Convention signatory nations (a group to which the United States belongs):

[R]ecognize that the illicit import, export and transfer of ownership of cultural property is one of the main causes of the impoverishment of the cultural heritage of the countries of origin of such property . . . [and] [t]o this end, the States Parties undertake to oppose such practices with the means at their disposal, and particularly by removing their causes, putting a stop to current practices, and by helping to make the necessary reparations.

The United States implemented the UNESCO Convention via the NSPA and Cultural Property Implementation Act, but as addressed above, as currently drafted, neither act fully

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122. Vineberg, 548 F.3d at 58-59.
123. See UNIDROIT, supra note 96.
contemplates the complexities of Holocaust restitution art. In fact, if an illicitly obtained cultural object is brought into a nation that does not have an agreement with the source nation to reciprocally enforce property law, the local law of the new host nation would not require the object be returned.\footnote{125}{See Kimberly L. Alderman, \textit{The Ethical Trade in Cultural Property: Ethics and Law in the Antiquity Auction Industry}, 14 ILSA J. INT'L & COMP. L 549, 560 (2008).}

The UNIDROIT Convention requires restitution of stolen objects, but requires “any request for the return shall be brought within a period of three years from the time when the requesting State knew of the location of the cultural object and the identity of its possessor, and \textit{in any case within a period of fifty years from the date of export}.”\footnote{126}{UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, Article 5(5), http://www.unidroit.org/English/conventions/1995culturalproperty/1995culturalproperty-e.htm (last visited Oct. 3, 2009).} In addition to this fifty-year limitation period, neither the United States nor Germany signed this convention.\footnote{127}{UNIDROIT, Status of the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects – Signatures, Ratifications, Accessions, http://www.unidroit.org/english/implement/i-95.pdf (last visited Oct. 3, 2009).} Thus, although both conventions were ambitious in scope, they were largely unsuccessful because they suffered from non-participation of key states or did not encourage nations to enact drastic responsive legislation.

As discussed earlier, the Washington Conference of 1998 resulted in recommendations for the United States to implement at the suggestion of politicians, academics, attorneys and art historians.\footnote{128}{See The Presidential Advisory Commission on Holocaust Assets, \textit{supra} note 111.} While the Commission made numerous suggestions, none of the options have yet been implemented, thus illustrating another failure of cooperation and vision.

Perhaps the most confusing area of reform proposed for the restitution of Holocaust art, however, is that of statute of limitations and laches defenses. Currently, each state utilizes different rules regarding the application of statute of limitations to restitution claims – there is no universal standard. The statute of limitations is nearly impossible to apply to Holocaust art because there is too much disagreement of when to begin the
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 clocks – from discovery or from the point of sale or theft. While a move towards a universal statute of limitations as it applies to Holocaust art would be helpful and permit true owners to pursue stolen works in a fair fashion, this type of reform does nothing to encourage current possessors to perform title checks.

Although European countries passed several laws aimed at ensuring original owners’ art pieces were returned to them, academics estimate over $10 billion in stolen art is still missing. One thing, therefore, is clear: past proposals and laws have been too limited or have lacked proper enforcement power to accomplish the lofty goal of returning Holocaust art. Unlike other attempts suggested in the past, this proposal to amend the NSPA takes an aggressive step forward by criminalizing knowing possession of items that were sold despite the owner’s assent. Further, this proposal better addresses the complexity that not all Holocaust art was simply stolen – many pieces were actually bought, at criminally low prices.

IV. Lessons Unlearned: “A Crime Against Mankind”

History instructs there are too many instances of “lessons unlearned;” all too often after the “first” instance of an event, society fails to address its limitations before the “second” occurrence. Looting is not a new phenomenon and the Nazis were neither the first nor the last to loot art on a massive scale. The Ancient Greeks believed “when a city is taken in war, the persons and the property of all the inhabitants therefore belong to the captors.” The Romans paraded their plundered art in “triumphal processions of [their] newly acquired treasures.” During the Napoleonic Era, the defeated country offered the French army national “spoils” for Napoleon’s Louvre project. And in 2003, the Iraqi National Museum in Baghdad was invaded,

130. See Choi, supra note 17, at 169-70.
132. Id. at 7.
133. See id. at 12-13.
not once, but three times by the Iraqi militia, the local peoples and finally the United States military. Donny George, the Director of Research at the museum said afterward “this is a crime, not against the Iraqi people, but against mankind.”

Although undoing past wrongs is impossible, assertive and severe legislation can provide true owners of this looted art some justice. The proposed amendment of the NSPA would provide such relief to not only the victims of Nazi-looting, but also to those victims of all wartime looting. This aggressive legislation will best counter this type of atrocious crime, will illustrate these war crimes negatively affect all of mankind and ultimately demonstrate these crimes will not be tolerated. “The mills of justice may grind slowly,” but it is time for the “forgotten prisoners of war” to return home.*

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* Author’s Note: Baroness Bissonnette’s story continues not only to the present, but has no visible end. On October 27, 2009, the arts and antiquities unit of the U.S. Customs and Immigration Enforcement agency searched her Providence home, seizing “miscellaneous unidentified documents, photos and three passports.” Katie Mulvaney, Providence Couple Embroiled in Search for Nazi Art, PROVIDENCE JOURNAL (R.I.), Nov. 5, 2009, at A1, available at 2009 WL 22144259.