RAYMOND J. DOWD

Federal Courts and Stolen Art: Our Duty to History

FEDERAL COURTS HAVE started to confront many claims involving works of art that were stolen during World War II. During the war, massive looting of artwork took place—it was perhaps the greatest looting in human history. Following the war, Germany and Austria enacted some of the world's strictest personal privacy laws, and the Iron Curtain went up. Ostensibly to protect minorities from a future Adolf Hitler, Western privacy laws had the effect of concealing the extent and nature of the looting and making it impossible for families—many of whom had lost multiple members—to recover lost property.

A treaty signed by 11 nations in 1955 kept records of Nazi concentration camps confidential, impossible to search, and extremely difficult to locate—even for close family members. In 2007, those nations finally ratified treaty amendments that will permit access to the Bad Arolsen records on 17.5 million people. These developments and the opening of other archives over the past decades have finally enabled destroyed communities to start the process of finding each other. Families are reuniting, and stories of lost family property are being exchanged and compared. For the first time, the power of the Internet is being harnessed to assist victims in tracing their lost property, including artwork.

Recent books and films are now starting to capture some of the events of wartime looting. In 1994, historian Lynn Nicholas wrote *The Rape of Europa*, which was made into a film that came out this past year. Robert Edsel's book, *Rescuing Da Vinci: The Single Most Extraordinary "Untold" Story of WWII*, tells the efforts of a group of Allied soldiers known as the "Monuments Men." These soldiers went onto the battlefields, saved monuments from destruction, and oversaw the return of artwork following the war.

The Holocaust had a legal structure. More than 400 laws and decrees were passed in Germany and Austria, many of which have not been translated or, if they have been translated, are not available commercially. A few examples show the nature of these laws:

- The pre-Nazi Weimar Republic imposed a "flight tax" of 25 percent; anyone who wanted to leave Germany had to put their assets in the hands of a trustee, who ensured that Germany got its cut.
- In 1935, Germany passed the infamous Nuremberg Laws on Citizenship and Race defining who was Jewish and stripping Jews of German citizenship. *See* www.mtsu.edu/~baustin/nurmlaw2.html.
- On April 26, 1938, shortly after Germany invaded Austria, Hitler passed a law requiring all Jews who possessed 5,000 Reichsmarks or more to file a Jewish Property Declaration, listing all property in extraordinary detail. This law empowered Hermann Goering, director of the Four Year Plan, to assure that the Third Reich would get these assets.

The Jewish Property Declaration law was the cornerstone of the Holocaust. These declarations were filed in summer 1938 under pain of imprisonment and confiscation of the property. In 1938, the Nazis were broke and had overextended their credit to finance their arms build-up. The solution they found was to steal all Jewish property listed in the property declarations. By November 1938 the Reich Ministry of Finance calculated the extent of the property declared and the time that it would take for the property to be "liquidated." In November 1938, the "atonement tax" was assessed at one billion Reichsmarks against Jews, making them pay for Nazi violence against Jews.

In December 1938, laws were passed banning Jews from making commercial transactions and appointing Nazi trustees to oversee the liquidation of their property. Additional fees, penalties, and assessments were levied against Jews to ensure that if they left the Reich they would be penniless. All payments to Jews were kept in blocked accounts, and Jews could get only enough for subsistence living as they were herded into communal living quarters. These measures were done "legally." A recent book, *Hitler's Beneficiaries* by historian Goetz Aly, notes that 9 percent of Germany's entire budget in 1939 came from property stolen from Jews.

On Jan. 5, 1943, the Allied governments issued the Inter-Allied Declaration Against Acts of Dispossession Committed in Territories under Enemy Occupation or Control, which warned neutral countries that

transactions in looted goods would be rescinded after the war. 8 DEP'T. ST. BULL. 21 (1943). Following the war, the Allies passed military laws that nullified transactions that had taken place as a result of Nazi domination, even in cases where a good-faith purchaser existed. Remarkably, there are no detailed surveys or satisfactory discussions in U.S. law reviews of the Nazi-era laws, penalties, punitive taxes, and Allied attempts to unwind these transactions.

On Dec. 11, 1950, the U.S. Department of State issued a bulletin to universities, museums, libraries, art dealers, and booksellers in which it noted reports of sales of stolen artworks by past and present members of the armed forces. In the bulletin, the department stated, "It is the responsibility and desire of the [g]overnment of the United States to recover and return to owner nations those cultural objects, including works of art, archival material and books, looted, stolen or improperly dispersed from public and private collections in war areas and brought to the United States during and following World War II." In 1964, the *New York Times* reported that, as a result of these efforts, the U.S. State Department had recovered almost 5,000 stolen works of art found in the United States between 1945 and 1963.

With the advent of the Cold War, however, the Allies lost their zeal for pursuing the restitution issue in Europe. Back home, however, U.S. district courts were urged to assist in rescinding Nazi transactions. The U.S. State Department issued a letter to that effect, contained in *Bernstein v. N.V. Nederlandsche-Amerikaansche, Stoomvaart-Maatschappij*, 210 F.2d 375, 376 (2d Cir. 1954), which stated that Nazi acts would not be subject to the Act of State Doctrine. Letters from the State Department urging a court to provide a forum to claimants are now known as "Bernstein letters." A recent Supreme Court ruling *Republic of Austria v. Altmann*, 541 U.S. 677 (2004), affirmed the U.S. commitment to provide a legal forum for stolen property claims when the justices permitted the heir of an original owner of artwork to sue Austria in a U.S. court.

But not all Americans have been committed to restitution. With a strong postwar dollar, in the 1950s and 1960s American museums and private collectors went on buying sprees, paying bargain-basement prices for artwork coming from Europe with missing provenances. After the private collectors who had purchased much of the artwork died, their estates left generous donations of problematic works to museums and received generous tax benefits in return. With remarkably little dissent, practically an entire generation of art historians has turned a blind eye to this practice.

Under great pressure from the Clinton administration, in 1998, museums finally agreed to publish on the Internet works of art that had provenance gaps arising from World War II and to make it easier for potential claimants to investigate claims and to pursue recoveries of property owned by their families. Many museums with such holdings have now added sections to their Web sites that enable researchers to locate and view artwork and provenance information. As more information is published, more artwork will be spotted by families who have given up hope, and genealogists will be able to track down owners of orphaned artwork. According to testimony given to Congress by the director of the Art Institute of Chicago in 2006, additional research must be done on "tens of thousands" of artwork with Nazi-era provenance problems.

Recently, a case in Rhode Island determined that a Nazi-era sale was a "forced sale" and awarded summary judgment. *Vineberg v. Bissonnette*, 529 F. Supp. 2d 300 (D.R.I. 2007). The case is currently being appealed to the First Circuit. A number of cases have been filed in federal courts by museums seeking declaratory judgments that sales of artwork by Jews in the mid-1930s were "voluntary." Famous cases of claimants tracking down family heirlooms abound, and the caseload should soon increase. Thus, litigants 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. Proving one murder or theft is possible in civil practice, but when thousands have been murdered and witnesses have been eliminated or are unavailable, proving the individual theft of one work of art can prove elusive.

A starting point is the decision reached by of the international tribunal that met to consider the charges against Nazi war criminals in *The Nurnberg Trial 1946*, 6 F.R.D. 68 (Int'l Military Tribunal). In 1946, the U.S. Government Printing Office printed the trial exhibits in an eight-volume set, which included many German laws that were translated into English. An excerpt of the proceedings of the Nuremberg Trial is available on DVD, which is well worth watching. Following prosecutor Robert Jackson's example, it may be easier to prove that thousands—or hundred of thousands—of works of art were despoiled, rather than prove an individual case. In this manner, the evidentiary presumption should shift against the holder of a European artwork that has dubious documentation.

As families reunite, as old stories are exchanged, and as new leads and clues emerge, federal judges will be deciding whether or not the claims arising out of these Nazi-era transactions should be time-barred. Since the war, it has been extremely expensive to research these questions, involving, as it does, hiring expensive historians in multiple jurisdictions to search for a needle in the proverbial haystack. Our common law throughout the United States is that "no one can take title from a thief." But these Jewish families will be confronted with the defense of laches as well

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engaged in some form of elder law, whether or not we characterize those cases as such. Cases related to Social Security benefits, veterans' benefits, health care, and health care fraud all involve the area of elder law to some degree. As the population ages, a greater portion of the litigants in federal courts will be seniors, if for no other reason than seniors will occupy a larger sector of the universe of consumers of legal services.

It is unlikely that the federal court system will be able to create specialty courts and still adhere to its jurisdictional limitation.[3] However, modifying traditional federal courtrooms to accommodate the aging population is clearly a measure that we can advocate. As we adapt our courts to new technology, we should also urge that the modifications that need to be made for senior citizens be included among the physical changes.

In addition, there are many subjective and relatively cost-neutral steps that can be taken. Good Guardianship,[4] a pamphlet published by AARP, offers 10 suggestions for partnerships between courts and local senior organizations to improve the delivery of judicial services to aging adults. The pamphlet also offers a list of other resources available to assist the legal community in providing help to senior citizens as they navigate the court system.

As federal lawyers, we need to focus on this increasingly vital topic. As the population shifts from the "baby boom" to a "senior boom," many of us and many of our clients will need to confront the issues raised by age. If we ignore these problems, we will shirk our responsibility for good government and the proper administration of justice. **TFL**

Endnotes

[1]Max Rothman and Burton Dunlap, *Judicial Responses to an Aging America*, 42 Court Review: The Journal of the American Judges Association 8 (2005).

[2]Denise O. Dancy and Brenda K. Uekert, *The Aging of America, The Rise of Elder Abuse and Its Impact on Judicial Education*, NASJENews Quarterly, Summer 2007, nasje.org/news/newsletter0703/resources02.htm.

[3]A clear exception is the U.S. Court of Appeals for Veterans' Claims.

[4]*See* www.ncea.aoa.gov/NCEAroot/Main_Site/pdf/publication/guardianshipombudsman.pdf.

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as accusations that they did not act reasonably and diligently. Courts will be called upon to answer the question: What diligence was reasonable? How does a family explain that a refugee was too traumatized to speak about a horror that he or she had survived and too busy trying to feed a family to finance costly and fruitless searches for missing assets?

In *Marei von Saher v. Norton Simon Museum of Art at Pasadena*, 2007 WL 4302726 (C.D. Cal. 2007), the court found California's Civil Code 354.3, which extended the statute of limitations for Holocaust-era claims until 2010, unconstitutional. The case is currently on appeal to the Ninth Circuit.

Our federal courts now face the choice of whether our common law rule that "no one can take title from a thief" will remain the fundamental law of the land. It is to be hoped that district courts will interpret equitable doctrines such as laches in light of the mass extermination of an entire people, will heed our strong federal policy of ensuring that property looted by the Nazis is returned to its rightful owners, and will strike down any statutes of limitations that violate our nation's duty under international law to provide a meaningful remedy. Our American example should be followed by other countries, where tens of thousands of looted works of art have been concealed to this day. If the United States does not respect the rights of property owners and cut through the legalisms protecting holders of stolen goods, no one else will. **TFL**

Raymond J. Dowd is a partner with the firm of Dunnington Bartholow & Miller LLP in New York City and is a member of the FBA Editorial Board.

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