RAYMOND J. DOWD

Federal Courts and Stolen Art in 2011: A Crisis for Americans

On Oct. 6, 2010, I met former District Attorney Robert Morgenthau, who is now of counsel at Wachtell Lipton Rosen & Katz, at the Museum of Jewish Heritage: A Living Memorial to the Holocaust in New York City. A founder of the museum, Morgenthau told me about his battle to find support among the Jewish establishment to memorialize the Holocaust and the opposition he encountered. He described how many people would just prefer to forget.

We had just toured an exhibit on the Morgenthau family that recounted the political awakening experienced by Henry Morgenthau Sr. when he was the U.S. ambassador to the Ottoman Empire (1913–1916). When Ambassador Morgenthau protested the Armenian genocide, he was asked by both the Turks and the U.S. State Department why he cared, since he was a Jew. His response: "I am an American." He quit his post and toured the United States to speak out against the tragedy.

In the July 2008 issue of *The Federal Lawyer*, I wrote a column introducing many readers to the issue of Nazi-looted art confronting U.S. federal courts. In the two years that have elapsed, more cases have been filed, and some circuit courts of appeal have spoken. During that time, my quest to obtain the return of artworks looted by the Nazis from Fritz Grunbaum, an Austrian Jewish cabaret artist who was interned and murdered in the concentration camp at Dachau, has led me to give lectures at the Jewish Museum in Berlin, at Yad Vashem in Jerusalem, at universities and synagogues, and to chapters of the Federal Bar Association.

Fascinated by my interest, many ask me if I am Jewish. My background is Irish Catholic, but the real response, like that of Henry Morgenthau Sr., is that this is an issue that all Americans should care about. I am an American. If our museums contain stolen property, it poisons all our lives and teaches our children the opposite of what we all believe in. The public is not "educated," "elevated," or "enlightened" by being exposed even to the greatest artwork that belongs in a private Jewish living room. Prosecutors should be pursuing cases involving stolen art just as diligently as they pursue cases involving stolen cars. We don't ask the religion of the car's owner before arresting the thief and returning the car.

Why are these cases involving people who have long been dead hitting our federal courts only now? Here are a few reasons:

- Entire families were murdered and unable to trace relatives for decades.
- Children were shipped to foreign countries and lost their language skills.
- At the urging of the Allies, Europe enacted the world's strictest privacy laws to prevent another Hitler, but in fact preventing Jewish families from being able to trace one another.
- Many countries, particularly republics in the former Soviet Union, had property and genealogy records completely sealed.
- Only this year have millions of concentration camp records been made accessible through Yad Vashem and the U.S. Holocaust Memorial Museum.
- Tracing artworks takes decades, and many remain hidden or "hide in plain sight" with key provenance records concealed from user-friendly public inspection.

What has changed over the last two years? On Sept. 2, 2010, in *Bakalar v. Vavra*, 2010 WL 3435375 (2d Cir. Sept. 2, 2010), the Second Circuit vacated the trial judge's application of Swiss law to give a Swiss purchaser the title to an Egon Schiele artwork stolen from Fritz Grunbaum. I had lost the first federal Holocaust-era art trial in U.S. history based on the application of Swiss law and then spent a year of my life preparing and arguing the successful appeal. Even though this case was an important victory, the issue is now to be reconsidered by the district judge, who will be applying New York law this time, and the litigation, which commenced in 2005, shows no signs of ending.

But much more is happening. On Oct. 4, 2010, the U.S. Supreme Court invited the acting solicitor general to file briefs expressing the view of the United States in *von Saher v. Norton Simon Museum of Art,* 2010 WL 3834227. In *von Saher*, the Ninth Circuit struck down California's extension of its statute of limitations to permit Holocaust survivors and their survivors to file art claims as a violation of the executive branch's power to conduct foreign policy.

In *Cassirer v. Kingdom of Spain*, 616 F.3d 1019

(9th Cir. 2010) an en banc panel of the Ninth Circuit determined that a suit against Spain to recover a Nazi-looted artwork was not barred by the Foreign Sovereign Immunities Act, even though Spain had not stolen the artwork but had merely acquired it. In *Dunbar v. Seger-Thomschitz*, 615 F.3d 574 (5th Cir. 2010), the opposite result was reached, based on the application of the Louisiana law of acquisitive prescription and a different set of facts.

What can we expect from this new wave of litigation? First, the issue has started to move into the public eye and out of an apparent cultural amnesia. In September 2009, Robert Edsel, a Texas oilman-turned-art detective, published *The Monuments Men: Allied Heroes, Nazi Thieves, and the Greatest Treasure Hunt in History* (Center Street). PBS has aired the film *The Rape of Europa*. Popular culture is starting to revisit the topic of Nazi art looting—a subject that was very much in the public eye in 1945 and 1946—and articles are filling the pages of such U.S. publications as *National Geographic, Atlantic Monthly*, and *The New Yorker*.

In 1943, a commission headed by Supreme Court Justice Owen Roberts was created to protect works of cultural value in Allied-occupied areas of Europe. In 1950 and 1951, the U.S. State Department distributed bulletins warning museums, art dealers, colleges, and libraries not to acquire artworks of European provenance without ascertaining the chain of title. As everyone knew then, if a work of art came from Europe and the previous owner was unknown, the chances were pretty good it had been stolen from a Jew. On Nov. 16, 1964, the *New York Times* published a front-page story by reporter 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.

Another change in the past two years has been a growing interest among scholars in the property crime aspect of the Holocaust. Until very recently, Holocaust historians have remained resolutely focused on the issue of genocide and mass murder. But in the wake of the 2006 publication in Germany of historian Goetz Aly's *Hitler's Beneficiaries: Plunder, Racial War and the Nazi Welfare State* (Henry Holt, 2007), scholars have started to examine the profit motives for the greatest crime in human history. An extremely important addition to the scholarship in this area is historian Martin Dean's *Robbing the Jews: The Confiscation of Jewish Property in the Holocaust: 1933–1945* (U.S. Holocaust Memorial Museum, 2009).

Unfortunately, American historians and legal scholars have shown little serious interest in publishing works on Nazi art looting, with several outstanding exceptions such as publications by Professor Jonathan Petropoulos of Claremont McKenna College and Professor Jennifer Kreder of the Salmon P. Chase Law School in Northern Kentucky. Law reviews reflect a growing interest among law students; again, however, with a few exceptions, the topic is not treated seriously or systematically in the nation's law schools.

An additional change in the past two years has been a systematic backlash from U.S. museums. In the wake of D.A. Morgenthau's seizure of Egon Schiele's *Portrait of Wally* and *Dead City* at New York's Museum of Modern Art, the international community reeled from the scandal. In response, the U.S. State Department organized the Washington Conference on Nazi-Confiscated Art, which led to the adoption of the Washington Principles (available at www.state.gov/www/regions/eur/981203_heac_art_princ.html).

Following adoption of the Washington Principles in December 1998, many countries—including Austria, Germany, and Great Britain—formed restitution commissions, opened up archives, and encouraged solutions based "on the merits" rather than by using technical defenses such as statutes of limitations. In the United States, however, museums repeatedly sued Jewish heirs for declaratory judgments, claiming laches and conducting psychological warfare, accusing claimants and their attorneys of laziness and greed.

In the decade that followed the adoption of the Washington Principles, U.S. museums have refused to grant free and open access to archives and have failed to publish acquisition information for artworks with a European provenance entering the United States after 1932 but created prior to 1946. Works on paper and sculptures have been completely neglected. The American Association of Museums has thus far failed to condemn such tactics.

In 2009, I was invited to participate in a panel of legal experts discussing the topic of legal obstacles to restitution at the Prague Conference on Holocaust-Era Assets. Amid self-congratulatory presentations by museums and auction houses, I was treated like the skunk at the tea party. The U.S. delegation, led by Special Envoy Stuart Eizenstat, included representatives of U.S. museums, demonstrated a sincere effort by Secretary of State Hillary Clinton to bring U.S. museums into a consensual, nonlitigious process for restituting stolen artworks.

The Prague Conference culminated in 46 countries signing the Terezin Declaration at the infamous concentration camp at Theriesenstadt. www.holocausteraassets.eu/files/200000215-35d8ef1a36/TEREZIN_DECLARATION_FINAL.pdf. The declaration had no impact on U.S. museums, however. The continual stonewalling on the part of U.S. museums has had a deleterious effect on the efforts of the Jewish diaspora to reclaim property throughout the world. Ambassador Stuart Eizenstat continues to lead an effort to create a U.S. restitution commission under the auspices of the State Department. I attended a conference in Washington, D.C., this spring at which Eizenstat spoke and was astonished to see this career

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Judge Hogan combined his love of teaching with his love for trial work and his enthusiastic support for the next generation of lawyers, many of whom have gone on to practice in federal court.

Reflecting on his role as a judge, Judge Hogan advised, "Don't be overly impressed with the robe. The job belongs to the public. It is just my privilege to occupy the space for a time." He said it's important for a judge to be humble. "You may appear impressive, but there have been and will be times when you are the least gifted lawyer in the courtroom."

Judge Hair believes that commonsense and the ability to reduce the complex to the easily understandable are among Judge Hogan's greatest skills. When asked which of his accomplishments he's most proud of, he replies: "That all my children are good parents and good examples for our grandchildren. That I have managed to obtain the trust of my colleagues on and off the bench. … That I married the right girl. That I excel at cutting the grass, washing and waxing cars, power washing decks, and painting fences."

In addition to his work as a federal magistrate judge, Judge Hogan has been an active member of both professional and community organizations. He is a member of the Cincinnati, Ohio State, and Federal Bar Associations and a former president of the Potter Stewart Inn of Court. For more than 20 years, Judge Hogan has been a trustee of Central Clinic, a provider of behavioral health and forensic services, and has served as chair of the clinic's board. He has served as a knothole baseball coach and a member of his church's education commission and is currently the chair of the Building Maintenance and Grounds Committee of a community condominium project near Lake Cumberland, Ky., where he enjoys boating and golfing in his spare time.

"Sometimes we are judged by what is said and not said about us," says Judge Helmick. "In my 36 years of knowing Judge Hogan, I've never heard an unkind word spoken of him. That is quite an accomplishment in this day of instant feedback and blogging." Indeed, Judge Hogan's life's work demonstrates that the universal praise for him as an outstanding jurist, lawyer, husband, and father is well-deserved. **TFL**

Laura Welles Wilson and Karen Litkovitz were both career law clerks to Magistrate Judge Hogan.

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of vacancies in certain circuit and district courts, which can delay cases being heard in a timely fashion. Similarly, our Association supports the increase in CJA panel attorney and ALJ pay rates.

And now Judge Jay Zainey of the Eastern District of Louisiana is working with the FBA to bring the SOLACE program to national prominence by starting programs with a number of FBA chapters throughout the country. SOLACE is the acronym for Support of Lawyers/Legal Personnel—All Concern Encouraged. The sole purpose of this program is to unite legal professionals in a network that reaches out in a small, but meaningful and compassionate way to those judges, lawyers, court personnel, paralegals, legal secretaries, and their families who experience a death or some catastrophic illness, sickness, or injury. Wherever it sees a need, the FBA takes action!

Stay tuned—your FBA plans to take more Action! **TFL**

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diplomat's raw frustration with the intransigence of U.S. museums.

Without the joint political will of the U.S. Congress and the executive branch to truly finish the business of World War II, the question of whether the Allied victory over Nazism will continue to be betrayed by individual profiteers clinging to stolen property remains open. Russia, which today houses hundreds of thousands of artworks stolen from Germany and its Jews, will never return them unless the United States shows leadership in this effort. Because Holocaust survivors and even their heirs are dying, unless Congress, the State Department, or the Justice Department act quickly and sensibly, the courts of the United States will preside over another great robbery—this one in 2011. **TFL**

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