Fordham Law Review Symposium
Remedies for Looted Art and Cultural Property—Civil, Criminal or Consensual?

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Judge Michael Mukasey
Former Attorney General of the U.S.

Remarks

I want to begin by thanking Gideon Taylor for that generous introduction, and along with Dean Landau, for conceiving and organizing this important symposium, and to thank the Fordham Law Review and Fordham Law School for sponsoring and hosting it.

Because this symposium is sponsored by a law review and takes place at a law school, the focus of much of it may be on the role of the law in providing remedies for historical events that have involved the looting and theft of cultural property. But I think those of us who are lawyers have to be somewhat diffident in emphasizing the role of the law here. The law does not function in a vacuum, and the law does not function simply in its traditional role of providing organizing principles so as to create a set of widely accepted expectations that allow people to go about their daily personal and economic activities in an organized fashion.

Part of what distinguishes the subject of this symposium from what might be a symposium on simply tracing and retrieving stolen goods and assets in general, is that we are dealing with objects that are works of creative genius, or for some other reason considered emblematic of the culture from which they originated. They are therefore at least in part objects that are properly to be put on display for cultural and educational purposes, usually in museums and sometimes in galleries and auction houses. As a result, museums, galleries and auction houses themselves have been major actors in disputes over artistic and cultural property, at least in the united states.

These disputes have been influenced as well by shifting cultural attitudes and sensitivities, so that what may have been regarded as perfectly legitimate museum display, for example, of objects from a Native American village, including

those from a burial ground, are now regarded as artifacts properly belonging to the particular native American tribe from which they come, and insofar as possible to be repatriated to that tribe.

Contrast this with the fact that ancient Egyptian, Greek and Roman sarcophagi are on display in museums without generating as much controversy, at least for the moment.

An entire subset of principles governing the treatment of cultural objects removed from their initial setting applies to artworks and cultural objects that were looted by the Germans in the 1930's and 40's as part of the Holocaust visited upon the Jews, and Schiele's Portrait of Wally_which was the subject of a case before me—is in that category of artworks. The case had some unique and intricate legal and factual twists and turns, but I think it illustrates nicely some of the policy considerations that underlie disputes over looted art and artifacts more generally, and also to some extent both the advantages and the shortcomings of dealing with such a dispute in the setting of a lawsuit.

The woman depicted in the painting – Wally Neuzil – was the mistress of the artist Egon Schiele. The painting was hanging in the Vienna home of Lea Bondi, who was the Jewish owner also of an art gallery. Her gallery was seized as part of the Nazi aryanization program following the joinder of Austria and Germany known as the Anschluss in 1938. A Nazi official named Welz came to her home in 1939 and said he wanted the Wally portrait also, despite her claim that it was not part of the gallery collection and therefore not subject to the aryanization program. She surrendered the painting out of fear of what he could do if she did not

After the war, Welz's property was seized by U.S. troops. The post-war Austrian government enacted procedures to reverse the results of the aryanization program. The Wally portrait was mistakenly included in a group of paintings that belonged to another owner who was killed in the Holocaust, and after being given to his heirs was sold to the belvedere gallery.

Enter Dr. Rudolph Leopold, a collector of Schiele paintings who the evidence seemed to show knew that Portrait of Wally had belonged to Lea Bondi. He saw it hanging in the Belvedere gallery, and in 1954, he traded another Schiele painting for the portrait, and continued to display it at the belvedere. Bondi visited the Belvedere and claimed Wally as hers but she got nowhere.

The Belvedere became the Leopold museum, with Dr. Leopold appointed a director for life. Shortly afterward he sold the Wally portrait to the museum. In 1997, as part of a contract with the museum of modern art, the Leopold museum sent the

painting to New York for display at the MOMA as part of an exhibit that ended in January 1998. A few days after the exhibit ended, the United States attorney for the southern district of New York obtained a seizure warrant for the portrait, arguing that it had been knowingly transported to New York by the Leopold museum, with knowledge that it was stolen, in violation of the national stolen property act, and was subject to seizure and return to its rightful owner.

I think the quick availability of this seizure warrant— which was issued by a magistrate judge on the government's application before the matter was assigned to a district judge—was probably the principal if not the only advantage of a court proceeding as the forum in which to resolve this dispute. Which is to say, I think it is at least arguable that the high water mark of justice in this case was reached before it was assigned to me.

The parties to the litigation in addition to the government, included the Museum of Modern Art, the Leopold museum, and the heirs of Lea Bondi, the original owner of the painting. The litigation extended for more than ten years, and was ultimately decided when the case became trial ready under the supervision of Judge Preska, to whom I transferred the case when I left the bench. Judge Preska is not only a good friend of mine, but also a good friend of Fordham. Her patient and skillful administration of the case brought it to the eve of trial, although it was what one might call an actuarial event that ultimately resulted in the settlement. On the eve of trial, Dr. Leopold, whose state of mind as to knowledge of the theft of the painting was a key issue in the case, died. Eventually the case was settled with a sizeable payment by the Leopold to the heirs of Lea Bondi in return for allowing the Leopold to own and display the painting, but with the stipulation that a placard be hung alongside the painting describing the looting of the painting in 1939.

Despite the enormity of the events underlying the case, it was handled pretty much as an ordinary if somewhat complex international tussle over stolen property. A lot of ink was spilled over issues such as the act of state doctrine, international comity, the political question doctrine, choice of law, the recovery doctrine, standing – the usual yada yada yada of litigation.

What may seem odd about that, particularly in the setting of a symposium such as this, is that the United States has been a leader since the 1990's in the adoption of what is known as the Washington principles – setting an international framework for the handling of claims relating to Nazi-looted art.

Some 43 other countries adhere to those principles and many have established restitution panels to handle these disputes outside the court system – a

system where all sorts of rules, including but not limited to statutes of limitation, often prevent claimants from having their stories fully told and their cases fully heard. The one accommodation the united states has made has been to adopt the Holocaust expropriated art recovery act of 2016, which extends the statute of limitations for claims relating to Nazi-looted art for ten years following its adoption.

Although that statute expires by its terms on December 31, 2026, there are efforts underway to extend it, and also to clear one impediment that arose in 2019, when the U.S. Court of Appeals for the Second Circuit held in *Zuckerman v. Metropolitan Museum of Art* that although the statute did away with a defense based on the statute of limitations, it left in place a defense based on the equitable doctrine of laches – or unreasonable and prejudicial delay in bringing a case. Although there have been cases since Zuckerman declining to recognize a laches defense, the law is at best uncertain, and as I indicated there is consideration being given to doing away entirely with the defense.

Zuckerman is a curious case for defending the continuation of the laches defense, which as the lawyers here are no doubt aware generally raises intensively fact based issues. In *Zuckerman*, the laches finding was made at the appellate level on a motion to dismiss, apparently based on speculation that the 70-year delay must have prejudiced the museum because hypothetical witnesses would be deceased and hypothetical documents missing. It would seem that a more nuanced statutory laches provision would be in order—making clear that only strong evidence of actual prejudice to a possible defense by the holder of a disputed work, and of unreasonable behavior by a claimant, would be sufficient to defeat an otherwise viable claim.

Here, I think it would be useful in connection with any attempt to get the date extended and to change the nature of any defense, to be able to point to concrete cases that were brought during the current extended period that did not exist at the time the current extension was passed, as well as facts suggesting that there might be other cases out there of which we are unaware, for example by citing works that were likely looted by the nazis, but whose whereabouts are not now known – if people are aware of such works. A recent Wall Street Journal report about previously undisclosed Credit Suisse ties to Nazi officials suggests that there may still be facts out there that suggest additional instances of Holocaust era looting that we are not yet aware of.

Unlike many other countries, which have established restitution forums to handle these disputes, the United States, as has been pointed out, does not have a ministry of culture to offer a forum for resolving these disputes, and museums in

this country are private institutions that have their own interests in enhancing their stature by acquiring and displaying works of art and culturally significant objects. This was driven home to me --with a sledgehammer -- during the *Portrait of Wally* case, when the Museum of Modern Art, argued that its standing as a party was established not only by its possession of the painting – which was enough – but alternatively by its claim that the museum would suffer damage in the future if the painting were subject to forfeiture because that would diminish the likelihood that other art of questionable ownership would be offered to the museum for display. Luckily, I did not have to decide whether recognizing an interest in potentially displaying stolen art was something I should do consistent with public policy.

I think that in the United States, because of the structure of our legal system, we are unlikely to find that there is any way disputes over looted art and cultural property can be placed in a separate legal category from disputes about stolen property generally, and resolved outside that legal system on any but a voluntary basis, and therefore that it falls to cultural institutions—principally museums—and auction houses—to try to encourage the development of a forum that the parties to such disputes will find sufficiently attractive to forgo reliance on the sometimes rigid and often expensive mechanisms offered by courts. Christie's, for example, has a provenance research department focused on restitution issues and has supported the claim of heirs of Fritz Grunbaum, a Viennese cabaret artist killed in a concentration camp, to proceeds from the auction of another Schiele painting—Boy in a Sailor Suit—to be held in London next month.

I wish you luck in exploring such alternatives among the other subjects you discuss in this symposium, and I thank you for the privilege of speaking to you today.