REFUGE IN EXILE—THE PECULIAR CATEGORY OF FLUCHTGUT AND ART TRANSFERRED BY VICTIMS IN FLIGHT FROM NAZI PERSECUTION

*By: Nicholas M. O'Donnell**

I. INTRODUCTION

In the roughly twenty–five years since the Washington Conference on Holocaust–Era Assets, U.S. courts and international advisory panels have handled dozens (U.S. courts) and hundreds (foreign state advisory panels) of cases that brought claims arguing in one manner or another that works of art that changed hands in the Nazi era should be restituted to the original owners or their heirs. These claims are often referred to as Nazi looting, theft, or confiscation, but that terminology involves multiple layers of complexity. While the initial renewed awareness in the 1990s of art displaced during the Nazi era was couched in terms of Nazi theft, it quickly expanded to embrace an understanding of so–called forced sales, in which a Jewish owner in Germany or occupied territory is presumed to have been under duress, absent proof to the contrary, such that the original owner is deemed never to have lost valid title.

What happens then, however, about those works of art that were taken from Germany or other occupied areas by their owners who fled *because* of anti–Semitic persecution but that were sold elsewhere outside of German–controlled territory? What should the law make of art sales in Switzerland, or in France before the occupation, where the owner may have been selling the painting as one of their few marketable pieces of property, either to provide funds for their personal survival or to escape further to the United Kingdom or the Western Hemisphere? Should the law make a distinction at all?

More than twenty years ago, a new term entered the lexicon to address this category: *Fluchtgut*. *Fluchtgut* was coined in discussions in Switzerland, not surprisingly, because of Switzerland's unique status both during the war and after as a non–belligerent in which the art market continued, and even thrived. *Fluchtgut* is translated literally as "flight goods." The term has continued to prompt discussion, and has influenced the handful of alternative resolution panels created by European governments. Yet it has not really held sway in judicial outcomes. Here in the United States, several cases that might be described as *Fluchtgut* have been dismissed, but typically for reason of expired

statutes of limitations and without any consideration of the concept. The category as such is unexamined in domestic caselaw and statute. Interestingly, however, the market has moved ahead of this more conservative view, and increasingly works sold in flight cannot be taken to auction without some agreement with the heirs.

Accordingly, it is time to grapple with this concept and give it some definition. The morally compelling nature of these claims is clear: where Nazi persecution is the proximate cause of the artworks finding their way into a market where they come to sale today, a pure application of domestic state law fails to meet the issue adequately. But it is also potentially destabilizing. Without a set of contours and an understandable burden of proof, the sale of such works will be paralyzed in a way that is helpful neither to the heirs of Nazi victims, nor current owners. This article will set these concepts in context and propose some aspirational goals.

The proposal is to treat these cases using not a new conceptual framework but a traditional one: unconscionability and capacity. Examining whether the contracting parties had meaningful alternatives to the transaction (the most important always being the power to say no) or legal status in their adopted or temporary homes that gave them access to actual rights and bargaining power would give shape to a standard that so far has lacked meaningful legal definition. The stakes are not hypothetical. Uncertainty roils the market and threatens the stability of transactions not from eighty years ago, but in the last quarter century. It is time to address it, and the best way is to give courts and parties the analytical framework to assess difficult historical circumstances.

II. CONFISCATED, SOLD UNDER DURESS, AND . . .

On January 30, 1933, President Paul von Hindenburg appointed Adolf Hitler as Chancellor of the German Reich[1]. Barely a decade into the Weimar Republic—a stitched–together fledging confederation of states that until the end of the First World War had been largely hereditary monarchies and duchies that formed Germany in 1871—the country had succumbed to authoritarianism.[2]

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* Nicholas M. O'Donnell is a Partner at Sullivan & Worcester LLP and the founder of the firm's Art and Museum Law practice. He acknowledges his colleague Madeline Crane for her assistance in this article.

[1] *See* HOLOCAUST ENCYCLOPEDIA, U.S. HOLOCAUST MEM'L MUSEUM, *The Nazi Party*, https://encyclopedia.ushmm.org/content/en/article/the-nazi-party-1 [https://perma.cc/D8RE-4W67].

[2] After the abdication of Kaiser Wilhelm II, the German Empire was proclaimed a republic on August 11, 1919, an ostensibly democratic state. As the economic collapse of Germany after the war, hyperinflation, and ultimately the Great Depression took hold, however, the nascent democracy was buffeted by authoritarian impulses. Hitler's failed *putsch* in 1923 was only the beginning, and ultimately it was the election of World War I general Hindenburg, who overtly played on the myths of the "stab in the back" being responsible for Germany's woes, that made Hitler's appointment possible after the Nazi Party's dramatic gains (though still not a majority) in the December 1932 elections. *See* HOLOCAUST ENCYCLOPEDIA, U.S. HOLOCAUST MEM'L MUSEUM, *The Weimar Republic*, https://encyclopedia.ushmm.org/content/en/article/the-weimar-republic [https://perma.cc/CA9Y-E293].

There would not be a free election again in Germany for over a dozen years.[3] The repression that followed immediately is well–documented, but the Nazis' immediate attention to art and policy were a central part of their effort to remake society as they saw fit, the so–called *Gleichschaltung*, according to their artistic sensibilities.[4]

The organization of these cultural initiatives fell under Joseph Goebbels's new ministry, the Reichsministerium für Volksaufklärung und Propaganda (Reich Ministry for Public Enlightenment and Propaganda, or "RVP").[5] This agency assumed control over what were acceptable and unacceptable forms of creative art.[6] Moreover, the business of art fell under the Reichskammer der bildenden Künste ("RBK"), the Reich's Chamber for the Visual Arts, itself a subsidiary of the Reich Culture Chamber (Reichskulturkammer), each subsidiary under the RVP in the Nazi hierarchy.[7] In 1933, Goebbels issued a report on art, the Deutscher Kunstbericht, laying out his manifesto for the place of visual arts in the new order.[8] This document left no doubt as to the new regime's priorities and intentions. The Kunstbericht set forth, among other topics that any art considered "cosmopolitan" or "Bolshevist" was to be removed from German museums immediately, museum directors who (in the Nazis' view) wasted public money by supporting un–German art were to be fired immediately, and artists who did not conform to the regime's taste were to be ignored and not even mentioned[9].

Most critically for Jews in Germany in the 1930s, pressure was brought to bear immediately through boycotts, rendering economic life increasingly unsustainable. Emigration was a fraught subject and not easily accomplished. Most countries of the world turned their back on Jewish immigrants; the United States for example, was operating in the 1930s under its nation–based quota system.[10] Ironically, the now–infamous Reichsfluchtsteuer—flight tax—was a pre–Nazi law intended to hinder the flight of capital from the Weimar Republic

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[3] The election of December 1932 is acknowledged as the last actually democratic election until the defeat of Germany on May 8, 1945. After the Reichstag fire on February 8, 1933, the so-called Reichstag Fire Degree on February 28, 1933 suspended basic civil rights and the Enabling Act of March 23, 1933 concentrated power in the Chancellor as opposed to the Reichstag (legislature). *See* HOLOCAUST ENCYCLOPEDIA, U.S. HOLOCAUST MEM'L MUSEUM, *Foundations of the Nazi State*, https://encyclopedia.ushmm.org/content/en/article/foundations-of-the-nazi-state [https://perma.cc/FYN9-BWZZ].

[4] FREDERIC SPOTTS, HITLER AND THE POWER OF AESTHETICS 43–45 (Overlook Books 2002).

[5] HOLOCAUST ENCYCLOPEDIA, U.S. HOLOCAUST MEM'L MUSEUM, *Culture in the Third Reich: Overview*, https://encyclopedia.ushmm.org/content/en/article/culture-in-the-third-reich-overview [https://perma.cc/9BRP-U2LH].

[6] *Id.*

[7] *Id.*

[8] STEPHANIE BARRON, DEGENERATE ART: THE FATE OF THE AVANT–GARDE IN NAZI GERMANY 13 (1991).

[9] *Id.*

[10] ADAM HOCHSCHILD, AMERICAN MIDNIGHT: THE GREAT WAR, A VIOLENT PEACE, AND DEMOCRACY'S FORGOTTEN CRISIS 350–52 (2022).

during its hyperinflation.[11] Nonetheless, many German Jews seeking to leave were caught in the vice of the lack of an available destination and the need to raise unavailable capital with rapidly–diminishing options to earn a living.

The situation only worsened as the 1930s progressed. The Reich Citizen Law of September 15, 1935 further distanced Jews from any claim to civic life, creating a new category of *Reichsbürger*—Reich Citizen (from which Jews were duly excluded).[12] By 1938, it was nearly impossible as a practical matter for German Jewish collectors or art dealers to emigrate.[13] The April 26, 1938 Ordinance for the Registration of Jewish Property (the "Registration Ordinance")[14]; the November 20, 1938 Ordinance for the Attachment of the Property of the People's and State's Enemies; and the December 3, 1938 Ordinance for the Employment of Jewish Property (Property Employment Ordinance) were all passed.[15] The Registration Ordinance, and the inventories that were printed for use, quite literally gave German and Austrian officials a list of where to look and whom to coerce, and the Property Employment Ordinance made the Aryanization of Jewish businesses effectively compulsory. Between the two, economic existence—and the ability to exert any actual economic choice—ended. Austria's Jews lost their country and all of their rights inside of barely a month in the spring of 1938.[16] And none of that solved the problem of where to go. As Germany occupied Czechoslovakia, Belgium, the Netherlands, and France, in particular, the same dynamic followed, trapping many Jews who had managed to free Germany only to see the nightmare of the Nazis at their doorstep once again.[17] In all of these places, Jewish art collectors and dealers

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[11] See N.Y. DEPT. OF FIN. SERV., *Laws of Persecution*, https://www.dfs.ny.gov/consumers/holocaust_claims/laws_of_persecution [https://perma.cc/GZC5-ZJBB].

[12] OFF. OF THE HISTORIAN, FOREIGN RELATIONS OF THE U.S. DIPLOMATIC PAPERS, 1935, THE BRITISH COMMONWEALTH; EUROPE, VOL. II: REICH CITIZENS LAW OF SEPTEMBER 15, 1935, https://history.state.gov/historicaldocuments/frus1935v02/d305 [https://perma.cc/TY3V-8HRL].

[13] JONATHAN PETROPOULOS, THE FAUSTIAN BARGAIN: THE ART WORLD IN NAZI GERMANY 66 (1st ed. 2000).

[14] Lorraine Bissoneault, *A 1938 Nazi Law Forced Jews to Register Their Wealth—Making It Easier to Steal*, SMITHSONIAN MAG., (Apr. 26, 2018), https://www.smithsonianmag.com/history/1938-nazi-law-forced-jews-register-their-wealthmaking-it-easier-steal-180968894/ [https://perma.cc/5YJ9-6CAQ].

[15] *See* HOLOCAUST ENCYCLOPEDIA, U.S. HOLOCAUST MEM'L MUSEUM, *Antisemitic Legislation 1933–1939*, https://encyclopedia.ushmm.org/content/en/article/antisemitic-legislation-1933-1939 [https://perma.cc/CPG7-PGEQ].

[16] After a tumultuous period in which the Austrian Nazi party staged its own failed coup in 1934, Hitler threatened invasion of Austria (his native country) unless Austria called off a planned plebescite and agreed to annexation. Despite Austria's capitulation to all of Germany's demands concerning appointment of a Nazi government, German troops crossed the border on March 12, 1938. The annexation, or *Anschluss* was declared the next day. The repression of Vienna's substantial Jewish population was swift and harsh, featuring public humiliations like cleaning toilets or scrubbing sidewalks with only toothbrushes as leering crowds looked on. *See* HOLOCAUST ENCYCLOPEDIA, U.S. HOLOCAUST MEM'L MUSEUM, *Nazi Territorial Aggression: the Anschluss*, https://encyclopedia.ushmm.org/content/en/article/nazi-territorial-aggression-the-anschluss [https://perma.cc/2FY7-R97U].

[17] After the infamous Munich conference in September 1938, Germany annexed the Sudetenland in Western Czechoslovakia. On March 15, 1939, Germany invaded and declared the Protectorate

were deprived of the essential aspect of any valid commercial transaction—the capacity to say no to unacceptable terms.

Lilly Cassirer, of whom this paper discusses more later, provides a paradigmatic example of the circumstances that took *Rue Saint–Honoré, après–midi, effect de pluie* (1892) by Camille Pissarro from her possession. A Nazi opportunist named Jakob Scheidwimmer approached Cassirer with an obviously inadequate price, which she needed to pay the flight tax to leave Germany. Lilly later testified in 1951 that she entered into the sale even though the price did not even remotely reflect the painting's true value, and out of concern whether the Gestapo might take offense at a refusal to sell. The Pissarro was seized in Rotterdam by the occupying German forces from Jakob Sulzbacher, a department store owner in a borough of Munich who had obtained it from Scheidwimmer. The painting somehow made its way from there into the hands of Ari Walter Kampf, son of painter Eugen Kampf and nephew of Nazi–approved landscape painter Arthur Kampf. It was auctioned in 1943 in Berlin at Hans W. Lange auction house for RM 95,000—more than 100 times what Lilly had been paid.[18]

Switzerland was, for obvious reasons, a preferred destination for the sale of art during the Nazi Era. Its unshakable neutrality and sophisticated economy—not to mention the shared German language—made it a sought–after option. Well–known Jewish collectors and scholars including Max Emden, Justin Thannhauser, and Walter Feilchenfeldt found refuge in the Swiss Confederation, and often bought and sold works to each other.[19]

III. PRINCIPLES OF RESTITUTION

The need to liquidate art and other property barely scratches the surface, of course, of the destruction wrought by Nazi Germany across Europe. Yet, as the Second World War progressed, though well before it was in hand, the Allies took note of the Nazis' continent–wide displacement of property from its most vulnerable victims. On January 5, 1943—even before victory at Stalingrad—the government of the United Kingdom issued the *Inter–Allied Declaration*

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of Bohemia and Moravia (including Prague), to which many Austrian Jews had fled. HOLOCAUST ENCYCLOPEDIA, U.S. HOLOCAUST MEM'L MUSEUM, *Czechoslovakia*, https://encyclopedia.ushmm.org/content/en/article/czechoslovakia [https://perma.cc/5FD6-35WB]. Germany occupied Belgium, the Netherlands, and France in 1940. HOLOCAUST ENCYCLOPEDIA, U.S. HOLOCAUST MEM'L MUSEUM, *World War II Dates and Timeline*, https://encyclopedia.ushmm.org/content/en/article/world-war-ii-key-dates [https://perma.cc/D6HJ-5MJD].

[18] *See* Cassirer v. Thyssen-Bornemisza Collection Found, 862 F.3d 951, 956 (9th Cir. 2017).

[19] Jörg Krummenacher*, St. Gallen as a hub for the art trade*, NZZ (May 11, 2016), https://www.nzz.ch/schweiz/raubkunst-und-fluchtgut-stgallen-als-drehscheibe-des-kunsthandels-ld.81899 [https://perma.cc/Q3DR-Z3SG]. *See also* Walter Feilchenfeldt, *Ein Leben mit Kunsthandel, van Gogh und Cézanne*, DU KULTURMEDIEN Juni 2015 (special issue devoted to life and scholarship of Feilchenfeldt).

against Acts of Dispossession committed in Territories under Enemy Occupation and Control.[20] Better known since as the London Declaration, the statement was joined by sixteen other nations (including the French National Committee, the Soviet Union, and the United States).[21] The London Declaration took aim not only at the lawless plunder that had spread from the Atlantic to the Urals, but also at the pseudo–transactional seizures guised as "purchases," reserving those allied nations':

> [R]ights to declare invalid any transfers of, or dealings with, property, rights and interests of any description whatsoever which are, or have been, situated in the territories which have come under the occupation or control, direct or indirect, of the governments with which they are at war . . . . This warning applies whether such transfers or dealings have taken the form of open looting or plunder, or of transactions apparently legal in form, even when they purport to be voluntarily effected.[22]

The London Declaration's refusal to honor ostensible sales from Jews and others without the power to enter into arms–length transactions followed into policy after the Allied victory. To bring order to the defeated Germany and Austria that now had no government, the Allies enacted a series of Military Government Laws. Relevant to present purposes, Military Government Law No. 59 ("MGL No. 59") was entitled *Restitution of Identifiable Property*. The preamble takes an important position, at odds with the traditional civil law of many of European countries impacted by its enactment (and by the underlying looting):

> Property shall be restored to its former owner or to his successor in interest in accordance with the provisions of this Law even though the interests of other persons who had no knowledge of the wrongful taking must be subordinated. Provisions of law for the protection of purchasers in good faith, which would defeat restitution, shall be disregarded except where this Law provides otherwise.[23]

Property is defined as "confiscated" in MGL No. 59 if it was (1) not conveyed in good faith, under duress, or otherwise an unlawful taking; (2) seized

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[20] OFF. OF HISTORIAN, INTER–ALLIED DECLARATION AGAINST ACTS OF DISPOSSESSION COMMITTED IN TERRITORIES UNDER ENEMY OCCUPATION OR CONTROL, FOREIGN RELATIONS OF THE U.S.: DIPLOMATIC PAPERS, 1943, GENERAL, VOL. 1, Doc 456, https://history.state.gov/historicaldocuments/frus1943v01/d456 [https://perma.cc/83EH-JV8X].

[21] *Id.*

[22] *Id.*

[23] Military Government, United States Area of Control, Germany; Law No. 59: Restitution of Identifiable Property at Part I, Article 1, ¶ 2.

by government act or in abuse of a government act; or (3) seized as a result of measures taken by the Nazis.[24] Critically, MGL No. 59 turned the ordinary burdens of making a civil claim for tortious loss on its head, obliging the defender of any transaction to prove it was fair, not for the victim to prove it was unenforceable.[25] Instead, in a series of provisions concerning "Confiscated Property," MGL No. 59 covers transactions under duress, governmental seizures, and seizures by Nazi party officials. To analyze a particular transaction, MGL No. 59 applies a presumption as the starting point, which states:

Presumption of Confiscation

1. It shall be presumed in favor of any claimant that the following transactions entered into between 30 January 1933 and 8 May 1945 constitute acts of confiscation within the meaning Article 2:
    a. Any transfer or relinquishment of property made during a period of persecution by any person who was directly exposed to persecutory measures on any of the grounds set forth in Article 1;
    b. Any transfer or relinquishment of property made by a person who belonged to a class of persons which on any of the grounds set forth in Article 1 was to be eliminated in its entirety from the cultural and economic life of Germany by measures taken by the State or the NSDAP [Nazi Party].[26]

These principles were applied both to the Allies' joint restitution efforts, spearheaded most famously by the Monuments, Fine Art and Archives ("MFAA") division, the so–called Monuments Men.[27] The results of the Nuremberg trials reinforced these concepts further still.[28]

Once the MFAA staffers returned home and the countries of Western Europe wound down their own restitution programs, civil law became the domain of any further development. In other words, what was to be done (if anything) with regard to the effect on good title flowing from art transactions

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[24] *Id.* at Part II, Article 2, ¶ 1.
[25] *Id.* at Part II, Article 3, ¶ 2.
[26] *Id.* at Part II, Article 3, ¶ 1.
[27] LYNN H. NICHOLAS, THE RAPE OF EUROPA: THE FATE OF EUROPE'S TREASURES IN THE THIRD REICH AND THE SECOND WORLD WAR 274, 276 (1994).
[28] The Nurnberg Trial, 6 F.R.D. 69, 82 (1946) ("On the 1st April 1933, a boycott of Jewish enterprises was approved by the Nazi Reich Cabinet, and during the following years a series of anti–Semitic laws were passed, restricting the activities of Jews in the Civil Service, in the legal profession, in journalism and in the armed forces. In September 1935, the so–called Nuremberg Laws were passed, the most important effect of which was to deprive Jews of German citizenship. In this way the influence of Jewish elements on the affairs of Germany was extinguished, and one more potential source of opposition to Nazi policy was rendered powerless.").

where one party was subject to this coercive dynamic? In the United States, at least, this activity was startingly low for decades. *Menzel v. List*, the primary case in this respect and the still most cited case for the common law principle that a true owner retains paramount title, did not occur until the 1960s—and it remained a rare example for decades after.[29] The case is oft–cited for principles on theft, but seldom explored in detail given that the facts are closer in some way to *Fluchtgut*.

Erna Menzel and her husband were Belgian Jews who fled Brussels in March 1941. The Menzels left in their apartment a painting by Marc Chagall, *Le Paysan a L'echelle* (*The Peasant and the Ladder*).[30] Soon after they left, the painting was seized by the Einsatzstab Reichsleiter Rosenberg ("ERR"). Seizure by the ERR is one of the few questions on which there is agreement—now—that a good–faith acquisition thereafter is essentially an impossibility if the work bears the ERR stamp. Yet as discussed below, the ERR did not seize the Chagall *from* the Menzels, they left it behind when they fled for their lives. When Menzel found the current possessor, Albert List, List defended his acquisition as a good–faith purchaser from Klaus Perls[31] in 1955 at the latter's gallery on Madison Avenue, unaware of the painting's history.

Menzel prevailed. Notably, the court dismissed the idea that the Menzels had abandoned their property because abandonment is a relinquishment of a known right with no intent to reclaim it.[32] The court noted that this idea had further support in international law.[33] It is *Menzel*'s last point of analysis that has provided its most enduring legacy, which has ironically obscured that it was not a case about direct theft, but abandonment under duress[34]:

> Throughout the course of human history, the perpetration of evil has inevitably resulted in the suffering of the innocent, and those who act in good faith. And the principle has been basic in the law that a thief conveys no title as against the true owner.

Menzel's articulation of the common–law indifference to a good faith purchaser in the face of a true owner's claim might conflict with the countries where most of the art displaced between 1933 and 1945 still was in the 1960s—

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[29] Menzel v. List, 267 N.Y.S.2d 804, 819 (N.Y. Sup. Ct. 1966).
[30] *Id.* at 806–07.
[31] *Id.* at 807–08. Perls testified that he had acquired the work in July 1955 from the Galerie Art Moderne in Paris.
[32] *Id.* at 809–10 (citing Franmor Realty Corp. v. LeBoeuf, 104 N.Y.S.2d 247 (N.Y. Sup. Ct. 1951)), *aff'd.* 279 App. Div. 795, 109 N.Y.S.2d 525 (2d Dept. 1952); In re Johnson, 294 F. 258, 260 (5th Cir. 1923); In re Kerns' Guardianship, 169 P.2d 975, 979 (Cal. Dist. Ct. App. 1946).
[33] Menzel v. List, 267 N.Y.S.2d 804, 809–10 (N.Y. Sup. Ct. 1966) (citing Collac c. Etat Serbe–croate–slovene [Yugoslavia], 9th Collection of Decisions of the Mixed Arbitral Tribunals 195 (Hungarian–Serbian–Croatian–Slovenian Mixed Arbitral Tribunal May 15, 1929) (citing further a Yugoslavian tribunal, the court held that "personal property temporarily abandoned at the approach of the enemy, without the relinquishment of the owner's right of ownership, is neither foreclosed nor forfeited.")).
[34] *Id.* at 819.

Europe. In Europe, civil law countries generally provide that in some circumstances a good faith purchaser for value will generally prevail against the true owner. For example, under the German civil code, § 9354 Abs. 1 BGB, a bona fide purchaser cannot acquire good title if the work was lost against the will of the owner.[35] In the case of looted art the true owner will prevail because theft is against the will of the owner, but something left behind (*i.e.*, not among the items selected to go) is not strictly against the owner's will, and the bona fide purchaser might prevail.[36] Even then, civil law countries frequently provide for the possibility of prescriptive acquisition of personal property.[37] Under Swiss law, for example, a good faith purchaser will obtain title after an uninterrupted and unchallenged period of five years generally, thirty years for cultural property.[38] By contrast, common law in the United States (except Louisiana[39]) permits only for the adverse possession of real property. This, in turn, sets up a thorny conflicts of laws question. If a work changes hands in Germany or Switzerland in the 1950s under circumstances that might involve a bona vide purchaser, should that law apply in a later dispute, or the law of the later place of acquisition?

The causes of the modern revival of interest in the subject and potential restitution of art displaced during the Nazi era—whether by looting, forced sale, or otherwise—can fairly be attributed to a number of factors, including the availability of sources previously secluded behind the Iron Curtain, and interest in addressing financial assets and insurance policies stolen from European Jews or absorbed by financial institutions holding them for murdered Jews. Banks (and Switzerland) in particular were famously the subject of hearings led by Senator Alphonse D'Amato (R–NY),[40] and renewed scholarship in the early and mid–1990s.[41] In quick succession, the *Portrait of Wally* case and the 1998

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[35] Friederike Gräfin von Brühl, *German Flight Goods as a Legal problem: the Example of George Grosz, in* FLUCHTGUT – GESCHITCHTE, RECHT UND MORALS: REFERATE ZURE GLEICHNAMIGEN VERANSTALTUNG DES OSKARE REINHART MUESUEMS IN WINTERHUR 153 (Peter Mosimann & Beat Schönenberger eds., Stämpfli Verlag 2015).

[36] *Id.*

[37] *Id.* at 154 (citing § 957 GBG); *see also, e.g.,* Spanish Civil Code Art. 1955.

[38] Schweizerisches Zivilgesetzbuch [ZGB], Code Civil [CC], Codice Civile [CC] [Civil Code] Dec. 10, 1907, SR 210, Art. 728 (Switz); *See also* Ivo Schwander, BASLER KOMMENTAR ZUM SCHWEIZER PRIVATRECHT: ZIVILGESETZBUCH II, ART. 457–977 ZGB UND ART. 1–61 SCHLT ZGB: 2. AUFLAGE, (Nedim Peter Vogt, Thomas Geiser eds. 2nd ed. 2003).

[39] LA. CIV. CODE ANN. Art. 3490 (1983), *see also* Dunbar v. Seger–Thomschitz, 638 F. Supp. 2d 659, 665 (E.D. La. 2009) (vesting ownership in Kokoschka painting once owned by Viennese Jewish collector Oskar Reichel on the basis of finding a good faith acquisition in 1946 by Sarah Reed Blodgett from the Galerie St Etienne in New York).

[40] Arthur Spiegelman, *D'Amato: Switzerland used Holocaust Victims' Assets to Compensate its Citizens*, WASH. POST, (Oct. 17, 1996), https://www.washingtonpost.com/archive/politics/1996/10/17/damato-switzerland-used-holocaust-victims-assets-to-compensate-its-citizens/43a6e46a-7457-4d7e-9557-8c4220afd338/ [https://perma.cc/6TQS-RYMM].

[41] NICHOLAS, *supra* note 27, at 415–17; *see also* HECTOR FELICIANO, THE LOST MUSEUM: THE NAZI CONSPIRACY TO STEAL THE WORLD'S GREATEST WORKS OF ART 155–62 (1995).

Washington Conference moved the issue from an academic discussion to front–page news.

To a wider public, *Wally* presented probably the first widely–publicized story of Nazi–displaced art. For a public that was accustomed to Nazis in popular culture as stormtroopers with Swastika armbands, not art dealers in suits, the dynamics involved were revelatory. Lea Bondi was a Viennese art dealer. She owned and operated the Würthle und Sohn Gallery. "After the Anschluss, a Nazi functionary, named Friedrich Welz, Aryanized her gallery, and then visited her again to indicate that he wanted another painting hanging in her home: *Portrait of Wally*, by Egon Schiele."[42] Like Lilly Cassirer, faced with no real choice, Bondi relented. The *Wally* case,[43] somewhat fortuitously, broke as an exhibition from the Leopold Museum in Vienna as the Museum of Modern Art in New York was winding down. Shortly before the show ended, Judith Dobrzynski wrote an article reviewing the show in *The New York Times*, teasing the Bondi history.[44] Before long a roughly–twelve–year legal battle ensued centered on whether Dr. Rudolph Leopold, who acquired the painting after the war from the Austrian National Gallery, knew the Schiele to be stolen property when it came to the United States for exhibition. After years of preliminary disputes over, among other things, the scope of New York and U.S. laws concerning immunity from seizure,[45] the U.S. District Court ruled that Dr. Leopold's awareness of the painting's valid title (and thus whether customs laws were obeyed or violated when it was brought to New York for the exhibition) was a question of fact for a jury to decide.[46] On the eve of trial, the parties settled on financial terms and the painting returned to Vienna, where it hangs today.[47]

Similarly, the 1998 Washington Conference on Holocaust Era Assets, and the corollary Washington Conference Principles on Nazi–Confiscated Art put to paper that there was more to this issue than garden variety personal property law. At their core, the Washington Principles were an aspirational call to the participating countries to address claims of Nazi–Confiscated art (the term used in the Principles) in a manner that was "fair and just," an equitable consideration, not merely the strictly legal result. What that means, of course, is capable of considerable interpretation, but at least five countries—Austria, France,

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[42] *See generally* NICHOLAS M. O'DONNELL, A TRAGIC FATE: LAW AND ETHICS IN THE BATTLE OVER NAZI–LOOTED ART 48–62 (2017).

[43] *Id.*

[44] Judith H. Dobrzynski, *The Zealous Collector—A Singular Passion for Amassing Art, One Way or Another*, N.Y. TIMES (Dec. 24, 1997) https://www.nytimes.com/1997/12/24/arts/zealous-collector-special-report-singular-passion-for-amassing-art-one-way.html

[45] *See* N.Y. ARTS & CULT. AFF. LAW § 12.03 (LexisNexis 2024) (prohibiting seizure of any art lent to a cultural institution by a nonresident exhibitor); In re Grand Jury Subpoena Duces Tecum, 93 N.Y.2d 729 (1999). *See also* Immunity from Seizure Act (IFSA), 22 U.S.C. § 2459 (precluding immunity from seizure for work loaned on cultural exchange but only after prior approval by the State Department, which no one obtained for *Wally*).

[46] United States v. Portrait of Wally, 663 F. Supp. 2d 232, 269 (S.D.N.Y. 2009).

[47] Randy Kennedy, *Leopold Museum to Pay $19 Million for Painting Seized by Nazis*, N.Y. TIMES, (Jul. 20, 2010), https://archive.nytimes.com/artsbeat.blogs.nytimes.com/2010/07/20/leopold-museum-to-pay-19-million-for-painting-seized-by-nazis/ [https://perma.cc/UHP3-GGQU].

Germany, the Netherlands, and the United Kingdom—thereafter tried to begin grappling with this question with regard to works in their possession by creating alternative resolution committees of one sort or another. In their initial conception, the alternative resolution committees were invoked to address what was framed in the Washington Principles—Nazi *confiscated* art. The Washington Principles do not define what Nazi–Confiscated art. In execution, how broadly that term should be interpreted, proved harder to define.[48]

IV. *FLUCHTGUT*—A SWISS CONUNDRUM

Other than Spain, the principle continental country actually to stay out of the war was Switzerland. As a result of the idiosyncrasies of the art market in Switzerland during and after the war, and the presence of many German Jewish collectors fleeing persecution, it was in Switzerland that the concept of *Fluchtgut* arose.

The term *Fluchtgut* is usually traced to a 2001 paper by Esther Tisa Francini.[49] In fact, the historian Thomas Buomberger had previously published a paper three years earlier that used a similar word: *Fluchtkunst*, for the explicit purpose of distinguishing art sold or abandoned in flight from *Raubkunst*, the term usually used in German to refer to looted art (and very much in the context of the Washington Conference, focused as it was on looting and confiscation).[50] Francini and Buomberger opened the discussion of a new category in the Swiss art market: property brought out of Germany by emigrants, but then sold not in

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[48] On March 5, 2024, the World Jewish Restitution Organization and the U.S. Department of State convened a gathering to introduce the product of a collaboration between the Special Envoys for Holocaust Issues of many of the countries that participated in the Washington Conference. *See Best Practices for the Washington Conference Principles on Nazi–Looted Art*, U.S. DEP'T STATE (Mar. 5, 2024), https://www.state.gov/best-practices-for-the-washington-conference-principles-on-nazi-confiscated-art/ [https://perma.cc/45W3-UZE3].
Entitled "Best Practices for the Washington Conference Principles on Nazi–Confiscated Art," the document defines "Nazi–confiscated" and "Nazi–looted" to mean art "looted, confiscated, sequestered, and spoliated, by the Nazis, the Fascists and their collaborators through various means including but not limited to theft, coercion, and confiscation, and on grounds of relinquishment, as well as forced sales and sales under duress, during the Holocaust era between 1933–45."
Id. The adoption of that definition is important and will be influential but like the Washington Principles themselves it will not, without further legislative action, modify substantive domestic law. *See id.*

[49] *See* Esther T. Francini, Anja Heuss & Georg Kreis, *Fluchtgut—Raubgut: Der Transfer von Kulturgütern in und über die Schweiz 1933–1945 und die Frage der Restitution*, INDEPENDENT COMM'N EXPERTS SWITZ. — SECOND WORLD WAR (2001), https://www.uek.ch/en/schlussbericht/Publikationen/pdfzusammenfassungen/01e.pdf [https://perma.cc/6C46-B379].

[50] *See generally* THOMAS BUOMBERGER, RAUBKUNST, KUNSTRAUB: DIE SCHWEIZ UND DER HANDEL MIT GESTOHLENEN KULTURGÜTERN ZUR ZEIT DES ZWEITEN WELTKRIEGS (1998).

the ordinary course of the market but for means of living.[51] The Washington Principles make no reference to any such category.

Two examples involving the Oskar Reinhart Collection "Am Römerholtz" in Winterthur are illustrative. Reinhart was a preeminent collector who donated the eponymous villa and his collection to the Swiss Confederation in 1970. In 1939, Reinhart obtained the painting *Mother and Child* by Ferdinand Hodler from the collection of Max Meirowsky (a Jewish refugee) for 10,000 CHF.[52] The logistics of the sale and shipment were handled by Paul Cassirer and Fritz Nathan, by then themselves in exile.[53] The price was relatively similar to those Reinhart paid in contemporaneous sales for works by Hodler. Nathan was involved in another Hodler sale to Reinhart, *Surprised by a Storm* from the Frankfurt collection of Martin and Florence Flersheim.[54] Martin died of natural causes in 1935, but Florence emigrated to the United States in 1938, where she became a citizen. While she sent much of their collection to Holland, apparently part of it (including the Hodler) had been in Basel since 1931. Nathan brokered a sale from that Basel storage location to Reinhart in 1939 for 28,000 CHF, a price similar to what Reinhart had paid for works by Claude Monet and Vincent van Gogh. Florence did not include any of the works from Basel in her post–war claims for compensation. These sales would seem to fit the term insofar as Florence was a refugee within the meaning of the Geneva Convention fleeing persecution on the grounds of race, religion, nationality, or membership in a particular social group.[55]

Examples like this present a moral conundrum for works sold in Switzerland that would not have been had the owners not been Jewish refugees from Nazi persecution. Should these transactions be viewed with a but–for causation test? If so, virtually any flight goods scenario would be vulnerable to contemporary attack. Or is some broader proximate causation necessary to assess the sale? If a forced sale involves some implicit lack of volition on the seller's part, should the circumstances in which the sale may have been viewed, with welcome by the refugee for what it made possible, change the analysis?

Perhaps surprisingly to some, these distinctions were seldom explored in disputes in the fifteen or so years after the Washington Conference and the Swiss exploration of the *Fluchtgut* concept. In fact, many of these disputes involved facts and allegations that could have presented a vehicle to explore this question, but nearly all were resolved on jurisdictional or time limitation bases.

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[51] Marc Fehlmann, *Fluchtgut: Geschichte, Recht und Moral – Vorwort und Dank des Organisators, in* FLUCHTGUT – GESCHITCHTE, RECHT UND MORALS: REFERATE ZURE GLEICHNAMIGEN VERANSTALTUNG DES OSKARE REINHART MUESUEMS IN WINTERHUR 7 (Peter Mosimann & Beat Schönenberger eds., Stämpfli Verlag 2015).

[52] *Id.* at 9.

[53] *Id.*

[54] *Id.*

[55] *Convention and Protocol Relating to the Status of Refugees*, U.N. HIGH COMM'R REFUGEES (Dec. 2010), https://www.unhcr.org/media/convention-and-protocol-relating-status-refugees [https://perma.cc/Q2NS-MVTP].

V. STANDARDS AFTER THE WASHINGTON CONFERENCE

The five countries that created alternative panels occupied the full spectrum of belligerents in the war: perpetrator (Germany and Austria); occupation, resistance and counteroffensive (France and Holland); and Allied free soil (the U.K.),[56] thus bringing a panoply of ethical and moral consideration to the facts of particular cases. The Austrian panel has been robustly active[57] rendering hundreds of decisions. And while nothing here should be read as a conclusive analysis of that body of recommendations, the dynamics of Austrian Jewish property loss make the Fluchtgut situation less frequent for a few reasons. First, Austrian Jews simply had no time to get out in the same way. For example, barely a month after the Anschluss, Austrian Jews were obliged to declare all their property and were victimized swiftly in a way that was more comprehensive than Germany in 1933. Many Austrian Jews who stayed were subject to more explicit confiscations. Those that left often went to other areas in the historic Austro–Hungarian empire like Czechoslovakia or Yugoslavia, only to be victimized later when the German occupation arrived.

A. The German Advisory Commission

For better and worse, the German Advisory Commission, [58] referred to as the Limbach Commission for its presiding member, the late Jutta Limbach, has

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[56] Switzerland, by contrast, did not move immediately after the Washington Conference to create its own commission, but announced in November 2023 that such a commission would be formed. Florian Schmidt–Gabain, *Year in Review: Art Law in Switzerland*, LEXOLOGY (Jan. 12, 2024), https://www.lexology.com/library/detail.aspx?g=2e7af35a-be46-49cf-b2b2-2dd94d6a32c2#footnote-012 [https://perma.cc/8D57-ZZFU]. For a review of the participating nations' adherence to and progress towards the goals of the Washington Conference and Washington Principles, the reports by the Claims Conference and World Jewish Restitution Organization remain the best analysis. *See* Wesley A. Fisher & Ruth J. Weinberger, *Holocaust-Era Looted Art: A Current Worldwide Overview*, WJR: CONF. JEWISH MATERIAL CLAIMS AGAINST GERMANY (Mar. 5, 2024), https://art.claimscon.org/wp-content/uploads/2024/03/4-March-2024-Holocaust-Era-Looted-Cultural-Property-A-Current-Worldwide-Overview.pdf [https://perma.cc/SL2Y-KLP5].

[57] For a comprehensive review of the Austrian panel's recommendations, *see* RESTITUTED: 25 YEARS OF THE ART RESTITUTION PANEL IN AUSTRIA, (Birgit Kirchmayr & Pia Schölnberger eds., Czernin Verlag 2023).

[58] Officially entitled the "Advisory Commission on the return of cultural property seized as a result of Nazi persecution, especially Jewish property," the Advisory Commission can be convened if a claimant and a German museum agree to submit the matter. *See* Catherine Hickley, *Rare Violin Tests Germany's Commitment to Atone for Its Nazi Past*, N.Y. TIMES (Jan. 28, 2021), https://www.nytimes.com/2021/01/25/arts/music/violin-restitution-germany.html [https://perma.cc/C8JC-89M2]. The Commission's output is a recommendation, not an adjudication. *Id.* Only once has a German museum declined to follow the Commission's recommendation. In recent years the primary obstacle has become the ability of the German museum to refuse to appear, though in January 2024 after years of public debate, Cultural Minister Claudia Roth announced that any museum that did so would be ineligible for federal funding. Catherine Hickley, *German Culture Minister Implements Changes to Ease Restitution of Nazi–Looted Art*, THE ART NEWSPAPER (Jan.

cast a long shadow on restitution proceedings. All told, five of the Advisory Commission's recommendations[59] (of twenty–three total since 2003) might be considered flight goods cases, of which four resulted in restitution. This does not include several cases in which Jewish victims emigrated but it was unknown whether the disputed artworks were left behind.

The very first matter taken up by the Advisory Commission involved what would now be considered a *Fluchtgut* case. Julius and Clara Freund were German–Jewish collectors, who brought their collection to Switzerland in 1933 after the first year of the Nazi regime.[60] After several years of persecution, Julius and Clara fled to London in 1939, penniless. From London, and to sustain herself, Clara directed the sale of the collection at Galerie Fischer in Lucerne (Switzerland) in 1942, where they were purchased by Hans Posse. Posse was the head of the Führermuseum project for Linz, Austria. Without any published analysis, the Advisory Commission recommended in 2003 the restitution of three paintings by Karl Blechen and a watercolor by Anselm Feuerbach to the heirs of the Freunds.

Another example is *Peasant Girl without a Hat and with a White Headcloth* (1897) by Wilhelm Leibl. It was once owned by Dr. Alexander Lewin, who fled to Switzerland in 1938 as a result of persecution as a *Mischling* first degree. By 1939 it was in the Führerbau, also destined for the Führermuseum. The Commission recommended restitution in 2009.

In contrast to the Freund and Lewin cases, the heirs of Clara Levy were unsuccessful before the Advisory Commission. Levy lived in Berlin and fled anti–Semitic persecution to Luxembourg in 1939, taking seventy–nine paintings with her. She died in Luxembourh in March 1940 (pre–occupation). Her effects, including *Three Graces* by Lovis Corinth (now in the Bavarian State Paintings Collection), were shipped to New York later that spring to Else Bergmann, one of her daughters. The remainder of her household effects were confiscated by the German army after invasion. The Bavarian State Painting Collections refused to restitute the painting, arguing it was neither confiscated nor sold under duress. The Advisory Commission agreed and recommended against restitution in 2014.

The commission focused on economic plight as a factor for recommending restitution as exemplified by the case of Max James Emden. Max James Emden

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3, 2024), https://www.theartnewspaper.com/2024/01/03/german-culture-minister-implements-changes-to-ease-restitution-of-nazi-looted-art [https://perma.cc/5NRL-P4GD]. On March 13, 2024 the German federal government and the 16 federal states announced that the Advisory Commission would be revised further to constitute binding arbitration rather than optional mediation. Catherine Hickley, *Germany to Replace Nazi–Looted Advisory Panel with Binding Arbitration*, THE ART NEWSPAPER (Mar. 14, 2014), https://www.theartnewspaper.com/2024/03/14/germany-to-replace-nazi-loot-advisory-panel-with-binding-arbitration [https://perma.cc/46XG-7TR9].

[59] *Recommendations 5–6*, BERATENDE KOMMISSION NS–RAUBGUT, https://www.beratende-kommission.de/en/recommendations [https://perma.cc/64QE-76CV].

[60] *The Return of Cultural Property Seized as a Result of Nazi Persecution – The First Recommendation of the Advisory Commission*, BERATENDE KOMMISSION NS-RAUBGUT (Jan. 12, 2005), https://www.beratende-kommission.de/en/recommendations [https://perma.cc/N46M-HG5R].

was the proprietor of M. J. Emden Söhne, once Germany's leading department store. He acquired *The Zwinger Moat in Dresden* and *The Karlskirche in Vienna*, both by Bernardo Bellotto (Canaletto) between 1928 and 1930. Emden's business empire dwindled throughout the 1930s. Owner of the Brissago islands in Lake Maggiore in Switzerland, he was granted residence there and lived there until his death in 1940. Before his death, he sold the Canalettos to Karl Haberstock, one of Hitler's primary art dealers. His son Hans Erich Emden fled to South America. The Commission recommended restitution from the German federal government of the paintings in 2019 because "[n]otwithstanding the questions as to the reasonableness of the purchase price and the missing proof of transfer, the core facts of the case are Max Emden's economic plight, which was directly caused by National Socialist persecution, and the associated loss of assets as a result of persecution."[61]

Perhaps the key development in the *Fluchtgut* concept in the German commission is the Grawi case of 2021, concerning *Fuchse (Foxes)* by Franz Marc. Kurt Grawi was a banker at the Darmstädter und Nationalbank until its merger with the Dresdner Bank. Grawi was persecuted, and his enterprises and shareholdings Aryanized after 1935. Grawi was imprisoned at Sachsenhausen after Kristallnacht, and soon set about trying to emigrate. He left Germany at the end of April 1939 for Santiago Chile, via Belgium, permitted to take 10 Reichsmark with him. He conveyed his other property, to his non–Jewish wife Else before leaving. Grawi had purchased *Fuchse* in 1928. He loaned it to the Galerie Nierendorf in Berlin in 1939 for a retrospective exhibition. Correspondence indicated that Grawi left *Fuchse* with a "trusted friend," Dr. Paul Weil, for onward transfer to New York for sale. The painting was shipped to New York via Le Havre, where Ernst Simon was to sell it on Grawi's behalf. Simon wrote to Alfred Barr at the Museum of Modern Art ("MoMA"), who offered $800 (about one quarter what Grawi had paid). Grawi counteroffered at $1,250, but no deal was made. After dealer Curt Valentin collected *Fuchse* from MoMA, it was Karl Nierendorf who sold it to film director William (Wilhelm) Dieterle and his wife Charlotte in Los Angeles for an unknown price in 1940. The Dieterles consigned *Fuchse* in 1961 for auction at Galerie Klipstein & Kornfeld in Bern, Switzerland. It acquired at private sale there by Helmut Horten, who donated it to the Städtische Kunstsammlung Düsseldorf in 1962.

Here, the Commission was faced with a painting that not only made it out of Germany, but made it out of Europe for sale in the United States. Nonetheless, in 2021 the Advisory Commission recommended restitution to the Grawi heirs, observing "[t]he sale in 1940 in New York was the direct consequence of imprisonment in a concentration camp and subsequent

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[61] *Explanatory statement on the recommendation of the Advisory Commission in the case of Dr. Max James Emden vs. The Federal Republic of Germany*, BERATENDE KOMMISSION NS–RAUBGUT 1–3 (2019), https://www.beratende-kommission.de/media/pages/empfehlungen/emden-bundesrepublik-deutschland/e6552601b0-1701340841/19-03-26-recommendation-emden-germany.pdf [https://perma.cc/UAM9-2U4S].

emigration, and was so closely connected with Nazi persecution that the location of the event becomes secondary in comparison."[62] The recommendation went even further, to say that the price was *immaterial*—meaning well beyond the rebuttable presumption of MGL No. 59.

B. The United Kingdom Spoliation Advisory Panel

For its part, the United Kingdom Spoliation Advisory Panel ("SAP") has issued twenty–three detailed recommendations,[63] of which two might be considered *Fluchtgut* allegations. Of those, one recommended restitution. Interestingly, a high percentage of the SAP claims involve outright seizure scenarios, by the ERR from Robert Léo Michel Lévy Bing in Paris[64] or the Gestapo in Czechoslovakia from the collection of Arthur Feldman in Brno.[65] Like Austria, patterns emerge in the particular countries by virtue of their relationship and proximity either to the war's events or reactions to them (like seeking refuge in England).

The first case of what might be *Fluchtgut* was a claim by Erich Koch as heir to his late mother Ida Netter, concerning fourteen clocks and watches in the British Museum that Netter managed to bring to London after she fled Nazi Germany. As Koch described it, "[to] have the means to live in London, she auctioned off the part of the collection that she managed to transfer out of Germany."[66] The panel recommended that, despite what it called the moral strength of the claim, the timepieces should *not* be restituted.[67]

By contrast, *A View of Hampton Court Palace,* by Jan Griffier the Elder (c1645–1718), was owned by a Jewish woman who fled to Belgium in 1940, about a year after sending her belongings there. According to her son, the

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[62] *Recommendation of the Advisory Commission in the case of the Heirs of Kurt and Elise Grawi v. Landeshauptstadt Düsseldorf*, BERATENDE KOMMISSION NS–RAUBGUT 5 (2021), https://www.beratende-kommission.de/media/pages/empfehlungen/grawi-landeshauptstadt-duesseldorf/7f1e5e9347-1701340811/21-03-18-recommendation-grawi-duesseldorf.pdf [https://perma.cc/JM5H-UAVR].

[63] *Reports of the Spoliation Advisory Panel*, U.K. DEP'T CULTURE, MEDIA & SPORT (Mar. 18, 2024), https://www.gov.uk/government/collections/reports-of-the-spoliation-advisory-panel [https://perma.cc/MFZ9-ZERK].

[64] *Report of the Spoliation Advisory Panel in Respect of the Painting "La Ronde Enfantine" by Gustave Courbet in the Possession of the Fitzwilliam Museum, Cambridge*, U.K. DEP'T CULTURE, MEDIA & SPORT: SPOLIATION ADVISORY PANEL, 4 (2023), https://assets.publishing.service.gov.uk/media/6421626a32a8e00012fa9514/report_of_the_spoliation_advisory_panel_in_respect_of_the_painting_la_ronde_enfantine_by_gustave_courbet_print_final_mc_22_march.pdf [https://perma.cc/6DKL-WLVP].

[65] *Report of the Spoliation Advisory Panel in Respect of Four Drawings Now in the Possession of the British Museum*, U.K. DEP'T CULTURE, MEDIA & SPORT: SPOLIATION ADVISORY PANEL 1, 1 (2006), https://assets.publishing.service.gov.uk/media/5a7c7fbced915d6969f454d3/1052.pdf [https://perma.cc/49CA-NWLL].

[66] *Report Of the Spoliation Advisory Panel in Respect of Fourteen Clocks And Watches Now In The Possession Of The British Museum, London*, U.K. DEP'T CULTURE, MEDIA & SPORT: SPOLIATION ADVISORY PANEL 5 (2012), https://assets.publishing.service.gov.uk/media/5a78bbc1e5274a2acd1895ff/SAP-report-BM-HC1839.pdf [https://perma.cc/TG8D-UHD3].

[67] *Id.* at 9.

claimant (who had fled to the United Kingdom in 1939), the woman "sold the paintings (which were in store) one by one, to finance her basic necessities."[68] It resurfaced in 1955 at Lempertz, and was bought by the Friends of the Tate Gallery in 1961. Although concluding through a careful choice of law analysis including Belgium that the Tate had unassailable title, the SAP upheld the claim on moral grounds, relying heavily on the principles of the London Declaration.[69] The panel recommended an ex gratia payment, however, not outright return.

By contrast, very few cases that have gone to court in the United States have resolved (or even reached) on the merits *whether* a work of art was stolen, looted, or sold under duress as a result of Nazi persecution.[70] Overwhelmingly,

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[68] *Report of the Spoliation Advisory Panel In Respect of a Jan Griffier Painting Now in the Possession of the Tate Gallery*, U.K. DEP'T CULTURE, MEDIA & SPORT: SPOLIATION ADVISORY PANEL 3 (2001) https://assets.publishing.service.gov.uk/media/5a7f8cece5274a2e87db686f/Report_of_the_Spoliation_Advisory_Panel_in_respect_of_a_painting_now_in_the_possession_of_the_Tate_Gallery.pdf [https://perma.cc/ZU9Z-MHZ3].

[69] *Id.* at 9–12, 15.

[70] Vineberg v. Bissonnette, 548 F.3d 50, 53 (1st Cir. 2008) (affirming summary judgment for heirs of Max Stern, whose collection was the subject of a forced auction at Lempertz in 1937). *See also* Bakalar v. Vavra, 500 Fed. App'x 6, 7, 9 (2d Cir. 2012) (holding against the heirs of Fritz Grünbaum, who was interned and murdered at Dachau, that Schiele drawing that Eberhard Kornfeld later sold in Bern with provenance from Mathilde Lukacs, Grünbaum's sister–in–law, was *not* stolen by the Nazis, and that laches otherwise barred the Grünbaum heirs' claim based on an alternative theory that Lukacs had stolen the work after the war). *But see* Reif v. Nagy, 175 A.D.3d 107, 109–10, 114 (1st App. Div. 2019) (upholding replevin to Grünbaum heirs for Schiele works with the same Lukacs/Kornfeld provenance); *cf* Reif v. Art Inst. of Chicago, No. 23-CV-2443 (JGK), 2023 WL 8167182, at *1, 19–20, 23–24 (S.D.N.Y. Nov. 24, 2023) (dismissing claim to similarly Kornfeld/Lukacs-provenanced works based on collateral estoppel, relying on *Bakalar* judgment as controlling, also ruling claims were time-barred under HEAR Act and barred by laches). The mutually-exclusive conflict of results between *Nagy* and *Bakalar* was addressed in *AIC*, which emphatically endorsed *Bakalar* as the controlling precedent. *See also* Cassirer v. Thyssen-Bornemisza Collection Found., 89 F.4th 1226, 1230–33 (9th Cir. 2024) (applying Spanish law to vest title in Thyssen-Bornemisza Collection Foundation on the basis of prescriptive title after the Kingdom of Spain purchased the collection in 1993, notwithstanding 1939 forced sale from Lilly Cassirer and failure of Baron Hans-Heinrich Thyssen-Bornemisza to acquire good title in 1976 before eventual sale to Spain).

claims have foundered on statutes of limitation,[71] laches,[72] the Act of State Doctrine,[73] or lack of subject matter or personal jurisdiction over foreign sovereigns.[74] Some, like the *Portrait of Wally* case, have settled[75] after preliminary rulings one way or another on similar questions.

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[71] Detroit Inst. of Arts v. Ullin, No. 06-10333, 2007 WL 1016996, at * 3–4 (E.D. Mich. Mar. 31, 2007) (rejecting as untimely claim to Les Becheurs by Van Gogh by heirs of Martha Nathan, who sold painting in Basel, Switzerland in 1938 to Justin Thannhauser, Alexander Ball, and Georges Wildenstein); Toledo Museum of Art v. Ullin, 477 F. Supp. 2d 802, 803, 809 (N.D. Ohio 2006) (rejecting claim to Street Scene in Tahiti by Paul Gaugin by same Martha Nathan heirs based on the same Basel sale). *See also* Museum of Fine Arts, Bos. v. Seger-Thomschitz, 623 F.3d 1, 2, 9 (1st Cir. 2010) (upholding declaratory judgment claim in favor of MFA after heir to Oskar Reichel failed to bring claim within three years of making demand for Two Nudes (Lovers) by Oskar Kokoschka); Grosz v. Museum of Mod. Art, 772 F. Supp. 2d 473, 490–92 (S.D.N.Y. 2010) (dismissing claim for failure to file within three years of demand and refusal for three paintings by George Grosz).

[72] *See Bakalar*, 500 F. App'x at 8*; see also* Zuckerman v. Metro. Museum of Art, 928 F.3d 186, 197 (2d. Cir. 2019) (affirming on the basis of laches dismissal of claims by heirs to Alice Leffmann to The Actor by Pablo Picasso). Leffmann had sold the Picasso in Italy in 1938 after fleeing Germany. The District Court held the sale was not invalid for failure of evidence of duress. Zuckerman v. Metro. Museum of Art, 307 F. Supp. 3d 304, 319 (S.D.N.Y. 2018).

[73] Von Saher v. Norton Simon Museum of Art, 897 F.3d 1141, 1149 (9th Cir. 2018) (restitution in 1960s by Kingdom of Netherland to George Stroganoff–Sherbatoff was official act that precluded later restitution to heirs of Jacques Goudstikker); Emden v. Museum of Fine Arts, Houston, No. 4:21-CV-3348, 2022 WL 1307085, at *6 (S.D. Tex. May 2, 2022) (prior restitution to Hugo Moser was official act precluding claim by Max Emden heirs).

[74] Fed. Republic of Germany v. Philipp, 592 U.S. 169, 181 (2021) (domestic takings rule is incorporated within the meaning of "property taken in violation of international law" as used in the Foreign Sovereign Immunities Act, 28 U.S.C. § 1605); Simon v. Republic of Hungary, 77 F.4th 1077, 1088 (D.C. Cir. 2023) (stateless persons cannot assert property taking in violation of international law against foreign sovereign). *See also* de Csepel v. Republic of Hungary, No. 10–1261 (JDB), 2023 WL 6313576, at *18–19 (D.D.C. Sep. 28, 2023) (dismissing claims to all but one artwork from Herzog collection on the grounds that takings were by Hungarian government from either Hungarian nationals or stateless persons); Berg v. Kingdom of the Netherlands, 24 F.4th 987, 991 (4th Cir. 2022) (upholding dismissal on venue and personal jurisdiction grounds, and applicability of FSIA); Schoeps v. Freistaat Bayern, 611 F. App'x 32, 34 (2d Cir. 2015) (finding commercial activity exception inapplicable in case also involving sale to Thannhauser); Westfield v. Fed. Republic of Germany, 633 F.3d 409, 418 (6th Cir. 2011); Hulton v. Bayerische Staatsgemäldesammlungen, 346 F. Supp. 3d 546, 551 (S.D.N.Y. 2017) (allegations that Alex Vömel Aryanized Alfred Flechtheim's gallery insufficient to show state action necessary to invoke FSIA).

[75] Randy Kennedy*, Museum and Heirs Settle Dispute over Picasso*, N.Y. TIMES (Feb. 2, 2009) https://www.nytimes.com/2009/02/03/arts/design/03arts-MUSEUMSHEIRS_BRF.html [https://perma.cc/TC4W-LQNK] (settling claims against Museum of Modern Art and Solomon R. Guggenheim Foundation by heirs of Paul von Mendelssohn-Bartholdy); Judith Dobrzynski*, Settlement in Dispute Over a Painting Looted by Nazi*, N.Y. TIMES (Aug. 14, 1998) https://www.nytimes.com/1998/08/14/us/settlement-in-dispute-over-a-painting-looted-by-nazis.html [https://perma.cc/4A62-N3H3] (resolving claim to *Landscape with Smokestacks* at the Art Institute of Chicago by Goodman heirs); Relatedly, Maria Altmann's claim to *Portrait of Adele Bloch Bauer* and other works was resolved in binding arbitration after she prevailed at the Supreme Court on the retroactivity the FSIA to Austria for claims grounded in acts prior to the law's passage. *See generally* Republic of Austria v. Altmann, 541 U.S. 677 (2004). The heirs of Kazimir Malevich similarly settled a claim against the City of Amsterdam after prevailing on the threshold question of FSIA applicability. *See generally* Malevicz v. City of Amsterdam, 517 F. Supp. 2d 322 (D.D.C. 2007).

The contrast between U.S. caselaw and the moral considerations entertained by the foreign commissions is stark. Courts have been routinely indifferent to expressions of policy in federal legislation in reaching their conclusions, though sometimes they will express some hand–wringing in *dicta*.[76] Even so, the marketplace has been increasingly reluctant to sell works that come to auction—even where the facts might be considered abandonment or *Fluchtgut* rather than confiscation or a forced sale.[77] Christie's and Sotheby's in particular make explicit reference not to property law but to the Washington Principles, and with the implicit component of moral claims. Christie's expresses its aim to "Support the resolution of restitution claims for consigned artworks – advocating in the spirit of the Washington Principles, for fair and amicable solutions,"[78] citing examples such as *Meules de Blé* by Van Gogh, sold in 2011 pursuant to a settlement agreement between the previous owner, the heir of Max Meirowsky (the same collection from which the Hodler in the Oskar Reinhart Collection in Switzerland came) and the heirs of Alexandrine de Rothschild. Similarly, Sotheby's touts its "commit[ment] to the resolution of

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[76] Cassirer v. Thyssen Bornemisza Collection Found., 89 F.4th 1226, 1246 (9th Cir. 2024) (Callahan, J., concurring) ("I reaffirm the point we made in footnote three of our opinion in *Cassirer*, 824 F. App'x. at 457. Spain, having reaffirmed its commitment to the Washington Principles on Nazi–Confiscated Art when it signed the Terezin Declaration on Holocaust Era Assets and Related Issues, should have voluntarily relinquished the Painting. However, as we previously held, 'we cannot order compliance with the Washington Principles or the Terezin Declaration.' Our opinion is compelled by the district court's findings of fact and the applicable law, but I wish that it were otherwise."); Berg v. Kingdom of the Netherlands, 24 F.4th 987, 999 (4th Cir. 2022) ("To be sure, Berg's claim that the Nazi regime stole art owned by his grandfather's partnership presents a strong moral claim. However, as the Second Circuit noted in *Garb v. Republic of Poland*, 'strong moral claims are not easily converted into successful legal causes of action.'"); *see also* Adler v. Taylor, No. CV 04-8472-RGK (FMOX), 2005 WL 4658511, at *5–6 (C.D. Cal. Feb. 2, 2005) (declining to read 1998 Holocaust Victims Redress Act, Pub. L. No. 105–158, 112 Stat. 15 (1998) to create cause of action over claim to *Vue de l'Asile et de la Chapelle de Saint-Remy* by Vincent Van Gogh. Case was filed by the heirs of Margarethe Mauthner, who fled Germany in 1939). The Supreme Court was similarly dismissive of the policy of the Holocaust Expropriated Art Recovery Act of 2016 (HEAR Act), 130 Stat. 1524, viewing a statute explicitly designed to expand court redress by extending the statute of limitations as in fact primarily intended to promote *out of court* resolutions. Fed. Republic of Germany v. Philipp, 592 U.S. 169, 186 (2021) ("The statutes do promote restitution for the victims of the Holocaust, but they generally encourage redressing those injuries outside of public court systems."). This interpretation, made in service of the holding that Congress was not concerned with the genocidal taking of art by the Nazis, is utterly at odds with the statutory text and historical findings incorporated in the HEAR Act. Holocaust Expropriated Art Recovery Act, Pub. L. No. 114–308, 130 Stat. 1524 (2016) ("The Nazis' policy of looting art was a critical element and incentive in their campaign of genocide. . . .") (citing Holocaust Victims Redress Act, Pub. L. No. 105–158, 112 Stat. 15 (1998)).

[77] Richard Aronowitz–Mercer, *The challenges of resolving potential Fluchtgut questions from an art-market perspective*, *in* FLUCHTGUT – GESCHITCHTE, RECHT UND MORALS: REFERATE ZURE GLEICHNAMIGEN VERANSTALTUNG DES OSKARE REINHART MUESUEMS IN WINTERHUR 129 (Peter Mosimann & Beat Schönenberger eds., Stämpfli Verlag 2015) (sale after agreement with heirs concerning Max Emden paintings by David Teniers sold in Switzerland, not Germany).

[78] *About Christie's Restitution*, CHRISTIES'S, https://www.christies.com/en/services/restitution-services [https://perma.cc/3JUN-W7VK].

problems that can arise in respect of works of art that may have been displaced between 1933 and 1945 but not subsequently returned to their original owners,"[79] and features reference to sales pursuant to settlements with claimants of paintings not only sold under duress (*e.g.*, *Portrait of a Young Man with a Quill and a Sheet of Paper* by Agnolo Bronzino, sold by Ilse Hesselberger, née Wertheim[80]), but also what might qualify as *Fluchtgut* (*e.g.*, *Murnau mit Kirche II* by Wassily Kandinsky,[81] sold by Johanna Margarete Stern in the Netherlands with other works to survive after fleeing Nazi Germany). Indeed, the fact of a listing on the Lost Art database hosted by the German government effectively precludes a sale without settlement with the heirs, even though that database is subject only to a "plausibility check" and not readily susceptible to any judicial intervention to remove listings.[82]

VI. WHAT'S OLD IS NEW: A WAY FORWARD

Here, then, is where we seem to be in 2024: U.S. courts have seldom been willing to find duress sufficient to void a transaction and compel restitution of art today. The leading advisory panels of Europe adopt a more flexible standard and are willing, in certain circumstances, to recommend (though not compel) either restitution or a compromise payment even where a work of art was removed from areas of German control and sold in a neutral (or free) country like Switzerland or the United States. And finally, the market has become increasingly cautious, preferring to defer a modern–day sale even where the consignor has almost unassailable title unless and until a settlement is made.

This combination is untenable. Claimants who had no ability to bring claims as a practical matter or obtain enough information to make a claim are drowned in procedural defenses where few have the resources to pursue them. Good–faith collectors who relied on the integrity of the market under generally–accepted standards of the time—particularly for sales since the Washington Conference—suddenly find their property is unsellable without conveying part of the value of their property for entirely new scenarios like *Fluchtgut*, and often feel extorted. And state and national collections struggle to find a consistent standard to evaluate their own collections.

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[79] Lucian Simmons, *Art Restitution*, SOTHEBY'S, https://www.sothebys.com/en/about/services/art-restitution [https://perma.cc/RKE3-28HD].

[80] *Agnolo di Cosimo*, SOTHEBY'S, https://www.sothebys.com/en/buy/auction/2023/master-paintings-sculpture-part-i/portrait-of-a-young-man-with-a-quill-and-a-sheet?locale=en [https://perma.cc/3J5P-EK36].

[81] *Wassily Kandinsky*, SOTHEBY'S, https://www.sothebys.com/en/buy/auction/2023/modern-contemporary-evening-auction/murnau-mit-kirche-ii-murnau-with-church-ii-2?locale=en [https://perma.cc/T8GC-TJK8].

[82] Nicholas M. O'Donnell, *German High Court Rules Painting Will Stay Listed in Nazi-Era Lost Art Provenance Database,* THE ART L. REPORT (July 24, 2023), https://blog.sullivanlaw.com/artlawreport/german-high-court-rules-painting-will-stay-listed-in-nazi-era-lost-art-provenance-database [https://perma.cc/EK29-KBLZ] (concerning listing of *Calabrian Coast (Kalabrische Küste)* by Andreas Achenbach, listed by heirs of Max Stern).

If there is a common thread across the London Declaration, MGL No. 59, the Washington Principles, the HVRA, and the HEAR Act, it is the common–sense conviction that the Nazi regime's comprehensive discrimination on the one hand, and their particular obsession with art on the other hand, compel action beyond mere historical analysis. Yet too often, particularly in the last few years, judicial decisions are accompanied by loud throat–clearing, bemoaning the inability to reach a different result.[83]

A better way forward lurks in the principles enunciated by the men and women who faced the actual Nazis, and some very traditional concepts that have seldom been explored in modern caselaw: unconscionability and lack of capacity.

The perverse irony of unpacking so much of Nazi–era art transfer is the very idea that most of it was couched as an ostensible sale, with the exchange of some identifiable consideration. But a sale is just an agreement by another name, and even in the most liberal view of freedom of contract, there are limits. Unconscionability is an extreme remedy, to be sure. Yet the Restatement[84] and analogous law have long provided for the possibility of "substantive unconscionability," defined as

> [G]ross inequality of bargaining power, together with terms unreasonably favorable to the stronger party, may confirm indications that the transaction involved elements of deception or compulsion, or may show that the weaker party had no meaningful choice, no real alternative, or did not in fact assent or appear to assent to the unfair terms.[85]

Unlike the presumption of MGL. No. 59, the party challenging the contract based on unconscionability bears the burden of proof.[86]

Lack of capacity might also serve as a possible framework to review *Fluchtgut* transfers. This framework would be a high hurdle but might be the right fit for certain exceptional cases. Lack of capacity ordinarily refers to the literal or legal inability to enter into an agreement, such as infancy or intoxication.[87] That ability is often specific to history, and certainly includes concepts that today would seem outlandish and offensive—like gender, or indigenous status.[88]

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[83] *See, e.g.*, Cassirer v. Thyssen–Bornemisza Collection Found., 89 F.4th 1226, 1246 (9th Cir. 2024).
[84] RESTATEMENT (SECOND) OF CONTRACTS, § 208 CMT. D (AM. LAW INST. 1981).
[85] *Id.*
[86] *See, e.g.*, Parilla v. IAP Worldwide Servs., VI, Inc., 368 F.3d 269, 277 (3rd Cir. 2004).
[87] RESTATEMENT (SECOND) OF CONTRACTS, § 12 (AM. LAW INST. 1981).
[88] *Id.* at cmt. b.

Yet consider the history actually at issue here. Is it so difficult to conceive—with proper evidence and proof in a specific case—a Jewish refugee, who found themselves in a new and foreign place, cut off from any perceptible ability to access the rule of law, did not really have the capacity to contract? The difficulty of proving such an allegation is, in fact, its value as a standard. A Swiss or Belgian transplant could not merely say that the fact of the transaction was the basis to invalidate it. And over time, for better or for worse, as proof becomes harder, some kind of market and legal certainty could develop. This was always an imperfect fit, contracts are typically and fundamentally privately–ordered affairs, but the status quo needs settling.

The well–developed facts of many of the disputed cases in courts and national advisory panels provide an opportunity to test this thesis. For example, many of the events involving exiled dealers, like Thannhauser, Feilchenfeldt, or (Fritz) Nathan, would pass muster as valid transactions under this standard. Where Max or Hans Erich Emden had a course of dealing with Feilchenfeldt, one might reasonably conclude that where prices were exchanged, that the seller's bargaining power was *not* someone who "had no meaningful choice, no real alternative," such that valid title *would* flow from the transaction. Reasonable people might disagree from a historical perspective, but the market could rely on the transaction absent proof that unconscionability was more likely than not.

The sales by Martha Nathan to Justin Thannhauser and Wildenstein in Basel could be viewed under the same lens, examining historical correspondence where possible to see if the seller was, or was not, literally bereft of options. So, too, the Leffmann case of refugees in Italy, laboring under different anti–Semitic laws, or Margarethe Mauthner. Too many of these cases, when the merits were reached at all, thought only in terms of duress or state action. The Grünbaum case has been one of the most fiercely–contested, including very much about the proper framing (one of the few that adopted the course recommended here, though not a *Fluchtgut* paradigm). The heirs argued that Grünbaum lacked capacity to convey his art collection because he was imprisoned in Dachau. That principle is effectively unassailable, no one imprisoned in a concentration camp in Nazi Germany has any ability to resist, let alone any meaningful alternative to the transaction. But other links in the chain between Grünbaum and the modern market remain to be proven, and the various parties in different cases including the heirs, Richard Nagy, David Bakalar, and the Art Institute of Chicago made their best case. Isn't that how it should work?

Zuckerman (the Leffmann heirs) also provides an interesting case study. As noted above, the Second Circuit upheld a dismissal against the claimants on the basis of laches, holding that the work's location and public display at the Metropolitan Museum of Art was publicly–known for decades and thus equitable principles barred the claim.[89] Yet that was an alternative grounds for affirmance, the District Court had actually addressed the allegations of whether

[89] Zuckerman v. Metro. Museum of Art, 928 F.3d 186, 193–95 (2nd Cir. 2019).

the painting was stolen or otherwise still owned by the Leffmann heirs.[90] The District Court grappled with much of the confiscation–based terminology, ultimately concluding that it could not be said that selling the Picasso was the result of having been forced to do so as the law reads that term. The Court considered law from both Italy and New York about what constitutes a threat necessary to void a contract, and found there was inadequate allegations which, if true, from which a jury could conclude that there was a threat necessary to void a contract.[91] The Plaintiff did make an argument that the Court responded to in language that tracks the unconscionability standard without naming it explicitly, holding that she "fail[ed] to plead facts demonstrating that the Leffmanns had 'no other alternative' than to engage in the 1938 transaction."[92] This was, admirably and regardless of what one thinks of the District Court's conclusion, an attempt to address the fundamental dynamic of the transaction, rather than an off–ramp used by the Court of Appeals that more or less said any claim against a museum is barred by laches.

Settlements and advisory commission outcomes support this approach as well. Julius Freund, Alexander Lewin, Clara Levy, Max Emden, and Kurt Grawi all managed to get out of Germany with some of their art collection. Each of these cases' evidences could be examined to decide whether the standard was met. Arguably, Grawi might have the weakest argument, having managed not just to get out of Germany but all the way to America. So, too would Clara Levy's shipment to her daughter tend to show that she was making a choice, rather than lacking one. Max Emden's claim might have similar challenges, though a sale to Karl Haberstock would always bolster concern that there was some other sinister threat of harm behind the deal, as Lewin's heirs might argue as well. The Freunds' consignment at Galerie Fischer in Lucerne and purchase by Hans Posse might well make the case that they were surrounded by a lack of real options or legal status as a contract party. For the Koch claim in the UK, perhaps it is stronger than it first appeared. While Ida Netter was outside Germany, German Jews were famously refused legal status and often treated as enemy combatants in the UK. Is that a "meaningful choice" or "real alternative?" Perhaps not. The SAP result for the anonymous claim to *A View of Hampton Court Palace* looks wise under this standard, a refugee hiding in Belgium is hard to see as holding equal bargaining power.

None of the foregoing adjudicates any of these cases, of course, and nothing here is meant to pass judgment on the full weight of evidence offered by heirs and later owners. The evolving consideration of *Fluchtgut* is a salutary development in terms of history, law, and policy. With the lens of concepts already accessible—unconscionability and capacity—perhaps that can start to take more concrete form.

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[90] Zuckerman v. Metro. Museum of Art, 307 F. Supp. 3d 304, 322 (S.D.N.Y. 2018).
[91] *Id.* at 318.
[92] *Id.* at 320.