

Restitution of Nazi-Looted Art:
Is Morality Enough?

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The restitution of art (and other cultural property) looted by Nazi Germany may, at first glance, seem relatively simple. In the event that someone—be they a museum, an individual, an auction house—determines that an object in their possession was looted by Nazis, the person or institution should do everything in their power to return the object to either its original owner or their heir(s). However, not to speak too broadly, nothing relating to cultural property law is ever that simple. What if, despite knowledge that an object was looted, its rightful owner cannot be found? What if multiple parties claim to be the original or rightful owner?

The following restitution case, despite initially seeming cut and dry, shows the complexities inherent in the field. Lilly Cassirer, a German grandmother, was attempting to flee Germany in 1939, when Nazi officials approached her to “purchase” a piece of art she owned: *Rue Saint-Honoré, après-midi, effet de pluie*, by Camille Pissarro. Cassirer was fully aware of the coercive nature of the “forced sale” and acquiesced, selling the artwork to the Nazis for far less than its actual worth.¹ During the tumultuous aftermath of World War II, the painting went missing; instead of the work’s return, Cassirer settled with the German government. Germany paid her the actual cash value of the artwork, with the very important stipulation that she and heirs would be entitled to the painting’s return should it ever resurface.

In 2001, long after Cassirer’s death, the painting showed up in the collections of Madrid’s Thyssen-Bornemisza Museum, miles away from where it was first stolen. Under the pretense that Germany guaranteed the painting’s return to the Cassirer family, Claude Cassirer, Lilly’s grandson, sued the museum for the painting’s return. The museum, faced with a set of difficult choices, argued that they had had no part in the work’s theft; additionally, its display in a public museum was actively doing good for the enrichment of the Spanish public. This case,

¹ Kaplan, Isaac. “3 Cases That Explain Why Restituting Nazi-Looted Art Is So Difficult.” Artsy, July 5, 2017. <https://www.artsy.net/article/artsy-editorial-3-cases-explain-restituting-nazi-looted-art-difficult>.

which was tried in America, ended up using Spanish law (instead of American or international law). To summarize, the museum had held the piece for long enough without the Cassirer family finding it; therefore, the museum had a legal claim to keep the painting.²

Despite the complications that inevitably result when trying cases of Nazi-looted restitution, there is generally one constant that all parties involved can agree on the importance of: doing the right thing. Calling on morals and general morality is a common occurrence when discussing Nazi-looted art. It makes sense, after all: Nazi Germany, at an organizational and systemic level, was evil; acts of cultural looting are also generally considered evil or morally wrong; therefore, returning these looted objects is the good and morally just thing to do. For an example of this attitude, one only needs to look at 1998's "Washington Conference Principles on Nazi-Confiscated Art," a set of non-binding, internationally focused principles intended to "assist in resolving issues relating to Nazi-confiscated art."³ The particularly relevant sections of the Principles are as follows:

1. Art that had been confiscated by the Nazis and not subsequently restituted should be identified.
5. Every effort should be made to publicize art that is found to have been confiscated by the Nazis and not subsequently restituted in order to locate its pre-War owners or their heirs.
9. If the pre-War owners of art that is found to have been confiscated by the Nazis, or their heirs, can not be identified, steps should be taken expeditiously to achieve a just and fair solution.⁴

Of particular note is the concept of a just and fair solution, another idea whose initial simplicity quickly yields a great number of questions. What solutions are considered just and fair? What entity or governing body is able to determine the meaning of justness? Of fairness?

² "3 Cases That Explain Why Restituting Nazi-Looted Art Is So Difficult."

³ United States Department of State. "Washington Conference Principles on Nazi-Confiscated Art." Accessed March 7, 2024. <https://www.state.gov/washington-conference-principles-on-nazi-confiscated-art/>.

⁴ "Washington Conference Principles."

What happens if the parties involved in a given case disagree with the accepted definition of justness and fairness? Looking at the historical context for the Washington Conference may be able to help elucidate this problem.

The 1907 Hague Convention Concerning the Laws and Customs of War on Land is one of the earliest relevant international treaties to discuss. While it contains no explicit policy for restituting looted objects, the convention does specifically forbid looting and, importantly, requires any countries found to have engaged in looting to monetarily compensate the affected country.⁵ More specific provisions from later treaties expanded on this. The Treaty of Versailles, the signing of which marked the end of the First World War, specifically required Germany to return objects looted both during the First World War and the earlier Franco-Prussian War to France.⁶

During World War II, the wide-scale nature of Nazi looting became readily apparent to Allied forces. The 1907 ban of looting, of course, did nothing to stop it, and the Treaty of Versailles in general only served to further exacerbate the issue, to grossly oversimplify the ramifications the document had on the beginning of the Second World War. In 1943, four years after the start of the war, the Allies released the *Inter-Allied Declaration against Acts of Dispossession Committed in Territories under Enemy Occupation or Control* (more simply called the London Declaration). Simply put, the London Declaration announced that all acts of theft, including ostensibly legal forced purchases, carried out by Nazi Germany and its allies would be forcibly reversed after the war.

⁵ Campfens, Evelien. *Fair and Just Solutions?: Alternatives to Litigation in Nazi-Looted Art Disputes: Status Quo and New Developments*. The Hague, NETHERLANDS, THE: Eleven International Publishing, 2015. <http://ebookcentral.proquest.com/lib/gwu/detail.action?docID=1977383>, 14.

⁶ *Fair and Just Solutions*, 14.

From these early documents, we can glean the beginnings of the Washington Principles' concept of fair and just returns. Even before the days of the League of Nations, it was internationally acknowledged (at least by the signatories of the Hague Convention) that looting during wartime was illegal and would be punished. More relevantly, the London Declaration made specific note of technically legal forced sales of art—a technique used by the Nazis in which they all but forced sale of a work without physically stealing it. This provision's relevance comes from the fact that it sets an early precedent for seeking fair and just solutions: forced sale may not have technically been looting as set out by the 1907 convention, but it still had the moral and, importantly, emotional ramifications of more typical cases of wartime theft.

The influences on the Washington Conference are more than historic, however: English itself may have had an impact. In many languages, just and fair are synonymous. Take French, for example: both words can easily be translated as *juste*, and as such, the concepts are used interchangeably.⁷ But that is not the case with English, as first pointed out by economist Bart Wilson in an article in *The Atlantic*. To easily show the difference, imagine a child, complaining about a seemingly unnecessary rule, exclaiming: "It's not fair!" To a native English speaker, that sounds perfectly normal. However, instead imagine this child yelling that "It's not just!" While meaning similar things, this exclamation seems out of place, if not a bit silly.⁸

This difference comes to English as many quirks of the language do: conflicting influence from Germanic and Romance languages. "Fair," which has its roots in Old English by way of German, has, in many dictionaries, the primary meaning of "of pleasing appearance," with its secondary meaning of impartiality or following set rules coming from linguistic association.⁹

⁷ There is no citation for this translation as I am fluent in French.

⁸ Davidson, Douglas. "Just and Fair Solutions." In *Fair and Just Solutions?: Alternatives to Litigation in Nazi-Looted Art Disputes: Status Quo and New Developments*, edited by Evelien Campfens, 91–101. The Hague, NETHERLANDS, THE: Eleven International Publishing, 2015.
<http://ebookcentral.proquest.com/lib/gwu/detail.action?docID=1977383>, 92.

⁹ "Just and Fair Solutions," 92.

People viewed following the rules as attractive, and the association stuck. “Just,” however, which comes from the Latin *iustus*, has always had a strictly philosophical meaning not derived from associations with beauty. *Iustus* and its root *ius* tended to refer to the concept of justice beyond specific laws, whereas *lex*, the Latin source of the English word “legal,” generally referred to specific laws.¹⁰

Why is this etymology relevant? Many early codes regarding looted art specifically mentioned the beauty of the art as one of the reasons for its return; works of human-made beauty should be returned to their owners. Perhaps then we have come to a meaning of “fair” as relevant to the Washington Principles: solutions reached in cases of Nazi looting should be beautiful, emotionally and philosophically speaking, to the involved parties. In a more grounded sense, if a case’s lawyers come to an agreement that is deemed unappealing by the case’s claimant, the agreement should be reconsidered.

Beyond philosophical discussions of its relationship with the concept of justice, beauty has a very real impact on how Nazi-looted restitution is discussed. On “the morning of 22 July 1945,” a convoy of American military trucks drove through the streets, carrying a vast collection of 750 pieces of art stolen by the retreating German army the prior year.¹¹ Alongside American general Edgar Hume, Florence’s mayor—a socialist—hailed the event as the ““return of beauty”” to Italy following the horrors of the war.¹² To the people of Florence, a city torn by war, the return of the art marked the beginning of a period of healing; to the whole of Italy, this sense of rebuilding extended to the nation itself. After all, Italy was the first of the European governments to fall to fascism; as such it faced a particularly difficult journey of national

¹⁰ Ibid.

¹¹ Gaudenzi, Bianca. “The ‘Return of Beauty’? The Politics of Restitution of Nazi-Looted Art in Italy, the Federal Republic of Germany and Austria, 1945-1998: European Review of History.” *European Review of History* 28, no. 2 (April 2021): 323–46. <https://doi.org/10.1080/13507486.2021.1885350>, 323.

¹² ““Return of Beauty,”” 324.

rebuilding. The roads, cities, and buildings needed to be rebuilt, yes, but Italy, alongside its newly non-Axis governments of Austria and Germany, needed to rebuild its national identity.

While the subject of art and its use in post-war nation building is undoubtedly interesting, in this case, it concretely shows the importance of fairness, of beauty, when discussing restitution. The so-called “return of beauty” allowed these ex-fascist governments to exonerate themselves: they have returned the art and therefore are no longer culpable for its theft.¹³ However, despite any less-than-magnanimous intentions, restitution still had the notable impact of giving physical, beautiful objects back to their rightful owners, alleviating some post-war stresses.

“Fairness,” as a word, has its roots in the concept of beauty; what, then, of “justness” with its greater legal implications? This is easier to define and understand. Harkening back to the broader legal meaning of *iustus* and *ius*, “justness” should be sought by following the law, avoiding preferential treatment for any relevant party in a given case. But that is still ill-defined and difficult to achieve, not to mention the potential disagreements as to whether or not American, international, or another nation’s laws are actually just.

“Fair” and “just” are, as demonstrated, difficult to define. Despite that, cases were still successfully tried following the principles set out by the Washington Conference. In an examination of potential ways to improve Nazi restitution cases and lawsuits, Norman Palmer, an advisor to the United Kingdom’s Spoliation Advisory Council, posited this list of the important tenets of justice that should be considered:

1. A speedy resolution of issues: justice delayed is justice denied.
2. An impartial resolution of issues: *nemo iudex sua causa*.
3. Each side to be heard fairly and equally: *audi alteram partem*.
4. A level playing field, which allows no inside track to privileged disputants, and no advantage to those commanding superior resources.

¹³ “Return of Beauty,” 339.

5. A secure, accessible, neutral and capable forum.
6. A forum that is not only impartial but would reasonably be regarded by fair observers as impartial.
7. Renouncing technicality and approaching claims on their merits.
8. Approaching evidence realistically with regard to such factors as time and trauma.
9. Weighing all relevant factors, excluding all irrelevant factors.
10. Giving reasoned decisions that can be rationally challenged and where appropriate used as meaningful precedents.
11. Treating like cases alike: *in consimili casu consimile debet esse remedium*.
12. Fitting the remedy to the specific case.¹⁴

This is by no means a complete list, but its contents very well could prove helpful when considering the definition of “just and fair” as used in the Washington Principles. In addition to seeking a fair and just outcome, many cases involving Nazi restitution invoke an heir’s moral claim to an object—again, the idea of “doing the right thing.”

To briefly break the veil of academic neutrality, I want to clarify here that I fully and wholeheartedly believe that returning objects stolen by Nazis to their rightful owners is a morally just thing to do—however, problems can occur when trying to apply something as broad and subjective as “morality” to something as rigid as the legal system. As an example, literature on the subject often “speaks of ethical dilemmas and the importance of moral precepts to guide the return of... cultural property” without specifying “what the morality is to which it refers.”¹⁵ This has the same fundamental problem as the use of “just and fair” in the Washington Principles: invoking a broad concept without sufficiently defining its usage.

In many cases, the morals involved can be relatively simple: if a collector finds themselves in possession of a looted artwork without having done sufficient research into its

¹⁴ Palmer, Norman. “The Best We Can Do?” In *Fair and Just Solutions?: Alternatives to Litigation in Nazi-Looted Art Disputes: Status Quo and New Developments*, edited by Evelien Campens, 153–85. The Hague, NETHERLANDS, THE: Eleven International Publishing, 2015. <http://ebookcentral.proquest.com/lib/gwu/detail.action?docID=1977383>, 167-168.

¹⁵ De Girolamo, Debbie. “The Conflation of Morality and ‘the Fair and Just Solution’ in the Determination of Restitution Claims Involving Nazi-Looted Art: An Unsatisfactory Premise in Need of Change.” *International Journal of Cultural Property* 26, no. 4 (November 2019): 357–85. <https://doi.org/10.1017/S0940739119000316>, 366.

provenance, it seems clear that the artwork in question should be returned to its rightful owner. However, the waters get muddied as soon as competing moral claims get involved. In the Cassirer case discussed earlier, both parties involved had a valid moral claim to keep the Pissarro. Cassirer's family, of course, was the original owner of the piece and was legally entitled to it, as per their settlement with the German government. The Spanish museum, however, claimed that the art was doing a net societal good by educating the public despite having indirectly acquired the work via looting.

Even though any given individual may be more partial to one moral claim than another, both parties in the Cassirer case—and a great number of other Nazi restitution cases—have real, valid moral claims; an impartial observer could be convinced that any outcome of the case would result in “the right thing” being done. Another case further demonstrates the difficulty of appealing to morality in these cases. Dina Babbitt, a prisoner of Josef Mengele at Auschwitz-Birkenau, agreed to paint watercolor paintings of various Holocaust victims in exchange for the survival of her mother and herself.¹⁶ Babbitt, and, after her death, Babbitt's family, sued for the return of the paintings as they “are a reminder of her survival and represent her need to retain what belongs to her after having had everything taken away from her.”¹⁷ The Auschwitz-Birkenau State Museum, the watercolors' current owner, argued against the Babbitts' claim, citing their legal ownership of the artworks.

In addition to the museum's legal claim, they also have a moral claim that directly contradicts the Babbitts'. Rabbi Andrew Baker, at the time an advisor to the Auschwitz-Birkenau State Museum, claimed that the museum staff were not ““devils””; they simply were interested in maintaining Auschwitz as authentically as possible to preserve its

¹⁶ “The Conflation of Morality,” 370.

¹⁷ Ibid.

utility as a warning and a teaching tool.¹⁸ As with the Cassirer case, both parties have valid but competing moral claims. When told the details of the case, some (including myself, for honesty's sake) believe that the emotional importance of the Babbitts' claim trumps the museum's; others believe that the ASBM's claim of educating the public and serving the greater good trumps the victim's claim. And, operating from a purely moral standpoint, neither option is objectively correct.

If it is impossible to ascertain what outcome results in the "right thing" being done, then how can a fair and just outcome possibly be achieved? The answer may lie in reframing what aspect of the justice process "fair and just" is referring to. The majority of academic and legal discussion has been focused on ensuring the moral *outcome* of cases; instead, focus should be given to ensuring that the *proceedings* of a given case are fair, just, and moral.

This idea was gestured at in Palmer's proposed tenets of justice. More specifically, he suggested that "each side [should] be heard fairly and equally" and that cases should ensure "a level playing field, which allows no inside track to privileged disputants, and no advantage to those commanding superior resources."¹⁹ The idea of just court proceedings is wrapped up in the concept of "procedural justice"; the idea of, again, ensuring that all relevant parties are treated equally and with respect.²⁰ Pursuing procedural justice in these cases has the advantage of not being a purely hypothetical ideal.

When interviewed, Alfred Jacobsen, a Dutch man who made a restitution claim through the Dutch Restitution Committee, stressed how important it was that his claim was "treated very

¹⁸ Ibid.

¹⁹ Palmer, Norman. "The Best We Can Do?" In *Fair and Just Solutions?: Alternatives to Litigation in Nazi-Looted Art Disputes: Status Quo and New Developments*, edited by Evelien Campfens, 153–85. The Hague, NETHERLANDS, THE: Eleven International Publishing, 2015.
<http://ebookcentral.proquest.com/lib/gwu/detail.action?docID=1977383>, 167-168.

²⁰ "The Conflation of Morality," 368.

seriously...’ and that the claim was ‘considered thoroughly and professionally.’”²¹ Similar and related sentiments have been echoed by other restitution claimants. One family seeking the return of a stolen Persian rug, for example, complained of the government’s delay when dealing with the case. One claimant, however, summed up the argument for procedural justice quite neatly: “‘in some cases, though, it is not so much about restitution or compensation, but the way in which these cases are tackled.’”²²

These claimants are people whose lives and whose families have been affected by Nazi looting efforts; instead of being as results-oriented as much of the literature is, they instead seem to more highly value being treated with respect and with dignity during court proceedings. This is not to say that we should throw the concept of attempting to actually restitute objects to the wind, but that we should instead give greater focus to cases themselves rather than their outcomes. More specifically, many claimants value reconciliation more than simple restitution. As stated by Canada’s Truth and Reconciliation Commission, “‘reconciliation is about establishing and maintaining a mutually respectful relationship... For that to happen, there has to be awareness of the past, acknowledgement of the harm that has been inflicted, atonement for the causes, and action to change behaviour (sic).’”²³

Much of this discussion has been lofty and high-minded debates over very specific meanings of very vague words. What is fair? What is just? What is morality? And so on. But, to these claimants, the people actually impacted by the looting and by the restitution, these theoretical debates take on a much more important and concrete meaning. A man fighting for the return of his grandfather’s stolen art may not care about whichever definition of “fair” I

²¹ “Conflation of Morality,” 376.

²² Bas van Lier, quoted in De Girolamo, Debbie. “The Conflation of Morality and ‘the Fair and Just Solution’ in the Determination of Restitution Claims Involving Nazi-Looted Art: An Unsatisfactory Premise in Need of Change.” *International Journal of Cultural Property* 26, no. 4 (November 2019): 378.

²³ Truth and Reconciliation Commission of Canada, 2015, quoted in “Conflation of Morality,” 379.

decide upon; instead, as he actively goes through years and years of court proceedings, he cares that he, his family, and his history are treated with respect and with dignity.

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