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The HEAR Act:

An Underutilised Tool for Recovering Holocaust-Looted Art is Scheduled Soon Partially to Expire

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I. Introduction

On 16 December 2016, President Barack Obama signed into law the Holocaust Expropriated Art Recovery Act of 2016 (the 'HEAR Act').[1] The HEAR Act extended the statute of limitations for legal actions in the United States seeking the return of art lost to its owners as a result of Nazi persecution.

As the six-year anniversary of the HEAR Act approaches, surprisingly few reported lawsuits have arisen under its provisions.[2] Of course, many looted art claims are resolved consensually, and reported cases can serve only as a loose proxy for disputed looted art claims. Some cases also may be in incipient stages, and not yet have generated reported decisions; the 'Birds' Head Haggadah' case, described below, in which this author serves as counsel, is an example of one such case.[3] Nevertheless the dearth of case law suggests that the HEAR Act has been an underused tool in the restitution of Holocaust looted art.

The six-year anniversary of the HEAR Act's passage reflects an important milestone. The HEAR Act extends certain statutes of limitation by only six years. On the six-year anniversary of passage, many claims that would have benefited from its provisions will again be time barred.

At this critical juncture, this article will examine how courts to-date have addressed the HEAR Act and interpreted its provisions. It begins with a description of the Act itself, and then discusses the issues that have arisen before the courts and how they have been resolved. It is hoped that heirs and others with the types of meritorious claims that the

1 Holocaust Expropriated Art Recovery Act of 2016, Pub. L. No. 114–308, 130 Stat. 1524. For an excellent description of genesis of the Act and its early impact, see Nicholas O'Donnell, 'The Holocaust Expropriated Art Recovery Act: A Sea Change in US Law of Restitution', (2017) XXII *Art Antiquity and Law* 273.

2 A Westlaw search of the term 'Holocaust Expropriated Art' identified 18 reported decisions using that term. Even that small number overstates the number of claims because it includes multiple reported decisions issued in a single action, cases filed prior to enactment and decisions making only tangential references to the Act. It appears that fewer than ten lawsuits have been filed in response to the enactment of the HEAR Act.

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HEAR Act was intended to protect will recognise the approaching deadline and take necessary steps to preserve their rights.

II. The US Congress Passed the HEAR Act with High Hopes

The HEAR ACT was approved by both houses of the US Congress without a single dissenting vote,[4] and praise for the bill came from both sides of the American partisan divide.

Senator Ted Cruz, a conservative Republican Senator, for example, issued a passionate statement in support of the bill. He said:

> Today, we delivered a long-overdue victory for the families of Holocaust victims. This bipartisan legislation rights a terrible injustice and sends a clear signal that America will continue to root out every noxious vestige of the Nazi regime. I'm proud to have worked closely with my colleagues on both sides of the aisle to empower the victims of the horrific atrocities that took place over 70 years ago and will continue to fight to bring peace and justice to these families.[5]

Jerome Nadler, a left-leaning Democrat from New York, was equally supportive if more subdued:

> The passage of today's bill is a promise to the victims of the Holocaust that the United States is committed to creating a fair judicial process for the return of property that was wrongfully stolen during the Holocaust.[6]

III. Provisions of the HEAR Act

1. Findings of the Act

The HEAR Act contains a relatively lengthy series of findings that describes the backdrop against which it was enacted. The Act first found that, based on estimates, the Nazis had confiscated or otherwise misappropriated hundreds of thousands of works of art and other property as part of their genocidal campaign against Jews and others, activities described as the "greatest displacement of art in human history". It observed that, despite the efforts by the United States and its Allies to return the stolen artworks to their countries of origin, many works of art were never reunited with their owners.[7] Some of the art has since been discovered in the United States.

The Act then recounts the history of US efforts connected to Holocaust Art Restitution. It describes the Washington Conference, and its Principles on Nazi-Confiscated Art, including that "steps should be taken expeditiously to achieve a just and fair solution" to

4 See <www.cruz.senate.gov/newsroom/press-releases/sens-cruz-cornyn-praise-unanimous-passage-of-the-bipartisan-hear-act>, last referenced on 12 Oct. 2022.

5 *Id.*

6 <https://nadler.house.gov/news/documentsingle.aspx?DocumentID=391491>, referenced on 12 Oct.2022.

7 For an excellent analysis of the ways in which museums and governments have responded to the challenges of achieving justice when confronted with claims for art lost because of the Holocaust, see *Museums and the Holocaust* (2nd edn 2021).

claims involving such art that has not been restituted if the owners or their heirs can be identified. It describes the Holocaust Victims Redress Act, which expressed the sense of Congress that:

> all governments should undertake good faith efforts to facilitate the return of private and public property, such as works of art, to the rightful owners in cases where assets were confiscated from the claimant during the period of Nazi rule and there is reasonable proof that the claimant is the rightful owner.[8]

It also describes the Terezín Declaration issued at the 2009 Holocaust Era Assets Conference in Prague, which reaffirmed the 1998 Washington Conference Principles and urged all participants:

> to ensure that their legal systems or alternative processes, while taking into account the different legal traditions, facilitate just and fair solutions with regard to Nazi-confiscated and looted art, and to make certain that claims to recover such art are resolved expeditiously and based on the facts and merits of the claims and all the relevant documents submitted by all parties.

The Act observed that victims of Nazi persecution and their heirs had taken legal action in the United States to recover Nazi-confiscated art. These lawsuits faced significant procedural obstacles, however, partly due to state statutes of limitations, which typically bar claims within some limited number of years from either the date of the loss or the date that the claim should have been discovered. In some cases, this means that the claims expired before World War II even ended.

The Findings section further observed that the unique and horrific circumstances of World War II and the Holocaust had made statutes of limitations especially burdensome to the victims and their heirs. Those seeking recovery of Nazi-confiscated art must painstakingly piece together their cases from a fragmentary historical record ravaged by persecution, war and genocide. This costly process often cannot be done within the time constraints imposed by existing law.

The Findings concluded that Federal legislation was needed because a federal court had held that the Constitution prohibits US States from making exceptions to their statutes of limitations to accommodate claims involving the recovery of Nazi-confiscated art. In light of this precedent, the enactment of a Federal law was deemed necessary to ensure that claims to Nazi-confiscated art are adjudicated in accordance with United States policy as expressed in the Washington Conference Principles on Nazi-Confiscated Art, the Holocaust Victims Redress Act and the Terezín Declaration.

2. Purposes

In addition to the section Findings, the HEAR Act also contains a ‘purposes’ section, which identifies two goals. The goals are essentially consistent with the Findings: (1) To ensure that laws governing claims to Nazi-confiscated art and other property further United States policy as set forth in the Washington Conference Principles on Nazi Confiscated Art, the Holocaust Victims Redress Act and the Terezín Declaration; and (2) to ensure that claims to artwork and other property stolen or misappropriated by the Nazis are not unfairly barred by statutes of limitations but are resolved in a just and fair manner.

8 Public Law 105–158, 112 Stat. 15.

3. Extension of Statute of Limitations

a. Types of Expropriations to Which the HEAR Act Applies

The HEAR Act extends the statute of limitations for filing suit to recover "any artwork or other property" that was "lost" "during the covered period" "because of Nazi persecution." Most of these terms are defined broadly by the Act.

The HEAR Act defines "artwork or other property" broadly to include, among other things, pictures, paintings and drawings; statuary art and sculpture; books and musical objects; photos and movies; and sacred and ceremonial objects and Judaica. The "covered period" is defined as running from 1 January 1933 to 31 December 1945, which includes all events from the Nazis' rise to power until that regime's final demise. The term "because of Nazi persecution" means "any persecution of a specific group of individuals based on Nazi ideology by the Government of Germany, its allies or agents, members of the Nazi Party, or their agents or associates, during the covered period."

Equally important is the broad scope of loss covered by the HEAR Act. The Act does not apply only to art stolen by the Nazis, but to any objects that were "lost . . . because of Nazi persecution". This would appear to encompass any credible claim by Jews or other persecuted groups to recover their property when the loss was in any way related to persecution.

b. Time Periods Eligible for the Extensions

The HEAR Act utilises a series of definitions, rules, exceptions and exceptions-to-exceptions so that it requires significant effort to untangle its plain meaning.[9] A simple (but inexact) summary might be that the HEAR Act describes four rules for when a lawsuit may be filed despite pre-existing statutes of limitations:

Rule 1: If the heirs first discovered the identity and location of the object in which they own a possessory interest on or after 15 December 2016, then a lawsuit must be filed within six years from the date of discovery;

Rule 2: If the heirs first discovered the identity and location of the object in which they own a possessory interest on or after 15 December 2010, and before 15 December 2016, then a lawsuit must be filed by 16 December 2022;

Rule 3: If an heir knew the identity and location of the object after 1 January 1999, and before 15 December 2010, and had six years during that period in which to file a claim, then the statute does not extend the limitation period;

Rule 4: If the limitation period expired before 1 January 1999, then the limitation period extends to 16 December 2022.

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9 The statute first extends the period of limitation for covered claims generally so that it runs from the time of 'actual knowledge' of the loss. Someone without actual knowledge receives the benefit of this provision. It then provides that anyone who ever has had knowledge of a loss is deemed to have had actual knowledge of the loss as of the date of enactment. Under this 'deemer' provision, standing alone, all heirs would have six years from the date of enactment in which to file suit. It then excepts from this deemer provision those who fall into Rule 3 of the text above, i.e. those who had six years after the Washington Principles to file suit. The drafters apparently may have believed that those who had those six years to file suit after the Washington Principles should already have filed.

These abstract categories are more readily understood by reference to some examples:

1. An heir learns of a lost artwork on 1 January 2017. The period of limitation is extended until 1 January 2023.

2. An heir learns the identity and location of a lost artwork on 1 January 2002. The applicable period of limitation in her state is six years. Under the statute, no HEAR Act extension applies.

3. An heir learns of a lost artwork on 1 January 1960, and had the ability to file suit but did nothing. Under the HEAR Act, the statute of limitations is extended until 16 December 2022.

IV. Litigation

Only a small number of cases have been reported addressing the HEAR Act. These cases, some of which are in their early stages, nevertheless address, among other things, the type of relationship between the loss of the item and Nazi persecution that is necessary if the HEAR Act is to apply; the applicability of the HEAR Act to claims that arose and were time barred prior to 1999; whether HEAR Act protections always apply or are subject to foreign (non-US) choice-of-law provisions; whether cases might be permitted to proceed even when the artwork was not present in the United States; whether laches might apply; and whether a case could be dismissed on the grounds of forum non conveniens. A persistent undercurrent in these cases is that public policy in the United States favours restitution whenever the law may permit it, and without the usual deference afforded to the laws and policies of other countries.

a. When an Item is "Lost . . . Because of Nazi Persecution"

The HEAR Act applies broadly, not just to artwork looted by the Nazis, but to art "lost . . . because of Nazi persecution". This term implies that any causal connection between Nazi persecution and lost artwork, no matter how attenuated, might be sufficient to bring a lawsuit within the HEAR Act's protections.

The question of just how broadly this term should be interpreted is the subject of the case of *Holtzman as Tr. Of Elizabeth McManus Holtzman Irrevocable Tr. V. Philadelphia Museum of Art.*[10] *Holtzman* involved a 1926 Cubist painting by Dutch artist Piet Mondrian known as Schilderij No. 1, 60 x 60 cm. Mondrian, an abstract artist, was regarded as one of the greatest artists of the twentieth century.

Mondrian entrusted the painting to the Hanover Museum in or around 1927. In 1937, the painting was labelled 'degenerate art' and was seized by the Nazis. Mondrian, who was not Jewish and had previously moved to Paris, fled that city to London in the face of Nazi occupation, and later fled the bombing of Britain to New York.

Not above turning a profit, the Nazis sold the artwork to a New York City collector Gallatin. In or around December 1940, Gallatin bequeathed the painting to the Philadelphia Museum of Art; Mondrian bequeathed his paintings to his friend Henry Holtzman.

10 The case was initially filed in Pennsylvania State Court, before it was removed to federal court. See 20212022 WL 2651851.

In 2016, art researchers determined that the artwork belonged to Holtzman. Holtzman filed suit seeking its return. This case was filed in December 2021; it is now only in its early stages. The reported decisions to date deal only with the parties' arguments concerning which court should hear the case.

Yet even the initial decisions recognise that the case will need to address the meaning of the term "because of Nazi persecution". Under the statute, "Nazi persecution" means "persecution of a specific group of individuals based on Nazi ideology by the Government of Germany, its allies or agents, members of the Nazi Party".

A threshold question in the case therefore will be whether the Act extends to artwork confiscated by the Nazis as 'degenerate'. The Museum apparently intends to argue that the Nazis' persecution was addressed to the form of the art, not to the individuals who created it. There was no discrimination, they will argue, against a "specific group of individuals based on Nazi ideology".

In contrast, Holtzman apparently intends to argue that the definition extends more broadly, and that in any event the Nazis lumped together the supposedly 'degenerate' art with supposedly 'degenerate' artists (and even more broadly, lumped these groups together with Jews and homosexuals).

A similar issue has been raised in the matter of *Barzilai v. Israel Museum.*[11] In *Barzilai*, the Plaintiffs seek return of the Birds' Head Haggadah, a fourteenth-century Haggadah on display at the Israel Museum. The Plaintiffs are heirs of Ludwig Marum, the last openly Jewish member of the Reichstag, and one of the Nazis' first victims.

Dr Marum had safeguarded the Haggadah in his office, and the Marum family's pre-war ownership rights are undisputed; indeed, the Museum currently displays a plaque acknowledging the family's pre-war possession of the Haggadah. In 1933, Dr Marum was arrested, forced to march in a Parade of Shame, and then murdered by the Nazis. The remaining family members also were persecuted, forced from their home, and relocated to low-income housing. After all but one family member had fled for their lives, the Haggadah was looted from the family apartment. After the war it turned up in Israel without any evidence of a legitimate sale, and was purchased by the Bezalel Museum, the pre-State predecessor of the Israel Museum. Dr Marum's heirs learned of the Haggadah's reappearance in 1950, and quickly made a demand then for its return.

A disputed issue in the case is the question of whether the Haggadah was lost "because of Nazi persecution". The Museum has argued that the Haggadah should not be deemed to have been lost because of Nazi persecution, because it was merely "neighbor-looted art", not "Nazi-looted art". The Plaintiffs argue that the circumstances prevailing in Nazi Germany at the time, and the reappearance of the Haggadah under suspicious circumstances, are sufficient to establish that the Haggadah had been lost "because of Nazi persecution" as required under the HEAR Act. At the time of publication, this issue had not been resolved by the Court.

11 *Barzilai v. Israel Museum*, No. 153086/2022, New York Supreme Court, New York County, Part 60, Hon. Melissa A. Crane.

b. Pre-1999 Claims

The parties to the *Barzilai* case also dispute the interpretation of the HEAR Act provisions that apply to pre-1999 claims. Section 5 of the Act specifically excepts from its protections claims that meet the following criteria:

> (1) the claimant or a predecessor-in-interest of the claimant had knowledge of the elements set forth in subsection (a) on or after 1 January 1999; *and*
>
> (2) not less than six years have passed from the date such claimant or predecessor-in-interest acquired such knowledge and during which time the civil claim or cause of action was not barred by a Federal or State statute of limitations.

The Museum focused its argument on subpart 2, and argues that any time a party had six years in which to bring a claim, their claim is not protected by the HEAR Act. The Plaintiffs argued that the two sections must be read together, so that a claim is barred only if a plaintiff had six years before the Washington Conference to bring it. They observed that under the Museum's interpretation, section 5(1), quoted above, adds no meaning to the statute, which would violate a fundamental cannon of statutory interpretation. This issue is pending before the New York trial court on a motion to dismiss.

c. The HEAR Act Supersedes All Foreign and Domestic Limitations Periods in United States Courts

The case of *Gowen v. Helly Nahmad Gallery, Inc*.[12] involved a dispute concerning Amedeo Modigliani's *Seated Man with a Cane*, 1918, a painting that was allegedly taken by the Nazis and was lost for over a half century. This dispute generated at least four published judicial decisions in the State of New York.

By way of background, Oscar Stettiner was a Jewish art dealer who both lived and worked in Paris in the 1930s and this painting was part of his private collection. Stettiner's property, including the painting, was taken into custody and sold at public auction on 3 July 1944.

Philippe Maestraci was Stettiner's heir. Gowen was appointed administrator in the State of New York. Early in the case, the question came up as to whether a choice-of-law analysis would apply to determine whether the HEAR Act would apply, or whether New York courts would simply apply the HEAR Act to all cases. The Court "reject[ed] defendants' argument that HEAR can be displaced by a choice-of-law analysis".[13]

The *Gowen* analysis is consistent with the Supremacy Clause of the United States Constitution.[14] Under the Supremacy Clause, federal legislation is supreme over any contrary State laws. Accordingly, even when state laws might take into account foreign law for the purpose of determining a statute of limitations, the HEAR Act supersedes such state (and therefore foreign) statutes of limitation.

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12 *Gowen v. Helly Nahmad Gallery, Inc*., 60 Misc. 3d 963, 968, 77 N.Y.S.3d 605 (N.Y. Sup. Ct. 2018), aff'd, 169 A.D.3d 580, 95 N.Y.S.3d 62 (2019).

13 *Maestracci v. Helly Nahmad Gallery, Inc*., 155 A.D.3d 401, 404, 63 N.Y.S.3d 376, 379 (2017).

14 US Constitution, Article VI, Clause 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.").

d. Subject Matter Jurisdiction Over Artworks Located Abroad

Defendants in *Gowen* also argued that the because the artwork was physically located outside New York, Plaintiffs should be precluded from filing a claim in New York. The Court rejected that argument, finding that once a New York Court has determined it has personal jurisdiction over a party, the Court can order property located outside New York to be turned over to a prevailing party. It therefore concluded that:

> [g]iven that the Court ha[d] found personal jurisdiction over the Defendants is proper, the physical absence of . . . Seated Man with a Cane from the State of New York is of no consequence.[15]

e. Laches

Laches is an equitable defence available to a defendant who can show "that the plaintiff has inexcusably slept on [its] rights so as to make a decree against the defendant unfair."[16] Typically, a statute extending the statute of limitations on a claim also vitiates any laches defence.[17] At the same time, given the nature of the HEAR Act, which always involve events that occurred more than 75 years ago, the laches defence if applied broadly, easily could swallow the general rule – which Congress clearly could not have intended.

How to balance these issues was addressed by the Second Circuit Court of Appeals in *Zuckerman v. Metro. Museum of Art.*[18] In *Zuckerman*, the Plaintiffs were heirs to the Leffmans, wealthy German Jews who had managed to place a famous Picasso with an acquaintance in Switzerland before they fled from Germany to Italy. From Italy, they actively negotiated the sale of the Picasso for $13,200.[19]

Thereafter, the Plaintiffs, "being a financially sophisticated couple, actively and successfully pursued other claims for Nazi-era losses."[20] But they never pursued the Picasso. The Court held that the delay was unreasonable, and had unfairly prejudiced the Museum so that laches applied.

The Court first acknowledged that generally, in the face of a statute of limitations enacted by Congress, laches cannot be invoked to bar legal relief. It nevertheless held that laches could apply to claims extended by the HEAR Act, for two reasons. First, the text of the HEAR Act sets aside "a defense at law relating to the passage of time"; the Court reasoned that the HEAR Act therefore did not extend to laches, which is a defence in equity. Second, it noted that the legislative history supports such a conclusion.[21]

The *Zuckerman* Court then held that laches applied in the circumstances at hand, since

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15 *Gowen v. Helly Nahmad Gallery, Inc*., 60 Misc. 3d 963, 979–80, 77 N.Y.S.3d 605, 619 (N.Y. Sup. Ct 2018), *aff'd*, 169 A.D.3d 580, 95 N.Y.S.3d 62 (2019).

16 *Reif v. Nagy*, 175 A.D. 3d 107, 130 (N.Y. App. Div. 2019).

17 One early commentator argued that laches could continue to apply and bar claims even after the HEAR Act. Simon J. Frankel, 'The HEAR Act and Laches After Three Years', (2020) 45 *North Carolina Journal of International Law* 441.

18 *Zuckerman v. Metropolitan Museum of Art*, 928 F.3d 186 (2d Cir. 2019).

19 *Id.* at 189.

20 *Id.* at 194.

21 This analysis is less than wholly persuasive. As to the first argument, the general rule that laches will not undo an extension of the statute of limitations made it unnecessary for Congress to explicitly bar the defense of laches. As to the legislative history, it should not be applied to alter the plain meaning of the statute. Whatever the merits of the Second Circuit's conclusion, it seems unlikely that it will be reversed.

the Plaintiffs were sophisticated businesspeople, had sold the artwork on the open market in an apparent free-market deal, and had failed even to make a claim the painting for more than 70 years.[22] In these circumstances, it held that a museum that had innocently purchased the painting in the art market, while the sophisticated heirs slept on their purported rights, was protected by the laches doctrine.

The Second Circuit was careful to point to the limits of *Zuckerman*'s precedential value. It explained that the "HEAR Act directs that every case be given individual attention, with special care afforded to the particular facts."[23] In view of the HEAR Act's intention to extend the statute of limitation for such claims, *Zuckerman*'s direction that each case be addressed on its own merits reflects an underlying policy that only a strong showing of unreasonable delay and prejudice is likely to be sufficient for a defendant to invoke laches as a defence.

f. Forum Non Conveniens

While other countries have created various restitution processes, the HEAR Act is unique in extending the period of limitation for legal claims. Accordingly, cases arise under the HEAR Act where defendants argue that the court should not hear the case under the doctrine of forum non conveniens.

Under this doctrine, when a court finds that in the interest of substantial justice the action should be heard in another forum, the court may dismiss the action, on any conditions that may be just.[24] The forum non conveniens doctrine may apply where parties and witnesses are abroad, and documents are in a foreign language. Typically, courts invoke this doctrine only when a more convenient forum is available to hear the case. The general rule in New York, for example, is that the doctrine applies when "the court finds that in the interest of substantial justice the action should be heard in another forum."[25]

A recent decision of the New York Court of Appeals, New York's highest State court, in the matter of *Est. of Kainer v. UBS AG*,[26] upheld the dismissal of a HEAR Act case on forum non conveniens grounds, even as it signalled that courts generally should make themselves available to adjudicate HEAR Act claims.

Kainer involved a dispute among purported heirs to a Holocaust victim who had died without a will or children. The court found that New York was an inconvenient forum, for three reasons: first, that the plaintiffs would require substantial international discovery merely to establish personal jurisdiction; second, that the case involved complex issues of Swiss and French estate law; and third, that a Swiss proceeding was underway that might resolve the disputed issues, and that jurisdiction might be available in Germany or France as well.[27]

The general rule is that a forum non conveniens decision is a matter of lower court discretion, and therefore not a decision that can be reversed by New York's Court of Appeals. The Plaintiffs nevertheless appealed. The Court of Appeals affirmed that even

22 *Id.* 928 F.3d at 193.
23 *Zuckerman v. Metropolitan Museum of Art*, 928 F.3d 186, 189 (2d Cir. 2019).
24 NY CPLR 327.
25 *Id.*
26 *Est. of Kainer v. UBS AG*, 37 N.Y.3d 460, 181 N.E.3d 537 (2021).
27 *Id.,* 37 N.Y.3d 466-68.

in HEAR Act cases, the decisions of whether to dismiss on forum non conveniens was discretionary with the lower courts.

The Court's opinion was nevertheless noteworthy for two reasons. First, the Court found that the HEAR Act constitutes a "special circumstance" that the Court must consider in favour of retaining jurisdiction. It nevertheless found that given the circumstances, for this particular case the lower court could reasonably have found that New York courts were an inconvenient forum.

Second, the case was noteworthy for Justice Fahey's dissenting opinion. Justice Fahey recognised that the majority had arrived at a reasonable conclusion based upon existing precedent. Focusing on the rule that a dismissal for forum non conveniens was based on "substantial justice", he asserted:

> In my view . . . this is a unique circumstance for which our precedent does not adequately account. If the looting of the property of victims of the Holocaust is not included in the idea of what is meant by substantial justice, I am unsure what is. I respectfully dissent.[28]

g. Public Policy

Justice Fahey's dissent touched on a crucial facet of the HEAR Act jurisprudence: the public policy in favour of restitution. This policy is described in detail in the *Gowen* case.[29]

The defendants in that case argued that application of New York law would interfere with decisions by foreign governments, which ordinarily would be grounds for dismissal under the Act of State Doctrine. The Court rejected that argument, and held that it did not apply to art lost because of Nazi persecution. It explained that both the United States and the State of New York have historical and public policy driven interests in adjudicating claims involving artwork looted during the Nazi regime such that it weighs against using the Act of State Doctrine to defer to foreign law.

This public policy similarly played a role in the case of *Reif v. Nagy*.[30] That case involved artwork that had been in the possession of Fritz Grünbaum before the war. Grünbaum was a cabaret performer of Jewish Viennese descent living in Austria at the time of the Anschluss, and was a vocal critic of the Nazis. Grünbaum also was a prolific art collector who owned hundreds of works of art, including many by Schiele. Grünbaum was arrested in 1938 and murdered in the Dachau Concentration Camp. After his arrest, the Nazis stole his artwork.

The defendants were art dealers and claimed they had legitimate title to one of the Schieles previously owned by Grünbaum. The lower court awarded the Plaintiff summary judgment, and cited public policy in making its decisions:

> This case must be viewed in context. In 2016, Congress passed the Holocaust Expropriated Art Recovery Act of 2016 (HEAR Act) . . .. The HEAR Act

28 *Est. of Kainer v. UBS AG*, 37 N.Y. 3d at 469 (Fahey J. dissenting).
29 *Gowen*, above, note 15, 60 Misc. 3d 963 at 987.
30 *Reif v. Nagy*, 61 Misc. 3d 319, 323, 80 N.Y.S.3d 629 (N.Y. Sup. Ct. 2018), *aff'd as modified*, 175 A.D.3d 107, 106 N.Y.S.3d 5 (2019).

> compels us to help return Nazi-looted art to its heirs.[31]

Similarly, when the Appellate Division, the intermediate appeals court, upheld the judgment, it explained:

> We are informed by the intent and provisions of the HEAR Act which highlights the context in which plaintiffs, who lost their rightful property during World War II, bear the burden of proving superior title to specific property in an action under the traditional principles of New York law.[32]

Conclusion

Courts hearing claims under the HEAR Act have repeatedly expressed an understanding of the powerful public policy underlying the Act, and of the goal of restituting art lost to families during a dark period in human history. The decisions issued to date, while not universally in favour of claimants, generally reflect a public policy of allowing for restitution when feasible. It is hoped that heirs and other rightsholders will avail themselves of the HEAR Act's protections while that still is possible. Given the dearth of cases brought under the HEAR Act to date, and the timeline for opening of archives with large repositories of information regarding Nazi-looted property,[33] it would also behoove Congress to extend the 16 December 2022 deadline by another six years to provide a true and substantive opportunity for heirs of cultural property lost due to Nazi persecution to be able to discover and bring their claims.

31 *Ibid.*

32 *Reif v. Nagy*, 175 A.D. 3d at 132.

33 E.g., the OFP project of the Brandenburgisches Landshauptarchiv (<https://blha.brandenburg.de/index.php/the-ofp-project/>), to digitise and put online the approximately 42,000 personal files held in record group *Rep. 36A Oberfinanzpräsident Berlin-Brandenburg* documenting the looting of property from German Jews by the Nazi regime in the period 1938-1945, is expected to be completed only in 2023, after the critical deadline imposed by the HEAR Act.