



---

Volume 10

Issue 1 Fall 1999: *Symposium - Theft of Art  
During World War II: Its Legal and Ethical  
Consequences*

Article 5

---

## The Jewish Perspective on the Theft of Artworks Stolen During World War II

Steven H. Resnicoff

Follow this and additional works at: <https://via.library.depaul.edu/jatip>

---

### Recommended Citation

Steven H. Resnicoff, *The Jewish Perspective on the Theft of Artworks Stolen During World War II*, 10  
DePaul J. Art, Tech. & Intell. Prop. L. 67 (1999)  
Available at: <https://via.library.depaul.edu/jatip/vol10/iss1/5>

This Lead Article is brought to you for free and open access by the College of Law at Via Sapientiae. It has been accepted for inclusion in DePaul Journal of Art, Technology & Intellectual Property Law by an authorized editor of Via Sapientiae. For more information, please contact [digitalservices@depaul.edu](mailto:digitalservices@depaul.edu).

**1999 Symposium**  
**Theft Of Art During World War II: Its Legal And**  
**Ethical Consequences**

**THE JEWISH PERSPECTIVE ON THE THEFT OF**  
**ARTWORKS STOLEN DURING WORLD WAR II**

*Steven H. Resnicoff<sup>1</sup>*

I. PRELIMINARY OBSERVATIONS

We have already heard about how secular law approaches contests over stolen art. Jewish law—which is a coherent legal system, with axioms, principles, precedents and values—takes a different approach, and this is what I will focus upon.<sup>2</sup> Perhaps secular law can profit from Jewish law’s insights.

Before launching into this subject, though, I want to make a few comments about what has already been said - or, more poignantly - what has not been said. The preceding articles have focused primarily on disputes between the original owners of stolen art and those who are now in possession. Tragically, however, there is much stolen art for which there may not be any legal claimants. Entire families—indeed, entire towns, villages and cities—were

---

1 Professor of Law, DePaul University College of Law; Rabbinic Degree, Beth Medrash Govoha; Chairperson, Section on Jewish Law, Association of American Law Schools, 1998-99.

2 Of course, a more comprehensive treatment of the Jewish perspective would require consideration of various additional questions. For example, is it likely, on balance, to be either beneficial or harmful to the Jewish community as a whole (whether in the short-run or in the long-run) for Jewish individuals or organizations to pursue recovery of stolen art, reparations for unpaid wages and similar claims? Does the answer to this question depend on the particular nature of the claims asserted (stolen art versus unpaid wages), the manner in which the claims are asserted (politically versus legally), or the persons or entities against whom the claims are asserted? Second, assuming there were a clear answer to the first question, to what extent should that answer influence an individual Jew or Jewish organization in deciding whether to pursue such a recovery? Admittedly, these are meaningful questions. Alas, the answer to the first (as to the likelihood of communal benefit of harm) is impossible to divide, leaving a discussion of the second a bit overly theoretical.

cruelly liquidated. Distant relatives, if any survived, may be totally unaware of what specific pieces of art were owned by those who died. Even where original owners survived, they may simply lack the requisite proof to establish their prior ownership of the art.

In many of these cases, however, it may be possible to prove that the art came from some Jewish source—whether from an individual or from a communal organization, such as a looted synagogue. As an ethical matter, what *should* happen to this art? Should the party in possession (whether a museum or private collector) be entitled to keep it? Or, instead, should this art be used to benefit Jews—either Jewish Holocaust survivors, Holocaust organizations (such as *Yad VaShem*) or particularized Jewish communities? The Einsatzstab Reichsleiter Rosenberg (the “ERR”) had a specific policy of confiscating the art collections of Jews. If the property was stolen because it was owned by Jews *qua* Jews and the property cannot be returned to its owners (because they perished), perhaps it or its value should be used for Jews. Or perhaps even the answer to this question should depend on whether the current possessor of the property sincerely investigated its provenance before investing in it. After all, this is also part of the totality of any equitable calculus.

Under the law in many lands, where there is no heir, a decedent’s property escheats to the state. Should this be the rule regarding Holocaust art? In the case of the Holocaust, a number of countries—and considerable segments of their citizenries—were culpably involved, directly or indirectly, in the murderous elimination of such heirs. Should these countries and citizenries profit from their war crimes?<sup>3</sup>

Interestingly, immediately after World War II, the Office of Military Government, U.S. Zone approved the redistribution of a significant amount of unclaimed cultural items under American control to Jewish communities throughout the world by an entity essentially organized for this purpose, the Jewish Restitution

---

<sup>3</sup> See, e.g., Michael J. Kurtz, *Inheritance of Jewish Property*, 20 CARDOZO L. REV. 625, 629 (1998) (mentioning that this argument was raised by Jewish leaders near the end of World War II).

Commission.<sup>4</sup> Similarly, in 1996, the Austrian government auctioned off unclaimed World War II art in its possession and used the proceeds for the benefit of Holocaust victims.<sup>5</sup> Such procedures raise difficult questions as to precisely which Jewish interests should benefit. Nevertheless, it seems at least intuitively clear that this art be used to promote Jewish interests rather than non-Jewish interests—especially as to art that has Jewish cultural significance, such as religious manuscripts or ritual objects or ornaments.<sup>6</sup>

## II. JEWISH LAW AND THE RECOVERY OF STOLEN PROPERTY

Initially, I should stress that there is an internal Jewish law doctrine known as *dina demalkhuta dina* (literally, “the law of the kingdom is the law”). This doctrine provides that, under certain circumstances, Jewish law accepts particular secular laws as religiously binding. The precise parameters of this doctrine are subject to considerable debate.<sup>7</sup> In any event, for our comparative

<sup>4</sup> See Michael J. Kurtz, *Inheritance of Jewish Property*, 20 CARDOZO L. REV. 625 (1998).

<sup>5</sup> See Robert Schwartz, *The Limits of the Law: A Call for A New Attitude Toward Artwork Stolen During World War II*, 32 COLUM. J.L. & SOC. PROBS. 1, 25-26 (1998).

<sup>6</sup> It is also important to note that while this symposium focuses on stolen art, other types of property were stolen as well. Granted, the problems of proof may be more difficult regarding such other property, and the possibility of feasible solutions may be far more complex. Nevertheless, the loss of all types of property—and their possible ultimate recovery—remain important from any “Jewish” perspective. Indeed, while lost art may be directly relevant to Jewish families which were once affluent, the loss of other properties—from homes to Shabbos candle-holders—was experienced by virtually all European Jewry.

<sup>7</sup> See generally, Michael J. Broyde and Steven H. Resnicoff, *Jewish Law and Modern Business Structures: The Corporate Paradigm*, 43 WAYNE L.REV. 1685, 1765-1773 (1997); Steven H. Resnicoff, *Bankruptcy—A Viable Halachic Option?*, JOURNAL OF HALACHA & CONTEMPORARY SOCIETY XXIV:5 (Fall 1992). *Dina demalkhuta dina* would not, for instance, legitimize the discriminatory edicts issued by the Third Reich. For a reference—although an arguably ambiguous reference—to the application of *Dina demalkhuta dina* to the context of returning stolen property, see SHULHAN ARUKH, *Hoshen Mishpat* 353:3. The *Shulhan Arukh* was authored in the sixteenth century by R. Yosef

law purposes, it is more interesting to examine Jewish law's internal rules. Perhaps they can inform the debate as to what secular law should be.<sup>8</sup>

Three fundamental differences stand between the principal secular law approaches and Jewish law. First, litigation in common law jurisdictions, such as the United States, usually centers on statute of limitations issues.<sup>9</sup> If there is no statute of limitations problem, the original owner wins and the party in possession loses. Under Jewish law, no statute of limitations exists for the recovery of stolen property.<sup>10</sup>

Second, litigation in non-common law jurisdictions, including most European countries, typically revolves around whether the party in possession obtained the property in good faith, without knowing or having reason to know that the property had been

Caro. Throughout the years, the views of scores of outstanding commentaries have been annotated to the *Shulhan Arukh* which has contributed to its status as the most central code of Jewish law.

8 For purposes of brevity and clarity my comments about Jewish law's internal rules may include some oversimplification.

9 See, e.g., Robert Schwartz, *The Limits of the Law: A Call for a new Attitude Toward Artwork Stolen during World War II*, 32 COLUM. J.L. & SOC. PROBS. 1, 4-5 (1998); Laura McFarland-Taylor, *Tracking Stolen Artworks on the Internet: A New Standard for Due Diligence*, 16 J. MARSHALL J. COMPUTER & INFO. L. 937, 946-951 (1998); Alexandre A. Montagu, *Recent Cases on the Recovery of Stolen Art - The Tug of War Between Owners and Good Faith Purchasers Continues*, 18 COLUM.-VLA J.L. & ARTS 75 (1993). See also Lawrence M. Kaye, *Looted Art: What Can and Should Be Done*, 20 CARDOZO L. REV. 657, 668 (1998) (arguing that Article I of the 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, ratified by Russia and a number of Eastern European countries—but not by the United States or other major Western countries—would prevent the assertion of statutes of limitations against civil cases to recover plundered art).

10 Various Jewish law sources, old and new, assert that the mere passage of time does not generally prevent a claimant from successfully asserting his claim. See, e.g., SHULHAN ARUKH, *Hoshen Mishpat* 98:1; R. YEHIEL MICHEL EPSTEIN (19th-20th centuries), ARUKH HA-SHULHAN, *Hoshen Mishpat* 98:1; R. EZRA BASRI (contemporary), DINEI MAMANOT I, at 65-66; R. YAAKOV REICHER (1670-1733), SHEVUT YAAKOV III:182; R. YITZCHAK B. SHESHES (1326-1407), SHUT 404. But see MENACHEM ELON (contemporary), JEWISH LAW: HISTORY, SOURCES, PRINCIPLES IV, at 1724-1726 (contending that statutes of limitations have more generally become part of Jewish law).

stolen.<sup>11</sup> If the property was purchased in good faith, the party in possession wins and the original owner loses. Under Jewish law, whether a person acquiring stolen property knows it was stolen is also important, but its importance is limited.

Third, aside from these doctrinal differences between the Jewish and secular legal approaches, there is a basic difference as to result. The secular results, at least as between the party in possession and the original owner, are “all or nothing.” The common law jurisdictions award “all” to the original owner, while the non-common law jurisdictions award “all” to the good faith purchaser. In sharp contrast, Jewish law provides for “compromises.”

To explain the Jewish law position, it is necessary to introduce a new concept, known as *ye'ush* (despair). Although this concept is ignored by secular law, it is critical to Jewish law. *Ye'ush* occurs if and when the original owner of a piece of property despairs of the possibility that he or his heirs will ever recover it.<sup>12</sup> Whether *ye'ush* has occurred in a particular case can be determined either by evidence of the owner's express statements or by operation of law.<sup>13</sup> Someone who has possession of stolen goods can only convey title to a good faith transferee if there is *ye'ush*.<sup>14</sup> Consequently, if someone buys stolen goods from a thief and there is no *ye'ush*, the buyer does not acquire title even if he made the purchase in good faith. As a result, the buyer must surrender the object to its owner.<sup>15</sup> In this way, Jewish law differs from the secular law of non-common law countries.

11 See generally, the sources cited in note 7, *supra*.

12 J. DAVID BLEICH, CONTEMPORARY HALAKHIC PROBLEMS III, at 352.

13 With respect to some types of property, such as Jewish books or manuscripts, there may be legal presumptions against a finding of *ye'ush*. The applicability of such a presumption in the context of the Holocaust is subject to a spirited debate. See generally, J. DAVID BLEICH, CONTEMPORARY HALAKHIC PROBLEMS III, at 352-356; R. Simcha Krauss, *The Sotheby's Case - A Halachic Perspective*, IX JOURNAL OF HALACHA & CONTEMPORARY SOCIETY 5, 10-13 (1985).

14 There is a dispute among Jewish law authorities as to whether such a transfer of title is effective if the original owner's *ye'ush* does not occur until after the transferee took possession.

15 See SHULHAN ARUKH, *Hoshen Mishpat* 356:1.

To prevent this rule from obstructing commerce by frightening potential purchasers, ancient Jewish sages decreed that the owner must pay the buyer the amount the buyer paid for the property.<sup>16</sup> In the context of stolen art, where market prices may have risen sharply, this would admittedly impose some burden on the buyer but only as to the loss of possible profit on the purchase of the stolen property. Moreover, the buyer has in the meantime enjoyed possession of the art for free.<sup>17</sup>

Thus, in a case without *ye'ush*, (i.e., where the original owner has not despaired of recovering his property) common law jurisdictions would rule that the original owner gets the property back and the good faith purchaser gets nothing so long as there is no statute of limitations problem. By contrast, non-common law jurisdictions would say that the good faith purchaser keeps the property and the original owner receives nothing. Jewish law provides a compromise. The original owner recovers his property, and the good faith purchaser, who has enjoyed the property in the meantime, recovers his purchase price.

What about a bad faith purchaser? Under Jewish law, where there has been no *ye'ush*, a bad faith buyer has the same duty as a good faith buyer to return the property to its original owner. If the buyer purchased the property knowing that it was stolen, the original owner is not obligated to compensate the buyer at all.<sup>18</sup> In fact, some Jewish law authorities say this is the case even if the buyer did not *know* that the property was stolen so long as the seller was a known thief.<sup>19</sup> Consequently, as to bad faith buyers before *ye'ush*, the Jewish law result approximates that of common law and non-common law states.

On the other hand, suppose someone in good faith buys stolen property and there is *ye'ush*, (i.e., the original owner has despaired of ever regaining the property). In such a case, the buyer obtains

---

16 *Id.* The owner can try to recover from the thief, if he can find him, the amount the owner has to pay to the buyer.

17 *Id.*

18 *Id.*

19 *Id.*

title to the property.<sup>20</sup> Just as in a non-common law jurisdiction, such a buyer would be entitled to keep the property. Nevertheless, even in this scenario, some Jewish law authorities would require the good faith buyer to pay the original owner the difference between the value of the object and the amount that the buyer paid for it.<sup>21</sup> In light of the appreciation in the value of art, as well as the possibly depressed price paid by the buyer,<sup>22</sup> such a rule could provide the original owner considerable compensation. Thus, at least according to these authorities, Jewish law again mandates a compromise, while the secular systems provide for “all or nothing” results.

Interestingly, however, application of these Jewish law basic rules would provide that if there was *ye'ush*, a buyer acquires title even if he purchased the property knowing that it was stolen, and he would not technically be obligated to return the property.<sup>23</sup> Such a buyer, however, would be required to pay the original owner the full market value of the property.<sup>24</sup>

Up to now, we have surveyed the basic Jewish law rules. There is, however, an overarching principle that urges Jews to do more than the minimum required by law. While the corresponding secular expression might be to go “beyond the letter of the law,” the Jewish expression is to go “within the scope of the law” (*lifnim mi-shurat ha-din*). This phraseology is said to reflect the notion that the real self is one of kindness. The law defines the maximum distance a person is permitted to stray from his core values. By doing more kindness than is technically required, a person draws closer to his essential self. Under Jewish law, a firmly established custom has the effect of law. According to a number of authorities,

<sup>20</sup> See generally, J. DAVID BLEICH, CONTEMPORARY HALAKHIC PROBLEMS III, at 352.

<sup>21</sup> *Id.*

<sup>22</sup> Because the seller may have been somewhat averse to publicity - lest claimants learn about the art - the purchase price paid by the buyer may have been below market value.

<sup>23</sup> Of course, in acquiring the property, such a bad faith purchaser would be guilty of violating the prohibition against buying stolen goods. See, e.g., SHULHAN ARUKH, *Hoshen Mishpat* 356:1.

<sup>24</sup> *Id.*



a custom developed among Jews—arguably based on the *lifnim mi-shurat ha-din* principle<sup>25</sup>—that, even in cases in which there was *ye'ush*, one who buys stolen property must return it to the original owner if the owner reimburses him for the amount the buyer paid for it.<sup>26</sup> Although the buyers in such instances technically obtained title to the stolen goods and were not strictly required to return them, Jews accepted upon themselves the duty to restore property to those from whom it was stolen.

Notwithstanding this custom, Jewish law maintains various reasons why it remains important to determine whether the original owner experienced *ye'ush*, (i.e., whether he despaired of ever regaining possession of his property). For example, it is unclear whether Jewish law would require non-Jews to comply with this custom. Jewish law might not compel non-Jews to do more than the legal minimum. Indeed, assuming that there existed a validly constituted rabbinic governing authority, it is uncertain whether it would specifically enforce the custom even upon a Jew or whether compliance would depend on the individual's voluntary undertaking to conduct himself in accordance with Jewish law.

### III. SPECIAL FACTORS AFFECTING AN ANALYSIS OF HOLOCAUST

The organized theft of art by Nazis during World War II differed qualitatively from simple theft. From a comparative law perspective it is interesting to note that although secular legal discussions do not always account for these differences doctrinally, Jewish law does. For example,<sup>27</sup> Jewish law recognizes that, under certain circumstances and to a certain extent, ownership rights may be acquired by the “right of conquest” (*kibush milhamah*). Although this doctrine appears irrelevant to some cases of stolen

---

25 J. DAVID BLEICH, CONTEMPORARY HALAKHIC PROBLEMS III, at 367; R. YAAKOV YESHAYA BLAU (contemporary), PISHEI HOSHEN IV, at 75.

26 SHULHAN ARUKH, *Hoshen Mishpat* 356:7; R. YEHIEL MICHEL EPSTEIN, ARUKH HA-SHULHAN, *Hoshen Mishpat* 368:4.

27 Another example involves the doctrine of *zuto shel yam* (literally, the “flooding of the sea”), whereby people acquire possession of property they save from imminent destruction. See generally, J. DAVID BLEICH, CONTEMPORARY HALAKHIC PROBLEMS III, at 362-366.

art, such as when Jews were betrayed by private Gentile collectors to whom they entrusted their holdings, it seems at least arguably relevant to some of the organized Nazi confiscations. A number of subsidiary issues then arise—for instance, whether *kibush milhamah* operates even if there is no *ye'ush*, whether *kibush milhamah* applies to actions taken by a government against its own nationals and whether an *equitable* obligation exists to return property which came into one's hands after *kibush milhamah*.<sup>28</sup>

On a more elementary level, the plight of Jewish refugees is relevant when evaluating whether the original owners of the stolen art experienced *ye'ush*. Although in Talmudic times there were various general principles as to when *ye'ush* might be implied by law, modern commentators suggest that, because of changed circumstances, those principles are no longer valid. Instead, they argue that determining whether *ye'ush* occurred in a particular case requires a highly fact-sensitive inquiry.<sup>29</sup>

J. David Bleich is a law professor and a contemporary *halakhic* authority. Rabbi Bleich disagrees with Rabbi Isaac Liebes, another contemporary authority, whether as a matter of Jewish law, one should generally conclude that Jews caught up in the Holocaust experienced *ye'ush* as to Hebrew manuscripts that were stolen from them. Rabbi Bleich's words serve as apt testimony to the courage and faith of many of the members of the Holocaust generation, whose lives—as well as whose art—were so ruthlessly despoiled.

Rabbi [Isaac] Liebes [author of *Teshuvot Bet Avi* states]:

In such a state, if they already despaired of their lives, did they not most certainly [despair] of their property? To whom would it occur to think thoughts of his house or fortune while under the nails of the angel of death, the impure foul oppressor, in the death camps and in the ghettos?"  
Despite its ringing eloquence, this argument is less

---

28 See generally, J. DAVID BLEICH, CONTEMPORARY HALAKHIC PROBLEMS III, at 356-362, 367-372.

29 R. YAAKOV YESHAYA BLAU (contemporary), PISHEI HOSHEN IV, at 79.

than compelling. The diabolical designs of the Nazis are now a matter of historical record. But whether or not they were recognized at the time by the intended victims is an entirely different matter. The historical record indicates that the Germans did everything possible to conceal their malevolent intentions from both the victims and the world at large. Moreover, there is certainly every reason to assume that, even in the darkest hours of the Holocaust, the oppressed victims hoped and prayed for the defeat of the Germans at the hands of the Allies, and hence had reason to anticipate that their property would eventually be reclaimed by them or their heirs. Furthermore, even had the nefarious “final solution” been announced to the intended victims, *ye’ush* would not have ensued. *Ye’ush* is a psychological phenomenon and it is unthinkable that Jews of the Holocaust generation would have been so lacking in faith as to believe that, in violation of His covenant with Israel, G-d would permit the annihilation of the entire Jewish community. Hence, the unfortunate victims would certainly have clung to the belief that the plundered books would ultimately find their way into Jewish hands. Indeed, that belief has been confirmed by history.<sup>30</sup>

As time progresses, the generation of corrupt dealers and collectors who collaborated with the Nazis will eventually die out and their holdings, through auctions and the like, will increasingly pass into the public eye. As information, especially from former Soviet bloc countries, becomes increasingly accessible, and as Jewish and non-Jewish organizations utilize technologically advanced methods of searching and sharing such information, one can hope—and pray—that history will continue to confirm such faith.