

# EXECUTIVE WEAPONS TO COMBAT INFECTION OF THE ART MARKET

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We all know that criminal proceedings implicate heightened constitutional protections in comparison to civil proceedings. Many of us also have at least heard of civil forfeiture, somewhat of a hybrid of criminal and civil process that has its roots in this country in the first session of Congress.<sup>1</sup> A civil forfeiture proceeding is filed directly against a piece of real or personal property on the premise that its association with criminal activity has tainted it such that it is subject to forfeiture.<sup>2</sup> In the 1990s, the government's use of civil forfeiture to seize assets in its War on Drugs was widely criticized, and the Supreme Court determined that certain constitutional protections applied in particular circumstances.<sup>3</sup> But in 1996, in *Bennis v. Michigan*,<sup>4</sup> the Supreme Court ruled that the seizure of property, even one's residence, when the property owner "had no knowledge of, and did not consent to, the illegal use of the property," was not prohibited by the Due Process or Takings Clauses, which drew widespread criticism from legal academia.<sup>5</sup> Congress responded to *Bennis* by enacting the Civil Asset Forfeiture Recovery Act of 2000 (CAFRA), which raised the government's burden of proof in many civil forfeiture actions filed after 2000 from "probable cause" to "preponderance of the evidence" and codified a widely, but not universally, applicable "innocent owner defense."<sup>6</sup>

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1. E.g., Terrence G. Reed, *On the Importance of Being Civil: Constitutional Limitations on Civil Forfeiture*, 39 N.Y.L. SCH. L. REV. 255, 256 (1994). The first criminal forfeiture statute was the RICO Act passed in 1970. *Id.* at 264.

2. E.g., Tamara R. Piety, *Scorched Earth: How the Expansion of Civil Forfeiture Doctrine Has Laid Waste to Due Process*, 45 U. MIAMI L. REV. 911, 916-17 (1991).

3. See, e.g., Matthew P. Harrington, *Rethinking In Rem: The Supreme Court's New (and Misguided) Approach to Civil Forfeiture*, 12 YALE L. & POL'Y REV. 281, 282 (1994).

4. *Bennis v. Michigan*, 516 U.S. 442 (1996).

5. See Stefan D. Cassella, *The Uniform Innocent Owner Defense to Civil Asset Forfeiture: The Civil Asset Forfeiture Reform Act of 2000 Creates a Uniform Innocent Owner Defense to Most Civil Forfeiture Cases Filed By the Federal Government*, 89 KY. L.J. 653, 654 (2001).

6. 18 U.S.C. § 983(d) (2006).

Over the years, the executive branch has seized Nazi loot in various ways.<sup>7</sup> The seizure that launched the modern Holocaust-era art movement was that accompanying the civil forfeiture proceeding filed in federal court in 1999 against *Portrait of Wally*, a painting by Egon Schiele.<sup>8</sup> The seizure caused an uproar in the art world, which largely was concerned about future art loan prospects.<sup>9</sup> At the time, even I was concerned about the impact of the civil forfeiture seizure—despite the fact that I support widespread restitution of Nazi-looted art—because I worried about hindering State Department efforts to resolve remaining Holocaust-era issues globally and alienating museums and other possessors of tainted art, whose cooperation is essential for widespread restitution.<sup>10</sup> Now that some prominent museums have demonstrated the lengths to which they will go to try to prevent objective resolution of claims,<sup>11</sup> the issue has been cast in a whole new light: Should one feel sympathy about depriving obstinate possessors of Nazi-looted art of purported property rights pending resolution of colorable claims? The *Portrait of Wally* case recently settled for \$19 million,<sup>12</sup> without the seizure, we likely never would have seen the Washington Principles,<sup>13</sup> the Vilnius Declaration,<sup>14</sup> or the Terezín Declaration of 2009,<sup>15</sup> all of which support undertaking and publicizing provenance research and restitution.

Back in 2005, when I voiced some criticism of the case, I was inspired by the fact that the museum community seemed so responsive to the problem of Holocaust-era art—it had passed its own ethics codes that stated that museums should, on their own initiative, conduct and publicize provenance research so that survivors and heirs may have the opportunity

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7. See, e.g., *United States v. Herce*, 334 F. Supp. 111 (S.D.N.Y. 1971) (interpleader action following seizure).

8. See *United States v. Portrait of Wally (Wally I)*, 105 F. Supp. 2d 288, 290 (S.D.N.Y. 2000) (filed pre-CAFRA).

9. See, e.g., Lawrence M. Kaye, *A Quick Glance at the Schiele Paintings*, 10 DEPAUL-LCA J. ART & ENT. L. & POL'Y 11, 13 (1999).

10. Jennifer Anglim Kreder, *The Choice Between Civil and Criminal Remedies in Stolen Art Litigation*, 38 VAND. J. TRANSNAT'L L. 1199, 1251–52 (2005).

11. See, e.g., *United States v. Portrait of Wally (Wally IV)*, 663 F. Supp. 2d 232 (S.D.N.Y. 2009). This case took eleven years just to pass the summary judgment stage. *Id.* at 246.

12. Press Release, U.S. Attorney, S. Dist. of N.Y., *United States Announces \$19 Million Settlement in Case of Painting Stolen by Nazi* (July 20, 2010), available at <http://www.justice.gov/usao/nys/pressreleases/July10/portraitofwallysettlementpr.pdf>.

13. *Washington Conference Principles on Nazi-Confiscated Art*, U.S. DEP'T OF STATE (Dec. 3, 1998), <http://www.state.gov/p/eur/rt/hlcst/122038.htm>.

14. *Vilnius Forum Declaration*, COMM'N FOR LOOTED ART IN EUR. (Oct. 5, 2000), <http://www.lootedartcommission.com/vilnius-forum>.

15. Terezín Declaration, June 30, 2009, available at [http://www.holocausteraassets.eu/files/200000215-35d8ef1a36/TEREZIN\\_DECLARATION\\_FINAL.pdf](http://www.holocausteraassets.eu/files/200000215-35d8ef1a36/TEREZIN_DECLARATION_FINAL.pdf).

to claim their property and obtain restitution.<sup>16</sup> Although we have seen significant restitution from museums,<sup>17</sup> that old inspiration has turned to disappointment. In complete contradiction to museums' ethics codes, the Washington Principles, the Vilnius Declaration, the Terezín Declaration, and U.S. executive policy dating back to 1943,<sup>18</sup> some of the most esteemed museums in this nation<sup>19</sup> have run to court to file declaratory judgment actions to shut down claims of survivors and their heirs on statute of limitations grounds. The claimants likely were not able to complete expensive provenance research in multiple countries, multiple languages, and previously classified archives, to maximize their chances of succeeding in court.<sup>20</sup> My sympathy for one of those museums, the Museum of Modern Art in New York (MoMA), was obliterated when it refused to turn over simple provenance documents from its files,<sup>21</sup> despite the fact that its own web site proclaims that its files are open to serious researchers.<sup>22</sup> MoMA successfully shut down the case on statute of limitations grounds before discovery began.<sup>23</sup>

Since *Wally*, the executive branch has used civil forfeiture to retrieve three other Nazi-looted paintings and has negotiated settlements without filing proceedings.<sup>24</sup> First, it initiated *United States v. One Oil Painting*

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16. See *Guidelines Concerning the Unlawful Appropriation of Objects During the Nazi Era*, AM. ASS'N OF MUSEUMS, §§ 1–3 (Apr. 2001), [http://aam-us.org/museumresources/ethics/nazi\\_guidelines.cfm](http://aam-us.org/museumresources/ethics/nazi_guidelines.cfm); see also Press Release, Int'l Council of Museums, ICOM Recommendations Concerning the Return of Works of Art Belonging to Jewish Owners (Jan. 14, 1999), available at <http://archives.icom.museum/worldwar2.html>; *Report of the AAMD Task Force on the Spoliation of Art during the Nazi/World War II Era (1933–1934)*, ASS'N OF ART MUSEUM DIRS. (June 4, 1998), <http://www.aamd.org/papers/guideln.php>.

17. See *Resolved Stolen Art Claims*, HERRICK, FEINSTEIN LLP (2011), <http://herrick.com/siteFiles/Publications/1D9C7E813C0F21F910DE3DC6B5452E13.pdf>.

18. Jennifer Anglim Kreder, *Guarding the Historical Record from the Nazi-Era Art Litigation Tumbling Toward the Supreme Court*, 160 U. PA. L. REV. PENNUMBRA 253 (2011).

19. Jennifer A. Kreder, *Chart of Federal Holocaust-Era Art Claims Since 2004* (last updated Mar. 23, 2011) [hereinafter *Chart*], available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1636295](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1636295) (entries 2, 4, 5, 8 & 9).

20. See Jennifer Anglim Kreder, *The New Battleground of Museum Ethics and Holocaust-Era Claims: Technicalities Trumping Justice or Responsible Stewardship for the Public Trust?*, 88 OR. L. REV. 37 (2009).

21. See Transcript of Pretrial Motions Argument at 15–90, *Grosz v. Museum of Modern Art*, 2010 WL 88003 (S.D.N.Y. July 29, 2009) (No. 09-cv-3706).

22. *The Provenance Research Project*, THE MUSEUM OF MODERN ART, <http://www.moma.org/collection/provenance/> (last visited May 2, 2011) (“Please note that the Museum’s archival records for all collection works are open, as they always have been, to serious researchers.”).

23. *Grosz v. Museum of Modern Art*, No. 09 Civ. 3706, 2010 WL 88003 (S.D.N.Y. Jan. 6, 2010), *aff'd*, No. 10-257, 2010 WL 5113311 (2d Cir. Dec. 16, 2010).

24. E.g., Press Release, U.S. Immigration and Customs Enforcement, *Porcelain Masterpiece to Be Returned to Heirs of Former German Prime Minister* (Dec. 23, 2010), available at <http://www.ice.gov/news/releases/1012/101223newyork.htm>.

*Entitled Femme en Blanc By Pablo Picasso* after the purchaser moved the painting to Chicago, seemingly to avoid jurisdiction in California.<sup>25</sup> Second, just in December 2010 (and while the Supreme Court continued to consider petitions for certiorari in some cases brought by private litigants, which are still pending as of this writing<sup>26</sup>), the Immigration and Customs Office of Homeland Security initiated another civil forfeiture proceeding to seize two recently resurfaced paintings by Julian Falat that the Nazis looted from the Polish National Museum.<sup>27</sup> The underlying premises for the forfeitures include failures to declare the paintings to customs,<sup>28</sup> generally importing property contrary to law,<sup>29</sup> the crime of smuggling,<sup>30</sup> and violations of the National Stolen Property Act (NSPA).<sup>31</sup> The first two grounds fall under Title 19 of the United States Code, which pertains to customs. The criminal smuggling and NSPA violations fall under Title 18, which pertains to crimes.

A criminal smuggling prosecution requires that the defendant knowingly conspired or attempted to sneak the property across the border or “in any manner facilitate[d] the transportation, concealment, or sale of such merchandise after importation, knowing the same to have been imported or brought into the United States contrary to law.”<sup>32</sup> A person violates the NSPA if he or she (1) “transports, transmits, or transfers in interstate or foreign commerce” property “knowing [it] to have been stolen, converted or taken by fraud”<sup>33</sup> or (2) “receives, possesses, conceals, stores, barter[s], sells, or disposes” of property that has “crossed a State or United States boundary after being stolen, unlawfully converted, or taken.”<sup>34</sup>

Civil forfeiture under either title results in forfeiture of the property, not potential jail time and fines, provided that the preponderance of the

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25. See *United States v. One Oil Painting Entitled *Femme en Blanc* by Pablo Picasso*, 362 F. Supp. 2d 1175, 1179 (C.D. Cal. 2005).

26. *Chart*, *supra* note 19 (entries 2 & 4).

27. Verified Complaint, *United States v. One Julian Falat Painting Entitled *Off to the Hunt* and One Julian Falat Painting Entitled *The Hunt**, No. 1:10-cv-09291 (S.D.N.Y. Dec. 13, 2010); Press Release, U.S. Attorney, S. Dist. of N.Y., *United States Seizes Two Julian Falat Paintings Stolen by the Nazis During World War II from the National Museum in Warsaw, Poland* (Dec. 16, 2010), available at <http://www.justice.gov/usao/nys/pressreleases/December10/falatcivilforfeiturecomplaintpr.pdf>.

28. See 19 U.S.C. § 1497(a) (2006).

29. See 19 U.S.C. § 1595a(c)(1)(A) (2006).

30. See 18 U.S.C. § 545 (2006).

31. Verified Complaint, *supra* note 27; National Stolen Property Act, 18 U.S.C. §§ 2314–2315 (2006).

32. 18 U.S.C. § 545.

33. 18 U.S.C. § 2314.

34. 18 U.S.C. § 2315.

evidence supports the government's case that someone violated one of the listed provisions in connection with the property.<sup>35</sup> Title 18 forfeitures are now subject to the CAFRA innocent owner defense, whereas customs forfeitures fall beyond the scope of CAFRA.<sup>36</sup> Seizure power under the NSPA is vast, particularly since the 1986 amendments foreclosed defenses premised on the grounds that the goods "came to rest" in a jurisdiction and thus were no longer in interstate commerce.<sup>37</sup> Professor Stephen Urice maintains that a U.S. Attorney would have the power to initiate criminal or civil forfeiture proceedings even against a current possessor who defeated a civil lawsuit on technical grounds, so long as the possessor retains possession after being fully notified of all of the facts demonstrating the theft or smuggling.<sup>38</sup> Thus, the NSPA has the power to trump time-bar defenses that museums and other present-day possessors currently are using to defeat private litigants' civil claims for conversion and replevin.<sup>39</sup>

The power of the government to seize property with fewer checks than required in criminal proceedings is troubling to many.<sup>40</sup> Professor Tamara R. Piety, in a very thoughtful article written before the enactment of CAFRA, captures the concern:

Because the entire civil forfeiture doctrine is made up of legal fictions that if applied in a logically consistent manner provide no internal check on the government's power to employ forfeiture, its application is virtually unbounded. In effect, the operation of the civil forfeiture statutes allows the government to "bypass entirely the cumbersome criminal justice system, with its tedious set of impediments to investigation, prosecution, and conviction, and substitute a control system consisting of civil sanctions." Arguably

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35. See, e.g., *United States v. An Antique Platter of Gold*, 184 F.3d 131 (2d Cir. 1999).

36. See *United States v. Painting Known as Hannibal*, No. 08 Civ. 1511, 2010 WL 2102484, at \*4 (S.D.N.Y. May 18, 2010); *United States v. An Antique Platter of Gold*, 991 F. Supp. 222, 230 (S.D.N.Y. 1997) (citing *Bennis v. Michigan*, 516 U.S. 442, 450 (1996)) (noting the absence of an innocent owner defense before CAFRA); see also *United States v. One Lucite Ball Containing Lunar Material*, 252 F. Supp. 2d 1367, 1377 n.4 (S.D. Fla. 2003) (customs seizures exempt from CAFRA).

37. See Stephen K. Urice, *Between Rocks and Hard Places: Unprovenanced Antiquities and the National Stolen Property Act*, 40 N.M. L. REV. 123, 135 (2010).

38. Telephone Interview with Professor Stephen K. Urice to author (Apr. 4, 2011) (discussing forthcoming article).

39. See *Chart*, *supra* note 19 (entries 2, 4, 7, 8 & 9); see also *United States v. Portrait of Wally (Wally IV)*, 663 F. Supp. 2d 232, 275 (S.D.N.Y. 2009) (citing *United States v. Summerlin*, 310 U.S. 414, 416 (1940) (holding that *laches* may not be asserted against the government)).

40. E.g., LEONARD W. LEVY, *A LICENSE TO STEAL: THE FORFEITURE OF PROPERTY 4* (1996) (recounting one claimant of seized property denouncing "government greed and 'Nazi justice'").

this “bypass” is precisely the result that Congress intended when it enacted the forfeiture statutes, both civil and criminal . . . .<sup>41</sup>

A case that explores whether the desire to undo wartime wrongs justifies seizure without full criminal law legal protections is *Miller v. United States*, which upheld the Confiscation Acts passed by Congress during the Civil War.<sup>42</sup> The Confiscation Acts allowed for civil forfeiture of property owned by Confederate soldiers and their supporters.<sup>43</sup> The claimant in *Miller* objected to the forfeiture of his property on the grounds that criminal protections were necessary because the purpose of the Acts was to punish treason. The Court upheld the Acts by holding that the statutes “were not enacted under the municipal power of Congress to legislate for the punishment of crimes against the sovereignty of the United States,” but instead pursuant to Congress’s war powers.<sup>44</sup>

Justice Field, in dissent, agreed that the purpose of the Acts was to punish traitors.<sup>45</sup> He argued that the premise of civil forfeiture—that the property itself was “guilty”—was disingenuous, noting that the Acts do not punish “an offending thing, but are inflicted for the personal delinquency of the owner . . . and punishment should be inflicted only upon due conviction of personal guilt.”<sup>46</sup> Accordingly, Justice Field would have imposed Fifth and Sixth Amendment protections upon the proceeding and opined: “[I]f proceedings *in rem* for the confiscation of property could be sustained, without any reference to the uses to which the property is applied . . . all the safeguards provided by the Constitution for the protection of the citizen against punishment . . . would be broken down and swept away.”<sup>47</sup> Justice Field continued:

[I]t would sound strange to modern ears to hear that proceedings *in rem* to confiscate the property of the burglar, the highwayman, or the murderer were authorized, not as a consequence of their conviction upon regular criminal proceedings, but without such

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41. Piety, *supra* note 2, at 924 (quoting Steven Wisotsky, *Crackdown: The Emerging “Drug Exception” to the Bill of Rights*, 38 HASTINGS L.J. 889, 925 (1987)).

42. *Miller v. United States*, 78 U.S. (11 Wall.) 268 (1870); *see also* Reed, *supra* note 1, at 261 (“That a majority of the Court would, during the Reconstruction Era, strain to uphold the Confiscation Acts as a permissible exercise of Congress’s war powers should not be surprising.”).

43. Act of July 17, 1862, ch. 195, § 5, 12 Stat. 589, 590.

44. *Miller*, 78 U.S. at 304–05.

45. *Id.* at 321 (Field, J., dissenting).

46. *Id.* at 322 (quoting *The Amy Warwick*, 1 F. Cas. 808 (D. Mass. 1862) (No. 342)).

47. *Id.* at 322–23.

conviction . . . . It seems to me that the reasoning . . . works a complete revolution in our criminal jurisprudence . . . .<sup>48</sup>

The Supreme Court has wrangled with the chasm between criminal and civil proceedings wherein civil forfeiture lies, but it has consistently upheld the practice, largely because of its ancient usage. The following passage from *J.W. Goldsmith, Jr.-Grant Co. v. United States*, in which the Court ultimately upheld civil forfeiture in the face of an innocent owner argument, demonstrates the Court's reluctant endorsement of civil forfeiture:

If the case were the first of its kind, it and its apparent paradoxes might compel a lengthy discussion to harmonize the [forfeiture] section with the accepted tests of human conduct. . . . There is strength, therefore, in the contention that . . . [the section] seems to violate that justice which should be the foundation of due process of law required by the Constitution.<sup>49</sup>

Although the Court noted that “[r]egarded in this abstraction the [claimant’s] argument is formidable,” it went on to cite ancient authority, including British common law, Justice Story’s opinion in *The Palmyra*,<sup>50</sup> and the Bible, to uphold civil forfeiture of the tainted property.<sup>51</sup>

In contrast to Confiscation Acts seizures, customs seizures implicate Fourth, Fifth,<sup>52</sup> and Eighth<sup>53</sup> Amendment protections; the CAFRA innocent owner defense is, however, unavailable. Customs law is designed primarily for at-the-border seizures.<sup>54</sup> To expect border agents to make the determination whether the possessor’s failure to declare was made innocently is simply unrealistic. Although the seizures in *Wally* and *One Julian Falat Painting* were not made at the border, the readily moveable nature of chattels is one justification for swift process.<sup>55</sup> It would be

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48. *Id.* at 323.

49. *J.W. Goldsmith, Jr.-Grant Co. v. United States*, 254 U.S. 505, 510 (1921).

50. *See The Palmyra*, 25 U.S. (12 Wheat.) 1 (1827).

51. *See Goldsmith, Jr.-Grant Co.*, 254 U.S. at 510–11.

52. *See Boyd v. United States*, 116 U.S. 616, 634–35 (1886) (characterizing customs seizure as “quasi-criminal”).

53. *See Austin v. United States*, 509 U.S. 602 (1993).

54. *E.g.*, *United States v. Sandoval Vargas*, 854 F.2d 1132, 1139 (9th Cir. 1988) (“The customs search statutes were designed to implement [the right of the sovereign to protect itself] by giving special powers to customs officials at the border, beyond those exercised by ordinary law enforcement agents.”).

55. *E.g.*, George W. Nowell, *American Tools to Control the Illegal Movement of Foreign Origin Archeological Materials: Criminal and Civil Approaches*, 6 SYRACUSE J. INT’L L. & COM. 77, 89–91 (1978).

problematic to set forth a rule whereby smugglers somehow get heightened protections because they are not caught at the border.

Perhaps the painting in *One Julian Falat Painting* was smuggled into the country; certainly much Nazi-looted art has been.<sup>56</sup> The Verified Complaint in *One Julian Falat Painting* states that Homeland Security agents “have conducted a search of all available importation records and have not been able to find any records documenting that the painting was lawfully imported into the United States.”<sup>57</sup> In contrast, *Portrait of Wally* was not brought into the country secretly; it was on public view for all to see at MoMA. Thus, a question remains: Should Title 19 customs grounds (or Title 22 grounds as originally pled in *Wally*<sup>58</sup>) be used when Title 18 criminal grounds (with the CAFRA defense) could be?

While the executive branch has the power to decide how best to unwind Nazi looting,<sup>59</sup> constitutional shortcuts, even during times of war or afterward to address crimes committed during the war, should not be accepted lightly.<sup>60</sup> Just ends do not justify unjust means, but it seems fair to utilize civil forfeiture to fulfill the executive branch’s commitment to retribute Holocaust-era art, which dates back to 1943.<sup>61</sup> Civil forfeiture is an essential post-war executive tool because it “would over-strain governmental resources to prosecute the *people involved*, rather than looking to their property . . . .”<sup>62</sup> While historical rationales for civil forfeiture are inconsistent, as discussed below, some of those rationales are particularly poignant when it comes to Holocaust-era art.<sup>63</sup>

Professor Urice<sup>64</sup> has dissected Justice Stevens’s dissenting opinion in *Bennis*, “which created what is now the standard tripartite classification of contraband: pure contraband, proceeds of criminal activity, and tools of

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56. Milton Esterow, *Europe Is Still Hunting Its Plundered Art*, N.Y. TIMES, Nov. 16, 1964, at 1 (noting the recovery of nearly 4000 pieces of art by the State Department between 1945 and 1962); see also Ardelia R. Hall, *U.S. Program for Return of Historic Objects to Countries of Origin, 1944–1954*, 31 DEP’T ST. BULL. 493, 496 (1954).

57. Verified Complaint ¶ 18, *United States v. One Julian Falat Painting Entitled Off to the Hunt and One Julian Falat Painting Entitled The Hunt*, No. 1:10-cv-09291 (S.D.N.Y. Dec. 13, 2010).

58. See *United States v. Portrait of Wally (Wally IV)*, 663 F. Supp. 2d 232, 250 (S.D.N.Y. 2009).

59. See Kreder, *supra* note 18, at 257–60 (detailing executive policy and *Bernstein* case).

60. See generally *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *Ex Parte Quirin*, 317 U.S. 1, 25 (1942).

61. Kreder, *supra* note 18.

62. Piety, *supra* note 2, at 952 (emphasis added). I must note that Professor Piety’s quote is taken out of context in that she was not promoting this idea as philosophically supporting the use of the civil forfeiture doctrine in any way; the whole point of her article was to criticize the doctrine.

63. See *id.* at 947 (discussing “remedial” versus “criminal” distinction).

64. Telephone Interview with Professor Stephen K. Urice, *supra* note 38.



the criminal's trade."<sup>65</sup> The "pure contraband" category is most relevant for present purposes and contains objects "the possession of which, without more, constitutes a crime" and that "the government has an obvious remedial interest in removing . . . from private circulation . . . ."<sup>66</sup> Professor Urice points to unregistered firearms, illegal narcotics, and cigarettes in excess of 10,000 intended for resale without paying local taxes as examples of "pure contraband."<sup>67</sup> He concludes that stolen art is no different from these as a legal matter, thus offering a legal justification for treating Holocaust-era stolen art the same as any other stolen property subject to seizure under the NSPA.<sup>68</sup> Moreover, the presence of Nazi-looted art in the market "undermine[s] public confidence in the government"<sup>69</sup> and our museums, most of which hold state-issued not-for-profit certificates of incorporation.<sup>70</sup> The connection between the crime and the property is anything but fortuitous, as would be the case with, for example, a drug deal that happens to take place in the driveway of an innocent's home.<sup>71</sup> Although "[t]here is nothing even remotely criminal in possessing an automobile,"<sup>72</sup> the NSPA renders the possession of *any* stolen property valued in excess of \$5,000 that had moved in interstate commerce a crime.<sup>73</sup>

The due process philosophical underpinnings of CAFRA are seductive. Most people would agree that we generally should allow possessors of property facing forfeiture to the government to demonstrate that they were bona fide purchasers for value without any knowledge of prior taint. But when it comes to stolen art in the civil context under our law, bona fide purchaser status does not matter much. That one cannot get title from a thief is the common law rule in this country, although statutes of limitations and other doctrines may bar a claim.<sup>74</sup> The common law

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65. *Bennis v. Michigan*, 516 U.S. 442, 459 (Stevens, J., dissenting) ("For purposes of analysis it is useful to identify three different categories of property that are subject to seizure: pure contraband; proceeds of criminal activity; and tools of the criminal's trade.").

66. *Id.* at 459 (quoting *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693, 699 (1965)).

67. Telephone Interview with Professor Stephen K. Urice, *supra* note 38.

68. *See id.*

69. Piety, *supra* note 2, at 949.

70. Cf. Philippe de Montebello, *Art Museums, Inspiring Public Trust*, in *WHOSE MUSE?: ART MUSEUMS AND THE PUBLIC TRUST* 151–52 (James Cuno ed., 2004) (discussing the public's trust in museums).

71. *See* Piety, *supra* note 2, at 951.

72. *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693, 699 (1965).

73. *See* 18 U.S.C. § 2314 (2006).

74. *United States v. Portrait of Wally (Wally IV)*, 663 F. Supp. 2d 232, 265 n.24 (S.D.N.Y. 2009) ("Laches is a defense, not a means by which title is positively established." (citing *Halcon Int'l, Inc. v. Monsanto Australia Ltd.*, 446 F.2d 156, 159 (7th Cir. 1971) ("The doctrine of laches . . . is a shield of

protects theft victims over commercial certainty in part on the philosophy that whereas original owners were unwillingly robbed of the art's possession, subsequent purchasers made the choice to buy the art from the thief (albeit perhaps in good faith).<sup>75</sup> Thus, if the government were forced to overcome a CAFRA defense, it very well could be in a position worse than the original theft victim in bringing civil litigation.

The Washington Principles, Vilnius Declaration, and Terezín Declaration, although "soft law," dictate that time-bar and other technicalities should not trump the merits of a claim. If technicalities are allowed to trump the merits in Holocaust-art disputes, then we are allowing our courts to be manipulated to support a corrupted, infected market that gave financial support to a genocidal regime. The deceptive conduct of the thieves, smugglers, and many (perhaps most) purchasers who should have suspected the origin of the art (if they did not have outright knowledge of it), as well as some museums' and collectors' misuse of our courts to shut down claims on technical grounds, justify the government's use of civil forfeiture to seize the art.

In conclusion, possessing Nazi-tainted art is akin to possessing someone else's prescription medication—possession would be legal if only the chattel were in the correct hands. Without the power to seize the assets, corrupt dealers will continue to thrive. When it comes to true downstream innocents, the point is not to punish, but rather to protect the market from further infection and to assist claimants in accordance with the Washington Principles, Vilnius Declaration, and Terezín Declaration. Thus, the philosophies that have supported asset forfeiture in the customs context, without the same constitutional protections and without the CAFRA innocent owner defense, seem to be correct in the Holocaust-era art context. While the upshot is deprivation of purported property rights with due process protections less than those afforded criminal defendants, the deprivation is not on par with that which was the impetus for much of the outrage in the 1990s about the implementation of civil forfeiture as a "tactical nuclear weapon."<sup>76</sup> We are not depriving innocents of roofs over

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equitable defense rather than a sword for the investiture or divestiture of legal title or right.")); *A. Halcoussis Shipping Ltd. v. Golden Eagle Liberia Ltd.*, No. 88 Civ. 4500, 1989 WL 115941, at \*2 (S.D.N.Y. Sept. 27, 1989) (same); see also Ashton Hawkins et al., *A Tale of Two Innocents: Creating an Equitable Balance Between the Rights of Former Owners and Good Faith Purchasers of Stolen Art*, 64 *FORDHAM L. REV.* 49, 50 (1995).

75. See Hawkins, *supra* note 74, at 50.

76. Nkechi Taifa, *Civil Forfeiture vs. Civil Liberties*, 39 *N.Y.L. SCH. L. REV.* 95, 95 (1994) (quoting Michael deCourcy Hinds, *States Seek Tougher Drug Forfeit Laws*, *N.Y. TIMES*, July 16, 1990, at A11 (quoting Richard M. Wintory, Director of the National Drug Prosecution Centers)).

their heads to line the public purse; we are talking about taking art into custody until its ownership can be established—and then returning it to the true owner. Although we must vigilantly guard against unbridled governmental power, given the miserable state of affairs for claimants seeking justice in civil proceedings,<sup>77</sup> we will have to put some faith in the executive branch to exercise prosecutorial discretion in effectuating executive policy to reconstitute Holocaust-era art.<sup>78</sup> Perhaps the executive branch will find a way to reinvigorate civil litigation brought by claimants. Otherwise, those who have trafficked in Holocaust-era art will have successfully forced us into a false choice between private civil litigation and government-initiated civil forfeiture proceedings when there are other options. If all civil options ultimately prove ineffectual at securing restitution and cleaning up today's art market, then we may reach the point where, as in the antiquities arena, the executive's hand is forced to initiate criminal prosecutions.<sup>79</sup>

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77. See Chart, *supra* note 19.

78. But see Deborah Duseau & David Schoenbrod, *Overbroad Civil Forfeiture Statutes Are Unconstitutionally Vague*, 39 N.Y.L. SCH. L. REV. 285, 285–86 (1994) (expressing the view that faith in prosecutorial discretion not to bring overreaching cases is “insufficient comfort”).

79. E.g., Geoffrey R. Scott, *Spoliation, Cultural Property, and Japan*, 29 U. PA. J. INT'L L. 803, 806–10 (2008) (discussing the prosecution of Robert Hecht and Marion True).