



## Interview with LCCHP President Thomas R. Kline

By 2017 LCCHP fellow Khamal Patterson

KP: President Kline, what do you think of the recently passed [Foreign Cultural Exchange Jurisdictional Immunity Clarification Act](#) of the United States, which essentially allows former or current authoritarian regimes known to have cached looted art to engage other countries in cultural loans without repercussion? Looted art would be able to cross borders without penalty under the auspices of cultural exchange.

TK: I worked on the [Malewicz case](#) that called attention to this problem. The State Department always knew the Immunity from Seizure Act ("[ISA](#)") only prevented seizure, not suit, but pretended otherwise. This point was argued in *Malewicz*. The District Court of the District of Columbia in *Malewicz* held that the ISA only prevented seizure of loaned objects and did not a court from having jurisdiction over loaned objects. *Malewicz* called attention to this issue. Not a fan [of the Foreign Cultural Exchange Jurisdictional Immunity Clarification Act]. The problem is that the State Department does not provide for reasonable review of [loaned] objects before granting immunity from seizure. I wouldn't mind if the new Act granted immunity from seizure *and* suit for an object upon a finding that there is no colorable claim to the object. Some colleagues and I drafted a counter or opposing bill that would require the State Department to make a finding that there are no known colorable claims to an object before granting immunity from seizure. This Foreign Cultural Exchange Jurisdictional Immunity Clarification Act was written to help the Russians who complained the most about being sued in the U.S. Even with the new Act, they still do not seem to be making any loans.

KP: Is Russia no longer making cultural loans to the United States because of the controversy surrounding the Chabad Archives? I believe that a Jewish religious sect has lobbied Russia to allow the Archives to be brought to the United States so that the congregants may study it. It was displaced and later seized by the Nazis then taken to the Soviet Union and remains as property of its successor state.

TK: Yes, though I won't get into the specifics. Russia defaulted after the D.C. Circuit Court's [ruling](#) that the Soviet Union was subject to jurisdiction in the U.S. under the FSIA. A default judgment was entered against it in the District Court of the District of Columbia upon remand. They have not made any loans to the United States since.

KP: [Attorney Irina Tarsis](#) is an expert on looted art cached by authoritarian and former totalitarian regimes. She has written on this case as well.

TK: I am familiar with her work.

KP: The final draft of the Holocaust Expropriated Art Recovery Act ("[HEAR](#)") abandons explicit language that claims may be brought under the Act for sales under duress or forced sales. The final draft may or may not be addressing forced sales claims in its repeated references to "misappropriation." In [von Saher v. Simon Norton Museum of Art](#), it was evident that Jacques Goudstikker was the victim of a forced sale. In fact, the drafting of the HEAR Act many felt was, in part, to address the justifiable furor that the decision in the *von Saher* case caused. You were counsel in [Vineberg v. Bissonnette](#), which dealt with the issue of forced sales as theft. What do you think about HEAR Act declining to explicitly address forced sales? What lessons can be learned and applied from the *Vineberg* case?

TK: Let's just look at the language of the statute together. You mentioned that the statute does not mention forced sales, but does mention misappropriation.

KP: Alright. Let me just pull it up on my computer.

TK: I see it in Section Two: Findings.

KP: Forced sales are mentioned in what I think would be called the Preamble and also in Section Five: Statute of Limitations.

TK: In Section Three: Purposes, the language says, "(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.*" I think that the intention was to include "forced sales."

Let's address misappropriation and persecution. The problem with Holocaust legislation is that people were dispossessed in so many ways. It's difficult to come up with an all-encompassing definition. The term "misappropriation" isn't defined in Section Four: Definitions. No definition of misappropriation, but definitions for "persecution." The use of the word "lost" in Section Five is confusing. These things were not "lost" under the plain meaning of the word. I believe Congress intended the word "lost" to be very broad and to encompass forced sales.

Persecution: "because of Nazi persecution" is the heart of the problem that this phrase in Section Five creates. Here is the question: Suppose the person was subject to Nazi persecution but sold art at below market value to survive. Let's say the purchaser then sold the art to a Nazi official. Would a purchaser of that below market art then be subject to a claim under the HEAR Act as a party to a "forced sale"? What the statute sets forth is a very Western European oriented definition of "loss" and misappropriation.

There is a question about the scope of "wild appropriation." Lucian Simmons of Sotheby's uses that term to refer to claims based on neighbors taking art. People sold art to people that they knew because they couldn't work or access their bank accounts. Much of the art in the East had already been nationalized [by the Soviet Union]. Patricia Kennedy Grimsted of Harvard has written articles on losses in the East, particularly Ukraine. If you have a theft from the Polish National Museum, is it covered by the HEAR Act? So, the question of what is "lost" due to persecution is a difficult one to define or limit.

KP: That is a good question.

KP: What issues do you anticipate being litigated under the HEAR Act?

TK: We [the LCCHP] do have an [advocacy committee](#). Subgroup head [Lucille Roussin](#) worked on the HEAR Act. I attended the hearing before the Senate committee. At this point, all we can do is wait to see.

The first issue that emerges under the HEAR Act is whether it applies to money damages; damages do not appear in the final draft. The final draft was intended to apply only to claims for recovery. Money damages were available in an earlier draft. There might be parallel Holocaust litigation [as a result]; one part of the claim would be governed by the federal statutes of limitations, and the other is governed by the state statute of limitations. In the normal case, the cause of action to recover art is replevin. In the normal case, the cause of action to recover damages is conversion; these are for money damages. For example, I find my art, and I sue. We bring a replevin action to get the art back and a conversion action to get damages for loss of use; however, under the HEAR Act this would not be covered [because it would be a claim for money damages].

KP: Replevin and conversion are causes of action under state law with their own statutes of limitation.

TK: The Federal Government can preempt state law, but what happens in Louisiana with acquisitive prescription? In Louisiana, their laws are based on Civil Code principles. Civil law is a different legal system from the common law that governs in the other states. Acquisitive prescription in Louisiana is like adverse possession in a common law state like Maryland. In Maryland, there is a specific cause of action called "detinue" that functions like conversion; it includes a claim for money damages based on loss of value. We have no experience in this field with federal legislation displacing state statutes of limitations. It would be interesting to see how it plays out in the courts. By passing the HEAR Act, Congress was not foreclosing the possibility of extending the statute of limitations for other persecuted groups like Armenians.

A second question raised by the HEAR Act is the one you raised: whether it includes all forms of misappropriation and what does "lost" encompass. Though not explicitly stated in the final draft, as you pointed out, I argue forced sales would likely be covered under the HEAR Act.

Let's revisit the illustration from earlier. If the person selling art far below market value is a victim of Nazi persecution and the person who bought the art is not the persecutor, then has there been a forced sale?

Under German law, 1) the victim has to prove there was a transaction; 2) and the beneficiary has to prove that fair value was actually received by the persecuted individual. If I am persecuted, and my buddy gives me fair market value for the painting, then it's not duress under German law if I actually received the funds.

In *Vineberg v. Bissonnette*, we proved coercion thoroughly. [In that case] Max Stern had received an order to liquidate his gallery or turn it over. Jews were not considered appropriate receivers and custodians of German art and culture. Stern resisted, under the threat of murder. Stern fled soon after his gallery stock was seized and auctioned. Not all allegations of duress are as strong. The Stern case is on one end of the spectrum.

Then there is the [\[Martha\] Nathan case](#), where the woman [seller] was living in France *before* the occupation. The artwork was sold in Switzerland and she received the proceeds. The court decided the matter only on statute of limitation grounds and not on duress. There is not a body of case law in America to demonstrate what is "too much pressure" or not enough for a sale to have been made under duress. In the U.S., we start from the principle that not all transactions were under duress, but the analysis after that is not so clear because we don't have many cases.

In *Vineberg*, the court held that a forced sale is equivalent to theft. It is not a species of fraud that would give voidable title. It was important in American law to establish this point because in the U.S. a thief does not acquire and cannot pass good title. We ask: Would the transaction have taken place without coercion? The lesson from *Vineberg* is that a forced sale is theft under its facts. [As a result of this important precedent], I don't think that the HEAR Act had to mention forced sales specifically; though, I am troubled by the term "lost," given our lack of history [to put these transgressions into context].

KP: Fascinating. President Kline, we appreciate you sharing your experiences helping Holocaust victims finally get justice for their lost heirlooms.

TK: You are welcome. Please continue to follow developments in our restitution and cultural property laws. They are vital in our interconnected world.