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Jack Achiezer Guggenheim

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## ESSAYS

# Art & Atrocity: Cultural Depravity Justifies Cultural Deprivation

Jack Achiezer Guggenheim\*

### INTRODUCTION

At the end of World War II, in the wake of the horror and devastation of the Nazi war effort, the Soviet Union captured a significant collection of art from Nazi Germany.<sup>1</sup> Some of those pieces of art came from the private and public collections that had been stolen by the Nazis,<sup>2</sup> but many of the works came from legitimate

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\* Associate, Sidley & Austin, Washington, D.C. Yeshiva University, B.A., *cum laude*, 1993; Columbia Law School, J.D. 1996; Parker School of International and Comparative Law, C.O.A. 1996. The opinions expressed in this Essay are the author's own and are not attributed to Sidley & Austin or its clients. This Essay is dedicated to my family, particularly my mother, and it is in memory of the relatives, whom I never knew, who perished in the Holocaust and who taught me that the lessons of the Holocaust must never be forgotten.

1. See Alan Riding, *Museums and the Spoils of War: Are Finders Keepers?*, N.Y. TIMES, Mar. 12, 1995, at E3.

2. Immediately after the fall of the Third Reich, Germany's national collections were swollen with tens of thousands of art objects looted from conquered countries. See WILLIAM L. SHIRER, *THE RISE AND FALL OF THE THIRD REICH: A HISTORY OF NAZI GERMANY* 946-47 (Simon & Schuster/Touchstone 1990) (1959) [hereinafter *RISE AND FALL OF THE THIRD REICH*] (detailing the Nazi looting of art treasures from conquered nations, primarily from France, where the Germans stole enough art work in 1940 to fill "134 [railroad] freight cars loaded with 4,174 cases of art works comprising 21,903 objects, including 10,890 paintings . . . includ[ing] works of, among others, Rembrandt, Rubens, Hals, Vermeer, Velázquez, Murillo, Goya, Vecchio, Watteau, Fragonard, Reynolds and Gainsborough"). In a secret order issued in 1940, German *Reichsmarschall* Hermann Goering specified three categories of disposition for the art objects then being plundered from the Louvre Museum in Paris:

1. Those art objects about which the Fuehrer has reserved for himself the decision as to their use.
2. Those . . . which serve the completion of the Reich Marshal's collection . . .
3. Those . . . that are suited to be sent to German museums.

Goering Order of November 5, 1940, Fuehrer Conferences on Naval Affairs, Hitler's

German national collections, museums, and institutions.<sup>3</sup> For more than half a century the Soviet Union denied that it had these works of art in its possession.<sup>4</sup> Recently, however, Russia, the successor to the Soviet Union, admitted to taking these works; Russia also prominently displayed them in its museums.<sup>5</sup> Germany has demanded the return of the art, stating that the works of art are Germany's cultural property and that under international law and treaties, Russia is required to return them.<sup>6</sup> Germany's claim

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Headquarters, at 53 (Aug. 16, 1942), *quoted in* RISE AND FALL OF THE THIRD REICH, *supra*, at 945 & n.16; *see also* Angela Joy Davis, Comment, *Beyond Repatriation: A Proposal for the Equitable Restitution of Cultural Property*, 33 UCLA L. REV. 642 (1985) (discussing the legal responsibility to restore cultural property to the victims of the Holocaust). *See generally* Lisa J. Borodkin, Note, *The Economics of Antiquities Looting and a Proposed Legal Alternative*, 95 COLUM. L. REV. 377 (1995) (discussing a victim's legal rights to the return of stolen art); Hans Kennon, *Take a Picture, It May Last Longer if Guggenheim Becomes the Law of the Land: The Repatriation of Fine Art*, 8 ST. THOMAS L. REV. 373 (1996) (same).

3. Hitler, a failed house painter, dreamed of building a "super-museum" of "non-degenerate" art in Linz, Austria. *See* Sylvia L. Depta, Comment, *Twice Saved or Twice Stolen? The Trophy Art Tug-of-War Between Russia and Germany*, 10 TEMP. INT'L & COMP. L.J. 371, 371 (1996); *see also* ADOLF HITLER, MEIN KAMPF [MY STRUGGLE] 258-66 (Ralph Manheim, trans., Houghton Mifflin Co. 1971) (1926) (delivering a tirade against the rise of degenerate and senseless modern art in Germany and Austria).

4. *See* Riding, *supra* note 1.

5. *See id.*

6. *See id.* Depending upon the country or international agreement, the definition of cultural property varies greatly. A general definition includes art, artifacts, antiques, significant architecture, artificial landscapes, religious objects and sites, and native peoples' objects. *See* Roger W. Mastalir, *A Proposal for Protecting the "Cultural" and "Property" Aspects of Cultural Property Under International Law*, 16 FORDHAM INT'L L.J. 1033, 1040 (1993) (discussing accepted definition of cultural property); Elissa S. Myerowitz, Comment, *Protecting Cultural Property During A Time of War: Why Russia Should Return Nazi-Looted Art*, 20 FORDHAM INT'L L.J. 1961, 1964-67 (1997). The 1970 United Nations Educational, Scientific and Cultural Organization ("UNESCO") Convention on the Means of Prohibiting the Illicit Import, Export and Transfer of Ownership of Cultural Property is widely accepted as providing a workable definition of cultural property. UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, Nov. 14, 1970, art. 1, 823 U.N.T.S. 231, 234-36, 10 I.L.M. 289, 289-90 [hereinafter UNESCO Convention]. The UNESCO Convention defines cultural property as:

[P]roperty which, on religious or secular grounds, is specifically designated by each State as being of importance for archaeology, prehistory, history, literature, art or science and which belongs to the following categories:

(a) rare collections and specimens of fauna, flora, minerals and anatomy, and objects of paleontological interest;

encompasses an estimated two hundred thousand museum quality pieces and two million books.<sup>7</sup> The German government believes that among those objects are unique representations of German culture and history, such as two Gutenberg Bibles and eighty early German gold items.<sup>8</sup> To date, Russia has refused to return the appropriated art on the grounds that the art should serve as compensation for the damage Germany inflicted on Russia during the Second World War.<sup>9</sup> Russia also asserts that it is not bound to return the German art under international law or treaties.<sup>10</sup>

Current international law favors Russia's position, but only on the timing of the claims, not on legal principle. Although the 1995 Convention of the International Institute for the Unification of Pri-

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- (b) property relating to history, including the history of science and technology and military and social history, to the life of national leaders, thinkers, scientists and artists and to events of national importance;
  - (c) products of archaeological excavations (including regular and clandestine) or of archaeological discoveries;
  - (d) elements of artistic or historical monuments or archaeological sites which have been dismembered;
  - (e) antiquities more than one hundred years old, such as inscriptions, coins and engraved seals;
  - (f) objects of ethnological interest;
  - (g) property of artistic interest, such as:
    - (i) pictures, paintings and drawings produced entirely by hand on any support and in any material (excluding industrial designs and manufactured articles decorated by hand);
    - (ii) original works of statuary art and sculpture in any material;
    - (iii) original engravings, prints and lithographs;
    - (iv) original artistic assemblages and montages in any material;
  - (h) rare manuscripts and incunabula, old books, documents and publications of special interest (historical, artistic, scientific, literary, etc.) singly or in collections;
  - (i) postage, revenue and similar stamps, singly or in collections;
  - (j) archives, including sound, photographic and cinematographic archives;
  - (k) articles of furniture more than one hundred years old and old musical instruments.

*Id.* at 234-36, 10 I.L.M. 289-90.

7. See Riding, *supra* note 1.

8. Rod MacLeish, *The Art and the Glory: The Lost Masterpieces of the Hermitage*, VANITY FAIR, Mar. 1995, at 126, 138.

9. See Catherine Foster, *Stolen Art as War Booty: Hostages or Harbingers of Peace?*, CHRISTIAN SCIENCE MONITOR, Feb. 8, 1995, at A18.

10. See Riding, *supra* note 1.

vate Law (“UNIDROIT Convention”)<sup>11</sup> calls for the return of cultural property, it is inapplicable to the current dispute between Germany and Russia because the UNIDROIT Convention does not apply retroactively.

Although the UNIDROIT Convention should be used for guidance in resolving disagreements over appropriated cultural property,<sup>12</sup> injustice would flow from application of the UNIDROIT Convention to the current Russian-German dispute. The return of appropriated cultural property to those who have committed acts of inhumanity would help recreate the same mindset that led to the atrocities. Moreover, cultural property should not be returned where the value of such return is outweighed by equitable concerns. Where a country has acted with cultural depravity, it justifies its own cultural deprivation. Where the cultural property was used in, or contributed to, popularly supported acts of inhumanity, civil forfeiture of property used in a crime is a means of helping reimburse society for the costs associated with such crime and fighting such crimes.

This Essay argues that Russia’s refusal to return the German art is correct under a theory of cultural forfeiture. Part I summarizes the facts leading up to the current dispute, presenting both Germany’s argument for the return of the appropriated art and Russia’s justifications for retaining it. Part II proposes the doctrine of cultural forfeiture, which rests on the concept that cultural depravity justifies cultural deprivation, and sets forth a three-pronged test to determine when a country loses its right to demand the return of cultural property appropriated from its museums and other national

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11. International Institute for the Unification of Private Law (UNIDROIT): Final Act of the Diplomatic Conference for the Adoption of the Draft Convention on the International Return of Stolen or Illegally Exported Cultural Objects, June 24, 1995, 34 I.L.M. 1322 [hereinafter UNIDROIT Convention]. The International Institute for the Unification of Private Law (“UNIDROIT”) is an intergovernmental organization, based in Rome, which attempts to harmonize the laws of different countries. In 1988, UNIDROIT began drafting codes for the harmonization of cultural property laws.

12. See generally Myerowitz, *supra* note 6 (arguing that using the UNIDROIT Convention as a guidepost Russia should return the World War II art to Germany). *But see generally* Depta, *supra* note 3 (arguing that all the appropriated art, that of Germany and its victims, should be kept by Russia in order to avoid causing instability in the art and antiquities market).

institutions and archives. Part III applies the cultural forfeiture test to the dispute between Russia and Germany and finds that the test is satisfied by the barbaric acts of inhumanity committed by the German people during World War II. This Essay concludes that the cultural forfeiture test justifies Russia's retention of German artwork appropriated from German national collections, institutions, and museums at the end of the Second World War.

## I. BACKGROUND

The modern-day tug of war over the appropriated German cultural objects continues a dispute that is rooted in the lawlessness and Nazi terror of World War II, but is now fought on the higher plane of international law.<sup>13</sup> Citing the UNIDROIT Convention,<sup>14</sup> which advocates that stolen cultural property must be returned to its true owner,<sup>15</sup> Germany argues that whenever possible cultural property should be returned to its country of origin because cultural property enhances a country's quality of life, economy, and cultural environment by helping a nation define its identity and origin.<sup>16</sup> The Russian government maintains that it is lawfully entitled to the cultural objects under the Act of State Doctrine as legitimate reparations for the destruction of its own cultural property by Germany, and as the result of the doctrine of prescription.<sup>17</sup>

### A. *Facts of Dispute*

In January 1995, the Russian government confirmed the rumor that it had confiscated German cultural objects at the end of the Second World War, partly as revenge and partly as restitution, for the destruction of Russian cultural property during the Nazi invasion of Russia.<sup>18</sup> In that same year, the Hermitage Museum in St.

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13. See Myerowitz, *supra* note 6, at 1990.

14. See UNIDROIT Convention, *supra* note 11.

15. See *id.* art. 3, 34 I.L.M. at 1331.

16. See John Henry Merryman, *Two Ways of Thinking About Cultural Property*, 80 AM. J. INT'L L. 831, 845-48 (1986); see also, Lisa J. Borodkin, *The Economics of Antiquities Looting and a Proposed Legal Alternative*, 95 COLUM. L. REV. 377 (1995).

17. See S. Shawn Stephens, *The Hermitage and Pushkin Exhibits: An Analysis of the Ownership Rights to Cultural Properties Removed from Occupied Germany*, 18 HOUS. J. INT'L L. 59, 96-97 (1995).

18. Near the end of the Second World War, the Soviet army established trophy bri-

Petersburg opened an exhibition entitled "Hidden Treasures Revealed"<sup>19</sup> while the Pushkin Museum in Moscow showed a similar display entitled "Twice Saved."<sup>20</sup> The following year, the Pushkin Museum opened the "Gold of Troy" exhibition.<sup>21</sup>

The cultural property on display came from many different sources including German museums, institutions, and personal collections of works Germany had taken from its victims.<sup>22</sup> Two notable collections that were taken from Jews and subsequently taken from Germany by Russia are the collections of the Herzog and Hatvatny families of Budapest.<sup>23</sup> Those collections and other works stolen by Germany from its victims are distinct from, and should be treated differently than, the national collections Russia has taken from Germany. In 1990, the German and Russian governments began negotiations regarding the possible return of the cultural property. But those discussions stalled, and Germany now demands that the Russian government return its national treasures.<sup>24</sup>

### B. *Relevant International Agreements*

The Hague Conventions of 1899<sup>25</sup> and 1907<sup>26</sup> established the

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gades, which were divisions of the Soviet army. Their mission was to capture artwork from German museums and bunkers and return it to Russia. See Myerowitz, *supra* note 6, at 1990. The trophy brigades would look throughout Germany for specific pieces of art with an equivalent value to an item of Russian art that was missing or destroyed. See H. Wayne Elliott, *Beautiful Loot*, 153 MIL. L. REV. 275, 276-77 (1996) (reviewing KONSTANTIN AKINSHA & GRIGORII KOZLOV, *BEAUTIFUL LOOT* (1995)).

19. See Richard Beeston, *War Booty Row Over Russian Exhibition*, THE TIMES (London), Mar. 30, 1995 (stating that the exhibition consisted of 74 paintings, including works by Picasso, Van Gogh, Renoir, and Cezanne).

20. See Riding, *supra* note 1 (reporting that the exhibition included 63 works, most notably works by El Greco and Goya).

21. See Christopher Knight, *Displaying the Spoils of War*, L.A. TIMES, Mar. 20, 1995, at A1 (previewing the 1996 opening of the exhibit, which would include "gold from ancient Troy, excavated and taken to Germany").

22. See Stephens, *supra* note 17, at 62-63.

23. See Jo Ann Lewis, *Uncovering a Buried Treasure*, WASH. POST, Jan. 23, 1995, at B1.

24. See Beeston, *supra* note 19; Knight, *supra* note 21.

25. Convention with Certain Powers on the Laws and Customs of War on Land, July 29, 1899, 32 Stat. 1803 [hereinafter 1899 Land War Convention].

26. Convention with Other Powers on the Laws and Customs of War on Land, Oct.

first formal international guidelines for the protection of cultural property during wartime.<sup>27</sup> The 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (“Hague Convention”) further attempted to protect cultural property.<sup>28</sup> The Hague Convention explicitly prohibits countries from damaging and stealing cultural property during a war.<sup>29</sup>

In 1970, the Hague Convention was supplemented by the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property (“UNESCO Convention”).<sup>30</sup> The UNESCO Convention requires any country exporting cultural property to provide adequate ownership documentation with the exported object.<sup>31</sup> It fur-

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18, 1907, 36 Stat. 2277 [hereinafter 1907 Land War Convention].

27. Russia was a party to both the 1899 and 1907 Land War Conventions. The guidelines of those conventions include a general rule prohibiting the confiscation of private property and a rule imposing legal proceedings on any destruction, damage, or confiscation of private property. See 1907 Land War Convention, arts. 46 & 56, 36 Stat. 2306-07, 2309; see also, David A. Meyer, Note, *The 1954 Hague Cultural Property Convention and its Emergence Into Customary International Law*, 11 B.U. INT’L L.J. 349 (1993).

28. See Final Act of the Intergovernmental Conference on the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 215 [hereinafter Hague Convention].

29. See Hague Convention, art. 4, 249 U.N.T.S. 242-44 (explaining the Hague Convention’s general prohibition against destruction of cultural property). The Hague Convention prohibits any act of hostility against cultural property. Included in this general prohibition are any acts of theft, pillaging, or vandalism of cultural property. The Hague Convention states that:

The High Contracting Parties undertake to respect cultural property situated within their own territory as well as within the territory of other High Contracting Parties by refraining from any use of the property and its immediate surroundings or of the appliances in use for its protection for purposes which are likely to expose it to destruction or damage in the event of armed conflict; and by refraining from any act of hostility directed against such property.

*Id.* at 242-44.

It is noteworthy that Germany, which now seeks protection under international conventions for its cultural property, ignored the French government’s World War II protest that the plunder of France’s art treasures in 1940 violated the Hague Convention. See RISE AND FALL OF THE THIRD REICH, *supra* note 3, at 945 (quoting *Reichsmarschall* Goering’s reaction to the French protest as, “I am the highest jurist in the state, [hence i]t is my orders which are decisive”).

30. See UNESCO Convention, *supra* note 6.

31. See *id.*, art. 6, 823 U.N.T.S. at 240, 10 I.L.M. 290-91. Article 6 of the UNESCO Convention requires the introduction of an export certificate for any object, that the ob-



ther provides that all signatory nations should enact legislation prohibiting domestic institutions<sup>32</sup> from possessing any illegally obtained cultural property.<sup>33</sup>

The 1995 UNIDROIT Convention is the most recent step forward in the protection of cultural property.<sup>34</sup> The UNIDROIT Convention is based on the common law philosophy that cultural property must be returned to its true owner.<sup>35</sup> In order to appease civil law countries, the UNIDROIT Convention provides that any dispossessed owner of cultural property who was a bona fide purchaser shall receive compensation for the return of the property to its original owner.<sup>36</sup> Although there was much discussion during the Convention about the implications of retroactively applying the convention,<sup>37</sup> it was ultimately determined that the agreement would be a purely active agreement that strongly condemned prior acts.<sup>38</sup>

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ject not be exported unless it has such a certificate, and that the restriction be publicized.  
*Id.*

32. See *id.*, art. 7(a), 823 U.N.T.S. 240, 10 I.L.M. 291 (mandating that signatory nations take necessary steps consistent with their national legislation).

33. See *id.*, art. 7(a), 823 U.N.T.S. 240, 10 I.L.M. 291.

34. See UNIDROIT Convention, *supra* note 11, 34 I.L.M. *passim*; see also, Myerowitz, *supra* note 6, at 1977 (citing Lyndel V. Prott, *UNESCO and UNIDROIT: A Partnership Against Trafficking in Cultural Objects*, 1 UNIFORM L. REV. 59 (1996)); Claudia Fox, Comment, *The UNIDROIT Convention on Stolen Property or Illegally Exported Cultural Objects: An Answer to the World Problem of Illicit Trade in Cultural Property*, 9 AM. U. J. INT'L L. & POL'Y 225 (1993); Spencer A. Kinderman, Comment, *The UNIDROIT Draft Convention on Cultural Objects: An Examination of the Need for a Uniform Legal Framework for Controlling the Illicit Movement of Cultural Property*, 7 EMORY INT'L L. REV. 457 (1993); Nina R. Lenzer, Comment, *The Illicit International Trade in Cultural Property: Does the UNIDROIT Convention Provide an Effective Remedy for the Shortcomings of the UNESCO Convention?*, 15 U. PA. J. INT'L BUS. L. 469 (1994); Monique Olivier, Comment, *The UNIDROIT Convention: Attempting to Regulate the International Trade and Traffic of Cultural Property*, 26 GOLDEN GATE U. L. REV. 627 (1996).

35. See UNIDROIT Convention, *supra* note 11, art. 3, 34 I.L.M. 1331.

36. See Myerowitz, *supra* note 6, at 1982.

37. See INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW, DIPLOMATIC CONFERENCE FOR THE ADOPTION OF THE DRAFT UNIDROIT CONVENTION ON THE INTERNATIONAL RETURN OF STOLEN OR ILLEGALLY EXPORTED CULTURAL OBJECTS, ACTS AND PROCEEDING 42 (1995) (discussing drafters' reasoning behind adoption of final convention articles).

38. See Myerowitz, *supra* note 6, at 1984.

### C. Germany's Position

Germany's argument for the return of its cultural art is founded on the concept of cultural nationalism. Cultural nationalism is the belief that whenever possible cultural property should be returned to its country of origin,<sup>39</sup> because it enhances a country's quality of life, economy, and cultural environment. The enhancement occurs because the property helps a nation define its identity and origin,<sup>40</sup> as well its sense of its present and future.<sup>41</sup> Furthermore, the existence of a common culture is closely tied to the awareness of a sense of community, and protecting cultural property fosters a community's awareness of common culture and helps people to remain aware of the way in which individuals in a community are intertwined.<sup>42</sup> Arguably, cultural nationalism applies not only to art created in a certain country, but also to art that first became truly culturally valuable in such country. In an agreement based on the principle of cultural nationalism, prior to the revelation that Russia had taken art from Germany at the end of the World War II, the Russian and German governments decided under the provisions of the 1990 German-Russian Cooperative Treaty<sup>43</sup> that both countries would return any cultural objects illegally in their possession.<sup>44</sup>

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39. See John Henry Merryman, *Two Ways of Thinking About Cultural Property*, 80 AM. J. INT'L L. 831, 845-48 (1986); see also, Lisa J. Borodkin, *The Economics of Antiquities Looting and a Proposed Legal Alternative*, 95 COLUM. L. REV. 377 (1995). As a general rule, the taking of government property without the sovereign's consent is illegal and is the equivalent of common law theft under customary international law. Nevertheless, there has historically been an exception to this general rule for the taking of property from the vanquished nation by a conquering nation to prosecute a war effort. See LEONARD D. DUBOFF, *THE DESK BOOK OF ART LAW* 129 (1977).

40. See Stephanie O. Forbes, Comment, *Securing the Future of Our Past: Current Efforts to Protect Cultural Property*, 9 TRANSNAT'L LAW. 235, 241-42 (1996); see also Robin Morris Collin, *The Law and Stolen Art, Artifacts, and Antiquities*, 36 HOW. L.J. 17 (1993).

41. See Paul M. Bator, *An Essay on the International Trade in Art*, 34 STAN. L. REV. 275, 304 (1982); see also Kimberly A. Short, Note, *Preventing the Theft and Illegal Export of Art in a Europe Without Borders*, 26 VAND. J. TRANSNAT'L L. 633 (1993).

42. See Bator, *supra* note 41, at 304.

43. Treaty on Good-Neighborliness, Partnership and Cooperation, Nov. 9, 1990, F.R.G.-U.S.S.R., art. 16, 30 I.L.M. 504, 512 [hereinafter German-Russian Cooperative Treaty] (stating intentions to return cultural property to its original owners).

44. See Myerowitz, *supra* note 6, at 1991.

The argument has been made that the UNIDROIT Convention should be applied as a guide formulating a disposition to the cultural property taken during the Second World War. Under such an application, Germany's cultural property taken by the Soviet Union at the end of World War II and presently in Russian museums, should be returned to the German government.<sup>45</sup> It has been further recommended that the International Court of Justice ("ICJ") should adjudicate this dispute and that the ICJ should take advantage of the UNIDROIT Convention and apply it as a guide in its determination.<sup>46</sup>

#### D. *Russia's Position*

The Russian government maintains that it lawfully obtained the cultural objects after World War II under the Act of State Doctrine,<sup>47</sup> because the Russian government was, for all intents and purposes, the legal German government when it took the cultural objects.<sup>48</sup> Russia also argues that as a victorious occupying power it is allowed legitimate reparations for the destruction of its own cultural property by Germany, the vanquished government.<sup>49</sup> In addition, Russia argues that the passage of time has given it title to the artwork by way of the doctrine of prescription,<sup>50</sup> as recognized

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45. *See id.* at 1964.

46. *See id.* at 1996.

47. *See Knight, supra* note 21.

48. *See id.* *But see* *Menzel v. List*, 267 N.Y.S.2d 804, 813-19 (Sup. Ct. 1966) (providing an example of a court's reasoning as to why the Act of State Doctrine might not apply), *modified as to damages*, 279 N.Y.S.2d 608 (App. Div. 1967), *rev'd as to damages*, 298 N.Y.S.2d 979 (1969). In *Menzel*, the court held that the plaintiff was the sole owner of a Chagall painting because, *inter alia*, the Nazi confiscation of the painting did not occur within the territorial limits of the German government. *Id.* at 815-16. *But see* *Stroganoff-Scherbatoff v. Weldon*, 420 F. Supp. 18, 22 (S.D.N.Y. 1976) (holding that the Act of State Doctrine applied because the Russian Army appropriated works pursuant to governmental decree as recognized by the United States). In *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964), the Supreme Court stated that for the Act of State Doctrine to apply, a taking must be done by a sovereign government, within the territorial limitations of such government, by a government that is recognized at the time of suit.

49. *See Knight, supra* note 21.

50. With the passage of time, ownership rights vest in possessed property in order to promote stability. *See* D.H.N. Johnson, *Acquisitive Prescription in International Law*, 27 BRIT. Y.B. INT'L LAW 332, 333 (1950).

by both civil law and common law systems.<sup>51</sup> Therefore, Russia maintains that it is not in violation of any international agreements. Russia also believes the 1990 German-Russian Cooperative Treaty, like the other international agreements cited by Germany, was not intended to apply retroactively, hence is not binding or determinative in the current dispute.<sup>52</sup> Russia additionally argues that the taking of the cultural property was lawful as a reprisal for Germany's initiation of the war and its intentional mass destruction of Russian art and architecture.<sup>53</sup> As for the property that Russia appropriated from Germany, which originally belonged to Germany's victims, Russia, at least in principle, has agreed to return them to such victims or their survivors.<sup>54</sup>

## II. CULTURAL FORFEITURE

As our society evolves from a series of national communities to a global community, it becomes necessary to adapt domestic ideas to the international arena. One concept, heavily developed in the United States and experiencing a recent resurgence in popularity, is civil forfeiture. That concept is premised on the belief that forfeiture of property used in a crime reimburses society for the expense of such crime and fighting such crimes.<sup>55</sup> The concept of civil forfeiture can be adapted to the current dispute between Russia and Germany over the cultural property that Russia appropriated from Germany at the end of the Second World War. This new concept and device should be termed cultural forfeiture, as it dictates the circumstances under which a country forfeits its right to its cultural property.

The historical antecedents of civil forfeiture can be traced to

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51. See Stephens, *supra* note 22, at 96-97.

52. See Depta, *supra* note 3, at 384.

53. See Stephens, *supra* note 22, at 61.

54. See Knight, *supra* note 21.

55. The director of the Executive Office for Asset Forfeiture, Cary Copeland, described civil forfeiture as "an ancient legal procedure which is proving to be dramatically effective in attacking modern crime." Cary Copeland, CIVIL FORFEITURE FOR THE NON-LAWYER 2 (BJA Asset Forfeiture Project, Wash., D.C., Spring 1992), *quoted in* William Carpenter, *Reforming the Civil Drug Forfeiture Statutes: Analysis and Recommendations*, 67 TEMP. L. REV. 1087, 1104 (1994) (discussing the forfeiture controversy, the problems with drug forfeiture statutes, and approaches to reform).

biblical times.<sup>56</sup> Since then it has appeared in the legal systems of the Athenians, the Romans, and the Goths, among many other legal systems.<sup>57</sup> The English jurist William Blackstone explained that one rationale for the forfeiture of property is that forfeiture serves as a remedy for a breach of the social contract.<sup>58</sup> Blackstone's comments may be transposed from the national context to the international context. Just as an individual who violates the social compact with the state may be deprived of property, the country that violates the social compact of the international community may be deprived of property.<sup>59</sup>

#### A. *Application of Cultural Forfeiture*

The international community should adopt cultural forfeiture as a free standing device and incorporate it into the UNIDROIT Convention and other relevant agreements as an exception to the international community's determination that cultural property generally should be restored to the deprived nation. The standard for

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56. See George T. Pappas, Comment, *Civil Forfeiture and Drug Proceeds: The Need to Balance Societal Interests With the Rights of Innocent Owners*, 77 MARQ. L. REV. 856, 858-60 (1994); see also Jacob J. Finkelstein, *The Goring Ox: Some Historical Perspectives on Deadlands, Forfeitures, and the Western Notion of Sovereignty*, 46 TEMP. L. Q. 169, 180-81 (1973).

57. See Carpenter, *supra* note 55, at 1103-05.

58. William Blackstone wrote that:

[A]ll property is derived from society, being one of those civil rights which are conferred upon individuals, in exchange for that degree of natural freedom which every man must sacrifice when he enters into social communities. If therefore a member of any national community violates the fundamental contract of his association, by transgressing the municipal law, he forfeits his right to such privileges as he claims by that contract; and the state may very justly resume that portion of property, or any part of it, which the laws have before assigned him.

1 WILLIAM BLACKSTONE, COMMENTARIES \*299; see also Pappas, *supra* note 56, at 860.

59. See generally Michael F. Alessio, Comment, *From Exodus to Embarrassment: Civil Forfeiture Under the Drug Abuse Prevention and Control Act*, 48 SMU L. REV. 429 (1995) (discussing the history of civil forfeiture, its development in western jurisprudence, and its application and constitutionality in the United States); Donald J. Boudreaux & A.C. Pritchard, *Civil Forfeiture and the War on Drugs: Lessons From Economics and History*, 33 SAN DIEGO L. REV. 79 (1996) (same); Alan Nicgorski, *The Continuing Saga of Civil Forfeiture, the "War on Drugs," and the Constitution: Determining the Constitutional Excessiveness of Civil Forfeitures*, 91 NW. U. L. REV. 374 (1996) (same).

cultural forfeiture should be premised on the idea that where a country has acted with cultural depravity, it has justified its own cultural deprivation. The various agreements calling for the return of cultural property assume that the return of such property advances the development of the deprived country and that such return is also ultimately in the best interest of the rest of the international community.<sup>60</sup>

Those assumptions are not always valid. Furthermore, other concerns may trump the best interests of the deprived country. For example, it is very possible that the return of Germany's cultural property is not in the best interest of Germany or the international community. Such return could contribute to the re-establishment of the German mindset responsible for the Holocaust, hence equitable considerations urge that Germany be deprived of its art and that Russia have the right to keep it. Thus, the best interests of Germany and the international community might be best served by Germany's cultural deprivation being another form of punishment for that country's inhuman actions of World War Two. Therefore, it is necessary to establish a standard to determine when the return of cultural property is not in the overall best interest of the deprived country and the international community, or when such interests are outweighed by other interests.

#### 1. Structure of the Cultural Forfeiture Test

The return of cultural property is not in the overall best interest of a deprived country or the international community when the cultural property was used in, or contributed to, popularly supported acts of inhumanity, due to the legitimate fear that return of appropriated cultural property would help recreate the same national mindset that underlay the original acts of inhumanity. Furthermore, cultural property should not be returned where the value of such return is outweighed by equitable concerns.

In order to reach these objectives, a cultural forfeiture standard should use at its base line the following three-pronged model test:

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60. See Forbes, *supra* note 40, at 241-42; see also Bator, *supra* note 41, at 304; Collin, *supra* note 40; Short, *supra* note 41.

A country forfeits its right to the return of its cultural property captured in war, when:

- 1) such country has committed acts of substantial inhumanity;
- 2) such acts of inhumanity were supported by the general populace of such country; and
- 3) such country's cultural property was meaningfully used in, contributed to, or inspired such acts of inhumanity.

## 2. Operation of the Cultural Forfeiture Test

The primary purpose of this cultural forfeiture test is to determine when the international community should be concerned that the return of appropriated cultural art might contribute to a recreation of the dangerous cultural mindset which was in part responsible for the previous acts of inhumanity, and to otherwise justify cultural forfeiture on the basis of equitable concerns, even where such concern is not present. Therefore, the first prong of the cultural forfeiture test, that the country which has been deprived of cultural property has committed acts of substantial inhumanity, is intended to insure that where a country commits acts of inhumanity, it earns deserved concern that its future behavior will conform to its past bad conduct. Indeed, such concern was the basis for the Allies seizure, at the end of World War II, of works painted by the German military. In fact, although Germany and German individuals have made requests that such paintings be returned, the United States, which holds many of those seized properties, has refused.<sup>61</sup> Forfeiture is justified by the serious concern over recidivist national behavior by a country that has committed atrocities. Because cultural property—including artwork—helps shape a country's character, it is one of the elements that underlie national conduct.<sup>62</sup> Therefore, withholding a country's cultural property

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61. See *Morning Edition: War Art Confiscated* (National Public Radio broadcast, Aug. 4, 1997), transcript available in WESTLAW, 1997 WL 12821475.

62. See DANIEL JONAH GOLDHAGEN, *HITLER'S WILLING EXECUTIONERS: ORDINARY GERMANS AND THE HOLOCAUST* 7 (Vintage Books 1997) (1996) [hereinafter *HITLER'S WILLING EXECUTIONERS*]. Professor Goldhagen maintains that:

reduces prospects for new acts of inhumanity.

Moreover, a country that has committed acts of inhumanity calls into question the very value of its cultural property, at least in relation to itself. One of the underlying principles of the international community's call for the return of a country's cultural property is that the property is part of the essence of the country's national character.<sup>63</sup> If that is true, it follows that where a country's character has been tarnished by recent acts of inhumanity, the cultural value of its art is tarnished as well.

The second prong of the cultural forfeiture test, that the deprived country's acts of inhumanity were supported by the general populace, is intended to insure that such deprivation is equitable. In order to fairly deprive a country of its cultural property, the general populace must be responsible for the country's acts of inhumanity.<sup>64</sup> A deprivation that affects the overall populace of a country is equitable where acts of inhumanity were committed by the overall populace.<sup>65</sup>

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The men and women who became the Holocaust's perpetrators were shaped by and operated in a particular social and historical setting. They brought with them prior elaborate conceptions of the world, ones that were common to their society, the investigation of which is necessary for explaining their actions. This entails, most fundamentally, a reexamination of the character and development of anti-Semitism in Germany during its Nazi period and before, which in turn requires a theoretical reconsideration of the character of anti-Semitism itself.

*Id.* at 7.

63. See Forbes, *supra* note 40, at 241-42; see also Bator, *supra* note 41, at 304; Collin, *supra* note 40; Short, *supra* note 41.

64. See Russell Glazer, Comment, *The Sherman Amendment: Congressional Rejection of Communal Liability for Civil Rights Violations*, 39 UCLA L. REV. 1371 (1992) (discussing the notion of communal liability in Western philosophy).

65. See *id.* The Third Circuit's reasoning is instructive in *United States v. Kowalchuk*, 773 F.2d 488 (3d Cir. 1985) (affirming denaturalization of an individual who contributed to the persecution of Jews during World War II); see also *Fedorenko v. United States*, 449 U.S. 490 (1981) (denaturalizing defendants accused of contributing to Nazi persecution); *Maikovskis v. Immigration & Naturalization Serv.*, 773 F.2d 435 (2d Cir. 1985) (same), *cert. denied*, 476 U.S. 1182 (1986); *United States v. Sprogis*, 763 F.2d 115 (2d Cir. 1985) (same); *Laipenieks v. Immigration & Naturalization Serv.*, 750 F.2d 1427 (9th Cir. 1985) (same); *United States v. Kairys*, 600 F. Supp. 1254 (N.D. Ill. 1984) (same), *aff'd*, 782 F.2d 1374 (7th Cir.), *cert. denied*, 476 U.S. 1153 (1986); *United States v. Kungys*, 571 F. Supp. 1104 (D.N.J. 1983) (same), *rev'd*, 793 F.2d 516 (3d Cir. 1986), *rev'g circuit court and remanding*, 485 U.S. 759 (1988); *United States v. Schellong*, 547



The third prong of the cultural forfeiture test, that the cultural property was meaningfully used in, contributed to, or inspired acts of inhumanity, is intended to insure a clear link between the lost cultural property and the country's actions. Through this link a country openly forfeits its right to its cultural property by tarnishing the cultural property's value and raising concern that returning the cultural property will inspire, or contribute to, future acts of inhumanity.

### B. *Cultural Forfeiture Serves Objectives of Punishment*

The cultural forfeiture standard also serves the four traditional objectives of punishment: retribution, rehabilitation, deterrence, and incapacitation.<sup>66</sup> Under a retributive vision of justice, punishment is justified by the need to compensate society for the harm inflicted by the offender.<sup>67</sup> The conceptual underpinnings of the retributive model favor proportionality by striking a moral balance between the punishment inflicted and the gravity of the crime.<sup>68</sup> Since the recommended cultural forfeiture standard requires substantial acts of inhumanity done with popular support, cultural forfeiture only punishes those deserving of punishment. By depriving a country which has committed inhuman acts, and by allowing a country that was hurt by such deprived country to keep the prop-

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F. Supp. 569 (N.D. Ill. 1982) (same), *aff'd*, 717 F.2d 329 (7th Cir. 1983), *cert. denied*, 465 U.S. 1007 (1984); *United States v. Koziy*, 540 F. Supp. 25 (S.D. Fla. 1982) (same), *aff'd*, 728 F.2d 1314 (11th Cir.), *cert. denied*, 469 U.S. 835 (1984); *United States v. Dercacz*, 530 F. Supp. 1348 (E.D.N.Y. 1982) (same); *United States v. Linnas*, 527 F. Supp. 426 (E.D.N.Y. 1981) (same), *aff'd*, 685 F.2d 427 (2d Cir.) (mem.), *cert. denied*, 459 U.S. 1036 (1982); *United States v. Demjanjuk*, 518 F. Supp. 1362 (N.D. Ohio 1981) (same), *aff'd*, 680 F.2d 32 (6th Cir.) (per curiam), *cert. denied*, 459 U.S. 1036 (1982).

66. See Toni M. Massaro, *Shame, Culture, and American Criminal Law*, 89 MICH. L. REV. 1880, 1890 (1991).

67. See Brian J. Telpner, Note, *Constructing Safe Communities: Megan's Laws and the Purposes of Punishment*, 85 GEO. L.J. 2039, 2055 (1997).

68. See Robert Blecker, *Heaven or Hell? Inside Lorton Prison: Experiences of Punishment Justified*, 42 STAN. L. REV. 1149, 1164 (1990). Immanuel Kant, the philosophical forefather of retributivism, argued that punishment "can never be used merely as a means to promote some other good for the criminal himself or for civil society, but . . . must in all cases be imposed on him only on the ground that he has committed a crime." I. KANT, *THE METAPHYSICAL ELEMENTS OF JUSTICE* 100 (J. Ladd trans. 1965). Thus, punishment is conceived as an end in itself. David Dolinko, *Three Mistakes of Retributivism*, 39 UCLA L. REV. 1623, 1627 (1992).

erty it has appropriated, a step towards compensating society for the harm inflicted by the offender is being made. However, since the country that has been deprived has committed substantial acts of inhumanity, the severity of deprivation cannot by itself be nearly sufficient punishment to balance the gravity of the crime.

Punishment also has been justified on the theory of rehabilitation. Through rehabilitation a criminal is taught attitudes, values, habits, and skills by which he can function productively and lawfully.<sup>69</sup> Rehabilitation can take constructive or destructive forms—either helping offenders change their attitude and behavior or imposing negative stimuli to teach offenders to avoid wrongful behavior.<sup>70</sup> Cultural forfeiture helps rehabilitate the criminal country by removing stimuli which contributed to the offense and simultaneously introducing a negative stimuli which teaches the offenders to avoid wrongful behavior.

The goal of punishment under the deterrence model is to prevent future crimes.<sup>71</sup> Deterrence can take two forms: “specific” or “general.” Specific deterrence justifies punishment on the basis that the individual wrongdoer will be deterred from committing the same acts in the future.<sup>72</sup> Specific deterrence bears some similarity to the rehabilitation rationale, in that both focus on the future behavior of the individual offender.<sup>73</sup>

General deterrence, in contrast, seeks to justify punishment as deterring all members of society from committing the wrongful act.<sup>74</sup> The philosophical underpinning of deterrence-based punishment is utilitarianism; these punishments, though imposing some “evil” in their own right, maximize the good for the greatest number by preventing greater evil in the future.<sup>75</sup> A standard of cultural forfeiture serves the ends of both specific and general deterrence. A country’s retention of appropriated artwork deters the deprived country from repeating its acts of inhumanity. The ra-

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69. See Massaro, *supra* note 66, at 1893-94.

70. See Telpner, *supra* note 67, at 2058-59.

71. See Massaro, *supra* note 66, at 1893-94.

72. See *id.* at 1895.

73. See Blecker, *supra* note 68, at 1197.

74. See Telpner, *supra* note 67, at 2061.

75. See *id.* at 2061.

tionale is that the deprived country realizes the gravity of the punishment: that such acts, along with other punishments, will cause future appropriations of both the country's new and remaining old cultural property. Furthermore, taking such actions on the international stage, along with other more severe forms of punishment, might deter other members of the international community from committing acts of inhumanity.

The incapacitation justification for punishment argues that the key to punishment is disabling the offender from committing crime in the future. Punishment should "protect the community from the offender, either by confining her physically, or otherwise disabling her from committing future crimes."<sup>76</sup> Incapacitation justifies imposing external controls on offenders to minimize future risk to society.<sup>77</sup> Since the cultural forfeiture standard requires that the cultural property have been used in, or contributed to, the acts of inhumanity, depriving the actor of such cultural property may diminish the possibility of such repeated actions in the future.

### III. APPLICATION OF CULTURAL FORFEITURE TEST TO DISPUTE BETWEEN RUSSIA AND GERMANY

During World War II, Germany perpetuated the greatest act of barbaric inhumanity in history.<sup>78</sup> In a savage and brutal fashion Germans attempted to commit genocide, calling it the "final solu-

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76. See Massaro, *supra* note 66, at 1899.

77. See *id.* at 1899.

78. See RISE AND FALL OF THE THIRD REICH, *supra* note 3, at 946 (summarizing the extent of the Nazi depravity during World War II). In his landmark chronicle of the Third Reich, journalist and historian William L. Shirer characterized the Nazi era as an "incredible story of horror [that] would be unbelievable were it not fully documented and testified to by the perpetrators themselves:"

Nazi degradation sank to a level seldom experienced by man in all his time on earth. Millions of decent, innocent men and women were driven into forced labor, millions more tortured and tormented in the concentration camps and millions more still, of whom there were four and a half million Jews alone, were massacred in cold blood or deliberately starved to death and their remains—in order to remove the traces—burned.

*Id.* at 946; see also NORMAN DAVIES, EUROPE: A HISTORY 897 (Oxford Univ. Press 1996) ("There are shades of barbarism in twentieth-century Europe which would once have amazed the most barbarous of barbarians.").

tion” to the “Jewish question.”<sup>79</sup> The mass murders committed by Germany certainly constituted substantial acts of inhumanity, were popularly supported, and incorporated Germany’s cultural property.<sup>80</sup> Therefore, Germany’s actions justify, *inter alia*, Russia’s retaining Germany’s cultural property as cultural forfeiture.

A. *Germany’s Substantial Acts of Inhumanity*

Between 1933 and 1945, Germany undertook a state-sponsored, systematic persecution and annihilation of European Jewry.<sup>81</sup> More than six million Jews were murdered.<sup>82</sup> Gypsies and the handicapped were also targeted for destruction.<sup>83</sup> “Millions more, including homosexuals, Jehovah’s Witnesses, Soviet prisoners of war, and political dissidents, also suffered grievous oppression and were put to death under Nazi tyranny.”<sup>84</sup>

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79. See THE OXFORD COMPANION TO WORLD WAR II 364-71 (I.C.B. Dear & M.R.D. Foot, eds., Oxford Univ. Press 1995) [hereinafter OXFORD WORLD WAR II COMPANION] (summarizing the *Endlösung*, “final solution:” the term used by the Germans for the extermination of six million Jews during World War II). *Reichsmarschall* Hermann Goering used the phrase “final solution” in 1941, when he directed Nazi state security chief Reinhard Heydrich to report as soon as possible on the “measures already taken for the intended final solution of the Jewish question.” Goering Directive to Heydrich, (July 31, 1941), *quoted in* RISE AND FALL OF THE THIRD REICH, *supra* note 3, at 964 (citing III NAZI CONSPIRACY AND AGGRESSION 525-26 (Nuremberg Document No. 710-PS)). The phrase “final solution” was subsequently used in an official letter written by Adolf Eichmann, the SS officer who, in autumn 1941, “was entrusted with the task of preparing the mechanics of the final solution.” OXFORD WORLD WAR II COMPANION, *supra*, at 368. Eichmann wrote that a Jewish woman’s emigration application had been denied “in view of the approaching final solution of the European Jewry problem.” Letter from Adolf Eichmann to the German Foreign Office (Oct. 28, 1941), *quoted in* OXFORD WORLD WAR II COMPANION, *supra*, at 368. The phrase “final solution” subsequently appeared in many official German documents. *Id.*

80. See RISE AND FALL OF THE THIRD REICH, *supra* note 3, at 241-44 (detailing the “Nazification” of German culture between 1933 and 1937, the period in which the Nazis consolidated their hold over German life)

81. See UNITED STATES HOLOCAUST MEMORIAL MUSEUM, THE HOLOCAUST: A HISTORICAL SUMMARY 1 (n.d.) [hereinafter HOLOCAUST SUMMARY]; see also SUSAN D. BACHRACH, TELL THEM WE REMEMBER: THE STORY OF THE HOLOCAUST *passim* (1994) [hereinafter WE REMEMBER].

82. See HOLOCAUST SUMMARY, *supra* note 81, at 1. See RISE AND FALL OF THE THIRD REICH, *supra* note 3, at 967-74, for a chilling account of the operation of the extermination camps.

83. See HOLOCAUST SUMMARY, *supra* note 81, at 1.

84. *Id.*

Germany set its course toward cultural depravity in 1933, when Adolph Hitler became Chancellor of Germany.<sup>85</sup> That same year the German government took away the freedom of speech, assembly, and press, and opened the first concentration camp at Dachau, Germany, for political opponents of the regime.<sup>86</sup> Later in 1933, a nationwide boycott of Jewish-owned businesses in Germany was carried out; laws were passed to permit forced sterilization of Gypsies, the mentally and physically disabled, African-Germans, and others considered “inferior” or “unfit;” other laws excluded “non-Aryans” from government employment.<sup>87</sup> The following year, homosexuals and Jehovah’s Witnesses were arrested throughout Germany.<sup>88</sup> In 1935, racial laws were introduced at a rally in Nuremberg,<sup>89</sup> after which Gypsies were arrested and deported to Dachau concentration camp.<sup>90</sup> In 1938, the Germans burned numer-

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85. See HITLER’S WILLING EXECUTIONERS, *supra* note 62, at 87-94 (summarizing the anti-Semitic German consensus that existed upon Hitler’s assumption of national power in 1933). That consensus was based on a belief that “[t]he Jews and Slavic peoples were the *Untermenschen*—subhumans . . . [who] had no right to live.” RISE AND FALL OF THE THIRD REICH, *supra* note 3, at 937; see also MEIN KAMPF 51-65, *supra* note 3 (detailing Hitler’s transformation into an anti-Semite). Hitler wrote that:

If, with the help of his Marxist creed, the Jew is victorious over the other peoples of the world, his crown will be the funeral wreath of humanity and this planet will, as it did thousands of years ago, move through the ether devoid of men.

Eternal Nature inexorably avenges the infringement of her commands.

Hence today I believe that I am acting in accordance of the will of the Almighty Creator: *by defending myself against the Jew, I am fighting for the work of the Lord.*

*Id.* at 65.

86. See RISE AND FALL OF THE THIRD REICH, *supra* note 3, at 271 (“From the very first weeks of 1933, when the massive and arbitrary arrests, beatings and murders by those in power began, Germany under National Socialism ceased to be a society based on law.”); see also HITLER’S WILLING EXECUTIONERS, *supra* note 62, at 89-93 (summarizing the severance of Jews from the German bodies social and politic and the beginning of their treatment as aliens within Germany).

87. See, e.g., RISE AND FALL OF THE THIRD REICH, *supra* note 3, at 268 (detailing the passage of Germany’s Civil Service law of April 7, 1933, which “quickly rid the [German] judiciary not only of Jews but those whose Nazism was deemed questionable”).

88. See generally *id.* at 231-276 (summarizing life in Nazi Germany between 1933 and 1937, including the crackdown on non-Aryans).

89. See *id.* at 233-34 (detailing the effects of the Nuremberg Laws of September 15, 1935).

90. See *id.* at 271 (“The first concentration camps sprang up like mushrooms during

ous synagogues and looted Jewish homes in a nationwide program called *Kristallnacht*, and nearly thirty thousand Jewish men were deported to concentration camps.<sup>91</sup>

On September 1, 1939, Germany's invasion of Poland began the conflict that escalated into World War II.<sup>92</sup> The following month German doctors were authorized to kill institutionalized mentally and physically disabled persons in an "euthanasia" program.<sup>93</sup> In the spring of 1940, Germany invaded Denmark, Norway, Belgium, Luxembourg, the Netherlands, and France,<sup>94</sup> and in 1941, Germany invaded North Africa, Yugoslavia, Greece, and the Soviet Union.<sup>95</sup> During this time Germany established mobile killing squads, *Einsatzgruppen*, to begin the mass murder of Jews, Gypsies, and Communist leaders.<sup>96</sup> In one incident alone, in the forests of Babi Yar, nearly thirty-four thousand Jews were killed.<sup>97</sup> In December 1941, gassing operations began at the Chelmno extermination camp.<sup>98</sup>

In 1942, German leaders met to discuss the "final solution to the Jewish question."<sup>99</sup> Later that year, Germany began the mass

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Hitler's first year of power. By the end of 1933, there were fifty of them.").

91. See EUROPE: A HISTORY, *supra* note 78, at 976.

92. See MARTIN GILBERT, THE SECOND WORLD WAR: A COMPLETE HISTORY I (rev. ed. 1991) [hereinafter GILBERT, SECOND WORLD WAR HISTORY] (reporting that the attack on Poland in September 1939 triggered one of "the most destructive conflicts in human history; more than forty-six million soldiers and civilians perished, many in circumstances of prolonged and horrifying cruelty"); see also JOHN KEEGAN, THE SECOND WORLD WAR 44-47 (1990) [hereinafter KEEGAN, SECOND WORLD WAR] (summarizing the invasion of Poland and the strategy behind the attack).

93. See WE REMEMBER, *supra* note 81, at 32.

94. See KEEGAN, SECOND WORLD WAR, *supra* note 92, at 54-87; GILBERT, SECOND WORLD WAR HISTORY, *supra* note 92, at 52-56, 61-116.

95. See KEEGAN, SECOND WORLD WAR, *supra* note 92, at 127-59, 173-208; GILBERT, SECOND WORLD WAR HISTORY, *supra* note 92, 165-211.

96. See WE REMEMBER, *supra* note 81, at 42 (describing the *Einsatzgruppen* as "[s]pecial action squads . . . made up of Nazi (SS) units and police").

97. See *id.* at 42-43.

98. See *id.* at 48.

99. *Id.* at 46. The conference was held on January 20, 1942, at a villa in the Berlin suburb of Wansee to coordinate the activities of German government agencies in developing Zyklon-B gas, crematoria, and dedicated death camps for the "final solution." See EUROPE: A HISTORY, *supra* note 78, at 1016-18. The Wansee Conference was convened by Gestapo chief and SS *Obergruppenführer*, "lieutenant-general," Reinhard Heydrich, the head of the Reich Security Main Office ("RSHA"), who indicated to the conference

murder of Jews in the gas chambers at six extermination camps: Chelmno, Auschwitz-Birkenau, Treblinka, Sobibór, Belzec, and Majdanek-Lublin.<sup>100</sup> In 1943, Germany put down Jewish armed resistance in the Warsaw Ghetto, and the Treblinka and Sobibór concentration camps.<sup>101</sup> In 1944, Germany occupied Hungary and deported 430,000 Hungarian Jews to Auschwitz-Birkenau, where most of them were gassed.<sup>102</sup> On June 6, 1944, D-Day, the Allied powers invaded Western Europe. Less than one year later, on May 7, 1945, Germany surrendered ending the war in Europe.<sup>103</sup>

### B. *Germany's Acts of Inhumanity Were Popularly Supported*

The Holocaust was the defining feature of German politics and political culture during World War II.<sup>104</sup> Although members of other national groups helped the Germans murder millions of Jews, “the commission of the Holocaust was primarily a German undertaking.”<sup>105</sup> Germany was the driving force behind the Holocaust

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that “in the course of this Final Solution of the European Jewish problem approximately eleven million Jews are involved”—to be worked to death or killed outright. XIII TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS 210-19 (Nuremberg Document No. NG-2586-G), *quoted in* RISE AND FALL OF THE THIRD REICH, *supra* note 3, at 965-66.

100. See WE REMEMBER, *supra* note 81, at 48.

101. See *id.* at 70-72.

102. See *id.* at 48.

103. See *id.* at 91-92. See generally Lawrence Douglas, *Film as Witness: Screening Nazi Concentration Camps Before the Nuremberg Tribunal*, 105 YALE L.J. 449 (1995) (discussing German activity during World War II within a legal context); Lawrence Douglas, *Wartime Lies: Securing the Holocaust in Law and Literature*, 7 YALE J.L. & HUMAN 367 (1995) (same); K. Lesli Ligorner, Note, *Nazi Concentration Camp Guard Service Equals “Good Moral Character”?: United States v. Lindert*, 12 AM. U. J. INT’L L. & POL’Y 145 (1997) (same); Matthew Lippman, *Fifty Years After Auschwitz: Prosecutions of Nazi Death Camp Defendants*, 11 CONN. J. INT’L L. 199 (1996) (same); Vera Ranki, *Holocaust History and the Law: Recent Trials Emerging Theories*, 9 CARDOZO STUD. L. & LITERATURE 15 (1997) (same); Kirsten E. Swisher, Note, *Justice Delayed: The Role of Equitable Considerations in the Denaturalization and Deportation of Nazi War Collaborators*, 7 GEO. IMMIGR. L.J. 415 (1993) (same); Geri J. Yonover, *Anti-Semitism and Holocaust Denial in the Academy: A Tort Remedy*, 101 DICK. L. REV. 71 (1996) (same); *Compensation for Property Confiscated by Nazis is Exempt From U.S. Tax*, 83 J. TAX’N 154 (1995) (same).

104. See HITLER’S WILLING EXECUTIONERS, *supra* note 62, at 4-5 (“Explaining the Holocaust is the central intellectual problem for understanding Germany during the Nazi period.”).

105. See *id.* at 6 (explaining that the Germans were the most culpable for the atroci-

because “the decisions, plans, organizational resources and the majority of its executors were German.”<sup>106</sup> Professor Daniel J. Goldhagen notes that “the first task in restoring the perpetrators to the center of our understanding of the Holocaust” is to grammatically restore the perpetrators to their identities by “eschewing convenient, yet often inappropriate and obfuscating labels, like ‘Nazis’ and ‘SS men,’ and calling them what they are, ‘Germans.’ The most appropriate, indeed the only appropriate *general* proper name for Germans who perpetrated the Holocaust is ‘Germans.’”<sup>107</sup>

Hundreds of thousands of Germans had a role in the slaughter of the Jews and the “vast concentration camp system.”<sup>108</sup> Although the Nazi state made “half-hearted attempts” to minimize exposure of the German populace to the killings, millions knew of the genocide.<sup>109</sup> When the Germans who exploited slave labor are counted among those involved in the genocide, millions of German people perpetrated grievous crimes and atrocities during World War II.<sup>110</sup>

Although Germany is *known* to have operated 10,005 camps and ghettos during World War II,<sup>111</sup> it is likely that more camps

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ties that were committed because “[n]on-Germans were not essential to the perpetration of the genocide, and they did not supply the drive and initiative that pushed it forward”).

106. *See id.* at 6.

107. *Id.* at 6.

108. *See id.* at 8 (reporting that anti-Semitic sentiment was so prevalent during the Nazi reign that it touched almost all segments of the German populace).

109. *See id.* at 8 (detailing the widespread knowledge of the Holocaust in Germany). Professor Goldhagen states:

Hitler announced many times, emphatically, that the war would end in the extermination of the Jews. The killings met with general understanding, if not approval. No other policy (of similar or greater scope) was carried out with more persistence and zeal, and with fewer difficulties, than the genocide, except perhaps the war itself.

*Id.* at 8 (footnote omitted).

110. *See id.* at 166-67 (hypothesizing that “[i]t would not be surprising if the number [of perpetrators of the Holocaust] turned out to be five hundred thousand or more”); *see also* KONNILYN G. FEIG, *HITLER’S DEATH CAMPS: THE SANITY OF MADNESS* 12-13 (1981) [hereinafter *HITLER’S DEATH CAMPS*].

111. *See* *HITLER’S WILLING EXECUTIONERS*, *supra* note 62, at 167 (stating that a study revealed the existence of more than 10,000 camps if ghettos are considered); *see also* *HITLER’S DEATH CAMPS*, *supra* note 110, at 26.



existed and have not been identified.<sup>112</sup> Of the 10,005 known forced labor camps and ghettos, Jews were murdered in more than 1,600 of them.<sup>113</sup> In addition, Germany operated “52 main concentration camps which had a total of 1,202 satellite camps.”<sup>114</sup> It is not certain how many Germans worked at those camps and ghettos, but it is known, for example, that Auschwitz had 7,000 guards at various times in its main camp and 50 satellites, Dachau had 4,100 guards and administrators, and Mauthausen had over 5,700 guards and administrators.<sup>115</sup>

The *Einsatzgruppen*, one of the itinerant German killing institutions, started out with 3,000 men; replacements were rotated in and out,<sup>116</sup> and the unit catalogue for the *Einsatzgruppen* lists more than 6,000 persons.<sup>117</sup> In addition, thirty-eight police battalions “participated in the genocidal slaughter of European Jews;” a minimum of 19,000 men served in those police battalions, and it is probable that even more served “because [those battalions] had personnel rotations.”<sup>118</sup> Between 1941 and 1943, three SS<sup>119</sup> brigades also slaughtered Jews in the Soviet Union.<sup>120</sup> The total number of persons who served in the various killing institutions exceeds 330,000, according to the entries in one catalogue.<sup>121</sup> Additionally, unknown thousands of Germans directly contributed to the genocide in their roles as administrators, railroad officials, army soldiers, police and other deportation personnel, and slave

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112. See HITLER’S WILLING EXECUTIONERS, *supra* note 62, at 167.

113. See *id.* at 167.

114. *Id.* at 167.

115. See *id.* at 167 (stating that “[o]ne estimate concludes that fifty guards were necessary for every five hundred prisoners in a satellite camp”).

116. See *id.* at 167; see also HITLER’S DEATH CAMPS, *supra* note 110, at 20-22.

117. See HITLER’S WILLING EXECUTIONERS, *supra* note 62, at 167.

118. *Id.* at 167. Police battalions averaged more than five hundred men and played a significant role in the slaughter of the Jews. See *id.* at 181-82.

119. SS was the abbreviation for *Schutzstaffeln*, “protection squads,” established within the Nazi Party as a military organization that swore personal allegiance to Hitler. See OXFORD WORLD WAR II COMPANION, *supra* note 79, at 1044-50.

120. See HITLER’S WILLING EXECUTIONERS, *supra* note 62, at 167.

121. See *id.* at 168 (stating that the catalogue “has information on 4,105 institutions involved or suspected of having been involved in Nazi crimes”); see also NAZI MASS MURDER: A DOCUMENTARY HISTORY OF THE USE OF POISON GAS [NATIONALSOZIALISTISCHE MASSENTÖTUNGEN DURCH GIFTGAS] (Eugen Kogon et al. eds., Mary Scott & Caroline Lloyd-Morris trans., Yale Univ. Press 1993).

labor supervisors.<sup>122</sup> Those Germans shared moral responsibility for the Holocaust, even if they did not participate directly in the killings.

Moral philosophers have focused on contexts in which individuals may seek to deflect blame onto the organizations to which they belong by arguing that the organization is to blame, that they were only doing their job, or that their contributions were too minimal to justify holding them morally responsible.<sup>123</sup> Philosophers have argued that in order to evaluate properly an individual's acts, it is necessary to consider how those acts might foreseeably combine with the acts of others to produce significant effects.<sup>124</sup>

The harm the Nazis wrought was accomplished by an organized effort that integrated the actions of many individuals who occupied different roles in many different organizations.<sup>125</sup> Because killing large amounts of people can only be accomplished through an organized group effort, moral responsibility will attach to an individual member merely because the individual voluntarily joined and retained membership in a group while knowing the group's objectives.<sup>126</sup>

Where the contribution of any particular group member to a collective action is neither necessary nor sufficient, each member may seek to deny moral responsibility.<sup>127</sup> To deal with this problem, each person involved in a collective action must be held morally responsible even though his actions were neither causally nec-

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122. See HITLER'S WILLING EXECUTIONERS, *supra* note 62, at 167.

123. See Stephen J. Massey, *Individual Responsibility for Assisting the Nazis in Persecuting Civilians*, 71 MINN. L. REV. 97, 99 (1986).

124. See 1 RAUL HILBERG, THE DESTRUCTION OF THE EUROPEAN JEWS 8-13 (rev. ed. 1985) [hereinafter DESTRUCTION OF JEWS]; see also Massey, *supra* note 123, at 99.

125. See DESTRUCTION OF JEWS, *supra* note 124, at 9. Hilberg wrote that:

The destruction of the Jews was an administrative process, and the annihilation of Jewry required the implementation of systematic administrative measures in successive steps. There are not many ways in which a modern society can, in short order, kill a large number of people living in its midst. This is an efficiency problem of the greatest dimensions, one which poses uncounted difficulties and innumerable obstacles.

*Id.* at 9; see Massey, *supra* note 123, at 136.

126. See Massey, *supra* note 123, at 140; see also DESTRUCTION OF JEWS, *supra* note 124, at 9.

127. See Massey, *supra* note 123, at 140.

essary nor sufficient.<sup>128</sup> When an individual knows that his actions, in combination with the actions of others, will produce harm, he has a moral obligation not to act, even when his actions in isolation would have an insignificant effect.<sup>129</sup> Therefore, the German populace, with millions who had a direct hand in the murders and many more whose actions supported such murders, was responsible for the Holocaust. Thus, the German populace's involvement in the Holocaust is "staggering."<sup>130</sup>

*C. Germany's Cultural Property was Meaningfully Used in,  
Contributed to, and Inspired Acts of Inhumanity*

Germany's cultural property was substantially used in, and stimulated the commission of barbaric acts. Although art generally is thought to have a humanizing effect, "to the Nazis, art was a reason for their atrocities."<sup>131</sup> On the eve of the Holocaust, the German people were extremely culturally sophisticated. German national art was representative of both the common people and the intellectuals. The art valued by Germans was reflective of their psyches at that time. It was that collective cultural psyche that led Germans to commit acts of inhumanity and allowed them to proceed so efficiently in their barbarism. Because German national art is a reflection of an inhumane psyche, and because it contributed to the Germans' ability to commit acts of inhumanity, the Germans substantially deflated the value of such art to German society and Germany's right to the return of the artwork.

German cultural works were used to incite German acts of in-

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128. *See id.* at 140.

129. *See id.* at 142; *see also* DEREK PARFIT, REASONS AND PERSONS 67-86 (1984).

130. Professor Goldhagen posits that:

When the number of people who were parties to the genocidal enterprise, who must have staffed these institutions and occupied these roles, is considered, and when the still far larger number who worked in the larger system of domination . . . is also taken into account, the inescapable conclusion is that the number of Germans who contributed to and, more broadly, had knowledge of this regime's fundamental criminality was staggering.

HITLER'S WILLING EXECUTIONERS, *supra* note 62, at 168.

131. John Dorsey, *The Nazis and the Art of Theft; History: Loyola College Professor Explores the Blurred Line Between Art and Politics in the Eyes of the Third Reich*, BALTIMORE SUN, May 1, 1996, at E1.

humanity and were believed by the Germans to be a reflection of their persona. For example, in his pseudo-autobiographical novel of 1923, *Michael*, Joseph Goebbels, who would later be in charge of Nazi propaganda, wrote that art was one of the essential components in building a new German utopia.<sup>132</sup> The arts thrived in wartime Germany because of immense encouragement by the government.<sup>133</sup> Even when all other able-bodied Germans were recruited into the military, the best artists and musicians were exempt.<sup>134</sup> The Nazis even revised copyright laws in order to give creators greater protection.<sup>135</sup> According to one noted scholar, Professor Steinweis, the Berlin Philharmonic and other artistic organizations and institutions legitimized the Nazi-German regime by maintaining the image of Germany as the land of Goethe and Beethoven.<sup>136</sup>

In 1939, Hitler had his office in the Reich Chancellery very carefully decorated.<sup>137</sup> He chose works which reflected the German cultural persona and which glorified himself, the German people, and the German philosophies incorporated in Nazi ideology. There were representations of Frederick the Great and Bismarck to imply that Hitler was the heir to a distinguished lineage.<sup>138</sup> Angelica Kauffmann's painting, "Hermann's Return from the Battle of the Teutoburger Forest," recorded a German victory over the Romans, and represented Hitler's promise of future Ger-

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132. Adolph Hitler's propaganda chief Joseph Goebbels wrote that:  
Europe will be reconstructed by peoples who will be the first to overcome the mass madness and find their way back to the principles of personality . . . .  
Works of art, inventions, ideas, battles, laws and states—at the beginning of all of them stands always the man.

JOSEPH GOEBBELS, *MICHAEL* (1923), quoted in Alan Steinweis, *Hitler and Carlyle's "Historical Greatness"*, HISTORY TODAY, June 1, 1995, at 33.

133. See David Patrick Stearns, *Between the Lines*, OPERA NEWS, July 1, 1995, at 26.

134. See *id.*

135. See *id.*

136. See *id.*; ALAN E. STEINWEIS, *ART, IDEOLOGY, & ECONOMICS IN NAZI GERMANY: THE REICH CHAMBERS OF MUSIC, THEATER AND THE VISUAL ARTS* (Univ. of North Carolina Press 1993) [hereinafter NAZI ART, IDEOLOGY & ECONOMICS] (asserting that artists "bestowed a certain cultural legitimacy" on the Nazi movement). Steinweis is an associate professor of History and Judaic studies at the University of Nebraska.

137. See Dorsey, *supra* note 131.

138. See *id.*

man military triumph.<sup>139</sup> The school of Rubens' painting in Hitler's office, "Hercules and Omphale," evoked both the classical, glorious times which the German people hoped Hitler would bring again, and the image of a hero, which is how the German people envisioned Hitler.<sup>140</sup> Indeed, paintings of Hitler, particularly in medieval armor,<sup>141</sup> were popular throughout Germany.<sup>142</sup>

Potent art can generate ideas and influence individual attitudes. The Nazis took culture seriously and sought to bend it to their will.<sup>143</sup> The Nazis' determination to control German culture produced an extremely elaborate system of state subsidy.<sup>144</sup> As much energy and money was spent on the arts as on the autobahns.<sup>145</sup> Enormous sums were lavished on orchestras, museums, and theaters, and generous prizes were awarded to favored writers, composers, and artists.<sup>146</sup> Culture influenced the way the Nazi state saw itself, and Hitler frequently gave speeches on artistic topics.<sup>147</sup> The Nazi dedication to culture actively shaped the Nazi attitude and facilitated acts of inhumanity.<sup>148</sup>

According to one commentator, Diane du Bois,<sup>149</sup> "the Nazis used art to serve their own propaganda ends."<sup>150</sup> Likewise, accord-

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139. *See id.*

140. *See id.*

141. *SEE EUROPE: A HISTORY*, supra note 78, at 942-43, Plate No. 58 (photographic depiction of H. Lanzinger's *Adolf Hitler als Ritter* (c.1939), a portrait of Adolf Hitler in armor as a Teutonic knight).

142. *See Morning Edition: War Art Confiscated* (National Public Radio broadcast, Aug. 4, 1997), transcript available in WESTLAW, 1997 WL 12821475.

143. *See* Frank Whitford, *Rot of the Reich*, THE TIMES (London), Sept. 7, 1997, (Culture), at 29.

144. *See id.*

145. *See id.*

146. *See id.* Some artists, such as the sculptor Arno Breker, were freed from the obligation to pay income tax. *See id.*

147. *See id.*

148. *See id.*

149. Executive director of the musical collection, *Music Nearly Lost—Europe Between the Wars—A Celebration*, Sarasota Music Archive. *See* Kurt Loft, *Music From the Silence: Jewish and Avant-Garde Composers Condemned by Hitler's Regime are Receiving New Recognition Thanks to a Remarkable Series of Recordings and a Musical Archive in Sarasota*, TAMPA TRIB., Dec. 28, 1997, (Baylife) at 1.

150. *See id.* (quoting Diane du Bois).

ing to Professor Jonathan Petropoulos,<sup>151</sup> Germans used art for its symbolic meaning in order to further the Nazi cause.<sup>152</sup> Professor Petropoulos writes that, for the Nazis, “[a]rt offered a means to achieve legitimacy and social recognition.”<sup>153</sup> In addition, art played a significant role in Germany’s quest for world domination.<sup>154</sup>

Adolf Hitler had more than six thousand paintings in his personal collection.<sup>155</sup> *Reichsmarschall* Hermann Goering, Hitler’s second in command, bought old masters such as Rembrandt and Van Dyck,<sup>156</sup> and his collection included paintings by the old masters, looted from the Louvre Museum in Paris.<sup>157</sup> Heinrich Himmler, head of the SS, had an affinity for classic art related to war, and his collection included a Etruscan bronze helmet, medieval armor, and old ceremonial spears.<sup>158</sup> The Minister of Culture in Nazi Germany would arrange exhibits contrasting “worthless” works by “sub-humans” with compositions depicting the Aryan man in settings highlighting his superior qualities.<sup>159</sup>

In the aggregate, Germans viewed the acquisition of art as legitimizing the Nazi regime and its actions.<sup>160</sup> The Nazis used culture to “cover the stench of barbarism” with the “essence of high art.”<sup>161</sup> As a result, Professor Petropoulos contends that “the Nazis preoccupation with culture was so great that it became an element

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151. Professor of History at Loyola College.

152. See JONATHAN PETROPOULOS, *ART AS POLITICS IN THE THIRD REICH* 7, 14 (1996).

153. See *id.* at 7.

154. See Dorsey, *supra* note 131.

155. See *ART AS POLITICS IN THE THIRD REICH*, *supra* note 152, at 181.

156. See *id.* at 187-88.

157. See *supra* note 3 (setting forth Goering’s secret order for the disposition of art masterpieces stolen from France, dividing the loot among himself, Hitler, and German national collections).

158. See *ART AS POLITICS IN THE THIRD REICH*, *supra* note 152, at 212-14.

159. Paul Bogdanich, *The Acceptable Alternative*, SALT LAKE TRIB., Nov. 17, 1997, at A8.

160. See *ART AS POLITICS IN THE THIRD REICH*, *supra* note 152, at 261, 310-11.

161. Justin Davidson, *Villains or Heroes? Was Wilhelm Furtwangler a pawn of the Nazis or a guardian of the German cultural tradition? What about Elisabeth Schwarzkopf and Herbert von Karajan?*, NEWSDAY, Oct. 13, 1996, at C17 (reviewing Ronald Horwood’s 1986 play, *Taking Sides*, at the Brooks Atkinson Theater on Broadway).

in itself in the motivation behind their behavior.”<sup>162</sup>

Another prime example of German culture used to inspire the Germans' inhumane acts is German architecture. The scale, materials, and iconography of prestige projects in Berlin, for instance, were used by the Nazis to promote an ideological connection to classical political and social institutions.<sup>163</sup> Nazi party and German state institutions used architecture to reinforce a connection to racial history or to the supposed essence of Germanness.<sup>164</sup> Indeed, in any investigation of National Socialist culture, art, and politics are complementary terms.<sup>165</sup> As art scholar Paul Jaskot notes, the pseudo-scientific Nazi racial theories and propaganda that contributed to the efforts to destroy the Jewish people were buttressed by art or architectural production and contemporaneous critical response.<sup>166</sup> Furthermore, Professor Jaskot hypothesized that German culture combined with Nazi policies contributed to the destruction of the Jewish population.<sup>167</sup>

An additional example of the German use of cultural works in the perpetration of the Holocaust, and as inspiration for the Holocaust, is the work of the composer Richard Wagner.<sup>168</sup> Wagner's music was played at Nazi rallies and at Nazi state occasions to raise the passions of the German people;<sup>169</sup> concentration camp

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162. ART AS POLITICS IN THE THIRD REICH, *supra* note 152, at 261.

163. See Paul B. Jaskot, *Anti-Semitic Policy in Albert Speer's Plans for the Rebuilding of Berlin*, 78 ART BULLETIN 622 (1996). Jaskot is an assistant professor in the Department of Art at DePaul University. See also NAZI ART, IDEOLOGY & ECONOMICS, *supra* note 136, at 34-38.

164. See NAZI ART, IDEOLOGY & ECONOMICS, *supra* note 136, at 34-38; Jaskot, *supra* note 163.

165. See Jaskot, *supra* note 163.

166. See *id.*

167. Professor Jaskot opined that:

The symbiosis between that which was most prized in Nazi Germany—its culture—and that which proved most criminal—its policies aimed at eliminating specific social and political groups—indicates the extent to which architectural interests were involved with events that culminated in the destruction of the Jewish population in Berlin.

*Id.*

168. Richard Wagner, the German opera composer, coined the term “the plastic demon of the decay of humanity” to describe Jews. HITLER'S WILLING EXECUTIONERS, *supra* note 62, at 398.

169. Note also the work of Wagner's protege, German composer Richard Strauss,

victims were forced to play German music, including Wagner's, when the doomed marched to the gas chambers and while torture took place,<sup>170</sup> and Wagner's anti-Semitic writings, such as "Jews in Music," further fomented the German anti-Semitism that fostered the Holocaust.<sup>171</sup> While Wagner's work is perhaps one of the strongest examples of the role of Germany's cultural works in the Holocaust, all of Germany's cultural property is tainted by its relation to Germany's actions. Consequently, all Germany's cultural property can be said to have contributed to Germany's inhuman acts because the Holocaust was the product of Germany's social and cultural frame of mind.<sup>172</sup> The society and culture of Germany was permeated with anti-Semitism.<sup>173</sup> Professor Goldhagen stated that "understanding the beliefs and values common to German culture . . . is the most essential task for explaining the perpetration of the holocaust."<sup>174</sup> Furthermore, a nation's artistic heritage reflects its cultural ideology.<sup>175</sup> The cultural anti-Semitism of Germany's common people and cultural elite evidences the taint of Germany's cultural property.<sup>176</sup> Anti-Semitism was prevalent in Germany from artist cliques to universities.<sup>177</sup> It corrupted lawyers and

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who became the president of the Reich Music Chamber during World War Two. See Emanuel Krasovsky, *Classical Music; Music Once Banned, Now Business as Usual*, N.Y. TIMES, Jan. 18, 1998, § 2, at 30.

170. See Dimitri Drobatschewsky, *Ross's Swan Song: Controversial "Ring"*, GREATER PHOENIX JEWISH NEWS, Sept. 12, 1997, at 14 (reporting that the Arizona Opera's annual Wagner festival was controversial in the Jewish community because members of the community connected Wagner with Adolf Hitler and the Holocaust).

171. See *id.*

172. See HITLER'S WILLING EXECUTIONERS, *supra* note 62, at 7 ("The men and women who became the Holocaust's perpetrators were shaped by and operated in a particular social and historical setting. They brought with them prior elaborate conceptions of the world, ones that were common to their society, the investigation of which is necessary for explaining their actions.")

173. See *id.* at 8, 80-128. German literature also was permeated with anti-Semitism, and blamed the Jews "for nearly every evil that had befallen the world." *Id.* at 28, 64.

174. *Id.* at 23.

175. See Elliott, *supra* note 18, at 279.

176. See EUROPE: A HISTORY, *supra* note 78, at 899 (noting that the material advancement of European civilization was accompanied by a "terrible regression in political and intellectual values," in which "Europe's most educated elites" joined "the manipulated masses of the most afflicted nations" in participating in the "genocidal crusade for rescuing 'European civilization'").

177. See HITLER'S WILLING EXECUTIONERS, *supra* note 62, at 83 (summarizing the



judges and perverted doctors.<sup>178</sup> Because cultural works contributed to Germany's cultural frame of mind, reflected that cultural frame of mind, and helped perpetrate German acts of inhumanity, Germany greatly diminished the value of its cultural property—raising concern that Germany might again use the art seized by Russia to foster atrocity. Consequently, Germany has forfeited its right to that cultural property.

#### CONCLUSION

The artwork in Russia's possession taken by Germany from Germany's victims must be returned to such victims or their survivors, regardless of what happens to the other works in Russia's possession. Those pieces are not German cultural property, but rather stolen property. Russia has stated that it is committed to returning such artwork to its true owners. Germany, which is responsible for the persecution of art collectors, among others, and the subsequent theft of their art, should be equally committed to making restitution.

As for the artwork taken from German national institutions, whether or not the international treaties are found to apply either as determinative or indicative, and regardless of the legality of Russia's taking the artwork, Russia should be allowed to keep the appropriated German cultural property. Germany's acts of cultural depravity justify its cultural deprivation.

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widespread anti-Semitic views within Germany); *see also* MAX WEINREICH, *HITLER'S PROFESSORS: THE PART OF SCHOLARSHIP IN GERMANY'S CRIMES AGAINST THE JEWISH PEOPLE passim* (1946) (discussing the spread of anti-Semitic sentiment throughout Germany).

178. *See* ROBERT N. PROCTOR, *RACIAL HYGIENE: MEDICINE UNDER THE NAZIS* 1-9 (Harvard Univ. Press 1988) (stating that "the ideological structure we associate with National Socialism was deeply imbedded in the philosophy and institutional structure of German biomedical science"); Norman L. Greene, et al., Symposium, *Nazis in the Courtroom: Lessons From the Conduct of Lawyers and Judges Under the Laws of the Third Reich and Vichy, France*, 61 *BROOK. L. REV.* 1121 (1995); Matthew Lippman, *The Nazi Doctors Trial and the International Prohibition on Medical Involvement in Torture*, 15 *LOY. L.A. INT'L & COMP. L.J.* 395 (1993); Peter Mostow, "Like Building on Top of Auschwitz": *On the Symbolic Meaning of Using Data From the Nazi Experiments, and on Non-Use as a Form of Memorial*, 10 *J.L. & RELIGION* 403 (1993/1994); Kristine M. Severyn, *The Nazi Doctors and the Nuremberg Code*, 4 *J. PHARMACY & L.* 167 (1995).

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The concept of cultural forfeiture should be introduced to the international arena and this Essay's cultural forfeiture test—or a similar test—should be created. The test should create an exception to the UNIDROIT Convention. Under this Essay's model cultural forfeiture test, Germany forfeited its right to its cultural property by the commission of popularly supported acts of inhumanity, which incorporated and were inspired by its cultural property. Such forfeiture would serve the objectives of punishment and would hopefully diminish the future occurrence of acts of atrocity.