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Volume 49 | Issue 1

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2017

# The Night Café Redux: A Study of Sordidness, From Arles to the U.S. Courts

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## Recommended Citation

Allan Gerson, *The Night Café Redux: A Study of Sordidness, From Arles to the U.S. Courts*, 49 Case W. Res. J. Int'l L. 197 (2017)  
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# THE NIGHT CAFÉ REDUX: A STUDY OF SORDIDNESS, FROM ARLES TO THE U.S. COURTS

Allan Gerson\*

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## I. THE NIGHT CAFÉ: UGLINESS THEN AND NOW

Vincent van Gogh described *The Night Café*, painted in 1888 in Arles, as one of his “ugliest” paintings.<sup>1</sup> This unsettling work has elicited other descriptions, such as “a vision of hell . . . [that evokes] instability, uncertainty, [and] the indeterminacy of being.”<sup>2</sup> Yet it is also a vision that has managed to go beyond its era, as questions of the painting’s rightful ownership continue to abound. I was the principal attorney in the recent litigation over the Yale University Art Gallery’s ownership of the work.<sup>3</sup> I have no intention to retry the case in writing this essay, but only to shed some light on the uncertainty that continues to surround *The Night Café*’s rightful ownership. Unfortunately, the Second Circuit Court of Appeals’ unpublished ruling, issued on October 20, 2015, that only adds to that uncertainty.<sup>4</sup>

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<sup>1</sup> Letter from Vincent van Gogh to Theo van Gogh (Sept. 8, 1888), in VINCENT VAN GOGH: THE LETTERS, no. 676 (Leo Jansen, Hans Luijten & Nienke Bakker eds., 2009), available at <http://vangoghletters.org/vg/letters/let676/letter.html> [<https://perma.cc/5BLF-AZS5>].

<sup>2</sup> Sal Westrich, *A Coffee for Van Gogh*, 58 FMR 20, 26 (Oct. 1992).

<sup>3</sup> Yale Univ. v. Konowaloff, 620 F. Appx. 60, 61 (2d Cir. 2015), cert. denied, 136 S. Ct. 1494 (2016).

<sup>4</sup> *Id.*

## II. “[C]OMMIT[TING] CRIMES”: THE CONSPIRATORS

*In my painting of the night café I've tried to express the idea that the café is a place where you can ruin yourself, go mad, commit crimes . . . in an ambiance of a hellish furnace, in pale sulphur.*

—Vincent van Gogh<sup>5</sup>

At first glance, the painting appears to depict a café interior with a billiard table and several patrons, including two lovers at a corner table.<sup>6</sup> In a letter Van Gogh wrote to Emile Bernard, he refutes that impression, identifying the female figure as “a whore sitting there at the table with her fellow.”<sup>7</sup> Perhaps they are negotiating a fee, or plotting a crime.

Were Van Gogh to repaint *The Night Café* to reflect the ensuing history of disputed claims to the painting’s true ownership, it seems likely, based on papers of public record,<sup>8</sup> that he would begin by replacing the male and female pair with figures of Steven Clark, an avid art collector,<sup>9</sup> and Charles Henschel, Director of New York’s Knoedler Gallery.<sup>10</sup>

Before Clark acquired *The Night Café* in May 1933, an outright purchase seemed impossible.<sup>11</sup> The work had been the star of Russian businessman Ivan Morozov’s collection of French Impressionist paintings when the Bolsheviks confiscated them in 1918 and then fell

5. Letter from Vincent van Gogh to Theo van Gogh (Sept. 9, 1888), in VINCENT VAN GOGH: THE LETTERS, no. 677 (Leo Jansen, Hans Luijten & Nienke Bakker eds., 2009), available at <http://vangoghletters.org/vg/letters/let677/letter.html> [<https://perma.cc/TF7F-NQ6X>].

6. For a reproduction of the work, see *Le café de nuit (The Night Café)*, YALE UNIV. ART GALLERY (2016), <http://artgallery.yale.edu/collections/objects/12507> [<https://perma.cc/5SCU-DVBB>].

7. Letter from Vincent van Gogh to Emile Bernard (Sept. 19–25, 1888), in VINCENT VAN GOGH: THE LETTERS, no. 684 (Leo Jansen, Hans Luijten & Nienke Bakker eds., 2009), available at <http://vangoghletters.org/vg/letters/let684/letter.html> [<https://perma.cc/6MXY-H582>].

8. *Yale Univ. v. Konowaloff*, 5 F. Supp. 3d 237 (D. Conn. 2014), *aff’d*, 620 F. App’x 60 (2d Cir. 2015), *cert. denied*, 136 S. Ct. 1494 (2016).

9. Opening Brief of Defendant-Appellant Pierre Konowaloff at 16, *Yale Univ. v. Konowaloff*, 620 F. App’x. 60 (2d Cir. 2015) (No. 14-3899) [hereinafter Opening Brief].

10. Ann Landi, *150 Years of Helping Shape a Nation’s Taste*, N.Y. TIMES (Dec. 1, 1996), <http://www.nytimes.com/1996/12/01/arts/150-years-of-helping-shape-a-nation-s-taste.html> [<https://perma.cc/5AVR-QDHF>].

11. Opening Brief, *supra* note 9, at 16.

under the control of the Soviet Union as the successor government.<sup>12</sup> By the 1930s, the Soviet regime had sold works confiscated from the Romanoff czars' collection to Paul Mellon and J.P. Morgan for millions of dollars in an effort to fund industrialization projects. Yet the comparatively low price commanded by the Van Gogh painting offered little incentive for the Soviets to sell it.<sup>13</sup> Additional impediments to Clark's acquisition of the work included the U.S. government's likely opposition to the purchase, given America's refusal to recognize the Soviet Union and trade with it after the Bolsheviks failed to provide compensation for illegally seized U.S. property.<sup>14</sup> Clark and his dealer Henschel also realized that an open transaction would likely draw the attention of the exiled members of the Morozov family in France,<sup>15</sup> who could then bring suit to reclaim the painting.

To overcome the obstacles blocking Clark's acquisition of the Van Gogh, Clark and Henschel hit upon a scheme of surreptitious acquisition.<sup>16</sup> Henschel revealed that Knoedler Gallery had good relations with the newly formed Mattieson Gallery in Berlin, the arm for the then-ascendant Nazi Party's acquisition of world masterpieces, including those in the Soviet Union.<sup>17</sup> The ostensible plan was for the Mattieson Gallery to bribe a Russian official to release the painting to the gallery, which would then make its way to Knoedler's in New York, where the final sale to Clark would be arranged with no trace of its origins.<sup>18</sup> As a measure of safety, Henschel advised Clark to keep the painting under wraps at his home for many years before public display.<sup>19</sup>

In accordance with Henschel and Clark's scheme, it appears that a Soviet official was bribed in 1933 to release *The Night Café* to

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12. *Konowaloff*, 5 F. Supp. 3d at 238–39.

13. Opening Brief, *supra* note 9, at 6–7.

14. Opening Brief, *supra* note 9, at 7.

15. *See Cezanne Portrait seized by Russian Bolsheviks belongs to the Met*, COMM'N FOR ART RECOVERY, <http://www.commartrecovery.org/docs/CezannePortraitMet.pdf> [<http://perma.cc/8FR8-ZM4U>] (last visited Nov. 25, 2016) (describing how Morozov fled to France after losing his art collection to Bolshevik confiscation).

16. Opening Brief, *supra* note 9, at 7. Correspondence documenting Clark and Henschel's scheme was submitted as exhibits to the U.S. courts that would later sit in judgment in the proceeding for good title between Yale University and Pierre Konowaloff, Ivan Morozov's heir. *See Yale Univ. v. Konowaloff*, 5 F. Supp. 3d 237 (D. Conn. 2014).

17. Opening Brief, *supra* note 9, at 7.

18. Opening Brief, *supra* note 9, at 16.

19. Opening Brief, *supra* note 9, at 16.

Mattieson.<sup>20</sup> Later that year, Clark acquired it from Knoedler.<sup>21</sup> At his death in 1960, Clark bequeathed *The Night Café* to Yale University, which received the work in 1961.<sup>22</sup> No record officially approving the work's sale to Clark exists.<sup>23</sup> More specifically, there is no chain of provenance showing that the painting had been duly acquired through a legitimate sale.<sup>24</sup> Yale's title is as good as that of Clark, and Clark appears as a thief.

This narrative is the essence of the argument made by Pierre Konowaloff, Ivan Morozov's great-grandson and sole heir, after Yale filed suit in 2007 for a judicial imprimatur recognizing that *The Night Café* was the university's to own, display, and, if it so chose, to de-acquisition.<sup>25</sup>

Three years earlier, Pierre Konowaloff had been invited to Russia to be honored for his family's acumen in assembling an important group of French Impressionist paintings.<sup>26</sup> While in Russia, Konowaloff discovered that Yale University, not Russia, had possession of *The Night Café*.<sup>27</sup> When he made inquiries, Yale told him that the statute of limitations bared him from bringing up the question of good title.<sup>28</sup> Uncomfortable with the challenge posed by Konowaloff, Yale preemptively filed suit in the U.S. district court in Connecticut for a declaration of good title.<sup>29</sup> Konowaloff, named as the defendant, counterclaimed.<sup>30</sup> At first, he asserted that Yale stood in the shoes of a thief because the Bolsheviks' confiscation violated international laws' prohibition of selective taking of cultural property, in distinction to legitimate nationalization policies by different economic systems.<sup>31</sup>

After further evidence emerged about the manner of Clark's acquisition, Konowaloff amended his argument. He renounced any

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20. Opening Brief, *supra* note 9, at 7.

21. Opening Brief, *supra* note 9, at 16.

22. Yale Univ. v. Konowaloff, 5 F. Supp. 3d 237, 239 (D. Conn. 2014).

23. Opening Brief, *supra* note 9, at 8.

24. Opening Brief, *supra* note 9, at 8–9.

25. Complaint at 20–21, Yale Univ. v. Konowaloff, 5 F. Supp. 3d 237 (D. Conn. 2014) (No. 309CV00466); *see also* Opening Brief, *supra* note 9, at 16 (identifying Konowaloff as the sole heir to the Morozov collection).

26. Opening Brief, *supra* note 9, at 16.

27. Opening Brief, *supra* note 9, at 16.

28. Yale Univ. v. Konowaloff, 5 F. Supp. 3d 237, 239 (D. Conn. 2014); Complaint, *supra* note 25, at 19.

29. Complaint, *supra* note 25, at 20.

30. Answer and Counterclaim, Yale Univ. v. Konowaloff, 5 F. Supp. 3d 237 (D. Conn. 2014) (No. 309CV00466).

31. *Id.* at 13–14.

challenge to the confiscation.<sup>32</sup> Instead, he informed the district court that he would be traveling to Russia to try to unravel the mysterious circumstances surrounding the painting's "sale."<sup>33</sup> Yale objected to the trip as a fishing expedition, but the district court allowed Konowaloff to proceed.<sup>34</sup>

When potentially damning evidence arrived from the Russian Federation under official seal, suggesting that Soviet officials had turned a blind eye to the underhanded nature of the painting's sale, Yale abandoned its pursuit of a declaration of good title.<sup>35</sup> Instead, it filed for summary dismissal of Konowaloff's claims, thus assuring that the Russian Federation documents would never see the light of day.<sup>36</sup> The district court ruled in Yale's favor, on the theory that the Act of State doctrine forbade it from allowing these facts to go public.<sup>37</sup>

On October 20, 2015, the Court of Appeals for the Second Circuit, to whom Konowaloff had appealed the district court's ruling, delivered a "Summary Order" affirming the district court's decision.<sup>38</sup> It was accompanied with a rider that "RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL VALUE."<sup>39</sup> Thus, its reasoning could not be subjected to the usual scrutiny accorded to judicial opinions.<sup>40</sup> The upshot was that Yale could continue to hold on to *The Night Café* despite its lack of any record of good title.<sup>41</sup> It could, as it had been doing since it had received the painting 1961, continue to exhibit it on the walls of its university art gallery.<sup>42</sup> The work's value was, by that time, substantial.<sup>43</sup> Recent estimates filed without objection in the courts placed its value at \$200 million.<sup>44</sup>

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32. Opening Brief, *supra* note 9, at 6.

33. Opening Brief, *supra* note 9, at 8.

34. Opening Brief, *supra* note 9, at 8.

35. Opening Brief, *supra* note 9, at 9.

36. Opening Brief, *supra* note 9, at 9.

37. *Yale Univ. v. Konowaloff*, 5 F. Supp. 3d 237, 242 (D. Conn. 2014).

38. *Yale Univ. v. Konowaloff*, 620 Fed. Appx. 60 (2d Cir. 2015).

39. *Yale Univ. v. Konowaloff*, No. 14-03899, at 1 (2d Cir. Oct. 17, 2014).

40. See George C. Pratt, *Summary Orders in the Second Circuit Under Rule 0.23*, 51 BROOK. L. REV. 479, 484-87 (1985) (explaining the difficulty of responding to a summary order).

41. *Konowaloff*, 620 Fed. Appx. at 62.

42. *Konowaloff*, 5 F. Supp. 3d at 239.

43. Sarah Cascone, *Man Loses Quest to Reclaim \$200 Million Van Gogh Painting Seized by Bolsheviks*, ARTNET NEWS (Mar. 29, 2016), <https://news.artnet.com/market/vincent-van-gogh-yale-night-cafe-lawsuit-461216> [<https://perma.cc/5L92-CWK2>].

44. *Id.*

III. THE EVIDENCE BEHIND THE CURTAIN: THE PAY-OFF TO  
AN UNNAMED SOVIET CURATOR OR OFFICIAL

*I [Alexei Melnikov, former Head of the Legal Department of the Russian Ministry of Communications] made enquiries with the Russian State Archive of Social and Political History and the State Archive of the Russian Federation and received their official responses (both attached) that their respective archives do not contain any documents directly or indirectly related to the sale of Van Gogh's The Night Café painting. Having said this, I make the following CONCLUSIONS . . . [T]he supreme bodies of government and administration of the U.S.S.R. did not make any decision in May of 1933 on the sale of Van Gogh's The Night Café painting and, moreover, did not review the potential sale thereof.*

—Alexei Melnikov, September 20, 2013<sup>45</sup>

*Mr. Melnikov's supplement states that there is no record that the sale of the painting in 1933 was authorized by the Soviet government, despite the fact that there was a system of redundancy requiring multiple approvals, thus raising issues of material fact as to title as to whether U.S. foreign relations would possibly be adversely impacted by adjudication of Yale's claim to a declaration of title in this matter.*

—Phillip Brown, Co-Counsel to Konowaloff, September 26, 2013<sup>46</sup>

On March 10, 2014, after eight months without a response from the district court, Konowaloff filed a request that evidence obtained from the Russian Federation be examined in a trial on the merits.<sup>47</sup> The new motion called for a settlement conference:

[T]he Court will have to consider whether the evidence presented by the Russian Federation and the supporting affidavit place into question whether Yale's acquisition occurred through the bequest of a person with no title to the Painting, a fact Yale could have examined at the time of the bequest rather than having accepted it at face value.<sup>48</sup>

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45. Affidavit of Alexei Melnikov, *Yale Univ. v. Konowaloff*, 5 F. Supp. 3d 237 (D. Conn. 2014) (on file with author).

46. Affidavit of Phillip Brown, *Yale Univ. v. Konowaloff*, 5 F. Supp. 3d 237 (D. Conn. 2014) (filed in opposition to Yale University's motion for summary judgment on Konowaloff's counterclaim to good title to the painting) (on file with author).

47. Defendant's Reply in Support of Request for Resumption of Settlement Conference at 2, *Yale Univ. v. Konowaloff*, 5 F. Supp. 3d 237 (D. Conn. 2014) (No. 309CV00466) 2014 WL 1225057.

48. *Id.*

Were Van Gogh to repaint *The Night Café* in light of this turn, he might well have added figures of Konowaloff's attorneys with the signed and sealed documents of the Russian Federation in hand. The rigid attendant wearing a white coat, looking blankly on, would resemble the posture of the court in rendering its judgment.

#### IV. THE ACT OF STATE DOCTRINE APPLIED

*Because "the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment," . . . and the court finds that the act of state doctrine applies to bar Konowaloff's counterclaims, the motion for summary judgment is being granted.*

—Judge Alvin W. Thompson, March 20, 2014.<sup>49</sup>

Although the district court's ruling relies on the Act of State doctrine to summarily dismiss Konowaloff's counterclaims, treating as irrelevant the evidence obtained from the Russian Federation,<sup>50</sup> it failed to cite, let alone discuss, the controlling case on the Act of State doctrine: the unanimous U.S. Supreme Court decision in *W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp., Int'l.*<sup>51</sup>

#### V. SCALIA AND KIRKPATRICK IGNORED

In *Kirkpatrick*, Justice Scalia instructed that the Act of State doctrine be viewed as a deviation from courts' normal duty to adjudicate cases.<sup>52</sup> As such, he admonished, it may be employed only "when a court *must decide*—that is, when the outcome of a case turns upon—the effect of official action by a foreign sovereign."<sup>53</sup>

Had it applied that test, the district court would have realized that the case before it was not one in which it "must decide" on the basis of the legality of a foreign sovereign act. After all, Konowaloff had renounced any intent to challenge the validity of the Bolshevik confiscation.<sup>54</sup>

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49. Yale Univ. v. Konowaloff, 5 F. Supp. 3d 237, 242 (D. Conn. 2014).

50. *Id.*

51. *W.S. Kirkpatrick & Co. v. Ent'l Tectonics Corp., Int'l.*, 493 U.S. 400 (1990).

52. *Id.* at 701.

53. *Id.* at 705 (emphasis original).

54. Opening Brief, *supra* note 9, at 6.



Instead, the district court chose to ignore *Kirkpatrick*.<sup>55</sup> Then, it treated Konowaloff's *explicit* disavowals of any challenge to a Russian act of state, as in fact an *implicit* challenge to a foreign sovereign act.<sup>56</sup> This, it reasoned, was because Konowaloff's claim of a superior possessory interest to that of Yale University under New York or Connecticut replevin and conversion law, meant that he had to challenge the legitimacy of the confiscation.<sup>57</sup> And that, the district court ruled, "would necessarily require the court to make an inquiry into the legal validity of the 1918 nationalization decree. However, such inquiry is precluded by the act of state doctrine."<sup>58</sup>

But what the district court failed to realize is twofold. First, under New York replevin law, as spelled out in the cited *Bakalar* case, a plaintiff in a replevin action need merely assert that the property in question was never voluntarily surrendered.<sup>59</sup> The plaintiff does not have to contend, and carry the proof of so demonstrating, that the taking by whatever party took the property was *unlawful*, only that it had not been voluntarily surrendered.<sup>60</sup> Second, even if an act of state was being challenged, the Act of State doctrine could not be employed, *Kirkpatrick* teaches, before judges balance the rights of a litigant to adjudication against a foreign state's right to be free from scrutiny.<sup>61</sup>

In Scalia's words, "despite the Act of State doctrine's technical applicability," it still may not be employed where there are countervailing policy considerations.<sup>62</sup> Most important of these is a showing of likely impairment to U.S. foreign relations<sup>63</sup>—the *raison d'être* for the doctrine.<sup>64</sup> Also of importance is where the property in question resides,<sup>65</sup> and whether there has been any alienation of the property by the State involved in its confiscation.<sup>66</sup>

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55. See *Yale Univ. v. Konowaloff*, 5 F. Supp. 3d 237 (D. Conn. 2014) (basing the ruling on state doctrine without citing to *W. S. Kirkpatrick*, 493 U.S. at 409–10.)

56. *Id.* at 241.

57. *Id.*

58. *Id.*

59. *Bakalar v. Vavra*, 619 F.3d 136, 147 (2d Cir. 2010).

60. *Id.*

61. *W.S. Kirkpatrick & Co. v. Ent'l Tectonics Corp., Int'l.*, 493 U.S. 400, 409 (1990).

62. *Id.*

63. *Id.* at 404.

64. *Id.* at 409–10.

65. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 428 (1964).

66. William Harvey Reeves, *The Act of State-Foreign Decisions Cited in the Sabbatino Case: A Rebuttal and Memorandum of Law*, 33 *FORDHAM L. REV.* 599, 612 (1965).

Had the district-court judge followed the injunctions of the *Kirkpatrick* ruling he would have had to answer these questions affirmatively before rendering his ruling:

- a. Was any official act of state explicitly challenged?
- b. If the answer to the first question is “no,” can the courts nevertheless infer an implicit challenge to an act of state?
- c. Assuming the answer to the second question is “yes,” is application of the Act of State doctrine warranted absent a showing of impairment to foreign relations?
- d. Assuming the answer to the second question is “yes,” is application of the Act of State doctrine warranted despite the fact that the foreign state has alienated its interest in the underlying property, either by sale, or by failure to contest ownership by a foreign party?
- e. Assuming the answer to the second question is “yes,” must the court apply the Act of State doctrine despite room for argument that under pertinent state law, Russia’s 1918 confiscation is irrelevant to Konowaloff’s display of a superior possessory interest versus Yale University?<sup>67</sup>

None of these questions were answered in the affirmative, as the district court chose to ignore *Kirkpatrick*, despite considerable argumentation as to its application by both Yale University and Konowaloff.<sup>68</sup>

Had the district court considered the questions required of it by *Kirkpatrick*, it would ineluctably have been led to the conclusion that Konowaloff’s counterclaims were not barred by act-of-state considerations.

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67. *Yale U. v. Konowaloff*, 620 Fed.Appx. 60, 61 (D. Conn. 2015).

68. Sur-Reply of Pierre Konowaloff at ¶ 14, *Yale U. v. Konowaloff*, 5 F.Supp.3d 237 (D. Conn. 2014) (No. 3:09CV00466AWT), 2010 WL 1479006; *see also* Memorandum in Support of Motion to Dismiss Counterclaims by Plaintiff-Counterclaim Defendant Yale U. at 16, *Yale U. v. Konowaloff*, 5 F.Supp.3d 237 (D. Conn. 2014) (No. 309CV00466), 2009 WL 5167511.

VI. THE COURT OF APPEALS JUDGES FURTHER MUDDY THE  
WATERS WITH AN UNPUBLISHED OPINION (“SUMMARY  
ORDER”)

[E]ven if we were to take his statement of abandonment [of any challenge to the Bolshevik confiscation of the painting] to this Court as binding as we are entitled to do . . . , the result is that Konowaloff has *accepted* the validity of the 1918 expropriation and thus *admitted* any legal claim or interest he has in the Painting was *extinguished* at that time.<sup>69</sup>

But the finding that Konowaloff has *accepted* the validity of the 1918 expropriation simply flies in the face of the facts. Konowaloff, wanting to avoid the shoals of the Act of State doctrine that would be involved in challenging Russia’s expropriation,<sup>70</sup> adopted instead a position of abstention,<sup>71</sup> whereby, as his attorney made clear at oral argument before the court of appeals, that he neither affirms nor disaffirms the legality of the confiscation and that in the particular context of his dispute with Yale, the legitimacy of Russia’s confiscation was irrelevant insofar as the governing question was whether—however Russia acquired the painting—it had lost possession by virtue of theft.<sup>72</sup>

Nevertheless, the court of appeals ruled that Konowaloff, through his attorney, had accepted the legitimacy of the confiscation, thus denying him standing to contest Yale’s ownership.<sup>73</sup> The decision rested on the most expansive reading of the Act of State doctrine to date; and again, like the district court, the appeals court failed even to mention the Supreme Court’s *Kirkpatrick* ruling. Nor did the court of appeals undertake any rigorous examination of New York or Connecticut law to address Konowaloff’s argument that it is the relative strength of his claim to title versus Yale’s that is controlling, not whether there is a

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69. *Konowaloff*, 620 Fed.Appx. at 61 (emphasis added).

70. *Id.* at 61.

71. Madeleine Frith, Ece Yelioglu Yildizci & Marc-André Renold, *The Night Café Painting—Morozov Heirs v. Yale University*, UNIV. OF GENEVA: ARHEMIS (Feb. 2014), <https://plone.unige.ch/art-adr/cases-affaires/the-night-cafe-painting-2013-morozov-heirs-v-yale-university/case-note-2013-the-night-cafe-painting-2013-morozov-heirs-v-yale-university> [<http://perma.cc/6NW3-V7TZ>].

72. Pierre Konowaloff’s Opposition to Yale University’s Renewed Motion for Summary Judgment at ¶ 5, *Yale U. v. Konowaloff*, 5 F.Supp.3d 237 (D. Conn. 2014) (No. 309CV00466 AWT), 2013 WL 3328244 (“Konowaloff alleges that under replevin law, he has a right to contest Yale’s claim to this painting and that all he has to show is a possessory interest, that demand has been made, and that he has inherited title.”).

73. *Konowaloff*, 620 Fed.Appx. at 61.

third party (Russia) with a potentially superior claim that chooses not to exercise it.

Should Yale be proud? It did not win vindication of its original claim of good title, only a summary, unpublished appellate-court opinion that denies the Morozov heir—Pierre Konowaloff—his day in court.<sup>74</sup> Additionally, the Summary Order did not expressly base dismissal on act-of-state grounds, but rather on the assertion that the Russian confiscation “extinguished” Konowaloff’s rights because of the factually incorrect assertion that he “accepted” its lawfulness.<sup>75</sup>

What would Van Gogh think? Perhaps that this history of what happened to his famous, “ugliest” painting was in keeping with his lifeless portrayal of the sordidness of life at the *The Night Café*.<sup>76</sup> The rigid attendant next to the billiards table seems an apt metaphor for the façade of the rule of law in this case. Like the billiards table in *The Night Café*, there is the hint of an orderly process at work, which lets the balls go where they may; but at *The Night Café* nothing is what it seems, not then and not now. A furnace blows hot air. Any breath of fresh air is left beyond the borders of this sealed room. Today that breath of fresh air is the evidence proffered by the Russian Federation through its Ministry of National Archives, on official stationery, duly transmitted to the district court.<sup>77</sup> Of course, Yale had an opportunity to challenge its authenticity and the truth of its conclusions. But it chose instead to assure that the evidence never saw the light of day. Who needs a Declaration of Good Title, anyway? That would require a trial, and Yale decided it preferable to hold on to *The Night Café* with no claim to good title.<sup>78</sup>

And so the billiard table and balls, the lined bottles and the attendant’s rigid posture that point to order and precision, are overtaken in the original painting by the disarray of the chairs and glasses that convey instability and uncertainty. And, in the contemporary vein, that instability and uncertainty remains, highlighted by the fact that the Second Circuit Court of Appeals’ insisted that its ruling not be cited as precedent.<sup>79</sup> Finally, the U.S. Supreme Court itself, beset with a deluge of cases clamoring for review, only added to the uncertainty by declining Konowaloff’s petition for certiorari.<sup>80</sup>

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74. *Id.*

75. *Id.*

76. Letter from Vincent van Gogh to Theo van Gogh (Sept. 8, 1888), *supra* note 1.

77. Affidavit of Alexei Melnikov, *supra* note 45.

78. *Yale U. v. Konowaloff*, 5 F.Supp.3d 237, 242 (D. Conn. 2014).

79. *Konowaloff*, 620 Fed.Appx. at 60.

80. *Konowaloff v. Yale U.*, 136 S.Ct. 1494 (2016).

## VII. WHAT CAN BE DONE?

In our system of government, it is not the courts, but the legislative and the executive branches that are the final word where issues of U.S. foreign relations arise.<sup>81</sup> Here, under the shibboleth of noninterference in U.S.-Russian relations, evidence duly proffered by the Russian National Archives Ministry—the counterpart to the U.S. National Archives—was ignored. An unprecedented and groundbreaking Russian national archives search for any record of an authorized sale to the Matthiesen Gallery was cavalierly dismissed as unworthy of the court’s attention on Act of State grounds;<sup>82</sup> even though it was the state whose interests were ostensibly being protected, that was signaling to the court that it welcomed an adjudication of Konowaloff’s versus Yale University’s right to *The Night Café*.<sup>83</sup>

The upshot is that instead of furthering certainty about such competing claims to title, the courts have promoted uncertainty. The Supreme Court’s carefully articulated tests to prevent courts from shirking their duty to adjudicate cases were ignored by the sleight of hand of an unpublished opinion that decided the fate of *The Night Café*, on the specious grounds of not interfering in U.S.-Russian relations.<sup>84</sup> Suggestions by Konowaloff that an opinion be sought from the Solicitor General on this point were also summarily dismissed.<sup>85</sup>

Yet, New York and Connecticut laws both provide an entirely separate ground for adjudication, where the Act of State doctrine is not even implicated. A legislative amendment to existing replevin law is necessary to make clear, that, as between the heir to property bearing original good title, and the holder of that property which shows no valid claim to title (other than being the recipient of a bequest from an ostensible thief), that the heir need do no more than demonstrate that he “involuntarily” relinquished control of the property, for purposes of an action in replevin or conversion. Indeed, this would serve to only clarify, and more sharply define, existing law.

Moreover, such a legislative adjustment would also assure that New York and Connecticut laws are consonant with the trend in Nazi restitution cases, which hold that technical defenses not be raised to deny victims the benefits of a proper adjudication of title based on the

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81. Richard F. Grimmett, *Foreign Policy Roles of the President and Congress*, US DEPT. OF STATE (June 1, 1999), <http://fpc.state.gov/6172.htm> [<https://perma.cc/Y857-3KUX>].

82. *Konowaloff*, 5 F.Supp.3d at 242.

83. *Id.*

84. *Konowaloff*, 620 Fed.Appx. at 61.

85. Petition for Writ of Certiorari at 12–13, *Yale U. v. Konowaloff*, 620 Fed. Appx. 60 (2d Cir. 2015).

reality of what transpired in the dispossession of their families' precious works of art.<sup>86</sup>

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86. *Report Concerning Current Approaches of United States Museums to Holocaust-Era Art Claims*, WORLD JEWISH RESTITUTION ORG. (June 25, 2015), <http://art.claimscon.org/wp-content/uploads/2015/06/WJRO-Report-Concerning-Approaches-of-United-States-Museums-to-Holocaust-Era-Art-Claims.pdf> [<https://perma.cc/7N5Y-4UKT>].