
WHAT'S A SURVIVOR TO DO? AN INQUIRY INTO VARIOUS
OPTIONS AND OUTCOMES FOR INDIVIDUALS SEEKING
RECOVERY OF NAZI-LOOTED ART

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“Labour to keep alive in your breast that little spark of celestial fire called
conscience.”¹



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Introduction

As the granddaughter of Holocaust survivors, I have always been inquisitive about World War II, the tumultuous time during which my grandparents came of age. On one side of the world, my father's parents suffered tremendously at the hands of the Nazis. On the other side of the world, my mother's parents fought valiantly for my father's parents' freedom from the Nazis. Neither side knew that one day they would be connected by more than a shared struggle against Nazi oppression, that they would be connected by love, and the familial bonds which grow from that love.

My patriarchal grandmother was taken to Auschwitz along with her family in 1939. After years of being shuffled between numerous concentration camps, my grandmother eventually was taken to Bergen-Belsen, a Nazi concentration camp located in Lower Saxony, southwest of the town of Bergen near Celle. When the Allied Forces arrived in 1945, only my grandmother and her older sister had survived to see the camp's liberation.

Soon after the liberation, my grandmother met my grandfather, a young man, who until recently had been utilized by the Germans as a laborer in a concentra-

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¹ George Washington, *Rules of Civility and Decent Behaviour in Company and Conversation* (Ferry Farm, 1744), available at <http://gwpapers.virginia.edu/documents/civility/transcript.html>.

² The Mann family circa 1952.

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tion camp. The two quickly fell in love and became inseparable, marrying in Stockholm, Sweden in 1947. My father was born three years later. In 1953, my grandparents were sponsored by relatives already in America, and my small family made their way to America. They passed through Ellis Island when they arrived in the United States, where our complicated original family surname of "Mankowicz" was shortened to the more easily-pronounced "Mann." The Mann family soon settled into their new American lives on Chicago's South Side, learning the English language by reading newspapers, and eventually opening a small, successful grocery store.

My matriarchal grandparents were raised in the Green Bay, Wisconsin area, and after completing high school in 1942, my grandfather joined the United States Army. During World War II, my grandfather advanced in the ranks of the military, becoming an officer and served his country in France and Germany. My grandmother supported him and the war effort from home in the United States, and they were married almost immediately when he returned in 1946. My mother and her younger brother followed in quick succession, and eventually the Schrickel (my mother's maiden name) family also found themselves in the Chicago area.

During their reign of terror, the Nazis did not simply destroy the lives, families, and communities of those groups they deemed inferior, but they also attempted to destroy the cultural contributions that these people had made to the world. One way in which this policy was carried out was through the systematic plundering of art. This article examines the issues a private party wishing to reclaim a piece of art stolen by the Nazis during World War II faces in both international and domestic legal arenas. It will include a brief history of the Nazi regime, as well as a discussion of cultural property in general. It will continue by assessing common problems facing an individual claimant in a potential legal dispute involving Nazi-stolen art, focusing on the relevant aspects of international and U.S. law. This article will then focus on four specific case studies involving four works of art plundered by the Nazis during World War II (considered the most famous pieces by the author), the different approaches used by the claimants in each, and the results of these efforts. This paper will then conclude with a general statement of the shape this area of law is likely to take in the future, how the ideas of equity and conscience are intertwined with the facts of each case, and the judiciary's activist role in adjudicating cases of this nature.

Where Art and Fascism Intersect: A Brief History of the Nazi Regime's Cultural Pillaging

I can never pretend to understand the atrocities my family, and countless others like them, experienced under the Nazi regime in the years before and during World War II. Beyond the well documented human tragedy, there exist lesser-known areas of collateral damage from the War which still affects us today. What can best be described as the Nazi art campaign, a systematic effort to plunder art from across Europe, is one such lingering wound of the Nazi era. The amount of art plundered by the Nazis before and during the War is almost

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unimaginable. From 1938-1945, the Nazis, under the direction of Adolf Hitler, seized thousands of pieces of art worth billions in today's dollars.³ Historians, while not able to pinpoint an exact number, have estimated that around 240,000 pieces of art were looted, and their combined worth valued somewhere in the neighborhood of \$20.5 billion.⁴ The United States government has estimated that one-fifth of all Western art then in existence was seized, or obtained via coerced sales by German forces and other Nazi agents before and during World War II.⁵

The Nazis accumulated their treasure trove of stolen art in two ways: first, by confiscating pieces from individuals, mostly Jews being shipped to concentration camps in Germany and other occupied countries throughout Europe; or second, by coercing the sale of pieces of art and paying bargain-basement prices for them.⁶ This scheme was not accidental; Hitler had sanctioned the official Nazi policy that mandated the taking of all works of art during the War in an effort to bring to fruition his dream of making Germany the cultural center of Europe.⁷ The decision as to which pieces were to be taken and how they were to be stored and preserved were made with military precision.⁸ German forces included members that were highly trained art specialists, and it was their duty to oversee Hitler's growing collection.⁹ In an ironic twist of fate, it was these specialists who were responsible for the preservation of the collection and they likely rescued many famous pieces from complete destruction.¹⁰ Similarly, the Nazis kept meticulous records, and inventoried nearly every piece.¹¹ These records would come to the aid of some Holocaust victims wishing to locate their valuables years, or even decades, later.¹²

Hitler envisioned a national museum filled with valuable art that demonstrated the Third Reich's cultivation and supremacy, and in his view only German or Germanic art was worthy of such stature.¹³ However, Hitler understood that art

³ Sue Choi, *The Legal Landscape of the International Art Market After Republic of Austria v. Altmann*, 26 NW. J. INT'L L. & BUS. 167, 167 (2005) (citing Emily E. Maples, Comment, *Holocaust Art: It Isn't Always "Finders Keepers, Losers Weepers": A Look At Art Stolen During the Third Reich*, 9 TULSA J. COMP. INT'L L. 355, 356 (2001)).

⁴ *Id.* at 167.

⁵ Howard N. Spiegler, *Recovering Nazi-Looted Art: Report From the Front Lines*, 16 CONN. J. INT'L L. 297, 298 (2001).

⁶ David Wissbroecker, *Six Klimts, A Picasso, & A Schiele: Recent Litigation Attempts to Recover Nazi Stolen Art*, 14 DEPAUL-LCA J. ART & ENT. L. & POL'Y 39, 40 (2004).

⁷ Spiegler, *supra* note 5, at 298.

⁸ Choi, *supra* note 3, at 167 (citing Stephan J. Schlegelmilch, Note, *Ghosts of the Holocaust: Holocaust Victim Fine Arts Litigation and A Statutory Application of the Discovery Rule*, 50 CASE W. RES. L. REV. 87, 92 (1999); LYNN H. NICHOLAS, *World War II and the Displacement of Art and Cultural Property*, in THE SPOILS OF WAR: WORLD WAR II AND ITS AFTERMATH: THE LOSS, REAPPEARANCE, AND RECOVERY OF CULTURAL PROPERTY 39 (Elizabeth Simpson ed., 1997)).

⁹ Choi, *supra* note 3, at 167.

¹⁰ *Id.*

¹¹ Hector Feliciano, Owen Pell, & Nick Goodman, *The Lost Museum: The Nazi Conspiracy to Steal the World's Greatest Works of Art*, 20 WHITTIER L. REV. 67, 68 (1998).

¹² *Id.*

¹³ Wissbroecker, *supra* note 6, at 40.

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that did not live up to this standard could still be worthwhile to his cause; as a result he also seized so-called “degenerate art.”¹⁴ Degenerate art included works that depicted Jewish subjects or pieces that were in some way critical of the Nazi ideology.¹⁵ Works by modern masters like Van Gogh and Picasso were also included in this classification due to their revolutionary depictions of the human figure.¹⁶ Likewise, abstract and modern works, by artists like Matisse or displaying Dadaism or Cubism, were considered “degenerate” in nature.¹⁷ Hitler did not destroy the degenerate art; instead the Nazis used it like currency, using these pieces to make trades for worthwhile Germanic art.¹⁸ Interestingly, this was not the only use Hitler found for these subjectively worthless pieces. In 1937, before the works were sold to dealers or collectors, they were displayed at a museum in Munich at an exhibit called “Entartete Kunst,” or “Degenerate Art.”¹⁹

Following the end of the War, Allied forces attempted to catalog and preserve the plundered art being found in vaults and hiding places all over Europe, a nearly impossible undertaking.²⁰ In the decades following the War many of these pieces began resurfacing in various galleries, museums, and private collections around the world, despite their often disjointed or unknown provenance.²¹ In the end, Hitler’s displacement of many of Europe’s art treasures resonated long after the fall of the Nazi regime. Today, more than sixty years later, many descendants of Holocaust victims are still attempting to relocate and reclaim their family’s stolen valuables with varying degrees of success.

Cultural Property Ideas

Property rights have been called the “cornerstone of civilized societal values.”²² The concept that one is entitled to exclusive control of his property, free from the intrusion of others, is arguably one of the most basic liberties assigned in the United States Constitution, and is affirmed in nearly every legal system worldwide.²³ Relevant to cultural property claims involving stolen art in the United States is the fundamental and accepted rule that it is impossible to obtain good title to stolen property, even if the property was purchased in good faith.²⁴

Under this rule, it is entirely possible that persons or museums may genuinely believe they have obtained good title to works of art, when in fact they have no actual ownership rights to the works. The person or entity that believes it owns

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ Choi, *supra* note 3, at 168 (citing Schlegelmilch, *supra* note 3, at 93-94).

¹⁷ Choi, *supra* note 3, at 168.

¹⁸ Wissbroecker, *supra* note 6, at 41.

¹⁹ *Id.*

²⁰ Choi, *supra* note 3, at 169.

²¹ *Id.*

²² Shirley Foster, *Prudent Provenance – Looking Your Gift Horse in the Mouth*, 8 UCLA ENT. L. REV. 143, 147 (2001).

²³ *Id.* at 148.

²⁴ Spiegler, *supra* note 5, at 299.

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the piece may sell it or loan it to another person or entity in either a domestic or international transaction, further complicating the true owner's undertaking of retrieving the piece. It is also possible that a potential claimant may face the daunting task of bringing suit against a foreign government in the process of attempting to reclaim a work of art, or that the attempt may require intervention on the part of the claimant's government.

Returning a piece of art stolen by the Nazis during the Holocaust to the heirs of its original owner "serves the greater good in a . . . prolific sense," because the act of returning the piece supports the values that underscore society.²⁵ At the end of the War in 1945, many European countries enacted laws in an effort to return Nazi-plundered artworks to their original owners.²⁶ Despite these seemingly good intentions, most of these laws failed to bring about their intended result, with only half of the artwork stolen by the Third Reich having been returned to their true owners.²⁷

Both domestic and international attempts to return to their rightful owners cultural properties stolen during World War II followed over the next six decades, via international treaties and domestic legislation.²⁸ Many difficulties still exist for a potential claimant seeking the return of stolen art, including choice of law questions, the issue of sovereign immunity, and statutes of limitations.²⁹ In any case, an individual attempting to recover art through a domestic or foreign legal dispute resolution process likely faces a long path, fraught with complications.

Case Studies: How Equity and Conscience Interplay to Provide Relief for Private Parties Seeking to Reclaim Nazi-Looted Art

Cases involving cultural property stolen by the Nazis over sixty years ago in numerous countries around the world involves complex and tedious aspects of domestic and international law. Interestingly, cases of this nature are never exactly the same, and often feature varied approaches and strategies. It is possible to group the most common problems faced by potential claimants in cultural property cases into three general categories: 1) locating the piece of art in question; 2) establishing an individual's ownership or title to the piece such that he can proceed in an action to reclaim it; and 3) dealing with the applicable statute of limitations and its implications.³⁰

The case studies included in this article are not meant to be exhaustive, but are rather meant to be a brief inquiry into some of the more complex cases involving Nazi-looted art. At the center of many of these disputes are arguably some of the most famous works of art ever created. Like the pieces themselves, the circum-

²⁵ Foster, *supra* note 22, at 147.

²⁶ Choi, *supra* note 3, at 170.

²⁷ *Id.*

²⁸ Arjun Gupta, *A Portrait of Justice Deferred: Retroactive Application of the FSIA and Its Implications for Holocaust Era Art Restitution: Republic of Austria v. Altmann*, 124 S. CT. 2240 (2004), 30 U. DAYTON L. REV. 373, 396 (2005).

²⁹ Choi, *supra* note 3, at 170.

³⁰ Spiegler, *supra* note 5, at 299.

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stances of each case are unique, but each case has a common theme: the application of principles of equity and conscience to right past wrongs.

Klimt's "Portrait of Adele" and Altmann's Lengthy Legal Battle: Judicial Activism Provides Equity to Holocaust Art Heirs

A wealthy Austrian family, owners of an expensive art collection, is forced to flee their native country on the eve of the Nazi annexation of Austria in 1938.³¹ Mounted on the walls of their home are six paintings by a prestigious artist, paintings that will be confiscated by the Nazis soon after the annexation.³² The surviving heirs of the family attempt to recover the paintings after the War, but to no avail.³³ Sixty years later, in 1998, an Austrian journalist discovers evidence linking the paintings to their rightful owners, a discovery that eventually leads the family's descendants to be reunited with their treasured family heirlooms.³⁴ At first glance this story seems like a Hollywood screenplay, but in actuality, this is the story of Maria Altmann. The harrowing details of the effort to recover the Altmanns' family art come from the pages of the United States Supreme Court opinion, *Altmann v. Republic of Austria*.³⁵

Maria Altmann was born in Austria in 1916, the niece of wealthy Jewish sugar magnate Ferdinand Bloch-Bauer and his wife Adele Block-Bauer.³⁶ Prior to the Nazi annexation of Austria, known as "*Anschluss*", Ferdinand and Adele maintained a principal residence in Vienna.³⁷ The Bloch-Bauers were patrons of the arts, and near the turn of the century Adele had posed for two paintings by the now-famous Art Nouveau artist Gustav Klimt.³⁸ In addition to these two portraits, the Bloch-Bauers owned four other paintings by the artist, which they kept at their home in Vienna. Today these six paintings are valued at over \$150 million.³⁹

In 1907, Adele sat for the first portrait; a beautiful and intricate piece that included an image of Adele's narrow face and long neck superimposed over a complex mosaic of shapes and colors.⁴⁰ Additionally, Klimt was able to capture Adele's dress in a way few other artists have, weaving together the imaginary elaborate gold threads. Klimt's portrait manages to capture Adele's powerful intellect, while allowing the colors contained on the canvas to tell her story. At the time she sat for the portrait Adele was unaware that this acquisition would eventually become one of Klimt's most famous pieces, and the subject of a long-

³¹ *Altmann v. Republic of Austria*, 541 U.S. 677, 681 (2004) [hereinafter *Altmann*].

³² *Id.* at 681.

³³ *Id.* at 683.

³⁴ *Id.* at 681.

³⁵ *Id.* at 677-83.

³⁶ *Id.* at 681.

³⁷ *Id.*

³⁸ *Id.*

³⁹ Gupta, *supra* note 28, at 375.

⁴⁰ Alison Frankel, *The Case of the Stolen Klimts*, LAW.COM, Nov. 1, 2006, <http://www.law.com/jsp/law>.

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standing and fervent legal dispute that would include numerous individuals and the national governments of two countries.⁴¹

Ferdinand had supported national efforts opposing Germany's seizure of Austria prior to annexation.⁴² When the *Anschluss* took place in 1938, he and his family were forced to flee, and he ultimately settled in Zurich.⁴³ During the *Anschluss*, Ferdinand claimed that the Nazis "Aryanized" his sugar company, took possession of his home, and seized all of his belongings, including the artwork he and his wife had collected.⁴⁴ Although Ferdinand held title to all the Klimt paintings, when Adele died in 1925 her will requested that the works be donated to the Austrian National Gallery.⁴⁵ At the time Ferdinand indicated that he intended to fulfill his wife's request; however he was not legally obligated to comply with her final wishes.⁴⁶

A Nazi lawyer, Dr. Erich Fuhrer, who had assisted in the liquidation of the Bloch-Bauer estate during the *Anschluss*, kept some of the confiscated works of art for himself, including the Klimt paintings.⁴⁷ Dr. Fuhrer eventually sold or donated all but one of the Klimts to the Austrian National Gallery, claiming that he was attempting to fulfill the terms of Adele Bloch-Bauer's will.⁴⁸ Meanwhile, Bloch-Bauer's niece Maria Altmann had also fled Austria during the *Anschluss*, eventually settling in California in 1942 and obtaining United States citizenship in 1945.⁴⁹ Ferdinand died in Zurich in 1945, bequeathing the titles to the Klimt paintings to his heirs, who included Altmann.⁵⁰

In 1946 World War II was over, and the Austrian government enacted a law that declared all transactions motivated by Nazi ideology null and void.⁵¹ However, this law did not readily provide a legal remedy by which Altmann or other Bloch-Bauer heirs could reclaim the Klimts. This was due to a provision in the law which stated that exportation of works of art deemed culturally significant would require the permission of the Austrian Federal Monument Agency, and the Klimt paintings fell into this category.⁵² Over the next few years a series of negotiations between the family and the City of Vienna, the Austrian Federal Monument Agency, and the Austrian National Government took place.⁵³ The

⁴¹ *Id.*

⁴² *Altmann*, 541 U.S. at 682.

⁴³ *Id.*

⁴⁴ Gupta, *supra* note 28, at 375.

⁴⁵ *Altmann*, 541 U.S. at 681.

⁴⁶ *Id.* at 682.

⁴⁷ Gupta, *supra* note 28, at 376.

⁴⁸ *Id.*

⁴⁹ *Altmann*, 541 U.S. at 681.

⁵⁰ Gupta, *supra* note 28, at 376.

⁵¹ *Altmann*, 541 U.S. at 682.

⁵² *Id.* at 683.

⁵³ Gupta, *supra* note 28, at 376.

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negotiations continued for the next fifty years, but never resulted in the return of the Klimts to members of the Bloch-Bauer family.⁵⁴

During the negotiations in 1948, a Viennese lawyer retained by the family wrote to the National Gallery in an attempt to have three of the Klimts sold by Dr. Fuhrer returned to the family.⁵⁵ The Gallery's response asserted that Adele Bloch-Bauer had bequeathed the paintings to the Gallery, and that the Gallery had simply allowed Ferdinand to possess the works during his lifetime.⁵⁶ Later in 1948, the family's lawyer went outside the scope of his authority and attempted to represent the family without permission in a series of transactions.⁵⁷ These transactions eventually led to the lawyer signing a document on behalf of the family conceding that Ferdinand had wished to follow his wife's request to donate the Klimts to the Gallery.⁵⁸

Then in 1998, a journalist investigating the Gallery's files made an important discovery: documents which revealed that at all times Gallery officials knew that neither Adele nor Ferdinand Bloch-Bauer had actually donated the Klimts to the Gallery.⁵⁹ The journalist published a series of astonishing articles following his discovery.⁶⁰ One article described how the Gallery had represented that Klimt's first portrait of Adele was donated in 1936, when in fact the portrait had been donated in 1941.⁶¹ Shockingly, the journalist had uncovered a letter written by Dr. Fuhrer in which he donated the portrait, and included the words "Heil Hitler" at the close of the correspondence.⁶²

Despite the journalist's discovery, the family was confronted with numerous obstacles in securing the return of the now-famous Klimt paintings. Regardless of the uncovering of Dr. Fuhrer's letter, the National Gallery persisted in denying the return of the six Klimt paintings to Altmann.⁶³ At this point Altmann decided she would file suit in Austria to recover the six paintings.⁶⁴ She faced considerable hurdles in dealing with a foreign legal system.⁶⁵ In Austria, the court costs are assigned to the claimant filing suit, and are proportional to the monetary value of the recovery sought in the potential case; for Altmann's case this would have translated into millions of dollars.⁶⁶ She then sought and was granted a

⁵⁴ *Id.*

⁵⁵ *Altmann*, 541 U.S. at 683.

⁵⁶ *Id.*

⁵⁷ *Id.* at 683-84.

⁵⁸ *Id.* at 683.

⁵⁹ *Id.* at 684.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² Andrew J. Extract, *Establishing Jurisdiction Over Foreign Sovereign Powers: The Foreign Sovereign Immunity Act, The 'Act of State' Doctrine and the Impact of Republic of Austria v. Altmann*, 4 J. INT'L BUS. & L. 103, 107 (2005).

⁶³ *Id.* at 108.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

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waiver from the Austrian courts.⁶⁷ Even with this waiver, Altmann would have been required to pay approximately \$350,000.⁶⁸ Altmann decided to voluntarily dismiss her suit in the Austrian courts, and proceeded to file an action against the Republic of Austria in the United States District Court for the Central District of California.⁶⁹

Altmann claimed that the Nazis expropriated the six Klimt paintings from her family in violation of international law, and that the Republic of Austria fell under the court's jurisdiction due to an exemption from foreign sovereign immunity provided in the Foreign Sovereign Immunities Act (FSIA).⁷⁰ FSIA is an established principle of international law, and operated for over 200 years as a grant of absolute protection to foreign sovereigns and their agents from the jurisdictional range of the U.S. courts.⁷¹ In 1952, the U.S. adopted a more restrictive theory of sovereign immunity in regards to a number of nations and sovereign participation in commercial activities forms. However, judicial application of this post-1952 restrictive theory is muddled and confounded by contradictions.⁷²

In 1976, FSIA was ultimately amended to reflect the shift away from the grant of absolute immunity to foreign governments and towards a more moderate and regulated system of immunity and exemptions from immunity.⁷³ In addition to establishing exclusive statutory authority in determining the application of foreign sovereign immunity, the 1976 amendment to the FSIA also provides three exceptions to the general rule of immunity: 1) waiver of immunity by a foreign state; 2) actions arising out of a foreign sovereign's commercial activity; and 3) expropriation of property in violation of international law.⁷⁴ If any of these exceptions are met, a U.S. Federal District Court may obtain proper subject matter jurisdiction over a foreign sovereign, as was eventually the case for Altmann in attempting to reclaim the six Klimt paintings.⁷⁵

Despite the seemingly supportive exception to the 1976 FSIA, Altmann's case was far from over. After filing her claim in federal court, the Republic of Austria claimed that they were immune from U.S. jurisdiction on two bases: 1) they claimed that because most of the alleged wrongdoing took place in 1948, they would have benefited from absolute immunity in the U.S.; and 2) they were presently entitled to this immunity for their past acts.⁷⁶ The District Court sided with Altmann, holding that the 1976 FSIA applied retroactively, and further that the expropriation exception applied to Altmann's claim.⁷⁷ Austria appealed the deci-

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Altmann*, 541 U.S. at 685.

⁷⁰ *Id.* at 680-81.

⁷¹ Gupta, *supra* note 28, at 377.

⁷² *Id.* at 379-80.

⁷³ *Id.* at 377.

⁷⁴ *Id.* at 381.

⁷⁵ *Id.*

⁷⁶ *Altmann*, 541 U.S. at 686.

⁷⁷ *Id.*

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sion, and the Ninth Circuit Court of Appeals affirmed and remanded the District Court's decision.⁷⁸ A petition for rehearing was subsequently filed and denied by the Court of Appeals, and eventually certiorari to the United States Supreme Court was granted.⁷⁹ On June 7, 2004, the Supreme Court finally provided relief for Altmann by holding in a six to three decision that, "FSIA applies to conduct occurring prior to its enactment (1976), and prior to the United States' adoption of the restrictive theory of sovereign immunity (1952)."⁸⁰ At long last, Altmann was able to regain what rightfully belonged to her family, undergoing decades of turbulent legal disputes, numerous trips across the Atlantic Ocean, and an appearance before the Supreme Court.⁸¹ In 2006, Altmann sold Klimt's first portrait of her aunt Adele Bloch-Bauer to cosmetics heir Ronald Lauder for \$135 million.⁸²

Although Altmann's case is obviously important to her and the memory of her ancestors, it is significant in a larger sense in that it clarified an important piece of legislation applicable to every player on an international stage. In the wake of the Supreme Court's decision it is possible that other families who lost valuables at the hands of the Third Reich may be able to revive legal claims that seemed to have disappeared along with their family heirlooms.

Schiele's "Portrait of Wally" and Picasso's "Femme en Blanc": Result-Oriented Government Intervention Provides Justice

It is 1938, and Egon Schiele's "Portrait of Wally" (Wally) hangs in the apartment of Lea Bondi, a Jewish art dealer, in Vienna, Austria.⁸³ In that same year Germany would annex Austria, and put into effect "Aryanization" laws that would effectively mandate the transfer of property belonging to Jewish citizens to Aryan people.⁸⁴ Under this policy, Aryans could coerce Jews into the sale of their possessions for artificially low prices, and the Jewish victims could do nothing to halt the sales.⁸⁵ A German named Friedrich Welz, a self-proclaimed Aryan, would come to personally benefit from the country's new policies, as he would eventually procure the "purchase" of many pieces of fine art under the process of Aryanization.⁸⁶

In 1938, Bondi and her husband were preparing to flee the country when Welz came to her apartment to discuss the transfer of her gallery to his growing collection.⁸⁷ During discussions he noticed Wally hanging on her wall, and demanded

⁷⁸ Gupta, *supra* note 28, at 376.

⁷⁹ *Id.* at 376-77.

⁸⁰ Gupta, *supra* note 28, at 377.

⁸¹ *Id.*

⁸² Frankel, *supra* note 40.

⁸³ Spiegler, *supra* note 5, at 306.

⁸⁴ Susan E. Brabenec, *The Art of Determining "Stolen Property": United States v. Portrait of Wally, A Painting By Egon Schiele*, 105 *F. Supp. 2D* 288 (S.D.N.Y. 2000), 69 *U.CIN. L. REV.* 1369, 1386 (2001).

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ Spiegler, *supra* note 5, at 306.

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that she give him the painting, a piece from her private collection.⁸⁸ Welz likely noticed the painting because he was already familiar with Schiele's work; he had recently secured the transfer of the collection of another Viennese art patron, Dr. Heinrich Rieger, which contained a number of Schiele's pieces.⁸⁹ Bondi subsequently surrendered the Schiele painting to Welz for no compensation, frightened of the consequences that might ensue should she refuse his demand.⁹⁰ Bondi soon fled the country for England, and eventually Welz transferred the painting to his gallery in Salzburg.⁹¹

At the conclusion of World War II, the Allied forces occupying Austria attempted to organize the pieces of art and other cultural artifacts that had been confiscated by the Nazis and their cohorts in order to eventually return these pieces to their original owners.⁹² Around this time, Welz was arrested for suspicion of war crimes, and the large art collection he had amassed was turned over to the U.S. forces for sorting.⁹³ Wally was mistakenly mixed in with the collection that had belonged to Rieger, which Rieger had bequeathed to his son and his granddaughter upon his death.⁹⁴

In 1948, Rieger's heirs were given ownership of his collection, and agreed to sell part of the collection, including Wally, to the Austrian National Gallery in Vienna.⁹⁵ In the meantime, the U.S. forces responsible for mistakenly including Wally in Rieger's collection, alerted the Austrian authorities of the error.⁹⁶ Regardless of this recognition, the Gallery insisted on taking the piece for itself, and Wally became part of its collection.⁹⁷ In the years that followed, Bondi learned of the location of her prized Wally from Dr. Rudolf Leopold, a Schiele collector who had come to her in London in an attempt to locate more of the artist's pieces.⁹⁸ Bondi asked Leopold if he would help her secure Wally's return from the Gallery, and went to the Gallery herself in 1953 to make her claim.⁹⁹

Although Leopold represented that he would help Bondi recover Wally from the Gallery,¹⁰⁰ in 1954 he acquired Wally for himself in a transaction involving a different Schiele from his private collection in exchange for Wally.¹⁰¹ Bondi

⁸⁸ Brabenec, *supra* note 84, at 1386.

⁸⁹ Spiegler, *supra* note 5, at 306 (Rieger was subsequently transferred to a concentration camp and died shortly after his arrival).

⁹⁰ Brabenec, *supra* note 84, at 1386.

⁹¹ *Id.*

⁹² Spiegler, *supra* note 5, at 306.

⁹³ Brabenec, *supra* note 84, at 1387.

⁹⁴ *Id.* (However it seems that the U.S. forces may have suspected this mistake at the time of its making).

⁹⁵ Spiegler, *supra* note 5, at 306.

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.* at 307.

¹⁰⁰ Wissbroecker, *supra* note 6, at 45.

¹⁰¹ Spiegler, *supra* note 5, at 307.

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learned of Leopold's acquisition in 1957, when she saw an exhibition catalogue in which Leopold had listed himself as Wally's owner.¹⁰² Bondi went to the exhibition and confronted Leopold, but to no avail.¹⁰³ Soon after, she hired Austrian lawyers to convince Leopold to return Wally to its rightful owner; however she never filed suit against Leopold.¹⁰⁴ Bondi's failure to bring any legal action against Leopold or any other individual or entity in an Austrian court was primarily due to her distrust of the Austrian government.¹⁰⁵ Historical records of post-War recovery efforts by Jews in Austria support Bondi's belief that any legal attempt by a Jew in Austrian courts would be futile.¹⁰⁶ Bondi even suspected that her own lawyers had attempted to delay taking appropriate action, and that all persons involved in the potential action were siding with Leopold.¹⁰⁷

Bondi died in 1969 without ever recovering Wally.¹⁰⁸ However, the fight for her beloved painting did not die with her.¹⁰⁹ In 1994 Leopold sold Wally, and the entirety of his art collection, to the newly formed Leopold Museum in Austria, at which he had been named "Director for Life."¹¹⁰ Then in 1997, the Leopold Museum loaned its collection of Schieles, including Wally, to the Museum of Modern Art (MoMA) in New York.¹¹¹ When Bondi's heirs learned of the location of Wally they insisted that MoMA hold the painting while the heirs' ownership claim to the painting was resolved.¹¹² The museum refused, citing its contractual obligations with the Leopold Museum for the safe and timely return of Wally at the end of the agreed-upon exhibition period.¹¹³

In 1998, the New York District Attorney's office learned of the controversy surrounding Wally, and issued a subpoena for the painting.¹¹⁴ The subpoena was related to an investigation the District Attorney's office had commenced to assess whether Wally was stolen property brought into New York in violation of the common law doctrine of stolen property.¹¹⁵ Lengthy litigation concerning the validity of the subpoena under New York's anti-seizure laws followed, with a decision finally being elicited from the New York Court of Appeals.¹¹⁶ The de-

¹⁰² Wissbroecker, *supra* note 6, at 45.

¹⁰³ *Id.*

¹⁰⁴ Spiegler, *supra* note 5, at 307.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ Wissbroecker, *supra* note 6, at 45.

¹⁰⁹ *Id.*

¹¹⁰ Spiegler, *supra* note 5, at 307.

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ Wissbroecker, *supra* note 6, at 47.

¹¹⁵ Spiegler, *supra* note 5, at 307.

¹¹⁶ *Id.*

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cision held that the subpoena was to be quashed, and that Wally could be returned to the Leopold Museum in Austria.¹¹⁷

It seemed as if Wally would slip through the fingers of Bondi's heirs, but then within hours of the court's decision the United States Customs Service ("Customs") and the National Stolen Property Act ("NSPA") saved the day. Customs was able to obtain a seizure warrant for Wally on the grounds that it constituted "stolen property knowingly imported into the United States in violation of the NSPA."¹¹⁸ Immediately afterwards the U.S. government filed a civil forfeiture action in federal court to have Wally permanently removed from the Leopold Museum, and Bondi's heirs, as well as the Leopold Museum and others, claimed ownership of the painting in that action.¹¹⁹

This case is currently ongoing in the Southern District of New York, and has survived numerous jurisdictional, summary judgment, and dismissal motions by the parties. Wally is currently in New York, in the custody of MoMA, and it will stay there until a final decision is rendered as to whether Wally was in fact stolen from Bondi some sixty years ago and whether her heirs are entitled to ownership of the painting.¹²⁰ Until then, questions and criticisms remain regarding the actions of the parties involved, including the U.S. government's decision to intervene and MoMA's seemingly uncooperative stance in assisting claimants in the recovery of Holocaust assets.¹²¹ Similarly, questions remain as to how the Austrian government's recent opposition to Holocaust recovery efforts can be reconciled with the affirmative steps it has taken in the past to secure the return of Nazi-looted artworks to their rightful owners.¹²²

Interestingly, the NSPA and government interaction played a part in the resolution of another high-profile Holocaust art reclamation case, and led to a much different result.¹²³ Carlota Landsberg owned Picasso's "Femme en Blanc" prior to World War II, and entrusted it to a reputable art dealer in Paris, Justin Thannhauser.¹²⁴ The Nazis invaded France in 1940 and subsequently the painting seemed to have vanished at the hands of the Nazis.¹²⁵ By 1975, the painting had resurfaced and was purchased by Marilyn Alsdorf, an art collector in Chicago, Illinois.¹²⁶ In 2002, Alsdorf sent the piece to David Tunkl, an art dealer based out of Los Angeles, California, who eventually sent the painting to Switzerland

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 308.

¹¹⁹ *Id.*

¹²⁰ Wissbroecker, *supra* note 6, at 49.

¹²¹ *Id.* at 52.

¹²² *Id.*

¹²³ Graham Green, *Evaluating the Application of the National Stolen Property Act to Art Trafficking Cases*, 44 HARV. J. ON LEGIS. 251, 262 (2007).

¹²⁴ *United States of America v. One Oil Painting Entitled "Femme en Blanc" By Pablo Picasso*, 362 F. Supp. 2d 1175, 1178 (2005) [hereinafter *Picasso*].

¹²⁵ *Id.*

¹²⁶ Donald S. Burris & E. Randol Schoenberg, *Reflections of Litigating Holocaust Stolen Art Cases*, 38 VAND. J. TRANSNAT'L L. 1041, 1047 (2005).

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to be viewed by a potential buyer.¹²⁷ The prospective purchaser contacted the Art Loss Register (“ALR”) in London, which informed him that the Nazis had confiscated the piece during World War II.¹²⁸ The potential buyer then informed Alsdorf of the ALR’s findings.¹²⁹ Meanwhile, the ALR located Tom Bennigson, Landsberg’s sole heir, and informed him of the status and location of the painting.¹³⁰ Over the course of these discussions the painting was returned to Tunkl in Los Angeles.¹³¹

Alsdorf, fully aware of the painting’s legacy, instructed Tunkl to have the piece transported back from Los Angeles to Chicago.¹³² Bennigson quickly retained counsel, and was informed by Alsdorf’s attorney that the painting was to be sent to Alsdorf in Chicago immediately.¹³³ Bennigson immediately filed a complaint in California Superior Court to seek a temporary restraining order; however, hours before the hearing was to take place the painting was put on a plane and shipped back to Chicago.¹³⁴

In a strange turn of events, the District Judge presiding over the case in California found that the court lacked personal jurisdiction over Alsdorf, despite the fact that she had seemingly submitted to jurisdiction in California by instructing that the painting be sold by a California art dealer.¹³⁵ In 2004, the California Court of Appeals affirmed, and Bennigson petitioned the California Supreme Court for review, a petition that was eventually unanimously granted.¹³⁶ However, before the California Supreme Court had occasion to review the case, the U.S. Attorney’s Office intervened and charged Alsdorf under the NSPA.¹³⁷ The charge was premised upon the theory that she had knowingly transported art stolen by the Nazis between states, and thus was liable for civil forfeiture of the piece.¹³⁸ Not surprisingly, the parties began arduous settlement negotiations soon after.¹³⁹ The painting was valued at between eight million dollars and ten million dollars, and Alsdorf, citing her age and a desire to resolve her affairs, eventually agreed to pay Bennigson \$6.5 million for the painting.¹⁴⁰ In the end, Bennigson was able to recover sixty-five percent to eighty percent of the paint-

¹²⁷ *Picasso*, 362 F. Supp.2d at 1179.

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ Burris, *supra* note 126, at 1047.

¹³² *Picasso*, 362 F. Supp.2d at 1179.

¹³³ Burris, *supra* note 126, at 1047.

¹³⁴ *Id.*

¹³⁵ *Id.* at 1048.

¹³⁶ *Id.*

¹³⁷ Green, *supra* note 124, at 262.

¹³⁸ *Id.*

¹³⁹ Burris, *supra* note 126, at 1049.

¹⁴⁰ Kiesha Minyard, *Adding Tools to the Arsenal: Options for Restitution from the Intermediary Seller and Recovery for Good-Faith Possessors of Nazi-Looted Art*, 43 *TEX. INT’L L.J.* 115, 132 (2007).

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ing's value,¹⁴¹ and government intervention in the form of the NSPA was able to quickly accomplish what would have likely taken years to adjudicate in the courts.

The Seattle Art Museum and Matisse's "L'Odalisque": Relying on the Kindness of Strangers to "Do the Right Thing"¹⁴²

In 1997, the Seattle Art Museum ("SAM") made a shocking discovery: they had been displaying Nazi war booty for years in the form of a Matisse painting entitled "L'Odalisque."¹⁴³ As SAM came to discover, Paul Rosenberg, a French art collector whose collection had fallen prey to the Nazis during World War II, had originally owned L'Odalisque.¹⁴⁴

As mentioned in a previous section of this article, the Nazis kept meticulous records of the art they stole, photographing, describing, and inventorying their newly-acquired collection.¹⁴⁵ As luck or irony would have it, these records have become instrumental pieces of evidence for individuals seeking to recover Nazi-looted possessions.¹⁴⁶ Additionally, these records have facilitated researchers' efforts to compile and publish books and reports in recent years, like Hector Feliciano's *The Lost Museum*.¹⁴⁷ It was in this book that the Rosenberg heirs first learned that their family had owned the Matisse painting L'Odalisque, and that it had been subsequently lost to Nazi confiscation.¹⁴⁸

After making their discovery, the Rosenberg heirs determined the whereabouts of L'Odalisque and immediately filed suit against SAM in the U.S. District Court in Washington.¹⁴⁹ SAM then began the lengthy task of researching the provenance of the painting, and within months was able to confirm that the piece had indeed belonged to Rosenberg prior to the beginning of World War II.¹⁵⁰ SAM agreed to return the painting, citing its moral obligation to do so, and a desire to "do the right thing."¹⁵¹ However, as SAM would come to learn, no good deed goes unpunished, as the museum would eventually come to owe hundreds of thousands of dollars in legal fees.¹⁵²

¹⁴¹ *Id.*

¹⁴² Daniel Range, *Deaccessioning and its Costs in the Holocaust Art Context: The United States and Great Britain*, 39 *TEX. INT'L L.J.* 655, 655 (2004) (quoting the Seattle Art Museum, responding to why it returned a piece of stolen Holocaust art in its possession without legal intervention).

¹⁴³ Foster, *supra* note 22, at 144.

¹⁴⁴ *Id.* at 152.

¹⁴⁵ Feliciano, Pell & Goodman, *supra* note 11, at 168.

¹⁴⁶ *Id.*

¹⁴⁷ Spiegler, *supra* note 5, at 300.

¹⁴⁸ *Id.*

¹⁴⁹ Foster, *supra* note 22, at 152.

¹⁵⁰ Range, *supra* note 142, at 655.

¹⁵¹ *Id.*

¹⁵² *Id.*; SAM would eventually bring suit against Knoedler & Co., the gallery L'Odalisque had been purchased from in 1954, and recover all of the legal fees they incurred in defending themselves against the claim brought against them by the Rosenberg heirs to reclaim the title to L'Odalisque.

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SAM had come to possess L'Odalisque when the Bloedel family donated it to the museum in 1991.¹⁵³ The Bloedels had purchased the piece in 1954 from the reputable New York art gallery, Knoedler & Co., and believed they held the rightful title to it.¹⁵⁴ After SAM agreed to return the painting to Rosenberg's heirs, the museum filed suit in U.S. District Court against Knoedler for fraud, breach of implied warranty, and negligent misrepresentation.¹⁵⁵ SAM argued that it was entitled to bring suit against Knoedler because the Bloedels' legal rights regarding L'Odalisque had been transferred to SAM upon the donation of the painting.¹⁵⁶ Although the District Court for the Western District of Washington originally disagreed with SAM's claim and held that the museum did not have standing to bring suit against Knoedler, it eventually vacated the earlier ruling and reinstated SAM's case.¹⁵⁷ In its opinion the Court stated: "as a matter of equity, SAM should be permitted its day in court so that the case may be disposed of in its merits."¹⁵⁸ However, the merits of the case would never be judged; in October 2000 SAM and Knoedler settled out of court, agreeing that Knoedler would reimburse SAM for the legal fees and costs it had incurred in the pending case.¹⁵⁹ The agreement further stated that Knoedler would transfer to SAM one or more pieces of art from the Knoedler collection, to be selected by SAM, in order to reimburse SAM for the loss of L'Odalisque.¹⁶⁰

While the end of this story is noteworthy, the combination of the absence of a final ruling by the Court and the seemingly remarkable gesture of SAM's generous return of L'Odalisque to the Rosenberg heirs leaves some important unanswered questions. Most notably, the question remains whether a statute of limitations would have prevented the Rosenberg heirs from succeeding in their claim to L'Odalisque had SAM not agreed to return the painting without legal intervention.

While each state in the United States dictates its own statute of limitations periods for recovering stolen property, there is a general consensus that under the discovery rule a "plaintiff's case does not accrue, and thus the statute of limitations does not commence, until the plaintiff, using due diligence, knows or should know of the identity of the possessor [of the stolen property]."¹⁶¹ After the war, Paul Rosenberg had attempted to find the four hundred pieces that had comprised his collection before Nazi confiscation, traveling to numerous countries, hiring various attorneys and filing claims with international authorities.¹⁶²

¹⁵³ Foster, *supra* note 22, at 152.

¹⁵⁴ *Id.* at 143.

¹⁵⁵ *Id.* at 152.

¹⁵⁶ *Id.*

¹⁵⁷ *Rosenberg v. Seattle Art Museum*, 124 F. Supp.2d 1207, 1211 (W.D. Wash. 2000).

¹⁵⁸ *Id.* at 1210.

¹⁵⁹ Foster, *supra* note 22, at 153.

¹⁶⁰ *Id.*

¹⁶¹ *Id.* at 155 (quoting Symeon Symeonides, *On the Side of the Angels: Choice of Law and Stolen Cultural Property*, PRIVATE L. IN THE INT'L ARENA 750 (2000)).

¹⁶² *Id.* at 154-55.

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How did Rosenberg's activities affect the time of accrual of the cause of action? It is reasonable to assume that, while none of his efforts resulted in identifying the whereabouts of L'Odalisque, if the Rosenberg heirs had been required to argue their case in court, Paul Rosenberg's actions in attempting to recover his collection would have been found to be as diligent as could be expected under the circumstances.¹⁶³ As such, his actions would probably have been held sufficient to toll the statute of limitations, and the Rosenberg heirs' legal claim to L'Odalisque would likely have succeeded. Their story may provide Holocaust heirs with some hope that an old claim may not necessarily be a fruitless claim.

Conclusion and Proposed Solutions

As the old saying goes, rules are made to be broken — and if they cannot be broken, sometimes they can be bent. Such is the present state of the law surrounding an individual's claims to art confiscated during the Holocaust, which is highly influenced by an overwhelming urge to right past wrongs by returning stolen property to its rightful owner. Interestingly, the demands of conscience and concepts of equity are largely at play in claims of this nature, in that “public policy allows discretionary application of equitable defenses when the ‘wrong result’ might occur. For instance, the doctrine of estoppel is flexible in application, turning largely on the circumstances involved in the total situation, turning perhaps on the relative innocence or culpability of the plaintiff and the defendant, for the law may aid one who is comparatively the more innocent.”¹⁶⁴

Perhaps certain issues are so socially important as to go beyond strict application of the rules; how else can one resolve the mainly plaintiff-oriented holdings in cases of this nature? Courts implicitly recognize the necessity of making a social statement in regard to those victimized during the Holocaust by crafting their holdings to achieve desirable social policy results. This judicial activism can be observed in the Supreme Court's holding that retroactively applied the Foreign Sovereign Immunity Act to Holocaust era art claims in *Republic of Austria v. Maria V. Altmann*, 541 U.S. 677 (2004). Similarly, humane government action has played an important role in cases of this nature, sometimes supplying justice when all judicial avenues had been exhausted. While the battle over Egon Schiele's “Portrait of Wally” rages on in the Southern District of New York, government intervention in the form of a civil forfeiture action under the National Stolen Property Act seems to have played a large part in Alsdorf's decision to settle her case in *United States of America v. One Oil Painting Entitled “Femme en Blanc” By Pablo Picasso*, 362 F. Supp.2d 1175, 1178 (2005). Lastly, and perhaps most remarkably, it seems impossible to deny this phenomenon when one looks to the circumstances surrounding Matisse's “L'Odalisque.” Not only did the Seattle Art Museum return the painting to the heirs of its pre-Holocaust owner without legal compulsion; in addition, the gallery it sued to recover its losses chose to settle with minimal complications.

¹⁶³ *Id.* at 155.

¹⁶⁴ Foster, *supra* note 22, at 157 (quoting from *O'Keefe v. Snyder*, 416 A.2d 862, 869 (1980)).

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It seems undeniable that the principles of equity, the demands of conscience, and a desire to serve the greater good, are important factors in Holocaust-era legal disputes. If property ownership rights are indeed the cornerstone of civilized societal values,¹⁶⁵ then “in returning a stolen painting to a family that lost it as helpless victims of wartime looting, [the person returning the painting] respects property ownership rights and supports the values that underscore civility, thus benefiting society overall.”¹⁶⁶ Holocaust survivors and heirs wishing to assert legal claims to stolen family heirlooms can take heart in recent developments in this area of the law, for it seems judges, state and national governments, and individuals and entities alike all want the same result: to do the right thing for Holocaust survivors and their heirs.

¹⁶⁵ Foster, *supra* note 22, at 147.

¹⁶⁶ *Id.* at 148 (quoting HECTOR FELICIANO, *THE LOST MUSEUM* 189 (1st ed. 1997)).