

**CASE NOTE: HOW *REPUBLIC OF AUSTRIA V. ALTMANN*
AND *UNITED STATES V. PORTRAIT OF WALLY* RELAY THE
PAST AND FORECAST THE FUTURE OF NAZI LOOTED-
ART RESTITUTION LITIGATION**

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“There may be times when we are powerless to prevent
injustice, but there must never be a time when we fail to
protest.”¹

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1. Elie Wiesel, Nobel Lecture (Dec. 11, 1986), *available at* http://nobelprize.org/nobel_prizes/peace/laureates/1986/wiesel-lecture.html. Elie Wiesel is a Holocaust survivor, writer, and political activist who received the Nobel Peace Prize in 1986. Born in 1928 in what is now Romania, the Nazis deported Wiesel and his family to the German concentration camps, where his parents and one sister perished. Following his liberation, Wiesel published *Night*, a memoir of his experiences as a prisoner in several camps. He has since authored numerous

I. INTRODUCTION

In 2006, Christie's auction house in London sold five paintings by the Viennese artist Gustav Klimt for a total of \$327 million.² News of this extraordinary sale not only reverberated throughout the world's art market, but also affected a surprising group of individuals—American heirs of Holocaust victims.³ The 2006 auction represented the culmination of a six-year legal battle to recover the Klimt paintings, stolen by the Nazis from Maria Altmann's family during World War II.⁴ Two years earlier, in 2004, the United States Supreme Court decided *Republic of Austria v. Altmann*,⁵ a landmark case in Nazi looted-art litigation, a subset of Holocaust reparations litigation.

Altmann forecasts future successes for Holocaust victims' heirs who are either currently bringing similar looted-art claims, or plan to do so in the future. However, *Altmann* raises a multitude of complex legal, moral, and social issues that significantly affect American and international law and international relations. Current and future claimants must be cognizant of these issues as their personal claims to numerous pieces of the world's most famous art enter the American court system.⁶

In particular, claimants should turn to the two milestone cases of looted-art litigation as guideposts for bringing such claims: *Republic of Austria v. Altmann* and *United States v. Portrait of Wally, A*

books and lectured internationally regarding the situation of the Jews and other groups around the world persecuted due to their religion, race, or national origin. *Elie Wiesel – Biography*, LES PRIX NOBEL/THE NOBEL PRIZES 1986 (Wilhelm Odelberg ed., 1987), available at http://nobelprize.org/nobel_prizes/peace/laureates/1986/wiesel-bio.html.

2. Souren Melikian, *How Christie's Kept Top Spot Over Sotheby's in 2006 Sales*, INT'L HERALD TRIB., Jan. 13, 2007, at 9.

3. *See id.*

4. Roberta Smith, *Sensualist With a Cause in Old Vienna*, N.Y. TIMES, Oct. 19, 2007, at E31.

5. 541 U.S. 677 (2004).

6. "Although an exact number is impossible to pinpoint, between one-fourth and one-third of Europe's artistic treasure trove was pillaged by the Nazis in an effort to realize Hitler's vision for Germany as the cultural center of Europe." David Wissbroecker, *Six Klimts, a Picasso, & a Schiele: Recent Litigation Attempts to Recover Nazi Stolen Art*, 14 DEPAUL-LCA J. ART & ENT. L. 39, 40 (2004). Further, it is estimated that the Nazis removed over three million art objects from occupied European countries. Lucy Dunn Schwallie, *Acts of Theft and Concealment: Arguments Against the Application of the Act of State Doctrine in Cases of Nazi-Looted Art*, 11 UCLA J. INT'L L. & FOREIGN AFF. 281, 282 (2006).

Painting by Egon Schiele.⁷ The *Portrait of Wally* litigation progressed through the New York courts prior to *Altmann's* 2004 ruling.⁸ Unlike Mrs. Altmann's multimillion-dollar recovery, however, Lea Bondi Jaray's heirs, the plaintiffs in *Portrait of Wally*, still seek possession of their family's painting by the famous Austrian painter, Egon Schiele. In this way, *Portrait of Wally* presents an interesting paradox: although recognized as the most famous and influential Nazi looted-art case, the litigation's full consequences are yet to be determined.⁹

This article views *Altmann* and *Portrait of Wally* in unison to gain perspective on the development of Nazi looted-art claims in America. When viewed together, *Altmann* and *Portrait of Wally* embody the current concerns and hopes of looted-art Holocaust reparations plaintiffs in the United States and internationally. This article will first introduce the Nazi regime's systematic looting of European art, which stole over three million artworks from museums and private collections, acquiring between one-fourth and one-third of Europe's vast artistic fortune.¹⁰ Second, this article will analyze how *Portrait of Wally* progressed through the New York court system, ultimately invoking government intervention, and reaching an impasse that may never be defeated.¹¹ The article will then analyze *Altmann's* progression through the California courts and its eventual success in the United States Supreme Court.¹²

The article next discusses the effects of *Altmann* and *Portrait of Wally* on both American and international law and the international art community, such as a heightened duty to research provenance and resolve ownership disputes.¹³ Lastly, this article asserts that as the lifespan of remaining generations of Holocaust survivors nears its end, pressing time constraints create urgency for current and future claims.¹⁴ While the time is ripe for Holocaust

7. United States v. *Portrait of Wally, A Painting by Egon Schiele*, No. 99 Civ. 9940(MBM), 2002 WL 553532 (S.D.N.Y. Apr. 12, 2002).

8. See *infra* Part III (discussing how *Portrait of Wally* progressed to New York's highest court).

9. MICHAEL J. BAZYLER, *HOLOCAUST JUSTICE: THE BATTLE FOR RESTITUTION IN AMERICA'S COURTS* 226 (2003).

10. See *infra* Part II.

11. See *infra* Part III.

12. See *infra* Part IV.

13. See *infra* Part V.

14. See *infra* Part VI.

restitution claims due to the confluence of past successful claims, academic and media attention, and cooperation from the international art community,¹⁵ this article concludes that without legislative action, a potential “restitution dilemma” may occur where claims lack the necessary factual basis to succeed.¹⁶

II. THE BASIS FOR NAZI LOOTED-ART LITIGATION: HITLER’S CULTURAL OBSESSION

Historically, Adolf Hitler is notorious for his systematic plan to exterminate European Jewry, best exhibited by the Nazi regime’s incredibly methodical plan known as the Final Solution.¹⁷ Not surprisingly, Hitler employed the same methodology in his conspiracy to establish Germany as the world’s dominant cultural center.¹⁸ As such, the Nazis confiscated artworks on a historically unmatched level.¹⁹

To achieve his “showpiece of Nazism,” Hitler first ordered the compilation of a comprehensive list of German art in foreign countries.²⁰ “The Kummel Report” claimed that the Nazis had title to any artwork ever connected to Germany—an undertaking indicative of Hitler’s belief that reclaiming German nationalism required German cultural supremacy.²¹ To house his new

15. See *infra* Part VI.

16. See *infra* Part VI.

17. Adolf Hitler named his plan to annihilate the Jewish people the “Final Solution” in which the Nazi regime persecuted European Jews in systematically planned stages. CHRISTOPHER R. BROWNING, *THE ORIGINS OF THE FINAL SOLUTION I* (2004). Approximately six million Jewish men, women, and children—two-thirds of the Jews living in Europe before World War II—perished under the Final Solution. MITCHELL BARD, *THE NUREMBERG TRIAL II* (2002).

18. See Sue Choi, *The Legal Landscape of the International Art Market After Republic of Austria v. Altmann*, 26 NW. J. INT’L L. & BUS. 167, 168 (2005) (discussing how Hitler “systematically acquired the most desirable art in Europe.”).

19. Benjamin E. Pollock, *Out of the Night and Fog: Permitting Litigation to Prompt an International Resolution to Nazi-Looted Art Claims*, 43 HOUS. L. REV. 193, 196 (2006) (citing HECTOR FELICIANO, *THE LOST MUSEUM: THE NAZI CONSPIRACY TO STEAL THE WORLD’S GREATEST WORKS OF ART* 23 (Tim Bent & Hector Feliciano trans., Basic Books 1997) (1995)).

20. FELICIANO, *supra* note 19, at 24–26 (discussing how art historian Otto Kummel produced the three-volume report for Hitler). The Kummel Report also included works of art in the West that Hitler intended to “recover” after he conquered Europe. Amy L. Click, *German Pillage and Russian Revenge, Stolen Dega’s Fifty Years Later—Whose Art Is It Anyway?*, 5 TULSA J. COMP. & INT’L L. 185, 188 n.17 (1997).

21. Pollock, *supra* note 19, at 196 n.18 (citing FELICIANO, *supra* note 19, at 24–25). See also Kirstin E. Petersen, *Cultural Apocalypse Now: The Loss of the Iraq Museum*

collection, Hitler chose his childhood home of Linz, Austria to build a museum exemplifying German cultural superiority as “one of the Reich’s crowning glories.”²²

Besides seeking art to venerate German artists and bolster Germany’s cultural preeminence, Hitler also sought “degenerate art” by non-German artists that depicted Jewish subjects, criticized Germany, or contradicted Nazi ideology.²³ Such art ended up either in private collections of numerous Nazi officials, or as war currency to obtain more German art.²⁴ In particular, Hitler targeted Vienna and Paris since both cities enjoyed widespread artistic and cultural sophistication, holding “lavish private collections” and housing “galleries of important modern art dealers.”²⁵ In fact, both claims for looted art from *Altmann* and *Portrait of Wally* involve art stolen from upper-class Austrian Jews who were actively involved in Vienna’s artistic culture and community.²⁶

Just as the Nazis were not simply murderers, but mass murderers, they were also not simply art thieves, but professional plunderers with highly trained art specialists under their command.²⁷ For example, the Nazis divided the artworks by

and a New Proposal for the Wartime Protection of Museums, 16 MINN. J. INT’L L. 163, 175 (2007).

22. Pollock, *supra* note 19, at 196 n.18 (citing FELICIANO, *supra* note 19, at 21).

23. Choi, *supra* note 18, at 168. Hitler viewed the subjects of works by modern artists such as Van Gogh, Chagall, and Picasso to be “exaggerated and revolutionary depictions of the human figure”, thus rendering them “as inferior as the Jews themselves.” *Id.* at 168–69 (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, 93–94 (1999)). Hitler also targeted artwork by Pissarro and Matisse as inferior, along with art displaying Dadaism, Futurism, and Cubism. *Id.* at 169 (citing Emily A. 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, 358 (2001)).

24. Pollock, *supra* note 19, at 196 (quoting Owen C. Pell, *The Potential for a Mediation/Arbitration Commission to Resolve Disputes Relating to Artworks Stolen or Looted During World War II*, 10 DEPAUL-LCA J. ART & ENT. L. & POL’Y 27, 35 (1999) and Wissbroecker, *supra* note 6, at 40–41).

25. Wissbroecker, *supra* note 6, at 42.

26. Maria Altmann claimed title to six paintings by Gustav Klimt and Lea Bondi Jaray claimed title to a *Portrait of Wally*, a painting by Egon Schiele. See *Republic of Austria v. Altmann*, 541 U.S. 677 (2004); see also *United States v. Portrait of Wally*, No. 99 Civ. 9940(MBM), 2002 WL 553532 (S.D.N.Y. Apr. 12, 2002).

27. Schlegelmilch, *supra* note 23, at 92 (citing Lynn H. Nicholas, *Introduction to THE SPOILS OF WAR: WORLD WAR II AND ITS AFTERMATH: THE LOSS, REAPPEARANCE, AND RECOVERY OF CULTURAL PROPERTY* 47, 39 (Elizabeth Simpson ed., 1997)). In

determining whether they would be transported to Germany, or sold, based on the “quality and desirability” of each piece.²⁸ In securing the art in various locations throughout Europe, this calculated looting actually preserved some of the world’s most celebrated artworks from becoming casualties of the War.²⁹ Ironically, this systematic approach included detailed documentation of the Nazis’ acquisitions, thus providing critical evidence for modern Nazi looted-art claimants.

Hitler’s obsession with art pervaded Nazi ideology. Between 1938 and 1945, the Nazi regime looted and confiscated an estimated three million artworks throughout occupied Europe.³⁰ In doing so, the Third Reich effectively looted between one-fourth and one-third of European art.³¹ In fact, under Hitler’s twelve-year reign, “as many works of art were displaced, transported, and stolen as during the entire Thirty Years War or all the Napoleonic Wars.”³² From a restitution perspective, a U.S. presidential commission on Holocaust assets estimates 100,000 Nazi-looted artworks are currently hidden or missing throughout the world.³³

The racial and cultural purity fundamental to Nazi ideology extended to Hitler’s plan to appropriate European art.³⁴ It was not enough merely to steal the art; rather, the Nazis’ exhausting and extensive processes intended to strip European Jews of their dignity

France alone, the Nazis had a sixty-person staff charged with commandeering trucks, transport trains, and valuable fuel allocations necessary to confiscate and loot art throughout France. FELICIANO, *supra* note 19, at 4.

28. Choi, *supra* note 18, at 168 (describing how the looted art was organized at one central repository in the Galerie Nationale du Jeu de Paume in Paris).

29. Schlegelmilch, *supra* note 23, at 92 (citing Nicholas, *supra* note 27, at 39).

30. Schwallie, *supra* note 6, at 282.

31. See Wissbroecker, *supra* note 6, at 40. Despite only a recent recognition of Holocaust restitution looted-art claims, in 1945, the Nuremberg War Crimes Tribunal named one of the indictments against Nazi officials as the extensive looting of Europe’s cultural property. FELICIANO, *supra* note 19, at 6.

32. FELICIANO, *supra* note 19, at 23.

33. See Kelly Crow, *The Bounty Hunters*, WALL ST. J., Mar. 23, 2007 (Weekend Journal), at W1. The mission of the Presidential Advisory Commission on Holocaust Assets in the U.S. is to “conduct a thorough study and develop a historical record of the collection and disposition of the assets of Holocaust victims that came into the possession or control of the Government of the United States.” Presidential Advisory Comm’n on Holocaust Assets in the U.S., “Mission Statement,” available at <http://www.pcha.gov/missionstatement.htm>. The Commission also “comprehensively review[s] research, carried out by others, into the collection and disposition of such assets that came into the possession or control of non-Federal entities.” *Id.*

34. Pollock, *supra* note 19, at 196.

and cultural lifestyles.³⁵ Thus, Nazi looted-art restitution claims represent more than the theft of a particular family's private collection—they instead symbolize the profound depths of the Nazis' crimes against humanity.³⁶ Restitution claims therefore carry a heavy burden to attempt to right an enormously unforgivable crime.³⁷

To establish Germany as the world's most civilized society, Hitler implemented an unprecedented, ruthless, and immoral scheme to steal all European art for German ownership. This illogicality pervades much of the Nazi regime's ideology as evidenced in the Nuremberg and Frankfurt Auschwitz trials.³⁸ On trial, Nazi officials steadfastly denied any wrongdoing.³⁹ Participating in such grave immorality, while simultaneously believing oneself to be moral and decent, "remains one of the most troubling unanswered and perhaps unanswerable questions of the Holocaust."⁴⁰ Holocaust restitution litigation, and looted-art claims in particular, specifically confront these and other complex issues inherent within such a problematic historical era.

35. See *id.* at 196–97 (discussing how the Nazi regime subjected European Jews to laws that confiscated their personal collections and how "eradicating an entire people and their cultural heritage went hand in hand.").

36. See *id.* at 197 (quoting Eric Gibson, *De Gustibus: The Delicate Art of Deciding Whose Art It Is*, WALL ST. J., July 16, 1999, at W11).

37. See *id.* (discussing how stolen artworks symbolize a "terrible crime," recovery of which is an "equally symbolic form of justice").

38. United States Holocaust Memorial Museum, Collections Highlight: Auschwitz Through the Lens of the SS, <http://www.ushmm.org/wlc/article.php?lang=en&ModuleId=10007437> (last visited Feb. 20, 2008) [hereinafter *Through the Lens*]. The Nuremberg Trials were held in Nuremberg, Germany from 1945 to 1949 and constitute the series of trials most notable for prosecuting prominent Nazi officials. See BARD, *supra* note 17. The Frankfurt Auschwitz Trials lasted from December 20, 1963 to August 10, 1965 and charged twenty-two former officials of the Auschwitz-Birkenau concentration camp. See DEVIN O. PENDAS, THE FRANKFURT AUSCHWITZ TRIAL, 1963–1965 1–2 (2006).

39. *Through the Lens*, *supra* note 38. For example, Rudolf Hoss, Auschwitz's chief commander, consistently maintained that he was a moral and decent person. *Id.* Hitler himself also referenced the scores of looted art in his last will and testament claiming the paintings "were not for any personal gain" but to create the Linz museum, thus suggesting a benevolent purpose behind the Nazis' actions. FELICIANO, *supra* note 19, at 23.

40. *Through the Lens*, *supra* note 38.

III. THE *UNITED STATES V. PORTRAIT OF WALLY, A PAINTING BY EGON SCHIELE* LITIGATION

In October 1997, Vienna's Leopold Museum loaned 150 artworks by the renowned Austrian Expressionist, Egon Schiele, to New York's Museum of Modern Art (MoMA) as part of a three-year international tour.⁴¹ Five days before the exhibition's January 1998 close, the heirs of two Holocaust victims formally informed the MoMA that two of the exhibit's paintings were stolen by the Nazis from Austrian Jews during the Nazi invasion of Austria.⁴² One letter identified the true owner of *Portrait of Wally* as Lea Bondi Jaray, a Jewish Austrian art dealer who fled to London in 1938 to avoid Nazi persecution.⁴³ A second letter asserted title to *Dead City III*, once belonging to Fritz Grunbaum, an Austrian Jewish comedian who perished in the Dachau concentration camp in 1941.⁴⁴ Both letters indicated that neither the Bondi nor Grunbaum heirs ever consented to the sale or transfer of the paintings and asserted the heirs as the paintings' lawful owners.⁴⁵ The heirs requested the MoMA not move or transfer the paintings, pending determination of their true ownership.⁴⁶

In letters to each party, the MoMA conveyed sympathy regarding the heirs' ownership claims but asserted that a contractual obligation required that the museum return the paintings to the Leopold Museum.⁴⁷ As further legal support, the MoMA also cited statutory law specifically providing that works of

41. *In re Grand Jury Subpoena Duces Tecum Served on Museum of Modern Art*, 719 N.E.2d 897, 898 (N.Y. 1999). See also BAZYLER, *supra* note 9, at 226. The exhibition was entitled "Egon Schiele: The Leopold Collection, Vienna" and ran from October 12, 1997, to January 4, 1998. Ronen Sarraf, Note, *The Value of Borrowed Art*, 25 BROOK. J. INT'L L. 729, 744 (1999). Egon Schiele was an Austrian Expressionist artist who achieved an independent anticlassical style. See JANE KALLIR, *EGON SCHIELE: LIFE AND WORKS* 7-11 (2003). Interestingly, Schiele was a protégé of Gustav Klimt, the artist whose paintings are at issue in *Republic of Austria v. Altmann*, 541 U.S. 677 (2004). CHRISTIAN M. NEBEHAY, *GUSTAV KLIMT: FROM DRAWING TO PAINTING* 20 (1994).

42. *In re Grand Jury Subpoena*, 719 N.E.2d at 898. See also BAZYLER, *supra* note 9, at 227. The Nazi invasion of Austria, the Anschluss, occurred in March 1938 and established Austria as part of the German Reich.

43. *In re Grand Jury Subpoena*, 719 N.E.2d at 898. See also BAZYLER, *supra* note 9, at 227.

44. *In re Grand Jury Subpoena*, 719 N.E.2d at 899. See also BAZYLER, *supra* note 9, at 227.

45. *In re Grand Jury Subpoena*, 719 N.E.2d at 899.

46. *Id.*

47. *Id.*

art brought to New York for exhibition could not be seized or made subject to attachment.⁴⁸ A follow-up letter indicated that the MoMA intended to ship the paintings to Europe on January 8, 1998, for their next exhibition in Barcelona.⁴⁹

The heirs immediately contacted Robert Morgenthau, New York County's District Attorney, who quickly impaneled a state criminal grand jury.⁵⁰ To prevent the two paintings from leaving New York, the grand jury issued a subpoena duces tecum ordering the MoMA to appear as a witness and produce the paintings.⁵¹ However, New York County's Supreme Court granted the MoMA's motion to quash the subpoena under section 12.03 of the New York Arts and Cultural Affairs Law, which states:

No process of attachment, execution, sequestration, replevin, distress or any kind of seizure shall be served or levied upon any work of fine art while the same is enroute to or from, or while on exhibition or deposited by a nonresident exhibitor at any exhibition held under the auspices or supervision of any museum, college, university or other nonprofit art gallery⁵²

Under section 12.03, known as the antiseizure law, the court thus granted the paintings automatic immunity from seizure.⁵³ Specifically, the court held that the heirs could preserve their potential rights to the art, but could not use the MoMA's temporary

48. *Id.* The MoMA's letter also stated:

Art museums . . . depend on art loans from foreign institutions to organize exhibitions that make it possible for the public to see and appreciate art from all over the world. It is important for U.S. museums to offer foreign institutions the security of knowing that loan agreements will be honored.

Id.

49. *Id.*

50. BAZYLER, *supra* note 9, at 230. Morgenthau's grandmother's first cousin perished at the hands of the Nazis in Treblinka, one of Poland's concentration camps. Corey M. Baker, *Robert Morgenthau*, *Lifestyles Magazine*, available at http://www.lifestylesmagazine.com/website/past/stories/192/Lifestyle_092004_002.html.

51. BAZYLER, *supra* note 9, at 230. "The purpose of a subpoena duces tecum is . . . to direct a witness to appear and produce specified physical evidence." *In re Grand Jury Subpoena*, 719 N.E.2d at 908 (citing *Matter of Hynes v. Moskowitz*, 377 N.E.2d 446 (N.Y. 1978)). The MoMA did however send the Schiele exhibit, absent *Portrait of Wally* and *Dead City III*, to Barcelona's Picasso Museum once Spanish authorities assured the Leopold Foundation they would not seize the artworks. Sarraf, *supra* note 41, at 748.

52. N.Y. Arts & Cult. Aff. Law § 12.03 (McKinney 1984 & Supp. 2008).

53. *In re Grand Jury Subpoena*, 719 N.E.2d at 899.

exhibition to avoid pursuing their claims in Vienna, where the art originated.⁵⁴

Much controversy surrounded the next stage of the Schiele litigation. When the case reached New York's Supreme Court's Appellate Division, thirteen New York museums filed amicus briefs arguing against the subpoena.⁵⁵ They argued that requiring the MoMA to retain the paintings would drastically affect international museum relations since museums would hesitate to loan art to American museums for fear of seizure or litigation.⁵⁶ Declining art loans would consequently threaten New York's cultural prominence.⁵⁷ Ironically, the Jewish Museum was one of those thirteen that asked the court to rule against the heirs' demand.⁵⁸

Despite the museums' pleas, the New York Supreme Court's Appellate Division reversed the decision.⁵⁹ The court concurred with Morgenthau's argument that section 12.03 applied only to civil proceedings. The court of appeals held that the legislature intended section 12.03 "to protect works of fine art from being seized by local creditors in a *civil* proceeding."⁶⁰ Thus, 12.03 did not prohibit New York criminal authorities from "holding" alleged stolen artwork until they determined the artwork's official status.⁶¹ This reading of the law justified Morgenthau's criminal investigation into the stolen Schiele paintings at the time of the court's ruling, thereby requiring that the paintings remain in New York, and sanctioning Morgenthau's subpoena for the MoMA to

54. *In re Application to Quash Grand Jury Subpoena Duces Tecum Served on Museum of Modern Art*, 677 N.Y.S.2d 872, 880 (N.Y. Sup. Ct. 1998), *rev'd*, 253 A.D.2d 211 (N.Y. App. Div. 1999), *rev'd*, 719 N.E.2d 897 (N.Y. 1999). The statute's purpose is to "provide the broadest possible protection for out-of-state art work on loan to New York cultural institutions." N.Y. Arts & Cult. Aff. Law § 12.03 note (McKinney 1984 & Supp. 2008) (Purpose) (citing *In re Application to Quash*, 253 A.D.2d 211).

55. Laura Popp, *Arresting Art Loan Seizures*, 24 COLUM.-VLA J.L. & ARTS 213, 226 (2001).

56. *Id.* See also BAZYLER, *supra* note 9, at 231.

57. Popp, *supra* note 55, at 226. Due to the controversy surrounding the Schiele paintings, the MoMA pulled other loaned works from exhibitions. *Id.* Further, art institutions are cited as "unlikely to volunteer that they withheld artworks [for fear of] a possible cloud on title." *Id.*

58. BAZYLER, *supra* note 9, at 231.

59. *In re Application to Quash*, 253 A.D.2d at 218. See also BAZYLER, *supra* note 9, at 231.

60. *In re Application to Quash*, 253 A.D.2d at 217 (emphasis added).

61. See N.Y. Arts & Cult. Aff. Law § 12.03 (McKinney 1984 & Supp. 2008).

produce the paintings before a grand jury.⁶² Further, since the subpoena did not constitute a “seizure,” it did not violate section 12.03’s prohibition against “seizure . . . upon any work of art.”⁶³

The MoMA appealed, and the New York Court of Appeals, New York’s highest court, reversed the appellate court and upheld the trial judge’s decision.⁶⁴ The court held that on a “facial reading,” the antiseizure law is “not limited to civil processes,” thereby allowing section 12.03 to cover criminal seizures.⁶⁵ According to the court, the grand jury’s criminal subpoena requiring that the paintings indefinitely remain in New York significantly interfered with the Leopold Foundation’s possessory interests in the Schiele paintings.⁶⁶ Thus, the subpoena constituted seizure in violation of New York’s antiseizure law.⁶⁷

Only a few hours after the court of appeals ruled in favor of the MoMA, James B. Comey, the U.S. Attorney for the Southern District of New York, obtained a warrant to seize *Portrait of Wally* while simultaneously seeking civil forfeiture of the painting from the Leopold Foundation.⁶⁸ The government sought forfeiture under three federal laws that: (1) prohibit smuggling goods into the United States;⁶⁹ (2) prohibit illegal exportation of war materials;⁷⁰ and (3) permit seizure of stolen property.⁷¹ The

62. *In re Application to Quash*, 253 A.D.2d at 231. *See also* BAZYLER, *supra* note 9, at 231.

63. *In re Application to Quash*, 253 A.D.2d at 218. *See also* BAZYLER, *supra* note 9, at 231.

64. *In re Grand Jury Subpoena Duces Tecum Served on Museum of Modern Art*, 719 N.E.2d 897, 904 (N.Y. 1999); *see also* BAZYLER, *supra* note 9, at 231.

65. *In re Grand Jury Subpoena*, 719 N.E.2d at 900. *See also* BAZYLER, *supra* note 9, at 231–32.

66. *In re Grand Jury Subpoena*, 719 N.E.2d at 902. *See also* BAZYLER, *supra* note 9, at 232.

67. *In re Grand Jury Subpoena*, 719 N.E.2d at 902. *See also* BAZYLER, *supra* note 9, at 232.

68. *United States v. Portrait of Wally*, No. 99 Civ. 9940(MBM), 2002 WL 553532, at *4 (S.D.N.Y. Apr. 12, 2002). *See also* BAZYLER, *supra* note 9, at 232. Coincidentally, the case was assigned to the same judge handling the class action Holocaust insurance litigation at the time, Chief Judge Michael Mukasey. *Id.* at 233.

69. 18 U.S.C. § 545 (2000) (prohibiting importing merchandise contrary to law).

70. 22 U.S.C. § 401(a) (2000) (authorizing United States Customs to seize, detain, and order the forfeiture of articles in violation of licensing or approval requirements).

government not only alleged that the painting was imported into the United States in violation of the National Stolen Property Act, but also alleged it was about to be exported in further violation.⁷² At this time, the warrant did not cover *Dead City III* due to evidence that a Grunbaum heir received the painting after the war.⁷³ Thus, the MoMA immediately shipped *Dead City III* back to Vienna.⁷⁴ The U.S. Customs Service, however, took custody of *Portrait of Wally*, holding it in a Department of Homeland Security warehouse.⁷⁵

In July 2000, in *Portrait of Wally I*, the district court dismissed the action by ruling the painting ceased to be “stolen” once the U.S. military recovered it after World War II.⁷⁶ Next, in *Portrait of Wally II*, the court granted the government leave to file a Third Amended Complaint in December 2000 after U.S. Attorney Mary Jo White convinced Chief Judge Michael Mukasey to retract his final judgment and allow the heirs a final chance to persuade the court.⁷⁷ In April 2002, in *Portrait of Wally III*, Judge Mukasey reversed his previous dismissal and denied motions to dismiss the renewed action, thereby allowing the forfeiture action to proceed once again.⁷⁸ In his final ruling, he rescinded his prior ruling that *Portrait of Wally* was not stolen property under federal law.⁷⁹ In June 2005, the Leopold Museum moved for summary judgment.⁸⁰ The

71. 19 U.S.C. § 1595(a) (2000) (providing that stolen merchandise imported into the United States in violation of the law be seized and forfeited); *Portrait of Wally*, 2002 WL 553532, at *1.

72. *Portrait of Wally*, 2002 WL 553532, at *1 (applying 18 U.S.C. § 2314 (1994), which criminalizes transfer in interstate or foreign commerce of any goods, wares, merchandise, or money, worth \$5,000 or more, known to have been stolen).

73. Popp, *supra* note 55, at 222.

74. *Id.* See also BAZYLER, *supra* note 9, at 232. The Leopold Museum in Vienna, Austria currently exhibits *Dead City III*. See generally Leopold Museum Collection, Expressionism, <http://www.leopoldmuseum.org/english/html/expressionismus.php> (last visited Feb. 5, 2008).

75. BAZYLER, *supra* note 9, at 232.

76. United States v. *Portrait of Wally (Portrait of Wally I)*, 105 F. Supp. 2d 288, 294 (S.D.N.Y. 2000), *reargument denied*, United States v. *Portrait of Wally (Portrait of Wally II)*, No. 99 Civ. 9940(MBM), 2000 WL 1890403 (S.D.N.Y. Dec. 28, 2000).

77. *Portrait of Wally II*, 2000 WL 1890403, at *2; see also BAZYLER, *supra* note 9, at 234. After retracting his decision, Chief Judge Mukasey explained, “This is not an ordinary case. . . . There are more interests potentially at stake . . . than those of the immediate parties.” *Portrait of Wally II*, 2000 WL 1890403, at *1.

78. United States v. *Portrait of Wally (Portrait of Wally III)*, No. 99 Civ. 9940(MBM), 2002 WL 553532, at *31 (S.D.N.Y. Apr. 12, 2002).

79. *Id.* at *15. See also BAZYLER, *supra* note 9, at 234.

80. Stephen W. Clark, *World War II Restitution Cases*, SL077 A.L.I.-A.B.A. Continuing Legal Educ. 541, 550 (2006).

case remains undecided with *Portrait of Wally* sequestered in United States custody.⁸¹

The extensive proceedings of the Schiele litigation illustrate the complicated struggle inherent in Nazi looted-art litigation. Absent precedent regarding these types of highly individualized and unique cases, the court vacillated between advancing and delaying the litigation.⁸² This modus operandi unintentionally immobilized many who claim title to Nazi-stolen artworks, unable to reclaim their family heirlooms. But the litigation surrounding *Portrait of Wally* potentially laid the foundation for future Nazi looted-art claims. The zealous advocacy of those involved, such as District Attorney Robert Morgenthau and U.S. Attorney Mary Jo White, compelled the court to address the complex issues surrounding Nazi-stolen art claims. Ironically, *Portrait of Wally* established much-needed precedent despite its legal impasse. In doing so, the case laid significant groundwork in the looted-art restitution battle. In its footsteps, *Republic of Austria v. Altmann*⁸³ further defined that precedent, providing claimants a stronger basis to reclaim Nazi-stolen art successfully.

IV. THE *REPUBLIC OF AUSTRIA V. ALTMANN* DECISION: RECLAIMING GUSTAV KLIMT

In 1998, Maria Altmann approached attorney E. Randol Schoenberg, an old family friend, seeking help to reclaim her uncle's art collection seized during the Nazi invasion of Austria.⁸⁴ Unbeknownst to Altmann and Schoenberg, she would not only recover her uncle's famous paintings, but also give the United States Supreme Court an opportunity to significantly change both American and international law. As one of the most prominent

81. Popp, *supra* note 55, at 222.

82. MICHAEL J. BAZYLER & ROGER P. ALFORD, INTRODUCTION TO HOLOCAUST RESTITUTION: PERSPECTIVES ON THE LITIGATION AND ITS LEGACY 4 (Michael J. Bazylzer & Roger P. Alford eds., 2006) (discussing how Holocaust looted-art claims differ from other Holocaust restitution claims because the looted-art heirs are not suited for consolidated class action litigation in seeking return of specific artworks). Many of the present restitution cases present particular fact patterns because each claimant has a unique personal story regarding his or her family's stolen art. Schlegelmilch, *supra* note 23, at 93.

83. 541 U.S. 677 (2004).

84. E. RANDOL SCHOENBERG, *Whose Art Is It Anyway?*, in HOLOCAUST RESTITUTION: PERSPECTIVES ON THE LITIGATION AND ITS LEGACY 288 (Michael J. Bazylzer & Roger P. Alford eds., 2006) [hereinafter SCHOENBERG, *Whose Art?*].

Holocaust restitution cases to advance through the United States courts, *Altmann* continues to impact and define looted-art litigation under the Holocaust reparations litigation umbrella.⁸⁵

Maria Altmann was born in Vienna, Austria in 1916 to an affluent and prominent Viennese Jewish family.⁸⁶ Maria's uncle, Ferdinand Bloch-Bauer, was a successful businessman who earned his fortune in the sugar industry.⁸⁷ He and his wife Adele enjoyed spending time in their Viennese *palais* and at their castle outside Prague.⁸⁸ As members of the wealthy Viennese intellectual elite, Ferdinand and Adele were also dedicated art patrons who owned several dozen paintings by important Austrian artists and other fine artworks, including tapestries and a 400-piece collection of highly valuable Viennese classical porcelain.⁸⁹

In their widespread support of Austrian art and culture, the Bloch-Bauers favored and supported the painter Gustav Klimt.⁹⁰ Now regarded as one of the world's most renowned painters,

85. SCHOENBERG, *Whose Art?*, *supra* note 84, at 292.

86. *Altmann*, 541 U.S. at 681.

87. *Id.*

88. *See id.*; *see also* E. Randol Schoenberg, *Summary and Factual Background of Ferdinand Bloch-Bauer Klimt Case* (July 21, 2005), http://www.adele.at/Summary_July_2005/Summary.pdf [hereinafter Schoenberg, *Klimt Case Summary*]. Ferdinand and Adele Bloch-Bauer lived at Elisabethstrasse 18 on the fashionable Schillerplatz in Vienna. Schoenberg, *Klimt Case Summary*, *supra*, at 5. The Bloch-Bauers' castle, Schloss Jungfer, was seized by the Nazis and used by Reinhard Heydrich, a high-ranking official who worked closely with Adolf Hitler and Heinrich Himmler. *Id.* at 5 n.8. Heydrich is believed to be one of the Nazis who initiated the deportation of European Jews to extermination camps, also known as the Final Solution. BROWNING, *supra* note 17, at 399. Neither Ferdinand Bloch-Bauer nor his heirs ever recovered the castle or any of its property. Schoenberg, *Klimt Case Summary*, *supra*, at 5 n.8; Deposition of Maria Altmann, vol. I at 26:8–27:3, 50:2–51:2, vol. II at 227:3–228:21, *Altmann*, 541 U.S. 677 (2004) (No. 00-8913), *available at* http://www.adele.at/Deposition_Altmann1.pdf and http://www.adele.at/Deposition_Altmann2.pdf.

89. *Altmann*, 541 U.S. at 682. Other than the Gustav Klimt works, some of the paintings Ferdinand and Adele Bloch-Bauer owned were by prominent Austrian artists such as Ferdinand Georg Waldmuller (romantic painter), Rudolf von Alt (landscape and architectural painter), Emil Jakob Schindler (impressionist painter), August von Pettenkofen, Friedrich von Amerling (academic painter), Johann Matthias Ranftl, Eugen Jettel, Peter Fendi, Johann Michael Neder, and Josef Danhauser. Schoenberg, *Klimt Case Summary*, *supra* note 88, at 6.

90. PATTY GERSTENBLITH, ART, CULTURAL HERITAGE, AND THE LAW 532 (2004). Adele Bloch-Bauer is known for being one of Gustav Klimt's primary patrons. *Id.* (citing David Rapp, *The Story of Adele*, HA'ARETZ, Apr. 4, 2003, *available at* www.adele.at (click on "Press Clippings"; click on "Press Clippings Other Countries"; click on 2003 link; click second link in list)).

Gustav Klimt thrived during Europe's Belle Epoque.⁹¹ In this "Beautiful Era," Europe experienced peace between its major powers, the development of new technologies, and commercial arts adopting modern forms.⁹² Particularly in Vienna, there were extraordinary advancements in art, architecture, music, literature, and psychology.⁹³

During this progressive time, Ferdinand and Adele Bloch-Bauer associated closely with Klimt, and in 1904, Ferdinand commissioned Klimt to paint a portrait of his wife.⁹⁴ Klimt completed *Portrait of Adele Bloch-Bauer I* in 1907, and the painting hung in the Bloch-Bauers' Viennese home.⁹⁵ Klimt later painted *Adele Bloch-Bauer II* in 1912.⁹⁶ Together, Ferdinand and Adele Bloch-Bauer acquired seven of Klimt's paintings before Klimt's death in 1918: *Adele Bloch-Bauer I* (1907), *Adele Bloch-Bauer II* (1912), *Birch Wood* (1903), *Schloss Kammer on the Attersee III* (1910), *Apple Tree I* (1912), *Houses in Unterach* (1916), and *Portrait of Amalie Zuckerkandl* (1917–1918).⁹⁷

91. The Belle Epoque began during the late nineteenth century and lasted until World War I. Klimt is especially renowned for the work produced during his "Golden Era" such as one of his most famous works, *The Kiss*, which depicts a couple embracing while shrouded in gold against a plain background. NATHANIEL HARRIS, *THE LIFE AND WORKS OF GUSTAV KLIMT* 58 (2002). *The Kiss* was painted from 1907–08 and currently hangs in the Österreichische Galerie in Belvedere, Vienna. See Österreichische Galerie, <http://www.belvedere.at/jart/pj3/belvedere/main.jart?rel=en> (last visited Oct. 31, 2007).

92. See Gilles Neret, *Vienna Between Reality and Illusion*, <http://www.all-art.org/symbolism/klimt1.html> (last visited April 16, 2008).

93. GERSTENBLITH, *supra* note 90, at 532 (discussing Gustav Klimt's cultural surroundings in Vienna, Austria between World War I and World War II).

94. Schoenberg, *Klimt Case Summary*, *supra* note 88, at 6.

95. *Id.* In *Adele Bloch-Bauer I*, Adele only occupies a small portion of the painting while intricate golden patterns dominate the canvas, demonstrating Klimt's innovative experimental style. GERSTENBLITH, *supra* note 90, at 533 (citing Rapp, *supra* note 90).

96. This made Adele the only model Klimt ever painted twice. NEBEHAY, *supra* note 41, at 220. Adele personally requested this second portrait, seeking to look more like a Viennese society woman than a Byzantine princess in response to Klimt's evocative style that shrouded Adele in decorative gold. GERSTENBLITH, *supra* note 90, at 533 (citing Rapp, *supra* note 90).

97. NEBEHAY, *supra* note 41, at 220. Gustav Klimt died from a stroke in Vienna in 1918. *Id.* at 187. Egon Schiele published the following obituary for Klimt:

GUSTAV KLIMT
AN ARTIST OF UNBELIEVABLE PERFECTION
A HUMAN BEING OF RARE PROFUNDITY
HIS WORKS ARE SACRED

Id.

When Adele died suddenly of meningitis in 1925, she left Ferdinand as her sole heir.⁹⁸ Adele's will only "kindly requested" Ferdinand consider donating the two Klimt portraits of herself and the other Klimt paintings the couple owned to the Austrian Gallery after Ferdinand's death.⁹⁹ Although appearing facially insignificant, this detail from Adele's will significantly affected the success of Maria Altmann's case seventy-nine years later. Since Adele only "requested" donation, her will established Ferdinand as the true owner of the Klimt paintings, and not the Austrian Gallery.¹⁰⁰ In 1936, Ferdinand did convey one Klimt painting, *Schloss Kammer on the Attersee III*, to the Austrian Gallery.¹⁰¹

Prior to the Nazis' invasion of Austria in March 1938, Ferdinand fled the country to avoid persecution, leaving behind all his possessions, properties, business, and mass fortune.¹⁰² In addition to seizing the assets of Ferdinand's sugar company, the Nazis appropriated the Bloch-Bauers' home in Vienna and forced the liquidation of Ferdinand's artworks.¹⁰³ The Nazis then appointed attorney Dr. Erich Fuhrer, who distributed the remaining six Klimt paintings through a series of trades and sales during which the Austrian Gallery obtained *Adele Bloch-Bauer I*, *Adele Bloch-Bauer II*, and *Apple Tree I*.¹⁰⁴ The *Altmann* case identifies this disposition of Ferdinand's artworks as undertaken "without Ferdinand's consent, against his will and in violation of international law."¹⁰⁵

98. See *Republic of Austria v. Altmann*, 541 U.S. 677, 704 (2004).

99. *Id.* See also Geri J. Yonover, *The Last "Prisoners of War": Unrestituted Nazi-Looted Art*, 6 J. L. & SOC. CHALLENGES 81, 84–85 (2004).

100. *Altmann*, 541 U.S. at 704.

101. Choi, *supra* note 18, at 172.

102. *Altmann*, 541 U.S. at 682. Ferdinand fled not only because he was Jewish, but also because he had supported efforts to resist annexation and was sought after by the Nazis. *Id.*

103. Nazi and museum officials met in the Bloch-Bauers' *palais* to determine how to divide up Ferdinand's considerable art collection. Lisa Iadevaia, *Altmann v. Republic of Austria*, 13 DEPAUL-LCA J. ART & ENT. L. 481, 482 (2003). Some art went to Hitler himself, some was sold, and some went to Vienna's museums. First Amended Complaint Against the Republic of Austria and the Austrian Gallery at 11–12, *Altmann v. Republic of Austria*, 335 F. Supp. 2d 1066 (C.D. Cal. 2004) (No. CV 00-8913FMC). The Nazis also illegally taxed Ferdinand to render his business theirs, which Ferdinand's will referenced as "an illegal manner." *Id.* at 13.

104. *Altmann*, 541 U.S. at 682. A Nazi lawyer, Dr. Erich Fuhrer, took possession of the six Klimts. *Id.*

105. First Amended Complaint Against the Republic of Austria and the Austrian Gallery at 12, *Altmann*, 335 F. Supp. 2d 1066 (No. CV 00-8913FMC).

Ferdinand died in 1945 while living in exile in Zurich, Switzerland.¹⁰⁶ He left his entire estate to his two nieces, including Maria Altmann, and one nephew.¹⁰⁷ Not surprisingly, Ferdinand did not leave any paintings to the Austrian Gallery in his will.¹⁰⁸ Having fled persecution by the Nazis, Maria and her husband Fritz settled in Los Angeles in 1940.¹⁰⁹ Resuming Ferdinand's preliminary efforts to recover his paintings, the Altmann family began proceedings in 1947 to locate and retrieve the stolen artwork.¹¹⁰

A. *Initiation of Legal Proceedings*

Interestingly, the legal and procedural history of Maria Altmann's case mirrors her personal journey from religious intolerance in Europe to American liberation and redemption. Maria first filed suit in the Austrian courts because the Austrian National Gallery held the paintings at the time.¹¹¹ Unable to pay Austrian court filing fees, Maria's counsel sought a fee reduction and waiver of the statute of limitations, a second major procedural hurdle.¹¹² Due to the Austrian authorities' delay in responding to

106. *Id.* at 13–14.

107. Altmann was recognized as heir to 25% of Ferdinand's estate; her older brother Robert Bentley of Vancouver, Canada and sister Luise Gattin of Zagreb, Yugoslavia, were recognized as heirs of 25% and 50% of the estate, respectively. *Id.* at 16. The entire estate Ferdinand left consisted solely of restitution claims. SCHOENBERG, *Whose Art?*, *supra* note 84, at 290.

108. Considering the role that the Gallery played in the Nazis' looting, Ferdinand's family supported this result. SCHOENBERG, *Whose Art?*, *supra* note 84, at 290. Maria Altmann stated:

What love could my uncle have for Austria after they robbed him of everything. He had no intention of giving the Klimts to these people. . . . This art was dragged out of the house by people who murdered their friends. Would Adele want the things she treasured left [in Austria] after that?

BAZYLER, *supra* note 9, at 242.

109. Maria Altmann became an American citizen in 1945. *Altmann*, 541 U.S. at 681.

110. *Id.* at 683.

111. Donald S. Burris & E. Randol Schoenberg, *Reflections on Litigating Holocaust Stolen Art Cases*, 38 VAND. J. TRANSNAT'L L. 1041, 1045–47 (2005) (discussing the legal history behind Maria Altmann's case prior to the Supreme Court verdict in 2004).

112. Austrian law proportioned court filing fees to the amount in dispute, meaning Maria's filing fees would reach two million dollars, an estimate based on the paintings' values at the time of filing. *Id.* at 1045. In fact, Austrian authorities

Altmann's requests throughout this process, Maria filed suit in a United States district court based on her status as a California resident.¹¹³

The Republic of Austria (Austria) moved to dismiss Maria's allegations of international law violations in connection with the stolen art.¹¹⁴ Judge Florence-Marie Cooper denied Austria's motion to dismiss and held that (1) the Foreign Sovereign Immunities Act (FSIA)¹¹⁵ applied to events occurring before 1952;¹¹⁶ (2) Altmann established a substantial, non-frivolous claim under the FSIA expropriation exception to immunity that the taking of the paintings violated international law;¹¹⁷ and (3) no treaty between the United States and Austria barred the suit.¹¹⁸

Austria and the Gallery appealed, and the Ninth Circuit Court of Appeals affirmed the district court's judgment denying Austria's motion to dismiss, and remanded for further proceedings.¹¹⁹ Mirroring the district court, Circuit Judge Wardlaw held that (1) applying the FSIA to Altmann's suit was not impermissibly retroactive, and (2) the FSIA's expropriation exception applied.¹²⁰ The court asserted that due to its "complicity and perpetuation of the paintings' discriminatory expropriation," Austria could not

first agreed to reduce Maria's required fees, but then filed an appeal to raise them to the maximum level. *Id.*

113. *Id.* at 1046.

114. *See* *Altmann v. Republic of Austria*, 142 F. Supp. 2d 1187, 1197 (C.D. Cal. 2001).

115. 28 U.S.C. §§ 1602–1611 (2000 & Supp. 2005). The Foreign Sovereign Immunities Act (FSIA) immunizes foreign sovereigns and their instrumentalities from suit in United States courts unless the action falls under one of the statute's specific exceptions. *Id.* § 1602 note (Exclusiveness of Remedy) (citing *Reed v. Islamic Republic of Iran*, 439 F. Supp. 2d 53 (D.D.C. 2006)).

116. *Altmann*, 142 F. Supp. 2d at 1199.

117. *Id.* at 1202–03.

118. *Id.* at 1208. Additionally, the court held that (1) Altmann satisfied the FSIA's exhaustion requirement; (2) the Gallery was an agency or instrumentality of Austria; (3) the Gallery engaged in commercial activity in the United States; (4) Austria did not provide an adequate alternative forum for the suit; and (5) the Gallery was doing business in a judicial district. *Id.* at 1215. The District Court also granted Altmann fifteen days to amend and set forth the proper basis for venue. *Id.* at 1203, 1205, 1214–1215. The court had jurisdiction over the defendants through FSIA exceptions that applied to both pre-1952 and post-1952 acts. *Id.* at 1199–201.

119. *Altmann v. Republic of Austria*, 317 F.3d 954, 974 (9th Cir. 2002).

120. *Id.* The Ninth Circuit also held that (1) Austria and the Gallery had sufficient minimum contacts with the United States for personal jurisdiction; (2) the co-heirs were not necessary parties; (3) venue was proper; and (4) the *forum non conveniens* doctrine did not warrant dismissal. *Id.* at 970–73.

have expected immunity since such seizures explicitly violated Austria's obligations under the Hague Convention.¹²¹ The court also found that the Gallery engaged in commercial activity in the United States, thus establishing personal jurisdiction over the defendants.¹²²

The court of appeals then denied Austria's petition for rehearing and certiorari was granted.¹²³ In its landmark holding, the Supreme Court affirmed the denial of Austria's motion to dismiss based on sovereign immunity.¹²⁴ Turning toward its principle purpose, the Court recognized that sovereign immunity was never intended "to permit foreign states and their instrumentalities to shape their conduct in reliance on the promise of future immunity from suit in United States courts."¹²⁵ The Court further commented that sovereign immunity involved "political realities and relationships" rather than such reliance on existing immunity rules.¹²⁶ This analysis therefore warranted judicial deference to the congressional intent that the FSIA establish sovereign immunity, regardless of when the conduct occurred.¹²⁷ The Court thus held that the presumption against the retroactive application of statutes did not apply.¹²⁸ Justice Stevens, writing for the majority, reasoned that the FSIA applies to conduct that occurred *prior* to its enactment, and *before* the United States adopted the restrictive theory of sovereign immunity.¹²⁹ This

121. The Ninth Circuit used this explanation in holding that application of the FSIA to Altmann's suit was not impermissibly retroactive. *Id.* at 966–67. The United States, Austria, and Germany signed the Hague Convention (IV) on the Laws and Customs of War on Land into effect in 1907. International Humanitarian Law-State Parties/Signatories, <http://www.icrc.org/ihl.nsf/WebSign?ReadForm&id=195&ps=P> (last visited Feb. 9, 2008). The court of appeals in *Altmann* ruled that Austria violated its obligation under article 46, which forbids the confiscation of private property, and article 56, which forbids "[a]ll seizures of . . . works of art." Hague Convention (IV) on the Laws and Customs of War on Land art. 56, opened for signature Oct. 18, 1907, 36 Stat. 2277, 1 Bevans 631 (entered into force Jan. 26, 1910), *cited in Altmann*, 317 F.3d at 965. *See also* Schwallie, *supra* note 6, at 300.

122. The court used this explanation for why it held that the FSIA's expropriation exception applied. *Altmann*, 317 F.3d at 968–69. The defendants also conceded proper service. *Id.* at 969.

123. *See Altmann v. Republic of Austria*, 327 F.3d 1246, 1247 (9th Cir. 2003).

124. *See Republic of Austria v. Altmann*, 541 U.S. 677, 702 (2004).

125. *Id.* at 696.

126. *Id.*

127. *Id.* at 697–99.

128. *Id.*

129. *Id.*

landmark ruling therefore established that the FSIA did not prohibit Mrs. Altmann from pursuing a private cause of action in the United States against the Austrian government to return the stolen Klimt paintings.¹³⁰

Upon remand, the district court denied Austria's motion to dismiss and set a fall 2005 trial date.¹³¹ In May 2005, however, the parties agreed to submit the matter to binding arbitration in Austria, under Austrian law.¹³² In January 2006, an Austrian arbitration panel ruled that the Nazis improperly seized the paintings in 1938 during the Austrian occupation, and thus awarded the Klimt paintings to Ferdinand and Adele Bloch-Bauer's heirs.¹³³ In doing so, the Austrian panel validated Mrs. Altmann's claim by demanding Austria immediately return the paintings.¹³⁴

B. *Analysis of Altmann*

Despite the many underlying issues in *Altmann*, the Supreme Court predicated its decision on only one, requiring the trial court to decide the remaining issues.¹³⁵ Ironically, despite this strategic narrowing of its holding, the Court actually widened the legal and political debate regarding Holocaust victims' future efforts to seek relief against foreign governments.¹³⁶ From this opening emerged

130. See Anne-Marie Rhodes, *On Art, Theft, Tax, and Time: Triangulating Ownership Disputes Through the Tax Code*, 43 SAN DIEGO L. REV. 495, 508 n.58 (2006).

131. Choi, *supra* note 18, at 176.

132. *Id.* Under the agreement, the case will be dismissed and not subject to refiling, with the parties agreeing to accept the panel's decision as final, without any right of appeal. *Id.* See also Clark, *supra* note 80, at 559.

133. Patty Gerstenblith & Lucille Roussin, *International Cultural Property*, 41 INT'L LAW. 613, 616 (2007). The arbitration panel consisted of individuals chosen by the parties and included an Austrian lawyer and two Austrian professors. Clark, *supra* note 80, at 559.

134. Clark, *supra* note 80, at 559.

135. Republic of Austria v. Altmann, 541 U.S. 677, 700–02 (2004). The issues that the Court did not address in *Altmann* include: lack of personal jurisdiction over the Republic and the Gallery; the doctrine of *forum non conveniens*; failure to join indispensable parties; and improper venue in the Central District of California. *Id.*

136. *Id.* at 700. The Supreme Court itself acknowledges the narrowness of its holding and asserts that because the "FSIA in no way affects application of the act of state doctrine, our determination that the Act applies in this case in no way affects any argument petitioners may have that the doctrine shields their alleged wrongdoing." *Id.* at 701. See also BURT NEUBORNE, *A Tale of Two Cities: Administering the Holocaust Settlements in Brooklyn and Berlin*, in HOLOCAUST RESTITUTION: PERSPECTIVES ON THE LITIGATION AND ITS LEGACY 74–75 (Michael J. Bazylar & Roger P. Alford eds., 2006).

conflicting analyses: either the narrow *Altmann* holding detrimentally affected future reparations plaintiffs, or provided future victims and heirs expectations of success.

The argument that *Altmann* negatively impacts Holocaust reparations litigation views the narrow holding as a barrier for future efforts seeking relief from foreign governments.¹³⁷ This theory suggests the Supreme Court believed *Altmann's* holding would help Holocaust victims by applying the FSIA to *all* actions, even if the claim's underlying acts occurred prior to the FSIA's 1976 enactment.¹³⁸ Conversely, some individuals intimately involved in reparations litigation believe the holding's narrowness impaired all future Holocaust reparations claims in the United States from international success.¹³⁹

Not long after its holding, *Altmann* did adversely affect a Holocaust reparations case, raising a red flag for future success in American courts.¹⁴⁰ In *Abrams v. Société Nationale des Chemins de Fer Francais*,¹⁴¹ Holocaust survivors sued the French National Railroad for committing crimes against humanity by deporting French Jews to concentration camps during World War II. Contrary to *Altmann*, the *Abrams* plaintiffs had argued against retroactively applying the FSIA.¹⁴² In *Abrams*, the French government acquired the railroad in 1983 from civilians who owned it throughout the War.¹⁴³ The plaintiffs therefore argued against FSIA retroactivity since it would grant sovereign immunity, eliminating the French Government's liability.¹⁴⁴ In this way, *Altmann* actually entitled the now government-owned French railroad to immunity, despite the railroad's willing participation in deporting its Jewish citizens to

137. NEUBORNE, *supra* note 136, at 74–75.

138. *See Altmann*, 541 U.S. at 679; NEUBORNE, *supra* note 136, at 74–75.

139. NEUBORNE, *supra* note 136, at 74–75. For example, Burt Neuborne, lead counsel in the Swiss Bank Holocaust Reparations settlement, argues that *Altmann* “doomed virtually all other Holocaust Reparations efforts against foreign governments.” *Id.*

140. *See generally id.* at 75.

141. 389 F.3d 61 (2d Cir. 2004).

142. *See Abrams v. Société Nationale des Chemins de Fer Francais*, 175 F. Supp. 2d 423, 425 (E.D.N.Y. 2001), *vacated*, 332 F.3d 173 (2d Cir. 2003), *vacated*, 542 U.S. 901 (2004); *see also* Mark J. Chorazak, *Clarity and Confusion: Did Republic of Austria v. Altmann Revive State Department Suggestions of Foreign Sovereign Immunity?*, 55 DUKE L.J. 373, 395 (2005).

143. *Abrams*, 389 F.3d at 64–65. *See also* Pollock, *supra* note 19, at 212 n.159; Chorazak, *supra* note 142, at 395.

144. *Abrams*, 175 F. Supp. 2d at 426.

Nazi-run slave labor camps. Protected by sovereign immunity, the court dismissed the plaintiffs' complaint.¹⁴⁵

While *Abrams* followed soon after *Altmann*, later cases between 2004 and today reveal a more positive perspective on *Altmann*'s effect on reparations litigation.¹⁴⁶ This view establishes *Altmann* as a pivotal Holocaust reparations case, especially under the looted-art umbrella.¹⁴⁷ Having litigated all the way to the Supreme Court prior to arbitration, *Altmann* established the United States' civil litigation system as an acceptable platform for Nazi looted-art cases.¹⁴⁸ In this way, *Altmann* added brush strokes to a nearly empty canvas, the colors of which materialize in recent art restitution cases following the *Altmann* decision.¹⁴⁹

Such Nazi looted-art claims litigated in the United States and abroad have become increasingly common.¹⁵⁰ This rise likely corresponds with the declassification of World War II documents by governments world-wide, increased academic and media attention to Nazi looted-art restitution, and artworks that reemerged onto the art market, some unseen since World War II.¹⁵¹ Fortunately, these recent cases may utilize *Altmann* as compelling precedent to validate the Court's willingness to hold foreign governments accountable for the Nazis' illegal appropriation of artworks belonging to Jewish families. In fact, legal scholars have

145. *Abrams*, 389 F.3d at 64–65. Burt Neuborne argues that the Second Circuit dismissed *Abrams* reluctantly. NEUBORNE, *supra* note 136, at 75.

146. *See, e.g.*, *Malewicz v. City of Amsterdam*, 362 F. Supp. 2d 298, 306 (D.D.C. 2005).

147. *See Choi*, *supra* note 18, at 176.

148. Jennifer Anglim Kreder, *The Choice Between Civil and Criminal Remedies in Stolen Art Litigation*, 38 VAND. J. TRANSNAT'L L. 1199, 1204 (2005).

149. Choi, *supra* note 18, at 180.

150. *Id.* *See also* Alexandra Minkovich, *The Successful Use of Laches in World War II-Era Art Theft Disputes: It's Only a Matter of Time*, 27 COLUM. J.L. & ARTS 349, 349 (2004).

151. Choi, *supra* note 18, at 180–81. *See also* Minkovich, *supra* note 150, at 349. The Soviet Union, Switzerland, Germany, and France only recently declassified documents that address World War II art theft. *See* Minkovich, *supra* note 150, at 372. Various intelligence services including the United States National Archives released such declassified information and specifically provided details about the German pursuit of the European art market, such as names of dealers and artworks involved. Kelly Diane Walton, *Leave No Stone Unturned: The Search for Art Stolen by the Nazis and the Legal Rules Governing Restitution of Stolen Art*, 9 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 549, 564 (1999).

already recognized the *Altmann* decision as deeply resonant in emerging and subsequent cases.¹⁵²

For example, *Malewicz v. City of Amsterdam*¹⁵³ relies on the Court's FSIA interpretation asserted in *Altmann*.¹⁵⁴ *Malewicz* raised the issue of whether artworks on loan to American museums for exhibition can establish United States jurisdiction, despite immunity from seizure granted under a separate Act, the Federal Immunity from Seizure Act (IFSA).¹⁵⁵ Such a grant of jurisdiction would fall within the FSIA exception as seen in *Altmann*, and would allow an attempt to recover the artworks or their value in a United States court.¹⁵⁶

Malewicz's contested artworks were paintings allegedly belonging to heirs of the famed Russian painter, Kazimir Malewicz.¹⁵⁷ Malewicz's heirs sued the City of Amsterdam to recover fourteen of Malewicz's paintings (or their equivalent value) sent to the United States for exhibitions at two prominent American museums.¹⁵⁸ For the duration of the exhibitions, the State Department granted the paintings immunity from seizure under the Federal Immunity from Seizure Act (IFSA).¹⁵⁹ Malewicz's heirs objected to this grant of immunity, and filed suit while the

152. James A.R. Nafziger, *Panel: Protecting the Cultural Heritage in War and Peace*, 5 SANTA CLARA J. INT'L L. 486, 491 (2007).

153. 362 F. Supp. 2d 298. (D.D.C. 2005).

154. *Id.* at 306. See also Patty Gerstenblith & Bonnie Czeglédi, *International Cultural Property*, 40 INT'L LAW. 441, 446–47 (2006).

155. Federal Immunity from Seizure Act, 22 U.S.C. § 2459(a) (2000); *Malewicz*, 362 F. Supp. 2d at 312. See also Nafziger, *supra* note 152, at 491 (stating there is an exception to the protection that FSIA provides to foreign sovereigns).

156. Gerstenblith & Czeglédi, *supra* note 154, at 446.

157. *Malewicz*, 362 F. Supp. 2d at 301. Kazimir Malewicz was a world-renowned Russian artist prior to World War II. He was known for founding the Suprematist Art Movement, which greatly influenced abstract art. *Id.* In 1927, Malewicz brought more than one hundred of his artworks to Berlin for exhibition and upon returning to Russia, left the art in Germany for safekeeping. *Id.* Malewicz died in 1935. *Id.* Eventually, Amsterdam's Stedelijk Museum ended up with eighty-four of these paintings around 1956. Gerstenblith & Czeglédi, *supra* note 154, at 447.

158. Gerstenblith & Czeglédi, *supra* note 154, at 447. New York's Solomon R. Guggenheim Museum held the exhibition in 2003, followed by Houston's Menil Collection in early 2004. *Id.*

159. *Malewicz*, 362 F. Supp. 2d at 303. "It is generally agreed that, in the context of art loans, sovereign immunity is a narrow and precarious path to protection." Norman Palmer, *Adrift on a Sea of Troubles: Cross-Border Art Loans and the Specter of Ulterior Title*, 38 VAND. J. TRANSNAT'L L. 947, 966 (2005).

paintings were still located in the United States, alleging that Amsterdam wrongfully expropriated the paintings.¹⁶⁰

The U.S. District Court for the District of Columbia first found “no inconsistency between both providing immunity from seizure [under the IFSA] during the exhibition, and finding a basis for U.S. jurisdiction” under the FSIA exception.¹⁶¹ Jurisdiction existed as long as the defendant allegedly took the paintings in violation of international law, the artwork was present in the United States when the plaintiffs filed the complaint, and the foreign sovereign conducted commercial activity in the United States.¹⁶² Thus, the court established that the FSIA prevents seizure, but does not protect the art from a suit contesting ownership.¹⁶³ Subsequently, in March 2005, the court denied Amsterdam’s motion to dismiss due to an insufficient record that prevented the court from determining whether the FSIA’s expropriation exception applied.¹⁶⁴ The City appealed, submitted additional evidence to support its immunity argument, and renewed its motion to dismiss.¹⁶⁵

In June 2007, the court echoed the *Altmann* decision that methodically invalidated each of Austria’s attempted arguments.¹⁶⁶ The *Malewicz* court similarly eliminated each argument by

160. Gertenblith & Czegledi, *supra* note 154, at 447. The Malewicz heirs filed suit to recover the paintings exactly two days before the exhibit closed. Nafziger, *supra* note 152, at 491. “The Stedelijk Museum claimed either to have acquired the paintings [around 1958, or], through acquisitive prescription in 1993.” Gerstenblith & Czegledi, *supra* note 154, at 447. Arguing the court lacked jurisdiction over the claim, the City of Amsterdam filed a motion to dismiss. *Id.* The court dismissed the motion but directed the parties to meet and determine how to obtain additional information. *Id.*

161. Nafziger, *supra* note 152, at 491–92.

162. *Id.* “This was so even though when the defendant was served, the paintings had already been returned to Amsterdam.” *Id.* at 492. It is also important to note that when determining whether or not the commercial activity element was present, the court looked to the activity’s nature, not purpose, finding “[t]here is nothing ‘sovereign’ about the act of lending art pieces.” *Malewicz v. City of Amsterdam*, 362 F. Supp. 2d 298, 313–14 (D.D.C. 2005). The FSIA defines “commercial activity carried on in the United States” as “commercial activity carried on by [the foreign] state and having substantial contact with the United States.” 28 U.S.C. § 1603(e) (2005).

163. See generally *Malewicz*, 362 F. Supp. 2d at 310–12.

164. *Id.* at 315–16; *Malewicz v. City of Amsterdam*, 517 F. Supp. 2d 322, 325 (D.D.C. 2007).

165. *Malewicz*, 517 F. Supp. 2d at 325.

166. See generally *id.*

Amsterdam, claiming that they all “fell short.”¹⁶⁷ The court held that: (1) the statute of limitations defense involved “too many factual issues to be resolved in a Rule 12 motion”; (2) the act of state doctrine was not geared toward the type of act at issue (acquiring artworks for display in an art museum); and (3) the *forum non conveniens* argument failed since the Dutch doctrines of liberative and acquisitive prescription precluded the plaintiffs from bringing claims in the Netherlands.¹⁶⁸ Accordingly, the court denied the City’s renewed motion to dismiss, holding that the record contained “sufficient contacts to establish jurisdiction under the FSIA’s expropriation exception.”¹⁶⁹ Thus, through *Malewicz*, the court permitted in rem jurisdiction in the United States for temporary artwork displayed on loan in U.S. museums.¹⁷⁰

The *Malewicz* decision successfully extends *Altmann*’s reach over Nazi looted-art litigation. Specifically, *Malewicz* cautions foreign artwork lenders of possible litigation in the United States despite federal immunity.¹⁷¹ This ominous caveat to foreign entities conversely affords a “window of opportunity” for future looted-art cases from heirs seeking to reclaim their family’s stolen art.¹⁷² In doing so, *Malewicz* potentially lessened the burden of bringing such cases to fruition in the United States, as exhibited by *Altmann*’s toilsome (although successful) six-year journey.

V. SCHIELE AND ALTMANN: A PORTRAIT OF WHAT LIES AHEAD

Altmann and *Portrait of Wally*, along with cases that follow in

167. *Id.* at 339. Also, E. Randol Schoenberg, Maria Altmann’s counsel, observed that through the history of the *Altmann* case, Austria raised every procedural argument possible so that by the time the case reached the Supreme Court, the Austrians “were down to their last one.” SCHOENBERG, *Whose Art?*, *supra* note 84, at 291–92. The Supreme Court even invalidated Austria’s final argument that cases concerning acts that took place during World War II do not fall under the FSIA’s scope. *Id.* at 292.

168. *Malewicz*, 517 F. Supp. 2d at 340.

169. *Id.* However, the Court did recognize that “whether the City’s contact with the United States in connection with the loan of the Malewicz paintings was ‘substantial’ [was] a close question.” *Id.*

170. *See generally id.*; *see also* Choi, *supra* note 18, at 184.

171. Choi, *supra* note 18, at 184.

172. *See id.* Choi also refers to this “window of opportunity” as the “jurisdictional hook.” *Id.* (quoting Predita Rostomian, Comment, *Looted Art in the U.S. Market*, 55 RUTGERS L. REV. 271, 295 (2002)). Also, the Federal Immunity from Seizure Act (IFSA) applies only to international loans, thus precluding the majority of interstate loans that occur in the United States. 22 U.S.C. § 2459(a) (2000). *See also* Choi, *supra* note 18, at 184.

their footsteps, help create “changing attitudes for a restorative justice.”¹⁷³ In addition, the U.S. government has enacted certain laws that demonstrate a serious commitment to remedying Holocaust restitution claims.¹⁷⁴ Individualized legal battles for each restitution claim thus emerge from this momentum of change and procedure.¹⁷⁵ In particular, both *Altmann* and *Portrait of Wally* affect very specific jurisdiction and restitution issues of national and international law, sometimes prompting government or political intervention.¹⁷⁶ Culturally, *Altmann* and *Portrait of Wally* encouraged the movement in the world’s art community seeking to alter how institutions lend art and research provenance.¹⁷⁷

Due to *Altmann*, federal courts must now “exercise jurisdiction over claims that meet the FSIA’s immunity exceptions without regard for when the act occurred.”¹⁷⁸ Although it may appear that the issue of retroactivity is the most critical legal element of Nazi looted-art claims, *Altmann* and *Portrait of Wally* include various other relevant themes. For example, in *Portrait of Wally*, government intervention likely occurred due to policy considerations and a renewed interest in recovering Holocaust assets.¹⁷⁹ Such intervention is perhaps tied to the belief that the United States has a “moral responsibility” based on the “spirit of American decency” to support Holocaust restitution.¹⁸⁰

International considerations also surface in *Altmann* and *Portrait of Wally*. These cases have significantly affected the international art market in positive and negative ways. On one hand, the cases communicated to the world that American courts would allow zealous advocacy of Nazi looted-art claims. Thus, those

173. Rhodes, *supra* note 130, at 497.

174. See, e.g., Holocaust Victims Redress Act, Pub. L. No. 105–158, 112 Stat. 15 (1998); Kreder, *supra* note 148, at 1248.

175. Rhodes, *supra* note 130, at 497.

176. *Id.*

177. See, e.g., Jennifer Anglim Kreder, *Reconciling Individual and Group Justice with the Need for Repose in Nazi-Looted Art Disputes*, 73 BROOK. L. REV. 155, 167–69 (2007) (discussing how in response to *Portrait of Wally*, the American Association of Museum Directors created the Task Force on the Spoliation of Art during the Nazi/World War II Era (1933–1945) that published museum guidelines, such as the need to investigate collections regarding any provenance gaps related to World War II).

178. Pollock, *supra* note 19, at 212; Republic of Austria v. Altmann, 541 U.S. 677, 698 (2004).

179. Wissbroecker, *supra* note 6, at 52.

180. BAZYLER, *supra* note 9, at 301–02.

involved within the international art market cannot ignore the far-reaching effects of *Altmann's* success and *Portrait of Wally's* ongoing pursuit of restitution.

On the other hand, the jurisdictional and title-claim issues at the heart of both *Altmann* and *Schiele* harmed the practice in which museums and galleries loan artworks to institutions around the world for shared exhibitions.¹⁸¹ Freedom of trade is a fundamental principle of the world's art market in which artworks circulate without legal prohibitions and restrictions.¹⁸² Originally, Congress implemented antiseizure statutes such as the FSIA to protect public access to art through international exchange.¹⁸³ *Altmann's* astounding success and America's current hold on *Portrait of Wally* weaken the authority of such statutes. Not surprisingly, international art institutions fear individuals will file lawsuits when specific artworks enter the appropriate jurisdiction.¹⁸⁴ Moreover, such institutions may even lose the art through government seizure, as with *Schiele's Portrait of Wally*, which still remains under lock and key in the United States.¹⁸⁵ Thus, this legitimate threat of litigation and seizure resounds throughout the world's art community, hindering the common practice of international art sharing.¹⁸⁶

However, the *Schiele* and *Altmann* cases also positively affected the international art market by providing legal impetus for art institutions to appropriately research and determine the provenance of works in their collections.¹⁸⁷ Domestically, both the American Association of Museum Directors and the Association of Art Museum Directors publicly pledged to review the provenance

181. See Choi, *supra* note 18, at 177 (suggesting that title claim disputes "can be detrimental to the common practice of loaning works of art.").

182. See Erik Jayme, *Globalization in Art Law: Clash of Interests and International Tendencies*, 38 VAND. J. TRANSNAT'L L. 927, 940 (2005).

183. *Id.* at 945.

184. See Choi, *supra* note 18, at 177 (detailing the negative consequences felt by institutions when lawsuits are filed).

185. *Id.* See also Popp, *supra* note 55, at 222 (discussing how *Portrait of Wally* remains in United States custody).

186. See Choi, *supra* note 18, at 177.

187. Robert Schwartz, *The Limits of the Law: A Call for a New Attitude Toward Artwork Stolen During World War II*, 32 COLUM. J.L. & SOC. PROBS. 1, 25 (1998). "Until the art community reaches a systemic solution, concerned members of the public must continue to publicize their efforts to aid individuals in pursuing claims to recover stolen works." *Id.*

of works in their collections, and to resolve ownership disputes.¹⁸⁸ Due to this pledge, numerous museums have returned paintings to their rightful owners.¹⁸⁹ To further facilitate disclosure, the American museum community is creating a searchable central registry of Holocaust-era cultural property held by American museums.¹⁹⁰ Internationally, the *Altmann* and *Schiele* litigations have aided the recovery of Nazi-looted art. For example, Lea Bondi's claim to *Portrait of Wally* significantly influenced the Austrian government to return scores of looted artworks from Austrian museums.¹⁹¹ Overall, these and other inherent themes of *Altmann* and *Portrait of Wally* significantly alter the past, present, and future of Holocaust restitution litigation.

VI. THE RESTITUTION DILEMMA: A FADING GENERATION, A THRIVING LEGAL INDUSTRY

To establish viable claims, Holocaust restitution claims depend on highly individualized factual substance.¹⁹² Family wills, photographs of artworks in a family's home in pre-World War II Europe, or even narrative accounts yield such information. Over sixty years after World War II, however, the remaining generations of Holocaust survivors are quickly diminishing, rendering restitution claims incredibly time sensitive. Not much time remains for even the youngest survivors, who remain capable of contributing the necessary factual information to relay their stories. Thus, much of this vital record may fade along with the generation that bore witness to it.

Nonetheless, Nazi looted-art claims represent a booming legal field that has grown from boutique practice to mini-industry.¹⁹³ Most likely, the confluence of past successful claims, academic and media attention, and initiatives in the international art community

188. Wissbroecker, *supra* note 6, at 53 n.76. The United States convened a conference of forty-four nations in Washington to lay down principles about how to handle Nazi-related claims. *Id.* at 52 n.72.

189. *Id.* at 53 n.76.

190. Presidential Advisory Commission on Holocaust Assets in the U.S., "Findings," available at http://pcha.ushmm.org/PlunderRestitution.html/html/Findings_Agreements.html#anchor783314.

191. Schwartz, *supra* note 187, at 25.

192. See BAZLER & ALFORD, *supra* note 82, at 4 (discussing the unique, individualized nature of Holocaust restitution looted-art claims).

193. See Kelly Crow, *The Bounty Hunters*, WALL ST. J., Mar. 23, 2007 (Weekend Journal), at W1.

added to the surge in restitution interest. Heightened attention may result from the exposure surrounding *Altmann* and *Portrait of Wally*. Fortunately, these two cases laid significant groundwork for restitution litigation to advance through the U.S. legal system. This foundation may save potential claimants significant time and effort in bringing claims. As the generation of survivors continues to fade, time is truly an invaluable advantage for heirs to obtain as much of the necessary factual basis as possible.

Thus, one may argue we are currently in the burgeoning stages of a “restitution dilemma” that may soon culminate in a restitution impasse. One aspect of this dilemma is that the recent breakthrough in Nazi looted-art litigation occurred as fewer and fewer generations of witnesses are accessible to looted-art claimants. Eventually, documentation and oral history that create the requisite record for claimant heirs to prove their family once owned stolen art will become even further removed in time and potentially less credible. To address this problem, the Presidential Advisory Committee on Holocaust Assets in the U.S. proposes the Federal government preserve and facilitate research into Holocaust-era archival records.¹⁹⁴ If implemented, this approach will document the factual substance required for viable restitution claims. Additionally, the federal government will expand the historical record by preserving the stories of Holocaust survivors and their American heirs.

Cases such as *Altmann* and *Portrait of Wally* demonstrate another dimension of an upcoming restitution dilemma. In both cases, proving Nazi theft of the art was an easier hurdle to surpass than proving who may claim title to the art today. For future claims however, the inability to prove this “who” should not eliminate the opportunity for restitution once the court identifies the art as Nazi-looted. To solve this problem, organizations such as the Conference on Jewish Material Claims Against Germany propose that when Jewish owners, individuals, or heirs cannot be identified, artwork should be returned to the Jewish people rather than become property of those governments in which the art emerged.¹⁹⁵

194. Presidential Advisory Commission on Holocaust Assets in the U.S., “Recommendations,” available at <http://www.pcha.gov/PlunderRestitution.html/html/Recommendations.html>.

195. See Conference on Jewish Material Claims Against Germany, Artworks and Other Cultural Property Restitution and Compensation, http://www.claimscon.org/index.asp?url=looted_art_pg2 (last visited Feb. 2, 2008).

Similarly, restitution advocates urge Congress to remove impediments to the identification and restitution of Holocaust victims' assets, which can include looted art.¹⁹⁶ Such legislative changes would directly address the problem of proving title and facilitate restitution. Without attention to these important issues, future looted art may be deemed stolen but remain permanently "un-restituted"—the restitution dilemma in effect.

VII. CONCLUSION

Together, *Altmann* and *Portrait of Wally* embody both the existing difficulties and hopeful expectations for plaintiffs in Nazi looted-art claims. Most importantly, the extensive litigation and publicity surrounding the two cases propelled restitution into the consciousness of the American public, the international art market, and the American court system.¹⁹⁷ It is imperative that the American courts continue to build on the momentum set by *Altmann* and *Portrait of Wally*.

During the height of Nazi power, Adolf Hitler's SS Chief Heinrich Himmler declared that Hitler must "kill all the Jews" for if not, "their grandchildren will ask for their property back."¹⁹⁸ The body of Nazi looted-art litigation illustrates how Hitler's regime drastically underestimated not only the grandchildren of Holocaust victims, but also American judicial power. Through each looted-art claim, American courts continue to hold European institutions accountable for their participation in Nazi crimes. In this way, through some of the world's most celebrated art, justice is served.

196. See Presidential Advisory Commission on Holocaust Assets in the U.S., "Recommendations," available at <http://www.pcha.gov/PlunderRestitution.html/html/Recommendations.html>.

197. See Lawrence M. Kaye, *A Quick Glance at the Schiele Paintings*, 10 DEPAUL-LCA J. ART & ENT. L. 11, 26 (1999).

198. BAZYLER, *supra* note 9, at 295. See also John L. Jr. Allen, *Victims No More – Holocaust Survivors File Lawsuits*, NAT'L CATHOLIC REPORTER, May 7, 1999, available at http://findarticles.com/p/articles/mi_m1141/is_27_35/ai_54623103/pg_1 (last visited Feb. 2, 2008).