

**PORTRAIT OF WALLY – HOW ONE PAINTING FOREVER
CHANGED THE STANDARD FOR RESTITUTION OF
NAZI ERA LOOTED ARTWORKS**

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* J.D. Candidate 2023, University of Wisconsin Law School. I would like to sincerely thank Professor Ashby Fox for her supervision and insight on this comment, Samhita Collur for her guidance as my Note and Comment Editor, and all Wisconsin International Law Journal staff that had a part in this process.

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INTRODUCTION

During World War II, the Nazis looted anything and everything from Jewish people, including their artworks.¹ Many of those artworks are still displaced today.² The case *United States v. Portrait of Wally* is a battle between the Leopold Museum, a private Austrian museum, and the United States government over a painting known as *Portrait of Wally* by Egon Schiele, an Austrian expressionist.³ This painting was taken from a Jewish woman during the German annexation of Austria in 1938, known as the

¹ *Anschluss*, U.S. HOLOCAUST MEM’L MUSEUM, <https://www.ushmm.org/collections/bibliography/anschluss> [<https://perma.cc/UAD7-LDE9>].

² Stuart E. Eizenstat, *Opinion: Art Stolen by the Nazis is Still Missing. Here’s how we can Recover it*, WASH. POST (Jan. 2, 2019, 6:06 PM), https://www.washingtonpost.com/opinions/no-one-should-trade-in-or-possess-art-stolen-by-the-nazis/2019/01/02/01990232-0ed3-11e9-831f-3aa2c2be4cbd_story.html [<https://perma.cc/K926-W2W3>].

³ *United States v. Portrait of Wally*, 663 F. Supp. 2d 232, 236 (S.D.N.Y. 2009).

Anschluss,⁴ and she unsuccessfully fought for its return until her death in 1969.⁵ *Portrait of Wally* was housed in the Leopold Museum in Austria until it was temporarily transferred to the Museum of Modern Art in the United States for an Egon Schiele exhibition in 1997.⁶

The New York County District Attorney's Office issued a subpoena for *Portrait of Wally*⁷ which gained global attention, causing restitution efforts for Nazi era looted artworks to soar after a fifty-year gap.⁸ That subpoena was the first step in what came to be *United States v. Portrait of Wally*, which set the stage for the world's current political and legal restitution scheme for Nazi era looted artworks, including Austria's Art Restitution Act enacted in 1998. Austria's Art Restitution Act allows Nazi era artworks looted from Jewish people to be returned to the rightful owner or their heirs free of charge when the artworks are in the possession of the Austrian government.⁹ However, this statute does not apply to artworks held by private institutions.

United States v. Portrait of Wally showcases how the United States has a more effective system for restoring Nazi era looted artworks to their rightful owners than Austria. Austria's Art Restitution Act does not cover works in the possession of private institutions; therefore, it did not apply to *Portrait of Wally*, which was in the possession of a private museum. The United States' laws applicable to art restitution are not limited to artworks in the possession of public institutions and apply generally to goods that have entered the United States that are in violation of international law.¹⁰ Because so many rightful owners of looted artworks are from Austria, the Austrian government should have a more effective system than the United States, to ensure that Nazi era looted artworks are restored to their rightful owner or their heirs.

⁴ *Id.* at 238.

⁵ *Id.* at 244–45.

⁶ *Id.* at 245–46.

⁷ *Id.* at 246.

⁸ Bert Demarsin, *Let's Not Talk About Terezin: Restitution of Nazi Era Looted Art and the Tenuousness of Public International Law*, 37 *BROOK. J. INT'L L.* 117, 136 (2011).

⁹ BUNDESGESETZ ÜBER DIE RÜCKGABE VON KUNSTGEGENSTÄNDEN UND SONSTIGEM BEWEGLICHEM KULTURGUT AUS DEN ÖSTERREICHISCHEN BUNDESMUSEEN UND SAMMLUNGEN UND AUS DEM SONSTIGEN BUNDESEIGENTUM [FEDERAL ACT ON THE RESTITUTION OF WORKS OF ART AND OTHER MOVEABLE CULTURAL ASSETS FROM AUSTRIAN FEDERAL MUSEUMS AND COLLECTIONS AND OTHER FEDERAL PROPERTY] BUNDESGESETZBLATT I [BGBl I] No. 181/1998, <https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10010094> (Austria) [hereinafter FEDERAL ACT ON THE RESTITUTION OF WORKS OF ART].

¹⁰ See 18 U.S.C. 2314; 19 U.S.C.S. § 1595a(c)(1)(A); 19 U.S.C. § 1595a(a); 18 U.S.C. § 545; 22 U.S.C. § 401.

This comment analyzes *United States v. Portrait of Wally*, explores how it spurred international efforts towards further restitution of Nazi era looted artworks, and concludes that the United States has a more effective system for ensuring restitution for victims of Nazi era looting than the Austrian system. Part I of this comment examines the history behind Austrian and United States legislation regarding restitution of Nazi era looted artworks, including World War II era Aryanization, subsequent looting, resulting legislation, international conferences, and applicable statutes. Part II examines how the *United States v. Portrait of Wally* case spearheaded international efforts towards restitution and showcased how the United States has a more effective system for restoring Nazi era looted artworks to their rightful owners or their heirs than Austria. Part II also gives recommendations for how Austria should amend its laws regarding art restitution. Part III asserts that the United States has a more effective legal system for providing restitution and justice to victims of Nazi era looting and their heirs.

I. BACKGROUND

A. WORLD WAR II AND HOLOCAUST HISTORY OF NAZI ERA LOOTING

Between 1933-1945, a core element of Nazi Germany's ideology was anti-Semitism.¹¹ Jewish people especially were deprived of nearly all of their legal rights by the Nuremberg Laws, which were put in place by German dictator, Adolf Hitler.¹² Hitler became determined to invade Poland, which in turn started World War II in 1939.¹³

Prior to the start of the war, Austria was both economically and politically weak.¹⁴ Nazis assassinated the Austrian chancellor, Engelbert Dollfuss, and attempted to take over the government.¹⁵ Kurt von Schuschnigg, an Austrian politician who opposed the Nazi rule, became the new chancellor but he did not gain much popular support due to the

¹¹ *Nazi Party*, ENCYC. BRITANNICA, <https://www.britannica.com/topic/Nazi-Party> [https://perma.cc/VHM7-Y8NK].

¹² *Id.*

¹³ *World War II*, ENCYC. BRITANNICA, <https://www.britannica.com/event/World-War-II> [https://perma.cc/4VWD-UMDB].

¹⁴ *Anschluss*, *supra* note 1.

¹⁵ *Id.*

turmoil in the country.¹⁶ He supported Austrian independence and tried to organize a plebiscite as a last resort, but was ultimately dissuaded from doing so due to Nazi pressure.¹⁷ He resigned immediately.¹⁸

Up to this point, Italy had heavily assisted Austria in maintaining independence.¹⁹ However, once Hitler became allied with the Italian Prime Minister Benito Mussolini, Mussolini gave up on protecting Austria.²⁰ Hitler then sent German troops into Austria which resulted in Austria being incorporated into Germany in 1938.²¹ This horrific event became known as the *Anschluss*.²²

Following the Nazi takeover of Austria, antisemitic acts and violence skyrocketed in the country.²³ Jewish people were required to register their property and assets valued at 5,000 or more Reichsmarks.²⁴ Jewish communities were deported to ghettos and concentration camps in Eastern Europe.²⁵ Anyone who opposed the Nazis became subject to arrest, torture, or death.²⁶ During this time, the German political police force known as Gestapo and the Austrian Nazis looted Jewish Austrians' belongings, seized their businesses, and arrested those unwilling to relinquish their property.²⁷ Many Jewish Austrians were forced to flee to other countries.²⁸ The Nuremberg laws forced Jewish people out of Austria's economic, social, and cultural sphere.²⁹

¹⁶ *Id.*

¹⁷ *Anschluss*, ENCYC. BRITANNICA, <https://www.britannica.com/event/Anschluss> [<https://perma.cc/6QWJ-BVY4>]; A plebiscite is "a vote by which the people of an entire country or district express an opinion for or against a proposal especially on a choice of government or rule." *Plebiscite*, MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/plebiscite> [<https://perma.cc/G7GP-WSZ2>].

¹⁸ *Anschluss*, *supra* note 1.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ Lorraine Boissoneault, *A 1938 Nazi Law Forced Jews to Register Their Wealth – Making It Easier to Steal*, SMITHSONIAN MAG. (Apr. 26, 2018), <https://www.smithsonianmag.com/history/1938-nazi-law-forced-jews-register-their-wealthmaking-it-easier-steal-180968894/> [<https://perma.cc/U46Q-5RVK>]; This value was about what \$2,000 would have been at the time; *Id.*

²⁵ *Austria*, U.S. HOLOCAUST MEM'L MUSEUM, <https://encyclopedia.ushmm.org/content/en/article/austria> [<https://perma.cc/TM45-6SAD>].

²⁶ *Anschluss*, *supra* note 1.

²⁷ *Id.*

²⁸ *Austria*, *supra* note 25.

²⁹ *Id.*

The Nuremberg Laws that were implemented throughout Nazi Germany, including Austria, effectively justified the looting of property, including artwork and other cultural pieces, owned by Jewish people.³⁰ Art pieces from Austria and other countries were brought mainly to Linz, Austria, the art capital of Nazi Germany.³¹ This was part of the Nazis' goal of eliminating Jewish culture and identity,³² but also was part of Hitler's goal to create a museum of his own with the collected works.³³ During Hitler's reign, more than 600,000 artworks were stolen and up to 100,000 of those works are still missing.³⁴

After World War II, the United States' forces were authorized by military decree to seize various categories of property that had been taken from Austria by Germany or other countries.³⁵ During this time, many artworks were returned to pre-war owners or their estates.³⁶ The United States turned over the remaining property, where rightful owners could not be located, to the Austrian government in 1952.³⁷ At that time, Austria was still not an independent nation.³⁸ Austria was occupied by the United States, the United Kingdom, France, and the Soviet Union until it gained independence³⁹ through the 1955 State Treaty.⁴⁰

³⁰ Chloe Ricke, *The Time is Now: Why the United States Should Follow the United Kingdom's Lead and Implement a Federal Nazi-Looted Art Spoliation Advisory Panel*, 44 GA. J. INT'L & COMP. L. 665, 667 (2016).

³¹ Rudolph Houck, *Memorandum: Austrian Art Restitution*, <https://www.commartrecovery.org/docs/AustrianArtRestitutionNYConference.pdf> [<https://perma.cc/B4JU-AR7G>].

³² Eizenstat, *supra* note 2.

³³ Beth Harris & Steven Zucker, *Nazi looting: Egon Schiele's Portrait of Wally*, KHAN ACADEMY, <https://www.khanacademy.org/humanities/art-1010/early-abstract/expressionism1/v/schiele-wally> [<https://perma.cc/5VFFV-N83X>].

³⁴ Eizenstat, *supra* note 2.

³⁵ *United States v. Portrait of Wally*, 663 F. Supp. 2d 232, 239 (S.D.N.Y. 2009); This task was given to the Reparations, Deliveries, and Restitution Division of the United States forces to carry out. *Id.*

³⁶ Houck, *supra* note 31.

³⁷ *Id.*

³⁸ ESLI RESTOR. JUST. & POST-HOLOCAUST IMMOVABLE PROP. REST. STUDY TEAM, *Overview of Immovable Property Restitution/Compensation Regime – Austria (as of 8 March 2017)*, (2017), <https://archive.jpr.org.uk/download?id=3251> [<https://perma.cc/SZY7-BVGL>].

³⁹ *Id.*

⁴⁰ State Treaty for the Re-Establishment of an Independent and Democratic Austria, May 15, 1955, 6 U.S.T. 2369, 217 U.N.T.S. 223.

B. AUSTRIAN EFFORTS FOR RESTITUTION RIGHT AFTER WORLD WAR II

After World War II, Austria began passing laws addressing restitution of looted artworks from the Nazi era.⁴¹ In 1945, the Registration Act of 1945 in Austria required any person with looted property, including artworks, dating back to the start of the Nazi era, March 13, 1938, to register the property with the Austrian government.⁴² The following year, the Annulment Act of May 15, 1946 declared “null and void” any legal transaction that had taken place after the *Anschluss* and was associated with Nazi Germany.⁴³

A series of restitution acts were enacted by the Austrian government in the 1940s as well. The First Restitution Act was enacted on July 26, 1946.⁴⁴ This first act covered movable and immovable property that was looted during the Nazi era and remained in the possession of the Austrian government, and stated that claims had to be made by June 30, 1961.⁴⁵ The Second Restitution Act was enacted on February 6, 1947.⁴⁶ This act covered private and communal property that was looted by Nazis and transferred to the Austrian government between March 13, 1938 and May 9, 1945 on the basis of forfeiture.⁴⁷

⁴¹ See *The Austrian Legislation on Art Restitution after World War Two*, NAT'L FUND REPUBLIC AUSTRIA FOR VICTIMS OF NAT'L SOCIALISM, <https://www.kunstdatenbank.at/the-austrian-legislation-on-art-restitution-after-world-war-two> [<https://perma.cc/9WMH-KC2P>].

⁴² VERORDNUNG DER STAATSKANZLEI IM EINVERNEHMEN MIT DEN BETEILIGTEN STAATSÄMTERN VOM 11. JUNI 1945 ÜBER DIE REGISTRIERUNG DER NATIONALSOZIALISTEN 1996 [Ordinance of the State Chancellery in Agreement with the State Offices involved of June 11, 1945, on the Registration of National Socialists] STAATSGESETZBLATT [STGBL] No. 18/1945, https://www.ris.bka.gv.at/Dokumente/BgblPdf/1945_19_0/1945_19_0.pdf (Austria).

⁴³ NAT'L FUND REPUBLIC AUSTRIA FOR VICTIMS OF NAT'L SOCIALISM, *supra* note 41.

⁴⁴ BUNDESGESETZ VOM 26. JULI 1946 ÜBER DIE RÜCKSTELLUNG ENTZOGENER VERMÖGEN, DIE SICH IN DER VERWALTUNG DES BUNDES ODER DER BUNDESLÄNDER BEFINDEN [Federal Law of 26 July 1946 on the Restitution of Seized Property Administered by the Federation or the Federal Provinces] BUNDESGESETZBLATT [BGBl] No. 156/1946, https://www.ris.bka.gv.at/Dokumente/BgblPdf/1946_156_0/1946_156_0.pdf (Austria) [hereinafter FIRST RESTITUTION ACT] (explained in ESLI RESTOR. JUST. & POST-HOLOCAUST IMMOVABLE PROP. REST. STUDY TEAM, *supra* note 38, at 6).

⁴⁵ *Id.*

⁴⁶ BUNDESGESETZ VOM 6. FEBRUAR 1947 ÜBER DIE RÜCKSTELLUNG ENTZOGENER VERMÖGEN, DIE SICH IM EIGENTUM DER REPUBLIK ÖSTERREICH BEFINDEN [Federal Law of 6 February 1947 on the Restitution of Seized Property owned by the Republic of Austria] BUNDESGESETZBLATT [BGBl] No. 53/1947, https://www.ris.bka.gv.at/Dokumente/BgblPdf/1947_53_0/1947_53_0.pdf [hereinafter SECOND RESTITUTION ACT] (explained in ESLI RESTOR. JUST. & POST-HOLOCAUST IMMOVABLE PROP. REST. STUDY TEAM, *supra* note 38, at 5–6).

⁴⁷ *Id.* (explained in ESLI RESTOR. JUST. & POST-HOLOCAUST IMMOVABLE PROP. REST. STUDY TEAM, *supra* note 38, at 7).

The Third Restitution Act was passed in Austria in 1947.⁴⁸ This act applied to private and communal property that was looted by Nazis between March 14, 1938 and May 9, 1945 which ended up with private individuals and businesses after World War II.⁴⁹ This federal law created Restitution Commissions which had jurisdiction over all claims under this law.⁵⁰ The main goal of the Restitution Commissions was to reach a settlement on restitution of the property.⁵¹ Claims for restitution under this act, made by those who were victims of Nazi era looting, had to be filed by July 31, 1956.⁵² In that time, almost 40,000 claims were filed in an effort to regain possession of stolen property.⁵³

Around this time, Austria gained independence through the 1955 State Treaty, and with this independence came additional restitution rights.⁵⁴ The 1955 State Treaty states that property which was confiscated during the Nazi era is to be returned to the original owner and, where restoration is impossible, compensation for losses will be granted.⁵⁵ Additionally, under this Treaty, Austria agreed to take into its control the rights of property that were looted during the Nazi era that were “heirless or unclaimed for six months after the coming into force of the present Treaty.”⁵⁶ After that, there was a gap in restitution efforts by Austria until 1998.

⁴⁸ BUNDESGESETZ VOM 6. FEBRUAR 1947 ÜBER DIE NICHTIGKEIT VON VERMÖGENSENTZIEHUNGEN [Federal Law of 6 February 1947, concerning the annulment of property seizure] BUNDESGESETZBLATT [BGBl] No. 54/1947, as amended by 148/1947, https://www.ris.bka.gv.at/Dokumente/BgblPdf/1947_54_0/1947_54_0.pdf (Austria) [hereinafter THIRD RESTITUTION ACT] (explained in ESLI RESTOR. JUST. & POST-HOLOCAUST IMMOVABLE PROP. REST. STUDY TEAM, *supra* note 38, at 7).

⁴⁹ *Id.* (explained in ESLI RESTOR. JUST. & POST-HOLOCAUST IMMOVABLE PROP. REST. STUDY TEAM, *supra* note 38, at 7).

⁵⁰ *Id.* § 19(1).

⁵¹ ESLI RESTOR. JUST. & POST-HOLOCAUST IMMOVABLE PROP. REST. STUDY TEAM, *supra* note 38, at 7.

⁵² *Id.* at 8.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ State Treaty for the Re-Establishment of an Independent and Democratic Austria, *supra* note 40, art. 26.

⁵⁶ *Id.*

C. COORDINATED EFFORTS TO SEEK JUSTICE FOR NAZI ERA
ARTWORK SEIZURES RESURGE IN 1998

Other than the immediate post-war efforts made by Austria, global efforts towards restitution of Nazi era looting were not prioritized in the slightest until 1998. The famous American case *United States v. Portrait of Wally* was initiated in 1998⁵⁷ and gained the world's attention soon after. The uproar from this case quickly sparked global interest in restitution efforts for Nazi era looting of artworks.⁵⁸

1. *United States v. Portrait of Wally*

The history of the painting in dispute in this case dates back to the 1930s, when Lea Bondi Jaray (“Bondi”), an Austrian Jewish woman, owned the Egon Schiele painting entitled *Portrait of Wally*.⁵⁹ During the *Anschluss*, Bondi's art gallery was subject to confiscation, and during a negotiation of the sale of the art gallery, a man named Friedrich Welz (“Welz”), saw *Portrait of Wally* on the wall in her personal collection and demanded she give it to him.⁶⁰ Bondi resisted but gave it up as she and her husband were supposed to flee Austria the next day and they thought Welz could prevent them from fleeing.⁶¹ Welz, who became a Nazi, was arrested after the War by the United States forces and his property, including *Portrait of Wally*, was transferred to the Austrian government.⁶² *Portrait of Wally* ended up in the Belvedere, an Austrian National Gallery.⁶³ Dr. Leopold, an art collector, met with Bondi after the war and she requested that he get *Portrait of Wally* back for her.⁶⁴ He instead made a deal with the Belvedere and kept *Portrait of Wally* for himself.⁶⁵ In 1994, Dr.

⁵⁷ See *United States v. Portrait of Wally*, 663 F. Supp. 2d 232, 246 (S.D.N.Y. 2009).

⁵⁸ Press Release, U.S. Att’y S. Dist. of N.Y., United States Announces \$19 Million Settlement in Case of Painting Stolen by Nazi (July 20, 2010).

⁵⁹ *Portrait of Wally*, 663 F. Supp. 2d at 238.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.* at 239.

⁶³ *Id.* at 241–42.

⁶⁴ *Id.* at 243.

⁶⁵ *Id.*

Leopold's collection, including *Portrait of Wally*, was sold to the Leopold Museum,⁶⁶ a new museum he founded.⁶⁷

In 1997, part of the Schiele collection, including *Portrait of Wally*, was loaned to the Museum of Modern Art in New York ("MoMA").⁶⁸ *Portrait of Wally* was on display at the MoMA from October 8, 1997 through January 4, 1998, when the New York County District Attorney's Office issued a subpoena for it after heirs of Bondi claimed ownership.⁶⁹ The New York Court of Appeals quashed the subpoena and United States Magistrate Judge James C. Francis issued a seizure warrant for the painting.⁷⁰ The United States government then commenced a forfeiture action and seized *Portrait of Wally*, spurring litigation between the United States government and the Leopold Museum.⁷¹

2. Restitution Efforts Following the Commencement of *United States v. Portrait of Wally*

Since 1998, there has been a spike in international efforts for restitution of Nazi era looted artworks in response to *United States v. Portrait of Wally*.⁷² New legislation passed and disputes over Nazi-looted art skyrocketed.⁷³ Heirs and estates of those whose possessions were looted came forward laying claim to their rightfully-owned pieces.⁷⁴ Litigation and negotiations around rightful ownership spiked worldwide. It came to world leaders' attention that agreements regarding restitution of Nazi era looting must be made at the international level.⁷⁵ The progression of these efforts is outlined below.

a. The Washington Conference

In December 1998, the American Association of Art Museum Directors and the American Alliance of Museums came together to create

⁶⁶ *Id.* at 245.

⁶⁷ *Rudolph Leopold*, LEOPOLD MUSEUM, <https://www.leopoldmuseum.org/en/museum/museum-history/rudolf-leopold> [<https://perma.cc/HSB7-GMWR>].

⁶⁸ *Portrait of Wally*, 663 F. Supp. 2d at 246.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² Demarsin, *supra* note 8, at 131.

⁷³ *Id.* at 131–34.

⁷⁴ *Id.* at 134.

⁷⁵ *Id.* at 135.

a task force to make recommendations on Nazi era looted art.⁷⁶ These recommendations led to the Washington Conference,⁷⁷ at which delegates of forty-four nations, including Austria, and thirteen nongovernmental organizations came together at the United States Holocaust Memorial Museum in Washington, D.C. to discuss ways to rectify the injustices related to property rights that occurred during the Holocaust.⁷⁸ The delegates signed on to eleven non-binding principles, known as the Washington Conference Principles on Confiscated Art (“the Washington Principles”),⁷⁹ that aimed to simplify the identification process and track down rightful owners of Nazi-looted art pieces to settle property

⁷⁶ Jennifer Anglim Kreder, *The “Public Trust”*, 18 U. PA. J. CONST. L. 1425, 1466 (2016).

⁷⁷ *Id.*

⁷⁸ Demarsin, *supra* note 8, at 137, 178.

⁷⁹ The Washington Principles are:

1. Art that had been confiscated by the Nazis and not subsequently restituted should be identified.
2. Relevant records and archives should be open and accessible to researchers, in accordance with the guidelines of the International Council on Archives.
3. Resources and personnel should be made available to facilitate the identification of all art that had been confiscated by the Nazis and not subsequently restituted.
4. In establishing that a work of art had been confiscated by the Nazis and not subsequently restituted, consideration should be given to unavoidable gaps or ambiguities in the provenance in light of the passage of time and the circumstances of the Holocaust era.
5. Every effort should be made to publicize art that is found to have been confiscated by the Nazis and not subsequently restituted in order to locate its pre-War owners or their heirs.
6. Efforts should be made to establish a central registry of such information.
7. Pre-War owners and their heirs should be encouraged to come forward and make known their claims to art that was confiscated by the Nazis and not subsequently restituted.
8. If the pre-War owners of art that is found to have been confiscated by the Nazis and not subsequently restituted, or their heirs, can be identified, steps should be taken expeditiously to achieve a just and fair solution, recognizing this may vary according to the facts and circumstances surrounding a specific case.
9. If the pre-War owners of art that is found to have been confiscated by the Nazis, or their heirs, cannot be identified, steps should be taken expeditiously to achieve a just and fair solution.
10. Commissions or other bodies established to identify art that was confiscated by the Nazis and to assist in addressing ownership issues should have a balanced membership.
11. Nations are encouraged to develop national processes to implement these principles, particularly as they relate to alternative dispute resolution mechanisms for resolving ownership issues.

Washington Conference Principles on Nazi-Confiscated Art, U.S. DEP’T OF STATE (Dec. 3, 1998), <https://www.state.gov/washington-conference-principles-on-nazi-confiscated-art/> [<https://perma.cc/Q3ZG-ZX4T>].

conflicts.⁸⁰ The Washington Principles acknowledge that each State signatory has a different legal system and can carry out the Washington Principles within the context of each State's laws.⁸¹ Austria, among other countries, incorporated the Washington Principles into its legislation.⁸²

b. Austrian Art Restitution Act of 1998

By December 1998, after the Washington Conference, Austria passed the Art Restitution Act of 1998.⁸³ In January 1998, when the New York County District Attorney issued a subpoena for *Portrait of Wally*, changes began in Austria in response.⁸⁴ That same month, the Federal Ministry for Education and Cultural Affairs in Austria issued internal instructions to examine art collections in federal museums and to the Federal Office for the Protection of Monuments to identify looted / stolen works from the Nazi era.⁸⁵ The Art Restitution Act of 1998, and its amendments in 2009 and 2011, establish the current basis for Austria's restitution laws and procedures relating to Nazi era looted artworks.⁸⁶

The Art Restitution Act authorizes the Austrian Federal Ministers⁸⁷ to return artworks and cultural assets from Austrian federal museums, collections, and institutions to their rightful owners or their heirs for free when a claim is brought.⁸⁸ The scope of this act includes art pieces and cultural pieces that were looted under the Nazi regime, between January 30, 1933 and May 8, 1945.⁸⁹ Specifically, the Art Restitution Act

⁸⁰ *See id.*

⁸¹ *Id.*

⁸² *The JUST Act Report: Austria*, U.S. DEP'T OF STATE, <https://www.state.gov/reports/just-act-report-to-congress/austria/> [<https://perma.cc/DJ4D-86GP>].

⁸³ Victoria Bonadies, *Taking Greater Responsibility: Austria's Art Restitution Act and the Need for Further Reform*, 34 AM. U. INT'L L. REV. 671, 677 (2019).

⁸⁴ Houck, *supra* note 31, at 2; Judith H. Dobrzynski, *What Makes the "Portrait of Wally" Case so Significant?*, THE ART NEWSPAPER (Apr. 24, 2012), <https://www.judithdobrzynski.com/11595/what-makes-the-portrait-of-wally-case-so> [<https://perma.cc/EEW4-A6AB>].

⁸⁵ NAT'L FUND REPUBLIC AUSTRIA FOR VICTIMS OF NAT'L SOCIALISM, *supra* note 41; Houck, *supra* note 31, at 2.

⁸⁶ *See* FED. MINISTRY REPUBLIC AUSTRIA: ARTS, CULTURE, CIVIL SERVICE AND SPORT, ART RESTITUTION IN AUSTRIA, <https://www.bmkoes.gv.at/en/Topics/arts-and-culture/culture/art-restitution-in-austria.html> [<https://perma.cc/X9HR-WB34>].

⁸⁷ Federal Ministers are appointed members of the federal government of Austria. *See* MINISTERS AND STATE SECRETARIES, FED. CHANCELLERY REPUBLIC OF AUSTRIA, <https://www.bundeskanzleramt.gv.at/en/federal-chancellery/the-austrian-federal-government/ministers.html> [<https://perma.cc/34GK-U97E>].

⁸⁸ FEDERAL ACT ON THE RESTITUTION OF WORKS OF ART, *supra* note 9, § 3.

⁸⁹ *Id.* § 1(1)(2a).

applies to objects that were: subject to restitution but instead became property of the federal government,⁹⁰ purchased through a legal transaction by the federal government during the Nazi era,⁹¹ or restituted to the federal government through proceedings ending in abandonment.⁹² The Federal Ministers have the power and duty to determine the rightful owner or heir.⁹³ If the rightful owner or heir cannot be determined, the property is transferred to the National Fund of the Republic of Austria for Victims of National Socialism.⁹⁴

The Art Restitution Act established a committee in the Federal Ministry of Education, Art and Culture to advise the Federal Ministers on determining the rightful owner of the looted artworks.⁹⁵ The committee consists of Ministers, a representative of the State Attorneys, and an academic expert.⁹⁶ Once it has been determined who the rightful owners or their heirs are, if the name is consistent with who brought the claim, the artworks are transferred to them for free.⁹⁷ Additionally, the Art Restitution Act calls for a Commission for Provenance Research which heads research, processing, and archival of the history of the federal collection that may be subject to restitution.⁹⁸

In addition to Austria's Art Restitution Act and its adoption of the Washington Principles, the United States and Austria negotiated and signed the Washington Agreement in 2001, which established further mechanisms for restitution of Nazi era looted property in Austria.⁹⁹ In this agreement, a General Settlement Fund was created and tasked with resolving debates regarding property losses suffered from 1938-1945.¹⁰⁰

⁹⁰ *Id.* § 1(1)(1).

⁹¹ *Id.* § 1(1)(2a).

⁹² *Id.* § 1(1)(3).

⁹³ *Id.* § 2(1)(1).

⁹⁴ *Id.* § 2(1)(2).

⁹⁵ *Id.* § 3(1).

⁹⁶ *Id.* § 3(2).

⁹⁷ *Id.* § 1–3.

⁹⁸ *Id.* § 4a.

⁹⁹ ABKOMMEN ZWISCHEN DER ÖSTERREICHISCHEN BUNDESREGIERUNG UND DER REGIERUNG DER VEREINIGTEN STAATEN VON AMERIKA ZUR REGELUNG VON FRAGEN DER ENTSCHÄDIGUNG UND RESTITUTION FÜR OPFER DES NATIONALSOZIALISMUS [AGREEMENT BETWEEN THE AUSTRIAN FEDERAL GOVERNMENT AND THE GOVERNMENT OF THE UNITED STATES OF AMERICA TO REGULATE QUESTIONS OF COMPENSATION AND RESTITUTION FOR VICTIMS OF NATIONAL SOCIALISM], BUNDESGESETZBLATT III [BGBL III], No. 121/2001, <https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=20001396> (Austria).

¹⁰⁰ *Id.*

Additionally, the agreement set up an arbitration panel made up of one person from the Austrian government and one from the United States government, and a chairman chosen by those two officials.¹⁰¹ The panel provided restitution for Nazi-looted property claims where three elements were met: 1) the property is currently public property, 2) the property was owned by the Jewish community at the time of the loss, and 3) the claim has not yet been settled or was previously denied.¹⁰² Applications had to be filed by 2011 and the panel finished processing applications in 2018.¹⁰³ With this fund, about 140 cases restituted property worth about \$52,600,000.¹⁰⁴

c. Further Global Restitution Efforts

International efforts to address Nazi era property seizures occurred alongside these regional efforts. In 1998, the European Union established the Resolution on the Restitution of the Possessions of Holocaust Victims, which calls for governments, the European Council, and the European Commission to ensure restitution of Nazi era looted possessions to Jewish people.¹⁰⁵ In accordance with the resolution, the Council of Europe met in 1999 to address the spoliation of Jewish cultural pieces and property.¹⁰⁶ At that point, the Council of Europe represented forty-one countries.¹⁰⁷ At this meeting, the Parliamentary Assembly of the Council of Europe adopted Resolution 1205, which urged the restoration of looted Jewish cultural property in Europe.¹⁰⁸ Resolution 1205 was different from the Washington Principles because it focused specifically on Jewish cultural property.¹⁰⁹ While the Washington Principles only discuss the restoration of property that was confiscated, Resolution 1205 urged the restitution of property that was lost in a variety of additional ways, such as unofficial Aryanizations, forced sales, and coercion.¹¹⁰

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ U.S. DEP'T OF STATE, *supra* note 82.

¹⁰⁴ *Id.*

¹⁰⁵ Resolution on the Restitution of the Possessions of Holocaust Victims, 1998 O.J. (C 292) 0166.

¹⁰⁶ *Conferences, Declarations, and Resolutions*, CLAIMS CONFERENCE – WJRO: LOOTED ART AND CULTURAL PROPERTY INITIATIVE, <https://art.claimscon.org/resources/additional-resources-2/> [<https://perma.cc/M2UH-FS9A>].

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ Demarsin, *supra* note 8, at 141.

¹¹⁰ *Id.*

Resolution 1205 also declared that a European conference was to be held to further discuss the return of cultural property, and called for legislative reform to follow up on the implementation of the Washington Principles and Resolution 1205.¹¹¹ In 2000, the Lithuanian government held the follow-up conference in Vilnius.¹¹² Though the conference furthered the international efforts of rectifying injustices from the Holocaust, it did not produce any significant changes from the Washington Principles.¹¹³ Disappointingly, the conference produced no legally binding standards.¹¹⁴

In 2003, the European Parliament adopted the following resolution regarding Nazi era looted property: “European Parliament resolution on a legal framework for free movement within the internal market of goods whose ownership is likely to be contested.”¹¹⁵ This resolution called on the European Commission to conduct a study by the end of 2004 on systems to be put in place for locating the status of looted property, establishing ownership of property, and establishing dispute resolution mechanisms.¹¹⁶

This resolution did not play a role until the Prague Holocaust Era Assets Convention in 2009.¹¹⁷ There, representatives from forty-six nations met in Terezin, Czech Republic, and created the Terezin Declaration to reaffirm support and encourage the application of the Washington Principles.¹¹⁸ The Terezin Convention did not produce any new standards and merely affirmed what had already been established in prior conferences.¹¹⁹

¹¹¹ EUR. PARL. ASS., *Looted Jewish Cultural Property*, Resolution 1205, 19 (1999), <https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=16726&lang=en> [<https://perma.cc/KUR7-BC62>].

¹¹² CLAIMS CONFERENCE – WJRO: LOOTED ART AND CULTURAL PROPERTY INITIATIVE, *supra* note 106.

¹¹³ Demarsin, *supra* note 8, at 142–43.

¹¹⁴ *Id.* at 143.

¹¹⁵ European Parliament Resolution on a Legal Framework for Free Movement Within the Internal Market of Goods Whose Ownership Is Likely to Be Contested, EUR. PARL. DOC. T5-0584/2003.

¹¹⁶ *Id.*

¹¹⁷ Demarsin, *supra* note 8, at 144.

¹¹⁸ *Terezin Declaration*, HOLOCAUST ERA ASSETS CONF. (June 30, 2009), http://holocausteraassets.eu/files/200000215-35d8ef1a36/TEREZIN_DECLARATION_FINAL.pdf [<https://perma.cc/46DU-J77R>].

¹¹⁹ Demarsin, *supra* note 8, at 145.

Recently, in 2019, the European Parliament passed another resolution regarding the restitution of looted art.¹²⁰ The resolution calls for the European Union and its member nations to establish procedures and practices for identifying and recovering cultural property pieces that were looted during the Nazi era.¹²¹ In all, the Washington Principles have established the most far-reaching and substantive framework on restitution, but the conversation about furthering efforts to find justice for looted pieces is still developing within government agencies.

D. LEGISLATIVE SCHEMES AND LEGAL DOCTRINES GOVERNING RECOVERY IN THE UNITED STATES

Though Nazi era looting did not occur in the United States, the United States has several doctrines, to be discussed in this section, that may apply towards restitution. Many of the doctrines apply broadly to stolen property but have been used as tools for restitution of Nazi era stolen artworks.

1. *The National Stolen Property Act*

The National Stolen Property Act was enacted in 1934 and governs the movement of stolen property both nationally and internationally.¹²² The Act states in pertinent part that “whoever transports, transmits or transfers in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of \$5000 or more, knowing the same to have been stolen, converted, or taken by fraud. . . shall be fined under this title or imprisoned not more than ten years, or both.”¹²³ It has been argued that the Act applies to cultural pieces stolen by Nazis during World War II.¹²⁴ In order for the statute to apply to stolen pieces from the World War II era that ended up in the United States, three elements must be met: “1) transportation in interstate or foreign commerce of property 2)

¹²⁰ CLAIMS CONFERENCE – WJRO: LOOTED ART AND CULTURAL PROPERTY INITIATIVE, *supra* note 106.

¹²¹ European Parliament Resolution of 17 January 2019 on Cross-border Restitution Claims of Works of Art and Cultural Goods Looted in Armed Conflicts and Wars, EUR. PARL. DOC. T8-0037/2019.

¹²² See *National Stolen Property Act*, NAT'L OCEANIC & ATMOSPHERIC ADMIN., <https://coast.noaa.gov/data/Documents/OceanLawSearch/Summary%20of%20Law%20-%20National%20Stolen%20Property%20Act.pdf> [https://perma.cc/X9VY-68CP].

¹²³ 18 U.S.C. § 2314.

¹²⁴ See *United States v. Portrait of Wally*, 663 F. Supp. 2d 232, 236 (S.D.N.Y. 2009).

[that is] valued at \$5000 or more 3) with knowledge that the property was stolen, converted, or taken by fraud.”¹²⁵

The word “stolen” is not defined in the National Stolen Property Act. There are a number of interpretations for what “stolen” means in this context as discussed below. The United States Supreme Court broadly interpreted the meaning of the word “stolen” and concluded that its meaning depends on the context under which the property was seized, but that it generally means the taking of personal property of another without the right to do so, with the intent to do so.¹²⁶ The Eighth Circuit held that “stolen” means “all felonious or wrongful takings with the intent to deprive the owner of the rights and benefits of ownership.”¹²⁷ The Sixth Circuit looked at the Oxford English Dictionary’s definition of the word “steal,” which means “to take dishonestly or secretly,” and found that for something to have been “stolen,” the owner does not have to have been permanently deprived of ownership of the item.¹²⁸

In *United States v. Portrait of Wally*, the United States government argued that *Portrait of Wally* was stolen and then shipped into the United States in violation of the National Stolen Property Act.¹²⁹ The ultimate issue in that case was whether the three elements of the Act have been met and, specifically, whether Dr. Leopold knew *Portrait of Wally* was stolen when it was imported into the United States.¹³⁰

2. *The Recovery Doctrine*

Common law principles acknowledge that an item can cease to be stolen, which leads to restitution laws most likely not being applicable.¹³¹ Under English common law doctrine, “one cannot be convicted of receiving stolen goods if, before the stolen goods reached the receiver, the goods had been recovered by their owner or his agent, including the police.”¹³² This common law recovery doctrine applies agency principles where the police or government officials are acting on behalf of the owner

¹²⁵ *Id.* at 250.

¹²⁶ *United States v. Turley*, 352 U.S. 407, 412, 414 (1957).

¹²⁷ *United States v. Bates*, 584 F.3d 1105, 1109 (8th Cir. 2009).

¹²⁸ *United States v. Jackson*, 401 F.3d 747, 750 (6th Cir. 2005).

¹²⁹ *Portrait of Wally*, 663 F. Supp. 2d at 236.

¹³⁰ *Id.* at 237.

¹³¹ *Id.* at 259.

¹³² *United States v. Muzii*, 676 F.2d 919, 923 (2d Cir. 1982).

of the stolen good.¹³³ The goods cease from being stolen when they are in the possession of the police, as the police are holding it in trust for the owner.¹³⁴ This is distinguishable from a case when a government officer inspects and identifies a piece of property.¹³⁵

In the case of *United States v. Portrait of Wally*, the Leopold Museum argued that the recovery doctrine applied because the United States Forces had recovered *Portrait of Wally* so it would cease from being stolen.¹³⁶ However, the judge ultimately found that the recovery doctrine did not apply in this case because the United States Forces were tasked with sorting and transferring the property.¹³⁷

3. Civil Forfeiture in the United States

When a stolen item is brought into or exported from the United States, it is subject to forfeiture.¹³⁸ There are several statutes that apply to this scenario, and the application of these statutes depends on the specific nature of the piece of stolen property.

First, 19 U.S.C.S § 1595a states that essentially any piece of property brought into the United States, that is contrary to law, may be seized and forfeited.¹³⁹ A piece of property is deemed contrary to law and shall be seized if it is stolen property.¹⁴⁰

In addition, 18 U.S.C.S. § 545 addresses the smuggling of goods into the United States. Whoever smuggles goods into the United States “shall be fined under this title or imprisoned not more than 20 years, or both.”¹⁴¹ These goods shall be forfeited to the United States.¹⁴² Again, goods that are stolen are “contrary to law.”¹⁴³ Therefore, smuggling stolen goods into the United States leads to forfeiture to the United States.

Lastly, 22 U.S.C.S. § 401 addresses civil forfeiture for stolen goods brought into the United States, specifically illegal exportation of

¹³³ *United States v. Portrait of Wally*, 105 F. Supp. 2d 288, 293 (S.D.N.Y. 2000).

¹³⁴ *See United States v. Johnson*, 767 F.2d 1259, 1267 (8th Cir. 1985).

¹³⁵ *Id.* at 1269.

¹³⁶ *Portrait of Wally*, 663 F. Supp. 2d at 259.

¹³⁷ *Id.* at 260.

¹³⁸ 19 U.S.C. § 1595a(c)(1)(A).

¹³⁹ *Id.* (a).

¹⁴⁰ *Id.* (c)(1)(A).

¹⁴¹ 18 U.S.C. § 545.

¹⁴² *Id.*

¹⁴³ 19 U.S.C. § 1595a(c)(1)(A).

war materials.¹⁴⁴ It states that whenever an attempt to export any arms or munitions of war from the United States is in violation of law, the arms or munitions may be seized by the Secretary of Treasury.¹⁴⁵ In addition, the statute states that when any commodity from war other than arms or munition of war that is contrary to law is attempted to be exported, the Secretary of Commerce may seize it.¹⁴⁶ When these items are seized, they shall be forfeited to the United States.¹⁴⁷

These three statutes regarding civil forfeiture work together; they all essentially mean that an item illegally brought into the United States shall be forfeited to the United States government. They are often applied together, especially when looking at Nazi era looted artwork pieces that end up in the United States.¹⁴⁸ These pieces are commodities from war, so if there has been an attempt to smuggle them into, import them into, or export them from the United States, then all three of these statutes may be applied to allow civil forfeiture. The statutes would also arguably come into play when the National Stolen Property Act applies because the National Stolen Property Act similarly requires that the artwork be unlawfully imported into the United States or exported in a foreign commerce transaction. In *United States v. Portrait of Wally*, the government argued that because the National Stolen Property Act applied to *Portrait of Wally*, the painting was also subject to civil forfeiture.¹⁴⁹ This issue would have gone to trial had the parties not settled.¹⁵⁰

4. *Foreign Sovereign Immunities Act*

In addition to the previous three doctrines that can be used together for a restitution claim, the Foreign Sovereign Immunities Act also has been used to bring restitution claims.¹⁵¹ The Foreign Sovereign Immunities Act is a federal statute that addresses when a case can lawfully be brought against a foreign sovereign or its agencies.¹⁵² A foreign sovereign is normally immune from suit in the United States, but there are

¹⁴⁴ 22 U.S.C.S. § 401.

¹⁴⁵ *Id.* (a).

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ See *United States v. Portrait of Wally*, 663 F. Supp. 2d 232, 236 (S.D.N.Y. 2009).

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at 276.

¹⁵¹ See *Republic of Austria v. Altmann*, 541 U.S. 677, 687–88 (2004).

¹⁵² 28 U.S.C. § 1605.

a few exceptions to that rule. One exception to foreign sovereign immunity is a case “in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state.”¹⁵³ Plaintiffs have used this statute to bring restitution cases in the United States, and the Supreme Court has found that it applied to the restitution of a Nazi era looted piece of artwork.¹⁵⁴

5. *Nazi-looted Property Acts*

Nations all around the world have implemented legislation to ensure justice is served for those whose property was unjustly seized from them during World War II. In 1998, the United States enacted the Holocaust Victims Redress Act.¹⁵⁵ This Act specifically applies to cultural property loss for Holocaust survivors,¹⁵⁶ and is intended to provide justice to victims of the Holocaust whose property was seized by the United States government.¹⁵⁷ The Act focuses on bank accounts, trusts, securities, or assets, and directly states that the legislation applies to looted artworks.¹⁵⁸

II. ANALYSIS

Part II will illustrate how *United States v. Portrait of Wally* spearheaded international efforts towards restitution of Nazi era looted art and examine how the case showcases that the United States’ system for seeing that justice is served for victims of Nazi era looting is more effective than the Austrian system. First, the analysis will frame the international efforts towards restitution post-1998 with regard to the national attention surrounding *United States v. Portrait of Wally*. Then, the analysis will look specifically at the progress that Austria, the country of origin of *Portrait of Wally*, made in its restitution laws post-1998. Finally, it will analyze the holdings of *United States v. Portrait of Wally* and demonstrate how they showcase that the United States’ system for restitution of Nazi era looted art is more effective than the Austrian system.

¹⁵³ *Id.* (a)(3).

¹⁵⁴ *Altmann*, 541 U.S. at 701.

¹⁵⁵ Holocaust Victims Redress Act, Pub. L. No. 105-158, 112 Stat. 15 (1998).

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

It will conclude by explaining how Austria's restitution laws should be amended to reflect the United States' system.

A. UNITED STATES V. PORTRAIT OF WALLY SPEARHEADED
INTERNATIONAL EFFORTS TOWARDS RESTITUTION OF NAZI ERA
LOOTED ARTWORK

United States v. Portrait of Wally is the underlying reason for the recent surge in global legislation regarding the restitution of Nazi era looted artwork.¹⁵⁹ Without this case and the attention it brought to restitution, the world's legal and political efforts towards furthering restitution of Nazi era looted artworks would not be where they are today. A brief overview of the *United States v. Portrait of Wally* case was given above, and the facts of the case are recounted below. An analysis follows regarding how the world would not be where it is today with restitution efforts regarding Nazi era looted artworks were it not for *United States v. Portrait of Wally*.

1. *Facts of United States v. Portrait of Wally*

Bondi Jaray ("Bondi") obtained Egon Schiele's painting, *Portrait of Wally*, around 1925.¹⁶⁰ Bondi owned an art gallery in Vienna called the Wurthle Gallery, but *Portrait of Wally* was in her personal collection at home.¹⁶¹ In 1938 during the *Anschluss*, the Wurthle Gallery was labeled "non-Aryan" and subject to confiscation by Nazi Germany since the owner, Bondi, was Jewish.¹⁶² Bondi opened negotiations for the gallery and sold it to a man named Friedrich Welz ("Welz"), who became a member of the Nazi party shortly after the transaction.¹⁶³ It is disputed whether the transaction was voluntary for this reason.¹⁶⁴ During the negotiation, Welz was at Bondi's apartment and allegedly saw *Portrait of Wally* hanging on her wall and demanded she hand it over.¹⁶⁵ She resisted because it was part of her personal collection.¹⁶⁶ Ultimately, Bondi gave

¹⁵⁹ See Demarsin, *supra* note 8, at 131.

¹⁶⁰ *United States v. Portrait of Wally*, 663 F. Supp. 2d 232, 238 (S.D.N.Y. 2009).

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

Portrait of Wally to Welz when her husband reminded her that Welz could prevent them from escaping to England, which they planned to do the next day.¹⁶⁷ Welz never paid Bondi for *Portrait of Wally*.¹⁶⁸ Welz subsequently obtained a collection of Schiele paintings, some of which were from a collection owned by Dr. Heinrich Reiger, a Jewish dentist and collector of Schiele's works who did not survive the Holocaust.¹⁶⁹

When the United States forces occupied Austria after World War II, Welz was arrested and detained, and his property was seized, including the Schiele collection that included *Portrait of Wally*.¹⁷⁰ The United States forces were told to restore ownership of artworks that were taken from Austria or other countries back to the country of origin.¹⁷¹ Dr. Rieger's heirs tried to recover their family property stolen by Nazis, including the Schiele collection, and requested that Welz be prevented from reacquiring the collection.¹⁷² But, *Portrait of Wally* was not part of this request.¹⁷³ After three years of dispute, the Austrian government consented to restitution of the Schiele paintings collection to the Reiger heirs, which mistakenly included *Portrait of Wally*.¹⁷⁴ The Rieger heirs then negotiated a sale of their Schiele collection to the Belvedere, a national gallery in Vienna owned by the Austrian government.¹⁷⁵ This transaction again included *Portrait of Wally* by mistake.¹⁷⁶

After the war, Bondi also began restitution efforts against Welz and successfully regained ownership of her gallery, but not *Portrait of Wally*.¹⁷⁷ A few years later, Dr. Rudolph Leopold, another collector of Schiele's works, met with Bondi and bought several pieces of art.¹⁷⁸ During that meeting, Bondi asked about *Portrait of Wally*'s whereabouts.¹⁷⁹ Dr. Leopold knew *Portrait of Wally* was rightly Bondi's because she was listed as the last owner in the 1930 Kallir Catalogue, and

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* at 238–39.

¹⁷⁰ *Id.* at 239.

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.* at 241.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* at 242.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* at 243.

¹⁷⁹ *Id.*

he told her that *Portrait of Wally* was in the Belvedere.¹⁸⁰ Bondi said it was hers and asked him to get the painting and ship it to her.¹⁸¹ Dr. Leopold told her that he would help her, but subsequently acquired *Portrait of Wally* for himself from the Belvedere in exchange for other artworks.¹⁸² Bondi found out and unsuccessfully tried to regain ownership of *Portrait of Wally* from Dr. Leopold until she died in 1969.¹⁸³

In 1994, Dr. Leopold became director of the newly established Leopold Museum and sold his art collection to the museum, including *Portrait of Wally*.¹⁸⁴ In 1996, The Leopold Museum loaned part of its Schiele collection, including *Portrait of Wally*, to the MoMA in New York for a Schiele exhibition.¹⁸⁵ *Portrait of Wally* was on display at the MoMA from October 8, 1997–January 4, 1998, when the New York County District Attorney’s Office issued a subpoena for the painting.¹⁸⁶ The subpoena was in response to Bondi’s heirs’ requests to the MoMA and New York political and legal entities that the painting remain in the United States for investigation of rightful ownership.¹⁸⁷ The New York Court of Appeals, the state’s highest court, quashed the subpoena as issued in violation of a New York state statute, and subsequently United States Magistrate Judge James C. Francis issued a federal seizure warrant for the painting.¹⁸⁸ The United States government then commenced a forfeiture action and seized *Portrait of Wally*, with the goal of returning the painting to its rightful owner, Bondi’s estate.¹⁸⁹

Four motions were litigated¹⁹⁰ before a settlement was reached in 2010 between the Leopold Museum, the United States government, and

¹⁸⁰ *Id.*; see also Egon Schiele, KALLIR RSCH. INST., <https://kallirresearch.org/artist-egon-schiele/> [<https://perma.cc/SJD7-T9Q5>] (explaining that the 1930 Kallir Catalogue is an art catalogue compiled by Otto Kallir of Schiele’s paintings and their whereabouts in 1930).

¹⁸¹ *Portrait of Wally*, 663 F. Supp. 2d at 243.

¹⁸² *Id.*

¹⁸³ *Id.* at 244.

¹⁸⁴ *Id.* at 245.

¹⁸⁵ *Id.* at 246.

¹⁸⁶ *Id.*

¹⁸⁷ Judith H. Dobrzynski, *District Attorney Enters Dispute Over Artworks*, N.Y. TIMES (Jan. 8, 1998), <https://www.nytimes.com/1998/01/08/nyregion/district-attorney-enters-dispute-over-artworks.html> [<https://perma.cc/4SVG-CMAJ>].

¹⁸⁸ *Portrait of Wally*, 663 F. Supp. 2d at 246.

¹⁸⁹ U.S. Att’y S. Dist. of N.Y., *supra* note 58, at 3.

¹⁹⁰ See *Portrait of Wally*, 663 F. Supp. 2d 232; *United States v. Portrait of Wally*, 2002 U.S. Dist. LEXIS 6445 (S.D.N.Y. Apr. 12, 2002); *United States v. Portrait of Wally*, 105 F. Supp. 2d 288 (S.D.N.Y. 2000); *United States v. Portrait of Wally*, 2000 U.S. Dist. LEXIS 18713 (S.D.N.Y. Dec. 28, 2000).

Bondi's estate.¹⁹¹ The Leopold Museum agreed to pay Bondi's estate \$19,000,000 in exchange for *Portrait of Wally*.¹⁹² This battle ultimately brought justice to a victim of Nazi era looting almost seventy years after the work was stolen and sparked a new movement towards restitution efforts globally.¹⁹³

2. *Aftermath of United States v. Portrait of Wally*

When the New York County District Attorney's Office issued a subpoena for *Portrait of Wally* in 1998, *United States v. Portrait of Wally* became an internationally known dispute that was widely reported in the press¹⁹⁴ and in law journals.¹⁹⁵ The global attention given to the *Portrait of Wally* case, which likely was elevated because it started around the fiftieth anniversary of World War II,¹⁹⁶ sparked an international effort to further restitution of Nazi era looted art.¹⁹⁷ Global legislation regarding restitution of Nazi era looted art would not be where it is today were it not for the *Portrait of Wally* case.

The Washington Conference took place in the United States a few months after the New York County District Attorney issued a subpoena for *Portrait of Wally* as a result of the new attention brought to restitution.¹⁹⁸ It was at that conference that the Washington Principles were developed.¹⁹⁹ The Washington Conference marked the first global effort towards restitution after World War II.²⁰⁰ The Washington Principles were

¹⁹¹ U.S. Att'y S. Dist. of N.Y., *supra* note 58.

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ See, e.g., Demarsin, *supra* note 8, at 136 n.78; Dobrzynski, *supra* note 187; Judith H. Dobrzynski, *Man in the Middle of the Schiele Case*, N.Y. TIMES (Jan. 29, 1998), <https://www.nytimes.com/1998/01/29/arts/man-in-the-middle-of-the-schiele-case.html> [<https://perma.cc/S7HT-32RA>]; *Nazi Era Art Claims Fail to Halt Shipment*, WASH. POST (Jan. 6, 1998), <https://www.washingtonpost.com/archive/lifestyle/1998/01/06/nazi-era-art-claims-fail-to-halt-shipment> [<https://perma.cc/Z4QK-D372>].

¹⁹⁵ See, e.g., Demarsin, *supra* note 8, at 136 n.78; Lawrence M. Kaye, *A Quick Glance at the Schiele Paintings*, 10 DEPAUL-LCA J. ART & ENT. L. 11, 12; 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. 1396.

¹⁹⁶ Bonadies, *supra* note 83, at 674.

¹⁹⁷ Demarsin, *supra* note 8, at 137.

¹⁹⁸ U.S. DEP'T OF STATE, *supra* note 79; *United States v. Portrait of Wally*, 663 F. Supp. 232, 236 (S.D.N.Y. 2009).

¹⁹⁹ Demarsin, *supra* note 8, at 137.

²⁰⁰ Bonadies, *supra* note 83, at 677.

guiding, but non-binding, and were the first step in the movement towards globally recognized restitution efforts.²⁰¹

Further international efforts quickly followed. As discussed above, in 1998, the European Parliament established its first resolution on restitution of Nazi era looted art.²⁰² The timing of this resolution was no coincidence; it was released in the wake of *United States v. Portrait of Wally*. The European Union's resolution led to the Parliamentary Assembly's Resolution 1205.²⁰³ This resolution went further than the Washington Principles by focusing specifically on restitution of Jewish cultural property and called for a European conference regarding the issue.²⁰⁴ Resolution 1205 also called for a European conference to further discuss the implementation of the Washington Principles, the resolution itself, and restitution of Nazi era looted artworks in general.²⁰⁵ This conference did not amount to anything binding but furthered conversations and efforts towards restitution.²⁰⁶ In 2003, the European Parliament issued another resolution regarding commerce of goods with contested ownership.²⁰⁷ Then, in 2009, the Terezin Declaration was created at the Prague Holocaust Era Assets Convention which reaffirmed the international goal of restitution of Nazi era looted possessions to victims.²⁰⁸

These international-policy-related events, explained in further detail above in Part II, would not have occurred without the revival of the focus on restitution that was spurred from *United States v. Portrait of Wally*.²⁰⁹ Each conference, resolution, and declaration happened because of the one before it. It was a chain of events that occurred in direct response to *United States v. Portrait of Wally*. The conferences did not produce any binding legislation but left it to each country to implement the restitution

²⁰¹ Chloe Ricke, *The Time is Now: Why the United States Should Follow the United Kingdom's Lead and Implement a Federal Nazi-Looted Art Spoilation Advisory Panel*, 44 GA. J. INT'L & COMP. L. 655, 671 (2016).

²⁰² Resolution on the Restitution of the Possessions of Holocaust Victims, 1998 O.J. (C 292) 0166.

²⁰³ EUR. PARL. ASS., *Looted Jewish Cultural Property*, Resolution 1205, 19 (1999), <https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=16726&lang=en> [<https://perma.cc/KUR7-BC62>].

²⁰⁴ Demarsin, *supra* note 8, at 141.

²⁰⁵ *Id.* at 142–43.

²⁰⁶ *Id.* at 143.

²⁰⁷ See European Parliament Resolution on a Legal Framework for Free Movement Within the Internal Market of Goods Whose Ownership Is Likely to Be Contested, EUR. PARL. DOC. T5-0584/2003.

²⁰⁸ HOLOCAUST ERA ASSETS CONF., *supra* note 118.

²⁰⁹ Dobrzynski, *supra* note 84.

goals internally, which sparked legislative reform within individual countries.²¹⁰

a. Efforts in Austria

Austria received a large amount of negative attention for its lack of legislation regarding restitution between the 1940s and 1998, and its reform efforts in 1998 were triggered by *United States v. Portrait of Wally*.²¹¹ Bondi, the original owner of *Portrait of Wally*, was from Austria,²¹² and the Leopold Museum that housed *Portrait of Wally* until the painting was transferred to the United States was located in Austria.²¹³ In the beginning of 1998, there were no active laws governing restitution of Nazi era looted property to rightful owners and their heirs.²¹⁴ The 1955 State Treaty that brought independence to Austria was the only active law that mentioned restitution, and it established that the Austrian federal government was to take under its control heirless or unclaimed property that was confiscated or looted during the Nazi era.²¹⁵ Prior to this treaty, in the 1940s, the Austrian government had issued three rounds of restitution acts to promote justice for victims of Nazi era looting.²¹⁶ Each of these acts, however, had a short time limit of when claims had to be filed.²¹⁷ After this trilogy of legislation, Austria implemented no new restitution legislation for about 50 years.

The gap in Austrian restitution legislation ended in December of 1998 when Austria passed the Art Restitution Act of 1998 in response to the subpoena in the United States for *Portrait of Wally*.²¹⁸ This Act has been amended twice since ratification and it establishes the current basis

²¹⁰ Lucia Foulkes, *The Art of Atonement: How Mandated Transparency Can Help Return Masterpieces Lost During World War II*, 38 B.C. INT'L & COMP. L. REV. 305, 313–15 (2015).

²¹¹ Houck, *supra* note 31, at 2; Bonadies, *supra* note 83, at 677.

²¹² *United States v. Portrait of Wally*, 663 F. Supp. 2d 232, 238 (S.D.N.Y. 2009).

²¹³ LEOPOLD MUSEUM, <https://www.leopoldmuseum.org/en/visit/getting-here> [https://perma.cc/6XME-859B].

²¹⁴ Bonadies, *supra* note 83, at 677.

²¹⁵ See State Treaty for the Re-Establishment of an Independent and Democratic Austria, *supra* note 40.

²¹⁶ See ESLI RESTOR. JUST. & POST-HOLOCAUST IMMOVABLE PROP. REST. STUDY TEAM, *supra* note 38, at 6–8; FIRST RESTITUTION ACT, *supra* note 44; SECOND RESTITUTION ACT, *supra* note 46; THIRD RESTITUTION ACT, *supra* note 48.

²¹⁷ See ESLI RESTOR. JUST. & POST-HOLOCAUST IMMOVABLE PROP. REST. STUDY TEAM, *supra* note 38, at 6–8.

²¹⁸ Bonadies, *supra* note 83, at 677; Dobrzynski, *supra* note 84, at 2.

for restitution laws in Austria.²¹⁹ However, it only provides for restitution of federally-owned artworks to its rightful owner or their heirs,²²⁰ it does not include restitution of Nazi era looted artworks that are in private institutions, businesses, or houses.²²¹ The implementation of this Act was a large step in the right direction, and it would not have happened without *United States v. Portrait of Wally* starting an international uproar for reform in restitution laws.²²² However, amendments are still needed to make Austria's restitution laws an adequate remedy for the injustices of Nazi era looting.

United States v. Portrait of Wally showcases that the United States' legal system for restitution of Nazi era looted artworks is more effective than Austria's for seeing that justice for victims of Nazi era looting is served. *Portrait of Wally* was in Austria from the time it was stolen from Bondi during the Nazi era until it was displayed in the MoMA in New York in 1997.²²³ Austria's Art Restitution Act did not touch *Portrait of Wally* because it was in a private collection, and Austria's restitution laws only apply to artworks in federal collections.

B. UNITED STATES V. PORTRAIT OF WALLY SHOWCASES THAT THE
UNITED STATES HAS A MORE EFFECTIVE SYSTEM TO SERVE
JUSTICE TO VICTIMS OF NAZI ERA LOOTING THAN AUSTRIA

Portrait of Wally was untouchable by Austrian restitution laws while in Austria, and the fact that it took *Portrait of Wally* being on display in the MoMA in the United States for litigation to commence shows that the United States has more effective restitution laws than Austria. *United States v. Portrait of Wally* proves that Austria's restitution laws should be amended to comprehensively cover stolen works in both public and private collections, just like the system in the United States.

²¹⁹ See FED. MINISTRY REPUBLIC AUSTRIA: ARTS, CULTURE, CIVIL SERVICE AND SPORT, *supra* note 86.

²²⁰ *Id.* § 1.

²²¹ Bonadies, *supra* note 83, at 679.

²²² See Houck, *supra* note 31.

²²³ See *United States v. Portrait of Wally*, 663 F. Supp. 2d 232, 238–46 (S.D.N.Y. 2009).

1. *Holdings of United States v. Portrait of Wally*

United States v. Portrait of Wally was litigated for over ten years in the United States,²²⁴ but the result showcases the effectiveness of the United States' laws applicable to restitution of Nazi era looted artwork in comparison to the Austrian system. When *Portrait of Wally* was on display at the MoMA, the family and heirs of the original owner claimed that it had been stolen.²²⁵ This spurred Robert Morgenthau, the Manhattan District Attorney, to issue the subpoena and look into the claims.²²⁶ When the subpoena was issued, *United States v. Portrait of Wally* commenced in the United States.²²⁷ The subpoena was quashed in 1999 by the New York Court of Appeals in a ruling, which held that seizure of artworks on loan to museums is prevented in New York.²²⁸ The next day, United States Magistrate Judge James C. Francis IV of the Southern District of New York issued a federal seizure warrant for *Portrait of Wally*²²⁹ based on a finding of probable cause that the painting violated the National Stolen Property Act.²³⁰ The following day, the United States government commenced an action to forfeit *Portrait of Wally* to return the painting to Bondi's estate.²³¹ Bondi's estate, another relative of Bondi's, the Leopold Museum, and the MoMA all filed claims to *Portrait of Wally* and were claimants in the case.²³² Litigation spanned for over ten years before a settlement was reached in 2010 that brought justice to Bondi's heirs.²³³ The terms of settlement included that the Leopold Museum would pay Bondi's estate \$19,000,000 in exchange for *Portrait of Wally*.²³⁴ The holdings, and more specifically the outcome of the settlement, showcase that the United States has a more effective system for bringing justice to victims of Nazi era looting than Austria.

²²⁴ See *id.* at 232; *Portrait of Wally, United States v. Portrait of Wally*, No. 99CV9940, 2002 U.S. Dist. LEXIS 6445 (S.D.N.Y. Apr. 12, 2002); *United States v. Portrait of Wally*, 105 F. Supp. 2d 288 (S.D.N.Y. 2000); *United States v. Portrait of Wally*, No. 99CV9940, 2000 U.S. Dist. LEXIS 18713 (S.D.N.Y. Dec. 28, 2000).

²²⁵ Dobrzynski, *supra* note 194.

²²⁶ *Id.*

²²⁷ *Portrait of Wally*, 663 F. Supp. 2d at 246.

²²⁸ *Id.* (applying Section 12.03 of New York's Arts and Cultural Affairs law).

²²⁹ *Id.*

²³⁰ U.S. Att'y S. Dist. of N.Y., *supra* note 58.

²³¹ *Id.*

²³² *Id.*

²³³ See *id.*

²³⁴ *Id.*

a. Wally I & II

In *United States v. Portrait of Wally*, 105 F. Supp. 2d 288, (“*Wally I*”), the first case regarding the painting, the United States Southern District of New York Court addressed the issue of whether the painting was stolen to determine if the National Stolen Property Act and forfeiture laws applied.²³⁵ The United States brought the action against the Leopold Museum and argued that the painting was stolen and the civil forfeiture laws applied.²³⁶ For the National Stolen Property Act to apply, the following elements must be met: “1) transportation in interstate or foreign commerce of property 2) valued at \$5000 or more 3) with knowledge that the property was stolen, converted, or taken by fraud.”²³⁷ The Leopold Museum moved to dismiss the complaint under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6)²³⁸ and argued that the painting was not stolen and therefore not forfeitable because the recovery doctrine applied.²³⁹ The Leopold Museum argued that even if the painting was stolen by Welz, it would have ceased being stolen when the United States forces recovered it.²⁴⁰ The United States District Court for the Southern District of New York found for the Leopold Museum, holding that federal law controlled,²⁴¹ and the recovery doctrine applied.²⁴² This holding was based on the finding that United States forces were acting on behalf of Bondi when they recovered the painting, so *Portrait of Wally* was not stolen.²⁴³ In *United States v. Portrait of Wally*, 2000 U.S. Dist. LEXIS 18713, (“*Wally II*”), the court granted the United States’ motion to alter the judgment to allow an amended complaint.²⁴⁴

b. Wally III

In *United States v. Portrait of Wally*, 2002 U.S. Dist. LEXIS 6445, (“*Wally III*”), the United States amended its complaint and argued that the

²³⁵ See *United States v. Portrait of Wally*, 105 F. Supp. 2d 288, 289 (S.D.N.Y. 2000).

²³⁶ *Id.*

²³⁷ *United States v. Portrait of Wally*, 663 F. Supp. 2d 232, 250 (S.D.N.Y. 2009).

²³⁸ *Portrait of Wally*, 105 F. Supp. 2d at 289.

²³⁹ *Id.* at 290–91.

²⁴⁰ *Id.* at 291.

²⁴¹ *Id.* at 292.

²⁴² *Id.* at 294.

²⁴³ *Id.*

²⁴⁴ *United States v. Portrait of Wally*, No. 99CV9940, 2000 U.S. Dist. LEXIS 18713, at *5 (S.D.N.Y. Dec. 28, 2000).

recovery doctrine did not apply.²⁴⁵ The United States argued that American forces seized all property of suspected war crimes, regardless of whether it was stolen,²⁴⁶ and the property was then sorted and transferred to its country of origin.²⁴⁷ The Leopold Museum again filed a motion to dismiss.²⁴⁸ The Court denied the motion, finding that the recovery doctrine did not apply and *Portrait of Wally* could be considered stolen.²⁴⁹

The Leopold Museum argued that even if the recovery doctrine did not apply, the complaint failed to allege intent by Welz to steal *Portrait of Wally*.²⁵⁰ However, the Court found that intent was present.²⁵¹ The United States then asserted that *Portrait of Wally* remained stolen until it was at the MoMA.²⁵² The Court found that neither the Belvedere nor Dr. Leopold were owners of *Portrait of Wally*, so the Leopold Museum did not obtain it in good title, and it remained stolen.²⁵³ The Court ultimately denied the Leopold Museum's motion to dismiss.²⁵⁴

Additionally, the grandson of Bondi's husband, Ronald Jaray, (not part of her estate), was a claimant in the case, and he filed a motion for summary judgment to reject the claim of Bondi's estate.²⁵⁵ The court granted Bondi's estates' motion for summary judgment, dismissing Jaray's claims, as Jaray was never adopted by Bondi.²⁵⁶ Therefore, in *Wally III*, the court denied the Leopold Museum's motion to dismiss and granted summary judgment to dismiss Jaray's claim.²⁵⁷

c. Wally IV

Seven years went by until the next case. In 2009, both the United States and the Leopold Museum moved for summary judgment.²⁵⁸ The United States and Bondi's estate sought summary judgment that declared

²⁴⁵ United States v. *Portrait of Wally*, No. 99CV9940, 2002 U.S. Dist. LEXIS 6445, at *46–47 (S.D.N.Y. Apr. 12, 2002).

²⁴⁶ *Id.*

²⁴⁷ *Id.*

²⁴⁸ *Id.* at *3.

²⁴⁹ *Id.* at *46.

²⁵⁰ *Id.* at *50.

²⁵¹ *Id.* at *51–52.

²⁵² *Id.* at *52–58.

²⁵³ *Id.* at *59.

²⁵⁴ *Id.* at *96.

²⁵⁵ *Id.* at *97.

²⁵⁶ *Id.* at *100–01.

²⁵⁷ *Id.*

²⁵⁸ United States v. *Portrait of Wally*, 663 F. Supp. 2d 232, 236 (S.D.N.Y. 2009).

forfeiture of *Portrait of Wally*, applying the National Stolen Property Act and civil forfeiture laws.²⁵⁹ The Leopold Museum sought summary judgment that would strike the seizure warrant and release *Portrait of Wally* to the Leopold Museum.²⁶⁰ The Leopold Museum argued that *Portrait of Wally* was not stolen or converted, and, if it was, the Museum did not have knowledge of it.²⁶¹ The Leopold Museum argued that, in order to prove that the civil forfeiture laws applied to *Portrait of Wally*, the United States had to show probable cause “to believe that 1) the [Leopold] Museum imported *Wally*, 2) *Wally* was stolen, 3) and the [Leopold] Museum knew *Wally* was stolen when it shipped the painting to the MoMA.”²⁶²

The United States argued that an agreement was signed between the MoMA and the Leopold Museum, which showed probable cause to believe it was jointly imported, so both parties imported it into the United States.²⁶³ The United States met its burden of showing probable cause that *Portrait of Wally* was stolen in *Wally III*.²⁶⁴ The Leopold Museum did not meet its burden of proof to show that Welz did not steal *Portrait of Wally*.²⁶⁵ The Court then upheld *Wally III* in finding that the recovery doctrine did not apply²⁶⁶ and that *Portrait of Wally* remained stolen until it was in the MoMA.²⁶⁷ The United States made a probable cause showing that the Leopold Museum knew *Portrait of Wally* was stolen when it shipped the painting to the MoMA.²⁶⁸ Lastly, the Court found that a trial was warranted on the issue of whether the Leopold Museum could overcome the United States’ evidence and prove that it did not know *Portrait of Wally* was stolen when it imported the painting into the United States.²⁶⁹

²⁵⁹ *Id.* at 237.

²⁶⁰ *Id.* at 236–37.

²⁶¹ *Id.* at 247; The Leopold Museum made additional arguments that the United States’ claim should be dismissed under the Act of State doctrine and in the interest of international comity, that the equitable defense of laches applied, and that the forfeiture of *Wally* would violate due process. *Id.*

²⁶² *Id.* at 251–52.

²⁶³ *Id.* at 252.

²⁶⁴ *Id.* at 256.

²⁶⁵ *Id.* at 259.

²⁶⁶ *Id.* at 261.

²⁶⁷ *Id.* at 269.

²⁶⁸ *Id.* at 252–53.

²⁶⁹ *Id.* at 252.

d. The Settlement

On July 20, 2010, the United States Attorney of the Southern District of New York announced a settlement, bringing justice to Bondi's heirs.²⁷⁰ A trial had been scheduled for July 26, 2010 to determine the single issue of whether the Leopold Museum could overcome the United States' showing of probable cause that the Leopold Museum knew *Portrait of Wally* was stolen when it shipped the painting to the MoMA.²⁷¹ However, six days before the scheduled hearing, the United States, the estate of Bondi, and the Leopold Museum reached a settlement agreement, wherein the Leopold Museum agreed to pay the Bondi's estate \$19,000,000 in exchange for *Portrait of Wally*.²⁷² The settlement brought justice to a victim of Nazi era looting almost 70 years after the fact.²⁷³ Today, the painting remains in the Leopold Museum in Vienna, Austria, and is displayed with a description of the painting's history.²⁷⁴

This settlement showcases that the United States has a more effective system to serve justice to victims of Nazi era looting than Austria, the country where so much of the Nazi era looting took place. Austria's restitution laws did not touch *Portrait of Wally* because the Art Restitution Act only applies to works in public institutions, and *Portrait of Wally* was in a private institution. Therefore, it took *Portrait of Wally* being in the United States for any restitution laws to apply.

2. Other Cases in the United States

While the *Portrait of Wally* litigation was pending, international attention was on Nazi era looting of artwork, and specifically on how the United States court system may be the best place to bring the action. In 2004, amid the *United States v. Portrait of Wally* litigation, the United States Supreme Court addressed its first case regarding Nazi era looted artworks: *Republic of Austria v. Altmann*, 541 U.S. 677 (2004), which was not able to be resolved in the victim's home country of Austria, as explained below. In 2022, the federal courts in the United States are still

²⁷⁰ U.S. Att'y S. Dist. of N.Y., *supra* note 58.

²⁷¹ *Id.* at 3.

²⁷² *Id.*

²⁷³ *Id.*

²⁷⁴ Egon Schiele, *Portrait of Wally Neuzil*, LEOPOLD MUSEUM, <https://www.leopoldmuseum.org/en/collection/highlights/147> (last visited Feb. 13, 2023) [<https://perma.cc/G7R4-NWWZ>].

hearing cases regarding Nazi era looted artworks. These cases further showcase the United States court system's effectiveness in restitution of Nazi era looted artworks.

a. Republic of Austria v. Altmann

Republic of Austria v. Altmann was litigated in the United States alongside *United States v. Portrait of Wally*. Maria Altmann was the niece of Ferdinand Bloch-Bauer, who was a wealthy businessman in the sugar industry.²⁷⁵ Ferdinand and his wife, Adele, lived in Vienna and collected valuable works of art, including six paintings by Gustav Klimt.²⁷⁶ Two of those paintings were commissioned by Ferdinand of his wife, Adele, one of them being the now famous *Portrait of Adele Bloch-Bauer I*.²⁷⁷ Adele died in 1925, and in her will she asked her husband to bequeath the paintings to the Belvedere Gallery after his death.²⁷⁸ However, Ferdinand was the sole owner of the paintings and never transferred ownership to the Belvedere Gallery.²⁷⁹ During the *Anschluss*, Ferdinand fled to Zurich, and his possessions, including the Klimt paintings, were looted by Nazis.²⁸⁰ A Nazi lawyer sold three of the paintings to the Belvedere Gallery.²⁸¹

Ferdinand left his estate to his nieces and nephew, including Altmann, unaware that his possessions had been seized.²⁸² The heirs tried to recover the paintings from the Belvedere Gallery, and a Gallery representative responded that Adele bequeathed the paintings to the Belvedere Gallery, refusing restitution.²⁸³ Documented evidence, however, revealed that neither Adele nor Ferdinand had donated the six Klimt paintings to the Belvedere Gallery.²⁸⁴ This triggered Altmann to file claims to recover the paintings under the new Austrian Art Restitution Act of 1998.²⁸⁵ However, the committee analyzing the claim allegedly misread Adele's will on purpose to be a binding obligation that required the

²⁷⁵ Republic of Austria v. Altmann, 541 U.S. 677, 681 (2004).

²⁷⁶ *Id.*

²⁷⁷ *Id.*

²⁷⁸ *Id.* at 681–82.

²⁷⁹ *Id.*

²⁸⁰ *Id.* at 682.

²⁸¹ *Id.*

²⁸² *Id.*

²⁸³ *Id.* at 683.

²⁸⁴ *Id.* at 684.

²⁸⁵ *Id.*

paintings to stay in the Belvedere Gallery.²⁸⁶ Altmann then announced she would file a lawsuit in Austria for restitution of the paintings.²⁸⁷ Court costs in Austria were proportional to the value of the recovery sought, however, and the paintings at issue here were worth millions.²⁸⁸ Altmann had to ultimately dismiss the suit in Austria as she could not afford it, but she later refiled a civil suit in her new home state of California in the United States under the Foreign Sovereign Immunities Act.²⁸⁹

The case was litigated in United States federal courts until it reached the Supreme Court in 2004.²⁹⁰ The Supreme Court ruled that the Foreign Sovereign Immunities Act applied, justifying Altmann's claim against the Austrian government in the United States.²⁹¹ Arbitration was subsequently initiated in Austria, and the arbitration panel found in favor of Altmann. The arbitration panel concluded that the Klimt paintings were never donated to the Belvedere Gallery, they were looted by Nazis.²⁹² If it were not for the United States Supreme Court's finding that Altmann's claims against the Austrian government were justified, arbitration in Austria would not have occurred. Thus, *Republic of Austria v. Altmann* is another example of how the United States has a more effective system to resolve and retribute Nazi era looted artworks than Austria.

After Altmann retained possession of *Portrait of Adele Bloch-Bauer I*, she sold it in June 2006 to well-known art dealer, Ronald Lauder, for \$135 million. Lauder purchased the painting for the Neue Galerie in Manhattan, NY,²⁹³ an intimate gallery dedicated to early twentieth-century German and Austrian art and design.²⁹⁴ The sale was the then highest price paid for a painting.²⁹⁵ The other restituted Klimt paintings were sold later that year and put on display, along with the *Portrait of Adele Bloch-Bauer*

²⁸⁶ *Id.*

²⁸⁷ *Id.*

²⁸⁸ *Id.*

²⁸⁹ *Id.* at 685.

²⁹⁰ *See id.* at 688.

²⁹¹ *Id.* at 701–02.

²⁹² Bonadies, *supra* note 83, at 683–84.

²⁹³ Tom Teodorczuk, *Adele Bloch-Bauer: Gustav Klimt's 'woman in gold'*, CHRISTIE'S (June 15, 2016), <https://www.christies.com/features/The-Woman-in-Gold-7494-1.aspx> [https://perma.cc/G6NB-ZXGE].

²⁹⁴ *Mission Statement*, NEUE GALERIE, <https://www.neuegalerie.org/content/mission-statement> [https://perma.cc/LZ5K-2YTT].

²⁹⁵ Teodorczuk, *supra* note 293.

I, at the Neue Galerie.²⁹⁶ This restitution story has since been made into an iconic movie, *Woman in Gold*.²⁹⁷

b. Cassirer v. Thyssen-Bornemisza Collection Foundation

The United States Supreme Court recently heard the *Cassirer v. Thyssen-Bornemisza Collection Foundation* case in early 2022, the most recent case addressing Nazi era looted art.²⁹⁸ During World War II, the Cassirer family owned a Camille Pissarro impressionist painting, *Rue Saint-Honoré, après-midi, effet de pluie*, that had to be turned over to the Nazis in exchange for visas to leave Nazi Germany.²⁹⁹ The painting was sold anonymously and Cassirer's heir unsuccessfully tried to locate the painting after the war.³⁰⁰ The German courts compensated her for the lost painting but she did not waive her right to recover the painting if it was found.³⁰¹ In 1976, Baron Hans-Heinrich Thyssen-Bornemisza, an art collector, purchased the painting.³⁰² In the 1990s, he sold his collection, including the painting, to the Thyssen-Bornemisza Collection Foundation, an agency of the Kingdom of Spain.³⁰³ An heir further down the Cassirer line of descendants discovered the painting's location in 2000 and filed suit in California, his state of residence, under the Foreign Sovereign Immunities Act.³⁰⁴ After nearly two decades of litigation, the United States Supreme Court heard the case, and vacated the 9th Circuit's holding.³⁰⁵ The Court held that, under the Foreign Sovereign Immunities Act, the California choice-of-law rules applied rather than the federal choice-of-law rules and remanded the case.³⁰⁶ This still left for further litigation to determine who the rightful owner is.³⁰⁷ However, it again displays the effectiveness and far reach of the United States court system (even though

²⁹⁶ *Id.*

²⁹⁷ See *WOMAN IN GOLD* (BBC Films 2015).

²⁹⁸ See *Cassirer v. Thyssen-Bornemisza Collection Found.*, 142 S. Ct. 1502 (2022).

²⁹⁹ *Cassirer v. Thyssen-Bornemisza Collection Found.*, 737 F.3d 613, 615–16 (9th Cir. 2013).

³⁰⁰ *Id.* at 616.

³⁰¹ Sarah Cascone, *The U.S. Supreme Court Will Offer the Final Word in a Two-Decade Battle Over a Nazi-Looted Pissarro Painting*, ARTNET (Dec. 20, 2021), <https://news.artnet.com/art-world/supreme-court-will-hear-nazi-looting-case-over-disputed-pissarro-2050684> [<https://perma.cc/K5CC-26YM>].

³⁰² *Cassirer*, 737 F.3d at 616.

³⁰³ *Id.*

³⁰⁴ *Id.*

³⁰⁵ *Cassirer v. Thyssen-Bornemisza Collection Found.*, 142 S. Ct. 1502, 1508 (2022).

³⁰⁶ *Id.*

³⁰⁷ *Id.* at 1510.

this looted artwork came from Germany rather than Austria), and it illustrates that restitution debates are still happening today.

3. *Austria is not Effectively Serving Justice to Victims of Nazi Era Looting*

Cases regarding Nazi era looted artworks are limited in Austria for many reasons, including jurisdiction, inadequate laws, heirs moving, and court costs. The cases that are litigated in Austria regarding art restitution are governed by the Art Restitution Act, but, as stated above, the Act only applies to pieces that are federally owned. Therefore, Austria should revamp its own laws to cover a broader range of restitution circumstances – just like the system in the United States.

a. Jurisdiction

Unfortunately, no harmonizing conflict-of-law rules exist at the international level.³⁰⁸ Therefore, it is often very difficult to figure out the proper jurisdiction for bringing cases regarding Nazi era looted artworks.³⁰⁹ Many countries may have jurisdiction over the same claim involving Nazi era looted artwork.³¹⁰ However, cases brought in the United States, when there is personal jurisdiction, have been effective a number of times to bring justice to the heirs of the rightful owner.³¹¹

b. Heirs and Artworks Relocating

Additionally, heirs and artworks moving to different countries can pose jurisdictional challenges. It has now been almost ninety years since World War II, and many heirs of Jewish people who were displaced are not in the same country as their ancestors. Cases like *Republic of Austria v. Altmann* are brought in the United States because the heir of the original owner of a painting lives in the United States.³¹² Similarly, many art pieces

³⁰⁸ *Cross-border Restitution Claims of Art Looted in Armed Conflicts and Wars and Alternatives to Court Litigation*, at 25, Directorate General for Internal Policies, PE 556.947 (2016), [https://www.europarl.europa.eu/RegData/etudes/STUD/2016/556947/IPOL_STU\(2016\)556947_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2016/556947/IPOL_STU(2016)556947_EN.pdf) [<https://perma.cc/QCE7-7CGJ>].

³⁰⁹ *See id.*

³¹⁰ *Id.*

³¹¹ *See U.S. Att’y S. Dist. of N.Y.*, *supra* note 58, at 3; *Republic of Austria v. Altmann*, 541 U.S. 677 (2004).

³¹² *See Altmann*, 541 U.S. at 677.

are constantly moving across international borders. *Portrait of Wally* ended up in the United States because of a contractual exhibition in the MoMA, on loan from the Leopold Museum in Austria.³¹³ The location of the heir or the painting can be the reason for jurisdiction being proper in the United States. Whatever the reason for jurisdiction, the United States courts' effectiveness in providing restitution, as compared to the original home countries of many Nazi era looted artworks, warrants change in Austria.

c. Inadequate Laws in Austria

One of the biggest reasons that Austrian courts have a less favorable venue over Nazi era looted artwork cases is because of its inadequate laws. The current and applicable restitution law in Austria, the Art Restitution Act, as stated above, only provides for restitution free of charge for federally-owned artworks.³¹⁴ Nazi era looted artworks that are in private institutions, businesses, or houses are not returned by the state to the original owner or their heirs free of charge like federally-owned works are, and are subject to high court fees.³¹⁵ Works in private institutions, like *Portrait of Wally* in the Leopold Museum, are left unaccounted for by the Art Restitution Act, which leads to many obstacles in bringing claims. For one, private institutions have full discretion on restitution and are not legally obligated by Austria to return any artworks to victims of Nazi era looting unless a victim prevails in litigation.³¹⁶ Also, where litigation for federally-owned artworks typically takes between one and six years, cases regarding works in private institutions typically take between eleven and twenty years.³¹⁷ Therefore, Austria should hold private institutions accountable for restitution of Nazi era looted artworks and amend its Art Restitution Act accordingly.

d. Austrian Court Fees

Lastly, Austria's outrageously expensive court fees do not enable individuals to file claims for restitution of Nazi era looted artworks that are in private institutions, as court fees are proportional to the recovery

³¹³ See *United States v. Portrait of Wally*, 663 F. Supp. 2d 232, 246 (S.D.N.Y. 2009).

³¹⁴ FEDERAL ACT ON THE RESTITUTION OF WORKS OF ART, *supra* note 9, § 1.

³¹⁵ Bonadies, *supra* note 83, at 679.

³¹⁶ *Id.* at 686.

³¹⁷ *Id.* at 687.

sought.³¹⁸ Therefore, artworks looted during the Nazi era that are valued at millions of dollars³¹⁹ would have court fees of about the same amount. Austria's court fees are therefore not financially feasible for most people. Artworks like *Portrait of Wally* would have likely cost millions of dollars to bring to court in Austria.³²⁰ Although federally-owned looted artworks are returned free of cost, those that are in private institutions are nowhere near free to get back in Austria.³²¹ There is also very minimal information available about court fees in Austria. This again warrants change in Austria.

4. Austrian Recommendation and Cases

The Art Restitution Act of 1998 established an Advisory Board that makes recommendations to the Federal Ministers, who are charged with returning artworks from Austrian federal museums to their rightful owners or their heirs.³²² This procedure does not exist for artworks in private institutions. The Advisory Board's recommendations are not binding, but always have been followed.³²³

On March 6, 2020, the Advisory Board published a recommendation regarding a different Egon Schiele painting, *Four Trees*, which was located in the Belvedere Gallery, a federally-owned museum.³²⁴ The Advisory Board recommended the painting be transferred from the Belvedere Gallery to the legal successors of Josef Morgenstern.³²⁵ The Morgensterns were persecuted by Nazis, and before escaping Vienna, entrusted the painting to their lawyer for safe keeping.³²⁶ The lawyer died

³¹⁸ Republic of Austria v. Altmann, 541 U.S. 677, 684 (2004).

³¹⁹ See U.S. Att'y S. Dist. of N.Y., *supra* note 58, at 3.

³²⁰ See *id.*

³²¹ See Republic of Austria v. Altmann, 541 U.S. at 684.

³²² FEDERAL ACT ON THE RESTITUTION OF WORKS OF ART, *supra* note 9, § 3.

³²³ COMM'N FOR ART RECOVERY, THE AUSTRIAN ART RESTITUTION LAW 2, <http://www.commartrecovery.org/docs/TheAustrianArtRestitutionLaw.pdf> [<https://perma.cc/RJ4Q-4MZ2>]; The recommendations made by the Advisory Board are available on the Federal Ministry of Arts, Culture, Civil Service and Sports' website. See Art Restitution Advisory Board, *Decisions*, BUNDESMINISTERIUM: KUNST, KULTUR, ÖFFENTLICHER DIENST UND SPORT, <https://provenienzforschung.gv.at/en/empfehlungen-des-beirats/beschlusse/>.

³²⁴ Art Restitution Advisory Board, *Morgenstern Josef*, BUNDESMINISTERIUM: KUNST, KULTUR, ÖFFENTLICHER DIENST UND SPORT (Mar. 6, 2020), <https://provenienzforschung.gv.at/en/empfehlungen-des-beirats/beschlusse/> [<https://perma.cc/99BV-AT7A>].

³²⁵ *Id.*

³²⁶ *Id.*

and the painting was somehow put in the Belvedere Gallery.³²⁷ The Advisory Board recommended restitution because the Morgensterns lost title due to circumstances caused by Nazi persecution and the Art Restitution Act applied.³²⁸

As seen in the Morgenstern case, the Art Restitution Act is effective in a limited sense. It requires that artworks in federally-owned institutions get returned free of charge to their original owner or their heirs. However, both *Portrait of Wally* and *Four Trees* are paintings by Egon Schiele that were rightfully owned by Jewish people in Austria who lost them due to the *Anschluss*. The biggest difference in these cases is that *Portrait of Wally* was located in a private institution, so the Art Restitution Act did not apply in Austria. It took *Portrait of Wally* being moved to the United States for litigation to commence, which shows that Austria's restitution laws are not effective enough.

5. *How the United States is More Effective*

The United States has a more effective system than Austria for bringing justice to victims and their heirs of Nazi era looting of artworks. This is because Austria's restitution laws that return Nazi era looted artworks free of cost do not include works in private institutions,³²⁹ and litigation for those pieces in Austria would cost as much as the piece is worth (if not more, in some cases).³³⁰ The United States has enacted a number of laws that have been used to bring restitution to victims of Nazi era looted artworks that are not limited to federally-owned pieces³³¹ and court fees, though expensive, are not nearly as expensive as Austrian courts.

United States v. Portrait of Wally showcases that the United States has a more effective system than Austria. If Austria's current restitution scheme was not limited to federally-owned works, it is almost certain that *Portrait of Wally* would not have ended up in the MoMA in the first place, and litigation in the United States would have never taken place. *Portrait of Wally* was displayed in the Leopold Museum, a private museum in

³²⁷ *Id.* at 3.

³²⁸ *Id.* at 5.

³²⁹ FEDERAL ACT ON THE RESTITUTION OF WORKS OF ART, *supra* note 9, § 1.

³³⁰ See *Republic of Austria v. Altmann*, 541 U.S. 677, 684 (2004).

³³¹ See 18 U.S.C. § 2314; 19 U.S.C. § 1595a; 18 U.S.C. § 545; 22 U.S.C. § 401.

Austria.³³² If Austria's Art Restitution Act included artworks in private institutions, allowing the free return of Nazi era looted artworks to their original owners, Bondi (or her heirs) more than likely would have been able to file and retain *Portrait of Wally* well before 2010.

However, the success of the case in the United States can be largely attributed to the effectiveness of the applicable National Stolen Property Act and civil forfeiture laws. The National Stolen Property Act makes it illegal for stolen goods valued at \$5,000 or more to be transported interstate or in foreign commerce when it is known that the good is stolen.³³³ Then, civil forfeiture laws allow the United States to seize property in the United States that is contrary to law.³³⁴ If *United States v. Portrait of Wally* would have gone to trial, it is more than likely that the court would have found that *Portrait of Wally* was stolen, which would have resulted in the United States seizing the painting and returning it to Bondi per the Holocaust Victims Redress Act. The National Stolen Property Act and civil forfeiture laws apply to any stolen goods.³³⁵ Additionally, since the United States government brought this civil case, the heirs of Bondi got their \$19,000,000 in settlement without the direct court fees³³⁶ that they would have had to pay in Austria.³³⁷

The Foreign Sovereign Immunities Act applied retroactively in *Republic of Austria v. Altmann*³³⁸ and was more effective in that case than litigation in Austria for a number of reasons. In *Republic of Austria v. Altmann*, the Klimt paintings were in a federally-owned museum, but recovery was still not possible because the government believed the paintings were voluntarily given to the museum,³³⁹ and litigation costs to prove otherwise were outrageous.³⁴⁰ Therefore, even when artworks are federally-owned in Austria, litigation is more effective in the United States for bringing justice to victims.

³³² See *Museum History*, LEOPOLD MUSEUM, <https://www.leopoldmuseum.org/en/museum/museum-history> [<https://perma.cc/4JZC-SCBW>].

³³³ 18 U.S.C. § 2314.

³³⁴ 19 U.S.C. § 1595a; 18 U.S.C. § 545; 22 U.S.C. § 401.

³³⁵ 18 U.S.C. § 2314; 19 U.S.C. § 1595a; 18 U.S.C. § 545; 22 U.S.C. § 401.

³³⁶ U.S. Att'y S. Dist. of N.Y., *supra* note 58, at 3; see *Republic of Austria v. Altmann*, 541 U.S. 677, 684 (2004).

³³⁷ See *Republic of Austria v. Altmann*, 541 U.S. 677, 684–85 (2004).

³³⁸ *Id.* at 700.

³³⁹ *Id.* at 684.

³⁴⁰ *Id.*

C. RECOMMENDATIONS

With about 100,000 artworks still missing from the Holocaust,³⁴¹ it is not too late for Austria to amend its Art Restitution Act to bring justice to victims of Nazi era looting. Austria should amend its Art Restitution Act to include private institutions, which would allow a speedier, free or low-cost avenue in Austria for the heirs of victims to finally regain possession of artworks unjustly looted during the Holocaust. Austria should also amend the Art Restitution Act to have fee-shifting provisions so that the victim bringing the case does not even have to pay attorney fees.

As Austria further develops its country and government, its history should be remembered, but learning and growing is necessary. Accessibility to artworks stolen almost ninety years ago is a critical component to serving justice to Holocaust victims and their heirs. Austria owes victims of Nazi era looted artworks the same recovery avenue for artwork in a private collection as a federally-owned collection.

III. CONCLUSION

The world's current efforts towards restitution of Nazi era looted artworks would not be where they are today were it not for *United States v. Portrait of Wally*, the case that showcases the effectiveness of the United States' system for restitution over Austria's system. *Portrait of Wally* by Egon Schiele was unjustly taken from Bondi, a Jewish woman, during the *Anschluss*, and she unsuccessfully fought for the return of her painting until her death in the 1960s. *Portrait of Wally* was in the Leopold Museum, a privately owned institution in Vienna, until it was temporarily transferred to the MoMA in the United States in 1997. When the New York County District Attorney issued a subpoena for the painting, it caught the world's attention. *United States v. Portrait of Wally* spurred a global revival in efforts towards restitution of Nazi era looted artworks. International restitution efforts including the Washington Conference, the European Union's resolutions regarding restitution of Nazi era looting, conventions, declarations, and even Austria's 1998 Art Restitution Act would not be where they are without the initiation of the case *United States v. Portrait of Wally*.

³⁴¹ Eizenstat, *supra* note 2.

Austria's 1998 Art Restitution Act, although better than no restitution laws, only applies to artworks in public institutions owned by the Austrian government. Therefore, no restitution laws in Austria applied to *Portrait of Wally*. In the United States, litigation for *United States v. Portrait of Wally* spanned more than ten years after the initial subpoena for *Portrait of Wally*, resulting in a \$19,000,000 settlement. *United States v. Portrait of Wally* showcases that the United States has a more effective system than Austria for seeing that justice is served to victims and their heirs of Nazi era looted artworks. Austria should therefore amend its Art Restitution Act to include restitution for artworks in privately-owned institutions and include a fee-shifting provision so victims do not have to pay court or attorney fees. There are still hundreds of thousands of displaced artworks from Nazi era looting during World War II, and more progress would be made in decreasing that number if Austria updated its Art Restitution Act.