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# Ethics or Law: Which should Prevail in Conflicts Regarding the Restitution of Nazi-Looted Art?

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# Ethics or Law:

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Which should Prevail in Conflicts Regarding the  
Restitution of Nazi-Looted Art?

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Submitted in partial fulfillment of the requirements for the degree

Master of Arts in Museum Professions

College of Communication and the Arts

Seton Hall University

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A handwritten signature in black ink, appearing to read 'Petra', written in a cursive style.

Approved by: \_\_\_\_\_

Petra ten-Doesschate Chu, Ph.D. Thesis Advisor

## Abstract

Museums and sovereign states often face a dilemma when confronted with a claim seeking restitution of Nazi-looted artwork. The assertion of legal technicalities may allow an institution to maintain possession of its artwork whereas ethics would dictate its return. This paper discusses three cases where legal technicalities take precedence over ethics. This conflict demonstrates the need to have such disputes addressed in a forum other than a court system.

## **Table of Contents**

**Introduction..... 5**

### **Nazi-Looted Art**

**Case Study #1..... 11**

### **Cassirer V. Kingdom of Spain and Thyssen-Bornemisza Collection**

**Case Study #2..... 22**

### **DAVID L. DE CSEPEL v. REPUBLIC OF HUNGARY, A FOREIGN STATE**

**Case Study #3..... 33**

### **United States of America, Plaintiff, v. Portrait of Wally a painting by Egon Schiele, Defendant**

### **In Rem**

**Conclusion..... 46**

### **Alternative Methods to Restitution**

**Bibliography..... 51**

“If the lawsuit is lost, I have lost my picture forever”

~Lea Bondi Jaray

## Introduction:

### Nazi-Looted Art

Shortly after its rise to power in 1933, the Nazi Party began a gradual but systematic effort to eliminate Jewish participation in the German economy. Towards that end, the Nazis engaged in unrelenting intimidation and propaganda tactics designed to economically devastate Jewish owned businesses or to force their transfer to a non-Jew for a fraction of their worth. The transfer of Jewish owned property and businesses to a non-Jew was part of a process that the Nazis termed “Ariserung” or “Aryanization.” Initially, the transfer process was “voluntary,” but in 1938, after the events of the Kristallnacht, the German government legalized Aryanization; effectively eliminating whatever value remained in a Jewish owned business. With Aryanization as law, it was legal to seize and confiscate Jewish property. It is estimated that before the Nazi Party’s rise to power in 1933 there were 50,000 Jewish owned businesses in Germany. Subsequent to the adoption of Aryanization as law in 1938 only 9,000 Jewish owned businesses remained.<sup>1</sup> As part of the “Aryanization law” any Jewish owned business still in operation was forcibly placed under government trusteeship.

In 1939 Nazi Germany, oppressive laws targeting the Jewish community had become pervasive in nearly every aspect of Jewish life. During this time the Jewish population was stripped of basic civil rights and their German citizenship. Additionally, they were required to register all of their belongings, including all works of art, with the Nazi government. Central to the Nazi program of appropriating Jewish owned property was the goal of erasing even the memory of Jewish life in Europe. Bruce Hay, in *Nazi-Looted Art and the Law*, notes, “... as one

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<sup>1</sup> “The Holocaust,” The Holocaust - Yad Vashem (Shoah Resource Center, The International School for Holocaust Studies), accessed July 15, 2019, [https://www.yadvashem.org/yv/en/holocaust/resource\\_center/item.asp?gate=1-3](https://www.yadvashem.org/yv/en/holocaust/resource_center/item.asp?gate=1-3).

court recently observed... the property seizures, being designed to deprive Jews of the resources needed to survive as a people constituted acts of genocide.”<sup>2</sup> Consequently, many Jewish families felt that they had no option but to attempt to secure freedom by leaving the country. To do so, a Jew would be required to either surrender items of value, or, be forced to sell the item(s) at a small fraction of its worth. If all went well the “seller” would be allowed to leave the country and hopefully secure freedom.

It has been estimated that between 1933 and 1945 the Germans appropriated approximately 600,000 pieces of art, exclusive of rare books, coins, stamps, furniture, and other objects of art.<sup>3</sup> Indeed, the plunder was so vast that records from the Nuremburg trials indicate that it took 29,984 railroad cars to transport all of the stolen art.<sup>4</sup> After the war, efforts were made, by those who were fortunate enough to survive or, alternatively, by heirs, to secure the return of wrongfully expropriated property. Although the Allies endeavored to collect and return Nazi-looted art (45,000 pieces were returned to Jewish owners in France alone) it was an impossible task to satisfactorily complete this effort.<sup>5</sup> The post-war political climate in Europe which included the rise of Communism further complicated this effort.

Art dealers in the United States were not shy about dealing in stolen art and it is not surprising that many works ended up in U.S. museums and private collections.<sup>6</sup> Jonathan Petropoulos Ph.D, a professor at Claremont McKenna College with particular expertise on the

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<sup>2</sup> Bruce L. Hay, *NAZI-LOOTED ART AND THE LAW: the American Cases* (S.I., NY: SPRINGER INTERNATIONAL PU, 2018), pg 2.

<sup>3</sup> Bruce L. Hay, *NAZI-LOOTED ART AND THE LAW: the American Cases* (S.I., NY: SPRINGER INTERNATIONAL PU, 2018), pg 202.

<sup>4</sup> Bruce L. Hay, *NAZI-LOOTED ART AND THE LAW: the American Cases* (S.I., NY: SPRINGER INTERNATIONAL PU, 2018), pg 202.

<sup>5</sup> Bruce L. Hay, *NAZI-LOOTED ART AND THE LAW: the American Cases* (S.I., NY: SPRINGER INTERNATIONAL PU, 2018), pg 204.

<sup>6</sup> Bruce L. Hay, *NAZI-LOOTED ART AND THE LAW: the American Cases* (S.I., NY: SPRINGER INTERNATIONAL PU, 2018), pg 202-203. 206-207.

subject of Nazi-looted art, in testimony before Congress stated that many prominent American museums have collections that include Nazi-looted art and went on to say that this is not the result of negligence or innocence but rather of a disregard of provenance.<sup>7</sup> According to Petropoulos, it was not until the publication of several books in the late 1990s that these Holocaust-restitution claims began to receive widespread publicity. Certainly, the increase in public awareness has compelled many museums and galleries to conduct more in-depth due diligence provenance research, which has resulted in the return of approximately 2,000 Holocaust-looted artworks from around the world since 1998.<sup>8</sup>

It is startling to think that most of the litigation concerning Nazi-looted art is a phenomenon of the last 25 years, though the events giving rise to these disputes occurred from the mid-1930s to the mid-1940s. To a certain extent, this can be explained by laws in Europe that overwhelmingly favor the individual or entity in possession of the artwork, almost regardless of how it came to be in their possession. For example, the typical statute of limitations governing these disputes in Europe expired in excess of half a century ago. However, laws in the United States most often do not bar at least the filing of a claim. On the other hand, laws in this country, especially when it comes to lawsuits involving sovereign states and their museums, allow for the defendant's reliance on what most people would refer to as legal technicalities. Nevertheless, the United States is viewed as a favorable jurisdiction within which to pursue restitution.<sup>9</sup>

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<sup>7</sup> Bruce L. Hay, *NAZI-LOOTED ART AND THE LAW: the American Cases* (S.I., NY: SPRINGER INTERNATIONAL PU, 2018), pg 206-207.

<sup>8</sup> Bruce L. Hay, *NAZI-LOOTED ART AND THE LAW: the American Cases* (S.I., NY: SPRINGER INTERNATIONAL PU, 2018), pg 208.

<sup>9</sup> Bruce L. Hay, *NAZI-LOOTED ART AND THE LAW: the American Cases* (S.I., NY: SPRINGER INTERNATIONAL PU, 2018), pg 250-252.

Until recently, it was exceptional for a dispute over ownership to be resolved without extensive and prohibitively expensive litigation.<sup>10</sup> For the most part, although there are significant exceptions, such disputes center on works of art which are relatively inexpensive in today's art world. Of course, "relatively inexpensive" is always a question of perspective. One attorney involved in pursuing restitution claims associated with Nazi-looted art is of the opinion that unless the art at issue is worth at least three million dollars, it is probably best to walk away from litigation.<sup>11</sup> On the other hand, artworks that have values in the tens of millions of dollars, if not greater, seem to engender almost a knee-jerk response, especially on the part of museums or sovereign states to protect the integrity of their collections almost regardless of the ethics involved.

This paper will examine three such cases, each of which involves a work of art that was belatedly located by a rightful owner or their heirs, who made a concerted effort trying to secure its return, or, alternatively compensation for its taking. Each case demonstrates how a defendant museum and/or sovereign state can manipulate a legal system resulting in extraordinarily protracted litigation built upon the assertion of legal technicalities. These cases exemplify how prominent museums, aided by the sovereign state in which they are located, turn a blind-eye towards treaties, international guidelines, association parameters, and, ethics in an effort to maintain possession of wrongfully appropriated works of art. The burdens placed upon a private individual(s) seeking restitution are certainly onerous especially when one's adversary includes a sovereign state in addition to a prominent museum. The third case study (*Portrait of Wally*) is an example of the benefits a claimant receives when supported by a sovereign state.

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<sup>10</sup> Bruce L. Hay, *NAZI-LOOTED ART AND THE LAW: the American Cases* (S.I., NY: SPRINGER INTERNATIONAL PU, 2018), pg 249-250.

<sup>11</sup> Bruce L. Hay, *NAZI-LOOTED ART AND THE LAW: the American Cases* (S.I., NY: SPRINGER INTERNATIONAL PU, 2018), pg 251.

Many organizations have been formed in an effort to assist in the location and the return of looted art. Because of the time lag between the 1930s and the times when most claims have been made, determining who qualifies as a rightful owner is an arduous process, far more complicated than the assessment of whether a work of art was wrongfully appropriated. Ordinarily, that issue has proven to be the easy part of the restitution process. Ethics would dictate that reuniting the works of art or providing in lieu compensation to a knowingly aggrieved party is the right thing to do. One would think this would be especially true if the accused party is a museum of note or a sovereign state as opposed to a private individual collector. Most often, a museum and the sovereign state are signatories to many treaties, museum association guidelines, and, many international conferences that have adopted formal protocols regarding looted art, all of which have been designed to eliminate red tape in an effort to redress wrongful appropriation. Unfortunately, the process as presently constituted all too often does not seem to work. Litigation very rarely seems to address the issue of wrongful appropriation but rather becomes a battle of legal technicalities. Thankfully, there is growing sentiment that these claims should not be litigated but rather adjudicated by some form of alternative dispute resolution.

Nicholas M. O'Donnell, author of *A Tragic Fate: Law and Ethics in the Battle over Nazi-Looted Art* best summarizes the dilemma when he states:

“...Museum associations wrestle with how to create ethical rules for their members, yet the resulting lack of legal enforcement of the guidelines or principles causes those same association members to remain silent in the face of claims of irrefutably stolen art. Thus, while it is a truism that every case of looted art and quest for restitution is different, this generalization too often serves as an excuse for deflecting the hard questions and

common themes that these cases raise because it requires each claimant to re-prove what should not be in question, to begin anew when so much is already known.”<sup>12</sup>

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<sup>12</sup> Nicholas M. O'Donnell, *A Tragic Fate: Law and Ethics in the Battle over Nazi-Looted Art* (Chicago, IL: American Bar Association, 2017), pg XII.

## Case Study #1

### Cassirer V. Kingdom of Spain and Thyssen-Bornemisza Collection

Fearing for her wellbeing in Nazi Germany, a Jewish woman named Lilly Cassirer decided that she had no other choice than to leave the oppressive country that was her home. Lilly had been married to Fritz Cassirer (1871-1926), the son of Julius Cassirer (1841-1921) a wealthy Jewish industrialist who owned a prominent Berlin art gallery.<sup>13</sup> Lilly inherited certain artworks that had once belonged to her father-in-law including an oil painting by French Impressionist master Camille Pissarro (1830-1903). This painting, *Rue Saint-Honoré, après-midi, effet de pluie*, was completed by Pissarro in 1897. The painting was purchased by Julius Cassirer in 1900 and was in Lilly's possession when she decided to emigrate from Germany in 1939.<sup>14</sup>

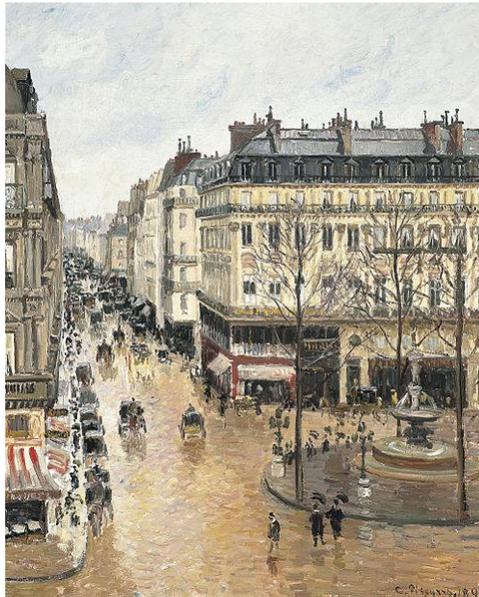


Figure 1: Camille Pissarro, *Rue Saint-Honoré, après-midi, effet de pluie*. Image courtesy of Museo Thyssen-Bornemisza, Colección Permanente, accessed via [https://commons.wikimedia.org/wiki/File:Camille\\_Pissarro\\_-\\_Rue\\_Saint-Honor%C3%A9,\\_dans\\_l%27apr%C3%A8s-midi.\\_Effet\\_de\\_pluie.jpg](https://commons.wikimedia.org/wiki/File:Camille_Pissarro_-_Rue_Saint-Honor%C3%A9,_dans_l%27apr%C3%A8s-midi._Effet_de_pluie.jpg)

<sup>13</sup> Bruce L. Hay, *NAZI-LOOTED ART AND THE LAW: the American Cases* (S.I., NY: SPRINGER INTERNATIONAL PU, 2018), pg 137.

<sup>14</sup> Bruce L. Hay, *NAZI-LOOTED ART AND THE LAW: the American Cases* (S.I., NY: SPRINGER INTERNATIONAL PU, 2018), pg 137. & *Cassirer v. Thyssen-Bornemisza Collection Found.*, 153 F. Supp. 3d 1148 (C.D. Cal. 2015).

In order to leave the country, a Jew had to obtain permission from the Nazi government. The government also had to grant permission to take personal belongings. Lilly Cassirer was no exception to this rule. Concurrent with her request to leave the country, Lilly had to make known the possessions that she wished to take with her. Of course, this included the Pissarro painting. The Nazi government appointed Jakob Scheidwimmer, a Munich art dealer, to appraise her belongings. Scheidwimmer, acting on behalf of the Nazis, refused to allow Lilly to leave with the painting. Accounts slightly differ regarding whether Lilly received any compensation whatsoever for the painting. Bruce L. Hay in *Nazi-Looted Art and the Law* states that “she was forced to surrender the Pissarro painting” while another account states that she was paid the equivalent of 360 dollars in what was then Reichsmarks.<sup>15</sup> It matters little as the latter account also states that Lilly was unable to access the payment as it was allocated to a blocked account, making it impossible to withdraw the funds.<sup>16</sup> Regardless of which scenario above is accurate, the painting was either confiscated or “sold” under duress. One cannot dispute that Lilly reasonably feared for her safety and certainly could not risk being denied an exit visa.

After obtaining possession of the Pissarro, Scheidwimmer approached Jewish art collector Julius Sulzbacher with the intent to unethically acquire his belongings. Sulzbacher, also looking to flee Nazi Germany, was only allowed to leave if he gave the Nazis three unnamed German paintings in exchange for the Pissarro painting.<sup>17</sup> Upon fleeing the country, the Sulzbacher family went to the Netherlands with the Pissarro in their possession. The Netherlands would eventually be invaded and occupied by the Nazis in May of 1940.<sup>18</sup> At some point, the

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<sup>15</sup> *Cassirer v. Thyssen-Bornemisza Collection Found.*, 153 F. Supp. 3d 1168 (C.D. Cal. 2015).

<sup>16</sup> *Cassirer v. Kingdom of Spain and Thyssen-Bornemisza Collection Foundation*, 616 F. Supp. 3d 1019 (9<sup>th</sup> Cir. 2010) (en banc), cert. denied, 564 U.S. 1037 (2011).

<sup>17</sup> Opinion, *Cassirer v. Thyssen-Bornemisza Collection Found.*, 153 F. Supp. 3d 1148 (C.D. Cal. 2015)

<sup>18</sup> Bruce L. Hay, *NAZI-LOOTED ART AND THE LAW: the American Cases* (S.I., NY: SPRINGER INTERNATIONAL PU, 2018), pg 137.

painting was confiscated by the Gestapo and sent back to Germany to remain in the Nazis' possession until 1943.<sup>19</sup> Consequently, the Nazis came into possession of four paintings acquired through intimidation tactics and the "legalization" of Aryanization.

In 1943, the painting was sold by an unknown consignor at a Berlin auction to an unknown buyer for the price of 95,000 Reichsmarks. Then, in 1951 the painting was illegally smuggled out of Germany and into the United States by a Californian art gallery, Frank Perls Gallery of Beverly Hills.<sup>20</sup> The gallery then sold the painting to collector Sidney Brody for 14,850 dollars. The painting was once again sold in 1952; this time through a New York art gallery, to Missouri collector Sydney Schoenberg for 16,500 dollars. The painting would not appear on the market again until 1976 when it was sold through the Stephen Hahn Gallery in New York. A Swiss collector named Baron Hans Heinrich Thyssen-Bornemisza purchased the painting for 275,000 dollars.<sup>21</sup> *Rue Saint-Honoré, après-midi, effet de pluie* (1897) remained in Thyssen-Bornemisza's personal collection until 1993 when, along with the rest of his collection, was sold to the Kingdom of Spain for 350 million dollars. At that time, the estimated value of the Thyssen-Bornemisza collection was between one and two billion dollars. Spain purchased the collection on behalf of a newly founded state museum, ironically named, the Thyssen-Bornemisza Collection.<sup>22</sup> The Thyssen-Bornemisza Collection is recognized as a nonprofit institution of the Kingdom of Spain.<sup>23</sup>

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<sup>19</sup> Cassirer v. Kingdom of Spain and Thyssen-Bornemisza Collection Foundation, 616 F. Supp. 3d 1019 (9<sup>th</sup>.Cir. 2010) (en banc), cert. denied, 564 U.S. 1037 (2011).

<sup>20</sup> Opinion, Cassirer v. Thyssen-Bornemisza Collection Found., 153 F. Supp. 3d 1148 (C.D. Cal. 2015)

<sup>21</sup> Opinion, Cassirer v. Thyssen-Bornemisza Collection Found., 153 F. Supp. 3d 1148 (C.D. Cal. 2015)

<sup>22</sup> Bruce L. Hay, *NAZI-LOOTED ART AND THE LAW: the American Cases* (S.I., NY: SPRINGER INTERNATIONAL PU, 2018), pg 137.

<sup>23</sup> Opinion, Cassirer v. Thyssen-Bornemisza Collection Found., 153 F. Supp. 3d 1148 (C.D. Cal. 2015)

Spain and the Thyssen-Bornemisza Collection conducted two provenance investigations regarding the collection in 1989 and 1993, and did not find any issue with the Pissarro painting.<sup>24</sup> However, on the backside of the painting there remains a readily visible and partially intact ownership label. An examination of that label reveals the address of Cassirer's former gallery in Berlin.<sup>25</sup> This oversight, which at best was negligent and at worst intentional, causes one to question the integrity of the provenance investigations conducted in 1989 and 1993, both from a legal and ethical perspective. One would assume that the Museum would conduct adequate due diligence, especially regarding a painting of this magnitude. At the very least, there is sufficient evidence to raise suspicion regarding the painting's provenance. Failure to, at a minimum, alert the proper authorities justifies raising an accusation regarding the Museum's ethical intentions and by extension those of the Kingdom of Spain. Furthermore, at least one commentator suggests that even a cursory review of records from the Baron's archives demonstrates that he deliberately mislead investigators regarding his acquisition of the painting, in an attempt to conceal its past.<sup>26</sup> Of course, the Museum could argue that they relied upon the Baron's representations. Nevertheless, in the face of evidence to the contrary, the Museum did not discharge its obligation to thoroughly investigate the painting's provenance. All of the above stated information and much more, are pertinent to the eventual law suit that the Cassirer family would file against Spain and the Thyssen-Bornemisza Collection in an attempt to finally be reunited with the prized painting.

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<sup>24</sup> Opinion, *Cassirer v. Thyssen-Bornemisza Collection Found.*, 153 F. Supp. 3d 1148 (C.D. Cal. 2015)

<sup>25</sup> Bruce L. Hay, *NAZI-LOOTED ART AND THE LAW: the American Cases* (S.I., NY: SPRINGER INTERNATIONAL PU, 2018), pg 137.

<sup>26</sup> Joel Rubin, "Nearly 80 Years Ago, Nazis Stole a Family's Painting. Now an American Judge Will Decide If It Should Be Returned," *Los Angeles Times* (Los Angeles Times, December 3, 2018), <https://www.latimes.com/local/lanow/la-me-nazi-art-trial-20181203-story.html>.

After World War II, the Allied forces established a method of returning Nazi looted property to its rightful owners. It was called the Military Law No. 59 and its basic principles are as follows:

1. It shall be the purpose of this Law to effect to the largest extent possible the speedy restitution of identifiable property (tangible and intangible property and aggregates of tangible and intangible property) to persons who were wrongfully deprived of such property within the period from 30 January 1933 to 8 May 1945 for reasons of race, religion, nationality, ideology or political opposition to National Socialism. For the purpose of this Law deprivation of property for reasons of nationality shall not include measures which under recognized ruled of international law are usually permissible against property of nationals of enemy countries.

2. Property shall be restored to its former owner or to his successor in interest in accordance with the provisions of this Law even though the interests of other persons who had no knowledge of the wrongful taking must be subordinated. Provisions of law for the protection of purchasers in good faith, which would defeat restitution, shall be disregarded except where this Law provides otherwise.<sup>27</sup>

In 1948, under this newly sanctioned law, Lilly Cassirer filed a claim against Jakob Scheidwimmer for the restitution of, or, compensation for, her confiscated painting. Julius Sulzbacher also filed a claim for compensation, or, the restitution of the Pissarro painting and his three other German paintings. In 1954, the United States Court of Restitution Appeals, a judicial system established under MGL No. 59, confirmed that Lilly Cassirer was the rightful owner of the Pissarro.<sup>28</sup> However, all parties involved believed the painting to be either lost or destroyed during the war. In 1957, the German Federal Republic established a law known as the Brüg which governed claims related to property that was pilfered by the Nazis during their reign. Lilly elected to drop her MGL No. 59 claim against Scheidwimmer and file a new claim against Germany. Grete Kahn, Sulzbacher's heir, joined in the claim. A settlement agreement was made

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<sup>27</sup> "Court of Restitution Appeals Report," Harvard Mirador Viewer, accessed July 15, 2019, [https://iif.lib.harvard.edu/manifests/view/drs:6347670\\$519j](https://iif.lib.harvard.edu/manifests/view/drs:6347670$519j). (pg 503 seq. 519)

<sup>28</sup> Opinion, *Cassirer v. Thyssen-Bornemisza Collection Found.*, 153 F. Supp. 3d 1148 (C.D. Cal. 2015)

in 1958 stating that: 1. Germany would compensate Lilly Cassirer 120,000 Deutschmarks (an agreed upon estimate of the painting's value as of April 1, 1956); 2. Sulzbacher's heir would receive 14,000 of the 120,000 Deutschmarks awarded to Lilly Cassirer; 3. Jakob Scheidwimmer would receive two of Sulzbacher's three German paintings.<sup>29</sup> This agreement would seemingly conclude the Cassirers' legal proceedings regarding the looted painting. Lilly passed away in 1962, four years after the agreement was reached. However, Lilly's passing is not the end of the story.

Lilly's grandson and heir, Claude Cassirer (1921-2010) emigrated to the United States during the war after escaping from an internment camp. Ultimately, Claude retired in California.<sup>30</sup> In 2000, Claude learned from a family friend that the Pissarro painting was in fact not lost or destroyed but was actually publicly displayed at the Thyssen-Bornemisza Collection in Madrid, Spain. Claude's friend discovered the whereabouts of the painting through a promotional piece for the museum in a catalog which pictured the painting. Apparently, Claude was upset that the Pissarro, wrongfully taken from his family, was on display in an institution named after a family that had bankrolled Hitler.<sup>31</sup> In an effort to secure the return of the Pissarro, Claude engaged the support of certain United States Congress members. Efforts on his behalf were not successful and on May 3, 2001 a formal petition was filed in Spain by the Cassirer family requesting the return of their painting.<sup>32</sup> Spain's Minister of Education, Culture and Sports promptly denied the Cassirer's request.<sup>33</sup> The inability of congressional members to help

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<sup>29</sup> Opinion, *Cassirer v. Thyssen-Bornemisza Collection Found.*, 153 F. Supp. 3d 1148 (C.D. Cal. 2015)

<sup>30</sup> Bruce L. Hay, *NAZI-LOOTED ART AND THE LAW: the American Cases* (S.I., NY: SPRINGER INTERNATIONAL PU, 2018), pg 138.

<sup>31</sup> Bruce L. Hay, *NAZI-LOOTED ART AND THE LAW: the American Cases* (S.I., NY: SPRINGER INTERNATIONAL PU, 2018), pg 138.

<sup>32</sup> Opinion, *Cassirer v. Thyssen-Bornemisza Collection Found.*, 153 F. Supp. 3d 1148 (C.D. Cal. 2015)

<sup>33</sup> Kevin P. Ray, "Cassirer v. Thyssen-Bornemisza Collection Foundation: Application of Spanish Law of Adverse Possession Vests Title to Pissarro Painting in Spanish Museum, Not Original Owner's Heirs," *Cultural Assets*, March

obtain restitution coupled with the formal denial of Claude's petition prompted him in 2005 to file a case in the United States District Court of Central California. Cassirer was simply seeking restitution of the painting that was stolen from his family by the Nazis during World War II.

Cassirer filed his claim against the Kingdom of Spain and the Thyssen-Bornemisza Collection Foundation. The case would be acrimoniously litigated for ten years as the defendants exhausted every effort to win the case on procedural grounds, or, as a layman would say "on a technicality." The parties argued jurisdictional issues, foreign state immunity, exhaustion of remedies, justiciability, constitutionality, foreign affairs preemption, due process, conflicts of law, and various statutes of limitations all before addressing the issue of who owns the painting. Although, it is certainly understandable that a party to litigation would assert any and all arguments that may serve to advance its interests, none of the above-referenced legal defenses address the ultimate issue at the center of the dispute, namely, did the Cassirer family own the painting and was it seized from them under circumstances that warrant restitution. Instead, what occurred in this case and most others of this nature, is the presentation of legal arguments by the defendants which when successfully asserted, preclude adjudication on the substantive "merits" of the claim. These arguments are presented and designed to secure the dismissal of a claim before actually getting to the merits. A cogent argument can be made that, although law, each of the referenced defenses (jurisdiction, statute of limitations, foreign state immunity, etc...) represent legal technicalities that a claimant has to overcome in order to allow a court to address the ultimate issue. All involved may agree that a piece of artwork was wrongfully appropriated from its rightful owner, but, at the end of the day, cases involving Nazi-looted art are, more often

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28, 2018, <https://www.gtlaw-culturalassets.com/2015/07/cassirer-v-thyssen-bornemisza-collection-foundation-application-of-spanish-law-of-adverse-possession-vests-title-to-pissaro-painting-in-spanish-museum-not-original-owners-heirs/#page=1>.

than not, determined by what a layperson would clearly recognize as the application of a legal technicality, as opposed to the application of ethics and morals. Throughout the process, the Museum and Spain made no effort to reach a resolution with the Cassirer family.

Spain argued that the Cassirer family should be prohibited from filing a suit against Spain due to the Foreign Sovereign Immunities Act. However, it was decided that Spain was not in fact protected by this law because there is an exception regarding the taking of property in violation of international law. Ultimately, the controlling issue before the court was choice of law: Spanish law or Californian law. California law states that the original owner's rights take precedence even over that of a good-faith purchaser. Furthermore, this law provides original owners a six year statute of limitations for repatriation claims against museums and galleries. This period begins upon the original owner's discovery of the location of the stolen property and its current possessor.<sup>34</sup> Since the Cassirer family discovered the location of their painting and its possessor in 2001, and, filed their suit in 2005 they are legally eligible to pursue the painting in the state of California. Conversely, Spanish Civil Code Article 1955 states:

“Ownership of movable property prescribes by three years uninterrupted possession in good faith. Ownership of movable property also prescribed by six years of uninterrupted possession, without any other condition.”<sup>35</sup>

In other words, under Spanish law, an individual or entity that possesses movable property for a period of six uninterrupted years becomes the legal owner of that property regardless of whether

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<sup>34</sup> Kevin P. Ray, “Cassirer v. Thyssen-Bornemisza Collection Foundation: Application of Spanish Law of Adverse Possession Vests Title to Pissaro Painting in Spanish Museum, Not Original Owner's Heirs,” Cultural Assets, March 28, 2018, <https://www.gtlaw-culturalassets.com/2015/07/cassirer-v-thyssen-bornemisza-collection-foundation-application-of-spanish-law-of-adverse-possession-vests-title-to-pissaro-painting-in-spanish-museum-not-original-owners-heirs/#page=1>.

<sup>35</sup> Kevin P. Ray, “Cassirer v. Thyssen-Bornemisza Collection Foundation: Application of Spanish Law of Adverse Possession Vests Title to Pissaro Painting in Spanish Museum, Not Original Owner's Heirs,” Cultural Assets, March 28, 2018, <https://www.gtlaw-culturalassets.com/2015/07/cassirer-v-thyssen-bornemisza-collection-foundation-application-of-spanish-law-of-adverse-possession-vests-title-to-pissaro-painting-in-spanish-museum-not-original-owners-heirs/#page=1>.

or not they came into its possession illegally. Note, that the Spanish statute of limitations is typical of most European countries. Bear in mind, that at no time during the litigation of this claim did the court find that Spain/ Thyssen-Bornemisza Collection were in fact a good-faith purchaser of the Pissarro painting.

The United States Court system would eventually determine that Spanish law should apply to the case. Under Spanish law, it was determined that the painting legally belonged to Spain and the Museum. However, the court felt that perhaps the Museum is ethically obligated to “pause, reflect, and consider whether it would be appropriate to work towards a mutually-agreeable resolution of this action.”<sup>36</sup> The court’s request fell on deaf ears and the Cassirer family has filed an appeal.

It is rather perplexing that Spain made no attempt to reach an agreement with the Cassirers considering that Spain is a signee: of the International Council of Museums’ (ICOM) Code of Ethics, the 1998 Washington Conference on Holocaust Era Assets, the Vilnius International Forum on Holocaust-Era Looted Cultural Assets (2000), and also the Holocaust Era Assets Conference which was held in both Prague and Terezin and led to the Terezin Declaration (2009).<sup>37</sup> With the exception of ICOM, the above-referenced organizations, conferences, and treaties were established to assist in the recovery of art expropriated by the Nazis and have promulgated guidelines to assure that whenever possible, expropriated art is reunited with its rightful owner. Museums and sovereign states that are signatories to these agreements have agreed to adhere to the highest level of ethical standards when dealing with Nazi-looted art.

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<sup>36</sup> Nazi looted art and the law (Cassirer, 153F.Supp.3d at 1168)

<sup>37</sup> Kevin P. Ray, “Cassirer v. Thyssen-Bornemisza Collection Foundation: Application of Spanish Law of Adverse Possession Vests Title to Pissarro Painting in Spanish Museum, Not Original Owner's Heirs,” Cultural Assets, March 28, 2018, <https://www.gtlaw-culturalassets.com/2015/07/cassirer-v-thyssen-bornemisza-collection-foundation-application-of-spanish-law-of-adverse-possession-vests-title-to-pissarro-painting-in-spanish-museum-not-original-owners-heirs/#page=1>.

Spain's actions raise a myriad of questions regarding the effectiveness of the codes of ethics promulgated by the museum community for the museum field. What is the point of these ethical declarations if they take a backseat to legal technicalities? Frankly, despite the proliferation of various treaties, international position papers, and formal understandings within the museum community, none of the above become relevant in the context of litigation until a defendant museum or sovereign state has exhausted all efforts to secure a dismissal of the claim arguing legal technicalities. The immense value of much of the artwork seems to fuel the rationalization that protracted litigation in an effort to maintain possession of a work of art justifies avoiding the question of rightful ownership. Museums and sovereign states seem to lose sight of the fact that regardless of whether a work of art has nominal value or extreme value, the ultimate issue of misappropriation remains the same in each case.

In section 2.2 of ICOM's *Code of Ethics*, of which Spain is a signee, it states that "evidence of lawful ownership in a country is not necessarily valid title."<sup>38</sup> Spain has endorsed and executed several ethical convention treaties that call for the repatriation of Nazi looted art, and the perpetuation of ethical standards within the museum field. Based on this case study, it becomes quite evident that the Spanish government and museum field disregard the treaties referenced herein. Furthermore, Spain has been highly criticized for its inconsistent stance regarding the repatriation of Nazi looted art despite its participation and endorsement of ethical proposals contained in various treaties to which it is a signee. It is also interesting to note that the

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<sup>38</sup> *ICOM Code of Ethics for Museums* (Paris: ICOM, 2006).

Spanish legislature has taken no action to address the issue of the repatriation of Nazi looted property.<sup>39</sup>

On April 30, 2019, in a final ruling, the federal court in California ruled that custody of the painting should remain with Spain and the Thyssen-Bornemisza Collection. It was determined that under Spanish Law “actual knowledge” that the painting was stolen art at the time it was purchased by Thyssen-Bornemisza governs ownership. Although there are certainly “red flags” regarding the painting’s provenance, which should have resulted in greater due diligence, nevertheless, the court determined that these “red flags” did not rise to the level of actual knowledge.<sup>40</sup>

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<sup>39</sup> Wesley A. Fisher and Ruth Jolanda Weinberger, “Holocaust-Era Looted Art: a Current World-Wide Overview,” rep., *Holocaust-Era Looted Art: a Current World-Wide Overview* (St. Petersburg: Conference on Jewish Material Claims Against Germany, 2014), pp. 1-57, pg. 41.

<sup>40</sup> Raphael Minder, “Court Rules Spanish Museum Can Keep a Painting Seen as Nazi Loot,” *The New York Times* (The New York Times, May 1, 2019), <https://www.nytimes.com/2019/05/01/arts/design/court-rules-spanish-museum-can-keep-a-painting-seen-as-nazi-loot.html>.

## Case Study #2

### DAVID L. DE CSEPEL v. REPUBLIC OF HUNGARY, A FOREIGN STATE

Baron Mór Lipót Herzog (1869-1934) was a prominent Jewish banker in pre-war Hungary. He was also a passionate art collector. Throughout his lifetime, Herzog was able to accrue more than 2,000 paintings, sculptures and various other works of art.<sup>41</sup> The accumulation of artwork became known as the “Herzog Collection.” It was considered one of Europe’s largest private collections of art and it was the largest collection of art in Hungary.<sup>42</sup> The Herzog Collection contained various works of art by many well-known artists such as El Greco, Diego Velázquez, Pierre-Auguste Renoir, Claude Monet, and Gustave Courbet.<sup>43</sup>



Figure 2: El Greco, *The Agony in the Garden of Gethsemane*. This painting was part of the Herzog Collection and considered one of El Greco’s most notable works. Image courtesy of Toledo Museum of Art, accessed via [https://commons.wikimedia.org/wiki/File:El\\_Greco\\_-\\_The\\_Agony\\_in\\_the\\_Garden\\_-\\_WGA10484.jpg](https://commons.wikimedia.org/wiki/File:El_Greco_-_The_Agony_in_the_Garden_-_WGA10484.jpg)

<sup>41</sup> de Csepel v. Republic of Hungary, 714 F.3d 591, 594–97 (D.C. Cir. 2013)

<sup>42</sup> de Csepel v. Republic of Hungary, 714 F.3d 591, 594–97 (D.C. Cir. 2013)

<sup>43</sup> Alycia Regan Benenati, “Lawsuit Background,” Hungary Looted, accessed July 15, 2019, [https://hungarylootedart.com/?page\\_id=8](https://hungarylootedart.com/?page_id=8).

In 1934, Baron Mór Lipót Herzog passed away and the Herzog Collection remained in the possession of his wife, Johanna Herzog de Csete, until her death in 1940.<sup>44</sup> After their deaths, the Herzog Collection was inherited by their two sons István and András, and their daughter Erzsébet.<sup>45</sup> In 1920, Erzsébet married Alfonz Weiss de Csepel, the son of Baron Manfred Weiss de Csepel. At the time, Baron Manfred Weiss de Csepel was Hungary's leading industrialist and owned the Manfred Weiss Works, the largest machine factory in Hungary.<sup>46</sup>

On November 20, 1940 Hungary aligned itself with Hitler and the Axis powers. This led to the institution of many anti-Semitic laws in Hungary, similar to the laws established in Nazi Germany. These anti-Semitic laws restricted Jews' participation in the Hungarian economy and society. The Hungarian government and its state police fully supported and executed a program that plundered the assets of everyone of Jewish heritage in the country. Similar to the Nazis, the Hungarian government was particularly interested in the confiscation of artwork that belonged to Jews. The government required Jews to register all of their valuable belongings, above all, works of art.<sup>47</sup> The belongings were then inventoried by the government's newly established Commission for the Recording and Safeguarding of Impounded Art Objects of Jews. The registered artworks would then be collected (seized) "for safekeeping" by the Commission for Art Objects, which was run by Dénes Csánky, the Director of The Hungarian Museum of Fine Arts.<sup>48</sup>

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<sup>44</sup> Bruce L. Hay, *NAZI-LOOTED ART AND THE LAW: the American Cases* (S.I., NY: SPRINGER INTERNATIONAL PU, 2018), pg 239.

<sup>45</sup> *de Csepel v. Republic of Hungary*, 714 F.3d 591, 594–97 (D.C. Cir. 2013)

<sup>46</sup> Alycia Regan Benenati, "Lawsuit Background," Hungary Looted, accessed July 15, 2019, [https://hungarylootedart.com/?page\\_id=8](https://hungarylootedart.com/?page_id=8).

<sup>47</sup> *De Csepel v. Republic of Hungary*, 169 F. Supp. 3d 143 (D.D.C. 2016)

<sup>48</sup> *De Csepel v. Republic of Hung.*, 714 F.3d 591, 594 (D.C. Cir. 2013)

In March of 1944, German troops began to occupy Hungary. SS Commander Adolf Eichmann also entered the country at that time. He established his headquarters at the Majestic Hotel in Budapest, Hungary.<sup>49</sup> In the short months that followed in 1944-1945, more than half of a million Jews (75% of the Jewish population in Hungary) were “detained, stripped of their possessions, and transported by Hungarian security forces to their deaths in German concentration camps or were literally executed on the streets of Budapest.”<sup>50</sup> This became known as the Hungarian Holocaust.

In 1942 András Herzog was forced into a Hungarian labor camp where he died in 1943.<sup>51</sup> Shortly after András’ death, the Hungarian government attempted to send István Herzog to the Auschwitz death camp. István was able to escape with the help of his former sister-in-law’s husband, Count István Bethlen Jr. He was put in a safe house that was protected by the Spanish Embassy; which was somewhat ironic as Spain, although “neutral,” was very sympathetic to the Axis cause.<sup>52</sup>

In 1943, in an attempt to protect the Herzog Collection, the family decided to hide the majority of the artwork in the cellar of a factory that they owned in Budafok, Hungary. The family was purportedly aided in this effort by Dénes Csánky. Perhaps it was a mistake to include Mr. Csánky in this endeavor as not long after, the Nazis and Hungarians discovered the works of art in the factory cellar. Unsurprisingly, Dénes Csánky was present at the opening of the containers that held the Herzog Collection; the same containers that he recently helped pack and hide. Csánky inventoried the objects that were seized from the Collection. An article from the

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<sup>49</sup> *de Csepel v. Republic of Hungary*, 169 F. Supp. 3d 143 (D.D.C. 2016)

<sup>50</sup> Alycia Regan Benenati, “Lawsuit Background,” Hungary Looted, accessed July 15, 2019, [https://hungarylootedart.com/?page\\_id=8](https://hungarylootedart.com/?page_id=8).

<sup>51</sup> *de Csepel v. Republic of Hungary*, 169 F. Supp. 3d 143 (D.D.C. 2016)

<sup>52</sup> *De Csepel v. Republic of Hung.*, 714 F.3d 591, 594 (D.C. Cir. 2013)

May 23, 1944 issue of *Magyarság*, an anti-Semitic and pro-Nazi newspaper quoted Dénes Csányi regarding the Herzog Collection:

“[t]he Mór Herzog collection contains treasures the artistic value of which exceeds that of any similar collection in the country. The former banker obtained these Goya, Greco and other pictures from his fellow Jew Marcell Nemes, and after his death his immediate relatives inherited them. If the state now takes over these treasures, the Museum of [F]ine Arts will become a collection ranking just behind Madrid.”<sup>53</sup>

The seized artwork was then taken to Adolf Eichmann at the Majestic Hotel. He inspected all of the artworks and selected many of the pieces for his own personal collection and the collection of the Third Reich. These pieces were then sent to Germany while the remaining pieces were given to the Museum of Fine Arts for safekeeping.<sup>54</sup> More works from the Herzog collection would eventually be seized by the Hungarian government and the Nazis as they looted the family’s homes, safety deposit boxes, vaults, and other properties.<sup>55</sup> Factories owned by the Herzog family were also seized and turned into weapons manufacturing facilities for the Axis forces.<sup>56</sup>

The Herzog family decided to flee the country in hope of escaping further persecution. In May of 1944, Erzsébet de Csepel, her children, and other members of the Herzog and de Csepel families left Hungary. Erzsébet and her children reached Portugal in June of 1944. They eventually settled in the United States in 1946 where they were reunited with Alfonz who was previously held hostage by the Nazis. Erzsébet gained her U.S. citizenship on June 23, 1952.<sup>57</sup>

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<sup>53</sup> *De Csepel v. Republic of Hung.*, 714 F.3d 591, 594 (D.C. Cir. 2013)

<sup>54</sup> *De Csepel v. Republic of Hung.*, 714 F.3d 591, 594 (D.C. Cir. 2013)

<sup>55</sup> Hungarylootedart Herzog Complaint

<sup>56</sup> Alycia Regan Benenati, “Lawsuit Background,” Hungary Looted, accessed July 15, 2019, [https://hungarylootedart.com/?page\\_id=8](https://hungarylootedart.com/?page_id=8).

<sup>57</sup> *De Csepel v. Republic of Hung.*, 714 F.3d 591, 594 (D.C. Cir. 2013)

István Herzog's family became separated, with some staying in Hungary and others escaping to Switzerland. András Herzog's wife and two daughters Julia Alice Herzog and Angela Maria Herzog fled to Argentina. Eventually, they would travel and settle in Italy.<sup>58</sup> Some members of the Herzog family returned to Hungary immediately after the conclusion of World War II. However, their stay there was short lived as all of their possessions had been looted and their homes destroyed.

After Germany's defeat in May 1945, the Russian military discovered pieces from the Herzog Collection in Germany. However, those pieces were collected and sent to Russia. The collected pieces are believed to have disappeared shortly after their shipment to Russia. Another portion of the Herzog Collection was recovered by the Allied forces in the late 1940s. These objects were sent back to Hungary for the sole purpose of temporary custody. It was customary for the Allies to return artwork to the country of origin in those instances where the identity of the owner was not known. These objects were given to the Museum of Fine Arts by the Hungarian government for safekeeping. Many other works of art from the Herzog Collection were placed in the custody of various museums and educational institutions scattered across Hungary.<sup>59</sup> The Herzog family was not aware of the placement of these works of art.

Shortly after the conclusion of World War II, the Herzog family struggled to regain possession of some part of the Herzog Collection from the Hungarian government. Hungary does not, nor ever had, legal claim to any of the pieces of art in the Herzog Collection. Article 27 of the 1947 Treaty of Peace with Hungary states that:

1. Hungary undertakes that in all cases where the property, legal rights or interests in Hungary of persons under Hungarian jurisdiction have, since September 1, 1939, been

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<sup>58</sup> De Csepel v. Republic of Hung., 714 F.3d 591, 594 (D.C. Cir. 2013)

<sup>59</sup> De Csepel v. Republic of Hung., 714 F.3d 591, 594 (D.C. Cir. 2013)

the subject of measures of sequestration, confiscation or control on account of the racial origin or religion of such persons, the said property, legal rights and interests shall be restored together with their accessories or, if restoration is impossible, that fair compensation shall be made therefor.

2. All property, rights and interests in Hungary of persons, organisations or communities which, individually or as members of groups, were the object of racial, religious or other Fascist measures of persecution, and remaining heirless or unclaimed for six months after the coming into force of the present Treaty, shall be transferred by the Hungarian Government to organisations in Hungary representative of such persons, organisations or communities. The property transferred shall be used by such organisations for purposes of relief and rehabilitation of surviving members of such groups, organisations and communities in Hungary. Such transfer shall be effected within twelve months from the coming into force of the Treaty, and shall include property, rights and interests required to be restored under paragraph 1 of this Article.<sup>60</sup>

Although Hungary did recognize that the Herzog family had ownership rights to the Herzog Collection, they failed to give physical possession to the family. Hungary charged the Herzog family with outlandish fees for recovering and preserving the artworks during and after World War II. The Hungarian government also refused to grant an exportation permit to the members of the Herzog family that no longer lived in Hungary. Eventually, Hungary physically returned some pieces of the collection. However, shortly after the works' repatriation the Hungarian officials began harassing the Herzog family and their legal representatives. The Hungarian government even brought forth false smuggling allegations against the family. The threats and false allegations ceased when the Herzog family "agreed" to return the pieces to Hungary for safekeeping.<sup>61</sup> In 1948, the Museum of Fine Arts displayed some of the same pieces with labels that mentioned the pieces were "on deposit;" a tacit admission that the pieces belonged to someone else.<sup>62</sup>

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<sup>60</sup> Treaty of Peace with Hungary, Article 27, September 15, 1947.

<sup>61</sup> Alycia Regan Benenati, "Lawsuit Background," Hungary Looted, accessed July 15, 2019, [https://hungarylootedart.com/?page\\_id=8](https://hungarylootedart.com/?page_id=8).

<sup>62</sup> De Csepel v. Republic of Hung., 714 F.3d 591, 594 (D.C. Cir. 2013)

Hungary was a Communist country and this made matters even more difficult for the Herzog family. Efforts to obtain information regarding the whereabouts of many pieces of the Collection were futile, leaving the Herzog family unaware of the location and status of most of their collection. One can only imagine, especially in a world without the internet, how difficult it must have been to locate a missing work of art during a time of such discord. Even when pieces were located, the Hungarian government did not offer fair hearings for the exportation of looted property.<sup>63</sup>

However, in 1989, the collapse of Communism in Hungary provided the Herzogs, and others that were similarly situated, with new hope that they could locate and recover some of their lost artworks and the family once again began efforts at restitution. The family learned that many pieces from their collection were in fact being publically displayed at the Hungarian National Gallery and the Museum of Fine Arts. Each work's label described them as "From the Herzog Collection."<sup>64</sup> Before her death in 1992, Erzsébet de Csepel was able to regain possession of six paintings and a wooden sculpture. However, these seven works of art were all attributed to little known artists. The works' value and significance were rather inconsequential to the Herzog Collection.

Following Erzsébet de Csepel's death, her daughter Martha Nierenberg continued negotiations with the Hungarian government. In 1999, after several years of failing to reach a satisfactory conclusion, Martha Nierenberg filed a lawsuit in Budapest against the Hungarian government. Nierenberg was seeking the restitution of twelve artworks from the collection. The Budapest Municipal Court ruled in favor of the Herzog family, and the twelve works of art were

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<sup>63</sup> De Csepel v. Republic of Hung., 714 F.3d 591, 594 (D.C. Cir. 2013)

<sup>64</sup> De Csepel v. Republic of Hung., 714 F.3d 591, 594 (D.C. Cir. 2013)

to be restituted. However, in 2008 a Hungarian appellate court reversed that decision, concluding that the government had acquired title to the artworks through adverse possession. Consequently, the Hungarian government was ordered to return only a single work of art from the Collection.<sup>65</sup>

Although Hungary refuses to repatriate works of art in their collection, the country has strongly pursued claims for restitution of pieces that were taken from Hungary during World War II. In 1992, Hungary formed the Hungarian Committee for the Restitution of Cultural Property. The Committee was established for the sole purpose of recovering art that was looted by the Soviet forces during the war. In 1998, the Committee also sponsored the publication of *Sacco di Budapest*, a book that discusses the many pieces of art that were believed to have been looted from Hungary. Mentioned within the book are several pieces from the Herzog Collection.<sup>66</sup> In that same year, the Hungarian government filed a claim against the Montreal Museum of Fine Arts in Canada for the restitution of a painting that was allegedly looted from Hungary during the war. In 1999, Hungary secured the return of *The Wedding Feast at Cana*, by Giorgio Vasari.<sup>67</sup>

Hungary's disregard for restituting other's property was clearly on display at the 1998 Conference on Holocaust-Era Assets in Washington, where forty-four nations discussed the issue of Nazi looted art. During the conference, the Hungarian delegation admitted that between

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<sup>65</sup> Bruce L. Hay, *NAZI-LOOTED ART AND THE LAW: the American Cases* (S.I., NY: SPRINGER INTERNATIONAL PU, 2018), pg 240.

<sup>66</sup> De Csepel v. Republic of Hung., 714 F.3d 591, 594 (D.C. Cir. 2013)

<sup>67</sup> De Csepel v. Republic of Hung., 714 F.3d 591, 594 (D.C. Cir. 2013)

March 1944 to April 1945 the “persecution of Jews proliferated and the confiscation of Jewish property took place.”<sup>68</sup> The Hungarian delegation continued by stating:

The Hungarian government is fully committed to the restitution or compensation of Holocaust victims concerning cultural assets. For managing this complex task - which includes scholarly research, political decision making, bill drafting, and negotiations with representatives of foreign states, contacts with Holocaust survivors, etc. – a state commissioner will be designated.<sup>69</sup>

No commissioner was ever assigned, nor has any action been taken by Hungary to return objects that were wrongfully appropriated, remain in its borders, and housed in its museums.

On July 27, 2010, acting on behalf of the Herzog family, David de Csepel, the great-grandson of Baron Mór Lipót Herzog together with Julia Alice Herzog, and Angela Maria Herzog, the daughters of András Herzog, filed a lawsuit in the federal district court in the District of Columbia.<sup>70</sup> The lawsuit named the Republic of Hungary, the Hungarian National Gallery, the Museum of Fine Arts, the Museum of Applied Arts, and the Budapest University of Technology and Economics as the defendants.<sup>71</sup> The family’s complaint declared that the defendants had kept forty-four works of art from the Herzog Collection and that they had breached bailment agreements under which Hungary and its institutions were holding the pieces in trust for the family after the war.<sup>72</sup> The family is seeking a declaration of rightful ownership to the works of art and the return of the pieces or, alternatively, a sum in excess of \$100 million in

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<sup>68</sup> “Washington Conference On Holocaust-Era Assets,” The Washington Conference on Holocaust-Era Assets (Florida Center for Instructional Technology, 2005), <http://fcit.usf.edu/holocaust/resource/assets/index.HTM>, chapter 3, pg. 271.

<sup>69</sup> “Washington Conference On Holocaust-Era Assets,” The Washington Conference on Holocaust-Era Assets (Florida Center for Instructional Technology, 2005), <http://fcit.usf.edu/holocaust/resource/assets/index.HTM>, chapter 3, pg. 273.

<sup>70</sup> Bruce L. Hay, *NAZI-LOOTED ART AND THE LAW: the American Cases* (S.I., NY: SPRINGER INTERNATIONAL PU, 2018), pg 240.

<sup>71</sup> Bruce L. Hay, *NAZI-LOOTED ART AND THE LAW: the American Cases* (S.I., NY: SPRINGER INTERNATIONAL PU, 2018), pg 240.

<sup>72</sup> Bruce L. Hay, *NAZI-LOOTED ART AND THE LAW: the American Cases* (S.I., NY: SPRINGER INTERNATIONAL PU, 2018), pg 240.

compensation.<sup>73</sup> Hungary denied all claims and called for a dismissal on procedural and jurisdictional grounds.

In 2011, the court ruled in favor of Hungary's motion to dismiss the case. However, the court rejected Hungary's defenses of sovereign immunity, international treaty, statute of limitations, the doctrines of act of state, political question and forum non conveniens.<sup>74</sup> The court, however, did agree with Hungary that the action was barred by the doctrine of international comity. The ruling was appealed by both parties, the Hungary defendants sought reinstatement of those defenses that were struck by the court. The Herzogs sought to overturn the lower court's decision that their claim was barred. In April of 2013, the appellate court found in favor of the Herzog family, ruling that the claim was not barred by the foreign state immunity act, but rather was protected by the commercial activity exception of the act. Further, the court dismissed as a defense the doctrine of international comity which the lower court had decided was a legitimate defense to the claim brought by Hungary. The court sent the case back for further findings by the district court. In March of 2016, the district court ruled that the case was no longer protected by the commercial activity exception to the foreign state sovereign immunity statute and reaffirmed its 2011 ruling in favor of the Hungary defendants. The Herzog family appealed this ruling on January 7, 2019, but the Supreme Court decided against hearing the appeal. The Herzog family has yet to receive any artwork from the collection that bears their name. Although the family is now precluded from pursuing redress against the sovereign state of Hungary, their case remains open against three Hungarian museums and a university.<sup>75</sup>

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<sup>73</sup> *de Csepel v. Republic of Hungary*, 169 F. Supp. 3d 143 (D.D.C. 2016)

<sup>74</sup> Bruce L. Hay, *NAZI-LOOTED ART AND THE LAW: the American Cases* (S.I., NY: SPRINGER INTERNATIONAL PU, 2018), pg 240.

<sup>75</sup> "High Court Won't Hear Lawsuit over Art Seized during WWII," AP NEWS (Associated Press, January 7, 2019), <https://www.apnews.com/2388cba59b1e4258bf9d74f5afcbf417>.

Reasonable people cannot possibly disagree that the artworks in question were wrongfully seized from the Herzog family. The facts are clear and essentially not disputed. However, the court never gets the opportunity to return what was clearly wrongfully taken from Herzog family, as its hands were tied by the assertion of legal technicalities. Once again, ethics takes a backseat. Moreover, Hungary showed itself to be a prime example of a country consciously ignoring ethical practices they have agreed to and legal documents that they have signed.

### Case Study #3

#### United States of America, Plaintiff, v. Portrait of Wally a painting by Egon Schiele, Defendant In Rem

Lea Bondi Jaray (“Bondi”) (1880-1969) was a prominent Jewish Austrian art dealer who owned the Würthle Gallery in Vienna, Austria. Bondi was well known for her support of the artist Egon Schiele (1890-1918) and other Austrian expressionists.<sup>76</sup> In or around 1925, Bondi acquired Egon Schiele’s *Portrait of Wally* (1912).<sup>77</sup> The oil-on-wood painting depicts a red-headed woman dressed in black. The woman is Valerie Neuzil, Schiele’s lover and model. Bondi occasionally showed *Portrait of Wally* in exhibitions, but primarily kept the painting hanging on a wall in her apartment.<sup>78</sup> In the time following World War II, Schiele became recognized as one of the most influential Austrian artists of the twentieth century.



Figure 3: Egon Schiele, *Portrait of Wally Neuzil*. Image courtesy of Leopold Museum, accessed via [https://commons.wikimedia.org/wiki/File:Egon\\_Schiele\\_-\\_Portrait\\_of\\_Wally\\_Neuzil\\_-\\_Google\\_Art\\_Project.jpg](https://commons.wikimedia.org/wiki/File:Egon_Schiele_-_Portrait_of_Wally_Neuzil_-_Google_Art_Project.jpg)

<sup>76</sup> Bruce L. Hay, *NAZI-LOOTED ART AND THE LAW: the American Cases* (S.I., NY: SPRINGER INTERNATIONAL PU, 2018), pg 15.

<sup>77</sup> *U.S. v. Portrait of Wally*, 663 F. Supp. 2d 232 (S.D.N.Y. 2009)

<sup>78</sup> *U.S. v. Portrait of Wally*, 663 F. Supp. 2d 232 (S.D.N.Y. 2009)

On March 12, 1938, Nazi Germany annexed Austria; this event became known as the Anschluss.<sup>79</sup> In accordance with the Nazi's Aryanization laws, particularly those that prohibited Jews from owning a business, Bondi's gallery was designated as "non-Aryan." This subjected Bondi's business to confiscation. A year earlier Bondi had attempted, without success, to sell the gallery to Friedrich Welz as the business was experiencing financial difficulties. A day after the Anschluss, Bondi reopened negotiations with Mr. Welz who ultimately bought the gallery for 13,550 Reichsmarks.<sup>80</sup> Following the sale, Mr. Welz initiated the process to Aryanize the gallery. Bondi, fearing for her life and the wellbeing of her family, began preparations to leave the country. On March 15, 1939, Mr. Welz's request was approved.<sup>81</sup> Shortly thereafter, he became an official member of the Nazi Party. In his Nazi Party application, Welz boasted that "I made my gallery available solely to Aryan artists" and "the gallery always stocked pictures of our Führer."<sup>82</sup>

On the night before Bondi and her family were to escape to England, Welz visited Bondi at her apartment to discuss information regarding the Würthle Gallery. The events that transpired that night are the subject of dispute but the more credible version is the position advanced by Bondi. She claims that while in her apartment, Welz saw *Portrait of Wally* hanging on the wall and demanded that she hand it over to him. Welz felt that he was entitled to the painting as part of his purchase of the gallery. After much resistance and explaining that the painting was part of

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<sup>79</sup> Bruce L. Hay, *NAZI-LOOTED ART AND THE LAW: the American Cases* (S.I., NY: SPRINGER INTERNATIONAL PU, 2018), pg 15.

<sup>80</sup> Bruce L. Hay, *NAZI-LOOTED ART AND THE LAW: the American Cases* (S.I., NY: SPRINGER INTERNATIONAL PU, 2018), pg 15.

<sup>81</sup> *U.S. v. Portrait of Wally*, 663 F. Supp. 2d 232 (S.D.N.Y. 2009)

<sup>82</sup> Amended Statement of Material Facts in support of Joint Motion for Summary Judgment by Plaintiff United States of America and Claimant Estate of Lea Bondi Jaray (filed February 26, 2009).

her private collection, Bondi ultimately relented as she feared, and rightly so, that Welz could prevent her family's escape the next day.<sup>83</sup>

The defendants in the eventual court case claim that Welz bought the painting for 200 Reichsmarks. The United States, ultimately a party to the litigation regarding the ownership of the painting supported Bondi's version and there is credible evidence to justify that position. Of significance is an authenticated letter from Lea Bondi to her friend and Egon Schiele scholar Otto Kallir wherein she states:

[He] saw [*Portrait of Wally*] hanging on the wall and demanded the painting. I explained that the painting is my own private property and that it had nothing to do with the Würthle. He kept pushing in the unpleasant way it was done at that time until my husband who was also present told me to give in and that we probably already wanted to leave the country tomorrow, don't make any trouble you know what the man could do."<sup>84</sup>

Bondi wrote another letter to Kallir in the 1960's that similarly explained the events that transpired that night with Welz.

After Welz took possession of the painting, it remained with him until the end of the war when he was arrested by the United States military in 1945 for suspected war crimes. At that point, all of the artworks in his possession, including *Portrait of Wally*, were confiscated by the military. As was the custom, the military made a concerted effort to reunite seized artworks with their rightful owners. In this instance, the military was unable to determine the identity of the rightful owner and consequently the artworks were returned to their country of origin, Austria.<sup>85</sup>

In the interim Welz apparently withstood nearly two years of periodic interrogation and the charges initially leveled against him were not sustainable. Although it is not clear, it appears

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<sup>83</sup> Bruce L. Hay, *NAZI-LOOTED ART AND THE LAW: the American Cases* (S.I., NY: SPRINGER INTERNATIONAL PU, 2018), pg 15.

<sup>84</sup> Letter to Otto Kallir (dated August 22, 1966).

<sup>85</sup> Bruce L. Hay, *NAZI-LOOTED ART AND THE LAW: the American Cases* (S.I., NY: SPRINGER INTERNATIONAL PU, 2018), pg 202.

that Welz sought the return of “his” collection that was confiscated by the military at the time of his arrest.

In May 1947, Robert Rieger hired attorneys Dr. Oskar Mueller and Dr. Christian Broda in an attempt to recover his family’s Schiele collection which was lost during the war. In 1938, Dr. Heinrich Rieger (Robert’s father), a Jewish dentist and prominent collector of Egon Schiele had sold his Schiele collection to Welz. The collection was sold under duress, as part of an attempt to escape the Holocaust. However, Dr. Rieger and his wife Berta died at the Theresienstadt concentration camp around 1942.<sup>86</sup> On behalf of Robert Rieger, Dr. Broda wrote a letter to the Repatriations, Deliveries, and Restitution Division of the United States requesting the prevention of Welz’s reacquisition of the Rieger collection. The letter specifically mentioned several Schiele paintings, one of which was titled *Portrait of His Wife*. The *Portrait of Wally* was never mentioned in the letter. It is believed that the U.S. forces may have confused the two paintings and unknowingly incorporated *Portrait of Wally* into the Rieger collection. In 1947, U.S. forces handed the Rieger collection over to the Austrian government for safekeeping. Unaware of the mistake, the Rieger heirs decided to sell the majority of their collection to the government owned Austrian Gallery Belvedere in 1950. *Portrait of Wally* was part of the collection that was sold to the Belvedere.<sup>87</sup>

Through her own restitution claim against Friedrich Welz, Lea Bondi regained ownership of her gallery in 1949. She continued to search for *Portrait of Wally* for several years but was unsuccessful in determining its location until 1953 when she was visited in London by Dr. Rudolf Leopold (1925-2010), a young Austrian art collector. Dr. Leopold was seeking the

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<sup>86</sup> *U.S. v. Portrait of Wally*, 663 F. Supp. 2d 232 (S.D.N.Y. 2009)

<sup>87</sup> Bruce L. Hay, *NAZI-LOOTED ART AND THE LAW: the American Cases* (S.I., NY: SPRINGER INTERNATIONAL PU, 2018), pg 15.

assistance of Bondi in locating several Schiele paintings. Leopold ultimately bought several artworks from Bondi. During the course of their meeting, Bondi asked Leopold if he knew the whereabouts of *Portrait of Wally*. Leopold was aware that Bondi was the previous owner of the painting as she was listed as its owner in Otto Kallir's 1930 catalogue, the catalogue raisonné of Schiele's paintings.<sup>88</sup> He told Bondi that the painting was in the Belvedere's collection. After explaining to Leopold that the painting was stolen from her during the war, Bondi requested that Leopold contact the Belvedere's management in hopes of reaching a restitution agreement.

Shortly after his meeting with Bondi, Leopold contacted the Belvedere and inquired about acquisitioning Schiele's *Cardinal and Nun* and *Portrait of Wally*. The Belvedere and Leopold eventually came to a trade agreement regarding *Portrait of Wally*. In exchange for the painting, Leopold would give the Belvedere Egon Schiele's *Rainerbub*, a painting from his personal collection. A year after his meeting with Bondi, Leopold had successfully acquired *Portrait of Wally* from the Belvedere. However, Leopold did not return the painting to Bondi. Instead, he elected to keep the painting for his personal collection without ever informing Bondi.<sup>89</sup>

It was not until three years after Leopold acquired *Portrait of Wally* that Bondi learned the painting was in his possession. Curious of his intentions, Bondi had her lawyer Dr. Emerich Hunna write a letter to Leopold on her behalf. Hunna's letter asked if Leopold acquired the painting from the Belvedere "based on [Bondi's] request that [Dr. Leopold] represent her interests, and [had] just not reported this to her yet." "[I]n any case, I ask you to explain."<sup>90</sup>

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<sup>88</sup> *U.S. v. Portrait of Wally*, 663 F. Supp. 2d 232 (S.D.N.Y. 2009)

<sup>89</sup> Bruce L. Hay, *NAZI-LOOTED ART AND THE LAW: the American Cases* (S.I., NY: SPRINGER INTERNATIONAL PU, 2018), pg 16.

<sup>90</sup> *U.S. v. Portrait of Wally*, 663 F. Supp. 2d 232 (S.D.N.Y. 2009)

Leopold's reply stated that Bondi had personally failed to pursue her painting from the Belvedere. Leopold stated that it was "clear she no longer had an ownership right" to her painting.<sup>91</sup> For the next decade, Bondi attempted several methods (even trying to shame him) to coerce Leopold into returning the painting. Lea Bondi passed away in London of 1969 having been unsuccessful in all of her attempts to reclaim her painting. During her lifetime, Bondi never filed a formal lawsuit against Leopold as she was convinced the Viennese courts would always favor a Viennese doctor over an expatriate.<sup>92</sup>

In 1994 Leopold sold his art collection to the Austrian government for approximately \$175 million.<sup>93</sup> In return, the Austrian government built a private museum named in his honor (The Leopold Museum). Further, Leopold was named the Museum's "Museological Director" for life and was able to select half of the Museum's Board of Directors, as well as his own seat on the board.<sup>94</sup> In 1997, as part of an exhibition titled "Egon Schiele: The Leopold Collection," the Leopold Museum loaned Portrait of Wally and more than 150 other Schiele paintings to the Museum of Modern Art (MoMA) in New York City. The paintings were shipped to New York in September of 1997. Portrait of Wally was on public display from October 8, 1997 to January 4, 1998.<sup>95</sup>

During the MoMA's exhibition, Henry Bondi (Lea Bondi's nephew), acting on behalf of Lea Bondi's heirs, contacted the Museum and informed it that the painting was in fact stolen.

Bondi's nephew then requested that the MoMA not return the painting to the Leopold Museum

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<sup>91</sup> United States V Portrait of Wally, 663 F. Supp.2d 232, 245 (S.D.N.Y 2009).

<sup>92</sup> United States V Portrait of Wally, 663 F. Supp.2d 232, 245 (S.D.N.Y 2009).

<sup>93</sup> Judith H. Dobrzynski, "THE ZEALOUS COLLECTOR -- A Special Report.; A Singular Passion For Amassing Art, One Way or Another," The New York Times (The New York Times, December 24, 1997), <https://www.nytimes.com/1997/12/24/arts/zealous-collector-special-report-singular-passion-for-amassing-art-one-way.html?mtrref=www.google.com&gwh=754A289828A5BBA417504B313DC9230D&gwt=pay>.

<sup>94</sup> *U.S. v. Portrait of Wally*, 663 F. Supp. 2d 232 (S.D.N.Y. 2009)

<sup>95</sup> *U.S. v. Portrait of Wally*, 663 F. Supp. 2d 232 (S.D.N.Y. 2009)

until rightful ownership could be determined. The MoMA refused the request as it was contractually obliged to return the painting to the Leopold Museum. After Bondi's request was denied, he contacted District Attorney Robert Morgenthau who issued a subpoena for the painting just a few days before its return to the Leopold Museum. The subpoena demanded that the painting be handed over to a grand jury to investigate whether or not the Museum was in possession of stolen property. The serving of the subpoena shocked the art world as many feared that it would have a tremendously negative impact on the ability of American museums to secure loans of artwork from other countries.<sup>96</sup>

The MoMA filed a motion in court to retract the subpoena. After several trials, the case was sent to New York's highest court. In September of 1999 the court nullified the subpoena due to New York's Arts and Cultural Affairs law which states:

“No process of attachment, execution, sequestration, replevin, distress or any kind of seizure shall be served or levied upon any work of fine art while the same is enroute to or from, or while on exhibition or deposited by a nonresident exhibitor at any exhibition held under the auspices or supervision of any museum, college, university or other nonprofit art gallery, institution or organization within any city or county of this state for any cultural, educational, charitable or other purpose not conducted for profit to the exhibitor, nor shall such work of fine art be subject to attachment, seizure, levy or sale, for any cause whatever in the hands of the authorities of such exhibition or otherwise.”<sup>97</sup>

This effectively ended the state-level proceedings.

After the nullification of the subpoena the federal authorities intervened. The United States Attorney's office issued a warrant for the temporary seizure of Portrait of Wally and on September 22, 1999 brought forth a civil forfeiture in the federal court system which sought to

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<sup>96</sup> *Portrait of Wally: The Face that Launched a Thousand Lawsuits* (P.O.W. Productions, 2012).

<sup>97</sup> N.Y. Arts & Cult. Aff. Law § 12.03

permanently retain the painting.<sup>98</sup> The United States government supported its claims through the legal basis that the Leopold Museum had violated federal law prohibiting the importation of property known to have been stolen.<sup>99</sup> The Leopold Museum and Lea Bondi's estate both joined the proceedings and both claimed rightful ownership. The Leopold Museum also called for the dismissal of the case which was granted by the district court in July of 2000 on the grounds that the painting did not qualify as "stolen property."<sup>100</sup> The court claimed that the painting lost its stolen status when it was recovered by the United States military and subsequently transferred to the Austrian government for restitution. This resulted in the U.S. Attorney's office amending its complaint to state that the military officials, who recovered the painting, were unaware that it was stolen and that the painting was never subjected to a proper restitution proceeding.<sup>101</sup> In April of 2002, the amended complaint was upheld and the court reversed its previous decision, confirming that the painting was in fact stolen property upon entering the United States.

The Leopold Museum brought forth many proposed grounds for dismissal, almost all of which were rejected by the court.

In 1955 Austria and the United States (as well as the other Allied countries) signed the State Treaty of 1955. This treaty effectively ended the occupation of Austria and established it as an independent civilian government. Article 26 of the State Treaty of 1955 stated that Austria must return property that had been forcibly taken or transferred due to the owner's religion and/or racial origin.<sup>102</sup> If property remained unclaimed or it was heirless after six months, the Austrian government was given control of the object(s) and was to distribute it to "appropriate

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<sup>98</sup> *U.S. v. Portrait of Wally*, 663 F. Supp. 2d 232 (S.D.N.Y. 2009).

<sup>99</sup> National Stolen Property Act, 18 U.S.C. § 2314.

<sup>100</sup> *United States v. Portrait of Wally*, 105 F. Supp.2d 208 (S.D.N.Y. 2000).

<sup>101</sup> Bruce L. Hay, *NAZI-LOOTED ART AND THE LAW: the American Cases* (S.I., NY: SPRINGER INTERNATIONAL PU, 2018), pg 17.

<sup>102</sup> Bruce L. Hay, *NAZI-LOOTED ART AND THE LAW: the American Cases* (S.I., NY: SPRINGER INTERNATIONAL PU, 2018), pg 18.

agencies or organizations” for it to “be used for the relief and rehabilitation of victims of persecution.”<sup>103</sup> The Leopold Museum falsely argued that Article 26 expressly states that the Austrian government was given rightful possession of *Portrait of Wally* due to the fact that Bondi failed to reclaim the painting within six months of the treaty’s ratification. The Leopold Museum also believed that the United States had no jurisdiction in the matter as the treaty entrusted the Austrian government with Nazi-looted property. The court rejected both claims on the grounds that the Austrian government did not use the painting towards “relief of victims of the Holocaust” and that the treaty makes no mention of barring another country’s court system of jurisdiction regarding Nazi-looted art.<sup>104</sup> As the Austrian government failed to abide by Article 26 of the State Treaty of 1955, the United States’ was in fact within jurisdiction.

The Leopold Museum also argued that the case should be dismissed due to the doctrine of international comity. This doctrine allows for “a discretionary act of deference by a national court to decline to exercise jurisdiction in a case properly adjudicated in a foreign state.”<sup>105</sup> However, the court also denied this motion as Austria’s interest in dismissing the case did not outweigh the United States’ interest in adjudicating it.

Another issue raised by the Leopold Museum, and subsequently denied by the court, was the equitable doctrine of laches. This doctrine usually applies when it is “clear that a plaintiff unreasonably delayed in initiating an action and a defendant was unfairly prejudiced by the delay.”<sup>106</sup> As the last correspondence between the two parties was over forty years ago, the equitable doctrine of laches would theoretically apply. However, it was rejected due to the fact

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<sup>103</sup> Austrian State Treaty of 1955, art. 26(2).

<sup>104</sup> Austrian State Treaty of 1955, art. 26(2).

<sup>105</sup> *In re Maxwell Communications Corp.*, 93 F.3d 1036, 1047 (2d Cir. 1996).

<sup>106</sup> *Robins Island*, 959 F. 2d at 423

that this forfeiture proceeding was filed by the United States federal government to enforce the laws against trafficking stolen property, not due to a private claim by the Bondi heirs.<sup>107</sup>

Perhaps the strongest argument presented by the Leopold Museum was that of prescriptive possession under Austrian law. Essentially, ownership by prescription provides that title to property may be acquired by good faith possession for a specified period of years which under Austrian law is three years.<sup>108</sup> The court found that neither Leopold nor the Belvedere could satisfy the requirement of good faith and rejected their argument.

The Leopold Museum also argued that it was not given fair notice that the painting would be subjected to forfeiture had it entered the United States. The court denied this argument as well since the government believed that the Leopold Museum knew of the painting's stolen status. However, the Leopold would have a fair opportunity during the trial to argue that it was unaware of the status of the painting.

As Dr. Leopold was the director of the Leopold Museum, his assumed knowledge of the painting's stolen status is attributed to the Museum as well. It is important to note that in this case negligence is not the same as knowledge. The U.S. government compiled a great deal of evidence that implied Leopold knew the painting was previously stolen. The following evidence was deemed sufficient enough to prove probable cause of Leopold's knowledge of the painting's stolen status. Leopold was personally made aware of the situation by Lea Bondi herself in 1953. He was also aware that Bondi was a Jew living in Nazi occupied Austria where Jewish art dealers were in fact losing their collections to Nazi theft. While acquiring the painting from the

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<sup>107</sup> Bruce L. Hay, *NAZI-LOOTED ART AND THE LAW: the American Cases* (S.I., NY: SPRINGER INTERNATIONAL PU, 2018), pg 21.

<sup>108</sup> Bruce L. Hay, *NAZI-LOOTED ART AND THE LAW: the American Cases* (S.I., NY: SPRINGER INTERNATIONAL PU, 2018), pg 34.

Belvedere, Leopold expedited the process and even threatened to “withdraw his offer if the exchange were further delayed.”<sup>109</sup> The court believed this evidenced Leopold’s knowledge that the Belvedere was not in rightful possession of the painting and that Leopold wanted to complete the transaction before it was made known. Second, the court argues that after Leopold acquired the painting, he purposefully avoided Bondi in hoped that rightful possession would be granted to him through prescriptive possession. Also, while in possession of the painting, Leopold never once did any research to verify its provenance. Further, Leopold altered the provenance of the painting on a couple occasions. In a detailed 1972 book about Egon Schiele, Leopold mentioned only himself and Emil Toepfer as previous owners. It was not until 1995 that Leopold mentioned the Riegers and Lea Bondi in a discussion of the paintings provenance. The court asserts that this was an attempt to legitimize his acquisition of the painting, as he knew the Riegers never truly owned the painting.

The Leopold Museum attempted to rebut the U.S. government’s evidence against Dr. Leopold and itself with its own claims. Dr. Leopold claimed that Lea Bondi did not inform him that the painting was stolen. He also claimed to have told Bondi to meet with the Belvedere’s director. Leopold even claims to have set up a meeting between the two, but Bondi failed to show. The Museum made note that Leopold exhibited *Portrait of Wally* several times after he acquired, claiming that it was at one such exhibition in 1957 that Bondi learned of Leopold’s possession of the painting. Lastly, Leopold argued that he never tried to falsify the painting’s provenance but rather add information that he thought to be true.<sup>110</sup>

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<sup>109</sup> United States v. Portrait of Wally, 663 F. Supp. 2d at 269 (S.D.N.Y. 2009)

<sup>110</sup> United States v. Portrait of Wally, 663 F. Supp. 2d at 232 (S.D.N.Y. 2009)

Due to the conflicting evidence presented by both parties, a jury trial was ordered to resolve the issue. All parties involved spent six years preparing pretrial information and arguments. In June of 2010 Dr. Leopold passed away. The trial was set to begin on July 26, 2010. Shortly after his passing, the Leopold Museum contacted the Bondi heirs to offer them 19 million dollars in exchange for *Portrait of Wally*. The Bondi heirs accepted the offer and agreed to settle the dispute out of the trial. In August of 2010, *Portrait of Wally* was shipped back to the Leopold Museum where it still hangs on display today. The amount of attention this case garnered was unprecedented. From 1990 to 1997 there were only two Holocaust restitution cases filed in the U.S. courts system. This case showed that it was possible to effectively pursue restitution in the U.S. courts system and many claims have since been filed.

The success experienced by the Bondi heirs can, more likely than not, be attributed to the fact that supporting their cause was the power of the Attorney General's office of the United States. The heirs' likelihood of success would have been greatly diminished without the intervention of the Attorney General who possessed both the legal acumen and financial resources to see the matter through to conclusion. Although technically representing the interests of the United States, the Bondi heirs benefited from those efforts. Fortunately, the government felt that Dr. Leopold did not have clean hands and were able to present a convincing argument in that regard. Perhaps the government was influenced by the authenticated letter(s) sent by Bondi to Otto Kallir at a point in time well before any contemplation of litigation. Bondi's letters leave no doubt as to the painting's provenance.

It is interesting that the Leopold Museum was willing to equitably resolve this matter, but only after the death of Dr. Leopold. Perhaps his passing provided the Leopold Museum with an opportunity to act in an ethical manner and compensate the rightful owners. Of course, should

one choose to take a dim view of things, it could be argued that the Leopold Museum ultimately settled because it was advised by its attorneys that there was little chance of prevailing on the merits.

## Conclusion:

### Alternative Methods to Restitution

As exemplified in the previously discussed case studies, museums and their respective countries are often unwilling to retribute Nazi-looted art, even when substantial evidence indicates that the object was clearly stolen or looted during the Nazi-era. This reluctance to retribute is alarming considering that almost fifty countries have signed ethical treaties such as the 1998 Washington Conference on Holocaust-Era Assets and the Terezin Declaration. The Washington Conference proposed eleven principles, including transparency and accessible records and archives. Signatories of such treaties agreed on the importance of restitution and vowed to make significant strides towards researching and returning any Nazi-looted objects that may be in their possession.

Article VII of the Washington Conference states:

“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.”<sup>111</sup>

However, as the three case studies have shown, countries often refuse to repatriate objects that are of significant historical and/or financial value. Often, these countries prefer to take the issue to court where they can utilize legal technicalities to further their cases. As national governments can spend large amounts of money on litigation, a commodity that most of the plaintiffs do not have, they often win. Such tactics can be extremely intimidating to pre-war owners and heirs that are looking to reclaim their property.

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<sup>111</sup> “Washington Conference Principles on Nazi-Confiscated Art,” U.S. Department of State (U.S. Department of State), accessed July 15, 2019, <https://2001-2009.state.gov/p/eur/rt/hlcst/23231.htm>.

A report conducted in 2013 by the Conference on Jewish Material Claims Against Germany (Claims Conference) and the World Jewish Restitution Organization (WJRO) unveils disappointing statistics regarding countries' implementation of principles agreed upon in ethical treaties like the Washington Conference and Terezin Declaration. The report found that only 34% of all signatories of the treaties had made major or substantial progress in implementing ethical restitution principals.<sup>112</sup> This statistic evidences that ethics are given little regard when a country is protected by international and/or their own laws. While it cannot be disputed that the Washington Conference and Terezin Declaration have contributed in some manner towards the restitution process of Nazi-looted art, evidence shows that these ethical declarations often take a backseat to legal technicalities. Perhaps an analysis of ethics and the law regarding museums needs to be developed further especially in the context of the restitution of Nazi looted property.

The International Council of Museums (ICOM) constructed the ICOM Code of Ethics for Museums. This Code includes several sections regarding Nazi-looted art. Principle 2 of the Code states:

“Museums that maintain collections hold them in trust for the benefit of society and its development...Inherent in this public trust is the notion of stewardship that includes rightful ownership, permanence, documentation, accessibility, and responsible disposal.”

Further, museums are expected to establish full provenance of objects in their collection, particularly objects that are of sacred significance.<sup>113</sup> However, similar to the Washington Conference and Terezin Declaration, there are no mechanisms in place that patrol the adherence to the Code, as ethics are not enforceable. Therefore, it may be prudent to develop alternative

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<sup>112</sup> Wesley A. Fisher and Ruth Jolanda Weinberger, “Holocaust-Era Looted Art: a Current World-Wide Overview,” rep., *Holocaust-Era Looted Art: a Current World-Wide Overview* (St. Petersburg: Conference on Jewish Material Claims Against Germany, 2014), pp. 4.

<sup>113</sup> *ICOM Code of Ethics for Museums* (Paris: ICOM, 2006), principle 2, pg. 3.

methods for resolving Nazi-looted art ownership issues. In fact, Principle XI of the Washington Conference encourages nations to:

“...develop national processes to implement these principles, particularly as they relate to alternative dispute resolution mechanisms for resolving ownership issues.”<sup>114</sup>

Most signatories of the Washington Conference have failed to set up such processes. Germany, France, the Netherlands, Austria, and the United Kingdom are the only signatories that have established alternative methods towards resolution. Each signatory established a committee that issues recommendations on disputed works of art that are in the possession of a public collection.<sup>115</sup> This alternative method can have a profoundly positive impact on the resolution of conflicts about rightful ownership of objects. Resolving ownership disputes outside of court provides pre-war owners and heirs with a greater chance of reclaiming their property, as statutes of limitations and the law of adverse possession make reclaiming Nazi-looted property extremely difficult. Exemplified in these three case studies, many countries and their museums argue that due to the object(s) being in their collections for a particular duration of time without claims against it, the ownership of the object(s) is legally transferred over to them. This can lead to a mentality of stashing an object with suspicious provenance until the law of adverse possession legally declares it a museum's property.

The United States signed the Holocaust Expropriated Art Recovery (HEAR) Act into law in 2016. The purposes of the Act are as follows:

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<sup>114</sup> “Washington Conference Principles on Nazi-Confiscated Art,” U.S. Department of State (U.S. Department of State), accessed July 15, 2019, <https://2001-2009.state.gov/p/eur/rt/hlcst/23231.htm>.

<sup>115</sup> Catherine Hickley, “Washington Principles: the Restitution of Nazi-Looted Art Is Still a Work in Progress, 20 Years On,” *The Art Newspaper* (The Art Newspaper, November 26, 2018), <https://www.theartnewspaper.com/news/restitution-of-nazi-looted-art-a-work-in-progress>.

(1) To ensure that laws governing claims to Nazi-confiscated art and other property further United States policy as set forth in the Washington Conference Principles on Nazi-Confiscated Art, the Holocaust Victims Redress Act, and the Terezin Declaration.

(2) To ensure that claims to artwork and other property stolen or misappropriated by the Nazis are not unfairly barred by statutes of limitations but are resolved in a just and fair manner.

The HEAR Act is a significant reason why a United States jurisdiction is often favored for claimants attempting to regain their property. Unfortunately, the exorbitantly high prices for filing and litigating a lawsuit in the United States can often be quite inhibitive. The formation of an International Alternative Dispute Resolution Forum would undoubtedly benefit claimants who are seeking restitution of their artwork. This forum would act as an unbiased international committee that would serve as an alternative court system for Nazi-era restitution disputes. However, this forum would focus on the merits of the case rather than legal technicalities. The committee would be comprised of international experts that would be able to offer an unbiased and expert ruling. In order to avoid legal technicalities, both parties would have to enter into binding arbitration. The committee's ruling would be final and legally binding, ensuring a fair and ethical resolution.

Cassirer, Herzog, and Bondi represent three cases of Nazi-looted art that have been litigated in the United States. Although not randomly chosen, they may as well have been as they are each indicative of what occurs once a disputed matter ends up in the court system. Invariably, a claimant is compelled to engage in often prohibitively expensive litigation involving seemingly countless appeals. Furthermore, before a claimant gets to submit proofs regarding the validity of an expropriation claim, he/she is required to prevail on any number of highly complex defenses asserted by the defendant seeking to maintain possession of the artwork in question. Throughout this paper, I have referred to these defenses as legal technicalities. I do so because they serve to

preclude a court from adjudicating the true merits of a claim. Bruce L. Hay has identified three categories of cases filed in the United States regarding Nazi-looted art: suits involving claims against public museums; suits involving claims against foreign states; and suits involving private collectors.<sup>116</sup> This paper does not include a discussion of any claim against a private collector. That is because, for better or worse, there is not the same level of expectation regarding ethical behavior. A museum is expected to adhere to the highest ethical standards in all aspects of its operations but particularly so when it comes to the provenance of an acquisition.<sup>117</sup> It is equally clear that a museum also has an ethical obligation to preserve and protect its collections. However, this is not an either-or kind of argument. Even given a scenario where a museum is a good faith purchaser of what turns out to be a piece of Nazi-looted art, it nevertheless is a piece of Nazi-looted art!

Regardless of any rights afforded to a museum under the law, the scenarios described above begs the question of whether or not it is ethical for a museum to advance arguments designed to prevent restitution to a knowingly aggrieved claimant. Of course, it sounds overly simplistic, but, maybe it should be. An examination of the twenty cases involving Nazi-looted art filed in U.S. courts as of 2017 reflect that there has only been one case wherein a court actually got to address the issue of whether a claimant asserted a legitimate claim of wrongful appropriation.<sup>118</sup> All of the other cases were resolved not on the merits of the claim but rather due to a legal technicality.

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<sup>116</sup> BRUCE L. HAY, *NAZI-LOOTED ART AND THE LAW: the American Cases* (S.I., NY: SPRINGER INTERNATIONAL PU, 2018), pg 1.

<sup>117</sup> Bernice L. Murphy, ed., *MUSEUMS, ETHICS AND CULTURAL HERITAGE* (Place of publication not identified, NY: ROUTLEDGE, 2017). & Gary Edson, *Museum Ethics* (London: Routledge, 2005).

<sup>118</sup> BRUCE L. HAY, *NAZI-LOOTED ART AND THE LAW: the American Cases* (S.I., NY: SPRINGER INTERNATIONAL PU, 2018), pg 4.

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