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Lawrence M. Kaye

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**1999 Symposium  
Theft Of Art During World War II: Its Legal And  
Ethical Consequences**

**A QUICK GLANCE AT THE SCHIELE  
PAINTINGS<sup>1</sup>**

*Lawrence M. Kaye<sup>2</sup>*

I. INTRODUCTION

In October 1997, a remarkable collection of 150 paintings and drawings by the early 20<sup>th</sup> century Austrian artist Egon Schiele was exhibited at the Museum of Modern Art or "MoMA" in New York City. Most of these works had never before been seen in the United States. The works on display had been loaned to MoMA by the Leopold Museum in Vienna, Austria. The founder of the museum, Dr. Rudolf Leopold, an ophthalmologist by training but an art collector by avocation, had assembled over several decades,

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1 This article is based on the keynote address that was delivered at the *DePaul-LCA Journal of Art and Entertainment Law* Annual Symposium entitled "Theft of Art During World War II: Its Legal and Ethical Consequences." The event was held on October 14, 1999 in Chicago, Illinois.

2 Mr. Kaye is a litigation partner at the New York law firm of Herrick, Feinstein LLP. He is a 1970 graduate of St. John's University School of Law where he was Editor-in-Chief of the *St. John's Law Review*. Mr. Kaye has practiced art and cultural property law for thirty years. He has represented foreign governments, victims of the Holocaust, families of renowned artists and other claimants in connection with the recovery of art and antiquities. Among other things, he was a lead attorney in the landmark case of *Kunstsammlungen zu Weimar v. Elicofon*, 678 F.2d 1150 (2d Cir. 1982), in which two early masterpieces by Albrecht Durer stolen at the end of the Second World War were successfully recovered and returned to the Weimar Art Museum, and he and his colleagues successfully recovered for the Republic of Turkey the fabled Lydian Hoard antiquities, long held by the Metropolitan Museum of Art.

Mr. Kaye's law firm represents the heirs of Lea Bondi Jaray in *United States v. Portrait of Wally*, 99 Civ. 9940 (MBM), currently pending in the United States District Court for the Southern District of New York. The heirs have filed a claim in that forfeiture action.

a vast collection of artworks, which included 250 pieces by Schiele.

In the 28 years of his short life, Schiele produced more than 300 paintings and 3,000 drawings. The Leopold Schieles, which are representative of his life's work, were characterized by MoMA as the world's finest private collection.<sup>3</sup> The collection, on worldwide tour for three years, was scheduled to be exhibited in New York for three months before the paintings were to travel to the Picasso Museum in Barcelona, Spain.

But in January 1998 when the Leopold collection left New York, two paintings did not go with it. "Portrait of Wally" and "Dead City III" were about to become the center of an international dispute, testing the scope of an unusual New York law and underscoring a troubling issue: what to do about artwork stolen by the Nazis more than 60 years ago when those items come into the United States today.

This saga began on December 31, 1997, five days before the exhibition was to close, when the Museum of Modern Art was contacted by Henry Bondi, who notified MoMA that "Portrait of Wally" had been owned by his aunt, Lea Bondi Jaray, a Viennese Jew and gallery owner, and that it had been taken from her during World War II. MoMA also heard from Rita and Kathleen Reif, on behalf of the heirs of Fritz Grunbaum, a Jewish art collector and comedian, who informed the museum that "Dead City III" had been stolen during the war from Grunbaum's collection. Lea Bondi Jaray had been able to escape from Austria in 1939 and lived out her life in London. Fritz Grunbaum, not as fortunate, perished in the Dachau concentration camp in 1940.

Bondi and the Reifs asked MoMA to retain the paintings until the issue of rightful ownership could be determined. MoMA rejected the requests, citing its contractual obligation to return the paintings to the Leopold Museum and a New York statute that it said forbids the seizure of cultural properties on loan to nonprofit institutions in New York. MoMA then informed the Bondi and Grunbaum families that the paintings would be shipped out of the

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3 Joan Brunskill, *Schiele at MoMA*, ASSOC. PRESS, Oct. 24, 1997.

country on January 8, 1998 or shortly thereafter, when the exhibition closed.

Each of the families then contacted various government officials, including Robert Morgenthau, Jr., the New York County District Attorney, who, on January 7, 1998, served MoMA with a grand jury subpoena duces tecum demanding the production of "Portrait of Wally" and "Dead City III." The two works had already been crated for shipment, but the subpoena blocked their transport and kept them in New York.

To say that the subpoena created an uproar is to put it mildly. Museums claimed to be "shocked," expressing concern that such actions would slow or stem the international flow of artwork into New York. The Austrian government also expressed outrage. Various organizations made statements supporting one side or the other, and the media weighed in on both sides. But, to the victims of the Holocaust, the subpoena symbolized a willingness to provide a much-needed forum to redress past wrongs. In my view, the District Attorney's actions were a proper and welcome exercise of his powers.

The subpoena issued to MoMA directed it to appear before the grand jury and produce the paintings for examination. The grand jury was convened to investigate whether "Portrait of Wally" and "Dead City III" were stolen by Nazi agents or collaborators and, if so, whether any parties should be indicted for criminal possession of stolen property in New York. While many pundits immediately and publicly asserted that the subpoena was an inappropriate use of the People's powers to investigate crimes, the District Attorney took the position that the subpoena was a proper exercise of his powers to investigate stolen property within his jurisdiction.

MoMA immediately moved to quash the grand jury subpoena in the New York County Supreme Court, New York's trial level court.<sup>4</sup> MoMA argued that the paintings were exempt from grand jury process because of a New York statutory provision, Section 12.03 of the Arts and Cultural Affairs Law, which had never before

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4 *In the Matter of the Application to Quash Grand Jury Subpoena Duces Tecum Served on the Museum of Modern Art*, 177 Misc.2d 985, 677 N.Y.S.2d 872 (Sup. Ct. N.Y. Co. 1998).

been the subject of judicial scrutiny. It provides, in relevant part, that, "[n]o 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 . . . on exhibition . . . [at] any museum . . . [in] . . . this state for any cultural, educational, charitable or other purpose not conducted for profit to the exhibitor."<sup>5</sup> The meaning of this provision would be considered by three different New York courts and hotly debated by a host of legal scholars and other commentators.

## II. SUPREME COURT OF NEW YORK, NEW YORK COUNTY

Court battles can often be dry and technical, stripped of all of the human drama that is at the real heart of the matter. So here, while the public debate focused on the enormous and gut-wrenching historical and moral questions arising out of the claims to the Schiele paintings, the issues debated in the Supreme Court before Justice Laura Drager turned on the technical construction of Section 12.03. The primary question before the court was whether the statute was intended to apply to a criminal subpoena issued on behalf of a grand jury investigating possible criminal offenses.

The People argued that Section 12.03 was intended to encompass only civil seizures and that it could not be applied to a subpoena issued in connection with a criminal investigation. They

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<sup>5</sup> N.Y. ARTS & CULT. AFF. LAW 12.03 (McKinney 1984). The statute provides:

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 en route 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.

argued that, under basic rules of statutory construction, the meaning of the phrase "any kind of seizure" must be determined from its context. In Section 12.03, that phrase sits among an enumeration of civil remedies: attachment, sequestration, replevin, to name just a few. Those are purely civil remedies. There are no references to subpoenas or warrants, or other aspects of criminal procedure contained in the statute. The People also asserted that the plain import of the statutory language, along with its legislative history, revealed that the provision was intended to apply solely to civil remedies.

The People also argued that the grand jury had been given broad powers and that it was against the public interest to impose any restrictions on the grand jury process, particularly when there was nothing within the text of Arts and Cultural Affairs Law § 12.03 or its legislative history indicating that the Legislature intended to restrict the grand jury's power to issue subpoenas for artwork otherwise covered by its provisions. Finally, the People noted that the statute was not intended to protect stolen art and that allowing it to shield such thefts could effectively turn New York into a safe haven for stolen art.

MoMA likewise focused on the phrase "any kind of seizure," but, in contrast to the People, ignored the context of the statute. Instead, the Museum contended that there was nothing in the plain language of the statute that indicated that it was not applicable to criminal proceedings. MoMA's response was also heavily grounded in policy. MoMA argued that Section 12.03 was intended to encourage the free flow of art into New York and that upholding the subpoena would deter foreign lenders from sending their works to New York institutions. MoMA's policy argument is difficult to fathom. With one exception, no other state in the United States has a statute like Section 12.03; yet, important loan exhibitions regularly visit museums in San Francisco, Boston, Chicago and other great cities.<sup>6</sup>

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<sup>6</sup> Under a Texas statute, artwork on exhibit in Texas museums cannot be the subject of "any process of attachment, execution, sequestration, replevin, or distress or of any kind of seizure, levy, or sale on a work of fine art." However, the Texas statute explicitly excludes stolen art from its protection "if theft of the

The court, however, ruled in favor of MoMA. The court's decision focused on the meaning of the word "seizure" in the statute. Justice Drager concluded that the use of the words "any kind of" before the word seizure compelled the conclusion that the word was intended to mean interference with possessory interests of any kind, even if imposed by the District Attorney's subpoena. The phrase "any kind of seizure" was deemed broad, unlimited and unambiguous. The subpoena was quashed.<sup>7</sup>

### III. SUPREME COURT, APPELLATE DIVISION

The District Attorney appealed to New York's intermediate appellate court, the Appellate Division, where a four-judge panel voted unanimously to reverse the decision of the trial court.<sup>8</sup> While acknowledging that the Legislature had intended to maintain the "free flow" of art by passing Section 12.03 in 1968, the appellate panel took a more narrow view of its reach. Writing for the court, Justice Richard Andrias examined the meaning of the word "seizure." He, however, came to a conclusion opposite to that reached by the trial court, relying on a decision of New York's highest court which held that a subpoena issued on behalf of a grand jury does not authorize a seizure. Rather it simply seeks to cause physical evidence to be available for examination by the grand jury.<sup>9</sup> In addition, after tracing the origin of the statute, Justice Andrias concluded that Section 12.03 was never intended to apply to criminal matters. Therefore, Section 12.03 could not be used to quash the subpoena for the Schiele paintings.<sup>10</sup>

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work of art from its owner is alleged and found proven by the court." 1999 Tex. Gen. Laws 1043 (June 18, 1999).

7 See *In the Matter of the Application to Quash Grand Jury Subpoena Duces Tecum Served on the Museum of Modern Art*, 677 N.Y.S. 2d 872, 177 Misc. 2d 985.

8 *In re Application to Quash Grand Jury Subpoena Duces Tecum Served on the Museum of Modern Art*, 688 N.Y.S.2d 3, 253 A.D.2d 211 (1st Dep't 1999).

9 *Id.* at 6, 253 A.D.2d at 214 (citing *In re Heisler v. Hynes*, 42 N.Y.2d 250, 252, 397 N.Y.S.2d 727, 366 N.E.2d 817 (1977)).

10 *Id.* at 8, 253 A.D.2d at 215.

Of particular note was the court's response to MoMA's public policy argument that the legislative intent was to promote the arts in New York and maintain a "free flow" of art by protecting foreign lenders from legal process and challenges. While agreeing that the intent of Section 12.03 was to facilitate the free flow of art, the court dismissed that intent as a basis for quashing the subpoena: "[I]t is not contended, nor could it be, that the public interest is served by permitting the free flow of *stolen* art into and out of the State."<sup>11</sup>

#### IV. THE COURT OF APPEALS

The battle over the subpoena continued into the Court of Appeals, New York's highest court.<sup>12</sup> In addition to the submissions by MoMA and the District Attorney, which essentially repeated the arguments made to the lower courts, *amicus curiae* briefs were filed by the Committee on Art Law of the Association of the Bar of the City of New York (which had also submitted an *amicus curiae* brief in the Appellate Division),<sup>13</sup> the International Association of Jewish Lawyers and Jurists, and a group of 12 museums, including the Metropolitan Museum of Art, the Albright-Knox Art Gallery, the Brooklyn Museum, and somewhat surprisingly, the Jewish Museum, to name a few. The Association of the Bar took the lawyers' route, laying out its analysis of Section 12.03 and its legislative history, and examining various methods of statutory interpretation. The International Association of Jewish Lawyers and Jurists weighed in with a brief discussing, among other things, the particular interests of Holocaust survivors and the Jewish community. The *amici* museums argued that upholding the subpoena would threaten their ability to secure loans of artwork. At oral argument in the Court of

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11 *Id.* at 7, 253 A.D.2d at 216 (emphasis added).

12 *In the Matter of the Grand Jury Subpoena Duces Tecum Served on the Museum of Modern Art*, 93 N.Y.2d 729, 697 N.Y.S.2d 538, 719 N.E.2d 897 (1999).

13 The brief submitted by this committee contained a footnote indicating that the author of this article, who is a member of the committee, did not participate in the drafting or preparation of that submission.



Appeals, which I attended, the judges, all but one of whom spoke, focused not so much on the legislative history (in my view, the key issue) but rather on the conduct of the District Attorney. At the argument the judges appeared to be concerned that, more than 18 months after the subpoena was issued, there did not seem to be an active investigation nor any indictments on the horizon.

The result in the Court of Appeals was another reversal. The subpoena was quashed. The 6-1 decision gave broad scope to Section 12.03. The court found that the language and legislative history clearly indicated that it was meant to bar the seizure of loaned art in criminal as well as civil cases. "[A] comprehensive reading of the history reveals a consistent, unyielding legislative intent to promote artistic and cultural exchanges by creating a climate in New York free from the threat of seizure by judicial process and by encouraging nonresidents to share their works of art with the public."<sup>14</sup>

Having concluded that the statute was as applicable to criminal investigations as to civil matters, the court then weighed in with its view of the meaning of "seizure." Echoing the opinion of the trial court, the Court of Appeals found that the everyday meaning -- interference with possessory rights -- was applicable here. "In order to afford artwork the protective cloak of section 12.03, the process at issue -- whether civil or criminal -- must constitute or effectuate meaningful interference with a lender's possessory interest in that property."<sup>15</sup>

The court then had to identify the interference. The subpoena itself could not be considered interference because, as the court itself acknowledged, a subpoena of the kind issued by the District Attorney "generally does not authorize the seizure, impoundment or other disruption in possession of property, and is not intended to deprive its custodian of control."<sup>16</sup> But the court was seemingly troubled by the fact that the paintings had been scheduled to leave New York a year and a half earlier and were still in New York

14 *In re Grand Jury Subpoena Duces Tecum Served on the Museum of Modern Art*, 93 N.Y.2d at 736, 697 N.Y.S.2d at 541, 719 N.E.2d at 900.

15 *Id.* at 738-39, 697 N.Y.S.2d at 543, 719 N.E.2d at 902.

16 *Id.* at 739, 697 N.Y.S.2d at 543, 719 N.E.2d at 902.

without any indictments issued. And to the court, that year and a half delay, along with the indefiniteness of the process, effected a seizure.

There was a dissent by Judge Smith. He stated that Section 12.03 does not apply to criminal cases and, that even if it did, enforcement of a subpoena duces tecum to produce the paintings for the grand jury would not constitute a seizure. He noted that "[c]ertainly, the Legislature could not have intended that New York assist the free flow of stolen art under an umbrella of complete immunity from civil and criminal processes."<sup>17</sup> He continued, "[s]uch a ruling adversely affects society as a whole, whose 'interest is best served by a thorough and extensive investigation' into potential crimes."<sup>18</sup>

My own view, with all due respect to the Court of Appeals, is that it reached the wrong conclusion and did so for the wrong reasons. First, one cannot ignore the fact that the impetus for the Legislature's adoption of Section 12.03 was the seizure by a judgment creditor of a nonresident's art collection which had been loaned for exhibit in New York. Moreover, the legislative history clearly indicates that the purpose of the provision was to prevent creditors in civil cases from attaching or otherwise interfering with the loaned art. And there is nothing in that legislative history to suggest that there was any intent to apply the provision to criminal investigations.

Second, it had been well-settled in New York that this type of subpoena duces tecum did not constitute a seizure. Third, to find the necessary interference with possessory rights that would equate with a seizure, the court had to rely on the length of time that the paintings had been in New York.<sup>19</sup> But, as Judge Smith noted in his dissent, the delay was attributable to MoMA's decision to fight the subpoena rather than produce the paintings to the District Attorney for examination. "[T]hese paintings have never been

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17 *Id.* at 749, 697 N.Y.S.2d at 550, 719 N.E.2d at 909 (Smith, J., dissenting).

18 *Id.* (citations omitted).

19 *Id.* at 739, 697 N.Y.S.2d at 544, 719 N.E.2d at 902. At the time the court issued its decision, the paintings had been in New York for more than 18 months after the exhibition closed.

produced pursuant to the subpoena duces tecum issued by the District Attorney. The subpoena was served on the Museum on January 7, 1998. The Museum moved to quash the subpoena on January 22, 1998. By agreement, the Museum has retained possession of the paintings pending resolution of these proceedings."<sup>20</sup>

On one level, the Court of Appeals decision has created more problems than it resolved. For example, by sweeping criminal process into the scope of Section 12.03, criminal investigations may be hampered, and New York could be turned into a haven for stolen art. To cite an example from the District Attorney's brief: suppose a thief were to steal a million-dollar painting from MoMA and deliver it to a collector abroad. If that collector then loaned the painting to another museum in New York, the painting might be beyond the investigative reach of the New York authorities.

In addition, the Court of Appeals rationale is fact-specific. The determination that the subpoena for the Schiele paintings was a seizure turned on the length of time that the paintings remained in New York. What guidelines should be followed by law enforcement officials are therefore not clear. It appears that sometimes a subpoena can be issued for an allegedly stolen painting; sometimes it cannot. And if the length of detention is the sole test for the application of Section 12.03, then protracted litigation of a subpoena could turn that subpoena into a seizure, as it did here.

## V. THE IMPACT OF THE COURT OF APPEALS DECISION

All of this may be academic, however, because the New York Legislature is now considering legislation which would limit the application of Section 12.03 specifically to *civil* seizures.<sup>21</sup> As District Attorney Morgenthau noted when the legislation was proposed: "[T]he legislation unveiled today will remove any ambiguity from the current statute and allow for proper

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<sup>20</sup> *Id.* at 748, 697 N.Y.S.2d at 549, 719 N.E.2d at 908, n. 5 (Smith, J., dissenting).

<sup>21</sup> See A09075, 1999-2000 Reg. Sess. (N.Y. 1999).

investigations by New York prosecutors of alleged art theft."<sup>22</sup> The legislation, if passed, should neutralize the Court of Appeals decision in the future.

In addition, a number of institutions and governments have undertaken an unprecedented self-examination. Museums are scrutinizing the provenances of their holdings. Some are revising their acquisition policies to provide that works with questionable provenances will not be borrowed or bought. The Association of Art Museum Directors has drafted guidelines for its members to follow in dealing with problems similar to those raised by the Schiele paintings case.<sup>23</sup> The United States Congress is funding the Presidential Advisory Commission of Holocaust Assets, whose mandate is to research and report on assets of Holocaust victims that may have come into the custody of the United States after World War II.<sup>24</sup> And, perhaps most significantly, Austria, in direct response to the uproar over the Schiele paintings, has passed legislation which could return confiscated artwork hanging in national museums to their rightful owners.<sup>25</sup>

But none of these changes offers specific relief to the heirs of Lea Bondi Jaray and Fritz Grunbaum. With the decision of the New York Court of Appeals and no legislation in place, it appeared that both "Portrait of Wally" and "Dead City III" were going back to Austria. In fact, "Dead City III" was sent back to Austria immediately. But, insofar as "Portrait of Wally" is concerned, the question of the painting's fate continues to be the subject of the American legal process.

For, within hours of the New York Court of Appeals decision, the federal government swiftly stepped into action. On the very day that the decision was handed down, upon application of the United States Customs Service, a United States Magistrate issued a warrant for the seizure -- within the true meaning of the word -- of

22 Assembly Speaker Sheldon Silver Press Release, *Silver and Morgenthau Seek to Aid Holocaust Victims*, Sept. 23, 1999.

23 David D'Arcy, *Much Piety and Hot Air*, THE ART NEWSPAPER, Jan. 1999, No. 88.

24 Hugh Eakin, *Unfinished Business*, ART NEWS, Sept. 1999.

25 Jane Perlez, *Austria Is Set to Return Artworks Confiscated From Jews by Nazis*, N.Y. TIMES, March 7, 1998, at A1.

"Portrait of Wally." The federal warrant was based on a finding of probable cause that the painting was stolen property introduced into the United States in violation of law.

On the day following the seizure, the United States Attorney for the Southern District of New York filed an action in the United States District Court for the Southern District of New York seeking the forfeiture of "Portrait of Wally." The action is predicated on various federal statutes. The first statute, 19 U.S.C. § 1595a(c), prohibits the importation of merchandise into the United States "contrary to law."<sup>26</sup> The second, 22 U.S.C. § 401, prohibits the attempted export of any articles in violation of the law.<sup>27</sup> The law alleged to be violated is 18 U.S.C. § 2314, a criminal statute which states that "whoever transports, transmits or transfers in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of \$5,000 or more, knowing the same to have been stolen, converted or taken by fraud" shall be subject to criminal penalties.<sup>28</sup> Both 22 U.S.C. § 401(a) and 19 U.S.C. § 1595a(c) provide for the forfeiture of articles seized under those statutes.

While the District Attorney's issuance of the subpoena back in January 1998 was dismissed by critics as politically motivated, the United States Government's intervention validates his actions. In my view, there is no doubt that it is appropriate for law enforcement officials to take appropriate actions when artwork stolen during the Holocaust is illegally brought into the United States.

## VI. THE STORY OF LEA BONDI JARAY

The government's forfeiture complaint<sup>29</sup> sets forth in great detail many of the events which allegedly took place from the time Lea Bondi Jaray was deprived of "Portrait of Wally" to the time when

<sup>26</sup> 19 U.S.C. § 1595a(c) (1999).

<sup>27</sup> 22 U.S.C. § 401 (1990).

<sup>28</sup> 18 U.S.C. § 2314 (1970).

<sup>29</sup> Since the action was commenced, the government has amended the complaint twice for technical, non-substantive reasons.

the painting landed in the hands of the Leopold Museum in Austria. That case will not focus on the statutory niceties and technical arguments that defined the subpoena litigation in the New York state courts. Instead, what will necessarily be presented to the court is the story of what happened to a Jewish art dealer living in Vienna, Austria after the Nazis swept in.

The story of Lea Bondi Jaray is fascinating as well as distressing. The United States forfeiture complaint alleges the following:<sup>30</sup> In 1939, Lea Bondi Jaray was forced to sell her art gallery to a Nazi collaborator named Friedrich Welz. Bondi owned the "Portrait of Wally," which she kept as part of her private collection in her apartment. When Welz came to her apartment to discuss the gallery's transfer, he insisted that she give him the painting. Out of fear for what Welz, a member of the Nazi party, could do, she turned it over. Shortly thereafter, Bondi and her husband were able to flee to London. Also around that time, another Viennese art collector, Dr. Heinrich Rieger, was forced to sell his art collection, which included a number of Schiele works, to Welz. Rieger was deported to the Theresienstadt concentration camp where he died shortly after his arrival.

After the war, the United States occupation forces in Austria attempted to sort out the artwork and other cultural artifacts that had been taken by the Nazis and their collaborators. During this process, "Portrait of Wally" was erroneously mixed in with the Rieger collection. That collection, or at least a part of it, was sold to the Austrian National Gallery by Rieger's heirs. Although Austrian authorities were made aware by the United States forces of the mix-up, the Austrian National Gallery nevertheless took the painting, and "Portrait of Wally" became part of that museum's collection.

Some time after the war, Lea Bondi Jaray learned that her beloved painting was hanging in the Austrian National Gallery. In 1953, Dr. Leopold paid Bondi a visit in London, ironically, to seek her assistance in locating more Schiele paintings, and told her that

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30 Out of regard for legal and ethical constraints imposed upon lawyers when they discuss pending cases, this author will only discuss what is within the four corners of the Government's civil forfeiture complaint.

he had seen "Portrait of Wally" hanging in the Austrian Gallery. Bondi asked Leopold to help her regain her painting.

Instead, in 1954, Dr. Leopold entered into an agreement with the Austrian National Gallery whereby he exchanged a Schiele painting from his own collection for "Portrait of Wally," and kept "Wally" for himself. In 1994, Dr. Leopold sold his art collection to the Leopold Museum, including "Portrait of Wally." In late 1997, it formed part of the exhibit of Schiele paintings loaned by the Leopold Museum to the Museum of Modern Art. We will now have to wait for the outcome of the United States forfeiture action to see how the story ends.

## VII. THE FEDERAL STATUTE

There is a federal statute that *might* have made the prolonged litigation in the New York State courts unnecessary. The Federal Immunity from Seizure Act<sup>31</sup> protects foreign artwork exhibited at a not-for-profit cultural institution from any federal or state judicial process *if* the party seeking protection submits an application to the appropriate United States agency for a determination that the art is of cultural significance *and* that the exhibition is in the national interest. It is conceded that MoMA did not seek to take advantage of the federal law's protection for the Schiele exhibit. Had MoMA obtained protection of the Federal Immunity from Seizure Act, there may have been no New York County grand jury subpoena. The People, in their brief to the Court of Appeals, noted that MoMA had applied for federal protection four times in the three years prior to the Schiele exhibit and, not surprisingly, seventeen times since the Schiele subpoena was issued.

Before the Schiele subpoena litigation, federal applications for immunity were addressed on an *ad hoc* basis, and only one or two had ever been denied. But now, an interagency group that includes the State Department is establishing guidelines for museums to follow when providing information about works of art to the

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31 Immunity from Seizure Act, 22 U.S.C. § 2459 (1990). When an application for immunity is submitted, notice of the application is given and published, and comments and objections are invited.

government. The Deputy General Counsel of the United States Information Agency has been quoted as saying: "If an artwork was in Paris in the 40's, we'll be looking at provenance. We didn't before."<sup>32</sup>

### VIII. CONCLUSION

Efforts to restore Nazi-plundered artwork to their rightful owners are beginning to gain momentum. As mentioned earlier, Austria has passed a law that, under certain conditions, permits the return of property confiscated during World War II. The full extent of that law's effectiveness has yet to be determined. For example, under that statute, the Austrian government returned over 200 pieces of art to the Austrian branch of the Rothschild family.<sup>33</sup> But another looted art claim, involving a collection of art that included six paintings by Gustav Klimt, was rejected, in great part, by Austria. Recently, a member of the Herzog family filed a lawsuit in Hungary seeking restitution of certain pieces of art being displayed in Budapest museums.<sup>34</sup> Baron Herzog, a prominent Jewish businessman in Hungary before the war, had assembled a vast collection of art. In 1944, Hungary passed a law stripping its Jewish citizens of their property. The Herzog family tried to hide its treasures, but they were discovered by the State Security Police, who took them to exhibit to Adolf Eichmann. Eichmann helped himself to some of the pieces and most of the rest were shipped to Germany. After the war, the Herzog collection was shipped back to Hungary. To this date, most of those pieces remain in the possession of the Hungarian State.

There are other claims pending. In Great Britain, heirs of a German Jew killed by the Nazis are claiming a Dutch master currently hanging in the Tate Gallery. The daughter-in-law of Max Silberberg, a German Jewish businessman, who just won restitution of a Van Gogh from Germany, has laid claim to a

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32 Judith H. Dobrzynski, *Lenders Pull Two Bonnard's From a Show At the Modern*, N.Y. TIMES, Apr. 29, 1998, at E1.

33 L.J. Davis, *See No Evil*, CALIFORNIA LAWYER, Oct. 1999.

34 *List of Nazi-Stolen Paintings Uncovered*, ASSOC. PRESS, Nov. 12, 1999.



Pissarro in the collection of the Israel Museum in Jerusalem.<sup>35</sup> In New York, there is litigation between the Wildenstein & Co. art gallery and the family of Alphonse Kann, a French Jewish collector, over eight rare illuminated manuscripts that were looted by the Nazis.<sup>36</sup> In Seattle, a dispute between the Seattle Art Museum, the heirs of a French Jewish collector Paul Rosenberg and the New York gallery Knoedler and Company was resolved when the museum agreed to give the disputed painting, Matisse's *Odalisque*, to the Rosenberg family.<sup>37</sup>

In a way, the story of "Portrait of Wally" sweeps in every issue addressed at this conference. It touches on the victimization of Jewish art lovers by the Nazis and their collaborators. At the same time, it illustrates the tension between a museum director's scholarly obligation to faithfully trace the provenance of each artwork while satisfying the duty to improve his or her Museum's holdings. Finally, it highlights the need for proactive solutions, both public and private, for these long- ignored problems.

In any event, the actions taken with respect to "Portrait of Wally" have had the unintended but beneficial effect of expanding public focus on the aftermath of the Holocaust. The question of how effectively we are addressing the need to do something about Nazi-plundered art has taken on great legal and ethical significance. While various solutions are apparent, there is still room for creativity. The key is that, as a result of all of this litigation and publicity, everyone on every side is starting in large and small ways to address this problem. Sixty years later, the world is just beginning to deal with this aspect of the Holocaust.

35 *Id.*

36 Hector Feliciano, *Nazi Plunder: Seeking Moral Justice by The Return of Looted Art*, L.A. TIMES, Jan. 11, 1998, at M1.

37 See *List of Nazi-Stolen Paintings Uncovered*, *supra*, note 34. The Museum was unsuccessful in its attempt to recover the cost of the painting from the gallery which had sold it to a collector, who then willed it to the Museum.