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On Art Theft, Tax, and Time: Triangulating Ownership Disputes Through the Tax Code

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I. INTRODUCTION

In the Nuremberg Trials after World War II, Alfred Rosenberg, head of the Einsatzstab Reichsleiter Rosenberg (ERR), was convicted of war crimes including plunder and pillage for orchestrating the systematic and unlawful taking of works of art.[1] Tens of thousands of works were taken from private collections and public museums. Some were destined for Hitler's planned museum in his hometown of Linz, Austria, some were sold for war funds, and some were just destroyed as degenerate art.[2]

After the war, commissions were established to assist in the return of looted art works.[3] Much was, in fact, returned. Yet sixty years later, the

1. The Nuremberg Trial, 6 F.R.D. 69, 156-58 (1946). Alfred Rosenberg was charged in the Nuremberg Trial with all four criminal counts of crimes against peace, war crimes, and crimes against humanity. *Id.* Included in the war crimes definition was the "plunder of public or private property." *Id.* at 113. The Nuremberg Tribunal found the evidence of war crimes so overwhelming that it dealt with them generally, noting that the Nazis implemented a systemic plunder of public or private property, including a "wholesale seizure" of art treasures. *Id.* at 113, 122.

> Rosenberg is responsible for a system of organized plunder of both public and private property throughout the invaded countries of Europe. Acting under Hitler's orders of January 1940, to set up the "Hohe Schule," he organized and directed the "Einsatzstab Rosenberg," which plundered museums and libraries, confiscated art treasures and collections, and pillaged private houses. His own records show the extent of the confiscations. In "Action-M" (Moebel), instituted in December 1941 at Rosenberg's suggestion, 69,619 Jewish homes were plundered in the West, 38,000 of them in Paris alone, and it took 26,984 railroad cars to transport the confiscated furnishings to Germany. As of July 14, 1944, more than 21,903 art objects, including famous paintings and museum pieces, had been seized by the Einsatzstab in the West.

Id. at 157.

2. There are a number of excellent, and chilling, sources describing Hitler's vision for purifying and collecting art. Chief among them is LYNN H. NICHOLAS, THE RAPE OF EUROPA: THE FATE OF EUROPE'S TREASURES IN THE THIRD REICH AND THE SECOND WORLD WAR (1994). *See also* HECTOR FELICIANO, THE LOST MUSEUM: THE NAZI CONSPIRACY TO STEAL THE WORLD'S GREATEST WORKS OF ART (Tim Bent & Hector Feliciano trans., 1997); THE SPOILS OF WAR (Elizabeth Simpson ed., 1997).

3. *See, e.g.*, Craig Hugh Smyth, *The Establishment of the Munich Collecting Point*, *in* THE SPOILS OF WAR, *supra* note 2, at 126-30; Rebecca L. Garrett, *Time for a Change? Restoring Nazi-Looted Artwork to its Rightful Owners*, 12 PACE INT'L L. REV. 367, 370-72 (2000).

Within two weeks of the German surrender, General Eisenhower, as Supreme Commander of Allied Forces, issued orders establishing collecting points for looted art. Munich was chosen as one of the Central Collecting Points (CCP), and it was originally conceived to be a storage facility. However, its scope quickly included "*de facto* fallout from the art looting remains unfinished, as owners and heirs of owners continue to search for and sometimes find their missing works.[4] Aided by technology and international arts organizations, newly released public records, and changing attitudes for a restorative justice, when looted art is located today, the work's return to the original owner from the current owner is no longer a linear administrative matter. Time has rendered the process a private legal one, sometimes with governmental or political overtones. In the emotionally charged and exceedingly contentious legal sphere, the expectations of legitimate ownership rights of each of the innocent parties collide. This impossible triangle of thief, owner, and innocent buyer—described centuries ago—remains.[5]

Having one's day in court is central to our legal system. As in most litigation, the parties in looted art cases often end the legal challenge with a privately negotiated settlement.[6] The pressure to settle is

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responsibility for repatriation." Craig Hugh Smyth, *The Establishment of the Munich Collecting Point*, *in* THE SPOILS OF WAR, *supra* note 2, at 129.

> When accredited representatives of looted countries were invited to have offices in the Collecting Point and to document, with the help of staff, the ownership of objects, in order to prove they were from their countries, the officer-in-charge had to rule on whether the documentation was sufficient for an object to be released for repatriation—easy to do at the start for the Ghent Altarpiece (fig. 64) or Michelangelo's *Bruges Madonna* (fig. 65). Other shipments were less spectacular. The difficult problems arose [later].

Id.

When the last Director of the Munich CCP arrived, he found that:

> [W]ork at the Munich CCP continued in its orderly routine. Lists were reviewed and checked against claims and works in storage. New claimants were directed to make very specific descriptions of what they had lost, when, and how. Appointed representatives of the nations occupied by Germany (especially France, the Netherlands, and Belgium) assisted in the process. When a work had been identified as having come from such a nation *after the date of occupation*, it was returned to the *government* of that nation. To that source, the owner could then make a claim for restitution.

S. Lane Faison, Jr., *Transfer of Custody to the Germans*, *in* THE SPOILS OF WAR, *supra* note 2, at 140 (italics in original).

In the case of *DeWeerth v. Baldinger*, 804 F. Supp. 539 (S.D.N.Y. 1992), the court recounts how Mrs. DeWeerth unsuccessfully reported her Monet's disappearance to the military government for the Bonn-Cologne area after the war.

4. *See, e.g.*, Adler v. Taylor, No. CV 04-8472-RGK (FMOx), 2005 U.S. Dist. LEXIS 5862 (C.D. Cal. Feb. 2, 2005) (discussing recent allegations against actress Elizabeth Taylor); *Dutch to Return Nazi-Seized Paintings to Heir*, CHI. TRIB., Feb. 7, 2006, at A11.

5. *See, e.g.*, Menachem Mautner, *"The Eternal Triangles of the Law": Toward a Theory of Priorities in Conflicts Involving Remote Parties*, 90 MICH. L. REV. 95, 95 (1991).

6. Michael J. Bazyler & Amber L. Fitzgerald, *Trading with the Enemy: Holocaust Restitution, the United States Government, and American Industry*, 28

understandable in all cases, but especially so when the ownership of a unique work of art is in question; a Solomonic judgment is just not viable.[7] Commentators have urged the formation of new specialized commissions and rules for these disputes to streamline the process, to bring a measure of uniformity and predictability, and thereby to calm the chaos of a worldwide art market.[8]

Beyond the emotionally draining pull of any dispute, many publicized cases involve property worth significant amounts, often millions of dollars.[9] This monetary dimension can make prompt resolution of claims unlikely. Continuing emergence of disputes over Nazi-looted art coupled with the strong desire and policy to resolve these disputes between the two innocents, leads to examining all potentially productive strategies including tax. Tax is not a neat and tidy doctrinal solution, rather the appeal of tax as a strategy to assist in resolving disputed art cases lies in its pragmatic and familiar everyman nature. The United States income tax system routinely balances dynamic and competing policies, such as revenue raising, economic stimulation, and horizontal and vertical equity, that often yield to normative concerns.[10] Tax

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BROOK. J. INT'L L. 683, 711 (2003); Lawrence M. Kaye, *Looted Art: What Can and Should Be Done*, 20 CARDOZO L. REV. 657, 659-61 (1998); *infra* Part III (discussing *Greece v. Ward* and *Goodman v. Searle*).

7. King Solomon's order to cut the baby in half revealed the true mother—and King Solomon's wisdom. 1 *Kings* 3:16-:28 (King James). A similar order today to cut the art in half would, of course, destroy the art without revealing the "true" owner. What if a judge, however, were able to cut the legal ownership in half, and not the art? Each of the two innocent parties could conceivably be declared the owner of an undivided one-half interest in the work of art. Undivided co-ownership interests are common in real property and partnerships; there is no theoretical reason why co-ownership interest in art could not exist. Practical concerns such as possession schedules and insurance could hamper such a resolution, but such concerns are not insurmountable.

An increasingly common technique in gifting valuable works of art (especially to museums but also to one's children or heirs) is to create undivided fractional ownership interests. This allows a taxpayer to transfer an interest in the work to a charity and stay within the quantitative limitations of the charitable deduction for income tax purposes. *See* Anne-Marie E. Rhodes, *Big Picture, Fine Print: The Intersection of Art and Tax*, 26 COLUM. J.L. & ARTS 179, 193-96 (2003); Rachel Emma Silverman, *Joint Custody for Your Monet*, WALL ST. J., July 6, 2005, at D1.

8. Rebecca Keim, *Filling the Gap Between Morality and Jurisprudence: The Use of Binding Arbitration to Resolve Claims of Restitution Regarding Nazi-Stolen Art*, 3 PEPP. DISP. RESOL. L.J. 295 (2003); Ralph E. Lerner, *The Nazi Art Theft Problem and the Role of the Museum: A Proposed Solution to Disputes over Title*, 31 N.Y.U. J. INT'L L. & POL. 15 (1998); Owen C. Pell, *The Potential for a Mediation/Arbitration Commission to Resolve Disputes Related to Artworks Stolen or Looted During World War II*, 10 DEPAUL-LCA J. ART & ENT. L. & POL'Y 27 (1999).

9. *See* discussion *infra* Part III.B.

10. The deduction for home mortgage interest is but one example. *See, e.g.*, Roberta F. Mann, *The (Not So) Little House on the Prairie: The Hidden Costs of the Home Mortgage Interest Deduction*, 32 ARIZ. ST. L.J. 1347 (2000); Edward A. Zelinsky, *Efficiency and Income Taxes: The Rehabilitation of Tax Incentives*, 64 TEX. L. REV. 973 (1986).

provides a structure amenable to striking balances as perceptions and impact shift over time. Equally important for the individuals involved, the tax structure would not require a determination of wrongdoing or wrongful conduct on the part of either of the two innocents.

This Article will examine ways in which the tax code can be used in fashioning settlements between individuals over disputed Nazi-looted art.[11] Part II provides an overview of Nazi-era art looting. Part III examines the income tax charitable deduction as a tool in settling disputes. Part IV explores the theft loss deduction as a possible tool in crafting settlements. Part V discusses the policy ramifications of using the tax code to resolve these private art disputes and proposes allowing a theft loss deduction when Nazi-looted art is returned to the owner.

II. NAZI LOOTING OF ART

When Adolf Hitler came to power, his "revolution [was not] only political and economic. It [was] above all cultural."[12] This cultural

11. The primary focus of this Article is on art ownership controversies between individuals—not disputes involving an ownership claim of a sovereign government. This is not because government claims are less contentious (consider the Elgin/Parthenon marbles controversy), rather, the obvious differences of history, resources, and intergovernmental foreign relations can skew discussion. *See* Hugh Eakin, *Italy Goes on the Offensive with Antiquities*, N.Y. TIMES, Dec. 26, 2005, at E1.

No discussion of contested ownership of cultural property can ignore the Elgin/Parthenon marbles dispute; it is undoubtedly the prime example of the difficulty of these cases. Between 1801 and 1812, Lord Elgin removed many of the remaining marble statues from the ruins of the Parthenon on the Acropolis in Athens and sent them to London. *See, e.g.*, John Merryman, *Thinking About the Elgin Marbles*, 83 MICH. L. REV. 1881 (1985). In 1816, he sold them to the British Museum, where they remain housed and known as the "The Elgin Marbles." *Id.* From the beginning, there was controversy in England and Greece over the proper ownership of these marbles. *Id.* In 1983, the Greek government formally requested the return of the "Parthenon marbles," and in 1984, the British government formally rejected the Greek claim to the "Elgin marbles." *Id.*

The controversy continues today, two hundred years after the removal, and is perhaps even intensifying as cultural property and its role in society emerges as an extremely important topic in the academy and the popular press. *See, e.g.*, Christine K. Knox, *They've Lost Their Marbles: 2002 Universal Museum Declaration, The Elgin Marbles and the Future of the Repatriation Movement*, 29 SUFFOLK TRANSNAT'L L. REV. 315 (2006).

12. NICHOLAS, *supra* note 2, at 6, quoting from a speech of the director of the Combat League for German Culture in 1933. That speech continued:

> [A]lready it has uncovered long hidden sources of German folkways, has opened paths to that new . . . awareness that all the expressions of life spring from a specific blood . . . a specific race! . . . Art is not international. . . . If anyone should ask: What is left of freedom? he will be answered: there is no

prong initially manifested itself in the 1930s with a purification of art; that is, the elevation of Hitler's preferred romantic Germanic art and a purging of modern, degenerate art from German museums.[13] When the Nazi revolution moved beyond Germany to the invasion of other countries, the art looting similarly escalated, accompanied by an increasingly blatant anti-Semitism and a renewed nationalism. The private art collections owned by Jewish families in Austria, for example, were expropriated almost immediately after the Austrian Anschlus invasion in 1938,[14] and the great collections of Jewish families in France were systematically tracked down and confiscated. Art treasures held in museums, churches, or private collections that had been previously "plundered" from Germans were to be repatriated to Germany in accordance with lists drawn up in advance of military operations.[15] As military operations became more widespread, so did the looting of art. But even by early summer 1939, the sheer amount of confiscated and safeguarded art was overwhelming. Order needed to be imposed. Hitler authorized Hans Posse to "build up the new art museum" for his hometown of Linz.[16] The priorities were straightforward: the Fuhrer Reserve had first choice among the looted works, then German museums could make selections, finally the remainder was sold at auctions or through dealers.[17]

> freedom for those who would weaken and destroy German art . . . there must be no remorse and no sentimentality in uprooting and crushing what was destroying our vitals.

Id.

13. See *id.* at 3-6 for a description of a 1939 auction of degenerate art from German museums' collections of Picasso, Van Gogh, Klee, Braque, Matisse, Kokoschka, and others.

14. *Id.* at 38. See, for example, FELICIANO, *supra* note 2, at 24-46, for a description of the "Exemplary Looting of the Rothschild Collections."

15. FELICIANO, *supra* note 2, at 24-26.

> Already sketched out in Hitler's writings was a plan to repatriate works of art taken from Germany and dispersed throughout the world. . . . Hitler [ordered] the eminent art historian Otto Kümmel . . . . to compile an exhaustive list of German art held in foreign countries since the beginning of the sixteenth century.
>
> Kümmel's research culminated in three volumes . . . . Their vast work remained a secret for the entirety of the war.
>
> [T]he Kümmel Report overlooked nothing. . . . What was essential was that the German people had been *geraubt*, despoiled, of their heritage . . . . But the report's demands also had a historical significance that went deep into the German nationalism: They were to erase the humiliation of the Treaty of Versailles in 1919, which ended World War I, and to restore to German culture the central place that Nazis thought was its birthright.

Id. (emphasis in original).

16. NICHOLAS, *supra* note 2, at 44.

17. *Id.* at 45. In practice, however, after Hitler made his choices, Hermann Goering, working through the ERR, made his selections for his personal art collection to be housed at his estate, Carinhall. *See, e.g.*, FELICIANO, *supra* note 2, at 31-40.

Hitler, of course, did not invent the wartime looting of art works.[18] Yet the breathtaking scope of the Nazi plunder, its systematic approach, and involvement at the highest levels was unmatched in history. Even sixty years later, we do not know all that was taken, who took it, its continued existence or its whereabouts.[19] What we do know is that there is worldwide interest in dealing with the issue today.[20]

18. History affords many examples of victors carrying off the spoils of war. The Old Testament tells us of the siege of Jerusalem by the Babylonians under King Nebuchadnezzar in 586 B.C. and the plunder of Solomon's temple: "[T]he bowls, and the cauldrons, and the candlesticks, and the spoons, and the cups; that which was of gold in gold and that which was of silver in silver, took the captain of the guard away." *Jeremia* 52:19 (King James). The Arch of Titus in the Roman Forum was erected in A.D. 81 to commemorate the victory of Titus in Jerusalem. One relief in particular shows rather vividly the victors displaying their plunder, including a Menorah from Herod's Temple. *See generally* Jeanette Greenfield, *The Spoils of War*, *in* THE SPOILS OF WAR, *supra* note 2, at 34-38. The exquisite four horses of San Marco in Venice were taken by the Crusaders from the Hippodrome during the sack of Constantinople in 1204. Six centuries later, these very same horses were taken by Napoleon in 1797 and paraded triumphantly in Paris in 1798. After Napoleon's military defeats in 1814 and 1815, the four horses were returned to San Marco through the Convention of Paris in 1815. During World War II, these horses were removed for safekeeping. Today the original four horses are inside San Marco and copies stand in the facade. *Id.*

Nor is it likely that art looting is of historic interest only. *See* Amy E. Miller, *The Looting of Iraqi Art: Occupiers and Collectors Turn Away Leisurely from the Disaster*, 37 CASE W. RES. J. INT'L L. 49 (2005) (arguing the United States is liable for a breach of international law by allowing art looting in Iraq).

19. Estimates as to the amount of plunder of works of art during the war vary considerably. For example, one estimate is that one-fifth of all Western art was seized by the Nazis. Kaye, *supra* note 6, at 657. Another is that 220,000 works of art, valued at \$2.5 billion in 1945 and \$20.5 billion in 2003 were seized. Bazyler & Fitzgerald, *supra* note 6, at 709. Another estimate indicates "600,000 important works" were seized while "[a]s many as 100,000 pieces are still . . . missing." Ralph Blumenthal, *New Efforts to Recover Nazi Plunder*, N.Y. TIMES, Feb. 27, 2003, at E1. Most likely, "[t]he total amount of loot will never be known; it has proved beyond man's capacity to accurately compute." WILLIAM L. SHIRER, THE RISE AND FALL OF THE THIRD REICH 943 (1960).

The stereotype of official impeccable German recordkeeping only goes so far. Even good records are lost, have misattributions, and contain inaccurate information. Additionly, personal human greed plays a role. Unauthorized and unofficial takings of others' property by officials, neighbors, and others were commonplace. Some property demonstrably taken by Germany was later "restituted" as reparations to the Soviet Union, sometimes officially, sometimes not. *See, e.g.*, Margaret M. Mastroberardino, *The Last Prisoners of World War II*, 9 PACE INT'L L. REV. 315 (1997); Silvia L. Depta, Comment, *Twice Saved or Twice Stolen?: The Trophy Art Tug-of-War Between Russia and Germany*, 10 TEMP. INT'L & COMP. L.J. 371 (1996).

20. Bazyler & Fitzgerald, *supra* note 6, at 710.

The worldwide movement to recover Nazi-looted art also has its roots in the United States. In late 1998, the U.S. Department of State and the U.S. Holocaust Memorial Museum hosted the Washington Conference on Holocaust-Era Assets at the U.S. Department of State. Forty-four governments, as

III. CHARITABLE DEDUCTION

The charitable deduction has been part of the federal income tax system since 1917.[21] While there have been periodic reforms to section 170 over time, the basic outline has remained fairly constant for most taxpayers: donations by taxpayers to qualified charities can qualify for an income tax deduction. However, once the charitable gift moves from a monetary one to a work of art, qualitative and quantitative statutory and regulatory requirements become extremely demanding.[22] Despite the complexity, there are two variations where buyers in disputed art cases have successfully used the charitable deduction in fashioning a settlement. One involved stolen antiquities returned to the Greek government using a U.S. charity as a conduit; the other involved the transfer of a Nazi-looted work of art to a U.S. museum.

A. Greece v. Ward: *Mycenaean Treasure from Aidonia*

In April 1993, the Michael Ward Gallery, a prominent antiquities gallery in New York, announced a show entitled "Gold of the Mycenaeans," featuring a rare collection of Greek antiquities dating from the 15th century BC.[23] The exhibition catalogue showed a collection of gold jewelry and artifacts, with the collection's price set at $1,500,000. The

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> well as numerous international non-governmental organizations, sent delegations to the conference to deal with Nazi-stolen assets, including artwork found throughout the world. The conference was designed as an international effort. . . .

Id. (footnotes omitted). One result of the meeting was the development of a set of nonbinding principles, the Washington Conference Principles of Nazi-Confiscated Art. Those principles aim to provide transparency in art provenance and to facilitate the restitution of Nazi-looted art across many different countries and different legal systems, a technique that has been called "narrative norms." Eric Jayme, *Globalization in Art Law: Clash of Interests and International Tendencies*, 38 VAND. J. TRANSNAT'L L. 927, 943 (2005). Although the agreed upon principles are nonbinding, they nevertheless may impact the law over time as courts are called upon to consider questions of interpretation and construction of statutes. *Id.* These norms can and have played a role beyond the judiciary, as legislatures consider resolutions or new statutes, and the executive branch takes action. *See infra* note 77. Moreover, many museums have now fashioned proactive statements on provenance. *See, e.g.*, American Association of Museums, Guidelines Concerning the Unlawful Appropriation of Objects During the Nazi Era (1999), http://www.aam-us.org/museumresources/ethics/upload/ethicsguidelines_naziera.pdf.

21. 26 U.S.C. § 170 (Supp. 2001). The charitable deduction debuted in a tax bill that raised tax rates to help finance the cost of America's entry into World War I. The concern then as now was that as income tax rates would rise, donations to charities would fall. "Now, when war comes and we impose these very heavy taxes on incomes, that will be the first place where the wealthy men will be tempted to economize, namely, in donations to charity." 55 CONG. REC. 65, 6728 (1917) (statement of Sen. Hollis).

22. *See* RALPH LERNER & JUDITH BRESLER, ART LAW 1554-1604 (3d ed. 2005).

23. Emily C. Ehl, Comment, *The Settlement of* Greece v. Ward: *Who Loses?*, 78 B.U. L. REV. 661, 674 (1998).

collection was stunning, not only for its obvious aesthetic value, but to some antiquities experts, for its obvious similarity to looted Mycenaean cemetery treasures from Aidonia.[24] The government of Greece, having reviewed the catalogue, contacted the Ward Gallery to demand the return of its cultural property. The demand was unsuccessful. Within two weeks of the rejection, Greece filed a lawsuit in the Southern District of New York requesting that the sale be enjoined and that Greece be declared the owner of the collection.[25] For seven months, negotiations continued on the case.

Michael Ward, the Director of the Ward Gallery, was a prominent scholar-dealer and a member of a U.S. presidential panel concerning art smuggling.[26] He was determined to end the controversy without further litigation.[27] A direct transfer of the disputed collection to Greece would certainly have done so, but instead the dispute created a triangulation of ownership interests.

The Society for the Preservation of the Greek Heritage, a Washington based 501(c)(3) charity, agreed to accept the donation of the collection from the Ward Gallery, and the Greek government simultaneously agreed to drop its claim against the Ward Gallery.[28] The charitable deduction under the Internal Revenue Code served as the critical link. For a transfer of property to a recognized public charity, the Ward Gallery could deduct the donation of the tangible personal property as long as the use of the tangible property was related to the charity's purposes.[29] The Gallery would need to ascertain that the charity did not

24. Ricardo J. Elia, Greece v. Ward: *The Return of Mycenaean Artifacts*, 4 INT'L J. CULTURAL PROP. 119, 121 n.17 (1995); *see also* Mary Williams Walsh, *A Grecian Treasure: Back from the Grave?*, L.A. TIMES, Aug. 12, 1996, at A1 ("When American experts familiar with the late Grecian Bronze Age saw a photo of the sale pieces accompanying a report on the upcoming auction in the New York Times, they could not believe their eyes.").

25. Greece v. Ward, No. 93 Civ. 3493 (S.D.N.Y. May 25, 1993).

26. Elia, *supra* note 24, at 120, 124 ("The irony that the gallery director is a member of . . . a presidential committee . . . was widely noted . . . ."); *see also* Walsh *supra* note 24 ("Ward's prominence in the cultural preservation world [was a factor in favor of Greece's claim]. No ordinary gallery owner, he had a strong scholarly interest and sat on the U.S. Cultural Property Advisory Committee . . . . 'It was a very difficult position for Mr. Ward,' [the director of antiquities for Greek Ministry of culture] said.").

27. Norman Hammond, *Looted Gold Goes Back to Greece*, TIMES (London), Jan. 20, 1994, at 20.

28. Elia, *supra* note 24, at 122.

29. Because of Ward's status as a dealer with respect to the Mycenaean antiquities (and not as a collector), the deduction would be limited to the taxpayer's basis, and not

intend to sell the property or put it to an unrelated use. What was that intended use? It was to transfer the property back to Greece. By triangulating the transfer through a conduit charity, Mr. Ward and the Greek government were able to settle their controversy.

B. Goodman v. Searle: Landscape with Smokestacks

Daniel C. Searle purchased a Degas pastel-over-monotype, *Landscape with Smokestacks*, for $850,000 in July 1987.[30] A member of the Art Institute of Chicago's Board of Trustees, Mr. Searle, was informed by the Art Institute of the availability of the Degas and its desirability.[31] But for a lack of acquisition funds, the Art Institute itself would have purchased the Degas.[32] The Art Institute made arrangements for Mr. Searle to view the Degas at the apartment of its then current owner in New York; at Mr. Searle's request, the landscape was sent to the Art Institute for inspection.[33] It was given a "clean bill of health."[34] Seven years after his purchase, Mr. Searle loaned the Degas to the Metropolitan Museum of Art in New York for an exhibition. Grandsons of Friedrich and Louise Gutmann, who were killed in the Holocaust, saw the catalogue for the exhibition and recognized the work as one that had

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the fair market value. 26 U.S.C. § 170(e)(I)(A) (Supp. 2001). Ward's cost was reportedly $150,000. *See* Hammond, *supra* note 27; Walsh, *supra* note 24.

30. HOWARD J. TRIENENS, LANDSCAPE WITH SMOKESTACKS 11 (2000). Mr. Trienens was counsel for Mr. Searle, the defendant collector. *Id.* at XIV. One reason he wrote the book was his belief that the media oversimplified the story. *Id.*

> As reported by the media, the story is straightforward. . . .
>
> As the facts emerged in the course of litigation, however, the straightforward media story turned out to be complex. . . .
>
> . . . .
>
> This book's purpose is not to solve the mystery of what actually happened to the landscape. Rather, the purpose is to describe what lies beneath the surface of the press reports and television programs. This provides a more intriguing, if more ambiguous, story.
>
> As what is known of the story of *Landscape with Smokestacks* is revealed, genuine questions emerge about the capacity of our judicial system to deal with cases of this kind and, perhaps more significantly, the performance of the media in such an emotionally charged atmosphere.

Id. at XIII-XIV.

Thomas R. Kline of Washington D.C. represented the Gutmann family. When the case was transferred to Chicago, Sachnoff & Weaver, Ltd. became local counsel for the Gutmann family. I, Anne-Marie Rhodes, was then and remain now as Of Counsel at Sachnoff & Weaver, Ltd. Although not directly involved, I was certainly aware of the case. I cite Mr. Trienen's book primarily because it is well-written and germane, but also because like Mr. Trienens, it might be difficult for me to "escape the charge that [this] is slanted in [the client's] favor . . . ." *Id.* at XIV.

31. *Id.* at 8.

32. *Id.* at 6.

33. *Id.* at 8.

34. *Id.* at 11.

belonged to their grandparents.[35] With their aunt Lili Gutmann, Nick and Simon Goodman sued Daniel Searle in July 1996, for the return of the Degas.[36] The controversy was highly publicized by both print and broadcast media.[37] The value of the Degas was estimated to be $1,100,000.[38] On the eve of trial in summer 1998, the parties settled their litigation.[39] The charitable deduction played a role.

The settlement agreement provided that each of Lili Gutmann, Nick Goodman, Simon Goodman, and Daniel Searle would transfer her or his ownership interest in the Degas to the Art Institute of Chicago.[40] Daniel Searle's transfer would be a gift of his interest; the Gutmann family transfers would be sales. The total sales price would be one-half of the then fair market value of the Degas. Fair market value would be the average of two independently prepared appraisals. One of the appraisers would be chosen by the Gutmann family from a list of individual appraisers prepared by the Art Institute; the other appraiser, also to be chosen by the Gutmann family, would be Christie's or Sotheby's. The Gutmanns chose Richard Feigen and Christie's.[41]

In November 1998, the Art Institute informed the parties that Mr. Feigen had appraised the Degas at $575,000, while Christie's had appraised it at $300,000.[42] The average therefore was $437,500, one half of which is $218,750. Mr. Searle would use these appraisals in preparing his income tax return and claiming a charitable deduction for his one-half interest valued at $218,750. Disappointed with the appraisals, the Gutmanns did not accept the Art Institute's tender of the $218,750 in payment for their collective one-half interest; instead, the

35. *Id.* at 15; *see also* Hector Feliciano et al., *Nazi-Stolen Art*, 20 WHITTIER L. REV. 67, 89 (1998) ("Now, my brother and I started looking everywhere. . . . Pretty quickly we found the Degas landscape . . . . It was in an exhibit in the Metropolitan Museum of Art in New York in 1994 and was . . . owned by Daniel Searle.").

36. TRIENENS, *supra* note 30, at 28-34; *see also* Goodman v. Searle, No. 96 CV 5310 (S.D.N.Y. July 17, 1996), transferred to No. 96 C6459 (N.D. Ill. 1996). Except when referring to specific individuals, this Article will refer to the Gutmann (and not the Goodman) family, using the common ancestral name.

37. TRIENENS, *supra* note 30, at 28-34. Print media included articles in the *Los Angeles Times*, the *Washington Post*, the *Chicago Tribune*, the *Boston Globe*, *ARTNews*, and *Chicago Magazine*. The story was broadcast on National Public Radio, the CBS program *60 Minutes*, and on public television. *Id.*

38. *Id.* at 12.

39. *Id.* at 86, 93.

40. *Id.* at 93-94.

41. *Id.* at 94.

42. *Id.* at 94-95.

Gutmanns requested a reappraisal.[43] Mr. Feigen did not revise his valuation, but in April 1999, Christie's raised its valuation by $100,000 in light of a November 1998 sale of another Degas pastel. The new average therefore was $487,500, one-half of which, $243,750, the Art Institute paid to the Gutmann family for their ownership interests.[44] Mr. Searle was able therefore to claim an amount $25,000 higher as a charitable deduction on his income tax return. By each side recognizing at some level an ownership interest of the other, and then by both triangulating their interests to create ownership in a new third party, the dispute was resolved. Today, *Landscape with Smokestacks* hangs in the Art Institute with a plaque reflecting its prior dual ownership, a "purchase from the collection of Fritz and Louise Gutmann and a gift of Daniel C. Searle."[45]

Mr. Searle paid $850,000 for the Degas in 1987 and received a $243,750 charitable deduction for the transfer of his ownership interest in 1998 to the Art Institute. Mr. Searle clearly suffered an economic loss. Was another tax approach available?

IV. THEFT LOSS DEDUCTION

Internal Revenue Code section 165(a) provides a general deduction for losses sustained in a taxable year, with subsection (c)(3) restricting individual taxpayers' personal, non-business losses to those arising from "fire, storm, shipwreck, or other casualty, or from theft."[46] No statutory definition of theft exists; the regulations provide merely that theft is "deemed to include, but shall not necessarily be limited to, larceny, embezzlement, and robbery."[47] Cases and rulings under section 165(c)(3) nevertheless have drawn a tight line as to what constitutes a theft and routinely distinguish theft losses from other losses, with the two elements of criminality and timing having particular prominence and relevance.

To claim a theft loss, a taxpayer first must prove an illegal, wrongful taking, not just that the property is missing.[48] In the textbook case

43. Nick Goodman had been quoted as saying he was "looking for a value of about $1 million." *Id.* at 95.

44. *Id.* at 95-96.

45. Ron Grossman, *How a Family's Degas Traveled from Their Estate to the Center of Controversy*, CHI. TRIB., Jan. 28, 2001, sec. 7, at 14.

46. 26 U.S.C. § 165 (2000). Other casualty and theft were added to the section in 1916. Revenue Act of 1916, ch. 463, § 5(a), 39 Stat. 756, 759. The 1913 original enactment of the federal income tax had provided only for "fires, storms, or shipwreck." Tariff of 1913, ch. 16, § IIB, 38 Stat. 114, 167.

47. Treas. Reg. § 1.165-8(d) (2005).

48. Rev. Rul. 72-112, 1972-1 C.B. 60.

illustrating theft loss, Mary Frances Allen was not allowed a theft loss deduction for the loss of her brooch.[49] Mrs. Allen had only proven that she had worn her brooch to the Metropolitan Museum of Art in New York, that it was crowded that day, and that a search at the Metropolitan did not uncover the brooch. For the majority, that offer of evidence, although proving a loss, did not prove a loss from theft. The court reminded observers that not all losses are tax deductible.

Second, the taking must be illegal and done with criminal intent, with illegality determined under the law of the state where the taking occurred.[50] For thefts of a routine nature, say auto thefts, this is not a particularly stringent standard. In the context of a foreign country's expropriation or nationalization of a taxpayer's personal property, however, using the internal law of that country to determine illegality seldom yields a deduction for the taxpayer.[51] The *Farcasanu* case discussed below illustrates the harsh application of the theft loss deduction in the context of foreign expropriation of private property, and reflects the chaos of the 1940's especially well.[52]

A. Farcasanu, *Foreign Expropriation, and the Act of State Doctrine*

Mrs. Farcasanu was the wife of the U.S. Minister to Rumania in 1937, and as was then customary, she and her husband furnished their living quarters with their own property including rare and valuable furniture, antiquities, and art.[53] Eleven days after Rumania declared war on the United States in December 1941, Mrs. Farcasanu's husband died from leukemia. She was forced to flee Bucharest in such great haste that she even had to leave her deceased husband's remains in Rumania.

By the time Mrs. Farcasanu was first able to return to Rumania in November 1945, the Communists were in control. Though she wished to leave, the head of the American Mission persuaded her to stay,

49. Allen v. Comm'r, 16 T.C. 163 (1951).

50. Edwards v. Bromberg, 232 F.2d 107, 111 (5th Cir. 1956); *see also* Martin J. McMahon, Annotation, *What Constitutes Tax Deductible Theft Loss Under 26 USCS § 165*, 98 A.L.R. FED. 229 (1990).

51. Alan Epstein, Note, *Foreign Expropriation Losses of Personal Assets: Should a Deduction be Allowed Under Internal Revenue Code Section 165(c)(3)?*, 40 TAX LAW. 211, 231 (1986).

52. Farcasanu v. Comm'r, 436 F.2d 146 (D.C. Cir. 1970), *aff'g* 50 T.C. 881 (1968). The summary of facts is drawn from the court's opinion and will generally not be footnoted separately.

53. *Id.*

viewing her personal connections to the royal family as an important political advantage. In early 1947, Mrs. Farcasanu once again returned to the United States in great haste due to a family emergency. Mrs. Farcasanu requested the State Department to ship her property back to America, but it declined for fear of antagonizing the Rumanian government. Thereafter, Mrs. Farcasanu's personal property was nationalized by the Rumanian government.

In 1956, the Foreign Claims Settlement Commission awarded Mrs. Farcasanu $103,445 of her requested $295,716. When it appeared that no additional compensation would be forthcoming, Mrs. Farcasanu claimed a theft loss deduction on her 1959 income tax return. The Tax Court upheld the Service's denial of the deduction.[54]

In a per curiam opinion affirming the denial, the court of appeals acknowledged that theft under section 165 is "defined broadly," but also that theft must be determined under the law of the situs of the taking, and always requires a criminal intent.[55] In cases of foreign expropriation of private property, the court noted that cases have drawn a "sharp distinction . . . between takings . . . made under color of governmental authority, and takings . . . in clear violation of the commands of the sovereign."[56] As long as the confiscating official acted under "color of legal authority, arbitrary and despotic as it may have been," there can be no "theft for tax deduction purposes."[57]

Farcasanu gives active tax support to the Act of State doctrine that:

> [T]he Judicial Branch [of the United States government] will not examine the validity of a taking of property within its own territory by a foreign sovereign government extant and recognized by the country at the time of the suit, in the absence of a treaty or other unambiguous agreement regarding controlling legal principles, even if the complaint alleges that the taking violates customary international law.[58]

54. *Farcasanu*, 50 T.C. 881 (1968).
55. *Farcasanu*, 436 F.2d at 149.
56. *Id.*
57. *Id.*
58. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 428 (1964). It is beyond the scope of this Article to delve deeply into the highly complex and porous Act of State doctrine. It is important to note, however, the Supreme Court held in 2004 that the Foreign Sovereign Immunities Act did not prohibit Maria Altmann, the niece and heir of a prominent Jewish art collector, from pursuing a private cause of action in the United States federal court system against the Austrian government for the return of six Gustav Klimt paintings that had belonged to her family before the Nazi takeover. Republic of Austria v. Altmann, 541 U.S. 677, 701 (2004). On January 15, 2006, an Austrian arbitration panel determined that the Klimts were wrongfully acquired by the Austrian museum and ordered their return to the family. "Austrian Arbitration Court: Maria Altmann and Dr. Neil Averspurg versus the Republic of Austria," American Society of International Law, http://www.asil.org/ilib/2006/03/ilib06031.htm#j5 (last visited Oct. 15, 2006). The paintings arrived shortly thereafter in Los Angeles, "a dream come true" for Maria Altmann. Daisy

Hence, the court believed the Act of State doctrine precluded it from evaluating the expropriation as a theft.

Despite this harsh precedent denying a theft loss deduction for foreign expropriation, the Act of State doctrine may not necessarily foreclose a theft deduction when Nazi-looted art is returned to the original owner. First, one may argue the doctrine itself was inappropriately incorporated into the tax system.[59] Simply put, a deduction by a taxpayer under the Internal Revenue Code does not interfere with the President's ability to set foreign policy, involve the U.S. Government in the internal affairs of a sovereign state, or pose a threat to that sovereign's assets. The realm of the doctrine is international diplomacy, not the Form 1040. Second, even if the Act of State doctrine is relevant to the Code, the facts of a particular case may negate its application.

Nguyen, *Inheritor of Stolen Klimts Welcomes Paintings to L.A.*, CHI. TRIB., Apr. 6, 2006, sec. 1, at 6. By June 2006, the magnificent portrait of Adele Bloch-Bauer I by Klimt had been sold by the heirs, reportedly for a record $135 million, to the Neue Galerie in New York. The Neue Galerie is a museum specializing in Austrian and German art and the subject of its famous acquisition has been described by Ronald S. Lauder, a founder of the museum, as "our Mona Lisa." Carol Vogel, *Lauder Pays $135 Million, a Record, for a Klimt Portrait*, N.Y. TIMES, June 19, 2006, at E1.

It would indeed be ironic if the Act of State doctrine, which does not now prevent a private cause of action against a foreign government from proceeding in the United States, continues to prohibit a U.S. taxpayer from claiming a theft loss deduction for income tax purposes.

59. Epstein, *supra* note 51, at 228-30.

> Unfortunately, the courts have indiscriminately incorporated the Act of State doctrine into the law of federal income taxation without expressing any substantive reasons to support this incorporation. In fact, the doctrine's adoption partially appears to be the product of trial tactics. . . . Farcasanu filed several motions for a continuance based on her concession "that the case of *Banco Nacional de Cuba v. Sabbatino* then pending before the Supreme Court was 'controlling on the issue of whether "nationalization" is a "theft"' for the purpose of a deduction for theft loss. . ." Because *Sabbatino* held that an American court could not characterize an expropriatory act as a theft, the Tax Court logically concluded that Farcasanu's loss not deductible.
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> . . . .
>
> The declaration of the confiscatory act as a "theft" solely for purposes of federal income taxation should not interfere with international relations because it does not require the imposition of Western ideologies upon non-Western nations. The expropriating nation will not be affected by this characterization . . . .

Id. at 228-29 (footnotes omitted).

B. Menzel, *Facts, and the Act of State Doctrine*

Almost forty years ago in a private ownership dispute case, a New York court determined that the seizure by the ERR of a privately owned Chagall painting was an act of plunder or pillage under international and military law, and therefore not lawful.[60] Mr. and Mrs. Menzel lived in Brussels until March 1941 when they fled from the oncoming Nazis. They had hurriedly left their apartment and its furnishings, including a painting by Marc Chagall. Treating this as "decadent Jewish art," the painting, along with other works of art, was seized and a receipt was left by the ERR indicating the property was taken for "safekeeping."[61] After the war, the Menzels searched for the painting unsuccessfully until 1962 when it was located in the possession of the defendant List, who had purchased the painting in good faith in 1955. Mrs. Menzel (Mr. Menzel having died) brought a replevin suit to recover the painting. A jury returned a verdict in favor of Mrs. Menzel finding that the painting belonged unqualifiedly to Mrs. Menzel, and that it was looted and stolen from her apartment.

On a motion to set aside the verdict, the court determined the seizure was not lawful and the Act of State doctrine did not apply to preclude the court's inquiry into the validity of acts of the Nazis.[62] The court carefully considered the four factors necessary for the Act of State doctrine to apply, and held that none of the four was met.

The first factor is that the taking must be by a foreign sovereign government. In the Menzel case, the Chagall was taken by the ERR, determined by the court to be an organ of the Nazi party and not a foreign sovereign government.[63] Second, the taking must be within the territory of the foreign government. Assuming arguendo that the taking was by Germany, the Chagall was taken from the Menzel's residence in Brussels in 1941. German military occupation did not make Brussels part of Germany; the Kingdom of Belgium was the recognized government of Belgium, though in exile.[64] Third, the foreign government must be extant and recognized by the United States at the time of the suit. The Third Reich had collapsed with its surrender in 1945 and, therefore, was not in existence when Mrs. Menzel filed her lawsuit.[65]

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60. Menzel v. List, 267 N.Y.S.2d 804 (1966).
61. *Id.* at 806.
62. *Id.* at 812. In doing so, the court cited the Supreme Court's decision in *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964).
63. *Id.* at 813-15.
64. *Id.* at 815-16.
65. *Id.* at 816.

Fourth, the taking must not violate any treaty obligation. Belgium, Germany, and the United States all signed the 1907 Hague Convention Respecting the Law and Customs of War on Land. That convention formally forbade pillage. The court noted that the "pillage so rampant during the Nazi occupation was specifically held to be in violation" of the 1907 Hague Convention by the Nuremberg trials.[66] For many Nazi-looted art disputes, some, if not all four, of these factors will be similar.

C. Divining Congressional Intent on Foreign Expropriation

The *Farcasanu* court had another reason supporting its application of the Act of State doctrine to bar a theft loss deduction. In 1964, Congress added new section 165(i), since repealed, to specifically allow a deduction for losses arising from the confiscation of nonbusiness property by the Cuban government between 1958 and 1964.[67] These were to be treated as losses "to which paragraph (3) of subsection (c) applies."[68] No Committee Report discusses this new subsection, as it was added as an amendment from the Senate floor. The Conference Report merely states that such losses shall be treated as losses from "other casualty."[69] For the Tax Court, this enactment removed "any doubt" as to congressional intent and understanding as to the scope of theft under section 165(c)(3) for foreign expropriation.[70]

It is possible, however, that section 165(i) had more grounding in the practical politics of the Cold War era than in tax doctrine. Cuba's proximity to the United States may have increased the number of U.S. taxpayers, and hence voters, directly affected by Castro's nationalization. Section 165(i) could have been added to smooth the way for taxpayers' Cuban claims, for by declaring Cuban expropriation losses to be statutorily deductible, individual taxpayers would not bear the burden of

66. *Id.* at 817.
67. Revenue Act of 1964, Pub. L. No. 88-272, § 238, 78 Stat. 19, 128, *repealed by* Tax Reform Act of 1976, Pub. L. No. 94-455, § 1901(a)(26), 90 Stat. 1520, 1767.
68. *Id.* For a brief history of former section 165(i), see also *Ogden v. United States*, 432 F. Supp. 214 (S.D. Miss. 1975), *aff'd* 555 F.2d 134 (5th Cir. 1977).
69. H.R. REP. NO. 88-1149 (1964) (Conf. Rept.), *as reprinted in* 1964 U.S.C.C.A.N. 1940, 1992; *see also* Rev. Rul. 65-87, 1965-1 C.B. 111 ("[A]ny loss of property (not used in a trade or business or for income-producing purposes) resulting from expropriation . . . by the Government of Cuba . . . is treated as a loss from a casualty within the meaning of section 165(c)(3) of the Code . . . .").
70. Farcasanu v. Comm'r, 50 T.C. 881, 890 (1968), *aff'd*, 436 F.2d 146 (D.C. Cir. 1970).

proving "other casualty."[71] That Congress took specific action in the instance of Cuban expropriation apparently deeming it an "other casualty," does not logically mean an individual taxpayer is foreclosed from proving a theft in another context.

Even if *Farcasanu* was correct in its perception of congressional policy on expropriation for tax purposes, does it remain defining for the still reverberating Nazi-looted art? Section 803 of the Economic Growth and Tax Relief Reconciliation Act of 2001, another enactment with scant legislative history, may provide a fresher perspective on congressional intent. Under that section, payments received by an eligible U.S. taxpayer as restitution arising from the Holocaust are excluded from gross income for federal income tax purposes.[72] Section 803 reflects the principles of the late 1998 international conference convened by the United States concerning Nazi-era assets, including Swiss bank accounts, insurance, and other corporate transactions.[73] As a result of this United States led initiative, over $8 billion has been paid to Holocaust survivors, their heirs, and charitable organizations.[74]

Normally, gross income includes interest, dividends, and any gains derived from dealings in property, but does not include a mere return of one's original property. To the extent, therefore, that restitution payments include as a measure of restitution amounts for the interest, dividends, and gains beyond one's actual original property, there would be income for tax purposes absent section 803. In contrast, the return of the original property, such as art, would not give rise to income to the owner. Nevertheless section 803 specifically excludes from gross income the value of the actual "assets stolen or hidden from, or otherwise lost" that are returned to the taxpayer.[75] This unnecessary overinclusiveness of the exclusion speaks to its normative, as opposed to fiscal, value. In

71. Epstein, *supra* note 51, at 220. It is interesting to note that Fidel Castro appropriated works of art from private collectors that are also now starting to appear on the world auction market. *See* Celestine Bohlen, *Reclaiming Art Caught in the Cuban Revolution: In Cases Reminiscent of Looted Nazi Art, Emigres Trace Fate of their Collections*, N.Y. TIMES, June 6, 2002, sec. E, col. 2; Mary Anastasia O'Grady, *Castro's Art Theft Puts Sotheby's on the Spot*, WALL ST. J., Oct. 29, 2004, at A15.

72. Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. No. 107-16, § 803, 115 Stat. 38, 149 [hereinafter EGTRRA § 803].

73. *See supra* note 20 and accompanying text.

74. Bazyler & Fitzgerald, *supra* note 6, at 686-87 ("The United States has been the prime mover behind the numerous agreements concluded between 1998 and 2001 . . . . These settlements brought about by the U.S. government and in U.S. courts . . . have now reached a figure somewhere between $8 to $11 billion . . . .").

75. EGTRRA § 803.

the words of its Senate sponsor, "[t]he federal government should not make one dime on Holocaust restitution, ever."[76]

That a transferee does not have income upon the receipt of returned property does not mean the transferor does or does not have a corresponding deduction upon the transfer. Symmetry of treatment between two parties to a transaction is not required by tax policy or practice. Each party is to account separately for the transaction. Consequently section 803's non-tax impact on the transferee is not decisive on the issue of a transferor's deduction. What section 803 does underscore, however, is an articulated United States policy, including tax, supporting resolution of Nazi-era claims.[77]

With this rather elliptical history in mind, can an innocent buyer of Nazi-looted art now legitimately claim a theft loss deduction when that work of art must be returned to the heirs? Resolving the two additional section 165(c)(3) issues of timing and meaning of art theft will be critical to the decision.

D. Timing

Virtually all theft loss cases pose the situation of the taxpayer as the direct victim of the thief and the consequent theft; there are no intermediary transfers. The question of a time delay in a theft scenario was addressed early in the statute and easily resolved in favor of the

76. 148 CONG. REC. 151, S11796 (2002) (statement of Senator Fitzgerald regarding the Holocaust Restitution Tax Fairness Act of 2002). The Act removed EGTRA's December 31, 2010 sunset provision from application to section 803. *Id.*

77. Section 202 of the Holocaust Victims Redress Act provides:

> It is the sense of Congress that consistent with the 1907 Hague Convention, all governments should undertake good faith efforts to facilitate the return of private and public property, such as works of art, to the rightful owners in cases where assets were confiscated from the claimant during the period of Nazi rule and there is reasonable proof that the claimant is the rightful owner.

Pub. L. No. 105-158, § 202, 112 Stat. 15, 17-18 (1998). Judicial reluctance in the United States to term the Nazi looting of art as theft may be waning. Recently, the Supreme Court characterized the Nazi regime as engaging "not only in genocide and enslavement but theft of Jewish assets." Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 401 (2003). See also Justice Ginsberg's dissent, stating that "the Nazi regimentation of inhumanity we characterize as the Holocaust, marked most horrifically by genocide and enslavement, also entailed widespread destruction, confiscation, and theft of property belonging to Jews." *Id.* at 430. The Nuremberg trials themselves, where criminal charges over the looting of art were alleged and proven, should not be ignored. *See generally* The Nuremberg Trial, 6 F.R.D. 69 (1946). *See also* Sue Choi, *The Legal Landscape of the International Art Market After* Republic of Austria v. Altmann, 26 NW. J. INT'L L. & BUS. 167, 198-99 (2005).

taxpayer: a theft was deemed sustained for purposes of the deduction when it was discovered.[78] The lapse of time is not, therefore, by statutory pronouncement, fatal to the deduction. Yet when presented with a theft loss deduction claimed by an innocent purchaser one or more sales transactions removed from the thief, the circuits are split, as illustrated by the following cases.

1. Boothe v. Commissioner

In 1960, Mr. Boothe sold his interest in certain Soldier's Additional Homestead Rights, which he had purchased in 1959.[79] These rights were originally granted to certain soldiers who served in the Civil War, and allowed them to apply for and receive a fee interest in certain federal lands. These rights were freely assignable. Mr. Boothe's rights were traceable to William H. Dooley, Jr., the original grantee, who perfected his claim in 1873. Twenty-five years later in 1898, Mr. Dooley assigned all of his rights to claim 120 acres to Mr. Black. Thereafter in 1916, Mr. Dooley again sold all his rights (in three assignments of forty acres each) to B.A. Mason. Thirty-five years after his purchase, Mr. Mason sold one of the forty acre assignments to Mr. Davis in 1951. It was from Mr. Davis's estate in 1959 that Mr. Boothe purchased the disputed rights for $4400. Mr. Boothe attempted to exercise his rights in the State of Washington, but the land he desired was not available under this program. Fourteen months later, Mr. Boothe then sold his interest to R. L. Spoo for $8000, reporting a gain of $3600 on his income tax return. Mr. Spoo's designee attempted to exercise the rights on land in Nevada, but like in Mr. Boothe's attempt, that land was not available. The Bureau of Land Management, however, held that the rights were valid. When a second attempt to exercise the rights was made with respect to land in Oregon, the Bureau held the rights invalid due to the 1898 assignment to Mr. Black.

Mr. Spoo then sued Mr. Boothe for breach of warranty of title, recovering a judgment of $20,792 in damages. Mr. Boothe paid the judgment in 1977 and claimed a theft loss deduction on his income tax return. The Commissioner denied the theft loss deduction since Mr. Boothe was not the victim of a theft.

The sole issue before the Tax Court was the characterization of the $20,792 judgment paid by Mr. Boothe as either a theft loss under section 165(c) or a capital loss under section 165(f).[80] The practical difference

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78. 26 U.S.C. § 165(e) (2006).
79. Boothe v. Comm'r, 82 T.C. 804 (1984), *rev'd*, 768 F.2d 1140 (9th Cir. 1985) (per curiam).
80. *Id.* at 805.

is quantitative; that is, for capital losses in excess of capital gains, there is only a modest deduction allowed,[81] whereas a theft loss was at the time almost wholly deductible.[82] Applying the origin of the claim doctrine, the majority Tax Court opinion supported by ten judges decided that the 1977 judgment arose from the 1960 sale to Mr. Spoo.[83] Hence, under the principle of *Arrowsmith*, the loss originated in a capital transaction and was therefore a capital loss.[84] It was consequently unnecessary for the majority to determine if a taxpayer who is not the direct victim can claim the deduction as a theft loss.[85] Two dissenting opinions supported by eight judges were filed.[86]

On appeal, the Ninth Circuit, in a brief per curiam opinion, noted that the "unusual facts in this case created sharp differences of opinion.... We agree with and adopt the dissenting opinion of Judge Körner."[87] In

81. 26 U.S.C. §§ 165(f), 1211(b) (1977).

82. As in effect in 1977, a theft loss was allowable as a deduction only to the extent the loss from each theft exceeded $100. *Id.* Today there is an additional quantitative limitation in section 165(h)(2), essentially allowing personal casualty losses only to the extent such personal casualty losses exceed ten percent of the taxpayer's Adjusted Gross Income (AGI). *See* U.S.C. § 165(h)(2) (2006).

83. *Boothe*, 82 T.C. at 807.

> The deductions claimed by petitioners were for a judgment of damages and court costs. The inquiry as to the character of the deduction should, therefore, focus upon the nature of the litigation. Where litigation involves the acquisition or disposition of capital assets, the origin and character of the claim is the controlling test.... Although most of the cases involving this issue relate to deductibility under section 162 or section 212, there is no reason why the test should not be applied to a deduction claimed under section 165.

Id. (citations omitted). Judge Hamblen's dissent offers "several reasons to resist such expansion." *Id.* at 812; *see also* Edward J. Schnee & Nancy J. Stara, *The Origin of the Claim Test: A Search for Objectivity*, 13 AKRON TAX J. 97, 119-21 (1997).

84. "In *Arrowsmith v. Comm'r*, 344 U.S. 6 (1952).... [t]he Supreme Court held that the payments by the taxpayers were allowable only as capital losses because they arose from the earlier capital transaction. We conclude that the principle of *Arrowsmith* applies here." *Boothe*, 82 T.C. at 808.

85. "In view of our holding based upon the origin-of-the-claim test, it is unnecessary for us to decide whether a taxpayer who is not the direct victim of a theft is entitled to deduct a theft loss." *Id.* at 809.

86. Judge Körner's dissent (discussed *infra*) was joined only by Judge Whitaker. *Id.* at 812. Judge Hamblen's dissent was joined by five Tax Court Judges. *Id.* at 819. Judge Hamblen's dissent first rejects the "expansion" of the origin of the claim test to section 165, then addresses the "principal question now sidestepped by the majority" and resolves "the victim proximity issue" in the taxpayer's favor. *Id.* at 812.

87. Boothe v. Comm'r, 768 F.2d 1140, 1141 (9th Cir. 1985) (per curiam). The sharpest difference was between the ten judge majority opinion (which viewed the case wholly through an origin of the claim prism) and Judge Hamblen's six judge dissent (which viewed the case wholly through a theft loss prism). *See* Schnee & Stara, *supra* note 83.

his dissenting opinion in the Tax Court, Judge Körner viewed the case as involving two distinct and separate events.[88] The first was a theft "even though (Boothe) was not the immediate purchaser from the fraudulent vendor."[89] This theft occurred in 1959 when Mr. Boothe purchased his interest, but it was discovered by the taxpayer only when litigation was concluded in 1977, and thus deductible in 1977.[90] Under section 165(b), the basis for determining the amount of any loss is the adjusted basis of the property. Consequently, Mr. Boothe's theft loss was his basis, or $4400. The second event concerned the remaining $16,392 in damages, proceeding from the breach of warranty of title lawsuit. Judge Körner agreed with the majority's origin of the claim analysis sustaining the capital loss in the amount of $16,392.[91]

The Ninth Circuit in *Boothe* removed the perceived obstacle of direct connection between the thief and victim, and did so when the theft spanned forty-three to sixty-one years (from the fraudulent sale by Mr. Dooley in 1916, to Mr. Boothe's innocent purchase in 1959, to discovery in 1977), multiple purchasers (Mr. Mason to Mr. Davis, to Mr. Boothe), and apparent judicial and administrative acceptance of validity (inclusion in Mr. Davis's estate, and Bureau of Land Management holding). These attributes of time, multiple sales, and apparent title/acceptance will often be present in the Nazi-looted art cases. This makes *Boothe* very citable, but the sharp differences in opinion noted by the Ninth Circuit persist.

2. Krahmer v. United States

In 1985, the same year the Ninth Circuit decided *Boothe*, the claims court decided *Krahmer v. United States*, another theft loss deduction case.[92] In *Krahmer* not only was the timing of the alleged theft an issue, but another issue, particularly pertinent in art cases, also emerged. The distinction between losses attributable to thefts involving art and those to

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88. "[T]he majority and Judge Hamblen have taken an overly simplistic view of the facts . . . by telescoping the relevant events which occurred here, so as to produce a single transaction giving rise to a deductible loss, rather than two distinct and separable events having different tax consequences." *Boothe*, 82 T.C. at 809 (Körner, J., dissenting). By separating the loss into two component parts, Judge Körner was able to bridge the two myopic competing views.

89. *Id.* at 810.

90. *Id.* ("I would therefore hold that he suffered a theft loss in 1959, when he purchased the nonexistent rights, in the amount of $4,400, which, not being discovered until 1977, was deductible by him in that year under section 165(e), subject to the limiting provisions of section 165(c)(3).").

91. See *id.* at 811 for the computation.

92. Krahmer v. United States, 9 Cl. Ct. 49 (1985), *aff'd in part*, 810 F.2d 1145 (Fed. Cir. 1987).

misattribution or authenticity raised concerns about the scope and meaning of theft involving art for tax purposes.

Mr. Krahmer had purchased over the years many paintings from Mr. Mitscherlich, an art dealer. Two paintings proved problematic. One was attributed by the art dealer to Nicholas Poussin. Mr. Krahmer had paid $30,000 for the Poussin painting, which he later sold for $2000 when it was determined not to be by Poussin, but by Poussin's nephew instead. The second painting bore the signature of "W. M. Chase" and the taxpayer paid $5000 for it. The Chase signature on the painting was later determined to be a forgery and the painting was thereafter sold for only $300, resulting in a $4700 loss. The taxpayer claimed theft losses arising from each transaction.

The *Krahmer* trial court denied a theft loss deduction for misattribution of the Poussin painting. The court determined that since there was no forgery but only "an erroneous statement by the seller as to the likely artist," it would be necessary for the taxpayer to establish that the seller defrauded the taxpayer by "knowingly and intentionally misattributing" the work.[93] The taxpayer's evidence as to the dealer's status as an experienced art expert, although not a Poussin specialist, as well as his allegations concerning the dealer's course of conduct as implying deceit were unpersuasive as to knowing and intentional misattribution.

The trial court, however, drew a clear and easy distinction between the two paintings. It allowed the deduction for the second painting, with the forged Chase signature, as ipso facto fraudulent: "Unlike the 'Poussin,' the 'Chase' painting was signed, and that signature was a forgery. Thus, anyone who sustained a loss on purchase in the belief that the painting was by William Merritt Chase was the victim of a theft by false pretenses or swindle."[94]

As to the government's contention that the taxpayer must be the direct victim of the forger, the trial court was not persuaded:

> It is apparent that Congress' concern was not to punish the wrongdoer but to provide tax relief to the *victim* of the loss . . . . The intended connection is between the taxpayer and the loss, or more specifically in this case between the taxpayer and the theft, not between the taxpayer and the thief. Thus, it should make no difference in the application of this relief statute whether the taxpayer dealt directly with the forger or was the victim once or several steps removed.[95]
>
> . . . .

93. *Id.* at 53.
94. *Id.* at 52.
95. *Id.* (emphasis in original).

> Here, plaintiff has suffered a loss at the hands of a forger, however distant in time or privity was the forger's act. Plaintiff need not know the identity of the forger. He need only prove that the forgery was the cause of the loss. By his discovery of the forgery, perpetrated by persons unknown, plaintiff has satisfied his burden.[96]

On appeal in 1987, the Federal Circuit Court of Appeals held the lower court's determination that the "mere existence of the forged signature . . . was sufficient to prove a theft by false pretenses is incorrect as a matter of law, and . . . reverse[d] it."[97] Significantly the Federal Circuit held that the taxpayer was required to show that the art dealer, from whom the taxpayer had purchased the painting, knowingly and intentionally defrauded him by the misattribution. The court required an active deception at the time of the taxpayer's purchase, reasserting a direct link between the thief and the taxpayer. Interestingly, although the lower court had discussed the *Boothe* decision extensively,[98] the Federal Circuit did not distinguish or even reference *Boothe* on appeal.[99]

3. *Suddenness and Mistakes*

What is the underlying concern of the IRS in requiring direct contact between the thief and the taxpayer? The answer may be nothing more than an unexamined historic imperative, the traditional section 165(c)(3) suddenness requirement, or with shades of Mary Frances Allen and her brooch, distinguishing theft from mistake.

Recall that section 165(c) limits an individual's nonbusiness, nonprofitseeking losses to those losses arising "from fire, storm, shipwreck,

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96. *Id.* at 53.
97. Krahmer v. United States, 810 F.2d 1145, 1147 (Fed. Cir. 1987).
98. *See Krahmer*, 9 Cl. Ct. at 53.
99. Six years later, however, the Tax Court in another left loss deduction case did make an approving reference. *See* Jensen v. Comm'r, 66 T.C.M. (CCH) 543, 546 (1993). The Jensens had unknowingly invested in a Ponzi scheme run by Chacklan Enterprises. *Id.* at 544. The taxpayers' actual investment was through their long-trusted broker, Mr. Howarter, and not directly with Chacklan. *Id.* Like his clients, Mr. Howarter was not a knowing participant in the Ponzi scheme. *Id.* at 545. Once the scheme collapsed later in the same year, the taxpayers claimed a theft loss deduction, which the Service denied. *Id.* at 545, 546. Although the Service agreed a theft had occurred, it argued the taxpayers were not entitled to a theft deduction because they were not direct investors in Chacklan Enterprises. *Id.* at 546. The Tax Court determined as a factual matter, however, that the taxpayers were investors in Chacklan, specifically stating that "[t]here is no requirement that an investor have direct contact with the entity in which he is investing." *Id. Jensen* is noteworthy because the Tax Court cited *Boothe* in the face of a pointed IRS argument that there was no direct contact between the taxpayer and the thief. *See id.* However tempting it is to read *Jensen* as an endorsement by the Tax Court of *Boothe's* no-direct-contact-required, such an unqualified statement in unwarranted. First, the court found that the taxpayers were investors in Chacklan. *Id.* Second, because the Jensens were Nevada residents, the Ninth Circuit's decision in *Boothe* governed. *See id.* at 544.

or other casualty, or from theft." In interpreting "other casualty," courts adopted the principle of *ejusdem generis*, that is, interpret the phrase in light of the surrounding terms.[100] Consequently, deductible losses from "other casualty" require an identifiable event that is "sudden, cataclysmic, and devastating,"[101] or "of a sudden, unusual or unexpected nature"[102] put most simply, "only sudden events can be deductible casualties."[103] If the tincture of time underlies deductibility for "fire, storm, shipwreck, or other casualty," it may, consciously or not, also color the interpretation of "or from theft."

A second rationale for the IRS insistence on a direct link between the thief and the taxpayer may be an institutional belief that defining theft in a hard edged way, making theft a fortress, best distinguishes theft from mere "loss." Mary Frances Allen and her missing brooch illustrates the slippery slope the IRS intends to avoid. In the context of art, the slippery slope includes the critical distinction between theft and misattribution. A time honored method of art education is for students to copy the masters—there is no criminal intent at the time.[104] As time passes,

100. See, for example, *White v. Commissioner*, 48 T.C. 430, 435 (1967) holding that the loss of a diamond from a ring when a hand was slammed in a door was a casualty loss:

> The principle of *ejusdem generis* as it is presently applied does no violence to congressional intent. Its application has been consistently broadened so that wherever unexpected, accidental force is exerted on property and the taxpayer is powerless to prevent application of the force because of the suddenness thereof or some disability, the resulting direct and proximate damage causes a loss which is like or similar to losses arising from the causes specifically enumerated in section 165(c)(3).

101. Popa v. Comm'r, 73 T.C. 130, 132 (1979), *acq. in result* 1981-2 C.B. 2.

102. Rev. Rul. 63-232, 1963-2 C.B. 97.

103. Joel S. Newman, *Of Taxes and Other Casualties*, 34 HASTINGS L.J. 941, 964 (1983) ("Perhaps the problem is one of timing. It is generally easy to determine when a deductible casualty occurs, especially since, under current law, only sudden events can be deductible casualties.").

104. Of course, not all copies proceed from purely academic motives. In *State v. Wright Hepburn Webster Gallery, Ltd.*, 314 N.Y.S.2d 661 (1970), the New York Attorney General unsuccessfully sought to enjoin a sale of paintings advertised as created by "Master Forger David Stein." At the time, Mr. Stein was in a Paris jail for selling art forgeries. *Id.* at 663. The court noted:

> [H]e has apparently been permitted by the French authorities to produce paintings "in the style of" such renowned artists as Chagall, Matisse, Picasso, Braque and others, subject to the proviso that they bear his own signature, "Stein, D.," rather than the simulated signatures of these masters as had been his prior practice.

Id. The Attorney General was concerned that over time Mr. Stein's signature would be removed and the works would enter the art market as original works. *Id.* at 664. The certainty decreases and confusion increases. To shift to the U.S. tax system a measure of monetary liability for mistakes in judgment should require a higher threshold of congressional intent. A lower threshold would greatly increase the availability of the theft deduction in personal transactions where the underlying transaction concerned judgment and not theft. The U.S. tax system would then become an insurer of sorts not only for theft but mistakes in judgment as well, something Congress did not intend.

A third rationale for requiring a nexus between thief and taxpayer is that to allow otherwise could ultimately blur the tax distinctions between generally deductible business losses and generally nondeductible personal losses, so that all losses become deductible.[105] Moreover, in the context of Nazi-looted art, the original illegal taking may not have involved a U.S. taxpayer at the time of the Nazi regime's theft. The U.S. taxpayer became involved generally only over time and with the passage of the work of art through the international art market. Allowing the U.S. tax system to address an injury to a non-U.S. taxpayer from sixty years ago could result in an unwarranted expansion of section 165. This limited view of the time of injury however, ignores the reality of the ongoing injury to the current U.S. taxpayer. The injury began in World War II and continues.

V. POLICY RAMIFICATIONS OF USING THE TAX CODE

Whether or not the Internal Revenue Code can be used as a tool for resolving Nazi-looted art cases, the broader question is whether it should be so used. Do any policy considerations support or defeat the use? Unquestionably, the law should assist people in resolving disputes; so to the extent tax consequences can help resolve honest disputes, especially between two innocents, this is a positive step. Yet any attempt to shift financial liability from an individual taxpayer to all taxpayers raises legitimate concerns. These include direct tax policy concerns, such as revenue loss, vertical equity, and conceptual concerns, and non-tax concerns, such as the United States increasingly becoming an art theft haven.

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court was not persuaded that the Attorney General's suspicion of future misconduct qualified as a current nuisance, and the sale was allowed. *Id.* at 664, 668.

105. Something of this sort may also underlie the issue concerning the availability of the theft loss deduction for stock losses attributable to Enron- or WorldCom-type conduct. *See* I.R.S. Notice 2004-27, 2004-16 I.R.B. 782; Robert Willens, *Financial Misrepresentations by Management May Lead to 'Theft' Losses for Corporate Stockholders*, DAILY TAX REP., Sept. 29, 2005, at J1 ("[W]e can safely conclude that the indispensable key to the claim that a theft loss has been sustained . . . is the legal concept of privity . . . .").

A. Revenue Loss

Inherently, deductions lower the amount of tax collected.[106] As a purely academic discussion, no estimate as to revenue cost exists; but the cost, relative to the entirety of the income tax system, would probably not be significant. In determining the amount of the loss, the taxpayer's basis is the starting point, not fair market value.[107] In addition, since 1983, section 165(h) has imposed a quantitative restriction limiting theft loss deductions to those in excess of ten percent of a taxpayer's AGI.[108] This quantitative restriction, coupled with the deduction's availability only in the year the loss is sustained without carryover or carryback, suggests that the utility of the theft loss deduction will be limited. Moreover, structural limitations applicable across the board to all taxpayers, including the phase out of itemized deductions and the possible imposition of the Alternative Minimum Tax, could similarly limit the revenue loss. One might well wonder, in fact, if these quantitative limitations and restrictions defeat using the theft loss in this context as a practical matter.

B. Vertical Equity

Equity considerations, however, appear more troublesome.[109] Because the art most likely to be in controversy will be of great value,[110] the ownership of such works similarly is most likely to be concentrated in the high income bracket taxpayer. Thus, high income taxpayers would likely stand to benefit the most from the application of the theft loss deduction to Nazi art restitution cases. For some commentators, that would be enough to reject the application.

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106. This is admittedly a general proposition; in any particular case a deduction could be "wasted" because there is insufficient income to absorb it.

107. 26 U.S.C. § 165(b) (2000).

108. Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, § 203(b), 96 Stat. 324, 422.

109. Horizontal equity concerns, such as the concern that similarly situated taxpayers should be treated similarly, are notoriously difficult to address, particularly when unique works were stolen over sixty years ago. Who is the similarly situated taxpayer? Is it one who purchased the painting unwittingly directly from the thief? Or is it someone who bought a Degas only to have it stolen from her home? In any case, it is hard to see the difference from a tax perspective because the taxpayer no longer has the painting.

110. *See* TRIENENS, *supra* note 30, at 97 ("I am almost at the point of saying that if the art isn't worth $3 million, don't go after it.") (quoting Thomas Kline, counsel for the Gutmann family in the Degas dispute).

This observation of high end utility should not be sufficient in and of itself to reject the application of the theft loss deduction. Any allowable deduction in our system is more valuable to a higher bracket taxpayer than to a lower bracket taxpayer; such is the nature of progressive rates.[111] As long as the deduction is available to all, the equity of its lopsided use should cause consideration of the deduction's purpose. Although limited, the legislative history suggests deductible section 165(c)(3) losses are those that are extraordinary and nonrecurring, "beyond the average or usual losses incurred by most taxpayers in day-to-day living," and that are sufficient in size to have a significant effect upon an individual's ability to pay federal income taxes.[112]

Applying this standard, an ownership dispute over a work of art stemming from Nazi confiscation over sixty years ago handily meets the extraordinary standard; one hopes it meets the nonrecurring standard for that taxpayer, and the sufficient in size standard has arguably been addressed by the ten percent norm. The ability-to-pay reference is more difficult to address because of its uncertain meaning in this context. Does the loss of a work of art compromise the taxpayer's ability to pay income taxes? Arguably not, since the art does not generate dollars with which to pay tax. This argument proves too much since items of nonbusiness, nonprofit seeking personal property generally do not generate income subject to tax. If the ability-to-pay standard is suggesting that the taxpayer will need to spend income to replace the stolen property, this is uncertain in our context given the uniqueness of the work and acknowledging that art, unlike a home, is not a necessity that must be replaced. The ability-to-pay argument should not be determinative because in the context of section 165(c)(3)'s history, normative concerns about the taxpayer's victimization by outside, sudden, uncontrollable forces seem more important.

C. Conceptual Concerns

The Haig-Simons income formulation provides a recognized starting point in articulating a conceptual framework for the income tax. Under the formula, income is "the algebraic sum of (1) the market value of rights exercised in consumption and (2) the change in the value of the store of property rights between the beginning and end of the period in

111. The U.S. income tax system is highly stratified. Most American taxpayers pay more in payroll taxes than they pay in income tax; most individual income tax returns claim the standard deduction rather than itemized deductions. *See* EDWARD J. MCCAFFERY, FAIR NOT FLAT 17-19 (2002).

112. H.R. REP. NO. 88-749, at 52 (1963); S. REP. NO. 88-830, at 57 (1964).

question."[113] Using the theft loss deduction when returning Nazi-looted art to the original owner can be seen as consistent with the Haig-Simons formulation as there has been an overall reduction in the taxpayer's store of property rights.[114] The charitable deduction is more problematic as two offsetting effects arguably exist. By transferring the art work to a charity, the taxpayer, as in the theft loss scenario, has decreased the value of his store of property rights. But by choosing to effect that same transfer as a gratuitous donation, the taxpayer may be seen as exercising rights of consumption by foregoing a sale. Nevertheless, by the longstanding policy considerations underlying the charitable deduction, such charitable dispositions are not considered as giving rise to income. Congress has chosen to encourage transfers to charities, presumably since the charities assist the government in fulfilling some of its public functions.

D. Non-Tax Considerations

A traditional apprehension is that deductions that proceed from normative, noneconomic concerns are inappropriate in the tax system and contribute needlessly to the complexity of the system.[115] Many commentators today acknowledge that a pure tax system is unlikely and acknowledge, if not support, recognition of such in the tax system. As previously discussed, the tax system has already been used recently to address Nazi-era reparations.[116] But would the norm of a tax settlement in these cases have a negative ripple effect elsewhere? Would tax settlements increase the flow of illicit art to the United States or lower a buyer's diligence in purchasing if the buyer is aware the tax system may be a partner at the ready when the purchase goes bad? Is there not something distasteful about United States charities and museums being used as conduits or repositories for looted art? The answer to each of these questions is probably yes. The questions, however, miss the mark.

The goal is to support the return of Nazi-looted art consistent with stated United States policy. Nazi looting of art is an historic fact. If

113. HENRY C. SIMONS, PERSONAL INCOME TAXATION 50 (1938).

114. Jeffrey H. Kahn, *Personal Deductions—A Tax "Ideal" or Just Another "Deal"?*, 2002 MICH. L. REV. DETROIT C.L. 1, 37-40 (2002).

115. *See, e.g.*, Mark G. Kelman, *Personal Deductions Revisited: Why They Fit Poorly in an "Ideal" Income Tax and Why They Fit Worse in a Far from Ideal World*, 31 STAN. L. REV. 831 (1979).

116. *See* discussion *supra* Part III.

more of it resurfaces, whether in the United States or elsewhere, that is a good thing, as finding the art is the first step in returning the art to its original owner. To counter a possible increase in the flow of illicit art into the United States, three practical points might be addressed. First, lawmakers could limit use of the theft loss deduction to cases involving the restitution of Nazi-looted art, and not any stolen art, to the victim. Second, lawmakers could restrict the tax deduction to Nazi-looted art formally entered on a recognized international registry for Nazi-looted art as of a certain date. Finally, in order to deal with the problem of "fake" Nazi-looted art, the Service should require expert testimony from a qualified appraiser as to authenticity as part of the taxpayer's return.

Due diligence on the part of buyers is unlikely to decrease substantially because of a deduction. No one wants to lose money, and a deduction is of course only a partial recovery of money spent, unlike a credit. Moreover, much of the contested art was purchased years ago when buyers' diligence passively relied on the reputation of art galleries. Today, with the ready availability of Internet database searches and the steady drumbeat of news stories, buyers can fairly be held to a higher, active standard of diligence. The passage of time thus has more likely increased the due diligence of buyers, and one can rightly question the bona fides of recent purchases.

Charities as conduits and museums as repositories for art of questionable provenance does seem distasteful at first.[117] In the long run, however, the art returns to the original owners, or with their agreement and approval, to a wider public ownership.

V. CONCLUSION

Six decades after the end of World War II, controversies over the ownership of Nazi-looted art continue to emerge. Time has worked a shift in perceptions and expectations for those controversies; time is no longer an ally for the repose of title. This unsettling of bona fide expectations of title for an innocent buyer raises claims in law and in equity that are equally meritorious to those of the original owners. For a legal system that adjudicates on a case-by-case basis, a claim over ownership of a unique work of art is a zero sum game—one winner, one loser. This harsh reality of uniqueness, set against the competing interests of legitimate market concerns and demands of restorative justice, requires fresh and open inquiry into workable solutions.

117. This issue is not new for museums. Only recently, however, is the issue discussed widely in a forthright manner. *See* Hugh Eakin & Elisabetta Povoledo, *Met's Fears on Looted Antiquities Are Not New*, N.Y. TIMES, Feb. 20, 2006, at E1.

Tax is an eminently practical system that affords two possible strategies for those ownership disputes. Using the charitable deduction would generally resolve the dispute by creating an outright public ownership, and hence public benefit and oversight. Using the theft loss deduction, ownership would generally remain private, but the public would nevertheless bear some of the direct financial costs in the ownership shift from one party to the other. The public benefit is admittedly less direct: assistance in dispute resolution, support for private ownership of property, and protection of legitimate market expectations. Perhaps because of this imbalance in public costs and benefits, the availability of the theft loss deduction may not be as straightforward as the charitable deduction. Time, manifested by the IRS's apparent requirement of direct nexus between the thief and the taxpayer, should not act as a stumbling block for the theft loss deduction strategy in the limited context of Nazi-looted art. The language of the Code does not require the nexus and perhaps even recognizes a different timeframe for theft. Case law support for tracing the theft back in time through multiple purchases does exist. Finally, general tax policy concerns do not and should not outweigh the stated United States policy to assist in the restoration of Nazi-looted art. The impossible eternal triangle of thief, owner, and innocent buyer should not find support in tax and time.