

10-1-2009

## Reconciling Policy And Equity: The Ability Of The Internal Revenue Code To Resolve Disputes Regarding Nazi-Looted Art

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### Recommended Citation

Joseph F. Sawka, *Reconciling Policy And Equity: The Ability Of The Internal Revenue Code To Resolve Disputes Regarding Nazi-Looted Art*, 17 U. Miami Int'l & Comp. L. Rev. 91 (2009)

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**RECONCILING POLICY AND EQUITY: THE ABILITY OF THE  
INTERNAL REVENUE CODE TO RESOLVE DISPUTES  
REGARDING NAZI-LOOTED ART**

*Joseph F. Sawka\**

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**I. INTRODUCTION**

Museums in the United States and around the world are coming under attack from various groups because many hold what is believed to be Nazi-looted art from the Holocaust.<sup>1</sup> While numerous

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<sup>1</sup> See, e.g., *Rosenberg v. Seattle Art Museum*, 124 F. Supp. 2d 1207, 1210 (W.D. Wash. 2000); *Her Majesty’s Attorney-General v. The Trustees of the British Museum*, [2005] EWHC (Ch) 1089, [1]-[8] (Eng.); Press Release, Worcester Art Museum, Case of Nazi-Looted Art Solved at Worcester Art Museum (Apr. 30, 2004), available at <http://www.worcesterart.org/Information/PR/Past/4-30-04.html>; Michael J. Reppas II, *Empty “International” Museums’ Trophy Cases of Their Looted Treasures and Return Stolen Property to the Countries of Origin and the*

scholars and researchers have taken it upon themselves to address potential ways to resolve the disputes by means other than litigation, only a handful of publications address the solutions available for individual current possessors of Nazi-looted art. This article proposes a new look at the Internal Revenue Code as a viable option for current possessors and claimants to effectively and equitably resolve the disputes.<sup>2</sup>

Although there is growing concern about the use of art investments as a tax shelter, which may serve to encourage illicit trade in stolen artwork,<sup>3</sup> there is a more subtle, and arguably, more sympathetic view for the favorable use of the Internal Revenue Code ("the tax Code") in the art and cultural property trade world. Intrinsically linked to the illicit trade in antiquities is the devastation that occurred at the hands of the Nazi regime during World War II. When the Allied troops liberated Paris in 1944, the Nazi regime had pillaged approximately one-fifth to one-third of all the art in Europe.<sup>4</sup>

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*Rightful Heirs of Those Wrongfully Dispossessed*, 36 DENV. J. INT'L L. & POL'Y 93, 93 (2007).

<sup>2</sup> See Kiesha Minyard, *Adding Tools to the Arsenal: Options for Restitution from the Intermediary Seller and Recovery for Good-Faith Possessors of Nazi-Looted Art*, 43 TEX. INT'L L.J. 115 (2007) (discussing the resolution options offered by the U.S. court system through litigation).

<sup>3</sup> In 2008, federal agents searched the art museums, private homes, and storage sites in the Los Angeles area, where they discovered numerous rare artifacts that were illegally imported into the United States. Applications for the warrants said that smugglers and art dealers were selling prehistoric artifacts to Americans, who were provided with inflated appraisals used for tax deductions when the items were donated to the museums. See Matthew L. Wald, *Tax Scheme Is Blamed for Damage to Artifacts*, N.Y. TIMES, Feb. 4, 2008, at E1; see also Leah K. Antonio, *The Current Status of the International Art Trade*, 10 SUFFOLK TRANSNAT'L L. REV. 51, 58 (1986) ("Many commentators agree that the use of art investments as tax shelters is a prime factor for the flourishing illicit trade in stolen or counterfeit art."); L. DEBOFF, *THE DESKBOOK OF ART LAW 1984 SUPPLEMENT XIV* 20-29 (1984) (discussing fine art investments as tax shelters); Joseph H. Marxer, Note, *Section 183 of the Internal Revenue Code: The Need for Statutory Reform*, 62 IND. L.J. 425, 426 n.10 (1987) ("Tax shelters involving fine art have become quite commonplace."); Susan E. Wagner, Note, *The Implications of Changing the Current Law on Charitable Deductions – Maintaining Incentives for Donating Art to Museums*, 47 OHIO ST. L.J. 773, 776-77 (1986) (discussing the potential use of artwork as a tax shelter).

<sup>4</sup> Howard N. Spiegler, *Recovering Nazi-Looted Art: Report From the Front Lines*, 16 CONN. J. INT'L L. 297, 298 (2001); Kelly Diane Walton, *Leave No Stone Unturned:*

Today, tens of thousands of works of art are still missing, but many items have made their way into museums, private collections, and auction houses in the United States.<sup>5</sup> Thus, individuals or entities in the United States may be unaware – or aware – that a piece of artwork they own has Nazi taint. As the original owners' and their heirs' claims for restitution and other legal claims become more prevalent, individuals and entities are unwilling to hand over the artwork because of their monetary investment in the item.

This article focuses on the need for an alternative solution to litigating Nazi-looted art claims. It proposes the use of section 501(c)(3) governmental organizations as mediums to achieve the public policy goals that courts and lawmakers have struggled with over the last few years. In particular, this article argues that the tax Code achieves the most equitable outcome for parties involved in disputes involving Nazi-looted art. Part II provides historical background to the current situation involving Nazi-looted art, emphasizing the deep emotional and psychological underpinnings. Part III introduces the complexity of litigating and resolving Nazi-looted art cases. Part IV examines a variety of past and contemporary proposals and guidelines by lawmakers and organizations that have addressed the current situation involving Nazi-looted art. It advances the proposition that the tax Code can be used as a practical device to accomplish the overarching policy goals that the proposals and guidelines have failed to meet. Part V introduces and analyzes the possible tax solutions offered by section 170 and section 501(c)(3) of the tax Code. It proposes the creation of a federal entity organized under section 501(c)(3) of the Internal Revenue Code to relieve the burden placed upon museums and similar institutions in the transactions. The article concludes in Part VI with a discussion of the need for government intervention in the area of Nazi-looted art and the need for a more cohesive body of law, which the tax code can provide. The goal of this article is to persuade the reader that the Internal Revenue Code is a viable – and neutral – tool to resolve Nazi-looted artwork disputes, instead of relying on courts, which are

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*The Search for Art Stolen by the Nazis and the Legal Rules Governing Restitution of Stolen Art*, 9 FORDHAM INTELL. PROP. MEDIA & ENT. L. J. 549, 558 (1999).

<sup>5</sup> HECTOR FELICIANO, *THE LOST MUSEUM: THE NAZI CONSPIRACY TO STEAL THE WORLD'S GREATEST WORKS OF ART* 4 (Basic Books 1998) (1997).

inadequately equipped to deal with the political, emotional, and psychological connections that may come into play in these contexts.

## II. HISTORICAL BACKGROUND

The Nazi policies of discrimination, persecution, and extermination took on an economic dimension.<sup>6</sup> Even before the victory of the Allied powers during World War II, it was clear that the economic and political landscape of Europe had changed forever. The destruction of cities, the devastation of economies, and the displacement of people contributed to the future events of what would eventually become known as the Cold War.<sup>7</sup> However, in the months following the aftermath of World War II, the world would come to know not only of the gross human violations suffered at the hands of the Nazi regime, but also of the cultural devastation that the Nazi regime had accomplished. During this period, the Allied forces discovered that the Nazis had looted their victims' assets, which ranged from precious metals to antique artwork.<sup>8</sup> In effect, the Nazi regime had carried out the greatest art theft in human history.<sup>9</sup>

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<sup>6</sup> PRESIDENTIAL ADVISORY COMM'N ON HOLOCAUST ASSETS IN THE U.S., PLUNDER AND RESTITUTION: THE U.S. AND HOLOCAUST VICTIMS' ASSETS: FINDINGS AND RECOMMENDATIONS OF THE PRESIDENTIAL ADVISORY COMMISSION ON HOLOCAUST ASSETS IN THE UNITED STATES AND STAFF REPORT, S. REP. NO. 1, at Ch. 2 (2000) [hereinafter PACHA], available at <http://www.pcha.gov/PlunderRestitution.html/html/StaffChapter2.html>; see also LYNN H. NICHOLS, THE RAPE OF EUROPE: THE FATE OF EUROPE'S TREASURES IN THE THIRD REICH AND THE SECOND WORLD WAR (1994).

<sup>7</sup> See WILLIAM L. SHIRER, THE RISE AND FALL OF THE THIRD REICH 1139-40 (Simon & Schuster 1960) (1959) (describing the aftermath of World War II); 3 ENCYCLOPEDIA BRITANNICA 444 (15th ed. 2007) (“[N]ear the close of World War II, the uneasy wartime alliance between the United States and Great Britain on the one hand and the Soviet Union on the other began to unravel. . . . The Cold War had solidified by 1947 . . .”).

<sup>8</sup> PACHA, *supra* note 6.

<sup>9</sup> See Spiegler, *supra* note 4, at 298; see also Jennifer Anglim Kreder, *Reconciling Individual and Group Justice with the Need for Repose in Nazi-Looted Art Disputes*, 73 BROOK. L. REV. 155, 178-79 (2007). In 1948, the U.S. office of Military Government announced that U.S. troops discovered nearly 10.7 million cultural objects in Nazi storage areas. Paulina McCarter Collins, *Has “The Lost Museum” Been Found? Declassification of Government Documents and Report on Holocaust Assets Offer Real Opportunity to “Do Justice” for Holocaust Victims on the Issue of Nazi-Looted Art*, 54 ME. L. REV. 115, 125 (2002).

During the reign of Hitler and the Third Reich, “as many works of art were displaced, transported and stolen as during the entire Thirty Years War or all the Napoleonic Wars.”<sup>10</sup> Although the capture of art and cultural property during war is an ancient practice,<sup>11</sup> the Nazis went beyond the bounds of decency and decimated European cultures. The Nazi regime made it a policy to wipe out entire cultures by destroying cultural property or assimilating it into what Hitler saw as the ideal culture.<sup>12</sup> “Inherent in Hitler’s dreams of a pure Germanic race was a vision of pure Germanic art. His two-fold plan involved ridding his empire of ‘degenerate art’ and amassing a vast collection of pure Germanic art . . . .”<sup>13</sup> Believing that the modern artistic sensibility led to a decline in morals, Hitler saw a direct correlation between the rise in artistic expression and the rise in political progressiveness.<sup>14</sup>

The Nazi regime carried out these acts with precision and efficiency.<sup>15</sup> A specialized unit, named the Einsatzstab Reichsleiter Rosenberg (hereinafter “ERR”), performed a substantial amount of the looting.<sup>16</sup> The ERR served a dual purpose. First, it found and took

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<sup>10</sup> FELICIANO, *supra* note 5, at 23.

<sup>11</sup> See Stephan J. Schlegelmilch, Note, *Ghosts of the Holocaust: Holocaust Victim Fine Arts Litigation and a Statutory Application of the Discovery Rule*, 50 CASE W. RES. L. REV. 87, 92 (1999) (providing examples of art pillaging across time).

<sup>12</sup> Owen C. Pell, *The Potential for a Mediation/Arbitration Commission to Resolve Disputes Relating to Artworks Stolen or Looted During World War II*, 10 DEPAUL-LCA J. ART & ENT. L. & POL’Y 27, 30 (1999); see also Spiegler, *supra* note 4, at 298.

<sup>13</sup> Kelly Ann Falconer, Comment, *When Honor Will Not Suffice: The Need for a Legally Binding International Agreement Regarding Ownership of Nazi-Looted Art*, 21 U. PA. J. INT’L ECON. L. 383, 394 (2000).

<sup>14</sup> See *id.*

<sup>15</sup> See generally Raymond J. Dowd, *Federal Courts and Stolen Art: Our Duty to History*, 55 FED. LAW 4, 4 (2008) (describing the “legal structure” the Nazis put in place to systematically dispossess Jews of their property). Nearly ten percent of Germany’s budget came from property stolen from Jews. *Id.*

<sup>16</sup> FELICIANO, *supra* note 5, at 35. Initially, Hitler divided this task between three competing groups: the Wehrmacht, the German diplomatic corps, and the ERR, which took orders directly from Nazi Party leader Alfred Rosenberg. *Id.* at 35-36. But eventually, with convincing by Reichmarschall Hermann Goering, the ERR became the Third Reich’s primary vehicle for seizing and confiscating art in Europe. *Id.* at 35; see also JOHN E. CONKLIN, ART CRIME 218-19 (Praeger Publishers 1994) (1994) (explaining Goering’s control over the ERR).

artworks the Nazis valued.<sup>17</sup> Second, it aimed to rid the German empire of so-called “degenerate art.”<sup>18</sup> Estimates place the value of the items looted by Nazis to be equal to the current fair market value of approximately 20.5 billion dollars.<sup>19</sup> The Third Reich’s ravages were not “a mere incident of war, but an official Nazi policy” – an imperative of the regime directed by Hitler himself.<sup>20</sup>

After the War, Allied troops attempted to return the looted items to their original owners, but many remained ownerless.<sup>21</sup> Nevertheless, many of these items found their way into the stream of commerce in the United States and around the world. Items began resurfacing in various art galleries, auction houses, private collections, and museums. Unfortunately, the Nazi regime’s displacement of numerous European cultural items resonates today, more than six decades later. Many Nazi victims and their descendants are still in the process of locating and reclaiming their family’s stolen cultural property, each with varying degrees of success.

With the declassification of government documents, globalization, advances in telecommunications, and increased interests in the subject matter by scholars, there has been an increase in legal

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<sup>17</sup> See Falconer, *supra* note 13, at 394.

<sup>18</sup> *Id.* “Degenerate” art encompassed several types of art Hitler despised, including modern art, FELICIANO, *supra* note 5, at 20-21, and art by Jewish artists or depicting Jewish subjects, Emily J. Henson, Comment, *The Last Prisoners of War: Returning World War II Art to Its Rightful Owners – Can Moral Obligations Be Translated into Legal Duties?*, 51 DEPAUL L. REV. 1103, 1105 (2002). Though the initial purpose in seizing “degenerate” art was to destroy it, *id.* at 1106, Nazi authorities soon realized its value in the marketplace, *see* Schlegelmilch, *supra* note 11, at 88.

<sup>19</sup> Spiegler, *supra* note 4, at 299 (citing Michael J. Bazzyler, *Nuremberg in America: Litigating the Holocaust in United States Courts*, 34 U. RICH. L. REV. 1, 161 (2000)).

<sup>20</sup> *Id.* at 298; *see also* FELICIANO, *supra* note 5, at 4 (“If Hitler . . . had not been interested in the arts, Nazi art looting would certainly not have been a war priority . . . .”); Barbara J. Tyler, *The Stolen Museum: Have United States Art Museums Become Inadvertent Fences for Stolen Art Works Looted by the Nazis in World War II?*, 30 RUTGERS L.J. 441, 447 (1999) (“At Hitler’s direction, the Third Reich looted and hoarded family collections and museums alike in fulfilling Hitler’s covetousness for fine art.”).

<sup>21</sup> Greg Bradsher, *Documenting Nazi Plunder of European Art*, THE RECORD, Nov. 1997, available at <http://www.archives.gov/research/holocaust/records-and-research/documenting-nazi-plunder-of-european-art.html>.

disputes to settle the ownership of Nazi-looted art.<sup>22</sup> Normally, these lawsuits consist of original victims, their heirs, or descendants charging museums, private owners, galleries, and others with possession of stolen goods because the cultural property was never returned to them in the aftermath of World War II. However, many of the Nazi-looted items were “acquired by good-faith purchasers who paid fair value for the artwork or received the artwork as a donation, as is often the case for a museum.”<sup>23</sup> Thus, the complexities of litigation primarily involve claims of good title. Also intertwined with these claims are the passionate feelings aroused by attachment to a work of art, as well as the overwhelming psychological implications of the atrocities of the Holocaust. These factors do not make litigation simple or short, and it is these considerations this article now addresses.

### III. COMPLEXITIES OF LITIGATING NAZI-LOOTED ART CASES

World War II invokes deep emotions for many people. As such, bringing claims for Nazi-looted art before a court necessarily implicates these emotions. Even though judges and juries try to be impartial, it is difficult not to feel some sort of emotional or psychological inclinations.<sup>24</sup> Due to these unique and complex circum-

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<sup>22</sup> See generally Robert Schwartz, *The Limits of the Law: A Call for a New Attitude Toward Artwork Stolen During World War II*, 32 COLUM. J. L. & SOC. PROBS. 1 (1998).

<sup>23</sup> Ralph E. Lerner, *The Nazi Art Theft Problems and the Role of the Museum: A Proposed Solution To Disputes Over Title*, 31 N.Y.U. J. INT’L L. & POL. 15, 15 (1998).

<sup>24</sup> Emotional feelings are often illustrated in court opinions through the choice of language. See *Menzel v. List*, 267 N.Y.S.2d 804, 820 (N.Y. Sup.Ct. 1966) (“In the case at bar, the underlying transaction was the looting, plunder and pillage by the Nazis, which was of the very essence of evil. . . . The law stands as a bulwark against the handiwork of evil, to guard to rightful owners the fruits of their labors.”); see also *Burger-Fischer v. Degussa AG*, 65 F. Supp. 2d 248, 285 (D.N.J. 1999) (“Every human instinct yearns to remediate in some way the immeasurable wrongs inflicted upon so many millions of people by Nazi Germany so many years ago, wrongs in which corporate Germany unquestionably participated.”); *In re Nazi Era Cases Against German Defendants Litig.*, 129 F. Supp. 2d 370, 389 (D.N.J. 2001) (“[I]f pure evil has ever existed, it was undeniably manifest in the conduct of the Nazi government and its corporate henchmen during the 1930s and 1940s. . . . No



stances, many commentators recommend resolution outside of the courtroom.<sup>25</sup>

In addition to the emotional ramifications of litigating Nazi-looted art cases, other significant factors make the resolution of these claims especially complex. One of the most influential reasons why commentators suggest parties settle is because of time. While typical disputes regarding title do not involve prolonged periods of time, thefts of Nazi-looted art occurred more than sixty years ago, and so locating the artwork can be extremely difficult.<sup>26</sup> Considering that the thefts occurred in a time of war, much of the artwork has since crossed many borders and has vanished without leaving any traces. The global transport of artwork, along with the lapse in time, has made efforts to find Nazi-looted artwork almost futile – that is, until the last decade.

From 1945 through 1995, only ten Holocaust-related suits were filed in American courts.<sup>27</sup> However, since 1995, with the growth of technology and global communication,<sup>28</sup> Nazi-looted art

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amount of money could ever restore life to the tens-of-millions whose lives were taken, or compensate the millions of survivors whose lives were destroyed.”).

<sup>25</sup> See *Distribution of Unclaimed or Heirless Property Left Over After the Holocaust*, House Comm. on Int. Relations, 105th Cong. (1998) (statement of Stuart Eizenstat, Undersecretary of State for Economic, Business, and Agriculture).

<sup>26</sup> Thomas Kline, *Neutrality, Morality, and the Holocaust: Recovery of Stolen Art Sold in the United States from a “Neutral” Country*, 14 AM. U. INT’L L. REV. 243, 245 (1998). This has become somewhat easier to do than in the past. See Spiegler, *supra* note 4, at 300. But see Benjamin E. Pollock, Comment, *Out of the Night and Fog: Permitting Litigation To Prompt an International Resolution to Nazi-Looted Art Claims*, 43 HOUS. L. REV. 193, 206 (2006) (“The art trade faces an uphill battle in any attempt at regulation, as art is highly mobile, easy to conceal, and difficult to trace.”); Spiegler, *supra* note 4, at 301 (arguing that building a successful claim still requires searching through a multitude of records); Lawrence M. Kaye, *Avoidance and Resolution of Cultural Heritage Disputes: Recovery of Art Looted During the Holocaust*, 14 WILLAMETTE J. INT’L L. & DISP. RESOL. 243, 256 (2006) (commenting on the high non-participation rate in a recent survey investigating museums’ potentially stolen holdings).

<sup>27</sup> Bazyler, *supra* note 19, at 7.

<sup>28</sup> Major museums are beginning to disseminate the inventory that they have to the public via internet postings, which specifically “identify artworks in their collections with gaps in provenance between 1933 and 1945.” Spiegler, *supra* note 4, at 301-02 (citing Celestine Bohlen, *Museums Accept Stronger Role in Search for Looted Art*, N.Y. TIMES, Nov. 30, 2000, available at <http://www.nytimes.com> (search “Museums accept stronger role” and select the “All Results Since 1851 tab)).

claims have increased dramatically. Primarily, the surge in claims is due to the new availability of documents worldwide. Prior to the collapse of the Soviet Union, the Cold War prevented access to basically all of the key records and documents concerning Nazi-looted art located within the Soviet Union.<sup>29</sup> Thus, hopes of finding stolen pieces of art were very low. However, the fall of communism in Eastern Europe shed new light on the whereabouts of many stolen pieces.<sup>30</sup> The previously concealed documents and records were exposed to the world. Similarly, many records kept by Allied forces from World War II were classified for many years. As one United States Congresswoman stated, “[f]ederal agencies have been permitted to keep certain information secret at the expense of families and researchers who are simply looking for closure and answers to questions that have plagued them for decades.”<sup>31</sup> As these records have started to become available to the world, some individuals and organizations have been able to begin tracking down their stolen items.<sup>32</sup> However, searching through the multitude of documents is difficult, even for the most efficient and skilled attorney.<sup>33</sup>

After locating a piece of artwork, claimants must establish the right to make a claim, which is often a difficult and complicated

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<sup>29</sup> Leah J. Weiss, Note, *The Role of Museums in Sustaining the Illicit Trade in Cultural Property*, 25 CARDOZO ARTS & ENT. L.J. 837, 866-67 (2007).

<sup>30</sup> Schlegelmilch, *supra* note 11, at 97 n.60 (citing Lynn H. Nichols, *Introduction to THE SPOILS OF WAR: WORLD WAR II AND ITS AFTERMATH* 47, 47 (Elisabeth Simpson ed. 1997) (1997) (“With the end of the Cold War and the opening up of Eastern Europe, it has become apparent that large numbers of works of art previously thought to be lost are, in fact, stored in repositories in countries of the former Soviet Union.”)).

<sup>31</sup> Rep. Carolyn Maloney, *quoted in* Joseph Altman, Jr., *Washington Briefing/A Weekly Report on People and Issues in the Nation's Capital/Unraveling Nazi War Crimes/President Set to Sign Bill Declassifying Documents*, NEWSDAY, Aug. 16, 1998, at A22.

<sup>32</sup> See Spiegler, *supra* note 4, at 301.

<sup>33</sup> The head of the department of curatorial records at the National Gallery of Art in Washington, D.C. noted, “[t]he very nature of World War II provenance research is interdisciplinary. It requires knowledge of art history, politics, the history of collections, and the locations of archival materials that document the movement of art, in addition to historical provenance research, a fairly specialized methodology in its own right.” Nancy H. Yeide, *Behind the Lines: Lessons in Nazi-Era Provenance Research*, MUSEUM NEWS, Nov./Dec. 2000, at 49.

task.<sup>34</sup> Because these paintings were stolen so long ago, they usually have a decorated trade history. As time passes, the likelihood that they can be identified by eyewitnesses fades. In order to prove a claim, or even to recognize the existence of one, claimants may have to check family records, governmental files, and auction records.<sup>35</sup> These sources of information may be hard to come by because, after the Second World War, Europe was in a state of uncertainty, and sources are likely scattered across borders.<sup>36</sup> Furthermore, the “negligence by purchasers or donees in researching title [to the artwork] propels these works of art through the marketplace.”<sup>37</sup>

There are also the financial burdens that claimants must bear. Litigating Nazi-looted art claims is prohibitively expensive.<sup>38</sup> Plaintiffs must first track down the missing work,<sup>39</sup> and they must assemble enough evidence to show proper ownership.<sup>40</sup> These series of events can take years to litigate – some have lasted a decade, or

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<sup>34</sup> Kaye, *supra* note 26, at 256. Today, heirs and descendants will typically assert a claim for artwork or other items, and they may have trouble gaining access to records, documentation, and other material that can factually establish ownership. *See id.* Those claimants are also unlikely to have meaningful personal knowledge about the artwork’s ownership and provenance, Spiegler, *supra* note 4, at 302, and may only have a vague notion of what the piece even looks like. Indeed, many second- and third-generation heirs may be “entirely unaware of what their ancestors once owned and the legal rights . . . that are attached to it.” Henson, *supra* note 18, at 1147.

<sup>35</sup> Stephanie Cuba, Note, *Stop the Clock: The Case to Suspend the Statute of Limitations on Claims for Nazi-Looted Art*, 17 CARDOZO ARTS & ENT. L.J. 447, 461–62 (1999); *see also* Spiegler, *supra* note 4, at 302.

<sup>36</sup> *See* Cuba, *supra* note 35, at 462 (citing Constance Lowenthal, Remarks at The Holocaust: Moral & Legal Issues Unresolved 50 Years Later (Feb. 9, 1998) (transcript on file with the Cardozo Law Review)).

<sup>37</sup> *Id.* at 450-51.

<sup>38</sup> Bazzyler, *supra* note 19, at 183; *see also* ISABELLE FELLRATH GAZZINI, CULTURAL PROPERTY DISPUTES: THE ROLE OF ARBITRATION IN RESOLVING NON-CONTRACTUAL DISPUTES 57-58 (2004) (enumerating some of the costs of a typical art restitution action); *accord* Kelly Crow, *The Bounty Hunters*, WALL ST. J., Mar. 23 2007, at W1 (the heirs to artwork entitled *Adele Bloch-Bauer I* recently sold four other recovered paintings for \$192 million, but had to pay their attorney \$100 million).

<sup>39</sup> *See* Dowd, *supra* note 15, at 5 (“[I]t has become extremely expensive to research these questions, involving, as it does, hiring expensive historians in multiple jurisdictions to search for a needle in the proverbial haystack.”).

<sup>40</sup> *See* Spiegler, *supra* note 4, at 298; Henson *supra* note 18, at 1120; Kaye *supra* note 26, at 256.

longer.<sup>41</sup> Thus, the cost of regaining the artwork increases substantially as the years drag on.<sup>42</sup> Consequently, it is highly likely that claimants, even successful ones, will end litigation with significant expenses.<sup>43</sup> In fact, some experts suggest that “claimants must be prepared to spend at least \$100,000 in costs just to begin litigation.”<sup>44</sup> Some lawyers who specialize in art claims suggest that “if the artwork is worth less than three million dollars, the work should be given up” rather than having the heirs expend “exorbitant sums on retrieval efforts.”<sup>45</sup> Such a suggestion seems surprising, but actual results have confirmed its truth. For example, a Connecticut claimant spent nearly \$10.4 million to recover stolen artworks worth about \$22 million.<sup>46</sup> Costs can reach dismal proportions even for those parties who choose to settle. One recent settlement was reportedly “just enough to cover the costs of litigation.”<sup>47</sup>

A final problem with litigating these claims is that public trials can be harmful to the artwork itself and to the parties involved in the dispute.<sup>48</sup> In addition to tainting the artworks’ merchantability, the dispute casts doubt on the “credibility, reliability and reputation of the parties involved” in its acquisition.<sup>49</sup>

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<sup>41</sup> See, e.g., Carol Kino, *Stolen Artworks and the Lawyers Who Reclaim Them*, N.Y. TIMES, Mar. 28, 2007, at H28.

<sup>42</sup> See GAZZINI, *supra* note 38, at 58 (describing the costs incurred during the “years until a final decision is issued”).

<sup>43</sup> See Jennifer Kreder, *Nazi-Looted Art: Should It Be Returned at All Costs?*, Address at the Association for the Study of Law, Culture, and the Humanities Conference, sponsored by University of Texas (2005); see also Raymond Dowd, *Attacks on Owners of Stolen Art*, COPYRIGHT LITIGATION BLOG, Jan. 10, 2009, <http://copyrightlitigation.blogspot.com/2009/01/attacks-on-owners-of-stolenart.html>; accord Minyard, *supra* note 2, at 116.

<sup>44</sup> Tyler, *supra* note 20, at 444.

<sup>45</sup> *Id.* at 444-45.

<sup>46</sup> Carol Vogel, *Recovered Artworks Heading to Auction*, N.Y. TIMES, Feb. 22, 2007, at E1.

<sup>47</sup> Spiegler, *supra* note 4, at 303 (discussing the Goodman litigation discussed *infra* note 97).

<sup>48</sup> GAZZINI, *supra* note 38, at 57-58.

<sup>49</sup> *Id.* at 56-57; see, e.g., Adler v. Taylor, No. CV 04-8472 (RGK), 2005 U.S. Dist. LEXIS 5862 (C.D. Cal. Feb. 2, 2005) (dismissing a claim against actress, Elizabeth Taylor, for return of Nazi-looted art); see also Linda Greenhouse, *Elizabeth Taylor to Keep Van Gogh*, N.Y. TIMES, Oct. 30, 2007, at E2.

In the end, even though Nazi-looted art claims are on the rise, the art remains difficult to reclaim and defend because of a myriad of factors, which, when aggregated, make litigation unattractive and ineffective. This situation threatens the entire purpose of implementing public policy to restore the works of art to their proper places. Not only does the impact of litigation costs undermine the “restorative-justice”<sup>50</sup> reasons for making these claims easier to bring, but also, the high costs discourage claimants from bringing claims in the first place. One must admit that parties likely think about the cost of filing suit first, and will not litigate if it is not economically justified.<sup>51</sup> Unsurprisingly, the expensive litigation costs associated with Nazi-looted art restitution efforts tend to “yield[ ] far fewer results than efforts to reconstitute other assets, such as other property and financial holdings.”<sup>52</sup> Reducing litigation costs is critical to ensuring effective and meaningful resolutions.<sup>53</sup> While numerous corrective solutions have been proposed and implemented, the litigation system is still as inadequate as it was prior to the proposals. The next section focuses on the chaos that plagues Nazi-looted art cases, and why piling legislation upon legislation is not an effective means to achieve the ultimate goals of restorative-justice.

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<sup>50</sup> Lauren Fielder Redman, *The Foreign Sovereign Immunities Act: Using a “Shield” Statute As a “Sword” for Obtaining Federal Jurisdiction in Art and Antiquities Cases*, 31 *FORDHAM INT’L L.J.* 781, 785 (2008); see also Anne-Marie Rhodes, *On Art, Theft, Tax, and Time: Triangulating Ownership Disputes Through the Tax Code*, 43 *SAN DIEGO L. REV.* 495, 525 (2006).

<sup>51</sup> See David H. Isaacs, *The Highest Form of Flattery? Application of the Fair Use Defense Against Copyright Claims for Unauthorized Appropriation of Litigation Documents*, 71 *MO. L. REV.* 391, 443 (2006) (“Where the transaction costs associated with seeking restitution are greater than the amount the harmed party can be expected to obtain from a lawsuit, the injured party will deem it economically inefficient to sue in order to obtain restitution.” (internal citations omitted)).

<sup>52</sup> Weiss, *supra* note 29, at 870 (2007).

<sup>53</sup> Cf. Isaacs, *supra* note 51, at 443, (noting that “society as a whole obtains a benefit from increasing the number of parties that can obtain restitution,” a number which can be increased by lowering transaction costs).

**IV. PRIOR SOLUTIONS HAVE PROVEN  
INSUFFICIENT: THE INTERNAL REVENUE CODE AS  
A SOLUTION**

For one reason or another, Nazi-looted art cases seem to implicate international factors in our minds, whether it is the circumstances of World War II, illicit global trade in art, or the widespread emotional and political sentiment toward Nazi victims. Regardless of the reasons, Nazi-looted art cases are not actually an issue that international politics will ever be able to solve. The events of World War II occurred six decades ago, and many of the claims that arise are on an individual basis, not on a governmental or international political scale.<sup>54</sup> A myriad of proposed and enacted international rules, guidelines, and legislation have attempted to address the claims of original owners, heirs, and descendants for the return of Nazi-looted art and other items. However, the bulk, if not all, of the solutions have proven ineffective for numerous reasons.

*A. Ineffectiveness of International Agreements*

The first international agreement that attempted to govern the restitution of Nazi-looted art claims was the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 1954 (hereinafter "the Hague Convention").<sup>55</sup> The Hague Convention was created to "add teeth" to the policy of restitution by providing criminal penalties.<sup>56</sup> However, the drawback of the Hague Convention was that it only applied to the military.<sup>57</sup> Thus, it is of very little use – aside from providing policy arguments – to civil litigants.

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<sup>54</sup> *But see* Republic of Austria v. Altmann, 541 U.S. 677, 688-702 (2004) (holding that an exception in the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1602-11 (2000), to the general grant of sovereign immunity found therein (and in prior case law) applied to the Plaintiff's claim against the state of Austria for return of Nazi-stolen art located in an Austrian state-owned museum).

<sup>55</sup> Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 240 [hereinafter Hague Convention]; *see also* John Henry Merryman, *Two Ways of Thinking About Cultural Property*, 80 AM. J. INT'L L. 831, 835 (1986).

<sup>56</sup> Claudia Caruthers, Comment, *International Cultural Property: Another Tragedy of the Commons*, 7 PAC. RIM L. & POL'Y J. 143, 148 (1998).

<sup>57</sup> Lisa J. Borodkin, Note, *The Economics of Antiquities Looting and a Proposed Legal Alternative*, 95 COLUM. L. REV. 377, 388 (1995).

In 1970, a new solution to Nazi-looted art claims and other cultural pillaging was proposed, known as The UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property of 1970.<sup>58</sup> The UNESCO Convention contained a broader set of guidelines and rules than the Hague Convention, and focused on remedies for civil claimants.<sup>59</sup> Nevertheless, like its predecessors, the UNESCO Convention has been criticized for its limited enforceability.<sup>60</sup> The enforcement problems associated with the UNESCO convention made it undesirable for many states to sign immediately.<sup>61</sup>

Due to the shortcomings of the UNESCO Convention, the International Institute for the Unification of Private Law authored another treaty, the UNIDROIT Convention on Stolen or Illicitly Exported Cultural Objects.<sup>62</sup> The UNIDROIT Convention allowed for individual causes of action and harmonized substantive rules governing claims.<sup>63</sup> Yet, the major drawback of the UNIDROIT Convention is that it provides a fifty-year statute of limitations, thus precluding any claims arising from the Nazi era.<sup>64</sup>

The ability to create comprehensive binding international agreements that are enforceable across the global community has proven extremely difficult. Thus, the United States took an alternative approach and utilized a non-binding agreement. The 1998 Washington Conference on Holocaust-Era Assets focused on “procedures to be adopted by states to facilitate the resolution” of Holocaust-era disputes.<sup>65</sup> However, since the Conference was a non-

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<sup>58</sup> Lyndel V. Prott, *Responding to World War II Art Looting*, in RESOLUTION OF CULTURAL PROPERTY DISPUTES/PEACE PALACE PAPERS 134 (2004).

<sup>59</sup> Borodkin, *supra* note 57, at 389 (explaining that unlike the Hague Convention, which only applied to the military, the UNESCO Convention granted countries the ability to enter into agreements that enabled them to bring claims for stolen art and antiquities in foreign jurisdictions).

<sup>60</sup> GAZZINI, *supra* note 38, at 47 (stating that the Convention only provides “extremely limited, counterproductive, when not altogether inappropriate,” means of enforcement).

<sup>61</sup> See Borodkin, *supra* note 57, at 389 (stating that England, Switzerland, Germany, Japan, the Netherlands and France have never ratified); GAZZINI, *supra* note 38, at 45-46.

<sup>62</sup> Tyler, *supra* note 20, at 464.

<sup>63</sup> See *id.*

<sup>64</sup> *Id.* at 464-65.

<sup>65</sup> Prott, *supra* note 58, at 135. At the conference, it was suggested that countries

binding agreement, the guidelines adopted by the representatives of the more than forty countries and organizations in attendance carry no binding legal effect.<sup>66</sup> Rather, the guidelines represent a general political and social stance toward the restitution of Holocaust-Era assets. As the non-binding nature of the Conference made the establishment of a uniform approach very difficult, participants were satisfied with “general goals and guidelines” encouraging claimants to “come forward.”<sup>67</sup> Nevertheless, the Conference itself stands as a general policy toward a theory of restorative-justice.

Scholars, commentators, politicians, and others have consistently argued for international solutions, such as arbitration and mediation, as alternatives to litigation to restore Nazi-looted art to its rightful owners.<sup>68</sup> However, the proposed solutions have ignored key facts. First, the use of international arbitration or mediation commissions is only available when both parties to the case consent to jurisdiction.<sup>69</sup> Furthermore, even if parties consented to the international jurisdiction, binding international agreements governing stolen art have a fifty-year record of failure, a shortcoming even their advocates acknowledge.<sup>70</sup>

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publish lists of stolen or wrongfully appropriated cultural property, search for possible owners, and return the items in question to the appropriate agencies or bodies when successors in title could not be identified. *Id.*

<sup>66</sup> Benjamin E. Pollock, Comment, *Out of the Night and Fog: Permitting Litigation To Prompt an International Resolution to Nazi-Looted Art Claims*, 43 HOUS. L. REV. 193, 204-05 (2006).

<sup>67</sup> Kreder, *supra* note 9, at 170-71.

<sup>68</sup> See, e.g., Lerner, *supra* note 23, at 36 (proposing a “restitution commission” to settle such disputes); Claudia Fox, *The UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects: An Answer to the World Problem of Illicit Trade in Cultural Property*, 9 AM. U.J. INT’L L. & POL’Y 225, 265 (1993) (proposing retroactive application of the UNIDROIT Convention); Pell, *supra* note 12, at 28 (proposing creation of an international commission to facilitate mediation and arbitration); Rebecca L. Garrett, *Time for a Change?: Restoring Nazi-looted Artwork to Its Rightful Owners*, 12 PACE INT’L L. REV. 367, 392 (2000) (arguing for an international solution to Nazi-looted art).

<sup>69</sup> See Norman Palmer, *Statutory, Forensic and Ethical Initiatives in the Recovery of Stolen Art and Antiquities*, in THE RECOVERY OF STOLEN ART 1, 268, 279 (Norman Palmer ed., 1998) (arguing that international agreements need consent, either from the parties in the case of arbitration or of their governments for binding international agreements to be workable at all).

<sup>70</sup> Nathan Murphy, *Splitting Images: Shared-Value Settlement in Nazi-era Art*



There is an even more omnipresent issue regarding international commissions: time. Setting up international arbitration, mediation, or binding international protocols is a costly and time-consuming undertaking.<sup>71</sup> While costs are always of concern to parties in litigation, international tribunals do not resolve monetary issues involved with Nazi-era cases. In the context of Nazi-looted art cases, in which evidence and witnesses may not be readily available, time is an important factor. “[A]s the lifespan of remaining generations of Holocaust survivors nears its end, pressing time constraints create urgency.”<sup>72</sup> Resolving claims can depend on highly individualized facts, and so many scholars and commentators have advocated for inter-national agreements. However, because of the “international feel” of Nazi-looted art cases, it is simply unrealistic to rely on them to effectively solve claims.

#### ***B. Domestic Regulation and Resolution***

Instead of focusing on international agreements to resolve claims for Nazi-looted art, the United States should concern itself with domestic legislation. It is already apparent that the primary parties to litigation of Nazi-looted art claims in the United States are museums and individuals, not (foreign) government agencies.<sup>73</sup> In addition, unlike the illicit trade in antiquities, there is little political

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*Restitution Claims* 13 (June 26, 2009) (unpublished article, available at [http://works.bepress.com/nathan\\_murphy/](http://works.bepress.com/nathan_murphy/)) (citing Jennifer Anglim Kreder, *Reconciling Individual and Group Justice with the Need for Repose in Nazi-Looted Art Disputes*, 73 BROOK. L. REV. 155, 163, 174 (2007) (discussing the failure of other international agreements to reach meaningful results)).

<sup>71</sup> See Pollock, *supra* note 66, at 230 (noting that binding agreements require participation not only from governments, but also from “museums, auction houses, and dealers both at home and abroad”).

<sup>72</sup> Shira T. Shapiro, Case Note, *How Republic of Austria v. Altmann and United States v. Portrait of Wally Relay the Past and Forecast the Future of Nazi Looted-Art Restitution Litigation*, 34 WM. MITCHELL L. REV. 1147, 1149 (2008).

<sup>73</sup> See Pollock, *supra* note 66, at 204-05; see generally Stephen W. Clark, *Selected World War II Restitution Cases*, A.L.I.-A.B.A., COURSE OF STUDY MATERIALS, LEGAL PROBLEMS OF MUSEUM ADMINISTRATION 217 (2005); Associated Press, *N.Y. Man Returns Nazi-looted Art Hanging in His Room*, May 7, 2009, available at <http://abcnews.go.com/US/wireStory?id=7522164>; Catherine Hickley, *Thousands of Nazi-Looted Works Are Held by Museums, Survey Says*, BLOOMBERG PRESS, Apr. 27, 2007, [http://www.bloomberg.com/apps/news?pid=20601088&refer=muse&sid=aTk1ztqGBb\\_I](http://www.bloomberg.com/apps/news?pid=20601088&refer=muse&sid=aTk1ztqGBb_I).

involvement on either side. Thus, it makes little sense to address the current situation through an international stance.

In recognition of the growing complexities plaguing Nazi-looted art claims in the United States, Congress passed the U.S. Holocaust Assets Commission Act in 1998 – the same year as the Washington Conference. The Act created a 21-member commission whose main duties involve developing a thorough “historical record of the collection and disposition of the assets” of Holocaust victims in the event the assets ever come into the “possession or control of the [f]ederal government.”<sup>74</sup> The Commission had a two-fold purpose: first, to make Americans aware of how their government deals with Holocaust-era looted art in conjunction with “the moral imperative to remember, and learn from, the darkest period in modern times”; and second, to provide assistance to Holocaust-looted art claimants with the recovery of their stolen property.<sup>75</sup> However, the purpose and effect of the Commission have been questioned.<sup>76</sup> To date, the Commission has only disseminated reports containing some recommendations, which have “broke[n] little new ground” and are considered by some to be “a lost opportunity to provide definite answers” to questions regarding these claims.<sup>77</sup>

Although the Commission and the Washington Conference have not made great strides in the area of Holocaust-era art restitution, the policy implications speak greatly to the public attitude toward Nazi-looted art. In fact, there has been an influential effect of the policy within the non-profit organization community, primarily with museums. The policy toward restitution efforts of Nazi-looted art, bolstered formally by the United States government in the Washington Conference and Presidential Advisory Commission, has influenced both the development of museums’ codes of ethics,<sup>78</sup> and the promulgation of guidelines addressing Nazi-looted assets.<sup>79</sup>

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<sup>74</sup> 22 U.S.C. § 1621(3)(a)(1) (1998).

<sup>75</sup> PACHA, *supra* note 6.

<sup>76</sup> See Murphy, *supra* note 70, at 15.

<sup>77</sup> Ralph Blumenthal, *Panel on Nazi Art Theft Fell Short, Experts Say*, N.Y. TIMES, Mar. 3, 2003, at E1.

<sup>78</sup> See MARILYN E. PHELAN, MUSEUM LAW: A GUIDE FOR OFFICERS, DIRECTORS AND COUNSEL 460 (Kalos Kapp Press 2001) (1994).

<sup>79</sup> See Michael J. Bazylar & Amber L. Fitzgerald, *Trading with the Enemy: Holocaust Restitution, the United States Government, and American Industry*, 28 BROOK. J. INT’L L. 683, 710 (2003) (referencing the Washington Conference in stating that

The two primary self-regulations guiding museums' restitution efforts are the Report of the American Association of Museum Directors Task Force on the Spoliation of Art during the Nazi/World War II Era<sup>80</sup> and the American Association of Museums' Guidelines Concerning the Unlawful Appropriation of Objects During the Nazi Era.<sup>81</sup> The overall policy goal of these regulations is to uphold the ethical and educational purposes of museums, and to provide equitable restitution of disputes involving Nazi-looted art.<sup>82</sup> Irrespective of their legally unenforceable nature, these guidelines collectively provide necessary instruction for museums to navigate the myriad of legal doctrines and laws – often inconsistently applied – that govern Nazi-looted art litigation. Furthermore, because no single law governs the return of art confiscated by the Nazis during the Holocaust, it is fortunate that leading museum organizations in the United States have promulgated guidelines to aid museum employees in properly navigating provenance issues.

While the guidelines promulgated by the AAM and AAMD are an ethical milestone in the effort to recover Nazi-looted art, the actual recovery of the art itself is all but plain. In fact, neither the AAM nor the AAMD require museums to return artwork to the claimant, even if the claimant has fool-proof evidence. Rather, the AAM proposes that museum's "should seek other methods than

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"[t]he worldwide movement to recover Nazi-looted art also has its roots in the United States"). Cf. Videotape: Edward Luby, Cultural Property and Asset Repatriation (The Judah L. Magnes Museum Apr. 22, 2007), *available at* [http://fora.tv/2007/04/22/Cultural\\_Property\\_and\\_Asset\\_Repatriation](http://fora.tv/2007/04/22/Cultural_Property_and_Asset_Repatriation) (revealing that there has been "a striking change in the last 20 years" regarding the growing importance of the law in day-to-day museum activities).

<sup>80</sup> ASSOCIATION OF ART MUSEUM DIRECTORS, REPORT OF THE AAMD TASK FORCE ON THE SPOILIATION OF ART DURING THE NAZI/WORLD WAR II ERA (1998), <http://www.aamd.org/papers/guide1n.php> [hereinafter AAMD].

<sup>81</sup> See AMERICAN ASSOCIATION OF MUSEUMS, GUIDELINES CONCERNING THE UNLAWFUL APPROPRIATION OF OBJECTS DURING THE NAZI ERA (2001), [http://www.aam-us.org/museumresources/ethics/nazi\\_guidelines.cfm](http://www.aam-us.org/museumresources/ethics/nazi_guidelines.cfm).

<sup>82</sup> See ASSOCIATION OF ART MUSEUM DIRECTORS, ART MUSEUMS AND THE IDENTIFICATION AND RESTITUTION OF WORKS STOLEN BY THE NAZIS 4 (2007), [http://www.aamd.org/papers/documents/Nazi-lootedart\\_clean\\_06\\_2007.pdf](http://www.aamd.org/papers/documents/Nazi-lootedart_clean_06_2007.pdf) (describing member museums' mission to "serve the public through art and education" and noting that museums' directors remain accountable "to their trustees, staff, donors, and community for ensuring that museums fulfill their public service mission and reinforce the leadership position of museums as cultural and educational resources").

litigation (such as mediation)” when a claimant has sufficient evidence to establish ownership.<sup>83</sup> The AAMD suggests that mediation should be used when necessary, and that “the museum should offer to resolve the matter in an equitable, appropriate, and mutually agreeable manner.”<sup>84</sup> Neither set of guidelines calls for the immediate return of the illicit artwork. Instead, the solution is merely to seek an alternative to litigation, which would ultimately result in a loss for the museum.

From the prior discussion, it is evident that the main element weaving the legislation and regulations together in both the international and domestic context is the policy of restorative-justice. Lawmakers have been utterly concerned with providing avenues for claimants to bring their claims, all the while forgetting about the legal and factual circumstances surrounding the claims. In addition, museums and individuals will likely be quite unwilling to part with the artwork because of the monetary investment in the piece. Thus, the mere ability to bring a claim does little to help reconstitute the artwork speedily and efficiently. Furthermore, the legislation ignores the equitable adjustments that must be made in these contexts. Nazi-looted art cases do not present a typical thief/victim scenario; nor do they present a typical good-faith/bad-faith purchaser scenario.<sup>85</sup> The factual circumstances in Nazi-looted art cases mandate an approach that recognizes the equitable and legal rights of the victim *and* the good-faith purchaser. In addition, parties should not be left at a disadvantage when neither party has committed any wrongdoing. These two critical concepts are what international and domestic legislation have constantly ignored.

With so much legislation doing so little, it is time for a new approach to the Nazi-looted art situation. The original owner of the artwork in these situations was often the victim of outright looting by the Nazi regime during World War II, or an unwilling participant in

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<sup>83</sup> See AMERICAN ASSOCIATION OF MUSEUMS, *supra* note 81.

<sup>84</sup> ASSOCIATION OF ART MUSEUM DIRECTORS, *supra* note 80.

<sup>85</sup> Some may argue that it is difficult to justify treating the Holocaust as a unique historical event deserving special treatment. The problem of wartime looting of art is not new. However, despite these concerns, the sheer magnitude of the Holocaust mandates a unique approach. “The number of people affected, the amount of art taken, the value of the art taken, and the countries involved make this atypical and require a holistic solution.” Schwartz, *supra* note 22, at 2 n.7.

a forced sale. Alternatively, the good-faith purchaser innocently bought the artwork or received it through donation unaware of the work's disheartening past. When the courts are forced to choose between these two innocent parties, it hardly seems that justice is being given its full effect.

The Internal Revenue Code can provide an effective solution to the dilemma, and at the same time, use of the Code furthers the all-important policies that prior legislation and regulations have attempted to accomplish, but in a much simpler form. More significantly, the tax Code provides a neutral basis by which to resolve private Nazi-looted art cases, thereby encouraging parties to avoid litigation. The remainder of this article explores the means through which the tax Code can achieve these policy objectives and the potential role that the government may play in achieving these goals.

#### **V. SECTION 170 AND SECTION 501(C)(3): THE SOLUTION PROVIDED BY THE TAX CODE**

##### ***A. An Introduction: The Interplay Between Sections 170 and 501(c)(3)***

Section 501(c) of the Federal Internal Revenue Code (2009) generally provides tax-exempt status to certain organizations.<sup>86</sup> For purposes of this article, the focus is on section 501(c)(3), which grants non-profit organizations an exemption from the federal income tax. Section 501(c)(3) organizations include "corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes."<sup>87</sup> Although there is scant documented congressional history to explain Congress's decision to grant tax-exempt status to certain organizations, courts and commentators have taken it upon themselves to explain the basis for tax-exemption. The widely accepted theory is that tax-exempt status is granted to encourage activities that are "recognized as inherently meritorious and conducive to the general welfare."<sup>88</sup> The United

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<sup>86</sup> I.R.C. § 501 (2009).

<sup>87</sup> I.R.C. §501(c)(3) (2009).

<sup>88</sup> David A. Brennan, *Charities and the Constitution: Evaluating the Role of Constitutional Principles in Determining the Scope of Tax Law's Public Policy Limitation for Charities*, 5 FLA. TAX REV. 779, 845 (2002) (quoting JAMES J. FISHMAN ET AL., *NONPROFIT ORGANIZATIONS: CASES AND MATERIALS* 316 (Foundation Press 1995) (internal citations omitted)).

States Supreme Court has also espoused a version of this theory. In *Bob Jones University v. United States*,<sup>89</sup> the Court noted that, “in enacting . . . § 501(c)(3), Congress sought to provide tax benefits to charitable organizations, to encourage the development of private institutions that serve a useful public purpose . . . .”<sup>90</sup>

Undeniably, museums and other similar organizations that operate for charitable and educational purposes fall under the characterization provided in section 501(c)(3), thereby providing them tax-exempt status.<sup>91</sup> Working in conjunction with section 501(c)(3) is section 170 of the Code, which provides individuals with advantageous tax deductions for contributions to section 501(c)(3) organizations.<sup>92</sup> Section 170 encourages donation to these organizations by allowing donors to deduct contributions representing up to 50% of the donor’s adjusted gross income.<sup>93</sup>

Understandably, 501(c)(3) status for charities and the related section 170 deduction for donors are important to many charitable groups. Some individuals will not give to a charity if it does not have 501(c)(3) status, as no tax deduction would be allowed. Loss of this status can therefore be harmful, if not fatal, to a charity’s existence. In addition, section 501(c)(3) organizations must be aware of the possibility of having their tax-exempt status revoked if they engage in actions that influence legislation or fail to serve a public purpose, and the organization must make sure that no part of their net earnings inure to the benefit of any private party.<sup>94</sup>

The system of donations and deductions set up by the tax Code provides a context in which to resolve Nazi-looted art disputes without the need for litigating the issues in the court system. Allowing an individual to donate the Nazi-looted artwork to a section 501(c)(3) organization, which would either keep the item with the claimants consent or return it to the person claiming it as their own, would reduce the costs and time that it takes to successfully -

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<sup>89</sup> 461 U.S. 574 (1983).

<sup>90</sup> *Id.* at 587-88.

<sup>91</sup> Stefanie H. Roth, Solomon R. Guggenheim Foundation, *Museum Relationships with For-Profits*, ALI-ABA COURSE OF STUDY MATERIALS: LEGAL ISSUES IN MUSEUM ADMINISTRATION (2006), available at [http://files.ali-aba.org/thumbs/datastorage/skoobesruoc/pdf/CL077\\_chapter\\_05\\_thumb.pdf](http://files.ali-aba.org/thumbs/datastorage/skoobesruoc/pdf/CL077_chapter_05_thumb.pdf).

<sup>92</sup> I.R.C. § 170(b) (2009).

<sup>93</sup> See I.R.C. § 170(b) (2009).

<sup>94</sup> I.R.C. § 501(c)(3) (2009).

and efficiently – solve the dispute. As of today, only one Nazi-looted art dispute has looked to the tax Code for a solution, *Goodman v. Searle*.<sup>95</sup> *Searle* illustrates that there are advantages to settling Nazi-era artwork disputes out of court. Particularly, this case illustrates the ability of the Internal Revenue Code to advance public policy, while at the same time, allowing two innocent parties to avoid a detrimental loss.<sup>96</sup>

**B. The Test Case: *Goodman v. Searle***

Daniel C. Searle purchased a Degas pastel-over-monotype, *Landscape with Smokestacks*, for \$850,000 in July 1987.<sup>97</sup> A New York art dealer informed the Art Institute of Chicago of the availability of the Degas.<sup>98</sup> The Art Institute arranged for Mr. Searle to view the Degas at the apartment of its then-current owner.<sup>99</sup> Then, the landscape was sent to the Art Institute for inspection.<sup>100</sup> The artwork received a “clean bill of health.”<sup>101</sup> In 1994, Mr. Searle loaned the Degas to the Metropolitan Museum of Art in New York for an exhibition.<sup>102</sup> In 1995, Mr. Searle received a letter of “demand for return” from the grandsons of Friedrich and Louise Gutmann, who perished at the hands of the Nazis during the Holocaust.<sup>103</sup> They saw the catalogue for the exhibition and recognized the work as one that had belonged to their grandparents.<sup>104</sup> The heirs claimed that their grandparents sent the painting to Paris for safekeeping during World War II.<sup>105</sup> The family believed that Soviet troops had taken the artwork to Russia at the conclusion of the War and had “hoped to find informa-

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<sup>95</sup> Rhodes, *supra* note 50, at 505-06.

<sup>96</sup> *Goodman v. Searle*, No. 96-C6459, (N.D. Ill. 1996).

<sup>97</sup> Rhodes, *supra* note 50, at 504 (citing HOWARD J. TRIENENS, *LANDSCAPE WITH SMOKESTACKS* (Northwestern University Press 2000)).

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* at 504-05.

<sup>105</sup> Kevin M. Williams, *Degas Settlement Lands in Uncharted Territory*, CHI. SUN-TIMES, Aug. 16, 1998, at 43, available at <http://www.museum-security.org/reports/05098.html>.

tion about it after 1991 when the Soviet Union collapsed” and archived information became available.<sup>106</sup>

Mr. Searle, however, claimed that the family had sold the Degas because they were suffering financially during the War, but no proof of sale existed.<sup>107</sup> Searle also argued that the applicable statute of limitations barred the heirs’ claims.<sup>108</sup> He argued that if they had been more diligent in their search, instead of waiting until the fall of the Soviet Union, they would have learned of the artwork’s whereabouts well before its sale to him.<sup>109</sup> With their aunt, Lili Gutmann, the grandsons sued Daniel Searle in July 1996 for return of the Degas.<sup>110</sup> The controversy was highly publicized by both print and broadcast media.<sup>111</sup> The Degas was valued at approximately \$1,100,000.<sup>112</sup> Two years after the original filing of the suit, the parties, on the eve of trial, settled their dispute via section 501(c)(3) and section 170 of the Internal Revenue Code.<sup>113</sup>

The settlement agreement provided that Lili Gutmann, Nick Goodman, Simon Goodman, and Daniel Searle would transfer his or her respective ownership interest in the artwork to the Art Institute of Chicago.<sup>114</sup> Mr. Searle’s transfer of ownership would constitute a donation to a section 501(c)(3) organization, which would qualify as a

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<sup>106</sup> Spiegler, *supra* note 4, at 303.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*; Bazyley, *supra* note 19, at 169. Searle argued that the Goodmans should have known about the Degas’s presence in the United States because of the publication of two books (in 1968 and 1974) that included information regarding the Degas, and because of three exhibits at college museums (in 1965, 1968, and 1974) that featured the Degas. *Id.* at 169 n.685. The plaintiffs claimed that they reported the loss of the artwork immediately after the War to the Allied Forces, government officials in Germany, France, and Holland, Interpol, art experts and the International Foundation for Art Research. *Id.* at 170 n.686.

<sup>110</sup> Rhodes, *supra* note 50, at 505 (citing TRIENENS, *supra* note 97, at 27-28).

<sup>111</sup> *Id.* at 505 n.37 (“Print media included articles in the *Los Angeles Times*, the *Washington Post*, the *Chicago Tribune*, the *Boston Globe*, *ART News*, and *Chicago Magazine*. The story was broadcast on National Public Radio, the CBS program *60 Minutes*, and on public television.” (citing TRIENENS, *supra* note 97, at 28-34)).

<sup>112</sup> *Id.* at 505 (citing TRIENENS, *supra* note 97, at 12).

<sup>113</sup> *Id.* (citing TRIENENS, *supra* note 97, at 86, 93).

<sup>114</sup> *Id.* (citing TRIENENS, *supra* note 97, at 93-94). Lili Gutmann, Nick Goodman, and Simon Goodman would own half of the artwork and Mr. Searle would hold ownership over the other half. *See id.*



tax deduction for him under section 170.<sup>115</sup> The artwork was appraised at \$487,500.<sup>116</sup> Mr. Searle used the appraisal and claimed a charitable deduction of \$243,750 under section 170 for his one-half interest in the artwork.<sup>117</sup> The other parties sold their interest to the Art Institute of Chicago.<sup>118</sup> “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.”<sup>119</sup>

Although the parties and the Institute clearly benefited from the transaction, the heirs felt that the outcome was bittersweet. “Both sides spent a ton of money . . . . It was a terrible waste, in a way . . . . We’re hoping this could be a landmark case that would show other families one way to do it, so that they don’t have to go through what we did.”<sup>120</sup>

### 1. The Benefits and Ingenuity of the Transaction

The settlement in *Goodman v. Searle* was novel in that it allowed both sides to emerge without a total loss. In 1987, Mr. Searle paid \$850,000 for the Degas, and when he transferred his ownership interest to the Art Institute in 1998, he received a \$243,750 charitable deduction.<sup>121</sup> Likewise, the Goodman heirs were able to take ownership of the artwork and sell their interest in it to the Art Institute. In all, the dispute over who had legal title to the artwork was a minimal concern as long as both parties benefited from the transaction. In fact, it is true that Mr. Searle clearly suffered a monetary loss on the artwork. However, the Gutmann heirs also suffered a loss because

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<sup>115</sup> *Id.*

<sup>116</sup> *Id.* at 506 (citing TRIENENS, *supra* note 97, at 94-96). The final appraisal price was based upon two separate appraisals that were averaged. *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> Williams, *supra* note 105, at 43 (statement of Nick Goodman, one of the heirs). The Goodman family initiated negotiations with Mr. Searle. According to Nicholas Goodman, grandson of the original owners, trying to negotiate a settlement was difficult: “We are trying to negotiate a settlement. They are reluctant to settle. The problem we are finding is that any potential adversary, being wealthy enough to own a Degas or a Renoir, likely has the resources to engage in protracted litigation such as ours. The monetary expenses are unbelievable.” FELICIANO, *supra* note 5, at 90.

<sup>121</sup> Rhodes, *supra* note 50, at 506.

they could have litigated the matter in court, won the case, received the artwork, and then they might have sold it for its full fair market value. Nevertheless, when juxtaposing the outcome of the case with the potential “winner-take-all” outcome that would have resulted if the case had gone to court, it was clearly better for the parties to settle.<sup>122</sup> Since the parties settled, they saved a tremendous amount in courts costs, time, and energy.<sup>123</sup>

While the easiest way for parties to reduce costs is to reach a negotiated settlement, such techniques are often overlooked as an option because of the perception that an indivisible art object cannot be shared.<sup>124</sup> Yet, as *Searle* demonstrates, there is at least one viable option to satisfy both sides of the case – it is simply a matter of searching for the appropriate area of law to resolve the dispute rather than automatically relying on the judicial system. The tax Code benefited all parties involved, even the Art Institute, which received the Degas at a reduced price. In addition to resolving the dispute equitably, the tax Code furthers the policy that so many bills of legislation have tried to accomplish.

If the entire purpose behind legislation regarding Nazi-looted art is to return the artwork to the original owners and heirs, then there should not be a reason to object to the use of the tax Code in resolving these disputes. Congress’ concern was not to punish the current possessor but to provide relief to the original owner. Thus, the tax Code falls squarely in line with Congressional intent. Settlements that utilize the tax Code will cost the U.S. government nothing, and the transactions support the theory of restorative-justice.

As of today, legislation has done little to effectuate the return of Nazi-looted art. Use of the tax Code accomplishes what legislation

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<sup>122</sup> The high cost and lengthy process of litigation may well have cost Mr. Searle more than what he paid for the artwork. In addition, there was the probable risk that Mr. Searle would lose the case, and thus, he would have nothing for his efforts. For arguments that settlements are generally less expensive, *see, e.g.*, RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 567-571 (6th ed. 2003); James N. McNally, *Lessons Learned in the Court of Appeals Settlement Program*, 79 MICH. B.J. 488, 488 (2000) (“Settlements bring higher satisfaction among litigants and can be a cheaper, quicker alternative to litigation.”).

<sup>123</sup> Parties still incur some litigation costs when they settle, but they are usually much lower than the cost of going to trial. David Rosenberg & Steven Shavell, *A Simple Proposal to Halve Litigation Costs*, 91 VA. L. REV. 1721, 1722-23, 1726 (2005).

<sup>124</sup> Murphy, *supra* note 70, at 26-27.

has failed to accomplish: it embodies a neutral policy which does not discriminate based on the status of the current possessor or the original owner. Allowing current possessors a tax deduction for a donation of their interest in the artwork to a section 501(c)(3) organization resolves the dispute over title, and subsequently, the public also benefits by the organization's acquisition of the item.

In further support of the tax Code, sixty years of resolutions, agreements, and legislation have not made claims logistically easier to bring. Claimants do not see any benefit in bringing a claim in the U.S. court system due to high transaction costs. However, with the use of the tax Code as a negotiation element, claimants may see the probability of spending less money, which would encourage them to pursue negotiation settlements at a much earlier time, rather than heading to court.<sup>125</sup>

## 2. Potential Problems

As with any proposed solution to the Nazi-looted art dispute, there are potential drawbacks to the use of the tax Code. However, the problems are not serious enough to discredit such an approach in its entirety. Probably the most concerning issue is that many may feel that use of the tax Code is an attempt to shift financial liability from the current possessor to all taxpayers. Since the artwork's value is likely to be very high, the amount in controversy is also going to be very high.<sup>126</sup> Of course, taxpayers do not like to hear that they will be financing a tax deduction, especially of an individual in a high tax bracket.<sup>127</sup> Yet, the notion that taxpayers are ultimately paying for the current possessor's deduction is not sufficient to defeat the purpose of the donation, nor is it sufficient to disregard the tax Code approach to the dispute. The availability of section 170 deduction for charitable contributions to section 501(c)(3) organizations is an option available

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<sup>125</sup> See generally Rhodes, *supra* note 50 (discussing the tax treatment of sales of artwork, which may constitute long-term capital gain or loss, instead of ordinary income).

<sup>126</sup> For example, Thomas Kline, counsel for the Gutmann family in *Goodman v. Searle*, stated, "I am almost at the point of saying that if the art isn't worth \$3 million, don't go after it." Lee Rosenbaum, *Will Museums in U.S. Purge Nazi-Tainted Art?*, ART IN AMERICA, Nov. 1998, at 38, available at [http://findarticles.com/p/articles/mi\\_m1248/is\\_n11\\_v86/ai\\_21257944/](http://findarticles.com/p/articles/mi_m1248/is_n11_v86/ai_21257944/).

<sup>127</sup> More than likely, an individual who was able to purchase a Nazi-looted piece of art was quite wealthy.

to everyone willing to make a donation. Furthermore, the events are most likely a one-time occurrence. Thus, taxpayers do not constantly subsidize the same transactions from a single possessor. Furthermore, the entire motivation behind the transaction is in favor of everyone, not a single few. The donation to a section 501(c)(3) organization creates public ownership of the artwork, and therefore, public oversight. As previously stated, if the goal of legislation is to resolve the dispute over title, the use of the tax Code accomplishes this goal without significant intervention of the government or the court system.

A second concern for many is that allowing tax deductions for donations of Nazi-looted artwork increases the trade in illicit artwork.<sup>128</sup> Some may feel that if current possessors can achieve tax deductions by donating their interest to a section 501(c)(3) organization, then bad-faith purchasers will seek out Nazi-looted art and try to achieve the same tax deductions in similar transactions. However, these fears are misplaced because the likelihood of actually discovering Nazi-looted art is relatively low. If Nazi-looted artwork could be discovered so easily, then we would expect to see a large amount of claimants coming forth. Also, the likelihood that Nazi-looted art is being sold on the black market is unlikely because of the general unawareness of a given item's provenance.<sup>129</sup> Thus, the difficulty in discovering whether an item was looted by the Nazi regime sixty years ago negates the idea that people will trade the artwork at immense rates on the black market.

On the other hand, there is a significant issue that can occur in a slightly different context that can have a tremendous impact on negotiations that utilize the tax Code. The logic differs slightly when two parties in a dispute regarding Nazi-looted art seek to use section 501(c)(3) organizations as conduits to return the property to the

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<sup>128</sup> Rhodes, *supra* note 50, at 523-24; Emily C. Ehl, Case Comment, *The Settlement of Greece v. Ward: Who Loses?*, 78 B.U.L. REV. 661, 685-86 (1998).; see Matthew L. Wald, *Tax Scheme is Blamed for Damage to Artifacts*, N.Y. TIMES, Feb. 4, 2008, at E1; see also Borodkin, *supra* note 57, at 405.

<sup>129</sup> A review of many of the claims already brought in courts demonstrates that current possessors were often completely unaware of the item's provenance, and that the sellers were usually innocent. See, e.g., *Menzel v. List*, 267 N.Y.S.2d 804 (1966); *Rosenberg v. Seattle Art Museum*, 42 F. Supp. 2d 1029 (D. Wash. 1999); *Springfield Library and Museum Ass'n v. Knoedler Archivum, Inc.*, 341 F. Supp. 2d 32 (D. Mass. 2004).

original owner, similar to what occurred in *Greece v. Ward*, an illicit antiquities case.<sup>130</sup>

In 1993, the Ward Gallery, a prestigious New York art gallery, exhibited and offered for sale a collection of ancient Mycenaean jewelry and artifacts.<sup>131</sup> Greece initiated an investigation and claimed the Ward collection included treasures taken from the Mycenaean tombs.<sup>132</sup> The parties announced that they had agreed to a mutually beneficial out-of-court settlement.<sup>133</sup> The Ward Gallery agreed to donate the collection of Mycenaean artifacts to the Society for the Preservation of the Greek Heritage, a Washington-based nonprofit charitable organization, and in turn, Greece agreed to withdraw its lawsuit.<sup>134</sup> In effect, the Society for the Preservation of the Greek Heritage, a section 501(c)(3) organization,<sup>135</sup> acted as a conduit between the settling parties. "The Gallery donated the treasure collection to the Society, and then the Society handed the treasure over to Greece. This creative settlement allowed the Ward Gallery to claim a tax deduction under section 170 and to recoup its acquisition cost of the stolen antiquities, which was rumored to be \$150,000."<sup>136</sup>

In the context of Nazi-looted art cases, it would not be a leap of judgment to assume that parties might construct their transaction similar to that in *Ward*. A current possessor might donate the artwork to a section 501(c)(3) organization, taking the maximum tax deduction allowed, and then the organization would return the artwork to

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<sup>130</sup> See generally Rhodes, *supra* note 50, at 502-04 (citing *Greece v. Ward*, No. 93 Civ. 2493 (S.D.N.Y. May 25, 1993)).

<sup>131</sup> *Id.* at 502.

<sup>132</sup> See *id.* at 503.

<sup>133</sup> See *id.*

<sup>134</sup> Ricardo J. Elia, Case Notes, *Greece v. Ward: The Return of Mycenaean Artifacts*, 4 INT'L J. CULTURAL PROP. 119, 122 (1995); Mary Williams Walsh, *A Grecian Treasure: Back From the Grave?*, L.A. TIMES, Aug. 12, 1996, at A1.

<sup>135</sup> Join The Society for the Preservation of the Greek Heritage, <http://www.spghworld.org/joinspgh.htm> (last visited Apr. 10, 2009).

<sup>136</sup> Ehl, *supra* note 128, at 675 (citing Irvin Molotsky, *20 Years After Thievery, Rare Gold Ornaments Will Return to Greece*, N.Y. TIMES, Jan. 31, 1996, at C16) (additional citations omitted). After briefly displaying the collection in the Russell Senate Office Building in Washington, D.C. in January 1996, the Society returned the collection to Greece in early February 1996. Molotsky, *supra*.

the claimant. Such a transaction allows both parties to benefit to the fullest, but denies the public any interest in the item.<sup>137</sup>

In these situations, the argument becomes much easier for the opponents of transactions that utilize the tax Code. Here, the organization receives – and keeps – nothing of tangible value, thereby defeating the public benefit theory behind the tax-exempt status of the organization. One party then abuses the section 501(c)(3) organization in order to obtain a favorable tax deduction. On the other hand, the organization has arguably helped to further the public policy of providing restitution to victims of the Holocaust, and consequently, descendants and heirs of the victims. This seemingly fulfills the public benefit purpose of the tax-exempt organizations. In addition, when neither party to the dispute is a thief or a bad-faith purchaser, society does not suffer any harm. From this author's viewpoint, it seems better to allow the parties to utilize the section 501(c)(3) organization because the artwork returns to its original owner, heirs, or descendants, thus fulfilling the restorative-justice goals of Congress. Nevertheless, a tax-deduction for the current possessor hardly appears proper when the public has received nothing in return. Thus, it would be more appropriate for Congress to enact a small revision in the tax Code allowing the completion of the transaction, but only allowing a tax credit in these instances, not a tax deduction. This minor revision would combat the notion that taxpayers are financing the transaction.

Even with the potentially negative motivations of current possessors to utilize section 501(c)(3) organizations, not all claimants have the most respectable intentions. Claimants who only intend to

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<sup>137</sup> Furthermore, there is a secondary argument, that there might be a fear that current possessors might start donating the artwork to section 501(c)(3) organizations without providing the sufficient information to alert the organizations as to the provenance issues. However, with the AAM and AAMD guidelines in place, and in light of general awareness of the importance of thorough research for acquisitions, section 501(c)(3) organizations have taken – and are taking – a more technical approach to preventing this situation. See generally Stephen J. Knerly, Jr., *Selected Issues for American Art Museums Regarding Holocaust Era Looted Art*, Prague Conference on Holocaust Era Assets, available at <http://www.aamd.org/advocacy/> (discussing the various approaches that US museums have taken to guard against false artwork, discover Holocaust-Era artwork in inventories, and specifically stating, “U.S. museums are fully committed to responding to all claims carefully and in good faith”).

sell an item, once reclaimed, to a third party raise the issue of “monetization” of the Holocaust – a criticism leveled at victims and heirs who seek financial recovery for their losses.<sup>138</sup> In this circumstance, it seems better to allow both parties to utilize section 501(c)(3) organizations, as in *Searle*. Allowing a claimant to reclaim a piece of artwork for the purpose of selling the item seems to contravene the moral reasons for restituting the artwork. Encouraging negotiated settlements via the tax Code provides benefits to innocent parties and incidental benefits to society as well. Thus, the aggregate benefit to all should occupy a higher place in our echelon of values, so that we hesitate to view the benefit to one individual as an absolute. In essence, it appears there is an ultimate question of whether society sees that it is better to fulfill the concept of restorative-justice, or whether it is better to stop a single individual from benefiting in these situations.

### 3. Nevertheless, the Ends Justify the Means

Even with the fear of exploitation of section 501(c)(3) organizations, it is undeniable that settlements of these cases using the tax Code comport with, and further, the ethical and legal goals of all prior legislation. In fact, domestic tax law recognizes the tax-exempt status of money received from Germany by Holocaust victims in connection with Nazi confiscated property. *I.R.S. Notice 95-31*<sup>139</sup> states that monetary compensation or property received by U.S. individuals under the German Act Regulating Unresolved Property Claims for property confiscated by Nazis or subjected to a forced sale represents compensation for damages and is exempt from U.S. taxation.<sup>140</sup> Use of section 501(c)(3) and section 170 of the Internal Revenue Code as a means to achieve the decisive objective of restorative-justice outweigh the potential negativities associated with their use. Nazi-looted art cases are instances where the results, and public policy associated

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<sup>138</sup> Burt Neuborne, *Preliminary Reflections on Aspects of Holocaust-Era Litigation in American Courts*, 80 WASH. U. L. Q. 795, 827 (2002).

<sup>139</sup> 1995-1 C.B. 307, 1995 WL 279779 (I.R.S.).

<sup>140</sup> See also Convention on Income Tax, U.S.–F.R.G., art. XIX, ¶ 1(c), Aug. 2, 1989, S. TREATY DOC. NO. 101–10 (1990) (providing that the entire monetary amount, including interest, is exempt from taxation under the income tax convention between the United States and Germany).

with it, justify the use of the tax code to allow both sides of the dispute to avoid a total loss.

### *C. Creation of a Government Entity*

In the face of all the adversity and positivity, there is at least one aspect of section 501(c)(3) organizations, in the context of Nazi-looted art cases, that should be altered by Congress. Rather than allowing parties to agree upon any section 501(c)(3) organization, there should be a central federal organization, incorporated as a section 501(c)(3) organization, that deals specifically with Holocaust-era disputes. As stated, potential problems regarding the use of section 501(c)(3) organizations as nothing more than pass-through entities might encourage sham transactions in which the public receives nothing of value despite both parties having benefited. Such transactions leave the entity's section 501(c)(3) tax-exempt status in jeopardy. However, the creation of a federally controlled section 501(c)(3) organization would relieve societal skepticism from the issue.

Congress should create a single entity that would be responsible for helping the parties resolve their dispute, and at the same time, keep the public's best interest in mind. Parties would be directed to seek settlement through the federal section 501(c)(3) entity in order to gain a charitable tax deduction under section 170. The entity would be responsible for researching the provenance of the artwork, estimating its appraisal value, and approving the transaction in its entirety, including all relevant tax consequences. This would ensure the purpose of section 501(c)(3) tax-exempt status is fulfilled.

The parties should only be allowed to seek out alternate 501(c)(3) organizations in cases where they are unable to come to a negotiated settlement that the federal 501(c)(3) organization approves. Nonetheless, even in these instances, the alternate section 501(c)(3) organization should obtain approval from the federal 501(c)(3) organization on the terms of the deductions and transfers. It is entirely possible that one section 501(c)(3) organization will agree to pay a higher price for an item than the federal entity may offer to pay. For example, in *Searle* it is possible that the non-profit organization might have agreed upon a higher price than this paper's aspirational federal entity would agree to pay, which would have resulted



in Mr. Searle obtaining a larger deduction and the Gutmann family receiving a higher amount of payment for the artwork. This is not a concern because section 501(c)(3) organizations will likely obey market fluctuations and economic factors. The federal entity's approval would protect against a sham-type transaction, in which the current possessor/donor may attempt to claim a large deduction. The organization, however, would simply give the artwork to the claimant, as was the case in *Ward*.<sup>141</sup> In these situations, a federal entity would ensure that the donor receives a tax credit rather than a deduction. Thus, such a federal entity would ensure that the public benefits from the transaction while simultaneously upholding Congress' motivation for granting tax-exempt status to section 501(c)(3) organizations.

## VI. CONCLUSION

Transactions that use section 501(c)(3) organizations as conduits to further their own tax prerogatives do not necessarily entail abuse of either the organization or the tax code. It is a commonly accepted principle that U.S. taxpayers may minimize their taxes and maximize their deductions, within limits.<sup>142</sup> There is no reason to conclude that taxpayers involved in a dispute regarding Nazi-looted art cases be precluded from taking advantage of the tax code to resolve the complex disputes, which invoke deep emotional and psychological considerations, making them unsuitable for litigation. As one author has eloquently stated,

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

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<sup>141</sup> See also Borodkin, *supra* note 57, at 404 (discussing a case where a current possessor donated Turkish sarcophagus to a section 501(c)(3) organization – to avoid litigation – and took a tax deduction under section 170, but where the organization sent the sarcophagus to Turkey on permanent loan); Hugh Pope, *Turkish Jubilation over Recovery of Ancient Sarcophagus: Smuggled Treasure is Coming Home*, THE INDEPENDENT, Apr. 27, 1994, at 1, available at <http://www.independent.co.uk/> (enter “Turkish jubilation” in search box).

<sup>142</sup> *Comm'r v. First Sec. Bank of Utah, N.A.*, 405 U.S. 394, 398 (1972) (“Taxpayers are . . . generally free to structure their business affairs as they consider to be in their best interests, including lawful structuring . . . to minimize taxes.”).

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.<sup>143</sup>

One assumes that claimants want to avoid high transaction costs in art restitution claims by settling.<sup>144</sup> However, Nazi-looted Art cases do not settle at the expected rate. In a recent multi-year academic study of major American art restitution cases, the report showed that less than one-third of them settled out of court.<sup>145</sup> This number is somberly lower than the average settlement rate for American litigation, which is between ninety and ninety-eight percent.<sup>146</sup> It seems the parties involved in Nazi-looted art disputes tend to believe their only option is to get everything or nothing at all. These beliefs restrict parties from coming to a negotiated agreement because neither side is willing to go home empty-handed. Bargaining over indivisible objects – like artwork – often fails because indivisibility creates a “psychological barrier that leads the claimants to think in zero-sum terms.”<sup>147</sup> The moment litigants perceive a dispute as “zero-sum” or “win-lose” rather than “win-win,” the benefit they could otherwise enjoy through a compromise disappears completely.<sup>148</sup> The tax code can provide solutions to the “zero-sum” mindset

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<sup>143</sup> Rhodes, *supra* note 50, at 524.

<sup>144</sup> Nevertheless, parties do agree to settle. This is especially true when claimants have a particularly strong evidentiary record against the current possessor. See, e.g., Felicia R. Lee, *Seattle Museum To Return Looted Work*, N.Y. TIMES, June 16, 1999, at E4 (describing how the board of trustees of the Seattle Art Museum unanimously chose to return Matisse’s *Odalisque* after its World War II theft was documented in Hector Feliciano’s book).

<sup>145</sup> GAZZINI, *supra* note 38, at 61. *But cf. id.* n.95 (noting that many of the cases that settled did so recently). This suggests that, though still not as often as theory would predict, some parties are beginning to find ways for their claims to be concluded out of court.

<sup>146</sup> See Russell Korobkin & Chris Guthrie, *Psychology, Economics, and Settlement: A New Look at the Role of the Lawyer*, 76 TEX. L. REV. 77, 77, 84 (1997) (estimating the rate at more than ninety percent).

<sup>147</sup> H. Peyton Young, *Dividing the Indivisible*, 38 AM. BEHAV. SCIENTIST 904, 904 (1995) (including paintings in a list of “indivisibles”).

<sup>148</sup> GAZZINI, *supra* note 38, at 63; see also Jon Elster, *Solomonic Judgments: Against the Best Interests of the Child*, 54 U. CHI. L. REV. 1, 39-40 (1987) (discussing how

in these situations. Allowing both the parties and society to benefit is the ultimate goal, and is achievable through the effective structuring of a transaction in a manner that capitalizes on provisions of the tax code.

Although critics are correct in stating that potential abuse exists in transactions that merely use section 501(c)(3) organizations as conduits to gain tax deductions, their apprehension is overemphasized. Potential abuse of the court system and of the tax code are always a factor. Nevertheless, the courts and the tax system adjust accordingly to the people's needs and to public policy. As of this date, the Internal Revenue Service has not found a transaction similar to *Searle* to be in violation of any public policy or otherwise abusive of the tax system. As such, it is clear the I.R.S. interprets the purpose of the section 501(c)(3) tax-exempt organizations as being met by effectuating the resolution of replevin and restitution claims in the case of artifacts and artwork in these contexts.

In sum, the benefits of this proposal are: (1) parties are encouraged to allow artwork to remain in the museums, with charities, and within the public purview, where they belong, by means of a tax deduction; (2) compensation is provided to the Holocaust victims, their heirs, and descendants; (3) disputes over title are solved efficiently and equitably, avoiding the complexities of litigation; (4) little revision of the Internal Revenue Code is needed; and (5) all of the foregoing is accomplished at little or no cost to society. The foregoing proposal presents an alternative to inefficient results provided by litigation in the U.S. court system. It is an equitable resolution to the competing interests of innocent parties and societal standards.

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departing from the "winner-take-all principle" that normally governs toward forms of compromise may be preferable in child-custody disputes). Likewise, art cases are often seen as "winner-take-all propositions" with no possibility of compromise. See Sue Choi, Comment, *The Legal Landscape of the International Art Market After Republic of Austria v. Altmann*, 26 NW. J. INT'L L. & BUS. 167, 191 (2005) (arguing that restitution claims can settle).