

J. Steven Schumacher

## **Resolving Nazi-era Art Repatriation Claims in the Twenty-First Century**

### **A Note to the Reader**

To protect the anonymity of this project's subject, certain details including some names, dates, locations, etc. have been altered. Additionally, subject-specific citations have been omitted.

### **I. Abstract**

J. Steven Schumacher, "Resolving Nazi-era Art Repatriation Claims in the Twenty-First Century," *Legal Studies Senior Honors Thesis* (2013)

When the Nazi government came to power in 1933, a cataclysmic chain of events were set into motion that would eventually generate global turmoil and leave millions dead. An unexpected casualty of this horrific era was the displacement of huge volumes of art seized from European Jews that were either sold to enrich Nazi coffers or handed to Nazi elites. After Germany's surrender in 1945, Europe was in ruins and among those rebuilding their lives were Jews who escaped Hitler's Final Solution. For some of these individuals and their families, this process eventually included asserting their rights to property stolen from them. Among those property claims, arguably the most complex, high stakes, and rigorously contested have pertained to fine art. Even in the twenty-first century, art-based repatriation claims continue to be waged by the next generation of Holocaust survivors on behalf of deceased relatives. Often such claims present current owners – both private collectors and public institutions – with huge financial liabilities and the potential diminution of esteemed collections.

This project explores the legal complexities and psychological dynamics experienced by Nazi-era art repatriation claimants and their attorneys through both scholarly and field research. This project combines a review of scholarly sources; an analysis of art repatriation claim resolution trends; and the compilation of an in-depth microhistory of a notable claimant, David Smythe, based on semi-formal interviews with Smythe and his attorney, Klaus Foerster, as well as data gathered from newspaper and other journal articles written about Smythe's art repatriation efforts. Ultimately, this

project provides a data-driven evaluation of why claimants initiate art repatriation litigation; how claimants and attorney's rationales for such litigation converge and diverge; and how attorneys overcome the evidentiary difficulties of claims initiated 70 to 80 years after the occurrence of the initial theft.

## **II. Introduction (to topic and research questions)**

In recent years, the subject of Nazi-era art repatriation has become an area of increasing scholarly interest. The initial challenge of the project was identifying a discrete aspect of Nazi-era art repatriation from which a socio-legal project could be conducted within the 2013 spring semester. While the findings reflected in the Literature Review provided a solid foundation of the background and landscape of Nazi-era art repatriation resolution as it exists today, a lecture conducted October 22, 2012 – Art: Litigating Holocaust-Era Expropriation Claims – provided valuable first-hand insight into the topic. One of the lecture's attendees was David Smythe, the great nephew of the prominent German Jewish art dealer, Zellig Spiegelman, whose extensive art collection was seized during the early years of the Nazi regime. While Smythe has worked with his German-based attorney in recent years to initiate numerous repatriation claims against a variety of institutions such as museums and auction houses, the family's efforts to reclaim lost property dates back to the early 1950s. This chance meeting with Smythe provided the discrete socio-legal aspect of Nazi-era art repatriation for this project. As detailed in the following sections, the project was designed employing a microhistory format (detailed in the Methodology/Logic of Inquiry section) to demonstrate how Nazi-era art repatriation claims manifest in today's legal arenas by analyzing Smythe's experience as a claimant who utilizes legal professionals to pursue his interests. Through this project, the following general research questions are explored:

- Why claimants initiate art repatriation litigation?
- How claimants and attorney's rationales for such litigation converge and diverge?
- Given that concrete evidence of ownership of victims' possessions as well as records of what the Nazis stole from their victims can be extremely difficult to obtain, what

strategies do attorneys employ to maneuver around these issues and further their clients' interests?

### **III. Literature Review**

#### **Fine Art as Nazi Plunder**

The Nazi government was both highly organized and unrelenting in their efforts to eradicate Europe's Jewish population. As Jews in Nazi-occupied territories either fled their homes to seek shelter in more hospitable countries or were deported to concentration camps, they often left behind the bulk of their possessions, which for some included personal art collections. The volume of artwork stolen by the Nazis through confiscation or forced sale is estimated to be "more than 600,000 works of art" (Yip). This represents "between one fourth and one third of the total artworks in Europe" and, among those pieces stolen by the Nazis, over 100,000 remain unaccounted for (Thompson 408). Further complicating matters, it wasn't until the 1980s when previously classified war records were made available to the public in the United States and Europe that any documentation was even available that revealed exactly what the Nazis had taken and what they had done with those stolen items (Thompson 409).

As more documentation of stolen art emerged, some Holocaust survivors and heirs had records of vital importance that enabled them to pursue reclaiming possessions stolen forty to fifty years prior. To aid in this effort, foundations began to emerge that consolidated search efforts and facilitated the repatriation process. One of the most notable is the Art Loss Register, "an online organization dedicated to maintaining a database of stolen art," that alerts families whenever pieces for which they are searching reappear in the art market (Thompson 410).

#### **The Gap Between Justice and Legislation in the United States**

While some claimants came into unprecedented access to information about their family's stolen items beginning in the 1980s, the U.S. legal system provided little legal framework with which to guide domestic Nazi-era art repatriation claims resolution. As a result, many defendants and their attorneys have relied on traditional tort remedies to

resolve their claims. Replevin actions – “actions for the return of stolen property” – and conversion – “[which] allows plaintiffs to recover the monetary value of the claimed artwork instead of the return of the work itself” – have made pursuing such cases much more widely possible but both are subject to a statute of limitations (Thompson 419-421). Conversion-based claims seem to expand the definition of repatriation beyond the traditional return of the object itself. Regardless of whether repatriation is approached through a replevin action or conversion, Thompson explained: “A plaintiff’s claim will fail if title has vested in the good-faith purchaser of a stolen work upon the expiration of the statute of limitations on the initial theft” (Thompson 421). Beyond traditional tort remedies, California provides one of the few statutory laws specific to Nazi-looted art claims (Thompson 419).

Interestingly, it is the response to the statute of limitations that has by and large defined the landscape of U.S. art repatriation claims resolution. Thompson observed that “jurisdictions have different rules for when the statute of limitations tolls,” however with regards to U.S. Nazi-era art repatriation claims, many “have been dismissed because the statute of limitations expired” (421-422). Typically, individuals who are sued for the return of Nazi looted art held in their possession are more likely to contest on the grounds of expired statute of limitations with U.S. courts ruling in their favor (Thompson 421-422). Conversely, museums rarely question the statute of limitations for ethical reasons and for fear of bad publicity and reputational damage (Thompson 423-424). In Thompson’s assessment, “given the difficulty of overcoming the statute of limitations, the museums’ ethical choice is a huge incentive for heirs to make claims against museums rather than private owners” (Thompson 423). Additionally, lawyers representing claimants have also begun to employ alternative methods of negotiation that make restitution efforts more appealing to individuals and institutions holding disputed artworks (refer to the below section, Balancing Justice and Profitability).

### **Recent Developments Impacting U.S. Nazi-era Art Repatriation Claims**

Because no single law governs the resolution of Nazi-era art repatriation claims internationally, country-specific legislation varies significantly. The Washington Principles,

established in 1998 during the Washington Conference on Holocaust-Era Assets, was “the first truly international effort to address the issue of Nazi looting” (Thompson 435). The guidelines embedded within the Washington Principles “encouraged nations to aid the resolution of such claims through the creation of tools such as central registries of looted art and public awareness campaigns,” however it left the resolution of claims to each participating nation’s own legal system (Thompson 435). The result is that while The Washington Principles and other similar agreements attempt to establish international Nazi-era art repatriation claims resolution protocols, they lack the force of law to ensure global adoption and consistency of application (O’Donnell 2012). Within the United States, a case heard by the U.S. District Court in Los Angeles in 2012 significantly defined the landscape of Nazi-era art repatriation litigation nationally. The case – *Marie von Saher –v– Norton Simon Museum of Art at Pasadena* (CV 07-2866-JFW (JTLx) (D. Calif., March 22, 2012) – involved the “daughter-in-law and sole heir of Jacques Goudstrikker, a well-known Dutch art dealer during the interwar period” in her attempt to reclaim a pair of paintings by the sixteenth century Dutch painter, Lucas Cranach the Elder (O’Donnell 2012). The paintings were initially stolen by the Nazis, then commandeered by Hermann Goring for his private collection, and finally seized by the U.S. Army after the war, which returned the paintings to the Dutch government (O’Donnell 2012). Ultimately, the paintings made a winding path to the Norton Simon Museum of Art at Pasadena in 1971 (O’Donnell 2012). Von Saher’s legal struggle for the paintings began 1998 when she “filed a claim with the Dutch Secretary for Education, Culture, and Science, seeking the return of property taken by Goring” that was ultimately rejected (O’Donnell 2012). Within four years, the case was heard in a variety of Dutch and U.S. courts via a series of appeals (O’Donnell 2012). Through the various rulings that courts have applied to the case, *Von Saher v. Norton Simon Museum* has actually stripped away many privileges that favored U.S.-based art repatriation claimants, including the invalidation of two California laws that extended the statute of limitations for wartime artwork claims and upholding the “State Department’s determination that foreign nations, once art is returned there, are better situated to sort through the differences between real and sham transactions during war” (O’Donnell 2012). The Art Law Report assessed the most recent verdict as:

A strong precedent for museums, but expect controversy to follow. If the 9<sup>th</sup> and 5<sup>th</sup> Circuits eventually conflict on the preemption point, the Supreme Court may be interested in hearing the case (having turned down her first petition on the statute of initiations question last year) (O'Donnell 2012).

As it stands, the obvious impacts of this landmark case are (a) claimants in the United States and their attorneys are left with few options outside of non-litigated negotiations between parties and (b) parties in possession of disputed artworks have little chance of being taken to court and have a legally-ordained right to refuse either the return of artworks or to offer financial settlements.

### **Claimants and Litigation**

Apart from the legality surrounding repatriation lawsuits, a general trend emerged among claimants who have increasingly envisioned philanthropy as an aspect of their restitution efforts. More and more frequently, heirs see their families' artworks as both a connection to relatives they have lost and as important cultural symbols that should remain accessible to the public. The push and pull of this dynamic – the desire to lay claim to an object stolen from a relative yet wanting the object to benefit the larger community – is also a factor in Smythe's claimant experience. Examples of this trend include Marie Altmann who, through a protracted legal battle involving both the United States Supreme Court and the Austrian government (vol. 541 U.S. 677 (2004)), won back her aunt Adele's Klimt paintings after the U.S. Supreme Court ruled that she could pursue a claim against the Austrian government for those paintings seized from her family by the Nazis (Thompson 428). Ultimately, she sold the most valuable painting to Ronald Lauder because "he promised to donate it to the Neue Gallerie in New York" (Thompson 428). Another example is an earlier settlement achieved by the family of the Jacques Goudstikker who, upon the return of works stolen from him, put the collection in circulation as a travelling museum exhibition to both recognize Goudstikker's legacy and serve as a testament to the ways in which Nazi-inflicted injustices are being righted by later generations (Thompson 428).

The resolution objectives pursued by Nazi-era art repatriation claimants and the overarching motives they entail seem very much aligned with scholarly assessments of

dispute creation and generalized claimant motivations. Felstiner, Abel, and Sarat view disputes as “social constructs” that are shaped by the observer and principally exist “in the minds of the disputants” (631-632). Disputes arise when “an unperceived injurious experience (unPIE, for short)” is “transformed into a perceived injurious experience (PIE)” (Felstiner, Abel, and Sarat 633). Felstiner et al. view a litigant’s shift in perception from UnPIE to PIE as being part of a sequential transformation process, consisting of *naming*, *blaming*, and *claiming*. *Naming*, the first and perhaps most critical of the three transformations, occurs when an experience is perceived as having been “injurious” (Felstiner, Abel, and Sarat 635). This is followed by *blaming* – the “transformation from perceived injurious experience to grievance,” a process in which “a person attributes an injury to the fault of another individual or social entity” (Felstiner, Abel, and Sarat 635). Finally, *claiming* is the transformation that “occurs when someone with a grievance voices it to the person or entity believed to be responsible and asks for some remedy ... a claim is transformed into a dispute when it is rejected in whole or in part” (Felstiner, Abel, and Sarat 635-636). Of particular relevance within the dynamics associated with Nazi-era art repatriation litigation, Felstiner, Abel, and Sarat assert:

People never fully relegate disputes to the past, never completely let bygones be bygones ... there is always a residuum of attitudes, learned techniques, and sensitivities that will, consciously or unconsciously, color later conflict.

Furthermore, there is a continuity to disputing that may not be terminated even by formal decision. The end of one dispute may create a new grievance, as surely as a decision labels one party a loser or a liar ... new claims may emerge from the recesses of untouched dissatisfactions (639).

Once a claim has transformed into a dispute, claimants will often seek assistance in pursuing their interests. Claimants’ motivations for seeking redress are seemingly as varied as the claims themselves, but research suggests that motives fall within major categorical themes. At the most basic level, Sells assesses the root of the motivation as a problem in which the claimant encounters:

“... a problem they are convinced must be addressed but, for one reason or another, don’t feel capable of handling themselves ... if the problem is one the client can

accept without need of further resolution or is one the client feels capable of dealing with personally, then a lawsuit will not arise” (87).

However, Robbennolt and Sternlight further refine this resolution-based desire into a subset of motivational categories: a need for information, a need for justice (procedural, distributive, and retributive), a need for apology, a need for reform, a need for other nonmonetary personal satisfaction, and/or a need for litigation (213).

- *Need for information* – “one of the central reasons people pursue legal claims” – is based in the desire to know what actually occurred as well as the overarching motives for why it occurred (Robbennolt 213).
- *Need for justice* is a motivational category in which a claimant is inclined toward having their voice heard. For these claimants, whether they seek distributive, procedural, or retributive justice, “... a monetary settlement cannot entirely take the place of the opportunity to provide their perspective in a setting in which they are treated in a dignified fashion” (Robbennolt 213-214).
- *Need for apology* often works in tandem with all other motives because the claimant’s desire in seeking an apology may well be motivated by any or all of the other motivational categories, such as: “a need to be treated fairly, a need to understand what happened, a need to achieve retribution or restoration, or a need to be reassured that an offense will not recur” (Robbennolt 217).
- *Need for reform* is a motivational category in which a client seeks a lasting change in behavior or procedure so as to prevent what they experienced from being repeated (Robbennolt 217-218).
- *Need for other nonmonetary personal satisfaction* is similar to and can take the form of *need for apology* in that it may work in tandem with all other motives, or as Robbennolt and Sternlight state: “beyond their concerns for information, justice, or reform, clients may also care a great deal about things that have minimal or uncertain monetary value. Symbolic gestures, for example, can have important meaning to clients” (218).
- *Need for litigation* is a type of nonmonetary consideration in that the claimant is motivated by the need to seek litigation for their grievance – in essence, seeking their proverbial day in court (Robbennolt 221).



## **Lawyers' Views on Representing Repatriation Claimants**

Of course, lawyers are the workhorses behind almost every Nazi-era art repatriation claim – applying huge amounts of time, money, and skill into litigating these incredibly complex cases. These lawyers are motivated by a number of factors. The first factor: repatriation cases are noble endeavors in which historic victims are finally able to achieve some degree of justice – the acknowledgment that a wrong was committed against a relative, the return of a stolen object, securing monetary compensation for looted property, or the like. Larry Kaye, who represented the Goudstrikker heirs, provided the following assessment of his involvement:

As a Jew, obviously, developments like this are very important to me and they are emotional; as a lawyer.... I look at it from the viewpoint as being able to do something through the rule of law that assists the victims of past crimes, and that's a good feeling as well (Thompson 430).

The second factor: repatriation cases are highly lucrative particularly as the value of artwork seized during World War II continues to increase in value. Often, claimants engage in contingency arrangements with attorneys through which the attorney receives a percentage of the recovered artwork (Thompson 432). For example, the contingency fee of Clemens Toussaint, a European lawyer specializing in repatriation litigation, is said to be as high as fifty percent, due to “the amount of time it takes to research the claims – ten years for his work for the heirs of Kashmir Malevich – and the staff he must hire” (Thompson 433). In Thompson’s assessment, the financial gains that repatriation litigation represents has led to an increase in attorneys seeking such cases that is “in proportion to the rise of prices in the art market” (Thompson 432).

The issues pertaining to how attorneys view their role in resolving art repatriation claims and what motivates them to pursue these highly specialized cases are evaluated through the course of this project via pre-determined questions posed to Smythe and his attorney. For a specific list of questions, refer to Section IV. Methodology/Logic of Inquiry, Interview Protocols.

## **Balancing Justice and Profitability**

After a claimant has committed to pursuing his or her right to an unrestituted object and an attorney has been retained to negotiate and/or litigate on the claimant's behalf, a new issue is introduced – the financing of legal fees. In light of the expense involved in the resolution of art repatriation claims, even those claimants who desire to have their artwork remain in the museums in which they reside must make concessions or pursue alternate methods of negotiation in order to move forward with their claims. The most obvious option for claimants is to sell all or a portion of the works recovered to meet the expense of litigation. In 2006, "Sotheby's auctioned thirty-eight restituted works, and Christie was responsible for auctioning another three hundred million dollars worth of restituted art" (Thompson 434-435). However, creative negotiations between claimants and museums have resulted in some interesting outcomes that have kept artwork on public display. While many of these interactions have entailed a museum simply paying a monetary settlement to the heirs and retaining the painting, some have been more creative in nature (Thompson 437). For example, the heirs of Philipp von Gomperz reached an agreement with the North Carolina Museum of Art in Raleigh, North Carolina through which they received a far below market value settlement for their family's painting in exchange for the museum's promise to use the painting's provenance for historic education (Thompson 437). One particularly creative resolution is the agreement reached between Eric Weinmann and the two entities that held his family's painting – an individual collector and the Yale University Art Museum. Ultimately, the individual collector agreed to donate his interest to the museum, the museum agreed to give the painting to Weinmann for ten years, and Weinmann agreed to donate the piece to the museum at the conclusion of the ten year period (Thompson 437).

## **Negotiation: An Alternative to Litigation**

The above-mentioned trend toward creative negotiations as a means of resolving Nazi-era art repatriation claims as an alternative to court-mandated settlements, combined with the scant legislation pertaining to repatriation litigation and the tremendous moral leverage of the claimants themselves conforms to academic assessments of when pre-trial

negotiations are most effective. Cooter, Marks, and Mnookin provide the following observation about when negotiations play a critical role:

The fundamental obstacle to cooperation is the absence of an authoritative rule for dividing the stakes. It is up to the players to find a division of the stakes acceptable to both of them. Strategy consists in trying to maneuver an opponent into accepting an unfavorable distribution. The objective of a skillful bargainer is to convince others that he intends to act in such a way that it is in their best interest to do what is in his best interest (228).

Within what the authors refer to as “bargaining in the shadow of the law,” the typical dispute dynamic that is the most receptive to pre-trial negotiation involves clearly defined players (e.g., the plaintiff and defendant) and the stakes of litigation are also clearly understood (Cooter 228). Further, there are obvious incentives to avoiding a trial that in the United States impact both sides including “legal fees, cost of delaying resolution of the dispute, waste from a judicial outcome off the contract curve” (Cooter 228). Indeed, Cooter et al. view a court trial as “a gamble”: “The expected value of the gamble is what a gambler believes the payoff to be on average ... The risk of the gamble is the difference between the best and worst possible payoffs” (245). Within this context, negotiation serves as a tool of hedging one’s bets in a climate of uncertainty either created through legislative ambiguity, lack of precedent, indeterminate public reaction to a court ruling, or any combination of these factors. Pre-trial negotiations of U.S.-based Nazi-era art repatriation claims seem particularly important given the reliance on tort remedies that are subject to regionalized statutes of limitations, which usually do not benefit the claimant. In such instances, pre-trial negotiation would seem to serve as a means of resolution that takes into consideration both the legal leverage of the defendant and the tremendous moral leverage of the claimant. Additionally, for an entity like a museum, negotiation offers the possibility of avoiding external costs that might be incurred to mitigate the negative publicity associated with unpopular litigation.

## **IV. Methodology/Logic of Inquiry**

### **Research Method: Microhistory Overview**

Alexandra Havrylyshyn demonstrated the effectiveness of microhistory research – a cutting edge genre of research – through a presentation she gave on October 24, 2012 during the H195A Legal Studies Honors Thesis Seminar. Havrylyshyn had performed a microhistory as part of her master’s thesis in which she chronicled the activities of a specific legal practitioner as part of a larger study about early 18<sup>th</sup> century law in Quebec. What is striking about the process Havrylyshyn described was that she was able to explore broader legal themes through investigating the activities of a specific individual. When asked about the suitability of applying microhistory methodology to the study of the resolution of Nazi-era art repatriation claims in the twenty-first century, Havrylyshyn confirmed that it could present an ideal means to channel the research and persuasively craft the thesis. The following reflects data collected on microhistory research protocols.

### **What is a Microhistory?**

The syllabus for “Deviant, Outcasts & other ‘Others’: Microhistory and Marginality in Early Modern Europe”, an undergraduate class offered at Cornell University, defines microhistory as follows:

Microhistory is a particular methodological approach to the study and writing of history. The aim of microhistory is to present peculiar moments in the past by focusing on the lives and activities of a discrete person or group of people. By illuminating the trials and tribulations of ordinary people in their everyday lives, microhistory aims to show both the extent of and the limits upon human agency, i.e. [sic] the ability of individuals to make meaningful choices and undertake meaningful actions in their lives (Corpis).

Sigurdur Gylfi Magnusson, the chair of the Center for Microhistorical Research at the Reykjavik Academy in Iceland, further refines the concept of microhistory research:

Nearly all cases [sic] which microhistorians deal with have one thing in common; they all caught the attention of the authorities, thus establishing their archival

existence. They illustrate the function of the formal institutions in power and how they handle people's affairs (Magnusson 2006).

Thus, by focusing on the manner in which a single noteworthy individual responded to a specific set of circumstances that impacted a broader population, microhistories can reveal intricate details of great historic importance that might be lost in an analysis of larger aggregated populations.

### **Developing a Microhistory Project**

To better understand how microhistory projects are assembled and presented, and in absence of concrete protocols, a review was conducted of Havrylyshyn's master's thesis, *Troublesome Trials in New France: The Itinerary of an Ancien Regime Legal Practitioner 1740-1743*. In reviewing her work, particularly the case studies she presented in chapter two, the following assessments of microhistory methodology were compiled:

- The goal of a microhistory researcher is to present a detailed chronology of an individual derived from primary source materials (in Havrylyshyn's case, legal transcripts) that also takes into account historic and cultural factors that likely influenced the experiences of the subject within a defined set of circumstances.
- Personal and historic details are woven together into a narrative that reveals not only the unique circumstances of the subject but also points to larger cultural trends that would have been applicable to others at a similar time and location. For example, Havrylyshyn provides the detail that one of her subjects – an enslaved woman named Marie-Marguerite – had only one eye, which served not only as a personally identifying characteristic, but also provided evidence of her Aboriginal origins (at the time, Aboriginals would routinely scar members of conquered communities, including burning out a victim's eye with a hot coal, as a means humiliation and identification) and, in turn, linked her to the ethnic majority of Quebec's enslaved population (35).
- Taken in total, a microhistory serves as a practical point of comparison against more aggregated scholarly research (as reflected in a project's Literature Review) that supports or challenges assertions of how historic policy, procedure, or events actually manifested themselves in the lives of individuals at a particular time or place.

## Description of Project Sources

This thesis explores the issue of Nazi-era art repatriation claims through both:

- An in-depth microhistory of Zellig Spiegelman that includes the efforts of his great nephew, David Smythe, to reclaim his family's stolen art collection, based on semi-formal interviews with Smythe and his attorney, Foerster, as well as data gathered from newspaper and other journal articles written about Smythe's art repatriation efforts.
- An analysis of aggregated data collected on international repatriation claims resolved through May 1, 2013.

## Sources

The range of sources this thesis is based on include (but are not limited to):

- ***Resolved Stolen Art Claims – Claims for Art Stolen During the Nazi Era and World War II, Including Nazi Looted Art and Trophy Art***

This database, which records the details of resolved Nazi-era art repatriation claims, is collected and updated by the law firm Herrick, Feinstein LLP based on:

... Information derived from published news articles and services available mainly in the United States or on the Internet, as well as law journal articles, press releases, and other sources, consulted as May 1, 2013 (Herrick 1).

For each claim, the following data points are captured: the country in which the claim was made; the date of return/resolution; who the claim was made by; who or what entity the claim was received by; the artwork(s) claimed; and the mode of resolution.

From this data, an analysis has been assembled that provides a sense of how art repatriation claims are generally resolved across the field – both internationally and domestically. This analysis helps to establish how Smythe's experience – as reflected in the microhistory – conforms to or contrasts with aggregated litigation trends.

- **Semi-structured interview with David Smythe**

At the initial stages of this project, Smythe was eager to participate and agreed to meet for coffee to discuss his general impression of what his experience as a Nazi-era art repatriation claimant has been like, as well as his family's history. This initial conversation provided the beginnings of the microhistory that would ultimately be compiled. Christina Stevens, the H195A GSI, proposed employing a semi-structured

interview format for gathering the remainder of the microhistory data. The Sage Dictionary of Qualitative Inquiry describes a semi-structured interview as:

The typical in-depth, semistructured ... aims to elicit stories of experience. The active interview is framed as an interactional encounter. Note that oral history interviews do not fit neatly in this classification. They are something of a hybrid between fact-finding and elicitation of stories and memories of experience (Schwandt 163).

In conducting a semi-structured interview, a list of essential questions is prepared beforehand but the interviewer has the flexibility to explore other topics revealed through the course of the interview that might add value to the data collected (Semi-structured Interviews). The use of interviews as a means of data collection has inherent advantages and disadvantages. Crosswell distills these attributes within the following table (186):

<b>Data Collection Types</b>	<b>Options within types</b>	<b>Advantages of the type</b>	<b>Limitations of the type</b>
Interviews	Face-to-face: one on one, in-person interview	<ul style="list-style-type: none"> <li>• Useful when participants cannot be observed directly</li> <li>• Participants can provide information</li> <li>• Allows researcher “control” over the line of questioning</li> </ul>	<ul style="list-style-type: none"> <li>• Provides “indirect” information filtered through the views of interviewees</li> <li>• Provides information in a designated “place” rather than the natural field setting</li> <li>• Researcher’s presence may bias responses</li> <li>• People are not equally articulate and perceptive</li> </ul>

Within the context of interviewing Smythe, the semi-structured interview format has the benefit of creating a less formal atmosphere in which he was able to freely relate his experiences without feeling he is being deposed or making another form of formal statement. The challenge this interview structure presented was that it necessitates constant monitoring to ensure the conversation remains relevant to answering or enhancing the understanding of my thesis research questions. Ultimately

the semi-structured interview data was analyzed through the lens of the thesis questions – comparing and contrasting the data against the scholarly research conducted and documenting points of conformity and deviation. For an outline of the Smythe’s interview questions, refer to Appendix 1: Interview Protocols – Smythe and Foerster Questions.

- **Semi-structured interview with Smythe’s attorney, Klaus Foerster**

For the purposes of this study, Smythe permitted access to his attorney so that a semi-structured interview could be conducted. While Foerster is located in Germany, he speaks English fluently and uses Skype as a means of communication. It was initially believed the semi-structured interview format would maintain its effectiveness within this online conference medium. For an outline of the Foerster’s interview questions, refer to: Appendix 1: Interview Protocols – Smythe and Foerster Questions.

- **Supporting documents and information**

To present Smythe’s experience in the most complete and objective manner possible, this project incorporates research derived from newspaper and other journal articles written about Smythe’s art repatriation efforts. Initially, Smythe provided copies of numerous articles written about him in U.S. and German media. While these articles offered useful data, independent Internet research was also conducted on Smythe’s claims and his family history to counteract any bias that might arise from relying solely on information provided by him.

## **Interview Protocols**

The complete list of essential questions asked to Smythe and Foerster during the semi-structured interviews can be found at: Appendix 1: Interview Protocols – Smythe and Foerster Questions.

## **Developments Impacting the Execution of Interview Protocols and Data Collection**

Through the execution of this project, unanticipated events mandated some alterations to the above stated data collection process. Initially, Smythe provided his consent to contact Foerster and even communicated with Foerster that he would be contacted in regards to participating in this project. In early February, an email was sent to



Foerster to establish a date and time to conduct the semi-formal interview and requesting access to any resolved claims documentation. Foerster did not respond to the initial request and when a follow-up email was sent two weeks later, Smythe responded that he had been instructed by Foerster to cease participation in this project due to potential damage it could pose to their future claims efforts. Through a lengthy negotiations process, Smythe and Foerster agreed to participate under the following conditions:

- Smythe would participate in in-person semi-structured interviews, but further interviews could not be recorded.
- Foerster would respond to interview questions, but only in writing.
- Data provided by both Smythe and Foerster would be presented preserving their anonymity. To this end, the names of all parties associated with their claims have been changed, key identifying details (e.g., names of specific artworks, etc.) have been modified, and citations that could potentially reveal their identities have been omitted.
- Foerster would provide no access to documents pertaining to Smythe's resolved claims.

While these changes modified the collection process and the presentation of information, it did not negatively impact the ability to answer the project's three research questions. Therefore, all conditions were agreed to and the project proceeded with these conditions in place.

## **V. Anticipated Findings**

The initial project research yielded a number of noteworthy trends as reflected in the Literature Review:

### **Claimants' attitude toward art repatriation**

To a claimant pursuing a Nazi-era art repatriation claim, often times his/her motives are based primarily on the symbolic recognition of a wrong committed against a deceased relative (e.g., the desire for acknowledgement of the theft – often expressed by way of a plaque displayed next to the artwork stating its provenance including the details of the theft) with financial gains serving either as secondary or peripheral aims. As reflected in the high profile cases of Maria Altmann and the Goudstrikker family, there is a growing desire among claimants to have artwork restituted from museums remain accessible to the

public (Thompson 428). In order to achieve this, claimants are increasingly accepting token financial settlements in exchange for some form of recognition of the plundered provenance of their family's possession, thus keeping the artwork on public display and providing claimants with the sense they have achieved justice for their victimized ancestor.

### **Ways in Which Claimants and Attorney's rationales for litigation converge/diverge**

Increasingly, claimants want to pursue their right of ownership to artwork stolen from their families during the Holocaust while still making these items available to the public. And attorneys want to fight the good fight but need to be paid for their investment of time, resources, and expertise. While Thompson's seminal article does an outstanding job of introducing her theories on what motivates individual players within art repatriation litigation, this project posits that a theoretical gap exists that addresses how the divergent interests of claimants and attorneys are reconciled through the litigation process itself.

### **Strategies for Representing Nazi-era Art Repatriation Claims**

Given the ambiguity and sparseness of legislation governing the litigation of Nazi-era art repatriation claims combined with the difficulties claimants face in producing concrete evidence of ownership for property owned by relatives 70 to 80 years prior, claimant's attorneys face unique litigation challenges. Even while claimants may only seek symbolic settlements, their attorneys need to apply different tactics toward advancing their clients' interests against the individuals and entities that hold the disputed items in possession.

### **Anticipated Findings**

Through the execution of this project, it was expected that the above trends would not only be confirmed, but demonstrate how these trends are manifested within the real life experience of an individual claimant. Further, through the careful analysis of the outcomes of all art repatriation claims initiated through May 2013, this project sought to establish how scholarly resources and Smythe's claimant experience conform to or contrast with larger, international Nazi-era art repatriation litigation trends.

## **VI. Project Findings**

### **Zellig Spiegelman**

#### **Spiegelman: Early Life**

In 1878, Zellig Spiegelman was born in Warendorf, a city in northwest Germany (citation omitted). He had only one sibling – a sister named Ingrid, who was “quite a bit older” and “barely mobile” after a bout with polio during childhood left her wheelchair-bound (citation omitted). From a “family of wealthy Rhineland wine merchants,” Spiegelman found little passion for the business he was to inherit (citation omitted). In 1910, the 32-year old Spiegelman wed Maggie Abramowitz, a member of “one of the richest Jewish families in Essen,” in a union arranged by his parents (citation omitted). As explained by his great nephew, David Smythe, Spiegelman’s family “wanted to marry him off” due to a wave of increasingly persuasive rumors circulating about his homosexuality (citation omitted). Reflecting on Zellig and Maggie’s marriage, Smythe stated: “I have no idea how the relationship to my Great-Aunt [sic] (his wife) functioned, but they seemed to have a close relationship” – significantly, a relationship that would produce no heirs (citation omitted). During the couple’s honeymoon in Paris, Spiegelman spent “his wife’s entire dowry on art” (citation omitted). When the Spiegelman and Abramowitz families voiced their concern about the liquidation of the dowry for a myriad of cubist paintings – many of them by the then unknown artist Pablo Picasso – Spiegelman is said to have replied, “don’t worry, these things will double in price” (citation omitted). While history has proven Spiegelman’s prediction a gross underestimation, global strife would ultimately undercut the success of his first gallery. During World War I, “Spiegelman went to war, serving in the Westphalian Uhlan Regiment, but not on the front. His gallery collapsed and his inventory was sold at auction in Berlin” (citation omitted). Yet, this initial failure did not dampen Spiegelman’s ambitions. If anything, it strengthened his commitment to become one of Europe’s leading collectors and dealers in modern art.

#### **Spiegelman: His Rise to Fame in the Art World**

In 1919, Spiegelman “reopened his Dusseldorf gallery” and began publishing his own magazine, *Der Hauptstadtisch* (The Metropolitan), which “dealt with subjects like art,

sports and dance” (citation omitted). Through the magazine, Spiegelman developed friendships with some of the era’s great writers, such as Ernest Hemingway(citation omitted). However, fine art remained Spiegelman’s focus. In October 1921, he expanded his operations, opening a new flagship in Berlin (citation omitted). By 1922, branches of Gallerie Spiegelman were opened in Frankfurt and Cologne (citation omitted). Additionally, Spiegelman’s spacious Berlin flat on fashionable Konig Strasse (of which photographs still exist) housed his personal art collection and served as an additional display space for certain pieces he wished to present to his more elite clientele for sale:

The story is that he may well have brought people over [to the flat] and used it as an extension of his showroom. If you had a good client, you might have said, ‘come on over,’ get them drunk, and see if you can sell them something (citation omitted).

The 1920s were, indeed, the apex of Spiegelman’s professional and personal lives. Through his fleet of galleries, Spiegelman quickly became recognized as:

the leading dealer in Germany for modern French art ... [he] eventually also exhibited a select number of Expressionist, Bauhaus, and Neue Sachlichkeit (New Objectivity) artists, including Ernst Barlach, Max Beckmann, George Grosz (under contract from 1925 to 1931), Paul Klee (whom he represented from 1927 to 1933), Oskar Kokoschka, Wilhelm Lehmbruck, and August Macke (citation omitted).

Spiegelman’s great love for the art world was visibly reciprocal. Spiegelman was depicted in work that spanned almost every artistic epoch from the turn of the 20<sup>th</sup> century through the 1920s. He was painted by Ernst Linnenkamp (1906), Hanz Bolz (1910), Marie Laurencin (1910-12), Louis Marcoussis (1914), Karl Hofer (1922), Otto Dix (1926), Pascin (1927); Rudolf Belling used his prominent ears as the subject of an abstract sculpture (1927); and he was photographed by Hugo Erfurth (1928) (citation omitted). Known for his glittering parties and outrageous personal style, Spiegelman’s 50<sup>th</sup> birthday held in 1928 at the Hotel Kaiserhof in Berlin became legendary:

Friends made a commemorative publication that contained tributes by Joachim Ringelnatz, Ernest Hemingway and other authors. Max Beckmann, George Grosz and other artists contributed drawings. The party guests included Tilla Durieux, the poet Gotfried Benn, the publisher Hermann Ullstein and the boxer Max Schmeling, who

said: “If I were a painter, I would want Spiegelman to represent me” (citation omitted).

In 1930, Spiegelman became an internationally recognized figure in the art market when he provided New York’s Museum of Modern Art (MoMA) with a large collection of Paul Klee paintings for their fourth exhibition and donated “to MoMA its first permanent piece – a bronze of the German boxer Max Schmelling by Rudolf Belling” (now lost) (citation omitted).

### **Spiegelman: Persecution, Exile, and Death Under the Third Reich**

The galleries began to experience financial difficulties as evidenced by Spiegelman’s cancelling of artist George Grosz’s monthly stipend in 1931, which he attempted to reinstate in 1932 when his “financial situation improved marginally” (citation omitted). In fact, according to Smythe, from about 1930, some people and institutions savvy to the impact of the rise of Nazism began withholding payments to Spiegelman “correctly guessing the time would come when they could just keep stuff they had ‘bought’ or received ‘for appraisal’” (citation omitted). However, 1933 – the year Hitler became Chancellor of Germany – would prove Spiegelman’s bleakest period. In March, Spiegelman tried to generate capital by auctioning some of his collection to which “the local Nazi storm troopers got wind of the event and staged a public protest, encircling the gallery and stopping the sale” (citation omitted). That same month, Nelson Von Schnecken, Spiegelman’s non-Jewish business partner, took over the Dusseldorf gallery (citation omitted). This takeover has been viewed as an “aryanization” – “the confiscation of property from Jews”:

Von Schnecken was a member of the SA (Sturm Abteilung, or Brown Shirts) – the violent Nazi paramilitary organization ... Von Schnecken’s takeover of Spiegelman’s Dusseldorf gallery should be viewed as a kind of “Aryanization.” Transfer of the Dusseldorf branch away from Spiegelman under duress is a strong indication that something similar occurred with regards to his Berlin gallery (citation omitted).

Upon the takeover, Von Schnecken reportedly wrote to a Swiss colleague about the situation stating: “It’s high time Germany had a good spring cleaning and I’m glad I’m part of it” (citation omitted). Following the war, “Von Schnecken claimed to have almost no

recollection of Spiegelman and even filed an application for reparations, which was later rejected (citation omitted)..

As Spiegelman's financial situation worsened, so to did his public image among Nazi-identified Germans. In April, *Volksparole*, a Nazi newspaper published by Joseph Goebbles, published a scathing article on Spiegelman (citation omitted). By November, Spiegelman attempted to liquidate his remaining galleries and assets through a "tax advisor," so he could avoid bankruptcy and leave the country (citation omitted). At the end of 1933, Spiegelman fled Germany with a few pieces of artwork ultimately for London, leaving Maggie behind in a "fruitless" effort to sell her real estate (citation omitted). In fall 1935, Spiegelman reported his desperate state to American art historian and founding director of MoMA, Alfred Barr: "I lost all my money and all my pictures ... the only things I didn't lose are my name, my experience, my knowledge of nearly every French modern picture, and my connections in Europe" (citation omitted). Barr reacted to the letter, which included a plea to purchase an important modernist sculpture from Spiegelman, by writing to a museum trustee: "I think he might possibly take as little as \$2,000 for this really great modern figure. We might offer him even less" (citation omitted). Things became so desperate that in 1936, Spiegelman divorced Maggie "on the theory that her life would be easier if she were no longer associated with him" (citation omitted). When it seemed things could not get worse for Spiegelman, in 1937 while still in London:

after slipping and falling on an icy street, he went to a hospital, where he contracted blood poisoning from a rusty nail on his bed. His leg was amputated but it was too late. Spiegelman died on April 13, 1937, in "misery, pain, and despair," as his English acquaintances recalled (citation omitted).

Before his death, Spiegelman named Mosche Cohen, a nephew from Maggie's side of the family, "as his sole heir" in his last will dated February 8, 1936 (citation omitted). (Refer to Appendix 2: Spiegelman/Smythe Family Tree for an abbreviated mapping of family relationships.) Mosche's son David stated, "I think Spiegelman was closest to our [the Smythe] family" due to the Spiegelman family's disdain for his gay lifestyle and anger that he did not go into the family business, which created "distance between the other Spiegelmans" (citation omitted).

Maggie, who was at Spiegelman's side in when he died in London, returned to Berlin – a decision that proved fatal:

In December 1941, a friend reported: "After Maggie Spiegelman had received orders to pack 25 kg of her belongings and be ready for deportation to Minsk, she made rice pudding, added the necessary amount of (the barbiturate) Veronal, and ate the rice pudding." When the Gestapo broke down the door the next morning, she was still breathing, despite having taken an overdose of the powerful sedative. Maggie Spiegelman eventually died in a hospital (citation omitted).

The last of Spiegelman's living relatives – his mother, Gretchen, and sister, Ingrid – committed suicide together to escape deportation (citation omitted).

### **Spiegelman: His Artistic Legacy**

It is estimated that upon Maggie's death, the Spiegelman's private art collection, which was "forfeited to the Reich" included:

100 to 120 works of art, of which 60 to 70 were paintings. They also owned a collection of tribal art from the South Pacific, which is now in museums in Cologne, Zurich and other cities. It is generally unclear which paintings were still hanging on the walls when the Gestapo sealed Maggie Spiegelman's apartment (citation omitted).

Yet, despite the magnitude of Spiegelman's collection and his significant participation in the development of Europe's modern art movement, it has been observed that following his death and until very recently, "he has been written out of history by those persons and institutions, particularly MoMA, who profited from his demise" (citation omitted). However, time seems to be righting this omission. On its website, the Kunsthalle Basel museum announced a showing of "37 artworks (paintings, sculptures, drawings and prints) ... that were either bought directly from Zellig Spiegelman or were donated by him to the museum between 1920 and 1931" (citation omitted). Further, the museum announced:

Zellig Spiegelman's dedicated engagement as an art dealer left its mark on numerous German museums, thanks to his active role in developing their collections of modern art. A research project conducted by 15 museums aids to uncover these

traces, present the results of the investigation in an illustrative manner and make them publicly accessible via an internet platform (citation omitted).

MoMA now hosts a brief biographical page on Spiegelman within their larger website (citation omitted). Spiegelman's legacy has even been employed for more nefarious purposes: "the greatest forgery ring in German history recently ripped off the art collecting world, including actor/art collector John Voight, by faking works from Spiegelman's stolen collection" (citation omitted). It seems that in the twenty-first century, Spiegelman is being written back into the pages of art history.

## **David Smythe**

### **Smythe: Biographical Background**

David Smythe, Spiegelman's grand nephew, has been described as:

An affable, soft-spoken man, [who] now lives in San Francisco. His grandparents came from Berlin, and his grandmother was Spiegelman's sister-in-law. The family name was still Cohen at the time. Smythe grew up in London and later studied medicine at Oxford (citation omitted).

The 67 year old Smythe explained, "my father's father was a doctor who died when he [Smythe's father] was six" at which point the family emigrated from Berlin to London (citation omitted). The family struggled financially and Smythe's father was particularly sensitive to the comfortable lifestyle his family had left behind in Germany (citation omitted). Reflecting on Spiegelman having named Smythe's father his sole heir, Smythe stated:

It's kind of interesting that I might inherit some of this stuff because that's what my father must have wanted ... luckily I made enough money in medicine that the money is a very minor aspect of the whole thing (citation omitted).

Smythe's father did attempt to claim compensation for the property stolen from Maggie's apartment (the artwork in Spiegelman's galleries could not be claimed because much of the inventory was possessed on a consignment basis and, therefore, not owned by Spiegelman) after the war with unsatisfactory results:



In June 1953, the Berlin District Court awarded 20,400 Deutschemarks, of which 12,400 were for furniture and household goods. The court estimated the replacement value of the paintings by “Hofer, Klee, George Gross, Matthiess, Monet and Renoir, that is, world-renowned artists,” at 8,000 Deutschmarks (citation omitted).

Likely, this settlement was not the product of adjudication but part of a procedure or law that allowed victims of Nazism to be compensated directly from the German government for their losses generally and did not foreclose subsequent legal action for the return of individual items stolen and in the possession of another entity or individual. That settlement was the only compensation Smythe’s father ever received and the matter was considered closed. However, in the early 2000s, Smythe – whose parents were then deceased – was contacted by a German-based attorney wishing to represent the family’s interests in repatriation claims stemming from the items stolen from Maggie’s apartment (citation omitted). Over the past two years, Smythe, who has since changed his attorney, has received four separate settlements for artwork found in Germany (citation omitted). The following sections were developed from feedback Smythe provided during in-person interviews about his experiences: attitude toward art repatriation; alignment of claimant and attorney’s rationale for pursuing claims; and understanding of claims strategies.

### **Smythe: Attitudes Toward Art Repatriation**

Media reporting on Smythe’s repatriation efforts consistently mention his philanthropic intentions. An article on Smythe’s settlement with the Kunstmuseum in Bonn for a famous Modernist painting stated: “Smythe plans to use the settlement money to set up a foundation to investigate the German prewar art market” (citation omitted). Another article chronicling his subsequent settlement efforts, reported: “Smythe says that he doesn’t want to auction off the paintings ... or take them back to the United States. The paintings, he says, should stay in the museums, and he intends to donate the proceeds from their sale to AIDS research” (citation omitted).

Smythe himself expresses conflicting feelings about his gains from Spiegelman’s estate. In reflecting on the monetary settlements he and his lawyer have secured – currently estimated at over \$4 million – Smythe stated, “the current settlements are almost

more than fair considering I didn't know I had even lost the paintings to begin with" (citation omitted). On one hand, Smythe concedes that when the pieces were stolen 80 years ago, they were worth far less, but also points out that "no amount of money can compensate for the actual lives of my great uncle, great aunts, and great grandmother" (citation omitted). Already financially successful, Smythe stated he "cannot spend all the money" he has amassed (citation omitted). However, he views the windfall from Spiegelman's estate as "opening opportunities to do something meaningful socially for causes of personal importance, like AIDS research, immigration reform, pharmaceutical research, and so on" (citation omitted). This commitment to channeling earnings from Spiegelman settlements into philanthropic coffers thus precludes the desire to acquire any of the original artwork, "how could I justify having a \$2 million painting on my wall when someone else could really use the money" (citation omitted).

Smythe's attitude toward his repatriation efforts has shifted over time. Before his initial attorney contacted him, Smythe "didn't even know there was a legal issue to pursue" nor did he feel a significant sense of loss over the death of his great uncle (citation omitted). Concerned with Spiegelman's homosexuality, Smythe's father kept that part of his family's history a secret (citation omitted). Thus, an important aspect of Smythe's experience as a repatriations claimant has been gaining access to previously censored details of his family's history that has, in turn, reshaped his perception of his family's persecution in Germany. Smythe states he is "grateful to be alive now" and can appreciate how his father's lifestyle was ripped apart by the Nazi's rise to power (citation omitted). What he has learned through this process has reaffirmed his commitment to his efforts, "the more I learn, the more I believe injustice did occur, which makes me want justice all the more" (citation omitted).

### **Smythe: Alignment of Claimant and Attorney's Rationale for Pursuing Claims**

The concepts of justice and righting a wrong are foundational to Smythe's rationale for pursuing his repatriation claims. Reporting on his stated motives, Der Spiegel Online quoted Smythe saying, "I want justice" (citation omitted). Smythe harbors no ill will toward contemporary Germany. He stated he "never had a sense of deprivation as far as Germany was concerned" and even returned to Germany during young adulthood to work for an

airline (citation omitted). However, Smythe takes issue with the earlier erasure of Spiegelman's name from history. According to Smythe, "the Spiegelman name has disappeared, which is bizarre ... it feels like something is being repressed. His old associates washed their hands of him. His name needs to be reestablished" (citation omitted). In fact, the process of pursuing his right to Spiegelman's property is a necessary means to having Spiegelman's legacy acknowledged. Smythe feels an important distinction exists between an apology and acknowledgement. As he explained, "it's weird when people who weren't involved apologize. How can you apologize for the Holocaust? To do something like that could be very insulting" (citation omitted). For Smythe, acknowledgement can be achieved through non-monetary means, "for the piece in the museum, I insisted an honorary plaque be displayed that acknowledged its Spiegelman provenance" (citation omitted). Smythe further explained, "the money is less important than the principle" (citation omitted).

Smythe feels particularly passionate about pursuing claims against individuals and institutions that possess Spiegelman artwork but, out of ignorance, deny or dispute its provenance. Smythe admitted that when an opposing party refuses to own up to the fact that they are in possession of artwork looted from Spiegelman, "it makes litigation that much more desirable" (citation omitted). But more troubling to Smythe are those parties that knowingly possess looted artwork yet "claim they don't know" (citation omitted). "I'm not a punitive person," explained Smythe, "but it's appalling when they [someone knowingly possessing stolen artwork] are very polite but don't act – there's a real problem" (citation omitted). Yet such instances have made Smythe that much more grateful to "those who did do the right thing," by admitting they possessed artwork with a questionable provenance and agreeing to work with Smythe's attorney on a settlement (citation omitted).

Ultimately, through his legal efforts, Smythe would like to establish a precedent that if a piece of artwork stolen from Spiegelman is displayed publicly (in a museum, gallery, etc.), that it be accompanied by a plaque explaining "a bit about Spiegelman, how it was stolen from him, etc." (citation omitted). Smythe expressed his desire to one day see wings in museums devoted to Spiegelman's collection, or more impressively, a single museum established to display his entire collection (citation omitted).

Smythe's believes his attorney, Klaus Foerster's rationale for pursuing repatriation claims is more moral than monetary. "He feel a sense of moral outrage – these cases for him are personal," explained Smythe. While Foerster, who works on a contingency fee, is "able to make a living at it, too," Smythe observed, "there's a huge amount of guilt [over the Holocaust] in the German psyche," which makes pursuing repatriation claims more of a moral cause for Foerster (citation omitted). However, because of the backlash associated with potential residual anti-Semitism, the perception of his "taking items off German museum walls," and potentially being seen as "wallowing in a disagreeable past," Smythe speculates that Foerster is "probably not a popular figure in Germany" (citation omitted).

### **Smythe: Understanding of Claims Strategies**

When initially asked about his role in determining the strategy for presenting his claims, Smythe stated he had no role in this process (citation omitted). After some reflection, he stated "I have discussed ideas [with Foerster] and he will say either they are good or stupid" (citation omitted). Smythe stated that his attorney says he is very much part of the process due to his interest in the cases and his willingness to travel and that Smythe's physical presence in the process shows he is "not a predatory lawsuit person" (citation omitted). However, Smythe's understanding of the inner workings of Foerster's procedure suggests Smythe is at least a very savvy legal consumer. Smythe offered the following overview of Foerster's method for locating Spiegelman artwork:

Klaus has a different technique [than his previous attorney]. He has amassed a huge database of all the paintings and sculptures with a Spiegelman connection. Any item sold before 30 January 1933 (the Nazi seizure of power) ... is eliminated ... Klaus then marks items that can be traced (i.e. they exist today) and whether they were "sold" (potentially legally "under duress") before Spiegelman died in 1937, or after, when my father should have been reimbursed as the sole heir (citation omitted).

Smythe then described Foerster's process of contacting entities in possession of potentially looted artworks; crafting a carefully worded letter stating, "we know you have in your collection the following items ... and will you cooperate" (citation omitted)? Smythe believes that through the process of pursuing his claims, in Germany they are "making the laws as they go along" that other claimants can later benefit from (citation omitted).

Smythe is pleased with Foerster's strategic handling of his cases. "He's doing a good job," stated Smythe, "he gets into fights with people, but is still as diplomatic as he needs to be" (citation omitted). Based on Smythe's feedback, it seems his partnership with Foerster has created a strategic union in which Foerster provides provenance research and legal muscle and Smythe provides the ethical "face" of the claim – a union that has already yielded significant financial success.

## **Klaus Foerster**

### **Foerster: Biographical Background**

Klaus Foerster is an attorney based in Frankfurt, Germany. Over the past 15 years, Foerster has represented more than 50 Nazi-era art repatriation claims "of different complexity" (citation omitted). Foerster estimates that art repatriation claims account for 80 percent of his current workload – his fastest claim was resolved in two weeks, while "other claims have been lasting for seven or eight years" (citation omitted). Foerster's first contact with Smythe was five years ago:

I had a phone call with Dave Smythe, because I had some questions regards [sic] his uncle's collection, whose name appeared in the provenance of a painting I was investigating at that time for another client. He told me about his family's story and that he was being misrepresented at that time by another lawyer who did not pursue any claims for years. Finally, I took over the case and we started working together (citation omitted).

Since taking over Smythe's case, he has represented "many" claims on his behalf, but could not specify the exact number due to sensitivity around claims currently pending (citation omitted). The following sections were developed from feedback Foerster provided in writing about his experiences: attitude toward art repatriation; alignment of claimant and attorney's rationale for pursuing claims; and understanding of claims strategies.

### **Foerster: Attitudes Toward Art Repatriation**

Foerster's attitude toward art repatriation seems less vocational than ethical. As he explained, "I got involved in Holocaust-related cases in the late 1990s for the first time and since then I feel being on a 'mission'" (citation omitted). Foerster, who is not Jewish, views his participation in the repatriation claims process as a way to provide justice and closure to his clients:

I work in the sure knowledge that I am doing the "right thing", assisting the victims – Jewish families – all over the world to get justice after all that time elapsed and bring closure to unsettled matters (citation omitted).

### **Foerster: Alignment of Claimant and Attorney's Rationale for Pursuing Claims**

Foerster puts a good deal of effort into ensuring his alignment with his clients to prevent attorney-client conflicts from emerging. Foerster confirmed he does perform an initial screening with most potential clients to ensure both are aligned on strategies and desired outcomes, but he did not elaborate on how this process is conducted (citation omitted). Foerster indicated he has not yet experienced a situation in which conflicting interests have emerged between him and any of his clients and stated, "as a lawyer, one is obligated and one should seek to avoid such situations before they might occur (citation omitted). Reflecting on the essential components of his attorney-client relationships, Foerster remarked, "at first, absolute mutual trust. Secondly, a more or less regular exchange of ideas and information. To the third, if possible, success at the end of the day, of course" (citation omitted). In characterizing his relationship with Smythe, Foerster observed "he is what we call an 'active' client, very responsive and interested in what is going on" (Foerster 4/5/2013). In fact, Foerster usually consults with his clients on important decisions and strategic elements of the claims process, "developing a strategy is an ongoing process in which the client usually is involved" (citation omitted). When asked to prioritize his clients' rationales for pursuing repatriation claims on a 10 (highest) to 1 (lowest) scale, Foerster provided the following: need for justice (10), obtaining new information about relatives (8), receiving money or return of property (5), receiving non-monetary or symbolic compensation (5), desire for an apology (2), need for reform (2),

desire to have their “day in court” (1) (citation omitted). Foerster’s responses strongly suggest his collaborative style and consideration for his clients’ rationales for pursuing their repatriation claims keep both parties aligned throughout the legal process.

### **Klaus Foerster: Understanding of Claims Strategies**

Having represented repatriation claims both within and outside Germany, Foerster summarized his experiences as, “[it is] very tough, many obstacles, our counterparts usually very defensive, so you learn – you have to be – stubborn and you need a long breath” (citation omitted). Within Germany, Foerster has a range of laws/guidelines to assist him in his efforts, “there are laws, especially enacted by the Allied Forces and the Allied Command in Germany, by the Federal Republic of Germany after 1949, and also other local and/or international laws and guidelines” explained Foerster (citation omitted). Foerster’s response indicates that the German government has passed a battery of laws permitting the relatives of individuals whose artworks were seized by the Nazis to pursue their claims many years after the theft occurred, though it remains unclear exactly what these laws are or precisely how they impact a claimant pursuing artworks found within Germany. Even with these laws/guidelines, Foerster is careful to point out, “for good reasons, negotiating/settling claims without litigation and/or lawsuits enjoys top priority” (citation omitted).

One difficulty unique to Nazi-era repatriation claims is the duration of time – 70 to 80 years – that has elapsed since the occurrence of the initial theft. Foerster estimates the degree of difficulty in establishing property ownership as:

Sometimes easy, but in most cases rather difficult because of the lack of first-hand documentation. That differs from case to case, depending on how much information had been preserved with the families involved and can be obtained from other sources (e.g., archives, courts, museums, art dealers, etc.) (citation omitted).

However, Foerster asserts that the biggest hurdles in representing repatriation claims in Germany is “suppression and ignorance” of Germany’s period under Nazi rule and the occurrence and effects of the Holocaust (citation omitted).

To offset these challenges, Foerster and his team devote a significant amount of time to the initial preparatory/research phase of each case:

The initial research phase of a claim requires hard preparatory work – visiting archives, full-scale investigations in every way, contacting the possessor being best prepared. Negotiations. Sometimes you have to make matters public (keyword “PR) (citation omitted).

While Foerster did not provide a direct overview or summary of his strategy for representing repatriation claims, his responses indicate that he leverages the following strategic components: (a) close partnerships with his clients that include understanding their rationales for litigation; (b) a comprehensive knowledge of various undisclosed country-specific laws/guidelines impacting Nazi-era repatriation claims; (c) pursuing negotiation over litigation; (d) investing resources in preparatory research to offset the challenges posed by the significant amount of time that has elapsed since initial thefts occurred and the lack of historic awareness that exists in some segments of the population; and (e) the willingness to leverage the media to generate public awareness and, potentially, sympathy for his clients’ claims. This system seems to produce consistent results. Foerster reported that the outcomes of Smythe’s various settlements were consistent with what he had anticipated when he initiated the claims and that the resolution of Smythe’s claims were no different from other art repatriation claims he’s previously represented (citation omitted).

## **Resolved Claims Data**

### **Resolved Claims Data: Report Overview**

The law firm Herrick, Feinstein LLP maintains an active record of resolved art repatriation claims through their report, *The Resolved Stolen Art Claims – Claims for Art Stolen During the Nazi Era and World War II, Including Nazi Looted Art and Trophy Art*. The report dated May 1, 2013 records for each claim: the country in which the claim was made; the date of return/resolution; who the claim was made by; who or what entity the claim was received by; the artwork(s) claimed; and the mode of resolution.

### **Resolved Claims Data: Observations on the Report’s Comprehensiveness**

The report states the following about how its source data is gathered:



... Information derived from published news articles and services available mainly in the United States or on the Internet, as well as law journal articles, press releases, and other sources, consulted as of May 1, 2013 (Herrick 1).

Significantly, the report fails to capture either of the two settlements Smythe received in 2011. While such omissions reveal that the report fails to capture *every* art-related repatriation case, it succeeds in providing the most extensive collection of repatriation case data currently available. For the purposes of the following analysis, the report’s data is viewed as a reflection of overarching trends in the resolution of stolen art claims rather than as a definitive representation of every claim that has been resolved through May 1, 2013. The following analysis only includes cases in which the defendant was an individual, not a country or an institution (e.g., a museum).

**Resolved Claims Data: Geographic Dispersion and General Utilization**

Nazi-era art repatriations claims have been filed on behalf of individuals and resolved in 19 countries, which include:

Australia	France	Japan	Slovakia
Austria	Germany	The Netherlands	Switzerland
Canada	Hungary	New Zealand	United Kingdom
Czech Republic	Israel	Poland	United States
Estonia	Italy	Scotland	

Among those countries with resolved Nazi-era art repatriations claims, 13 or 68.42% are located in Europe. The first recorded art repatriation claims on behalf of individuals were filed in 1996 both in the Czech Republic (the claim went into litigation, resulting in a court-ordered return of the paintings) and France (the claim was not litigated and the drawing was returned). Since 1996, claims have been filed globally every subsequent year. As of May 1, 2013, Herrick, Feinstein LLP have recorded 180 resolved Nazi-era art repatriations claims on behalf of individuals. The five countries with the highest volume of resolved Nazi-era art repatriations claims are:

Country	Number of Resolved Claims	% of Resolved Claims
<b>Germany</b>	<b>49</b>	<b>27.22%</b>
<b>United States</b>	<b>33</b>	<b>18.33%</b>
<b>Austria</b>	<b>23</b>	<b>12.78%</b>

<b>The Netherlands</b>	<b>23</b>	<b>12.78%</b>
<b>France</b>	<b>13</b>	<b>7.22%</b>

These five countries have generated 78.33% of all the Nazi-era art repatriation claims resolved globally. Interestingly, the United States – the country with the second highest number of resolved claims – is the only country among the top five not located in Europe. Further, the United States accounts for 71.74% of resolved Nazi-era art repatriation claims generated by non-European countries. This high utilization for a country located a continent away from where the thefts occurred might suggest that a higher percentage of those fleeing Nazi persecution immigrated to the United States; museums and collectors in the United States have acquired a higher percentage of artwork that was stolen by the Nazis; and/or a perception exists that repatriation claims can successfully be waged in United States.

### **Resolved Claims Data: Resolution Trends by Geographic Location**

An analysis of the data reveals that the two major means by which art repatriation claims are resolved are through non-litigation (i.e., negotiations between parties conducted outside of a formal legal setting) and litigation (i.e., formal legal process in which a judgment is rendered by a third party). Among those claims captured in the resolved claims data, the overwhelming majority has been resolved through non-litigation:

	<b>Non-Litigation</b>	<b>Litigation</b>
<b>All Countries</b>	(155/180) <b>86.11%</b>	(25/180) <b>13.89%</b>
<b>Germany</b>	(44/49) <b>89.80%</b>	(5/49) <b>10.20%</b>
<b>U.S.A.</b>	(27/33) <b>81.82%</b>	(6/33) <b>18.18%</b>

Therefore, regardless of geographic location, claimants and their attorneys prefer to forego formal legal channels in favor of informal negotiations between parties, which likely reflects the time and expense required to litigate such claims formally.

Claims, whether litigated or not, are usually resolved in one of three ways. Either artwork is returned; a monetary settlement is accepted in lieu of the artwork (this includes settlements involving symbolic payments below the artwork’s value in exchange for the artwork’s provenance to be displayed, etc.); or the claim is denied. The following reflects the dispersion of settlement outcomes:

	<b>Artwork Returned</b>	<b>Financial Settlement</b>	<b>Claim Denied</b>
<b>All Countries</b>	(143/180) <b>79.44%</b>	(33/180) <b>18.33%</b>	(4/180) <b>2.22%</b>
<b>Germany</b>	(47/49) <b>95.92%</b>	(2/49) <b>4.08%</b>	(0/180) <b>0.00%</b>
<b>U.S.A.</b>	(19/33) <b>57.58%</b>	(13/33) <b>39.39%</b>	(1/33) <b>3.03%</b>

The data reflects that the majority of claims resulted in the return of artwork. This is particularly pronounced in Germany where almost 96% of claims resulted in the artwork's return. It is worth noting that while a claim may result in the return of the artwork, what the claimant does with the artwork once returned is not recorded, which could include selling the artwork to pay legal expenses, etc. Also significant is that all of Germany's recorded repatriation claims have resulted in either the return of artwork or a financial settlement – no recorded claims have been denied. This seems to suggest that culturally, Germany is particularly sensitive to the rights of claimants and favors the full restitution of property over monetary settlements as a method of resolution. Further, with no German claims being denied, it could also serve as a signal to potential claimants that obtaining a favorable outcome is not that difficult, which, in turn, might increase the frequency of German-based claims being filed. More significantly still, this unblemished win rate could be an indicator that the moral leverage of being a Nazi-era art repatriation claimant in the country in which Nazism originated is particularly potent because of the guilt Germany still harbors over the atrocities that occurred under the Third Reich.

## **VII. Analysis of Project Findings**

To gauge the impact of the project's findings, the following section applies the collected data to the three research questions:

- Why claimants initiate art repatriation litigation?
- How claimants and attorneys' rationales for litigation converge and diverge?
- Given that concrete evidence of ownership of victims' possessions as well as records of what the Nazis stole from their victims can be extremely difficult to obtain, what strategies do attorneys employ to maneuver around these issues and further their clients' interests?

## **Analysis of Project Findings: Why Claimants Initiate Art Repatriation Litigation**

The data reflected in the Literature Review indicates many individuals who initiate Nazi-era art repatriation claims view the claims process as an opportunity to achieve a symbolic recognition of a wrong committed against a deceased relative. A growing trend reported among claimants whose artworks are held by public institutions such as museums, is the willingness to accept symbolic financial settlements with the artworks remaining on display in exchange for some form of public recognition of their plundered provenance.

Smythe's attitude toward art repatriation seems to mirror and perhaps expand the boundaries of this philanthropic trend. While he has received far more than what might be considered symbolic amounts through the resolution of his various claims, he has channeled his awards into charitable organizations. In fact, in light of the significant value of the artworks in question, Smythe finds the idea of taking possession of any of his great uncle's original artwork to be morally repugnant, or as he stated: "how could I justify having a \$2 million painting on my wall when someone else could really use the money" (citation omitted).

Interestingly, Smythe commented that, before his initial attorney contacted him, he "didn't even know there was a legal issue to pursue (citation omitted). This observation seems to affirm Felstiner, Abel, and Sarat's belief that disputes are "social constructs" that arise when "an unperceived injurious experience (UnPIE, for short)" is "transformed into a perceived injurious experience (PIE)" (Flesteinter, Abel, and Sarat 633). In Smythe's case, the attorney who initially contacted him about his great uncle's estate served as the conduit for the transformation of Smythe's perception. In fact, Smythe's experience mirrors the Felsteiner et al. theory of *naming, blaming, claiming* (Flesteinter, Abel, and Sarat 633). For Smythe, *naming* – the transformation that occurs when an experience is perceived as having been "injurious" – occurred when his initial German attorney contacted him, making him aware of his legal rights to property stolen from his great uncle by the Nazis (Flesteinter, Abel, and Sarat 635). *Blaming* – when "a person attributes an injury to the fault of another individual or social entity" – occurred when Smythe's attorney made him aware that those institutions in possession of his great uncle's artworks were morally and legally

obligated to return or make some form of restitution for those pieces in their collection (Flesteinter, Abel, and Sarat 635). Finally, *claiming* – “when someone with a grievance voices it to the person or entity believed to be responsible and asks for a remedy” – occurred when Foerster began contacting institutions in possession of Smythe’s great uncle’s artworks, which served to initiate the negotiations process (Flesteinter, Abel, and Sarat 635).

Smythe’s outlook with regards to pursuing his claims to his great uncle’s stolen art collection as a means to fund charitable organizations seems very much in keeping with the philanthropic trends reported among the larger claimant population. Further, it appears as though attorneys – both his previous and current legal representation – have played a significant role in shaping Smythe’s belief that he has a grievance, making him aware that there are institutions who have a responsibility for compensating him for that grievance, and that he should empower an attorney with the right to pursue the resolution of this grievance on his behalf.

### **Analysis of Project Findings: How Claimants and Attorney’s Rationales for Litigation Converge and Diverge**

Research indicates that claimants are increasingly pursuing their right of ownership to artwork stolen from relatives by the Nazi government for reasons other than financial gain. Similarly, attorneys representing repatriation claims often voice their commitment to being part of a morally just cause. But ultimately, these claims involve artworks that have increased substantially in value since they were initially stolen 70 to 80 years prior. While claimants seem motivated less by monetary settlements than by other forms of restitution (e.g., need for justice, need for apology, etc.), attorneys, while pursuing justice for their clients, still need to “keep the shop open” by securing lucrative settlements. This presents the question of how claimants and attorney’s rationales for such litigation converge and diverge.

Smythe represents the claimant side of this experience. His rationale for litigation is best summed up in his own words: “I want justice” (citation omitted). Justice for Smythe is reestablishing his great uncle’s name in art history. While Smythe views apologies being offered by the current generation on behalf of the previous generation as potentially

“insulting,” acknowledgement of his great uncle’s connection to the artwork is very important to Smythe. While Smythe describes himself as not being a particularly litigious person, he strongly favors pursuing claims against institutions that out of ignorance or deceit deny their possession of his great uncle’s artworks. Additionally, through this process, Smythe has gained an awareness of a piece of his family’s history that was previously censored by his relatives. Obtaining this additional information has added to the overall value of his claimant experience.

Smythe’s rationales correspond to several of the claimant motivational categories established by Robbennolt and Sternlight, specifically:

- **Need for justice** – In this case, justice is achieved by settlements that acknowledge Smythe’s great uncle’s legacy and the crimes committed against him.
- **Need for apology** – While Smythe openly opposes the idea of an apology, he does desire an acknowledgement of the fact that his uncle’s artwork was stolen from him, which might be viewed as an intransitive form of an apology.
- **Need for information** – Smythe has expressed his appreciation for the information he has obtained about his great uncle through the course of his claims process. While not necessarily a rationale for the initiation of his claims, it has added value to his experiences as a claimant.

Smythe speculates that Foerster’s motivation for representing Nazi-era art repatriation claims is based in “moral outrage” over the persecution of Jews by Nazi Germany. Smythe believes Foerster undertakes such work at the risk of damaging his own reputation in the country in which he lives. Foerster describes himself as being on “a mission,” “doing the right thing,” and getting “justice” for his clients. From this perspective, both claimant and attorney express a unified and morally based rationale for litigation. To ensure he and his clients are aligned in their rationales for litigation throughout the claims process, Foerster invests a great deal of time up front to screen his clients, establish mutual trust, and facilitate a regular exchange of ideas.

For all his efforts, Foerster does seem to demonstrate an accurate understanding of what motivates his clients for initiating art repatriation claims – prioritizing the need for justice and a desire for information over the desire for financial settlements, apologies, and the opportunity to have their “day in court.” Foerster’s stated commitment to righting the

wrongs committed by the Nazis as well as his consistent alignment with his clients in their rationales for litigation, suggest that within the realm of Nazi-era art repatriation litigation, claimants and attorney's rationales for such litigation are very much complementary.

However, the fact that Smythe, who had no idea that a legal issue existed with his great uncle's estate, obtained his legal counsel only after they had contacted him through a cold call-like process suggests something unstated might be working in tandem with his attorneys' rationale for litigation. It seems significant that Smythe is the great nephew of one of the most prominent German Jewish art dealers and collectors during the Nazi takeover of Germany whose collection in today's market is worth potentially hundreds of millions of dollars. That these two German attorneys contacted him of their own volition to offer their services on a contingency basis could easily be seen as a kind "cherry picking" among potential Nazi-era art repatriation claimants in an attempt to secure only the most lucrative claims. If this assessment is correct, it might imply that Smythe's attorneys actively seek out only those art repatriation cases that enable them to both champion a morally worthy cause as well as pursue the opportunity to reap significant material rewards for themselves and their clients. In turn, this would suggest a degree of divergence in claimant and attorney's rationales for litigation.

### **Analysis of Project Findings: Nazi-era Theft Claims Strategies**

Nazi-era art repatriation claims, whether filed in the United States or abroad, present their own unique challenges to claimants and their attorneys. Regardless of where a claim is filed, the 70 to 80 years that have passed since the original theft occurred requires that extensive historical research be conducted in order to establish ownership. It also inspires attorneys representing claimants to resolve claims directly with those in possession of the artworks and their attorneys. Ultimately, the goal is to secure for the claimant either the return of the artwork or a settlement that achieves the claimant and attorney's objectives and to do so as efficiently as possible. To bypass the lengthy and expensive process of litigating art repatriation claims, attorneys are primarily – to use Cooter, Marks, and Mnookin's terminology – "bargaining in the shadow of the law" in order to reduce "legal fees, cost of delaying resolution of the dispute, [and] waste from a judicial outcome off the contract curve" (Cooter 228). Not insignificantly, it also shields defendants

– particularly museums and reputation-conscious collectors – from the negative press associated with being accused of possessing Nazi plundered artwork.

Smythe, as a consumer of legal services, is particularly well acquainted with his attorney’s claim strategies and even plays a role within those strategies – serving as the face of the claim. Smythe understands the inner workings of how Foerster rules in/out artworks to pursue claims for and the tactics he employs for initiating claims negotiations with holding parties. Not only is Smythe aware of Foerster’s strategy, he supports his efforts – freely admitting “he’s doing a good job” (citation omitted).

Foerster, as a provider of legal services, readily admits that despite the range of undisclosed laws/guidelines that would support his claims in a German court of law, his first preference is to negotiate claims outside a courtroom. While convenience is certainly a motivating factor, so too is the fact that “most cases are rather difficult because of the lack of first-hand documentation” (citation omitted). Ultimately, Foerster’s strategy is an amalgam of intertwined resources that include (a) close partnerships with his clients; (b) leveraging his knowledge of country-specific laws/guidelines regulating Nazi-era repatriation claims; (c) actively advocating for negotiation over litigation; (d) placing priority on preparatory research; and (e) leveraging the media as an additional means to publicize his efforts and garner support for his clients. To his credit, Foerster’s strategy has been proven effective by virtue of the consistent results rendered for his client, Smythe.

The data contained in the report, *The Resolved Stolen Art Claims – Claims for Art Stolen During the Nazi Era and World War II, Including Nazi Looted Art and Trophy Art*, further validates that Foerster’s strategy is reflective of both global and German art repatriation claim trends. Among the 180 cases resolved worldwide captured in the report, over 86% were resolved through non-litigation (i.e., negotiated outside of a courtroom between parties). In Germany, where Foerster has presented all of Smythe’s claims, the percentage of cases resolved through non-litigation is even higher, almost 90%. However, to date the outcomes of Smythe’s claims do differ in one significant way from both global and German resolution trends; only one of Smythe’s claims (resolved May 23, 2013) resulted in the return of artwork – all his other claims were resolved through financial settlement. This is a stark contrast particularly to Germany’s resolution trends of which almost 96% result in the return of artwork and the remaining 4% result in a financial



settlement (no reported claims have been denied). Even when considering that the Resolved Stolen Claims report fails to capture *every* art-related repatriation claim, it still begs the question, “why have the outcomes of Smythe’s claims deviated so significantly from the reported trend?” The data does not present a clear answer to this question, but it seems highly probable that an explanation might be found in a further assessment of reported cases resulting in the return of artwork, specifically investigating what happened to the artwork upon its return. Given the strong trend reported among claimants, including Smythe, to have artwork remain accessible to the public combined with the necessity to compensate claimants’ legal counsel, it seems quite likely that claimants who have artwork returned to them sell the artwork soon thereafter – either for symbolic or market values – to return it to the public, pay legal bills, and potentially fund charitable organizations. If true, Smythe’s experience as a Nazi-era art repatriations claimant is far more consistent with reported trends in virtually every aspect.

## **VIII. CONCLUSION**

This project tested scholarly assessments of Nazi-era art repatriation litigation by closely examining the experience of one claimant and his attorney. Through the process of answering the three research questions, a more complex composite emerged of the legal landscape that impacts Nazi-era art repatriation claims and the players involved. As a result, this project should be viewed both as an extension of scholarly research on the issue and a point of origin from which further scholarly research can be launched. Other studies that might lend further clarity on this subject might include:

- An attorney-focused study on motives for representing Nazi-era art repatriations claims.
- A post-claims resolution study examining how settlements are distributed after a claim is finalized.
- An expanded micro-history study following multiple claimants and their attorneys.

Such studies would serve to document and further crystallize an important phenomenon in legal history that should be preserved for subsequent generations.

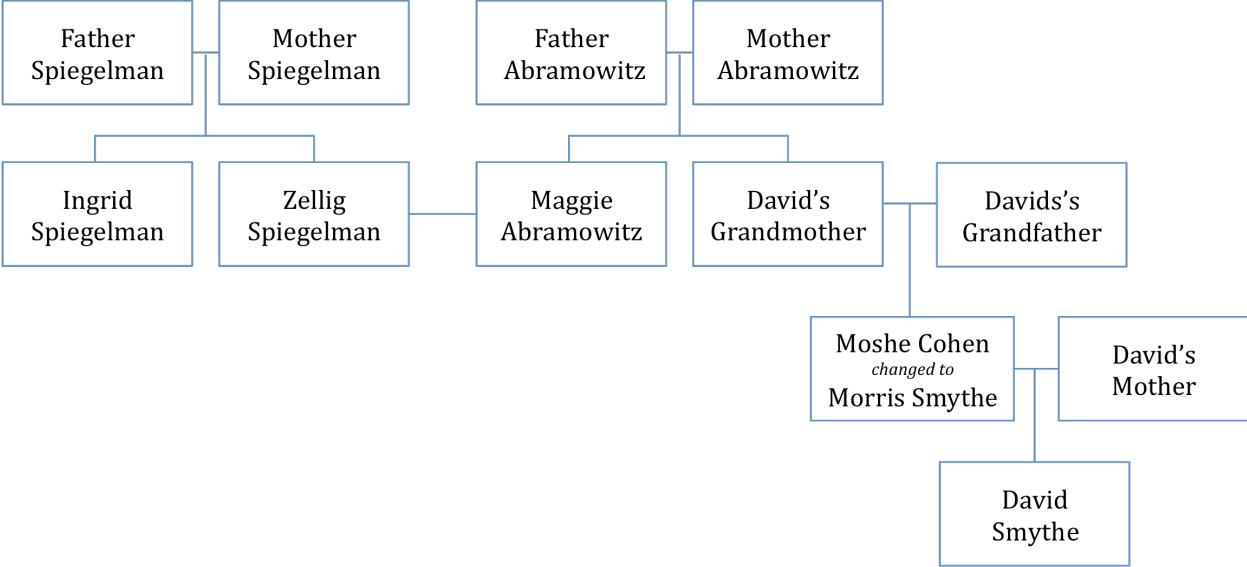
## Appendix 1: Interview Protocols – Smythe and Foerster Questions

Smythe Questions	Foerster Questions
<b>Factual Background/General Context/Overarching Motives</b>	
<ul style="list-style-type: none"> <li>• How many pieces of artwork do you estimate were stolen from Spiegelman?</li> </ul>	<ul style="list-style-type: none"> <li>• How long have you been representing Nazi-era art repatriation claimants?</li> </ul>
<ul style="list-style-type: none"> <li>• What are your principal reasons for initiating your repatriation claims?</li> </ul>	<ul style="list-style-type: none"> <li>• How many claims do you estimate you have been involved in?</li> </ul>
<ul style="list-style-type: none"> <li>• It's been mentioned in a number of articles that you've donated all or part of your settlement funds. How does philanthropy fit in to your motivations as a claimant?</li> </ul>	<ul style="list-style-type: none"> <li>• What percentage of your workload do you anticipate is art repatriation-related?</li> </ul>
<ul style="list-style-type: none"> <li>• To what extent do you believe that pursuing your claim will provide you with new information about Spiegelman and/or his life?</li> </ul>	<ul style="list-style-type: none"> <li>• How did you choose to practice this type of law?</li> </ul>
<ul style="list-style-type: none"> <li>• How much has a “need for justice” influenced your various legal actions?</li> </ul>	<ul style="list-style-type: none"> <li>• What makes you continue to represent these kinds of claims?</li> </ul>
<ul style="list-style-type: none"> <li>• To the extent that it's possible, would you desire some form of apology as part of your settlement?</li> </ul>	<ul style="list-style-type: none"> <li>• Thinking about the Nazi-era art repatriation claimants you've worked with, on a scale of 1 – 10, with 1 being of no importance and 10 being of major importance, how important do you think following factors are to your clients in pursuing their claims:                             <ul style="list-style-type: none"> <li>○ Receiving money or the return of property</li> <li>○ Obtaining new information about their relative</li> <li>○ A need for justice</li> <li>○ The desire for an apology</li> <li>○ Need for reform</li> <li>○ Other nonmonetary or symbolic compensation</li> <li>○ To have their day in court</li> </ul> </li> </ul>
<ul style="list-style-type: none"> <li>• Do you feel that by pursuing your claims, you are helping to influence change or reform in the handling of future Nazi-era art repatriation claims/disputes?</li> </ul>	
<ul style="list-style-type: none"> <li>• Are there any nonmonetary or symbolic gestures you would like offered as part of your settlement?</li> </ul>	
<ul style="list-style-type: none"> <li>• While all of your claims have been resolved outside of a courtroom, does having “your day in court” hold any value to you?</li> </ul>	
<b>Client/Attorney Relations</b>	
<ul style="list-style-type: none"> <li>• How did you find your first attorney?</li> </ul>	<ul style="list-style-type: none"> <li>• How did you come to represent Smythe?</li> </ul>
<ul style="list-style-type: none"> <li>• How would you describe your experience with him?</li> </ul>	<ul style="list-style-type: none"> <li>• What factors made Smythe a good client for you and your firm?</li> </ul>
<ul style="list-style-type: none"> <li>• How did you find your second attorney?</li> </ul>	<ul style="list-style-type: none"> <li>• What do you expect from your clients and what should your clients expect from you?</li> </ul>
<ul style="list-style-type: none"> <li>• How would you describe your experience with him?</li> </ul>	<ul style="list-style-type: none"> <li>• What role has Smythe played in determining the strategy for presenting his claims?</li> </ul>
<ul style="list-style-type: none"> <li>• What do you expect from an attorney?</li> </ul>	<ul style="list-style-type: none"> <li>• What kinds of negotiations usually take place between you and your clients through the claims process?</li> </ul>

<ul style="list-style-type: none"> <li>• What role have you played in determining the strategy for presenting your claims?</li> </ul>	<ul style="list-style-type: none"> <li>• Have you experienced, either with Smythe or with other similar clients, situations where conflicting interests emerged? <ul style="list-style-type: none"> <li>○ If yes, please describe</li> <li>○ If no, what do you attribute this to?</li> </ul> </li> </ul>
<ul style="list-style-type: none"> <li>• How is your attorney paid for his services (e.g., flat fee, pro-bono, contingency, etc.)?</li> </ul>	
<ul style="list-style-type: none"> <li>• Was there ever a time when you disagreed with your attorney about some aspect of the case? <ul style="list-style-type: none"> <li>○ If yes, what was the source of the disagreement?</li> <li>○ If yes, how was the disagreement resolved?</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>• Do you do any initial screening with potential clients to ensure you are both in alignment on strategies and desired outcomes? <ul style="list-style-type: none"> <li>○ If yes, what does that process look like?</li> <li>○ If no, why not?</li> </ul> </li> </ul>
<ul style="list-style-type: none"> <li>• What do you think is your attorney's motivation in taking on these types of cases and/or your case specifically?</li> </ul>	
<ul style="list-style-type: none"> <li>• How do you feel your attorney has represented your interests to date?</li> </ul>	
<ul style="list-style-type: none"> <li>• If you had a friend with similar legal needs, would you recommend your attorney? <ul style="list-style-type: none"> <li>○ Why/why not?</li> </ul> </li> </ul>	
<b>Scope of Claims Resolution</b>	
<ul style="list-style-type: none"> <li>• How many claims have you and your attorney initiated so far?</li> </ul>	<ul style="list-style-type: none"> <li>• How many claims have you negotiated on behalf of Smythe?</li> </ul>
<ul style="list-style-type: none"> <li>• How many of these claims have been negotiated without litigation?</li> </ul>	<ul style="list-style-type: none"> <li>• How many of these claims have been negotiated without litigation?</li> </ul>
<ul style="list-style-type: none"> <li>• How many of these claims have been initiated outside of Germany?</li> </ul>	<ul style="list-style-type: none"> <li>• How many of these claims have been initiated outside of Germany?</li> </ul>
	<ul style="list-style-type: none"> <li>• How have you dealt with representing claims in areas outside Germany?</li> </ul>
	<ul style="list-style-type: none"> <li>• Reflecting on your overall experience representing repatriation claims, what has the process been like?</li> </ul>
<b>Evaluating Outcomes</b>	
<ul style="list-style-type: none"> <li>• To date, you have received settlements for two pieces of art. Were the outcomes of these settlements consistent with what you anticipated when you initiated your claims?</li> </ul>	<ul style="list-style-type: none"> <li>• To date, you have received settlements for two pieces of art. Were the outcomes of these settlements consistent with what you anticipated when you initiated your claims?</li> </ul>
<ul style="list-style-type: none"> <li>• What has been the emotional impact of receiving these settlements?</li> </ul>	<ul style="list-style-type: none"> <li>• How were the resolutions of these claims similar to and/or different from other art repatriation claims you've represented?</li> </ul>
<ul style="list-style-type: none"> <li>• How fair do you feel these settlements have been?</li> </ul>	<ul style="list-style-type: none"> <li>• Why do you believe Smythe's cases were resolved without litigation?</li> </ul>
<ul style="list-style-type: none"> <li>• How appropriate do you feel these settlements have been?</li> </ul>	

<ul style="list-style-type: none"> <li>• How satisfied have you been with these outcomes?</li> </ul>	
<b>Claims Strategy (General)</b>	
<ul style="list-style-type: none"> <li>• What is your overall understanding of your attorney's litigation strategies?</li> </ul>	<ul style="list-style-type: none"> <li>• Could you briefly describe your process for representing a claim from the point you take on a client to the point a settlement is established?</li> </ul>
<ul style="list-style-type: none"> <li>• Do you have any expectations regarding your attorney's litigation strategies?</li> </ul>	<ul style="list-style-type: none"> <li>• How long does this process take?</li> </ul>
	<ul style="list-style-type: none"> <li>• What are some of your greatest hurdles in representing art repatriation claims?</li> </ul>
	<ul style="list-style-type: none"> <li>• How have you dealt with these challenges?</li> </ul>
	<ul style="list-style-type: none"> <li>• How difficult is establishing property ownership in Nazi-era art repatriation cases given that these thefts occurred 70-80 years ago?</li> </ul>
	<ul style="list-style-type: none"> <li>• Are there certain repatriation laws – German, American, or International – that aid in your effort to establish your clients' property rights?</li> </ul>

# Appendix 2: Spiegelman/Smythe Family Tree



### Appendix 3: Summary of Herrick, Feinstein LLP Report: Resolved Stolen Art Claims (as of 7/29/2011)

#### Code Key

- NL/R = No Litigation/Return
- NL/\$ = No Litigation/Monetary Settlement
- NL/NR = No Litigation/No Return
- L/R = Litigation/Return
- L/\$ = Litigation/Monetary Settlement
- L/NR = Litigation/No Return – Claimant loses

#### Aggregate – All Years/All Countries

NL/R	NL/\$	NL/NR	L/R	L/\$	L/NR	Total
128	24	3*	15	9	1	180

#### Aggregate – Resolution Type by Year (All Countries)

	NL/R	NL/\$	NL/NR	L/R	L/\$	L/NR	TOTAL	% of Total Cases
1996	1			1			2	1.12%
1997	1	1					2	1.12%
1998	1	2					3	1.68%
1999	14			2	1		17	9.50%
2000	7	2					9	5.03%
2001	9	3		1			13	7.26%
2002	9	4				1	14	7.82%
2003	10	1	3*				14	7.82%
2004	9	1		1			11	6.15%
2005	8				2		10	5.59%
2006	9	6		4			19	10.61%
2007	9			2			11	6.15%
2008	6	2		2	1		11	6.15%
2009	4				2		6	3.35%
2010	4				1		5	2.79%
2011	9			1	2		12	6.70%
2012	11	1		1			13	7.26%
2013	7	1					8	4.47%
<b>TOTAL</b>	<b>128</b>	<b>24</b>	<b>3</b>	<b>15</b>	<b>9</b>	<b>1</b>	<b>180</b>	
<b>% of Total Cases</b>	71.51%	13.41%	1.68%	8.38%	5.03%	0.56%		100%

\* All cases from the Netherlands

**Aggregate - All Years/U.S. ONLY**

NL/R	NL/\$	L/R	L/\$	L/NR	Total
18	9	1	4	1	33

**Aggregate - Resolution Type by Year (U.S. ONLY)**

	NL/R	NL/\$	NL/NR	L/R	L/\$	L/NR	TOTAL	% of Total Cases
1998		1					1	3.03%
1999	1						1	3.03%
2000	1	1					2	6.06%
2001		3					3	9.09%
2002	1	2				1	4	12.12%
2003	1						1	3.03%
2004	3						3	9.09%
2005	1				1		2	6.06%
2006	3	1					4	12.12%
2007	1						1	3.03%
2008	1	1		1	1		4	12.12%
2009	3				2		5	15.15%
2010							0	0%
2011	2						2	6.06%
<b>TOTAL</b>	<b>18</b>	<b>9</b>		<b>1</b>	<b>4</b>	<b>1</b>	<b>33</b>	
<b>% of Total Cases</b>	54.55%	27.27%	0.00%	3.03%	12.12%	3.03%		100%

**Aggregate - All Years/Germany ONLY**

NL/R	NL/\$	L/R	Total
42	2	5	49

**Aggregate - Resolution Type by Year (Germany ONLY)**

	NL/R	NL/\$	NL/NR	L/R	L/\$	L/NR	TOTAL	% of Total Cases
1999	5						5	10.2%
2000	5						5	10.2%
2001	4						4	8.16%
2002	1	1					2	4.08%
2003	1						1	2.04%
2004	3						3	6.12%
2005	2						2	4.08%
2006	4			1			5	10.2%
2007	3			1			4	8.16%
2008				1			1	2.04%
2009							0	0%
2010	2						2	4.08%
2011	4			1			5	10.2%
2012	5			1			6	12.24%
2013	3	1					4	8.16%
<b>TOTAL</b>	<b>42</b>	<b>2</b>	<b>0</b>	<b>5</b>	<b>0</b>	<b>0</b>	<b>49</b>	
<b>% of Total Cases</b>	85.71%	4.08%	0%	10.2%	0%	0%		100%



**Aggregate - All Years/NON-U.S Countries**

NL/R	NL/\$	NL/NR	L/R	L/\$	L/NR	Total
110	15	3*	14	5	0	147

**Aggregate - Resolution Type by Year (NON-U.S. Countries)**

	NL/R	NL/\$	NL/NR	L/R	L/\$	L/NR	TOTAL	% of Total Cases
1996	1			1			2	1.36%
1997	1	1					2	1.36%
1998	1	1					2	1.36%
1999	13			2	1		16	10.88%
2000	6	1					7	4.76%
2001	9			1			10	6.80%
2002	8	2					10	6.80%
2003	9	1	3*				13	8.84%
2004	6	1		1			8	5.44%
2005	7				1		8	5.44%
2006	6	5		4			15	10.20%
2007	8			2			10	6.80%
2008	5	1		1			7	4.76%
2009	1						1	0.68%
2010	4				1		5	3.40%
2011	7			1	2		10	6.80%
2012	11	1		1			13	8.84%
2013	7	1					8	5.44%
<b>TOTAL</b>	<b>110</b>	<b>15</b>	<b>3</b>	<b>14</b>	<b>5</b>	<b>0</b>	<b>147</b>	
<b>% of Total Cases</b>	74.83%	10.20%	2.04%	9.52%	3.40%	0%		100%

\* All cases from the Netherlands

## Data Analysis of Resolved Cases

### Countries: 19

Australia	France	Japan	Slovakia
Austria	Germany	The Netherlands	Switzerland
Canada	Hungary	New Zealand	United Kingdom
Czech Republic	Israel	Poland	USA
Estonia	Italy	Scotland	

*Note – Russia and Ukraine excluded; no claims were filed by or on behalf of individuals*

### Countries - European: 13 (68.42%)

Austria	Germany	Poland	United Kingdom
Czech Republic	Hungary	Scotland	
Estonia	Italy	Slovakia	
France	The Netherlands	Switzerland	

*Note – Russia and Ukraine excluded; no claims were filed by or on behalf of individuals*

### Countries - Non-European: 6 (31.58)

Australia (1)	Israel (5)	New Zealand (1)
Canada (4)	Japan (2)	USA (33)

### First Recorded Resolved Art Claim by an Individual

- 1996 – Czech Republic (L/R) and France (NL/R)
- 1999 – Germany’s first claims (x5)
- 1998 – USA (earlier claims had been made, but by countries or museums)

### Total Number of Resolved Claims Globally - 180

#### Number of Resolved Claims by Country (Sorted in by Number of Resolved Claims)

Germany (49)	United Kingdom (8)	Italy (2)	New Zealand (1)
USA (33)	Switzerland (6)	Japan (2)	Poland (1)
Austria (23)	Czech Republic (5)	Australia (1)	Scotland (1)
The Netherlands (23)	Israel (5)	Estonia (1)	Slovakia (1)
France (13)	Canada (4)	Hungary (1)	

### Top 5 Resolved Claims Countries

Country	Number of Resolved Claims	% of Resolved Claims
<b>Germany</b>	<b>49</b>	<b>(49/180) 27.22%</b>
<b>USA</b>	<b>33</b>	<b>(33/180) 18.33%</b>
<b>Austria</b>	<b>23</b>	<b>(23/180) 12.78%</b>
<b>The Netherlands</b>	<b>23</b>	<b>(23/180) 12.78%</b>
<b>France</b>	<b>13</b>	<b>(13/180) 7.22%</b>

*Note – Top 5 Claims Countries Account for 78.33% of all claims resolved.*

### Percentage of Resolved Claims by Geographic Location

Location	Percentage
Non-U.S. (147/180)	<b>81.67%</b>
Germany (49/180)	<b>27.22%</b>
U.S. (33/180)	<b>18.33%</b>
Non-Europe (46/180) (including U.S.)	<b>25.56%</b>

*Note – Germany's percentage is larger than the percentage of all non-European countries including the U.S.*

### Dispersion of Resolved Claim Settlements by Geographic Location

	Return	\$	NR
<b>All Countries</b>	(143/180) <b>79.44%</b>	(33/180) <b>18.33%</b>	(4/180) <b>2.22%</b>
<b>Germany</b>	(47/49) <b>95.92%</b>	(2/49) <b>4.08%</b>	(0/180) <b>0.00%</b>
<b>U.S.A.</b>	(19/33) <b>57.58%</b>	(13/33) <b>39.39%</b>	(1/33) <b>3.03%</b>
<b>Non-U.S.</b>	(124/147) <b>84.35%</b>	(20/147) <b>13.61%</b>	(3/147) <b>2.04%</b>

*Note – Germany has NO No Returns ... It also has the highest percentage of returns of any geographic location*

*Note – Even if something is returned, it can be sold after the return ... difficult to determine how many of these items remain with the claimant and how many are sold to pay expenses*

### No Litigation v. Litigation by Geographic Location

	NL	L
<b>All Countries</b>	(155/180) <b>86.11%</b>	(25/180) <b>13.89%</b>
<b>Germany</b>	(44/49) <b>89.80%</b>	(5/49) <b>10.20%</b>
<b>U.S.A.</b>	(27/33) <b>81.82%</b>	(6/33) <b>18.18%</b>
<b>Non-U.S.</b>	(128/147) <b>87.07%</b>	(19/147) <b>12.93%</b>

### Resolved Claim Resolution Trends by Geographic Location

	Year First Claim Resolved	Year Most Claims Resolved	Year Least Claims Resolved
<b>All Countries</b>	1996	2006 (19)	1996 & 1997 (2)
<b>Germany</b>	1999	2012 (6)	2009 (0)
<b>U.S.A.</b>	1998	2009 (5)	2010 (0)
<b>Non-U.S.</b>	1996	1999 (16)	2009 (1)

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