

Internal Influences in the Repatriation Movement: possible future directions with a focus on indigenous cultural property¹Erin H. Caswell²**Resumo**

Ao reunir a literatura existente tendo em vista um mais amplo debate sobre repatriamento e examinar como diferentes vertentes dentro desta discussão, beneficiam ou restringem, o trabalho pretende acrescentar e potencialmente esclarecer a discussão acadêmica e profissional existente sobre o repatriamento a partir de coleções de museus, tendo em vista a compreensão de como essas interações irão continuar a definir-se e a desenvolver-se no futuro. Não se trata nem uma justificação nem da exploração de uma posição particular sobre esta questão controversa na prática museológica, mas sim uma investigação sobre o funcionamento interno do processo de repatriamento, da legislação, das obrigações profissionais e da discussão que rodeiam esta questão.

Palavra Chave: Repatriação; Propriedade cultural; Museologia

Abstract

By bringing together existing literature on the wider repatriation debate, and examining how different strands within the discussion influence, benefit or constrain one another, it is the hope of the author that this work will add to, weave together and potentially

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illuminate existing scholarly and professional discussion of repatriation from museum collections, with a view to understanding how these interactions will continue to build or develop in future. This is neither a justification nor an exploration of a particular stance on this contentious issue in museum practice, but rather an investigation of the inner workings of the repatriation movement and the legislation, professional obligations and discussion which surround it.

Keywords: Repatriation; cultural property; museology

1. Introduction

Repatriation, as an issue within the arts and heritage sector, is both a contentious and a complex one.³ There are no easy answers which apply to every claim for the return of a work of art or item of cultural property, and each must be examined on individual merits, including legal considerations both modern and historic, competing interests on the side of the institution and claimant(s), national or institutional policies governing deaccessioning and restitution, the benefits of retaining the item versus returning it to its place of origin, and whether public opinion may be for or against the return. By bringing together existing literature on the wider repatriation debate, and examining how different strands within the discussion influence, benefit or constrain one another, it is the hope of the author that this work will add to, weave together and potentially illuminate existing scholarly and professional discussion of repatriation from museum collections, with a view to understanding how these interactions will continue to build or develop in future.

³ Repatriation/Restitution/Return: I have used these terms somewhat interchangeably, though the term 'repatriation' has been used most often. By doing this I do not wish to enter into the debate on the appropriateness of the word, with its perceived connotations of 'patria' or an appropriate homeland for the material under discussion. Instead, I have chosen to use the term which I feel is used most often, and is thus most recognisable, in reference to the act of deaccessioning museum objects and transferring ownership to individuals or communities.

This is neither a justification nor an exploration of a particular stance on this contentious issue in museum practice, but rather an investigation of the inner workings of the repatriation movement and the legislation, professional obligations and discussion which surround it.

In the following pages, the range of materials currently subject to claims for repatriation, or the return of items of cultural property to individuals or groups representing previous owners, has been divided into categories; namely human remains, antiquities, 'looted' art and indigenous cultural property.⁴ While these categories all fall under the umbrella of repatriation, they are in fact largely separate issues, stemming from different historical circumstances and often entailing different solutions. The hypothesis investigated in this work is that, alongside external influences such as indigenous movements, economic fluctuations or a political desire to atone for unresolved grievances,⁵ repatriation is also internally stimulated, with developments in one area affecting other areas in turn,

⁴ The terms 'cultural property', 'cultural patrimony' and 'cultural heritage' are used somewhat interchangeably in the literature on the subject, although different interpretations or nuances are possible. The term 'cultural property' is, however, used most often, and is the preferred term in this document, although the alternatives are also employed in some cases for stylistic reasons. When works have been quoted, the author's preferred term has been retained. John Henry Merryman, "The Public Interest in Cultural Property," in *Thinking About the Elgin Marbles: critical essays on cultural property, art and law*, ed. John Henry Merryman (The Hague: Kluwer Law International, 2000), 107; Merryman, "The Public Interest in Cultural Property," 96; Robert K. Paterson, "The "Caring and Sharing" Approach: recent progress in the International Law Association to develop draft cultural material principles," *International Journal of Cultural Property* 12, no. 1 (2005)

⁵ John Torpey discusses repatriation as part of a wider tendency to make amends in some fashion for past wrongs, as part of a 'post-utopian' reaction against the past. John Torpey, *Making Whole What Has Been Smashed: on reparations politics* (Cambridge, MA: Harvard University Press, 2006). See also Catherine Bell, "Restructuring the Relationship: domestic repatriation and Canadian law reform," in *Protection of First Nations Cultural Heritage: laws, policy, and reform*, ed. Catherine Bell and Robert K. Paterson (Vancouver: UBC Press, 2009), 19; Elazar Barkan, *The Guilt of Nations: restitution and negotiating historical injustices*, 2nd ed. (Baltimore, MD: The Johns Hopkins University Press, 2001), xxix.

whether by the promulgation of legislation, providing arguments and moral positions which can be used in multiple debates, or through the influencing of public opinion.⁶ The article looks first at a broad outline of the circumstances surround the repatriation of indigenous cultural property, and what mechanisms currently govern the return of items in different contexts, before examining in turn human remains, antiquities and 'looted' art. In each case, after providing historic and current context, interactions between the contested category and that of indigenous cultural property are considered, in order to find both overlaps where interactions occur, and the limitations of any such influences between the categories. Where broad trends can be distinguished these have been discussed in the final section of this work, with a view to understanding which interactions between different strands within repatriation will be likely to influence museum practice for years to come.

2. The Repatriation of Indigenous Cultural Property

Indigenous cultural property has been taken as the example through which the central hypothesis is explored. This category of contested material has been deliberately selected as one with various historical, legal and ethical specificities which make for interesting crossovers and connections with other categories of contested material. Most of the ethnographic material, sacred objects and items of indigenous cultural property now in museum collections were collected as part of a colonial project. There were

⁶ While the latter term can be interpreted in a variety of ways, I have interpreted public opinion throughout this document largely through an analysis of media stories, non-specialist/academic publications, and anecdotal evidence of decision-making based on favourable or unfavourable 'public opinion'. The public I envisage therefore encompasses both the museum-going public (or other stakeholders) of particular institutions, but also the wider public, both national and international, who have shared their views on repatriation issues in public forums. The evidence used is thus subjective and qualitative rather than scientific or quantitative, but it is my belief that the information gained in this endeavour sheds an interesting light on how developments in repatriation are seen by those affected in the widest sense.

various motivations for colonial or imperial agents, missionaries and others to obtain such objects,⁷ and during the period of colonialism and early contact indigenous objects were variously traded, sold fairly, sold by individuals who did not possess the right to alienate cultural property, stolen, or discovered in an 'abandoned' state and removed.⁸ While some collectors were not acting unethically according to contemporary Western moral standards, others knew even at the time that the removal of certain material from its traditional context was forbidden by local laws and traditions, and thus described it as 'trophies' or 'plunder'.⁹ This flow of property took place on such a scale, and over such a period of time, that the largest collections of cultural property of some peoples exist outside their native country.¹⁰

⁷ See, for example, Moira G. Simpson, "Revealing and Concealing: museums, objects, and the transmission of knowledge in Aboriginal Australia," in *New Museum Theory and Practice: an introduction*, ed. Janet Marstine (Oxford: Blackwell, 2006), 153-155; Kathleen S. Fine-Dare, *Grave Injustice: the American Indian repatriation movement and NAGPRA* (Lincoln, NE: University of Nebraska Press, 2002), 4-5, 14, 33; Richard Pankhurst, "Ethiopia, the Aksum Obelisk, and the return of Africa's Cultural Heritage," *African Affairs* 98, no. 391 (1999), 229-231; Barbara Lawson, "From Curio to Cultural Document," in *Museums and the Future of Collecting*, 2nd ed., ed. Simon J. Knell (Aldershot, UK: Ashgate, 2004), 103-104, 108.

⁸ Fine-Dare, 4-5, 34; Edmund J. Ladd, "A Zuni Perspective on Repatriation," in *The Future of the Past: archaeologists, Native Americans, and repatriation*, ed. Tamara L. Bray (New York: Garland Publishing, 2001), 107.

⁹ Tom Griffiths, *Hunters and Collectors: the antiquarian imagination in Australia* (Cambridge: Cambridge University Press, 1996), 53. See also Cressida Fforde, *Collecting the Dead: archaeology and the reburial issue* (London: Duckworth, 2004), 59, 61-64; Paul Tapsell, "Out of Sight, Out of Mind: human remains at the Auckland Museum – Te Papa Whakahiku," in *Looking Reality in the Eye: museums and social responsibility*, ed. Robert R. Janes and Gerald T. Conaty (Calgary: University of Calgary Press, 2005), 161, 164; David Hurst Thomas, *Skull Wars: Kennewick Man, archaeology, and the battle for Native American identity* (New York: Basic Books, 2000), 56; Cressida Fforde, "Collection, Repatriation and Identity," in *The Dead and their Possessions: repatriation in principle, policy and practice*, ed. Cressida Fforde et al. (London: Routledge, 2002), 27; Janna Thompson, "Cultural Property, Restitution and Value," *Journal of Applied Philosophy* 20, no. 3 (2003): 254.

¹⁰ Barkan, *The Guilt of Nations*, 257-258; Patty Gerstenblith, "The Public Interest in the Restitution of Cultural Objects," *Connecticut Journal of International Law* 16

No matter the circumstances of acquisition, however, the fact remains that the basis of many modern collections of ethnographic material continues to lie in the active collection of indigenous cultural property during the height of colonialism in the nineteenth and early twentieth centuries. Although many indigenous people were unwilling to part with items, and in some cases have sustained ongoing campaigns for their return, unequal colonial or 'First World'/'Third World' (and 'Fourth World') power relations have ensured that, with some exceptions, such collections have largely remained intact.¹¹ While those who advocate the return of other contested categories such as human remains or World War II-related items can rely on a certain moral and emotive power, at least rhetorically speaking, and while some categories of antiquities benefit from substantial legal protections, indigenous cultural property appears to be the least-discussed and least-repatriated category of contested material in museum and institutional collections.¹²

(2000-2001): 206; Lissant Bolton, "The Object in View: Aborigines, Melanesians, and museums," in *Museums and Source Communities: a Routledge reader*, ed. Laura Peers and Alison K. Brown (London: Routledge, 2003), 48; Walter R. Echo-Hawk, "Preface," in *Mending the Circle: a Native American repatriation guide: understanding and implementing NAGPRA and the official Smithsonian and other repatriation policies*, ed. Barbara Meister (New York: American Indian Ritual Object Repatriation Foundation, 1996).

¹¹ Joe Watkins, "Cultural Nationalists, Internationalists and "Intra-nationalists": who's right and whose right?," *International Journal of Cultural Property* 12 (2008): 12, 79; Moira G. Simpson, *Making Representations: museums in the post-colonial era*, 2nd ed. (London: Routledge, 2001), 178; Isabel McBryde, "Introduction," in *Who Owns the Past?*, ed. Isabel McBryde (Melbourne: Oxford University Press, 1985), 87-89; Moira Simpson, *Museums and Repatriation: an account of contested items in museum collections in the UK, with comparative material from other countries* (London: The Museums Association, 1997), 1-3.

¹² Although the body of literature is more substantial now, the situation does not appear to have substantially altered since similar claims were made by Christian Feest in 1995. Christian F. Feest, "'Repatriation': a European view on the question of restitution of Native American artifacts," *European Review of Native American Studies* 9, no. 2 (1995). See also Chip Colwell-Chanthaphonh, "Repatriation and the Burdens of Proof," *Museum Anthropology* 36:2 (2013), 108-109.

The importance of addressing separately the issue of the repatriation of indigenous cultural property has been acknowledged by some international organisations, although it has not yet been fully resolved. The 1983 statement by the United Nations General Assembly on the return or restitution of cultural property to countries of origin, for example, while not specifically naming indigenous cultural property, supports an extra-legal, collaborative approach suitable to the resolution of such claims.¹³ Another example of an international effort to aid the resolution of cultural property disputes are the Principles for Cooperation in the Mutual Protection and Transfer of Cultural Material adopted in 2006 by the International Law Association.¹⁴ While neither response is designed to be applied exclusively to claims made by indigenous peoples, they can be taken as recognition of the need for approaches for the resolution of claims that fall outside existing frameworks for disputed cultural material.¹⁵ This principle has also been applied

¹³ United Nations General Assembly, "Return or Restitution of Cultural Property to the Countries of Origin," available online at *United Nations*, <http://www.un.org/documents/ga/res/38/a38r034.htm> (accessed 26 May 2015). See also United Nations General Assembly, "United Nations Declaration on the Rights of Indigenous Peoples," available online at *United Nations*, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N11/467/34/PDF/N1146734.pdf?OpenElement> (accessed 26 May 2015); Michael Pickering, "Repatriation, Rhetoric and Reality: the repatriation of Australian Indigenous human remains and sacred objects," *Journal of the Australian Registrars Committee* 41 (2002), 16-17; David James Butts, "Māori and Museums: the politics of indigenous recognition" (Ph.D. thesis, Massey University, 2003), 45; Peter H. Welsh, "Repatriation and Cultural Preservation: potent objects, potent pasts," *University of Michigan Journal of Law Reform* 54 (1991-1992), 853; Erica-Irena Daes, *Protection of the Heritage of Indigenous People* (New York: United Nations, 1997).

¹⁴ James A. R. Nafziger, "The Principles for Cooperation in the Mutual Protection and Transfer of Cultural Material," *Chicago Journal of International Law* 8, no. 1 (2007), 157-158; Remarks by Robert K. Paterson in James A. R. Nafziger et al., "International Cultural Law: looking back and looking ahead," *American Society of International Law, Proceedings of the Annual Meeting* (2006), 328.

¹⁵ See also an alternative judicial solution to international cultural heritage disputes in Alessandro Chechi, "Evaluating the Establishment of an International Cultural Heritage Court," *Art, Antiquity and Law* 18:1 (2013), 31-57.

directly to the issue of indigenous cultural property by organisations such as the American Indian Ritual Object Repatriation Fund, founded by Elizabeth Sackler in 1991 in order to bypass legal, political and other issues and, in essence, achieve repatriation to Native American communities through purchasing and returning objects.¹⁶ International documents which do specifically deal with the repatriation of indigenous cultural property, such as the 2007 United Nations Declaration on the Rights of Indigenous Peoples, have their own issues of scope, interpretation and implementation.¹⁷ The number of historic circumstances leading to collection of objects, as well as the variety of approaches in attempting to secure their repatriation, thus makes indigenous cultural property an interesting testing ground for interactions with other areas of the wider repatriation debate.

2.1 Human Remains and the Return of Indigenous Cultural Property

Common sense would perhaps dictate that the type of repatriation most likely to affect developments in the return of indigenous cultural property is that of human remains. Even if the remains of indigenous people are not the most heavily represented in all museum and institutional collections,¹⁸ they have certainly

¹⁶ Elizabeth Sackler, Martin Sullivan and Richard Hill, "Three Voices for Repatriation," in Agnes Tabah, *Native American Collections and Repatriation* (Washington, D.C.: American Association of Museums, 1993), 136-137; Elizabeth Sackler, "About the American Indian Ritual Object Repatriation Foundation," in *Mending the Circle: a Native American repatriation guide: understanding and implementing NAGPRA and the official Smithsonian and other repatriation policies*, ed. Barbara Meister (New York: American Indian Ritual Object Repatriation Foundation, 1996); Simpson, *Making Representations*, 223; Andrew Gulliford, "Bones of Contention: the repatriation of Native American human remains," *Public Historian* 18, no. 4 (1996), 31; Feest, 39; June Camille Bush Raines, "One is Missing: Native American Graves Protection and Repatriation Act: an overview and analysis," *American Indian Law Review* 17, no. 2 (1992), 662.

¹⁷ Shea Esterling, "One Step Forward, Two Steps Back: the restitution of cultural property in the United Nations Declaration on the Rights of Indigenous Peoples," *Art, Antiquity and Law* 18:4 (2013), 323-343.

¹⁸ Comments by Jane Hubert, Sebastian Payne and Tristram Besterman in Tiffany

become the most controversial over the last few decades, with the rise of indigenous rights movements, changing levels of support for indigenous issues in settler societies and the prominence of indigenous concerns on international agendas.¹⁹ In the same period that many indigenous cultural objects were being traded or collected, indigenous human remains began to be collected in many instances as a convergence between the advancement of scientific theories based on physical racial differences and the opportunities and interests of imperial expansion and colonialism. Theories of human evolution developed in the nineteenth century, using the arguments of Darwin and others to create a scale of social and physical development with Caucasians or Europeans at its pinnacle.²⁰ This was useful to those European societies which were then building empires, and their legal and physical domination of these same subjects allowed for the relatively easy collection of specimens for scientists involved in early studies of ethnography or

Jenkins et al., "Transcript of the Panel Discussion 'Human Remains: objects to study or ancestors to bury?'," available online at *Institute of Ideas*, <http://instituteofideas.com/documents/transcriptsandreports/HumanRemains.pdf> (accessed 26 May 2015), 1, 3, 9; Fforde, *Collecting the Dead*, 12, 26.

¹⁹ Esterling, 324. In some instances, I have referred to 'settler societies' as distinct from colonial or post-colonial societies in general. In using this term, I am referring to "...the overseas extensions of the states of Western Europe, places that were established as colonies or outposts of Euro empires in which existing indigenous populations were dislocated by settler-colonists." The different historical and contemporary experiences of indigenous peoples in settler societies versus those of self-governing groups warrant the distinction being drawn. The United States of America, Canada, Australia and New Zealand are the settler societies most often referred to. Welsh, 837; Thomas F. King, *Cultural Resource Laws and Practice: an introductory guide* (Walnut Creek, CA: AltaMira Press, 1998), 16, 19, 22, 149-150.

²⁰ Conal McCarthy, *Exhibiting Māori: a history of colonial cultures of display* (Wellington: Te Papa Press, 2007), 21; Ana Filipa Vrdoljak, *International Law, Museums and the Return of Cultural Property* (Cambridge: Cambridge University Press, 2006), 8; Devon A. Mihesuah, "Introduction," in *Repatriation Reader: who owns American Indian remains?* (Lincoln, NE: University of Nebraska Press, 2000), 2-3.

physical anthropology.²¹ The remains of more indigenous individuals were collected as curiosities, including *toi moko* (tattooed Māori heads) and shrunken heads.²² Still other indigenous people were treated as curiosities and displayed while still alive, and were then preserved and remained in museum collections after death.²³ The origins of the debate over human remains repatriation, referred to in some cases as the ‘reburial movement’, are often traced to wider indigenous rights movements or indigenous cultural renaissances of the 1960s to 1980s.²⁴ After long periods of unequal power relationships, a new political consciousness developed amongst many indigenous groups, leading them to fight for recognition and redress.²⁵ For some such groups, the repatriation

²¹ D. Thomas, 56; Fforde, “Collection, Repatriation and Identity,” 27; conversation with Paul Tapsell, 9 March 2010.

²² Tapsell, “Out of Sight, Out of Mind,” 153, 156-157. Cases involving *toi moko* in museum collections are still topical, as evidenced by the debate over a repatriation from the collection of the city of Rouen and attempted sales at auction in recent decades. Olivier Amiel, “A Māori Head: public domain?,” trans. Marine Bel and Michael Berger, *International Journal of Cultural Property* 15, no. 3 (2008); Fforde, *Collecting the Dead*, 70; Manlio Frigo, “The International Symposium “From Anatomic Collections to Objects of Worship: Conservation and Exhibition of Human Remains in Museums,” Paris (France), February 22-23, 2008,” *International Journal of Cultural Property* 15 (2008): 437. Conal McCarthy points out, however, that indigenous people’s response to human remains on display may be more complex than assumed. McCarthy, *Exhibiting Māori*, 33.

²³ D. Thomas, 77-101; Fine-Dare, 18; Henry J. Sockbeson, “The Larsen Bay Repatriation and Common Errors of Anthropologists,” in *Reckoning with the Dead: the Larsen Bay repatriation and the Smithsonian Institution*, ed. Tamara L. Bray and Thomas W. Killion (Washington, D.C.: Smithsonian Institution, 1994), 159.

²⁴ See, for example, Nicholas Thomas, *Possessions: indigenous art/colonial culture* (London: Thames and Hudson, 1999), 187-188; D. Thomas, 198-199, 209-215; Simpson, “Revealing and Concealing,” 166; Barkan, *The Guilt of Nations*, 160-161, 188-189; Butts, “Māori and Museums,” 18-19, 83-87. Kathleen Fine-Dare traces the origins of the modern repatriation movement back much further in the case of Native American resistance and activism. Fine-Dare, 47-84.

²⁵ I am not suggesting that all indigenous movements (or groups) are identical or even similar in their form, origin or desired outcomes, but merely that the political awareness and activism of several indigenous groups can be seen to have undergone great transformations at this time. Cf. Gulliford, “Bones of Contention,”

and reburial of their ancestors became an issue of combined symbolic, social, religious and political importance.²⁶ The existence of high-profile cases of repatriation or reburial in turn led to increased debate of the issue in political, professional and public spheres, and in some cases the development of policies for institutions and professional organizations, as well as new legislation which governs the disposition of human remains.

The debate over the repatriation of human remains has not, however, been concluded, by any stretch of the imagination. Currently, the issue tends to be portrayed as one which pits scientists defending their right to use collections of human remains for medical and anthropological research against communities who are determined, for reasons noble or political, to remove all such remains from the public domain.²⁷ As in other areas of the repatriation debate generally, there is a recurrent fear that if some claims for the repatriation of remains are acquiesced to, then many collections will soon be reduced to nothing.²⁸ Generally, however, it is reasonable to state that more museum professionals now view repatriation of human remains positively than would once have been the case, many repatriations of such material have been successfully carried out, and these interactions have sometimes led to ongoing positive relationships between museums and their

133-134; Sonia Atalay, "Multivocality and Indigenous Archaeologies," in *Evaluating Multiple Narratives: beyond nationalist, colonialist, imperialist archaeologies*, ed. Junko Habu et al. (New York: Springer, 2008); Paul Tapsell, "Taonga, Marae, Whenua – Negotiating Custodianship: a Maori tribal response to the Museum of New Zealand," in *National Museums: negotiating histories: conference proceedings*, ed. Darryl McIntyre and Kirsten Wehner (Canberra: National Museum of Australia, 2001), 114, 117-118.

²⁶ Frigo, "The International Symposium," 438.

²⁷ See, for example, Stephen Kinzer, "Museums and Tribes: a tricky truce," *New York Times*, 24 December 2000: 21; Mark Henderson, "Museum Fears Losing Bodies of Evidence," *The Times* (London), 10 May 2004.

²⁸ See, for example, Ann M. Kakaliouras, "When Remains are "Lost": thoughts on collections, repatriation, and research in American Physical Anthropology," *Curator* 57:2 (2014), 214-215.

source communities.²⁹ Discussion of the repatriation of human remains in the public sphere is generally in favour of returning remains to communities or descendants.³⁰

This evolving debate over the repatriation of human remains has been reflected in a number of countries by developments in legislation and in institutional or professional policies or codes of ethics. The piece of national legislation most

²⁹ See, for example, Council of Australian Museum Associations, *Previous Possessions, New Obligations: policies for museums in Australia and Aboriginal and Torres Strait Islander peoples* (Melbourne: Museums Australia, 1993), 9, 11-14; Robert K. Paterson, "Ancestral Remains in Institutional Collections: proposals for reform," in *Protection of First Nations Cultural Heritage: laws, policy, and reform*, ed. Catherine Bell and Robert K. Paterson (Vancouver: UBC Press, 2009), 156; Simpson, *Museums and Repatriation*, 38-48, 80; D. Thomas, 216; Mihesuah, "Introduction," 4; Gulliford, "Bones of Contention," 120-121; Richard Hill, "Reflections of a Native Repatriator," in *Mending the Circle: a Native American repatriation guide: understanding and implementing NAGPRA and the official Smithsonian and other repatriation policies*, ed. Barbara Meister (New York: American Indian Ritual Object Repatriation Foundation, 1996), 82; Deanne Hanchant, "Practicalities in the Return of Remains: conflict in the use of heritage in the modern world," in *The Dead and their Possessions: repatriation in principle, policy and practice*, ed. Cressida Fforde et al. (London: Routledge, 2002); Simpson, *Making Representations*, 231; Barkan, *The Guilt of Nations*, 202; Elisabeth Tooker, "A Note on the Return of Eleven Wampum Belts to the Six Nations Iroquois Confederacy on Grand River, Canada," *Ethnohistory* 45, no. 2 (1998), 220, 232-233. Such policies have been developed even for those museums where large categories of material can be claimed for repatriation under legislation. This is the case, for example, in the United States' National Museum of the American Indian. Andrew Gulliford, "Curation and Repatriation of Sacred and Tribal Objects," *Public Historian* 14, no. 3 (1992), 24-25, 32-33; Nancy B. Rosoff, "Integrating Native Views into Museum Procedures: hope and practice at the National Museum of the American Indian," in *Museums and Source Communities: a Routledge reader*, ed. Laura Peers and Alison K. Brown (London: Routledge, 2003).

³⁰ Comments by Jane Hubert in Jenkins, 2; Mary M. Brooks and Claire Rumsey, "'Who Knows the Fate of His Bones?': rethinking the body on display: object, art or human remains," in *Museum Revolutions: how museums change and are changed*, ed. Simon J. Knell et al. (London: Routledge, 2007); Michael Pickering, "Where To From Here?: repatriation of indigenous human remains and 'The Museum'," in *Museum Revolutions: how museums change and are changed*, ed. Simon J. Knell et al. (London: Routledge, 2007), 256-257.

often discussed in relation to human remains repatriation is the United States' Native American Graves Protection and Repatriation Act (NAGPRA) of 1990, which built on an increasing number of institutional policies and state legislation favourable to the protection or repatriation of human remains,³¹ and provides for the dissemination of information, repatriation of all remains from federally-funded institutions upon proof of cultural affiliation (including remains newly discovered on federal lands), and the repatriation of certain categories of indigenous cultural property.³²

³¹ See, for example, discussion of repatriation from the collections of the Smithsonian Institution's collections, including the 'Larsen Bay' repatriation (for which negotiations began in 1987) in Gulliford, "Bones of Contention," 138; Sockbeson; Barkan, *The Guilt of Nations*, 193-194; Donald J. Ortner, "Scientific Policy and Public Interest: perspectives on the Larsen Bay repatriation case," in *Reckoning with the Dead: the Larsen Bay repatriation and the Smithsonian Institution*, ed. Tamara L. Bray and Thomas W. Killion (Washington, D.C.: Smithsonian Institution, 1994); Gordon L. Pullar, "The Qikertarmiut and the Scientist: fifty years of clashing world views," in *Reckoning with the Dead: the Larsen Bay repatriation and the Smithsonian Institution*, ed. Tamara L. Bray and Thomas W. Killion (Washington, D.C.: Smithsonian Institution, 1994); Tamara L. Bray and Lauren Guttenplan Grant, "The Concept of Cultural Affiliation and its Legal Significance in the Larsen Bay Repatriation," in *Reckoning with the Dead: the Larsen Bay repatriation and the Smithsonian Institution*, ed. Tamara L. Bray and Thomas W. Killion (Washington, D.C.: Smithsonian Institution, 1994); Melinda A. Zeder, "Repatriation at the National Museum of Natural History: present and future," in *Reckoning with the Dead: the Larsen Bay repatriation and the Smithsonian Institution*, ed. Tamara L. Bray and Thomas W. Killion (Washington, D.C.: Smithsonian Institution, 1994); Thomas W. Killion and Tamara L. Bray, "Looking Toward Larsen Bay: evolving attitudes at the Smithsonian Institution," in *Reckoning with the Dead: the Larsen Bay repatriation and the Smithsonian Institution*, ed. Tamara L. Bray and Thomas W. Killion (Washington, D.C.: Smithsonian Institution, 1994).

³² Jane Hubert and Cressida Fforde, "Introduction: the reburial issue in the twenty-first century," in *The Dead and Their Possessions: repatriation in principle, policy and practice*, ed. Cressida Fforde et al. (London: Routledge, 2002), 6-9; Heard Museum, "Sample of Summaries: Hualapai collections in the Heard Museum," reproduced in *Mending the Circle: a Native American repatriation guide: understanding and implementing NAGPRA and the official Smithsonian and other repatriation policies*, ed. Barbara Meister (New York: American Indian Ritual Object Repatriation Foundation, 1996); Patty Gerstenblith, "Identity and Cultural Property:

While NAGPRA is currently the most far-reaching legislation dealing with the repatriation of human remains, however, it is not the only example, and other countries and international organizations have also instituted official or unofficial policies of returning remains to indigenous communities.³³ One example of the latter is in the Karanga Aotearoa Repatriation Programme run from the National Museum of New Zealand Te Papa Tongarewa and funded by the New Zealand government.³⁴ The goals of the programme include negotiation with foreign institutions, research, care and domestic repatriation of returned remains and constant consultation, following the belief that "...iwi involvement assists in the reconnection between ancestors and their descendants."³⁵ Even

the protection of cultural property in the United States," *Boston University Law Review* 75 (1995): 622-627; H. Marcus Price III, *Disputing the Dead: U.S. law on aboriginal remains and grave goods* (Columbia, MO: University of Missouri Press, 1991), 24-25, 29-31, 43-115.

³³ See, for example, Council of Australian Museum Associations; Museums Australia, *Continuing Cultures, Ongoing Responsibilities: principles and guidelines for Australian museums working with Aboriginal and Torres Strait Islander cultural heritage* (Canberra: Museums Australia, 2005); Assembly of First Nations and Canadian Museums Association, *Turning the Page: forging new partnerships between museums and First Peoples* (Ottawa: Task Force on Museums and First Peoples, 1992); Bell, "Restructuring the Relationship," 16, 45-46, 56; Paterson, "Ancestral Remains in Institutional Collections," 163-164; Butts, "Māori and Museums," 51-53; Catherine Bell, "Aboriginal Claims to Cultural Property in Canada: a comparative legal analysis of the repatriation debate," *American Indian Law Review* 17, no. 2 (1992), 457. Even in the United States, where NAGPRA is in effect, some commentators see certain institutional policies on repatriation as being more flexible and effective than the legislation itself. Thomas H. Boyd and Jonathan Haas, "The Native American Graves Protection and Repatriation Act: prospects for new partnerships between museums and Native American groups," in Agnes Tabah, *Native American Collections and Repatriation* (Washington, D.C.: American Association of Museums, 1993), 97-98.

³⁴ Museum of New Zealand Te Papa Tongarewa, *The Karanga Aotearoa Repatriation Programme: resources 1-11* (Wellington: Museum of New Zealand Te Papa Tongarewa, n.d.), Resource 2.2, Resource 11.1; Paterson, "Ancestral Remains in Institutional Collections," 158.

³⁵ Museum of New Zealand Te Papa Tongarewa, Resource 1.1, 1.2, Resource 3.1, Resource 5.1. The repatriation of Māori or Moriori cultural property (taonga) is

without repatriation legislation, therefore, far-reaching results can be and have been achieved.³⁶

Points of commonality between human remains and indigenous cultural property in museum collections are not hard to find, with items often representing the same cultures, or even burials. Explorers, missionaries and colonial officials had, in many cases, fairly easy access to indigenous cultural property, whether this property was traded, found 'abandoned', stolen, looted or bought. A further point of comparison is the argument used to refute the repatriation of both human remains and indigenous cultural property which acknowledges that collection methods were sometimes unethical by historical or modern standards, but argues that the primary standard by which the disposition of artefacts should be considered is their educational or research value in their current location.³⁷ Even discounting such appeals to universal values, the debate over the repatriation of indigenous human remains has affected the repatriation of indigenous cultural property in certain ways, both concrete and rhetorical. Firstly, the

specifically excluded from the purview of the programme. Ibid., Resource 10.1. Iwi: a traditional Māori tribal group based on shared descent from a named ancestor or ancestors. See also Barkan, *Guilt of Nations*, 170-171; Johnny P. Flynn and Gary Laderman, "Purgatory and the Powerful Dead: a case study of Native American repatriation," *Religion and American Culture* 4, no. 1 (1994).

³⁶ See also the Vermillion Accord on Human Remains, adopted by the World Archaeological Congress in 1989, as an example of a human remains policy of an international professional organisation. World Archaeological Congress, "Vermillion Accord on Human Remains," available online at *World Archaeological Congress*, <http://www.worldarchaeologicalcongress.org/about-wac/codes-of-ethics/168-vermillion> (accessed 26 May 2015); Simpson, *Museums and Repatriation*, 78; Paterson, "Ancestral Remains in Institutional Collections," 168; Larry J. Zimmerman, "A Decade After the Vermillion Accord: what has changed and what has not?," in *The Dead and their Possessions: repatriation in principle, policy and practice*, ed. Cressida Fforde et al. (London: Routledge, 2002).

³⁷ See, for example, Feest; Timothy McKeown, "Implementing a 'True Compromise': the Native American Graves Protection and Repatriation Act after ten years," in *The Dead and their Possessions: repatriation in principle, policy and practice*, ed. Cressida Fforde et al. (London: Routledge, 2002).

similar origins of many collections of indigenous human remains and cultural property have led, in some instances, to them being incorporated into the same legislation or guidelines, for example under NAGPRA.³⁸ NAGPRA does not deal only with cultural property associated with burial practices, but goes much further, including "...specific ceremonial objects which are needed by traditional Native American religious leaders for the practice of traditional Native American religions by their present day adherents..." and objects "...having ongoing historical, traditional, or cultural importance central to the Native American group or culture itself, rather than property owned by an individual Native American...".³⁹ This includes the return of indigenous cultural property newly discovered on federally controlled land, with preference for returning it to indigenous descendants or communities rather than assigning it to museums.⁴⁰ In the United States, therefore, advocates for the repatriation of indigenous cultural property have benefited greatly from developments within the wider repatriation debate, specifically within the movement to have human remains returned.

A similar convergence between the repatriation of human remains and that of indigenous cultural property can be seen in a number of institutional policy documents and ethical guidelines related to human remains which also deal with cultural property associated with burials, or even go as far as including historic photographs or museum records related to human remains.⁴¹ The

³⁸ U.S. Department of the Interior, "Native American Graves Protection and Repatriation Act (as amended)," available online at *National NAGPRA*, http://www.nps.gov/history/local-law/FHPL_NAGPRA.pdf (accessed 26 May 2015), 166-167.

³⁹ *Ibid.*, 167.

⁴⁰ *Ibid.*, 169-172.

⁴¹ National Museum of Australia, "Aboriginal and Torres Strait Islander Human Remains Policy version 2.1," available online at *National Museum of Australia*, http://www.nma.gov.au/__data/assets/pdf_file/0008/1412/POL-C-011_Aboriginal_and_Torres_Strait_Islander_human_remains-2.2_public.pdf (accessed 26 May 2015); National Museum of Australia, "Non-Australian Indigenous Human Remains Policy," available online at *National Museum of Australia*,

implication is that certain categories of indigenous cultural property are, by their nature, deserving of the same level of respect, treatment and consideration for repatriation as the remains with which they were once associated. It is important to note, however, that not all policies advocate for, or even mention in detail, the special consideration or repatriation of indigenous cultural property in conjunction with that of human remains.⁴² There are other factors at play here: for example, the incorporation of the category of cultural property into legislation or policies on human remains appears to be affected by whether or not the process takes place within a settler society, and is thus influenced more directly by the indigenous peoples in question than is the case for other countries with ethnographic collections. There are also legislative constraints in some countries, such as the various statutes governing national museums including the British Museum Act of 1963 where the presumption is against the deaccessioning of any museum artefact. Even within the United Kingdom, however, human remains are subject to different rules on ownership and return.⁴³ Nonetheless,

http://www.nma.gov.au/__data/assets/pdf_file/0012/1461/POL-G-024_Non-Aust_Indigenous_human_remains-1.0-public.pdf (accessed 26 May 2015); Historic Scotland, "The Treatment of Human Remains in Archaeology," available online at *Historic Scotland*, <http://www.historic-scotland.gov.uk/the-treatment-of-human-remains-archaeology.pdf> (accessed 26 May 2015); Royal Cornwall Museum, "Policy on Human Remains, Royal Cornwall Museum, Royal Institute of Cornwall, Truro," available online at *Royal Cornwall Museum*, <http://www.royalcornwallmuseum.org.uk/pages/documents/HumanRemainsPolicy.pdf> (accessed 26 May 2015), 2, 4, 7-8.

⁴² University of Manchester, "Policy Document for the Strategic Development of the Manchester Museum: Policy on Human Remains," available online at *The Manchester Museum*, <http://www.museum.manchester.ac.uk/aboutus/reports/policies/fileuploadmax10mb,120796,en.pdf> (accessed 26 May 2015); Department for Culture, Media and Sport, "Guidance for the Care of Human Remains in Museums," available online at *British Museum* (www.britishmuseum.org), <https://www.britishmuseum.org/pdf/DCMS%20Guide.pdf> (accessed 26 May 2015), 19.

⁴³ Edward Manisty and Julian Smith, "The Deaccessioning of Objects from Public Institutions: legal and related considerations," *Art, Antiquity and Law* 15:1 (2010),

laws or policies in which cultural property is included as an issue to be considered alongside human remains can still be seen as a developing trend which allows some documents to reach outside the confines of the category for which they were originally designed and affect the wider repatriation debate. Examples abound of indigenous cultural property which has been successfully repatriated under legislation or policies designed first and foremost to deal with the issue of human remains. Under the categories of cultural property established by NAGPRA, in particular, it has been possible for indigenous peoples to make successful requests for the repatriation of important artefacts not directly associated with burials.⁴⁴ Cases of institutional policies leading to the repatriation of

71-74; United Kingdom Parliament, "British Museum Act 1963," available online at *British Museum*, <http://www.britishmuseum.org/PDF/BM1963Act.pdf> (accessed 26 May 2015); United Kingdom Parliament, "Human Tissue Act 2004," available online at http://www.legislation.gov.uk/ukpga/2004/30/pdfs/ukpga_20040030_en.pdf (accessed 26 May 2015); Simpson, *Making Representations*, 227; Fforde, *Collecting the Dead*, 119-123, 126-127. Museums in the United Kingdom are often accused of 'hiding behind' statutes barring them against deaccessioning, rather than attempting to lift them, while uncertainty over museums' powers of deaccessioning items from their collections has led in recent years to the preparation of reports on the extent of the issue and the formulation of guidelines to deal with requests, as well as provisions under the Human Tissue Act 2004. Norman Palmer, *Museums and the Holocaust: law, principles and practice* (Leicester: Institute of Art and Law, 2000), 26-27. Simpson, *Museums and Repatriation*; Jane Weeks and Valerie Bott, *Scoping Survey of Historic Human Remains in English Museums: undertaken on behalf of the Ministerial Working Group on Human Remains* (London: Ministerial Working Group on Human Remains, 2003); Jane Legget, *Restitution and Repatriation: guidelines for good practice* (London: Museums and Galleries Commission, 2000); United Kingdom Parliament, "Human Tissue Act 2004"; Fforde, *Collecting the Dead*, 129-132, 135-138, 140-150; Paterson, "Ancestral Remains in Institutional Collections," 167, 169-170

⁴⁴ For an early example of a successful repatriation, see Joe Watkins, "Artefactual Awareness: Spiro Mounds, grave goods and politics," in *The Dead and their Possessions: repatriation in principle, policy and practice*, ed. Cressida Fforde et al. (London: Routledge, 2002), 149-150; Jeanette Greenfield, *The Return of Cultural Treasures*, 3rd ed. (Cambridge: Cambridge University Press, 2007), 174-176; Patty Gerstenblith, "Museum Practice: legal issues," in *A Companion to Museum Studies*,

both human remains and associated grave goods can also be found.⁴⁵

In addition to this concrete influence on the practice of the repatriation of indigenous cultural property, the discussion surrounding the return of human remains to descendants or communities has also influenced how the public views the issue. This can be seen, for example, in articles written for the public domain which combine the issues of the repatriation of human remains and that of indigenous cultural property, either by citing examples of both, or by employing the same rhetoric, vocabulary and arguments.⁴⁶ To the reader of such articles, human remains and indigenous cultural property in museums form one and the same, or at the very least related, issues.⁴⁷ It therefore becomes apparent that the repatriation of indigenous cultural property is influenced to a significant extent by the legislation and policies governing, practice of and support for the repatriation of human

ed. Sharon Macdonald (Oxford: Blackwell Publishing, 2006), 453.

⁴⁵ Museum Victoria, "Annual Report 2003/2004," available online at *Museum Victoria*, <http://museumvictoria.com.au/pages/2877/2003-2004/2003-2004research.pdf> (accessed 26 May 2015), 73; Russell Thornton, "Repatriation as Healing the Wounds of the Trauma of History: Cases of Native Americans in the United States of America," in *The Dead and Their Possessions: repatriation in principle, policy and practice*, ed. Cressida Fforde et al. (London: Routledge, 2002), 22-23; Mark O'Neill, "Repatriation and its Discontents: the Glasgow Experience," in *Who Owns Objects?: the ethics and politics of collecting cultural artefacts*, ed. Eleanor Robson (Oxford: Oxbow, 2006), 112-113.

⁴⁶ Patrick O'Driscoll, "Law to Return Indian Remains Boggled Down," *USA Today*, 9 March 1998: 01.A; Anon., "Editorial: Indians have rights to relics," *Denver Post*, 7 September 2003: E.06; Richard Weizel, "From Hallowed Ground Conn. Tribe Wants Return of Artifacts From Graves," *Boston Globe*, 10 January 1998: B.1; Anon., "Museum Set to Lose Indian Treasures," *New York Times*, 19 February 1993: A12.

⁴⁷ See, for example, Gabriella Coslovich, "At Odds on the Art of Possession," *Sydney Morning Herald*, 19 January 2008; Rita Beamish, "Artifacts Suspended in Cultural Tension: Native Hawaiians vie with museum," *Washington Post*, 1 June 2003, A03; Tickey Pule, Director of the National Museum of Botswana, quoted in Rachel L. Swarns, "Africa Rejoices as a Wandering Soul Finds Rest," *New York Times*, 6 October 2000: A.4; Elaine Sciolino, "French Debate: is Maori head body part or art?," *New York Times*, 26 October 2007; Kinzer; Henderson.

remains from institutional collections. This is in some ways a self-reinforcing process. As more legislation and policies are written in support of the repatriation of human remains (and some categories of cultural property), there are more instances of repatriation in practice, and these gain a higher public profile, again with some inclusion of cultural property into the discussion. A number of authors have commented on the influence of favourable public opinion in obtaining positive outcomes for specific repatriation claims, and it can also be posited that further legislation and policies favouring the return of indigenous human remains and cultural property are more likely to be successfully implemented if policy-makers have the support of their respective publics behind them.

2.2 Antiquities and the Return of Indigenous Cultural Property.

A brief survey of written sources on the issue of repatriation from museum collections would lead some to believe that it is synonymous with a handful of claims for the return of high-profile antiquities.⁴⁸ Of these, the most prominent, with a body of written and verbal debate stretching back almost 200 years, are the Elgin Marbles, long displayed in the British Museum.⁴⁹ Since their controversial arrival in the United Kingdom and purchase by the British Museum in 1816,⁵⁰ the debate over where the Marbles

⁴⁸ See, for example, Mary Ellen O'Connell and Sara DePaul, "Report on the Conference: Imperialism, Art and Restitution," *International Journal of Cultural Property* 12 (2005), 489; Derek Fincham, "Transnational Forfeiture of the Getty Bronze," *Cardozo Arts & Entertainment Law Journal* 32:2 (2014), 471-472; Thompson, 251; Simpson, *Museums and Repatriation*, 2.

⁴⁹ While the selection of one of these terms over the other is sometimes used to show support for or opposition to the return of this collection of objects to Greece, I have used the term 'Elgin Marbles' to refer to those fragments removed by Lord Elgin in the nineteenth century and now housed in the British Museum, while the term 'Parthenon Marbles' is used to refer to the surviving elements of decoration as a whole.

⁵⁰ Anon., "Editorial: return the Parthenon Marbles," *New York Times*, 2 February 2002: A.18; George Gordon, Lord Byron, *The Poetical Works of Lord Byron* (London: Ward, Lock & Co., 1882), 12-14; John Henry Merryman, "Thinking About the Elgin Marbles," in *Thinking About the Elgin Marbles: critical essays on cultural property*,

should reside has been simmering and developing, with new momentum occasionally added.⁵¹ The case of the Elgin Marbles is often cited as the most influential repatriation issue to date with opinions, often polarized, expressed in almost all imaginable forms, including a poetic turn by Lord Byron.⁵² It also takes on importance as a test subject in a field which is heavily dominated by the discussion of precedent and the fear of museum storehouse being emptied by a tidal wave of claims for return.⁵³

Perhaps more important than the effect of the Elgin Marbles debate on the idea of precedents in repatriation, however, is the

art and law, ed. John Henry Merryman (The Hague: Kluwer Law International, 2000) 43, 45; Roger Atwood, *Stealing History: tomb raiders, smugglers, and the looting of the ancient world* (New York: St Martin's Press, 2004), 136-137. See also Greenfield, 57.

⁵¹ Anon., "Stones to Die For: as pressure increases on Britain to return the Elgin Marbles, British excuses for refusing to do so are growing thinner," *The Economist* 354, no. 8162, 18 March 2000: 85; Patrick O'Driscoll, "Ancient Art at Center of Dispute: portion of fabled 'Parthenon Marbles' on display in Britain," *USA Today*, 26 August 2004: D.04; Anthee Carassava, "In Athens, Museum is an Olympian Feat," *New York Times*, 20 June 2009: C1.

⁵² See, for example, Christopher Hitchens, ed., *The Elgin Marbles: should they be returned to Greece?* 2nd ed. (London: Verso, 1997); Timothy Webb, "Appropriating the Stones: the 'Elgin Marbles' and the English national taste," in *Claiming the Stones/Naming the Bones: cultural property and the negotiation of national and ethnic identity*, ed. Elazar Barkan and Ronald Bush (Los Angeles: Getty Research Institute, 2002); Anon., "Not Carved in Stone: the British should look again at the issue of returning the Elgin Marbles to Greece," *The Economist* 354, no. 8162, 18 March 2000, 21; Barry Came, "Will Britain Lose its Marbles?," *Maclean's*, 13 December 1999: 33-34; Anon., "Stones to Die For," 85; O'Driscoll, "Ancient Art at Center of Dispute."

⁵³ Margaret Loftus and Thomas K. Grose, "They've Lost Their Marbles: Greece and others try to get treasures back," *U.S. News & World Report* 128, no. 25 (26 June 2000): 58; Atwood, 139-141; Thompson, 252-253; Welsh, 847. The image of 'opening the floodgates' is recurrent in discussions of the fear of precedent. See, for example, Piers Davies, "The Return of Cultural Heritage to Indigenous Peoples: conflict or cooperation," unpublished paper presented to the International Law Association, (Wellington, 2008), 7; Eric Gibson, "Finders Keepers? Antiquities and their Origins," *Wall Street Journal*, 30 December 2005: W.11; Simpson, *Museums and Repatriation*, 80.

fact that they appear to represent all things to all thinkers on the subject, and have been used to underpin a number of arguments both for and against repatriation in general, and the repatriation of antiquities more specifically: for example the distinction between 'cultural nationalists' and 'cultural internationalists' made by John Henry Merryman,⁵⁴ the importance of historical relativism and context when assessing repatriation claims,⁵⁵ or the question of whether or not cultural continuity has a bearing on claims for repatriation.⁵⁶ Even taking the single example of the Elgin Marbles,

⁵⁴ Merryman, "Thinking About the Elgin Marbles", 26, 61-62; See also John Henry Merryman, "Cultural Property Ethics," in *Thinking About the Elgin Marbles: critical essays on cultural property, art and law*, ed. John Henry Merryman (The Hague: Kluwer Law International, 2000); John Henry Merryman, "The Retention of Cultural Property," in *Thinking About the Elgin Marbles: critical essays on cultural property, art and law*, ed. John Henry Merryman (The Hague: Kluwer Law International, 2000); John Henry Merryman, "A Licit Trade in Cultural Objects," in *Thinking About the Elgin Marbles: critical essays on cultural property, art and law*, ed. John Henry Merryman (The Hague: Kluwer Law International, 2000); Sarah Eagan, "Preserving Cultural Property: Our Public Duty: a look at how and why we must create international laws that support international action," *Pace International Law Review* 13 (2001): 414-416. The concept has been criticised by some as a 'crude dichotomy'. James A. R. Nafziger and Ann Nicgorski, "Conference on Cultural Heritage Issues: the legacy of conquest, colonization and commerce, Willamette University, Salem, Oregon October 12-14 2006," *International Journal of Cultural Property* 14 (2007): 446; A third category, that of cultural intra-nationalists, or those within a nation who seek repatriation from a dominant group, is an interesting one, with ramifications for the return of cultural property in settler societies, but has not been widely developed thus far. Watkins, "Cultural Nationalists, Internationalists and "Intra-nationalists."

⁵⁵ The contemporary legality of Elgin's actions is not a given, and has been much debated. See, for example, Christopher Hitchens, "The Elgin Marbles," in *The Elgin Marbles: should they be returned to Greece?*, ed. Christopher Hitchens (London: Verso, 1997), 27-32; Merryman, "Thinking About the Elgin Marbles," 35-40; Greenfield, 73, 81; Atwood, 134-135.

⁵⁶ Hitchens, "The Elgin Marbles," 90. Similarly, indigenous groups are often seen through a lens of a so-called 'authentic' culture, frozen at some point in the past, with modern communities seen to be somehow inauthentic for having evolved and adapted their practices in response to external and internal influences. Denis Byrne, "Heritage as Social Action," in *The Heritage Reader*, ed. Graham Fairclough et al. (London: Routledge, 2008), 151, 164; Pia Altieri, "Knowledge, Negotiation and

therefore, it is possible to argue that the debate surrounding the repatriation of antiquities affects repatriation more generally,⁵⁷ with the same arguments permeating discussions of the repatriation of indigenous cultural property in public forums.⁵⁸ As the preeminent example of a claim for repatriation, the Elgin Marbles have even, in some cases, been referred to directly in media discussions of the return of indigenous cultural property, providing the public with a frame of reference through which to understand another category of debated material.⁵⁹ A room of sculptures in London, therefore, has seen its influence extend until it has become a symbol for anyone with an opinion on repatriation.

The influence of the debate around the repatriation of antiquities is not purely rhetorical however, and it is important not to relegate indigenous people and their cultural property solely to the past, in the form of historic collections and grievances and moral arguments for return. Although the basis of many was firmly established, ethnographic collections did not cease to exist or expand with the end of the colonial period, and indigenous groups in many parts of the world have continued throughout to struggle to

NAGPRA: reconceptualizing repatriation discourse(s),” in *Law and Religion in Contemporary Society: communities, individualism and the state*, ed. Peter W. Edge and Graham Harvey (Aldershot, UK: Ashgate, 2000), 141; Arapata T. Hakiwai, “The Search for Legitimacy: museums in Aotearoa, New Zealand – a Maori viewpoint,” in *Heritage, Museums and Galleries: an introductory reader*, ed. Gerard Corsane (London: Routledge, 2005), 156; Brian Durrans, “The Future of the Other: changing cultures on display in ethnographic museums,” in *The Museum Time Machine*, ed. Robert Lumley (London: Routledge, 1988), 144-145; Simpson, *Making Representations*, 35, 251; D. Thomas, 211; N. Thomas, 15; Gerstenblith, “Identity and Cultural Property,” 627; Welsh, 843-844.

⁵⁷ See, for example, the recurring references to the Elgin Marbles in the work of Kathleen Fine-Dare on repatriation of indigenous cultural property. Fine-Dare, 17, 43.

⁵⁸ See, for example, the discussion of the different sides of the debate, the argument for historical relativism and the importance of context with respect to Native American cultural property in Edward Rothstein, “Antiquities, the World is Your Homeland,” *New York Times*, 27 May 2008.

⁵⁹ *Ibid.*, with reference to the Greek case for repatriation.

retain cultural property or have it returned to them. Similar challenges are faced by source countries of antiquities, although distinctions are sometimes made between the continuity of the different cultures compared to indigenous descendents.⁶⁰ Legislation and institutional policies related to more recent collecting is one area, aside from lending weight to arguments, in which overlap between approaches to the two contested categories can be felt. Legislation and policies relating to the protection and repatriation of antiquities have not tended to include indigenous cultural property as a distinct category subject to repatriation in the same way as have some policies relating to human remains. The piece of international legislation most discussed in relation to the removal and return of antiquities and other cultural property is the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Cultural Property 1970 (UNESCO 1970).⁶¹ While the Convention's definition of cultural property is wide, and left to be defined by each state when implementing it,⁶² the fact that it does not retroactively apply to cases before 1970 has obvious disadvantages for those who lay claim to items of indigenous cultural property, most of which had entered ethnographic collections well before this time. UNESCO 1970 is further limited by the fact that it applies only to those countries who

⁶⁰ A similar definition of the category of antiquities seems to be employed by James Cuno. James Cuno, "Introduction," in *Whose Culture?: the promise of museums and the debate over antiquities*, ed. James Cuno (Princeton: Princeton University Press, 2009), 1. Other definitions cite a cut-off date before which objects are deemed to be antiquities. See, for example, Aaron Kyle Briggs, "Consequences of the Met-Italy Accord for the International Restitution of Cultural Property," *Chicago Journal of International Law*, 7, no. 2 (2007), 624.

⁶¹ UNESCO, "Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property 1970," available online at [UNESCO.org, http://unesdoc.unesco.org/images/0013/001333/133378mo.pdf](http://unesdoc.unesco.org/images/0013/001333/133378mo.pdf) (accessed 26 May 2015). See also Roger W. Mastalir, "A Proposal for Protecting the "Cultural" and "Property" Aspects of Cultural Property under International Law," *Fordham International Law Journal* 16 (1992-1993), 1040-1042.

⁶² UNESCO, "Convention on the Means of Prohibiting and Preventing."

have become party to it, and requires domestic legislation in order to enact it.⁶³ Cultural property, both indigenous and antique, is further protected from contemporary removal or export in commercial or military contexts by international agreements such as UNESCO's Convention for the Protection of Cultural Property in the Event of Armed Conflict with Regulations for the Execution of the Convention 1954 (Hague 1954), the 1999 Second Protocol to this

⁶³ U.S. Department of State, "Convention on Cultural Property Implementation Act 1983," available online at *Bureau of Education and Cultural Affairs* <http://eca.state.gov/files/bureau/97-446.pdf> (accessed 26 May 2015); Australian Government Attorney General's Department, "Aboriginal and Torres Strait Islander Heritage Protection Act 1984," available online at *ComLaw*, [http://www.comlaw.gov.au/comlaw/Legislation/ActCompilation1.nsf/0/977187C250C68E0ECA256FD5002111F2/\\$file/AbTSIHerProte1984WD02.pdf](http://www.comlaw.gov.au/comlaw/Legislation/ActCompilation1.nsf/0/977187C250C68E0ECA256FD5002111F2/$file/AbTSIHerProte1984WD02.pdf) (accessed 26 May 2015); Australian Government Attorney-General's Department, "Protection of Movable Cultural Heritage Act 1987," available online at *ComLaw*, [http://www.comlaw.gov.au/ComLaw/Legislation/ActCompilation1.nsf/0/4AE22E1FA6EB2EE8CA256FB9002265F2/\\$file/ProtecMovCultHer86WD02.pdf](http://www.comlaw.gov.au/ComLaw/Legislation/ActCompilation1.nsf/0/4AE22E1FA6EB2EE8CA256FB9002265F2/$file/ProtecMovCultHer86WD02.pdf) (accessed 26 May 2015); Australian Government Attorney-General's Department, "Protection of Movable Cultural Heritage Regulations 1987," available online at *ComLaw*, [http://www.comlaw.gov.au/ComLaw/Legislation/LegislativeInstrumentCompilation1.nsf/0/C64AB64D36FC980DCA256F71004348CD/\\$file/ProtMovCultHer1987.pdf](http://www.comlaw.gov.au/ComLaw/Legislation/LegislativeInstrumentCompilation1.nsf/0/C64AB64D36FC980DCA256F71004348CD/$file/ProtMovCultHer1987.pdf) (accessed 26 May 2015); James E. Sherry, "U.S. Legal Mechanisms for the Repatriation of Cultural Property: evaluating strategies for the successful recovery of claimed national patrimony," *George Washington International Law Review* 37, no. 2 (2005), 519; Robert K. Paterson, "Protecting Taonga: the cultural heritage of the New Zealand Maori," *International Journal of Cultural Property* 8, no. 1 (1999), 110; Ellen Herscher, "International Control Efforts: are there any good solutions?," in *The Ethics of Collecting Cultural Property: whose culture? whose property?* 2nd ed., ed. Phyllis Mauch Messenger (Albuquerque: University of New Mexico Press, 1999), 117; Nina R. Lenzner, "The Illicit International Trade in Cultural Property: does the UNIDROIT Convention provide an effective remedy for the shortcomings of the UNESCO Convention?," *University of Pennsylvania Journal of International Business Law* 15 (1994-1995): 477-480; Piers Davies and Paul Myburgh, "The Protected Objects Act in New Zealand: too little, too late?," *International Journal of Cultural Property* 15 (2008), 328-333; Barbara T. Hoffman, "International Art Transactions and the Resolution of Art and Cultural Property Disputes: a United States perspective," in *Art and Cultural Heritage: law, policy and practice*, ed. Barbara T. Hoffman (Cambridge: Cambridge University Press, 2006), 162; Briggs, 631-633.

document, and the International Institute for the Unification of Private Law (UNIDROIT)'s 1995 Convention on Stolen or Illegally Exported Cultural Objects (UNIDROIT 1995),⁶⁴ the latter of which aims to overcome difficulties in enacting legislation such as UNESCO 1970 because of the incompatibility of different national laws. Furthermore, legislation is found in many countries which protects certain categories of cultural material from export after a certain date, often by vesting ownership of some categories of material in the state.⁶⁵ The majority of the legislative frameworks, on

⁶⁴ UNIDROIT; UNESCO, "Convention for the Protection of Cultural Property in the Event of Armed Conflict with Regulations for the Execution of the Convention 1954," available online at [UNESCO.org, http://unesdoc.unesco.org/images/0008/000824/082464mb.pdf](http://unesdoc.unesco.org/images/0008/000824/082464mb.pdf) (accessed 26 May 2015); Neil Brodie, Jenny Doole and Peter Watson, *Stealing History: the illicit trade in cultural material* (Cambridge: McDonald Institute for Archaeological Research, 2000), 40, 50; Lyndel V. Prott, "Saving the Heritage: UNESCO's action against illicit traffic in Africa," in *Plundering Africa's Past*, ed. Peter R. Schmidt and Roderick J. McIntosh (Bloomington, IN: Indiana University Press, 1996), 35-36; Lyndel V. Prott, "Protecting Cultural Heritage in Conflict," in *Archaeology, Cultural Heritage and the Antiquities Trade*, ed. Neil Brodie et al. (Gainesville, FL: University Press of Florida, 2006). Certain criticisms have been levelled against UNIDROIT 1995, including in John Henry Merryman, "The UNIDROIT Convention: three significant departures from the urtext," in *Thinking About the Elgin Marbles: critical essays on cultural property, art and law*, ed. John Henry Merryman (The Hague: Kluwer Law International, 2000); Brian Bengs, "Dead on Arrival?: a comparison of the Unidroit Convention on Stolen or Illegally Exported Cultural Objects and U.S. property law," *Transnational Law & Contemporary Problems* 6 (1996); Mastalir, 1051-1054; Lenzner, 419-499.

⁶⁵ For discussion of some national export prohibition laws, see, for example, Briggs; Herscher; William G. Pearlstein, "Claims for the Repatriation of Cultural Property: prospects for a managed antiquities market," *Law and Policy in International Business* 28, no. 1 (1996); Jordana Hughes, "The Trend Toward Liberal Enforcement of Repatriation Claims in Cultural Property Disputes," *George Washington Journal of International Law and Economics* 33, no. 1 (2000); William G. Pearlstein, "Cultural Property, Congress, the Courts, and Customs: the decline and fall of the antiquities market?," in *Who Owns the Past?: cultural policy, cultural property, and the law*, ed. Kate Fitz Gibbon (New Brunswick, NJ: Rutgers University Press, 2005); Kwame Anthony Appiah, "Whose Culture Is It?," in *Whose Culture?: the promise of museums and the debate over antiquities*, ed. James Cuno (Princeton: Princeton University Press, 2009), 79-80.

examination, do not specifically exclude indigenous cultural property as a category of material which may have been stolen, looted or illegally exported. Legislation for the protection of cultural property, despite its limitations of enactment, timeframes and categorization of cultural property, has however been used in high-profile cases in a number of countries in cases where the movement of indigenous cultural property was disputed.⁶⁶

This body of legislation has proved most useful in the protection of recently removed cultural property, particularly that which is well-documented and can be shown beyond doubt to have been removed since UNESCO 1970 or the relevant domestic legislation was enacted. High profile examples of the repatriation of antiquities as a direct result of UNESCO 1970 include the return of a gold wreath, marble statue, relief and stele from the Getty Museum to Greece in 2006, and the return of 156 Xia and Ming Dynasty items from Denmark to China in 2008.⁶⁷ Importantly, though, the efficacy of this legislation has not been solely in the area of illicitly excavated and exported antiquities. One case involving the organised removal of indigenous cultural property in recent decades was the theft and subsequent repatriation of the textiles sacred to the Aymara people of Coroma, Bolivia, removed for sale in the 1970s-80s.⁶⁸ The framework established in the United States for the implementation of UNESCO 1970, as well as existing United States Customs Service

⁶⁶ See, for example, Greenfield, 307-311; Sherry, 522-523.

⁶⁷ The repatriations to China were a result of a formal claim under UNESCO 1970, while the return of items from the Getty was the result of an institutional policy deliberately designed to bring the museum's acquisitions policy in line with the legislation. UNESCO, "Recent Examples of Successful Operations of Cultural Property Restitutions in the World," available online at [UNESCO.org](http://portal.unesco.org/culture/en/ev.php-URL_ID=36505&URL_DO=DO_TOPIC&URL_SECTION=201.html), http://portal.unesco.org/culture/en/ev.php-URL_ID=36505&URL_DO=DO_TOPIC&URL_SECTION=201.html (accessed 26 May 2015).

⁶⁸ Susan Lobo, "The Fabric of Life: repatriating the sacred Coroma textiles," *Cultural Survival* 15, no. 3 (1991); Cristina Bubba Zamora, "Collectors Versus Native Peoples: the repatriation of the sacred weavings of Coroma, Bolivia," *Museum Anthropology* 20 (1996), 39-43.

guidelines on the import and export of cultural property, were useful in successfully repatriating some of this stolen cultural property.⁶⁹ Importantly, the weavings, once repatriated to Bolivia, were not claimed by national collections, but underwent a further domestic repatriation to indigenous communities.⁷⁰

Other cases in which legal action has been brought against illegal exporters, importers or purchasers of antiquities have helped to bring issues surrounding cultural property in general to much greater public notice.⁷¹ First and foremost among these is undoubtedly the indictment by the Italian courts of Marion True, former curator of antiquities at the Getty Museum in Los Angeles, for her involvement, along with antiquities dealer Robert Hecht, in the purchasing of smuggled antiquities.⁷² Subsequent to this case, the Getty Museum has brought its institutional policies in line with UNESCO 1970, and has repatriated a substantial number of antiquities from its collections to both Italy and Greece.⁷³ Such examples form part of a body of court cases, instances of return, and news media stories debating unethical, illicit, illegal or best practice institutional standards on the part of museums large and small.⁷⁴ Discussion of cultural property issues brought into the

⁶⁹ Lobo; Bubba Zamora, 42-43.

⁷⁰ Bubba Zamora, 43.

⁷¹ Briggs, 640-641; Atwood, 142-145, 149; Peter Watson and Celia Todeschini, *The Medici Conspiracy: the illicit journey of looted antiquities from Italy's tomb raiders to the world's greatest museums* (New York: Public Affairs, 2006), ix-xii, 101-103, 238-240, 248, 263-264; James Cuno, *Who Owns Antiquity?: museums and the battle over our ancient heritage* (Princeton: Princeton University Press, 2008), 31.

⁷² Watson and Todeschini, 9, 17-18, 20-23, 27, 72, 81, 87-88, 98, 109, 123, 146-147, 200, 203-205, 213, 229, 269-284, 286-287, 297; Briggs, 640-641; Brodie, Doole and Watson, 26; Neil Brodie, "Smoke and Mirrors," in *Who Owns Objects?: the ethics and politics of collecting cultural property*, ed. Eleanor Robson et al. (Oxford: Oxbow, 2006), 2-3; Peter Watson, "Convicted Dealers: what we can learn," in *Archaeology, Cultural Heritage, and the Antiquities Trade*, ed. Neil Brodie et al. (Gainesville, FL: University Press of Florida, 2006).

⁷³ UNESCO, "Recent Example of Successful Operations."

⁷⁴ See, for example, Angela M. H. Schuster, "Repatriation Games," *Art & Auction* 36:11 (2013), 44-45; James Cuno, "Museums, Antiquities, Cultural Property, and the US Legal Framework for Making Acquisitions," in *Who Owns the Past?: cultural*

public domain by cases of trafficked antiquities has not been limited to legal questions, furthermore, but has also involved the consideration of the importance of cultural property to a people's sense of identity and heritage. Public opinion, for the most part, is critical of institutional practices which are revealed to be questionable, and supportive of efforts to return antiquities acquired in unethical circumstances to their original locations, as well as the reunification of collections and fragmented objects.⁷⁵ All of these developments, while they have predominantly affected the market for and collection of antiquities, have clear implications for indigenous cultural property, from greater scrutiny of collecting practices to practical precedents for repatriation claims.⁷⁶ Whether strengthening an argument or providing a legal framework to challenge the removal or export of indigenous cultural property, therefore, there has once again been a fruitful overlap between this category of contested material and another strand of the repatriation debate.

2.3 'Looted' Art and the Return of Indigenous Cultural Property

A further area of debate in the discussion surrounding repatriation from institutional (and private) collections are the artworks and artefacts taken from their owners in times of conflict.

policy, cultural property, and the law, ed. Kate Fitz Gibbon (New Brunswick, NJ: Rutgers University Press, 2005), 154; Brodie, "Smoke and Mirrors," 9-11; Watson; Renfrew; Cuno, *Who Owns Antiquity?*, 1, 31; Anthony Browne and Pierre Valentin, "The Art Market in the United Kingdom and Recent Developments in British Cultural Policy," in *Who Owns the Past?: cultural policy, cultural property, and the law*, ed. Kate Fitz Gibbon (New Brunswick, NJ: Rutgers University Press, 2005), 98-99; Fincham, 481-483.

⁷⁵ Atwood, 142-144.

⁷⁶ See, for example, David Bonetti, "Curators, Countries Debate Who Owns the Past," *St Louis Post-Dispatch*, 26 February 2006: B1; Stevenson Swanson, "Peru Pushes Yale for Inca Artifacts: clashes between museums, nations more frequent," *Chicago Tribune*, 6 October 2000, C3; Maria Puente, "Stolen Art Met With Public Yawn: but the Metropolitan's 'hot pot' holds a modern cautionary tale," *USA Today*, 30 March 2006, D.1.

Such objects are often referred to as 'looted art'. While the largest displacement of art and artefacts yet seen took place during World War II, particularly in areas occupied by Nazi and Soviet forces, the issue of the removal of cultural property in times of war has a long history in the treaties and legislation of many countries, often being traced back to the movement of cultural property during the Napoleonic Wars.⁷⁷ The legacy of the Napoleonic Wars of the early nineteenth century in terms of the treatment of cultural property in times of conflict is generally agreed to have continued throughout the nineteenth and early twentieth centuries in documents such as the 1863 Lieber Code, 1874 Declaration of Brussels and 1933 League

⁷⁷ Interestingly, the term 'cultural property', like the term 'reparations' was originally used in the context of wartime plunder, and has since been extended to its much broader current usage. Some have also seen in this period an early example of the centralising and universalising mentality which endures today, basing encyclopaedic collecting practices on such benefits as the preservation of cultural material and the role of such material in the host society. In some cases the protection of cultural property during times of war is traced back much further, to classical antiquity or the medieval to early modern periods. The Napoleonic period has been taken as the focus for the current study, however, as the basis for a renewed and formalised interest in protection and restoration. Moira Simpson, "The Plundered Past: Britain's challenge for the future," in *The Dead and Their Possessions: repatriation in principle, policy and practice*, ed. Cressida Fforde et al. (London: Routledge, 2002), 201; David Wilson, "Return and Restitution: a museum perspective," in *Who Owns the Past?*, ed. Isabel McBryde (Melbourne: Oxford University Press, 1985), 103; Elazar Barkan, "Amending Historical Injustices: the restitution of cultural property – an overview," in *Claiming the Stones/Naming the Bones: cultural property and the negotiation of national and ethnic identity*, ed. Elazar Barkan and Ronald Bush (Los Angeles: Getty Research Institute, 2002), 18; Michael F. Brown, "Heritage as Property," in *Property in Question: value transformation in the global economy*, ed. Katherine Verdey and Caroline Humphrey (Oxford: Berg, 2004), 53; Kate Fitz Gibbon, "Chronology of Cultural Property Legislation," in *Who Owns the Past? cultural policy, cultural property, and the law*, ed. Kate Fitz Gibbon (New Brunswick, NJ: Rutgers University Press, 2005), 3; Michael J. Kurtz, *America and the Return of Nazi Contraband: the recovery of Europe's cultural treasures* (Cambridge: Cambridge University Press, 2006), 3-7; Peter Gathercole, "The Repatriation of Ethnographic Objects," *RAIN* 46, no. 2 (1981); Torpey, 8-9, 43; Feest, 33-34; Vrdoljak, 24, 29; Goodwin, 680-683; Greenfield, 238, 390; Webb, 97-98; Eagan, 417-421.

of Nations Roerich Pact.⁷⁸ It should be noted, however, that the model of cultural property protection developed in response to the Napoleonic campaigns and reinforced thereafter applied predominantly to conflicts between European or Western combatants. It was not until the advent of Hague 1954 that this protection was extended to the other peoples of the world, and in many senses such notions continue not to apply to many modern conflicts which include ideological or religious groups as combatants, or to conflicts where the destruction of cultural property is used as a tool of terror or oppression.⁷⁹ High profile cases of artworks repatriated after twentieth-century looting do not tend to share common geographical or cultural origins with indigenous cultural property, but they do share other similarities, including the unequal power relations which led to their original removal. Furthermore, in debating the potential repatriation of looted art, moral arguments are often privileged over legal rights of possession. It is in this aspect, rather than the impact of traditional and modern legal mechanisms for the return of looted property, that the greatest effect on the repatriation of indigenous cultural property can be seen.

The Hague Convention was first and foremost a response to the looting of artworks and other items of cultural property shortly before, during and after World War II.⁸⁰ This looting, which was for the most part a result of Nazi policies and expansion through Europe (but also took place in Soviet-occupied areas)⁸¹ represented the

⁷⁸ Fitz Gibbon, "Chronology of Cultural Property Legislation," 3-4; Simpson, "The Plundered Past," 201.

⁷⁹ Barkan, "Amending Historical Injustices," 19-21; Martin Bailey, "Brutal Islamic State Attack Puts Mosul Museum's Future in Doubt," *The Art Newspaper* 267 (April 2015), 28; Afolasade Abidemi Adewuni, "War Time Pains, All Time Pains: spoilage of cultural property in Mali," *Art, Antiquity and Law* 18:4 (2013), 309-321.

⁸⁰ Eagan, 421-423.

⁸¹ Greenfield, 183, 188-189, 191-195. See also Lynn H. Nicholas, *The Rape of Europa: the fate of Europe's treasures in the Third Reich and the Second World War* (London: Macmillan, 1994), 200-201, 361-362; Jonathan Petropoulos, *Art as Politics in the Third Reich* (Chapel Hill, NC: University of North Carolina Press, 1996), 146;

most organised and extensive removal of cultural property yet seen during any period of war or peace.⁸² By the end of World War II, tens of thousands of artworks had been taken from their original owners, including a small number removed by liberating or occupying troops during the last stages of the war.⁸³ Just as this period had represented the largest-scale looting yet seen, it then became the largest attempt at the restitution of cultural property as the war ended and the occupation of Germany and the Cold War began. Due to the sheer volume of works involved, the variety of fates which may have befallen them, as well as the destruction of documentation, unprecedented numbers of deaths, and mass displacement of refugees, the task of attempting to reunite artworks with their owners was overwhelming.⁸⁴ The decision to return

Nikolai Nikandrov, "The Transfer of the Contents of German Repositories into the Custody of the USSR," in *The Spoils of War: World War II and its aftermath: the loss, reappearance, and recovery of cultural property*, ed. Elizabeth Simpson (New York: Harry N. Abrams, Inc., 1997); Anon., "Trophy Art in Limbo: legislators stop repatriation of WWII loot," *Russian Life* 46, no. 3 (May-June 2003): 9; Armin Hiller, "The German-Russian Negotiations over the Contents of the Russian Repositories," in *The Spoils of War: World War II and its aftermath: the loss, reappearance, and recovery of cultural property*, ed. Elizabeth Simpson (New York: Harry N. Abrams, Inc., 1997); Hagen Graf Lambsdorff, "Return of Cultural Property: hostages or war or harbingers of peace?," in *The Spoils of War: World War II and its aftermath: the loss, reappearance, and recovery of cultural property*, ed. Elizabeth Simpson (New York: Harry N. Abrams, Inc., 1997), 241-243; Feest, 36; Barkan *The Guilt of Nations*, xxiv, 65-70, 72-73, 76, 81; Kurtz, 26-27, 104, 111-112, 179, 210-213.

⁸² L. Nicholas, 3-10, 30-31, 38-39, 44, 61, 65, 103, 133, 155-156, 444; Petropolous, *Art as Politics*, 7, 14, 75, 92; N. Palmer, *Museums and the Holocaust*, 1, 3-7, 9, 59-62; Kurtz, 14, 16-17, 19-21, 24, 28-31, 39; Greenfield, 240, 356; Jonathan Petropolous, *The Faustian Bargain: the art world in Nazi Germany* (Oxford: Oxford University Press, 2000), 4-5, 7.

⁸³ Goodwin, 675; L. Nicholas, 354; N. Palmer, *Museums and the Holocaust*, 10-11; Kurtz, 210. The case of Joe Meador's looting of the Quedlinburg treasures has come to particular public attention. Kurtz, 224-225; Greenfield, 406; Peter Raue, "Summum Ius Summa Iniuria: stolen Jewish cultural assets under legal examination," in *Art and Cultural Heritage: law, policy and practice*, ed. Barbara T. Hoffman (Cambridge: Cambridge University Press, 2006), 188.

⁸⁴ L. Nicholas, 351, 407-409; N. Palmer, *Museums and the Holocaust*, 118-120; Kurtz, 73-74, 84-85, 87-89, 127-128, 142-145, 151-176.

artworks to countries rather than owners as a result of these challenges, while it was the most expeditious method at the time, has also caused ongoing controversy, particularly when cultural property was claimed by refugees moving between legal jurisdictions, or returned to and subsequently nationalised by socialist governments.⁸⁵ The foundation for later international conventions on cultural property,⁸⁶ Hague 1954 is seen by many as the ultimate statement of the 'cultural internationalist' position, or the importance of cultural property as the heritage of all mankind.⁸⁷ The Hague Convention attempts to protect both movable and immovable cultural property from deliberate or accidental destruction, looting or vandalism. Building on a historic international legal foundation, as well as the idea that cultural property is the heritage and responsibility of all humanity, Hague 1954 has helped to reshape ideas around the treatment of cultural property during times of conflict. And as one scholar has noted, "[a]lthough the 1954 Hague Convention has no direct application to the protection of cultural property during peacetime or the prevention of illicit trade, it established key concepts incorporated in

⁸⁵ L. Nicholas, 323, 382-383, 413-414, 429; N. Palmer, *Museums and the Holocaust*, 125; Kurtz, 182-183.

⁸⁶ John Mulvaney, "A Question of Values: museums and cultural property," in *Who Owns the Past?*, ed. Isabel McBryde (Melbourne: Oxford University Press, 1985), 89.

⁸⁷ Hughes, 136; Greenfield, 365; Herscher, 120; Barkan, "Amending Historical Injustices," 22; Merryman, "Thinking About the Elgin Marbles," 56-57; John Henry Merryman, "Two Ways of Thinking About Cultural Property," *American Journal of International Law* 80, no. 4 (1986), 831-832; André Emmerich, "Improving the Odds: preservation through distribution," in *Who Owns the Past?: cultural policy, cultural property, and the law*, ed. Kate Fitz Gibbon (New Brunswick, NJ: Rutgers University Press, 2005), 247; Jane Warring, "Underground Debates: the fundamental differences of opinion that thwart UNESCO's progress in fighting the illicit trade in cultural property," *Emory International Law Review* 227 (2005): 246. Other scholars have seen it as a Western perspective, which dismisses the ownership which some groups would claim over their own history. See, for example, Larry J. Zimmerman, "Plains Indians and Resistance to "Public" Heritage Commemoration of Their Pasts," in *Cultural Heritage and Human Rights*, ed. Helaine Silverman and D. Fairchild Ruggles (New York: Springer, 2007).

later treaties on these topics.”⁸⁸

In 1999 a Second Protocol was added to Hague 1954.⁸⁹ In response to phenomena seen for example in the Balkans or in Iraq, this Protocol was designed to create a new system for the enhanced protection of the most important cultural property, by establishing individual criminal responsibility for the theft or destruction of such property during times of war, as well as imposing increased responsibility to prevent illicit exports on occupying powers and improving the protection of cultural property in civil conflicts.⁹⁰ On a smaller scale, in 2007, the Department of the Army of the United States provided further protection by preparing a ‘Civil Affairs Arts, Monuments and Archives Guide’ to aid soldiers on active duty in the recognition and protection of cultural property.⁹¹ The Guide implements the Hague Convention principles to which the United States is not officially party, and summarises the overall task at hand as follows: “The cultural heritage of a country is the legacy of physical artifacts and intangible attributes of a group or society that are inherited from past generations, maintained in the present, and bestowed for the benefit of future generations. In the past, plunder has often followed warfare and natural

⁸⁸ Warring, 246.

⁸⁹ UNESCO, “Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict 1999,” available online at *UNESCO.org*, <http://unesdoc.unesco.org/images/0013/001306/130696eo.pdf> (accessed 26 May 2015).

⁹⁰ Simpson, *Making Representations*, 268; Greenfield, 224, 353; Neil Brodie, “Introduction,” in *Illicit Antiquities: the theft of culture and the extinction of archaeology*, ed. Neil Brodie and Kathryn Walker Tubb (London: Routledge, 2002), 7; Helaine Silverman and D. Fairchild Ruggles, “Introduction: Cultural Heritage and Human Rights,” in *Cultural Heritage and Human Rights*, ed. Helaine Silverman and D. Fairchild Ruggles (New York: Springer, 2007), 8.

⁹¹ U.S. Department of the Army, *Civil Affairs Arts, Monuments, and Archives Guide* (Washington, D.C.: U.S. Government Printing Office, 2007). This is at least partly in response to particular cases of past failure to protect cultural property. See Zia Akhtar, “Theft in Babylon: repatriation and international law,” *Art, Antiquity and Law* 17:4 (2012), 325, 333-340.

disaster.”⁹²

“Because of its emotional context, cultural property is particularly vulnerable in times of conflict. Combatants may exact political retribution by targeting symbols of their enemies’ cultural identity. There is also the matter of competing priorities for limited resources in securing the cultural properties. There is the temptation for wanton looting and destruction for either money or power.”⁹³ In the years between the Hague Convention of 1954, its Second Protocol of 1999 and the preparation of this last document in 2007, it is apparent that certain ideas about cultural property have evolved and been disseminated to a wide audience.⁹⁴ The main benefit of Hague 1954 and its protocols, therefore, may not be in the protection of specific manifestations or categories of cultural property, but rather in raising awareness of the importance of all cultural property to the people to whom it belongs, and the need to protect it under even the most difficult circumstances.

The impact of the repatriation of looted artworks on that of indigenous cultural property is not solely in the field of international treaties, however. As a further specific response to the looting of cultural property during World War II, a number of countries, including Russia, Austria and the United States, have made exceptions to rules on stolen property, statutes of limitations or the ability of museums or other institutions to deaccession items, or issued national guidelines, in recognition of the special nature of this period of looting in history.⁹⁵ In many legal systems, this has the

⁹² U.S. Department of the Army, 1.

⁹³ *Ibid.*, 3.

⁹⁴ *Ibid.*

⁹⁵ See, for example, Christopher W. Michaels, “Stolen Art Restitution Claims and the Exhaustion of Local Remedies: how foreign-based plaintiffs are able to succeed under the Foreign Sovereign Immunity Act,” *The Journal of Arts Management, Law, and Society* 42 (2012), 22, 27-31; N. Palmer, *Museums and the Holocaust*, 101-105; L. Nicholas, 418; Lenzner, 496; Bell, “Aboriginal Claims to Cultural Property in Canada,” 469-471; Hoffman, 159; Ashton Hawkins and Judith Church, “A Tale of Two Innocents: the rights of former owners and good-faith purchasers of stolen art,” in

added effect of establishing a possible precedent to be drawn on in later cases for repatriation.⁹⁶ The case in Austria of two paintings by Egon Schiele, for example, which came to light when the works were loaned to New York's Museum of Modern Art in 1998, caused the Austrian government to change its position on the return of artworks stolen during the World War II period to a more favorable one for claimants.⁹⁷ In the late 1990s, the Washington Conference on Holocaust Era Assets established recommended principles for dispute resolution, while the results of a hearing in the House of Representatives on the repatriation of Holocaust-era assets were published in 2006, including discussion of guidelines and assessment of the handling of previous cases.⁹⁸ Nevertheless, the situation for

Who Owns the Past?: cultural policy, cultural property, and the law, ed. Kate Fitz Gibbon (New Brunswick, NJ: Rutgers University Press, 2005), 57; Charles A. Palmer, "Recovering Stolen Art: avoiding the pitfalls," *Michigan Bar Journal* 82 (2003).. The merits of doing so are questioned by some scholars. See, for example, Raue.

⁹⁶ Hawkins and Church, 58. See also Jeremy G. Epstein, "The Hazards of Common Law Adjudication," in *Who Owns the Past?: cultural policy, cultural property, and the law*, ed. Kate Kitz Gibbon (New Brunswick, NJ: Rutgers University Press, 2005), 123, 125-126; Adele Merenstein, "The Zuni Quest for Repatriation of the War Gods: an alternative basis for claim," *American Indian Law Review* 17, no. 2 (1992), 607, 620; C. Palmer, 21; Hoffman, 171, 176; N. Palmer, *Museums and the Holocaust*, 80; Price, 116-117; Hawkins and Church, 58; Raue, 185, 188-189; Bell, "Aboriginal Claims to Cultural Property in Canada," 490-492, 502-504; Paterson, "Ancestral Remains in Institutional Collections," 161.

⁹⁷ One of the paintings was claimed by the heirs of Fritz Gruenbaum but had been legitimately sold, while the other, formerly belonging to Dr. Heinrich Reiger, had been sold by an heir to the Austrian Gallery and then transferred to the Leopold Museum. Their return to Austria was blocked by the New York courts while the dispute was resolved, and the argument that they were no longer 'stolen' because they had been previously seized but returned to the wrong party was rejected. Greenfield, 285, 291; Kurtz, 228-229; Gail Russell Chaddock, "Art World Wary of New Rules on Stolen Goods," *Christian Science Monitor*, 10 February 1998, 1. The decision to examine the provenance of Austrian collections may have been as much in response to the publicity over such cases as to legal or other issues. Gerstenblith, "Museum Practice: legal issues," 450.

⁹⁸ U.S. House of Representatives: House Committee on Financial Services, *Review of the Repatriation of Holocaust Art Assets in the United States: hearing before the subcommittee on domestic and international monetary policy, trade, and*

claimants varies from country to country, sometimes affected by legislation around deaccessioning items from museum collections, as in the United Kingdom where the merits of creating a bespoke response to this particular historic situation have been debated for some time.⁹⁹

The responses to the looting of artworks and cultural property during World War II have, in the decades since the end of war, extended beyond legislative chambers. As one author has noted: “[f]or essentially the first time in history, the international art community launched a coordinated campaign to repatriate stolen art and revise museum acquisition policies.”¹⁰⁰ Some claims for return have been carried out in emotional rhetoric in the media, while others, including the return of a fourteenth-century manuscript to Vienna in 2003, are the result of enforcement of existing guidelines or policies (in this case those of the US Customs Service).¹⁰¹ In some instances, museums and other good-faith purchasers have taken legal action against dealers or others who misled them as to the provenance of certain objects, thereby assigning accountability to more parties than merely the possessors and claimants.¹⁰² The media and public scrutiny over the issue of art looted during World War II Holocaust, as well as the desire to act ethically and transparently, has led many museums to improve their

technology of the committee on financial services (Washington, D.C.: U.S. Government Printing Office, 2006), 51-52, 54, 177; Greenfield, 296; Kurtz, 218-220.

⁹⁹ Greenfield, 295-297; N. Palmer, *Museums and the Holocaust*, 27-28, 106-107; Simpson, *Making Representations*, 281-282; Simpson, “The Plundered Past,” 215; Felicity Heywood, “Nazi Loot Bill to Become Law,” *Museums Journal* (December 2009): 13. See also discussion of similar issues in the United States in Charles A. Goldstein and Yael Weitz, “Claims by Museums of Public Trusteeship and the Response to Restitution Claims: a self-serving attempt to keep Holocaust-looted art,” *Art, Antiquity and Law* 16:3 (2011), 215-216, 218-221, 224.

¹⁰⁰ Goodwin, 674.

¹⁰¹ Greenfield, 221.

¹⁰² The Seattle Art Museum, for example, sued in 1998 the dealer who had sold it a painting by Matisse claimed by the heirs of Paul Rosenberg. The painting was returned to the claimants. Greenfield, 282; N. Palmer, *Museums and the Holocaust*, 50.

self-regulation in terms of guidelines for acquisitions, loans and provenance research.¹⁰³ The most important effect of the repatriation of 'looted' artworks and cultural property on the wider repatriation movement has thus been a reframing of the terms in which the return of cultural property and disputes surrounding it is seen. Because of factors including the dispersal of artworks and people, the semi-legal transfer of some property, the difficulty in tracing stolen works of art, and the barriers imposed by statutes of limitations and other legal requirements, the return of items stolen under Nazi policies to the original owners or their heirs is often portrayed as an ethical rather than strictly legal issue, in which exceptions can be made or moral pressure brought to bear on current possessors in order to ensure the desired outcome.¹⁰⁴ It has been noted that "[e]thical standards and regulatory laws usually follow public demand; public demand concentrates on specific situations that need to be redressed."¹⁰⁵ The fact that these standards, guidelines and policies have the ability to throw doubts over the previous methods of acquisition not only of artworks but of other areas of museum collections shows the importance which the repatriation of looted cultural property has had, even if one is to look only at the example of World War II.¹⁰⁶ Once again, public education and media attention have played a key role in ensuring that the profile of looted art claims remains high, and developing and adapting solutions become necessary as the result of public scrutiny and opinion.¹⁰⁷ It should also be noted that in some

¹⁰³ Gerstenblith, "Museum Practice: legal issues," 449; Simpson, "The Plundered Past," 201; Atwood, 149; Kurtz, 218, 223, 235; Willard L. Boyd, "Museums as Centers of Controversy," *Daedalus* 128, no. 3 (1999), 190-191.

¹⁰⁴ Cases involving the return of Holocaust-era assets to survivors or their heirs in recent years have ensured that the public interest in these issues remains high. Barkan, *The Guilt of Nations*, xv-xvii, xxiii.

¹⁰⁵ W. Boyd, 190-191.

¹⁰⁶ Simpson, "The Plundered Past," 199; James Cuno, "Introduction," in *Whose Culture?: the promise of museums and the debate over antiquities*, ed. James Cuno (Princeton: Princeton University Press, 2004), 12-13.

¹⁰⁷ Vrdoljak, 236.

discussions these links are not merely potential, but rather specific links have been drawn between the repatriation of World War II looted art and that of indigenous cultural property.¹⁰⁸

There are, nonetheless, limitations to the extent to which World War II and the Nazi looting of artworks and cultural property can be used as a model or foundation for supporters of other repatriation claims. Although statutes of limitations have in some cases been extended or altered in order to show more leniency towards Holocaust victims or their heirs, for example, most of the relevant exceptions, guidelines and legislation excludes items looted or taken before World War II. Furthermore, some scholars have foreseen the end of the current high profile of reparations or repatriation from this period, as Holocaust-related claims are settled and the number of remaining possible claimants dwindles.¹⁰⁹ Whether the benefits of the links between looted art, repatriation in general and the repatriation of indigenous cultural property in particular can survive the end of claims related to Nazi or World War II-era looting remains to be seen.

4. Internal influences in repatriation: possible future directions

The preceding pages have discussed the various ways in which different categories of material claimed for repatriation affect one another, taking the example of the effect on the return of indigenous cultural property. While each category is contested as a result of particular circumstances, both modern and historic, and any claim for return demands the negotiation of national and international legislation, institutional policies, successful or unsuccessful precedents, moral and ethical arguments and public opinion,¹¹⁰ it is possible to recognise some trends across the

¹⁰⁸ Davies, 10; Thornton, 20-23.

¹⁰⁹ Torpey, 4-5.

¹¹⁰ For example, see the article by Tom Flynn on the circumstances facing those involved in repatriation in the United Kingdom. Tom Flynn, "Return Journey," *Museum Practice* 25 (Spring 2004).

different types of repatriation described above. While this is partly an exercise in hypothesis, it is also firmly grounded in an analysis of claims, laws, case studies, public discussions, policies and guidelines relating to repatriation as they have evolved thus far.

The first trend meriting further discussion is that which sees indigenous cultural property included in legislation or policies which aim to facilitate the repatriation of another category of material. This is not to say that the repatriation of indigenous cultural property is always an accidental side effect, but rather that it was not necessarily the original intention of those proposing, supporting, drafting, or lobbying for these laws. In some cases, where the definition of cultural property eligible for protection is vague enough, it is possible to adapt and utilise the legislation to pursue claims for different categories of objects, including indigenous cultural property, while in others, the protection of a category of material seen to be related to indigenous cultural property has led to this group of objects being specifically included. Such laws have been promulgated at both the international and national levels. UNESCO 1970 and UNIDROIT 1995 are both examples of international legislation in which the definition of protected cultural property is sufficiently broad to apply to both indigenous cultural property and other contested categories.¹¹¹ International agreements such as these are equally important for the effect which they have on domestic legislation in turn. Both of these agreements have been important for the implementation of legislation in various nations through which indigenous cultural property enjoys increased protection and mechanisms for repatriation to the original owners or their descendents.¹¹² It should be remembered here, furthermore, that in a number of

¹¹¹ UNESCO, "Convention on the Means of Prohibiting and Preventing."

¹¹² See, for example, New Zealand Parliament, "A Protocol Issued by the Crown through the Minister for Arts, Culture and Heritage Regarding Interaction with Taranaki Whānui ki te Upoko o te Ika on Specified Issues," available online at govt.nz, <https://www.govt.nz/dmsdocument/1961> (accessed 26 May 2015); U.S. Department of State; Lobo.

cases domestic legislation on the sale or movement of stolen property has also been used successfully to return items of cultural property to claimants, despite not being covered specifically by such laws. Other legal responses to the issue of repatriation have specifically included indigenous cultural property as a category within their purview, even if this may not have been the lawmakers' original intent. The preeminent example of this is the 1990 NAGPRA in the United States,¹¹³ but similar provisions are made for example in the National Museum of the American Indian Act (NMAIA) of 1989 (which provides for repatriation in a similar fashion to NAGPRA, but applies only to the Smithsonian Institution), and various state laws,¹¹⁴ and indigenous cultural property does not only enjoy specific protection and provisions for repatriation in the United States, but in a number of other countries as well.¹¹⁵

Going hand-in-hand with the wider context of increasingly multicultural societies, the growing visibility of indigenous rights movements, and the recognition of non-Western points of view,¹¹⁶

¹¹³ U.S. Department of the Interior, "Native American Graves Protection and Repatriation Act (as amended)"; Steven Vincent, "Indian Givers," in *Who Owns the Past?: cultural policy, cultural property, and the law*, ed. Kate Fitz Gibbon (New Brunswick, NJ: Rutgers University Press, 2005), 35; Barbara Isaac, "Implementations of NAGPRA: the Peabody Museum of Archaeology and Ethnology, Harvard," in *The Dead and Their Possessions: repatriation in principle, policy and practice*, ed. Cressida Fforde et al. (London: Routledge, 2002); McKeown.

¹¹⁴ U.S. Department of the Interior, "National Museum of the American Indian Act 1989," available online at *Repatriation Office, Smithsonian National Museum of Natural History*, http://anthropology.si.edu/repatriation/pdf/nmai_act.pdf (accessed 26 May 2015); Price, 24-25, 29-31, 43-115; Gerstenblith, "Identity and Cultural Property," 638-639.

¹¹⁵ For example, Australian Government Attorney-General's Department, "Aboriginal and Torres Strait Islander Heritage Protection Act 1984"; Australian Government Attorney-General's Department, "Protection of Movable Cultural Heritage Act 1986"; Australian Government Attorney-General's Department, "Protection of Movable Cultural Heritage Regulations 1987"; New Zealand Parliament, "Protected Objects Act 1975/Protected Objects Amendment Act 2006"; Bell, "Aboriginal Claims to Cultural Property in Canada"; Assembly of First Nations and Canadian Museums Association .

¹¹⁶ See, for example, discussion in Simpson, *Making Representations*, 178-179;

the trend towards inclusion of issues relating to the repatriation of indigenous cultural property in national and international legislation seems likely to continue. This may be through an increase in specifically enacted legislation, as seen in the United States' NAGPRA and NMAIA, through the extension of existing legal approaches outside the confines of settler societies to former colonial centres, or through the successful adaptation of general repatriation or stolen property statutes to indigenous cultural property claims in more countries than has been the case thus far. A related trend specific to the repatriation of indigenous cultural property, and one which also seems likely to continue, is the adoption of principles and guidelines favorable to the protection or repatriation of this category of material by institutions or professional organisations worldwide.¹¹⁷ While most such policies focus on ethical and legal acquisitions rather than dispositions from museum collections, and the majority do not specifically mention the return of indigenous cultural property (human remains are a more common subject of regulation), this is not always the case. The International Council of Museums (ICOM), for example, has

comments by Tristram Besterman in Jenkins, 3; Atalay; Welsh, 839-840; Robert Layton and Julian Thomas, "Introduction: the destruction and conservation of cultural property," in *Destruction and Conservation of Cultural Property*, ed. Peter G. Stone, Julian Thomas and Robert Layton (London: Routledge, 2001), 12, 17; George P. Nicholas, "The Persistence of Memory, the Politics of Desire: archaeological impacts on Aboriginal peoples and their response," in *Indigenous Archaeologies: decolonizing theory and practice*, ed. Claire Smith and H. Martin Wobst (London: Routledge, 2005), 85, 87; Ken Isaacson and Stephanie Ford, "Looking Forward, Looking Back: shaping a shared future," in *Indigenous Archaeologies: decolonizing theory and practice*, ed. Claire Smith and H. Martin Wobst (London: Routledge, 2005), 358-360; Claire Smith and H. Martin Wobst, "Decolonizing Archaeological Theory and Practice," in *Indigenous Archaeologies: decolonizing theory and practice*, ed. Claire Smith and H. Martin Wobst (London: Routledge, 2005), 5-7.

¹¹⁷ See, for example, the work of Clemency Chase Coggins on unethical acquisitions and the role of museums. Clemency Chase Coggins, "Archaeology and the Art Market," in *Who Owns the Past: cultural policy, cultural property, and the law*, ed. Kate Fitz Gibbon (New Brunswick, NJ: Rutgers University Press, 2005), 224-226; Clemency Chase Coggins, "A Proposal for Museum Acquisition Policies in the Future," *International Journal of Cultural Property* 7, no. 2 (1998).

produced statements in favour of the return of important cultural property to source communities,¹¹⁸ and general museum policy in some countries is now in favour of culturally appropriate curation of indigenous collections and the return of some objects to community groups.¹¹⁹ As a form of extrajudicial regulation of museum practices relating to indigenous cultural property these guidelines, statements, principles and policies will continue to affect the way that repatriation claims develop either in support of or as an alternative to any relevant legislation. Such documents tend to have a 'trickle-down' application, as national organisations adopt guidelines in keeping with national or international viewpoints on repatriation; these become binding on members, or are adopted in turn in the policies of affiliated institutions. Political fluctuations may have a bearing in some countries, as in the legislation recently passed in Australia in 2013 to limit Aboriginal claims against loaned objects,¹²⁰ but in any event, it seems that in the future an increasing number of institutions will be legally obliged, or will take it upon themselves, to return items of indigenous cultural property in their collections to source communities.

Another way in which the repatriation of indigenous cultural property is affected by developments in the wider field of repatriation from museum and institutional collections is through the establishment of precedent. Precedents take the form both of concrete cases used subsequently to build trends in favour of repatriation in legal or institutional settings, and high-profile examples around which debates and viewpoints form on repatriation in general, or certain categories of disputed material in particular. Given the rise in successful repatriation claims over the

¹¹⁸ Including in its 2001 Code of Ethics for Museums. ICOM, *ICOM Code of Ethics for Museums (revised 2004)* (Paris: ICOM, 2006), 9-10.

¹¹⁹ Unless quoting other works, this term is used in the context of the indigenous peoples of Australia, rather than indigenous peoples in general.

¹²⁰ See discussion in Norman Palmer, "Itinerant Art and the Architecture of Immunity from Legal Process: questions of policy and drafting," *Art, Antiquity and Law* 16:1 (2011), 1-23.

preceding decades, the previously-discussed trends towards legislation and guidelines to increase the protection and return of indigenous cultural property, and the importance of certain case studies to scholarly work and discussion around repatriation, it seems certain that the establishment and use of precedents will continue to impact upon all categories of material claimed for repatriation both now and in the future.

One location in which the establishment of precedent is key is found in the legal arena. While infractions of relevant legislation are needed in order to bring criminal or civil cases, the outcome of complex cases is often decided by the successful or unsuccessful arguing of a legal precedent. For repatriation claims under common law systems, legal precedents can make the difference between the return of artefacts to their original communities or source countries, or their retention by current owners.¹²¹ In the literature on repatriation claims, it is possible to trace the legal precedents which have had the largest impact on subsequent cases.¹²² Not all

¹²¹ Claire L. Lyons, "Objects and Identities: claiming and reclaiming the past," in *Claiming the Stones/Naming the Bones: cultural property and the negotiation of national and ethnic identity*, ed. Elazar Barkan and Ronald Bush (Los Angeles: Getty Research Institute, 2002), 123.

¹²² For example *United States v. McClain*, 545 F. 2d 988 (5th Cir. 1977) and *United States v. McClain* 593 F. 2d 658, 664 (5th Cir. 1979); Supreme Court of the State of New York, "In RE Application to Quash Grand Jury Subpoena Duces Tecum Served on the Museum of Modern Art," reproduced in Norman Palmer, *Museums and the Holocaust: law, principles and practice* (Leicester: Institute of Art and Law, 2000), 184-221. See also Cuno, "Museums, Antiquities, Cultural Property," 149-150; Hoffman, 164-165; Gerstenblith, "The Public Interest in the Restitution of Cultural Objects," 216-218; John Henry Merryman, "'Protection' of the Cultural 'Heritage'?" *American Journal of Comparative Law* 38 (1990), 516-518; Lauryne Wright, "Cultural Resource Preservation Law: the enhanced focus on American Indians," *Air Force Law Review* 54 (2004), 54, 140-141; Patty Gerstenblith, "Cultural Significance and the Kennewick Skeleton: some thoughts on the resolution of cultural heritage disputes," in *Claiming the Stones/Naming the Bones: cultural property and the negotiation of national and ethnic identity*, ed. Elazar Barkan and Ronald Bush (Los Angeles: Getty Research Institute, 2002); Douglas W. Owsley and Richard L. Jantz, "Kennewick Man – A Kin? Too Distant," in *Claiming the Stone/Naming the Bones: cultural property and the negotiation of national and*

precedents, however, are legal. Equally important to the development of the repatriation movement are practical and theoretical precedents upon which actions and arguments can be based. A major stumbling block in the attempt to have any kind of contested material repatriated, including indigenous cultural property, for example, is the unwillingness of museums and other institutions to create a practical precedent in favour of return. If an overly lenient precedent were to be established, the fear of some museum professionals is that a surge of repatriation claims would follow, resulting in the emptying of storerooms and collections around the world.¹²³ Similarly, many proponents of the return of indigenous cultural property to source communities rely on precedents when they refer to successfully concluded claims for similar or related material.¹²⁴ By referring to precedents with similar circumstances or underlying moral arguments, it is possible in some cases for those advocating the repatriation of indigenous cultural property to strengthen their arguments in the eyes of museum professionals and the public, perhaps even to the point of ensuring success. Who is to say, furthermore, that other trends within the art world, such as the repatriation of certain categories of object via the art market and private purchases, may not help to set a precedent

ethnic identity, ed. Elazar Barkan and Ronald Bush (Los Angeles: Getty Research Institute, 2002); Dorothy Lippert, "Remembering Humanity: how to include human values in a scientific endeavour," *International Journal of Cultural Property* 12 (2005); Douglas P. Lackey, "Ethics and Native American Reburials: a philosopher's view of two decades of NAGPRA," in *The Ethics of Archaeology: philosophical perspectives on archaeological practice*, ed. Chris Scarre and Geoffrey Scarre (Cambridge: Cambridge University Press, 2006), 155-156; Tim Murray and Jim Allen, "The Forced Repatriation of Cultural Properties to Tasmania," *Antiquity* 69, no. 266 (1995); Briggs, 636-634; D. Thomas, 114-115, 117; Fforde, *Collecting the Dead*, 105-117; Smith and Wobst, 11.

¹²³ Davies, 7; Greenfield, 408.

¹²⁴ See, for example, discussion in Arapata Hakiwai, "Māori Taonga – Māori Identity," in *Art and Cultural Heritage: law, policy and practice*, ed. Barbara T. Hoffman (Cambridge: Cambridge University Press, 2006); Torpey; Bell, "Aboriginal Claims to Cultural Property in Canada," 463; Tapsell, "Taonga, Marae, Whenua," 113.

for claimants of indigenous cultural property?¹²⁵

A final way in which major repatriation cases operate as a kind of precedent is in the underpinning of arguments for or against the return of cultural property. As the preeminent case of a historic repatriation claim, it is the belief of the author that the Elgin Marbles, for example, will continue to form the basis of arguments over the retention or return of cultural property for as long as they continue to exist in any location. Similarly, as long as Holocaust-related claims continue to be resolved and human remains continue to form part of museum collections, the merits of upholding ethical over legal or scientific over emotional principles in deciding claims for return, and the idea of restitution as a means of making amends for historical injustices will continue to be debated, with an obvious effect on historic cases of contested indigenous cultural property.¹²⁶

¹²⁵ Johanna Devlin, "Repatriation via the Art Market: a new type of recovery, new trends coming from China," *Journal of Art Crime* 8 (2012), 44-55; Press Release, Annenberg Foundation, "Annenberg Foundation and Hopi Nation Announce Return of Sacred Artifacts to Native American Hopi Tribe," 2013, available online at www.annenbergfoundation.org/node/51351 (accessed 30 May 2015); Sophie Balaÿ and Nina M. Neuhaus, "Repatriation of Looted Artefacts to Afghanistan: the new concept of the 'White Knight,'" *Art, Antiquity and Law* 17:2 (2012), 147-153.

¹²⁶ Numerous examples can be found of proponents of both retention and return arguing their cases. See, for example, Renee M. Kosslak, "The Native American Graves Protection and Repatriation Act: the death knell for scientific study?," *American Indian Law Review* 21, no. 1 (1999-2000); Christina E. Garza and Shirley Powell, "Ethics and the Past: reburial and repatriation in American archaeology," in *The Future of the Past: archaeologists, Native Americans, and repatriation*, ed. Tamara L. Bray (New York: Garland Publishing, 2001); Patricia M. Landau and D. Gentry Steele, "Why Anthropologists Study Human Remains," in *Repatriation Reader: who owns American Indian remains?*, ed. Devon A. Mihesuah (Lincoln, NE: University of Nebraska Press, 2000); Jack F. Trope and Walter R. Echo-Hawk, "The Native American Graves Protection and Repatriation Act: background and legislative history," in *Repatriation Reader: who owns American Indian remains?*, ed. Devon A. Mihesuah (Lincoln, NE: University of Nebraska Press, 2000); Rosemary A. Joyce, "Academic Freedom, Stewardship and Cultural Heritage: weighing the interests of stakeholders in crafting repatriation approaches," in *The Dead and their Possessions: repatriation in principle, policy and practice*, ed. Cressida Fforde et al. (London: Routledge, 2002); Paul Turnbull, "Indigenous Australian People, Their Defence of the Dead and Native Title," in *The Dead and their Possessions:*

As repatriation cases of all types continue to be concluded with either returns or retention, it will be possible for those on both sides of the repatriation debate, including the return of indigenous cultural property, to build up their stocks of precedents upon which to rely. This trend is one which will continue to flourish for as long as repatriation claims, particularly high-profile ones, are brought.

A final trend which is likely to continue to be of importance to developments in repatriation is that of the influence of public opinion. As discussed in previous chapters, both museum professionals and other commentators have discussed the ways in which public opinion can lead to a particular outcome in a repatriation case, or preference for a particular course of action when faced with an issue within the repatriation debate. In the case of human remains, even institutions which are initially reluctant to return ancestral remains to indigenous communities can be influenced by public opinion which favours their repatriation over curation. While in some cases public opinion is expressed in opposition to the return of objects from museum collections, for example well-known or favourite items, or items which, once returned, may be sold and enter the domain of the private collector, the prevailing trend in public opinion seems to be in favour of the repatriation of certain categories of material in certain circumstances.¹²⁷ As acknowledgement of non-Western values continues to grow in the wider professional, national and international communities, it is very likely that the arguments now applied to collections of skeletal remains will be applied with more frequency and success to ethnographic and other collections containing indigenous cultural property. While the extent to which Holocaust-era claims for the return of works of cultural property will

repatriation in principle, policy and practice, ed. Cressida Fforde et al. (London: Routledge, 2002), 64-66, 83; Vincent; Raines, 645, 653.

¹²⁷ Karl E. Meyer, "Editorial: let Greece have the Marbles," *New York Times*, 18 May 1997: 4.16; Anon., "Editorial: Indians have rights to relics," *Denver Post*, 7 September 2003: E.06; Cuno, *Who Owns Antiquity*, 1; Anon., "Stones to Die For," 85; Simpson, *Museums and Repatriation*, 38, 44; N. Palmer, "Itinerant Art," 5.

be ongoing is questioned by some, connections between such claims and those for the repatriation of indigenous cultural property have already been established. The drawing of similarities between one type of claim and another which is more easily understood and digested by the public is a useful technique for harnessing support which may be crucial in lobbying for legislation, encouraging changes in policies, or influencing decisions on particular repatriation claims.

Whether in benefiting from legislation or gathering public support, and whether from the fields of human remains, antiquities or looted art, therefore, there are many interactions within the repatriation movement which affect the return of indigenous cultural property. The trends drawn out in the last section of this work are broad ones, but nonetheless provide an indication for both museum practitioners and those arguing the other side of the repatriation debate of where the overlaps within this broad topic occur, and where precedents, arguments or frameworks can be found which may work either for or against a particular claim for repatriation. Further work could be done on the areas in which another of the categories within the repatriation debate has been affected by the wider movement,¹²⁸ or indeed on how external shifts and fluctuations, whether political, economic or social, affect these internal interactions, but the fact remains that repatriation will continue to affect museum collections and practice, as well as the communities or individuals claiming items, for many years to come, and a greater understanding of how the repatriation debate functions and develops is invaluable for all concerned.

¹²⁸ See, for example, a proposal to enact legislation similar to NAGPRA to protect looted art in Akhtar, 325-346.