



## The Ends of the Museum

Tatiana Flessas

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Law Department

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# The Ends of the Museum

Tatiana Flessas<sup>\*</sup>

**Abstract:** In recent years, there have been a plethora of cases in which museums have had to release treasured pieces. New legal initiatives and developments increasingly make repatriation claims by source nations and other single or group ‘original owners’ possible, most recently in the area of illicitly-trafficked antiquities. Modern scholarship radically questions the genealogy and functions of the museum, and its relationship with the concepts of space, culture, and identity. Much of the criticism comes from heretofore allied disciplines, in particular, archaeology. Museums are now searching for strategies to protect their collections from the loss of authority and status that attend repatriation claims in this climate of criticism. Yet, do museums collude in this loss of authority by joining in the ‘proportization’ of their collections? Embedded in the notion of modern museology is the primacy of the object. This, arguably, aids the legal and political initiatives that permit deaccessioning of objects, imposing external requirements on the retention or return of certain types of collections, and regulating the relationship between the collector and the museum. This article suggests that the complex of emerging laws and practices in the area of antiquities collecting points to a new understanding of the relationship between repatriation and museums.

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<sup>\*</sup> Law Department, London School of Economics. I would like to thank the students in my Cultural Property and Heritage Law LLM seminars in 2008-10 and 2012-13 for their engagement with and insight into the issues that are discussed in this article. All links to websites in this article have last been accessed on June 5, 2013.

*'And now, what's going to happen to us without barbarians?'*

~ Constantine Cavafy, *Waiting for the Barbarians*, 1904

## INTRODUCTION

The legal regulation of the trade in antiquities and of the activities of the museums that acquire and house them has generated some pressing questions about the future of the museum. Museums have been compelled to take stock of their historical implication in the trade in antiquities (legal and illegal), and address claims for the repatriation of artefacts acquired through illicit trafficking. Should museums continue to collect antiquities, or to contest demands for the repatriation of illicitly-trafficked antiquities? And, if not, how can they retain their value as cultural institutions? A survey of academic and policy-directed commentaries written over the past fifteen years reveals some increasingly-polarised positions within the fields of museology and archaeology.<sup>1</sup> As new strategies appear for retaining or repatriating antiquities, so do new models of engagement between the parties and new statements of the values that underlie the activities in this field. Each side couches its arguments in terms of preserving culture, protecting it from the loss that results from either repatriation or return of artefacts.

There are signs that the legal regime of 'cultural property' is coming to an end, to be replaced by new approaches to managing the cultural heritage, as are the dichotomies of 'cultural nationalism' and 'cultural internationalism' that have so long defined it.<sup>2</sup> Legal theorists are struggling to find replacements for the concept of property in this area. On the one hand, objects are by definition

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<sup>1</sup> See Colin Renfrew, *Loot, Legitimacy and Ownership: The Ethical Crisis in Archaeology*, Duckworth, 2000 and James Cuno, *Who Owns Antiquity? Museums and the Battle Over Our Ancient Heritage*, Princeton University Press, 2008 (hereinafter '*Who Owns Antiquity?*') for two of the clearest opposing positions in this area.

<sup>2</sup> For example, describing the developing landscape on which these conflicts occur, Francesco Francioni suggests that any simple distinction between 'national' and 'cosmopolitan' values is mistaken, as both the definitions of 'cultural property' and the law become increasingly complex. Francesco Francioni, 'Chapter 1: The Evolving Framework for the Protection of Cultural Heritage in International Law', in Silvia Borelli and Federico Lenzerini eds, *Cultural Heritage, Cultural Rights, Cultural Diversity: New Developments in International Law*, Martinus Nijhoff Publishers, 2012, pp. 3-25. See also, James A R Nafziger, 'The Present State of Research' in *The Cultural Heritage of Mankind*, Center for Studies and Research in International Law and International Relations, Hague Academy of International Law, 2005. From a different perspective, John Carman argues that the concept of 'property' itself must be further understood by archaeologists, in order to comprehend the multiplicity of values that underlie legal and economic regulatory regimes in heritage management. John Carman, *Against Cultural Property: Archaeology, Heritage and Ownership*, Duckworth, 2005. Finally, Lyndel Prott and Patrick O'Keefe suggest that 'property' is now outmoded in the international arena; the work of UNESCO is focused on the protection of 'heritage', in part to avoid the constraints of property-based legal discourse. Lyndel V Prott and Patrick O'Keefe, "'Cultural Heritage" or "Cultural Property"?'', *International Journal of Cultural Property* Vol.2, 1992, pp. 307-320. See also Janet Blake, 'On defining the cultural heritage', *International & Comparative Law Quarterly*, 2000, pp. 61-85.

subject to property regimes,<sup>3</sup> on the other, objects in museums signify across a range of different legal identities and regulatory regimes, which in turn access values that are derived from disciplines other than law. These values themselves need to be examined.<sup>4</sup>

Nevertheless, when it comes to law and legal regulation, the museological and archaeological communities generally continue to think in terms of ‘nationalist retention laws’ and ‘cosmopolitanism’ or ‘encyclopedic’ museums, reaching for the clarity of defensible demarcation lines between positions, actors, and values.<sup>5</sup> This is interesting, as such clear demarcations do not appear to exist between the disciplines of museology and archaeology themselves, which intersect productively at many points. In the area of repatriation, as a whole, these communities work together to identify illicitly-trafficked objects and negotiate their return.<sup>6</sup> It is also interesting because it represents a moment in the development of both disciplines in which external forces and internal imperatives have reshaped their habitation of the field of cultural production. Archaeologists have always played many different roles in defining the landscapes which they themselves generate through excavation and study. Museums, too, have always been purposive in the collection and display of culturally-significant objects. Neither discipline understood itself as merely protective of culture; both accepted that culture was also destroyed by its practitioners. In recent years, the role of law in this debate has changed quite profoundly. Law is no longer taken as an institution external to the activities of both disciplines, but as a resource that museum professionals and archaeologists exploit in the pursuit of their respective agendas. What are the implications of this recruitment of legal forms?

This question might be answered from many different perspectives. The approach taken by this article is to examine emerging legal and regulatory strategies deployed in the area of repatriation, in order to propose that the recent

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<sup>3</sup> This is most true of antiquities in the field of cultural heritage law. See Francioni, *supra* n. 2 pp. 3-6 for an expanded discussion of the various regimes – i.e., human rights, environmental law, etc. – which now also regulate cultural heritage more broadly.

<sup>4</sup> For example, ‘cosmopolitanism’ is increasingly proposed as the best depiction of the underlying values in cultural property discourse, replacing the concept of ‘cultural internationalism’, which is now seen as too limited. How the notion of cosmopolitanism intersects with, or maps onto, the cultural property field requires its own analysis. However, as a preliminary suggestion, it might be worth noting that ‘cosmopolitan’ and ‘international’ are cognates rather than definitions of each other, and that the management of objects, no matter how politically motivated, is evidently, and profoundly, different than the self-directed politics of peoples. In light of the relationship between cosmopolitanism and the Enlightenment project (and thus the project that underlies the great ‘encyclopedic’ museums), see: Sheldon Pollock, Homi K Bhabha, Carol A Breckenridge, and Dipesh Chakrabarty, ‘Cosmopolitanisms’, *Public Culture* 12(3), 2000, pp. 577-589; Peng Cheah, ‘Cosmopolitanism’, *Theory Culture Society* 23, 2006, pp. 486-496; Kwame Anthony Appiah, ‘Whose Culture Is It?’ in James Cuno, ed., *Whose Culture?: The Promise of Museums and the Debate Over Antiquities*, Princeton University Press, 2009, pp. 71-86.

<sup>5</sup> There are of course critiques of such simplicity from many disciplines. See for example, David A. Scott, ‘Modern antiquities: the looted and the faked’, *International Journal of Cultural Property*, Vol. 20, (2013), pp. 49-75 (Art History), and Mark Busse, ‘Museums and the things in them should be alive’, *International Journal of Cultural Property* Vol. 15 (2008), pp. 189-200 (Anthropology) for cogent and thought-provoking critiques of simple distinctions between ‘nationalism’ and ‘cosmopolitanism’.

<sup>6</sup> See, for example, n. 55, below.

polemical and dichotomous discourses regarding repatriation projects are mistaken. The retentionist/universal line of critique is not only outmoded, as will be argued below, it is also unproductive. After all, evidently both ‘sides’ of the discussion are right.<sup>7</sup> This article looks at the demands made in/on the ‘law’ in the context of the greater shifts in the museological and national-patrimonial projects of the past few decades, with particular reference to the ongoing conflicts regarding the acquisition and return of antiquities. The arguments made below seek to reframe the debate at its most fundamental level: first, this article argues that *museums themselves* seek to take the position of ‘nations’ vis-à-vis their collections; far from shunning ‘nationalist retention laws’, encyclopedic museums claim their protection with increasing ferocity. Second, it argues that the normalization of repatriation debates and the law that supports them is not in contradistinction to the museum project, it is a *result* of it. The development of the disciplines of archaeology and museology, in tandem, has created the legal environment which both may experience as hostile. This article is, therefore, a response to James Cuno’s position in *Who Owns Antiquity?*<sup>8</sup>; it is also an examination of the genealogy of the problems inherent in the repatriation debate. Finally, it seeks to move the discussion to a more productive platform than the endless restatement of outworn distinctions and political projects. It concludes by considering a world in which there are no ‘outsiders’ or ‘enemies’: what should the law protect if culture no longer needs protection from barbarians? Possibly the most important use of the law in this area is to focus on the spaces that make culture possible, not on the objects that inhabit them.

## REPATRIATION AND ANTIQUITIES: THE CHANGING LANDSCAPE

Over the past decade, leading national museums have been confronted with increasing numbers of demands for the repatriation of objects in their collections. In February 2013, the British Museum was threatened with a suit in the European Court of Human Rights as part of an ongoing attempt by Turkey to repatriate

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<sup>7</sup> In brief, of course universal or encyclopedic museums are important and should be protected, and of course repatriation requests should be honoured. The work of ‘culture’ demands both. Any examination of the field will demonstrate competing values operating within it; these values remain important in themselves regardless of the conflicts in which they participate. See Tatiana Flessas, ‘Sacrificial Stone’ *Law and Literature* 14(1), 2002, 49-84, for the argument that the assignment of identity and cultural ‘ownership’ is necessarily fictional (an agreement with Cuno et al.); and Tatiana Flessas, ‘The Repatriation Debate and the Cultural Commons’ 17(3), *Social and Legal Studies Journal*, Special Issue, 2008, p. 387-405, for the argument that the Declaration on the Importance and Value of the Universal Museum (2004) is more a strategic tool against the ‘slippery slope’ of repatriation claims, than a substantively meaningful position (an agreement with repatriation activists).

<sup>8</sup> See n.1, *supra*.

ancient artefacts.<sup>9</sup> Turkey is also demanding the return of objects in the Metropolitan Museum of Art in New York City.<sup>10</sup> Italy, Greece, Egypt, Iraq, and other ‘source’ nations are also engaging in aggressive legal, and quasi- or para-legal, initiatives to force the return of antiquities that they believe have been illegally looted from within their borders.<sup>11</sup> Almost every week there is a new public discussion about the preservation, sale, or repatriation of antiquities.<sup>12</sup> When facing repatriation requests, museums respond differently depending on the type of object requested and the legal requirements they have to satisfy,<sup>13</sup> and on the specific policies of the museum itself.<sup>14</sup> What is clear is that repatriation requests constitute one of the areas in which the relationship between museums, law, and the increasing interest in national patrimony is being renegotiated.<sup>15</sup> As such, it is also a place of debate about the role of museums in the 21<sup>st</sup> century.

The UK has 54 ‘national museums’,<sup>16</sup> founded by Acts of Parliament and ‘sponsored’ by the Department of Culture, Media and Sport (hereinafter

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<sup>9</sup> Gareth Harris, ‘British Museum Faces Call for Repatriation of Artefacts’, *Museums Journal*, Issue 113/01, p. 13, January 1, 2013. Available at: <http://www.museumsassociation.org/museums-journal/news/02012013-british-museum-faces-repatriation-call>.

<sup>10</sup> Dan Bilefsky, ‘Seeking Return of Art, Turkey Jolts Museums’, *N.Y. Times* September 30, 2012. Available at: <http://www.nytimes.com/2012/10/01/arts/design/turkeys-efforts-to-repatriate-art-alarm-museums.html?pagewanted=all&r=0>.

<sup>11</sup> Hugh Eakins, ‘The Great Giveback’, *N.Y. Times*, January 26, 2013. See also, regarding the Marion True case and the practices at the Getty Museum, Jason Flech and Ralph Frammolino, *Chasing Aphrodite: The Hunt for Looted Antiquities at the World’s Richest Museum*, Houghton Mifflin Harcourt, 2011 (see also: <http://chasingaphrodite.com>). Hugh Eakins writes, in part referencing the Marion True case, that ‘The news has become astonishingly routine: a major American museum announces it is relinquishing extraordinary antiquities because a foreign government claims they were looted and has threatened legal action or other sanctions if it doesn’t get them back’.

<sup>12</sup> Most recently, William Dalrymple, ‘Buried Treasure’, in *The Guardian*, June 1 2013.

<sup>13</sup> There are three areas in which museums typically face repatriation requests. The first is in the area of antiquities. The second is as regards human remains and associated sacred cultural objects. The third area is not strictly ‘repatriation’, as it involves the restitution of paintings looted in the Nazi era and claimed by descendants of the original owners. However, it is an area in which museums are facing the loss of pieces of their collection on some of the same grounds as in the other two areas and to that extent should be noted. In the UK and the US, they must now comply with legislation in these areas. In the UK, see: the Human Tissue Act 2004, s.47 and the Holocaust (Return of Cultural Objects) Act 2009. See also: Norman Palmer, *Museums and the Holocaust*, Institute of Art and Law, 2000.

<sup>14</sup> Even where there are clearly-defined legal requirements, there are disagreements on these issues within the museological establishment. The British Museum displays very ancient human bodies (*The British Museum Policy on Human Remains, 2005*); the Manchester museum has implemented much stricter criteria for display (*The Manchester Museum Policy on Human Remains, 2010*). There are museums that are sympathetic to the claims of nouveau-Pagans for control over the treatment (including possible reburial) of ancient skeletons, such as those discovered near Avebury. ‘Give us back our bones, pagans tell museums’ *Guardian*, 5 Feb 2009. Available at: <http://www.guardian.co.uk/science/2007/feb/05/religion.artnews>.

<sup>15</sup> Museums in the UK and worldwide have had to address their policies in the face of increasing requests for repatriation of antiquities. See, for example, the Policy Statement on Repatriation of Cultural Property by the Museums Association UK (September 2006), for an overview of repatriation requests and ethical issues faced by museums in the UK. Available at: <http://www.museumsassociation.org/publications/12913>.

<sup>16</sup> These include the British Museum, the Victoria and Albert Museum, the Tate, the Wallace Collection, the Imperial War Museum, the Museum of London, the National Gallery, the National Portrait Gallery, the Natural History Museum, and other museums vulnerable to repatriation claims. See [http://www.culture.gov.uk/what\\_we\\_do/museums\\_and\\_galleries/3383.aspx](http://www.culture.gov.uk/what_we_do/museums_and_galleries/3383.aspx). The Museums Association estimates that ‘It is estimated that there are about 2,500 museums in the UK, depending on

‘DCMS’).<sup>17</sup> These are ‘generally larger institutions that hold collections considered to be of national importance’.<sup>18</sup> The national museums are run by Boards of Trustees, who are appointed by the Prime Minister.<sup>19</sup> They have occupied a privileged legal position since their inception.<sup>20</sup> The major national museums are exempt charities under the 1993 Charities Act (as amended by the 2006 Act).<sup>21</sup> They remain subject to the rules generally applicable to charities, but museum trustees have enormous discretion over the management and display of their collections.<sup>22</sup> However, both in the UK and in the US, Trustees’ and museum directors’ discretion has always been limited in the area of deaccessioning pieces, which is traditionally regulated by the founding charter of the specific museum. This has been a strategically interesting position vis-à-vis repatriation claims. Museums may choose to petition for permission to return an object to its source nation, but cannot be held responsible for a refusal which is in line with their statutory obligations to retain their collections.<sup>23</sup> Yet, increasingly, museums are being held accountable for acquisition practices rather than merely retention of their collections. Collection development is at the core of the museological project, and, arguably, the expansion of the ethos of repatriation to cover not only specific objects of great cultural significance but all objects which may have been illegally acquired, strikes a blow at the core of museum functioning, authority, and identity. Museum directors internationally are beginning to identify this development as an even greater threat to the museum project than the repatriation demands of the past.<sup>24</sup>

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what you include. Over 1,800 museums have been accredited by the Museums, Libraries and Archives Council (MLA)’.

<sup>17</sup> <http://www.museumsassociation.org>.

<sup>18</sup> Id.

<sup>19</sup> By contrast, in the US most museums are private not-for-profit corporations, administered by Boards of Trustees but not answerable to any governmental agency (with the exception of the National Gallery and the Smithsonian). US museums may receive state and federal funding, but there is no Secretary or Ministry of Culture.

<sup>20</sup> DCMS allocates government funding, runs consultative processes and can insist on compliance with governmental policies and initiatives, but they are fundamentally ‘hands off’ in the running of these museums. See [http://www.culture.gov.uk/what\\_we\\_do/museums\\_and\\_galleries/3383.aspx](http://www.culture.gov.uk/what_we_do/museums_and_galleries/3383.aspx).

<sup>21</sup> (Charities Act 1993, Schedule 2 §§ (k) – (z).) The Charity Commission Guidance to Exempt Charities states that the exemption is because ‘they are considered to be adequately supervised by, or accountable to, some other body or authority.’ (Charity Commission, ‘CC23 – Exempt Charities’ (April 2008). Available at: <http://www.charity-commission.gov.uk/publications/cc23.asp#4>).

<sup>22</sup> <https://www.gov.uk/government/publications/dcms-as-principal-regulator-of-exempt-charities>.

<sup>23</sup> For example, the British Museum Act 1963 allows deaccessioning in very limited circumstances (ss.3-6 et seq., see also: ‘BRITISH MUSEUM POLICY ON DE-ACCESSION OF REGISTERED ITEMS FROM THE COLLECTION’, available at: <http://www.britishmuseum.org/pdf/Deaccession.pdf>). The British Museum Act 1963 (Amendment) Bill 2009-10, currently in its first reading in the House of Commons, is intended to expand the circumstances in which the British Museum may transfer objects from its collection to a different institution. See <http://services.parliament.uk/bills/2009-10/britishmuseumact1963amendment.html>. More generally, see the Museums Association position on disposal, available at: <http://www.museumsassociation.org/download?pid=15854>.

<sup>24</sup> James Cuno, ed., *Whose Culture?: The Promise of Museums and the Debate over Antiquities*, Princeton University Press, 2012.

Certainly the collegial and mutually-profitable set of partnerships between curators, collectors, museum boards of directors, academics, and dealers that stocked the antiquities collections of the great national and private museums in the late 19<sup>th</sup> and 20<sup>th</sup> centuries is now under scrutiny, and often under attack, from both within and without the museological and national-patrimonial establishments.<sup>25</sup> There are many interconnected reasons for this shift. In part, this is a result of initiatives begun by archaeologists in the 1960s and 1970s,<sup>26</sup> who were appalled at the loss of cultural context and academic knowledge which attends looting.<sup>27</sup> In the 1990s, Professor Colin Renfrew, the former Director of the Illegal Antiquities Research Centre and a fellow at the MacDonald Institute for Archaeological Research at Cambridge University, spearheaded a campaign for museum accountability and due diligence regarding the provenance of these objects when they come to the market.<sup>28</sup> Archaeologists were (and remain) equally appalled by the operation of the antiquities market, which relies on looted artefacts. The chain of dealings between the original looters and the final high-end sale(s) to museums and private collectors by major antiquities dealers or in internationally-recognized auction houses is rarely entirely legal or straightforward. Not unusually, the journey of an artefact from its source to its final buyer is characterized by deliberate obfuscation of the origin of the pieces,<sup>29</sup> forged export

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<sup>25</sup> There have been a great many books, articles, blogs, commentaries, and debates on the issues around the proper regulation of ancient objects. See: Brodie, Neil, Jenny Doole and Colin Renfrew, eds. *Trade in Illicit Antiquities: The Destruction of the World's Archaeological Heritage*, McDonald Institute for Archaeological Research 2001; David Gill, <http://lootingmatters.blogspot.co.uk>; Jennifer Anglim Kreder, 'The Revolution in U.S. Museums Concerning the Ethics of Acquiring Antiquities', 64 *University of Miami Law Review* 997 (2009-2010). Lyndel V Prott, 'National and International Laws on the Protection of the Cultural Heritage', in Kathryn W Tubb ed., *Antiquities Trade or Betrayed: Legal, Ethical and Conservation Issues*, Archetype Publishers Ltd. 1995; Derek Fincham, <http://illicit-cultural-property.blogspot.co.uk>.

<sup>26</sup> See Clemency Coggins, 'Illicit Traffic of Pre-Columbian Antiquities', 29 *Art Journal* 94 (1969).

<sup>27</sup> 'Looting' is not the same in different cultures and different times. There is a long history of looting in various antiquities-rich nations; there are also differences between 'subsistence' looting and organized looting on a large scale. See: Robert Mac Ginty, 'Looting in the Context of Violent Conflict: a Conceptualisation and Typology' *Third World Quarterly* 25(5) (2004), pp. 857-870; David Matsuda, 'The Ethics of Archaeology, Subsistence Digging, and Artefact Looting in Latin America: point muted counterpoint', *International Journal of Cultural Property*, 7(1) (1998) pp. 87-97.

<sup>28</sup> To make his point, Renfrew imagines what would have been the result if Philip of Macedon's tomb at Vergina, Macedonia, had been discovered by looters rather than archaeologists:

'When objects are looted, all reliable context disappears, and it is likely that the objects would have been sold individually. The scraps from which the great ivory shield was reconstructed would have been overlooked. The arguments of attribution to Philip could not have been made. The assemblage as a whole and its association with Vergina would have been lost. Instead one would have been left with a number of isolated but rather special items occurring individually on the market.'

Colin Renfrew, *Loot, Legitimacy and Ownership: The Ethical Crisis in Archaeology*, London: Duckworth, 2000, p. 24.

<sup>29</sup> Renfrew goes on to sketch the typical description of a looted object in an auction catalogue, which might conclude: 'Found in Macedonia, Thrace or the Euxine Coast, reportedly during the First World War. The property of a gentleman, acquired from a distinguished Greek family in Alexandria. [...] The imprecision in the text as to place of origin would be deliberate, since no nation could then reliably claim ownership. The suggestion of early discovery, impossible to contradict by means of documentation, would place the find well before 1970, the year of the UNESCO Convention.' Id.

licenses,<sup>30</sup> and the willingness of the sellers (and sometimes the buyers) to turn a blind eye to smuggling.<sup>31</sup>

On the part of the source<sup>32</sup> nations, the demand for the return of antiquities is also part of the continuing processes of decolonisation, and often of nation-building.<sup>33</sup> As in the recent case of Turkey's demand for the repatriation of looted antiquities, above, source nations argue that looting must have been the de facto means by which antiquities reached the market.<sup>34</sup> The argument is underpinned by these nations' reliance on modern geographical boundaries, although they may also claim artefacts based on ancient or historical territories. Public museums are subject to the requirements in international directives and Conventions signed and ratified by the States Parties to them. International instruments generally break down into two broad categories. The first is protection of cultural property from destruction; these international instruments derive from the classical international law of war. Although their focus is protection, they are used for repatriation, as they include sections or accompanying Protocols that mandate signatories to aid in returning illegally taken property.<sup>35</sup> The second is control over the illegal export or import of cultural property, and its return to the source nation. If ratified, these impose positive obligations to repatriate stolen or looted cultural property, and to use or enact national legislation to prevent museums and other institutions from acquiring property that has been illegally exported from other states.<sup>36</sup> These international instruments are given effect by domestic statutes.<sup>37</sup>

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<sup>30</sup> For a particularly evocative description of this, see Peter Landesman, 'The Curse of the Sevso Silver', *The Atlantic*, November 1, 2001. Available at: <http://www.theatlantic.com/magazine/archive/2001/11/the-curse-of-the-sevso-silver/302331>.

<sup>31</sup> See Jason Flech and Ralph Frammolino, *Chasing Aphrodite: The Hunt for Looted Antiquities at the World's Richest Museum*, Houghton Mifflin Harcourt, 2011; David Gill and Christopher Chippindale, 'From Malibu to Rome: Further Developments on the Return of Antiquities', *International Journal of Cultural Property* 14(2) (2007), pp. 205-240.

<sup>32</sup> Jane Warring cautions against the unreflective use of the terms 'source' and 'market' nations. This article follows her formulation that 'the terms "market" and "source" are not meant to invoke guilt or evoke sympathy, but rather to express an economic reality; source nations possess a very valuable, inadequately protected, and highly desirable commodity that market nations demand, for various social and economic reasons'. Jane Warring, 'Underground Debates: The Fundamental Differences of Opinion that Thwart UNESCO's Progress in Fighting the Illicit Trade in Cultural Property', 19 *Emory International Law Review* 227, 233 (2005) at n.32.

<sup>33</sup> See, generally, Barbara T Hoffman, ed., *Art and Cultural Heritage: Law, Policy and Practice*, Cambridge University Press, 2006; and Lyndel V Prott ed., *Witnesses to History: Documents and Writings on the Return of Cultural Objects*, Stationary Office Books, 2009.

<sup>34</sup> 'We know 100 percent that these objects at the Met are from Anatolia,' the Turkish region known for its ancient ruins, Mr. Suslu, an archaeologist, said in an interview. 'We only want back what is rightfully ours.' Bilefsky, n.2 *supra*.

<sup>35</sup> An example is the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (recently ratified by the US on March 13, 2009, not yet signed by the UK), its forerunners and its Protocols, especially the 1954 Protocol which 'requires occupying powers to prevent the illegal export of cultural material and to seize and return illegal imports'. James A R Nafziger, 'The Present State of Research' in *The Cultural Heritage of Mankind*, Center for Studies and Research in International Law and International Relations, Hague Academy of International Law, 2005, pp.200-1.

<sup>36</sup> The second type of international instrument is more narrowly focused on controlling the movement of cultural artefacts and art. The UK signed the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property on October

Where the objects have entered the market recently, source nations rely on national patrimonial laws, increasingly stringently enforced,<sup>38</sup> in conjunction with international conventions, in order to make sweeping requests for the return of antiquities. At issue are usually illegal export or title disputes, and usually both.<sup>39</sup> As a brief overview, in the UK and the US, these cases usually proceed by way of a two-part legal argument, in which the first step is to establish the ownership of the objects by the claiming or source nation, and the second is to determine whether the objects were illegally exported or sold. The courts apply *lex situs*<sup>40</sup> and the criminal law of the market nation to determine the issues. The most recent case of this kind in the UK is *Republic of Iran v Barakat Galleries*<sup>41</sup>, in which the State of Iran sought to reclaim ancient artefacts from an antiquities dealer. The Court of Appeals overturned a High Court decision in favour of Barakat,<sup>42</sup> applying *lex situs* to determine that Iran was in fact the true owner of the goods. It was crucial to the decision that the UK had recently signed the 1970 UNESCO Convention. The Appellate Court judge in *Barakat* found that the court was bound to give effect to the intention of the government to act in accordance with the provisions of the 1970 Convention and classified the claim in *Barakat* as a ‘patrimonial claim’

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31, 2002. Of particular interest is its requirement that “consistent with national legislation”, parties must prevent museums and similar institutions from acquiring property illegally exported from other States.’ The 1970 Convention contains other requirements which attempt to ‘compromise between the interests of art-importing and art-exporting States, while requiring the importing State’s co-operation in the recovery and retrieval of illicitly exported property’ (Nafziger, *Id* p.202). More recently, the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects was designed to supplement the 1970 Convention. Nafziger writes that ‘The aim was to focus on questions of private law associated with illicit trafficking that were not addressed by the 1970 UNESCO Convention and thereby strengthen the protective regime’ (Nafziger, *Ibid* pp. 250-1). This Convention applies prospectively only, and has not yet been signed by the US, the UK, France or many other ‘market’ states.

<sup>37</sup> In the UK, these turn on the preservation of cultural objects and the prevention of illegal excavation or export of these objects and objects illegally excavated or imported from abroad. The two most important are the Dealing in Cultural Objects Act (2003), which makes it illegal to deal in objects known to have been illicitly excavated or exported after December 30, 2003; and the Iraq (United Nations Sanctions) Order (2003) prohibits the ‘importation or exportation of any illegally removed Iraqi cultural property’. Iraq (United Nations Sanctions) Order (2003), § 8 (1) – (6) Illegally Removed Iraqi Cultural Property. Other domestic statutes which affect museums and museum practices include the Export of Objects of Cultural Interest (Control) (2003), and the Treasure Act 1996, which spurred the creation of the Portable Antiquities Scheme. The US and the EU member states have their own complex of legislation implementing UN directives, nationalizing their own cultural property, providing for the protection of cultural objects, and preventing illicit dealings in art and antiquities. See: Kelley Elizabeth Yasaitis ‘Case Note: National Ownership Laws as Cultural Property Protection Policy: The Emerging Trend in *United States v. Schultz*’ (2005) 12 *International Journal of Cultural Property* 95-113.

<sup>38</sup> And at times very recently promulgated, as in the case of the People’s Republic of China: see Stefan Gruber, ‘Protecting China’s Cultural Sites in Times of Rapid Change: Current Developments, Practice and Law’, *Asia Pacific Journal of Environmental Law*, Vol. 10(3 & 4), 2007. However, China is not alone in this. Many other ‘source’ nations are now enforcing their national patrimonial statutes with increased stringency.

<sup>39</sup> See Janet Ulph and Ian Smith, *The Illicit Trade in Art and Antiquities: International Recovery and Criminal and Civil Liability*, Hart Publishing, 2012.

<sup>40</sup> For discussion and critique of this position, see Derek Fincham, ‘How Adopting the *Lex Originis* Rule Can Impede the Flow of Illicit Cultural Property’, 32 *Columbia Journal of Law and the Arts* 111 (2008).

<sup>41</sup> *Republic of Iran v Barakat Galleries* [2007] EWCA Civ 1374.

<sup>42</sup> The lower court judge had found that the Iranian law relied upon by the Republic of Iran was both penal and public, following *Attorney-General of New Zealand v Ortiz & others* [1983] 2 All ER 931 (HL).

which could appropriately be heard in an UK court. This combination of a ‘blanket’ (or ‘blank cheque’) national patrimonial statute in the source nation, backed by domestic law in the market nation, often with reference to a statute either giving effect to, or interpreted in light of, an international Convention, is the emerging pattern of repatriation cases. In the case of antiquities that were acquired well before the modern era of international cultural property protection instruments, source nations claim that the excavation and removal of these objects is a form of theft that should be redressed, and use national patrimonial statutes, if available, in conjunction with standard doctrines of contract and property law in order to insist on their return. The result is that any antiquity in almost any ‘market’ nation museum is now vulnerable to a repatriation claim.<sup>43</sup>

This situation has not only changed the landscape on which museums acquire antiquities, but also on which they carry out their day-to-day business. Museums are particularly vulnerable to censure as they intersect with the market at a variety of different points. They are not merely ‘holders’, ‘keepers’ or ‘owners’ of antiquities, they are also collectors and the beneficiaries of collectors. They are vulnerable to repatriation requests in each of these roles. Increasingly, when these requests are made, they are made aggressively, publicly, and are couched in legal or quasi-legal terms that cut through the web of self-regulation and professional relationships that museums constantly evolve with source nations and dealers.<sup>44</sup> Furthermore, this level of repatriation activity and public censure affect the future capabilities of museums to build up their collections.<sup>45</sup> Whereas human skeletons and art looted in WW2 can be returned with general agreement that the practices of collecting these kinds of materials should be stopped, the case of antiquities is different. The antiquities market *in its entirety* is largely suspect.<sup>46</sup> At the same

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<sup>43</sup> ‘Although Turkey ratified the convention in 1981, it is now citing a 1906 Ottoman-era law — one that banned the export of artifacts — to claim any object removed after that date as its own.’ Bilefsky, n.2, *supra*.

<sup>44</sup> See Hugh Eakins, ‘The Great Giveback’, *N.Y. Times*, January 26, 2013.

<sup>45</sup> See Daniel Grant, ‘Is It Possible to “Collect” Antiquities These Days?’ Huffington Post, April 5, 2011. Available at: [http://www.huffingtonpost.com/daniel-grant/antiquities-collecting-due-diligence\\_b\\_844838.html](http://www.huffingtonpost.com/daniel-grant/antiquities-collecting-due-diligence_b_844838.html).

<sup>46</sup> The functions and (il)legality of the antiquities market are complex, and much is still not known about it. For example, one estimate is that the black market alone is worth about \$6 billion per year, but this figure cannot be confirmed. See Mark V Vlasic and Tess Davis, ‘When Museums Do the Right Thing’, *N.Y. Times*, May 17, 2013. For discussion and description of the licit, illicit and ‘grey’ markets in antiquities, see: Simon MacKenzie and Penny Green, ‘Criminalising the Market in Illicit Antiquities: An Evaluation of the Dealing Cultural Objects (Offences) Act 2003 in England and Wales’, in S. MacKenzie and P. Green eds., *Criminology and Archaeology: Studies in Looted Antiquities*, Oxford: Hart, 2009; Blythe A. Bowman, ‘Transnational Crimes Against Culture: Looting at Archaeological Sites and the “Grey” Market in Antiquities’, 24 *Journal of Contemporary Criminal Justice*, 225 (2008); Neil Brodie, ‘Uncovering the Antiquities Market’. In R. Skeates, C. McDavid and J. Carman eds., *The Oxford Handbook of Public Archaeology*, Oxford: Oxford University Press, 2012, pp.230-252; Jennifer Anglim Kreder, ‘The Revolution in U.S. Museums Concerning the Ethics of Acquiring Antiquities’, n.7, above; Christine L. Green, ‘Antiquities Trafficking in Modern Times: How Italian Skullduggery *Will* Affect United States Museums,’ 14 *Villanove Sports and Entertainment Law Journal* 35 (2007).

time, it is the *raison d'être* of museums to house (and study, and make available to the public) their collections.<sup>47</sup>

Over the past two decades, museums have engaged in a great deal of self-regulation, in response to archaeologists' arguments and to the changing attitudes of source nations (as well as to changes in the museological project overall, as will be discussed below). The Museums Association of the UK, DCMS, as well as many other museums in the UK and abroad, have adopted various procedures to ensure due diligence when acquiring antiquities. The most common is known as the '1970 rule' under which museums take as their cut-off date the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, and do not acquire antiquities which lack clear documentation of provenance and title back to 1970.<sup>48</sup> The Association of Art Museum Directors agreed in 2008, and again in 2013, to follow this 'rule'.<sup>49</sup> However, this has always been applied on a case-by-case basis, differently by different museums, and in any event is insufficient.<sup>50</sup> Museums also increasingly return objects under the terms of Memoranda of Understanding (MoU's). These may be made between nations<sup>51</sup> or between museums and other organizations.<sup>52</sup> In addition, all museums have internal policies on repatriation, and each case is carefully considered. Although at times this heightened concern is recognized,<sup>53</sup> it might be increasingly naïve for any museum to believe that self-regulation will ever suffice. Claims for repatriation of cultural objects are characterized by long-standing and very heated debates about the values

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<sup>47</sup> The International Council of Museums ('ICOM') states: 'A museum is a non-profit, permanent institution in the service of society and its development, open to the public, which acquires, conserves, researches, communicates and exhibits the tangible and intangible heritage of humanity and its environment for the purposes of education, study and enjoyment.' ICOM Statutes, 2007.

<sup>48</sup> Patty Gerstenblith, *Expert Report on the 1970 UNESCO Convention* (UNESCO 2012).

<sup>49</sup> AAMD *New Report on Acquisition of Archaeological Materials and Ancient Art* (2008); *Introduction to the Revisions to the 2008 Guidelines on the Acquisition of Archaeological Material and Ancient Art* (Adopted by the AAMD Membership 29 January 2013).

<sup>50</sup> Jason Flech and Ralph Frammolino, *Chasing Aphrodite: The Hunt for Looted Antiquities at the World's Richest Museum*, Houghton Mifflin Harcourt, 2011, pp.4-5. See also: Randy Kennedy, 'Museum Leaders Toughen Artifact Acquisition Guidelines', *N.Y. Times*, January 30, 2013.

<sup>51</sup> See, for example: *Agreement Between The Government Of The United States Of America And The Government Of The Republic Of Italy Concerning The Imposition Of Import Restrictions On Categories Of Archaeological Material Representing The Pre-Classical, Classical, And Imperial Roman Periods Of Italy* (available at: <http://eca.state.gov/files/bureau/it2001mou.pdf>) and *The Memorandum of Understanding Between the Government of the United States of America and the Government of the People's Republic of China Concerning The Imposition of Import Restrictions on Categories of Archeological Materials From the Paleolithic Period Through the Tang Dynasty and Monumental Sculpture and Wall Art At Least 250 Years Old* (available at: <http://eca.state.gov/files/bureau/ch2009mou.pdf>).

<sup>52</sup> Interestingly, in 2006 'the British Museum and the Museums, Libraries & Archives Council announced a Memorandum of Understanding with eBay, whereby the Department of Portable Antiquities & Treasure monitors eBay for items of potential Treasure, questions vendors and notifies the Metropolitan Police's Art & Antiques Unit of any unreported items. Upon formal notification from the police, eBay are required to end the sale, and the police may investigate further.' Available at: <http://www.heritagegateway.org.uk/gateway/news/detail.aspx?ctid=101&id=4844>.

<sup>53</sup> See Mark V Vlasic and Tess Davis, 'When Museums Do the Right Thing', *N.Y. Times*, May 17, 2013.

underlying ‘ownership’ and entitlement,<sup>54</sup> and beyond that, about how to frame the debate in the first instance.<sup>55</sup>

These legal developments form an important part of the scaffolding on which the museological community, government agencies, the public, and academics query the changing role(s) of museums overall. If on the one hand the discussion of the ‘changing role’ or ‘future’ of museums is a benign reflection of commitment to core values such as relevance and community service,<sup>56</sup> on the other, there is an unavoidable undertow of criticism, defensiveness, and anxiety in the discussion. The emerging multifocal sites of legal and quasi-legal attack on museum practices and collections require the great museums that house these artefacts to search for more solid ground from which to negotiate their responses to repatriation. After all, the injustice of a museum always, structurally, being on the wrong side of a repatriation request is evident: museums may be looted themselves, as in the 2003 Iraq conflict; they may also be the recipients of collections of objects swept up during war, ongoing postcolonial struggles, civil wars that erupt after international military actions, and other forms of violent conflict. In the latter cases, the ongoing rhetorical conflation of ‘collector’ and ‘saviour’ which began in the 17<sup>th</sup> and 18<sup>th</sup> centuries and has been often aired since, takes on new life.<sup>57</sup> Finally, until the recent spate of returns via the threat of legal action, most repatriation happened quietly as a result of careful scholarship and negotiations with source nations.<sup>58</sup>

The search for new ground from which to exert authority takes on both a new critique of the existing law, and a reformulation of the museum project. The legal critique is based on the rejection of the national patrimonial laws described above. In an early formulation of this position, Geraldine Norman wrote in ‘Bad laws are made to be broken’ that

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<sup>54</sup> For example, the perspective that ‘There is a basic, underlying conflict between the museums’ humanist perspective and an essentially political vision in which art is first and foremost the property of individual nations.’ Kate Fitz Gibbon, ‘Dangerous Objects: Museums and Antiquities in 2008’, available at: [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1479424](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1479424).

<sup>55</sup> Jane Warring, ‘Underground Debates: The Fundamental Differences of Opinion that Thwart UNESCO’s Progress in Fighting the Illicit Trade in Cultural Property’, 19 *Emory International Law Review* 227 (2005). See also: John Henry Merryman, ‘Two Ways of Thinking About Cultural Property’, 80 *American Journal of International Law* 831 (1986) and Paul M Bator, ‘An Essay on the International Trade in Art’, 34 *Stanford Law Review* 275 (1982) for early and very influential paradigms of analysis. As importantly, see Norman Palmer, *Museums and the Holocaust*, Institute of Art and Law, 2000, for the argument that perhaps law is not the correct vehicle for regulation in this area at all.

<sup>56</sup> See, for example, the Museum Association’s ‘Museums 2020’ project, which asks a wide range of participants to comment on how museums should remain relevant into the future. Available at: <http://www.museumassociation.org/museums2020>.

<sup>57</sup> See ‘Report from the Select Committee on the Earl of Elgin’s Collection of Sculptured Marbles, &c.’ House of Commons 1816, p.20. These arguments are rehearsed into modernity, most poignantly by the international community recently mourning the destruction of the Bamiyan Buddhas by the Taliban in Afghanistan in 2001.

<sup>58</sup> For an interesting example, see: <http://egyptology.blogspot.co.uk/2009/05/clarification-myers-museum-collection.html>. The Myers Museum at Eton recently returned 454 ancient artefacts to Egypt of its own volition in 2009.

A total export ban is [...] illogical in countries where customs officers are easily bribed. Moreover, it seems crazy to try and keep every artefact that is unearthed in the country of its origin. ... Export controls which permit the sale of duplicates or less important pieces make cultural and financial sense. [...] If the laws were internationally perceived as fair, upright people would not break them. At present, in deed if not in word, the whole of the antiquities trade and most museum curators condone antiquities smuggling [because] [...] the laws in the countries of origin make no sense.<sup>59</sup>

This position has since been refined by James Cuno, current President and CEO of the J Paul Getty Trust, the institution that has been more castigated recently than any other for participation in the illegal antiquities trade.<sup>60</sup>

In *Who Owns Antiquity?*,<sup>61</sup> Cuno argues that museums should be permitted to acquire antiquities without special regard to provenance or illegal excavation/export, as the present legal regime neither stops the illicit trade in antiquities nor permits museums (and through them, curators, scholars, and the public) to learn from and be inspired by these ancient objects.<sup>62</sup> Cuno's point is that the laws put in place to 'protect' antiquities from looters do not work,<sup>63</sup> and that they are made in the interests of nationalism:

The real argument over the acquisition of undocumented (unprovenanced) antiquities is not what it appears to be. It is not really between art museums and archaeologists, about the protection of the archaeological record from looting and illicit trafficking in antiquities. It is between museums and modern nation-states and their nationalist claims on that heritage. Archaeologists are part of the argument as allies of those states [...].<sup>64</sup>

Cuno states that 'in many respects, when faced with the choice whether or not to acquire an undocumented antiquity, the looting of the archaeological site has already occurred and the knowledge that may have been gained from [...] context has already been lost'.<sup>65</sup> Therefore, the only decision that a museum has to make is whether or not to acquire such an antiquity, and 'putting aside the legal risks for a moment', why not acquire? He acknowledges that archaeologists disagree with

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<sup>59</sup> Geraldine Norman, 'Bad laws are made to be broken' in Kathryn W Tubb, ed., *Antiquities Trade or Betrayed: Legal, Ethical and Conservation Issues*, Archetype Publishers Ltd. 1995, p. 143.

<sup>60</sup> This can be seen in the case recently dropped in Italy, in which Marion True, the ex-curator of antiquities at the Getty Museum, and Robert Hecht, an art dealer, were prosecuted for allegedly trafficking in illegally excavated antiquities in 2002. The Marion True controversy demands its own article, and is cited here only to point out the large amounts of public criticism of the Getty's collecting practices since the case began in 2005. See: *Chasing Aphrodite*, n.3 *supra*; Elisabetta Provoledo, 'Time Limit Ends Antiquities Case of Ex-Curator', *The N.Y. Times*, October 14, 2010.

<sup>61</sup> See n.1, *supra*.

<sup>62</sup> Ibid p.7,

<sup>63</sup> Ibid pp.43 and xxxv.

<sup>64</sup> Ibid p. xviii.

<sup>65</sup> Ibid p.7.

this position for many reasons, but believes that the public interest in making these antiquities available for display and study (and keeping them out of private collections or the black market) trumps purely archaeological concerns.

To begin with, archaeologists argue that Cuno's position is based on a misrepresentation of the nature of the market in antiquities. Ricardo J Elia writes of Norman's argument – and, by implication, of Cuno's – that it relies on a 'mythology of the market' rather than on a true understanding of the complexity of the interactions and participants.<sup>66</sup> Second, looters and dealers participate in a market with the expectation, often, that museums will be the ultimate purchasers. Renfrew emphasises this point, suggesting that Cuno is effectively arguing against the '1970 rule':

By implication he criticises more cautious institutions such as the British Museum or the Archaeological Institute of America which agree to follow the '1970 rule' in order to combat the traffic in illicit antiquities and the destruction of archaeological sites which sustains it.<sup>67</sup>

Without dismissing Cuno's arguments for the 'encyclopedic museum', Renfrew draws attention to the considerable discretion that museum curators have, and to the persistence of evidence of shady dealings with traffickers and collectors. Illegal collecting, on the part of museums as well as private collectors, leads to destruction of archaeological sites and 'the massive loss to knowledge which ensues when saleable antiquities are separated, without record, from the context of their discovery'.<sup>68</sup> Ultimately, Renfrew's point is that Cuno's 'musings on ethnicity and nationalism are not centrally relevant to the problem of safeguarding the world's cultural heritage. For clearly the competent territorial authorities must have the main responsibility for safeguarding archaeological sites: ethnicity is not the issue'.<sup>69</sup>

Cuno argues that archaeologists' work is co-opted by the nation-state for use in creating 'national', as opposed to 'encyclopedic', museums, and that the 'encyclopedic museum', resting on the values of 'cosmopolitanism'<sup>70</sup> is the victim

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<sup>66</sup> Ricardo J Elia, 'Comment on "Irreconcilable Differences?": Scholars for Sale.' *Papers from the Institute of Archaeology* 18 (2007), pp.16-18, at p.16: 'For decades the antiquities market has promoted a unitary vision of how objects come to the market. This vision acts as a mythology that sanctions the collection of antiquities, blames the victims, and denies the reality of archaeological site looting. It is a fantasy world where source countries are repressive villains and collectors are heroes, where the economic forces of supply and demand have no effect, and where every one of the thousands of museum-quality antiquities that appear on the market each year comes from old collections or chance finds made by poor peasants. In the fantasy world of the antiquities market, systematic looting by criminal gangs does not exist, archaeologists are dreary Philistines who don't appreciate beauty, and archaeological context does not matter.'

<sup>67</sup> Colin Renfrew, 'Book Review', in *The Burlington Magazine*, November 2008, p.768.

<sup>68</sup> Id.

<sup>69</sup> Id.

<sup>70</sup> Cuno cites Kwame Antony Appiah, *Cosmopolitanism: Ethics in a World of Strangers*, W.W. Norton, 2006; as well as Appiah, *The Ethics of Identity*, Princeton University Press, 2005. He also looks to the work of

of these short-sighted laws. Cuno, Neil MacGregor (the Director of the British Museum), and others claim that the use of national patrimonial laws and the threat of criminal prosecution are the latest approaches to a conflict that is not truly legal: who can ‘own’ artefacts from cultures that are long gone? Shifting national borders, religions, and governments mean that claims based on location should not be the criterion for the attribution of ownership.<sup>71</sup> Cuno invokes the observations of Neil MacGregor on the encyclopedic nature of the British Museum:

[...] the British Museum was established for the whole world on the premise that the study of things gathered together from all over the world would reveal the truth and ‘not one perpetual truth, [...] [but] truth as a living, changing thing, the truth constantly remade as hierarchies are subverted, new information comes, and new understandings of societies emerge. And as such truth emerged, it was held, it would change those societies and the result would be tolerance.

The British Museum’s collection was formed as a means to knowledge and a way of creating a new kind of citizen for the world. That it was in London was only because London met its founder’s terms: his collection would be kept together and would be open, free to any and all interested persons. It could easily have been in another European capital but at the time, London was the most cosmopolitan and largest city in all of Europe. It was presumed that more – and more different – people would experience the collection in London than anywhere else.<sup>72</sup>

It is worth reproducing this quotation at length because it demonstrates the various strands that Cuno and MacGregor weave together. It is true that ‘culture’ cannot be confined by national borders – or any borders at all. It is also true that ‘artefacts’ are not, as such, ‘culture.’ The relationships between objects, collections, scholarship, and museums are complicated, and untangling them requires more than either the straightforward motivations that Cuno assigns to source nations or the disinterested posture he assigns to ‘encyclopedic’ museums.<sup>73</sup>

On the surface, there are relatively straightforward critiques of Cuno’s argument. First, it may have been true in 1753 that only London met its founder’s terms, but certainly other cities would do so in the 21<sup>st</sup> century: Sir Hans Sloane

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Edward Said and Amartya Sen to underscore the crucial importance of the non-parochial vision of life and knowledge.

<sup>71</sup> Ibid Chapter 5, ‘Identity Matters’, pp.121-145, at p.125: ‘Nationalist retentionist cultural property laws are based on false assumptions about art and culture: that the parameters of art and culture can be fixed – that the currents of influence can be stopped – and identified as national, as having *national* characteristics.’ (emphasis in original).

<sup>72</sup> Ibid pp. xxiv-xxxv.

<sup>73</sup> For example, merely generating a site of national heritage, or merely being motivated by the desire to educate.

was an Englishman based in London, and surely that is also significant (as it would be today). Second, at this point, his collection could ‘be kept together and would be open, free to any and all interested persons’ anywhere in the world. Third, is London still the most ‘cosmopolitan and largest city in all of Europe’? These are arguments based on past realities, couched as justifications for the future, and they reference the well-known ‘classical’, secular-sacred, enlightenment project model of the museum. Indeed, later in the analysis, this article will return to the questions of ‘the past’, if only to argue that Cuno and others are attempting to return to a past state of affairs vis-à-vis the deference that museums used to experience as of right from actors outside of the museological community.<sup>74</sup> There are also more significant, if equally self-evident, refutations of Cuno’s (and MacGregor’s) arguments. Nationalism is at the core of the ‘encyclopedic’ museum project in many, many ways. The previous analysis has demonstrated that although museums may be ‘encyclopedic’ in outlook and in values – and this is evidently a good thing – they are national in terms of definition, legal status, and protection. And overall, these great museums receive a great deal more protection from their governments than they do regulation or repatriation requests. Perhaps the easiest way to express this critique of Cuno’s attempt to avoid the changing landscape in antiquities collection is to say this: despite MacGregor’s oratory, the British Museum remains the *British* Museum, not the *Encyclopedic Museum, UK Branch*. MacGregor’s statement regarding changing cultural and historical understanding – that the British Museum is meant to recognize ‘truth as a living, changing thing’ – is functionally meaningless in a broad context, as this ‘truth’ seems to be meant to stay at the level of the objects in the collections, rather than inform the museum’s participation in the wider debates in society.<sup>75</sup>

This exposes the core problem which troubles Cuno: at the level of the commitment to, and academic knowledge of, the objects in a museum’s collection, Cuno’s arguments about the importance of the collection itself are unassailable. The relationship between a world-class museum and its objects may be beyond the comprehension of commentators from outside the discipline. The collection is central to the traditional definition of the museum.<sup>76</sup> How, then, is it understandable that external actors may have more ‘rights’ over a museum’s acquisition practices or collection than the museum itself? Even more, the idea of

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<sup>74</sup> See Colin Renfrew: ‘James Cuno sets out what might, ten years ago, have been described as the art museum director’s case on the proprieties of ownership and acquisition. His position is still indeed held by the collection of which he is Director (the Art Institute of Chicago) along with such other influential institutions as the Metropolitan Museum or the Boston Museum of Fine Arts. But the times have moved on, and other museums, including now the Getty itself, have shown themselves willing to adopt more careful acquisition policies and to avoid buying antiquities which might have been the product of looting. Cuno here, thoughtfully and with well-chosen examples, reasserts the traditional view.’ ‘Book Review’, *The Burlington Magazine*, November 2008, p.768.

<sup>75</sup> What better argument for the return of the Parthenon Marbles than the recognition of changing ‘truths’? Yet, the ‘truth’ that is recognized, by the British Museum and by the UK government, is that ‘Elgin Marbles’ belong, as a matter of law, to Britain.

<sup>76</sup> See n.38 *supra*.

a museum as *being* its collections is central to the anxiety and dissonance that museum directors today experience when they begin to lose ‘control’ of the objects in their collections. In the book following on from *Who Owns Antiquity?*, this focus on the object is made even more explicit.<sup>77</sup> Therefore, it is not Cuno’s argument about *law* that is important in this context: that is merely the response to a new set of repatriation strategies. Cuno takes the law at face value; he adopts ‘the encyclopedic’ as a blanket virtue for museums but does not propose it as a standard for the law. Unsurprisingly, Cuno is caught in the same paradox as MacGregor, above. If his purpose were to extend ‘encyclopedic’ values to the law, he would have to conclude that it would not matter at all where the contested object/collections were kept as long as whichever museum held them was displaying artefacts from different cultures in a legal regime which regulated museums in line with universal enlightenment values.<sup>78</sup> Although this would seem to be the position that Cuno and MacGregor must be espousing, it cannot be. Somewhat ironically, they are arguing for a regime in which specific artefacts – ancient antiquities – are kept in specific museums – encyclopedic museums – and an ‘encyclopedic’ understanding of cultural property law does not support that argument.<sup>79</sup> *Only national patrimonial laws, and international conventions supporting them, do that.*

### **OBJECTS AND AUTHORITY: THE REPATRIATION OF ARTEFACTS IN THE CONTEXT OF MUSEOLOGY**

Rather, Cuno’s broadsides regarding ‘national patrimonial law’ are attempts to intervene on the deeper questions regarding authority: the authority to keep or return artefacts implicates (is part of) the authority to position the object on (through) the field of cultural meaning. This authority is eroding, both for reasons beyond any museum’s control and as a result of decisions made over the past generation of museum curatorship.<sup>80</sup> Regardless of the reasons that the objects should (or should not) move from one museum to another, or from a museum to

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<sup>77</sup> James Cuno, ed., *Whose Culture? The Promise of Museums and the Debate over Antiquities*, Princeton University Press, 2012. In the ‘Introduction’, Cuno writes: ‘Museums value the discrete object for all that can be learned from it and from seeing it among other objects from different cultures in the context of the museum’s galleries. Unlike the archaeological establishment, museums do not believe that unexcavated antiquities – whose archaeological context has not been scientifically recorded, or which didn’t come from an ancient archaeological context – are meaningless.’

<sup>78</sup> There is a great deal more to be said here, which is beyond the scope of this article. Note that the Louvre is in the process of opening a ‘branch’ in Abu Dhabi. Is this an example of an ‘Encyclopedic Museum, Abu Dhabi branch?’ or is it, as named, the Abu Dhabi Louvre? This question is not easy to answer at this time. See: <http://m.gulfnews.com/news/uae/general/abu-dhabi-louvre-opens-birth-of-a-museum-exhibition-1.1173827>.

<sup>79</sup> Although this might look like the ‘cultural internationalism’ perspective, the irony is that Cuno and others treat encyclopedic museums in a ‘nationalistic’ manner and argue for the blanket retention of their collections.

<sup>80</sup> See the discussion of the new museology, below.

a local group or community, what is evident in repatriation claims is that the museum may no longer be the primary arbiter of the meaning of the object. Various disciplines and histories cohere in order to make an object the focus of a repatriation claim, as the construction of the value of the object and the construction of the ‘past’ which it metonymically represents, are effected in tandem.<sup>81</sup> To put an object in a museum is not only to preserve, protect, or conserve it; it is also to produce it as a cultural object from within a web of meaningful relationships.<sup>82</sup> The same is true of taking an object out of a museum. However, repatriation claims deploy strategies that are usually straightforwardly linear, using arguments couched in terms of property or ‘ownership’ to move things out of museums. The claims deliberately erode the authority of the museum to determine the meaning of the objects within it, instead privileging narratives and genealogies that favour specific and local knowledge(s) of particular things. Cuno’s insistence on protecting the collection at the expense of the ‘truth’ of new and different understandings of the cultural value of (particular) artefacts, and his argument that museums should be free from the laws that are meant to protect against an international crime, only entrenches the problems that he is seeking to redress.

At the time of the development of the ‘great’ public national museums, museum space was, to some extent, sacralised. From the 18th through to the mid-20th centuries, museums were deliberately designed to resemble other ceremonial spaces, such as palaces and temples. Like these other ritual spaces, museum space was marked off for a specific purpose, monumental, clearly defined, ceremonial and liminal.<sup>83</sup> In the 19<sup>th</sup> century, these elements of the museum were self-evident, and self-evidently preconditions to the aesthetic and transcendent experience(s) of the museum visitor. The museum ‘project’ was in keeping with museum architecture.<sup>84</sup> It is this moment in museum development which many of the laws creating and protecting museums reflect.<sup>85</sup> In *Civilizing Rituals*, Carol Duncan

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<sup>81</sup> Of course, this position accepts that the development of the interrelationship between object and the various narratives and projects that define it is itself complex. See, for example, Cornelia Vismann, ‘The Love of Ruins’ in *Perspectives on Science*, vol. 9, no. 2 (2001), pp. 196-209.

<sup>82</sup> Samuel J M M Alberti, ‘Objects and the Museum’, *Isis*, 96:559-571 (2005), p.561.

<sup>83</sup> Carol Duncan, *Civilizing Rituals: Inside Public Art Museums*, Routledge, 1995, pp.10-11.

<sup>84</sup> In the ‘aesthetic’ ideal of the art museum, works of art are valued for ‘their unique and transcendent qualities [...] the museum space is expected to provide a sanctuary for their contemplation.’ Carol Duncan, *Civilizing Rituals: Inside Public Art Museums*, Routledge, 1995, p.4. See also Victoria Newhouse, *Towards a New Museum*, The Monacelli Press, Inc. 1998, pp. 46-7.

<sup>85</sup> This is most evident in the international Conventions protecting museums in time of war. The 1954 Hague Convention and its predecessors (the works of Vattel, the Lieber Code, the Hague Protocols) reflect the understanding of the secular-sacred museum rather than the modern destination model. The destructive effects of war on museums are balanced by some constructive ones; as Boniface and Fowler note, ‘War [...] is a terrible razer of museums, presumably because of their iconographic values, and it is presumably precisely for the same reason rather than simple functionalism or a pure love of scholarship that one of the priorities for postwar winners and losers is to rebuild the old museum or build a new one. [...]’

demonstrates that something remains in the museum visit or museum experience that hints at a lingering quasi-sacrality. In her study of art museums, she defines the work of the museum as transmitting values and beliefs to visitors in the form of experiences that are structured as rituals: '[...] a museum's central meanings, its meanings *as a museum*, are structured through its ritual'.<sup>86</sup> The museum *is* the ritual structure it produces.<sup>87</sup> In this conception, the museum is a sacred space because it is a space in which rituals are possible, regardless of which specific values or experiences are being transmitted. Put differently, rituals are not possible in spaces that have lost the hallmarks of sacrality. Although museums have been intricately linked into the 'formation of urban modernity' from their inception, and served (and still serve) state (and other public) policies,<sup>88</sup> a purely secular space does not allow for the museum-ritual. Museum visits, to remain museum visits, must remain a kind of rite of passage into a differently-conceived experience of a different world, regardless of whether that world contains academic knowledge, self-knowledge, is aspirational in terms of social status, or whether it represents partaking in a particular kind of shopping or eating.<sup>89</sup> Museums must still create the sense of a threshold, and indeed the museum sheds a kind of light onto the objects, artefacts and location that 'heritage' and 'tourism' regimes cannot.<sup>90</sup> Today, the space of the museum is no longer constituted as sacred or sacrosanct in this way.<sup>91</sup> Although a 'cultural centre' like the Centre Pompidou in Paris can access the marketplace or factory model of culture without losing its authority as a

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War is a source of objects for museums; commercial exploitation of war sites can serve museum projects by preserving buildings and artefacts and attracting tourism revenue, as can sites of great atrocities. Boniface and Fowler, *Heritage and Tourism in the Global Village* p.104.

<sup>86</sup> Duncan, 1995, p.2 (emphasis in original).

<sup>87</sup> In Duncan's view, these 'ritual scenarios' transmit the values and beliefs that serve the purpose(s) of the museum, which are partially drawn from the type of museum it is (art, archaeological, anthropological, etc.), and partially drawn from the social-historical moment in which the museum exists. Duncan does not limit art museums to their social or political components, however. '[W]hile art museums are understood to be both producers of ideology and products of social and political interests, they are not entirely reducible to these categories. It is [...] precisely the complexity of the art museum – its existence as a profoundly symbolic cultural object as well as a social, political, and ideological instrument – that makes the notion of the museum as ritual so attractive.' (*Civilizing Rituals*, pp.4-5).

<sup>88</sup> Michaela Giebelhausen, 'The Architecture *Is* the Museum' in *New Museum Theory and Practice*, edited by Janet Marstine, Blackwell 2006, p.42.

<sup>89</sup> See Pierre Bourdieu, *The Love of Art: European Art Museums and their Public*, Stanford University Press, 1991. (trans Dominique Schnapper).

<sup>90</sup> Boniface and Fowler, *Heritage and Tourism in the Global Village* p.105: 'The very word "tourism" seems tawdry in such a context, while the concept of "museum" is enhanced. When human kind is battling, not with its past but with its own nature, then "heritage" too takes on a different dimension.'

<sup>91</sup> Shifts in the architecture and uses of the museum in the 20<sup>th</sup> and 21<sup>st</sup> centuries slowly replaced the 'temple' model with the 'destination' model of public space: a place where one could visit the café or the shop without entering the exhibition halls; where curators and directors also must think about tourism and blockbuster exhibitions as means of raising revenues. This is predominantly true in the 'new' museum. Here, visitors are meant to enter into a predominantly social, commercial space, in which the threshold of the museum and the huge and very expensive special events and exhibitions generate awareness in the visitor of not only 'high' culture but also the importance and presence of revenue-gathering, corporate sponsorship, and international status. See: Kylie Message, 'The New Museum', *Theory, Culture and Society* 23(2-3), pp. 603-606.

museum space,<sup>92</sup> the turn away from the original conception of the great national museums<sup>93</sup> gives rise to increased anxiety about the museum project. Partially as a result of this kind of change, Patty Gerstenblith and others have recently commented that entering the museum in this century and this climate may be similar to entering a warehouse – with catering facilities.<sup>94</sup> The museum in this view is in danger of being a mere repository of objects, not a celebration of culture and its possibilities, a danger only exacerbated by increasing repatriation claims which in themselves may also desacralize the museum.<sup>95</sup>

The legal conflicts and claims around repatriation and deaccessioning can be understood not only as specific problems for specific museums, but as expressions of a larger shift in the museum project. The museum has been critiqued as representing a point of crisis, or in crisis, since the early part of the 20<sup>th</sup> century. Museums have been seen as places where objects, torn from their contexts, are placed in a terrible and meaningless proximity to each other.<sup>96</sup> Paul Valery, Walter Benjamin, and later, Theodor Adorno (among others) have all discussed the phenomenon of the museum's relationship with its objects, and the ways in which collections and collectors express a certain object-related habitation of modernity.<sup>97</sup> Douglas Crimp argues that the context of the museum and its

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<sup>92</sup> 'Its scale, high-tech vernacular, and unusual color scheme were bold and discordant. The project represented a new departure: a cultural center that combined diverse functions such as a library, videotheque, temporary exhibition spaces, a bookshop, cafes, and restaurants, and the city's museum of modern art. The Pompidou functions as a multidisciplinary cultural factory which attracts a variety of audiences.' Michaela Giebelhausen, 'The Architecture *Is* the Museum' in *New Museum Theory and Practice*, edited by Janet Marstine, Blackwell 2006, p.56.

<sup>93</sup> Separate from the question of repatriation, on the DCMS's website there is a clear 'steer' on the modern museum's purposes: 'When it comes to the Museums and Galleries sector we have four main priorities:

- Ensuring that children have the opportunity to enjoy a vibrant cultural and sporting life
  - Opening institutions to the widest possible cross section of people
  - Ensuring that the creative, leisure and tourist industries provide the maximum possible benefit to the economy
  - Ensuring our museums and galleries are exciting, modern and provide real value for money
- By focusing on these objectives we aim to improve education, social cohesion, regional regeneration, the quality of our institutions and our cultural life.' Available at: [http://www.culture.gov.uk/what\\_we\\_do/museums\\_and\\_galleries/default.aspx](http://www.culture.gov.uk/what_we_do/museums_and_galleries/default.aspx).

<sup>94</sup> Patty Gerstenblith, 'Acquisition and Deacquisition of Museum Collections and the Fiduciary Obligations of Museums to the Public', 11 *Cardozo Journal of International and Comparative Law* 409, 414 (2003).

<sup>95</sup> Kevin Hetherington discusses how museums are experienced in modernity. He states that 'Museums are no longer just defined in terms of their gallery spaces. In a world of simulation and consumerism, of global tourism and heritage preservation and of entrepreneurial public-private regeneration of urban space, the city itself has become museumified. [...] Museums have adapted to the challenges of capitalism in ways that have challenged their former high art mission.' (citation omitted) Kevin Hetherington, 'Museum', in *Theory, Culture and Society* 23(2-3), pp. 597- 603 (2006), at p. 602. 'As early as the beginning of the nineteenth century...Antoine-Chrysostome Quatremere de Quincy lamented the tearing of objects from their original context.' Janet Marstine, *New Museum Theory and Practice*, Blackwell, 2006, p.15. See also Victoria Newhouse, *Towards a New Museum*, The Monacelli Press, Inc., 1998, pp. 47-51.

<sup>97</sup> 'Theodor Adorno used the German word "museal" [...] to describe objects that are no longer connected to the culture that produced them or to the present. He declared [...] "Museum and mausoleum are connected by more than a phonetic association. Museums are like the family

changing role(s) are a site where modernity, as both a process and as a discourse, is clearly expressed.<sup>98</sup> He argues that ‘the history of museology is a history of the various attempts to deny the heterogeneity of the museum, to reduce it to a homogenous system or series’.<sup>99</sup> From the inception of the modern museum project, the radical heterogeneity of the objects in the museum and their equally-radical ‘object-ness’ was critiqued by theorists who questioned the existence of any possible homogenizing discourse, or indeed, the possibility that such a discourse might exist. Instead, the multiplicity of objects and their meanings demonstrated how necessary it was to find a new way of thinking about the connections between objects and knowledge.<sup>100</sup> This is a different view of the value of the collections that make up the encyclopedic museum.

The ‘new museology’ inaugurated by Peter Vergo in 1988<sup>101</sup> was to some extent a response to these kinds of critiques filtered through the social sciences of the mid-20th century; it brought together the research and social theory that questioned the ongoing validity of the ‘temple’ model of the museum. Vergo proposed that the acquisition and display of objects in a museum necessarily represent the assignment of values to these objects and the cultures from which they come. This formulation of curatorship no longer acts as a criticism of the ‘value-neutral’ position of the object in the authoritative, ‘temple’ model of the museum; it has come to replace that model.<sup>102</sup> A specific example of the new museology may be seen by looking at Charles Saumarez Smith’s warning, in the same volume in 1989, that the continued meaning of the museum rests on objects being seen as mobile and culturally-defined rather than static and best appreciated in an a-historical or a-contextual space. He writes that

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sepulchers of works of art. They testify to the neutralization of culture.” Janet Marstine, *New Museum Theory and Practice*, Blackwell, 2006, at p.15.

<sup>98</sup> Douglas Crimp, *On the Museum’s Ruins*, The MIT Press 1993.

<sup>99</sup> Ibid, p.54.

<sup>100</sup> Crimp discusses Flaubert’s critique of the museum’s relationship with disparate and often fragmentary objects, quoting Flaubert’s claim that “The fiction is that a repeated metonymic displacement of fragment for totality, object to label, series of objects to series of labels, can still produce a representation which is somehow adequate to a nonlinguistic universe. Such a fiction is a result of an uncritical belief in the notion that ordering and classifying, that is to say, the spatial juxtaposition of fragments, can produce a representational understanding of the world. Should the fiction disappear, there is nothing left of the Museum but ‘bric-a-brac,’ a heap of meaningless and valueless fragments which are incapable of substituting themselves either metonymically for the original objects or metaphorically for their representations.” Ibid, p.53. See also: Tony Bennett, *The Birth of the Museum: History, Theory, Politics*, Routledge, 1995.

<sup>101</sup> Peter Vergo, *The New Museology*, Reaktion Books, 1989.

<sup>102</sup> Vergo’s manifesto is the foundation for much of museum practice today, especially in anthropological and archaeological museums. No one would disagree that museums contain and transmit value judgments in all acts of collecting, acquiring, exhibiting and retaining material, nor that ‘Beyond the captions, the information panels, the accompanying catalogue, the press handout, there is a subtext comprising innumerable diverse, often contradictory strands, woven from the wishes and ambitions, the intellectual or political or social or educational aspirations and preconceptions of the museum director, the curator, the scholar, the designer, the sponsor – to say nothing of the society, the political or social or educational system which nurtured all these people and in so doing left its stamp on them.’ *The New Museology*, pp.2-3.

One of the most insistent problems that museums face is precisely the idea that artefacts can be, and should be, divorced from their original context of ownership and use, and redisplayed in a different context of meaning, which is regarded as having a superior authority. [...] Museums are assumed to operate outside the zone in which artefacts change in ownership and epistemological meaning. Yet anyone who has attended closely to the movement of artefacts in a museum will know that the assumption that [...] objects are somehow static, safe, and out of the territory in which their meaning and use can be transformed, is demonstrably false.<sup>103</sup>

This position is now accepted as valid without question. The primacy and fluidity of objects and their histories is no longer seen as antithetical to the museum project. There is an established nexus of scholarship at the intersection of anthropology, art history, science studies, and other disciplines that has taken the manifesto of the new museology to heart. For example, Samuel Alberti writes in 2005 that ‘object biographies’ are an exceptionally fruitful way to ‘approach the history of museums [...]’.<sup>104</sup> Almost twenty years later, his project follows the route advocated by Vergo, Saumarez Smith, and others leading the call for a new approach to museums and their scholarship.

The arguments around the repatriation of antiquities occur on this landscape as well as across the legal instruments and strategies to which Cuno and others object. Evidently the transformations in meaning and use contemplated by Saumarez Smith cannot come purely from within the museological establishment. Here, however, the question arises whether the definition of the ‘collection’ and its value can continue to be determined largely by the curator (or the museum director). Modern museology assumes the multivocal eruption into speech of objects and collections that formerly spoke only with the voice of the curator. In the new museology, the battle to control the meaning of the object, that is, to provide the ultimate frame for it, or what Valerie Casey calls the ‘*legislated*’ value of art and artefacts, is ongoing.<sup>105</sup> In a very real way, this is a good thing. Saumarez Smith writes that to silence the narratives of mutable and dissonant meanings and histories is to be in danger of forgetting ‘the high idealism and the academic intentions which lay behind the foundation of museums’.<sup>106</sup> Rather than seeing the

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<sup>103</sup> Charles Saumarez Smith, ‘Museums, Artefacts, and Meanings’ in Peter Vergo, ed. *The New Museology*, Reaktion, 1989, p.9.

<sup>104</sup> ‘We can trace the careers of museum things from acquisition to arrangement to viewing, through the different contexts and the many changes of value incurred by these shifts. In doing so we study a series of relationships surrounding objects, first on the way to the museum and then as part of the collection. These are relationships between people and people, between objects and objects, and between objects and people. [...] In this conception, the museum becomes a vessel for the bundle of relationships enacted through each of the thousands of specimens on display and in store.’ Samuel J M Alberti, *Isis* (2005) 96:559-571, p.561.

<sup>105</sup> Valerie Casey, ‘Staging Meaning: Performance in the Modern Museum’, *The Drama Review* 49, 3 (T187), Fall 2005, p.80.

<sup>106</sup> Charles Saumarez Smith, ‘Museums, Artefacts, and Meanings’ in Peter Vergo, ed., *The New Museology*, Reaktion, 1989, p.9.

emphasis on polyvalence and mutability as signs of ‘spoiled’ sacred space, we might more accurately see them as guaranteeing a new set of rituals and expert discourses, that is, ensuring the survival of the old museum project in a new form.<sup>107</sup>

In light of the past 30 or more years of this approach to museum collections, the unavoidable result is that at some point objects may escape curators, and the museum project itself, entirely. This gestures beyond the problems presented by the conflation of objects and knowledge, or museums and discourse. Rather, the problem is the ‘free for all’ of materiality itself. Where history, meaning and contextualization of collecting practices go, must the objects themselves logically follow? What are the justifications for retaining objects when they are valued *as objects*? As Cuno writes in his essay ‘The Object of Art Museums’: ‘I want to focus on the object because while museums do many things [...] nothing is more important than adding to our nation’s cultural legacy and providing visitors access to it, if only [...] one object at a time.’<sup>108</sup> Cuno argues that the physical presence of the object is central to the research and scholarship that ultimately gives both the knowledge and the object its meaning.<sup>109</sup> Although he is discussing the art museum here, surely the same argument must apply in the realm of antiquities, which are best (if not only) appreciated in their materiality. Actors in this field are in something like a cleft stick, or a double bind: on the one hand, there is the primacy of the object, a primacy which is in explicit in much of the writing of curators, historians, and commentators on material culture. On the other hand, the museum will not survive as a (mere) collection of objects. The new museology has removed much of the aura of sacrality from museums; it has also valorised the life of objects beyond their value to, or in, the museum. At issue now is how the project(s) and meanings of the museum have changed, and whether they are adequately protected from erosion.<sup>110</sup> Certainly, the endless

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<sup>107</sup> See Jens Andermann and Silke Arnold-de Simine, ‘Introduction: Memory, Community and the New Museum’, *Theory, Culture and Society* Vol.29(1): 3-13 (2012). It might even be said that the old museum project survives in its old form: Oliver Impey quotes Francis Bacon on the necessities of a learned man in 1594, which include “a goodly, huge cabinet, wherein whatsoever the hand of man by exquisite art or engine has made rare in stuff, form or motion; whatsoever singularity, chance, and the shuffle of things hath produced; whatsoever Nature has wrought in things that want life and may be kept; shall be sorted and included.” He then comments: ‘museums are still in the business of “keeping and sorting” the products of Man and Nature and in promoting understanding of their significance.’ The new museology has not significantly changed that role, and nor has the development of the concept of the encyclopedic museum. Oliver Impey and Arthur MacGregor, *The Origins of Museums: The Cabinet of Curiosities in Sixteenth- and Seventeenth-Century Europe* (xxx), p.xvii.

<sup>108</sup> ‘The Object of Art Museums’ in *Whose Muse? Art Museums and the Public Trust*, James Cuno, ed., Princeton University Press and Harvard Art Museums, 2006, p. 52.

<sup>109</sup> ‘The museum is not just a treasure house, it is also a center of a very special kind of research and education. [...] In the art museum, research and teaching are object-based: prompted by the object, engaged with the object, and offered up by the particular way objects are experienced in space as physical things made of matter of a certain size and scale, worked in a certain way, and presented under certain circumstances, whether they be those of the gallery or study room.’ Id.

<sup>110</sup> For an argument that ‘museum as process’ restores the functionality of the art museum, see Carol S Jeffers, ‘Museum as Process’ in *Journal of Aesthetic Education*, Vol. 37, No. 1, (Spring 2003), pp. 107-119. To some extent, ‘sacrality’ has been replaced by trust in the museum visitor, which is a wonderful

return to ‘education’, ‘community’, and ‘experience’ cannot protect museums from losing their mandate over the keeping and ordering of the things they contain.<sup>111</sup> If the objects are stripped of the aura, the extra meaning that ‘being in the museum’ gives them – whatever that is – then there is no valid reason to keep them in the museum once a plausible competing claim as to their meaning, use, or value has been made.

In order to combat this problem, museum professionals attempt to define their authority more broadly than is stated in their founding documents or mission statements. James N Wood, Director of the Art Institute of Chicago from 1980-2004, identifies eight sources of authority for the modern art museum: nourishment, expertise, hierarchy, memory, conservation, architecture, mission, and leadership. He states that

The first and indispensable type of authority that legitimizes the art museum is what I call the authority of nourishment. First and foremost we are our collections, and it is assumed that these original works of art, selected for their aesthetic quality and historical significance, provide something essential to society.<sup>112</sup>

It is no gift to museums challenged by repatriation claims to base nourishment as definitely on ownership of the ‘original works of art’ as Wood does. The ‘something essential’ they provide to society may be provided in a different museum, in a different country or by a different narrative than that emanating from the Art Institute of Chicago. Without disagreeing with the substance of Wood’s argument, it is possible to point out the dangers of basing the identity, utility or meaning of the museum on the specificity of its objects.

At this point, the concerns expressed by increasing numbers of repatriation claims come into focus. Perhaps the only way to retain objects under current circumstances is to speak in the voice of the museum itself, and claim the objects as some part of its essence – and this article suggests that this is the underlying purpose of the emphasis on the encyclopedic museum, as it was in the 2002

result. For a discussion of the museum visitor in Britain in the 1980’s, see Nick Merriman, *Beyond the Glass Case: the Past, the Heritage and the Public in Britain*, Leicester University Press, 1991.

<sup>111</sup> For example, the reorganization of the Smithsonian’s Native American collections in the wake of the Native American Graves Protection and Repatriation Act (1990) was fuelled by the desire to respond to the critiques of colonialism and insensitivity made regarding the Smithsonian’s storage of hundreds of human skeletons and associated tribal objects. For a discussion of the development of the New Museum of the American Indian in light of the repatriation of human skeletons and associated objects, see: C. Timothy McKeown, ‘Considering Repatriation Legislation as an Option: The National Museum of the American Indian (NMAIA) & The Native American Graves Protection and Repatriation Act (NAGPRA)’ in *UTIMUT-Past Heritage-Future Partnerships: Discussions on Repatriation in the 21<sup>st</sup> Century*, Mille Gabriel and Jens Dahl, eds., International Work Group for Indigenous Affairs, Copenhagen 2008 – Document No. 122, pp.134-147. Available at: [http://www.iwgia.org/publications/search-pubs?publication\\_id=28](http://www.iwgia.org/publications/search-pubs?publication_id=28).

<sup>112</sup> James N Wood, ‘The Authorities of the American Art Museum’ in *Whose Muse? Art Museums and the Public Trust*, James Cuno, ed., 2006, Princeton University Press and Harvard Art Museums, p. 108.

attempt by the Directors of 18 of the world's most important museums to inaugurate the 'Universal Museum.' It is an attempt to manage the (paradoxical) results of hyper-valuing objects.<sup>113</sup> Museums assuredly provide a context in which the development of culture can occur; however this article argues that linking the development of culture too closely to the retention of objects is an error. If 'universalism', or the 'encyclopedic museum', relies on amassing and preserving objects, the project is doomed to failure. Objects in modernity are overdetermined; the artefacts found in a museum exist at the nexus of a constellation of different theories, uses and meanings that arise from source communities, legal instruments and activists, archaeologists, anthropologists, historians, dealers and 'looters' as well as from the art historians and curators who have responsibility for them. The repatriation debates are to some extent the *result* of the emphasis on the materiality of culture, an emphasis in which museum curators and directors have *joined* nation states and cultural commentators.

What the repatriation debates demonstrate, uncontroversially, is that the power to frame the objects is crucial to the struggle to retain them. Equally, they demonstrate that the power to frame certain objects will rarely, if ever again, rest solely with any specific museum. This is particularly true of the conflicts surrounding the acquisition, retention, and repatriation of antiquities, which represent in many cases the Platonic ideal of the museum artefact: valuable, rare, thought-provoking, and suggestive as to context and meaning, signifying both as artefact and as art. The crucial point here is that *the 'repatriation problem' must be seen as one strand of museum theory as much as an area of law*, and the genealogy of this phenomenon has to include the changing theories and practices within museology itself. The retentionist language, policies, and statutory controls in this area are all attempts to safeguard both ownership and this particular power of interpretation and dissemination. In less conflicted times, the two were conceptualized as making up one complex of privileges: ownership and interpretation cross-defined the museum artefact. This complex no longer functions smoothly. The result thus far has been to attempt to separate ownership and interpretation, most often by retaining the object while allowing the power to interpret to be shared by others outside the museum.<sup>114</sup> Less often, the strategy has been to let the object go while retaining the authority of interpretation. (Smaller museums and museums with more specific community- or educationally-based missions – museums which would not define themselves as 'encyclopedic' – seem to be choosing a different path, in which both kinds of authority are gently eroding or transforming into a genuinely collaborative set of projects with the surrounding communities.) For the 'encyclopedic' museums however, these solutions have been exposed as half-measures, eroding the museums' legitimacy while not solving

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<sup>113</sup> 'Declaration of the Importance and Value of Universal Museums', available at: [http://icom.museum/fileadmin/user\\_upload/pdf/ICOM\\_News/2004-1/ENG/p4\\_2004-1.pdf](http://icom.museum/fileadmin/user_upload/pdf/ICOM_News/2004-1/ENG/p4_2004-1.pdf).

<sup>114</sup> How the British Museum handles the controversy around the ownership of the Elgin/Parthenon Marbles is an excellent example of this. See: [http://www.britishmuseum.org/about\\_us/news\\_and\\_press/statements/parthenon\\_sculptures.aspx](http://www.britishmuseum.org/about_us/news_and_press/statements/parthenon_sculptures.aspx)

the problem of how to manage their relationship to the objects in their collections.<sup>115</sup> Cuno's work is representative of the attempt to rejoin ownership and interpretation, but it fails because the developments in museology and the landscapes of both ownership and interpretation in modernity make this impossible.<sup>116</sup>

## CONCLUSION

Being unable to return to past certainties, some of the great national and international museums have sought to undermine measures that challenge their right to 'own' – that is, acquire and retain – illicitly-trafficked ancient objects. As a result, these museums increasingly valorise the authority they derive from *ownership* over the authority that was previously ascribed to *objects* themselves as expressions of cultural, historical and artistic knowledge. Recent statements and texts reveal a consensus view that a museum which cannot retain its art and artefacts will not survive in a meaningful way. This may be true; it certainly points to the truth that for the great museums the utility of the brute force of ownership in a property-based culture cannot be overestimated. Nevertheless, this recourse to the concept of 'ownership' is misguided. First, the availability of this protection is much more limited than commonly imagined; second, replacing object-based authority with owner-based authority does not solve the problem. Indeed, even if an unproblematic 'ownership' regime were possible, privileging a right of exclusive possession is antithetical to the values of the enlightenment museum. The ongoing commitment to public education and personal transformation may not even truly require legal ownership of the collection.<sup>117</sup>

Art museums, National and Archaeological Museums, and Anthropological Museums – and related Collections – each have their own Mission statements, Charters, Founding Act, Funding and Management Agreements, and other documentation setting out their 'ownership' of the objects within their care. Unfortunately, this ownership is not, and cannot, be protected from attack. The law in this area attempts to reconcile some of the complex inter-relations between the (legally-protected) space of museums and the production of culture. Given the nature of cultural objects, 'ownership' must always be partial, and mediated by politics and public opinion. This is entirely in line with Cuno's argument regarding

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<sup>115</sup> One solution may be to constitute, or re-constitute, the museum as a *space* which can be protected rather than a *collection of objects* which can be guaranteed eternally.

<sup>116</sup> See n.65, *supra*.

<sup>117</sup> The numbers of 'imaginary' and 'digital' museums that exist on the internet or as art installations or on Facebook or temporarily in other ways are increasing. 'Museum' in these cases may merely be a homonym to 'museum' as it is used in repatriation discourse. However, it is worth noting the fragmentation and metamorphoses of the term, as its appropriation in these kinds of projects points to the ongoing relevance and authority of the concept of the museum overall.

the fluidity of culture, as it is with Renfrew and Brodie's arguments about the importance of provenance. In this environment, title to ancient artefacts that have unknown provenances and fictional export documents *should not* be settled once and for all. To do so would be to enshrine the notion of 'barbarians' into the very heart of the museum project: although artefacts require protection from destruction, they do not require protection from the currents of culture itself. The validity of the concept of 'encyclopedic' or 'universal' or 'enlightenment' depends on the free motion of artefacts, and the adherence to laws that respect the complexity of knowledge, heritage, and beauty rather than the market in broken, unprovenanced and rootless objects. Therefore, the only conclusion possible is that museums *must* repatriate antiquities and they *must* abide by the laws promulgated for the protection of others. To behave differently is to reframe the museum project indeed, from encyclopedic to autocratic; from protecting the public good to protecting the rights of the collector; it is to take a large step backwards.