Cultural Property Repatriation: History, Legality, and Ethical Precedents for Museums in the United States

Rhiannon Bell

Abstract: Cultural property repatriation has emerged as a controversial topic of international diplomacy. Countries that were subject to archaeological desecration are now reclaiming illicitly exported artifacts from foreign museums. Because museums in the United States operate as private institutions, enforcing uniform legal standards is challenging. This paper theorizes a legislative model that would regulate the acquisition and repatriation policies of federally-funded museums. This proposal is developed through analyzing the efficacy of existing laws designed to regulate the illicit antiquities market, as well as through evaluating the federal government's response to the repatriation movements for Native American cultural property and Holocaust-era artwork.

Introduction

In our society museums are regarded as the protectors of our cultural heritage. They are tasked with the responsibility of researching and preserving valuable objects, as well as offering education to the public. Museums in the United States are regarded to be "one of the most trustworthy sources of objective information", more so than the government and the media.[1] However, most are unaware that museums in the U.S. are subject to virtually no oversight or regulation. With the exception of the Smithsonian Institution and the National Gallery of Art in Washington D.C., American museums operate as private institutions, both nonprofit and for-

[1] http://www.aam-us.org/about-museums/museum-facts, American Alliance of Museums Museum Facts, Accessed July 31, 2015.

profit.[2] Unlike most countries, where principle museums are run by the state, American museums typically operate in accordance with their own self-imposed policies.[3]

This extends to acquisition practices. Ethical concern for objects with ties to illicit global markets varies from museum to museum. While some are stringently opposed to acquiring objects that lack clean provenance, others are more or less indifferent.[4] This issue of unethical acquisition practices was brought into the public domain towards the end of the 20th century, as requests for the repatriation of cultural property started to become prevalent throughout the world. Countries and communities that were subject to colonial rule or widespread archaeological desecration began to pursue the restitution of objects, and in some cases human remains, that were unjustly taken from their territories.

Concern over the ethical dimensions of museum acquisitions is not a new phenomenon. In the 1970s Native Americans began to protest the right of museums to unethically acquire indigenous remains and artifacts.[5] In the 1990s, survivors of the Holocaust and their heirs began to confront European and American museums over their possession of artworks that had been confiscated from persecuted Jews.[6] These repatriation movements serve as useful precedents for understanding the current state of repatriation law in the United States. This paper analyzes their successes and failures in order to theorize an effective piece of legislation that would regulate the acquisition policies of select museums.

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[2] Weil, Stephen E., 'Museums in the United States: The Paradox of Privately Governed Public Institutions', *Museum Management and Curatorship* 15, no. 3 (1996), p. 249.
[3] Beltrametti, Silvia, 'Museum Strategies: Leasing Antiquities', *The Columbia Journal of Law & the Arts* 36, no. 2 (2013), p. 253.
[4] Op. cit., p. 205.
[5] Harms, Cecily, 'NAGPRA in Colorado: A Success Story', *University of Colorado Law Review* 83, no. 2 (2012), p. 598.
[6] Thompson, Erin, 'Successes and Failures of Self-Regulatory Regimes Governing Museum Holdings of Nazi-Looted Art and Looted Antiquities', *Columbia Journal of Law & the Arts* 37, no. 3 (2014), p. 384.

I. United States International Cultural Property Repatriation Policies Post-1970

During the first half of the 20th century many countries began to implement laws that restricted or outlawed the export of archaeological materials.[7] However, such laws were widely ignored as western institutions continued to expand their collections. The movement for repatriation began to develop rapidly after 1960 when the United Nations General Assembly adopted the 'Declaration on the Granting of Independence to Colonial Countries and Peoples.'[8] As a result, many newly independent nations made efforts to impede looting activities and recover important objects that had been taken under colonial rule.[9]

Throughout the 1960s countries that had been subject to cultural desecration gained enough support that in 1970 the United Nations Educational, Scientific and Cultural Organization (UNESCO) drafted the 'Convention on the Means of Prohibiting and Preventing the Transfer of Cultural Property'. The Convention encompasses three main goals for improving cultural diplomacy: It establishes preventative measures for the export and import of cultural property; grants countries the right to pursue repatriation and restitution; and creates an international framework that allows states to protect cultural property through collaborative measures.[10]

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[7] Such laws include: Italy, 1907 Law N.386: Protection of the Conservation of Monuments and Objects of Antiquity and Art; Egypt, 1912 Ministerial Decree N.51: Regulations for the Export of Antiquities; Nicaragua, 1923 Decree N.29 on the Export of Archaeological Objects; Iran, 1930 National Heritage Protection Act. http://www.unesco.org/culture/natlaws/ UNESCO Database of Cultural Heritage Laws, Accessed October 31, 2015.

[8] Prott, Lyndel V., 'Strengths and Weaknesses of the 1970 Convention: An Evaluation 40 Years After its Adoption', *United Nations Educational, Scientific and Cultural Organization*, (2012), p. 2.

[9] Op. cit., p. 2.

[10] Prott, p. 2.

Thus far, the Convention has been ratified by 129 states.[11] However, because the Convention is not a self-executing treaty, states don't need to accept all of its provisions when ratifying it. This means that each country is able to choose what aspects of the Convention it would like to enforce in its own domestic legislation, which can significantly obstruct the repatriation efforts of claimant states.[12] Even though the United States ratified the Convention in 1983 when Congress passed the Cultural Property Implementation Act (CPIA), the law only enforces two of the 1970 Convention's articles: 7(b) and 9.[13] Article 7(b) prohibits the importation of illicit cultural property, and Article 9 calls for countries to develop import controls.[14]

These provisions allow foreign states to request U.S. import restrictions for specific categories of objects that are in danger of desecration. In order to establish restrictions, the requesting country must prove that it's cultural property is at risk of illicit exportation, and that its own national laws can't supply adequate regulation. The President can then enter into a bilateral agreement with the country to approve its restrictions, and then the Department of Homeland Security carries out enforcement.[15] Thus far the United States has formed bilateral treaties with only 16 countries, and the majority have been established within the last 15 years.[16] Because these restrictions are not retroactive, only objects exported after the date of the

[11] http://www.unesco.org/new/en/culture/themes/illicit-trafficking-of-cultural-property/1970-convention/states-parties/ States Parties | 1970 Convention, Accessed July 11, 2015.
[12] Weiss, Leah J., 'The Role of Museums in Sustaining the Illicit Trade in Cultural Property', *Cardozo Arts & Entertainment Law Journal* 25, no. 2 (2007), p. 846.
[13] Vitale, Katherine, 'The War on Antiquities: United States Law and Foreign Cultural Property', *Notre Dame Law School* 84, no. 4 (2009), p. 1843.
[14] Op. cit., p. 1844.
[15] Luke, Christiana, 'U.S. Policy, Cultural Heritage, and U.S. Borders', *International Journal of Cultural Property* 19, no. 2 (2012), p. 179.
[16] http://eca.state.gov/cultural-heritage-center/cultural-property-protection/bilateral-agreements, Cultural Property Protection Bilateral Agreements, Accessed October 24, 2015.

alliance's formation are subject to scrutiny. This means that the legislation currently doesn't place heavy restrictions on museum acquisition practices, but its scope is likely to become more prevalent in the future as more bilateral agreements are formed. And while this law makes certain objects subject to search and seizure, it does little to regulate objects once they have already moved into the market. It doesn't establish criminal penalties for trafficking, as the law's priority is customs control and not overseeing the activities of museums and dealers.[17]

The National Stolen Property Act (NSPA) is another law that criminalizes the trafficking of illicit cultural property. However, this law was not designed to restrict importation or enable countries to make repatriation claims, and it's really only effective in prosecuting a narrow range of traffickers.[18] Under the NSPA, a claimant state may repatriate an object if it can prove that the object originated within its borders, and that it's monetary worth exceeds $5,000.[19] The law also requires that the receiving party knew the object "to have been stolen, converted or taken by fraud"[20], which means that dealers and traffickers can be subject to prosecution, but collectors and museums can escape charges of fraudulent activity with relative ease.

However, if it can be proven that a museum knowingly acquired an object with illicit origins, then the museum can be formally prosecuted by a claimant country. In order for an object to be regarded as illicit under the NSPA, it must have been exported in violation of the source country's cultural patrimony and ownership laws. These are not simply export controls,

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[17] Kaye, Lawrence M., 'Art Wars: The Repatriation Battle', *New York University Journal of International Law & Politics* 31, no. 1 (1998), p. 85.
[18] The NSPA was originally the 1919 National Motor Vehicle Theft Act, which prohibited interstate transport of stolen automobiles. The law was revised in 1934 to more broadly criminalize the illegal transport of property across state borders. Urice, Stephen K., 'Between Rocks and Hard Places: Unprovenanced Antiquities and the National Stolen Property Act', *New Mexico Law Review* 40, no. 1 (2010), 133.
[19] *National Stolen Property Act*, *U.S. Code* 18 (1934), §§ 2314.
[20] Op. cit., §§ 2315.

but laws that vest ownership of cultural materials in the state and restrict or prohibit the exportation of archaeological objects without explicit government permission. Ever since the 1977 case of McClain v. United States, the U.S. judicial system has taken a stance to uphold these types of laws.[21] The McClain case led to the prosecution of several dealers who had smuggled pre-Columbian artifacts out of Mexico. They were convicted under the NSPA because of the 1972 'Mexican Federal Law on Archaeological, Artistic and Historic Monuments and Zones', which declares that all undiscovered pre-Columbian artifacts are property of the state.[22] From this case the Fifth Circuit established the McClain Doctrine, which states that cultural property can be repatriated if the claimant state can prove the following criteria:

> (1) The object was discovered within its territory; (2) a patrimony law that unequivocally vested ownership of such an object in the State – even without physical possession – was in effect when the object was removed from that country; and (3) such foreign patrimony law is not so vague as to violate the due process requirements of the U.S. Constitution.[23]

The McClain Doctrine was later invoked as legal precedent in one of the most famous instances of repatriation from an American museum. In 1906 the Ottoman Empire established an umbrella law, which declared that the state had right of ownership over all objects of cultural patrimony discovered on public or private land. Once an object is clandestinely removed it

[21] Betts, Carrie, 'Enforcement of Foreign Cultural Patrimony Laws in U.S. Courts: Lessons for Museums from the Getty Trial and Cultural Partnership Agreements of 2006', *South Carolina Journal of International Law and Business* 4, no. 1 (2007), p. 79.
[22] Shelley Janevicius, Alessandro Chechi, Marc André Renold. 'Case Pre-Columbian Archaeological Objects – United States v. McClain', *Arthemis: Art-Law Centre, University of Geneva.*
[23] Op. cit.

becomes stolen property.[24] In the 1980s the Turkish government requested the Metropolitan Museum of Art to repatriate a collection of over 360 gold and silver artifacts known as the Lydian Hoard, which the museum had acquired in 1966 without valid provenance.[25] The museum had kept the collection hidden from the public for twenty years, which indicated its knowledge of the hoard's illicit nature.[26] The Turkish Government presented evidence that the artifacts came directly from the tombs of King Croesus of Lydia, and were exported subsequent to the enactment of the 1906 Ottoman law; thus the state met the requirements of the McClain Doctrine, and in 1993 was able to repatriate the collection under the NSPA.[27]

While laws such as the CPIA and NSPA are not ideal they are moderately effective for restricting trafficking. Besides these laws, museums remain free from government intervention in their acquisition practices. The situation regarding unethical acquisition has been improving due to the formation of stricter due diligence guidelines established by organizations such as the American Alliance of Museums (AAM), the Association of Art Museum Directors (AAMD), and the International Council of Museums (ICOM). However, these organizations have no authoritative power and can't do much more than blacklist museums that have violated their regulations.[28]

In 2008 the AAMD attempted to develop a mechanism for external oversight by creating a database called the 'Registry of New Acquisitions of Archaeological Material and Working of

[24] Ozel, Sibel, 'Under the Turkish Blanket Legislation: The Recovery of Cultural Property Removed from Turkey', *International Journal of Legal Information* 38, no. 2 (2010), p. 179.
[25] Gerstenblith, Patty, 'Acquisition and Deacquisition of Museum Collections and the Fiduciary Obligations of Museum to the Public', *Cardozo Journal of International and Comparative Law* 11 (2003), p. 409.
[26] Op. cit.
[27] Salem, Aisha, 'Finders Keepers? The Repatriation of Egyptian Art', *Journal of Technology Law & Policy* 10 (2005), p. 189.
[28] Vitale, p. 1837.

Ancient Art'.[29] The AAMD requests that all member museums use the database to report and justify acquisitions that don't conform to the AAMD Code of Ethics. Unfortunately, only 24 out of the AAMD's 243 members have registered any objects in the database, and less than 1,000 objects in total have been registered.[30] Ideally, this would mean that 90 per cent of the AAMD's museums have enforced stellar due diligence policies for the last seven years, but this is unlikely to be the case. In addition, many of the objects that have been registered lack important articles of information, and don't provide adequate justification for why they ought to be considered exceptions. This makes it clear that most museums won't abide by established ethical standards unless there are tangible repercussions.

Regardless, a number of museums have consistently opposed the illicit market. Despite the fact that Congress was slow to enact domestic legislation, 1970 has been adopted as the benchmark for cultural property acquisition. This means that most institutions will not acquire an object unless there is documented evidence that it left its country-of-origin before 1970, or that it was legally exported after 1970.[31] In April 1970 the University of Pennsylvania Museum of Archaeology and Anthropology was the first institution to announce that it would no longer acquire objects lacking legal provenance, a statement that became known as the Pennsylvania Declaration.[32] The 1970-rule was informally adopted by many more institutions in the following years, and has now been accepted as the international standard.[33]

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[29] https://aamd.org/object-registry/new-acquisitions-of-archaeological-material-and-works-of-ancient-art/browse, 'New Acquisitions of Archaeological Material and Works of Ancient Art', Accessed October 22, 2015.
[30] Op. cit.
[31] Prott, p. 3.
[32] Brodie, Neil, Jenny Doole, and Peter Watson, 'Stealing History: The Illicit Trade in Cultural Material', *The MacDonald Institute for Archaeological Research,* (2000), p.10.
[33] Op. cit.

II. Native American Cultural Property Repatriation from American Museums[34]

Despite the lack of effective legislation, the United States is regarded as a forerunner of cultural repatriation, largely for its implementation of the The Native American Graves Protection and Repatriation Act (NAGPRA). The initiative for this act began to gain support in the 1970s with the rise of the Indian Burial Rights Movement, which protested the "legacy of grave robbing, postmortem head hunting and unethical research."[35] This legacy was aided by a number of discriminatory federal laws, including the Antiquities Act of 1906, which categorized indigenous remains and historical objects discovered on federal lands as government property.[36] This meant that archaeologists were allowed to unearth burial sites and transfer any objects or remains to museums without consent from the deceased's family or affiliated tribe.[37] Such expeditions led to museums amassing hundreds-of-thousands of cadavers and millions of cultural objects, which were housed and displayed in conscious violation of Native American spiritual beliefs.[38]

Following the effective critique mounted by the Burial Rights Movement, efforts to draft a piece of legislation that would protect Native American cultural property escalated throughout the 1980s.[39] In 1986 proponents began outlining proposals, and twenty-six bills were drafted

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[34] This paper recognizes that North America's indigenous populations utilize a wide variety of terms for self-identification. Including, 'American Indian', 'Indian', 'First Americans', etc. For the purpose of consistency, 'Native American' and 'indigenous' will be the used as the principle reference terms in this paper.

[35] Riding In, James, 'Without Ethics and Morality: A Historical Overview of Imperial Archeology and American Indians', *Arizona State Law Journal* 24, no. 1 (1992), p. 25.

[36] American Antiquities Act, U.S. Code 16 (1906), § 431-433.

[37] Op. cit.

[38] Colwell-Chanthaphonh, Chip, 'Remains Unknown: Repatriating Culturally Unaffiliated Human Remains', *Anthropology News* (March 2010), p. 4.

[39] The initiative received backing from organizations such as the Association on American Indian Affairs (AAIA), the Native American Rights Fund (NARF), and the National Congress of the American Indian (NCAI). Keeler, Honor, 'Indigenous International Repatriation', *Arizona State Law Journal* 44, no. 2 (2012), p. 754.

before NAGPRA was formally introduced.[40] When the final draft was submitted the Senate passed the bill by voice vote, and the House of Representatives approved it by unanimous consent the next day. President George H. W. Bush signed the bill into law on November 23, 1990; thus introducing one of the most important pieces of legislation in the history of cultural politics.[41]

From a legal standpoint, NAGPRA dictates three primary goals: the protection of indigenous burial grounds; criminal penalties for trafficking in Native American remains and artifacts; and the repatriation of human remains and objects of cultural significance to their closest affiliated tribes and nations.[42] Under the law all federally-funded museums and federal agencies were required to review their collections and compile inventories of all Native American human remains and associated funerary objects; as well as summaries of all unassociated funerary objects, sacred objects, and objects of cultural patrimony. These summaries were to be completed in 1993 and the inventories in 1995.[43] Through research and consultation, museums and agencies were instructed to identify the lineal descendants or federally-recognized tribes with the closest affiliation to the remains and objects that were eligible for repatriation, and then return the materials in question for reburial, display, or active use. The law also established a governmental review committee to help resolve disputes between museums and tribes, and a national office to carry out the administrative responsibilities of the act.[44]

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[40] Timothy, McKeown, 'Implementing a 'True Compromise': The Native American Graves Protection and Repatriation Act after Ten Years', In *The Dead and Their Possessions: Repatriation in Principle, Policy, and Practice* (New York: Routledge, 2002) p. 108.
[41] Op. cit.
[42] Harms, p. 601.
[43] 25 U.S.C. §3003.
[44] Op. cit., §3006.

NAGPRA was an important milestone in the development of global repatriation policies. Beyond the scope of its legal obligations, it required museums to educate themselves on the contemporary cultures of the peoples that they were representing, and to recognize the validity of indigenous property rights. To this day NAGPRA is the most comprehensive piece of repatriation legislation in the world.[45] It influenced the repatriation policies of Australia and the United Kingdom[46], and provided a framework for the 'United Nations Declaration on the Rights of Indigenous Peoples'.[47]

Despite NAGPRA's success there were and still are many inherent problems with the law's drafting and implementation. Many tribal governments and museum experts are in agreement that while it is a "good" law, in the sense that it has good intentions, it doesn't function to its full potential.[48] The law was enacted as a piece of civil and human rights legislation, and although it had widespread executive support, museum workers and local tribal governments had little input into the bill's final construction.[49] As a result, the provisions of the act were strongly influenced by a drive for social justice, but don't take into account the practicality of enforcing a mandate of this scale.

It's no surprise that insufficient funding continues to be a significant obstacle for museums and tribes that are trying to create effective repatriation programs. While the law authorizes the Secretary of the Interior to provide funds to museums and tribes, funding wasn't

[45] Nafziger, James A. R., and Robert K. Paterson, *Cultural Law: International, Comparative, and Indigenous* (Cambridge: Cambridge University Press, 2010), p. 427.
[46] Keeler, p. 707.
[47] Op. cit., p. 706.
[48] Colwell-Chanthaphonh, Chip, 'The Work of Repatriation in Indian Country', *Human Organization* 71, no. 3, (2012), p. 287.
[49] McKeown, p. 108.

made available until 1994, which was one year before final inventories were due.[50] On an annual basis, the federal government only allocates $1.5 to $2.5 million in grants despite the NAGPRA Review Committee consistently recommending allocating $4 to $5 million in order to achieve full compliance.[51] When funding isn't available museums aren't able to conduct adequate research, host consultations, and are forced to neglect other responsibilities.[52] The initial lack of funding was exasperated by the demanding deadlines for the completion of summaries and inventories.

While the 1993 and 1995 deadlines were sufficient for the majority of museums there were still 58 institutions that requested extensions.[53] Among them was the Peabody Museum of Archaeology and Ethnology (PMAE) at Harvard University, which houses one of the largest anthropological collections in the world. The PMAE has been lauded for its repatriation efforts, but the institution also had difficulty meeting NAGPRA's required deadlines. In 1990 the museum had collections dating back more than 125 years with an estimated 12,000 sets of human remains that originated from 46 states.[54] In addition, it had approximately eight million indigenous objects to identify and classify.[55] As Barbara Isaac, a representative from the PMAE wrote, "Neither tribal members, nor key legislators were willing to accept that consulting and

[50] Chari, Sangita, 'Journeys to Repatriation: 15 Years of NAGPRA Grants, 1994-2008', *Museum Anthropology* 33, no.2 (2010), p. 210.
[51] National Parks Service, 'Native American Graves Protection and Repatriation Review Committee: Report to Congress, 1995-1997', (Washington D.C., U.S. Department of the Interior, 1998), p. 3.
[52] National Parks Service, 'Native American Graves Protection and Repatriation Review Committee: Report to Congress, 2009' (Washington D.C., U.S. Department of the Interior, 2009), p. 7.
[53] Isaac, Barbara, 'Implementation of NAGPRA: the Peabody Museum of Archaeology and Ethnology, Harvard', In *The Dead and Their Possessions: Repatriation in Principle, Policy, and Practice,* (New York: Routledge, 2002), p. 160.
[54] Op. cit.
[55] Op. cit., 161.

attributing cultural affiliation would require a time-consuming (and therefore expensive) exploration of the record available."[56]

The museum was only given a three-year extension for inventory completion, despite its substantiated request for eight years. It wasn't able to meet its second deadline and was denied another extension despite its excellent productivity record.[57] Afterwards, the museum was not allowed to apply for funding through the NAGPRA grant program, and was only able to complete the inventory process in 2001 due to increased financial assistance from the university.[58] In the end, the PMAE estimates that the cost of completing its inventory was $7 million.[59]

In addition to providing minimal monetary support, the federal government also failed to establish an effective bureaucratic system for assisting museums and tribal governments. Necessary tasks such as submitting Notices of Inventory Completion and Notices of Intent to Repatriate couldn't be published in the Federal Register because of serious understaffing in the NAGPRA National Office.[60] As a result, there has been a consistent backlog of unpublished draft notices and allegations of non-compliance awaiting investigation.[61] The federal government's unpreparedness was also demonstrated by the fact that the NAGPRA Review Committee wasn't appointed until 1992,[62] and civil penalty regulations didn't go into effect until 1997.[63]

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[56] Op. cit., 162.
[57] Op. cit., 163.
[58] Op. cit., 168.
[59] Op. cit., 164.
[60] Review Committee, 1995-1997, p. 5.
[61] National Parks Service, 'National NAGPRA Program: FY14 Final Report', (Washington D.C., U.S. Department of the Interior, 2014), p. 11
[62] McKeown, C. Timothy, 'A Willingness to Listen to Each Side: The Native American Graves Protection and Repatriation Review Committee, 1991-2010', *Museum Anthropology* 33, no. 2 (2010), p. 219.
[63] Review Committee, 1995-1997, p. 3.

The language of the act itself also created conflict, as it is often vague and confusing. Some states, such as Colorado, have resorted to passing supplementary legislation because the vagueness of the original act was hindering progress.[64] For example, NAGPRA makes "object(s) of cultural patrimony" and "sacred object(s)" eligible for repatriation, but these are subjective classifications that are dependent on the cultural histories of their affiliated tribes.[65] This means that museum workers are unqualified to categorize eligible objects unless they possess a comprehensive knowledge of hundreds of diverse belief systems.

This vagueness can also make it very difficult for tribes to claim ownership. NAGPRA states that claimants, "can show cultural affiliation by a preponderance of the evidence based upon geographical, kinship, biological, archaeological, anthropological, linguistic, folkloric, oral traditional, historical, or other relevant information or expert opinion."[66] However, because museums are granted final authority in determining whether or not an object is eligible for repatriation, claims can be dismissed if the evidence doesn't conform to the standards of the Anglo-American legal system. Tribal representatives say that a lack of involvement in determining cultural affiliation is NAGPRA's largest flaw.[67]

All of these complications have resulted in a very slow rate of progress. By 2010 there were still more than one million culturally unidentifiable funerary objects and 116,000 unidentifiable human remains in museum and federal agency collections.[68] While most of these objects could be identified through extensive research it is not as simple as identifying a

[64] Harms, p. 609.
[65] 25 U.S.C. §3001.
[66] 25 U.S.C. §3005(a).

[67] Colwell-Chanthaphonh, Chip, 'The Work of Repatriation in Indian Country', *Human Organization* 71, no. 3 (2012), p. 289.
[68] Colwell-Chanthaphonh, Remains Unknown, p. 4.

geographic location.[69] Most indigenous tribes have histories of migration, bifurcation, and inhabiting undefined borders, which can make genealogical tracking problematic. There are currently 566 federally-recognized tribes in the United States, and hundreds of non-recognized ones.[70] For a museum to identify the exact tribe that has the closest cultural affiliation with an unidentified object it would need unlimited time and resources.

It has been twenty-five years since NAGPRA was enacted. While many of it's inadequacies still persist, museums have for the most part adapted and reformed their policies to reflect the legal and ethical requirements of the law. While most would agree that enacting NAGPRA was a necessary step in advancing the rights of North America's indigenous populations, its construction and implementation left much to be desired. This doesn't necessarily mean that introducing legislation to regulate the acquisition or repatriation policies of museums is without merit, but one would need to have realistic expectations to ensure that the complications associated with NAGPRA are avoided.

III. The Repatriation of Holocaust-Era Artwork from American Museums

As museums struggled throughout the 1990s to comply with the requirements of NAGPRA another repatriation movement began inciting controversy worldwide. Survivors of the Holocaust and their heirs began to come forward with claims against museums for the possession of artwork that had been confiscated by the Nazis during World War II. In contrast to the Indian

[69] The NAGPRA Review Committee has stated that approximately 80 per cent of human remains could be identified with thorough research and consultation. Birkhold, Matthew, 'Tipping NAGPRA's Balancing Act: the Inequitable Disposition of 'Culturally Unidentified Human Remains under NAGPRA's New Provision', *William Mitchell Law Review* 37, no. 4 (2011), p. 2059.

[70] http://www.ncsl.org/research/state-tribal-institute/list-of-federal-and-state-recognized-tribes.aspx, National Conference of State Legislatures Federal and State Recognized Tribes, Accessed October 24, 2015.

Burial Rights Movement, the Holocaust-Era Repatriation Movement wasn't about cultural healing for a community, but legal restitution for individuals.

The intention of the Third Reich was to strip Jewish citizens of all of their assets, property, insurance, and art in order to liquidate them into the German economy before disposing of the original owners.[71] Hundreds of thousands of artworks were stolen from Jewish families, cumulatively worth an estimated $2.5 billion.[72] Unlike the chaotic plundering that is often associated with warfare, the Third Reich primarily used legal methods to coerce Jewish owners into voluntarily relinquishing their property.[73] Those who weren't coerced were often forced to flee and leave behind all possessions and records, or would sell their art to the Third Reich to pay the high taxes necessary to escape occupied territories.[74] Seized artwork was auctioned off, destroyed, absorbed into personal collections, or kept for Hitler's future *Führermuseum*.[75] Because the Nazis operated within the context of their own laws they created the façade that they had seized this work ethically, which meant that museums and collectors abroad could acquire the work in good-faith.[76]

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[71] Skinner, Katherine, 'Restituting Nazi-Looted Art: Domestic, Legislative, and Binding Intervention to Balance the Interests of Victims and Museums', *Vanderbilt Journal of Entertainment and Technology Law* 15, no. 3 (2013), p. 679.
[72] This equates approximately $20.5 billion in contemporary value. Bazyler, Michael J., *Holocaust Justice: The Battle for Restitution in America's Courts* (New York, New York University Press, 2003), p. 202.
[73] Cohen, Patricia, 'Museums Faulted on Restitution of Nazi-Looted Art', *New York Times,* 1 July, 2013.
[74] Gold, David, 'California Dreaming: The Continuing Debate in California Over the Constitutionality of Eliminating the Statute of Limitations on Holocaust-Era Art Repatriation Claims', *NYSBA Entertainment, Arts and Sports Law Journal* 2, no. 1 (2011), p. 27.
[75] U.S. House, Subcommittee on Domestic and International Monetary Policy, Trade, and Technology of the Committee of Financial Services. *Review of the Repatriation of Holocaust Art Assets in the United States: Hearing before the Subcommittee on Domestic and International Monetary Policy, Trade, and Technology of the Committee of Financial Services*, 109th Congress, July 27, 2006, p. 10.
[76] Skinner, 679.

After the war ended Allied forces discovered hoards of stolen art in Nazi strongholds all throughout Europe. In an effort to return the work to its rightful owners, the United States established the Repatriations, Deliveries, and Restitution Division.[77] The mission of this military division was to document and organize the discovered artworks, and return them to their proper countries. The assumption was that each European government would develop its own internal mechanism for returning the art to its original owners, but unfortunately very few countries were able to dedicate the resources needed to carry out this task.[78] The Division was shut down in 1948, and the matter remained dormant for decades.[79]

In the late 1990s the issue began to resurface, as the growth of digital technologies and online archives allowed public access to museum collections.[80] A wealth of new information was now available, and Jewish claimants began to reach out to museums throughout Europe and the United States to reclaim work that they believed they were legally entitled to.[81] The threat of lawsuits put pressure on museums and the American government to act quickly, and respondents took many proactive measures to address the issue, even if not all of their efforts were successful.

The matter received strong support from the Senate, House, State Department, and the Clinton Administration, so in the late 1990s proposals were submitted at Congressional hearings for setting new standards for museum acquisition policies.[82] However, proposals have been consistently struck down by collector lobbying groups as well as museum professionals who

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[77] Op. cit., 676.
[78] Op. cit.
[79] Op. cit.
[80] Op. cit., 677.
[81] Op. cit.
[82] *Review of the Repatriation of Holocaust Art Assets in the United States,* p. 2.

argue that the matter should be left in the hands of the museums.[83] To this day, there are no national laws that apply to the restitution of Holocaust-era artworks. While organizations such as the AAM and the AAMD have followed through in the creation of uniform codes of ethics for Holocaust-era artwork there are no mechanisms for enforcement and virtually no repercussions for neglect.[84] Due to technical defenses, such as the statute of limitations, it is incredibly difficult for claimants to reclaim artwork through litigation.

In the United States the statute of limitations for an individual filing suit for the recovery of stolen property is three years.[85] There are two doctrines for this regulation: the discovery rule and the demand and refusal rule. Under the discovery rule the clock begins ticking when the claimant discovered, or ought to have discovered the whereabouts of the object they wish to reclaim. The problem is that this is a very subjective standard, and museums can use this technicality to dismiss legitimate cases.[86] This is exemplified in the case of Seger-Thomschitz v. Museum of Fine Arts, Boston (MFA). Dr. Seger-Thomschitz is the heiress to the Austrian-Jewish collector, Oskar Reichel. In 2007 she entreated the MFA to grant her ownership of a valuable Kokoschka painting titled 'Two Nudes', arguing that in 1938 Reichel was coerced to sell the painting under duress, and proper title was never transferred.[87]

After an internal investigation the MFA concluded that it was entitled to keep the painting because its provenance was legally valid.[88] The MFA proceeded to commence an action against Seger-Thomschitz in district court to gain absolute ownership, and argued that all of her

[83] Thompson, p. 383, 399.
[84] Beltrametti, p. 232.
[85] Skinner, p. 686.
[86] Amineddoleh, Leila, 'The Extension of Statutes of Limitations for the Restitution of Nazi-Looted Art', *The Entertainment and Sports Lawyer* 31, no. 1 (2014), p. 26.
[87] Museum of Fine Arts, Boston v. Seger-Thomschitz (No. 09-1922) (2010), United States Court of Appeals, First Circuit.
[88] Op. cit.

claims were time-barred because she had passed the statute of limitations. The MFA argued that in accordance with the discovery rule, she ought to have reasonably known about the painting's whereabouts long before 2007.[89] Rather than judging her case based on its merits it was dismissed on a statute of limitations technicality and the court ruled in favor of the MFA.[90]

The demand and refusal rule is much more comprehensive. It dictates that the three-year statute begins to run once a claimant requests the return of an object, and is refused by the current possessor.[91] This means that if a Holocaust survivor asks a museum to return an artwork, and his request is denied, he then has three years to file suit against the museum. If this principle were the national standard, then restitution cases would be far simpler. However, New York is the only state to practice the demand and refusal rule.[92]

These are the most common obstacles faced by claimants in the United States. Many have proposed granting Holocaust-era claims special exemption from the statute of limitations, but no national legislation has been seriously considered. In response to the federal government's lack of action, the California legislature passed a bill in 2002 that eliminated the three-year statute of limitations for claims of Holocaust-era artwork from museums and galleries.[93] While this statute was ideal for claimants it was swiftly attacked by the federal government. After its implementation, the Ninth Circuit court of appeals declared that the statute was unconstitutional because it overstepped the bounds of state responsibility and conflicted with

[89] Op. cit.
[90] Op. cit.
[91] Amineddoleh, p. 26.
[92] California is an exceptional case. While the state still enforces the discovery rule, in 2010 the state legislature extended the statute of limitations to six years, and it begins from the point of *actual* discovery rather than when the claimant *ought* to have made the discovery. Gold, p. 27.
[93] Gold, p. 22.

the national government's exclusive right to form foreign policy.[94] While the court was sympathetic towards the cause it determined that the Executive Branch had sole authority in resolving war crimes.[95]

While the national government has done very little to facilitate replevin claims for Holocaust-era artwork, organizations such as the AAM and AAMD have been proactive in setting standards and publishing guidelines for how member museums should address the situation. In 1998 both organizations worked collaboratively with the State Department to host the Washington Conference of Holocaust-Era Assets, which was organized to discuss international standards for acquiring and repatriating confiscated artwork.[96] The AAMD introduced a set of eleven principles, known as the Washington Principles, which were closely tailored after their own ethical standards.[97]

In summary, the principles requested all signatories to identify, publicize, and restitute artworks that had been confiscated by the Nazis. Despite the non-binding nature of these principles, the majority of attending delegates were reluctant to accept them because they didn't want to establish the expectation that they would enact their own domestic legislation to enforce the principles.[98] To appease the attending delegates an opening paragraph was added, which stated that countries were free to "act within the context of their own laws" in addressing the matter.[99] This addition persuaded 44 countries to adopt the principles, but as a result their effect was severely mitigated.[100] With the exception of a few countries, notably Austria, the vast

[94] Op. cit., p. 23
[95] Op. cit.
[96] Thompson, p. 384.
[97] Op. cit.
[98] *Review of the Repatriation of Holocaust Art Assets in the United States*, p. 110.
[99] Op. cit.
[100] Op. cit.

majority of signatories created no effective laws, programs, or standards for enforcing the principles domestically.[101]

In order to compel their own members to abide by the principles, in 2003 the AAMD created the Nazi-Era Provenance Internet Portal, which is a searchable registry where member museums are able to submit information for objects in their collections that may have changed hands within Europe from 1933 to 1945.[102] The goal of this registry is to make provenance information publically available to aid potential claimants. While this project had significant support early on, interest in Holocaust-era repatriation began to wane during the mid-2000s. The initial goal was to have an estimated 140,000 potential objects registered in the database by 2009,[103] but as of October 2015 only 29,000 objects have been registered.[104]

While institutions within the United States have tried repeatedly to enforce uniform guidelines the fact of the matter is that without national legislation there can be no consistent policy. Implementing a law as comprehensive as NAGPRA may not be necessary, but claimants will continue to face unfair obstacles as long as the federal government expects thousands of museums to uniformly abide by a set of unenforced moral principles.

IV. A Theoretical Model for Regulating Museum Acquisition and Repatriation Policies

There is currently no consensus in the museum world regarding the best course of action to take in the international repatriation movement for archaeological and ethnological materials. A number of proposals have been submitted, but the reality is that there is no perfect solution that will satisfy all viewpoints and ideologies. Taking into consideration the successes and failures of

[101] Op. cit., p. 117.
[102] http://www.nepip.org/ Nazi-Era Provenance Internet Portal, Accessed October 24, 2015.
[103] *Review of the Repatriation of Holocaust Art Assets in the United States*, p. 113.
[104] Nazi-Era Provenance Internet Portal

how the United States legal system has addressed the Native American and Holocaust-era repatriation movements, as well as the current trajectory of the international cultural property repatriation movement, I shall propose a legislative model for how the U.S. government and the museum community could address the situation.

My proposition is to implement a law that would prohibit all museums that receive federal funding from accessioning cultural property that was exported from its source country in violation of that country's national patrimony and ownership laws. Any objects retroactively acquired outside of these parameters shall be eligible for repatriation if requested by the source country. This standard is established in the ethical codes of ICOM and the AAM, so it ought to cause little difference in the current acquisition policies of most reputable institutions. As the 'ICOM Code of Ethics for Museums' states, "Museums should abstain from purchasing or acquiring cultural objects from an occupied territory and respect fully all laws and conventions that regulate the import, export and transfer of cultural or natural materials."[105]

In order to enforce this policy and provide a mechanism for accountability, a database will be established in which museums shall submit provenance information and collection histories for all new acquisitions, regardless of whether or not they conform to the aforementioned standards. This is necessary because even when museums have conducted appropriate research, there will likely be situations in which provenance documentation will prove to be insufficient when assessed by a second party. There is also the possibility of forged and falsified information, which cannot be discovered if it's not accessible. Specific names or businesses that have garnered reputations for dealing in illicit materials may also be identified in collection histories.

[105] International Council of Museums Code of Ethics, 2013, p. 10.

The national database shall be similar to the Nazi-Era Provenance Internet Portal. It shall be publically accessible, but museums can request for specific articles of information to be privatized to uphold client confidentiality or other complications. However, if a foreign government makes a repatriation claim, then the museum must provide all information associated with the object in question unless doing so would constitute a direct threat to national security. This standard shall be judged by a governmental office that will be created as part of the law. This small office, similar to the NAGPRA National Office, shall be established within the Department of Homeland Security. Its staff shall be responsible for monitoring database activity, conducting investigations, assisting museums and foreign governments with questions, and assigning civil penalties to museums that fail to comply.

Under this law, before a federally-funded museum can acquire an object it must verify that its provenance is valid. The museum may conduct an internal investigation, but must make its research and findings available for review by the national office. If a museum wishes to accession an object that is outside the standards of the law, then it must receive permission from the object's source country. This would entail contacting the relevant ministry or department of the foreign government and providing all known information regarding the object in question. If the appropriate foreign authority grants the museum permission to accession the object, then it may do so. If the country refuses, then the museum may not legally acquire the object, unless it is accessioned with the agreed upon intention of repatriation.

The law shall also establish a review committee modeled from the NAGPRA Review Committee and the Cultural Property Advisory Committee. Its members will be comprised of museum professionals; experts in the fields of archaeology, ethnology, and related disciplines; experts in the international trade of cultural property; and experts in related fields of cultural

diplomacy. This committee shall meet several times a year to discuss progress and to openly hear testimony from parties affected by the law, and its members shall then submit an annual report to Congress with recommendations for improving or amending the law. The committee's primary responsibility will be acting as a mediator for disputes between museums and foreign governments. While the committee won't have power of arbitration, its members shall provide council to contesting parties so that they may determine the best course of action without incurring costly legal fess.

If a foreign government makes a repatriation claim for an object that was exported in violation of its national patrimony laws, then it must meet the three established criteria of the McClain Doctrine. Before making a formal request, representatives from the claimant state should visit the museum to discuss the objects that are legally eligible for repatriation, and how the objects will be exhibited after their return. Both parties should also discuss the possibility of compensation for repatriated items. While not required, it is common for foreign states to compensate museums through loans of valuable work, new research opportunities, and institutional alliances.[106]

After the consultation phase, the country shall submit a formal repatriation request detailing exactly what objects it would like to repatriate, and providing evidence for its ownership claim. Once a request has been received the museum shall have a period of six months to either accept or deny a request. This period should only be utilized if the museum plans to reject a request, and must compile evidence to support its decision. If a request is accepted, the museum will still have six months to physically repatriate the object unless there are outstanding complications or a mutually agreed upon reason for the delay.

[106] Beltrametti, p. 238.

Once an object has been successfully repatriated, then the museum must submit a Notice of Repatriation Completion in the Federal Register, which the national office will publish. The museum must also notify the national office of exactly what objects were repatriated, and the circumstances surrounding their return. This way the office can uniformly compile data for reporting and publication. To aid this process, the Government Accountability Office ought to be allowed to conduct surveys and evaluate museums in order to assess progress. Because the Government Accountability Office is an impartial agency it could provide a third-party perspective on the effectiveness of the legislation.

The system of civil penalties for failure to comply shall be very similar to the NAGPRA system. Failures to comply will include omitting or falsifying information, not acknowledging repatriation requests, and neglecting to report objects to the national database. Each instance of failure to comply shall constitute a separate violation, and anyone may bring forth an allegation to the attention of the national office. Allegations must indicate what specific provisions of the act the museum has failed to comply with, and provide evidence to support the allegation.

Once the national office has received an allegation it will acknowledge the receipt, notify the museum, and then conduct an investigation. The office investigator will then determine whether or not the museum's actions constitute a failure to comply. If a museum is assessed a civil penalty it may pay it, or attempt to contest it. The Department of Homeland Security will be responsible for determining the penalty amount, but the NAGPRA Review Committee has recommended an assessment based on an amount equal to 0.25 per cent of the museum's annual budget, or $5,000, whichever is less. In addition, a subsequent fine of $1,000 for every day after

the assessment that the museum continues to refuse compliance.[107] The amount of the penalty may seem too modest a fine, but the intention is not to burden smaller institutions with fines that will hinder their ability to operate, but just to cause enough inconvenience to ensure compliance. However, if a foreign country brings a lawsuit against a museum for illegal activity, then the museum can still be formally prosecuted.

If a repatriation claim is brought forth, museums shall not be obligated to pay for the expenses associated with the physical transport of the object, but there still ought to be a source of funding established to provide museums with grants for conducting research. Either there should be additional funding allocated to the Institute of Museum and Library Services, or a grant program specifically created for this legislation. Grants ought to be allocated on a rolling, non-competitive basis, and should be dedicated towards activities such as research, staff compensation, and consultation expenses. Because this law would require no systemic retroactive research, allocating $2 to $3 million annually ought to be sufficient.[108]

There are many additional measures that should be implemented outside of the requirements of the law. In-person and online training programs should be developed to educate museum workers on international repatriation proceedings, and additional funding should be allocated for collaborative projects that extend beyond basic compliance. However, even if all potential problems are accounted for unforeseen difficulties will still occur. Insufficient funding,

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[107] *Code of Federal Regulations*, Native American Graves Protection and Repatriation Regulations, title 43, subpart C, §10.12.

[108] These calculations are drawn from a 2007 NAGPRA funding report. In 2007 museums requested approximately $800,000 in grant funding for NAGPRA-related activities, and tribes requested about $2 million. Because the NAGPRA Review Committee consistently recommends allocating double the average annual amount, $2 to $3 million is an educated estimate for how much museums may require. Raether, Kelsea, 'NAGPRA Consultation/Documentation Grants: Analysis of Final Reports', *National NAGPRA Program,* 2012, p.11.

conflicting viewpoints, and legal complications are unavoidable. There is no perfect solution, but inaction is not the answer.

Conclusion

The primary lesson that NAGPRA demonstrated is that enacting demanding legislation without preparing a substantial support system is unfair both to the museums responsible for complying with the law, and the parties who wish to pursue repatriation. On the other hand, in the case of Nazi-era artwork, neglecting to enact legislation or set enforceable standards is not fair for those pursuing ownership. It is evident that our current laws regarding international stolen property are insufficient because none are constructed to apply towards museums. While it is difficult to regulate museums in the United States due to their status as private institutions, museums that receive funding from the federal government ought to be subject to higher standards of due diligence.

This proposal would cause little disruption in current museum acquisition practices. The cost of enforcement would be minimal, and it would make larger museums subject to public transparency. It recognizes the legitimacy of national patrimony laws, but doesn't require foreign states to repatriate property under the NSPA. This is important because if domestic ownership laws are not enforced internationally, then they can't effectively deter the activity of the illicit market. Enforcing fundamental due diligence standards for our museums sends the message that illicit trafficking will not be tolerated within U.S. borders, and that our museums truly are as trustworthy as our public believes.

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