

MUSEUMS AS CENTERS OF CULTURAL UNDERSTANDING

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The concept of a museum is primarily western in origin. It is a human construct designed to learn through the acquisition, preservation and interpretation of collections of objects.

However, a museum is more than a warehouse of objects. It is a place of ideas about objects. Whose objects? Whose ideas?

Traditionally, museums defer to the curators' judgment as the acquirers of the objects and the authenticators of the ideas emanating from the objects. However, exhibition labels seldom acknowledge specific curatorial authorship, thus leaving visitors with the impression that it is an Olympian institution rather than a mere individual speaking. People, not gods, make museums.

Even as the people who are the museum have become more professional during the past 50 years, their judgments and actions have been and are increasingly challenged. Curatorial

“expertness” does not trump public concerns about what is collected and how it is exhibited.

Because museums conserve the past, they are not oriented toward new ideas and new ways. Museums tend to stick with the familiar rather than reach out to the unfamiliar. Too often they justify the status quo as the upholding of standards and decry change as politically correct pandering. Instead of blinders, professionals of all types need peripheral vision. They have little perception of how others perceive them. In the case of museums we live in a time where the intellectuals and publics in our own and different cultures no longer unquestionably genuflect before the majesty of traditionally western oriented museums.¹

Times change. Even museum perspectives change with the times. We are in an era of rapid policy evolution with respect to the acquisition, retention, and exhibition of museum collections. Since World War II there has been a sea change in the attitude of large American museums. Art museums have

¹ Boyd, Museums As Centers of Controversy, 128 Daedalus 185 (1999).

widened their scope beyond western art and “classical” antiquities. Art historians who have moved into nonwestern fields begin to sound like cultural anthropologists. Meanwhile, archaeologists and cultural anthropologists are emerging from a period of guilt over their predecessors’ ideas and methods. It is a sign of growing respect for “otherness” that museums have moved away from the term “primitive” when referring to the cultural objects of Oceania, Africa, and the Americas. Even totem poles are rising in artistic estimation. In 1981 the Field Museum reopened its Northwest Coast Indian and Inuit exhibit with the counsel of an advisory committee of clan representatives. One of the committee members was commissioned to create a totem pole that was installed during a large public ceremony in front of the Museum. When the pole was not included in a book on public sculpture in Chicago, the Museum asked why not. The reply was that the pole was only a native carving. The next edition of the book included the totem.

With the ending of political colonialism and the rise of multinational cultural forums, the collection policies of museums have come under increasing scrutiny. We are in an age of cross-cultural divides about the acquisition, retention, and exhibition of museum collections. Museums cannot be impervious to these differing perspectives if they are to be intellectually and ethically credible in a world where the views of others also count.

According to a Christian Science Monitor feature on General John Abizaid, U.S. Commander in charge of Mideast Forces²:

“Abizaid often stresses the cross-cultural imperatives of the war on terrorism, and the importance of nonmilitary remedies.”

He told a Congressional committee: “What will win the global war on terrorism will be people that can cross the cultural divide.”

Museums need to cross cultural divides with respect to collections and exhibitions, and non-legal means are important in doing so. When a museum moves beyond cultural objects made

² See text at www.csmonitor.com/2004/0305/p01s02-usmi.html.

for the marketplace, more than connoisseurship and money are involved. In crossing cultural divides, we need to be respectful of other perspectives and places. The term “retentionist” as applied to source countries sounds like a pejorative and is inappropriate, especially because museums are also “retentionists.”

It is the nature of all people to be protective and proud of their heritage. Even in a global society, we live our lives locally. Tom Friedman used the metaphor of “The Lexus and the OliveTree” to make the point that while all people want some of the material benefits of globalism, they still treasure the heritage of place.

Understanding and mutual respect go a long way in bringing people together where there are differences. Universalism is more likely to be achieved through cross-cultural collaboration than through either unilateral or multilateral declarations.

Law changes to reflect the times even as it is rooted in the need for societal stability. Cultural property and cultural heritage

have different legal and societal meanings. The first suggests property law and the second human rights law. They are not, however, mutually exclusive, but integrating them across cultural divides calls for understanding and respect, open-mindedness and good will, and above all patient listening to each other.³

Both illegal and legal trading of cultural objects for financial purposes go back to time immemorial. As George Stocking points out:

“. . . material culture was, in a literal economic sense, ‘cultural property’. The very materiality of the objects entangled them in Western economic processes of acquisition and exchange of wealth.”⁴

However, we offend many when we view their cultural treasures only in economic terms. Such objects are beyond

³ Merryman, Cultural Property, International Trade and Human Rights, 19 *Cardozo Arts & Ent. L.J.* 51 (2001); Wilkie, Public Opinion Regarding Cultural Property Policy, 19 *Cardozo Arts & Ent. L.J.* 97 (2001); Hughes, The Trend Toward Liberal Enforcement of Repatriation Claims in Cultural Property Disputes, 33 *The Geo. Wash. Int'l L. Rev.* 131, 134-135 (2000); Shapiro, Repatriation: A Modest Proposal, 31 *N.Y.U. J. Int'l L. and Pol.* 95, 96-100 (1998); Gerstenblith, Identity and Cultural Property: The Protection of Cultural Property In The Unites States, 75 *B.U. L. Rev.* 559, 567-586 (1995); Merryman, Two Ways of Thinking About Cultural Property, 80 *Am. J. Int'l L.* 831 (1986); Merryman, Thinking About the Elgin Marbles, 83 *Mich. L. Rev.* 1881 (1985).

⁴ *History of Anthropology*, Vol. 3, Objects and Others, Essays on Museums and Material Culture, p. 5, University of Wisconsin Press (1985).

monetary appraisal. Indeed they are profaned when regarded in other than respected spiritual terms.⁵

So much for the preaching. How well do I practice it? Not all that well, but better than if I had not tried. I am clearer in my mind as to the acquisition and exhibition of museum collections. I am less clear about retention and repatriation of collections.

ACQUISITIONS

Starting in the early 1970s, the Field Museum's accession policy became very restrictive.⁶ This was triggered by both the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property⁷ and the Convention on International Trade in Endangered Species of Wild Fauna and Flora.⁸ Since the Field Museum focuses on environmental biodiversity as well as archaeology and ethnography, its accession policy provides that

⁵ O'Keefe & Pratt, *Law and Cultural Heritage*, Vol. 3, 839-840 (1989); Shapiro, *supra* note 3, at 97. *See by analogy* Rakotoarisoa, *Intangible Heritage: do we Have the Right?*, ICOM News #2 p.11, (2004).

⁶ U.S. v. McClain, 545 F.2d 988, 997 n.14 (1977).

⁷ *See* http://www.unesco.org/culture/laws/1970/html_eng/page2.shtml.

⁸ *See* <http://www.cites.org>.

the Museum and staff “shall be in full compliance with laws and regulations, both domestic and foreign, governing transfer of ownership and movement of materials across political boundaries.”

Similar institutions have similar provisions because they regularly do field work in other countries and need both work and transit permits. If the institution does not comply with the laws of the host country, its staff does not get permits. Moreover, these institutions are deeply concerned with the destruction of archaeological sites, cultural groups, and environmental habitats. In addition to basic research, they are increasingly drawn into issues of protection and preservation. For these reasons, American cultural and biological institutions nowadays adhere to the laws of the source nation, and movement into the U.S. primarily takes the form of loans, exchanges, and traveling exhibits. These institutions have changed as knowledge, needs, and values have changed.

Indeed, the law also changes. The recent decision in *U.S. v. Schultz*⁹ has made clear that the US will enforce foreign cultural patrimony laws.¹⁰ Three federal appeals courts — the 2nd, 5th and 9th circuits — have now taken this position.¹¹ It is noteworthy that the Egyptian law applied in *Schultz* provides “for licensure of certain archaeological missions, and for circumstances under which antiquities may be donated by the government to foreign museums in appreciation of those missions’ work.”¹²

National organizations of the American museum community opposed judicial recognition of cultural patrimony laws primarily on the legal grounds that U.S. courts do not enforce cultural property export restrictions of other countries.¹³

⁹ *U.S. v. Schultz*, 333 F.3d 393 (2nd Cir. 2003), *cert. denied*, *Schultz v. United States*, 157 L. Ed. 2d. 891 (2004).

¹⁰ For a proposed U.S. uniform state cultural patrimony statute, see Gerstenblith, *supra* note 3, at 641-88.

¹¹ *U.S. v. McClain*, 545 F.2d 988 (5th Cir. 1977), *rehearing denied*, 551 F.2d 52 (5th Cir. 1977), *and appeal after remand*, 593 F.2d 658 (5th Cir. 1979); *U.S. v. Hollinshead*, 495 F.2d 1154 (9th Cir. 1974). For discussion of these cases, see Hughes, *supra* note 3, at 138-44.

¹² *U.S. v. Schultz*, 333 F.3d 393, 402 (2nd Cir. 2003). This type of sharing is often referred to as “partage”.

¹³ *U.S. v. An Antique Platter of Gold*, 991 F. Supp. 222 (1997), *aff’d*, 184 F. 3d 131 (2nd Cir. 1999) (Brief of Amici Curiae in support of the appeal of Michael H. Steinhardt-American Association of Museums, Association of Art Museum Directors, Association of Science Museum Directors, and American Association for State and Local History). *See also* *U.S. v. McClain*, 545 F. 2d 991-992 n.1 (5th Cir. 1997); Merryman, *Cultural Property, International Trade and Human Rights*, 19 *Cardozo Arts & Ent. L.J.* 51, 52-61 (2001); Merryman, *The Free International Movement of Cultural Property*, 31 *N.Y.U. J. Int’l L. & Pol.* 1, 3-9, 13-14 (1988).

They argued that an export license is only relevant where imports are embargoed under the 1983 Cultural Property Implementation Act. That Act is Congress' limited implementation of the 1970 UNESCO Treaty. Pursuant to that legislation, the President, after consultation with the Cultural Property Advisory Committee, can restrict the import of specified archaeological and ethnographic objects where the President determines that such cultural property is in jeopardy from pillage.¹⁴ However, on June 28, 2004, the Association of Art Museum Directors published a "Report on Acquisition of Archaeological Materials and Ancient Art".¹⁵ "The report is the work of a Task Force comprised of AAMD members, and is part of a continuing process by which AAMD examines professional practices for the acquisition and display of works of art in all fields". The report affords acquisition guidelines for members. The guidelines include the following:

¹⁴ 19 U.S.C. §2602 a(1)(A).

¹⁵ See <http://www.aamd.org>.

II. A. 2. “Member museums should make a concerted effort to obtain accurate written documentation with respect to the history of the work of art, including import and export documents. Member museums should always obtain the import documentation when the work of art is being imported into the U. S. in connection with its acquisition by the museum.”

II. D. “1970 UNESCO Convention”

“In recognition of the November 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import and Export and Transfer of Ownership of Cultural Property, member museums should not acquire any archaeological material or work of ancient art known to have been “stolen from a museum, or a religious, or secular public monument or similar institution” (Article 7b of the Convention). In addition, member museums should not acquire any archaeological material or work of ancient art known to have been part of an official archaeological excavation and removed in contravention of the laws of the country of origin.

“Member museums should not acquire any such works of art that were removed after November 1970 regardless of any applicable statutes of limitation and notwithstanding the fact that the U.S. did not accede to the Convention until 1983.”

Although not inclusive of ethnographic and other cultural property covered by UNESCO Treaty, these AAMD guidelines constitute a significant ethical step forward in reducing illegal trade in cultural objects.

Instead of fighting a losing legal and public relations battle against source countries, the movement of cultural property will be greatly advanced by the cooperation and respect exemplified in the AAMD Guidelines.

For example, source country patrimony laws might be modified to authorize export of some objects to foreign museums and collectors. Such legal exportation would result in greater dissemination of knowledge, accurate provenance, and elimination of damage to the objects as well as the sites. Moreover, the sale proceeds from legal exports could fund local museums and site protection and preservation.¹⁶ But the question is: will American museums and collectors respect such liberal laws or claim they are merely an exercise of police power which US courts should not enforce? It is American refusal to

¹⁶ For an extensive discussion on this approach, see the Japan Society website at <http://www.Japansociety.org> for a transcript of April 9, 2003, "Cultural Property Forum: The Export Policies of China, Korea, and Japan."; Merryman, Two Ways of Thinking About Cultural Property, 80 Am. J. Int'l L. 831, 846-849, 852-853 (1986). See also Merryman, Cultural Property, International Trade and Human Rights, 19 Cardozo Arts & Ent. L.J. 51, 52-58 (2001) (limit source country retention to national "treasures"); Rudenstein, Cultural Property: The Hard Question of Repatriation, 19 Cardozo Arts and Ent. L. J. 69, 80-82 (2001); Hughes, *supra* note 3, at 145-46; Pearlstein, Claims For The Repatriation Of Cultural Property: Prospects For A Managed Antiquities Market, 28 Law & Pol'y. Int'l Bus. 123, 140-150 (1996) (proposal for a managed, self-policing antiquities market).

recognize any legal limitation on collecting that has driven source countries to enact wall-to-wall patrimony laws.

As the AAMD Guidelines demonstrate, the time has come to respect the perspective of site countries and to recognize the legitimacy of their concerns. Museum associations are churning out ethics codes that espouse such respect even though actions belie that rhetoric. Consequently, aggrieved groups must resort to confrontation as in the case of Native Americans and Holocaust survivors.¹⁷ Ethical credibility requires that dealers, collectors, academics, and museum professionals of all perspectives must now talk and work together actively to implement the ethics they separately espouse.¹⁸ Ethically we have a long way to go, however. In a New York Times, August 20, 2004, story on the return of a stolen Egyptian relief, Martin D. Ficke, a special agent for Immigration and Customs Enforcement, is reported as commenting that “New York continues to be a hub of art smuggling through its airports and

¹⁷ Boyd, *Museums As Centers of Controversy*, 128 *Daedalus* 185, 190-92 (1999).

¹⁸ Wilkie, *supra* note 3, at 102-104; Merryman, *supra* note 13, at 9-14.

seaport” and specifically is quoted as saying “There’s a market in museums, auction houses, curators...And that keeps us pretty busy.”¹⁹

Ethics require more of us than the law requires.²⁰ Ethically all American collectors have the joint responsibility to act affirmatively and voluntarily to stop illicit trade.²¹ Associations of museums, dealers, and private collectors need a joint statement on good practices which is forthright and clear. If all American collectors conduct themselves ethically, we need not fear the redeployment of the US Customs Art Fraud squad to fight terrorism and financial fraud.²² Indeed, American collectors will be in the vanguard of General Abizaid’s legion of people who can cross the world’s cultural divides.

Site countries and museums are publishing inventories of cultural objects and sites, and web lists of stolen objects are

¹⁹ Pogrebin, *Stolen Artwork From Temple Will Be Returned to Egypt*, N.Y. TIMES, Aug. 20, 2004, at A23.

²⁰ Boyd, *Museum Accountability: Laws, Rules, Ethics and Accreditation*, 34 *Curator* 165, 173-174 (1991).

²¹ *See generally* Messenger, *The Ethics of Collecting Cultural Property* (2nd ed.) (1999); *Ethical Considerations and Cultural Property*, 7 *Int’l Journal on Cultural Property* #1 (Special Issue - 1998).

²² D’Arcy, *U.S. Customs art squad reassigned to war on terror*, *The Art Newspaper* (London) Jan. 2004.

proliferating²³, so that it is difficult to make the case for a good faith purchaser. The media thrive on art theft. To cry foul, a foreign consul need only go to the media in the U.S. locality where a museum, a dealer, or a collector holds the object. Public shaming can often bring about repatriation.²⁴

Attitudes are also shifting in other cultural property importing countries. The Wall Street Journal of February 18, 2004, reported that:

“Earlier this month saw ‘Not for Sale,’ a two-day Swiss-British conference, held in Geneva, on the traffic in artifacts from Iraq, Afghanistan and elsewhere. Bringing together an unusual group of antiquities dealers, collectors, academics, museum professionals, politicians, diplomats and law-enforcement officials from around the world, it was organized to discuss the implementation of new laws passed by Britain and Switzerland, and to consider strategies to better policing and tracking down of illegally excavated as well as stolen antiquities.

“Both countries were known for being clearinghouses for stolen antiquities. To rectify that, they are now acceding

²³ See ICOM Red Lists of African Archaeological Cultural Objects at Risk, Latin American Cultural Objects at Risk, and Emergency List of Iraqi Antiquities at Risk at <http://icom.museum/redlist>; Culture Without Context, Newsletter of the Illicit Antiquities Research Centre at <http://www.mcdonald.cam.ac.uk/IRAC/cwoc>; Pickard, Policy and Law in Heritage Conservation, 320-323 (2001) (European Conventions on Protection of Architectural (Granada) and Archaeological (Malta) Heritage); Hamma, Finding Cultural Property Online, 19 Cardozo Arts & Ent. L.J. 125, (2001); Bibas, The Case Against Statutes of Limitation for Stolen Art, 103 Yale L.J. 2437, 2460-2469 (1994). For additional links dealing with illicit trade in cultural property, see ICOM Useful Links at http://www.icom.museum/traffic_links.html.

²⁴ Wilkie, *supra* note 3, at 101-103; Shapiro, What The New Millennium Might Bring, 19 Cardozo Arts & Ent. L.J. 105, 106 (2001).

to the (UNESCO) Convention (bringing to 102 the number of countries acceding to the Convention). In addition, last December Britain passed the Dealing in Cultural Objects (Offences) Act, which makes it illegal to knowingly deal in stolen artifacts. ...

“In addition, the two countries have agreed on the need for more cooperation among art professionals, academics and law-enforcement agencies; to set up expert task forces to work with law enforcement; and to create databases to track stolen artifacts.”²⁵

REPATRIATION

The UNESCO Treaty applies to acquisitions made after a country implements the Treaty.

What about museum collections acquired prior to that time?

I am less sure about what you do when a museum is requested to repatriate a cultural object(s) it has held for a long time. I do know that stonewalling will not work in the global information age. It is better to be open and to seek to build a relationship with the claimant.²⁶

²⁵ Zainab Bahrani, *British and Swiss Get Tough About Smuggling In the Fray*, WALL ST. J., Feb. 18, 2004.

²⁶ Boyd, *Museums As Centers of Controversy*, 128 *Daedalus* 185, 197-199 (1999).

Like the UNESCO Treaty, the AAMD Guidelines apply to prospective acquisitions. Nevertheless, the Guidelines set forth good practice with respect to prior acquisitions:

I. D. “AAMD recognizes that some works of art for which provenance information is incomplete or unobtainable may deserve to be publicly displayed, preserved, studied, and published because of their rarity, importance, and aesthetic merit. AAMD affirms that art museums have an obligation to such works of art, which in the absence of any breach of law or of these principles may in some cases be acquired and made accessible not only to the public and to scholars but to potential claimants as well.”

II. F. “If a member museum gains information that establishes another party’s claim to a work of art acquired after the date of this Report, even though this claim may not be enforceable under U.S. law, the museum should seek an equitable resolution with the other party. Possible options that should be considered include: transfer or sale of the work of art to the claimant; payment to the claimant; loan or exchange of the work of art; or retention of the work of art.”

Similarly, the Code of Ethics of the International Council of Museums²⁷ calls for dialogue:

“4.4 Return and Restitution of Cultural Property

“ ...

“In response to requests for the return of cultural property to the country or people of origin, museums should be prepared to initiate dialogues with an open-

²⁷ See <http://icom.museum/ethics.html#4>.

mindful attitude based on scientific and professional principles (in preference to action at a governmental or political level). In addition the possibility of developing bilateral or multilateral partnerships with museums in countries that have lost a significant part of their cultural or natural heritage should be explored.”

This section intimates that it is preferable for museums to take the initiative “based on scientific and professional principles” rather than to leave it to governments to act based on political considerations which are more likely to take precedence over cultural policy concerns.

What happens if you cannot reach an AAMD “equitable resolution” with a claimant or develop an ICOM “partnership” with other museums? There is always recourse to impartial conflict resolution through conciliation, mediation, arbitration, and litigation. This is easier said than done. How do you get parties to the table and what principles and laws might apply?

What principles and laws govern repatriation?

Do they apply *ex post facto*?

There are various relevant declarations, but usually they are neither explicit nor universally recognized.

Two examples of such declarations are the Declaration on the Importance and Values of Universal Museums and the Draft Declaration on the Rights of Indigenous People.

The Declaration on the Importance and Value of Universal Museums²⁸ issued in December 2002, and signed by the directors of 19 U.S. and Western European museums — reads in part:

“The international museum community shares the conviction that illegal traffic in archaeological, artistic, and ethnic objects must be firmly discouraged. We should, however, recognize that objects acquired in earlier times must be viewed in the light of different sensitivities and values, reflective of that earlier era. The objects and monumental works that were installed decades and even centuries ago in museums throughout Europe and America were acquired under conditions that are not comparable with current ones.

“Over time, objects so acquired — whether by purchase, gift, or partage — have become part of the museums that have cared for them, and by extension part of the heritage of the nations which house them. Today we are especially sensitive to the subject of a work’s original context, but we should not lose sight of the fact that

²⁸ 57 ICOM News #1 at 4 (2004) (The signers of the Declaration are: The Art Institute of Chicago; Bavarian State Museum, Munich (Alte, Pinakothek, Neue Pinakothek); State Museums, Berlin; Cleveland Museum of Art; J. Paul Getty Museum, Los Angeles; Solomon R. Guggenheim Museum, New York; Los Angeles County Museum of Art; Louvre Museum, Paris; The Metropolitan Museum of Art, New York; The Museum of Fine Arts; Boston; The Museum of Modern Art, New York; Opificio delle Pietre Dure, Florence; Philadelphia Museum of Art; Prado Museum, Madrid; Rijksmuseum, Amsterdam; State Hermitage Museum, St. Petersburg; Thyssen-Bornemisza Museum, Madrid; Whitney Museum of American Art, New York; The British Museum, London.

museums too provide a valid and valuable context for objects that were long ago displaced from their original source.

“ ...

“Calls to repatriate objects that have belonged to museum collections for many years have become an important issue for museums. Although each case has to be judged individually, we should acknowledge that museums serve not just the citizens of one nation but the people of every nation...”

While it is true that the foregoing is a unilateral declaration by the directors of 19 significant western art museums and that it is particular rather than universal in approach, it, nevertheless, is a noteworthy statement of the museum “retentionist” view of repatriation. The declaration would carry greater bona fides if it were explicit as to the action the signers are now taking to stop current illegal traffic in cultural objects, such as requiring export licenses as a condition precedent of new acquisitions.²⁹ By referring to prior purchases and gifts of collections, the Declaration raises appropriate legal issues to be considered from differing cultural perspectives when the acquisition took place.

²⁹ As to these bona fides see Petridis, *Exhibition Review: Arts of Africa, Asia, Oceania, and the Americas. Musée du Louvre, Pavillon des Sessions, Paris, France*, *African Arts* 34, 3 (2001): 74-77, 95-96.

To be truly universal, museums need to look beyond their own cultural traditions and laws to those of the source nation as well. In this way all the laws applicable at the time of prior transactions can be considered. This more universal approach is reflected in Article 12 of the Draft Declaration on the Rights of Indigenous People (1994)³⁰:

“Indigenous peoples have the right to practice and revitalize their cultural traditions and customs. This includes the right to maintain, protect, and develop the past, present and future manifestations of their culture, such as archaeological and historical sites, artifacts, designs, ceremonies, technologies and visual and performing arts and literature, as well as the right to the restitution of cultural, intellectual, religious and spiritual property taken without their free and informed consent or in violation of their laws, traditions and customs.”

Applying Article 12 to repatriation cases would not be inconsistent with U.S. and European law. It is settled law in the western civil and common law that transactions can be vitiated in the case of fraud, undue influence, mistake, and theft.

It is true that many contested objects have been in museum collections for long periods of time. There is no legal

³⁰ See [http://www.unhchr.ch/huridocda/huridoca.nsf/\(Symbol\)/E.CN.4.SUB.2.RES.1994.45.En?OpenDocument](http://www.unhchr.ch/huridocda/huridoca.nsf/(Symbol)/E.CN.4.SUB.2.RES.1994.45.En?OpenDocument)

consensus as to when a claim for restitution of cultural property is barred by time. Courts consider what is equitable under the circumstances.³¹

Given the reluctance of courts to enforce stale claims, it is important to make a persuasive case for repatriation on the merits. Justifiable bases for repatriation are comprehensively set forth in Volume 3 O'Keefe and Prott's 1989 seminal treatise, *Law and the Cultural Heritage*.³²

Museums cannot hide behind fiduciary duties where a good case for repatriation is made. U.S. museums have deaccession policies which are subject to the oversight function of the attorney general in the state where the museum is incorporated. When a museum governing board takes action to deaccession for purposes of repatriation, the attorney general should be apprised of the action and the rationale for it.

Since the western museum *raison d'être* is to preserve and protect objects, the claimant should demonstrate that the objects

³¹ Bibas, *supra* note 23.

³² *See also* Shapiro, *supra* note 3, at 103-105.

when transferred will be inalienable and, consistent with the claimant's traditions, will be under the perpetual care of a recognized cultural custodian and will be appropriately accessible.

Given the dangers of terrorism, war, civil disturbance, natural disasters, and inadequate funding for facilities and storage, the museum and claimant should work out an agreement by which some of the objects remain deposited with the repatriating museum so that if a disaster occurs in either place a portion of the collection will be saved.

If the museum and the claimant cannot mutually agree as to the disposition of the objects, an impartial third party could conciliate, mediate, or arbitrate. Coming, often as strangers as well as protagonists, from different perspectives makes it hard for the parties to agree on a method of dispute resolution which both parties would consider impartial. Judicial litigation is a last resort.

Although claiming to be internationalists, American museums may not be willing to utilize an international forum. For example, Article 4 of the 1976 Convention on the Protection of the Archaeological, Historical, and Artistic Heritage of the American Nations provides for an Inter-American Council to settle disputes among the parties to the Convention.³³ The U.S., however, is not a party to the Convention.

My own repatriation experience relates to Native Americans. In the late 1980s I was asked by the American Association of Museums to participate with a few museum colleagues in discussions with Montana Congressman Melchert's administrative assistant Clara Spotted Elk. She was interested in how Congress might reconnect Native Americans with their tribal heritage residing in museum collections. Many of these collections are located far from where tribes live, and also,

³³ 15 Int'l Legal Materials 1350,1351 (1976). *See also* Merryman, International Trade and Human Rights, 19 Cardozo Arts and Ent. L. J. 51, 52-58 (European Court of Justice), 61-64 (European Court of Human Rights) (2001); Reppas, The Deflowering of the Parthenon: A Legal and Moral Analysis on why the 'Elgin Marbles' must be returned to Greece, 9 Fordham Intell. Prop. Media & Ent. L.J. 911, 954-975 (1999) (related regional and international laws); Gegas, International Arbitration and the Resolution of Cultural Property Disputes: Navigating the Stormy Waters Surrounding Cultural Property, 13 Ohio St. J. On Disp. Resol. 129, 151-166 (1997) (arbitration as the proper forum); Prunty, Toward Establishing an International Tribunal for the Settlement of Cultural Property Disputes: How to Keep Greece From Losing its Marbles, 72 Geo. L.J. 1155, 1167-1182 (1984) (proposed international court for cultural property dispute settlement).

sadly, tribal members were often barred access to collection storage.

Following those discussions, Michael Fox, then Director of the Heard Museum, proposed the Phoenix Dialogue consisting of 12 people — 6 Native Americans, 3 archaeologists and anthropologists, and 3 museum people. The Dialogue was the prelude to NAGPRA. Although there was a push on the part of the Native Americans and the other two museum representatives to file a unanimous report, the archaeologists dissented in part. As one of the museum members, I filed a separate opinion to the Dialogue report which dissented on the issue of applicable substantive law. I also set forth my individual concern in May 14, 1990, testimony before the U.S. Senate Committee on Indian Affairs.

In part I said:

“...I fully subscribe to the portions of the majority report relating to the role and responsibilities of museums and the exchange of information between museums and Native American groups. I also fully agree to the need for an impartial process to resolve disagreements. I depart from the Panel’s proposal for ex post facto change of the

substantive law applicable at the time Native American remains and cultural objects came into the possession of museums and the law applicable to Museum fiduciary duties respecting the stewardship of collections. I believe that all pre-existing legal standards and rights, including those existing under Native American customary law, must be respected and considered in the resolution process. To make major shifts now in the applicable substantive laws would in my judgment bring results far beyond the ability of all of us to foresee.

“During the dialogue, I was impressed by the understandable concerns of Native Americans about the insensitive treatment by some museums of their cultural heritage. I also was strengthened in my conviction that generally museums have played, and continue to play, a major role in multicultural learning in a pluralistic society.”

“Even with continuing cooperative working relationships, I know there will be times when differences arise which must be resolved impartially and fairly. In a democratic society, there must be an accessible process through which to weigh and resolve such differences in an open and constructive manner. In the Dialogue the view was clearly expressed that Native Americans have not fared well in federal tribunals and that a local process would be preferable. At the Field Museum we have developed a policy which provides a local process. It provides for conciliation, impartial dispute resolution, and application of Native American as well as other pertinent law. The Field Museum “repatriation” policy tries to balance Native American concerns with the Museum’s threefold concerns about collection preservation and scholarship, the fiduciary duty for collections, and the scholarly and public need to understand the sum as well as the parts of the human condition in an increasingly interdependent world.”³⁴

³⁴ Hearing Before Senate Select Committee on Indian Affairs, 5/14/90, pp. 119-121.

I then went on to propose in some detail a possible legislative mandated alternative dispute resolution process which would be subject to judicial review.

“...Any legislation ought to contain a three-step process to encourage conciliation, decision, and finality. Legislation should first encourage and then facilitate good faith efforts by the parties to reach mutually agreeable solutions. Failing voluntary resolution, an impartial administrative tribunal should be available to resolve the differences. Finally, explicit provision must be made for judicial review of the tribunal’s decision in order to provide finality and to satisfy constitutional requirements.

“Any tribunal should be a truly impartial decision mechanism. Such a tribunal should be made up of equal numbers of Native Americans and museum professionals. Neither group should be given greater representation in order to preserve the tribunal’s impartiality and meet the test of procedural due process.

“The impartial panel should be given latitude as to how it crafts its decision with respect to possession and stewardship of the materials in question. Legally and philosophically, both museums and Native Americans hold cultural material of prior generations in trust for future generations. Neither should be free to dispose of the material without restrictions. Accordingly, the panel should have the latitude to order reconsecration, repatriation with conditions, continued study of the objects, joint custody, or any combination of these possibilities.

“Ultimate judicial review of the resolution process is essential to assure constitutionality of an administrative tribunal. Such judicial review should generally defer to the

factual findings made by the administrative tribunal. All adjudication of the parties' relevant legal rights, on the other hand, must be subject to *de novo* review.

I believe that "standing" to initiate any dispute resolution process should be broadly defined to include any descendant group which is biologically and/or culturally affiliated with the original group. I also believe that any individuals who have any reasonable or good faith interest whatsoever, be it scientific, social, or otherwise, should be permitted to submit written and oral statements regarding any claim. Nevertheless, there needs to be a process to aid the Museum and tribunal to determine which claimant among several may have the strongest claim.

With respect to the standards for repatriation, I caution against legislation regarding the appropriate "burden of proof." Such legislation may very well result in *ex post facto* alteration of pre-existing substantive rights. Repatriation based on such legislated standards could constitute a taking under the Fifth Amendment. At most, the legislation should simply outline the order in which the parties are to submit arguments and proofs.

I believe that all the existing appropriate legal standards should be a part of the adjudicating process. The panel must consider Native American and state and federal law. Within each of these types of law, the panel must consider varied concepts of property law, constitutional law, and contract law. The panel must also consider the different rights uniquely held and the obligations owed by each of the interested individuals, groups, museums, sovereign and quasi-sovereign entities. In particular, the panel must be cognizant of the legal fiduciary responsibility for conserving and protecting collections."³⁵

I concluded my testimony by stressing the role of museums

³⁵ *Id.* at 124-127.

in advancing cross cultural understanding:

“As you approach this complex situation, I hope you will consider the enormous contributions museums have made over centuries to knowledge and education. As human institutions, they have their failings as all humans do. Yet it is because of their central mission of collecting that we have preserved the cultural history of so many people. Museums have made extraordinary contributions to our understanding of each other, as well stated by Walter Echo-Hawk when he wrote in 1986:

‘Since their inception, museums in the United States have had a relationship with Native Americans that has been both beneficial and antagonistic. Museums played a vital role in the preservation of Native American culture during crisis periods in which the federal government actively sought to assimilate the Indian into the mainstream of American Society.

‘Today, these collections provide a means for all Americans to better understand, appreciate, and respect past and present-day American Indians. ... Museums have played, and can continue to play a role as a bridge between cultures.’

“And Mr. Echo-Hawk correctly concludes that, ‘The relationship between museums and Indians has not always lived up to its fullest potential.’”³⁶

At best my dispute resolution proposal and ex post facto substantive law argument were perceived as arcane. And so NAGPRA came into being with only a few of the larger

³⁶ *Id.* At 128-129

anthropological/archaeological museums expressing reservations as to some of its provisions.

Suffice it to report, that NAGPRA has brought museums and tribes closer together. While there is potential constitutional “takings” vulnerability in the law, no museum has successfully challenged the act on that ground. The Field Museum trustees are greatly troubled by the fact that the law does not prohibit tribes from reselling repatriated cultural objects. As a consequence, the Field staff has been instructed by the Board to negotiate an inalienable restriction with the tribe.

Since Congress appropriated inadequate funds to carry out the legislation, The Field Museum provides the equivalent of one coach airfare to enable a tribal representative or representatives to visit the Museum. When tribal representatives visit, they are put in touch with Chicago’s American Indian Center and the Museum’s Native American trustee.

Whenever the Museum repatriates, the Illinois Attorney General is notified first, and the Board itself officially repatriates

by resolution. In some instances the Museum is asked by tribes to hold repatriated objects indefinitely because they either do not have or cannot agree on an appropriate depository.

Because NAGPRA applies only to U.S. museums, private collectors who desire their collections to go intact to an institution must export them to a foreign museum. Ironically, the U.S. may need export controls on Native American collections. On the other hand, some foreign museums are voluntarily repatriating Native American objects as well as remains.

EXHIBITIONS

Museums need to be open to the representatives of the cultures represented in their collections. In particular, joint ventures build respect and mutually beneficial relationships. The classic case in point is the longtime relationship of the Oriental Institute of the University of Chicago with Egyptian scholars and governmental authorities. Joint research and exhibit ventures with source countries should be the norm and are especially crucial with respect to encyclopedic museum collections.

When it creates exhibits, the Field Museum includes representatives of the cultures and environments encompassed in the exhibits.

For example, in the early 1900s the Field Museum purchased a Maori Meeting House from an Englishman who had purchased it from a German who had acquired it in New Zealand. The current curator was concerned about how the present day Maori from the town of origin would feel about the Museum's possession of the House. The Museum connected

with the Maori whose forbears were from that House. Young Maori were engaged to rehabilitate the House. The Museum received long-term loans of portions of the House which remained in New Zealand. With the help of a corporate sponsor and the New Zealand government, a good sized delegation of Maori came to Chicago for the rededication. Forty-eight hours before the event the Maori entered into an extensive palaver in their hotel. Some argued for repatriation of the House. The final vote was in favor of the House staying at the Field Museum. The young Maori felt it was their joint project with the Museum and the elders argued that this is an opportunity to educate people who do not know who the Maori are.

The Maori exhibit team was greatly interested in the Museum's Pawnee Earth Lodge which was built jointly with a Pawnee Advisory group. The Maori were impressed that the Earth Lodge is used for public programs, so they insisted that the Museum make the Meeting House available for meetings just as an active House would function.

In another instance, the Field Museum was approached by a large American foundation which felt that the Museum has a major African collection and that Museum might be willing and able to remount an exhibit from the point of view of Africans and African-Americans. The exhibition team was co-headed by an art historian whose father was a cultural leader (sultan) in the Cameroons and an African American community activist. Several local African Americans on the Advisory Committee wanted the Museum to dismantle the Egyptian exhibit which had just opened because it did not conform to their view. The Museum did not do so. In one section of the Africa exhibit a label explains that a particular group of objects were taken from their original location by a British punitive expedition.

When exhibiting human remains and sacred objects from foreign countries, the Field Museum looks to the exhibition policies of those countries and the cultural practices of the people represented.

Recognizing the importance of place in understanding cultural context, both the Egyptian and African exhibits at the Field Museum explore how the environment influences culture and how culture impacts the environment.

Since the future of the Field Museum depends on cross-cultural relationships globally as well as locally, the Museum's mission statement reflects this interdependency. The section entitled "Collections: World-Wide Knowledge Database" concludes by stipulating that

"In discharging its collection trusteeship, the Museum recognizes the special relationship it has with the people whose cultures and habitats are represented in the collections. We will nurture these special relationships so together we can enhance greater understanding of cultural traditions and environmental surroundings for the benefit of all humankind."

Another section designated "Linkages-Working With Others" asserts:

"The Museum has an obligation to seek out and collaborate with researchers and teachers who reside in areas from which our collections come."

Finally, the last section called: “Cultural Understanding and Mutual Respect: Listening to Each Other” concludes that:

“The Museum subject matter directly relates to the great issues of the present and the future: environmental and cultural diversity and their interrelationships. There are differing scholarly and public viewpoints on these concerns. While the Museum does not take institutional positions on these issues, it must serve as a center of free inquiry, a marketplace for multiple points of view on these matters. In doing so it serves as a forum where relevant controversy can be aired. In this way the Museum can be a ‘door in the wall’ of our differences and inspire greater knowledge, understanding and respect for our varied natural environments and cultural heritages”

CONCLUSION

If it seeks to be international, a museum needs to be inclusive rather than exclusive. It is a custodian of collections for diverse publics and environments. Where the museum purports to have a multicultural mission, it must by definition embrace culturally diverse perspectives. Scholarly research and exhibits will be enriched by this universal approach.

At root, museum collections are about human relationships. When human relationships are open and engaging, museums

prosper. Common sense and ethical precepts should take precedence over arcane and divisive legal duels when dealing with museum collections. In sum, I have come to the same conclusion about tangible cultural property that Michael Brown has come to about intangible cultural property, namely we need to negotiate our way to more balanced and working relationships.³⁷

A stellar example of this approach is the 2002 agreement entered into between the American Museum of Natural History and the Confederated Tribes of the Grand Ronde Community of Oregon maintaining the Willamette Meteorite at the Museum and recognizing the Tribe's spiritual relationship to the meteorite. "The agreement reflects mutual recognition of and respect for the traditions of both the Tribe and the Museum."³⁸ In the 21st century a museum must be a center for cultural understanding and mutual respect.

³⁷ Brown, *Who Owns Native Culture?*, pp. 242-246, 247, 252 (2003).

³⁸ See at <http://www.amnh.org>. See also Shapiro, *supra* note 3, at 105-108; Gerstenblith, *The Public Interest in the Restitution of Cultural Objects*, 6 Conn. J. Int'l. L. 197, 241-246 (2001); Maranda, *Heritage, objects, collecting: the need for an ethical approach*, ICOM Int'l Committee for Museology, 11-12 (2000).

American museums eventually joined European museums as leading centers for the production of new knowledge in their fields of interest. A period of intense museum building, in both an intellectual and physical sense was realized in the late nineteenth and early twentieth centuries (called "The Museum Period" or "The Museum Age").¹ They are effectively cultural bookmarks, taking pieces of art, culture, history, and science and marking their glory in a location that the general public can view. Museums celebrate human culture and our ability to understand the world around us, such as in science history museums. At one point in time, museums aimed at a particular constituency.