Fordham Intellectual Property, Media and Entertainment Law Journal

Volume 23 *Volume XXIII*
Number 3 *Volume XXIII Book 3*

Article 4

2013

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Cover Page Footnote

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Kirsten Hower and Catherine Sunday Coravos offered terrific research assistance.

The Parthenon Sculptures and Cultural Justice

Dr. Derek Fincham*

From government and philosophy to art, drama and culture, the ancient Athenians, as most everyone knows, gave future generations so much. Yet the pinnacle of their artistic achievement, the Parthenon, remains a damaged and incomplete work of art. The year 2012 marked the two-hundredth anniversary of the last removal of works of art from the Parthenon. That taking was ordered by an English diplomat known to history as Lord Elgin, and it reminds us that cultures create lasting monuments. But cultures that have removed the artistic achievements of other nations have increasingly been confronted with uncomfortable questions about how these objects were acquired. Nations of origin are increasingly deciding to press claims for the repatriation of works taken long ago. They proceed through history mindful of the irresistible genius their forebears have shown, and are unwilling to cease their calls for return.

The majority of the surviving sculptures from the Parthenon in Greece are currently on display in the British Museum in London. The Greek government, along with cultural heritage advocates throughout the world, has been asking for the reunification of these sculptures in the New Acropolis Museum in Athens. Greece has offered a number of concessions, but the British Museum and the British Government have repeatedly refused to seriously discuss reunification.

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Mounting pressure on the British Museum, and the inescapable fact that the Parthenon was an ancient unified work of art both mean that the Parthenon marbles will either eventually be returned to Greece or else be subjected to an endless repatriation debate. Here I offer a series of principles which the Greeks and the British Museum can take to jointly create a just return. This conversation has relevance far beyond its immediate context, because the way the British Museum and Greece resolve this argument will have much to say for the future of the management of our collective cultural heritage.

FIGURE 1: THE PARTHENON AS IT APPEARED IN THE EARLY NINETEENTH CENTURY ATOP THE ACROPOLIS[1]

Cold is the heart, fair Greece, that looks on thee,
Nor feels as lovers o'er the dust they loved;
Dull is the eye that will not weep to see
Thy walls defaced, thy mouldering shrines removed
By British hands, which it had best behoved
To guard those relics ne'er to be restored.
Curst be the hour when from their isle they roved,
And once again thy hapless bosom gored,
And snatched thy shrinking gods to northern climes abhorred!

—LORD BYRON[2]

[1] THOMAS ROGER SMITH & JOHN SLATER, ARCHITECTURE, CLASSIC AND EARLY CHRISTIAN 88 (1882), *available at* http://www.gutenberg.org/files/29759/29759-h/29759-h.htm.

[2] LORD BYRON, CHILDE HAROLD'S PILGRIMAGE (1812), *available at* http://www.gutenberg.org/files/5131/5131-h/5131-h.htm.

INTRODUCTION

On July 31, 1801, sailors and laborers climbed the walls of the Parthenon and began removing a sculptured block of marble which depicts a youth and a centaur battling each other (perhaps the Athenian hero Theseus).[3] That initial removal was just the first step in a long process. Reminding us just how immovable these sculptures were, the task was considerable. From 1801 to 1812, under the authority of the ambassador to the Ottoman Empire, Thomas Bruce, the seventh Earl of Elgin, over half of the sculptures from the Parthenon were removed and ultimately transported back to Great Britain. These included friezes, metopes, architectural elements, pedimental figures from the Parthenon itself,[4] and even one caryatid from the Erectheion.[5] In 1837 the Greek Archaeology Society was founded after Greece won her independence from the Ottoman Empire.[6] At its first meeting, held on the Parthenon, Iakovos Rizos Neroulos, the first president of the Archaeological society, said, "[t]hese stones are more precious than rubies or agates. It is to these stones we owe our rebirth as a nation."[7] The removal of these works of art presents an utterly unique case—these integral works of art, the very symbol of Hellenism, stood atop the Acropolis for over two thousand years.

Given their beauty, and the commanding position these works of art once had on the Acropolis, it should come as no surprise that calls for the reunification[8] of these sculptures will likely continue. That these works of art were removed during the final years of an extended centuries-long occupation by the Ottoman Empire only adds emphasis to the dispute. With Lord Byron as the most vocal

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3 *See infra* note 105 and accompanying text.

4 *See infra* notes 78–93 and accompanying text.

5 For the present location of the remaining architectural and sculptural elements of the Parthenon, see CHRISTOPHER HITCHENS, THE PARTHENON MARBLES: THE CASE FOR REUNIFICATION app. 1 (updated ed. 2008).

6 *See* Robert Browning, "The Parthenon in History," *in* THE PARTHENON MARBLES: THE CASE FOR REUNIFICATION 13 (updated ed. 2008).

7 *Id.*

8 When works of art move to where they were located in an earlier time, terms like "repatriation," "restitution," or even simply "return" are used. In the case of the Parthenon sculptures, "reunification" is the term preferred by Christopher Hitchens. *See* HITCHENS, *supra* note 5, at xvii.

early campaigner, Greeks and cultural heritage advocates have asked for the return of these sculptures repeatedly over the past two centuries.[9]

The vigorous debate about the fate of the Parthenon sculptures began soon after Elgin ordered them removed.[10] The arguments for both sides has been examined in some detail,[11] with many authors asking why the Greeks are continuing to press their claim,[12] or examining the circumstances under which Elgin was able to secure the removal of the works.[13] Yet the arguments relied on most extensively by the British Museum and those who support its continued retention of the sculptures rely primarily on

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[9] Byron's criticism was more felt than reasoned. There were of course many excellent reasons *to* dissent to the taking. Byron's criticisms of Elgin took the form of poetic rants and lamentations on his discovery of the then-barren acropolis. He did not address any specifics of the illegal or unethical acquisition of the sculptures and fragments. *See* KARL E. MEYER, THE PLUNDERED PAST 178–79 (1973).

[10] Karl Meyer calls it the "ur-text of restitution controversies." *See* Karl E. Meyer, *Who (Really) Owns the Past?*, 23 WORLD POL'Y J 85, 89 (2006).

[11] *See, e.g.*, HITCHENS, *supra* note 5; DOROTHY KING, THE ELGIN MARBLES (2006); WILLIAM ST. CLAIR, LORD ELGIN AND THE MARBLES (1998); THEODORE VRETTOS, A SHADOW OF MAGNITUDE: THE ACQUISITION OF THE ELGIN MARBLES (1974).

[12] Professor John Henry Merryman, the prominent cultural property academic who largely supports the international movement of art, and criticizes repatriation on what he calls nationalistic and emotional arguments, wrote an essay in 1985 coming to the conclusion that the British Museum should keep the sculptures. *See* John Henry Merryman, *Thinking About the Elgin Marbles*, 83 MICH. L. REV. 1881 (1985). He renewed his argument in an updated essay in 2006. *See* John Henry Merryman, *Whither the Elgin Marbles*, *in* IMPERIALISM, ART AND RESTITUTION 98 (John Henry Merryman ed., 2006).

[13] Former Dean of Cardozo Law School David Rudenstine has in a series of articles questioned the initial legality of Elgin's taking of the sculptures by carefully examining the historical record. *See* David Rudenstine, *Lord Elgin and the Ottomans: The Question of Permission*, 23 CARDOZO L. REV. 449 (2001); David Rudenstine, *A Tale of Three Documents: Lord Elgin and the Missing, Historic 1801 Ottoman Document*, 22 CARDOZO L. REV. 1853 (2000); *see also* Michael J. Reppas II, *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, 980 (1998) ("Unless Greece has the courage to fight now for a remedy to this injustice, then the world's symbol of democracy will always be covered in shame."). In a compelling student Note, John Moustakis argued for inalienability of certain important works of cultural property, foreshadowing in many ways the treatment of these objects as pieces of cultural heritage. He used as his example the Parthenon sculptures on display at the British Museum. *See* John Moustakas, Note, *Group Rights in Cultural Property: Justifying Strict Inalienability*, 74 CORNELL L. REV. 1179 (1989).

the passage of time and the notion that the dispute would raise uncomfortable questions.[14] We must have a more sophisticated conversation about the disposition of these important pieces of art. This Article examines the historical context behind Elgin's actions and applies the law as it existed at the time to his actions. But it also goes a step further and compares Elgin's actions to contemporary cultural heritage law and policy. This is a novel argument which allows for the debate to move forward in a productive way.[15] It shows that individuals who have attempted to do what Elgin has done today find themselves in violation of domestic and international cultural heritage law. By applying principles of cultural justice, derived partly from environmental justice scholarship, this article presents a case for a just reunification of the Marbles in Athens.

Justice is the proper benchmark with which to measure the British Museum's continued retention of these works of art. It is an enduring tragedy that the monuments of ancient cultures, which are dear to artists, to historians, and to future generations depend for their survival on arbitrary choices made through governments. The choices of these institutions are carried out by individuals who may be swayed by expediency or even arrogance. Rome's Coliseum, for example, was stripped for construction materials.[16] The facing stone from the pyramids was used to help construct Cairo in the middle ages. We cannot undo the harm to those ancient monuments, but we can substantially remedy the taking of the sculptures of Phidias on the Parthenon, which were smashed

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[14] Karl E. Meyer, Editorial, *Let Greece Have the Marbles*, N.Y. TIMES, May 18, 1997, http://www.nytimes.com/1997/05/18/opinion/let-greece-have-the-marbles.html (arguing that many of the arguments in favor of the British Museum retaining possession of the sculptures merely state that "restitution would be inconvenient and that possession is 90 percent of the law").

[15] International legal scholar Kurt Siehr argues "[i]t should be obvious that cases dealing with the return of recently stolen or smuggled pieces of art cannot serve as precedent for the return of the "Elgin Marbles." This does not necessarily imply that the 'Elgin Marbles' should not be returned." Kurt Siehr, *International Art Trade and the Law*, 243 RECUEIL DES COURS 9, 153 (1993).

[16] *See, e.g.*, DETROIT AND ROME: BUILDING ON THE PAST 6 (Melanie Grunow Sobocinski ed. 2005) "For centuries the Colosseum was used as a stone quarry. It has been said that the outer perimiter's wall, in antiquity, was 545 meters, and up to 100,000 meters of travertine . . . . Most of the outer perimeter has completely vanished." *Id.* at 47.

and forcibly removed by Elgin's agents. Why should present generations be held to the decision of an individual, who decided a work of art should be damaged and separated? These actions harm future generations and deprive us of the full benefit of our collective cultural heritage. Preventing and repairing this devastation should be the aim of every cultural heritage advocate, and is a primary obligation of any civilization. Some of these arguments have been made before. But before pursuing these important questions we should ask why we should be considering the current placement of the works of art removed by Elgin. There are three reasons.

First, circumstances have changed, requiring a re-examination of this dispute through a different perspective. Looking simply at the question of whether Elgin rightfully acquired the sculptures in the early part of the nineteenth century gives an incomplete picture. After all, as more nations request the return of objects taken in the distant past, current law and normative practice have begun to shift radically to allow increased respect for the preservation of sites and archaeological context.[17]

Second, this controversy stands as the most fundamental dispute plaguing the relationship between museums and nations of origin.[18] The dispute overwhelms so much of cultural heritage scholarship as to prevent the field from moving forward. Not too long ago, museums primarily were repositories for the world's great masterpieces. But their role is shifting. As Professor Merryman points out, we care (or should care) about the dispute because these objects represent "an essential part of our common past," they are masterpieces of artistic achievement which "enrich our lives," and these objects comprise the plupart of the vast collections of art at museums like the British Museum, the Louvre,

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[17] For an earlier attempt to show why preserving archaeology is such an important goal for cultural heritage advocates, see Derek Fincham, *The Fundamental Importance of Archaeological Context*, *in* ART AND CRIME 1 (Noah Charney ed., 2009), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1446957.

[18] The disputes between Italy and North American Museums are another example. *See* David Gill & Christopher Chippindale, *From Boston to Rome: Reflections on Returning Antiquities*, 13 INT'L J. CULTURAL PROP. 311 (2006).

or the Metropolitan Museum of Art in New York and which will, Merryman argues, be subject to repatriation claims.[19]

Finally, the resolution to this dispute means a great deal to the world community. To put it bluntly, buildings that look like the Parthenon exist all over the world, and notably include the United States Supreme Court. As Robert Browning notes, "in 1897 the citizens of Nashville, Tennessee, wished to build in their Centennial Park a replica of a famous building, one which would symbolize their own aspirations and recall the principles which inspired the founder of the Union and those who saved it from disintegration, they chose the Parthenon."[20] UNESCO chose as its emblem the façade of the Parthenon. In 1999 President Clinton offered to mediate the dispute between Greece and Britain.[21] In 2004 the United States Senate called on the United Kingdom to return the sculptures.[22] The dispute matters a great deal to a great many people.

Those who wish to see the Parthenon sculptures returned to Athens must start with the question of what is the just thing to do with them today.[23] This is the same question that many environmental activists, shut out of the decision-making and law-making process, have used to achieve real, lasting and productive change.[24] This article seeks to describe what can be done, given

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19 *See* Merryman, *Thinking About the Elgin* Marbles, *supra* note 12, at 1895.

20 Browning, *supra* note 6, at 1.

21 Marc Lacey, *Clinton Tries to Subdue Greeks' Anger at America*, N.Y. TIMES, Nov. 21, 1999, http://www.nytimes.com/1999/11/21/world/clinton-tries-to-subdue-greeks-anger-at-america.html. President Clinton noted the importance of Athens and its cultural monuments: "We are all Greeks . . . . We are all Greeks not because of monuments and memories but because what began here two and a half thousand years ago has at last, after the bloody struggles of the 20th century, been embraced all around the world." *Id.*

22 U.S. Congress, Senate, S. Con. Res. 134, 108th Cong., 2d Sess. (2004).

23 More and more nations of origin are taking this step. *See, e.g.*, Jane Warring, *Underground Debates: The Fundamental Differences of Opinion That Thwart UNESCO's Progress in Fighting the Illicit Trade in Cultural Property*, 19 EMORY INT'L L. REV. 227, 299 (2005) (noting that since 2002 Zahi Hawass in his capacity as the Director of Egypt's Council of Antiquities "sparked controversy with his campaign for massive cultural restitution" including requesting "the Rosetta Stone from the British Museum in London, the Bust of Nefertiti in the Berlin Museum, and the Head of King Amenhotep III from the Louvre").

24 Environmental justice offers concrete avenues for underrepresented groups and minorities to access and work to correct deficiencies in their physical environment. The

the shifts in cultural policy and law in recent decades,[25] to achieve cultural justice with the Parthenon sculptures currently being retained by the British Museum. By considering justice, we can move the long conversation about the proper place for these works of art forward in novel, constructive, and educative ways.

This Article proceeds in five parts. It begins in Part I by describing illicit cultural heritage and analyzing why the Parthenon dispute dominates the discussion of cultural heritage law. Part II puts the creation of the Parthenon in historical context. It then examines the broader geopolitical circumstances which made it possible for Elgin to secure access to the Parthenon for his agents. Based on a contemporary decision in 1813, we can see that at least what were deemed "civilized" nations largely respected the cultural patrimony rights of each other and were admonished for not doing so, as evidenced by an admiralty prize case from 1813.[26] It examines in some depth the firman that Elgin acquired from Ottoman officials and presents a critical analysis of what it says and does not say about the extent of the permission Elgin secured from Ottoman officials. Part II concludes that, based on the available historical evidence, we cannot be certain what permission Elgin was able to secure from the Ottoman officials. It also presents the reactions that the taking of the Parthenon fragments caused, including reactions in nineteenth-century Great Britain, and in the rest of the world.

Part III describes the theory of cultural justice, which allows us to craft a workable and productive framework for moving toward a resolution of the Parthenon sculptures dispute. It references the environmental justice movement as a model for cultural policy makers. Part IV builds off of the discussion of cultural justice and

movement offers a number of important lessons for the cultural heritage movement. *See* Derek Fincham, *Justice and the Cultural Heritage Movement: Using Environmental Justice to Appraise Art and Antiquities Disputes*, 20 VA. J. SOC. POL'Y & L. 43 (2012).

[25] In 1985, when Merryman analyzed the dispute over the Parthenon sculptures, he described a very different set of cultural policies and laws than exist today. *See* Merryman, *Thinking About the Elgin Marbles*, *supra* note 12, at 1921 ("Criteria for an appropriate international distribution of the artifacts of a culture do not yet exist; the dialogue until now has been dominated by demands for repatriation and by deference to cultural nationalism.").

[26] *See infra* notes 107–14 and accompanying text.

applies contemporary cultural heritage law and practice to the actions of Elgin. Finally, Part V demonstrates why now is a ripe time for the British Museum and Greece to come to a just resolution to this dispute.

I. ILLICIT CULTURAL HERITAGE

The so-called Elgin Marbles are the best known of a class of objects called illicit cultural heritage.[27] These are objects of major

[27] The 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Cultural Property defines the scope of cultural objects:

> For the purposes of this Convention, the term "cultural property" means property which, on religious or secular grounds, is specifically designated by each State as being of importance for archaeology, prehistory, history, literature, art or science and which belongs to the following categories:
> (a) Rare collections and specimens of fauna, flora, minerals and anatomy, and objects of palaeontological interest;
> (b) property relating to history, including the history of science and technology and military and social history, to the life of national leaders, thinkers, scientists and artist and to events of national importance;
> (c) products of archaeological excavations (including regular and clandestine) or of archaeological discoveries;
> (d) elements of artistic or historical monuments or archaeological sites which have been dismembered;
> (e) antiquities more than one hundred years old, such as inscriptions, coins and engraved seals;
> (f) objects of ethnological interest;
> (g) property of artistic interest, such as:
> (i) pictures, paintings and drawings produced entirely by hand on any support and in any material (excluding industrial designs and manufactured articles decorated by hand);
> (ii) original works of statuary art and sculpture in any material;
> (iii) original engravings, prints and lithographs ;
> (iv) original artistic assemblages and montages in any material;
> (h) rare manuscripts and incunabula, old books, documents and publications of special interest (historical, artistic, scientific, literary, etc.) singly or in collections ;
> (i) postage, revenue and similar stamps, singly or in collections;
> (j) archives, including sound, photographic and cinematographic archives;
> (k) articles of furniture more than one hundred years old and old musical instruments.

artistic or historical importance which have been taken from their original context under illegal or unethical circumstances. These objects also include stolen objects,[28] objects which have been looted from their archaeological context,[29] and fake and forged[30] objects.

In cultural heritage debates, the precise language used to describe the dispute, the parties and the objects themselves carry different levels of meaning.[31] The objects now on display in the

Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property, United Nations Educational, Scientific and Cultural Organization art. 2, Nov. 14, 1970, 96 Stat. 2350, 823 U.N.T.S. 231 [hereinafter 1970 UNESCO Convention].

[28] *See, e.g.*, Solomon R. Guggenheim Found. v. Lubell, 569 N.E.2d 426 (N.Y. 1991). In that case the Solomon R. Guggenheim Foundation successfully initiated a replevin action for the recovery of a gouache by Marc Chagall that had been stolen by a mailroom employee in the late 1960s. *Id.*

[29] *See, e.g.*, United States v. Schultz, 333 F.3d 393 (2d Cir. 2003); R v. Tokeley-Parry, [1999] Crim. L. R. 578. These prosecutions of a Manhattan antiquities dealer (in New York) and his accomplice (in England) are an example of a trans-Atlantic prosecutorial effort which saw the unraveling of one antiquities smuggling operation. Schultz was a successful antiquities dealer in New York City and a former president of the National Association of Dealers in Ancient, Oriental and Primitive Art. His co-conspirator in England, Jonathan Tokeley-Parry, provided him with photographs and descriptions of the objects and arranged for them to be smuggled out of Egypt and shipped to Schultz at his New York gallery. In order to get the objects out of Egypt, Tokeley-Parry disguised the objects as cheap tourist souvenirs. Schultz and Tokeley-Parry falsified documents to create a fictitious provenance suggesting that the objects were part of a collection that had belonged to an English family since the 1920s, pre-dating the Egyptian law. Schultz sold the most important of the objects, a head said to be of Amenhotep III, to a private collector for $1.2 million. Tokeley-Parry was tried and convicted in England in 1997 for dealing in stolen antiquities and implicated Schultz. *See* Patty Gerstenblith, *Controlling the International Market in Antiquities: Reducing the Harm, Preserving the Past*, 8 CHI. J. INT'L L. 169, 175–76, 182–83 (2007); *see also* United States v. An Antique Platter of Gold, 184 F.3d 131 (2d Cir.1999). The gold platter case was the first use of criminal forfeiture to seize an illicitly exported object and return it to its nation of origin. In this highly-publicized case, an antique platter of Sicilian origin was sold to Michael Steinhardt, a New York collector, via a Swiss art dealer who acquired the work in 1991 from a Sicilian coin dealer. The U.S. government seized the work from Steinhardt and successfully brought an action for civil forfeiture. *Id.* at 133. The Second Circuit affirmed that the work had been illegally imported. *Id.* at 140.

[30] For a discussion of these counterfeit works see John Henry Merryman, *Counterfeit Art*, 1 INT'L J. CULTURAL PROP. 27 (1992).

[31] *See, e.g.*, Alan Audi, *A Semiotics of Cultural Property Argument*, 14 INT'L J. CULTURAL PROP. 131, 149 (2007) ("All too often, rearranged and rehashed argument-bites pass for substantive analysis. Along with the Elgin Marbles myth and its alibis, the

British Museum's Duveen Gallery were removed by Lord Elgin, who served as British Ambassador to Greece during the time when the Ottoman Empire controlled Athens.[32] The sculptures at issue have been referred to as either the "Parthenon marbles" or as the "Elgin Marbles."[33] But in fact the Marbles are, according to the British Museum, termed "The Elgin Collection" because that is what the 1816 Act of Parliament which purchased them required they be called.[34]

The importance of cultural heritage to a people is undisputed, and universally accepted. In the Supreme Court of Ireland, Chief Justice Finlay stated that:

> It would, I think, now be universally accepted, certainly by the People of Ireland, and by the people of most modern States, that one of the most important national assets belonging to the people is their heritage and knowledge of its true origins and the buildings and objects which constitute keys to their ancient history.[35]

There are of course two competing ideas about how works of art should be controlled, and both have been exhaustively debated.[36] One line of thought, adopted by some museums and art dealers, conceives of a system in which works of art should be moved internationally, and maintains that these objects are best preserved by residing in museums or in the art market.[37] This view

misleading veneer and authority of legal propositions have come to permit authors to dispense with the underlying issues at stake by adopting heavily value-laden positions that appear innocent or objective.").

32 *See infra* section II.B.

33 *See, e.g.*, William G. Stewart, *The Marbles: Elgin or Parthenon? IAL Annual Lecture, December 2000*, 6 ART, ANTIQUITY & L. 37 (2001) (arguing that "[t]hose who want the Marbles to stay in the British Museum are Elgin Marble-ers, those who want them returned to Athens, and of course, the Greeks, are Parthenon Marble-ers") *Id.*

34 An Act to Vest the Elgin Collection of Ancient Marbles and Sculpture in the Trustees of the British Museum for the Use of the Public, 1816, 56 Geo. 3, c. 99.

35 Webb v. Ireland, [1988] I.R. 353.

36 *See* John Henry Merryman, *Two Ways of Thinking about Cultural Property*, 80 AM. J. INT'L L. 831, 831–32 (1986).

37 *See, e.g.*, JAMES B. CUNO, WHO OWNS ANTIQUITY?: MUSEUMS AND THE BATTLE OVER OUR ANCIENT HERITAGE (2008); Edward Rothstein, *Antiquities, the World is Your*

often ignores or minimizes the destruction of information, and the removal of objects from important heritage sites.

In contrast, an opposing set of norms urges that the demand for antiquities and works of art encourages the looting of sites. The sharp conflict between these different views of heritage has produced an entrenched and often unhelpful debate. By examining how behaviors have changed, we can begin to construct a foundation for arriving at common sense approaches which reduce the looting of sites and the destruction of history.[38]

When it comes to illicit cultural heritage, archaeologists and the collector community do actually agree on a few core ideas: they lament the theft of art, the destruction of archaeological context and the looting of archaeology.[39] Even the hardened buyers and sellers of material cultural heritage have been forced into a grudging appreciation of the laws which apply to cultural objects.[40] The disagreement emerges when it comes time to propose solutions and consider the causes of the illicit activity. Nevertheless, these solutions are elusive. National borders are no barrier to works of art, and limited law enforcement resources have been directed at small pockets of the collector and dealer community. We should be paying more attention to the important figures in the cultural heritage community, and how their behavior may be changing. Two recent events involving prominent members of the dealer and museum community signal the emergence of fundamental changes to the way the art and museum community deals with illicit objects.

Homeland, N.Y. TIMES, May 27, 2008, http://www.nytimes.com/2008/05/27/arts/design/27conn.html.

[38] *See* Derek Fincham, *A Coordinated Legal and Policy Approach to Undiscovered Antiquities: Adapting the Cultural Heritage Policy of England and Wales to Other Nations of Origin*, 15 INT'L J. CULTURAL PROP. 347, 366 (2008).

[39] *See, e.g.*, Alexander A. Bauer, *New Ways of Thinking About Cultural Property: A Critical Appraisal of the Antiquities Trade Debates*, 31 FORDHAM INT'L L.J. 690 (2008).

[40] Philippe de Montebello, the long-serving former director of New York's Metropolitan Museum of Art, has acknowledged that museums should abide by the law, and yet he is "puzzled, by the zeal with which the United States rushes to embrace foreign laws that can ultimately deprive its own citizens of important objects useful to the education and delectation of its own citizens." Randy Kennedy & Hugh Eakin, *Met Chief, Unbowed, Defends Museum's Role*, N.Y. TIMES, Feb. 28, 2006, at B7, *available at* http://www.nytimes.com/2006/02/28/arts/28mont.html.

The first involved the prosecution of prominent antiquities dealer Frederick Schultz. He was convicted of conspiring to receive stolen Egyptian antiquities, but before his conviction he was a prominent Manhattan art dealer who was publicly critical of the regulation of the antiquities trade.[41] Schultz served as the president of the National Association of Dealers in Antique, Oriental and Primitive Art and was very critical of a 2001 bilateral agreement imposing import restrictions on certain antiquities originating from Italy, arguing "[i]t is a very bad precedent in many regards . . . . These kind of broadly defined restrictions would be impossible to comply with and impossible to enforce."[42] He refused to abide by and accept the legal restrictions, erecting his own code, perhaps because the present body of cultural heritage law was in his view too broad to allow him to make a living as an antiquities dealer, or he did not sufficiently value archaeological context or respect the sovereign rights of Egypt to care for its own heritage.

The second involved former Getty Curator Marion True, who was tried in Italy for conspiring to acquire stolen antiquities.[43] True was a complicated figure. On the one hand she was an advocate for positive change. In a speech made at the annual Association of Art Museum Directors gathering in 2000 she criticized antiquities dealers, argued for more accountability on the part of museum staff and their boards, and most notably she argued that "if serious efforts to establish a clear pedigree for the object's recent past prove futile, it is most likely—if not certain—that it is the produce of the illicit trade and we must accept responsibility for that fact."[44] Also, she backed up these calls for reform with real action in one notable case involving looted mosaics from Cyprus.

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41 *See* United States v. Schultz, 333 F.3d 393, 395 (2d Cir. 2003).

42 *See* Celestine Bohlen, *Old Rarities, New Respect: U.S. Works with Italy*, N.Y. TIMES, Feb. 28, 2001, http://www.nytimes.com/2001/02/28/arts/old-rarities-new-respect-us-works-with-italy.html.

43 Elisabetta Povoledo, *Italy and U.S. Sign Antiquities Accord*, N.Y. TIMES, Feb. 22, 2006, http://travel.nytimes.com/2006/02/22/arts/design/22anti.html.

44 Marion True, Speech at the Ass'n of Art Museum Directors (June 1, 2000), *available at* https://www.documentcloud.org/documents/254275-marion-trues-2000-denver-presentation.html.

When they were offered to the Getty she refused them. As the Seventh Circuit Court of Appeals noted:

> [T]he aptly-named Dr. True explained to the dealers that she had a working relationship with the Republic of Cyprus and that she was duty-bound to contact Cypriot officials about them. Dr. True called Dr. Vassos Karageorghis, the Director of the Republic's Department of Antiquities and one of the primary Cypriot officials involved in the worldwide search for the mosaics. Dr. Karageorghis verified that the Republic was in fact hunting for the mosaics that had been described to Dr. True, and he set in motion the investigative and legal machinery that ultimately resulted in the Republic learning that they were in Goldberg's possession in Indianapolis.[45]

On the other hand, she was using many of the same hidden policies she was criticizing to violate domestic and international law. This ultimately resulted in a public and lengthy trial in Italy and the return of a number of beautiful objects from the Getty to Italy. Though her prosecution was dismissed when the statute of limitations expired on her indictment,[46] she has been the subject of a great deal of criticism and it seems unlikely that she will return to the heritage field.[47]

Both Schultz and True were firm believers that collectors and museums should be free to acquire great works of art to build universal museums.[48] The difficulty for an institution like the British Museum when confronted with the Parthenon marbles case is they are now connected in uncomfortable ways with the actions

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[45] Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts, Inc., 917 F. 2d 278, 283 (7th Cir. 1990).

[46] Jason Felch, *Charges Dismissed Against Ex-Getty Curator Marion True by Italian Judge* [Updated], L.A. TIMES CULTURE MONSTER, Oct. 13, 2010, http://latimesblogs.latimes.com/culturemonster/2010/10/charges-dismissed-against-getty-curator-marion-true-by-italian-judge.html.

[47] Malcolm Bell, *The Beautiful and the True*, WALL ST. J., July 2, 2011, http://online.wsj.com/article/SB10001424052702303339904576405983959162302.html.

[48] *See, e.g.*, CUNO, *supra* note 37.

of these recent violators of the law. There is no question that many of the same arguments about the availability of art and the access of wide publics to these works has been made about works which have been proven to be stolen, illegally exported, and which result in damage and destruction to ancient sites.

Take for example the decision by the Metropolitan Museum of Art (the "Met") to return the most prized piece of ancient Greek pottery in the world to Italy[49]—a large wine vessel known as the Euphronios or Sarpedon Krater.[50] The object had been looted from the ancient Etruscan city of Caere (modern day Cerveteri) just north of Rome. For many years the Met had defended its retention of the krater on the grounds that it had rightfully acquired ownership of the piece because it was an innocent purchaser.[51]

The Met's purchase was tied directly to the illicit looting of the Etruscan complex just outside Cerveteri.[52] The Met's decision to return the krater in exchange for the long term loan of other objects signaled a new shift in the relationship between nations of origin and the universal museums which display works of art from these regions.[53] It signaled an important move away from simple ownership and allowed cultural policymakers to introduce new factors into the decision-making process, namely stewardship and context.

Since the time of ancient Greece, writers have criticized the systematic taking of cultural heritage. Charles de Visscher, a Belgian jurist and judge on the International Court of Justice, quotes Polybius of Athens (writing before 146 BCE) with respect to protecting cultural resources:

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[49] Randy Kennedy & Hugh Eakin, *The Met, Ending 30-Year Stance, Is Set to Yield Prized Vase to Italy*, N.Y. TIMES, Feb. 3, 2006, at A1.

[50] *See* FABIO ISMAN, I PREDATORI DELL'ARTE PERDUTA: IL SACCHEGGIO DELL'ARCHEOLOGIA IN ITALIA (2009); VERNON SILVER, THE LOST CHALICE: THE EPIC HUNT FOR A PRICELESS MASTERPIECE (2009); PETER WATSON & CECILIA TODESCHINI, THE MEDICI CONSPIRACY (2007).

[51] *See* Kennedy & Eakin, *supra* note 49.

[52] Paul Hofmann, *In Italy, New Hope Stirs the Tomb Robbers*, N.Y. TIMES, Apr. 5, 1973.

[53] Fabio Isman, *Justice is Slow, but Italy Has Not Given Up the Fight*, ART NEWSPAPER, Nov. 17, 2011, http://www.theartnewspaper.com/articles/Justice+is+slow%2c+but+Italy+ has+not+given+up+the+fight/24989.

> One may perhaps have some reason for amassing gold and silver; in fact, it would be impossible to attain universal dominion without appropriating these resources from other peoples, in order to weaken them. In the case of every other form of wealth, however, it is more glorious to leave it where it was, together with the envy which it inspired, and to base our country's glory, not on the abundance and beauty of its paintings and statues, but on its sober customs and noble sentiments. Moreover, I hope that future conquerors will learn from these thought not to plunder the cities subjugated by them, and not to make the misfortunes of other peoples the adornments of their own country.[54]

The contemporary art market has had an uneasy relationship with these classes of objects, because its typical practice limits the information conveyed between buyer and seller.[55] As a consequence the major art auction houses have, far too often, been an active participant in the purchase and sale of illicit objects.[56] Museums as a result have been forced to broaden the scope of their mission beyond merely amassing as many masterpieces as possible, and are facing more and more calls for the return of objects which have been acquired without documentation pre-dating 1970.[57] They have been confronted with the looting, destruction, and lawlessness which unchecked art buying has produced. Since the early 1970s an organized effort has attempted to return these works of art to their place of origin and to prevent

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[54] CHARLES DE VISSCHER, INTERNATIONAL PROTECTION OF WORKS OF ART AND HISTORIC MONUMENTS 823 (1949).

[55] *See, e.g.*, Derek Fincham, *Fraud on Our Heritage: Towards a Rigorous Standard for the Good Faith Acquisition of Antiquities*, 37 SYRACUSE J. INT'L L. & COM. 145 (2010).

[56] *See, e.g.*, Ralph Blumenthal & Tom Mashberg, *Officials Are Set To Seize Antiquity*, N.Y. TIMES, Apr. 5, 2012, at C1, *available at* http://www.nytimes.com/2012/04/05/arts/design/ancient-cambodian-statue-is-seized-from-sothebys.html.

[57] *See, e.g.*, Jason Felch, *Italian Official Seeks Return of "Getty Bronze,"* L.A. TIMES, Mar. 27, 2011, *http://articles.latimes.com/2011/mar/27/entertainment/la-et-getty-bronze-20110328.*

further destruction and looting of existing sites.[58] The flagship international convention[59] which encouraged States Parties to prohibit and prevent the illicit movement of these objects describes the dangers of the illicit movement of art.[60]

Under current principles of cultural heritage law, many nations, including both the United States and the United Kingdom, will recognize and enforce the ownership declarations of other nations. So, under contemporary practice, had Greece enacted an ownership declaration over the Parthenon, a court in either the United States or the United Kingdom would recognize and enforce the Greek rights in the Parthenon and its fragments.

Take for example a recent decision widening foreign recognition of cultural heritage ownership declarations, *Islamic Republic of Iran v. Barakat Galleries*. The case determined that the Republic of Iran had done enough to create a right by Iran to seek the return of a number of chlorite jars, bowls, and cups.[61] The antiquities—eighteen in total—had been recently removed from Iran's Jiroft region, they dated to between 2000 and 3000 B.C.E.[62] Fayez Barakat, the owner of the gallery, claimed to have purchased the items from auctions houses in France, Germany and Switzerland under laws which favored him, the purported good

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[58] One of the works which helped spark this movement did so by making direct connections between the art market in the United States and looting in Central America. *See* Clemency Coggins, *Illicit Traffic of Pre-Columbian Antiquities*, 29 ART J. 94, 94 (1969).

[59] *See* Convention on Cultural Property Implementation Act, Pub. L. No. 97-446, 96 Stat. 2350 (codified at 19 U.S.C. §§ 2601–2613) (implementing the UNESCO Convention in the United States).

[60] *See* 1970 UNESCO Convention, *supra* note 27. Article 2.1 states:

> The States Parties to this Convention recognize that the illicit import, export and transfer of ownership of cultural property is one of the main causes of the impoverishment of the cultural heritage of the countries of origin of such property and that international co-operation constitutes one of the most efficient means of protecting each country's cultural property against all the dangers resulting therefrom.

Id.

[61] Islamic Republic of Iran v. Barakat Galleries Ltd., [2007] EWCA (Civ) 1374, [2009] Q.B. 22, *available at* http://www.bailii.org/ew/cases/EWCA/Civ/2007/1374.html.

[62] *Id.* at paras. 3–4.

faith purchaser.[63] In the initial decision, the High Court in London held that it could not establish Iranian rights in the antiquities.[64] But leave was granted to appeal by Judge Gray because "of the importance of the issues not only to Iran but to other countries seeking the return of valuable antiquities that form part of their national heritage."[65] The Court of Appeal had to evaluate two potential issues. First, whether Iran had acquired rights in the antiquities as a matter of Iranian law. Second, if those rights were with Iran, whether an English court could recognize and enforce those rights against Barakat.[66]

The Court of Appeal examined provisions of the Iranian Civil Code,[67] its National Heritage Protection Act of 1930,[68] regulations implementing that act,[69] a law preventing unauthorized looting in Iran,[70] and finally Iran's 1979 constitution.[71] In evaluating these disparate sources, the Court of Appeal adopted a broad appreciation of Iranian rights in the illicit objects, saying "it is not the label which foreign law gives to the legal relationship, but its substance, which is relevant."[72] In awarding title to the objects, the court took the aggregate impact of all these laws related to cultural heritage in Iran and found that Iran had patrimonial rights to full title of the objects which entitled it to immediate possession of the works.[73] In so holding, the court made clear that Iran was seeking to exercise its sovereign rights over its cultural heritage, and also

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63 *Id.* at para. 5. For a discussion of the problem of the different choice of law principles involving civil and common law systems in the context of cultural property, see generally Derek Fincham, *How Adopting the Lex Originis Rule Can Impede the Flow of Illicit Cultural Property*, 32 COLUM. J.L. & ARTS 111 (2008).

64 Islamic Republic of Iran v. Barakat Galleries Ltd., [2007] EWHC (QB) 705.

65 Islamic Republic of Iran v. Barakat Galleries Ltd., [2007] EWCA (Civ) 1374, [1], [2009] Q.B. 22, *available at* http://www.bailii.org/ew/cases/EWCA/Civ/2007/1374.html.

66 *Id.* at para. 6.

67 *Id.* at para. 36.

68 *Id.* at paras. 37–38.

69 *See* Regulations of 3 Nov 1930 (National Heritage Protection Act) articles 17, 18, 25, 31, 36, 41, 48, 50, and 51 (Iran), *available at* http://www.ifar.org/statute.php?docid=1241813931.

70 Islamic Republic of Iran v. Barakat Galleries Ltd., [2007] EWCA (Civ) 1374, [41], [2009] Q.B. 22, *available at* http://www.bailii.org/ew/cases/EWCA/Civ/2007/1374.html.

71 *Id.* at paras. 42–44.

72 *Id.* at para 49.

73 *Id.* at paras. 131–50.

that a number of important policy considerations exist to assist nations in the effort "to recover antiquities which form part of its national heritage."[74]

Apart from the length of time separating the two cases, there are many similarities between Barakat's decision to bring his objects to England, and the efforts by Elgin to acquire parts of the Parthenon. If anything, we can view Elgin as more culpable, as he actively pursued through his position as ambassador to seek permission to remove the objects from the Parthenon. Though a great deal of time has passed between that initial damage and removal, were a court to hear the dispute, it would likely be guided by the same broader policy aspirations that the Court of Appeal considered. These include the 1995 Unidroit Convention, which allows states to request the return of a cultural object which has been illegally exported from another state.[75] In addition, European Council Directive 93/7 allows Member States to take actions against the possessor of works of art which have been unlawfully removed.[76] Moreover, UNESCO Convention Article 13(d) obliges States Party "[t]o recognize the indefeasible right of each State Party to this Convention to classify and declare certain cultural property as inalienable which should therefore ipso facto not be exported, and to facilitate recovery of such property by the State concerned in cases where it has been exported."[77] These legal principles demonstrate the changing environment in which cultural heritage law now finds itself.

These and other cultural heritage law principles point broadly to a strong founding principle: re-examination of the provenance of objects which have been illicitly removed from their context, whether it be by looters or influential foreign ambassadors. This re-examination is a painful process for the current retaining

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74 *Id.* at para. 154.

75 Unidroit Convention on Stolen or Illegally Exported Cultural Objects art. 5.1, June 24, 1995, 34 I.L.M. 1330, 1332 (1995), *available at* http://www.unidroit.org/english/conventions/1995culturalproperty/1995culturalproperty-e.pdf.

76 Council Directive 93/7 on the Return of Cultural Objects Unlawfully Removed from the Territory of a Member State, art. 5, 1993 O.J. (L 74) 4 (EC), as amended by Directive 96/100, 1997 O.J. (L 60) 59 and Directive 2001/38, 2001 O.J. (L 187) 43.

77 1970 UNESCO Convention, *supra* note 27, at art. 13(d).

institution, in this case the British Museum. But it is a necessary process if these institutions are going to consider themselves members of the cultural heritage community. There is of course a tremendous value to the visitors of the British Museum when they see and experience the Parthenon sculptures. But that value cannot outweigh other considerations, for new principles and a better cultural heritage law framework now exist. The British Museum's continued retention of these sculptures allows it to keep these objects on a technicality, one that implicitly and subtly rejects the wisdom of laws and policies which allowed a nation like Iran to secure the return of 5000-year-old artifacts which had been looted from their archaeological context.

II. THE PARTHENON SCULPTURES

To appreciate the dispute over the Parthenon sculptures, it is necessary to understand the historical context of Athens, the Parthenon, and the geopolitical circumstances surrounding Lord Elgin's removal in some detail.

A. Athens and the Parthenon

As a result of its successful maritime trade, in antiquity Athens rose to become the capital of the Mediterranean.[78] This allowed Athens to create a staggering array of cultural, legal, and governing successes which helped lay the foundation for so many subsequent human achievements.[79] The Acropolis of Athens was the center of this maritime empire. In 480 BCE an invading Persian army destroyed the ceremonial buildings there, and after their victory the Athenians rebuilt the monuments. The Parthenon has been called "a declaration of Athenian success and supremacy in Greece, with no little hubris and spirit of imperialism."[80] The Parthenon was built on the Acropolis, at its highest point. The Acropolis was both a stronghold and religious cultural center. Even though supporters

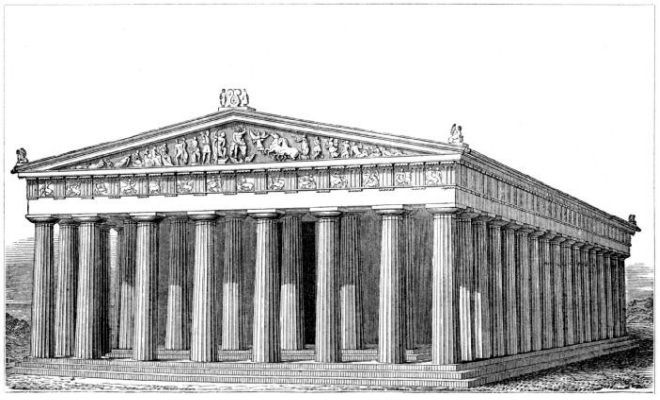
[78] MARILYN STOKSTAD & MARGARET A. OPPENHEIMER, ART: A BRIEF HISTORY 105 (1999).

[79] *See id.*

[80] John Boardman, *The Elgin Marbles: Matters of Fact and Opinion*, 9 INT'L J. CULTURAL PROP. 233, 235 (2000).

of the British Museum's position point to Athens' role in the fifth century BCE as an imperial, even tyrannical power, there can be no question that Athens set important precedents for all of Western Civilization. Robert Browning makes the case that Athens, along with the creation of the Parthenon in the fifth century BCE, saw "an astounding intellectual and artistic awakening" as this period marked the first time men "first reflected in a rigorous and yet imaginative way on the nature of knowledge, on the principles which guide human conduct, on the significance of their own past, on the way the universe was composed and how it worked. The very words logic, philosophy, ethics, history, physics are Greek."[81]

FIGURE 2: THE PARTHENON AT ATHENS IN THE TIME OF PERICLES, 438 BCE[82]



The Parthenon stands as an achievement due to the limitations imposed by Greek architectural orders. Greek architects, in restricting their efforts to certain set types of buildings, were able to perfect their creations:

> Acceptance of limitations naturally directed effort towards attaining perfection in each class of design, as would scarcely have been the case if the architects had allowed themselves wider scope for

[81] Browning, *supra* note 6, at 2.

[82] SMITH & SLATER, *supra* note 1, at frontispiece.

> originality and experiment; instead, their constant aim was to achieve ideal proportions in every detail. In that they succeeded to a degree which no other race has emulated. The Parthenon came as near perfection as is humanly possible, both in design and in meticulous execution.[83]

These sculptures were created out of white Pentelic marble and had remained fixed to the Greek temple for 2,200 years before their removal.

The Parthenon sculptures were meant to be viewed in context with each other on the Parthenon:

> They were conceived and designed as integral parts of the Temple of the goddess Athena on the Acropolis. They acquire their real conceptual meaning only in their natural and historic environment. It is evident that only if the unity of the whole is again acquired, by reuniting all its dismembered parts, can the Parthenon be re-established as a supreme symbol of universal spirit.[84]

A leading art history text describes the artistic and cultural worth of the Parthenon:

> The Parthenon illustrates the refinement of Greek architecture in its structure and design. It follows the typical cella and peristyle plan and uses the Doric order. To counteract the optical illusions that would distort its appearance when seen from a distance, the architects made many subtle adjustments. Usually, long horizontal lines appear to sag in the center, but here they do not because the architects designed both the base of the temple and the entablature to curve slightly upward toward the center. The columns have a subtle swelling, or

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83 A. W. LAWRENCE, GREEK ARCHITECTURE 58 (5th ed. 1996).

84 Nicoletta Divari-Valakou, *Revisiting the Parthenon—National Heritage in a Global Age*, *in* UTIMUT: PAST HERITAGE—FUTURE PARTNERSHIPS 116, 117 (Mille Gabriel & Jens Dahl eds., 2008).

> entasis, and tilt inward slightly from bottom to top. In addition the space between columns is less at the corners than elsewhere. These subtle modifications in the arrangement of elements give the Parthenon a buoyant organic appearance and prevent it from looking like a heavy, lifeless stone box. The building becomes in effect, a gigantic marble sculpture.[85]

FIGURE 3: THREE GODDESSES FROM THE EAST PEDIMENT OF THE PARTHENON, CURRENTLY AT THE BRITISH MUSEUM[86]

At either end of the building were pediments which celebrated the Goddess Athena and the ways in which she favored Athens and Attica. [87] These pediments were over ninety feet long by three feet

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[85] STOKSTAD & OPPENHEIMER, *supra* note 78, at 107.

[86] File: Pediments of the Parthenon—Brithish Museum—4.jpg, WIKIMEDIA COMMONS (Aug. 14, 2009), http://commons.wikimedia.org/wiki/File:Pediments_of_the_Parthenon-British_Museum-4.jpg.

[87] *See* Browning, *supra* note 6, at 6. Robert Browning describes the Parthenon temple:

> The Parthenon is a Doric peripteral amphiprostyle temple; that is, it has a row of Doric columns on either side and a double row in the porches at either end. It is built entirely of white Pentelic marble from Attica . . . . There were originally fifty-eight columns, seventeen on either side, eight at either end, and six in the inner row in each porch. There was also an interior colonnade supporting the roof, of which a few traces still remain. The temple was divided into two chambers, the cella on the east, in which stood Phidias' gold and ivory statue of Athena, 12 metres high, and the opisthodomis on the

deep. At the center they would have reached eleven feet. These figures were carved in the round, and are roughly twice life size. The east pediment represented the birth of Athena.

FIGURE 4: A VIEW OF THE PARTHENON FROM THE EAST TAKEN IN 2008[88]

The metope panels portray mythical battles between the Greeks and otherworldly figures. Greeks are shown fighting the Amazons and centaurs, and the siege of Troy is depicted, as are the gods fighting giants.

> west, in which the treasures of the goddess and the city were stored. T here was no internal communication between the two chambers. The sculptures comprised triangular pediments at either end, with statues in the round representing the birth of Athena and her contest with Poseidon for the land of Attica, ninety-two metopes in high relief (thirty-two on each side, fourteen on each end) showing scenes from Greek mythology and legend of special Athenian interest, and a frieze in low relief 160 metres long depicting the procession to the temple at the Panathenaic festival. Metopes and frieze were part of the structure of the building and not decoration added after its completion.

Id.

[88] File: Parhtenon—façade est.jpg, WIKIMEDIA COMMONS (July 20, 2008), http://commons.wikimedia.org/wiki/File:Parthenon_-_facade_est.jpg.

FIGURE 5: A VIEW OF ONE OF THE SOUTH METOPES DEPICTING A LAPITH AND A CENTAUR IN COMBAT, CURRENTLY AT THE BRITISH MUSEUM[89]

FIGURE 6: A VIEW OF THE NORTH FRIEZE OF THE PARTHENON, CURRENTLY AT THE BRITISH MUSEUM[90]

The frieze, which ran behind the metopes, depicted the Panathenaea, a procession which honored the goddess Athena.[91] It would have been nearly forty feet above the ground, and would

89 Image captured by author at the site in 2003; used with permission.

90 File: Parthenon frieze north XLII.JPG, WIKIMEDIA COMMONS (Sept. 21, 2010, 1:38 AM), http://commons.wikimedia.org/wiki/File:Parthenon_frieze_north_XLII.JPG.

91 *See* JEANETTE GREENFIELD, THE RETURN OF CULTURAL TREASURES 48 (3d. ed. 2007). The event held special significance for ancient Athenians: "This was the main religious event of the year in Athens and took place annually in early August on the day traditionally regarded as the birthday of the goddess." *Id.*

have been masked from view until the viewer approached the building.

Ultimately, the Parthenon sculptures represent "the culture of ancient Greece" as well as the "genesis of the ideal of humanism and beauty in art."[92] The Parthenon itself had survived largely intact after its creation. It was converted into an early Christian church, and later, after the Ottoman occupation of Athens, it became a mosque. In 1687 a serious blow was dealt to the Parthenon and tremendous damage was done to the structure of the temple and its sculptures when it was bombarded by invading Venetian forces and the powder stored there by the Ottoman forces caused an explosion which damaged the building.[93] Despite this damage, the structure itself had survived the defeat and conquest of this important maritime city for centuries, and it was not until the early nineteenth century and the arrival of Lord Elgin that the temple was seriously altered from its present state.

B. Lord Elgin and the Marbles

The most complete account of Lord Elgin and the circumstances surrounding his removal of the Parthenon sculptures was an account written by Arthur Hamilton Smith[94] which appeared in the 1916 volume of the *Journal of Hellenic Studies*. Smith was at the time the Keeper of Greek and Roman Antiquities at the British Museum.[95] The removal of the sculptures and the damage sustained to the building itself as well as the sculptures

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[92] Nadine Gordimer, *Preface to the Updated Edition* of CHRISTOPHER HITCHENS, THE PARTHENON MARBLES: THE CASE FOR REUNIFICATION (updated ed. 2008).

[93] *See* Browning, *supra* note 6, at 10. Browning describes the context for the damage:

> In 1687 a Venetian army made up almost entirely of mercenaries, besieged Athens in a vain attempt to drive the Turks from Greece. On 26 September, during a bombardment of the Acropolis by the Swedish Count Koenigsmark, a mortar bomb penetrated the roof of the Parthenon and caused the supplies of gunpowder which the Turks had stored in the building to explode. . . . The damage done to the Parthenon was extensive.

Id.

[94] A. H. Smith, *Lord Elgin and His Collection*, 36 J. HELLENIC STUD. 163 (1916).

[95] *See* HITCHENS, *supra* note 5, at 26. Hitchens notes that Smith "was a defender of Elgin in both a public and a private capacity. His concern . . . was with the integrity of the [British] Museum, and he was a distant relation of the Elgin family." *Id.*

marks the first main issue to be considered in evaluating the removal of the sculptures. This history must be considered in evaluating the British Museum's ongoing retention of the marble sculptures.

Thomas Bruce has become known to history as Lord Elgin, thanks to his title as the Seventh Earl of Elgin.[96] He was appointed "Ambassador Extraordinary and Minister Plenipotentiary of His Britannic Majesty to the Sublime Porte of Selim III Sultan of Turkey."[97] In 1800, when Elgin arrived in Athens, it was a province of the Ottoman Empire with perhaps 1300 houses, surrounded by a ten-foot-high wall built to protect the city and allow for tax collection.[98]

FIGURE 7: A PLAN OF ATHENS SHORTLY BEFORE ELGIN'S ARRIVAL[99]

[96] *See* RUSSELL CHAMBERLIN, LOOT!: THE HERITAGE OF PLUNDER 13 (1983). Elgin married a wealthy young woman and promised her a new mansion, to be known as Broom Hall, as a wedding gift. Elgin hired the young architect, Thomas Harrison, who, having been trained in Rome, was convinced that the only fitting style for such a mansion at that time was "classical." In 1799, Elgin was offered the post of ambassador to Constantinople at the Court of the Sublime Port, i.e. the Sultanate. Harrison lit up at the idea, eager to "transport Greece to Scotland." *See id.* at 14.

[97] *See* ST. CLAIR, *supra* note 11, at 1. However, ill fortune eventually befell Elgin. He was plagued with a skin disease which disfigured his face. Napoleon took a personal dislike to Elgin, which eventually resulted in his capture in France while he was attempting to return to England. He was held for three years, and when he returned he lost his seat in the House of Lords and discovered his wife had left him. *See* MEYER, *supra* note 9, at 175.

[98] *See* ST. CLAIR, *supra* note 11, at 44.

[99] *See* Smith, *supra* note 94, at 178 (reproducing a map by Louis François Sébastien Fauvel).

English art collectors had great difficulty accessing sites in Italy during its occupation by Napoleon.[100] This meant that Englishmen who wished to pursue their antiquarian desires were forced to proceed to Greece as Britain's influence with Ottoman officials increased. In fact it was the combination of English military victories over French forces at the Nile in Egypt that had really elevated the standing of the British with Ottoman officials.[101] Elgin would have enjoyed a great deal of influence over the Ottoman officials in Constantinople due to the geopolitical forces then bringing the Ottoman Empire and Great Britain together.[102]

This influence set the stage for the various official permissions which Elgin sought in removing the sculptures.[103] It was on July 31, 1801 that parts of the Parthenon were first removed. In a letter

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[100] *See* WILHELM TREUE, ART PLUNDER: THE FATE OF WORKS OF ART IN WAR AND UNREST 122, 128 (1961) (noting "the emergence of France in her new role as mistress of all Europe" and Napoleon's "plundering Italy of her art treasures").

[101] *See* HITCHENS, *supra* note 5, at 30.

[102] *See* Smith, *supra* note 94, at 191. Elgin himself noted this confluence of events that aided his cause:

> In proportion with the change of affairs in our relations towards Turkey, the facilities of access were increased to me and to all English travellers; and about the middle of the summer of 1801 all difficulties were removed; we then had access for general purposes . . . .The objection disappeared from the moment of the decided success of our arms in Egypt.

Id.

[103] David Rudenstine argues:

> The museum-going public assumes that Elgin's artisans removed the sculptures from the Parthenon walls only after Elgin had secured permission from proper Ottoman authorities. One can never know all the reasons why such a belief is so deeply embedded, but some reasons seem obvious. The sheer scope and magnitude of the removal was so enormous that it is difficult to imagine that such an undertaking could have commenced without permission. Moreover, because the Ottomans used the Acropolis as a military garrison it is inconceivable that the denuding of the Parthenon took place without some governmental approval. The stripping of the sculptures strikes the modern mind, a mind that has turned the Parthenon into a symbol of Western civilization, as such a desecration that it may seem improbable that such an event could have occurred without the approval of appropriate Ottoman authorities.

Rudenstine, *A Tale of Three Documents*, *supra* note 13, at 1855 n.13.

sent to Lord Elgin by Philip Hunt,[104] Hunt described the first removals:

> To-day the Ship-Carpenter and five of the Crew mounted the walls of the Temple of Minerva, and by the aid of Windlasses, Cordage and twenty Greeks, they succeeded in detaching and lowering down without the slightest accident, one of the Statues or Groups in the Metopes representing a combat between a youth (probably Theseus) and a Centaur; it has long been the admiration of the world; indeed nothing can equal it for beauty and grace.[105]

It is a great irony that had this taking occurred during wartime, the law of the nineteenth century would have been much different and subsequent scrutiny of Elgin's actions would have been more severe.[106]

Much of the law dealing with art and cultural heritage as it existed at the time of the removal of the Parthenon structures flows

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[104] The British Museum describes Philip Hunt:

> In 1799, at the age of 27, Philip Hunt was appointed chaplain to Lord Elgin's embassy in Constantinople. He was an energetic and highly intelligent man and, as well as the usual duties of a personal chaplain, he became involved in diplomatic affairs and the purpose of his second trip to Greece was specifically to gather intelligence on the country's readiness to meet an expected French attack and to foster goodwill. This mission was very important for both the Ottoman authorities and for the British Foreign Office.

Letter by Philip Hunt Describing the Removal of Sculptures from the Parthenon Temple, THE BRITISH MUSEUM, http://www.britishmuseum.org/explore/highlights/highlight_objects/gr/l/parthenon_letter_philip_hunt.aspx (last visited Nov. 17, 2012).

[105] *See* Smith, *supra* note 94, at 196 (quoting a letter from Philip Hunt to Lord Elgin).

[106] The nineteenth-century jurist Henry Wheaton wrote in 1846:

> By the ancient law of nations, even what was called *res sacrae* were not exempt from capture and confiscation. Cicero has conveyed this idea in his expressive metaphorical language, in the fourth oration against Verres, where he says that "Victory made all the *sacred* things of the Syracusans *profane*." But by the modern usage of nations, which has now acquired the force of law, temples of religion, public edifices devoted to civil purposes only, monuments of art, and repositories of science, are exempted from the general operations of war.

HENRY WHEATON, ELEMENTS OF INTERNATIONAL LAW 395 (3d ed. 1846).

from international law and the law of war. *The Marquis de Somerueles*, an admiralty prize case, which was decided before the Parthenon sculptures were acquired by Parliament, set an early precedent for treating works of art and pieces of cultural heritage differently from other works of art.[107] The Supreme Court of the United States has cited the case as authority for the proposition that international law forbids the capture of vessels engaged in certain activities related to "discovery or science."[108] In 1813 the United States and England were at war.[109] An American vessel was carrying works of art from Italy to the United States, and was captured by an English vessel.[110] The vessel and her cargo were taken to Nova Scotia where England sought to make the cargo a lawful prize and so to seize the works of art for England.[111] However, a petition for restitution for the works of art, which were bound for the Philadelphia Academy of Arts and Sciences, was granted.[112] The deciding judge, Dr. Croke, said:

> The same law of nations, which prescribes that all property belonging to the enemy shall be liable to confiscation, has likewise its modifications and relaxations of that rule. The arts and sciences are admitted, amongst all civilized nations, as forming an exception to the severe rights of warfare, and as entitled to favor and protection. They are considered not as the peculium of this or of that nation, but as the property of mankind at large, and as belonging to the common interests of the whole species.[113]

So, had Greece gained its independence, *The Marquis de Somerueles* would have stood for the proposition that more

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107 *See* The Marquis de Somerueles, Stewart's Vice-Admiralty Reports 482 (N.S. 1813). The case is reprinted and commented on in John Henry Merryman, Case Note, *The Marquis de Somerueles: Vice-Admiralty Court of Halifax, Nova Scotia, Stewart's Vice-Admiralty Reports 482 (1813)*, 5 INT'L J. CULTURAL PROP. 319, 319–21 (1996).

108 *See* The Paquete Habana, 175 U.S. 677, 709 (1900).

109 *See* Merryman, *supra* note 107, at 321.

110 *See id.*

111 *See id.*

112 *See id.* at 321–22.

113 *Id.*

powerful nations do not have the right to simply seize works of art from other nations. But as it happened, Elgin's acquisition of the marbles was not subject to judicial review, but rather was ratified by an act of Parliament.[114]

Lord Elgin left for Constantinople with his wife and his personal secretary William Richard Hamilton, whom Elgin then left in Italy with the Neapolitan painter Giovanni Lusieri.[115] Lusieri and Hamilton were sent to Greece to make detailed sketches, careful measurements, and plaster casts of every ancient monument in Greece. Nothing was said about removal or the dismantling of the Parthenon. At the time, it was being used as a Turkish fortress. After much struggle with the Turkish disdar in charge of the fortress, the pair managed a deal of £5 a day paid to the disdar for access to the Acropolis. Even so, access was extremely limited, as the two were only allowed near the less-important ground-level marbles.

After one year of this slow progress, in 1801 Dr. Philip Hunt, Chaplain to the British Embassy at Constantinople and Greek antiquities enthusiast, arrived in Athens and saw the slow state of progress. Hunt wrote to Elgin advising him to use his influence in Constantinople to override the disdar's restrictions. Hunt advised Elgin to request "the liberty to take away any sculptures which do not interfere with the works or walls of the citadel."[116] This is the first point at which any mention is made of physically moving the marbles.

At the moment that Elgin received Hunt's letter, British influence in Ottoman government was at a particular coincidental high, due to the recent British victory in the Battle of the Nile. Elgin was being showered with honors and easily received the privileges he sought. The crucial clause in this firman (written in Italian) gave the right to take away "*qualche pezzi di pietra*," which translates to "some pieces of stone." Elgin's agents

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[114] *See* An Act to Vest the Elgin Collection of Ancient Marbles and Sculpture in the Trustees of the British Museum for the Use of the Public, *supra* note 34.

[115] *See* CHAMBERLIN, *supra* note 96, at 14.

[116] *See id.* at 15.

stretched this firman to its permissive limit[117]—it was interpreted to mean "any."[118] Thus began the dismantling of the Parthenon. Just in the first stage of removal, 300 workmen spent over a year filling 200 chests with marble pieces, which were sent to Scotland in 1803 to adorn Elgin's home, Broom Hall.[119] To give an idea of the scale of the job, Edward Dodwell wrote: "Everything relative to this catastrophe was conducted with an eager spirit of insensate outrage, and an ardour of insensate rapacity, in opposition not only to every feeling of taste but to every sentiment of justice and humanity."[120] By the end of the production, Elgin had spent £28,000 for the cost of dismantling and boxing. Despite the fact that he has become so linked with these sculptures, Elgin was not present during any of the dismantling, save for a brief visit in 1802.

He did, however, send word urging his men to work as quickly as possible, as he knew Turkish favor for the British was dwindling. On his way home by land, war broke out in France and he was held hostage in that country until 1806. When he finally returned to England, his life was in ruins; his wife had left him for another man, his diplomatic standing had collapsed (he lost his seat in the House of Lords), and an attack on his marbles instigated by Richard Payne Knight**,** a "leading member of the Society of Dilettanti, elegant young men who possessed both taste and money all well wrapped up in self-confidence"[121] awaited him. Payne attacked not only Elgin personally, but also the authenticity of his marbles, claiming that they were Roman from the time of Hadrian.[122] All of the marbles finally arrived in England in 1812 (Elgin had to spend another £5,000 in the process to retrieve twelve chests that had sunk during sea passage); Elgin had already abandoned the idea of bringing them to Scotland.

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117 *See* MEYER, *supra* note 9, at 173. Meyer cites Sir Harold Nicolson, a British writer who served in the foreign office with Greece as his placement, who argued that the ambiguous permission did not mean a wholesale stripping of the structure: "Even a most free and lavish translation of the Italian tongue cannot twist these words into meaning a whole shipload of sculptures, columns and caryatids." *Id.*

118 *See id.* at 16.

119 *Id.* at 173–4; CHAMBERLIN, *supra* note 96, at 16.

120 *See* CHAMBERLIN, *supra* note 96, at 16.

121 *Id.* at 25.

122 *See id.*

Eventually, opinion in England turned from Payne's venomous attacks to public approval, especially thanks to the artist Canova, who effusively lauded the caliber of the statues. Initially, those who lamented the "rape of the most beautiful building in the world"[123] were only those who travelled to Athens and saw the wounded monument for themselves. Notably, the famous British philhellene and poet, Lord Byron, hurled poetic phrase after poetic phrase at Lord Elgin:

> Cold as the crags upon his native coast
>
> His mind as barren and his heart as hard.[124]

All told, Elgin's agents removed

- seventeen figures from the Parthenon pediments;
- fifteen metopes;
- fifty-six slabs of the temple friezes;
- one caryatid column;
- four pieces of the temple of victory;
- thirteen marble heads;
- a large assortment of carved fragments, painted vases, sepulchral pillars and inscribed albas.[125]

It is no surprise then that the removal of all these tons of marble from an ancient structure caused considerable damage. Merryman acknowledges that the removal certainly damaged the monument: "[t]he metopes and frieze were integral parts of the Parthenon's structure. In removing them, substantial portions of the adjoining masonry were damaged."[126] Lusieri even admitted that he had "been obliged to be a little barbarous"[127] in ordering the removal of the sculptures. One German archeologist, Adolf

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123 *Id.* at 26.

124 See JOHN HENRY MERRYMAN, THINKING ABOUT THE ELGIN MARBLES 44 (2009) (quoting Byron's *Childe Harold's Pilgrimage*). Merryman notes that "[t]he French, with the crucial, if unacknowledged, assistance of Byron, coined the term *Elginisme* to refer to the act of removing cultural property from its site." *Id.* at 45.

125 *See* MEYER, *supra* note 9, at 174.

126 Merryman, *Thinking About the Elgin Marbles*, *supra* note 12, at 1884.

127 ST. CLAIR, *supra* note 11, at 110 (quoting a letter from Lusieri to Elgin).

Michaelis, "criticized the brutal manner in which the marbles had been prized out of their surrounds. 'The removal of the statue of the Erechtheion, in the particular, had severely injured the surrounding architecture.'"[128]

The Greeks began restoration on the Acropolis in 1832, shortly after regaining independence from the Turks. With their independence, calls for the return of the marbles gained strength. Russell Chamberlin argues: "[w]hat had been a causal—perhaps even praiseworthy—act, in connection with an unregarded building, became an unforgivable act of vandalism when that building became a symbol of a gallant little nation's fight for freedom."[129]

Broke and exasperated, Elgin offered his marbles to the British government for the price of £74,240, a figure he had calculated based on the total expenses the marbles had cost him. In 1815 Elgin submitted a petition to the House of Commons asking that Great Britain purchase the Parthenon sculptures for the nation.[130]

Elgin laid out two main reasons why Great Britain should acquire the sculptures: for their value as works of art for the people of Great Britain, and, second, in order to rescue the sculptures from further damage.[131] With respect to the value, many in Great Britain feared that if the British government did not acquire the sculptures then they would end up in France, as so many other works of art in Europe had.[132] Charles de Visscher, an international lawyer who witnessed the destruction and spoliation of art during World War II, strongly criticized the arguments Elgin gave before Parliament justifying the removal of the sculptural elements from the Parthenon:

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128 *See* CHAMBERLIN, *supra* note 96, at 36.

129 *Id.* at 28. Chamberlin notes that "[t]here was something deeply moving about a tiny, desperately poor nation setting aside funds to restore its patrimony, to bind up the wounds of the beautiful buildings that were part also of the heritage of all mankind." *Id.* at 37.

130 *See* Smith, *supra* note 94, at 294.

131 *See id.* at 324–35.

132 *See* ANA FILIPA VRDOLJAK, INTERNATIONAL LAW, MUSEUMS AND THE RETURN OF CULTURAL OBJECTS 31 (2006)

> It is very doubtful, however, whether the arguments put forth can actually justify the irreparable damage resulting from his action. The fact is that the principle of the unity and integrity of a monument of such extraordinary artistic and historic value clearly outweighs any other consideration here. Neither the possibility of spoliation at the hands of foreigners, nor the likelihood of defacement or destruction of the monuments on the Acropolis—these were motives later cited by Lord Elgin—had the dual character of certainty and imminence that might have justified so serious a step.[133]

In 1816 a Select Committee was convened to "enquire whether it be expedient that the collection should be purchased on behalf of the public."[134] The Select Committee found that neither the Ottomon officials nor the Greek people protested the removal. The Committee determined that Elgin had acquired the needed right to remove the sculptures as a consequence of his position as ambassador and the purchase of the collection should move forward "to improve . . . national taste for the Fine Arts."[135] The 1816 Select Committee report revealed that Great Britain had aims to secure the economic and cultural advantage of the marbles to spur its own advancement.[136] As Ana Vrdoljak notes, "Britain, like Napoleonic France, was not reticent in projecting its imperial ambitions through a universal survey museum befitting an imperial capital of an ever-expanding colonial empire."[137] One of the other strong arguments in favor of British acquisition was the idea that Elgin, through his own initiative, had rescued the sculptures from destruction.[138] One MP was hesitant to acquire them on the grounds that the "sacred relics" should not be removed from "that consecrated spot" in Athens; however, they were in his estimation

133 DE VISSCHER, *supra* note 54, at 828.
134 VRDOLJAK, *supra* note 132, at 31.
135 *Id.*
136 *See id.*
137 *Id.*
138 *Id.*

likely to see further ruin if they "were lying in their own country in a course of destruction."[139]

Parliament did purchase the sculptures with public funds.[140] Elgin was offered £35,000,[141] a remarkably low price partially defended by the fact that Elgin had acquired the marbles while in his post as a public servant. Elgin bitterly took the offer, and "stepped out of history, leaving it to the marbles to carry his name down to posterity."[142]

C. Reaction to the Taking

Contemporary Greeks and many others in the cultural heritage movement have requested the reunification of the sculptures in Athens, where a new museum has been built to display the sculptures from the Parthenon which remained in Athens.[143] Museum-goers would now be able to view the Parthenon sculptures as the artists originally intended, with the exact layout of the temple, all while making a direct visual connection between the sculptures and the Parthenon itself, which is visible from the upper gallery of the museum. Despite this fact, and despite repeated calls for return in the two centuries the British Museum has possessed the sculptures, they remain in the Bloomsbury district of London at the British Museum.

The removal of the sculptures by Elgin's agents—and the destruction which they exacted on the Parthenon itself—has been called one of the most destructive acts committed on what is the world's most important ancient Greek monument.[144] There have been four broad types of reaction to the taking of the Parthenon sculptures and fragments by Elgin and his agents. The first, the collector's view, was that of Lord Elgin himself, who saw an opportunity to "save" parts of this remnant of antiquity while also bearing in mind his own potential gain. Second, the views of curators, who see in Elgin's actions an end result that enriched the

139 *Id.*
140 *See id.*
141 CHAMBERLIN, *supra* note 96, at 27.
142 *Id.* at 28.
143 *See infra* Part V.
144 *See* Browning, *supra* note 6, at 10.

cultural heritage of Great Britain and London. This view cherishes the social value these objects have acquired since their removal to London, and argues that this new context for the objects justifies any illegal or unethical aspect in their acquisition.[145] Third, the Byronic view puts forth these ancient monuments as indissoluble parts of the national patrimony.[146] A final view has emerged, which argues that these objects are best displayed in their context, on or near the Parthenon.[147]

The Greeks themselves were very critical of any potential removal of any element of the Parthenon. John Morritt, a member of Parliament speaking to the Select Committee in 1816 on the question of what interest Greeks had expressed in the Parthenon, stated that:

> [H]e had stayed at Athens . . . in the spring of 1795. . . . He had himself found it impossible to remove some neglected fragments of the frieze. In his opinion the Greeks were decidedly and strongly desirous that the marbles should not be removed from Athens, and he conceived that nothing but the influence of a public character could obtain that permission.[148]

In 1924 Sir Harold Nicolson called for the return of a Parthenon caryatid to Greece to commemorate the 100th

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[145] For example in a similar context, Philippe de Montebello, former Director of the Metropolitan Museum of Art, when discussing recent Italian efforts to repatriate works of art, expressed exasperation at nations seeking the return of art which had been taken:

> What I don't understand is why the Italian government is suddenly getting so aggressive about seizing works from the Met and the Getty and other American museums. It's not as if Italy is rushing to return the gilded horses of San Marco, stolen by the Venetians in the 1200's from Constantinople. . . . There is a resurgence of nationalism and misplaced patriotism. There is the sense that, "This is our identity."

Deborah Solomon, *Stolen Art?*, N.Y. TIMES MAGAZINE, Feb. 19, 2006 http://www.nytimes.com/2006/02/19/magazine/19wwln_q4.html.

[146] MEYER, *supra* note 9, at 179.

[147] The creation of the New Acropolis Museum is a physical embodiment of this argument, that the sculptures removed by Elgin are best-viewed in context. *See* Michael Kimmelman, *Elgin Marble Argument in a New Light*, N.Y. TIMES, June 24, 2009, at C1, *available at* http://www.nytimes.com/2009/06/24/arts/design/24abroad.html.

[148] Smith, *supra* note 94, at 339.

anniversary of Lord Byron's death in the Greek War of Independence. He devised this plan as a symbolic gesture to benefit Anglo-Greek relations. The memorandum was, of course, shot down.[149] That and all subsequent efforts to reunify some or all of the Parthenon sculptures in Athens have been rejected by Parliament and by the British Museum. The dispute will not likely go away until a final reunification or some other satisfactory agreement can be reached.

When members of the United States military team known as the Monuments, Fine Arts and Archives program (the team sought to prevent art theft and return works of art taken from nations by the Nazis) learned of a potential plan by Allied forces to seize German cultural objects, they drafted the Wiesbaden Manifesto in November 1945:

> We wish to state that from our own knowledge, no historical grievance will rankle so long, or be the cause of so much justified bitterness, as the removal, for any reason, of a part of the heritage of any nation, even if that heritage may be interpreted as a prize of war. And though this removal may be done with every intention of altruism, we are none the less convinced that it is our duty, individually and collectively, to protest against it, and that though our obligations are to the nation to which we owe allegiance, there are yet further obligations to common justice, decency, and the establishment of the power of right, not might, among civilized nations.[150]

This describes the difficult position the British Museum will continue to have to navigate. Rudenstine has argued that a reunification of the sculptures is likely and will be uncomfortable for Great Britain:

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[149] *See* MEYER, *supra* note 9, at 171–72.

[150] In 1946 a former Monuments and Fine Arts and Archives officer published the letter along with an explanation of the context for the courageous statement. Charles L. Kuhn, *German Paintings in the National Gallery: A Protest*, 5 COLL. ART ASS'N 78, 82 (1946).

> [T]he pressure on Britain to repatriate Lord Elgin's antiquities collection seems to be increasing, and if the current trend continues, Britain may well return the marbles to Athens. If that occurs, Britain will be acknowledging, whether it wishes to or not, that what was acceptable during the age of empire must give way to the demands of an ever-shrinking world that aspires to the rule of law.[151]

One of the most powerful advocates for reunification, Melina Mercouri, was a Greek actress who became Greek Minister of Culture and was a vocal and persuasive champion for the reunification of the Parthenon sculptures. When asked why she in her capacity as Greek Minister of Culture would only make a request for the Parthenon sculptures:

> Because we have fought and died for the Parthenon and the Acropolis. Because when we are born, they talk to us about all this great history that makes Greekness. Because this is the most beautiful, the most impressive, the most monumental building in all Europe and one of the seven miracles of the world. Because the Parthenon was torn down and mutilated when we were under the Ottoman Turkish occupation. Because the marbles were taken by an aristocrat like Lord Elgin for his own pleasure. Because this is our cultural history and it belongs not to the British Museum but to this country and this temple. We don't ask to have statues and paintings and everything that is Greek in all the museums of the world. But with the marbles it is a question of restoring integrity to a mutilated building. The Parthenon has stood for 2,000 years, symbol of a civilization. We want the most beautiful part of it back in Greece.[152]

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[151] Rudenstine, *Lord Elgin and the Ottomans*, *supra* note 13, at 471.

[152] *Q&A: Melina Mercouri: Greece's Claim to the Elgin Marbles*, N.Y. TIMES, March 4, 1984, at E9.

Though he ultimately advocates that the British Museum retain the sculptures, Merryman concedes that the emotional appeals for the return of the sculptures have much to offer: "If the matter were to be decided on the basis of direct emotional appeal, the Marbles would go back to Greece tomorrow."[153] And yet he goes on to remark that emotional arguments are, at least in the legal context, too often weak on the facts or the law, and that our emotional response is "unreliable" in resolving difficult questions.[154] Emotional responses may be unreliable, yet in Merryman's long discussion of the law and ethics of the controversy, he offers many reasons why the sculptures must stay with the British Museum rather than be returned to Greece.[155] But he omits many facts, primarily from the art-historical perspective. And as regards the law, if we evaluate the current state of cultural heritage law, and take a very long look at the facts of the creation and stewardship of the Parthenon, we come to very different conclusions.

III. CULTURAL JUSTICE

The discussion up to this point has looked to the history of the Parthenon and the various reactions to Elgin's taking. This history has merit and offers invaluable context to the present dispute, but the key to moving the discussion forward will be to ask what

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153 Merryman, *Thinking About the Elgin Marbles*, *supra* note 12, at 1883.

154 *Id.*

155 In his conclusion to the piece, Merryman seems to apologize for cutting against popular sentiment for return:

> There is something dispiriting about a reasoned conclusion that conflicts with a congenial sentiment. . . . As a practicing, credentialed Hellenophile who once subscribed fully to the usual attitude toward the Marbles, I have watched with growing dismay as the accepted version showed itself to misrepresent history and to indulge nationalist sentiment.

Id. at 1922. With his final clause, perhaps he contradicts his claim to be a Hellenophile, of course, but he at least makes the claim to have come to the reluctant conclusion that the sculptures should stay with the British Museum. Contrast Merryman's view with that of Ana Vrdoljak, writing about the context surrounding the decision in 1816 to acquire the Parthenon sculptures from Elgin: "[i]f Greek claims for return were later to be characterized as nationalist, there can be little doubt that the British position was equally imbued with a sense of national pride and identity formation." VRDOLJAK, *supra* note 132, at 32.

should be done with the Parthenon sculptures now. What Elgin did, how justified he was, and how wise it was for Parliament to acquire these objects are all important historical questions, but with respect to these pieces of cultural heritage, we need to ask the deeper questions which can work towards resolving the dispute.

The best framework for reaching a productive resolution to the dispute will be by applying principles of justice. In a recent article,[156] I traced the connections between environment and culture and argued that environmental justice has much to offer the cultural heritage movement. This concept, cultural justice, implies that cultures have a right to access the works of other cultures while also maintaining the right to their own culture and its expressions. When discussing justice we must remember of course that it is a big, sometimes aspirational concept. For "justice" to have any meaning we must subject it to some kinds of boundaries. In discussing the application of justice to the environment, Ole Pedersen argues that we must "subject the concept [of justice] to critical scrutiny, given the possible implications of its claims of injustice."[157] The same applies when constructing theories for applying justice to the Parthenon sculptures.

To animate our discussion we need a framework for understanding how we can achieve justice within such a vexing and long-running dispute. To that end, we need first to craft a guiding principle for what justice is with respect to cultural objects, and second, we must provide a viable framework for achieving that goal.

John Rawls's theory of justice offers the most promise for our understanding of cultural heritage. He envisions a space where we can craft principles of justice, a place he calls the "original position," where we are separated from our internal bias by a "veil of ignorance."[158] He offers a conceptual space in which "[m]en are to decide in advance how they are to regulate their claims against

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[156] Derek Fincham, *Justice and the Cultural Heritage Movement: Using Environmental Justice to Appraise Art and Antiquities Disputes*, 20 VA. J. SOC. POL'Y & L. 43 (2012).

[157] Ole W. Pedersen, *Environmental Principles and Environmental Justice*, 12 ENVTL. L. REV. 26, 26 (2010).

[158] JOHN RAWLS, A THEORY OF JUSTICE 12 (1971).

one another and what is to be the foundation charter of their society."[159] Mutually disinterested individuals will meet in the imaginary "original position" behind their "veil of ignorance" at a point where they will have no knowledge of their status or abilities and where they decide upon the rules that will govern their society.[160] In the original position we are freed from bias and can then craft a set of principles to promote justice. Rawls argues that "[a]mong the essential features of this situation is that no one knows his place in society, his class position or social status, nor does anyone know his fortune in the distribution of natural assets and abilities, his intelligence, strength, and the like."[161] This original position should not be thought of as a "primitive condition of culture."[162] Instead, the veil of ignorance removes us from an understanding of identity, culture, class, race, or position of any kind. It provides a mechanism for questioning principles and cultural divisions.[163]

In thinking about this veil of ignorance, we have to be careful to think about *when* the dispute we are considering occurred. For example, if we were to consider the propriety of Elgin's actions in 1816, it is very likely that we might have agreed that the threats to the Parthenon posed by the Ottoman officials and the lack of care with which they treated the monument and the marble could justifiably have meant that Elgin was removing the objects to preserve them. That is an arguable position, of course, one which exceeds the ambitions of the present work, but that is the kind of reasonable decision we would consider in weighing Elgin's actions. While Rawls uses the veil of ignorance to limit unhelpful attributes like social position or personal attributes, it is those considerations which play an integral role in forging our

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159 *Id.* at 11.

160 *Id.* at 12, 136.

161 *Id.* at 12.

162 *Id.*

163 *See* Drucilla Cornell & William W. Bratton, *Deadweight Costs and Intrinsic Wrongs of Nativism: Economics Freedom and Legal Suppression of Spanish*, 84 CORNELL L. REV. 595, 669 (1998) ("The veil of ignorance forecloses knowledge of our gender, our ethnic identity, our linguistic origin, our race, or our class position. Without this knowledge, the perpetuation of social hierarchies is not rational because no one knows where in the world of social hierarchies she would fall.").

relationships with works of art and objects of cultural heritage. This cannot mean that we simply separate the sculptures even further and distribute them equally across the world's museums. Art removed from its cultural context loses value. A decision-maker without any cultural context to evaluate a claim must view these cultural objects as peculiar objects which groups prize, but it will be difficult to determine a just result in individual cases.[164] As a consequence, we must also look to other movements to better understand the relationship between culture and justice. The disposition of cultural objects should not merely be governed by the degree to which this or that group had access to economic or political power. To achieve justice with these works we must not only preserve and protect these objects for future generations but also ensure that they are *viewed* in a just way.

To put it another way, decisions about the proper disposition of works like the Marbles must factor in the original intention of the artists. It should allow the public to view the works as a unified whole, as the integral piece of art and architecture that the original creators intended.[165] Rawls's veil of ignorance allows us to consider how we might resolve the dispute, but in stripping away the cultural, historical and artistic connections we have with Ancient Greece and the Parthenon, we lose sight of what makes the sculptures such a vibrant piece of cultural heritage. We are unable to fully grasp the life the objects had since they were put on display at the British Museum, and are also unable to see the

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[164] *See* Rebecca Tushnet, *Worth a Thousand Words: The Images of Copyright*, 125 HARV. L. REV. 683, 694 (2012). Tushnet argues that

> cultural factors are vital in determining what, if anything, those perceptual tendencies will mean, both generally and as a matter of law. Judges and lawyers are not mistaken in intuitively drawing lines between images and words. The problem with judges' and lawyers' unexamined intuitions is that they then take for granted the social and legal consequences of the differences between text and image, often in conflicting ways.

Id.

[165] The idea of giving artists rights in their works long after they have sold them has a rich history. Michelangelo may have been the first artist to claim these rights for himself while he was struggling against the patronage system. *See* Natalie C. Suhl, *Moral Rights Protection in the United States under the Berne Convention: A Fictional Work*, 12 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1203, 1206–07 (2001).

important role they could play unified at the New Acropolis Museum.

In the present case, the best approximation of the original position is to consider how, in the aggregate, cultures have decided to protect and preserve cultural heritage by examining the cultural heritage policy which has governed these important works in recent decades. As we will see, if one shifts one's view of cultural heritage from a position of raw acquisition and collecting to a position that aims to put objects in their proper context and encourages stewardship of them, the increasingly unjust nature of the British Museum's retention of these works of art is revealed. It is an uncomfortable truth that repose has played an important role in cultural heritage disputes, but the mere passage of time seldom promotes justice. More importantly the passage of time will not always establish a stronger connection between works of art and the viewer.[166] Moving away from strict legalistic defenses is the first step to producing a just outcome to these long-running disputes.

One example of a recent repatriation may offer guidance and help illuminate the concept of cultural justice. In a 2011 article, Stacey Jessiman detailed the process of repatriation of a totem pole from a European museum to a North American indigenous community.[167] In 2006 a G'psgolox totem pole was returned to the Haisla First Nation in British Columbia.[168] Before that, the pole had been in Stockholm, Sweden's Museum of Ethnography for seventy-seven years.[169] The nine-meter pole was commissioned in 1872 and depicts a smallpox epidemic in the area which spared the

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166 *See, e.g.*, Iran v. Berend, [2007] EWHC (QB) 132 (holding that an Achaemenid limestone relief that upheld the French prescription period of twenty-five years in refusing to return the Persian antiquity to Iran, even though it had been removed from a monument in Persepolis).

167 Stacey R. Jessiman, *The Repatriation of the G'psgolox Totem Pole: A Study of Its Context, Process, and Outcome*, 18 INT'L J. CULTURAL PROP. 365 (2011).

168 *Id*. at 365.

169 Stephen Hume, *Rise of a Spirit Totem Embodies the Resurgence of Haisla Culture*, VANCOUVER SUN, Sept. 2, 2000, at A23 ([The fate of the totem pole] "symbolized the trials of the Haisla people following first contact with Europeans. Their villages stood empty, ravaged by epidemic after epidemic. They were impoverished as the dominant culture appropriated their resource base. In the end, even the most important of their cultural icons were turned into colonial booty.").

clan which commissioned it.[170] Olof Hansson was a Swedish consul stationed in Prince Rupert, British Columbia, who desired to acquire a totem pole to take back to Sweden, and he was granted permission to do so by the federal Department of Indian Affairs.[171] The removal of the pole was given official permission by the state, just as Elgin argued before Parliament in 1816 that he had been given permission by Ottoman officials to order removal of parts of the Parthenon. But neither the Greek people nor the Haisla First Nation were allowed an opportunity to protest the removal.[172] This inability of the creating community or its descendants constituted an injustice.

The removal of the pole was a "source of grief for the people of the Haisla Nation."[173] They were aware the pole had been taken but they were not certain of its location. In 1991, a Haisla delegation, which included the descendant of Chief G'psgolox, who had commissioned the pole, traveled to Stockholm to discuss with the museum the pole's repatriation. [174]

After a long series of discussions, the pole was finally returned in 2006.[175] The discussions led to some unexpected and positive developments. Initially, the Swedes were concerned that the pole would be returned to the elements and would eventually disintegrate. Yet this was precisely the role that the creators of the object envisaged. From the perspective of the Haisla, they came to admire and respect the Swedes for caring for the pole and preserving it for them.[176] From the perspective of the Swedish museum, a connection was created between the Haisla Nation and Sweden as the tribe contextualized the pole before it was returned to Canada and carvers from the tribe traveled to Sweden to create

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170 *See Canadian Totem Pole to Travel Home from Sweden*, GLOBE & MAIL, Mar. 13, 2006, at R2.

171 *See* Jessiman, *supra* note 167, at 369.

172 There may have been a great deal of protest at the local level to taking of objects from Ottoman-controlled lands at this time which has gone unrecognized. *See* Fredrik Thomasson, *Justifying and Criticizing the Removals of Antiquities in Ottoman Lands: Tracking the Sigeion Inscription*, 17 INT'L J. CULTURAL PROP. 493, 500 (2010).

173 *See* Jessiman, *supra* note 167, at 366.

174 *See id.*

175 *See id.* at 376.

176 *See id.* at 382.

another object. As the Swedish Culture Minister noted in a 2006 ceremony to commemorate the new pole, the replacement work "will also give us cause to consider the importance of respect and cooperation in our dealings with one another in the present day and age."[177]

This was a just result. Even though the pole was repatriated and may now deteriorate in the elements as its creators intended, both communities are left with versions of the original cultural object, and the connections and stories and educational process which emerged created an important and lasting connection.[178] Yet this process would not have been possible had either side resorted to legal claims. There are instances, particularly with respect to claims for objects we might classify as historical takings, which can be better dealt with outside the courtroom in a deliberative educative process which has the potential to produce improved outcomes for all sides involved. Certainly not every case can yield such a good result, and there are hard feelings on both sides even in this dispute.[179] Nonetheless, the end result was the best possible realization of cultural justice for the creator community and the Swedish museum.

In a perfect world, the British Museum and Greece would come to a similar mutually beneficial agreement. And yet ultimately, when considering the Parthenon dispute and in order to

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[177] *Id.* at 381.

[178] *See id.* at 376–77 (noting that since the introduction of the new pole, the visitorship to the Museum of Ethnography has increased, interest in the Haisla people has been raised, and in the Kitimaat Village in North America the Haisla are raising funds to build a dedicated facility for the original object).

[179] As Stacey Jessiman notes:

> Chief Dan Paul Sr. felt profound sadness that his ancestor's pole would continue to be housed indoors instead of being allowed to complete its cycle . . . . In addition the length of the repatriation process and the financial strain it imposed was hard for the Haisla to bear. At every step, they encountered seemingly insurmountable barriers involved in finding the necessary funds to travel to Sweden to make their repatriation claim, negotiate the pole's return, carve the two replica poles, ship one replica to Sweden and the original pole home, and hold all the traditional ceremonies necessary for raising the replicas and celebrating the original pole's arrival home in Kitimaat.

Id. at 381.

craft a just resolution, we must be mindful of the rules the international community has created in evaluating cultural heritage disputes. The international law and norms which govern the distribution of cultural heritage have changed remarkably since the problems of looting first gained widespread attention in the early 1970s. In order to achieve a just resolution to the Parthenon sculptures dispute we need to consider the law as it existed in the early nineteenth century, but also the law as it exists today.

IV. APPLYING CULTURAL HERITAGE LAW TO THE DISPUTE, THEN AND NOW

Greece's claim to the Parthenon sculptures is complicated by the fact that the country had been occupied by the Ottoman Empire at the time of the removal. Elgin attempted to secure permission for the removal from Ottoman officials. Whether the officials had the legal right to permit this removal, and whether Elgin successfully acquired these legal rights before the removal has been considered elsewhere.[180] The Greek claim, though, is complicated by the interactions between Elgin on behalf of Great Britain and the Ottoman Empire.[181]

A. Applicable Law in the Early Nineteenth Century

One of the best ways to gauge the law as it existed when Elgin ordered the removal of the Parthenon sculptures is to examine the reaction of legal systems and writers to the efforts by Napoleon to amass art from all over Europe. If no treaty or other law applies directly to a dispute, the contemporary custom and state practice at the time can become the primary basis for deciding whether any given action comports with international law.[182] Of course, at the

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[180] *See, e.g.*, Rudenstine, *Lord Elgin and the Ottomans*, *supra* note 13.

[181] This difficult chain of custody over the sculptures mirrors in many ways the fundamental problem with art theft involving two innocents. *See* Fincham, *How Adopting the Lex Originis Rule Can Impede the Flow of Illicit Cultural Property*, *supra* note 63, at 111, 113–14.

[182] *See, e.g.*, The Paquete Habana, 175 U.S 677, 700 (1900) ("Where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations.").

time, Napoleon was amassing works of art from every part of the globe where the French army had power.

1. Great Britain's Reaction to Napoleon's Spoliation

As French forces invaded lands, commissioners systematically gathered works of art to be removed back to Paris.[183] In Belgium alone the French removed the central part of Jan Van Eyck's magnificent altarpiece at the Cathedral of St. Bavon in Ghent in 1794, and it was not returned until the Congress of Vienna negotiated its repatriation in 1815.[184]

There was a great deal of resistance to these French takings.[185] After the plunder of Rome by the French, Quatremère de Quincy, an early Enlightenment expert in architectural theory and archaeology criticized the taking:

> The arts and sciences have long formed in Europe a republic whose members, bound together by the love of and the search for beauty and truth, which form their social contract, are much less likely to isolate themselves in their respective countries than to bring the interests of those countries into closer relation, from the cherished point of view of universal fraternity. . . . It is as a member of this universal republic of the arts and sciences, and not as an inhabitant of this or that nation, that I shall discuss the concern of all parts in the preservation of the whole. What is this concern? It is a concern for civilization, for perfecting the means of attaining happiness and pleasure, for the advancement and progress of education and reason: in a word, for the improvement of the human race. Everything that can help toward this end belongs to all peoples; no one of them has the right to appropriate it for itself, or to dispose of it arbitrarily.[186]

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183 *See* VRDOLJAK, *supra* note 132, at 23–24.

184 *See* DE VISSCHER, *supra* note 54, at 824.

185 *See* CHAMBERLIN, *supra* note 96, at 137.

186 *See* DE VISSCHER, *supra* note 54, at 824.

De Quincy was more concerned with viewing and enjoying this cultural heritage in context. Why should French forces take objects from Rome rather than "exploit the ruins of Provence . . . why not restore the beautiful amphitheater at Nimes to house the ancient treasures of this Roman colony?"[187] Ana Vrdoljak notes that the other European nations were unwilling to protect the rights of Greeks living in the Ottoman Empire—at least with respect to their cultural heritage:

> Significantly, the European Powers purported to impose provisions on the Ottoman Empire to protect minorities. Yet, instead of protecting the cultural and religious heritage of minorities within the Ottoman Empire, these States and their nationals took advantage of the unrest and resultant economic and political upheaval to reap antiquities for their private and public collections.[188]

Which is why it came as a surprise to many that in October 1815 the *London Courier* published portions of a letter from Paris:

> Things have suddenly taken a very different appearance here. To the great astonishment of everybody, and when there was least reason to expect it, the Duke of Wellington came to the diplomatic conferences with a note in his hand, by which he expressly required all works of Art should be [re]stored to their respective owners. This excited great attention, and the Belgians, who having immense claims to make had been hitherto most obstinately refused, did not wait to be told that they might begin to take back their own.[189]

So the initial impulse to amass art at all costs was being resisted. In 1815 at the Congress of Vienna, the British delegation advocated for a return of cultural objects which had been taken and transported to Paris to form the Louvre. William Richard

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[187] Dorothy Mackay Quynn, *The Art Confiscations of the Napoleonic Wars*, 50 AM. HIST. REV. 437, 439–40 (1945).

[188] *See* VRDOLJAK, *supra* note 132, at 32.

[189] *See* Quynn, *supra* note 187, at 448.

Hamilton, who had been appointed Elgin's private secretary at the Constantinople embassy,[190] was at the Congress of Vienna and wrote:

> [A]ll the Sovereigns in Europe have thought it worth their while to confer seriously on the propriety of leaving Paris in possession of the chefs-d'oeuvres of [ancient] art . . . they have risked a fresh war to remove them from Paris. . . . [T]hese works are considered so sacred a property, that no direct or indirect means are to be allowed for their being conveyed elsewhere than where they came from.[191]

Writing in 1815, the Foreign Secretary for Great Britain, Lord Castlereagh, wrote: "[U]pon what principle deprive France of her late territorial acqusitions, and preserve to her the spoliations appertaining to those territories, which all modern conquerors have invariably respected as inseperatable [sic] from the country to which they belong."[192] While the British were securing and negotiating the restitution of works of art taken at the Congress of Vienna in 1815, one year later, in 1816, Parliament considered whether Elgin had legally acquired the Parthenon sculptures from Athens, a people which had been "subject to foreign occupation"[193] for hundreds of years by the Ottoman Empire. So in an example of striking disparate treatment, works of art removed from "civilized" or independent nations were returned, but art which was taken by an occupying power was not.

Nevertheless, the seeds for protecting art during conflict were sown at the Vienna Congress. Securing cultural heritage during armed conflict gained increased international support with the advent of the "Lieber Code," formulated by the German-American

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190 *See id.* at 449. Hamilton was also responsible in 1801 for ensuring the Rosetta stone made its way to the British Museum. In Egypt he discovered French soldiers shipping the Rosetta stone out, in violation of an agreement with the British forces, and he personally commandeered soldiers and rowed out to the ship in question and returned the Rosetta Stone back to land. *Id.*

191 *See* Smith, *supra* note 94, at 332.

192 *See* VRDOLJAK, *supra* note 132, at 19.

193 *Id.* at 30.

political scientist Francis Lieber.[194] The Lieber Code is a set of army regulations set out by President Abraham Lincoln for the conduct of the Union army during the American Civil War. This was the first attempt to codify the measures which should be taken to protect cultural property. Article 34 of the Lieber Code states that property should be treated as private property unless used for a military purpose.[195] Art is dealt with in article 35, which provides "Classical works of art, libraries, scientific collections, or precious instruments . . . must be secured against all avoidable injury, even when they are contained in fortified places whilst besieged or bombarded."[196] Continued concern over protecting private property produced the 1899[197] and 1907[198] Hague Conventions. These Conventions prohibit invading forces from pillaging and require them to abide by the civil laws of the conquered territory.[199] Article 27 of the 1907 Convention provides that all religious, scientific, and historic monuments should be protected.[200]

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[194] Instructions for the Government of Armies of the United States in the Field, promulgated as General Orders No. 100, Apr. 24, 1863 [hereinafter Lieber Code], *available at* http://avalon.law.yale.edu/19th_century/lieber.asp.

[195] The article reads:

> As a general rule, the property belonging to churches, to hospitals, or other establishments of an exclusively charitable character, to establishments of education, or foundations for the promotion of knowledge, whether public schools, universities, academies of learning or observatories, museums of fine arts, or of a scientific character—such property is not to be considered public property.

Id. at art. 34.

[196] *Id.* at art. 35.

[197] Hague Convention (II) with Respect to the Laws and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War on Land, July 29, 1899, 32 Stat. 1803. The Convention was adopted at the First Hague Peace Conference in 1899 and entered into force in 1900.

[198] Hague Convention (IV) Respecting the Laws and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277.

[199] *See* Andrea Cunning, *Property in Times of War and Peace*, 11 TULSA J. COMP. & INT'L L. 211, 215 (2003) ("The concern over protecting private property became more of an international concern as a nation's capability to conduct war was increased by many of the effects of the industrial revolution and warfare became more violent and destructive.").

[200] Hague Convention (IV) Respecting the Laws and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War on Land art. 27, Oct. 18

2. What Rights Did Elgin Acquire in the Sculptures?

An important initial consideration in any legal analysis of the dispute is what rights the Crown acquired from Elgin when it purchased the sculptures in 1816. An ancient legal principle known as *nemo dat quod non habet*[201] holds that the Crown can acquire no better title to the objects than what was acquired by Elgin.[202] In order to answer that question we must look to whether the Ottoman authority had the legal or moral right to sell portions of the sculptures, and if so, whether the Ottoman officials did in fact grant Elgin the right to remove the sculptures.

The claim that the Ottomans would have had the right to dispose of the Parthenon stems from the principle that because the empire was in complete control of Athens, it also had rights in the monuments and works of art located there. The Ottomans by the nature of their dominion over the Parthenon itself had a property interest in the structure, which the Greek nation would certainly have as well once it earned its independence a few decades later.[203] Yet this should not allow the Ottomans the right to strip a nation of all its artistic treasures.

1907, 36 Stat. 2277 ("In sieges and bombardments all necessary steps must be taken to spare, as far as possible, buildings dedicated to religion, art, science, or charitable purposes, historic monuments, hospitals, and places where sick and wounded are collected, provided they are not being used at the time for military purposes.").

[201] *See* Mitchell v. Hawley, 83 U.S. 544 (1872). As the Court stated the general principle:

> No one in general can sell personal property and convey a valid title to it unless he is the owner or lawfully represents the owner. *Nemo dat quod non habet*. Persons, therefore, who buy goods from one not the owner, and who does not lawfully represent the owner, however innocent they may be, obtain no property whatever in the goods, as no one can convey in such a case any better title than he owns, unless the sale is made in market overt, or under circumstances which show that the seller lawfully represented the owner.

Id. at 550.

[202] This principle is reflected in the Sale of Goods Act of 1979:

> Subject to this Act, where goods are sold by a person who is not their owner, and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had, unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell.

Sale of Goods Act, 1979, c.54, § 21(1) (U.K.).

[203] *See* D. P. O'CONNELL, THE LAW OF STATE SUCCESSION 226 (1956).

Merryman argues that the actions of Ottoman officials under the law of nations as it then existed meant that their authority to sell or dispose of the monument (or part of it) was "presumptively valid."[204] Merryman admits that even if we were to assume the Ottoman authorities had the right to dispose of the sculptures, the legality of the disposal should not be transferred except in "the most unusual circumstances."[205] If one does not feel that the systematic removal of sculptures from an ancient monument which is one of the seven greatest achievements of antiquity should not be subject to the principles governing cultural heritage, one wonders what role, if any, cultural heritage law should have.[206]

Elgin was urged to procure a written document from Ottoman officials in Athens which would have allowed him

- to enter freely within the walls of the Citadel, and to draw and model with plaster the Ancient Temples there;
- to erect scaffolding and to dig where they may wish to discover the ancient foundations; and
- liberty to take away any sculptures or inscriptions which do not interfere with the works or walls of the Citadel.[207]

This document, called a firman,[208] has not survived in original form, though there is an Italian version which survives today.

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[204] Merryman, *Thinking About the Elgin Marbles*, *supra* note 12, at 1897 ("In this instance the Ottomans had a solid claim to legal authority over the Parthenon because it was public property, which the successor nation acquires on a change of sovereignty.").

[205] *Id.* at 1897.

[206] Merryman himself admits in a subsequent writing that regulation of these objects is so important to preserve the objects that "[n]o thinking person argues for free trade in cultural property." *See* John Henry Merryman, *Cultural Property Internationalism*, 12 INT'L J. CULTURAL PROP. 11, 12 (2005).

[207] ST. CLAIR, *supra* note 11, at 88; Smith, *supra* note 94, at 190.

[208] Merryman raises the question of what this document is, and whether it should be considered a firman: "A Firman (firman, fermaun) was an edict/order/decree/permit/letter from the Ottoman government addressed to one of its officials ordering/suggesting/requesting that a favor be conferred on a person." Merryman, *Thinking About the Elgin Marbles*, *supra* note 12, at 1898 (citing 4 OXFORD ENGLISH DICTIONARY 249 (1961)). Rudenstine questions what exactly this document would have allowed Elgin to do:

> The question of whether the 1801 document was a firman has not been considered carefully by those who sympathize with Elgin's

Nearly all of the rights which Elgin, and by extension the British Museum, had acquired in the Parthenon sculptures stems from this document. And yet at the 1816 parliamentary Select Committee Elgin was unable to produce the permission. So there exists no direct evidence of proof from any official Ottoman source providing Elgin and his agents the right to remove the marbles.[209] One would be hard-pressed to imagine a more difficult and ambiguous body of evidence with which to resolve such a long-simmering dispute. The Italian version of what may have been the firman reads:

> Therefore after having fulfilled the duties of hospitality, and given a proper reception to the aforesaid Artists In compliance with the urgent request of the said Ambassador to that effect, and because it is incumbent on us to provide that they meet no opposition in walking viewing or contemplating the pictures and buildings they may wish to design or copy; and in any of their works of fixing scaffolding, or using their various instruments; it is our desire that on the arrival of this letter you use your diligence to act conformably to the instances of the said Ambassador as along as the said five artists dwelling in that place shall be employed in going in and out of the citadel of Athens which is the place of observation; or in fixing scaffolding around the ancient Temple of the Idols, or in modeling with chalk or gypsum the said ornaments and visible figures; or in measuring the

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> initial taking or the retention by the British Museum . . . . Although one might well think there was little difference between an "edict or order," on the one hand, and a decree or permit, on the other—they all seem like formal, legal documents—that is not true for a "letter," which can include a communication that is much less formal, and certainly less legal, in character.

Rudenstine, *A Tale of Three Documents*, *supra* note 13, at 1879.

[209] *See* GREENFIELD, *supra* note 91, at 74 ("Much has been made of interpreting this wording [of the Firman] in the years since that report. But the fact is that the Committee never had sight of *any* legal document or documentary evidence of any kind authorizing the removal of the marbles.").

> fragments and vestiges of other ruined buildings; or in excavating when they find it necessary the foundations in search of inscriptions among the rubbish; that they be not molested by the said Disdar nor by any other persons; nor even by you to whom this letter is addressed; and that no one meddle with their scaffolding or implements nor hinder them from taking away any pieces of stone with inscriptions and figures. In the aforesaid manner see that you behave and comport yourselves.[210]

The validity of this document, however, has been questioned. Rudenstine argues that "these few words fail to authorize removal of marble statuary from the Parthenon edifice. When they are read in the context of the entire document, the assertion that they permitted Lord Elgin to remove metopes, friezes and statues from the pediments is specious."[211]

This was the only translation provided to the Select Committee in 1816, and it may have materially differed from the document which Elgin acquired from Ottoman officials.[212] This calls into question what precise rights Elgin and his agents in Athens would have had with respect to the Parthenon and its architectural elements. The factual inquiry into what Elgin was granted—and when and by whom—and what legal rights to the Parthenon this entitled him is an interesting question of legal history, and one worth seeking answers to in archives in London, Athens, Istanbul, and elsewhere. Yet this piece sets aside the questions of the facts as they existed in 1801 when Elgin was negotiating with Ottoman officials.

The existence or non-existence of this documentary evidence should not dictate the result in this case. Whether a document exists in an archive or whether it was lost to history, or perhaps even destroyed by an apologist for Elgin, should not govern the result in this case. It is an element to consider certainly, but does

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210 ST. CLAIR, *supra* note 11, at 90.

211 Rudenstine, *Lord Elgin and the Ottomans*, *supra* note 13, at 456.

212 Rudenstine, *A Tale of Three Documents*, *supra* note 13, at 1883.

not overwhelm the entire enquiry. We must consider what rights Elgin was granted. What we know is that Ottoman officials, an occupying force, granted Elgin and his agents the right to do some study, and sketching of the Parthenon. It is certain that the Ottoman official who gave some degree of permission to Elgin should be allowed or permitted to speak for all future generations with respect to the disposition of these cultural objects.

In fact, even Elgin may have viewed the removal of the sculptures with some hesitancy. During the initial time of removal of the sculptures from the Parthenon, it is an open question whether Elgin even knew that Hunt and his agents in Athens were removing physical elements of the Parthenon.[213] In addition, Elgin sought some legal guarantees for the work being done in Athens when he returned to Constantinople.

Moreover, in order to secure the objects, Elgin may have needed to provide bribes to Ottoman officials.[214] Ottoman officials in Constantinople criticized the destruction taking place at the Parthenon twice, in 1804 and again in 1809.[215] This kind of behavior prevents us from characterizing the continued retention of the marbles as just.

Under English law, the act of bribing officials was very much prohibited, and had been since at least the time of the Magna

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213 Rudenstine, *Lord Elgin and the Ottomans*, *supra* note 13, at 460–61.

214 Merryman notes about the bribes Elgin would have offered to Ottoman officials:

> The Ottomans who were bribed were the responsible officials. Whatever their motivation may have been, they had the legal authority to perform those actions. At a time and in a culture in which officials routinely had to be bribed to perform their legal duties (as is still true today in much of the world), the fact that bribes occurred was hardly a significant legal consideration.

Merryman, *A Tale of Three Documents*, *supra* note 12, at 1902. Rudenstine finds the bribes objectionable because

> bribed Ottoman officials may have had discretion to perform the acts or not to perform them, in which case it becomes an essential ingredient to the exercise of discretion . . . . In short, a bribe in these circumstances does not merely grease a wheel that is otherwise turning; it creates the wheel, provides the grease, and commences the spinning.

Rudenstine, *Lord Elgin and the Marbles*, *supra* note 13, at 468.

215 *See id.* at 470.

Carta.[216] This attitude continued into the nineteenth century. In the case of *Barclay v. Pearson*, the Chancery court made clear the status of bribery in English law: "in bribery, if a man pays a sum of money by way of a bribe, he can never recover it in an action; because both plaintiff and defendant are equally criminal."[217] It is amazing the lengths to which some who support the British retention of the sculptures will go. In a response to St. Clair's third edition of his book analyzing Elgin and the removal of the Parthenon sculptures,[218] John Boardman, a professor of classical archaeology, dismissed the allegations of bribery on the part of Elgin: "On all scores, Elgin seems not to have paid overmuch 'under the counter' for his permits, to judge from comparable transactions, then and now. It would be naïve to believe otherwise, it can have no relevance to the legitimacy of possession of the marbles."[219] This shocking refusal even to consider the illegal or unethical actions of Elgin presents serious difficulty, as the entirety of the British Museum's case for retaining the marbles seems to lean on the idea that they have held them for nearly two centuries.

B. Have Circumstances Changed Since the Removal?

Merryman argues that we must use the state of international and domestic law as it would have existed at the time to weigh the legality of the acquisition of the sculptures.[220] Even Italy's vocal former culture minister has admitted that we should consider the law as it existed at the time of the taking.[221] Early nineteenth century international law offers a perspective on the legality of

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[216] In 1215 the Magna Carta forbade judges and other officials from accepting bribes: "to no one will we sell, to no one deny or delay right or justice." The Magna Carta para. 40 (1215), *available at* http://www.fordham.edu/halsall/source/magnacarta.asp.

[217] Barclay v. Pearson, [1893] 2 Ch. 154, at 167.

[218] ST. CLAIR, *supra* note 11.

[219] Boardman, *supra* note 80, at 234.

[220] *See* Merryman, *Thinking About the Elgin Marbles*, *supra* note 12, at 1900.

[221] In an interview in Rome in 2007, Francesco Rutelli acknowledged when asked about some claims for an ancient chariot removed in 1903 from Italy: "It's right to distinguish between works that were stolen—in Italy, after the 1939 law that oversees patrimony, and above all the UNESCO Convention of 1970 that fights the trafficking of artworks—and those sold 100 years ago. Otherwise, we just might have to deal with Napoleon's plundering!" Richard Lacayo, *Rutelli Speaks*, TIME (Oct. 2, 2007), http://entertainment.time.com/2007/10/02/rutelli_speaks.

Elgin's actions, but a more interesting question is what contemporary cultural heritage law has to say about Elgin and his actions. We should consider contemporary cultural heritage law in evaluating this dispute, rather than attempt to construct an international legal argument as would have applied two hundred years ago.

First, consider that the current rules have their origin in legal principles which were in effect at the end of the seventeenth century. Our inquiry into the legitimacy of current possession by the British Museum rests on two uneasy legal principles: the idea that a great deal of time has passed, and that long possession, even if it was illicit, creates a superior legal and moral right to the British retention of the sculptures. Additionally, these legal principles are ex post facto, adopted quite recently when compared to the dispute over the sculptures.

Second, consider that the ongoing looting and destruction of historic sites plagues nations of origin all over the world. The dealers and museums which acquire these illicit objects rely on the same arguments made by the British Museum for retaining the sculptures in London. They argue that access and preservation can be better accomplished in large universal museums—yet the underlying activity which brings these works of art to these institutions is theft, looting and the destruction of our collective cultural heritage. But the role of the universal museum is shifting. As the Cultural Heritage advocate and vice president of the International Council of Museums George O. Abungu argues, universal museums are now seen "as promoting the Western world's dominance and monopoly of interpretation over other peoples' cultures and colonization. The whole concept is therefore seen to be in need of a strategic rethink."[222]

The beginnings of such a strategic rethink did in fact occur. A House of Commons committee and a departmental advisory panel were both convened in 2000 to examine the United Kingdom's role in the illicit trade. The Culture, Media and Sport Committee of the

[222] *See* George O. Abungu, *"Universal Museums": New Contestations, New Controversies*, *in* UTIMUT: PAST HERITAGE—FUTURE PARTNERSHIPS 32, 32–33 (Mille Gabriel & Jens Dahl eds., 2008).

House of Commons (Select Committee) was organized by Labour MP Gerald Kaufman,[223] while the ministerial Illicit Trade Advisory Panel (ITAP) was chaired by Professor Norman Palmer. The Select Committee collected evidence for a report, published in July 2000, entitled *Cultural Property: Return and Illicit Trade*.[224] The Select Committee, similar in form and function to the Congressional committee model, addressed three key areas: the illicit excavation and looting of antiquities; the identification of works of art looted by the Nazis; and the return of cultural property now residing in British collections. A large part of the report deals with the issue of the return of the Parthenon marbles."[225]

1. Taking Mosaics from Turkish-Occupied Cyprus

Had Elgin removed the sculptures from the Parthenon while a foreign nation occupied the city of Athens, a myriad of domestic and international legal principles would forbid this taking. We can see the likely result if we imagine Elgin had acted 200 years later by examining the case of another art dealer who acquired through agents works of art from that part of the Mediterranean. The case of *Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts, Inc.*[226] involved the taking of mosaics from a Byzantine church on the island of Cyprus.[227] Following the war

[223] *See* CULTURE, MEDIA AND SPORT COMMITTEE, CULTURAL PROPERTY: RETURN AND ILLICIT TRADE, 1999–2000, H.C. 371-I, (U.K.), *available at* http://www.publications.parliament.uk/pa/cm199900/cmselect/cmcumeds/371/37102.htm.

[224] *See* MINISTERIAL ADVISORY PANEL ON ILLICIT TRADE, REPORT, Dec. 2000, (U.K.), *available at* http://www.heritage.gov.uk/images/publications/Report_AdPanel_Illicit_Trade.pdf.

[225] *See* CULTURE, MEDIA AND SPORT COMMITTEE, *supra* note 220, at paras. 148–52.

[226] Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts, Inc. 717 F. Supp. 1374 (S.D. Ind. 1989), *aff'd*, 917 F.2d 278 (7th Cir. 1990).

[227] *See, e.g.*, Stephen A. Bibas, *The Case Against Statutes of Limitations for Stolen Art*, 103 YALE L.J. 2437 (1994); Stephen Foutty, *Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts, Inc.: Entrenchment of the Due Diligence Requirement in Replevin Actions for Stolen Art*, 43 VAND. L. REV. 1839 (1990); Ashton Hawkins, Richard A. Rothman & David B. Goldstein, *A Tale of Two Innocents: Creating an Equitable Balance between the Rights of Former Owners and Good Faith Purchasers of Stolen Art*, 64 FORDHAM L. REV. 49 (1995); Lawrence M. Kaye, *Art Wars: The Repatriation Battle*, 31 N.Y.U. J. INT'L L. & POL. 79 (1998); Symeon C. Symeonides, *A Choice-of-Law Rule for Conflicts Involving Stolen Cultural Property*, 38 VAND. J. TRANSNAT'L L. 1177 (2005).

in Cyprus in 1974, the island was divided with occupied Turkish forces. Four mosaics dating from the sixth century BCE depicted Jesus, the Virgin Mary, an angel, and two apostles.[228] This is a contemporary situation which mirrors in many ways the situation in Ottoman-occupied Athens in the early nineteenth century.[229] In the northern, Turkish part of the island, Greek Orthodox churches were vandalized.[230]

The Church of Cyprus learned of the theft in 1979.[231] The Republic of Cyprus and the Church immediately began an extensive campaign to recover the mosaics by publicizing the theft to UNESCO, the International Council of Museums and Sites, the main auction houses such as Christie's and Sotheby's, foreign governments, museums, and even sent out a number of press releases.[232] In 1988, Peg Goldberg, an Indiana art dealer, traveled to Amsterdam to purchase art.[233] A fellow Indiana dealer, Robert Fitzgerald, introduced Goldberg to Michel van Rijn, whom she knew to be a convicted forger in France.[234] The two men offered to arrange the sale of the Byzantine mosaics, then in the possession of a Turkish art dealer in Munich, Aydin Dikman.[235] Goldberg agreed to purchase the works for $1,080,000, which she obtained as a loan.[236] In July 1988, Goldberg inspected the mosaics in the free port of Geneva, purchased them, and then returned to Indiana with the works.[237] In 1989, Cyprus demanded the return of the mosaics, and Goldberg refused.[238]

The Church of Cyprus and the Cypriot government brought a replevin action against Goldberg in federal district court in Indiana

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228 *See Autocephalous Greek-Orthodox Church*, 717 F. Supp. at 1377–78.

229 *See id.* at 1400.

230 *Id.* at 1379–80.

231 *Id.* at 1380.

232 *Id.*

233 *Id.* at 1381.

234 *Id.* at 1381. She was told that the seller was eager to quickly sell the mosaics because he "had recently become quite ill and had [a] cash problem." *Id.*

235 *Id.* at 1381–82.

236 *Id.* at 1382.

237 *Id.* at 1383.

238 *Id.* at 1385.

to recover the mosaics.[239] The legal issues presented in the case hinged on whether Cyprus' claim to recover the mosaics was barred by the statute of limitations[240] and whether the law of Indiana or the law of Switzerland should apply to the multi-jurisdictional dispute.[241] The court concluded that, under choice of law principles, Indiana law, and not Swiss law, governed the case. The Court held that the Indiana statute of limitations governed and applied the Discovery Rule,[242] under which a plaintiff must be reasonably diligent in seeking to locate the stolen property at issue.[243]

In light of the actions taken by Cyprus in publicizing the theft of the mosaics, the court concluded that the plaintiffs had exercised due diligence and thus rejected Goldberg's claim that the suit was time-barred. [244] Despite Goldberg's (unsubstantiated) allegations that she had contacted the International Foundation for Art Research (IFAR) and other organizations to confirm the propriety of the sale, the Court rejected Goldberg's argument that she was a good faith purchaser, concluding that she failed to exercise due

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[239] Replevin actions are often favored in cultural heritage disputes as the only issue which a claimant must establish is a right to present possession. It was all that was required under Indiana law in the dispute. *See id.* at 1395–96.

[240] *Id.* at 1392–93 ("[t]he statute of limitations was tolled by fraudulent concealment and equitable estoppel such that the plaintiffs filed their complaint in a timely manner").

[241] *Id.* at 1395 ("Their presence in Switzerland was temporary, as was intended. Those involved with the transaction intended that if the sale were consummated, the mosaics were to be shipped to Indiana; if not, the mosaics were to be returned to Germany. For the foregoing reasons, the Court concludes that under Swiss law the 'in transit' exception to the general *lex situs* rule would apply. Therefore, the law of the place of destination controls, which in this case is Indiana.").

[242] Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg & Feldman Fine Arts, Inc., 917 F.2d 278, 289 (7th Cir. 1990). The Seventh Circuit made use of a decision by the New Jersey Supreme Court which held the discovery rule applied to Georgia O'Keeffe who had three works of art stolen from her gallery in 1946. Three decades later the issue of timeliness of her replevin suit was a determinative issue in her claim. The New Jersey Supreme Court held her cause of action accrued when she first knew or reasonably should have known of the cause of action. *See* O'Keeffe v. Snyder, 416 A.2d 862, 870 (N.J. 1980).

[243] *Autocephalous Greek-Orthodox Church*, 717 F. Supp. at 1392–93 (S.D. Ind. 1989) ("[t]he statute of limitations was tolled by fraudulent concealment and equitable estoppel such that the plaintiffs filed their complaint in a timely manner.").

[244] *Id.*

diligence.[245] One interesting point considered by the Seventh Circuit was the question of whether many of the decrees of the Turkish Federal State of Cyprus had divested the Byzantine Church of title to the mosaics at issue. Goldberg asked the court to "honor these decrees under the notion that in some instances courts in the United States can give effect to the acts of nonrecognized but '*de facto*' regimes if the acts relate to purely local matters."[246] But the court declined to enforce these decrees because the United States had not recognized the Turkish state established in northern Cyprus, and neither had much of the rest of the world.[247]

Judge Cudahy in his concurring opinion described the ways in which the 1954 Hague Convention and the 1970 UNESCO Convention should also apply to the dispute.[248] He concluded by highlighting the importance of a broad inquiry when such important pieces of cultural heritage are at stake:

> But a short cultural memory is not an adequate justification for participating in the plunder of the cherished antiquities that play important roles in the histories of foreign lands. . . . The mosaics before us are of great intrinsic beauty. They are the virtually unique remnants of an earlier artistic period and should be returned to their homeland and their rightful owner. This is the case not only because the mosaics belong there, but as a reminder that greed and callous disregard for the property, history

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[245] *Id.* at 1402. The court embraced the language of Dr. Gary Vikan, at the time an Assistant Director for Curatorial Affairs/Medieval Curator of the Walters Art Gallery in Baltimore:

> The Court cannot improve on Dr. Vikan's summation of the suspicious circumstances surrounding this sale: "All the red flags are up, all the red lights are on, all the sirens are blaring." . . . Goldberg cannot rest on the presumption, which she is afforded under Swiss law, that she purchased the mosaics in good faith.

Id.

[246] *Autocephalous Greek Orthodox Church of Cyprus*, 917 F.2d at 291, 297 n.14 (7th Cir. 1990).

[247] *Id.* at 292–93.

[248] *Id.* at 295–97.

> and culture of others cannot be countenanced by the world community or by this court.[249]

One of the primary arguments the British Museum has used to defend its retention of the sculptures must invariably be the amount of time which has passed since they were removed from Athens and purchased for the British Museum—two centuries. This passage of time argument mirrors the argument that current possessors of illicit cultural objects typically bring when their claim to an object is challenged. In fact, the issue of timeliness often is outcome-determinative in these disputes.[250] Yet the policy reasons for allowing the passage of time to dictate the British retention of the sculptures rests on uneasy ground. The Greeks and other advocates have been making repeated claims for the return of the sculptures to the Parthenon. Though not successful, these demands indicate a persistent and well-reasoned resistance to continued British retention.

2. The Menil Foundation's Purchase, Rescue and Return of Byzantine Frescoes

Another example of a recent return of objects taken from Cyprus also provides an example of how a just return can be accomplished which both enriches a museum (albeit temporarily) and ensures the preservation of the object. In 1983 Cyprus was able to recover ownership of frescoes which had been removed from Northern Cyprus.[251]

A London art dealer contacted the Houston-based Menil Foundation informing the foundation that it knew it could potentially acquire the fresco.[252] It turned out that the frescoes were being sold by Aydin Dikman, the same middleman who

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[249] *Id.* at 297.

[250] For example, the Museum of Modern Art successfully defended against a replevin action for three works of art by George Grosz. The Museum argued that even though the paintings had been confiscated by Nazi forces from the artist himself, the Museum was unaware of these facts when it acquired them in 1954 and New York's statute of limitations for the claim had expired. *See* Grosz v. Museum of Modern Art, 772 F. Supp. 2d 473 (S.D.N.Y. 2010), *aff'd*, 403 F. App'x. 575 (2d Cir. 2010), *cert. denied*, 132 S. Ct. 102 (2011).

[251] *See Autocephalous Greek-Orthodox Church*, 717 F. Supp. at 1390.

[252] *Id.*

offered the mosaics to Peg Goldberg, who unsuccessfully attempted to sell them to the Getty museum.[253] Dikman told the Menil Foundation that the mosaics were from Turkey, which would have presumably meant they could be freely bought and sold, in much the same way the Ottoman Empire would have been free to dispose of parts of the Parthenon.[254] The Menil Foundation spent a total of $1.75 million to acquire the frescoes and restore them.[255] Dominique de Menil contacted the Archbishop of Cyprus and sought the permission of the church to restore the frescoes and act as stewards for a temporary period until the works could be returned to Cyprus:

> My Dear Archbishop, may I be bold enough to confide in Your Beatitude a project that has been growing in my heart. It concerns the frescoes of the Chapel of St. Themonianos from Lysi, and you will see Lysi in the occupied area. As you may recall, these frescoes had been ripped from the walls, and were in many pieces in the hands of a dealer when we heard of them and offered the Church of Cyprus to purchase and restore them. You encourage us to do so by granting permission to exhibit them in Houston for a period of 10 years. The frescoes are now in London being pieced together with great difficulty, and restored by an able professional dealer.[256]

On being shown the frescoes, the director of the Museum at the time, Walter Hopps, thought it was unlikely they had come from Turkey, and so, on the advice of counsel, he exercised due diligence by sending pictures of the frescoes to nine potential nations of origin. Ultimately, Cyprus responded and encouraged

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253 *Id.*

254 *Id.*

255 Louis Casiano, *Fans Get Their Last Look at Menil Frescoes*, HOUSTON CHRON. (Mar. 4, 2012, 3:45 PM), http://www.chron.com/news/houston-texas/article/Fans-get-their-last-look-at-Menil-frescoes-3379902.php.

256 *Implementation of the Helsinki Accords: Hearing Before the Comm'n on Sec. & Cooperation in Europe*, 99th Cong. 16 (1985) (statement of Father Constantinides, St. Constantine Cathedral, Maryville, Ind.).

Menil to essentially pay a ransom for the frescoes and see them returned.[257]

The Menil Foundation ultimately decided to purchase the frescoes for the Church of Cyprus, and came to an agreement whereby the Menil would restore the works of art and display them in Houston, Texas, but on the basis of a long term loan—title would remain with the Church of Cyprus.[258] On announcing the return of the frescoes to the Cyprus, Josef Helfenstein, the director of the Menil, said "[i]t was very clear that we are custodians. We are not the owners."[259]

The United Kingdom has also taken steps to eliminate the illicit trade in cultural heritage, and it is likely that if Elgin were to have committed his removal after the enactment of this statute, he would have been subject to prosecution. The Illicit Trade Advisory Panel recommended the creation of a new criminal offense which would prohibit the dishonest dealing in cultural objects.[260]

The act prohibits the dishonest dealing in a "tainted" cultural object. Tainted objects are defined as objects "removed from a building or structure of historical, architectural or archaeological interest where the object has at any time formed part of the building or structure."[261] To the extent that dealing in illicit cultural property was not covered, "it [should] be a criminal offence to import, deal in or be in possession of any cultural object, knowing or believing that the object was stolen, or illegally

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[257] Patricia C. Johnson, *The Menil Pays "Ransom" to Restore Frescoes*, HOUSTON CHRON, Jan. 8, 1989, § Zest, at 14, *available at* http://www.chron.com/CDA/archives/archive.mpl/1989_595348/the-menil-pays-ransom-to-restore-frescoes.html. Hopps states in the piece, "[t]he foundation paid the ransom in the name of the Republic of Cyprus . . . so we recovered and restored them, and recognize them as the property of the church and the republic in perpetuity. But we have them on extended, long-term loan." *Id.*

[258] *See Autocephalous Greek-Orthodox Church*, 717 F. Supp. at 1390 (S.D. Ind. 1989). For press accounts of the return see Douglas Britt, *Houston's Menil Is Returning Holy Artworks to Cyprus*, HOUSTON CHRON., (Sept. 26, 2011, 8:14 PM), http://www.chron.com/life/article/Houston-s-Menil-is-returning-holy-artworks-to-2186452.php; Elisabetta Povoledo, *The Menil Is to Return Frescoes to Cyprus*, N.Y. TIMES, Sept. 23, 2011, at C1.

[259] Britt, *supra* note 258.

[260] For background on the act see generally Richard Harwood, *Dealing in Cultural Objects (Offences) Act 2003*, 8 J. ART ANTIQUITY & L. 347 (2003).

[261] *Id.* at 350; *see also* Dealing in Cultural Objects (Offences) Act, 2003, c. 27, § 2(4) (U.K.).

excavated or removed from any monument or wreck contrary to local law."[262] The Department for Culture, Media and Sport issued the following statement after the introduction of the new offense:

> A new offence designed specifically to combat traffic in unlawfully removed cultural objects and will assist in maintaining the integrity of buildings, structures and monuments (including wrecks) world-wide by reducing the commercial incentive to those involved in the looting of such sites. It will send a strong signal that the Government is determined to put a stop to such practices.[263]

The criminal offense is not meant to be retroactive, and its drafters certainly did not intend it to apply to the Parthenon sculptures on display at the British Museum. However, had the act been in place in 1801, the act would apply to the actions of Elgin and the men he employed to remove objects from the Parthenon. Though the act itself does not apply, its spirit certainly speaks to a moral justification for the British Museum's retention of the sculptures.

There were no binding conventions in force at the time of the removal of the sculptures which would govern the present dispute. However, there are general principles which date back to Roman law, and these general principles embody legal principles, legal principles which are well-established and can be traced back to the time of the removal of the sculptures. Merryman carefully picks and chooses his authority. He puts forth the 1954 Hague Convention as supporting the idea that cultural property as he terms it is "the cultural heritage of all mankind" and thus should be seen everywhere[264]—Greek art should not only be seen in Greece, for example. Yet he ignores the prohibitions the Hague Convention placed on occupiers of foreign soil to safeguard and

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[262] ILLICIT TRADE ADVISORY PANEL, REPORT OF THE MINISTERIAL ADVISORY PANEL ON ILLICIT TRADE, 2000 (U.K.).

[263] DEPARTMENT FOR CULTURE, MEDIA AND SPORT CULTURAL PROPERTY UNIT, DEALING IN TAINTED CULTURAL OBJECTS—GUIDANCE ON THE DEALING IN CULTURAL OBJECTS (OFFENCES) ACT 2003, 2004, at 3 (U.K.), *available at* http://www.culture.gov.uk/NR/rdonlyres/F89F9981-05FD-4A9A-B9DF-0C82F3B3C50E/0/Dealincultural.pdf.

[264] *See* Merryman, *supra* note 36, at 836.

protect works of art. If these objects really are the collective cultural heritage of all mankind, then every nation should have an obligation to care for and prevent its separation and destruction.

V. CULTURAL JUSTICE FOR THE PARTHENON SCULPTURES

What does justice require the British Museum to do with the Parthenon sculptures? As an institution of culture and learning, it should, one thinks, be bound by a set of principles which extend beyond a "might makes right" argument justifying the continued retention of these objects. Those who support the status quo need only argue that the current state of affairs should be extended. However, when we consider the overwhelming weight of recent cultural heritage law and policy, the actions of Elgin and of the British Museum diverge in important ways.

Since the 1970 UNESCO Convention, there have been a number of resolutions not only to press states to accede to the Convention itself but also to repatriate cultural objects which were removed from their nation of origin before 1970.[265] These resolutions have limited legal effect, but they do allow states to press their rights.[266]

Much has changed in Athens in recent years. Christopher Hitchens noted in 1987 that he was confident the Parthenon marbles belonged in Athens, but that serious questions remained as to where they would be housed. How suitable was Athens? What was the condition of the sculptures that remained in Athens? The questions were answered thusly: "Athens was a polluted mess; the condition of the on-site sculpture was deplorable; neither the municipality nor the nation had anywhere serious to house any of the works of Phidias and his gifted assistants."[267] In 2013, there can be no arguing that Athens is not the best location for these

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[265] These have taken place with some regularity, for an example see *Resolution on the Return or Restitution of Cultural Property to the Countries of Origin*, G.A. Res. 61/52, U.N. DOC. A/RES/61/52 (Nov. 30, 2006).

[266] *See* James A. R. Nafziger, *The New International Legal Framework for the Return, Restitution or Forfeiture of Cultural Property*, 15 N.Y.U. J. INT'L L. & POL. 789, 806 (1983).

[267] HITCHENS, *supra* note 5, at xiii.

works. Athens now has a space to house the sculptures. On the top-floor gallery is a space which receives natural Greek sunlight. The space, designed by Bernard Tschumi, has created a space to display the sculptures as they were intended—as a natural progression. On the outside would be the metopes, with the frieze on the interior wall. The columns in the gallery are spaced just as the columns of the temple. From the paneled windows one can make a direct visual connection between the Parthenon itself and the sculptures. These new circumstances mean that the continued retention of the sculptures in the British Museum must be considered from a new perspective. It is now possible to view all the remaining sculptural elements from the Parthenon in the same day, while making a direct visual connection with the Parthenon itself.

At one point in time the sculptures may have been exposed to harmful elements in the atmosphere of Athens. Albert Elsen, writing in 1977 about the role art historians should be playing in the protection of art, stated:

> Masterpieces are "dismembered" not just by looting, theft, and other forms of vandalism, but by physical deterioration due to negligence, as in the case of the sculptures which remained on the Parthenon. A distinguished scholar of Parthenon sculpture told me of the years he vainly pleaded with the Greek officials in charge to at least put a roof over the exposed Parthenon frieze. He blamed the failure to save this masterpiece on curatorial timidity and political cowardice.[268]

John Henry Merryman was a colleague of Elsen for many years at Stanford, and the two first taught a unified course on the art and legal principles implicated in cultural property protection. The apparent need to put a roof over the Parthenon seems to have stuck with Merryman:

> It seems reasonable to suppose that the modern technology that produces Super Domes could be

[268] Albert Elsen, *Bomb the Church? What We Don't Tell Our Students in Art 1*, 37 ART J. 28, 31 (1977).

> employed to isolate and protect the Parthenon from the Athenian atmosphere. Would such a project be worth the expense? Would the resulting change in the dramatic Athenian skyline, where the romantic ruin of the Parthenon now hangs in the sky, visible for miles around, be acceptable? . . . We do not know the answers to such questions.[269]

In 1998 the writer William St. Clair, who had been supportive of British retention of the marbles, published a third edition of his book.[270] His revised book showed that the Marbles had been cleaned and scrubbed with abrasive tools and chemicals between 1937 and 1938 and that this had damaged their appearance.[271] He suggested that the damage to the Marbles sustained as a result of London's air pollution and the scrubbings of the marbles which necessitated the cleaning, as well as the museum's poor humidity controls, all weighed against the British Museum's argument that they have been good stewards of the objects.[272]

Another common argument made against the return of the marbles to Greece is that a return would mean all museums would be emptied and their contents returned to the nations of origin. And yet by using a just and educative repatriation process, this kind of mass emptying could not happen. Moreover, these nations of origin have never asked that every object be returned. Melina Mercouri said in 1982 that Greece was not asking for the return of all of its objects: "We are not asking for all our treasures back,

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[269] John H. Merryman, *Imperialism, Art and Restitution (Wither the Elgin Marbles?)*, 113 (2006).

[270] *See* ST. CLAIR, *supra* note 11.

[271] *See id.* at 281–313. For further discussion of this cleaning see William St. Clair, *The Elgin Marbles: Questions of Stewardship and Accountability*, 8 INT'L J. CULTURAL PROP. 391 (1999).

[272] St. Clair, *supra* note 271, at 413–15. These assertions were the subject of a rebuttal by Ian Jenkins, then the Assistant Keeper for Greek sculpture at the British Museum. Jenkins argued "if Lord Elgin had not acted as he did, and if the sculptures had not come to the museum when they did, they would not survive as they do." Ian Jenkins, *The Elgin Marbles: Questions of Accuracy and Reliability*, 10 INT'L J. CULTURAL PROP. 55, 56 (2001).

because the others were not taken in the thoroughly objectionable way that the Acropolis marbles were."[273]

Christopher Hitchens argued in 1997 that the burden of proof for returning the marbles falls on those advocating a reunification in Greece: "Those who support the status quo at the British Museum, and the retention in London of a great single work of classical Greek sculpture, have the great advantage of inertia on their side. Their arguments need not be good; indeed they need deploy no actual arguments at all."[274]

When the British Museum continues to claim it should keep the sculptures, it prevents the museum-going community from moving beyond Elgin's nineteenth-century order to remove the fragments of the Parthenon. At the time of the removal, there existed no direct law of the nations of the United Kingdom, Greece, the Ottoman Empire, or any other which could be applied in a direct and narrow way to the dispute over the Parthenon marbles. However, we can look to general principles common to these legal systems.[275] We must distinguish cases like that of the Parthenon sculptures—which carry such significance for a site, a city, and a culture—from other, lesser calls for repatriation. The Parthenon was conceived as an ancient monument and unified work of art: this integrity can be honored.

But perhaps the greatest factor which now supports the Greek position is the creation of the New Acropolis Museum in Athens.

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[273] *Greece is Pressing Britain for Return of Antiquities*, N.Y. TIMES, Nov. 21, 1982, at 25.

[274] HITCHENS, *supra* note 5, at xviii.

[275] This approach was used by the British-United States Claims Arbitral Tribunal of 1910 which argued that:

> International law, as well as domestic law, my not contain, an generally does not contain, express rules decisive of particular cases; but the function of jurisprudence is to resolve the conflict of opposing rights and interests by applying, in default of any specific provisions of law, the corollaries of general principles, and to so find . . . the solution of the problem. This is the method of jurisprudence; it is the method by which the law has been gradually evolved in every country resulting in the definition and settlement of legal relations as well between States as between private individuals.

Eastern Extension, Australasia and China Telegraph Co., Ltd. (Gr. Brit. v. U.S.), 6 R.I.A.A. 112, 114–15 (Brit.-U.S. Cl. Arb. 1923).

The Museum opened to the public in 2009.[276] Designed by Bernard Tschumi and constructed for an estimated $200 million, it is located southeast of the Acropolis hill, and the 280 meters separating the museum and the Parthenon itself allows the viewer to make a direct visual connection between the sculptures, the Parthenon, and the surrounding hills and countryside. The display allows the viewer to see the sculptures in the same light and in the same context as the original artisans.

FIGURE 8: A VIEW FROM THE NEW ACROPOLIS MUSEUM OF THE PARTHENON[277]

The art critic for the *New York Times*, Michael Kimmelman, described it as "light and airy" with the sculptures themselves "a miracle," because inside the museum one can see the original sculptures of the Parthenon frieze and plaster casts of the objects which remain in London.[278] The Museum provides a worthy state-of-the-art repository for these objects, and is a direct physical rebuttal to the argument that the Greeks simply cannot care for the

[276] Anthee Carassava, *In Athens, Museum Is an Olympian Feat*, N.Y. TIMES, June 20, 2009, at C1, *available at* http://www.nytimes.com/2009/06/20/arts/design/20acropolis.html.

[277] File:Acropolis—Museum Interior.JPG (Apr. 23, 2010, 1:17 AM), WIKIMEDIA COMMONS, http://commons.wikimedia.org/wiki/File:Acropolis—Museum_Interior.JPG.

[278] *See* Kimmelman, *supra* note 147.

sculptures. Moreover, the objects are displayed alongside plaster replicas where the original sculptures have been removed by Elgin, which is a further direct physical argument by the Greeks that there are objects missing.

CONCLUSION

The dispute over the sculptures removed from the Parthenon by Lord Elgin's agents may be one of the oldest international disputes. It is certainly one of the most interesting. This physical embodiment of Greek heritage and of the Periclean age, which was such an integral part of the massive work of art and architecture that is the Parthenon, has been the subject of argument and disagreement ever since the removal nearly two centuries ago.

This Article has proposed a just solution to the dispute by promoting a potential educative process which respects the social life of the Parthenon Sculptures at the British Museum, but also acknowledges the proper home is in Athens. The year 2012 marked the 200th anniversary of both the final removal of the fragments by Elgin's agents—and 2016 will mark the 200th anniversary of the decision by Parliament to purchase "Elgin's Collection" for the British Museum. Yet it is not really Elgin's collection. We have no way of knowing what might have happened to the sculptures had Elgin not sought their removal to Britain. It certainly sparked a renewal of interest in ancient Greece and has produced some wonderful benefits to visitors to the British Museum. But the sculptures were intended to be viewed together, under the Blue light of Athens. And now that Greece has erected a state-of-the-art repository for these ancient masterpieces, the arguments made by the British Museum grow more and more tenuous. The just solution will be to craft a mutually beneficial solution which benefits the art-consuming public. I will leave to the art historians and curators the question of whether museum-quality reproductions could or should be crafted in a way which could re-create the totem pole returned to the native peoples in British Columbia. But the ultimate solution to this dispute will leave a powerful precedent for future museums and future creator communities. Merely avoiding the issue and ignoring the changes

which have come to cultural heritage law and policy in recent decades is a dangerous precedent for the British Museum.

Finally, consider a final question. Why should these works of art, which Elgin only saw once before he proceeded to Constantinople from Athens, continue to bear his name? If the issue of the sculptures is resolved to the satisfaction of both Greece and advocates for cultural justice, does anyone imagine that the residents of London will be clamoring for their return to Bloomsbury in 200 years? But if they remain at the British Museum—will the Greeks eventually forget that the ancient masterpiece that sits atop their capital's Acropolis is missing the most renowned parts of its sculpture? The answer to both these question must be no. The law and principles governing our collective cultural heritage show that justice demands the repatriation of these sculptures.