

# The Cathedral of Looted Goods: Enforcing Cultural Property Repatriation with Calabresi and Melamed's Entitlement Protection Rules

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## Abstract

*While cultural repatriation has been at the forefront of international law discussion in the past decades, there remain barriers surrounding the actual return of cultural property to their source nations. Normatively, most nations agree that holding onto artifacts belonging to other peoples is both morally and legally unconscionable, but practically, there has been no enforcement scheme under international law for artifacts to finally return home. Calabresi and Melamed's property, liability, and inalienability rules could be justified and applied to repatriation disputes through consideration of a mixture of economic efficiency, distributive, and justice motivations. Using this framework to create a model of variable protection of international law would create a comprehensive enforcement scheme that resolves the fundamental enforcement problem that international law faces in facilitating repatriation.*

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## Table of Contents

I. Introduction.....	3
II. Current Legal Regime .....	4
A. Standing International Treaties.....	4
B. Case-by-Case Arrangements .....	5
III. Existing Legal Scholarship .....	6
A. Calabresi and Melamed’s Framework.....	6
B. Relationship Between Object and Owner.....	7
C. Establishment of an International Court of Arbitration .....	7
D. Limitations of Current Scholarship: The Enforcement Problem .....	7
IV. Proposed Solution .....	8
A. Property Rules .....	9
B. Liability Rules .....	12
C. Inalienability Rules.....	16
D. Summary of Enforcement Solutions .....	19
E. Policy Motivations and Potential Challenges .....	20
V. Conclusion.....	21

## I. INTRODUCTION

There is a long history of the “plunder, illegal export, and deceitful transfer” of cultural property in periods of war and colonialism.<sup>1</sup> Museums have become the target of criticism for their longstanding “failure to repatriate controversial cultural property to their respective countries of origin.”<sup>2</sup> Many high-profile artifacts have been repatriated, but the repatriation decision remains largely at the discretion of museums that are often reluctant to give up their collections.<sup>3</sup> Considering the economic and cultural considerations at stake in cultural repatriation, there has been an enormous increase in scholarship about this topic.<sup>4</sup> Nonetheless, there has been no comprehensive scheme internationally that ensures the *enforcement* of repatriation. The lack of enforcement means that repatriation decisions continue to be under the power of museums and by proxy, former colonial powers.

Cultural property is the idea that there are “certain tangible or intangible things which are of such importance to a defined cultural group that they should be subject to that group’s claims to disposition and control.”<sup>5</sup> The concept of repatriation is derived from the view that the appropriation of cultural property historically was unjust and illegal, and therefore there is an international obligation to return them to the nation-state of origin.<sup>6</sup> This Comment will focus on the repatriation of cultural property to their nation-state of origin under relevant international relations law.

The ideal enforcement scheme of cultural repatriation should draw upon Guido Calabresi and Douglas Melamed’s framework of property, liability, and inalienability rules to produce variable protection of entitlements under international law. This scheme will best balance the interests of the parties

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<sup>1</sup> Saby Ghoshray, *Repatriation of the Kobinoor Diamond: Expanding the Legal Paradigm for Cultural Heritage*, 31 *FORDHAM INT’L L.J.* 741, 742 (2008).

<sup>2</sup> Hannah R. Godwin, *Legal Complications of Repatriation at the British Museum*, 30 *WASH. INT’L L.J.* 144, 144 (2020).

<sup>3</sup> See, e.g., Stefanie Dazio, *Sculptures, Artifacts Returned to Peru in LA Ceremony*, AP NEWS (Apr. 21, 2023), <https://perma.cc/2WAV-HGCV>; Mark Brown, *London Museums Lag Behind Regional Peers in Returning Disputed Objects*, THE GUARDIAN (Sept. 18, 2023), <https://perma.cc/2KDN-24C5>; Press Release, Manhattan District Attorney’s Office, D.A. Bragg Returns 29 Antiquities to Greece (Mar. 21, 2023), <https://perma.cc/6HK4-CHRE>.

<sup>4</sup> *Dimensions Data Analysis Application*, DIGITAL SCIENCE & RESEARCH SOLUTIONS, INC., <https://perma.cc/47LL-PS49> (last visited Mar. 5, 2024) (showing that 246 publications mentioned “cultural property” in 1990 compared to 3,524 in 2023).

<sup>5</sup> LAURA S. UNDERKUFFLER, *THE IDEA OF PROPERTY: ITS MEANING AND POWER* 110 (2003).

<sup>6</sup> Tullio Scovazzi, *Repatriation and Restitution of Cultural Property: Relevant Rules of International Law*, in *ENCYCLOPEDIA OF GLOBAL ARCHAEOLOGY* 6318, 6318–19 (Claire Smith ed., 2014).

involved and achieve maximum effectiveness through the combined use of sanctions and opportunities for contractual freedom.

This Comment will begin by outlining the current legal regime governing cultural repatriation. It will emphasize that the current regime has legal limits that hinder its effectiveness in facilitating actual return, centered around temporal constraints and limited applicability. Then, the Comment will discuss existing scholarship proposing solutions to the above legal limits, specifically scholarship that draws upon Calabresi and Melamed's framework. It will argue that while existing scholarship provides normative arguments in favor of repatriation, none fully address the enforcement problem which remains a barrier to resolving repatriation disputes.

Finally, the main argument will be presented, demonstrating how the Calabresi and Melamed rules can be applied in different circumstances with prototypical examples of real-life repatriation disputes—the Benin Bronzes, the Getty Bronze, and Maori and Moriori ancestral remains. Through a combination of the rules and the integration with optimal protection theories of international law, this Comment will propose an enforcement framework in the form of a modified, ideal treaty that can be applied to any existing repatriation dispute. The Comment will conclude by addressing policy motivations for the proposed legal solution and outline potential challenges in implementation.

## II. CURRENT LEGAL REGIME

Three treaties in international law govern the repatriation of cultural property. There are also examples of successful repatriations facilitated by individual arrangements between nations. Ultimately, all existing legal mechanisms have significant temporal and enforceability limitations.

### A. Standing International Treaties

The Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 1954 was enacted after the World Wars, and only provided for “the protection of cultural property in war,” leaving “artifacts obtained in peacetime” unprotected.<sup>7</sup> The Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (the “1970 Convention”) was also passed as a response to “systematic

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<sup>7</sup> Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 1954 art. 3, May 14, 1954, 249 U.N.T.S. 216; Rachel Gholson, *Paying for the Past: Establishing a Court of Arbitration for Cultural Property Disputes*, 92 *Miss. L. J.* 455, 468 (2023).

looting of archaeological and sacred sites” following World War II.<sup>8</sup> While it required signing countries to prevent museums from acquiring illegally exported cultural property, it did little to obligate repatriation through a uniform legal standard.<sup>9</sup> The 1970 Convention has been “widely regarded as futile” due to its retroactive nature and lack of an enforcement mechanism.<sup>10</sup> The UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, unlike prior treaties, *mandated* “repatriation of all stolen property.”<sup>11</sup> However, it has the same problem of applicability only to “goods stolen or trafficked after the treaty’s ratification,” and has had limited ratification by fifty-four nations.<sup>12</sup> Notably, the United Kingdom, a target of many repatriation controversies, is not a ratifying nation.<sup>13</sup>

## B. Case-by-Case Arrangements

There has also been repatriation through individualized arrangements. In the Met-Italy Accord of 2006, the Met agreed to return the Euphronios Krater to Italy in exchange for “long-term loans of works of equal value and an absolution of liability for the illegal excavation and export of the Krater.”<sup>14</sup> While the Accord showed a promising strategy to resolve cultural property disputes, this arrangement is difficult to replicate. First, the Krater’s stature as a Roman masterpiece made its repatriation claim much more prioritized than that of other artifacts.<sup>15</sup> Second, the Met is a major tourist attraction and was at the time planning the opening of a Roman Art exhibit.<sup>16</sup> More so than other museums, it could not afford the embarrassment of a public trial and needed to maintain good relations with Italy.<sup>17</sup> Finally, Italy is a unique source nation. As a nation with “substantial art and antiquity resources . . . that enjoy high demand for their

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<sup>8</sup> Lawrence M. Kaye, *Art Wars: The Repatriation Battle*, 31 N.Y.U. J. INT’L. L. & POL. 79, 84 (1998) (citing Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property art. 7, Nov. 14, 1970, 823 U.N.T.S. 231).

<sup>9</sup> *Id.*

<sup>10</sup> Jennifer N. Lehman, *The Continued Struggle with Stolen Cultural Property: The Hague Convention, the UNESCO Convention, and the Unidroit Draft Convention*, 14 ARIZ. J. INT’L. & COMP. L. 527, 541 (1997).

<sup>11</sup> Claudia Caruthers, *International Cultural Property: Another Tragedy of the Commons*, 7 PAC. RIM. L. & POL’Y. J. 143, 149 (1998).

<sup>12</sup> Godwin, *supra* note 2, at 157 (emphasis omitted).

<sup>13</sup> *Id.*

<sup>14</sup> Aaron Kyle Briggs, *Consequences of the Met-Italy Accord for the International Restitution of Cultural Property*, 7 CHI. J. INT’L. L. 623, 623 (2007).

<sup>15</sup> *Id.* at 344.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 645.

cultural patrimony” from museums worldwide, it had a leverage in the negotiation that most other nations would not have.<sup>18</sup>

### III. EXISTING LEGAL SCHOLARSHIP

Much existing legal scholarship draw upon Calabresi and Melamed’s framework of entitlement protection rules. Others center their solutions around personhood theories. There are also solutions that propose the creation of enforcement bodies. All the above fail to create clear enforcement strategies that will resolve existing repatriation disputes.

#### A. Calabresi and Melamed’s Framework

Calabresi and Melamed’s entitlement protection rules framework posits three categories of protection for entitlements. First, an entitlement protected by property rules is protected to the extent that if someone wants to remove it from the holder, they must buy it “in a voluntary transaction in which the value of the entitlement is agreed upon by the seller.”<sup>19</sup> Second, an entitlement is protected by a liability rule if someone can transfer the entitlement by paying “an objectively determined value for it.”<sup>20</sup> Finally, some entitlements are inalienable, so that their transfer is not permitted, even between willing buyers and sellers.<sup>21</sup> While Calabresi and Melamed’s paper focuses on enforcing the rules domestically, their framework has been applied internationally in the realm of cultural repatriation.

Ariel Porat and Stephen Sugarman, drawing upon the framework, created a “Limited Inalienability Rule” (“LIR”) to cultural property transactions.<sup>22</sup> Under a LIR, the holder of the entitlement “is free to transfer her entitlement, but has an inalienable right to revoke the transfer (or the agreement to transfer) at a later stage” with no penalty.<sup>23</sup> The authors argue that an LIR would eliminate the costs of making entitlements for cultural property while mitigating negative externalities by allowing future generations to “revoke the deal once they realize that their interests were compromised.”<sup>24</sup> John Moustakas goes further than Porat and Sugarman to argue for *strict* inalienability of cultural property. He argues that

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<sup>18</sup> *Id.*

<sup>19</sup> Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1092 (1972).

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> Ariel Porat & Stephen Sugarman, *Limited Inalienability Rules*, 107 GEO. L.J. 701, 703 (2019).

<sup>23</sup> *Id.* at 704.

<sup>24</sup> *Id.* at 745.

efficiency, distributional, and intergenerational justice concerns justify a total ban on the transferability of a “group’s cultural memory.”<sup>25</sup>

## B. Relationship Between Object and Owner

There are also two key proposed legal solutions centered around the relationship between the object in question and its owner as applied to controversies in cultural repatriation.

Margaret Radin’s property theory posits that there are certain types of property so intrinsically tied to “expression of individual personhood” that they should be non-fungible.<sup>26</sup> Nadia Banteka extends Radin’s theory to argue that certain cultural property should be inalienable because of their “constitutive nature over the identity of the group that created them.”<sup>27</sup> Sarah Harding also notes that the unique importance of an artifact to a particular people unilaterally defeats any other party’s legitimate claims to ownership.<sup>28</sup> She argues for the customary right of ownership, which states that “some property actually increases in value when a group of people has access to it.”<sup>29</sup>

## C. Establishment of an International Court of Arbitration

While not drawing upon theories of property law, Rachel Gholson also acknowledges the complexity of ownership of disputed cultural property. To create an equitable solution, she proposes a “dedicated tribunal for the arbitration of cultural property disputes” that will weigh the individual “cultural, moral, and legal considerations” of each case.<sup>30</sup> This neutral body would consider factors such as the significance of the artifact to the source country and the source nation’s ability to preserve and protect cultural property in adjudicating claims.<sup>31</sup>

## D. Limitations of Current Scholarship: The Enforcement Problem

The above proposed solutions share the same shortcomings—the lack of clear enforcement strategies, a focus on prescriptive forward-looking norms, and

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<sup>25</sup> See John Moustakas, *Group Rights in Cultural Property: Justifying Strict Inalienability*, 74 CORNELL L. REV. 1179, 1227 (1988–1989).

<sup>26</sup> Nadia Banteka, *The Parthenon Marbles Revisited: A New Strategy for Greece*, 37 U. PA. J. INT’L L. 1231, 1242 (2016).

<sup>27</sup> *Id.* at 1241.

<sup>28</sup> Sarah Harding, *Justifying Repatriation of Native American Cultural Property*, 72 IND. L. J. 723, 725 (1997).

<sup>29</sup> *Id.*

<sup>30</sup> Gholson, *supra* note 7, at 458.

<sup>31</sup> *Id.* at 475.

no discussion of remedies that balance bright-line rules with case-by-case determinations. Even Moustakas admits that his proposal “does not explicitly advocate the return of” looted cultural property.<sup>32</sup> Gholson’s argument does provide an enforcement mechanism; however, international arbitration is often “slow, expensive, and unsuited to the dispute considered.”<sup>33</sup> Also, results of arbitration are often vulnerable to “review and attack by national courts that want to refuse enforcement.”<sup>34</sup> An arbitration tribunal would not be effective in overcoming the inherent enforcement challenges of international law.

Two main challenges remain that existing legal mechanisms and scholarship providing for repatriation fail to adequately address. First, international law inherently is perceived as relatively weak compared to domestic law, lacking compulsory measures for dispute settlement and largely relying on nations’ “own interests and power relations” for successful enforcement.<sup>35</sup> Second, existing scholarship focuses on normative, forward-looking arguments of how entitlements to cultural property *should* be distributed and protected. Legal solutions are needed for *currently* wrongfully held cultural property that are the target of repatriation disputes.

#### IV. PROPOSED SOLUTION

The ideal enforcement scheme of cultural repatriation should draw upon all three types of rules under Calabresi and Melamed’s framework to produce variable protection of entitlements under international law. Different rules could be justified and enforced, depending on the certain circumstance at hand, through a mixture of economic efficiency, distributive, and justice motivations. The proposed enforcement scheme would also consider the stream of benefits that arise from the preservation and access of these pieces of cultural property. It could resolve the fundamental enforcement problem that international law faces.<sup>36</sup>

In the following subsections, this Comment will elaborate on each of Calabresi and Melamed’s rule types and how they would apply in cultural repatriation contexts. For each type, the Comment will provide a prototypical

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<sup>32</sup> Moustakas, *supra* note 25, at 1227.

<sup>33</sup> See James M. Rhodes & Lisa Sloan, *The Pitfalls of International Commercial Arbitration*, 17 VAND. J. TRANSN’L L. 19, 21 (1984).

<sup>34</sup> *Id.* at 22.

<sup>35</sup> Joost Pauwelyn, *Optimal Protection of International Law: Navigating European Absolutism and American Voluntarism* 4 (U. of St. Gallen L. & Econ., Working Paper No. 27, 2007); Monica Hakimi, *Why Should We Care About International Law?*, 118 MICH. L. REV. 1283, 1283 (2020).

<sup>36</sup> Anu Bradford & Omri Ben-Shahar, *Efficient Enforcement in International Law*, 12 CHI. J. INT’L L. 375, 375 (2012).



example of a cultural property dispute situation to illustrate the motivations for its application and the type of enforcement solution the rule would induce. Ultimately, this Comment seeks to establish a pathway to an equitable solution to a variety of cultural property repatriation disputes. This enforcement framework will come in the form of a modified, ideal treaty that would emphasize the proper assignment of entitlements. The new treaty would propose different remedies that would apply to each circumstance, depending on which entitlement protection rule applies.

### A. Property Rules

An entitlement protected under a property rule can only be transferred from the entitlement holder to another through a *voluntary* transaction in which the value of that entitlement is determined by the seller.<sup>37</sup> The voluntary nature of the property rule is crucial because repatriation disputes center around involuntary transactions, where property is forcibly or illicitly taken from the nation-state of origin. The holder has the exclusive right to the in-kind enjoyment of the property and to monetary compensation in exchange for that in-kind enjoyment.<sup>38</sup>

A property rule is an appropriate *default* rule regarding cultural property. Furthermore, the distributional goals of cultural repatriation necessitate the assignment of the entitlement to the nation-state of origin. Since the failure to repatriate cultural property leads to the deprivation of enjoyment of the property from the rightful holder, an enforcement scheme should prioritize such a distributional arrangement. Also, in property disputes under the property rule, all parties come to a “collective decision” deciding to *whom* that property should have the primary entitlement, with the seller ultimately having the power to veto a buyer’s offer price.<sup>39</sup> Because the very idea of cultural property centers around property that “should be subject to [a] group’s claims to disposition and control,” any cultural repatriation enforcement scheme should emphasize the legitimate and undisputed claims of a people over their cultural property.<sup>40</sup>

A property rule also better exemplifies the unique nature of cultural property. Cultural property involves interests “inexplicable in market terms” that must be considered when distributing entitlements and comparing the relative interests of parties.<sup>41</sup> Often, they are “unique goods that are difficult to price,” making a

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<sup>37</sup> Calabresi & Melamed, *supra* note 19, at 1092.

<sup>38</sup> Madeline Morris, *Structure of Entitlements*, 78 CORNELL L. REV. 822, 844 (1993).

<sup>39</sup> Calabresi & Melamed, *supra* note 19, at 1092.

<sup>40</sup> UNDERKUFFLER, *supra* note 5, at 110.

<sup>41</sup> Kristen A. Carpenter et al., *In Defense of Property*, 118 YALE L. J. 1022, 1046 (2009).

default liability rule difficult and costly to enforce.<sup>42</sup> The property rule is straightforward—if a piece of cultural property does not “change hands freely between a willing seller and a willing buyer,” the exchange should not have occurred.<sup>43</sup> A property rule additionally better addresses inequalities of wealth and political power between nations at the heart of repatriation issues. Liability protection in this situation could allow for easy “take-and-pay” in which wealthy, former colonizing countries are allowed to breach cultural property norms and avoid repatriating artifacts by paying the requisite price.<sup>44</sup>

A prototypical example of a cultural repatriation dispute best governed by a property rule is the Benin Bronzes. The Benin Bronzes, a group of over 1,000 sculptural artifacts originating from the Kingdom of Benin in modern-day Nigeria, are largely held in the British Museum.<sup>45</sup> The artifacts were looted in a violent raid by British forces in 1897 of Benin City. While there have been major efforts to request a free, full-scale return of the Bronzes back to Nigeria for decades, the British Museum has been reluctant. So far, only a portion of the artifacts have been returned.<sup>46</sup>

The Benin Bronzes repatriation dispute should be governed by the property rule for several reasons. First, the Bronzes were not in the British Museum due to a voluntary transaction. Furthermore, the Benin Bronzes are a piece of property uniquely valuable to Nigerian heritage and are extremely difficult to “price.”<sup>47</sup> There are no high transaction costs associated with the return because it is clear that the entitlement holder, by way of the Nigerian government, is the current Oba of Benin, the ceremonial king and head of state of the Kingdom.<sup>48</sup> Finally, there is already an extensively planned new museum to be built in Benin City, the Edo Museum of West African Art, that will be built specifically to house the Benin Bronzes.<sup>49</sup> Therefore, there is no valid argument that the transfer would be wealth-decreasing as the Bronzes would be preserved and displayed similarly.

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<sup>42</sup> Pauwelyn, *supra* note 35, at 40.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at 46.

<sup>45</sup> Alex Marshall, *This Art Was Looted 123 Years Ago. Will It Ever Be Returned?*, N.Y. TIMES (Oct. 29, 2021), <https://perma.cc/QGT3-DVY4>.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> Alex Marshall, *Who Owns the Benin Bronzes? The Answer Just Got More Complicated.*, N.Y. TIMES (Jun. 5, 2023), <https://perma.cc/MN6V-JMQZ>. The Nigerian government has announced that the rightful holder is the current Oba of Benin, Ewuare II, who has expressed a desire for the Bronzes to be displayed in museums in Nigeria.

<sup>49</sup> Marshall, *supra* note 45.

There is also a clear difference in bargaining power between Nigeria and Great Britain. Nigeria was under British colonial rule for almost a century until 1960.<sup>50</sup> For generations of Nigerians, the British controlled every aspect of the economy and governance of their homeland. Great Britain, a wealthy nation with some of the world's most renowned museums, is not on an even playing field with Nigeria. A liability rule scheme could allow Britain to breach cultural property dictates by trying to pay their way out of repatriation, with Nigeria having no leverage to bargain for its desired outcomes.

How, then, should repatriations governed under the property rule be enforced? Referring back to the text of the most recent repatriation treaty, it is imperative that language about “fair and reasonable compensation” as a *replacement* for the return of objects should be edited to emphasize that compensation forms only *part* of the total sanctions, with the ultimate goal being return.<sup>51</sup> The property rule mandates compliance to a normative set of behaviors and Calabresi and Melamed’s framework provides for sanctions in a domestic setting when a party’s behavior deviates from the norm.<sup>52</sup> Unlike under domestic law, international law has no centralized backup enforcement mechanisms such as “police, bailiffs and prisons.”<sup>53</sup> However, international law has backup enforcement in the form of the “kicker of community costs.”<sup>54</sup> There is strong evidence that under the kicker of community costs, even solely self-interested states would comply with international law because of “reputation costs, fear of emulation and community pressure.”<sup>55</sup> Considering the recent increase in scrutiny of museums that continue to hold looted property, it is clear that these community costs are very high indeed. The British Museum has even created a webpage titled “Contested Objects from the Collection” on its website, documenting the status and information of the controversial items in its collection, including the Benin Bronzes.<sup>56</sup> By not allowing parties to *believe* that monetary compensation alone can substitute the actual performance of treaty obligations, the treaty ensures that the “kicker” of community costs is not weakened.

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<sup>50</sup> Ogechukwu Okonkwo, *The Making of Modern Nigeria*, THE REPUBLIC (Sept. 29, 2023), <https://perma.cc/Y4R6-5PRT>.

<sup>51</sup> UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, July 1, 1998, 2421 U.N.T.S. 43718 [hereinafter UNIDROIT].

<sup>52</sup> Henry E. Smith, *Property and Property Rules*, 79 N.Y.U. L. REV. 1719, 1750 (2004).

<sup>53</sup> Pauwelyn, *supra* note 35, at 76.

<sup>54</sup> *Id.* at 77.

<sup>55</sup> *Id.* at 87.

<sup>56</sup> *Contested Objects From the Collection*, THE BRITISH MUSEUM, <https://perma.cc/CS4W-B4S8> (last visited Apr. 11, 2024).

Interestingly, pressure from community costs under international law often arises when *domestic* actors pressure their governments to comply with treaty obligations without pressure from other states.<sup>57</sup> This phenomenon could be capitalized upon to strengthen the “kicker” of community costs to compel repatriation. In the context of cultural repatriation treaties, an ideal treaty would provide for domestic institutions to play a larger role in mandating museums and other wrongful holders of cultural property to respond accordingly to repatriation requests. By giving domestic institutions more authority and voice in the enforcement scheme, the treaty could increase community costs driven by domestic pressure, providing a clearer avenue for domestic actors to advocate for repatriation.

## B. Liability Rules

Liability rules under Calabresi and Melamed’s framework distinguish themselves from the rigidity of property rules for efficiency and distributional reasons. They allow for a compensated transfer of entitlement from the entitlement holder in an arrangement in which the entitlement holder gives up its in-kind enjoyment to the conflicting party in return for an agreed-upon compensation.<sup>58</sup> A liability rule may be favorable to a property rule if transaction costs are so high that “even though a transfer of the entitlement would benefit all concerned, such a transfer will not occur.”<sup>59</sup>

Calabresi and Melamed emphasize two variations of liability rules. A “standard” liability rule allows the wrongful conflicting party to keep the entitlement but forces it to compensate the entitlement holder.<sup>60</sup> The second variation, titled “Rule Four,” allows the entitlement holder to regain possession of its entitlement *only if* it compensates the conflicting party.<sup>61</sup> While an innovative solution, this rule “utterly subverts the nature of property rights” and becomes thoroughly problematic in contexts in which “bodily integrity” is of concern in valuating an entitlement.<sup>62</sup> As established earlier in this Comment, cultural property is property that is uniquely tied to the identity and personhood of a people, and as such, Rule Four is inappropriate in cultural property contexts.

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<sup>57</sup> Pauwelyn, *supra* note 35, at 87.

<sup>58</sup> Morris, *supra* note 38, at 851.

<sup>59</sup> Calabresi & Melamed, *supra* note 19, at 1106.

<sup>60</sup> *Id.* at 1116.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

The flexible nature of liability protection also allows for several other variations. The “reverse” liability rule allows an entitlement holder to *force* a compensated transfer of the entitlement to the conflicting party in the form of a buy-out scheme.<sup>63</sup> This rule, in cultural repatriation contexts, is especially advantageous to the entitlement holder, who is allowed to demand a desired value of compensation for cultural property that is *already* in the hands of the conflicting party. The combined liability and reverse liability rule allow either party to force a compensated transfer of the entitlement.<sup>64</sup> This combined rule could be between parties that are in a “closed market” with an existing close relationship.<sup>65</sup> It is appropriate in repatriation disputes between nations that have close existing relationships when it comes to the transfer of cultural property and could efficiently engage in reciprocal agreements.

Liability rules are best realized in circumstances in which case-by-case arrangements can be made. The traditional liability rule in Calabresi and Melamed’s paper envisions a “collective determination of the value” of the entitlement at a state-set price.<sup>66</sup> However, because of international law’s highly consensual nature and weaker protection of entitlements, we could envision a self-assessed valuation between the parties to set the compensation for the wrongfully held cultural property.<sup>67</sup> When two nations have equal bargaining power and equal incentive to “contract out” of the original treaty of cultural property protection to form their own reciprocal agreement, they should be allowed to. This rule is especially applicable when the return of property is practically unfeasible, or the identity of the entitlement holder is so obscured that the initial transaction cost of setting up property rights is sufficiently high. It may also be the case that the current holder of the property is clearly better equipped to care for and display the artifact as desired, and therefore a transfer would not be wealth-increasing. In such cases, a liability rule may facilitate “a combination of efficiency and distributive results which would be difficult to achieve under a property rule.”<sup>68</sup>

Because liability rules necessitate success in negotiations, it is key to consider bargaining costs *in addition* to transaction costs outlined above when deciding whether to move from a default property rule to the realm of liability rules. There are situations in which the transaction cost of setting up a transfer may be low, but the “likelihood of failure to reach agreement is substantial,” either because of

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<sup>63</sup> Morris, *supra* note 38, at 854.

<sup>64</sup> *Id.* at 856.

<sup>65</sup> *Id.* at 857.

<sup>66</sup> Calabresi & Melamed, *supra* note 19, at 1106.

<sup>67</sup> Pauwelyn, *supra* note 35, at 35.

<sup>68</sup> Calabresi & Melamed, *supra* note 19, at 1110.

strategic behavior of the parties or factors such as unequal bargaining power.<sup>69</sup> When there is unequal bargaining power, or where nation-states are more capable of hiding information strategically or engaging in behavior that hinders successful negotiations, the total cost of negotiations is high even if the transaction costs to set up negotiations is low.

There are international law justifications to support why a liability rule must be part of the enforcement scheme. Calabresi and Melamed argue that while the “original reason for a liability rule is an efficiency one,” it can also facilitate achieving society’s ideal distributive goals that would otherwise be impossible to achieve under a property rule.<sup>70</sup> This is especially relevant in the context of international entitlements because there are many elements that drive up transaction costs in international negotiations. Additionally, the “weaker” liability rule may also be appropriate due to the highly consensual nature of international law-making.<sup>71</sup> Allowing wiggle room for bilateral agreements within an international cultural property treaty increases incentives for nations to sign on, which existing treaties often do not provide.

A prototypical example of a cultural repatriation issue best governed by a liability rule is the “Bronze Statue of a Victorious Youth,” currently exhibited in the Getty Museum. The origins of the Getty Bronze are complex. Historians generally believe that it was made in Greece and lost at sea during transit by Roman authorities.<sup>72</sup> In 1964, an Italian fish trawler’s fishnets caught the figurine on the Adriatic Sea, and instead of reporting the discovery to authorities, the crew conspired to sell it illegally and divide up the proceeds.<sup>73</sup> Though Italian authorities eventually brought criminal proceedings against the individuals involved, they were acquitted because of uncertainty surrounding whether the figure was even found in Italian territorial waters.<sup>74</sup> The figure was sold to an unnamed individual and eventually resurfaced in Germany where the European art consortium Artemis held it for sale, and the Getty Museum purchased it in 1977 with no legal challenge.<sup>75</sup>

The following decades presented a series of legal disputes between Italian authorities and the Getty. In 1989, Italy made its first formal request for the return

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<sup>69</sup> Keith N. Hylton, *Property Rules and Liability Rules, Once Again*, 2 REV. L. & ECON. 137, 141 (2006).

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at 35.

<sup>72</sup> Derek Fincham, *Transnational Forfeiture of the Getty Bronze*, 32 CARDOZO ARTS & ENT. L. J. 101, 103–04 (2014).

<sup>73</sup> *Id.* at 106.

<sup>74</sup> *Id.* at 107.

<sup>75</sup> *Id.* at 108.

of the Bronze, which was refused by the museum.<sup>76</sup> Italy renewed its demand in 1996, but Getty curator Marion True responded that because of the expiration of the statute of limitations for the claim, repatriation was “not realistic.”<sup>77</sup> Most recently, in 2021, the Italian Senate passed a cultural property repatriation resolution; the Getty Bronze was at the center of this legislation.<sup>78</sup> The Getty referred back to its 2018 statement defending its legal entitlement to the ownership of the Bronze in response.

The Getty Bronze controversy is a strong candidate for the use of a liability rule. First, it is considered “nearly unrepatrable” due to its convoluted ownership history.<sup>79</sup> The cost of merely setting up initial property rights to the Bronze is high due to potential competing legal claims. Italy argues that the case is under Italian jurisdiction.<sup>80</sup> However, if the Bronze had been fished out of international territorial waters, Italy’s legal claims are weaker. By the time the final transfer of title to the Getty occurred, the Bronze was already on United States soil; should United States law then be applicable?<sup>81</sup> Furthermore, the purported creator of the sculpture was from Greece. Should Greece also have equal entitlement to repatriation?

Second, there is also an argument that Italy would not be the “highest-value location” for the Bronze. Some critics have argued that Italy already struggles “with the cost and difficulty of managing the objects that it does have in its museums and storehouses.”<sup>82</sup> For example, the Riace Bronzes were for years displayed at the Calabrian Museum.<sup>83</sup> However, when the museum closed for renovations, the Bronzes were transferred to local council offices where they were shuttered out of display for over two years due to funding issues for the renovation, attracting vocal criticism from local art history authorities.<sup>84</sup> On the other hand, there is evidence that the Getty Museum has been an excellent host for the Bronze. Admission is free, and the museum draws nearly two million

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<sup>76</sup> Claire Dettelbach, *Victorious Youth: Ownership Dispute Over the “Getty Bronze” Continues*, CENTER FOR ART LAW (June 23, 2018), <https://perma.cc/5UKU-6M6T>.

<sup>77</sup> Fincham, *supra* note 72, at 111.

<sup>78</sup> James Imam, *Italy passes restitution resolution amid renewed calls for return of the 'Victorious Youth' bronze from Getty Museum*, THE ART NEWSPAPER (July 19, 2021), <https://perma.cc/P5Z5-MJX2>.

<sup>79</sup> Fincham, *supra* note 72, at 101.

<sup>80</sup> Dettelbach, *supra* note 76.

<sup>81</sup> *Id.*

<sup>82</sup> Fincham, *supra* note 72, at 128.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

visitors each year.<sup>85</sup> The museum has also recently made significant investments into seismic mountmaking technology to provide resistance to potential earthquakes that may affect the safety of its collection.<sup>86</sup> The specific building within the museum complex where the Getty Bronze is held, the Getty Villa, is also entirely dedicated to Greek and Roman artifacts, presented in a way that places “the viewer in the context of what buildings and life resembled in antiquity.”<sup>87</sup>

Finally, the parties in question here are the same parties as in the successful Met-Italy Accord. Italy is a source nation unique in its rich cultural resources that has leverage in cultural property repatriation negotiations that most other nations do not have. This would not be a circumstance in which extreme inequality in power could lead to an exploitative “take-and-pay” situation. Italy could force compensation from the Getty Museum while allowing the Getty to maintain its entitlement to display the piece through a reverse liability rule. It could also negotiate a cultural exchange in which it receives artwork from the United States for its own museums. Both parties have high incentives to bargain and are unlikely to engage in strategic behavior to avoid a mutually beneficial arrangement, therefore driving down the cost of bargaining failure and tipping the scale towards the use of a liability rule versus a property rule.

### C. Inalienability Rules

An inalienability rule involves the greatest “degree of social intervention” in which legal authorities regulate the transfer of entitlements by outright forbidding sale.<sup>88</sup> One major justification for inalienability rules is the existence of moralisms—external costs that are nonmonetizable and do not lend themselves to easy collective measurement.<sup>89</sup> Moralisms often center around transactions people may find morally harmful, such as slavery, prostitution, or the sale of organs.

Most entitlements under international law are not inalienable.<sup>90</sup> However, there is one type of international law entitlement whose inalienability can be justified under the concern of moralisms. This is a “collective obligations” scheme

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<sup>85</sup> THE GETTY MUSEUM, <https://perma.cc/ABY5-WU4D> (last visited Apr. 11, 2024).

<sup>86</sup> Erin Migdol, *The Hidden Engineering Protecting Getty Art from Earthquakes*, THE GETTY MUSEUM (Jan. 26, 2022), <https://perma.cc/PAY4-7UFM>.

<sup>87</sup> Alexander MacKintosh Ritchie, *Victorious Youth in Peril: Analyzing Arguments Used in Cultural Property Disputes to Resolve the Case of the Getty Bronze*, 9 PEPP. DISP. RESOL. L. J. 325, 364 (2009).

<sup>88</sup> Calabresi & Melamed, *supra* note 19, at 1111.

<sup>89</sup> *Id.*

<sup>90</sup> Pauwelyn, *supra* note 35, at 57.



set out in treaties.<sup>91</sup> Collective obligations have potential to be applied in the context of cultural repatriation to property that treaty parties agree has unique cultural or spiritual significance to a people's heritage, such that inalienability is appropriate. Under this scheme, the transfer or otherwise unlawful holding of such designated property would be subject to punitive sanctions. Cultural artifacts like ancestral remains could be considered as having this type of significance such that fungibility is considered inappropriate. Such property may be aptly described not as *belonging* to a people but rather *of* them insofar as it forms part of their collective identity.<sup>92</sup>

Notwithstanding the justification for inalienability based on identity, it does little work in the practical enforcement of cultural repatriation. The basis of claiming that a piece of cultural property being equivalent to identity necessarily relies on a "subjective, personal assessment of possession."<sup>93</sup> It is impossible for an international legal enforcement scheme to create an objective standard of assessing whether such a claim is legitimate. It could also be argued that actual *possession* of the cultural property is not essential to the collective identity of a people, especially when the object in question no longer serves a functional purpose.<sup>94</sup> If a display of a piece of cultural property in the museum accurately respects the context and meaning of the property to the originating culture, it is hard to say that the object is now less so a part of the culture's identity.

However, variations of the inalienability rule can be applicable in cultural repatriation contexts. Legal scholars have posited the idea of "pliability" rules, where the entitlement protection rule is *dynamic* and *contingent*—the entitlement holder is protected by either a property or liability rule "as long as some specified condition obtains," and once the relevant conditions change the entitlement protection rule that applies also switches.<sup>95</sup> Such a rule can be applied to cultural repatriation cases with an incomplete inalienability rule, where the current wrongful entitlement holder can keep the cultural artifact for a set *lease* period. Once the set period, during which the wrongful holder compensates the entitlement holder under a liability rule scheme, ends, indefinite inalienability protection kicks in and reversionary interest to the rightful entitlement owner becomes absolute. The contingent incomplete inalienability rule is a practicable way of envisioning a method under which inalienability is applied *ex-post*.

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<sup>91</sup> *Id.*

<sup>92</sup> Erich Hattala Mathes, *The Ethics of Cultural Heritage*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Jul. 12, 2018), <https://perma.cc/DMV3-TB5B>.

<sup>93</sup> Harding, *supra* note 28, at 751.

<sup>94</sup> *Id.* at 751.

<sup>95</sup> Abraham Bell & Gideon Parchomovsky, *Pliability Rules*, 101 MICH. L. REV. 2, 5 (2002).

Additionally, inalienability in cultural repatriation contexts can also justify damages that go beyond the mere equal-value compensation of liability rule schemes. This is an arena in which punitive damages can be awarded to the rightful entitlement holder, based on how long the holder was deprived of the enjoyment of their cultural entitlement. The international effort in crafting provisions for punitive damages and a list of inalienable objects within an international treaty could provide an extra incentive for collaborative action among nations in enacting such a treaty.

One prototypical example of cultural property that may warrant the application of an inalienability rule is ancestral remains. One recent controversy regarding the repatriation of remains is the return of Maori and Moriori remains from Austria to New Zealand. Austrian taxidermist Andreas Reischek looted graves during his time in New Zealand, and much of his spoils remained in the Natural History Museum in Vienna until the formal return in September of 2022.<sup>96</sup> Tribal descendants began requesting for repatriation in the 1940s, but it was not until this past decade that the Museum finally became willing to confront past wrongs.<sup>97</sup> The formal return occurred in a ceremony on the shores of New Zealand as a crowd “sang, cried, and laughed” while performing funerary rituals.<sup>98</sup> The level of emotion and solemnity surrounding the return of this particular cultural property justifies why ancestral remains should be in a different category of protection than other cultural artifacts. Ancestral remains invoke Radin’s personhood theory as objects that are “intrinsically tied” to the expression of a group of people and invoke such strong emotions that they justify the application of an inalienability rule.<sup>99</sup>

A variety of inalienability rules may also have applications in cultural repatriation contexts beyond the agreed-upon list of artifacts. Radin has discussed the concept of “market-inalienability” in an attempt to place certain property “outside the marketplace” but “not outside the realm of social intercourse.”<sup>100</sup> Radin observes that market-inalienability should instead foster the transfer of property by gifting rather than economic transaction as part of human flourishing.<sup>101</sup> Because this Comment considers the value of the preservation of

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<sup>96</sup> Lucy Craymer, *Austria Returns Remains of 64 Indigenous People to New Zealand*, REUTERS (Sept. 28, 2022), <https://perma.cc/H2FB-XTMD>.

<sup>97</sup> Tess McClure, *Rage, but also Joy and Completeness: Bringing New Zealand’s Stolen Ancestors Home*, THE GUARDIAN (Oct. 3, 2022), <https://perma.cc/2KDN-24C5>.

<sup>98</sup> *Id.*

<sup>99</sup> Banteka, *supra* note 26, at 1242.

<sup>100</sup> Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1853 (1987).

<sup>101</sup> *Id.* at 1854.

cultural property to *all* peoples, not just the group from which the property originates, market-inalienability should always be applicable for such artifacts.

#### D. Summary of Enforcement Solutions

Ultimately, the enforcement problem of cultural repatriation can be resolved using the entitlement rules of Calabresi and Melamed’s framework, leading to optimal variable entitlement protection under international law. Primarily, it is key for an international treaty to emphasize the default property rule protection of any source nation’s entitlement to its cultural patrimony. Property rule protection should then rely on domestic community cost pressure and domestic enforcement channels to achieve effectiveness. Next, in circumstances in which the two nations have equal bargaining power and the transaction costs of return are so high due to entitlement-allocation controversy, and if the conflicting party to the entitlement holder is clearly shown as the higher-value holder of the property, liability rules should kick in. Finally, there is the potential for a collectively made list of designated cultural objects deemed unalienable and deserving of the most stringent protection by all nations. The plan of return of these objects must be of the highest priority, and punitive damages should be imposed to incentivize accelerated return. The summary of the application of the three rule types is in the table below.

<b>Rule type</b>	<b>When to apply</b>	<b>Enforcement mechanism</b>	<b>Prototypical example</b>
Property rule	<ul style="list-style-type: none"> <li>• Default rule</li> </ul>	<ul style="list-style-type: none"> <li>• Actual performance of return</li> <li>• Domestic community cost pressure</li> <li>• Domestic enforcement channels</li> </ul>	Benin Bronzes
Liability rule	<ul style="list-style-type: none"> <li>• Two nations have equal bargaining power</li> <li>• Transaction costs of return are high due to</li> </ul>	<ul style="list-style-type: none"> <li>• Bilateral agreement/case-by-case arrangement</li> </ul>	Getty Bronze

	entitlement-allocation controversy <ul style="list-style-type: none"> <li>• Current entitlement holder is clearly shown as the higher-value holder</li> </ul>		
Inalienability rule	<ul style="list-style-type: none"> <li>• Collectively made list of designated cultural objects</li> </ul>	<ul style="list-style-type: none"> <li>• Highest priority plan of return</li> <li>• Punitive damages based on period of alienation</li> </ul>	Maori and Moriori ancestral remains

Cultural repatriation involves a transfer of possession that should be envisioned as a process rather than an instantaneous action. This Comment’s proposed solution leaves space for phase-ins of changes in possession. Some artifacts entitled to property *or* inalienability protection may be first protected under a legal regime where the current holder is given a lease on the cultural property with a reversionary interest to the rightful holder based on a set period under which return must occur. Most objects protected under the property rule should also have a plan of return set in place as a first step to achieving successful repatriation.

#### E. Policy Motivations and Potential Challenges

While the rightfulness of repatriation is uncontroversial internationally, the actual return of cultural property is met with much more resistance. Therefore, a variable framework that weighs the interests of different parties against a sliding scale of standards would provide for much more effective adherence and repatriation action than a singular bright-line normative rule. Furthermore, this proposed solution does not involve the creation of new bodies or enforcement mechanisms, both of which could increase enforcement costs and delay remedies. Also, increasing incentives for nations to sign onto a sanctioned repatriation scheme would decrease the motivation for actors to participate in artifact “black markets.”

This solution also heavily capitalizes on the changing attitudes towards cultural property worldwide. Cultural repatriation issues have taken center stage in the news, and museums increasingly can no longer escape condemnation for

holding onto looted goods. It is crucial to take advantage of the rising tide in favor of repatriation. An enforcement scheme that relies on community pressure should become even more effective in years to come as public attitudes continue to shift in the direction of repatriation and respect for source nations' cultural patrimony.

The major challenge in this proposed solution is that it requires a high degree of trust between nations to collaboratively ratify a new treaty. Considering the recent conflicts between India and the U.K. regarding stolen objects, source nations may look upon such a treaty with suspicion and believe that they are written from the perspective and benefit of rich receiving nations that have powerful museums and cultural institutions.

## V. CONCLUSION

Cultural repatriation has increasingly come to the forefront of international law as an issue that warrants urgent remedies. Existing international legal schemes are generally ineffective and have retroactivity issues. Furthermore, most have limited buy-in, especially from nations that are most frequently the target of repatriation controversies. Calabresi and Melamed's framework for entitlement protection rules has strong potential to be applied to create a cultural repatriation enforcement scheme. Existing legal scholarship drawing upon their framework have almost solely relied on the inalienability rule that has limited enforcement capability. No scholarship has proposed a comprehensive solution for remedies that balances rule-based conventions with flexible case-by-case arrangements in a way that is enforceable *and* equitable to all parties involved. This Comment's proposed solution seeks to bridge that gap.