

FULL ACADEMIC RATIONALE FOR THE UEHIRO DECISION AID FOR THE RESTITUTION OF CULTURAL ARTEFACTS

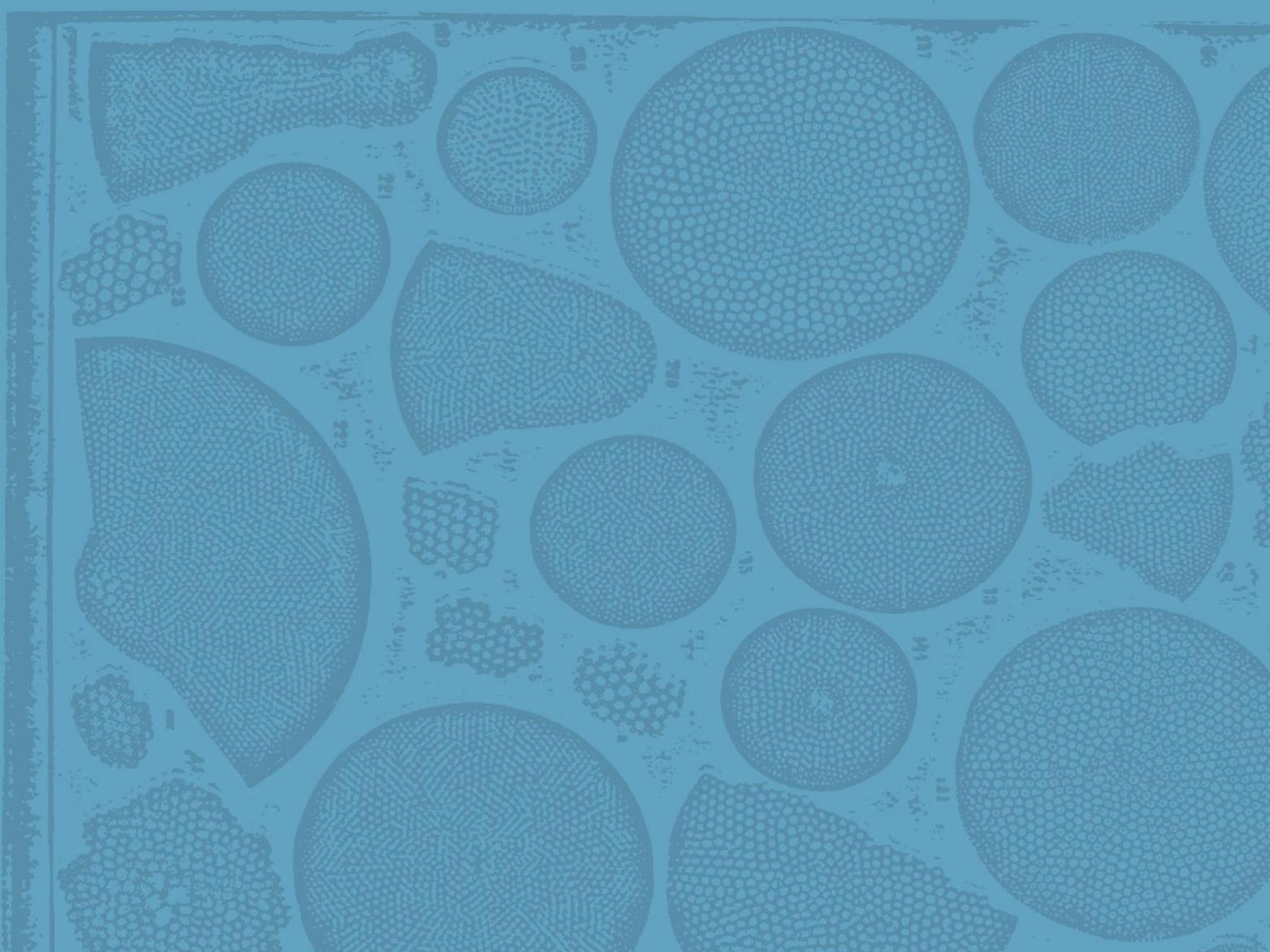




Table of Contents

1. Introduction.....	2
2. Procedural and Substantive Ethics, and Putting DARCA in Context.....	3
3. Terminology and Clarifications of Scope	4
Cultural Artefacts	4
The Applicability of DARCA.....	5
Defining 'Claimants'	5
The Reasonable Basis Standard of Proof	6
Defining 'Moral Obligation'	6
The Scope of DARCA	7
4. The Theoretical Foundations of DARCA	7
5. Assessing the Strength of the Obligation to Return.....	9
5.2 Cultural Property.....	10
5.3 Reparations for Historical Injustice	12
6. Detailed Academic Background to DARCA Questions 1-4.....	13
Q1. What basis is there for believing that the artefact was removed in a morally illegitimate manner?	13
Q2. Has the artefact played an important role or did it otherwise hold significant value for the claimant or the community from which it was taken?	15
Q3. What basis is there for believing that the claimant has a close relationship to the morally illegitimate removal of the cultural artefact?.....	16
Q4. Does the artefact have genuine and enduring value for the claimant's culture?	20
7. Assessing the Strength of the Obligation to Retain, and the Comparative Strength of the Competing Obligations.....	22
8. Detailed Academic Background to DARCA Questions 5-12.....	23
Q5. Does the artefact have an important cultural value that has been adequately served by the cultural institution that currently possesses it?	23
Q6. Is there a credible concern that returning the cultural artefact to the claimant would undermine the continued existence or safety of the artefact?.....	24
Q7. Does the credible concern about the safety or existence of the artefact following its return arise due to conduct that the claimant believes is required for the respectful treatment of the artefact?.....	25
Q8. Is the public display of the item in its current location incompatible with what is required for the item's respectful treatment according to the claimant?	26
Q9. Would the return of the artefact serve to enhance its cultural value or enable more widespread access?.....	27
Q10. Will the claimant face difficulties in readily accessing the item in its current location over the long-term future?.....	28
Q11. Has the institution's possession of the artefact created a 'legitimate expectation of retention'?.....	28
Q12. Are there any other relevant case-specific considerations that you have not yet raised in your responses?	29
9. Interpreting Outcomes.....	29
10. Decision Aid Logic	31
Questions 1-4.....	31
Questions 5-11	32
References	33

1. Introduction

- 1.1 In recent years, there has been a growing number of public debates about the ethics of ‘cultural restitution’ and ‘repatriation’. Following the Arts Council definitions, we shall understand these terms to concern ‘the process of returning cultural material to its original owners (restitution), or its place of origin (repatriation)’.¹ Some contested objects that have been the subject of high-profile debates about restitution and repatriation include, for example, the Parthenon Marbles, the Rosetta Stone, and the Benin Bronzes.²
- 1.2 These debates have become especially important for trustees of museums in the UK. Recently, trustees have resorted to the Charities Act 2011 in England and Wales in order to seek approval of the Charity Commission to make *ex gratia* applications of property based on a ‘moral obligation’ to return, as set out at section 106 of the Act.^{3 4} For our purposes here, it suffices to say that the question of whether an institution has a moral obligation to return an artefact can therefore be both culturally and legally significant. Trustees are increasingly likely to confront this issue. However, making such determinations is rarely straightforward: it often requires uncovering historical facts about the artefact and navigating complex philosophical questions about morality and justice.
- 1.3 Accordingly, the question of when, and whether, institutions have a ‘moral obligation’ to return an item in their collections is of significant import, from both a legal and a broader cultural perspective. It is also a question that trustees of cultural institutions in England and Wales are increasingly likely to face with regard to their collections.
- 1.4 However, it is also a deeply complex question. One reason for this is that those seeking to answer it will typically have to establish various important historical facts about the item in question. Perhaps more significantly, establishing that there is a moral obligation to return a cultural item will also require one to navigate nuanced issues in moral philosophy, as we shall explain below.
- 1.5 The Decision Aid for the Restitution of Cultural Artefacts (DARCA) is intended to aid users in coming to a rigorous and justifiable decision about the strength of an institution’s moral obligation to return a particular artefact. In this document, we outline the academic rationale for the decision aid, and explain the development of the aid in greater detail.

¹ Arts Council England, *Restitution and Repatriation*, 2. Some philosophers define restitution in a more restrictive and normatively laden sense. For example, Thompson defines restitution as ‘the restoration to its rightful owner of something that was unjustly taken’. Thompson, ‘Cultural Property, Restitution and Value’, 251.

² For a illustrative sample, see The Independent, ‘Elgin Marbles to Moai Heads - the Artefacts British Museum Has Been Urged to Return’; Biggar, ‘The Case for Keeping the Elgin Marbles’; Martinez, ‘Stephen Fry Dubs Returning Elgin Marbles to Greece ‘a Classy Act’’. For a recent academic treatment of the topic, see Herman, *The Parthenon Marbles Dispute*.

³ Charities Act 2022. It should be noted that there are other legal avenues via which a party might raise a restitution claim; this guidance is intended only to inform judgements relevant to section 106 applications.

⁴ Herman, ‘MUSEUMS, RESTITUTION AND THE NEW CHARITIES ACT’.



2. Procedural and Substantive Ethics, and Putting DARCA in Context

2.1 Several bodies, including Arts Council England and the International Council of Ethics for Museums (ICOM) have already produced relevant documents and ethical codes that offer indispensable guidance for parties seeking to address ethical issues surrounding cultural restitution and repatriation.⁵ In this section, we shall explain how DARCA can be distinguished from this existing guidance, and the supplementary role that it is intended to play.

2.2 In order to explain this, it is useful to draw a distinction between procedural ethics and substantive ethics. Procedural ethics pertains to the ethics of *how* a certain decision is reached. Existing guidance from the Arts Council on restitution and repatriation outlines comprehensive procedural ethical advice for trustees about procedures that institutions ought to follow in coming to a decision about whether they are under a moral obligation to dispose of an item. Stage one of this advice includes, amongst other things, the recommendation that trustees:

- a. gather sufficient information to ensure that their decision is suitably informed;
- b. be transparent about their decision-making process;
- c. involve multiple stake-holders.⁶

DARCA itself has little to add to the Arts Council's comprehensive guidance about these procedural ethical issues. Instead DARCA is intended to supplement this procedural guidance by providing a decision aid that facilitates a deeper engagement with substantive ethical issues in this context, as detailed below. That said, users are encouraged to use DARCA in accordance with this existing procedural guidance.

2.3 In contrast to procedural ethics, *substantive ethics* pertains to the ethical content of our decisions and actions. For instance, in the case of cultural restitution, perhaps the main (but not the only) substantive ethical question of interest is whether a cultural institution is morally obliged to return a particular item.⁷ In addition to its procedural ethical guidance, the Arts Council guidance also highlights various considerations that trustees might incorporate in coming to a substantive decision about the merits of a restitution claim in stage two of its guidance. These include:

- a. The significance of the item to the claimant;
- b. How the object was removed;
- c. How the museum has engaged with the object;
- d. Who is raising the claim.⁸

⁵ Arts Council England, *Restitution and Repatriation: A Practical Guide for Museums in England* (Arts Council, 2023); International Council of Museums, 'Code of Ethics'.

⁶ 'Restitution and Repatriation: A Practical Guide for Museums in England', Arts Council England, p. 12.

⁷ A further interesting and complex question is when and whether an institution may act on such an obligation

⁸ Arts Council England, *Restitution and Repatriation*, p. 14.



2.4 The Arts Council guidance provides an excellent starting point for those seeking to engage with substantive ethical issues about cultural restitution and repatriation. However, the motivation for DARCA's development was that those facing ethical questions about cultural restitution would benefit from further guidance about how the various considerations listed by the Arts Council (outlined in the previous paragraph) should be incorporated into an overall ethical analysis. Notably, there is also a significant body of work in the academic field of moral philosophy that has provided detailed analyses of how these considerations (and others) can also be used to develop moral arguments about cultural restitution and repatriation.

2.5 The aim of DARCA is thus to synthesize this body of work, into an approachable and accessible decision aid that can enable individuals to think systematically through various considerations relevant to substantive ethical questions about cultural restitution. The aim of the decision aid is to enable users to make practical moral decisions about cultural restitution in a well-reasoned and philosophically-informed manner. It is a decision aid rather than a decision-making tool - it does not seek to dictate or even steer a user towards any particular answer.

2.6 DARCA is based on questions concerning morally relevant features that have been widely discussed in the academic literature, and that are most likely to arise across different restitution and repatriation cases. However, there will sometimes be other factors (e.g. political, legal, aesthetical, reputational, and in some cases, other moral considerations) in particular cases that fall out of DARCA's scope. These case-specific factors will also need to be considered when users consider how to respond to a restitution claim. Although users of DARCA will have an opportunity to add details about their own particular case, the primary intended aim of DARCA is to facilitate discussion of morally relevant factors that are common to the majority of restitution cases.

3. Terminology and Clarifications of Scope

3.1 Prior to explaining the theoretical foundations of DARCA in section 4, this section of the document will clarify some of the terminology used throughout the remainder of this document.

Cultural Artefacts

3.2 First, DARCA is intended for use when considering the restitution or repatriation of what the tool refers to as 'cultural artefacts'. How precisely to define this term is itself an issue of some contention. Article 1 of the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property uses the term 'cultural property'.⁹ According to this definition, 'cultural property' refers to items that, on religious or secular grounds, are specifically designated by each state as

⁹ UNESCO, 'Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property.', UNESCO, accessed 30 January 2024, <https://en.unesco.org/about-us/legal-affairs/convention-means-prohibiting-and-preventing-illicit-import-export-and>.

being of importance for certain specified cultural purposes listed elsewhere in the definition.¹⁰ DARCA does not employ the same terminology of ‘cultural property’ for two reasons. First, ‘cultural property’ is sometimes used in the philosophical literature to capture a narrower set of items, (as this document will detail below), and the term ‘property’ can also be understood to have a quite specific legal meaning. Second, the UNESCO definition suggests that only states have the authority to designate that an item is of sufficient cultural importance to be identified an item of cultural property. However, as we shall detail below, it might plausibly be argued that other kinds of collective can appropriately be understood to confer morally significant meaning to certain items.

3.3 Accordingly, whilst the terminology of ‘cultural artefacts’ employed by DARCA may be understood to cover to a similar range of items captured by the UNESCO definition of cultural property, it should be understood to do so in a manner that circumvents the two contentious features of that definition.

The Applicability of DARCA

3.4 It should also be noted that DARCA is not intended for use when considering the return of human remains or property lost or stolen during the Nazi period in Europe; these issues are already covered by existing laws, guidance, and mechanisms.¹¹ It is also not intended for use with digital artefacts, which raise several further ethical and legal issues.¹²

Defining ‘Claimants’

3.5 DARCA makes reference to ‘claimants’ throughout the aid. In the simplest terms, a claimant in this context can be understood as a party that is raising a claim for the restitution or repatriation of a cultural artefact. As the Arts Council England Guidance makes clear, claims can arise from a wide range of sources including (amongst others) particular individuals (such as a descendant of a previous owner of the item); a community of origin or related organisation; a museum or other cultural institution; a foreign state; an organisation specially designated for dealing with restitution claims.¹³ The intention is that DARCA should be used iteratively, as a means of responding to claims as they arise. As such, it does not address the weighing up of one claim (or potential claim) against another. That said, the existence of a competing claim might potentially be relevant to the answer to some of the questions raised by DARCA, such as the assessment of the importance of the object to the claimant, and the closeness of a claimant’s relationship to the victims of a morally illegitimate removal of an object. In cases in which there are multiple, perhaps competing claimants for a particular artefact, users are advised to complete DARCA separately for each respective claim, and to compare outcomes across these claims.

¹⁰ Ibid.

¹¹ ‘Spoliation Of Works Of Art During The Holocaust And World War II Period - National Museum Directors’ Council Website’.

¹² Zeilinger, ‘Digital Art As ?’; Bailey, ‘Digital Value’.

¹³ Arts Council England, *Restitution and Repatriation: A Practical Guide for Museums in England* (Arts Council, 2023), 9.

The Reasonable Basis Standard of Proof

3.6 One of the difficulties that those facing restitution claims can encounter is that the available information about a claim can sometimes be incomplete, and it may not always be possible to verify every aspect of a claim. In accordance with the Arts Council England guidance, in such circumstances, it is suggested that users of DARCA should seek to establish where there is a *reasonable basis* to decide a particular matter. To have a reasonable basis to decide a matter can be understood to mean that all the information one has, taken together, provides a *reason to believe that it* is more likely than not that a certain fact or state of affairs obtains or obtained.¹⁴

Defining ‘Moral Obligation’

3.7 As detailed in the introduction, recent legal discussions have raised the question of what it is for a cultural institution to have a *moral obligation* to return a cultural artefact. For the purpose of DARCA, we may understand the claim that a party is under a moral obligation to perform some action (such as return a cultural artefact) to mean in the most general terms that there are *strong moral reasons* for them to do that thing. When one has a *strong* moral reason, we say that if that party were to refrain from performing the action without justification or excuse, this would amount to a failure to do what is morally required of them, or what they have a moral duty to do. As we shall note in the next paragraph, not all moral reasons are strong enough to generate these kinds of duties. It is worth noting here that a common justification for failing to act in accordance with a particular moral obligation is that the party in question is also under another competing and stronger moral obligation to perform a different action.

3.8 With this definition in mind, it is worth being explicit that not all moral reasons may be strong enough to give rise to obligations. That is, on this understanding, it is possible to have a moral reason to do something that would be ‘beyond the call of duty’. Philosophers often describe such acts as ‘supererogatory’. Whilst it can be morally good to perform a supererogatory act, to fail to do something that is supererogatory is not to fail to do something that one was morally obliged to do. It is worth drawing this distinction, as some of the moral arguments raised in favour of restitution and repatriation in the public sphere have been parsed in terms that could be understood to connote moral reasons weaker than those that ground moral obligation.¹⁵

3.9 Given the possibility of competing moral obligations, it can also be useful to distinguish two questions: The first is simply the question of whether a party is under a moral obligation to do something, *considered in isolation*. In considering this question, we are interested only in the question of whether there are strong moral reasons in favour of that action. The second question is whether a party is under an *all-things-considered obligation* to do that thing. In considering the second question, we are interested not only in the question whether there are strong moral reasons in favour of that action, but also in whether the individual is under any other competing obligations. We take Section 106

¹⁴ Arts Council England, *Restitution and Repatriation: A Practical Guide for Museums in England* (Arts Council, 2023), p.9.

¹⁵ Martinez, ‘Stephen Fry Dubs Returning Elgin Marbles to Greece ‘a Classy Act’.

of the Charities Act to be best interpreted as pertaining to question whether Trustees may reasonably be believed to be under *an all-things-considered* moral obligation to return a particular cultural item.

The Scope of DARCA

3.10 The aim of DARCA is to help users to come to a decision about a cultural institution's overall moral obligation in a case of cultural restitution. To do so, it prompts users to reflect on a series of questions pertaining to moral considerations that are common to a range of restitution and repatriation cases, and that have been widely discussed in the academic literature. DARCA is designed to deliver a general outcome, based on the common morally relevant features it investigates. In some cases, there could potentially be other case-specific factors that could ground a moral obligation to return a cultural artefact, and that are not adequately captured by the more general DARCA questions. Users are invited to raise these sorts of considerations at the end of using the decision aid, and the outcomes DARCA generates should be assessed in conjunction with these case-specific considerations. Case-specific considerations that users raise will also be included in their outcome document.

4. The Theoretical Foundations of DARCA

4.1 With these terminological clarifications in mind, this section will outline the theoretical foundations of DARCA. DARCA was developed in close partnership with an interdisciplinary group of stakeholders, which sought to identify key moral considerations concerning cultural restitution across two workshops, and following a review of existing sector guidance, law, policy, and academic moral philosophy. Of course, questions about cultural restitution can be raised across a range of other disciplines outside of moral philosophy. However, whilst it is recognised that this represents a limitation of DARCA, the theoretical foundations of the decision aid were limited in this way for several reasons. First, understanding the nature of moral obligation is one of the central tasks of moral philosophy; it is thus a discipline particularly well-suited for the question that DARCA aims to answer. Second, this literature has outlined various theoretical grounds why the considerations outlined in existing policy guidance (such as that provided by the Arts Council) are morally relevant. Third, as will be detailed below, although the literature in moral philosophy evidences important disagreements, much of the work in this field has converged on a common understanding of the different sources of moral obligation that can be operative in this context. Interested readers can find sources consulted in the development of this document in the bibliography.

4.2 The question of when a party has a moral obligation can be determined by consulting what different moral theories might claim we have reasons to do. As such, the concept of a moral obligation is perhaps more contentious and nebulous than the concept of a legal obligation. Whilst there is little room for debate about what the law states, there is greater scope to debate both what different moral theories claim we have reasons to do, and which moral theories provide the most plausible basis for our obligations. Nonetheless, this does not mean that we cannot reach any agreement about when trustees may reasonably be believed to be under a moral obligation to return a cultural artefact. There

is in fact a striking degree of convergence amongst quite different moral theories about what we have moral reasons to do.

4.3 One reason why we can sometimes face seemingly intractable debates in contentious areas of policy-making is that parties can be subject to competing obligations; they may have different moral reasons to follow two mutually exclusive courses of action, ‘pulling’ them in different directions. In order to resolve such cases, it is crucial to come to a reasoned judgement about the strength of these competing obligations, and to identify the strongest moral reason in a given context.¹⁶ The field of Practical Ethics aims, in part, to offer a systematic, pluralistic, and reasoned approach to making such judgements, informed by assessments of whether certain moral reasons are supported by converging moral theories, as well as by relevant empirical factors.

4.4 Debates concerning the restitution of cultural items provide an example of a case in which there can be such competing moral obligations. In the philosophical literature on the topic of cultural restitution, it is possible to identify the following two widely acknowledged competing moral obligations that trustees of cultural institutions might plausibly be under:

- a. *The Obligation to Return Items Based on the Moral Reasons to Respect Property Claims and/or to Provide Reparations for Historical Injustice* - In some cases, trustees might plausibly be understood to be under a moral obligation to return certain artefacts, if a claimant has a plausible moral claim to that item. That claim might appeal to the thought that the artefact is in some sense the ‘cultural property’ of the claimant. If the artefact was removed in a morally illegitimate manner, the moral claim might also be grounded in the idea that its return would constitute an appropriate form of reparation for a historical injustice involved in that morally illegitimate removal.¹⁷
- b. *The Obligation to Retain Items Based on the Moral Reasons to Preserve and Enable Access to Culturally Significant Items for Valuable Purposes, Including Education, the Advancement of Knowledge, and Aesthetic Worth* - Trustees of museums might plausibly be understood to be under a moral obligation to retain items within their collections, so that they are able to safeguard and enable access to culturally significant items. A culturally significant item is one that can be understood to be of significant value to the whole of humanity, because it manifests important parts of humankind’s shared cultural heritage. Accordingly, the thought here is that many cultural institutions play a crucial social role in preserving and protecting these culturally significant items, as well as enabling widespread public access to them. Conversely, in some cases, there might be legitimate concerns about either the safety of an artefact, or maintaining widespread public access to it, following restitution. These concerns, in

¹⁶ Sinnott-Armstrong, *Think Again*.

¹⁷ For discussion, see Thompson, ‘Cultural Property, Restitution and Value’; Bjornberg, ‘Historic Injustices and the Moral Case for Cultural Repatriation’; YOUNG, ‘Cultures and Cultural Property’; Harding, ‘Justifying Repatriation of Native American Cultural Property’; Matthes, ‘Repatriation and the Radical Redistribution of Art’.

combination with the above considerations, might be understood to provide some moral reason for a cultural institution to retain certain cultural artefacts.¹⁸

4.5 In order to resolve this conflict, one must assess the relative strength of the moral reasons enshrined within the two obligations. To do so, one must identify the various factors that might plausibly diminish or enhance the strength of these reasons¹⁹ – such factors have been identified in published academic work concerning the ethics of restitution as this document will demonstrate below. DARCA aims to provide a systematic decision aid to facilitate the resolution of this conflict in particular cases. As shown below, the questions that contribute to the formation of DARCA are supported by peer-reviewed analysis, published in journals in academic philosophy, as well as iterative consultation with the expert group attending the two project workshops. The identification of a factor in the academic literature may plausibly be understood as providing a sufficient basis for a reasonable belief that the factor is relevant to ascertaining the strength of the relevant moral obligations in this context. Other moral considerations were sourced from existing sector guidance, as detailed below. Finally, as explained above, DARCA cannot claim to be exhaustive with respect to all of the moral considerations that may reasonably be taken to be relevant to every individual case – for this reason, the decision aid gives users the opportunity to add further case-specific considerations at the end of the decision aid.

4.6 DARCA is fundamentally grounded in an ethical algorithm that comprise two halves. The first half aims to first establish the strength of moral obligation (a), identified above: The Obligation to Return Items Based on the Moral Reasons to Respect Property Claims and/or to Provide Reparations for Historical Injustice. The second half aims to provide a generalised assessment of the all-things-considered strength of that obligation, in light of countervailing considerations favouring the view that the trustees also have a competing obligation to retain the item in question. This document will detail the academic rationale for each of the questions in each half of algorithm in turn. The logic of the two halves of the algorithm can be found in section 10 of this document.

5. Assessing the Strength of the Obligation to Return

5.1 As noted above, the claim that a cultural institution has a moral obligation to return a cultural artefact is often based on the idea that a claimant has a plausible moral claim to that artefact. Much of the philosophical literature concerning the ethics of cultural restitution has sought to address what makes such claims plausible. As this document will explain, this literature has parsed these claims in terms of the moral reasons to respect claims to what has been referred to as ‘cultural property’ and/or to provide reparations for historical injustice. Whilst DARCA aims to capture the fact that there is often significant overlap between these arguments, it is prudent to begin by discussing each of these related grounds for the obligation to return a cultural artefact independently of one another. This document will begin by discussing the concept of ‘cultural property’ and its relevance to the ethics of cultural restitution.

¹⁸ For discussion, see Thompson, ‘Art, Property Rights, and the Interests of Humanity’; Thompson, ‘Cultural Property, Restitution and Value’; Schrag, ‘Ethical Obligations of Museum Trustees and the Looting of Our Collective Heritage’.

¹⁹ Sinnott-Armstrong, *Think Again*.

5.2 Cultural Property

5.2.1 At the outset of this discussion, it is useful to follow Robert Lindsay in observing that debates about moral claims to cultural artefacts can be understood to occur at two levels. First, there are questions about whether the artefact is the *legal* property of the claimant, in which ‘the circumstances (e.g., war, theft, colonial practices) whereby an artifact was removed from its original location – are what matter’.²⁰ However, these debates also occur at a second level, where the relevant question becomes ‘irrespective of where an artifact is presently located and how it got there, where, in the grander scheme of things, does it belong?’.²¹

5.2.2 Of course, as Lindsay also makes clear, the history of the object and the circumstances of its removal can also be relevant to this second question. Crucially, however, this second level of debate can be understood to pertain to a notion of ‘cultural property’ that is not co-extensive with legal conceptions of property. The idea here is that the moral obligation to return a cultural artefact could be grounded in this supra-legal conception of a claimant’s putative moral right to their cultural property.

5.2.3 As detailed in paragraph 3.2 of this document, UNESCO invokes the terminology of cultural property in a convention that is highly relevant to this topic. UNESCO understands the term to refer to property which, on religious or secular grounds, is specifically designated by each state as being of importance for certain specified cultural purposes. It is worth being explicit that there are thus two key aspects to this definition of cultural property that broadly map on to the two kinds of question identified in paragraph 5.2.1. First, the item in question must be designated as having a certain kind of importance. Second, it must also be the ‘property’ of a collectivity. Philosophical discussions of cultural property sometimes use this terminology in a manner that similarly reflects the idea that there are two aspects to defining cultural property, pertaining to the nature of the item’s possession and its significance. For example, Janna Thompson defines cultural property as follows:

Something is the cultural property of a collectivity if and only if a) it was legitimately acquired by the collective or its members — that is, not taken without consent or justification from others — or possession of it has been made legitimate by changes in circumstances; b) the item plays an important role in the religious, cultural or political life of people of the collectivity by functioning as a symbol of collective ideals, a source of identity for its members, as a ceremonial object, a focus of historical meaning, an expression of their achievements, or as a link with founders or ancestors.²²

She also notes that the ultimate justification for such cultural property rights is the value to members of a collective of being able to exercise collective control over these artefacts.²³

²⁰ Lindsay, ‘Can We Own the Past?’, 5.

²¹ Lindsay, ‘Can We Own the Past?’, p.5.

²² Thompson, ‘Cultural Property, Restitution and Value’, 252.

²³ Thompson, ‘Cultural Property, Restitution and Value’, 252–53.

5.2.4 Thompson's definition offers a more refined understanding of cultural property than UNESCO's definition for two reasons. First, as Matthes notes, it explicitly acknowledges that states are not the only collectives that could be legitimate owners of cultural property; such collectives could also include, for example, dispersed indigenous people.²⁴ Second, by virtue of condition (a) in the above quoted paragraph, Thompson gives a more explicit account of what it is for an item to amount to property simpliciter – the item must have been legitimately acquired, or its possession must have otherwise been made legitimate by changes in circumstances. In section 5.6, this document will outline an alternative approach to cultural property that dispenses with this sort of condition, and its implications for interpreting DARCA.

5.2.5 Whilst Thompson's definition of cultural property is often invoked in the philosophical literature, it has also been subject to a range of critiques, including (but not limited) to the following. First, some have criticised the requirement that cultural property can belong only to organised collectives that are capable of acting as collectives. The concern here is that this might preclude the applicability of the concept of cultural property to less formalised collectives, including those that cross apparent cultural discontinuities.²⁵ We shall return to this question below. A second criticism pertains to the necessity of a 'significance' condition in establishing what constitutes cultural property, such as condition (b) in the definition quoted in paragraph 5.2.3; as Matthes has argued, 'it's not clear that production by a member of a culture cannot be construed as grounding at least certain moral claims that might fit in the bundle of property rights'.²⁶ Third, Young has developed an account of cultural property according to which 'the very value of cultural property for some culture can, in some instances, provide the basis for the culture's claim on the property'. On Young's view, then, it appears that condition (a) in Thompson's definition is not necessary for an item to constitute cultural property.²⁷ Finally, others have raised the more fundamental concern about invoking notions of property or ownership with respect to culturally significant artefacts. For instance, Schrag questions the grounds of the assumption that anyone 'owns' cultural artefacts, and notes that standard conceptions of property and ownership can connote moral rights of acquisition and disposal that are problematic in the context of culturally significant artefacts.²⁸ Instead, he suggests that it might be more appropriate to think about a party's moral claims to a cultural artefact in terms of moral guardianship or stewardship of the artefact, rather than their having a right to it as their cultural property.²⁹

5.2.6 These various objections do not necessarily raise unavoidable problems for the concept of cultural property. Indeed, with respect to the final objection raised in the previous paragraph, Thompson has elsewhere outlined important limitations to cultural property rights that might plausibly forestall concerns about broad moral rights of disposal.³⁰ However, given the significant debate about the coherence of this issue, there are good

²⁴ Matthes, 'Repatriation and the Radical Redistribution of Art', 933.

²⁵ Matthes, 'Repatriation and the Radical Redistribution of Art'; YOUNG, 'Cultures and Cultural Property'; Ritchie, 'The Metaphysics of Social Groups'.

²⁶ Matthes, 'Repatriation and the Radical Redistribution of Art', 933.

²⁷ YOUNG, 'Cultures and Cultural Property'. In a similar vein, Lindsay notes that an argument in favour of returning certain artefacts begins by noting that certain artifacts are part of a culture's psychological landscape. Lindsay, 'Can We Own the Past?', p.5.

²⁸ Schrag, 'Ethical Obligations of Museum Trustees and the Looting of Our Collective Heritage', 82.

²⁹ Schrag, 'Ethical Obligations of Museum Trustees and the Looting of Our Collective Heritage', 82.

³⁰ Thompson, 'Art, Property Rights, and the Interests of Humanity'.

reasons to consider ways of thinking about the grounds of a moral obligation to return a cultural artefact with fewer contentious theoretical commitments. In the next section, we shall outline such an alternative.

5.3 Reparations for Historical Injustice

5.3.1 An alternative way of thinking about the theoretical grounds for the moral obligation to return a cultural artefact is to parse them in terms of reparative justice. Broadly, reparative justice concerns what is morally required of parties to rectify a past wrong. It can be understood to incorporate demands of rectification, understood as the ‘restoration of expropriated possessions or the provision of an equivalent for these possessions’.³¹ However, reparative justice is not confined to rectification in this sense; acts of true reparative justice also involve ‘an acknowledgement on the part of the transgressor that what he is doing is required of him because of his prior error’.³²

5.3.2 The idea that true reparations can be offered only by parties responsible for a historical injustice raises the question whether the concept of reparative justice can appropriately be applied in the context we are considering here. After all, it might be contended that existing people today are not responsible for the injustices perpetrated by their forebears. As Bjornberg highlights in her discussion, such notions of intergenerational responsibility ascriptions are widely debated in philosophy.³³ However, if one denies that such intergenerational moral responsibility is possible, then rectification might yet still plausibly be understood to amount to a warranted form of *compensation* (rather than reparation), where an offer of compensation is understood to remedy a harm without connoting moral responsibility for that harm’s occurrence.³⁴ In the interests of brevity though, this document will parse the argument in terms of reparative rather than compensatory justice.

5.3.3 In the context we are considering, it might be thought that returning a cultural artefact may be an appropriate way of rectifying an injustice that occurred when the artefact was obtained (either as reparation or compensation). One benefit of parsing the grounds of the obligation to return a cultural artefact in these terms is that it does not rely on a contestable notion of what can ground a ‘cultural property’ claim; one can be a victim of a historical injustice pertaining to the morally illegitimate removal of an artefact, even if it was not strictly one’s property. For instance, those who are stewards or guardians of a cultural artefact can plausibly be construed as victims of historical injustice, if items over which they were custodians were taken from them in wrongful manner. Indeed, some views of reparative justice suggest that obligations of reparative justice are not best understood as being grounded in the rights of affected communities *per se*; rather these obligations should primarily be grounded in the thought that beneficiaries of historical injustice have moral reasons to repair what has been damaged, or to make reparations that address the historical wrong committed.³⁵

³¹ Thompson, ‘Historical Injustice and Reparation’, 120.

³² Boxill, ‘The Morality of Reparation’, 118.

³³ Bjornberg, ‘Historic Injustices and the Moral Case for Cultural Repatriation’; Boxill, ‘Black Reparations’.

³⁴ For an illuminating comparison of reparations and compensation in a different context, see Buxton, ‘Reparative Justice for Climate Refugees’.

³⁵ Thompson, *Taking Responsibility for the Past*.

5.3.4 Even this brief discussion is sufficient to establish that, despite some differences, there is also significant overlap between the two approaches to grounding a moral obligation to return a cultural artefact. Most significantly for the purposes of DARCA, the strength of a moral claim to an artefact that is not in the claimant's possession can plausibly be understood to depend on several shared key factors, regardless of whether the claim is ultimately understood to be theoretically grounded by considerations of cultural property or reparative justice. The questions in the first half of the DARCA flowchart pertain to these shared characteristics.

6. Detailed Academic Background to DARCA Questions 1-4

Q1. What basis is there for believing that the artefact was removed in a morally illegitimate manner? ³⁶

6.1.1 This question is naturally of clear relevance for arguments grounded in considerations of reparative justice. However, the question can also be highly relevant for arguments grounded in considerations of cultural property. As already detailed in paragraph 5.2.2, the history of the object and the circumstances of its removal can be relevant to determining where an artefact truly belongs, and whether it can constitute a collective's cultural property. Indeed, at least on some definitions of cultural property, it may be difficult to mount a claim that an artefact constitutes cultural property following a lawful transfer of its possession to another party, *unless* that transfer involved some sort of moral illegitimacy that negates any effect the transfer is understood to have on the claimant's moral property rights.

6.1.2 In determining the strength of the basis for believing that the artefact was removed in a morally illegitimate manner, one crucial factor to consider in providing an answer to this question is the *strength of the evidence* of how the artefact was taken. In some cases, this may be well documented - however, in others, there may be significant gaps in our understanding of how different parties came into possession of an artefact over the course of its history.

6.1.3 Yet perhaps the most complex philosophical question concerns when a change in the ownership, possession, or custodianship of an item can appropriately be said to involve a morally illegitimate transfer of possession and/or ownership. In the interests of brevity, we shall henceforth invoke simply the notion of 'possession' rather than ownership when discussing the moral legitimacy of these transfers, in order to avoid questions about the coherence of the moral concept of cultural property, and its potential implications for rightful ownership.

6.1.4 Bjornberg provides a useful discussion of this set of issues, outlining various examples of what she terms 'morally illegitimate removals of cultural property'. ³⁷ First, a change in possession may have been unlawful at the time; in such cases, there is a straightforward

³⁶ The wording of this question is adapted from Bjornberg, 'Historic Injustices and the Moral Case for Cultural Repatriation', 463.

³⁷ Bjornberg, 'Historic Injustices and the Moral Case for Cultural Repatriation', 463–463.

case in favour of claiming that a historical injustice has occurred, on the basis that illegal behaviour typically involves a moral wrong. However, such cases lie outside the scope of DARCA, which concerns moral rather than legal obligations to return cultural artefacts. Nonetheless, a change in the possession of an item may have been lawful at the time and yet plausibly involve moral transgressions that are sufficient to constitute a historical injustice that warrants reparations. One clear example of this may arise if the change in possession involved acts that transgress moral norms to the extent that they would be considered unlawful by modern standards. An example of this might be looting and the taking of spoils of war. Alternatively, Bjornberg suggests that a removal of an artefact might have involved a significant injustice if the change of possession was based on an improper agreement.³⁸ An improper agreement might involve forms of influence that clearly undermine the voluntariness of the agreement, (such as duress and/or deception); alternatively an agreement might be improper because it was exploitative, in so far as the expropriator benefited from the transaction by taking unfair advantage of a vulnerable party in the expropriation.³⁹

6.1.5 Notably, on this last point, some philosophical discussions of colonialism have suggested that part of the wrong involved in colonialism is that it denied colonised populations equal and reciprocal terms of political association.⁴⁰ On this sort of view, the significant power imbalances between colonizers and the colonised population could potentially raise doubt about the moral legitimacy of even seemingly voluntary agreements between these parties. Moreover, it is possible that in some cases such agreements could also have failed to meet conditions of equality and reciprocity due to divergent interpretations of key concepts in those agreements, including rights, sovereignty, and property.⁴¹

6.1.5 Bjornberg suggests that the removal of an artefact might have involved a significant injustice if the removal was ‘agreed by someone who was not the legitimate owner of the object in question’.⁴² As Matthes highlights, this last possibility may also be understood to relate to the notion that items of cultural property may be understood to be inalienable;⁴³ according to this view, it might be the case that nobody (not even legitimate leaders of a collective) has the legitimate authority to agree to the transfer of possession and/or ownership of certain artefacts. However, it should be noted that this notion of inalienable property has been subject to criticism; for instance, as Coleman points out, the notion of inalienable property suggests a denial of sovereignty to cultural groups that wish to make choices to shape their own culture.⁴⁴

6.1.6 It should also be acknowledged that in seeking to identify morally illegitimate removals of cultural artefacts, one might raise the concern that some of the removals were not ‘unjust by the standards of the time’, and that ‘present possessors have no need to make

³⁸ Bjornberg, ‘Historic Injustices and the Moral Case for Cultural Repatriation’.

³⁹ Wertheimer, *Exploitation*.

⁴⁰ Ypi, ‘What’s Wrong with Colonialism’; Butt, ‘Colonialism and Postcolonialism’.

⁴¹ Ypi, ‘What’s Wrong with Colonialism’, 181.

⁴² Bjornberg, ‘Historic Injustices and the Moral Case for Cultural Repatriation’, 464.

⁴³ Matthes, ‘Repatriation and the Radical Redistribution of Art’, 936; Harding, ‘Justifying Repatriation of Native American Cultural Property’, 724. For a discussion of inalienability in the US legal context, see Harding, ‘Justifying Repatriation of Native American Cultural Property’.

⁴⁴ Coleman, ‘Repatriation and the Concept of Inalienable Possession’; Harding, ‘Justifying Repatriation of Native American Cultural Property’.

restitution just because standards have changed'.⁴⁵ However, Thompson explicitly responds to this argument, pointing out that as long as we today believe that our predecessors did perform immoral actions, then we cannot escape the requirements of restitution. Notice that this does not commit the supporter of restitution to a particular position on the blameworthiness or moral character of the historical individuals who were acting in accordance with the (perhaps now questionable) moral standards of their time, or indeed to the coherence of cultural and moral relativism more generally.⁴⁶ The point is that restitution claims pertain to how we *in the present* should morally respond to acts in the past that we now believe involved injustice.

6.1.7 If there is a sufficient basis for believing that an artefact was obtained in a manner that was morally illegitimate and constituted a historical injustice, then the moral obligation to return the item might (depending on other factors to be investigated in questions 2 and 3) be grounded in either considerations of reparative justice, or a wide range of theories of cultural property. On the other hand, if there is an insufficient basis for this belief, then the moral obligation to return the item cannot convincingly be grounded in considerations of reparative justice. However, there may be other ways to ground the obligation in a particular conception of cultural property, as this document will illustrate in its discussion of question 4.

Q2. Has the artefact played an important role or did it otherwise hold significant value for the claimant or the community from which it was taken?

6.2.1 The importance and value of the cultural artefact to the claimant or community from which it was removed can be relevant to the strength of a moral obligation to return the item in different ways, depending on how the ultimate grounds of the obligation are understood. First, as detailed above, some definitions of cultural property (such as Thompson's) claim that collectives can only be understood to truly have a moral cultural property right to an item if it is sufficiently important to that culture; according to this view, merely having produced or legitimately possessed the item is not alone sufficient.⁴⁷ Second, the importance of the item could plausibly also be thought relevant to the overall significance of the historical injustice involved in an artefact's morally illegitimate removal; the more important the item to the community, the greater the harm that may have been caused by any injustice involved in its morally illegitimate removal.

6.2.2 Although this question is thus relevant to assessing the strength of the moral reasons to return the cultural artefact based on these different theoretical grounds, they might yet have some different implications. For instance, Thompson is quite clear that, on her view, 'a claim to cultural property cannot be made retrospectively'.⁴⁸ Accordingly, the relevant question to consider here with respect to a cultural property claim is whether

⁴⁵ Thompson, 'Cultural Property, Restitution and Value', 254. See also Butt, 'Colonialism and Postcolonialism'.

⁴⁶ For a classic discussion of this issue, see Williams, 'The Truth in Relativism'.

⁴⁷ Thompson, 'Cultural Property, Restitution and Value'.

⁴⁸ Thompson, 'Cultural Property, Restitution and Value', 256.

the artefact had cultural importance to the community *at the time it was removed*. On the other hand, if the artefact was deemed to be significant only after its removal, then Thompson's view suggests that the obligation to return the artefact cannot be grounded in a claim to cultural property. Instead, it would have to be grounded by other moral considerations, such as the thought that the return of a highly valued item might serve as appropriate recompense in providing reparations for other historical harm, or a more general obligation of beneficence.⁴⁹

6.2.3 In any case, Thompson provides a useful analysis that can inform assessments of the cultural importance of an item to a given community. She suggests that this may plausibly be assessed by considering 'its role in the religious, cultural or political life of people of the collectivity by functioning as a symbol of collective ideals, a source of identity for its members, as a ceremonial object, a focus of historical meaning, an expression of their achievements, or as a link with founders or ancestors'.⁵⁰

6.2.4 In some cases, the item under consideration may not have played an important role or otherwise held significant value for the community from which it was taken. In such cases the moral obligation to return the item is naturally somewhat weakened. There are of course different theoretical explanations of why this is the case. If the obligation to return is based on considerations of reparative justice, then there could plausibly be said to be stronger moral reasons to provide reparations for injustices that have occasioned significant harm by removing something of significant value. However, this is quite compatible with saying that there can still be (weaker) moral reasons to rectify injustice, even if that injustice has caused only lesser harm. If the obligation to return is understood to be based on a right to cultural property, the situation is more complex; as detailed above, on some approaches to that concept, items that did not play a significant role in the community (or otherwise hold value) at the time they were removed cannot be identified as items of cultural property. On such an interpretation, the argument in favour of returning such an object cannot be grounded by a right to cultural property. It should be noted, however, that DARCA has no need to commit itself to that particular view of cultural property, although it is committed to the claim that a collective's claim to an artefact as an item of cultural property will at least provide *stronger* grounds for a moral obligation to return when that item played an important role or otherwise held significant value for the community from which it was taken. When this condition is not met, the obligation to return may be understood to be weaker because either (i) the collective has some weaker right to the artefact as an item of their cultural property or (ii) the collective simply does not have a cultural property claim in this case. In both cases, however, considerations of reparative justice can still be operative, and can play an important (and perhaps complementary) role in grounding the moral obligation to return.

Q.3 What basis is there for believing that the claimant has a close relationship to the morally illegitimate removal of the cultural artefact?

6.3.1 Regardless of whether the moral obligation to return is understood to be grounded by a moral right to cultural property or considerations of reparative justice, if there is a basis

⁴⁹ Thompson, 'Cultural Property, Restitution and Value', 256.

⁵⁰ Thompson, 'Cultural Property, Restitution and Value', 252.

for believing that a cultural artefact was removed in a morally illegitimate manner, it is crucial to consider the nature of the relationship between the claimant and that morally illegitimate removal, and those whom it affected.

6.3.2 From the perspective of reparative justice, the significance of these considerations is grounded in what Thompson calls the 'Exclusion Principle' of reparative justice. The exclusion principle states that 'individuals or collectives can only be entitled to reparations for injustice if they were the ones to whom the injustice was done.'⁵¹ If a claimant fails to meet this condition there may yet be other grounds for a moral obligation to return the item; however, the grounds of the obligation will not be that of reparative justice. In a similar vein, as Matthes points out with respect to the purported right to cultural property, 'the practical applicability of the concept of cultural property to repatriation issues in particular seems to require addressing questions about cultural group membership'.⁵² One plausible explanation for this is that returning an item to a claimant can only be justified by an appeal to the claim that an artefact is a community's cultural property, if the claimant is appropriately construed as similarly bearing some sort of right to that property by virtue of their relationship to the aforementioned community. Matthes also notes that the problems of cultural group membership carry over to approaches to repatriation as a form of reparation for historical injustice.

6.3.3 The most obvious way in which a claimant can meet the exclusion principle is if the claimant was a direct, contemporaneous victim of a morally illegitimate removal of an item that was in their possession (and perhaps appropriately construed as their cultural property). As Thompson notes, this can be understood quite broadly. She writes:

... cultural property does not belong merely to the members of a particular generation. It is a possession of the collectivity as an intergenerational association. Its members pass it down from one generation to another, and its meaning is bound up with their desire to perpetuate their traditions and practices. Since many collectivities, for example, nation-states and religious organisations, can retain their identity for a long period of time it seems reasonable to assume that their right of restitution may also be enduring.⁵³

6.3.4 However, more complex cases arise when restitution claims are raised by more distant descendants of the direct victims of the morally illegitimate removal of a cultural artefact, who are perhaps not appropriately understood as belonging to the same community that suffered the injustice at the time. These might include, for example, non-lineal descendants of a historical community who do not share many of the historical traditions and practices of their forebearers. There are two broad approaches in the philosophical literature that might be invoked to suggest that more distant descendants of a historical injustice can nonetheless have a sufficiently close relationship to that injustice to warrant reparations, or to be understood to retain a right to cultural property.⁵⁴ The remainder of this section will detail each approach in turn, before outlining criticisms of each.

⁵¹ Thompson, 'Historical Injustice and Reparation', 116.

⁵² Matthes, 'Repatriation and the Radical Redistribution of Art', 934.

⁵³ Thompson, 'Cultural Property, Restitution and Value', 254.

⁵⁴ These approaches were identified are identified in Thompson, 'Historical Injustice and Reparation'; Bjornberg, 'Historic Injustices and the Moral Case for Cultural Repatriation'; Matthes, 'Repatriation and the Radical Redistribution of Art'; Boxill, 'Black Reparations'.

6.3.5 First, what Bjornberg refers to as the ‘harm-based’ argument suggests that the morally illegitimate removal of an artefact might plausibly have harmed the contemporaneous custodians or owners of the item, and that this harm ‘initiated an unbroken chain of harms linked as cause and effect to the present day’.⁵⁵ On this approach then, the moral obligation to return an artefact is ultimately grounded in the idea that people *today* are victims of an ongoing harm initiated in the (perhaps distant) past, and modern-day parties can have a duty to rectify this because they have benefited from those harms.⁵⁶

6.3.6 However, behind this seemingly straightforward line of argument lies a great deal of complexity. First, it may be increasingly difficult to establish a direct causal relationship between historical injustice (and the contemporaneous harm it caused) in the distant past, and harms in the present day.⁵⁷ As a number of theorists have argued, counterfactual claims that a present harm (such as loss of access to a cultural item) would not have occurred but for some historic set of events can be difficult to prove, particularly given the reliance of such counterfactual claims on hypothetical situations that involve the vagaries of individual human choice.⁵⁸ Second, others have pointed out that the harm-based argument will, in many cases, raise a permutation of what philosophers refer to as the non-identity problem.⁵⁹ Briefly, the problem is that if certain past events had not occurred, then it is likely that some of the people who exist today would never have been brought into existence. If that is true of the relationship between the historical injustice involved in the morally illegitimate removal of a cultural artefact, and the claimant raising the issue of reparations for that removal, it is not clear that this claim is best grounded by considerations of harm to the claimant. The crux of the non-identity problem here is that, but for the historical unjust event that is alleged to have harmed them, the claimant would never have existed in the first place.

6.3.7 Neither of these objections to the harm-based argument are necessarily unimpeachable.⁶⁰ For instance, some have responded to the concern about the argument’s reliance on counterfactuals by claiming that we can have reasonable epistemic grounds for relying on suitably generalised counterfactual claims.⁶¹ Alternatively, the harm identified by the harm-based argument could also be understood to incorporate the psychological harms associated with the knowledge that a particular injustice was committed against one’s forebears, and that contemporary governments have not sought to redress this;⁶² this sort of harm is less vulnerable to concerns about counterfactual claims. Furthermore, whilst the non-identity problem appears to be a somewhat intractable problem in moral philosophy, several solutions to

⁵⁵ Bjornberg, ‘Historic Injustices and the Moral Case for Cultural Repatriation’, 465.

⁵⁶ Butt, ‘Colonialism and Postcolonialism’; Butt, ‘On Benefiting from Injustice’.

⁵⁷ See Thompson, ‘Historical Injustice and Reparation’.

⁵⁸ Bjornberg, ‘Historic Injustices and the Moral Case for Cultural Repatriation’, 468; Waldron, ‘Superseding Historic Injustice’; YOUNG, ‘Cultures and Cultural Property’, 114; Thompson, ‘Historical Injustice and Reparation’.

⁵⁹ See Bjornberg, ‘Historic Injustices and the Moral Case for Cultural Repatriation’, 466; Thompson, ‘Historical Injustice and Reparation’; Butt, ‘Colonialism and Postcolonialism’; Heyd, ‘Group (Non) Identity and Historical Justice’.

⁶⁰ For more on this, see Butt, ‘Colonialism and Postcolonialism’.

⁶¹ Simmons, ‘Historical Rights and Fair Shares’.

⁶² Bjornberg, ‘Historic Injustices and the Moral Case for Cultural Repatriation’, 467.

the problem have been proposed in the academic literature, and solutions to the problem are a subject of ongoing academic debate.⁶³

6.3.8 In any case, as Bjornberg highlights, these particular objections to the harm-based argument are not applicable to the second approach to establishing a sufficiently close relationship between distant descendants of a historical injustice and the morally illegitimate removal of a cultural artefact.⁶⁴ On what Bjornberg refers to as the ‘inheritance argument’, the thought is that the wrongful removal of an artefact could have plausibly harmed the contemporaneous custodians or owners of the item, and that this harm warranted reparations that these individuals never received. As a result, the desert for these warranted reparations may be understood to pass ‘by the right of inheritance to their descendants’, according to the argument under consideration here.⁶⁵ Thompson interprets this inheritance-based argument in a different way. The reason for this is that she claims that the ‘Exclusion Principle prevents individuals from inheriting an entitlement to reparation’; accordingly, she interprets the inheritance-based argument to claim that descendants can have an entitlement ‘by virtue of being heirs to possessions that would have been theirs if the injustice had not been done’.⁶⁶

6.3.9 Whilst the inheritance argument plausibly avoids some of the objections to the harm-based argument outlined in paragraph 6.1.5, it encounters other objections. In particular, Thompson points out that this argument relies on a conception of rights of possession and inheritance that requires defence.⁶⁷ Furthermore, advocates of the inheritance argument appear to face something of a dilemma; if rights of inheritance do not wane over time, then in some cases the claims of descendants can be undermined if their forebears themselves possessed an item on the basis of an injustice that violated some other group’s rights of inheritance. However, if rights of inheritance do wane, then this naturally undermines the inheritance-based argument for reparations to rectify injustice in the distant past. Waldron in particular has argued that historical injustices are often superseded by time for this sort of reason, as well as concerns about the sort of counterfactual judgments highlighted above.⁶⁸

6.3.10 Finally, there is a substantial objection that is applicable to both the harm-based argument, and the inheritance argument. The problem is that both arguments face a significant obstacle with respect to how the legitimate rightful descendants of the victims of historical injustice are to be identified.⁶⁹ As Bjornberg points out, ‘as centuries pass and different ethnic groups mix, it becomes increasingly difficult to determine which living individuals should be considered genetically or culturally related to the original victims’.⁷⁰ This general concern has been the subject of considerable philosophical

⁶³ For a small selection, see Wrigley, ‘Harm to Future Persons’; Gardner, ‘A Harm Based Solution to the Non-Identity Problem’; Finneron-Burns, ‘Contractualism and the Non-Identity Problem’.

⁶⁴ Bjornberg, ‘Historic Injustices and the Moral Case for Cultural Repatriation’, 465. For further comment on Bjornberg’s analysis though, see Matthes, ‘Repatriation and the Radical Redistribution of Art’, 936–37.

⁶⁵ Bjornberg, ‘Historic Injustices and the Moral Case for Cultural Repatriation’, 465.

⁶⁶ Thompson, ‘Historical Injustice and Reparation’, 119–20.

⁶⁷ Thompson, ‘Historical Injustice and Reparation’, 121. However, for a recent treatment of rights of inheritance, see Brassington, ‘On Rights of Inheritance and Bequest’.

⁶⁸ Waldron, ‘Superseding Historic Injustice’; Thompson, ‘Historical Injustice and Reparation’; Thompson, ‘Cultural Property, Restitution and Value’, 254.

⁶⁹ Bjornberg, ‘Historic Injustices and the Moral Case for Cultural Repatriation’; Thompson, ‘Historical Injustice and Reparation’; Harding, ‘Justifying Repatriation of Native American Cultural Property’.

⁷⁰ Bjornberg, ‘Historic Injustices and the Moral Case for Cultural Repatriation’, 465.

attention within the literature. Some theorists have understood the problems highlighted here to be sufficient to motivate attempts to base the obligation to return cultural artefacts in a manner that does not rely on considerations of reparative justice,⁷¹ or on notions of cultural property that rely on the right to such property's being inherited by distant descendants.⁷² Others, including Bjornberg, have suggested that various shared characteristics that ground a 'common character and a common culture that encompass many, varied and important aspects of life'⁷³ might plausibly be invoked to ground a group's claim to be the legitimate descendants of a historical community. Such characteristics might include, amongst other things, common social norms, religions, language, and customs amongst others. Thompson, on the other hand, defends an approach that emphasises the importance of 'family lines' in defending claims of inheritance, and the moral reasons to safeguard entitlements that 'result from expressions of love and concern intrinsic to family relationships'.⁷⁴

6.3.11 The paragraphs in this section should make it clear that there is still substantial philosophical debate about the issue raised by question 3 of DARCA. Clearly, DARCA cannot aim to settle these debates; instead, it adopts the spirit of Bjornberg's assessment when she claims that, whilst there are ways of responding to the various objections outlined in this section, their force should be considered on a 'case-by-case basis, taking all relevant empirical factors into consideration'.⁷⁵ Notably, DARCA leaves open the possibility that the claimant in some cases may not share a sufficiently close relationship to the victims of the historical injustice involved in the loss of the cultural artefact to warrant the return of the item based on a claim to cultural property or reparations for historical injustice. Furthermore, it remains silent on whether the justification for such an assessment is made on primarily empirical or philosophical grounds. However, such claimants may yet have some kind of moral claim to an item, by virtue of the considerations addressed in the next question.

Q4. Does the artefact have genuine and enduring value for the claimant's culture?

6.4.1 Users will arrive at question 4 only if their answers prior to that point have established that there is an insufficient basis for grounding the moral obligation to return the artefact in (i) reparative justice or (ii) conceptions of cultural property that claim an artefact can constitute cultural property only if it was once (legitimately) possessed by the party now making the claim, or a party that is closely related to those now making a claim. Question 4 thus explores an alternative foundation for the moral obligation to return the artefact in such cases.

6.4.2 In view of the various objections to the different analyses of cultural property considered in previous sections of this document, Young has defended an alternative

⁷¹ For such an attempt, which seeks to ground the obligation in considerations of distributive, rather than reparative justice, see Matthes, 'Repatriation and the Radical Redistribution of Art'.

⁷² For such an attempt, the conception of cultural property that Young develops in YOUNG, 'Cultures and Cultural Property'.

⁷³ Margalit and Raz, 'National Self-Determination' cited in Bjornberg, 'Historic Injustices and the Moral Case for Cultural Repatriation'.

⁷⁴ Thompson, 'Historical Injustice and Reparation'.

⁷⁵ Bjornberg, 'Historic Injustices and the Moral Case for Cultural Repatriation', 469.

conception of cultural property. More specifically, Young defends what he calls the ‘cultural significance principle’, which states: ‘When an item of cultural property has aesthetic, historical or other value to the members of some culture, then the culture has some claim to the ownership of the property in question’.⁷⁶ The thought here is that a collective ‘may so greatly value some item of cultural property that it ought to be their collective property’⁷⁷, even if the collective has not inherited, made, purchased, or been given the artefact in question. Young notes that the value in question must be ‘genuine, substantial and enduring’⁷⁸ if a moral claim grounded on this value is to override other applicable moral principles, such as the ‘rights of purchasers, finders and makers’.⁷⁹

6.4.3 Even with these caveats in mind, Young’s account of cultural property is somewhat revisionary in dispensing with a condition pertaining to prior acquisition, possession, or property. In this regard, it differs substantially from the analyses of cultural property outlined in paragraphs 5.2.3–5.2.5 of this document. As Young himself notes, the account appears somewhat liable to attack by means of *reductio ad absurdum* arguments, identifying examples where parties have a very strong cultural interest in something, and yet it would nonetheless be absurd to suppose the interest grounds a property claim.

6.4.4 It is possible that some of these *reductio* objections might be avoided if Young’s theory were to be parsed in somewhat weaker terms. Indeed, in her discussion of inalienable property rights Coleman discusses an example that draws out a distinction that could potentially render Young’s account more plausible. The example in question concerns Gallipoli, a site located in Turkey that is of considerable national significance for Australian identity, (given the country’s role in the World War One battle named after the location). Plausibly then, Australians place a very strong cultural value on the site as one that is central to their collective identity, and yet it is clearly not the property of Australia. As it stands, this example appears to represent a problematic *reductio* for Young’s approach. Nonetheless, Coleman suggests that this example illustrates a distinction between property and a form of moral ‘ownership’; for Coleman, ‘one can be said to own something one does not possess as property, and to possess as property something one does not own’. On this view, which appears to invoke a conception of *moral* rather than legal ownership, Australia can be said to own Gallipoli in a morally significant sense, even if it has no property right to the territory. In a similar vein, Young’s account could be construed in weaker sense as an account of moral ownership rather than cultural property *per se*. However, this weakening of the theory would also come at a cost. As Coleman points out, whilst moral ownership ‘may be a necessary condition for people to claim rights in relation to an object, it is not a sufficient reason for handing something over to them as their possession’.⁸⁰ Instead, such ownership might only somewhat limit the property rights of the possessors, imposing a duty upon them to consult the ‘owners’ to be consulted about the proper use of the object in question. Accordingly, it is not clear that Coleman’s sense of ownership can be invoked to ground a moral obligation to return a cultural item

⁷⁶ YOUNG, ‘Cultures and Cultural Property’, 122.

⁷⁷ YOUNG, ‘Cultures and Cultural Property’, 121.

⁷⁸ YOUNG, ‘Cultures and Cultural Property’, 122.

⁷⁹ YOUNG, ‘Cultures and Cultural Property’, 122.

⁸⁰ Coleman, ‘Repatriation and the Concept of Inalienable Possession’, 90.

6.4.5 So far in this sub-section, we have considered how a strong cultural interest might provide the basis for a moral obligation to return a cultural artefact that is ultimately grounded in a particular sense of cultural property or ownership. However, a strong cultural interest in an object might alternatively be understood to provide the basis for such a moral obligation grounded in a general principle of beneficence; the thought here is that we have moral reasons to benefit others (and to relieve harms), and these moral reasons can be strong when we can act in ways that serve to fulfil strongly held preferences.⁸¹ Nonetheless, whilst most moral theories accept the claim that we have moral reasons to benefit others, there is significant disagreement about just how strong those reasons are. Indeed, there is a concern that moral theories endorsing obligations of general beneficence are too demanding. Most pertinently for the purposes of DARCA, on some (albeit contentious) moral theories, we do not have general obligations of beneficence;⁸² instead, beneficent actions should be understood as commendable ideals. Crucially, on this sort of approach, moral reasons associated with general beneficence may not be sufficient to ground a moral obligation, even if they might more plausibly ground supererogatory acts.⁸³

6.4.6 In view of the considerations outlined in this sub-section, even if one can establish that an artefact holds significant cultural value for the claimant, this alone can provide only a comparatively weak basis for a moral obligation to return the item. In such cases, the moral obligation is theoretically grounded by either (i) a contestable notion of cultural property that is substantially less demanding than competing conceptions in the literature or (ii) a more fundamental obligation of general beneficence that is contested in normative ethics.

6.4.7 If one cannot establish that the artefact in question holds significant cultural value for the claimant, and that the item was not removed from them in a morally illegitimate manner, then, in the absence of further considerations that might be provided on a case-by-case basis, it is unclear that there are grounds for a moral obligation to return the item in this case.

7. Assessing the Strength of the Obligation to Retain, and the Comparative Strength of the Competing Obligations

7.1 The strength of the obligation to return a cultural artefact in isolation having been assessed, the remainder of the questions in DARCA aim to assess the strength of the obligation that the cultural institution may have to retain that artefact. Following these discussions, DARCA will be able to deliver a general assessment of the comparative strength of these competing obligations, in light of the moral considerations addressed in these questions.

⁸¹ Beauchamp, 'The Principle of Beneficence in Applied Ethics'.

⁸² Gert, *Common Morality*.

⁸³ Beauchamp, 'The Principle of Beneficence in Applied Ethics'; Gert, *Common Morality*.

7.2 As detailed in paragraph 4.4, the putative moral obligation that a cultural institution may be under to retain a cultural artefact may be understood to be grounded by the moral reasons they have to safeguard and enable access to certain culturally significant artefacts. Cultural institutions serve an important social function by safeguarding important values, including education, the advancement of knowledge, and aesthetic worth. Thompson refers to these collectively as ‘values for humanity’.⁸⁴ Further, it might be claimed that certain cultural items manifest these values in a particularly significant sense. It might thus plausibly be claimed that museums have an obligation to safeguard and enable access to items of such significant aesthetic, scientific or historical worth, and that this is an obligation that must be weighed against any claims to restitution.⁸⁵

8. Detailed Academic Background to DARCA Questions 5-12

Q5. Does the artefact have an important cultural value that has been adequately served by the cultural institution that currently possesses it?

8.1.1 The first question to consider in assessing the strength of the cultural institution’s moral obligation to retain a particular artefact is whether the artefact holds the sort of cultural value discussed above, and whether the cultural institution is adequately performing its social role by using the artefact in a way that promotes the values of education, the advancement of knowledge, and aesthetic worth.

8.1.2 It is of course difficult to provide substantive generalised guidance about when and whether artefacts can plausibly be said to bear such important cultural value; such judgments naturally require a case-by-case analysis grounded in significant aesthetic, historical, and scientific expertise and insight.

8.1.3 However, in addition to considering the nature of the artefact in question, assessors should also consider the cultural institution’s use of the artefact, and whether that use is conducive to the promotion of the values of education, the advancement of knowledge, and aesthetic worth. For instance, if an item is not on easily accessible public display, nor currently the subject of academic research, nor currently undergoing restoration, nor being safeguarded from dangers that might arise elsewhere, then it is plausibly more challenging to establish the institution has a moral obligation to retain the item in the interests of serving the aforementioned values.⁸⁶

8.1.4 If it cannot be established that the cultural artefact has an important cultural value which the institution is not appropriately serving, then this value cannot be said to

⁸⁴ Thompson, ‘Cultural Property, Restitution and Value’, 257.

⁸⁵ Thompson, ‘Art, Property Rights, and the Interests of Humanity’; Thompson, ‘Cultural Property, Restitution and Value’; Schrag, ‘Ethical Obligations of Museum Trustees and the Looting of Our Collective Heritage’.

⁸⁶ For relevant discussion, see Young, *Cultural Appropriation and the Arts*, 99–100.

ground a moral obligation for the institution to retain the item. Accordingly, a negative answer to question 5 will lead the user directly to consideration of an alternative, weaker ground for the obligation to retain, assessed in question 11. However, if the institution does have a basis for a claim to retention grounded by the cultural value of the artefact, and the institution's role in promoting the values of education, the advancement of knowledge, and aesthetic worth, then there are several further factors that assessors should consider in establishing the strength of the museum's obligation to retain the item on this basis.

Q6. Is there a credible concern that returning the cultural artefact to the claimant would undermine the continued existence or safety of the artefact?

8.2.1 Arguments in favour of restitution commonly encounter objections grounded in concerns that the return of the artefact would undermine the continued existence or safety of the artefact. In turn, this consideration is often taken significantly to undermine the case in favour of restitution, as the return would require the cultural institution to fail to fulfil its obligation to safeguard items of significant cultural value for humanity. In a similar vein, Bjornberg outlines what she calls the 'protection argument', as follows:

In cases where there is inadequate funding and expertise available to protect and care for repatriated property, it could be argued that the objects should be retained by their current possessors, at least until adequate resources are available in the country of origin.⁸⁷

8.2.2 This basic form of the protection argument might be understood to raise a powerful response to arguments for cultural restitution grounded in claims to cultural property. The reason is that property rights are typically understood to be subject to important moral limits; the fact that an item is one's property does not entail that one has complete freedom with respect to that object.⁸⁸ In particular, property rights do not always entail a right to destroy the item in question. Indeed, it is also relevant to note that there are substantial regulatory limits on the export of items of cultural interest that somewhat delimit the scope of actions that individuals may perform with respect to cultural artefacts that constitute their property.⁸⁹ In any case, if there are credible grounds for believing that the safety or continued existence of a cultural artefact would be endangered by its return, this might be understood significantly to undermine a putative moral obligation to return the item grounded in an appeal to cultural property rights.

⁸⁷ Bjornberg, 'Historic Injustices and the Moral Case for Cultural Repatriation', 472. Note that Bjornberg does allow that empirical and normative objections can be raised against this argument. See also Young, *Cultural Appropriation and the Arts*; Matthes, 'Repatriation and the Radical Redistribution of Art'.

⁸⁸ The significant cultural value of certain objects might also be understood to place certain moral limits on the property rights of their owners. For discussion, see Thompson, 'Art, Property Rights, and the Interests of Humanity'; YOUNG, 'Cultures and Cultural Property', 122.

⁸⁹ UK Government, 'Exporting or Importing Objects of Cultural Interest'; UNESCO, 'Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property.'

8.2.3 However, the basic form of the protection argument outlined above is also somewhat unnuanced; it fails adequately to attend to the different explanations of why the safety or continued existence of a cultural artefact could be endangered by its return. Of course, the safety or continued existence of cultural artefacts can in some cases be endangered by environmental pollution, warfare, theft, and inadequate care.⁹⁰ However, in other cases, it might be that the return of the artefact to the claimant raises credible concerns about the safety or existence of the artefact because the claimant's community has communicated that the respectful treatment of the artefact requires, for example, its burial or ritualistic destruction. In such cases, the cultural institution's moral reasons to preserve and safeguard a culturally significant artefact may come into stark conflict with the reasons to treat the artefact in a culturally appropriate manner, and non-Western ideals of what constitutes the true preservation and purpose of the object. If this conflict obtains, then the institution's overall obligation to retain the item is weakened by this countervailing moral reason.

8.2.4 Accordingly, if a response to arguments in favour of cultural restitution appeals to the moral reasons to preserve a particular artefact, it is imperative to engage in a nuanced analysis. One must not only establish (i) that the safety or existence of the artefact could credibly be undermined by its return; one must also establish that (ii) this could not admit of a justification grounded by the reasons to treat objects in a culturally appropriate and respectful manner. For this reason, DARCA adopts a two-step process in assessing the relevance and strength of the 'protection argument' against cultural restitution. Question 6 pertains to the factor identified in (i) above; question 7 pertains to the factor identified in (ii).

8.2.5 Of course, it is important to stress that any contention that restitution could credibly undermine the continued existence or safety of the artefact must be evidence-based, and not based on disingenuous or antiquated assumptions about the ability of other cultures to safeguard items of value.⁹¹ Moreover, assessors should also consider any shortcomings of the current institution's capacity adequately to preserve the item.⁹²

Q7. Does the credible concern about the safety or existence of the artefact following its return arise due to conduct that the claimant believes is required for the respectful treatment of the artefact?

8.3.1 If there is a credible concern that the return of the artefact would undermine its continued existence or safety, then it is important to assess why this is the case. This question assesses item (ii) identified in paragraph 8.2.4.

8.3.2 As detailed above, in some cases, claimants might communicate that the respectful treatment of a cultural artefact requires treatment that necessitates the destruction or ritual burying of the artefact. In such cases, the institution's moral reasons to retain and

⁹⁰ Merryman, 'The Public Interest in Cultural Property'; Bjornberg, 'Historic Injustices and the Moral Case for Cultural Repatriation'.

⁹¹ Lindsay, 'Can We Own the Past?'; Bjornberg, 'Historic Injustices and the Moral Case for Cultural Repatriation', 473; Harding, 'Justifying Repatriation of Native American Cultural Property'.

⁹² Matthes, 'Repatriation and the Radical Redistribution of Art'.

safeguard culturally significant artefacts come into stark conflict with the moral reasons to respect the community's own views about the cultural meaning of a given object, which may reflect non-Western ideals of what constitutes the true preservation and purpose of the object.

8.3.4 Yet, in other cases, the credible concern about the safety or continued existence of the artefact arises from other extraneous factors (such as environmental pollution, warfare, and theft) that are unrelated to the community's view about what is necessary for the respectful treatment of the artefact. In such cases, a credible concern about the safety or continued existence of the artefact following restitution strengthens the cases against returning the artefact. The reason for this is that cultural institutions have a moral reason to safeguard artefacts of significant cultural value in promoting the values of education, the advancement of knowledge, and aesthetic worth.

Q8. Is the public display of the item in its current location incompatible with what is required for the item's respectful treatment according to the claimant?

8.4.1 If there is no credible basis for a concern that returning the cultural artefact would risk its safety or existence, then the cultural institution's obligation to safeguard items of significant cultural value cannot alone be invoked to justify retaining the item rather than returning it to the claimant. However, in some cases, the cultural institution's obligation to further the values of education, the advancement of knowledge, and aesthetic worth might yet be invoked to justify retaining the item due to a concern that returning the item would frustrate these goals in other important ways. Nonetheless, these goals can also come into conflict with what is deemed to be required for the respectful treatment of the artefact.

8.4.2 In some cases, whilst the cultural institution's approach to preserving a cultural artefact may be compatible with what the claimant believes is required for its respectful treatment, the public display of the artefact may not be. Respectful treatment may require, for example, that only individuals of a certain standing within the claimant's community are able to access and engage with the item. Again, in such cases, the cultural institution's moral reasons to safeguard and promote the values of education, the advancement of knowledge, and aesthetic worth by publicly displaying the item can come into stark conflict with moral reasons to respect a community's own views about the cultural meaning of a given object. If this conflict obtains, then we may generally say that the institution's overall moral obligation to retain the item is plausibly weakened by this countervailing moral reason. However, this conflict does not similarly arise where the public display of the item is not incompatible with what the community believes is required for the respectful treatment of the item.

8.4.3 It should be noted that this line of argument can raise an additional moral complexity in specific cases, if there are credible grounds for believing that the claimant will restrict access to the artefact in a manner that strongly conflicts with the moral values of both the cultural institution itself, and the society it serves. For example, such circumstances might arise if there are grounds for believing that future access to the artefact might be denied to certain groups on discriminatory grounds following restitution. In such

circumstances, there might be plausible grounds for concern about the potential for the current possessor to be deemed morally complicit in practice that they understand to be morally problematic.⁹³

8.4.4 These particular sorts of cases are not explicitly addressed by DARCA because it aims to provide generalised guidance about morally relevant factors that arise across different restitution cases. Indeed, in the absence of specific details about the case, it is difficult to provide any sort of directive guidance about the potential implications that this might have for the cultural institution's moral obligations in these cases, without substantively committing DARCA to a particular (and likely contentious) position about the strength of moral reasons to avoid certain kinds of complicity. With this in mind, it is recommended that if there are reasonable grounds for believing that the conflict identified in 8.4.2 arises in the case under consideration, this should be raised at the end of the decision aid, when users are given the opportunity to add details about particular features of the case under consideration.

Q9. Would the return of the artefact serve to enhance its cultural value or enable more widespread access?

8.5.1 Cultural institutions can be particularly well-placed to safeguard and promote the values of education, the advancement of knowledge, and aesthetic worth, given the various resources available to them. However, in some cases these values might be better served by returning the artefact in question. For instance, these values might be better served by returning an artefact to its original intended context, if doing so will enable an enhanced appreciation for its aesthetic and/or historical value. Of course, it should be noted that artefacts cannot always be returned to their original context in this way. As Thompson notes, there is thus '... no general principle which determines where artefacts should be located if values for humanity are to be well served. Each case has to be considered on its merits.'⁹⁴

8.5.2 Alternatively, the claimant might be better placed to provide widespread fair access to the artefact in question. Matthes argues that if the moral reasons for a cultural institution to retain an object are understood to be grounded in the need to safeguard and promote the values of education, the advancement of knowledge, and aesthetic worth, then it is also important to consider 'the just distribution of such cultural goods'.⁹⁵ He notes that such considerations speak in favour of a quite radical redistribution of cultural artefacts to redress existing global inequities in access to cultural goods.

8.5.3 If a strong case can be made that the above values themselves, or global principles of distributive justice pertaining to those goods, can be better realised via restitution than by the cultural institution's retention of the artefact, the claim that these values can ground the cultural institution's obligation to retain the artefact is significantly

⁹³ Devolder, 'Complicity'.

⁹⁴ Thompson, 'Cultural Property, Restitution and Value'.

⁹⁵ Matthes, 'Repatriation and the Radical Redistribution of Art'.

weakened. If successful, this argument would suggest that the very values justifying the institution's moral claim to retain the artefact are better served by returning it to the claimant.

Q10. Will the claimant face difficulties in readily accessing the item in its current location over the long-term future?

- 8.6.1 If the public display of the item is compatible with its respectful treatment, and such display is the best way to fairly realise its cultural value for a global audience, the moral reasons in favour of retaining the object may yet be weakened if claimants themselves are unable readily to access an item to which they have some sort of moral claim.⁹⁶
- 8.6.2 Claimants may be unable to access and, in certain cases, use artefacts held in cultural institutions for different reasons. However, there may be steps that institutions can take to facilitate easier access to the artefact for certain groups; these may include providing funding for visits, or arranging long term loans of artefacts to the claimant. If the institution has already taken some such steps, or has a demonstrable commitment to doing so, it is suggested that this is detailed by the user in the explanatory notes in answering this question.

Q11. Has the institution's possession of the artefact created a 'legitimate expectation of retention'?

- 8.7.1 Legitimate expectations (LEs) are expectations that have three important properties.⁹⁷ First, LEs are predictions about a future state of affairs. Second, LEs are also prescriptive, in that they concern expectations about how others ought to act. Finally, LEs must be based on justifiable expectation. There is a great deal of debate in political philosophy about what makes the prescriptive element of LEs justifiable in this way.⁹⁸ However, claims based upon legitimate expectations in the absence of contested ownership are widely recognised in the law, and principles of limitation have significant moral grounding.⁹⁹ In the context of DARCA, it has been argued that an institution could have a legitimate expectation of retaining an item in their possession, where that expectation obtains under certain circumstances.¹⁰⁰

⁹⁶ Arts Council England, *Restitution and Repatriation*; Young, *Cultural Appropriation and the Arts*, 99.

⁹⁷ Brown, 'A Theory of Legitimate Expectations', 435–36.

⁹⁸ Melenovsky, *Conventionalism and Legitimate Expectations*; Brown, 'A Theory of Legitimate Expectations'; Buchanan, 'Distributive Justice and Legitimate Expectations'; Moore, 'Legitimate Expectations and Land'.

⁹⁹ Perez, *Freedom from Past Injustices*; Bjornberg, 'Historic Injustices and the Moral Case for Cultural Repatriation', 471.

¹⁰⁰ Bjornberg, 'Historic Injustices and the Moral Case for Cultural Repatriation'.

8.7.2 As Bjornberg points out, a legitimate expectation of retention may be understood to apply to the case of cultural property.¹⁰¹ However, claims to cultural items based on legitimate expectation must meet certain formal requirements analogous to those pertaining to legal claims of legitimate expectation to ownership of other, more conventional forms of property. For example, as Bjornberg points out, such claims must be:

‘... based on possession that is notorious, open, exclusive (i.e. for some time, the present possessor must have acted publicly as if the object belonged to them, and to them alone) and continuous (i.e. the present possessor must have had unrestricted access to the object for a certain period of time without any disruption).’¹⁰²

8.7.3 Bjornberg further suggests that the strength of a claim to an item grounded in legitimate expectation can be influenced by a number of factors, in addition to the duration of the institution’s possession.¹⁰³ The claim may be stronger, first, if the institution has spent ‘significant resources on maintaining and preserving the object in question’;¹⁰⁴ second, if the institution’s long-term possession of the item is understood to be an important contributing element of the institution’s identity, or the identity of a broader collective.

Q.12 Are there any other relevant case-specific considerations that you have not yet raised in your responses?

8.8.1 Here, users have the opportunity to raise any other case-specific considerations that may reasonably be understood to enhance or diminish the putative moral obligation to return the cultural artefact, or which might otherwise add nuance to the generalised outcome delivered by DARCA.

9. Interpreting Outcomes

9.1 Upon concluding DARCA, users will be presented with an outcome document, outlining the relative strength of the general case in favour of a moral obligation to return the cultural artefact under discussion in their case. The document will summarise the user’s answers to the questions, any further written justificatory notes, and how those answers have been used to develop the assessment delivered in the outcome.

9.2 There is of course a further question about what this assessment should entail in practical terms. More specifically, there is perhaps a further ethico-legal question about the minimum category of strength that a moral obligation must fall into on this framework for it to be ‘reasonable to believe’ that Trustees are under a moral obligation to return a particular cultural item. To be clear, DARCA is not committed to a particular view on this

¹⁰¹ Bjornberg, ‘Historic Injustices and the Moral Case for Cultural Repatriation’, 471.

¹⁰² Bjornberg, ‘Historic Injustices and the Moral Case for Cultural Repatriation’, 471–72.

¹⁰³ Bjornberg, ‘Historic Injustices and the Moral Case for Cultural Repatriation’.

¹⁰⁴ Bjornberg, ‘Historic Injustices and the Moral Case for Cultural Repatriation’.

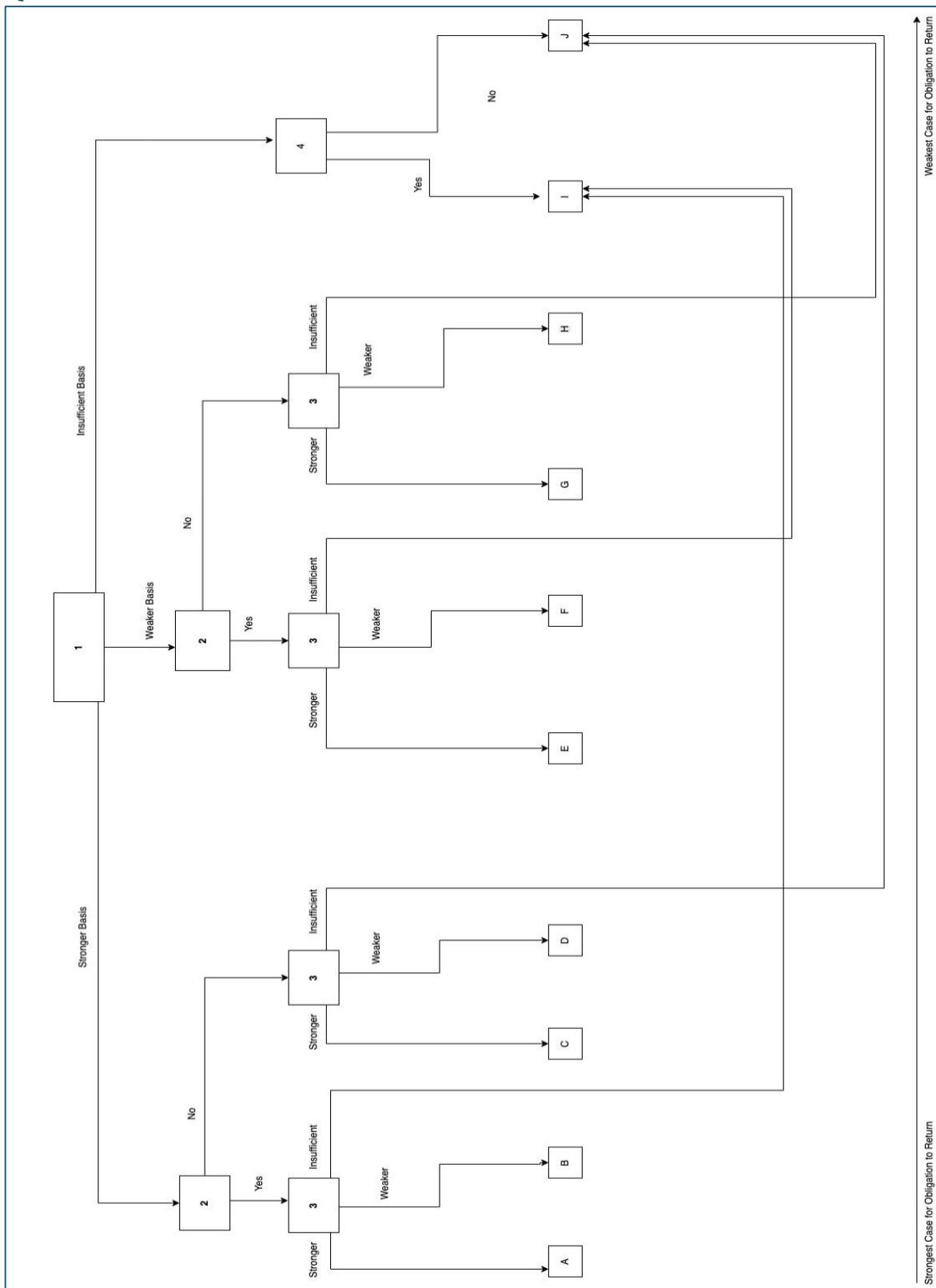


question - it is intended to enable users to come to a reasoned assessment of the strength of the moral obligation to return in an item in their own case.

9.3 DARCA does not prescribe when a moral obligation to return should become morally binding. Instead, it offers a systematic structure for reasoning about complex ethical questions, helping institutions reach judgments on a matter of practical ethics that are informed, balanced, and explainable. If a moral obligation is said to exist, this might be of use to trustees in England and Wales seeking to obtain approval of the Charity Commission under section 106 of the Charities Act 2011 mentioned above.

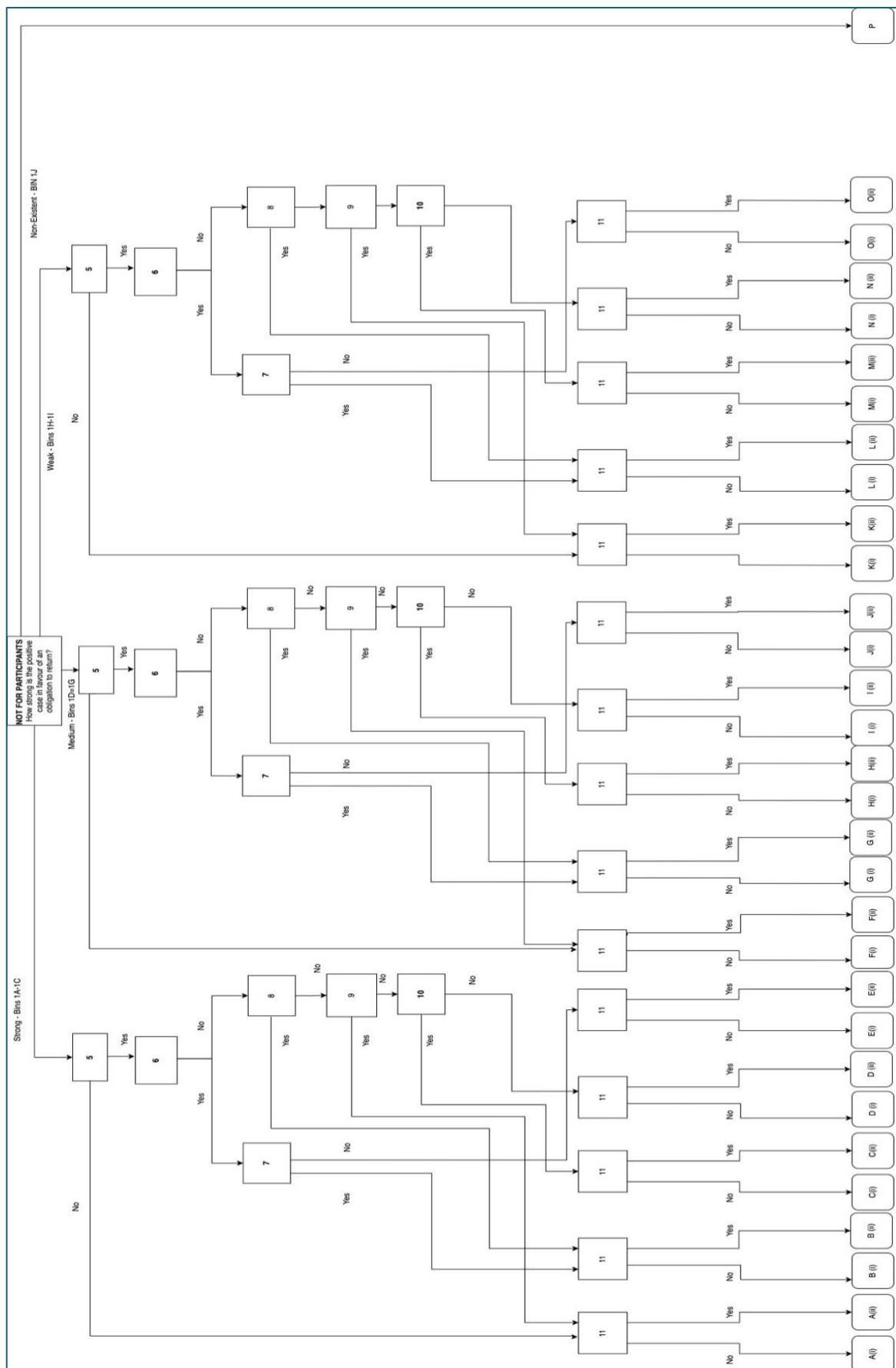
10. Decision Aid Logic

Questions 1-4



11

Questions 5-11



References

2. Arts Council England. *Restitution and Repatriation: A Practical Guide for Museums in England*. Arts Council, 2023.
<https://www.artscouncil.org.uk/supporting-arts-museums-and-libraries/supporting-collections-and-cultural-property/restitution-and-repatriation-practical-guide-museums-england>.
3. Bailey, Andrew M. 'Digital Value'. *Philosophy and Digitality* 1, no. 1 (2024): 25–39.
4. Beauchamp, Tom. 'The Principle of Beneficence in Applied Ethics'. In *The Stanford Encyclopedia of Philosophy*, Spring 2019, edited by Edward N. Zalta. Metaphysics Research Lab, Stanford University, 2019.
<https://plato.stanford.edu/archives/spr2019/entries/principle-beneficence/>.
5. Biggar, Nigel. 'The Case for Keeping the Elgin Marbles'. *The Telegraph*, 28 January 2023. <https://www.telegraph.co.uk/art/what-to-see/case-keeping-elgin-marbles/>.
6. Bjornberg, Karin Edvardsson. 'Historic Injustices and the Moral Case for Cultural Repatriation'. *Ethical Theory and Moral Practice* (Dordrecht) 18, no. 3 (2015): 461–74. <https://doi.org/10.1007/s10677-014-9530-z>.
7. Boxill, B. 'Black Reparations'. In *The Stanford Encyclopedia of Philosophy*, edited by Edward N. Zalta. 2011.
8. Boxill, Bernard R. 'The Morality of Reparation'. *Social Theory and Practice* 2, no. 1 (1972): 113–23. <https://doi.org/10.5840/soctheorpract1972216>.
9. Brassington, Iain. 'On Rights of Inheritance and Bequest'. *The Journal of Ethics* 23, no. 2 (2019): 119–42. <https://doi.org/10.1007/s10892-019-09283-5>.
10. Brown, Alexander. 'A Theory of Legitimate Expectations'. *Journal of Political Philosophy* 25, no. 4 (2017): 435–60.
11. Buchanan, Allen. 'Distributive Justice and Legitimate Expectations'. *Philosophical Studies* 28, no. 6 (1975): 419–25.
<https://doi.org/10.1007/bf00372903>.
12. Butt, Daniel. 'Colonialism and Postcolonialism'. In *International Encyclopedia of Ethics*. John Wiley & Sons, Ltd, 2013.
<https://doi.org/10.1002/9781444367072.wbiee763>.
13. Butt, Daniel. 'On Benefiting from Injustice'. *Canadian Journal of Philosophy* 37, no. 1 (2007): 129–52. <https://doi.org/10.1353/cjp.2007.0010>.
14. Buxton, Rebecca. 'Reparative Justice for Climate Refugees'. *Philosophy* 94, no. 2 (2019): 193–219. <https://doi.org/10.1017/S0031819119000019>.
15. Charities Act 2022 (2022).
<https://www.legislation.gov.uk/ukpga/2022/6/contents>.
16. 'Code of Ethics'. *International Council of Museums*, n.d. Accessed 10 December 2025. <https://icom.museum/en/resources/standards-guidelines/code-of-ethics/>.
17. Coleman, Elizabeth Burns. 'Repatriation and the Concept of Inalienable Possession'. In *7 Repatriation and the Concept of Inalienable Possession*. Berghahn Books, 2010. <https://doi.org/10.1515/9781845459598-009>.
18. Devolder, Katrien. 'Complicity'. In *International Encyclopedia of Ethics*. John Wiley & Sons, Ltd, 2017. <https://doi.org/10.1002/9781444367072.wbiee832>.

19. Finneron-Burns, Elizabeth. 'Contractualism and the Non-Identity Problem'. *Ethical Theory and Moral Practice* 19, no. 5 (2016): 1151–63.
<https://doi.org/10.1007/s10677-016-9723-8>.
20. Gardner, Molly. 'A Harm Based Solution to the Non-Identity Problem'. *Ergo: An Open Access Journal of Philosophy* 2 (2015): 427–44.
<https://doi.org/10.3998/ergo.12405314.0002.017>.
21. Gert, Bernard. *Common Morality: Deciding What to Do*. Oxford University Press, 2004.
22. GOV.UK. 'Exporting or Importing Objects of Cultural Interest'. 2 September 2024.
<https://www.gov.uk/guidance/exporting-or-importing-objects-of-cultural-interest>.
23. Harding, Sarah. 'Justifying Repatriation of Native American Cultural Property'. *Indiana Law Journal* 72, no. 3 (1997): 723–74.
24. Herman, Alexander. 'MUSEUMS, RESTITUTION AND THE NEW CHARITIES ACT.' *Art, Antiquity and Law* 27, no. 3 (2022).
https://justis.vlex.com/#search/jurisdiction:GB+content_type:4+source:23100/HERMAN+CHARITY/vid/museums-restitution-and-the-929241094.
25. Herman, Alexander. *The Parthenon Marbles Dispute*. Bloomsbury, 2023.
<http://www.bloomsburycollections.com.ezproxy-prd.bodleian.ox.ac.uk/collections/monograph>.
26. Heyd, David. 'Group (Non) Identity and Historical Justice'. *Res Publica* 30, no. 4 (2024): 705–22. <https://doi.org/10.1007/s11158-023-09649-5>.
27. <https://plus.google.com/+UNESCO>. 'Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property.' UNESCO. Accessed 30 January 2024. <https://en.unesco.org/about-us/legal-affairs/convention-means-prohibiting-and-preventing-illicit-import-export-and>.
28. Lindsay, Peter. 'Can We Own the Past? Cultural Artifacts as Public Goods'. *Critical Review of International Social and Political Philosophy* 15, no. 1 (2012): 1–17. <https://doi.org/10.1080/13698230.2011.583533>.
29. Margalit, Avishai, and Joseph Raz. 'National Self-Determination'. *The Journal of Philosophy* (New York, NY) 87, no. 9 (1990): 439–61.
<https://doi.org/10.2307/2026968>.
30. Martinez, Teresa Gottein. 'Stephen Fry Dubs Returning Elgin Marbles to Greece "a Classy Act"'. Express.Co.Uk, 12 December 2021.
<https://www.express.co.uk/news/world/1535206/elgin-marbles-news-stephen-fry-return-sculpture-greece-british-museum-boris-johnson>.
31. Matthes, Erich Hatala. 'Repatriation and the Radical Redistribution of Art'. *Ergo: An Open Access Journal of Philosophy* 4 (2017): 931–53.
<https://doi.org/10.3998/ergo.12405314.0004.032>.
32. Melenovsky, C. M. *Conventionalism and Legitimate Expectations*. Brill, 23 September 2020. <https://doi.org/10.1163/17455243-bja10061>.
33. Merryman, John Henry. 'The Public Interest in Cultural Property'. *California Law Review* 77, no. 2 (1989): 339–64. <https://doi.org/10.2307/3480607>.
34. Moore, Margaret. 'Legitimate Expectations and Land'. *Moral Philosophy and Politics* 4, no. 2 (2017): 229–55. <https://doi.org/10.1515/mopp-2017-0002>.

35. Perez, Nahshon. *Freedom from Past Injustices: A Critical Evaluation of Claims for Inter-Generational Reparations*. Edinburgh University Press, 2012. <https://www.jstor.org/stable/10.3366/j.ctt3fgs5d>.
36. Ritchie, Katherine. 'The Metaphysics of Social Groups'. *Philosophy Compass* 10, no. 5 (2015): 310–21. <https://doi.org/10.1111/phc3.12213>.
37. Schrag, Brian. 'Ethical Obligations of Museum Trustees and the Looting of Our Collective Heritage'. *International Journal of Applied Philosophy* 21, no. 1 (2007): 73–87. <https://doi.org/10.5840/ijap200721118>.
38. Simmons, A. John. 'Historical Rights and Fair Shares'. *Law and Philosophy* (Dordrecht, Holland) 14, no. 2 (1995): 149–84. <https://doi.org/10.1007/BF01001042>.
39. Sinnott-Armstrong, Walter. *Think Again: How to Reason and Argue*. Oxford University Press, 2018.
40. 'Spoliation Of Works Of Art During The Holocaust And World War II Period - National Museum Directors' Council Website'. Accessed 10 December 2024. <https://www.nationalmuseums.org.uk/what-we-do/contributing-sector/cultural-property/spoliation/>.
41. The Independent. 'Elgin Marbles to Moai Heads - the Artefacts British Museum Has Been Urged to Return'. 28 November 2023. <https://www.independent.co.uk/news/uk/home-news/british-museum-contested-artefacts-benin-bronzes-b2394754.html>.
42. Thompson, Janna. 'Art, Property Rights, and the Interests of Humanity'. *Journal of Value Inquiry* 38, no. 4 (2004): 545–60. <https://doi.org/10.1007/s10790-005-5869-7>.
43. Thompson, Janna. 'Cultural Property, Restitution and Value'. *Journal of Applied Philosophy* (Oxford, UK) 20, no. 3 (2003): 251–62. <https://doi.org/10.1046/j.0264-3758.2003.00251.x>.
44. Thompson, Janna. 'Historical Injustice and Reparation: Justifying Claims of Descendants'. *Ethics* 112, no. 1 (2001): 114–35. <https://doi.org/10.1086/339139>.
45. Thompson, Janna. *Taking Responsibility for the Past: Reparation and Historical Injustice*. Wiley, 2002.
46. Waldron, Jeremy. 'Superseding Historic Injustice'. *Ethics (Chicago)* 103, no. 1 (1992): 4–28. <https://doi.org/10.1086/293468>.
47. Wertheimer, Alan. *Exploitation*. Princeton University Press, 2021. <https://doi.org/10.1515/9780691214511>.
48. Williams, Bernard. 'The Truth in Relativism'. *Proceedings of the Aristotelian Society* 75 (1974): 215–28.
49. Wrigley, Anthony. 'Harm to Future Persons: Non-Identity Problems and Counterpart Solutions'. *Ethical Theory and Moral Practice* 15, no. 2 (2012): 175–90. <https://doi.org/10.1007/s10677-011-9280-0>.
50. Young, James O. *Cultural Appropriation and the Arts*. John Wiley & Sons, 2008.
51. YOUNG, JAMES O. 'Cultures and Cultural Property'. *Journal of Applied Philosophy* (Oxford, UK) 24, no. 2 (2007): 111–24. <https://doi.org/10.1111/j.1468-5930.2007.00359.x>.
52. Ypi, Lea. 'What's Wrong with Colonialism'. *Philosophy & Public Affairs* 41, no. 2 (2013): 158–91. <https://doi.org/10.1111/papa.12014>.

53. Zeilinger, Martin. 'Digital Art as ?Monetised Graphics?: Enforcing Intellectual Property on the Blockchain'. *Philosophy and Technology* 31, no. 1 (n.d.): 15–41. <https://doi.org/10.1007/s13347-016-0243-1>.