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Collecting "Tribal Art"—Sacred or Secular?

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Abstract: This article explores the history of collecting and dealing in non-Western cultural objects—primarily from the Pacific Islands—from the earliest explorers to the modern auction houses. It considers international and domestic laws relating to indigenous cultural material that might be seen as religious or sacred in character and concludes that while these rules clearly influence both private and institutional practices they fall short of legally impacting the functioning of otherwise lawful markets.

COLLECTING TRIBAL ART: A BRIEF HISTORY

The term "tribal art" is now mainly used by dealers, auction houses, and collectors (and some museums) to describe a collecting category that usually includes material objects from indigenous cultures in Africa, the Pacific islands, Southeast Asia, and (sometimes) the Americas.[1] This primarily Western-based market focuses on objects made for traditional use, ranging from the utilitarian (bowls and fishhooks) to the religious (grave goods and effigies). The market usually excludes contemporary material and places a premium on objects that show signs of traditional use or age. Since the supply of this sort of material is finite, there is sense that the available supply is shrinking as existing collections enter museums or return to communities of origin.[2]

In these remarks, I intend to briefly explore the history of tribal art collecting and dealing and assess how developing legally binding and nonbinding norms surrounding culturally sensitive material could influence the future of the worldwide market for tribal objects.

The history of tribal art collecting is varied and complex. It is difficult to generalize, but certain patterns tend to repeat themselves. For the purpose of these remarks, I will use the collecting of objects from the Pacific islands as my example. Like other

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Figure 1. Maori porpoise jaw bone comb (heru) collected by Lieutenant James King at Queen Charlotte Sound, New Zealand on the Third Voyage (1776-1780) of Captain James Cook, R.N. Private Collection.

sources of tribal art, the history of collecting what is often called *Oceanic art* reflects the deep fascination of Western culture with the remote, foreign, and exotic.[3]

In the Pacific, the voyages of European explorers, most famously James Cook in the late 18th century, represent the first documented instances of objects being obtained for Western collections.[4] Much of this collecting was motivated by contemporary scientific interest in peoples who were being encountered by Europeans for the first time.[5] European voyages of exploration had begun as early as the 15th century, but the Pacific was the last part of the globe to be revealed to Europeans who went on to exploit it commercially and colonize much of it.[6]

The objects collected by the earliest voyagers to the Pacific are now mostly to be found in various European museums, such as those in London, Paris, Stockholm, Berne, Vienna, and elsewhere.[7] At first, these objects were largely the focus of scientific

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interest for what they revealed about the civilizations that had produced them. As anthropology emerged as an academic discipline in the 19th century, it found tribal art invaluable to support theories that non-Western cultures were opposite to and perhaps represented an earlier stage of cultural evolution than those of the West.[8]

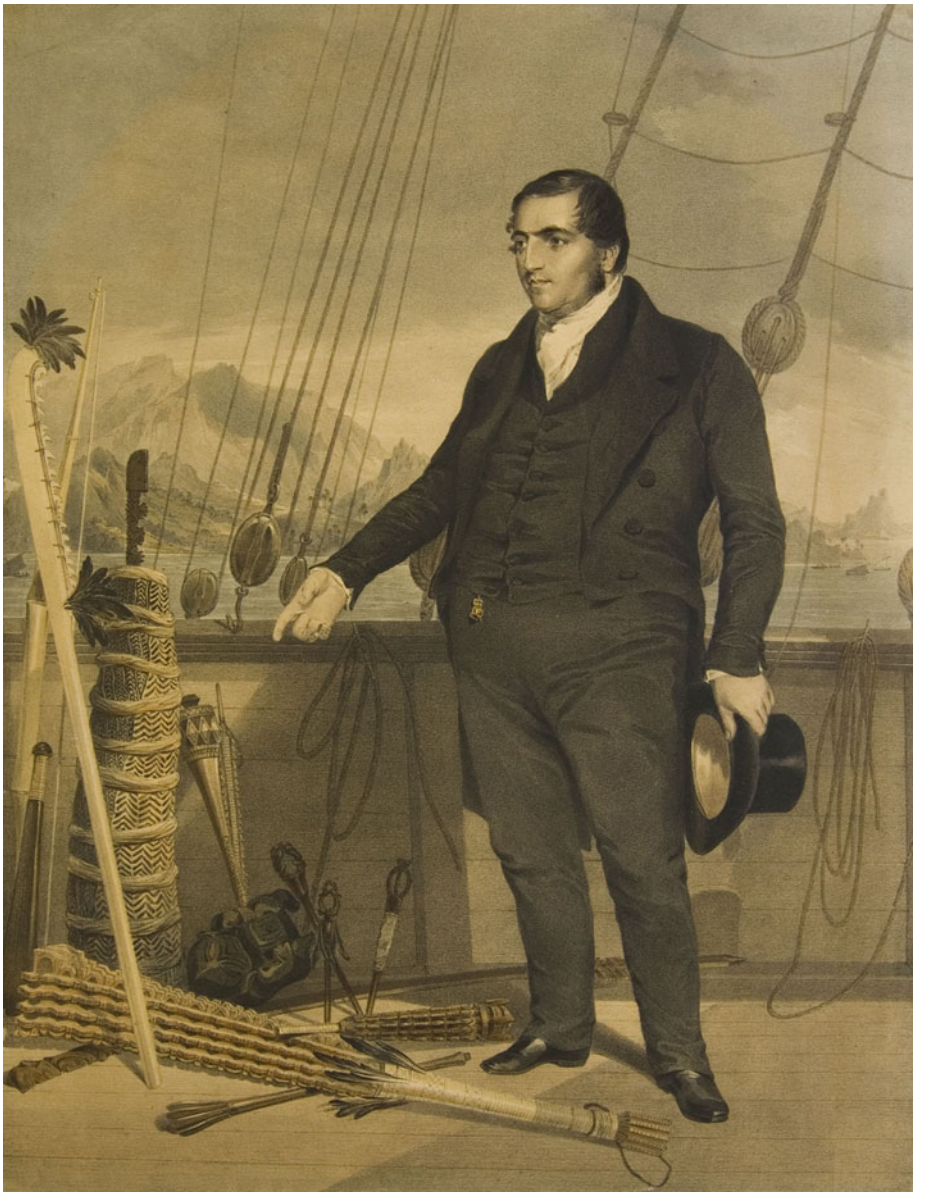


Figure 2. The Reverend John Williams (1796-1839), London Missionary Society, gesturing towards objects collected from various Polynesian islands. For the background to this image see David S. King, *Food for the Flames*: *Idols and Missionaries in Central Polynesia* (San Francisco, 2011) at xiii to xv.

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Detailed information about the collecting of Oceanic material during the 19th century is sketchy, but the presence of European missionaries on various islands led to the removal (as well as the destruction) of considerable quantities of material to European centers.[9] One important example was the establishment of the Missionary Museum at the London Missionary Society in 1815. Other phenomena were the world expositions held in Paris and elsewhere in Europe and the United States in the late 19th and early 20th centuries.[10] These celebrations of colonialism usually included displays of ethnographic objects and reinforced contemporary ideologies of Western cultural superiority.

The period between the late 19th century and the 1920s saw the emergence of a number of individually owned ethnographic collections in Europe and North America. This could be seen as the beginning of the modern era of tribal art collecting. In England, leading collections of Pacific artifacts included those of General Pitt Rivers, Harry Beasley, W. D. Webster, William Oldman, and James Hooper.[11] Some of these men were dealers as well as collectors, but usually only to finance their obsessions.

The biggest change affecting tribal art collecting came at the start of the 20th century when artists such as Picasso and Klee began to be interested in artifacts for what were perceived as their purely artistic qualities.[12] Some of these artists also became collectors but for different reasons than their predecessors. This phenomenon was most noticeable in Paris where the Dadaists and Surrealists, such as Duchamp and Breton, sought out Oceanic objects for their perceived relationship to dreams and fantasies.[13] At this point, the term "primitive art" began to be used for non-Western indigenous objects.[14] This term lasted into the 1980s where it was famously used to describe the Museum of Modern Art's *Primitivism" in 20th Century Art* exhibition of 1984 when indigenous objects were controversially displayed in juxtaposition to the works of Western 20th-century modernists.[15]

In the United States, widespread private collecting of non-Western art (from outside the Americas) does not seem to have occurred until after World War II.[16] What was to become heralded as fine art had earlier been displayed as ethnographic material in natural history museums, such as the Field Museum of Natural History, in Chicago and the American Museum of Natural History, in New York. In 1957 the Museum of Primitive Art, which contained the collection of Nelson Rockefeller, opened in New York.[17] This collection is now part of that of the Metropolitan Museum of Art.[18] Another major collection that became a museum in its own right was that of John and Dominique de Menil in Houston.[19] This collection contains important pieces of tribal art, including those from the Pacific, but it builds on the earlier approach of Nelson Rockefeller that eschewed anthropology in treating non-Western objects as fine art in their own right. Today, many leading American art museums contain rooms displaying selected objects from Africa, Oceania, and the Americas.

The establishment of the Museum of Primitive Art in New York marked the beginning of a period of expansion of American private collecting of African and Oceanic Art.[20] Several dealers exclusively focused on tribal art opened galleries in

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Figure 3. A 1943 Melbourne, Australia "primitive art" exhibition catalogue that expressly presented non-Western (including African, Oceanic and North American) objects for their perceived artistic value.

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Manhattan and a few other locations, such as San Francisco, Los Angeles, and Chicago. This period also saw auctions devoted exclusively to tribal art at Sotheby's and Christie's, as well as the founding (in 1988) of the Antique Tribal Art Dealers Association, Inc.[21]

THE CONTEMPORARY TRIBAL ART MARKET

There are now signs that tribal art collecting is undergoing further evolution. Some of these perceived changes characterize the antique and fine art markets in general, but others may be more specific.[22] Many tribal art dealers in the United States and the United Kingdom have passed on, retired, or closed their establishments. Simultaneously, the European market seems to have become primarily focused on Brussels and Paris. This trend is evidenced by the presence of two of the world's major tribal art shows in these cities: *Parcours des mondes* in Paris and the Brussels Non-European Art Fair (BRUNEAF) in Brussels. Change in the tribal art market has occurred alongside a perception that the so-called middle market for tribal art has weakened. High prices for tribal objects at Sotheby's and Christie's suggest that the top end of the market remains in good shape. This could be attributable to efforts by the leading auction houses to interest wealthy collectors of contemporary art in tribal material.[23] To a degree, these trends must be seen as a product of inevitable changes in taste that occur over time. Some suggest that newly rich collectors in China, Russia, and the Middle East typically show less interest in art of cultures besides their own. Others lament the erosion of connoisseurship, which is crippling collecting categories that demand a certain degree of study and expertise.[24]

Profound change has also characterized the market for antiquities from ancient Mediterranean, Middle Eastern, and pre-Columbian cultures. The 1970 UNESCO *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property* ("the UNESCO Convention") eventually led many museums to declare that they would no longer acquire objects that lacked evidence they had been lawfully acquired before 1970.[25] In 2008, the Association of Art Museum Directors announced rules to this effect, which were strengthened last year with the possibility now that institutions could be censured or expelled from the association if they failed to abide by its recommendations.[26] While few would suggest that all such post-1970 objects were necessarily illegally obtained, there is growing professional pressure on institutions not to acquire objects in a manner that might provide any incentive for thefts or illegal excavations. Since many such objects are gifts from collectors, this change in institutional norms has had an impact on patterns of private collecting and a resultant increase in the market prices for antiquities with a pre-1970 provenance.[27]

Will this trend in the market for antiquities also be reflected in the tribal art market? For some time tribal objects with distinguished provenance, formerly belonging to important collectors (such as William Oldman, James Hooper, George Ortiz, and Helena Rubinstein) or proven to have been collected by early explorers

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or travelers (such as James Cook, Jules Dumont d'Urville, James Edge-Partington, and Pierre Vérité) have tended to sell at a premium. This is partly because of a perceived lack of risk that they are fakes but also to the presumed connoisseurship of their earlier owners. Ironically, and sadly, these never seem to include named individuals from the objects' communities of origin. Sally Price has observed that the anonymity ascribed to indigenous artists is a Western construct that those willing to spend long hours in museum storerooms, and colonial archives, and engage in challenging field research can overcome.[28] Unlike antiquities, there is probably less likelihood that tribal objects have recently been removed from their source communities. Most tribal objects are made from wood or other perishable materials that make their survival in their places of origin unlikely. The supply of tribal art is now mostly from material already in the West, in private or institutional collections. Tribal objects recently removed from source are likely lacking the evidence of age or traditional use upon which the market has long placed a premium. Even tribal objects of obvious age were often originally made for sale to Western visitors rather than for traditional purposes. While the tribal art market continues to evolve, it is unlikely to ever disappear. Its future will probably most likely depend on the scarcity of high quality objects and the evolving vagaries of taste.

THE LEGAL STATUS OF SACRED INDIGENOUS CULTURAL OBJECTS

In the final part of these remarks, I will assess how recent international and domestic legal initiatives, combined with the evolving practices of museums, museum associations, and market actors could or should lead to further changes in the law and practice surrounding the tribal art market. It is beyond the scope of these remarks to discuss all such developments, but some examples will be canvassed.

The last few decades have witnessed the emergence of indigenous rights at both the international and national levels.[29] There has been a growing awareness among nonindigenous peoples that indigenous peoples usually view what Westerners call "art" as something that is an integral part of their daily lives and defines them as a distinct people.[30] However, this has apparently had little impact on tribal art–collecting in the West.

Starting in the 1980s, many indigenous communities brought pressure on both their own and foreign governments and museums to return certain cultural objects.[31] At first, such returns were not legally mandated but emerged from voluntary negotiations engaged in by both sides. In the United States, the *Native American Graves Protection and Repatriation Act* (NAGPRA) of 1990 established a statutory framework that afforded culturally affiliated tribes and lineal descendants the right to demand the return of human remains and certain categories (including sacred objects) of Native American and Native Hawaiian cultural objects from federal agencies and museums in receipt of federal funding.[32] Significantly, NAGPRA distinguishes between secular objects (made for commercial sale or trade) and "specific ceremonial objects which are needed by traditional Native American

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religious leaders for the practice of traditional Native American religions by their present day adherents" (defined as "sacred objects" in the law).[33]

While no other countries have passed as comprehensive a repatriation law as NAGPRA, several have voluntarily implemented procedures with similar effect. Thus in Canada, Australia, and New Zealand, there are instances where museums have returned objects from their collections to local indigenous communities.[34] Often these returns have symbolized newly emerging relationships between museums and indigenous groups who have become engaged in ongoing partnerships with institutions they formerly saw as strangers or even adversaries.

In 2006, the Association of Art Museum Directors (AAMD) approved a *Task Force Report on the Acquisition and Stewardship of Sacred Objects.* The report starts by saying:

> Most religious works of art are not considered to be sacred objects. Instead, these works serve to express religious ideas, values or feelings. Some works of art are, however, considered sacred objects. While art museums are secular institutions, the acquisition, handling, treatment, and interpretation of works of art deemed to be sacred objects may warrant special consideration since these works possess multiple purposes as works of art and sacred objects.[35]

These words clearly reflect a certain level of frustration with the ability of art museums to accommodate objects regarded as sacred, in what are viewed as progressive, secular institutions. They suggest that such an accommodation remains unresolved and is a work in progress, not least because of the lack of legal norms against which it can be developed. The AAMD report sets out some general principles for the guidance of art museums regarding such issues as the acquisition, handling, lending, or interpretation of works of art that have been identified as sacred objects. It makes only oblique reference to the considerations that might apply to requests for the return of such objects but urges any dialogue be conducted with respect and in good faith.

In tandem with developments at the national level, there have been growing international efforts to address the cultural rights of indigenous peoples. These culminated in the UN *Declaration on the Rights of Indigenous Peoples* being adopted by the General Assembly in 2007.[36] While most UN members voted in favor of the *Declaration*, four initially and notably did not: the United States, Australia, Canada, and New Zealand, seemingly because they believed they could not claim that their existing laws were in compliance with its provisions. Article 11.2 of the *Declaration* provides that states are obliged to:

> provide redress [to indigenous peoples] through effective mechanisms, which may include restitution … with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs.

Article 12, provides that:

> Indigenous peoples have the right to … the use and control of their ceremonial objects; and the right to repatriation of their human remains [and

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> that] States shall seek to enable … repatriation of ceremonial objects and human remains in their possession.…"

While not legally binding in the same way as treaties or domestic laws, the *Declaration* has already been used to support the recognition of certain indigenous claims by courts in France, Canada, and New Zealand.[37] Significantly, for the purpose of this discussion, the *Declaration* and other such instruments only bind states and not individuals. They do not address the status of indigenous cultural property under domestic law, although they could influence the development of such laws. The *Declaration* also leaves open for resolution issues about the precise scope of indigenous rights and how they are to be defined in relation to competing rights and claims.

Widespread collecting of indigenous human remains during colonial and postcolonial times mostly occurred in parallel with the collecting of tribal objects discussed earlier. This led to the accumulation of quantities of indigenous ancestral remains in Western museums and universities.[38] The *Vermillion Accord on Human Remains,* adopted in 1989 at a meeting of the World Archaeological Congress, was the first international declaration respecting the ancestral remains of indigenous peoples.[39] Around that time, most Western museums started ceasing to openly display such remains and major auction houses stopped accepting consignments for sale. In one remarkable court case, perhaps the only one effecting an international repatriation of indigenous remains, a New Zealand judge granted probate of the estate of a long-deceased Maori chief so that his heirs could claim possession of his preserved tattooed head (*mokomokai*), which had been consigned for sale at auction in England.[40] More recently, a French court denied the proposed return to New Zealand by a French museum of a similar head and its return was only made possible by an amendment to the French Heritage Code.[41] These events have surrounded an emerging consensus that museums and state institutions (whether or not required by law to do so) should return ancestral remains to indigenous source communities upon appropriate requests being made.[42] The law surrounding indigenous remains in private hands is complicated by existence of a "no property" rule concerning human remains generally, but the private market for such objects would appear to be small and probably near extinction.[43] Is the tribal art market headed for a similar fate?

There is no discrete category of sacred property in most legal systems. In the West, Roman law used the term *res sacrae* to describe objects used in connection with the worship of various deities.[44] Later, the term emerged in Canon law to describe certain ecclesiastical objects used in the liturgy. Such objects could not be privately owned. In England, Ecclesiastical courts still apply this concept, and courts in Quebec have also recognized this form of ownership.[45] Under private international law this sort of designation as to title under the laws of one state will usually receive recognition in others, but national laws that accord sacred character to cultural or religious objects remain rare.[46]

The issue of whether objects that are claimed to be sacred can be sold at auction recently came before a French court. When 70 Hopi kachina masks were about to be auctioned in Paris, Association Survival International France sought an order

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suspending their sale. The association said it did not claim the right to own or possess the masks, but it did not want the sale to proceed. While the court said that it recognized the masks were of sacred value to the Hopi, it concluded that the fact the objects could be regarded as having a religious character was an inadequate ground to prevent their lawful sale.[47] The French Civil Code no longer contains any reference to property considered as sacred or divine. The court rejected the argument that special rules in French law governing trade in human remains could, by analogy, apply to ritual objects. It also rejected an argument based on the UN *Declaration* of 2007, saying that the *Declaration* could not be the basis for a legal claim against an auction house to prevent the sale of privately owned property.[48]

The reasoning in the Hopi case may represent a correct application of French law. However, the facts of the case invite consideration of whether properties that certain individuals or groups regard as "sacred" should continue to be the subject of trade. Few countries regulate the private collecting of indigenous objects. New Zealand affords one of the most elaborate examples. Its *Protected Objects Act* requires private collectors of Maori artifacts to register as such and objects are labeled so that their movement and sale can be monitored.[49]

In the United States, Elizabeth Sackler has advocated a new ethic of collecting that embraces what she calls "reciprocity and the proactive participation on the part of the collector in identifying from primary sources … what it is appropriate to possess."[50] I question the reality as well as the desirability of such a goal. While there might be useful steps taken to enhance the responsibilities of private collectors on a voluntary basis, such as discouraging illicit movement of objects and encouraging gifts and loans, further changes to the status quo seem unlikely.

Although a case could be made that there is now a moral consensus about the impropriety of trade in ancestral remains, similar unanimity does not appear to have emerged regarding the tribal art market in general. As yet, there is no shared basis of understanding about which tribal objects should receive legal protection based on their religious or sacred qualities. While ancestral remains are a self-defining category of object, the same cannot be said of material claimed to be sacred in character. The meaning and significance attached to indigenous objects by all constituencies will continue to evolve as indigenous peoples, scholars, artists, scientists, and others develop new ways of seeing and understanding. This ongoing process can be enriched by a scrupulous market for tribal art. The alternative, to quote John Merryman, would likely be "an active, profitable and corrupting black market."[51]

ENDNOTES

1. For a discussion of the conceptual issues involved in the use of the term, see Dutton, "Tribal Art and Artifact," 13. Christie's and Sotheby's have avoided the "battle of words" by adopting the term "African and Oceanic Art" to describe what they formerly called "Tribal Art."

2. See Candela et al., "Tribal Art Market," 289; Geismar, "What's In a Price," 25; and Rubel and Rosman, *Collecting Tribal Art*.

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3. See "The European Appropriation of Indigenous Things" in Thomas, *Entangled Objects*, at 125–84.

4. See Kaeppler, "*Artificial Curiosities.*"

5. See Forster, *Observations Made During a Voyage Round the World*.

6. See Hempenstall, "Imperial Manoeuvres," 29–39; and Strathern, "European Contact," 121–30. An excellent outline of the vicissitudes of European contact with French Polynesia is Newbury, *Tahiti Nui*.

7. See Kaeppler, *Cook Voyage Artifacts*.

8. The major proponents of the progressivist view of social evolution were Tylor and Morgan. Their perspective was strongly contradicted by Boas in *The Mind of Primitive Man*.

9. For an excellent explanation of the interrelationship between missionaries and artifacts, see King, *Food for the Flames*.

10. See Greenhalgh, *Ephemeral Vistas*; and Corbey, "Ethnographic Showcases," 338–69.

11. For a discussion of English examples, see Waterfield and King, *Provenance*.

12. For a compilation of Picasso's tribal art collection, see Stepan, *Picasso's Collection*.

13. André Breton's tribal art collection was sold in Paris in 2003 for more than 4 million euros. See Cohen, *André Breton*.

14. See Linton, "Primitive Art," 34–51; and Errington, "What Became Authentic Primitive Art?," 201–26.

15. See Rubin, "*Primitivism" in 20th Century Art*; and Torgovnick, "William Rubin and the Dynamics of Primitivism," 119–37.

16. Clearly, there were isolated examples earlier than this, such as that of the renowned Dr. Albert Barnes, who acquired dozens of examples of African art during the first two decades of the 20th century as a result of his connections with Paris dealers such as Paul Guillaume. Like their European colleagues, American art dealers started to offer African art as early as after the 1913 Armory Show in New York. This was followed by specialized museum exhibitions, such as that of African art of the Museum of Modern Art in 1935.

17. See Goldwater et al., *Art of Oceania*.

18. See LaGamma et al., "Nelson A. Rockefeller," 82–91.

19. See de Menil et al., *La rime et la raison*; and Smart, *Sacred Modern*.

20. For a very evocative presentation of the collecting patterns of four modern American collectors of non-European art, see Byrnes, *The Artist as Collector*.

21. For the bylaws and policies of the Association, see www.ATADA.org/bylaws.html.

22. For an insightful analysis of the state of the tribal art market in Los Angeles, see "Tribal Art Market in Los Angeles," http://thetribalbeat.blogspot.ca/2011/06/tribal-art-market-in-los-angeles, 22 June 2011.

23. See Geismar, "What's in A Price," 25–27.

24. A well-known proponent of this perspective on the art market is Souren Melikian, "A Chaotic Market in Times of Scarcity," *New York Times*, 25 June 2005.

25. 828 U.N.T.S. 231, 10 *Int. Legal Mat.* 289. On 23 October 2006, the J. Paul Getty Museum adopted revised acquisition guidelines, including a requirement that there be evidence that ancient works of art or archaeological material, being considered for acquisition, were legally exported from their country of origin before 17 November 1970: http://www.getty.edu/about/governance/policies.html.

26. See Association of Art Museum Directors, *2013 Guidelines*.

27. See Ralph Blumenthal and Tom Mashberg, "Collectors Cursed by Dubious Artifacts," *New York Times*, 15 July 2012, AR1.

28. See Price, *Primitive Art in Civilized Places*, 105–106.

29. See Anaya, *Indigenous Peoples in International Law*.

30. This idea may, in turn, also be said to support ethnocentricity by giving Westerners control over aesthetic judgments about art in general. See Price, *Primitive Art*, 89–99.

31. See Nafziger et al., *Cultural Law*, 425–73.

32. See 25 U.S.C. §§3001 *et seq*. (1994) and Nafziger et al., *Cultural Law*, 427–34.

33. 25 U.S.C. § 3001 (3)(C).

34. For a valuable discussion of this process, see Vrdoljak, *International Law, Museums and the Return of Cultural Objects*, 275–97.

35. For the text of the report see "Report of the AAMD Task Force."

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36. GA Res. 295, UN GAOR, 61st Sess., UN Doc. A/RES/61/295 (2007).

37. For example, see *Takamore v. Clarke* [2012] NZSC 116, at paras. 12 and 35 (per Elias, C.J.).

38. Fforde, *Collecting the Dead*, 43–59.

39. See *The Vermillion Accord on Human Remains* (World Archeological Congress, 1989); and Nafziger et al., *Cultural Law*, 472.

40. *Re Estate of Tupuna Maori*, P580/88 (High Court of New Zealand, Wellington, 19 May 1988, Grieg J., (unreported); and Nafziger et al., *Cultural Law*, 725.

41. See Paterson, "Heading Home," 643–52.

42. See Paterson, "Ancestral Remains," 155–80.

43. The common law generally accepts that there is no property interest in the body of a deceased person. See *R. v. Kelly*, [1998] All E.R. 741.

44. See Nafziger et al., *Cultural Law*, 542–43.

45. See Pelletier, "The Case of the Treasures of L'Ange Gardien," 371–82.

46. See *Winkworth v. Christie Manson and Woods Ltd.* [1980] 1 Ch. 496 dealing with title to stolen movables under English conflict of laws principles. There appears to be no example of a decided case where the status of property as sacred under foreign law was recognized by the *lex fori*. The application of existing legal norms to such claims remains speculative. Even in domestic law there will be complex issues surrounding jurisdiction (federal or state), applicable law (common law or indigenous law), as well as the application of limitation periods. See Harding, "Justifying Repatriation," 723.

47. *Association Survival International France v. S.A.R.L. Neret-Minet Tessier Sarrou* (Tribunal de Grande Instance de Paris, No. RG 13/52880, 12 April 2013).

48. See Cornu, "The Hopi Masks Case"; and Debie, "Sacrilege? A Criminal Act?," 144–47. At another Paris auction in December 2013, the Annenberg Foundation of Los Angeles successfully bid on 24 Hopi and Apache objects, which it then returned to the tribes. See Tom Mashberg, "Secret Bids Guide Hopi Indians' Spirits Home," *New York Times*, 16 December 2013.

49. See Paterson, "Taonga Maori Renaissance," 111–12.

50. See Sackler, "The Ethics of Collecting," 132, 139.

51. See Merryman, "Two Ways of Thinking about Cultural Property," 831, 847–48.

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