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BY ROBERT ALAN HERSHEY

REPATRIATION OF SACRED NATIVE AMERICAN CULTURAL BELONGINGS FROM HISTORICAL RACISM

THE HOPI TRIBE AND OTHER PUEBLOAN SOCIETIES CONTINUE TO FIGHT FRENCH AUCTION-HOUSES THAT PROMOTE SALES OF SACRED BELONGINGS THAT THESE NATIVE NATIONS ASSERT ARE CRITICAL TO THEIR CUSTOMARY HERITAGES. TRIBES ELSEWHERE HAVE BEEN ALERT-ED TO OTHER POTENTIAL NATIONAL AND INTERNATIONAL AUCTIONS THAT COULD FOSTER DISAPPEARANCES OF THEIR OWN CULTURAL PAT-RIMONIES. YET TRADERS AND COLLECTORS CONTINUE TO PERPETUATE THESE TRANSFERS.

HOW WOULD YOU REACT IF YOUR ANCESTORS' SKELETONS WERE KEPT LOCKED IN PRIVATE OR MUSEUM CLOSETS? HOW WOULD YOU FEEL IF YOUR SACRED CEREMONIAL BELONGINGS, SO CENTRAL TO THE PRACTICE OF YOUR RELIGION, WERE AUCTIONED OFF SO SOMEONE COULD MOUNT THEM ON WALLS OR PLACE THEM BEHIND GLASS FOREVER DEPRIVING YOU OF RITUALS AND TRADITIONS ASSOCIATED WITH THEM? AND HOW WOULD YOU LIKE YOUR CULTURE TO BE DEFINED BY SOMEONE ELSE'S IMAGINA-TION OF WHO YOU ARE? TO LOCK AWAY RELIGIOUS BELONGINGS, VITAL TO CULTURAL CONTINUATION, IN MUSEUMS AND PRIVATE COLLECTIONS IS A VERITABLE EXTENSION OF WAR BY OTHER MEANS. INDIVIDUALS, INSTITUTIONS AND ORGANIZATIONS THAT CONTINUE TO HOLD SACRED ITEMS TAKE ON CONTEMPORARY ROLES AS VILLAINS BENEFITING FROM A HISTORY OF VIOLENCE AND CONQUEST, CLAIMING PROPERTY RIGHTS AGAINST THE LIFE BLOOD OF INDIGENOUS COMMUNITIES.



From first contact with Europeans and Indigenous Peoples, the “idea” of the Indian—the *savage*—has been a construct of the imagination of white crusaders. The Papal Bulls of the Catholic Church, public decrees issued by the Pope, authorized and blessed the conquest of “heathens, infidels, and savages.” Colonizers have used those ideas of the “other” to legitimize violence and appropriation to secure “civilization” for themselves. This is the international law of colonialism—the Doctrine of Discovery.

The original myths of righteousness of conquest and manifest destiny were embodied in the foundations of federal Indian law known as The Marshall Trilogy, Supreme Court cases between 1823 and 1832. Our first Chief Justice, John Marshall, set forth

the narrative and wrote that the courts of the “conqueror” would not apologize for the conquest of Native Peoples, character-

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izing Indians as fierce savages whose occupation was war. The Chief Justice said that to leave Native Peoples in possession of *their* country was to leave the country a wilder-

ness, and that such an outcome provided the justification for stripping them of the control of their lands. Marshall unleashed a juggernaut, and subsequent jurists declared Indians as inferior wards. These rights to conquest have placed Ancestral remains, religious objects and sacred items of Indigenous peoples in the hands of the colonizers. Indigenous Peoples have suffered all the colors of racism, in a patina of centuries. Native Peoples were considered “novelties” of the New World and were paraded internationally to the kings and queens of the European continent. In the United States in the 1830s and 1840s, Samuel Morton, the so-called father of physical anthropology, wrote in his book *Crania America* that American Indians were “slow in acquiring knowledge” and inferior to Europeans, theories that

lent scientific support for Manifest Destiny policies in the 19th century. In 1867 the Surgeon General's office issued directives for the military to find and collect Native American skulls and body parts for the Army Medical Museum. After the Civil War, stampedes of excavators galloped westward with archaeological fervor, receiving up to \$20 for an Indian skeleton and \$5 for a skull.

In the late 1800s, when archaeological science flexed muscle, collecting unknown thousands of Native American artifacts and human remains became popular for the well-to-do, and the taking of these items created an American Indian "art" market—though the items were never meant to be art or for commercial trade. The Antiquities Act of 1906 gave anthropologists almost free legal rein over

Native American sites by preventing access to amateur looters and allowing museums, federal agencies, military officers and pri-

Bill Hickok, and they were romanticized even after bloody wars against them. Indians were captured in dime-store novels and theatrical productions.

Even Adolf Hitler was mesmerized by the German writer Karl May, who was known for his adventure novels set in the American west. Hitler used U.S. own policies toward Indians as "inspiration" for his calamitous tactics and genocidal assaults. Some anthropologists claim the iconic German army helmet reminded Hitler of a Hopi turtle rattle. The fact that May never ventured to America is immaterial to the current folks who dress as the Iroquois of Eiche and the Navajo of Dresden, a fascination termed

"Indianthusiasm." And, thanks to TV and movie portrayals, many people now believe that *all* Indians either live in teepees within the tall bluffs of Monument Valley in Ari-

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vate collectors to amass large collections of Indigenous remains and cultural objects. Native Peoples were subjected to the Wild West Shows of Buffalo Bill Cody and Wild



zona and wear elaborate feather headdresses made from the plucking of eagles, or they are rich from their casino enterprises.

It is estimated that the remains of up to 2 million Native Americans are housed outside U. S. borders. Federal Indian policies, theft, swindles or procurement by violence of artifacts, and the demolition of and bribery to abandon customary responsibility for the retention of sacred belongings, all contributed to their having vanished from proper households and tribal traditional repositories. Tribal nations have confronted more than 1,500 museums seeking the fate of and return of over 200,000 skeletons and nearly a million funerary objects.

It is a common and insidious mistake that Native American iconography belongs to all of humanity. It does not. And, unless one has been initiated into one of the appropriate religious or other types of societies within each distinct Native culture, there is no way for a non-Indian to understand the complex dimensions of those belongings. And, most important, it is understood within each society who has the right and responsibility to care for and guard the belonging. Collectors, authors, researchers and government officials often do not understand that there is no public domain for cultural patrimony and sacred objects.

Native Americans (as defined by each society in their own traditional names) are dynamic and do not rest in the past or in anybody's idea of what tribes and Indians should be. Many Nations have adapted their contemporary lives in companionship with their connections to heritage, custom and tradition. Tribes are assiduous in business and in self-government despite the assaults of genocide, language suppression, religious invasions and theft of the bodies of their Ancestors and the robbery of both tangible and intangible cultural belongings.

Some call it, simply, the loss of their patrimony. But such characterization does not even begin to express the harm and devas-

tation over centuries leading to present-day dilemmas over returning Native funerary remains and icons of sacredness.

Thus far, it appears that Tribes seeking to repatriate their cultural belongings, their living and breathing spirits, are dependent upon the laws and processes for doing so that are designed by the colonizers. The Antiquities Act of 1906 applied only to items found on federal lands. The American Indian Religious Freedoms Act (AIRFA) has no teeth; the United Nations Educational, Scientific, and Cultural Organization (UNESCO) Treaty does not prevent the export

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of sacred Native artifacts; the Native American Graves Protection and Repatriation Act (NAGPRA) is a mechanism for identifying and returning to culturally affiliated communities Ancestors and funerary objects, but it is limited to those artifacts found on federal lands after 1990 or held by federal agencies or institutions that have received federal dollars; and the Archaeological Resources Protection Act (ARPA) of 1979, which protects material remains of human life that are at least 100 years old, has been challenged as applying only to remains and objects found on federal and Indian lands.

Other avenues that have been sought out for protection include the United Nations Declaration on the Rights of Indigenous Peoples, the Hague Convention, the UNESCO Convention for the Protection of Cultural Property in the Event of Armed Con-

flict, and the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property. The Lacey Act criminalizes behavior federally where the underlying conduct violates tribal game and fish laws. Sacred items are often adorned with the feathers of protected bird species. Possession of such items can be outlawed.

Yet existing federal statutes and international treaties are woefully incomplete and often ineffective at preventing the escalation of looting on Indian reservations, on public or private lands, and are completely inadequate to halt private land foraging. Diggers on private lands need only landowner permission. The sale of sacred items and even Ancestors' remains and burial belongings continue to be sold in the "art" market and occur without notice to affected tribes. What manner of repatriation can be effectuated from private collectors that have held belongings 200 years?

Auctioneers and traders of "antique" Indian art claim they need tribes to furnish them lists of what constitutes their sacred items. Otherwise, we are told, these dealers have no way of knowing how to make such determinations on their own. This is both specious and disingenuous. That the collectors place a market value on items in their possession that fetch significant prices is indicative of their special attributes of spirituality. Traders cannot claim, on the one hand, ignorance, and on the other hand benefit from the "perception" of sacredness. Collectors should be held to a standard whereby if they have a *reason to suspect* an item is culturally and historically important, they have a duty to investigate and determine its Indigenous affiliation and then must return it to that Nation.

There have been some repatriation success stories¹: the return of several wampum belts to the Onondagas; Ancestors returned home to Haida Gwaii; skulls and skeletons returned to members of the Torres Strait Islands by the Berlin Charite Hospital; the



repatriation of artifacts to the Chugach People in Alaska; and the completed return of the Acoma Shield. In the late 1980s the Smithsonian began to repatriate bones, and the German Museums Association has issued new ethical guidelines for museums facing repatriation claims. The Association on American Indian Affairs maintains a list of repatriation efforts and advises on pending auctions, and they have published a guide for tribes dealing with international repatriation.²

Tribes are committed to working with legislators,³ the U.S. State Department, the U.S. Department of the Interior, the Department of Homeland Security, and the Federal Bureau of Investigation.

If comprehensive, meaningful and systemic repatriation is to occur, it is for tribes and Native Nations to not rely solely upon laws created by the colonizing powers. They can enact or amend their laws to articulate civil and criminal penalties for the taking and holding of prohibited items. Tribes can systematize what items are secure for sale and appreciation and create certification mechanisms of provenance. Most important, they must seize their own processes by enacting comprehensive consultation and repatriation laws. They must dictate the terms by which consultation and the recovery of sacred belongings shall take place.


There is a non-bargained-for trap in segregating and categorizing *repatriation*

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as apart from historic genocide and subsequent intrusions into Native Peoples' cultures. The consequences of conquest—the absolute authority of the United States government over Native Nations and the concretized doctrines of nearly unshakable property laws—cry for a paradigm shift in how our attitudes shape our policies toward “Indians.” We are battling romanticism, the consequences of which are continued repression. Tribal laws, those enhancing powers of self-determination and that provide avenues and structures of redress, must be seen as educational and self-validated and then given measurable support from and in concert with federal and state laws upholding them. Native Nations should not be bound to Western-centric laws that separate the realms of intellectual property law protections between the tangible and the intangible. A sacred or holy belonging is the repository of a community's traditional knowledge, a part of a holistic whole both physical and metaphysical.

When one collects Native bones, knowledge and artifacts, there is a tendency to project into those objects an intangible awareness of the collectors' own special significance, as if those belongings hold mysticism—Indian power—and contain a foothold forward for one's own self that contains an efflorescence of adopted sacredness. By one's possession of these objects, individuals say they are honoring the Indians. But *ap-*

propriation is not the kinfolk of honoring. It is the dark side of intention. Our intentions are irrelevant and often harmful. Yes, one can buy, love and enjoy contemporary works of Native carvers and smiths and artists. That is appreciation. But to hold onto sacred belongings is anathema to integrity and moral ways. Very few have the right to revere, to venerate, these objects because, without contextual knowledge and permission, no others can in any way understand them or understand the nature of importance they are to an Indigenous culture.

Today, in the so-called era of self-determination, defined as a trust responsibility and a government-to-government relationship, federal policies and actions regarding Native American cultural heritage are still reflective of historic racism inherent in Marshall's pronouncement of inferior savages and other claims of the vanishing Indian. These juridical concepts have helped to justify the misappropriation and taking of burial remains and sacred items. 

endnotes

1. The communities themselves have approved of these public disclosures.
2. See, e.g., Chief Irving Powless, Jr., *The Day that 12 Wampum Belts Returned to Onondaga*, available at <https://bit.ly/37F4VPf>; William Mullen, *After a century at museum Indian remains go home*, available at <https://bit.ly/2YJL7q1>; International Repatriation Guide, available at <https://bit.ly/37GVaQx>.
3. See, e.g., the STOP Act (Safeguard Tribal Objects of Patrimony [S.2165]); the Native American and Native Hawaiian Cultural Heritage Protection Act [H.R. 7075].