Selling the Sacred: An Examination of Sacred Objects in Legal Contexts

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SELLING THE SACRED:
AN EXAMINATION OF SACRED OBJECTS IN LEGAL CONTEXTS

I. INTRODUCTION

"I think a real awareness about spirituality is happening in the world, with a strong move towards spirituality, as we are recovering from materialism." These are the words of Pierre Servan-Schrieber, an attorney who represented the Hopi Indian Tribe in Paris in April 2013, when a French court found that the sale of seventy Hopi Indian Katsinam’s (masks representing the spirits of the Hopi’s ancestors) by a Parisian auction house legal, despite their status as sacred artifacts. Generally speaking, such sales are prevented unless there is explicit approval from the tribes involved. Thus, the French court’s approval was a surprise to many who are familiar with the general policies, both international and local, regarding the sale of cultural and sacred objects.

The real issue, however, is not that the French court allowed the sale, but that the sale itself may lead to the justification of other similar sales in the future. The court’s insistence that the Katsinam’s were merely art objects to which sacred value could be ascribed is problematic because it opens the door to a more lax approach regarding the trade of these objects. This ruling allows sacred objects to be qualified more broadly and takes away the significance that such object may have.

Furthermore, in cases such as this particular French ruling, the alienability of such objects is wrested from the claimant culture and placed in the hands of the court. The language in the ruling revealed that these objects were less representative of the religious practices of the Hopi tribe, but rather a relic of a former practice.

2. Court Order 12042013, French Court of First Instance (informal translation).
3. Id.
As a result, the sale of sacred objects is not simply a sale of cultural artifacts, but rather a sale of religious traditions which cannot and should not simply be placed under the broad umbrella of “cultural heritage”.

When it comes to sacred objects and cultural heritage, the intersections seem obvious at first glance; however, when examining the nuances of the two it becomes increasingly clear that there are significant differences in the overlaps of the two classifications. Cultural heritage is straightforward and is generally attached to aesthetic and historical concepts which an object embodies – essentially cultural patrimony, as it will be discussed later in this article. Sacred objects, however, are both objects of cultural patrimony and also objects which are part of a living tradition – making them current and historical simultaneously. As a result, sacred objects are hard to define outside of their specific cultural context; they are not solely objects of history or art or religion, they are all of these things at once and also a part of a living tradition and practice.

The most effective means to prevent such issues in the future is for the courts to try to understand that sacred object are not just cultural objects which relate to a subgroup of an overall culture. Instead, sacred objects, which may be ingrained in a specific cultural set, are tied to living traditions as well as historical and cultural ones. Classification of any object as just historical, or cultural, or sacred, is problematic to those religious groups which seek to keep their sacred objects separate from their national culture. The Hopi Katsinam sale in France is only one such instance of sacred objects being subjected to the classification of cultural object; the ruling could lead to other cases of broadening classification of sacred objects, which may create problems in protection of all sacred objects in the future.

This comment will look at the United States’ approach to protection of sacred objects under Native American Graves Protection and Repatriation Act (“NAGPRA”) and how the ideas which govern NAGPRA can be applied to protect sacred objects around the world. Part II will examine the history of NAGPRA as it has been applied in the United States, and how it has helped to protect and preserve sacred objects since its enactment in 1990. Part II will also look at the roles that repatriation, provenance and
the rules that govern sacred objects in museum collections generally play in the return of cultural objects and how these approaches may be used as a guide to creating stronger protection for sacred objects. Part III will examine the existing legal precedents under NAGPRA and the specific rules which may have prevented the Hopi objects from ever leaving the United States. Part III will also specifically examine the Survival International ruling from Paris and discuss what the court did wrong in regard to its ruling. Finally, this article will look to see what questions need to be addressed by the courts in regard to sacred objects moving forward.

II. BACKGROUND

Before discussing the sale of sacred objects, it is important to understand how sacred objects are viewed in the international market – namely that they are grouped under the broad title of ‘cultural property’. Sacred objects are rarely distinguished from other cultural objects, because often religion is tied strongly to local and national culture and as a result, it is easier in a legal sense to group all these objects together. However, in cases where

4. UNESCO, Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (Oct. 12, 1970), available at http://portal.unesco.org/en/ev.php-URL_ID=13039&URL_DO=DO_TOPIC&URL_SECTION=201.html. There is no single legal definition of cultural property that it seems nearly impossible to identify exactly what ‘cultural property’ signifies. By and large, the definition of the term has been left to the respective courts. The Hague convention of 1954, UNESCO Convention of 1970 and UNIDROIT conventions have all attempted to develop and provide guidelines to participating nations, yet the guidelines are all far too broad to truly provide a clear definition. A working definition which I will use here derives from the UNESCO Convention. I choose this definition because, in defining cultural property broadly, the UNESCO convention best seeks to foster a feeling of cultural appreciation for other nations while also encouraging stronger internal protections of one’s own cultural property. Article 1 of the UNESCO Convention of 1970 defined cultural property as “property which, on religious or secular grounds, is specifically designated by each State as being of importance for archaeology, prehistory, history, literature, art or science . . . .”
there is a strong opposition to the sale of an object, not because of
the place it holds within a culture, but because of its part of a
living religious tradition, there is no governing legal precedent.

It is important in discussing the sale of any type of cultural
object to understand the role that provenance plays. Often sales of
cultural and sacred objects are justified due to traceable
provenance, a legal standard which disregards the importance the
objects place and alienability within a religion or culture. The lack
of such a standard may also serve to turn a blind eye to issues of
provenance where a culture would not ever actually part with the
objects, as was the case with the Hopi Katsinam.5

A. Understanding Sacred Objects in the Context of Cultural
Heritage and Preservation

Sacred objects can be understood as those objects which belong
to a religious custom.6 The value of sacred objects is attached not
just to the objects themselves, but to what the object represents in a
larger context beyond just the historical or aesthetic value of the
objects.7 As a result, such objects contain certain imperceptible
properties which are tied specifically to their sacred value. But
because they are physical objects, can be transported, and contain
a relatively documentable value, sacred objects are generally

5. See Tom Mashberg, Auction of Hopi Masks Proceeds After Judge’s
Ruling, N.Y. TIMES ARTSBEAT (April 12, 2013 8:20 AM),
http://www.artsbeat.blogs.nytimes.com/2013/04/12/french-judge-rules-that-
auction-of-hopi-masks-can-proceed/?pagewanted=print (“The Hopis say the
artifacts, known as Katsinam, or ‘friends,’ were stolen from tribal lands in
Arizona. Many are more than a century old. The auction house has said that a
French collector obtained them legally decades ago.”).
6. See Frank R. Ravitch, Religious Objects as Legal Subjects, 40 WAKE
FOREST L. REV. 1011, 1018 (2005). The article states that,
[r]eligious objects are powerful representations that may connect to deeply held
beliefs. For believers, they may be symbols of and conduits to transcendent and
very real truths. This may have an impact on how such objects are perceived by
nonbelievers who are aware of the power the objects have for believers. For
others, such objects may retain some of the power they have for believers, or
they may simply be things to look at.
Id.
7. Id.
qualified as cultural objects while rendering their sacred aspects secondary.  

Because sacred objects tend to be seen as cultural objects, this can overlook the fact that such objects represent something more than just national history and culture. There is a concept of spiritual property to sacred object which is difficult to qualify strictly as just ‘culture’. The added layer of meaning that sacred object possess is recognized by art historians, anthropologists and archeologists, yet generally the legal system has no way to clearly distinguish such objects. One of the few exceptions is NAGPRA in the United States.

1. An Overview NAGPRA and the Preservation of Sacred Objects

In 1990, the United States enacted the NAGPRA, which sought to create an ample set of rules which respected Native American culture, both as it exists in the present and to preserve its rich history. As a result, NAGPRA is not just a culturally protective
law, but most notably civil and human rights law through which a recognition religious practice and protection of fundamental rights is held to be most important.\textsuperscript{14}

NAGPRA defines cultural affiliation as where “there is a relationship of shared group identity which can be reasonably traced historically or prehistorically between a present day Indian tribe...and an identifiable earlier group.”\textsuperscript{15} NAGPRA’s restitution policies cover four major types of cultural items: ‘associated funerary objects’, ‘unassociated funerary objects’, ‘sacred objects’ and ‘cultural patrimony’.\textsuperscript{16} This article will focus only on the latter two categories.

Because NAGPRA was only enacted in 1990, its scope thus far has been fairly limited. The NAGPRA is preventative rather than retroactive, and seeks to end further abuses instead of correcting past mistakes. NAGPRA cannot restore objects which have been removed prior to its enactment.\textsuperscript{17} Instead repatriation of artifacts acquired prior to NAGPRA will have to arise from an entirely

the 1970s and 1980s. \textit{Id.} At the same time Native American tribes were also gaining more recognition and political power. \textit{Id.}

\textsuperscript{14} \textit{Id.} Furthermore, NAGPRA seeks to encompass the needs not just of tribal repatriation and preservation of culture, but also to create a framework where archeologists, anthropologists and museums may still study and collect artifacts relating to Native American tribes. \textit{Id.}

\textsuperscript{15} 25 U.S.C. § 3001(2).

\textsuperscript{16} 25 U.S.C. § 3001(3)(C), (D) (2012). Section (3)(C) defines sacred objects as “specific ceremonial objects which are needed by traditional Native American religious leaders for the practice of traditional Native American religions by their present day adherents...” \textit{Id.} § 3001(3)(C). Section 3(D) defines cultural patrimony as an object having ongoing historical, traditional, or cultural importance central to the Native American group or culture itself, rather than property owned by an individual Native American, and which, therefore, cannot be alienated, appropriated, or conveyed by any individual regardless of whether or not the individual is a member of the Indian tribe or Native Hawaiian organization and such object shall have been considered inalienable by such Native American group at the time the object was separated from such group. \textit{Id.} § 3001(3)(D).

\textsuperscript{17} \textit{See, e.g.}, Geronimo v. Obama, 725 F.Supp 2d 182 (2010). (Where the court denied the return of the remains of Geronimo, an Apache warrior, to the lineal descendants because the claim was in regard to an act which occurred before the enactment of NAGPRA.)
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selfless act of any organization or individual who possesses such objects.

Finally, questions of ownership under NAGPRA will often lead to the concept of group ownership and alienability as it pertains to sacred objects. As a result, these objects can be understood not as being "owned" by a person or tribe in a traditional, commercial, sense of the word; instead the objects are treated like living beings, the guardianship of whom is passed on from one generation to the next.

2. NAGPRA on Repatriation and Ownership

After the enactment of NAGPRA, sacred objects are to be returned to the lineal descendants or Indian tribe to whom the object is identified as belonging to or as having the closest cultural affiliation. Unclaimed objects are disposed of in accordance with the statute and the consultation of a review committee, as established under Section 8 of NAGPRA. Despite the fact that these rules make it significantly easier for tribes to initiate the return of sacred objects, it also places the burden of proof on the claimant. Fortunately, the statute has a built in regulation of a review committee which will give a claimant tribe a fair chance to rebut any claims against their right to possession.

NAGPRA has also created rules regarding repatriation of objects which are controlled by museums and Federal agencies. When one of these institutions receives an object which is likely to belong to a living tribe, they are to inventoried so that there are clear records in the institutional setting. It also stipulates that

20. Id. § 3002(b).
21. Id. § 3002.
23. See 25 U.S.C. § 3004(b) (West 2012). Section 3004(b) specifically stipulates that:
(1) The summary required under subsection (a) of this section shall be—
tribes be given access to these records to determine any relevant information regarding objects within such collections.\(^{24}\)

NAGPRA lacks a clear definition in regard to group ownership of an object – it may still be used as a means to regain control of items discovered, but is not specifically addressed in the statute. However, the statute’s broad language regarding the ability of a tribe to reclaim may suffice to make up for this deficiency, as is a lack of the specific amount of proof which is required to establish a claim. Furthermore, the statute also allows tribes to relinquish control of any object, should they so choose.\(^{25}\) In short, NAGPRA seeks to give as much autonomy as possible to tribes seeking to reclaim objects.

3. American Museum Policies Regarding Sacred Native Objects

In looking at sacred objects and cultural patrimony, it is important to remember that just because objects have been classified as such under legislation it does not necessarily mean that tribes will always demand sacred objects to be returned.\(^{26}\) There have been times where tribes consent to have objects placed in museums or on display, so long as the objects are treated with the respect that the tribe itself would pay to the objects.\(^{27}\) Even though NAGPRA provides a basic protection for objects within museum collections, museums often take this protection a step

\(^{(A)}\) in lieu of an object-by-object inventory;
\(^{(B)}\) followed by consultation with tribal government and . . . traditional religious leaders; and
\(^{(C)}\) completed by not later than the date that is 3 years after November 16, 1990.

\(^{24}\) See 25 U.S.C. § 3004(b)(2) (2012) ("Upon request, Indian Tribes . . . shall have access to records, catalogues, relevant studies or other pertinent data for the limited purposes of determining the geographic origin, cultural affiliation, and basic facts surrounding acquisition and accession of Native American objects subject to this section. Such information shall be provided in a reasonable manner to be agreed upon by all parties.").


\(^{26}\) See Gerstenblith, supra note 13, at 900.

\(^{27}\) Id.
further and enact policy which helps to govern what kinds of objects they accept and display.

In 2006, the Association of Art Museum Directors ("AAMD") released a report on the stewardship and acquisition of sacred objects in which they discussed the best methods of curating and educating the public in regard to sacred objects. The report looks at the fact that many indigenous cultures have ritual and practical uses for objects which are generally qualified as art by museums. The emphasis here is on collaborative discussion and consultation with the original cultural owners. The idea is to go beyond simple legal limits of museum ownership and to ensure that museums are only display objects in the most respectful way possible.

28. Mission, ASSOCIATION OF ART MUSEUM DIRECTORS, Mission Statement, https://www.aamd.org/about/mission (last visited on Sept. 24, 2013). The AAMD’s Mission statement states that "(t)he purpose of the Association of Art Museum Directors is to support its members in increasing the contribution of art museums to society. The AAMD accomplishes this mission by establishing and maintaining the highest standards of professional practice, serving as forum for the exchange of information and ideas, acting as an advocate for its member art museums, and being a leader in shaping public discourse about the arts community and the role of art in society."


30. Id. The report states, "Because sacred objects can be integral to the continuance of religious practice, museums should use special sensitivity when considering the acquisition of objects that may be sacred. Whenever possible, museums should consult with cultural and religious leaders of indigenous societies to ensure that an object can be collected or removed from its context without damaging a society’s central religious beliefs or practices."

31. Id. AAMD states that they believe that it is the responsibility of the museum to properly maintain such sacred pieces beyond simple identification and to try to create museum practices which take into account the importance that the object plays in its original religious setting. Id.

32. Id.
B. Repatriation and Provenance

Another aspect to consider for sale of sacred objects is the roles of provenance and repatriation (outside of NAGPRA). Generally speaking, before the sale of any culturally significant object, authentication is the first step any seller or buyer will take. Sacred objects which are shown to have a clear and unbroken provenance can still be thought to have been illegally obtained, as their alienability may be tied not to a person, but to a tribe or tradition. Legal problems arise when the object, assumed to be obtained from the claimants with consent, are actually objects of sacred value which the claimant would never willingly part with, or may not even have the ability to do so, due to the ownership of the item by the tribe as a whole.

Alternatively the return of cultural objects can occur in the form of repatriation. A practice most often used by museums, this practice is rarely applied by the sellers or private buyers of such objects because they would lose much more than they gain by the practice. Instead private collectors rely more heavily on the law of their home country to protect them as buyers because the many nations have worked to create laws to prevent the export of cultural objects rather than protecting importation objects. It is generally in trafficking cases where the role of import and export laws begins to play a stronger role in the trade of cultural objects.

The World Trade Organization ("WTO") has also implemented specific rules governing the movement of such objects. As a

33. See, e.g., United States v. Corrow, 119 F.3d 796 (10th Cir. 1997). In Corrow, several sacred items belonging to a religious singer were sold after his death, even though they belonged to another tribe. Id. at 798-99. This case will be discussed in more detail later in the article.
34. Corrow, 119 F.3d 796 at 800.
35. See John Henry Merryman, Cultural Property Internationalism, 12(1) INT'L J. OF CULT. PROP. 11 (2005) (discussing the idea that cultural property is becoming an increasingly globalized concept where all peoples feel the need to protect and preserve cultural property regardless of where it derives from).
36. See The General Agreement on Tariffs and Trade art. XX, July, 1986, 61 Stat. 5, 55 U.N.T.S. 187. Article XX states, [s]ubject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination
result, nations are more motivated to create law to prevent exportation of objects, and less motivated to protect objects which have entered their country. This also allows nations to determine what is culturally significant and protected within one’s own borders. However, it simultaneously creates less protection for objects which enter the country to be returned, as it may allow the presumption that culturally significant objects which are imported were acquired with the assumption that the nation that let them leave did not seek to protect them.

C. Import and Export Laws

There are two types of laws which govern the import and export of cultural goods: common law and civil law. A majority of countries partake in a more civil law based system which emphasizes local law over the law of the claimant country. Thus, the focus of cultural property cases in such countries is more directed towards the legal aspects of the pieces when they entered the country. In common law countries, such as the United States, significant weight is given to the laws of the claimant country.

between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures . . . [including those] imposed for the protection of national treasures of artistic, historic or archaeological value.

Id.

37. See Merryman, supra note 42; see also Stephanie O. Forbes, Securing the Future of Our Past: Current Efforts to Preserve Cultural Property, 9 TRANSNAT’L LAWYER 235, 237-243 (1996) (discussing the various approaches of common law countries and civil law countries when it comes to repatriation of cultural objects).


39. See Merryman, supra note 42.

40. See United States v. McClain, 593 F.2d 658, 670-71 (5th Cir. 1979); see also United States v. Schultz, 333 F.3d 393, 403-04 (2d Cir. 2003). In McClain, the court held that the National Stolen Property Act (NSPA) governed the sale of pre-Columbian artifacts which were being sold in the United States. Id. at 664. The court reasoned that the Mexican government enacted national
In the United States legislation has been enacted to help protect its cultural property. Within the United States, the National Stolen Property Act (NSPA) plays an important role in regards to the return of objects of cultural patrimony to other nations. Another important act, on a more localized and specific level is NAGPRA. Both the acts seek to protect objects, both of American and international origin from being sold under less than totally legal circumstances.

III. ANALYSIS

A. Existing Policy Background

One of the major issues involved with the civil law approach is its tendency to manage sacred objects from a more colonialist perspective, obscuring the value of the object within the claimant culture. These personal values are more than simply monetary, historical or cultural and hold a power which allows a culture to thrive and sustain itself by choosing to claim its past as important. The United States’ approach looking to the country of origin for guidance allows autonomy to claimant culture to remain while still giving wide avenues for the American party to prove their innocence.

ownership over items of cultural patrimony and that, as a result, the laws of the Mexican government regarding such items were to be given weight in any decision regarding such items. See McClain, 593 F.2d at 665.
41. See 18 U.S.C. §§ 2314-2315 (2012); see, e.g., McClain, 593 F.2d 658 (5th Cir. 1979); see, e.g., Schultz, 333 F.3d 393 (2d Cir. 2003).
43. Brown, supra note 8, at 45. The article stated that recently, scholars are moving beyond the critique of culture to a more pragmatic appreciation of the concept’s utility . . . [They are urged to] get past their fear of ‘theoretical incorrectness’ and recognize that pursuit of cultural rights offers the advantage of helping indigenous peoples achieve a degree of self-determination without directly challenging the territorial integrity of the nation state. Id.
B. NAGPRA Repatriation Applied

Another aspect to consider in regards to the sale of sacred objects is ownership. In Native American tribes, such as the Hopi, there are certain objects which are considered to be owned by the tribe as a whole. As a result, there is no legal justification for such object leaving the tribe in any capacity.

A major case regarding the return of sacred objects as governed by NAGPRA is United States v. Corrow. The court explicitly looked at the trafficking of items which are qualified as cultural patrimony, and defined such objects as

...[Having] (1) ongoing historical, cultural or traditional importance; and (2) be considered inalienable by the tribe by virtue of the object’s centrality in tribal culture. That is, the cultural item’s essential function within the life and history of the tribe engenders its inalienability such that the property cannot constitute the personal property of an individual tribal member.

The court focused on whether the items still had an ongoing importance to the tribe today. This definition was supported by

44. Corrow, 119 F.3d at 798. In Corrow, several items belonging to Ray Winnie, a hataali or a Navajo religious singer, were sold after his death. Corrow acquired the headdresses as well as several other items from Winnie’s widow for $10,000. Id. Winnie’s widow spoke no English and signed the agreement, after some negotiation, with a thumbprint. Id. At the time of sale Corrow suggested that he wanted to give them to a Navajo chanter in Utah to keep them sacred. Id. Sometime after this transaction occurred, Corrow was contacted through a trading company by a private dealer who was interested in purchasing the headdresses. Id. The interested buyer was, in fact, an undercover National Parks Service Ranger who had received information that there had been a questionable trade. Id. The FBI executed a search warrant and found the religious objects. Id.

45. Id.

46. Id. at 800. The items which the case concerned were certain ceremonial adornments which the Winnie had acquired from another clan during his apprenticeship (such items are often loaned between clans or passed from one
testimony given on behalf of the government by a Navajo anthropologist.\textsuperscript{47} The defendant, in an attempt to try to show the statute to be too vague in regard to its definition of cultural patrimony, presented testimony which showed that such items may be sold if the widow was uncomfortable with them falling into disuse.\textsuperscript{48}

The court found Corrow's argument of vagueness regarding NAGPRA lacking because he was\textit{ aware} of the alienability of the objects to Navajo culture\textsuperscript{49} due to his exposure and interest with the Navajo nation.\textsuperscript{50} Corrow may not have been aware of the specifics of NAGPRA legislation, but he should have, nonetheless, been aware of its broader applications.\textsuperscript{51}

The holding in\textit{ Corrow} was reaffirmed in\textit{ United States v. Tidwell}, which had a similar fact pattern, but reemphasized the point of an antiquities dealers' knowledge of NAGPRA.\textsuperscript{52} In\textit{ Tidwell}, the defendant had been previously convicted under NAGPRA and was a dealer in native artifacts, both circumstances

\textsuperscript{47} Id. at 801. (Harry Walters was the anthropologist who was consulted and stated that "[There] was no such thing as ownership of medicine bundles and that these are viewed as living entities").

\textsuperscript{48} Id.

\textsuperscript{49} Id. at 802-03. The court stated that,

[m]ost damning, Ms. Bia, Mrs. Winnie's granddaughter, recounted Mr. Corrow's representation that he wanted to buy the Yei B'Chei to pass on to another young chanter in Utah. Reasonably, a jury could infer from that representation that Mr. Corrow appreciated some dimension of the Yei B'Chei's inherent inalienability in Navajo culture. Although Mrs. Winnie stated she believed the Yei B'Chei belonged to her, she testified, 'I[t]here was another man that knew the ways and he had asked of [the Yei B'Chei] but I was the one that was stalling and ended up selling it.

\textit{Id.}

\textsuperscript{50} Id. at 803

\textsuperscript{51} Id. at 804.

\textsuperscript{52} See United States v. Tidwell, 191 F.3d 976, 979 (9th Cir. 1999). Tidwell's fact pattern is similar to Corrow in regard to the sale of sacred objects; here it was Hopi Katsinam that were in contention instead of Navajo artifacts. See\textit{ id.} The defendant again argued that NAGPRA was void for vagueness, but this argument failed.\textit{ Id.}
which would have placed him on notice of the laws governing the alienability of sacred objects.  

This idea of general awareness of the meaning and application of NAGPRA is significant because it shows that the court believes that such objects are clearly identifiable as sacred objects or otherwise significant, to those who would deal in them illegally. The rulings also serve to reaffirm the autonomy and alienability of Native American tribes to do as they wish with the objects that are part of their specific history, as opposed to letting the courts decide such issues. The court’s deference to the tribe over the claimant in regard to the determination of weight of evidence is indicative of an attempt to place the sacred objects within a cultural context in order to better understand and qualify their cultural worth in legal contexts.

C. Further Understanding the Importance of Sacred Objects under NAGPRA

The courts need to recognize that many sacred objects exist at an intersection of both an historical tradition and living traditions, and that as a result, they are both. The frames of reference regarding the importance of a sacred object for a claimant are different than they are for the rest of the world. A court cannot simply look to one aspect or another, nor can it simply re-qualify an object which exists at this intersection. Instead, this is where the definition of what a sacred object is can become incredibly significant.

Generally speaking, sacred objects are presented in a certain way to outsiders of a religion and are understood largely to be symbols of faith and spirituality. Treatment objects purely as symbols is problematic to say the least; sacred objects are part of religious practice and should not be treated merely as aesthetic objects. In the United States, restitution under NAGPRA serves to protect objects of cultural and sacred value within the country. Nevertheless, there remains a need for this value to be understood and contextualized when such objects have left the country. The

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53. Id. at 979-80.
54. Ravitch, supra note 6.
55. Id.
best solution seems to look towards the idea of cultural heritage and restitution, especially in taking an active role in the retrieval of objects. The way that the United States often looks to claimant nations in its decision making indicates an acknowledgment that such objects are not always fully understood in the American context.

In the case of the Katsinam in Paris, the religious aspect was deemed secondary to the material and aesthetic aspects of the masks; without context the Katsinam went from sacred objects to mere novelties for collectors. There is also the issue of whether, especially in the cases where sacred objects are involved, courts should look to the laws of the claimant nations in order to find the best solution in regards to restitution. Furthermore, the objects are not just a relic of past religious practices – they are a part of the present, living practice as well. The Hopi masks are still used in religious ceremonies, and should continue to be for generations, as they are considered to be the embodiment the spirits of deceased tribe members.

The best way to properly qualify sacred objects is to contextualize them within the current living practices and traditions of the claimants, which recognizes the deeper personal meaning they hold. Religion often plays a major part in developing cultures; yet to treat sacred objects as solely historical, art or cultural objects separates them from the fact that they still hold meaning and play a part in contemporary culture. Sacred objects are not relics to be preserved, but an active part of the continuing growth of culture.

1. Issues Regarding Sacred Objects and the International Market

United States law which seeks to protect cultural heritage within the country, such as NAGPRA, very clearly strives to restore sacred objects to tribes. NAGPRA has clearly delineated what a sacred object is, and how it is to be treated under the law. Yet, NAGPRA lacks the ability to protect objects once they have left

56. See, e.g., Corrow, 119 F.3d at 796; see also Tidwell, 191 F.3d at 976.
the country.57 When such objects are exported, specifically to countries which employ a civil law point of view, the cultural aspect is emphasized more and the religious aspect is all but overlooked. This unfortunately leads to what can essentially be perceived as a 'de-contextualizing' of the sacred object, which then removes the sacred importance of the object itself.

Another issue that arises under the civil law approach is that objects can be treated in a very colonial way (i.e. the implication being 'we can take better care of your objects in our museums than you can'). The fact that such objects are not protected abroad is a problem since there is no state motivation to retrieve the objects which are significant only to a small subset of the nation. It's not just that a facet of culture is restored when sacred objects are returned; the religious practices are restored to the object itself, and reaffirmed, and this may be an aspect in which the state does not wish to interfere in.

Finally, there is an issue regarding the fact that many of the sacred objects which have been sold abroad were likely removed as stolen objects from the country. Many tribes may lack the ability, funds or resources to make a claim. This is something for which law already attempts to provide remedies for, yet such remedies may, despite their broad terms, still tend to be insufficient. Many Native American sacred objects are owned not by a person, but by the tribe as a whole, or by family units within a tribe and as a result, no single person can sell the objects. At best, they may loan them to other tribes or members.58 As a result, such objects cannot have possibly been given in good faith to any person who claims to have legally obtained the items. Furthermore, such items are often governed by religious traditions and practices which require them to remain in the tribe. When

57. See e.g., Court Order 12042013, French Court of First Instance (informal translation):[w]hile the American Indian Religious Freedom Act dated August 11, 1978, cited by the plaintiff... recognizes the religious freedom for American Indians and the right for the same to practice their traditional religions, no provision forbidding the sale, outside of the United States of America, of objects having been or likely to be used for religious ceremonies is applicable in France. Id.

58. See, e.g., Corrow, 119 F.3d at 799.
such items are given to museums, they are often given with the caveat that the tribe still use them as religious items when they wish.\footnote{See 25 U.S.C. §§ 3004-3006 (West 2012).}

2. Possible Remedies

The overarching issue which must be addressed is how to treat sacred objects in a legal setting. The major issue is that there is a lack of definitions and understanding of how to qualify such objects. NAGPRA provides clear definitions, but is only applicable to Native American objects which in the United States. Objects which are part of widespread religions, such as Christianity, Judaism or Islam, which are easily recognizable are, likewise, easily protected by recognition. When it comes to smaller sacred practices, which courts may not be easily able to identify, the definition and clarification of what “sacred” means becomes a problem.

If courts can clearly set out a guideline to define and recognize sacred objects, then perhaps there will be less of an issue regarding the way they are treated in the legal system. They can look at the context of the object within the living religion, and use this to ascertain whether an object is used for religious purposes. Museums which display sacred objects often are able to create guidelines for their display; these may also serve a starting point for how they could be treated in a legal context.

The first matter to look at is how sacred objects have left their country of origin. Here in the United States, NAGPRA and other laws regarding importation and exportation of cultural goods are barriers to illegal importation. The best way to prevent trade in sacred objects is to look at the culture from where the object originated and it should appear obvious whether or not objects which are deeply religious in nature are often given away or not. Moreover, the role that the object plays within the religion should be examined and fully understood in context.

The Parisian sale of the Katsinams embody this confusion of cultural and religious object: the opinion of the French Court ignored the significance that these objects had on a spiritual level
to the Hopi tribe.\textsuperscript{60} The seller of the masks claimed that they had been freely given, while all Hopi claim that such objects would never leave the tribe.\textsuperscript{61} This fact, when taken in the context of the case make it appear that the French court chose to focus on the aesthetic value of the masks as its means of assessing whether the sale was valid.

In \textit{Survival International} the attorney for the Hopi sought to establish and emphasize aspects of the Katsinam that would allow them to gain protection under existing French laws; namely that the Hopi see the masks as living representations of members of the tribe. The court rejected this argument, stating that "...while [the Katsinam] are religious in nature and embody the spirit of such individuals’ ancestors, such masks cannot be deemed human bodies or parts of human bodies (whether living or deceased), which are protected under general principles recognized under applicable law..."\textsuperscript{62} Essentially, the court rejected the Hopi’s own understanding of their sacred objects and allowed the court’s understanding of the objects as essentially aesthetic cultural objects to be applied to define the Katsinam under the law. As a result, the court, in effect, removed the fundamental purpose of the objects, and transformed them into cultural objects which fit into a legal standard which allowed the sale to transpire.\textsuperscript{63} This removal

\textsuperscript{60} Court Order 12042013, French Court of First Instance (informal translation).\textsuperscript{p}ursuant to Articles 11 et seq. of the United Nations Declaration on the Rights of Indigenous Peoples dated September 13, 2007, the signatory states have committed to “provide redress (…) developed in conjunction with indigenous peoples, 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,” such declaration does not constitute a legal basis for an action brought against an auction house seeking acquirers for goods that a private individual claim’s to rightfully own. \textit{Id.} (emphasis added).


\textsuperscript{62} Case Court Order 12042013, French Court of First Instance (informal translation).

of the tribe’s values may signal that it is all right for future courts to reevaluate the worth of an object on standards that are not necessarily in line with its true value.

The key issue is that there is a lack of communication regarding how courts ought to treat sacred objects. If the court chooses to look at the Katsinam from their purely material aspects, they reject the aspects of the objects that are the fundamental basis of the case at hand. This makes the court’s decision regarding the sale easier, but it also shows a disregard for the autonomy and power that the Hopi may enact over their sacred objects. Sacredness as a descriptor is secondary, and therefore virtually irrelevant to the legal discussion of sacred objects. It is not the court’s responsibility to decide how religion is practiced or interpreted; for them to do so is not just disrespectful, but also implies that the courts are the interpreters of religion.

The French courts in Survival International openly acknowledged the specific religious significance of the Katsinams up for auction and they simply chose to see this religious significance as an outdated form of worship. The decision of the French court was taken to signify that the implicit sacred value of the objects was irrelevant to their cultural value and insignificant enough to not warrant protection by the courts. Because France

ruled that it could go forward, finding that the masklike objects, despite their divine status among the Hopis, could not be likened to dead or alive beings. A lawyer for the Hopis had argued that the tribe believes that the works embody living spirits, making it immoral to sell them under French law.

64. Paris Auction House Sells Hopi Masks Despite Tribe’s Objection, THE GUARDIAN (Apr. 12, 2013, 12:23 EDT), http://www.guardian.co.uk/world/2013/apr/12/paris-auction-sells-hopi-masks. The article stated that, “[i]n its ruling, the court noted that the Hopi ascribe ‘sacred value’ to the masks but ‘clearly they cannot be assimilated to human bodies or elements of bodies of humans who exist or existed’ – the sale of which would be banned in France.” Id.

65. Godreche, supra note 1. In an interview, the attorney who represented the Hopi tribe in Paris stated that, [w]e had mentioned two French legal precedents, or jurisprudences. First, there are tombs and funeral items that cannot be sold. And one family member is not allowed to sell family property that has belonged to a whole group over many generations. Those two characteristics applied to the Hopi masks—the Hopi’s relationship with them is similar to our relations, in France, to sepultures, and to
subscribes to a civil law approach in regard to the return of cultural artifacts, the legal focus was not on repatriation and preservation, but on provenance. The fact that the Hopi attest that such objects would never be given away or sold appears to have had very little weight in the decision.66

But more than this, however, may be the issue that the court simply was not comfortable depriving the auction house of both a major sale and the investment that had already been placed in the masks.67 The court is not wrong in focusing on the material aspects of the precedent it will set in allowing the sale to occur, it is just that it fails to also take into account the longer standing historical implications. As a result, the court establishes that it is reasonable to simply ignore sacred history in regard cultural artifacts. This action may even be further misinterpreted because of the fact that it was an indigenous culture which was hurt in the decision, which may, albeit inadvertently, give the impression that such cultures are not given the same amount of historical weight as more prominent cultures and religions.

Nevertheless, sacred objects are physical objects, often with aesthetic and cultural values which are easily assessable and at the same time they also possess a value to their owners that is nearly impossible to qualify in regards to their material aspects, and

the dead, that we pray by their tombs. For the Hopis, this goes through their masks, they are a symbol of communication between death and life. Then the family wealth, which cannot become a business—same for the Hopis: These belong to a whole tribe, and not one person.

Id.

66. The Guardian, supra note 73 (explaining that “[t]he court also alluded to a 1978 US law, the American Indian Religious Freedom Act, and wrote ‘no provisions banning the sale outside the United States of objects used in religious ceremonies or susceptible to be is applicable in France’”); see also Mashberg, supra note 5 (noting that “[t]he Hopis say the artifacts, known as Katsinam, or ‘friends,’ were stolen from tribal lands in Arizona. Many are more than a century old. The auction house has said that a French collector obtained them legally decades ago”).

67. BBC NEWS, supra note 70. According to the BBC, auctioneers “say the masks had been bought and sold in the past and were legally acquired . . . [and] blocking the sale would have implications for the trade of indigenous art and could potentially force French museums to hand back collections they have bought.” Id.
sacred value is hard to ascertain without context. Whether the value derives from the objects representational properties or from its role in religious practice, there is no real way to place a value, or even clearly explain these values to an outsider.

The court should have focused on the effect that import and export law has in the sale of such objects. In the United States, regardless of whether the importation was legal or not, the law looks specifically to the law of the claimant country, which means that where there is any doubt the claimants are likely to recover their objects. The United States' emphasis on returning objects is incredibly important to look at when it comes to sacred object, simply because it allows a fuller context to be given, and this expands the law's capacity for return of objects which may contain a questionable provenance.

When sacred objects are sold, they are not always treated as sacred. The sacred qualification is secondary to the fact that the objects are tangible with quantifiable properties. But sacred objects also have intangible properties which may not be self-evident within the physical object itself. Such was the case with the Hopi masks – they were sacred objects, representative of a deeply private and important religious practice. Yet, to an outsider they are merely masks, which have an aesthetic value and are part of an historical tradition which may or may not still be in practice.

To value sacred objects solely on aesthetic and cultural grounds is misplaced and leads to appropriate the objects within culture where it may not belong. Who deems aspects of culture as significant is a question with no easy answer – archeologists, anthropologists and art historians all deal with the aesthetic and historical aspects of this question. But the law steps in where there is quantifiable value; however, it is nearly impossible to place a value on what is not related to material qualities, but rather to sacred importance. The value of sacred objects is situated in the meaning that they have within their culture and religion. In situations where sacred objects belong to a tribe or a religious group as a whole can add yet more nuances to valuating such objects.

68. Brown, supra note 8, at 48-49.
The real issue, it seems, is not whether or not these objects even have value – but rather, how people who are not included in the sacred traditions should treat such objects. This is not to say that the objects should be kept away from outsiders; instead there needs to be a system in place which respects the way such objects are treated outside their sacred spaces and systems.

D. Implications of Survival International

The main impact that Survival International will likely have on cases involving the sale of sacred object is that it opens up the interpretations of cultural heritage in international courts and minimizes the importance of the “sacred” qualification of a sacred object. The case seems to have created a loophole where objects of indigenous religion are concerned and may allow courts to take a more liberal view of such objects. The irony here is that the purpose of cultural heritage laws is to prevent this sort of behavior by courts.

One of the issues that needs to be addressed in the wake of Survival International is the definition of sacred objects under the law. The French courts chose to address the issue before them by looking at the aesthetic aspects of the Katsinam’s and to address them as art objects which had were ascribed sacred properties. Culture is protected under law; religion is an aspect of culture which needs to be specifically addressed going forward. In the United States there have been steps in this direction under NAGPRA, with its specific protections of sacred objects.

A second issue to address specifically by courts is what exactly the term “sacred” implies. In an email with the attorney from Survival International, Pierre Servan-Schriber stated that he believed that there were three aspects to sacred objects that the court needed to acknowledge in order to warrant protection for such objects: (1) that the object must be considered sacred by the claimant nation, (2) that the nation be alive today, and (3) that the items considered sacred are not found for purchase or sale
anywhere. This seems like a simple set of rules for courts to adopt in the future. However, it may prove problematic where cultures have evolved or are widespread so that what is a sacred object in one part of the world is not seen in the same way by practitioners of the same religion in another.

One of the major, non-legal, issues that the case raised was its implications for the private purchaser of cultural objects. The private purchaser is motivated in significantly different ways from museums and the scientific community. The education of the private buyer is one aspect which may affect future sales; if this sale caused such an uproar, it may cause hesitation to purchase, or even sell in the future. An interesting outcome of the ruling and the fervor it stirred was that at least one of the buyers from the infamous auction in April have come forward and returned the masks to the Hopi tribe. The attorney who represented the tribe at trial purchased one of the masks at the auction as well, and returned it to the tribe. Perhaps these actions will speak louder to similar cases in the future and allow the courts to reevaluate their approach to sacred objects.

IV. CONCLUSION

There is no clear way to protect the sacred when there is no clear definition of what the sacred is, legally speaking. Unfortunately, it will likely take some time before the law can uniformly address the issue of sacred objects. The courts have found consistency in treating objects by their physical, material presence, and to look for value that is less than tangible presents problems that cannot be addressed in a single case. Part of the problem with trying to

69. E-mail from Pierre Servan-Schrieber, Managing Partner at Skadden, Arps, Slate, Meagher & Flom, to author (Oct. 3, 2013, 01:16 CST) (on file with author).
define sacred objects in a legal context is that cases such as Survival International are few and far apart. Furthermore, the case was decided in a matter of days, with no time to really persuade the court of the importance of the “sacred” qualifier of such objects. In the end, it is really that sacred objects need to be given a proper legal definition to be able to truly bridge the gap between the sacred world and the material one.

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