

**Paper based on presentation for “These Stones Are Mine”
“Raising the Bar: Searching for an Ethical Morality”**

June 6, 2006

Background:

The 1990 Native American Graves Protection and Repatriation Act (NAGPRA), a human rights law, passed as a result of more than a dozen years of lobbying by American Indian lawyers, activists, and advocates. NAGPRA requires federally funded institutions (museums, libraries, historical societies, and the like) to inventory their collections of Native American art and artifact, to apprise tribes of the human remains, grave goods, cultural patrimony, and ceremonial materials that they hold, and to consent to on-site examinations of those collections by native representatives. There is no statute of limitations. Claims must be listed in the Federal Register for a specified period of time and requests for returns must be made.

From history’s and the American Indian’s point of view, these items are evidence of the conquest by European invaders of the western hemisphere. They are spoils of war, or sales made under duress, and proof of the cultural and physical genocide of American Indians.

The American Indian Ritual Object Repatriation Foundation (AIRORF) was founded in 1992 as a conduit and facilitator of returns from the private sector. I direct you to our website, www.repatriationfoundation.org, for lists of essential reading and *Mending the Circle: A Native American Repatriation Guide* for information about NAGPRA and the Smithsonian Institution repatriation policies.

Today’s Panel:

“These Stones Are Mine” was introduced as a discussion and debate by our esteemed colleague and moderator, Barbara Hoffman, Principal, Hoffman Law Firm and editor of *Art and Cultural Heritage: Law, Policy, and Practice* (Cambridge University Press, 2006).

The discussion is clear; it is about international trade, international and national art legislation, and international and national property law (good faith purchase does not right title make).² But where is the debate? I invite you to follow my thinking to discover

that fodder. I begin with Barbara's suggestion to search for common threads, differences, and effects in the law and in current events.

Legally Driven Common Threads:

The Getty and Metropolitan museums share a common thread, involved, as they are, with international law and restitution negotiations. Each museum has reached accords to return art in their possession allegedly procured through a chain of illegal acts, as argued by the Italian government.³

Differences:

Interest in provenance came from academia, as it added to an object's intrinsic value. Today, provenance drives market prices—a clear title increases an object's value, an unclear title diminishes it; exhibition and/or publication of a work increase its value, and so forth.

Effects:

NAGPRA and the increasing number of descendant's claims on Nazi-looted art necessitates inventory and provenance reviews by museums and new de-accessioning policies. The restitution [in 2006] to Holland and Austria of spoils of war stolen by the Nazis are examples of legally driven accomplishments, as is the impact of the 1970 bilateral treaty, the Cultural Property Implementation Act (Article 9), which outlaws the exportation of indigenous cultural patrimony. The United States, not a signatory of this international law, is the only civilized nation that permits the exportation of its indigenous cultural patrimony. This spotlights our continuing cultural genocide of the American Indian people.

There is no debate about the efficacy of international laws or that their roots are grounded in human rights issues. Laws are clear: National and international transport or sale of stolen property is illegal and punishable, and for some institutions, ownership of specific American Indian material culture is prohibited under the Native American Graves Protection and Repatriation Act.⁴

Searching for the Debate:

It is the role of lawyers to review laws or file briefs during the prosecution of misanthropes.

It is the role of historians to review events and, with philosophers and ethicists, to discuss morals and ethics and argue for standards within the rubrics of relativism and consequentialism. Ethicists must be diligent not to be swayed by judgment—societal, moral, or otherwise. It is these foci that move us into the debate.

About Morality:

Moral behavior is to know the difference between right and wrong and to care about it. (In more common parlance, moral behavior is “doing the right thing.”)

Morality or moral behavior requires thinking; thinking requires information; having information requires selecting relevant facts and posits; and contextualizing information into moral standards requires the rigor of the elimination of bias.

The elimination of bias (or agenda) is essential if one is to arrive at a place of morality.

About Ethics:

Ethical standards and moral standards, to paraphrase the Wizard of Oz, are horses of a different color.

An ethical standard is 1) what we decide to be ethical and 2) our justification of it. It is, therefore, possible to act on an unconventional ethical belief and live according to it, despite having commonly held moral standards.

The following two historic examples show ethical standards that fly in the face of commonly held moral standards:

Ferdinand and Isabella, fighting back the Moors, suffered disastrous losses in Italy and Constantinople. Having invested money in armament build-up, they gave what was the equivalent, at that time, of \$7,000 to Columbus to sail westward in search of new wealth. And indeed he did bring more than they ever imagined.⁵ A Papal Bull gave Columbus, and subsequent conquistadors and explorers, the right, under religious law, to seize lands inhabited by heathens (non-Christians), who were converted under pain of torture, execution, or slavery.⁶ The Papal ethical standard was to rid the world of heathens and expand the Christian faith, regardless of a common understanding of morality.

In the same way, Nazi Germany’s wholesale torture and extermination of Jewish people turned Europe into a systematized slaughterhouse. The Nazis also seized from the

vanquished more than 16 million works of the world's greatest art ever produced. Aryan supremacy was the Nazi's ethical standard under which all this was justified.

Today we witness actions motivated by faith and greed that have changed our country's ethical standards. One decade ago, certain actions and events would have been reviled as morally unacceptable or illegal. Search, seizure, and suspension of habeas corpus are a few examples of a new status quo—each ethically justified.

Ethical Justification:

Ethical justification requires an action to be beyond self-interest. Conquistadors and Nazis, for example, embraced ethical standards for the self-proclaimed greater good (i.e., the saving of souls, the global victory of the Aryan race). The genocide of 20 million Indigenous Peoples in the Western hemisphere and the extermination of 6 million Jewish people was ethically justifiable because acting as such was within an accepted ethical standard.

Moral behavior, by definition, is rigorous and unrelenting; ethical behavior is subjective and malleable. The highest goal is behavior that is both morally and ethically sound. Therein lies the debate.

Resolved:

It is morally and ethically unsound for museums, dealers, or auctions houses, to own, buy, sell, or exhibit objects improperly or illegally obtained at whatever point in time.⁷

Responding arguments often come from within the framework of ethical justification.

For example, there is one anti-NAGPRA argument espousing the preservation of certain art or artifact as global patrimony. This disingenuous and sentimental point of view is ignorant of the worldviews and human rights of living American Indian cultures. And museums espousing the high road with accords reached for the restitution of objects, to Italy, for example, smacks as equally disingenuous. Where are their institutional policies regarding objects of illicit provenance?

I respond to these arguments with the contention that every person has the inherent right to items belonging to his or her forbearers, and each nation a moral right to

possession of its cultural patrimony. We have inherited a centuries-old ethic where victors enjoin the spoils of wars—to have or to destroy.

In Summation:

Changing ethical standards and new laws require a governments' commitment and an institutions' participation in halting the transfer of objects with questionable provenance. An active citizenry that demands right action of nefarious transfers could save art from the commercial world of commodity. I submit that the achievement of a global code of ethics—where an informed, responsible, and moral public shuns the adage “might over right”—is the road towards a civil society.

1. This paper is based on my panelist presentation for “These Stones Are Mine: Understanding the Current Art and Cultural Property Debate and Its Impact on the Art World,” a discussion at the National Museum of the American Indian in New York, NY on June 6, 2006. Moderator: Barbara Hoffman. Co-panelists: Sharon Cott, General Counsel of The Metropolitan Museum of Art, and Rena Neville, Senior Vice President and Director, Compliance, Sotheby's Holdings, Inc.
2. Also, see Richard Perez-Pena, “Guggenheim Presses Case on Ownership of a Stolen Painting,” *The New York Times*, The Metro Section, December 27, 1993, p. B1.
3. That said, historically it was the status quo for museums to acquire spoils of war and art and artifact from source nations. The sale of looted cultural patrimony was common before the passage of laws prohibiting international exportation of stolen property.
4. These laws are morally sound and exist as a result of changing ethical standards.
5. Gold, tin, and silver filled Monarchy and Vatican coffers and, ultimately, the World Bank.

6. Newcomb, Steven T. “The Evidence of Christian Nationalism in Federal Indian Law: The Doctrine of Discovery, Johnson v. McIntosh, and Plenary Power.” *New York University, Review of Law and Social Change*, Volume XX, Number 2, 1993.

7. The current art market is replete with art looted from the debacle in the Middle East. The theft, transfer, sale, and exhibition of masterpieces that have emerged illegally from the Middle East is finally under *ethical* scrutiny—the magnitude, a 4 billion dollar underground marketplace of stolen objects from Afghanistan and Iraq, has been described as the new currency of an illicit global economy, according to the *Smithsonian Magazine*.