

**SACRED PROPERTY: SEARCHING FOR
VALUE IN THE 9/11 RUBBLE**

Mateo Taussig-Rubbo

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Introduction

While the divisions between those broad organizing categories that structure much of everyday experience and action—such as public and private, sacred and secular, economic and political—are always subject to a degree of contestation, some events seem to confound these divisions in a more profound way. The attacks of September 11, 2001 generated numerous efforts to reconceptualize some of the broad organizing categories of U.S. policy and law, such as foreign and domestic, or national security and criminal law. This essay explores one part of that story: the way in which property was overwhelmed by what many individuals called the “sacred.” This new designation was applied both to real property (land) and souvenirs of the attacks. Some of the objects in question were unremarkable and sometimes actual rubble, but for those who possessed them they seemed to have transcended such banal categorizations.

Rather than focusing on the destruction of property and human life itself, my concern is with the form of value created through destruction. I ask who lays claim to that value, to what purposes it is directed, and how it attaches to material objects and land. In addition, I am interested in how this value interacts with property law, whether it overwhelms the usual property allocations, or whether it can be subordinated to them. As I briefly discuss, I see this essay as engaged in a cultural study of law and as moving between problematics generated by notions of political theology, material culture studies, law and religion and theorizations of the event.

In Part I, “Sacralization,” describes how what had been ordinary objects and real property, once destroyed and damaged, were perceived as sacred. What had been commercial real estate owned by the Port Authority of New York and New Jersey and leased by Larry Silverstein was, in the disturbing phrase of some New York City officials, “vaporized.” But the space where the buildings stood was claimed by numerous actors, including the Mayor of New York and the family members of victims. Analogies to conscription or eminent domain are suggestive if we focus on the de-privatization of an interest—my property

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or body, for example, being “taken” (in the language of the Constitution) for a public purpose. But the analogy breaks down in that the taking is not by the state, indeed, it is in some sense by the 9/11 attackers, and the new value is not exclusively for the state, as family members and the owners of property where the attacks happened also lay claim to this new value. Indeed, just who would take possession of the interest seems profoundly open-ended. More precisely, the sacred in these examples often refers to an interest (life, property) which cannot be transferred and yet which is irretrievably lost. Extrapolating from these examples, I discuss how under conditions where the usual allocations of the property regime are inadequate, where there is nothing and yet something, the sacred emerges.

In order to explore these themes in detail, Part II “The impossibility of owning the sacred,” considers the case of Federal Bureau of Investigation agents caught taking souvenirs from the attacks, as documented in a report produced by Office of the Inspector General (OIG) in the Department of Justice. Many such items had already been launched on far-flung journeys: 350 pounds of Ground Zero rubble was sent to U.S. soldiers in Afghanistan; Secretary of Defense Donald Rumsfeld had a metal shard from the plane flown into the Pentagon on his desk; and high-ranking FBI officials had asked local agents to secure debris for dignitaries. For some field agents, the souvenirs marked both the sacredness of the site and their privileged relationship with it. The OIG uncovered an informal policy allowing agents to take pieces of building façade and “tourist trash” such as refrigerator magnets from the Fresh Kills landfill in Staten Island where much of the 9/11 debris was deposited. A scandalized public, made aware of this souvenir-taking, regarded it as closer to a profaning act of theft and even grave desecration since the remains of many 9/11 victims had not been recovered and were, therefore, assumed to be intermingled with the debris. Agents urged, and the OIG agreed, that they had not violated policy in taking 9/11 rubble since the material was of “no value.” And yet the public response to revelations of souvenir keeping, not to mention the deployment of Ground Zero to mythically authorize the war on terror, suggest that what had been a normal piece of commercial real estate was becoming valuable, a form of what we might think of as sacred national property.

Part III, “Unconsecrated ground,” looks at the efforts of family members of some of the 9/11 the victims to lay claim to some of the rubble at the Fresh Kills landfill and to remove the remains from what is in effect a garbage dump—“unconsecrated ground” is term that they use. In court, they have asserted a federal and state law property interest and a First Amendment free exercise interest in the disposition of the remains of their relatives. Here a common law quasi-property interest in the dead body, rather than the “sacred” as such, is asserted. If we say that property was first transcended by sacralization, here a quasi-property claim is employed to challenge the decision to leave human remains commingled with ordinary household garbage. To date, these claims have failed.

While most of my examples are about a desire to possess objects and remains from the attacks, there is one significant exception: remains of 13 of the 19 hijackers have been identified, but these remain unclaimed at an FBI evidence repository.¹ How are we to think of these, as abandoned property, as mere evidence, as the real site of the sacred since they are one category of objects that no one knows how to treat?

Parts II and III thus address two controversies emanating from the Fresh Kills landfill: one concerning the improper taking of objects by FBI agents; the other concerning an allegation of the violation of a property interest in the human remains in the debris.

Part IV, “Appraising the sacred,” leaves this jurisprudence of garbage to look at the rural site in Pennsylvania where Flight 93 crashed on 9/11. Here there is also a claim of “sacred ground,” and an impossibility of recovering substantial human remains. Bodies and property are commingled. Unlike the other cases, however, this instance explicitly concerns the effect of this new sacred value upon the market value of real property. It also presents a scenario more familiar to scholars of religion in which the sacred exists in a determined central sacred space, as contrasted with the diffusion of the sacred in the prior examples. The owner of the land in Pennsylvania, possibly due to the assistance of the property “stigma” appraiser it has hired, appears to have determined that the land, *post* attack, is now worth fifty million dollars, about one hundred times its *ex ante* value. To date (April 2009) the site has not been secured for the National Parks Service memorial planned at the crash site. It seems that as a matter of takings law, that the owner should be compensated for that portion of the increase in value which emanates from the attack, but not for the increase which comes from the government’s decision to establish a permanent memorial of the site. This payment for the gain in market value seems like an unearned windfall, manna from heaven, a gain symmetrical to and generated by the loss suffered by the victims of the attack.

Having sketched the emergence and distribution of this sacred value, I briefly ask if there is anything to be said about *how* it is generated, beyond the obvious role of violent destruction. There is one well-known term that purports to be about the making of the sacred—sacrifice. Part V asks whether this concept is illuminating and applicable.²

¹Sean Hamill, *7 Years Later, 9/11 Hijackers’ Remains Are in Limbo*, N.Y. TIMES, Sept. 21, 2008.

²I engage at greater length with ideas of sacrifice in Mateo Taussig-Rubbo, *Outsourcing Sacrifice: the Labor of Private Military Contractors*, YALE JOURNAL OF LAW & THE HUMANITIES, vol. 21, No. 1: 103-169 (2009) (emphasizing importance of the private military contractor’s status as unsacrificeable to the emergence of the contractor industry in recent years in the United States, while noting difficulties encountered in maintaining that status in light of the killing of contractors and claims to sacrifice by contractors); and in Mateo Taussig-Rubbo, *Sacrifice and Sovereignty*, in J. Culbert and A. Sarat, eds., STATES OF VIOLENCE: WAR, CAPITAL PUNISHMENT, AND LETTING DIE, 83-126 (2009) (describing role of sacrifice in generating governmental accountability, and looking at

Implicitly, I attempt to apply three narratives to these cases. One is a three-stage movement: sacralization of the profane or disenchanting everyday through destruction; attempts to harness and participate in that value; and then a return of normal categories as the sacred dissipates and is reintegrated into the legal system. This conceptualization seems to echo a number of easily recognizable structures. It affirms a boundary between an immanent world and another domain, supposes that the world must be made meaningful, and draws our eye to moments when the boundary is breached.

A second narrative is to deny the existence of another domain of sacred value. This is to affirm that we live only in an immanent world in which the destruction of property and life is mere negation—and the entire exercise of charting the emergence of the sacred is an exercise in charting an absurdity. Here it is not just that we inhabit a Fallen world, but that there is no other place we might even seek to connect to another domain. This version might be easily associated with various versions of the rise of political modernity, after which moderns inhabit a world where the sacred is not only not ordinarily visible and not part of the everyday (as in the version above), but stakes out a stronger claim that there simply is no sacred “other” space and there are no non-human actors. Applying this version to the stories I describe, we might see them as signs of error and fetishism. For the actors I describe, of course, this would not seem sufficient: they insist that the act of negation is also generative and they would find it offensive to be told that they are summoning absurdities. For our purposes the danger of this second perspective is that it might allow us to not engage with the way in which this other form of value in practice served to energize and change the policy of the United States.

A third narrative arc supposes that the everyday world is sacralized and thus it contrasts with both of the others in that the sacred is not denied (as in the second, above) nor are the boundaries between sacred and property so sharp (as in the first). This third perspective recognizes that human life and property—either real property or one’s interest in one’s own life and body—are themselves regularly called “sacred.” Thus instead of a shift from profane to sacred we might see a redistribution of the sacred. Or in a more nuanced conception, we might say that these official points of the sacred—life, property—are ordinarily somewhat muted and latent. Hence the first narrative of sacralization through destruction could be reframed less as a move from the profane WTC office tower to the sacred ruin, than as a transition in the location of the sacred and its visibility. We could envision the explosion of a latent sacred through 9/11 as the already present sacred value inherent in bodies and real estate is distributed in a fine film over all that remains. Likewise, if the first narrative claims that there is a dissipation of the sacred and the reemergence of a normal property regime, we must not lose track of the

various case studies including hunger strikes and suicides by detainees in Guantánamo Bay, Cuba).

way that Ground Zero remains a sacred site for many people, even if it must now bear some of the burden of the wars for which it was mobilized, as its sacrality is institutionalized and formalized as a memorial site. This formalized or official “sacred” is, I think, more contained and regulated than the “sacred” I describe as present in wake of the attacks, where it seems to be at large and available to a range of actors.³ In its current life (in 2009) the sacrality produced by 9/11 does not generate the same amount of entrepreneurial effort, by politicians or others, to summon and harness the sacred to new ends. We might say that the sacred is like a volatile combustible material, one with a short half-life, and that it has now dispersed or has been reintegrated into the property regime or the memorial regime. It is interesting to ask, under this latter account, whether it occupies the same position as the sacred we see in the so-called religious domain, where it typically lies at rest and does not threaten (or promise) to challenge the larger categorical order of the society.

Before proceeding further, there are three additional points of orientation regarding my use of the terms “sacred,” “value” and “event.” The “sacred” moves through this essay in various guises. It is a word that some of the characters in the drama of 9/11 employ. Their usages can sometimes be linked in illuminating ways to various academic treatments of the word. Indeed, many of the now routine definitions from sociological classics seem to dovetail with the actors’ usages: for example, both Emile Durkheim and some of the FBI agents describe the sacred as that which is (in the words of the latter) “set apart and forbidden.”⁴ At other times the lack of fit draws attention to an important point. For instance, the ancient Roman idea of *sacer* as property which belongs to the gods seems resonant,⁵ although in my cases, it is the uncertainty around just who “owns” the sacred which is at issue. Even the so-called “ambivalence of the sacred,” seems helpful to keep in mind, as pieces of garbage and debris from a landfill are described as having “no value” and yet are turned into objects of veneration.⁶

³For a discussion of memorials as containing the sacred, see Paul W. Kahn, *Managing Violence: Acoustic Separation, Memorials and Scapegoats*, available at <http://www.law.yale.edu/intellectuallife/selanews.htm> and PAUL W. KAHN, SACRED VIOLENCE: TORTURE, TERROR, AND SOVEREIGNTY (2008).

⁴EMILE DURKHEIM, THE ELEMENTARY FORMS OF THE RELIGIOUS LIFE, 44 (1995) [1915] Trans. Karen E. Fields.

⁵TALAL ASAD, FORMATIONS OF THE SECULAR: CHRISTIANITY, ISLAM, MODERNITY 30 (2003) citing W.W. Fowler, “The Original Meaning of the Word *Sacer*,” in ROMAN ESSAYS AND INTERPRETATIONS 15 (1920). Asad writes of the *sacer* in the Roman Republic as “anything that was owned by a deity, having been ‘taken out of the region of the *profanum*’ by the action of the State, and passed on into that of the *sacrum*.”

⁶Giorgio Agamben has a rich discussion of the emergence of the “ambivalence of the sacred” in anthropological and psychoanalytic thought and he rightly, I think, criticizes its deployment as an explanatory device. But it is important to note that he does not disavow it as a description of the sacred: indeed, as I read him, the ambivalence is embedded in his notion of *homo sacer* as the subject of popular sovereignty and the object of state sovereignty. Pointing to the “ambivalence” of *homo sacer* does not seem to me much of an advance, although bringing sovereignty into conversation with the

I also seek to make use of the concept not only as an object of analysis, but also as a vehicle for thinking about conceptualizations of popular and governmental sovereignty in the United States. I find myself wanting to distinguish between two sacreds, one which is officially recognized and thereby contained and disempowered, and one which seems genuinely a site of power and uncontained potential, one that seems linked to sovereign power in an ability to disrupt, create and recreate a social world. I do think it is necessary to be wary of generalizations about “the sacred.” Talal Asad, in this vein, suggests that the “essentialization of ‘the sacred’ as an external, transcendent power” emerges from European encounters with non-Europeans, “in the enlightened space and time that witnessed the construction of ‘religion’ and ‘nature’ as universal categories.” Asad envisages a two-step movement: the beliefs and practices of non-Europeans were subject to “profanization,” the demonstration of their superstitious quality in light of reason and secular universal rights to property and conscience. And at the “very moment of becoming secular, these claims [about property, rights and conscience] were transcendentalized, and they set in motion legal and moral disciplines to protect themselves (with violence where necessary) as universal.”⁷ In the case of France, Asad describes that the secular becomes “salient at the time of the Revolution and acquires intimidating resonances of secular power,” in the declarations of natural, inalienable and sacred rights.⁸ “It was now,” Asad writes, “part of the discourse integral to the functions and aspirations of the modern secular state, in which the sacralization of individual citizen and collective people expresses a form of naturalized power.”⁹ Such histories and locations of the sacred illuminate conditions under which the sacred as the transcendent becomes compelling—and Asad’s description captures well some of the dimensions of the sacred I discern in the U.S. Yet I wish to resist the inference that a showing of historical particularity disables a deployment of the sacred as a tool of analysis or a generative category of social theorizing, even if it does undercut the universalism of writers such as Durkheim. Here I offer a description of “the sacred” as it emerged in relation to a particular event, attempt to locate the power it generated, and describe the way it restructured pre-existing allocations of property, value and authority.

Second, how are we to understand the “value” assigned to the objects I describe? Of course, value is hardly a less difficult term than the sacred.¹⁰ Value is employed here as a connecting term, one that refers to

sacred seems useful. GIORGIO AGAMBEN, *HOMO SACER: SOVEREIGN POWER AND BARE LIFE* (Trans. Daniel Heller-Roazen) (1998) 75-80.

⁷ASAD, *FORMATIONS*, 36.

⁸*Id.*, 32.

⁹*Id.*

¹⁰*Compare* DAVID GRAEBER, *TOWARD AN ANTHROPOLOGICAL THEORY OF VALUE: THE FALSE COIN OF OUR DREAMS* 33 (2001); and Arjun Appadurai, *Introduction: Commodities and the Politics of Value* 11-12 in ARJUN APPADURAI, ed., *THE SOCIAL LIFE OF THINGS: COMMODITIES IN CULTURAL PERSPECTIVE* (1986). Appadurai’s justly famous

the different domains/spheres/regimes that I describe, whether it be the sacred or market sphere. It is important to underline that the assertion that these different spheres are linked is more an ethnographic observation than theoretical position. What I am interested in is whether we can say anything specific about how they are linked and what the rate of exchange, if you will, between them might be. We can view the sacred as a form of value, perhaps a very extreme value, one that is at once greater than (or less than) other values. For example, if we talk of the sacred value of human life, we might mean that life is something that should not be exchanged for some other value. We have all kinds of “inalienable” values in this sense—life freedom, rights, sovereignty—and just which is actually the highest value seems quite contextual and contingent on action at given moment of decision. We can also think of value as exchange value, as, for instance, the monetary price that someone would pay in exchange for an interest in an object. Indeed, this is a classic dichotomy—which brings with it with Christian *contra* Jew overtones—resting on the divide between these two interdependent and complimentary senses of value as that which is inalienable and that which circulates. These are thematics that have been taken up in anthropological studies of value, material culture studies and “thing theory,” discussions that I see myself as participating in obliquely.¹¹ I am interested in how these transformations between domains of value are effected, and one way to think about that is

essay includes a host of methodological suggestions that can be seen at work in this essay, although I would not follow what seems to me to be his subjective Simmel-inspired theory of value. I do not explicitly undertake a discussion of Lockean or Marxian labor theory of value, Saussurian linguistic value, or the economist’s subjective notion of value, although I do suppose, as point of departure which I do not defend here, that the best way to explore value in its various meanings—ideas of relative worth or importance; what people desire or want or need; the cost or price of something; what can and cannot be traded—is neither as derivative of inherent or natural criteria, nor as expressions of individual desire or fancy. Rather, I suppose that one should look at cultural and social forms that are generated historically, by human action, that operate through institutions such as markets and states, that provide a contingent and changing structure of values. Having said that, I do think it is important to interrogate under what conditions we can envision (if and when we do) the material world as inherently valueless and divorced from the meaning-making “culture” which must breath significance into the world. *See also* Keith Hart, *Heads of Tails? Two Sides of the Coin*, MAN, vol. 21, no. 4: 637-656, 645-6 (Dec. 1986). Writing about money, Hart insists that we looks at value as entailing both the operations of actors in markets and as an expression of political authority. Hart counterpoises statist conceptions of the value of money as purely the expression of the will of the sovereign—fiat money—with a commodity theory of money.

¹¹*See*, for e.g. FRED R. MYERS, ed., *THE EMPIRE OF THINGS: REGIMES OF VALUE AND MATERIAL CULTURE* (2001); Claudio Lomnitz describes a dynamic similar to what attempt to capture in this essay: “because the idea of sovereignty is transcendent, its material embodiment in the form of inalienable possessions of the national community cannot always be successfully appropriated or harnessed by the state, and those possessions might be taken up in popular movements against the state.” Claudio Lomnitz, *Elusive Property: the Personification of Mexican National Sovereignty* in MYERS, ed., *id.* Bill Brown, *Thing Theory*, CRITICAL INQUIRY, v. 28, no. 1: 1-22, 5 (Autumn 2001).

through a specific kind of destruction, what I explore as a sacrifice, a form of action commonly connected to transfers between different kinds of value.

Third, I wish to consider the role of the event in changing which domain of value applies to objects or bodies, and the role of the event in creating or revealing sacred value. Implicitly, I ask about the ways that some events appear to restructure a categorical order. I am interested in what anthropologist Marshall Sahlins, in his analysis of the reception of Captain James Cook by the Hawaiian Kingdom in the late 1700s, calls the “structure of the conjuncture”: the way in which a regime of thought and practice (and valuation) apprehends happenings, transforms them into events, and may itself be transformed in the process.¹² This Hawaiian scenario is the template I have in mind (although not so literally that I demand to know whether Cook is played by President Bush or Bin Laden or both) as a point of comparison for thinking about the U.S. reception of 9/11: an event that is perceived as exterior and is indigenized, and which serves to create new possibilities and alignments in the pre-existing structure. One immediately apparent difference is that the Hawaiians in Sahlins’ account elaborated Cook’s fit with pre-existing categories, while the U.S. seems to have emphasized just how exotic and novel the whole unfolding event was.

I. Sacralization

Before the 9/11 attacks, the World Trade Center and the Pentagon were not just everyday examples of real property. They participated in what Terry Smith calls the “iconomy”¹³ as instantiations of U.S. post-war importance and dominance. As such, their destruction could be seen as part of an old technique of destroying the icons of one’s adversary. Although billed as a center for world trade, the WTC was the outcome of a decidedly statist form of capitalism. For most of its existence it was

¹² MARSHALL SAHLINS, *ISLANDS OF HISTORY* (1985).

¹³ TERRY SMITH, *THE ARCHITECTURE OF AFTERMATH* 15 (2006). There is a wealth of writing on the themes I discuss here as well as on many of the specific examples. See TABOR LINENTHAL, *SACRED GROUND: AMERICANS AND THEIR BATTLEFIELDS: LEXINGTON AND CONCORD, THE ALAMO, GETTYSBURG, THE LITTLE BIGHORN, PEARL HARBOR* (1993). For a more comprehensive discussion of the disposition of rubble from 9/11 than I provide here (which unfortunately I encountered after writing this essay) see MARITA STRUKEN, *TOURISTS OF HISTORY: MEMORY, KITSCH, AND CONSUMERISM FROM OKLAHOMA CITY TO GROUND ZERO* (2007). See also Mary L. Clark’s two articles. Mary L. Clark, *Treading on Hallowed Ground: Implications for Property Law and Critical Theory of Land Associated with Human Death and Burial*, 94 KENTUCKY L.J. 487, 531 (2005-06) (employing Margaret Radin’s work on personhood and property to discuss “decommodification” of WTC site footprints); and Mary L. Clark, *Keep Your Hands Off My (Dead) Body: A Critique of the Ways in Which the State Disrupts the Personhood Interests of the Deceased and His or Her Kin in Disposing of the Dead and Assigning Identity in Death*, 58 RUTGERS L. REV. 45 (Fall 2005).

heavily reliant on its public sector tenants and public subsidies. Before the Port Authority took the site for the WTC through eminent domain, the area had been a bustling retail area with shopkeepers of mostly Middle Eastern descent selling electronics.¹⁴ The WTC was probably not, for most Americans or New Yorkers, a national or sacred site in the American pantheon. Yet through its destruction and collapse, it was elevated and became not only a site where terrible things had happened, but a place where some weighty but usually ethereal categories—America, the United States—became visible in a profound way, a place where individuals had died for or been killed in the name of the United States. If desecration is the destruction of the sacred object, in this instance the act of destruction constituted what many people called the sacred.¹⁵ I am interested in destruction, here by a self-professed enemy, that eliminates one form of value but creates another.¹⁶

At the WTC site, the rubble from 9/11 existed at the border between numerous regimes of property and valuation. Was it still the property of the Port Authority, which authorized a group of architects and curators to organize what would be an “invaluable” collection of prime “artifacts”?¹⁷ Or was it a gravesite or “sacred burial ground” holding their entombed “brothers,” as firefighters said as they clashed with police restricting their access to the site? Was it, which must have come as a shock to leaseholder Larry Silverstein, the familial property of those who had died in the attacks? Through the fusing of different forms of material—the human tissue of office workers and firemen, steel I-beams, office files—and the different regimes of disposal that governed each—dignified burial, recycling, and search for proprietary information—the collapse of the towers also brought the different property regimes into collision.

It was not only a collision of different rules of property. There was also a political or sovereign element introduced, as these ordinary objects

¹⁴ SMITH, ARCHITECTURE, *id.*

¹⁵ Lior Strahilevitz, in his article *The Right to Destroy*, takes up the issue of when ownership does not include the right to destroy (as with restrictions in some jurisdictions on an owner’s right to destroy an artwork), and when destruction is typically mandated (for example, the waste of our internal organs upon death). Strahilevitz describes destruction as occurring “when an owner’s acts or omissions eliminate the value of all otherwise valuable future interests in a durable thing.” Lior Strahilevitz, *The Right to Destroy*, 114 Yale L.J. 781 (2005). I wish to focus on destruction (here by a third party, an enemy, not the owner) that at the same moment creates another form of value.

¹⁶For an argument on the central role of negation in creating the sacred in a “disenchanted” society, see MICHAEL TAUSSIG, *DEFACEMENT: PUBLIC SECRECY AND THE LABOR OF THE NEGATIVE* 13 (1999) (“The disenchantment of the world still seems to me a largely accomplished fact. What exists now is perhaps best thought of as a new amalgam of enchantment and disenchantment, the sacred existing in muted but powerful forms, especially—and this is my central preoccupation—in its negative form as desecration.” I would suggest that there remain in U.S. political culture official sites of the sacred—(American) life, the Constitution and other manifestations of the popular sovereign— even in the absence of “desecration”).

¹⁷Eric Lipton and James Glanz, *Relics: From the Rubble, Artifacts of Anguish*, Jan. 27, 2002 N. Y. TIMES.

and bodies had absorbed a blow addressed to the U.S. From within the horizon of the property regime, there may be something surprising in the notion that the destruction of commercial property and civilians could be an act addressed to the sovereign, to the U.S. However naïve or absurd the question may seem, we should not fail to ask just why it was that the attack could not have been received as addressed to the Port Authority, or to Larry Silverstein, or to the top-floor restaurant, Windows on the World. One answer lies not only in the announced intentions of the attackers, but also in the way that the sovereign, the U.S. is positioned in relation to the property regime. In *Johnson v. M'Intosh*,¹⁸ Chief Justice Marshall provided an early lesson in the way in which title flows from the sovereign, and how it could not be generated from the transactions between individuals and Indian nations. If the regime of private property causes the sovereign to recede into the background, behind a world of law, the 9/11 attacks, violating the sovereign's control over space and violence, reconjured it. At this foundational level, like John Locke's God who retains an interest in his creations,¹⁹ the U.S. retains an interest in private property.²⁰ In some legal guises, this is well known: property can be taken (with just compensation) under eminent domain, as was the case with the WTC construction in the 1970s. The U.S. can take the citizen's body through conscription without compensation (although one way to think of the tradition of calling deaths for the nation "sacrifices" is as another form of compensation).²¹ These have some resonance with what happened on 9/11, as there is a nationalization of property and bodies. And yet it is a nationalization that stems indirectly from the action of the government and is thus a more complex transactional form, involving action by a self-professed enemy who "gives" these objects and persons back to the U.S. through an action that "takes" them.

In the days after 9/11, then-President Bush made his way to Ground Zero, descended into the debris and wrapped his arm around a worker. "I can hear you," he declared to the national media through a megaphone, "the rest of the world can hear you, and the people who knocked down these buildings will hear from all of us soon."²² The President moved

¹⁸ 21 U.S. (8 Wheat.) 543, 588 (1823).

¹⁹ JOHN LOCKE, *SECOND TREATISE OF GOVERNMENT*, Thomas Peardon, ed., (1952) Chapter II, § 6 ("for men being all the workmanship of one omnipotent, and infinitely wise maker; all the servants of one sovereign master, sent into the world by his order, and about his business; they are his property, whose workmanship they are, made to last during his, not one another's pleasure: and being furnished with like faculties, sharing all in one community of nature, there cannot be supposed any such subordination among us, that may authorize us to destroy one another, as if we were made for one another's uses, as the inferior ranks of creatures are for ours. Every one, as he is bound to preserve himself, and not to quit his station willfully...").

²⁰ PAUL KAHN, *OUT OF EDEN: ADAM AND EVE AND THE PROBLEM OF EVIL* (2007) 72 (the "sovereign not only creates the possibility of property but has an underlying claim on all property, which can always be exercised to save the nation").

²¹ Taussig-Rubbo, "From Sacrifice to Tax," in *Outsourcing Sacrifice*, supra note 2.

²² "President Bush's Remarks to Police, Firemen and Rescue Workers," Sept. 14, 2001.

from the position of outsider, “I can hear you,” to the one speaking for “all of us,” and accepted that the U.S. was involved and would soon speak. This was no longer only an issue of life and property, but something more encompassing.

It is also important to mention several reorganizations of spatial and temporal relations in the days and weeks after 9/11 within which the sacredness I am interested emerged.²³ There was a militarization of space as the country’s air space was closed down—almost all civilian aircraft were grounded. The National Guard moved into Manhattan, and set up perimeters blocking off much of downtown. There was also, in contrast, what we might call a civilianization of spaces in New York City: a rush from the private sphere of homes and offices to public spaces as large groups congregated in parks to mourn and debate, while traffic noise seemed to disappear. Blood donations soared. Those associated with the rescue effort—the male fire fighters in particular—became especially erotic and heroic characters, fêted in bars and clubs throughout the City. Construction workers left their jobs and went to Ground Zero to offer assistance. Lamp-posts, building walls, and park fences were covered with photos of the missing and candles left in their memory. Ordinary spatial relations seemed transformed: the usages were neither public nor private, but something else. In a combination of militarization and civilianization, some civilians, now self-declared patriots, took it upon themselves to attack (and kill) those they associated with the terrorist attackers. On the other hand, Rebecca Solnit quotes one New Yorker: “Nobody went to work and everybody talked to strangers.” To which Solnit responds: “the most succinct description of an anarchic paradise I’ve ever heard.”²⁴ Overall, many of these non-state centered responses underscore that not only had the state failed to prevent the attacks, but that citizens turned to (and to a relatively small extent, on) one another, not the state, in the aftermath. It is in within this setting that ideas of the sacred at first circulated so vibrantly.

In these multiple recalibrations of space and land use, one usage of the “sacred” was to refer to the WTC site or Ground Zero. In the next part of this essay, I delve into a detailed case study of FBI agents taking mementos. For the rest of this section I wish to offer a few examples of the change in value post 9/11.

Calling the WTC site “sacred” could mean that it had been nationalized and should not be for commercial use. One year after 9/11,

²³ This list is based mostly on my first-hand impressions as an eye-witness and as consumer of main-stream media. Of course, there is already a huge published literature on these topics. The very quantity of writing (including now my own) might be thought of as another dimension of the sacredness thematic inasmuch as it suggests a desire to witness and document and assert one’s own participation in this moment. We might be better off if we simply ignored the attack—if we were able to digest it the same way we manage to do with road fatalities—but this seems, for myself at least, quite difficult.

²⁴ Rebecca Solnit, “The Uses of Disaster: Notes on Bad Weather and Good Government,” *Harper’s Magazine*, Oct. 2005, 35.

Rudolf Guliani, then Mayor of New York, linked the sacred to land-use questions:

I am convinced that Ground Zero must first and foremost be a memorial....People a hundred years from now should be able to grasp the enormity of this attack by visiting this sacred ground. Ground Zero is a cemetery. It is the last resting place for loved ones whose bodies were not recovered and whose remains are still within that hallowed ground.²⁵

What made the ground “hallowed”? Was it simply death? Or death in relation to some larger framework, such as an attack of the United States and war? Just who had access to this sacredness and what that meant seemed, like the suddenly changed usage of urban space, quite fluid. U.S. officials did, at first, not seem to have any monopoly on who could lay claim to being able to speak about and make demands in the name of the sacred. This was most noteworthy with respect to the victims’ family members who effectively positioned themselves as authorized speakers empowered to challenge officials.²⁶ Emergency workers established their own vocabulary, emphasizing heroism and sacrifice in contrast to victimhood.

Engaging in talk of the sacred could be a way of staking a claim to property. It was also a way to re-frame acts of theft, as with the case of the now canonical Iwo Jima-like photo from Ground Zero of three firefighters raising a U.S. flag amidst the WTC rubble. The firefighters had liberated the flag from an intact 130-foot private yacht moored nearby, and yet they were never prosecuted let alone challenged. For a good many people, including the New York County prosecutors, the attacks displaced the flag’s status as private property and rendered it—symbol of the nation, after all—a fully public object for which the firefighters made perfectly appropriate use. A website dedicated to documenting the flag’s career recounts that, “[s]till smelling of smoke,” it was launched on a world tour after being signed by Mayor Guliani and Governor Pataki at Yankee Stadium. It was taken to the USS Theodore Roosevelt *en route* to Afghanistan and was then “shared” with other military ships before returning to New York.

After its return Stateside, the owner of the yacht still did not challenge its liberation. Rather, she asked to “borrow” “our flag from the City prior to donating it the Smithsonian” to use for a fund raiser for 9/11 families on the yacht. She had, however, had it appraised at half a million dollars—a thousand fold increase from its \$50 cost. Once in possession of the flag, the yacht owner discovered that it had been switched with a

²⁵ Rudolf Guliani, “Getting it Right at Ground Zero,” TIME MAGAZINE, Sept. 2, 2002 available at www.time.com/time/covers/1101020909/agiuliani.html.

²⁶ Jonathan Simon, *Parrhesiastic Accountability: Investigatory Commissions and Executive Power in an Age of Terror*, 114 YALE L. J. (2005).

“fake,” a fact obvious since the returned flag was not the same size as the original. A lawsuit by the yacht owner, described as intended to recover the flag, not assert ownership of it, has not lead to its recovery.²⁷

It would be inaccurate to see the post-9/11 sacralization as a moment of license, just because the firemen’s theft was not seen as such. This recalibration from private property to the transcendent entailed various norms. For example, the iconic photo has its own web-site, but the image is apparently not for sale. Rather, it will be given without charge to “family members and surviving victims of 9/11.” The flag owner, despite the high monetary value of the appraisal of the flag, said she intended to give it to the Smithsonian. These distinctions—between sale and gift, between the general public and the community of sufferers and victims, between individual profit and communal property—permeate many of the stories of sacred 9/11 objects, even when, by their violation, they serve as the ground for a complaint about mis-use.

As an example of improper use under these norms, an individual who posed as a Red Cross worker and took garments from the Century 21 department store adjacent to the WTC site *was* charged and convicted of burglary.²⁸ This was despite his protest that the objects taken had no value after the attacks. While the flag and other cases I will describe concern the change in the value of objects pre- and post- 9/11, in this instance the court simply pointed to the price tags on the items and concluded that they “had the same or approximately the same market value on September 13 that they had before the events of September 11.”²⁹

The Century 21 burglar had it partially right: something had happened that transformed the value of many ordinary objects on 9/11, and there was a lifting of the normal property rules in some respects. But he missed obvious implicit requirements that we can try and reconstruct based on the stories from 9/11. First, the object had to show the marks of the attack, it had to be damaged or participate in some way like the flag which got smoke on it and had its picture taken amidst the debris. Its previous value had to have been overwhelmed by this new value emerging from destruction—like the destroyed doors of police cruisers that collectors sought. We might have recourse to Georges Bataille, and say that the object must be removed through destruction from the everyday world of useful things,³⁰ leaving two options: there is no value, or there is some non-everyday value, what some people after 9/11 called the sacred. Second, the object must be put to certain kinds of uses: typically, it seems, usage must emphasize and acknowledge this new non-everyday status.

²⁷ See www.findthe911flag.com. See Rick Hampson, *Mystery Drapes Flag's Disappearance*, USA TODAY, available at www.usatoday.com/news/nation/2006-08-30-flag-mystery_x.htm

²⁸ See *People v. Abbarrategui*, NY Slip Op 14606 (App. Div. 1st Dept. 2003) available at www.courts.state.ny.us/reporter/slips/14606.htm.

²⁹ *Id.*

³⁰ GEORGES BATAILLE, *THE ACCURSED SHARE: AN ESSAY ON GENERAL ECONOMY*, VOL. 1 (Trans. Robert Hurley) (1988).

Applied to the burglar, we would say that he not only did not have sacred objects, since the clothes he took lacked any stigmata, but he also made improper use of them. As the reactions of the public and prosecutors suggest, these sacred objects of 9/11 are often thought to belong to the public in some vague way—this is what permits stealing them, or rather makes their liberation not stealing—and thus individuals act properly when they transfer them from private possession (the flag on the yacht) to the public (the raising of the flag amidst the rubble). We can distinguish between the looter who took items for their *ex ante* value (the \$100 price of jeans), and those who saw the *ex post* value (the jeans that “survived” 9/11); and we can distinguish the thief who acts for improper ends and the person who positions their otherwise illegal action as a form of worship.

This recalibration and sacralization of otherwise inconsequential objects and pieces of junk has been a nation-wide phenomenon in which 9/11 objects are distributed far and wide, across the United States and throughout the world. More specifically, those closest to the attack often object to such collecting as disgusting and ghoulish while pointing to their personal connection to the event; it is those at some remove but seeking greater proximity who seem drawn to the relics. Many actors, from the President to visiting dignitaries, wanted some material object to enhance their connection to the event. President Bush recounted his own relic story on September 20, 2001 in his address to a joint session of Congress:

Some will remember an image of a fire or story of rescue. Some will carry memories of a face and a voice gone forever. And I will carry this. It is the police shield of a man named George Howard who died at the World Trade Center trying to save others. It was given to me by his mom, Arlene, as a proud memorial to her son. It is my reminder of lives that ended and a task that does not end.³¹

It seems as wrong (or right) to call the large metal I-beams from the WTC site that now dot the U.S. “junk” as it is to think of the remains of Christ’s cross as merely old wood. For those who participate in the form of value, these are transcendent, sacred objects—no jokes allowed. There is an inherent tension surrounding which mode of evaluation is brought to bear on the rubble and other objects that were recovered from 9/11—that they are value-less and junk seems to be a possibility always lurking in the background and is, if we follow Bataille, a precondition of their sacred status. Scores of communities around the U.S. have made memorials out of the WTC I-beams (often about 6 feet tall and crucifixion-shaped). While perhaps the sacred, as much as beauty, is in the eye of the beholder, do these still seem sacralized to those who pass them by on the street?

³¹ President Bush quoted in the *Washington Post*, available at www.washingtonpost.com/wp-srv/nation/specials/attacked/transcripts/bushaddress_092001.html.

What is the half-life of the sacred, when does it return to its “objective” status as junk and abandoned property?



9/11 memorial at Eisenhower Park in Nassau County, NY**

** Image by Ray Lopez. Creative commons license:
<http://creativecommons.org/licenses/by/2.0/deed.en>. Image posted at
<http://flickr.com/photos/raylopez/862062568/in/pool-911memorial>

II. The impossibility of owning the sacred

If the sacred is that which, as in the Roman Republic, belongs to the gods, to whom does it belong in this post 9/11 setting? We have something many people think of as “the sacred,” but no-one knows to whom it belongs. The desire of many individuals to possess an object from the 9/11 attacks might be thought of as an attempt to privatize what had become public sacred property. But this reiteration of a public/private split would overlook the way in which many individuals felt they were connecting to something beyond their normal lives and accessing a source of authority.

Before his resignation, a metal shard from the plane flown into the Pentagon rested upon Secretary of Defense Donald Rumsfeld’s office coffee table.³² When the story broke in March 2004, the propriety of his possession and display of the object was challenged. Rumsfeld, trying to defuse the scandal, did not claim personal ownership, but rather, as an aide explained, displayed it “for the Pentagon.”³³ Two years later, the relic remained and Rumsfeld described it as still “marvelous.” John Stewart on the *Daily Show* mocked this description: surely marvelous was too upbeat; a better word would be tragic, or somber, but not marvelous. But perhaps the equally important point was that Rumsfeld did not claim that he could own the object.

The story about Rumsfeld emerged in the course of an administrative investigation by the U.S. Department of Justice Office of the Inspector General (OIG) into the removal of items from sites of the 9/11 attacks. Since the sites were crime scenes, wasn’t it illegal to remove anything? As with the firefighters and the flag, it was not so simple. Prosecutors (here the United States Attorney’s Office for the Southern District of New York) had declined to prosecute the FBI agents who had not made obviously appropriate use of objects they had appropriated.

As a window into the economy of memento collection and circulation among FBI agents, the (redacted) OIG report, *Investigation Regarding Removal of a Tiffany Globe from the Fresh Kills Recovery Site* (2003) makes gripping reading.³⁴ It describes a long FBI tradition of taking souvenirs from crime scenes—rubble and a flag from the U.S. Embassy bombings in Africa in 1998; the elk antlers and roof shingles from the Unabomber’s cabin in 1996; and pieces of the Murrah federal building in Oklahoma in 1995.

With respect to 9/11, high-ranking officials asked for debris for dignitaries; and a U.S. military entity took 350 pounds of debris “so that

³² U.S. Department of Justice, Office of the Inspector General, *Investigation Regarding Removal of a Tiffany Globe From the Fresh Kills Recovery Site*, 25, Dec. 17, 2003 (hereinafter “OIG”) accessed at www.usdoj.gov/oig/special/0403a/index.htm.

³³ Associated Press, *DOJ: Rummy Took 9/11 Rubble*, Mar. 12 2004 available at www.cbsnews.com/stories/2004/03/12/national/main606123.shtml.

³⁴ OIG at 25.

every soldier going to Afghanistan could have a piece of the WTC in their pocket.” Many of the FBI agents said the New York Police Department and the Port Authority gave them “crosses cut from marble pieces and items made from the I-beams” “to commemorate their hard work,” even though “[m]any of these items made out of the debris were initially intended for relatives of the victims.”³⁵

Most of the OIG report focused on the Fresh Kills landfill in Staten Island, to which City officials sent most of the rubble. The Federal Emergency Management Agency described it as a task of “moving sacred ground,” and about 1.6 million tons of debris went to the site, the “world’s largest crime scene.”³⁶ It was sorted into evidence, personal effects, and human remains and the remainder was buried in the landfill. It was from this remainder, simultaneously garbage and yet something else, that many agents took items.

The removal of evidence, personal effects, or items of forensic value from crime scenes was already prohibited by the FBI—but what about this remainder which included tourist trinkets, rubble, etc?³⁷ The OIG concluded that the FBI had no policy. The release of the report caused a furor, as victims’ families thought of the debris as including human remains. In March 2004, the FBI announced a new policy, banning, as a press release said, the removal of “any items.”³⁸ The text of the new policy is not available (after several calls to the FBI) and is not published in the Code of Federal Regulations. Judging from the press release, the previously ignored category—mementos, souvenirs, relics, amulets, or national treasure—was not named. In their defense, some agents said that Fresh Kills was not a crime scene and that the items were non-evidentiary and of “no value.”

It is important to note that it is the New York-based FBI agents who described the debris as “sacred” and who “were disgusted by the fact that anyone would want to take items, including pieces from the building, which were contaminated with blood and human body parts.”³⁹ One NY agent recounted instances where she had foiled memento collecting: when another agent had a “piece of marble on his desk, which he was going to take home as a paperweight,” the New York agents “told him it was disgusting and that he could not take it.”⁴⁰ Another time, an agent from

³⁵ *Id.* at 19.

³⁶ “Moving Sacred Ground: U.S. Army Corps of Engineers Oversee Sensitive Mission,” available at http://www.fema.gov/remember911/911_sacred.shtm (“FEMA assigned the \$125 million mission to the U.S. Army Corps of Engineers to oversee the management of the 160-acre site at the Staten Island landfill, which became the world’s largest crime scene. More than 1.6 million tons of debris and steel were processed during the 1.7 million-hour operation, which came in significantly under budget at \$72 million”).

³⁷ Associated Press, *F.B.I. Agents Told No More Souvenirs*, Feb. 26, 2004 available at www.cbsnews.com/stories/2004/02/26/national/main602413.shtml.

³⁸ FBI Press Release, March 1, 2004, available at www.fbi.gov/pressrel/pressrel04/pressrel030104.htm.

³⁹ OIG at 21.

⁴⁰ OIG at 22.

the Detroit office was handing out WTC key chains inscribed with people's names. The New York agent got angry, saying "If you take those home, you are taking pieces of our agent who died with you."⁴¹ She also sabotaged other efforts to take mementos, "throwing the rocks [they had collected in duffle bags] out into a garbage bag or into a debris pile."⁴²

The agents who called the debris sacred, then, seemed to mean that it should not—as Emile Durkheim would have said of the sacred—be touched and was forbidden.⁴³ Durkheim thought of the sacred as attractive as well as repulsive—the famous "ambivalence of the sacred"—both holy and accursed. The New York agents were not drawn to the sacred objects, but principally wanted to obstruct the access of others who did not seem to them to have a sufficient degree of reverence. They had had contact with the event of 9/11 in a way that the other agents had not: their colleague had died and they were themselves witnesses and victims. Their attempt to enforce the no-touch rule should be seen in the context of their privileged position. They come across more like initiates protecting the sacred objects from others unable and unworthy to fully appreciate them. The out of town agents do not call the objects "sacred" and their attitude is more casual but still they distinguish from everyday objects.

Durkheim defined religion in terms of the sacred: "religion is a unified system of beliefs and practices relative to sacred things, that is to say, things set apart and forbidden—beliefs and practices which unite into one single moral community called a Church, all of those who adhere to them."⁴⁴ With the FBI agents we do not have such a unity of belief: the sacred cuts through the organization, dividing those who participated more directly from those on the periphery in the event. But it is not the case that the out of town agents have no regard for the objects: if that were the case, there would be no way to explain why they collected rocks and other garbage. At a minimum, they must have seen some value in what they simultaneously called "worthless" things. Indeed, the out of town agents construe the objects as abandoned in order to account for why they can take them.

The FBI agents kept their memento economy out of the sight of legal counsel. An FBI lawyer interviewed by OIG said that the "debris items belonged to the building owners and the insurance companies" and that if the FBI wanted these, it should have gone through court forfeiture proceedings. Another person (possibly an attorney but it is not clear because of redactions) also rejected the agents' idea that when something was put in the landfill it could be taken: "The burying of the debris was its final resting point; it was not abandonment."⁴⁵ The objects had not returned to a mythical original Lockean commons where they had no

⁴¹ OIG at 22.

⁴² OIG at 22.

⁴³ EMILE DURKHEIM, *THE ELEMENTARY FORMS OF THE RELIGIOUS LIFE*, 44 (1995) [1915] Trans. Karen E. Fields.

⁴⁴ *Id.*

⁴⁵ OIG at 23.

value. The agents suffered from a lay understanding of the landfill as abandoned property where they could simply appropriate without violating the rights of anyone else. While the FBI routinely gathers evidence from the trash in criminal investigations, this was a different situation.⁴⁶ Rather than a garbage dump, had Fresh Kills been converted into a cemetery, and the depositing of the remainder akin to burial?

A 9/11 artifact-theft investigation into the resale of a damaged door of a police vehicle had been derailed by rumors that the FBI had itself been taking mementos (the rumors caused the US Attorney to drop the case). It was the FBI agent, Jane Turner, whose case was upended who called the OIG.⁴⁷ It was not the objects that had only *ex post* value, such as the rubble and rocks, which triggered the investigation, but the taking of an expensive Tiffany & Company glass globe. The agent who took the globe, when confronted by the OIG, said that he didn't think the globe "had any value" and that since it didn't fit the three categories he was told to look for, it was going into the landfill.

In a sentence that perfectly captures not only the confusion about different registers of value, but the absence among some agents of the language of the sacred, the OIG report notes: "had he thought the item was of value, he would not have taken it."⁴⁸ When he got home to Minneapolis, the agent gave the globe to the FBI office secretary and he gave away the other rocks he had collected to other government employees. The agent gave the globe in "order to share the experience" the secretary thought, and she described it "not as a souvenir, but a relic" and remembered that the agent joked with her, "Don't ever sell this on eBay." Indeed, she "never intended to sell the globe and felt that it belonged to the office." Like Rumsfeld, the agent and the secretary seem to have sensed that the object wasn't private property, but property of the "office." Max Weber famously contrasted legal and bureaucratic rationality to charismatic and traditional forms of authority.⁴⁹ The FBI agents and the secretary recognize that they are distinct from their office. And yet they also seem to want to participate in the deeper, "charismatic" meaning they sense emanates from Ground Zero and the objects.

The OIG excused the agents who took rubble because there had not been any FBI policy in place that explicitly prohibited their action. But it

⁴⁶ See Milton Hirsch, *The Jurisprudence of Garbage*, 30-FEB CHAMPION 54 (2006) ("Long before the Information Age filled our garbage cans with data from which our identities could be stolen, our bank accounts pilfered, our medical needs revealed, FBI Director J. Edgar Hoover was encouraging his agents to obtain damning information about suspects and enemies by means of 'trash pulls'"); see also *California v. Greenwood* 486 U.S. 35, 108 S.Ct. 1625 (1988) (no Fourth Amendment expectation of privacy for trash left at curbside; case was not, according to Justice Brennan writing in dissent, n.2, decided on the "discredited" abandonment theory).

⁴⁷ Agent Jane Turner was fired, praised as a whistleblower, and recently awarded a half million settlement in a sexual harassment lawsuit

⁴⁸ OIG at 11.

⁴⁹ MAX WEBER, *ECONOMY AND SOCIETY: AN OUTLINE OF INTERPRETATIVE SOCIOLOGY*, Eds. G. Roth and C. Wittich, Trans. Ephraim Fischhoff, vol. II (1978).

criticized the globe-taker, for he had taken an object of “value.” It was not that the OIG did not see the flaw in this distinction: the rocks etc. “could be considered historic memorabilia or artifacts, making them items of value.” It simply stuck to a narrower conception of value. We might gloss this as one form of Weberian authority, the OIG as the legal-bureaucratic, coming upon the domain of another, the religious-charismatic, recognizing its existence, and going no further. Accordingly, the OIG determined that the globe would have cost \$350.00, but did not even attempt to determine the dollar value of the other items taken. Even with respect to the globe, the OIG did not attempt to discover its *ex post* dollar value. The report noted in parenthesis: “(We did not determine the value of the globe as an artifact from the World Trade Center, but it certainly was much higher than \$350).”⁵⁰

The 9/11 objects, as used by most of the FBI agents described in the OIG report, seemed to follow a conventional setting apart of sacred objects from normal commercial, profit-oriented, exchanges. For example, many of the agents described a no eBay policy. A recent search on eBay found one only item of 9/11 rubble for sale—a piece of the Pentagon, with a starting bid of 99 cents along with a sales pitch: “own a piece of American history.”⁵¹ eBay policy, incidentally, prohibits the sale of 9/11 rubble along with the sale of “Artifacts, Grave-Related Items, and Native American Crafts.”⁵² Broad social (and in many cases legal) sanction against sale will presumably lead some people to donate their 9/11 objects to a museum or a public entity that can possess and display the object with less controversy—as the 9/11 flag owner indicated she intended to do. In addition, the FBI agents circulated the objects among government employees, reaffirming the special status of officials as compared with the public in general.

Even though the out of town agents are in an inferior position *vis a vis* their New York colleagues, within the broader population they can claim an intimate link to 9/11. Indeed, we should see their collection efforts as an effort to solidify that position. Within the larger category of 9/11 related objects, those that I have been discussing are rare, purporting to be directly and intrinsically related to the event. Most people will not have access such relics, but rather will engage with a derivative set of commemorative objects, such as pins and photos, from the vendors at Ground Zero. This may be frowned upon as tacky commercialization and exploitation of tragedy, as a return of normal mercantile tendencies, as well as an important dimension in the emergence of a new tourist-pilgrimage site. We can discern three categories: the insider who has no need for a relic and feels disgust at the idea; the real relic; and tourist

⁵⁰OIG at 2.

⁵¹See http://cgi.ebay.com/Piece-of-the-Pentagon-From-9-11-AttackRubble_W0QQitemZ150227748995QQihZ005QQcategoryZ396QQssPageNameZWDVWQOrdZ1QQcmdZViewItem.

⁵²Ebay citation.

memorabilia. The real relic and tourist memorabilia are mutually constitutive, the real artifact defined by its exclusion from normal commercial trade and its place in a gift economy, while the tourist object itself implies the existence of the real relic which it echoes. Consider this interchange in 2008 between Peanut 22, planning a visit to New York, and Harry K, apparently a New Yorker, on a Yahoo! travel site:

Ground Zero - worth a visit? I'm hoping to go to NYC in the summer with my mum and sister. We're thinking of visiting Ground Zero. Is it worth seeing? I mean, I know there's 'nothing to see' in that it's just a construction site, but of course it's so much more than that. I want to go to see it - I want to understand more the devastation of that day, and would be interested to see how the construction's going, as would my mum who's connected to the construction industry. So as a site of historcal [sic] importance is it worth seeing? Does anyone know if it will even be 'open' for tourists in 2008? It won't be closed off for construction?

Go if you must, but please, please don't buy any cheesy souvenir from the street peddlers in front of the site. And don't call it 'Ground Zero,' NY'ers would rather call it the World Trade Center Site. And try to limit the picture taking of your loved ones arm in arm in front of the chain link fence.⁵³

Like the FBI agents, Harry K claims a privileged insider status, and offers instruction about the proper behavior and attitude the visitor should have. With the FBI agents, mere possession of the object is not the end of the story. It is by giving the objects to another (colleagues, secretary) that one becomes embedded in the history of the object and hence the event itself. One becomes a mediator of the event for another.

There is also, at least in the OIG report, a distinctly gendered dimension to these exchanges. As in the anthropological literature on high status gift exchange, it is men who give gifts as they seek to spread their name.⁵⁴ Moreover, the only people who interfered in the distribution are female, the New York agent and Jane Turner the whistle blower who called in the OIG (although the male in house counsel might have complained had they known about the practice). Since Marcel Mauss' 1926 classic *The Gift*, anthropologists have examined the ways in which gifts contain something of the person who gives them.⁵⁵ The flow of identity works in the other direction as well, as the personality of the object flows to the giver. But the deeper connection to anthropological

⁵³ Peanut 22 writing on Yahoo! Answers. Harry K, in response, *available at* <http://answers.yahoo.com/question/index?qid=20080216035220AADzAmS>.

⁵⁴ See, for e.g., MARILYN STRATHERN, *THE GENDER OF THE GIFT* (1988).

⁵⁵ MARCEL MAUSS, *THE GIFT: THE FORM AND REASON FOR EXCHANGE IN ARCHAIC SOCIETIES* (1926).

discussions of exchange and circulation might be found through Annette Wiener's work on the importance of inalienable possessions, those objects kept out of circulation.⁵⁶ Should we think of the 9/11 rubble as inalienable even though it has circulated so widely throughout the world? Here the possession of objects by the FBI agents is above all a scandal—their taking and circulation is unofficial even if not prohibited at first. As objects in which the significance of 9/11 inhered, they belonged to the United States or the families of the victims. Another way to approach this sense of the 9/11 rubble as inalienable is to note the radical difference with otherwise seemingly analogous stories, such as the taking of rubble of the Berlin Wall or the taking of booty from conquered enemies in war. The rubble of the Berlin Wall is of a deceased or at least superceded sovereign—East Germany—and those who collect it thus have a significantly different relation, I think, to what we see with 9/11. The 9/11 rubble pulsed for a time with sovereign presence and life. Likewise, the taking of 9/11 rubble is different to war booty since the latter entails taking from the vanquished enemy. Here the booty was not of the enemy, but of the “self,” a sovereign that had been injured but hardly vanquished. The FBI, we saw, had tradition similar to the taking of war booty in taking mementos from the Unabomber and other targets of its investigations. But in 9/11, perhaps inadvertently, it did something radically different in taking mementos of the wounds of its own superior, the United States, and thus of itself.

III. Unconsecrated ground

At Gettysburg, Abraham Lincoln reimagined a field of corpses as a site of transcendence and rebirth.⁵⁷ Surely he could have managed such a feat at a city dump, but this does seem to be a harder starting point. We have seen that the out-of-town FBI agents were operating simultaneously on two levels of value: many thought that the material going into landfill was worthless and yet worth taking. While they did not call it sacred, they thought that it should be segregated from a domain of commercial exchange. The local agents saw the material as sacred by which they meant untouchable, which in practice meant that they sought to prevent *other* agents from taking objects. In this section, I describe how the family members of the 9/11 victims are also caught between the various meanings they attach to the site. Here our focus shifts from objects to bodies. Like the FBI agents, they see the landfill as a place of abandonment and garbage—but, for them, this is scandalous, not an opportunity for a taking.

⁵⁶ ANNETTE WEINER, *INALIENABLE POSSESSIONS* (1992).

⁵⁷ See ABRAHAM LINCOLN, *GETTYSBURG ADDRESS* (Nov. 19, 1863), in 7 *COLLECTED WORKS OF ABRAHAM LINCOLN* (Roy P. Basler ed., 1953); see also FRANNY NUDELMAN, *JOHN BROWN'S BODY: SLAVERY, VIOLENCE & THE CULTURE OF WAR* (2004).

A group of the victims' families, the WTC Families for Proper Burial, Inc. recount that of the 2,749 victims of 9/11, only 292 "full bodies" were recovered. There was no trace of about 1,100 victims, and in the years following 9/11, there have been regular discoveries of hundreds of additional body fragments. And as I mentioned, remains of 13 of the 19 hijackers have been identified, but these remain unclaimed.⁵⁸

The family group initially sought to have the remains at Fresh Kills returned to Ground Zero. But they concede that "after four and a half years, that site has been designated for many other purposes and will not accommodate the remains of the dead."⁵⁹ We might think of this as a dissipation of the sacralization created by the attacks, as commercial and other uses gain in importance. Unlike Guliani, the new businessman Mayor Michael Bloomberg, says that downtown residents don't want to live next to a "cemetery."⁶⁰ But the family group is not content to have their relatives remain in what they call, inverting Lincoln, "unconsecrated ground."⁶¹ The phrasing is interesting: it plays on one half of Lincoln's formula: consecration has taken place through death on behalf of the nation, and yet the new site remains unconsecrated. On the groups' website, the analogy to military sacrificial deaths is made explicit as images from war memorials are juxtaposed to an image of Fresh Kills. The 9/11 deaths, described as "The First Casualties of the War on Terrorism," are aligned with the soldiers' deaths in war. The victims' families, with the backing of New York's U.S. Senators, have urged that the recovery operation be handed over to the POW-MIA agency that deals with recovery of soldiers' bodies.⁶²

Since not all the material at the landfill was sorted by machine (apparently better at finding remains than the FBI agents with their rakes), the family group argues that it is quite possible that the remains of their loved ones are in the landfill. Indeed, a City medical examiner has said it is a virtual certainty.⁶³ And outrageous claims continue to emerge, such as one that 9/11 remains from the landfill are filling street potholes.⁶⁴

⁵⁸Sean Hamill, *7 Years Later* supra n__.

⁵⁹See www.wtcfamiliesforproperburial.com (text quoted subsequently removed from site).

⁶⁰ Associated Press, *Mayor Bloomberg Takes Over WTC Memorial Project Despite His Earlier Criticisms*, available at www.foxnews.com/story/0,2933,218505,00.html.

⁶¹"UNCONSECRATED GROUND - FRESH KILLS" at www.wtcfamiliesforproperburial.com (text subsequently removed from site).

⁶² See www.voicesofsept11.org/dev/content.php?idtocitems=thelegacyofshame, Voices of September 11; see also Senator Clinton Press Release http://www.s11ukfsg.org/news/20061020_schumer_clinton_call.html.

⁶³Anemona Hartocollis, *Landfill Has 9/11 Remains, Medical Examiner Wrote*, N. Y. TIMES, available at www.voicesofsept11.org/dev/content.php?idtocitems=remainstimes.

⁶⁴ Beck Affidavit Para. 12, cited in Plaintiff's Memorandum in Opposition to Defendant's Motion to Dismiss at 12; see also *9/11 Remains Fill Potholes, Worker Claims*, DAILY NEWS, Mar 24, 2007, available at http://www.nydailynews.com/news/2007/03/24/2007-03-24_911_remains_fill_potholes_worker_claims.html.

The family group also complains that the material that was sorted by machine was not examined further for human remains. The FBI agent who oversaw the site, and who the Office of the Inspector General saw as the main culprit in allowing other agents to take objects,⁶⁵ had met with family members at Fresh Kills and told them that the sorted material “would look like—and essentially were—cremated remains.” When the family group asked this person, agent Marx, if they could have and bury the remains, he assured them that they were being kept separate from the other WTC material and the household garbage, and that they could have them at the conclusion of the search.⁶⁶

In fact, the families allege that the selected material was plowed back into the landfill and was covered with household garbage, shoes, tires, and other debris.⁶⁷ In order to get to the landfill, the family members drive by recycling and methane recovery plants and at the entry to the site a sign declares that household waste is dumped there.⁶⁸ They then sign in with a City Sanitation Department employee and sign a waiver in case of personal injury. The ground is unstable and eroding and in “summer, insects swarm about, and on some days, the stench of methane is too much... There is no place to leave flowers, no feeling of solace or closeness to a loved one.”⁶⁹ The City refused, according to the family group, to allow journalists: they, after all, would disturb the “sanctity of the space.”⁷⁰

The City has announced a plan to turn the dump into a park, while the family group insists that the remains should not become a “permanent fixture” amidst the household waste.⁷¹ The FPB lawsuit asserts various interests in the remains including a property right grounded in state common law; and a Constitutional due process and free exercise claim.⁷² The group does not seek to compel the City to make a positive individual identification of the human remains, nor do they seek money damages.⁷³

⁶⁵OIG *at* 18. This was the same agent who had, according to the OIG, assembled the most impressive collection of objects for his personal use, including: an elevator wheel, airplane spare tires, four police cruiser doors, WTC souvenirs, pieces of the building, melted guns, airplane pieces, WTC keys, lamp posts, a street sign, 8 American flags, a WTC observation deck Plate, and other items.

⁶⁶Plaintiff’s Memorandum in Opposition to Defendant’s Motion to Dismiss *at* 10.

⁶⁷WTC Families for Proper Burial et. Al v. City of New York, Michael R. Bloomberg et. al., Amended Complaint, June 27, 2006, 05 CV 7243, Para. 44.

⁶⁸Horning Affidavit *cited in* Plaintiff’s Memorandum in Opposition to Defendant’s Motion to Dismiss *at* 16.

⁶⁹*Id.*

⁷⁰*Id.*

⁷¹WTC Families for Proper Burial et. Al v. City of New York, Michael R. Bloomberg et. al., Amended Complaint, June 27, 2006, 05 CV 7243, Para. 55 (the FBI is not named in the suit).

⁷²*Id.*

⁷³*Id.*, Para. 7 (“Plaintiffs sue...not for money damages, but to obtain and dispose of their next-of-kin”).

They ask that the City re-sort the material and provide a “common burial in an appropriate site...without being surrounded by garbage.”⁷⁴

Many jurisdictions do recognize a “quasi-property” right in a dead body, usually enjoyed by the next of kin, to ensure a proper burial,⁷⁵ and this right has been found to apply to the partial remains of the 9/11 victims,⁷⁶ and to the cremated remains of the deceased.⁷⁷

The City urged that the family group does not have standing because it is not known whose remains, if any, are in the landfill, and hence the group cannot allege any actual deprivation. While there is a quasi-property right in the dead body—it is, the City says, only in the identifiable body.⁷⁸ Moreover, the property claim to the body must be individual, not one “held and shared collectively by a group,” and so the family group cannot be the vehicle for the suit.⁷⁹ Moreover, just as the U.S. government has no legally enforceable obligation to identify the remains of soldiers missing in action, the City argues that here, too, there is no justiciable issue.⁸⁰

Judge Hellerstein, who has the case along with much of the 9/11 litigation, was, according to accounts of the oral argument in February 2008, engaged by the symbolism of the case, comparing it to that of the “unknown soldier”—absent the dignified final resting place. He also suggested a compromise: that the parties take a small amount of the debris from Fresh Kills to Ground Zero,⁸¹ a part-for-whole synecdoche not accepted by the parties.

In his opinion dismissing the case *WTC Families for a Proper Burial, Inc. v. City of New York*,⁸² Judge Hellerstein used vivid prose to

⁷⁴ Memo. in Opposition to Defendant’s Motion to Dismiss at 34.

⁷⁵ See *Bortherton v. Cleveland* 923 F.2d.477 (6th Cir. 1991); *Colavito v. N.Y. Organ Donor Network, Inc.*, 356 F. Supp. 2d 237 (E.D.N.Y. 2005); see PERCIVAL E. JACKSON, *THE LAW OF CADAVERS AND OF BURIAL AND BURIAL PLACES* 41-55 (2d ed. 1950); see also HUGH Y. BERNARD, *THE LAW OF DEATH AND DISPOSAL OF THE DEAD* 19-21 (2d ed. 1979); G. D. C., *Right to Determine the Place of Burial of a Corpse*, MICH. L.REV., Vol. 23, No. 3. (Jan., 1925), 274-276.

⁷⁶ *Caseres v. Ferrer*, 6 A.D.3d 433, 434, (2d Dep’t 2004); cited in Plaintiff’s Memo. of Law in Opposition, at 52.

⁷⁷ Plaintiffs’ Memorandum of Law in Opposition to Defendants’ Motion to Dismiss the Amended Complaint or in the Alternative for Partial Summary Judgment at 52; citing *Schmidt v. Schmidt*, 267 N.Y.S.2d 465, 646 (Sup. Ct. N.Y. Co. N.Y.).

⁷⁸ Defendants’ Reply Memorandum of Law in Further Support of their Motion to Dismiss the Amended Complaint, at 17; Defendants’ Memorandum of Law in Further Support of their Motion to Dismiss the Amended Complaint, 20 (“It is not sufficient to allege that there are human remains in Fresh Kills to demonstrate an injury”).

⁷⁹ Memo to Dismiss, 22.

⁸⁰ Memo to Dismiss, 39, citing *Hart v. United States*, 894 F.2d 1539, 1546 (11th Cir. 1990) (finding that U.S. efforts to identify missing serviceman in Laos was a discretionary function as defined in the Federal Tort Claims Act, and thus court did not have jurisdiction); *Simmons v. United States*, 754 F. Supp. 274 (N.D.N.Y. 1991).

⁸¹ Alan Feuer, *Judge Hints He May Reject 9/11 Families’ Plea to Sift Fresh Kills for Remains*, N. Y. TIMES, Feb. 23, 2008.

⁸² *WTC Families for a Proper Burial, Inc. v. City of New York*, 567 F.Supp.2d 529, 532 (S.D.N.Y. 2008).

describe the 1,100 victims who “perished without leaving a trace, utterly consumed into incorporeality by the intense raging fires, or pulverized into dust by massive tons of collapsing concrete and steel.”⁸³ The judge “doubted” that the family group had standing since, as the City urged, “there are no identifiable remains to which a property right could attach, only an undifferentiated mass of dirt.”⁸⁴ Ordinarily, that would end the judge’s inquiry; but, the judge wrote, “this is no ordinary case,” and he proceeded to the merits of the suit.⁸⁵ The judge declined to extend the quasi-property right in the dead body to an “undifferentiated mass of dirt that may or may not contain undetectable traces of human remains not identifiable to any particular human being.”⁸⁶ Indeed, instead of a claim about recovering property, the judge construed the family group as attempting to compel the City to appropriate property: “plaintiffs seek to prevail upon the City to undertake the expense of moving many tons of debris and dirt and burying it in some other location... The City is under no obligation to provide property [a site for a cemetery] to certain of its citizens for burial of their loved one’s remains, however worthy the citizen and however honorable the deceased.”⁸⁷ The property claim of the family thus dissolved: not only did they themselves not have a property right in the debris, the judge read their demand for a dignified burial site as an effort to overreach and *obtain* property.

The judge also rejected the families’ claims that their right to the free exercise of religion had been violated since the City did not “target” any particular religion.⁸⁸ He openly commented on the novelty of the claim that the City’s refusal to segregate the sorted material from other debris could constitute a free exercise claim: “there is no constitutional case that applies this proposition [of the First Amendment] to an undifferentiated mass of debris.”⁸⁹ While the “debris of the World Trade Center, stained with the memories of those who perished at their desks and in the corridors and stairwells of the Twin Towers, could well have been considered hallowed,”⁹⁰ the City undertook a “quintessentially municipal task” in clearing the site, and properly took into account a range of considerations, none with the “purpose” of infringing on “anyone’s religious sensibilities.”⁹¹ The judge found that the material from the 9/11

⁸³ *Id.* 531.

⁸⁴ *Id.* 536.

⁸⁵ *Id.* 536.

⁸⁶ *Id.* 541-2.

⁸⁷ *Id.*, 542.

⁸⁸ *Id.* 540. At 541 Judge Hellerstein insisted that the proper standard in evaluating the City’s conduct in the “monumental and unprecedented task” of cleaning up was the “rational basis” test of *Employment Div. Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872, 881 (1990).

⁸⁹ *Id.* 539.

⁹⁰ *Id.*, 532.

⁹¹ *Id.* 539.

had been thoroughly inspected and that “All human remains that could be identified, were identified. Only dust remains.”⁹²

In conclusion, the judge shifted into a different register, writing about 9/11 as that which “will never be forgotten,” and that the victim’s families have “suffered a wrong for which there can be no remedy.”⁹³ He wrote of the “beautiful nature preserve and park” the City has planned for the landfill, one with a memorial with a view of WTC site, and urged that the “energy applied to this lawsuit might well be transferred to” participating in planning the park and memorial.

Sacralization frames the claims of many victims’ families and others (such as Mayor Guliani) to Ground Zero. It explains why private property should be taken over for the purposes of a familial or national shrine. At Fresh Kills, however, a different pattern emerges. The victims’ families combine the sacralization theme with a reassertion of property in order to protest the commingling of the remains amidst garbage. The City is violating both the rules of the sacred (putting it with garbage) and those of property (taking the body). Is there a latent tension in combining sacralization with property claims? For instance, if the first constitutes an understanding of the dead as belonging to the public in some respect (the death is special and sacred because it was *for* the U.S.), does the latter draw the remains back into the private sphere? The families seem aware of the tension since they present their property claim as directed towards a goal of “common” burial and a proper public memorial. And yet the demand for a common burial and the foregoing of individual identification, undercuts the requirement that the property interest be individual.

IV. Appraising the sacred

A different alignment of property and the sacred can be discerned at the site where United Flight 93 crashed in Pennsylvania on 9/11. My discussion of the FBI concerned a scenario where, under any normal sense of property, the agents had no entitlement to the objects they took, although they did try to justify themselves by pointing to the abandonment of the objects. With Flight 93 the plane crashed into private property, transforming its value, rendering it—once again—“sacred ground.”⁹⁴ As with the remains at the WTC and Fresh Kills, family members felt a claim to the land—the victims had become embedded in soil and debris and were, except for tiny fragments, unrecoverable. Patrick White, vice President of The Families of Flight 93 and the buyers agent for the group said: “It now serves as a cemetery” and that “To me, the property where the crash took place is priceless.” Yet in this case, the new value is

⁹² *Id.* 532.

⁹³ *Id.* 543

⁹⁴“Agreement Paves Way to Acquire Flight 93 Crash Site,” Flight 93 National Memorial. www.honorflight93.org.

claimed by a private party—the owner of the property, Svonavec Inc., a quarry company that had mined the land for coal. At the WTC and the Pentagon, there was not this specific dilemma: both were already “public” sites that could then be subject to the “privatizing” claims of family members. Svonavec insisted that the property, a 275 acre parcel, had not only become sacred, but that its market value had increased a hundred fold, from about a half million to fifty million dollars. In an almost literal sense, the crash was a windfall, a huge explosion of value on otherwise unremarkable land. To whom should this new value—as dollar value or as sacred value—accrue? We saw with the flag from the yacht that it was appraised at half a million dollars, although the owner insisted that she wanted to give it to a museum. And we saw that the burglar seemed to not have sacred objects nor to make proper use of them. Svonavec raises another combination: it clearly has title, but seems to be skirting a boundary of improper use by taking the new value for itself, even though this seems proper as a matter of property law. Here we know who “owns” the sacred as a matter of property law as it is irretrievably embedded in immovable property, but this does not seem to settle the matter, since we then confront an overwhelming effort to take the property from the owner, which in turn raises questions of property appraisal and what we can think of as the appraisal of the sacred. When Svonavec transfers the parcel (or it is taken from it), should the price include the cash value of this sacredness, or should it be held to the *ex ante*, pre-attack value?

Within months of the crash, the crater in Pennsylvania was filled and the area planted with grass. In September 2002 the Flight 93 National Memorial Act became law, which authorized the creation of a memorial as a “unit” of the National Park Service, a part of the Department of the Interior. But the Commission created to create the park was only empowered to acquire land from “willing sellers,”⁹⁵ to not use the power of eminent domain. The Park Service began acquiring about 2,000 acres of surrounding land for the memorial, but was unable to broker a deal with Svonavec for the crucial parcel. The Park Service website describes the transformation of the site and the purpose of the memorial:

A common field one day. A field of honor forever. May all who visit this place remember the collective acts of courage and sacrifice of the passengers and crew, revere this hallowed ground as the final resting place of those heroes, and reflect on the power of individuals who choose to make a difference.⁹⁶

⁹⁵Flight 93 National Memorial Act, P.L. 10-226, § 5(8) (Sept. 24, 2002).

⁹⁶ Flight 93 National Memorial Mission Statement. The reference to individuals making a difference is not, of course, to the hijackers, who were excluded in the Act from recognition in the memorial. Flight 93 National Memorial Act § 6 (“Clarification of Passengers and Crew. For the purposes of this Act, the terrorists on United Airlines Flight 93 on September 11, 2001, shall not be considered passengers or crew of that flight”). What distinguished Flight 93 was that the passengers were able to learn of the fate of the other hijacked flights, and they then, after voting, coordinated an attack on the

From the perspective of Families of Flight 93, an official group of the victims' family members, it seemed clearly improper that Svonavec should enjoy the windfall of this new "sacred" value. There was not an explicit claim that the property had been magically nationalized, and that it could be taken from Svonavec without compensation. But something close to the thought could be discerned. For example, White, of the Families group said:

Everybody's private property has a value. I understand that...but that property to me is priceless to [sic] the reason that it has blood, bones and the souls of my cousin...and that of 39 other people, and in a sense a tremendous price has already been paid for that land.⁹⁷

This idea, that the deaths on the land had already paid for it, is not exactly a legal claim, but asserts an important truth about the situation: that while Svonavec may have formal title, possession and real ownership has somehow already shifted to the state, the public, or some other entity. However strange the idea may seem when stated baldly, that by dying on your property I gain a claim to it, the process of purchasing the land is, from this perspective, a mere formality and reflection of a transfer already effected at some deeper level.

This conception of the scenario makes for an interesting comparison with Chief Justice Marshall's 1823 opinion in *Johnson v. McIntosh* where it emerges that the Indian nations have a right of occupancy, a right extinguishable at any time by the U.S., and that the Indian nations can never be an independent source of title, since title flows from the Crown and now the U.S. The sovereign, with bloody sword, lurks throughout in the opinion, the real source of the property regime and title. The Indians, that is, have a tentative stake in their relations with land, the capacity to occupy but not possess and not to transfer with good title. With Svonavec, the story seems to play in reverse: its valid title is but a mirage for a deeper truth, one in which occupancy by the deceased on his property turns into possession and title. The sovereign appears in this version too, but its presence is activated by the death of its citizens and the 9/11 attack.

However fanciful this might sound, note that although Svonavec apparently did want compensation for the 9/11 bump in value, it also insisted that it would donate for free the several acre "sacred ground" crash site itself. It too recognized that the "sacred ground" should not be

hijackers, crashing the plane short of its target. As Elaine Scarry argues, it is powerful example of collective action and democracy, one undertaken by ordinary people, not the government officials who failed to stop any of the planes. Elaine Scarry, "Citizenship in Emergency: Can Democracy Protect Us Against Terrorism?" *Boston Review*, October/November, 2002 at <http://bostonreview.net/BR27.5/scarry.html>.

⁹⁷Quoted in Jennifer Reeger, "Donation Box at Heart of Flight 93 Memorial Tiff in Somerset Co." *PITTSBURGH TRIBUNE REVIEW*, June 6, 2007.

sold; or, as the Families group might have it, that it had already been paid for. Certainly there are good strategic negotiating reasons for this, since it excluded the “sacred ground” from the exorbitant demands for many millions. (This also might raise the takings issue from another perspective under a scenario where the government did not want the sacred site. Could Svonavec argue that it had been taken, *de facto*, that the attack and the mourners, should be seen as equivalent to a “physical invasion” of its property⁹⁸).

One reason that Svonavec gave for the delay in coming to terms with the Park Service was that the Park Service had refused to release two appraisals it had commissioned of the parcel. The Park Service offered \$250,000, while the Families offered \$750,000, still a fraction of what Svonavec is reported to have thought appropriate. There is no clear indication where Svonavec was getting the fifty million figure from, but it has engaged the assistance of Randall Bell, a real estate damages appraiser claiming an expertise in “stigmatized” property. Typically the stigma is a violent death or a haunted house, and one that diminishes value: Bell apparently has offered counsel to owners seeking to sell properties such as the mansion where Heaven’s Gate members committed suicide and the house where JonBenet Ramsey was strangled. With Svonavec’s property the term stigma is alluring, capturing as it does the sacralized dimensions of the Flight 93 site, the markings on the land that show forth an inner truth and presence. Stigma is sometimes taken to be to unjustified prejudice—the now remediated environmental site that is, nonetheless, stigmatized.⁹⁹ But here, not only is stigma not negative, it seems an accurate term.

There is something unusual in the valuation of the parcel in Pennsylvania—and here I wish to pause and ask how the value of the Flight 93 site might be appraised by the legal system. Tantalizingly, two of the great national war memorial sites —Gettysburg and Arlington—led to Supreme Court cases on takings issues, but neither addressed our question of whether and how valuation accounts for increased value due to national loss on the site. *United States v. Gettysburg Electric Railway Co.*, decided in 1896, found that a war memorial is a public use.¹⁰⁰ In *United States v. Lee*, decided in 1882, a descendant of General Lee brought a

⁹⁸The notion of physical “invasion” as a taking typically applied to flooding of land by the federal government, and was first articulated *Pumpelly v. Green Bay Co.* 80 U.S. (13 Wall.) 166 (1871).

⁹⁹ [from cite ADD] “See Uniform Standards of Professional Appraisal Practice, Advisory Op. 9, at 143-45 (Appraisal Standards Bd. 2003) (defining “environmental stigma” as “an adverse effect on property value produced by the market’s perception of increased environmental risk due to contamination”). Such risk may be due to fear of potential liability for cleanup costs, potential liability to third parties affected by existing or prior contamination, or concerns regarding the ability to obtain financing for the property. See *Dealers Mfg. Co. v. County of Anoka*, 615 N.W.2d 76, 77 n.1 (Minn. 2000) (citing Peter J. Patchin, Valuation of Contaminated Properties, 56 *Appraisal J.* 7, 7-8 (1988)).”

¹⁰⁰*United States v. Gettysburg Electric Railway Co.* 160 U.S. 668 (1896).

successful suit to eject the United States from the current site of Arlington National Cemetery.¹⁰¹ The U.S. was using the site as a burial ground for troops, some of whom died in combat on the property. The property had, prior to the Civil War, been Lee's personal residence, which, during the war, the U.S. purchased in a tax sale, apparently upon a tax default that the U.S. concocted. Unfortunately, this remarkable case also does not tell us about the matter of valuation, although we do know that the U.S. subsequently agreed to pay Lee's heir \$150,000.¹⁰²

The Takings Clause of the U.S. Constitution provides that "[N]or shall private property be taken for public use, without just compensation."¹⁰³ Much current discussion focuses on what is a taking (e.g. the distinction with regulation and with partial takings), and especially after the Supreme Court's decision in *Kelo*, with what is public use.¹⁰⁴ Neither of these gets to the question of whether the private landowner can benefit from the value of their property as a site of national tragedy. An application of takings doctrine suggests that the owner of the Flight 93 site may obtain compensation for the increase in value due to the attacks, and possibly for the value of a private for-profit memorial, but not for the value of government-recognized memorial.¹⁰⁵ One approach defines the "just compensation" requirement of the takings clause to mean "the full monetary equivalent of the property taken. The owner is to be put in the same position monetarily as he would have occupied if his property had not been taken.... what a willing buyer would pay in cash to a willing seller."¹⁰⁶ Under the "scope of the project" rule, the market is defined to exclude the effects of the taking itself on market value: "Neither the Government nor the condemnee may take advantage of 'an alteration in market value attributable to the project itself.'"¹⁰⁷ Providing market value will often entail appraising a market value while at the same time government action radically upends market values. Indeed, this is often the point of eminent domain: that the government or the condemnee should not pay/receive the market price when the value of the *ex post*

¹⁰¹ *United States v. Lee*, 106 U.S. 196 (1862).

¹⁰² KARL DECKER and ANGUS MCSWEEN, *HISTORIC ARLINGTON*, 83 (1892) (this text does not provide a description of how the amount of compensation was determined; it does claim, at 66, that the burying Union dead on Lee's estate was intended by his former friend, Gen. M.C. Meigs, Quartermaster-General to the United States Army, to prevent Lee from ever returning to the property).

¹⁰³ U.S. CONST. amend. V.

¹⁰⁴ *Kelo v. City of New London* 545 U.S. 469 (2005).

¹⁰⁵ See also, Uniform Appraisal Standards for Federal Land Acquisitions.

¹⁰⁶ *Altamont Farmers Elevator & Warehouse Co. v. United States*, 409 U.S. 470, 473-74 (1973) (internal citations and quotation marks omitted).

¹⁰⁷ Powell, J. concurring, in *Altamont* at 479 (citing *United States v. Reynolds*, 397 U.S. 14, 16 (1970)); for scope of project rule see also, Uniform Appraisal Standards for Federal Land Acquisitions at 46.

conditions created by the government are included in the price, when it is the government which is itself the source of the new value.¹⁰⁸

Applying this scope of the project rule to a taking of the Flight 93 site, should the appraisal *exclude* the value of the land as a crash site? I think it does not: the attack was not (conspiracy theorists notwithstanding) a government project to create sacred ground on Svonavec's land. Indeed, it was a government failure to prevent the attack that is a condition of the value. It was the passengers, the hijackers, and United Airlines' plane, which created the "sacred ground," but it is hard to conceive how these actors would advance a claim for a portion of this value against the property owner. We might resist this reading that excludes the U.S. as creator of the value, and say what seems to be true: that even though the sacred value was not deliberately created by the U.S., that nonetheless the value only comes into being because the attack was addressed to the U.S., that the hijacking itself rendered the plane a site of "America" or the "United States" since that is what the hijackers indicated they were attacking. The sacred value, this to say, is parasitic and dependent on the U.S., although the victims' families might resist this, and say that it is sacred simply because of the deaths of their loved ones. Elaine Scarry offers a related framing:

United Airlines Flight 93 was a small piece of American territory—roughly 600 cubic meters in its overall size. It was lost to the country for approximately forty minutes when terrorists seized control. It was restored to the country when civilian passengers who became citizen-soldiers regained control of the ground—in the process losing their own lives.¹⁰⁹

If we have a scenario where one portion of American "territory" collides with another (the parcel in Pennsylvania), we could even offer an inverted reading by which taking the parcel is simply the U.S. recovering its own property, which happens to now be inextricably embedded in the private

¹⁰⁸One commentator writes highest and best use analysis typically is in relation to the value before the initiation of a taking. For example, "condemnation [for] blight is a diminution in the market value of a property due to pending condemnation actions; project enhancement is an increase in a property's market value in anticipation of a public project requiring condemnation action. As a general rule, the appraiser cannot properly consider either of these factors in the before situation when estimating highest and best use or value (Eaton, 1995). *However, definition of the project and date of its inception are often controversial issues*" (italics added). SM102 ALI-ABA 111, American Law Institute - American Bar Association Continuing Legal Education ALI-ABA Course of Study January 4 - 6, 2007 Condemnation 101: Fundamentals of Condemnation Law and Land Valuation, VALUATION METHODOLOGY - SUBTANTIVE: OVERVIEW OF A REAL ESTATE APPRAISAL; BASIC CONCEPTS OF MARKET VALUE AND THE THREE APPROACHES TO VALUE (Wayne Hunsperger, Hunsperger & Weston).

¹⁰⁹ Elaine Scarry, "Citizenship in Emergency: Can Democracy Protect Us Against Terrorism?" *Boston Review*, October/November, 2002 at <http://bostonreview.net/BR27.5/scarry.html>.

owner's soil. These alternate readings seem correct on a political or political theological level, but it seems hard to see how takings doctrine can take account of them. The appearance of the sacred value is a windfall to Svonavec, but it is not one the government created under the scope of the project rule.

On the other hand, the portion of the increased value that can be attributed to the government's decision to create public memorial itself, should not, under takings jurisprudence, go to Svonavec. That seems like the typical case where the property owner does not keep the increase.

It may be, moreover, that the market value that includes the "sacred" value is not quite the multi-million dollar windfall that Svonavec and its "stigma" appraiser envisage, although I have not seen the methodology that was employed to arrive at those figures. The Department of Justice guidelines for takings, the "Yellow Book" or the Uniform Appraisal Standards for Federal Land Acquisitions, provides that the preferred method of valuation is looking to comparable sales,¹¹⁰ which will be difficult to establish in this case. Another form of valuation is "highest and best use" which the appraiser may consider "if the property is clearly adaptable to a [more profitable] use other than the existing use..."¹¹¹ Perhaps at the sacred ground site, highest and best would be a for-profit memorial or a theme park related to the crash. The Yellow Book provides that a "proposed highest and best use cannot be the use for which the government is acquiring the property (e.g., missile test range, habitat conservation, airfield, park), unless there is a prospect and competitive demand for that use by others than the government."¹¹² If Svonavec plans a theme park, then it may avoid this problem of asserting the same use as the government. Highest and best use must also be a legal use and the appraiser can take into account zoning etc.¹¹³ If Svonavec's plan were to create a for profit memorial or theme park, it might be genuine problem for the appraiser to determine whether such a use would be permitted. But Svonavec cannot attempt to avoid this problem by saying that it intends a not-for-profit memorial. If it wants to use the highest and best use methodology, it must show an "economic" use.¹¹⁴ An

¹¹⁰ Uniform Appraisal Standards for Federal Land Acquisitions at 37 (comparable sales are the "best evidence of market value").

¹¹¹ Uniform Appraisal Standards for Federal Land Acquisitions at 34. *At* 36 stating that "highest and best use is a most important consideration in estimating market value..." while *at* 41 that cost approach, the cost of land plus cost of reproducing structures thereon is the "least reliable." *At* 36, the Yellow book advises that the appraiser is to consider "physical possibility, legal permissibility, financial feasibility, and its degree of profitability. That use which meets the first three tests and is the most profitable use (i.e., results in the highest value) is the property's highest and best use."

¹¹² Uniform Appraisal Standards for Federal Land Acquisitions at 35; *citing* United States v. Weyerhaeuser Co., 538 F.2d 1363, 1366, 1367 (9th Cir. 1976), cert. denied, 429 U.S. 929 (1976).

¹¹³ Uniform Appraisal Standards for Federal Land Acquisitions at 34; *citing* Olson v. United States 292 U.S. 246, 255 (1934) (but that use must be lawful (zoning etc)).

¹¹⁴ Uniform Appraisal Standards for Federal Land Acquisitions at 36 (The Department of

extremely tentative summary of the appraisal issues, then, is that that Svonavec will get the “sacred” value, but that the comparable sales valuation will be inconclusive and highest and best use as a for profit memorial or theme park would be devalued because of possible legal problems.

Svonavec allowed access to the site and a temporary memorial, and in 2006 stated it wanted to collect donations, a request denied by the Park Service. The company then allowed for two more years of use, but rescinded access in September 2008.¹¹⁵ Facing mounting pressure, and a Parks Service empowered in late 2007 to use the power of eminent domain,¹¹⁶ in January 2009 a deal was announced in which Svonavec donated the “sacred ground” crash site and agreed to a valuation process to be conducted by a federal court. In fact, however, as of this writing (April 2009) the deal is not finalized.¹¹⁷

V. Sacrifice

Thus far I have sketched the emergence of what some people call the sacred as embodied in objects and land, and I have described some of the trajectories of the sacred along different transactional pathways. And I have explored problems in determining who owns it, how it should be deployed, and how its market value might be determined. In this section I ask how this sacred value is created, and, in particular, I examine whether the idea of sacrifice is helpful.

In an etymological sense, if our question is how ordinary land or debris is made sacred, sacrifice seems to offer a ready-made answer, since it concerns a “making” of the “sacred.” This consecration is often said to be achieved through destruction of the offering. In Marcell Mauss and Henri Hubert’s sociological gloss from the 1890s, sacrificial procedure

Justice’s “view is that an appraisal premised on a highest and best use of ‘preservation,’ ‘conservation,’ ‘natural lands’ and the like is not an appraisal of ‘fair market value’ and is unacceptable for both direct purchase and eminent domain acquisitions.... Nor will it approve any appraisal report that incorporates a definition of highest and best use that includes the concept of non-economic uses”).

¹¹⁵See “Unreleased Appraisal at Heart of 9/11 Land Dispute,”

<http://www.appraisalinstitute.org/ano/current.aspx?volume=9&numbr=17/18>.

¹¹⁶Consolidated Appropriations Act (Sec. 128) “Amends Public Law 107-226 (Flight 93 National Memorial Act) to: (1) remove the requirement that the land or interests in land for the memorial site be acquired from willing sellers; and (2) authorize the acquisition of the land or interests by condemnation with donated or appropriated funds.” Vicki Rock, Law Change Allows Eminent Domain At Flight 93 Crash Site,” *DAILY AMERICAN*, Oct. 15, 2008. In early 2009, Flight 93 Families urged President Bush to issue an executive order that would allow the government to use a quick take procedure, in which the government would take the property and then determine the value in court. Upon hearing about the new power to take the property, Svonavec secretary-treasurer expressed disappointment: “they follow the rules, which they don’t do, or they steal the property.”

¹¹⁷Telephone interview April 14, 2009 [subject name redacted].

“consists in establishing a means of communication between the sacred and the profane worlds through the mediation of a victim, that is, of a thing that in the course of the ceremony is destroyed.”¹¹⁸ Claude Levi-Strauss, in the 1950s, wrote that “[s]acrifice seeks to establish a desired connection between two initially separate domains.”¹¹⁹ By asserting a connection and relation of identity between distinct objects—he was focusing on sacrifices of substitution where x is given instead of y —it blurred distinctions, and hence meaning itself. He derided sacrifice as, literally, nonsense.¹²⁰ It is nonsense, from the perspective of everyday “sense,” to see the sacred or the U.S. as somehow visible in a field or a brick. It is the action of destroying a part x (the plane, the individual person, the building) as a site of the larger whole y (the United States) that attempts to magically and momentarily in Levi-Strauss’ view collapse one into the other. And this nonsense, it is important to note, is shared, apparently, by attackers and the U.S. public. This action of finding the whole in the part, and destroying the part in order to reach the whole does seem related to what we imagine happens in sacrifice. But it does not seem coextensive.

We are also confused about sacrifice—should we distinguish the dead emergency workers from the civilians? Was one group heroic and self-sacrificing (Flight 93), the other victimized and sacrificed? Or are they all heroic, having absorbed an attack on the U.S. as the families protesting the internment at Fresh Kills assert? Or if we call the event a sacrifice, are we then recognizing the attackers as having “sacrificed.” Perhaps the biggest impediment to an application of the sacrificial schematic is that we cannot accept that the terrorists are in the position of sacrificer: we have a result of sacrifice—the sacred, the instantiation of the U.S.—while displacing the actor who created that meaning for us. Apparently the terrorists themselves also are uncomfortable in the role, they too, position themselves as victims in the mold of Isaac. We have effects (the emergence of the sacred) with a cause (the attackers) that is too awkward to accept. The terror attack reveals that the citizen may not always have limited liability—that their body can become the site through which the nation is both attacked and made visible. We cannot quite say “how” the new value is created. I think we can say that sacralization is a useful term; and sacrifice is one way of creating the sacred and yet there is an essential strangeness in calling the event a sacrifice. And perhaps this is just the point: the event does not fit simply into one established form of action.

Or we might start with another framing altogether: it is not that the everyday was “made” sacred by some event or transaction. Rather, the sacred was present in human life and real property already, and the process we must understand is not the creation of the sacred, but rather its

¹¹⁸ HENRI HUBERT & MARCEL MAUSS, SACRIFICE: ITS NATURE AND FUNCTION 97 (Trans. W.D. Halls) (1964).

¹¹⁹ CLAUDE LÉVI-STRAUSS, THE SAVAGE MIND 224-28 (1966).

¹²⁰ *Id.*

redistribution and confounding with other kinds of value. And this seems actually quite an easy task to track: the destruction simply moved the sacred from an inert, stable status to a diffuse and uncontained one, a transition visually expressed to the release of dust from bricks and mortar that then turned into a fine film that floated away from the WTC. In this alternate reading, we might think of the attack as a desecration: the attack on a sacred thing, the civilians, the WTC. This seems helpful, so long as we are not too literal and mean by desecration an attempt to de-sacralize, render an *ex ante* sacred thing everyday, as this meaning of desecrate seems rather implausible in this setting. Indeed, this literal sense seems quite backward since the main effect of the attack was to elevate the sense of sacredness of (American) life.

Conclusion

In this paper I have examined how the destruction of property and life seems to have generated a new form of value—what some participants called the “sacred.” While the destruction of property and life are often seen as mere negation and waste, as meaningless violence, we seem, in some of the examples I have explored, to confront another tradition—one which reads destruction as a point of connection to a different order of value.¹²¹ However, it was not entirely clear what was “sacred”—was it the family, the nation, the sovereign, death, the vaporization of life?

How are we to understand the value I have described? We might scoff, and consider this nothing more than a story about middle-aged FBI agents trying to have a memento of what is perhaps the highlight of their professional lives. Or we might suggest that they were following William Blake’s injunction to “see a world in a grain of sand”—in this case, a nation in a piece of rubble. Or, we might emphasize the strategic self-aggrandizing aspect of the FBI agents’ conduct.

It is useful to distinguish two alignments between the sacred and property. One alignment I have not focused on, though it may be the most obvious, is one in which sacred property is a form of property. This is the case with church property, or the sacred property of conquered indigenous groups now recognized by the governments that rule them.¹²² In this alignment, property (and the legal order more generally) contains and tames the sacred, having stripped the relevant community of sovereignty.

In a second alignment, the sacred encompasses and overwhelms the property designation, as I think we can see happening in some of my examples. In this moment, it seems that the sacred is aligned with sovereignty, and it transcends and grounds property. Of course, this

¹²¹ See Paul W. Kahn, *Managing Violence: Acoustic Separation, Memorials and Scapegoats*, available at <http://www.law.yale.edu/intellectuallife/selanews.htm>.

¹²² See, for e.g., Native American Graves Protection and Repatriation Act, Pub. Law 101-601 (1990) (Section (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...”).

second alignment contradicts some basic understandings of what defines political modernity, i.e., the banishment of the sacred from the political sphere. In that modernist narrative, the political sphere is no longer permeated by the divine. Instead a different category, religion, is generated to contain transcendence and the sacred. The political world is part of the secular, profane, Fallen world; it is, in Weber's phrase, "disenchanted." Indeed, once understood in this way, the protection of property can itself be seen as the highest, sacred even, obligation of the political order. From this understanding of political modernity, the first sense of the alignment between property and the sacred, one in which property contains the sacred (rather than being transcended by it) gets the relationship right.

What the examples I have explored suggest is that this containment operation does not always work, that the sacred can exceed its designated space. In other words, the "religious" is not the only place we find the sacred. We might ask then, whether, within our current constellation, we should think of the sacred as a religious category. We are caught between the two alignments of property and the sacred I outlined—sometimes it is contained, sometimes it exceeds property and the legal order more generally. The potential for sacralization is still present—the theme of political theology might be one way to describe this potential. Carl Schmitt famously wrote that "all significant concepts of the modern theory of the state are secularized theological concepts..."¹²³ The obvious example of this, for Schmitt, was the concept of sovereignty: either as state sovereignty or popular sovereignty, it remained irreducible to the legal order. We might take this to mean that although we think we live in a secular political order—one grounded in reason and the protection of life and property, etc.—actually we maintain close relationships with transcendence and the sacred. Political theology might be taken to mean, then, that nothing has really changed from the era where the sacred and the divine were official parts of the pre-modern politico-theological order. We have simply come up with new words, but have the same structure.

This does not seem to be what we see unfolding in my examples. In them, the sovereign and the sacred were removed from obvious public view until acts of creative destruction summoned them forth again. The sacred reemerged where it previously had not been visible. We might read this as being in line with the second alignment of property and the sacred, that is, that the sacred was revealed to encompass property. But as the moment of sacralization recedes in time, it is also possible to detect the other alignment, one in which property reemerges and is able to contain the sacred. Or, if we deploy the other narrative I have employed, we have witnessed merely the redistribution of the sacred from life and property as it was spread in a film over various other sites.

¹²³CARL SCHMITT, *POLITICAL THEOLOGY: FOUR CHAPTERS ON THE CONCEPT OF SOVEREIGNTY*, 36 (Trans. George D. Schwab) (2004 [1922]).