

THE FUTURE WILL NOT STOP ESCAPING US

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INTRODUCTION: TEACHING CULTURAL PROPERTY LAW FROM THE LEFT—A POSSIBILITY?

At the Teaching from the Left conference at Harvard Law School in March 2006, it was proposed that we live in “interesting times,” and that the recent events in the United States mean that we are uniquely at a point of crisis and responsibility. The fact that the government now condones torture, permits famine, fails to address health epidemics, erodes civil liberties at home as well as encouraging their erosion around the world, and initiates war, is taken as evidence of a kind of state of emergency unique to our generation. Yet I am not certain that there is anything unique about these particular political events, either now or at any other time in human history. Rather, one could say, “It is the end of the world. *Again.*”

What distinguished the moment of the conference was not the nature of the evils that we addressed, but rather the circumstances under which we gathered. We were gathered without fear in this particular time and place and were able to talk openly about these evils, with institutional support, freedom, and time to consider ourselves and our obligations to our students, our judgments, and our responses as a means of focusing on (and working under) these circumstances.

In light of this relatively luxurious protest environment, I will consider one of the questions that David Kennedy, and the commentators on his work, ask about political action in the “Newstream”¹ of international law: is modern international law and theory to a great extent, really, about *us*, its practitioners?² Further, is it possible to construct a program of teaching from the left in the field of cultural property and heritage law, or is the attempt, like the line from Stevie Smith, a matter of “not waving but drowning”?³

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1. See generally Deborah Z. Cass, *Navigating the Newstream: Recent Critical Scholarship in International Law*, 65 NORDIC J. INT'L L. 341, 344–45 (1996) (Neth.) (defining elements of Newstream critique of international law).

2. See generally David Kennedy, *Autumn Weekends: An Essay on Law and Everyday Life*, in LAW IN EVERYDAY LIFE 191, 191–235 (Austin Sarat & Thomas R. Kearns eds., 1993) (describing the role of the modern international lawyer in linking law and everyday life).

3. STEVIE SMITH, *Not Waving But Drowning*, in COLLECTED POEMS 301 (James MacGibbon ed., 1983).

Cultural property and heritage law is itself in a constant state of flux or transition. This field is produced by politically interesting times, almost generally shaped by war, loss, destruction of memory and monuments, theft, fraud, unprovable claims, and irresistible objects. At stake are the problems of determining ownership of very ancient, almost always intensely meaningful objects, for which typically more than only one or two individuals would give (or indeed have given) their lives.⁴ In each “regime change,” international conflict, or religious shift, cultural treasures cross borders, usually illicitly, are then mourned, and are sometimes demanded back as the tides shift again.⁵ Napoleon looted art treasures across Europe in the early nineteenth century⁶; a notable event in recent years was the Taliban’s destruction of the Buddhas in Bamiyan.⁷ Each conflict also brings with it the destruction of heritage in the form of lost community records and lived environments.

There are many other examples of loss and recovery, flashing across the networks of information and activism that make up the field. Cultural property problems constellate along axes of what used to be thought of as cultural nationalism and cultural internationalism.⁸ Today, these axes are better understood as loose vectors comprised of the standardization and globalization of questions of knowledge; class and taste (and the concomitant disputes around increasingly accessible “heritage” and the industries that arise around it); the political power of questions of origin (in the register of identity politics as well as in expert disciplines); the disjunction between territorial boundaries and cultural ones (and indeed the portability of cultural imperatives in a world in which economic imperatives lead to radical mobility of small groups and populations); and the proliferation of sub- and trans-national actors in the international field. During the conference, David Kennedy diagrammed the intellectual history of public international law across the twentieth century by identifying the

4. See, e.g., Peter Landesman, *The Curse of the Sevso Silver*, THE ATLANTIC MONTHLY, Nov. 2001, at 63, available at <http://www.theatlantic.com/doc/200111/landesman> (last visited Mar. 24, 2007) (describing the ownership battle over excavated Bulgarian silver).

5. Examples of cultural property cases include the ongoing disputes about the ownership of the Parthenon Marbles; ancient skeletons held in museums (e.g., the Kennewick Man in the U.S. and Australian skeletons in the U.K.); actions brought against museum curators and antiquities dealers for acquiring looted objects; and the competing claims to “heritage” objects and sites more generally. Examples of actors in this field include governmental ministers acting for nation-states; non- and quasi-governmental organizations; customs agents; national and international policing organizations; ethnic and cultural groups and sub-groups; private actors; and of course, an entire world of elite experts and commentators (professional and academic). The issues include questions of preservation, provenance, alienability, and patriation or repatriation. See generally JOHN HENRY MERRYMAN & ALBERT E. ELSÉN, *LAW, ETHICS AND THE VISUAL ARTS* (Kluwer Law Int’l, 4th ed. 2002) (1979).

6. See MERRYMAN & ELSÉN, *supra* note 5, at 2–9.

7. See Barry Bearak, *Over World Protests, Taliban Are Destroying Ancient Buddhas*, N.Y. TIMES, Mar. 4, 2001, at 1.10.

8. See John Henry Merryman, *The Public Interest in Cultural Property*, 77 CAL. L. REV. 339, 350–51 (1989).

categories that define this area and the different instruments, figures, and initiatives that filled these categories in specific eras.⁹ One can understand the problems that cultural property presents in terms of public international law with reference to this diagram: in terms of “Trauma,” “Doctrinal Focus,” and “Preoccupation,” cultural property law and analysis are defined by elements that Kennedy isolates as belonging to the first half of the twentieth century¹⁰; in the “Mode of Action” and “Mode of Organization” categories, they are presently rooted in the years 1950–1989¹¹; and only in the “Mode of Thought” and “Interdisciplinary resource” categories is cultural property analysis fully in the present (1990–2000) era.¹² Therefore, in its development, cultural property is still something of a niche (or stealth?) market for legal academics.

However, there is one area where “cultural property” and “public international law” are entirely coeval with each other: concerns about the meaning of “culture” within the study of international law are at the center of the “Newstream.”¹³ The questions and initiatives around identifying, protecting, and assigning ownership of these kinds of objects, practices, and knowledge are fracturing and recombining very rapidly both in cultural property and heritage commentaries, and within the context of international law more generally. There is no consensus about the meaning of “culture” or about its deployment. As a result, commentators in this field wonder what exactly law is being used to regulate. Can the law assess ownership or access rights without addressing the questions implicit in defining and assigning cultural identities or “culture” more generally? If one then takes on the question of “culture” beyond its formulation as an assessment and protection of who has property, “cultural” or not, in an object, this changes the teaching project, especially if one attempts to teach “from the left.”

Fundamentally, it is necessary to know who, or what, should be called “right” and who, or what, conversely, “left,” within a field of this complexity. Positioning oneself within the flow of the culture industries, especially in the international arena, is a deeply political project,¹⁴ but it occurs on a field in

9. David Kennedy, *One, Two, Three, Many Legal Orders: Legal Pluralism and the Cosmopolitan Dream*, 31 N.Y.U. REV. L. & SOC. CHANGE 641, 651 fig.1 (2007) (including the categories “Trauma,” “Doctrinal Focus,” “Preoccupation,” “Mode of Action,” “Mode of Organization,” “Heroic Figure,” “World Map,” “Mode of Thought,” and “Interdisciplinary resource,” and the time ranges 1900–1950, 1950–1989, and 1990–2000).

10. *Id.* (“War, Hague, League failure, treaties and customs, and minority rights, colonial management, collective security, nationalism and self-determination”).

11. *Id.* (“administration and policy management, conventions and rights, international institutions”).

12. *Id.* (“pragmatism, legitimacy, humanism, ethics, international relations, cultural and human sciences”).

13. See Cass, *supra* note 1, at 345–54 (describing Newstream’s challenge of international law’s traditional definitions of culture).

14. See generally FREDRIC JAMESON, *THE CULTURAL TURN: SELECTED WRITINGS ON THE POSTMODERN, 1983–1998* (1998).

which there is no such thing as a global positioning satellite. And here is where I return to the central theme in this essay. What are the prerequisites for such an endeavor? If “culture” essentially evades categorization, what can replace it, in or outside of the classroom? For example, can understandings of “the past,” “values,” or even “civilization” be taught at a time in which the understandings of what “culture” is—and what it could be in any common sense—are radically at risk? Before one can attempt to teach from the left, one must first attempt to determine what the *preconditions for political thought and action* are in this field. My argument is thus for the importance of self-reflection, and the importance of teaching the tools of self-reflection to enable students and commentators to make political judgments in the area of cultural property and heritage analysis. To make this argument, I will look at two elements that define the field itself. First, it is necessary to locate the actors in this field (including teachers and students) in time, as cultural property and heritage protection manipulate the concepts of past and future as part of how they manipulate legal entitlement to “culture.”¹⁵ Second, how is one able to make meaningful political statements, and judgments, in an environment in which the available understandings of future and past are fractured, purposive, and often contested?

Hannah Arendt considers exactly these problematics—time and the capacity for judgment—in her work.¹⁶ I will look to her analyses to determine how to teach the *capacity* to distinguish right from left when teaching international cultural property and heritage law. I will argue that our modern conceptions of time essentially produce and are linked to heritage issues; if one takes these conceptions seriously (a perspective that requires using the new approaches to international law), “critical” positions are genuinely problematic to identify. Arendt has a lot to say about the importance of identifying critical positions, and in particular, what might replace “left” in this area.

TIME: CULTURAL PROPERTY DISCOURSES AS A RESPONSE TO THE PROBLEMS OF MODERNITY

When Hannah Arendt wrote in 1958 of Sputnik’s ascent, she contemplated a moment in which human eyes were turned to the future.¹⁷ The emotion Arendt identified was relief. Looking upwards, the reaches of space were also the reaches of future time, and in 1958, Arendt noted that humankind saw all the pleasures of technology and freedom combining in a triumphant first step away from the earth and its discontents.¹⁸ Yet, almost fifty years later, it seems that public attention turns to the past with the same longing that had been felt for the

15. This is part of a greater set of functions, which are too broad to discuss within this essay: by addressing the problems of time, the cultural property claims themselves become discourses reflective and constitutive of modernity.

16. See *infra* notes 17–22 and accompanying text.

17. See HANNAH ARENDT, *THE HUMAN CONDITION* 1–6 (1958).

18. See *id.* at 1–2.

stars. Objects that seem to come from unimaginably distant pasts are increasingly fascinating. The media report the discovery of ancient skeletons and artifacts as prominently as the latest space flight, and the appeal of ancient cultures and monuments underwrites an increasing number of books, films, and fantasy adventures. The proliferation of objects, institutions, and legislation in the cultural property and heritage areas expose a fascination with the past rather than the future-orientation that Arendt predicted.

Moderns are horizon people, defined by a passionate attachment to what happens next. How then to explain this seemingly radical shift in attention from future to past? In 1958, Arendt identified some of the dangers that could be found in the newly actualized and long-awaited movement toward the horizon. Chief among these were a diremption between human political rationality and technological capability, and a problematic relationship between the human organism and its environment.¹⁹ She conceived the human condition, or the condition of our humanity itself, as having two characteristics: habitation on Earth and the capacity to speak intelligibly amongst ourselves about our own actions.²⁰ Arendt feared that the effect of our passionate attention to the future would be a flight away from the earth and its myriad physical and political constraints.²¹ The future could be a time in which we might slip our moorings in more than physical space. Her fear was that “we, who are earth-bound creatures and have begun to act as though we were dwellers of the universe, will forever be unable to understand, that is, to think and speak about the things which nevertheless we are able to do.”²² This would lead to some kind of crisis in our relationship with time, with speech and rationality, and with the earth itself. Regardless of where one lived, then, one would cease to inhabit the *human* condition.

In the years since the publication of *The Human Condition*, other philosophers have addressed the problems of living in future-time, a condition in which the future rather than the present (or a utility-based reading of the past) provides the confirmation of humanity’s projects. Jürgen Habermas and Niklas Luhmann, from their very different perspectives, discuss some of the problems of being “moderns”, or rather, orienting our self-identification to our relationship with time.²³ They agree that the future is the always-out-of-reach locus of the displacement of the successes that do not exist in the present. As such, it is either anarchic or utopian or both, and as a repository of our not-yet successes, it creates certain negative effects. First, the future may no longer be a source of human complexity or richness.²⁴ Second, Luhmann argues that we may have

19. *Id.* at 3–4.

20. *Id.* at 2–3.

21. *Id.*

22. ARENDT, *supra* note 17, at 3.

23. See generally JÜRGEN HABERMAS, *THE PHILOSOPHICAL DISCOURSE OF MODERNITY: TWELVE LECTURES* (Frederick Lawrence trans., The MIT Press 1993) (1985); NIKLAS LUHMANN, *OBSERVATIONS ON MODERNITY* (William Whobrey trans., Stanford Univ. Press 1998) (1992).

24. Cf. HABERMAS, *supra* note 23, at 12 (“Modernity’s specific orientation toward the future

already lost our ability to define or comprehend the future, and thus, have lost our capacity to understand ourselves as moderns at all, while clinging to the definition out of necessity.²⁵ If, in modernity, the web of meaning in epistemology and the acceptance of authority in the social dimension have both been lost, the effect of this loss is to dislodge certainties of human thought and action. We have to learn to manage risk rather than knowledge; put differently, the probabilities of the future and those of the present may be at any moment coupled or uncoupled. As the present and the future may not, in fact, be logically dependent upon each other, the attempt to live oriented towards the future is deeply unsettling.²⁶

The future, therefore, is a time in which political rationality is always on the verge of being divorced from, yet ultimately subject to, our emerging technological capabilities. This is not a redemptive vision. Unlike in the dreams of previous centuries, we do not head to the stars—or to a utopia of social and distributive justice—as a matter of rational evolutionary principles, or even as a result of transformative political philosophies. Instead, Luhmann asks what may await us when he asks, “What will become of humankind, of society? What living conditions will ‘future generations’ face—provided that a comparable humanity even exists, and not some gene-manipulated, normed humanoids who are differentiated according to program?”²⁷ In addition, we might not necessarily be aware of the texture, or the problems, of this crisis. It is in this context that we must understand the increasing interest in cultural property and heritage: the proliferation of instruments and interest in this field illustrates the desire to establish a ground for human flourishing in modernity. This conclusion is supported by the central position that arguments regarding “the past” maintain in this area—not least through recourse to principles of property law.²⁸

And yet, “the past” as deployed by cultural theorists and claimants in cultural property disputes does not necessarily provide a solution to the problem of grounding human continuity or political discourse. The forward leap and the backward glance have always been part of the same motion, and do not solve each other’s problems.²⁹ Modernity was ushered in by the “new” rationality of the Enlightenment, which also signified a “new” historical epoch, and vice versa. In this sense, the idea of “the new,” the new idea of the new, created the idea of “the old,” the new idea of the old. “The past” now means the moment before the

tears apart . . . traditional experiences of previous generations [and replaces them with] the kind of experience of progress that lends to our horizon of expectation . . . a ‘historically new quality . . .’” (internal citations omitted).

25. See LUHMANN, *supra* note 23, at 66–67.

26. See *id.* at 70.

27. *Id.* at 67.

28. See generally Lawrence M. Kaye, *The Future of the Past: Recovering Cultural Property*, 4 CARDOZO J. INT’L & COMP. L. 23 (1996) (describing the main issues in cases in which plaintiffs seek the return of cultural property).

29. See generally PAUL CONNERTON, *HOW SOCIETIES REMEMBER* (1989).

beginning of modern times. Yet, this newly created past is no more solid than the suddenly available future. The moment that continues to define modernity is one of opening, unguarded against (or unprepared for philosophically) a specific (or some unknown) future, in contrast to some suddenly unreliable, because constantly expanding, *past*. Our love affair with the future has had the paradoxical effect of foregrounding the past, as the result of being modern is, in each instant of modernity, to generate endless amounts of “past.” Therefore, the continuous renewal of the new is also the continuous production of the old, a machine that runs on the ingestion of time itself. This continuous renewal also powers, is the engine of, the heritage industry. In terms of cultural property disputes, this endless amount of past is material for strategic forays and maneuvers in the battle for whatever ground is being claimed. Claimants manipulate history, hierarchy, and identity in order to argue that the past itself dictates a particular outcome as a meaningful source of legal entitlement in itself. Yet which past to choose? “The past” is a field made up of many possible points of origin, generating many different narratives of descent and positions of entitlement. “Ground”, in the sense required, remains fundamentally unavailable.

Arendt imagined that we might finally reach the edge of the future and find *nothing there at all* that could serve as a place for human flourishing, a flourishing necessarily defined by acting and thinking against, or through, a common ground. This fluidity in time and space has serious implications for our capacity to be human, in any politically meaningful sense. How to assess the morality of the various options, much less take up political positions, in this landscape? It requires the philosophical, cultural, and multidisciplinary resources and perspectives of Newstream scholarship, in that what one must teach are the investments, battles, and objectives that the disputes in this area represent.³⁰ Furthermore, one must teach these elements not as a discrete set of principles and concepts being organized by another discrete set of legal practices, but as a response to the question of what does it mean to be human, and to ask human questions about what we are doing in this world? We turn to the past, and we argue about cultural property, as part of creating the preconditions for the political questions that the Teaching from the Left conference foregrounded.

JUDGMENT: ARE WE TEMPTED?

Against this understanding of international cultural property and heritage law, it is necessary to emphasize the importance of insisting upon the *capacity* to be human—to be civilized—in order to contemplate any capacity for political understanding. Arendt’s work addresses questions of judgment, within and outside of law, outside the scope of this essay. However, one or two points

30. See *supra* notes 1–2 and accompanying text.

might be useful in the endeavor to teach judgment “from the left,” or to make political discussion possible in the classroom.

First, Arendt isolates why it is uncomfortable to make judgments in this modernity:

Two things are involved here: First, how can I tell right from wrong, if the majority or my whole environment has prejudged the issue? *Who am I to judge?* And second, to what extent, if at all, can we judge past events or occurrences at which we were not present?³¹

Arendt is expressing the idea that we refuse judgment not out of forbearance, but out of fear that we have not enough freedom to be held responsible for our actions. Not enough freedom means not having the right words, nor the capacity to think nor to speak so as to be able to understand when judgment is required. This is the first element that requires self-reflection: the courtesy (for lack of a better word) of refusing judgment. If humanity requires the capacity to engage in political speech in order to be human, it also requires actual engagement in political speech. The ground itself—the battles regarding the definition of culture and the allotment of ownership rights which in turn guarantee cultural identity—is not enough. If one then avoids the moral imperative to “tell right from wrong, [even] if the majority or my whole environment has prejudged the issue,” then one avoids the point of protecting the precondition(s) of humanity.³²

Second, Arendt gives us another tool for distinguishing between the arguments about cultural relativism—which may be substantively valuable in debates regarding culture—and the belief that judgment itself must be entirely neutral if it is to be taught in the classroom. The worst consequence of the modern discomfort with judging, for Arendt, is the muddling of personal responsibility: both those who *were* factually guilty and those who *could not have been*, all feel guilty, and “where all are guilty, no one is.”³³ Guilt, which is part of the moral sense, thus becomes warped or disabled, and the concomitant ability to reason, to engage in the delicate balance that makes up personal and political responsibility, vanishes. Any action becomes personally possible, and it becomes impossible to distinguish between guilty and not guilty. This is the problem, in gross, addressed by the conference: not the troubling behavior of the U.S. government (and academy, in some cases), but the even-more troubling absence of guilt.

In conclusion, I return to the questions this conference raised. In the modern world, how can one judge what it is to be civilized, to be human, and to protect the values of civility and humanity? Governments and groups of all kinds make claims to objects that guarantee their capacity to project themselves

31. HANNAH ARENDT, *Personal Responsibility Under Dictatorship* (1964), in *RESPONSIBILITY AND JUDGMENT* 17, 18–19 (Jerome Kohn ed., 2003).

32. *Id.* at 18.

33. *Id.* at 21.

into a human future by ensuring a constant and consistent past. They also create heritage structures that enact their commitments to justice and judgment in the endless afterwards of law. But Arendt shows us that judgment is personal, and occurs on an individual scale.³⁴ In a world in which temptation and compulsion are closer than they should be, a world in which everyone is guilty so no one is, how does one approach a horizon-line of teaching and acting on which one is not, like Benjamin's Angel of History,³⁵ always being blown backward into the future?

Applying the insights that are developed in modern approaches to cultural property analysis would suggest the following approach. First, one must look to the (institutional) pasts available to lawyers and law professors in order to create new ground for this endeavor. Second, one must accept, and come to comprehend, the absolute certainty that the law will not provide any transformative or redemptive future either—i.e., things will remain much the same in the next decade or century as in the previous decade or century. In the area of cultural property, tombs will be robbed; museums will be looted; antiquities will be wrongly appropriated; and this will happen despite the proliferation of new international legislation prohibiting this behavior (and the rigorous enforcement of this legislation), because law is always, and systemically, *too late* to manage culture. In political and academic culture, vigilance about safeguarding whatever serves as the preconditions for the capacity to think is extremely necessary in these (as well as all other) political times. All law can do is make possible, at some points, the opportunity for some sort of civilization. It can only do this interstitially: within elite and protected institutions like law schools, within the moments that exist between teachers and students, and within the passions and commitments of specific initiatives, like this conference. Third, therefore, it is worth taking and exercising power in these contexts. I believe that one must teach while knowing that one creates, and inhabits, the moment between knowledge and action for students. Finally, I suspect that in my field, all I can do is teach the tools of self-knowledge. Self-knowledge is tricky; it demands gaucheness³⁶ from student and teacher both.

34. *See id.* at 29–30.

35. WALTER BENJAMIN, *Theses on the Philosophy of History*, in ILLUMINATIONS, 255, 259–60 (Hannah Arendt ed., Harry Zohn trans. 1970).

36. Thanks to Joanne Conaghan for this word.

