Spring 2001

# What Is Property's Fourth Estate - Cultural Property and the Fiduciary Ideal

Steven Wilf
*University of Connecticut School of Law*

# WHAT IS PROPERTY'S FOURTH ESTATE? CULTURAL PROPERTY AND THE FIDUCIARY IDEAL

*Steven Wilf*

The title of this introduction, of course, is a play upon the title of Abbé Sieyes well-known essay from the French Revolution, *Qu'est-que le tiers Etat?—What is the Third Estate?* In this brief essay, he tries to describe the emergence of a new class, the bourgeoisie, which is neither clergy nor nobility, and which should have its own rights and entitlements in the political constellation of late eighteenth-century France.[1] Property, like Frenchmen, has its estates; different types of property with their own rules. These estates are four-fold: real property; movables or chattel; intangible property–the intellectual property of our day, including exclusive rights established through copyright, trademark, rights of publicity, and patent; and the fourth estate–cultural property.[3]

Historically, each of these estates has its own character and governing rules. Real property, land and the fixtures affixed to the land, always has an owner–be it private individuals or the state--according to common law. Chattels may be returned to nature and become unowned objects, *res nullius*.[4] A succession of owners could be established for land. Common law, however, did not permit future estates for chattel.[5] There are many other distinctions which could be made between these two estates. But at the core of the difference between real property and chattel lay the significance of land tenure in the political economy of feudalism, and the idea that chattel was a more fluid sort of property. Real property law was fixed on the thing itself. If chattel was the issue for the case at bar, personal actions, such as trespass, were used. Chattel involved a tort, and the relief was pecuniary. While land was unique, chattel was seen as fungible property where "the

---

* Associate Professor of Law, University of Connecticut School of Law.

1. *See generally* Abbé Sieyes, *What is the Third Estate?* (1789) in EMMANUEL SIEYES, WHAT IS THE THIRD ESTATE AND OTHER WRITINGS (Michael Sonenscher trans., Hackett Pub. Co. 2001).

3. Cultural property as the fourth estate is not an original phrase of mine. *See* Richard Crewdson, *Cultural Porperty as the Fourth Estate?*, 81 LAW SOCIETY'S GAZETTE 126, 129 (1984) (discussing briefly the reasons for establishing a new set of property rules to deal with cultural property). Sarah Harding, Justifying Repatriation of Native American Property, 72 Ind. L.J. 723 provides an especially thoughtful justification for treating cultural property differently than other forms of property.

4. *See* J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 193-4, 322-24 (1979).

5. *Id.* at 323.

legal supposition is . . . one ox is indistinguishable from another ox."[6] The rule was monetary damages in cases involving chattel.

Cultural property is a pastiche of the other property regimes. Like real property, there is an implicit assumption that the thing itself, the *res*, is unique–and not a fungible good in which proprietary rights might be easily exchanged for money. This incommensurability makes other kinds of legal relief, like pecuniary relief, more difficult when ownership is contested since nothing can substitute for the priceless cultural artifact itself. Like chattel, on the other hand, the language of cultural property actions is infused with the language of tort. The wrong committed against the property of a cultural group may lead, as a consequence, to the destruction of a precious and irreplaceable object and a cognizable injury to the feelings of members of the group.[8] The third estate, intellectual property, consists of intangible products of the mind. Here, too, there are bits and pieces shared by cultural property for both regimes are infused with notions of human creativity. Indeed, cultural property has been expanded to include such intangibles as folklore and ritual traditions.[9] The shared idea, of course, for both intellectual property law and cultural property law is that creators–and the heirs of creators–should have some proprietary rights over their creations.

We *know* at a visceral level that there are some objects that should be protected from their owners. Whether we are Buddhists or not, the Taliban destruction of ancient Buddhist statues creates a loss–and if we are Buddhist, how much more deeply that loss might be felt. The justification and defining of the scope of cultural property entitlements has been less than successful.[10] In the UNESCO Convention on the Means of Prohibiting the Illicit Import, Export, and Transfer of Ownership of Cultural Property (1970), for example, the definition of cultural property rests upon the identification by each signatory state of protectable works from a variety of categories, including postage stamps, objects of ethnological interest, and antiquities of more than one hundred years old. The list is so varied in what it includes that it brings to mind Borges's bewildering classification system which he claims to have found in a certain Chinese encyclopedia, where it was found that animals were divided into, among other categories, those belonging to the Emperor; embalmed creatures; sucking pigs; and those that look from a long way off like flies. The problem with the taxonomy of cultural property is compounded when one looks at the issue of what exclusive rights collective proprietary rights entail.

---

6. FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, THE HISTORY OF ENGLISH LAW 151-52 (2nd ed. 1968).

8. A similar argument is used as the basis for artists' moral rights. *See* Susan Liemer, *Understanding Artists' Moral Rights: A Primer*, 7 B.U. PUB. INT. L.J. 41 (1998).

9. *See, e.g.*, The Bellagio Declaration, *reproduced in* JAMES BOYLE, SHAMANS, SOFTWARE, AND SPLEENS: LAW AND THE CONSTRUCTION OF THE INFORMATION SOCIETY 192-200 (1996).

10. Two articles by Sarah Harding, provide an especially thoughtful justification for treating cultural property differently than other forms of property: *Justifying Repatriation of Native American Property*, 72 Ind. L.J. 723 (1997) and *Value, Obligation, and Cultural Heritage*, 31 ARIZ. ST. L.J. 291 (1999).

But, as is so often the case in intellectual property, the extent of property ownership is defined by law in action. This Symposium on Cultural Property draws together a collection of disparate viewpoints–from a seasoned litigator in the area of the restitution of stolen works of art; from an archeologist who has long pursued cultural property questions; from an expert on indigenous peoples in the British Commonwealth; from one of the country's leading scholars in the field; and from the director of a major university museum–to discuss the implications of cultural property law in the literal, as well as the figurative, trenches. The result is a remarkable statement of the many ways cultural property issues are mediated through a variety of legal means--private law suits, negotiation, and legislative statutes–in order to determine what the metes and bounds of the property right entitlement look like in reality.

Howard Spiegler discusses one of the most morally compelling issues in cultural property law: the restitution of art works looted by the Nazis during World War II. Indeed, these moral claims are so robust, as Spiegler describes, to prompt a North Carolina Museum of Art to return a sixteenth-century German renaissance painting in its collection which was confiscated during the War to the heirs of a Viennese collector. But these claims are often obscured by the evidentiary problems which bedevil litigation in such cases. The original owners may have died during the War; there has been a significant passage of time; and the evidence may be grounded upon memory rather than photographs, catalogues, or insurance policies. Yale Art Gallery, for example, recently learned that one of the most important paintings on loan to the museum, Gustave Courbet's *Le Grand Pont* (1864) may have been taken from a Czechoslovakian collector during in the 1930s.[11] It is currently grappling with the evidence supporting the claims.[12]

Such cases, including the well-known litigation over Egon Schiele's *Portrait of Wally*, which Spiegler discusses, creates consciousness about the wartime experience in much the same way as Israel's Adolf Eichman trial probed the bureaucratic mentality behind genocide or France's bringing to justice Klaus Barbie prompted a second look at French collaboration.[13] Whether they like it or not, museum directors are thrust into the role of considering the *provenience* of a work of object as well as the object in its own right. Jame Cuno, director of Harvard University Art Museums, argues that the mission of the art museum is to serve as culture steward in the preservation and presentation of works of art. The risk of repatriation of a stolen work of art is no greater than the loss of funds expended on purchasing a fake. Both require a greater knowledge of the object.

But the knowledge of patterns of ownership and collecting by *bona fide* collectors, and the avarice of those who confiscated works of art, also tell us something about the object–the underside of art collecting. There are ethical dilemmas about the way art is produced, hoarded, and turned into contested

11. Patricia Grandjean, *A Nazi Cloud Hangs Over a Painting on Loan to Yale*, N.Y. TIMES, Mar. 18, 2001, at 14CN.

12. *Id.*

13. CHARLES S. MAIER, THE UNMASTERABLE PAST: HISTORY, HOLOCAUST, AND GERMAN NATIONAL IDENTITY 7 (1988).

commodities that goes beyond the narrower issue of wartime looted art. We most certainly do not want to divert museum directors, or the viewing public, from pursuit of aesthetics to ethics. But in order to understand an artifact, it is necessary to undergo what Germans refer to as *Vergangenheitsbewältigung*, mastering the past. Objects are not just contextualized by their producers-but also by every subsequent generation which displays it in different settings or even employs it as a usable artifact; values it in different ways; and, often shamelessly, borrows its motifs to create a new set of works of art. The looted art cases compel looking at the object differently-much as in Barry Unsworth's novel, *Stone Virgin*, where a sensuous renaissance madonna captures bits and pieces of the emotional lives of all those who encounter it.

We all have a relationship to an object of art. Some have more of a relationship than others. The Native American Graves Protection and Repatriation Act ("NAGPRA") vests title to cultural objects to those entities which have the closest affiliation with the object.[14] The idea, of course, is that those who will best police broader public interests in a cultural artifact will be those who are most emotionally vested in it. This is not always true. Navajos routinely destroy their earth images, which are used in a healing ritual, while museums preserve them.[15] We need to be on guard when we try to re-invest ownership rights in another individual or a collective, as NAGPRA does for these owners-despite their lineal genetic descent or cultural affiliation-may be so very different from the original makers of the artifact itself. Clemency Coggins warns us about this fallacy. Ownership is a peculiar notion for antiquities-and archeological remains, no matter how well preserved by a museum, lose much of their meaning when removed from their context at the archeological site.

It may very well be that all four of our property estates have suffered from more than a dose of romanticism. In the American Revolutionary period, real property was associated with republicanism and the emergence of autonomous Jeffersonian yeoman farmers. Later, movables were valorized as the possessions of an emerging mid-nineteenth-century middle class which embraced the cult of domesticity. Intellectual property doctine embodied a romantic conception of the author. Is the image of the romantic indigenous creator just another turn on this trope? Lawyers must return to the question of ownership-despite Coggins-because it raises the classic legal process question of who is best suited to police abuse of artifacts.

This is the issue discussed by Francis McManamon and Robert Paterson. McManamon traces the emergence of a legislative foundation for cultural property rights in the United States. In the last quarter of the nineteenth century, encountering native American sites in the Southwest crystallized interest in the protection of archeological objects. Ironically, as McManamon points out, the plundering of objects from these sites, and their broad distribution among the educated public, led to a growing awareness that the sites themselves might be at

14. Native American Graves and Repatriation Act, 25 U.S.C. § 3002 (2001).
15. Michael Brown, *Can Culture be Copyrighted?*, 39 CURRENT ANTHROPOLOGY 193 (1998).

risk. The concern with historic preservation led to a federal stewardship of antiquities on public land in much the same way as the national government took an increasingly prominent role in environmental.

The result was the Antiquities Act of 1906, a milestone in cultural property law. The Act protected archeological sites on federal public land, and Indian land, and provided for the establishment of National Monuments as directed by the President. It makes actionable any act which might "appropriate, excavate, injure, or destroy" an object of antiquity.[16] But the Antiquities Act, as McManamon, points out, also established a requirement for professional archeological standards for the excavation and investigation of archeological objects found on federal lands. The Antiquities Act was a Progressive Era Act. The turn towards a professional ethos is a classic move in Progressive Era thinking: good government was possible with the right stewards.

But the fiduciary ideal–the idea that museum directors (Cuno) or archeologists (McManamon) represent the best stewards may result in a mummification of traditional cultures. Robert Patterson discusses the variety of means for establishing proprietary rights for *indigenous peoples* themselves, making them into fiduciaries for their own interests. He examines a number of different strategies for the empowerment of native peoples which might result in the return of cultural property artifacts, including legislature mandated repatriation, as with NAGPRA, and negotiations. Of course, these often work together. NAGPRA has resulted in artifacts remaining in museums under terms agreed upon with Native Americans. Patterson has a clear preference for negotiated settlements. He points to the Canadian Task force on Museums and First Peoples as providing, in addition to repatriation, improved access to museum artifacts by Aboriginal people as well as increased involvement in managing collections.

The fiduciary ideal, then, might be best accomplished through multiple stewardships: museum curators, archeologists, native peoples–all of whom should have a sense of duty to the public at large as well as, perhaps, fealty to the artifact's historical creators. However, Patty Gerstenblith reminds us in her tightly argued essay, that while we may establish arguments for a compelling public interest in artifacts, a sense of stewardship must be balanced by the recognition that we are also seeking to influence complex and variegated international art markets. We will have to live with these markets–despite export controls–whether we like it or not, and we should choose legal rules which best preserve the public interest within the reality of legal, and often illegal, art markets.

This brief introduction cannot do justice to these rich and provocative essays. The making of the Cultural Property Symposium itself by a variety of student groups, including the *Connecticut International Law Journal*, the Black Law Students Association, the Hellenic Association, the International Law Society, the Jewish Law Students Association, and the Latino Law Students Association, proffers the best evidence of how important a psychological stake can be in increasing a sense of fiduciary and non-fiduciary duty. However, in the arena of

16. 16 U.S.C. § 433 (2001).

cultural property, the sense of being vested can also have a downside. It can lead to making cultural property issues ever more contested. Intellectual property faces the public goods problem–intangibles are expensive to create and inexpensive to copy. Without sufficient protection, they will become less available. Cultural artifacts raise the opposite dilemma. Often they are found objects, a kind of *art de vivre* made tangible; but, since there resides a fetishism about the uniqueness of art, they are also objects which cannot be copied and be the same as the original. Perhaps this sense of the artifact's distinctiveness, too, leads to the combative nature of cultural property litigation.

I began the essay with Abbé Sieyes, and I should like to conclude with him as well. Along with Condorcet, Sieyes was one of the leading Enlightenment figures calling for the balancing of literary property rights with the public interest.[17] But we do not always know where that interest lies—and, in fact, there may be competing public interests as well as private interests. The fiduciaries envisioned in these essays, museum curators, archeologists, and the indigenous peoples themselves, create competing claims for the disposition of objects. Cultural property's fiduciary ideal, then, is complex and rarely a question of vesting one bundle of rights upon one party. But, as scholars have so often reminded us, property never looks as neatly defined as the idea of metes and bounds or, for that matter, the right to exclude others, suggests. Is not this balancing–whether it be with real property, chattel, intangibles, or, indeed, with cultural property–a necessary feature of all four of property's estates?

17. ROGER CHARTIER, THE ORDER OF BOOKS 35-6 (Lydia G. Cochrane trans., 1994). For a thoughtful discussion of the role of the fiduciary in property law, see JOSEPH WILLIAM SINGER, ENTITLEMENT: THE PARADOXES OF PROPERTY 197-216 (2000).