The Idea of Cultural Heritage

Revised Edition

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In memory of my parents, Esther and Abraham Gillman,
and Stephen E. Weil

all come to symbolise democracy and liberty to the Spanish, Greek and American peoples, respectively. They may also symbolise them for other peoples. Beyond that, they have histories which connect them to Spain, Greece and America, and in the latter two cases also to Britain. Certainly there are countless objects and buildings that relate to specific cultures, but the focus at present is on important ones – those that stand out as exceptionally valuable. The important question to address, then, will be whether there is justification or not for moral claims to such symbols.

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"Two Ways of Thinking"

> In science of every kind, men should consider themselves as citizens of the world.
>
> Benjamin Rush[1]

> Distrust those cosmopolitans who, in their books, seek to find far away those duties which they disdain to fulfil around them. A philosopher loves the Tartars in order to be excused from loving his neighbour.
>
> Jean-Jacques Rousseau[2]

1. Heritage and International Conventions

I want to focus now on the work of John Merryman, whose articles over the past two decades have helped shape a significant part of the cultural landscape where art and law meet. In 'Two Ways of Thinking about Cultural Property', Merryman promotes a strong cosmopolitan position with regard to cultural nationalism, seeing the widespread recent legislative emphasis on local cultural heritages as having little virtue; and, where they do have virtue, Merryman suggests they do so only in respect to certain religious objects and human remains.[3] He therefore contests the

[1] To Richard Price. See Thomas J. Schlereth, *The Cosmopolitan Ideal in Enlightenment Thought: Its Form and Function in the Ideas of Franklin, Hume, and Voltaire, 1694–1790* (Notre Dame: University of Notre Dame, 1977), 26.

[2] *Emile, or on Education* (1762), 1:249/39, cited in Timothy O'Hagan, *Rousseau* (London: Routledge, 1999), 160.

[3] John Henry Merryman, 'Two Ways of Thinking about Cultural Property', (1986) 80 *American Journal of International Law* 831–53; see also those articles cited in Chapter 1, notes 37, 42 and 43, and note 5 below.

primacy of heritage over the ambassadorial role of objects, and seeks a relatively free trade in art and artefacts. From the tragic example of the Bamiyan Buddhas alone it is evident not only that objects and buildings may cease to be valued in their place of origin, but also that they may be greatly valued by people who live elsewhere.

Merryman's recurring contention is that the wording of two international Conventions drafted by UNESCO captures these broadly different approaches: the 1954 Hague Convention (for the Protection of Cultural Property in the Event of Armed Conflict), and the 1970 Convention (on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property). Merryman sees the Preamble to the 1954 Convention as embodying a nobility of purpose while also serving as a charter for internationalism:

> Being convinced that damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind, since each people makes its contribution to the culture of the world;
>
> Considering that the preservation of the cultural heritage is of great importance for all peoples of the world and that it is important that this heritage should receive international protection.[4]

The key phrases are "cultural heritage of all mankind", "culture of the world" and "the cultural heritage". In Merryman's opinion, the 1954 Hague Convention exerts an influence that extends beyond the obligations imposed on and accepted by its parties. It is a piece of legislation that exemplifies "cultural internationalism" and expresses the cosmopolitan notion of a general interest in cultural property apart from any national interest. Cosmopolitanism encourages the sharing of cultural objects beyond the source country and the exhibition of achievements of earlier cultures to a wider audience. Cultural particularism, however, militates against this: "the international agencies that might be expected to represent the more cosmopolitan, less purely nationalist, view ... are instead dominated by nations dedicated to the retention and repatriation of cultural property". He sees this second, particularist way articulated

[4] The Convention grew from the nineteenth-century Lieber Code, devised for the behaviour of military forces in a theatre of war. It demanded that classical works of art, libraries and scientific collections be secured against all avoidable injury but also allowed them to be removed by the conquering state; in no case might they be privately appropriated. *Instructions for the Governance of Armies of the United States in the Field*, issued by the Union command as General Orders No. 100, 24 April 1863; see Richard Shelley Hartigan, *Lieber's Code and the Law of War* (Chicago: Precedent, 1983); also Merryman, 'Two Ways of Thinking about Cultural Property', 833–5.

in the following proposition (one of eight) from the Preamble to the 1970 UNESCO Convention:

> Considering that cultural property constitutes one of the basic elements of civilization and national culture, and that its true value can be appreciated only in relation to the fullest possible information regarding its origin, history and traditional setting.

Merryman argues that Byron is culpable for the romantic nationalism which colours cultural property and heritage debate. So, though respecting the seriousness of Moustakas's approach to the Parthenon/Elgin Marbles, Merryman regards it "at bottom" as "Byronism all over again".[5] As Merryman frames it, the particularist way of thinking foregrounds national cultural heritages, the world dividing into source and market nations, where source nations are often Second or Third World and market nations First. The concern then is about net outward flows of cultural property from economically disadvantaged countries which in earlier centuries were frequently targets of colonial exploitation. Out of economic and historical imbalance comes a package of worries: about stopping the covert and damaging leakage of archaeological material (always subsequently unprovenanced), about building a sense of national achievement and about redressing the wrongs of the past.

The desirability of contextualisation applies, Merryman suggests, only to a small though important proportion of the total trade in stolen and illegally exported cultural objects. Such an intense focus on the primacy of context for everything encourages retentionist thinking (disguised as a concern to 'protect') that does a disservice to the potential of cultural artefacts to act as ambassadors. Nor does it necessarily restrict illicit traffic – it determines merely the form and the routes followed.[6] Congruent with

[5] For Byron, who together with Schiller and Keats had a profound admiration for classical Greece, the removal of the Parthenon sculptures by Elgin symbolised the plight of the Greek nation; he excoriated Elgin, who had never felt the "sacred glow" reserved for those with "polish'd breasts". Charles Taylor suggests that what the *Stürmer und Dränger* saw in the early Greeks was less a pre-modern consciousness and more what they themselves sought: unity with self and communion with nature; see Charles Taylor, *Hegel* (Cambridge: Cambridge University Press, 1975), 26–7. For the remark on Moustakas, see John Henry Merryman, 'Note on the Elgin Marbles', in his *Thinking About the Elgin Marbles: Critical Essays on Cultural Property, Art and Law* (Alphen aan den Rijn: Kluwer Law International, second edition, 2009), 22.

[6] This latter point is contested by Peter Cannon-Brookes, who sees U.S. ratification of the 1970 UNESCO Convention as having had a very marked impact on the trade, especially with respect to Central American antiquities; see Peter Cannon-Brookes 'The Movement, Location and Tracing of Cultural Property', (1992) 11 *Museum Management and Curatorship* 3–18.

this shift towards 'retentionism' are moves made to repatriate cultural objects to nations of origin, with the assumption that numbers of works presently abroad in museums and collections are wrongfully there. He argues, however, that

> It is not self-evident that something made in a place belongs there, or that something produced by artists of an earlier time ought to remain in or be returned to the territory occupied by their cultural descendants, or that the present government of a nation should have power over artifacts historically associated with its people or territory.[7]

He suggests that concerns about the 'loss' of objects with such symbolic value are overstated, since the majority of them are already publicly held.[8] He also believes that archaeologists, ethnographers and art historians lean toward particularism, because they emphasise cultural context and appear to require that all objects imported into market nations should be accompanied by export permits from the countries of origin.[9] Allowing the validity of both ways of thinking, he nonetheless wants to see the cosmopolitan position take priority when there is a conflict. Sharon Williams also finds this way of thinking admirable:

> From a doctrinal point of view, the newly emerging concept in international law of the "common heritage of mankind" provides a good foundation for the panoply of measures to be taken by states individually or collectively in order to protect the cultural heritage of mankind . . . This concept . . . could also justify the establishment of a concrete *international* cultural heritage, a new sort of property, owned by the international community as such, administered by an international agency.[10]

Jean Musitelli has suggested that the 1972 UNESCO Convention Concerning the Protection of the World Cultural and Natural Heritage helped

[7] John Henry Merryman, 'Thinking about the Elgin Marbles', (1985) 83 *Michigan Law Review* 1912. He suggests that the final wording of the UNIDROIT Convention reflects "bare retentionism", 'The UNIDROIT Convention: Three Significant Departures from the *Urtext*', (1996) 5 *International Journal of Cultural Property* 17.

[8] John Henry Merryman, 'Cultural Property Ethics', (1998) 7 *International Journal of Cultural Property* 28, and John Henry Merryman, 'The Nation and the Object', (1994) 3 *International Journal of Cultural Property* 70.

[9] Ibid., 31, and John Henry Merryman, 'A Licit International Trade in Cultural Objects', (1995) 4 *International Journal of Cultural Property* 32–8.

[10] Sharon A. Williams, *The International and National Protection of Movable Cultural Property: A Comparative Study* (Dobbs Ferry, N.Y.: Oceana Publications, 1978), 201–2.

form the concept of world heritage. Certainly I think it has been important in spreading the idea, but the construction itself derives from a variety of earlier sources that I shall explore below.[11]

In 'The Nation and the Object' Merryman argues that because people care deeply about cultural things for a variety of natural and laudable reasons, an object-centred public policy towards them is both desirable and unavoidable, the general goals of which should be preservation, truth and access.[12] If there is a conflict between preservation and access, preservation will take priority; if between truth and access, truth trumps access:

> In an object-oriented cultural property policy, the emphasis is on three conceptually separate but, in practice, interdependent considerations: preservation, truth and access, in declining order of importance. The most basic is preservation: protecting the object and its context from impairment. Next comes the quest for knowledge, for valid information about the human past, for the historical, scientific, cultural and aesthetic truth that the object and its context can provide. Finally, we want the object to be optimally accessible to scholars (for study) and to the public (for education and enjoyment).[13]

As he puts it elsewhere, the essential ingredient of any cultural property policy is, firstly, that things themselves be physically preserved: "if we don't care about its preservation, it isn't, for us, a cultural object".[14]

However, I think we need to be careful about the difference between instrumental and intrinsic values. Merryman's policy is led by instrumentalism, where preservation and access serve other intrinsic goods, and 'truth' can be either instrumentally valuable (providing information that assists preservation) or intrinsically valuable (relating to Finnis's 'knowledge'). But if these are instrumental values, then the highest value – preservation – is still only serving intrinsic goods, including knowledge, aesthetic experience and religion, the three with which we are most concerned with respect to heritage objects. I should state the obvious here, that if the object is destroyed (other than as part of shared ritual practice), then no intrinsic goods are served, and to the extent that objects are in

[11] Jean Musitelli, 'World Heritage, between Universalism and Globalization', (2002) 11 *International Journal of Cultural Property* 324.

[12] Merryman, 'The Nation and the Object', 64–5.

[13] Ibid. In prioritising preservation, Merryman concurs with Paul Bator: "The preservation of art constitutes our fundamental value" (Paul Bator, *The International Trade in Art* [Chicago: University of Chicago Press, 1983], 19–20).

[14] John Henry Merryman, 'The Public Interest in Cultural Property', (1989) 77 *California Law Review* 355.

intermittent or continuing danger, it certainly make sense to prioritise preservation. But even if preservation trumps knowledge as an instrumental good, it can't trump it as an intrinsic good (which Finnis argues can be done only subjectively, not objectively). That leaves much room for individuals to prioritise the relative importance of knowledge, aesthetic experience and religion, whether for themselves, or as part of groups or institutions. Merryman might counter that such value relativism gives the Taliban and others of a like iconoclastic disposition (e.g., Puritans in Reformation England, anti-Buddhist factions at the Tang Chinese court) the licence to destroy anything they regard as contravening their own religious beliefs and practices. I return to this problem in Chapter 5, drawing on Joseph Raz's thoughts about value and respect.

If interested individuals were asked to rank values, it is probable that collectors would often place aesthetic value above the value of knowledge, whereas archaeologists, appropriately concerned about illicit excavation, are likely to put the value of knowledge higher. There are two ways of understanding this: as a personal ranking, where individuals consider one or more basic values to be more important to them than others; or as an instrumental ranking, where in order to achieve a particular purpose (such as preserving objects from destruction), one believes that it is more useful to give precedence, for example, to knowledge over aesthetic experience.

In *The Return of Cultural Treasures* Jeanette Greenfield takes an opposite approach to Merryman. She also identifies conservation as a key and ongoing concern, alongside illicit trading (a contemporary issue) and the physical return of cultural property (which may be associated with illicit trading but is also an historic issue).[15] Her particularist focus is on equity, to see justice done in cases where cultural things have been taken by force, unequal treaty, theft or deceit. Since property is the subject of ownership, cultural property must belong to someone. The 'common heritage of mankind' therefore has less weight in the context of returns. But there needs to be a set of constraints defining the sorts of things that might properly be considered for return, achieved through a 'narrow frame of reference' that sifts out what are truly cultural treasures, such as exceptional or unique landmark objects.[16] At the heart of her book is a conviction that a great unfairness is involved in the alienation of objects

[15] Jeanette Greenfield, *The Return of Cultural Treasures* (Cambridge: Cambridge University Press, 1989) 254–5.

[16] Ibid. Greenfield wishes to see accepted at international law the premise that title is deemed not to have passed for three other classes of properties: (i) historic records or manuscripts of a nation, including the narrative representation of its history in an art

with a profound meaning for specific groups of people, often under conditions of war or colonial occupation, which should be remedied through the instruments of law. More occupied by the historic than the contemporary, which she feels is adequately covered by widespread national and international legislation, Greenfield puts much emphasis on the force of moral claims. Since the return of cultural treasures and cultural identity are tightly bound together, however, problems of settling the 'country of origin' follow. These recede, she argues, when cases are evaluated individually with due regard to the people for whom the object was made, by whom, for what purpose and place and the manner of subsequent acquisition.

In September 1983, a month before the request for restitution of the Parthenon/Elgin Marbles was made at governmental level, the Parliamentary Assembly of the Council of Europe called "on governments of Member States to recognise that the European cultural heritage belongs to all Europeans and to ensure that the diversity of this heritage remains easily accessible in each country". Greenfield responds thus: "This argument [the Council's] also ignores the additional factor of geography, since objects may sometimes belong not so much *to* a people as *within* a particular landscape".[17] More simply, the Council put commonality before national difference:

> The marbles are part of an Athenian ancient monument, and the Greek people are the indigenous descendants and inheritors of the Athenian republic. The link between Greek civilization, Athens and the marbles appears to be inexorable, and does not even bear comparison with any possible link that Britain may have with pieces of classical Greek sculpture, transported thousands of miles from their home.[18]

Merryman counterbalances this with a British claim:

> They help define the British to themselves, inspire British arts, give Britons identity and community, civilize and enrich British life, stimulate British scholarship. While one may argue that in these terms the Greek claim is more (or less) powerful than that of the British, it is not unreasonable to perceive the two positions as roughly equivalent.[19]

Other authors have sought a parallel with debates about the environment. In 1992, Lyndel Prott and Patrick O'Keefe argued that the term 'cultural

form which has been dismembered; (ii) objects torn from immovable property forming part of the sovereign territory of the State whence they were taken; and (iii) human relics.

[17] Ibid., 79–83. See also above, Chapter 1, note 43.

[18] Ibid.

[19] Merryman, 'Who Owns the Elgin Marbles', (1986) 85 *ARTnews* (September) 107.

property' should be superseded by 'cultural heritage', not only the larger intellectual concept, but more generous and less restrictive in scope.[20] Prott called for a new category of law, 'cultural heritage law', to parallel environmental law:

> Many issues are common to both of them. The deep concern with pollution, is an example: degradation of archaeological sites by industrial activities, and the rapid deterioration of monuments (marble disease is a particularly current concern). Another issue in common is the need to achieve a proper balance between public use and preservation and a proper consideration of heritage values in urban and other planning.[21]

For most of us, no conflict is involved in wanting to preserve a species of koala, an attractive animal. We feel that by so doing we are contributing to the common good of mankind. On the other hand, there may well be conflicts between protectors of rainforests and tree-dependent industries. Karen Warren has similarly proposed a 'non-renewable resource' argument that sees cultural properties as if they were environmentally endangered species, non-renewable and not anyone's property, so that our relationship to them is that of steward, custodian, guardian, conservator or trustee, and their protection and preservation is the collective responsibility of all of us. We should speak of endangered cultural heritages, endangered cultural pasts or endangered cultures. Like Merryman, Warren emphasises preservation as cardinal, and also mutual stewardship of the past (although their understanding of how to achieve this differs). Like Greenfield, she favours the restitution of legitimate 'cultural heritage' to countries of origin.[22] Yet works of art and cultural practices are neither trees nor koalas, and Martin Hollis makes a good argument that human social life and the laws of nature require different approaches.[23]

While there are those who would protect cultural practices because they are like endangered species, others are glad to see certain 'oppressive'

[20] Lyndel V. Prott and Patrick J. O'Keefe, '"Cultural Heritage" or "Cultural Property"?' (1992) 1 *International Journal of Cultural Property* 311.

[21] Lyndel V. Prott, 'Problems of Private International Law for the Protection of the Cultural Heritage', (1989) 217 *Recueil des Cours de l'Académie de la Haye* 310.

[22] She underscores the diversity of values and perspectives, and the importance of non-litigious compromise and consensus models for resolving disputes. Karen J. Warren, 'A Philosophical Perspective on the Ethics and Resolution of Cultural Property Issues', in Phyllis Mauch Messenger, ed., *The Ethics of Collecting Cultural Property: Whose Culture? Whose Property?* (Albuquerque: University of New Mexico Press, 1989), 1–26.

[23] See, for example, Martin Hollis, *The Cunning of Reason* (Cambridge: Cambridge University Press, 1987); see also below, Chapter 4, Section 2.

practices disappear. And, as Michael Brown notes, attempts to preserve and control tribal cultures can lead to unintended consequences, which sometimes happens in the wake of well-meaning legislation. He cites as an example the 1997 United Nations report *Protection of the Heritage of Indigenous People*, also known as the Daes Report; its authors accepted the idea of cultural integrity and proposed the concept of 'Total Heritage Protection', wherein a society is deemed to own its heritage: "everything that belongs to the distinct identity of a people and which is theirs to share, if they wish, with other peoples".[24]

There is another way of understanding this debate over the use and control of valuable resources, which is to see it in terms of disagreements between libertarians, liberals and communitarians. The three 'camps' are not themselves homogenous – for example, there are liberal cosmopolitans and also liberals who see individuals as more socially dependent; and 'left' and 'right' communitarians. I return to this alternative landscape in Chapters 3 and 6, but for the moment I want to remain with Merryman's framework since his voice is so influential in the literature.

To see the debate as Merryman does, between cosmopolites and particularists, continues a late eighteenth-century contest to which I now want to turn. In practice, however, the 'two ways' have often lodged together. So within the Preamble to the 1972 UNESCO Convention we find the phrases "world heritage of mankind as a whole", "heritage of all the nations of the world" and "world's heritage" accompanying the observation that "this unique and irreplaceable property" nonetheless belongs to specific people ("to whatever people it may belong").[25]

2. Cosmopolitanism and Particularism

Generally speaking, Enlightenment cosmopolites not only regarded the notion of national cultures with disdain but actively condemned the idea that local communities or nations might have a prior claim on individual actions and loyalties. To the cosmopolitan mind, the belief that nations and local cultures have value to their members over and above a universal community of citizens was simply unsustainable. The Marquis de Concordet saw the cosmopolitan position as a natural concomitant of the individual's freedom from received roles and identities. The more

[24] See Michael F. Brown, *Who Owns Native Culture?* (Cambridge, MA: Harvard University Press, 2003), 209–18.

[25] Seventeenth Session of the General Conference of UNESCO (Paris, 1972).

someone asserted their individual autonomy to choose the rational life they wished to lead, the more they would gravitate to a cosmopolitan sensibility. Eventually they would seek to participate in a universal language, an ideal Concordet shared with Descartes, Leibniz, Franklin and Voltaire.[26]

From the seventeenth century onwards, a cosmopolitan mindset was encouraged by the emerging commitment to experimental knowledge coupled with ever-greater opportunities for international trade. Many Enlightenment *philosophes* belonged to scientific societies in other countries, contributing ideas in mechanics, biology, natural history, geography, geology and anthropology. Collecting was a means of grasping the world and simultaneously measuring and ordering it. It gave rise to a new type of institution – the public museum – first formed in the late seventeenth century around the Tradescant collection in Oxford, in which curators and visitors alike shared the experience of rationally ordered access to and control of the myriad aspects of a comprehensible world.[27] One reason given by cosmopolitans for keeping the Parthenon/Elgin Marbles in the British Museum is that they contribute more to learning by being proximate to major artistic achievements from other cultures. The counterargument to Moustakas made by officers of the British Museum and others, including James Cuno and John Boardman, is that aesthetic experience and knowledge are furthest advanced by bringing to one location the 'best' of cultures.[28] Boardman reminds us that "the fact that museums worldwide can be and are centers for education, at all levels for all ages, depends on the dissemination of works of art far from their homelands".[29]

The Enlightenment promotion of knowledge as both instrumentally and intrinsically valuable continues strongly to inform attitudes within the museum community. On 8th December 2001, a group of museum

[26] See Will Kymlicka, *Politics in the Vernacular: Nationalism, Multiculturalism, and Citizenship* (Oxford: Oxford University Press, 2001), 203–5.

[27] See Eilean Hooper-Greenhill, *Museums and the Shaping of Knowledge* (London: Routledge, 1992), Chapter 7; Charles Taylor, *Sources of the Self: The Making of the Modern Identity* (Cambridge: Cambridge University Press, 1989), Chapters 8 and 9.

[28] See James Cuno, ed., *Whose Culture? The Promise of Museums and the Debate over Antiquities* (Princeton: Princeton University Press, 2009), 1–35; James Cuno, *Who Owns Antiquity? Museums and the Battle over Our Ancient Heritage* (Princeton: Princeton University Press, 2008); and John Boardman, 'The Elgin Marbles: Matters of Fact and Opinion', (2000) 9 *International Journal of Cultural Property* 233–62.

[29] Ibid.

directors responsible for such major, diverse collections issued a *Declaration on the importance and value of universal museums*, within which it was remarked that

> Although each case has to be judged individually, we should acknowledge that museums serve not just the citizens of one nation but the people of every nation. Museums are agents in the development of culture, whose mission is to foster knowledge by a continuous process of reinterpretation. Each object contributes to that process. To narrow the focus of museums whose collections are diverse and multifaceted would therefore be a disservice to all visitors.[30]

That is an extremely important point to make. Under slightly different circumstances, however, the Parthenon/Elgin Marbles might have been housed not in a universal institution but in a dedicated private museum in Mayfair, a mile or two from the British Museum.[31] Or, hypothetically, they might have gone to the Royal Academy, an institution then under the presidency of Benjamin West, a leading proponent of the Marbles' purchase by the government for the British Museum. Though possessing a fine collection of British art and Michelangelo's marble tondo of the Virgin and Child, the Academy can hardly be called encyclopedic. Returning the Marbles to Athens is surely as much about their departure from London as from the British Museum. So there might be a 'metropolitan' argument that underlines the benefits which accrue when major cities support a broad range of cultural institutions, including encyclopedic museums. Many large cities have developed as cultural *loci*, and the metropolis represents a further layer within the debate. Hence another way of looking at the collections of the British Museum (or the Smithsonian Institution) is to see them embedded within the diverse cultural life of London and Washington.

[30] *The Art Newspaper* (January 2003). In Cuno, *Whose Culture?*, 165–82, where the first chapter of the present work is included in shortened form, the editor ascribes to me the following question (at 177): justification for moral claims to culturally valuable and symbolic objects comes at what expense to the encyclopedic museum? This is an important question, because the consequences of restitution requests for such museums should indeed be considered, and one with which Cuno has been occupied and to which he himself gives an answer (as did Stephen Weil, cited below in Chapter 4, note 15), but not one actually posed in Chapter 1. My principal concern has been to understand the cosmopolitan-particularist debate in general, and to come to a position on the justification or otherwise for moral claims made on particularist grounds.

[31] The scheme was found to be impracticable because the museum would probably had to have been pulled down at the end of the lease. See William St. Clair, *Lord Elgin and the Marbles* (Oxford: Oxford University Press, revised ed. 1983), 180–1.

Merryman's support for publicly funded museums suggests that it is fair to see him as a liberal cosmopolitan, sympathetic to Jeremy Waldron's description:

> The cosmopolitan may live all his life in one city and maintain the same citizenship throughout. But he refuses to think of himself as *defined* by his location or his ancestry or his citizenship or his language. Though he may live in San Francisco and be of Irish ancestry, he does not take his identity to be compromised when he learns Spanish, eats Chinese, wears clothes made in Korea, listens to arias by Verdi sung by a Maori princess on Japanese equipment, follows Ukrainian politics, and practices Buddhist meditation techniques. He is a creature of modernity, conscious of living in a mixed-up world and having a mixed-up self.[32]

In this individual portrait, Waldron captures something of the spirit of exploration associated with Western nations during the seventeenth and eighteenth centuries, where, alongside deeply competitive, exploitative and selfish motives, there existed (and not necessarily in the same individuals and institutions) a genuine interest in and curiosity about the larger world that led to the cataloguing of knowledge and the encyclopedia. Willingness to attempt to understand and engage with the unfamiliar is characteristically cosmopolitan. Conversely, strong particularism (or traditionalism) has it that sets of good cultural practices associated with particular peoples should be endorsed and promoted because they are instrumentally and/or intrinsically valuable to those peoples. And even if individuals don't themselves follow all of these practices, theoretically they could (and in strong forms of traditionalism, they should); indeed they might admire those who do follow them, especially if the practices are in danger of dissolution. Particularists believe that culturally located practices are important to personal identity, and they may object, as Greenfield does, to the appropriation of works of art and architecture and other cultural forms that manifest such practices, or are associated with them, by others with a lesser claim as they see it.

The writings of J.G. von Herder undoubtedly provide a major source for the "cultural nationalism" identified by Merryman with the 1970

[32] Jeremy Waldron, 'Minority Cultures and the Cosmopolitan Alternative', (1992) 25 *University of Michigan Journal of Law Reform* 754. Kwame Anthony Appiah regards cultural purity as an oxymoron; see *Cosmopolitanism: Ethics in a World of Strangers* (New York: W. W. Norton, 2006), 113, and 'Whose Culture Is It?', in Cuno, *Whose Culture?*, 71–86.

UNESCO Convention.[33] Now while it can be argued, as Michael Forster convincingly does, that Herder effectively balanced liberal cosmopolitanism with an empirical understanding of social relationships, he did indeed claim that there was a human need to belong to some community, one key to which was language, "the matrix in which a person's awareness of his cultural heritage is aroused and deepened".[34] Another was customary law. For Herder, ancient Israel was a nomocracy that should continue to inspire respect for the rule of law, which he regarded as the central element of successful republican nationhood.[35]

Hegel also believed in the importance to common culture of the shared language, seeing language and work as the particular social forms in which people pass from a "disconnected mass" to a genuine unity.[36] Noting the Anglo-Saxon world's perception that this aspect of Hegelian (and Herderan) thought is extravagant (and, as Merryman himself suggests, contains the seeds of fascism), Charles Taylor comments that Hegel has simply been misread: his notion of the state is no more than "ethical life" itself:

> What we are as human beings, we are only in a cultural community. Perhaps, once we have fully grown up in a culture, we can leave it and still retain much of it. But this kind of case is exceptional, and in an important sense marginal. Emigrés cannot fully live their culture, and are always forced to take on something of the ways of the new society they have entered. The life of a language and culture is one whose locus is larger than that of the individual. It happens in the community. The individual possesses this culture, and hence his identity, by participating in this larger life.[37]

In Kant's version of cosmopolitanism, individuals would participate in the civic life of a great federation of states that adhered to Christian and classical European ideologies, whereas the defining feature of Herder's

[33] John Henry Merryman, 'The Retention of Cultural Property', (1988) 21 *University of California, Davis Law Review* 491.

[34] Johann Gottfried von Herder, *Philosophical Writings*, trans. and ed. Michael N. Forster (Cambridge: Cambridge University Press, 2002), xxxi–xxxii; see also Waldron, 'Minority Cultures and the Cosmopolitan Alternative', 756–9; and F.M. Barnard, *Self-Direction and Political Legitimacy: Rousseau and Herder* (Oxford: Clarendon Press, 1988), 238.

[35] F.M. Barnard, *Herder on Nationality, Humanity, and History* (Montreal: McGill-Queen's University Press, 2003), 20–3.

[36] See Timothy O'Hagan, 'On Hegel's Critique of Kant's Moral and Political Philosophy', in Stephen Priest, ed., *Hegel's Critique of Kant* (Oxford: Clarendon Press, 1987), 135, 153–4.

[37] Charles Taylor, *Hegel* (Cambridge: Cambridge University Press, 1975), 381.

republican state was respect for just, mutually agreed-upon laws that emerged within a particular community.[38] Moreover, a people's political culture had to be in accord with its non-political culture and thus, for Herder, cosmopolitanism was an empty formula lacking any comprehensive system of laws to anchor it.[39] He also promoted a cultural pluralism that warned against Kant's Eurocentrism:

> Least of all must we think of European culture as a universal standard of human values . . . For "European culture" is a mere abstraction, an empty concept . . . Besides, it can scarcely pose as the most perfect manifestation of man's culture, having – who can deny it? – far too many deficiencies, weaknesses, perversions and abominations associated with it. Only a real misanthrope could regard European culture as the universal condition of our species. The culture of man is not the culture of the European; it manifests itself according to time and place in every people.[40]

Yet in strongly refuting cosmopolitanism as an ideal form of political life, he wasn't rejecting the Kantian vision of universal harmony among autonomous individuals. Quite the opposite in fact, since he believed that universal values could be shared only through the striving of autonomous individuals – but autonomy had to begin within some particular political context, which must be the nation.[41] And indeed Herder's culturally sensitive liberalism has been amplified by a number of contemporary political philosophers, also attuned to the contribution of shared cultural practices to the autonomy of individual lives.

Jürgen Habermas has elegantly analysed one intriguing moment in the history of particularist thought, an 1846 gathering in Frankfurt of German jurists, philologists and historians, recorded as the *Proceedings of the Germanists*. The participants were concerned about a disconnect between political unity and the larger linguistic community, and historians among them proposed establishing a 'Union for the Preservation of German Nationality Abroad' which would embrace, among others, the

[38] Jeremy Waldron regards the "right of nations – what we would call the jurisprudence of international law" as the appropriate place for Kant's ideas on a world federation; see his 'Cosmopolitan Norms', in Seyla Benhabib et al., *Another Cosmopolitanism: Hospitality, Sovereignty, and Democratic Iterations* (Oxford: Oxford University Press, 2006), 89.

[39] But both he and Rousseau were troubled by its failure to emerge as a mature state; see Barnard, *Herder on Nationality, Humanity, and History*, 43–4.

[40] Cited in F.M. Barnard, *Herder's Social and Political Thought: From Enlightenment to Nationalism* (Oxford: Clarendon Press, 1965), 100.

[41] Ibid., 75–82.

many individuals then emigrating to America.[42] Roman law's evident sophistication and practicality notwithstanding, German customary law was promoted during this meeting as an important expression of the spirit of the people, a theme later taken up by the jurist Otto von Gierke, whose 'realist' theory of collective personality had some influence on British legal thought:

> Our German Fellowship is no fiction, no symbol, no piece of the State's machinery, no collective name for individuals, but a living organism and a real person, with body and members and a will of its own. Itself can will, itself can act; it wills and acts by the men who are its organs as a man wills and acts by brain, mouth and hand. It is not a fictitious person; it is a *Gesammtperson*, and its will is a *Gesammtwille*; it is a group-person, and its will is a group-will.[43]

As Ernest Barker observed in 1934, these Germanist ideas are significantly derived from Herder, whom Gierke cited repeatedly and considered a major influence on the 'School of Historical Law'.[44] Looking with foreboding at Mussolini, Barker was concerned by the danger of imputing real wills to states that then truly become self-willing Leviathans. That having been said, the early particularist writers were more cosmopolitan than Merryman allows. Rousseau, Herder and Hegel shared an agenda in which meaningful collective life must be balanced by individual autonomy.

3. Primitivism and World Culture

Historically, cosmopolitanism and particularism were often entwined. When Napoleon added Italian paintings to the newly established French State collection from his European campaign, Quatremère de Quincy in his *Lettres à Miranda* of 1796 argued for their restitution, because the affective power of art is weakened when removed from its original

[42] Jurgen Habermas, 'What is a People? The Frankfurt "Germanists' Assembly" of 1846 and the Self-Understanding of the Humanities in the Vormärz', in *The Postnational Constellation: Political Essays* (Cambridge, MA: The MIT Press, 2001), 1–25.

[43] F.W. Maitland, introduction to Otto von Gierke, *Political Theories of the Middle Ages* (Cambridge: Cambridge University Press, 1900), xxvi.

[44] "The affinities of Gierke are not with Duguit, the legal philosopher of French syndicalism: they are with Herder, the harbinger of German Romanticism. The figure of the *Volk* remains in the background of his thought; and the majority of the *Volk* is incarnate in a State which remains sovereign, even if it recognises that there are other group-realities besides itself". Ernest Barker, introduction to Otto von Gierke, *Natural Law and the Theory of Society 1500–1800* (Boston: Beacon Press, 1957), li–lii, lxx–lxxi and lxxxii–lxxxiii.

context.[45] However, as noted by John Merryman, Quatremère's sensitivity to local context is balanced with a republican cosmopolitanism:

> The arts and sciences belong to all Europe, and are no longer the exclusive property of one nation . . . It is as a member of this universal republic of the arts and sciences, and not as an inhabitant of this or that nation, that I shall discuss the concern of all parts in the preservation of the whole.[46]

Alongside this passage, Merryman cites the *Marquis de Somerueles* judgment as an instance of cultural internationalism. This is the earliest-recorded judicial decision on the exemption of art from the spoils of war. In 1813 the British Vice-Admiralty Court in Halifax, Novia Scotia, heard a petition from the Pennsylvania Academy of the Fine Arts ("a scientific establishment at Philadelphia") for the release of 21 Italian paintings and 52 prints captured by a British ship in 1812 from the American merchant vessel *Marquis de Somerueles* and taken to Halifax for judgment as prize. Judge Croke gave the following opinion:

> The same law of nations, which prescribes that all property belonging to the enemy shall be liable to confiscation, has likewise its modifications and relaxations of that rule. The arts and sciences are admitted among all civilized nations, as forming an exception to the severe rights of warfare, and as entitled to favour and protection. They are considered not as the peculium of this or of that nation, but as the property of mankind at large, and as belonging to the common interests of the whole species . . . In thus favouring an institution of this kind . . . we shall perhaps at the same time promote most effectually our own best interests.[47]

The judge's opinion was also expedient, since he hoped that by restituting the property he would encourage the development of a public taste in America ("there is a natural connexion between all the arts and sciences, as well material, as intellectual") that could no longer bear "such hideous deformities as the picture of a country . . . submitting to be the tool of a foreign despot" (i.e., France). Merryman suggests that Quatremère is the immediate source for Croke's cosmopolitan position, not least because of the former's opposition to Napoleon.

[45] Andrew McClellan, *Inventing the Louvre: Art, Politics, and the Origins of the Modern Museum in Eighteenth-Century Paris* (Cambridge: Cambridge University Press, 1994), 201. See also Ana Filipa Vrdoljak, *International Law, Museums and the Return of Cultural Objects* (Cambridge: Cambridge University Press, 2006), 21–9.

[46] John Henry Merryman, 'The Free International Movement of Cultural Property,' in *Thinking About the Elgin Marbles*, 398.

[47] Vice-Admiralty Court of Halifax, Nova Scotia, *Stewart's Vice-Admiralty Reports* 482 (1813), reprinted in John Henry Merryman, 'Note on the Marquis de Somerueles', (1996) 2 *International Journal of Cultural Property* 319–29.

Let me complicate further this cosmopolitan idea of the universal cultural heritage suggested by the two Hague Convention phrases "cultural heritage of all mankind" and "culture of the world", and propose that it has two additional sources, both related to Herder's particularism. The first of these is a series of movements that has come to be known as Primitivism. From the mid-nineteenth century, Western writers, painters and sculptors quickened their interest not only in folk art but also in the non-European 'primitive' and exotic. As industrialisation spread across the Western world, artists and writers looked back to 'purer' times, whether they were actually to be found in the past, or in societies that were deemed to be like the past, such as those of Asia or the Pacific. This is an oft-told story. The 'primitive' was also another means by which one could re-describe the proletarian, pre-industrial and natural in contrast to the bourgeois, industrial and mechanical. Ernst Gombrich argued that J.J. Winckelmann himself, although generally associated with neo-classicism, made a significant contribution to Primitivism in taking from Giambattista Vico the idea that Homeric and other early literatures manifested the virtues of purity and simplicity, and applying it to archaic sculpture and architecture.[48] This taste for the unadorned and 'rude' was seen to avoid the corruptions of later times, and it prefigures descriptions given in the next century of the vitality of *Gemeinschaft* (community) over the decay of *Gesellschaft* (civilisation), distinctions made in 1887 by the sociologist Ferdinand Tönnies.

Primitivism took a variety of forms, including the Gothic revival, the Pre-Raphaelites' turn to a romanticised version of the Middle Ages, and the British arts and crafts movement (which influenced Japan); the fascination exhibited by impressionist and post-impressionist artists with Japanese wood-block prints; the French Nabis painters living amongst indigenous 'primitives' of Brittany, and Paul Gauguin's domicile in Tahiti; the early modernists' valorisation of African and Pacific religious sculpture and masks; the Freudian and quasi-anthropological ideas of the

[48] "The noble simplicity and quiet grandeur *[die edle Einfalt und stille Grösse]* of noble statues is also the true hallmark of Greek writings of the best period – the writings of the school of Socrates"; E.H. Gombrich, *The Preference for the Primitive: Episodes in the History of Western Taste and Art* (London: Phaidon, 2002), 62. Herder's admiration for Winckelmann was tempered only by his feeling that the latter had not acknowledged the role of Egypt in the formation of Greek style: "men or nations invent only exceedingly rarely, where they are not forced to do so, and that they always prefer to fall back on tradition, heritage, imitation, learning" (ibid., 71) (Gombrich translates *Erbteil* as 'heritage' rather than, more conventionally, 'inheritance').

surrealists, and so on. Here is Max Pechstein writing from the Melanesian island of Palau in 1914:

> Since I myself grew up among simple people amidst nature, I readily came to terms with the abundance of new impressions. I didn't have to change my attitude that much . . . Out of the deepest feeling of community I could approach the South Sea islanders as a brother . . .[49]

Within this context, much was made of the idea of universal rhythm: "It is through the medium of rhythm that we may enter into a work of art and experience something of the exuberance and glow which fired the artist to creation . . ."[50] This preoccupation has been well described by Dee Reynolds, who notes the importance given in late nineteenth and early twentieth century Western thought to the relationship between poetry, music and early abstract art. Mondrian and Kandinsky were indebted to symbolist poetry, which in turn aspired to the state of music.[51] Profundity was associated with harmony and rhythm, and for Henri Bergson the deep rhythms of life itself.[52] Indeed, the modernist milieu was penetrated by a sense of the spiritual, famously articulated in Clive Bell's *Art* (1913), where he speculated about the emotional affect of an object as an end-in-itself: "We become aware of its essential reality, of the God in everything, of the universal in the particular, of the all-pervading rhythm".[53] Focusing on 'significant form' was, for Bell, the means to experience a deeper reality, but he was also reacting against a widespread preference for morally improving, descriptive narratives.

M.H. Abrams argues that celebrating works as ends-in-themselves, or self-contained worlds, was the product of an 18th century German synthesis – of neo-Platonism (the contemplation of Ideas) and Christian views

[49] Donald E. Gordon, 'German Expressionism', in William Rubin, ed., *"Primitivism" in 20th Century Art: Affinity of the Tribal and the Modern* (New York: Museum of Modern Art, 1984), II: 391.

[50] Osvald Sirén, *Chinese Sculpture from the Fifth to the Fourteenth Centuries* (London: Ernest Benn, 1925), xvii.

[51] Dee Reynolds, *Symbolist Aesthetics and Early Abstract Art: Sites of Imaginary Space* (Cambridge: Cambridge University Press, 1995).

[52] Bergson's ideas "suffered a period of 'absurd' popularity" in England between 1910–20; see Rachel Gotlieb, '"Vitality" in British Art Pottery and Studio Pottery', (1988) 127 *Apollo* 165.

[53] Clive Bell, *Art* (New York: Capricorn Books, 1958), 54. During the mid-nineteenth century, the German experimental psychologist Gustav Fechner designed scientific tests to discern the quantity of pleasure evinced by colours, shapes and lines; see Lynn Gamwell, *Exploring the Invisible: Art, Science, and the Spiritual* (Princeton: Princeton University Press, 2002), 96–7.

about the self-sufficiency of creation – which underpinned the movement known as 'art for art's sake' of which these early 20th century artists and critics were part.[54] Mere imitation was negatively contrasted with 'organic unity', as in the following passage from 1912 where Bell's fellow critic Roger Fry defends Post-Impressionism:

> . . . it is in line with the older and longer and more universal tradition, with the art of all countries and periods that has used form for its expressive, not for its descriptive, qualities. So far from this art being lawless and anarchic, it is revolutionary only in the vehemence of its return to the strict laws of design. If it is not too rash to try to coin a single phrase to explain a very varied movement, I should say that it is marked by the desire for organic unity in a work of art . . .[55]

The same year, in the pages of his newly established journal *Rhythm*, Michael Sadleir noted Kandinsky's desire to express the underlying resonance of nature, humanity, *Geist* and art:

> From this book [*Concerning the Spiritual in Art*] two main contentions arise. The first is virtually a statement of Pantheism, that there exists a 'something' behind externals common to nature and humanity alike. That is what Wordsworth believed, but while he approached the question subjectively, contenting himself with describing the experiences of his mood communion with the nature around him, the new art is to act as an intermediary for others, to harmonise the inner *Klang* [resonance] of external nature with that of humanity, it being the artist's task to divine and elicit the common essentials underlying both.[56]

Aside from the aesthetic satisfaction that people derive from rhythm within the visual and performing arts, and such qualities ascribed to it

[54] M.H. Abrams, 'From Addison to Kant: Modern Aesthetics and the Exemplary Art', in *Doing Things with Texts: Essays in Criticism and Critical Theory* (New York: W. Norton, 1989), 159–87.

[55] 'The Grafton Gallery: An Apologia' (1912), in Christopher Reed, ed., *A Roger Fry Reader* (Chicago: Chicago University Press, 1996), 113. A theory of organic unity had first been developed in Britain by Samuel Taylor Coleridge, influenced by Edward Young's *Conjectures on Original Composition*, 1759; see M.H. Abrams, *The Mirror and the Lamp: Romantic Theory and the Critical Tradition* (Oxford: Oxford University Press, 1971), 167–77 and 198–202, and James Benziger, who notes the importance for Coleridge of A.W. Schlegel, in 'Organic Unity: Leibniz to Coleridge', (1951) 66 *PMLA* 24–48. Imagination was central to Fry, as it was to Coleridge: "Art, then is, if I am right, the chief organ of the imaginative life"; see Roger Eliot Fry, 'An Essay in Aesthetics' (1909), in Fry's *Vision and Design* (Oxford: Oxford University Press, 1981), 17. Admiring both of Coleridge and Wordsworth, John Dewey underlined the role of imagination in the idea of organic unity: "The idea of a whole, whether of the whole personal being, or of the world, is an imaginative, not a literal, idea", in Dewey's *A Common Faith* (1934), cited by Alan Ryan, *John Dewey and the High Tide of American Liberalism* (New York: Norton, 1995), 271.

[56] Cited in Adrian Glew, 'On Kandinsky', *Tate Etc.*, no.7, Summer 2006.

by Bell, Fry, Sadleir and others, it appears that it has a further important physiological function: according to Oliver Sachs, rhythm plays a significant role in "coordinating and invigorating" basic locomotor movement.[57]

The second source of those universalising phrases originates in the same romantic *milieu* as Primitivism. Goethe coined the term *Weltliteratur* to signify writing that expressed *Humanität*, the expression of which was literature's ultimate purpose.[58] For Friedrich Schlegel, romantic poetry was by its very definition a progressive universal poetry that sought to apprehend and express every mode of human experience.[59] Transcending national literatures without destroying their identities, and understood as a concert of works rather than a selective collection, *Weltliteratur* was maintained by the discipline of philology of which Herder was a founder.[60] At the Frankfurt gathering, one philologist identified Goethe's idea with a spirit "which we ourselves call the occidental, a spirit that dominates in America just the same as in Europe".[61] Language and philology were key to both the particularist view of Germans as members of a single language culture (even when they were domiciled in other countries) and the cosmopolitan view that the spirit of poetry was a widely shared, trans-national experience. In 1932 Tönnies made the following point about the relationship of the particular and cosmopolitan, almost half a century after he had first set down his two categories of social life:

> I do not know of any condition of culture or society in which elements of *Gemeinschaft* and elements of *Gesellschaft* are not simultaneously present, that is, mixed. Moreover, although *Gemeinschaft*, too, arrives at higher and nobler forms of human relations, it is correct to say that *Gesellschaft* is the essentially variable element which enhances culture but also transforms it into civilization.[62]

[57] Oliver Sachs, *Musicophilia: Tales of Music and the Brain* (New York: Alfred A. Knopf, 2007), 233–42. For an argument about the relevance of neurological insights to the study of art making, see John Onians, *Neuroarthistory: From Aristotle and Pliny to Baxandall and Zeki* (New Haven: Yale University Press, 2007).

[58] Edward Said, *Culture and Imperialism* (London: Chatto & Windus, 1993), 52–3.

[59] Arthur O. Lovejoy, *The Great Chain of Being: A Study of the History of an Idea* (Cambridge, MA: Harvard University Press, 1936), 306.

[60] Erich Auerbach, 'Philology and *Weltliteratur*', trans. and intro. by Edward Said and Marie Said, (1969) 13 *Centennial Review* 1.

[61] Habermas, 'What Is a People?', 14.

[62] From 'My relation to Sociology', quoted in Timothy O'Hagan, *The End of Law?* (Oxford: Blackwell, 1984), 86–7, where the author lists the respective characteristics of *Gemeinschaft* and *Gesellschaft*, extracted from Tönnies' work.

Two decades later, the philologist Erich Auerbach sought to recover that Herderan and Goethean humanism founded on a Babel-like diversity: "The presupposition of *Weltliteratur* is a *felix culpa* [fortunate fall]: mankind's division into many cultures". Profoundly affected by his experience of exile from Germany, Auerbach here attempts to reconcile the universal with the particular:

> The most priceless and indispensable part of a philologist's heritage is still his own nation's culture and language. Only when he is first separated from this heritage, however, and then transcends it does it become truly effective. We must return, in admittedly altered circumstances, to the knowledge that prenational medieval culture already possessed: the knowledge that the spirit [*Geist*] is not national.[63]

This Germanist idea of unity-in-diversity reaches its apogee in the writing of Leo Spitzer, Auerbach's fellow philologist in exile. In his contribution to George Boas's *Studies in Intellectual History* published the year before the Hague Convention, we find Spitzer writing of "the general human mind", "a general human attitude" and our "general human experience" in, as Geoffrey Green puts it, "an effort to integrate his particular humanistic Spirit with the post-war idealistic yearning for world peace that helped create the United Nations".[64] On reflection, it is hardly surprising that humanist versions of the *Geist* should set themselves in opposition to the virulent National Socialist version, and that such thinking should appear in UNESCO's 1946 constitution ("the conservation and protection of the world's inheritance"), or an international convention of the early 1950s. Indeed, Timothy O'Hagan observes that documents such as the French Declaration of the Rights of Man and the Citizen, the United States' Declaration of Independence and the European Convention for the Protection of Human Rights and Fundamental Freedoms were all forged during or in the aftermath of struggles against oppressive political forces or alien occupations.[65] Auerbach's position of unity in diversity – a central concern also to one of Herder's more important translators, F.M. Barnard – reflects the Enlightenment aspect of German particularist thought, whereby individuals find a universal message through their local

[63] Auerbach, 'Philology and *Weltliteratur*', 2, 17.

[64] Contemporary with the publication of Andre Malraux's *Musee Imaginaire de la Sculpture Mondiale* (Paris, 1952–54). See Geoffrey Green, *Literary Criticism & the Structures of History: Erich Auerbach and Leo Spitzer* (Lincoln: University of Nebraska Press, 1982), 118, 145, and Leo Spitzer, 'Language: The Basis of Science, Philosophy and Poetry' in George Boas et al., *Studies in Intellectual History* (Baltimore: Johns Hopkins Press, 1953), 79, 82.

[65] O'Hagan, 'On Hegel's Critique of Kant's Moral and Political Philosophy', 157.

cultural life. Auerbach and Spitzer both eventually immigrated to the United States, promoted as the 'melting pot' *par excellence*, about which one might say that its constitutional and legal instruments form a *Gesellschaft* framework (and Herder would surely have praised the reverence accorded by Americans to the Constitution) while it also embraces many forms of *Gemeinschaft*, or traces thereof. In the twenty-first century, we may not be so concerned about universality as such but still want to make sense of the relationship between individual and community. Before turning back to that in Part III, I want to reflect more on the construction of the idea of heritage, and its inclusions and exclusions.

PART TWO

NARRATIVE AND CUSTOM