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Monuments to the Confederacy and the Right to Destroy in Cultural-Property Law

ABSTRACT. This Note identifies problems in cultural-property law that the recent wave of removals of Confederate memorials has illustrated. Because cultural-property law's internal logic tends inexorably towards supporting preservation, it has no conceptual framework for recognizing when a culture might be justified in destroying its own cultural property. I argue that destruction of cultural property can, in some cases, serve values that the preservationist impulse of cultural-property law has overlooked. I propose a new regime for cultural-property law that permits destruction in cases where the monument in question was established in celebration of a violation of the customary international law of human rights.

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INTRODUCTION

On June 17, 2015, Dylann Roof entered the Emanuel African Methodist Episcopal Church and shot twelve black congregants, killing nine.[1] News outlets promptly uncovered photographs of Roof visiting Confederate heritage sites and waving the Confederate flag while holding a gun. The grisly massacre triggered protests and debates across the nation—with many demanding the removal of the symbols that seemed to have provided the inspiration for Roof's acts. As commentators reevaluated the meaning and appropriateness of their display in public places and at public expense, many concluded that it was time for these monuments to be taken down or destroyed.

Amidst mass protests and heated controversy, Confederate memorials began to come down. After New Orleans's city council voted to remove the city's four Confederate monuments, following a lawsuit and a heated public debate,[2] the statues were removed in the middle of the night by workers wearing flak jackets and scarves to conceal their identities for their safety.[3] In Durham, without the sanction of the county, protestors smashed a statue of a Confederate soldier that stood outside the county's courthouse.[4]

As public debate on the monuments raged on, little reference was made to the body of law governing art, architecture, and statuary in the United States. Although public monuments are protected by a web of international-, federal-, and state-level law, these laws seemed to provide little guidance for establishing the appropriateness of removing or destroying monuments.

The controversy over monuments to the Confederacy thus reveals a major lacuna in the framework of cultural-property law: the lack of a theoretical framework for dealing with the permissible destruction of cultural property. As such, a city, state, or municipality making a decision about a contested monument will find the law unhelpful.

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1. Adam K. Raymond, *A Running List of Confederate Monuments Removed Across the Country*, N.Y. MAG. (Aug. 25, 2017), http://nymag.com/daily/intelligencer/2017/08/running-list-of-Confederate-monuments-that-have-been-removed.html [https://perma.cc/Z334-W2TE].

2. Monumental Task Comm., Inc. v. Foxx, 157 F. Supp. 3d 573 (E.D. La. 2016).

3. Richard Fausset, *Tempers Flare over Removal of Confederate Statues in New Orleans*, N.Y. TIMES (May 7, 2017), https://www.nytimes.com/2017/05/07/us/new-orleans-monuments.html [https://perma.cc/DUP3-ZMSQ]; Christopher Mele, *New Orleans Begins Removing Confederate Monuments, Under Police Guard*, N.Y. TIMES (Apr. 24, 2017), https://www.nytimes.com/2017/04/24/us/new-orleans-Confederate-statue.html [https://perma.cc/V3WZ-APLH].

4. Maggie Astor, *Protesters in Durham Topple a Confederate Monument*, N.Y. TIMES (Aug. 14, 2017), https://www.nytimes.com/2017/08/14/us/protesters-in-durham-topple-a-Confederate-monument.html [https://perma.cc/H5F2-TE4U].

Modern cultural-property law emerged in the wake of the destruction and looting that followed World War II.[5] Because cultural-property law's original purpose was to address the potential for wartime destruction of the world's treasures, its organizing principle is the preservation of historically or aesthetically significant heritage. As such, domestic and international cultural-property law has given little consideration to the question of whether a nation is ever justified in destroying its own cultural heritage. The logic of cultural-property law presses inexorably toward preservation.

But what cultural-property law fails to recognize is that the destruction of cultural property may promote important values. Destruction grabs headlines and inspires uniquely strong reactions. It promotes expressive values that cannot be equally realized through preservation. In the case of a victimized group, destruction of the victimizer's cultural property can realize powerful cathartic values. Alternatively, a group may wish to destroy certain objects to expressively disown the values memorialized by the works. These values are recognized in American law in varying ways under the First Amendment and under the common law of property,[6] but they collide directly with the preservationist impulse of cultural-heritage law.

In this Note, I argue that cultural-heritage law should recognize a limited right to destroy cultural property. A government should be permitted to destroy its cultural property, but only when that property was established in celebration of a violation of the customary international law of human rights. This approach recognizes the values served by destruction without casting aside the valuable protection that cultural-heritage law has afforded historically and aesthetically important art and architecture.

Part I sets out the background for this theory: historically, cultural-property law developed in response to widely deplored acts of destruction. As a result, the law orients itself around the value of preservation. However, cultural-property law has not meaningfully considered either why preservation is valuable or what deserves legal protection. It has also not considered when the destruction of cultural property might be warranted or desirable.

Part II points out the flaws of such a regime. I argue that important expressive and cathartic values can be served through the converse of cultural-property law's core value: destruction. I then examine some of the most commonly offered alternatives to destruction and conclude that a community could reasonably prefer destruction over these alternatives in some cases.

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5. *See, e.g.*, Anne-Marie Carstens, *The Hostilities-Occupation Dichotomy and Cultural Property in Non-International Armed Conflicts*, 52 STAN. J. INT'L L. 1, 16-17 (2016).

6. Lior Jacob Strahilevitz, *The Right to Destroy*, 114 YALE L.J. 781, 788-89, 824 (2005).

In Part III, I propose a new regime for cultural-property law that permits destruction in certain cases. Given cultural-property law's links to human rights law, nations should be permitted to destroy monuments that were established to celebrate violations of the customary international law of human rights.

I. PRESERVATION AS CULTURAL-PROPERTY LAW'S CORE VALUE

Consider a memorial such as the Nathan Bedford Forrest Monument, which stood in the center of Memphis until recently. Such a monument is protected by an interlocking web of domestic and international cultural-heritage legal provisions. On the international level, the 1954 Hague Convention requires states to preserve "movable or immovable property of great importance to the cultural heritage of every people, such as monuments of architecture, art or history, whether religious or secular."[7] Domestically, the Forrest Monument was protected by the Veterans' Memorial Preservation and Recognition Act of 2003 (VMPRA),[8] which penalizes anyone who "willfully injures or destroys, or attempts to injure or destroy, any structure, plaque, statue, or other monument on public property commemorating the service of any person or persons in the armed forces of the United States."[9] Being listed on the National Register of Historic Places,[10] the Forrest Monument would have had certain additional pro-

7. Convention for the Protection of Cultural Property in the Event of Armed Conflict art. 1(a), May 14, 1954, 249 U.N.T.S. 240 [hereinafter 1954 Hague Convention]. The 1954 Hague Convention does not contain an enforcement mechanism. The Convention only requires that the parties "undertake to take, within the framework of their ordinary criminal jurisdiction, all necessary steps to prosecute and impose penal or disciplinary sanctions upon those persons, of whatever nationality, who commit or order to be committed a breach of the present Convention." *Id.* art. 28. Even if the treaties did allow for enforcement actions in an international tribunal, the U.S. Supreme Court has held that the judgments of such tribunals when adjudicating treaties are entitled only to "respectful consideration" by U.S. courts. Breard v. Greene, 523 U.S. 371, 375 (1998) (per curiam). The enforcement mechanism contemplated by the treaties for breach of duty is sanctions—but it goes without saying that, in the face of serious geopolitical considerations, the United States is likely to face little pushback from the global community for the destruction of Confederate memorials. The treaty does represent a commitment, however, even if it is not a legally enforceable one.

8. 18 U.S.C. § 1369 (2018).

9. *Id.* § 1369(a).

10. Ryan Poe, *Memphis Haunted by Long, Conflicting History with Confederate Monuments*, COM. APPEAL (Aug. 15, 2017, 1:14 PM CT), https://www.commercialappeal.com/story/news/government/city/2017/08/15/memphis-confederate-monuments-through-years/568801001 [https://perma.cc/E2RN-MG2Y] (noting that in 2009, "[t]he Forrest Camp of the Sons of Confederate Veterans succeed[ed] in quietly adding Forrest Park to the National Register of

tections.[11] And because Tennessee had passed a statute forbidding the removal of any statue from state property,[12] Memphis could not legally remove the statue under state law.[13] Memphis ultimately removed its Forrest Monument through a clever work-around, transferring the park in which it stood to a nonprofit.[14] However, litigation continues before the Tennessee Historical Commission, with the Sons of Confederate Veterans suing to restore the monuments.[15]

The many protections accorded to the Monument raise the question of how cultural property has developed to the point where so many safeguards are afforded to Confederate memorials. Forrest's legacy is highly contested,[16] and there may be valid reasons why a city such as Memphis that owns and displays his statue on public land and at public expense might wish to remove or destroy the statue. Yet cultural-property law does not consider this possibility, instead providing only a variety of protections—protections that render the removal or destruction of such a statue difficult and probably illegal. Relatedly, cultural-property law provides protections in a value-neutral way. Once something is determined to be cultural property, the law assumes that it is worthy of protection. But as the Forrest example shows, that assumption may not be correct at all times.

This Part provides an overview of the interlocking domestic and international safeguards that protect Confederate memorials today. It further argues that underlying all of these laws is a preservationist ethos. Because cultural-property law developed through ad hoc responses to widely deplored acts of destruction of cultural property, the laws and treaty regimes currently in place are oriented toward requiring governments to protect cultural property. This preservationist ethos pervades both the law and theory of cultural property, including

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Historic Places, temporarily sidelining efforts to rename the park and remove its monument and graves").

11. *See, e.g.*, Jessica Owley & Jess Phelps, *Understanding the Complicated Landscape of Civil War Monuments*, 93 IND. L.J. SUPP. 15, 29-32 (2018).

12. Tennessee Heritage Protection Act of 2016, TENN. CODE ANN. § 4-1-412.

13. *See, e.g.*, Owley & Phelps, *supra* note 11, at 31.

14. Ryan Poe, *How Memphis Took Down Its Confederate Statues*, COM. APPEAL (Dec. 28, 2017, 5:51 PM CT), https://www.commercialappeal.com/story/news/government/city/2017/12/28/how-memphis-took-down-its-confederate-statues/984895001 [https://perma.cc/XDV5-8SAM]. Tennessee subsequently amended the Tennessee Heritage Protection Act to prevent this style of work-around.

15. Complaint, *In re* Descendants of Nathan Bedford Forrest, THC Administrative Docket Number: 04.47-150937J (April 5, 2018), https://www.tn.gov/content/dam/tn/environment/boards/documents/Amended_Petition_Rcvd_by_THC_4_5_18.pdf [https://perma.cc/AQ4S-YU7X].

16. *See infra* text accompanying notes 170-176.

its two major academic camps, cultural nationalism and cultural internationalism. Nowhere does cultural-property law consider the value of destruction, a problem that the issues surrounding Confederate memorials makes clear.

A. Cultural-Heritage Law in Practice

Cultural-property law has antecedents dating back at least to the Renaissance,[17] but the modern law began to emerge in the aftermath of World War II.[18] This law has developed as a series of ad hoc responses to widely deplored acts of destruction. The international treaty law governing cultural property arose as a response to the unprecedented destruction and looting of historical objects that occurred during the war. Similarly, the customary international law of cultural heritage has emerged as a response to acts of cultural destruction condemned by the international community, including, most significantly, the Taliban's 2001 bombings of the Bamiyan Buddhas and the destruction of numerous sites of religious and historical significance during the Yugoslav Wars of the 1990s.

Domestically, cultural-property law has similar preservationist roots. The most important piece of federal legislation governing cultural property, the National Historic Preservation Act (NHPA), was passed as the result of activism following the destruction of the original Penn Station in New York City in 1961.[19] And recently, the movement to remove or destroy Confederate monuments has led to a wave of state-level cultural-heritage laws that prevent municipalities from altering, removing, or destroying objects of historical significance. This Section reviews these historical events in detail, beginning with the international law of cultural property and then moving to U.S.-specific protections.

1. International Cultural-Property Law

The international law governing cultural property consists of multilateral treaties and customary international law. Because these have all emerged as the result of condemned acts or waves of destruction, they tend to prize cultural preservation above all else.

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17. *See* Gael M. Graham, *Protection and Reversion of Cultural Property: Issues of Definition and Justification*, 21 INT'L L. 755, 756-57 (1987).

18. PATTY GERSTENBLITH, ART, CULTURAL HERITAGE, AND THE LAW: CASES AND MATERIALS 544-45 (3d ed. 2012).

19. *See infra* notes 58-61 and accompanying text.

a. Treaties

The first major modern cultural-heritage treaty was the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, which was adopted by an intergovernmental conference of fifty-six nations in 1954. Called "[c]ultural property's founding document,"[20] the Convention's primary purpose was to require that nations engaged in war avoid destruction of culturally important material to the extent possible.[21] The Convention also placed affirmative obligations on nations to protect cultural property within their boundaries during times of peace.[22]

The Hague Convention was adopted in direct response to the "massive destruction and looting of cultural objects and monuments" during World War II.[23] The amount of cultural-property pillage during the war vastly exceeded any program of appropriation in human history.[24] The drafters of the Convention intended to establish principles for the protection of cultural property during armed conflict that would ensure this destruction never again occurred.[25]

The language of the Hague Convention reflects its orientation toward the preservation of cultural property in response to the destruction wrought by World War II.[26] The language of the Preamble reflects a value-neutral and preservation-oriented philosophy: "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," the contracting nations "[h]ave agreed" to the Convention's terms.[27] Thus, the Hague Convention assumes that preservation is a good, and that the

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20. Naomi Mezey, *The Paradoxes of Cultural Property*, 107 COLUM. L. REV. 2004, 2009 (2007).

21. The Convention contains a possibility of waiver for "military necessity." 1954 Hague Convention, *supra* note 7, art. 4 § 2.

22. *Id.* art. 4.

23. GERSTENBLITH, *supra* note 18, at 544.

24. *See* Graham, *supra* note 17, at 765; Anthi Helleni Poulos, *The 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict: An Historic Analysis*, 28 INT'L J. LEGAL INFO. 1, 21 (2000) ("The dimensions and scope of German pillage in World War II exceeded the plunder of all the wars of European history.").

25. *See* Poulos, *supra* note 24, at 36-38.

26. Patty Gerstenblith, *Protecting Cultural Heritage in Armed Conflict: Looking Back, Looking Forward*, 7 CARDOZO PUB. L. POL'Y & ETHICS J. 677, 684 (2009) ("The horrific experiences of World War II led the international community" to enact "the first international convention to address exclusively the fate of cultural property during war time.").

27. 1954 Hague Convention, *supra* note 7, pmbl.

cultural patrimony of all cultures is equally worthy of preservation because of its common value to all of mankind.

The second major cultural-heritage treaty was also drafted and ratified in response to the events of the World War II. An explosion in the illegal trade of cultural objects followed World War II.[28] This increase in the black-market trade of antiquities led to international efforts by the United Nations Educational, Scientific, and Cultural Organization (UNESCO), which culminated in the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property.[29] The core provision of the UNESCO Convention requires that states who are party to the treaty prevent the importation of cultural property "whose export from another State Party was illegal."[30]

Like the Hague Convention, the UNESCO Convention makes preservation of cultural property central to its stated mission. The Convention refers to the "moral obligations" of nations to "respect [their] own cultural heritage and that of all nations," and the requirement that "every State . . . protect the cultural property existing within its territory."[31] Taken together, the two treaties show that preservation lies at the center of the international treaty regime governing cultural heritage.

b. Customary International Law

The development of the customary international law of cultural heritage has followed a similar pattern to the development of treaty law: the international community has recognized ever greater obligations on the part of states to protect their cultural property in response to various acts of destruction. Although customary international law does not create the same obligations as treaties, it nevertheless provides guidance to domestic states. Formally described, customary international law is the body of law defined by the general practices of the states in the global community.[32] To be a part of customary international law, the rule must be in common usage and there must be a general opinion that the

28. GERSTENBLITH, *supra* note 18, at 649.

29. *Id.* at 649, 987; *see* United Nations Educational, Scientific, and Cultural Organization, Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, Nov. 14, 1970, 823 U.N.T.S. 231 [hereinafter 1970 UNESCO Convention].

30. GERSTENBLITH, *supra* note 18, at 649.

31. 1970 UNESCO Convention, *supra* note 29, pmbl.

32. Statute of the International Court of Justice art. 38(1)(b), June 26, 1945, 59 Stat. 1055, 33 U.N.T.S. 933 (defining customary international law as "a general practice accepted as law").

practice is "required, prohibited or allowed . . . as a matter of law."[33] While customary international law is not binding in a formal sense, it serves to guide nations in their development of domestic cultural-heritage protections.

Two events in particular led to expansions in the customary international law protections for cultural heritage—first, the destruction of sites of religious and historical significance during the Yugoslav Wars in the 1990s; and second, the bombing of the Bamiyan Buddhas by the Taliban in 2001. Although the Yugoslav Wars and the destruction of the Bamiyan Buddhas did not result in any additional treaty commitments, the international reaction to these events form the baseline to which countries respond when considering their own cultural-property laws.

i. Yugoslavia

The civil war in Yugoslavia saw the destruction of sites of major historical and archaeological importance. Combatants in the Yugoslav Wars deliberately targeted cultural property as part of a program of ethnic cleansing.[34] Bosnian Serbs demolished hundreds of mosques, churches, and cultural sites.[35] Federal troops also destroyed a number of sites of historical significance in Dubrovnik, including the city center, a UNESCO World Heritage site.[36]

During the war, the U.N. Security Council established the International Criminal Tribunal for the former Yugoslavia (ICTY). After the hostilities ended, the ICTY rendered several convictions for the desecration of the nation's cultural past. In *Prosecutor v. Kordić*, the ICTY held that deliberate destruction of the cultural property of a "particular political, racial or religious group[]" constituted a

33. Jean-Marie Henckaerts, *Study on Customary International Humanitarian Law: A Contribution to the Understanding and Respect for the Rule of Law in Armed Conflict*, 87 INT'L REV. RED CROSS 175, 178 (2005).

34. *See, e.g.*, Hirad Abtahi, *The Protection of Cultural Property in Times of Armed Conflict: The Practice of the International Criminal Tribunal for the Former Yugoslavia*, 14 HARV. HUM. RTS. J. 1, 1 (2001) (arguing that during the Yugoslav Wars "belligerents . . . tried to obtain psychological advantage by directly attacking the enemy's cultural property without the justification of military necessity").

35. *See, e.g.*, Joseph P. Fishman, *Locating the International Interest in Intranational Cultural Property Disputes*, 35 YALE J. INT'L L. 347, 359-60 (2010). For a comprehensive enumeration of the most egregious examples of deliberate destruction of cultural property, see Karen J. Detling, *Eternal Silence: The Destruction of Cultural Property in Yugoslavia*, 17 MD. J. INT'L L. 41, 66-67 (1993).

36. Abtahi, *supra* note 34, at 1.

crime against humanity under the ICTY statute.[37] The ICTY recognized that cultural property of special importance to nonstate groups needed protection from state actions even outside of the context of international armed conflict.[38] The ICTY also determined that the willful destruction of cultural property qualified as a criminal violation of customary international law.[39] In *Prosecutor v. Jokić*, the ICTY held that "the crime of destruction or wilful [sic] damage done to institutions dedicated to religion, charity, education, and the arts and sciences, and to historical monuments and works of art and science . . . represents a violation of the values especially protected by the international community."[40] These cases established that customary international law would not countenance the destruction of cultural property, even in an entirely civil conflict.

The decisions of the ICTY represented an important development in the international law protecting cultural property. While earlier treaty regimes had placed obligations on nations to take reasonable steps to protect cultural property in international armed conflicts, the ICTY's decisions recognized for the first time an obligation to protect cultural property in intranational disputes. Further, by linking cultural property to the human rights of particular groups, the ICTY greatly strengthened customary international law protections for cultural property.[41]

ii. Bamiyan

In early 2001, to the shock of the international community, the Taliban began to destroy the Buddhas of Bamiyan.[42] These massive statues were carved into sandstone cliffs in the Bamiyan Valley sometime between the third and sixth

37. Fishman, *supra* note 35, at 360; Prosecutor v. Kordić, Case No. IT-95-14/2-T, Judgment, ¶ 207 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 26, 2001), http://www.icty.org/x/cases/kordic_cerkez/tjug/en/kor-tj010226e.pdf [https://perma.cc/3LCD-U4N6].

38. *Id.* ¶ 360.

39. *Id.* ¶ 206.

40. Prosecutor v. Jokić, Case No. IT-01-42/1-S, Judgment, ¶ 46 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 18, 2004), http://www.icty.org/x/cases/miodrag_jokic/tjug/en/jok-sj040318e.pdf [https://perma.cc/BA6H-QFRA].

41. *See* Ana Filipa Vrdoljak, *Intentional Destruction of Cultural Heritage and International Law*, *in* MULTICULTURALISM AND INTERNATIONAL LAW: 2004 INTERNATIONAL LAW SESSION 377, 391 (Kalliopi Koufa ed., 2007) (noting that the ICTY's "jurisprudence reiterates the link increasingly being recognized in international law between cultural heritage and the enjoyment by a group or community of their human rights").

42. Francesco Francioni & Federico Lenzerini, *The Destruction of the Buddhas of Bamiyan and International Law*, 14 EUR. J. INT'L L. 619, 625 (2003).

centuries CE.[43] The two statues stood 174 feet and 118 feet tall, placing them among the largest Buddhist icons in the world.[44] On February 27, the Taliban ordered the destruction of all statues of any kind in the country, pursuant to the Islamic prohibition on idols.[45] In spite of an international outcry, including offers from assorted nations to remove the Buddhas,[46] the Taliban promptly began destruction operations.[47] Within a few weeks, the statues had been completely destroyed.[48]

The destruction of the Bamiyan Buddhas led to discussions of whether destruction of domestic cultural property could violate international law. International law had not previously considered the question of whether governments could destroy their own cultural property, focusing its attention instead on the protection of heritage during war.[49] Some international law scholars argued that the bombing nonetheless violated customary international law.[50] In the immediate aftermath of the bombings, however, the status of the attacks under international law was unclear.

Setting aside whether the destruction of the Bamiyan Buddhas was a violation of international law at the time the Taliban executed it, the international community moved to render similar future actions illegal. In response to the

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43. *Id.*

44. Agence France-Presse, *Pre-Islam Idols Being Broken Under Decree by Afghans*, N.Y. TIMES (Mar. 2, 2001), https://www.nytimes.com/2001/03/02/world/pre-islam-idols-being-broken-under-decree-by-afghans.html [https://perma.cc/X2UW-CHT2]. The original Buddhist community that built the statues was driven out of the area by Genghis Khan in the thirteenth century. Joshua Hammer, *Searching for Buddha in Afghanistan*, SMITHSONIAN MAG. (Dec. 2010), https://www.smithsonianmag.com/travel/searching-for-buddha-in-afghanistan-70733578 [https://perma.cc/F8KV-VTQ2]. The statues were thus not in use for contemporary religious practice.

45. *See, e.g.*, Agence France-Presse, *Taliban Decree Orders Statues Destroyed*, N.Y. TIMES (Feb. 27, 2001), https://www.nytimes.com/2001/02/27/world/taliban-decree-orders-statues-destroyed.html [https://perma.cc/CL3D-386Z].

46. *See, e.g.*, Barbara Crossette, *Feb. 25-March 3; Fear for Buddha Statues*, N.Y. TIMES (Mar. 4, 2001), https://www.nytimes.com/2001/03/04/weekinreview/feb-25-march-3-fear-for-buddha-statues.html [https://perma.cc/V6X5-CRF6].

47. *See* Barry Bearak, *Over World Protests, Taliban Are Destroying Ancient Buddhas*, N.Y. TIMES (Mar. 4, 2001), https://www.nytimes.com/2001/03/04/world/over-world-protests-taliban-are-destroying-ancient-buddhas.html [https://perma.cc/R53H-F5XQ].

48. *See* Barry Bearak, *Afghan Says Destruction of Buddhas Is Complete*, N.Y. TIMES (Mar. 12, 2001), https://www.nytimes.com/2001/03/12/world/afghan-says-destruction-of-buddhas-is-complete.html [https://perma.cc/744W-4EVZ].

49. *See supra* text accompanying notes 17-31.

50. *See, e.g.*, Francioni & Lenzerini, *supra* note 42, at 628-38.

concern that international law would sanction the destruction of cultural property, UNESCO adopted a "Declaration Concerning the Intentional Destruction of Cultural Heritage."[51] This document, expressly invoking the Bamiyan Buddhas,[52] clarified that intentional destruction of cultural heritage violates international law. According to the declaration, any nation that "intentionally destroys or intentionally fails to take appropriate measures to prohibit, prevent, stop, and punish any intentional destruction of cultural heritage . . . bears the responsibility for such destruction, to the extent provided for by international law."[53]

The customary international law of cultural property has thus emerged in response to various acts of destruction condemned by the international community. The Yugoslav Wars resulted in the obligation of nations to protect cultural property in intranational armed conflict, while the Bamiyan destruction elevated destruction by a government within its own territory to the level of a violation of international law. In both cases, destruction of cultural property led to expanded duties on nations to protect cultural heritage.

Because the international law of cultural property has emerged in response to acts of destruction, its instruments are focused on preservation. Further, the protections it offers are applied universally, to all cultural heritage, in a value-neutral way. As applied to the Confederate memorials, international law seems to require that cities leave them standing and protect them from potential damage. International law offers no possible criteria for a city attempting to evaluate whether or not removal or destruction of a monument is appropriate. Worse still, international law forbids destruction, irrespective of the reasons why the city or its citizens object to the content of the monument.

2. *Domestic Cultural-Property Law*

Domestic cultural-property law followed a similar course. Destruction of cultural property led to legislative action for historic preservation at both the state and federal level. Much like the international law of cultural property, domestic cultural-property law emerged in response to acts of destruction and recognizes only preservation as a legally cognizable value.

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51. UNESCO Res. 32 C/33, UNESCO Declaration Concerning the Intentional Destruction of Cultural Heritage (Oct. 17, 2003), http://unesdoc.unesco.org/images/0013/001331/133171e.pdf [https://perma.cc/8J6Z-SZMC].

52. *Id.*

53. *Id.* art. VI.

a. The National Historic Preservation Act

The most important piece of federal legislation governing cultural heritage in the United States is the National Historic Preservation Act (NHPA) of 1966.[54] Historic preservation efforts in the United States date back to the nineteenth century.[55] Before the NHPA, however, federal support was "very modest."[56] The Act was passed in response to growing concerns that urban renewal projects were destroying historic and cultural landmarks in major American cities.[57] In particular, the destruction of the old Art Deco Penn Station to make way for Madison Square Garden galvanized cultural-property efforts in New York and across the nation.[58] These efforts accelerated through the early 1960s.

In 1966, the U.S. Conference of Mayors produced a report, *With Heritage So Rich*, which examined the need for the preservation of historic buildings and districts in major U.S. cities.[59] The report covered the destruction of many build-

54. 54 U.S.C. § 100101 (2018).

55. Mark P. Nevitt, *The National Historic Preservation Act: Preserving History, Impacting Foreign Relations?*, 32 BERKELEY J. INT'L L. 388, 394 (2014) (describing early efforts at historic preservation, including the protection of Mount Vernon and the battlefield at Gettysburg).

56. Carol M. Rose, *Preservation and Community: New Directions in the Law of Historic Preservation*, 33 STAN. L. REV. 473, 474-75 (1981) ("[Federal support] consisted chiefly of the acquisition of a few individual park sites and 'landmarks' of national significance; the protection of 'antiquities' on federal property; a Depression-era survey of historically and architecturally significant structures; the founding of a nonprofit 'National Trust' to encourage private preservation; and the creation of an historic district in Washington's Georgetown." (citations omitted)).

57. *National Historic Preservation Act*, NAT'L PARK SERV. (Oct. 16, 2017), https://www.nps.gov/subjects/historicpreservation/national-historic-preservation-act.htm [https://perma.cc/A562-XNKS].

58. David Anthone, *Old Penn Station, the Birth of Historic Preservation in New York*, U.S. GEN. SERVICES ADMIN. (May 15, 2015), https://www.gsa.gov/blog/2015/05/15/Old-Penn-Station-the-Birth-of-Historic-Preservation-in-New-York [https://perma.cc/Y6CQ-9NFP] ("The 1964 demolition of the original 1910 Penn Station sparked the city's preservation legislation . . . . Out of the dust of that grand old station emerged the NYC Landmarks Preservation Commission, the largest municipal preservation agency in the nation responsible for protecting New York's significant buildings and sites.").

59. SPECIAL COMM. ON HISTORIC PRES., U.S. CONFERENCE OF MAYORS, WITH HERITAGE SO RICH 130-34 (1966).

ings of historic interest resulting from urban renewal projects and the development of the interstate highway system.[60] The recommendations of the report are "widely regarded as the seminal work behind the [NHPA]."[61]

The NHPA's preamble reflects the value of historic preservation on which the statute is founded. It states: "the spirit and direction of the Nation are founded upon and reflected in its historic heritage."[62] Further, "the historical and cultural foundations of the Nation should be preserved as a living part of our community life and development in order to give a sense of orientation to the American people."[63] NHPA thus assumes the value of preserving historical objects and preservation's importance to fostering a sense of national and communal identity.[64] Despite these lofty aims, the NHPA does not provide precise criteria for determining what specifically deserves the protection of cultural-heritage law other than properties of a certain age.

NHPA includes several important provisions. It requires that federal agencies report on the effects of their activities on historic properties.[65] Its major innovation, however, is the vast expansion of the National Register of Historic Places, both in the number of properties listed and in the protections afforded to those properties.[66] Listing on the Register affords protection and access to federal funds to "districts, sites, buildings, structures, and objects significant in American history, architecture, archaeology, engineering, and culture."[67] The National Register predates NHPA,[68] but the law significantly expanded it and

60. Nevitt, *supra* note 55, at 397; *see also* Rose, *supra* note 56, at 475 ("During the 1950s, federal, state, and local governments embarked on urban renewal and highway projects that chewed up aging neighborhoods and distinctive old buildings . . . .").

61. Rose, *supra* note 56, at 489.

62. 16 U.S.C. § 470(b)(1) (2018).

63. *Id.* § 470(b)(2).

64. Rose, *supra* note 56, at 488-91 (reviewing ways in which community-building may be "the central direction of recent preservation activity").

65. 54 U.S.C. § 306108 (2018) (previously codified at 16 U.S.C. § 470f (2012)).

66. Nevitt, *supra* note 55, at 397, 399-403.

67. 54 U.S.C. § 302101 (previously codified at 16 U.S.C. § 470a(a)(1)(A) (2012)). For discussions of funding and protection of historic landmarks, see, for example, *id.* § 306109, which permits inclusion of "preservation activities" as "eligible project costs" for federal agencies; and *id.* § 306102, which establishes preservation programs.

68. The National Register was originally established by the National Historic Sites Act of 1935. National Historic Sites Act of 1935, ch. 593, 49 Stat. 666 (1935) (codified as amended at 54 U.S.C. §§ 102303-04, 320101-04, 320106).

the protections afforded to properties on the list.[69] Today, the Register includes more than 900,000 items,[70] a number of which are Confederate memorials.[71]

In the five decades since its enactment, the NHPA has undoubtedly been responsible for a great deal of salutary historic preservation.[72] However, like the international cultural-property treaties discussed above, the NHPA leaves central problems in historic preservation law unanswered. Because the loss of cultural property was the inciting cause for the passage of the legislation, the law values preservation but gives little thought to what should be preserved or whether the law should recognize other values aside from preservation. In fact, the National Park Service does not choose which properties are listed on the National Register; instead, private individuals apply to have properties listed. Critically, the criteria for listing on the National Register are framed exclusively in terms of historical significance. The criteria require that the property either be "associated with events that have made a significant contribution to . . . our history," "associated with the lives of significant persons," "embody the distinctive characteristics of a type, period, or method of constructions," or "have yielded or may be likely to yield information important in our history."[73] The criteria give no consideration to broader community values, nor do they contemplate the possibility that some structures could be simultaneously historically significant and unworthy of preservation. Because the NHPA only identifies preservation as an end in itself without making clear the public purposes of preservation aside from vague appeals to historical importance, the law lacks a coherent rationale to direct preservation activities.

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69. Nevitt, *supra* note 55, at 399.

70. Spreadsheet of NRHP Listed Properties, NAT'L PARK SERV., https://www.nps.gov/subjects/nationalregister/upload/national-register-listed-20181017.xlsx.

71. *See, e.g.*, *National Register of Historic Places Program: Caddo Parish Confederate Monument*, NAT'L PARK SERV., https://www.nps.gov/nr/feature/places/13001124.htm [https://perma.cc/S5C3-TYVC]; *National Register of Historic Places Multiple Property Documentation Form,* NAT'L PARK SERV., (Mar. 28, 1996), https://npgallery.nps.gov/NRHP/GetAsset/NRHP/64500015_text [https://perma.cc/GE6V-GRUE]; *see also* Owley & Phelps, *supra* note 11, at 27 n.59 (taking notice of at least twenty-one entries in the National Register of Historic Places Database with "confederate" in the title).

72. *See, e.g.*, Tom Mayes, *The National Historic Preservation Act at 50—and Beyond*, NAT'L TR. FOR HIST. PRESERVATION (Oct. 14, 2016), https://savingplaces.org/stories/the-national-historic-preservation-act-at-50-and-beyond [https://perma.cc/D2H6-A8K8] (crediting the NHPA with preserving, among others, the French Quarter in New Orleans and the African Burial Ground in New York City).

73. *National Register Criteria for Evaluation*, NAT'L PARK SERV., https://www.nps.gov/nr/publications/bulletins/nrb15/nrb15_2.htm [https://perma.cc/8Z3Q-ARQV].

b. State Historic Preservation Law

The movement to remove or destroy Confederate memorials has triggered its own wave of legislative intervention. In recent years, states across the South have enacted cultural-heritage laws forbidding the removal of such monuments, as well as, in many cases, the renaming of buildings on state-owned property. To date, North Carolina, South Carolina, Georgia, Mississippi, Alabama, Virginia, and Tennessee have each enacted some version of a cultural-heritage law.[74] The language of these statutes is generally neutral on its face; statutes that specifically single out Confederate memorials for protection also provide that memorials of other major American conflicts are to be protected.[75] However, the connection between these statutes and the broader public debate around Confederate symbols is clear in many cases. For example, North Carolina passed its new Heritage Protection Act less than two weeks after the Confederate flag was removed from the South Carolina State House.[76]

The provisions of these statutes vary somewhat state to state, but the basic provisions are the same. They forbid the removal, alteration, or destruction of any monument or property owned by the state. Some of the current state laws, such as North Carolina's and Tennessee's, allow exceptions only as granted by the state historical commission.[77] Others, such as South Carolina's, allow no exceptions to the law at all.[78] Even in states where the historical commission has

74. *See, e.g.*, David A. Graham, *Local Officials Want to Remove Confederate Monuments—but States Won't Let Them*, ATLANTIC (Aug. 25, 2017), https://www.theatlantic.com/politics/archive/2017/08/when-local-officials-want-to-tear-down-Confederate-monuments-but-cant/537351 [https://perma.cc/MF4A-L6MN].

75. *See, e.g.*, ALA. CODE § 41-9-232(a) (2018) ("No architecturally significant building, memorial building, memorial street, or monument which is located on public property and has been so situated for 40 or more years may be relocated, removed, altered, renamed, or otherwise disturbed.").

76. Kasi E. Wahlers, *North Carolina's Heritage Protection Act: Cementing Confederate Monuments in North Carolina's Landscape*, 94 N.C. L. REV. 2176, 2180 (2016).

77. *See, e.g.*, N.C. GEN. STAT. § 100-2.1(a) (2017) ("[A] monument, memorial, or work of art owned by the State may not be removed, relocated, or altered in any way without the approval of the North Carolina Historical Commission."); TENN. CODE ANN. § 4-1-412(b)(1), (c)(1) (2018) ("Except as otherwise provided in this section, no memorial regarding a historic conflict, historic entity, historic event, historic figure, or historic organization that is, or is located on, public property, may be removed, renamed, relocated, altered, rededicated, or otherwise disturbed or altered . . . . A public entity exercising control of a memorial may petition the commission for a waiver of [this rule].").

78. S.C. CODE ANN. § 10-1-165(A) (2018) ("No Revolutionary War, War of 1812, Mexican War, War Between the States, Spanish-American War, World War I, World War II, Korean War, Vietnam War, Persian Gulf War, Native American, or African-American History monuments

the power to grant exceptions, the historical commissions have not yet granted a single exception to the new heritage laws.[79] The real purpose of the legislation is to ensure "that no monuments be altered or removed at any time, by anyone."[80]

These recent laws reflect the preservationist tendencies of cultural-property law. When cultural heritage is threatened with removal or destruction, the states have acted to preserve properties as they are. The effect of these laws, as critics have noted, is to "freeze[] the . . . landscape in time, prohibiting any municipality from permanently removing any monuments that they currently have or may acquire in the future, regardless of local consensus about their appropriateness."[81] Indeed, the expansive reach of these recent laws pushes inexorably toward cultural-property law's inevitable end: the complete preservation of the urban and monumental landscape, exactly as it exists in the present.

Thus, like the international law regime, domestic cultural-property law does not account for when the proprietor of cultural property might wish to remove its property from public display, or when it might wish to destroy it. The orientation of the law is toward preserving the cultural-heritage landscape exactly as it is. The example of the Confederate memorials shows potential failings in this approach, insofar as it provides no standard by which a community might decide whether the removal or destruction of its cultural property might be appropriate.

B. Cultural-Heritage Law in Theory

Theoretical approaches to cultural-property law similarly assume that preservation is an unalloyed good. Cultural-heritage theorists do not generally discuss the value of preservation or determinative criteria for deciding what cultural heritage ought to be preserved. Instead, scholarship on cultural heritage has tended to ask what approach will result in the greatest amount of preservation.

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or memorials erected on public property of the State or any of its political subdivisions may be relocated, removed, disturbed, or altered. No street, bridge, structure, park, preserve, reserve, or other public area of the State or any of its political subdivisions dedicated in memory of or named for any historical figure or historic event may be renamed or rededicated.").

79. *See Tennessee Heritage Protection Act*, TENN. HIST. COMMISSION, https://www.tn.gov/environment/about-tdec/tennessee-historical-commission/redirect---tennessee-historical-commission/tennessee-heritage-protection-act.html [https://perma.cc/UM88-8T5D] (listing all petitions filed on behalf of public entities in Tennessee requesting renaming privileges, none of which have been granted); *see also* Wahlers, *supra* note 76, at 2186-87 (arguing that the delegation of power to the commission in North Carolina is a "hollow façade").

80. Wahlers, *supra* note 76, at 2186.

81. *Id.* at 2191.

Following a well-known article by John Merryman, the two major competing theoretical models in cultural-heritage law have come to be known as the "internationalist" and "nationalist" camps. The first camp sees cultural property as the shared patrimony of humankind.[82] According to this group, no nation or culture has any greater interest than any other nation or culture in any specific piece of cultural property.[83] The second camp sees cultural property "as part of a national cultural heritage."[84] According to this view, nations have a "special interest" in cultural property produced within their borders.[85] Merryman's typology has become popular for speaking about theoretical justifications for cultural-property law, and various arguments for or against each approach have been articulated.[86]

Despite their many differences, both approaches assume the value of preservation. Cultural nationalism grounds itself in a logic of preservation: part of the reason for allowing source nations to retain cultural property within their borders and to demand repatriation of property from other nations is that the source nations will better protect the property.[87] Cultural nationalists also believe that laws banning the export of cultural property from source nations help protect against the looting of archaeological sites, thus protecting against the loss of knowledge that can be gained from the stratigraphy of the site.

Cultural internationalists take an approach that is even more relentlessly oriented toward preservation. The cultural internationalist approach, long associated with the United States in particular, has advocated for free international trade in cultural products as the superior method for preserving and studying

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82. John Henry Merryman, *Two Ways of Thinking About Cultural Property*, 80 AM. J. INT'L L. 831 (1986).

83. *Id.* at 831-32.

84. *Id.* at 832.

85. *Id.*

86. *See, e.g.*, Alexander A. Bauer, *New Ways of Thinking About Cultural Property: A Critical Appraisal of the Antiques Trade Debates*, 31 FORDHAM INT'L L.J. 690, 694 (2008) ("At one end are those who believe that everyone has a shared interest in and claim to the common heritage of humanity and that this sharing is best achieved through a vibrant and legal trade in cultural materials. On the other end are those who believe that the heritage of humanity is best secured through the recognition that cultural objects have special significance for specific groups . . . . In the literature, these two sides have become known respectively as 'cultural internationalist' and 'cultural nationalist,' representing the 'Two Ways of Thinking about Cultural Property' originally defined by legal scholar John Henry [Merryman]").

87. *See, e.g.*, Merryman, *supra* note 82, at 844 ("[T]he dialogue [of cultural nationalism] is about 'protection' of cultural property—i.e., protection against removal.").

them.[88] Cultural internationalism has historically defended universal museums, such as the British Museum and the Louvre, which contain a great deal of heritage from many regions of the earth, against the demands of postcolonial nations for the return of their cultural property. According to one prominent internationalist, the first priority in cultural policy should be "the preservation of the world's cultural legacy, object by object if necessary."[89] Critics of internationalism claim that internationalists' free-market approach to cultural property—in which property can be bought and sold on international markets—will lead to a tremendous concentration of the world's cultural heritage in the West. In response, internationalists argue against these concerns in light of the fact that Western museums are better equipped to protect cultural property because of their superior resources and ethos of stewardship.[90]

In sum, even the theoretical underpinnings of cultural-property law do not—indeed cannot—contemplate the justifiable destruction of cultural property. Whether under a nationalist or internationalist analysis, preservation is the raison d'etre of cultural-property law. Indeed, Merryman in his seminal article declared the core values of cultural-property law to be "preservation, access, and truth."[91] It is thus no surprise that the existing legal apparatus around cultural property—both in actual law and in theory—fails to consider *whether* cultural property could be permissibly destroyed, let alone *when*.

II. CULTURAL PROPERTY AND THE VALUE OF DESTRUCTION

If preservation of cultural property were always a desirable end, the status quo of cultural-property law would be acceptable. This Part argues that it is not: the destruction of cultural property can serve powerful expressive, cathartic, and practical interests that are unrealizable by preservation alone.

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88. *Id.* at 846 (coining the terms "cultural nationalist" and "cultural internationalist," and arguing that the cultural internationalist approach is superior).

89. James Cuno, *The Whole World's Treasures*, BOS. GLOBE, Mar. 11, 2001, at E7.

90. *See, e.g.*, Neil MacGregor, *To Shape the Citizens of "That Great City, the World*," *in* WHOSE CULTURE?: THE PROMISE OF MUSEUMS AND THE DEBATE OVER ANTIQUITIES 39, 43 (James Cuno ed., 2009). For a critique of MacGregor's view, see Salome Kiwara-Wilson, *Restituting Colonial Plunder: The Case for the Benin Bronzes and Ivories*, 23 DEPAUL J. ART, TECH. & INTELL. PROP. L. 375, 398-99 (2013).

91. John Henry Merryman, *The Nation and the Object*, 3 INT'L J. CULTURAL PROP. 61, 64-65 (1994).

A. The Expressive Value of Cultural-Property Destruction

The act of destroying cultural property has significant expressive power. Destroying art or cultural property provides the individual or group carrying out the destruction the opportunity to violently repudiate the message or content of the property in question.[92] Further, the destruction of cultural property can be an "effective means for communicating ideas and grabbing others' attention."[93] Destruction of cultural property has a way of generating headlines globally and of creating lasting cultural memories in the collective consciousness. In certain cases, the power of the statement sent through the destruction can outweigh the value of preserving the work itself.[94]

One type of expressive destruction is a people's collective rejection of disgraced political officials — a collective action of ancient pedigree. For example, the Roman period saw the so-called *damnatio memoriae*, or "dishonoring of the memory," of tyrannical emperors after their deaths, which included statues being torn down and names being struck from buildings and public monuments.[95] These practices continued in the Italian Renaissance, when the citizens of Florence "burned down villas owned by the exiled Salviati and Medici families."[96] In America, the signing of the Declaration of Independence was accompanied by the destruction of a number of statues and paintings of the British monarch, including the tearing down and marching through the streets of New York of a

92. *See* Amy Adler, *Against Moral Rights*, 97 CALIF. L. REV. 263, 280 (2009) (noting that, in the context of Confederate memorials, "there is a public interest in destroying the monument to symbolically repudiate the racist past").

93. Strahilevitz, *supra* note 6, at 824 (connecting the right to destroy property to First Amendment values).

94. For a similar argument as applied to creative artwork, see Adler, *supra* note 92, at 279-83. Adler argues that modification and destruction of unique works of art may "reflect the essence of contemporary-art making." *Id.* at 279. She points to the power of creative works, such as Robert Rauschenberg's *Erased de Kooning Drawing*, and Jake and Dinos Chapman's *Insult to Injury*, which was created by defacing a series of famous Francisco de Goya prints. *Id.* at 280-83.

95. *Damnatio Memoriae*, *in* 4 BRILL'S NEW PAULY 60, 60-61 (Hubert Cancik & Helmuth Schneider eds., 2010). *See generally* HARRIET I. FLOWER, THE ART OF FORGETTING: DISGRACE AND OBLIVION IN ROMAN POLITICAL CULTURE (2006) (describing these acts of destruction).

96. Tracy E. Robey, *"Damnatio Memoriae": The Rebirth of Condemnation of Memory in Renaissance Florence*, 36 RENAISSANCE & REFORMATION 5, 5 (2013).

statue of King George III at Bowling Green.[97] The statue was shipped to Newark to be melted down for bullets.[98]

Next, many of the most potent political symbols of recent decades have involved the destruction of cultural property in the context of regime change.[99] Take, for instance, the fall of the Berlin Wall. The destruction of the Berlin Wall by civilian East and West Germans is the most lasting symbol of the fall of communism in the Eastern Bloc. The fall of communism was also accompanied by the destruction of hundreds of statues of Vladimir Lenin that stood throughout the various Soviet states. In Ukraine alone, an estimated 5,500 statues of Lenin were standing in 1991.[100] Thousands were destroyed in the aftermath of Ukrainian independence, and today none remain standing.[101] As a more recent example, the toppling of a statue of Saddam Hussein in Baghdad offers a lasting image of the early days of the United States' invasion of Iraq in 2003.[102]

That destruction can uniquely convey some ideas is not foreign to American jurisprudence. On the contrary, First Amendment jurisprudence recognizes that certain ideas are expressed in a unique way through destruction—and that such expression is so important that it is worth constitutionally protecting. In landmark cases, the Supreme Court has protected flag burning and cross burning because of the particular expressive effect that destroying symbols can achieve.

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97. ISAAC BANGS, JOURNAL OF LIEUTENANT ISAAC BANGS: APRIL 1 TO JULY 29, 1776, at 57 (Edward Bangs ed., Cambridge, John Wilson & Son 1890) (1776), https://archive.org/details/journaloflieutenoobang/page/56 [https://perma.cc/266H-N2DD].

98. *Id.* ("The Lead, we hear, is to be run up into Musquet Balls for the use of the Yankies, when it is hoped that the Emanations of the Leaden George will make as deep impressions in the Bodies of some of his red Coated & Torie Subjects, & that they will do the same execution in poisoning & destroying them, as the superabundant Emanations of the Folly & pretended Goodness of the real George have made upon their Minds, which have effectually poisoned & destroyed their Souls, that they are not worthy to be ranked with any Beings who have any Pretensions to the Principles of Virtue & Justice.").

99. *See* Adler, *supra* note 92, at 280.

100. Jordan G. Teicher, *What Happened to Ukraine's 5,500 Lenin Statues?*, N.Y. TIMES: LENS (July 17, 2017), https://lens.blogs.nytimes.com/2017/07/17/what-happened-to-ukraines-5500-lenin-statues [https://perma.cc/N7CP-XM78].

101. *Id.* A final wave of Lenin-statue destruction occurred during the Euromaidan political crisis of 2013, when opponents of the pro-Russian Viktor Yanukovych smashed Lenin statues across the country. *Id.* (describing a scene in 2013 when protestors "slam[med] cudgels and sledgehammers on [a] statue's hardy red quartzite").

102. Stephen Farrell, *Firdos Square's Symbols: Then and Now*, N.Y. TIMES: WAR (Dec. 11, 2008), https://atwar.blogs.nytimes.com/2008/12/11/photographers-journal-firdos-squares-symbols-then-and-now [https://perma.cc/8HRC-2XBQ] ("The toppling of Saddam Hussein's statue in the square that afternoon—at the time probably the most potent television and newspaper image since Sept. 11—was seen across the world.").

In *Texas v. Johnson*, the Court held that the politically charged act of flag burning deserved constitutional protection in part because of the serious offense that the burning was intended to cause.[103] And in *Virginia v. Black*, the Court struck down a ban on cross burning in part because "[i]ndividuals burn crosses as opposed to other means of communication because cross burning carries a message in an effective and dramatic manner."[104] In both cases, the Supreme Court recognized the potent expressive power of destruction, and accorded it protection under the First Amendment.

The decisions in *Johnson* and *Black* differ from the destruction of cultural property, because in both cases the destruction was of a symbol rather than of a piece of cultural property. Nonetheless, the principles underlying the decisions extend to the destruction of cultural heritage. Under the Supreme Court's First Amendment jurisprudence, the very fact that the destructive act was intended to cause such shock may, in some cases, militate in favor of its constitutional protection. Some critics have argued that the Visual Artists Rights Act (VARA),[105] which prohibits the destruction of an artist's work "of recognized stature" during his or her lifetime,[106] is unconstitutional for precisely these reasons.[107] According to such critics, there is no principled reason why the artist's expression through creation should be granted any higher constitutional protection than the art owner's expression through destruction.[108] This is not necessarily to sug-

103. Texas v. Johnson, 491 U.S. 397, 411 (1989) ("Johnson was prosecuted because he knew that his politically charged expression would cause 'serious offense.' If he had burned the flag as a means of disposing of it because it was dirty or torn, he would not have been convicted of flag desecration under this Texas law.").

104. Virginia v. Black, 538 U.S. 343, 360 (2003).

105. 17 U.S.C. § 106A(a) (2018) ("[T]he author of a work of visual art . . . shall have the right . . . to prevent any destruction of a work of recognized stature.").

106. The "recognized stature" requirement is a subjective test that courts have determined by relying on testimony from members of the artistic community or by newspaper and magazine articles. *See, e.g.*, Martin v. City of Indianapolis, 192 F.3d 608, 610 (7th Cir. 1999); Cohen v. G & M Realty L.P., 320 F. Supp. 3d 421, 439 (E.D.N.Y. 2018) (finding "37 works on long-standing walls" to have "recognized stature by virtue of their selection . . . for these highly coveted spaces, as reinforced by the supportive evidence in the plaintiffs' Folios and Vara's compelling expert testimony as to their artistic merit and embrace by the artistic community"), *appeal docketed*, No. 18-538 (2d Cir. Feb. 23, 2018).

107. Kathryn A. Kelly, *Moral Rights and the First Amendment: Putting Honor Before Free Speech?*, 11 U. MIAMI ENT. & SPORTS L. REV. 211, 242-50 (1994); Eric E. Bensen, Note, *The Visual Artists' Rights Act of 1990: Why Moral Rights Cannot Be Protected Under the United States Constitution*, 24 HOFSTRA L. REV. 1127, 1138-44 (1996).

108. VARA litigation is relatively common and attracts a measure of popular attention. *See, e.g.*, Alan Feuer, *Brooklyn Jury Finds 5Pointz Developer Illegally Destroyed Graffiti*, N.Y. TIMES (Nov.

gest that cultural-heritage laws are unconstitutional—only that the law has recognized the expressive power of destruction in the closely connected context of the destruction of cultural symbols.

Destruction of cultural property thus can be just as expressive as the creation or establishment of a monument. Destruction has the capacity to carry a strong message in a particularly visceral way. It is a sui generis form that can capture negative evaluation of something in a way that preservation or creation cannot.

This expressive function could well extend to a municipality or state that wishes to destroy a Confederate memorial that it owns, rather than to recontextualize it or to move it to a museum. Recontextualization or removal serve the preservationist values of cultural-property law, but at the expense of the expressive value of destruction, which includes symbolic potential that the other options do not effectuate. Destruction can express extreme disavowal of the values that are attributed to the work in question. By destroying the statue, the community can make a statement that the monument is no longer expressive of the community's values.

The destruction of cultural property by a municipality or state differs from destruction by an individual, insofar as it is an institution that may represent the influence of different stakeholders. It is often the case in Confederate memorial removal cases that some members of the relevant community avidly advocate allowing the monument to stand. However, as the Supreme Court has repeatedly held, the government is entitled to speak as it wishes.[109] The same First Amendment values that underlie protections for citizens to destroy cultural symbols to make a political statement also support decisions by municipalities to destroy cultural-heritage items that they own. As will be discussed below, there are legitimate questions about whose decision destruction ought to be. However, the current regime of cultural-property law in the United States does not even allow this question to be asked, forbidding the destruction of cultural property at the international, federal, and state levels.

7, 2017), https://www.nytimes.com/2017/11/07/nyregion/5pointz-graffiti-jury.html [https://perma.cc/U5DL-NSGU]. I have not, however, identified any cases in which the constitutionality of VARA has been challenged.

109. Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 135 S. Ct. 2239, 2246 (2015) ("[A]s a general matter, when the government speaks it is entitled to promote a program, to espouse a policy, or to take a position. In doing so, it represents its citizens and it carries out its duties on their behalf."); Pleasant Grove City v. Summum, 555 U.S. 460, 468 (2009) (holding that a "government entity may exercise . . . [the] freedom to express its views"); Bd. of Regents of Univ. of Wis. Sys. v. Southworth, 529 U.S. 217, 229 (2000) (holding that government has the right "to speak for itself"); *see also* Nat'l Endowment for the Arts v. Finley, 524 U.S. 569, 598 (1998) (Scalia, J., concurring) ("It is the very business of government to favor and disfavor points of view.").

B. The Cathartic Value of Cultural-Property Destruction

The destruction of cultural heritage can also bring about a catharsis for a community, when the object in question has or symbolizes a particularly disturbing past. Catharsis is the "purgation or purification" of an emotional state.[110] The destruction of a monument that represents the harms inflicted upon a community can help release the traumas and pains engendered by that harm. While the expressive value discussed in the previous section inheres in the actor destroying the cultural heritage, the cathartic value of destruction benefits the community that either witnesses the act of destruction or benefits from the absence of the cultural property.

For example, in 1989, a group of Holocaust survivors publicly sank a boat, the Ostwind, that had been built at Hitler's direction and that he had boarded a few times.[111] The act was to commemorate the fiftieth anniversary of the so-called "Voyage of the Damned," the 1939 journey of the St. Louis, a liner from Germany carrying more than nine hundred Jewish refugees.[112] After being refused admission into Cuba, the liner's original destination, the boat came to Miami Beach, where its passengers begged to be admitted into the United States.[113] After the government refused to admit them, the ship was sent back to Europe, where many of its passengers fell victim to the Holocaust.[114]

Twenty-six of the St. Louis's original passengers attended the ceremony and many in attendance reported feeling a profound sense of catharsis at the sinking of the ship.[115] Abe Resnick, who came up with the idea of sinking the ship, stated: "My heart is clear; this isn't done out of any hatred . . . . But we felt we wanted to send a symbol that crime doesn't pay. We wanted to show the world."[116]

The Ostwind's destruction followed attempts by the American Nazi Party to purchase the boat for half a million dollars and to turn it into a memorial to the

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110. Alan Paskow, *What Is Aesthetic Catharsis?*, 42 J. AESTHETICS & ART CRITICISM 59, 59 (1983).

111. Jeffrey Schmalz, *Boat Hitler Built Is Sunk in Ceremony*, N.Y. TIMES (June 5, 1989), https://www.nytimes.com/1989/06/05/us/boat-hitler-built-is-sunk-in-ceremony.html [https://perma.cc/7MU9-7K2W] ("Never mind that the rumors are exaggerated and that the Ostwind was not really Hitler's personal yacht. He ordered her built and was aboard her a few times.").

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

Third Reich.[117] The owner of the Ostwind determined, however, that it would be "more principled" to give the boat to the Jewish community to destroy rather than to sell it to the Nazi group.[118] He stated that "it was certainly better to sink that boat off in Miami where it would do some good for some fish to breed and reproduce than to put it somewhere and make a shrine for a bunch of skinhead Nazis. In America we don't believe in that kind of stuff."[119] While some at the time argued that the boat should be preserved for its (disputed) historical importance, the Holocaust survivors undoubtedly derived personal benefit from the act of the boat's destruction. After the sinking of the ship, they could rest assured knowing that it would never serve as a memorial to genocidal values.

Reactions to Confederate memorial removals suggest that cathartic values are served when such memorials come down. When Confederate memorials have come down recently, they have attracted large crowds, many of whom describe it as an important personal moment. Many in New Orleans, for example, described a sense of relief at the removal of four monuments to Confederate leaders last year.[120] When the Forrest statue in Memphis came down, one onlooker reported: "This is something that happens once in a lifetime. When I heard the news, I was like, I want to be a part of this. I want to see with my own eyes . . . . I want to be able to tell this story, for myself and for future generations."[121]

Cathartic value could be served in some cases involving Confederate memorials. In places with histories of racial discrimination and abuse, the destruction of a monument has the potential to relieve the pains of the region's history. By effacing the monument from the landscape, the afflicted community is given the opportunity to move forward.

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117. *Transcript: Episode 189: Hitler's Yacht*, THIS AM. LIFE (July 13, 2001), https://www.thisamericanlife.org/189/transcript [https://perma.cc/8XXU-CLPY] [hereinafter *Hitler's Yacht*].

118. Schmalz, *supra* note 111.

119. *Hitler's Yacht*, *supra* note 117.

120. *See, e.g.*, Richard Fausset, *Tempers Flare over Removal of Confederate Statues in New Orleans*, N.Y. TIMES (May 7, 2017), https://www.nytimes.com/2017/05/07/us/new-orleans-monuments.html [https://perma.cc/G8DF-ZEPP] ("Wesley Lynch III . . . spoke, with passion and despair, about the statues not as relics, but as living symbols of a social order that, from his experience, wanted people like him to rise only so far.").

121. Ryan Poe, *Memphis Removes Confederate Statues from Downtown Parks*, COM. APPEAL (Dec. 20, 2017, 6:03 PM), https://www.commercialappeal.com/story/news/government/city/2017/12/20/memphis-council-votes-immediately-remove-confederate-statues/960707001 [https://perma.cc/NQB5-5HQZ].

C. The Practical Value of Destruction

There may also be practical reasons why a community would decide to destroy cultural property. The most common alternative to destruction suggested for Confederate memorials, for example, is removal to museum spaces. However, maintaining the memorials in museum spaces is not costless. Many Confederate memorials are large structures whose storage, preservation, and maintenance can be rather expensive. This was the conclusion of a government working group in Virginia, which assumed that monuments ought to be preserved but pointed out that removal to museums would not be practical in many cases because of the associated costs.[122] For example, the University of Texas recently removed its statue of Jefferson Davis from its south quadrangle to its American history museum.[123] The university set the statue in an exhibition, including information about the man who commissioned it, the artist, and the controversy surrounding the statue. Although public figures are not available, the exhibition was far from costless and came at a time when Texas universities were facing serious budget shortfalls.[124] When the university removed additional Confederate statues from the school's South Mall in the summer of 2017, the university announced that they would not join the Davis exhibit in the museum due to "space and expense practicality issues."[125]

One curiosity of cultural-property law's preservationist orientation is that it would countenance options that have the same effect as destruction. For example, cultural-property law would almost certainly permit a municipality to keep its Confederate memorials in a storage space to which no member of the public

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122. GOVERNOR MCAULIFFE'S MONUMENTS WORK GROUP, RECOMMENDATIONS FOR COMMUNITY ENGAGEMENT REGARDING CONFEDERATE MONUMENTS 5-6 (2016) ("[I]f discussions arise regarding the removal of a monument, its long-term care and appropriate curation as a museum artifact at a qualified facility must be considered. It was noted that, given the potential for considerable costs and limited funds at the local level, localities may focus on options other than removal.").

123. Rick Jervis, *When a Bronze Confederate Needed to Retire, University of Texas Found a Home*, USA TODAY (Aug. 18, 2017), https://www.usatoday.com/story/news/2017/08/18/Confederate-statue-retirement-home/580041001 [https://perma.cc/NQV8-6ZS3].

124. *See, e.g.*, R.G. Ratcliffe, *Senate Budget Slams Texas's Colleges and Universities*, TEX. MONTHLY (Apr. 7, 2017), https://www.texasmonthly.com/burka-blog/senate-budget-slams-texass-colleges-universities [https://perma.cc/3W5B-B786].

125. Brooke Sjoberg, *Jefferson Davis Statue to Stand Alone in Briscoe Center*, DAILY TEXAN (Oct. 26, 2017), http://www.dailytexanonline.com/2017/10/26/jefferson-davis-statue-to-stand-alone-in-briscoe-center [https://perma.cc/5KUB-95D3].

had access, so long as it maintained the memorials.[126] The memorials would be removed from public sight, but would still exist. This option looks like destruction from the perspective of the public, but still requires that the public pay to preserve the cultural heritage. Destruction may be preferable to hidden storage for simple economic reasons.

None of this is to say that destruction is always better than preservation. Preservation is often a laudatory goal and serves important aims, such as the preservation of history and of aesthetically significant works. However, as discussed above, the legal framework surrounding cultural property has not taken into account the fact that destruction can also serve important aims. But destruction of cultural property must be undertaken with care because, once done, it cannot be undone. In the next section, I argue for a limited exception to the protections of cultural-property law for a particular class of cultural heritage that may be amenable to destruction.

III. A HUMAN RIGHTS-BASED APPROACH

The preceding Parts argued that the destruction of some cultural property like Confederate monuments may serve important ends. These monuments, however, are protected by both international and domestic cultural-property law. In this final Part, I suggest an alternative theory that could offer a defense of cultural-property destruction. Under this theory, monuments erected in commemoration of violations of the customary international law of human rights should be exempted from the strictures of cultural-property law when the government that owns them wishes to destroy them. This limited exception could countenance the destruction of Confederate memorials, while providing a principled theoretical and legal foundation for opposing and combating acts such as ISIS's destruction of Palmyra. This approach ensures that nations have the right to destroy their own cultural property only in cases when it is in both the national and the international interest.

126. For a discussion of the related possibility of removing the public art of living artists under the Visual Artists Rights Act, see John Barlow, *Unringing the Bell: Publicly Funded Art and the Government Speech Doctrine*, 34 LOY. L.A. ENT. L. REV. 67, 104 (2014) ("The concept that publicly funded, publicly displayed art can be regulated via the Government Speech Doctrine is improper not only because of the nature of art speech but also because of the moral rights of an artist. This concept arises from the idea that public art should remain on public display because of an artist's right of integrity and the ill-defined scopes of both moral rights and the Government Speech Doctrine encourages wasteful litigation when public art is removed from public display." (footnotes omitted)).

A. Cultural-Property Law as Human Rights Law

The developing international law of cultural property increasingly recognizes the deliberate destruction of cultural property as a violation of international humanitarian law.[127] The international law of cultural heritage has come to recognize a connection to "human rights, and in particular with the collective dimension of the right to access, perform and maintain a group's culture."[128] Many attacks against cultural property are intended to attack the collective identity of cultural groups, in order to demoralize them or efface their legacy as an individual culture. Destruction of cultural property also deprives the world of the educational, aesthetic, and recreational value of the objects or buildings. The connection between the preservation of cultural property and human rights in international law can be traced back at least as far as the 1954 Hague Convention, which spoke of "'the cultural heritage of all mankind,' so as to underscore its connection to human rights."[129]

Emerging international criminal law classifies deliberate destruction of cultural property as a human rights violation. As discussed above, the ICTY found that various attacks on cultural property executed during the Yugoslavian conflict in the 1990s constituted violations of customary international law.[130] It further found that destruction of the cultural property of a particular religious group was a crime against humanity.[131] The ICTY regarded such attacks on cultural property as attacks on "the very . . . identity of a people," and as "a nearly pure expression of the notion of 'crimes against humanity,' for all of humanity

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127. Patty Gerstenblith, *The Destruction of Cultural Heritage: A Crime Against Property or a Crime Against People?*, 15 J. MARSHALL REV. INTELL. PROP. L. 336, 389 (2016) ("The unifying theme underlying [recent] developments is the recognition that cultural heritage is closely connected to humanity and to human rights, as can be seen from the statements of the Prosecutor in the Al-Faqi prosecution. Seeing cultural heritage through the lens of human rights assists us in reaching a more integrated understanding of the role that cultural heritage plays in the lives of human beings—the local community that lives among the heritage, the regional and national communities, and the world community."); *see also* Francesco Francioni, *The Human Dimension of International Cultural Heritage Law: An Introduction*, 22 EUR. J. INT'L L. 9, 10 (2011) (characterizing "the elevation of attacks against cultural property to the legal status of international crimes, especially war crimes and crimes against humanity" as one of three major "progressive development[s] in the law" of cultural heritage).

128. Francioni, *supra* note 127, at 14.

129. *Id.* at 13 (quoting Hague Convention 1954, *supra* note 7, pmbl.).

130. *See supra* text accompanying notes 34-41.

131. Prosecutor v. Kordić, Case No. IT-95-14/2-T, Judgment, ¶ 207 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 26, 2001), http://www.icty.org/x/cases/kordic_cerkez/tjug/en/kor-tj010226e.pdf [https://perma.cc/67EF-BA2S].

is indeed injured by the destruction of a unique religious culture and its concomitant cultural objects."[132]

The Rome Statute, which created the International Criminal Court (ICC), also recognizes destruction of cultural property as a violation of international humanitarian law.[133] Article 8(2)(e)(iv) defines a war crime to include "[i]ntentionally directing attacks against buildings dedicated to religion" and "historic monuments."[134] In 2016, in the case of *Prosecutor v. Al Mahdi*, the ICC rendered its first conviction for the war crime of intentional destruction of cultural property.[135] The Court convicted Ahmad Al Faqi Al Mahdi, who was the leader of *Hesbah*, the "morality brigade" of Ansar Dine, an ISIS-affiliated jihadist group in Mali.[136] Al Mahdi was charged with directing attacks on nine mausoleums and one mosque in Timbuktu.[137] Al Mahdi had been present for all ten attacks, and video evidence showed that he had participated himself in at least five of them.[138] Nine of the ten sites were UNESCO-protected World Heritage Sites, a fact known to Al Mahdi,[139] who publicly referred to "[t]hose UNESCO jackasses," during the destruction of the Djingareyber Mosque.[140] Like the ICTY, the ICC recognized that "international humanitarian law protects cultural objects as such."[141]

The case law of the ICC and the ICTY show an increasing recognition that the law governing the preservation of cultural property is a branch of human rights law. According to the ICTY, destruction of cultural property represents a

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132. *Id.*

133. Rome Statute of the International Criminal Court, Preamble, July 17, 1998, 2187 U.N.T.S. 90; *id.* art. 8.

134. *Id.* art. 8(2)(e)(iv).

135. Prosecutor v. Al Mahdi, ICC-01/12-01/15, Judgment and Sentence (Sept. 27, 2016), https://www.icc-cpi.int/CourtRecords/CR2016_07244.PDF [https://perma.cc/RS4Z-P54C]; *see also* Recent Case, Prosecutor v. Ahmad Al Faqi Al Mahdi, *Case No. ICC 01/12-01/15, Judgment & Sentence (Sept. 27, 2016)*, 130 HARV. L. REV. 1978, 1978-79 (2017) (criticizing the decision for failing "to define the scope of the Rome Statute's protection for cultural heritage more broadly, or alternatively to sound the alarm regarding certain inadequacies in its coverage").

136. *Al Mahdi*, ICC-01/12-01/15, ¶¶ 31-33, 53.

137. *Id.* ¶¶ 10, 45.

138. Recent Case, *supra* note 135, at 1982.

139. *Id.* at 1981.

140. *Al Mahdi*, ICC-01/12-01/15 ¶ 46 ("[A]s Mr Al Mahdi said himself during the Djingareyber Mosque attack: It's probably the oldest mosque here in town, and is considered a heritage site . . . a World Heritage Site. There are so many rumours relating to these shrines . . . . Those UNESCO jackasses . . . they think that this is heritage. Does 'heritage' include worshipping cows and trees?").

141. *Id.* ¶ 15.

violation of humanitarian law both on nationalist and internationalist axes. It violates the rights of the culture to which the property belongs by irrecoverably destroying a component part of it; simultaneously, it degrades the human race by depriving it of something unique and irretrievable.

The 2003 UNESCO Declaration Concerning the Intentional Destruction of Cultural Heritage, issued in the wake of the destruction of the Bamiyan Buddhas, also connects the national obligation to preserve cultural property to human rights law. This document expressly links cultural property to "human dignity and human rights" and requires states to take action "to prevent, avoid, stop and suppress acts of intentional destruction of cultural heritage."[142] Thus, the Declaration, which is binding on the United States, also recognizes the preservation of cultural property as a component of human rights law.[143] The trend toward recognizing cultural-property destruction as an arm of human rights law has continued with attempts to address the ongoing destruction of cultural property currently being carried out by ISIS in Syria and Iraq. In 2017, the United Nations Security Council unanimously adopted Resolution 2347, condemning ISIS's continuing destruction of cultural property and indicating that their behavior likely constituted war crimes.[144]

Viewing cultural-property law as an arm of human rights law suggests, however, that the protection of some objects even of substantial antiquity do not serve the law's underlying aims. If, as one recent U.N. Report noted, "[c]ultural heritage is to be understood as the resources enabling the cultural identification and development processes of individuals and groups which they, implicitly or explicitly, wish to transmit to future generations,"[145] then it seems questionable that cultural property's protections should extend to structures erected to impose upon or degrade some group of people. If cultural-heritage protections are in-

142. UNESCO Res. 32 C/33, *supra* note 51. While the 2003 Declaration does not contain any enforcement mechanism, the Declaration nevertheless obligates the United States to care for cultural property located within its borders and to see that it is not destroyed.

143. Francioni, *supra* note 127, at 13 (stating that the principle of a connection between human rights and cultural heritage was "given further legal strength and scope by the adoption [of the Declaration]").

144. S.C. Res. 2347, ¶ 1 (Mar. 24, 2017) (stating that the Council "[d]eplores and condemns the destruction of cultural heritage, inter alia destruction of religious sites and artefacts").

145. Karima Bennoune (Special Rapporteur in the Field of Cultural Rights), *Rep. of the Special Rapporteur in the Field of Cultural Rights*, U.N. Doc. A/HRC/31/59, 11 (Feb. 3, 2016), http://www.ohchr.org/Documents/Issues/CulturalRights/A-HRC-31-59_en.doc [https://perma.cc/JHP5-7ZWY].

deed about a people's "ancestral connection to place"[146] and if cultural-heritage destruction is really a "crime against people, not simply a loss of property," what does it mean if the cultural heritage was set up expressly to celebrate crimes against people?[147]

There is, thus, a tension between the underlying rationale behind cultural-property law and at least some of the cultural property to which it extends its protections. In the following section, I argue that the special protections conferred by cultural-property law should not extend to cultural heritage set up to commemorate violations of the customary international law of human rights. This limited exception would allow communities to decide for themselves whether to preserve or destroy cultural property that does not serve the underlying purposes of cultural-property law's protections.

B. A Human Rights-Based Approach to Cultural-Property Destruction

1. A Limited Exception to Cultural Preservation Law

A nation or other cultural proprietor who wishes to destroy cultural heritage should be permitted to do so only if the object was erected in celebration or commemoration of an act or ideology in violation of the law of nations. Using the customary international law of human rights has the advantage of limiting the number of circumstances when a monument would be exempt from the protections of cultural-heritage law, while leaving preservation rules intact for most cultural property.

There is no definitive list of human rights violations. However, the U.S. Supreme Court has held that courts are competent to ascertain what qualifies in the case of *Sosa v. Alvarez-Machain*.[148] *Sosa* concerned the 1789 Alien Tort Statute (ATS), which allows recovery for torts "committed in violation of the law of nations."[149] The Court held that the ATS was enacted to create jurisdiction over "a relatively modest set of actions,"[150] and with "the understanding that the common law would provide a cause of action."[151] The Court clarified that the statute

146. Gerstenblith, *supra* note 127, at 393 (quoting Kanishk Tharoor, Opinion, *Life Among the Ruins*, N.Y. TIMES (Mar. 20, 2016), https://www.nytimes.com/2016/03/20/opinion/sunday/life-among-the-ruins.html [https://perma.cc/XD3N-WECQ]).

147. *Id.* at 392.

148. 542 U.S. 692 (2004).

149. *Id.* at 697-99 (quoting 28 U.S.C. § 1350 (2000)).

150. *Id.* at 720.

151. *Id.* at 723.

allows a cause of action for violations of norms "of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms [i.e., violation of safe conducts, infringement of the rights of ambassadors, and piracy] we have recognized."[152] Since the Supreme Court's decision in *Sosa*, courts have routinely assessed whether particular acts qualify as human rights violations for purposes of ATS litigation.[153] One commonly used list, cited in the *Sosa* decision, is that of the *Restatement (Third) of Foreign Relations Law*, which enumerates the following as a comprehensive list of firmly established human rights violations under customary international law: genocide; slavery or slave trade; the murder or causing the disappearance of individuals; torture or other cruel, inhuman, or degrading treatment or punishment; prolonged arbitrary detention; and systemic racial discrimination.[154]

Many of the Confederate monuments that dot the South would qualify as honoring behavior that was in violation of today's customary international law of human rights—in particular, slavery and systemic racial discrimination. The overwhelming majority of monuments to the Confederacy were not erected in the immediate aftermath of the war.[155] Instead, monument construction peaked in the Jim Crow era, when hundreds of monuments were erected through the advocacy of private groups all throughout the South.[156] There were two major waves of Confederate memorial construction. A first wave began in the late nineteenth century, in the wake of the Supreme Court's decision in *Plessy v. Ferguson*.[157] Erection of monuments accelerated through the 1900s, peaking in 1910

152. *Id.* at 724-25.

153. *See, e.g.*, Flomo v. Firestone Nat. Rubber Co., 643 F.3d 1013 (7th Cir. 2011) (holding that a corporation's use of child agricultural laborers who were not formally employed at its Liberian plant could not give rise to ATS litigation); Abdullahi v. Pfizer, Inc., 562 F.3d 163 (2d Cir. 2009) (holding that the ATS conferred jurisdiction over a claim that corporations engaged in non-consensual experimentation on human subjects); Khulumani v. Barclay Nat'l Bank, Ltd., 504 F.3d 254 (2d Cir. 2007) (holding that the ATS conferred jurisdiction over a claim that corporations aided and abetted South Africa's apartheid government).

154. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 702 (AM. LAW INST. 1987).

155. *Whose Heritage? Public Symbols of the Confederacy*, S. POVERTY L. CTR. 11 (2017), https://www.splcenter.org/sites/default/files/com_whose_heritage.pdf [https://perma.cc/V7SA-D95N].

156. *Id.* ("The first [spike] began around 1900, amid the period in which states were enacting Jim Crow laws to disenfranchise the newly freed African Americans and re-segregate society. This spike lasted well into the 1920s, a period that saw a dramatic resurgence of the Ku Klux Klan, which had been born in the immediate aftermath of the Civil War.").

157. 163 U.S. 537 (1896).

and 1911.[158] A second, smaller wave of Confederate monument construction occurred in the mid-1950s, beginning almost immediately after the Supreme Court's decision in *Brown v. Board of Education*, apparently in resistance to the Civil Rights Movement.[159]

The timing of the placement of these monuments suggests that their purpose was in large part to celebrate the Southern legacy of slavery, to indicate support for white supremacy, and to intimidate Blacks living in the area.[160] Important Confederate memorials of the Jim Crow era are closely linked to the revitalization of the Ku Klux Klan (KKK) in the twentieth century.[161] Stone Mountain, Georgia, for instance, features an immense sculpture on the scale of Mount Rushmore, depicting Robert E. Lee, Stonewall Jackson, and Jefferson Davis.[162] The location of this monument, completed in 1972, was chosen because it was the site where the second KKK was founded in 1915.[163] Planning began within a year of this ignominious event, spearheaded by the Atlanta chapter of the United Daughters of the Confederacy.[164]

Stone Mountain also provides strong evidence for the close link between certain Confederate memorials and systemic racial discrimination.[165] Begun in the 1910s in the middle of the Jim Crow era, the plans for an "eighth wonder of the world" were eventually abandoned amidst infighting between various involved factions, including the KKK, the United Daughters of the Confederacy, the Stone Mountain Confederate Memorial Association, and Gutzon Borglum, the

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158. *Whose Heritage? Public Symbols of the Confederacy*, *supra* note 155, at 14.

159. *Id.* at 15.

160. Court Carney, *The Contested Image of Nathan Bedford Forrest*, 67 J.S. HIST. 601, 617 (2001) (discussing the connection between the 1905 establishment of the Nathan Bedford Forrest Monument in Memphis with "racism," "white supremacy," "the subtle threat of racialized social control," and "[the] strict racial subordination [that] stifled any expression of African American perceptions of the general"); *Whose Heritage? Public Symbols of the Confederacy*, *supra* note 155, at 11.

161. *Whose Heritage? Public Symbols of the Confederacy*, *supra* note 155, at 13 (noting the connections between Stone Mountain Park's creation and the KKK).

162. *See, e.g.*, Grace Elizabeth Hale, *Granite Stopped Time: The Stone Mountain Memorial and the Representation of White Southern Identity*, 82 GA. HIST. Q. 22, 22 (1998) (linking the planning of Stone Mountain to the election of Woodrow Wilson, the popularity of the film *The Birth of a Nation*, and the segregation of Washington, D.C. as early twentieth-century triumphs of a revitalized white South).

163. *Id.* at 23

164. *Id.* at 25.

165. The full story of the troubled construction of Stone Mountain is recounted in Hale, *supra* note 162.

monument's sculptor, who would later go on to design Mount Rushmore.[166] The project languished for decades, only to be revived in the 1950s in the wake of *Brown v. Board of Education*.[167] After that decision, the Georgia state assembly began a program of instating symbols of the Confederacy as signs of resistance to the Supreme Court's decision, including the purchase of Stone Mountain in order to attempt to complete the memorial.[168]

2. *Determining a Monument's Amenability to Destruction*

One important question in evaluating whether a memorial celebrates a violation of the customary international law of human rights is whether one should look to the circumstances of the monument's erection, the content of the monument, or the contemporary reception of the monument. I argue that the circumstances of the monument's erection offer the best yardstick for determining whether the monument should be subject to a human rights exception to general cultural-heritage protections.

Looking to the contemporary reception of the monument should be ruled out immediately. Public reactions to monuments are too varied to be reduced to a single contemporary reaction. The Confederate memorial debate illustrates this vividly. It is reasonable to accept that some defenders of Confederate memorials feel a genuine attachment to them as a part of their history, rather than as monuments to an antidemocratic, white-supremacist ideology. On the other hand, as discussed above, it is also reasonable to see the memorials as celebrations of systemic racial oppression. The same could be said of the Bamiyan Buddhas: while much of the world saw them as treasures of the world's cultural patrimony, fundamentalist Islamists saw them as an affront to their religious values.

The content of the monument affords a better option, but is still deficient in several respects.[169] The content or symbolism of a piece of cultural property may not directly express the ideology of the memorial. In the Southern context, monuments whose purpose was to celebrate a racial ideology rarely directly depicted slavery. Stone Mountain is a perfect example: although the relief depicts Confederate leaders without any explicit reference to slavery, its purpose was surely to evoke the racial ideology of the Confederacy. Looking to the content of the

166. *Id.* at 32–34, 38.

167. *Id.* at 40.

168. *Id.*

169. Debates over the legacy of figures depicted in the memorials have formed the greater part of the popular discourse surrounding the removal of Confederate memorials. *See, e.g.*, Eric Foner, *The Making and the Breaking of the Legend of Robert E. Lee*, N.Y. TIMES (Aug. 28, 2017), https://www.nytimes.com/2017/08/28/books/review/eric-foner-robert-e-lee.html [https://perma.cc/6PHM-2UHZ].

monument will often entail a complicated and contentious evaluation of the historical legacy of the figures it depicts—a task cultural-property law is ill equipped to manage.

Moreover, scrutinizing content also raises thorny questions on what exactly the "content" of a visual representation is. Controversies over interpreting the legacies of historical figures illustrate the point. Much of the debate surrounding Confederate memorials asks whether the figures represented in the memorials are worthy of celebration today. For example, defenders of statues of Nathan Bedford Forrest argue that he ought to be commemorated for his military brilliance[170] and his pleas for racial harmony late in life.[171] Others point to his position as the first Grand Wizard of the KKK and his involvement in the Fort Pillow massacre, where Confederate soldiers murdered hundreds of black soldiers after they had surrendered.[172] Forrest's defenders argue that his involvement in the KKK was limited and that he quickly disavowed the organization as its involvement in vigilante violence increased.[173] These evaluative questions are not likely to be solved by cultural-property law.

Looking to the circumstances of the monument's erection allows for a determination to be made whether the monument was established in celebration of a violation of human rights law and, as such, whether the cultural property should be amenable to destruction. In the case of the Forrest example, for instance, it is clear that, while Forrest's legacy is contested today, at the time that most of his

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170. *See, e.g.*, Carney, *supra* note 160, at 604-05 ("Memphians took great pride in Forrest's lack of formal military education but maintained that their hero, though untrained, instinctively knew the rules of battle."). Carney also points out, however, that there is considerable reason for doubt about the historical accuracy of these claims of Forrest's military prowess and claims regarding his importance to the Civil War. *Id.* at 601 ("During the Civil War, the uneducated general directed a number of limited victories over superior, if poorly led, Union forces. Although he may not have lost a major battle, most historians agree that his handful of successes failed to have any real impact on the future of the Confederacy.").

171. *See, e.g.*, John A. Tures, *General Nathan Bedford Forrest Versus the Ku Klux Klan*, HUFFPOST (July 6, 2015), https://www.huffingtonpost.com/john-a-tures/general-nathan-bedford-fo_b_7734444.html [https://perma.cc/9QTV-B48F] ("[T]oward the end of his life, General Forrest would have likely sought to exterminate those who would kill blacks in his name . . . . He eventually saw the light, softened his racism, and eventually worked to destroy the KKK.").

172. *See, e.g.*, Robbie Brown, *Bust of Civil War General Stirs Anger in Alabama*, N.Y. TIMES (Aug. 24, 2012), https://www.nytimes.com/2012/08/25/us/fight-rages-in-selma-ala-over-a-civil-war-monument.html [https://perma.cc/TKR4-YU5G] ("[H]e was accused of war crimes for allowing his forces to massacre black Union troops who had surrendered after the Battle of Fort Pillow in Tennessee in 1864. Following the war, he joined the newly formed Ku Klux Klan and became its first grand wizard.").

173. *See* Tures, *supra* note 171.

statues were erected, he was celebrated precisely for his role in human rights violations. In the early twentieth century when most of the statues of Forrest were erected, Forrest's role as a founder of the KKK was understood to be significant, and he was celebrated in large part *because of* that role.[174] Forrest's legacy was promoted during the romanticizing of the Klan that occurred in the early nineteenth century.[175] In fact, turn-of-the-century accounts cast Forrest's order to dissolve the Klan in the opposite light from that of his modern defenders: as an order only given once the Klan's objectives had been achieved.[176]

The use of contemporary sources will make it possible to establish the original intended purpose of the memorial. In some cases, inscriptions or other documentation make the issue glaringly clear. For example, the recently removed Battle of Liberty Place Monument in New Orleans had, until the 1970s, an inscription reading: "United States troops took over the state government and reinstated the usurpers but the national election of November 1876 recognized white supremacy in the South and gave us our state."[177] While the purposes behind other monuments may not be as clear, the ordinary methods of historical research should be able to establish what a monument was intended to memorialize.

If cultural property belonging to a nation is determined to have been produced in celebration of a violation of the customary international law of human rights, the nation in question should have the power to destroy it. Just because cultural property celebrates a human rights violation does not mean that it *should* be destroyed, only that international law should countenance such destruction.

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174. *See* Carney, *supra* note 160, at 610 ("During a period that featured some of the worst racial atrocities in American history, the Klan became a potent symbol of white supremacy—and in the midst of this resurgence of racism, Memphis chose to unveil its bronze equestrian memorial to Forrest. Had Memphis constructed such a memorial in the 1880s, it likely would have reflected the postwar themes in evidence at his funeral—a naturally gifted general of strong religious faith who had overcome childhood poverty to become a wealthy businessman . . . . Instead, by 1905, the year of the Forrest statue's dedication, increasing racial brutality . . . had helped to unite white Memphians and in turn transform the city's image of Forrest.").

175. *See, e.g.*, Thomas Dixon, Jr., *The Story of Ku Klux Klan: Some of Its Leaders, Living and Dead*, 22 METROPOLITAN MAG. 657, 668 (1905).

176. *Id.* at 668 ("The order of dissolution of the Klan as issued by General Forrest was in every way characteristic of the man. When the white race had redeemed six Southern States from Negro rule in 1870, the Grand Wizard knew that his mission was accomplished and issued at once his order to disband.").

177. JAMES W. LOEWEN, LIES ACROSS AMERICA: WHAT OUR HISTORIC SITES GET WRONG 199-200 (1999).

Cultural-property law should recognize that the right to destroy, "the most extreme recognized property right," vests in a government that owns cultural property memorializing a human rights violation.[178]

3. Confederate Monuments and the Human Rights Approach

Under this framework, a city that wishes to destroy a Confederate memorial that it owns would look to the historical circumstances of the monument's erection and establish whether it was done in celebration of a modern violation of customary international law. This approach would look to contemporary international human rights norms, rather than those at the time of the erection of the monument. Then the city would decide whether to destroy it using normal democratic processes. This framework allows for the vindication of the values that destroying cultural property can have, as discussed above. At the same time, it avoids the parade of horribles suggested by popular voices who advocate the preservation of Confederate memorials on the ground that there is no limiting principle to the logic of destruction. According to such critics, there is no stopping point, and soon all commemorations of imperfect historical figures will need to be removed from public spaces.[179] President Trump, for instance, recently made this claim, remarking: "This week it's Robert E. Lee. I noticed that Stonewall Jackson is coming down . . . . I wonder, is it George Washington next week and is it Thomas Jefferson the week after? You know, you really do have to ask yourself, where does it stop?"[180] Under the framework advocated here, there would be a clear line beyond which the normal preservation-oriented protections of cultural-property law would continue to apply—namely, anything not proscribed by customary international law's limited list of human rights violations.

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178. Strahilevitz, *supra* note 6, at 785.

179. *See, e.g.*, John Daniel Davidson, *Why We Should Keep the Confederate Monuments Right Where They Are*, FEDERALIST (Aug. 18, 2017), http://thefederalist.com/2017/08/18/in-defense-of-the-monuments [https://perma.cc/AA4C-RSGD]; *see also* Lawrence A. Kuznar, *I Detest Our Confederate Monuments. But They Should Remain.*, WASH. POST (Aug. 18, 2017), https://www.washingtonpost.com/opinions/i-detest-our-confederate-monuments-but-they-should-remain/2017/08/18/13d25fe8-843c-11e7-902a-2a9f2d808496_story.html [https://perma.cc/CY2U-VMWT] (comparing the destruction of Confederate monuments to the destruction of the Bamiyan Buddhas and arguing that Americans should oppose the destruction of Confederate monuments, not necessarily because there is no stopping point but because destruction erases our nation's imperfect history).

180. *See, e.g.*, Kristine Phillips, *Historians: No, Mr. President, Washington and Jefferson Are Not the Same as Confederate Generals*, WASH. POST (Aug. 16, 2017), https://www.washingtonpost.com/news/retropolis/wp/2017/08/16/historians-no-mr-president-washington-and-jefferson-are-not-the-same-as-confederate-generals [https://perma.cc/Z7HT-5FZF].

One hard problem arises in the case of old or ancient cultural property that may run counter to the national interest. Take, for instance, the triumphal arches commemorating the victories of the Roman emperors. All of these arches celebrate victories in wars that featured actions that today would be considered war crimes. Several, for example, such as the Arch of Constantine in Rome, feature depictions of manacled slaves being taken in the aftermath of the victory.[181] The Colosseum may also qualify as a monument celebrating human rights violations, as it was constructed for the production of gladiatorial shows and the reenactment of battles, many of which included violations of the modern laws of war. It is possible to imagine that, at some later point, these monuments could become rallying points for nationalist or neofascist groups. Indeed, the restoration of Roman ruins was a major element of Mussolini's agenda in the 1920s and 1930s.[182]

One possible response is to look to the existing international law of cultural-heritage protection, in particular the UNESCO World Heritage program, which, at least theoretically, protects sites "of outstanding universal value" that meet a set of selection criteria.[183] The list includes many of the sites that would be considered among the world's treasures, including, for instance, the entire historic center of Rome, which encompasses the Colosseum and the Arch of Constantine. One could argue that the objects on the list ought to be preserved, regardless of their possible commemoration of human rights abuses and of the desires of the nations or governmental subdivisions that own them. The UNESCO list, however, is not intended to be comprehensive and leaves outside of its compass many objects of historical importance.

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181. ALTA MACADAM & ANNABEL BARBER, BLUE GUIDE ROME 38 (11th ed. 2016).

182. *See, e.g.*, Aristotle Kallis, *The "Third Rome" of Fascism: Demolitions and the Search for a New Urban Syntax*, 84 J. MOD. HIST. 40, 44 (2012) ("The regime . . . endeavor[ed] to reconcile [conflicts between different branches of fascism] with and subsume them under Mussolini's growing fascination with the myth of *romanità*, focusing on both the historical legacy and the physical space of Rome . . . . [The Fascist architectural project] was . . . a project in strong, deliberate continuity with elements and themes from the city's history—not a 'new' city in the literal sense of the word[,] but the third iteration of the existing city, deferential to aspects of its history and space, seeking to 'reclaim' the ideal essence of its illustrious predecessors . . . from the ravages of time."); Max Page, *The Roman Architecture of Mussolini, Still Standing*, BOS. GLOBE (July 13, 2014), https://www.bostonglobe.com/ideas/2014/07/12/the-roman-architecture-mussolini-still-standing/csZ70EN2fTnUUNqXokRM9K/story.html [https://perma.cc/4RCD-WR6J]. *See generally* Jan Nelis, *Constructing Fascist Identity: Benito Mussolini and the Myth of* Romanità, 100 CLASSICAL WORLD 391 (2007) (explaining the centrality of Roman history and mythology to Italian Fascism); Romke Visser, *Fascist Doctrine and the Cult of the* Romanità, 27 J. CONTEMP. HIST. 5 (1992) (same).

183. *The Criteria for Selection*, UNESCO, https://whc.unesco.org/en/criteria [https://perma.cc/D6BB-HU3B].

A superior approach would be to trust nation-states to exercise their limited right to destroy judiciously. Because the approach advocated here merely authorizes nations—but does not obligate them—to destroy a limited class of monuments, nations would be more likely than not to continue to preserve cultural property that is important to national history and that generates significant tourism revenue. Although there is a clear and strong connection between the Colosseum or the Arch of Constantine and violations of modern human rights law, the national relationship of Italy to these structures is very different from the relationship in the United States between municipalities and their monuments to the Civil War. Because of these differences, it is highly unlikely that Italians will call for the destruction of either of these structures.

In recent years, some federal legislation has been introduced that would change the status of Confederate memorials under federal law. Existing proposals, however, do not promote a legal theory that validates this decision. During the 114th and 115th Congresses, several bills were introduced that would address the relationship between Confederate memorials and federal funds and land. The most sweeping bill, the No Federal Funding for Confederate Symbols Act, would have prohibited the use of federal funds for the "creation, maintenance, or display . . . of any Confederate symbol on . . . [any] Federal property."[184] The bill takes a broad definition of "Confederate symbol," including "[a]ny symbol or other signage that honors the Confederacy," and "[a]ny monument or statue that honors a Confederate leader or soldier or the Confederate States of America."[185] There is an exception, however, for Confederate symbols in use in a museum or educational exhibit.[186]

Other more modest proposals have been introduced. One bill, the Honoring Real Patriots Act of 2017, would require the Secretary of Defense to rename the ten military installations that are currently named for Confederate military leaders.[187] Another bill, H.R. 3779, would remove the monument to Robert E. Lee at the Antietam National Battlefield and would require the removal of all statues of people who served in the army of the Confederate States of America from the National Statuary Hall.[188] Various efforts have attempted to restrict the amount

184. H.R. 3660, 115th Cong. § 3(a) (2017).

185. *Id.* § 3(b).

186. *Id.* § 3(c)(2).

187. H.R. 3658, 115th Cong. (2017); *see also* LAURA B. COMAY ET AL., CONG. RES. SERV., R44959, CONFEDERATE SYMBOLS: RELATION TO FEDERAL LANDS AND PROGRAMS 3 (2017), https://fas.org/sgp/crs/misc/R44959.pdf [https://perma.cc/995M-TP5D] (describing the Honoring Real Patriots Act and similar bills).

188. H.R. 3779, 115th Cong. (2017); *see also* COMAY ET AL., *supra* note 187, at 7 (2017) (reporting that the bill would "require the Architect of the Capitol to arrange for the removal from the

of federal funding that can be used for the creation or maintenance of Confederate memorials. Thus far, none of these bills or appropriations riders have passed, but further attempts to pass such legislation seem likely given the political salience of the issue.

Further federal legislation should consider the proposal advocated here. Rather than writing legislation that names particular eras in time for monuments' removal, Congress should consider broader principles of what deserves federal protection in the cultural-heritage sphere.

Such an approach would not be unprecedented. For example, the United States has refused to repatriate vast amounts of Nazi-era art and propaganda.[189] In doing so, it has arguably taken a version of the view that art celebrating violations of human rights is not subject to the standard law of cultural property. The United States took a "significant body" of Nazi propaganda artworks during and after the Second World War.[190] Although the United States has returned most art expropriated from Germany during World War II, it has steadfastly refused to return a great deal of propaganda art produced during the period.[191] The United States has made this decision in the face of a growing global legal consensus in favor of repatriation of cultural property.[192] As Jonathan Drimmer has written: "The United States government has implicitly taken the position regarding the Nazi art that the broad and growing international legal consensus favoring protection and repatriation of cultural property is subject to an exception for art that helps to reinforce and instill the dominant tenets of a genocidal culture."[193] The United States steadfastly refuses to repatriate the art and, to this day, rarely displays it, because of concerns about a resurgence of Nazism.[194]

National Statuary Hall Collection of statues of persons who voluntarily served the Confederate States of America").

189. *See* Jonathan Drimmer, *Hate Property: A Substantive Limitation for America's Cultural-Property Laws*, 65 TENN. L. REV. 691, 693-95, 712-25 (1998) (recounting the history of how the United States expropriated thousands of Nazi paintings and refuses to return them).

190. *Id.* at 694.

191. *Id.* at 695 (describing how the United States refuses to return the objects "despite lawsuits from original owners, pleas from the artists, and official requests by the German government"); *see also* Andrew Beaujon, *How a Trove of Nazi Art Wound Up Under Lock and Key on an Army Base in Virginia*, WASHINGTONIAN (Nov. 12, 2017), https://www.washingtonian.com/2017/11/12/trove-nazi-art-wound-lock-key-army-base-virginia [https://perma.cc/5J8N-W4Y4] (noting that, while the United States repatriated a good deal of Nazi era art in the 1980s, it kept 586 pieces "of the most heinous stuff" at the insistence of the Army).

192. *See* Drimmer, *supra* note 189, at 695-96.

193. *Id.* at 696.

194. Beaujon, *supra* note 191 (reporting that the curator of the Army's German art collection said "[t]here's a very narrow line that we have to walk . . . because we certainly don't want it to be

The United States has maintained this position through both legislative action and litigation. In 1982, Congress passed, and President Reagan signed, a law requiring the repatriation of Nazi art but also requiring that all art be vetted by an interdepartmental committee established by the Secretary of the Army.[195] The Secretary was to make sure that repatriating any of the relevant art would not be inconsistent with the denazification principles of the Potsdam Protocol.[196] The United States retained 586 particularly heinous pieces of art.[197] Soon after, a collector of Hitler's art sued the government to get four of Hitler's watercolors, which the government had retained.[198] The United States took the position, both at the trial court and on appeal to the Fifth Circuit, that the art was being retained "so as to prevent [N]azism's resurgence," and that the decision to retain the art was a "highly sensitive political judgment."[199] Because the art contained a message of propaganda, the Army was entitled to retain the art.[200] The plaintiff's suit was ultimately rejected on other grounds—but the approach taken by the government gives evidence to a belief that normal rules surrounding cultural property ought not to apply in the case of art promoting genocide.[201]

The framework suggested here would take a similar approach. Art and monuments that celebrate or endorse actions taken in violation of the law of nations, such as genocide, would receive a lower degree of protection than cultural property of any other sort. As such, Nazi-era art, to the extent that it endorsed genocide—as much of it did—would not receive the same level of protection as cultural properties untainted by the endorsement of human rights violations.

CONCLUSION

Recent developments in the international law of cultural property have created ever-greater obligations on nations to preserve, and not to destroy, objects of historic and aesthetic importance. Amid these developments, theorists have

a rallying point for Nazism."); *see also id*. ("[I]t's unclear whether much of the Nazi collection will see the light of day. Though civilian researchers can ask for a visit, the Army is pretty careful about who's allowed in, and every now and then it gets an inquiry from someone who raises a red flag." (quotations omitted)).

195. Pub. L. No. 97-155, 96 Stat. 14 (1982).

196. *Id.*

197. Beaujon, *supra* note 191.

198. Price v. United States, 707 F. Supp. 1465 (S.D. Tex. 1989).

199. Reply Brief for the Appellant/Cross-Appellee, United States of America at 28, Price v. United States, 69 F.3d 46 (5th Cir. 1995) (No. 93-2564).

200. *Id.* ("Plaintiffs are certainly not entitled to arrogate to themselves the difficult policy judgment of whether Hitler watercolors could be the source of nazi resurgence.").

201. Price v. United States, 69 F.3d 46 (5th Cir. 1995).

failed to consider when a nation may have a legitimate interest in destroying its own cultural property and when that option should be legally available. The recent removals of many Confederate memorials in the United States illustrate this problem. To the extent that cultural-property law as an arm of human rights law recognizes the need to preserve cultural property to protect the dignity and integrity of cultural groups, it should also recognize the need sometimes to remove or destroy cultural property for the benefit of other groups. This permission must necessarily be circumscribed, lest it permit all types of cultural property to be destroyed. The approach advocated here, rooted in international human rights law, would provide a framework for considering when a culture is justified in destroying its own cultural property, without doing harm to the interests of the global community.