The Repatriation Debate and the Discourse of the Commons

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Abstract: What can the concept of 'the commons' lend to cultural property and heritage analysis? How can it be applied to these areas, if one looks beyond the protection of solely 'natural' resources such as land (although 'land', as a highly regulated substrate bearing a plethora of significations and values may itself no longer be considered a 'natural' resource)? The debates around property and culture are more usually understood by reference to 'cultural nationalism,' 'cultural internationalism' and the web of disciplines and resources that grow between these two traditional approaches, and yet, these resources leave many problems and issues in this field unresolved. The discourses that make up commons scholarship might serve to expand the tool box of cultural property discourse, in particular where the issues span the most personal and the most communal problems of all: human skeletons and repatriation claims. This essay argues that the very discourse of the commons itself is a strategy, a means of establishing and policing thresholds that in turn move according to strategies and desires of acquisition. In short, designating an object as located within 'the commons' is another way of justifying the appropriation of contested cultural property.

INTRODUCTION

In July 2000, UK Prime Minister Tony Blair met with Australian Prime Minister John Howard in London. On the agenda was the repatriation of Australian indigenous skeletons and associated objects currently held in UK institutions, and in particular, by the British Museum, the Natural History Museum, and other museums in the United Kingdom. When indigenous Australian groups requested the return of specific skeletons, 'the museums refused the requests on the grounds that return is prevented by legislation'.[1] The Trustees of the British Museum had claimed that the terms on which they hold the collection in trust forbade them to accede positively to the demands of indigenous peoples.[2] In July 2000, the precise

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[1] Human Remains Report (2003), §56, available at http://www.culture.gov.uk/Reference_library/Publications/archive_2003/wgur_report2003.htm.

[2] The British Museum Act 1963 permits the Trustees to dispose of items in the collection under section 5 and section 9 of the Act. Neither section specifically allowed the repatriation of human remains.

'Kennewick Man' by the press, has filled many of these roles in the United States. Human skeletons – or any objects of cultural importance – are mutable in value, and thus in identity within regimes of regulation that turn on value. These issues were considered in depth by the Working Group on Human Remains in Museum

example masks that include human hair or a bark canoe that is sewn around infant bones. These institutions may either separate the human remains from the 'mixed' materials, or if that is impracticable, de-accession the entire object. Under the new regime, DCMS expects that the national institutions named in the Act will exercise their own judgment in regards to the questions that arise when determining when it is appropriate to de-accession human remains. However, these institutions will be accountable to the DCMS and the Arts Minister for the Code of Practice it adopts. In this way, the British Government splits the difference between the aggressive repatriation policy it has promised Australia, and which the WGHR supports, and the case-by-case, internally-managed approach favoured by the national institutions consulted.

The DCMS has now approved a Code of Practice intended to give guidance to institutions on repatriation.[10] The British Museum has also drafted and approved its own policy on the matter.[11] In light of the permissive language in Section 47(2) of the Human Tissue Act 2004, and the broad language in DCMS's Code of Practice, it is not surprising that the British Museum's policy charts a very

distinctions between 'cultural nationalism'[15]and 'cultural internationalism'[16]; as well as the distinctions between 'indigenous' and 'Western', and yet, these distinctions are constantly being challenged by the emergence of new kinds of identities, institutions, and commonalities. The British Museum's insistence on government requests, for example, might be very short-sighted. The repatriation request might attach to a 'new' discovery, which the Museum has yet to own or to contemplate; it might come from an interest group within the UK; or it might refer to a gift to the Museum which was, in turn, the result of dealings that would be considered illegal in the present climate. As in the current conflict between the Natural History Museum and the Tasmanian Aboriginal community, it may be the scientific testing of the remains before repatriation that creates competing 'ownership' claims. The standards that the DCMS Code of Practice, the WGHR Report, and even the various Museum policies espouse have to be examined. The law must determine the meaning of concepts such as 'genealogical descendant', 'cultural continuity' or 'very close geographical, religious and cultural link,' when the tools of 'cultural nationalism' and 'cultural internationalism' are themselves in flux. Numerous new conventions and pieces of domestic legislation attempt to ensure that the cultural connections between peoples and languages, practices, stories, landscapes, and all the other indicia of 'their' history and memory are maintained. The proliferation of cultural property laws and conventions continues, in part because 'history' becomes more valuable, not less so – and as that happens, the reach of statutes and claimants stretches increasingly further backwards. To take another example from the British Museum's policy, the idea that 'cultural continuity' cannot be proven if the human remains are more than 300 years old is disingenuous at best, and is already being challenged.

How then to think about this debate? The emerging discourses of the 'commons' might offer a new approach to problems of cultural appropriation. The ways in which communities constellate around questions of use, preservation, and common values, rather than more classical models of 'ownership', are the hallmarks of the commons debate. The statutory and regulatory schemes for repatriating human skeletons are the result of years of political action by indigenous communities, which face a dual set of problems: first, of identifying themselves as specific rights-bearers within the overarching categories of nation-states, citizens, or subjects more generally; and second, claiming communal ownership of skeletons or mixed objects that had been appropriated as 'historical artefacts' rather than as elements, and definitions of, particular communities. As this kind of political action becomes increasingly embodied in law, museums, on

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[14] http://www.eniar.org/news/repat61.html

[15] 'Cultural nationalism' is the position taken in the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, which the UK Government signed in May 2003.

[16] 'Cultural internationalism' is the position taken in the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, which the UK Government is presently considering signing. The International Council of Museums (ICOM) and other international heritage organizations subscribe to this view.

the other hand, propose increasingly sophisticated arguments for the retention of these kinds of objects. Between the poles of 'identity' and 'universality', 'commons' or 'commonality' might have a great deal to offer cultural property analysis. To expand on the themes that are implicit within the UK experience, it is worth looking at a situation in which a new discovery threw an almost-equally-new repatriation statute into disarray, as happened in the United States in series of events surrounding the discovery of Kennewick Man.

COMMONS

In an article applying commons discourse to the problem of illicit trafficking in

As regards the inherent permeability of the art market to corruption, and the causes of this permeability, Caruthers may well be absolutely right. It is also clear that questions of value, and values, underpin most evaluations of 'culture', and therefore that any resolution of the problems in the field require solutions based in ethics as well as in regulation. However, there may be other reasons than the modalities of cultural property transmission that explain why the 'scarcity story' doesn't work in her analysis. Most fundamentally, *cultural property is not an increasingly-scarce resource*. Quite the reverse, as the plethora of new museums, new Governmental initiatives, and new pieces of legislation (national and international) identifying new and different pieces of information, life experiences, landscapes, and objects as 'cultural property' show.[31] Against this backdrop, it is reasonable that analyses based on increasing *scarcity* might fail. Yet, scarcity is only part of the story in arguments from within the discourse of the commons. The other parts are the concepts of appropriation, and of value/values. If one looks at the discourse from these perspectives, the question of how 'the commons' may affect, or be applied to, cultural property analysis resolves itself differently. In terms of methods and meanings of appropriation, cultural property and heritage, as objects and as sets of rights, conceptually sit somewhere between land-based rights and knowledge-based rights. 'Appropriation' in this context is complex, but in general the law valorizes the Lockean formulation of 'labour-mixing' as the means by which rights are obtained. In terms of values, again the analysis is complex, but it may also yield to commons theory. One could say that the values at play span the extremes of the purely natural and the purely conceptual (as for example, in indigenous skeletons in museums), as objects that are cultural property (or sites and practices that are heritage) combine the values inherent in the ownership of both land and knowledge. The values that animate cultural property discourses, in gross, turn on preserving, maintaining, and at times, creating, cultural identification and communal identity against the backdrop of shifting national and international boundaries and interests. This raises the question of commonality generally, and proposes that cultural property analysis, like intellectual property analysis[32], occurs on a field of endlessly-shifting and reforming 'commons'.

More finely, the values at play in cultural property discourses are very similar, if not the same, as those at play in the discussions of 'the commons' in the areas of

[31] See, for example, the 1995 UNIDROIT Convention; the Dealing in Cultural Objects (Offences) Act 2003; www.culturalcommons.org; the 2003 UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage (http://www.unesco.org/culture/ich_convention/index.php).

[32] In the area of intellectual property law, the term 'cultural commons' has been developed by commentators and practitioners to mean the set of cultural goods (words, images, stories, and sounds) which are in the public domain, and which are considered to be open and accessible to all, in the sense of being available as a substrate for further economic and cultural uses. In this area, the concept of 'the commons' is used to thematize the point of the conflicts that arise between those who claim that certain material is 'in the public domain', and the legal and market-based entitlements of trademark holders and other authors or producers of intellectual property whose material is being used. Property, publicity, and monopoly rights are contrasted with the idea of a 'cultural commons', or a realm of cultural goods in which access and use rights are largely unrestricted. Of course, any notion of an unrestricted domain created by technology or broadly-based media promulgation of cultural goods is in itself utopian or anarchistic or both. See: Lawrence Lessig, Code.

land/environmental law and intellectual property: preserving and expanding knowledge, communal identity, and the opportunity for future use(s) and developments. Participants in the debates regarding 'the commons' in environmental law, intellectual property, and arguably cultural property as well, are establishing (and then policing) the thresholds and boundaries between differing versions and visions of the past, of 'us' and 'them', and of what is available to be claimed for use, and by whom. In this sense, there is a second or other reading of 'the commons' and what it may mean that arises from the work of John Locke and Garrett Hardin. In order to consider the repatriation debate in this context more specifically, it is worth briefly discussing two points: first, the meaning of 'the commons', as originally put forth by John Locke in 1690, and then picked up and reworked by Garrett Hardin in 1968; and second, the definition of the commons as, in fact, common *values*.

In Chapter V of the *Second Treatise of Government*

belongs to the employer and fixes the employer's property in the things taken out of the commons.[38] This occurs before men enter into civil society, which is formed fundamentally to protect the private property that they have acquired. Therefore, use by man defines the purpose of the commons and furthermore, *that use is seen by Locke as naturally unrestrained or unlimited.* Man is 'naturally infinitely desirous'; in Locke's scheme the purpose of government is not to safeguard 'the commons', but to protect the unequal distribution of the property acquired.[39] Yet, the commons cannot go unused or unappropriated either. If the commons are not used, then they are wasted and humanity dies for lack of sustenance. The result of this is to place use and labour at the centre of value creation, and to make labour give rise to property.

This understanding of labour, used to secure property rights in land as well as in intellectual property, has never been entirely uncontroversial.[40] The values of the 'agrarian ideal' and the definitions of authorship cannot be taken for granted in the modern world (and possibly, they should never have been allowed to remain unquestioned).[41] At its core, however, is the act of *appropriation*, the reaching across the boundary of what is 'in common', and 'mixing labour' with the thing desired. It is this gesture that gives rise to the more interesting questions about the commons and cultural property. First, after the original moment of a limitless natural world in which ownership was unproblematic, the question of how 'the commons' are defined became paramount – who decides the boundary-line? Second, also after this moment, the act of appropriation became managed by the exchanges of labour, and money, formalized by contract, debt, investment, and other forms of legal and financial regulation, as well as by the legal investitures of previous appropriators – through use – as present owners. However, the idea of the commons and the idea of use were inextricably linked from the beginning, and remain so. In cultural property analysis, we can see this relationship articulated 'in reverse' so to speak. *The idea of use, based in the need for ethnic, religious, or cultural survival, can define an object as being 'in the commons'*. For example, indigenous skeletons in a museum, which can be defined as a 'commons' in a series of tenuous or metaphorical ways, but which legally is usually some form of trust established within a private institution, or a public institution (also usually in the form of a trust) created by statute, can be appropriated using the same arguments as would be made if the skeletons were found in an unowned wilderness in the state of nature. The fact that they have been 'taken' at least once does not stop new claimants from attempting to take them again; they are defined by their necessity for the (cultural) survival or nourishment of specific groups. At the moment that their present 'ownership' stops being a barrier to the attempt to repatriate the skeletons (or the objects), they have moved from the world of property rights back into the 'state of nature': 'The fruit, or venison, which noung a ba(the)onL

Indian, who knows no inclosure, and is still a tenant in common, must be his, and so his, i.e. a part of him, that another can no longer have any right to it, before it can do him any good for the support of his life'.[42] The notion of 'so his, i.e. a part of him, that another can no longer have any right to it' is crucial to the notion of 'the commons' as there are certain objects that must be appropriated in order to become useful: food and land, according to Locke, and also, in today's world, culture. Deciding that any of these objects may be acquired *as of right* brings the user into the realm in which arguments about the commons can be comprehended.

Skeletons in museums, or other elements of cultural property, may also be *retained* on arguments that seek to redraw the boundaries of the commons. In 2002, more than thirty of the world's great museums, including the five most prestigious,[43] signed a declaration stating that they were 'universal' museums. According to Mark O'Neill, Head of Glasgow Museums, this was a strategy to defend against repatriation claims.[44] Without disapproving of the concept of universal museums, O'Neill points out that to be truly 'universal', the great

possible commons, and in each, they are on one or the other side of the appropriative gesture that signifies the presence or absence of an argument regarding commonality.

Locke's emphasis on appropriation is echoed by Hardin's. In the unproblematized (and often fictionalized) past moment[47], the conflicts that make up the debate regarding access to or use of 'the commons' – here, many of the debates surrounding the ownership of cultural property – are implicit rather than explicit, dependent upon the advent of historical events such as invasion, colonization, or destruction on the one hand, and agricultural, social and economic differentiation on the other, in order to become visible.[48] However, in 1968, Garrett Hardin's argument in 'The Tragedy of the Commons'[49] portrayed the *inevitable* derogations from the original (if purely rhetorical) 'state of nature' in which survival goods are shared and preserved in some kind of natural communal harmony. Without postulating any sort of cultural disturbance or economic imperative, Hardin showed that 'the commons' as an unregulated free set of resources open to use by all cannot exist; in fact, that conflict and acquisitiveness are as much at the heart of communal appropriation of resources in the present day as they were in Locke's. Postulating both social stability and that each member of the society is a rational being seeking to maximize his gain, he shows that each person, when acting rationally in their own self-interests, will contribute to the inevitable exhaustion of the natural resources that support them. Interestingly, Hardin, like Locke, puts appropriation and greed (or at least, desire) at the centre of his discussion of commonality, but where Locke is sanguine about

KENNEWICK MAN

The case that would pit scientists against a coalition of Native American tribes and prompt a resurgence of the debate about indigeneity, race, and cultural heritage in America began in July 1996, when a skeleton was discovered on the bank of the Columbia River by two college students. They notified the police, who then called in the County coroner. The coroner asked an area anthropologist, James Chatters, to investigate.[50] Chatters's findings were initially that the skeleton was Caucasian.[51] The definitions of 'Caucasoid' and 'Caucasian' do not dovetail exactly: 'Caucasian' is a 'culturally defined racial category',[52] whereas 'Caucasoid' is 'a term of art that characterizes the descendants and early inhabitants of a broad set of regions, including both Europe and parts of South Asia. American Indians have features more in common with Mongoloid peoples descended from North Asia'.[53] The usage between the terms and traits of Caucasoid/Caucasian is sufficiently elided for Chatters '[a]t that point, [to be] quoted as saying in *The New York Times*, 'I've got a white guy with a stone point in him….that's pretty exciting. I thought we had a pioneer'.[54] However, the stone point was found to be from the 'Cascade period', dating the remains to about 9,000 years ago. This was shocking; the age and race of the skeleton became immediately at issue in America. The effect was to reopen the question of 'true' or 'original' *ownership* of the early history of North America. Among other issues, ownership of the skeletal remains metonymically stood for ownership of the moral high ground regarding the Native American claims of settler land-theft.

The United States Federal statute that controls disposition of these bones is the Native American Graves Protection and Repatriation Act (NAGPRA), which became law in 1990.[55] Unlike the Human Tissue Act 2004, NAGPRA tightly and prescriptively controls the ownership and disposal of Native American human remains, and sacred or cultural objects, presently in federally-funded museums, or found on Indian or federal land. As soon as the radiocarbon dating confirmed the age of the remains, conflict erupted as to their ownership and identity. The coalition of Indian tribes, unofficially led by the Umatilla Tribe, claimed the skeleton under NAGPRA. The coalition insisted on its right to rebury the skeleton immediately in a secret location. It would allow no (further) testing. This outraged the forensic anthropologists and other scientists working on theories of the 'peopling' of America. In order to preserve the skeleton as an object of study, this community claimed that the Caucasoid features and the remarkable age of the skeleton were reasons for not applying NAGPRA in this case. The result was a

[50] R.W Lannan, 'Anthropology and Restless Spirits: The Native American Graves Protection and Repatriation Act, and the Unresolved Issues of Prehistoric Human Remains' (1998) 22 *Harvard. Environmental Law Review* 369. Distinguishing recent remains from those in Indian burial sites was a familiar problem in that area of Washington.
[51] A.L. Slayman, 'A Battle over Bones' 1997 50(1) *Archaeology* January/February 16.
[52] D. Preston, 'The Lost Man', *The New Yorker*, 16 July (1997), 70.
[53] n 49 above, 374.
[54] n 50 above, 16.
[55] Native American Graves Protection and Repatriation Act (1990) 25 U.S.C. §§ 3001-13.

lawsuit. The plaintiffs in the case, *Bonnichsen* v *United States*,[56] included two Smithsonian Institution anthropologists and six prominent professors of anthropology. The complaint alleged that Kennewick Man was a rare discovery of international as well as national importance. Study of the skeleton would yield invaluable information regarding the history of the Americas and of human evolution more broadly. As a result, repatriation would result in 'irreparable harm' to science.[57]

As of August 2002, the District Court issued three orders in the case. The first, in February 1997, held that the Court had jurisdiction to review the Corps' decision that the remains found were Native American and thus came within the ambit of NAGPRA. In the second, issued June 1997, the Court denied a summary judgment motion by the Corps and simultaneously denied a motion by the scientists for permission to study the remains. In addition, it held that all the parties in the case have standing to bring actions under NAGPRA. Most importantly, U.S. Magistrate John Jelderks "asked lawyers for both sides to prepare arguments as to the meaning of 'indigenous' under NAGPRA".[58] In January 2000, the United States Department of the Interior (DOI) concluded that the remains are 'Native American' within the meaning of the statute. In September 2000, after considering approximately 25,000 pages of evidence, and indeed conducting further tests on the remains, the DOI concluded that a preponderance of the evidence shows that the Kennewick remains are culturally affiliated with the present-day Indian claimants. On the basis of that determination, the Secretary directed repatriation. The plaintiffs in *Bonnichsen* v *United States* then filed an amended complaint, and moved to have the DOI's disposition decision vacated. On August 30, 2002 Judge Jelderks reversed the decision of the Secretary.

For purposes of the present analysis, the case of Kennewick Man presents several points of interest. First, it demonstrates how a statute barely six years old, and the result of years of lobbying and debate in the US legislative system, can be thrown into disarray by a new archaeological discovery. In this sense, it also demonstrates the 'open world' character of cultural property, and its similarity to other forms of 'cultural commons.' Second, it demonstrates the contestability of definitions such as those proposed by the WGHR and used in the DCMS Code of Practice and the British Museum's repatriation policy document. Finally, it

foresees that 'Ancient human remains without living cultural descendants' will not be either requested from museums or returned if requested. However, 'human

methods, and a biologically distinct population. The evidentiary standard for establishing shared group identity is that the link must be 'reasonably' traceable.

To what extent is this relevant to the UK repatriation debate and to 'the commons'? The lack of a dedicated repatriation statute in the UK seems to avoid the complexities of political and legal interpretations that other countries have faced. However, these kinds of questions and terminology underlie the reality of repatriation claims generally and are profitably understood as part of the discourse of the commons. 'Indigeneity' is an *ongoing discussion* about common values and common identity, and a *strategy* for ownership claims. Most importantly, the reams of documents and years of work that went into determining whether Kennewick Man was a 'Native' American for purposes of NAGPRA occurred against the backdrop of a contentious public debate in America about what constitutes a 'Native American' more generally. Here, the questions of commonality, understood as the problem of values defining originary national identity and land rights, once again attach to Hardin's formulation of value(s) in 'the commons.' The question posed by Douglas Preston in *The New Yorker*, 'What was a Caucasoid man doing in the New World more than ninety-three centuries ago?' resonates, therefore, in several different spheres of possible analysis. The question itself already points to the sorts of sociological, scientific and historical judgments that are being challenged and defended in the commentaries on these kinds of cases. To some extent, the question *in itself* supports the patently false proposition that knowledge about race and habitation in America was, until now, uncontroversial. A skeleton calls forth the history of the skin and its sustenance: a history that is both disputed and ineffable. In the realms of law, science, and the media, the bones were fleshed and put into motion. 'Kennewick Man's' appearance as a controversy within the national consciousness must be assessed as a *function* of the ongoing debates regarding science, culture, and legitimate ownership of history.

Therefore, in allocating ownership of any contested bones, the field on which disputes occur is organized by the values that define national consciousness along moral and historical lines. For example, as regards Kennewick Man, arguably, the foundational concerns of American self-consciousness are *progress* and *identity*. From the perspective of the dominant culture, an American (of any origin) is a person who makes *progress* the hallmark of their identity. A non-American is a person who chooses *identity* over progress. A 'Native' American is the repository, in the story that Americans tell of their history, of the conflict and fluctuations between these two poles.[64] The debate over the meaning of 'indigenous' does not constitute a reappropriation of Native American identity, therefore, but an *appropriation* of it. The links between 'Native' and 'savage', and 'science' and

'souls'), of the colonized.[65] In this realm, ancient bones take many positions. The bones become a totem; as they are unfleshed, they can be made to wear skins of different colours. When they are gathered up, studied, identified, they constitute a kind of kaleidoscope of identity and political and scientific necessity. If at issue is decolonization, which is always more or less at issue in debates regarding the repatriation of indigenous skeletons, then what must be addressed is what Fanon refers to as 'the replacing of certain "species" of men by another "species" of men'.[66]

CONCLUSION

In this redrawing of boundaries through competing claims of appropriation – linguistic and cultural as well as bones and land – the practices and purposes of 'the commons' become visible. An ancient skeleton found in the UK and claimed by a particular group, for example, may well plunge the UK into the dilemmas of defining common values across contested cultural histories. In the beginning, therefore, 'All the World was America…', as Locke writes, but that originary moment repeats infinitely in each claim to an ancient skeleton or a new technology or piece of information. Here, 'the commons' may find its purpose in cultural property analysis. The appearance and disappearance of specific commons in the legal realm, as well as in the public consciousness, should be understood as the mapping of the appropriative instinct roaming through a landscape made up of overlapping if not infinite resources. Commons appear and disappear according to emerging objects, economies, and normative imperatives. The deployment of 'the commons' is always as a strategy for returning already-owned-things (experiences, cultural events, skeletons, or quasi-objectifiable artifacts) to an acquirable state. Although *protection* of resources is the stated goal of many claimants to scarce or valuable resources, *taking* is at issue in these discourses, and the example of cultural property, which also participates in the theorization of commonality and communality in the realm of property law, makes this visible.

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[64] T. Flessas, PhD thesis '*The Ownership of Time: Culture, Property and Social Theory*' (University of London Library, 2003).
[65] M. Foucault, *Discipline and Punish: The Birth of the Prison*, Translated by Alan Sheridan (London: Penguin Books, 1977).
[66] F. Fanon, *The Wretched of the Earth*, Preface by Jean-Paul Sartre, Translated Constance Farrington (New York: Grove Press, 1963), 35.