THE OWNERSHIP OF TIME: CULTURE, PROPERTY AND SOCIAL THEORY

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Abstract

The main argument of this thesis is that the future-oriented vision that characterizes modernity has, in recent years, become inverted into an obsession with the past, an obsession that is played out using the discourses of "ownership". The argument is developed by drawing a parallel between the question of time and place as it has been addressed in social theoretical discourses and (increasing) public concerns with owning the past – a past that is accessed and (more importantly) appropriated by means of claims to the ownership of ancient objects. The argument looks at two specific cases in which ownership of objects is translated into claims for ownership of the past: the Parthenon Marbles case and the Kennewick Man case. First, the argument engages in legal analysis of the property claims set out in these cases. Second, it analyses these legal claims by reference to the theories of Friedrich Nietzsche, Michel Foucault, and Frantz Fanon (among others) in order to question the meaning of these legal conflicts. What light do current social-theoretical discussions shed on the proliferation of cultural property and cultural heritage? Arguably, claims that turn on ownership of these sorts of objects themselves express a deep discomfort with the present understanding of modern society's location in time. The thesis concludes by suggesting that this obsession with the past is a reaction to the modernist obsession with the future, and that the lack of "place" that is so characteristic of modernity is also experienced as a lack of "time" for human flourishing. The proliferation of cultural property and cultural heritage cases and issues in law, and the increasing number of new museums, can be traced to these interconnecting absences, which discourses of ownership attempt to overcome.

To Chariclea Flessas and Paraskevoula Panaretou:

'"Ού το εμόν ή τό ςόν, τό ψύχρόν τούτο ρήμα, ερρήθη".'

Constantine Cavafy, *Anna Dalassini*

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Chapter One Introduction

Introduction: The horizon-line of modernity

When Hannah Arendt wrote in 1958 of Sputnik's ascent, she contemplated a world in which human eyes were turned to the future.[1] The emotion Arendt identified was "relief", as if in slipping the moorings of the earth, humankind finally had the capability to make a place for itself that would suit it in every particular. Looking upwards, the reaches of space were also the reaches of future time, and in 1958, Arendt noted that humankind saw all the pleasures of technology and freedom combining in a triumphant first step away from the earth and its discontents.

Certainly, by 1958 there had been beginning after beginning: the story of modernity is a story of infinite and recurrent beginnings. Yet, almost fifty years later, our eyes are turned to the past. We are fascinated by objects that seem to come from unimaginably distant pasts rather than approaching futures. The media reports the discovery of ancient artifacts more prominently than the latest flight to the stars, and the appeal of ancient cultures and monuments underwrites an increasing number of books, films and fantasy adventures.

Moderns are horizon people, defined by a passionate attachment to what happens next. How then to explain this seemingly radical shift in attention from future to past?

In 1958, Arendt identified some of the dangers that could be found in the newly actualized and long-awaited movement towards the horizon. Chief among these were a diremption between human political rationality and technological capability, and a problematic relationship between the human organism and its

[1] Hannah Arendt, *The Human Condition* (Chicago and London: The University of Chicago Press, 1958).

environment. She conceived the human condition, or the condition of our humanity itself, as having two characteristics: habitation on Earth and the capacity to speak intelligibly amongst ourselves about our own actions. Arendt feared that the effect of our passionate attention to the future would be a flight away from the earth and its myriad physical and political constraints. The future might be a time in which we might slip our moorings in more than physical space. Her fear was that "we, who are earth-bound creatures and have begun to act as though we were dwellers of the universe, will forever be unable to understand, that is, to think and speak about the things which nevertheless we are able to do".[2] Regardless of where we lived, then, we would cease to inhabit the *human* condition.

This would lead us to some kind of crisis in our relationship with time, with speech and rationality, and with the earth. It might well lead to a loss of "humanity" itself, as, divorced from the conditions that create humanity, "What will become of humankind, of society? What living conditions will 'future generations' face – provided that a comparable humanity even exists, and not some gene-manipulated, normed humanoids who are differentiated according to program?"[3] Furthermore, we would not necessarily be aware of the texture, or the problems, of this crisis. The loss of speech, like the loss of the earth itself, might create a race of apolitical, silenced entities who had only their domestic, appetitive, or "individual" lives to fall back on. We might be enslaved by the demands of producing and abiding by technology rather than be liberated by the freedom that it was supposed to bring. We might finally reach the edge of the future and find *nothing there at all* that could serve as a place for human flourishing, a flourishing necessarily defined by acting and thinking against, or through, a common ground. This image expresses a world in which even Max Weber's image of the "iron cage" would be a relief. For the lack of security, the need for reassurance in the face of an ever-expanding horizon might in fact be harder for human beings to bear than confinement.

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[2] Ibid. p. 3.

It is this vision that the following work addresses. Studying the issues that arise in legal, political, and philosophical disputes regarding cultural property leads to the conclusion that the increasing interest in cultural property and heritage expresses the desire to *establish a ground for human flourishing*. This ground must be created in contradistinction specifically to the anxiety generated by the particular temporality of modernity, and those results of our investment in that future that Arendt so succinctly and elegantly foretold in 1958. Cultural property and heritage studies are discourses that express modernity's relationship with time and with the earth itself. This has the effect of placing cultural property and heritage studies among the discourses of modernity, and of placing these discourses on the membrane or contested line between modernity and postmodernity.

The relationship with time

The real problem of modernity lies in the time dimension[4]

Niklas Luhmann

Certainly, we have not turned to the past because we have managed to exhaust the themes that Arendt identified as accompanying "the future". The relationship with time in modernity is fluid and unstable. Like all epochs, modernity is defined by conceptions (and conceptualizations) of time. Yet, *time itself* in modernity has substantive and not merely formal characteristics. The work of Jurgen Habermas and Niklas Luhmann covers the breadth of the field of sociotheoretical understandings of time in modernity, although of course there are many other notable scholars in this area.

The "relief" at escaping the earth that Arendt identified in 1958 was not long-lived. As Luhmann puts it, "Today we must live with extremely insecure perspectives of the future..."[5] Why is the habitation of the future so very insecure? In part it is because the future is always a moment of "not-yet". Luhmann and

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[3] Niklas Luhmann, *Observations on Modernity* (Stanford: Stanford University Press, 1998), p. 67. (Translated by William Whobrey)
[4] Ibid. p. 69.
[5] Ibid. p. 63.

Habermas, from their very different perspectives, agree that the future is a time of confirmation of the project of modernity, and as such, either anarchic or utopian or both. It is the always-out-of-reach locus of the displacement of the successes that do not exist in the present. As a repository of our not-yet successes, it creates certain negative effects. First, it may no longer be a source of human complexity or richness. Jurgen Habermas joins Luhmann in highlighting this possible result. According to Habermas, when the traditional experiences of previous generations are replaced by the experience of progress that gives a "new" horizon, the future shuts itself off from humanity as a source of genuine disruption, defined as hope or growth. The utopian overlay paradoxically weakens the desire to move forward, to find habitation through an active engagement with future time or capacities.[6]

Second, as a result of this, the future is possibly necessarily mis-defined. "But is this Modern, is Habermas's Modern, still our Modern? Is the society that employs the embarrassment of its self-description as a projection of a future, still our society? Can we – and it could certainly be asked: must we – hold such a view of the future because we could not otherwise know who we are and where we stand?"[7] The web of meaning in epistemology and the acceptance of authority in the social dimension have both been lost.[8] The effect of this is to dislodge certainties of human action as well as thought. We have to learn to manage risk rather than knowledge; put differently, the probabilities of the future and those of the present may be at any moment coupled or uncoupled. As the present and the future may not, in fact, be logically dependent upon each other, the attempt to live oriented towards the future is deeply unsettling.[9]

Although the telling of the story of modernity has only recently become problematically dual (on the one hand a tale of progress, and on the other, a tale of anxiety that produces a need for reassurance), the forward leap and the backward

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[6] Jurgen Habermas, *The Philosophical Discourse of Modernity* (Massachusetts: The MIT Press, 1997), p. 12. (Translated by Frederick Lawrence)
[7] Luhmann, *Observations on Modernity*, p. 66.
[8] Ibid. pp. 68-9.

glance have always been part of the same motion. Writing about Hegel as the first philosopher of modernity itself, Habermas states that "the secular concept of modernity expresses the conviction that the future has already begun: It is the epoch that lives for the future, that opens itself up to the novelty of the future. In this way, the caesura defined by the new beginning has been shifted into the past, precisely to the start of modern times".[10] The question then becomes, in the essential differentiation from the past that defines "modernity", what is created by the inscription and re-inscription of this "caesura"?

The concepts of rationality and time are essentially linked, with the "new" rationality of the Enlightenment also signifying a "new" historical epoch, and vice-versa. In this sense, the idea of "the new", the new idea of the new, created the idea of "the old", the new idea of the old. "The past" now means the moment before the beginning of modern times. Yet, this newly created past is no more solid than the suddenly available future. This moment that continues to define modernity is one of opening, unguarded (or unprepared philosophically) to a (or some unknown), future, in contrast to some suddenly unreliable, because constantly expanding, *past*. Our love affair with the future has the paradoxical effect of foregrounding the past, as the result of being modern is, in each instant of modernity, to generate endless amounts of "past".

> Because the new, the modern world is distinguished from the old by the fact that it opens itself to the future, the epochal new beginning is rendered constant with each moment that gives birth to the new. A present that understands itself from the horizon of the modern age as the actuality of the most recent period has to recapitulate the break brought about from the past as a *continuous renewal.*[11]

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[9] "There exists, therefore, only a 'provisional' foresight, and its value lies not in the certainty that it provides but in the quick and specific adjustment to a reality that comes to be other than what was expected". Ibid. p. 70.
[10] Habermas, *The Philosophical Discourse of Modernity*, p. 5.
[11] Ibid. pp. 6-7.

The continuous renewal of the new is also the continuous production of the old, a voracious machine that runs on the ingestion of time itself. Caught on the event-horizon of the future, history becomes all-consuming whereas time becomes scarce.[12]

The past, therefore, lay coiled in the very beginning of the modern age. The separation from "the past" gave modernity its primary identity. However, the distinction between past and "future" is not benign. The effect of this distinction is the "constant creation of otherness", without criteria for comprehending or assimilating this otherness. Lacking the "natural understanding of the tradition", we "fall back on humanity or reason...in a weakened sense of values that allows us to condemn the other".[13] This is our situation in the present. The present, defined as this moment, is essentially inhospitable. The lack of oxygen or ground at the junction of past and future remains at the core of most struggles for reconciliation in disputes that may be considered "cultural". Thinking about these issues, Homi Bhabha calls the space of modernity "unhomely"; in an echo of Arendt, he writes of "the 'unhomely' *condition* of the modern world".[14] In the arguments made in this thesis, the first source of the "unhomeliness" of the world can be traced back to the fact that "[a] s never before, the continuity from past to future is broken in our time".[15] We are humans without ground, as the present is a precarious moment between a past and a future that mirror and reject each other.

We must ask, therefore, if there is a modern conception of time that can ground human flourishing. Habermas suggests that when Walter Benjamin wrote the *Theses on the Philosophy of History*, "now time" was an attempt to re-radicalize the "effective-historical consciousness" that balanced past, present and future. Benjamin

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[12]"The 'new age' lent the whole of the past a world-historical quality....Diagnosis of the new age and analysis of the past ages corresponded to each other". The new experience of an advancing and accelerating of historical events corresponds to this, as does the insight into the chronological simultaneity of historically nonsynchronous developments". Ibid. p. 6, quoting Reinhart Koselleck, "Neuzeit" in *Futures Past: On the Semantics of Historical Time* (Cambridge, MA, 1985), pp. 231-66, p. 241.

[13] Luhmann, *Observations on Modernity*, p. 3.

[14] Homi Bhabha, *The Location of Culture* (London and New York: Routledge) pp. 9-18.

[15] Luhmann, *Observations on Modernity*, p. 67.

distrusted both tradition and the future horizon as guides to the consciousness of the present:[16]

> Hence Benjamin proposes *a drastic reversal* of horizon of expectation and space of experience. To all past epochs he ascribes a horizon of unfulfilled expectations, and the future-oriented present he assigns the task of experiencing a corresponding task through remembering, in such a way that we can fulfill its expectations with our weak messianic power. In accordance with this reversal, two ideas can be interwoven: the conviction that the continuity of the context of tradition can be established by barbarism as well as by culture, and the idea that each respective generation bears the responsibility not only for the fate of future generations but also for the innocently suffered fate of past generations.[17]

This is the final step in the problematic and paradoxical reversal of future-orientation into past-orientation: *justice* in modernity requires a particular relationship with what went before, not with what happens next, although *law*, by contrast, can only and always enact its blunt approximation of justice in (and into) the future.[18] The angel of history flies backwards into the future. This requirement haunts us. We are left, over and over, with *memory* in modernity as the functional equivalent of *reason* in the Enlightenment. Therefore, the role of memory in constructions of narratives of law must be discussed further, and will be addressed in Chapter Four of this thesis.

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[16] "[I]t is clear from his text that he distrusts *both*...the treasure of transmitted cultural goods that are supposed to pass into the possession of the present, and the asymmetric relationship between the appropriating activities of a present oriented to the future and the objects of the past that are made one's own". Habermas, *The Philosophical Discourse of Modernity*, p. 14.

[17] Idem.

[18] "What Benjamin has in mind is the supremely profane insight that ethical universalism also has to take seriously the injustice that has already happened and that is seemingly irreversible; that there exists a solidarity of those born later with those who have preceded them, with all those whose bodily or personal integrity has been violated at the hands of other human beings; and that this solidarity can only be engendered and made effective by remembering. Here the liberating power of memory is supposed not to foster a dissolution of the power of the past over the present, as it was from Hegel down to Freud, but to contribute to the dissolution of a guilt on the part of the present with regard to the past" Ibid. pp. 14-15.

For now, however, it is worth noting that memory in this sense – as constructed, a tool of "justice", as possibly false but nonetheless necessary – is the currency of cultural property. Narratives of memory, as this thesis argues, constitute one of the axes that define all disputes that can be considered "cases" regarding the ownership of ancient objects. To reach justice in these cases, (possibly false) memory must manipulate law and history both. What went "before" must be made to come "next", and vice-versa.

The relationship with speech and rationality

If in part the "unhomeliness" of inhabiting the present has to do with the problem with time (as we future-people are in fact necessarily past-obsessed), in great part it also has to do with the second issue that Arendt identifies, the diremption between speech and understanding – or rather, the problem with "rationality". The argument usually proposed is that different factions in modernity lack a common (normative) ground for discourse. Although true, this springs from the underlying problem, which is less one of "common ground" than one of specifically modern ground:

> In the twentieth century...the process of modernization achieves spectacular triumphs in art and thought. On the other hand, as the modern public expands, it shatters into a multitude of fragments, speaking incommensurable private languages; the idea of modernity, conceived in numerous fragmentary ways, loses much of its vividness, resonance and depth, and loses its capacity to organize and give meaning to people's lives. As a result of all this, we find ourselves today in the midst of a modern age that has *lost touch with the roots of its own modernity.*[19]

There are two aspects to this problem. The first is the continuous and continuously increasing lack of guaranteed congruence between perception and "the

[19] Marshall Berman, *All That Is Solid Melts Into Air* (New York: Penguin Books, 1988), p. 17. (emphasis added)

world", or between the tools of perception and the material to be perceived.[20] This affects personal experiences, cultural languages, and educational methodologies as much (or as well) as it does the problem of speaking publicly and intelligibly about technology. As a result, the position of the observer becomes key, as "the world" depends upon observation. Indeed, as will be discussed below, the concept of "postmodernity" can be understood as the semantic and philosophical acceptance of the primacy of observation as the core value of rationality itself. The second aspect is the problem of generating and founding normativity in this modernity. These two aspects are obviously intertwined. The sheer number of possibilities that erupt in a world created by each individual observer – the replacement of the Eye of God with one's own eyes – are met and balanced by the lack of moral obligations.[21] If the modern human being is the Creator, where can mandatory ethical rules be based?

To address the first aspect (via Arendt's theme of technology, briefly) we turn to Luhmann again. Luhmann argues that as a result of the condition of modernity, there is a loss of authority in both the rational and the social[22] dimensions. The binary code of "truth" is dislodged from its "moorings in preconstructivist certainties, be they assumptions about nature or about the nature of humankind (ideas) or be they successive linguistic, rationalistic, or consensualistic theories".[23] Luhmann proposes two sorts of solutions to this problem. The first is to add another layer of binary coding to the system that he has already established.[24] The second is more radical,

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[20] "The history of European rationality can be described as the history of the dissolution of a rationality continuum that had connected the observer in the world with the world". Luhmann, *Observations on Modernity*, p. 23.

[21] Discussing the commonalities of Marx and Nietzsche as wellsprings of modern (self-)knowledge and of modern philosophy, Marshall Berman writes: "For Nietzsche, as for Marx, the currents of modern history were ironic and dialectical: thus Christian ideals of the soul's integrity and the will to truth had come to explode Christianity itself. The results were the traumatic events that Nietzsche called "the death of God" and "the advent of nihilism". Modern mankind found itself in the midst of a great absence and emptiness of values and yet, at the same time, a remarkable abundance of possibilities". Berman, *All That Is Solid Melts Into Air*, p. 21.

[22] Luhmann, *Observations on Modernity*, p. 69.

[23] Ibid. p. 13.

[24] Luhmann argues for the acceptance of a second set of distinctions to describe modernity, in addition to the binary coding he has proposed so far. He proposes that the distinction between self-reference and external reference of any system be considered in tandem with the systems code already in place, i.e., positive code value and negative code value. These two sets of distinctions are related "orthogonally", that is, they are logically independent of each other. "[B]oth sides of the reference

and more interesting in the context of cultural property analysis. Rather than accepting a "lazy" formulation of difference or "otherness" that accepts the incommensurability and value-neutrality of each political or philosophical perspective,[25] Luhmann fundamentally questions the distinction rational/non-rational. He sets himself the task of understanding the underlying notion of "rationality" that imbues "Western rationality" and the work of Weber, Habermas *et al.*[26]

This opens entirely new vistas. Instead of excavating the diremptions that define rationality in modernity, Luhmann suggests that we consider the "other side of rationality", a side that is usually excluded by the rationalized and technologized world of modernity:

> The constructivist multicontextual concept of rationality must be the moment of a distinction....It is normal to place this distinction in a historical context, that is, in comparison to Old Europe or to other cultures of the ancient world. This leaves everything open for the self-concept of modernity, with which we are concerned, and leads to a term that is by now worn out: "postmodern". But maybe we can gain a more precise understanding of the "other side of rationality", one that could be characterized by the semantics of paradox, imaginary space, the blind spot of all observations, the self-parasitizing parasite, chance or chaos, reentry or necessity, externalizing toward an "unmarked state". These are ideas that would gain their contours exclusively from precision, fixed by rationality, and that would finally lead to an indirect self-characterization of the rational. But it works the other way too: the comprehensibility of the world becomes incomprehensible, and the awe of technology grows the more we know how it functions.[27]

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distinction are accessible for both code values". Luhmann argues that this is the best we can do in coming up with a way of creatively imagining modernity and its future(s). "Society must be satisfied with this possibility and with the combinatorial latitude it provides. It can no longer refer to a final thought, to a reference-capable unity, to a metanarrative (J.-F. Lyotard) that prescribes form and measure". Luhmann, *Observations on Modernity*, p. 11.

[25] "Another possibility, the laziest of all compromises, is to agree on 'pluralism.'" Ibid. p. 27.

[26] Ibid. p. 25.

[27] Ibid. pp. 41-2.

The point here is that *information fails us*. The link between knowledge and "data", or between information and accuracy, is increasingly tenuous. Paying close attention to technology may as well result in magical thinking as in logic; the abyss between science and alchemy is vanishing after centuries of functioning as a well-policed divide.

The second aspect is the problem of normativity. Habermas locates the problem of normativity in the rise of the principle of subjectivity. He sees the certainties produced in the cultural and social rationalization of the early modern period as folding into this principle: "In modernity...religious life, state, and society as well as science, morality, and art are transformed into just so many embodiments of the principle of subjectivity".[28] Subjectivity in this sense is absolutely dependent upon the correspondences between the subject as the source of reliable (rational) observation, and the subject as the object observed. This is a philosophical structure, "the structure of a self-relating, knowing subject, which bends back upon itself as object, in order to grasp itself as in a mirror image".[29] It requires a philosophical solution for the "differentiations within reason, the formal divisions within culture, and...the need for unification that emerges with the separations evoked by the principle of subjectivity".[30] The philosophical solution must consist of a new basis of normativity, as the "exemplary past" is now missing. One formulation of a solution is Benjamin's: we must look always backwards, or at any rate, outwards: we can ground our normativity in our responsibility towards (if not for) the injustices suffered by previous generations.

This answer does not reconcile the problem of sources, however. Therefore, as this thesis must interrogate the question of memory in cultural property analysis, it must also interrogate the question of ground or origin. "Modernity sees itself cast back upon itself without any possibility of escape".[31] Put differently, the values that

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[28] Habermas, *The Philosophical Discourse of Modernity*, p. 18.
[29] Ibid. p. 18.
[30] Ibid. p. 19.
[31] Ibid. p. 7.

modernity produces can only be "formulated in the modal form of contingency".[32] This means that as the two forces of technology and subjectivity act on "reason", truly "all that is solid melts into air". Yet, Luhmann and Habermas both propose structures that recast or bridge the diremptions that we are concerned with here. They are agreed, "[t] he emphasis on the tandem of technology and individuality, with which we proceed into the fog of the future, need not remain the sole description of modernity".[33] What they propose, however, are different techniques of reasoning. Both systems theory and communicative action are simultaneously descriptive and prescriptive answers to the question of the sphere of human political action in modernity. They presuppose that the task of reasoning remains conciliatory, that reason itself (reason in some sense including its opposite) can shore up the "world" as we know it. Reasoning, acting, communicating – as we know these human faculties – can still provide a ground for the future.

By contrast, in looking for a discourse that may reanimate the spirit of modernity, Berman looks to Marx and Nietzsche to contemplate something much simpler, and possibly less tenable, yet interesting nonetheless. Berman argues that Marx and Nietzsche imagine "newfangled-men",[34] the "man of tomorrow and the day after tomorrow",[35] who can reconcile technology and normativity *within themselves*, and *thus* solve these diremptions. Once again, therefore, we return to Arendt's contemplation of the human condition. The human being created by modernity, will, in an evolutionary motion (or spasm) survive modernity. He or she will turn modernity into "ground" in his or her own flesh. The rest of us will fall away (or, in Arendt's image, be left behind). This is not necessarily an apocalyptic vision, but in recent times, it has been approached with caution.[36] The question of which theory (or what kind of theory) will reinvigorate modernity is fundamentally linked with the

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[32] Luhmann, *Observations on Modernity*, p. 20.
[33] Ibid. p. 7.
[34] Berman, *All That Is Solid Melts Into Air*, p. 20.
[35] Ibid. p. 23.
[36] Two sources of theories of the effects of modernity on human beings are Donna Harraway *Modest Witness @ Second Millenium FemaleMan meets Onco Mouse: Feminism and Technoscience* (London and New York: Routledge, 1997), generally; and Jeremy Rifkin *The Age of Access: How the Shift from Ownership to Access is Transforming Modern Life* (New York: Penguin Books, 2000).

"project" of many modern commentators, who look to Marx, Nietzsche, Hegel and others in order to recapture the energy needed to be a "future person" . The focus, however, should remain on the notion of personhood itself. Luhmann sums up the end result of the modern spirit as follows: "An individual in the modern sense is someone who can observe his or her own observing".[37] The links between knowledge, identity, and the human condition have not resolved since Arendt sketched them out in her Prologue. They have become ever more complicated.

As information itself – "data" – becomes unreliable, the operation of human reason ceases to be (either ontologically or instrumentally) satisfactory. It ceases to give either pleasure or answers. The combination of future time and modern discourse leaves human beings, as Luhmann points out, without a source of authority to rely on in their struggles. This is not cured by "postmodernity", although in contrast to the future-oriented reliance on the "not yet", "[t] he discourse on postmodernity is a discourse without a future".[38] Rather, the problem becomes explicit:

> If we understand "postmodern" to mean the lack of unified cosmography, a universally applicable rationality, or even just a collective attitude toward the world and society, then this results from the structural conditions to which contemporary society delivers itself. It cannot abide a final word, and therefore it cannot abide authority. It knows no positions from which society could be adequately described for others from within society. *What is important here is not the emancipation of reason but emancipation from reason.* This emancipation need not be anticipated; it has already happened.[39]

The argument in this thesis is that the proliferation of cultural property cases, disputes, institutions, organizations and heritage-sites demonstrates and responds to this condition. The emancipation from reason was diagnosed in modernity and has come to (in part) define postmodernity, and for "proof" of this, we can look to the

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[37] Luhmann, *Observations on Modernity*, p. 7.
[38] Ibid. p. 2.

complex of arguments regarding individual identity, institutional purpose, and impossible informational certainty that go into most disputes regarding the ownership of cultural property. Rather than creating a new man, we seem to be creating and recreating the same canon of very old things.

The debate about the validity of "knowledge" in the sense discussed above, which regards not only the information that knowledge consists of, but also the conditions that make such information possible, has the effect that "knowledge" is always on the cusp of disappearing.[40] The losses that may accompany this kind of slippage are incalculable. They include not only "information" as we may think of it, but a certain commitment to the *values* that are touted as the (new) bedrock of modernity.[41] The argument of this thesis, that cultural property is a resolution of the problem with ground – ground as knowledge and certainty in modernity – requires that we negotiate the various modalities in which "knowledge" appears in this realm. We have to be careful to distinguish between "history", "myth" and "heritage", with the differing degrees of accuracy and appropriation that these terms express.[42] The

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[39] Ibid. p. 18. (emphasis added)

[40] For an example of this, see the debate regarding the "Afrocentric" teaching of Ancient Greek history. Writing about the irrelevance of "historical evidence" in the academy, Mary Lefkowitz notes that "The trouble was that some of my colleagues [at Wellesley College] seemed to doubt that there was such a thing as historical evidence, or that even if evidence existed, it did not matter much one way or the other, at least in comparison with what they judged to be the pressing issues and social goals of our own time. When I went to the then dean of the college to explain that there was no factual evidence behind some Afrocentric claims about ancient history, she replied that each of us had a different but equally valid view of history". Mary Lefkowitz, *Not out of Africa: how Afrocentrism became an excuse to teach myth as history* (New York: BasicBooks, 1996), p. 4. Lefkowitz's book is in response to Martin Bernal's *Black Athena: The Afroasiatic Roots of Classical Civilization (Vols.I and II*, New Brunswick, N.J.: Rutgers University Press, 1987, 1991). Bernal has since responded in turn in David Chioni Moore, ed. *Black Athena Writes Back: Martin Bernal Responds to his Critics* (Chapel Hill: Duke University Press, 2001).

[41] For an example of this, see the description of the cynicism with which the American Jewish elites are accused of manipulating not only knowledge regarding the Nazi holocaust, but also the monetary claims of the (few remaining) survivors. In fact, Norman G. Finkelstein makes the point that when the Jewish organizations recast the numbers of survivors in order to extract compensation from Swiss and German banks, the effect is a strange and frightening paradox: "...if, as the Holocaust industry suggests, many hundreds of thousands of Jews survived, the Final Solution couldn't have been so efficient after all. It must have been a haphazard affair – exactly what Holocaust deniers argue. *Les extremes se touchent".* Norman G. Finkelstein, *The Holocaust Industry* (London and New York: Verso, 2000), p. 128. Earlier, he puts the same point more graphically, recalling that his mother, a holocaust survivor, used to say "If everyone who claims to be a survivor actually is one...who did Hitler kill?" Ibid. p. 81.

[42] Gregory Ashworth et al., *Dissonant Heritage*, (New York: John Wiley and Sons, 1995), p. 6.

possibility, and impossibility, of finding solid "ground" in the forms of rationality and knowledge that inhere in modernity is discussed in Chapter Five.

For the moment, it is important to consider the problems that arise in attempting to theorize the past from such shaky foundations. The danger of not properly distinguishing between history, myth and heritage is summed up by Mary Lefkowitz *vis-à-vis* the teaching of Ancient Greek history. First, it leads to "history" that is clearly inaccurate or untrue.[43] Second, the reason that the distinctions become muddied is that the concepts of "history" or "accuracy" themselves are, in modernity, subject to certain kind of professional slippage. Lefkowitz describes the shift from factual accuracy as the touchstone of academic contributions, to an emphasis on "cultural motives". It is worth quoting Lefkowitz at length on this subject:

> Instructors in universities now place less emphasis on the acquisition of factual information than they did a generation ago. They are suspicious of the value of facts...they think that facts are meaningless because they can be manipulated and reinterpreted. [Recently, many historians] insist that history is always composed in conformity or response to the values of the society in which it is produced, and for that reason can be regarded as a cultural projection of the values of that society, whether individual writers are aware of it or not.
>
> *Such beliefs, if carried to their logical extreme, make it possible to say that all history is by definition fiction.* If history is fiction, it is natural to deny or to minimize all historical data (since it can be manipulated). Instead, these writers concentrate on cultural *motives*. Historians, in their view, write what they *are*. The quality of a discussion now depends on whether the participants of the discussion have good or beneficial motivations, as judged by themselves: if they believe that a person's motivations are good, then what they say will be right.[44]

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[43] Lefkowitz, *Not out of Africa*, generally.
[44] Ibid. p. 49 (emphasis added)

Lefkowitz thus describes the slippage from attributable historical information, conceptualized as "*warranted* evidence", to "*acceptable* claims", claims for which no evidence exists, positive or negative. Once this distinction is collapsed, the argument made on the basis of acceptable claims is then judged successful if it is "*culturally* plausible".[45]

This is precisely a process that any lawyer, legal academic or cultural theorist can (and arguably must) use to make cultural property claims. The problems that arise are similar to those Lefkowitz identifies, but they are heightened by the very authority of "the law" accessed by the participants in these disputes. Using the creative imagination to magic "history" into "heritage" results in claims of ownership that are almost inchoate in their very foundations. Partially, and as is discussed at greater length in Chapter Five, this would be a result of any attempt to ground knowledge in modernity. Given the need for legal and cultural certainty that cultural property discourses require, the claims made in this area must constantly veer towards, or into, the fictional. Generally, this thesis argues that "inheritors of the Ancient Greeks" or "Native American" are phrases that are stories or arguments more than they can ever be neutral descriptions. Partially, however, it is a useful technique of appropriation. When, as Lefkowitz writes, "in cultural history the quality of the argument depends upon its *cultural* merit",[46] and when we know that "cultural merit" is a standard that shifts twice or three times in each generation, then the legality of attaching any ancient objects to any modern peoples on the basis of cultural continuity[47] must be both interesting to any legal scholar and (in itself) deeply suspect.

Yet, to take the process seriously as a symptom of and expression of modernity, we see that the underlying need to make history into the present (or vice-versa) is real, even as it is acknowledged to be a source of inaccuracies.

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[45] Ibid. p. 51 (emphasis in original)
[46] Ibid. p. 50.
[47] This is the standard underlying most legislative instruments in this field.

> The past, in the sense of the past of human societies, remote in time, may never be revisited nor apprehended as reality...It is perhaps, as Collingwood said, "wholly unknowable; it is the past as residually preserved in the present that alone is knowable". We explore the past through our present perceptions of the evidence for its existence. This perceived past may bear little relation to the vanished reality, and that relationship may be barely amenable to the testing processes applied to scientific hypotheses...[48]

The analysis therefore returns to where it began. If accuracy is not important, certainty remains so. The uneasy linkages between what we "know" and what we are willing to claim open the question of our presumed ownership of a web of genealogical certainties that have *never* been "true".

The relationship with earth

Finally, the result and the expression of the foregoing, the final aspect of "unhomeliness" or "unfamiliarity" has to do with our present relationship to the earth itself. Once again, it is Arendt who most succinctly and elegantly asks the question:

> Should the emancipation and secularization of the modern age, which began with a turning-away, not necessarily from God, but from a god who was the Father of men in heaven, end with an even more fateful repudiation of an Earth who was the Mother of all living creatures under the sky?[49]

Although there is no answer to this question – or rather, no answer that presents itself entire, wholly present to our vision – when we look around at the cultural products that are provided to us, we see apocalyptic visions of flight. Films, novels, television programs all express a deep unease with the environment, or "earth", of the future. Humankind has either moved to a dystopia among the stars or is being infected and suppressed here on Earth. Humankind fights off or is the

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[48] R. G. Collingwood cited in Richard Handler, "Who Owns the Past? History, Cultural Property and the Logic of Possessive Individualism" in Brett Williams, ed. *The Politics of Culture* (Washington D.C.: Prentice-Hall, 1991) pp. 63-74, p. 65 (references omitted).

subject of medical experiments performed by aliens. The frightening monsters of childhood (and adulthood) are now aliens that come from the authorized, valorized worlds of medicine and science[50], hybrids, cyborgs, uncanny or unnatural in their *source*, rather than the creatures (equally frightening) of earlier fairy tales or myths.[51]

One of the questions that (thus) run through this thesis is the question of the conceptualization of our relationship with the earth, and with authority. Governmental and academic authority, whether it is portrayed by the fictional authority figures in popular culture, or remembered as the governments that undertook and maintained the systematic separation of indigenous peoples from their land (as will be discussed in Chapter Six), is involved in a process of "*unrooting*". In the final analysis, each person, family, or tribe is weighted with the task of re-rooting himself or herself. There are two immediate consequences of this. First, there is the lamentable and politically disastrous rise of "identity politics". Second, there is the need for a form of roots that cannot be detached from the earth. This is shown by the current emphasis on "the past": the path of the museum or the necropolis, that of myth as history, the claim (or the attachment to the fiction) of autochthonous identity. We cannot be separated from the Earth because we spring from it, and we claim it much like we claim the moral right to return "home".

Conclusion: The argument and structure of the thesis

This thesis argues that the obsession with the past, the desire for ancient objects, the sheer insecurity generated by modernity, explains, more than anything, the current direction of our cultural vision. As the desire to be free of the earth doubles back on itself to produce claims of autochthony, so the human capacity to sustain the demands made by consciousness must extend to equal flexibility and tolerance of change. The result (for most of us) is a retreat to the comforts of

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[49] Arendt, *The Human Condition*, p. 2.
[50] Worlds that are, in the public imaginary, already colonized by the "Government".
[51] Marina Warner, *No Go the Bogeyman. Scaring, Lulling, and Making Mock* (London : Chatto & Windus, 1998).

(historical) fiction. As modernity produces the flight to the past, it also produces the avoidance of the reasoning that animates the present.

The purpose of this thesis is to theorize the emerging field of "cultural property" analysis in law and social theory. The main argument is that cultural property, as a set of discourses (legal, historical, and sociotheoretical), and cultural property as a set of objects and practices (things, landscapes and knowledge), arise from human unease on the horizon-line of modernity, and help to produce this shift in attention from future to past. The law in this area is concerned with thematizing and allocating ownership along this temporal spectrum, and indeed, takes on the problem of assigning ownership over the terrain of this spectrum in modernity. Cultural property (discourses and objects both) is one of the means by which we mediate our increasingly-problematized relationship with time, and produce the ground that serves as our "present". On this argument, the project of theorizing cultural property requires looking at how the theoretically significant notion of the present is produced, what this notion consists of, and, as importantly, why it is increasingly necessary to have a means of producing the present.

In Chapter One, Introduction, I have set out the issues that organize the thesis as a whole. These consist of the ways in which the discourses of cultural property disputation reflect and respond to the problematics of modernity, and of human beings attempting to claim an uncontestable ground for human flourishing. These issues are amplified in succeeding Chapters. In Chapter Two, Case Studies, I set out the basic legal arguments surrounding the two controversies that serve as the case studies for this thesis: the Parthenon (formerly "Elgin") Marbles, and *Bonnichsen v. United States*[52] ("Kennewick Man"). The following Chapters will draw on the legal and moral issues that arise in these cases, and will re-state and expand upon relevant facts and arguments as necessary. Chapter Three, Cultural Property Defined, and Redefined as Nietzschean Aphorism, proposes a new means of defining cultural property, in which the problems of definition are resolved by recourse to Friedrich Nietzsche's philosophy of modernity. In Chapters Four and Five, I amplify the lines

of argumentation (summarized as "Narratives of Attachment" and "Narratives of Origin") that are suggested by the foregoing analysis. Looking at the most traditional of cultural property cases, that of the Parthenon Marbles, I demonstrate that cultural property (as objects and discourses) produces and is produced by the terrain at the intersection of these two lines of argument. In Chapter Six, I consider whether the foregoing structures and concerns apply equally well to Kennewick Man, in which ownership of a 9,000-year-old skeleton turns on the meaning of "indigenous" within a recently-enacted statute.

Finally, the Conclusion draws together the arguments made throughout and argues that the proposed theorization of cultural property in this thesis is supported by my research and supports the hypothesis presented in the Introduction. Cultural property represents (and furthers) the discourses of modernity itself. However, what animates these discourses? Obviously, this question can never be answered in full. In part, however, the following work attempts to add a few suggestions to the many approaches to the questions that Arendt asked in 1958.

[52] 969 F. Supp. 614 (D. Or. Feb. 19, 1997); 969 F. Supp. 628 (D. Or. June 27, 1997).

Chapter Two Case Studies: The Parthenon Marbles and Kennewick Man

The purpose of Chapter Two is to consider the specific arguments that arise in disputes regarding cultural property, and to consider, briefly, the special issues that arise in cases where the objects in dispute are very ancient. Disputes regarding very ancient objects show, more clearly than others, the importance of expert discourses, the mutability of legal rights in accordance with social and political changes in power, and the potential paradox of combining both "cultural" and "property" in this field. Against this backdrop, knowledge and culture cannot be separated, no more than can ownership and acquisition. Therefore, this is an area of law in which emerging arguments and schemes of ownership are very visible. Chapter Two seeks to provide the groundwork for the further consideration of these concerns.

Introduction: Why choose these two case studies?

This thesis concerns itself with the ownership or allocation of very ancient objects as a means of examining the issues (and the possible resolutions) that exist in the field of cultural property. Looking at the cases that address ancient objects, it becomes clear that "ownership" is in some sense impossible, as the claimants look to own history or identity as much as (or more than) the "things themselves". This means that the legal structures that order cultural property disputes are themselves disordered. The structures are unsteady and mutable; they are imploding, exploding, shifting, uncomfortable, *failing*. In this refractory and unstable condition, we see again the reality that cultural property discourse reflects a set of profoundly modern functions and considerations. For example, legal theorists are beginning to undermine the distinctions between "cultural nationalism" and "cultural internationalism"; as well as the distinctions between "indigenous" and "Western". As the questions about the ownership of various parts and kinds of culture enter the public (and legal) consciousness, patterns of ownership are seen in a fluid state. Most

importantly, questions regarding the ownership of very ancient objects *don't go away.* Each year, new books, articles, symposia and conferences are announced about these cases.[53] Studying these cases leads to the conclusion that the legal issues are somehow tangential to the conflicts that are meant to be resolved. This point will be addressed further in the conclusion to the Chapter.

These cases unfold against the background of cultural property law and theory more generally. First, there are at least two major strands in cultural property analyses. The first, represented by the international conventions for the preservation of cultural property during war, is administered by the United Nations, and is expressed in the work of traditional legal scholars and historians. From this perspective, which encompasses both the cultural nationalism[54] and cultural internationalism[55] ("the cultural property of all mankind"), the legal and legislative efforts regarding the return of cultural property are concerned with managing primarily physical objects, which are locatable at the intersection of the realms of national and international politics, and are cross-referenced against certain points in the realm of "culture". Culture in this schema is a quasi-normative organizing concept that can be loosely considered as underwriting the value of preserving certain kinds of objects in a form that acknowledges the concerns of (artistic) integrity and

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[53] As a caveat, although this Chapter attempts to provide comprehensive references to the works addressing the disputes, the sheer volume of the publications, draft papers and governmental materials available prevents full listing.

[54] "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. It is based in the idea that "particular peoples have particular interest in particular properties, regardless of their current location and ownership". Rosemary J. Coombe, "The Properties of Culture and the Possession of Identity: Postcolonial Struggle and the Legal Imagination" in Bruce Ziff and Pratima V. Rao eds, *Borrowed Power: Essays on Cultural Appropriation* (New Brunswick: Rutgers University Press, 1997), p. 83. This idea encompasses the belief that an object belongs, and thus should remain in the place it was created. As such, it includes arguments regarding artistic or aesthetic integrity, arguments regarding the merit(s) of context, and arguments of "the marbles are Greek and therefore belong in Greece variety". As a position, it underlies many of the policies and documents generated by the United Nations, UNESCO and the Council of Europe.

[55] "Cultural internationalism" is the position taken in the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, and also, possibly because it depends on domestic action, the 1972 Convention Concerning the Protection of the World Cultural and Natural Heritage. In this view, the cultural property of any people is considered to be the common cultural heritage of all mankind. This principle appears in the preamble to The Hague Convention: "Being convinced that

(territorial) allocation, and remains as close to the "original" form as possible. As such, the efforts of more traditional cultural property legislation and political activism are directed towards the work of reconstruction, restitution, retention, "repatriation" of the objects at issue. The claims regarding the disposition of the Parthenon Marbles (generally) exist in this area of cultural property law.

The second strand or school of cultural property analysis is represented by the field of critical cultural property analyses that are based in the disciplines of social theory, anthropology, heritage studies and the laws and policies being currently created around and for indigenous peoples. In these realms of legal and cultural theory, the emergent field of cultural property analysis focuses on multiculturalism, the effects of colonialism, and the rights of certain groups to pieces of their "identity".[56] The arguments often turn on the distinctions between East-West, North-South, and "indigenous" and "Western" or "technocratic" economic and social structures. In situations where an "indigenous"/"Western" split is visible, there is a different privileging of the term "culture" as used in "cultural property". "Culture" becomes a substantive rather than formal category, one that can anchor property claims without the concomitant operation of traditional notions of "law" or "proprietary rights". In this form of analysis, the past itself is understood as fluid, or as requiring reconstruction. This sort of theoretical project is supported by the work of traditional and non-traditional historians, anthropologists, cultural theorists and legal academics, and engages with the questions that are seen to define modernity more generally. The claims regarding the disposition of Kennewick Man (generally) exist in this area of cultural property law.

Many commentators attempt to balance these two approaches, or at least to consider alternative distinctions and strategies in deciding the difficult questions in the realm of cultural property law: repatriation, the competing claims of restitution

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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...".

and preservation, and the claims of museums.[57] In addition, there is a growing body of scholarship that looks to emphasize the commonalities among the various approaches (and even among extremely different "cultures") in regard to initiatives to protect cultural heritage.[58] Finally, between these two forms of analysis, there is an emerging attempt to instantiate the values of the latter approach within the more traditional legal landscape of the former. To this end, legal academics and theorists are proposing new uses of property law concepts within the legal framework of cultural property disputes,[59] or are proposing new legal bodies and tribunals to provide a forum for resolving these sorts of problems.[60]

The Parthenon Marbles: "The grandfather of cultural property cases..."[61]

The question of whether the "Elgin" (now "Parthenon") Marbles should be returned to Athens is one of the oldest questions in cultural property law, and has been extensively addressed by law professors, legal and cultural theorists, historians and politicians from 1816 until the present day.[62] Beyond the realms of academia and

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[56] This is a rapidly growing field of commentary. See, generally, Ziff and Rao, *Borrowed Power: Essays on Cultural Appropriation.* Much of the work on museums and "heritage studies" also incorporates this approach.

[57] See, for example, David Rudenstine, "Cultural Property: the Hard Question of Repatriation" 19 *Cardozo Arts and Entertainment Law Journal* 69 (2001); Sarah Eagen, "Preserving Cultural Property: Our Public Duty", 13 *Pace International Law Review* 407 (2001); Roger W. Mastalir, "A Proposal for Protecting the 'Cultural' and 'Property' Aspects of Cultural Property under International Law", 16 *Fordham International Law Journal* 1033 (1992/3).

[58] Sarah Harding, "Value, Obligation and Cultural Heritage", 31 *Arizona State LawJournal* 291 (1999).

[59] John Moustakas, "Group Rights in Cultural Property: Justifying Strict Inalienability", 74 *Cornell Law Review* 1179 (1989).

[60] Ann P. Prunty, "Toward Establishing an International Tribunal for the Settlement of Cultural Property Disputes: How to Keep Greece from Losing its Marbles", 72 *Georgetown Law.*Journal 1155 (1985).

[61] Derek Gillman, "Legal Conventions and the Construction of Heritage", 6:3 *Art Antiquity and Law* 239 (2001).

[62] For the legal arguments and history in this case, *see* David Rudenstine, "A Tale of Three Documents: Lord Elgin and Missing Historic 1801 Document", 22 *Cardozo Law Review* 1853 (2001); Rudenstine "The Legality of Elgin's Taking: A Review Essay of Four Books on the Parthenon Marbles", 8 *International Journal of Cultural* Property 356 (1999); William St. Clair, "The Elgin Marbles: Questions of Stewardship and Accountability", 8 *International Journal of Cultural Property* (1999); St. Clair, *Lord Elgin and the Marbles: the controversial history of the Parthenon sculptures* (Oxford and New York: Oxford University Press, 1998); John Henry Merryman, "Thinking About the

politics, the debate continues in the news media and on the Internet.[63] The Marbles are pieces of the Parthenon frieze removed from the Parthenon in Athens, with Ottoman permission, and shipped to England by Lord Elgin in the early part of the nineteenth century. In 1816, the British Parliament bought them for the British people, and they have been exhibited in or near the British Museum more or less ever since.[64] The Greek government has made numerous requests and demands for their return, all of which, despite strong public sentiment to the contrary, and some appearance of relenting during times of political crisis, the British government has steadfastly refused. Claims for their retention have been made on behalf of the British, and currently, both sides are arguing for the integrity of the Parthenon itself. The bases of the claims for retention or restitution now turn as much on principles of cultural internationalism as on cultural nationalism. Questions of stewardship and accountability also currently loom as large as the more traditional arguments based in standard principles of contract and property law.

The Greek government currently claims the Parthenon Marbles on the basis that they are fragments of the Parthenon, and that the Parthenon, as a symbol of the cultural heritage of the whole world, should be as complete as possible.[65] This claim carefully balances the "cultural internationalist" and "cultural nationalist" views of the Parthenon, accepts as a given the territorial basis for Greek ownership of the

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Elgin Marbles", 83 *Michigan Law Review* 1880 (1985); Merryman, 'The Public Interest in Cultural Property", *California Law Review* (1989); Jeannette Greenfield, *The Return of Cultural Treasures, 2d ed.*, (Cambridge and New York: Cambridge University Press, 1996); Christopher Hitchens, *The Elgin Marbles* (London: Chatto & Windus,1987).

[63] See: The Hellenic Ministry of Culture, http://www.culture.gr; *The Guardian*, http://www.guardian.co.uk/elgin; as well as the website of the Melina Mercouri Foundation http://lofstrom.com/mercouri and other private fora for this debate.

[64] For a witty and erudite description of the Marbles and discussion of their provenance, removal, travels, sale, and display, see Mary Beard, *The Parthenon* (London: Profile Books, 2002), pp. 155-81.

[65] Because the monument to which they belong, namely the Parthenon, is in Athens.
Because in Athens the Marbles will be exhibited close to the Parthenon and within sight of it, and the visitor can form a complete picture of the temple in its entirety.
Because they form an inseparable part of the monument – the symbol of Greek Classical civilization at its apogee. The restitution of the Marbles will restore the unity of the decoration and the architectural cohesion of the monument.
Because the British have an obligation, not to Greece but to the cultural heritage of the whole world, to restore its symbol, the Parthenon, which is also the emblem of UNESCO.
The Hellenic Ministry of Culture, http://www.culture.gr

Parthenon, and glosses over the reality that the sculptures would be placed in a museum rather than on the monument. In the latest bulletin from the Hellenic Ministry of Culture, there is no mention of the legal claims that have dominated the debate so far. Rather than arguing about the legality or validity of the "firman" allegedly giving Elgin's agents the right to remove pieces of the Parthenon, or the legality of the Ottoman action in disposing of Greek cultural history, the Ministry now focuses on arguments of aesthetic integrity and careful stewardship. This change in position may be an attempt to accommodate the perspective of the European Union, and reflects the difficulty of supporting legal claims regarding the ownership of ancient objects, rather than indicating a change of heart. However, the Greek government is attempting to shame the British government into returning the sculptures by leaving a large open space for them in the new museum that is being built on the Acropolis.

The British government firmly refuses to yield them. The first act of the new Labour government in 1997 was to reassure the nation that the Elgin Marbles would stay in the British Museum. This reassurance was given again in 2001. As a political act, the refusal to return the Marbles differentiated "new" from "old" Labour more effectively than almost any other act.[66] The Marbles have played a part in British identity and political life since Lord Elgin sold them to the nation in 1816. Although the basic claim for retention is that the Marbles were legally acquired, the British also claim that Lord Elgin saved the Marbles by removing them from the Acropolis, and that in the years since their removal they have become part of the British cultural heritage. The British claim of good stewardship and art historical accountability was shaken by William St. Clair's devastating proof of damage to the Marbles as a result of cleaning undertaken at Lord Duveen's request.[67] However, far from settling the question of location once and for all, the St. Clair findings have been hotly debated

[66]The "New", or politically centrist Labour Party in the UK disavowed the campaign promise of "Old" or politically left Labour that the Marbles would be returned to Greece.
http://www.guardian.co.uk/elgin
[67] St. Clair, "The Elgin Marbles: Questions of Stewardship and Accountability".

since their publication in *The International Journal of Cultural Property*. This debate will be summarized below.

John Henry Merryman in "Thinking About The Elgin Marbles" exemplifies the traditional legal argumentation concerning the debate over the Marbles.[68] In this Chapter, Professor Merryman's arguments will be amplified by or contrasted with other approaches, in particular the political/historical approach as set out by Christopher Hitchens in *The Elgin Marbles: Should they be returned to Greece*? and William St. Clair's *Lord Elgin and the Marbles*. As Merryman has been the leading scholar in the legal debate on the Parthenon Marbles, the analysis here proceeds by summarizing Merryman's legal arguments (and the factual bases he cites thereof), and where applicable, contrasting or confirming them by reference to the different sort of arguments and different reading of historical information in other sources.

Law

Merryman locates two basic points of contention in the Parthenon Marbles debate: "One is that the Marbles were wrongly taken by Elgin and have never belonged, legally or morally, to the British. The other is that, even if the Marbles became British property, they ought now to be returned to Greece".[69] In order to resolve the first point, Merryman uses standard principles of contract and property law. As "a purchaser in full knowledge of the facts", the British government's title to the Marbles can be no better than Elgin's. How good was Elgin's title? Elgin's authority to send a team to the Acropolis was granted by a "firman" or order from the Sublime Porte, the main administrative center of the Ottoman Empire at Constantinople, which requested that "no one meddle with their [Elgin's team of artists and workmen] scaffolding or implements nor hinder them from taking away any pieces of stone with inscriptions or figures".[70] This document only survives in

[68] Merryman, "Thinking About The Elgin Marbles".
[69] Ibid. p. 1896.
[70] Ibid. p. 1898. Merryman writes in n. 58: "I have seen a photocopy of the Italian version and agree that the English translation here set out renders it faithfully". For a slightly more skeptical view of the

Italian translation, as the original, in Turkish, was kept by the Ottoman officials in Athens and lost. In great part, this depends upon whether Elgin in fact exceeded the (legal) authority given to him by the Ottoman government to remove pieces of the Acropolis.[71]

Most commentators, Merryman included, conclude that Elgin exceeded the authority conferred by the firman. However, Merryman finds that there is a strong argument that the Ottoman government subsequently ratified Elgin's actions. For Hitchens, the fact that Elgin exceeded his authority under the firman granted by the Ottoman government[72] does not raise the legal question of later ratification. The legality and morality of the document, both important questions for Hitchens, devolve into the need to examine both the Ottoman officials' and Elgin's actions and motivations at that time. Without the legal framework of the fiction of ratification, Hitchens finds that the "actual force [animating the document, and thus the rationality of the acquisition] was one of *realpolitik* or *force majeure* or *raison d'état* or what you will".[73] The firman functioned as an expression of political relations between nations rather than a (primarily) legal document. As such, the document does not remove any responsibility from Elgin (or from later actors in the debate) for the legality of the removals; its only effect is to necessitate a deeper examination of Elgin's actions and motives in order to discover the degree of his complicity in the putative illegality inherent in any actions based on *force majeure.* Nonetheless, Merryman argues that the Ottoman authorities ruling Greece in 1801 could legally transfer ownership of the Marbles, although other commentators disagree.[74]

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firman, see Greenfield, *The Return of Cultural Treasures* in "The Elgin Marbles Debate", p. 55. Greenfield writes: "A copy, in Italian, of the firman is now said to exist to show that Lord Elgin had permission to take the marbles in 1801. ..It is the only known document supporting Lord Elgin's claim that he was entitled to bring the sculptures back to Britain. It is said to be in the possession of Mr. William St. Clair, joint chairman of the Byron Society in London."

[71] David Rudenstine, "Lord Elgin and the Ottomans: The Question of Permission", 23 *Cardozo Law Review* 449 (2001); Rudenstine, "A Tale of Three Documents: Lord Elgin and the Missing, Historic 1801 Document", 22 *Cardozo Law Review* 1853 (2001).

[72] Hitchens in *The Elgin Marbles* refers extensively to Turkey's gratitude toward England after the defeat of Napoleon and Greece's status as a subjugated nation.

[73] Ibid. p. 42.

[74] Merryman writes that "Under the international law of that time, the acts of Ottoman officials with respect to persons and property under their authority were presumptively valid. Even though their

Today, the conflicting arguments about this ratification and the continuing possession of the Marbles by the British Museum are found in legal arguments regarding the authority of museums to transfer objects that are now considered "cultural property". As regards the Parthenon Marbles in particular, David Rudenstine writes:

> Well-endowed, western museums collected disputed cultural patrimony mainly during the late eighteenth and nineteenth centuries, when the power of northern Europe was dominant. Although there are spirited disputes over whether those takings were proper in light of legal or ethical norms at the time of the takings, there is little doubt that most of those takings would be improper under contemporary legal and ethical standards. Although it is strongly asserted that the application of contemporary legal and ethical considerations to these past events is improper, museums in democratic societies are increasingly pressured to reconsider the provenance of their collections in light of contemporary standards. There are many reasons for this trend, including the fact that museums, because they occupy important positions of public trust in a democracy, are increasingly being asked to reexamine their holdings in light of values most prized by democratic societies, the most obvious relevant one being the consent of the people whose patrimony was removed. Although the resistance to assessing the taking of cultural patrimony in light of contemporary values is strong, the trend seems to be in that direction and the pressure from varying sources on museums to engage in such a retrospective appraisal is likely to mount.[75]

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actions might seem regrettable, unsound, or unfeeling, one would not question their legality, except in the most unusual circumstances. In this instance the Ottomans had a solid claim to legal authority over the Parthenon because it was public property, which the successor nation acquires on a change of sovereignty". Merryman, "Thinking about the Elgin Marbles", p. 1897 (n. 55 omitted).

[75] Rudenstine, "Cultural Property: the Hard Question of Repatriation" in *Cardozo Arts and Entertainment Law Journal* 69 (2001), pp. 70-71.

Indeed, this pressure has mounted. Norman Palmer makes the same points as Rudenstine, while also pointing to the need for a general policy review regarding the powers of dispersal that are legislatively allotted to museums.[76]

Merryman goes on to argue, "If the removal was so ratified, then as a matter of international law the removal was legal".[77] This point as well is hotly contested. The fact that Greece was under Ottoman rule at the time that the removals were authorized raises the question of whether the Ottomans had any moral right to dispose of the Marbles. Merryman discusses the morality of the acquisition in a different place in his analysis, but other theorists or advocates of return do not make the same separation between "legal" and "moral".[78] Particularly noticeably, in Hitchens' analysis, legality and morality merge and cannot be separated.[79] Nonetheless, for Merryman it is dispositive of the question that, under present international law, different principles would apply, but "[I]n international law...the rule is that the legal effects of a transaction depend on the law in force at the time".[80] Furthermore, Merryman finds that Greece might have lost its legal claim to the Marbles because "it all happened long ago", and Greece failed to make any official requests prior to 1983 for return of the Marbles. "Greece has...been in a position to sue for the Marbles since 1828 and has never done so".[81] The statute of limitations has run. This point is

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[76] Norman Palmer, "Sending Them Home: Some Observations on the Relocation of Cultural Objects from UK Museum Collections" in 5:4 *Art, Antiquity and Law* 343 (2000). Palmer adds "To a lawyer these cases are interesting because they occupy the interface between legal power and moral obligation. A museum cannot voluntarily dispose of its property, however compelling the moral demand, unless the dispersal is lawful. In the United Kingdom, museum powers of disposal are often ill-defined and ill-adapted to modern demands". Ibid. p. 347.

[77] Merryman, "Thinking about the Elgin Marbles", p. 1899.

[78] For a particularly interesting interweaving of the legal and the moral, see Michael J. Reppas II, "The Deflowering Of The Parthenon: A Legal And Moral Analysis On Why The "Elgin Marbles" Must Be Returned To Greece", 9 *Fordham Intellectual. Property Media and Entertainment Law Journal* 911 (1999).

[79] For example, see Hitchens' argument: "By Elgin's own account, and by all other certifiable histories, the Turks cared little or nothing for the temples under their control and even desecrated them to make mortar. What, then, is the moral force of a Turkish document which gives to foreigners the right to make themselves free of the Parthenon?" Hitchens, *The Elgin Marbles*, p. 42. Here, the violence of law does not take precedence over the violence of cupidity or politics.

[80] Merryman, "Thinking about the Elgin Marbles", p. 1900 (n. 65 omitted).

[81] Ibid. p. 1901. (n. 70 omitted).

also extensively refuted in other accounts of the events leading up to the present.[82] Finally, Merryman states that bribery of Ottoman officials or Elgin's use of his position as Ambassador in order to acquire the Marbles is not legally relevant to the determination of title.[83] Thus, Merryman disposes of the legal arguments in favour of restoring the Marbles to Greece.

Morality

Merryman then turns his attention to the moral argument. He begins by refuting Byron's "romantic misrepresentation and distortion of values" that "lies at the base of widely accepted attitudes toward cultural property".[84] He contrasts Byron's portrayal of the events surrounding the removal of the Marbles with the "more complex and interesting picture" provided by "history".[85] Merryman mentions that the French were in pursuit of the Marbles themselves, that in the absence of another collector the Marbles would have been exposed to yet worse hazards (the Ottomans, the War of Independence against the Ottomans, lightning and pollution), and that Elgin's motives, though clearly mixed, did include reverence for the Marbles.[86] Other writers also perceive the danger of the "collecting classes".[87]

> The seventeenth century marked the start of a growing interest in Greece and its monuments ...The first travelers had as their main motive not knowledge of the country itself but the hope of discovering *trésors* with which to enrich their private collections at home. The British formed significant, impressive

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[82] See Greenfield, *The Return of Cultural Treasures*, "The Elgin Marbles Debate" pp. 63-64; *see also* Hitchens, *The Elgin Marbles*, pp. 69-84.

[83] "At a time and in a culture in which officials routinely had to be bribed to perform their legal duties (as is still true today in much of the world), the fact that bribes occurred was hardly a significant legal consideration. As for the ambiguity of Elgin's position, there is a clear, if subtle, distinction between a gift of the Marbles *to Elgin*...and a gift *to the Crown* in the person of its emissary Elgin". Merryman, "Thinking about the Elgin Marbles", p. 1902 (nn. 75, 76 omitted).

[84] Merryman, "Thinking about the Elgin Marbles", p. 1905.

[85] Idem.

[86] Ibid. pp. 1905-8.

[87] Hitchens, *The Elgin Marbles*, p. 45, *see also* Beard, *The Parthenon*, "Open Season", pp. 83-7. In passing, Beard recounts how "One of the pieces of the frieze now in the British Museum...did not come via Lord Elgin at all, but was dug up in 1902, in a garden rockery at an Essex mansion.... What furious bout of spring-cleaning, distaste for family heirlooms or 'uncivilized ignorance' then consigned

> collections in the first decades of the seventeenth century...Following their example, over the next two centuries, other European travelers, mainly French, focused on collecting Greek art ...These travelers affected Greece both positively and negatively – the former because they led to systematic research and the study of culture: the latter because those travelers, being fanatic collectors of antiquities, were responsible for damaging and removing some of the most important monuments in the history of art.[88]

It is well known that at the time Elgin's team arrived in Athens, the Parthenon had already "succumbed to the passion of collectors".[89]

Merryman acknowledges that certainly, Elgin was motivated by nationalism and hoped to advance his career in some way by acquiring the Marbles. As, however, his career declined after his return to England, and the acquisition was financially ruinous for him, Merryman is inclined to find that it would not be at all unreasonable to come down on Elgin's side as rescuer of the Marbles.

> In judging the morality of his actions, that is a very weighty and perhaps determinative consideration. One who, at great personal cost, is responsible for the preservation of a great national treasure has performed a great moral act.[90]

Indeed, Elgin spoke movingly in his own defence at the parliamentary hearings on the sale of the Marbles, both about the "value" of his "Collection" and about his motives:

> I beg once more to repeat, that I do not offer this view of my expenses [£74,240] as a criterion of the intrinsic value of my Collection. I have ever been persuaded that, in justice to the Public, that should be calculated on other

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a notable fragment of the Parthenon frieze into the bedding of an English rock garden, we have simply no idea". Beard, *The Parthenon*, p. 87

[88] Flora E. S. Kaplan ed., *Museums and the Making of "Ourselves": The Role of Objects in National Identity*, Ch. 8, "The First Greek Museums and National Identity", (London and New York: Leicester University Press, 1994), p. 251 (references omitted).

[89] Greenfield, *The Return of Cultural Treasures*, p. 43.

> grounds. But it is, I trust, sufficient to prove, that in amassing these remains of antiquity for the benefit of my Country, and in rescuing them from the imminent and unavoidable destruction with which they were threatened, had they been left many years longer the prey of mischievous Turks, who mutilated them for wanton amusement, or for the purpose of selling them piecemeal to occasional travellers; I have been actuated by no motives of private emolument; nor deterred from doing what I felt to be a substantial good, by considerations of personal risk, or the fear of calumnious representations.[91]

In the complex of factors that determine the morality, if not the legality, of Elgin's actions, the question then becomes, "Are intentions enough?" Further, is *every* action of "preservation" a moral act?

The notion of Elgin as the "rescuer" of the Marbles is inconceivable to other writers. It is an important element of Hitchens's argument that Elgin made no mention of "rescue" or "preservation" until he was in the process of negotiating their sale to the British government. The "preservation" argument seems retrospective to many writers. It is an equally important element of Hitchens's (and others') arguments that pieces of the Marbles were broken, damaged, dropped, made thinner (easier to remove and carry), lost, and sunk during Elgin's tenure as "preserver" of the Marbles. The Parthenon was hacked, sawed at and "excavated" with impunity.[92] Nevertheless, even on an uncharitable reading of his intentions, Elgin's acquisitiveness was entirely in keeping with the time in which he lived:

> In the past, the collection and public display of objects and symbols of wealth and power have proclaimed the glories of autocracies, theocracies, kingdoms and empires. Aside from an innate acquisitive "instinct" often attributed to human beings, collections and displays...usually [consisted of]...items

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[90] Merryman, "Thinking about the Elgin Marbles", p. 1909.
[91] *Select Committee Report*, p. xvii, quoted in St. Clair, *Lord Elgin and the Marbles*, p. 247.
[92] Greenfield, *The Return of Cultural Treasures*, p. 63.

acquired by long-distance trade and conquest, monopolized and controlled by those in power, or by those seeking influence and power.[93]

These functions of "collecting" are still very much in evidence today. Yet, although Merryman quotes a well-known fragment from a letter from Giovanni Battista Lusieri to Elgin, in which Lusieri admits, "I have even been obliged to be a little barbarous",[94] he finds that Elgin saved more than he destroyed. This is an argument that Merryman discusses in various points in his analysis, and which also serves to polarize commentators on this debate.[95]

Was the removal, despite everything, a good thing because at least the Marbles still exist? Put differently, had they been left alone, would even fewer pieces of the frieze or other sculptures have survived? Obviously, once again "retentionists" and "restitutionists" come to different conclusions. There is evidence that before and during the War of Independence against the Ottomans, the Greeks both felt strongly about, and took steps to ensure, the preservation of the Parthenon.[96] Assuming that the Marbles survived the War of Independence against the Ottomans, as the pieces not taken by Elgin did, there seems to be at least a reasonable argument for the restitutionist position.[97] Although Merryman goes on to consider the consequences for someone who damages a great national treasure (the Parthenon),[98] he finds that

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[93] Kaplan ed., *Museums and the Making of "Ourselves"*, p. 2.
[94] Merryman, "Thinking about the Elgin Marbles", p. 1884.
[95] For a supporting assessment, *see* Greenfield, *The Return of Cultural Treasures*, pp. 58-9, quoting "The Report on The Elgin Marbles" by the Parliamentary Committee convened to consider the purchase of the marbles in 1816. *See also* Ibid. p. 63, quoting "a German archaeologist, Adolf Michaelis, [who] said of the Elgin Marbles [in 1882], that...taking the prevailing conditions at that time into account...'Only blind passion could doubt that Lord Elgin's act was an act of preservation.'" (n. 4 omitted)
[96] Hitchens, *The Elgin Marbles*, pp. 65-7.
[97] "Following the proclamation of independence from Turkey, scholars in Athens worked tirelessly to widen, explore, and reaffirm the history of Greece. A collective undertaking, the government launched a program of consolidation, restoration, and protection; and established historical zones, expropriated sites, and implemented both long-range excavation projects and emergency rescue operations". "The First Greek Museums and National Identity" in Kaplan ed., *Museums and the Making of "Ourselves"*, p. 246. *See also* Handler, "Who Owns the Past?" in Williams, ed., *The Politics of Culture*, p. 68.
[98] "The metopes and frieze were integral parts of the Parthenon's structure. In removing them, substantial portions of the adjoining masonry were damaged. Like the removals themselves, the resulting damage to the structure of the Parthenon has to be considered in judging the legality and morality of Elgin's actions". Merryman, "Thinking About The Elgin Marbles", p. 1884.

Elgin's actions in this area were more than compensated for by the facts as stated above.[99] As a result, the moral question lacks any "persuasively incisive answer...the opposing considerations are too much in balance".[100] As a result, Merryman applies the balancing test that yields results: "I conclude that the legality of the removal of the Marbles is clearly established and that its immorality has not been demonstrated".[101]

Cultural nationalism or cultural internationalism?

In light of this conclusion, Merryman considers the guidelines or standards for the allocation of cultural property. In order to address this question, he imagines "our own hypothetical supranational tribunal, one charged with making informed, principled decisions concerning the proper allocation of disputed cultural property...[H] ow should it decide?"[102] As briefly noted earlier in the Chapter, the case for cultural nationalism is made on the basis of preserving cultural identity ("particular peoples have particular interest in particular properties, regardless of their current location and ownership"[103]), yet:

> "Cultural nationalism," however pluralistic in intent, employs a European logic of possessive individualism when it claims objects as essential to identities and elements of authentic traditions. Possessive individualism...increasingly dominates the language and logic of political claims to cultural autonomy. The modern individual is...defined by the property she possesses. Modernity has extended these qualities to nation-states and ethnic groups, who are imagined on the world stage and in political arenas as "collective individuals". ...Within cultural nationalism, a group's survival,

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[99] Merryman, "Thinking About The Elgin Marbles", pp. 1909-10.
[100] Ibid. p. 1910.
[101] Idem.
[102] Ibid. p. 1911.
[103] Coombe, "The Properties of Culture" in Ziff and Rao, *Borrowed Power: Essays on Cultural Appropriation*, p. 3.

its identity or objective oneness over time, depends upon the secure possession of a culture embedded in objects of property.[104]

One immediate critique of this argument, therefore, is that it imposes a set of interconnecting European legal and proprietary structures on any non-European group or nation for which it may be deployed.

The deeper critique of cultural internationalism (at least as Merryman positions it within the Parthenon Marbles debate) arises from Merryman's underlying economic arguments. From the perspective of his imaginary fictional supranational tribunal, Merryman begins by affirming the distinction between property and identity, even when "cultural" modifies these concepts.

> In its truest and best sense, cultural nationalism is based on the relation between cultural property and cultural definition. For a full life and a secure identity, people need exposure to their history, much of which is represented or illustrated by objects. ...The difficulty comes in relating the notion of cultural deprivation to the physical location of the Marbles.[105]

If the British openly and respectfully acknowledge that the "identity" of the Marbles is Greek, then it is not clear what role "possession" should play in determining their location. At least as far as "enjoyment of *cultural* value" is concerned, location is important only because it makes the authentic objects, rather than reproductions, available in Greece. Oddly, however, given Merryman's reverence for the Parthenon as a work of art, in his analysis of cultural value, the value of authentic objects can only be shown *economically.* The "authentic" Marbles have to be shown to have greater value for Greeks than for anyone else, *measured by whether, if the Marbles were for sale, Greeks would pay a higher price for them than*

[104] Ibid. p. 84.
[105] Merryman, "Thinking About The Elgin Marbles", pp. 1912-13.

non-Greeks: "There must be some magic inherent in the authentic object, and not in an accurate reproduction, that speaks only to Greeks, or the argument fails".[106]

Economic value can therefore legitimately found apparently *cultural* principles of international law, where cultural values fail. Merryman analogizes the Greek attitude to The Elgin Marbles to other cases where a people believed that "[r]eturn of the object was essential to the well-being of the group, perhaps even to its survival. There is an analogous mystical element in the attitude of some Greeks toward the Marbles: something essential is missing; there is a cultural wound."[107] He concludes that these beliefs cannot serve as a basis for allocating cultural property *unless* they are supported by the willingness to pay more for the object. This implicit economic argument is then reinforced by an explicit economic assessment of the relative values of repatriation or retention. An explicit economic argument for return would rely on the possible economic goods that possession would confer on the Greeks. Therefore, the possibility of selling the Marbles, or the increased level of tourism to Greece, would constitute an economic advantage. This analysis establishes an underlying economic rationale for cultural internationalism. However, it is a rationale that supports rather than overturns conservative legal interests. As such, the certain benefit to the Greeks of the Marbles' return merely re-argues the question of the Marbles as property, and the Greeks' ownership of them. As Merryman has already determined that the Greeks have an identity right in the Marbles but not a property right, he disregards the economics of the situation. Against this background, he states that the principle that everyone, in every country, has an interest in the preservation and disposition of cultural property "is clearly accepted". From this, he concludes that "[t]he marbles are 'the cultural heritage of all mankind'." [108]

Yet, before concluding this, Merryman pauses to assess the values of the cultural nationalism perspective as well. On the basis of his assessment, it would not

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[106] Ibid. p. 1913 (n. 107 omitted)
[107] Ibid. p. 1914.

succeed in any case, not merely in the case of the Parthenon Marbles.[109] In front of Merryman's supranational tribunal, the validity of nationalism *per se* must be assessed separately from any (other) meaning attaching to objects that also serve as expressions of national pride. Not surprisingly, nationalism can be an unsavoury concept.[110] Furthermore, even if the tribunal accepted the general proposition that "works of importance to a culture belong at that culture's site",[111] it doesn't follow that the Marbles should be returned to *Greece*:

> [The Marbles] have been in England for more than a century and a half and in that time have become part of the British cultural heritage. The Elgin Marbles and other works in the British Museum have entered British culture, help define the British to themselves, inspire British arts, give Britons identity and community, civilize and enrich British life, and stimulate British scholarship.[112]

As one could argue that the Greek claim is *either* more or less powerful in these terms, Merryman finds the two positions roughly equivalent. In essence, his argument seems to be that the British can make the same kinds of political, cultural, and thus nationalistic arguments as the Greeks, and therefore both "sides" are equivalent. It is interesting that despite his faith in the law's ability to resolve other property issues, he does not seek to use any legal argumentation regarding these competing claims. Once the property issues are resolved to his satisfaction, then in a sense, the law becomes even more of an abstraction: a tool that either side could use, but not a tool that can be used to distinguish between them. In his role as judge, Merryman rules on extra-legal grounds: the case from cultural nationalism "fails because it expresses values not clearly entitled to respect (political nationalism),

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[108] Ibid. p. 1916.
[109] Merryman concludes that "its assertion before our supranational tribunal does not argue clearly, or perhaps at all, for the return of the Marbles to Greece". Ibid. p. 1915.
[110] Idem
[111] Idem
[112] Idem

because it is founded on sentiment and mysticism rather than reason, and because it is a two-edged argument that is equally available to the British".[113]

Questions of preservation, integrity and distribution

Under the umbrella of cultural internationalism, in this case as in others, Merryman attempts to balance the considerations that arise against those that he has already examined in his preceding analyses. When the legal, moral and nationalistic arguments are evenly balanced or inconclusive, the considerations that should prevail are, in order of decreasing importance, preservation, integrity, and distribution.[114] Merryman looks at each of these considerations in regard to the Marbles. In each case, he finds that the Marbles are better off staying where they are. First, both retrospectively and in a reasonable assessment of the future, the Marbles are safer in the British Museum than they would be in Athens. He comments that:

> Indeed, if one compares the record of care for works on the Acropolis and in the British Museum since 1816, it is clear [that]... [t]he sculptural reliefs remaining on the Parthenon and the Caryatids on the Erechtheion have all been badly eroded by exposure to a variety of hazards, including the smog of Athens. Even if...placed in a museum...rather than reinstalled on the Parthenon, what reason would there be to expose them to the danger involved in removal and transport? What reason would there be to expect that they would be safer in Athens, over the next 170 years, than they have been in London, over the past 170 years? If the time should come when they would be safer in Greece, then the preservation interest would argue for their return. Under present conditions, the preservation concern favors leaving the Marbles in the British Museum.[115]

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[113] Ibid. p. 1916.
[114] Ibid. p. 1917. For a full exposition of these considerations against the backdrop of the cultural nationalism/cultural internationalism debate, please *see* Sarah Eagen, "Preserving Cultural Property: Our Public Duty", 13 *Pace International Law Review* 414-17.
[115] Merryman, "Thinking About The Elgin Marbles", p. 1917.

For other commentators "the preservation interest" *already* argues for their return. William St. Clair[116] makes a powerful argument that in the 1930s the British Museum implicitly or explicitly permitted work crews hired by Lord Duveen, a noted art dealer who donated the "Duveen Gallery" to the British Museum to house the Marbles, to "clean" the Marbles in order to make them conform more closely to the then-prevalent notion of "Classical art". The cleaning, with copper brushes and strong lye soap, removed the precious original patina of the sculptures and possibly did other damage to the detail. This claim has seriously eroded the British Museum's previously unassailable claim to possession of the Marbles based on good stewardship and preservation, and has given ammunition to the calls for the return of the Marbles to Greece. The British Museum is in the process of minimizing the effects of these revelations. There have been two articles in the *International Journal of Cultural Property* disputing the gravity of St. Clair's claims, the second written by Ian Jenkins, the Assistant Keeper with responsibility for Greek sculpture at the British Museum.[117] Jenkins specifically refutes aspects of St. Clair's claims at some length.[118] The British Museum organized a conference on the preservation of the Parthenon Marbles in the wake of St. Clair's revelations,[119] but has yet to publish the forthcoming conference proceedings.

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[116] William St. Clair makes his arguments in (1998) *Lord Elgin and the Marbles*, pp. 281-313, and repeats and expands on them in "The Elgin Marbles: Questions of Stewardship and Accountability". The claims are reviewed as well in Beard, *The Parthenon*, pp. 168-81. *See also* Hitchens, *The Elgin Marbles*, pp. 89-93 for previous claims of damage to the Marbles while under British stewardship.

[117] J. Boardman, "The Elgin Marbles: matters of fact and opinion", 9 *International Journal of Cultural Property* 233-262 (2000); I. Jenkins, "The Elgin Marbles: Questions of Accuracy and Reliability", 10 *International Journal of Cultural Property* 55-69 (2001).

[118] It is not worth summarizing the article here. Suffice to say that Jenkins highlights exaggerations, inaccuracies, and omissions on St. Clair's part. Most interesting, however, is the *tone* of his response. He writes "That the 1930s cleaning was, as the vernacular has it, a 'cock-up', there is no doubt. The museum paid the price for it at the time with a major press scandal, and it has been talked of as an embarrassment ever since. Sixty years on and with all the principal players dead, what seemed most needed was a reasoned assessment of actual events in the 1930s and their implications for the sculptures themselves. Instead, St. Clair's attack, with its frequent misreading of documents and gross exaggeration of the consequences for the sculpture, generated another press scandal, further muddying the waters". I. Jenkins, "The Elgin Marbles: Questions of Accuracy and Reliability", 10 *International Journal of Cultural Property* 55, 56 (2001). The assumption that St. Clair should somehow fulfill the agenda of the British Museum is extraordinary, and indicative of the closed world of museum studies, curators, and scholars in this field.

[119] 1 December 1999.

Second, he examines the integrity consideration. This is concern "for restoration of the parts of 'dismembered masterpieces'".[120] In the case of the Marbles, this means considering whether they can be replaced on the Parthenon. If they can, the integrity consideration argument comes out in favour of the Greeks. Note that at this point, Merryman reaffirms that his focus is on the Parthenon as the total work of art, rather than on the frieze as a separate object. This is in some tension with his approach to the Marbles at earlier points in the argument. The fragmented frieze can satisfy all the preceding functions regarding art and culture as it exists today; however, in terms of "integrity", the thing to look to is the Parthenon. Once he establishes this point, it is an obvious step to point out that in fact the Marbles would not be returned to the Parthenon, but rather to a museum next to the Parthenon. This small distance voids any benefit that might accrue to the Parthenon. Obviously, this is an artistic as well as a "cultural property" determination, and of course, opinions differ. The "rememberment" argument is hampered by the reality, obvious in every major museum, that artworks are often literally in pieces and might be apportioned among two or three locations.

Finally, Merryman considers the distributional issues that arise within the international interest in cultural property. These issues arise from the tendency of nations to fall into "importer" and "exporter" classes, defined not only by surplus "art" or "culture", but also again by economic concerns.

> There is a tendency for works of art to flow from the poor to the wealthy nations, and one can imagine the unpleasant extreme of a Third World denuded of cultural property in order to stock the museums and the private collections of a few wealthy nations.[121]

Looking at how this consideration affects the debate over the Marbles, Merryman finds that Greece is not impoverished in cultural artifacts. Rather, Greece

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[120] Merryman, "Thinking About The Elgin Marbles", p. 1918.
[121] Ibid. p. 1919.

faces the problem of protecting and exhibiting its possessions.[122] In addition, a second aspect of the distribution consideration regards accessibility rather than retention. Focusing on considerations of accessibility, it is not clear to Merryman that the Marbles would be more accessible in Athens than they presently are in London. Merryman notes that "[c]riteria for an appropriate international distribution of the artifacts of a culture do not yet exist,"[123] but once again, Merryman uses inconclusive results on the legal scale to argue for stasis.

The life of objects

After the forgoing analysis, Merryman decides that the fictional supranational tribunal should leave the Marbles where they are. This is not a surprising result. Is it surprising that Merryman seems disappointed? He finds it "dispiriting...[that] a reasoned conclusion...conflicts with a congenial sentiment".[124] Yet, he began by setting sentiment and reason against each other. He proposes, and for the most part maintains, an explicitly legal approach as the most valid means of determining ownership. Along with the legal arguments, he does determine to consider the cultural, political, and moral aspects to the problem – but to do so only as these aspects are focused or resolved through the lens of "law": most notably, property law, contract law and international law, "based at least in part on reasoned, principled grounds".[125] Throughout this highly influential article, Merryman is speaking to the legal subject, in a confidential tone: among us, emotion does not play a valid role in assessing disputes. Reasonable people will agree or will agree to disagree, which comes to much the same thing.

Yet, there *is* something that reasonable people may feel passionately about, and would be correct to feel passionately about, which is the preservation of cultural

[122] Ibid. p. 1920.
[123] Ibid. p. 1921.
[124] Idem
[125] Ibid. p. 1883.

objects. Merryman reserves his passion for the injustice of privileging sovereignty over preservation, for the miserable life of unloved or unseen objects:

> objects that would be well-housed and preserved abroad are allowed to deteriorate in warehouses or inadequately maintained and staffed museums or, often worse, at unprotected and unexcavated sites at home.[126]

In Merryman's view, only the deep pockets of collectors can protect these objects, and only the English can keep the Marbles safe from the Ottomans, the Greeks, war, and nature. The life (preservation) of objects, translated into visibility (culture), founds his adoption of (or his reliance upon) the "ought" question, the "judge" position. *The life of objects, not the authority of the law*, is what Merryman defends when he deploys the array of modern Anglo-American legal principles against the "sentimental" position that ownership should in some sense, for some objects, track origin. The same passion informs Hitchens's argument. Finally, his plea is *for the Marbles*, not for the Greeks. The ownership interest of the Greeks is the vehicle that Hitchens adopts to achieve his goal: reunification of all the fragments. It is impossible to read Hitchens's book without coming away aware of and awed by the power that the Marbles as objects in themselves exert in his analysis. The act of return, in Hitchens's estimation should be "freely offered as a homage to the indivisibility of art and...of justice too".[127]

As one concluding note to this section of the Chapter, what of the Greek approach to the Marbles? Do most Greeks really care where the Marbles are? Despite the rhetoric of the Ministry of Culture, it's a difficult question to answer, but perhaps a few impressions will suffice. The history of modern Greek identity expresses a tension between Neoclassicism (or a creative return to the values of the ancient past)[128] and the authority of the Orthodox Church (or the importance of medieval Byzantine Hellenism). After the imposition of a Bavarian monarchy and

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[126] Ibid. p. 1889.
[127] Hitchens, *The Elgin Marbles*, p. 105.
[128] Kaplan ed., *Museums and the Making of "Ourselves"*, p. 250.

court on Greece in 1833, the Greeks once again turned to their history, but not in search of inspiration, rather as

> a sterile form of ancestor worship...Imitation...became an obsession. The effort to prove all "unbroken continuity of the nation", the main ideological tenet of the time, was used in the service of nineteenth-century "historicism". History and evidence from the past were to solve practical, "national" problems.[129]

This tension still exists in Greece today. Modern Greeks acknowledge there are other far more important issues for the Greek government to address than the disposition of the Parthenon Marbles. However, the appeal of the "past" that the Marbles represent cannot be denied. Whether they became important as a matter of propaganda, political power, or brainwashing, the Marbles are now important the Greeks.

As a second concluding note, both the cultural nationalist and the cultural internationalist positions are vulnerable to the same critiques. Political agendas, commodification by art dealers and museum curators (among others), as well as Eurocentric bias, are equally apparent in both conceptualizations of cultural property. The conception of cultural property as "the cultural heritage of all mankind" makes:

> [c]ultural internationalists easy to criticize from a cultural studies perspective. Their notions of value and rationality are decidedly Eurocentric; it seems to be beyond their comprehension that there are alternative modes of attachment to objects which do not involve their commodification, objectification, and reification for purposes of collection, observation, and display.[130]

Similarly, the conception of cultural property as the particular property of a given people implicates, even more deeply than Merryman's concern with "nationalism", the valorization of the property relation itself. The recurrent theme in

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[129] Idem (references omitted).
[130] Coombe, "The Properties of Culture", p. 83.

analyses of the cultural heritage claims of indigenous peoples is one in which "property" remains a clumsy, Westernized term for "attachment". In both conceptualizations, the relentless objectification of the Marbles is the keynote of the analyses. Obviously, the Marbles are objects, but their value does not lie in their objecthood. This is true of most "cultural property", and possibly true of all "property".[131] This point will be addressed further in the next section of the Chapter.

Kennewick Man: "A white guy with a stone point in him.... "[132]

In July 1996, 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.[133] Chatters's findings were summarized as follows in *Archaeology*:

> The shape of the pelvis indicated that the skeleton was a man's...five feet nine or ten inches tall. Observation of the pelvis, teeth, and skull sutures suggested he had been between 40 and 55 years old at death. He had a long, narrow skull, a projecting nose, receding cheekbones, a high chin, and a square mandible. The lower bones of the arms and legs were relatively long compared to the upper bones. These traits are not characteristic of modern American Indians in the area, though many of them are common among caucasoid peoples, and for this reason Chatters initially thought the skeleton was Caucasian.[134]

Chatters's early observations regarding the age of the skeleton, derived from examining the skull, led him to think that the skeleton was that of an early pioneer or

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[131] See, generally, John Gray, "The Idea of Property in Land" in Susan Bright and John Dewar eds, *Land Law* (Oxford and New York: Oxford University Press, 1998; and Simon Roberts and Tim Murphy "The Idea of Property", in W. T. Murphy and S. Roberts, *Understanding Property Law,* 2nd ed. (London: Fontana, 1994).

[132] Andrew L. Slayman, "A Battle over Bones", *Archaeology*, p. 16

[133] Distinguishing recent remains from those in Indian burial sites was a familiar problem in that area of Washington. Robert W. Lannan, "Anthropology and Restless Spirits: The Native American Graves Protection and Repatriation Act, and the Unresolved Issues of Prehistoric Human Remains". 22 *Harvard. Environmental Law Review* 369 (1998).

[134] Slayman, "A Battle over Bones", p. 16.

fur trapper.[135] However, as he examined the pelvis, he discovered an object that after an X-ray and CAT scan would prove to be an astonishingly early stone spear point:

> To his surprise, the scan revealed the object to be part of a willow-leaf-shaped spear point...It strongly resembled a Cascade projectile point – an Archaic Indian style in wide use from around nine thousand to forty-five hundred years ago.[136]

The age and race of the skeleton were immediately at issue in America. The skeleton became the center of a controversy regarding the meanings of "native", "Native", "indigenous" and "American". The definitions of "Caucasoid" and "Caucasian" do not dovetail exactly: "Caucasian" is a "culturally defined racial category",[137] 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".[138] 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.'"[139] The effect of this was to reopen the question of "true" or "original" ownership of the land 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 Federal statute that controls disposition of these bones is the Native American Graves Protection and Repatriation Act (NAGPRA), which became law in 1990.[140] The Act controls the ownership and disposal of Native American human

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[135] Douglas Preston, "The Lost Man", *The New Yorker*, 16 July 1997 (January/February 1997), p. 70. "The crowns of the teeth were worn flat, a common characteristic of prehistoric Indian skulls, and the color of the bone indicated that it was fairly old".
[136] Idem
[137] Idem
[138] Lannan, "Anthropology and Restless Spirits", p. 374.
[139] Slayman, "A Battle over Bones", p. 16.
[140] 25 U.S.C. sections 3001-13.

remains[141] presently in federally-funded museums, or found on Indian or federal land. Although the Act will be discussed in some depth below, broadly, when such remains are found, the federal land managers must notify the Indian tribes or indigenous groups in the area, and arrange for repatriation of the remains if the tribe(s) or group(s) so request, and the requirements of cultural affiliation *et al.* in the Act are fulfilled. As a result, the U.S. Army Corps of Engineers Walla Walla District, the federal land managers in the area, were responsible for determining the race, age, and general provenance of the skeleton and notifying the relevant tribe(s). The U.S. Army Corps, cognizant of their duties under NAGPRA, requested that Chatters determine the "race" of the skeleton.[142] Chatters verified his findings regarding the racial type of the bones by taking the skeleton to another anthropologist one hundred miles away who ran a forensic consulting agency. She confirmed his opinion: "I examined the bones, and I said 'Male, Caucasian.'"[143] The second anthropologist stuck by her opinion even when Chatters showed her the pelvis with the ancient point in it.

The next step in identifying, and dating, the skeleton was to send a small bone to a radiocarbon laboratory at the University of California at Riverside. The lab confirmed that the bone was the same age as the stone point, between ninety-three hundred and ninety-six hundred years old. This data guaranteed that Chatters had a tremendous archaeological find before him.[144] Finally, Chatters consulted a third physical anthropologist, a professor at Washington State University. His findings neatly summarize many of the issues or problems that are tied up in this case:

> His report noted some characteristics common to both Europeans and Plains Indians but concluded that "this skeleton cannot be racially or culturally associated with any existing American Indian group." He also wrote, "The

[141] and sacred or cultural objects
[142] Preston, "The Lost Man", p. 70.
[143] Idem
[144] Ibid. p. 72.

Native Repatriation Act has no more applicability to this skeleton than it would if an early Chinese expedition had left one of its members here."[145]

As soon as the radiocarbon dating confirmed the age of the remains, "legal wrangling over access to them began. Scientists want to study and test the remains; Native American tribes want to rebury the remains; and the federal government wants to ensure that the remains are treated in accordance with NAGPRA."[146]

In a different, earlier world, Chatters's opinion would have disposed of the issue. Anthropological evidence and the dictates of science, in conjunction with received "history", would have determined not only the origins but also the identity of Kennewick Man. However, neither the U.S. Army Corps of Engineers nor the coalition of five regional Indian tribes claiming ownership or control of Kennewick Man were prepared to allow such a resolution. On the Corps' reading of the statute, the location as well as the age of the skeleton, regardless of its Caucasoid features, triggered the provisions of NAGPRA. The Corps demanded that all scientific testing be stopped until the questions regarding ownership and control of the bones under NAGPRA were resolved. In addition, they "had the skeleton placed in a climate-controlled vault at the Pacific Northwest National Laboratory, in Richland, Washington, where it remains today".[147] The Corps then published notice of their intent to repatriate the skeleton.

Concurrently, the coalition of Indian tribes, unofficially led by the Umatilla Tribe, also continued to claim the skeleton under NAGPRA. Remaining unconvinced by the Caucasoid/Caucasian "identity" of the skeleton and the possible benefits to history and science that might come from further study, 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

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[145] Idem.
[146] Maura A. Flood, "'Kennewick Man' or 'Ancient One'? – A Matter of Interpretation", 63 *Montana Law Review* 39, 40 (2002).
[147] Lannan, "Anthropology and Restless Spirits", p. 377.

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. "On October 16, 1996... a group of eight anthropologists filed a complaint against the U.S. Army Corps of Engineers in the U.S. District Court for the District of Oregon".[148] The plaintiffs in this case, *Bonnichsen v. United States*,[149] include two Smithsonian Institution anthropologists and six prominent professors of anthropology. Robson Bonnichsen is the director of the Center for the Study of First Americans at Oregon State University.[150] 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 "peopling of the Americas and human evolution in general".[151] As a result, repatriation would result in "irreparable harm" to science.[152]

The background, proceedings, and status of the case are complicated.[153] As of April 1998, the District Court issued two orders in the case. The first, in February 1997, held that the Court has 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.[154] Most importantly, U.S. Magistrate John Jelderks "asked lawyers for both sides to prepare arguments as to the meaning of 'indigenous' under NAGPRA".[155] In January 2000, the United States Department of

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[148] Ibid. p. 379.
[149] 969 F. Supp. 614 (D. Or. Feb. 19, 1997); 969 F. Supp. 628 (D. Or. June 27, 1997).
[150] Preston, "The Lost Man", p. 73.
[151] Lannan, "Anthropology and Restless Spirits", p. 379.
[152] Idem
[153] For further information, *see* the summary in Flood, "'Kennewick Man' or 'Ancient One'?", 63 *Montana. Law Review* 44-53.
[154] Lannan, "Anthropology and Restless Spirits", p. 381.
[155] Douglas W. Ackerman, "Kennewick Man: The Meaning of 'Cultural Affiliation' and 'Major Scientific Benefit' in the Native American Graves Protection and Repatriation Act" 33 *Tulsa Law Journal* 359, 364 (1997).

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 June 19 and 20, Judge Jelderks heard arguments for and against that motion. At the hearing, counsel for each amicus presented arguments, and the president of the Society for American Archaeology also made a statement concerning his organization's position on the issues raised in this case. As of August 2002, Judge Jelderks has yet to issue his opinion.

The Native American Graves Protection and Repatriation Act

Under NAGPRA, "Native American" means "of, or relating to a tribe, people or culture that is indigenous to the United States".[156] The Act's scheme creates an "ownership or control" interest in Native American human remains, associated and unassociated funerary objects, and other cultural items. NAGPRA applies to Native American human remains and objects in federally-funded museums as well as those discovered on tribal or federal land after 16 November 1990.[157] The Act has two closely-linked objectives. The first is to create and enforce a process by which Federal agencies and museums inventory their holdings of Native American human remains and associated and unassociated funerary objects, as well as requiring these agencies and museums to work with the appropriate tribes to reach agreement on disposition of the holdings. The second objective of the Act is to protect burial sites on "Federal, Indian and Native Hawaiian lands".[158] The Act also includes a criminal provision under Title 18 of the U.S. Code, which allows fines and imprisonment for any person who sells, buys, uses for profit, or transports for sale and/or profit "the

[156] 25 U.S.C. 3001(9)
[157] 25 U.S.C. 3002, 3003.
[158] Lannan, "Anthropology and Restless Spirits", p. 396.

human remains of a Native American without the right of possession to those remains as provided in [NAGPRA]".[159]

The statute assigns "ownership or control" according to a hierarchical classification of persons or entities seeking control. First in line are lineal descendants of the Native American whose remains and associated funerary objects have been unearthed.[160] Then, "in any case in which such lineal descendants cannot be ascertained, and in the case of unassociated funerary objects, sacred objects, and objects of cultural patrimony", the scheme is as follows: first the Indian tribe or Native Hawaiian organization on whose tribal land the objects or remains were discovered are granted ownership or control of the remains or objects. Second, the tribe with the "closest cultural affiliation" with the remains or objects, and which, "upon notice, states a claim for such remains or objects" is granted ownership or control. Third,

> if the cultural affiliation of the objects cannot be reasonably ascertained and if the objects were discovered on Federal land that is recognized by a final judgment of the Indian Claims Commission or the United States Court of Claims as the aboriginal land of some Indian tribe...(1) in the Indian tribe that is recognized as aboriginally occupying the area in which the objects were discovered,...or (2) if it can be shown by a preponderance of the evidence that a different tribe has a stronger cultural relationship with the remains...in the Indian tribe that has the strongest demonstrated relationship....[161]

NAGPRA applies the same scheme to Native American human remains and objects discovered inadvertently after 16 November 1990.[162] The Act requires that anyone who knows or has reason to know that Native American human remains or other cultural items have been discovered on Federal or tribal lands must notify, in writing, the Secretary of the DOI or the head of any other agency or instrumentality

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[159] Idem. However, note that buying and selling is still permissible.
[160] 25 U.S.C. 3002(a)(1).
[161] 25 U.S.C. 3002(a)(2)(C).
[162] 25 U.S.C. 3002(d).

of the United States having primary management authority with respect to Federal lands. The appropriate Indian tribe or Native Hawaiian organizations must also be notified in writing.[163] However, the Act does *not* resolve the question of which person or entity gets ownership or control of human remains

> that (1) have no ascertainable "cultural affiliation" with any existing Native American tribe or organization and (2) have been discovered on federal land that has never been declared by the Court of Claims or the Indian Claims Commission to be the aboriginal land of any particular tribe.[164]

Therefore, Section (1) was the basis of the arguments before Judge Jelderks in *Bonnichsen v. U.S.* The plaintiffs were claiming that, due either to the specific genetic makeup of the remains, or the passage of time, the remains could have no ascertainable cultural affiliation with the tribes claiming them. This is a case of first impression, but also a case where the statutory language has yet to be clarified. When NAGPRA became law in 1990, the Secretary of the Interior, in conjunction with the NAGPRA Review Committee, was charged with promulgating the rules to enact the statute as well as regulations to cover this situation. In 1995, the Department of the Interior published final rules under NAGPRA.[165] However, the issue of unclaimed or unidentifiable objects was left unresolved. An empty subsection has been reserved for future regulations on this issue, which is still empty and reserved as of August 2002. The Review Committee has released two draft recommendations to Interior Dept. "regarding the disposition of culturally unidentifiable human remains".[166] As of the last scheduled meeting, the Review Committee had received about two hundred comments on the draft of the proposed regulations.[167]

Thus, Kennewick Man presents the ideal test case for (at least one of) the major weaknesses of NAGPRA. How does one determine the "lineal descendants",

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[163] 25 U.S.C. 3002(d)(1).
[164] Lannan, "Anthropology and Restless Spirits", p. 398-9.
[165] 43 C.F.R. pt. 10 (1996); 60 Fed. Reg. 62,134 (1995).
[166] Lannan, "Anthropology and Restless Spirits" p. 399.
[167] The last scheduled meeting of the Review Committee was on 25-7 June 1998, notice in 63 F.R. 18,441 (1998), Ibid. p. 400.

"tribal land", "closest cultural affiliation", or "aboriginally occupied" land of a nine-thousand-year-old skeleton? Even more importantly, as NAGPRA's scheme is one of "ownership and control", how does one go about making and proving links between an "ancient" or "prehistoric" skeleton and any modern-day Indian tribe or other indigenous group? These questions are of course sharpened by the "Caucasoid" traits of the skeleton, which raise interesting reactions regarding "ownership" and "origin" in America, and which will be discussed further below. For the moment, however, the question of the Act's interpretation remains. The interpretative questions are relevant to the sorts of issues that are faced by other "indigenous" claimants and the legislation enacted to protect them. NAGPRA is typical of the emerging statutory instruments meant to repatriate objects and reinstate rights based on cultural claims.[168]

There are at least three questions of statutory interpretation raised by *Bonnichsen v. United States.* As clearly and elegantly stated by Robert Lannan, these issues are:

> [F]irst...whether NAGPRA applies at all to the remains at issue in this case. This question turns on whether this...skeleton is "Native American", as that term is defined by the Act. If the remains are "Native American" and NAGPRA does apply, then *Bonnichsen* will raise a second issue, of how much evidence of "cultural affiliation" there must be for claimaint tribes to be given "ownership or control" of them...[A] final issue that *Bonnichsen* could present is whether NAGPRA would allow the federal government to permit scientific studies of the remains before making this transfer.[169]

Thus, the statutory scheme requires determining the meaning of "Native American" as well as "indigenous" and "cultural affiliation". This occurs in the context of "ownership and control", and therefore of property.

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[168] For example, the same standards are used in the Australian Native Title Act.
[169] Lannan, "Anthropology and Restless Spirits", p. 400.

The definition of "Native American" in NAGPRA "concerns not ...[an] individual's origin, but whether his '*tribe, people, or culture*' was itself 'indigenous' to the United States".[170] The *collective* must be "indigenous". As "indigenous" is not defined by the Act, it takes its common meaning.[171] Thus, "the question of NAGPRA's applicability to the remains...turns on whether this individual's 'tribe, people or culture' appeared 'naturally' here and was 'not introduced'."[172] The archaeological and anthropological theories of the "peopling" of America[173] suppose that the first inhabitants of the continent came from elsewhere. The question then becomes:

> If either event did take place 12,000 or more years ago, must some period of time have passed before descendants of these people became "indigenous", within the intended meaning of that term in NAGPRA?[174]

Lannan looks to the legislative history of NAGPRA to conclude ancient remains of any provenance are included under NAGPRA:

> Congress did presume that some of the remains controlled under the Act would be from prehistoric times. ..[T]he Act would apply to remains from throughout the 12,000 years that people are presumed to have inhabited North America.[175]

Obviously, the claimants in this case make the opposing argument.

The skeleton is too old to be linked to lineal descendants, was not discovered on tribal land, and the federal land on which it was discovered had not been recognized by a final judgment of the Indian Claims Commission or a United States Court of Federal Claims as the aboriginal land of any tribe. Thus, the question

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[170] Ibid. p. 401.
[171] Basic rule of statutory interpretation, cited by Lannan, p. 401, n. 208: 2A *Sutherland Stat. Construction* section 47.28 (ed. Norman J. Singer, 5th ed. 1992). See also Flood, "'Kennwick Man' or 'Ancient One'?", generally.
[172] Lannan, "Anthropology and Restless Spirits", p. 402.
[173] Idem. The "Bering Land Bridge theory...[and] the recent North Pacific Rim 'ice-shelf' hypothesis".
[174] Idem
[175] Ibid. pp. 430-1.

regarding "ownership and control" must be determined under the subparagraph that specifically gives ownership or control to the Indian tribe or Native Hawaiian organization with the "closest cultural affiliation with [the] remains".[176] Given that the regulations defining the meaning of this term are yet to be promulgated by the Secretary of the Interior, lawyers and legal theorists must take on the task of defining "cultural affiliation". As defined in the statute, it means "a relationship of shared group identity which can be reasonably traced historically or prehistorically between a present day Indian tribe or Native Hawaiian organization and an identifiable earlier group".[177] The regulations promulgated under this section set out the procedures by which this relationship can be traced or established. They define a three-pronged test, which must be met in full in order to satisfy the requirements. Summarized, the elements of the test are:

> (1) Existence of an identifiable present day Indian tribe ...with standing under these regulations and the Act; and (2) Evidence of the existence of an identifiable earlier group...; and (3) Evidence of the existence of a shared group identity that can be reasonably traced between the present-day Indian tribe...and the earlier group. Evidence to support this requirement must establish that a present-day Indian tribe...has been identified from prehistoric or historic times to the present as descending from an earlier group.[178]

Evidence that establishes an identifiable earlier group includes evidence of group identity and cultural characteristics, distinct patterns of material culture manufacture and distribution methods, and a biologically distinct population.[179] These factors are in keeping with basic archaeological/anthropological methods. The evidentiary standard for establishing shared group identity is that the link must be "reasonably" traceable. As such, the DOI rejected a "permissive interpretation", which would have allowed an evidentiary standard of establishing the "closest"

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[176] Ibid. pp. 402-3, citing 25 U.S.C. 3002(a)(2)(B).
[177] 25 U.S.C. 3001(2).
[178] Lannan, "Anthropology and Restless Spirits", p. 403, quoting 43 C.F.R. sec. 10.14(a) et seq. (1996).
[179] 43 C.F.R. 10.14(c).

cultural affiliation in favour of requiring the above standard of minimum evidence.[180] Overall, the standard of proof necessary to support a claim under NAGPRA based on cultural affiliation is by a "preponderance of the evidence". The statute does not require "scientific certainty"; once again, evidence can include "[g]eographical, kinship, biological, archaeological, anthropological, linguistic, folklore, oral tradition, historical, [or] other relevant information or expert opinion".[181] Again looking to the legislative history of the statute, Lannan concludes that the tribal coalition in *Bonnichsen v. U.S.* meets these regulatory requirements only in part. The tribal coalition meets the first prong of the test, the fit with the second prong is uncertain, and is yet more uncertain as regards the third.[182] Overall, there is an evidentiary problem or blind spot in this statutory scheme. The statute requires evidence that must, by definition, be either extremely scarce or nonexistent. As such, "[i]f NAGPRA does apply to prehistoric remains, and Congress did anticipate that some of these remains could be claimed by Native American groups based on "cultural affiliation", exactly how much of the different types of evidence identified in the regulations will be necessary to meet the above standard and be consistent with Congress's intent?[183] Again, this is a problem that applies to any statute that looks to repatriate ancient cultural property on the basis of ancient communities and bloodlines.

As regards the third question of statutory interpretation, whether scientific testing on the skeleton may be carried out before the bones are repatriated, the consensus among legal commentators seems to be that it may not. Certainly, the skeleton does not come under the provision allowing "completion of [specific] ongoing scientific studies prior to the transfer of remains to a qualified claimant". Indeed, the Act clearly states that it is not meant to be an authorization for initiating

[180] Ibid. p. 403, n. 223.
[181] Ibid. p. 404, quoting 43 C.F.R. 10.14(e).
[182] Ibid. p. 404.
[183] Ibid. p. 405.

new scientific studies on remains or funerary objects.[184] Therefore, the Act forbids new studies on remains already in federal custody as of November 16, 1990, a prohibition that also extends to new discoveries. As will be seen below, all sorts of questions and conflicts arise around the determination of what would constitute "major benefit to the United States" in this context. Whether using scientific studies to *determine* cultural affiliation results in a major scientific benefit to the United States is an open question. Commentators argue that under the terms of the statute, again the answer seems to be "no".[185]

As regards scientific testing, the legislative history of the statute raises more questions as to Congress's intent than answers to the question. The issue is important for two reasons. First, it is raised by the coalition of Indian tribes that are requesting the return of the remains. Indeed, these tribes feel that testing the remains is an impermissible intrusion on the bones of one of their ancestors. More generally, the question of Western science is often placed in opposition to the indigenous worldview in analyses of cultural property cases. In this case, it is clear that the definition of "cultural affiliation" in NAGPRA was reached only after long negotiations between the various members of the House Committee on Interior and Insular Affairs, and the Native American, museum, and scientific communities. Among the key points of compromise regarding repatriation were the definition of "cultural affiliation", permissible delay for completion of important scientific studies, and the shifting of the burden of proof in proving identity on to the Native American claimants.[186] In the event, however, the remains were tested invasively (bone was crushed and subjected to DNA and other tests) and exhaustively before the U.S. Department of the Interior made its findings.[187]

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[184] "[T]his chapter shall not be construed to be an authorization for...the initiation of new scientific studies of such remains and associated funerary objects or other means of acquiring or preserving additional scientific information from such remains and objects". 25 U.S.C. 3003(b)(2).
[185] Ackerman, "Kennewick Man", p. 367, quoting (and adding emphasis to) 25 U.S.C. 3004(a).
[186] Lannan, "Anthropology and Restless Spirits", p. 420.
[187] Flood, "'Kennewick Man' or 'Ancient One'?", p. 39.

As regards "cultural affiliation", the various committees engaged in framing the Act and the regulations considered the question of controversy over ancient Native American remains that potentially cannot be affiliated with any modern tribe at length. In part, the question was framed in "caretaker" language, which arguably references the (imperialist) "trustee" rhetoric prevalent in the U.S. Bureau of Indian Affairs.[188] In other part, the Society for American Archaeology stuck to the standard anthropological language, arguing that if unidentified remains are returned to the wrong tribe, it deprives the "rightful" group of their remains, as well as everyone else of the opportunity to learn from those remains.[189] The Society for American Archaeology would have required "a reasonably established 'continuity of group identity from [an] earlier to [a] present day group'."[190] Finally, this requirement was rejected in favour of the looser "preponderance of the evidence" standard for cultural affiliation given above. The extensive debate regarding the issue of unidentified or unaffiliated cultural remains, and the value of scientific study more generally, nevertheless merely deferred the conflict presented by Kennewick Man. Ackerman comments that

> Although almost every person or entity on the record noted balancing as necessary between the rights of Native Americans and scientists, the legislative history comes no closer than the statute to deciding the meaning of "cultural affiliation". Inexplicably, no effort, by example or otherwise, was made at further defining when a scientific study is of major benefit to the United States.[191]

Bonnichsen v. U.S. and the loopholes in NAGPRA demonstrate that the case of Kennewick Man arises in a landscape that is already occupied by (visible and invisible) grids of power (money, politics, "rights", "collecting", "science", etc) and emotion. It comes to the public eye and to the legal sphere as a question of

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[188] "[r]egarding the Native Americans whose tribes are extinct...the Government may be, if that's a desire...the caretaker of peoples who are extinct.'" Lannan, "Anthropology and Restless Spirits", p. 417, quoting Senator Daniel Akaka (D-Haw.) in a statement to the House Committee on Interior and Insular Affairs.
[189] Lannan, "Anthropology and Restless Spirits", p. 417, quoting Keith Kintigh.
[190] Ibid. p. 419-20.

"ownership and control", which may indeed signify power in its purest sense in a capitalist country at this time. NAGPRA represents at least a notional shift in the configuration of power in this realm:

> Non-Native Americans, including the scientific community, are given no ownership rights to Native American human remains or objects discovered after November 16, 1990, determined to be culturally affiliated under NAGPRA unless no tribe claims the remains or objects.[192]

As excavation on reservation lands can only be with the tribe's consent, there is a change in the power dynamic not only as regards ownership but as regards *discovery*. The legislative history and the language of the Act reflect an inevitable challenge to the standardized professional ideas of what "must" be known, what it is "useful" or "necessary" to know in the context of all sorts of studies that have relied on Native American artifacts and human remains. In this particular case, as well as in many others,[193] the power flux occurs in the context of the meaning and valuation of "indigenous" identity and scientific studies. If one question ultimately asked by the statute is "who has the power to grant permission to study the skeleton?" a different question ultimately asked by the case as a whole is "what does the conflict regarding "indigenous" and "science" mean? Or, how is it being used in this landscape?" Certainly, these questions can only be answered in part. For purposes of this section of the discussion, the legislative history of the Act is the primary source of any possible answers. Entwined with the legislative history of NAGPRA are the history of the United States and the history of the professions of anthropology, archaeology, and art dealing and collecting in America.[194]

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[191] Ackerman, "Kennewick Man", p. 369.
[192] Ibid. p. 366.
[193] Preston, "The Lost Man", p. 72. *See also*: Lannan, "Anthropology and Restless Spirits", pp. 384-5, n. 103.
[194] *See*, for example, the analysis of the art/culture complex and "primitive" art, in Shelly Errington, *The Death of Authentic Primitive Art and Other Tales of Progress* (Berkeley, Los Angeles and London: University of California Press, 1998).

Legislative history

The anthropological profession, museums, science, and law have intersected in a number of ways in the years leading up to the passage of NAGPRA. The interactions of these disciplines form a kind of knot. Any attempt to separate the various strands must begin with the acknowledgment that they can only be separated artificially – each action and area of discipline implicates the next. With that caveat, the events leading up to the passage of NAGPRA can be addressed as a series of legal, institutional and political developments, the results of which are not yet known. Again, the considerations that follow are the same as, or are easily translatable into, the considerations that apply to the emerging field of cultural property legislation regarding protecting the heritage of indigenous peoples.

The legislative history of NAGPRA, in its broadest sense, includes case law, governmental policies, and the history of the National Museum of the American Indian Act (NMAIA)[195] and political initiatives both in Washington D.C. and among grass-roots activists in Native American communities. Members of the anthropological profession also joined in the struggle for reform regarding burial rights and policies. In the realm of law, the two statutes addressing the problem of repatriating Native American human remains are NMAIA and NAGPRA. These were discussed and ultimately passed in two legislative efforts spanning the years 1987 to 1990. NMAIA concerns the new complex of museums and institutions that arose from the political effort to force repatriation of Native American human remains in the Smithsonian Institute's collection. The ways in which the Smithsonian Institution intersects with Native American organizations, studies, and legal initiatives are extremely complex. For the moment, these interconnections will be discussed briefly in the context of the NMAIA. NMAIA sets out the beginnings of national[196] legislative efforts to address the issues that are also addressed in

[195] 20 United States Code 80q (1989), amended in 1996.

[196] Many states had already enacted Native American burial and sacred site protection laws. There is also a history of case law addressing the question of standing in bringing actions regarding disinterment, grave-robbing, etc. "Native Americans generally believe they are connected spiritually

NAGPRA, and thus the principles and values that underlie (at least in part) the debate regarding Kennewick Man. The history of NMAIA expresses a great deal of conflict between museums and Native American interest groups.[197] It is a museum created out of the Smithsonian's collection of Native American art, artifacts and human remains. Thus, the Smithsonian is also germane to the analysis.

The Smithsonian Institution opened in Washington, DC in 1846.[198] It has been involved with the collecting and study of Native American human remains since its inception. It is at the core of the American historical project of national identity, an identity which (as will be seen below) turned in part on the subjugation if not outright negation of American Indians. Founded by the legacy of an Englishman, James Smithson,[199] who had never visited America, the Smithsonian today

> is made up of an aggregation of bureaus and near bureaus – museums, art galleries, and research offices and departments.... Some of them are totally governmental, some quasi-governmental, and some nongovernmental in status. ... it is ...the world's largest complex of museums and art galleries, with holdings in every area of human interest totaling more than 75 million objects and specimens." Of this incredible amount, "only about 1 percent of

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and familially with their ancestral Native Americans and that this connection is sufficient for standing. Courts, however, generally require a more direct and substantial interest". June Camille Bush Raines, "One is Missing: Native American Graves Protection and Repatriation Act: An Overview and Analysis" 17 *American. Indian. Law R.eview* 639, 646 (1992).

[197] Lannan, "Anthropology and Restless Spirits", p. 407.

[198] Raines, "One is Missing", p. 643. "At its opening, the Smithsonian Institution was funded for the most part by Englishman James Smithson. He left a half million dollars to the United States to create an entity which would 'increase and diffus[e]...knowledge among men'... It has since become federally funded". Ibid. n. 29, quoting Gordon R. Willey and Jeremy A. Sabloff, *A History of American Archaeology* 48, 41 (1974).

[199] "I bequeath the whole of my property...to the United States of America, to found at Washington, under the name of the Smithsonian Institution, an Establishment for the increase and diffusion of knowledge among men". Leonard Carmichael and J. C. Long, *James Smithson and the Smithsonian Story* (New York: G. P. Putnam's Sons, with The Smithsonian Institution, 1965) p. 14. The reasons for Smithson's bequest can only be guessed at. Conjecture includes the notion of America as a utopia, prevalent in Romantic thought at the time, and the fact that Smithson was a charter member of the Royal Institute of London. However, the most widely accepted reason is that Smithson, as the natural son of the Duke of Northumberland and a rich widow, was barred from the professions usually available to a gentleman, chose science as his life's work, and was led to this bequest by "his feeling that his own country, by denying him his noble birthright and the normal fulfillment of a life in England suitable to his talents and inclinations, had let him down". Paul H. Oehser, *The Smithsonian Institution* (Colorado: Westview Press, Inc.,1983) p. 9.

its holdings are on display at any one time, the rest being used behind the scenes by scholars and scientists...for the Smithsonian is also a major center of basic and scholarly research." Other institutional pursuits include research exhibitions, educational programs, [and] performing-art activities ....[200]

The Native American collection in turn was at the core of the Smithsonian. Working with the federal government, research into ethnology and information about American Indian tribes were among the first projects undertaken by the Institution.[201]

> The Smithsonian inaugurated the first systematic investigation of the American Indians.... The volume of studies became so vast that in 1879 the Federal Government consolidated its surveys as the United States Geological Survey. The anthropological work thereof was placed under the direction of the Smithsonian Institution as the Bureau of American Ethnology.[202]

Certainly, the attack on the Smithsonian's collection of Native American human remains and artifacts by Native American interest groups was a frontal attack on the museum/anthropological/government complex at the heart of the American establishment, and was met as such in the discussions leading up to the passage of NMAIA.

The Smithsonian originally refused to participate in the government-organized "task force to examine and make recommendations regarding the display and treatment of sacred objects and remains" set up in 1986.[203] There was great concern in the museum and anthropological communities that such "looting" of the Smithsonian, and the repatriation of the remains, would essentially destroy the practice of physical anthropology:

> Archaeologists at the Smithsonian fear that returning any of the bones would be to "forever alter, if not to end, the science of physical anthropology". The

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[200] Ibid. p. 58.
[201] Carmichael and Long, *James Smithson and the Smithsonian Story*, p. 163.
[202] Ibid. p. 165.
[203] Raines, "One is Missing", p. 644.

> chairman of the physical anthropology department...stated that...the loss to science would be irreversible. Proponents for Native Americans responded quickly by saying...that, "[S]ociety has decided that when human remains and science collide, science has to take a back seat."[204]

Negotiation of these issues finally focused on the problem of ancient or otherwise unidentifiable human remains.[205] It was clear that some compromise was going to have to be reached.[206] Finally, the Smithsonian "capitulated" in August 1989. "Meeting...with tribal representatives, Smithsonian officials agreed to return all 'reasonable identifiable' physical remains and burial objects to tribal descendants upon request."[207]

NMAIA authorizes a new museum under the Smithsonian umbrella specifically dedicated to the culture and history of Native Americans.[208] This museum will occupy the last free space on the Mall in Washington D.C. It will also include the collection of Native American arts and artifacts at the George Gustav Heye Center at the Alexander Hamilton U.S. Custom House in New York City. The Act provides a process to inventory the Smithsonian's collection of human remains and Native American funerary objects, as well as to return remains and objects to the family or tribe when the family or tribe can be determined. The hope is that the National Museum of the American Indian (NMAI) will generate research and educational programs no doubt similar to the Smithsonian's, but (at least arguably) from a different perspective. The Smithsonian and the NMAI will continue to work

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[204] Ibid. p. 645.

[205] "Much of the discussion recorded in the legislative history of the National Museum of the American Indian Act documents a controversy over the disposition of prehistoric remains in the Smithsonian Institution's collections, most of which were too ancient to be identified with any contemporary Indian tribe". Lannan, "Anthropology and Restless Spirits", pp. 408-9.

[206] "During the 1980s, federal organizations began to show signs of becoming cognizant of the fact that Indian burial sites and physical remains represent human life and culture, rather than scientific data". James Riding In, "Without Ethics and Morality: A Historical Overview of Imperial Archaeology and American Indians", 24 *Arizona State Law Journal,* 11, 31(1992).

[207] Idem

[208] "The NMAIA, a great improvement from the boxes of stored remains, applies only to the Smithsonian and serves as a 'living memorial to Native Americans'". Raines, "One is Missing", p. 651.

together on meeting the legislative mandates set out in the Act. In the Preface to the book published in conjunction with the first exhibition of the NMAI at the Heye Center (printed by the Smithsonian Institution), there is the following summary:

> *All Roads Are Good: Native Voices on Life and Culture* represents the important first effort of the [NMAI] to...bring the essential voices of native peoples themselves to the interpretation of our cultures and the things we have made.
>
> For much of our recent history, non-native scholars and others have been the principal interpreters of our lives and lifeways. ...
>
> The contents of this book, however, mark the public beginning of the museum's determination to include in a systematic way our own voices in this body of cultural representation.[209]

Despite the rhetoric, however, there is some question as to the efficacy of the Act as a reburial device. After the Smithsonian inventories its collection, it "is only required to repatriate those remains" that "are identified by a preponderance of the evidence as those of a particular individual or as those of an individual culturally affiliated with a particular tribe".[210] As the information necessary to make this kind of claim is lodged in or with the Smithsonian, "[o]bviously, Native Americans seeking repatriation of any items find themselves at the mercy of the National Museum of the American Indian".[211] As has been discussed above, the "preponderance of the evidence" standard was not used in NAGPRA to limit claims of cultural affiliation. Rather, in NAGPRA, the House Committee preferred "reasonably trace[able]", which is clearly a lower mark to hit.[212] Nevertheless, the same issues and competing considerations underlie NAGPRA as underlie NMAIA.

The most vocal early opponent was the Society for American Archaeology, which fought for an age limit on remains that could be repatriated. Arguing that

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[209] Smithsonian Institution, *All Roads Are Good: Native Voices on Life and Culture* (Washington: Smithsonian Institution Press, 1994) p. 9.
[210] Lannan, "Anthropology and Restless Spirits", p. 411.
[211] Raines, "One is Missing", p. 652.

people's definition of kinship "legitimately varies" over time and through cultures, the Society tried to prevent NAGPRA from applying to the entire "skeletal population" of remains.[213] The Senate Select Committee on Indian Affairs then convened a panel[214] of outside experts from the three communities most involved with the legislative effort: the Native American community, the museum community, and the scientific community.[215] The conflict between Native American religions and scientists' concerns surfaced more frequently during the legislative process leading up to NAGPRA than it did during the process leading to NMAIA. Members of the panel split six to three on the subject of whether ancient or unidentifiable remains should be repatriated. The majority believed

> that a respect for Native human rights requires that a process should be developed for disposition of these remains in cooperation with, and with the permission of, Native nations. Such process should take legitimate scientific interests into account in appropriate instances where Native consent is secured. ... (1) Scientific study of human remains carries an obligation to secure appropriate consent. None of these dead consented to donate themselves to science; (2) Present-day Native American nations are most closely connected to the dead and have the authority to speak on behalf of the unclaimed remains; (3) Native American nations and people strongly believe that these human remains are entitled to a decent place of rest. These wishes should be respected....[216]

The scientists on the panel, however, "stressed the need to learn about the future from the past".[217] These dissenters agreed that:

> museums should act in good faith in response to Indian requests for repatriation, and...museums should make every effort to respond positively to a repatriation request when there is a clear cultural link to the group making

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[212] Lannan, "Anthropology and Restless Spirits", p. 429.
[213] Ibid. p. 412.
[214] The Panel for a National Dialogue on Museum-Native American Relations.
[215] Lannan, "Anthropology and Restless Spirits", p. 413.
[216] Ibid. p. 414.
[217] Ackerman, "Kennewick Man", p. 368.

the request. [However,]... While we agree that there are cases in which...claims [to culturally unidentifiable remains] may be seen as human rights issues, we do not agree that such a determination mandates in all cases following the wishes of a nation or group.[218]

This split was resolved in favour of the majority. It is as a result of this kind of dialogue and resolution that *Bonnichsen v. U.S.* is before the court. (These considerations also underlie the problems with repatriation of objects in museum collections more generally.) Clearly, the conflict regarding repatriation presented by Kennewick Man was inevitable. The legislative history of the Act shows that the compromises and negotiations on the issue of repatriating ancient remains are not made easily. Nor are these compromises necessarily accepted. There are already two legislative efforts on the Congressional agenda to amend the Act, one of which attempts to undercut the compromises made thus far in favour of scientific study in cases like Kennewick Man.

Conclusion: The life of ancient objects

Why are these two cases presented together? First and foremost, because a central argument of this thesis is that the distinction between "indigenous" and "non-indigenous" or "Western" is highly suspect in cultural property or heritage disputes.[219] As such, the quintessential "Western" cultural property case and one of the quintessential "indigenous" cultural property cases should be examined for their similarities. Although analyses exist which make this argument, they are written from the perspective of the value(s) of (or inherent in) cultural property, which are shared by all peoples who organize themselves into a society. These analyses are extremely valuable, in that they examine the philosophical foundations of "value" in

[218] Lannan, "Anthropology and Restless Spirits", p. 415.
[219] This is increasingly true as indigenous peoples turn to Western legal structures to protect their cultural heritage.

this field,[220] and raise the issues of the essentializing and totalizing Western gaze.[221] In the present work, however, the perspective is different. In both the Parthenon Marbles case and in Kennewick Man, the "objects" at the center of the disputes are fundamentally created by expert observers, outside the specific community (or communities) that may treasure or seek to acquire the objects. In both cases, the legal structures used to address the issues are dependent upon specialized information from experts: both the Parthenon Marbles and Kennewick Man derive a great part of their identity from the discourses of knowledge and value that are attached to them.

Therefore, it is worth noting the importance of the same classes of people: collectors, archaeologists, and other kinds of professional experts that in fact create the objects at the center of the dispute. The information that the Parthenon Marbles predated Roman sculpture was central to the British Parliament's decision to buy the Marbles for the nation; the evidence of forensic anthropologists that the bones are both "Caucasoid" and 9,000 years old not only spurred the dispute about the "true owners" of the remains but also showed the strength of NAGPRA in the face of the scientific/academic establishment. A sea-change in evidence or attribution, a paradigm shift regarding artistic value or historical origin, and the effect would be like pointing out that the emperor has no clothes – if the Marbles are Egyptian, or the bones are mongoloid not Caucasoid, the disputes would melt away.

However, *without* this kind of change in information or evidence, the disputes will continue, and indeed *do* continue, regardless of the operation of "the law". This raises the following question: why are these disputes in the realm of *ownership* rather than art history or scientific analyses? If the value of the objects is so radically separate from their ownership, what does this say about "cultural property" or "cultural heritage"? This is a thorny question, as it asks to what extent culture and ownership are really linked in this realm of law. The conclusion is inescapable

[220] Sarah Harding, "Value, Obligation and Cultural Heritage", 31 Arizona State Law Journal 291(1999); Harding, "Justifying Repatriation of Native American Cultural Property", 72 Indiana Law Journal 723 (1997).

that these objects are at the center of *appropriation* debates rather than *ownership* debates. Ownership of the objects does not define the issues at stake as much as the struggle for ownership does. This makes the vectors of law, as used in these cases, aspirational and creative, transparent to the shifting mass of power struggles and acquisitive instincts that might underlie property law more generally. As we think of the purposive and systematic creation and maintenance of the value(s) of the objects, we must also think of the purposive and systematic creation and maintenance legislation and legal argumentation that address them. The law is not "the law" in this area. As stated in the Introduction, it fundamentally lacks authority against this background. It is the mouthpiece for negotiation and resolution of the dynamic force of acquisition across a wide range of philosophical and social concerns.

As such, the structures or rules that are applied to determine "ownership" in these cases sit on top of numerous other considerations, which themselves have very little to do with law. The debates about the firman in the Parthenon Marbles case and the legislative history of NAGPRA in Kennewick Man show that the legal doctrines or instruments are themselves porous when dealing with cases that concern extremely ancient objects. In both cases, the links between the "original owner" and the present possessors are superlatively fragile. These links are as constructed as the objects themselves are, as much a matter of conjecture, speculation and politics as the objects themselves. *Interpretation* is more important than *text* in these cases. The question then becomes, "what is this interpretation meant to establish?" Ownership has other meanings in this context than possession of the objects themselves, and is only instrumental as a means of ensuring these meanings. The issues that arise as a result of these (preliminary) conclusions will be addressed at further length in the following Chapters.

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[221] This is the underlying approach in much of the postcolonialist studies on cultural transmission, as well as, arguably, one of the premises of Rosemary Coombe's work, referenced above,

Chapter Three Cultural Property Defined, and Redefined as Nietzschean Aphorism

> *A thing would be defined once all creatures had asked "what is that" and had answered their question.*
>
> (Friedrich Nietzsche, *The Will to Power*)

Chapter Three, Cultural Property Defined, and Redefined as Nietzschean Aphorism, discusses the definition of cultural property, and proposes a new means of categorizing what sorts of ancient objects might fall into this category. The values in the current definitions are those that inhere in the concepts of "culture" and "life". The argument of the Chapter is that "culture" and "life" in these definitions demands a particular kind of interpretation. In real terms, the task of defining cultural property turns on understanding what sort of interpretation these objects demand. This Chapter proposes that the interpretative tools that the law requires in order to define a piece of cultural property are found in the philosophy of Friedrich Nietzsche. The argument is that the key to what constitutes cultural property is whether the object leads to self-knowledge, as this is the value that underlies both "culture" and "life". Following from the emphasis on self-knowledge, the interpretation at stake must be an interrogation of the attachment between "knower" and 'self-knowledge", as well as being constitutive of the link between the knowing self and the object. As such, the interpretation that the law requires in order to define a piece of cultural property is the same sort of interpretation that a Nietzschean aphorism requires from its readers. When an object demands this sort of contemplation, it is "cultural property".

Introduction: What is cultural property?

How is a piece of "cultural property" distinguished from other sorts of valuable historical or artistic material? This question underlies many of the disputes regarding the ownership of cultural property, and is indeed a threshold question that

often contributes to delays in addressing the substantive proprietary issues.[222] At present, conflicts are engendered by confusion regarding whether a particular object is "cultural property" or not; on a more general level, and in the climate of increasing protection for cultural artifacts, the concept of what may be "cultural property" is itself in flux.[223] As the field expands, practitioners and academics experience increasing difficulty because of the confusion in this area.

This Chapter proposes an underlying organizing schema that may aid in identifying the class of objects that make up cultural property. Rather than proposing further or expanded description of objects to be listed in the definitions sections of the major Conventions and Treaties addressing cultural property, the approach taken here is to look at the values[224] that these definitions embody, in order to understand the difference between "cultural property" and the art works, artifacts, and practices that are not protected by these legal instruments.[225] Through this method of analysis, it becomes clear that the definitions of cultural property turn on the valorization and preservation of life, all sorts of life and all sorts of evidence of life. Therefore, the first step of the analysis is to examine the values implicit in the cross-definitions of "culture" and "life".

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[222] The definition of "cultural property" determines not only which objects are protected by the conventions and treaties that regulate this field, but also who is affected by the prohibitions on acquisition, sale, or transport of these objects. The definition is often too broad to be useful. Pierre Valentin, "The UNIDROIT Convention on the International Return of Stolen or Illegally Exported Cultural Objects", 4(2) *Art, Antiquity and Law* 107 (1999).

[223] Marilyn Strathern, *Property, Substance and Effect: Anthropological Essays on Persons and Things* (London and New Brunswick: The Athlone Press, 1999); Coombe, "The Properties of Culture", in Ziff and Rao, *Borrowed Power: Essays on Cultural Appropriation*; Cathryn A. Berryman, "Toward More Universal Protection of Intangible Cultural Property", 1 *Journal of Intellectual Property Law* 293 (1994).

[224] The attempt to derive such values in the realm of cultural property is all the more important in an ever-expanding field of legislation, research and case law, especially to the extent that it is openly acknowledged that cultural property disputes often involve cross-cultural claims that cannot be addressed solely by reference to values that have traditionally been embedded within the legal commentaries on property. *See* Harding, "Value, Obligation and Cultural Heritage", p. 291.

[225] Valuable objects that are not "cultural property" may be protected by other kinds of legislation, that is, statutes or Conventions regulating the art market, museums or collections. For example, *see* Patrick O'Keefe, "Incidental Collections: Protection against Dispersal", 3 *Art, Antiquity and Law* 165 (1998).

When "culture" and "life" are read against each other in this realm, it becomes clear that the core of any definition of these objects is that they attract and require a particular kind of *interpretation*. Therefore, the task of defining cultural property turns on understanding what sort of "interpretation" these objects demand. This Chapter proposes that the interpretative tools that the law requires in order to define a piece of cultural property are found in the philosophy of Friedrich Nietzsche,[226] as his work is meant to provide insight into the values of values. When one considers the definitions of cultural property through this lens, it becomes clear that the key to what constitutes cultural property is whether the object leads to *self-knowledge*, as this is the value that underlies both "culture" and "life". Following from the emphasis on self-knowledge, the "interpretation" at stake must be *an interrogation of* the attachment between "knower" and "self-knowledge", and is *constitutive of* the (claimed) link between the knowing self and the (desired) object.[227] As such, the interpretation that the law requires in order to define a piece of cultural property is the same sort of interpretation that a Nietzschean aphorism requires from its readers.

There are two reasons that the Nietzschean aphorism provides both the model for definitions of cultural property, and the means for their interpretation. First, definitions of cultural property are necessarily compact yet essentially vacant structures,[228] and as such, the definition of cultural property and the Nietzschean aphorism both constitute the same kind of discursive field and (arguably) share the same purpose. Second, the aphorism is the essential mechanism for the transfer of knowledge in Nietzsche's philosophy. To some extent, the object itself shares in the aphoristic nature of the definition. It too is incomplete, requiring interpretation, and a

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[226] Keith Ansell-Pearson ed, *On the Genealogy of Morality* by Friedrich Nietzsche (Cambridge: Cambridge University Press, 1994) (Translated by Carol Diethe), p. 3.

[227] In this realm, an argument that the attachments at stake are those between the self and knowledge of the self raises questions of the "cultural self", or of "possessive nationalism", in which the links between theories of ownership and theories of human nature are understood as constitutive of legal definitions of cultural property. These questions have been extensively addressed in the work of Handler "Who Owns the Past?" in Williams, ed., *The Politics of Culture* , as well as in Coombe, "The Properties of Culture" in Ziff and Rao, *Borrowed Power: Essays on Cultural Appropriation*, and in the other articles in these collections.

carrier of the (possibly false) promise of (self-)knowledge. One could imagine that the object is a hard line around a space larger than itself. Thinking about the problem of definition(s), one could consider whether the object is the aphorism, and the definition is merely its interpretation. Or one could consider whether the reverse is also true: the definition is an aphorism, and the object is its interpretation. Although this analysis attempts to avoid the slippage between definition and thing, it does not always succeed. The concept of the aphorism pulls definition and object both within its ambit, as to define "cultural property" and to interpret one of Nietzsche's aphorisms is the same task, requiring the same tools, and being mindful of the same landscape. The object itself does not escape.

More generally, a Nietzschean perspective is particularly important as the legal instruments may embody an essential if invisible internal contradiction. Preservation, which is the purpose of these statutes or Conventions, and "life", may be opposed concepts. The final part of the analysis looks at the effect on culture of preserving the "life" that cultural property valorizes. If the values that inhere in legal definitions of cultural property are encoded as various formulations of the normative and epistemic tripling of *life-preservation-loss*, then the question becomes whether the result of the present definitions of cultural property is to valorize a necropolis of culture, a landscape in which "life" is reified without being understood, rather than the "life" that animates the ongoing, positive transmission of knowledge that is "culture". A Nietzschean approach to this triad allows for consideration of the consequences of finding "cultural property" wherever this triad is visible.

Definitions

Cultural property cannot be defined purely by description. An object that is "cultural property" and one that is not may be exactly alike in all particulars of workmanship, materials, and provenance. In the foundational twentieth-century

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[228] As argued below, "cultural property" consists of objects that must be understood as fundamentally incomplete or there is no space in the definition or description for the element of "culturally valuable". That element is imported into the definition or object by each interpreter of the text.

pieces of cultural property legislation, the 1954 Convention for the Protection of Cultural Property (The Hague Convention), and the 1970 UNESCO Convention,[229] cultural property is defined in a straightforward manner. For example, The Hague Convention, Article 1, defines cultural property as objects, buildings containing objects, and collections of buildings containing objects. However, it does not define the heart of the definition: "great importance to the cultural heritage of every people".[230] Obviously, it is the value of the object in this sense rather than in any other that brings it within the ambit of the legislation. Yet the fundamental question of what this value consists of is not stated. Rather, that piece of legislation, and more recent attempts to define cultural property, assume a common understanding of what is valuable. This assumption leaves a problematic[231] and inevitable lacuna in the middle of any of these definitions. A definition of cultural property cannot escape both asking and embodying the answer to the question "*why* is this thing valuable to the cultural heritage of any people, or to 'all mankind'?"[232]

In the past fifty years, more recent Conventions and Treaties radically expand the definition of cultural property, both as a result of the increased interest in "heritage" of all kinds, and partly as an attempt to address this question.[233] Within

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[229] The 1954 Convention for the Protection of Cultural Property (The Hague Convention); The 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import and Transfer of Ownership of Cultural Property.

[230] "(a) moveable or immoveable property of great importance to the cultural heritage of every people...(b) buildings whose main and effective purpose is to preserve or exhibit the moveable cultural property defined in sub-paragraph (a)... (c) centres containing a large amount of cultural property as defined in subparagraphs (a) and (b)..." (The Hague Convention 1954, Article 1).

[231] The difficulty in defining what makes the objects valuable persists, and has serious effects on all parties involved with the preservation, identification, sale or movement of these sorts of artifacts. For example, writing about the scope of the 1995 UNIDROIT Convention on the International Return of Stolen or Illegally Exported Cultural Objects, Pierre Valentin writes: "The definition of cultural object is critical because it will determine the scope of the Convention. ...The most important implication of...such a broad description of "cultural objects" is probably that the Convention will not just affect important collectors of museums who have access to a pool of knowledge when acquiring important and/or expensive objects, but it will also affect the general public". Valentin, "The UNIDROIT Convention", pp. 107-8.

[232] Cultural property legislation defines the "owners" of the cultural property either as a specific national, indigenous, or cultural group, or "all mankind".

[233] "Cultural property" includes new classes of things almost daily, and new legislation, new museums, and new disputes arise constantly. Against this background, any definition of cultural property would have to include 'heritage', 'intellectual property' and intellectual history components. The progression towards an increasingly complicated set of definitions is particularly visible within the area of

both national and international legislative frameworks, the definitions of cultural property become increasingly specific, and as a result longer and more complicated.[234] For example, paragraph (1) of the European Convention on Offences Relating to Cultural Property lists products of archaeological exploration and excavation, documents, works of fine and decorative art, tools, archaeological artifacts, musical instruments and rare manuscripts.[235] In paragraph (2), the European Convention goes on to list what may be considered more "modern" cultural property, including "property relating to the life of national leaders, thinkers, scientists and artists",[236] property relating to history,[237] property relating to events of national importance,[238] and "rare collections and specimens" of fauna, flora, minerals, anatomy, property of paleontological, anthropological, ethnological, philatelic and numismatic interest.[239]

Cultural property definitions have moved from the "objects – buildings for objects – concentrations of buildings for objects" scheme used in 1954, to lists of sources of information regarding human knowledge and culture very broadly.[240] For

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international (UNESCO and European Union) legislation, although the problem spans all attempts to define what constitutes cultural property. "It would be useful if there were a generally accepted definition of... 'cultural property'....Unfortunately this is not the case:...each Convention or Recommendation has a definition drafted for the purposes of that instrument alone; it may not...be possible to achieve a general definition suitable for use in a variety of contexts". Lyndell V. Prott and P.J. O'Keefe, *Law and the Cultural Heritage* (Abingdon: Professional Books Ltd., 1984), Ch. 1, "The Need for Protection", p. 8.

[234] For example, the definitions of what is covered by the UNESCO Convention for the Protection of the World Cultural and Natural Heritage; the 1995 UNIDROITConvention on Stolen or Illegally Exported Cultural Objects; The Protection of Moveable Cultural Property; the European Union Directive on the Return of Cultural Objects; the European Union Regulation on the Export of Cultural Goods (Council Regulation No. 3911/92); the European Convention on Offénses Relating to Cultural Property (23 June 1985); Recommendation Concerning the International Exchange of Cultural Property; etc. There are initiatives in Russia, Asia, India, Australia, and throughout North and South America as well.

[235] In the case of the decorative arts, tools, archaeological artifacts, and musical instruments, the objects have to be more than one hundred years old to qualify for protection. European Convention on Offences Relating to Cultural Property (1985), Appendix II, 1(g).

[236] Ibid. Appendix II, 2(f).

[237] Ibid. Appendix II, 2(e)

[238] Ibid. Appendix II, 2(g)

[239] Ibid. Appendix II, 2(h)-(p).

[240] This is not true only of the European Convention on Offences Relating to Cultural Property (1985), although it can be seen very clearly in this particular Convention: "(q) all remains and objects, or any other traces of human existence, which bear witness to epochs and civilizations for which excavations or discoveries are the main source or one of the main sources of scientific information;...(s)

example, "traces of human existence" which are not human remains (including DNA, etc.) or artifacts – in short, which are not necessarily tangible – must now be represented within cultural property law. Anthropological and commercial understandings of how objects are constituted and valued are emerging to make the claim that certain culturally-specific intangibles may be (or become) cultural property.[241] Folklore or ritual practices are also defined as "cultural property".[242] In keeping with this trend, cultural property need not be a tangible "thing". This heightens the problems of developing adequate definitions. The fluidity and (increasing) intangibility of these "objects" not only exposes the breadth of the law's – and the culture's – power to define, but also exploits the lacunae and interstices within any/all of the already-existing definitions and makes the project of defining "cultural property" more difficult.

How then to come up with a definition for "cultural value" that can both root the object solidly within culture, and remain flexible enough to make room for ever-novel classes of "things"? Looking at what is common to definitions of cultural property, it is clear that *each definition retains a space of or for the value that makes one object cultural property and another merely a beautiful or historically-significant artifact or piece of art.* This must be taken seriously. It cannot be mere oversight that retains a silence among all the words; rather, it is this *gap* that the following analysis attempts to show ineluctably defines an object as "cultural property" rather than mere "art object" or "archaeological artifact". This Chapter argues that in any description of cultural property there is necessarily a missing component, and the definition of cultural property is necessarily bound up with the space of this missing piece.

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archaeological and historic or scientific sites of importance, structures or other features of important historic, scientific, artistic or architectural value, whether religious or secular, including groups of traditional structures, historic quarters in urban or rural built-up areas and the ethnological structures of previous cultures still existent in valid form".

[241] *See supra,* the second footnote in the present Chapter, for a list of the relevent publications.

[242] Cathryn A. Berryman, as above; *see also* Christine Haight Farley, "Protecting Folklore of Indigenous Peoples: Is Intellectual Property The Answer?" 30 *Connecticut Law Review* 1 (1997); David R. Downes, "How Intellectual Property Could Be A Tool To Protect Traditional Knowledge", 25 *Columbia Journal of Environmental Law* 253 (2000); Srividhya Ragavan, "Protection of Traditional Knowledge", 2 *Minnesota Intellectual Property Review* 1 (2001).

Also common to these definitions is that the value of the property is a result of the *knowledge* that these kinds of objects may provide. Human knowledge and the objects are somehow equated with each other. The legislation protects objects that have the "cultural value" of assisting (or in some cases, guaranteeing) knowledge. In general, in cultural property

> [i]f "culture" consists "of learned modes of behaviour and its material manifestations, socially transmitted from one generation to the next and from one society or individual to another...then the cultural heritage consists of as much of those activities and the objects which give us evidence of them as we can perceive. [243]

This of course opens a great many questions. The two most important are the question of what the object of this knowledge is, and the relationship between culture and knowledge.

"Life"

To address the first question, the knowledge that the Conventions protect is knowledge about *life*: the definitions represent each and every aspect of life, familiar and unfamiliar. Life is *what* is important, in all its aspects: signs of life, early life, modern life, political life, human life, animal life – any indicia, elements, cast-offs, or environments in or through which life is available for study. This lack of discrimination, or possibly, this *impossibility* of discrimination, between the various forms, functions, and meanings of life, displays a central problematic of modernity.[244] How to assess the value or the meaning of (the objects in) these definitions?

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[243] Cf. Prott and O'Keefe, *Law and the Cultural Heritage* , p. 7.

[244] For example, Giorgio Agamben writes: "Almost twenty years before *The History of Sexuality*, Hannah Arendt had already analyzed the process that brings *homo laborans* – and, with it, biological life as such – gradually to occupy the very center of the political scene of modernity". Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life*, (Stanford: Stanford University Press, 1998), p. 3. (Translated by Daniel Heller-Roazen)

Giorgio Agamben[245] writes that the "idea of life"[246] is ungoverned in modernity. The lack of discrimination in definitions of cultural property may show these definitions to be one of the dimensions in which

> there will be little sense in distinguishing between organic life and animal life or even between biological life and contemplative life and between bare life and the life of the mind.[247]

The problem with contemplating "bare life", or life *qua* life, unmediated by knowledge of anything other than itself, is that thought requires an external correlate in order to avoid freeing "itself of all cognition and intentionality".[248] For Agamben, the task then is to think the necessary correlate. There must be a system of thought that stands outside of "life" and yet which does not fall into the trap of metaphysics. Without such a conceptual or philosophical system, knowledge – about life or anything else – is meaningless.

In cultural property analysis, the reference for the study of "life" is "culture", while "culture" requires the evidence and artifacts of "life". The danger is that this system leads to a meaningless proliferation of artifacts. If culture cannot stand outside life, then Agamben's concern also applies to the aim of much cultural property legislation: why bother to collect this sort of knowledge, as "[w]hat is the nature of a knowledge that has as its correlate no longer the opening to a world and to truth, but only life and its errancy?"[249] In order to consider whether the knowledge being sought has an external correlate, the analysis turns to the second question asked above. What is the relationship between "culture" and "knowledge"?

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[245] Agamben's work cannot be addressed here on its own terms, as it is too vast for the argument made in this Chapter. However, the correspondance between "bare life" and the (possibly uncritical) valorization of the "life" protected by cultural property legislation is remarkable, and serves to confirm that the issues raised in cultural property theory (legal and otherwise) are firmly rooted in the problematics of knowledge and reason in modernity more generally.

[246] Giorgio Agamben, *Potentialities: Collected Essays in Philosophy* (Stanford: Stanford University Press,1999), p. 220. (Translated by Daniel Heller-Roazen)

[247] Ibid. p. 239.

[248] Idem

[249] Ibid. p. 221.

Culture/knowledge

The emphasis on knowledge is intimately connected with the definition of "culture" in modernity. "Culture" has many meanings, particularly in attempts to define "cultural property". However, a very common definition of "culture" is the intended transmission and reception of knowledge. As such, culture is fundamentally a relational concept. It inhabits (and defines) interstitial space. Thus in this realm, culture is the medium for the transmission of knowledge between people, between institutions, between people and institutions, between objects and viewers, between knowledge itself and its interpreters. For the purposes of this Chapter, the last pairing is the most important. The (space of) culture can be understood (at least in part) as the (space defined by the) relationship between "knowledge" and "the self" as knower. The significance of these cross-definitions is to suggest that the space opened by the notion of cultural property – the nexus of culture and property[250] – is a space mediated through the self and self-knowledge.

Arguably, at the center of the complex of the will to self/knowledge that informs cultural property analysis is the problem that Friedrich Nietzsche places at the beginning of *On the Genealogy of Morality*:

> We are unknown to ourselves, we knowers, we ourselves, to ourselves, and there is a good reason for this. ..[*O*]*ur* treasure is where the hives of our knowledge are. As born winged-insects and intellectual honey-gatherers we are constantly making for them, concerned at heart with only one thing – to "bring something home". As far as the rest of life is concerned, the so-called "experiences", – who of us ever has enough seriousness for them? or enough time? ...We remain strange to ourselves out of necessity, we do not understand ourselves, we *must* confusedly mistake who we are, the motto

[250] The topography of the space of culture/knowledge in cultural property discourse includes an essentially propertized or commodified notion of knowledge as a transmissible good within it. Although this is not the main thrust of this Chapter, it is worth emphasizing that "knowledge" is "property" within culture. "Knowledge" is also "culture" within property.

> "everyone is furthest from himself" applies to us for ever, -- we are not "knowers" when it comes to ourselves...[251]

Nietzsche argues that modern human nature is to set out to know everything, and in particular ourselves. However, the ground(s), the very endeavour, of our knowing is flawed. Instead of deriving self-knowledge through experiencing our own, individual lives, the space of knowledge is extra-life. Yet this does not mean that this space (which is culture, in the present argument) can function as a true source for meaningful knowledge about "life". The "hive" consists of and contains the ascetic disciplines, as well as the objects of those disciplines. Although the products of asceticism are what we (erroneously) look to when we seek to know ourselves, the "hive" is where both the inside and the outside worlds are transformed, via "knowledge", into "honey" for what is inevitably our *not-self-knowing*. Nietzsche's point mirrors Agamben's: the rationalistic pursuit of knowledge will not lead to understanding "life" any more than the pursuit of "life" can be depended upon to generate knowledge.

The question is then, "why not"? Discussing Nietzsche's [link] between human experiences and the transmission of culture, Pierre Klossowski writes that:

> Culture (the sum total of knowledge) – that is, the intention to teach and learn – is the obverse of the soul's tonality, its intensity, which can be neither taught nor learnt. The more culture accumulates, however, the more it becomes enslaved to itself – and the more its obverse, the *mute intensity* of the tonality of the soul, grows.[252]

Culture and "the soul's tonality" are experientially opposed to each other in human life. Entering into the culture/knowledge system has the effect of silencing the expression of "the so-called 'experiences'" which in fact define each human life. In this space, the knowledge that is created and privileged by culture – by transmission

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[251] Nietzsche, *On the Genealogy of Morality*, p. 3.
[252] Pierre Klossowski, *Nietzsche and the Vicious Circle* (London: The Athlone Press, 1997) p. xix.

and intentionality – is negatively linked to what gives it meaning. Both the transmissive, acquisitive act of culture, and the accumulation that results, are part of a vicious circle of sorts, through which the "work" of culture and the "intensity" of the soul become increasingly separate.

In this construction, embedded in this notion of culture, is a conflict with the knowing self. What begins as an act of expression (or engagement with the world) becomes an experience of muteness (or distance). The intentionality that permeates "culture" results, however unintentionally, in silence. There is resistance to the *experience* of thought,[253] as there is a separation between thought and (true) experience. The knowledge that arises, therefore, is specious or damaging. "Culture" is the transmission of this kind of damaging knowledge. The human (or "life") experience that does not find expression in the culture/knowledge system is silenced, even as it gives rise to the intention to transmit knowledge (and thus to the activities and "goods" that define this system). Culture implicates knowledge and the self in conflicting sources and degrees of intensity.

This problematic link between culture/knowledge and self/knowledge, and the inversion of the direction of intentionality in this field (from looking outwards to looking inwards) sheds light on the field of cultural property. When thinking about how cultural property is defined, or even when thinking about the objects themselves, the same complex is visible. "Cultural property" consists of objects and practices or traditions that seem to guarantee or underwrite some profound knowledge of (human) history and experience. In cultural property disputes, the relationship with the pieces of cultural property is invested with the "intensity" that Klossowski finds in (the Nietzschean definition of) "culture". The experience of this intensity, or what Klossowski would call the "tonality" or "mood" of the parties, generates perceptions

[253] In Klossowski's description of Nietzsche's analysis of knowledge/culture, he is clear that Nietzsche's thought is partially an experience of delirium. This must be acknowledged as informing not only his life but, substantively, his work. The concept of the "resistance" to thought exists against this background.

of reality that often exceed rational understandings of time and selfhood.[254] Similarly, the claims made for/about ownership of the ancient object at issue telescope ideas of eternal identity and vast spans of time into present, human existence.[255] The result is that "culture" is read through "property" – things or non-things – to derive an (often or necessarily) irrational "knowledge" of the self.

The objects or practices themselves embody this conflict. As expressions of the struggle for self-knowledge in an environment that is (paradoxically) hostile to expression, they can be defined by looking to the fault-lines they embody. Arguably, cultural property analysis depends upon preserving knowledge itself, via preserving "things" (tangible or intangible) that are only valuable insofar as they provide foundations for knowing the roots of the (cultural) self. From this perspective, cultural property is a term that can include almost any sort of thing, including things not-yet-known or not-yet-recognized as culturally valuable, and most commentators agree that legislation protecting cultural property recognizes this essential fluidity. Thus, these definitions turn on a space or gap – something indescribable or indefinable – and the value of, or protection of human knowledge.

However, the knowledge that is derived via the route of acquiring or studying cultural property will never be enough to satisfy its "seekers". Fundamentally, it cannot meet the intensity or "truth" of the experience that is generated by, or packed into, the object or practice. No object can serve as the external point of "truth" that must exist in order to anchor the culture/knowledge complex, as no object can entirely stand outside of this complex and thus guarantee its accuracy. Simultaneously, there is an error in the methodology, the ascetic "bring[ing] something home" that Nietzsche discusses. The object/practice at issue cannot contain the knowledge sought; it is the space and the direction of the (desired) knowing that the cultural property opens up and represents that must be liberated in

[254] Cf. Klossowski generally, Ch. 3: "The Experience of the Eternal Return" in *Nietzsche and the Vicious Circle.*

[255] For example, the claims of a modern people to an ancient artifact require establishing continuities of identity with the original owners/makers of that artifact.

order to understand cultural property disputes.[256] The para-rational investment in the object must be reconciled, within the language of the definition of cultural property, with the imperative of modern culture.[257]

If one looks at the problematics at the core of cultural property (definitions and objects) in this manner, it becomes clear that the essential element of anything that may be defined as "cultural property" is that it must act as some sort of truth-claim or guarantee regarding the origin, existence, or meaning of the knowledge that underlies culture. The core of all cultural property (definitions and objects) is the valorization and fulfillment of this particular function. Therefore, the interpretation that is used to equate object and function is also at the core of all cultural property analysis. What sort of interpretation is required?

Aphorisms and interpretations

The link between self and knowledge, or the central figure in the construct of self/knowledge, is the piece of cultural property. As such, it *must* function as an aphorism, and furthermore, given the value of "culture" embedded within the concept of "cultural property", it must function as a *Nietzschean* aphorism. The object of cultural property, the definitions of cultural property, and the Nietzschean aphorism merge here. As aphorism, the cultural property functions as a puzzle, creating as well as accessing a/the place of *interpretation*, which is an interpretation in itself. The interpretive requirements for correctly "decoding" a piece of cultural property and a Nietzschean aphorism are the same, and implicate the same themes: the externality (asceticism) of "truth" and the aggression of "wisdom".

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[256] Certainly, knowledge about "the past" or "history" cannot ever be guaranteed as accurate. The idea of conflating artifact and meaning, or object and knowledge, erases, in this context, the necessary act of interpretation, and instead attempts to give the impression that the object is somehow enough on its own.

[257] This imperative is to generalize thought, to create abstract (and selfless) teaching and learning about knowledge. As the cultural imperative follows Nietzsche's ascetic ideal, the discussion of the split between culture/knowledge/self is best understood with reference to the Third Essay in Nietzsche, *On the Genealogy of Morality.*

At first impression, aphorisms may appear as wholly irrelevant to cultural property. Each definition of cultural property is so riddled with gaps and with allusions to past and future, that both the field and the objects within it cannot be defined "once and for all". In contrast, "an aphorism...is, an expression or saying which absolutely closes its borders to everything inessential and admits only what is essential".[258] Unlike definitions of cultural property, aphorisms are essentially concise: "(1) A 'definition' or concise statement of a principle in any science.... (2) Any principle or precept expressed in few words; a short pithy sentence containing a truth of general import; a maxim".[259]

Given the situation of inherent indeterminacy and flux in definitions of cultural property, it may seem strange to suggest that the form of interpretation required by Nietzschean aphorisms is the same as that embodied in definitions of cultural property.

Looking more closely, however, "aphorism" comes from the Ancient Greek, *aphorismos*, where it meant, primarily, to mark off by boundaries rather than to categorically define.[260] Aphorisms operate to demarcate space. In this sense, aphorisms are (very like) cultural property. As already discussed, a piece of cultural property is marked off from other things of equal age or origin; it is also a relationship, narrative, or practice marked off from other relationships, narratives or practices. In the didactic realms (teaching, memory, rhetoric), aphorisms represent locations of information. This dual nature (both boundaries and spaces) means that

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[258] Martin Heidegger, *Nietzsche* (Sydney: HarperCollins Australia, 1990), p. 11. (Vols.I and II) (Translated by David Farrell Krell)

[259] The *Oxford English Dictionary,* 1989.

[260] Aphorism is the combination of the prefix "*ap-*" (softened into "*aph-*" through its placement) and the root "*orizo*", the same root as in "*orizontas*", or horizon. Thus "*aphorizo*" means to mark off by boundaries, and "*ousia aphorismeni*" means property marked off by boundary pillars. In this sense, *aphorizo* means either to mark off for oneself or to border on. The second and third meanings are to determine or define, as in "*chronos aphorismenos*", a determinate time; or to separate, distinguish, or exclude, as in "*episteme aphorismeni*". It also means to bring to an end or to finish, to grant as a special gift. Finally, it means to banish. Liddell and Scott, *Greek-English Lexicon* (1940). In modern Greek (*Greek-English Dictionary*, Kyriakides, 1909), *aphorismos, -ou*, means excommunication primarily, but also an aphorism or maxim. The use of aphorisms originated with Hippocrates, who used them as mnemonic devices to transmit medical information to his students.

they both create and serve as access to the realm(s) that they demarcate. Again, cultural property also serves these functions.

There are two "psychologies" for aphorisms that have relevance to cultural property analysis. First, as metaphors, they embody a particular rhetorical space, in which the subject and the object of knowledge merge.

> The psychology of the metaphorical address...is that the audience will itself supply the connection withheld by the metaphor, so that the rhetorician opens a kind of gap with intention that the logical energies of his audience will arc it, with the consequence that having participated in the progression of the argument, that audience convinces itself.[261]

The entry into the realm of the object is one of the desired effects of cultural property discourse, and thus one of the reasons that cultural property legislation exists.[262] The gap at the center of definitions of cultural property may well serve as a locus for the willful appropriation of objects and the knowledge that underwrites their value.

Second, both objects and definitions delimit the realm of knowledge to do with information about humanity that might otherwise be lost. Therefore, cultural property seeks to ensure *memory*, another function of the Nietzschean aphorism:

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[261] Arthur C. Danto, "Some Remarks on the Genealogy of Morals", in Richard Schacht ed., *Nietzsche, Genealogy, Morality: Essays on Nietzsche's Genealogy of Morality,* (Berkeley, Los Angeles, London: University of California Press, 1994), pp. 35-48, p. 38.

[262] Within the context of cultural property law and disputes, this nexus of life and knowledge provides an explanation for the root of the disagreement, encoded within different pieces of legislation, about whether cultural nationalism or cultural internationalism should be the guiding approach to the allotment of cultural property. Knowledge of "life" continues to be the "object" of cultural property instruments, but it is knowledge *already possessed* rather than knowledge which is *missing or lost* that is at issue. In cultural nationalism, the underlying relationship to (the value of) knowledge is one of having rather than needing. All that is needed is the object that *expresses* the knowledge. In cultural internationalism, the object underwrites knowledge that might otherwise be "lost" or withheld, knowledge that is directly relevant to the past/future of "all mankind" or to human beings in an evolutionary sense. For example, The Hague Convention takes the position that cultural property belongs to "all mankind", whereas the 1970 UNESCO Convention instead validates specific national claims to cultural property. The conflict between general and specific owners has been extensively addressed in the commentaries on ownership in this realm, cf. John Henry Merryman, "The Public Interest in Cultural Property", 77 *California Law Review* 339 (1989).

> There is another but comparable psychology for the aphorism, namely that once heard it is unlikely to pass from recollection, so its pointed terseness is a means to ensoul the message it carries, and to counteract the predictable deteriorations of memory.[263]

The constitution of the definition may thus serve as both the constitution of the self-knowledge that it seeks to appropriate, and the guarantee of this knowledge. Entering into the world of the object, and appropriating that world as an act of memory, is perfectly possible (indeed unavoidable) within the aphoristic form.

Therefore, upon further reflection, the gaps and allusions discussed above, the pitted surface of the definition (and often of the object) may themselves be the essential demarcation of boundaries. If that which marks an object or practice as a piece of cultural property is a space, an inadequacy in rational description, then the inadequacy of the definition may be "proof" of the relevance of the aphoristic form. Moreover, if within the space of cultural property one finds the topography of the will to self/knowledge, than the similarity or usefulness of the Nietzschean aphorism becomes even more striking. The meaning of any aphorism requires interpretation, and central to the interpretation is a relationship of radical discontinuity between outside and inside, culture and self, knowledge and its transmission.[264] This form of interpretation requires unearthing and/or contributing the long narrative sentences that underlie the brief fragments of definitions and objects both. The surface of the piece is a lure rather than an answer to the question that it sets. The object presents putative or assumed linkages between origin, truth, and wisdom, which are then decoded or interpreted by the vast army of commentators, lawyers, and scholars that address it.

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[263] Danto, "Some Remarks on the Genealogy of Morals", p. 38.

[264] "[The] high Nietzschean tonalities found their immediate expression in the aphoristic form: even there, the recourse to the code of everyday signs is presented as an exercise in continually maintaining oneself in a discontinuity with respect to everyday continuity". Klossowski, "The Experience of the Eternal Return" in *Nietzsche and the Vicious Circle*, p. 65

Interpretations and battles: truth and wisdom

What then is truth?...A mobile army of metaphors, metonymies, anthropomorphisms, a sum, in short, of human relationships which, rhetorically and poetically intensified, ornamented and transfigured, come to be thought of, after long usage by a people, as fixed, binding, and canonical.[265]

(Friedrich Nietzsche)

Objects that are "cultural property" must serve as guarantees for culture, and the relationship with culture/knowledge, that the legislative documents encode. As such, they must stand outside the life/culture/knowledge complex if they are to succeed. The first question is, therefore, how, if at all, can these objects be made to function as a source of non-relativistic "truth"? The second question is, what possible relationship can there be between the object/definition and the interpreter (the judge, lawyer, curator, etc.) such as to guarantee the production of this "truth".

The truth-claims made in a Nietzschean aphorism – and in this aphorism in particular – are similar to the truth-claims made by/in a piece of cultural property. Truth is "...traditionally associated with the adequation of a proposition and a thing".[266] Although lawyers or legislators are not philosophers, the substance of cultural property definitions requires them to make assessments of truth-claims in this essentially conflictual realm.[267] To base legal categorization of a thing on claims made about the truth that it embodies[268] is to contemplate the possible correspondences between (the value of) knowledge and (the value of) things. The

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[265] Nietzsche, quoted in "Genealogies and Subversions" by Alasdair MacIntyre, in Richard Schacht ed., *Nietzsche, Genealogy, Morality: Essays on Nietzsche's Genealogy of Morality*, (Berkeley, Los Angeles, London: University of California Press, 1994), pp. 284-305.

[266] Marc Shell (1993), *Money, Language, and Thought*, Ch. 6 "What Is Truth? Lessing's Numismatics and Heidegger's Alchemy", p. 156 (paraphrasing Heidegger).

[267] Cultural property instruments arose out of experiences of conflict. War, loss, and theft gave rise to the imperative to preserve certain kinds of things. Yet, as the classes of things to be preserved have multiplied, the protective imperative has become generalized to a point where the question arises regarding the nature of the danger. At stake seems to be not just physical damage and appropriation, but intellectual/cultural damage and appropriation as well.

value of the object is that it guarantees connection and correspondence with a world outside "bare life" or mere proliferation; thus, it provides *true* knowledge of what "we" (human beings or a specific people) are. In this sense, the object itself opens – or embodies – the space of this "truth".

This space is fundamentally contested. To engage with the law regarding cultural property means entering modernity, a realm of forces and strategies that center on the acquisition and deployment of the power to know. In order to make this argument, and to address the issues that arise, the following analysis relies heavily, if not exclusively, on Alasdair MacIntyre's discussion of the aphorism above.[269] MacIntyre assesses the truth claims made in this aphorism *qua* "truth" from a methodological perspective. As such, his analysis is very important to the question of interpretation raised here. Can aphorisms (and their cognates in this Chapter: objects of cultural property and the definitions in cultural property instruments) be interpreted so as to guarantee the "truth" that they are being used to represent? MacIntyre's analysis of the claims made by Nietzsche in this aphorism is both an exposition of the techniques by which aphorisms can be interpreted, and a substantive examination of the "battlefield" on which the "army" fights. The battlefield, says MacIntyre, is that of reason. Discussing the nature of the battle and the various positions and strategies that may be assumed within it, MacIntyre asks whether, to enter this battle, one has to be an encyclopedist or a genealogist? Has Nietzsche evaded the position of the nineteenth-century disseminator of knowledge, the "encyclopedist"/lecturer by becoming a genealogist? Is there an object to be known, or does the act of speaking knowledge constitute the object and the knower both in a field of (ongoing) conflict?

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[268] One could say that the truth that a piece of cultural property presents is that of its origin or of its history, but in cultural property law, the emphasis on life means that the claims center on the truth of its being *as* truth.

[269] Although MacIntyre is not primarily a Nietzsche scholar, his subject in this essay is also a meditation on Nietzsche's claims regarding truth and (the transmission of) knowledge.

The question appears, on the surface, to be one of authority, complicated by the modern confusion as to genre.[270] Can Nietzsche speak about the truth from a valid position of authority?[271] Nietzsche scholars have extensively theorized the problem of interpretation as regards Nietzsche's truth-claims and the link between the will to power and knowledge.[272] Certainly, in the contemporary university, neither the dissemination nor the reception of knowledge can guarantee "truth". Indeed, culture in modernity (as defined above) must be understood as conflict:

> in our situation of radical disagreements a lecture can only be an episode in a narrative of conflicts; sometimes it may be a moment of truce or negotiation between contending parties, or even a report from the sidelines by a necessarily less than innocent bystander, but nonetheless it is always a moment of engagement in conflict.[273]

Given this landscape, can there be any guarantee or evidence of "truth" that can serve as the foundation for culture/knowledge?

The importance of this aphorism depends upon the cross-definition or cross-reliance of its "truth" and of its "aphoristic nature". If untrue, it fails as an aphorism, and vice-versa. Does this aphorism merely serve as a shifting of the ground for the

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[270] Tracing the genre of the lecture from the Middle Ages, MacIntyre points out that the medieval lecture took the *texts* as authoritative, rather than the speaker. Truth and rationality were independent of each other, and could be cross-referenced for validity. In the late nineteenth century, truth and rationality – lecture and lecturer – folded into each other. The authority was vested in both, acting as one. The lecturer vouched for the truth of the lecture. It is this structure that Nietzsche's aphorism was meant to address. The question remains regarding whether Nietzsche escapes the position of authority that he sought to discredit. Although Nietzsche's aphorism is both a harbinger and a definition of the genealogy of knowledge in modernity, the question that Nietzsche scholars ask is whether Nietzsche necessarily took on the authority of the nineteenth-century lecturer to make this statement, and if so, what effect that position would (or does) have on the substantive claim being made. This question cannot be addressed in this Chapter, but it is important to note that Nietzsche's position (both inside and outside the culture/knowledge system) is an expression of a relationship to the culture/knowledge complex that many "experts" must necessarily share.

[271] *See* MacIntyre, "Genealogies and Subversions" pp. 287-9 for MacIntyre's summary of the ongoing debate regarding the philosophical validity of Nietzsche's truth-claims.

[272] In whole, this is an enormous field, and is too big a topic to be included *per se* in this Chapter. Please see: Werner Hamacher, "The Promise of Interpretation: Reflections on the Hermeneutical Imperative in Kant and Nietzsche", in Laurence A. Rickels ed., *Looking After Nietzsche* (Albany: State University of New York Press, 1990).

[273] MacIntyre, "Genealogies and Subversions", p. 285.

transmission of knowledge, or does it succeed in giving a solid definition of truth? The statement that Nietzsche makes about the truth – that there is no truth "as such", thus that all truth is perspectival – is a statement that seems to make an universal, non-perspectival claim.[274] The claim is that there is no truth "as such" because there is no one world to which the truth "as such" could attach. The corollary of this argument, which is also another objection to Nietzsche's framing of "the truth", is that the very denial that there is "...one world, 'the world', beyond and sustaining all perspectives, may itself perhaps seem to have an ontological, nonperspectival import and status".[275] Is his aphorism substantively false, therefore? More importantly, does the aphoristic technique rely on the acceptance of a particular metaphysical or ontological set of assumptions, which themselves stand outside of the knowledge (and thus the culture) industry? The question is relevant to the issue in this Chapter, as cultural property serves as guarantees for this industry. Do the objects themselves encode transcendent principles, or do they open up the contested, embattled space that Nietzsche and MacIntyre describe?

This problem is exacerbated by Nietzsche's statements regarding interpretation. The relation that any interpreter has to any text is ultimately individual, therefore,

> it is not just that all interpretation is creative, but also that all commentary is interpretation; Nietzsche held of utterances what he held of things: "That things possess a constitution in themselves quite apart from interpretation and subjectively is a quite idle hypothesis".[276]

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[274] In this sense, it is vulnerable to the same sorts of questions and critiques as the question of "authority" briefly addressed above. For example, if Nietzsche excepts himself from the position of a contestant for the truth, and instead takes the position of truth-giver, then not only does he challenge his position as an "outsider" to the academy of his time, but he also challenges the statement he is making about the genealogy of truth, and the definition he gives of his philosophical endeavour more generally. As MacIntyre writes, "If this is so, Nietzsche thus understood will have been restored to conventional academic philosophy, an apparent radical at one level but not at all so at another". (MacIntyre, "Genealogies and Subversions", p. 288)

[275] Idem

[276] Idem

Metaphor rules the endeavour of interpretation, and thus of the constitution of things.[277] MacIntyre argues that to attempt to shift metaphors into other conceptual modes, especially that of ontology is to make a (possibly deliberate) mistake.[278] If this attempted shift is deliberate, then it is a strategy, "some more-or-less successful attempt to preempt the possibility of rival interpretations".[279] The result is to put Nietzsche himself in a problematic position (a professorial or professional position) opposite his own utterances. Genres in which truth is found within metaphors lend themselves only reluctantly to genres in which authoritative statements are made. In addition, Nietzsche's definition of truth and the subsequent critiques of this definition[280] also result in the problematizing of any other commentator's truth-claims, whether these claims are lodged in a text or are about an object, or both.

The solution is to take the aphoristic form seriously, and to look at the operation of interpretation in the Nietzschean aphorism. If the academic form of utterance is negative, repressed, and repressive:

> By contrast the Nietzschean aphorism is active, a place and a play of contrary forces, the medium through which a current of energy passes. "An aphorism," Deleuze has said, "is an amalgam of forces that are always held apart from each other". It is in uttering and responding to aphorisms that we outwit the reactive, academic mode.[281]

The marking-off or boundary functions of the aphorism are visible in this definition. An aphorism keeps things separate as a *means* of defining them, rather than *because* they are *necessarily* different. Thus for MacIntyre (as well as for Danto), aphorisms are the medium for speaking anticonsequentialist truth. The relationship between the

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[277] "For metaphors are the currency of interpretation just as they are of the texts interpreted". Idem.
[278] Aphorisms are metaphors, but if Nietzsche's aphorisms are authoritarian statements of non-contingent metaphysical or ontological "reality", then they are shifted into "other conceptual modes". At this point, the aphorism would be merely a standard didactic technique, and not a way of transmitting a genuinely new perspective on/as knowledge.
[279] MacIntyre, "Genealogies and Subversions", p. 289.
[280] From within the philosophical academy, mostly. *See*, generally, *The Philosophical Forum*, No. 4, December 1999, and *The Continental Philosophy Review*, Vol. 32, No. 4, October 1999.
[281] MacIntyre, "Genealogies and Subversions", p. 290.

knower and what is known is of prime importance.[282] The scholar or commentator who relies on non-aphoristic, objective or non-specific perspectives when thinking about thinking becomes trapped in dialectical reasoning, which is in turn a short step from *ressentiment.*[283] Reasoning must be an activity in the arena of other activities, and not a retreat into the safety of a predetermined authority.

Reasoning requires a reasoning subject, in relation to a text, an object, or another subject.[284] Is the genealogist (the heir to the Nietzschean approach to knowledge) "fixed" in stance or in identity at that moment of (his or her) publication? Is the reader? They meet in a "now" which is a shared, and timeless, time.[285] This relationship anchors the world. As such, it does not escape the metaphysics that the genealogist has *necessarily* rejected, but it remains pegged to immediate, personal, shifting experience. The egos of writer and reader are (at least) momentarily fixed, and the shared vision, therefore, must also have (at least) a moment of fixity. The world exists,[286] there is "one world" if only for a moment, for two people, one wearing the mask of the "author" and the other also disingenuously and strategically[287] reading. In this moment, all the distinctions collapse, genealogist becomes encyclopedist, viewer becomes maker, writer becomes reader and vice-versa.

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[282] MacIntyre argues that Nietzsche's aim was to combat the deformation that modern morality caused, which made the specific task of the genealogist to trace the development and workings of *ressentiment.*

[283] "For Nietzsche all theorizing, all making of claims occurs in the context of activity....So it is not by reasoning that at a fundamental level anyone moves from one point of view to another. To believe that reasoning can be thus effective is to express allegiance to that dialectic of which Socrates was the initiator, and in so doing to reaffirm one's inability to escape from the inhibiting and repressing reactive formation which the repressive and reactive habits of activity exhibited in dialectical reasoning bind its adherents". MacIntyre, "Genealogies and Subversions", p. 292.

[284] As MacIntyre asks, "the genealogist who has put the academic stance in question by writing and publishing his or her book is addressing whom?" MacIntyre, "Genealogies and Subversions", p. 295

[285] "This appeal to impersonal, timeless standards, so often taken for granted in the post-Enlightenment world by those who take themselves to have rejected metaphysics, is itself only to be understood adequately as a piece of metaphysics. The possibility of such an appeal is inseparable from the possibility of that atemporal "now" at which writer and reader encounter each other, that "now" at which both can appeal away from themselves and the particularity of their own claims to *what is* timelessly, logically, ontologically, and evaluatively, and is only thereby and therefore the property of neither writer nor reader". Idem.

[286] Here is the sting in MacIntyre's tail: his careful and thoughtful, indeed approving, analysis of "genealogy" leads to *metaphysics.*

The aphorism invites the writer and reader into a world of engagement, in which truth can erupt or be agreed upon, not into a world of "truth" *per se*. The object of cultural property, as aphorism, as a set of boundaries, does the same. It cannot guarantee the "truth" that its definition as "cultural" property is seeking. The drive to know the truth about an object, according to Nietzsche, is "evidence of a culture in which lack of self-knowledge has been systematically institutionalized". This comports with the foregoing analysis of the value of "life" in cultural property instruments. Basing law on the "truth" of an object, as cultural property instruments do, is a business which requires infinite flexibility if it is not to lead to cumulative and genuinely harmful ignorance. Any *one* conception of truth, or conception of the rationality that leads to the truth, will land the commentator in the position of the nineteenth-century lecturer that MacIntyre discusses, a position that is both personally and professionally compromised.[288] In nineteenth -century academic scholarship, the truth of bad morality would have appeared "both incredible and offensive".[289] In twentieth- and twenty-first-century academic scholarship, when Nietzschean analyses and the rise of the genealogist are commonplaces, the truth underlying an object, a conflict, an investment or an understanding may still appear "incredible and offensive".[290] Certainly, this analysis leaves the commentator who might want to think in or through the cultural property complex with difficult questions. If the object does not guarantee truth, then why protect it? Alternatively, in order for the object to guarantee truth, what moment of meeting must occur between the object and its interpreter?

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[287] Cf. Michel de Certeau, *The Practice of Everyday Life* (Berkeley and London: University of California Press, 1984).

[288] Bad morality "assumes many different forms, among them those of nineteenth-century academic scholarship" (MacIntyre, "Genealogies and Subversions", p. 291). Furthermore, if one is a member of the professoriate, then one is by definition a person deformed by the will to power through the process of cultural/knowledge transmission. It is particularly through taking on the authority to speak/know that one runs the risk of institutionalizing ignorance, and doing harm thereby. MacIntyre points out that Nietzsche removed himself from this position, commenting that it is not possible to live for truth in the university. MacIntyre, "Genealogies and Subversions", p. 287.

[289] MacIntyre, "Genealogies and Subversions", p. 292.

[290] *See*, for example, the debate between Martin Bernal and Mary Lefkowitz regarding the roots of Greek philosophy, fought out most recently in Lefkowitz, *Not out of Africa*, and Bernal, *Black Athena Writes Back*.

"Warriors"

Unconcerned, mocking, violent – thus wisdom wants us: She is a woman and always loves only a warrior.

(Friedrich Nietzsche)

The following analysis relies heavily on the work of Arthur Danto's commentary on the above aphorism, as Danto addresses the problem raised in the preceding section of the analysis. What does it mean to be a "genealogist", which is the posture of the interpreter or commentator on cultural property? Danto makes the claim that the Third Essay of *On the Genealogy of Morals*, which is concerned with the acquisition and transmission of knowledge, is a gloss on this aphorism regarding wisdom.[291] Reading the aphorism against this section of the *Genealogy*, he concludes that the aphorism means that the doing of knowing generates the *self* that knows as well as the *object* that is known. Thus, the doing is all.

> What sort of warrior is unconcerned? One...for whom the means is an end, for whom warmaking is not so much what you do but what you are, so that it is not a matter of warring for but as an end. There is, he [Nietzsche] tells us in the first essay [of *On the Genealogy of Morality*], "no 'being' behind doing...'the doer' is merely a fiction added to the deed".[292]

This is the truth of the warrior beloved by wisdom. The violence and mockery required, the unconcern, are "not instrumental but the moral essence of the warrior...".[293] There is no gap between being and doing, which might mean, under different circumstances, that there is no gap for (self-reflexive) thought.

However, the work of the *Genealogy* is a work *about* thought and its effects. Like MacIntyre, Danto acknowledges that Nietzsche's use of essay form raises

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[291] Danto, "Genealogies and Subversions", p. 35.
[292] Idem

problematic questions about the substance of Nietzsche's argument.[294] The danger is that an essay on (even the effects of) thought automatically leads to the opposite of the "warrior", the ascetic, who is the (always unloved-by-wisdom) purveyor of bad conscience. Nietzsche must avoid the danger of occupying the ascetic position at all costs, as examining the value of values requires claiming a ground and maintaining a posture that allow for this kind of examination.[295] This requires, in turn, a position both inside and outside the endeavour, which means a position that both uses "reason" and retains its genealogy. The ascetic will always fail to recognize the foundations of his or her thought(s), precisely because he or she cannot examine their own investment in a particular outcome. The instrument of "life" (thought, philosophy) becomes turned toward an enactment of life-in-death (withdrawal, *ressentiment.*) By contrast, the warrior has no investment in any particular outcome. Thus, the warrior can be both inside and outside the battle for truth; to extend the image of the aphorism, the warrior must both desire wisdom and refuse to court "her". Danto argues that in this manner, the *Genealogy* escapes being a philosophical treatise, an ascetic exercise like any other.

Therefore, the aphorism buried at the heart of the *Genealogy* (and the position opposite "knowledge" that gives rise to Nietzsche's aphorisms generally) saves the book from asceticism. The purpose of this, or any Nietzschean aphorism is to effect a transformation in the reader.[296] The reader is not meant to become a philosopher (the ascetic trick), but to become *well*, to swallow the pill, the flaying-device of the

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[293] Idem

[294] Danto argues that Nietzsche's position vis-à-vis the *writing* of the *Genealogy* is complicated. "Someone who uses ascetic practices to kill asceticism is engaged in a very complex communication, supposing he is coherent at all, and he would be right that we are missing what is taking place when we merely *read the words*". Danto, "Genealogies and Subversions", p. 39.

[295] Nietzsche cannot afford the posture of "encyclopedist", cf. MacIntyre, *supra.*

[296] Danto argues that *ressentiment* is one of the roots of the conditions that the *Genealogy* is meant to cure. When one moralizes suffering, wrongly assigning responsibility within or to oneself (and thus making the suffering into deserved punishment), then one is in the realm of *ressentiment.* If one cannot distinguish between consequences and punishments, one makes category mistakes (with appalling results, i.e., religion). The two results of this wrong thinking are first, fundamental ignorance, and second, further suffering (of the kind that could be avoided). "[I]f there is any single moral/metaphysical teaching I would ascribe to him, it would be this: suffering really is meaningless, there is no point to it, and the amount of suffering caused by *giving* it a meaning chills the blood to contemplate". Danto, "Genealogies and Subversions", p. 45.

aphorism, and then to be healed from "interpretations of suffering which themselves generate suffering".[297] The aphorism is a medication- (if not health-) delivery device. The medication it delivers is the removal of meaning from anything other than what is.[298] This healing is a painful process, given the mocking, hurtful nature of the therapeutic device: "it is as though the entirety of the *Genealogy* is a cell of inflictions and instrument of asectic [sic] transformation and a very rough book".[299] This process subverts or undercuts both the traditional transmission and the traditional definition of "knowledge". Knowledge must be *self*-knowledge, and it can only occur through experience, defined and valorized as Klossowski suggests. The aphoristic form insists that the reader enter the aphorism, and that the aphorism enter the reader. The warrior – the producer of the aphorism – is unconcerned with "illness" in all its forms: *ressentiment*, nostalgia, asceticism, and the numerous ills of body and mind that that they produce. The end result of the warrior's battle is the process, the day-to-day experience, of *health*, which is *"life"*.

The question in the realm of cultural property is whether the interpreters[300] that engage in the task of "making" a mere artifact into "cultural property", do so from the (necessary) position of the *unconcerned* warrior. To be a warrior in this realm means to set about decoding the meaning of the object without expectations (either of what will be found or of what is there to be found). On the battlefield that is "truth", and that is the necessary referent of the "culture" in "cultural property", reasoning must be an activity without attachment if it is to be part of life. Freedom – or rather, infinite mobility – is the primary requirement for the warrior. In addition, can the aphoristic mandate – *life!* – be reconciled with the valorization of "life" in cultural property discourse?

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[297] Danto, "Genealogies and Subversions", p. 43.
[298] The root of human strength is in not internalizing – thus not anthropomorphizing – suffering. Danto, "Genealogies and Subversions", p. 46.
[299] Danto, "Genealogies and Subversions", p. 39.
[300] For example, a legislator or framer of legislation; a lawyer or advocate; a curator – all these roles or functions are interpretive roles.

Thus far, the answers to these questions are more negative than positive. The "life" at stake in definitions of cultural property is not the "life" that informs "culture". Nor do the framers of the instruments defining cultural property maintain the position of "warriors" on the battlefield of "truth". All too often, these definitions are purposive forays rather than the disengaged engagement needed for "wisdom". "As the function of cultural property is to anchor "truth" and "wisdom" for the purposes of "culture"" it would be easy to conclude at this point that the endeavour fails, as the definitions merely seek to affirm values that have already reified into a set of proprietary rights rather than accepting the notion that proprietary rights in this realm are essentially fluid. However, this conclusion is not dispositive of the bigger questions. *Must* the law defining cultural property shift, so as to reflect a set of positive answers to the questions above? Must the values of "life" and "culture" in "cultural property" shift from those that inform asceticism (descriptive, prescriptive, purpose-oriented) to those that inform the interpretation of aphorisms?

The necropolis

The purpose of each and every Convention or Treaty regulating cultural property is twofold: definition and preservation. How can or do we understand the increasing interest in or need for protection of each element or strand of "culture"? What is meant or made by the privileging of preservation over other means of assigning value to the object? As the work of the law in this area is to formulate objects to which notions of "cultural property" can attach, the fundamental conceptual structure on which this work relies is that which can sustain the reflexive, cyclical privileging of preservation *per se*. The movement of the legislative definitions of cultural property is from "objects" to "life", and from "knowledge" to preservation, reification, and security. There are two ways in which we can understand this. First, the attempt to define cultural property requires addressing the concept of "preservation". To question the meaning of "preservation" within this schema is to consider what the law protects *against*. It attempts to protect – paradoxically, as this is a hallmark of life – *permeability*. Second, preservation is the hallmark of the kind

of "culture" that reifies "life". It is the opposite of the aphoristic endeavour, and the opposite of the values that "cultural property" is meant to ensure.

Permeability or erasure is the third part of the life-preservation structure. The attempt to define cultural property, and to address the values that inhere within cultural property issues, requires thinking in terms of *life-preservation-loss*. The struggle to define "cultural property" and to determine appropriate protection for it in the twentieth century has arises from and is entwined with looting and theft of (primarily art) objects during war.[301] The value-laden approach to defining cultural property is thus not surprising. The space in which things are/can be valuable after the Second World War still begs definition. The extremes are the ineffable and the acquirable; the return to ("indigenous"?) notions of spiritual origin and the acceptance of a dollar-driven status identity. Legislation protecting cultural property continues to respond to the potential dangers to objects that arise during armed conflict. The most solid of objects are porous and permeable, in the view of this kind of legislation. The dangers are forces that can corrode or erase these objects as solid things: natural disasters, war, vandalism, and looting. Recent attempts to expand the definition of cultural property are attempts to extend the legal protections already in place for tangible objects in wartime to tangible and intangible objects threatened in other contexts and other types of conflict. Losses due to natural disaster or to theft during archaeological excavations, disappearance into the collections of private individuals, bad conservation or misidentification of provenance are all forms of erasure. The object is permeable to commerce and to forgetfulness regardless of whether it is a totem or a myth of origin, a sacred scroll or a language. Commentators disagree regarding which ending results in the most permanent loss – sale into a private collection, sale at all,[302] or decay. In the attempt to allot or determine "ownership" in this field, commentators fall back on the core self-justifying belief or principle in

[301] Cf. Generally, Ch. 1, "Plunder, Reparations and Destruction" in John Henry Merryman and Albert E. Elsen, eds, *Law, Ethics and the Visual Arts, 3rd ed.* (London, The Hague, Boston: Kluwer Law International, 1998).

[302] Even to a museum, as "sale" means "loss" to the rituals or *living* meanings of the culture from which the object came.

Western thought that the *true* owners of a culture are the people that *preserve* it.[303] In a landscape of assured loss, loss easily inverted into willing destruction, the highest expression of ownership rights now requires that the true owner desire the culture's (or object's) preservation above all.

The question of permeability again references the question of values, but the answer to that question is predetermined. If the value is preservation, or rather, if preservation defines the ground upon which all other conflicts may be played out, then to make a claim regarding cultural property, and to do so using the law, is already to exist in a state of bad consciousness. Arguably, a member of a living culture is less concerned with decay or destruction than the laws protecting cultural property and cultural heritage can allow. Arguably, also, the increasing cultural-propertization of so many objects and practices labels the present as a necropolis of culture. In Nietzschean terms, if the warrior can get lost in the battle – cease to exist – the ascetic, by way of contrast, usually gets lost in the necropolis. Outsiders value a culture in stasis; *participants* value something else. Thought that is not aphoristic belongs to the ascetic and characterizes the necropolis, because over time it enshrines or maintains *dead things*. By contrast, thought that retains its violence is the response to the kind of reason that leads to half-life, or to the particular death that is found in preservation. The warrior does not become an ascetic if thinking remains a form of making life, of waging war, in short, if the aphoristic form is used.

> [I]f one's writings are to be mocking and violent, hence meant to *hurt*, the aphorism is a natural, obvious form to use; for, piercing like a dart the defenses of reason, it lodges inextricably in the mind's flesh, where it sticks as a perpetual invasion: like a barbed arrow, it cannot be extricated without tearing its host.[304]

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[303] It may be worth noting that ownership may begin in "blood" or "history", but arguably it ends in appropriation. Indeed, one of the largest and most covert arguments in cultural property analysis is between passive and active ownership, that is, between ownership earned by identity and ownership earning identity. de Certeau, *The Practice of Everyday Life* on strategies and tactics is interesting here.
[304] Danto, "Genealogies and Subversions", p. 36.

The writer of the aphorism is the warrior; the reader is being attacked. The reader, and in this analysis, the viewer or curator of cultural property, colludes in the assault. Thought itself becomes necessarily painful, both in its generation and in its exercise; the warrior mocks those he holds up for admiration.[305]

Yet, the warrior would not hold up the "preservers" for admiration. The objects meant by definitions of cultural property are usually both things and attachments, both objects and the stories told about them. How do we know when we are in the realm of the necropolis? How can we tell the difference in value or attachment – assuming there is such a difference – between the action of excavating an artifact and that of storing it in a museum, from bringing a piece of knowledge "back to life" and then "preserving" it? Nothing is discarded in this process of increasingly complex definitions; rather the field becomes ever more cluttered. The value of these objects should be diluted by the constant expansion of the field, yet it is the value of the values expressed in the definition of cultural property that becomes faint or vague against the backdrop of a plethora of things. In a world of more and more preserved and "valuable" things, it is not clear any more *why* they are valuable. The value-generating and value-laden *preservation* of things and not-things becomes itself problematic in this realm. Preservers not only choose the ascetic path for themselves, they also remove any other choices from others. There is only one way to value culture; there is only one correct posture for experiencing "life".

As such, the law has to consider the function of making a cultural property claim in order to settle the conflicts that arise. The function includes generating the grounds of and for the conflict. Legal analysis of such claims must both address the claims made regarding the physical object and the claims made regarding the right to make claims. The question of whose "property" the object is includes both these components. The "truth" of the object as property of a particular people, or of all

[305] "[S]ince aphoristic form is prophylactic against forgetfulness, and since pain is the prime reenforcer of retention, aphorism and pain are internally related, and so this form spontaneously presents itself to a writer whose warrior violence must be turned against those he appears to admire: the healthy forgetters, the innocent brutes". Danto, "Genealogies and Subversions", p. 39.

mankind (the "life"-related value of the object), and the "truth" of who would be able to make this kind of determination (the knowledge-based authority or capacity of the identifier/claimant of the object), merges in the definition of a given object as "cultural property". In the next section, the question of ground is considered again, from the perspective of the second kind of truth-claim. Who can speak of or for the "truth" of the object? How must this speech be undertaken in order to keep the object in the realm of "life", if such an undertaking is possible at all?

Conclusion: The value of these values

The question of *why* the thrust of cultural property instruments is the protection of valuable (worth preserving, knowledge-based) access to "life" is answered: because knowledge about life is itself valuable. Thus, the objects that lead to such knowledge are worth preserving. The paradox is that the object(s) must be preserved, but the object(s) *per se* are not valuable. As the field of cultural property shifts its boundaries, precisely through new definitions of what may constitute cultural property, the objects included within it, or that go to constitute it, also shift. This approach to the question of definitions raises two other related questions that must be addressed in conclusion of this Chapter. First, is a "general definition" of cultural property either possible or necessary? The search for any definition, much less a definition that could include all kinds of claims regarding "cultural property", may be mistaken. Definitions announce, and also distinguish between what may enter the category, place or ground being identified, and what may not. Yet, lodged in each definition of cultural property is the notion (or myth) that it announces itself, presenting itself as a threshold and opening ground within itself that demands definitions from others hoping to enter into the realm proposed by the object. This leads to a second question. To what does the indeterminacy and flux within the notion of cultural property attach? Put differently, what is the substrate or fundamental concern that anchors the notion of "cultural property"?

One of the hallmarks of cultural property disputes is the idea that the things at issue are *always* valuable and *have always been* valuable. Some element(s) of the definition/object must be responsive to this argument. As these determinations cannot be made once and for all, or in advance, the ground opened by cultural property – definitions, objects, and law – is one of discontinuities in surface. The seemingly exhaustive legal definitions are the location of gaps, paradoxes, inconsistent values, sudden switches of focus. In effect, the definitions discussed above do not determine the meaning of "cultural property". Rather, they place the protected object in the position of a ladder or trellis, allowing the people claiming it to claim the ground from which it springs, and allowing that ground to support the claimants.[306] As a conceptual structure, "cultural property" (either the term or the specific object) is the combination of the law and the object. It inhabits a middle realm between ground and claimants, a realm in which the law and the thing(s) interweave. In this vision, cultural property is the structure that allows attachment to something other than the object itself.[307]

The "something other" is then what requires definition. The argument here is that the "something other" is a kind of space or ground itself; it is the place in which the arguments and battles regarding identity occur. It is the "common ground" claimed for or by knowledge and reason as transmissible goods, i.e., "culture". If the attempt to claim a constant ground for (necessarily) shifting identity is one element of what the attempt to claim cultural property is "about", then the question presented is *where*, in the world of modernity, can this claim be made. What sort of space or

[306] The Christian imagery is inescapable here. Exploring this imagery fully is beyond the scope of this Chapter, although obviously any discussion of the 'self' against the ground of "the law" must take on the question of Christianity. This is particularly true when working with the concept of the Nietzschean self, which is irradiated by the problem of selfhood in the context of Christianity. For an authoritative discussion of the relation between the notion of the Christian "self" and the legal ground from which that springs (and vice-versa), *see* Tim Murphy, "Law and Society: The Penetrative Scheme and the Juridical Soul" in *The Oldest Social Science? Configurations of Law and Modernity* (Oxford: Clarendon Press, 1997).

[307] The argument that the "ground" may be only, or even primarily, the concept of "land" that accompanies theories of nationhood or the self-determination of peoples is not addressed in this thesis. Certainly, cultural property disputes serve political functions and seek to anchor territorial claims. The strain of cultural property analysis that seeks to explain the desire for the object as a desire for the legitimation of, and entitlement to, a given political identity is extremely valuable.

ground is necessary? *The object of cultural property creates the necessary space, but it is not defined by it.* The "cultural property" opens up this space within itself. It is a space of constant conflict, requiring a particular posture from the actors who attempt to navigate it.

There are two hallmarks of cultural property that come out of this analysis. First, when one looks at the debates that arise out of the claim of ownership of a piece of "cultural property", it is obvious that an object that is cultural property differs from other objects in its *function*, not in its age or source. The question regarding the function of cultural property goes to the question of "essence" or "value", as do the preceding indicia. Some preliminary suggestions as to the function of cultural property would include: a mirror, a hammer, a scalpel, a means of differentiating past and future from present, a theft (from rightful owners and from thieves both), and a porous shell. Like any object, an object defined as "cultural property" can be redefined, misdefined, or forgotten. The definition attaches great value to the object, at least for the particular moment in which a culture claims the object as its property. Simultaneously, the language of this definition is predicated on the argument (if not belief) that the moment of the object is universal rather than particular. The momentariness of the definition is balanced by the eternality of the adjectives chosen. This is a realm of inversions and ironies, therefore, a place where utter certainties of description and substance (stone, bone, clay, etc.) expose uncertainties and conflicts.

Second, an object putatively becomes/can be recognized as cultural property, at least to the extent of being the foundation for a dispute regarding its ownership, when the object is equally valued *on the same ground(s)* – defined herein as *in the same place* – by two different groups or cultures. This is a logical impossibility in the realm of cultural property law, as it is implicit in the argument from origin, as the law understands it, that origin is a singular and specific locus/event. More generally, the dualities contemplated by academic scholarship, the "clash of values" and oppositional accounts of identity, forbid thinking of cultural property claims as occurring in any sense without "genuine" attachment, that is, without living links

between the object and the claimants. Nonetheless, when one looks at conflicts in this realm, one sees that the arguments are of ownership and generation or creation mixed. The skill to *know* the object, and the skill to *make* it, cross-fertilize each other in the minds of the contestants. Right beneath the surface lurks the structure of knowing/owning/making. Each of these three terms can pair with the others: knowing/making or knowing/owning are as accurate descriptions of this structure as owning/making. This structure accounts for the relevance of most hermeneutic schemes/schematics to the field of cultural property. To what extent interpretation is also "discovery" or "creation" is of immediate and obvious interest when looking at debates that arise in this field. In its essence, this is an argument about identity, in the modern sense (a ghost recognizing itself in, or taking over the gaze of a visitor to a museum), which attempts to flatten the modern conception of identity by referring to an absolute source of being that predates and survives this particular understanding of humanity at this time.

The making of the object through interpretation, however, is always, painfully, the second making. The origin eludes, as does the piece of cultural property itself.[308] No matter how permeable, these artifacts remain impervious to our eyes. In this case, however, it is not knowledge but *ownership* that debunks most cherished myths of origin (even as it creates other myths). A myth of origin rarely survives the conflation of "then" and "now" that is represented by defining an object as cultural property. As "then" is not "now", nor are "we" "them". Our origin – as owners – is entirely other than the origin that the object was supposed to guarantee. Sooner or later, therefore, either the object demands its own "truth", or it succumbs to a truth that may or may not suit the role mapped out for it by its owner. At that

[308] This is a necessary side-effect of any attempt to "fix" knowledge in modernity. For example, Nietzsche's repudiation of classical philology as practiced in Germany in the nineteenth century is a result, in part, of the reified and inaccurate relationship that classical scholars at that time had established between Ancient Greece and (their) modernity. "Were the classical philologists in fact to understand classical realities, he [Nietzsche] was to remark, they would recoil horrified. And they would do so in part at least because they would have to acknowledge that their own academic purposes had alienated them from their object of study and concealed it from them". MacIntyre, "Genealogies and Subversions", p. 286. What was true of those scholars is equally true today of any "purposive" scholarship.

moment, the owner/commentator is free of a particular kind of twentieth- or twenty-first century illness. When one accepts defeat in the search for the "true essence" of the object, then one ceases to be deformed – one takes up a different position opposite

> whatever drive it is whose inhibition and distortion have led to an unacknowledged complicity in a system of suppressions and repressions expressed in a fixation whose signs and symptoms are the treatment of highly abstract moral and epistemic notions as fetishes. That drive turns out to be...the will to power.[309]

One may still choose to excavate, if that is where pleasure lies, but the necropolis loses its authority to mediate wisdom, meaning, or life.

> The morality of thought lies in a procedure that is neither entrenched nor detached, neither blind nor empty, neither atomistic nor consequential. ... But how much more difficult it has become to conform to such morality now that it is no longer possible to convince oneself of the identity of subject and object.... Nothing less is asked of the thinker today than that he should be at every moment both within things and outside them – Munchhausen pulling himself out of the bog by his pig-tail becomes the pattern of knowledge which wishes to be more than either verification or speculation. And then the salaried philosophers come along and reproach us with having no definite point of view.[310]

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[309] MacIntyre, "Genealogies and Subversions", p. 287.
[310] Theodor Adorno, *Minima Moralia* (New York: Schocken Books, 1978) p. 74. (Translated E. F. N. Jephcott)

Chapter Four Narratives of Attachment: Memory

Chapter Four looks at the controversy surrounding the ownership of the Parthenon Marbles in order to argue that narratives of attachment and belonging underlie every attempt to use the law to determine ownership of ancient objects. The Chapter then analyzes these narratives to show that the law in cultural property claims attempts to allocate ownership of metaphors, as much as it seeks to allocate ownership of objects. What is the link, however, between allocation of metaphors and allocation of objects? Can objects and metaphors represent each other in the realm of cultural property theory and law? What might the metaphors used in staking claims to ancient objects represent? Against a reading of what Friedrich Nietzsche says about memory in *On the Genealogy of Morality*,[311] this Chapter looks to analyses of memory and mourning to suggest that the claims for the Parthenon Marbles are claims for (authorized) memory, and to query what sort of memory is being claimed: memory that references sterile mourning, or memory that instead avoids lament and nostalgia, and functions as one of the mechanisms of man's "overcoming". If it is the latter, then the claims for the Parthenon Marbles (or for any relics, iconic fragments or archaeological artifacts), represent memory that has resulted in completed mourning, a paradoxical position in which the city and its inhabitants claim the past in order to allow amnesia or forgetting to flourish, and thus to underwrite the possibility of a, or any, future.

Therefore, the following Chapter has several purposes. First, it seeks to establish the linkages between metaphors and objects that constitute one of the ways in which the discourses and objects of cultural property represent the epistemological and ideological terrain of "modernity". Second, it supports the position, stated in the Introduction, that memory is the epistemological mode of modernity, and that cultural property discourse partakes of (and enables) that mode. Third, it sets out the

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[311] Friedrich Nietzsche, *On the Genealogy of Morality* ed. Keith Ansell-Pearson, trans. Carol Diethe (Cambridge: Cambridge University Press, 1994.)

substantive argument that the discourses of cultural property are narratives of attachment that derive their power (if not their validity) from the appropriation and manipulation of memory, or, put differently, that ownership and memory cross-define each other in this field. The discursive problems that arise – fictionalization, mourning, and not least, forgetting – are absolutely central to the processes of establishing ownership of *any* object of cultural property (not merely the Parthenon Marbles). In order to fulfill these purposes, the present Chapter turns again to the facts and law that have already been set out in Chapter Two, beginning to theorize the material that has already been presented. As such, the repetitions of the facts and law from Chapter Two in this Chapter and in Chapter Five are intended although not intended to be onerous.

Introduction: Memory and ownership

> *These dreamy blinkings-out*
> *Strike me as grace, if I may say so,*
> *Capital punishment,*
> *Yes, but of utmost clemency at work,*
> *Whereby the human stuff, ready or not,*
> *Tumbles, one last drum-roll, into thyme,*
> *Out of time, with just the fossil quirk*
> *At heart to prove – hold on, don't tell me... What?*
>
> (James Merrill, "Losing the Marbles")

"Just as expecting is possible only on the basis of awaiting, *remembering* is possibly only on that of forgetting, *and not vice versa.* [312] This is a tremendously cruel observation: although it is commonly acknowledged that memory may hurt, Heidegger points out that the pain of memory depends upon the different, and possibly greater, pain of forgetting. To remember, one must be in a state of

[312] Martin Heidegger, *Being and Time* (New York: Harper & Row, 1962), pp. 388-9. (Translated by J. Macquarrie and E. Robinson)

forgetfulness after having not been in such a state: that is, to remember one must be in a state of loss. What is remembered is thus resuscitated, created, retrieved or otherwise brought into being or into consciousness or both as an acquisition or re-acquisition of the lost object. In political theory, the lost object is originary racial or political purity, a beginning that is predicated on the destruction of memory itself.[313] In law, and in particular in claims regarding the allocation of cultural property, what is to be gained by tropes or narrative events of remembering or forgetting? Bluntly, property. The argument proposed is that the narrative of ownership is one of the shifting membranes between memory and forgetting. Cultural property discourse and autobiographical tropes occur in the same space and have the same object(s) and criteria. They make property out of the past, spinning gold out of straw or treasures out of some alliance between things and the stories told about them. Like all memorial narratives, they are mechanisms of appropriation and lies. The effect is to create property out of what may not have been property before it was claimed.

To claim ownership of an ancient object, the law requires a declaration of provenance. Yet, the "past" that underlies the debates regarding memory and the ownership of ancient objects, and that forms the substrate(s) of the account(s) of origin, is itself in the making.[314] "Memory, history, and relics have long served as mutual metaphors".[315] The account of provenance is itself a combination of history, memory, and fiction.[316] The techniques used to support cultural property claims, and to create the narratives of attachment to the object, are techniques of memorialization, which in modernity (as suggested above) reference mourning. However, this Chapter argues that these memorial narratives are turned, not towards the past but towards the future. "To be is to have been, and to project our messy, malleable past into our

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[313] Paul Connerton, *How societies remember* (Cambridge: Cambridge University Press, 1989).
[314] David Lowenthal, *The Past is a Foreign Country* (Cambridge: Cambridge University Press, 1985); Peter J. Fowler, *The Past in Contemporary Society:Then, Now* (Oxford and New York: Oxford University Press, 1992); Adrian Forty and Susanne Küchler eds, *The Art of Forgetting* (Oxford and New York: Berg, 1999).
[315] Lowenthal, *The Past is a Foreign Country*, p. 251.
[316] Ibid. "History, fiction and faction", pp. 224-38.

unknown future."[317] They function as the mechanisms of the process of "overcoming" that Nietzsche describes in *On the Genealogy of Morality*, the process that forms modern "man" out of his precursor, a "necessarily forgetful animal, in whom forgetting is a strength...".[318] The mechanisms of "overcoming" require memory as a positive, or active force. Therefore, the narratives that underlie claims for ancient objects seek to manage the loss that inevitably accompanies time, to overcome memory itself, and through the ownership of the object, to bring mourning to an end.

"The past" and the case of the Parthenon Marbles

The disputes regarding the ownership of the Parthenon Marbles serve as exemplars of the process of "overcoming" on many interpretive levels. Speaking at a debate in the Oxford Union in 1986, Melina Mercouri declared "There are *no* Elgin Marbles!"[319] In 2001, there are *no longer* any Elgin Marbles.[320] It is a small elision, yet one that represents a strategic victory over Lord Elgin, and over his memory. The statues themselves remain in the British Museum. As objects patinated with layers of meanings and affiliations that constantly fluctuate, they continue to elude both identification and ownership. They are glossed, at any given moment, by discourses and strategies of memory and forgetting. The question of *who* owns the Parthenon Marbles may be better considered by asking *how* these sculptures can be owned, and what mechanisms of "ownership" are used. The question "who owns" addresses the ownership of memory and history as much as it does the ownership of fragments of a ruined building. As regards the allocation of ancient objects, it is paradigmatic of all cultural property discourse. Yet, it may be particularly relevant to the allocation of

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[317] Ibid. p. xxv.
[318] Nietzsche, *On the Genealogy of Morality*, p. 39
[319] In June 1986, the topic for debate in the Oxford Union was the return of the Parthenon Marbles to Greece. Melina Mercouri, then Greek Minister of Culture, argued for their return. http://www.uk.digiserve.com/mentor/marbles
[320] The frieze removed from the Parthenon by agents of Lord Elgin and acquired by Parliament on behalf of the British people in 1816, with the conditions that they always be kept together and they always be known as the "Elgin Marbles", is "now officially called the Parthenon Marbles by both Britain and Greece". *The Guardian*, Friday 26 October 2001. http://www.guardianunlimited.co.uk/elgin

modern objects and modern sacred sites as well. War constantly creates ruins and those who mourn them, and the question of who owns these ruins is as relevant to the future as it is to the past.

As previously described in Chapter Two, the question of whether the Parthenon Marbles should be returned to Athens is one of the oldest questions in cultural property law,[321] and is continuously debated in the news media and on the Internet.[322] To restate, briefly, the issues, claims for the restitution or retention of the Marbles have been made on behalf of the British, the Greeks, and currently, the Parthenon itself, but it is not clear what "ownership" of these stones would mean. The bases of the claims for retention or restitution now turn as much on principles of cultural internationalism[323] ("The cultural property of all mankind") as on cultural nationalism ("They are Greek"; "The British are the true inheritors of the Ancient Greeks").[324] Questions of stewardship and accountability also currently loom as large as the more traditional arguments based in standard principles of contract and property law. Certainly, both the Greek the British governments are less than clear, and possibly less than honest, about the grounds for their claims of these objects.

The Greek government currently claims the Parthenon Marbles on the basis that they are fragments of the Parthenon, and that the Parthenon is a symbol of the cultural heritage of the whole world and should be as complete as possible.[325] This claim carefully balances the "cultural internationalist" and "cultural nationalist" views of the Parthenon, accepts as a given the territorial basis for Greek ownership of the Parthenon, and glosses over the reality that the sculptures would be placed in a museum rather than on the monument. The Greek government is attempting to shame the British government into returning the sculptures by leaving a large open space for the sculptures in the new museum that is being built on the Acropolis. Their absence demands and connotes their presence: it is (already) monumental.

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[321] See Chapter Two, n. 62.
[322] See Chapter Two, n. 63.
[323] See Chapter Two, n. 55.
[324] See Chapter Two, n. 54.

The British government steadfastly refuses to yield the Marbles, which have played a part in British identity and political life since Lord Elgin sold them to the nation in 1816. Although the basic claim for retention is that the Marbles were legally acquired, the British also claim that Lord Elgin saved the Marbles by removing them from the Acropolis, and that in the years since their removal they have become part of the British cultural heritage. The British claim of good stewardship and art historical accountability was shaken by William St. Clair's devastating proof of damage to the Marbles by cleaning carried out at Lord Duveen's request.[326] Now, the British, like the Greeks a generation, or a century, ago, fall back on their claim to Ancient Greece. The conflict between the modern Greeks and the British government reflects and turns on the battle being waged for the ownership of memory, history, autochthony, filiation, and descent from the "Greeks". As such, the perspectives taken on the legal claims explicitly[327] and implicitly interrogate the meaning of "the past". One cannot discuss cultural property questions without taking a position on the accessibility of "the past" to modern observation. The case of the Parthenon Marbles exemplifies this point as well; the imperative of assessing the construction of memory as a strategy of ownership becomes apparent when looking at the history of the Parthenon and the Marbles.

The Parthenon

In both sets of claims, the Parthenon itself stands as the primary cipher. Even before the Marbles, the history of the Parthenon itself displays the links between memory, history, and civic identity that are at the heart of public buildings. No public building is built by accident. The choice of what it memorializes, or represents, however, changes over time. Any public building risks this fluidity of function and

[325] The grounds for the restitution of the Parthenon Marbles are set out in Chapter Two, n. 65.
[326] St. Clair, "The Elgin Marbles: Questions of Stewardship and Accountability" (see Chapter Two).
[327] See Chapter Two, "The Parthenon Marbles" generally.

meaning.[328] In the case of the Parthenon, memory, mourning, and forgetting were inextricably intertwined from when it first came into being. This complex of signs, in stone, continues to the present day. Therefore, any attempt to set out the history of the Parthenon must address the question of what is retained and what is discarded of original meaning or intent. The Parthenon was built a generation after the Persians laid waste many of the earlier temples on the Acropolis.[329] Pericles directed the rebuilding of the Parthenon in order to erase the memory of the Persian conquest of Athens, and to commemorate the predominance of Athens among the city-states of Ancient Greece. However, within a few years after its completion, and before the temple of the Erechtheion was finished, the Peloponnesian War began between Athens and Sparta. The Athenians lost this war a generation later.[330] Thus the marker of Athenian triumph over the Persians (and of domination over the other city-states that formed the Delian League) shifted almost immediately to a symbol of loss. Within two generations, the political power that the Parthenon was intended to represent had come to an end.

In this sense, the "Elgin" or "Parthenon" Marbles anchor the history of the Parthenon rather than the other way around, as to tell the story of the Parthenon is to choose an arbitrary moment of origin, and continue. The history of the Parthenon is as complicated as the history of Athens. In later antiquity, the Parthenon was appropriated by non-Athenian Greeks and by the Romans as a symbol of later regimes' appropriation of the classical Athenians' patrimony. The building then remained largely unchanged until the Byzantine Emperor Constantine converted to Christianity and declared Christianity the official religion of the Empire in the fourth century A.D. In the early sixth century, the Parthenon was converted to a Greek Orthodox church. It was dedicated to Our Lady of the Holy Wisdom, in order to maintain and benefit from the linkages with the pre-existing worship of Athena.

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[328] Gillian Rose proposes the idea of the built form as being constantly in process -- architecture is indeed "the most synaesthetic, most exposed, bearer of social utopianism". Gillian Rose, *The Broken Middle* (Oxford and Cambridge: Blackwell Publishers, 1992), p. 300. She argues that architecture, like law, is the privileged occupier of the moment between, the middle in which is performed the difficult and unending art of educating power and of moderating between particular, singular and universal.
[329] Herodotus, *The Histories*, Bk VIII Ch. 53, p. 628. (Everyman Library edn)

Athens nevertheless remained a provincial center of the Byzantine Empire until 1204, when invaders, primarily crusaders (Franks) and Venetians, began to conquer the Byzantine Empire. At that point, the Parthenon became the Roman Catholic church of Notre Dame, and a large tower was built near the entrance to the Acropolis.

In 1453, the Ottomans occupied Greece and took possession of Athens. The Acropolis, as a militarily strategic position, served as the fortress of the Ottoman army posted in Athens. In 1687, during the attempt by the Venetian general Morosini to retake Athens, the Parthenon was being used as a munitions arsenal by the Turkish forces. Shelling Athens from the harbour, Morosini hit the Parthenon. The building exploded. After that, it was a ruin. In the following year, the Turks re-captured Athens, and built a small minaret and mosque on the ruins of the Parthenon. They also used it to garrison some army officers, building small houses among the ruins. By the end of the eighteenth century, Athens was a small Oriental town, with a multicultural population, churches, mosques, palm trees, camels, traveling gentlemen and artists from Europe. At the time of the Greek War of Independence against the Ottoman Empire,[331] the Acropolis bore the traces of these other incarnations.

In 1833, the Greek state was established with the support of the European powers. At this point the Parthenon assumed the form and meaning that it carries today. The European regard for Ancient Greece and the virtues and values of classicism not only contributed to the recognition of the modern Greek state, but also mandated that state's emphasis on Ancient Greece and the identity of its people with the Ancient Greeks.[332] The reconstruction of the Parthenon began immediately. The struggle to establish and maintain the chosen national identity meant that the traces of medieval and late Hellenistic history vanished. Even pre-classical archaic structures on the Acropolis were nearly lost. "Greece", and by extension "Athens", was no longer multicultural and multilingual, it was "purely" classical. As a result of this decision, the Parthenon was deliberately restored as a ruin:

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[330] 431-404 B.C.

[331] The Greek War of Independence from the Ottoman Empire began in 1821 and continued until 1828.

> In 1834 the Bavarian neo-classical architect Leo von Klenze was invited to Athens to advise the new government on a policy for the future of the Acropolis. Like Elgin and most of his contemporaries, von Klenze admired the Athens of the fifth century above all other periods of the past. He proposed that Greece should repair the surviving monuments, using a mixture of old marble and modern imagination. They would, however, remain as ruins, romantic and picturesque, a lasting reminder of what had been lost and what had been regained.[333]

This plan was acted upon by successive Greek governments, until 1890:

> when virtually everything had already gone, the so-called "purist" approach to the Acropolis came to an end. The Parthenon was now a badly ruined building of the fifth century. The Acropolis was a fully dug archaeological site.[334]

The memorial was complete.

The building, in its "finished" form has come to symbolize an Athens that existed for less than one hundred years, and yet which has come to represent the Greeks that exist two and a half thousand years later. All Greeks have not become Athenians, but "the people of Greece came to regard the Parthenon as the "soul of Greece".[335] However, following the history of the Parthenon as set out above, does the "soul of Greece", thus defined, belong to the Greeks? This soul may well be as British, as French, as German, as it is Greek. Pericles began the making of the Parthenon. The Europeans of the eighteenth and nineteenth centuries passionately supported the Classical history of the building. The Greeks of the eighteenth,

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[332] St. Clair, *Lord Elgin and the Marbles*, pp. 322-4.
[333] Ibid. p. 316.
[334] Ibid. p. 326.
[335] Ibid. p. 325, quoting Melina Mercouri.

nineteenth, and twentieth centuries have appropriated both "origins": the origin of Pericles, and that of classical scholarship. These Greeks ensured that :

> [t]he temple...which for more than a thousand years, according to one traveller, had languished as a place for the worship of a Jewish peasant and an Arab camel driver, had at last been returned to its true purpose.[336]

This statement can be read as a failure as well as a success. One must ask what this sort of return represents. One must also ask how ownership claims can be resolved or even understood in this context.

The frieze

The sculptures at the center of the dispute distill the discourse of remembrance and sacrifice that the building itself represents.[337] The Marbles are large sections of the frieze that ran around the entire Parthenon. Currently, as described in Chapter Two, the bulk of the frieze is in the Duveen Gallery of the British Museum, although there are a few panels in the Acropolis Museum in Athens. Directly in front of the entrance to the Duveen Gallery, in the middle of one of the long walls of the rectangle that makes up the Gallery, is the East frieze, which consists of the focus of the ceremonial procession.[338] Here, there are the gods of Olympus, two adults (a man and a woman), two girls bearing trays with folded cloths on them, a child that could be either a girl or a boy, and magistrates or tribal heroes. The gods ranked on either side look away from the scene. The meaning of this tableau is a mystery.[339] Clearly, the frieze refers to an event that engages and concerns the entire population of

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[336] Ibid. p. 327 (n. 62 omitted).
[337] The frieze represents a gathering of the citizens of Athens, engaged in a communal and commemorative activity. See *infra* Chapter Five for fuller description of the frieze; see also St. Clair, *Lord Elgin and the Marbles*, pp. 51-53, Beard, *The Parthenon*, "Making Sense of the Frieze", pp. 128-37.
[338] Rather than using the long walls of the rectangle to display the long sides of the frieze, as it was found on the rectangle of the Parthenon, the display arranges the frieze so as to show, immediately, its culmination. Arguably, this decision is in keeping with Duveen's decision to "clean" the Marbles. At the time the Duveen Gallery was built, the Western eye arranged the Marbles as "art" rather than "artifacts" – an obvious point as Duveen was an art dealer.
[339] St. Clair, *Lord Elgin and the Marbles*, pp. 53-5.

Athens. Until recently, scholars speculated that the frieze depicted the Panathenaic Festival, which celebrated Athena, the founding deity of Athens, but this theory has never been wholly accepted as the correct account of what the frieze depicts.[340] Indeed, it is impossible to know what the true meaning of the scene "really" is. The meaning of the frieze is a matter of interpretation.[341]

Recent scholarship suggests that the subject-matter of the frieze commemorates not the Panathenaic Festival, but one of the ancestor-myths of the political founding of Athens, the sacrifice of Erechtheus's daughters.[342] In this myth, the ancient king Erechtheus was told that he must sacrifice one of his three daughters in order to be guaranteed success in the war against the Thracians.[343] Erechtheus was either the second or the first great founding father of Athens, either a descendant of Kekrops and Erechthonious, the mythical founders of the autochthonous Athenian race, or an alternative incarnation of these figures.[344] The Erechtheion on the Acropolis also commemorates Erechtheus. Herodotus writes that from earliest times there was a "temple of Erechtheus the Earth-born, as he is called, in this citadel...".[345]

The people of Athens and the city of Athens could not be distinguished from each other. In Euripides's *Erechtheus,*[346] Erechtheus's wife Praxithea justifies the sacrifice of her daughters by identifying Athenians as an autochthonous people.[347]

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[340] "James Stuart and Nicholas Revett, travelers who documented their visit to the Acropolis with drawings and descriptions published in 1787, were the first to identify the frieze as the Panathenaic procession, an integral part of Athena's birthday festival". Joan B. Connelly, "Parthenon and *Parthenoi*: A Mythological Interpretation of the Parthenon Frieze" in *American Journal of Archaeology* 100 53-80 (1996), p. 53.

[341] There are no ancient sources on the meaning of the frieze. Connelly, "Parthenon and *Parthenoi*", p. 53. See also Chapter Five, *infra.*

[342] Ibid. generally.

[343] Ibid. p. 53-80; St. Clair, *Lord Elgin and the Marbles*, p. 54.

[344] Kekrops/Erichthonios/Erectheus was the first man that sprung out of the earth of the Acropolis when the goddess Athena prevailed against Poseidon in the struggle to be the patron of the city-state.

[345] Herodotus, *The Histories*, Bk VIII, Ch. 53.

[346] "As it happens, a substantial number of new fragments of a lost play by Euripides, the *Erechtheus*, have been recovered from the papyrus used for wrapping an Egyptian mummy in the Sorbonne. ...By an amazing piece of good fortune in which the Greeks would have seen the hand of a friendly god, the recently recovered fragments include the justificatory speech of Erechtheus' wife Praxithea..." St. Clair, *Lord Elgin and the Marbles*, p. 55.

[347] C. Collard, M. J. Cropp and K. H. Lee, eds, *Euripides: Selected Fragmentary Plays*, Vol. I (1995), p. 159.

Although autochthony will be discussed more fully in the next Chapter (Chapter Five), for the moment it is worth noting that as citizens, the Ancient Athenians of the classical period considered themselves to be a people that sprung from the land of the Acropolis itself.[348] Praxithea herself may be represented on the Parthenon frieze,[349] and it is interesting to note that another of the Athenians' autochthonous ancestors, the figure of Kekrops, was also represented on the West pediment of the Parthenon.[350] Arguably, therefore, the frieze memorializes civic memory of origin and sacrifice.

Certainly, the Acropolis served as the center of Athens and of its cults and myths long before the Classical Parthenon was constructed.[351] Visiting the Acropolis Museum[352] in search of panels from the Classical frieze, one sees that the figures from the archaic Parthenons depicted the same narrative program. The sculptures from the pediments of the earlier temples on the site show:

> The "frightening monsters" with their superhuman strength and daemonic power, and the...lions tearing at the flesh of...calves...Their purpose is not to relate a story, but merely to remind one of the existence in the world of terrible powers that are overawing and overwhelming. ...Yet there is no one more powerful than man ... Attic sculpture displays the terrible power of supernatural beings but at the same time projects the human being, both heroic and mythical, who succeeds in harnessing this power.[353]

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[348] Manolis Andronicos, *The Acropolis* (Athens: Ekdotike Athenon S.A., 1980), p. 14.
[349] See discussion in Chapter Five, infra, regarding the meaning of the central panel of the Parthenon Frieze.
[350] This figure may be seen in the Acropolis Museum as it was "left in the pediment by Elgin's agents because it was then thought to be a Roman replacemet", B. F. Cook, *The Elgin Marbles* (London: British Museum Press, 1997), *p.* 57.
[351] Andronicos, *The Acropolis*, p. 14.
[352] "Built as inconspicuously as possible in the southeastern corner of the sacred rock, the Acropolis Museum contains in its few rooms the sculptures found on the Acropolis, votive offerings to Athena or adornments from her temples. ... The creations of the Archaic art of the sixth century B.C., collected and displayed in the first rooms of the Museum, and those of the flowering of Classical art which [peaked]...during the thirty or forty years of the second half of the fifth century B.C. in the shape of the sculptures of the Parthenon and the parapet of the temple of Athena Nike, offer the visitor a unique vision...". Ibid. p. 68. A new, much larger Museum is currently planned.
[353] Ibid. p. 69.

At the time that the frieze was created, the Golden Age of Athens had vanquished the "frightening monsters". Yet, Connelly shows that the Parthenon Marbles are in keeping with the narrative program of the archaic Parthenon as well as the Classical temple ordered by Pericles.[354] As in Von Klenze's scheme almost two millennia later, the program is one of memorializing and "overcoming" simultaneously. However, the act at the heart of the Parthenon frieze is an act of sacrifice that holds both elements of the program in stasis. On the Parthenon frieze, it is always *before* the sacrifice: the sacrifice has not yet been made; the future of the city hangs in the balance. The link between a people and their place of origin might always portray this particular moment, deliberately or not. Memory and the future – "overcoming" – may be dependent on each other and opposed. At the heart of this conjunction (or trajectory) are human sacrifice, war, death, and a grim commitment to the future. The Classical order and rhythm of the Parthenon frieze displays (in the form of a mystery to modern viewers) these necessities.

The discourse of cultural property is origin-obsessed, relentlessly backward-looking. The very idea of "cultural property" references re-claiming, rather than merely claiming; the act of establishing origin is portrayed as an act of recollection.[355] For very ancient objects, such as the Parthenon frieze, the recollection must take the form of a narrative that links the claimant with ahistorical time. This narrative, *impossibly*, turns on memory.

> [I]n his list of peoples who inhabit the Peloponnese, the historian Herodotus carefully distinguishes those "staying in the same place", meaning those whose ancestor is autochthonous, from the rest who are considered immigrant, or at least displaced populations...*But autochthony must be earned. ...[O]ut*

[354] "This new reading allows the full sculptural program of the Parthenon to be understood as a coherent whole: the west pediment shows the original contest between Athena and Poseidon for patronage of the city; the frieze commemorates the first military threat to Athens launched by Poseidon's son Eumolpos and the virgin sacrifice that ensured victory for the Athenians.... Thus, the full sculptural program serves as a greater metaphor for the Athenian triumph over the Persians in 480 B.C., in short, the nexus of 'saving the city" from exotic outsiders and the preservation of Athens by and for the autochthonous Athenians". Connelly, "Parthenon and *Parthenoi*", p. 71.

[355] "All beginnings contain an element of recollection". Paul Connerton, *How societies remember*, p. 6.

> *of Herodotus' statement a...criterion emerges, implicit but imperative, which adds to the transmission of the soil that of memory.* It is well to occupy the land, but even better to maintain the autochthonous tradition, in order to strengthen the ties that bind the present to the time of origin.[356]

To maintain the autochthonous tradition means to possess cultural objects such that the acts of claiming and possessing *do the work of memory*. This is *narrative* work. It requires a purposive engagement with the past in order to fictionalize it.

The Parthenon frieze suggests that the work of memory is ambiguous in its valorization of accuracy; rather than pure or objective recollection, it is, in a sense, memory management. "Overcoming" the memorialized moment, that is, moving into the future, may mean overcoming memory itself.[357] Certainly, the frieze shows that for the Ancient Greeks, the future was built on the collapse of "time immemorial" into "time memorial"; and indeed, into "time remembered".[358] Within the realm of cultural property, this sort of purposive relativization and historicization of "the past", interacting with cultural memory and cultural forgetting, constitute the field on which, or through which, cultural property (and the related fields of museum management and "heritage" sites) has become an ever-expanding discourse.[359] Nevertheless, despite the claims of memory and autochthony, there is no possible uninterrupted relationship with ancient objects. Memory is at issue because it underpins the claim of autochthony, but also because it is an essential narrative trope of the *fictions of uninterrupted attachment* that are necessary in cultural property claims. These (fictional) claims are in turn necessary to annex the past as a foundation for the continuing survival of a people or *polis*, that is, for a foundation, not for a particular future, but for the possibility of *any* future.

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[356] Loraux, *Born of the Earth: Myth and Politics in Athens* (New York: Cornell University Press, 2000), pp. 14-15. (emphasis added)
[357] Lowenthal, *The Past is a Foreign Country*, p. 205.
[358] The argument that the modern obsession with cultural property represents not only unease about the exclusively future time valorized by modernity, but also an attempt to find the epistemic grounds from which to vault forward is addressed in Chapter Five, *infra*.

Memory: techniques of "overcoming"

The sort of active or generative memory that figures narrative is its own object, creating itself out of the exercise of its own faculties. It serves as both structure and substance of narrative. This may be seen in the different ways that the art of memory is practiced in different historical periods. The balance between mneme and anamnesis shifts over time, as does the "direction" of memory and the "place" or "landscape" in which memory is presumed to operate.[360]

The understanding that genealogies of (self-) knowledge are also exercises of the will, and thus artifacts of human creation, begins, in the modern era, with Nietzsche. In Sections 1-3 of the Second Essay of *On the Genealogy of Morality,*[361] Nietzsche examines how "nature" "[bred] an animal *which is able to make promises*".[362] The human ability to make promises is bred in counter-force to the natural, healthy state of forgetfulness. Memory is an expression of will, created through some symbiosis between "nature" and "man".

> [P]recisely this necessarily forgetful animal, in whom forgetting is a strength, representing a form of *robust* health, has bred for himself a counter-device, memory, with the help of which forgetfulness can be suspended...in those cases where...a promise is to be made: consequently, it is by no means merely a passive inability to be rid of an impression once it has made its impact,...instead it is an active *desire* not to let go, a desire to keep on desiring what has been, on some occasion, desired, really it is the *will's memory*: so that a world of...circumstances and even acts of will may be

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[359] Lowenthal, *The Past is a Foreign Country*, p. xv.
[360] Raphael Samuel, *Theatres of Memory:* Vol. 1*: Past and Present in Contemporary Culture* (London: Verso, 1994).
[361] Nietzsche, *On the Genealogy of Morality*, "Guilt", "bad conscience" and related matters" (1994) pp. 38-71.
[362] Ibid. p. 38.

placed quite safely in between the original "I will"...and the actual discharge of the will.[363]

The act of making a promise triggers the ability to remember, or rather, to suspend forgetfulness. This ability is the cornerstone of "the *sovereign individual*", a man who has been made reliable by the "straightjacket" of the "morality of custom" and who, because of his own reliability, because of the sublimation of his animal self, now possesses a will that allows him to be predictable to himself and responsible to others.

Society and the morality of custom, working through brute force, overcome the "frightening monsters" of *human* nature. They:

> were simply *the means to*...the *sovereign individual*...like only to itself, having freed itself from the morality of custom, an autonomous, supra-ethical individual (because "autonomous" and "ethical" are mutually exclusive)...a man...who has *the right to make a promise* – and has...an actual awareness of power and freedom, a feeling that man in general has reached completion.[364]

Brute force – pain – links the present with the promise made in the past, continues (or guarantees the continuation) of *that* desiring self. This continuation, through the complex of pain, social benefits, promises and the enforced discharge of fixed desire, constitutes the sort of memory that is, in turn, the cornerstone of reason.[365] One could say, this sort of memory is the cornerstone of this sort of reason.[366] Nietzsche here is engaged in diagramming the tools and processes that led to a "man who is now free", "a "master of the *free* will" because he "really does have the right to make a promise".

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[363] Ibid. p. 39.
[364] Ibid. p. 40.
[365] "With the aid of...[pain],...man was eventually able to retain five or six "I-don't-want-to's" in his memory, in connection with which a *promise* had been made, in order to enjoy the advantages of society – and there you are! With the aid of this sort of memory, people finally came to 'reason'!" Ibid. p. 42.
[366] Tim Murphy, "Foucault: rationality against Reason and History", in Philip Windsor, ed., *Reason and History* (Leicester: Leicester University Press, 1990).

A promise, a guarantee of the will's desire, leads to freedom. However, there are two problems with this. First, man is *not free*, regardless of his "actual awareness of power and freedom". Not even Zarathustra is (wholly) free.[367] This degree of will and of concomitant "freedom" is merely an interim point in the development of "man". Memory gives man the right to the future, but a split exists between the repressions, pain, and "breeding" that lead to the right, and the use of it. Humankind must reach the *future* in order to become free, an objective that not only defines Nietzsche's scheme for the next step of mankind, the next "overcoming" that will continue and invert the processes that brought us thus far, but also as regards the possibility, the field or ground for this process. The desire to keep on desiring into the future is the minimum requirement for the nexus of time and will that may, in each instant, change the pain of self-overcoming into the affirmation of life.[368] Second, in Nietzsche's scheme, the desire to make the promise must predate memory and reason both. As the example of Zarathustra shows, it also postdates memory and reason. Yet, the "blond beast" or the "superman" putatively gains something entirely different from making promises than the self-satisfaction of being reliable that the "sovereign individual" feels. [369] One could argue that the "blond beast" and the

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[367] "A seer, a willer, a creator, a future itself and a bridge to the future – and alas, also like a cripple upon this bridge: Zarathustra is all of this". Nietzsche, "Of Redemption", *Thus Spake Zarathustra* (Ware: Wordsworth Editions, 1997), p. 161.

[368] Keep in mind that one of the underlying questions here is *time* in all its permutations: "According to Heidegger, Zarathustra teaches not morality but metaphysics: he brings a message of 'redemption' which may release us from 'antipathy' – *Widerwille*, literally, 'against will' – towards the passage of time". This does not release us from willing, rather it defines willing as "the 'Being of beings as a whole'", and therefore antipathy becomes affirmation. Rose, *The Broken Middle*, p. 88. In this schema, time and will are indissolubly linked.

[369] NB: the question of the "individual" must be approached very, very carefully. Thus far I have used the term only insofar as Nietzsche uses it. For a discussion of the term and its possible meanings in modernity, *see* Murphy, *The Oldest Social Science*. In particular, the nexus between "individual", "memory" and "future" is caught and questioned in the middle of the inversion or "overcoming" that society is presently: "Should we not let go of our memories? Should we not allow ourselves to be open to the future, and learn to live without the fantasy of security and paternity which the older other vision, which we can now see as a vision, held out, once, to us? [W]e need...to be more sensitive to the rather peculiar character of the individualism which has been installed in our age, using the building blocks of so many half-memories, and to recognize that this modern individualism sits alongside epistemic and orientational attitudes and practices through which this same individual is effaced into the average man. The freedom of the individual is triumphant at the same time as the erasure of the institutional and epistemic presuppositions which for so long sustained the individual as a 'meaningful' project". Murphy, *The Oldest Social Science*, p. 34. (n. 99 omitted)

superman" gain the ability to make important or fateful promises: to enact human sacrifices, to deny contractual society, to be an autochthonous citizen of a *polis* that we cannot imagine. It is not clear what the purpose of memory or reason would be to a person who remembers and forgets seamlessly, without the aide-mémoire of pain.

In this shifting world of forces and objects, Nietzsche's analyses illuminate what is at stake in debates regarding cultural property. Nietzsche's inversion of the past into the future, of memory into desire, sets a new horizon-line for addressing cultural property claims. "For Nietzsche all great things bring about their own demise through a process of self-overcoming".[370] The claim for return of cultural objects, the reaching for and use of great art, great ancient cultures: these gestures form an act of self-overcoming, a necessary and necessarily-cannibalized foundation for the future. The gesture is the "dice-throw", the scooping up the past in order to throw it forward, to overcome, to invert, to survive, to grow, to be stronger, to be the *same but different*. The desire to keep on desiring (memory) and the object through which desire focuses itself (the Parthenon Marbles) conspire in an elision of time, an attempt to slip the constraints of time and vault into immortality. What else is required by "nature" for the sovereign individual, does the sovereign individual come to require of himself? The very notion of desire, of "longing", is pinned to immortality.[371] Immortality and mortality, mourning, alterity: memory is concerned with what can be acquired and overcome. As in archaeology, memory is concerned with what can come to function as a foundation, which will in turn, and necessarily be forgotten.

If the gesture is the dice-throw and the field or ground for this gesture is the shifting field of forces geared to immortality, the figure that animates the ground of this discourse is the figure of memory, and the technique by which it does so is a

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[370] *On the Genealogy of Morality*, editor's introduction, Keith Ansell-Pearson, p. xix.

[371] Susan Stewart makes this point in *On Longing: Narratives of the Miniature, the Gigantic, the Souvenir, the Collection* (Durham and London: Duke University Press, 1993). She traces the meaning of "longing" as longing for or after immortality (1713, Oxford English Dictionary). She continues: "[T]he location of desire, or...the direction of force in the desiring narrative, is always a future-past, a deferment of experience in the direction of origin and thus *eschaton*, the point where narrative begins/ends..." . Stewart, *On Longing*, p. x.

steadfast fictionalization, or "lying", in the face of a "truth"[372] that might express any other will to power. The hallmarks of memory as mechanism of cultural property claims, like those of memory as a technique of "overcoming", are falsehood and repression. Memory inverts into forced, not "natural" forgetting, it is uncomfortable with both the past and the future. Engaging in the discourses of memory mean taking up a (consciously?) *resistant* posture, in which memory, *and forgetting,*[373] both stand as barriers to the strategies and tactics of competing wills.

This stance raises the question of representation: language and "reality" have to be untangled in order for the techniques of memory and narrative to be visible. Modern ideas of memory both partake in and must address this problem, in contrast to ancient or medieval constructions of memory, in which memory is coeval with knowledge, organized on a grid of representation in which the phenomenological triangle of viewer/object/perspective remains unproblematic.[374] The fictionalizing or "lying" stance is that of *narrative.* The past as narrative requires a (constructed) link between the authority of the poet or storyteller and that of the scholar.[375]

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[372] any sort of truth: political, historical, scientific. "Truth" is a term that must be explored in some depth. Maudemarie Clark, *Nietzsche on Truth and Philosophy* (Cambridge: Cambridge University Press, 1990), attempts to resolve the internal contradictions regarding "truth" in Nietzsche's philosophy.

[373] Cf. Peter Goodrich, "Of law and forgetting: literature, ethics and legal judgment" in *Law in the Courts of Love: Literature and other minor jurisprudences* (London and New York: Routledge, 1996), pp. 112-37. Goodrich makes the point that law resists (denies) its genre (literature), and through this "aspires to assume the modern character and quality of the discourse of fate" Ibid. p. 112. Fate cannot be argued with, it exists at no and at all times, and, working within the available personae and scenes of the law, it allows judgment without responsibility. Goodrich argues that the confusion and denial of genres is deliberate and disingenuous, and is a technique of forgetting that "must be correlated initially to the phantasm of an origin. Forgetting institutes an invisible and so absolute cause, a non-empirical source, an image or symbol of certitude...which memory cannot directly supply and yet which science needs as the most basic justification of its enterprise". Goodrich, *Law in the Courts of Love,* pp. 121-2.

[374] The two basic modern treatises on memory and the *ars memoria,* as well as a growing field of legal analysis that derives from the techniques of literary and anthropological criticism, demonstrate that memory and forgetting have only recently been understood as primarily psychological states connected to "individual" psyches. Rather, memory served many communal, social functions. Among scholars, memory and learning or knowledge were indissolubly linked. Remembered (and actively remembering) texts identified members of a community to each other, and guaranteed their continued membership in that community. Mnemonic technique anchored rhetoric, and thus oratory, public argument and persuasion of all kinds. Frances Yates, *The Art of Memory* (London: Ark Paperbacks, 1984); Mary Carruthers, *The Book of Memory: A Study of Memory in Medieval Culture* (Cambridge: Cambridge University Press, 1990).

[375] There is an interesting question here about the various senses that are used in memory and that underpin (different kinds of) authority (even though mnemonics are a tool of rhetoric): the blind poet

The figure of memory (Mnemosyne)

The modern art of memory (as seen in psychoanalysis, oral history and "heritage" discourses) is rooted in the Romantic movement in poetry and painting, as well as in the notion of "resurrectionism".[376] This is to root modern memory in a persistent sense of anxiety and nostalgia, a position that it shares with other concepts (particularly that of time) in "modernity".[377] The direction of speech is towards the dead rather than towards the living, the direction of vision is internal rather than external. Therefore, the link between memory and the past requires an examination of the link between memory and mourning. In the realms of literary criticism, memory as a trope or figure is connected to mourning and to mortality, thus to the ethics of identity and alterity.[378] Considering the work of Paul de Man – and eulogizing de Man after his death – Derrida links the figure of Mnemosyne[379] with mourning. He draws a distinction, rooted in psychoanalytic theory, between possible and impossible mourning. In possible mourning, one interiorizes the image or ideal of the other, as opposed to an "impossible mourning, which, leaving the other his alterity, respecting thus his infinite remove, either refuses to take or is incapable of taking the other within oneself, as in the tomb or the vault of some narcissism".[380] Derrida defines the tropological use of "memory" to mean a certain relation that

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or storyteller, the sighted scholar who has committed a text so perfectly to memory that he can "read it into" the blank center of a page of commentary and marginal comments – the center of the page *left* blank by later commentators, so only those who had read and memorized – internalized – the text, could "read" the book. Carruthers, *The Book of Memory*, Ch. 6: " Memory and Authority", pp. 189-220, *see* pp. 217-18.

[376] Samuel, *Theatres of Memory*, p. viii: "'resurrectionism'...[was]...a history which aimed to give a voice to the voiceless and speak to the fallen dead".

[377] "[The Romantic era's] idea of memory was premised on a sense of loss. It divorced memory-work from any claim to science, assigning it instead to the realm of the intuitive and instinctual. It pictured the mind not as a watchtower but as a labyrinth, a subterranean place full of contrived corridors and hidden passages. Instead of anamnesis, the recollection that resulted from memory-training and conscious acts of will, imaginative weight fell on what Proust called 'involuntary memory' – the sleeping traumas which spring to life in times of crisis". Samuel, *Theatres of Memory*, p. ix.

[378] Jacques Derrida, "Part I: Mnemosyne" in *Mémoires: for Paul de Man* (New York and Chichester: Columbia University Press, 1986). See also Goodrich, *Law in the Courts of Love.*

[379] the goddess of memory, who also represents wisdom and is the mother of the Muses

[380] Derrida, *Mémoires*, p. 6.

exists between a speaker and his or her subject, a relation that is internal but that makes the internal visible to the speaker, so in a sense turns him or her inside out.

Once again, the defining moment of memory is the vault from origin (unknown and unknowable) into the future (also unknown and unknowable). In order for memory to be more than "a technics, a recording", impossible mourning must be attempted via an originary affirmation.[381] Memory depends on affirmation, a pre-existing, non-rational "yes" that extends into an always-unknowable future.[382] In this sense, Derrida (and de Man) access the themes addressed by Nietzsche.[383] Yet, this affirmation, while bringing the self into resolution for the self, does not rest there. The key to "impossible" mourning is precisely that it rests both before and beyond the self, anchoring the dual, or Janus-faced nature of narrative: "Is narrative possible? Who can claim to know what a narrative entails? Or, before that, the memory it lays claim to?"[384] In the meeting of mortal with mortal, which is "really" the meeting of mortal with his or her own mortality, what we have "is the origin of fiction, of apocryphal figuration..."[385] An opening, in language, becomes possible out of the impossibility of "true" mourning. This generates the deployment of several genres and tropes that describe the work of memory: autobiography,[386] prosopopeia and the epitaph,[387] and allegory.[388] Fiction erupts to fill the space otherwise left always empty. The originary affirmation remains a "yes" that cries out "I will!"

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[381] Ibid. p. 32.

[382] "[T]he "yes", which is a non-active act, which states or describes nothing, which in itself neither manifests nor defines any content, this *yes* only commits, before and beyond everything else. And to do so, it must repeat itself to itself: *yes, yes*. It must preserve memory; it must commit itself to keeping its own memory; it must promise itself to itself; it must bind itself to memory for memory, if anything is ever to come from the future. This is the law, and this is what the performative category, in its current state, can merely approach, at the moment when "yes" is said, and "yes" to that "yes". Ibid. p. 20.

[383] Ibid. p. 31. As will be seen below, resistance, affirmation, and truth converge in criticism that attempts to denude language of its generic (lyrical) and pseudo-historical character, that demands rigorous attention to the *work* of memory.

[384] Ibid. p. 10.

[385] Ibid. p. 34.

[386] Ibid. pp. 22-24.

[387] Ibid. pp. 25-27.

[388] Derrida describes de Man's definition of "allegory" as "a sort of narrative (rather than historical) fable – or rather, that of a story which certain people know how to tell about something which, finally, is not historical". Ibid. p. 36.

These genres and tropes are all interstitial, reflecting the interstitial nature of memory and narrative in this scheme of analysis. Like memory, they inhabit the space "between Being and the law"[389] and "between fiction and truth...".[390] Like memory, they cannot possibly (or impossibly) express the truth. In Derrida's work, "[t]he 'truth' of 'true mourning' is...part of the procession" that Nietzsche describes: "What is truth then? A mobile army of metaphors, metonymies, and anthropomorphisms".[391] "True mourning" is only slightly "less deluded" than these other forms of truth. "The most *it* can do is to allow for non-comprehension and enumerate ...prosaic, or better, *historical* modes of language power".[392] This stripping away of the comforts of language brings out and makes possible analyses of "'resistances' and of the symptoms they produce (for example the 'resistance to theory' in literary studies)".[393] In this sense, true mourning functions as a resistance to resistance, as an acceptance of the little "truth" available to the mourning subject, who has become, himself, the object of his own memory. In this endeavour, the space opened between speech and image is familiar.[394] The distance between the sign and the signifier, between the "self" and the "other" has already begun to be explored, and the resulting landscape is now being imported, more or less wholesale, into this realm of images and attachments, beliefs based in mythologies of family and history, and entitlements conferred, still, by blood.[395] Despite the "alliance" of affirmation, and the future-oriented finitude which is "the trace of the other in us",[396]

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[389] Ibid. p. 10.
[390] Ibid. p. 22.
[391] Ibid. p. 30, quoting Paul de Man in "Anthropomorphism and the Trope in the Lyric", which begins with a quote from Nietzsche.
[392] Idem, quoting Paul de Man in "Anthropomorphism and the Trope in the Lyric", p. 262.
[393] Idem
[394] One could say, cynically, that in the modern, or recent literature, memory becomes important again as the latest prey of modernity, the most recent "thing" to become post-modern.
[395] Cf. Julia Kristeva, *Strangers to ourselves* (New York: Columbia University Press. 1991). (Translated by Leon Roudiez)
[396] Derrida, *Mémoires*, p. 29.

Derrida knows that "in memory of" are words that we can never resolve to our satisfaction: "[w]e remain in *disbelief* itself. For never will we believe either in death or immortality...".[397]

In Derrida's scheme, we overcome not mourning but our own mourning, and then rarely. The work of memory and mourning, however, is the work of "overcoming" described in the *Genealogy*. Man forces an unnatural result, and in the rupture or rift that creates, a new faculty comes into being. With the new faculty comes a new "man". Caught between forgetting and impossible mourning, we expand past our boundaries: we speak of others' lives when they are not there to contradict us, and of time that has (always?) already slipped its moorings. We take ownership of the past. This act of affirmation – the "yes" that cries out "I will!"— is the act needed to claim ancient objects or to occupy or rebuild ruins. It is a cry of fictional recognition, of desire-driven appropriation, of power that seeks to overturn the loss *of memory* in the past. It is unethical, brutal, and it is a relief.

The results of purposive memory: the future

Does the link between memory and mourning only arise when we face the alterity of death, which is in fact that of our own mortality? Or is "death" what we *always* face in the past, the meaning of "the past" to us? It is possible that when facing an ancient object – freighted with the past, but immortal, outlasting comprehensible stretches of human time – the relationship between memory and mortality, between memory and mourning changes. Our conception of the immortality of the object may restructure the process(es) of memory in us, so that the impossible (either mourning or immortality) becomes possible (in some evolutionary fantasy, guaranteed by the narrative of "the past"). Alternatively, the terrible fragility of ancient things may cause greater mourning. If, however, these questions resolve themselves into questions of immortality, of endless desire rather than "endless

[397] Ibid. p. 21.

mourning",[398] then we stand in a complicated, compromised position opposite time. We stand in the position of "afterwards" in order to *move forward*, a position that affirms the necessary affirmation, and raises interesting questions.[399]

A different reading of the possibilities of memory and mourning suggests a different approach to take to achieve "reason", in order to access a different version of (civic) "overcoming". In the reading proposed by Gillian Rose, reason can be released from the debates that diminish it in modernity (the schisms between representation and reality, between metaphysics and ontology), and also the brutalities that lodge it in mourning. She argues that memory and reason can work together gradually to rediscover their own moveable boundaries, as they explore the boundaries of the soul, the city and the sacred.[400] In theory, reason can work with and through memory to complete mourning. Completed mourning acknowledges the creative involvement of action in the configurations of power and law: it does not find itself unequivocally in a closed circuit that exclusively confers logic and power.[401] Action then is not caught between representation (metaphysics) and ethics, or between ontology and "the law" of naming, of language. Rather, "explorations of our mutual entanglements in power" can be based on an understanding of "reality" that is neither founded in metaphysics nor results in narcissism. As a result, reason can survive modernity[402] and its denial of classical philosophical foundations:

> [I]f..."reality" is intrinsically relational and experience is generated between what interconnected actors posit as independent of them and their difficult discovery of those positings, then the critique of representation becomes possible without it depending on any outworn metaphysical base.[403]

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[398] Gillian Rose, *Mourning Becomes the Law: Philosophy and Representation* (Cambridge: Cambridge University Press, 1996), p. 11.
[399] This is a question of forced civic amnesia as well as one of anamnesis. For the stance required, *see*: Nicole Loraux, "Of Amnesty and Its Opposite", in *Mothers in Mourning* (Ithaca and London: Cornell University Press, 1998), pp. 83-109; Erich Auerbach, *Mimesis: The Representation of Reality in Western Literature* (Princeton: Princeton University Press, 1998). (Translated by Willard R. Trask)
[400] Rose, *Mourning Becomes the Law: Philosophy and Representation*, generally.
[401] Ibid. pp. 11-12.
[402] For an expanded explanation of this relation/opposition, *see* Rose, ibid. pp. 27-31.
[403] Ibid. p. 13.

The freedom that results is positive and outwardly-directed.

The view of "reality" that Rose argues for here depends on a "phenomenological description of experience", and it sustains learning, growth, and knowledge "as fallible and precarious, but risk-able".[404] The "risk" is directly the opposite from that contemplated by Derrida. It is a risk of making "*temporarily* constitutive positings of each other which form and reform both selves",[405] which is a risk of positing, failing, and positing again. The risk is of "*activity beyond activity*"[406] rather than the Levinasian "passivity beyond passivity" which results from interiorized mourning. "Activity beyond activity" remains an ethical formulation of the problem, but its "direction of fit" with "otherness" is different than Levinas's. In this analysis, the idea of political action is not necessarily determined by a closed or already-defined notion of the subject. The realm that we would like to live in may be barred to us, but there is a huge realm of possible action remaining. Memory and mourning are turned not towards the individual but towards the *polis*.

Rose discusses this through analyzing the meaning of a painting by Poussin, *Gathering the Ashes of Phocion*.[407] Phocion's mourning wife defies the law of the city to gather his ashes. One reading of the act of gathering the ashes is that it is an act of perfect love; it is opposed to reason and to law, and it is necessarily outside the boundaries of the unjust city, which is represented by the classical architecture depicted behind the two women. Rose puts forward the opposite argument. She argues that the classical buildings

> present the rational order which throws into relief the specific act of injustice perpetrated by the current representatives of the city – an act which takes

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[404] Idem
[405] Idem (emphasis added).
[406] Idem (emphasis added).
[407] "Phocion was an Athenian general and statesman, who offered a model of civic virtue in his public and his private life. ...[He] was eventually accused of treason by his enemies, and was sentenced to die...by taking hemlock. As an additional disgrace, Phocion's burial within Athens was forbidden, and no Athenian was to provide fire for his funeral. His body was taken outside the city walls and burnt by a paid alien; his ashes were left untended on the pyre. ... The painting shows Phocion's wife with a trusted woman companion. They have come to the place outside the city wall where the body of Phocion was burnt so that Phocion's wife may gather his ashes...". Ibid. p. 23.

> place outside the boundary wall of the built city. The gathering of the ashes is a protest against arbitrary power; it is not a protest against power and the law as such. To oppose anarchic, individual love or good to civil or public ill is to deny the third which gives meaning to both...the just city and the just act, the just man and the just woman. In Poussin's painting, this transcendent but mournable justice is configured, its absence given presence, in the architectural perspective which frames and focuses the enacted justice of the two women. To see the built forms themselves as ciphers of the unjust city has political consequences: it perpetuates endless dying and endless tyranny, and it ruins the possibility of political action.[408]

The grieving woman and the acts of memorialization and mourning *correct* the law, do not *challenge* reason. The citizens of the *polis* are the "just man and the just woman". The just city is the city that creates these people; they are "sovereign individuals", they are themselves memorialized.

There are too many differences between Phocion's wife and Praxithea to attempt a true analogy. Nevertheless, despite their differences, the stories have a few similarities. In the just city (or the city perceived as just), memory and mourning invert into autochthony and immortality. On the walls or against the walls of the living city, or on the outskirts of the ideal(-ized) (interiorized) city, mourning finishes and memory has work to do amongst a web of forces and experiences. To do the work of memory and to complete mourning in this context, one has to reject the (purely) interstitial reading of the nature of memory itself. Praxithea and Phocion's (unnamed) wife *act* to create the necessary tropes of memorialization, and their actions save and reflect the just city. This is in keeping with the legal analyses referenced above, as well with theories of historical and political memory. The argument made by Raphael Samuel in *Theatres of Memory*, and in much of the contemporary discourse in history, heritage and museum studies, is that:

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[408] Ibid. p. 26.

> [M]emory...is an active, shaping force; that it is dynamic – what it contrives symptomatically to forget is as important as what it remembers – and that it is dialectically related to historical thought, rather than being some kind of negative other to it.[409]

This is the sort of memory used in and by cultural property discourse. It is the memory of autobiographical and fictional tropes turned to the uses of law, to claim a belief in the continuation of a just place, a just future.

Forgetting

The question of forgetting first arose as the description of one aspect of how memory serves as resistance and mechanism, forcing the human being out of a singular state and into a position of (personal and political) responsibility to others.[410] To return briefly to the question, and to the Ancient Greeks, is forgetting any more possible than true memory or mourning? The Ancient Greeks recognized and rejected what the city feared: the "fascination of loss", "pleasure of tears" and "suspended time" which threatens the positivity of the political sphere: "Hence the rejection of memory when it tries to be the guardian of rifts and breaches: the city wants to live and perpetuate itself without breaks, and its citizens must not wear themselves out with crying".[411] In the ancient Greek *polis*, mourning or lamentation had to stay within emotionally and politically acceptable bounds. The result could be "tantamount to the banning of memory – that is, of certain kinds of memory".[412] The exception to this rule was the "lamentation of mothers" – women who had the right to mourn publicly. Although Praxithea was allowed to mourn, Loraux, speaking of her

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[409] Samuel, *Theatres of Memory*, p. x.
[410] cf. Goodrich, *Law in the Courts of Love: Literature and Other Minor Jurisprudences*.
[411] Loraux, *Mothers in Mourning*, p. 10.
[412] "[I]n the year 492, the dramatist Phrynicus presented his Athenian audience with a tragedy about the capture of the Ionian city of Miletus by the Persians in 494. ...The emotional impact on the audience – a veritable explosion of tears – led to such a political uproar that Phrynicus was fined one thousand drachmas as punishment for having 'reminded' the Athenians 'of their own misfortunes'... [A]ny future performance of this tragedy...was interdicted by the state...". Gregory Nagy, "Foreword", in Loraux, *Mothers in Mourning*, p.xi.

zeal to sacrifice her daughters, comments that Praxithea is "Athenian" more than "mother" and that as Praxithea wraps herself in the autochthonous ideal, she is "elated with a very personal fanatical sense of citizenship that she pushes to the limits of deceit" in not just offering her daughter but "freely giving" her...".[413] Praxithea is poised to memorialize, not mourn, her daughter in the service of the Athenian city.

"Laws exist to delimit the bounds of mourning".[414] In the law of Ancient Greece, mourning ends with memorialization and the command to forget. The command to forget encapsulates the essence of the Ancient Greek idea of amnesty. Forgetting weaves personal mourning into political life; as regards the law, it is within the ambit of power to compel amnesty. Civic memory and civic forgetting were linked but orthogonal to mourning and lamentation. The memory was banned in order to ban the rage and the endless cycles of retaliation that accompany absolute grief; it was legal and legally enforced forgetting. Amnesty and amnesia were linked.[415] *What was selected for forgetting was what was deemed no longer essential for the future of the city or the people.*[416] Is this possible today?[417] As Loraux asked regarding the Ancient Greeks, is there ever absolution for absolute grief, cycles of endless retaliation? In Ancient Greece, amnesty was "formal civic act of nonremembering".[418] The discourse of cultural property shows us that rather than remembering and refusing to remember, we forget and refuse to forget. In this sense, we are still where Nietzsche placed us over a century ago.

What does this mean for cultural property?

The links between objects, memory, and history – between things and interpretive discourse – are themselves the fabric of the discursive field through

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[413] Loraux, *Mothers in Mourning*, p. 14.
[414] Ibid. p. 19.
[415] Loraux, "Of Amnesty and Its Opposite", in *Mothers in Mourning*, pp. 83-4.
[416] Ibid. pp. 84-93. I do not do her argument justice, as she displays a complexity of thought and scope of erudition that would require a Chapter of its own.
[417] There is a great deal of scholarship on this question. *See*, for example, Forty and Küchler eds, *The Art of Forgetting*.
[418] Nagy, "Foreword" in Loraux, *Mothers in Mourning*, p. xii.

which the law generates the narratives that validate claims to pieces of cultural property. The narratives of past events are themselves often, if not essentially, fictional.[419] The narrative that defines a relic is the narrative that weaves memory and history into and through the physical object, destabilizing the "thing-ness" of the object itself.[420] Furthermore, "the past's empirical absence leaves a grain of doubt which philosophical analysis cannot wholly allay".[421] It may seem self-evident that physical objects anchor the narrative(s) of the past better than remembered events; arguably a vase or statue or piece of flint keeps its shape through time, is merely glossed by the often competing or challenged stories told about it. Yet both as physical objects and as loci of memory or history, relics are themselves in flux. The physical being of objects leads inevitably to their decay. As importantly, however, objects (in particular of this kind) cannot be separated from the disciplines of memory and history, and the meanings that attach to or are found in these disciplines.[422] Objects from the ancient past may remain physically present while being phenomenologically irrelevant to the knowledge of the past that they are presumed to guarantee.[423] In short:

> Memory, history, and relics offer routes to the past best traversed in combination. Each route requires the others for the journey to be significant and credible. Relics trigger recollection, which history affirms and extends

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[419] "All accounts of the past tell stories about it, and hence are partly invented; as we have seen, story-telling also imposes its exigencies on history". Lowenthal, *The Past is a Foreign Country*, p. 229.

[420] "Every relic thus exists simultaneously in the past and in the present. What leads us to identify things as antiquated or ancient varies with environment and history, with individual and culture, with historical awareness and inclination". Lowenthal, *The Past is a Foreign Country*, p. 241. *See*, also, Clark, *Nietzsche on Truth and Philosophy*.

[421] Lowenthal, *The Past is a Foreign Country*, p. 190.

[422] "Ubiquitous as they are, relics suffer greater attrition than do memories or histories. Whereas history in print and memories recorded on tape can be disseminated without limit and are thus potentially immortal, physical relics are continually worn away. ...Were artifacts like memories, everything ever built might be brought to light again, Freud suggests.... Remote and recent memories often survive along with present impressions of the same scene, but for artifacts the new must replace the old [or the old the new]; material things emerge by discarding previous integuments. Otherwise past and present would blur into unintelligibility.... Artifacts are ceaselessly effaced, whether suddenly destroyed by earthquake or flood, war or iconoclasm, or slowly perishing by erosion. Less of last week survives than of yesterday, less of last year than of last month". Ibid. p. 239.

[423] "[A]rtifacts are simultaneously past and present; their historical connotations coincide with their modern roles, commingling and sometimes confusing them.... The tangible past is in continual flux, altering, ageing, renewing, and always interacting with the present". Ibid. p. 248.

backwards in time. History in isolation is barren and lifeless; relics mean only what history and memory convey.[424]

In this argument, once again memory is like history: "inherently revisionist and never more chameleon than when it appears to stay the same".[425] Like history, memory is a creature of the present,[426] and like memory, history is a story told according to the constraints or rules of fiction.[427] In this scheme, critical theory should recognize that memory constructed in this manner functions to allow *necessary* fictions. The truths that are at stake in cultural property debates cannot be erased by knowledge, as they are both fictional and real; they are stories told about desire, translated into promises regarding the future. In this sense, the fictions of memory become "truths" as obdurate and permeable as the objects themselves. Unless this understanding serves as the linchpin of analyses of claims for return, the objects themselves – the bowls and columns and vases and masks – remain untouched, still elude theory. An object can only be understood – in its ownership as well as in any other quality – by understanding the stories that are told about it. The "falseness" of the memory is in direct proportion to the magnitude (if not the meaning of) the claim to the object.

Objects that are defined as cultural property are riddled with absences: the people who made the object, those who worshipped it or at it, the various fluxes of populations that acquired it, "legally" or not. Rights attach to long-dead figures in the past, which are reanimated and returned to relevance. In this sense, old objects are always palimpsests, come to the present with erasures and attachments, marginal interpretations and unintended emendations. The authority of history or science, the

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[424] Ibid. p. 249.
[425] Samuel, *Theatres of Memory*, p. x.
[426] "[M]emory is historically conditioned, changing colour and shape according to the emergencies of the moment;...it is progressively altered from generation to generation. It bears the impress of experience, in however mediated a way. It is stamped with the ruling passions of its time". Samuel, *Theatres of Memory*, p. x.
[427] "[H]istory involves a series of erasures, emendations and amalgamations quite similar to those which Freud sets out in his account of "screen memories", where the unconscious mind, splitting, telescoping, displacing and projecting, transposes incidents from one time register to another and materializes thought in imagery". Idem.

identities[428] that would seem to control possession or reappropriation of these objects, are brought to the "thing itself" in overlapping, purposeful waves. There is thus a primary contradiction in attempting to understand the field on which cultural property debates are enacted. The fluidity of the discourse comes up against the solidity of the object. The reverse is also true: the solidity of the discourse (for example, the language of law and the tropes or patterns of "cases" and "judgments") comes up against the fluidity of objects that are always being interpreted and thus recreated. There is an ever-shifting line or "membrane" between discourse and (physical) object, the membrane that itself creates "property".

As such, ownership occurs on this line. The valid owner is, or will be, the owner that is directing the vector of narrative discourses of desire and attachment.[429] This membrane is mediated by power, by will, and by the process of human development, the exercise of will to move forward through the process of "overcoming" described by Friedrich Nietzsche in his philosophy. [430] The question of "justice", hotly debated, also performs this strange inversion from past to future, from the stern rules of ownership and contract that define what Nietzsche labels "prehistory" or "morality of custom" to a legal scheme of justice premised on the increasing wealth and security of the original owners of the object. Following Nietzsche, the superabundance of goods and (cultural) security means that certain communities can "afford" to "lose" the objects that used to represent their most cherished possessions. On the other hand, as the Western world becomes richer, museums, heritage sites, and claims for cultural property are proliferating. It is possible that in the endless future of modernity, ownership of the past becomes ever more necessary. As a result of these inherent contradictions and shifting attachments

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[428] For example, identities of nationhood, language, purpose, ethnic association.

[429] *See*, generally, for property and desire, Jeanne Schroeder, *The Vestal and the Fasces: Hegel, Lacan, property, and the feminine* (Berkeley: University of California Press, 1998).

[430] Will to power and the composition of "the world" in Nietzsche's philosophy merge; *see* Clark, *Nietzsche on Truth and Philosophy*, Ch. 7: The Will to Power, pp. 205-44, in particular the point that "The idea is that the world consists not of things, but of quanta of force engaged in something of the order of 'universal power-struggle' ...with each center of force having or being a tendency to extend its influence and incorporate other such centers. ...Heidegger seems right that will to power constitutes Nietzsche's answer to the metaphysical question concerning the essence of what is...". p. 206.

to objects, the field of cultural property analysis must be approached via a theory or philosophy that can address the fluidity of the conflicts presented. The question of origin and that of narrative need to be addressed in a way that allows for the *eruption* as well as the recovery of contested objects.

To return to the question presented by the case of the Parthenon Marbles, the foregoing analysis seeks only to explore some of the investments and mechanisms that perpetuate the conflict, rather than to propose any particular solution. Property does not exist without the desire for possession, and it is that desire that must be understood.[431] Cultural property is, strangely, more vulnerable to the vicissitudes of desire than other sorts of property, because it requires the memory of many people and the shared concern for a common future. The language of cultural property law makes the assumption that this sort of interest exists. But if it doesn't? Artifacts are vulnerable to war, decay, and the depredations of collectors; they are vulnerable not to amnesia but to the dreadful forgetting that underlies flares of memory and memorialization. The debate(s) regarding the ownership of the Marbles are better, overall, than the alternative to such debates.

Conclusion: Memory as ownership

The Parthenon is an iconic ruin. Fragmented, it still appears whole from an (essential) distance. For the modern person in Athens, the act of looking upwards has come to presume the experience of looking backwards in time, to a structure that retains its outline and authenticity from the originary point of its coming into being until the present moment, and which must be protected, unchanged, into the future. As has been suggested above, however, this experience is fictional, depending upon managed omissions and recently-acquired memories. This may not matter. It is the fierceness of the gaze rather than the clarity of the vision that wins such claims. Memory is always forgetting itself. It exceeds its boundaries, it knows impossible things, and it vanishes terribly and leaves nothing in its wake. As the romantic ideal

[431] See Schroeder, *The Vestal and the Fasces*.

collapses into the recognition of present artificiality and fragility, one must take a position on the questions of these claims regarding the past: one must contemplate whether the Parthenon requires the pieces taken from it, and which claimants require the ownership of the ruins more. We look to law to resolve these questions for us, to make fragments into wholes, things and stories both, transformed into objects that can be claimed or owned rather than simply found, lost, or mourned.

Simultaneously, however, arguments based around the possessive urge create a void around them, turn the full world of modernity, the world of forces and discourses, tactics and strategies, into a seeming emptiness. In part, this is because will creates a vacuum around itself of necessity, it requires a space in which to operate. In the most extreme formulation of the argument presented in this Chapter, we do not remember or own anything at all. To succeed in claims for ancient objects we must find a justification for ownership that prevents the very notion of owning an object that has outlasted immemorial human generations from seeming ridiculous. By the time a legal or diplomatic claim is made for the "return" of some "property" by a "people", the complex of desiring and storytelling, of self and object, present and past, that which is created by will, and that which is denied or promised by "history", have all merged into claims of memory and attachment that sound like "I want" in full cry, or (its synonyms) "I deserve", "I am entitled to", "I reclaim". To translate this cry into "justice" means to decode it, to find the engine that drives its tremendous power. In the philosophy of Nietzsche and the workings of memory, there is a beginning to this endeavour. In the Parthenon Marbles, like in all ancient artifacts, there is enough silence to make an end.

Chapter Five Narratives of Origin: "Autochthonous" Heritage

The earth is the very quintessence of the human condition... [432]

(Hannah Arendt)

Chapter Five looks again at the case of the Parthenon Marbles. However, whereas the previous Chapter looked at the narratives of attachment that underlie legal claims, this Chapter looks at the narratives of origin (original possession and original identity) that are also used to establish ownership. This Chapter uses the same complex of fact, law and socio-historical materials to argue that the issues inhering in the legal claims for the return or retention of ancient objects of cultural property are issues that have to do with claiming a particular ground of (and for) origin on the parts of the claimants. Once again, the problem has as much to do with epistemology as it has to do with possession. The substantive argument made here is that narratives of origin in cultural property discourse are meant to stand against, or *resist*, the effects of the genealogical approach to knowledge. The primary effect of the genealogical approach to knowledge (an approach that has already been discussed in Chapter Three) is the almost-complete loss of certainty as to the truth of assessments of origin. This has two subsidiary effects: first, the effect on the object at stake is that it is increasingly "erased" by the discourses that seek to describe and to own it. The object is described and re-described according to the nodes of power, history, truth and possession that constitute it at any given moment. Second, in the realm of discourses of ownership, the effect of the genealogical approach is to "erase" the category of "owner" as well as that of "object". Objects and owners, therefore, are in a state of flux.

This Chapter makes the substantive argument, intended to apply to all "cultural property", that the claims brought for ownership are meant to address this situation of originary erasure and loss. It argues that the arguments regarding "origin" turn on commodification and heritage as a means of replacing genealogy

[432] Arendt, *The Human Condition*, p. 2.

with certainty. Once again, we are in the realm of fiction. The fictions of heritage and the reifications of commodification seek to stand against the flux described above. "Heritage management" and commodification of the desired (fictional or mythological) originary identity are the techniques whereby the (irrational and unsustainable) desire for a particular and unshakeable origin is guaranteed by and transformed into ownership of the object itself.

This Chapter therefore proceeds in four steps. First, with reference to the Parthenon Marbles, it describes the search for rootedness or originary identity. Again, some repetition of facts, law, or history from Chapters Two and Four is necessary (not merely inevitable). The Parthenon Marbles materials are here being analyzed to provide a substantive segment of a theorization of cultural property; as such, with each set of arguments the materials have to be re-examined. Second, more generally this Chapter demonstrates how this search is inescapably frustrated by the genealogical approach to origin. Third, it proposes that the response to this situation is found in the increasing prevalence of "heritage" and "commodification" in modernity. Finally, it concludes that the claims for repatriation, and even for retention, of a particular object turn on the claimants adopting the position of "autochthonous" peoples. This position is briefly distinguished from that of "indigenous peoples", although this distinction (and its collapse) will be addressed at greater length in Chapter Six. This Chapter ends by considering whether the "autochthonous" position also reflects the problematics of the human condition discussed in the Introduction. The reliance on "heritage" may be both a response to "genealogy" and recognition that the loss of the earth itself is unbearable; possibly we seek to link ourselves in an archaic manner to that which may be leaving us behind.

Introduction: In search of "rootedness"

This Chapter focuses on the question that has been asked, implicitly when not explicitly, throughout this thesis. How do we assess, and indeed constitute, the value

of cultural property? The case of the Parthenon Marbles, and the philosophy of Friedrich Nietzsche, Michel Foucault, and Gilles Deleuze, begin to address this question. The main point of the Chapter is that the value of an object of cultural property is in our use of it to stake a claim to a particular origin, and through that, to a rootedness in the world that can best be described or understood as the claim to an *autochthonous* identity. There are two further arguments that arise from this central premise. First, the reason for this claim is the uncertainty provoked by the status of the disciplines of origin and knowledge in modernity. Second, the effect of claiming this sort of rootedness is to destabilize the traditional and essentialist distinctions between "indigenous" and "non-indigenous" in this particular context, as narratives of origin, when traced back to their foundations, have largely similar goals. These are goals of primary "nobility", "belonging", "ownership" that can be merely *stated* rather than needing to be *argued.*[433] As such, the goals of claiming autochthonous rootedness to the earth itself mirror the goals of some modern genres of scholarship.[434] As in legal discourse the ownership of the objects at stake is the mode through which these meanings are expressed, the meaning or place of the law will be discussed through the legal formulations of means of owning origin, or "heritage".

To recapitulate the central theorization of cultural property proposed in this thesis, the value, definition, and meaning(s) of cultural property are located at the nexus of two vectors: narratives of *attachment* and narratives of *origin*. Against this background, the determination (question) of origin must be understood as both

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[433] However, it is important not to confuse a reductionist approach to similarities of *content* among foundation myths with the more nuanced scholarship that looks to the *purpose* of these myths. "Nineteenth-century German scholarship attempted to derive these multiple legends from a single myth, a creation myth common to all Greeks and which each city presented in its own local form: men born of the Earth or the union of the Earth and the Sky....But beyond the fact that these wearisome reductions to a single, semipiternal story generally overlook the specific traits of each tradition or each figure, divine or human..., it is a poor method always to seek to reconstitute the singular, as if a primitive, unitary *logos*, lost for all time, continues to be expressed through fragments of discourse, accidental traces of a paradigm that has disappeared. ... It is not that each city wishes to tell in its own way the story of the birth of the first man. Every foundation myth is less concerned with providing a version of the beginnings of humankind than with postulating the original nobility of a founder...". Loraux, *Born of the Earth*, p. 9.

[434] *See*, for example, the debate about the claims, purposes and problems of Afrocentric retellings of intellectual history: Lefkowitz, *Not Out of Africa*, especially "The Myth of the Stolen Legacy", pp. 122-54.

discursive and factual, that is, as inhabiting a field in which where a thing comes from is a matter of (usually ever-changing) interpretation. In this field, the claim to autochthonous ground (through these narratives of origin) is cross-referenced with the claims to memory (communal, social, political, architectural, rhetorical and other forms) as a genre of narratives of attachment. The claim(s) to memory have been addressed in the previous Chapter. The claim to origin is addressed here.

The research in the case of the Parthenon Marbles that founds this part of the thesis arguably shows that the most important discourse of origin in cultural property law postulates the autochthonous identity of the people making the claim to the object. The link between autochthonous origins and techniques of memory as forming claims to identity and ownership (of objects and land) is very old. To repeat the quotation from Herodotus given in the previous Chapter:

> [I]n his list of peoples who inhabit the Peloponnese, the historian Herodotus carefully distinguishes those "staying in the same place", meaning those whose ancestor is autochthonous, from the rest who are considered immigrant, or at least displaced populations...But autochthony must be earned. Etymologically only the first ancestor born from the soil is autochthonous, he whose arrival establishes city life and legitimates the link between the people and their land. One further step, and the autochthony of the ancestor, transmitted by filiation, extends to all his descendants. Historians take note of this extension, at the same time employing the word subject to two conditions: When it concerns a people, autochthony characterizes the strict relationship which, from the beginning and uninterruptedly, attaches them to their land. ...But out of Herodotus' statement a second criterion emerges, implicit but imperative, which adds to the transmission of the soil, that of memory. It is well to occupy the land, but even better to maintain the autochthonous tradition, in order to strengthen the ties that bind the present to the time of origin.[435]

[435] Loraux, *Born of the Earth*, pp. 14-15.

Rather than looking at the requirements of memory, this Chapter looks at the complex of autochthony, filiation (heritage) and soil also at the center of the disputes regarding the ownership of very ancient objects.

The question remains, however, how to assess the "origin" of any ancient object. Therefore, the second step of the argument made here consists of aerating some of the problems that arise. The discourses that determine origin are discourses irradiated by all the uncertainties and shifting allegiances that characterize scholarship, or more precisely, *knowledge* in modernity. After Friedrich Nietzsche and Michel Foucault, the structure of knowledge, at least as the evaluation of values is concerned, is *genealogy*. The effect of this is to heighten the problems at issue. Certainty of knowledge, and the kind of certainty that could possibly ground claims of autochthony, is in very short supply in this scheme of knowledge. Rather, we must accept that the very knowledge we rely on to ground our claims to these objects is knowledge that *erases* rather than maintains certainty regarding origins. The discourses that we rely on in modernity are discourses that presume a fluid landscape of "nodes" and "rhizomes", of contingent connections and sudden disconnections. The more we look at an object through this sort of lens, especially a valued object, the more it fades from our view.

Therefore, we must be able to conceptualize a place in which neither "rootedness" nor ownership can be contested. "Heritage" is the modern form of origin-ownership. In the heritage scheme, origin becomes a product that can be owned and thus bought, sold, heightened, or traded. Commodification, therefore, becomes an interesting and necessary discourse (or topic) in this context. Not only are there many legal arguments regarding the commodification of the objects at stake, but also, in the argument of this Chapter, commodification is a necessary, and necessarily artificial, *reification* of the narratives of origin in this field. The commodification of narratives of origin, understood as "heritage", along with fundamental claims to autochthony, serve as *resistance* to the process of erasure and loss that otherwise attends our attempts to find a kind of ground(ing) in these sorts of

objects. Commodification is thus erroneous and necessary, highly artificial and yet fundamental to our valuation of cultural property.

The argument made in this Chapter, although proceeding through a close reading of the myths underlying the Parthenon frieze, could as easily be turned to the myths underlying the Indian Coalition's claim for the return of the bones of Kennewick Man. The substance of the myths and meanings that inhere in the case of Kennewick Man will be discussed later in the thesis. For the moment, the issues that animate the argument are equally applicable to Kennewick Man. These issues are the means by which the subjects of dispute are created in the discursive field of cultural property, and intertwined with this, the meaning of "autochthonous" in this field, as well as the means by which the construction of "heritage" is responsive to the problems raised by narratives of origin in modernity.

The discursive and the factual define the same field (description *makes* the objects)

> The traveler Pausanias, visiting the Acropolis in the second centuury A.D., described the sculptures that he saw decorating the pediments of the Parthenon as well as Pheidias's monumental statue of Athena housed within (Paus. 1.24.5). He made no mention...however, of the 160-m-long frieze, set high and in the shadows of the exterior colonnade. Without an ancient source to confirm what the ancient viewers saw in this frieze, modern interpreters have been free to reconstruct a meaning on their own.[436]

The sculptures at the center of the dispute are large sections of the frieze that ran around the entire Parthenon.[437] Currently, as described above, the bulk of the

[436] Connelly, "Parthenon and *Parthenoi*", p. 53.

[437] The frieze begins on the West side of the Parthenon, the side that the visitor first sees when entering the compound of the Acropolis. From there it then moves around the long North and South sides of the building until the two sides of the procession meet at the East side. From the West side therefore, which consists of scenes of preparation, the procession moves up the North and the South sides in rows of horsemen, chariots, various marshals directing the procession and youths holding the horses, elders,

frieze is in the Duveen Gallery of the British Museum, although there are a few panels in the Acropolis Museum in Athens, and two panels in the Louvre in Paris. The Duveen Gallery has been described in Chapter Four, but again, it is worth restating the way in which the Marbles are displayed within the Gallery, and the experience of viewing them in their present location. Fundamentally, when one visits the Duveen Gallery, one sees a vista of classical art in a space specifically designed for it. The room is bare, colourless, dressed in polished stone, and set up in a counter-intuitive manner. The gallery is a long rectangle, which one enters in the middle of one of the long walls. The fragments from the East frieze are to the right, and then the North frieze occupies the rest of the long wall on the right and continues on the opposite (long) wall. On the left is the beginning of the South frieze, which also continues on the opposite wall. Directly in front of the visitor is the East frieze, which consists of the focus of the ceremonial procession. As one enters the gallery, directly opposite the main door one sees the scene that originally existed on the East side of the Parthenon.

> Horsemen, charioteers, musicians, water-carriers, animals for sacrifice all converge, from their two sides, on a strikingly enigmatic climax which is shown directly over the eastern door itself...:a piece of cloth is held up by, or passed between, a man and a child (male or female, it is not clear); behind the man, a woman seems about to take more cloth, or perhaps padded stools, from a pair of girls; on either side a group of deities, 12 in all, sit with their backs to the scene – recognizably superhuman, because even seated they equal the height of the standing mortals.[438]

This culmination consists of a "mystery".[439] Clearly, the frieze refers to an event that engages and concerns the entire population of Athens, and there is a great deal of scholarship speculating on what that event might be. Until recently, the most

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musicians, water-jar carriers, tray-bearers, and animals being led to sacrifice. The two arms meet at the ceremonial scene that takes place on the East side of the Parthenon. Here, there are the gods of Olympus, two adults (a man and a woman), two girls bearing trays with folded cloths on them, a child that could be either a girl or a boy, and magistrates or tribal heroes. St. Clair, *Lord Elgin and the Marbles*, pp. 51-53; Beard, *The Parthenon*, "Making Sense of the Frieze", pp. 128-37.

[438] Ibid. p. 129.

prevalent theory was that the frieze depicted the Panathenaic Festival, which celebrated Athena, the founding deity of Athens. James Stuart in the *Antiquities of Athens* first proposed this theory in 1789. For many people this remains the most plausible explanation of the frieze.[440] However, it does not account for the differences between what is historically known about the Panathenaic Festival and what is depicted on the frieze, and in particular, this theory does not account for "why the Athenians broke what seems otherwise to have been an iron rule of Greek temple sculpture – that only mythological scenes, and never events from real life, were represented".[441] The problems of meaning are deepened by other considerations. First, as Mary Beard asks, "How, after all, would we recognise the correct 'solution' if we found it?"[442] Second, the recent restoration of the Parthenon has uncovered heretofore unknown and surprising evidence of a second frieze, running around the inner eastern porch and over the main eastern door of the Parthenon. A fire destroyed this frieze in the third century A.D. The remaining fragments suggest that it was shorter than the frieze that still exists, and was seemingly carved more deeply. As far as can be reconstructed, it featured a row of standing female figures. No one knows what it could have meant, although "it is almost bound to have been seen as the continuation of the narrative which ended...at the scene with the *peplos* or shroud".[443]

This striking new discovery only throws more attention on the meaning of the central scene of the surviving frieze.[444] For the purposes of this Chapter, as for Chapter Four, the most persuasive account seems that put forward by Joan B. Connelly in "Parthenon and *Parthenoi*: A Mythological Interpretation of the Parthenon Frieze".[445] Therefore, it is worth restating Connelly's project and

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[439] St. Clair, *Lord Elgin and the Marbles*, pp. 53-5.
[440] Sue Blundell, "Marriage and the maiden: narratives on the Parthenon", in Sue Blundell and Margaret Williamson eds, *The Sacred and the Feminine in Ancient Greece* (London and New York: Routledge, 1980), pp. 47-70.
[441] Beard, *The Parthenon*, p. 135.
[442] Ibid. p. 136.
[443] Ibid. p. 137.
[444] "[I]t is an unsettling thought that the premise on which almost every explanation of 'our' frieze has always been based – that the strangely low-key incident with the cloth marks the climax of the story – is now called into question". Beard, *The Parthenon*, p. 137.
[445] *American Journal of Archaeology* 100 (1996) 53-80.

conclusions here. Connelly's purpose is to take "a fresh look at the frieze within the context of the story preserved in the *Erechtheus*, and thereby allow for a very different reading of the images, one that may find greater harmony with the sculptural program of the Parthenon as a whole".[446] Connelly suggests that the subject matter of the frieze commemorates one of the founding myths of Athens (a topic in keeping with the standard sculptural programs of ancient Greek temples). Specifically, the Parthenon frieze depicts the myth in which one of the ancient kings of Athens, Erechtheus, was told that he must sacrifice one of his daughters in order to be guaranteed success in a war against the Thracians.[447] All three had sworn, however, that if one must die they would all share that fate. Arguably, the East side of the frieze shows Erechtheus, his wife Praxithea, and the three daughters in the moment before the sacrifice. Erechtheus was the second great founding father of Athens. Thus, the legend surrounding Erechtheus was one of the ancestor or tribal myths of Athens and a common topic or theme in Athenian art.

The mythical founders of the Athenian race, Kekrops and Erechthonios, sprung from the earth of the Acropolis[448] and were portrayed as half-serpent, half-man. These figures "represented a fundamental element of the land itself. The lower half of [their bodies]...was a serpent, indicating...[their] chthonic origin".[449] Erechtheus is commonly accepted as Erechthonios's grandson, although the names "Erechtheus" "Erechthonios" and "Kekrops" are often used interchangeably in other tellings of this foundational myth. As has already been stated in Chapter Four, the ancient Athenians of the classical period considered themselves to be an autochthonous people, a people that sprung from the land of the Acropolis itself.[450]

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[446] Connelly, "Parthenon and *Parthenoi*", p. 57.
[447] St. Clair, *Lord Elgin and the Marbles*, p. 54.
[448] "Hephaistos had once tried to rape Athene, and when she repulsed him he ejaculated onto her leg; the wool which she used to wipe away his semen was thrown onto the ground, and as a result a child, Erichthonious, was born from the earth. The infant, who in some versions of the story had a torso which terminated in a snake, was then adopted by Athene as her foster-child and entrusted to the care of the daughters of Kekrops". Blundell, "Marriage and the maiden: narratives on the Parthenon", p. 65.
[449] Andronicos, *The Acropolis*, p. 16.
[450] Ibid. p. 14.

Therefore, arguably the subject matter of the frieze commemorates the union of race and land, man and earth as a founding moment of Athenian originary identity.

This identity was worth death in war and death in human sacrifice. A clear statement of this is found in Euripides's *Erechtheus*.[451] Once again, it is worth repeating the material presented earlier, as Erechtheus's wife Praxithea's speech goes to the assertion of autochthony via the soil as much as it does through the operation of memory and memorial techniques. In this play, Praxithea justifies the sacrifice of her daughters by saying that she is giving her children to the "city" much as a mother would send her sons to battle. This analogy maintains the political and the physical definition of autochthony: not only getting flesh and blood from the land, but giving it back. This relation makes Praxithea a "citizen" of Athens. It is, in many ways, a brutal exchange:

> I shall give my daughter to be put to death. I take many things into account and first of all that I could not find any other city better than this. To begin with we are an autochthonous people... [S]omeone who settles in one city from another is ... a citizen in name but not in his actions.[452]

This is the relationship to origin and identity that is arguably represented on the Parthenon frieze. A settler could die defending Athens but not partake in this relationship.

In support of Connelly's position, when one visits the Acropolis Museum[453] in search of pieces of the frieze, one has a completely different experience from that when one visits the British Museum. The Acropolis served as the center of Athens and of its cults and myths long before the Parthenon was constructed, and thus the museum places the remaining pieces of frieze in the context of other and very

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[451] See Chapter Four, n. 347.
[452] C. Collard *et al. Euripides: Selected Fragmentary Plays*, vol. I (1995), p. 159.
[453] See Chapter Four, n. 352.

different artifacts.[454] These artifacts, again first discussed in Chapter Four, are also relevant here. The sculptures of the archaic Parthenon consist of

> "frightening monsters" with their superhuman strength and daemonic power, ...Their purpose is not to relate a story, but merely to remind one of the existence in the world of terrible powers that are overawing and overwhelming. Yet [finally] there is no one more powerful than man.... Attic sculpture displays the terrible power of supernatural beings but at the same time projects the human being, both heroic and mythical, who succeeds in harnessing this power.[455]

The figures on the pediments of the archaic Parthenon are half-man and half-serpent, brightly-coloured animals, scenes of humankind's "overcoming" both the bonds of memory and forgetting that constitute the process of becoming human,[456] and the dangers that attend chthonic origins and attachments. Although the Golden Age of Athens vanquished the "frightening monsters", in the Classical order and rhythm of the Parthenon frieze is embedded the story of the link between a people and their place of origin. At the heart of this link are human sacrifice, war, death, and the political survival of the community.

Indeed, these concerns gave shape and meaning to the entire Parthenon itself.[457] As Beard comments, "[t]he building and the funding of the Parthenon are inseparable from the Athenian empire, its profits, its debates and discontents".[458] Long after Athens ceased to be an empire, the Parthenon as a public building continued to represent the shifts in power and political and religious identity that attend all major civic structures that survive from antiquity. As discussed earlier,[459] even the most cursory history of the Parthenon and the artifacts that survive from it show that there is only the most fictional unity between the building itself and the

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[454] Andronicos, *The Acropolis*, p. 14.
[455] Ibid. p. 69.
[456] See Chapter Four generally.
[457] See Chapter Four, "The Parthenon".
[458] Beard, *The Parthenon*, p. 39.
[459] See Chapter Four, "The Parthenon".

"origins" that are contained within it. The line of descent from the Ancient Greek builders of the Parthenon to the modern Europeans that make up the Greek people today is contestable.[460] Throughout the nineteenth and early twentieth centuries educated (usually expatriate) Greeks published scholarly arguments demonstrating the identity of "modern" and "Ancient" Greeks through the continuing identity of territory, language, and in some cases, physiognomy. (Indeed, argument on these themes continues today as regards the return or retention of the "Marbles".)

It was originally as part of this struggle to establish and maintain the chosen national identity that the buildings on the Acropolis were restored. In contrast to the archaeological conventions followed today, the restoration of the Parthenon in the nineteenth century involved excavating down to the rock of the Acropolis. As both an expression of this belief and in order to achieve this result, the Parthenon was restored as a Romantic ruin of fifth century Athens.[461] The traces of medieval and late Hellenistic history vanished. "Greece", and by extension "Athens", was not the multicultural, multilingual backwater it was during Ottoman rule, it instead came to represent, *uninterruptedly*, the center of the Classical, democratic world.

Throughout its history, and certainly in the present, the Parthenon and the Parthenon frieze[462] retain their function as a link between race and soil, citizen and origin. This is of course not unique to the Parthenon. Cultural property claims regarding very ancient objects either occur in the context of the art market (which is one of almost pure commodification), or, by contrast, contest the right to occupy (inherit or own) *these positions*, that of member of the race, citizen of the (imaginary) city, product of the particular soil. Indeed, the two sources of value intermix and cross-define each other over the centuries. As a result, it is difficult to separate them today. In so far as broad understandings are useful in this field, our modern

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[460] St. Clair, *Lord Elgin and the Marbles*, pp. 322-4.
[461] Ibid. p. 316. For a full discussion of the program of restoration of the Parthenon, see Chapters Two and Four.
[462] The Marbles are often, if not always, meant to stand for the Parthenon itself. *See* Beard, *The Parthenon*, p. 168 and generally.

valorization of "autochthonous" might well merge with what it meant to the Ancient Greeks.

Autochthony defined

The terms autochthonic and autochthonous[463] derive from the Greek *autokhthon*, born from the earth [*kthon*] itself [*autos*] of one's homeland. Yet the meaning of "coming from the earth of one's homeland" is not simple. On the one hand: "Man comes from the earth. On this point – ground zero of myth...poets and philosophers, national traditions of the poleis, and tales of the origins of the Greek race all agree."[464] On the other hand:

:: [I]n order to characterize the beginnings of humanity, myths multiply the repetition, the reduplication, the discontinuity. Sometimes men are born from primordial beings who are themselves derived from the earth, and who, in a sort of dress rehearsal, ensure the transition between the origin and the times of men. ...Sometimes reduplication and discontinuity dominate, and the myth is prepared to annihilate a first human race in order to give humanity a new start: the flood removes men from the face of the earth, but Deucalion and Pyrrha, by throwing stones onto the ground, produce a new human race that instantly engages in the process of reproducing itself. ...For man *qua* man was born of men, and not of the unknown.[465]

In this case, man was not born from woman but from stones thrown by the righteous, which in turn means, from *law*:

The Athenian myth of autochthony - according to which each citizen originated in an ancestor born of the soil of the city - is the primordial example of a legal institution that generated its own founding origin. Nicole Loraux observes that the myth of autochthony was constituted in the present,

[463] "Native to the soil, aboriginal, indigenous", "Consisting of or formed from indigenous material (opp. allochthonous)" (*Oxford English Dictionary*, 1989)
[464] Loraux, *Born of the Earth*, p. 1.
[465] Ibid. p. 3.

> by means of a technique that was always poised in the middle, between origin and end... This primordial myth of institutional origin, in which the force of autochthony was constituted only by its continued iteration, illustrates how legal origins were constituted and sustained by their present dramatisation and reception. Although the time of transmission was an institutional time, and although that time was ostensibly inscribed in historical duration, in fact the institution generated the historical duration to which it referred.[466]

The repetition within mythical time is enacted by the repetition in legal time. Origins are purposive, and are purposively responsive to the present. This is visible in the debate(s) regarding the ownership of heritage, as well as in Praxithea's speech in the *Erechtheus*. For the moment, however, this is also visible in the debates regarding ownership in this field more generally. The law requires an account of ownership that institutes and re-institutes the claim of the original possessors in each following holder of the "property". In the case of cultural property, it requires that one collapses identity: the *same* Greeks make the claim for the Marbles' return, the *inheritors* of Periclean Athens make the claim for their retention. In both cases, the claim is one of autochthonous "ground". Yet, simultaneously, it is the distance from that very origin that opens the space for the institution of both "knowledge" (as a reflexive endeavour) and law. "[E]verything takes place in a manner suggesting that the Greeks were less interested in their origins *per se* than in this separation from their origins which definitively constituted the human condition."[467]

Discourses of origin

The legal definitions of cultural property set out two common requirements: for a thing to be cultural property, one must know where it came from, and it must be (or be made to be) meaningful to more than one person. Interpreting these requirements characterizes most of the debates concerning the ownership of contested objects. In a sense, therefore, the law seeks to understand the value of this originary

[466] Alain Pottage, "An original genetic inheritance", forthcoming.

narrative. As the narrative is essentially purposive, seeking to establish originary ground and continuing entitlement, the issues of value are complex. A starting point to untangle these issues is in the philosophy of Friedrich Nietzsche. In *On the Genealogy of Morality,*[468] Nietzsche addresses exactly this problematic of (ethically and politically) purposive accounts of origin. Indeed, the complex of iterating origin while deriving the space of this iteration from the distance from origin – the problem of constructing origin as a source of fundamentally legal security – is also addressed by Nietzsche. The following argument will take up one of these strands rather than attempting to engage with all of them. What is the purpose of narratives of autochthonous origin in the realm of cultural property? That it is indeed *autochthonous* origin at stake will become clear through the following analysis.

The understanding that values are themselves subject to discourse, as well as to the related ideas of utility and desire, begins, in the modern era, with Nietzsche. There is a certain joyous amount of irony in turning to Nietzsche in reference to cultural property claims, and to the Parthenon Marbles in particular: the arguments made for the return of the "Marbles" would provoke an exquisite sympathy on his part. In contrast to the Ancient Greeks, Nietzsche would find the modern Greeks now muddle-headed, intellectually sentimental, and petty, all this obvious in that they are *origin*-obsessed. In the modern Greeks' desire for "their" Marbles is their emergence as Europeans, arguably a hundred years later than the nineteenth-century Europeans that Nietzsche freely vilified throughout his work. Neither "blond beasts" nor supermen, the modern Greeks become "historians" and join the credulous, anxious plebeians described by Michel Foucault:

> We have become barbarians with respect to those rare moments of high civilization: cities in ruin and enigmatic monuments are spread out before us; we stop before gaping walls; we ask what gods inhabited these empty temples. Great epochs lacked this curiosity, lacked our excessive deference; they ignored their predecessors: the classical period ignored Shakespeare.

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[467] Loraux, *Born of the Earth,* p. 4.
[468] Nietzsche, *On the Genealogy of Morality.*

> .Europeans no longer know themselves; they ignore their mixed ancestries and seek a proper role.[469]

To make a claim to anything extremely ancient on the basis of filiation or descent is indeed to "ignore...mixed ancestries". The question is, however, what is the "proper role" that is being sought? Additionally, how is this proper role being sought? Although it is worth saying at the outset that Nietzsche himself would regard this endeavour with scorn, the main thinkers of and after Nietzsche's "genealogy" (Michel Foucault and Gilles Deleuze) might help to answer these questions.

In the *Genealogy*, Nietzsche addresses the question of the "value of values", or the source of value-judgments such as "good" or "evil". He questions where the notion of values (for example, justice, or Christian values) itself originates, and what animates this notion. As such, he addresses the question of origin itself. The first step of his argument is to identify the standard philosophical argument of his day, which located origin, particularly in regard to values, as the "purpose" of a thing. Nietzsche disagrees with this formulation. Understanding the purpose does not lead to understanding the origin of a value, but only to understanding of the uses to which the will to power has put it. He contrasts a genealogy of the will to power with a genealogy of the valorization of origin itself, thus putting forward his concept of origin, which is one of "emergence" or "descent". In the area of discourse about cultural property claims to very ancient objects, the analogies run as follows: in these claims, the "original" or the "authentic" is privileged as guarantors of the value of the objects and of the identity of the claimants. If one were merely to question the narrativity of the accounts of origin, one would be left (more or less) with a deeper understanding of the purpose(s) of these accounts. Genealogy applied to the mere narrative as will to power might well explain the differing claims and histories presented, but it would not explain *why origin itself* is important in this field.

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[469] Michel Foucault, "Nietzsche, Genealogy, History" in *Language, counter-memory, practice* (Ithaca: Cornell University Press, 1978), p. 59

On the other hand, genealogy *per se* gets closer to Nietzsche's idea of origin: emergence or descent is a conception of origin (and the values expressed therein) that depends upon a constant fluidity of "becoming" or "emerging" that can be understood as the process by which things and relations are *constituted as valuable.* For example, rather than looking to fluctuations in the *accounts* of origin or ownership that irradiate these kinds of cultural property claims, a genealogical analysis of the nexus that we think of as the Parthenon Marbles case would expose the *valorization* of the following: the objects themselves (the frieze is now visible as "the Parthenon Marbles"); the narratives of attachments to the object (the legal, historical and ethical cultural property claims); and last but not least, the people making the claim(s) (in their chosen identity, i.e., the Greeks as "Europeans"). Genealogy, expressed as becoming/emergence/descent (origin), asks "what is emerging in these claims?" In order to understand the complex that is the Parthenon Marbles, and other ancient objects cases that depend upon assessments and creations of origin (i.e. Kennewick Man), we must turn to the analyses of Michel Foucault and Gilles Deleuze for an understanding of the devolution of genealogy from these problematics.

In the realm of cultural property disputes, the kinds of proprietary claims made are expressed through narratives that function both as genealogies and as something different. In many of the claims in the Parthenon Marbles case, we can easily see the narrative regarding the past – the purposive retelling of past events – as the Nietzschean will to power expressing itself by reconstructing and reconstituting both the object(s) at stake (the Marbles) and "history" (the modern Greek state aligning itself in 1833 not with its medieval or Byzantine ancestry but with Ancient Greece). Yet also, we can see that by telling stories about the past in this manner, the claimants are addressing or are accessing the question of time. The claimants in this case are turning the past into a narrative that can somehow be completed within or by human experience. The attempt is to push inhuman reaches of time (and incredibly ancient, if not immortal, objects) into a structure that can be held within human finitude through the operation of identities such as: "the same objects", or "the same Greeks". These identities are unsupportable given that they rely on *knowledge* for

their determination, and indeed, that they rely on the kind of knowledge that is the hallmark of modernity, of which genealogy is both tool and product. The eruption of this problematic of time means that narrative regarding the past cannot be accounted for solely by the will to power and the genealogy of purpose. The kind of time being manipulated requires that we ask what sort of narrative genre can be imagined to underwrite these kinds of claims? The claim made either explicitly or implicitly in cultural property claims for ancient objects is that the origin of the object, objectively, presents a series of ineluctable necessities, which in turn mandate a certain legal outcome. These necessities are conceived of as historical truths or realities that are imbued with their own moral force. The force of the "truths" means that the law must necessarily conform to the proposed (or unearthed) "origin". This raises the question of the performative capabilities of "forces" understood in this way (as the overlap between "origin" and "truth" in the genealogical endeavour of knowledge).

To understand the demand for return of the Parthenon Marbles, we must begin by understanding what forces might mean in this context. We begin with the paradox regarding origin sketched out above (regarding autochthony): Foucault states clearly that genealogy "opposes itself to the search for "origins".[470] It stands *against* original identity, as at the (historical) beginning of things, one always finds disparity and difference. Deleuze states the content of the objection: Nietzsche's philosophy of "sense and values" had to be critique, in which "value" implies a critical reversal of the foundational processes of philosophy. Rather than founding values in some historically- or "objective[ly-]" derived origin and then removing values from criticism, Nietzsche discovered the two "inseparable moments of critical philosophy" in (1) "the referring back of all things and any kind of origin to values"; and (2) "the referring back of these values to something which is, as it were, their origin and determines their value".[471] Thus, in Deleuze's reading, Nietzsche removes philosophy from the "indifferent element" which had been its medium. Values cannot be indifferent to their origins; nor may a simple derivation or smooth

[470] Ibid. p. 140.

beginning be allowed to stand unchallenged, as this in turn suggests an indifferent origin for values. The value of any value (and certainly the value of such a thing as a "truth" or an "origin") is always descended from "s*omething* which is, at it were, their origin...". The content of this "something" is what the search for origin must uncover.

Foucault and Deleuze argue that the beginning or center of any "something" of this kind (and definitely of all values or valuations that are taken as orthodox later) stands not an originary unity, but an originary struggle. It is this struggle that determines essence, that is foundational and that gives rise to the state of (later) existence which in turn founds the possibilities of evaluation[472] that are used in determining values and their origins. To refuse to see distance, disparity, struggle, ambivalence or contingency in beginnings is to fail to do philosophy, i.e., to fail to affirm life. The meaning of disparity or difference is therefore not factual but philosophically positive: "The differential element is both a critique of the value of values and the positive element of a creation".[473] Difference is an active element constitutive of each origin, not "the" origin. As such, it is one of the foundational eruptions that defines "genealogy":

> Genealogy means both the value of origin and the origin of values. Genealogy is opposed to absolute values as it is to relative or utilitarian ones. Genealogy signifies the differential element of values from which value itself derives. Genealogy thus means origin or birth, but also difference or distance in the origin.[474]

Foucault arrives at the same conclusion: "The origin lies at a place of inevitable loss, the point where the truth of things corresponded to a truthful discourse, the site of a

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[471] Gilles Deleuze, *Nietzsche and Philosophy* (London: The Athlone Press, 1983), p. 2. (Translated by Hugh Tomlinson)
[472] "evaluation" defined. Ibid. p. 1.
[473] Ibid. p. 2
[474] Idem

fleeting articulation that discourse has obscured and finally lost".[475] He goes on to say:

> A genealogy of values, morality, asceticism, and knowledge will never confuse itself with a quest or their "origins", will never neglect as inaccessible the vicissitudes of history. On the contrary, it will cultivate the details and accidents that accompany every beginning...it will await their emergence, once unmasked, as the face of the other. ...The genealogist needs history to dispel the chimeras of the origin...[476]

The creative philosophical act and the (functional?) historical act do not merge but rather entwine, paralleling each other at some points in each analysis and winding around each other at others.

The difference in all origin(s) can be understood as the hierarchy of forces present at the (any) beginning: "Hierarchy is the originary fact, the identity of difference and origin".[477] In this sense, as will be seen when discussing the meaning of "force", perhaps the philosophical and the historical arguments come closer than is first apparent. They are also closely connected when discussing "becoming" (Deleuze) and "emerging" (Foucault). This is the final point to be made about the (non-)meaning of "origin" for purposes of marking out a theoretical realm for this Chapter. Interestingly, "becoming" and "emerging" serve as half-way points or hinges between "origin"/genealogy and "sense"/force. They are active, non-abstract processes that derive meaning from the notion of (some) origin, but their energy or activity from concrete (if not always identifiable) forces. These processes serve as good examples of what Foucault and Deleuze might mean when they claim that ideas and objects may be interchangeable with each other, or at least may function as the same sorts of things. Deleuze discusses the idea of "becoming" through a discussion of Nietzsche's use of the figure of Heraclitus. In Deleuze's reading of Nietzsche,

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[475] Foucault, "Nietzsche, Genealogy, History", p. 143.
[476] Ibid. p. 144.
[477] Deleuze, *Nietzsche and Philosophy*, p. 7.

Heraclitus is a tragic[478] thinker. The problem in Heraclitus's work is justice, as it is in Nietzsche's.[479] When Deleuze writes that life is "radically innocent and just"[480] for Heraclitus, he is describing the modality in which Nietzsche believes justice is possible.[481] The elements of this modality are: the instinct of play as the basis for understanding existence; existence is an aesthetic rather than religious or moral phenomenon; and most importantly, making "an affirmation of becoming".[482] In Nietzsche's work, Heraclitus thinks two thoughts: "there is no being everything is becoming", and "being is the being of becoming as such".[483] Deleuze then aligns multiplicity with becoming, and unity with being. The two terms (the two fluid thoughts of Heraclitus, the realm of possible justice) are related as manifestation (becoming) and affirmation (being). Therefore becoming is multiplicity and manifestation and being is unity and affirmation, and they are both, or all, complete(d) in each moment of the existence of any particular thing.[484] Rather than making existence responsible or blameworthy, affirming becoming and affirming the being of becoming is a *game*. The third term to these two moments is the player, who Deleuze also identifies as the artist or the child. In the "dicethrow" that this game enacts, justice is the law of this world, not a sum of injustices to be expiated. Justice

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[478] "Multiple and pluralist affirmation – this is the essence of the tragic". Ibid. p. 17.

[479] Nietzsche states that Christian ideology and tragic thinking pose the highest question in philosophy: "Has existence a meaning?" This question is the most experimental and empirical question possible, because it poses the problems of interpretation and evaluation simultaneously. Deleuze goes on to note that "[s]trictly speaking it means 'what is justice?' and Nietzsche can say without exaggeration that the whole of his work is an effort to understand this properly". Ibid. p. 18.

[480] Ibid. p. 23.

[481] Justice is not possible without innocence, in that *ressentiment* (it's your fault), bad conscience (it's my fault), and responsibility (it's the result of their common actions) while motivated by the instinct of revenge, are not simple psychological events but rather "the fundamental categories of Semitic and Christian thought, of our way of thinking and interpreting existence in general". Ibid. p. 21. The new ideal or interpretation or way of thinking would then have to be irresponsibility, in the most positive sense. The question must shift from, is blameworthy existence responsible or not, to, is existence blameworthy or innocent? The concept of innocence here is primary or originary but not religious. Instead, here is where Deleuze finds his multiple truth: "innocence, the innocence of plurality, the innocence of becoming and of all that is". Ibid. p. 22 (n. 17 omitted) Heraclitus, as a pre-Socratic philosopher and an innocent, escapes being labeled "irresponsible" in the "child" sense that Nietzsche applies to the other Greeks. *See* also ibid. p. 29.

[482] Ibid. p. 23.

[483] Idem

[484] The figure of completion is the figure of "return": "Return is the being of that which becomes. Return is the being of becoming itself, the being which is affirmed in becoming. The eternal return as law of becoming, as justice and as being". Idem

and hubris are completely opposed in this scheme.[485] The just figure is the player, not the priest, historian, or other custodian of values. The player is irradiated, constantly transformed, by the game. As will be seen in a moment, this is true of *things* as well, as things are no more than a collection of forces arranged in a temporary and ever-shifting hierarchy. In this way, justice becomes possible. It need not be enacted in response to the past, but merely found in the constantly-shifting play of forces in the present.

If Deleuze analyses "origin" by means of Heraclitus, Foucault breaks Nietzsche's notion of "origin" into "descent" and "emergence". "Descent" ("*Herkunft*") means the ancient affiliation to a group, i.e., blood, social class or tradition. It is a mechanism for sorting out different traits, for finding the differential element that animates any claims of a unified soul or coherent self-identity. The notion of descent, as a component of genealogy, "does not resemble the evolution of a species and does not map the destiny of a people".[486] Like "descent", "emergence" ("*Enstehung*") works with Deleuze's exposition of "becoming" to argue against any teleological arguments based in claims of self-evident meaning. Current developments are not necessarily culminations:

> As it is wrong to search for descent in an uninterrupted continuity, we should avoid thinking of emergence as the final term of an historical development; the eye was not always intended for contemplation, and punishment has had other purposes than setting an example.[487]

Rather, all emergences occur against a background of hostile forces. A species must protect its form against destruction either by outsiders or by internal weakness(es). Each emergence is interesting in the context of the play of dominations – of strong and weak forces confronting and appropriating each other – that must be interpreted. The interpretation becomes itself an actor or player in the

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[485] Ibid. p. 25.
[486] Foucault, "Nietzsche, Genealogy, History", p. 146.
[487] Ibid. p. 148.

endless combat. Once again, the historical act becomes a (philosophically?) creative one:

> [I]f interpretation is the violent or surreptitious appropriation of a system of rules, which in itself has no essential meaning, in order to impose a direction, to bend it to a new will, to force its participation in a different game, and to subject it to secondary rules, then the development of humanity is a series of interpretations.[488]

Interpretation succeeds when it exits the realm of metaphysics, that is, when it ceases to serve as "the slow exposure of the meaning hidden in an origin" in order to expose instead the contested and contingent "development of humanity".[489]

In both Deleuze and Foucault's analyses, the attempt to understand origin requires attempting to understand a hierarchy of forces acting within a layered and repeating present. Metaphysics, traditional philosophy, values reified by constructions of origin or historical error give way to a philosophy of sense and values that is encapsulated in a game played by a figure that has no thought of winning it. This figure only seeks to affirm the play. To play, in Foucauldian terms, is to place all thoughts of the "immortal in man" within a "process of development".[490] This is where meaning is found in the historical "sense". Foucault relies on the notion of "effective" history rather than on any more anthropomorphic figure in order to state the same requirement of active affirmation: "'Effective' history...will uproot its traditional foundations and relentlessly disrupt its pretended continuity. This is because knowledge is not made for understanding, it is made for cutting [*trancher*]".[491] In regard to the necessarily active mode of philosophy as critique, Deleuze agrees. "This way of being is that of the philosopher precisely because he intends to wield the differential element as critic and creator and therefore

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[488] Ibid. p. 151-2.
[489] Ibid. p. 151.
[490] Ibid. p. 152.
[491] Ibid. p. 154.

as a hammer".[492] The "knowledge" that "cuts" and the "philosopher" that "hammers" perform the same operation. "*Trancher*" means to cut *off*, to make an end rather than "to dissect". The act of intervention in each formulation is in part an act of destruction. Origin and *telos* are thus *necessarily* in the same phrase, regardless of who or what utters it. The reason to search the (possible) beginning(s) is in order to recognize the constant end(s). To speak of origin or *telos* without each other and the present moment is to lack awareness of law (becoming) and necessity (play).[493] It is to join the Greeks in their blindness to original *law* (that is, it is to join them in the enaction of the autochthonic *myth* rather than in the iteration of the autochthonic origin), "without exception or possible infraction".[494] In contemplating the dangers of arguments based in "origin", Deleuze and Foucault find that any analysis of "origin" must commit itself to the present while remaining strangely unattached from the traditional directionality of time. The moment of origin does not describe the starting point from a certain past to an identifiable future.

Nietzsche the genealogist turns away from questions of origin even as he answers them ("*Pudenda origo*").[495] What "emerges" is and is not what begins. The search for origins is useless, as it serves only to direct our attention to the present or to a purely simian past. When we look for origins, what we find are forces: rules, violence, desire, compromises and masks. Analysis in this realm does not solve the problems of causality, meaning or identification that it is meant to solve. Therefore, if not "the inviolable identity of their origin",[496] what and where do things come from? Deleuze writes that:

> A thing is sometimes this, sometimes that, sometimes something more complicated – depending on the forces...which take possession of it. ...[T]he evaluation of this and that, the delicate weighing of each thing and its sense, the estimation of the forces which define the aspects of a thing and its relations with others at every instant – all this (or all that) depends on

[492] Deleuze, *Nietzsche and Philosophy*, p. 2.
[493] Ibid. p. 29.
[494] Idem
[495] Foucault, "Nietzsche, Genealogy, History" p. 141, quoting Nietzsche, *The Dawn, p.* 102.

philosophy's greatest art – that of interpretation. To interpret and even to evaluate is always to weigh.[497]

For Foucault, as discussed above, interpretation is the seizure of fundamentally meaningless rules in order to impose a meaning upon them. Contra metaphysics, "the development of humanity is a series of interpretations".[498] It is worth noting that Foucault and Deleuze are not saying the same thing here. The thing-ness of a thing or the meaning of a historical development are both derived rather than discovered (or worse: "re-discovered").[499] For Deleuze, however, this derivation must occur in the context of believing (in) the mask that a particular force wears. Mimicry or trickery is not merely a function of the survival or triumph of certain forces. "The mask or the trick are laws of nature and therefore something more than mere mask or trick".[500] They also guide the task of interpretation, both in that "the art of interpreting must also be an art of piercing masks...and the point of keeping up the mask while it is being reshaped".[501]

The present is not privileged – rather, it is not permitted the luxury of being *predetermined.* The questions raised in or by an object in the present do not have "logical", "a priori", or "deductive" answers in reference to the past. In this realm, "the past" is clearly demarcated as terra incognita. Therefore, history and its cognates – narrative, memory, law – can be *resistance* or *desire*, but they cannot be *truth.* Therefore, they do not answer questions unless they win a battle against other forces also clamouring to affirm their difference from each other. In this sense, genealogy must enter the arena under the standard of knowledge, that is, as both subject and object. Origin is not equivalent to the present-day understanding of the purpose of a thing. Not even historical (or archaeological) analyses of "purpose" lead to origin, as the genealogy of purpose shows only "that the will to power has achieved mastery

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[496] Foucault, "Nietzsche, Genealogy, History", p. 142.
[497] Deleuze *Nietzsche and Philosophy*, p. 4.
[498] Foucault, "Nietzsche, Genealogy, History", p. 151.
[499] Ibid. pp. 153-4.
[500] Deleuze, *Nietzsche and Philosophy*, p. 5.
[501] Idem.

over something less powerful and impressed upon it its own idea...of a use-function".[502] Ideas of what things are *for* only comment on the present or a series of infinite presents; they leave the past untouched. Yet how to determine the value of the ("true"?) origin of the object? Or even, the value of the origin *to us*? Nietzsche singles out the error of relying on "purpose", but his analysis applies to other forms of conceptualizing values (and value[503]) as well. The values that we project backwards add another layer of opacity between us and the meaning of the object or even our continuing desire for it. Despite – or rather because of – our narrative, the past is fundamentally opaque to the present.

At this point, we have narratives of origin that stand against a "true" knowledge of origin; narratives of attachment that stand against "knowledge" as it exists in modernity, that is, as a product of science, epistemes, discourses, genealogy itself; and thus which stand against the very forms and techniques that makes them possible. It becomes clear that the claims of origin and ownership, resolving into genealogy and narratives of attachment, are in fact *resistances* to the kind of knowledge and composition of subject(s), objects(s) and selves about which Nietzsche writes: "[t]he sight of man now makes us tired...We are tired of *man*...".[504] This creates more than a few problems for the resolution of cultural property claims. First, it may be a truism of cultural property analysis that evolution of a species and destiny of a people is the final point of most appropriative arguments based in claims of origin (i.e., original ownership of a given object, or originary rights in land or artifacts as expressing the ongoing identity of a people in a self-evident or uncomplicated manner). However, Foucault and Deleuze's readings of what knowledge means in modernity work against arguments of this type. Second, and as a result of the foregoing point, the fluidity of the "past" robs the people claiming it of the certainty of a "future". The condition of knowledge as genealogy means that the only "ground" available is contested and uncertain, and possibly not stable enough to root the claimants deeply

[502] Nietzsche, *On the Genealogy of Morality*, p. 55.
[503] Cf. Nietzsche, *On the Genealogy of Morality,* Second Essay, Sections 4-5, 20, pp. 42-5 and 66-7.
[504] Nietzsche, *On the Genealogy of Morality,* First Essay: "Good and Evil", "Good and Bad", Section 12, p. 27.

enough to flourish in their (or any) future. Finally, the problem of "where things come from" is also a result of the condition of knowledge in modernity. Not only the diremption between representation and reality, but also that between the "mask" and the "forces" underneath it, mean that value will always be contested and contestable in an uneasily shifting field. Specific claims about the origin of the object, the notion of the common history of "mankind", and legal arguments about ownership merge into and differentiate themselves from a background in which the genealogical game demonstrates that the separation of "origins" and their meanings only affirms their contingency.

In this field, knowledge and things are porous to each other, merge and intertwine so that although "origin" remains constantly and crucially important, the value of things shifts with our formulation or knowledge of them. This situation is anathema to the actors (and forces) that rely upon definite values, and definite origins. If however the state of any attempt at knowledge or valuation results in the *loss* of certainty, then what remains is the possible *construction* of certainty – certainty as a fictional and fiercely-maintained substrate to the ownership of (or claim to) these ancient objects. Although there are many responses to valuation or valorization in this context, there are two that are of particular relevance to cultural property law: heritage and commodification. The increasingly-prevalent concept of "heritage" is the solution that we have come up with in order to endure (or correct) the reality of this radical contingency. The argument here is that "heritage" as it is being developed folds "origin" into "law". The operation of heritage – its creation and maintenance – conforms with the questions of commodification that irradiate the field of cultural property. As importantly, however, heritage guarantees both the myth and iteration of (a kind of) autochthony. It enables an image of origin and maintains a legal space in which to preserve this image, regardless of the "truth" or the "slippage" in the narratives that a heritage site presents. This part of the argument begins by noting the commodification issues that inhere in cultural property cases, and then examines these issues in the wider context of "heritage".

Commodification

> The term "commodification" can be construed narrowly or broadly. Narrowly construed, commodification describes actual buying and selling (or legally permitted buying and selling) of something. Broadly construed, commodification includes not only actual buying and selling, but also market rhetoric, the practice of thinking about interactions as if they were sale transactions, and market methodology, the use of monetary cost-benefit analysis to judge these interactions.[505]
>
> (Margaret Jane Radin)

The heated debate regarding commodification of cultural property has two aspects: first, there are questions regarding the appropriateness of reifying the value of the objects by recourse to market rhetoric, and second, there are the practical questions regarding the appropriateness of the sale of these objects on the art market.[506] As regards the Parthenon Marbles, the questions of commodification and alienability are more than usually intertwined, as if the Marbles can be alienated, then they can be alienated from the Greeks both in terms of value and in terms of ownership.[507] The following analysis proceeds by briefly noting the commodification argument(s) in Professor J. H. Merryman's foundational article, and later book, "Thinking About the Elgin Marbles".[508] These arguments have been set out earlier, but will be recapitulated here.

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[505] Margaret Jane Radin, "Market Inalienability", 100 *Harvard Law Review* 1849, 1859 (1987).
[506] There is a great deal of literature on this topic. For an analysis that thoroughly considers both aspects of the question, as well as providing an interesting and persuasive argument regarding "human flourishing", *see* Harding, "Value, Obligation and Cultural Heritage"; for a piece focusing on issues arising in international markets, see John E. Putnam II, "Common Markets and Cultural Identity: Cultural Property Export Restrictions in the European Economic Community", *University of Chicago Legal Forum* 457 (1992).
[507] For a series of arguments for why this sort of alienation is wrong, *see*: Michael J. Reppas II, "The Deflowering of the Parthenon: A Legal and Moral Analysis On Why the 'Elgin Marbles' Must Be Returned To Greece", 9 *Fordham Intellectual Property, Media and Entertainment Law Journal* 911 (1999); Moustakas, "Group Rights In Cultural Property: Justifying Strict Inalienability".
[508] Merryman, "Thinking About the Elgin Marbles"; Merryman, *Thinking About the Elgin Marbles: Critical Essays on Cultural Property, Art and Law.*

As a threshold issue, the value of the Marbles in Merryman's scheme is an already reified, art historical value. He begins by considering standard principles of property law, contract law and international law, and applying them to the facts. (Many other commentators find the facts of this case almost infinitely contestable.)[509] On the bases he considers, he finds that title to the Marbles did pass to the English, and that there are no compelling considerations that would argue for their return to the Greeks. Regardless of the substantive merits (or otherwise) of his position, what becomes clear by the end of his analysis is that he fails to take seriously the *reasons* that the values of preservation, of authenticity, and of (even admittedly "mystical") attachment are so predominantly prevalent in this field.[510] Rather, Merryman insists on speaking to the legal subject, in a confidential tone, and thus creating a community of commentators rather than possessors. Among us, he seems to be saying, emotion does not play a valid role in assessing disputes.

Yet, this unemotional assessment breaks down when Merryman exchanges discourses of ownership for those of art history. In keeping with the art-historical approach that he takes regarding the value of the Marbles, Merryman indicates that reasonable people may feel passionately about – and would be correct to feel passionately about – the preservation of cultural objects as *objects*.[511] This means that his most cogent and passionate arguments are in favour of commodification, from the perspective of the value of preservation. The implicit argument is made through his claim that *collecting* and *preservation* are necessarily and benignly linked. This follows long-established patterns for determining the "correct" or "moral" ownership of valuable art or sacred objects, as the overriding value of preservation in cultural property law is closely linked to normative conceptions of rescue. Many possible critiques of this position exist. For example, these concepts are often only instrumentally connected, rather than logically following from each

[509] Hitchens, *The Elgin Marbles*, St. Clair, *Lord Elgin and the Marbles*; St. Clair, "The Elgin Marbles: Questions of Stewardship and Accountability".
[510] As such, arguably he fails to see what the law is called upon to do in regards to these kinds of conflicts. This Chapter does not engage in an analysis of Merryman's position overall. Please see the citations *supra* for nuanced and careful critiques of Merryman's conclusions.
[511] See Chapter Two, "The life of objects".

other. Furthermore, the dangers as well as the virtues of the "collecting classes" are established historical fact,[512] often requiring legal intervention.

Remaining in this vein, however, Merryman also sets out an explicit economic argument regarding the Greek claim to the Marbles. As stated more fully in Chapter Two, Merryman argues that the "authentic" Marbles have to be shown to have greater value for Greeks than for anyone else, measured by whether, if the Marbles were for sale, Greeks would pay a higher price for them than non-Greeks.[513] Therefore, the possibility of selling the Marbles, or the increased level of tourism to Greece, would constitute an economic advantage that might give the Greeks a valid claim to the return of the Marbles. But it is an inescapable conclusion that the values that inform the art/culture market are not the same as those that motivate cultural property claims, as, if Merryman were correct in his assessment of the values at stake, then there would be no ongoing cultural property claims or disputes.[514]

Margaret Radin has addressed the tension between various derivations of the value of things in her analysis of "commodification". Commodification takes place in a discursive realm in which literal and metaphorical markets merge into each other.[515] The process of commodification is dependent upon an acceptance of "market rhetoric", which means "the discourse in which we conceive of and speak of something as if it were a commodity subject to market exchange".[516] The significance of the increasing reliance on market rhetoric, or the discourse of

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[512] Ibid. p. 45; *see* also Greenfield, *The Return of Cultural Treasures*, p. 43.
[513] "There must be some magic inherent in the authentic object, and not in an accurate reproduction, that speaks only to Greeks, or the argument fails". Ibid. p. 1913. (n. 107 omitted)
[514] It must be noted that it is precisely in order to claim a fundamentally non-economic link to such objects that the Greeks – or *any* "plaintiffs", before a real or an imaginary tribunal – make such claims. As such, it is an error to maintain that the only value that can attach to the perception of authenticity in this context is economic. Merryman recognizes this, analogizing the Greek attitude to the Parthenon Marbles to other cases where a people believed that "[r]eturn of the object was essential to the well-being of the group, perhaps even to its survival. There is an analogous mystical element in the attitude of some Greeks toward the Marbles: something essential is missing; there is a cultural wound". Ibid. p. 1914. He concludes that nevertheless these beliefs cannot serve as a basis for allocating cultural property. In a sense, this merely re-argues the question of the Marbles as property, and therefore the basis of the Greeks' claim for ownership of them.
[515] Radin, *Contested Commodities*, p. 2.
[516] Ibid. p. 6.

commodification, is multifold. First, "commodification worries seem to occur only in conjunction with other worries about social wrongs, in particular about subordination and redistribution of wealth".[517] Second, commodification implies the reduction of all value(s) to price, or sums of money. This flattens all evaluative discourse:

> there is no mystery about which of two items is more valuable; it is the one with the higher price tag. Furthermore, for any two items, one of them must be more valuable than the other, or else the two must be equal in value. Moreover, transitivity holds: if A is more valuable than B and B is more valuable than C, then A is more valuable than C. Commodification thus implies a strong form of value commensurability.[518]

This approach is already applied to items of historic value or "cultural property" in the art market. Most art and antiquities dealers firmly believe that objects should go to the people who are prepared to pay the most for them, as they are the people who value the objects the most.

As an argument, it has a particular resonance at this time in this culture, for the reasons that Radin sets out throughout her work, as well as the increasing attention being paid to the commodification of cultural or other experience itself.[519] It also bears a close similarity to the argument that Merryman makes regarding commodification of art objects, although he does not go so far as to make economic value the only indicator of worth:

> It is not always clear what people mean by commodification or why they think it is undesirable. One possible meaning – that the work of art is itself somehow reduced or sullied by being bought and sold – surely does not bear scrutiny...[S]uppose that the work is bought by someone who has no interest in art other than as an investment, someone who treats the work as a means of making a quick profit....[I]f the work itself is not endangered or made less available for study and enjoyment, what is the harm?...[W]hy should

[517] Ibid. p. 8.
[518] Ibid. p. 9.

awareness that a painting brought a high (or low) price at auction be a less legitimate part of what the viewer brings to it than awareness that the painter died young...? There is no pure aesthetic experience, no immaculate perception....[I]t is difficult to avoid the conclusion that the commodification objection expresses little more than an effete prejudice. It denigrates dealers and collectors as investors and speculators who contribute to the impairment of unspecified artistic values. Even museums, when they sell off works from their collections, become soulless commodifiers. ...Such an attitude does not deserve to be taken seriously by serious people. ...There will be a market. Cultural objects will be bought and sold. The choice, if there is one, is between a licit market and a black market.[520]

In the most basic understanding of the debate, the acquisitive instinct in people is an engine for self-determination and self-identification, whether on the private or institutional level, nationally or internationally. To commodify today is thus to make things available, to bring them into one's own sphere.

The most useful model for understanding what makes the Marbles valuable, and to what extent property rights can attach via these values, however, may not be the model that one finds in the art/culture industry, or in theories of transfer and allocation that are understood by reference to markets or free trade.[521] There are real differences between auction houses and museums, even as there are real similarities.

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[519] *See* Jeremy Rifkin, *The Age of Access*, and *infra* p. 179.

[520] Merryman, "A licit international trade in cultural objects", in *Thinking About the Elgin Marbles*, p. 219.

[521] "Although there are exceptions to the free trade principle relating to goods such as firearms, drugs, [etc.]... political leaders may urge that no more categories should be added to this list. The answer to this argument can only be to show that protection of the cultural heritage is as essential as the reasons for other exceptions and that significant and unique items of the cultural heritage cannot in any case be considered on the same level as commodities. ...Some commentators in art market States claim that national policies on cultural exchange are aimed against the control of export or protection of cultural property by the States of origin. They do so on the ground that maximum benefit to all mankind is achieved by the freest movement of cultural objects (Merryman, 1986). Such arguments may not only be self-serving, by ensuring that the flow of cultural property goes where there is most money (irrespective of any other criterion), but also sound paternalistic, assuming that cultural goods will be necessarily better appreciated and cared for in transit or importing States than in their States of origin". O'Keefe and Prott, *Law and the Cultural Heritage,* Vol.3, "Movement", pp. 565-6.

The ability to care for objects (in any sense of the verb: to house or to feel emotion) cannot be *equated* with the ability to pay more than others for them. Indeed, it is not clear that being able to "care" for them in art historical terms is at all the point. The objects themselves are often already so damaged, so partial, that what might make the crucial difference in terms of allocation may be the ability to *use* them, or to *transform* them into the kind of substrate or ground from which they themselves have already been torn.

From the perspective of what threatens cultural property, one can see that forces of nature and forces of categorization amount to the same end result. The bonds between thing and people are weighed and measured, are judged. The object defines the owner, and vice-versa. The question becomes, not only what relationship, but also what posture earns or mirrors objects of such gravitas? This question inverts: what values have to be aspired to, or pretended, or espoused in order to be an owner in this realm?

Heritage

The arguments about commodification of the *objects* miss the point. At issue is the concept of commodifying the *origins* that are being claimed through these objects. The process by which this occurs in the creation of heritage,[522] in which occurrences, artifacts, or even personalities of the past are transformed "into a product intended for the satisfaction of contemporary consumption demands".[523] This is a commodification process, different from the sort(s) of commodification that

[522] Heritage is generally defined as: (1) a property that descends to an heir; (2) something transmitted by or acquired from a predecessor; (3) tradition, something possessed as a result of one's natural situation or birth: birthright (Oxford English Dictionary, 1989). In addition to these meanings, heritage has come to have other meanings: a relict physical survival from the past; a non-physical aspect of the past when viewed from the present, including collective memory and the heritage of everyday life; all accumulated cultural and artistic productivity, ex. "high culture", "our national heritage" (which is a synonym for national culture broadly defined), and aboriginal peoples and group heritage; this includes the physical environment, ex. "heritage landscapes", "heritage flora and fauna" as well as major commercial activity, ex. "the heritage industry", selling goods and services with a heritage component, as well as the saleable past extended to a 'saleable culturally distinctive present", including the "ecomuseum" concept. Ashworth et al., *Dissonant Heritage*, pp. 1-3.

Merryman and others imagine operates in the realm of cultural property. The question of whether objects per se are commodified is irrelevant in this field. The resources in this process are events, myths, folk memories, personalities, place and history itself. The selection is not a result of chance survival but of deliberate choice, something which we see in the story, or management, of the Acropolis and the Parthenon Marbles. In the transformative process, "selected resources are converted into products through "interpretation".... Interpretation has been defined as "the basic art of telling the story of a place".[524] In the area of heritage and the commodification of culture – in this specific example, of origin – "Interpretation integrates resource elements by the shaping of a 'core product'."[525] The core product is "the experience", or intangible ideas or feelings conveyed through thematic interpretation. At the moment of consumption, the heritage product is entirely individual. Each consumer combines the possible resources, the interpretations presented, into a unique experience. The heritage producer of course also has broad powers of interpretation, giving rise to a "product range" from the resources listed above.[526]

Although the "heritage experience" is intensely personal, as each "visitor" or "consumer" creates it, this is an essentially legal structure:

> By definition, heritage exists only in terms of the legatee and thus the heritage product is a response to the specific needs of actual or potential users. The concept of heritage is culturally constructed, thus there is an almost infinite

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[523] Ibid. p. 7.
[524] Ibid. p. 8.
[525] Idem
[526] There are many implications and critiques of this model. These include the absence of a fixed determination of what resources are or might be; problems around the exercise of choice regarding the uses made of the past; problems regarding the definition of authenticity – who is authenticating the validity of these uses of the past? (Early museums failed to label artifacts as labels were considered an "irrelevant intrusion between the object and the viewer". Ibid. p. 10)) Some critics reject the commodification argument, saying that the intrinsic value of the resource shines through the attempted commercialization; others believe that the heritage model is not capable of being fully implemented, as it requires too much control or management realistically to exist in this form.

variety of possible heritages, each shaped for the requirements of specific consumer groups.[527]

The only constraints on this process are based in shared notions of criteria of authenticity. The assumption is that these "criteria are recognizable by consensus and measurable".[528] The most putatively obvious criterion is that of authenticity as, regardless of the need for external authentication, "Authenticity in the heritage model derives from the experience of the consumer and specifically from the extent that the product satisfies whatever expectations the consumer has of the past".[529]

Yet can the possible problems of authenticity be resolved? When one looks at the Acropolis, what does one see? Put differently, there is a difference between the past as history and the past as heritage. The distinction is: "If, however selective and subjective, 'history is just the old things that happened to happen,' then 'heritage...is possession'".[530] The distinction turns on the process by which the past is constructed. If history assumes that past episodes really exist, the facts of history are a series of judgments accepted by historians. Heritage also assumes the past to exist,

> *even in the sense as Avalon or Atlantis exist*, as products of a creative imagination, in response to some need in the creator. Heritage is, by the original definition of the word, determined by the legatee; all heritage is someone's heritage and that someone determines that it exists.[531]

Heritage is possession in that it is a product of the present that seeks to create and capture the past. It is irrelevant whether the past conforms to a historical or epistemological "truth", as in this model heritage is purposefully developed in order to select an inheritance from an imagined past, and to decide what should be passed on to an imagined future. Therefore, one of the most striking features of heritage is that it is purposive (rather than true). Imagined memory, or mythic time (as opposed

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[527] Ibid. p. 8.
[528] Ibid. p. 9.
[529] Ibid. pp. 10-11.
[530] Ibid. p. 6.

to the "real time" of history) has real-world consequences. It helps modern social groups to shape their identity and thus their future.[532]

There are many legal ramifications/problems arising out of this formulation of heritage, turning on the question of ownership of origins:

> At its simplest, all heritage is someone's heritage and therefore logically not someone else's: the original meaning of an inheritance implies the existence of disinheritance and by extension any creation of heritage from the past disinherits someone completely or partially, actively or potentially. ..The attempted creation of a universal heritage which provides an equal but full inheritance for all is not only essentially illogical but the attempt to approach it rapidly creates its own problems... [533]

The dissonance implicit in "heritage" is also the dissonance implicit in "commodification": in changing resources into products, heritage products encompass all the tensions and dilemmas inherent in all commodification. In terms of product development, therefore, these would include problems regarding the conflicts between generalization and particularization, between homogenous and heterogenous products, and a focus on consumer expectation that leads inevitably to a reduction of the past into particularized place identities that lead to a spurious determination of "uniqueness" which plays a political role in the experience of the heritage "consumers".[534]

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[531] Idem (emphasis added)

[532] "By engaging with the idea of 'national heritage' we are imaginatively (and as visitors and tourists, temporarily) constituting the 'nation' (or region, group, industry, etc.) as a real entity, according to the underlying assumptions. We are, in play, enacting the creation and development of the concept of the 'nation', which...logically and imaginatively required its prefiguration in terms of traditions, languages, folk arts, etc". David Brett, *The construction of heritage* (Cork: Cork University Press, 1996), p. 156.

[533] Ashworth et al., *Dissonant Heritage*, p. 21. In a sense, this is another answer to the attempt to comprehend the choice between cultural nationalism and cultural internationalism in the allocation of this kind of property.

[534] Ibid. p. 22.

It is this "uniqueness" that is at stake in the ownership (and commodification of) the Parthenon Marbles. As in all cases concerned with very ancient objects, the idea of the "uniqueness" is tied to ancient origins, and is meant to stand against all the vagaries of history, time, chance, and knowledge that would remove the solidity of this kind of ground from its modern-day would-be "inheritors". As this is a uniqueness of which one can be possessed and of which one can be dispossessed, it is the locus of the contestation of the ownership of these objects. "Heritage disinheritance" is an inevitable result of heritage commodification. Even where the heritage commodities (i.e., the objects) are not at the center of ownership battles, any non-participating groups are disinherited by definition; even groups that "participate" in shaping the "heritage product" face the problems of choice among resources and the problem of already-existing "heritages" that don't conform to present goals. The messages given by these heritage products may be dissonant in regard to prevailing norms, objectives, or dominant ideology. Arguably, drawing a distinction between identity and interpretation can only modify the inevitability of disinheritance. A society composed of different social groups can encompass different and exclusive heritages, via mutual indifference, tolerant acceptance as of necessity, or mutuality of esteem.[535]

This is not an option in the field of cultural property disputes. First, assuming that it is possible to draw a distinction between identity and interpretation, each side of that distinction would be contested and commodified. Second, obviously, this is a field generated by disputes. Interpretation and claims to ownership cannot be separated. "Progressive interpretations can make heroes out of villains and then villains from the heroes...".[536] The problem is, in effect, *stopping* the process of interpretation. Once again, this is an attempt to succeed in an artificial and self-protective endeavour, to create a deliberate and necessary lie. This becomes ever more important as ever more aspects of daily life become commodified, or rather, as culture and commodity merge. As Jeremy Rifkin writes, "[a]fter hundreds of years of

[535] Ibid. p. 30.
[536] Ibid. p. 92.

converting physical resources into propertied goods, we are now increasingly transforming cultural resources into paid-for personal experiences and entertainments".[537] Ancient objects then must "stand for" an originary past and unity that – as a result of their falseness, of the imaginative act that constructs them – *cannot* be lost. This requires not only creating a narrative that cannot be challenged (as a foundational myth of autochthony, "*even in the sense as Avalon or Atlantis*", or the Parthenon, and metonymically the Parthenon Marbles), but also, finally, and in effect, owning or commodifying time itself. David Brett suggests this, proposing that "we cannot understand the idea of heritage without examining what it is possible to mean by such...notions as a distant *then* becoming a present *now*; and how the bringing of the past into the present requires a strategy whereby time is given spatial form in a place".[538]

Conclusion: Autochthonous ground?

What becomes obvious is that the unity and the origin that the Parthenon Marbles point to are constructed out of necessity, held together with managed omissions and anachronistic technologies. Autochthonous ground is a myth that also flourishes in modernity. As regards the Parthenon, it is possible that in the encounter between the gaze from a distance and the experience of a closer, sharper vision, one is catapulted into an ethical relationship with the building itself. As the romantic ideal collapses into the recognition of present artificiality and fragility, one must take a position on the questions of unity, origin, and attachment: one must contemplate whether this structure requires the pieces taken from it, or in what way these pieces could be required and returned.

Looking more closely at the Parthenon frieze and the Parthenon itself, one becomes aware of a landscape littered with body-parts and pieces of objects valued in their fragmentation: the torso of a statue stands for the corpus of the building itself,

[537] Rifkin, *The Age of Access*, p. 137.
[538] Brett, *The construction of heritage*, pp. 14-15.

and the dismay at the destruction and loss of beauty is managed through the notion that through this fragment one preserves and can access the time and certainties that have been assigned to classical Athens. Fragmentation, human sacrifice, war damage and the scavenging and "restorations" of collectors are resolved in the (paradoxical?) dream or desire of an originary unity. The law plays an important role in this endeavour. The international legal schemes of preservation of cultural property have been developed against the backdrop of war and continue to monitor claims made by the inhabitants of Cyprus, Yugoslavia, and other countries in which opposing ethnic and religious identities are in conflict. Legal theorists balance the claims of national identity against the commodification arguments made by lawyers and collectors. War and collectors, preservation *in situ* or in museums: law's place is in a troublesome "afterwards". It attempts to legislate or mandate the putting together of that which has all too obviously been ripped apart.

In this sense, law stands in its familiar position in modernity. In contrast to the Biblical story of Solomon and the harlots, it becomes clear that in the case of cultural property analysis, law arrives on the scene after the infant has been murdered, after "justice" has been done. (This would not have troubled an Ancient Greek. In the subject of the Parthenon frieze and in the plays that survive from that period, the "before" and "afterwards" of justice collapse into necessary violences.) In modernity, however, law has a different mandate than to ensure the justice that could have been celebrated on the altar of the Parthenon. Today, law stands after dismemberment, history, law itself. It must, in order to contemplate justice, move to a position of the present, if not the past. Law must somehow arrive at the moment before Solomon's sword executes "justice" on the body of the infant.

It is interesting that we can live comfortably, easily in a world full of valorized fragments and still hold this ideal of justice as unification. Yet, this Chapter argues that we have no choice but to choose to believe in a fictional, resistant "origin", one that can be bought, sold, shared, but not *lost* – or to give up the idea of justice at all, as without some moment of originary certainty, or some uncontested

ground, we lack the opening to the future that is necessary in order to mark out a landscape in which justice can be enacted. Only when facing the future does "afterwards" become "before". In this sense, our effort in claiming ancient objects is to become, as the Ancient Greeks or the peoples represented by Kennewick Man, autochthonous peoples. We will plant ourselves in any small pieces of unearthed ancient marble, bones, soil.

Chapter Six Cultural Property and Kennewick Man

> *Violence has changed its direction. When we were victorious we practiced it without its seeming to alter us; it broke down the others, but for us men our humanism remained intact. United by their profits, the peoples of the mother countries baptized their commonwealth of crimes, calling them fraternity and love; today violence, blocked everywhere, comes back on us through our soldiers, comes inside and takes possession of us. Involution starts; the native recreates himself, and we, settlers and Europeans, ultras and liberals, we break up.* [539] (Jean-Paul Sartre)

Chapter Six continues the preceding analyses by looking at the arguments made up to this point in a case which is presently being "written" into a specifically legal narrative. Once again, the questions raised concern the claim to an ancient object, a nine-thousand-year-old skeleton. The claims made in support of ownership signify claims to land based on autochthony, and to history based on cultural narrative. Although it might appear that this case inhabits a specifically modern, or future-looking context, that of addressing the effects of colonialism and decolonization, in fact claiming ancient identity as a means of overcoming or re-writing the effects (and experiences) of colonialism is one of the primary uses of cultural property discourse. It is certainly part of the story of the Parthenon Marbles. This Chapter seeks to confirm the accuracy of the theorization of cultural property that is being proposed in this thesis. The definition of these bones as porous, requiring interpretation; the fictional narratives of memory; the equally-fictional narratives of origin (heritage): do these arguments operate equally well to draw distinctions and claim ground in the "Manichean" world of colonialism? Can cultural property, so understood, read the black and white line has been drawn in America by these ancient, colourless bones?

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[539] Jean-Paul Sartre, "Preface" to Frantz Fanon, *The Wretched of the Earth* (New York: Grove Press, 1963), p. 28

If so, then the theory proposed throughout this thesis is correct. This Chapter uses the dispute of Kennewick Man to contemplate whether "truth" (scientific, historical, or legal) exists in these sorts of cases, or if we are once again turning to cultural property discourses to create necessary fictions. As always, the point of these fictions is to underwrite a future in which continued existence and (new) justice are possible.

Introduction: "Indigenous" and "native"

When a human skeleton was discovered in 1996 near Kennewick, Washington, along the bank of the Columbia River,[540] the coroner and forensic anthropologist that were called in to examine the bones made two discoveries: first, that the bones seemed to belong to a Caucasoid man, and second, that the bones were nine thousand years old. These two facts or propositions could not coexist in the picture that scientists and historians had built up of America. The "first peoples" of America are thought to be the American Indians or Native Americans; a race that is descended from Mongoloid peoples that settled in North America. In the received history of the "peopling" of America, Caucasiod people came much later, as invaders or settlers that threatened and displaced these earliest inhabitants. Until relatively recently, the racial characteristics and the theory of the peopling of America that underlie this received history were taken as more or less uncontroversial. Recently, however, skeletal remains of great age and Caucasoid characteristics have been discovered in America. Recently also, the Native American Graves Protection and Repatriation Act (NAGPRA),[541] in conjunction with the National Museum of the American Indian Act (NMAIA),[542] make these skeletal remains (potentially) unavailable to the professionals that have been largely responsible for the account of early American settlement. Museum curators, archaeologists, anthropologists, and biologists (among others) may no longer have access to Native American skeletons,

[540] *Bonnichsen v. U.S., Dept. of Army*, 969 F.Supp. 628, 631 (D.Or. 1997).
[541] 25 U.S.C. sections 3001-13.

either as "specimens" or as "exhibits". The picture of the world is changing just at the moment that these professionals are no longer allowed, in an uncomplicated (or at least self-policed fashion) to direct the change.

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?"[543] 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 this case. This formulation presupposes that we know what a Mongoloid man was "doing" in the "New World" more than ninety-three centuries ago. To some extent, the question *in itself* supports the patently false proposition that knowledge about race and habitation in America has been, 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 this moment in science, in time, and in culture. The colourless bones of Kennewick Man raise questions about flesh, race, and spirit in America, questions that apply to the various struggles of indigenous peoples and cultural property more generally.

The purpose of NAGPRA is both to prevent future desecration of Native American graves and grave-sites, and, perhaps more importantly, to make reparation for past plundering. At the center of the Act, of the controversy regarding the disposition of the bones, and of the conflict between Native American groups and scientists is the question of "indigenous" in America. The first part of this Chapter will thus look at law review articles, relevant media sources, and U.S. legislation. The second will attempt to reposition the issues raised by looking at them through the lens of the development of the discipline of anthropology, as a way of understanding

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[542] 20 United States Code 80q (1989), amended in 1996.
[543] Preston, "The Lost Man", p. 72.

the inscription of the "values" that are now defined as "oppositional" by the foregoing sources. Running throughout this endeavour are theories of cultural property. As will be seen below, the legal academy's analysis of Kennewick Man turns upon notions of cultural identity and cultural affiliation, the ownership rights that attach when such identity or affiliation is "proved", and the gap between the positions of various "interest groups" on the effect(s) if not the meaning(s) of this skeleton in the fields of race and origin. As such, the proper positioning of the questions raised by Kennewick Man requires considering what sorts of legal and cultural analytical structures can encompass the question of the meaning of ownership, not only of original artifacts but also of origin itself, bred or discovered literally in the bone.

The dispute between the parties is cast in terms of scientific inquiry as well as in terms of cultural and historical certainty. Narrowly, at issue is the question of what "indigenous" means in the legislative scheme of the Native American Graves Protection and Repatriation Act (NAGPRA).[544] In broad terms, however, the question again is one regarding "origin" and the problematics of determining identity and ownership that accompany this concept in the realm of cultural property law. Broadly, the claim of the plaintiffs in the case (*Bonnichsen v. U.S.*)[545] is that only now can science profitably examine ancient bones. New scientific techniques and instruments mean that these bones are a treasure trove of information regarding the "peopling" of America. Underlying this argument is the notion that only science can speak to this subject; furthermore, science *must* speak to this subject, not only for the benefit of Native Americans, but also for all of humankind. On the other hand, for many Native Americans, whether the skeleton displays Mongoloid or Caucasoid traits makes no difference to the skeleton's identity. Their argument is that a people finally enfranchised with the same rights as other U.S. citizens, i.e., the right to the burial of their dead, must not allow these rights to be challenged by the same "science" that was an instrument of their original disenfranchisement. Furthermore, they argue, any human being on the American continent nine thousand years ago was a "native"

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[544] 25 U.S.C. sections 3001-13, and *See* Chapter Two.
[545] *Bonnichsen v .U.S.,* 969 F.Supp. 628, 631 (D.Or. 1997).

American. As such, this case demonstrates the relevance of the foregoing analyses regarding the function of cultural property disputes in modernity. The argument made by this Chapter is that much like the dispute regarding the ownership of the Parthenon Marbles, the dispute regarding the ownership of these bones speaks more to an anxiety vis-à-vis the future than any possible certainty vis-à-vis the past.

In the legal commentaries on this case, the issues regarding the meaning of "indigenous" or "native" in the legislative scheme are defined polemically. Most often, the commentators discuss a "clash" between Native American and scientific values. The first argument made in this Chapter is that this framework cannot adequately address the questions of identity, ownership, and conflict that make the determination of the racial and cultural affiliation of 9,000-year-old bones a hotly debated question today. Rather, it is necessary to contemplate the Native American ("Mongoloid") and European ("Caucasoid") claims to the New World and the (old) earth that composes it. In the interweaving of claims regarding autochthonous origin, indigenous identity, and the claims of science and its philosophical offshoots, one can find the mirroring and continuation of the early wars between "settlers" and "Indians". In order to understand why this conflict persists, and indeed erupts at every opportunity, it is necessary to understand why these claims are posed in the present; long after the question of "ownership" of New World/old earth has been answered. This Chapter argues, first, that there is another territory, that of *knowledge and the value of knowledge itself*, which is being fought for at this time. The conflicts and clashes that are being located in the realm of law in turn are based in a conflict regarding epistemology. Indeed, the problem is one of "facts" in this area. When something is so old, how do we know what it is or whom it might possibly belong to? This sort of question underlies legal conflicts and serves as the substrate for the cases that erupt in the public consciousness. The battle before the court in this case does not merely concern entitlement to knowledge within the constraints of NAGPRA, but entitlement to knowledge *itself*, as the one thing that can trump law, politics, identity, and history in America. When the assessment of knowledge (or different kinds of

knowledges) questions or destabilizes the power balance of the dissemination and authorization of knowledge itself, wars of colonialization once again break out.

In the question regarding the disposition of Kennewick Man – of what happens to these bones – the field on which the debate is being conducted is organized by the values or problems that define the American national consciousness. As will be shown below, the foundational concerns of American self-consciousness (as they display themselves in the debates concerning Kennewick Man) are *progress* and *identity*. These two terms are in some tension with each other. 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. A "Native American" that moves ("forward") into the dominant mode of "civilization" is an American, entitled to the protections that the United States Constitution guarantees to all Americans. A "Native American" that refuses this identity, choosing instead a different set of values that either define "progress" in a different way or reject it entirely, is a "Native", or "native", or, in the previous century, a "savage" (open to pity, censure, and education). The second argument of this Chapter is that this structure remains true in the present, or rather, recurs when a conflict between "progress" and "identity" arises. The development of "savage" into "Native" doubles back into "indigenous", a term of art in the cultural property lexicon.

The third argument that this Chapter makes is that the debate over the meaning of "indigenous" does not constitute a reappropriation of Native American identity, but an appropriation of it. Whatever "indigenous" means, it cannot mean "natural" given such a history and discursive field. The links between "Native" and "savage", and "science" and "progress", reference colonialism. More specifically, these linkages reference the colonization of "original" peoples by settlers who anchor themselves and their values by force. The colonization of original inhabitants is the

background to any modern debate(s) regarding indigenous rights or cultural property. The conflicts and congruences listed above move across and through the history of colonization. "Progress" or "Native" reach their apogee as descriptive terms against the personhood (however defined: bodies and minds, but also query "souls"[546]) of the colonized. In this realm, the ancient bones of Kennewick Man hold many positions: original man, but not "Native", this contested by the parties in this case, therefore: original man, thus "indigenous"; this contested yet again: non-indigenous because not "Native" (Caucasoid, settler); belonging to scientists as an "early American", belonging to Native Americans as "one of us". 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. The constitutive pieces add up to more than one phantasm in the American landscape. If at issue is decolonization, which this Chapter claims is always more or less at issue in debates regarding the return of objects of cultural property, then what must be addressed is what Fanon refers to as "the replacing of certain 'species' of men by another 'species' of men":

> At whatever level we study it – relationships between individuals, new names for sports clubs, the human admixture at cocktail parties, in the police, on the directing boards of national or private banks – decolonization is quite simply the replacing of a certain "species" of men by another "species" of men. Without any period of transition, there is a total, complete, and absolute substitution.[547]

This is not an evolutionary argument, although it raises, as an imperative, the questions of the development of "man". Whether the "native" is Nietzsche's "blond beast" or the American (noble?) savage, he or she is a classified entity, a "man" in "modernity", of (and representative of) this time. To then place the concerns at issue within the context of a "clash of values" as the American law review articles do is to make a category mistake. The central value that attaches to the very notion of "man"

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[546] Michel Foucault, *Discipline and Punish: The Birth of the Prison* (London: Penguin Books, 1977). (Translated by Alan Sheridan)

or "human being" is missing. Yet how to begin to derive this value? This Chapter suggests two routes: one via the claims(s) attached to the dead, and the other via the claims that are made between the living. To begin with the first route, a question that irradiates the various approaches to the scientific study of Kennewick Man is: when do the dead become "history"? That such a question is central to modern legal and social theory is unavoidable; the theorizing of modernity has remained transfixed with its own reflection in and through war and the atrocities that accompany state-sanctioned violence. In keeping with this, the well-established link between cultural property and war is as evident in the case of Kennewick Man as it is in UNESCO claims arising out of civil wars and invasions around the world. The ethnic cleansing and related looting and dispersal of cultural artifacts that have become familiar in the media and over the internet in the past years[548] were practiced as well in America in the first two hundred years of European settlement. As will be seen below, many of the practices of collectors and scientists in anthropology easily fall into this category.

However, a colonized people have had a different sort of war waged upon them as well:

> Not so very long ago, the earth numbered two thousand million inhabitants: five hundred million men, and one thousand five hundred million natives. The former had the Word; the others had the use of it....From Paris, from London, from Amsterdam we would utter the words "Parthenon! Brotherhood!" and somewhere in Africa or Asia lips would open "...thenon! ...therhood!"[549]

As in colonialism the Word is given, in the process of decolonization, the battle moves to the realm of culture, history and knowledge. The claims to cultural property in philosophy, education, and science can be seen as reclaiming "the Word" in this sense. To make claims on reason and rationality, to exercise control over the

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[547] Fanon, *The Wretched of the Earth*, "Concerning Violence", p. 35.
[548] For an comprehensive guide to the "looting" question, please see: http://wings.buffalo.edu/anthropology/Documents/lootbib.html
[549] Sartre, "Preface" to *The Wretched of the Earth*, p. 7.

instruments of knowledge and to determine whether or not something is *worth* knowing is in fact to wage the war of decolonization. It is a war that cannot be forestalled or managed by the other side, either by the settler or, after a while, by the elite native bourgeoisie. The claim to knowing, speaking, or allowing is a rebellion.[550]

There are at least two ways to understand, therefore, attachment to the dead in cultural property analysis. First, there is attachment to the dead members of the tribe, race, or group; the claims of these dead are to protection from further dishonour and desecration. Second, there is the attachment to the soon-to-be-dead, in the sense that Fanon describes the realization that mobilizes decolonization in colonized people. The certainty of one's own death becomes a fact and a companion; one is attached to it precisely as one is attached to one's culture and values. The "man" who is ready to fight against colonialism places himself with the already-dead.

> It will not be without fearful losses; the colonial army becomes ferocious; the country is marked out, there are mopping-up operations, transfers of population, reprisal expeditions, and they massacre women and children. He knows this; this new man begins his life as a man at the end of it; he considers himself as a potential corpse.[551]

As part of this, there is attachment to the martyred or symbolic dead. On the battlefield in which (future) law must address (past) violence, the dead who were killed in the struggle against (to take the place of) the settler become martyrs. In the "Manichean" world of colonialism, the "natives" that transgress, that cross the boundaries from one side to the other, are atavistic figures of transgression and escape.

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[550] "During the period of decolonization, the native's reason is appealed to. ... [But] [t]he violence with which the supremacy of white values is affirmed and the aggressiveness which has permeated the victory of these values over the ways of life and of thought of the native mean that, in revenge, the native laughs in mockery when Western values are mentioned in front of him. In the colonial context the settler only ends his work of breaking in the native when the latter admits loudly and intelligibly the supremacy of the white man's values. In the period of decolonization, the colonized masses mock at these very values, insult them, and vomit them up". Fanon, *The Wretched of the Earth*, p. 43.

[551] Sartre, "Preface" to *The Wretched of the Earth*, p. 23.

This Chapter argues that the ancient dead belong, somewhat paradoxically, to this last group. They stand both far behind and ahead of the living. Whether the identification of these figures comes from myth, from art, or from oral histories, they occupy a strangely-fluid place in time: origin is placed before the eyes of the present, as a goal or as a guarantee. As such, we must address to what extent this relationship with the ancient dead is a mechanism of inverting or reversing the vectors of identification and power that have not only impacted the flesh of the colonized people, but have also penetrated into the depths of their past.[552] When origin is once again prior to vision (rather than the end result of searching), then the direction of attack changes. The person in possession of origin is in possession of power rather than serving as the substrate for the gaze of the colonizer. As a result of not only the abuses perpetrated on the native body, but also of the struggle for shifting meaning, the dead result in different sorts of specters for settler and native in the decolonized world.[553]

If Native Americans struggle to claim the bones of Kennewick Man in order to lay claim to an uncolonized past and a decolonized future, how do we understand the identities being occupied in the present? Vis-à-vis both progress and identity, the Native Americans interested in this case[554] are refusing to countenance further identification from the outside. In this sense, they are refusing to stand in the position

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[552] Arguably, this is the situation that the Greeks of 1833 faced *vis-à-vis* their recent history of Ottoman occupation. Why not keep any "memory" of medieval history on the Acropolis? Certainly the reason is in part due to the kind of chauvinism that Bernal postulates in his depiction of the "Aryan model" in *Black Athena*. However, the Greeks must also have been engaged in rejecting the absolute knowledge that to some (unacceptable) extent, the Greeks had been *made*, as moderns, by the Ottoman occupation.

[553] It is not clear that these dead are important in the same way to people who can determine their status in the present. First, as has been pointed out in many of the law review articles on Kennewick Man, the grave protection and burial laws are different for members of the dominant culture. Second, the iconography of dead bodies is theorized differently according to different sorts of politics. In political anthropology, corpses that belong to the dominant culture symbolize other sorts of struggles, and in/on a landscape where the sacred requires different sorts of protection. "Introduction: Corpses on the move" in Katherine Verdery, *The Political Lives of Dead Bodies in the Postsocialist Transformation* (New York: Columbia University Press, 2000).

[554] The Coalition of tribes that have presented amicus briefs in this case are not strictly parties to the lawsuit, in which the parties are a coalition of scientists and the Corps of Engineers. Please see Chapter Two, and the discussion *infra*.

of "other" in order to guarantee the dominant culture's "same". This is a negative identification, however. The question remains, what is a native?

> NATIVE: born thrall (cf. NEIF) xv; (astrol.) subject of a horoscope; one born in a particular place xvi; original or usual inhabitant xvii. – medL. nativus, sb. use of L. nativus adj. (whence na-tive adj. xiv, of one's birth xv)....[555]

From "born thrall" one can see the progression to "indigenous person" via "native/savage" in American scholarship and ideology from Colonial times forward. "Born thrall", however, as will be discussed below, applies, in the American mythology, to the presumption that Native Americans suffered not from slavery of the body but of the mind; that they were born thrall to ignorance of civilization, born different in terms of goals and values. The early settlers of America considered this slavery of the worst sort. The Native Americans only became "savages" through their refusal to "learn", a refusal that became constituted as an incapacity. Presently, the factors that in turn lead to the determination of "indigenous" identity turn around the notion of "original inhabitant". Yet these factors, as set out by various legal theorists, include the following: a claim to autochthonous origin, including the sacred component of the group's own coming into being; "sacred" and/or "spiritual" narratives of attachment to the land; and often a "trust" (in the legal sense) relationship between the colonizers and the original inhabitants. To the present day, it is not only "being there first" that constitutes the indigenous person; it is *how* one is "there". The mode of habitation and the values that are expressed are determined in the first instance by experts, i.e., anthropologists, archaeologists and paleontologists. Later, the indigenous group begins to speak for itself, which is a rupture of a different, and for the dominant culture, more serious kind.

Against this background, the American response to the discovery of Kennewick Man in the media is easier to understand. It is not possible to summarize, briefly, the range of articles and comments that have attempted to deal with the

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[555] *The Oxford Dictionary of English Etymology*, ed. C. T. Onions (Oxford: Oxford University Press, 1966).

questions presented by this case.[556] As always in political or ethical conflict, each commentator wants to be in control of the grounds or positioning of the debate. Nevertheless, it is the "people" that give this dispute its weight. The most sophisticated articles in the most liberal of all fora circle gingerly around the same points that are made in considerably less enlightened media. For example, the commentator in *The New Yorker*, quoted above, writes at the end of the article:

> Some tabloids and radio talk shows have referred to Kennewick as a "white man" and have suggested that his discovery changes everything with respect to the rights of Native Americans in this country. ..There are some less racially enlightened folk in the neighborhood who are saying, "Hey, our ancestors were here first, so we don't owe the Indians anything".
> This is clearly racist nonsense: these new theories cannot erase or negate the existing history of genocide, broken treaties, and repression. However, it does raise an interesting question: If the original inhabitants of the New World were Europeans who were pushed out by Indians, would it change the Indians' position in the great moral landscape?[557]

The answer given by a scientist, in the same article, is also quite indicative of the endeavour being undertaken by the American establishment to frame the debate and answer the (absurd} question: "If you go back far enough, eventually we all have a common ancestor – *we're all the same.*"[558] This is the project and the conflict: are we all the same? can we be made to be all the same? and if we are all the same, who gets to decide what we are? Identity constituted as property raises questions of ownership and use, claims of status and rights that can only be answered or adjudicated in a landscape in which brute force and brutish philosophies still exert considerable power.

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[556] http://www.kennewick-man.com/
[557] Preston, "The Lost Man", p. 81.
[558] Idem

The conflict as positioned in the law review articles

The commentators writing in American law review articles make cogent claims that the best understanding of the legal claims being made[559] is as a "clash of values" between native and dominant cultures. Usually, but not always, the conclusion is that the cultural differences are irreconcilable. In these analyses, NAGPRA will always contain a series of fault-lines between people(s) that cannot be crossed by law (and by extension by reason). One law review article concludes that the problem is one of reason contra faith, in the great historical tradition of opposition to scientific advances that question or conflict with religious doctrine.[560] Another argues that the depth or degree of cultural difference means that only power can force a solution; as it did in the history of the past two centuries in America:

> The irreconcilable cultural differences between Native Americans and Anglo-Americans are thought to be the reason for...military conflict, for if Anglo-Americans could not make Native Americans conform to Anglo-American ideas...they, instead, conquered them. By analogy, if Native American and Anglo-American perceptions of human remains are irreconcilable, disputes such as Kennewick Man will be resolved by sheer power, albeit legal, rather than military, power.[561]

However, the second writer resolves the above analogy in a way that is extremely similar to the argument of the first: "No compromise is possible where belief meets logic".[562]

It is difficult to imagine, however, which cultural identifications or practices can be cleanly defined as "belief" and which are "logic". The distinctions at issue here are determined perceptually and historically; this relativism irradiates all aspects of the modern world, particularly, one could say, "science". This section of the

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[559] See Chapter Two, *supra*, for a complete statement of the issues that arise.
[560] Lannan, "Anthropology and Restless Spirits".
[561] Ackerman, "Kennewick Man", p. 381.
[562] Idem

Chapter attempts to consider these positions and their resolution into "values" that can "conflict" with each other.[563] The argument being made is that the descriptive and the prescriptive, the utilitarian and the extreme become facets of each other in which the very notion of "valuation" is quite possibly compromised. For example,

> Two of this country's highest values are the objective pursuit of knowledge using scientific methods and respect for people's religious traditions and convictions. On occasion, these values have come into conflict, and public policies have been developed to address the competing concerns.[564]

Or:

> The struggle between Indians and archaeologists is one that encompasses two fundamental principles: equal protection for everyone under the law and religious freedom.[565]

In order to locate and explore the differing values cited, the law review articles discuss the specific narratives of myth, religion, science, and origin that are held to create the conflict. The different accounts are presented as equal and opposed quantities.[566] The question of indigenous identity, posed as a question regarding the origin of humankind in North America, becomes a dispute between, on the one hand, tribal accounts of how Native Americans came to inhabit the earth, and on the other, scientific theories of migration of peoples from Europe or Asia. Underlying this dispute is an entire host of differences, metaphysical, legal, and sociological that possibly "explains" the reason(s) for the conflict.

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[563] The question of how cultural differences become epistemological or ethical imperatives, or vice-versa, is obviously too broad to be resolved in this Chapter. Underlying the various accounts of origin are supporting philosophical positions regarding the meaning(s) of time and place, of the possible and the impossible. Nor is such a project necessarily required in order to understand what is at stake in this case. Nevertheless, in looking at the discussion of Kennewick Man, one sees epistemological lines drawn and ethical positions taken in a sort of seamless web, in which knowledge and the right to knowledge merge and should not be separated.

[564] Lannan, "Anthropology and Restless Spirits", p. 369.

[565] Riding In , "Without Ethics and Morality", p. 12.

[566] For example, the sections that address the cosmological or metaphysical problems arising from the accommodation of differing views of death and/or (re)burial are titled: "COMPETING VIEWS AND INTERESTS UNDERLYING BONNISCHEN v.UNITED STATES" (Lannan, "Anthropology and Restless Spirits", p. 382) and "SOME ARGUABLY IRRECONCILABLE CULTURAL DIFFERENCES BETWEEN NATIVE AMERICANS AND ANGLO-AMERICANS".(Ackerman, "Kennewick Man", p. 373).

There are at least four major categories of "cultural difference" between Native Americans and others. These are different conceptions of time, different conceptions of the relationship between humans and animals, different conceptions of property, and different valuations of science.[567] Each will be summarized briefly and discussed separately. First, *time* in the Native American cosmology is cyclical rather than linear.[568] This conceptualization has very important consequences for the idea of the "past". For example,

> [b]ecause Anglo-Americans view time linearly, it is reasonable to assume that the older the human remains the less likely that we will feel any emotional disconcertion over their being scientifically analyzed. ... [Whereas] [i]mportant relationships which Anglo-Americans think of as in the past are conceived by Native Americans as immediate.[569]

The notion discussed above, in which dead bodies have the rights and responsibilities of "history" rather than "human beings" attached to them, does not exist in the Native American (metaphysical) universe. Dead bodies never become objectified, thus never lose their human claim on the living. In Anglo-American terms, therefore, Native American human remains retain the claim that the newly-dead make to proper burial, rather than exchanging this for the study and preservation that are perceived to accrue to the long dead.

Second, the difference in the *relationship between humans and animals* in the Native as opposed to the Anglo-American cultural tradition also leads to potential conflict regarding Kennewick Man:

> Whereas Anglo-American traditions see humans as clearly below God and above other animals, Native American traditions do not make sharp

[567] Ackerman, "Kennewick Man" pp. 373-81.
[568] Ibid. p. 374.
[569] Idem.

distinctions among these three groups; further, humans are free to interact with gods and other animals.[570]

The significance of this Native American belief in light of burial practices is again linked to the continuing viability, for lack of a better word, of the dead. The dead leave this world for a similar world, in which the same relationships between the human, natural, and divine are maintained. The living have the responsibility to ensure the placement of the dead in the next world by maintaining their placement in this one. The superimposition of the realms of the dead and the living again means that the dead do not fade from human care with the passage of time. Rather, when the dead go into the earth, they continue to inhabit the world that gives all members of the Native American community their own continuing identity. This may be seen not only in the study of Native American identity-structures, but also in the legal arguments made for Native American regulation of paleontological resources.

Third, the different *conceptions of property* are also a potential fault-line between the Native American and the scientific or Anglo-American communities. The lack of private property in Native American tribes and culture, in conjunction with the foregoing differences, means that

> [t]he Native American concept of property is relevant to Kennewick Man because the idea of someone having the "right to possession" of human remains is offensive and incomprehensible. How can one own the dead? Further, evidence suggests that Native Americans are unconcerned if human remains are repatriated to the wrong Native American group.[571]

Interestingly, this would seem to make a mockery of NAGPRA's "ownership and control" scheme of allocation. Why agree to this language if the communitarian ownership structure of property made it offensive? The problem here is not the substantive content of the cultural practice, but rather the notion of the difference:

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[570] Ibid. p. 375.
[571] Ibid. p. 377.

given that Native Americans think of ownership differently, the assumption is that they cannot "own" their dead. However, it is a truism that ownership is "a bundle of rights". The rights of "ownership or control" include the right to protect, to allocate, to preserve, to determine the meaning of "benefit" in the particular context and to determine who may be a beneficiary. These are all considerations that inform the Native American arguments in the reburial debate.[572] Ancestors are commonly understood to "belong to" their descendants regardless of the conception of property at work within the specific culture. Thus it is the question of descent that underlies this particular "difference", and which will transform it into a "value" that can be assigned to a possessor.

Finally, the fourth difference is how *science* is valued in each culture.[573] "Science" in the American commentaries refers to all sorts of disciplines and discoveries: anthropology, biology, archaeology, etc. There are two facets to the arguments made about science. The first regards "creationism", or the value of science as regards its ability to give an adequate account of origin of peoples. The second is about the effect that scientific practices have had or may have on Native American life. Of course, both arguments merge in various ways when used instrumentally to allow or deny reburial. To begin with the second aspect, Native Americans do not accept that the benefits of science outweigh its cost in terms of human rights:

> Whereas Anglo-Americans perceive science as an objective, important practice in a world where technology is the key to competing in a world economy, Native Americans are indifferent or even hostile toward science. If disputes such as Kennewick Man are to be resolved by a balancing of human rights versus scientific rights, Native Americans might view the science scale as well nigh empty: "I can't imagine the kind of benefit we might get from

[572] S. Webb, "Reburying Australian skeletons", 61 *Antiquity* 292-6 (1987), p. 295. *See also*: L. J. Zimmerman, "Webb on reburial: a North American perspective", 61 *Antiquity* 462-3 (1987), p. 462: "The parallels between attitudes expressed by Aborigines and by Native Americans about the treatment of ancestral skeletons seem extraordinary".

research on human remains that can compensate for the negative impact that this longstanding violation of human rights has had on the mental health of our American Indian and Alaskan Native communities."[574]

This is a question about utility more than it is about "truth". The argument from utility is based not only on an assessment of harm done to community members, but also on a different set of (metaphysical) supports for what constitutes "reality". [575] Here, the two potentially-different kinds of objections to "science" merge. If "identity" is not founded in the sort of data that science provides, then why privilege that data? If a transvestite can live as a woman within her tribe and the world at large, secure in her female identity, then the meaning of the Y chromosome may be both unchallenged and irrelevant.[576] The metaphysical supports for Native American identity and the rejection of scientists' accounts of the peopling of North America here come together. Identity as guaranteed within the tribe was, in a sense, until quite recently, all.

The other facet of the distrust felt by some members of the Native American community for science is based in the belief that science does not (indeed cannot) give an adequate account of the origin of peoples in North America. Some Native Americans

adhere to what observers have labeled "Native American creationism", a set of beliefs that rejects scientific theories on the origin of humanity, including

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[573] Generalizations are dangerous here – the literature clearly states that some Native Americans do not mind DNA testing or scientific examination of human remains, whereas among Americans of all types there are individuals and groups that are adamantly opposed to "science".

[574] Ackerman, "Kennewick Man", p. 378, n. 182 quoting the statement of Dr. Emory Johnson in the Senate Hearings for NAGPRA.

[575] "With the exception of the religious transformations of Catholic initiates and women who change their names, family ties, and loyalties when they are married, no personal transformations are acceptable in the West. Yet, among primal peoples, there are numerous societal and personal ceremonies that make all types of drastic changes in identity and reality possible for virtually everyone. And these changes are considered actual transformations". Jamake Highwater, *The Primal Mind: Vision and Reality in Indian America* (New York: Harper and Row, 1981), pp. 181-2.

[576] See account of We'wha in Highwater, *The Primal Mind*, pp. 183-7.

both the theory of evolution and the Bering land bridge theory, and finds literal truth in Native American oral traditions on creation.[577]

The Native American scholar and activist Vine Deloria, Jr put this argument most strongly. Deloria argues against the scientific theories of origin based on a critique of the techniques used to generate knowledge in the realm of science. Scientific truth is not truth at all, as too often

> scientists, instead of objectively criticizing each other, are quick to accept another academician's theories so that their status within the university and profession is assured. ... Specialization within the sciences has led to "millions of irrefutable facts" which go unchallenged because scientists have no knowledge of related, though distinct, fields and because of doctrinal pressures.[578]

In Deloria's argument, authority and ignorance are constantly merging into "fact". The effect of this practice on evolutionary theory is to transform the long-standing explanations and arguments at the core of the theory into dogma. The older the theory, the less it can be challenged by scientific experiments that question the prevailing paradigm. [579]

Furthermore, in the realm of science in modernity, authority and knowledge structures do not merge seamlessly. The techniques of "hard" science itself are open to criticism. Carbon dioxide dating, used throughout the anthropological sciences to date artifacts, depends upon carbon-dioxide levels, which fluctuate from century to century, and thus give no stable "ground" from which to determine age. Deloria finds that the theories that scientists have proposed to explain the peopling of America owe more to racism and political utility than to science. Both the Bering Strait theory and the newer Ice Bridge theory ensue

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[577] Lannan, "Anthropology and Restless Spirits" p. 387.
[578] Ackerman, "Kennewick Man", p. 379, quoting Vine Deloria, Jr. in *Red Earth, White Lies: Native Americans and the Myth of Scientific Fact*, p. 58.
[579] This is one of the arguments also made by Bernal in *Black Athena.*

from an Anglo-American desire to deny Native Americans the argument that they were here a very long time, as opposed to a few thousand years, before Europeans arrived.[580]

Against this background, the reading of "scientific" to mean "correct" is seriously compromised. Deloria argues that scientists have become the new priests of modern society, and their "information" is correspondingly a matter of faith. Why not, then, turn to sources (such as priests) that have more, and more fundamental, authority of this kind?

Deloria thus looks to the oral traditions of Native American tribes to "explain" origin. Authority and truth are represented by tribal narratives:

> "American Indians, as a general rule, have aggressively opposed the Bering Strait migration doctrine because it does not reflect any of the memories or traditions passed down by ancestors over many generations". Deloria prefers explanations of creation in Native American oral traditions, which he believes are more reliable than Western Science because they are not based on fragmented, detached observations, but on collective human experience.[581]

These traditions are creationist rather than evolutionary, proposing an autochthonous origin for Native Americans in North America. For example, a Cheyenne River Sioux Tribe repatriation officer stated that:

> We know where we came from. We are the descendants of the Buffalo people. They came from inside the earth after supernatural spirits prepared this world for humankind to live here. If non-Indians choose to believe they evolved from an ape, so be it.[582]

Yet, they are not "creationist" in the sense that Christian orthodoxy has defined the concept. There is no one way, one path or one truth; the underlying premise of

[580] Ackerman, "Kennewick Man", p. 380.
[581] Lannan, "Anthropology and Restless Spirits", p. 387.

'science" and monotheism both is disregarded. As Deloria writes, "[m]ost tribal religions make no pretense as to their universality or exclusiveness".[583] Rather, the complex of religion, tradition, and memory that Deloria privileges over "Western Science" has a different aim.

In the early days of the furor over Kennewick Man, the Umatillas issued a statement written by Armand Minthorn, "a member of a new generation of Native American activists, who see religious fundamentalism...as a road back to Native American traditions and values".[584]

> Our elders have taught us that once a body goes into the ground, it is meant to stay there until the end of time.... If this individual is truly over 9,000 years old, that only substantiates our belief that he is Native American. From our oral histories, we know that our people have been part of this land since the beginning of time. We do not believe that our people migrated here from another continent, as the scientists do.... Scientists believe that because the individual's head measurement does not match ours, he is not Native American. Our elders have told us that Indian people did not always look the way they look today. Some scientists say that if this individual is not studied further, we, as Indians, will be destroying evidence of our history. It is passed on to us through our elders and through our religious practices.[585]

This response is in keeping with the statements made during the Senate and Congressional Hearings before NAGPRA became law. The legislative history of NAGPRA reflects the birth of the Indian Burial Rights movement in the 1970s and the increasing political sophistication of the groups involved in this movement.[586] Native American lawyers and activists raised the issues of ethics, the preservation of

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[582] Ibid. p. 388.
[583] Vine Deloria, Jr., *God Is Red* (New York: Grosset & Dunlap, 1973), p. 217.
[584] Preston, "The Lost Man", p. 74.
[585] Idem.
[586] These groups were the American Indians Against Desecration, the National Congress of American Indians, the Association of American Indian Affairs, the American Indian Science and Engineering Society, and various coalitions of tribes. In the 1980s, the group that achieved pre-eminence was the Native American Rights Fund. Riding In, "Without Ethics and Morality", p. 25.

Indian religious freedom, and equality under the law to argue against the practice of treating Native American human remains as anthropological or archaeological artifacts.[587] Long-standing anger regarding the methods of collecting and storing Native American human remains and the (possibly more recent) skepticism about the benefits of "science" merge in the question of what to do about Kennewick Man.

In this sense, the image of "Native American creationism" that one encounters (in the law review articles and elsewhere) is a very modern phenomenon. This of course is not true of Native American religion itself. However, within the debate regarding Kennewick Man, the claims made for and by Native American religion are arguments for an identity that cannot be shaken either by science or by politics. Writing about the European construction of the history of humanism, Sartre writes that the "settler"

> leaves out of account the human memory and the ineffaceable marks left upon it; and then, above all there is something which perhaps he has never known: we only become what we are by the radical and deep-seated refusal of that which others have made of us.[588]

This point applies equally to the argument made about anthropology, below. It is possible that the various observations made about Native Americans by settlers and then scientists, which over time have been corrected or become uncontroversial through the operation of professionalism or professional standards, are here being rejected. The "truth" about Native Americans is for Native Americans to determine. Religion may be a form of self-knowledge on all sorts of levels; "creationism" in this context is a form of resistance to the various disciplines/"knowledges" that have defined the Native American self. As such, it is a sword not a shield. In the debate about scientific testing of ancient bones, some tribal representatives espouse "creationism" because studies of human remains are "not necessary to an

[587] Ibid. pp. 25-6.
[588] Sartre, "Preface" to *The Wretched of the Earth*, p. 17.

understanding of their tribes' history".[589] The origin of *relevant* peoples is already known.

Against this background, religious practices are being used to deny the validity of the perceptual act that science demands. Thus,

> [t]he insight has slowly dawned on the scholarly world that American Indian religions are not just a thing of the past, something we can look up in Catlin's, Grinnell's, Morgan's, Fewkes's, or Boas's works. These religions...continue to flourish, sometimes in traditional forms, and sometimes in new appearances. ...The common religious heritage from the past is strengthened at religious conferences.... In books published by Indian spokesmen for old traditional religions the inherited religious values are emphasized. In short, we meet an Indian population in growing religious self-consciousness and in rapid religious expansion. Whatever the forms, the past is nourishing the present.[590]

"Westerners" or "white men" or "Anglo-Americans" cannot see through Native American tribal or personal identity to the creature within. In the rejection of the values of science, one sees clearly the rejection of the disciplines of anthropology and archaeology, as well as the struggle to derive a cohesive history for Native American peoples that is free of interference and subjugation.

Assuming, for the moment, that the law review articles cited are correct in positing a "clash of values", the foregoing analysis begs the question of which values are at stake. The questions of time, the relationship between humans and animals, individual and communal property and belief versus logic must be re-organized if they are to expose values that can "clash" over the "ownership or control" of human bones. Merely claiming that "science" (whatever that is) and "religion" (whatever that is) are in conflict, and that this conflict is well-known within the American

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[589] Lannan, "Anthropology and Restless Spirits" p. 387.

political landscape, is not enough. Why are these two realms in conflict, after years of "consensus-building", in a country that prides itself on its religious tolerance? The only way to answer this question is by excavating the values that underlie the two faiths of science and religion. Each term has its meaning in the context of American history and the Native American experience. First, "science" must be considered through the linkages between science, education and progress. The emphasis on science, the factor that makes science a "value" rather than a discipline or perceptual methodology, derives from the American emphasis on the value of progress in all its incarnations. *Progress* is the value that informs "science".

Second, "religion" must be considered through the linkages between religion, "individualism" and identity. The emphasis on religion, the factor that gives religion its content in this case is the American emphasis on *identity*. It is not Native American religion that problematizes the question of "ownership and control" of ancient bones, it is the fact that Native Americans are "speaking for" the dead, and for themselves, in the name of religion. These were "expert" positions, reserved for non-Indians. In "Native American creationism", it is the "Native American" and not the "creationism" that generates the problems. The replacement of one sort of speaker with another has tremendous effect,[591] even, and possibly most frighteningly, as regards the authority of science (and thus exposes authority itself, authority denuded of its mask of "truth"). What relevance does science have in a culture in which – to stretch a point -- sex-change "operations" don't need doctors?[592] What relevance does science have if the identity of a Native American has nothing to do with whether they have Caucasoid or Mongoloid features? With whether their ancestors had Caucasoid or Mongoloid features? The values that are at stake in this conflict are not "science and religion" or "religion and equal protection", although of course these formulations express facets of genuine cultural difference and ethical dissonance. Rather, the values that form the battleground on which the debate regarding

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[590] Ake Hultkrantz, *The Study of American Indian Religions* (New York and Chico: The Crossroads Publishing Company and Scholars Press, 1983), p. 109.
[591] As stated above, NAGPRA gives non-Native Americans no ownership rights in this situation.
[592] Again, *see* account of We'wha in Highwater, *The Primal Mind*, p. 183-7.

Kennewick Man is being held are "progress" and "identity". These values really do "clash". An identity not dependent on progress is (as will be discussed below) anti-American. It also serves as a challenge to the value of progress itself. These values, when working in tandem rather than in opposition, have already defined the field of anthropology.

To trace the means by which "science" translates into "progress" and "religion" into "identity" in this debate, it is necessary to reformulate the four points of cultural difference listed above. Returning to the first point, the temporal difference is merged with the religious and the cultural. Native Americans speak of their "...responsibility to protect all human burials, regardless of race".[593] This responsibility is founded on respect for the tribe's ancestors, on the link between the tribe and the land, and on the conception of time as a potentially-infinite present moment.[594] Such a conceptualization undercuts the notion of "progress" while affirming "identity". In one sense, the Native American image of time is in fact quite common, as personal or "sacred" time, within the context of modernity[595]:

> [t]he aboriginal "dreamtime" is the solution to the Western question asked by...Hannah Arendt: "Where are we when we think?"[596]

However, the trans-cultural commonality of this kind of time does not necessarily require or call forth the other values that define modernity:

> it is impossible to conceive of *progress* in the contemporary non-Indian lineal sense in Native American thought. We in the West refer to the cumulative process in which the more and the "new" automatically become identified with the better. Primal people do not conceive of such progressive and secular time.[597]

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[593] Lannan, "Anthropology and Restless Spirits", p. 389.
[594] Ibid. p. 390, quoting Chief Joseph, leader of the Nez Perce tribe, in a 1879 address to U.S. Congress: "'This country holds your father's body. Never sell the bones of your father and your mother.'" Also quoting Patrick Lefthand: "'go into our future hand in hand with the past...'".
[595] Highwater, *The Primal Mind,* p. 95.
[596] Ibid. p. 89.

The Native American conception of time also functions as an anti-commodification device of sorts, turning "the Western notions about *things* into propositions about *events*".[598]

Time, therefore, is a disruption in the expectation of shared uncontroversial "facts", and thus in the assumption of possibly-shared values. Time *itself* is not a "fact" for Westerners and Native Americans in the same manner. Notions of cyclical as opposed to linear time affect the notion of the future and the past, as stated above, and the difference between the two also affects the metaphysics of reality. One cannot think Western science without the Western conception of time:

> the phenomenon of time-experience is crucial to that empirical and observational philosophy called science in the West. ...Together with language and mathematics, this linear construction of temporal experience constitutes the essence of the active Western mode of consciousness.[599]

Time here is a floating signifier, it can modify or stand for the conflict within the valuation of progress or within that of identity.[600]

The question of the "chain of being" also merges both with the religious and with the scientific. Such a notion postulates identity as a matter of placement within a divinely-ordered world, and progress as dependent upon increasing one's comprehension regarding the demarcation between species. From the time of Linnaeus, there have been culturally-defended differences between not only species but their value, spatial organization corresponding with ethics and meaning in the realm of biology and the other classificatory disciplines. This remains obvious today. The claims of "knowledge" or "science" are ethically and morally tied to *capacity* as much as they are to meaning. The scientists in *Bonnichsen* are demanding the

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[597] Ibid. p. 90.
[598] Ibid. p. 108.
[599] Ibid. p. 95.
[600] Ibid. p. 97: "The visionary images of recent Western literature, like the syntax of primal people such as the Hopi, provide a nonlinear perspective alien in the West ever since the rise of Aristotelian realism. It is a vantage as urgently needed in science as it is in art".

opportunity to study skeletons, genetic material and "morphological differences and similarities" as a *right*.[601] The claim to this right is based on the effects of potential knowledge, to wit a better understanding of history and many practical advantages for modern society in the fields of paleopathology and epidemiology.[602] Furthermore, and more importantly, the right is based on increased capability in the laboratory. Dr. Bonnichsen's argument is that we have the technology to examine bones and residual tissue in such detail for the first time, "especially in molecular biology".[603] Because we have the technology, we have the imperative to use it. Progress must not be denied. Furthermore, to deny scientists this right – the right to discovery – is to deny all people knowledge in the broadest sense.[604]

In these three areas, it was a mark of *savagery* not to be able to distinguish properly between one thing and another; it was a mark of *willful* savagery to refuse to learn the true value of agriculture, animal husbandry, and "progress". From the 1830s, the true value of these skills was tied to American notions of individualism, personal freedom, and equal opportunity. The value of these skills constituted as *values*, and not merely knowledge, had to do with accepting American identity, joining in the American "project" in the grandest sense:

> Equal opportunity became a significant condition of individualism as it was understood in America; and of all the accesses to equality the most valued was education. It was education...of a very special kind; for it envisioned that barbarism and all the other deviations that separated peoples could and should be obliterated by knowledge. Thus, it became mandatory to be an educated individual; and all good Americans were expected to take advantage of their opportunities to become the same as everyone else and therefore as good as everyone else.[605]

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[601] Lannan, "Anthropology and Restless Spirits", p. 391.
[602] Idem
[603] Ibid. p. 392.
[604] Another plaintiff in the case, Dr. D. Gentry Steele, "echoed [Dr. Bonnichsen's]...sentiment: "If it gets buried now, it would be the same as if one or two people read a Shakespearean play and then someone burned the book, and those three people tried to tell the rest of us what it was like". Lannan, "Anthropology and Restless Spirits", p. 392.
[605] Highwater, *The Primal Mind*, p. 171.

Thus *education*, the middle term of the equation linking science and progress, and *individualism*, the middle term linking religion and identity, are themselves linked. Education and individualism are two sides of the same coin: the "civilized" American person. This person is defined in contrast to the savage. Native Americans have consistently refused to join in this currency.

As a last note to this section of the Chapter, before moving to a discussion of anthropology and "savagism", it may be interesting to look at the scientists' attorneys' speculations regarding the Corps' decision to side with the Indians. Part of what is at stake in the positioning of the legal and cultural questions in the commentaries on Kennewick Man is the attempt to avoid recognizing the values and issues that are in conflict with each other. Thus, the scientists' attorneys commented that the Corps

> constantly has a variety of issues it has to negotiate with Native American tribes...among others, land issues, water rights, dams, salmon fishing, hydroelectric projects, and toxic-waste dumps. The Corps apparently decided...that in this case its political issues would be better served by supporting the tribes than by supporting a disgruntled group of anthropologists with no institutional backing, no money, and no political power.[606]

This is of course a mixture of the accurate and the disingenuous.[607] Preston then invokes the bogey-men of the American intellectual establishment:

> There are large constituencies for the Indians' point of view: fundamentalist Christians and liberal supporters of Indian rights. Fundamentalists of all varieties tend to object to scientific research into the origins of humankind because the results usually contradict their various creation myths. A novel

[606] Preston, "The Lost Man", p. 74.
[607] Although the plaintiffs in *Bonnichsen* are suing in their own names, without explicit institutional backing, an amendment to NAGPRA was immediately introduced that sought to protect the claims of science against precisely this, or even less "questionable" challenges from the Act.

coalition of conservative Christians and liberal activists was important in getting NAGPRA through Congress.[608]

Again, this is not strictly true. It is rather a flattening of the political landscape in order to mirror (or partake in) a favourite trope of American social analysis: the oppositional extremes that meet at the same irrational point, somewhere well beyond the boundaries of desirable political (or academic) life.[609] The same rights for all and religious fervour still seem to go hand-in-hand as harbingers of ruin and social decay. This can be seen from a different perspective, but as clearly, in the next section of this Chapter.

Anthropology and the "savage"

It is most unpleasant work to steal bones from a grave, but what is the use, someone has to do it. (Franz Boas)

The cultural differences so painstakingly excavated by legal commentators on NAGPRA and Kennewick Man are easily, if not fundamentally, irrelevant. These differences, constituted as "barriers" standing in the way of "resolution", beg their opposites: conquerors versus the conquered, "pure" ownership versus compromised allotments of culture and (self-)identity. These opposites are not available. There is, in a sense, already too much difference.

> The turbulence and velocity of change in the West which has epitomized the destiny of the nineteenth and twentieth centuries was unknown among Indians.[610]

Native Americans were living in a world with entirely different parameters from that of the people who studied them, even before *specific* cultural differences became

[608] Preston, "The Lost Man", p. 74.
[609] In the forum of *The New Yorker*, which is where the commentary appeared, it is also to engage in a sort of scare-mongering that is strangely familiar to the "liberal humanist" middle classes.
[610] Highwater, *The Primal Mind*, p. 193.

politically or legally relevant. The epistemological and place-oriented problems of modernity, and the discourses that now seek to resolve these problems through an appropriation of or engagement with "the past" are, to a great extent, problems that Native Americans do not share. This is the categorically different conceptual landscape that underlies the specific differences listed above. Without lapsing into essentialism, or into the error of defining Native Americans as "pre-modern" – indeed, without making *any* judgments as to how to best define the Native American world-view – if one begins to assess the notions that underlie modernity itself, one can see where the analyses in the American commentaries miss the point of the conflict.

An example of this sort of analysis is to point out that the Western notion of "identity" did not exist in the Native American community until quite recently.

> It is taboo among primal people like Indians for someone to depart from communal mentality. Traditional Indians reject this kind of behavior as antisocial and treasonous; and, what is more, most white people (even those strongly in favor of assimilation of Indians into the dominant culture) are quick to charge a culturally rebellious Indian with the exploitation of his heritage.[611]

Yet ignorance, like knowledge, is not value-neutral. In the case of Native Americans, this ignorance meant that the Native American community had to both discover its "own" voice, and learn how to make that voice heard, in order to fight a rear-action:

> [they were] fighting brilliantly to retain the past that missionaries and government teachers were attempting to obliterate. Those tenacious Indians of the 1920s were not reaching for the future but striving for an identity almost stolen away from them.[612]

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[611] Ibid. p. 195.
[612] Ibid. p. 194.

The arguments about "indigenous" and about "science" occur in a landscape in which concepts such as "individuality" or "individualism", in the Western Romantic sense that is more or less taken for granted in America (and which modernity is just beginning to question), are themselves in flux.

An "indigenous person" is an observed entity, and thus an entity that must make the most of observation. The lines of sight, both outside-in and inside-out, are the raw material for the creation of the self. Against the specific characteristics assigned to modernity, the human sciences have resulted in intermixed categories and compromised or impossible dualities. Moreover, the attempt to fix identity, whether through science or through politics, founders on the very sort of knowledge that it requires:

> "Our fascination with the native, the oppressed, the savage" masks "a desire to hold onto an unchanging certainty somewhere outside our own 'fake' experience. It is a...not-too-innocent desire to seize control."[613]

"Other"-referential knowledge, which is the hallmark of identity studies, arguably then has the same origin as classical anthropology. Does it have a different result? Is it the very presumption of knowledge, of self or of "the other", that one has a "not-too-innocent desire to seize control"? Clearly, there is a great deal of scholarship regarding these questions.[614] Nonetheless, "indigenous" remains a contested term, both substantively and formally. In the process of self-creation, the values that are assigned to "indigenous," in turn defined as "pure" or as "conforming", all-too-easily shape "identity" into "the identifiable".

> [G]ood Indians are supposed to remain *pure* – which means that they are supposed to be static. So intense is the Western attitude toward Indian purity that sophisticated Indians are normally looked upon as not *really* being

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[613] Diana Fuss, *Identification Papers* (London: Routledge, 1995), p. 9, quoting Rey Chow in *Writing Diaspora: Tactics of Intervention in Contemporary Cultural Studies*.
[614] *See*, for example, Bill Ashcroft et al. eds, *The Post-colonial Studies Reader* (London and New York: Routledge, 1995).

> Indians. And so intense is the Indian regard for conformity that psychologists working with urbanized Native people are always pointing out...that their individuated patients suffer...intense guilt toward their tribes....[615]

The claim is easily sustained that "[p]rimal people and the people of the dominant cultures tend to understand themselves as persons in quite different ways".[616] How Native Americans became recognizable to others is seen in the history of anthropology. How they are currently recognizable to themselves forms one of the foundations of the conflict regarding the disposition of Kennewick Man. A review of the history of anthropology within the context of Native American studies brings to light the field on which the "differences" between Native Americans and others are exposed, and also brings to light the impossibility of separating what is known from how it is known. Reading the claims of the plaintiffs in *Bonnichsen* against even the briefest history of Indian studies in the United States is an illuminating experience. The dynamics of identity and values discussed throughout this Chapter display the same relationships when read through even the briefest history of anthropology:

> first, the only violence is the settler's; but soon they will make it their own; that is to say, the same violence is thrown back upon us as when our reflection comes forward to meet us when we go toward a mirror.[617]

The violence of the anthropologist is absorbed and reflected back by the "indigenous" person. The institutions (of education and government) that express the anthropologist, that are the reflecting surface for both anthropologist and "native" or "Native", are themselves expressions of violence. They are *meant* to be expressions of violence; they were created to conquer, to classify, to *own*.

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[615] Highwater, *The Primal Mind*, p. 196.
[616] Ibid. p. 117.
[617] Sartre, "Preface" to *The Wretched of the Earth*, p. 17.

This point is tangential to, yet supported by, the work of Roy H. Pearce in his brilliant *Savagism and Civilization: A Study of the Indian and the American Mind.*[618] Pearce argues for the equal and progressively-opposing (self-) identifications of the "American" in contradistinction to the "Indian". He argues that "civilization" and "savagism" are counter-themes to each other, and explores the variations that arise from this central idea.

> I have tried to recount how it was and what it meant for civilized men to believe that in the savage and his destiny there was manifest all that they had long grown away from and yet still had to overcome. ...In America before the 1850s that belief was most often defined negatively – in terms of the savage Indians who, as stubborn obstacles to progress, forced Americans to consider and reconsider what it was to be civilized and what it took to build a civilization. Studying the savage, trying to civilize him, destroying him, in the end they had only studied themselves, strengthened their own civilization, and given those who were coming after them an enlarged certitude of another, even happier destiny – that manifest in the progress of American civilization over all obstacles.[619]

Pearce states that he is writing the history of a belief, and as such, is working with language and human error.[620] The Indian became the symbol of the idea of the savage, and savagism, in America:

> [t]here is here the whole complex of savagism: the picture of men who, living under wild circumstances apart from civilization, have developed specifically noncivilized virtues.[621]

Once again, the values of progress and of identity are discovered lurking within a foundational moment of American self-perception. Pearce's materials are the texts of the period between 1609 and 1851. The belief that Pearce is tracing

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[618] Roy H. Pearce, *Savagism and Civilization: A Study of the Indian and the American Mind* (Berkeley and Los Angeles: University of California Press, 1988).
[619] Ibid. p. xvii.
[620] Ibid. p. xx.

informed the science of anthropology and the popularization of the Indian in American art and literature for two and a half centuries, and continued to do so until quite recently. This belief required the habit of subsuming data to itself, a phenomenon that Pearce also exposes. The idea of the savage, the symbol of the Indian, and the mental habit of interpreting all sociological or anthropological data so as to support the belief in manifest destiny – resulted in the Indian being defined as "the zero of human society". The idea of the savage had colonized American thought about the indigenous people in America. The idea of the savage coloured the data collected about Indians. Yet the data supported the idea of the savage. If the notion of "savagism" required proof, then

> [p]roof required first-hand observation and...close analysis, classification, and summing-up of what had been observed. Facts were collected first-hand, recorded, analysed, and conclusions come to.[622]

In short, "proof" required science, and science delivered the desired result: "[i]n the end the hypothesis was proved in fact; the savage proved savagism; a symbol bodied forth an idea".[623]

The hypothesis was the business of anthropology, as will be seen below, and the question that remains is whether the "Native" in "Native American" still exists as this sort of anthropological product. Pearce would argue not. He would argue that Americans, as scientists and scholars, have moved on from the moment in which Native American culture had to be "at once historically anterior and morally inferior...".[624] "But then," Pearce continues, "the Indian is no great personal issue to us".[625] In the question raised by Kennewick Man, however, the Indian is in fact of great personal importance to many people, in fact, to all Americans ("Native" or not)

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[621] Ibid. p. 122.
[622] Ibid. p. 105.
[623] Idem
[624] Idem
[625] Idem

who are committed to "progress" and to "identity".[626] As a result, when "the Indian" is of personal importance, do the ideas about savagism and civilization recur, burst through the rigourous separations between facts and judgments, knowledge and politics, that scholars in the human sciences have tried to construct? Must "the Indian" remain a (reversed) reflection of the American self in order to remain recognizable, thus visible, authentic and manageable at these times? Conversely, is the violence – no matter how deserved or predictable – done to the values of the American scientist by NAGPRA, or to the Smithsonian by NMAIA, a reflection of the violence that has shaped the "native"? "Laying claim to and denying the human condition at the same time: the contradiction is explosive".[627] The second part of the legislative history of NAGPRA consists of the mechanics of precisely this explosive, contradictory process. From this perspective, it becomes clear that the conflicts that make the problem of Kennewick Man potentially irresolvable are conflicts that are rooted in colonization and the role that "science" and education play in this process, and not in some innocently-discovered "difference" that must be accommodated by the law. At the end of the day, the questions of identity and cultural property have to do with what sorts of bailiwicks are being defended, or what battles are being fought, possibly long after the concept of being "at war" has fallen out of favour.

Congress enacted NMAIA and NAGPRA amid a "climate of reform".[628] Indian graves, human remains, sacred sites, and artifacts of all kinds have been excavated, studied, and collected from the time the first Europeans landed in America. The "Indian" was an object of fascination, and as an object, was more accessible in death than in life:

> Violations of Indian burials had occurred during the Colonial period, but the Revolutionary War era was a formative one in which white Americans assumed tacit ownership over dead American Indians. Although most

[626] This thesis does not discuss the other ways in which these questions may be of "great personal issue", that is, that shifts in identity can force shifts in allocation of property rights in land itself. There is a recurrent fear in the American national consciousness that Native Americans will get "their" land back, which is the fear that "tribal lands" under NAGPRA or any other statute may one day include vast tracts of various American States.

[627] Sartre, "Preface" to *The Wretched of the Earth*, p. 20.

transplanted Europeans had little use for living Indians, many developed a fixation for dead ones.[629]

This "fixation" has had many effects, and an equal number of causes. The notions of savagism and primitivism interacted with the development of anthropology as a science, and the underlying values of anthropologists, to allow the fixation to grow into a series of disciplines and institutions. The originally-amateur excavations of burial sites and both private and government collections of human remains have in a sense generated the sciences of American anthropology, archaeology and paleontology. These sciences, and the "science" that animates them, in turn validated the claims of science regarding ancient human remains.

Native American artifacts of all kinds have always and obviously been part of the American intellectual landscape. The history of excavations begins with curiosity, continued (and continues) in the name of science, and latterly describes academic and commercial enterprises.[630] Unfortunately, this history also exposes racism and colonizing practices in all these endeavours. The history of the United States shows that for each of these disciplines, the following statement is true:

> Although now conceptualized as a disinterested science, archaeology in the United States developed in the context of colonialism. The process of European expansion into North America, which began in the late 1400s, set a tone of racial intolerance, injustice, and immorality that became integrated into and imbedded in white intellectual thought. Explorers, looters, and settlers (often one and the same)...by virtue of the "Doctrine of Discovery," claimed a right based on the ethnocentric notion of Christian preeminence to the North American continent.[631]

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[628] Lannan, "Anthropology and Restless Spirits", p. 396.
[629] Riding In, "Without Ethics and Morality" p. 15.
[630] Of course a museum is both an academic and a commercial enterprise.
[631] Riding In, "Without Ethics and Morality".

The disinterest or objectivity of archaeology, anthropology, and paleontology are in themselves arguments that need to be made, rather than facts that can be maintained.

Given the constraints of this Chapter, the development of the science of anthropology in America can only be sketched. In 1784, Thomas Jefferson excavated Native American burial mounds on his property.[632] More importantly, it was Jefferson "who encouraged Americans to go systematically after the facts".[633] In 1803, Jefferson, among others, set out the kinds of information that Lewis and Clark were to gather about Native Americans. Classification and categorization of data were as much tools of American expansion into Native American land as war, bargaining, treaties, or contracts for the sale of land. Information was needed in consideration of

> the interest which every nation has in extending and strengthening the authority of reason and justice among the people around them...it may better enable those who may endeavour to civilize and instruct them, to adapt their measures to the existing notions and practices of those on whom they are to operate.[634]

Pearce makes the point that regardless of the complexity and specificity of the data collected, the explorers, whether private travelers or sent by the government, "all conclude that the Indian is everywhere, essentially the same, the savage of their idea of savagism".[635] European-Americans could *observe* specific differences, for example between hunting and agricultural tribes, but they couldn't *recognize* them. All Indians were hunters, and hunters, whether or not they were admired, had to be pitied because they were not civilized.[636] Only agricultural societies could give rise to civilization.

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[632] Raines, "One is Missing", p. 642.
[633] Pearce, *Savagism and Civilization*, p. 106.
[634] Ibid. p. 107.
[635] Ibid. p. 109.
[636] Ibid. p. 110.

It is clear from Pearce's analysis that the pendulum swung from honest admiration to necessary pity. Even when "civilization" was not admired by the early explorers, recorders, and collectors of Native American data and artifacts, it was seen as "*...certain.* Man's increase, and the march of human improvements in this New World, are as true and irresistable [*sic*] as the laws of nature..."[637] The march of civilization certainly marched over the Native American. Data was gathered continuously, and each piece of data was interpreted to signify the inevitable and speedy end of the Indian. By 1815, prizes were being offered by state historical societies for essays on the Indian before he vanished forevermore. The "fact" that the Indian would cease to exist, as a "natural" man in his "natural" state, was considered inevitable as the Indian represented savagism ever more clearly to the American mind. Regardless of how contented, "noble", or virtuous Indians were, they were not willing to accept the structure of values regarding property and commerce that would lead to "civilization" as the settlers and explorers understood the concept. Indians could hope for continuity but not greatness for their communities. They could not generate progress or permanence, and again, they unwilling to "give in".

Moreover, the last pieces of information necessary to prove savagism – information about Indian moral character and feelings, thought processes, and mythologies and religions – were forthcoming. It became clear to the early scholars and experts that Indians were deprived of even the potential for civilization because they were deprived of the Christian religion. This made some observers sad, and others philosophical:

> "[t]he Indian, delighting in war and in glorious deeds, is yet ignorant of the greatest victory of which man is capable – the conquering of one's self. ..." The means to this victory would be, obviously enough, Christian civilization.[638]

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[637] Ibid. p. 112, quoting George Catlin, one of the first explorers of the West, in his *Letters and Notes on the Manners, Customs, and Condition of the North American Indians* (1841).
[638] Ibid. p. 118.

Thus moving from admiration (and poorly-disguised envy in some cases) to pity to a preoccupation with the Indian "self", American early anthropologists turned to the question of the structure of Indian thought and "savage mentality".[639] The question, to be answered by scientific means, was more or less no longer about "Indians" but about "savages".

> What holds the Indians to savagism is the wildness of their life; what makes that wildness meaningful to them are their myths and their religion; what makes these myths and that wildness possible is their "mental characteristics"; what makes for those mental characteristics is their savagism.[640]

From this point, the Native American became a problem to which science must provide a solution.

In the early 1830s, Samuel G. Morton and others turned to the new disciplines of craniology and phrenology to analyze Native Americans. To this end,

> Morton measured several hundred human skulls belonging to members of different races, including American Indian, Hottentot, and Australian Aborigine. After pouring mustard seeds into and weighing the skulls, Morton postulated that the Anglo-Saxon had the largest brain capacity and, therefore, more intelligence than other peoples of the earth. Preoccupied with American natives, he eventually assembled a large collection of Indian crania.[641]

In 1868, the U.S. Surgeon General ordered troops to collect Native American crania, again for scientific purposes.[642] The Surgeon General "ordered all U.S. Army field officers to send him Indian skulls so that studies could be performed comparing the

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[639] Ibid. p. 120.
[640] Ibid. p. 121.
[641] Riding In, "Without Ethics and Morality", p 17.
[642] The Surgeon General's memorandum to field surgeons in 1868 urging medical officers to send them skulls for their "niological collection", of which "The chief purpose...is to aid the progress of anthropological science by obtaining measurements of a large number of skulls of the aboriginal races of North America". Ibid. p. 19, (n. 31, quoting from Memorandum from C. H. Crane, Assistant Surgeon General, United States Army, to Medical Officers, 1 September 1868))

sizes of Indian and white crania".[643] This order resulted in mass decapitation of Native American dead: "over 4,000 heads were taken from battlefields, POW camps and hospitals, and fresh Indian graves or burial scaffolds across the country".[644] The crania collected by the Surgeon General were ultimately stored in the Smithsonian's Museum of Natural History.[645] The Smithsonian holds the single largest collection of Native American human remains in the United States (over 18,500 skeletons by its own estimate).[646] Because the bodies were "savage" bodies, all were allowed to participate in these practices.

The public fascination with Indian burials and crania continued to fuel amateur collecting. Museums benefited greatly from the combination of amateur anthropology, science, and greed that resulted in other great collections of Native American human remains.

> Mutilations and grave looting operations...during the 1700s and 1800s by intellectuals and the United States Army created an ambiance of legitimacy for such activities. Consequently, nonacademics also desecrated Indian graves... For example, white Americans entering California during the gold rush mania of the late 1840s and early 1850s ravaged tribal burial sites looking for fabled Indian treasure. Describing some three hundred skulls taken from a cave and placed on public display in San Francisco, one observer noted: "The cranial developments [of the remains on display] are very similar to those of the present Indians, though one of the skulls appear[s] to have a very intellectual character". The "owner" later sold the collection...to Harvard University's Peabody Museum.[647]

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[643] Lannan, "Anthropology and Restless Spirits" p. 393.
[644] Idem, quoting testimony of witness from the Native American Rights Fund during the House NAGPRA hearings.
[645] Raines, "One is Missing", p. 643.
[646] Idem
[647] Riding In, "Without Ethics and Morality", p 20.

Museum collections throughout the United States yield a total as high as 600,000 skeletons; there are even Native American skeletons in Europe.[648] If the number is adjusted to take into account the collections in educational institutions, then the estimates reach two million.[649] As will be discussed at greater length below, these collections too often do not take the "humanity" of the "remains" into account, thus causing additional distress to some Native Americans. "Western Washington University has in basement storage over eighty Lumi remains. One tribe member who visited...stated, "There were our people stacked in little boxes like cordwood".[650]

The relationship between anthropological collecting and universities is long-standing.[651] The same complex of curiosity, greed and fascination spurred academic research into the "truth" about Native Americans and the past more generally. The two results of this were that:

> Universities established course work and offered degrees in archaeology. ... Moreover, parties of archaeologists from universities across the nation systematically surveyed and excavated numerous Indian ruins and burial sites.[652]

University programs largely ignored the question of ethics,[653] at least until the anthropological profession began to determine its own code in 1967.[654] University-trained anthropologists, archaeologists and paleontologists worked with the U.S.

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[648] Raines, "One is Missing", p. 643.
[649] Lannan, "Anthropology and Restless Spirits", p. 393.
[650] Raines, "One is Missing", p. 644.
[651] "Following the tradition of Jefferson, researchers asserted that Indian remains and cemeteries contained a key for unraveling the mysteries of the past. Consequently, universities, state historical societies, and government agencies emerged as leading violators of Indian burial rights". Riding In, "Without Ethics and Morality", p. 21
[652] Idem.
[653] "Rather, college professors instilled the notion into their students that such activities were beneficial and necessary for understanding the past". Riding In, "Without Ethics and Morality", p. 22
[654] Carolyn Fluehr-Lobban ed., *Ethics and the profession of anthropology: dialogue for a new era* (Philadelphia: University of Pennsylvania Press, 1991). The American Anthropological Association (AAA) developed its own code, the Principles of Professional Responsibility (PPR) in the second half of the twentieth century.

government and military as agents both at home and abroad.[655] The relationship between the nascent professions or disciplines of anthropology and paleontology on the one side, and the United States government and its policies on the other mutually-reinforced the (already) entitled, if not possessive, approach to Native American human remains.

> that group of adventurers who clustered around ...the Bureau of American Ethnology (BAE) was forging an identity for anthropology in the American landscape, but it had not yet consolidated a profession. Although these adventurers' research was sponsored by the U.S. government, they had a high degree of freedom of inquiry that we are unaccustomed to associating with government employment in the later part of the twentieth century. Perhaps this is because their mission was to salvage the cultural remnants of already pacified Indian communities and not the more controversial work of later times involving non-Western, non-American populations.[656]

However, from the perspective of the Native American activists agitating for burial rights reform, the work these adventurers did was quite controversial. The United States government seemed more willing to return land to Indian tribes than rights to their dead.[657] Within the American Anthropological Association, there was some examination of the Association's relationship with the United States government's practices abroad, even though that did not always yield critical insight into the practices of the profession closer to home.[658] As the profession progressed in standing, the relationship with the government also deepened. Fanning out from the universities, anthropologists joined other federal institutions and continued the practices – and the belief systems – encouraged by their professors.

> By the 1930s, not only had anthropology in the United States established a scientific identity but increasing numbers of trained students were entering the

[655] Fluehr-Lobban ed., *Ethics and the profession of anthropology*, p. 13.
[656] Ibid. p. 16.
[657] Raines, "One is Missing", p. 649.
[658] "Boas' outrage against the wartime activities of four anthropologists who had combined intelligence-gathering with their research...resulted in the first clear-cut case wherein the issue of

> new professional slots opening up in the academy and seeking professional opportunities in government service. With no impediments or even questions having been raised within the AAA regarding government employment, anthropologists took up government civilian jobs in significant numbers.... Agencies other than the traditional hiring places of anthropologists, such as the Bureau of American Ethnology, or National Museum, employed anthropologists in the Department of the Interior, Bureau of Indian Affairs (BIA), National Park Service, the Department of Agriculture, and the Soil Conservation Service.[659]

Throughout the 1930s, the sorts of practices that were encouraged by the Surgeon General in 1868 were still acceptable within the profession and its premier institutions.[660] After the bombing of Pearl Harbor in 1941 the AAA joined the war effort; post-World War II, "anthropologists continued in a pattern of employment by the U.S. government that was basically a continuation of the war effort".[661]

There is a long-standing relationship between not only anthropological collecting and universities, but also between the American profession of anthropology and the practices of colonization and colonialism.[662] University degrees were put to use in colonial administrative contexts both in the United States and in Britain. Practically,

> the charge that anthropology is the handmaiden of colonialism is a powerful reality insofar as anthropologists have been willing to pursue their research within an environment constrained by governments. Academic freedom has

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unprofessional behavior was raised in the AAA organizational framework". Fluehr-Lobban ed., *Ethics and the profession of anthropology*, pp. 16-17. *See also* p. 18.

[659] Ibid. p. 18.

[660] "In the 1930s, Smithsonian Institution archaeologists visited the Native Alaskan village of Karson Bay and, without permission, removed over eight hundred human remains and associated funerary objects from a burial site". Lannan, "Anthropology and Restless Spirits", p. 393.

[661] Fluehr-Lobban, ed., *Ethics and the profession of anthropology*, p. 20.

[662] Comparisons are between U.S. overseas operations and the English imperial system, although in terms of relative scale, "perhaps the better comparison is with the Bureau of Indian Affairs and British colonial administration in Africa and Asia". Ibid. p. 21.

been cultivated in the academy, but for all our history since the 1930s, anthropologists have been seeking work outside the academy.[663]

In terms of theory, it is questionable how much of the colonial context remained separate from the classroom and the suppositions that directed academic research. It was only when the relationship between anthropologists and the U.S. Army became public in the Chilean press that the profession moved to promulgate ethical guidelines for its practices,[664] the first "statement on Problems of Anthropological Research and Ethics". At issue in this document were clandestine research[665] and government contracts.

However, "[u]naddressed in 1967 was the anthropologist's proper relationship to people studied, to students, to clients, and to fellow human beings".[666] Within a year of the 1967 Statement, an advertisement appeared in *American Anthropologist* for a research anthropologist to work in Vietnam with the Psychological Operations Headquarters.[667] This touched off another crisis in the profession and led to the formation of the Principles of Professional Responsibility in 1971.[668] Rather than attempting to define anthropologists' duties or loyalties, it attempted "to provide a framework within which disclosures of ethical problems and debate on ethical issues" could occur within the profession.[669] It did not mention secret research, government contracts, or responsibility to the people studied. When the PPR was revised in 1990, the first principle remained "first responsibility to the people whose lives and cultures

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[663] Ibid. pp. 21-2.
[664] A quasi-secret initiative called "Project Camelot" originated in the Department of the Army's Office of the Chief of Research and Development, and was subsequently carried out under contract research to the American University in Washington, D.C. "T]he project was addressing the problem of counterinsurgency in Latin America and how increased knowledge, gained through social science research, would assist the army in coping with internal revolutions in the region". When this plan, which was not classified, was "leaked" to the press in Chile, there were strong protests in Latin America and in Congress. Ibid. pp. 23.
[665] "The principle enunciated was that clandestine research is wrong, that secret research is unethical, and...that both are unprofessional". Ibid. p. 27.
[666] Ibid. p. 26.
[667] Ibid. p. 27.
[668] Ibid. p. 29.
[669] This code was revised unsatisfactorily in 1984. Ibid. pp. 31.

anthropologists study...".[670] However, as always, this ethical requirement exists in a medium that includes "Responsibility to Employers, Clients and Sponsors", and which again does not mention secret or clandestine research.[671] It is ironic that this history is perceived as an account of the tension between "pure research" and "ethics",[672] given the early and continuing links between collectors, looters and government agents. Arguably, as these various identities fed into the identity of "scientist", the underlying values and the nature of the original interconnecting ties between them did not truly shift. It is possible to become a much better "scientist" while retaining the same skill level as a collector, looter, or government agent.

It is against this background, and while claiming that only now do the techniques for "true" science exist, that the plaintiffs in *Bonnichsen v. U.S.* are staking their claim to Kennewick Man. Pearce provides an interesting summary of the results of the early years of study of Native Americans:

> First the savage was put back in history; then he was put out of it. For the eighteenth-century Scots and the Americans who had followed them, savagism...was the first and lowest state of society;.... For [Americans in the mid-nineteenth century,] savagism has become simply noncivilization. ... And the Indian must die, since noncivilization is not life.[673]

In light of the one hundred and fifty years of anthropology, one wonders whether the profession has become used to playing Lazarus, removing and reinstating "life" with a certain amount of impunity.

Conclusion: common ground

The conflicts at issue in this case are presented as conflicts between different notions of the world, or different notions of the origin of people – American people.

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[670] Ibid. p. 32.
[671] Idem
[672] Ibid. p. 34.
[673] Pearce, *Savagism and Civilization*, p. 127.

The idea that the law can address these competing visions was not part of the legislative purpose of NAGPRA. Rather, the court in *Bonnichsen* and the commentators in the American academy are attempting to half-generate and half-presuppose common ground on which these conflicts can be explored. Yet, as this thesis has argued throughout, the problems in this case are problems in which "cultural property" is doing the work of "fixing" modernity; and as a result, "common ground" (or "autochthonous identity") is precisely what is being claimed by both sides. Common ground itself is precisely what is at issue. Certainly, the debate about Kennewick Man is not a debate that can be subsumed within a structure of law or society that can accommodate two sides. Rather, the better image or analogy for the competing considerations at issue is one of war, in a landscape that has the characteristics of a war-zone or a colonized territory more than those of a disagreement within a discipline. The replacements and identifications at stake in this different landscape require different tools than a straightforward exploration of "history" or "law".

The issues presented by the possibly ahistorical and acultural bones of "Kennewick Man", turn on questions of origin and culture that have a great deal in common with debates regarding (reverse) affirmative action, identity politics, and ethnic cleansing (and the jurisprudential approaches to both trans- and infra-national conflicts represented by The Hague and UNESCO conventions on cultural property.) The attempt to subsume the issues at stake in Kennewick Man into a landscape in which the conflict is "manageable" by and through the American cultural hegemony is a *realpolitik* sort of solution, tried and tested over the past two and a half centuries of American experience. The mechanisms of this process, as discussed above, require shifting definitions of the "values" implicit in the American totems of science, religion, and law. Therefore, "science" may well not be science, religion may well be politics, and law is a response to historical injustice rather than a guarantee of either "privileges" or "rights". Science, religion, law: one could say that in this field of shifting identities, identifications, alliances and ends they intersect to form the field of

analysis itself, that the "conflicts" or "struggles" exist as a matter of course, as definitional imperatives or evolutionary principles in these realms.

Therefore, we require a different field or realm in which to assess the idea of "indigenous". Is there a moment in which "indigenous" does not mean "native" or "savage"? Can cultural property claims serve as one of the techniques by which "native" inverts itself into "person" or "individual" or "free man" in modernity? The work of Frantz Fanon might give some insight into this function of cultural property discourse. Fanon explains the process of creating a native. It is still an open question, needing more research, to determine whether creating a native also leads to creating a "Native", and to what extent the Indian reburial movement and the conflict over the disposition of Kennewick Man is an attempt to invert or subvert the "native" lurking at the heart of "Native American". The landscape of modernity is one that comports well with Fanon's vision:

> There is a crushing sociopsychological history among conservative Indians whose cultural tenacity somehow got confused with a sadly compromised grasp of their own heritage. A mixture of quasi-Christian morality, quasi-Indian activism, and a decline in their firsthand experience in Native American customs has resulted in a reactionary mentality that poses as traditionalism. ...*The compromises typical of middle Americans* have left many Indians touched by a degraded and stereotypical "pow-wow" view of themselves.[674]

It remains to be seen if the same process that crushes – examination, discourse, violence – can liberate. If so, cultural property claims and discourse(s) (with all their flaws) will serve as one of the tools of this liberation. Possibly, this is the trajectory of "indigenous" peoples:

> Decolonization never takes place unnoticed, for it influences individuals and modifies them fundamentally. It transforms spectators crushed with their inessentiality into privileged actors, with the grandiose glare of history's

[674] Highwater, *The Primal Mind*, p. 196. (emphasis added)

floodlights upon them. It brings a natural rhythm into existence introduced by new men, and with it a new language and a new humanity. Decolonization is the veritable creation of new men. But this creation owes nothing of its legitimacy to any supernatural power; the "thing" which has been colonized becomes man during the same process by which it frees itself.[675]

[675] Fanon, *The Wretched of the* Earth, pp. 36-7.

Chapter Seven Conclusion

In this thesis, I have proposed a means of theorizing cultural property. I have addressed both the development and meaning of cultural property "discourses" (the increasing amounts of cases, legislation and commentaries) and "cultural property" itself (artifacts and knowledge). My argument in brief was that cultural property, and the increasing prevalence of the discourse regarding it, have been first a by-product and then an industry of modernity. This position is the result of research into why legal arguments so often fail adequately to resolve the cases brought before the law. Looking at the cultural property case that presents the most traditional set of legal and moral arguments used in this field, the case of the Parthenon (formerly "Elgin") Marbles, and "Kennewick Man", brought in the United States to settle ownership of a 9,000-year-old skeleton, which presents the most novel sorts of legal and socio-theoretical arguments, I have demonstrated that when the law confronts claims made regarding the ownership of ancient objects, it is in fact confronting claims made regarding the ownership of pre- or anti-modern *time.*

The first premise of the argument (set out in the Introduction) is that modernity produces "the past" as it has come to irradiate and define cultural property, and also produces the problems that are being addressed in cases regarding the ownership of ancient objects. This premise is based in the work of Hannah Arendt, who, in *The Human Condition*, foresaw a radical shift in the conditions that produce(d) humanity. The human condition requires a certain kind of "grounding": human beings must be tied to the earth as dirt and the earth as commonality, and they must be able to speak to each other about their values, actions and choices. For Arendt, the launch of Sputnik spoke of the end of common ground, the ground of the earth and the ground of possible speech. The love of the horizon also demonstrated the rejection of (past) earth. In broader terms, this moment of turning to the horizon accords perfectly with the very definition of "modernity". In modernity, therefore, Arendt identified certain dangers. What of humanity in a world in which the

necessary foundations for the production of *humanity* were lacking? As human biological functioning is increasingly assured by technological means, humanity becomes less confident of its own survival. In terms of Arendt's criteria for the human condition, which look to the production of humanity rather than biologically human beings, there is no guarantee, in any realm (fiction, history, law) of either continued human existence or human flourishing.

Therefore, as a first step, this thesis found that our existence on the horizon-line of modernity could be considered existence oriented towards future-time, although this existence is one that requires contemplating the possibility of stunning human losses. Here, we see the first intimation that the value of ancient objects is essentially tied to the temporal unease of the present/future dichotomy on which we are required to live. As humanity lives longer on the cusp of the future (that Arendt must have seen as the dark curve of space), it becomes increasingly and ironically reluctant to shed the past. Since the Enlightenment, the notion of increasing prosperity, knowledge, and health on the basis of rational investigation and technological advance has been almost unquestioned. The myth if not reality of progress cannot be denied. As a result, the *future* was the legally and historically valorized time necessary for human flourishing. When one looks to the prevalence and persistence of disputes regarding ancient objects, however, one sees that today, this "important" time is the *past*. Indeed, one can go further and postulate that for the first time since Antiquity the past takes on vivid cultural importance. Rather than looking to ensure the possibility of cultural change, the actors in these disputes look to ensure cultural continuity, and in so doing, confront the questions of authority, ownership and definition that attach to claiming particular historical (or ahistorical) times.

The question that arises, however, is what role the law plays in mediating this relationship with time in modernity. The actors in cultural property disputes look to the law for resolution. The mechanisms for claiming possession in the law are rooted in theories and structures of ownership. Logically, therefore, the claims for the past

are oriented towards ownership claims (of these past times). If the past could be removed, or replaced within the future in order to make possible (at least the illusion of) solid future ground, facing the horizon would loses some of its horror. However, it is not clear that legal resolution is possible. What we see when we look at these kinds of cases is legal doctrine attempting to come to terms with arguments regarding something other or more than ownership of discrete objects.

In dealing with ancient objects of cultural significance, the fluctuation of meaning, use and origin that makes up historical narrative is immediately relevant. The law in this realm has two tasks: the first to define the objects, which requires (attempting to) fix or reify their significance to the participants in the dispute; and the second to allocate the objects, which requires creating a field in which justice is possible. *As regards justice and time, however, justice cannot take place in the past.* Therefore, law in this area also has to find a means to project its action into the future. The principles of original ownership and descent of title that settle property disputes where this particularly heightened element of time is lacking cannot serve either disputants or courts in these cases. Like the disputants, the law must take the past and reposition it; the past, as the subject of the dispute, must come to serve as an instrument of reconstituting the modern opening to the future. This requires a different methodology than the common law reliance upon precedent and the "seamless web" of the law. Instead, the law (the court, or legal commentators, or the framers of international statutes) must collude in acknowledging, and then disrupting, the diremptions that Arendt describes.

The case studies, therefore, set out what the law actually does when faced with these kinds of complex cases. The first of these, the debate regarding the ownership of the Parthenon Marbles, relies upon (and to some extent characterizes) the classical arguments in the field. The second dispute, regarding the determination of the ownership of "Kennewick Man", provided the opportunity to look at different sorts of arguments. Rather than the classical legal approaches to cultural property *per se*, Kennewick Man turns on questions of law that could only be addressed by

determining the meaning of "indigenous" under the relevant statute. This case, therefore, foregrounded the emerging discourses in cultural property argumentation and legislation.

Discussing these two particular case studies allowed me to set out the major schools of thought on the definition and allocation of cultural property, by looking to one of the most representative and one of the most novel cases available. In both cases, the object(s) at stake were extremely ancient, which in turn heightened the element of time, and allowed me to consider it at some length in the following Chapters. However, before thinking about the issue of time, these case studies presented the opportunity to define the ownership structures and to summarize the positions of the leading legal and sociohistorical commentators in the field. The most important and interesting results of this part of the research was the emergence of great swathes of similar values and purpose(s) within the traditional and non-traditional approaches to the comprehension and resolution of cultural property disputes. The lines between "Western" and "Indigenous" blurred, while it became clear instead that both the Parthenon Marbles case and that of Kennewick Man represented the attempt on the part of the disputants to claim the past and use it to anchor the future.

In both cases, the mechanisms of asserting ownership were very similar (for example, writing – if not re-writing – history in order to anchor claims of original legal and moral title). More importantly, however, it became obvious that both sets of claimants were in fact making arguments that turned on the assertion of their own autochthonous (rather than "indigenous") rootedness to the ground that in turn *supplied* these objects. Yet, the "ground" was not political ground or "the State". Although the arguments turned on "Ancient Greeks" and "Native Americans", they did not follow the patterns and tropes of identity politics, in which the rights attaching to a particular "identity" are established or amplified. Instead, the development of a particular kind of discourse became evident through analyzing these cases. The acquisition of a particular identity was itself the legally-significant act. Acquiring

(unremarkable) ownership rights over the objects was a means of establishing the desired cultural (rather than political) identity. I characterize this identity as "autochthonous" because the arguments sought to established linkages to ground and grounding (in the Arendtian sense, i.e., dirt and discourse both) through claiming rights and objects. For example, the arguments of the modern British to the Parthenon Marbles turned on establishing their claim to the ground from which the objects came: the cultural ground of Ancient Greece and the legal ground of the acquisition from the Ottomans. The arguments of the modern Greeks turned on establishing their claim to the cultural ground of Ancient Greece and to the dirt of the Acropolis. Similarly, the claimants in Kennewick Man all argued for the identities of "Native" and for "American".

The claimants in these cases engaged in creative and proactive acts of self-naming in order to root themselves unshakeably in the ground that these objects represent. This is why the claimants took on the identities required by the objects rather than the other way around. As such, the legal assessment of these cases bore out my original hypothesis. The value of the objects turned on their use-value vis-à-vis the problems that accompany and define our habitation of modern time. My argument that all cultural property discourse occurs as a response to this condition, and that cultural property discourse is one of the discourses that animates modernity itself, is born out by these disparate cases, and holds true regardless of whether the analysis follows "traditional" lines or not.

What sorts of objects could serve as "ground" in this (pre-modern) sense? The question that perplexes most commentators regarding the definition of cultural property is not identification but delineation; any object can be cultural property but how do we know which objects are? Obviously, one interesting way of answering this question has been to look to the constitution of the cases themselves. In this view (and generally rightly) the claimants will define cultural property by bringing a claim for it. However, this approach does not provide any way of predicting what might become cultural property, or, put differently, how to recognize it before it is at issue

(for example, how to distinguish between art or artifacts in museums that are not cultural property, and those that are). In contrast to the definitions of cultural property available in various international instruments, I have proposed a definition based on the values that occur at the cross-section of "culture" and "property". On this analysis, it became immediately obvious that the statutes also partake of the dominant purpose of cultural property discourse, which is to preserve the "condition" for future generations to be "human". These instruments seek to preserve objects that represent and ground human life itself, in most of its manifestations and with reference to many of its associated artifacts and objectives. However, this insight makes the task of defining cultural property almost impossible, given the possibly infinite number of such objects. Therefore, as specific descriptions are not the way forward, one must look the value(s) implicit in the value assigned to human life itself.

Here, I turned to the work of Friedrich Nietzsche to evaluate the value of these objects and to question whether there is a formula that can act as a guide to further or future definition. I proposed that objects that are cultural property are accepted by the law as essentially fluid or unfinished. They require a particular kind of interpretation, one that completes them. As they speak to human life, the interpretation must speak to self-knowledge. These objects, themselves limited by their physical boundaries and often ancient enough to be quite silent as to their origin or purpose, are valued for their very silence and mutability. The claimant speaks through the object; the object itself, in giving the opportunity for this kind of speech, functions as a Nietzschean aphorism. The best definition of objects that can be or will become "cultural property" is that these objects must be useful as a Nietzschean aphorism is useful. They can be recognized by their utility rather than by their age, beauty, uniqueness, or commonality. The utility is precisely that which has been hypothesized throughout: these objects ground, and give ground for, human life in a modernity that may not have the tools for its continuation otherwise.

Turning to discourses rather than objects, I returned to the case of the Parthenon Marbles to propose that cultural property cases occur on a terrain mapped

by the intersection of two lines of argument: narratives of attachment (or claims of ownership) and narratives of origin (or claims to ground). "Cultural property" consists of the objects that are constellated on this grid, and "cultural property discourse" consists of the interpretive and creative mechanisms by which each line of argumentation is developed. First, I considered the creation and meaning of narratives of attachment. Property rights are based in claiming ownership through time and by good title. In cultural property, particularly as regards ancient objects or practices, this is often impossible. Instead, what must happen is that lines of ownership and descent must be reconstituted. This is a creative act, and often an act of outright fictionalization. Yet, in order to prevail, the fiction must be or must become authoritative. Cultural property discourse requires a means of establishing narratives of attachment that are both fictional and authoritative; both available to speech and yet having the capacity to transcend archives, records, documents, and other sources that may not exist or may not serve the purpose(s) of the claimant.

One of the dominant epistemological modes of speaking authoritatively in modernity is memory and memorialization, and this is the mode accessed by the narratives of attachment used in cultural property discourse. Personal memory cannot span the reaches of time required, but cultural memory is not valid against the horizon-line of modernity, where "the past" is constantly shifting. Furthermore, how can memory serve as a foundation for the human condition given these constraints? To grasp the trajectory of far past into the near future, what is required is a personal, fictional, yet entirely modern set of memorial techniques. These techniques include the rhetorical tropes of autobiography, the eulogy, the epitaph and prosopopeia. Narratives in these styles are personal, authoritative, unquestionable, and at the same time, intensely modern, as they depends upon the absence of the other, the incompleteness of the object, and most importantly, the silence of the audience. Western rationality can thus possibly reach beyond itself to dredge up a form of protection from its effects: modernity can be staved off by memorialization. Yet, as creatures of modernity, these narrative techniques are linked to mourning, sterility and loss, whereas the enactment of a cultural property claim must be, in order to

remain true to the hypothesis of this work, an act of rescue, creation, and possibly escape. Once again, the argument turns to the work of Friedrich Nietzsche to provide a different reading of memory. The techniques of memorialization irradiate modernity; however, the meaning of memory can be (to some extent) redemptive, if it is seen as a form of inversion and complexity that forces humanity to evolve. Reaching for the past, in this sense, does not avoid or escape the future. If cultural property discourse uses tropes of memory to vault forward, as it does, then it avoids the sterility that would merely reproduce a given evolutionary moment without ever moving beyond it.

The creation and purpose of the narratives of origin that form the second axis of cultural property discourse were considered in Chapter Five, where, drawing again on the "facts" and narratives of the Parthenon Marbles case, I looked into a different sort of problem that arises in authoritatively claiming ground from the far past. If one dominant epistemological mode is memorialization, the other is genealogy. Genealogical endeavours do not maintain the integrity of their subjects; rather, they dissolve them into a shifting set of components that can be, at any given moment, constituted differently or assigned to an entirely different "history" or "owner". Knowledge in modernity does not provide firm foundation for immutable certainty regarding anything at all, and much less origin – neither origin of a thing nor origin of a people or race. The part of cultural property discourse that describes or ascribes origin, therefore, must be a narrative that can withstand the genealogical endeavour. Once again, the primary option is a form of fiction. Knowledge defined by "heritage" is again authoritative and fictional identity; supported by commodification and the tourism industry but also open to reinterpretation and fantasy. Most importantly, once maintained, it cannot be shaken by "truth", as truth is emphatically not the point of narratives of origin understood as heritage. Thus, this second vector of cultural property discourse also responds to the problematics of time in modernity, and produces a means of owning both past and future. The two vectors together, narratives of attachment and narratives of origin, define the field on which cultural property claims occur because they provide the means to solve the problem of living

on the horizon-line of modernity. Instead of being transfixed by, and rootless within, space, humanity attempts to avoid the consequences of its rationality and claim a realm that guarantees a more benign past and more human future.

The relevance of Kennewick Man to the argument of the thesis overall is as a test case for the accuracy and utility of the theory of cultural property herein proposed. For the theory to be useful to other scholars or commentators, it must apply to more cases than the Parthenon Marbles. The case of Kennewick Man does indeed support this theorization of cultural property overall. First, as in the case of the Parthenon Marbles, the claimants on both sides of the Kennewick Man case used historical narrative, scientific data, and arguments of cultural identity to claim ownership. Although the discourses of colonialism and postcolonialism that are used by the Kennewick Man claimants are not openly referenced by the claimants to the Parthenon Marbles, they are discourses that arguably could be used with equal validity by both the British and the Greeks. Again, although unlike the claimants in the Parthenon Marbles case, the claimants in Kennewick Man openly claimed autochthony as a foundation for their ownership, lodging "truth" firmly within the bailiwick of cultural existence rather than any objectively ascertainable system, the foregoing analysis has shown that autochthony is precisely what is at stake in the Parthenon Marbles case.

The differences, therefore, are at most differences between the sources of the arguments in the two cases, not the substance. Indeed, they only serve to highlight the similarities in the two arguments' structure. Both sides in Kennewick Man made arguments on the axes of narratives of memory and of origin. Indeed, these two strands of arguments folded into each other: as the skeleton had just recently appeared, and thus had no "objective" history whatsoever, the arguments used memorial techniques to establish origin and claims of (the skeleton's) origin to underwrite the validity of the memorial techniques. Most importantly, both claimed present ground and future time – place and time to *be* Native Americans or scientists on the substrate of this object – as the necessary good that the law could award them.

The "white-ness" and the "native-ness" of the dead man opened new ground in America, and it was this ground (and future time) that became the real "cultural property" that was being claimed. One can see a reflection of exactly this issue in the cleaning of the patina of the Parthenon Marbles. Ground, colour, nativity are as at stake in one case as they are in the other.

The final conclusion that can be drawn from my hypothesis and the research that supports it is that although cultural property is defined by its utility, that utility itself needs to be further theorized. Thus far, the utility of cultural property (objects and discourse) is its function as a protection against modernity. But is this merely the attempt to find something that protects us from ourselves? We are all "autochthonous peoples" now; we are no longer content with mere indigeneity, the shifting sands of "identity" or the secondary securities of ownership and rationality to anchor us on the horizon-line that we've created for ourselves. The result of our making our slice of time in the world un-home-like or uncanny to ourselves, however, is that we become cut-rate versions of Walter Benjamin's "angel of history": looking forever backwards we nonetheless fail to see our ethical responsibility or accept the horror that has brought us to this position. We do not feel empathy with the vanquished, instead we identify ever more strongly with the victors. On the edge of the abyss, we contemplate new forms of rationalization and domination. We continue to collect "cultural treasures" instead of building no more museums and letting shrines and cemeteries remain full. It is possible that what we would find, if we looked further at the subject, is that being "moderns" is the least of our problems. Quite possibly, whether or not we have been modern is not as important as the other question – have we been *human*?

The "frightening monsters" vanquished by the ancient Greeks are the same as the aliens that (now) terrify us, or the memories that (have always) frightened and grieved us. Certainly, it is the conclusion of this thesis that the past *escapes* ownership. It is the future that is relentlessly at stake. Claims made regarding the ownership of ancient objects are claims that attempt to constitute an endlessly-

recreated past and a radically-open future. This is the endeavour that animates the attempted ownership of time, as well as the often-futile recourse to the discourse of law in this area. As such, they are claims that attempt to swing the mass of history on a fulcrum that opens the horizon to justice.

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