

State Property or Cultural Property? The Limitations of Replevin as an Interpretive Framework for
Disputed Archives

Ryan Speer

Virginia Tech

In recent years, the state has evidenced a dedication to preserving our documentary heritage not only by maintaining archival repositories, but also by attempting to remove particularly notable and valuable historical documents from public circulation. North Carolina's efforts to regain its official copy of the Bill of Rights, a downright caper featuring a sting operation directed by the Federal Bureau of Investigation, is perhaps the most notable recent example of the phenomenon (Goss, 2010). In recent decades many such cases have been handled much more quietly, but in initiating suits to pursue contested historical documents and when relying heavily on particular legal strategies for their recovery, the public sector has decisively shaped this debate. The ubiquity of the term "replevin" among relevant parties is one sign of success: in the councils of state archivists, among the professional organizations of both state and academic archivists, and throughout the community of private manuscript collectors, in conference sessions and journal articles, and in informal conversation, "replevin" serves as a pervasive shorthand descriptor of conflicts involving the ownership of public documents. A common law remedy for parties seeking the return of stolen or otherwise unlawfully held property, and largely concerned with proof of title, replevin is the central feature of most individual state laws created to defend the property rights of governments in their official records (Bain, 1983). Replevin's stringent requirements, have, much to the detriment of informed and reasonable dialogue, lent a consistently acrimonious tenor to an otherwise episodic string of conflicts over public records. Relations between state archives and private collectors have only deteriorated in recent years, and at this point it would be helpful to develop alternative approaches to the analysis and mediation of these contests.

The Private Market and Archival Preservation in the United States

Recognizing the priority and influence of the private sector in preserving American archives is a necessary step in beginning to understand the complexities of this issue. American documentary preservation efforts have always been pursued within a mixed economy of public and private activity. At one time or another, either of the two sides might have been said to be dominant. Institutional archives, including government repositories and university special collections, are now the primary actors, but for much of our history governments have been imperfect guardians of the documentary heritage embodied in their inactive records. Only at the turn of the 20th century did state-funded archival institutions emerge as dedicated organizations to protect these records. And for years the state archives were alone; there would be no national archives until the 1930s. In terms of archival preservation, the 19th century belonged almost wholly to the individual collector of historical manuscripts. Private historical societies and private individuals served notably as archival custodians during this period, assembling manuscript collections through auction and catalogue sales, private commerce, and by personally seeking the items out where they were stored. Amidst the private letters they sometimes saved public papers: federal, state, or local government records, which at this time were usually kept in a variety of generally poor, dirty, and fire-prone accommodations. This material was sometimes pilfered, sometimes rescued from officially-sanctioned destruction, from the paper mill or the dump, maybe wheedled from the custody of a public official, or taken home by a public official, or otherwise chanced upon in unexpected ways. In this way, notable portions of state, local, and federal archives entered the private autograph trade, afterwards lying quietly in wait and only in recent decades emerging as a divisive public policy issue.

While the money involved was quite modest until at least the 1910s or 1920s, there existed sufficient competition between private collectors to bring about an increasingly robust private market for some varieties of historical documents. Such monetary value was a function of the expressive value of the papers. The written remains of notable individuals serve as a means to experience the past more fully, to discern more truly the motivations and inner lives of historical figures. During the 19th century high point of private collecting, public figures, political and military figures, furnished by far the most sought after body of documents. The old fashion for collecting documents signed by all of the signers of the Declaration of Independence, or the members of the Constitutional Convention, or the generals of the Revolution, bear out this intense focus on personality. It is at the problematic intersection of private desire and public personalities at which the state begins to have some impact on the collecting field. Most of the private collecting material involves in one way or another figures who served prominently in the military or in some form of government service. Over the past century or so, as governments have come to more fully realize the value of the historical record for legitimizing and celebrating their past activities, they have moved to assert, reassert, or bolster property rights in historical records which were for many years at least neglected or even, as some private collectors would argue, abandoned, thus impinging on ground traditionally reserved to individual collectors, and engendering the present state of conflict.

The Uses of Replevin

The ever-increasing monetary value of certain historical documents in the private market has long encouraged theft from archival repositories. Replevin actions have proven to be effective in cases of well-documented theft, where it can be proven conclusively that the

document or documents are indeed public records *and* that they were stolen from either state archival institutions or the original creating office. However, it seems clear enough that replevin-based remedies, while effective in such clear-cut cases of outright theft, applied liberally to more ambiguous cases tend to hinder mutual understanding between parties engaged in complex disputes over public archives. An overreliance on the logic of replevin has damaged good faith between public and private spheres of documentary preservation. The replevin action itself constitutes an exceedingly narrow and rigorous examination of the facts surrounding title to contested or stolen property. The stringent requirements of this particular variety of legal inquiry tend to, at best, obviate complex questions on the propriety of private collecting and, at worst, such as when the state is unable to prove definitively its prior custody of the records in question, work against public officials in unexpected ways.

Perhaps the greatest impact of this dominance of replevin is that, in strictly considering the facts of ownership, which is the purpose of replevin, the ethical dimensions of state ownership and private ownership of historical documents are not fully explored. Replevin-based remedies assume the state's absolute ownership of the papers in question, and cast all non-state actors as improper custodians, presumptively cutting off avenues for discussion of motivations and making mutual respect impossible. The exercise of blanket property rights in state papers, regardless of the past inefficacy or absence of physical or intellectual controls on inactive public records, only requires the state to cite a colonial recording law or to provide other more or less mechanical and occasionally ill-fitting statutory justification for the retention of public information. In this way, the state betrays no intimation that the possession of a valuable artifact, and not just the information contained in disputed archives, is often a primary goal. While disputes over historical documents presumably are satisfied at times by the provision of copies to

the state, most often, at least in the fully-litigated and subsequently-publicized cases it is the items themselves which are usually wanted. Too often it is not the informational but the expressive value of the archival material which is most prized by state actors. But when records disputes play out in the context of replevin laws, state actors may cloak a variety of intentions in efficient and faceless legal machinery.

Cultural Property as an Interpretive Framework

Replevin's characteristic inability to examine the historical and cultural bases of real property rights in public records makes it a poor method for mediating what often are essentially public contests over the control and uses of cultural heritage materials. A reasonable baseline would be to view a certain class of disputed archives, such as material that was not stolen from state archival facilities, but instead entered the trade in some other fashion prior to the establishment of those repositories, as recovered cultural heritage objects rather than, as the state might have it, purely as government records improperly alienated from rightful custody. "Cultural property" is most often used to refer to three dimensional antiquities, usually associated with international disputes over alienated works of art such as the Elgin Marbles, and has never been a significant influence on archival theory or practice. Calling public archives "cultural property" implies a variety of public ownership which goes beyond that claimed by archival agencies of the state. Of course, in practice the current international regime of cultural property laws has resulted in a great deal of turmoil and has severely limited the above-ground trade in archaeological materials. But in the case of archival materials, and taken less to extremes in implementation, such an approach might inform more flexible and pragmatic models of cultural stewardship, accommodating greater nuance in prosecuting records disputes, and perhaps

introducing more beneficial and useful dialogue into those conflicts. Reference to the expressive value of disputed documents is absolutely necessary to further the development of responsible public policy. Such an expanded inquiry into the source and nature of the dispute over public archives in private hands, into the ethical framework underlying a true public ownership of the documentary heritage, would be enriched by introducing into the debate the concept of cultural property, as well as associated extra-legal frameworks for understanding and mediating conflict over the ownership of culturally significant objects.

It is useful to see the trade in American manuscripts as only a small part of a much larger international trade in cultural property. And it is also useful to view the issues of public archives management collectively referred to as “replevin” as part of a larger complex of debate and scholarship related to the public management of cultural heritage. Some of the literature of cultural property law is especially useful for framing the debate over stray documents. In particular, legal scholar John Merryman’s (1989) work on the utility of cultural property holds out the promise of a more sophisticated approach to analyzing the utility of various public and private use cases of disputed American archival material. He identifies three fundamental elements of value adhering to cultural property: preservation, truth, and access. These elements are intertwined to a certain degree, and have their own ambiguities, but by considering the merits of various disputes over stray documents using a reasonably flexible framework such as this, we could reach nuanced and constructive conclusions that would never arise from a replevin case.

Preservation

Merryman gives first priority to preservation, to actively preserving or having the means to best preserve a given property. While reservation is the cornerstone of the private sector’s

claim for public relevance, in light of the establishment of the state archives the continuing relevance of private documentary preservation efforts is questionable. The market for archival materials, or rather the size of the pool of material which was historically held outside of the repositories and which made its way into commerce before the establishment of state archives, might provide some indication of the value and continuing relevance of the private collector in preserving material. If the manuscript trade can be compared to the rare book trade, it would then follow that private buying is currently outstripping institutional purchasing, lending some strength to the argument for private collecting as an ongoing force in preservation (Reese, 2000). Maybe the most relevant point here is the power of the market to preserve material by compelling the unearthing or continued preservation of manuscripts outside of the institutions. It can certainly be argued that some classes of manuscript materials were preserved and continue to be preserved due to their monetary value to the private market. When the institutional buyers partake of this market, they are benefiting from activities established in the years of private collecting's dominance. And after all, it is often market value that seems to compel the state to file replevin suits in the first place.

Alongside of physical preservation, Merryman also considers the value of the preservation of context. This does turn up another mark against the private collector. In the earliest days of manuscript collecting in the United States, the most common way to accumulate autograph materials was by way of exchange with other collectors. These private transactions, usually conducted not in person but through the mail, were the backbone of the trade during the antebellum period. In the absence of any formal association of autograph enthusiasts or other encouragement to public meeting, autograph collectors located each other most often through mutual friends. Letters to and from the most prominent early collectors exist in some quantity,

and generally include more or less extensive want lists of desirable autographs, lists of their own duplicate autographs which were available for trade, requests for trades of specific materials, and detailed discussion about parcel forwarding and other details of postal service. Thus, an unfortunate corollary to the success of private collectors in preserving documentary material was the corresponding dispersal of archives over a wide geographic area. Considerable archival fonds do come to market and, presumably comprise some measure of private transactions, but the retailing of historical documents does tend to encourage the breaking up and individual resale of material from coherent archives. The degree to which such a breach can be repaired affects the consideration of preservation and its context. Something removed by autograph collectors from context decades ago may or may not be able to reassume meaning within a new or renewed intellectual context.

Truth

Truth refers to “the shared concerns for accuracy, probity, and validity that, when combined with industry, insight, and imagination, produce good science and good scholarship” (Merryman, 1989, p 359). The authenticity of the cultural property is the primary concern. This authenticity or truth value is partly a function of context. Merryman also refers to damage done to the search for truth by the introduction of counterfeit material, a problem to varying degrees in the manuscript trade and in the larger trade in antiquities. The contrast in what we might imagine are the varieties of truth sought by state archivists and private collectors is instructive: in pursuing items which are valued highly in the private market, state actors would appear to be announcing themselves as close fellows. Possibly they are driven by spite alone and seek to negate the values of the private market, but that seems less likely. Both sides are essentially seeking the same truth

or variety of truth about historical actors as expressed in documents from their hand. The primary difference seems to be the ability of the document owner to create or engender an environment in which the apprehension of the material fosters careful and proper consideration and explication of the truths embodied therein. The requirement for upholding truth overlaps to a certain degree with the third of the rubrics, access.

Access

If preservation is the private sector's strongest claim, then access is the chief strength of the state archives. A complicating factor is the state's frequent conflation of preservation and access. Replevin suits are about physical possession of the documents in question. While some, or possibly many, cases are settled by the provision of copies by collectors to affected or interested state institutions, the power and right to control the physical ownership and presentation of cultural property is the real prize. Controlling the physical document, and subsequently the terms of access to that document, is paramount to the state. There are risks involved in headlong pursuit of physical possession of stray documents. Perhaps one of the most debilitating effects of replevin disputes has been the resulting possibility that private collectors will withdraw completely from any helpful association with public archives. But clearly public institutions, notwithstanding occasional difficulties in locating and describing historically significant materials in their care, carry the day in terms of public access to public archives.

The Future of Replevin

Relations between collectors and the state seem to be either stagnant or deteriorating (Dow, 2012). Encouraging a more widespread focus on the utility of individual cases of records ownership, on interpretive frameworks incorporating factors such as those proposed by John

Merryman, would allow for much needed flexibility and dialogue. As things currently stand, with rigid contests of title taking the place of cooperation, each side is at risk of losing prestige and public standing.

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