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## **A TALE OF TWO PROSECUTIONS: PROSECUTING HERITAGE CRIME IN ENGLAND AND THE UNITED STATES, A CAUTIONARY TALE.**

### **INTRODUCTION**

In an ideal world the protection of a nation's cultural heritage would not depend on the use of the criminal law, but in the real world it is a sad fact that it does. A successful prosecution of a person who has committed a heritage offence<sup>1</sup> is generally seen as something which can send a clear message that these offences will be taken seriously and as something likely to deter other intending offenders. In 2012 following conviction of a night hawker<sup>2</sup> on eight counts of theft and going equipped for stealing a press release issued by Lincolnshire Police said that it was "important that the nighthawking 'community' sit up and take notice that this is not a harmless activity, but a criminal activity that robs us all of our historical heritage" and that the prosecution was intended "to send out a clear message that illegal metal detecting and heritage crime will be taken seriously."<sup>3</sup> Similarly, in 2013, following a conviction for causing criminal damage to the Grade I Greyfriars church in Gloucester, the press release issued by English Heritage included a statement that "We hope this case sends a clear message to other 'would-be' graffiti artists that their actions will not be tolerated in our communities."<sup>4</sup> Commentators in the United States (US) have also referred to the value of

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<sup>1</sup> Heritage offences are those which affect a heritage asset such as an historic building or an archaeological site. The term includes not those offences specifically intended to protect the historic built environment, but also general offences such as arson or criminal damage which have an impact on the historic heritage.

<sup>2</sup> Night hawkers are persons who use metal detectors on historic sites without lawful authority such as the permission of the owner of the land.

<sup>3</sup> *Operation Totem, 41 year-old man convicted*, archived Lincolnshire Police Press Releases 2012. Available at <http://www.lincs.police.uk/News-Centre/News-Releases-2012/Operation-Totem,-41-year-old-man-convicted-.html>. Last accessed 3 April 2014.

<sup>4</sup> *Greyfriars Church Vandal Sentenced*. English Heritage Press Release, 21 February 2013. Available at <http://www.english-heritage.org.uk/about/news/greyfriars-church-vandal-sentenced/>. Last accessed 3 April 2014.

prosecuting for heritage offences: Canaday and Swaine have argued that any viable prosecution under the Archaeological Resources Protection Act 1979 (ARPA) should be “aggressively” pursued<sup>5</sup>, and Swaine that the prosecution can give the “biggest bang for our buck.”<sup>6</sup> In the light of this general perception of heritage crime prosecutions, this article will consider two relatively recent prosecutions, one in England and one in the US. The English prosecution was for the offence of failing to report the discovery of a single small item regarded as treasure under the Treasure Act 1996. The US prosecution was brought under ARPA and involved a two-year long undercover operation by the FBI against offenders involved in looting and dealing in antiquities worth thousands of dollars. At first sight these two prosecutions appear to have little in common, but both prosecutions were brought under legislation intended (at least in part)<sup>7</sup> to save cultural resources for the nation and both cases appear at first sight to have been successful, in that the defendants were convicted of the offences for which they were prosecuted. However rather than deterring heritage crime, or suggesting that it is something that the authorities will take ‘seriously’, the outcome of both prosecutions may well have been the reinforcement of the commonly held perception of heritage crime as trivial and of ‘treasure hunting’ as a harmless hobby. Although the commitment to prosecuting heritage crime must generally be applauded, both cases reveal that even the most well intended prosecutions may be counterproductive, sending out what is precisely the ‘wrong’ message to offenders and the public. This article is therefore something of a cautionary tale, but first it will be useful to set out the facts of the two prosecutions, the chronology of the cases and the reaction to them.

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<sup>5</sup> T. Canaday & T. Swaine, *Operation Indian Rocks, Conducting Inter Agency ARPA Investigations*, (2005) SAA Archaeological Record, Society of American Archaeology, 26-32, p.30.

<sup>6</sup> T. Swaine, *How do you manage your resources if they are being stolen and sold at the swap meet?* In S. Weber & D. Harmon (Eds.), *Rethinking Protected Areas in a Changing World: Proceedings of the 2007 GWS Biennial Conference on Parks, Protected Areas, and Cultural Sites* (2008) 100-101, p.101.

<sup>7</sup> According to the Treasure Act 1996 Code of Practice, DCMS (2008), the 1996 Act is “intended to provide a mechanism to allow the public acquisition of finds that come within its scope.” Treasure Act Code of practice, p.6. Under ARPA all archaeological resources as defined in the Act are the property of the US Government.

## THE TREASURE ACT PROSECUTION

In February 2010 Kate Harding became the first person to be prosecuted under the Treasure Act 1996. The Treasure Act 1996 replaced the old medieval law of treasure trove in England. Although in its original incarnation as treasure trove it was a revenue raising measure for the Crown, the modern statutory law of treasure is more concerned with saving items of historic or archaeological interest for the nation. Under the 1996 Act certain items, principally gold and silver objects, and groups of coins from the same finds, over 300 years old,<sup>8</sup> found after 24 September 1997 constitute 'treasure' and are the property of the Crown.<sup>9</sup> Any person who finds treasure is under a duty to report the find, as set out in section 8 of the Act:

8(1) A person who finds an object which he believes or has reasonable grounds for believing is treasure must notify the coroner for the district in which the object was found before the end of the notice period.

8(2) The notice period is fourteen days beginning with –

- (a) the day after the find; or
- (b) if later, the day on which the finder first believes or has reason to believe the object is treasure.

It is a criminal offence to fail to report something believed to be treasure.<sup>10</sup> A Coroner's inquest is held to determine if the object is indeed treasure. If it is declared to be treasure, the practice is that objects are offered in the first instance by the Secretary of State to the national museum and that if the national museum does not wish to acquire the objects it

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<sup>8</sup> Section 1, Treasure Act 1996. The Treasure (Designation) Order 2002 added to the definition of treasure prehistoric base-metal assemblages.

<sup>9</sup> Section 4, Treasure Act 1996.

<sup>10</sup> Section 8(3), Treasure Act 1996.

offers them to other museums.<sup>11</sup> Where the object is to be transferred to a museum, the Secretary of State must determine whether a reward is to be paid by the museum before the transfer.<sup>12</sup> The reward will be an amount equal to the market value of the objects,<sup>13</sup> and is generally shared between the finder (provided the finder had valid permission from the occupier or landowner to be on the land where the find was made)<sup>14</sup> and the landowner or occupier. The payment of rewards is intended “to encourage the reporting of finds and to ensure that there are adequate incentives to finders while at the same time discouraging wrong behaviour.”<sup>15</sup> These rewards may be considerable. In the case of the Staffordshire Hoard of over 80 Anglo Saxon gold and silver objects discovered near Lichfield in 2009, the hoard was valued at £3,285 million. The Treasure Act 1886 therefore uses a mixture of ‘carrot’ and ‘stick’ – offering a reward for reporting finds, but threatening prosecution for failure to do so.

In 2008 Kate Harding brought an object to the Finds Liaison Officer (FLO)<sup>16</sup> at Ludlow Museum for identification under the Portable Antiquities Scheme (PAS). The PAS scheme is a voluntary reporting system for archaeological objects under which members of the public are encouraged to bring chance finds in for identification and for logging of the findspot.<sup>17</sup> The PAS scheme has proved an invaluable means of improving the archaeological record of finds: more than 815,000 objects have been brought in by over 14,000 metal detectorists and others and recorded under the scheme since 1997.<sup>18</sup> It has also been a useful way of

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<sup>11</sup> Treasure Act Code of Practice, above, note 7, p.33

<sup>12</sup> Section 10(2), Treasure Act 1996

<sup>13</sup> For information on valuing treasure, see Treasure Act Code of Practice, above, note 7, pp. 36-38.

<sup>14</sup> Ibid. p.39

<sup>15</sup> Ibid.

<sup>16</sup> I am grateful to Peter Reavill, the Finds Liaison Officer at Ludlow Museum, for sharing some of the background information to this case with me.

<sup>17</sup> However as the system is voluntary, and it may mean that some museum quality finds are not reported, but go straight to the market. One of the most notorious recent examples being the ‘Crosby Garret’ helmet sold at Christie’s for £2,281, 250, which being made of bronze did not fall within the definition of treasure under the 1996 Act.

<sup>18</sup> British Museum website, <[https://www.britishmuseum.org/research/research\\_projects/all\\_current\\_projects/pas\\_in\\_archaeological\\_research.aspx](https://www.britishmuseum.org/research/research_projects/all_current_projects/pas_in_archaeological_research.aspx) . Accessed 4 April 2014.

identifying potential treasure items. Ms. Harding told the FLO that she had found the object in Ludlow six months before. However she subsequently gave him a different location for the find, although still in the same locality. The FLO examined the find, and once it had been identified by experts at Birmingham Museum & Art Gallery and the British Museum as a silver piedfort of Charles IV of France, dating from the fourteenth century, correctly told her that because the object had a silver content of more than 10% it was treasure under the 1996 Act, and that as the finder she was under a statutory duty to report the find to the Coroner within 14 days, and advised her that failure to do so was an offence.<sup>19</sup>

Piedforts are rare discoveries: only four have previously been discovered in this country, one of which was bought by the British Museum for £1800 in 2007. The exact nature of a piedfort is critical. Some of the later criticism of the prosecution centred on the belief that what Ms. Harding had found was a single coin but despite its appearance, a piedfort is not in fact a coin, and it is likely that this piedfort was struck for ceremonial presentation in the French court of Charles IV. This is important because single coins are not covered by the 1996 Act: section 1 of the Treasure Act 1996 defines treasure as including an object at least 300 years old and which (a) is not a coin but has metallic content of which at least 10 per cent by weight is precious metal; or (b) is one of at least two coins in the same find and have that percentage of precious metal; or (c) is one of at least ten base metal coins in the same find. The Treasure Act Code of Practice also makes it clear that single coins “will not be treasure, unless they are found in association with objects that are treasure, or unless there is exceptionally strong evidence that they were buried with the intention of recovery.”<sup>20</sup> Whilst Section 3(2) of the Act defines the term ‘coin’ as including any metal token “that was, or can reasonably be assumed to have been, used or intended for use as or instead of money”, it seems that piedforts were never intended to enter circulation, but were

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<sup>19</sup> The Treasure Act Code of Practice also makes this duty clear: “If a finder discovers an object that he does not immediately believe to be treasure but learns subsequently that it may be treasure, for example... after having it identified by a museum, then he should report it within 14 days of realising that it may be treasure.” Treasure Act Code of Practice, above, note 7, p.16.

<sup>20</sup> Ibid. p.9.

“distributed to engravers at different mints in order to show them what to copy” and making “the pieces deliberately thick and heavy ensured they were not mixed unintentionally with ordinary coins.”<sup>21</sup>

Despite several reminders from the FLO over the course of a year, she failed to report the find to the Coroner. In 2009 the Coroner for South Shropshire reported the matter to the police who investigated and on the basis of the evidence collected the Crown Prosecution Service (CPS) decided to prosecute her for failure to report the find as required under section 8 of the Act. In February 2010 Ms. Harding pleaded guilty to the offence at Ludlow Magistrates’ Court. In the plea in mitigation her defence solicitor told a story which was different to the original version of the finding of the piedfort as told to the FLO, and this was the version of the facts which was published in all press reporting of the offence. The story of the find was now that her mother had found the ‘coin’ buried in the ground at her family home in Tenbury Wells, Worcesterstershire, when Ms. Harding was nine years old and that her mother had given it to her. This would mean that the object had been found before the Treasure Act 1996 came into force – something on which later adverse comments were also based. In addition press reporting of the trial said that her defence solicitor had also argued that she had not deliberately withheld the piedfort from the Coroner, but was ‘disorganised’ and had forgotten where she had put it, and that although the piedfort was of sentimental value to Ms. Harding as a keepsake from her late mother, it had no significant financial value and was not something that “there are going to be queues around the block” to see.<sup>22</sup> The magistrates gave her a conditional discharge, ordered her to pay £25 of the £300 costs<sup>23</sup>

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<sup>21</sup> *The Piedfort Coin - A Rare Collector's Item. Twice the Weight, Double the Thickness*, Royal Mint website, <http://www.royalmint.com/discover/uk-coins/piedforts>. Last accessed 4 April 2010. It is perhaps not helpful that this article refers to “the Piedfort coin”.

<sup>22</sup> *In court, woman who kept an old coin she'd found as a child*, Daily Express, 27 February 2010. Available at < <http://www.express.co.uk/news/uk/160757/In-court-woman-who-kept-an-old-coin-she-d-found-as-a-child>>. Last accessed 4 April 2014.

<sup>23</sup> The CPS were privately told that the magistrates considered that the prosecution should never have been brought.

and to deliver the piedfort to the police.<sup>24</sup> After the conviction was obtained West Mercia police issued a press release which included a lengthy quotation from Michael Lewis, the Deputy Head of Portable Antiquities and Treasure at the British Museum, who explained the purposes of the Treasure Act as “giving local and national museums the opportunity to acquire important finds” and pointed out that despite numerous reminders she had failed to hand in the piedfort. This press release also included the usual ‘clear message’ statement:

“This is a landmark case and it sends a clear message to those who fail to report Treasure. It shows that the police and the coroners’ service give Treasure and archaeological heritage law a high profile and will take proactive measures against those who disregard it.”<sup>25</sup>

So far, this appeared to have been a successful prosecution: but from this point it can be argued that things started to go wrong. The press reports of the prosecution, which were all based on the version of the events at the trial became the subject of considerable public comment on newspaper blog sites and on internet sites of interested parties such as metal detectorists, archaeologists and numismatists. There was a limited degree of support for the prosecution. The director of *Coin News* magazine was quoted as saying the 1996 Act was “not a means for the state to take away your ancient finds with just a cheerful ‘thank you’” and that a reward would be paid.<sup>26</sup> He also commented, “It’s for the good of the country, history and archaeology. You may lose your find, but you’re not going to lose your cash.”<sup>27</sup>

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<sup>24</sup> Despite the claim that she had lost it, she handed it over to the police very soon after the conviction.

<sup>25</sup> *Ludlow Woman Admits Failing To Report Treasure: First Case Of Its Kind In The Country*, West Mercia Police Press release, 26 February 2010, available at <https://www.westmercia.police.uk/news/news-articles/ludlow-woman-admits-failing-to-report-treasure-first-case-of-its-kind-in-the-country.html>. Last accessed 4 April 2014.

<sup>26</sup> It is ironic that had she reported the piedfort to the Coroner, she might have shared the market value with the landlord of the property where the coin was allegedly found. However from the facts it would appear that Ms. Harding fell foul of the Treasure Act Code of Practice, on a number of counts. The Code provides that rewards will not be paid where “the finder has committed an offence under section 8 of the Act”; where “all the relevant circumstances surrounding a find, including the find-spot, were not reported” and where “there are reasonable grounds for believing that a find was made elsewhere than on the alleged site”. Treasure Act Code of Practice, above n.7, p. 41.

<sup>27</sup> *Controversy over Shropshire woman not declaring find*, BBC News online, at <http://news.bbc.co.uk/1/hi/england/shropshire/8547430.stm>. Last accessed 10 April 2014.



However most public reaction, as reflected in blogs<sup>28</sup> saw the prosecution as a waste of time and money over a trivial ‘lapse’, and the FLO was depicted as a ‘jobsworth archaeologist’ who had persecuted a bereaved young woman for something she had done as a child. In an attempt to counter the bad publicity with which the case was now surrounded, in March 2010 Michael Lewis from PAS released a supportive explanatory statement defending the FLO and the CPS and clarifying “a number of points that have either been omitted from the media reports, or have been incorrectly reported.”<sup>29</sup> This pointed out that a piedfort was not a coin as “experts agree they were not used as currency”; that although it had been reported that Ms. Harding found the coin as she worked in the garden with her mother at their home in Tenbury Wells she had originally told the FLO that she found it in 2008 in her garden in Ludlow; that she was repeatedly informed of her legal obligations to report the silver piedfort under the Treasure Act 1996, but failed to do so, so the case was brought to the attention of the local Coroner; that police investigated the case and passed the file to the Crown Prosecution Service, which took the decision to prosecute.

A barrister who read about the case contacted Kate Harding and advised her that she had grounds to ask for the case to be re-opened, because as she had not been the finder (because, as the press reported, her mother had found it) she was not under any duty to report the find and was not therefore guilty of the section 8 offence. Acting on this advice, in July 2010 she applied for the case to be reconsidered by the magistrates on the basis there had been an error in law. The CPS decided not to pursue the case any further on the grounds that although there was sufficient evidence to support the prosecution the District Crown Prosecutor now felt that it was not in the public interest to prosecute, and told the FLO that the “most important thing” was that as the piedfort had now been handed to the Coroner there could be a treasure inquest.<sup>30</sup>

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<sup>28</sup> These comments will be discussed in more detail below.

<sup>29</sup> *First Prosecution under the Treasure Act*, PAS, 1 March 2010. Available at <<http://finds.org.uk/news/stories/article/id/187>>. Last accessed 4 April 2014.

<sup>30</sup> Private e-mail correspondence between Peter Reavill and Carolyn Shelbourn

Finally in June 2011, the Coroner's Inquest was held. Although a Treasure Inquest is usually held without a jury,<sup>31</sup> the Coroner in this case used his discretion to have the matter heard before a jury. The jury heard that Ms. Harding had told several different stories to police and historians about how she found the piedfort, but held that it had been found by Kate Harding not by her mother, and that it had been found after the Treasure Act came into force and declared it to be treasure. Press reporting of the inquest said that she 'broke down' when told that the piedfort must be given to the British Museum.<sup>32</sup>

### **THE FOUR CORNERS PROSECUTION**

ARPA, as amended in 1988, is the principal US federal legislation on the protection of the archaeological heritage.<sup>33</sup> The provisions of the Act apply only to sites on 'public land', that is, sites and monuments which are in Federal ownership or are on Indian land. Like the definition of treasure in the Treasure Act 1996 in England, section 3(1) of ARPA provides a comprehensive definition of archaeological resources as "any material remains of past human life or activities which are of archaeological interest, as determined under uniform regulations" which is at least 100 years of age, including

"pottery, basketry, bottles, weapons, weapon projectiles, tools, structures or portions of structures, pit houses, rock paintings, rock carvings, intaglios, graves, human skeletal remains, or any portion or piece of any of the foregoing items..."

Section 6(a) ARPA provides that "no person may excavate, remove, damage, or otherwise alter or deface or attempt to excavate, remove, damage or otherwise deface any archaeological resource on public lands or Indian lands" except in accordance with a permit granted under section 4 of the Act. Section 6(b) prohibits any person from "selling,

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<sup>31</sup> Treasure Act Code of Practice, above n.7, p.31.

<sup>32</sup> *Court rules rare 14th century coin must be returned*, Shropshire Star 24 June 2011. Available at <<http://www.shropshirestar.com/news/2011/06/24/court-rules-rare-14th-century-coin-must-be-returned/>>. Last accessed 4 April 2014.

<sup>33</sup> The provisions of ARPA can be found at 16 USC §§ 470aa-mm.

purchasing, exchanging, transporting, receiving, or offering to sell, purchase, or exchange any archaeological resource excavated or removed from public or Indian lands in violation of ARPA or any other provision of Federal law”, and section 6(c) prohibits the same activities, in the course of interstate or foreign commerce in violation of any State or local law. Section 6(d) makes it an offence to “knowingly” carry out any of the activities prohibited in subsection 6(a) to (c) and provides for a maximum fine for a misdemeanour conviction of \$100,000 and \$250,000 for a felony conviction. In addition, on conviction for of a misdemeanour, the defendant may be sentenced to up to 12 twelve months’ imprisonment, and up to 5 five years’ imprisonment on conviction of a felony.

In 2006 the FBI had received information from a former dealer that there was a network of individuals in the Four Corners area of the US who regularly looted sites and trafficked in illegally excavated objects – many of which came from Indian burial sites. The ‘Four Corners’ region of the US is the area on the borders of the States of Utah, Colorado, Arizona and New Mexico and is particularly rich in remains of the Ancestral Puebloan (Anasazi) Indian culture, which dates from about 800-1200 AD. There are an estimated 16,000 sites across the four states and the federal authorities estimate that two thirds of these have been looted at some time. Members of the Navajo and Hopi tribes who live in the area make no distinction between the Ancestral Puebloan and modern cultures resident in the area, so looting of sites can cause distress to tribal members, particularly as many of the disturbed sites contain burials. Looting and removing objects from archaeological sites has a long history in this area. In the 19<sup>th</sup> century museums would pay local ‘pothunters’ for artefacts for their collections: for example, the University of Utah paid local people \$2 for each pot, enabling a museum collection of over 2,000 pots to be assembled in only five years.<sup>34</sup> This led to a culture in which excavating archaeological resources was acceptable and many of the pothunters came to regard themselves as the experts, with what they considered to be a

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<sup>34</sup> R.B.Woodbury, *Sixty Years of South-Western Archaeology: a History of the Pecos Conference*, Albuquerque: University of New Mexico Press (1993), p.405.

right to dig for artefacts, a belief still held by many people in the area today.<sup>35</sup> Even after ARPA was passed in 1979, the practice continued, although most pothunters are now knowledgeable enough to claim that they find artefacts on privately owned land which is not subject to ARPA. Pothunting may also be a means of supplementing income in an area which has a high level of unemployment, and where the average annual income is \$14,000 compared with an average US household annual income of \$50,000. High quality finds can command high prices: writing in the *Salt Lake Tribune* in 2010, Loomis noted that a Hopi jar had recently sold for a record price of \$280,000 and \$18,000 had been paid for a Pueblo shield.<sup>36</sup>

Following the receipt of information from the informer, in 2007 the FBI began a two year undercover 'sting' operation. This was to be the largest ever operation carried out in the US in relation to archaeological looting, and it cost nearly half a million dollars. During the undercover operation, the informant was paid \$7,500 a month for his services (a huge sum compared to average annual incomes and something which caused hostility when it became known. He 'bought' 256 items from the gang for a total of \$335,685, indicating that those involved were far more than mere 'hobby collectors'. The informant wore a 'wire' and a concealed camera to gather evidence of these illicit sales. In 2009, FBI personnel carried out a dawn raid, wearing bullet-proof vests and armed with shot guns, during which 25 people were arrested, most of whom came from the same place, the town of Blanding, in Utah, a small, close knit community of only 3,300 residents. Many were apparent pillars of the community, including the general practitioner, a maths teacher, and the brother of the local sheriff. Several were pensioners. However despite their apparent virtue, some of those arrested, including the doctor and his wife had previously been arrested or convicted for offences under ARPA and others came from families with members who had ARPA

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<sup>35</sup> J. Goddard, *Anticipated Impact of the 2009 Four Corners Raid and arrests*, (2011) Crime Law and Social Change, 175-188.

<sup>36</sup> B. Loomis, *Raid drives down demand for American Indian artefacts*, Salt Lake Tribune, December 27 2010. Available at <http://www.sltrib.com/sltrib/news/50918714-78/says-auction-american-indian.html.csp>. Last accessed 23 April 2014.

convictions. The indictments included 115 felony charges: most related to offences under ARPA, but other charges included theft of federal property, theft of Indian tribal property and transporting stolen property. The FBI and the Government celebrated the arrests with a press conference and issued a statement which included a statement by Ken Salazar, the Secretary of the Interior, who said

“Let this case serve notice to anyone who is considering breaking the law and trampling over our nations’ cultural heritage that the BLM, the Department of Justice, and the federal government will track you down and bring you to justice”

and a statement by Timothy Fuhrman, the Special Agent in Charge from the FBI, Salt Lake City, which said,

“The FBI takes this matter seriously and spent a significant amount of personnel and financial resources in exposing this network of individuals illegally trafficking in these items. The FBI remains committed to devoting all necessary resources to address this problem.”

However almost immediately after this triumphant announcement things started to go wrong. Two of those who had been arrested (including the popular local doctor) committed suicide. This was followed shortly after by the suicide of the informant. At this point even some of the few people who had been supportive of the prosecution became critical: they were appalled by the apparent lack of support given to the informer, who was a recovering alcoholic and had been put under huge amount of stress during the undercover operation. He was also known to be suicidal and the authorities had already taken away another gun which he owned. The town of Blanding closed ranks, becoming openly hostile to the prosecution. At the annual 4<sup>th</sup> July Independence Day parade the town mayor opened ceremonies with a prayer beseeching God to keep Blanding citizens free from unreasonable searches and seizures. "Legalize Pot" T-shirts, emblazoned with images of ancient ceramic pots, being sold at the parade festivities sold out.

With the death of the informer the FBI lost their star witnesses and the admissibility of the recorded evidence was then challenged by defence lawyers. Many of those arrested pleaded guilty to lesser offences in plea bargaining deals. Despite the very high penalties available on conviction under ARPA, and the fact that some of the defendants had previous ARPA convictions, all those convicted received sentences of probation and some were also given small fines. Only one person involved in the incident received a custodial sentence – for threatening the undercover informant with a baseball bat. Finally in June 2011 the widow of the local doctor began civil proceedings against the FBI, alleging their harassment drove him to suicide.

### **DID THE PROSECUTIONS CHANGE ATTITUDES TO HERITAGE CRIME?**

When prosecutions are brought, one of the reasons for doing so is the hope that this will lead to heritage crime being taken more seriously, as something which merits enforcement action. However in both these cases analysis of comments on internet blogs and in the press suggest that the prosecutions were generally regarded as a heavy handed and unjustified reaction to minor offending.

Comment on the Treasure Act prosecution was generally hostile. Typical comments on newspaper blogs following a report of the trial included:<sup>37</sup>

- “So the Crown prosecution service is unable to make cases against criminals and blame it on lack of evidence...but have the time to prosecute someone over a coin found in a garden. Talk about easy targets!”
- “You could not make this up bankers, M.Ps committing fraud persons killing people on the road persons committing robbery all getting away scot free and they prosecute a young woman for finding a coin and not telling about it.”

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<sup>37</sup> Original spelling and punctuation has been retained in all quoted comments from blogs and on-line discussion groups.

- “What a shame, what could have been a lovely keepsake and memory of her Mum has been ruined by this frankly ridiculous waste of time.”
- “The criminal protection Society should never have pursued this case. Easy Pickings another conviction to put up for display. Heaven help save us from JOBSWORTHS.”

The prosecution may also have been counterproductive. Given the purpose of the 1996 Act and the PAS scheme, what is perhaps most worrying about the Treasure Act prosecution is the number of commentators in blogs who said that the case would deter them from taking anything in for identification. Typical blog comments at the time of the trial include:

- “Quote – He said- ‘This is a landmark case and it sends a clear message to those who fail to report Treasure.- unquote Yes I think the message is – don’t show it to your local or any museum...”
- “It does send out a clear message to me. Anything I find I will keep to myself or sell privately.”
- “Dr Lewis said today: ‘This is a landmark case and it sends a clear message to those who fail to report treasure’. Well, no. It sends a clear message NOT to report trivia that you happen to find in the garden. Best thing to do is throw them in the bin.”

For many commentators, the only message the case appears to have sent out is ‘whatever you do, don’t report finds to a museum or you may end up being prosecuted’. This could undermine the PAS scheme, which has been successful in encouraging many hobby metal detectorists into a culture of bringing things forward.

In the Four Corners case too, there was hostile reception of the prosecution:

- “The message was delivered: but what a way to deliver it”
- “It’s time for the FEDS to rethink their hard ball tactics and the archaeological community to rethink their unqualified support for the same”

- “Illicit excavation is only one misuse of ‘sacred artefacts’. Another is to see them to justify a witch hunt that serves only government propaganda”
- “The whole point they wanted to make is gone...It is completely swamped by the ridiculous imagery of people in flak jackets taking some old sucker, shackled hands and feet and shuffling him into the slammer.”

Reactions to the arrests in 2009 were very similar to those which followed a similar raid by federal authorities on the homes of 16 individuals in Blanding suspected of offences under ARPA in 1986,<sup>38</sup> which was described as “appalling” by the chairman of the Grand County Commission<sup>39</sup> and as “an act of terrorism” by a San Juan County Commissioner, who was also quoted as saying that had one of the federal agents been shot in the raids he would “have been on the side of the shooters.”<sup>40</sup> None of those whose homes were searched in the 1986 raid were prosecuted, but the federal authorities retained the objects seized, leading many on the area to consider they had ‘stolen’ artefacts which belonged to the community, and as Goddard puts it, this also “sent the message that the artifacts<sup>41</sup> were so valuable that they would be taken at gunpoint.”<sup>42</sup> In an echo of the comments of the local Commissioners following the 1986 raid, in a Senate Judiciary Hearing Republican Utah Senator Hatch demanded a Congressional inquiry into the 2009 Four Corners raid, called the use of more than a 100 armed agents to arrest a small number of people for non-violent

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<sup>38</sup> Including the home of Lynn Shumway, a relative of one of the defendants in the Four Corners Prosecutions

<sup>39</sup> San Juan County Commission Minutes, 27 May 1986, cited in M.R. Sanders, *Hearts and minds: collaborative approaches to archaeological site preservation*. MA Thesis University of Denver, (2013) p. 157. Accessible at <  
[http://digitaldu.coalliance.org/fedora/repository/codu%3A66853/Sanders\\_denver\\_0061M\\_10793.pdf/Sanders\\_denver\\_0061M\\_10793.pdf](http://digitaldu.coalliance.org/fedora/repository/codu%3A66853/Sanders_denver_0061M_10793.pdf/Sanders_denver_0061M_10793.pdf)>. Last accessed 2 April 2014.

<sup>40</sup> M. Keele, *Targets of Artifact Raids are Fuming over Federal Agents’ Tactics*. Deseret News, May 11 1986. Available at <  
<http://news.google.com/newspapers?nid=336&dat=19860511&id=oeRNAAAIBA&sjid=SYQDAAAIBA&pg=6851,4256999>>. Last accessed 2 April 2014.

<sup>41</sup> In direct quotations American spelling will be retained.

<sup>42</sup> J. Goddard, above n.35, p.181.



crimes “unnecessary and brutal” and alleged this had directly led to the suicide of the local doctor.<sup>43</sup>

In an area where there is already traditional opposition to intrusion by central government, the Four Corners raid and the prosecutions that followed may have entrenched existing hostility to the law, and had the consequence of making the public less willing to co-operate with the authorities. The action seems to have undone much of the re-education work done following the raids on illegal pothunters in 1986 by the local museum, which has a room dedicated to educating people why illegal pothunting is wrong. Instead there now seems even more local hostility towards the enforcement of ARPA offences: a former head of Bureau of Land Management (BLM)<sup>44</sup> said that the result of the case was that “In the current anti-fed climate, we face bandits who view looting as almost a revolutionary, if not patriotic, act”. Perhaps one of the strongest indications of the impact of the Four Corners prosecution (or its lack of impact) was the comment of a retired BLM ranger, who when asked whether he thought the prosecution would stop people in the area from looting, wryly replied, “Some of them will. The ones that are dead.”<sup>45</sup>

### **COULD THE PROSECUTIONS HAVE BEEN BETTER MANAGED?**

In the Harding case the question of who found the piedfort and when it was found would be critical, and there was a variance between what was said in her defence at the trial and what she told FLO when she originally brought in the object for identification. It was essential that the prosecution prove that she had been the finder for a conviction to be. Despite this the FLO was not called as a witness in person and it appears that the prosecution did not

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<sup>43</sup> Main Justice, (2009) Hatch rebukes Holder for Indian artefact raid, *Main Justice website and blog*, June 17. Available at <http://www.mainjustice.com/2009/06/17/hatch-rebukes-holder-for-indian-artifact-raid/>. Last accessed 30 December 2013.

<sup>44</sup> The BLM is the agency which manages the federal land concerned in this prosecution.

<sup>45</sup> **18 months after Utah raid, do artifact laws stop theft?** *Salt Lake Tribune January 3*. Available at <http://www.sltrib.com/sltrib/home/50909888-76/blanding-probation-utah-artifacts.html.csp>. Last accessed 29 December 2013.

challenge the 'found in the garden when she was nine' version of the facts despite the fact that this contradicted what she had told the FLO, and what he had included in his statement to the CPS. Apparently the first the FLO knew of the version of events given in Ms. Harding's defence was when he read the newspaper reports of the case.<sup>46</sup> The press release also failed to clarify the issue of where the object had been found, stating simply that a "South Shropshire woman has been sentenced by magistrates after admitting to finding and failing to report Treasure",<sup>47</sup> necessitating the issue of the statement of clarification on behalf of PAS.

In blog comments after the trial the CPS was criticised for failing to apply the second requirement of the CPS Code of Practice,<sup>48</sup> that the prosecution be "in the public interest". The fact that they later decided that it was not in the public interest to pursue the case when it was submitted for reconsideration does little to deflect that criticism – and gives the appearance of having been influenced by the bad publicity surrounding the case. There was also poor communication about this decision between the CPS and the FLO. The CPS did not inform the FLO of their reasons for abandoning the case. When he contacted them, asking the CPS what message the failure of this first prosecution sent out, he was told "Can't win them all".<sup>49</sup>

Even allowing for the fact that this was the first prosecution brought under the Act there seems to have been some confusion over how to proceed and considerable delay in bringing the prosecution: Ms. Harding failed to report the object in 2008, but the prosecution was not brought until 2010. Delay could become very important in the future once section 8C of the Treasure Act 1996 is brought into force. Section 8C, to be introduced into the Act by the Coroners and Justice Act 2009, provides that "Proceedings for an offence under

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<sup>46</sup> Private e-mail correspondence between Peter Reavill and Carolyn Shelbourn.

<sup>47</sup> See <https://www.westmercia.police.uk/news/news-articles/ludlow-woman-admits-failing-to-report-treasure-first-case-of-its-kind-in-the-country.html>. Last accessed 4 April 2014.

<sup>48</sup> Available at [https://www.cps.gov.uk/publications/code\\_for\\_crown\\_prosecutors/](https://www.cps.gov.uk/publications/code_for_crown_prosecutors/). Last accessed 23 April 2014.

<sup>49</sup> Private e-mail correspondence between Peter Reavill and Carolyn Shelbourn.

section 8 or 8A may be brought within the period of six months from the date on which evidence sufficient in the opinion of the prosecutor to warrant the proceedings came to the prosecutor's knowledge" and "No such proceedings may be brought by virtue of this subsection more than three years after the commission of the offence".

Although different standards of proof apply in civil proceedings like the inquest and criminal proceedings, the fact that the Treasure Inquest had held that she was the finder could have been relevant to the prosecution proceedings, and made proving this essential requirement of the offence easier. It is all the more unfortunate that the CPS decided not to continue the prosecution following the application for a re-hearing, given the outcome at the inquest. It is interesting that this first prosecution, over 20 years after the Act was passed, would reveal a potential difficulty for those wishing to prosecute under the Act: the requirement or prove that the defendant was the finder. This defect may be remedied in future by an amendment to the 1996 Act to be introduced under the Coroners and Justice Act 2009: the section 8A will impose a duty to report treasure on a person who "acquires property" in an object and "believes or has reasonable grounds for believing" that the object is treasure. This would include dealers, and those who, like Ms. Harding acquired the object as a gift. Under section 8A(3) it will be an offence for a person who acquires property in treasure not to report it to the Coroner.<sup>50</sup>

There is no doubt that Ms. Harding was uncooperative, and as her story of the find changed, she must also have not been telling the truth at some point. The desire to bring a prosecution against her is totally understandable, but at it might be thought questionable that the first prosecution under the Treasure Act should have been brought in relation to failure to report this single item, albeit one worth several thousand pounds. This appears to be the sort of situation which might be better dealt with by the use of an out of court disposal such as an adult caution. This is a formal warning issued by the police on the instruction of a senior police officer (or sometimes on the direction of the CPS), and may be used for low level

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<sup>50</sup> The Coroners and Justice Act 2009 provides for introduction of a new office of 'Coroner for Treasure'.

offences where an offender could have been charged or prosecuted for an offence but it is not regarded as being in the public interest to do so. This may have been an option given that Harding pleaded guilty at the trial: an adult caution requires that the offender has made a clear admission to all elements of the offence and has not raised a defence. The offender must also give informed consent to the administering of the caution.<sup>51</sup>

In the Four Corners prosecution the decision to prosecute was wholly justified given the serious nature of the offending and the fact that some of the defendants had previous convictions for offences under ARPA. However the 'grandstanding' of the FBI and Government at the press conference after the arrests looks ridiculous with hindsight. Although in the UK the congratulatory press release usually follows conviction, publicity is given where arrests are made – and the Four Corners case shows the need for caution. The informant could have been given much more support by the federal authorities. Not only would this have been the compassionate thing to do, their case would have been much stronger if the star witness had been able to give evidence. Instead the case became entangled in debates about the admissibility of the recorded evidence. It is also questionable whether the costs of the operation were justified by the outcome.

According to English Heritage one of the key aims of any intervention following a heritage offence is to “enable the offender to recognise the consequences of his or her behaviour” and to make them change this in the future, arguing that enforcement “will be most successful if it aims to impact on the underlying issues and problems that may be hindering a long-term change in behaviour and the repetition of offending.”<sup>52</sup> Whilst a well-judged and well managed prosecution may contribute to this end, and publicity surrounding such prosecutions may change attitudes to heritage offences, these two cases prosecutions show

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<sup>51</sup> For more detail on adult cautions and conditional cautions, see English Heritage/ARCH, *Interventions: Prosecution and alternative disposals*, Sections 7.5 and 7.6. Available at <<http://www.english-heritage.org.uk/publications/interventions-prosecutions-alternative-disposals/interventions-guidance.pdf>>/. Last accessed 10 April 2014. See also Home Office Circular 16/2008, *Simple Cautioning – Adult Offenders*.

<sup>52</sup> *Ibid.*, Section 3.

that a prosecution may have unexpected, although perhaps not unforeseeable, consequences. Prosecutions such as these can seriously undermine the law, and send out precisely the wrong signals out to the local community. It is obviously all too easy to be wise with hindsight, but both these cases have had what might, at the least, be considered unfortunate results.

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