Brian Schrag's Commentary on "Scientific Research and the Autonomy of Indigenous Peoples: The Case of the Kennewick Man"

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The case of "Kennewick Man" raises a complex set of ethical and legal issues. It also illustrates the broader debate over the ethical and social-political issues surrounding the relation of archeology and archaeologist to indigenous peoples and the appropriateness of laws such as the NAGPRA to resolve these issues.

This case features arguments over who has "legitimate" claims to the remains. It is important to clarify the use of the expression "legitimate claims." "Legitimate claims" can refer either to "legally" legitimate (Who should have the legal right to determine the disposition of these remains?) or "morally" legitimate (Independently of the legal question, who, if anyone, is morally justified in determining the disposition of these remains?). Deciding the legal question does not necessarily decide the moral issue. Establishing a legally legitimate claim to something does not settle the issue of the moral legitimacy of that claim. Some laws are unwise, and others are unjust. Thus, standing behind the legal debate and the NAGPRA legislation are moral arguments over who has a morally legitimate claim to deciding the disposition of the remains. I will confine my remarks to an assessment of one moral argument regarding the disposition of the remains in this case.(1)

One moral claim asserted in this case is that those who are "related" to the Kennewick remains have the strongest moral claim on determining the disposition of the remains. The notion of "related" is crucial here. One sense of "related" is that of being a direct close descendent who actually knew the person whose remains were under discussion. Hence the rhetorical question, "What if these were your grandparents that were being dug up and studied?" There are, of course, very

strong moral arguments for respecting the wishes of those who are "related" in that sense.(2) (Recognizing the power of such moral argument does not preclude the possibility that the relatives might permit study of the remains or that they might not object to such study.(3)) However, the remains in this case are not closely related to any living group. The rhetorical question is inappropriate here.

Various remote senses of "related" are captured in the NAGPRA requirement: "In the case of human remains inadvertently discovered on federal land, NAGPRA regulations require the government to notify Indian Tribes 'likely to be culturally affiliated with' the remains, tribes 'which aboriginally occupied the area,' and 'any other Indian tribe. . . reasonably known to have a cultural relationship to' the remains."(4)

One moral argument supporting the concern for cultural affiliation is that disposition of the remains by someone other than the culturally affiliated may violate the religious beliefs of the culturally affiliated people. Two anthropologists articulate the argument:

> People cannot own people, even the remains of dead people, according to virtually all Native American traditions. Thus it is inappropriate for anyone, Indian or otherwise to possess such remains for whatever purpose. . . . [T]he rights of those being studied take precedence over the rights of anthropologists who study them. . . when that act interferes with or is contrary to the religious and cultural beliefs of those being studied or their descendants.(5)

Presumably, the argument applies only to remains of Native Americans. Since the "religious and cultural beliefs of those being studied" are invoked to justify such a ban on the study of remains, if other, non-Native American groups have different beliefs, then by the argument, it would be inappropriate to impose the beliefs of Native Americans upon them. That is, Native Americans could not argue that they should direct the disposition of the remains of peoples who do not share their religious beliefs.

The argument is invoked in this case. The Umatilla are one group who have asserted a legal claim for Kennewick Man. Armand Minthorn, a Umatilla trustee and religious leader, has written: "Our religious beliefs, culture, and our adopted procedures tell us this individual must be reburied as soon as possible."(6) The

argument seems to be as follows:

1. All Native Americans now living hold the view that "People cannot own people, even the remains of dead people." Furthermore, any Native Americans who have ever lived in the past also held this view.
2. Any ancient human remains found in North America must be the ancestors of current Native American populations.
3. If anyone were to excavate, study or maintain a collection of any ancient human remains found in North America, they would be violating the cultural and religious beliefs of Native Americans.
4. Respect for the religious beliefs of Native Americans in this matter overrides all other considerations including pursuit of scientific understanding of the population of the North American continent.
5. Therefore, it is inappropriate to excavate, study or maintain a collection of any ancient human remains found in North America.

With respect to Premise 1, one might wonder whether the religious and cultural beliefs of contemporary Native Americans are so univocal. The Colville tribe also has asserted a claim to Kennewick Man. However, Adeline Fredlin of the Colville tribe's archaeology and history department reportedly said, "[The] Colville are interested in further study of ancient skeletons found in the region by non destructive analysis."(7)

Premise 1 must include the proviso that all Native Americans who ever lived in the past also held this view regarding remains. Otherwise one has a situation in which contemporary Native Americans are imposing their religious beliefs on those who lived in the past and had different religious beliefs, or at minimum that contemporary Native Americans are failing to respect the different religious beliefs of earlier inhabitants of North America. One wonders whether there is really sufficient evidence to assert such a sweeping claim regarding the religious beliefs of peoples who lived 9,000 years ago. It may be true, but how do we know?

To the degree to which the argument rests on the religious beliefs of the culturally affiliated, Premise 2 is the crucial question. Is it really true that all human remains on this continent are the ancestors of the current Native Americans and can therefore be assumed to have shared the religious beliefs of contemporary Native Americans?

The first anthropologist to examine the Kennewick Man found "a long, narrow skull, a projecting nose, a high chin, and a square Mandible. The lower bones of the arm and legs were relatively long compared to the upper bones. . . traits. . . not characteristic of modern American Indians in the area though many of them are common among Caucasoid peoples."(8) A second anthropologist viewed the skull and "concurred the skeleton was Caucasian."(9) A third anthropologist examined the bones and concluded the skeleton "cannot be anatomically assigned to any existing tribe in the area or even to the western Native American type in general. . . . It shows some traits that are more commonly encountered in material from the eastern United States or even of European origin, while certain diagnostic traits cannot presently be determined."(10)

The director of the Center for the Study of First Americans at Oregon State University has suggested "'Kennewick Man could have been part of a different migration' -- that is, his forebears may have come not from North Asia like those of other Native Americans, but from other parts of Asia or even Greenland."(11)

Minthorn gives one response to the scientists' claims: "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."(12)

The moral claim to the right to determine the disposition of his remains is based on the assertion of a relation of Kennewick Man to a group. It appears that the assertion of a connection comes down to an assertion of empirical fact (that only ancestors of Native Americans lived on this continent and that Kennewick Man must be related to contemporary Native Americans). However, no empirical evidence is allowed to count against the asserted empirical fact. In such circumstances, it is fair to ask whether this is an empirical claim at all.

One might argue that the assertion of a connection is an article of religious faith and that disregarding it would violate and fail to respect religious beliefs. If such is the case, then this situation may be closer to the classic issues involving the medical treatment of Jehovah's Witnesses. It is beyond the scope of this commentary to comment in detail about the epistemological status of such claims or the degree to which principles of religious toleration ought to be invoked. Suffice it to say that such considerations would change the parameters of the debate. The

argument then is no longer one over the scientific issues but an argument in political philosophy.

- (1)For a broad discussion of the some of the ethical considerations in research on human remains, see my commentary on "With Bones in Contention: Reparation of the Human Remains" in Research Ethics: Fifteen Cases and Commentaries (Bloomington, Ind.: Association for Practical and Professional Ethics, 1997), pp. 149-161. See in particular the moral arguments against violating the wish of Native Americans who have a direct relationship to human remains.
- (2)Ibid.
- (3)To illustrate the diversity of attitudes toward treatment of the remains of close relatives, consider the fact that Heidelberg University, in 1989, claimed to have had permission from next of kin to use 200 corpses including 8 children in automobile crash test. See C. E. Harris, M. Pritchard and M. Rabbins, Engineering Ethics; Concepts and Cases (Belmont, Calif.: Wadsworth Publishing, 1995), pp. 183-184.
- (4)Andrew Slayman, "A Battle Over Bones," Archaeology 50 (January/February 1997): 16-23, p. 17.
- (5)Anthony Klesert and Shirley Powell, "A Perspective on Ethics and the Reburial Controversy," American Antiquity 58 (2, 1993): 249-250.
- (6)Slayman, "A Battle Over Bones," p. 18.
- (7)Ibid.
- (8)Ibid., p. 16.
- (9)Ibid., p. 17.
- (10)Ibid.
- (11)Science 275 (March 7, 1997): 1423. See also Science 277 (July 11, 1997): 173.
- (12)Slayton, "A Battle Over Bones," p. 18.