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

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The case of the Kennewick Man, and NAGPRA in general, raise many difficult questions. The specific questions listed in the case are discussed below. Additional relevant issues are then raised. Finally, precedents and analogous situations are considered.

1. Are there values that are more important than the value of scientific research?

Clearly, some values are more important than scientific research. For example, it is generally accepted that research on human subjects cannot be conducted without consent of the patient or study subject. The Nuremberg Code, established in 1947, specifies that consent in research experiments must be voluntary. It also requires that experiments be conducted in such a manner as to avoid unnecessary harm, both physical and mental (Nuremberg Military Tribunals 1947). The American Anthropological Society's guidelines state that research should be conducted in a manner that does not harm the subject. (American Anthropological Association 1995) These examples suggest that the well-being of the subject is a more important value than scientific research in and of itself. Thus, we already recognize instances when other values are considered more important than scientific research.

2. Is cultural autonomy one such value?

In the United States, arguments for cultural autonomy in the practice of science could be based on arguments for religious freedom. The free exercise of religion occasionally conflicts with the practice of science. For example, a patient has the

right to refuse medical treatment on religious grounds. Religious autonomy may be considered a form of cultural autonomy, implying that it is acceptable and legal for different groups to practice science in different ways or not at all.

Globally, recognition of the value of cultural autonomy has increased with a greater sensitivity toward colonial attitudes and with growing political movements to recognize the rights of indigenous peoples throughout the globe. Colonial practices extended beyond politics; they included economic, social and even scientific systems. Scientific colonialism has been defined as "that process whereby the centre of gravity for the acquisition of knowledge about the nation is located outside the nation itself." (Galtung 1967:13) Using this definition, archaeological and physical anthropological research into past Native American societies can be considered a form of scientific colonialism. Research is conducted outside the Native American nations, by outside scientists. The physical remains are curated on the outside, and the knowledge gained through the study of these remains is generally disseminated outside Native American nations. After realizing the potential for research on Native Americans to be conducted in a colonial manner, archaeologists and physical anthropologists have the challenging tasks of forming more balanced relationships with the descendants of the Native American nations they are studying.

Does the political independence of groups necessarily entail independence from other cultural, social, intellectual and scientific practices? At the very least, political independence implies that autonomous groups have the right to regulate the practices of science within their community. However, in keeping with accepted conventions of scientific research, autonomous regulation should not permit the practice of science so that it harms persons outside the community.

Could it be argued that the scientific study of the remains of indigenous peoples should not be permitted because it is not an accepted practice within most indigenous communities? Alternately, could it be argued that the archaeologists, physical anthropologists and the public body of knowledge are harmed by repatriation practices? If the harm is not physical or financial, how can it be measured? If both sides are harmed, should the deciding criteria be which side suffers the most harm? This reasoning would imply that the decision rests on benefit to the greater good. Accordingly, it could be argued that the study of remains benefits the larger society while cessation of study would benefit only a minority of the population. Such an argument would likely result in a ruling

favorable to study rather than repatriation. This type of ruling would also imply that the rights of minority groups do not receive special protection, an idea that is still being debated in our society. Recent political action in California and in the U.S. Congress demonstrates that the American public is divided in its opinion of special programs and protection for minority groups.

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3. Is NAGPRA a suitable means for addressing the problem of the disposition of Native American remains?

NAGPRA was designed to prevent continued ethical abuses in the study of human remains. One objection to NAGPRA is that it attempts to legislate ethics and morals, which may not be the appropriate domain for federal law. However, federal legislation can be considered appropriate in this case for the following reasons:

1. The federal government has acted to protect certain values (such as free speech) in the interest of the American public.
2. The federal government has also acted to protect the rights of minority groups.
3. The federal government has traditionally been the authority to enact laws regarding Native American tribes.
4. Federal laws are an effective means for establishing national standards for certain behaviors.
5. Existing federal laws already protect cemeteries and burials.
6. National (and international) laws that protect cultural property already exist in the United States and other countries.

When considered in the context of these precedents, a federal law to protect Native American graves and grave goods seems appropriate. However, NAGPRA is vague enough to permit differing opinions of what constitutes a legitimate claim. Furthermore, the legislation does not reconcile the differing interests of the parties involved in repatriation. It also leaves open the means for handling claims, so that some institutions may recognize an affiliation that other institutions do not.

For institutions or researchers who disagree with NAGPRA and feel protective or proprietary about their collections, mild forms of noncompliance (such as foot-dragging or shoddy cataloging) may be a temptation. However, this response can only create further hostility. It reinforces the impression that archaeologists and museums hoard their collections and are unwilling to share them with other

interested parties. Focusing on the problems with NAGPRA and its implementation only diverts attention from the central issue -- the appropriate way to study human remains. Instead of disputing the validity of the law, archaeologist and institutions should focus their energies on developing revisions that are generally acceptable to all parties. For example, some sources used to support repatriation claims are now known to contain erroneous information that leads to claims on unaffiliated materials. Standards of proof, implementation procedures and accepted affiliations could be developed as addenda to the law in order to make it more explicit and fair.

Problems with the law do not necessarily imply that the law is unjust but rather that the law isn't perfect and that revisions are necessary. Those who are concerned about potential pitfalls might choose to compile lists of suggested revisions through a committee of archaeologists, physical anthropologists, Native Americans and members of Congress. They may press for legislative revisions, for clarifications from the court systems and for the adoption of the revisions through other means than legislation.

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4. Are there moral or ethical considerations that are more important than following the letter of the law? If so, what implications does that have for limitations to scientific research, not just in archaeology, but in all disciplines?

NAGPRA was written to address ethical obligations. Like many laws, it can be interpreted narrowly or broadly. A narrow reading of the law, which gave more weight to the biological and historical data, would result in a decision that the skeleton does not meet the requirements for reclamation. With a narrow reading, scientific research would be permitted to continue. However, a broad interpretation of the law, which gives equal weight to oral history, would find that the skeleton does meet the requirements for repatriation. Since NAGPRA can be interpreted in different ways, should sympathy for the concerns of the Native Americans or for the concerns of the archaeologists weigh more heavily? Should a moral obligation to respect the dead influence the reading of the law? What about a perceived ethical obligation to compensate for the wrongdoing of the past? Is the integrity of the scientific research process less important than humanistic concerns? As Galtung (1967:13) argues, "knowledge is known as a good thing, but in human affairs it is not immaterial how that knowledge was acquired." That implies that archaeologists, physical anthropologists and all other researchers whose subjects are human beings

must be certain that their research methods are justifiable in humanistic *and* scientific terms.

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5. Should science defer to the wishes of indigenous people?

In this case study, this question is the primary issue directly confronting scientific research. The case challenges both the autonomy of the scientific research process and the scientific method itself. First, the right to autonomy in scientific research is challenged by the right to cultural autonomy. Should scientific research (provided it is not violating human rights or other laws) be restricted by political concerns? If the archaeologists and physical anthropologists are not harming their subjects, what would be the implications for the practice of science if their research were forbidden? Is there a potential to set dangerous precedents here? Does it matter that the subject of the study is a rare find? Does it matter that the information that could be gained from the study would be extremely valuable, since very little data on the subject exists to date? (NAGPRA legislation does provide exemptions for cases where the study of the remains results in a major benefit to the United States.) Or is this case a clear-cut example of scientific colonialism, where the study would not produce information of major benefit?

Is it responsible conduct to stop a research project that has already begun? If the study were stopped, it would be impossible to attain complete, valid or reliable results. Should the limited data that were already collected be used? Without enough time to complete the study, it would be difficult to attain any results beyond basic measurements. Without assurance that the study results are valid, should the partial results be used? If the study subject is deemed "off limits" for further study, how can reliable results be assured? Should data from a study that has been stopped mid-stream be published, published with caveats, or remain unpublished?

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6. Are there times when the importance of scientific information outweighs the wishes of indigenous people?

In addition to the problem of assuring the integrity of the scientific research process, this case also raises the issue of what knowledge should be included in the public domain. Does the tribe's interest in reburying the skeleton outweigh the

interest of contributing to scientific knowledge about migration to the New World and the history of the United States? Should we accept the oral history of the tribe as the source of information rather than scientific data? By extension, should we then adopt indigenous theories on any topic rather than exploring them through science? If that were the case, it is possible that the recent outbreak of the Ebola virus would not have been stopped, or stopped as quickly, because indigenous theories of the disease were not preventing its spread. Clearly, in this case, Western scientific research that investigated how Ebola was spread did benefit indigenous peoples.

NAGPRA legislation does provide exceptions to repatriation when the remains are a necessary part of a scientific study that would contribute significantly to the United States. If the material is repatriated, it is returned only after study is complete. Thus, the legislation itself seems to recognize exceptions to repatriation procedures. Is this a recognition of the value of information and/or the interests of the larger public? The law is vague in this regard.

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7. Are archaeologists and physical anthropologists facing a legitimate threat to research?

It appears that some research is threatened. However, much research (i.e., research on nonfederal or nontribal property) is unaffected by NAGPRA legislation as it currently stands. With federal laws that also require the constant assessment of cultural resources in developing areas, it is unlikely that archaeology as a profession will disappear entirely. However, NAGPRA legislation may mean that archaeologists must find a new modus operandi -- one that involves consultation with native peoples in order to develop mutually satisfying research projects. To this end, some archaeologists have already developed research programs founded on collaboration with Native Americans.

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8. If so, how can archaeologists and physical anthropologists continue to conduct research while operating within the restrictions required by law?

As discussed above, archaeologists and physical anthropologists are faced with the prospect of doing their work in a new way. Some lines of research may not be

permitted, and research must be designed so that legally and ethically compromising situations are avoided. Preventive measures that ensure compliance may become necessary. Although they may eliminate some potentially exciting research projects, compliance and respect will be necessary to forge stronger relations with Native Americans. The end result may be that, after archaeologists and physical anthropologists demonstrate respect for and develop research programs in collaboration with Native Americans, feelings of distrust, alienation and powerlessness may be relieved, and currently forbidden areas of research may be reopened.

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9. How can archaeologists and physical anthropologists continue to conduct research while abiding by the spirit of the law?

In situations such as the Kennewick case, research is begun for salvage purposes and/or the discovery of remains is unintentional. What starts as an accepted line of research may become ethically compromised. Again, it seems that the best way to avoid such a situation is to plan ahead. If human remains, either prehistoric or historic, are encountered, how should one proceed? On federal property or tribal lands, NAGPRA is explicit in the proper procedures. However, it does not outline proper procedure on nonfederal or nontribal property, although there may be state guidelines. If full excavation is not possible, are there acceptable means of documenting the remains without removing them from the ground? If a sacred object is encountered, what should happen?

These kinds of situations often arise unexpectedly. When faced with an unexpected situation, the archaeologist will usually choose to proceed according to his or her training (which encourages study through careful documentation and removal to the lab). Most archaeologists are required to call the State Historic Preservation Office (SHPO) for an official opinion how to proceed. Emergency phone calls to the SHPO may remain necessary because of unexpected finds, but an archaeologist should not begin field work until he or she is sure of SHPO policy and Native American concerns. In addition, frequent contact with a representative of local or interested Native American groups would also be advisable. Although this approach may initially lead to headaches and unwanted research restrictions, inclusion is an important means of demonstrating the desire to work with Native Americans. It also prevents the spread of rumors and the suspicions that are generated by "closed"

research.

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Further Considerations

Several ulterior motives can lie behind repatriation claims and arguments against repatriation. Below, three examples of these motives are raised and then discussed.

- If it were found that a group was claiming skeleton in an attempt to strengthen their land claims and thus gain power over other Native American groups, would that change the strength of the group's argument for repatriation?
- If the group that receives skeletons or grave goods also received money with which to rebury the materials, should a profit-making motive be considered in the decision?

In some cases, ulterior motives may play a role in repatriation claims or dispute. NAGPRA may be open for abuse just as other laws are. However, NAGPRA does not contain provisions that allow for exceptions when ulterior motives are suspected (or even proven). In cases where ulterior motives are suspected but repatriation is permitted anyway, follow-up may be necessary to make sure that the proper reburial procedures are being followed and the intent of the law is thereby upheld. Revisions to the law, including provisions for follow-up and assessment of penalties for noncompliance with reburial guidelines, may prevent ulterior motives from overriding the intent of the law.

- What if the study of the skeleton were fueled by other considerations, such as a desire for fame, or for the grant money that can be obtained to study skeletal remains and grave goods, especially for ancient skeletons like the Kennewick Man? Should these factors play a role in determining the validity of the archaeologists' arguments against repatriation?

Desire for fame and funding may play a role in the tenacity with which an archaeologist or physical anthropologist disputes a repatriation claim. Again, NAGPRA does not contain clauses that permit consideration of these matters in repatriation rulings. The primary means of preventing economic factors and/or vanity from entering the arbitration process is the necessity to prove that a study will result in major benefits to the United States. However, proving that the study is

important is a different matter than completing, publishing and widely disseminating the results of the study. These requirements and penalties for noncompliance might be added to the law to prevent archaeologists and physical anthropologists from using important remains primarily for personal gain.

The biggest problem that archaeology faces is not repatriation, but the looting of sites and the buying and selling of artifacts, which creates the market for looted or forged materials. The relation of looting and forged artifacts to NAGPRA are considered below.

- If the reputation of the archaeologist involved in the study, or if the nature of the archaeological find were suspect, how should the repatriation claim be handled? Can the reputation of the contesting parties be included in decisions about repatriation?
- What if it appeared that the material was looted or faked? In such cases, it may require archaeological study to prove that the materials are genuine. If such research is prohibited, should potentially forged artifacts be repatriated?

In the above scenarios, it would be of interest to all parties that the artifacts and remains be thoroughly investigated and that the reports of the investigation be reviewed by an outside evaluator before any rulings are made. Native Americans probably don't care to claim forged materials, and archaeologists and physical anthropologists wouldn't want to invest their energies and resources in a dispute over repatriation when the materials are not authentic. NAGPRA was not written for remains that aren't culturally affiliated or to artifacts that are not part of a tribe's cultural heritage, past or present. However, the law does not currently require authentication. Authenticity should be included in the definition of indigenous human remains, funerary objects (both associated and unassociated), sacred objects and objects of cultural patrimony.

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Precedents

Two possible sources may be used on a comparative basis in reviewing this case. The first source involves informed consent; the second involves research on subjects who have traditionally been subject to prejudicial treatment.

Informed consent. Because the subject of the study cannot provide consent, and

because there is no recognized legal guardian, policies regarding informed consent can only be loosely applied to this case. However, there are provisions for cases where the generalizable knowledge that is vital to the understanding of a condition can provide the basis for conducting research that may pose more than minimal risk to a subject. This exception may be used to argue that, at least in this case, study of the remains should go forward.

Prejudicial treatment. Even science has not lacked examples of prejudicial treatment. (Jones 1993) Prejudice should be considered in this case, too. Would archaeologists be so interested in the remains if they belonged to a white settler from the nineteenth century? If not, is it because the research potential is less, or is it because there is a reluctance to do similar research on subjects who share the same ancestry? A positive answer to the latter question would indicate the prejudices are playing a role in the research process.

Conclusion

The case of the Kennewick Man appears to fall under NAGPRA provisions that permit study followed by repatriation in situations where the results would be of major benefit. With multiple claimants, however, the situation also requires decision by mutual agreement or arbitration. The case is now in court; no ruling had been issued as of November 1, 1997.

Although this case deals with an archaeological problem, it involves issues of concern to scientific research. NAGPRA and repatriation claims challenge the integrity of the research process and the scientific method. In cases where scientific research conflicts with cultural values, which should take priority? This question can be argued from a philosophical, legal and ethical point of view. The answer is not clear, and any attempt at a solution is likely to be hotly contested. Situations such as this repatriation claim probably will be evaluated on a case-by-case basis. Consequently, a case such as this one may not be used to generalize a solution for instances when scientific research conflicts with other cultural systems. However, the case does point out some of the ethical issues that will require sensitivity as researchers conduct research or review research proposals outside a traditional Western setting.

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