

Conflicting Codes: Professional, Ethical, and Legal Obligations in Archaeology

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ABSTRACT: *Archaeologists employed in governmental positions often deal with issues that produce conflicts between their professional duties to their employer, their ethical responsibilities to the resource, and their obligations as established by legislation. The paper examines some of the conflicts imposed on governmental archaeologists by each of these systems but focuses on the conflicts imposed by federal legislation and regulations on governmental archaeologists, using “Kennewick Man” as an example.*

While the discipline takes pride in the fact that it is establishing a code of ethics which it hopes will make the discipline more responsive to the humanistic aspects of society, it must also be aware that there are professional archaeologists whose employment is dependent not as much on the quality of their research as it is on how well the game is played, how well the employer is pleased, how well archaeologists manage their programs, and how well archaeologists can abide by regulations which sometimes force them to choose between conflicting codes which govern their conduct.

This is not to say that archaeologists employed in the academic sector are not under pressure to maintain well managed programs, but archaeologists who work in

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the public sector are often pulled between conflicting codes of conduct which govern their activities on a day-to-day basis. Additionally, those archaeologists who manage resources for a governmental agency must decide the extent they allow themselves to be bound by contracts as employees when the Agency's actions might jeopardize the very resources they are supposed to protect. While protecting the resource is important for the maintenance of the historic fabric of the nation, the archaeologist who is constantly preventing an Agency from performing its legislated duties will certainly be looking for another position shortly.

Naturally, conflicts such as these do not arise every day, but perhaps they would be easier to understand if they did. All too often, however, the archaeologist employed by a governmental agency must tread a fine line between the Agency's policies, the need to protect the resource (sometimes from the agency itself), and the need to maintain a professional approach to the situation.

Professional obligations to our employers

Archaeologists owe their employers their livelihood, their loyalty, and, perhaps most of all, the professional performance of their duties. And the employer expects loyalty and a professional performance on a consistent basis. But the employer-employee relationship carries with it an implicit servitude that must occasionally be questioned. No employer should ever ask an employee to do anything patently illegal, immoral, or unethical, but, occasionally some circumstances arise which force archaeologists to decide how to adequately do the job without circumventing the standards required by professionals.

Archaeologists who are bound by the policy of a government agency—either on the state, federal, or tribal level—must occasionally do things they personally do not want to do. There are policy statements which govern our actions towards certain groups of the population and which make it difficult to perform our duties at times. Employees of the United States Department of the Interior's Bureau of Indian Affairs, for example, are bound by a Presidential statement issued in April of 1994 and Executive Order 13084 of May 14, 1998, which re-affirm the formal "government-to-government" relationship between federal and tribal governments.^b

Such pronouncements as these put pressure on individual employees to determine the more appropriate method of consulting with American Indians—whether as individuals or as representatives of a foreign government. It often is difficult to reach agreement on certain matters if the relationship gets too formal. And with the tenuous nature of many tribal governments, the elected official who agrees to a particular issue at one time may not be in the same office one month later.

b. The total sentence reads: "The United States continues to work with Indian tribes on a government-to-government basis to address issues concerning Indian tribal self-government, trust resources, and Indian tribal treaty and other rights."

Certain aspects of the governmental archaeologist's relationships to various constituencies are defined by such proclamations and procedures. Many archaeologists are limited by agency bureaucracies to a certain level of contact with other elected officials, with consultation procedures becoming more formal and simultaneously less productive. Rather than working things out as individuals, meetings occasionally acquire the pomp and circumstance of embassy meetings, with participants cloaked in rigid formality dancing a procedural "pas-de-deux".

Ethical obligations to our discipline

The Society for American Archaeology (SAA) has recently provided its membership with a new set of guidelines that it hopes will be "crucial in defining the future of archaeology as a profession."¹(p. 9),² These guidelines, as presented through a set of eight principles, are meant to serve "as a directional beacon by which individuals might steer their professional activities"³(p.593) rather than as a set of formalized "Thou-shalt-nots".

Archaeologists in the federal sector are perhaps more likely to follow the SAA guidelines in their day-to-day activities than any other set of practicing archaeologists. Many of the guidelines are a part of the job descriptions of the federal archaeologist: stewardship, accountability, prohibition against commercialization, public education and outreach, public reporting and publication, records and preservation, and training and resources. The eighth, "intellectual property" rights, while often less applicable to most federal archaeologists because of the public nature of their employment, is nonetheless important to those who conduct any sort of research which involves living humans.

Stewardship (cultural resource management) is the governmental archaeologist's job; the federal government defines the clientele and the Agency's accountability to it; the government "owns" the property; the Office of Personnel Management provides guidance concerning the preservation of records; and occasionally the Agency offers resources for "pure" research. But many federal archaeologists are content to produce minimal reports circulated to the minimal number of people in the normal minimal ways. Of course, except in special instances, federal archaeologists receive little or no recognition for any activities beyond the minimal. Conversely, academic publications (such as this article) and/or participation in discipline-wide programs are viewed by some governmental supervisors and managers as a means of getting the government to sponsor activities that enhance the individual's chances of obtaining a better (i.e. "academic") position in the future. A system which fails to recognize commitment by its employees to their discipline is a flawed system.

Legal obligations to our profession

Lastly, federal archaeologists are bound by certain aspects of the system which go beyond merely influencing our decisions—legislation which define procedures we must follow. Three main pieces of legislation have a direct bearing on the governmental archaeologist's practice of the discipline—the National Historic Preservation Act, the Archaeological Resources Protection Act, and the Native American Graves Protection and Repatriation Act.^c

The National Historic Preservation Act (NHPA) of 1966 set forth a national policy of historic preservation, recognizing that it was important for the nation to protect items of historic value as a means of maintaining the country's ties to its history. While the Act itself did not mention any separate groups that must be consulted, subsequent amendments named tribal and other Native groups (Native Hawaiians and Alaskan Corporations) and specifically set them up as distinctive from the other cultures in the United States. This forced the governmental archaeologist to redefine procedures for communicating and consulting with tribal groups apart from other local groups with which he or she might normally work.

Additionally, amendments which allowed properties of traditional religious or cultural importance to native groups to be included in the National Register further complicated the process by blurring the line between concrete fact and traditional thought. No longer did a property have to be a physical place where a documented event transpired, it could be a physical place where mythical events were thought to have transpired. I shall return to this point later.

The Archaeological Resources Protection Act (ARPA) of 1979 was established to strengthen the Antiquities Act of 1906. The Act required anyone wishing to excavate archaeological material from Indian land to consult with the affected Indian tribe or tribes. It also allowed those affected tribes to attach their own terms and conditions to the permit. Essentially, this Act gave congressional recognition to the rights of Indian tribes to regulate the excavation or removal of archaeological resources on Indian land.

The newest piece of federal legislation which affects archaeologists, the Native American Graves Protection and Repatriation Act (NAGPRA) influences federal archaeologists to side with Native American groups which claim human remains and associated grave goods from museums and institutions which receive federal funding of any sort. It essentially requires anthropologists to assume that the results of some research will not be shared openly with other groups and that science is NOT a belief system held at the same level of esteem by everyone.

As most authors have pointed out in relation to the law's implementation,^{4, 5, 6, 7} NAGPRA is strictly human rights legislation aimed at providing equal treatment of all human remains under the law, without consideration of "race" or cultural background.

c. It is not the intent of this paper to analyze the total impact of these three pieces of legislation, but an examination of particular facets of them will prove illustrative.

The law was meant to remedy unequal treatment of Native American remains by previous generations of American military, bureaucracy, and science. The repatriation of items of cultural patrimony to American Indian tribes is also consistent with the return of items of cultural patrimony to sovereign (albeit foreign) nations by private museums.

Certain sections of NAGPRA place federal archaeologists in a direct conflict with the obligations inherent in the SAA's ethical guidelines presented by Lynott and Wylie.¹ As "good" archaeologists, they should be concerned with the health of the discipline as a whole. However, as federal archaeologists, they are legally constrained in some of the ways in which they practice the discipline in relation to various components of the public.

While Geoffrey Clark feels that, under NAGPRA, "Political considerations thus take precedence over disinterested evaluation of knowledge claims,"⁸ (p.22) and that archaeology should be "... a 'science-like' endeavor—as opposed to a political enterprise, an industry, a platform for promoting a social agenda or a public relations exercise,"⁸ (p.22) Australian archaeologist Colin Pardoe writes, "A scientific view of the world is not corrupted by advocacy, or by an interest in the wishes of Aboriginal people."⁹ (p.138)

As I have offered elsewhere,¹⁰ (p.25) I find it difficult to believe that science is above or outside of the society or political system in which it exists. Society influences and molds science—the topics scientists study, the freedom they have or don't have to study touchy topics, and the ways in which the society punishes those who do not work within its system. While Nazi scientists did "good science", it is not the results of Nazi science which the world finds unacceptable but rather the political enterprise behind it, the "industry" it created, its platform for promoting a social agenda, and its exercise in public relations.

The governmental archaeologist can find that legislation has created perhaps unwilling advocates for a cultural group, rather than "neutral" scientists interested only in the study of archaeology, and such advocacy often places archaeologists in conflict with those who believe that archaeologists should maintain "a careful neutrality".¹¹(p.104)

By setting American Indian heritage and belief systems apart from those of other cultural groups in the United States, these three pieces of legislation may force some archaeologists to act in a manner which might be detrimental to the discipline as a whole. These legislative acts have elevated American Indian belief systems to the level of science, something few other religious or belief systems (if any) have been able to accomplish to date.

One situation adequately illustrates this point: Kennewick.

Kennewick as an example

Kennewick Man describes a skeleton discovered on Sunday, July 28, 1996, by Will Thomas and Dave Deacy eroding out of the banks of the Columbia River near Kennewick, Washington. The remains set into motion a court case that has involved several Indian tribes, individual anthropologists, and the United States government in a legal conflict over the control of heritage and human remains. The human skull had characteristics that caused Dr. James Chatters, examining the human bones as agent for the Benton County Coroner's Office, to conclude it belonged to a Caucasian male. Two other physical anthropologists, Dr. Catherine J. MacMillan and Grover S. Krantz, generally agreed that skeletal characteristics suggested Caucasian origin. When a CAT scan ordered by Chatters revealed a projectile point fragment in the hip of the dead individual, the left fifth metacarpal was sent to the University of California at Riverside for radiocarbon testing, with the sample returning dates between 9,200 and 9,600 years ago. Once the antiquity of the bones was tentatively determined, the Corps of Engineers, as custodian of the property on which the remains were found, took possession of them, citing the inadvertent discovery clause of NAGPRA.^d

Under NAGPRA, the Corps was obligated to notify American Indian tribes which were "likely to be culturally affiliated with", which "aboriginally occupied the area", or which "is reasonably known to have a cultural relationship to" the human remains. As a result, five tribes (the Umatilla, the Yakama, the Nez Perce, the Colville, and the Wanapum) filed a joint claim for the human remains. The Corps published a "Notice of Intent to Repatriate" to the five tribes but, on October 16th, before the mandatory 30-day waiting period after the second publication of the "Notice" expired, eight anthropologists filed suit in District Court to block the repatriation. The names of the eight anthropologists read like a "Who's Who" of North American archaeology and physical anthropology— Robson Bonnicksen, C. Loring Brace, George W. Gill, C. Vance Haynes Jr., Richard L. Jantz, Douglas W. Owsley, Dennis J. Stanford, and D. Gentry Steele.

Material found on federally owned or controlled land during construction activities is subject to repatriation to Native American groups who are eligible to claim it, and the material's possible importance to the scientific community is not considered, unless the relevant tribes agree to allow scientific tests to be performed.^e

Imagine the personal anguish most governmental archaeologists would feel if forced to uphold a federal policy in regard to materials equally as important to science and Native American cultures as "Kennewick Man". But perhaps some would feel a major sense of relief knowing that the decision was not theirs to make, and that they

d. "Inadvertent discoveries" are defined and procedures concerning them regulated under 43CFR Part 10.4.

e. Current litigation (*Bonnicksen v. United States*, USDC CV No. 96-1481-JE)¹² seems to contradict this interpretation. However, until decided, the author will go with the most common interpretation of the regulations.^{4, 13}

could hide behind the “legislated ethics” of federal regulations. Science in the federal sector is rarely free from outside influences and external pressures, as this situation remarkably demonstrates.

I believe most American scientists have welcomed the Kennewick situation because it will ultimately force the Courts to make clearer the definitions used in the law. The Courts may decide at what point immigrants into the “New World” stopped being immigrants and became Native Americans, whether the information about their struggles belongs to the entire world or only to the traditional cultures which claim them as ancestors, at what level “cultural affiliation” begins and ends, and whether American Indian tribal groups have the right to require that traditional religions must be considered equivalent to Western Science as an explanatory method.^f

Kennewick will be important to all scientists whose work involves American Indians. The Court’s decision might allow archaeology to continue to operate free from legal constraints on its assumptions of scientific importance, it might force archaeology to limit its investigations to non-Native American subjects, it might force archaeology to operate only under “politically correct” research topics that ever-increasingly-focused groups might force upon it, or it might force archaeology to establish partnerships that will be beneficial to all involved.

Integrated programs

But how can governmental archaeologists develop integrated programs which fulfill their professional, ethical, and legal obligations and which are beneficial to all parties involved?

Integrated programs which take into consideration the professional, ethical, and legal obligations placed on the archaeologist should be tailored to each specific program, of course, but these programs will often result from an earnest effort at developing strong working relationships with the various “publics” with which the archaeologist deals.

For example, I work for the Bureau of Indian Affairs and am obligated (by legislation) to maintain formal relationships with the tribal officials with whom I interact. But by developing and strengthening personal relationships with those individuals, and through formal classes, training sessions, and conversations, I made certain they were aware of the legal, philosophical, and methodological constraints placed on me as an archaeologist.^g We became friends before we became colleagues.

f. See Opinion issued by United States Magistrate Judge John Jelderks on June 27, 1997. Judge Jelderks issued a written opinion “to supplement and amplify ... bench rulings, and to provide additional guidance to the defendants so that this controversy may be resolved in a timely and orderly manner.”¹⁴ (p.3) The Opinion provided 17 issues which it felt the Corps should consider, among them issues which are at the very heart of NAGPRA.¹⁴ (pp.45-51) First and foremost among them is whether such ancient remains are subject to NAGPRA or not.¹⁴ (p.45)

g. See Watkins and Parry¹⁵ (p.49) for more description of efforts made in this regard.

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Personal respect was necessary before we were able to move beyond the artificial barriers that had developed because of perceived differences in our attitudes. I had to show them I was more than the “grave robber” or “bone digger” they thought me to be.

And this has also made the legislated aspects of my job easier. Even though the tribe may be legally entitled to something, they rarely exercise that legal right unilaterally, without discussing the options available and the possible outcomes of their decisions. I may be tied by legislation to an action, but the tribe is not. I’ve chosen to nurture relationships with tribal elected and appointed members so that I become part of the decision making process rather than an obstacle to it.

Summary

Archaeologists are forced every day to deal with situations which measure their ethical values. To those employed in the academic sector, guidance on most of the ethical issues they face may be found in the ethics codes of the SAA, the American Anthropological Association, or other organizations to which they belong. Archaeologists employed in the government sector must not only consider the guidelines their discipline offers them, but must also follow a set of ethics created by legislation which governs their actions to protect the cultural environment.

Utilizing a programmatic approach to developing relationships with interest groups can help a governmental archaeologist to combine the SAA ethics guidelines and legal guidelines into a program that allows them to fulfill their obligations to their employer. But if archaeologists wait until problems rise, they might find themselves stuck in the middle of situation as sticky as Kennewick. By talking with the groups before a situation develops, it is easier for archaeologists to convince interest groups that they want to work through mundane situations as well as through touchy ones.

Such programs will work for almost any group—not just Native American or minority-based groups. Local neighborhoods and regional associations are interested in knowing what to expect from us in all sorts of situations, not just in emergency situations. They want us to talk to them all the time, not just when something is wrong. And archaeologists shouldn’t show up only when there is a problem, or else these groups will associate us with problems. We must step beyond minimal obligations established by our employers, our profession, and our legislation in order to develop programs that will increase the involvement of all our “publics” in a truly public archaeology.

So why does American archaeology feel the threat to its existence, and why are federal and other governmental archaeologists placed in the middle of the struggle between tribal and scientific interests? Perhaps archaeologists, as scientists, have been insulated from the rest of the public for too long. We must determine whether our interests are the same as those of the rest of the world, and whether the history we try to write is the history everyone wants to read.

REFERENCES

1. Lynott, Mark J. and Alison Wylie, eds. (1995) *Ethics in American Archaeology: Challenges for the 1990s*. Special Report, Society for American Archaeology. Washington, D.C.
2. Wylie, A. (1999) Science, Conservation and Stewardship: Evolving Codes of Conduct in Archaeology, *Science and Engineering Ethics* **5**: 319-336.
3. Lynott, Mark J. (1997) Ethical Principles and Archaeological Practice: Development of an Ethics Policy, *American Antiquity* **62**(4): 589-599.
4. Hutt, Sherry (1992) Illegal Trafficking in Native American Human Remains and Cultural Items: A New Protection Tool. *Arizona State Law Journal* **24**(1): 135-150.
5. Hutt, Sherry, Elwood W. Jones, and Martin E. McAllister (1992) *Archeological Resource Protection*. The National Trust for Historic Preservation: The Preservation Press, Washington, D.C.
6. Tsosie, Rebecca (1997) Indigenous Rights and Archaeology, in: Swidler, et al, eds., *Native Americans and Archaeologists: Stepping Stones to Common Ground*. AltaMira Press, Walnut Creek, CA., pp. 64-76.
7. Welsh, Peter H. (1992) Repatriation and Cultural Preservation: Potent Objects, Potent Pasts. *University of Michigan Journal of Law Reform* **25** (3&4): 837-865.
8. Clark, G.A. (1998) NAGPRA, the Conflict between Science and Religion, and the Political Consequences, *Bulletin of the Society for American Archaeology* **16**(5): 22, 24 & 25.
9. Pardoe, Colin (1992) Arches of Radii, Corridors of Power: Reflections on Current Archaeological Practice, in: Attwood and Arnold, eds., *Power, Knowledge and Aborigines*, La Trobe University Press, pp. 132-141.
10. Watkins, Joe (1998) Native Americans, Western Science, and NAGPRA, *Bulletin of the Society for American Archaeology* **16**(5): 23 & 25.
11. Meighan, Clement W. (1986) *Archaeology for Money*. Wormwood Press. Calabasas, California.
12. *Bonnichsen v. United States*, USDC CV No. 96-1481 JE, filed October 16, 1996.
13. Horn, Amanda (1997) The Kennewick Man Loses Sleep over NAGPRA: Native Americans and Scientists Wrestle over Cultural Remains. *Sovereignty Symposium X: Circles of Life*, pp. 503-524, Tulsa, OK.
14. Jelderks, Magistrate John (1997) Opinion, *Bonnichsen v. United States*, USDC CV No. 96-1481-JE. On-line version at URL <http://www.goonline.com/science/kennewic/court/opinion.htm>.
15. Watkins, Joe and Tom Parry (1997) Archeology's First Steps in Moccasins, *Common Ground* **2**(3/4): 46-49, Summer/ Fall issue, National Park Service Archaeology and Ethnology Program, Washington, DC.