

Privacy versus History

How Far Should the Dead Hand Reach?

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One of the most fundamental tenets of medical research, enshrined in the World Medical Association's Declaration of Helsinki, is that scientific investigation involving human beings requires the informed consent of the subjects.¹ The Nuremberg Code of 1946, formulated in response to the Nazi atrocities of World War II, begins with the warning that the "voluntary consent of the human subject is absolutely essential" as a prerequisite for such research.² In the United States, this principle served as the foundation for the Belmont Report of 1979, prepared by the National Commission for the Protection of Human Subjects of Biomedical and Behavioral Research in response to public outcry against the Tuskegee Syphilis Study, and later entered American law through Titles 21 and 45 of the Code of Federal Regulations.³ These ethical rules clearly apply to living human beings as well as to the freshly deceased. What is far less certain is whether such protections extend to research on the remains of long-dead individuals, including the ice-preserved bodies of prehistoric men, Egyptian mummies, the relics of Catholic saints, and organic material left behind by departed emperors, presidents, and celebrities of the distant past. This question has acquired added significance in the last decade as genetic testing on such remains and advances in pathology make possible the revelation of numerous historical "secrets"—ranging from the familial relationships of the pharaohs to possible hormonal causes for Abraham Lincoln's depression.⁴ Soren Holm launched a public debate on the matter in 2001 with regard to stored tissue samples from Tutankhamen and Ötzi, a 5,100-year-old mummified iceman.⁵ More recently, Frank Rühli and Ina Kaufmann of the University of Zurich posed a series of provocative questions regarding the study of mummy remains that spawned considerable discourse on the ethics of researching long-dead subjects, but they chose not to offer "a final recommendation" on whether and how such research should be permitted.^{6,7} What is clear is that the question of which limitations—if any—should be imposed on scientific research conducted on the remains of such long-dead subjects, and how those limitations should be implemented, is likely to remain a matter of considerable controversy as investigative technology improves and additional human remains are discovered.

The purpose of this article is to propose a series of ethical guidelines for when such research on long-dead subjects may be conducted without informed consent. The first section analyzes the competing interests of the deceased subjects, living stakeholders, living nonstakeholders, and the general public in the human remains of individuals deceased in the distant past. The second section sets forth a series of criteria for excluding human remains from the general requirements of informed consent and includes an effort to define which criteria qualify a corpse as "long

dead.” The third section uses these guidelines to assess four cases that have generated considerable interest among scholars: (1) the 9,300-year-old skeleton of “Kennewick Man”; (2) the mummified corpse of the boy pharaoh, Tutankhamen; (3) the gender identity Queen Christina of Sweden (1626–89); and (4) blood samples of President Abraham Lincoln. Although efforts have been made in the past to apply a framework to specific sets of remains, the goal of this essay is to establish a general and consistent rule that can be applied to any such cases that arise.

Who “Owns” the Remains of the Long Dead?

Life is finite and death is certain. Human remains, however, preserved under suitable conditions, may survive thousands of years. Because the concept of informed consent—as least as we now understand it—is largely a by-product of the last five decades of bioethical and medico-legal thinking, if voluntary agreement of the subject were required to conduct research on cadaveric sources, no research on human beings who died prior to the modern era would ever be possible. Although such a position is extreme, it is concededly not without its merits. For example, let us imagine a variation on John Rawls’s veil of ignorance, which argues that society should be ordered as an individual would arrange it a priori when “no one knows his place in society, his class position or social status.”⁸ In our scenario, an individual must establish a rule governing informed consent a priori behind a “temporal veil of ignorance,” in which he does not know whether he will be born before or after the rise of modern bioethical theory. Would such a person adopt a rule that favors assumed consent while knowing that, if he were born before the modern era, such a rule might expose his medical and familial secrets? Or would a person adopt a strict rule that prohibits research on premodern remains while knowing that, if he were born in the current era or beyond, such a rule would limit the availability of knowledge about the historic past? How one answers this question, of course, depends significantly on how one values privacy against knowledge.

As a general principle, Western society in areas outside of medical research has been willing to tolerate the abridgement of privacy rights of the long deceased. For example, the personal correspondence of historic individuals now in the public domain is often published and disseminated with little thought as to whether these individuals might want their intimate affections and animosities aired for general consumption. Even in the field of scientific research, we have widely accepted sacrifices of the privacy of long-dead individuals if doing so does not actually use or compromise their bodily remains. For example, genetic testing on the descendants of President Thomas Jefferson and his African American slave, Sally Hemings, has convincingly demonstrated that Jefferson fathered at least one of her children.⁹ Few questioned the ethics of such DNA sampling as an invasion of Jefferson’s privacy, as they might have if his own body had been exhumed. Yet if the use of human remains is to be treated differently from other forms of privacy compromise, a convincing explanation must be proffered for treating such research as different *in kind*. Specifically, one needs to examine whether any of the parties who might have an interest in blocking research on the long dead—namely, the deceased subjects, their descendants and collateral relatives, their cultural stakeholders, nonstakeholders contemplating their own posthumous wishes, and the general

public—have any legitimate and compelling claim to prevent such compromises of privacy.

Deceased Subjects

A long-standing debate exists in the philosophical literature as to whether a person can have rights and interests that transcend death. In his seminal essays, "The Rights of Animals and Future Generations" and "Harm and Self-Interest," political ethicist Joel Feinberg argued that the dead can retain "interests" and can be harmed posthumously, noting that "the awareness of the subject"—impossible after death—was not necessary for such harm to occur.^{10,11} Environmental theorist Ernest Partridge both challenged and reconceptualized this approach in his celebrated response to Feinberg, "Posthumous Interest and Posthumous Respect," which proposed that protections for the dead should be understood in terms of the interests of the living.¹² According to Partridge, "because the living hold expectations and concern for having their own wills respected, they also have an interest in respecting the wills of the deceased."¹³ Partridge explained the consequences of not honoring the wishes of the dead in terms of their impact on the living: "If, conversely, [the living] violate the 'quasi-interests' of the dead, they diminish their own living anticipations of favorably affecting the conditions of life beyond the time of their own lives, through their chosen disposition of their own possessions and through a keeping of promises made to them."¹⁴ Interestingly, English and American common law in the nineteenth century adhered to the principle of *corpus nullius in bonis*, which held that a person did not have any property rights in his body after death.¹⁵ Only over the last fifty years, as organ donation became possible and autonomy replaced beneficence as the dominant principle in Western allopathic medicine, have various jurisdictions come to recognize legal interests in human bodies that transcend death.¹⁶ Yet whether or not society chooses to protect the interests of the dead, doing so is only dispositive in the rare cases in which the future wishes of the long dead are known. Holm has noted one of these: "Irish Giant" Charles Byrne, who sought to have his body buried at sea rather than displayed publicly (but whose wishes were not ultimately honored).¹⁷ For the vast majority of the long dead, their wishes remain unknown and unknowable.

The possibility of substituted judgment, which might be used to evaluate the interests of the recently dead, is poorly suited for assessing the theoretical wishes of those from past generations. Applying the writings of long-dead leaders to contemporary situations, as is done, for example, in the field of constitutional interpretation, has proven to be extremely contentious and often renders more confusion than clarity.¹⁸ The prospect of extrapolating the values of long-dead individuals to contemporary situations *in the absence of written evidence* must inevitably be an exercise in fruitless speculation. Would Ötzi the Iceman want the modern world to know that he had wandered into his Tyrolean grave from the Austrian north rather than the Italian south?¹⁹ Ötzi's genetic origins, determined by his mitochondrial DNA, have significant implications for the long-standing (but now dormant) political feud between Italy and Austria over the border region in which his corpse was found. As Holm presciently points out, such questions likely could have no significance for a man from the Stone Age, to whom countries and national boundaries were entirely alien.²⁰

If the wishes of the long dead are not known, it does not follow logically that the default position should be to prevent research on their remains. Although such research might undermine their interests, it just as easily might further their interests. For example, learning genetic information about a common ancestor might positively influence the future health choices of progeny, or aid medical research that could increase the life expectancies of these progeny, which would in turn advance the values of a long-dead individual for whom the preservation of a family line was a paramount objective. Genetic testing might establish false paternity or consanguineous relationships, thereby impugning the reputation of a long-dead leader; on the other hand, such testing might also disprove such accusations, vanquishing a groundless rumor and restoring the unsullied renown of the subject. Or the testing might confirm false paternity or consanguineous relationships, but this might actually be just as the subject had wished. Would Tutankhamen want the present generation to know that his parents were brother and sister—a fact that likely caused him no distress 3,300 years ago?²¹ Would he greet such revelations today with shame? Or would he want to tout the cause of sibling marriage and take pride in his values being conveyed to a contemporary audience? Little is gained from attempting to answer these questions. In short, no plausible mechanism exists for assessing how a long-dead individual's personal interest might be affected by research until the research is actually done and the results compiled, and even then, no reasonable principles exist for applying the data. In the absence of clearly expressed or discernable wishes, the interests of the long-dead offer no justification for establishing additional privacy safeguards and so curtailing research on their remains.

Living Stakeholders

Descendants and Collateral Relatives. A second group of individuals who might claim an interest in preserving the privacy rights of long-dead remains are those of the deceased's direct and collateral descendants. Relatives of the deceased have two distinct claims to an interest in the use of their ancestor's remains: material interests and emotional interests.

Material interests invoke those revelations that inadvertently also expose private information about the living without their consent. Although this information might come in various forms, such as revealing ethnic origins or undermining lineage claims, the most striking instance of secondary unmasking is with regard to genetic illness. Revealing that a long-dead relative carries a particular disease marker can also inform descendants that they are at risk for the disease—a revelation that they might not wish to discover. This is unlikely to be the case with the remotely dead but is a genuine and legitimate concern for descendants of those deceased in the past few centuries. Social revelations can also implicate disease findings: If one learns that the paternity of one's ancestor is false and discovers the identity of the actual father, one also discovers that one is at risk for any genetic diseases carried in that biological parent's DNA.

A second set of interests for descendants of the long dead are purely emotional interests. These might include merely the solace of knowing one's ancestors are buried properly, but in some cultures these might also mean freedom from haunting for the living individual by the disturbed forebears. Mormons, for example, believe that "saving ordinances" such as "proxy baptism" must be made

available to those who lived before the time of Joseph Smith.²² However, the premise that individuals can assert interests based on the welfare of their long-dead ancestors, often accepted without appropriate interrogation, quickly degenerates to absurdity. The problem is that there is no logical reason to possess a greater claim to the interests of direct ancestors than to those of collateral ancestors. Although direct progeny are favored by law over collateral relatives in the short term for other matters, such as inheritance, the law does not recognize distant claims, and the common law actually created a complex series of safeguards to prevent them; even if I could theoretically prove that I am the only living descendant of a man forebear who owned of a parcel of land during biblical times, the law does not permit me to claim such a property. As a result, if we accept emotional claims, any living person who can trace a real or even possible collateral relationship to any long-dead individual can assert a claim of emotional interest, thereby curtailing research. One living individual who opposed all such research on cultural grounds might stifle the will of the planet.

It should also be noted that even determining the relatives and collateral descendants possessing interests is itself a deeply problematic task. For example, both the nieces and nephews of President Warren Harding and the descendants of Nan Britton, his alleged mistress, claim to be his closest relatives.²³ Whether or not to test Harding's remains for a match to Britton's grandchildren is a question that would have to be answered by his most direct descendant, according to current law, but determining the identity of that descendant would require knowledge of the test's results. This paradox is all too frequent in such cases.

Cultural Stakeholders. Much has been written about the rights of cultural stakeholders to assert the interests of their forebears. In fact, this is one of the few areas in which American law has generated a specific set of rules to govern the use of a particular set of remains. In 1990, Congress passed the Native American Graves and Repatriation Act, which (among other consequences) effectively granted Native American tribes the right to withhold consent from research on ancient remains that could be linked to their communities.²⁴ In addition to actual ownership, Holm has outlined two possible justifications for such claims: either "the culture is the best proxy decision-maker available" or "specific uses of the tissues offend current members of the culture."²⁵ As a political choice, it is clear why deference is often paid to cultural groups—usually indigenous populations—that assert such claims. As a matter of ethics, however, Holm quite convincingly argues that such an approach is not particularly useful.²⁶ Although cultural stakeholders may know the orthodox thought of that group on a particular matter, they have no way of knowing the particular preferences of the deceased. Just because an individual was a member of a Native American culture does not mean they shared *all* of that community's values any more than being born a Catholic means one agrees at all times with the Pope. Additionally, why the right of the living cultural stakeholders not to be offended trumps the right of the community to acquire knowledge is not entirely clear. Social scientists could easily define themselves as a culture to assert a counterclaim. One of the ironies of research on long-dead human remains is that those with some of the weakest claims, cultural stakeholders, have often been given the greatest authority.

Cultural stakeholders often hold strong and sincere beliefs regarding the importance of treating the corpses of fellow members from their communities in

a certain manner, and it is certainly not the intention of this essay to dismiss the value of those concerns. Although some groups and their leaders may assert such claims for the purposes of maintaining political or social solidarity in the contemporary world, in essence using the debate over long-dead remains to further a contemporary agenda for their communities and thereby demonstrating a clear conflict of interest between their own welfare and the cadaver's interests, many have genuine ethical and religious reasons for wishing to assert a preference in the way remains of their cultural forebears are treated. However, respecting the sincerity of such claims does not necessarily entail allowing a present-day community to claim authority over the remains of a long-dead individual who may or may not have shared that present-day community's norms and values. Moreover, determining the scope of the cultural community that should have final say demonstrates the problem with deferring too much to cultural stakeholders: why should a particular tribe or ethnic group have the last word over the fate of such remains and not a larger cultural group, such as a nation, or even the largest cultural group of all, humankind? Increasingly, we have come to accept that time extinguishes certain rights, even if those rights were originally denied unjustly. A cultural group deprived of land 5,000 years ago cannot show up on the property of the current occupants and reassert a claim, because of the inevitable social disruption that would ensue. Allowing cultural stakeholders to assert claims over the long dead creates a similar disruption for research and should be permitted only under the narrow circumstances discussed in the following.

Living Nonstakeholders

Living nonstakeholders are those individuals who seek to control their own remains after death and therefore have a general interest in how the remains of the already departed are handled. Their interests are often given short shrift in analysis of this question, yet they may actually have as strong a claim as either relatives or cultural stakeholders. The concern of living nonstakeholders is that by conducting research on the long dead without their consent, one opens a moral door to allowing research on the remains of the more recently dead as social values change. Living nonstakeholders may also have specific concerns for the use of their own remains in the distant future. These concerns are among the most challenging to answer for those who favor research without overt consent. The most workable solution to this problem is to create two sets of rules—one that governs remains from the pre-bioethics era and another that will apply to all remains from the informed consent era onward, even into the distant future. Because anyone living today has a reasonable opportunity to consent to future research, not doing so might presumptively be taken to mean a refusal that lasts into perpetuity. In order to avoid the consequences of such a presumption of refusal, a system (as discussed in the following) should be generated for obtaining such consent en masse.

General Public

The general public will *almost* always have an interest in furthering research and knowledge at the expense of the deceased. Occasionally, rare cases may arise in which the discovery of biological "secrets" about a long-dead individual might

have significant deleterious effects on the public welfare. In a monarchy, for example, determining false paternity of a distant ancestor of the king might raise questions of legitimacy that could undermine not only the current leader but also centuries of laws promulgated by mistaken claimants to the throne. Such instances are likely to be few. However, any policy approach to research on the long dead should contain a safety valve for preventing research in such cases in the absence of popular consent.

Guidelines for Overriding Informed Consent

Most approaches to informed consent in medicine presume that consent should be required in the absence of a compelling reason not to require consent. This approach contrasts with the approach taken by other fields, in which after the expiration of a lengthy period of time, the presumption favors disclosure unless a compelling reason exists to withhold information from the public. Declassification of government documents, for example, is presumptively limited to a set time frame of between twenty-five and seventy-five years in the United States.²⁷ The testimony of grand juries in high-profile cases is often revealed on the passage of a lengthy period of time—with the caveat that the testifying witnesses are already deceased. This death + time approach has been used by federal judges in a series of high-profile Cold War cases, such as the trials of Alger Hiss and Julius and Ethel Rosenberg.^{28,29} With regard to pathological research, the challenge is distinguishing the long dead from the merely dead, which inherently requires drawing a bright line. How dead is long dead to be?

Two concerns are paramount in establishing such a timeframe. First, the time elapsed between the cutoff and the present should be long enough so that it is reasonable to believe that no living human beings have vested, firsthand emotional interest in the deceased. As personal knowledge of an individual is likely to raise substantially one's knowledge of both that person's wishes and his or her worldview, and to create personal trauma if that person's wishes are overridden, a cutoff should ensure that a full human lifetime elapses between the death and the present. Second, the time elapsed should be no longer than necessary to meet the first criteria, as each additional year not only limits scientific discovery but, through wear and tear on the remains, may actually render some information unknowable. Achieving a balance between these competing goals should be the determining factor in defining the time frame. English common law strove to apply a similar framework in its famed rule against perpetuities, an inheritance law principle for real property that balanced the value of honoring the wishes of the deceased against the harm of tying up valuable assets indefinitely.

The proposal of this article is that informed consent should automatically be required by researchers conducting research on remains of bodies less than one hundred years old and that this cutoff date should advance annually, at least for another forty years. In contrast, for remains greater than one hundred years old, research should be allowed without overt consent unless one of the stringent criteria for withholding permission outlined in the following is met. Needless to say, death + 100 years is an arbitrary cutoff—and not one to which the author of this essay is wedded. Yet a century seems to be a long enough period of time to remove the personal and emotional edge from information likely to be garnered from such research. Because the purpose of the rules proposed by this article is to

grapple with the problem created by those who could not have consented to future research, because the very idea of informed consent was culturally alien, this definition of long dead should not apply to those currently living, even when they have been dead for one hundred years, or to those who are born after these standards are adopted.

These guidelines are designed to apply to past cases but should not be carried forward into the future—probably beyond the post–World War II era, although the exact time frame for a cutoff is a matter best left for another essay. In other words, one hundred years from now, one should not presume consent of those now living, as the means exist for contemporary individuals both to understand the concept of informed consent and to voluntarily agree to such investigation in the future. Such a per se limitation should adequately address most of the concerns of living nonstakeholders. At the same time, a mechanism ought to be developed to allow currently living and future human beings to consent to such research on a mass scale, if they so choose, to ensure that their wishes are known by successive generations of researchers. Again, how that consent ought to be obtained—whether through an opt-in or opt-out system, through the democratic process, through individualized assessments by private physicians, or through the completion of an advance directive—is a complex and challenging question best explored elsewhere.

Once one establishes a juncture at which research without overt consent will be authorized, exceptions to that principle need to be outlined. This essay proposes four such exceptions in cases in which (1) the wishes of the decedent were clearly expressed; (2) relatives can demonstrate material harm from the research, such as the unmasking of genetic risks; (3) cultural stakeholders or living nonstakeholders can demonstrate a specific, *tangible* harm caused by such research greater than mere offense that is unique to their subgroup; or (4) the public welfare might be severely threatened by the research and so the general populace should have a democratic say in whether it takes place. Exceptions three and four are likely to be met only under extraordinary circumstances.

This essay explicitly rejects a cost-benefit analysis or similar case-by-case assessment (such as that proposed by Rühli and Kauffman), which would compare the damage to be done to the remains and the stakeholders against the value of the knowledge to be acquired, as such an approach would be so subjective as to undermine the purpose of guidelines. The problem with such an approach is that it demands a comparison of harms and benefits that cannot be meaningfully compared. In a few rare cases, such as research that may lead to a better understanding of the spread of disease or the prevention of toxic exposures, the benefits of research on the long dead may be so obvious as to trump almost any competing claim in a cost-benefit analysis. However, most benefits gained from such research will involve expanding the scope of human knowledge. To some, this is a paramount value. To others, no amount of historical knowledge, obtained only to satisfy intellectual curiosity, will ever trump any damage done to remains or any objection by stakeholders. Furthermore, the importance of research is often only clear after it has been conducted—and knowledge obtained to answer one set of questions may prove highly valuable when applied to another. Although it is certainly true that some cultures hold the welfare of cadavers to be an essential value, many others—including our own—place significant moral value on expanding the parameters of our knowledge and explaining our history and origins. The purpose of this essay is not to compromise between those approaches, if such a compromise were even possible,

which it may not ever be, but rather to embrace the latter viewpoint and to propose a system for implementing ethical guidelines that reflect the contemporary, Western value system, namely one that favors both individual autonomy and scientific research.

Four Paradigmatic Cases

The final question to be explored is how these guidelines would apply to actual cases of surviving remains. Analyzing four recent controversies through the lens of the guidelines should offer some clarity. At the same time, this analysis is designed not to explore each of these complex controversies fully, but only to demonstrate how the specific criteria established in the second section of this essay would apply.

Kennewick Man

“Kennewick Man” is the name applied to a set of human remains found in Kennewick, Washington, in 1996 and believed to be 9,300 years old (via radiocarbon dating).³⁰ Anthropologist Robson Bonnichsen sought to conduct tests on the remains, but the Umatilla tribe asserted ownership of the skeleton, whom they called “the Ancient One,” under the Native American Graves and Repatriation Act (NAGRA) of 1990. The Umatilla claimed, in the words of leader Armand Minthorn, that their “religious beliefs, culture, and . . . adopted policies and procedures [required] that this individual must be re-buried as soon as possible.” Once a body goes into the ground, wrote Minthorn, “Our elders have taught us that . . . it is meant to stay there until the end of time.”³¹ As part of their lawsuit to reclaim the remains, which they eventually lost, the Umatilla even opposed the DNA testing that might determine whether or not the living tribe had any biological or genetic connection to the remains.³²

A traditional analysis of this case—as required by NAGRA—places undue emphasis on the question of whether or not Kennewick Man was in fact a forebear of the Umatilla people. Under our analysis, this concern is secondary. Because carbon dating places the remains beyond the life + 100 years threshold, our question is whether or not a compelling reason exists to overrule our default rule of permitting such research. The wishes of Kennewick Man cannot be credibly discerned. Even if he were a relative of the Umatilla, we have limited knowledge of the beliefs of Umatilla ninety centuries ago and even less knowledge of the particular range of views of different tribesmen or how they might translate into today’s world. Research on the remains is unlikely to unmask genetic data about living Umatilla. In short, the entire argument against research rests in the tribe’s alleged cultural stake in the remains—but it is neither clear that the subject shared those cultural views nor intuitive that the cultural preferences of a minority should trump the majority’s desire for increased knowledge. Under the guidelines outlined in the second section, such research should be permitted.

Tutankhamen

The remains of Tutankhamen (1341 BC–1323 BC), the “boy pharaoh” of the Eighteenth Dynasty, spurred much of the initial debate surrounding research on

mummies and other long-dead remains. At the same time, his case offers a paradigmatic example of how “the moral dilemma of mummy research”—as Rühli and Kauffman describe it—is not really much of a moral dilemma at all.³³ Tutankhamen’s wishes are unknown. As much as our knowledge of Egyptian theology suggests that he might not want his remains disturbed, his choice to be mummified might imply the theoretical knowledge that his remains could be used by future generations. Moreover, if confronted with contemporary ideas about life and death, Tutankhamen might reconsider his beliefs entirely. The familial stakeholders no longer exist—or, if they do, their identities are unknown and likely lost forever. It is inconceivable that a descendant of the pharaohs will suffer either material or emotional harm if her forebears are used for pathological or genetic study. Cultural stakeholders have a similarly weak claim. In the first place, there is a decidedly limited cultural connection between the pharaohs of the New Kingdom and the Arab-Islamic culture of present-day Egypt; to the degree that it does exist, it is as much a modern construct of geographic fate and tourism boards as it is a direct cultural lineage. Present-day Egyptians are relatively unconvincing cultural stakeholders for Tutankhamen. In addition, the policy of the Egyptian authorities has generally been to encourage such research, thus rendering the point moot. The general public also has nothing discernable to fear from knowledge gained by such studies. As much as Tutankhamen has generated the debate, he is among the cadavers least in need of protection on privacy grounds.

Christina of Sweden

Queen Christina Alexandra of Sweden (1626–89) was one of the dominant monarchs of Europe during the seventeenth century. She was also highly peculiar for a female leader in that she wore the clothing of a man and disdained “all the things that females talked about and did.”³⁴ In her own autobiography, Christina wrote that her gender was in question at the time of her birth. As a result of these suspicions, which endured into the twentieth century, physical anthropologist Carl-Herman Hjortsjö exhumed the queen’s remains in 1965 to attempt to determine her sex and to seek clues of intersexuality.³⁵ The results proved inconclusive—although additional testing today with modern techniques might reveal more information.³⁶

A traditional approach to assessing the ethics of Hjortsjö’s efforts would emphasize the privacy rights of the subject and might compare these concerns with the limited value of the knowledge to be obtained. In contrast, a standard that does not require overt consent, as proposed in this essay, demands a compelling reason for *not* permitting such research. Had Sweden only allowed male inheritance of the throne, this case might have called for the invocation of the public welfare exception outlined previously—as Christina would not have been the legitimate heir in 1632. Moreover, if Christina had given birth to a son who later assumed the head of state, a compelling argument might be made that such a revelation of mistaken or concealed gender could undermine much of contemporary Swedish law, which would in turn justify a public referendum on such research. However, Swedish tradition *did* allow for female monarchs—sparing us such a debate. In addition, Christina eventually abdicated in favor of her cousin, Gustavus Adolphus, and she is not the progenitor of the present-day Swedish royal family. In the absence of materially concerned progeny, it is doubtful that any social

or ethical purpose would be served by preventing additional research on her remains.

Abraham Lincoln

A more contemporary case involves the bloodstained pillowcase on which United States president Abraham Lincoln died on April 15, 1865.³⁷ California cardiologist John G. Sotos, an expert on presidential health, has cataloged a number of well-documented symptoms in order to make a case that Lincoln, at the time of his assassination, suffered from a terminal cancer derived from a genetic ailment known as multiple endocrine neoplasia type 2B (MEN-2B).³⁸ The revelation that Lincoln suffered from MEN-2B has significant historical implications. If Lincoln sensed he was dying, this might explain his conduct of the war and his plans for postwar reconstruction.³⁹ Yet the pillowcase is currently held by the Republic Civil War Museum and Library in northeast Philadelphia, and its president, Eric Schmincke, has opposed such testing on the grounds that it would violate Lincoln's privacy.⁴⁰ No living direct descendants of Lincoln remain.

President Lincoln has been dead for 145 years, so he just qualifies under our death + 100 years criteria. If he had living descendants, even four or five generations removed, then a strong argument could be made that they should have a say in the testing, as the results might implicate their own health and genetic risks. Nothing, of course, is known about Lincoln's preferences as to whether he would want such information to be made public. In fact, his case emphasizes the futility of efforts to unravel such wishes. Would Lincoln, an intensely private man, wish to keep such information from the public? Or would Lincoln, who often defied public opinion, care little if his medical condition were exposed? Or would Lincoln, as an advocate of human dignity, withhold such data in deference to the privacy rights of living nonstakeholders? Or would Lincoln, a "man of the ages" and a student of history, desire that all efforts be expended to expand collective knowledge? No army of philosopher-pathologists could ever enumerate all of the possible hypothetical interests of the deceased president. Although it is obviously true that Lincoln's privacy would be compromised if his disease state were to be determined, it is not at all clear how this would serve or undermine either his wishes or his interests.

Conclusions

Research on the long dead—with a few notable exceptions, such as the handling of Native American remains under NAGRA—largely occurs unchecked by any limits other than the ethical principles of individual researchers. Despite numerous international conventions that implicitly might limit such research, no serious efforts have been made to curtail research on the remotely dead in the name of privacy. That is, as a general matter, a cause for celebration. Rühli and Kauffman advocate an approach that weights various "relevant decision-making criteria" to determine whether or not particular research should be conducted.⁴¹ In contrast, this essay argues that, in most cases, research on the remotely dead implicates few, if any, of the privacy concerns that might apply to the living or recently deceased. Although gratuitously desecrating the remains of the long dead might strike us as unpalatable, that does not necessarily mean that the long dead

possess privacy rights that need to be protected. Rather than a subjective, cost-benefit-analysis approach to such research, a set of criteria should be established for when the need for informed consent expires. This essay proposes one such possible criterion (death + 100 years). Whether this criterion, or another, is ultimately adopted, clarity in this field would certainly be helpful to researchers. Examining the tissue of Egyptian pharaohs or nineteenth-century presidents is different in kind from research on contemporary subjects, and it requires a distinct set of rules.

Notes

1. A Declaration of Helsinki—Ethical Principles for Medical Research Involving Human Subjects (June 1964); available at <http://www.wma.net/en/30publications/10policies/b3/index.html> (last accessed 1 Oct 2010).
2. Nuremberg Code of 1946, Directives for Human Experimentation; available at <http://ohsr.od.nih.gov/guidelines/nuremberg.html> (last accessed 1 Oct 2010).
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