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**Computer Law
&
Security Review**

What post-mortem privacy may teach us about privacy[☆]



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ABSTRACT

This paper approaches the debate about the protection of digital legacies through a medical confidentiality lens, capitalising on its outlier status in common law jurisdictions as a privacy-type duty that survives the death of the rightsholder. The discussion takes the case law in England and Wales and by the European Court of Human Rights on post-mortem medical confidentiality as a springboard for interrogating how these judgments navigate the traditional objections to post-mortem privacy. Whilst the legal duty of medical confidentiality, drawing on the professional duty of the Hippocratic Oath, acts in the first place as a trust mechanism between doctor and patient based on a reciprocity of interests, its incidental effect of protecting not just the rightsholder but also duty bearers and the industry, signals more complex operational dynamics. The post-mortem continuation of that duty in turn brings these other relationships to the surface. Indeed, the post-mortemness amplifies that confidentiality – and by extension information privacy – can rarely be located in an isolated, singular binary relationship between a duty bearer and a rightsholder but is entangled in the great messy sociality of life that involves multiple overlapping, interdependent relationships of relative trust. These may upon the death of the primary rightsholder – make an appearance as concurrent or competing claims on her legacies and incidentally also carry her post-mortem privacy.

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1. Introduction

The persistence of data and information in global online networks has tested the functional and temporal boundaries of privacy protection. Such persistence can have dire personal

and professional consequences for individuals if unfavourable personal information enters the online domain. Digital memory lacks the 'natural' forgetfulness of humans as a protective mechanism upon which privacy law has previously relied. Some relief is now provided in the EU through the right-to-be-forgotten under the General Data Protection Regulation

[☆] University of Southampton. Many thanks to Remigius Nwabueze and the anonymous referees for their helpful comments on an earlier draft.

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<https://doi.org/10.1016/j.clsr.2022.105737>

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[GDPR]¹ which allows individuals to request data controllers such as search engines to ‘forget’ outdated or inaccurate personal information in the results produced in response to name searches, and thereby gives them some control over their personal narratives in the public domain.² Yet, the problematic of informational persistence also continues after death precisely because personal data and information remains unaltered in situ, and the rightsholder is no longer there to give directions. Whilst the issue of personal legacies is not inherently new, digital remains exceed, in depth and breadth, the amount and sensitivity of previous analogue records. This has led to renewed discussions of the merits, or otherwise, of post-mortem privacy protection.³ Such post-mortem privacy would address itself, in the first place, to ‘digital legacies’ or ‘digital remains’ – such as email histories,⁴ social media accounts,⁵ documents and files, search histories, personal DNA or health profiles and digital footprints more generally. Post-mortem privacy has also been called upon by relatives to prevent public access to death scene images, against the threat of potentially large online circulations.⁶ Furthermore, personal big data has created entirely new post-mortem possibilities with privacy implications. For example, deepfakes, that is AI-generated impersonations based on existing personal digital footage, can bring the deceased ‘back to life’, with both innocuous and abusive potentials which once more fall within the possible ambit of privacy protection.⁷ Copyright and other intellectual prop-

erty rights which serve economic interests, outlast the death of the rightsholder, but should privacy underwritten by dignity concerns also remain intact post-mortem and, if so, how long and guarded by whom?

In some civil law jurisdictions, such as Germany, personality rights do not automatically expire upon death,⁸ which gives those jurisdictions a solid foundation for navigating the raised stakes of personal digital remains. Meanwhile common law countries are especially ill-equipped to deal with the new phenomenon, given the absence of a developed personality rights jurisprudence and their adherence (but for some statutory interventions) to the long-standing maxim *actio personalis moritur cum persona*, that is personal, as opposed to proprietary, actions die with the person.⁹ This maxim which goes, at least, as far back as *Hambly v Trott* (1776)¹⁰ is based on the idea that ‘personal rights’ are by their very design attached to the person and thus not transferrable. By implication, any post-mortem recovery would be ‘in the nature of a penalty rather than compensatory.’¹¹ The maxim captures injuries to intangible interests of personality, of which privacy is an example *par excellence*: ‘[i]t is well settled that the right to privacy is purely a personal one; it cannot be asserted by anyone other than the person whose privacy has been invaded.’¹²

This paper examines the call for post-mortem privacy in respect of digital legacies by mapping one of the few contexts where even common law jurisdictions have recognised the possibility of privacy surviving the death of the rightsholder, that is in respect of medical confidences.¹³ Whilst its almost unique status may suggest an outlier case the rationale of which is not transferrable to other subject-matters,¹⁴ the argument here is that the animating forces behind post-mortem medical confidentiality are instructive about post-mortem privacy generally. Thus the microcosm of medical confidentiality delivers an opportunity for interrogating why and how the law recognises post-mortem medical privacy de-

¹ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data.

² *Google Spain SL and Google Inc v Agencia Española de Protección de Datos (AEPD) and Mario Costeja González* C-131/12 (CJEU, GC, 13 May 2014) EU:C:2014:317, interpreting the Data Protection Directive 95/46/EC, now Art 17 of the GDPR. NNG de Andrade, ‘Oblivion: the right to be different ... from oneself: re-proposing the right to be forgotten’ in Alessia Ghezzi, Ângela Guimarães Pereira, Lucia Vesnic-Alujevic L (eds) *The Ethics of Memory in a Digital Age – Interrogating the Right to Be Forgotten* (New York: Palgrave Macmillan, 2014) 65. For some limited US authority to the same effect, see e.g. *Briscoe v Reader’s Digest Association* 4 Cal 3d 532 (1971) concerning a newspaper revelation of the claimant’s criminal past which had the effect of alienating his daughter and friends from him.

³ Jason Mazzone, ‘Facebook’s Afterlife’ (2012) 90 *North Carolina Law Review* 1643; Lilian Edwards, Edina Harbinja, ‘Protecting Post-Mortem Privacy: Reconsidering the Privacy Interests of the Deceased in a Digital World’ (2013) 32 (1) *Cardozo Arts & Entertainment Law Journal* 101; Natalie M Banta, ‘Death and Privacy in the Digital Age’ (2016) 94 *North Carolina Law Review* 927; Floris Tomasini, *Remembering and Disremembering the Dead* (Palgrave, 2017) esp Ch3.

⁴ *Estate of Maria Cecilia Quadri v Parisi* (2021) WL 3544783 (Fla Cir Ct); see also *Ajemian v Yahoo! Inc* 84 NE3d 766 (Mass 2017).

⁵ *Digital Inheritance III* ZR 183/17 (12 July 2018) BGH.

⁶ In *National Archives and Records Administration v Favish* 541 US 157 (2004) the US Supreme Court allowed the family’s privacy claim in respect of death scene images of the deceased as an exemption to freedom of information requests (here made by journalists): ‘The well-established cultural tradition of acknowledging a family’s control over the body and the deceased’s death images has long been recognized at common law.’

⁷ Marisa McVey, ‘Deepfakes and the Dead: The Case of Anthony Bourdain’ (10 August 2021) *Modern Technologies, Privacy Law and the Dead* <https://thefutureofprivacylaw.wordpress.com/2021/08/10/deepfakes-and-the-dead-the-case-of-anthony-bourdain/>

⁸ *Mephisto* 30/173 (24 February 1971) BVergG; *Marlene Dietrich* 1 ZR 49/97 (1 December 1999) BGH; *Wilhelm Kaisen* 1 BvR 932/94 (5 April 20012) BVerfG; see also § 189 of the German Criminal Code (offence of defiling the memory of the dead).

⁹ Note, for example, Recital 27 of the GDPR which provides that ‘This Regulation does not apply to the personal data of deceased persons. Member States may provide for rules regarding the processing of personal data of deceased persons.’ In the UK data protection is limited to living individuals: s.3(2) of the Data Protection Act 2018.

¹⁰ *Hambly v Trott* (1776) 1 Cowper 371 (where the court acknowledged the limited application of the maxim to torts); but the Common Law Procedure Act 1833, replaced by the Law Reform (Miscellaneous Provisions) Act 1934 allowed for the deceased’s estate to recover some losses that arose before their death.

¹¹ Alvin E Evans, ‘Survival of Claims For and Against Executors and Administrator’ (1931) 19 *Kentucky Law Journal* 195, 206.

¹² *James v Screen Gems Inc* (1959) 174 CalApp 2d 650, 653; *Hendrickson v California Newspapers Inc* (1975) 48 CalApp 3d 59, 62.

¹³ For the related problematic of data donations, see Edina Harbinja, ‘Posthumous Medical Data Donation: The Case for a Legal Framework’ in Jenny Krutzinna, Luciano Floridi (eds), *The Ethics of Medical Data Donation* (Cham: Springer, 2019) 137.

¹⁴ Solicitor-client privilege is an analogous professional exception: for the UK, see Solicitors Regulation Authority, *Code of Conduct* (s.6.3) and *Guidance - Confidentiality of client information* (5 April 2022); for the US, see *Swidler & Berlin v United States* 524 US 399 (1998).

spite the standard reasoning for rejecting it. How does it deal with the argument that in the absence of a subject there is no victim and thus no possibility of any wrongdoing? After all a duty must be 'owed to someone, and... once that person has died, there is no one capable of enforcing it.'¹⁵ Practically and theoretically privacy must come to an end on death:

"The rationale for the rule, good or bad, is plain: The dead do not experience privacy, or its deprivation, at least in the same sense that the living do. More elegantly put, "The Creator has made the earth for the living, not the dead. Rights and powers can only belong to persons, not to things, not to mere matter, unendowed with will." Letter from Thomas Jefferson to Major John Cartwright, (June 5, 1824)¹⁶

Also, as privacy is inextricably linked with the subjectivities of the rightsholder, deliberating on a post-mortem privacy breach would appear to require second-guessing the wishes and sensibilities of the deceased. Meanwhile, any offence caused to the family of the deceased appears derivative and may or may not be allowed as a claim in its own right, as distinct from the right of the deceased.¹⁷ Finally, given that privacy is invariably asserted against competing rights, the death of the rightsholder cannot but also affect the continued legitimacy of the balance struck ante-mortem. So how does the duty of medical confidentiality navigate these arguments to the effect of allowing post-mortem protection?

The outlier status of post-mortem medical confidentiality also delivers a stress test for the general conception of privacy which tends to be constructed not just as a personal right, such as a contractual right, but as a 'hyper-personal' one,¹⁸ that is one asserted *against* the community: 'the right not to participate in the collective life – the right to shut out the community.'¹⁹ Whilst rights such as freedom of expression, assembly or religion have obvious collective or public dimensions closely linked with the exercise of the individual right, privacy appears to be profoundly anti-social - and not just in terms of allowing the individual to withdraw from the community, but also by locating its core objective in self-sovereignty or self-authorship.²⁰ Privacy seems to be, in its very essence, about the individual and, moreover, the living individual- giving them an instrument to allow them to flourish by delineating the boundaries of private-public spaces.²¹

¹⁵ *Bluck v The Information Commissioner and Epsom and St Helier University NHS Trust* (2007) 98 BMLR 1, para 17.

¹⁶ *Estate of Maria Cecilia Quadri v Parisi* (2021) WL 3544783 (Fla.Cir.Ct.) 3, citing Thomas Jefferson, *Writings* (Merrill D. Peterson ed, 1984) 1490, 1493.

¹⁷ For example, under s. 1 of Fatal Accident Act 1976 dependants of the deceased may sue in their own right to recover for their losses caused by the death due the wrongful act.

¹⁸ In German 'höchst persönlich'.

¹⁹ Thomas I Emerson, *The System of Freedom of Expression* (1970) 545, 549 [emphasis added], critiqued in Daniel J Solove, 'The meaning and value of privacy' in Beate Roessler, Dorota Mkrosinska (eds), *Social Dimensions of Privacy* (Cambridge: CUP, 2015) 71; see also Helen Nissenbaum, *Privacy in Context* (Stanford: Stanford University Press, 2010) esp Chapter 4; Prescilla Regan, *Legislating Privacy* (University of North Carolina Press, 1995).

²⁰ Nissenbaum *ibid* 81ff.

²¹ This boundary is especially relevant to the Anglo-American conception of privacy which locates privacy principally in the home and does not recognise privacy claims in public: James Q

David Feldman observed in the context of Art 8 of the European Convention of Human Rights [ECHR]: '[privacy is about] doing and living, not about maintaining dignity for its own sake.'²² This then means that post-mortem privacy appears *prima facie* bereft of its main and only protagonist, the living individual, with no residual purpose to discharge; and yet, the duty of medical confidentiality survives the death of its main protagonist.

This paper approaches the thematic through two complementary perspectives. First, it locates the post-mortem duty of medical confidentiality in the professional duty, as enshrined in the Hippocratic Oath, and its relatively recent elevation to a legal obligation in the jurisprudence of England and Wales and the European Court of Human Rights. The provenance of that legal duty in the Oath, as an original site of information privacy, reveals its primary role as a trust mechanism between doctor and patient based on a reciprocity of interests. Yet, it is its role as an institutional kitemark and its secondary protective cloak of duty bearers that signals more multi-layered operational dynamics. The post-mortem continuation of the duty in turn brings these other interests and relationships to the surface. *Second*, the paper argues that medical confidentiality is the poster child of information privacy, whether constructed as a quasi-proprietary right or shield for 'embodied vulnerability'. Whilst either conception betrays privacy's orientation towards the living, the post-mortem survival of medical privacy reveals its location in interlocking relationships of mutual dependencies and attendant harm potentials. The post-mortemness amplifies that information privacy can rarely be located in an isolated, singular binary relationship between a duty bearer and a rightsholder but is entangled in the great messy sociality of life. The multiple overlapping, interdependent or conflicting relationships of relative trust may - upon the death of the primary rightsholder - make an appearance as competing or concurrent claims on her legacies and incidentally and reflexively 'carry' her post-mortem privacy. How these claims are ultimately resolved speaks to the cultural and socio-economic understanding of a society of itself, and the relative weight it attaches to familial, social and economic units. It also goes to show that privacy is after all deeply social.

2. Post-mortem medical confidentiality - an industry standard

2.1. From a professional post-mortem duty of medical confidence to a legal one

It is somewhat surprising that the first cited case to engage with post-mortem medical confidentiality in England and Wales is as recent as 1996. In *Re C (Adult Patient: publicity)*²³

Whitman, 'The Two Western Cultures of Privacy: Dignity Versus Liberty' (2004) 113 *Yale Law Journal* 1151.

²² David Feldman, *Civil Liberties and Human Rights in England and Wales* (2nd edn, Oxford: OUP, 2002) 524.

²³ *Re C (Adult Patient: publicity)* [1996] 2 FLR 251. For earlier ambiguous contrary authority, see *Prince Albert v Strange* (1849) 1 H & T 1, 25, where the Lord Chancellor referred to *Wyatt v Wilson* (1820, Un-

Sir Stephen Brown had to decide whether an order restricting publicity about a young man in a permanent vegetative state should continue after his death following an order that authorised the discontinuation of all life-sustaining treatment. The purpose of the order restricting publicity before his death was to protect the patient, his relatives and hospital staff and that purpose, so he held, endured:

'I have already referred to the potential effect on *medical and other staff*, knowing that on the death of the patient their anonymity would be lost and that that might well have some detrimental effect upon the way in which they might care for the patient. I believe that that consideration also applies to the *parents and members of the family* of the patient... I am also satisfied that there is a principle of medical confidentiality which is relevant in the context of the facts of this case and similar cases. It is a further matter of public interest that those who... [seek continued confidentiality] should be untrammelled by the fear of publicity in coming to the very sensitive and fundamental decision which it involves.'²⁴

This reasoning, firstly, identifies the pre-mortem significance of the post-mortem duty,²⁵ and thereby acknowledges the forward-looking effect of legal obligations as guiding behaviour rather than just retrospectively compensating for wrongdoing. Second, Justice Brown recognises that confidentiality is also protective of medical and care staff and the family, and so opens up the group of beneficiaries beyond the patient. Indeed, he does not specifically mention the deceased.²⁶ Third, whilst medical confidentiality is treated as only one factor that went towards the post-mortem publicity order, the other factors spell out the consequences, were confidentiality to be lost. Stressing medical confidentiality as a separate point highlighted its distinct professional status²⁷ and the endurance of that professional duty beyond the death of the patient: 'General Medical Council's 'Blue Book'... states that... a patient's death does not of itself release a doctor from the obligation to maintain confidentiality.'²⁸ In effect the judgment

elevated the *professional* post-mortem duty of medical confidentiality to a legal one – one might say as a matter of bottom-up law making. Later cases have sought to find common law precedent for this post-mortem duty in the equitable duty of confidentiality based on Toulson and Phipps' *Confidentiality*²⁹ and their reliance on *Morison v Moat* (1851).³⁰ Yet, that case would at best provide 'light' support for the duty of medical confidentiality as it centred around the commercial exploitation of a secret recipe which the deceased business partner had unlawfully disclosed to his son and as such came much closer to a proprietary interest, a trade secret, as a type of intellectual property,³¹ with *mutual* obligations of confidentiality. Thus it would be more accurate to view the post-mortem legal duty of medical confidentiality as a judicial innovation based on the long-standing professional duty.

Again in 1996, post-mortem medical confidentiality became a legal controversy in France but was ultimately resolved before the ECtHR.³² Here it concerned the release of a book, *Le Grand Secret*, about President Francois Mitterrand shortly after his death. The book detailed medical confidences about Mitterrand by his private physician Dr Gubler and in particular his cancer diagnosis in 1981 a few months after he was elected President of France. In civil proceedings for a breach of medical confidentiality, for an invasion of Mitterrand's privacy and for injury to his relatives' feelings, the Paris Tribunal de Grande Instance granted an interim injunction on the basis that the book was a 'blatant abuse of freedom of expression.'³³ In the subsequent main proceedings, the Court of Appeal disallowed Mitterrand's *privacy* claim as 'the possibility for anyone to prohibit any form of disclosure about [their private life] is only open to the living,'³⁴ but allowed a civil claim for breach of the duty of medical confidentiality (based on an offence under Art 226-13 of the French Criminal Code) and banned the distribution of the book indefinitely:

'[medical confidentiality is] not only in the public interest but also in the interests of private individuals, in order to guarantee the security of the confidential information which they are required to entrust to certain persons on account of their status and profession. The duty... is *founded on the relationship of trust* essential to the provision of medical treatment, whereby patients are assured that anything they tell their doctor or cause him to see, hear or understand, as a person in whom such information must be confided, will not be disclosed by him.'³⁵

rep) in which Lord Eldon appeared to have assumed that the duty of medical confidentiality ceased upon death: 'If one of the late King's physicians had kept a diary of what he had heard or seen, the court would not in the King's lifetime, have permitted him to print or publish it.'

²⁴ Re C *ibid* 256 [emphasis added].

²⁵ As identified by a number of commentators: JC Buitelaar, 'Post-mortem privacy and informational self-determination' (2017) 19 *Ethics Informational Technology* 129, 131ff; Joel Feinberg, *Harm to others* (New York: OUP, 1984) 93 ('the subject of harm in death is the living person ante-mortem, whose interests are squelched.')

²⁶ However, he arguably analogised the case before him to Re C (A Minor) (*Wardship: Medical Treatment*) (No 2) [1990] 1 FLR 263 concerning disclosures of a seriously and irreversibly brain-damaged child who would never experience the harm of privacy intrusive publicity.

²⁷ Note that s.3(1)(f) of the Access to Health Records Act 1990 appears to assume the existence of the post-mortem duty of medical confidentiality as it allows only a limited number of persons ('personal representative and any person who may have a claim arising out of the patient's death') access to those records.

²⁸ Re C above n 23, 254. See also World Medical Association, *Declaration of Geneva* (1948) *inter alia*: 'I will respect the secrets which are confided in me, even after the patient has died'; or Art 9 of the GDPR, in particular Art 9(3) on 'obligations of professional secrecy'.

²⁹ RG Toulson, CM Phipps, *Confidentiality* (2nd edn, Sweet & Maxwell, 2006) para 11-053, cited in *Bluck* above n 15, para 18.

³⁰ *Morison v Moat* (1851) 9 Hare 241.

³¹ *Bluck* above n 15, para 18, 24, where court nonetheless based its decision on the post-mortem equitable duty of confidentiality (para 21).

³² *Plon (Société) v France* 58148/00 [2004] ECHR 200 [hereafter *Plon (Société)*]

³³ Judgment of Tribunal de Grande Instance (18 January 1996) and the Court of Appeal's judgment (13 March 1996) discussed in *Plon (Société)* *ibid*, para 9.

³⁴ *SA Editions Plon v Mitterrand* (27 May 1997) Paris Court of Appeal discussed in *Plon (Société)* above n 32, para 15.

³⁵ *SA Editions Plon v Mitterrand* (27 May 1997) *Ibid* [emphasis added]; the permanent ban was upheld in *SA Editions Plon v Mitterrand* (14

The rights corresponding to the duty were inherited by Mitterrand's relatives.³⁶ So much like in *Re C*, medical confidentiality (here based on a professional Code backed by criminal law) occupied a status in its own right - albeit with a variation in so far as the French court explicitly distinguished post-mortem medical confidentiality from post-mortem privacy.³⁷ However, when the case came before the ECtHR in *Plon (Société) v France* (2004) as an alleged breach of Art 10, the Court framed the action in privacy terms: '[the ban of the book is] intended to protect the late President's honour, reputation and privacy, and... that these "rights of others" were passed on to his family on his death does not appear in any way unreasonable or arbitrary.'³⁸ Moreover, whilst holding that the permanent ban of the book was a disproportionate measure to pursue the legitimate aim of the rights of Mitterrand and his heirs, the ECtHR upheld the temporary ban and thus arguably allowed for post-mortem privacy claims, at least in the medical context.³⁹

Although neither of the two cases directly concerned digital legacies,⁴⁰ the fact that they both engaged with post-mortem medical confidence as a 'new' issue in the mid-1990s is hardly a coincidence. More likely, it testifies to a growing sensitivity to information privacy, and transparency as its counterpart, against a dramatic expansion in the collection of personal and other information.⁴¹ The enactment of the EU Data Protection Directive 1995⁴² and the Freedom of Information Act 2000 (UK)⁴³ speak to the same phenomenon. Applied to the medical context, it resulted in a tension between openness and confidentiality:

'One of the paradoxes faced by modern medicine and one of the reasons why the Hippocratic Oath has had to be qualified by so many other Codes and Declarations, is that modern medicine is built not on secrecy and rites of initiation, but on

exoteric scientific knowledge, on free publication and open access to the results of medical research.'⁴⁴

Still medical confidentiality has remained largely intact, albeit with numerous exceptions. Moreover, a steady flow of decisions in England and Wales have tentatively, but consistently, confirmed the existence of the post-mortem duty of medical confidentiality.⁴⁵ They have also positioned it within, rather than outside, related information privacy-transparency frameworks, such as the equitable duty of confidence, the right to privacy and data protection law as well as freedom of information - all with very different provenances.

Not atypically, in *Bluck v Information Commissioner and Epsom and St Helier University NHS Trust* (2007)⁴⁶ a mother's freedom-of-information request to access the health records of her deceased daughter (without the consent of the daughter's widower as next of kin) for the purpose of reviewing the hospital's admitted negligence was - according to the Tribunal - validly refused.⁴⁷ Such access would violate medical confidentiality and as such fell within the exception in s.41 of the Freedom of Information Act 2000 covering 'obligations of confidence'. The Tribunal seamlessly absorbed the duty of medical confidentiality within the law on confidence and also within the right to privacy under Art 8.⁴⁸ Whilst it acknowledged the 'dogmatic' older authorities according to which confidences of personal, rather than proprietary or quasi-proprietary, character do not vest in the deceased's estate, it found them 'overruled, at least in relation to medical records, by the more recent cases [*Plon (Société) v France*] on private information.'⁴⁹ In *Bluck* the post-mortem duty served, on the one hand, as an ordering device to adjudicate between the competing entangled stakes of the widower as deceased's next of kin (the nearest family), the mother (the public/the family) and the hospital (the duty bearer). On the other hand, the post-mortem duty also emerged as peculiarly protective of the duty bearer, here the hospital. With the rightsholder deceased, the persistence of the duty means that the confidential information potentially becomes locked up with the duty bearer, which is all the more problematic where the duty bearer, as in *Bluck*, is implicated in the death of the rightsholder. The moral hazard

December 1999) Cour de Cassation, cited in *Plon (Société)* above n 32, para 16.

³⁶ *Ibid*, although note *Plon (Société)* above n 32, para 29, where the cause of action accrued before Mitterrand's death in 1995 when the decision to publish was taken. Similarly, under Law Reform (Miscellaneous Provisions) Act 1934, enforcement of a right after death requires that the cause of action existed at the time of death.

³⁷ But note *Plon (Société)* above n 32, para 16, referred to SA Editions *Plon v Mitterrand* (14 December 1999) Cour de Cassation) where the Court observed that the facts 'could also constitute interference with the right to respect for private life.'

³⁸ *Plon (Société)* above n 32, para 34.

³⁹ *Plon (Société)* above n 32, para 48, 53-55; the ECtHR also stressed that the temporary ban allowed the urgent-application judge to forestall the 'delicate issue' of post-mortem privacy rights until the main trial (para 47).

⁴⁰ In *Plon (Société)* above n 32, para 40 and 53, on the confidential nature of the book and the proportionality of the ban, considering that the book had already been published online.

⁴¹ For a systematic overview of the numerous data collections systems and practices in place, see Nissenbaum above n 19, Chapters 1-2.

⁴² Data Protection Directive 95/46/EC; for the regulated disclosure of patient information in the UK see: s.3(1) of the Access to Medical Reports Act 1988; s.251 of the NHS Act 2006; and The Health Service (Control of Patient Information) Regulations 2002.

⁴³ Freedom of Information Act 2000, s.41 and 42 for the confidentiality exceptions.

⁴⁴ Ian E Thompson, 'The nature of confidentiality' (1979) 5 *Journal of Medical Ethics* 57, 57.

⁴⁵ *Lewis v Secretary of State for Health & Anor* [2008] EWHC 2196; *M v IC and Medicines and Health Products Regulatory Authority* [2010] GIA/3017/2010; *Webber v IC and Nottinghamshire Healthcare NHS Trust* [2012] FIA/4090/2012; *Re Meek* [2014] EWCOP 1; *The Press Association v Newcastle Upon Tyne Hospitals Foundation Trust* [2014] EWCOP 6; *V v Associated Newspapers Ltd & Ors* [2016] EWCOP 21.

⁴⁶ *Bluck* above n 15.

⁴⁷ *Bluck* above n 15, para 1: Five years after the daughter's death the mother 'discovered that the Hospital's treatment of her daughter had not been satisfactory, that it had admitted liability for her daughter's death and had reached a settlement with her widower, on behalf of himself and two children of the marriage, under which a substantial compensation payment had been made.'

⁴⁸ *Bluck* above n 15, para 11 [emphasis added].

⁴⁹ *Bluck* above n 15, para 24-28; this rather overstates the effect of *Plon (Société)* above n 32, para 29, where the cause of action vested in the deceased before death i.e. the book contract was signed before Mitterrand had died. Under Art 1382 of the French Civil Code actions vested in the victim whilst alive are, on death, transferred to the deceased's estate..

that arises from the duty transforming into an impenetrable shield of secrecy is addressed by transferring the confidences to the deceased's personal representative as their next best custodian.⁵⁰ Yet, whether such transfer of confidences should be read as an exception to a post-mortem duty or its instantiation is debatable and ultimately indeterminate.

2.2. An institutional trust mechanism or a cloak of secrecy?

Cases like *Re C* and *Bluck* signal a subtle but significant shift in the modern contextuality of the duty of medical confidentiality. It is not owed by the doctor by virtue of her intimate relationship with the patient, but it is in essence an apersonal institutional duty in respect of medical records accessible to a host of people within and outside an organisation. In the same vein, they are - or the institution is - bound by the confidentiality not on the back of a personal relationship with the confider, but because of the accepted standing of the record and its sensitive nature and purpose.⁵¹ Incidentally, this shift from a personal to an institutional setting of the duty also underscores that confidentiality, or privacy, is rarely about complete secrecy or non-disclosure (in which case protection would not be required) but generally about circumscribed disclosure.⁵² The limits of that disclosure vary and may encompass a single person, the doctor, although more commonly extend to a group, even a large one, of individuals within an institution or across institutions. The limits also vary in different jurisdictions; as one commentator observed: 'English law recognizes intermediate states between being completely private (known only to one person) and completely public (in the public domain). This is in sharp contrast to American privacy law, which has frequently tended to view the private and the public as binary opposites.'⁵³

This modern institutional setting within which the (post-mortem) duty of medical confidentiality finds itself and which flows from the heightened complexity and specialisation of contemporary society is not out of tune with the human rights framework; the principal target of this framework are also in-

stitutions and its principal object is to guard against abuses of entrusted power.⁵⁴ Meanwhile the traditional duty of medical confidentiality in Western practice with its roots in the 'Hippocratic tradition, the Christian concept of the confessional, and the 19th century philosophical and legal notions of individual autonomy'⁵⁵ had its normative focus on the individual practitioner and 'conceptualised the professional relationship between doctor and patient as strictly limited to the individuals concerned.'⁵⁶ Still, this individual focus occurred against a strong institutional background. The Hippocratic Oath which dates back to a body of writing including texts by Hippocrates himself (460 BC),⁵⁷ on the one hand, 'formed part of the system of Hippocratic medical deontology (an ethic that stresses duty, looking at the intrinsic rightness of an act or an intention rather than the consequences)⁵⁸ that was in medieval times brought under the moral authority of the Church and only during the Renaissance reconceived in secular humanist terms. Notably, on such deontological construction, the centre of gravity of the wrong lies in the undue disclosure by the duty bearer rather than in any harm suffered by the rightsholder. By foregrounding the *duty* rather than corresponding harm, the duty of medical confidentiality is not so obviously deprived of its key legal subject upon the death of the beneficiary.

On the other hand, the Oath was also concerned with kite-marking the medical profession as a credible trustworthy industry:

'[I]t helped to distinguish physicians from laymen and charlatans, because the former through their adherence to ethical conduct articulated in the Oath, saw themselves and were seen as learned and high-minded professionals rather than merely ignorant tradesmen or petty businessmen of questionable morality.'⁵⁹

The Oath carries its meaning and legitimacy through collective acceptance and strict adherence; and it is the Oath, as an institutional guarantee that generates trust rather than any personal relationship.

The kite-marking, or self-regulation, through the Oath allows for a two-sided deal to be struck between doctor and patient based on a reciprocity of interests. The physician, and more precisely the medical profession, has a collective interest in patients truthfully disclosing 'information that may be relevant to the diagnosis, to trust in the physician's professional ability and co-operate in observing the prescribed therapeutic regime.'⁶⁰ Patients have an interest in the physi-

⁵⁰ Access to Health Records Act 1990 (largely supplanted by the Freedom of Information Act 2000, albeit not for deceased persons.)

⁵¹ As reflected in causes of actions, such as the duty of confidentiality or data protection law.

⁵² See particularly those commentators who construct privacy as informational self-determination, that is as control over who has access to information about oneself, e.g. Alan Westin, *Privacy and Freedom* (New York: Atheneum Press, 1967); Charles Fried, 'Privacy' (1968) 77 *Yale Law Journal* 475.

⁵³ Daniel J Solove, Neil M Richards, 'Privacy's Other Path: Recovering the Law of Confidentiality' (2007) 96 *Georgetown Law Journal* 123, 186; Joel Feinberg, *The Moral s Limits of the Criminal Law, Vol 1: Harm to Others* (Oxford: OUP, 1984)54 ('My right to determine by my own choices what enters my public field of experience is one of the various things that meant by the "right to privacy". My personal space, however, diminishes to the vanishing point where I enter the public world.') For limited contrary US authority of 'privacy in pubic' e.g. *Briscoe v Reader's Digest Association* 4 Cal 3d 532, 534 (Cal 1971): 'The claim is not so much one of total secrecy as it is of the right to define one's circle of intimacy—to choose who shall see beneath the quotidian mask. Loss of control over which "face" one puts on may result in literal loss of self-identity.'

⁵⁴ Human rights are vested in individuals as an antidote to the power entrusted to the State to ensure internal and external security backed by a monopoly of legitimate violence.

⁵⁵ Danuta Mendelson, 'The Medical Duty of Confidentiality in the Hippocratic Tradition and Jewish Medical Ethics' (1998) 5 *Journal of Law and Medicine* 227,227; for the checkered history of the Oath, see also Thompson above n 44.

⁵⁶ Mendelson above n 55, 229.

⁵⁷ *ibid.*

⁵⁸ Mendelson above n 55, 228.

⁵⁹ Mendelson above n 55, 229.

⁶⁰ *ibid.* See also *Z v Finland* 22009/93 [1997] ECHR 10, para 95: 'Without such protection, those in need of medical assistance may be deterred from revealing such information of a personal and intimate nature as may be necessary in order to receive appropriate treatment and, even, from seeking such assistance, thereby en-

cian ‘utilis[ing] scientific knowledge and clinical skills in arriving at an accurate diagnosis and efficacious treatment’⁶¹ and guarding their confidences from disclosure which could cause embarrassment, stigma or incrimination. In that way, the professional duty acts as a trust mechanism for effective medical practice and treatment. Contrary to the reasoning of the ECtHR in *Plon (Société)* the duty of confidentiality is not founded on an *a priori* relationship of trust but allows for that trust relationship to be created. Trust is the outcome, not the foundation.⁶² On a sharper reading, however, the Oath’s ‘obligations of secrecy were as much concerned with protecting trade secrets and maintaining control over initiatives as they were concerned with the patient’s interests.’⁶³ Such construction makes reliance on trade secret cases like *Morison v Moat* (1851) as precedents for the post-mortem duty not so outlandish after all, and usefully underlines the double-edged nature of confidentiality and its potentially protective effect on duty bearers.⁶⁴ So if the duty is understood not as merely owed to the confiding patient but also to serve as an industry kitemark and potentially for protecting duty bearers, the death of the primary rightsholder again only partially affects its *raison d’être*.

These dynamics are instructive for the online environment and for platforms as initial custodians of digital legacies. First, the imposition of a duty of confidentiality, or information privacy rights, does not offer a one-sided protective device for the benefit of users only, but recognises the reciprocal interests underlying the interaction between user and provider. Users reveal more or less private information and providers promise - contractually or under the compulsion of law⁶⁵ - not to misuse it. This deal serves the industry as much as the rightsholder as a foundational trust mechanism. The reciprocity of interests is liable to have stronger application to services reliant on sensitive personal data (fitness apps, health care providers, dating or adult sites) than those feeding off less sensitive information (online marketplaces, gaming or professional platforms). It is also bound to exert more pressure in competitive markets where providers have an interest in differentiating themselves from ‘laymen and charlatans’. Second, the potential protection afforded by the duty of confidentiality to duty bearers also extends to the online context. In the

German case of *Digital Inheritance* (2018)⁶⁶ the parents of the 15-year old deceased sought access to the private content of her Facebook account to find out if she had expressed suicide intentions and to defend a suit brought by the train driver involved in her death. Facebook refused them access partly based on its user contract (governing the memorialisation of accounts of deceased users) and the account’s personal nature, and partly to protect the privacy of the deceased’s communication partners. This cloak of secrecy would also have served Facebook’s own interests considering how often it has been accused of failing to protect children and young people from harmful content, including suicide sites.⁶⁷ For the German court, however, the parents’ claim fell within ordinary inheritance law - with the account content being analogous to letters and Facebook to a postal service - and it thus held in their favour.⁶⁸ The parent’s entitlement was not displaced by data protection law as their interests in accessing the account trumped, according to the court, those of the daughter’s communication partners not to have their messages revealed.⁶⁹ Meanwhile, the post-mortem personality right of the deceased was not inconsistent with the outcome, but also played no determinative role in it. The court favoured the family interests at the expense of the interests of the daughter’s social contacts amongst the overlapping, co-dependent and conflicting privacy stakes that surfaced - at the post-mortem stage - from the primary confidential relationship between Facebook and the daughter.⁷⁰ This was a value judgement which aligned with German jurisprudence and societal values but could ultimately, in law, only be justified by circular reasoning drawing on ‘reasonable expectations’.⁷¹

dangering their own health and, in the case of transmissible diseases, that of the community.’

⁶¹ Mendelson above n 55, 229.

⁶² *Plon (Société)* above n 32. See also Eric Barendt, ‘“A reasonable expectation of privacy”: a coherent or redundant concept?’ in Andrew T Kenyon (ed), *Comparative Defamation and Privacy Law* (Cambridge: CUP, 2016) 96 (arguing that the test of ‘reasonable expectation of privacy’ is redundant). Mark A Hall, ‘Law, Medicine, and Trust’ (2002) 55 *Stanford Law Review* 463, 469 (*inter alia* noting that patient rights are based on a *prima facie* lack of trustworthiness of the physician).

⁶³ Thompson above n 44, 57.

⁶⁴ Thompson above n 44, 63, noting that medical secrecy facilitates the doctor’s independent clinical judgement: ‘Secrecy is not the enemy of truthfulness but the companion and guardian of truthfulness as we explore the possibilities for truthfulness in a given situation.’

⁶⁵ Most prominently data protection law.

⁶⁶ *Digital Inheritance* above n 5. For similar US cases, see Fredrick Kunke, ‘Virgians family, seeking clues to son’s suicide, wants easier access to Facebook’ (17 February 2013) *Washington Post*; *In re Request for Order Requiring Facebook, Inc. to Produce Documents and Things* 923 F Supp 2d 1204 (ND Cal 2012); *In re Ellsworth* No 2005-296, 651-DE (Mich Prob Ct 2005).

⁶⁷ For example, Jim Waterson, Dan Milmo, ‘Facebook whistleblower Frances Haugen calls for urgent external regulation’ (*The Guardian*, 25 October 2021)

⁶⁸ *Digital Inheritance* above n 5, para 47-51; note the court contrasts the inheritance of a social media account to a more personal contract, such as one for medical treatment [para 35] but in each case the inheritance would be limited to a passive right of access. In the subsequent decision in *Digital Inheritance III* ZB 30/20 (27 August 2020) BGH, the court held that Facebook had to give the parents full access to the account, and not simply a pdf document with the relevant content.

⁶⁹ *Digital Inheritance* above n 5, para 64-95.

⁷⁰ *Digital Inheritance* above n 5, esp para 74-81; consistent with the family-centred paradigm of inheritance law in Western societies; see Natalie M Banta, ‘Death and Privacy in the Digital Age’ (2016) 94 *North California Law Review* 927.

⁷¹ *Digital Inheritance* above n 5, para 87, 91; the court relied on Art 6(1) (a) and (f) and Recital 47 of the GDPR (i.e. ‘necessary for contractual performance’ and ‘legitimate interest’ respectively) but the real controversy was centred around the ‘legitimate interest’ ground, given that the granting the parent access could not easily be justified as a ‘necessary’ adjunct of the performance of the user contract.

This choice has been resolved differently in the US by the Revised Uniform Fiduciary Access to Digital Assets Act (2015)⁷² which initially adopted a similar ‘asset neutrality [approach]: Fiduciaries ought to be able to access digital assets as easily as assets stored on paper.’⁷³ Subsequently and under pressure from platforms, the Act was revised to give fiduciaries access to user accounts only if the user had consented to it either via an online tool or in a ‘will, trust, power of attorney, or other record’⁷⁴ ostensibly to satisfy ‘consumer demand for private, encrypted, anonymous services.’⁷⁵ This alternative ordering is arguably also aligned with prevalent societal values, only in this case ‘the strong libertarian and individualistic aspects of American society’ that prioritises individual liberty and freedom of contract over and above a more ‘collective or communitarian view of the world.’⁷⁶

3. Post-mortem medical confidentiality as privacy

3.1. Medical privacy: property or shield for embodied vulnerability?

Whilst medical confidentiality has a long-standing checkered history as a professional duty and as such occupied a status apart from the relatively recently conceived human rights framework, the judicial trend has been to absorb it within privacy frameworks.⁷⁷ Yet, locating medical confidentiality within privacy depends on how one constructs privacy and the values embedded within that construction. Moreover, as shown below, competing conceptions, although theoretically mutually exclusive, may in practical jurisprudence run in parallel and competition with each other.

Privacy as property. In the information economy especially, it is tempting to construct privacy as a proprietary interest and confidentiality as digital assets with the effect of bringing those interests within the familiar parameters of the market and its transfer mechanisms and corrective legal interventions. Privacy as a disposable commodity can account for the exchange of ‘personal data’ in return for ‘free’ online services in transactional terms, and for the fact that much personal information is, collectively, economically highly valuable. Whilst some commentators have called for an explicit recognition of

a proprietary right to privacy,⁷⁸ privacy in the common law world has, in any event, grown out of strong proprietary roots with values that are still residually present. Privacy at common law has its origins in the traditional focus on the home (as extension of the body) as the place of non-interference,⁷⁹ and in commercial secrets protected through the equitable duty of confidentiality.⁸⁰ Although this duty has always been a personal one, historically it arose either out of property or contract and came to the rescue of confidences in commercial matters, notably trade secrets.⁸¹ Only gradually did it expand to personal confidences, but it remained even then entangled with the idea of property, albeit a wide version. In extending the duty of confidence to communications between husband and wife,⁸² the court in *Argyle v Argyle* (1967)⁸³ relied on *Wyatt v Wilson* (1820)⁸⁴ which dealt with King George III’s medical confidences in a diary:

‘The diary there was the physician’s and the only thing which could be described in any sense as the property of the King was the information it contained and to which the physician was given the access. If such information can be regarded as within the protection afforded to property then similar confidential information communicated by a wife to her husband could also be so regarded.’⁸⁵

Thus the court equated personal information with a type of ownership; it used the concept of property which is a familiar tool for conferring control over a subject-matter to confer control over personal information. By the same token, in their seminal article on ‘The Right to Privacy’ (1890)⁸⁶ Samuel

⁷² Revised Uniform Fiduciary Access to Digital Assets Act (2015) of the Uniform Law Commission; see also prior version Uniform Fiduciary Access to Digital Assets Act (2014).

⁷³ Suzanne Brown Walsh, Benjamin Orzeske, Turney P Berry, ‘You Can’t Always Get What You Want’ (Nov 2015) *Trusts & Estates* 2, 3.

⁷⁴ See s.4-5 of the Revised Uniform Fiduciary Access to Digital Assets Act (2015).

⁷⁵ Brown Walsh above n 73, 4.

⁷⁶ Frederick Schauer, ‘The Exceptional First Amendment’ (2005) *Faculty Research Working Paper Series, Harvard University, John F. Kennedy School of Government* 22; but see Banta above n 70, where the author argues for the family orientation of US inheritance law and that this orientation should be reflected in the default rules of digital asset succession (as it is in some US jurisdictions).

⁷⁷ Contrast Mazzone above n 3, 1683, for arguably important distinctions between health records and social media data.

⁷⁸ Huw Beverley-Smith, *The Commercial Appropriation of Personality* (Cambridge: CUP, 2002); Zittrain, Jonathan, ‘What the Publisher Can Teach the Patient: Intellectual Property and Privacy in an Era of Trusted Privication’ (2000) 52 *Stanford Law Review* 1201; Lawrence Lessig, ‘Privacy as Property’ (2002) 69(1) *Social Research* 247. For resistance to privacy construction as self-ownership, see Julie Cohen, ‘Examined Lives: Informational Privacy and the Subject as Object’ (2000) 52 *Stanford Law Review* 1373.

⁷⁹ Whitman above n 21.

⁸⁰ In England, the action for misuse of private information has its roots in the equitable duty of confidentiality as applied to a quasi-medical case in *Campbell v MGN Ltd* [2004] UKHL 22. Note, in *Boardman v Phipps* [1966] UKHL 2., the House of Lords rejected the idea that confidential information was or could be property in the narrow meaning.

⁸¹ *Toulson & Phipps* above n 29, para 11–053: ‘Equity may impose a duty of confidentiality towards another after the death of the original confider. The question is not one of property (whether a cause of action owned by the deceased has been assigned) but of conscience.’ See also *Coco v Clark AN Clark (Engineers) Ltd* [1968] FSR 415, 419: ‘The equitable jurisdiction in cases of breach of confidence is ancient; confidence is the cousin of trust. The Statute of Uses, 1535, is framed in terms of “use, confidence or trust”; and a couplet, attributed to Sir Thomas More, Lord Chancellor avers that “Three things are to be held in Conscience; Fraud, Accident and things of Confidence.”’ *Imerman v Tchenguiz* [2010] EWCA Civ 908, para 54ff.

⁸² Marriage was, of course, traditionally a business transaction and so strongly underpinned by property interests.

⁸³ *Duchess of Argyll v Duke of Argyll* [1967] Ch 302.

⁸⁴ *Wyatt v Wilson* 1820 (unreported), discussed in *Prince Albert v Strange* (1849) 1 H & T 1, 25.

⁸⁵ *Argyll v Argyll* above n 83, 320.

⁸⁶ Samuel D Warren, Louis D Brandeis, ‘The Right to Privacy’ (1890) 4 *Harvard Law Review* 193; developed into a four-part tax-

Warren and Louis Brandeis argued that the continental European type right to privacy⁸⁷ had also found its ways into the common law to protect ‘the right to one’s personality’⁸⁸ in contradistinction to the protection afforded by the concept of property.⁸⁹ Yet, in light of the duty of confidence at the time, they conceded that ‘[i]f the fiction of property in a narrow sense must be preserved, it is still true that the end accomplished by the gossip-monger is attained by the use of that which is another’s, the fact relating to his private life...’⁹⁰ They concluded that the principle underlying the rights that protected privacy is ‘in reality not the principle of private property, unless that word be used in an extended and unusual sense.’⁹¹

Privacy as property commodifies – with varying strengths depending on the narrow or wide version – confidences and personal information generally. In the case of medical confidences it commodifies, or puts a price tag on, the disclosure of physical and mental vulnerabilities, infirmities and suffering. In that sense, medical confidences intensify the counterintuitive dimensions of constructing privacy as property.⁹² Through such a proprietary construction, the law follows the market in trading in privacies with all its attendant inequalities. The medical confidences of President Mitterrand and King George III were (post-mortem) very valuable and in both cases protected against the tide of prior legal authority; and in the case of President Mitterrand even against his ante-mortem consent, which had the effect of preserving their price and the distribution of the profits already made.⁹³ Meanwhile the afflictions of ordinary individuals are commodities of little (individual) value in the marketplace, and as devalued goods are also more readily alienated, pre- or post-mortem.⁹⁴ Such relatively easy alienation occurs online through a click of a privacy notice, as legally accommodated in the EU through Art 9 of the GDPR which, in emphasis, appears more concerned with facilitating the use of sensitive personal data, including ‘data concerning health’, than maintaining its non-disclosure.

onomy by William L Prosser, ‘Privacy’ (1960) 48 *California Law Review* 383. On the latter’s influence on American privacy, see Neil M Richards, Daniel J Solove, ‘Prosser’s Privacy Law: A Mixed Legacy’ (2010) 98 *California Law Review* 1887. See generally, Ferdinand D Schoeman (ed), *Philosophical Dimensions of Privacy – An Anthology* (Cambridge, CUP, 1984, reissued 2007).

⁸⁷ Warren and Brandeis *ibid*, 198, 214.

⁸⁸ Warren and Brandeis *ibid*, 207, 205 (‘inviolate personality’).

⁸⁹ Warren and Brandeis *ibid*, 204.

⁹⁰ Warren and Brandeis *ibid*, 204.

⁹¹ Warren and Brandeis *ibid*, 213. For the divergent paths taken by America and England and Wales to action for breach of confidence as a source of privacy, see Richards and Solove above n 53.

⁹² Thomas Mertens, ‘Bona Fama Defuncti in Kant’s Rechtslehre: Some Perspectives’ (2019) 24(4) *Kantian Review* 513, 514 on Kant’s proprietary construction of one’s reputation (and thus post-mortem personality rights): ‘But if a person acquires a good name by means of such an irreproachable life, it continues to belong to him even if he is no longer among the living. Because this person owns this good name.’ [emphasis added] Generally, Margaret Jane Radin, *Contested Commodities* (Cambridge, MA: Harvard University Press, 1996).

⁹³ Plon (Société) above n 32, para 39.

⁹⁴ See e.g. *The Press Association v Newcastle Upon Tyne Hospitals Foundation Trust* above n 45, para 45-47.

A proprietary right to privacy also means that at the post-mortem stage the new owners of the confidentialities ought to be at liberty to sell off ‘valuable’ ones.⁹⁵ Alienability is after all constitutive of property, its essential characteristic, and thus necessarily imported into any proprietary construction of privacy.⁹⁶ The judge in *Lewis v Secretary of State for Health & Anor* (2008) observed that ‘[i]f a doctor who treated a celebrity suffering from AIDS during his final illness were subsequently to sell to a newspaper intimate details which had been revealed to him by his former patient in confidence... it would seem contrary to justice that the doctor should make a wind-fall from his breach of his obligation.’⁹⁷ Yet, would the same hold for the beneficiaries of the deceased’s confidentialities?

Again German jurisprudence offers a useful commentary on how privacy as property may fit within a constitutional setting that offers strong post-mortem personality protection. By treating personal digital legacies as standard property, the court in *Digital Inheritance* (2018) applied settled principles of German inheritance law which draws neither a distinction between valuable and private assets,⁹⁸ nor between different media in which such assets may be stored.⁹⁹ Such ordering based on asset neutrality was, according to the court, not inconsistent with the deceased’s post-mortem personality rights, particularly when the beneficiaries were also, as in this case, her closest relatives.¹⁰⁰ Arguably the law of succession at least partially embeds post-mortem personality protection, whilst delivering a pragmatic solution for handling personal effects.¹⁰¹ Importantly for the purposes here, the digital asset in the hands of the parents became encumbered in the process of the transfer, not by any additional post-mortem interests of the deceased, but by the entangled proprietary and privacy stakes of others - *vis-à-vis* Facebook (the parents could not actively use the account or interfere with the platform’s IP rights in the content of the deceased¹⁰²) and *vis-à-vis* the deceased’s communication partners (the parents could access the daughter’s content but not disclose it further¹⁰³). Although the court had insisted that the daughter’s social media contacts, even as teenagers, ought to have known that their messages to another account might become accessible to parties other than the account holder, it still imposed on the parents a duty of confidentiality in respect of the con-

⁹⁵ Unless the acquired proprietary interest is understood as a form of stewardship.

⁹⁶ Radin above n 92, ? .

⁹⁷ *Lewis v Secretary of State for Health & Anor* above n 45, para 23, citing with approval Toulson and Phipps above n 29, para 3-191

⁹⁸ *Digital Inheritance* above n 5, para 18-51, § 2047(2) of the German Civil Code (and § 2373 on family photos and documents).

⁹⁹ See also US statutes that treat digital assets as an ordinary part of the deceased’s estate e.g. Connecticut General Statutes Ann. § 45a-334a (2012); Delaware Code Ann Title 12 § 5004 (2016); Idaho Code Ann § 15-3-715(28); Indiana Code § 29-1-13-1.1. (2018). See also *Estate of Maria Cecilia Quadri v Parisi* (2021) WL 3544783 (Fla Cir Ct) (where the claimant was granted custody of her late sister’s email accounts, pursuant to Florida’s Fiduciary Access to Digital Assets Act.

¹⁰⁰ *Digital Inheritance* above n 5, para 52-53.

¹⁰¹ *Digital Inheritance* above n 5, para 30 and 51.

¹⁰² *Digital Inheritance* above n 5, para 36, and para 38 on Facebook’s IP interests.

¹⁰³ *Digital Inheritance* above n 5, para 92

fidences of these communication partners. Such analytical messiness is inevitable given that privacy is generally not located in isolated relationships but in a web of overlapping, reciprocal social interactions of relative trust,¹⁰⁴ which were here accommodated through an encumbered property right. Notably whilst the parents may be ‘natural’ guardians of the daughter’s post-mortem dignity, the protection of the communications by her social media contacts from further public disclosure would have also - incidentally - sheltered the daughter’s parallel confidentiality.

The alternative market-based ordering enshrined in the *Revised Uniform Fiduciary Access to Digital Assets Act* (2015) leaves the digital assets of deceased users, by default, in the hands of platforms as their custodians. As the Act is silent on the custodian duties of the platform – such as fiduciary duties¹⁰⁵ or data protection duties of purpose or storage limitation - it both actualises the narrow construction of privacy as property as a disposable commodity and dissipates its meaning in the process. Privacy as a legal right is effectively lost upon death, and privacy as a fact may or may not continue depending on the market-driven decisions of the platforms vis-à-vis its users, as enshrined in its terms of service.

Privacy based on embodied vulnerability. Despite variations in Western constructions of privacy embedded in distinct social and cultural histories,¹⁰⁶ information privacy is broadly underwritten by the idea of vulnerability or shielding individuals from the harsh light of public exposure.¹⁰⁷ As such, it makes a good fit with the concept of ‘embodied vulnerability’ that has in recent human rights discourse been posited as their hallmark, justifying their claim to universalism. In *Vulnerability and Human Rights* (2006)¹⁰⁸ sociologist Bryan Turner defended the concept of human rights against critiques by cultural relativists:

‘There is a foundation to human rights – namely our common vulnerability. Whilst humans may not share a common culture, they are bound together by the risks and perturbations that arise from their vulnerability. Because we have a common ontological condition as vulnerable, intelligent be-

ings, human happiness is diverse, but misery is common and uniform.’¹⁰⁹

According to Turner, human vulnerability arises from the body, the mind and the ‘location within which experiences of the body and of our dependencies on other humans unfold.’¹¹⁰ By implication human rights attach to ‘conditions that make embodiment, enselfment, and emplacement possible... [and human rights abuses] typically involve some attack on the body through torture and deprivation, an assault on the dignity of the self through psychological threat [e.g. privacy], and some disruption to place through exclusion – imprisonment, deportation, seizure of land, or exile.’¹¹¹ Along similar lines, Martha Fineman has argued that using the concept of vulnerability to define marginalised groups fails to recognise vulnerability as a ‘universal, inevitable, enduring aspect of the human condition’¹¹² - with consequences for social and state responsibility. This vulnerability arises ‘from our embodiment, which carries with it the ever-present possibility of harm, injury, and misfortune... [and thus] the ever-constant possibility of dependency.’¹¹³ Although ‘vulnerabilities range in magnitude and potential at individual level... no individual can avoid vulnerability entirely.’¹¹⁴

Through this vulnerability-dependency lens, medical confidentiality encapsulates the very essence of information privacy.¹¹⁵ In the case of medical confidences the ever-present possibility of harm, injury and misfortune has become actualised, a real physical or mental vulnerability, and with it comes the threat of public disclosure and a loss of dignity and of one’s good standing in society, and thereby literally adding insult to injury.¹¹⁶ After all ‘mind and body are never separated. Who we are is a social process that is always constructed in terms of a particular experience of embodiment.’¹¹⁷ Yet, an illness or infirmity should not be to one’s discredit, as Justice Jackson found in *The Press Association v Newcastle Upon Tyne Hospitals Foundation Trust* (2014) to justify the post-mortem disclosure of the patient’s identity:

¹⁰⁹ Ibid 9.

¹¹⁰ Ibid 27 [emphasis added].

¹¹¹ Ibid.

¹¹² Martha A Fineman, ‘The Vulnerable Subject: Anchoring Equality in the Human Condition’ (2008) 20 *Yale Journal of Law and Feminism* 1, 8.

¹¹³ Ibid 9 [emphasis added].

¹¹⁴ Ibid 10.

¹¹⁵ Ibid 8, Fineman constructs the vulnerability thesis of human rights principally in physical (or medical) terms: ‘Our embodied humanity carries with it the ever-constant possibility of dependency as a result of disease, epidemics, resistant viruses, or other biologically-based catastrophes’. Note, in *Imerman v Tchenguz* [2010] EWCA Civ 908, para 67, where Lord Neuberger M.R. observed that ‘privacy is still classified as part of the confidentiality genus, the law should be developed and applied consistently and coherently in both privacy and “old fashioned confidence” cases, even if they sometimes may have different features.’

¹¹⁶ In the case of American privacy with its focus on governmental intrusion, ‘public censure’ must be understood as ‘official’ or governmental intrusions.

¹¹⁷ Turner above n 108, 27. See also Julie Cohen, ‘What Privacy Is For’ (2013) 126 *Harvard Law Review* 1904, 1911f: ‘Certain features of liberal selfhood have been roundly and justifiably critiqued, most notably its abstraction from embodied reality and its independence from relational ties.’

¹⁰⁴ For privacy as enabling concept for relationships, see Robert Murphy, ‘Social Distance and the Veil’ (1964) 66 *American Anthropologist* 1257; James Rachels, ‘Why Privacy is Important’ (1975) 4(4) *Philosophy & Public Affairs* 323; Stanley I Benn and Gerald F Gaus (eds), *The Public and the Private in Social Policy* (London: Croom Helm and St. Martin’s Press, 1983) 3; and Ferdinand D Schoenman, ‘Privacy: philosophical dimensions of the literature’ in Schoenman above n 86, 1, 22ff. This is also increasingly apparent in data protection law; see e.g. Lilian Edwards, Michèle Finck, Michael Veale, Nicolo Zingales, ‘Data subjects as data controllers: a Fashion(able) concept?’ (2019) *Internet Policy Review* <https://policyreview.info/articles/news/data-subjects-data-controllers-fashionable-concept/1400>

¹⁰⁵ Section 17 imposes on fiduciaries the ‘normal’ fiduciary duties.

¹⁰⁶ Whitman above n 21, 1164; see also Robert C Post, ‘Three Concepts of Privacy’ (2001) 89 *The Georgetown Law Journal* 2087.

¹⁰⁷ ‘Public exposure’ is differently constructed in American and European privacy jurisprudence with the former fearing governmental interference, whilst the latter is more concerned about societal intrusions. Whitman above n 21.

¹⁰⁸ Bryan S Turner, *Vulnerability and Human Rights* (Pennsylvania State University Press, 2006).

‘It [the judgment] described LM’s history of mental health difficulties, her longstanding religious faith and her declining health. None of the information given in the judgment or referred to during the hearing is of particular sensitivity or confidentiality, nor does it reflect any discredit on LM. The physical, mental and spiritual challenges that she faced could confront anyone. Also, her way of life, whether better described as independent or isolated, makes it unlikely that any wider harm will come from linking her name with her story.’¹¹⁸

Such reasoning misunderstands the nature of the harm against which the right to privacy protects. The vulnerabilities at stake in privacy, or other human rights, are rarely self-inflicted or objectively discrediting. Indeed, often they are entirely beyond personal or human control, and they may still impact on one’s standing in the community, and so on one’s life choices. The ECtHR in *Z v Finland* (1997) recognised that the confidentiality of a person’s HIV infection was imperative given that ‘[t]he disclosure of such data may dramatically affect his or her private and family life, as well as social and employment situation, by exposing him or her to opprobrium and the risk of ostracism.’¹¹⁹ Medical confidentiality magnifies the basic interests and values protected by privacy. Its principal purpose is not to hide individual wrongdoing but to shield the individual from public scrutiny and the threat of prejudiced reactions.

This much has been recognised in defamation law where the standard test to decide whether a statement is or is not defamatory, is whether the publication would tend to lower the defamed ‘in the estimation of right thinking members of society generally.’¹²⁰ Whilst ‘right thinking members’ of society should not think less of a person alleged to have been raped, to be gay or to have HIV, many ordinary ‘respectable’ members of society actually do and so protection has still been granted.¹²¹ Such prejudices are not a temporary problem to be overcome with more education or regulation, but are an inevitable aspect of social life where public scrutiny acts by default as an inhibitor of personal freedoms, and at times unduly so – as recognised and redressed by the right to privacy. The threat of undue public scrutiny and prejudice also contextualises Art 9 of the GDPR and its list of sensitive personal data over and beyond health and body-related data, such as one’s ‘racial or ethnic origin, political opinions, religious or philosophical beliefs, or trade union membership... sex life or sexual orientation...’ This list is expressive of the life choices and areas of autonomous decision-making that are shielded, through data protection law, for the purpose of guarding their free nature. In so far as Art 9 does not just extend to health, sex life or religious beliefs, but also to political opinions and trade union membership, informational privacy emerges as

a backbone of democratic processes and showcases privacy as protecting important public goods and not just individual flourishing.¹²²

The idea of privacy as an enabler of self-authorship through shielding an individual’s choices and personal information from public scrutiny cuts both ways *vis-à-vis* post-mortem privacy. In the first place, privacy is – on this construction – a tool for the living to allow unencumbered, autonomous decision-making in support of personal (and democratic) flourishing. Here the post-mortem right has nothing to offer after the death of the rightsholder when embodied vulnerability and dependencies cease, and so too the need for protection. In the second place, however, privacy as a shield against public prejudice also points to the wrong against which the protection is sought, and this wrong appears to remain a wrong, quite regardless of whether its *primary* victim has died. Moreover, privacy based on vulnerability invokes the notion of dependency and thus locates privacy in relationships, that is relationships of dependency or, as the case may be, of *mutual* dependencies. This brings the discussion squarely to the question of what harm may be suffered by a lack of medical confidentiality, or more generally information privacy, after death.

3.2. Harm? ‘A mouldering corpse has no feelings’

The standard core argument against post-mortem privacy is that a ‘mouldering corpse has no feelings.’¹²³ As ‘reputation and injured dignity are generally of no concern to a deceased person,’¹²⁴ no harm can be done by disclosing pre-mortem confidences: ‘[O]ne’s death means the permanent end not only of one’s physical life, but also of one’s conscious life. Death, so conceived, has its obvious drawbacks, but also its benefits; for the dead are at least free from pain, grief, despair, and other unpleasant sensations, moods, emotions, and so on.’¹²⁵

Relational confidentiality. Post-mortem medical confidentiality judgments have tended to rely on the inhibitive effect that a post-mortem loss of confidentiality may have on ante-mortem care,¹²⁶ and so afforded protection to medical or care staff and relatives consulted about the treatment.¹²⁷ Justice Brown in *Re C* referred to a ‘public interest that those who may be faced with considering the making of an application of the kind [taking away life-sustaining treatment]... should be untrammelled by the fear of publicity in coming to the very

¹¹⁸ *The Press Association v Newcastle Upon Tyne Hospitals Foundation Trust* above n 45, para 45.

¹¹⁹ *Z v Finland* above n 60, para 96.

¹²⁰ *Sim v Stretch* [1936] 2 All ER 1237.

¹²¹ See e.g. *Morgen v Lingen* (1863) 3 LT 800 (insanity); *Yousoupoff v M-G-M* (1934) 50 TLR 581 (rape); see also Sexual Offences (Amendment) Acts 1976 and 1992 (confidentiality of rape victim ‘during that person’s lifetime’) See also, *Barrymore v News Group Newspaper Ltd* [1997] FSR 600 (where the disclosure of a homosexual affair was held to be a breach of confidence).

¹²² Nissenbaum above n 19, 85ff, on the difference between ‘common value’, ‘public value’ and ‘collective value’.

¹²³ Buitelaar above n 25, 133; see also George Pitcher, ‘The Misfortunes of the Dead’ (1984) 2 *American Philosophical Quarterly* 183.

¹²⁴ Beverley-Smith above n 78, 124 (note the word ‘generally’).

¹²⁵ Pitcher above n 123, 183.

¹²⁶ *Bluch* above n 15, para 13 (note this consequentialist argument also applies to the patient: ‘if a patient is aware that the information he gives his doctor may be disclosed to the public after his death he may not make full disclosure, with the result that medical staff may be unable to make a correct diagnosis or provide appropriate treatment.’)

¹²⁷ See also Thompson above n 44, 57.

sensitive and fundamental decision.¹²⁸ He extended the publicity restriction in order to protect the identity of the deceased patient's family and his doctor and carers. In *Re Meek*, Judge Hodge observed that '[i]t is in the public interest that those who aspire to care for an incapacitous person, or to manage his affairs, should not be exposed to the full glare of public criticism if they genuinely fall short. To do so might discourage others to take on such a role.'¹²⁹ In these cases, the privacy of medical staff, carers and relatives was protected in their own right as directly implicated in the same confidences as the deceased.¹³⁰ So whilst the patient depended on the care, loyalty and confidentiality of medical staff and relation, they too were vulnerable - by virtue of the fact that their well-intentioned but difficult decisions and actions could be judged harshly by the public.

Such direct overlapping confidentiality is akin to the concept of relational privacy, where the invasion of the privacy of the living arises from the post-mortem breach of the *notional* privacy of the deceased. Typically, in *ML v Slovakia* (2021)¹³¹ the ECtHR accepted that ML's *own* privacy was breached by the sensational lurid articles about her son's sexual abuses, convictions and later suicide in tabloid newspapers two years after his death. These triggered 'negative reactions to them by the people around her [which] had had significant detrimental effects on her, particularly as she was known to be the mother of the deceased, bore the same family name as him, and lived in the village mentioned in the article.'¹³² Whilst the claim concerned ML's own privacy, it hinged on a finding of a would-be breach of her deceased son's privacy.¹³³ Similarly, in the above cases the claims belonged to the living, and only indirectly to the dead, and therein lies an answer to post-mortem privacy: 'distinguishing between the content of an obligation and its justification... suggests that wrongful actions regarding the dead violate claims of the living...'¹³⁴ So when the law in such circumstances protects the claims of the living, such protection also incidentally carries the privacies of the dead. By the same token the German court's decision in *Digi-*

tal Inheritance (2018) to allow the parents' claim to access their daughter's account subject to protecting her communication partners' messages from further disclosure recognised, on the one hand, the emotional vulnerability of parents to any harm suffered by their children and, on the other hand, the vulnerability of her social media contacts to have their private messages exposed and scrutinised.¹³⁵ Accommodating these two sets of vulnerabilities and dependencies had also the incidental effect of sheltering the daughter's confidences from wider disclosure. Whilst the *Revised Uniform Fiduciary Access to Digital Assets Act* (2015) validates the vulnerabilities of the deceased's communication partners and perhaps corporate 'vulnerabilities' of platforms, to the exclusion of close family,¹³⁶ there are numerous US states that have adopted digital legacy statutes with rights hierarchies similar to the German position.¹³⁷

The above cases demonstrate the artificiality of constructing privacy solely as an individual right, rather than a relational one that attaches to social groups with interdependent vulnerabilities and mutual dependencies.¹³⁸ By implication, the extent to which this relational privacy may be a gateway for privacy protection of digital legacies is less a question of attitudes to post-mortem rights and more of recognising that privacy is frequently located across relationships of trust.¹³⁹

Public good of human dignity. The purest version of post-mortem confidentiality occurs where the duty to the patient survives her death and forms the basis of a claim by others on her behalf. In *Plon (Société)* the ECtHR accepted that Mitterrand's medical confidences could be 'transferred' or 'passed on' to his widow and children, who effectively stepped into Mitterrand's shoes to enforce his rights.¹⁴⁰ Similarly in *Bluck* the Information Tribunal held that the Trust's duty to the daughter survived her death and that *her* claim for a breach passed onto her widower as her personal representative. These cases crystallize the very centre of controversy of post-mortem privacy rights and the question of what harm, if any, such right redresses - beyond consequentialist argu-

¹²⁸ *Re C* above n 23, 256; *The Press Association v Newcastle Upon Tyne Hospitals Foundation Trust* above n 45, para 43; *Re Meek* above n 45, 104.

¹²⁹ *Re Meek* above n 45, para 104.

¹³⁰ Albeit not to the extent of allowing alleged serious improprieties to remain hidden; see, for example, *Re Meek* above n 45 (misappropriation of funds); *Lewis v Secretary of State for Health & Anor* above n 45 (inquiry into the non-consensual removal of organs/tissue from deceased patients at NHS and other facilities); *Bluck* above n 15 (the NHS had already settled negligence with next-of-kin).

¹³¹ *ML v Slovakia* 34159/17 [2021] ECHR 821 (14 October 2021). On 'family's reputation', see also, *Putistin v Ukraine (Football "Death Match")* 16882/03 [2013] ECHR 1154; *Dzhugashvili v. Russia (dec.) (Joseph Stalin)* 41123/10 [2014] ECHR 1448. For England and Wales, see: *OPO v MLA & Anor* [2014] EWCA Civ 1277 (where (relational) privacy failed but the tort of intentionally inflicting mental suffering succeeded).

¹³² *ML v Slovakia* *ibid*, para 28.

¹³³ *ML v Slovakia* *ibid*, para 38, 39. J Berg, 'Grave secrets: Legal and ethical analysis of postmortem confidentiality' (2001) 34 *Connecticut Law Review* 81.

¹³⁴ Stephen Winter, 'Against Posthumous Rights' (2010) 27(2) *Journal of Applied Philosophy* 186, 196 [emphasis added].

¹³⁵ *Digital Inheritance* above n 5, para 81 (recognising the non-material interests of the parents)

¹³⁶ Sections 4 and 5 of the *Revised Uniform Fiduciary Access to Digital Assets Act* (2015) essentially validate the service agreement of platforms, bar contrary pre-mortem directions by the user.

¹³⁷ For statutes, see above n 99. See also: *Bazemore v Savannah Hosp* 155 SE 194 (1930), *Loft v Fuller* 408 So 2d 619 (1981) and *New York Times Co v. National Aeronautics & Space Admin* 782 F Supp 628 (DDC 1991) (noting the familial privacy interest in audio recordings of astronauts immediately before the Challenger explosion). Family reputation was not recognised in: *Flynn v Higham* 197 Cal Rptr 145 (1983) (a book claimed the claimants' father was a homosexual and Nazi spy); *Hendrickson v California Newspapers Inc* 48 Cal App 3d 59 (1975) (an obituary revealed that the claimants' husband and father had criminal convictions).

¹³⁸ Mertens above n 92, 514f, commenting on the Dutch Criminal Code, that only prosecutes libel of the deceased if a complaint is made by a close relative, and thus arguably implicates their reputation. See also Linnet Taylor, Luciano Floridi, Bart van der Sloot (eds), *Group Privacy – New Challenges of Data Technologies* (Springer, 2017).

¹³⁹ For an example of the judicial unwillingness to recognise relational privacy see *OPO v MLA* [2014] EWCA Civ 1277.

¹⁴⁰ *Plon (Société)* above n 32, para 34.

ments focused on others. What harm can *the deceased* suffer after death?

For Warren and Brandeis, the invasion itself was the harm against which privacy protects: '[i]f the invasion of privacy constitutes a legal *injuria*, the elements for demanding redress exist, since already the value of mental suffering, caused by an act *wrongful in itself*, is recognized as a basis for compensation.'¹⁴¹ Consistently classic common law actions, such as trespass to land or to the person, that have long protected privacy interests, are actionable *per se*.¹⁴² Equally, the equitable duty of confidence does not require 'detriment' beyond the breach of the duty itself. Megarry J in *Coco v A N Clark (Engineers) Limited* (1968) commented:

'At first sight, it seems that detriment ought to be present if equity is to be induced to intervene; but I can conceive of cases where a plaintiff might have substantial motives for seeking the aid of equity and yet suffer nothing which could fairly be called a detriment to him, as when the confidential information shows him in a favourable light but gravely injures some relation or friend of his whom he wishes to protect.'¹⁴³

If harm lies in the invasion itself the question is whether such dignitary harm can be suffered by the dead? Clearly not, the dead are dead. In *Lewis Justice Foskett* cited with approval Toulson and Phipps' *Confidentiality*¹⁴⁴ that in relation to a post-mortem disclosure of medical confidentialities 'it could not be said that the deceased would suffer detriment from the publication, but it would seem contrary to justice that the doctor should make a windfall from his breach of his obligation...'¹⁴⁵ The gist of the privacy action lies in the invasion of one's personal domain¹⁴⁶ that is a domain constituted through consciousness. Consciousness is not just a *sine qua non* for an invasion, but also the key arbiter whether an invasion in fact occurred or not: 'In one circumstance, a surprise kiss on the back of the neck is a claim-violating trespass; while in another context an unanticipated kiss appropriately expresses affection. Often the difference is what the kiss means to the kissee (not the kisser).'¹⁴⁷ Privacy - as a subjective right and concerned with the individual holding 'the active right to decide who

can interfere with his inviolate personality'¹⁴⁸ - is irretrievably extinguished upon death. Yet, even as an objective right, denoting 'an individual's inalienable interest in worthwhile elements of his personality,'¹⁴⁹ privacy runs into difficulty after death because rights are based on moral claims (giving rise to obligations by others to the rightsholder) which in turn presumes 'an entity with the capacity to experience things as significant.'¹⁵⁰ It requires a rightsholder who cares: 'Human agency is special because things matter to humans. A hypothetical agent (a very advanced computer) might manifest all other aspects of consciousness; but if it lacked the capacity to care, it might 'do' things, but be without an interest.'¹⁵¹ The argument that post-mortem rights protect the ante-mortem interests of the rightsholder, as a form of retrospective privacy, are still up against the fact that at the point when the purported wrong occurs, the rightsholder's capacity to care has vanished and so his claim of being wronged.¹⁵² Equally, the argument that a right to privacy could attach to the 'social persona' or 'public persona' that survives the biological death of a person¹⁵³ - 'subsisting in the speech and memory of living persons as well as in information held in impersonal media'¹⁵⁴ - cannot get round the fact that this disembodied and disemselfed 'public persona' has no capacity to experience things as significant and is therefore not 'someone' capable of having a moral claim.

However, just because the dead cannot be harmed by privacy intrusions or otherwise, does not mean that those 'invasions' are not harmful, albeit not because of any harm to the dead.¹⁵⁵ In *Plon (Société)* the ECtHR found that the duty of medical confidentialities survived Mitterrand's death, and the breach occurred despite Mitterrand's pre-mortem attempts to release the doctor from the duty:

'President Mitterrand had officially released Dr Gubler from his obligation by asking him to publish health bulletins on him for years, had expressed the wish, more generally, to make public all matters pertaining to his health and, when asked by another doctor how his illness should be reported, had replied: "Do as you see fit; announce what you want".'¹⁵⁶

¹⁴¹ Warren and Brandeis above n 86, 213 [emphasis added].

¹⁴² *Bluck* above n 15, para 15, expressly approved that the lack of detriment did not defeat the claim.

¹⁴³ *Coco v A N Clark (Engineers) Limited* [1968] FSR 415, 421; *Attorney General v Guardian Newspapers Ltd (No 2)* [1988] UKHL 6, 2f: '[A]s a general rule, it is in the public interest that confidences should be respected, and the encouragement of such respect may in itself constitute a sufficient ground for recognising and enforcing the obligation of confidence even when the confider can point to no specific detriment to himself... The anonymous donor of a very large sum to a very worthy cause has his own reasons for wishing to remain anonymous, which are unlikely to be discreditable.' See also *Gulati & Ors v MGN Ltd (un-redacted)* [2015] EWHC 1482.

¹⁴⁴ *Toulson and Phipps* above n 29.

¹⁴⁵ *Lewis v Secretary of State for Health & Anor* above n 45, para 23.

¹⁴⁶ Joel Feinberg, *Harm to Others* (Vol. 1) (Oxford: Oxford University Press, 1984) 7.9

¹⁴⁷ *Winter* above n 134, 190. See also *Smith v Dha* [2013] EWHC 838: '[n]o one other than a claimant can give reliable evidence about his or her feelings or distress. No one other than a defendant—should a defendant die—can give reliable evidence to rebut a plea of malice.'

¹⁴⁸ *Buitelaar* above n 25, 134.

¹⁴⁹ *Buitelaar* above n 25, 134.

¹⁵⁰ *Winter* above n 134, 186.

¹⁵¹ *Winter* above n 134 190.

¹⁵² In particular, *Pitcher* above n 123, and *Feinberg* above n 146, 93 (arguing that the harm after death is the ante-mortem person whose transcendent interests are squelched), criticised by Joan Callahan, 'On Harming the Dead' (1987) 97(2) *Ethics* 341; and by *Winter* above n 134. Note, Feinberg tries to get around the retrospectivity by arguing that the right is violated well before death, when the person first acquired the right (92).

¹⁵³ *Buitelaar* above n 25, 132ff. Floris Tomasini, *Remembering and Disremembering the Dead* (Springer, 2017) 28: 'According to Feinberg-Pitcher we can only squelch transcendent interests of ante-mortem persons. This is unnecessarily restrictive, as it is possible to think of harms in relation to social death as well harms in relation to biological death. In the case of the latter, narrative or ipse identity survives in the form of memory and biography that is refigured by others who survive the deceased.'

¹⁵⁴ *Winter* above n 134, 187.

¹⁵⁵ *Callahan* above 152, 349ff.

¹⁵⁶ *Plon (Société)* above n 32, para 24.

Mitterrand's medical confidentiality was guarded not because he enjoyed any post-mortem right (which would also have entailed treating his waiver of confidentiality with deference) but because of the status of medical confidentiality as an important public good. That status is so high in France that a breach is criminalised with very few defences; neither death nor consent will release the doctor from the duty.¹⁵⁷ Thus in *Plon (Société)* the overriding interest in medical confidentiality had the effect of guarding post-mortem privacy interests without giving rise to a personal right as such.

Such overriding public good exists outside the domain of medical confidentiality in the public good of 'respect for the dead' and framed in human rights discourse through the concept of human dignity. Human dignity expresses a commitment to showing all human beings a minimum level of respect based simply on our common humanity, a commitment that cannot but transcend death.¹⁵⁸ Whilst such basic respect appears to be readily accepted for the human body,¹⁵⁹ in as much as personal dignity extends to body and mind, there is no reason why the same dignified treatment should not be applied to the memory of the deceased. A claim to respect the intrinsic value of humanity would seem hollow, if upon death a person's body or memory could be wantonly defiled or denigrated without any disapprobation. In the US case of *New York Times Co v City of New York Fire Department* (2005) the court poignantly observed: 'The desire to preserve the dignity of human existence even when life has passed is the sort of interest to which legal protection is given under the name of privacy.'¹⁶⁰ This resonates with the words of the German Constitutional Court in *Mephisto* (1971): 'it would be inconsistent with the constitutional mandate of the inviolability of human dignity, which underlies all basic rights, if a person could be belittled and

denigrated after his death. Accordingly, an individual's death does not put an end to the state's duty... to protect him from assaults on his human dignity.'¹⁶¹ If a society makes dignified or respectful treatment of human beings an imperative, the death of a person is not a major turning point to that societal commitment.

And yet, even these public goods – the public good of medical confidentiality or human dignity – are solidly anchored in the deceased's closest relationships, and thereby given concrete meaning through their significance to the living.¹⁶² In *Plon (Société)* the public good of medical confidentiality was, upon Mitterrand's death, transferred to, and enforceable by, his family. In *Digital Inheritance* the daughter's post-mortem dignitary interests added no extra dimension to the settlement of her estate, as the parents were on both accounts the relevant parties. In England, the court in *Lewis* commented on the endurance of the post-mortem duty of medical confidentiality: '[t]he period for which any duty of confidentiality could reasonably be expected to continue would depend on many circumstances, including the nature of the relationship, the nature of the information and any harm which might be caused to the deceased's estate or, possibly, those whom the deceased would reasonably have wished to protect, as well as any grounds for justifying disclosure.'¹⁶³ The familial focus also comes through explicitly in the old US case of *Schuyler v Curtis* (1895),¹⁶⁴ where the court observed that a 'privilege may be given to the surviving relatives of a deceased person to protect his memory, but the privilege exists for the benefit of the living, to protect their feelings, and to prevent a violation of their own rights in the character and memory of the deceased.'¹⁶⁵ In other words, post-mortem dignitary interests, constructed as public goods, are neither self-supporting nor ever-lasting, but once more tied to the interests of living relations, as manifested by their enforcement actions or lack thereof.

3.3. The post-mortem reconfiguration of competing rights of the living

Whether post-mortem medical confidentiality takes shape as a form of relational privacy or as a general public good, the wider lessons it holds for post-mortem (digital) privacy is that it is, after all, firmly focused on the interests of the living. The

¹⁵⁷ *Plon (Société)* above n 32, para 28, 37 (government arguing that medical confidentiality protects the general interests of society). Generally, consent by the patient or their legal advisers is an exception to the duty, see e.g. Thompson above n 44, 58.

¹⁵⁸ Buitelaar n 25, 135; Mertens above 92, 516f, noting Kant 'does not accept limitations on who can bring a legal case against posthumous defamation and on when.' But Feinberg above n 146, 95: 'It is absurd to think that once a promisee has died, the status of a broken promise made to him while he was alive suddenly cases to be that of a serious injustice to the victim and becomes instead a more diffuse public harm.'

¹⁵⁹ *Jäggi DNA* (22 December 1999) Swiss Federal Court, cited in *Jäggi v Switzerland* 58757/00 [2010] ECHR 1815, para 19, noting the 'right of the deceased, deriving from human dignity, to protect his remains from interferences contrary to morality and custom, and the right of the close relatives to respect for the deceased and the inviolability of his corpse...' *Pannullo and Forte v France* 37794/97 [2001] ECHR 741, where the Court found that a delay by the judicial authority in issuing a burial certificate and returning the body of a four-year-old daughter to the parents constituted interference with their right to respect for their private and family life. See also, US case of *Reid v Pierce Ct* 961 P2d 333 (Wash 1998) (surviving family members have a privacy interest in the autopsy records of a deceased).

¹⁶⁰ *New York Times Co v City of New York Fire Department* 829 NE 2d 266, 269 (NY 2005), but see also e.g. *Cordell v Detective Publications Inc* 419 F2d 989 (6th Cir 1969) (refusal to recognise a cause of action by a mother for a breach of her deceased daughter's privacy arising from an unauthorised publication of a sensational account of her brutal murder).

¹⁶¹ *Mephisto* above n 8.

¹⁶² Mertens above n 92, 515, commenting that – contrary to Kant's view – the criminal offence of libelling the dead (in Dutch and other laws) 'can only be prosecuted if a complaint is filed either by direct relatives of the deceased or by the spouse' and the motivating force in these cases before the court is the interest of living persons in protection against attacks on their reputation.' Note too the argument by Feinberg above n 146, 86, about 'other-regarding interests' that survive death and are also focused on the relational interests of the living.

¹⁶³ *Lewis v Secretary of State for Health & Anor* above n 45, para 23 [emphasis added], citing with approval Toulson and Phipps above n 29, para 3-191.

¹⁶⁴ *Schuyler v Curtis* 42 NE 22 (NY 1895).

¹⁶⁵ *ibid* 25, also noted: 'It is the right of privacy of the living which is sought to be enforced here. That right may in some cases be itself violated by interfering with the character or memory of a deceased relative.'; see also *National Archives and Records Administration v Favish* 541 US 157 (2004).

post-mortem protection of medical confidentiality emerges as an *adjunct* to guarding privacy interests of the living. Whilst the confidentiality of the deceased may survive her death, this is entirely contingent on the existence of a living ‘carrier’ with parallel interests, *and* on those interests trumping the interests of others (as in *Re C* or *Re Bluck*). By the same token, with the deceased taken out of the equation, death becomes a point for reviewing and reconfiguring the balance struck ante-mortem between the competing rights of the living.¹⁶⁶

Competing Privacy Rights. A direct confrontation between the privacy interests of the deceased, or his estate, and the privacy rights of others occurred in *Jäggi v Switzerland* (2010)¹⁶⁷ where the death of the rightsholder became the touchstone for reversing the pre-mortem settlement of rights. Jäggi had tried, throughout his life, to prove AH’s paternity but was unable to do so during AH’s lifetime against the latter’s express wishes. After AH had died Jäggi’s request to take a DNA sample from AH’s body (whilst exhumed at the end of the lease of the tomb) was rejected by the Swiss Federal Court on the basis that the right to know one’s parentage was outweighed by ‘the right of the deceased, deriving from human dignity, to protect his remains from interferences contrary to morality and custom, and the right of the close relatives to respect for the deceased and the inviolability of his corpse.’¹⁶⁸ The ECtHR, however, allowed for the DNA paternity test to go ahead given that it was a ‘relatively unintrusive measure’ that struck a fair balance between ‘the applicant’s right to discover his parentage against the right of third parties to the inviolability of the deceased’s body, the right to respect for the dead and the public interest in the protection of legal certainty.’¹⁶⁹ Meanwhile the ‘deceased’s own right to respect for his private life... could not be adversely affected by a request to that effect made after his death.’¹⁷⁰ The ECtHR struck a fresh balance between the privacy interests of the son *and* the post-mortem dignitary interests of the deceased (or his estate) - such as the inviolability of his corpse, the right to rest in peace or the right of the close relatives to respect for the deceased - and held in favour of the son, but not without being mindful to the dignity of the deceased.

Competing Public Goods. Similarly, the death of the rightsholder may also trigger a rebalancing of the pre-mortem tension between the duty of medical confidentiality and other rights and public goods, such as freedom of speech or open justice. In *Re Meek* (2014) the death of the vulnerable patient tipped the balance in favour of the publication of the judgment from being anonymised pre-mortem to being de-anonymised post-mortem. Hodge J took the deceased out of the equation

as she had ‘no longer... any need for the special protection afforded by anonymity’¹⁷¹ and then framed the question as one of the competing interests of the living - here the protection of the carers versus open justice. Protecting carers from the ‘full glare of public criticism if they genuinely fall short’ had to be weighed against the ‘article 10 right to freedom of expression, including the right to receive and impart information... that justice should be open to public scrutiny.’¹⁷² Hodge J continued: ‘[i]t is in the public interest that those who... have abused the trust placed in them properly to care for P or to manage P’s affairs, should be exposed to the full glare of publicity. The knowledge of the risk of this may serve to deter others from doing the same.’¹⁷³ So post-mortem confidentiality should not be allowed to transform itself into a cloak of secrecy behind which wrongdoing can occur without any possibility of accountability.

How the death of the rightsholder should alter the ante-mortem balance is necessarily contestable and dynamic. In *Plon (Société)* the publishing company of *Le Grand Secret* argued that the public interest in freedom of expression should - post-mortem - trump Mitterrand’s medical confidentiality as the book ‘contributed both to the right of citizens - towards whom President Mitterrand had voluntarily assumed a duty of “medical transparency” - to receive information about a “State lie”, and to a more general debate about the health of serving leaders... [and] that the debate had not become any less pressing after François Mitterrand’s death.’¹⁷⁴ The ECtHR disagreed in so far as it found the *temporary* injunction issued ten days after Mitterrand’s death to be ‘necessary in democratic society’; yet, the absolute and indefinite injunction issued nine months after his death was disproportionate: ‘the more time that elapsed, the more the public interest in discussion of the history of President Mitterrand’s two terms of office prevailed over the requirements of protecting the President’s rights with regard to medical confidentiality.’¹⁷⁵ So while freedom of expression could legitimately be curbed, pre-mortem and temporarily post-mortem, to protect medical confidentiality, the collective interest of the living in reflecting on Mitterrand’s political legacy meant that access to his confidential medical information (which *de facto* had already been in the public domain) formally changed hands less than a year after his death - from the relatives to the public. In the case of private individuals, as applicable to most digital legacies, any public interest in private or personal information of the deceased is generally much smaller than in respect of public or political figures.¹⁷⁶ Still, it seems that where the privacy interests of the deceased or her deceased estate are in direct confrontation with individual claims to privacy or other rights or collective goods, such as open justice or free access to information, the law betrays its forward looking orientation by firmly erring on the side the latter.

¹⁶⁶ *Lewis v Secretary of State for Health & Anor* above n 45, para 58: ‘the public interest in disclosure of the material sought outweighs the other public interest, namely, that of maintaining the confidentiality of medical records...’

¹⁶⁷ *Jäggi v Switzerland* 58757/00 [2010] ECHR 1815.

¹⁶⁸ *Jäggi DNA* (22 December 1999) Swiss Federal Court, cited in *Jäggi v Switzerland* *ibid*, para 19.

¹⁶⁹ *Jäggi v Switzerland* above n 167, para 40.

¹⁷⁰ *Jäggi v Switzerland* above n 167, para 42, citing *Estate of Kresten Fittenborg Mortensen v Denmark* (dec.) 1338/03 [2006] ECHR, where the ECtHR had held that ‘the private life of a deceased person from whom a DNA sample was to be taken could not be adversely affected by a request to that effect made after his death.’

¹⁷¹ *Re Meek* above n 45, para 104.

¹⁷² *Ibid*.

¹⁷³ *Ibid*.

¹⁷⁴ *Plon (Société)* above n 32, para 30 (para 36 for contrary argument of the government).

¹⁷⁵ *Ibid* para 53.

¹⁷⁶ As specifically acknowledged, for example, in *V v Associated Newspapers Ltd and Ors* [2016] EWCOP 21.

4. Conclusion

This paper capitalised on the outlier status of the post-mortem duty of medical confidentiality to interrogate the possibility of post-mortem privacy as prompted by the debate about digital legacies. The microcosm offered an analytical gateway into the problematic first and foremost because in the case of medical confidentiality post-mortem protection has been allowed in England and Wales and by the ECtHR, and it thus provides a site for testing the standard objections to such protection. Furthermore, as medical confidentiality encapsulates, as argued here, the very essence of information privacy, conclusions reached in its specific context become available to the general one of information privacy. Finally, the grounding of medical confidentiality in the long-standing professional duty, as enshrined in the Hippocratic Oath, also brings with it complementary insights about its institutional drivers, including for its post-mortem extension.

A close reading of recent case law reveals that the post-mortem duty of medical confidentiality is after all a fake: where the duty of medical confidentiality survives the death of the rightsholder, it in fact protects the overlapping privacy interests of the living. These protected significant others may be medical staff, care personnel or family, whose own privacies are directly implicated in the purported breach of that of the deceased. Even when post-mortem privacy or confidentiality is constructed as an expression of a public good, such as human dignity, it is not an indefinite, self-sustaining protective device but squarely anchored in the interests of the deceased's significant others. Yet, as much as the living are caught in the confidentiality of the deceased and thus protected against purported breaches of the deceased's notional privacy, the deceased's confidentiality is also reflexively sheltered from wider disclosure by these parallel interests of the living. By the same token, where individual or collective interests of the living are in conflict with those of the deceased, or the deceased's estate, the former are liable to trump the latter.

What so-called post-mortem privacy tells us about privacy is that privacy has a clear forward-looking orientation; on the death of the rightsholder it switches its focus to the living - as a tool for their autonomous decision-making free from public scrutiny. Post-mortem privacy also amplifies that pri-

vacancy is located in and across relationships and as such deeply social; it is not protective of the individual versus the community, but of individuals *within* communities and is constitutive of these communities. It enables trusted relationships amongst strangers with a reciprocity of interests across social, professional and public domains. The question for privacy is not whether there was an *a priori* relationship of trust, but whether there ought to be a trusted relationship. By the same token, whilst privacy as a legal right assumes a neat singular, binary, one-way claim made against another, on the ground it is entangled in the messy sociality of life and its multitude of overlapping, interdependent and conflicting relationships of often mutual vulnerabilities and attendant dependencies, and so casts its net much wider than any one individual at a time.

Digital legacies do not generally upset these privacy fundamentals but enhance their significance. There is little that speaks in favour of corporate platforms becoming the default custodians of their users' legacies and attendant confidentiality of others, and thus to unsettle the traditional post-mortem ordering of analogue personal effects with a strong family orientation. On the contrary, the personal (and economic) value of such digital legacies, coupled with the moral hazard associated with locking them up with corporate duty bearers, speaks in favour of keeping traditional intestate ordering firmly in place. Meanwhile, the fact that the deceased's personal data has entered the realm of big data and therein become inextricably and *irretrievably* part and parcel of algorithmic intelligence shows primarily the limits of information privacy law and only in the second and derivative instance the limits of any post-mortem ordering.¹⁷⁷ At the same time, it reinforces the argument about the deeply social nature of privacy and its location in and across the tangled multitude of human relations.

Declaration of Competing Interest

I have no conflict of interests.

Data Availability

No data was used for the research described in the article.

¹⁷⁷ See e.g. Elaine Kasket, *All the Ghosts in the Machine: The Digital Afterlife of your Personal Data* (Robinson, 2019); Michèle Finck, 'Hidden Personal Insights and Entangled in the Algorithmic Model: The Limits of the GDPR in the Personalisation Context' in Uta Kohl, Jacob Eisler (eds), *Data-Driven Personalisation in Markets, Politics and Law* (Cambridge: CUP, 2021)