Journal of Media Law

ISSN: (Print) (Online) Journal homepage: www.tandfonline.com/journals/rjml20

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Remigius N. Nwabueze & Matthew White

To cite this article: Remigius N. Nwabueze & Matthew White (2024) Privacy law and the dead – a reappraisal, Journal of Media Law, 16:2, 468-502, DOI: 10.1080/17577632.2024.2438395

To link to this article: https://doi.org/10.1080/17577632.2024.2438395

Published online: 06 Jan 2025.

JOURNAL OF MEDIA LAW
2024, VOL. 16, NO. 2, 468–502
https://doi.org/10.1080/17577632.2024.2438395

Routledge
Taylor & Francis Group

Privacy law and the dead – a reappraisal

Remigius N. Nwabueze and Matthew White

School of Law, University of Southampton, Southampton, UK

ABSTRACT

Privacy is regarded as a fundamental right that is protected in multiple and varying ways. This cannot be said for privacy of the dead. This article considers the importance of post-mortem privacy and reviews the law of privacy and post-mortem privacy in England and Wales including under the ECHR. It also considers medical confidentiality and whether common arguments that pertain to the dead (e.g. organ donation, burial, testamentary dispositions and posthumous copyright) lend support to post-mortem privacy arguments. This article introduces the concept of post-mortem privacy as envisioned by Harbinja and Edwards, and discusses whether the dead can be legal rights holders with a focus on the Interest Theory of rights. This allows for the discussion of post-mortem theories and harm. It concludes by supplementing Donnelly and McDonagh's theories on ante-mortem anxiety and Davey's theory on chilling effects with the jurisprudence of the ECHR to create a new legal right.

KEYWORDS Privacy; post-mortem privacy; common law; human rights; interest theory of rights

Introduction

The death of a person can lead to many questions being asked by those that are living. This can range from (but is not limited to) questions asked out of curiosity, for closure or even for law enforcement purposes.[1] Of course, if said person were still alive, these would undoubtedly raise issues of privacy. Privacy has been an important consideration where curiosity, closure and law enforcement measures are relevant.[2] To this effect, a living person's privacy is regarded as a fundamental right and is protected in

CONTACT Remigius N. Nwabueze R.N.Nwabueze@soton.ac.uk

[1]M Donnelly and M McDonagh, 'Keeping the Secrets of the Dead? An Evaluation of the Statutory Framework for Access to Information about Deceased Persons' (2011) 31(1) Legal Studies 42.

[2]*Couderc and Hachette Filipacchi Associés v France* App no. 40454/07 (ECHR, 10 November 2015), [100]–[102]; *Mikulić v Croatia* App no. 53176/99 (ECHR, 7 February 2002), [66]; *Malone v United Kingdom* App no. 8691/79 (ECHR, 2 August 1984).

multiple and varying ways.[3] The protection of privacy for the living also extends to health information (medical confidentiality).[4] In England and Wales, medical confidentiality, even post-mortem, is so rigorously protected that Donnelly and McDonagh sought to identify ways to enable easier access to such information.[5] These sorts of stringent privacy protections of the living are lacking with respect to the dead.[6] A pertinent question, therefore, arises as to whether the law in England and Wales recognises, or should recognise and protect, post-mortem privacy? This is the question this article – and a second article to follow (Article II) – will address.

The idea of post-mortem privacy, which was conceptualised as 'the right of a person to preserve and control what becomes of his or her reputation, dignity, integrity, secrets or memory after death'[7] has become a 'vital topic of public and scholarly legal concern.'[8] Thus, the stakes of not protecting it have become a matter of concern. Non-recognition and non-protection of privacy post-mortem engenders numerous legal problems in several situations. For example, private information of the deceased could be used without restriction; the deceased's private information could be commercially exploited without the authority of their estate or survivors; the deceased's private information might be publicly disclosed, or used for non-anonymised analytical purposes.[9] Arguably, the infringements highlighted above could violate the informational self-determination of the deceased in several ways, such as not respecting their will to delete information after death, their will to hide certain aspects of their lives or to not have their life overrepresented in some way.[10] The importance of the idea of post-mortem privacy examined in this article is underscored by a recent and widely publicised scandal in which some police officers were accused of unauthorisedly taking and disseminating the pictures of two murdered

[3]See for example Article 8 of the European Convention on Human Rights (especially the expansive interpretation of it by the European Court of Human Rights as we will see), Article 7 of the Charter of Fundamental Rights, Article 12 of the Universal Declaration of Human Rights and see the Indian Supreme Court's interpretation of Articles 14, 19 and 21 of the Constitution of India 1949 in *Justice K. S. Puttuswamy (Retd.) and Anr. vs Union Of India And Ors* (2017) 10 SCC 1 which guaranteed the right to privacy.

[4]Donnelly and McDonagh (n 1).

[5]ibid; see also JPM Bonnici and KA Choong, 'Access to the Health Records of Deceased Patients: Why the Law is in Need of Review' (2009) 25(2) Computer and Security Law Review 155.

[6]*Jäggi v Switzerland* (2008) 47 EHRR 30; *Deepa Jayakumar v. AL Vijay and Ors* [O.S.A.No.75 of 2020].

[7]L Edwards and E Harbinja, 'Protecting Post-Mortem Privacy: Reconsidering the Privacy Interests of the Deceased in a Digital World' (2013) 32(1) Cardozo Arts & Ent LJ 83, 103.

[8]JC Buitelaar, 'Post-mortem Privacy and Informational Self-determination' (2017) 19 Ethics Inf Technol 129.

[9]C Ohman and L Floridi, 'An ethical framework for the digital afterlife industry' (2018) 2(5) Nature Human Behaviour 318; T Magee, 'What Happens To Your Data After You're Dead?' (19 November 2013) <www.forbes.com/sites/tamlinmagee/2013/11/19/what-happens-to-your-data-after-youre-dead/>.

[10]G Malgieri, 'R.I.P. – Rest in Privacy or Rest in (Quasi-)Property? Personal Data Protection of Deceased Data Subjects between Theoretical Scenarios and National Solutions' in R Leenes, R Van Brakel, S Gutwirth and P De Hert (eds), *Data Protection and Privacy: The Internet of Bodies* (Hart Publishing 2018) 146.

sisters, Bibaa Henry and Nicole Smallman (Smallman sisters).[11] In the course of the conviction and sentencing of the police officers for misconduct in public office, the court observed that the offending police officers had violated the privacy of the murdered women and had stripped them of dignity in death.[12]

An infringement of the dead's privacy can also have an impact on the bereaved, e.g. relatives, friends and descendants of the deceased; this could be by way of additional distress to their grief, and the infliction of harm to their memory of the deceased.[13] Thus, the court observed in *R v Jaffer & Lewis* (Smallman sister's case) that the 'family members movingly describe the deep distress caused by their loss of control of the treatment of those for whom they grieve.'[14] Another way the bereaved can be harmed by post-mortem privacy violations is where the private information of their decedent is used to exploit their grief vulnerability, such as through micro-targetted advertisements,[15] or the strategies devised by afterlife companies to keep the grieving hooked to their service, including the use of unsolicited communications.[16] Private information about the deceased, e.g. genetic, health, race, and gender information or data could also be used to infer information about the living relatives which can be used to make predictions about them,[17] and might lead to discrimination.[18] Survivors also face the threat of deepfaking their dead (e.g. Tupac and Michael Jackson),[19] which can cause them serious emotional distress, and could become damaging conduits for racist abuse. Worse still, an unauthorised creation of pornographic deepfakes could harm emotional dependence (the dependence on others for fulfilment), and engender abusive communications and deception for commercial purposes.[20] The predicament for survivors highlighted above might become worse with the operationalisation of generative forms of AI, such as ChatGPT, which is alleged to have the potential to produce a more convincing facsimiles of dead people.[21] Moreover, revival of the dead

[11] BBC News, 'Nicole Smallman and Bibaa Henry: Sisters were repeatedly stabbed' (10th June 2020) <www.bbc.com/news/uk-england-london-52995428>; Also, R N Nwabueze and M White, 'Post-mortem Relational Privacy: *R v Collins; R v Lewis and Jaffer*: A Second Look' (forthcoming).

[12] *R v Jaffer & Lewis*, Sentencing Remarks, Recorder of London, December 6th 2021, [19]–[20], [27(iv)].

[13] Malgieri (n 10).

[14] *R v Collins; R v Lewis and Jaffer* [2022] EWCA Crim 742, [11].

[15] Malgieri (n 10); R Calo, 'Digital Market Manipulation' (2014) 82 George Washington Law Review 995, 1029.

[16] B Jiménez-Alonso and IB de Luna, 'Griefbots. A New Way of Communicating With The Dead?' (2023) 57 (2) Integrative Psychological and Behavioral Science 466, 478.

[17] Malgieri (n 10).

[18] S Viljoen, 'A Relational Theory of Data Governance' (2022) 131(2) The Yale Law Journal 573, 642.

[19] Deepfake is 'an image or video of someone that has been created, altered or manipulated using artificial intelligence (AI) in a way that makes the fabricated media look authentic': E Harbinja, L Edwards and M McVey, 'Governing Ghostbots' (2023) 48(1) Computer and Security Law Review 1, 2.

[20] ibid 5–6.

[21] T Kneese, 'Using Generative AI to Resurrect the Dead Will Create a Burden for the Living' (21 August 2023) <www.wired.com/story/using-generative-ai-to-resurrect-the-dead-will-create-a-burden-for-the-living/>.

through generative AI reveals some power imbalance against survivors, because it is the developers and companies that control how long a Chabot can persist. This can create bureaucratic headaches for the bereaved as they attempt to control AI replicas of their deceased loved ones.[22]

Obviously, the numerous issues highlighted above delineate an extensive field and scope of study. Consequently, our analysis will be developed in a two-part article. Both parts ultimately examine the question of whether, and to what extent, post-mortem privacy can be protected under the common law of England and Wales and under Article 8 of the European Convention on Human Rights (ECHR/Convention Rights). This article lays the foundation for Article II by highlighting the law on privacy protection in England and Wales and under Article 8 as interpreted by the European Court of Human Rights (ECtHR). It reviews the origins of the Hippocratic Oath and medical confidentiality (and post-mortem) from an English and Welsh common law perspective in combination with jurisprudence from the ECtHR. It then considers the extent to which post-mortem privacy (other than medical confidentiality) is protected under the common law, legislation, ECHR jurisprudence, data protection instruments, and copyright. This article also considers whether traditional arguments that relate to the dead, such as those relating to organ donation, burial, testamentary dispositions, and posthumous copyright, might lend support to the recognition of post-mortem privacy.

Furthermore, this article explores Harbinja and Edward's call for the recognition of post-mortem privacy,[23] Davey's definitional refinement,[24] and the theoretical arguments for post-mortem privacy protection. This allows for a discussion of whether the dead can be legal rights holders with a focus on the Interest Theory of rights which, in turn, permits a conversation on post-mortem theories and harm. This includes Donnelly and McDonagh's simplified argument of ante-mortem anxiety[25] in combination with Davey's idea of chilling effects. The latter two ideas, which essentially boil down to living a fulfilled life free of inhibitions will be supplemented by our own contribution, influenced by van der Sloot, that the ECHR promotes human flourishing and the development of personality rights which in turn minimises the setting back of interests (relating back to the Interests Theory of rights). This article also examines the importance of Article 8 in relation to other Convention rights and suggests that the potential for ante-mortem anxiety and chilling effects, as highlighted above, might negatively harm

[22]ibid.
[23]Edwards and Harbinja (n 7) 83.
[24]T Davey, 'Until Death Do Us Part: Post-mortem Privacy Rights for the Ante-mortem Person' (2020) 13 <https://ueaeprints.uea.ac.uk/id/eprint/79742/1/TINA%20DAVEY.%20THESIS%20FINAL%20%281%29.pdf>.
[25]Donnelly and McDonagh (n 1) 46.

the enjoyment of other fundamental freedoms. Cumulatively, all of the above could be used as a justificatory framework for the legal recognition and enforcement post-mortem privacy. Some unexamined questions remain, such as the duration of any recognised post-mortem privacy right?[26] There is also the question of who was harmed by the post-mortem violation of privacy, was it the deceased, a family member or all the family members?[27] A further question is whether the legal recognition of post-mortem privacy interests and rights in England and Wales would undermine the traditional claim that human rights are inalienable? We hope to examine all of the above questions in Article II.

Privacy and the law in England and Wales and the ECHR

This section provides an historical overview of privacy protection in England and Wales. The essence of this overview is to underscore the concerted and programmatic legal and regulatory work that was done to develop an effective privacy protection for the living. This contrasts poignantly with, and puts in bold relief, the absence of privacy protection for the dead, a gap that this article seeks to address. Thus, this section highlights the development of privacy protection under the common law (e.g. breach of confidence, misuse of private information (MPI), data protection law, and copyright) as well as under Article 8. The difficulty of the conceptualisation of privacy will not be specifically addressed in this article.[28]

Arguably, the starting point of modern privacy discourse is the famous article written by Warren and Brandeis.[29] The idea of protecting privacy, however, dates back to the ancient Greeks/Romans,[30] thus prompting the observation of Edward Coke that a 'man's house is his castle, *et domus sua cuique est tutissimum refugium* [and each man's home is his safest refuge].'[31] Coke's maxim first appeared in English case law in the seventeenth century.[32] This maxim continues to symbolise a *zone of privacy* often beyond the reach of the modern regulatory state.[33] Furthermore,

[26]H Beverley-Smith and others, *Privacy, Property & Personality* (CUP 2005) chs 4 and 5.
[27]These sorts of issues were also explored by H Beverley-Smith and others, *Privacy, Property & Personality* (CUP 2005) chs 4 and 5.
[28]H Nissenbaum, *Privacy in Context: Technology, Policy and the Integrity of Social Life* (Stanford University Press 2010) 67, 68; E Barendt, 'Privacy as a Constitutional Right and Value' in P Birks (ed), *Privacy and Loyalty* (Clarendon Press 1997) 1, 6.
[29]SD Warren and LD Brandeis, 'The Right to Privacy' (1890) 4 Harvard Law Review 193.
[30]DH Flaherty, *Privacy In Colonial New England* (1st edn, University of Virginia Press 1972) 85; Barrington Moore, *Privacy: Studies in Social and Cultural History* (Routledge 1984) 115–16.
[31]E Coke, *The First Part of the Institutes of the Laws of England, or, A Commentary on Littleton* (London, 1628, ed. F. Hargrave and C. Butler, 19th ed., London, 1832), Third Institute, 162.
[32]*Semayne v Gresham* [1604] 77 E.R. 194, 195.
[33]JL Hafetz, '"A Man's Home is His Castle?": Reflections on the Home, the Family, and Privacy During the Late Nineteenth and Early Twentieth Centuries' (2022) William & Mary Journal of Women and Law 175, 176.

Entick v Carrington,[34] decided in the mid-eighteenth century, was a leading constitutional law case[35] that encapsulated the protection of one's property (affirming the maxim) and possessions, and a condemnation of the intrusion into privacy.[36] Similarly, the Hippocratic Oath (discussed more below) provides an historical background to the concept of confidentiality,[37] and although not directly concerned with the preservation of privacy, the protection of attorney-client privilege or confidentiality dates back to at least the sixteenth century.[38]

The protection of privacy before the Human Rights Act 1998

The historical development of privacy protection above was tellingly focused on the privacy of the living, and not on the privacy of the dead. This trend of protection, which ignored post-mortem privacy, continued in the 18th and 19th centuries,[39] before the enactment of the Human Rights Act 1998 (HRA). Thus, the law of confidence was developed which initially arose in the commercial context stemming from complaints as to the making of 'illicit copies of confidential papers or misused the information for [the copier's] own, rather than his principal's, purposes.'[40] *Prince Albert v Strange*[41] was one of the earliest cases on breach of confidence, concerning the unlawful copying and proposed publication of etchings of the Royal family. Lord Cottenham LC stated that '[i]n the present case … privacy is the right invaded.'[42] This suggests that, although an injunction was granted for breach of confidence, it was the privacy interest that was decisive.[43] A more modern rationalisation would regard *Prince Albert* as an early case of misuse of private information. *Morison v Moat*[44] concerned the seeking of an injunction preventing a servant from using a secret formula of his employer's. In granting the injunction, Sir George Turner VC noted that 'it was clearly a breach of faith and of contract … to communicate the secret.'[45] *Prince Albert* and *Morison* were cited with approval in *Lamb v Evans*, referring to them as cases where the employee copied something they were provided with in confidence and had subsequently

[34] *Entick v Carrington & Ors* [1765] 2 Wils KB 274.
[35] RN Nwabueze, 'Privacy Protection against Physical Intrusion: Development of a Pure Intrusion Tort in England and Wales' (2022) 28 Tort Law Review 167, 171.
[36] ibid 171–72.
[37] DJ Solove and NM Richards, 'Privacy's Other Path: Recovering the Law of Confidentiality' (2007) 96 Geo. L.J. 123, 134.
[38] *Berd v Lovelace* (1577) 21 Eng. Rep. 33; *Dennis v Codrington* (1580) 21 ER 53.
[39] Solove and Richards (n 37) 136–38.
[40] *Imerman v Tchenguiz* [2010] EWCA Civ 908, 54.
[41] (1849) 1 Mac & G 25.
[42] ibid 46.
[43] Nwabueze (n 35) 172.
[44] (1851) 9 Hare 241.
[45] ibid 263.

been restrained from communicating it to anyone else.[46] *Saltman Engineering Co. v Campbell Engineering Co* established that a breach of confidence is not limited to cases that involve a contractual relationship.[47] This principle was affirmed in *Duchess of Argyll v Duke of Argyll,*[48] *Stephens v Avery,*[49] and *Attorney General v Guardian Newspapers Ltd (No 2).*[50] Therefore, the modern requirements of breach of confidence are that information have a necessary quality of confidence about it; it must have been imparted in circumstances which import an obligation of confidence; and the unauthorised use of the information must be detrimental to the party communicating it.[51] As the cases above show, the case applying these requirements on breach of confidence pertain to the living, and not to the dead.

The European Convention on Human Rights

With the development of the European Convention on Human Rights in the twentieth century, it might have been thought that the historical lack of protection for the privacy of the dead in England and Wales would be addressed, but that regulatory opportunity was not seized upon. Right from the drafting history of Article 8, it was clear that post-mortem privacy protection was not anticipated, nor intended, by the United Kingdom. Even as regards the living, the United Kingdom resisted a more liberal interpretation of Article 8 as documented by the Council of Europe (CoE).[52] For instance, in 1949, the Consultative Assembly of the CoE included in its agenda measures to fulfil the declared aim of safeguarding and further realisation of human rights and fundamental freedoms. Teitgen, the then Rapporteur laid a proposal before the Committee on Legal and Administrative Questions regarding the inviolability of private life, home, correspondence and family in accordance with Article 12 of the UN Declaration of Human Rights. At the meeting of the Committee later on that month, Lord Layton of the United Kingdom suggested that this paragraph be deleted. This suggestion was defeated and instead an amendment was agreed upon.[53] What this demonstrated was that even at an early stage the United Kingdom *did not want* any general right to privacy even within the framework of the ECHR. It is also notable that in relation to family rights, Teitgen noted

[46][1893] 1 Ch 218, 235.
[47](1963) 3 All E.R. 413, 414.
[48][1967] Ch 302.
[49][1988] Ch 449.
[50][1990] 1 AC 109, 281; see also Solove and Richards (n 37) 162–63.
[51]Solove and Richards (n 37) 161–62.
[52]Council of Europe, Preparatory work on Article 8 of the European Convention on Human Rights, (9 August 1956) <www.echr.coe.int/LibraryDocs/Travaux/ECHRTravaux-ART8-DH(56)12-EN1674980.pdf>.
[53]ibid para 3.

that the erosion of familial privacy had been used for racial and religious discrimination.[54]

In 1950, when the Conference of Senior Officials left a blank space for an article on privacy, the UK delegation sought to fill in this gap. Notably, the United Kingdom suggested that everyone should have the right to freedom from governmental interference with his privacy, family, house or correspondence. The United Kingdom further elucidated that no restriction should be placed on the exercise of this right *other than* such that are in accordance with the law and are necessary in a democratic society. However, the Conference of Senior Officials adopted the Article 8 wording which inserted the 'right to respect for,' replaced house with 'home,' and that said rights shall be recognised. Further, the adopted wording proposed that there shall be no interference by a public authority *except such as is in accordance with the law* and *is* necessary in a democratic society.[55] In August of 1950, the United Kingdom further suggested limitations on Article 8 including economic well-being and the protection of the rights and freedoms of others.[56] Therefore, although the United Kingdom did not get its wish of initially excluding Article 8 from the ECHR framework, it did obtain certain concessions which justify the limitation of that right in which it is now recognised as:

(1) Everyone has the right to respect for his private and family life, his home and his correspondence.
(2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society …

The threshold for interference with Article 8 is not an especially high one,[57] and the evidence necessary to establish an interference[58] does not need to be factual in nature (for example, an individual can claim to be a victim of secret surveillance, *without* having to actually demonstrate its actuality e.g. not materially proven).[59] Private life does not end at 'the right to

[54]P-H Teitgen, Establishment of a collective guarantee of essential freedoms and fundamental rights (5 September 1979) <https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=36&lang=en>.
[55]Council of Europe (n 52) para 10.
[56]ibid para 13.
[57]*AG (Eritrea) v Secretary of State* [2007] EWCA Civ 801, [28].
[58]D Korff, 'The Standard Approach Under Articles 8–11 ECHR and Article 2 ECHR' (2009) <https://web.archive.org/web/20170713060015/http://ec.europa.eu/justice/news/events/conference_dp_2009/presentations_speeches/KORFF_Douwe_a.pdf>.
[59]I Roagna, 'Protecting the right to respect for private and family life under the European Convention on Human Rights' (2012) 35 <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806f1554>.

privacy, the right to live, as far as one wishes, protected from publicity.'[60] Private life has also been acknowledged to be a 'broad term not susceptible to exhaustive definition.'[61] It encompasses the physical and psychological integrity of a person[62] as well as physical and social identity.[63] It includes activities of a business/professional nature, the right to establish and develop relationships with the outside world, the right to personal development, the moral integrity and so on.[64] Similar to the notion of private life, family life is also a loose concept[65] that includes biological and non-biological relationships.[66]

Correspondence aims to protect the confidentiality of private communications, which has also been interpreted as guaranteeing the right to uninterrupted and uncensored communications with others.[67] The ECtHR acknowledged that Article 8 protects the confidentiality of private communications and the confidentiality of *all* the exchanges in which individuals may engage for the purposes of communication.[68] The ECtHR acknowledged that correspondence is interfered with irrespective of the contents of a communication,[69] and extended protection to the means or method of communication.[70]

Although much (Western) scholarship focuses on privacy as an intrinsically individual value, there are some that argue that it also has a social one.[71] From a Danish perspective, it was the social expectation of secrecy that eventually developed into informational citizens' rights.[72] It has been suggested 'that a sociological analysis is useful in illuminating aspects of human rights law in ways that remain largely absent in legal scholarship.'[73]

[60] *X v Iceland* App no. 6825/74 (ECHR, 18 May 1976).
[61] *Aksu v Turkey* App nos. 4149/04 41029/04 (ECHR, 15 March 2012), [58].
[62] *S and Marper v United Kingdom* [2008] ECHR 1581, [66].
[63] *Campanelli v Italy* App no. 25358/12 (ECHR, 24 January 2017), [159].
[64] NA Moreham, 'The Right to Respect for Private Life in the European Convention on Human Rights: a Re-examination' (2008) 1 European Human Rights Law Review 44, 45, 51.
[65] *X, Y and Z v United Kingdom* App no. 21830/93 (ECHR, 22 April 1997), [36].
[66] Roagna (n 59) 28.
[67] ibid 32.
[68] *Michaud v France* App no. 12323/11 (ECHR, 6 December 2012), [90]; *Niemietz v Germany* [1992] ECHR 80, [32].
[69] *A v France* App no. 14838/89 (ECHR, 23 November 1993), [34–37].
[70] Roagna (n 59) 33.
[71] PM Regan, *Legislating Privacy, Technology, Social Values and Public Policy* (The University of North Carolina Press 1995); K Hughes, 'The Social Value of Privacy, the Value of Privacy to Society and Human Rights Discourse' in B Roessler and D Mokrosinska (eds), *Social Dimensions of Privacy Interdisciplinary Perspectives* (Cambridge University Press 2015) 228–29; F Malloggi, 'The Value of Privacy for Social Relationships' (2017) 6(2) Social Epistemology Review and Reply Collective 68, 70, 72, 74.
[72] S Wadmann, M Hartlev and K Hoeyer, 'The Life and Death of Confidentiality: A Historical Analysis of the Flows of Patient Information' (2022) Biosocietes 29 1.
[73] P Johnson, 'Sociology and the European Court of Human Rights' (2014) 62(3) Sociological Review 547, 561.

Article 34 ECHR[74] does permit group applications to the ECtHR[75] which could represent societal interests.[76]

Article 8 imposes both positive and negative obligations on states. The former requires a state to take active steps to ensure adequate protection of Article 8(1) rights. The latter concerns the state avoiding any interference with Article 8(1) rights, unless Article 8(2) is satisfied.[77] The ECtHR has also noted that the protection of personal data is of fundamental importance to private life.[78] Article 8 and human rights can be linked to post-mortem privacy in that it has been suggested that the dead can be rights holders insofar as the living treat them as having such.[79] Autonomy and dignity play a large role in granting post-mortem rights with the idea of treating the wishes of the once living with respect,[80] which could fit within the parameters of Article 8's non-exhaustive definition.

Post-human rights

Considerable judicial developments in privacy law took place in the wake of the HRA but,[81] again, these legal developments focused on the privacy of the living, rather than on the dead. This means that the regulatory opportunities offered by post-human rights reforms were not utilised to develop post-mortem privacy protection. For instance, privacy protection in domestic law was extended in *Campbell v MGN Ltd*[82] to reflect the incorporation of Article 8 ECHR. Prior to *Campbell*, to accommodate the domestication of human rights, English and Welsh courts stretched the parameters of breach of confidence[83] until Lord Nicholls in *Campbell* distinguished private and confidential information and thus proposed that the 'essence of the tort is better encapsulated now as misuse of private information.'[84] This distinction between breach of confidence and MPI

[74]The Court may receive applications from any person, nongovernmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right.
[75]B van der Sloot, 'Do Groups Have a Right to Protect Their Group Interest in Privacy and Should They? Peeling the Onion of Rights and Interests Protected Under Article 8 ECHR' in L Taylor, L Floridi, and B van der Sloot (eds), *Group Privacy New Challenges of Data Technologies* (Springer Nature 2017) 199.
[76]ibid 217.
[77]Moreham (n 64) 46–49.
[78]*S and Marper* (n 62) [103].
[79]C Moon, 'What Remains? Human Rights After Death' in Kirsty Squires, David Errickson and Nicholas Márquez-Grant (eds), *Ethical Challenges in the Analysis of Human Remains* (Springer 2020) 43.
[80]K Smolensky, 'Rights of the Dead' (2009) 37(3) Hofstra Law Rev 763, 802.
[81]NA Moreham, 'Beyond Information: Physical Privacy in English Law' (2014) 73(2) Cambridge Law Journal 350, 358.
[82][2004] UKHL 21.
[83]Solove and Richards (n 37) 168–71.
[84]*Campbell* (n 82) [465].

as separate actions[85] was confirmed in *Douglas v Hello! (No 3)*.[86] MPI requires a reasonable expectation of privacy and a balancing exercise by the courts to weigh in all the relevant factors.[87] In *Vidal-Hall v Google Inc*, the Court of Appeal confirmed MPI as a separate cause of action from breach of confidence and held that it was a tort in its own right.[88] This approach was also endorsed in the recent case of *Duchess of Sussex v Associated News Ltd*.[89] However, MPI has not yet been extended to the realm of post-mortem privacy protection.

Post-mortem protection in the Copyright, Designs & Patents Act 1988

Arguably, the UK Copyright, Designs and Patents Act 1988 (CDPA) protects not only the privacy of a living author, but also the privacy of a dead author. Thus, the Act offers some post-mortem privacy protection. For instance, s.12(2) of the CDPA provides that copyright 'expires at the end of the period of 70 years from the end of the calendar year in which the author dies.' Furthermore, sections 9 and 11 provide that the author of the work is the first owner of the copyright unless the author is an employee during the work's creation and there is no agreement to the contrary.[90] Whilst the copyright subsists, the owner of the copyright has certain exclusive rights such as reproducing copies, but importantly the owner is entitled to keep the work to themselves and not reproduce it; those who reproduce works (as a whole or a substantial part) without consent of the copyright owner infringe the copyright, unless a defence is established.[91] The unauthorised use of copyrighted work can infringe upon the privacy of the copyright holder.[92] Copyright laws protect the creator's privacy by what has been described as the surrogacy approach.[93] The link between copyright and privacy dates back to at least the eighteenth century. For instance, Warren and Brandeis relied heavily on *Millar v Taylor*,[94] a landmark copyright case, to provide a conceptual basis 'for the recognition by the common law of the right to privacy.'[95]

[85]Nwabueze (n 35) 175.
[86][2008] AC 1, [72].
[87]Nwabueze (n 35) 176–85.
[88][2015] EWCA Civ 311, [21].
[89][2021] EWCA Civ 1810.
[90]*HRH The Duchess of Sussex v Associated Newspapers Ltd* [2021] EWHC 273, [130]–[131].
[91]ibid [132].
[92]ibid [155].
[93]D McCallig, 'Private But Eventually Public: Why Copyright in Unpublished Works Matters in the Digital Age' (2013) 10(1) SCRIPTED 39, 43.
[94](1769) 98 English Reports 201.
[95]McCallig (n 93) 48.

Data protection and other regulatory protection of post-mortem privacy

Data protection law in the United Kingdom is no different, in terms of the absence of post-mortem privacy protection for the dead in comparison to the existence of a reasonably effectual privacy protection for the living. The United Kingdom has enacted successive data protection instruments, the current being the Data Protection Act 2018 (DPA).[96] Data protection instruments in general govern the processing of what is called '(sensitive/special category) personal data.' Under the UK's data protection law, however, 'personal data' refers only to the data of a living person. The introduction of data protection instruments into the United Kingdom stemmed from European obligations.[97] Data protection gained prominence due to technological changes in the 1960s, thus requiring more detailed rules in protecting personal data. Various resolutions were adopted by the CoE's Committee of Ministers based upon Article 8 ECHR.[98] Though they are closely related in that they both seek to protect fundamental values (i.e. autonomy and human dignity) in order to allow personality development, privacy and data protection do not protect exactly the same interests. The former concerns the holistic intertemporal protection of individuals' inner dimensions, the latter is triggered when information leaves the private sphere at which point demands for transparency of such processes become prevalent.[99]

Data protection does have the potential to extend post-mortem given that the refusal to do so in the United Kingdom is not on a solid foundation.[100]

Post-mortem medical confidentiality

The discussion above underscores that the historical and modern developments in privacy law focused on protecting the privacy of the living, and

[96]Data Protection Act 1984, Data Protection Act 1998 and the Privacy and Electronic Communications (EC Directive) Regulations 2003 which is still in force; Data Protection Act 2018 (DPA). The Data Protection & Digital Information Bill, however is currently in progress through Parliament.

[97]Council of Europe Convention 108 1981; Directive 95/46/EC (Data Protection Directive), Directive 2002/58/EC (ePrivacy Directive), Regulation (EU) 2016/679 (General Data Protection Regulation).

[98]European Union Agency for Fundamental Rights, 'Handbook on European data protection law' (April 2018) 24 <www.echr.coe.int/documents/handbook_data_protection_eng.pdf>.

[99]J Kokott and C Sobotta 'The Distinction between Privacy and Data Protection in the Jurisprudence of the CJEU and the ECtHR' (2013) 3(4) International Data Privacy Law 222, 225; M Tzanou, 'Is Data Protection the Same as Privacy? An Analysis of Telecommunications' Metadata Retention Measures' (2013) 17(3) Journal of Internet Law 20; D Elliott, 'Data Protection is more than Privacy' (2019) 5(1) European Data Protection Law Review 13; O Lynskey, 'Deconstructing Data Protection: The "Added-value" of a Right to Data Protection in the EU Legal Order' (2014) 63(3) International and Comparative Law Quarterly 569; PG Chiara, 'The Balance Between Security, Privacy and Data Protection in IoT Data Sharing: A Critique to Traditional "Security & Privacy" Surveys' (2021) 7(1) European Data Protection Law Review 18, 26–27.

[100]E Harbinja, *Digital Death, Digital Assets and Post-mortem Privacy: Theory, Technology and the Law* (Future Law. Edinburgh University Press 2022) 78.

not the dead, thus leaving a considerable gap in post-mortem privacy protection. Filling this privacy gap requires both judicial and scholarly ingenuity. In this section, we suggest that the law on medical confidentiality, which bears the closest affinity to post-mortem privacy, could be deployed analogically to develop post-mortem privacy protection for the dead. Thus, by drawing on the law relating to medical confidentiality, this section examines the potential for developing privacy protection post-mortem by analysing the origins of medical confidentiality, how it has evolved, and how its protection could translate to post-mortem obligations.

Medical confidentiality

Medical confidentiality is such an important aspect[101] of the doctor patient relationship that it is now considered a norm.[102] Medical confidentiality likely traces its roots back to the Hippocratic Oath dated between the 6th and 3rd centuries B.C.[103] An important aspect of the Oath states that:

> And whatsoever I shall see or hear in the course of my profession, as well as outside my profession in my intercourse with men, if it be what should not be published abroad, I will never divulge, holding such things to be holy secrets.[104]

Even though it was not a regular or constant medical practice through the ages,[105] it eventually became a more concrete practice when physicians sought to redefine the profession by presenting themselves as honourable and trustworthy.[106] The phrase 'what should not be published abroad' suggests the obligation is not absolute,[107] as is the case with medical confidentiality whether exemptions exist by legislation[108] or a court.[109] The

[101]AH Ferguson, 'History of Medicine The Evolution of Confidentiality in the United Kingdom and the West' (2012) 14(9) American Medical Association Journal of Ethics' 738, 738.
[102]GL Higgins, 'The History of Confidentiality in Medicine: The Physician-Patient Relationship' (1989) 35 Can Fam Physician 921.
[103]ibid; D Mendelson, 'The Medical Duty of Confidentiality in the Hippocratic Tradition and Jewish Medical Ethics' (1998) 5 Journal of Law and Medicine 227, 227.
[104]SJ Reiser, AJ Dyck and WJ Curran, *Ethics in Medicine: Historical Perspectives and Contemporary Concerns* eds. (Massachusetts Institute of Technology Press 1977) 5, 6, 12–15, 17, 26–34, 37–38; However, see U Kohl, 'What Post-mortem Privacy May Teach us About Privacy' (2022) 47 Computer Law & Security Review 1, 7 where it is noted that the obligations of secrecy in the Oath were as much to do with maintaining trade secrets and controlling initiates as they were concerned with patient confidentiality.
[105]IE Thompson, 'The Nature of Confidentiality' (1979) 5 Journal of Medical Ethics 57, 57.
[106]Ferguson (n 101) 739.
[107]ibid 738.
[108]General Medical Council, 'Disclosing patients' personal information: a framework' <www.gmc-uk.org/ethical-guidance/ethical-guidance-for-doctors/confidentiality/disclosing-patients-personal-information-a-framework#when-you-can-disclose-personal-information>; see also the Public Health (Control of Diseases) Act 1984 and Health Protection (Notification) Regulations 2010.
[109]*The Duchess of Kingston's Case* (1776) 168 ER 175; AH Ferguson, 'The Lasting Legacy of a Bigamous Duchess: The Benchmark Precedent for Medical Confidentiality' Soc Hist Med (2006) 19(1) 37; sections 8–12 of the Police and Criminal Evidence Act 1984.

traditional model of doctor-patient medical confidentiality has altered due to factors such as public health policy, the emergence of patient-health care services, and technology.[110] The latter highlights the threat of underhandedly and unlawfully allowing Google access to patient records,[111] and the aim of forming of contracts with surveillance companies[112] with a dubious human rights record.[113] Regarding public health policy, the emergence of new categories of diseases meant a rebalancing of interests in favour of collective welfare through, for example, reporting cases of contagious and infectious diseases.[114] Regarding patient-health care services, there has been an increase in health-care specialists and medical institutions that are responsible for patient care that gradually supplanted the doctor-patient relationship, this in turn has raised questions about the continued relevance of doctor-patient confidentiality.[115] Regarding technology, this has facilitated the storage and sharing of patient information, but has also raised concerns about security and accessibility which has shifted discourse onto issues of patient rights/autonomy, bioethics and human rights.[116]

Initially a matter of medical ethics,[117] in the law of England and Wales, it is now well established and not in dispute 'that medical professionals generally owe a duty to maintain confidence in information about a patient's health and treatment.'[118] Earlier cases on medical confidentiality date back to at least the 18th[119] and 19th centuries.[120] The rationale for medical confidentiality was not solely based upon patient privacy, but there are strong public policy grounds[121] for doing so as elucidated by the ECtHR in *Z v Finland* when they held that:

[110]Ferguson (n 101) 739–40.
[111]medConfidential, 'Health data, AI, and Google DeepMind' (24 May 2018) <https://medconfidential.org/whats-the-story/health-data-ai-and-google-deepmind/>.
[112]medConfidential, 'The (Palantir) Procurement (part one)' (22 January 2022) <https://medconfidential.org/2023/the-palantir-procurement-part-one/>.
[113]M Linares and A Bychawski, 'Five reasons to worry about 'spy tech' firm Palantir handling your NHS data' (4 March 2021) <www.opendemocracy.net/en/digitaliberties/five-reasons-to-worry-about-spy-tech-firm-palantir-handling-your-nhs-data/>.
[114]Ferguson (n 101) 740.
[115]ibid.
[116]ibid.
[117]RB Carter 'The Medical Profession' in E. H. Pitcairn (eds), *Unwritten Laws and Ideals of Active Careers* (London 1899) 244–47.
[118]*ABC v St George's Healthcare NHS Trust & Ors* [2020] EWHC 455 (QB), [36]; see also *Campbell*, (n 90), Lady Hale, 'It has always been accepted that information about a person's health and treatment for ill-health is both private and confidential. This stems not only from the confidentiality of the doctor-patient relationship but from the nature of the information itself,' [499]; J Herring, *Medical Law and Ethics* (Oxford University Press 2012) 224.
[119]*The Duchess of Kingston's Case*, (n 109).
[120]A der Verfasser and others, 'Medical Confidentiality in the Late Nineteenth and Early Twentieth Centuries: An Anglo-German Comparison' (2010) 45(2) Medizinhist J. 189. Though the authors' note that '[b]reaches of secrecy by British doctors *could only* be penalised by the courts if they involved slander or libel.'
[121]*ABC*, (n 118), [37].

> [T]he protection of … medical data, is … crucial not only to respect the sense of privacy of a patient but also to preserve his or her confidence in the medical profession and in the health services in general. 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 endangering their own health and, in the case of transmissible diseases, that of the community.[122]

This passage demonstrates the ECtHR's acute awareness of the importance of trust in the medical profession at an individual and societal level.

Medical confidentiality: post-mortem obligations

The post-mortem ethical obligation of confidentiality in doctor-patient relationships underscored in the Hippocratic Oath is reflected in the British Medical Association's handbook on Medical Ethics, and similarly in the Declaration of Geneva (a declaration of a physician's dedication to the humanitarian goals of medicine) which states that 'I will respect the secrets which are confided in me, even after the patient has died.'[123]

This ethical obligation is also reflected in paragraph 134 of the General Medical Council's 'Confidentiality' document.[124] The extension of medical confidentiality post-mortem reflects the importance of not deterring patients from seeking medical advice or disclosing intimate details to their doctor. It also reflects the importance of not harming the deceased, their relatives and the groups of individuals with which the deceased had a commonality of interests, hence it is noted that death 'does not cancel the obligation of confidentiality which remains of import to all survivors within the radius of interests of the deceased.'[125] This accords with the idea that there are strong privacy and public policy grounds for such protection.

Numerous post-mortem obligations have been imposed by the law of England and Wales and the ECHR in recent decades. The Access to Health Records Act 1990 (AHRA) saw the codification of sorts of post-mortem medical confidentiality. It established a right of access to health records by the person to whom they relate, but (due to subsequent data protection instruments) only deals with records of deceased persons.[126] Right of access can only be exercised by the deceased's personal representatives or any

[122] *Z v Finland* [1997] ECHR 10, [95].
[123] Thompson (n 105) 57.
[124] General Medical Council, 'Confidentiality content' <www.gmc-uk.org/ethical-guidance/ethical-guidance-for-doctors/confidentiality/managing-and-protecting-personal-information#disclosing-information-after-a-patient-has-died>.
[125] MH Kottow, 'Medical Confidentiality: An Intransigent and Absolute Obligation' (1986) 12(3) Journal of Medical Ethics 117, 119.
[126] Donnelly and McDonagh (n 1) 49; Kohl (n 104) fn 50.

person 'who may have a claim arising out of the patient's death.'[127] A deceased's personal representative is 'usually the person who holds the probate documentation (such as the Grant of Probate or Letters of Administration) or is named as executor in the deceased's will.'[128] The AHRA sets out several circumstances which prevents access to health records[129] which Donnelly and McDonagh note, significantly limit its scope and means 'that there is no possibility of access to health records for people who are simply seeking answers or accountability.'[130] On the other hand this could be seen as respecting post-mortem medical confidentiality to an exceptionally high degree.

Not long after the enactment of the AHRA, *Re C (Adult Patient: publicity)*[131] became the first case in England and Wales to deal with post-mortem medical confidentiality. In that case, Sir Stephen Brown ruled that an order under s.11 Contempt of Court Act 1981 remained effective so that the identity of the patient's family, doctors and carers could not be published. Kohl notes that this judgment 'elevated the professional post-mortem duty of medical confidentiality to a legal one.'[132]

A few years later, the Freedom of Information Act 2000 (FOIA) was enacted. This was to enable 'members of the public a right of access to information held by public authorities with the goal of promoting accountability in the way in which these authorities perform their functions.'[133] Given the interrelation between the FOIA and the DPA, where the latter only concerns personal data of the living,[134] the personal information exemption of the former means that it does not apply to information relating to the deceased.[135] Access instead is determined through the operation of a confidentiality exemption found in section 41. This provides that information is exempt if 'it was obtained by the public authority from any other person (including another public authority)' and 'the disclosure of the information to the public' would constitute a breach of confidence.

[127]Section 3(1)(f) of the AHRA; Donnelly and McDonagh, (n 1), 59; Kohl, (n 104), fn 27; see *Re AB* [2020] EWHC 691 (Fam) for the distinction between personal representative and someone who may have a claim arising out of the patient's death.
[128]NHS England, 'Access to the health and care records of deceased people' (10 February 2023) <https://transform.england.nhs.uk/information-governance/guidance/access-to-the-health-and-care-records-of-deceased-people/>.
[129]Donnelly and McDonagh (n 1) 59–60.
[130]ibid 60.
[131][1996] 2 FLR 251.
[132]Kohl (n 104) 4.
[133]Donnelly and McDonagh (n 1) 61.
[134]M White, 'R v Collins: A second look' (13 February 2023) <https://thefutureofprivacylaw.wordpress.com/2023/02/13/r-v-collins-a-second-look/>; confirmed in *Campbell v Secretary of State for Northern Ireland* [2018] UKUT 372 (AAC) where the Upper Tribunal ruled that no subject access request could be made on behalf of the deceased.
[135]Donnelly and McDonagh (n 1) 61.

The first case from an ECtHR perspective to deal with post-mortem medical confidentiality was *Plon (Société) v France*.[136] This concerned the publication of medical details of President Francois Mitterrand's cancer shortly after his death in the book titled *Le Grand Secret*, which was written by his doctor. The issue before the ECtHR was whether the banning/injunction of the book struck the right balance between Article 8 and freedom of expression protected under Article 10. The ECtHR held that:

> [the ban was] 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.[137]

The ECtHR held that the privacy interest would weaken over time[138] but, by upholding the temporary ban, they did allow 'for post – mortem privacy claims, at least in the medical context.'[139] *Plon* was considered in *Bluck v Information Commissioner and Epsom & St Helier University Hospitals NHS Trust*[140] which concerned the Information Tribunal's refusal (upholding a prior Information Commissioner's (ICO) decision that the duty of confidence survives death and was enforceable by the personal representatives of the deceased)[141] of a mother's request under the FOIA to access the health records of her deceased daughter for the purpose of reviewing the hospital's admitted negligence *without* the consent of her daughter's widower. The Tribunal 'seamlessly absorbed the duty of medical confidentiality within the law on confidence and also within the right to privacy under Art 8.'[142] It maintained that it would be unconscionable for a doctor to breach medical confidence pre and post-mortem, as 'a duty of confidence is capable of surviving the death of the confider.'[143] The Tribunal sidestepped the post-mortem harm issue by noting that detriment was no longer seen as an essential element for an action of breach of confidence.[144] The Tribunal *also* noted that had it been asked to decide on whether disclosure would violate the widower's Article 8 rights, it would have said that it did.[145] Therefore demonstrating a hierarchy of Article 8 interests in that the widower's Article 8 rights superseded that of the mother. *Bluck* nevertheless establishes support not only for the idea of post-mortem privacy but also post-mortem *relational* privacy which is whereby 'a relative can have a legal privacy interest which relates to the disclosure of information about the deceased which

[136](2006) 42 EHRR 36.
[137]ibid [34].
[138]ibid [53].
[139]Kohl (n 104) 5.
[140]EA/2006/0090, [22]–[24].
[141]*Re Epsom & St Helier University NHS Trust Information Commissioner* FS50071069, 23 October 2006.
[142]Kohl (n 104) 5.
[143]*Bluck* (n 140) [21].
[144]Donnelly and McDonagh (n 1) 50.
[145]*Bluck* (n 140) [32].

arises from their "close relationship" with her.'[146] *Bluck* could also, however, be seen as a demonstration as to why the FOIA is not the appropriate avenue for accessing information regarding the dead, because its primary purpose is to promote governmental (not private body) accountability; the public interest justifications for access are more in line with underlying FOI principles than those based on more personal interests, thus elevating the standard required when family members seek access to information for purely personal reasons.[147] *Bluck* could also be regarded as problematic owing to the fact that it potentially offers a shield to the duty bearer who is implicated in the death of the original rights holder.[148] *Re C (Adult Patient: publicity)* and *Bluck* illustrate the evolution of medical confidentiality from doctor-patient to one that now includes 'an apersonal institutional duty in respect of medical records accessible to a host of people within and outside an organisation.'[149]

Lewis v Secretary of State for Health[150] concerned whether medical records of deceased patients should be disclosed to an inquiry into the removal for analysis of tissue from the bodies of deceased persons who had worked in the nuclear industry.[151] Foskett J considered it at least arguable that 'the duty [of confidence] does survive the patient's death.'[152] This view was based on a number of factors[153] including the strong policy grounds elucidated in *Z v Finland*,[154] the judge's willingness to accept the decision in *Bluck*,[155] and that *Plon* supported the idea of post-mortem medical confidentiality.[156] In allowing the disclosure, Foskett J acknowledged three distinct sets of public interest: the first regarding families' need to know the truth, the second, the need to maintain public confidence in the National Health Service and nuclear industry, and the third, the fact that the inquiry was co-sponsored by the state.[157] This case is regarded as having augmented legal recognition and protection of post-mortem medical confidentiality.[158]

The confidentiality exemption in the FOIA has been relied upon by the ICO more than a dozen times.[159] In *M v IC and Medicines and Health*

[146]Davey (n 24) 21 and 102.
[147]Donnelly and McDonagh (n 1), 66.
[148]Kohl (n 104) 5–6.
[149]ibid 6.
[150][2008] EWHC 2196 (QB).
[151]Donnelly and McDonagh (n 1) 50.
[152]*Lewis* (n 150) [18].
[153]ibid [20], [23].
[154]ibid [21]–[22].
[155]ibid [26].
[156]ibid [27].
[157]ibid [59]; KA Choong and JPM Bonnici, 'Posthumous Medical Confidentiality The Public Interest Conundrum' (2014) 1(2) European Journal of Comparative Law and Governance 106, 110–11.
[158]Choong and Bonnici (n 157) 108.
[159]Donnelly and McDonagh (n 1) 64. This number has likely since increased given that this article was published in 2011.

Products Regulatory Authority[160] the Upper Tribunal allowed the requester's appeal for information in a report held by the public authority concerning a pharmaceutical trial of a drug developed by Pfizer. In obiter, Judge Lloyd-Davies agreed with Foskett J on actionable breaches of post-mortem medical confidentiality. *Webber v IC and Nottinghamshire Healthcare NHS Trust*[161] and *Trott and Skinner v Information Commissioner*[162] both confirmed that it would be an actionable breach of confidence for the relevant public authorities to disclose the deceased hospital/care records to those who were not personal representatives even if they could apply to become so or were next of kin. *Re Meek* concerned the question of whether the anonymity granted (due to Court of Protection proceedings) during the deceased's lifetime remained intact post-mortem.[163] HH Judge Hodge QC ruled that it did not due to the fact that 'P's death means that P no longer has any need for the special protection afforded by anonymity.'[164] Instead the issues were framed as competing interests of the living, one of open justice versus the protection of carers[165] and concluded that deanonymisation was permissible.[166] This was because the Court of Protection agreed that their judgments were not intended 'to afford a shield to those who abuse the trust of those whose interests the rule was promulgated to protect.'[167]

In *Press Association v Newcastle Upon Tyne Hospitals Foundation Trust*,[168] Peter Jackson J considered and agreed with Hodge QC's sentiments in *Meek* in so far that in the eyes of the law, the deceased cannot be affected by what is said about them.[169] However, he did not believe this meant 'protection required in life is automatically lost upon death' as there are 'a number of considerations that may make it necessary and proportionate to continue to uphold after death the privacy that existed in lifetime' giving the examples of medical confidentiality and the interests of justice.[170] He also noted that it was the duty and right of the court to consider when required to do so 'whether that information should continue to be protected following the person's death.'[171] In justifying post-mortem disclosure in that instance however, Jackson J as

[160](GIA/3017/2010).
[161](GIA/4090/2012).
[162](EA/2012/0195) (March 2013).
[163][2014] EWCOP 1.
[164]ibid [104].
[165]ibid; Kohl (n 104) 15.
[166]*Meek* (n 163) [105].
[167]ibid.
[168][2014] EWCOP 6.
[169]ibid [43].
[170]ibid.
[171]ibid [42].

highlighted below misunderstood the nature of harm which privacy protects.[172] Looking for a singular type of injury results in fewer privacy problems being recognised.[173] Jackson J seemingly considers harm in terms of material effects on the deceased, which may be correct, but it is not the only way to view a privacy harm. This can be illustrated by an individual not knowing there is a secret camera in their shower. This may not materially affect them (because they are not aware of the secret camera), but it would be surprising to contend that no harm takes place. Therefore, conscious experience of harm is not necessary for harm to take place. This could be applied to the deceased and such an argument will be developed further in Article II. *V v Associated Newspapers Ltd & Ors*[174] concerned whether the Court of Protection had jurisdiction under section 47 of the Mental Capacity Act 2005 in granting anonymity (reporting restriction order) to a deceased patient which it had previously ruled had capacity. The Court of Protection concluded that such orders could extend beyond a patient's death following Peter Jackson J in *Press Association v Newcastle*.[175]

Arguably, post-mortem medical confidentiality could be viewed as primarily meant for the protection of the overlapping privacy interests of the living (medical staff, care personnel or family member),[176] and that the real rationale is for the good of society rather than the deceased.[177] As the analysis above shows, however, the protection of the dead's privacy is not inconsistent with the societal good pursued by the ideals of medical confidentiality.[178] Furthermore, the analysis above indicates that post-mortem medical confidentiality is protected vicariously.[179] In sum, the developing law on post-mortem medical confidentiality has evolved so significantly as to warrant the suggestion that 'English law now appears to be leaning towards the recognition of a legal duty of confidence to deceased people, in respect of health records.'[180]

[172]Kohl (n 104) 11.
[173]M White, *Surveillance Law, Data Retention and Human Rights- A Risk to Democracy* (Routledge 2024) 315.
[174][2016] EWCOP 21.
[175]ibid [145].
[176]Kohl (n 104) 16.
[177]Davey (n 24) 102.
[178]D Solove, *Understanding Privacy* (Harvard University Press 2009) 94; J-F Blanchette and DG Johnson, 'Data Retention and the Panoptic Society: The Social Benefits of Forgetfulness' (2002) 18 The Information Society 33, 34–35.
[179]T Davey and D Mead, 'Whose Right Is It Anyway? The Duties Owed to a Deceased and to Surviving Family Members When Dealing with a Corpse: Brennan v City of Bradford Metropolitan District Council and Leeds Teaching Hospitals NHS Trust [2021] 1 WLUK 429' (2021) 30(1) Medical Law Review 137, 145.
[180]Donnelly and McDonagh (n 1) 52.

Post-mortem privacy beyond medical confidentiality

As delineated by the analysis above, post-mortem medical confidentiality is considered 'the closest provision to post-mortem privacy that the United Kingdom currently has.'[181] Consequently, the section above suggested that the law on medical confidentiality could be deployed analogically to develop an English and Welsh law on post-mortem privacy. In this section, we consider how, absent the context of medical confidentiality discussed above, the law in England and Wales could evolve to protect privacy post-mortem. Thus, this section examines the potential to use the common law and laws relating to testation, organ donation, burial, data protection, ECHR and copyright (second to medical confidentiality in terms of closeness to post-mortem privacy) to develop English and Welsh law on post-mortem privacy.

Common law

Nwabueze and Hancock have noted that:

> By operation of the maxim: *actio personalis moritur cum persona*, the common law of England and Wales does not recognise a privacy right of action in tort after the victim's death.[182]

This maxim was most clearly recognised (but not applied) by an English court in the seventeenth century *Pinchon's case*.[183] The maxim establishes that personal causes of action die with the person, and given that privacy has been argued to be a personality right[184] it lends support to the idea that post-mortem privacy is not recognised by the law of England and Wales. The idea that this maxim is sufficient to nullify the argument of post-mortem privacy will be challenged in Article II.

Analogies between post-mortem testamentary freedom and post-mortem privacy

Harbinja argued that autonomy should transcend death to form a rationale for post-mortem privacy analogous to the post-mortem control of property through testamentary freedom.[185] It was noted that in common law

[181]Davey (n 24) 19.
[182]RN Nwabueze and H Hancock, 'What's Wrong with Death Images? Privacy Protection of Photographic Images of the Dead' (2022) Computer Law & Security Review 47, fn13; *John Anthony Mizzi v Malta* App no. 17320/10 (ECHR, 22 November 2011), concurring opinion of Sir Nicholas Bratza, [2].
[183]RN Nwabueze, 'Posthumous Photographic Images' in M Trabsky and I Jones (eds), *Routledge Handbook of Law and Death* (Routledge 2024) (in press); *Pinchon's Case* [1611] 77 E.R. 859.
[184]Davey (n 24) 111.
[185]E Harbinja, 'Post-mortem Privacy 2.0: Theory, Law, and Technology' (2017) 31(1) International Review of Law, Computers & Technology 26, 30.

jurisdictions, freedom of testation was practically unlimited.[186] Harbinja further observes that some argue that freedom of testation is an aspect of the testator's personality rights, thus rendering it an unalterable aspect of them.[187] Davey, however, argues that based on a historical account a testator's 'power ceased upon the making of the will or bequest, not upon his death, and so there was no such thing as governing beyond the grave or a continued right beyond death through his will.'[188] In this regard, Davey concludes that there was no such concept of autonomy transcending death as argued by Harbinja.[189] Davey argues that the basis for post-mortem testation is legal fiction.[190] It must be noted that on closer inspection, Harbinja was not focussed on the law as the analysis 'did not include many details about the laws surrounding the freedom of testation, *as the conceptual comparisons* were the focus of the section.'[191]

Organ donation and burials

Regarding organ donation, Davey notes that, historically, there has always been a great emphasis on protecting the integrity of the deceased's body (by way of general rejection of the use of corpses for research purposes) out of respect for the dignity of the deceased.[192] This, for Davey, accords with the idea of effecting assurances, by which the living treat the dead as they wish to be treated themselves when they die.[193] This idea of protecting the integrity of the body post-mortem is also reflected today whereby surviving relatives may reject the idea of organ donation *even if* the deceased expressed their desire to do so upon their death.[194] For Davey, however, the argument that this can translate into post-mortem privacy protection is not supported because:

> [L]iving individuals have an interest in what happens to their privacy rests not on interests that survive death, but rather on the benefit to them of knowing, while they are alive, that their privacy will be respected.[195]

Regarding burials, the law of England and Wales recognises a dead body as *nullius in bonis*, thus there can be no rights to ownership of the dead,[196] and therefore, as underscored by *Williams v Williams*, the executor or a person in

[186]ibid 31.
[187]ibid.
[188]Davey (n 24) 75.
[189]ibid.
[190]ibid 78–79.
[191]Harbinja (n 185) 31. Our emphasis.
[192]Davey (n 24) 83–85.
[193]ibid 82.
[194]ibid 87.
[195]ibid 88.
[196]*Jonathan Yearworth & Ors v North Bristol NHS Trust* [2009] EWCA Civ 37, [31].

lawful custody of a deceased person is not bound to dispose of the body in accordance with the will.[197] Such a position has received fierce criticism for ignoring fundamental human rights issues.[198] Interestingly, Lord Judge noted that one of the rationales for this was that 'there could be no ownership of a human body when alive, why should death trigger ownership of it?'[199] This is true as ownership of human beings is prohibited by virtue of Article 4 ECHR.[200] This does raise an interesting issue if Lord Judge's words are altered to 'there is control of personal information when alive, why should death change that?' Could this be part of a rationale to argue in support of post-mortem privacy, or as Davey notes, similarly to organ donation, it is wishes of the living that take precedence over the deceased as to the particulars of burial and therefore does not lend support to post-mortem rights of sorts?[201]

Data protection

Recital 27 of the General Data Protection Regulation (GDPR) excludes deceased people from the scope of its protection but nevertheless leaves it to Member States to determine whether such right should be recognised. As noted above, the DPA excludes the deceased from its protection. This is exemplified in *Campbell v Secretary of State for Northern Ireland*,[202] a case which concerned whether a subject access request could continue on a deceased's behalf. The Upper Tribunal concluded that the deceased's rights under section 7 (subject access requests) of the DPA 1998 were purely personal and did not survive their death, nor could it be a right for a third party to utilise them, however close to the deceased they were.[203] Not even an expectation created by the state could confer such powers on the Tribunal.[204]

ECHR

From an ECHR perspective, in *Jäggi v Switzerland*, the ECtHR ruled that the private life of a deceased person could not be adversely affected post-mortem.[205] This was affirmed in *Estate of Kresten Filtenborg Mortensen v*

[197] *Williams v Williams* [1882] 20 Ch D 659.
[198] RN Nwabueze, 'Legal Control of Burial Rights' (2013) 2 Cambridge Journal of International and Comparative Law 196.
[199] *Jonathan Yearworth* (n 196) [31].
[200] The authors are aware of the practices of slavery in past and modern forms.
[201] Davey (n 24) 96–97.
[202] *Campbell* (n 134).
[203] ibid [32].
[204] ibid [39]–[41].
[205] *Jäggi* (n 6) [43].

Denmark (*KFM*)[206] where the ECtHR held that allowing Article 8 to be applicable to the deceased would 'stretch the reasoning developed in this case-law too far' and was thus 'not prepared to conclude that there was interference' with Article 8 by the taking of DNA samples of the deceased. The ECtHR distinguished *KFM* from previous case law on the grounds that Article 8 complaints were lodged and relied upon by applicants when they were *alive* and not made on behalf of the deceased. This position has since been reiterated.[207] Additionally, the ECtHR has ruled that applications under Article 34 cannot be brought by deceased persons,[208] or their representatives.[209]

Copyright

The Statute of Anne 1709 is widely regarded as the first Act to provide copyright and post-mortem copyright protection.[210] *Pope v Curl*[211] highlighted the privacy gap in the correspondence chain and sought to close this through copyright, which ultimately helped shape the level of privacy a letter writer could expect when such communication occurs.[212] It was ruled that Curl could not publish Pope's letters without his licence or consent. In *Gee v Pritchard*[213]the claimant unsuccessfully argued on privacy grounds that there should be an injunction to restrain the defendant from publishing their private letters. Instead, the injunction was granted on the basis of the claimant's property right in their letters.[214] Similarly, in *Pollard v Photographic Co*[215]an injunction to prevent the commercialisation of the claimant's photograph was granted based upon an implied contract rather than the claimant's privacy. This demonstrated English law's preference for protecting economic rights as opposed to moral rights.[216] Importantly, in *Pope v Curl*, Lord Chancellor Hardwicke indicated that such protection endured post-mortem.[217]

In the United Kingdom, the Copyright Act 1842 had the opposite effect of *promoting* posthumous publication. Prior to this, posthumous publication

[206]*Estate of Kresten Filtenborg Mortensen v Denmark* App no. 1338/03 (ECHR, 15 May 2006).
[207]*Akpinar and Altun v Turkey* App no. 56760/00 (ECHR, 27 February 2007), [82]; *Boljevic v Serbia* App no. 47443/14 (ECHR, 16 June 2020), [50].
[208]*Aizpurua Ortiz and Others v Spain* App no. 42430/05 (ECHR, 2 February 2010), [30]; *Varnava and Others v Turkey* App nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90 (ECHR, 18 September 2009), [111].
[209]*Ciobanu v Romania* App no. 52414/99 (ECHR, 16 December 2003, (dec.)).
[210]McCallig (n 93) 44.
[211](1741) 2 Atk. 342; 26 ER 608.
[212]McCallig (n 93) 46.
[213][1818] 2 Swanst 402.
[214]Nwabueze (n 35) 172; G O'Farrel, 'Copyright in Letters' (2020) 42(5) European Intellectual Property Review 281.
[215][1888] 40 Ch D 345.
[216]McCallig (n 93) 51.
[217]ibid 47.

was only possible, if while alive, the author assigned copyright in their work. The 1842 Act meant that posthumous protection was only possible if their work was destroyed prior to their death.[218] McCallig rightly notes that modern justifications for privacy such as autonomy and dignity meant that:

> [A]n author's fear that his private communication may be the subject of post-mortem social scrutiny might, while alive, limit his individual expression, hinder the development and growth of his individual personality, and inhibit his ability to freely and privately communicate with others in order to form and develop meaningful relationships.[219]

These inhibitory factors are discussed in more detail below and in Article II. As noted above, s.12(2) of the CDPA does remedy the issue of posthumous publication by granting post-mortem protection of copyright for 70 years, and therefore, offers significant protection to a dead author. However, this protection is not perpetual, and it does also mean that when the 70 years do expire, big tech companies (if they still exist) that host emails, private journals, blogs and private messages will be in possession of a wealth of copyright free material.[220]

Summary

This section has demonstrated that other than through medical confidentiality, there is little scope for the evolution and development of post-mortem privacy in the law of England and Wales through the common law, testamentary law, organ donation and burial law, data protection, and the ECHR. In contrast, copyright law (in addition to medical confidentiality) offers the best tool for analogical development of post-mortem privacy protection, not least because copyright law expressly confers post-mortem protection to a deceased author. Therefore, on the basis that medical confidentiality and copyright law could evolve to undergird post-mortem privacy law in England and Wales, as argued above, the analysis in the section below attempts to provide some conceptual and theoretical rationales for such potential privacy protection post-mortem.

Formulating a rationale for post-mortem privacy

As highlighted above, the evolution of post-mortem privacy protection in England and Wales could be underpinned by analogical applications of laws relating to medical confidentiality and copyright. This section attempts to provide some conceptual and theoretical rationales for post-mortem privacy which, as delineated in the introduction to this article, has been

[218]ibid 51.
[219]ibid 53.
[220]ibid 44.

defined as 'the right of a person to preserve and control what becomes of his or her reputation, dignity, integrity, secrets or memory after death.'[221] This definition has since undergone further development.[222] In this section, therefore, we examine the questions of whether the dead can suffer *harm*, and if so, whether harm suffices for the holding of legal rights by the dead, such as a right of privacy post-mortem? To answer the questions above, we consider a variety of theoretical arguments for post-mortem privacy protection, including Donnelly and McDonagh's simplified ante-mortem argument[223] and Davey's arguments about chilling effects. This will be supplemented with a fundamental rights' argument.

Can the dead be legal rights-holders?

Many legal rules suggest that the dead have no rights,[224] exemplified by the maxim *actio personalis moritur cum persona* highlighted above. There is, however, uncertainty as to what a 'right' actually entails and the question has eluded lawyers and philosophers for centuries.[225] To fill in this void, Hohfeld conceived of 'rights' as rights (claims), privileges (liberties), powers, and immunities.[226] Although Hohfeld's framework has been described as a necessity 'when looking at the construction of the legal right to post-mortem privacy and in ascertaining what it purports to do'[227] others argue that it is too rigid, does not discuss posthumous rights, nor is it clear on whether it concerned moral or legal rights and moral or legal persons.[228]

This potential void left by Hohfeld has been filled in by what is known as the Interest and Will theories.[229] The Interest Theory ascribes to the idea that dead people are potential rights-holders as they share certain commonalities with paradigmatic right-holders (competent living adult persons) and 'are legally shielded against sundry forms of harmful treatment.'[230] The Interest Theory differs from the Will Theory in that the former recognises that protection of the deceased can be recognised by law, for example, as a legal right.[231] Will Theorists argue that legal rights only exist for those who are

[221]Edwards and Harbinja (n 7) 103.
[222]Harbinja (n 100).
[223]Donnelly and McDonagh (n 1) 46.
[224]Smolensky (n 80).
[225]ibid 766.
[226]W Hohfeld, 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1913) 23(1) The Yale Law Journal 16, 28, 30: W Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning and Other Legal Essays* 36 (Walter Wheeler Cook ed., 1919).
[227]Davey (n 24) 62.
[228]Smolensky (n 80) 767–68.
[229]ibid 768.
[230]MH Kramer, 'Do Animals and Dead People have Legal Rights?' (2001) 14(1) Canadian Journal of Law and Jurisprudence 29, 31.
[231]ibid.

sentient and are capable of making choices, and therefore, because this is not applicable to the dead, they can be afforded legal protection but they cannot be rights-holders.[232] They might argue that any apparent post-mortem rights actually belong to the living and are principally aimed at controlling the behaviour of the living.[233] Smolensky, however, argues that the Will Theory 'ultimately fails to completely explain many legal rulings, and its underlying theory of rights does not comport with ordinary legal or social discourse.'[234]

The Interest Theory, however, maintains that those who are unable to make choices, can still be potential legal rights-holders because they still have interests even if they cannot be expressed.[235] The Interest Theory focusses on well-being or benefit, rather than choice, and some[236] have argued that due to this, the dead can be potential rights-holders.[237] This is the position of this article, in that by utilising the Interest Theory it will be argued that 'the dead, although unable to make real-time choices, are capable of being legal right-holders'[238] because the theory 'connects wronging, remediary duties and rights, and does this in a very natural way.'[239] Kramer notes that:

> [A]s a conceptual matter, attributions of legal rights to … dead people … are perfectly acceptable; virtually every proponent of the Interest Theory of rights would agree as much. As a moral matter, furthermore, the classification of dead people … as potential holders of legal rights is very often appropriate.[240]

However, Kramer did distinguish between legal protections and legal rights ascription – prohibiting walking on grass does not confer rights upon the grass itself.[241] Thus, Kramer argued that 'an additional factor must be implicitly or explicitly taken into account: the moral status of the being to whom the rights-attribution is made.'[242] This is what Kramer would describe as the supplementation with 'moral argumentation.'[243] Ascertaining this moral status requires singling out a class of beings who can uncontroversially be described as rights-holders, and then to assess the right-holding status of

[232]Smolensky (n 80) 768–69; E Partridge, 'Posthumous Interests and Posthumous Respect' (1981) 91(2) Ethics 243, 246–47, 249.
[233]Smolensky (n 80) 769.
[234]ibid.
[235]ibid.
[236]J Feinberg, 'Harm and Self-Interest' in *Rights, Justice, and the Bounds of Liberty: Essays in Social Philosophy* (Princeton University Press 1980) 45, 59–68.
[237]Smolensky (n 80) 769.
[238]ibid 766.
[239]VAJ Kurki, 'Rights, Harming and Wronging: A Restatement of the Interest Theory' (2018) 38(3) Oxford Journal of Legal Studies 430, 443.
[240]Kramer (n 230) 54.
[241]ibid 32–33.
[242]ibid 33.
[243]ibid 32.

another being by comparison to this uncontroversial or paradigmatic rights-holder.[244] Thus, Kramer observed that to ascribe legal rights to the dead:

> [T]he key move is to subsume the aftermath of each dead person's life within the overall course of his or her existence. By highlighting the sundry constituents of that aftermath – e.g. the continuing influence of the dead person on other people and on the development of various events, the memories of him that reside in the minds of people who knew him or knew of him, and the array of possessions which he accumulated and then bequeathed or failed to bequeath – we can highlight the ways in which the dead person still exists. He endures, of course, not typically as an intact material being but as a multi-faceted presence in the lives of his contemporaries and successors. For a certain period, then, he can be morally assimilated after his death to the person he was during his lifetime.[245]

However, as argued below, such criteria may not necessarily be decisive or required in determining whether post-mortem privacy can be successfully argued and thus confer post-mortem legal rights.

Post-mortem theories and harm

Arguments for post-mortem harms date back, at least, as far as Aristotle.[246] The standard argument against any notion of post-mortem privacy is that the dead cannot be harmed,[247] after all '[w]hat harm can the deceased suffer after death?'[248] Additionally, not all harms are transferable upon death.[249] Although there is seldom comprehensive legal discourse on the concept of harm as a justification or argument against post-mortem privacy,[250] some have suggested that the privacy intrusion in and of itself is the harm.[251] However, Kohl notes that if that is the case, can such dignitary harm be suffered by the dead? This is answered in the negative because 'the dead are dead.'[252] Kohl does concede that privacy intrusions can be harmful, *but not because they are harmful to the dead*.[253] Sperling summarised these difficult questions as *how* can the dead be harmed if they do not know or experience it, and if the deceased no longer exists, *who* is the subject of post-mortem harm?[254]

[244]ibid 33.
[245]ibid 47.
[246]Aristotle, *Nicomachean Ethics* (Roger Crisp ed., Cambridge University Press 2000) 16–17.
[247]Kohl (n 104) 11.
[248]ibid 13.
[249]Davey (n 24) 27.
[250]ibid 140.
[251]Kohl (n 104) 13.
[252]ibid.
[253]ibid.
[254]D Sperling, *Posthumous Interests: Legal and Ethical Perspectives* (Cambridge University Press 2008) 15.

The literature on post-mortem harms is vast,[255] and it is beyond the scope of this article to consider it all, instead it will focus on select parts. Feinberg's theory is briefly discussed because his work can be regarded 'as a natural starting point in … discussions of posthumous harm.'[256] Feinberg, another Interest Theorist, argues that potential holders of legal rights are those that have an interest, defined as having a stake,[257] and the harm arises when this person's interests are setback.[258] For Feinberg, the subject of harm is not the corpse, but the ante-mortem person, the living person that is now deceased.[259] This person, he contends, was harmed because the subject of their interest was, all along, going to be defeated whether they were privy to it or not.[260] Feinberg does not ascribe to the view of retrospective harm, rather he argues 'that [the harm] was true all along.'[261] This addressed Partridge's criticism that it was senseless to discuss issues of post-mortem harm without there being an interest bearer.[262] Feinberg draws his argument from Pitcher,[263] a position that was similarly maintained by Nagel.[264]

Feinberg's theory has, however, been subject to critique. Callahan rejects Feinberg's ante-mortem person being a subject capable of holding an interest, because she argues that only the living can bear interests, including those that are post-mortem in nature as 'the interests a person had before death only survive *as interests* if they are carried on by living interests bearers.'[265] She continues that, due to the harm being attributed in the way that Feinberg suggests (that is, that the harm occurred all along),[266] the person who inflicted the harm will have this attributed to them before having actually done anything, using the example of a child yet to be born causing post-mortem harm because the harm was true all along.[267] Sperling further argues that Feinberg's argument provide no point in time at which harm occurs and there is no way of distinguishing the unharmed and harmed ante-mortem person.[268] Both Callahan and Sperling also point to

[255]J Feinberg, 'The Rights of Animals and Unborn Generations', in W Blackstone (ed), *Philosophy and Environmental Crisis* (University of Georgia Press 1974) 43–68; BB Levenbook, 'Harming Someone after His Death' (1984) 94(3) Ethics 407; G Pitcher, 'The Misfortunes of the Dead' (1984) 21 American Philosophical Quarterly 183; D Grover, 'Posthumous Harm' (1989) 39(156) Philosophical Quarterly 334; Steven Luper 'Posthumous Harm' (2004) 41(1) American Philosophical Quarterly 63; JS Taylor, 'The Myth of Posthumous Harm' (2005) 42(4) American Philosophical Quarterly 311.
[256]B Kultgen, 'Posthumous Repugnancy' (2022) 22(3) Journal of Ethics and Social Philosophy 317, 319.
[257]J Feinberg, *The Moral Limits of the Criminal Law: Harm to Others* (Oxford University Press, 1984) 34.
[258]ibid 88.
[259]ibid 89–91.
[260]ibid 91.
[261]ibid.
[262]E Partridge, 'Posthumous Interests and Posthumous Respect' (1981) 91(2) Ethics 241, 247.
[263]Pitcher (n 255).
[264]T Nagel, 'Death' (1970) 4(1) Noûs 73, 76.
[265]JC Callahan, 'On Harming the Dead' (1987) 97(2) Ethics 341, 344.
[266]ibid 345.
[267]ibid.
[268]Sperling (n 254) 25.

the fact that, in arguing for the ante-mortem person as the subject of harm, Feinberg effectively conceded that the dead cannot be harmed.[269] Theories similar to Feinberg's have also been lambasted for not being sufficient to establish that posthumous events can harm the dead, as in order to do so, according to Kultgen 'it must be that one can be harmed but be *completely unaffected* by the harm at any time in the future, and not just unaware of it.'[270]

Sperling on the other hand, whilst rejecting the idea that the dead could qualify as a person,[271] nevertheless agreed that certain post-mortem interests exist in the form of the 'recognition of one's symbolic existence.'[272] Sperling argued that, in recognition of the deceased's symbolic existence, their interests could be harmed in that 'when tied to the concept of interests, harm is conceived as the thwarting, setting back, or defeating of an interest.'[273] Sperling conceptualised the 'Human Subject' as the subject of posthumous harm, and that the *Human Subject* exists before birth and after death of a person and has rights 'that refer to and protect some of the life interests and far-life-long interests of [them]'[274] and should relate to 'actions made by the deceased while alive or to promises made to or by the deceased.'[275] However, this approach has been criticised for being closer to a concept than a person, and may not make any more sense to talk of harming the 'Human Subject' than it does to talk about harming the dead.[276]

The prospect of post-mortem harm theory

Perhaps the way to protect the interests of the deceased could be less extravagantly explained by acknowledging that the living is harmed at *the prospect* of post-mortem events.[277] Donnelly and McDonagh drew on the idea from McGuinness and Brazier that what happens 'to us in death affects us in life.'[278] Donnelly and McDonagh continue that if a living person cannot be confident that a degree of respect will be shown to them (their dead body or wishes) once they have passed, they may experience harm in the

[269]Callahan (n 265) 346; Sperling (n 254) 25.
[270]Kultgen (n 256) 319. Note however, Kultgen concedes that the problem he raises cannot effectively deal with the various defences Boonin proposes, fn 3. As such, Kultgen's critique leaves the underlying rationale for this article largely unaffected.
[271]Sperling (n 254) 5.
[272]ibid 9, 40–41.
[273]ibid 10.
[274]ibid 37–38.
[275]ibid 84.
[276]Donnelly and McDonagh (n 1) 46.
[277]ibid 47.
[278]S McGuinness and M Brazier, 'Respecting the Living Means Respecting the Dead too' (2008) 28(2) Oxford Journal of Legal Studies 297, 311.

form of anxiety and unhappiness whilst still alive.[279] They proceed to note that it may be reasonable to argue that failure to accord a certain degree of protection to the dead could significantly harm the interests of the living.[280] Scarre contends that 'we feel strong distaste *while alive* for the prospect of our loss of privacy when dead.'[281] Indeed, in *Press Association*, Peter Jackson J noted that a reason to protect post-mortem privacy was in the 'interests of justice, *which require[s] that people should not be deterred from approaching the court out of fear that any privacy will automatically lapse on death*.'[282] Davey takes this idea a step further in arguing that harm can be caused to the living in three ways when post-mortem privacy is not protected:

> [T]he loss of the living's critical interest in maintaining her private life in death, means that she is harmed in life even if she did not know that this would occur. Secondly, the risk of the revelation of private matters when dead, *can cause a person to inhibit or change their behaviour and thus not live their life in the manner that they would otherwise have done were it not for the threat of post-mortem exposure. This can be said to therefore prevent them from living an autonomous and fulfilling life.* Consequently, they could indeed suffer in advance of the 'posthumous harm' being executed. They can actually experience 'harm' in life by not having liberty of action in virtue that their actions may, or will, become public knowledge upon death. Finally, a person may harbour a secret in life which, the prospect of revelation upon death, causes them harm in life.[283]

Davey continues that such post-mortem privacy violations can cause even greater harm than those envisioned by Feinberg 'by virtue of the knowledge in life that this can occur in death. It could mean that without the protection of privacy when one dies, the ante-mortem person suffers harm that is the consequence of that knowledge.'[284] Donnelly and McDonagh and Davey's idea of living a fulfilled life in fact accords with the ECtHR's notion of private life in that it comprises 'the right to establish and to develop relationships with other human beings, especially in the emotional field for the development and fulfilment of one's own personality.'[285] This can be exemplified in European Commission on Human Right's judgment in *X v Germany* where the applicant was allowed to have his ashes scattered in his garden on his death because it closely related to his private life 'since persons may feel the need to express their personality by the way they arrange how they are buried.'[286] A restriction on this expression would

[279]Donnelly and McDonagh (n 1) 46–47.
[280]ibid 47.
[281]G Scarre, 'Privacy and the Dead' (2013) 19(1) Philosophy in the contemporary world 1, 10.
[282]*The Press Association v Newcastle Upon Tyne Hospitals Foundation Trust* (n 168) [43] (our emphasis).
[283]Davey (n 24) 20 (our emphasis).
[284]ibid 170.
[285]*X v Iceland* [1976] ECHR 7.
[286][1981] ECHR 8.

interfere with Article 8, and could affect a person's psychological and moral integrity and therefore bring it within the scope of the ECHR. The ECtHR has held, albeit in differing circumstances and in relation to a different Convention Right, that a permanent state of anxiety and uncertainty about one's future could violate Article 3.[287] The ECtHR continued that 'its conclusions concerning the respondent State's responsibility under Articles 3 … the Court considers that the State's actions and omissions likewise engaged its responsibility under Article 8.'[288] The ECtHR spoke of the importance of moral integrity and the importance of personal development.[289] Such is the protection that Article 8 can afford, van der Sloot argues that the ECtHR's interpretation promotes human flourishing.[290] van der Sloot continues that human flourishing, a key concept in virtue ethics is directed at 'the optimal personal development a person can attain – it therefore knows virtually no boundaries, as almost everything could be instrumental to maximum flourishing.'[291] The development of one's personality and identity are key elements of personality rights.[292] These are more than just negative freedoms.[293] As noted above, Article 8 encompasses social identity, however, van der Sloot takes this position further by arguing that Article 8 has been developed to include personality rights that entail positive obligations for human flourishing.[294] van der Sloot further argued that 'the scope is potentially much broader and could include almost every aspect of one's individual development.'[295] van der Sloot makes reference to the notion that the ECtHR coined the term 'quality of life' which 'is a very subjective characteristic which hardly lends itself to a precise definition.'[296] The ECtHR has since used this term 'in a wide variety of cases, especially in those in which the Court has extended the scope of Article 8 ECHR in the direction of a personality right.'[297] This could further support the idea of promoting human flourishing, minimising chilling effects/anxiety which, without the former, would ultimately lead to life going less well for individuals. Furthermore, van der Sloot argued that Article 8 protects privacy and personality rights, both of which fall under Feinberg's set back of interests (harm), the former falling under welfare interests, while the latter falling under ulterior

[287] *El-Masri v the former Yugoslav Republic of Macedonia* [2012] ECHR 2067, [202].
[288] ibid [249].
[289] ibid [248].
[290] B van der Sloot, 'Privacy as Human Flourishing: Could a Shift Towards Virtue Ethics Strengthen Privacy Protection in the Age of Big Data?' (2014) 5(3) JIPITEC 230.
[291] ibid 239, 42.
[292] B van der Sloot 'Privacy as Personality Right: Why the ECtHR's Focus on Ulterior Interests Might Prove Indispensable in the Age of "Big Data"' (2015) 31 Utrecht Journal of International and European Law 25.
[293] ibid 26.
[294] ibid, 27; see also Buitelaar (n 8) 134.
[295] van der Sloot (n 292) 44.
[296] ibid 42; *Ledyayeva, Dobrokhotova, Zolotareva and Romashina v Russia* [2006] ECHR 896, [90].
[297] van der Sloot (n 292) 46.

interests.[298] Thus, Article 8 is linked to the setting back of interests i.e. frustration of desires and making life go less well for someone.[299] This would only serve to strengthen the argument for positive obligations (discussed further below). Davey also noted that:

> [T]he lack of post-mortem privacy culminates in the so-called 'chilling effect,' which in a legal context, describes the 'inhibition' or 'discouragement' by the subject chilled, of the exercise of their natural and legal rights.[300]

van der Sloot argues that the ECtHR has considered chilling effects in relation to laws that stigmatise homosexuality and can lead to the reluctance to disclose sexual orientation and create 'a chilling effect in relation to engaging in sexual activities and developing one's personality to the fullest.'[301] It is clear how an anxiety about a lack of post-mortem privacy could lead to a lack of developmental fulfilment given some continued stigma towards homosexuality. There is also the issue of *wanting* to keep any development, if it were to occur, in private; the anxiety of this being revealed post-mortem is very real. Additionally, the importance of Article 8 in relation to other Convention Rights became apparent when Goold noted that '[i]t is hard to imagine, for example, being able to enjoy freedom of expression, freedom of association, or freedom of religion without an accompanying right to privacy.'[302] The ECtHR has also recognised that chilling effects can adversely impact *other* Convention Rights, such as Article 11 (freedom of association and assembly),[303] and Article 10 (freedom of expression).[304] The same could be said for measures of secret surveillance, in that they create chilling effects, intrude into psychological integrity and limit personal autonomy.[305] Chilling effects can also affect the way in which a person practises their religion,[306] therefore relating to Article 9 (freedom of thought, conscious and religion). It is important to note that chilling effects should not solely be considered in terms of individual harms as '[c]hilling effects harm society because, among other things, they reduce the range of viewpoints expressed and the degree of

[298]ibid 45.
[299]For example, Davey contends, from a familial/relational privacy standpoint, Feinberg argues that there can be a 'welfare interest' which arises from relationships between e.g. parent and child i.e. the 'other regarding interests.' This Davey notes 'there can exist a relational post-mortem privacy interest which can be harmed and is therefore capable of founding a legal right under Article 8.' See Davey (n 24) 192–94.
[300]Davey (n 24) 170.
[301]van der Sloot (n 290) 236–37, 30.
[302]BJ Goold, 'Surveillance and the Political Value of Privacy' (2009) 1(4) Amsterdam Law Forum 3, 4.
[303]M White 'Case Comment: Catt v the United Kingdom: A Lesson for the UK and European Court of Human Rights?' (2019) 3(1) Journal of Information Rights Policy and Practice 1.
[304]White (n 173) ch 4 and 314–19.
[305]V Aston 'State Surveillance of Protest and the Rights to Privacy and Freedom of Assembly: A Comparison of Judicial and Protester Perspectives' (2017) 8(1) EJLT 1.
[306]White (n 173) ch 4 and 314–19; DS Sidhu, 'The Chilling Effect of Government Surveillance Programs on the Use of the Internet by Muslim Americans' (2007) 7(2) U. Md. L.J. Race Relig. Gender & Class 375.

freedom with which to engage in political activity.'[307] These fears and the chilling effects they can create are exacerbated by technological advancements and the increase in sophisticated mass surveillance.[308] Perhaps these anxieties could be ameliorated by a state's positive obligation under Article 8 to rectify this; van der Sloot observes that positive obligations under Article 8 'fits well in the virtue ethical paradigm, in which the state may have a duty to facilitate the human flourishing of its citizens.'[309] van der Sloot further noted how Aristotle was the founder of virtue ethics and that it could 'become a new and important addition to understanding the background, value, and scope of the right to privacy.'[310] As highlighted above, Aristotle did favour the idea of post-mortem harms, and therefore, this article could aid the idea of protecting post-mortem privacy by envisioning the prospect of post-mortem harm as a justifying basis for the creation of a legal right.

In sum, the analysis above provided an insight into theories of harming the dead, first by pointing to arguments against the existence of such harm, then proceeding to highlight the opposite view with a focus on Feinberg. It then considered the *prospect* of harm to the ante-mortem person whereby the lack of post-mortem protections could cause harm to the living whilst alive. It was then argued that these ideas could be backed up by the jurisprudence of Article 8 given its ability to promote human flourishing. All of this means that there are, potentially, some conceptual and theoretical justifications that could undergird post-mortem privacy protection if English and Welsh law evolved in that direction.

Conclusion

This article seeks to add to the discourse on post-mortem privacy, by determining if and to what extent post-mortem privacy can be protected under the common law, data protection, copyright and the ECHR. This article discussed the law of privacy (including post-mortem privacy) in England and Wales and under the ECHR, and also considered whether common arguments that pertain to the dead (e.g. organ donation, burial law, testamentary dispositions, and posthumous copyright lend support to post-mortem privacy arguments). It suggested that although most of the historic and contemporary developments in privacy law focused on the living rather than the dead, it is possible for post-mortem privacy protection in England and Wales

[307]DJ Solove, '"I've Got Nothing to Hide" and Other Misunderstandings of Privacy' (2007) 44 San Diego Law Review 745, 746.
[308]This term is used loosely to not only include state surveillance but surveillance by tech companies and other forms of data collection.
[309]van der Sloot (n 290) 239, 42.
[310]ibid 240, 43.

to evolve along the direction of laws relating to medical confidentiality and copyright. The article then considered some of the conceptual and theoretical justifications for such a potential privacy right post-mortem, by examining the issue of whether the dead can be legal rights holders, focussing on the Interest Theory of rights. This in turn allowed for a discussion on post-mortem theories and harm which permitted the development of an ante-mortem prospect of harm backed by ECHR positive obligations to advocate for a new post-mortem privacy legal right. This post-mortem privacy right that is designed to set at ease the ante-mortem person through the state's positive obligation would add a welcome and much needed protection in an age where post-mortem privacy violations are becoming more frequent. It also avoids the issue of assigning harm to the dead as this is a right that is intended to promote human flourishing whilst living.

Disclosure statement

No potential conflict of interest was reported by the author(s).

Notes on contributors

Remigius N. Nwabueze is a professor of law at the University of Southampton.

Matthew White was a Research Fellow at the University of Southampton, School of law.