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# Privacy law and the dead – a reappraisal (part II)

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**ABSTRACT**

In an earlier article, we argued that post-mortem privacy is not sufficiently protected in England and Wales. In this article, we draw from Boonin's posthumous harm thesis and posthumous wrong thesis to develop a framework and rationale for justifying the recognition and enforcement of a privacy right post-mortem. Essentially, our theoretical framework suggests that, just as a living person can be harmed by an act that does not have any effect on their conscious experience, such as the frustration of their desires, the dead can also suffer unfelt harm. We test and illustrate the analytical and explanatory power of this theoretical framework with a USA post-mortem privacy case and five relevant practical examples. Furthermore, we examine some important cases in England and Wales, and some cases from the ECtHR, to show how the use of our framework could lead to the recognition and justification of a privacy right post-mortem.

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**KEYWORDS** Privacy; post-mortem privacy; interest theory of rights; posthumous wrongs; posthumous harms

## Introduction

In an earlier article (Privacy Law and the Dead (Part I)),[1] we introduced the idea of post-mortem privacy and its importance to legal discourse and then argued that, in contrast to the privacy of the living, post-mortem privacy is not sufficiently protected under the laws of England and Wales. We argued that English and Welsh law could develop a post-mortem privacy interest or right along the lines of medical confidentiality which endures beyond death and copyright protection which lasts for 70 years after the death of an author. We argued that this direction of development could be underpinned by modern theories of right-holding and posthumous harm. Thus, we suggested

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[1]Remigius N Nwabueze and Matthew White, 'Privacy Law and the Dead – a Reappraisal' (2025) 16(2) Journal of Media Law 468. From here on, this article will be referred to as 'Part I'.

that the existence of a post-mortem privacy right or interest is theoretically possible and justifiable. Furthermore, we argued that the European Court of Human Rights (ECtHR) jurisprudence on the existence, scope and implications of a state's positive obligation under the ECHR could undergird our argument for the development of a post-mortem privacy right or interest.

In this article (Part II), we deepen and extend that analysis with a further theoretical disquisition on the existence of, and justifications for, a post-mortem privacy right, and particularly, we argue that it is conceptually or theoretically possible for a post-mortem privacy action to be brought on behalf of the deceased themselves, rather than project such actions as being reliant on some relational interests. Clearly, we support the development of a relational privacy claim post-mortem, but we argue that it should be a freestanding claim by survivors, separate from, though relying on, a post-mortem privacy claim by the deceased themselves or on their behalf. To achieve the above, we draw from David Boonin's posthumous harm thesis and posthumous wrong thesis to develop a theoretical framework and rationale that could be deployed to justify the recognition and enforcement of a privacy right post-mortem.[2] Crucially, the subject of harm under Boonin's posthumous wrongs/harm thesis's framework is the living person who is now dead; it is the frustration of their desire that harmed and wronged them. In short, we argue that, as a living person could be the subject of an unfelt harm, so too can the dead be harmed without any conscious experience of the harm. Our argument proceeds by cursorily highlighting the relevance and importance of the interest theory of right-holding, which could be used to make a plausible case for the existence of a post-mortem privacy right. In particular, we focus on the debate between Matthew Kramer and Joseph Bowen, to show that regardless of the conception of interest to which an interest theorist subscribes,[3] the interest theory offers a persuasive account of right-holding by the dead. We then move on to analyse Boonin's posthumous wrongs/harm thesis and its potential as a justificatory theoretical framework for a post-mortem privacy right. We test and illustrate the analytical and explanatory power of this theoretical framework with a US post-mortem privacy case and five relevant practical examples that apply throughout the analysis. Furthermore, we examine some important cases in England and Wales to show how the use of our framework could lead to the recognition and justification of a post-mortem privacy right. We repeat this analytical strategy for some relevant cases drawn from the ECtHR based on the ECHR. All of the above leads

[2]D Boonin, *Dead Wrong: The Ethics of Posthumous Harm* (OUP 2019).

[3]Bowen identified five different conceptions of 'interest' for the purposes of Interest Theory: J Bowen, 'The Interest Theory of Rights at the Margins Posthumous Rights' in M McBride and VAJ Kurki (eds), *Without Trimmings: The Legal, Moral, and Political Philosophy of Matthew Kramer* (OUP).

us to argue that a plausible case can be made for the existence and recognition of a post-mortem privacy right for the deceased, and a relational privacy right post-mortem for survivors. This, in turn, raises important new questions which we endeavour to examine in the final section, about the duration of any recognised post-mortem privacy right,[4] and who is harmed by a post-mortem violation of privacy – is it the deceased, a family member or all the family members?[5] Will the legal recognition of post-mortem privacy interests and rights in England and Wales undermine the traditional claim that human rights are inalienable?

## Background to the justificatory theory of rights for the dead

Using Kramer's interest theory of right-holding, we argued in the previous article (Part I) that dead people are potential rights-holders because they share certain commonalities with paradigmatic right-holders (competent living adult persons)[6] and 'are legally shielded against sundry forms of harmful treatment'.[7] Kramer's view of interest above is, however, capacious and non-justificatory in nature, because (on the non-justificatory interest theory) an entity's interest needs only to be served or protected by the performance of a duty (imposed on another person) in order for the entity to qualify as an interest-bearer.[8] The non-justificatory interest theory, therefore, does not require an account of the grounds for, or justification of, the duty correlative to the interest.[9] This contrasts with a justificatory theory of interests under which an entity is an interest-bearer only if their interest is of sufficient moral importance or weight as to *justify* the imposition of a correlative duty. The non-justificatory version of the interest theory establishes a standard of interest that can be easily satisfied in contrast to the justificatory version. Because of this difference, a critique might contend that our arguments based on the interest theory, in this and the earlier article, are implausible. In this opening section, therefore, we respond briefly to this potential objection by arguing that even if Kramer's capacious and non-justificatory theory of interest is rejected, it is still possible to maintain the dead's right-holding status by recourse to the narrower and justificatory theory of interest. An example of justificatory interest theory is the 'well-being' interest theory of right espoused by Bowen.[10]

[4]H Beverley-Smith and others, *Privacy, Property & Personality* (CUP 2005) chs 4 and 5.
[5]These sorts of issues were also explored by Beverley-Smith and others (n 4) chs 4 and 5.
[6]Nwabueze and White (n 1) 493.
[7]MH Kramer, 'Do Animals and Dead People have Legal Rights?' (2001) 14(1) Canadian Journal of Law and Jurisprudence 29, 31.
[8]MH Kramer, 'In Defence of the Interest Theory of Right-Holding: Rejoinders to Leif Wenar on Rights' in M McBride (ed.), *New Essays on the Nature of Rights* (Hart 2017) 49.
[9]Bowen (n 3) 55–56.
[10]ibid 51.

*Well-being* is what makes a person's life go well for them. Bowen argues that X's interests consist of X's well-being. On the justificatory interest theory, therefore, it is X's well-being that grounds or justifies a duty on Y which is correlative to X's right.

Bowen argues that Kramer's capacious interests theory offers an implausible or insufficient account of the ground of holding rights, because an analyst would need to supplement Kramer's capacious interest theory with an inquiry into the moral status of the interest-bearer.[11] Replying to Bowen, Kramer suggests that Bowen's objection above lacks substance as it is reliant upon a mere terminological matter and potentially misunderstands Kramer's distinction between the idea of the dead being a potential right-holder and the duration of such a right.[12] In sum, Bowen's criticism of Kramer's capacious interest theory of rights centres on its inability to consider the nature of the dead's interests themselves.[13] Bowen, therefore, suggests that it is possible to focus on the interests of the dead themselves by recourse to the well-being view of interests.[14] Thus, Bowen argues that if the dead are bearers of well-being, they are potential right-holders on the interest theory.[15] He observes that such an argument, in order to be plausible, 'must explain why things can be good or bad for one without those things affecting one's experiences'.[16] Boonin offers these sorts of justificatory arguments, which we analyse below, but it suffices for this section to say that the interest theory of rights can undergird right-holding by the dead regardless of the version of the interest theory to which an analyst subscribes. Particularly, we argue below that the well-being of a person who is now dead can be made worse (or, for that matter, better) by an act that takes place after the person has died. In furtherance of this justificatory view of interest or right-holding, we argue that, just as the well-being of a living person might be set back, undermined or ameliorated by an act that does not have any effect on that person's conscious experience; the well-being of the dead can also be affected by an unfelt act. Thus, conscious experience of some act that occurs after death is not a necessary measure or criterion of the dead's well-being. In essence, we argue that even on the justificatory (narrower, well-being) theory of interests espoused by Bowen, it is still possible to regard the dead as potential right-holders.

[11] ibid 59.
[12] MH Kramer, 'Looking Back and Looking Ahead Replies to the Contributors' in M McBride and VAJ Kurki (eds), *Without Trimmings the Legal, Moral, and Political Philosophy of Matthew Kramer* (OUP 2022) 371–74; 379–82.
[13] Bowen (n 3) 65.
[14] ibid 66.
[15] ibid 68.
[16] ibid 71.

## A justifying theory: posthumous wrongs and harm

In this section, we consider Boonin's sophisticated theoretical framework which posits that the dead can be harmed, and thus wronged, by an act that occurs after death, even if the deceased cannot have conscious experience of such harm. For this proposition, Boonin relies on a tripodic argument which is essentially grounded in analogy to unfelt harm potentially inflicted on the living. Just as the living can suffer unfelt harm, Boonin argues, the dead can also be harmed. The idea that the living can suffer harm via an act that does not have any effect on their conscious experience was recently exemplified in England and Wales by the phone hacking case of *Gulati v MGN Ltd.*[17] In *Gulati,* the claimants were unaware of the fact that the defendant newspaper proprietor hacked, unlawfully accessed and listened to mobile phone voicemail messages left by callers on claimants' phones.

In the final instalment of Peter Jackson's Lord of the Rings trilogy, Gandalf reassures Pippin that death is liminal, not a finality. He says:

> Pippin: I didn't think it would end this way.
> Gandalf: End? No, the journey doesn't end here. Death is just another path … One that we all must take.[18]

For Bob Brecher, the dead 'do not cease to be a person after (they) have died' and they 'remain part of a community (they) remain a person, even if a dead person'.[19] Remigius Nwabueze highlights how Native Hawaiians in the US regard the dead as continuing to exist post-mortem.[20] Some might even argue that the dead possess virtual immortality.[21] Others may disagree and argue that death *is* the end of a person's existence and personhood. Boonin, however, argues that even if death amounts to a permanent annihilation, the dead can still be wronged.[22] It is this thesis, developed by Boonin, that this article utilises to formulate a rationale to argue for post-mortem privacy rights of the dead. Thus, this section is dedicated to the analysis of the main thrust of his theory. Boonin's posthumous wrong thesis states:

> It is possible for an act to make things worse for a person, or to make that person's life go less well for them, in a way that generates a moral reason against doing it even if the act takes place after the person is dead.[23]

[17] *Gulati v MGN Ltd.* [2015] EWHC 1482 (Ch). We are grateful to one of the reviewers for drawing our attention to this example.
[18] *The Lord of the Rings: Return of the King* (2003), WingNut Films and New Line Cinema.
[19] B Brecher, 'Our Obligation to the Dead' (2002) 19(2) Journal of Applied Philosophy 109, 115.
[20] RN Nwabueze, 'Posthumous Photographic Images' in M Trabsky and I Jones (eds), *Routledge Handbook of Law and Death* (Routledge 2024) 276; *Pinchon's Case* [1611] 77 E.R. 859.
[21] R Madoff, *Immortality and the Law: The Rising Power of the American Dead* (Yale University Press 2010).
[22] Boonin (n 2) 2.
[23] ibid 2.

Alongside the posthumous wrongs thesis, Boonin posits what he calls the posthumous harm thesis which stipulates that, '[i]t is possible for an act to harm a person even if the act takes place after the person is dead.[24]

For Boonin, if it can be successfully argued that the posthumous harm thesis is true, then the posthumous wrongs thesis is also true.[25] In that regard, Boonin develops a three-premised argument as follows:

> P1. It is possible for an act to harm a person while they are alive even if the act has no effect on that person's conscious experiences;
>
> P2. If it is possible for an act to harm a person while they are alive even if the act has no effect on that person's conscious experiences, then frustrating a person's desires is at least one way to harm a person; and
>
> P3. If frustrating a person's desires is at least one way to harm a person, then it is possible for an act to harm a person even if the act takes place after the person is dead.[26]

Boonin highlights that even if his premises are subject to an objection, they can be modified to defeat the objection, and thus, enable the posthumous harm thesis to proceed and in turn, the posthumous wrongs thesis.[27] This modifiability certainly provides a significant degree of flexibility. Boonin, however, makes no assumptions about whether the dead are owed moral obligations. Under Boonin's harm-based framework, it is a sufficient condition for post-mortem harm that an act can harm a person even if the act takes place post-mortem.[28] As Boonin's syllogism above delineates, he derives the plausibility of post-mortem harm from unfelt frustration of a living person's desire, thus observing that if

> A's act frustrates B's desire, then A's act harms B. I will refer to this as the desire satisfaction principle. When I say that A's act harms B, I mean that all else being equal, A's act makes B worse off than B would otherwise have been.[29]

This can be summarised as follows:

> P1: It is possible for A's act to inflict unfelt harm on B.
>
> P2: If it is possible for A's act to inflict unfelt harm on B, then the Desire Satisfaction Principle is true.
>
> P3: If the Desire Satisfaction Principle is true, then it is possible for A's act to harm B even if the act takes place after B is dead.

[24]ibid.
[25]ibid.
[26]ibid 2–3.
[27]ibid 3.
[28]ibid 9.
[29]ibid 11.

C: It is possible for A's act to harm B even if the act takes place after B is dead.[30]

Boonin's desire satisfaction principle is flexible,[31] non-specific and supportive of multiple and diverse scenarios.[32] For instance, Boonin observes that 'if people really do have desires about how things go after they die, then people can be harmed by acts that take place after they die'.[33] If we consider what Boonin has maintained so far, we could suggest that it is possible for A to inflict unfelt harm on B by taking a picture of their dead body and sharing it on social media. We refer to this as example 1.[34] Considering the flexibility and non-specific nature of the desire satisfaction principle, it is arguable that most people, particularly B in example 1 above, would not want an image of their dead body shared via social media.[35] This type of desire, evincing an expectation of non-interference with B's dead body in example 1 above, establishes a sufficient condition relevant to B's life and thus creates a post-mortem state of affairs. As this satisfies the desire satisfaction principle, it can be argued that A harmed B, by making B worse off than they would have been, even though B is already dead. This accords with Boonin's observation that '[t]heir reputation, relationships, and *control over access to their body* all seem to be sufficiently relevant to how their life is going for them'.[36] The desire satisfaction principle therefore seems to suggest that if privacy is not respected post-mortem it can result in harm to the deceased.

Boonin responds to several objections against his notion of unfelt harm. Limitation of space impedes the analysis of such objections and Boonin's responses, but they include those relating to the notion of conflicting perspectives;[37] the risk objection;[38] the status-quo bias;[39] other values;[40] the useful fiction;[41] the equivocation objection;[42] and the subject of harm objection.[43] Visa Kurki notes that:

[30]ibid 14–15.
[31]ibid 102.
[32]ibid 107.
[33]ibid 113.
[34]In this example and example 3 below, we refer to the (more or less) rare situations whereby private information is gathered after death. However, in example 2 and *Weaver's* case below (n 45), we use the contrasting situations involving the gathering of private information during life which is capable of inflicting unfelt harm on the living. The use of these contrasting examples supports our argument that the idea of unfelt harm is plausible whether or not the 'harming' act occurs before or after death. We are grateful to the reviewer for nudging us to make this clarification.
[35]S Zabala, 'Why We Need to Stop Posting Photos of Other People's Dead Bodies On Social Media' (11 October 2017) <https://thoughtcatalog.com/sade-andria-zabala/2017/10/why-we-need-to-stop-posting-photos-of-other-peoples-dead-bodies-on-social-media/>.
[36]Boonin (n 2) 102. Our emphasis.
[37]ibid 21–26.
[38]ibid 29.
[39]ibid 39.
[40]ibid 45.
[41]ibid 48.
[42]ibid 52.
[43]ibid 116–18.

> In the third sense of 'harm', '[t]o say that A has harmed B … is to say much the same thing as that A has wronged B, or treated him unjustly'. Thus, in this deontic sense, harming entails wronging. Wronging, in turn, is connected to rights:
>
> One person wrongs another when his indefensible (unjustifiable and inexcusable) conduct violates the other's right, and in all but certain very special cases such conduct will also invade the other's interest and thus be harmful in the sense already explained.
>
> This connection between harming, wronging and rights is readily intelligible: it would, for instance, be odd to say that 'You have violated Mary's rights but you have not wronged her'.[44]

In sum, this section has utilised Boonin's theory of posthumous wrongs/harm thesis to provide a rationale which could be utilised to argue for a post-mortem privacy right. While the final two sections suggest the ways that law could supplement this, the section below examines a US case that pertinently illustrates the posthumous wrongs/harm thesis in practice.

## Posthumous wrongs and harm thesis in the case of Weaver v. Myers

In *Weaver v. Myers et al*,[45] a Florida statute requires a potential claimant in a medical malpractice suit to serve a pre-action notice to the potential defendant, under which the claimant must authorise the release of the claimant's medical records relevant to that suit to the defendant; the pre-action notice also requires the claimant to consent to the defendant's conduct of *ex parte*/secret interviews with the claimant's medical provider(s). In *Weaver*, Mrs. Weaver, acting individually and as a personal representative of her late husband (Mr. Weaver), brought a medical malpractice action against the defendant, alleging that her husband died because of his negligent medical treatment by the defendant. She argued that the aforementioned Florida Statute violated her husband's right to privacy under the Florida Constitution.[46] The Circuit Court and the District Court of the Appeal both rejected this proposition.[47] On appeal to the Supreme Court of Florida, they referred to *Antico v Sindt Trucking, Inc*[48], which implicitly acknowledged the existence of post-mortem privacy.[49] The Supreme Court of Florida, however, went one step further and explicitly ruled that:

[44]VAJ Kurki, 'Rights, Harming and Wronging: A Restatement of the Interest Theory' (2018) 38(3) Oxford Journal of Legal Studies 430, 443–44.
[45]SC15-1538 (Supreme Court of Florida Nov. 9, 2017).
[46]ibid [7–8].
[47]ibid [8–10]. The former holding that the right to privacy stops at death and are retroactively destroyed, and the latter holding that any privacy rights are waived by virtue of filing a medical negligence claim.
[48]148 So 3d 163, 164 (Fla. 1st DCA 2014).
[49]SC15-1538 (n 45) [13–15].

> [A] decedent does not retroactively lose and can maintain the constitutional right to privacy that may be invoked as a shield in all contexts, including but not limited to medical malpractice cases, against the unwanted disclosure of protected private matters, including medical information that is irrelevant to any underlying claim including but not limited to any medical malpractice claim. Death does not retroactively abolish the constitutional protections for privacy that existed at the moment of death.[50]

Accordingly, the Supreme Court of Florida held that, even in death, Mr. Weaver maintained his constitutional right to privacy, which could be invoked as a shield.[51] It observed that this case involved 'invoking another person's right to privacy to protect disclosure of that person's constitutionally protected information *for that person's benefit*'.[52] It concluded that 'the right to privacy in the Florida Constitution attaches during the life of a citizen and is not retroactively destroyed by death'.[53] This line of reasoning is similar to that which was elucidated by Jackson J in *Press Association v Newcastle Upon Tyne Hospitals Foundation Trust*.[54] There is a caveat, however: the Supreme Court of Florida distinguished *Weaver* from previous cases where similar privacy claims were rejected on the ground that the private information or conduct alleged in those previous cases occurred *after* a person's death.[55] In contrast, Mr Weaver's relevant medical records in issue were already in existence during his lifetime.[56] Thus, in relation to private information or medical records that accrued before death, the Supreme Court of Florida observed that it would amount to retroactive destruction of the right to privacy if privacy protection were denied to such pre-existing private information, with the result that

> The secrets of that person's life, including his or her sexual preferences, political views, religious beliefs, views about family members, medical history, and any other thought or belief the person considered to be private and a secret are subject to full revelation upon death.[57]

This implies that post-mortem privacy protection exists but only in relation to private information that accrued pre-mortem.

Arguably, *Weaver* is rationalisable with the posthumous wrongs/harm thesis framework above. For instance, Mr Weaver's right to privacy (and medical confidentiality) was protected by the Florida Constitution. Presumably, Mr Weaver, whilst alive, had no desire to waive this constitutional privacy protection. Disclosure of Mr Weaver's medical information via the

[50]ibid [16].
[51]ibid [17].
[52]ibid [19]. Our emphasis.
[53]ibid [50].
[54][2014] EWCOP 6, see Part I.
[55]SC15-1538 (n 45) [18], [20], [21], [22].
[56]ibid [20].
[57]ibid [24].

Florida Statute would frustrate this desire; therefore, it could potentially or actually harm and wrong Mr Weaver even though he is dead. Furthermore, the Supreme Court of Florida's interpretation of the Florida Constitution *benefitted* Mr Weaver; this accords with the posthumous rights thesis (whereby 'benefiting another person is not merely a good thing to do but positively obligatory'[58]) and thus further supports the posthumous wrongs/harm thesis. This analysis affords a significant degree of post-mortem privacy protection. As noted above, however, the Supreme Court of Florida emphasised that conduct that occurs *after* someone has died is *not* protected by privacy under the Florida Constitution. In example 1 above, for instance, it would mean that while the information on B's phone would be protected under the Florida Constitution despite their death, photos taken and disseminated of their dead body by A might not enjoy such privacy protection. The posthumous wrongs/harm thesis may provide two solutions to this. First, arguably it is difficult to provide a satisfactory moral justification for the provision of privacy protection to phone information under the Florida Constitution, when the same protection is denied to photos taken and disseminated post-mortem. This implies that the Florida Constitution requires an extension. Second, a living person's privacy rights arguably include a right to that person's image.[59] Therefore, given that the posthumous wrongs/harm thesis framework relies upon the extension of a living person's harm or state of affairs to the dead, it is arguable that the dead equally have a right to their image, which cannot be retroactively destroyed *because* the image right had *already* accrued while they were alive.

## Post-mortem privacy in England and Wales and the posthumous wrongs/harm thesis

This section utilises the idea that the posthumous wrongs/harm thesis creates the necessary basis for legal rights and discusses whether this could allow the common law of England and Wales to protect privacy post-mortem. In Part I, we argued that post-mortem medical confidentiality is the closest the law of England and Wales has come to recognising post-mortem privacy, and

[58]Boonin (n 2) 193.

[59]In the context of English and Welsh law, we deploy 'right to a person's image' in a very loose and non-technical sense because, generally speaking, English and Welsh law does not recognise a right to one's image. In contrast, the ECtHR, under the influence of the concept of personality rights developed in continental jurisprudence, recognises that the right to a person's image is a core aspect of their personality protected under Article 8. This difference in approach (which is arguably partially offset by both jurisdictions' equal emphasis on the need for balancing of conflicting rights and the application of proportionality test) is recognised by the recent Court of Appeal decision in *Stoute v NGN Ltd.* [2023] EWCA Civ 523, [47]. Also, the differences between the domestic and ECtHR approaches in this connection have been carefully analysed in an interesting and valuable piece by Moosavian: R Moosavian, 'Stealing Souls: Article 8 and Photographic intrusion' (2018) 69 NILQ 531.

that copyright is a close second.[60] In that regard, we examined the cases of *Queensberry v Shebbeare*[61] and *Morrison v Moat*[62] which involved a claim to prevent the publication of a manuscript and secret formula respectively. Obviously, *Queensberry* and *Moat* provide only light support for post-mortem privacy due to the nature of what was protected, but more importantly, both cases have certain resonances with the posthumous wrongs/harm thesis. As the injunctions granted in both cases prevented the frustration of the desires of the deceased persons therein, it is arguable that both cases are consistent with the posthumous wrongs/harm thesis.

Furthermore, in *Airedale N.H.S. Trust v Bland*,[63] Lord Hoffman rejected the argument that Tony Bland (who was in a persistent vegetative state) 'felt no pain or humiliation and therefore had no interest which suffered from his being kept alive'.[64] Lord Hoffman observed:

> I think that *the fallacy in this argument is that it assumes that we have no interests except in those things of which we have conscious experience*. But this *does not accord with most people's intuitive feelings about their lives and deaths*. At least a part of the reason why *we honour the wishes of the dead about the distribution of their property is that we think it would wrong them not to do so, despite the fact that we believe that they will never know that their will has been ignored*. Most people would like an honourable and dignified death and *we think it wrong to dishonour their deaths, even when they are unconscious that this is happening*. We pay respect to their dead bodies and to their memory because we think it an offence against the dead themselves if we do not. Once again, *I am not concerned to analyse the rationality of these feelings. It is enough that they are deeply rooted in our ways of thinking and that the law cannot possibly ignore them*.[65]

Clearly, Lord Hoffman implied above that a living person's interest or certain desires of that person might be set back or frustrated after their death. Munby J agreed with Lord Hoffman's view that it is 'not just the sentient or self-conscious who have dignity interests protected by the law'.[66] Also, the Court of Protection has embedded in its jurisprudence the idea that 'dignity abides even where consciousness is lost *and indeed, beyond death*'.[67] Similarly, in *R (on application of Addinell) v Sheffield City Council*,[68] Sullivan J noted that the deceased 'child too has a right to privacy',[69] and that when 'considering questions of privacy and family life

[60]Nwabueze and White (n 1) 488.
[61](1758) 28 Eng. Rep. 924, 924 (Ch.).
[62](1851) 9 Hare 241.
[63][1993] AC 789.
[64]ibid [829 [B]].
[65]ibid [829 [C]]. Our emphasis.
[66]*Burke, R (on the application of) v The General Medical Council Rev 1* [2004] EWHC 1879, [58].
[67]*North West London Clinical Commissioning Group v GU (Rev1)* [2021] EWCOP 59, [78]. Our emphasis.
[68][2000] 10 WLUK 768.
[69]ibid [12].

under article 8, *the balance would come down firmly in favour of social service records remaining confidential to the deceased*'.[70] In *Edwards-Moss & Anor v Revenue and Customs*,[71] Mosedale J 'asked whether a deceased person has a right to privacy: *both parties thought that she did and I agree that persons have the right in general to expect their medical records will remain confidential even after their death*'.[72] The appellants in *Edwards-Moss* relied upon Article 8 and a general right under English and Welsh law to not have private matters made public.[73] Whilst ultimately finding in favour of the His Majesty's Revenue and Customs,[74] Mosedale J weighed 'in the balance the appellants' *and deceased's right to privacy*'.[75] The tenor of the decisions above is congruent with similar cases already examined, such as *Bluck v The Information Commissioner and Epsom & St Helier University NHS Trust*,[76] *Robert O' Hara v IC (Freedom of Information Act 2000)*,[77] *Press Association*,[78] and *R v Collins*.[79] The point is that the post-mortem-type privacy protection accorded by these cases above is partly explicable or justifiable on the ground that, absent such protection, the deceased person's desires whilst alive in relation to their privacy would be frustrated; this rationale is underpinned by the posthumous wrongs/harm thesis framework examined above.

It may, however, be argued that the posthumous wrongs/harm thesis which potentially inspired the recognition of post-mortem privacy in the cases examined above unacceptably goes beyond the confines of Article 8 of the ECHR and might not be consistent with the *Ullah* principles, because of '[t]he duty of national courts … to keep pace with the Strasbourg jurisprudence as it evolves over time: *no more*, but certainly no less'.[80] It is not certain that this sort of judicial duty is absolute. For instance, Judge Nicholas Bratza, former UK ECtHR judge, did observe that, sometimes, national courts should consciously leap ahead of Strasbourg.[81] This is borne out by the fact that judicial creativity in English tort law is not entirely dependent on the Human Rights Act 1998.[82] To this end, Mary Donnelly and

[70]ibid [15]. Our emphasis.
[71][2016] UKFTT 147.
[72]ibid [46]. Our emphasis.
[73]ibid [38].
[74]ibid [55].
[75]ibid [51]. Our emphasis.
[76][2007] EA/2006/0090.
[77][2011] UKFTT EA_2010_0186 (GRC), [8], [16].
[78]*Press Association* (n 54) [43].
[79][2022] EWCA Crim 742, [51].
[80]*Ullah, R (on the Application of) v Special Adjudicator* [2004] UKHL 26, [20]. Our emphasis; *R (Gentle) v Prime Minister* [2008] UKHL 20, [56].
[81]N Bratza, 'The Relationship Between the UK Courts and Strasbourg' (2011) 5 European Human Rights Law Review 505, 512; *Rabone v Pennine Care NHS Foundation Trust* [2012] UKSC 2, [112].
[82]J Gligorijević, 'Privacy at the Intersection of Public Law and Private Law' (2019) Public Law 563.

Meave McDonagh highlighted the example of *Lewis v Secretary of State for Health*, observing that as:

> Foskett J acknowledged, the decision in *Z v Finland had been concerned with information about a living patient and the ECtHR had not engaged at all with the question of posthumous duties*. Further, the information at stake in *Z* was especially significant, as it related to HIV status, and the section from the court's judgment relied upon in *Lewis* must be understood in this context. *However, Foskett J was nonetheless prepared to recognise the application of similar arguments in respect of patients after their death*.[83]

Similarly, Foskett J did not regard the passage of time as capable of diminishing the strength of the obligation of confidentiality,[84] in contrast to the ECtHR in *Plon (Société) v France*.[85] All of the above provides an opportunity to construct, as suggested by Boonin,[86] a parallel scenario of an unfelt harm on the living and a posthumous harm. With this construct, essentially delineating Boonin's posthumous wrongs/harm thesis, it can be argued that the common law should not make a distinction between an unfelt privacy harm inflicted on the living and a privacy harm inflicted on the dead; this would have the effect of extending misuse of private information (MPI) under the common law to encapsulate cases of violation of privacy post-mortem. Breach of confidence, as highlighted in Part 1, already applies post-mortem.[87] To illustrate the suggestion above (example 1), two scenarios may be used. These scenarios are pre-emptively being signposted for being graphic. Say, in example 2, A covertly takes photos of B while B is nude in their bed; A disseminates the nude photos on social media. Suppose that, in example 2 above, B is asleep while, say in example 3 (based on similar facts), B is dead. B in example 2 has a reasonable expectation that photos of them would not be taken whilst they were asleep, nor disseminated on social media. Thus, example 2 is an uncontroversial case of MPI, even if B does not intend to make a claim against A.[88] B's desire for privacy in example 2 is clearly frustrated by A's actions and thus accords with the posthumous wrongs/harm thesis's framework. In example 3, it is *living* B that had the same desire as B in example 2, but again, this was ultimately frustrated by A's actions. Therefore, if the posthumous wrongs/harm thesis is correct, then

[83] 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, 51.
[84] *Lewis v Secretary of State for Health* [2008] EWHC 2196, [30].
[85] [2004] ECHR 200, [53]. Though, see further below that the ECtHR noted that time was relevant in so far as the post-mortem right came into conflict with another right, freedom of expression after the former had already been breached.
[86] Boonin (n 2) 80.
[87] Nwabueze and White (n 1) 484–87.
[88] 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, 144.

our assessment of example 2 should be used to inform our assessment of example 3 in a way that would be unjustified if the posthumous wrongs/harm thesis were false.[89] *Ex hypothesi*, example 3 is, therefore, a case of MPI post-mortem. The argument here is that the harm in both examples is not dissimilar and that, based on the posthumous wrongs/harm thesis's framework, if harm is the basis of distinction between protecting an alive B over dead B, then both suffered harm in the circumstances. Consequently, the *Press Association* case above could have been decided differently since Jackson J accepted that 'LM was a private person who would not have wanted her private information to be made public;'[90] thus, the court clearly accepted that LM's desire was frustrated. Given the limitations of the torts that protect privacy (and by extension post-mortem privacy) under the common law, we consider a potential ECHR response below.

## Post-mortem privacy, ECHR and the posthumous wrongs/harm thesis

As with the common law above, there are obstacles to the realisation of post-mortem privacy under the ECHR. For instance, claims under Article 34 cannot be brought by deceased persons or their representatives. According to the ECtHR, the deceased is not considered a 'person' for the purposes of Article 34.[91] Similarly, in *Jäggi v Switzerland*, the ECtHR was not prepared to stretch the meaning of Article 8 to include the protection of a deceased person, although the dissenting opinion of Judges Hedigan and Gyulumyan doubted 'the finding in that judgment that the dead have no Article 8 right to rest in peace'.[92] This dissenting opinion in *Jäggi* offers an analytical opportunity which we exploit below to argue for the recognition of post-mortem privacy right under the ECHR consistently with the posthumous wrongs/harm thesis framework.

### *Human rights of the dead, Article 8; post mortem and the ECtHR's living instrument and autonomous concepts*

A relevant question here is whether human rights apply to the dead. In the context of forensic work, Adam Rosenblatt argues that 'human rights for the dead are philosophically unworkable and irreconcilable'.[93] Claire Moon disagrees, contending that the dead 'can be rights *holders* insofar as the living behave as if they have obligations towards the dead, treat them as if they

[89]Boonin (n 2) 80.
[90]*Press Association* (n 54) [47].
[91]Davey and Mead (n 88) 145.
[92](2008) 47 EHRR 30. (See below for more detail).
[93]A Rosenblatt, 'International Forensic Investigations and the Human Rights of the Dead' (2010) 32(4) Human Rights Quarterly 922.

have rights, and confer rights upon them in practice'.[94] Kirsten Smolensky suggests that posthumous autonomy and dignity play a large role in granting post-mortem rights in that there are innate human desires to treat the wishes of the once-living person with respect.[95] Indeed, the 'human dignity of one person fructifies human dignity of other person and both of them contribute to the flourishing of humanity in general'.[96] This resonates with Bart van der Sloot's idea of Article 8 promoting human flourishing. Judge Fura-Sandström in *Akpinar and Altun v Turkey* observed, albeit in the context of Article 3, that it was her 'conviction that the duty imposed on the Member State authorities to respect an individual's human dignity, and to protect bodily integrity, cannot be deemed to end with the death of the individual in question'.[97] She held that human dignity extends to the dead and that there is a compelling ethical principle that human beings must always be treated as an end, never a means.[98] As regards the scholarly views above, recall that our argument based on the posthumous wrongs/harm thesis framework does not project the deceased themselves as the bearer of rights; rather, it is the living person, who is now deceased, that is being harmed by having their desires frustrated. In that way, we seek to provide a justificatory framework for the legal rights of a person who is now dead. We argue that this rationale could be deployed to underpin and/or justify the extension of Article 8 rights to post-mortem situations. Such an extension is possible given that the ECHR is a 'living instrument', and thus must be 'interpreted in the light of present-day conditions'.[99] Furthermore, the ECHR can be interpreted in other creative ways,[100] given that the interpretation of international law is a cognitive and creative process.[101] Pertinently, Judge Popović of the ECtHR observed that:

> A range of various techniques used by the [ECtHR], such as evolutive interpretation, innovative interpretation, interpretation contrary to the drafters' intent, and autonomous concepts, prove that judicial activism has prevailed in the court's jurisprudence.[102]

[94]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. Our emphasis.
[95]K Smolensky, 'Rights of the Dead' (2009) 37(3) Hofstra Law Rev 763, 802.
[96]P Bureš, 'Human Dignity: An Illusory Limit for the Evolutive Interpretation of the ECHR?' (2017) 110 Amicus Curiae 20, 27.
[97][2007] ECHR 183, partially dissenting opinion of Judge Fura-Sandström, [4].
[98]ibid [5].
[99]*Tryer v UK* [1978] ECHR 2, [31].
[100]A Mowbray, 'Creativity of the European Court of Human Rights' (2005) 5(1) Human Rights Law Review 57, 79; Bureš (n 96) 23; LK Yee Rosa, 'Expansive Interpretation of the European Convention on Human Rights and the Creative Jurisprudence of the Strasbourg's Court' (2014) 1(1) Journal of Undergraduate Humanities 70.
[101]Bureš (n 96) 20.
[102]D Popovic, 'Prevailing of Judicial Activism over Self-Restraint in the Jurisprudence of the European Court of Human Rights (2009) 42 Creighton Law Review 361, 396.

Thus, there is nothing barring the ECtHR from abandoning its previous decisions.[103] Moreover, George Letsas argues that the ECtHR has opted 'for the moral reading of the Convention rights'.[104] He observes that '[t]o interpret a treaty is ultimately to interpret a moral value' as it is neither about the meaning of words or the intentions of Member State parties.[105] The techniques the ECtHR uses to interpret the ECHR reject the originalist idea of interpretation, which implies that fundamental rights are fixed or frozen in time.[106] The ECtHR's interpretive approach adumbrated above does not, for example, always care to establish a European Consensus,[107] nor insist that certain moralistic views should be abandoned; rather, it is more concerned with the moral value the Convention Right serves and what arguments best support it, something that Letsas dubs 'the moral reading of the Convention'.[108] Letsas further observed that for every fact an interpreter takes into account when determining the purpose of a treaty there must ultimately be a *non-factual* explanation of why this fact is relevant for doing so.[109] For Letsas, 'which facts are relevant for interpreting a treaty must ultimately depend on some normative proposition about *moral reasons or values*'.[110] The normative link between human rights and general moral rights are much stronger and direct when, for instance, a state treats a person as less than human; such a state commits a grave moral wrong.[111] Specifically, Letsas considers the right to private life as an abstract moral truth which states have a duty to respect,[112] observing that:

> If the purpose of international human rights law is to make states accountable for the violation of some fundamental moral rights which individuals have against their government, *then the purpose of human rights courts is to develop, through interpretation, a moral conception of what these fundamental rights are. It is to discover, over time and through persuasive moral argument, the moral truth about these fundamental rights.* In order to fulfil this purpose, *neither empirical inquiries into the consensus between states parties nor dictionary definitions are required.*[113]

[103]See the ECtHR's approach to the legal recognition of transgender people when one contrasts *Rees v UK* [1986] ECHR 11, and *Goodwin v UK* (2002) [2002] ECHR 588.
[104]G Letsas, 'Strasbourg's Interpretive Ethic: Lessons for the International Lawyer' (2010) 21(3) The European Journal of International Law 509, 512.
[105]ibid 512.
[106]ibid 513.
[107]'The Court relies on this doctrine to delimit the margin of appreciation that it grants a respondent State, and it uses the doctrine to justify supervision and intervention against the "outlier State" when the legal practices of Member States of the European Convention on Human Rights (The Convention or ECHR) reflect a certain commonality' P Minnerop, 'European Consensus as Integrative Doctrine of Treaty Interpretation: Joining Climate Science and International Law Under the European Convention on Human Rights' (2023) 40 (2) Berkeley J Intl L 207, 209.
[108]Letsas (n 104) 527–28.
[109]ibid 534.
[110]ibid 535. Our emphasis.
[111]ibid 539.
[112]ibid 539–40.
[113]ibid 540. Our emphasis.

All of the above implies that the interpretation of the ECHR is grounded in moral reasoning/value, something that accords with the posthumous wrongs/harm thesis by virtue of its reliance on the moral reasoning for doing or not doing something. Similarly, autonomous concepts imply that the ECtHR takes an 'anti-textualist view that the meaning of many legal terms'[114] is independent of national law,[115] and this is linked to the idea that the ECHR concepts 'should not be interpreted in a conventionalist way'.[116] Consequently, applicants before the ECtHR could propose a different conception of what counts as an instance of a legal ,[117]for instance, the concept of private and family life under Article 8. As highlighted above, this interpretive and conceptual flexibility allows for the use of the posthumous wrongs/harm thesis rationale to argue for the extension of Article 8 to cases of post-mortem privacy violations.

## Overcoming Article 34 ECHR in light of the posthumous wrongs/harm thesis

The ECtHR already accepts that dealing appropriately with the dead out of respect for the surviving relatives falls within the scope of Article 8.[118] In *Plon*, the ECtHR held that the ban/injunction was 'necessary in a democratic society *for the protection of the rights of President Mitterrand* and his heirs',[119] and that it was intended to 'protect the late President's honour, reputation and privacy'.[120] Tina Davey notes that the language used by the ECtHR suggested that the dead President *himself* had privacy rights.[121] This also concurs with Smolensky's view that the use of rights language play a large role in granting post-mortem rights. Furthermore, in *Putistin v Ukraine*,[122] the ECtHR accepted that 'the reputation of a deceased member of a person's family may, in certain circumstances, affect that person's private life and identity, and thus come within the scope of Article 8'.[123] This suggests that, in certain circumstances (though this is no longer clear),[124]

[114]ibid 523–24.
[115]ibid 524–25.
[116]G Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (Oxford University Press 2009) 46.
[117]ibid 51.
[118]*Genner v Austria* [2016] ECHR 36, [35]; though see critique, S Groom, 'Over My Dead Body: Privacy Rights of the Deceased under the ECHR' (25 October 2021) <https://pleasantblog.co.uk/2021/10/25/over-my-dead-body-privacy-rights-of-the-deceased-under-the-echr/>.
[119]*Plon* (n 85) [48]. Our emphasis.
[120]ibid [34].
[121]T Davey, 'Until Death Do Us Part: Post-Mortem Privacy Rights for the Ante-Mortem Person' (2020) <https://ueaeprints.uea.ac.uk/id/eprint/79742/1/TINA%20DAVEY.%20THESIS%20FINAL%20%281%29.pdf> 202.
[122][2013] ECHR 1154.
[123]ibid [33].
[124]Groom (n 118).

there may be obligations upon States to effectively protect the privacy of the deceased and their surviving relatives. We should note at the outset that whilst the ECtHR cases of *Plon* and *Putistin* above, as well as those examined below, tend to conflate privacy and reputational interests, a conflation that is sometimes reflected in domestic jurisprudence,[125] we are nonetheless only focused on the deceased and their relative's' privacy interests rather than their reputational interests. In essence, we are not directly or indirectly advocating for posthumous protection of reputational interests.[126]

In *Jäggi*, the majority observed that the Swiss Federal Court held that the deceased's relatives did not cite philosophical grounds for opposing exhumation and DNA extraction.[127] This implies, at the very least, that the ECtHR could entertain the possibility of philosophical arguments as to why certain actions might infringe the deceased's Article 8 rights or harm them, given that it was the relatives *and* the deceased's rights that were considered at the national level. This 'philosophical gap' potentially provides an opportunity for utilising or implementing the posthumous wrongs/harm thesis as analysed above. Pertinently, Judges Hedigan and Gyulumyan disagreed with the majority in *Jäggi* regarding the inapplicability of Article 8 to the deceased. They doubted:

> *The KFM finding that the dead have no Article 8 right to rest in peace*. Whilst normally a complaint in respect of such an alleged violation would be brought at the suit of the deceased's relatives, I wonder: does the right to rest in peace disappear where there are no relatives to vindicate it? Does this right only attach to the relatives? I would think that these are issues that have yet to be fully resolved in the Court. *I would have thought that there is a European consensus on the right of the dead to rest in peace and thereby a right under Article 8*.[128]

Judges Hedigan and Gyulumyan raise an important issue above underscoring the significance of the distinction between a potential relational privacy action on the one hand and, on the other hand, a direct privacy action for, or on behalf of, the deceased. Although the idea of relational privacy post-mortem is a step in the right direction, it may not sufficiently protect the dead absent the dead's standalone privacy right, especially where there are no relatives to vindicate an accrued relational privacy right. Davey and David Mead seem to support this proposition.[129]

Accordingly, we argue that post-mortem privacy protection should not depend solely upon the existence of some potential harm caused to the

[125]For example, *ZXC v Bloomberg* [2022] UKSC 5.
[126]We are thankful to the peer-reviewer for drawing our attention to this point.
[127]*Jäggi* (n 92) [41]. It is accepted that they could have meant objections just to the exhumation and DNA extraction, and *not* whether the deceased had any rights *per se*.
[128]ibid, the dissenting opinion of Judge Hedigan joined by Judge Gyulumyan.
[129]Davey and Mead (n 88) 144.

relatives; harm to the relatives themselves could, however, constitute a separate cause of action for the consideration of the ECtHR. The living person rationale in the posthumous wrongs/harm thesis could support the idea of protecting the now deceased *and* their relatives under Article 8, whereby a violation of the deceased's right might strengthen and substantiate the claim of their relatives. We might illustrate this with example 1 above of A inflicting unfelt harm on B by taking a picture of their dead body and sharing it on social media: A frustrates B's desire (thus, A harms and wrongs B). This violates B's Article 8 right. The violation of B's Article 8 right could, in itself, be evidence of harm to B's relative, C, because (i) it affects C personally, and (ii) C is aware that B's desires have been frustrated. C's absence or disinterestedness in pursuing a relevant claim should not change the fact that B's Article 8 right has been violated. This is exemplified in Judge Wojtyczek's concurring opinion in *Petrova v Latvia*[130] where he was not persuaded by the majority's view that an application may not be brought in the name of a deceased person.[131] He observed that the majority's approach was inconsistent with the applicable rules of treaty interpretation, in that, as highlighted above regarding the moral value and moral reading of the Convention, the ECHR does not exclude a less categorical interpretive approach. Wojtyczek J further observed that the possibility of lodging an application on behalf of the deceased depends on the nature of the right that is under consideration 'and, more precisely, on the nature of the specific entitlement coming within the scope of the particular Convention right in question'.[132] He held that the removal of the organs of the deceased in *Petrova*, without the consent of the deceased or his relatives, violated the *deceased's* right, as well as the right of the deceased's *relatives*.[133] This is consistent with our argument above, to the effect that a violation of B's right is potentially the evidence of a violation of C's (B's relative's) right.

The observations of Wojtyczek could be seen as interpreting Article 34 in a flexible manner, consistently with the ECtHR's approach under the living instrument doctrine of Convention interpretation, which 'is not confined to the substantive provisions of the Convention, but also applies to those provisions … which govern the operation of the Convention's enforcement machinery'.[134] Arguably, therefore, this interpretive model could be applied to *procedural* provisions of the ECHR,[135] such as Article 34. Further support for this could be gained from the idea of autonomous concepts highlighted above, for as Judge Van Dijk observed, 'the law can give an

[130][2014] ECHR 647.
[131]ibid, concurring opinion of Judge Wojtyczek, [4].
[132]ibid.
[133]ibid [5].
[134]*Loizidou v Turkey* [1995] ECHR 10, [71].
[135]Yee Rosa (n 100) 72.

autonomous meaning to … concepts like "person"'.[136] This helps to undergird the argument that Article 34 can be interpreted even more flexibly, especially given that the meaning of the 'victim' element of Article 34 has also been interpreted *autonomously*.[137] Thus, it can be argued that the restrictive interpretation of 'person' in Article 34 can be overcome, by creatively interpreting the Article, as suggested above, in a manner that projects a living person under the Article as necessarily including a dead person within its remit by virtue of the posthumous wrongs/harm thesis elucidated above. This would firmly place the dead within the scope of the ECHR.

Some of the cases of the ECtHR imply a move in that direction. For instance, in *Dzhugashvili v Russia*,[138] where the question was whether a post-mortem defamatory publication against Stalin could be litigated by Stalin's grandson, the ECtHR held that it:

> [D]oes *not find sufficient reasons to depart from its established case-law in the instant case*. It follows that the applicant does not have the *legal standing to rely on his grandfather's rights under Article 8 of the Convention* because of their non-transferable nature.[139]

Firstly, the fact that the ECtHR in *Dzhugashvili* held that a grandson does not have legal standing to rely upon their deceased grandfather's Article 8 rights does suggest implicitly that the grandfather has Article 8 rights. Secondly, the fact that the ECtHR held that they could not find *sufficient reasons* to depart from its jurisprudence on the non-transferability of Article 8 rights suggests that its current position is not set in stone. Furthermore, in *Madaus v Germany*[140] and *Genner v Austria*,[141] the ECtHR implied that the deceased person's privacy interest was a 'civil right'[142] and 'core personality right'[143] respectively in relation to Article 8. Also, in *ML v Slovakia*[144] the ECtHR held that, under Article 8, a deceased family member's privacy interest or reputation is 'a part and parcel'[145] of the living relative's private life. The interpretive attitude of the ECtHR in the cases above in relation to Article 8 reflects the suppleness of its analogical approach in relation to Article 34 as analysed above. Potentially, therefore, the ECtHR's implied call for *sufficient reasons* in *Dzhugashvili* opens a window of opportunity for the application of the posthumous wrongs/harm thesis's

[136] *Sheffield And Horsham v UK* [1998] ECHR 69, dissenting opinion of Judge Van Dijk, [8].
[137] *Asselbourg and 78 Others and Greenpeace Association-Luxembourg v Luxembourg* App no. 9121/95 (ECHR, 29 June 1999 (dec.)).
[138] [2014] ECHR 1448.
[139] ibid [24]. Our emphasis.
[140] [2016] ECHR 500.
[141] *Genner* (n 118).
[142] [2016] ECHR 500, [15].
[143] *Genner* (n 118) [45].
[144] [2021] ECHR 821.
[145] ibid [48].

framework examined above. This might result in the ECtHR departing from its current restrictive precedents on Articles 8 and 34, and thus, pave the way for the bringing of both relational privacy action and a direct privacy action on behalf of the deceased as argued above.

In sum, we argue that the posthumous wrongs/harm thesis's framework offers a useful theoretical tool that could be used to examine and interpret Articles 8 and 34 of the ECHR in order to recognise and enforce a privacy right for the dead post-mortem. At the risk of oversimplification, this primarily rests on the premises that a living person desires to maintain privacy during their lifetime; this desire continues after death, but is ultimately frustrated by a privacy violating act executed post-mortem.

## *Practical examples of the use of the posthumous wrongs/harm thesis to analyse and extend Articles 8 and 34 post-mortems*

To further illustrate our analysis above, two additional examples can be delineated, say examples 4 and 5. In example 4, Government A hacks into the email account of B, and is thus able to read sent/received/draft messages etc., of B. Similarly, in example 5, A does the same to B. The difference between examples 4 and 5 is that, in example 5, B is deceased at the time A hacked B's email account.[146] Hacking and monitoring under the ECHR fall under the rubric of measures of secret surveillance.[147] A State's duty is generally of non-interference with Article 8. The desire for B in both scenarios is a basic respect for their privacy. In each scenario, B is not aware of the privacy infringement, either because B does not have the necessary information to determine that a hack has occurred or that B is *unable* to know that fact because B is deceased. Example 4 represents what has been highlighted above as an *unfelt* harm. Pertinently, the ECtHR has observed with regards to measures of secret surveillance that an interference with Article 8 could occur regardless of '*[w]hether or not [the applicant] was aware* of the security cameras'.[148] Thus, the *mere existence of secret surveillance legislation* is enough to trigger the application of Article 8,[149] irrespective of any measures actually occurring.[150] As Andrew Roberts notes (in relation to data retention, but is also applicable to secret surveillance generally), harm[151] can exist *in the*

[146]Examples 4 and 5 can be further illustrated with the ECtHR cases of *Klass & Others v Germany* [1978] ECHR 5029/71 and *Weber & Saravia v Germany* [2008] 46 E.H.R.R, which suggests that Art 8 can cover state surveillance even where the applicant cannot point to evidence that they have been subject to surveillance. We are grateful to the reviewer for this point.
[147]*Privacy International and Others v UK* App no. 46259/16 (ECHR, 7 July 2020, (dec.)), [45].
[148]*Perry v UK* [2003] ECHR 375, [41], [38], [40] and [43]. Our emphasis.
[149]M White, *Surveillance Law, Data Retention and Human Rights – a Risk to Democracy* (Routledge 2024) 89.
[150]*Roman Zakharov v Russia* [2015] ECHR 1065, [168].
[151]A Roberts, 'Privacy, Data Retention and Domination: Digital Rights Ireland Ltd v Minister for Communications' (2015) 78(3) Modern Law Review 535.

*absence of such awareness* of it.[152] Awareness leaves the possibility for resistance[153] (of course, in the case of the deceased, it would be done on their behalf).

Arguably, therefore, the ECtHR already accepts the idea that unfelt harms are capable of interfering with, and violating, Article 8 rights. B's desire for privacy in example 4 above is clearly frustrated by A's actions, and thus accords with the posthumous wrongs/harm thesis. In example 5, it is *living* B (thus qualifies as a 'person' and 'victim' under Article 34) that had the same desire as B in example 4, but again, this was ultimately frustrated by A's actions. Thus, if the posthumous wrongs/harm thesis is correct, then our assessment of example 4 can be used to help inform our assessment of example 5 in a way that would be unjustified if the posthumous wrongs/harm thesis were false.[154] Furthermore, a violation of B's Article 8 rights could constitute the evidence of a violation of C's (B's relative) rights. Therefore, it is arguable that example 5 illustrates the argument for respecting private, family life and correspondence post-mortem. Similar principles could be applied to 'home',[155] where A unlawfully enters B's home and seizes B's documents.

It might be objected that while the posthumous wrongs/harm thesis focuses on desires, Article 8 primarily focuses on negative freedoms. Nonetheless, Article 8 also encompasses positive obligations; this positive obligation might potentially ensure that there is some form of post-mortem protection for the dead via the posthumous wrongs/harm thesis's framework of projecting a living person's desire onto the dead. As argued above, it is permissible under the ECtHR's interpretative framework to interpret Article 8 in this manner. For as observed by the ECtHR, a failure to maintain a dynamic and evolutive approach to the Convention would risk rendering it a bar to reform or improvement.[156]

Furthermore, the argument above that Article 8 has a post-mortem reach implies that it could also apply horizontally; that means that the common law would be required to adapt incrementally,[157] so as to protect individuals against non-state actors who violate a person's privacy post-mortem.

[152]ibid 544; Liberty, 'Liberty's Briefing on Part 8 of the Investigatory Powers Bill for Committee Stage in the House of Commons' (April 2016) <www.libertyhumanrights.org.uk/wp-content/uploads/2020/02/Libertys-Briefing-on-Part-8-of-the-Investigatory-Powers-Bill-for-Committee-Stage-in-the-House-of-Commons.pdf> 14.
[153]Roberts (n 151) 545.
[154]Boonin (n 2) 80.
[155]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, 35.
[156]*Stafford v UK* [2002] ECHR 470, [68]–[69].
[157]NA Moreham, 'Beyond Information: Physical Privacy in English Law' (2014) 73(2) Cambridge Law Journal 350, 358.

Finally, it should be observed that if Article 8 is extended post-mortem as argued above, it should, much like the case of a living applicant, involve a balancing exercise in relation to the competing rights of the parties.[158] This ensures that Article 8's protection post-mortem would not be construed as an absolute right.[159]

## Duration and enforceability of post-mortem privacy rights

If a right of privacy post-mortem is recognised as argued in this article, sundry consequential questions arise regarding the duration and enforceability of such an accrued right. These questions include the issues of how long a post-mortem privacy right should last; who should exercise a post-mortem privacy right on behalf of the deceased; and whether the recognition and enforcement of a post-mortem privacy right undermine the generally shared view that human rights are inalienable? This final section attempts an analysis of these important issues, albeit in a sketched manner.

### How long should a post-mortem privacy right last?

This issue, as highlighted at the beginning of this article, featured prominently in the debate between Kramer and Bowen.[160] Kramer argues that while the duration of a post-mortem right is uncertain, it does not endure forever or indefinitely. Under Kramer's analysis there are inherent disparities in the length of time in which dead persons hold post-mortem rights, that is, some deceased persons would be right-holders for a much longer time than others.[161] Kramer contends that after a certain period of time, the deceased's status as a right-holder begins to diminish or cease, such as when the deceased no longer feature in the memories of current or future generations, or when extant memories of the deceased are more akin to historical knowledge.[162] Thus, Kramer observes that when the deceased's presence 'consists only in historical connections – because all her contemporaries have ceased to exist – her status as a potential holder of legal claim-rights no longer obtains'.[163] This can even occur whilst the deceased's contemporaries are still alive.[164] When the dead cease to hold post-mortem rights in the circumstances conceived by Kramer above, should that cessation of right-holding

[158]*PJS v News Group Newspapers* [2016] A.C. 1081, 1094; E Harbinja, 'Post-Mortem Privacy 2.0: Theory, Law, and Technology' (2017) 31(1) International Review of Law, Computers & Technology 26, 37. Or in general, see Article 8(2) for a list of justifications for interference.
[159]For a useful discussion of similar point: Michael Birnhack and Tal Morse, 'Digital Remains: Property or Privacy?' (2022) 30 international Journal of Law and Information Technology 280.
[160]Kramer, 'Looking Back and Looking' (n 12) 380.
[161]ibid 381.
[162]ibid 382.
[163]ibid.
[164]ibid.

affect the validity or continuation of a post-mortem privacy right in particular? The relevance of this question arises from the nigh immortality of the internet.[165] Should someone else's memory be the determining factor as regards the question of a right's longevity, or should it just be one of the relevant factors to be considered? We are agnostic as to the correct answers to these questions. Obviously, perpetual duration of post-mortem privacy protection might arguably amount to an overreach and give rise to obvious difficulties. For instance, indefinite protection might obstruct investigation of the dead's private life on an issue that is of interest to the public, such as sexual misconduct allegations against a person who is now dead.[166] It is sensible, therefore, that post-mortem protection should in theory last for a shorter, rather than a longer, period. We therefore hazard, on the basis of a rule of thumb, that post-mortem privacy protection should last between ten and fifteen years as a minimum starting point. Kramer, as highlighted above, also raised the important issue of disparity that exists between dead persons in relation to the duration in time of their posthumous rights based upon memories. Potentially, this sort of disparity in the right-holding of deceased persons might raise the issue of discriminatory treatment under Article 14 ECHR. But, as suggested above, this potentially discriminatory treatment between dead persons would be avoided if the duration of post-mortem protection is fixed for a certain number of years.

The German and French legal systems have a settled history and jurisprudence on the protection of personality rights post-mortem; but even there, this sort of question has remained critical and controversial and has not always attracted a unanimous answer.[167] In Germany, although it is acknowledged that post-mortem personality rights are a dwindling right that vanishes over time (fading with public memory),[168] the right to one's image is protected for ten years after death and an author's personality rights exist for 70 years after their death.[169] Bulgaria,[170] Denmark, Estonia, Hungary and Iceland[171] all have varying time constraints on post-mortem privacy protection. However, in Portugal, under Article 17 of Law no. 58/2019, protection of the deceased's data can potentially last indefinitely. In

[165]U Bacchi, 'Data of the Dead: Virtual Immortality Exposes Holes in Privacy Laws' (17 April 2020) <www.reuters.com/article/idUSKBN21Z0NE/>.

[166]However, we would note that any post-mortem privacy right, if recognised would not be absolute, given the nature of Art. 8(2) (see footnote 154), particularly given it would have to be balanced against *other* Convention Rights, therefore, should not block any such investigations. Thanks to the reviewer for prompting us to make this consideration.

[167]Beverley-Smith and others (n 4) chs 4 and 5.

[168]ibid 125–26.

[169]ibid 128.

[170]E Harbinja, 'Does the EU Data Protection Regime Protect Post-Mortem Privacy and What Could Be The Potential Alternatives?' (2013) 10(1) Scripted 19, 26.

[171]D Erdos, 'Dead Ringers? Legal Persons and the Deceased in European Data Protection Law' (2021) 40 Computer Law & Security Review 1, 11.

England and Wales, Foskett J did not consider the passage of time as capable of eradicating the strength of the obligation of confidentiality.[172] In *Plon*, the ECtHR did acknowledge that 'the more time that elapsed, the more the public interest in discussion of the history of President Mitterrand's … [tenure] … prevailed over the requirements of protecting … [his] … medical confidentiality'.[173] However, the ECtHR did make a caveat to the observation above, by noting that its ruling does not mean that historical debates required the relinquishing of the duty of medical confidentiality post-mortem (which is tightly regulated in France), only that once the duty has been breached, the passage of time must be considered when assessing a ban when freedom of expression is at stake.[174] Therefore, it can be argued that the ECtHR in *Plon did not* set a time limit on when post-mortem rights may cease in general, only that time was a relevant factor to consider in the circumstances of *Plon*.

Despite our offhand suggestion of ten to fifteen years (as a minimum starting point) for post-mortem privacy protection above, a potential starting point in England and Wales might be to consider s 12(2) of the Copyright, Designs and Patents Act 1988 which 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'. While this provides some significant protection for a dead author, it is not perpetual in duration; therefore, once the 70 years are up, any personal data of the dead author will be at the behest of tech companies that host this information. This would eventually lead to the commodification of vast amounts of (sensitive/special category) personal data when the 70 years are up as these companies would have a wealth of copyright free information,[175] even though Judge Pastor Vilanova of the ECtHR remarked that '[h]uman dignity cannot be paid for'.[176]

### Who should exercise said rights on behalf of the deceased?

If a right of privacy exists post-mortem, and potentially lasts indefinitely as argued above, who should exercise or enforce the right on behalf of the deceased? Perhaps, the most obvious answer is that the right of enforcement

[172] *Lewis* (n 84) [30].
[173] *Plon* (n 85) [53].
[174] ibid.
[175] This point is, however, controversial and might attract the riposte that various types of information are already commodified irrespective of copyright, data-protection or Art 8 protections. For a useful review of this debate: Shoshana Zuboff, 'The Age of Surveillance Capitalism' in Wesley Longhofer and Daniel Winchester (eds), *Social Theory Re-Wired* (3rd edn, Routledge 2023). We would like to note that, however, this is not an argument to suggest that post-mortem privacy protections are futile in a world where vast amounts of private information are stored, on the contrary, it is an argument that existing protections are not strong enough.
[176] *S.M v Croatia* App no. 60561/14 (ECHR, 25 June 2020), concurring opinion of Judge Pastor Vilanova, [4].

vests in whomever the deceased appointed as their (legal) representative. 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'.[177] However, death can come suddenly, and not everyone would be in a position to make a will or even consider how best to protect their privacy post-mortem. There is also the possibility that the deceased's preferred/chosen representative dies before or soon after the deceased themselves. In England and Wales nearly 60% of adults have not made a will.[178] Intestacy laws, such as the Administration of Estates Act 1925 or Wills Act 1837, could be a possible avenue to remedy the gap in will creation; however, it is impossible to create intestacy laws that can cater for everyone.[179] However, if a dispute arises regarding the deceased's representative, this could, under intestacy laws, be settled by a court of law, as is the case in France in relation to a post-mortem data protection.[180]

## *Would allowing the existence of post-mortem privacy rights weaken the claim that human rights are inalienable?*

Human rights are often regarded as inalienable.[181] Inalienable rights are generally regarded as incapable of being waived or transferred.[182] Terrance McConnell notes that there are two interpretations of inalienable rights, a narrow and a broad interpretation. The narrow interpretation posits that 'if a right is inalienable, then the mere fact that the possessor of that right has consented is never sufficient to justify encroaching that right'.[183] The broad interpretation claims that 'if a right is inalienable, then the consent of the possessor of that right is neither necessary nor sufficient to justify encroaching the right'.[184] The former is more permissive of the waiving of rights than the latter, and it was the preferred interpretation for McConnell.[185] The main issue that inalienability and post-mortem privacy rights bring up relates to the transference of rights. Could the exercise of the

[177]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/>.
[178]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, 117.
[179]SN Gary, 'Adapting Intestacy Laws to Changing Families' (2000) 18(1) Minnesota Journal of Law & Inequality 1.
[180]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) 160.
[181]Council of Europe, 'What are Human Rights?' <www.coe.int/en/web/compass/what-are-human-rights->.
[182]T McConnell, 'The Nature and Basis of Inalienable Rights' (1984) 3(1) Law and Philosophy 25, 27.
[183]ibid 31.
[184]ibid.
[185]ibid 31–32.

deceased's post-mortem privacy rights by the deceased's representative in order to safeguard the deceased's privacy interests be regarded as the result of the transference of that right? As Corien Prins observed, the ECtHR has ruled that rights can be waived if they are done in an explicit manner.[186] Thus, Prins concluded that:

> [P]rivacy thus does not prevent individuals exploiting their privacy rights by using the instrument of freedom of contract. Individuals are free to negotiate the content of the economic value of their personal data.[187]

The European Union takes the opposite view in that the commodification of personal data is generally perceived as unfavourable.[188] However, a report that was partially based on the Council of Europe's (CoE) Guide to Human Rights for Internet Users demonstrated the difficulty for Internet users to 'consent to the terms of service of online platforms in order to make fully informed decisions on issues which affect their human rights such as content restriction policies and the processing of personal data'.[189] Online platforms utilise a 'take it or leave it' approach to terms of service and terms of service are long-winded, even for the legally trained, resulting in many customers not reading or reading them and not understanding what is being agreed to.[190] The CoE reaffirms that human rights prevail 'over the terms and conditions imposed on Internet users by any private agent' and that States have a positive obligation to supervise the private sector.[191] This would seem to imply that privacy-related material on the Internet might be protected indefinitely after the death of the author, in contrast to the 70 years posthumous copyright protection highlighted above whereby private entities would have free-reign on unprotected material once the 70 year period expired.

Furthermore, Olivier De Schutter examined the waivability of human rights under the ECHR with particular reference to materials on the Internet. This includes the potential waiver of posthumous protection of such materials. He 'recognises the right of that person to waive the right conferred upon her … in the precise sense of exchanging it against an advantage to which the right-holder attaches more value than to the preservation of her fundamental right itself'.[192]

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[186]C Prins, 'Property and Privacy: European Perspectives and the Commodification of our Identity' in L Guibault and PB Hugenholtz (eds), *The Future of the Public Domain, Identifying the Commons in Information Law* (Kluwer Law International 2006) 241.
[187]ibid.
[188]Harbinja (n 170) 38.
[189]J Venturini and others, 'Terms of Service and Human Rights: An Analysis of Online Platform Contracts' (2016) <https://repositorio.fgv.br/server/api/core/bitstreams/02b9e162-4be0-4822-b506-f1a760920050/content> 11.
[190]ibid 23–24.
[191]ibid 26.
[192]O De Schutter, 'Waiver of Rights and State Paternalism under the European Convention on Human Rights' (2020) 51(3) Northern Ireland Legal Quarterly 481, 483.

De Schutter makes a distinction between waivers as a privilege and waivers as a right, noting that:

> [T]he waiver as a *privilege* is invoked by the State, arguing that the individual has consented to the situation he denounces as a violation of his right, the waiver as a *right* is invoked by the individual, arguing against the paternalism of the State which intends to impose the benefit of an unwanted right against the very will of the right-holder.[193]

The latter, waiver as a right, De Schutter contends, is not recognised by the ECHR.[194] Arguably, and having regard to De Schutter's distinction, Prins' observation above was likely referring to waiver as a privilege, and *not* waiver as a right. Even if one were to accept Prins' view on a waiver of privacy, it would be difficult to accept that terms of service employed by many online platforms act as an explicit waiver of rights.[195] In any event, this will not affect post-mortem rights unless the deceased waived such rights before death. In terms of human rights, therefore, there is nothing that prevents a right of privacy from lasting perpetually or indefinitely after death of the right-holder. This is already the case with medical confidentiality which is protected indefinitely after death. Moreover, a perpetually indefinite post-mortem privacy right does not necessarily need to work against post-mortem copyright protection, because they can work in tandem,[196] although they would protect different interests.

Arguably, our analysis of posthumous wrongs/harm thesis above might resolve this issue of transference of right. Recall that we deployed Boonin's living person argument to project the existence of posthumous harm and wrong. This means that when a representative of the deceased exercises a post-mortem right on behalf of the deceased, it is the deceased's right that is in issue, and therefore, any question of transference or inalienability of such a right does not arise. This is consistent with the idea under the German Constitution which renders human dignity inviolable even after death.[197]

## Conclusion

Throughout this article, we have endeavoured to show that law, in general, and English and Welsh law, in particular, have struggled with the protection of the privacy of the dead. As demonstrated in the previous article (Part I),

[193]ibid 495.
[194]ibid.
[195]Council of Europe, 'Terms of Service and Human Rights: An Analysis of Online Platform Contracts' (12th January 2018) <www.coe.int/en/web/freedom-expression/home/-/asset_publisher/RAupmF2S6voG/content/terms-of-service-and-human-rights-an-analysis-of-online-platform-contracts>.
[196]Harbinja (n 170) 26.
[197]Beverley-Smith and others (n 4) 125.

current scandals[198] and some recent cases implicating the privacy of the dead have put the issue in bold relief.[199] In this article, we have attempted to develop a framework that could furnish a rationale to justify post-mortem privacy protection. Our analysis draws from Boonin's posthumous wrongs/harm thesis which, in short, posits that it is possible to make life go less well for someone in a way that generates a moral reason against doing something even if the act takes place after the person is dead, and that it is possible for an act to harm someone even if it takes place after they have died. Crucially, the subject of harm under Boonin's posthumous wrongs/harm thesis framework is the living person who is now dead; it is the frustration of their desire that harmed and wronged them. In short, as a living person could be the subject of an unfelt harm, so too can the dead be harmed without any conscious experience of the harm. We used several illustrative practical examples, including the USA case of *Weaver,* to argue and operationalise the posthumous wrongs/harm thesis.

Particularly, we argued that:

- The PWT/PHT uses moral reasoning to justify itself and is capable of acting as a starting point for the creation of legal rights;
- Current jurisprudence of the ECtHR against the recognition or protection of post-mortem privacy rights is not set in stone; this allows for the application of the PWT/PHT with a view to protecting privacy post-mortem;
- The living instrument's doctrine of interpretation in relation to the Convention is grounded in moral reasoning and does not require a European Consensus, and thus potentially enables some judicial creativity in the direction of PWT/PHT;
- The ECtHR has already accepted that there is a duty to deal with the dead with respect under Article 8 of the ECHR;
- The ECtHR implicitly accepted that the dead have post-mortem privacy rights, though some judges disagree with that proposition. At the very least, the ECtHR has entertained the possibility of a successful argument to the effect that the dead have privacy rights post-mortem.
- The idea that the ECtHR utilises the living instrument and autonomous concepts doctrines to interpret and extend Article 8 as potentially encompassing the personality right of the dead can be deployed to overcome or extend the meaning of 'person' and 'victim' under Article 34 so as to enable an application to be brought by or on behalf of a deceased person.

[198]Nwabueze and White (n 1) 469–70.

[199]For instance: *Lunak Heavy Industries (UK) Ltd & Anor v Tyburn Film Productions Limited* [2024] EWHC 2312 (Ch). This case concerns a claim in unjust enrichment arising from use of the late Peter Cushing's reproduced image as Grand Moff Tarkin in the Star Wars prequel, *Rogue One*.

We also suggested that our analysis in this article could usefully underpin a relational privacy claim post-mortem. The culmination of all of the above is our argument that Article 8 extends post-mortem. Furthermore, we argued that the recognition and enforcement of post-mortem privacy rights should be balanced against other competing rights or interests. Finally, we addressed some questions and issues relating to the duration of a post-mortem privacy right, who should exercise such a right and whether post-mortem privacy rights are human rights, and as such, considered alienable.

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