Until Death Do Us Part:

Post-mortem Privacy Rights for the Ante-mortem Person

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Abstract

The qualified right of privacy that the living have under Article 8 of the Human Rights Act 1998 ceases upon death. This thesis questions why this is so and why that which is private in life should not remain so in death. It demonstrates that, within the context of the digital era in particular, the ante-mortem person can be harmed by post-mortem breaches of privacy thereby justifying the extension of Article 8 protection beyond death. It does so by examining the theoretical and jurisprudential basis of a number of existing legal protections afforded to the dead together with the philosophical harm thesis and the importance of society's 'intuitive' feelings towards those who have died. This research is a unique contribution to the post-mortem privacy scholarship which currently focuses on the protection and transmission of 'digital assets' on death rather than privacy *per se* and does not utilise the harm thesis to justify the protection of Article 8 as the mechanism for doing so.

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Lastly, I wish to dedicate this thesis in loving memory of my second mum Hazel Nicholls, who sadly passed away in January 2020. She was a joy and will always be remembered for her love of butterflies and all things purple. She had the kindest of hearts and is very much missed.

Chapter 1

Introduction

It is a platitude that we live our whole lives in the shadow of death; it is also true that we die in the shadow of our whole lives.[1]

When Dworkin wrote in 1993, he could not have conceived of the impact that the internet would have on the shadow in death of which he spoke. Since then it has become increasingly difficult for the dead's 'whole lives' to languish in the shadow, partly unseen by others, away from prying eyes. The living are no longer able to be sure that their secrets will die with them, their mistakes forgotten, unable to enter death safe in the knowledge that their private life will be buried with them. When we die, the 'shadow of our whole lives' loses the opaqueness that is capable of existing when living 'our whole lives.' The protection that exists to maintain our privacy in life is lost on death. Our whole lives are capable of being thrust from behind the shadows into the glaring light of the internet for huge swathes of people, people we have never met, to see and pick over. This thesis was borne from the indignation felt when the world saw and picked over the lives of three children, and their grieving family, killed by their mother Tania Clarence.[2] Their father's Face-book page mined for photographs,[3] their health difficulties relayed and explained to all,[4] aerial footage of their house and garden streamed across the world.[5] How far did these dead children have to come out of the shadows and for what purpose?

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[1] Ronald Dworkin, *Life's Dominion - An Argument about Abortion and Euthanasia*, (Harper Collins Publishers 1993) 199.

[2] She smothered three-year-old twins Max and Ben and her daughter Olivia, aged four, at the family home in New Malden on 22 April 2014.

[3] Caroline Davies, 'Tania Clarence charged with the murder of her three disabled children' *The Guardian* (London, 24 April 2014) <www.theguardian.com/uk-news/2014/apr/24/tania-clarence-charged-murder-three-children> accessed 21 November 2018.

[4] All three children had 'spinal muscular atrophy 2, a life-shortening condition that causes severe muscle weakness which can result in problems moving, eating, breathing and swallowing.' 'Mother Tania Clarence who killed her children 'overwhelmed' *BBC News* (London, 23 November 2015) <www.bbc.co.uk/news/uk-england-london-34898895> accessed 7 June 2018.

[5] Martin Robinson and Arthur Martin, *Mail Online (*London, 29 April 2014) <www.dailymail.co.uk/news/article-2611900/Tania-Clarence-charged-murdering-3-disabled-children-New-Malden.html> accessed 21 November 2018.

This thesis challenges the apparent transparency of the 'shadow of our whole lives' when dead, in the digital era. It questions why if we have protection for our privacy in life, that does not continue in death? It asserts that without such protection harm is caused not only to the individual living person but to society as a whole. Harm that can, and should, be prevented. It provides an avenue for this to be done.

1.1 Post-mortem Privacy

The concept of post-mortem privacy was introduced into legal scholarship in 2013 by Edwards and Harbinja. They defined it as '…the right of a person to preserve and control what becomes of his or her reputation, dignity, integrity, secrets or memory after death.'[6] This thesis refines that definition to 'the right of a person to respect for her private and family life post-mortem.' Conceived from within a human rights framework, the right argued for herein, would allow for a person's ante-mortem privacy rights, under Article 8 of the Human Rights Act 1998, to continue post-mortem. So, the shadow in which our private matters can live in life remains equally opaque in death. Unfortunately, the shadow in life is itself hindered by the context in which our private matters exist - the digital age - which has created a very real lacuna in our privacy laws, and which continues to threaten in death.

1.2 Context

Whereas in the non-digital world an 'ordinary' person's private matters would be unlikely to hold sufficient newsworthiness to justify mass publication, nowadays ordinary people can appear to take on the status of 'celebrities' with their private lives being disseminated across the world in seconds. An example is that of Blair, a passenger on a flight from New York to Dallas in July 2018, who shared on Twitter under the hashtag #planebae, by which events are known, '…play-by-plays of what appeared to be a budding romance' between two passengers who were sitting in front of her and her boyfriend. More than 300,000 people retweeted Blair's thread. Nearly a million liked it.[7] Her boyfriend continued to dig for information about the

[6] Lilian Edwards and Edina Harbinja, 'Protecting Post-Mortem Privacy: Reconsidering the Privacy Interests of the Deceased in a Digital World.' (2013) 32(1) Cardozo Arts & Ent LJ 83, 85.

[7] Megan Garber, 'Two strangers met on a plane and the internet ruined it' *The Atlantic* (Washington DC, 6 July 2018) <www.theatlantic.com/entertainment/archive/2018/07/planebae-and-the-slow-death-of-whimsy/564473> accessed 12 December 2019.

seatmates and their posts went viral. Twitter fans then 'doxed' the unknown woman,[8] and soon her personal information was being widely distributed without her knowledge or consent. Media outlets such as USA Today and Good Morning America were reporting on it and Ryan Seacrest joked about it. The male passenger involved enjoyed his newfound celebrity status and 'happily made the rounds of television interviews.' He even updated his social media profiles to include #planebae. The female passenger however, received 'so much unwanted attention and harassment, both online and in real life, that she quit social media' and issued a statement. In it she described how she had been '…doxed, shamed, insulted and harassed. Voyeurs have come looking for me online and in the real world.' It is clear that she had been caused a great deal of distress by 'strangers' discussing her '…private life based on patently false information.' She concluded by saying that: 'I did not ask for and do not seek attention. #planebae is not a romance – it is a digital-age cautionary tale about privacy, identity, ethics and consent.'[9] In the pre internet world it is unlikely that this 'story' would ever have been discussed by more than a handful of the people that knew the passengers who had witnessed this so-called 'budding romance' and there would certainly not have been the delving into personal information that this passenger endured.

This case is just one of many privacy invasions that the internet facilitates with the speed and breadth unheard of in the pre-digital era. Additionally, as Judge Kozinski once observed: 'They say that removing something from the Internet is about as easy as removing urine from a swimming pool…'[10] This context therefore presents great difficulties when seeking to protect privacy, not least because the safeguards provided by media ethics and regulation of main-stream media outlets are not present with private individuals that share information and images online which are in breach of a person's privacy. And it is not just the living who face these viral breaches of privacy but also, this thesis will argue, potentially the dead and so too the living surviving relatives. Hamill sees technology, and the internet in particular, as having created 'a virtual graveyard where accident videos can be viewed, and corpses can be closely

[8] Search for and publish private or identifying information about (a particular individual) on the Internet, typically with malicious intent.
[9] Garber (n 7).
[10] Alex Kozinski, 'The Dead Past' (2011-2012) 64 Stan L Rev Online 117, 124 <https://heinonline-org.uea.idm.oclc.org/HOL/Page?handle=hein.journals/slro64&id=119&collection=journals&index=journals/slro> accessed 19 March 2019.

scrutinized…'[11] He sees the internet as 'aggressively attacking the privacy of decedent's relatives' as there is now a 'specialty market for gruesome, grisly, and highly disturbing death-images' in which, he argues, there can be no 'legitimate public interest' regardless of the 'fact that users are curious enough to view this content and perpetuate a demand for this market…'[12] A recent example is that of 17 year old Bianca Devins, whose alleged murderer, and boyfriend of two months, Brandon Clark shared on social media graphic images of her with her throat cut.[13] Whilst some users implored people not to look but to report, many others actually copied and shared the gruesome photographs, with some using Bianca's murder as an opportunity to gain followers.[14] Bianca Devin's step mother said: 'I will FOREVER have those images in my mind when I think of her. When I close my eyes, those images haunt me.'[15]

The online sharing of grotesque images of the deceased is just one of the issues complicit in the notions of post-mortem, and relational post-mortem, privacy, the latter being where a living survivor can have a privacy interest which relates to disclosure of information about their deceased relative arising from their 'close relationship' with her. This thesis uses the surviving 'relative' as the recipient of the post-mortem relational privacy right herein, to include non-blood relations who have an identified 'close' relationship with the deceased.

There are of course many less obvious and gruesome examples of post-mortem, and relational post-mortem, privacy breaches that will be considered and which demonstrate, this thesis argues, the need for the legal protection outlined herein.

As will be seen this thesis moves away from the current focus of post-mortem privacy scholarship - digital assets and data protection and thus on-line privacy - to demonstrate how and why protecting off-line privacy, or the analogue, is of great importance too. Without such protection complete post-mortem privacy cannot be achieved, not least of all because in the

[11] David Hamill, 'The Privacy of Death on the Internet: A Legitimate matter of Public Concern or Morbid Curiosity' [2011] 25 Journal of Civil Rights & Economic Development 833, 836.
[12] ibid 866.
[13] Kelly-Leigh Cooper, 'Bianca Devins: The teenager whose murder was exploited for clicks' *BBC News* (US and Canada, 21 July 2019) <www.bbc.co.uk/news/world-us-canada-49002486> accessed 18th August 2019.
[14] Coming just four months after the Christchurch attacks, where there was live stream video of the shooting of people at two mosques, Bianca's case has renewed scrutiny of the way social media is policed.
[15] Cooper (n 13).

digital age the real life and the analogue can in fact become on-line and digital. Take Elaine Kasket, for example: when her mother found love letters between her parents, she 'made the archive more accessible and readable' by sorting them into chronological order and placing them in binders offering them to family members to read if they wished. Kasket, however, when she came into possession of them, 'went about things completely differently'.[16] Where her mother 'stayed faithful' and 'compiled', Kasket 'translated' and 'curated'. Where her mother 'maintained privacy' Kasket 'seized control of the border between public and private and shifted the boundary line.' In sum her mother 'stayed analogue' and Kasket 'went digital' by posting them online. She held 'up a digital prism to a static, material legacy,' she 'turned the prism this way and that, watching the colours change, finding the refractions that' she 'liked best.' And importantly she 'wasn't alone' she invited a crowd of onlookers to watch along with' her. 'I took a private correspondence that was not intended for me and transformed it from its original functions…'[17] Private matters that previously would have likely stayed within the confines of the family who would have inherited the letters, became digital and travelled far and wide. Whilst most would not see this as a gross breach of her grand-parents' privacy, it serves as a simple example of how protecting the privacy of only the living's digital assets or data when dead, does not protect their privacy *per* se and thus why this thesis, and the theoretical solution it provides for the protection of post-mortem privacy, encompassing both the digital and non-digital, is of importance.

1.3 Structure of the Thesis using the Thematic Example of Soldier X

When Edwards and Harbinja introduced the concept of post-mortem privacy into legal scholarship they did so by using three scenarios which they suggested 'intuitively' concerned '*post-mortem privacy*: rights of privacy for the dead.'[18] It is their first example, derived from the facts in the US case of *Ellsworth* that is used as an illustrative thread through-out this thesis.[19] Significant changes were made to the actual facts of the case with their scenario reading as follows:

[16] Elaine Kaskett, *All the Ghosts in the Machine, Illusions of Mortality in the Digital Age*, (Robinson 2019), xviii.
[17] ibid.
[18] Edwards and Harbinja (n 6) 84-85.
[19] R*e Ellsworth*, No. 2005-296, 651-DE (Mich. Prob. Ct. 2005). In summary: Yahoo argued that their non-survivorship policy ('*No Right of Survivorship and Non-Transferability. You agree that your Yahoo! Account is non-transferable and any rights to your Yahoo ID or contents within your account terminate upon your death. Upon receipt of a copy of a death certificate, your account may be terminated, and all content therein permanently deleted')* protected the privacy of the deceased and thus prevented disclosure. His heirs argued that they should be

> A young U.S. marine dies in combat in Iraq. His widow and heir petitions to have access to his webmail account, but the webmail provider stands by its terms and conditions, which forbid the transfer of account passwords and require termination of the account and deletion of its contents on notice of an account holder's death. The webmail provider agrees, however, after a court order is obtained, to transfer the contents of the inbox and folders to the widow as a digital download without handing over passwords. On examination, the widow finds to her distress that the emails provide evidence of a homosexual affair that the marine was having with a fellow soldier; some of the emails say explicitly that she was never to know about it.[20]

Edwards and Harbinja amended the facts so as to illustrate how the revelation of the affair '…might have a negative impact, both for the reputation of the dead and the welfare of the living.'[21] They suggested other alternative examples such as him '…hiding an admission of cowardice under fire…' to show that things can be said in an email '…that we do not want, or plan for, certain individuals to ever read.'[22] In this thesis the scenario is amended further to account for the jurisdictional differences[23] and to include off-line evidence of the homosexual affair as opposed to following the confines of the original scenario with only e-mails.

This thematic example will be developed throughout each of the five main chapters according to the theoretical and/or legal concepts under discussion within each one. Using it as a thread throughout this thesis allows for a practical illustration of the legal protection that would be afforded to both the living and dead Soldier X, and his surviving relatives, by each provision that is discussed. For example, in chapter 2 which deals with privacy under Article 8 for the living, it will be seen that Soldier X could likely protect the fact of his homosexuality and affair from public revelation, whereas this would not be the case upon his death as presently there is no post-mortem privacy right under Article 8. The thematic example will be used, therefore, to illustrate how the concept of post-mortem privacy, as defined and applied by the current

able to see the emails which contain his 'last words' which may be lost forever if Yahoo deleted the account. The Judge compromised by ordering copies of the emails to be given to the family but not the transfer of log in or password information, thereby allowing Yahoo to comply with their own privacy policy.

[20] Edwards and Habinja (n 6) 84.

[21] ibid 92.

[22] ibid.

[23] *Ellsworth* was a U.S case and this thesis deals specifically with English law and in particular Article 8 of the Human Rights Act 1998.

scholarship, would apply to Soldier X in any of the given circumstances under discussion. The same 'test' will be applied, through this thematic example, to the definition and framework adopted in this thesis to ascertain what protection it would afford to Soldier X. Ultimately, it is concluded that the solutions for post-mortem privacy protection, currently offered by the legal scholarship, may protect the emails and digital assets containing the fact of Soldier X's homosexuality and affair, but do not, and cannot, protect his post-mortem privacy *per se*, meaning that these private matters can be revealed upon his death. The route map to these conclusions, and the solutions offered by this thesis, will be shown as follows:

Chapter 2: Privacy for the Living

Soldier X could prevent the disclosure of his sexuality and affair whilst alive under Article 8, but that protection ceases upon death.

This chapter examines both the theoretical concepts of privacy and the current legal position as they relate to the living. It demonstrates that many of the values that underpin privacy as a theoretical concept inform the legal concept and thus the legal provisions and jurisprudence. This chapter traces the course of legal thinking by looking at the law as it currently stands, as well as how it became to be so, demonstrating that there has been considerable development in the law on privacy. It thus lays the groundwork for the discussion to follow in the remaining chapters about extending these provisions to protect the living's privacy when dead, in so far as possible.

Chapter 3: Existing Legal Protection for the Dead

Existing legal provisions relating to succession, burial, organ donation, and medical confidentiality do not prevent the revelation of, inter alia, Soldier X's homosexuality or affair, but do protect some aspects of his dignity and ante-mortem autonomy.

This chapter explores the historical foundations and development of four existing legal provisions[24] that are considered, by some, to be legal rights of the dead and which can be said to protect the dead in some form, even if not bestowing upon them legal rights. The four provisions were chosen as they are prominent UK laws, three of which relate specifically to

[24] Testamentary freedom, organ donation, burial and medical confidentiality

the dead and whilst the fourth, medical confidentiality, pertains to the living as well, it is considered as the closest provision to post-mortem privacy that the UK currently has. In addition, testamentary freedom is championed by the current scholarship as an analogy with post-mortem privacy and is argued as demonstrating the concept of 'transitional autonomy', the in-depth analysis of in this chapter counters those arguments.

The importance of the exploration of the historical foundations of each of the chosen provisions is that it provides an insight into society's understanding of death and what it values for the living. They demonstrate the theoretical underpinnings used in this thesis to be developed in chapter 5, that which is termed the 'death culture' which includes societal and legal intuition and what we might term 'effecting assurances'. This is the notion that there is a potential 'mutual interest' in one another's privacy being maintained, so that 'if your privacy is protected, that tells me that mine will be.'[25]

This chapter is not concerned with the moral rights or otherwise of the dead but with whether they can or do have any rights at all and if so, what they are and in what form. The critical point here is that the analysis shows that the current legal provisions that provide protection for the dead are not rights ascribed to the dead themselves but to the living. It is this analysis, within the Hofeldian jural framework, which forms the basis of the post-mortem privacy right, argued herein, being ascribed to the living.

Chapter 4: Post-mortem Privacy

The current suggested solutions for the protection of post-mortem privacy would not prevent the fact of Soldier X's homosexuality or affair from being made public upon his death, even if they do provide protection for his digital assets (including his emails).

This chapter considers the legal scholarship on post-mortem privacy and its focus on the protection of digital assets and data protection. It explores the current definition, scope, right ascription and underlying rationales of the current literature and identifies the gap which this

[25] David Mead, 'A Socialised Conceptualisation of Individual Privacy: A Theoretical and Empirical Study of the Notion of the 'Public' in UK MoPI Cases' (2017) 9 (1) Journal of Media Law 100, 106.

thesis fills: by focusing on the narrow application of a much wider concept the resultant solutions do not protect post-mortem privacy *per se* but only the digital assets or data within which a private fact may be contained. This chapter, then, introduces the novel contribution being made by this thesis: it proffers a new definition of post-mortem privacy and begins to iterate how centering that on Article 8 will allow for more comprehensive protection, a claim that is developed and expanded in the subsequent chapter.

Chapter 5: Legal Intuition meets Philosophical Harm

Soldier X could have been caused harm by, inter alia, the post-mortem disclosure of his homosexuality and affair. The current scholarship does not consider harm, in any depth, as a rationale for protection. However, their solutions would prevent Soldier X being harmed by the risk of the revelation of the private matters contained within his digital assets but not any other medium. The solution offered in this thesis would protect Soldier X from such harm.

This chapter iterates and defends the key claim made in this thesis – that the Article 8 right to privacy in life can, and should, be extended into death – and makes good the rationale for extending such protection. To successfully establish a post-mortem privacy right under Article 8 this chapter demonstrates that a 'harm' is caused when post-mortem privacy is unprotected. This is required as a mirror to that which is required in life when seeking protection under Article 8. The harm can be caused to the living in three ways: first, the 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.

This chapter delves into the complex philosophical debate on harm to establish the legal arguments herein. The rationales for doing so can best be summed up in the words of Ronald Dworkin:

> Legal philosophers' debate about the general part, the interpretative foundation any legal argument must have. We may turn that coin over. Any practical legal argument, no matter how detailed and limited, assumes the kind of abstract foundation jurisprudence offers, and when rival foundations compete a legal argument assumes one and rejects others. So, any judge's opinion is itself a piece of legal philosophy, even when the philosophy is hidden, and the visible argument is dominated by citation and lists of facts. Jurisprudence is the general part of adjudication, silent prologue to any decision at law.[26]

Chapter 6: Post-mortem Relational Privacy

The protection of Soldier X's emails under the post-mortem privacy solutions offered by the current scholarship would incidentally protect the privacy of his lover and of course his widow and family but only insofar as that information was not contained in any off-line material or indeed any digital assets that were not Soldier X's (perhaps the recipient of the emails).

Soldier X's lover would have an Article 8 claim to protect his own privacy. His widow would potentially, it is argued, have an Article 8 claim on the basis that the revelation of her late husband's affair and homosexuality would breach her own privacy.

This chapter explores the concept of post-mortem relational privacy, which is introduced in chapter 4, whereby a relative can have a legal privacy interest which relates to the disclosure of information about the deceased which arises from their 'close relationship' with her. It is a concept that has been developing over the last 20 years in the US but has received virtually no attention within the UK. This chapter shows how post-mortem relational privacy can, and should, be protected under Article 8 as it currently stands. The European Court of Human Rights ('ECtHR') has made tentative moves to recognise it in so far as the surviving relatives' reputational interests can be affected by disclosure of matters relating to the deceased. The

[26] Ronald Dworkin, *Law's Empire* (Harvard University Press 1986) 90.

recognition of an enforceable post-mortem relational privacy right would have the added benefit of tangentially protecting the privacy of the dead in some respects.

1.4 Summary

This thesis develops two research questions, the resolution of which advance our thinking (and the literature) significantly in two linked ways. First, it demonstrates that the narrow focus in current legal scholarship on the protection post-mortem of only digital assets and data protection leaves a gap in the protection of post-mortem privacy that needs to be filled if we are to ensure comprehensive privacy protection in the digital age. Secondly, and in order to fill that gap, it constructs a theoretically sound post-mortem privacy right (encompassing off-line as well as on-line privacy) developed from within a human rights framework. In doing so, it asserts – contrary to the view taken among most scholars - that autonomy alone is not sufficient to constitute a founding principle. Instead it offers an alternative based on the harm principle, responding to the fact that identifiable harms in life can be suffered by invasions of privacy in death. It rejects any notion that the right is, or can be, a 'right of the dead': the right to privacy post-mortem is one that can only be ascribed to the living.

Those two aims are achieved by the utilisation of three overarching threads that run through this thesis

- the thematic illustrative example of Soldier X as outlined above
- the application of the philosophical harm principle to justify in part the legal protection of post-mortem privacy
- the application of the death culture and the principle of effecting assurances. These run alongside harm to form the foundational principles upon which the post-mortem privacy right contended for in this thesis is established.

Along the way reliance is placed on the teleological approach to interpretation of the European Convention of Human Rights taken by the ECtHR, which provides the pathway needed to establish a continuing right of privacy within Article 8. It does so because this approach allows the '…meaning given to the Convention rights to adapt and change according to the evolving

social norms…'[27] thus making the Convention a 'living instrument' which '…must be interpreted in light of the present-day conditions.'[28] This dynamic approach to interpretation will allow for the consideration of the rationales and justifications argued in this thesis in light of the modern day context highlighted. It is to this which the first chapter of the substantive part of this thesis now turns.

[27] Andrew Nicol, Gavin Millar and Andrew Sharland *Media Law and Human Rights* (OUP 2009) 12 para 2.04, these are said by Udo Fink to be 'informed by technical innovations and data protection issues…', 'Protection of privacy in the EU, Individual Rights and Legal Instruments' in N Witzleb, D Lindsay, M Paterson and S Rodrick (eds), *Emerging Challenges in Privacy Law: Comparative Perspectives* (CUP 2014) 75, 91.
[28] *Tyrer v UK* (1978) 2 EHRR 1 [16].

Chapter 2

Privacy for the Living

Soldier X

(i) *Soldier X deliberately did not seek promotion within the ranks for fear that doing so risked a spotlight being shined upon him and the possible revelation of his adulterous relationship with a high-ranking male member of the Armed Forces.*

(ii) *A newspaper has threatened to publish a story revealing his affair.*

(iii) *Prior to his death Soldier X had undergone medical testing to confirm or rule out a suspected genetic condition (on his father's side). This was to determine the possibility of Soldier X having passed this genetic disorder on to the couple's two children, who could not be tested until they reached adolescence. He had specifically recorded that he did not give consent to his medical practioners to disclose either the fact of the testing or the consequent results. He died after the tests but before the results were communicated to him. He had also disclosed to his GP his homosexual affair.*

2.1 **Introduction**

The UK signed the European Convention of Human Rights in 1950, ('the Convention') and was the first country to ratify it in 1951, having played a major role in proposing, negotiating and subsequently drafting it. It came into force in 1953, and although under international law the UK was then bound by the Convention, it was thought unnecessary to incorporate it into English law as our own common law was considered to be sufficient.[1] However, as the ECtHR developed its jurisprudence, divergence between the two arose and inconsistency occurred.[2]

[1] Mary Arden, Lady Justice of Appeal, *Human Rights and European Law: Building New Legal Orders* (OUP 2015) 11.
[2] ibid 24.

Thus, the Human Rights Act 1998 ('the Act') was passed. As of the 2nd October 2000, when the principal provisions of the Act came into effect, the courts in England and Wales were given the powers to rule on Convention rights and must now not act in a way that is incompatible with the rights secured by the Convention, taking into account the jurisprudence of the ECtHR.[3]

It is important to note that the ECtHR employs a teleological approach[4] when it comes to interpreting the Convention.[5] This is in accordance with Article 31 (1) of the Vienna Convention[6] which provides that: 'A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its objects and purpose.'[7] The 'protection of human rights'[8] and the 'maintenance and promotion' of 'the ideals and values of a democratic society,'[9] have been identified as the objects and purposes of the Convention. 'Pluralism, tolerance and broadmindedness' are considered as important aspects of a democratic society.[10] This teleological approach is vital in allowing the '…meaning given to the Convention rights to adapt and change according to the evolving social norms…'[11] thus making the Convention a 'living instrument' which '…must be interpreted in light of the present day conditions.'[12] Fink takes the view that this 'is a central feature of the Court's case law in general and is particularly prominent in the jurisprudence on Article 8.'[13] This is echoed by van der Sloot who sees Article 8 as having been 'the main pillar on which

[3] Section 6 (3) of the Act defines courts and tribunals as 'public bodies' and s.6 (1) provides that: 'It is unlawful for a public authority to act in a way which is incompatible with a Convention right.' This is known as the 'indirect horizontal effect' of the Act, not one where the Convention is directly applicable or gives rise to free standing rights. Section 3 provides that 'so far as it is possible to do so, primary legislation and subordinate legislation must be read and be given effect in a way which is compatible with Convention rights.' A court could therefore be in breach of section 6 by refusing to grant a remedy, where some aspect of Article 8 could be said to be protected, if the particular statutory provision did not exclude such a remedy.

[4] For a full exposition of this approach see Nial Fennelly, 'Legal Interpretation at the European Court of Justice' (1977) 20 Fordham Int'l L.J. 656.

[5] Andrew Nicol, Gavin Millar and Andrew Sharland *Media Law and Human Rights* (OUP 2009),12 para 2.03.

[6] The Vienna Convention on the Law of Treaties, 1969.

[7] The European Court has indicated that it will apply the Vienna Convention: *Golder v UK* (1975) 1 EHRR 524, 532.

[8] *Soering v UK* (1989)11 EHRR 439.

[9] *Kjeldsen, Busk Madesn and Pedersen v Denmark* (1976) 1 EHRR 711, para 53.

[10] *Handyside v UK* (1976) 1 EHRR 737, 754.

[11] Nicol (n 5) 12 [2.04].

[12] *Tyrer v UK* (1978) 2 EHRR 1 [16].

[13] The ECtHR addressed social changes and the evolving nature of family relationships when it held that same sex relationships fall within the meaning of 'private life'. Udo Fink, 'Protection of privacy in the EU, individual rights and legal instruments' in N Witzleb, D Lindsay, M Paterson and S Rodrick (eds) *Emerging Challenges in Privacy Law: Comparative Perspectives* (CUP 2014) 75, 91.

the Court has built its practice of opening up the Convention for new rights and freedoms…'[14] He sees the 'reinterpretation' of Article 8, which will be considered below, as allowing the court to better deal with the 'key questions revolving around privacy violations stemming from the new technological paradigm…'[15] This dynamic approach to interpretation is important to the aim of this thesis, to extend Article 8 to protect the privacy of the dead, as it commits the court to taking 'greater care' in its consideration of older cases so as to ascertain whether 'changing conditions have undermined its basis.'[16] For example, it has been recognised by the courts that new technology, such as the internet and social networking sites, now allow invasions of privacy to occur much more easily.[17] It is therefore incumbent upon the courts to apply vigilance in the protection of privacy. Consequently, this chapter will look at the law as it currently stands, as well as how it became to be so, as tracing the course of legal thinking can help highlight '…how much change has taken place and must yet take place.'[18] This discussion will form the basis of the arguments that are put forward in chapter 5, which will show that whilst post-mortem privacy, as a legal right under Article 8, may not be protected presently, there is scope and justification for it being so in the future.

This chapter will, therefore, start by looking at privacy as a concept and the values that underpin it, as many of these inform the legal concept of privacy and thus the legal provisions and jurisprudence. In this respect it should be noted that there is '…an enormous historical, sociological and philosophical literature about the value of privacy, its role in social life and the different meanings given to it in various cultures.'[19] These debates are not for this thesis which is premised upon the basis that privacy serves a number of values that can be ascertained from the positive functions it performs for the individual and society as a whole. Of relevance

[14] Bart van der Sloot, 'Privacy as Personality Right: Why the ECtHR's Focus on Ulterior Interests Might Prove Indispensable in the Age of "Big Data" (2005) Utrecht Journal of International and European Law 25, 38.
[15] ibid, 28. van der Sloot's focus is on the Big Data processes which he defines as 'gathering massive amounts of data without a pre-established goal or purpose, about an undefined number of people, which are processed on a group or aggregated level through the use of statistical correlations', 46.
[16] For example: In the case of *Rees v UK* (1986) 9 EHRR 56, it was held that it was not a requirement under Article 8 that a transsexual could change their gender on their passport, whereas 16 years later in the case of *Goodwin v UK* (2002) 35 EHRR 447, it was found that Article 8 was breached when there was a lack of recognition of a person's new gender.
[17] For an example*: Bărbulescu v Romania* (2017) 44 BHRC 17, an employer was monitoring an employee's private messages contained on Yahoo Messenger. ECtHR found that this was a form of communication enabling individuals to lead a private social life and thus the employer had breached Article 8.
[18] Arden (n 1) 1.
[19] Eric Barendt, 'Privacy as a Constitutional Right and Value' in P. Birks (ed), *Privacy and Loyalty* (Clarendon Press 1997) 1, 6.

herein, is the theory that privacy promotes 'liberty of action,' achieved by one's conduct not being known by others, thus preventing '…interference, pressures to conform, ridicule, punishment, unfavourable decisions, and other forms of hostile reaction…' which may have resulted if the conduct was known.[20] By removing the possible 'unpleasant consequence' a person's liberty to perform actions is increased. In this way privacy is linked to a 'variety of individual goals,'[21] not only freedom from census and ridicule, but also the promotion of a person's autonomy,[22] mental health,[23] and human relations.[24] In essence, it can be a way of protecting one's reputation and can enhance individual 'dignity,' at least to the extent that dignity requires non exposure.[25] It is accepted that whilst these may be sound reasons for valuing privacy for the living, not all of them can translate into being so for posthumous privacy. For example, the dead cannot suffer ridicule or embarrassment or pressure to conform.[26] However, as will be argued in chapter 5, the living can themselves suffer pressure to conform as well as limitations on their autonomy and development of human relations, as a result of their conduct being, or potentially being, known to survivors when they are dead. Alongside the value of privacy to the individual there are also societal benefits that will be discussed. The consideration, therefore, of the underlying values to, and functions of, privacy for the living is important groundwork in demonstrating that these can be thwarted in life by the revelation of private information after death, and thus justify post-mortem protection.

Of course, not all conceptual theories can, or do, translate into legal provisions or assist with the legal interpretation thereof. This chapter, therefore, goes on to look at the laws protecting privacy, their underpinning values and highlight ways in which the law does encompass the theoretical arguments discussed. Although this chapter is dealing solely with the current legal provisions that protect the privacy of the living, it lays the groundwork for the discussion to follow in the remaining chapters about extending these provisions to protect the living's privacy when dead, in so far as possible.

[20] Ruth Gavison, 'Privacy and the Limits of the Law' (1980) 89 (3) The Yale Law Journal 421, 441, 448.
[21] ibid 448.
[22] ibid 449.
[23] ibid 448.
[24] ibid 450 '…control over 'editing' one's self is crucial, for it is through the images of others that human relations are created and maintained.'
[25] ibid 455.
[26] T M Wilkinson, 'Last Rights: The Ethics of Research on the Dead' (2002) 19 (1) Journal of Applied Philosophy 31, 37.

The discussion in this chapter will show that there has been considerable development of the law on breach of confidence and privacy which has come about as a result of changes to the political and social landscape. Of relevance to this thesis is that identified by Toulson and Phipps as the '…increased media appetite for public details of private lives often obtained intrusively.'[27] With that in mind this chapter will conclude by looking briefly at the Leveson Report: *An Inquiry into the Culture, Practices and Ethics of the Press*,[28] which highlighted this phenomenon. Its relevance to this thesis will be seen primarily in chapter 6, when dealing with the harm that can be caused to the family and friends of the deceased person whose privacy is invaded. It is however looked at in this chapter as Lord Leveson's consideration of some elements of privacy assist in demonstrating that this thesis is not an exercise in theoretical inquisitiveness but that there is a very real and contemporary context in which it is founded.

2.2 Privacy as a Concept

Privacy is a difficult concept to define and '…even in respect of the living the extent and nature of the privacy interest is contested.'[29] The theoretical debate is vast, spanning numerous disciplines with really only one near universal point of agreement within it: 'privacy is a messy and complex subject.'[30] This section is necessarily highly selective in its consideration of the literature, with its purpose being to locate the living's interest in privacy and its values and functions to the individual and society, so as to translate these post-mortem, in as far as this is possible.

Gavison's neutral conception of privacy '…as a sturdy foundation for building moral and legal conceptions is probably the most complete and best known,'[31] and so will be utilised in this thesis to build a 'sturdy foundation' for the justification of the moral and legal conceptions of post-mortem privacy. It is for this reason that the structure of this theoretical section follows

[27] R G Toulson and C M Phipps, *Confidentiality* (3rd edn, Sweet & Maxwell 2012) 15. Two other factors were also identified: (i) information regarded as security by the government and (ii) sophisticated means of obtaining information covertly.
[28] Lord Justice Leveson, 'An Inquiry into the Culture, Practices and Ethics of the Press' (House of Commons Paper no. 780) (The Stationary Office 2012).
[29] Mary Donnelly and Maeve 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, 48.
[30] Helen Nissenbaum, *Privacy in Context: Technology, Policy and the Integrity of Social Life* (Stanford University Press 2010) 67.
[31] ibid 68.

the three different contexts in which Gavison says 'privacy must have a coherence.'[32] First, the neutral concept which enables identification of losses of privacy, second, as a value which enables identification of invasions of privacy and third as a useful concept in a legal context allowing for the identification of when legal protection is required.[33] Of course within each of these contexts there are alternative theories to Gavison's that will be discussed.

2.2.1 Neutral Concept of Privacy: Identifying Losses of Privacy

The first element of disagreement as to the concept of privacy is broadly between those who strive for a descriptive account of what privacy is, versus those who advocate a normative one. Gavison is within the former camp and argues for a 'general distinction' between the 'concept and value of privacy.'[34] The concept of privacy should be descriptive and 'neutral,' as it 'identifies losses of privacy' and thus ensures that discussions and claims of privacy are 'intelligible.'[35] This neutral concept of privacy allows the determination, of what aspects of privacy are desirable, to be approached in a 'non-pre-emptive way,'[36] and allows talk of states of increased and decreased privacy, but without resorting to the normative question of whether these states are good or bad.[37] Nissenbaum raises the fact that in certain circumstances less privacy may be desirable and any reduction does not necessarily mean that a 'violation' or 'intrusion' has occurred, both terms that indicate that something wrongful has happened.[38] For example, a person posts online a private matter to try and find a solution to it, maybe she is seeking a long lost relative and so that they may be identified she discloses private details publicly. In this situation less privacy is deliberate and desirable.

The rejection of a 'value laden concept at the outset' omits the asking of any questions of the nature of the information or how it was obtained or indeed the wishes and choices of the individual concerned.[39] That way, Gavison says, this concept of privacy serves 'important functions that entitle it to prime facie legal protection.'[40] Gavison argues that the 'neutral

[32] Gavison (n 20) 423.
[33] ibid 423.
[34] ibid 424.
[35] ibid 423.
[36] ibid 425.
[37] Nissenbaum (n 30) 68.
[38] ibid 68.
[39] Gavison (n 20) 423 and 425 (footnote 14).
[40] ibid 425.

concept of privacy' (as opposed to a normative, value laden one) allows for the identification of where losses of privacy occur. However, when looking at privacy in a legal context it must also 'indicate a value,' the assessment of which '…can only be determined at the conclusion of the discussion about what privacy is and when – and why – losses of privacy are undesirable.'[41]

The reductionist theorists disagree and deny there is an independent 'right to privacy' and the utility of privacy as a separate concept.[42] They argue that it has to be assumed that normative intent is integrated into privacy's core meaning, as there is virtually no use of privacy with a purely descriptive meaning.[43] So when we look at a violation of the 'right of privacy,' what we actually find is that some other interest has been involved[44] and we should be looking at the reasons[45] behind the decisions, so as to be able to identify the real interests that are protected, for it is not privacy itself that enjoys protection.[46] So, the right to privacy is 'derivative' in the sense that 'it is possible to explain in the case of each right…how we have it without even once mentioning the right of privacy.'[47] Of course this is a much simplified summary of some complex arguments and there is disagreement within the school of thought itself, but as Gavison highlights, they are '...united in denying the utility of thinking and talking about privacy as a legal right, and suggest some form of reductionism.'[48] It is for this overriding reason that this thesis does not utilise the reductionist theory, as it is concerned with the legal right of privacy as enunciated in Article 8, and looking at the theoretical rationales and justifications of that right, so as to build a foundation for a post-mortem privacy right.

In addition to the descriptive versus normative accounts of privacy there are two main approaches to its 'character.' Gavison's neutral conception of privacy is concerned with

[41] ibid 425.
[42] Richard Posner, 'Privacy' (1960) 48 California Law Review 383; 'Privacy, Secrecy and Reputation' (1979) 28 BUFFALO L. Rev. 1; 'The Right to Privacy' (1978) 12 Ga. L. Rev, 393, cited in Gavison (n 20) 422; Kalven, 'Privacy in Tort Law: Were Warren and Brandeis Wrong? (1966) 31, Law & Contemp. Prob. 326; Davis 'What do we mean by a right to privacy?' (1959) 4 S.D.L. Rev. I, cited in Gavison (n 20) 422 (footnote 6).
[43] In other words, the 'neutral conception' put forward by Gavison: Richard Post (1989) 'The Social Foundations of Privacy: Community and Self in the Common Law Tort' (1989) 77 (5) California Law Review 957.
[44] For example: reputation, property, freedom from mental distress, Gavison (n 20) 422 (footnote 9).
[45] For example: 'hypersensitivity (see Kalven n (42) 329, cited in Gavison (n 20) 422 (footnote 7) or a 'desire to manipulate and defraud': Richard Posner 'Privacy' (n 42) cited in Gavison (n 20) 422 (footnote 8).
[46] Kalven (n 42), cited in Gavison (n 20) 422 (footnote 6).
[47] J Thompson, 'The Right to Privacy' (1975) 4 Philosophy & Public Affairs 295, 313.
[48] They claim that consideration of legal protection is not 'illuminated' by the 'concept of privacy' Gavison (n 20) 422.

'limited accessibility,' that is '…the extent to which an individual is known, the extent to which an individual is the subject of attention, and the extent to which others have physical access to an individual.'[49] In other words 'secrecy, anonymity and solitude,'[50] each being 'distinct and independent, but interrelated,'[51] with all three being 'part of the same notion of accessibility.[52] The other approach is that which incorporates an element of 'control' into its definition, such as Alan Westin's '…claim of individuals, groups, or institution's to determine for themselves when, how, and to what extent information about them is communicated to others.'[53] Marmor sees the interest in privacy as being grounded in having '…a reasonable measure of control over the ways in which they present themselves (and what is theirs) to others.'[54] Froomkin writes that privacy is the 'ability to control the acquisition or release of information about oneself.'[55] Whilst 'control' over private information is an important aspect of privacy so is the degree of 'access' that others have to that information regardless of who is in control of it. While access and control might seem like reverse sides of the same coin, the following examples show how they are not co-terminus or even co-dependent. A person may not have 'control' over the private information contained in her tax return, Her Majesty's Revenue and Customs does, but nevertheless it is still important to her what degree of 'access' others can have to that private information. Similarly, medical records, a person is not in control of these and the information they contain but is still concerned with who has access to that information. Or perhaps private photographs, taken with consent but now in the possession of a person's loved one, it matters what degree of access others have to those photographs even though she herself is not in control over who does.

Criticism of the control based definitions centres around their emphasis on individual autonomy, which is seen as a weakness by Regan[56] when seeking to protect privacy in a legal context, given it is invariably pitted against the social utility of freedom of speech.[57] In addition,

[49] Gavison (n 20) 433 (footnote 40).
[50] ibid.
[51] ibid 428.
[52] ibid 434.
[53] Alan Westin, *Privacy and Freedom* (Atheneum 1967) 7. Gavison argues that 'claim' should not be used to describe privacy if we are not to pre-empt the value of privacy by adopting a 'value laden concept'. She sees privacy as a 'situation between the individual vis-à-vis others, or as a condition of life.' Gavison (n 20) 425.
[54] Andrei Marmor, 'What is the Right to Privacy?' (2015) 43 (1) Philosophy and Public Affairs 3, 4.
[55] A M Froomkin, 'The Death of Privacy?' (2000) 52 Stanford Law Review 1461, 1464.
[56] Priscilla Regan, 'Legislating Privacy' (University of North Carolina Press 1995) 212.
[57] This will be discussed below in 2.2.2.2 'Value of Privacy to Society'.

people may not have lost control of their privacy but may have chosen to give it up.[58] A modem day example of this would be when someone posts private information to a social media page. Reiman argues that privacy needs to be independent of any issues of control, seeing the right of privacy not as a right to control access to the self but a right '…that others be deprived of that access,' thus this right will protect the ability to control access to the person. [59] Anita Allen seeks to 'hybridize control and access,'[60] by introducing three dimensions to privacy: physical privacy ('seclusion and solitude'), informational privacy ('confidentiality, secrecy, data protection and control over personal information') and proprietary privacy ('control over names, likenesses and repositories of personal information') and argues that privacy can be compromised both when a person's solitude is broken, and when control over their personal information is diminished.[61] For the purposes of this thesis it is sufficient to do as Nissenbaum suggests and see both the control over personal information as an important aspect of privacy, but so too the degree of access others have regardless of who is in control.[62] That is seeing both approaches as capturing 'essential aspects of privacy that we seem to care about.'[63]

According to Gavison, the neutral concept of privacy outlined, with its central notion of accessibility better explains '…our intuitions as to when privacy is lost.'[64] It is then necessary to move to the second context in which privacy must be coherent by defining the 'scope of the desirable legal protection' by seeking to 'describe the positive concepts that identifies those aspects of privacy that are of value'[65] to both the individual and society. Identifying the value, or functions, of privacy enables us to see when invasions, or unwanted intrusions, occur.

[58] R Parker, 'A Definition of Privacy' (1974) 27 Rutgers L Rev 280.
[59] Jeffrey Reiman, 'Driving to the Panopticon' (1995) 11 Santa Clara Computer & High Technology LJ 27, 31.
[60] Nissenbaum (n 30) 71.
[61] Anita Allen, *Uneasy Access: Privacy for Women in a Free Society* (Rowman & Littlefield, 1998) cited in Nissenabaum (n 30) 71; Anita Allen-Castellitto, 'Coercing Privacy' (1999) 40 William and Mary Law Review 723, cited in Nissenbaum ibid.
[62] Nissenbaum (n 30) 71.
[63] ibid.
[64] Gavison (n 20) 429.
[65] Gavison (n 20) 440. She admits to this not being an 'easy task'.

2.2.2 Privacy as a Value: Identifying Invasions of Privacy

Identifying losses of privacy does not mean that the law will, or should, necessarily intervene. A claim for legal protection of privacy is '…compelling only if losses of privacy are sometimes undesirable and if those losses are undesirable for similar reasons.'[66] It is this similarity in the reasons advanced for the protection of privacy as a value that '…enables us to draw principles of liability for invasions.'[67] So the *reasons* identify those 'aspects of privacy that are considered desirable' and thus a 'claim for legal protection for privacy' means 'only those aspects should be protected,' resulting in no need for any further reference to the neutral concept of privacy.[68] Gavison locates the value of privacy in its 'functional relationship to valued ends,' which are 'many and diverse' and '…include a healthy, liberal, democratic, and pluralistic society; individual autonomy; mental health; creativity; and the capacity to form and maintain meaningful relations with others.'[69] These are instrumental justifications for privacy in that they are highlighting how privacy can relate to other goals and explain why we consider privacy to be a value, but they do not mean we only protect privacy *because of* those other values. It is the similarity of the reasons for regarding losses of privacy as undesirable which supports the notion that the legal system should make an explicit commitment to privacy as a value in itself.[70] Gavison structures her analysis 'around the ways in which privacy functions to promote goals, rather than the goals themselves,'[71] so for example, the need for freedom from constant scrutiny so as we can flourish, to form independent judgements and to experiment without being watched for fear of ridicule or reproach.[72]

Gavison sees the need to protect privacy coming from two areas of concern, the first being the individual and links privacy to 'mental health, autonomy, growth, creativity, and the capacity to form and create meaningful human relations.'[73] The second is 'the type of society we want,'

[66] ibid 425.
[67] ibid 424.
[68] ibid 425.
[69] ibid 442.
[70] ibid 424.
[71] ibid 446.
[72] Jeffrey Reiman draws a similar connection to Gavison in 'Privacy, Intimacy and Personhood' (1977) 6 Philosophy and Public Affairs 26, 31-36.
[73] Gavison (n 20) 444.

a liberal, pluralistic and democratic one, that does not stop the individual achieving the goals already highlighted.[74]

2.2.2.1 Value of Privacy to the Individual

So far as the individual is concerned it can be said that 'privacy is central to the attainment of individual goals under every theory of the individual that has ever captured man's imagination.'[75] Of relevance to this thesis is the argument that privacy functions to promote and reflect 'liberty of action' thereby linking it with a number of individual goals. One of these is autonomy. Much like privacy: 'Autonomy itself is a complicated concept that incorporates multiple meanings.'[76] It has been described as a 'protean concept' meaning 'different things to different people.'[77] Consequently, there is a huge literature spanning various disciplines offering numerous conceptions of autonomy from philosophical, to sociological, to ethical and legal. An in-depth consideration of this literature is beyond the scope of this thesis[78] which will focus on John Stuart Mill's conception of 'autonomy as liberty'. This is partly because Mill has been identified as an 'influential philosopher' upon the 'ethos' of the Convention and thus consideration of his theory can shed some light upon its underlying values.[79] This is an important aspect of this thesis for two main reasons. First, the ethos of the Convention and the jurisprudence that it has produced, in relation to Article 8 in particular, underpins the main argument of this thesis, namely that the privacy of the dead should be protected by the extension of the Article 8 principles to apply to invasions of privacy after death. Secondly, one of the leading post-mortem privacy scholars, Edina Harbinja, argues that autonomy should transcend death to protect post-mortem privacy, much in the way that she says testamentary freedom allows for a person's autonomous decisions in relation to the distribution of their assets to transcend death.[80] This is not an argument with which this thesis will concur. It will be argued that not only is autonomy incapable of transcending death, but that testamentary freedom is not demonstrative of it doing so. Utilising the Hohfeldian framework and Steiner's argument that

[74] ibid.
[75] ibid 445.
[76] R Rao, 'Property, Privacy, and the Human Body' [2000] B.U.L. Rev 359, 360.
[77] R H Fallon, 'Two Senses of Autonomy' (1964) 46 Stan. L. Rev. 875, 876.
[78] For a full insight into the concept of autonomy see J. B. Schneewind, 'The Invention of Autonomy: A History of Modern Moral Philosophy' (CUP 1998).
[79] Arden (n 1) 35.
[80] Edina Harbinja, 'Legal Aspects of Transmission of Digital Assets on Death.' (PhD thesis, University of Strathclyde 2017) 87; Edina Harbinja, 'Post-mortem Privacy 2.0: Theory, Law, and Technology' (2017) 31 (1) International Review of Law, Computers & Technology 26, 30.

it is impossible to locate, in a bequest, 'all its implied Hohfeldian jural positions…'[81] it will be shown that autonomy does not transcend death but is exercised by the ante-mortem person to affect events post their death. However, before considering the arguments in relation to autonomy and post-mortem privacy it is necessary to look at them in relation to privacy and the living.

John Stuart Mill in 'On Liberty' introduced what is known as the 'harm principle.' He argued that '…the only purpose for which power can be rightfully exercised over any member of the civilised community, against his will, is to prevent harm to others. His own good, either physical or moral, is not sufficient warrant.'[82] So the only part of a person's conduct that can be justifiably controlled by society is that part which concerns others. 'In the part which merely concerns himself, his independence is, of right, absolute. Over himself, over his own body and mind, the individual is sovereign.'[83] In other words the individual is autonomous. Mill also asserts that both the individual and society benefit the more that individuals develop themselves.[84] The influence of Mill's harm principle on the ethos of the Convention can be seen in the qualified rights, considered below, that require justification for any interference with an individual's freedom to act as she determines (for example, in pursuit of their Article 8 or 10 rights).[85]

Mill's theory was adopted and adapted by a number of scholars including Rawls,[86] Raz,[87] and Rao who describes autonomy as evoking '…images of self-rule, self-determination and self-sovereignty,'[88] and more recently by Bernal who sees privacy as 'crucial' in protecting 'autonomy in a digital world.'[89] Many scholars now consider autonomy and privacy to be inseparable and there can be no doubt that autonomy is believed to play a vital role in privacy

[81] Hillel Steiner *An Essay on Rights* (Blackwell Publishers 1994) 254.
[82] John Stuart Mill, *On Liberty and Considerations on Representative Government* (Basil Blackwell 1946) 8.
[83] ibid.
[84] 'In proportion to the development of his individuality, each person becomes more valuable to himself, and is therefore capable of being more valuable to others.' Ibid.
[85] Arden (n 1) 35.
[86] J Rawls and S R Freeman, Collected Papers (Harvard University Press, 1999) 365.
[87] J Raz, *The Morality of Freedom* (Clarendon Press 1986) 369: 'The autonomous person is a (part) author of his own life. The ideal of personal autonomy is the vision of people controlling, to some degree, their own destiny, fashioning it through successive decisions throughout their lives.'
[88] Rao (n 76) 360.
[89] Paul Bernal, *Internet Privacy Rights: Rights to Protect Autonomy* (CUP 2014) 11.

protection. Autonomy will be considered further in chapter 4 when discussing the current scholarship on post-mortem privacy.

A function of privacy, in promoting liberty of action, is it allows a person to do something without the knowledge of others thereby preventing 'interference, pressure to conform, ridicule, punishment, unfavourable decisions, and other forms of hostile reaction.'[90] There are of course those who argue that there are problems with allowing people such liberty,[91] and would question the 'value' and desirability of privacy in for example, Soldier X's case. Posner and Epstein[92] would no doubt argue that the foundation of his desire for privacy is a wish to 'manipulate and cheat,' thereby depriving his wife (and others) of the opportunity to make an informed decision about the relationship (marriage or friendship) and whether to continue it. Soldier X's unilateral decision not to disclose his sexuality and affair in order to maintain the relationship with his wife (and friends, family, colleagues) would be seen as, in itself, questionable. This may be so on a philosophical and moral level but as will be seen below, in the legal context the courts are not concerned with this moral aspect when considering whether a person has a 'reasonable expectation of privacy,' and thus the private information (for example, Soldier X's affair) deserves the protection of the law.[93]

Another function of privacy, that is of interest for the purposes of this thesis, is that of promoting 'liberty in ways that enhance the capacity of individuals to create and maintain human relations…'[94] By allowing people the control to 'edit' themselves so as to 'establish a plurality of roles and presentations to the world…human relations are created and maintained'.[95] James Rachaels argues that one of the underlying interests protected by the right to privacy concerns our social interactions and the 'ability to create and maintain different kinds of relationships with different people.'[96] Marmor says that the interest in controlling the ways

[90] Gavison (n 20) 448.
[91] See Posner (n 42) 'Privacy' 394-403; (n 42) 'Privacy, Secrecy and Reputation' 11-17.
[92] Epstein, 'Privacy, Property Rights and Misrepresentations (1978) 12 GA. L Rev 455, 466-74.
[93] For example: *ASG v GSA* [2009] EWCA Civ 1574 [6] (Waller LJ); *CTB v News Group Newspapers Ltd and Imogen Thomas (no 1)* [2011] EWHC 1232.
[94] Gavison (n 20) 450.
[95] ibid.
[96] 'Why Privacy is Important' (1975) 4 Philosophy and Public Affairs 323, 326. And see Adam Moore, 'Privacy: Its Meaning and Value' (2003) 40 American Philosophical Quarterly 215, for similar arguments.

we present ourselves to different people is an essential aspect of our wellbeing.[97] The commonality in the 'individual privacy promotes liberty' arguments is that people are able to do and say what they would not without privacy due to the '…fear of unpleasant or hostile reaction from others.'[98] There may also be a fear of causing harm or distress to their loved ones or colleagues, should the individual conduct themselves in such a way, if privacy was not attached to the action. This could be said to be the case so far as Soldier X is concerned. He keeps his sexuality private for fear of unpleasant and hostile reactions from his wife and others, and of course would fear causing them harm or distress if this and his conduct was to be known by them. This fear could, this thesis contends, result not only from the risk of revelation in his life-time but also after his death.

Privacy can also be said to serve the function of securing the individual's dignity in so far as dignity requires 'non-exposure.'[99] As with the concepts of privacy and autonomy, dignity is another that defies a universally agreed upon definition either theoretically or legally. Once again, the vast literature spanning, inter alia, history, religion, philosophy, politics and law is beyond the scope of this thesis. [100] The original legal conception of privacy by Warren and Brandies,[101] saw it as a way of protecting dignity (as well as promoting autonomy as discussed above) as in the right of a person to be valued and respected, not as a means, but as an end in themselves. Without privacy a person's dignity can be harmed. As will be seen below dignity is a fundamental underlying principle of human rights law.

[97] Marmor (n 54) 4 (footnote 4) adopts the interest theory (to be discussed in Chapter 3) by assuming that rights are grounded in interests which are understood as an aspect of a person's well-being and that only interests that require the imposition of duties on others are protected as rights.
[98] Gavison (n 20) 452.
[99] ibid 455.
[100] Probably the most famous conception of what dignity means is the classical liberal account developed by Immanuel Kant, *Groundwork of the Metaphysics of Morals: A German – English Edition*, Mary Gregor and Jens Timmerman (eds) (trs) <https://eds.b.ebscohost.com/eds/ebookviewer/ebook/bmxlYmtfXzM1NzM4OV9fQU41?sid=be80efdb-4559-4ea5-bbd5-661b434f7980@pdc-v-sessmgr02&vid=1&format=EB&rid=8> accessed 7 July 2016.
[101] 'The Right to Privacy' (1890) 4 Harv L Rev, 193. 'The Right to Privacy' (1890) 4 Harv L Rev, 193. More recently Floridi has advanced the argument that 'privacy should be based directly on the protection of human dignity, not indirectly, through other rights....'Luciano Floridi. 'On Human Dignity as a Foundation for the Right to Privacy' (2016) 29 Philosophy & Technology 307, 308, and his views more widely are considered in chapter 4.

2.2.2.2 Value of Privacy to Society

Building on several early thinkers about the social value of privacy, Regan argues that there is a 'broader social importance of privacy.'[102] Her review of legal scholars, philosophers and social scientists interested in privacy, identifies an 'unmistakable sense that situating privacy as a social value is appropriate, intellectually defensible and vital given the trajectory of current surveillance activities.'[103] Regan calls for a 'rethinking' of the 'social value of privacy' and develops three bases for its social importance. The 'common value,'[104] the 'public value'[105] and the 'collective value.'[106] Of most relevance to this thesis is the 'common value' which is premised on the basis that 'all individuals appreciate some degree of privacy and have some common perceptions about privacy.'[107] Regan goes back to John Stuart Mill's theory, and that of Ruth Gavison, and argues that 'privacy is important for the development of the type of individual that forms the basis of the contours of society that we share in common.'[108] So, the functions of privacy for the individual as outlined above, also play a part in the function privacy has for society as a whole. There is a general desire to live in a society which allows privacy for individuals so as they can '…grow, maintain their mental health and autonomy, create and maintain human relations and lead meaningful lives.'[109] By allowing its members to lead meaningful lives a '…more pluralistic, tolerant society' is created .[110]

A variation on that theme is one that makes clearer the communitarian claims that privacy has, reflexively shaping us and allowing to shape, and in turn be shaped, by the societies of which we are parts. Julie Cohen puts it well:

> "Theories about privacy have a tendency to dissolve into contradictions. So, for example, one justification commonly asserted for privacy is that it promotes and protects individual autonomy, but making privacy serve autonomy effectively is impossible unless one confronts the constructedness of selfhood. Another common justification for privacy is that it promotes and protects an essential degree of

[102] Priscilla Regan, 'Privacy and the common good: revisited' in Beate Roessler and Dorota Mokrosinska (eds) *Social Dimensions of Privacy: Interdisciplinary Perspectives* (CUP 2015) 50, 53 – 55.
[103] ibid 55.
[104] ibid 56 – 60.
[105] ibid 60 – 62.
[106] ibid 62 – 65.
[107] ibid 56.
[108] ibid.
[109] Gavison (n 20) 455.
[110] ibid 455.

> separation between self and society. That justification is implicitly predicated on the reality of social construction, but making privacy serve the construction of selfhood effectively is impossible unless one confronts privacy's social (i.e., collective) value."[111]

Following on from Regan and Gavison, Mead highlights the fact that 'claims to an *individualised* right to privacy' are in effect 'setting privacy up to fail' when it is pitted against 'claims to a *socialised* right of free speech, with its long pedigree and generally acknowledged wider instrumental role.'[112] He draws upon Regan's 'common value' and elements of her 'public value' and offers a 'typology of rationales' in an effort to construct a 'privacy with social value or utility' which may stand more of a chance of prevailing over the more socialised notion of freedom of expression.[113] Mead typifies the social conceptions of privacy that he identifies as 'working at one of two meta-levels: effecting assurance or protecting activity' and demonstrates that there is a potential 'mutual interest' in one another's privacy being maintained.[114] The 'effecting assurance' account is described 'at its simplest' by Mead as 'if your privacy is protected, that tells me that mine will be.'[115] This is as relevant to post-mortem privacy as it is for ante-mortem privacy. In addition, the concept of 'effecting assurance' can be seen in chapter 3, albeit in a completely different context, when looking at what is termed as the 'death culture.' It will be seen that, historically, many of the legal protections that can be said to apply to the dead[116] were founded upon, and propagated as a result of, the living having an interest in the notion that if, for example, the dead's testamentary wishes and bodily integrity were respected so too will theirs when they die.

It is also argued by Gavison and Mead that, '…respect for privacy will help a society attract talented individual's to public life.'[117] By protecting people's privacy so that they are safe in

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[111] Julie Cohen, 'Turning Privacy Inside Out' (April 12, 2018) 'Theoretical Inquiries in Law 20.1', 1, available at SSRN: https://ssrn.com/abstract=3162178. See also Julie Cohen, 'What Privacy is for' (2013) 126 Harv L Rev.

[112] David Mead, 'A Socialised Conceptualisation of Individual Privacy: A Theoretical and Empirical Study of the Notion of the 'Public' in UK MoPI Cases' (2017) 9 (1) Journal of Media Law 100, 101.

[113] ibid.

[114] The typology of rationales for the 'effecting assurance as social utility' can be found ibid 106 -108 and the 'protecting assurance as social utility' at 108 – 117.

[115] ibid 120.

[116] For example, testamentary freedom, burial, organ donation and medical confidentiality.

[117] Gavison (n 20) 456; David Mead, 'It's a Funny Old Game – Privacy, Football and the Public Interest' [2006] European Human Rights Law Review, 541.

the knowledge that any 'skeletons' they may have in the cupboard, won't be publicly revealed, they are free to run for public office and 'high profile' positions.[118] This 'meritocratic privacy,' as described by Mead, can be illustrated in the example of Soldier X. The threat of his sexuality and affair being published prevents him applying for the senior 'high profile' position out of fear. This is a loss not just to Soldier X in his ambitions being thwarted, but to the army and many others, because his talents are such that they would benefit greatly from him being in that role.

2.2.3 Privacy as a Legal Concept: Actionable Violations of Privacy

The final context to be considered is the coherence of privacy as a legal concept which necessarily 'relies on our understanding of the functions and values of privacy.'[119] This context is specifically to do with 'actionable violations,' namely privacy must be a concept that enables us to identify those occasions calling for legal protection. The first context was 'losses' identified by the neutral concept of privacy, the second 'invasions', identified by privacy as a value,[120] and the third 'violations.' All three contexts, Gavison states, comprises a subset of the previous category.[121]

The theoretical analysis of privacy above shows the importance of privacy to the individual and society. However, as will be seen in the next section, the importance asserted is inadequately reflected in the legal protection it is afforded. This is so for several reasons, not least of all the need, for example, to balance the right for privacy in Article 8 with the right to freedom of expression in Article 10. The limitations on the scope of legal protection does not however translate to diminish the importance of privacy for the reasons outlined.[122] Gavison gives some obvious,[123] and some not so obvious reasons for the inadequate reflection of the importance of privacy in the legal protection. One of the latter reasons, which will be developed in relation to the dead in chapter 5 - categorised as 'unaffected harms'- is the fact that there are ways to invade the privacy of the individual without them being aware of it. For example, when a person

[118] Gavison (n 20) 456.
[119] ibid 425.
[120] '…for claims of legal protection of privacy are compelling only if losses of privacy are sometimes undesirable and if those losses are undesirable for similar reasons' ibid 423.
[121] ibid 423.
[122] ibid 457.
[123] For example: people do not bring actions due to the length and prohibitive cost of legal proceedings, ibid 458.

is being followed or covertly observed, or having their communications intercepted. The lack of awareness is obviously a problem in a legal context which requires a complainant to bring legal proceedings to obtain a remedy. This absence of complaint is no indication that an invasion and consequent harm has not taken place, but just that the individual is ignorant of the fact.

Gavison also makes the point that in those contexts where privacy is the most valuable, the law is of little use by virtue of the fact that it is a very public institution.[124] If someone is to utilise the legal process so as to protect their privacy, they risk publicly exposing, to a far wider audience, the information they seek to protect. [125] Consequently, the law's effectiveness in protecting privacy is necessarily limited yet this should not undermine privacy's importance. Despite the law's perceived inadequacies Gavison argues, against the reductionists, that privacy is a useful legal concept and rejects the denial of its utility as such. She argues that the law should make an explicit commitment to privacy. She advocates that in looking at the law of privacy two questions should be asked: 'what privacy is' and then 'to what extent the law protects it.'[126] This approach, she says, provides for an understanding of the scope of legal protection, the way it reflects social needs, as well as give an insight into further legal protection 'created by social and technological conditions.'[127] This thesis concurs with Gavison and thus adopts this approach in the next section of this chapter as well as within this thesis as a whole.[128]

2.3 The Law

Historically the law in England and Wales took a narrow approach to privacy, both as to its content and its scope, and as such no general right of privacy was implemented by Parliament or developed by the common law.[129] Nevertheless the courts did recognise the concept of privacy and where an invasion of such may have occurred. This was demonstrated as early as

[124] ibid 459.
[125] Known as the 'Streisand effect' (although Gavison does not use that term) is where a legal action further increases the publicity surrounding the information that the person sought to keep private, ibid 458.
There are solutions to ameliorate this risk in the form of pre-trial injunctions but never-the-less the risk remains, given the internet and its lack of any real regulation in this respect.
[126] ibid 460.
[127] ibid 460.
[128] The reductionist approach is to start from the legal decisions themselves, without an external conception of privacy and thus they often rely on a concept of privacy that derives from the decision themselves. For further discussion and critique see Gavison, ibid 460-461.
[129] This was confirmed most famously in the case of *Kaye v Robertson* (1991) FSR 62, 66.

1849, in the case of *Prince Albert v Strange*, where Cottenham LC referred to the fact that despite Prince Albert bringing his claim on the basis of property rights and breach of confidence, the real right that had been invaded was that of privacy, which had arisen out of a confidential relationship.[130] Indeed, prior to the implementation of the Human Rights Act, privacy was often protected via the vehicle of breach of confidence, which still remains an important element of privacy law today. Initially the judiciary were at pains to emphasise that any new cause of action protecting privacy in accordance with Article 8, was a matter for Parliament and not themselves. Indeed, Mummery LJ in *Wainwright v Home Office* in 2002, warned against the creation of such a vague 'blockbuster tort.'[131] And even though Lord Woolf C.J in the case of *A v B,* of the same year, was willing to accept the possibility of a right of privacy in English law, he saw it as a last resort with most cases being able to be resolved within the law of confidence.[132]

Nevertheless in a series of cases, starting with *Campbell v Mirror Group Newspapers Ltd* in 2004,[133] the courts went on to effectively develop the tort of 'misuse of private information,'[134] which has been described as a 'hybridisation of art. 8 and the cause of action for breach of confidence.'[135] For Toulson and Phipps, the judiciary have 'skilfully developed' the law in this area 'incrementally by expansion of breach of confidentiality,'[136] which they say is 'understandable' as the courts are 'more willing to make a new law by adapting or extending existing doctrine rather than creating a new branch of law.'[137] For Lachlan Urquhart it is a matter of 'judicial 'shoe-horning'' of Articles 8 and 10 'into the law of confidence' which 'has

[130] [1849] EWHC Ch J20 (08 February 1849). Also see *Max Moseley v News Group Newspapers Ltd* [2008] EWHC 1777 (QB) [224] – [226] (Eady J).

[131] [2002] EWCA Civ 2081 [2002] QB 1334 57- 60, not only was there a 'weight of authority' denying the existence of such a tort, there were public policy issues involved [108]-[114] (Buxton LJ). See also R. Buxton, 'The Human Rights Act and the Private Law' (2000) 116 L.Q.R 48.

[132] [2002] EWCA Civ 337 [2003] QB 195.

[133] UKHL 22: in relation to drug addiction. And other cases which were primarily brought by well-known figures arguing their privacy had been invaded by the threat, or publication, of something private for example: an extra marital affair in the cases of *CC v AB* [2007] EMLR 11; *John Terry (previously referred to as 'LNS') v Persons Unknown* [2010] EWHC 119 (QB); *Rio Ferdinand v MGN Limited* [2011] EWHC 2454 (QB). The publication of wedding photos: *Douglas v Hello! (No 1)* [2001] QB 967 [2000] EWCA Civ353; *Douglas v Hello! Ltd (No 2)* [2003] EMLR 28.

[134] *Douglas v Hello! (No 1)* ibid, it was recognised that it had been developed.

[135] Toulson and Phipps (n 27) [7-001]. Of course, the section 6 obligation, referred to in the introduction to this chapter, provided the impetus for the courts, as public authorities, to ensure that they did not act in a way that is incompatible with Article 8.

[136] Ibid [2-2012]. It was stated in *Douglas v Hello! Ltd (no 1)* (n 132) [88] that there is an 'innate ability of the common law to develop this field.'

[137] Ibid [2-2012]. It is with this rationale in mind that the basis of chapter 5 is the adoption of existing doctrine, namely Article 8 to protect privacy post-mortem.

led to the emergence of a complex patchwork of privacy protection under the English common law.'[138] Despite years of protestations to the contrary, and various names being used to describe it, the court in the case of *Vidal Hall and Others v Google Inc*. finally settled that 'misuse of private information' is now an actionable tort.[139] An individual can now have concurrent claims under breach of confidence and misuse of private information under Article 8.

Article 8 'protects individual interests such as autonomy, dignity and personal development'[140] and provides that: 'Everyone has the right to respect for his private and family life, his home and correspondence.'[141] This right is qualified by the recognition of the social interest in Article 8 (2) that there are occasions when intrusion into private and family life may be justified, such as where the intrusion is necessary for the 'protection of the rights and freedom of others.' One such right that often gets pitted against Article 8 is that contained within Article 10 (1) which states that: 'Everyone has the right of freedom of expression,' although 10 (2) provides that this right 'carries with it duties and responsibilities.' Similarly, to the qualification in Article 8 (2), Article 10 (2) recognises there are occasions when protection of the rights of others may make it necessary for freedom of expression to give way. Whilst Article 10 is, of course, important it is not the focus of this thesis which seeks to establish that privacy should be *prime facie* protected after death, as it is in life under Article 8.[142]

Even with the relatively new 'misuse of private information' cause of action, the law of confidence remains an important part of the law of privacy and is therefore the necessary starting point when considering the current law. This section will examine how it has influenced the development of the law of privacy under Article 8 and go on to consider what the current law protects and how, looking at the values that the jurisprudence highlights as underpinning it, and the structure of its application. It will be seen that nothing within the current law of privacy is applicable to the dead,[143] and indeed the ECtHR has specifically said that the

[138] Lachland D Urquhart, 'Regulation of Privacy and Freedom of the Press' in *Law, Policy and the Internet*, Lilian Edwards (ed) (Hart Publishing 2019) 214. The 'shoe-horning' terminology came from *Douglas v Hello*! [2005] EWCA Civ 595 [53] cited in *McKennitt v Ash* [2005] EWHC 3003 (QB) [8]; *Coogan and Phillips v News Group* [2012] EWCA Civ 48 [48]
[139] [2014] EWHC 13 QB.
[140] Bart van der Sloot, *Privacy as Virtue: Moving Beyond the Individual in the Age of Big Data* (Intersentia 2018) 22, <https://doi-org.uea.idm.oclc.org/10.1017/9781780686592> accessed 17 June 2019.
[141] Article 8 (1).
[142] As will be seen in chapter 5 the unique position of the dead will necessitate amendments.
[143] There is jurisprudence on the privacy rights of the dead person's family under Article 8, which will be discussed in chapter 6.

Convention does not so apply.[144] However the exploration of the provisions in this chapter will highlight parts of the law, and underpinning values, that will be developed in the remaining chapters of this thesis arguing for privacy protection post-mortem. It should be noted at this stage, that two values that are important in the discussion of post-mortem privacy are those of autonomy and dignity which are identified as being extremely important underpinning values of the Convention.[145] Both concepts defy universal agreement as to their definition.[146] However, they are firmly established and reiterated in both the Convention and the human rights jurisprudence, as will be seen below. Indeed, Lord Hoffman, in the landmark case of *Campbell*, said that human rights law had identified 'private information as something worth protecting as an aspect of human autonomy and dignity.'[147] There is also widespread recognition from the courts that privacy is, as Lord Nicholls asserted '…essential for the wellbeing and development of the individual.'[148]

2.3.1 The Duty of Confidentiality

The jurisprudential basis of a duty of confidentiality arises from a confidential relationship which can be contractual or equitable.[149] Examples of such relationships are those between a legal adviser and client, under legal professional privilege,[150] an informant and the police,[151] a journalist and source,[152] those dealing with trade secrets[153] and of particular relevance to this thesis, that of a doctor and patient,[154] (known as 'medical confidentiality'). Its relevance is considered in detail in chapter 3 when looking at existing provisions that protect the dead. It is perhaps the closest we come to post-mortem privacy, albeit only in relation to medical information, as there are ethical, and disputed legal, provisions for the continuance of medical confidentiality beyond death.

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[144] *Jaggi v. Switzerland*, App no. 58757/00 (2006) 47 EHRR 30.
[145] Human dignity is specifically stated as underpinning the Universal Declaration of Human Rights, which forms the basis of the Convention, however even in this respect the concept is complex.
[146] 'We live in a world where the idea of human dignity is everywhere invoked and everywhere contested.' Jacob Weinrib, *Dimensions of Dignity: The Theory and Practise of Modern Constitutional Law* (CUP 2016) 1.
[147] *Campbell v MGN Newspapers Ltd* [2004] UKHL 22 [2004] 2 AC 457 [50].
[148] ibid [12] (Lord Nicholls).
[149] Toulson and Phipps (n 27) [2-004]. Equitable being based on fairness and conscience. It should be noted that the 'new' misuse of private information cause of action does not require a confidential relationship.
[150] *R v Derby Magistrates' Court, ex parte B* [1996] AC 48, 507 (Lord Taylor CJ).
[151] *R v Lewes Justice ex parte Home Secretary* [1973] AC 388, 413.
[152] *R v Lewes Crown Court ex p Hill* [1991] 3 Cr App R 60, 66-67 (Bingham LJ); *R v Secretary of State for the Home Department, ex p Simms* [2000] 2 AC 115, 131 (Lord Steyn).
[153] *JIH v NGN Ltd* [2010] EWHC 2818 (QB) paras 58 and 59.
[154] *W v Egell* [1989] EWCA Civ 13.

A legal obligation of confidence is imposed upon a doctor[155] in respect of confidential information[156] concerning the patient, gathered in her professional capacity. This pertains whether the information is obtained directly from the patient, from their medical records, conversations with other medical professionals or otherwise.[157] There is an abundance of guidance covering a vast array of health and medical related areas to assist in the identification and performance of the duty owed to the patient.[158] The focus of this section is on the general right of medical confidentiality in life, as opposed to the ethical position, and the rationales and justifications thereof, which will be considered in relation to the dead in the following chapter.

Like privacy, medical confidentiality is not an absolute right[159] and there can be other interests that outweigh it. Disclosure is governed by several legislative and regulatory provisions such as for the good of public health[160] or the furtherance of a criminal investigation.[161] The rationales behind a duty of confidentiality in a patient doctor relationship were articulated by the ECtHR in the case of *Z v Finland:*[162]

> …the court will take into account that the protection of personal data, not least medical data, is of fundamental importance to a person's enjoyment of his or her right to respect for private and family life as guaranteed by art 8 of the Convention. Respecting the confidentiality of health data is a vital principle in the legal systems of all the contracting parties to the Convention. It 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.

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[155] And all other medical and health care professionals who are concerned in advising and treating patients.
[156] Personal health information relates to one's medical condition and has been defined by Raymond Wacks as '…those facts, communications or opinions which relate to the individual and which it would be reasonable for him to regard as intimate and sensitive and therefore want to withhold or at least restrict their collection, use and circulation.' Raymond Wacks, *Personal Information Privacy and the Law* (Bodley Head 1989) 26.
[157] Toulson (n 27) 245 para 11-002.
[158] General Medical Council, 'Confidentiality: good practice in handling patient information' <www.gmc-uk.org/ethical-guidance/ethical-guidance-for-doctors/confidentiality> accessed 28 December 2019.
[159] The 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#paragraph-9 accessed 28 December 2019.
[160] Public Health (Control of Diseases) Act 1984 and Health Protection (Notification) Regulations 2010, which requires a doctor to inform the proper officer of the local authority of actual or suspected cases of infectious diseases.
[161] Police and Criminal Evidence Act 1984 ss.8 to 12 by order of a Circuit Judge.
[162] (1997) 25 EHRR 371.

> 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.[163]

The maintenance of confidentiality is therefore justified in terms of the personal and social consequences, in that without it people may be less likely to seek medical treatment which not only has the potential to cause harm to themselves but to others too. There is therefore within the 'necessary role of trust in fiduciary relationships, the intrinsic value of privacy as a human good, and the interpersonal demands of human dignity and autonomy.'[164]

Thus, subject to the law outlined below in relation to breach of confidentiality, Soldier X would have a right to privacy in relation to his medical records, which would include the fact that he underwent genetic testing and the results. Nothing could be disclosed to his wife or anyone else without his express consent unless he himself lacked capacity to consent and disclosure was of benefit to him, required by law, was in the public interest or where a statutory process had set aside the common law duty of confidentiality.[165] This is also applicable to the non-medical information that he disclosed to his GP about his sexuality. As will be seen the position may not continue as such upon his death.

As well as the duty of confidentiality arising from confidential relationships there are a number of other situations in which a duty of confidentiality can exist. Of particular relevance to this thesis is that breaches of confidential information about a person's private life can be

[163] ibid [95].
[164] Jessica Berg, 'Grave Secrets: Legal and Ethical Analysis of Post-mortem Confidentiality' (2001) 34 Conn L Rev 81, 87.
[165] For a full list of circumstances in which disclosure can be made: General Medical Council (n 158).

actionable,[166] as well as disclosure of private diaries,[167] correspondence,[168] and information relating to a medical condition, even where it is not within the doctor/patient relationship of confidence.[169] Disclosure of sexual relationships[170] is a recurring issue for the courts, very often featuring adultery, which has been found not to affect the 'reasonable expectation of privacy.'[171] However, it is important to note that not everything that takes place within a relationship, that can be considered to be a confidential one, is covered by the so called 'cloak of confidence'. There are limiting principles employed by the courts as was established in the *Spy Catcher* case.[172] Although this case was decided some years before the implementation of the Human Rights Act and was therefore focused on the traditional concept of confidence, Lord Goff's three limiting principles of the duty of confidentiality[173] are still relevant when considering an application under Article 8 and the competing Article 10 right to freedom of expression. The first limitation on the duty of confidentiality is that it 'only applies to information to the extent that it is confidential…' once the information has entered the 'public domain,' meaning that it is 'generally accessible…it cannot be regarded as confidential...' Secondly, the duty of confidentiality '…applies neither to useless information, nor to trivia…' and the third limiting principle is that 'the public interest, which is the basis of the law's protection of confidence, can be outweighed by some other countervailing public interest which favours disclosure. This last limiting principle requires the court to carry out 'a balancing operation.'[174]

The test for a duty of confidentiality being owed is an objective one and the information disclosed '…must be of a nature and obtained in circumstances such that any reasonable person

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[166] *Argyll (Duchess) v Argyll (Duke*) [1967] AC 302; *Max Mosely v News Group Newspapers Ltd* [2008] EWHC 1777 (QB) [100] (Eady J): '…people's sex lives are to be regarded as essentially their own business – provided at least that the participants are genuinely consenting adults…'

[167] *Associated Newspapers v HRH Prince of Wales* [2006] EWCA Civ 1776 [2008] [48].

[168] *Maccaba v Lichtenstein* [2005] EMLR 9 [4] (Gray J) '…as a general rule correspondence between A and B on private matters such as their feelings for one another would be a prime candidate for protection.' However, it does depend on the circumstances and context.

[169] *X v Y* [1990] 1 QB 220.

[170] *Stephens v Avery* [1988] Ch. 449 [454] (Nicholas Browne-Wilkinson V-C): 'To most people the details of their sexual lives are high on their list of those matters which they regard as confidential'. The case concerned a married party in a lesbian relationship. *Barrymore v News Group Newspapers Ltd [*1997] FSR 600, Jacob J: "The fact is that when people kiss and later one of them tells, that second person is almost certainly breaking a confidential arrangement.

[171] *ASG v GSA* [2009] EWCA Civ 1574 [6] (Waller LJ). The concept of the 'reasonable expectation of privacy' will be discussed below.

[172] *AG v Guardian Newspapers (no 2)* [1990] 1 AC 109.

[173] ibid 282 [B] – [F].

[174] As will be seen Article 8 requires the same in what is termed the 'balancing exercise'.

in the position of the recipient ought to recognise that it should be treated as confidential.'[175] If the duty is found to exist then the court will, of course, move on to consider whether it has been breached.

2.3.1.1 Breach of Confidence

The test for breach of confidence was first enunciated in the 1969 case of *Coco v AN Clark (Engineers) Ltd*,[176] and was unanimously approved by the Court in *Douglas.*[177] The information itself must firstly have 'the necessary quality of confidence about it. Secondly, that information must have been imparted in circumstances importing an obligation of confidence. Thirdly, there must be an unauthorised use of that information to the detriment of the party communicating it.'[178] The law has, however, since developed and in the case of *Campbell*, it was stated that the requirement for an initial confidential relationship had been 'firmly shaken off,'[179] and instead a duty of confidence can arise when 'someone receives information they know or ought to know is fairly and reasonably to be regarded as confidential.'[180] In addition, the information about an individual's private life is no longer described as 'confidential' but 'private.' This modified form of confidentiality is often described as the 'extended action' for breach of confidence,'[181] and has, according to Lord Hoffman, 'absorbed' the values of Articles 8 and 10 of the Convention,[182] so that they are now part of the cause of action. However, there remains a distinction between an action under Article 8 and one brought for a breach of confidence, which was summed up by Lord Nicholls *in Douglas v Hello! Limited* (No 3):

> As the law has developed breach of confidence, or misuse of private information, now covers two distinct causes of action, protecting two different interests: privacy and secret (confidential) information. It is important to keep these two distinct. In some cases, information may qualify for protection both on grounds of privacy and confidentiality.[183]

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[175] *Napier v Pressdram Ltd* [2009] EWCA Civ 443 [42] (Toulson LJ).
[176] [1969] RPC 41.
[177] *Douglas v Hello*! (No 6) (2003) EWHC 2629 (Ch); [2004] EMLR 13 [55 – 56]. The court did omit the words 'to the detriment of the confider'.
[178] *Coco* (n 176) [111].
[179] *Campbell* (n 147) [14] (Lord Nicolls).
[180] ibid [47] – [48] (Lord Hoffman); [85] (Lord Hope).
[181] T Alpin, L Bentley, P Johnson and S Malynicz, *Gurry on Breach of Confidence: The Protection of Confidential Information* (2nd edn, OUP 2012) [1.25], [2.156] – [2.157].
[182] *Campbell* (n 147) [14], [17] (Lord Hoffman).
[183] [2007] UKHL 21; [2008] 1 AC 1, 255.

An individual therefore, can have concurrent claims under breach of confidence and the misuse of private information tort.[184] It should be noted that there remains academic argument as to whether privacy can actually be, or should be, protected as a tort,[185] and whether there are in fact two causes of actions, in addition to breach of confidence, namely 'preventing the misuse of private information' but also 'preventing the wrongful access to private information.'[186] In addition Michael Tilbury argues '…against the protection of privacy in the action for breach of confidence' for a number of very cogent reasons. Not least of all that the development of the common law does not 'optimally achieve' greater protection of privacy as the 'so-called 'right to privacy' is not the type of 'right' that is typically protected in private law.'[187] It thus 'sits uneasily in the law of tort'[188] and confidentiality.[189] Whilst these arguments are of great interest, the scope of this thesis allows for only the consideration and application of the judicial determinations in this respect. This is especially so in this chapter as it is considering what the legal position is for the living as opposed to what it should or could be. However, Tilbury's premise that privacy should be protected as a human right (rather than a common law one) is considered in relation to the normative argument, put forward in chapter 5, for privacy protection for the dead.

2.3.2 Article 8: Meaning of 'Private Life'

When considering the theoretical concept of privacy above, it was apparent that there are two divergent opinions of its definition, the reductionists versus those that see privacy as unique in its own right. The Convention jurisprudence shows that the courts have taken a wider approach and do not seek a definition of privacy as a concept, but rather concentrate on the aspects that form part of a 'private life.'[190] However, examination of the jurisprudence, and

[184] See for example: *Campbell* (n 147); *Max Moseley v News Group Newspapers Ltd* [2008] EWHC 1777 (QB)
[185] Michael Tilbury 'Privacy: Common Law or Human Right?' in *Emerging Challenges in Private Law, Comparative Perspectives* in N Witzleb, D Lindsay, M Paterson and S Rodrick (eds) *Emerging Challenges in Privacy Law: Comparative Perspectives* (CUP 2014) 157.
[186] N McBride and R Bagshaw, Tort Law, (4th edn, Pearson 2012) chapter 21 (n 70-72) cited in Tilbury, ibid.
[187] The law of tort (in a rights-based account) understands a 'right' as a 'claim right' in the strict Hohfeldian sense, which will be discussed in chapter 3. Therefore 'a general right to privacy is not a right in this sense' as it does not identify 'who is under a legal duty to respect the right' and does not have the 'specificity that is typical of common law rights' Tilbury (n 185) 163. 'Privacy seems to encompass everything, and therefore it appears to be nothing in itself', D Solove, *Understanding Privacy* (Harvard University Press 2008) 7.
[188] The grounds of its incompatibility differ depending on the account for tort law as either the 'rights-based model of tort law' or 'the loss allocation model of tort law'. Tilbury (n 185) 160.
[189] ibid.
[190] Rebecca Wong, 'Privacy: Charting its Developments and Prospects' in M Klang and A Murray (eds) *Human Rights in the Digital Age* (GlassHouse 2005) 147.

the extremely broad scope afforded to the term 'private life,' indicate that it may well be considered synonymous with privacy. Article 8 itself uses the word 'respect' and thus allows it to be 'wider in scope.'[191] Laws J, in the case of *Wood,* highlighted the fact that the words of Article 8 alone, might lead one to think that the '…essence of the right was the protection of close personal relationships. While that remains a core instance, and perhaps the paradigm case of the right, the jurisprudence has accepted many other facets.'[192] Indeed, it is abundantly clear from the case law that there is no one comprehensive definition of what is meant by 'private and family life' under Article 8 and it is 'very broad indeed.'[193] This not only reflects the definitional difficulties of the concept of privacy, as was seen in the previous section, but also the fact that the Convention is a 'living instrument' which is interpreted in accordance with present day conditions[194] In respect of Article 8 there is clearly 'an ever-changing scope of what constitutes private life, informed by technological innovations and data protection issues...' [195] which makes a comprehensive and limited definition of private and family life undesirable, even if it could be achieved.

Whilst the concept of 'private life' is '…not susceptible to exhaustive definition,'[196] the courts have identified several facets to the concept. They have found that private life covers the physical and psychological integrity of a person,[197] as well as multiple aspects of a person's physical and social identity,[198] including gender identification, name, sexual orientation and sexual life.[199] It also includes a person's right to their image.[200] Another important element of private life is information about a person's health[201] including 'mental health'. Article 8 protects the right to identity and personal development, and the right to establish and develop relationships with other human beings and the outside world. The preservation of mental

[191] ibid 152.
[192] *Wood v Commissioner of the Metropolis* [2009] EWCA Civ 414 [19].
[193] ibid [18]-[21].
[194] *Tyrer* (n 12) was the first case in which the court accepted the 'living instrument' doctrine.
[195] van der Sloot sees Article 8 as having functioned as the main reference when the ECtHR accepts new rights and freedoms under the Convention' Sloot (n 140) 39.
[196] *S v United Kingdom* (2008) 48 ECRR 1169 [66]-[67].
[197] *Pretty v United Kingdom* (2002) 35 EHRR I [61]; *YF v Turkey* (2003) 39 EHRR 715 [33].
[198] *Mikulic v Croatia Reports of Judgement and Decisions* 2002-1, 141, para 53 and [2002] I FCR 720.
[199] See *inter alia*: *Bensaid v United Kingdom* (2001) 33 EHRR 205 [47]; *Peck v United Kingdom* (2003) 36 EHRR 41 [57]: Private and family life may also include other means of personal identification and of linking to a family. Not all sexual activity carried out in private necessarily falls within Article 8: *Laskey v UK* (Application Nos. 21627/93; 21974) [1997] ECHR 4, (1997) 24 EHRR 39; *R v Brown* (1994) 1 AC 212.
[200] *Sciacca v Italy* (2005) 43 EHRRR 400 [29].
[201] *Z v Finland* (1997) 25 EHRR 371 [71].

stability is in that context an indispensable precondition to effective enjoyment of the right to respect for private life.'[202] In addition Article 8 also protects a right to personal development and the right to establish and develop relationships with other human beings and the outside world.[203] Baroness Hale in *R (Countryside Alliance) v AG*,[204] stated that Article 8 protects a 'private space' as well as the 'personal and psychological space within which each individual develops his or her own sense of self and relationships with other people.'[205] And Lord Bingham found that it protects a 'private sphere' where an individual can expect to be 'left alone to conduct their personal affairs and live their personal lives as they choose.' [206] This is in line with the court in the case of *Von Hannover* which found there was a 'zone of interaction' (even in public) a person has with others which can fall within the scope of Article 8 as it is: '…primarily intended to ensure the development, without outside interference, of the personality of each individual in his relations with other human beings.'[207] These facets of the term of private life are akin to the understanding of the concept of privacy itself, for example, Lord Mustill[208] saw 'privacy' as denoting:

> …at the same time the personal 'space' in which the individual is free to be itself, and also the carapace, or shell, or umbrella, or whatever other metaphor is preferred, which protects that space from intrusion. An infringement of privacy is an affront to the personality, which is damaged both by the violation and by the demonstration that the personal space is not inviolate.[209]

An apt example of how broad the scope of Article 8 has become, is *K v Germany* where the court found that the applicant's complaint, that he was not allowed to have his ashes scattered in his garden, was to be examined under Article 8.[210] The court acknowledged that: 'It may be doubted whether or not this right includes the right of a person to choose the place and determine the modalities of his burial' but found that it did, reasoning:

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[202] *Bensaid* (n 199) [47]. Eady J expressly followed *Bensaid* in *Maxine Carr v News Group Newspapers Limited* [2005] EWHC 971 (QB) [3].
[203] *Friedl v Austria* (1995) 21 EHRR 83 (Commission Decision 15225/89) [45].
[204] [2007] UKHL 52.
[205] ibid [116].
[206] ibid [10].
[207] *Von Hannover v Germany* (2005) 40 EHRR 1 [50].
[208] *R v Broadcasting Standards Commission, Ex parte BBC* [2000] EWCA Civ 116 [48].
[209] ibid [48].
[210] As well as Article 9: everyone has the right to freedom of thought, conscience and religion. This right includes the freedom to manifest his religion or belief in worship, practice and observance.

> Whilst those arrangements are made for a time after life has come to an end, this does not mean that no issue concerning such arrangements may arise under Article 8 since persons may feel the need to express their personality by the way they arrange how they are buried . The Commission therefore accepts that the refusal of the German authorities to allow the applicant to have his ashes scattered in his garden on his death is so closely related to private life that it comes within the sphere of Article 8 of the Convention.[211]

It can therefore be seen that the scope of the meaning of private life is very broad indeed and encompasses many of the theoretical aspects of privacy discussed in the previous sections. Sloot sees the court as having accepted 'the right to develop one's identity and personality' in both the private and public sphere as well as in the 'personal and the professional realm' as 'one of the core rationales underlying Article 8'. This he asserts is illustrative of the 'shift of the interpretation' from the original 'classic right to privacy…to a more encompassing personality right.'[212]

However, whilst there are many potential facets of private life that may engage Article 8, not all will amount to a claim of misuse of private information which potentially attracts legal protection. The court in *Ambrosiadou v Coward* held that although respect for private and family life is fundamentally important, the courts will not automatically protect information just because it relates to a person's family and private life, as the courts should '…expect people to adopt a reasonably robust and realistic approach to living in the 21st century.'[213]

2.3.2.1 Misuse of Private Information: Reasonable Expectation of Privacy

In a claim under Article 8 for the misuse of private information, the 'new methodology'[214] requires the court to start by considering the first of a two-stage test. This 'threshold test' requires the courts to decide whether Article 8 is in fact engaged and if so whether the

[211] *K v Germany*, App no 8741/79 (Commission Decision, 10 March 1981) 137, 139.
[212] van der Sloot (n 14) 35.
[213] [2011] EWCA Civ 409 [30].
[214] Established in *Campbell* (n 147) and sanctioned in *Re S (A Child)* [2004] UKHL 47 [17] (Lord Steyn).

information is such as to give rise to a 'reasonable expectation of privacy'.[215] The question asked is '…what a reasonable person of ordinary sensibilities would feel if he or she was placed in the same position as the claimant and faced with the same publicity.'[216] Therefore, the question at this first stage of adjudicating upon an Article 8 claim is a 'broad one' that requires 'all the circumstances' of the case to be taken into account.[217] Sir Anthony Clarke MR, in the case of *Murray*, summarised what these circumstances are likely to include: the attributes of the claimant; the nature of the activity in which the claimant was engaged; the place at which it was happening; the nature and purpose of the intrusion; the absence of consent; whether the effect upon the claimant was known, or could be inferred; the circumstances in which, and the purposes for which, the information came into the hand of the publisher.`[218] It is important to highlight that the truth or falsity of the information disclosed can be irrelevant to the courts consideration, as the law of privacy is now concerned with the 'nature of the intrusion' not just with the information itself.[219] Lord Hope asserted, obiter, that '…there is a vital difference between inaccuracies that deprive the information of its intrusive quality and inaccuracies that do not.'[220] It should also be noted that whilst this 'reasonable expectation of privacy' can be displaced by the applicant's own conduct, and has been deemed to have been so in some cases that usually involved well known people or 'celebrities,'[221] the so-called 'courting' of publicity will not necessarily mean that the reasonable expectation of privacy is lost – again it depends on the facts of the case.[222]

2.3.2.2 Misuse of Private Information: Balancing Exercise

Once the court is satisfied that Article 8 is engaged and there is a reasonable expectation of privacy in the information disclosed, it moves onto the second stage: balancing the interest in keeping the information private against the interest in revealing the information. In most cases

[215] *CTB* (n 93) [23].
[216] *Campbell* (n 147) [99].
[217] *Murray v Express Newspapers* [2009] Ch 481 [24], [27], [35[, [40]. Further *TSE and ELP v News Group Newspapers Ltd* [2011] EWCH 1308 (QB) [18].
[218] *Murray* (n 217) [35] – [36].
[219] See Eady J in *CTB v NGN Ltd and Imogen Thomas* (n 93) [23]. Of the irrelevancy point see *McKennitt* (n 138) [80], [87]; *Prince Radu of Hohenzollern v Marco Huston and Sena Julia Publications Ltd* [2007] EWHC 2735 [14].
[220] Lord Hope (obiter) in *Campbell* (n 147) [102].
[221] See *A v B. C. D* [2005] EMLR 26; [2005] EWHC 1651 (QB) [22], [23] (Eady J).
[222] *Campbell* (n 147) [57].

the Article 8 application will be met with a defence raised under Article 10 dealing with freedom of expression. This is considered as '…one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment.'[223] It is seen as a vitally important freedom, especially 'to the organs of the media' and it helps ensure that '…the press are freely able to enquire, investigate and report on matters of public interest.'[224] Lord Steyn in the case of *Re S*[225] made it clear that when the court is considering an application under Articles 8 and 10, neither article takes precedence and therefore when they come into conflict a 'balancing exercise' must take place. This requires an 'intense focus on the comparative importance of the specific rights being claimed' *and* the 'justifications for interfering with or restricting each right must be taken into account.'[226] The court must '…balance the claimant's interest in keeping information private against the countervailing interest of the recipient in publishing it.'[227] Considerations on one side such as the impact on the claimant and their family of publication, versus the importance of the story, for example, in contributing to a debate on a matter of public interest. The court must then undertake the 'ultimate balancing act' of the 'proportionality test' which must be applied to each,[228] being '…tested by, among other things, the standard of what is necessary in a democratic society.'[229]

There are many examples of the court undertaking this balancing exercise, but the landmark case of *Campbell* is probably one of the most illustrative, as the court found for each article in different aspects of the exercise. The newspaper had published details of Naomi Campbell's drug addiction and details of her therapy at 'Narcotics Anonymous'. The article was accompanied by covert photographs showing her outside the building where a session had taken place. The court (by a majority) found that publishing the *details* of Campbell's treatment and the covert photographs was a 'disproportionate interference' with her Article 8 right to keep private her treatment for drug addiction. However, although the court found[230] that there would 'ordinarily' be Article 8 protection for the *fact* of her drug addiction and the *fact* that she was

[223] *Nilsen and Johnsen v Norway* [1999] 30 EHRR 878 [43].
[224] *ETK News Group Newspapers Ltd* [2011] EWCA Civ 439 [13] (Ward LJ). Public interest is not the same as what is 'of interest' to the public. It is for the court to decide whether a publication is in the public interest.
[225] *Re S* (n 214) [17] (Lord Steyn).
[226] ibid.
[227] *Campbell* (n 147) [137] (Lady Hale).
[228] *Re S* (n 214) [17] (Lord Steyn.)
[229] *Douglas v Hello! Magazine Ltd* [2001] 2 ALL ER 289, CA [137] (Lord Sedley).
[230] The parties having agreed upon this point.

receiving treatment,[231] there was no breach in publishing these facts due to the existence of a public interest in countering Campbell's previous denial of them.

However, that was the limited extent to which Article 10 was victorious as the court went on to find for Campbell. The overall decisive factor in the majority of the House doing so was the '…excessive intrusion' the article, coupled with the photographs, presented in her private life. The facts that the private information related to a 'health' issue which was deserving of privacy and that the publication had the potential to cause Campbell harm were decisive factors. There being no compelling need to publish the name of the organisation she was attending or the details of the therapy, and the covertly taken photographs added greatly overall to the intrusion that a reasonable person of ordinary sensibilities would feel that the article made into her private life.[232] The publication also had the potential to cause her harm by jeopardising the continued success of the treatment,[233] this aspect was given a 'great deal of weight' by Lady Hale and was considered to be an 'important factor to be taken into account in the assessment of the extent of the restriction that was needed to protect Campbell's right to privacy.'[234] In addition the photographs added to the 'potential harm' by making Campbell think '…she was being followed or betrayed and deterring her from going back to the same place again.'[235] Thus, the information allied to the photographs went significantly beyond the revelation that the appellant was a drug addict and was engaged in drug therapy and beyond being 'peripheral' to the publication of that information.'[236]

It is also of interest, for the purpose of chapter 6 and the post-mortem relational privacy discussion, that Lord Carswell made reference to the fact that the publication might not just affect Campbell herself but might also 'inhibit other persons attending the course from staying with it, when they might be concerned that their participation might become public knowledge'.[237] This is an example of how the invasion of one person's privacy can have a direct

[231] *Campbell* (n 147) [23]-[24] (Lord Nicholls). Dissenting judgment but majority agreed.
[232] ibid [121] (Lord Hope).
[233] ibid [152] (Lady Hale).
[234] ibid [118] (Lord Hope).
[235] ibid [155] (Lady Hale).
[236] ibid [165] (Lord Carswell).
[237] ibid Mead (n 112) 105, calls this a 'parasitic interest' in the privacy of another, 'to whom they have some connection.

impact on another and will be discussed in more detail when considering the concept of post-mortem relational privacy in chapters 4 and 6.

2.3.3 Remedies

Section 12 of the Human Rights Act comes into play whenever the court is considering relief that 'might affect the exercise of the Convention right to freedom of expression.'[238] The relief granted is usually an injunction preventing publication of the matter which the applicant alleges is in breach of their Article 8 right, and the court is not to grant such relief before trial unless it is '…satisfied that the applicant is likely to establish that the publication should not be allowed.'[239] In addition to the court having regard to the importance of the right to freedom of expression it must, in the case of journalistic material,[240] take into account the extent to which the material is, or is about to be, 'available to the public,[241] or in the public interest to publish[242] and any relevant privacy code.[243]

The relevant privacy code at the time of writing,[244] is clause (2) of the Editors Code of the Independent Press Standards Organisation (IPSO).[245] This code is a voluntary set of rules that newspapers and magazines regulated by IPSO have agreed to. The wording is similar to Articles 8 and 10 in that there is an entitlement to respect for 'private and family life, home, health and correspondence, including digital communications.'[246] In addition editors are required to 'justify any 'intrusions' into an 'individual's private life without consent,'[247] and when considering a person's 'reasonable expectation of privacy account will be taken' of the 'extent to which the material is already in the public domain or will become so,' as well as of the complainants 'own public disclosures.'[248] And in a nod to the case of *Van Hannover* it is

[238] Section 12 (1).
[239] Section 12 (3).
[240] As well as literary or artistic material.
[241] Section 4 (a) (i).
[242] Section 4 (a) (ii).
[243] Section 4 (b).
[244] The latest version of the Editors' Code of Practice came into effect on 1 July 2019, <www.ipso.co.uk/editors-code-of-practice/> accessed 10th October 2019.
[245] Is the independent regulator for newspapers and magazines in the UK. It was established in response to the Leveson Inquiry (n 28) which is discussed below.
[246] Clause 2(i) <www.ipso.co.uk/editors-code-of-practice/#Privacy> accessed 10 October 2019.
[247] Ibid (ii).
[248] Ibid (ii).

declared 'unacceptable to photograph individuals, without their consent, in public or private places where there is a reasonable expectation of privacy.[249] Clause 2 is subject to the exception of a public interest being demonstrated, which is defined in a non-exhaustive list and the express declaration that: 'There is a public interest in freedom of expression itself.'[250]

Prohibitory injunctions are capable of being perpetual but are incapable of being enforced post-death, therefore should Soldier X satisfy the court that an injunction should be granted to prohibit the publication of information relating to his sexuality and/or affair, an injunction could be granted which would stay in place until his death (unless any third party made an application to amend or discharge before that time).

2.4 Context in which Privacy Law Functions Today

As was highlighted in the chapter 1, the context in which privacy law functions today is relevant to the arguments put forward herein, and the solutions it offers for the protection of post-mortem privacy. The digital age has created a very real lacuna in our privacy law not least of all, for the purposes of this thesis, the possible speed and breadth of the dissemination of real world information not necessarily created and stored digitally, as well as the fact that '…removing something from the Internet is about as easy as removing urine from a swimming pool…'[251] The added complication for the protection of privacy in this context is found in the fact that the safeguards provided by media ethics and regulation of main-stream media outlets are not present with private individuals that share information and images online which are in breach a person's privacy.

Whilst this chapter has placed emphasis upon the misuse of private information aspect of privacy, there is another dimension of 'physical privacy' which was brought to the fore in quite a spectacular way in 2012 during the Leveson Inquiry. Its relevance to this thesis is

[249] Ibid (iii).

[250] <www.ipso.co.uk/editors-code-of-practice/#ThePublicInterest> accessed 10 October 2019. There is also IMPRESS which is another voluntary membership media regulator which has a standards code dealing with privacy and guidance thereto <www.impress.press/standards/> accessed 10 October 2019.

[251] Alex Kozinski, 'The Dead Past' (2011-2012) 64 Stan L Rev Online 117, 124 <https://heinonline-org.uea.idm.oclc.org/HOL/Page?handle=hein.journals/slro64&id=119&collection=journals&index=journals/slro > accessed 19 March 2019.

twofold: first, some of the evidence before the Inquiry related to the invasion of privacy of the families of people who had died (as well as the dead themselves in some respects). This will be addressed in chapter 6 which considers the phenomena of 'post-mortem relational privacy' and the jurisprudence that focuses on the privacy rights of the deceased's immediate relatives. Lord Leveson made several observations in relation to this which will be considered within that chapter. The second area of relevance of the Inquiry to this thesis, is contained within the evidence received, and observations made by Lord Leveson, as they show that there is a need for reconsideration of privacy law. This thesis argues that this can and should include privacy for the dead.

Ultimately, Lord Leveson found that there existed 'a cultural strand …within the press betraying an unethical cultural indifference to the consequences of exposing private lives, and a failure to treat individuals with appropriate dignity and respect.'[252] The Inquiry was set up as a response to the public outcry over the News of World hacking into the mobile phone of the murdered teenager Milly Dowler. Over several months Lord Leveson heard evidence from many witnesses whose privacy had been invaded, whether by phone or email hacking, blagging, door stepping, surveillance or harassment. Some of the evidence, from celebrities and ordinary people, was shocking and the impact upon them harrowing.[253] The media in the form of journalists, press photographers and editors also gave evidence. The Inquiry was not concerned with legal rights as such and did not look at how privacy law itself was working, so did not hear from judges and lawyers in this respect.[254] However, not only did Lord Leveson make numerous references to 'dignity and respect' throughout the report when dealing with privacy and invasions thereof, he also included a section entitled: 'Lack of Respect for Privacy and Dignity' in the chapter dealing with: 'Criticisms of the culture, practices and ethics of the press.'[255] As can be seen from the discussion above, 'dignity and respect' are part of the ethical

[252] Leveson (n 28) Chapter 6 [F] 592 [2.1].
[253] See for example the Case Studies in chapter 5, ibid. <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/270941/0780_ii.pdf> accessed 6 March 2018.
[254] Ibid, Leveson did indicate his agreement with the Joint Committee on Privacy and Injunctions <https://publications.parliament.uk/pa/jt201012/jtselect/jtprivinj/273/273.pdf> [37] accessed 17 July 2018, that legislative intervention in the law of privacy was not necessary as it would likely generate further litigation. He praised the way in which the Judiciary had developed the law of privacy within the common law as it allowed flexibility as well as an enunciation of the relevant factors to be considered when balancing the competing issues. Leveson (n 28) Part J, Chapter 4 [4.2] 1508.
[255] Leveson (n 28) Part F, Chapter 6, 593.

foundations of the law of privacy, as was confirmed by Lord Hoffman.[256] Of course, Article 8 specifically refers to 'respect.' So, although Leveson did not consider the law of privacy as such, he was considering both privacy and freedom of expression, which are fundamental human rights, which reflect 'underlying moral and political arguments'.[257] For example: dignity and autonomy are dependent on respect for privacy, and free speech is required to allow individuals to participate in liberal democracy. It is in this context that Barendt suggests a sharp distinction cannot be drawn between 'ethical and legal questions' as in the face of strong ethical arguments for legal protection of privacy 'it would be odd if the law failed to protect it or did so inadequately.'[258] There can be no doubt that there were strong ethical arguments that could be made based upon the atrocious breaches of privacy that were highlighted in the evidence before the Inquiry, yet little has actually come of it.[259] In fact within an hour of the publication of the report, the then Prime Minister, David Cameron, unequivocally rejected Leveson's main proposals for new legislation.[260]

While the Leveson Inquiry might not help us understand with any greater clarity or precision the doctrinal scope of privacy law for those who have died, it illuminates with considerable force and authority the impact that media intrusion has had on its victims, as will be highlighted in chapter 6.

2.5 Conclusions

This chapter has shown that the scope of Article 8 has grown exponentially since its inception, with van der Sloot seeing 'no logical end to the expansion' of its domain particularly given the 'new questions and challenges' that arise in modern society.[261] The ECtHR's dynamic teleological approach to interpretation is an important component of this thesis, as it allows the court to better

[256] Lord Hoffman in *Campbell* (n 147) [50], said that human rights law has identified '… private information as something worth protecting as an aspect of human autonomy and dignity.'
[257] Eric Barendt, 'English Privacy Law in the Light of the Leveson Report' in N Witzleb, D Lindsay, M Paterson and S Rodrick (eds), *Emerging Challenges in Privacy Law: Comparative Perspectives*, (CUP 2014) 180, 181.
[258] ibid.
[259] This is despite public outrage and condemnation of the breaches of privacy and Leveson's numerous recommendations.
[260] Leveson (n 28) all proposals can be found in the Executive Summary document at: <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/229039/0779.pdf> accessed 6 June 2016. The self-regulator, the Press Complaints Commission was abolished, as recommended by Leveson, and there are now two regulators IPSO (n 243) and IMPRESS (n 249).
[261] Van der Sloot (n 14) 44.

deal with the key notions surrounding privacy violations arising from the new technological era and to adapt to 'evolving social norms'.[262] Thus, whilst it is clear that Article 8 does not presently apply to post-mortem privacy there is certainly a pathway, along the teleological interpretation approach, for it being so. This would of course involve utilisation of the theoretical rationales and justifications for privacy, considered in the earlier part of this chapter, which established the values and functions of privacy for the living individual and society as a whole. Many of these assists in forming the foundations of the post-mortem privacy right contended for within this thesis and parts of the rationales and justifications discussion in this chapter are relevant to the provisions to be considered within the next. For example, autonomy and dignity. Chapter 3 examines the current legislative provisions that can be said to 'protect the dead' and identifies the roots and causes of these so as to gain an insight into society's understanding of death and what it values for the living. These, coupled with the discussion in this chapter, starts the process of underpinning a solid foundational framework for the post-mortem right to privacy – the aim of this thesis.

[262] Nicol (n 5) [2.04] these are said by Udo Fink to be 'informed by technical innovations and data protection issues…', 'Protection of privacy in the EU, individual rights and legal instruments' in Witzleb (n 185) 91.

CHAPTER 3

Existing Legal Protection for the Dead

3.1 Introduction

This chapter examines the current legislative provisions that can be said to 'protect the dead,' whether it be in the distribution of their estate, the manner of their burial, their donation of organs or the confidentiality of their medical records.[1] Some scholars assert that such legislative provisions are examples of 'posthumous rights' that are attributable to the dead as legal rights holders.[2] An examination of these provisions, however, shows that they are not, in a strict legal sense, rights of the 'dead' but rights of the 'living' to affect events beyond their death. The term 'strict legal sense' is used here as the language of 'rights' is not confined to a legal context and indeed there are many different types of 'rights': human, political, social, economic, animal, natural and moral rights. The plethora of usages of the term 'right' can cause confusion and uncertainty as to what exactly it is, what benefit can be derived from it, in what context, and whether it imposes a duty on another person. The legal context is no exception – it has been beset by a lack of clarity and confusion, something which the American jurist, Wesley Hohfeld, at the beginning of the twentieth century, sought to remedy. Concerned that the seeming confusion and blending of non-legal and legal conceptions arising from 'the ambiguity and looseness of our legal terminology,' was hindering clear understanding he sought to disambiguate the legal concept of a right and thus strive for clarity and '…the true solution of legal problems…'[3] Hohfeld was concerned that the legal usage of the term 'rights' was not always being used in the 'strictest sense' of claim-rights, but was often used in a 'very broad and indiscriminate' way to '…cover what may be a privilege, a power, or an immunity…'[4] In his attempt to overcome these problems and to 'limit' the use of the term

[1] Mistreatment of the dead through improper or indecent interference with corpses attracts a range of criminal law offences which will not be considered, other than in minor tangential reference. This thesis is constructing a potential civil law remedy, the rationales and justifications for which are not to be found in the criminal law provisions. Although they are of '…an impressive number…in England and Wales' they lack any '…coherent approach to the nature of the wrongs' and as such 'lack a clear conceptual foundation.' Jonathan Herring, 'Crimes Against the Dead' in Belinda Brooks-Gordon and others (eds), *Death Rites and Rights* (Hart Publishing 2007) 219.

[2] Kirsten Rabe Smolensky, 'Rights of the Dead' (2009) 37 (3) Hofstra Law Review 763.

[3] Wesley Hohfeld, 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1913) 23 (1) The Yale Law Journal 16, 28.

[4] ibid 30.

'right' to a 'definite and appropriate meaning'[5] he devised his 'scheme of jural relations,'[6] an analytical scheme which splits rights into four different categories known as Hohfeldian incidents: claims,[7] liberties or privileges,[8] powers[9] and immunities.[10] Of relevance in this thesis is that rights and powers are respectively correlative to duties and liabilities. In summary, Hohfeld uses the synonym 'claim' for the term 'right'[11] and distinguishes between 'claim-rights,' being rights to have things done for or to one, and thus imposing a correlative duty on another person, and liberties or privileges, that are rights to do things, with no correlative duty to be respected by others. Whilst there has been scholarly debate around the details and usefulness of the Hohfeldian framework, it is 'now widely accepted' as an 'effective way by which the composition of all legal rights can be explained.'[12] The framework is important in ascertaining the true and precise meaning of any right asserted and thus is necessary when looking at the construction of the legal right to post-mortem privacy and in ascertaining what it purports to do. Utilising the Hohfeldian logic goes some way to ensuring that vagueness and the absence of clarity do not impede the right's normative value. For this reason, the Hohfeldian framework of jural and deontic logic will be used in this chapter when exploring the existing legal provisions relating to the dead and also in subsequent chapters when considering the conceptualisation of the right to post-mortem privacy.

This chapter identifies the historical evolution of the rationales and justifications underpinning four areas of law pertaining to the dead: testamentary freedom, organ donation and bodily integrity, burial and medical confidentiality. The motivation for this approach is that summed up by Ruth Richardson: 'Historians unpack the present by looking behind it, to try and discern

[5] ibid 31.
[6] ibid 30.
[7] '…one's affirmative claim against another', ibid 59.
[8] '… one's freedom from the right or claim of another', ibid 59. Hohfeld found that the '*dominant* technical meaning' of the term 'privilege,' found in a wide survey of judicial precedent, is the 'negation of *legal duty*', ibid 39, and thus this is the 'most appropriate and satisfactory' term to use in this respect. Ibid 38.
[9] '…one's affirmative 'control' over a given legal relation as against another,' ibid 59. The scheme of jural relations shows that a legal power is the opposite of a legal disability and correlative of a legal liability. Ibid 44. Hohfeld uses the synonym (legal) 'ability' being the opposite of 'inability' or 'disability.' Once again, his concern was that the use of the term 'right' being used when the 'legal quantity involved' was really a 'power' was resulting in 'confusion of thought as well as ambiguity of expression' ibid 45. This issue will be looked at in more detail when dealing with the law of succession below and how rights language is used when in reality it is a power that is being given/invoked.
[10] '…one's freedom from the legal power or 'control' of another as regards some legal relation', ibid 59. Immunity is a correlative of disability ('no power') and the opposite or negation, of liability.
[11] ibid 32.
[12] Henry Pearce, 'Personality, Property and Other Provocations: Exploring the Conceptual Muddle of Data Protection Rights under EU Law' (2018) 4 EUR. Data Prot. L. Rev. 190, 191.

roots and causes.'[13] By identifying the roots and causes of the current provisions relating to the dead, insight will be gained into society's understanding of death and what it values for the living. This understanding will then assist in devising a solid foundational framework for a right of post-humous privacy – the aim of this thesis. Along the way the concept of a legal right and the characteristics required of legal rights holders will be examined, culminating in this chapter's conclusion that, at a conceptual level, the dead can be potential legal rights holders, but they are not in reality, as is evidenced in the analysis of the current legislative provisions. These provisions also clearly demonstrate that the legislature and judiciary are prepared to recognise and enforce interests and rights pertaining to the dead - there is certainly no absolute bar to doing so. This discovery is a positive step forward and a foundational limb for a post-mortem right for privacy which will be developed in chapter 5.

This chapter does not look at the normative jurisprudence or seek to answer the question 'What rights *should* the dead or the living have', or to look specifically at the right of post-mortem privacy. That is dealt with in chapters 4 and 5. The purpose of this chapter is to provide the groundwork for the discussion of post-mortem privacy as a right and its ascription, by considering what the current law provides for the dead and the underlying rationales for these provisions (or in some circumstances absence of provision).

The discussion in this chapter builds upon the preceding one, which dealt with the existing legal provisions relating to privacy in England and Wales, and which concluded that the right to privacy does not extend beyond death. Parts of the rationales and justifications discussion in that chapter are relevant to the provisions to be considered within this one. For example, the discussion of autonomy in chapter 2 is developed by looking at it in relation to the 'prearranging of events that will only occur post-mortem'. Cantor calls this interest 'prospective autonomy'.[14] This prospective autonomy interest is clearly seen in the pre-mortem wishes which are expressed in a will as to the disposition of the deceased's property or pre-mortem wishes as to the donation of their organs or disposal of their body. The exercise of this prospective autonomy, evidenced in pre-mortem wishes/instructions, is done in the expectation or hope that

[13] Ruth Richardson, 'Human Dissection and Organ Donation: A Historical and Social Background' (2006) 11 (2) Mortality, 151.
[14] Norman Cantor, *After we Die: The Life and Times of the Human Cadaver* (Georgetown University Press 2010) 29.

they will be implemented. It is argued here that individuals have an interest in what happens to them when they are dead, not necessarily because interests survive their death, but rather the benefit to them is knowing, while they are alive, that their wishes will be respected.

Dignity and respect were also discussed in the previous chapter and are important aspects of the laws that protect the dead. They are reflected in society's 'intuition' that the dead may no longer be here, but they are deserving of the living's respect and should be treated with dignity. This is at the core of what is termed herein as the 'death culture'. It was Ruth Richardson, in her in depth and plentiful research of the dead and burial that initially used the phrase 'popular death culture'[15] to describe that which she found in the traditional attitude towards death and the corpse. There were recurring death customs whereby society treated the dead body with care and respect even though it was no longer an 'actual person'. Ritual reverence continued to be given for the person that the cadaver represented. Cantor sees this as attributing a 'quasi-human status, a sort of quasi-personhood, to the cadavers.'[16] There is an 'intimate association' which 'accounts for the common expectation of dignified and respectful treatment' and that '…dignity and respect that a cadaver's quasi-personhood entails are suffused with human values…' albeit not at the same 'level of dignity accorded to the living.'[17] The death culture[18] is highlighted in the discussion of all four areas of law below and forms a prominent explanation and justification for why post-mortem privacy is important. It is thus developed in more detail in chapter 5.

The thematic example, outlined in chapter 1 and considered in chapter 2, will be developed at the beginning of each section so as to provide an illustration in the section's conclusion as to how the current law would apply to Soldier's X's situation.

[15] For a full exposition of this term see Ruth Richardson, chapter 1 'The Corpse and Popular Culture' in *Death, Dissection and the Destitute* (Penguin Books 1988) 3.
[16] Cantor (n 14) 4.
[17] ibid.
[18] This thesis uses the term death culture when describing not just the rituals and reverence found in relation to the dead body itself, but all those customs and beliefs/intuitions that continue to see the dead person as they were ante-mortem.

3.2 Who has the Right – the Living or the Dead?

'…. the dead have no rights. They are nothing; and nothing cannot own something'[19]

This thesis will not enter the philosophical debate about the ontological status of the dead – it adopts the 'dead-are-gone assumption', and thus proceeds on the basis that the dead are no longer in existence.[20] This is not to deny that their physical body may remain and so too their memory in the surviving, but they themselves, as a legal entity, do not exist.

The adoption of this 'dead are gone assumption' would, on the face of it, obviate the need for a discussion on whether the dead can have legal rights as defined: they cannot as they do not exist. However, this simplistic view does not do justice to the disputants on either side of the debate as to whether the dead can, do, or should have legal rights. In addition, when it comes to the conclusion of this thesis, a more nuanced approach is needed - as in its assertion that the dead cannot, in reality, be legal rights-holders it does not necessarily mean that the dead cannot be given legal protection, for example: safeguards against harm or mistreatment. This chapter shows how the existing laws do that, as opposed to ascribing legal rights to the dead themselves. This is contrary to some of the current post-mortem privacy scholarship, which appears, or seeks, to ascribe the suggested right to the dead. Smolensky, for example, asks '…why the law gives decedents certain legal rights but not others.'[21] She highlights '…testamentary distributions, burial requests and organ donation designation…,' as examples of legal institutions protecting the 'rights of the dead' and doing so '…even if they contradict the preferences of the living.'[22] There is a vast and complex debate, which has raged for decades, as to whether or not the dead can have interests that ground legal rights and thus are capable of being legal rights holders, some of which will be discussed in the next chapter when looking at the claims made by some post-mortem scholars. However, this thesis does not make any new arguments, or indeed add to this debate. It adopts an interest-based approach and proceeds on the basis, for the reasons outlined below, that interests are capable of surviving death and the

[19] Thomas Jefferson to James Madison, 6 September 1789 in 'The Papers of Thomas Jefferson' 27 March 1789 to 30 November 1789 (Princeton University Press 1958) <https://jeffersonpapers.princeton.edu/selected-documents/thomas-jefferson-james-madison> accessed 6th February 2019.
[20] Tim Mulgan, 'The Place of the Dead in Liberal Political Philosophy' (1999) 7 (1) The Journal of Political Philosophy 52, 54.
[21] Smolensky (n 2), 763.
[22] ibid.

dead are conceptually capable of being rights holders, but they are in fact not. This is so because, *inter alia*, they fall foul of the Hohfeldian jural relations framework adopted in this thesis.

It is against this background that the 'will' and 'interest' theories of rights, as well as Dworkin's concepts of critical and experiential interests, will be considered. This exploration serves two main purposes at this stage: first, it lays the groundwork for the analysis of the existing legislation under discussion in this chapter. Secondly, it acts as a precursor to the more detailed philosophical arguments explored in chapters 4 and 5 when dealing with the proposed right of post-mortem privacy.

3.2.1 Will and Interest Theories

The 'will' and 'interest' theories are the two main theories of rights in legal philosophy. Both accept that dead people[23] '…are legally shielded against sundry forms of harmful treatment.'[24] They benefit from legal protection. However, they disagree as to whether these protections can be 'classified as legal rights held by…' the dead.[25] The will theorists say they cannot. At a conceptual level the dead are incapable of holding legal rights themselves as they are unable to make reasoned decisions. According to the will theorists the essence of a right, '…consists in the opportunities for the right-holder to make normatively significant choices relating to the behaviour of someone else.'[26] As the dead are unable to make such choices, they are unable to be legal rights-holders. This thesis does not adopt the will theory of rights preferring the interest theory which sees dead people as 'potential' right-holders at a conceptual level.

According to the interest theory, the essence of a right, '…consists in the normative protection of some aspect(s) of the right holder's well-being.'[27] So, the focus is on well-being rather than an exercise of choice. Within the interest theorists there is agreement that an entity, in this case

[23] and infants, animals, mentally incapacitated, comatose and senile people.
[24] Matthew Kramer, 'Do Animals and Dead People have Legal Rights?' (2001) 14 (1) Canadian Journal of Law and Jurisprudence 29, 31.
[25] ibid.
[26] ibid 29.
[27] ibid.

a dead person, has a legal right when others owe a duty to protect one of its interests,'[28] and thus '…legal rules conferring rights promote the rights-holder's well being represented by her legal interest.'[29] However, there is no agreement as to how interests can translate into legal rights. The question Kramer asks is does the fact that the interest theorists' '…doctrine *conceptually permits* ascriptions of legal rights…' to the dead also '…*require such ascriptions*, insofar as legal norms impose duties that are essentially for the benefit of those creatures.'[30] So, does the answer to the conceptual question settle the matter as it does for the will theorists? The answer, according to Kramer, is no - the 'conceptual analysis' requires supplementation with 'moral argumentation' before an 'endorsement of the notion of …dead people's rights'[31] can be made. He identifies 'an additional factor (that) must be implicitly or explicitly taken into account: the moral status of the being to whom the rights-attribution is made.'[32] He therefore takes 'mentally competent human adults' who are 'un-controversially…potential right-holders,'[33] as the 'unproblematic point of reference' to then look at the 'similarities and differences' between them and the dead, simultaneously inquiring '…about the moral significance of any such similarities and differences.'[34] Thus Kramer asks whether the interests of the dead are '…sufficiently close (in morally pregnant terms) to the interests of the mentally competent person.'[35] He argues that in order to classify the dead as potential right-holders it is necessary to refer to their past and '…subsume the aftermath of each dead person's life within the overall course of his or her existence.'[36] The memories and continuing influence of the dead on the living, the possessions she accumulated or bequeathed, Kramer calls the 'sundry constituents of the aftermath' which 'highlight the ways in which the dead person still exists.'[37] The dead person is 'a multi-faceted presence in the lives of his contemporaries and successors' and for a certain period after his death he can be 'morally assimilated…to the person he was

[28] 'Interest' refers to those moral claims of an entity, the violation of which is a moral wrong, all things being equal.' Hilary Young, 'The Right to Posthumous Bodily Integrity and Implications of Whose Right It Is' (2013) 14 (2) Marquette Elder's Advisor 197, 208.
[29] Daniel Sperling, *Posthumous Interests, Legal and Ethical Perspectives* (CUP 2008) 71. He does point out that the 'weight' of the right does not necessarily correspond to the 'weight 'of the interest, as there may be others involved who also have interests. See Joseph Raz, 'Rights and Individual Well-being' in *Ethics in the Public Domain* (Clarendon 1994) 44, especially 45-51, cited in Sperling ibid 71 (note 78).
[30] Kramer (n 24) 31.
[31] ibid 32.
[32] ibid 33.
[33] For the interest theorists 'mentally competent adults are capable of being rights-holders' whereas for the will theory they are 'uniquely capable' of being rights-holders, ibid 32.
[34] ibid 33.
[35] ibid.
[36] ibid 47.
[37] ibid.

during his life-time.'[38] This is an important consideration for this thesis as the death culture and intuitive beliefs will illustrate. We talk of, and remember, the deceased as she was in life not as she is now – a corpse or ashes. The continuance of her privacy in death is a continuance of the person she was during her lifetime.

For Kramer, even if one is to say that very little legal protection should be given to the interests of the dead he argues that '…one ought to accept that any legal obligations which do non-contingently confer protection on those interests have thereby conferred legal rights on the dead.'[39] Kramer is at pains to emphasise that he deals only with whether or not the dead can be 'potential' right-holders not whether their interests should *in fact* be protected or to what extent. They can be potential right-holders but with hardly any legal protection.[40] In summary, Kramer argues that if the dead person holds rights in life '…then he continues to be a potential rights-holder so long as posthumous prominence renders him assimilable to the person he was whilst alive.'[41] For Kramer virtually every 'proponent of the interest theory' would subscribe, at a conceptual level, to the attribution of legal rights to the dead and as a moral matter such ascription would be seen as 'very often appropriate.'[42] In addition, as an empirical matter, the dead do have interests that are legally protected by the '…imposition of duties on present day human beings.'[43] Thus, according to Kramer, it is apt for those to be characterised as legal rights held by the dead.[44] Whether any should be so protected is a moral/political question which Kramer does not seek to address. However, Smolensky does, and points to the use of 'rights language' that often comes from courts and legislators '…when creating legal rules that benefit decedents' interests…'[45] Whilst she does accept that wrong language can arise in court judgments, she maintains that the 'consistent use of rights language' appears to stem from 'a series of social and cultural norms,'[46] which 'guide judges and legislatures to honour and respect the dead, particularly where the concomitant harms to the living are minimal.'[47] There is an 'innate desire among the living to honour the wishes of the dead even when those wishes

[38] ibid.
[39] ibid.
[40] ibid 48.
[41] ibid.
[42] ibid 54.
[43] ibid.
[44] Although this would not be the case in accordance with the Hohfeldian analysis.
[45] Smolensky (n 2) 2.
[46] Such as 'dignity and respect for the decedent's wishes' ibid 764.
[47] ibid 763-764.

negatively impact their own interests.'[48] This will be clearly shown in the discussion of the 'death culture,' later in this chapter, and indeed is an important argument for the post-mortem privacy right outlined in chapter 5. However, whilst this innate desire of the living to respect the dead can translate into the foundations of legislation 'protecting' them, it does not, in itself, translate into legal rights for the dead themselves.

Feinberg, another interest theorist, takes a different approach to Kramer and sees a legal rights holder as someone who must have an 'interest,' defined as having a 'stake' in something, which requires 'rudimentary cognitive equipment.'[49] A legal right is a claim against someone and only those interests (stakes) are claims. Unlike Kramer he considers the moral status in determining who *is* the interest holder, whereas Kramer's broader approach sees an entity that can benefit as being able to have interests and considers the moral status only *after* the status of the interest holder is established. Despite these two different approaches the conclusions reached using either are not that different because although all of Feinberg's interest holders are capable of being rights holders only a subset of Kramer's is so capable, namely those whose moral status is considered comparable to the competent adult human. Neither theory requires the ability to enforce the rights oneself and the nature of what is protected does not dictate who the legal rights holder is. The law can protect X without X being a legal right holder.[50]

This thesis proceeds therefore on the premise that although having interests is the basis for having legal rights, they alone may not be sufficient to amount to a legal right. The dead may have interests, but they do not amount to legal rights as they fall foul of the strict Hohfeldian analysis of claim rights with their correlative duties.

Thus, it is argued that the dead can have interests, but these do not translate into legal rights for the dead themselves meaning that the dead's post-mortem privacy interest would not amount to a post-mortem privacy right, as is sought within this thesis. However, these interests

[48] ibid 763.
[49] Young (n 28) 209.
[50] ibid 210. Kramer gives the example of a law that forbids walking on the grass. The lawn has interests but not legal rights. The legal rights holder is the landowner, or the public, for whose benefit the lawn is maintained. The grass will be protected by the law, but it is not a legal right holder. Kramer (n 24) 36.

are capable of supporting a legal right for the living person by virtue of them being what Dworkin calls 'critical interests.'[51] Specifically, in the context of this thesis, a living person has a 'continuing critical interest' in her privacy being maintained (for all the theoretical reasons outlined in chapter 2) which is capable of being harmed by a post-mortem invasion of her privacy. It is to this discussion which we now turn.

3.2.2 Critical Interests

In chapter 5 it is argued that privacy is a critical interest in the same way as Young argues that the corpse is to us in the section of organ donation below. It will be illustrated how the living have a foundational 'critical' interest in privacy protection after death thereby forming a foundational value for the protection of post-mortem privacy. Dworkin's theory will first be outlined here, shown how it applies in practise to bodily integrity below, and then developed and applied to this thesis in chapter 5.

Dworkin talks of 'experiential' and 'critical' interests and that the ability to shape our lives according to these is 'central to the value of autonomy.'[52] The former are defined as interests that deal with 'experience and the state of mind' whilst the latter reflect '…critical judgments about what makes life good.' Experiential interests are the things we do because 'we like the experience of doing them' for example swimming, listening to music or reading. The 'value of these experiences, judged one by one, depends precisely on the fact that we do find them pleasurable or exciting as an experience.'[53] Critical interests however are those that do make 'life genuinely better to satisfy' and 'represent critical judgments rather than experiential preferences.'[54] They are in effect '…opinions about what is good for me in that critical sense.' Dworkin uses the examples of 'close friendships' or 'close relationships with one's children' which are something most people believe are a good thing and people *should* want and are important to them. These relationships are not important purely for the experience of having them.[55] Dworkin also gives examples of people making 'momentous decisions' such as

[51] Ronald Dworkin, *Life's Dominion: An Argument about Abortion and Euthanasia* (Harper Collins Publishers 1993) 201.
[52] ibid 224.
[53] ibid 201.
[54] ibid 202.
[55] Ibid.

pursuing a lucrative career or staying at home to look after their children, and says that these are not made by trying to predict how much pleasure the choice will bring. It is not just a matter of choice but a matter of judgement. Some people have a 'steady, self-defining commitment to a vision of character or achievement that their life as a whole, seen as an integral narrative, illustrates and expresses.'[56]

The relevance of this distinction between critical and experiential rights is that it assists in our understanding of 'many of our convictions about how people should be treated.'[57] This becomes particularly relevant for this thesis when we look at the 'death culture' below and its importance to the rationales and justifications for a right to post-mortem privacy. Dworkin also sees this distinction as important in understanding tragedy. He highlights the tragic element of someone nearing the end of their life and regretting wasted opportunities and 'nothing in which he can take any pride at all.'[58] This regret, Dworkin argues, cannot be explained if people only have experiential interests. It is also possible, argues Dworkin, that a person can have regret as the result of a critical judgment made at a later time, 'in retrospect, from the perspective of his new convictions, not a new discovery about the actual felt quality of the experience he had.'[59]

Yet when it comes to post-humous events 'death and experience' are mutually exclusive, so Dworkin's theory leads to the assumption that only critical interests can survive death, if indeed any interest is capable of surviving death.[60] Dworkin can see how people can care about their experiential interest – they do that which they like, and try and avoid that which they do not like to experience, such as pain for example. But he asks, 'why people should also care about their critical interests or even have the concept of such interest.'[61] Why should we care about not wasting our lives, or not doing anything but have as good a time as possible? Why do we make sacrifices in life for the good of others? Dworkin is clear that he is not seeking to provide a theory of critical interests from a biological or evolutionary point of view but from an *intellectual* one 'so that we may better understand these ideas from the inside, understand

[56] ibid 205.
[57] ibid 202. Dworkin uses the example of 'mind changing drugs or other forms of brainwashing that produces long-lasting pleasure and contentment' not being considered to be in a person's 'interests' meaning they are against a person's *critical* interests not experiential.
[58] ibid 202.
[59] ibid 203.
[60] Young (n 28) 212.
[61] Dworkin (n 51) 203.

introspectively how they connect with other larger beliefs we have about life and death and why human life has intrinsic value.'[62] Critical interests therefore can help this thesis better understand the death culture.

Dworkin highlights that 'legally', at least, 'only experiential interests' appear to matter and makes reference to the case of Anthony Bland, who was in a permanent vegetative state, where Lord Mustil, when adjudicating upon whether it was in Bland's best interests to have his life support withdrawn said: 'The distressing truth which must not be shirked is that [discontinuing life support] is not in the best interest of Anthony Bland, for he has no best interests of kind.'[63] If this is the case and only experiential interests count then Dworkin asks how can we make sense of people agonising, for example, when contemplating our wills or for relatives and friends when we are gone? Dworkin uses his analysis to discuss and decipher how it matters 'to the critical success of our whole life how we die.'[64] This thesis and the following section, in particular, utilises this critical interest analysis to look at the 'death culture' and ask how it matters to the critical success of our whole life how we are treated upon death, that is our estate disposition, or bodily integrity, our disposal/burial and our medical records. Ultimately it will assist in explaining how maintaining our privacy in life and death matters to the 'critical success of our whole life.' The claim being asserted in this thesis is that what happens to us after death, that is what others might know about us, has the capacity to affect our choices while we are alive. If that is so then there is a continuing critical interest that can be harmed by post-mortem events, such as revelation or publication.

[62] ibid 204.
[63] *Airedale N.H.S. Trust –v- Bland* [1993] AC 789 [45]-[46] cited in Dworkin ibid (n 51) 208. This case is considered in further detail in chapter 5 when dealing with 'intuition'.
[64] Cantor (n 14) 209.

3.3 Testamentary Freedom

Soldier X

Soldier X lodged his properly executed will with his solicitor, six months before he died. Within that will he bequeathed all his estate to his lover. He did not provide for either his wife or children.

Nature gives man no power over his earthly goods beyond the term of his life; what power he possesses to prolong his will beyond his life – the right of a dead man to dispose of property – is a pure creation of the law, and the State has the right to prescribe the conditions and limitations under which that power shall be exercised.[65]

The concept of testamentary freedom – an individual can dispose of her property upon death as she sees fit - would, on the face of it, allow Soldier X to do as he pleases with his estate. People may think it wrong to effectively disinherit family members, but as we have seen autonomy is a fundamental value and '…the foundation for many rights to control one's life and one's possessions, including the law of wills…Freedom of testation is a fundamental value…because it accords with the strong human desire to exert control over one's own property.'[66]

As will be seen in the following chapter, the current scholarship relies on testamentary freedom as an analogous concept to post-mortem privacy, arguing that it illustrates a form of transitionary autonomy, in that the autonomy in life to make decisions about the disposition of one's property transcends death.[67] This concept is then used to underpin a post-mortem right to privacy. This is not something with which this thesis will concur, and thus this section looks at the historical development of the current law of testamentary disposition to ascertain its

[65] Sir William Harcourt, on the occasion of his introducing the first bill for graduated death duties in Parliament in 1894, quoted in Richard Ely, Willford King and Samuel Orth, Vol 1, *Property and Contract in their Relations to the Distribution of Wealth* (Macmillan 1914) 416.
[66] Heather Conway, *The Law and the* Dead (Routledge 2016) 137.
[67] Edina Harbinja, 'Post-mortem Privacy 2.0: Theory, Law and Technology' (2017) 31 (1) International Review of Law, Computers & Technology 26, 27-32.

scope and any relevant justifications and rationales. This exploration will show that complete freedom of testation in English law is an anomaly and in fact was only enjoyed for a period of 47 years. Significantly, the living's autonomy to make decisions as to the distribution of their estate was not in any way a 'transitional' concept that bridged life with death. Historically, it did not even extend beyond the initial making of the will, which was irrevocable, and thus could even end before death itself.

It is said that: 'Few legal agencies are, in fact, the fruit of more complex historical agencies than that by which a man's written intentions control the posthumous disposition of his goods.'[68] As such, the confines of this thesis will allow not much more than a cursory consideration of the historical background to the law in this respect, yet one which is sufficient to lay the foundation of the critique in chapter 4.

3.3.1 Historical Background

Testamentary freedom was cited, by the Law Commission, as an 'integral part of the law of England and Wales,'[69] however according to Dainow 'It is not necessary to go beyond the authoritative assertions of well recognised legal historians in order to demonstrate that the so-called traditional freedom of testation is not an immemorial practice.'[70] Sir Henry Maine credits the Romans for inventing the will, but he stresses that care must be taken '…not to attribute to it in its earliest shape the functions which have attended it in more recent times.'[71] The main function was not in distributing a dead person's goods, but a method by which to transfer '…the representation of the household to a new chief…'[72] Of note is that the testaments from which the modern will descends,[73] were not as they are now, secret, nor revocable and most importantly for the discussion in this chapter, they took effect immediately on their execution, even where the testator themselves survived the act of testation.'[74] It is thought that wills were

[68] Henry Sumner Maine *Ancient Law: Its Connection with the Early History of Society and Its Relation to Modern Ideas* (8th edn, Spottswoode and Co 1800) 196.
[69] Juliet Brook, 'Testamentary Freedom – Myth or Reality?' (2018) 1 Conveyancer and Property Lawyer 19, 19 citing the Law Commission, *Intestacy and Family Provision Claims on Death* (Law Com No 331, 2011) para 1.2.1.
[70] Joseph Dainow, 'Limitations on Testamentary Freedom in England' (1940) 25 (3) Cornell Law Quarterly 337, 339.
[71] Maine (n 68) 194.
[72] ibid.
[73] ibid 201.
[74] ibid 174.

primarily, at that time, made on the deathbed but it is believed that '…if the Testator did recover, he could only continue to govern his household by the sufferance of his Heir.'[75] Thus, historically 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. As such there was no concept of autonomy transcending death as is argued by Harbinja in relation to modern testamentary freedom. Maine highlighted the fact that in '…most ancient and classical legal systems…the emergence of testamentary succession either did not occur or was so structured as to constitute the right involved as one of inheritance rather than bequest.'[76]

The Roman definition of inheritance was 'a succession to the entire legal position of a deceased man.'[77] The universal successor was immediately clothed with 'the entire legal person…all the rights and duties of the dead man.'[78] This was the same whether by will or by intestacy.[79] Thus, the physical person had gone but 'his legal personality survived and descended unimpaired on his Heir – or Co-heirs, in whom his identity (so far as the law was concerned) was continued.'[80] In a nutshell, a man 'governed' the family, was 'lord of its possessions' and held them as 'trustee for his children and kindred.' Thus, upon death the 'rights and obligations' attached to the 'head of the house' would attach to 'his successor' as they were 'the rights and obligations of the family.'[81] In Roman testamentary jurisprudence, the family was in effect a corporation and never died.[82] The fact of death was eliminated from the 'devolution of rights and obligations,' the heir did not merely '*represent* the deceased…' they 'continued his civil life, his legal existence.'[83] There was a notion that a person's posthumous existence was in the heir and to this the will was 'inextricably linked.'[84] So wills can be understood as having had as their original objective the continuance of the deceased's legal existence by their heir, with no autonomy or choices being made by the deceased prior to their death.

[75] ibid.
[76] Hillel Steiner, *An Essay on Rights* (Blackwell Publishers 1994) 252 citing Maine (n 68) chapters VI, VII.
[77] ibid 181.
[78] ibid.
[79] ibid.
[80] ibid 182.
[81] ibid 184.
[82] ibid 187.
[83] ibid 186.
[84] ibid 189.

It was not until the Statute of Wills in 1540 that it was made possible to devise an estate in land by will[85] and the making of wills was then generally done in advance of mortal illness. Thus so-called 'deferred gifts' started to allow '…donors to participate strategically in the exchange mechanism which established or confirmed their status within a series of complex social networks while retaining the property which symbolized their status.'[86] The will therefore, began to encapsulate the donor's 'social identity' as they themselves perceived it to be.[87] Through their bequests they could be seen to '…articulate, manipulate, reinforce or protect relationships with individuals or institutions.'[88] The '…significance of the bequest of land in terms of status for donors and potential beneficiaries was considerable.'[89]

The principle of testamentary freedom, whereby a person can dispose of her property upon death as they see fit, evolved gradually over time.[90] Initially the only freedom of testation was over chattels and the 'tripartite rule' came into play if a man left a wife and children: one third was given to the spouse, one third to the children and the final third[91] could be freely distributed but even this was usually give to the church.[92] Historically, a major and recurring influence in the implementation and maintenance of wills, was the church and it was this institution that provided for the 'rapid assimilation' of wills at the earliest point in history.[93] It is apparent that religious foundations relied 'almost exclusively' on 'private bequests' resulting in 'the decrees of the earliest Provincial Councils' containing 'anathemas against those who deny the sanctity of wills.'[94]

It was not until 1891 that full testamentary freedom came into being, with the passing of the Mortmain and Charitable Uses Act. However it was short-lived, lasting only up and until the passing of The Inheritance (Family Provision) Act 1938.[95] This Act was the result of a decade

[85] Meaning to leave land and property by will to named beneficiaries.
[86] Linda Tollerton, *Wills and Will Making in Anglo-Saxon England (Woodbridge, Suffolk: York Medieval Press; Boydell Press: Rochester, N.Y., 2011),* 80
[87] ibid 281.
[88] ibid 139.
[89] ibid 141.
[90] Brook (n 69) 19.
[91] If the testator was survived by only a spouse or children, then the law provided for one half to go to the survivor/s with the remaining half to be freely distributed.
[92] Dainow (n 70) 341.
[93] Maine (n 68) 172 and 173.
[94] ibid 173.
[95] Currently, the Inheritance (Provision for Family and Dependants) Act 1975.

long parliamentary consideration of the extent to which a limitation should be placed upon testamentary freedom.[96] The Act restricted the right to disinherit dependents and gave the court a discretion to override the terms of the will so as to make reasonable provisions for surviving dependents. The rationale was explained by Michael Albery who commented:

> The protection of the rights of the family as an essential unit in society is a primary concern of most systems of law. Complete freedom of testation, as enjoyed under English law for a brief period of 47 years, is therefore by the standards of contemporary jurisprudence an anomaly.[97]

3.3.2 Analysis of Testamentary Freedom as a Law that Protects the Dead

Undoubtedly society has moral duties with regard to the implementation of the wishes expressed by the ante-mortem person as to the distribution of their estate. These can be seen to continue after death but is it, as some would suggest, a legal right that is ascribed to the dead? This thesis adopts the argument put forward by Steiner, based on the Hohfeld analysis, to answer in the negative. Steiner argues that a bequest is not capable of being an incident of just rights[98] because it is impossible to locate 'all its implied Hohfeldian jural positions in the holders of those rights.'[99] Rights and powers are correlative to duties and liabilities. The transfer of ownership involves an exchange of correlatives. Steiner uses the example of the living 'Red' transferring the object 'O' to the living 'Blue'. By doing so Red has transferred all her 'rights and powers she held against Blue with respect to O'. So, for example Red's right that 'Blue not interfere with her possession of O is replaced by her right that Red not interfere. Correlatively, Blue's duty not to interfere is transferred to Red.'[100] When one then considers transfer of ownership by bequest 'Red, as testator, incurs no restriction whatsoever on assigning ownership of O to Blue only posthumously.' The process of transfer of ownership (in modern day law) '*cannot begin until after Red's demise'* not least of all because Red is entitled to alter her will at any point up until her death. Steiner therefore argues that the 'transfer of ownership

[96] Dainow (n 70) 344-357: outlining the history of the 1938 Act.
[97] Cited in Brook (n 69) 22. The Law Commission published a wide-ranging consultation paper on *Family Property Law* [1971] EWLC C42: 'The principle of absolute freedom of testation is acceptable only if the view were taken that it is more important to be able to dispose of property than to meet natural and legal obligations to the family. We do not believe this view to have any degree of support.'
[98] Steiner (n 76) 251, looks at 'just' property rights in which there are four ways for a person to acquire titles to things, one of which is '(iii) by having the titles to those things voluntarily transferred to him by their owners.'
[99] ibid 254.
[100] ibid 253.

by bequest can be performed only by a living person'[101] and he goes on to seek identification of its jural status. To whom and by whom is the duty owed? Red, as testator, cannot incur a duty not to interfere with Blue's possession of O since Blue can acquire no right to O unless and until Red dies and transfer takes place. Could it therefore be a duty that is owed to the bequeathing Red by White, who has been appointed as executor, and who is authorised to perform the transfer? It is difficult to see how if White has a duty it can be understood as a correlative one, being a duty owed to another. A correlative duty exists where another person holds the 'power to waive or demand (enforce) compliance.' There is no-one who has this power in respect of White's duty. It is not Red because White's duty does not arise until Red is dead and thus Red is not capable of waiving or demanding anything. It is not Blue because White's duty would be superfluous if it were possible for Red posthumously to transfer these powers or indeed ownership directly to Blue. So, asks Steiner, is not what White has a power rather than duty? If so, it could not be acquired until after Red's death because before that she is under a duty not to interfere with O and thus has no power to transfer ownership of it. But it is not possible for Red posthumously to transfer this power of disposal to White or her role would be '…superfluous in as much as it would equally be possible for Red posthumously to transfer the property directly to Blue.' In addition, having the 'power' of disposal does not mean the disposition has to be made in favour of Blue. Even if we say 'White's power is conjoined with a duty to dispose in favour of Blue' we are again left asking how such a duty can be construed as correlative? Steiner asks, 'In whom does the power to demand compliance with vest?' The answer to these questions is in fact the 'State'. This is so because 'the rights, duties, and powers involved in testamentary succession are, as most texts in jurisprudence confirm, necessarily founded upon a fiction.'[102]

Legal fictions are discussed in detail in chapter 5 but are shown here, in the words of Oliver Wendell Holmes, functioning in modern day testamentary laws: 'The theory of succession to persons deceased…is easily shown to be founded upon a fictious identification between the deceased and his successor…'[103] This was seen in the historical background outlined above, whereby the 'Roman heir came to be treated as identified with his ancestor for the purposes of the law…'[104] He was considered one and the same person so: 'Rights to which B as B could

[101] ibid 254.
[102] ibid 256.
[103] Oliver Wendell Holmes, *The Common Law*, M.D. Howe (ed) (Macmillan 1968) 266, cited in Steiner (n 76) 256.
[104] ibid.

show no title, he could readily maintain under the fiction that he was the same person as A, whose title was not denied…'[105] In present day testamentary law, the executor 'represents the person of his testator' and 'derives his characteristics from the Roman heir.' Holmes sees the 'meaning of this feigned identity' being found in history but 'the aid which it furnished in overcoming a technical difficulty must be appreciated.'[106] So, if according to the legal fiction described by Holmes, Red and White are considered to be one and the same person it becomes even more impossible (if that is indeed possible) for White to owe Red a correlative duty. They are one of the same. Steiner concludes that if White does have a duty it must be 'correlative to a right held by the state which is the only possible author of the requisite fiction.'[107]

Finally, Salmond describes inheritance as:

> in some sort a legal and fictitious continuation of the personality of the dead man…it may be said that the legal personality of a man survives his natural personality …Although a dead man has not rights, a man while yet alive has the right, or speaking more exactly the power, to determine the disposition after he is dead of the property which he leaves behind him…[108]

In conclusion therefore, the analysis above undermines the scholarship that a perceived 'right' of testamentary freedom is ascribed to the dead and supported by autonomy transcending death. However, their argument could be, of course, maintained by perpetuating the legal fiction upon which it is based. The analysis therefore serves two, possibly mutually exclusive, purposes, first to undermine the argument but also to show how it can be perpetuated, for the discovery of the legal fiction shows that the law is willing, in certain circumstances, to devise and proceed upon the basis of such fictions, which in turn can be supportive of a post-mortem privacy right, as will be discussed in chapter 5.

3.3.3 Conclusion

It is clear that Soldier X's will did not make adequate provision for his wife and children and thus it is open for his dependents to challenge it. So, despite his expressly documented

[105] ibid.
[106] ibid.
[107] ibid 257.
[108] Glanville Williams, *Salmond on Jurisprudence* (11th edn, Sweet and Maxwell 1957) 482 – 4.

autonomous wish that his lover should receive his entire estate, this can be overridden by the law. This is in accordance with the Inheritance (Provision for Family and Dependants) Act 1975. Section 1 allows for application to be made for financial provision from the deceased's estate on the grounds that reasonable financial provision for the applicant has not been provided. Section 2 provides that reasonable financial provision means such as it would be 'reasonable in all the circumstances of the case' for the applicant[109] 'to receive, whether or not that provision is required for his or her maintenance.'[110]

This whistle stop tour of the history of wills and testamentary disposition demonstrates that firstly, there is no such thing as unrestricted testamentary freedom and although in most cases the ante-mortem wishes evidenced in a properly executed will shall be honoured, there are occasions where the law will override provisions. Secondly, it demonstrates that testamentary freedom is not, as is argued by some post-mortem scholars, given to the 'dead' to distribute their property, but is given to the living person to exercise prospective autonomy in prearranging the desired distribution of their estate that will only occur post-mortem. Thus, autonomy itself does not 'transcend' death. This argument will be developed in detail in the next chapter when discussing the current legal scholarship and the assertion that autonomy should transcend death so as to accommodate a post-mortem privacy right. Finally, the discussion of testamentary freedom demonstrates that autonomy in testamentary wishes, is like other rights, not absolute. There are competing interests here, for example, the state's interest in its citizens being provided for but not itself being financially responsible for the dependants -v- the living person not wanting to so provide upon death. In these circumstances, and in accordance with the rules, the state's interest prevails. Akin to the individuals wish to maintain privacy -v- the public interest in knowing.

[109] Which includes spouse, civil partner, former spouse not remarried, children including those that are not blood related and anyone being maintained by the deceased at the time of death (section 1).
[110] Section 2 save it omits 'whether or not that provision is required for his or her maintenance' in relation to all applicants other than spouse or civil partner, who receive that which is reasonable in all the circumstances for his or her maintenance.

3.4 Organ Donation[111]

Soldier X

Soldier X had recorded his consent, with the NHS Organ Donor Register, to the donation of all his tissues and organs upon his death. His wife was made aware of this decision and the medical professionals, in accordance with the Human Tissue Act, Code of Practice A, attempted to 'sensitively support' her 'to respect' her husband's consent. However, she refused and whilst no other person has a legal right to revoke the consent given, the decision to retrieve the organs lies with the person who will be undertaking it. The doctor, unwilling to inflict any more emotional distress on wife X, and in fear that ignoring her objections would cause adverse publicity or even legal action, declined to follow Soldier X's explicit instructions.

You could die with an organ card in every pocket, and another one pasted on your forehead, and still no-one would touch you if your [family] said no.[112]

The fact that Soldier X's autonomous decision, one which he expressed explicitly through the register set up for the specific purpose of recording such decisions,[113] is ignored is in contravention of the law which regulates the donation, removal, storage and use of 'relevant

[111] Whilst this section only refers to organ donation, the legal position is the same for tissue donation.
[112] Dr Roy Reeves envisaged this scenario in 'When is an Organ Donor not an Organ Donor?' Reeves and others (2004) 12 Southern Medical Journal 97.
[113] A secure database which records the organs and tissues those who have 'opted in' wish to donate. Those who do not wish to donate can also record their decision on the register < www.organdonation.nhs.uk/register-to-donate/> accessed 17 May 2019. It is important to note that the Organ Donation (Deemed Consent) Act 2019 (popularly known as Max and Kiera's law) will come into effect in the Spring of 2020 and will bring England in line with Wales (and Scotland) by changing to an 'opt out' system whereby all adults, who are not within one of the excluded groups, will be considered to have consented to be an organ donor when they die unless they register their decision otherwise <www.legislation.gov.uk/ukpga/2019/7/pdfs/ukpga_20190007_en.pdf > accessed 12th June 2019.

material' from the dead. The Human Tissue Act 2004[114] is underpinned by the 'fundamental guiding principle of consent,[115] and it is said that the legislative ethos is clear – respect for autonomy alongside utilitarian arguments for increasing the available supply of organs, ensures that the individual's donative intent is paramount.[116] Conway however, sees the current position as contributing '…little more than a statutorily sanctioned expression of preference,' as although the family have no legal right to veto the consent given by the deceased, the medical profession appears to 'afford them a de facto one by declining to retrieve organs in the face of familial objections.'[117] So, in practice Soldier X's wife's decision will supersede that of her late husband. Of note is the fact that if Soldier X had not wished his organs to be donated and thus, he had not given his consent, this decision could not be disregarded by anyone, his organs could not, in law, be taken without his consent.

By giving preference to his wife's choice, the ante-mortem wish of Soldier X becomes irrelevant and begs the question why bother giving the living the opportunity to express their wish, in the belief that it will be honoured, if it may well not be at the behest of the survivors? The answer is found in tracing the historical foundations of organ donation. This, and the subsequent tracing of burial laws, in the next section, are important to this thesis in demonstrating one of the foundational justifications for a right to post-mortem privacy: it is termed 'intuition' in chapter 5 and encapsulates the 'death culture' and the oft held belief/intuition that the dead may have some kind of sentience and thus can be harmed. They are thus to be treated with respect and dignity which accords with the notion of effecting assurances – that the living treat the dead as they wish to be treated themselves when they die.

[114] The high-profile organ retention scandals, in the 1990s, led to public outcry and a need for regulation of the removal, storage and use of 'relevant material' (defined in section 53 of the Act) from the dead. See J K Mason and G T Laurie, 'Consent or Property? Dealing with the Body and Its Parts in the Shadow of Bristol and Alder Hey' (2001) 64 Modern Law Review 710; D Price, 'The Human Tissue Act 2004 (2005) 68 Modern Law Review 798; Margaret Brazier, 'Retained Organs: Ethics and Humanity' (2002) 22 Legal Studies 550.

[115] Section 1 and Schedule 1 and the Human Tissue Authority, Code A (n 3) section 2. 'Guiding Principles and the fundamental guiding principle of consent', section 2.

[116] '[L]aws granting individuals the right to decide how their corpses will be disposed of exemplify a legal right of posthumous bodily integrity that takes precedence over the wishes of the family', Young (n 28) 251.

[117] Conway (n 66) 148. There is no case law on whether a family member can override explicit consent, and the Human Tissue Act provides a statutory framework which would prevent the doctor being criminally or civilly liable, however it is unheard of that doctors will go against the strongly held view of the grieving relative. Ibid 165 – 167.

3.4.1 **Historical Background**

Just as it is today, the tuition of anatomy by dissection was a very important part of medical education and training. Corpse and organ shortages were historically a recurring problem with demand outstripping supply for centuries.[118] Measures to alleviate the shortage saw dissection playing 'a complex role in retributive justice' and since the early Tudor era, dissection was a punishment deeply feared.[119] Enforced dissection was even enshrined in statutes. For example, Henry VIII, in the sixteenth century, made dissection a judicial punishment for the worst of murderers and the 1752 Act of Parliament (25 Geo. 11c.37) granted doctors the bodies of *all* murderers.[120]

Despite efforts to increase the legally sanctioned supply of corpses it was outstripped by the medical demand from the Anatomy Schools. By the Georgian era[121] these shortages spawned what were known as 'grave robbers,' 'body snatchers' or 'resurrectionists,' whom anatomy schools paid to procure corpses.[122] There was, understandably one might think, very real opposition to body snatching and enforced dissection/organ donation which led to 'entire communities…vehemently...' protesting.[123] This public fear and horror at such practices is seen by Richardson to be a consequence of their 'flagrant contravention of traditional care of the dead,' an affront to the 'integrity' and 'identity' of the deceased and 'upon the repose of the soul.'[124] The traditional attitude towards death and the corpse is termed, by Richardson, as the 'popular death culture,' which she found in recurring death customs that emphasised the protection of the physical body, even though it was no longer an 'actual person' but merely a cadaver. Society continued to treat the dead body with care and respect and abide by ritual reverence for the person that this cadaver represented. The '…deep wells of custom and belief…' about the appropriate care of the dead that '…death tapped into…' served two purposes, firstly, to assure the repose of the soul and secondly to comfort survivors.[125] It is

[118] Richardson (n 13) 155.
[119] ibid 155.
[120] ibid 154.
[121] 1714 – 1830.
[122] Richardson (n 13) 155.
[123] ibid 154 & 156. Body snatching or the 'removal of a body from the grave' was not actually a crime due to the body not being property in law and 'so long as the grave was not desecrated nor was any shroud or jewellery removed from it.' Joanne Wilton, 'An Anatomist's Perspective on the Human Tissue Act' in Belinda Brooks-Gordon and others (eds), *Death Rites and Rights* (Hart Publishing 2007) 261, 263.
[124] Richardson (n 13) 155.
[125] ibid 154.

suggested that the second of these could serve two purposes itself: the comfort in mourning the person they have lost but also effecting the assurance that they too will be treated with appropriate care when they die.

The continued shortage of corpses and the public outcry prompted Parliament to establish a Select Committee on Anatomy whose solution, published in their report in 1828, was that 'those who died in poverty, without money enough for a funeral,' would replace murderers as the source of corpse supply to the medical profession.[126] It was argued that this 'new source of corpses' that were 'so cheap and easily available…would undermine the body snatchers market economy.'[127] And so it was that the Anatomy Act 1832 was implemented.[128] Although there was an 'opt-out' clause, it was ineffective inside a Poor Law workhouse.[129] It is perhaps, again, understandable that the Anatomy Act did nothing to 'encourage public trust and promote bodily donation,'[130] resulting in the continued shortage of corpses up until Parliament significantly shifted its attitude towards the 'sick poor' and created the National Health Service in 1948. In 'a spirit of trust and generosity,'[131] bodies were, and continue to be, voluntarily donated.[132]

However, as will be seen below, people do still object to their organs being donated upon death and so do many survivors, even in light of a positive ante-mortem choice by the deceased to donate. This is of significance to this thesis as it reveals '…a close kinship between thought processes today and those of the past in which the corpse was believed to possess some kind

[126] ibid 160. The solution was arrived at despite a range of suggestions that would have provided a safe and unobjectionable supply through voluntary contributions (ranging from high profile people donating to make it fashionable and giving monetary reward for donation, to using the bodies of those who took their own lives and those dying in prison), ibid 160.
[127] ibid 160.
[128] The infamous body snatchers, Burke and Hare, who provided the Edinburgh Anatomy school with fresh day-old corpses by means of providing hospitality to guests and smothering them in their sleep, caused such a national outcry (it become known as 'burkophobia') that the implementation of the Act was hastened through 'considerable opposition'. Ibid 161.
[129] ibid 161. See Richardson, *Death, Dissection and the Destitute* (n 15) 3-28, for a full discussion about the social meaning and importance of the Anatomy Act and a comprehensive understanding of 'traditional attitudes towards death and the corpse'.
[130] Richardson (n 13) 163. No specific concern for the interest of the decedents was reflected in the Act, see Parry and Clarke, *The Law of Succession* (9th edn, Sweet and Maxwell 1988) 6.
[131] Richardson (n13) 162.
[132] The number of opt-in registrations in the UK at the end of March 2019 was 25.3 million. Annual Organ Donation and Transplant Activity Report 2018 – 2019 <https://nhsbtdbe.blob.core.windows.net/umbraco-assets-corp/16422/section-1-summary-of-donor-and-transplant-activity.pdf> accessed 21 June 2019.

of sentience after death.'[133] What is it that people fear about organ donation and why - given that the person is dead and cannot feel pain or indeed know anything about what is happening? The relevance, for this thesis, of seeking to understand the answer to this question is that the justifications behind it may apply, in some form, to the dead persons' privacy. Whilst there are '…deep-rooted social, religious and cultural views on the inviolability of the human corpse that shape contemporary attitudes to donation,'[134] these would, in themselves, not justify protecting the privacy of the dead. However, as will be argued in chapter 5, the ingrained beliefs and society's intuition in relation to respecting the dead, partly can.

3.4.2 Organ Donation Today

The most up-to date statistics from the NHS Blood and Transplant's *National Potential Donor Audit 2018-2019,*[135] appear to confirm what Sque et al found to be the main reasons for survivors objecting to organ donation. Families were '…clearly concerned about the treatment of the deceased and sought to continue to protect them…,' they were '…reluctant to 'let go' and relinquish their guardianship and ability to protect, even if it meant offering a lifeline to recipients.'[136] Their concerns about the donation operation and it prolonging suffering were also expressed.[137] The audit found that the overall familial consent/authorisation rate for organ donation was 67%. When a patient's decision was known at the time of potential donation that figure was 93%. However, a total of 79, out of the 1004 families declined authorisation for donation, specifically overruling their 'loved one's known decision to be an organ donor'. A further 229 refused as a result of the deceased 'previously expressing a wish not to donate' and there were 835 families who gave other reasons for refusal, with the most relevant to this thesis being:

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[133] Richardson (n 13) 162. An analysis of this apparent 'belief' is important groundwork for the discussion in Chapter 5 dealing with the philosophical debate of post-humous harm potentially justifying post-humous rights.
[134] Conway (n 66) 161.
[135] <https://nhsbtdbe.blob.core.windows.net/umbraco-assets-corp/16411/section-13-national-potential-donor-audit.pdf> accessed 29 August 2019.
[136] Magi Sque, Sheila Payne and Jill Macleod Clark, 'Gift of Life or Sacrifice? Key discourses for understanding decision-making by families of organ donors' in *Organ and Tissue Donation: An Evidence Base for Practice,* Magi Sque and Sheila Payne (eds) (Open University Press 2007), 40, 49-50. The authors reviewed data from studies with donor families, conducted between 1996 and 2003 and '[P]rovided some unique insights into the complex process of organ donation', 55.
[137] ibid 51.

Reasons why the family did not support organ donation 1 April 2018 to 31 March 2019[138]	*%*
Family were not sure whether the patient would have agreed to donation	18.9
Family felt the length of time for donation process was too long	10.3
Family did not want surgery to the body	8.7
Family felt the patient had suffered enough	7.5
Family did not believe in donation	4.4
Family felt the body needs to be buried whole (unrelated to religious or cultural reasons)	4
Family wanted to stay with the patient after death	1.5
Family concerned that other people may disapprove/be offended	0.4
Family concerned donation may delay the funeral	0.1
	55.8%

The reasons for objection can be said to be two-fold, first in relation to the dead person themselves and secondly in relation to the survivors. As to the former, families object in an apparent belief that the ante-mortem dead person had a right to decide and as they did not do so, better be safe than sorry and not allow donation. In addition, the reasons appear to show that some survivors maintain the belief that their dead relative can be wronged, harmed or suffer in some way even though they are dead.[139] The decisions that can be said to reflect the survivor's wishes relate to their own feelings and sensibilities, even if resulting in a stark contrast to the ante-mortem wishes of the deceased.

The Human Tissue Act which regulates organ donation, came about as a result of the organ retention scandals in the 1990's and presents an underlying ethos of not only protecting the

[138] Extracted from the *National Potential Donor Audit 2018-2019* (n 135): Table 13.10 Reasons why the family did not support organ donation, 1 April 2018 to 31 March 2019.
[139] This is of relevance to chapter 5 when looking at harm and intuition.

dead from unlawful bodily interference but the survivors from the horror of this. Thus, the law gives a negative 'right' to the dead not to have their organs harvested without their express consent but is really only giving rights, interests and choices to the living, whether it be the antemortem person in consenting to organ donation or the survivors in objecting thereto. In an apparent paradox, we respect the ante-mortem wishes of the dead, as seen in the preceding discussion on testamentary freedom, yet allow the survivors to thwart these when it comes to organ donation.[140] It is suggested that the fact that this is in 'practise' as opposed to in 'law' demonstrates the power of the feelings towards the dead. Practitioners are prepared to go against the letter of the law, and people are prepared to ignore that they have done so, in order to take account of the survivors' feelings and intuition in respect of the dead. This is despite the pressing utilitarian need for organ donations.

3.4.3 Analysis of Organ Donation as a Law that Protects the Dead

Looking at the theoretical position so far as organ donation is concerned, we turn to Young's analysis of critical interests and bodily integrity. She argues that living people can have critical interests in their bodily integrity,[141] which grounds rights and concludes:

> 'A living person's legal right to posthumous bodily integrity can therefore be grounded in a critical interest, while alive, in the treatment of her corpse. We care about our corpses because they are closely linked to our living bodies, which are central to our concepts of ourselves and to our autonomy while alive.'[142]

But the question remains – do these critical interests survive death? As will be seen in chapter 5 there are scholars who argue that the dead can be harmed and consequently, some argue, they have legal rights. However, if we conclude, for the purposes of this section, that there is no ability to harm critical interests after death, then what are the reasons for respecting the wishes of the living relating to their bodily integrity after their death? [143] If we break a promise to the 'dead' then it is immoral but does not wrong the dead person. However, Young argues, if the living doubt their own wishes will be respected post-mortem, then their critical interest in the treatment of their corpse cannot be satisfied.[144] Thus, the claim that living individuals have an

[140] And, as will be seen below, their burial wishes.
[141] She looks at organ donation, burial, and post-humous reproduction.
[142] Young (n 28) 214.
[143] ibid 213.
[144] ibid 214.

interest in what happens to their corpses rests not on interests that survive death, but rather on the benefit to them of knowing, while they are alive, that their wishes will be respected. A central argument of this thesis but in relation to privacy, of course, rather than bodily integrity. Young's crucial argument in relation to bodily integrity as a 'critical interest' demonstrates however, how privacy can be said to be a critical interest too. This is illustrated by quoting Young's summation of why posthumous bodily integrity can be grounded as a critical interest whilst alive and then substituting post-mortem privacy in place of post-humous bodily integrity as follows:

> A livings person's legal right to *posthumous bodily integrity* can therefore be grounded in a critical interest, while alive, in the treatment of her *corpse*. We care about our *corpses* because they are closely linked to our living *bodies,* which is central to our concepts of ourselves and to our autonomy while alive.'[145]

Those italicised words are now changed to reflect the position of post-mortem privacy with the words in bold as follows:

> 'A livings person's legal right to **posthumous privacy** can therefore be grounded in a critical interest, while alive, in the **treatment of her privacy**. We care about our **privacy** because it is closely linked to our living **persons**, which is central to our concepts of ourselves and to our autonomy while alive.'

To justify the 'close link' of privacy to 'our living persons' we can refer back to chapter 2 and the rationales and justification for privacy as a concept and then as interpreted through Article 8 jurisprudence. It was clear through that analysis that privacy, or a private life, is 'central to our concepts of ourselves and to our autonomy while alive.'[146] Our privacy in life is a critical interest as it allows us the freedom and autonomy to be ourselves and make those critical judgments which we believe make our life better. If we doubt our privacy will be maintained or our secrets kept post-mortem, then our critical interest in the maintenance of our privacy and non-revelation of our secrets, cannot be satisfied. Thus, the claim that living 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. This argument is developed further in chapter 5.

[145] ibid.
[146] ibid.

3.4.4 Conclusion

In conclusion, and despite Soldier X's express wishes, his organs would not be donated in the face of his grieving wife's objections. It appears this is unlikely to change, as a matter of practise, even in light of the new opt out legislation coming into force in the Spring of 2020. The guidance to the new Organ Donation (Deemed Consent) Act 2019 stipulates that families will be consulted about donation after their relative's death. It has been confirmed by Anthony Clarkson, Director of Organ Donation and Transplantation at NHS Blood and Transplant, that '[E]ven after the law around organ donation changes in England and Scotland next year, families will still be approached before organ donation goes ahead.' It therefore remains to be seen if the medical profession will continue in the same vein as they have, in the face of opposition to donation by the families.

3.5 Burial[147]

Soldier X

Soldier X had included in his last will and testament specific instructions as to the form that his funeral would take, the method of disposal of his corpse, and his final resting place. He had chosen his casket, a headstone and specified that he wanted to be buried in full military uniform, in a family plot in a cemetery near his hometown, some 500 miles away from the marital home. He also specified that his funeral was to be a lavish celebration of his life and achievements where all his family and friends could pay their last respects.

Like Soldier X, many people have strong views about what should happen to them after they have died, and it is a common misconception that a person's wishes are legally binding and will be carried out according to their instructions. In fact, funeral directions are not legally binding in the UK, even when expressly documented in a will for example, and the person with the duty to dispose of the body is under no obligation to honour the deceased's instructions.[148] Wife X, as executor of his will, and in accordance with the current legal framework in England & Wales, was entitled to possession of the corpse and was under a duty of disposal.[149] She chose to ignore all her husband's instructions and cremate him at a local crematorium, scattering his ashes at sea. She also chose not to have the lavish funeral attended by many, as requested, or to erect a headstone in her husband's memory. Whilst most would consider her

[147] In this thesis the word 'burial' is used to denote all permissible methods for the disposal of human remains (other than gifting under the Human Tissue Act 2004) which are legal within the UK, currently cremation and, internment. There are however new and emerging methods such as 'Resomation' (dissolving bodies in an alkaline solution). In Scotland, the recent introduction of the Cremation and Burial Act 2016 has provided a clear platform for the introduction of the technology. In England and Wales, it has frequently been stated that the technology can be introduced if it complies with all current building and environmental authority regulations. Regulatory approvals are currently being explored <http://resomation.com/about/need-for-change/> accessed 11 June 2019. There is also 'Promession' which is a type of ecological burial that uses liquid nitrogen and a process of freezing and vibration to remove all water from the body, causing it to break down into fine particles that do not release any toxins into the earth <www.funeralzone.co.uk/blog/biodegradable-burial-concepts> accessed 11 June 2019.

[148] Where the deceased made a will, and there is no doubt over its validity, this is the executor: *Williams v Williams* (1882) 20 Ch D 659. If the deceased dies intestate the right of possession and obligation to dispose, fall upon the highest ranked next of kin followed by other specified relations in descending order of consanguinity – the presumptive administrator, see Administration of Estates Act 1925 section 46.

[149] the detailed legal framework (still governed by old common law rules) is beyond the scope of this thesis, a full discussion of which can be found in Conway (n 66) 59 – 86.

actions to be morally reprehensible, she was, unlike in the case of organ donation, legally entitled to do as she did. Depending on the circumstances there may be recourse to the courts by a relative wishing to uphold Soldier X's instructions,[150] but these are not relevant to this thesis, as the crucial point here being illustrated is that *prime facie* the law does not recognise a legal right ascribed to the living, or the dead, when it comes to the disposal of their body or any attendant arrangements. This contrasts with the law of testamentary freedom and organ donation, where there is a *prime facie* right in life, to decide about what happens to one's property on death (subject to the exceptions discussed in section 3.3) and one's organs (with the caveats discussed in section 3.4).

Before mapping out the historical basis for the law on burials it is important to note that there are, of course, restrictions on what people can do, even if they are legally entitled to possession of the body for the purposes of disposal. These have evolved primarily, to deal with public health concerns, public policy considerations and pragmatic problems that may arise because of a lack of space, for example, but also, there are criminal offences dealing with indecent and improper interference with corpses. Those who argue for reform of the law to allow for funeral instructions to be enforced, point to these restrictions to show that ante-mortem requests which go against public policy or public health concerns, for example, could be prevented whilst allowing for the vast majority of people's wishes to be honoured.[151] An in depth analysis of the arguments for reform of the law in relation to burial is outside the scope of this thesis however, the rationales put forward for reform do inform the analysis in this chapter. This section focuses on the historical basis for the law and specifically why people have not been given a right to dictate what happens to their body or their own funeral arrangements, concluding in an analysis as to whether any of these rationales can be used to support, or indeed undermine, a post-mortem right to privacy enabling the living to dictate what happens to their privacy when dead.

[150] Possibly under section 116 Supreme Court Act 1981 'special circumstances.' For an example of its application see *Scotching v Birch* [2008] ALL ER (D) 265.
[151] Conway (n 66) chapter 5; Thomas Muinzer, 'The Law of the Dead: A Critical Review of Burial Law, with a view to its Development (2014) 34 (4) Oxford Journal of Legal Studies 791.

History shows that the law relating to the disposal of corpses is '…underpinned by fundamental beliefs around appropriate treatment of the dead,'[152] the most obvious one being the 'right'[153] to a decent burial.

3.5.1 Right to a Decent Burial

Whereas there has never been a 'right' to dictate one's own burial there has been, and continues to be, one to have a decent burial. Lord Denman CJ, in the 1840 case of *The Queen v Stewart*, declared that, 'Every person dying in this country…..has a right to a Christian burial,'[154] which translates in modern times to a burial '…comporting with the prevailing sense of decency in the community.[155] In his judgment Lord Denman quoted Lord Stowell who in the case of *Gilbert v. Buzzard* stated that to allow dead bodies '…to be carried in a state of naked exposure to the grave, would be a real offence to the living, as well as an apparent indignity to the dead.'[156] Lord Denman concluded that, 'The feelings and the interests of the living…create the duty' to be cast on someone to carry the dead 'to the grave, decently covered…' [157] Conway expresses this as the 'ingrained notions of human dignity and respect for the dead,'[158] which was considered in the previous section when dealing with organ donation and the historical 'death culture' which still persists today.

There is, of course, another important motivating factor behind the 'basic entitlement' of a decent burial, namely, public health and the need for the prompt disposal of the dead. It is no doubt the primary justification behind the law which places the ultimate burden upon the state for the burial/funerals of people who have no relatives to take possession of the body or to

[152] Conway (n 66) 57.
[153] Referred to here in the sense discussed in the introduction to this chapter - namely an imprecise but commonly used term that does not denote a 'right' in the strict legal sense.
[154] (1840) 12 Ad & El 773, 778. See also *Regina v Vann* 2 Den, 325. Stephen J in the case of *Regina v Price* (1884) 12 QBD 247, 253 notes that the Court in *Stewart* could not have 'intended to express themselves with complete verbal accuracy for…the Court speaks of the 'rights' of a dead body, which is obviously a popular form of expression – a corpse not being capable of rights….' Again 'verbal accuracy' was lacking in use of the phrase 'Christian burial' which excluded those who were not Christians.
[155] Conway (n 66) 59 (footnote 5) citing H Y Bernard *The Law of Death and Disposal of the Dead* (Oceana Publications 1966) 15.
[156] (1820) 3 Phill Ecc 335, 349-3.
[157] *Stewart* (n 154) 778.
[158] Conway (n 66) 60.

arrange/pay for their funeral.[159] These state arranged funerals were historically known as the 'pauper's funeral,' and are still referred to as such, most recently by the media when reporting on the local authority arranged funeral of Steven Dymond.[160] Historically, the poor went to great lengths to avoid a paupers funeral with 'Any and every means by which the poor could raise money was pressed into the service of a decent burial'.[161] The funeral was very important for the living themselves as well as the survivors. The question is why? What difference does it make once one is dead? There is perhaps no 'coherent' answer to that question. Tom Laquer, has suggested that the funeral became a display of one's worth in life and 'the pauper funeral became a symbol of great power, even to those in no danger of being subject to it.'[162] Having said that, 'Poor Law officials recognised the customary and moral rights of the dependent poor to their perception of a 'decent' funeral.'[163] And as funerals across the social scale became more commercialised during the Victorian period '…parish authorities often responded to pauper death with generosity and feeling, creating new levels of customary rights.'[164]

The relevance of this historical background is, once again, in the notion of the death culture whereby the dignity of, and respect for, the dead are crucial societal intuitions evidenced in the practise and rituals surrounding burial and disposal of the dead. The law therefore ensures that everyone is given a decent burial so why does it not enforce their wishes as to the nature of that burial?

[159] Public Health (Control of Disease) Act 1984, s 46 (1): It shall be the duty of a local authority to cause to be buried or cremated the body of any person who has died or been found dead in their area, in any case where it appears to the authority that no suitable arrangements for the disposal of the body have been or are being made otherwise than by the authority. Sub-s (3): An authority shall not cause a body to be cremated under subsection (1) or (2) above where they have reason to believe that cremation would be contrary to the wishes of the deceased.' It is of note that sub s 3 gives greater protection to the ante-mortem wishes in relation to manner of burial than someone who is being buried by their relatives who have no such restriction placed upon them.

[160] For example: Bonnie Christian, 'Steve Dymond Funeral: Jeremy Kyle Guest who Died in Suspected Suicide after Appearing on Show is Laid to Rest' *Evening Standard*, 13 June 2019 <www.standard.co.uk/news/uk/funeral-held-for-jeremy-kyle-guest-steve-dymond-who-died-in-suspected-suicide-a4166256.html> accessed 10 June 2019. Dymond being in the news as he committed suicide shortly after having failed a lie detector test on the ITV Jeremy Kyle show.

[161] Richardson, *Death, Dissection and the Destitute* (n 15).

[162] Elizabeth Hurren and Steve King, 'Begging for a Burial: Form, Function and Conflict in Nineteenth Century Pauper Burial' (2005) 30 (3) Social History 321, 322 (note 8).

[163] ibid 325.

[164] ibid 339.

3.5.2 **No Property Rule**

Despite there being a commitment to treat the dead with respect and dignity when it comes to their burial, the law seemingly ignored the 'intuitive' feeling that it should occur in accordance with their wishes. Historically this is because the law saw the dead body as *nullius in bonis,*[165] thus rendering funeral instructions ineffective on the basis that there is no property in a body. It cannot be disposed of in the same way as property in a will. This results in the funeral instructions being 'simply precatory statements, which do not impose any legal obligations on those tasked with the funeral.'[166]

Nullius in bonis is said by Conway to be a 'legal myth'[167] perpetuated by the misinterpretation, in cases subsequent to *Haynes,* of its finding that a dead person could not own property.[168] It was expressly stated by Kay J, in *Williams v Williams,* that, 'It is quite clearly the law of this country that there can be no property in the dead body of a human being.'[169] He went on to declare that, 'If there be no property in a dead body, it is impossible that by will or any other instrument the body can be disposed of.'[170] Nabueze is vociferous is his criticism of the common law rule of non-enforcement of burial wishes in *Williams* '…it is not only unjustifiable, but is also based on shaky jurisprudence and its continuance in modern day society can be said to ignore some fundamental human rights issues.'[171] Other scholars agree and Conway, for example, calls the 'no property rule' a 'legal folk lore'[172] which creates a legal paradox as the '…responsibility for disposing of the dead is based on rules that govern the disposal of property after death.'[173] It is to those rules which we now turn.

[165] In the ownership of nobody.
[166] Conway (n 66) 127.
[167] ibid 2.
[168] (1614) 12 Co Rep 113.
[169] (1882) 20 Ch D 659, 663.
[170] Ibid 665. It was noted by Counsel for the executor that the executors have the sole discretion as to the funeral: *Stag v Punter* 3 Atk.119 and that the testators' directions are frequently disregarded: *Dawson v Small* Law Rep. 18 Eq. 114; *Lloyd v Lloyd* 2 Sim (N.S) 255.
[171] R N Nwabueze, 'Legal Control of Burial Rights' (2013) 2 Cambridge Journal of International and Comparative Law, 196. See also P Matthews, 'Whose Body? People as Property' (1983) 36 Current Legal Problems 193, 196 – 221.
[172] Conway (n 66) 127
[173] ibid 61 (foot note 13)

3.5.3 Rules as to Entitlement to Disposal of the Corpse

Common law rules outlining the duty of disposal and the rights of possession of the corpse, or ashes, have a 'clear order of entitlement' derived 'from long standing principles around estate administration and liability for funeral expenses.'[174] These rules are followed mostly without any recourse to the courts. However, where there is a dispute between family members as to the disposal and burial arrangements of the deceased they are used by the court as a guide in the resolution.[175]

Conway argues that 'funeral instructions should be determinative when courts arbitrate disputes over the dead.'[176] As will be explored in chapter 5, the judiciary, generally, are becoming increasingly willing to consider the ante mortem wishes of the dead, seemingly based on the fact that intuitively this is the right thing to do. Indeed, the principle of personal autonomy would also dictate that they be respected. Autonomy is an important interpretative element of Article 8 which has been considered to encompass death related directions. As was seen in the European Commission case of *X v Federal Republic of Germany*, allowing an applicant to have his ashes scattered in his garden on his death was considered to be so closely related to his private life that it came within the sphere of Article 8. This was because '…persons may feel the need to express their personality by the way they arrange how they are buried.'[177] So too, the ante mortem wishes were an important factor in the decision as to the disposal of the deceased in the case of *Burrows v HM Coroner for Preston*.[178] Although the court in *Ibuna v Arroyo* denied the 'paramountcy' suggested in *Burrows*, it nevertheless accepted that 'personal representatives ought to take account of the deceased's wishes.'[179] So whilst there is no legal obligation to uphold the deceased wishes it does appear that the courts are increasingly willing to take them into account.[180] Could one such reason for doing so be the increased recognition of the power of the death culture and its rationales?

[174] ibid 61.
[175] For a detailed exposition of these rules see Conway (n 66) 61- 86. The primary responsibility falls upon the personal representative of the deceased as dictated by succession law rankings.
[176] Conway (n 66) 124.
[177] *X v. Germany*, App no 8741/79 (Commission Decision, 10 March 1981).
[178] [2008] EWHC 1387.
[179] [2012] EWHC 428 (Ch).
[180] Conway (n 66) 130.

Daniel Sperling argues that these ante mortem '…desires and wishes are so important to the living person that the meaning attached to them is inter alia conditioned upon their being fulfilled after the person is dead.'[181] In this respect:

> …people define themselves in terms of their physical selves, and so invasions of the body after death, especially through acts preformed contrary to a person's prior wishes regarding disposal of her body injures the personality of this person and the image she would have wanted to have after death.'[182]

Thus, the critical interest argument of Young, discussed above in relation to organ donation, is equally applicable to the disposal of one's corpse:

> A livings person's legal right to *posthumous bodily integrity* can therefore be grounded in a critical interest, while alive, in the treatment of her *corpse*. We care about our *corpses* because they are closely linked to our living *bodies,* which is central to our concepts of ourselves and to our autonomy while alive.'[183]

3.5.4 Conclusion

We have seen in the discussion above that people are entitled to a decent burial, the property rule is considered to be a misnomer, and that the courts are showing an increasing willingness to prioritise the ante mortem wishes of the deceased. Reform of the burial laws is surely justified so as to allow for the ante mortem wishes of the deceased to be honoured. Conway and Muinzer argue that it can and should be brought in line with the law in relation to testamentary freedom and organ donation.[184] The latter effectively providing a 'right to posthumous bodily self-determination.'[185] However, as was highlighted in the discussion of organ donation, the current legislation in respect thereof is seen as 'little more than a statutory sanctioned expression of preference,' [186] given the effective 'veto' held by the surviving, albeit

[181] Sperling (n 29) 168.
[182] ibid 169.
[183] Young (n 28) 214.
[184] Conway (n 66) 149-155 and Muinzer (n 151) 818.
[185] Conway ibid.
[186] ibid 148.

not legally sanctioned. Thus, as we saw in the discussion of organ donation, the wishes of the living often outweigh those of the dead.

Historically a person's '…ability to dictate the post-mortem fate of their body is limited,'[187] and even if judges recognise this in disputes, most don't come before the court enabling the survivors to do as they please, unless another living person takes up the mantle on behalf the dead. In Soldier X's case, therefore, his wife can disregard his expressed wishes no matter how morally wrong that may be.

[187] ibid 125.

3.6 Medical Confidentiality

Soldier X

Prior to his death, and with his wife's knowledge, Soldier X had undergone medical testing to confirm or rule out a suspected genetic condition. This was to determine the possibility of Soldier X having passed this genetic disorder on to the couple's two children who could not be tested until they reached adolescence. Upon Soldier X's death his wife sought disclosure of the results of that test in addition to access to his general medical records on the basis that his affair may have put her health at risk. Soldier X had not expressly withheld his consent for disclosure of the results to his wife nor the fact of his homosexual affair.

As was seen in chapter 2, the law would protect the medical confidentiality of Soldier X in his lifetime. This section will look at the legal position now that he is dead, and his wife is seeking disclosure. In contrast to the scenario posed in chapter 2 we proceed, in this, on the basis that his wife had knowledge that he was undertaking the tests otherwise there would, on the face of it, be no reason for her to seek disclosure of something of which she was not aware.

3.6.1 The Ethical Obligations

'Your duty of confidentiality continues after a patient has died.'[188]

This ethical obligation found in paragraph 134 of the General Medical Council's 'Confidentiality' comes from the Declaration of Geneva: 'I will respect the secrets which are confided in me, even after the patient has died.' There may also be a legal obligation imposed.[189] The law on medical confidentiality can be seen as an example of a so-called 'right' of the dead, the infringement of which can be said to amount to a breach of the deceased's 'rights' and lead, at the very least, to disciplinary action against the professional disclosing the confidential information. As was seen in chapter 2, one of the rationales for medical

[188] General Medical Council's *Confidentiality* (2017) para 134. This guidance came into effect on 25 April 2017. It was updated on 25 May 2018 to reflect the requirements of the General Data Protection Regulation and Data Protection Act 2018 <www.gmc-uk.org/ethical-guidance/ethical-guidance-for-doctors/confidentiality/managing-and-protecting-personal-information> accessed 19 January 2020.
[189] *Lewis v. Secretary of State for Health* [2008] EWHC 2196.

confidentiality is that without it people may not confide in their doctor and thus not receive the required medical treatment, which could not only harm them but also society as a whole. The extension of this principle into death can be seen as a logical one – a person may not confide in their doctor for fear that upon their death their confidence will be breached and revealed. Indeed, it is summed up by Michael Kottow as follows:

> If the death of a famous politician should prompt a physician to uncover his knowledge about the deceased's homosexual inclination, still living patients of the same physician might register with distaste and fear the possibility that private information about them could eventually be disclosed after they died. This suspicion may well be unsettling and therefore harmful to them…[190]

The arguments in relation to post-mortem medical confidentiality are akin to those for post-mortem privacy: the fear of the post-mortem revelation of the medical information, or indeed other personal information known to the medical practitioner such as Soldier X's homosexuality, which may cause distress to their loved ones, can cause harm to the ante-mortem person. In addition, the revelation of confidential information of deceased persons by medical practitioners undermines the living's confidence not only in them, but in the likelihood of their own information will remain private when they themselves die. The effecting assurances are undermined which can have an impact not only on the individual but on society. Thus, looking at the rationales and justifications of post-mortem medical confidentiality assists in constructing an argument in support of privacy *per* se continuing after death.

There are, of course, circumstances when relevant information must be disclosed,[191] for example, when it is required by law, to help a coroner with an inquest, on death certificates, when necessary to meet a statutory duty of candour,[192] and when a person has a right of access to records under the Access to Health Records Act 1990,[193] unless an exemption applies. Otherwise it will depend on the facts, although if the now deceased person had, in life,

[190] Michael H Kottow, 'Medical Confidentiality: An Intransigent and Absolute Obligation' (1986) 12 (3) Journal of Medical Ethics 117, 119.
[191] Guidance (n 187) para 135.
[192] The obligations associated with the statutory duty of candour in England are contained in regulation 20 of the Health and Social Care Act 2008 (Regulated Activities) Regulations 2014. In Scotland they are contained in section 22 of the Health (Tobacco, Nicotine etc. and Care) (Scotland) Act 2016.
[193] or the Access to Health Records (Northern Ireland) Order 1993.

expressed a desire for the information to remain confidential it should be. If no instructions were given, then the medical professional should take account of, for example: any distress or benefit to the patient's partner or family; whether disclosure may also disclose information about the patient's family or anyone else; whether the information is already public knowledge or can be anonymised or de-identified and the purpose of the disclosure.[194] Lastly, there are circumstances in the guidance that provide when disclosure should be made and these include, inter alia, when a statutory process sets aside the common law duty of confidentiality and there are no express instructions against disclosure from the deceased; when disclosure is justified in the public interest to protect others from a risk of death or serious harm and when a parent of a child patient or someone close to the patient asks for information about the circumstances of the death.[195]

Ethically therefore, disclosure by the medical professional after death can amount to a professional breach and the rationales for medical confidentiality in life can be said to be applicable post death. However, the legal position is not so clear cut.

3.6.2 The Legal Obligations

In *Lewis v Secretary of State for Health* the court found that divulgence by a doctor of information supplied in confidence by a patient who had since died, could be seen as 'unconscionable' as well as 'unprofessional'.[196] Thus, in principle equity could regard the doctor as owing a duty of confidentiality to the deceased's estate. Foskett J found that it was at least 'arguable' that a doctor's duty of confidentiality is capable of surviving death.[197] This is certainly what the ECtHR appeared to find in the case of *Éditions Plon v France*[198] which concerned the revelation by the doctor of the late President Mitterrand, shortly after his death, of the cancer he suffered for virtually the whole term of his Presidency. As the case is considered in detail in chapter 5, suffice to say here that it supports the proposition that the legal obligation of confidentiality survives the death of the patient, albeit that the obligation

[194] Guidance (n 187) para 136.
[195] ibid 137.
[196] *Lewis* (n 188) [23] (Fosket J) citing Toulson and Phipps on *Confidentiality* (2nd edn. Sweet and Maxwell 2006) [11-053]- [11-054].
[197] ibid 18.
[198] [2004] ECHR 200.

is not one that is necessarily permanent. That will depend on the circumstances, but it can be argued that the more sensitive the type of examination/treatment and the more sensitive the results give rise to a more prolonged obligation to maintain confidence. In *Plon* and *Re C* (adult patient; publicity),[199] the diminution of confidentiality over time was emphasised. In reference to archived records which remained subject to a duty of confidentiality the court in *Re C* stated that '…the potential for disclosing information about, or causing distress to, surviving relatives or damaging the public's trust will diminish over time.'[200] The rationales for diminishment over time of the confidentiality of records is an aspect of the post-mortem privacy right being developed in this thesis. It is proposed that post-mortem privacy protection should attach to relevant information for a period of 70 years from the end of the calendar year in which the person dies.[201] It is considered that this period of time is the most appropriate to ameliorate the possible negative consequences that disclosure of the private matter may have on the deceased relatives or those close to her within their life-times, whilst also ensuring the concerns around archival and historical preservation are accounted for in the development of this right. [202]

Plon was considered in the case of *Pauline Bluck v Information Commissioner and Epsom & St Helier University Hospitals NHS Trust,*[203] which found that the decision allowed for the survival of the deceased's right to medical confidence and that an action can be brought on the deceased's behalf. Five years after her death the mother of the deceased found out that the hospital where she had died had admitted liability and settled a medical negligence claim brought by the deceased's personal representative, her widower. The mother sought disclosure of the deceased's medical records under the Freedom of Information Act 2000. The widower refused consent to disclose and the NHS Trust therefore declined the request. The mother appealed to the Information Tribunal who ruled that the information was exempt from disclosure under section 41 which relates to the disclosure of information that would amount to a breach of confidence. The principal issue in the case was whether the duty of

[199] [1996] 2 FLR 251.
[200] ibid 138.
[201] This is akin to the provision within the Copyright, Designs and Patents Act 1988, s.12 (2).
[202] This was the period considered appropriate by Lord Hutton for example, as will be seen in Chapter 6, when he sought to '...protect Dr Kelly's widow and daughters for the remainder of their lives (the daughters being in their 20s at that time) from the distress which they would suffer from further discussion of the details of Dr Kelly's death in the media.' 'Dr Kelly evidence: Lord Hutton statement in full' *BBC News* (London, 22 October 2010) <www.bbc.co.uk/news/uk-politics-11605918> accessed 12 June 2018.
[203] (2007) 98 BMLR 1

confidence survived the patient's death. If it did, was it actionable and by whom? What can be seen from this decision is the notion 'that the deceased's own privacy right can survive her death and can be enforced by her next of kin.'[204] And the Tribunal did accept that this is so in respect of medical records.

The NHS Trust also argued that disclosure would be in breach of Article 8 which is a statutory prohibition on disclosure for the purposes of section 44 of the FOIA. The Tribunal did not find that Article 8 amounted to a directly enforceable legal prohibition for the purposes of section 44, but did say that if they had been required to determine the point, they would have found that the widower's Article 8 rights would be breached by the disclosure. This is of significance in the arguments that will be put forward in chapter 6 when dealing with relational post-mortem privacy, which recognises that a deceased's relatives can have an interest in the disclosure of private matters about the deceased. In saying that they would have determined the widower's Article 8 right to be breached by disclosure of the medical records, the court in *Bluck* were effectively supporting a relational post-mortem privacy right in relation to the deceased medical records.

3.6.3 Conclusion

What can be seen from the consideration of the medical confidentiality provisions and in particular from the case of *Lewis* is that first, posthumous medical confidentiality is identified as a value to society in preventing patients being deterred from seeking medical attention.[205] Secondly, trust in the medical profession would be lessened if practitioners were able to disclose confidential medical records upon death, which would be considered to be a detriment to society.[206] *Lewis* appears to show that the real rationale for post-humous medical confidentiality is for the good of society rather than for the deceased individual, albeit it provides tangential protection for the dead.

[204] ibid 8.
[205] *Lewis* (n 188).
[206] However, Sperling (n 29) 234, professes to being unable to find any clear theoretical understanding, in medical ethics or law, of the concept of medical confidentiality, in the post-mortem context, that can explain the duty to maintain confidentiality.

There does appear to be a very real argument that deceased patients have an interest in maintaining medical confidentiality in addition to current and future patients having such an interest. The interests are the same in the post-mortem and pre-mortem context.

In Soldier X's case, in life his medical records were not disclosable for the reasons outlined in chapter 2, in death however his widow, as personal representative,[207] has an unqualified right of access to his record and need give no reason for applying for access to it.[208]

3.7 Conclusions

This chapter has ascertained several useful concepts which will assist in constructing a legal post-mortem privacy right. The most prominent of which is that termed the 'death culture' seen as reflecting society's 'intuition' that the dead may no longer be here, but they are deserving of the living's respect and should be treated with dignity. This common expectation was found in all four of the legal provisions that were considered in this chapter, evidenced in the traditional attitude towards death and the corpse and the recurring death customs whereby society treats the dead body with care and respect. People endow the corpse with an almost 'quasi-human status',[209] often intuitively feeling that the dead may have some kind of sentience and thus can be harmed. They talk of, and remember, the deceased as she was in life not as she is now – a corpse or ashes. This death culture, it will be argued, amounts to a prominent explanation and justification for why post-mortem privacy is important. The continuance of the deceased's privacy is a continuance of the person she was during her lifetime and thus society intuitively will wish to treat her with respect and dignity.

It was also illustrated how the living rely upon the notion of effecting assurances that respecting the dead brings to them – they treat the dead as they wish to be treated themselves when they die. This provides further support for the argument for post-mortem privacy. The living care about and respect the privacy of the dead as they care about what happens to theirs when they are dead.

[207] The Act provides that a personal representative is the executor or administrator of the deceased person's estate.
[208] Access to Health Records Act 1990, s 3 (1) (f).
[209] Cantor (n 14) 4.

Having looked at the privacy rights of the living in chapter 2 and the rationales for various provisions that protect the dead in some form in this chapter, we will next consider the current construction of post-mortem privacy within legal scholarship, as this thesis advances its original claim: that a free-standing general right to post-mortem privacy can be developed from within a human rights framework. That right is not premised solely on autonomy or dignity but instead a person suffering existing in vitam harm through knowledge that there might be a post-mortem revelation of private matters.

Chapter 4

Post-mortem Privacy

Soldier X

A young British soldier dies in combat. His widow and heir petitions to have access to his webmail account. The court orders the transfer of the contents of the inbox and folders to the widow as a digital download without handing over passwords. On examination, the widow finds to her distress that the emails provide evidence of a homosexual affair that Soldier X was having with a senior officer; some of the emails say explicitly that she was never to know about it. The private facts contained within these emails are known by third parties and are divulged within Soldier X's hard copy diaries. In addition, the newspaper who had threatened to publicly reveal these details whilst Soldier X was alive is threatening once again to do so now that he is dead.

Adapted from the scenario outlined in Lilian Edwards and Edina Harbinja, 'Protecting Post-Mortem Privacy: Reconsidering the Privacy Interests of the Deceased in a Digital World.' (2013) 32(1) Cardozo Arts & Ent LJ 83, 84.

4.1 Introduction

By examining the specific right of, or interest in, a private life whilst living, remaining private and free from intrusion after death, this research will be contributing to the fast-growing area of scholarly debate which uses a relatively new concept in law: post-mortem privacy. Edwards and Harbinja noted in 2013 that: 'Post-mortem privacy (deceased persons' privacy) has been, so far, a phenomenon of interest predominantly for sociologists, psychologists, anthropologists and other humanities and social sciences scholars…' and didn't at that stage '…represent a term of art in the legal profession (not even amongst privacy scholars).'[1] They therefore introduced this concept into legal scholarship by way of three scenarios,[2] which Edwards and

[1] Lilian Edwards and Edina Harbinja, 'Protecting Post-Mortem Privacy: Reconsidering the Privacy Interests of the Deceased in a Digital World' (2013) 32(1) Cardozo Arts & Ent LJ 83, 85.

[2] Ibid, 84-85 (i) the US marine example, based upon the Ellsworth case, as outlined in the introduction to this thesis and above (ii) A well-known novelist dies having destroyed all paper manuscripts of unfinished works (but not the one stored on Cloud Drive) and having stated that upon her death she did not want any unfinished works published. Her will left everything to her literary agent. Cloud Drive released the unfinished novel to the author's sole child who sold it for a large sum of money. Based on case of Nabokov (note 3) (iii) A Facebook shrine is made from the page of a teenage girl who died from a drugs overdose. The parents persuade Facebook to give

Harbinja suggested 'intuitively' concerned what they termed '*post-mortem privacy*: rights of privacy for the dead.'[3] They defined the concept of post-mortem privacy as '…the right of a person to preserve and control what becomes of his or her reputation, dignity, integrity, secrets or memory after death.'[4] The application of this definition was confined to 'digital assets,'[5] due to the '…crucial gap in the online legal privacy protection.'[6] There was nevertheless recognition in the scholarship that the '…phenomenon of post mortem privacy can be contemplated from the perspective of privacy in general…' and that it has many 'implications' and '…angles, such as protection of personality rights, author's moral rights, dignity, defamation, libel, organ donation and other strictly personal rights and claims.'[7] Having said that, the focus of legal post-mortem privacy scholarship, since the concept was introduced and defined by Edwards and Harbinja, has undoubtedly been on digital assets and data protection rather than privacy in general. Indeed, Harbinja has recently refined the original definition of post-mortem privacy, now describing it as 'the right of the deceased to control his personal digital remains post-mortem, broadly, or the right to data protection post-mortem, narrowly defined.'[8]

The finessing of, what shall be called, the 'original' definition to restrict its application to 'digital remains' and 'data protection',[9] better reflects those aspects of post-mortem privacy which the current scholarship seeks to protect. However, it is clear that matters contained within the 'original' definition, and off-line post-mortem privacy, are now not necessarily covered by the 'new' definition, as they may not be contained within a person's 'digital

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them access to locked posts and discover photos of their daughter's unconscious body at the party which have gone 'viral.'

[3] ibid 85.

[4] ibid 85.

[5] ibid 85 '…defined widely and not exclusively to include a range of intangible information goods associated with the online or digital world, including social network profiles….;emails, tweets, databases etc…;.in game virtual assets…; digitised text, image music or sound…;passwords to various accounts associated with the provision of digital goods and services, either as buyer, user or trader…; domain names; two or three-dimensional personality-related images or icons…and the myriad of digital asset emerging as commodities capable of being assigned worth…'

[6] Edina Harbinja, 'Post-mortem Privacy 2.0: Theory, Law, and Technology' (2017) 31 (1) International Review of Law, Computers & Technology 26, 27.

[7] Edina Harbinja, 'Does the EU Data Protection Regime Protect Post-mortem Privacy and what could be the Potential Alternatives?' (2013) 10 (1) SCRIPT-ed. 19, 22.

[8] Edina Harbinja, 'The 'New(ish)' Property, Informational Bodies and Post Mortality ' in M Savin-Baden and V Mason-Robbie (eds.), *Digital Afterlife: Death Matters in a Digital Age (*Taylor and Francis 2019) 2. Unpublished at the time of writing, page references are those contained in <https://ssrn.com/abstract=3495512> accessed 12 January 2020.

[9] Personal data is defined in the Data Protection Act 2018, s 1 as 'data which relate to a living individual'.

remains' or may not amount to 'data' for the purposes of legal protection. It is for this reason that it is argued in this chapter, that the 'original' definition, as opposed to the 'new' one, better reflects what the concept of 'post-mortem privacy' *is* and *should be*. That is a right of the *living* person to preserve and control what becomes of her private information *per se,* post-mortem. Both her offline and online privacy should be so protected. This thesis provides a route by which this can be done and starts by introducing a new definition of post-mortem privacy: 'the right of the person to respect for her private and family life post-mortem.' Conceived from within the human rights framework, it would allow for a person's ante-mortem privacy rights, under Article 8, to continue post-mortem.[10] Allowing, therefore, for that which would be protected under Article 8 in life, to remain so in death. The theoretical underpinnings of this right will mirror that which founds the Article 8 right in life namely, autonomy, dignity and the harm principle.

This chapter will start by looking at the scope and definition of the current post-mortem privacy right as advanced by Harbinja and others, before considering to whom the right is to be ascribed: the dead, another entity or the living. The first two are posited by the current scholarship, while the third is unique to the arguments herein. It is important to say that this thesis does not seek to challenge the scholarship in relation to the numerous solutions offered as to the transmission or disposal of digital assets/remains or data on death. The suggestions of a mix of '…policy, legislative and 'code' changes'[11] provide vital avenues of protection that offer practical and enforceable solutions to the unique nature of digital assets and the difficulties they create so far as privacy is concerned. The proposed definition and framework for protection can, and should, exist alongside the reforms suggested by the current scholarship. However, this thesis does suggest that the narrow focus taken by post-mortem privacy scholarship has meant that exploration of the very real possibility that protection is, theoretically and normatively, available from within the preferred human rights framework, has been left unexplored. Based on the assertion that '...the legal conception of privacy as a human right (Article 8...) does not really offer arguments for the proponents of post-mortem

[10] This is however, within tighter boundaries than the Article 8 right in life, so as to reflect the unique nature of the post-mortem right and to take account of, inter alia, freedom of expression and concerns around archival and historical preservation.

[11] Edina Harbinja, 'Legal Aspects of Transmission of Digital Assets on Death' (PhD thesis, University of Strathclyde 2017) 12.

protection,'[12] the scholarship has moved away from its initial preferred framework and away from establishing an overall concept of post-mortem privacy. It is providing welcome solutions but through piecemeal protection under different existing laws and practices, with relevant amendments and suggestions of new policies and codes. This thesis will not traverse the numerous issues identified with digital assets and data protection that are dealt with in detail in the present scholarship. It uses this chapter to consider the development of the concept of post-mortem privacy, its right ascription and current theoretical underpinnings. Along the way the groundwork will be laid for the articulation of the fundamental underpinning required for the protection of post-mortem privacy from within the human rights framework - the aim of this thesis.

To ensure that the right of post-mortem protection is given legal status as a whole rather than piecemeal, there is a need to ascertain, with certainty, not only it's definition and scope but upon which legal entity the right is to be bestowed and how. This chapter considers three categories of possible recipients: the dead (4.3.1 below) another entity (4.3.2 below) and the living (4.3.3 below). There does need to be a comprehensive discussion, within post-mortem privacy literature, of whether the 'dead' or the 'deceased' can have legally enforceable rights and if they can, is the right of post-mortem privacy capable of being ascribed to them? Presently it is unclear if there is agreement within the current scholarship as to whether the proposed right is sought to be ascribed to the dead themselves. Phrases such as 'rights of privacy for the dead,' and 'the deceased's right to privacy' appear to suggest that this is the case. This apparent lack of clarity will be considered in this chapter with the ultimate resolution being the post-mortem privacy right proposed herein, which is ascribed to the living person. The contention within this thesis, as was demonstrated in chapter 3 when considering the legal position of the dead, is that they cannot and do not have rights themselves.

If the dead do not, or cannot, have rights themselves, or the post-mortem privacy right cannot, or should not, be ascribed to them, can it be ascribed to another entity? That is, can it be ascribed to neither a living nor dead human being/person? Three such theories are considered in section

[12] Harbinja (n 7) 25.

4.3.2 below, whereby the post-mortem privacy right is ascribed to a 'digital double',[13] or one's 'symbolic existence'[14] or an 'informational body'.[15] These are ingenious methods by which to seek post-mortem privacy protection: however, as is accepted by Buitelaar, for example, they are unlikely to infiltrate the legal system in the very near future. [16]

The third category of possible recipients for the post-mortem privacy right that will considered in this chapter are living human beings. We might split that into two sub-categories. First, the ante-mortem person, in line with the main argument propounded in this thesis:- that the living person should be ascribed the right in life, for privacy post-mortem, under Article 8, upon the basis that they can in life be harmed by a lack of privacy in death. This argument is summarised below and developed in detail in the next chapter. Secondly, the living 'survivors' should be ascribed a post-mortem privacy right under Article 8. This is so because surviving relatives can themselves suffer harm to their own interests when the deceased's privacy is invaded by, for example, the publication of photos of their dead body. Known as 'post-mortem relational privacy', the concept is based on the premise that an 'enforceable legal interest can arise from one's close relationship with another.'[17] Thus, relatives of the deceased may have actionable privacy interests which relate to the disclosure of information about the deceased. This concept has been developing within US jurisprudence and scholarship concerning 'death related' images and records but is yet to infiltrate the law in England and Wales, or indeed the academic scholarship to any significant degree. It is of significance to this thesis and will be considered in this chapter, and developed in chapter 6, not least of all because it provides an avenue by which the privacy of the dead can be protected, albeit tangentially. Ultimately, this thesis demonstrates that in addition to the Article 8 right being extended to include the living's right to post-mortem privacy it can also be utilised, in its current form, to protect the privacy of the survivors with the consequence of tangentially protecting the deceased themselves. The ECtHR has made tentative moves towards recognising this, as will be seen in chapter 6.

[13] J C Buitelaar, 'Post-mortem Privacy and Informational Self-determination' (2017) 19 (2) Ethics and Information Technology 129-142.
[14] Daniel Sperling, *Posthumous Interests: Legal and Ethical Perspectives* (CUP 2009).
[15] Harbinja (n 8).
[16] Buitelaar (n 13) 139.
[17] Christine Emery, 'Relational Privacy - A Right to Grieve in the Information Age: Halting the Digital Dissemination of Death-Scene Images' (2011) 42 Rutgers LJ 765, 771.

4.2 Definition and Scope of the Concept of Post-mortem Privacy

It appears that the introduction of the 'novel phenomenon of post-mortem privacy' stems partly from its repeated usage by service providers '… (without using the term itself), when refusing to transfer a deceased person's account/allow for access/memorialisation', and is discussed by Harbinja as '…one of the features affecting rules on the transmission of assets on death.'[18] Post-mortem privacy therefore is used as an argument against the 'general transmission' of digital assets 'on death without the deceased's consent…'[19] 'Digital assets' have been defined variously but widely as '(A)ny electronic asset of personal or economic value' which 'include a huge range of intangible information goods associated with the online or 'digital world.''[20] Harbinja's 'tentative solutions' to the '…piecemeal and patched approach...' of post-mortem protection is to provide a mix of '…policy, legislative and 'code' changes.'[21] Post-mortem privacy, together with autonomy, is proffered by Harbinja as an alternative framework,[22] so as to prevent the default transmission of digital assets which cannot be considered to be property.

Arguments in relation to post-mortem protection of informational privacy contained within digital assets are explored in detail in Harbinja's doctoral research, which looked at '…the main issues surrounding the transmission of digital assets on death.'[23] She looked at the 'legal nature of digital assets,'[24] and whether they could be considered to be property and thus form part of an estate that could transmit upon death.[25] She concluded that they could not, and should not, be considered property and that whilst some could be protected under copyright and transmit on death, both succession and copyright laws would need legislative amendment. Harbinja also concluded that personal data and information is neither property nor protected by copyright and thus cannot be transmitted on death. She therefore explored alternative legal institutions, such as breach of confidence and data protection, and concluded that these should be extended to include deceased users.[26]

[18] Harbinja (n 11) 226.
[19] ibid 226, 'i.e. by default, through the laws of intestacy or by requiring the intermediaries to provide access to the deceased's emails.'
[20] Edwards and Harbinja (n 1) 85.
[21] Harbinja (n 11) 12.
[22] ibid 13.
[23] Harbinja (n 11) 10.
[24] ibid 4.
[25] ibid 10.
[26] ibid 12.

More recently, Harbinja has rejected the attempt at redefining digital assets as the 'new' new property'.[27] She looked at the 'classical conceptualisations of digital assets as property and the 'new' new property'[28] exploring whether this is the correct way to perceive digital assets conceptually.'[29] Harbinja concluded that the 'new' new property was not a term that was suitable 'to describe the complex nature of digital assets and legal relationships that surround digital legacy.'[30] She found that: 'It is extremely difficult, conceptually, normatively and doctrinally, to define digital assets as property, and to encompass different sorts of their personal and monetary value.'[31]

It can be seen that one of the fundamental issues facing the legal post-mortem privacy scholarship in the digital age is the 'property -v- personality' dichotomy. Although the common law maxim of a*ctio personalis moritur cum persona* (personal causes of action die with the person) has been diluted over the years, it is still the case that whilst generally economic rights survive death passing on to the heirs in accordance with the laws of succession, personality rights cease upon death. Privacy is seen generally as a 'personality right.'[32] These rights tend to be protected through specific torts and causes of action, for example, we saw in chapter 2 how 'judicial activism'[33] in the UK courts led to the development of the tort of 'misuse of private information' so as to accommodate the Article 8 right. In addition, the ECtHR has stated that Article 8 only applies to the living.[34] Thus how can post-mortem privacy be protected? The dichotomy for the legal post-mortem scholarship has been therefore, whether to hold on to the principle that privacy is a fundamental human right and thus cannot be treated as property or commodified, thus making post-mortem protection very difficult. Or to attempt to achieve

[27] Defined as 'the next hypothetical stage of the development of property' H Conway and S Grattan, 'The 'New' New Property: Dealing with Digital Assets on Death' in H Conway and R Hickey (eds), *Modern Studies in Property Law* (Hart Publishing 2017) 99-115, cited in Harbinja (n 8) 2. The 'new' new property follows on from the 'new' property defined by J Langbein, 'The Non Probate Revolution and the Future of the Law of Succession' (1984) 97 Harvard Law Review, 1108, 'which included pensions, life policies and joint assets', cited in Harbinja (n 8) 2.
[28] Harbinja (n 8) 1.
[29] ibid.
[30] ibid 13.
[31] ibid.
[32] Edwards and Harbinja (n 1) 101; Bart van der Sloot, 'Privacy as Personality Right: Why the ECtHR's Focus on Ulterior Interests Might Prove Indispensable in the Age of "Big Data" (2005) Utrecht Journal of International and European Law 25, 28.
[33] Edwards and Harbinja (n 1) 103.
[34] *Jaggi v. Switzerland,* App. No. 58757/00, (2006) 47 EHRR 30.

its protection by devising solutions based upon the property/economic value that can be ascertained from digital assets and personal data, thereby commodifying privacy and treating it as property.

Harbinja's preferred framework of protection for post-mortem privacy rights has always been under human rights law in line with the '…long established EU tradition of treating protection of personal data…' within that framework.[35] Indeed Edwards and Harbinja are of the view that the 'EU data protection law is arguably the most important legal instrument for protection of informational privacy in Europe – both offline and online….'[36] It seems, therefore, that these rights are '…just what is needed to protect the post-mortem privacy of data subjects in a digital world.'[37] However, Harbinja has questioned the direction the EU Data protection regime which has suggested a '…shift in the underlying notion of data protection from a purely rights-based notion to one more focused on commodification of personal data as property of economic value.'[38] Whilst data protection law does not protect the personal data of the dead, there is a discretion as to implementation which 'enabled the introduction and protection of post-mortem privacy…'[39], insofar as it protected 'personal data' as opposed to post-mortem privacy as 'originally' defined.[40]

As has been stated this thesis does not seek to challenge the scholarship in relation to the transmission of digital assets on death. Nor does it seek to address or challenge the solutions suggested to prevent transfer to the deceased's heirs as a default position or through succession laws, thereby potentially transferring assets that the deceased would not want to be given to their heirs. Autonomy in life, to make decisions about what happens after death, is an important thread in this thesis and it is agreed people should be able to decide in life what happens to their digital assets on death. Where this thesis does challenge the current scholarship is in its usage of the concept of post-mortem privacy *limited* to online digital assets. Whilst it is of course accepted that it is entirely proper to limit the focus of research to digital assets and the

[35] Harbinja (n 7) 38.
[36] Edwards and Harbinja (n 1) 112.
[37] ibid 120.
[38] ibid 121.
[39] Harbinja (n 7) 38.
[40] Some states have used this discretion to 'offer some kind of post-mortem protection' albeit limited in scope and time. The UK however is not one of them. Edwards and Harbinja (n 1) 112.

informational privacy of the deceased and not to address '…all the possible arguments for protecting post-mortem privacy,'[41] it is argued that the definition of post-mortem privacy and the scope of the legal protection sought, should not be so limited. Therefore, it is suggested that a more appropriate terminology for the focus of the current post-mortem scholarship would be that which is adopted by Natalie Banta: 'digital privacy after death' or perhaps 'post-mortem digital privacy'.[42] Re-labelling as such would thereby allow the general concept of post-mortem privacy to encompass the much wider scope of both on-line and off-line privacy after death with 'post-mortem digital privacy' forming a sub category of the wider concept.

It is contended here that the wider approach is required if privacy is to be protected and not just digital assets or data. By limiting the scope of the concept of post-mortem privacy to the protection of digital assets, it is not post-mortem privacy *per se* that is being protected, but merely the transmission of digital assets upon death. Thus, if only digital assets are protected under post-mortem privacy law, whilst they themselves may remain private, the information contained within them may not, if that information is known, or can be ascertained from, elsewhere. For example, if post-mortem digital protection is afforded, or in Banta's words 'digital privacy after death', without offline post-mortem privacy, the situation could arise whereby information is gathered about X (from off-line or online sources) which could not be published in her lifetime,[43] but can be revealed upon her death. The digital asset containing the private matter could not, but the knowledge of the private matter could. The information itself is not being protected but the digital asset which contains the information. So, when we look at the Soldier X's scenario: if post-mortem digital asset privacy existed his wife, and the public at large, would never have sight of the emails and thus would not find out about Soldier X's affair through that channel. However, there is nothing to prevent the publication of the fact of his homosexual affair regardless of who has access to that information and where it is contained. As we saw in life Soldier X, in all likelihood, would have been able to obtain an injunction under Article 8 to prevent the revelation of his private affair, by publication. This does not continue on death and thus merely protecting any digital assets in which the fact is contained is not providing the continued protection that Soldier X desires or is deserving of. As will be seen in the following chapter, this thesis argues that the knowledge that there is a

[41] Harbinja (n 7) 26.
[42] Natalie Banta, 'Death and Privacy in the Digital Age' (2016) 94 North Carolina Law Review 927, 930.
[43] For example, because it breaches Article 8 and there is no Article 10 right in relation thereto.

risk that his 'secret' will be revealed and his wife will find out, can cause him harm in life, justifying the continued protection under Article 8 in death.

Thus, at the extreme, protection of the digital asset can be irrelevant and superfluous, even digital assets that contain facts which a deceased has expressed in life that she does not want to be revealed. The current scholarship does not address the fact that the private information which the deceased does not want revealed may not be contained solely within the digital assets themselves, although it may have been gathered as a result of the digital world. For example: Soldier X's email was read by a third party who upon his death published the fact of his homosexuality and efforts to hide the truth from his wife. Or a number of digital photos were uploaded on to a friend's Facebook page which accidentally included one of Soldier X and his lover. Upon his death a friend of this friend distributed this photo thereby revealing Soldier X's affair.

This thesis, therefore, contends that there is a need for wider protection beyond solely digital assets and will develop the argument that for post-mortem privacy to be truly protected the scope must be widened to include a general right to post-mortem privacy under the Human Rights Act. This is achieved by way of an extension of the Article 8 qualified right to privacy, into death. This is a novel approach, as the current limited focus has meant that there has not been any previous attempt to situate post-mortem privacy, as a whole, within a human rights framework. Without discussing and developing arguments that post-mortem privacy should be protected as a human right, there is no basis for it to be so protected. It is therefore argued that a back to basics approach is needed to ensure that the necessary foundations for the rationales and justifications for post-mortem privacy are grounded. This thesis therefore provides a critique and approach distinct from the current literature.

Ultimately, it is argued that the definition of the concept of post-mortem privacy should be that contained within Article 8, with the necessary modifications,[44] to reflect its unique post-mortem nature and to take account of inter alia, freedom of expression and concerns around archival and historical preservation. So, it is the 'right of the person to respect for her private

[44] Such as a time limitation – see chapter 7 herein.

and family life post-mortem.' Adopting a more focused terminology such as 'digital privacy after death',[45] 'post-mortem digital privacy', or more specifically for the data protection aspect 'post-mortem data protection', would allow for the wider concept of 'post-mortem privacy' to obtain to all post-mortem privacy both offline and on-line. This definitional differentiation between protection of post-mortem privacy *per se* and that of digital assets and data protection post-mortem, allows for the required conceptual clarity championed by Hohfeld. It also allows for the scope of the legal right to be ascertained with greater precision and the legal right holder to be determined more easily.

The justification proffered for this wider approach is *ad idem* with the justification given for the digital assets' protection namely, the '…changed circumstances of the digital era…'. However, it is not just the 'amount' of privacy that can be invaded because of the

> …growth in creation, sharing and acquisition of digital assets, which often have a peculiarly personal and intimate character, and also happen to be voluminous, shareable, hard to destroy and difficult to categorise under current legal norms of property and rights.[46]

Also critical is the 'speed and breadth' with which even non-digital privacy matters can be uncovered and disseminated in the digital world. As was highlighted in chapter 2 the context in which issues of privacy are found in the modern world is very different to the pre-internet age. This is, of course, just as true for post-mortem privacy. A truly horrific example of how an ordinary person, upon their death can be thrust into the public eye and 'go viral' is that of eighteen-year-old Nicole Catsouras.[47] Nicole drove her father's Porsche, without permission, and was involved in a fatal accident. She was half decapitated in the accident which was '…so gruesome the coroner wouldn't allow her parents to identify their daughter's body.'[48] As part of standard fatal traffic collision procedures, California Highway Patrol Officers took photographs of the scene of Catsouras' death. These photographs were then forwarded to colleagues and were leaked onto the Internet, where some remain today. To compound the family's distress an anonymous person sent Nikki's father copies of the photographs with the

[45] Banta (n 45) 930.
[46] Edwards and Harbinja (n 1) 85.
[47] *Catsouras v Californian Highway Patrol*, 181 Cal. App 4th 856 (Cal. Ct. App.2010).
[48] Jessica Bennett, 'One Family's Fight Against Grisly Web Photos' *Newsweek* 24 April 2009 <www.newsweek.com/one-familys-fight-against-grisly-web-photos-77275> accessed 17 July 2017.

message 'Wooooo Daddy! Hey daddy, I'm still alive.'[49] This case reflects '…a growing trend that is fuelled by modern technology, compounded by morbid curiosity…'[50] and is relevant to the discussion of post-mortem relational privacy below. However, it is an example, here, of the privacy of the deceased being breached (albeit not legally) in a way that most people would think as unacceptable. Such exposure clearly goes against the 'death culture' and intuitive beliefs we have that the dead should be treated with respect and dignity. Yet Nicole herself had no protection against such an invasion of her privacy. The California Court of Appeal[51] however, held that her relatives did have their own privacy rights in the images of her death.'[52] The family went on to reach a settlement of $2.37 million dollars against the California Highway Patrol.

If we pretend for a moment that this case has arisen within the jurisdiction of the law of England and Wales, we can see that protection of post-mortem privacy limited to digital assets or data protection would not protect Nicole as the digital asset came into existence subsequent to her death and in any event was not hers to control. However, the post-mortem privacy right argued herein could prevent the disclosure of such private death images. There are two ways in which this could, theoretically, be achieved both of which will be discussed in more detail in the subsequent chapters when constructing the post-mortem privacy rights argued for herein. In summary, the continuing Article 8 right would provide the living Nicole with a right not to have such private death images distributed.[53] However, given that there is currently no such continuing Article 8 right Nicole's parents could bring their own Article 8 claim on the basis of post-mortem relational privacy arguing that their privacy interest has been breached by publication of the images of their daughter.[54]

It is of course accepted that unlike an '…item of traditional physical property, which can only be bequeathed to one individual…,' digital property can be inherited by more than one person and be copied '…to any number of inheritors, or put on the web for anyone and everyone to

[49] Jessica Bennett, 'A Tragedy that won't Fade Away' *Newsweek* 4 May 2009 <www.newsweek.com/id/195073> accessed 17th July 2017.
[50] Emery (n 17) 767.
[51] Fourth District, Division 3.
[52] *Catsouras* (n 50) 872 – 87.
[53] This will be developed in chapter 5.
[54] This will be developed in chapter 6.

see, and thus is worthy of protection. [55] However, the same is true (admittedly to a lesser extent) with real property in the digital age, such as a private photograph, letters or a diary, which are equally capable of being copied and distributed just as widely, even though they did not start out in a digital form. It is difficult to see how the solutions offered by the current scholarship would protect post-mortem privacy of digital assets that come into existence post-mortem. For example, Soldier X's private, hard copy diaries are copied by his wife and she publishes them on-line – they are not Soldier X's digital asset but that of his wife, the content is Soldier's X's but could not be protected as a digital asset as it never belonged to him. However, if Soldier X's diaries were contained within a digital asset, rather than hard copy, the solutions offered by the post-mortem digital privacy arguments would protect them.[56] Similarly, whilst the digital asset in the form of the emails which contain the fact of his homosexual affair would be protected, Soldier X's right not to have this private fact disclosed upon death, would not be. Ultimately, 'post-mortem digital privacy' protection does not protect a private, intimate matter contained within a person's 'real world remains.' Just as a private matter contained within a person's digital remains could potentially, without protection, spread globally, so too could a private matter that is not contained within them. Although there can be no doubt that '…digital assets could change their quality and become tangible from their initial intangible state (e.g. printing photos)'[57] the opposite should also be recognised, a hardcopy photo could have an 'intangible' form, as an online version of the offline version/original could be made.[58]Therefore, only seeking protection for the intangible object (namely the online photo) allows for the tangible offline object to be revealed and exploited upon death. Both versions of this photograph should have post-mortem protection if it is private within the boundaries of Article 8. Both require protection and, it is argued, must be protected, otherwise it is not 'privacy' *per se* that is being protected but digital assets *per se*.

[55] Tony Walter, 'Communication Media and the Dead: from the Stone Age to Facebook' (2015) 20 (3) Mortality 215, 227. Walters uses an original photograph not a negative, as an example of traditional physical property.
[56] Some of the solutions are subject to Soldier X making clear his preferences in life.
[57] Harbinja (n 11) 23.
[58] We saw in the introduction to this thesis how Kaskett transformed her grandmother's hard copy letters into digital assets, Elaine Kaskett, *All the Ghosts in the Machine, Illusions of Mortality in the Digital Age*, (Robinson 2019) xviii.

Having discussed the legal definition of post-mortem privacy and its scope, it is necessary to ascertain who (or what) could be ascribed the right, as this has a significant bearing on what rationales and justifications for the right can be advanced.

4.3 Ascription of the Right of Post-mortem Privacy

There are three main categories of potential post-mortem privacy right holders: the dead themselves, another entity (neither a living nor dead human being as recognised by the law) or the living (either the deceased person ante-mortem or the surviving third party). Edwards' and Harbinja's original definition appears to ascribe the right of post-mortem privacy to the living: It is '…the *right of a person* to preserve and control *what becomes of* his or her reputation, dignity, integrity, secrets or memory *after death*.'[59] It is an ante-mortem right not a post-mortem one. In this way the 'right of privacy in death' attaches to the living person so that post-mortem privacy is not about 'rights of privacy for the dead' but the 'right of the living person for privacy when dead.' This interpretation is seemingly reinforced by Harbinja's analysis, within her doctoral thesis, of current and proposed protection of digital assets through the service providers for example:

> (Users) interests are therefore in the centre of the argument, underpinning findings in all the chapters, i.e. respecting autonomy and wishes of the deceased expressed pre-mortem with regard to the transmission of their assets on death.[60]

However, across the literature there is a lack of clarity as to how the concept of post-mortem privacy will be transcribed into rights and to whom they will be ascribed. Harbinja's analysis above does not appear to sit well with many of the explanations given in the literature, which suggest that the right of post-mortem privacy is to be ascribed to the deceased themselves.

4.3.1 Post-mortem Privacy Right for the Dead Themselves

As was seen in chapter 3 this thesis adopts the 'dead-are-gone assumption.' The dead are no longer in existence, although their physical body may remain and so too their 'public

[59] Edwards and Harbinja (n 1) 85.
[60] Harbinja (n 11) 31.

personae',[61] but they themselves, as a legal entity, do not exist. There is much scholarship, across numerous disciplines, about the status of the 'dead,' whether they can have rights (legal or otherwise) and if so, how they may be justified. Some legal scholars assert that there is no definitive answer as to when the legal personality dies and thus no definitive answer as to whether or not the dead can have legal rights or interests.[62] As was seen in the previous chapter when exploring the existing laws applicable to 'dead people' (such as organ donation, medical confidentiality and testamentary freedom) the '…law proceeds upon the basis that the deceased, as a legal person, does not survive his physical death.'[63] This thesis adopts this approach. Consequently, it diverges from the assertion that the dead themselves can, and do, 'control, as a fact…the devolution of his property' otherwise known as the 'dead hand of control'.[64] This latter point is of significance in the critique of current post-mortem privacy literature, which relies upon the analogy with testamentary freedom as an example of how the law does recognise the 'extension' of a person's autonomy into death and thus should do the same with post-mortem privacy. This is an analysis with which this thesis disagrees, albeit it is in agreement with the argument that testamentary laws should take account of post-mortem privacy where possible. This however can only be, it is argued, through decisions made in exercising ante-mortem autonomy.

This is contrary to some of the current post-mortem privacy scholarship, which appears, or seeks, to ascribe the suggested right to the dead. We saw for example that Smolensky, asks '…why the law gives decedents certain legal rights but not others' and provides examples of legal institutions that she says protect the 'rights of the dead'.[65] There are also numerous examples in Harbinja's research where it is unclear whether the dead or the living are to be ascribed the legal right. Edwards and Harbinja's summation of the concept of post-mortem privacy is 'rights of privacy for the dead,'[66] and throughout her work Harbinja maintains that

[61] For non-consequentialists death does not end the 'public persona' made up of 'that which is said, thought and written about the person – subsisting in the speech and memory of the living persons…' This public persona survives death and 'this persistence is a point in favour of post-humous claims, as there is a complex post-humous person available to bear claim-ascription': Stephen Winter, 'Against Post-humous Rights' (2010) 27 (2) Journal of Applied Philosophy 186, 187.
[62] R Tur, 'The Person in Law' in A Peacoke and G Gillet (eds) *Persons and Personality: A Contemporary Inquiry* (Basil Blackwell 1987) 122.
[63] Ngaire Naffine, 'When Does the Legal Person Die - Jeremy Bentham and the Auto-Icon' (2000) 25 Austl J Leg Phil 79, 88.
[64] Lewis Simes, *Public Policy and the Dead Hand* (University of Michigan Law School 1955) 1.
[65] Kirsten Rabe Smolensky, 'Rights of the Dead' (2009) 37(3) Hofstra Law Review 763.
[66] (n 1) 85.

post-mortem privacy protects the 'privacy interests of the dead'[67] and has called the concept 'the deceased's right to privacy' when asking if it would be legally viable to recognise such within the EU Data Protection regime.[68] In addition, the 'new' definition specifically ascribes the right to the deceased himself in the broader context, although maybe to the living when it comes to the narrower definition of 'data protection': 'the *right of the deceased* to control his personal digital remains post-mortem, broadly, or the right to data protection post-mortem, narrowly defined.'[69]

In addition to the vocabulary and definitional suggestions, there are three distinct arguments addressed by the current scholarship that appear to show that they are arguing that the deceased themselves should be ascribed the right. The first – '…one of the most significant arguments against the legal recognition of post-mortem privacy is the lack of real harm to the user, that is, the deceased cannot be harmed or hurt.'[70] Harbinja counters this by using the '…analogy with the option to bequeath one's property' and says that if the deceased cannot suffer harm then they '…should not be interested in deciding what happens to their property on death as they would not be present to be harmed by the allocation'.[71] She appears to be saying, therefore, that the *deceased* can be *harmed* as she is countering the 'most significant argument' which says that they cannot be. In doing so it appears that she is seeking to attribute the right to the deceased themselves as they are the 'subject' of the harm.

Secondly, the argument advanced by Harbinja that a person's autonomy should 'transcend death' in the form of post-mortem privacy, thereby allowing '…an individual to control privacy, identity and personal data post-mortem…',[72] suggests that the right is being ascribed to the dead themselves rather than being exercised in life by the living person making provisions for after her death by way of a will, for example. This appears to mean the

[67] Harbinja (n 11) 4 and 11 '…the thesis discusses as part of its novel contribution to the literature the phenomenon of post-mortem privacy: ie: the privacy interest of the deceased'. 'Post-mortem privacy, a potentially contested phenomenon, only accentuates the need to account for the interests of the deceased more…' ibid 16.
[68] Harbinja (n 7) 22.
[69] Emphasis added. Harbinja (n 8) 5.
[70] Harbinja (n 6) 32, referencing H Beverley-Smith, '*The Commercial Appropriation of Personality* (CUP 2002) 124.
[71] ibid.
[72] Harbinja (n 6) 30.

deceased's autonomy should be recognised and thus the post-mortem privacy right is ascribed to the deceased herself.

The final incident is the apparent concession that as privacy is considered to be a human right under Article 8, and a personal one within the tort law regime, it does not survive death. This must surely exclude, therefore, the dead from protection of their privacy as a right bestowed upon them within either regime. Indeed, Harbinja highlights the fact the ECtHR maintains that '…Article 8 grants protection only to the living,' refusing to '…recognise this right to the deceased, unless their privacy is connected to the privacy of the living individuals.'[73] Thus she asserts that '...the legal conception of privacy as a human right (Article 8...) does not really offer arguments for the proponents of post-mortem protection.'[74] That, of course, is presently doctrinally correct, but normatively not so if the right is ascribed to the living person for post-mortem privacy. The point here, however, is that the scholarship is addressing an issue that would only need to be addressed if it was being suggested that the right to be protected should be that of the deceased's as opposed to a living person.

Therefore, the refined definition, the vocabulary used, and the arguments addressed, appear to show that the current scholarship are asserting that the post-mortem privacy right should be ascribed to the dead. However, this does not marry with a complete reading of Harbinja's research or with the majority of the solutions that are offered for post-mortem digital privacy protection. They are solutions that allow for the living ante mortem person to have the right in life to make decisions about what happens to their digital assets on death. The criticism here being made is that the stand-alone concept of post-mortem privacy as proffered by Harbinja and others, lacks clarity and precision. Some may say that such a critique is merely quibbling over semantics and inconsequential to the concept under discussion. The response to such a suggestion is twofold: first that proper legal protection is being sought,[75] and as such the law requires certainty and precision, the nature of which was outlined in the previous chapter. This chapter goes someway to showing how this is possible by utilising the guiding principles as to what is required to found a legal interest and right in accordance with the Hohfeldian and

[73] Harbinja (n 7) 25.
[74] ibid.
[75] Harbinja (n 11) 12 '…the thesis argues that this phenomenon (post-mortem privacy) merits policy and legal attention'.

interest theories, as was outlined in chapter 3. Secondly, the proposed definition allows protection for post-mortem privacy to be advanced in a coherent and overarching way rather than relying on piecemeal protection from different areas of law underpinned by different rationales.

4.3.2 Post-mortem Privacy Right for Another Entity

Post-mortem privacy literature proffers a second possible recipient of the post-mortem privacy right, other than the dead themselves, which shall be termed 'another entity' for the purposes of this thesis and meaning it is not a living or dead human being/person. There are three such theories which will be considered in chronological order for the sake of convenience.

In 2008 Sperling proposed an 'analytical solution' derived from the 'existence assumption.'[76] He asserts that there should be an 'interest in the recognition of one's symbolic existence'.[77] Namely the 'human subject' should be used in place of the concept of 'personhood,'[78] to 'categorise the existence' of the living. So, the human subject will *hold* all human *interests belonging* to the person whose interests they are.[79] This new conceptualisation of the human existence in the form of the human subject does not exist in a physical or material way, but its existence is 'logical' and 'temporal'.[80] Its 'significance lies in the fact that this subject belongs to the moral community of humans….bestowed with an entitlement merely to hold interests for the person whose interests they are, the defeat of which constitutes a legal harm.'[81]

Sperling utilises four categories of interests, two of which are potentially relevant: 'after-life' interests which apply '…only to states and events that happen after a person's death.' These include wills, life insurance policies, donor cards, bequeathing of one's body to medical research and such things as 'being remembered after death as a human being with specific

[76] Sperling (n 14) 34.
[77] ibid 46.
[78] ibid 38: 'Conceptualizing our existence only in terms of the concept of personhood is too narrow an approach and leaves many important human interests unprotected at times when such legal safeguards are necessary.'
[79] ibid 35.
[80] ibid 36.
[81] ibid 37.

characteristics etc.'[82] The second relevant category is 'far-lifelong' interests which '…would apply to one's life but also to episodes after one's death.' Such interests could be 'in respecting one's privacy and good reputation.'[83] Whilst the human subject does not have these interests as they are those of the person, it *holds* those interests (during and after life) so that they exist after the death of the person whose interests they are, as the human subject exists after death.[84] A legal harm may occur when any of these interests are defeated after death, with the 'harmful condition' occurring 'simultaneously' with the 'harmful act,' and the subject harmed being the human subject, not the ante-mortem person who is no longer in existence.[85]

Sperling provides legal support for the recognition of the symbolic existence in the 'living defamation and privacy laws' as they 'protect the way a person's 'story of life' is being told…' and in case law such as *Bland.*[86] Sperling argues that the law is seeking to protect something 'additional to the person's physical existence' and that which is akin to the 'interest in the recognition of one's symbolic existence.'[87] According to Sperling, it follows that by accepting the human subject's existence persists over time and holds a person's interest beyond their lifespan, '…there should be no prime facie conceptual difficulty in holding that this subject can also be a *potential* right-holder.' [88]

Sperling is taking as the basis for his 'symbolic existence' theory what is termed in this thesis as 'intuition', which will be discussed in detail in the next chapter. It is that which arises from the apparent legal acceptance of certain 'rights' of the dead, the rationality with which Lord Hoffmann was unconcerned, '(I)t is enough that they are deeply rooted in our ways of thinking and that the law cannot possibly ignore them.'[89] Using Sperling's symbolic existence, the law could choose to protect the 'interest' of the dead without the need to resolve the difficulties associated with the harm thesis namely, 'harm', 'subject' or 'time' which will be discussed in

[82] ibid 14.
[83] ibid 14. Dorothy Grover argues that posthumously thwarting these type of interests affects 'whether people are the kinds of people they take pains to be' in 'Posthumous Harm' (1989) 39 Philosophical Quarterly 334, 351.
[84] Sperling (n 14) 39.
[85] ibid.
[86] ibid. *Airedale N.H.S. Trust –v- Bland* [1993] AC 789. This case is considered in detail in chapter 5. It deals with a young man in a permanent vegetative state as a result of being injured in the Hillsborough disaster.
[87] Sperling (n 14) 46.
[88] ibid 50. Sperling's theoretical concepts are followed by a practical analysis of 'posthumous interest' in a medico-legal context. He did find that there are problems on a theoretical, practical and normative level, the latter being found in the difficulty the law has in categorising the 'legal dilemmas which death situations provoke' and for Sperling the 'conflicting values arising out of these disputes are difficult to frame', ibid 176.
[89] *Airedale* (n 89) 829 [C].

chapter 5. Thus, if we were to use Sperling's categories of after life and far lifelong interests '… for interests to be fulfilled, it is justifiable to argue that the value of one's life extends beyond one's lifespan and that some interests that belong to the person continue to have effect after her death'[90]

The second theory is Buitelaar's 'forward looking theoretical argument' which may well provide '…protection for the various forms of post-mortem presence that are likely to subsist in the future.'[91] It effectively ascribes a person's 'digital double' the right to post-mortem privacy (again dealing solely with digital remains). The post-mortem digital persona should be endowed '…with an appropriate locus in the legal framework that governs the survival or extinction of the rights and duties of subjects.'[92] Effectively this 'life form' is being supplanted as the bearer of the 'continuation of the privacy rights of the ante-mortem owner'.[93] He therefore argues that due to the '…overwhelming persistence of digital persona on the internet without there being a living counterpart…' the post-mortem digital persona should be endowed with this 'appropriate locus.' [94]

Buitelaar accepts that the accommodation of a right to privacy of '…such a life form as the continuation of the privacy rights of the ante-mortem owner' is beyond the present legal system. However, he does not rule out that it may be in the future and argues that '...fundamental human rights need not be limited to the rights of the living human beings.'[95] This thesis does not seek to undermine Buitelaar's argument that a post-mortem digital persona *could* exist and *could* be given appropriate legal status to protect 'digital remains.' As will be seen this thesis, and the framework it establishes, can co-exist with many of the solutions offered within existing scholarship in relation to digital remains and also can assist in their justification. However, unless the nature of 'fundamental human rights' changes, they are grounded in foundational values of which dignity and autonomy are uppermost. It is therefore necessary for a legal post-mortem privacy right to be justified accordingly. This thesis, and in

[90] Sperling (n 14) 32.
[91] Buitelaar (n 13) 131.
[92] ibid 135.
[93] ibid 139.
[94] ibid 135.
[95] ibid 131.

particular the arguments in chapter 5, relating to intuition and harm, therefore, can assist in supporting and providing justification for these alternative personae being ascribed this right.

Most recently, Harbinja looked at 'digital assets and death' and introduces the notions of informational bodies (a philosophical concept),[96] immortality and post-mortal society (sociological concepts),[97] to support her new concept of 'post-mortal privacy'[98] and indeed the 'new' definition of post-mortem privacy. Her aim was to consider theory and concepts that went beyond theories of property, intellectual property and privacy, where research relating to the 'concept of digital assets' had previously concentrated, to 'offer a comprehensive framework and a more nuanced normative support for future policy and law...'[99]

Harbinja asserts that post-mortem privacy is 'conceptually…closely related to Floridi's notion of 'informational body.' This says that human beings exist through information related to their identity.[100] Thus Floridian ethics maintain that a person has a '…right to control one's personal identity…an informational structure, constituted by everything that defines this identity…' (memories, search history etc.)[101] Therefore individuals are essentially their own information and thus '…their personal data are their informational bodies' so data should be seen as being 'ours' as in 'our body' as opposed to 'our car'. This informational body attaches to both the living and the dead and is applied regardless of a person's un/awareness of, Harbinja argues, having their privacy compromised.[102] Infringement of informational privacy is therefore an act of aggression to the specific person and to humanity and more generally 'human dignity.' To maintain one's dignity is a key for remaining the master of one's existence in the world.[103] Ohman and Floridi argue that '… the dead's informational body continues to have the right to

[96] Harbinja (n 8) 6, citing the Floridian concept as explored in 'Distributed Morality in an Information Society' Science and Engineering Ethics (2013) 19 (3) 727–743; *The Ethics of Information* (OUP 2013); *The Fourth Revolution—How the Infosphere is Reshaping Human Reality* (OUP 2014).
[97] Harbinja (n 8) 7 citing Michael Hviid Jacobsen, *Post Mortal Society: Towards a Sociology of Immortality* (Routledge 2017).
[98] Harbinja (n 8) 2.
[99] ibid 1.
[100] This is similar to Marx's 'inorganic body metaphor' which is explained by Harbinja (n 8) 6, as being the production of objects by oneself which if exploited (the works and the labour) means that capitalism is alienating the self. This comes as result of the exploitation of the digital remains of the deceased where one's informational body is being alienated and commercially used post-mortem.
[101] Harbinja (n 8) 6.
[102] akin to the 'unaffected' harm principle to be discussed in chapter 5.
[103] The concept of dignity was discussed in chapter 3 and will be developed in chapters 5 and 6.

be treated with respect and dignity worthy of human existence even after the end of their physical existence.'[104] Harbinja sees an analogy with the '…protection that the law traditionally offers to the physical body and its integrity post-mortem, as well as the fact that the organic body is not considered property in most legal systems.'[105] If we treat the human body with respect after death, by analogy, we should provide for the same treatment for the informational body, underpinned by dignity and autonomy.

4.3.3 Post-mortem Privacy Right for the Living

(a) Ante-mortem Person

Whilst the post-mortem privacy literature is not *ad idem* as to whether the dead themselves can be ascribed the right, there is agreement on its non-ascription of the right to the living. Only Buitelaar raises the possibility and goes on to reject such an argument on the basis that to do so '...could only provide a limited form of protection, as it would be restricted to honouring ante-mortem expectations.'[106] This thesis disagrees that such a limitation is inevitable and argues that it is the living who have the interest in what happens after their death. Thus, we are looking at the 'different kinds of interests and rights of the living' rather than 'between the respective rights and interests of the living or dead.'[107] This thesis therefore argues that the post-mortem privacy right should attach to the living person. Chapter 5 develops the rationales and theoretical underpinnings for such an argument and provides the framework within which this right could function in law, allowing for the extension of a person's Article 8 right post-mortem, with the addition of a 'guardian post-mortem' to enforce it.

It is predominantly the harm principle which acts as the theoretical underpinning justifying the ascription of the privacy right to the living person. In summary, this thesis aligns with the Feinberg/Pitcher theory of unaffected harm: a person can be harmed in life by that which they

[104] Harbinja (n 8) 6. Carl Öhman and Luciano Floridi, 'The Political Economy of Death in the Age of Information: A Critical Approach to the Digital Afterlife Industry' (2017) Minds & Machines (27) www.researchgate.net/publication/319632601_The_Political_Economy_of_Death_in_the_Age_of_Information_A_Critical_Approach_to_the_Digital_Afterlife_Industry accessed 12 January 2020. Floridi "On Human Dignity as a Foundation for the Right to Privacy" (2016) 29 Philosophy & Technology 307.

[105] Harbinja (n 8) 6, citing Margaret Brazier, 'Retained Organs: Ethics and Humanity' (2002) 22 (4) Legal Studies,550; J Herring, *Medical Law and Ethics* (OUP 2016).

[106] Buitelaar (n 13) 131.

[107] Geoffrey Scarre, *Death* (Acumen Publishing Limited 2007) 48.

do not know about, for example harm to reputation can occur even if one is unaware that defamation has occurred.[108] The 'Pitcher logic' means that any intrusion resulting in a loss of the deceased's interest in maintaining her private life, means that she was harmed in life even if she did not know that this would occur. This thesis develops this philosophical stance into a legal argument.[109] As there is clearly no legal right in the UK to privacy after death, living people can actually be aware of the potential harm that can befall them subsequent thereto. In other words, the very absence of a right creates or causes potential current harm based on a future outcome. As was seen in chapter 3, this is unlike a testamentary wish in a will not being honoured, as most people believe that they will be and that the law protects them. Or unlike the person's family not thriving, or their reputation being trashed, all of which they will not know of in life. So the consequence of the after-death invasion of privacy for the ante-mortem person, is an even greater harm than that envisaged in the Feinberg/Pitcher argument, by virtue of the knowledge in life that this can occur in death.[110] 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, thereby defeating the rationales behind the privacy interests and rights outlined in chapter 2, namely autonomy, dignity, mental health etc. This justification, which is explored in depth in the next chapter provides support for the assertion that the right of post-mortem privacy should be ascribed to the living person.

Of course there are the arguments arising from the 'death culture', the notion of 'effecting assurances' and society's 'intuition' that the dead should be respected and treated with dignity, that provide additional support for post-mortem privacy protection, all of which will be discussed further in the next chapter.

(b) Surviving Person: Post-mortem Relational Privacy

This section will explore the second 'living' person that it is argued can and should be ascribed a post-mortem privacy right.[111] The surviving relatives do in fact have an ordinary Article 8

[108] Joel Feinberg, *The Moral Limits of the Criminal Law* (OUP 1984-988); 1984; George Pitcher, 'The Misfortunes of the Dead' (1984) 2 American Philosophical Quarterly 183.
[109] in chapter 5.
[110] It could be said that a person who has obtained an injunction under Article 8 whilst living can be virtually certain that once dead the matter is likely to be published (it may of course depend of the length of time between the granting of the injunction and the death). This will be explored further in chapter 5.
[111] This thesis uses the term 'post-mortem relational privacy' as defined by Ana Hering, 'Post-mortem Relational Privacy: Expanding the Sphere of Personal Information Protected by Privacy Law (University of Florida 2009)

privacy claim if their privacy interests are directly affected by the disclosure of information about the deceased. So, the intrusion into the deceased's privacy has the consequence of intruding into the privacy of the surviving relative, for example, the deceased's diaries contain private matters about the relative. In these circumstances the relative would have their own Article 8 claim preventing the disclosure of the private matters as an intrusion into the deceased's privacy (the disclosure of their diaries) is directly affecting the surviving relative by disclosing private matters about them also. However, this is a simple Article 8 right of the living person and does not rely upon the relationship with the deceased to form a claim. This can be seen if we consider the position of Soldier X's lover who would have a freestanding claim to prevent the disclosure of his own homosexuality and the affair by the publication in the newspaper of Soldier X's involvement.

It is the second way in which a surviving relative may have a post-mortem privacy right under Article 8 that is of interest to this thesis and which forms the subject matter of this section before being developed further in chapter 6. Described as 'post-mortem relational privacy', it is an emerging concept whereby a relative can have a legal privacy interest which relates to the disclosure of information about the deceased which arises from their 'close relationship' with her. Described by Hering as '…the idea that family members have a privacy interest in death related information about their deceased relative.'[112]

Post-mortem relational privacy is a concept that has received very little attention from the academic world, and only marginally more in the legal one, of the UK. The definition, and theory underpinning this concept, is therefore sourced from American scholarship and jurisprudence, which is, in itself, limited to 'death related information' about the deceased such as autopsy and death scene photographs. Originally described by Mills as 'relational privacy' this concept was seen as an '…approach to protect intrusions that occur to relatives of a

12. This is rather than simply 'relational privacy' or 'familial privacy' as these terms can also include matters between living people as well as between the deceased and surviving relative(s). Jan Bikker also uses the term in 'Disaster Victim Identification in the Information Age: The Use of Personal Data, Post-Mortem Privacy and the Rights of the Victim's Relatives' (2103) 10 (1) SCRIPTed 57, when seeking to 'raise awareness of post-mortem privacy related themes associated with disasters and in particular the issues affecting the deceased and needs of the surviving next of kin.

[112] Hering (n 114) 12 and 252. However, Hering does at p 207, take on a wider definition of a 'privacy interest in *information* about their dead relative' so not limited to 'death related' information. It is clear however that her analysis does not go beyond 'death related information'.

deceased person.' It did so by recognising that relatives can have privacy interests which relate to the disclosure of information about the deceased.[113] It was not seen as a 'distinct remedy' but more like a 'judicial doctrine' which was 'employed through court interpretation.'[114] Hering, building on Mills' work, inserted 'post-mortem' into the labelling of the concept on the basis that this more aptly describes the concept.

This section will introduce post-mortem relational privacy by outlining its development within the US jurisprudence and academic literature which has arisen out of a number of high-profile cases relating to the disclosure of death scene and autopsy images and records. The purpose of doing so is to establish the rationales and justifications for the concept so as to lay the groundwork for the contention, in chapter 6, that a post-mortem relational privacy right should be developed under Article 8.

(i) Development of the Concept in US Jurisprudence

Post-mortem relational privacy is founded upon two underlying principles, firstly, that family members maintain a relational status with a deceased relative,[115] and secondly the surviving relatives may have a privacy interest in information about their deceased relative. The information takes on a 'posthumous value to the decedent's surviving relative.'[116] It is these interests that post-mortem relational privacy seeks to protect either by preventing disclosure of private information about the deceased or by providing redress, through the award of damages, after such information has been wrongly disclosed.

The first shoots of the modern day post-mortem relational privacy concept in the US were seen in the 1990's. During that decade there were three cases that garnered media interest and saw the courts refuse the release of death related information about the deceased on the basis that to do so would breach the surviving relative's privacy interests. The first, in 1991, was that involving the NASA tapes of the *Challenger* space shuttle crew's last words. All seven

[113] Jon Mills, *Privacy: The Lost Right* (OUP 2008) 200.
[114] ibid 194, referencing 'relational privacy' not in specific post-mortem context but where harm caused to a close relative is seen as a 'harmful intrusion to the individual'.
[115] evidenced, for example, in inheritance rights, wills and trusts, see Hering (n 114) 16.
[116] Bikker (n 114) 60.

members of the crew died moments after the launch in 1986. The tragedy attracted international attention. The court refused disclosure of the tapes, finding that to do so 'would constitute a clearly unwarranted invasion of the families' personal privacy.' It noted that '(e)xposure to the voice of a beloved family member immediately prior to that family member's death is what would cause the *Challenger* families pain.'[117]

Two years later in 1994 the court in *Rolling v State*[118] made reference to the *Challenger* case in deciding whether crime-scene and autopsy photographs of the victims of brutal murders should be disclosed. Jon Mills[119] made the argument on behalf of the families, which the court accepted, that close relatives had privacy rights of their own, separate and distinct from the deceased, that release of the photographs would breach. The court described the test to be applied to the question of whether the images should be publicly disclosed 'as balancing the public's right to know against residual privacy interests of the victims' relatives.'[120] The court found that the families' right of privacy was 'either derivative from the victims themselves or in their own right'[121] and referred to the decision in *Challenger* in determining that the right was based on their relationship with the deceased. The court also found that had they survived, the murder victims themselves, would have been able to prevent the disclosure of the photos and thus so too should their relatives.[122] This almost sounds like a nod to allowing the privacy interest of the deceased, whilst living, to be passed on to the surviving relatives, something which is clearly not entertained in the US, or indeed European or UK law. Of course, what the court appears to be highlighting is that the privacy interests are one of the same in that the relatives of the deceased will clearly be affected, as would the living victim, if those photographs were published.

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[117] *N.Y. Times Co. v. Nat'l Aeronautics & Space Admin,* 782 F. Supp. 628 (D.D.C. 1991), 631.
[118] *State v. Rolling*, 1994 WL. 722891, 3 (Fla. Cir. Ct, Alachua County, July 27, 1994).
[119] John Mills is an American Professor who in addition to teaching and writing on privacy represented the family members of the deceased: victims of murderer Danny Rolling, to prevent the reproduction of crime-scene photographs; family members of Gianni Versace in *Versace v State Attorney of Florida (Dade County),* No. 097-29417 CA 32 (F;. Cir. Ct. filed Dec 30 1997) to close the record including autopsy and crime scene photographs and the widow of the NASCAR driver Dale Earnhardt in *Earnhardt v. Volusia County, Office of the Ed. Exam'r*, No 2001-30373-CICI (Fla. Cir. Ct. July 10,2001) to prevent the release of the autopsy photographs (discussed later in this section).
[120] Mills (n 116) 166. A similar test to the Article 8 and 10 balance in the Human Rights Act.
[121] *Rolling* (n 121).
[122] Mills (116) 28. The court considered the public interest and allowed the inspection of those photos that had been seen by the jury, under supervision, with no copies allowed. The subsequent case involving the death of designer *Versace* (n 122) saw the court close the records completely, the difference being that no trial had taken place due to the alleged murderer's suicide, so the photos were never seen in open court by a jury as they had been in the case of *Rolling*.

The final case in that decade to deal with post-mortem relational privacy was that of *Reid v Pierce County*,[123] where the Supreme Court of Washington held that 'the immediate relatives of a decedent have a protectable privacy interest in the autopsy records of the decedent. That protectable privacy interest is grounded, in maintaining the dignity of the deceased.'[124] The court did note that although it is the relatives who hold the privacy interest 'the locus of the dignity that suffers injury may actually be with the deceased.'[125] As has been argued in this thesis, the dignity of the dead is an important aspect in the justification of post-mortem privacy for the dead themselves and, as will be seen in chapter 6, it is equally important in post-mortem relational privacy and is increasingly being recognised in US law.

It was the high-profile death of Dale Earnhardt, in February 2001, which raised a 'voyeuristic controversy' resulting in a 'legacy of legislation and litigation.'[126] Earnhardt was a NASCAR racing driver who died as a result of a crash. His widow vehemently objected to journalists being allowed access to the autopsy photographs so as they could learn more about the cause of death and any safety issues.[127] She mounted a public campaign to prevent their release. Although the media's motive was not, in itself, voyeuristic, this case resulted in the Florida legislature passing a bill called the 'Earnhardt Family Protection Act.'[128] The Act made all photographs and videotapes of autopsies confidential and thus exempt from Florida's Public Record Act unless 'good cause' for disclosure was shown.[129] The public's outrage was perhaps reflected in the trial judge's words:

> Modern times have witnessed an erosion of the individual expectation of privacy to a pathetic point. …. Our society has tacitly accepted a standard that permits invasions of privacy of gross dimension, and we have become forgetful of some very basic concepts.

[123] 961, P.2d 333, 339 (Wash. 1998).
[124] Ibid 342 cited in Clay Calvert, 'The Privacy of Death: An Emergent Jurisprudence and Legal Rebuke to Media Exploitation and a Voyeuristic Culture' (2006) 26 Loyola of Los Angeles Entertainment Law Review 133, 155. There is a statute now protecting autopsy record cases under the Family Protection Act, FLA.STAT. 406.135 (2003).
[125] Calvert (n 127) 158.
[126] Clay Calvert, 'Revisiting the Voyeurism Value in the First Amendment: From the Sexually Sordid to the Details of Death' (2004) 27 (3) Seattle University Law Review 721, 723.
[127] *Earnhardt* (n 122). There had been a previous investigation into the safety of NASCAR racing.
[128] Now the Family Protection Act FLA. STAT. ch. 406.135 (2003).
[129] In the *Earnhardt* case (n 122) it was agreed with the family that the newspapers pathologist could access and inspect the photographs to ascertain whether there was a need for heightened NASCAR safety measures.

> Foremost among them is the simple notion that many things are nobody else's business.[130]

The pictorial records of death, and audio recordings of the moments prior to death, were being seen by the US courts as 'nobody else's business' and were being protected from disclosure on the basis that to do so would be a breach of the surviving relative's privacy. The concept of post-mortem relational privacy was developing and in 2004 received US Supreme Court recognition in the 'jurisprudentially revolutionary'[131] case of *National Archives & Records Administration v. Favish.*[132] For the first time the court recognised '…that surviving members enjoy a privacy interest that must be considered when analysing the release of agency records.'[133] The case garnered international attention primarily as it involved a former aide of Hilary Clinton, Vince Foster. Foster was found dead of gunshot wounds in a park in Washington DC and despite numerous inquiries finding that he had committed suicide, some believed that he was murdered. Favish was one of them and he sought disclosure of the death scene photographs of Foster under the Freedom of Information Act (FOIA). The court found that the photos fell within exemption 7 (C) of the FOIA which provides that 'records or information compiled for law enforcement purposes' are exempt from disclosure if their production 'could reasonably be expected to constitute an unwarranted invasion of personal privacy.'[134] The decision was based not on Foster's own privacy but that of his surviving relatives who wanted to 'secure their own refuge from a sensation seeking culture, for the sake of their own peace of mind and tranquility, not for the sake of the deceased.'[135] Justice Anthony Kennedy, on behalf of a unanimous court, stated that:

> Family members have a personal stake in honoring and mourning their dead and objecting to unwarranted public exploitation that, by intruding upon their own grief,

[130] Ibid *5.
[131] Calvert (n 127) 135.
[132] 541 U.S. 157 (2004).
[133] Joseph Romero, 'National Archives & Records Administration v. Favish: Protecting Against the Prying Eye, the Disbelievers and the Curious' (2004) 50 NAVAL L. Rev. 70.
[134] *Favish* (n 135) 7 (Justice Kennedy). The initial question had been whether this exemption could extend to the deceased family and on finding that it could the court went on to consider whether that privacy claim was outweighed by the public interest in disclosure.
[135] ibid 8 (Justice Kennedy).

> tends to degrade the rites and respect they seek to accord to the deceased person who was once their own.[136]

Justice Kennedy provides here a simple summation of that which has been discussed in previous chapter as the 'death culture' in addition to societal intuition to accord respect to the dead.

Although the case itself, like that of the *Challenger* case, was dealing with the statutory construction of the FOIA and government agency records, it can be seen, as Calvert asserts, that the reasoning of the court went much further than that. It found that the term 'personal privacy' was 'intended to permit family members to assert their own privacy rights against public intrusions long deemed impermissible under the common law and in our cultural traditions.'[137] Calvert proffered the view that the word 'personal' could be construed in these circumstances as 'familial.'[138] And although this did not mean that family members were in the same position as the 'subject of disclosure' the court said that they had little difficulty

> …in finding in our case law and traditions the right of family members to direct and control disposition of the body of the deceased and to limit attempts to exploit pictures of the deceased family member's remains for public purposes.[139]

Of note was that the court looked at the 'respect in almost all civilizations from time immemorial' that is paid to burial and funeral rites,[140] and saw these as 'a sign of respect a society shows for the deceased and for surviving family members.'[141] These cultural traditions surrounding the dead were discussed in chapter 3, where it was established that the foundations of the considered laws pertaining to the dead, were based on a 'death culture' that placed high importance on maintaining respect for, and the dignity of, the dead for a variety of reasons. They are key components for the post-mortem privacy concept and play an equally important role in the post-mortem relational privacy concept.

[136] ibid 9.
[137] ibid.
[138] Calvert (n 127) 154. Article 8 of course includes both 'private and family life' within its definition.
[139] Favish (n 135) 7.
[140] ibid citing generally 26 Encyclopaedia Britannica 851 (15th edn. 1985).
[141] Favish (n 135) 8.

Whilst the *Challenger* and *Favish* cases dealt with whether a federal agency had properly applied the exemption under the FOIA by refusing to disclose the information sought, the *Rolling* and *Earnhardt* cases involved state legislation, so the decisions were not binding on other states. However, the courts found in each that the disclosure of certain death related information held by the government would have been an 'unwarranted invasion of the surviving relatives' privacy' and would cause 'further suffering.'[142] It is clear that the court's reasoning allows for the conclusion that they were united in the opinion that 'an individual's privacy interests are not limited to information about him or herself.[143] The 'ambit of personal information for which an individual may seek protection includes information about one's dead relatives.[144] Of course the decisions were only in relation to 'death related information' and thus the developing post-mortem relational concept was limited accordingly. This thesis will argue that in relation to an Article 8 post-mortem relational privacy claim, the rationales and justifications vocalised by the US courts provide support for a concept that goes beyond 'death related information' and incorporates private information about the deceased that is not necessarily 'death related.'

According to Calvert the *Favish* decision 'fuelled' the subsequent growth in the privacy of death cases[145] which either sought the suppression of images and information about the dead, or the punishment of those that had published such matters. Cases of note are firstly, the action against Harper's magazine for the publication of a photograph of a private, open casket funeral of a National Guardsman killed in Iraq.[146] The court made an important distinction between this case and other cases that have examined the issue: '[c]ourts that have found an invasion of privacy have done so when the case involves death-scene images such as crime scene or autopsy photographs.'[147] In this case the photos were not gruesome images but of a soldier in military uniform and therefore not protected.[148] Secondly, in 2005 the Court of Appeals of New

[142] Hering (114) 19.
[143] ibid.
[144] ibid.
[145] Calvert (n 127) 136.
[146] *Showler v. Harper's Mag, Found*, Case No. 05-CV-178-S (E.D. OKla June 14, 2005).
[147] Catherine Leibowitz, 'A Right to Be Spared Unhappiness: Images of Death and the Expansion of the Relational Right of Privacy' (2013) 32 Cardozo Arts & Ent LJ 347, 352.
[148] In this respect, the original executive order of President Bush in 1991 known as the 'Dover Policy,' with its stated rationale of grieving families having a right to privacy and that public access to such ceremonies was an unwarranted invasion of that right, was ripe for criticism. The Order restricted public access to honour guard

York prevented release, on application of the New York Times, of the 911 emergency telephone calls from the 11th September 2001 terrorist attack on the World Trade Centre.[149] The court recognised that 'the surviving relatives have a legally protected privacy interest' and found that:

> It is normal to be appalled if intimate moments in the life of one's deceased child, wife, husband or other close relative become publicly known, and an object of idle curiosity or a source of titillation. The desire to preserve the dignity of human existence even when life has passed is the sort of interest to which legal protection is given under the name of privacy.[150]

The literal words of the court clearly allow for greater scope to a post-mortem relational privacy concept than merely 'death related information' with reference to 'intimate moments in the life of …' and the 'desire to preserve the dignity of human existence.' They are also reflective of the discussion in previous chapters, in particular in chapter 3 and what will be seen in chapters 5 and 6. There is an intuition and desire to respect the dead and protect their dignity even though they are no longer in physical existence. Here it matters not that they will not know that their last moments are played out in the media, the surviving relatives will know, and it is they who the law is increasingly willing to protect in certain circumstances. Of course, as a corollary the deceased themselves are protected by the non-disclosure of their last moments.

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ceremonies for service members killed in overseas conflicts and made the government-generated photographs of these events exempt from public disclosure. However, President Bush was accused of manipulating privacy concerns in an attempt to hide the human cost of the Iraq War and in 2005 it was repealed. Summary from Ana Hering, 'Killed in Action: Limitations of Post-mortem Relational Privacy Jurisprudence' (International Communication Association Annual Meeting, 2007) <https://search.ebscohost.com/login.aspx?direct=true&db=ufh&AN=26950422&authtype=sso&custid=s8993828&site=eds-live&scope=site. Accessed April 14, 2020> accessed 20 October 2019.

[149] *Providence Journal Co. v. Town of W. Warwick*, No. 03-2697, 2004 R.I Super. Ct, LEXIS 136, *6, cited in Calvert (n 127) 136.

[150] *N.Y. Times Co. v. City of N.Y. Fire Dep't*., 829 N.E.2d 266. 269 (N.Y. 2005) The Courts decision echoed that in the Challenger space shuttle case in 1991: *N.Y. Times Co. v. Nat'l Aeronautics & Space Admin,* 782 F. Supp. 628, 633 (D.D.C. 1991) Similarly, in *Providence* (n 152) *6-8, Judge Pfeiffer stated that the court could not '…conceive of a greater affront to such *dignity* than permitting others to listen to the anguish that is embodied' in the dying victims 911 emergency calls. '…these communications are entitled to protection whether initiated by victims or family members to avoid a highly intrusive interference with legitimate privacy entitlement these individuals should be afforded' (Judge Pfeiffer) 6-7.

The final US case of note is that of *Marsh v County of San Diego* in 2012,[151] in which the court found that the common law right to non-interference with a family's remembrance of a decedent was so '…deeply rooted in this Nations' history and tradition, and implicit in the concept of ordered liberty' that it should be constitutionally protected.'[152] It is of course accepted that there is no direct comparison between the US and UK common law jurisprudence so far as non-interference with a family's remembrance is concerned, as indeed, there was none in relation to the FOIA provisions and autopsy records being public documents, for example.[153] The purpose of this section is not to compare the two legal systems and their provisions, but to highlight how the post-mortem relational concept has been developed in the US and to consider the rationales of the court for doing so. This coupled with the academic analysis of post-mortem relational privacy provides the understanding of the concept which, although not in obvious existence in the UK, can be seen in some form, for example, in Clause 4 'Intrusion into Grief or Shock' of the IPSO Editors Code,[154] or the comments made by Lord Justice Leveson at the conclusion of his Inquiry,[155] as well as in some medical cases,[156] and is tentatively being recognised by the ECtHR as is outlined in the following section. Chapter 6 utilises the discussion here to develop a post-mortem relational privacy right under Article 8.

(ii) **ECtHR Recognition of Post-mortem Relational Privacy**

The ECtHR has shown a willingness to recognise post-mortem relational privacy rights within very strict boundaries. The first case that really dealt with privacy issues concerning a dead person and his relatives was that involving President Mitterrand.[157] The decision of the court and its language[158] showed that there was an emerging recognition of post-mortem relational

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[151] *Marsh v County of San Diego*, 680 F.3d 1148 (9th Cir.2012).
[152] ibid 1154.
[153] In the UK post-mortem records are considered confidential medical records and thus not public documents unless they have been disclosed in a Coroner's Court which is public proceedings. Even then application need be made to the Coroner as an 'interested party' which is defined in s 47(2) of the Coroners and Justice Act (CJA) 2009 and includes a long list of classes of people such as, *inter alia*, the personal representative of the deceased, the deceased's spouse, civil partner, partner, parent, child, siblings, grandparents, step parents and half siblings.
[154] <www.ipso.co.uk/editors-code-of-practice/#IntrusionIntoGriefOrShock> accessed 10 December 2019.
[155] *Report into the Culture, Practices and Ethics of the Press* (2102) <www.gov.uk/government/publications/leveson-inquiry-report-into-the-culture-practices-and-ethics-of-the-press> accessed 9 June 2019.
[156] For example, *Pauline Bluck v The Information Commissioner and Epsom and St Helier University NHS Trust*, (2007) 98 BMLR 1.
[157] *Editions Plon v France* App no. 58148/00 (ECtHR, 18 May 2004). Discussed in detail in chapter 6.
[158] It upheld the initial urgent injunction, granted to the deceased Presidents wife and children, to prevent the publication of a book detailing the private health matters of the President when in office. The court did so on the basis that '…it was necessary in a democratic society for the protection of the rights of President Mitterrand and

privacy of which the grieving relative can avail in certain circumstances and for a limited period of time. However, it is not just the 'grieving' relatives that may have a post-mortem relational privacy right and the case of *Putistin v. Ukraine* in 2013, was a significant development in the law.[159] The ECHR accepted '…that the reputation of a deceased member of a person's family may, in certain circumstances, affect that persons' private life and identity, and thus come within the scope of Article 8.'[160] It nonetheless emphasised that '…such a situation will occur in relatively exceptional circumstances.'[161] The latest case regarding Article 8 and the dead is *Dzhugashvili v. Russia,* which found that publications concerning the reputation of a deceased member of a person's family might, in certain circumstances, affect the person's private life and identity and thus come within the scope of Article 8.[162] Chapter 6 explores whether these European decisions, and the language used by the court, can form a basis for a recognised post-mortem relational privacy right which could in fact, indirectly, protect the dead themselves and if so how. Once again, the concept of 'harm' is important, this time explored within a relational post-mortem context and arguing that bereaved relatives can be harmed by the invasion of the deceased's privacy.

Having looked at the definition, scope and three categories of potential recipients, of a post-mortem privacy right, the remaining sections of this chapter will consider the theoretical underpinnings advanced as well as outline those relied upon for this thesis.

4.4 Theoretical Underpinnings

4.4.1 Autonomy and Testamentary Freedom

Autonomy is considered by Harbinja as the '…the key value driving the development of law in this area.'[163] It is said that post-mortem privacy '…builds on the conception of privacy as an aspect of one's autonomy. This means that autonomy should in principle transcend death and allow an individual to control their privacy/identity/personal data post-mortem.'[164] Thus

his heirs'. Ibid 26 [48]. The court did, however, go onto find that nine and half months after death there was no longer a pressing need justifying a continued ban.

[159] (2013) ECHR 1154. Discussed in detail in chapter 6.

[160] ibid 8 [33].

[161] ibid 12 [1] in the concurring opinion of Judge Lemmens.

[162] (2014) ECHR 1448.

[163] Harbinja (n 6) 28; Harbinja (n 11) 37 '…autonomy is a guiding principle of the entire thesis' and 37 '…autonomy and its relationship with…. post-mortem privacy' is '…the main underpinning value of the thesis…'

[164] Harbinja (n 6) 30.

autonomy should be '…extended on death, *inter alia* in the form of post-mortem privacy.'[165] Harbinja asserts this would be analogous to the 'post-mortem control of property through the concept of testamentary freedom…' This is because it is '…another concept that implies the extension of an individual's autonomy on death, by way of disposing of his property through a will.'[166] In summary, Harbinja argues that theories of autonomy translate into theories of privacy because privacy is an aspect of autonomy, which she then uses to conceptualise post-mortem privacy. Here post-mortem privacy is seen as an extension of autonomy post-mortem (with regards to the disposal of property) analogous with testamentary freedom. This thesis takes issue with the arguments outlined above on two counts. First, that autonomy can transcend death and secondly, that testamentary freedom is an example of it so doing.

Autonomy in relation to privacy was discussed in chapter 2. Suffice to say that the argument against autonomy transcending death is summed up by Buitelaar when he says that the deceased cannot '…exercise human autonomy as an active agent in the traditional, legal sense…'[167] In addition, the examination of testamentary freedom in chapter 3 showed this to be a misconceived analogy, for it is the living person's autonomy that is honoured through succession law and this does not, and cannot, extend beyond death, by implication or otherwise. It is not post-mortem 'control' of property that is taking place but 'ante-mortem control' of property. There is no control when dead, as amendments cannot be made by the deceased: - they cannot enforce their own wishes, and there is a physical impossibility for them to control their property. Harbinja uses the analysis of testamentary freedom as a conceptual comparison 'in order to relate this general concept to post-mortem autonomy and post-mortem privacy.'[168] However she bases her right to post-mortem privacy on the right of 'post-mortem autonomy'. It is argued here that this is a fiction as post-mortem autonomy cannot exist. In reality it is the exercise of what Cantor calls 'prospective autonomy', or ante mortem autonomy. Decisions and choices are made in life, to affect events beyond one's death. However, unlike the impossibility of post-mortem autonomy, there can be post-mortem privacy for this requires no right of, or decision to act by, the deceased, but merely the living to act upon their 'duty' to

[165] ibid 28.
[166] ibid 87.
[167] Buitelaar (n 13) 132.
[168] Harbinja (n 6) 28.

ensure that post-mortem privacy is afforded to the dead consistent, it is argued, with the decedent's Article 8 right in life.

Buitelaar's solution to the fact that there can be no legal post-mortem human autonomy is to reconsider '…the implementation of the notion of human autonomy' to 'digital representations of the self.'[169] In addition he utilises various aspects of 'respect' for the dead to support further some form of post-mortem privacy. This thesis develops this notion in the form of 'intuition' and in particular what it calls 'legal intuition' whereby courts are showing a willingness to implement the intuitive desire to respect the dead and indeed their privacy and that of their families.[170] Supported by the notions of the 'death culture' and 'effecting assurances' discussed in chapter 3, together with the concept of harm to be discussed in chapter 5, the right of post-mortem privacy is justified without the need to argue that human autonomy transcends death, a notion that this thesis argues is unsupported by the theories of autonomy.

It is important to say that it is agreed, for all the normative and legal doctrinal reasons Harbinja explores in her work,[171] that digital assets should not be propertised so as to allow their transmission on death through the 'proprietary regime.' She rejects the idea of digital assets being property either in the traditional sense (so that which could be bequeathed under the laws of succession) and also as 'new' new property.[172] This is despite the fact that this would be a much easier route in which to protect digital assets and one that is argued by others. However, if digital assets are not property it is difficult to see conceptually how freedom of testation can '…translate into the online environment…'[173] on the basis that they '…are a counterpart of the offline assets and wealth.'[174] Buitelaar rejects this possibility and uses a 'strict juridical interpretation' when asserting that succession laws '…relate only to what happens to the assets with economic value[175] someone leaves behind after his death…'[176] He says that the succession laws therefore do not assist in deciding '…who inherits the persistence of the non-economic,

[169] Buitelaar (n 13) 132.
[170] Developed in chapters 5 and 6.
[171] Harbinja ibid (n 13), (n 7) and (n 8).
[172] Harbinja (n 8).
[173] where digital assets mainly comprise of informational and personal data content.
[174] Harbinja (n 11) 102. Harbinja (n 6) 31.
[175] This is not strictly the case as there are non-economic offline 'assets' that can be transferred through the law of succession such as letters or diaries that may have no economic value but do have a sentimental value.
[176] Buitelaar (n 13) 134.

digital elements of the deceased's physical, psychic and moral personality as represented in the vicarious digital double of his ante-mortem self.'[177] It is also difficult to see where privacy as a concept comes into testamentary freedom as it is not 'an asset or wealth.' Of course, it would be welcomed if legislative changes allowed a person to transmit their digital assets, in the same way as offline assets, as a form of ante-mortem autonomy, which may indirectly protect post-mortem the private matters contained therein. Representations made to the House of Lords Select Committee on Communications,[178] in relation to the internet, and to the Law Commission's 'Making a Will' consultation paper,[179] are applauded as both seek to ensure that inter alia, digital remains are protected and users are given autonomy, in life, to choose what happens upon their death. However, for the reasons outlined above it is not considered to be post-mortem privacy that is being protected here.

This thesis therefore argues against the use of testamentary freedom in two respects: first its use as an analogy to show autonomy transcends death. Secondly, in this apparent use of privacy in a property context to justify the reforms sought in relation to digital assets by virtue of them not being regarded as property in law. Privacy is an important and fundamental (if often highly contested) human right in life under Article 8. It also has its limitations. Yet if digital assets are protected under the guise of 'post-mortem privacy' within succession laws then surely assets that are not private at all can be protected within this concept? It is the use of the post-mortem privacy concept in a testamentary freedom context that is challenged not the ends that are sought.

4.4.2 Harm

Harm, an integral part of the argument being advanced in this thesis, forms no part of the current legal scholarship on post-mortem privacy. The legal literature has not taken a comprehensive account of the concept of harm, as either a justification for post-mortem privacy or an argument against. This is despite it being recognised that '…one of the most significant

[177] ibid 135.
[178] 'The Internet: To Regulate or Not to Regulate? Summary of Response' submitted by the British and Irish Legal Education and Technology Association (BILETA) <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/communications-and-digital-committee/the-internet-to-regulate-or-not-to-regulate/written/82642.pdf> accessed 12 September 2019.
[179] 'Making a Will' Consultation Paper 231, 2017 < https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2017/07/Making-a-will-consultation.pdf> accessed 6 November 2018.

arguments against recognising post-mortem privacy is the lack of actual harm to the user, i.e. the deceased cannot be harmed or hurt.'[180] Although Harbinja, for example, rejects this argument it is fair to say that harm is not explored in any detail, either within the philosophical post-humous harm debate, or within its meaning in the existing tort or human rights regimes. The only real argument put forward is that of the analogy with testamentary freedom and the fact that if the argument that the dead cannot be harmed is correct then likewise '...the deceased should not be interested in deciding what happens to their property on death as they would not be harmed by the allocation.'[181] However as the 'deceased' does have an interest 'in deciding what happens to their property on death,' Harbinja argues that so too do 'users have interests in what happens after their death…'[182] The examination of testamentary freedom, in chapter 3, showed that harm is not considered as a rationale underpinning succession laws but economic factors and the interest of the living are, so it is suggested that this analogy is a misguided one in this respect.

Harbinja also agrees with Berg's assertion that the deceased '…are subject to less harm, so the protection should not equate to the protection granted to living persons, if it is to be awarded at all.'[183] There is a vast and complex philosophical literature in which Berg proffers her findings, very little of which appears to be considered by legal post-mortem privacy scholars. In addition, and despite the recognition that privacy is a tort[184] and a human right,[185] no exploration of harm within these frameworks is considered. The absence of any detailed analysis of the principle of 'harm' within legal post-mortem privacy literature is an omission that, it is argued, needs to be addressed. This thesis will demonstrate the importance of considering harm when it comes to justifying the legal protection of post-mortem privacy. It is argued that privacy is a human right under Article 8 which (as is the nature of such rights) requires an element of harm or wrong of some sort to enable its justification and thus enforcement. In addition, if, as is preferable, post-mortem privacy is to be protected as one

[180] Harbinja (n 18) 96. Harbinja (n 6) 32.
[181] Harbinja (n 18) 96.
[182] ibid and Harbinja (n 6) 33.
[183] Harbinja (n 7) 25, citing Jessica Berg, 'Grave Secrets: Legal and Ethical Analysis of Post-mortem confidentiality' (2001) 34 Connecticut Law Review 81, 94.
[184] Harbinja (n 7) 31. Harbinja accepts that 'a significant benefit of property over torts privacy regime is the principle that there is no need for individuals to demonstrate harm in order to be able to protect their property' (n 11) 194.
[185] Harbinja (n 11) 196: 'Propertisation would contradict with the human right nature of privacy'; '…privacy is inseparable from personhood, as a human right cannot be waived or transferred' Harbinja (n 7) 31.

consolidated right and not shoe-horned, in a piece meal way, into existing, often inappropriate and outdated legislative provisions, then harm is a concept that must be tackled head on. Without dealing with harm, a human rights framework for post-mortem privacy is surely unattainable and certainly far less justifiable than an argument underpinned by the principle.

In summary, the conclusion that will be reached in chapter 5 is that knowing that Article 8 protection does not transcend death, the living suffers from the so-called 'chilling effect.' In a legal context this describes the 'inhibition' or 'discouragement' by the subject chilled, of the exercise of their natural and legal rights. Thus, the risk of the revelation of private matters when dead[186] can cause the subject 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 that risk. Consequently, they could indeed suffer in advance of the 'posthumous harm' being executed. They can experience 'harm' in life by not having liberty of action in virtue that their actions may, or will, become public knowledge upon death. McGuinness and Brazier assert that the prospect of posthumous harm occurring can actually cause harm to the interests of the living person.[187] A person may 'experience harm in the sense of considerable anxiety and unhappiness whilst alive.'[188] The thought of private matters becoming publicly available which may sully her reputation or embarrass, shock or disappoint her family and friends, could cause considerable anxiety and distress in life. This thesis argues that this is heightened by the knowledge that even in life one cannot, in law, do anything about the prospective posthumous harm. So, a living person who is to have their privacy wrongfully invaded in life can seek an injunction to prevent it. Even if a full injunction is granted in her favour, preventing publication of the private matters, she knows that upon her death that protection ceases. She is 'harmed' in life by this knowledge and indeed by not being able to do anything in life to control that information in death. Price suggests that we wrongfully setback surviving interests when we fail to respect the wishes of ante-mortem individuals regarding posthumous matters over which they have a

[186] A person may fear such due to the effect it may have on her family or her reputation.
[187] Sheelagh McGuinness and Margaret Brazier, 'Respecting the Living Means Respecting the Dead too' (2008) 28 (2) Oxford Journal of Legal Studies 297, 311.
[188] Mary Donnelly and Maeve 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, 46.

'right of control'.[189] In life a person has a right to control[190] what remains private in their life (and can take action in law to maintain their privacy). Why then should that control be lost upon death? If one has a right to control one's privacy in life does this not justify it being the 'subject of an interest surviving death'?

There is the separate harm that can occur to the relative of the deceased which justifies a post-mortem relational privacy right as discussed above. The Leveson Inquiry, the Kerslake Report and the Commissioner for Victims and Witnesses Review into the Needs of Families Bereaved by Homicide, provide examples in chapter 6 of the harm that can be inflicted upon surviving relatives by invasions of the deceased's privacy. These are threefold: the harm caused by the thwarting of the surviving relatives desire to protect the dead from being treated with a lack of respect or dignity. Secondly, the direct harm inflicted upon them through the exposure of, for example, photographs of the deceased at their death scene, or revelations of a private matter about the deceased themselves to the public at large, and thirdly the harm caused to society by the thwarting of the effecting assurances which will be discussed in detail in the next chapter.

4. 5 Conclusions

This chapter has reviewed the legal post-mortem privacy literature and ascertained that despite the initial wide scope of the definition of the concept, introduced by Edwards and Harbinja, the focus of the scholarship over the past 6 years or so has been on protection of digital assets and data protection, post-mortem. It has explored the definition, scope, right ascription and underlying rationales of the post-mortem privacy concept proposed in the current literature and identified the gap which this thesis fills. The focus on the narrow application of the much wider concept of post-mortem privacy results in the post-mortem protection of digital assets and data protection but not post-mortem privacy *per se*, in for example off-line private matters. Thus, this thesis's novel contribution of a more comprehensive post-mortem privacy right under Article 8 was introduced.

[189] David Price, 'Property, Harm and the Corpse' in Brooks-Gordon, Ebtehaj, Herring, Johnson; Richards, (eds) on behalf of the Cambridge Sociological Group, *Death Rites and Rights* (Hart Publishing, 2007) 207.
[190] And/or limit accessibility, as was discussed in chapter 2.

The current proposed solutions for the protection of post-mortem privacy, therefore, would not prevent the fact of Soldier X's homosexuality or affair from being made public upon his death, even if they do provide protection for his digital assets (including his emails). The solution argued in the thesis would provide the required protection and it is that to which we now turn.

CHAPTER 5

LEGAL INTUITION MEETS PHILOSOPHICAL HARM

SOLDIER X

This thesis contends that Soldier X has suffered harm to his privacy interests by the risk in life of the revelation of his homosexuality and his extra marital affair and by the subsequent revelation of these facts after he died.

The basis for these contentions are argued in this chapter which provides a solution that would protect Soldier X from the harm outlined above.

5.1 **Introduction**

This chapter iterates the main thrust of this thesis which contends that the Article 8 right to privacy in life can, and should, be extended into death. Having looked at what that right in life consists of and what protections the law is prepared to extend to the dead, so far as their bodily integrity, burial, testamentary wishes and medical confidentiality are concerned, the following has been established: Article 8 protection ceases upon death; the law is prepared to, and does in fact, protect the dead seemingly in accordance with societal norms and intuitions found in what are termed the 'death culture' and 'effecting assurances'.[1] To successfully establish a post-mortem privacy right under Article 8 this chapter must show that 'harm' is caused when post-mortem privacy is unprotected, just as it would be required to found a claim in privacy in life. In addition, it must show who will suffer the harm, how and when. The answers to these questions will be derived from the voluminous philosophical debate about post-humous harm which will be translated into the foundations of the legal right to post-mortem privacy contended for in this thesis.

[1] Of course, there are many other considerations as well, such as public health in the burial and organ donation rules for example.

This philosophical debate on post-humous harm is an enduring and complex one. It was Epicurus that sowed the seeds, in the third century BCE, about the 'evil' of death:

> *Become accustomed to the belief that death is nothing to us. For all good and evil consist of sensation, but death is deprivation of sensation…So death, the most terrifying of ills, is nothing to us, since so long as we exist, death is not with us; but when death comes, then we do not exist. It does not then concern either the living or the dead, since the former it is not, and the latter are no more.*[2]

His argument is summed up by Stephen Luper as follows: 'if death harms the individual who dies, there must be a *subject*[3] who is harmed by death, a clear *harm*[4] that is received, and a *time* when that harm is received.'[5] Epicurus sees no 'coherent solution' to the three issues of *subject, harm* or *time* and therefore rejects the 'harm thesis,' which argues that the dead can be harmed. Advocates of the thesis point to the false presumption made by Epicurus that '…only bad things are experienced harms (i.e.: pains), just as the good things are experienced goods (i.e.: pleasures).[6] Whilst he is right to say that '…death is the deprivation of experience…' there are '…goods and evils that do not consist in positive or negative experiences and of which the subject may never even be aware.'[7] The philosophical debate on 'posthumous harm', as will be seen, presents 'a hard case for disputants on either side of the issue'[8] with no answer materialising that 'can put us fully at ease.'[9] This thesis posits that the basis of this apparent ill-ease is ***'intuition'***. In the context of the dead this is referring to an instinctive feeling that the dead do have interests and rights which should be respected and protected. It is apparent that these intuitive feelings are abundant within the legal system itself where '…judges, legislators and lawyers are in conflict about whether to follow their gut feelings and stand for

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[2] Epicurus, 'Letter to Menoeceus' (341 – 270 BCE) in Cyril Bailey (ed) *The Extant Fragments* (Clarendon Press 1926) 85. Although Epicurus focuses on death itself Stephen Luper argues that if his argument is good it can apply 'more generally, to include all events that follow death.' Stephen Luper, *The Philosophy of Death* (CUP 2009) 67.

[3] Epicurus '…believed death to be a deprivation of sensation precisely because…. there was no longer a subject to *have* any sensation...' Geoffrey Scarre, *Death* (Acumen Publishing Limited 2007) 87.

[4] The Epicurean teaching is the 'hedonistic thesis that all good for human beings consists in pleasure and all evil in pain. If death is the deprivation of sensation, then it follows… that it is neither good nor bad for us but indifferent' ibid 87.

[5] Luper (n 2) 67.

[6] Scarre (n 3) 88.

[7] ibid.

[8] Ernest Partridge, 'Posthumous Interests and Posthumous Respect' (1981) 91 (2) Ethics 243, 244.

[9] ibid 243.

the dead by regarding them as the persons they were, or stick to existing legal doctrines and hold that the dead are no longer persons in the eyes of the law.'[10]

This chapter is, therefore, in two main parts. It starts with an exploration of the intuitive aspect to the debate and will show that such 'feelings' can be the premise for legally enforceable rights to be maintained beyond death. We saw in previous chapters what has been termed the 'death culture', where the living treat the dead with dignity and respect, often intimating that they have some kind of sentience. We explored the existing provisions that protect the dead in chapter 3 and how these were underpinned by such social norms and intuitions about the treatment of the dead. In addition, we considered how the living can be said to seek the protection of the dead's privacy as a way of effecting the assurance that by doing so their own privacy will be protected when they are dead. These powerful social intuitions and norms play a part in this chapter too. However, these elements can only take us so far, in terms of justifying post-mortem protection. The second part of the chapter therefore asserts that the living can be harmed by events that occur posthumously, alternatively stated as the dead are or can be harmed. It therefore supports a defence of the philosophical harm thesis and solution to the Epicurean problem of harm, subject and time by arguing that there is, in fact, a confluence of harm, subject, and time – the *subject* is the ante-mortem person, the *harm* is the negative effect the potential invasion of privacy can have on the subject and the *time* is during their ante-mortem life – such as to justify a conclusion that there can be harm in post mortem disclosures. Those three concepts - 'harm', 'subject' and 'time' – provide the organisational structure for the second part of this chapter and found the backbone for the original claim being made in this thesis: the living can be harmed in life by their privacy being invaded after death – such that, they maintain an interest in life for it not to occur. Consequently, the Article 8 right in life can and should be extended so as to protect the living from harm through the risk of such invasions.

The third part of this chapter provides additional support for this thesis beyond the tripartite Epicurian structure, and explores two arguments that provide further justification for the post-mortem privacy concept, not least of all the argument that a lack of post-mortem privacy can cause societal harm as well as the stated harm to the living individual.

[10] Daniel Sperling, *Posthumous Interests, Legal and Ethical Perspectives* (CUP 2008) 5.

5.2 Intuition

In chapter 3 reference was made to the case of *Anthony Bland* in respect of Dworkin's critical and experiential interests. Bland was a young man who was in a permanent vegetative state following serious injuries he sustained in the Hillsborough disaster and the court was adjudicating upon whether it was in his best interests to have his life support withdrawn. In this chapter it is the words of Lord Hoffman that are of particular relevance when looking at what is termed herein as 'legal intuition' that is, as described by Sperling, the judiciary's following of their own 'gut feelings' so as they 'stand for the dead by regarding them as the persons they were' rather than following the strict letter of the law and regarding them as no longer in existence in the eyes of the law.[11] Lord Hoffman dismissed the Official Solicitor's argument that Bland 'felt no pain or humiliation and therefore had no interest which suffered from his being kept alive.'[12] In doing so he said the following:

> *'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.'*[13]

There are numerous examples of courts following the path Lord Hoffman was drawn to in *Bland,* with the consistent use of language that would suggest that the 'dead' are perceived to have 'rights' worthy of protection by the law. For example, Sullivan J, in *R (on application of Addinell) v Sheffield City Council,*[14] went so far as to say that the dead '….child too has a right

[11] ibid.
[12] *Airedale N.H.S. Trust –v- Bland* [1993] AC 789, 829 [B].
[13] ibid 829 [C].
[14] QBD (Administrative Court) 27th October 2000 (unreported) CO/3284/2000 (transcript: Smith Bernal) <www.lexisnexis.com/uk/legal/search/homesubmitForm.do> accessed 3rd May 2016.

to privacy….' and when '…considering questions of privacy and family life under article 8, the balance would come down firmly in favour of social services records remaining *confidential to the deceased*.'[15] Indeed, Janne Rothmar Hermann,[16] is of the opinion that in the case concerning the revelation of confidential medical records of the former French President Mitterand,[17] the European court went so far as to find that, at least for a period of time, '…fundamental rights such as the *right to respect to private life*[18] and the flowing right to secrecy concerning health information do extend to the deceased person.'[19] This interpretation, which on the face of the language used by the court is correct, is not wholly justifiable as an overarching principle to be relied upon as a precedent in this respect. For although the ECtHR makes reference to the fact that the injunction granted by the national court was '...intended to protect the late President's honour, reputation and privacy….' and in time of public interest prevailing '…over the requirements of protecting the President's rights with regard to medical confidentiality…,' it appears that the true tenet of the judgment relates to the claimant's rights, namely the wife and children of the deceased. The case might thus be conceived as one of post-mortem relational privacy, which was outlined in chapter 4, whereby a legal interest arises from one's relationship with another.[20] In addition, the case related to medical confidentiality which, as was seen in chapter 3, can attract protection after death but as a separate action not under the umbrella of privacy.

Nevertheless, what can be seen is the use of 'rights language' coming from the courts, in relation to the dead. This can be interpreted as coming from the conscious or subconscious intuitive 'gut feelings' identified by Sperling, which are ingrained within the fabric of society.[21] For Smolensky '…dignity and autonomy play a large role in the granting of posthumous rights by law makers…' [22] These principles, she says, are seen in the consistent use of 'rights

[15] My emphasis. The estranged father of the deceased 15year old boy sought disclosure of his son's social services records and, in part, argued that the Council's refusal to disclose the records was a breach of the obligation under Article 8 to respect family life.
[16] 'Use of the Dead Body in Healthcare and Medical Training: Mapping and Balancing the Legal Rights and Values' [2011] European Journal of Health Law 277, 29.
[17] *Editions Plon v France* App no 58148/00 (ECHR, 18 May 2004).
[18] Emphasis added.
[19] Hermann (n 16) 281.
[20] This case is considered in more detail in the next chapter – pots-mortem relational privacy.
[21] Sperling (n 10) 5.
[22] It should be noted that Smolensky is an American academic and her conclusions relate to the American legal system not that of the UK. Kirsten Rabe Smolensky, 'Rights of the Dead' (2009) 37 (3) Hofstra Law Review 763, 802.

language' throughout the law and '…have played an important role in the development of posthumous rights.'[23]

There are many facets to our 'intuitions' and not all of them, as intimated by Lord Hoffman, are borne from rationality. Scarre succinctly encapsulates the dilemma: 'The puzzle is then to reconcile the moral intuitions which posit the existence of obligations towards the dead with the seemingly reasonable thought that there can be no obligations towards the non-existent.'[24] There are however some plausible and rationale arguments as to how and why these intuitions have arisen and are so enduring. Brecher, for example, sees the acknowledgment that the dead are not just memories but are in the biological category of 'dead people' placing the dead person '…within a moral framework implying some sort of continuity.'[25] The dead '…do not cease to be a person after (they) have died', they 'remain part of a community (they) remain a person, even if a dead person.'[26] We may have ceased to exist physically but we are still '…members of a particular community; and it is on that account that the dead can be said to have interests.'[27] Brecher argues that obligations are 'inescapably relational' as they are 'either predicated on' or are in 'recognition of a relation between the person whose obligation it is and the person(s)...to whom they owe an obligation…'[28] Thus keeping promises made to a person whilst alive, when they are dead, 'seems neither counter intuitive nor even controversial.'[29]

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[23] ibid.

[24] Geoffrey Scarre, 'Privacy and the Dead' 2012 (19) 1 Philosophy in the Contemporary World 1, 2.

[25] Bob Brecher, 'Our Obligation to the Dead' (2002) 19 (2) Journal of Applied Philosophy 109, 113.

[26] Ibid 115. The notion of our identity extending into the future is a concept Avner De-Shalit calls the 'transgenerational communities'. We may have ceased to exist physically, but we are still '…members of a particular community; and it is on that account that the dead can be said to have interests.' It allows for our identity to extend beyond our death. Avner De-Shalit, *Why Posterity Matters: Environmental Policies and Future Generations* (Routledge 1995) 34. This theory is beyond the realms of this thesis – a full exposition of it can be found within the text 13-50.

[27] Brecher (n 25) 113.

[28] ibid 111.

[29] ibid. The idea of community and continuity can be seen in consideration of Kant's theory based on the recognition for human dignity (in considering reputational matters). Kant argues that 'members of kingdom' should never be treated as 'mere means' or 'acquiesce' to such treatment. To slander someone in life or death is to treat them with inadequate respect and the prospect of being post-humously slandered is one that a person 'ought to resent' during her lifetime if she has a properly developed sense of self- respect. It is not only other people whom we should treat respectfully as ends in themselves, but ourselves too. Kant does not address privacy specifically, but his theory is equally applicable to it. Immanuel Kant, *The Foundations of the Metaphysics of Morals* (The Bobbs-Merrill Company Inc 1965) 54.

It is also clear that the living often seek to foster that continuing bond and their surviving identity. Exley suggests that '…while survivors may indeed be engaged in a process of negotiating a new after death role or place for the dead, dying individuals themselves actively contribute to their post-mortem selves.'[30] In her research[31] she found that people did look to the future beyond their deaths and often '…actively contributed to the memories they hoped to leave behind.' Exley interprets this as suggesting that they 'hoped that they would continue to play some part in the lives of the living after their own deaths.'[32] They also often separated 'the body and self-identity' on the basis that although they were living in a 'failing physical shell their identities had the potential to exist outside and beyond the confines of this space.'[33] And just as 'social death' can 'occur before biological death', in that other people slowly withdraw from them, '…social life can occur after it.' By social life it is meant that the living involve the dead in their 'experiences and activity' such as continuing to speak to the dead person 'effectively continuing her relationship with him despite the fact that he is now no longer alive.'[34] This after death existence in the minds of both the living prior to death and the survivors afterwards, lends support to the argument made by Scarre, and others, when looking at harm and how the living care about what happens to their reputation and dignity after death. According to Scarre '…we feel strong distaste *while alive* for the prospect of our loss of privacy when dead.'[35] So as living people we wish to have our reputation and privacy protected when dead which propagates the intuitive feelings of the survivors to respect and facilitate this.

These intuitive feelings towards the dead are demonstratively intertwined with the concept of harm. Pitcher illustrates this when he says: 'If we allow our unfettered intuition to operate on certain examples, it becomes abundantly clear that we think the dead can indeed be wronged.'[36] He gives an example of a son promising to bury his father in the family plot when dead, but then giving his body over for medical research. 'Our intuition tells us…' that the father has

[30] Catherine Exley, 'Testaments and Memories: Negotiating after-death identities' (1999) 4 (3) Mortality 250, 251.
[31] A qualitative study on 'the experiences of living with terminal illness from the dying individual's perspective': methodological notes: 252-254.
[32] Exley (n 30) 256.
[33] ibid 261. Of relevance was that she also found that the dying influenced life after death by helping to plan their funerals, this contributing to 'their identity beyond the grave' ibid 257.
[34] ibid 252.
[35] Scarre, 'Privacy' (n 24) 10.
[36] George Pitcher, 'The Misfortunes of the Dead' (1984) 21 (2) American Philosophical Quarterly 183. Pitcher uses 'to wrong someone' as a '…generic term to cover such actions as being unjust to someone, maligning or slandering someone, betraying someone's trust, and so on'.

been '…badly betrayed by his son.'[37] Indeed a good many of the philosophers who are disputants of the 'harm thesis' do not discount intuitive feelings. Callahan, for example, says that just because the dissenters do not believe that actions which are wrong harm the dead it does not follow that those actions are not wrong in themselves and that there might be very good reasons (other than harm) for holding them to be wrong.[38]

Taylor illustrates the correlation between intuition and harm in his thesis of the 'intuitive case of posthumous harm.' This underpins the Feinberg-Pitcher harm thesis, which is discussed in detail below. Taylor identifies two sets of intuitions: the 'anti hedonistic intuition,'[39] otherwise called the 'un-affecting harms' principle, and the 'dead can be wronged' intuition.[40] The first of these intuitions is a head on attack of the Epicurian thesis outlined in the introduction to this chapter – some things can harm us without our being aware of them, for example money is stolen from your bank account of which you are not aware. Your knowledge is not necessary for the harm to your interest to have occurred. The second is an intuition that was partly borne out in chapter 3 when discussing the death culture – the intuition that we believe that the dead can be harmed even though they are dead for example, by being treated with a lack of dignity. Taylor argues that without these intuitions shoring it up, the 'harm thesis' would fail immediately given the 'problem of the subject' and the 'problem of backwards causation'. The problem of the subject is that the dead are gone and thus cannot be harmed – there is no 'subject' to be harmed. The problem of backwards causation is said to occur in the Feinberg-Pitcher contention that the harm occurs to the living person and it was true all along that it would occur. The two intuitions that Taylor identifies, form part of the foundational basis for the theoretical arguments underpinning the post-mortem privacy right contended for in this thesis.

Intuition appears to be accepted by those scholars who dispute the concept of posthumous harm on the basis that there are 'plausible reasons why duties might be owed to the dead which do not require recourse' to such conception.[41] In fact Partridge says the context of harm is too

[37] ibid 183.
[38] Joan Callahan, 'On Harming the Dead' (1987) 97 (2) Ethics 341, 349.
[39] James Stacey Taylor, 'The Myth of Post-humous Harm' (2005) 42 (4) American Philosophical Quarterly 311, 312.
[40] ibid 313.
[41] Mary Donnelly and Maeve 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, 47. For example: Brecher's (n 25) theory outlined above.

restrictive and thus the scope of the theory may not be wide enough to actually 'justify the widely held intuition that the dead have moral claims against the living.'[42] Partridge would prefer the notion of 'posthumous respect' requiring a larger frame of reference which in turn could lead 'to a more comprehensive account of respect for the dead' serving 'both to clarify our conception of the moral personality and to strengthen the principle of the social contract.'[43] He concludes that even though the dead's interests do not survive their death 'in a community of moral personalities and just institutions, we are not only permitted to give the dead their due, we are morally required to do so.[44] Upon this basis Partridge would concede that it might not be 'entirely inappropriate' to speak of 'harming the dead' or 'protecting the interests of the dead' in a 'loose and figurative sense.' However, he prefers the moral requirements toward the dead to be termed 'duties of respect toward the dead,' or 'posthumous respect', or 'giving the dead their due.'[45]

5.2.1 Recalcitrant intuitions

Callahan, an anti-harm thesis advocate, accepts that sometimes there is compassion for the dead and what seems like genuine moral outrage if, for example, a promise is broken, but she calls these 'recalcitrant intuitions.'[46] Reliance upon these make us think that anti-harm thesis theories are wrong. She asserts that these intuitions cannot be accounted for philosophically 'ie: brought into reflective equilibrium with some philosophical theory' but rather should be accounted for psychologically.[47] Callahan emphatically rejects that our 'sentiments' are adequate to found a good philosophical reason for holding that the dead can be harmed or wronged as there is simply 'no subject to suffer the harm or wrong.'[48] This thesis, as will be argued later in this chapter, disagrees as to her analysis of there being 'no subject' - it is the living person. In addition, in a legal arena, and as was stated by Lord Hoffman, societal intuitions, feelings and norms can be so 'deeply rooted in our ways of thinking' that 'the law cannot possibly ignore them.'[49] They can, in part, form the foundation of legal provisions and it is that which is argued herein.

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[42] Partridge (n 8) 264.
[43] ibid.
[44] ibid.
[45] ibid.
[46] Callahan (n 38) 347.
[47] ibid.
[48] ibid.
[49] *Bland* (n 12) 829 [C] (Lord Hoffman).

Callahan is willing to accept, like other anti-harm theorists, that that these 'sentiments' that the dead can be harmed are 'widely shared' resting on 'the fact that we quite naturally think of the dead as they were ante-mortem.' She therefore sees it as 'psychosocial sciences' task to establish 'an account of our pre-analytic intuitions that the dead can be harmed or wronged.'[50] There is an apparent and prevalent 'identification' with the dead, one that 'plays a crucial role in our responses which are paradigmatic empathetic responses.'[51] We do not identify with the post-mortem person but the ante–mortem person. These do not however, according to Callahan 'constitute or entail genuine moral commitments about harm and wrong to the dead.'[52] Having said this Callahan makes an important assertion that '…none of this entails that certain actions which we are inclined to think are wrong because they harm the dead are not wrong. All that follows is that such actions are not wrong *because* they harm the dead. There might yet be some other reason for holding that such actions are wrong.'[53] Indeed '…common-sense morality is far from permitting us to act however we like towards the dead.'[54] We think it wrong to dishonour their memory, ignore their testamentary wishes, donate their body for research without their consent or libel them. Some of these 'appear to disrespect the privacy of the deceased person for example, publishing embarrassing extracts from her private diaries, revealing to strangers her medical history, or disturbing her grave.'[55]

Thus, from a philosophical point of view, even those that do not accept that the dead have interests and thus can be harmed, concede of the intuitive belief that the dead do have the moral right to be treated with dignity and respect. It is this concept of intuition (with all its stated components)[56] that translates into the first of the two main underpinning rationales of the legal post-mortem privacy concept argued herein. Of course, this thesis argues that the dead are in fact capable of being interest holders, albeit not legal rights holders, and thus have a continuing critical interest in their privacy that can be harmed in death, thereby supplementing the intuitive belief that this is so.

[50] Callahan (n 38) 347. This view was touched upon when looking at burial and organ donation in chapter 3, however a detailed analysis is outside the realms of this thesis.
[51] ibid 348.
[52] ibid.
[53] ibid 349.
[54] Scarre (n 24) 2.
[55] ibid.
[56] As was seen chapter 3 in relation to the death culture and recognised by the judiciary above in what is termed herein as 'legal intuition'.

5.2.2 The Law Begs to Differ

However, despite the common 'intuitive' feelings that people in general, the judiciary and scholars on either side of the debate on posthumous interests and rights, the law begs to differ in some respects. In particular, the age old common law principle of *actio personalis moritur cum persona* (personal causes of actions die with the person) appears to show a contrary and negative approach to the dead having rights or interests that are personal to themselves.[57] The ECtHR's case law affirms this by not recognising any Article 8 rights for the deceased.[58] Thus, on the face of it, and despite the seeming 'gut feeling' and language used by the judiciary, the law is unsupportive of recognising the continuance of personal interests and rights post-mortem and consequently a post-mortem privacy right. Having said that, as was seen in chapter 3, there are a number of direct and indirect legal protections for the dead, dealing with, inter alia, medical confidentiality, organ and tissue donation, provisions concerning succession and testation as well as disposal of, and crimes committed against, dead bodies. The historical and conceptual foundations of the law that relates to the dead shows that these substantive laws are based on a number of different reasons and not wholly based upon intuitive feelings towards the dead or as Partridge, a disputant of the harm theory, suggests, as a comfort for the living.[59] It is his view that the living have an obligation (legal, moral or both) to enforce contracts such as wills and promises that are drawn to protect the interests of the living, while alive, to affect events beyond their death. Partridge says that one of the reasons for this is that the survivors have similar motives and by respecting the wishes of the deceased they protect their own interest by 'strengthening the just traditions and social contracts that protect the interests and expectations of all, while alive, to have posthumous influence.'[60] Should they not respect the wishes of the dead '…they diminish their own living anticipations of favourably affecting the conditions of life beyond the time of their own lives…'[61] This was looked at in the context of Mead's notion of 'effecting assurances' previously and features in the 'death culture'

[57] The rationale for this principle was that upon death there is no one to compensate or punish for the harm done. As a substantial amount of the interest's value was the decedents, it died with her and thus to compensate or punish an estate did not appear just. This principle has been whittled away somewhat over the years. Smolensky (n 22) 788

[58] *Jäggi v. Switzerland* App no. 58757/00 (ECHR 2006-X); *Estate of Kresten Filtenborg Mortensen v. Denmark* (Dec.) App no. 1338/03 (ECHR 2006-V); *Koch v. Germany* App no. 497/09 (ECHR 19/07/2012) 18; *Putistin v. Ukraine* App no. 16882/03 (ECHR 21/02/2014). Of course, people's lives are very often entwined, resulting in disclosure of information about one person effectively providing information about another person. In such circumstances the privacy interest of the living person who was intimately connected with the dead person may also be implicated. This discussion will be developed in chapter 6.

[59] Both these factors, alongside others, form the basis of such laws.

[60] Partridge (n 8) 254.

[61] ibid 261.

discussion. As a consequence he sees no reason not to maintain the 'fictions' of harms and wrongs to the dead within our legal system, primarily because the living are comforted by knowing that after death the law will ensure the same protection to them.[62] Callahan agrees that Feinberg and Partridge have provided 'good reasons', considered below, that 'appeal to the interests of the living' for maintaining 'the fictions of harm and wrong to the dead in our legal institutions.'[63] However, according to Smolensky any account that implores the notion that supposed legal rights of the dead are only implemented '…in an attempt to control the behaviour of the living person…'[64] is limited and ignores '… cultural norms, including an innate desire among the living to honour the wishes of the dead even when those wishes negatively impact their own interest.'[65] As we have seen the death culture is key to understanding the 'cultural norms' and 'innate desire' to respect the dead and honour their wishes or our obligations/promises to them. Rather than it being apparently separate as Smolensky intimates, it is suggested here that they are very much interconnected. So, although it is accepted that in, and of, themselves the intuitive feelings are insufficient justification for the imposition of legal rules, there can be no denying that they do, and should, have an important role within the legal system of a democratic society. As Smolensky says, it is through the mechanism of democracy that society aggregates individual preferences relating to rights '…in such a way that the law, in theory, should naturally reflect the ever-changing values of society.'[66] The course charted in chapter 2 showed the changing values of society in relation to privacy, primarily, as a result of the technological advancement and in particular digital communication. Thus, this thesis endeavours to show that the 'values of society,' which of course include the intuitive feelings towards the dead, should be reflected within the law and it is possible to justify intuitive feelings by reference to the harm thesis when looking at posthumous privacy protection.

5.2.3 Legal Fictions

Partridge makes reference to the 'fictions' of harms and wrongs to the dead that the legal system maintains primarily as a comfort to the living. In a way this is what Lord Hoffman in *Bland*

[62] Callahan (n 38) 351 – 352. We looked at legal fictions in relation to testamentary freedom and do so in more detail below.
[63] Callahan (n 38) 351.
[64] Smolensky (n 22) 763.
[65] ibid 775.
[66] ibid 789.

was referring to – intuitions that do not, in themselves, amount to legal principles but which are so 'deeply rooted' within society that '...the law cannot possibly ignore them.'[67] And maybe also why Sullivan J, and the ECtHR in the case of *Plons*, appear to ascribe a post-mortem right of privacy to the dead person in the cases highlighted above.[68] It intuitively feels like the right thing to do in the circumstances of the case, even though it is not a legally defensible position to adopt. The notion of legal fictions – described by Friedman as a 'form of legal reasoning in a strict sense [forming] a bridge between ideology and fact'[69] – might assist here. They are perceived to be a sort of 'legal pretending' and 'a well-known form of the legalism of evasion.'[70] They are propositions which '…come out of the mouth of a judge or other legal actor that states as a fact something which is not a fact at all…' and the pronouncer and everybody else knows this to be so. Bentham was a vociferous opponent to what he described as 'wilful falsehoods' with their object being to steal 'legislative power.'[71] He even advocated that '…the judge who invents a fiction ought to be sent to jail.'[72] The most memorable and graphic of Bentham's descriptions of legal fictions was when he likened them to '…a wart which here and there deforms the face of justice ... a syphilis which runs in every vein, and carries into every part of the system the principle of rottenness.'[73] So, whilst these legal fictions may seem somewhat 'strange and a trifle outrageous,'[74] they were in fact a mainstay of the medieval common law, although of course not nowadays. Sir Henry Maine saw them as a useful device to maintain flexibility in the law as '…social necessities and social opinion are always more or less in advance of the Law.'[75] So, the use of legal fictions can enable the law to fall into step with current social needs, something which the teleological approach adopted by the ECtHR when interpreting the Convention, as discussed in chapter 2, assists in. Sir Henry identifies legal fictions as the first, in historical order, of three 'agencies by which Law is brought into harmony with society.'[76] The others are Equity and Legislation. His definition of legal fictions is that they 'signify any assumption which conceals, or affects to conceal, the fact

[67] *Bland* (n 12) [85] (Lord Hoffman).
[68] *R (on application of Addinell)* (n 14).
[69] Lawrence Friedman, *The Legal System, A Social Science Perspective* (Russel Sage Foundation 1975) 252.
[70] Ibid 250.
[71] Jeremy Bentham and C.K. Ogden, *Bentham's Theory of Fictions* (Routledge and Kegan Paul 1932) xviii.
[72] Cited in Oliver Mitchell, 'The Fictions of the Law: Have They Proved Useful or Detrimental to Its Growth?' (1893) 7 Harvard Law Review 249, 250.
[73] ibid.
[74] Friedman (n 69) 250.
[75] Henry Maine, *Ancient Law: Its Connection with Early History of Society and it's Relations to Modern Ideas'* (20th edn John Murray 930) 31.
[76] ibid.

that a rule of law has undergone alteration its letter remaining unchanged, its operation being modified.'[77]

This thesis does not suggest that a post-humous privacy right should be borne from a legal fiction, yet it does garner support from the apparent willingness of the court to do so, in the choice of words used and recognition of the deeply imbedded intuitions society has in relation to the dead. A combination of the 'death culture', 'effecting assurances' and 'legal intuitions' in the form of the language used by the courts and the judiciary's apparent lack of concern as to the 'rationality' of society's feelings that are 'deeply rooted in our ways of thinking', allows for the 'apparent fictions' to prosper. These, in combination with the harm principle to be discussed below, form the theoretical arguments proffered for the justification of the post-mortem privacy right to be implemented in law, not merely be maintained as a fiction.

An illustration of the power of societal intuitions and legal fictions can be seen when we look at them from another route, so in the positive account which allows for the dead, inter alia, to be honoured and justice rendered to them posthumously. For example, PC Dave Phillips in 2016,[78] received the Freedom of the Borough award in posthumous recognition of his service.[79] Why do we grant such honours?[80] The dead person is incapable of experiencing the pleasure of receiving such an award. If it is for the family, or those who remember the deceased, then whilst admirable it is never bestowed as such but put firmly at the feet of the deceased, honouring their ante-mortem achievements regardless of their non-existence as a person. In addition, it is often unquestioned that justice can be and is rendered to the dead. A most recent example would be the culmination of the longest jury case in British legal history: the inquest into the 96 people killed in the Hillsborough disaster. Of course the importance of this case was far reaching, in that it unearthed the truth of the events and consequently was to hold the police to account yet, given the history of this matter, the jury's verdict was seen by most to

[77] ibid 32.
[78] 20th May 2016. PC Phillips was an on duty officer who was run down and killed by a teenager who had stolen a car: 'PC Dave Phillips to receive Posthumous Wirral Award' *BBC News 23 March 2016* <www.bbc.co.uk/news/uk-england-merseyside-35883004> accessed 1 June 2018.
[79] 'The award of an honour makes the nominee a member of an Order and to become a member you have to be alive (in much the same way as membership of a football team). Bravery awards do not confer membership of a group so they can be awarded posthumously.' Oonagh Gay, *Parliamentary Standard Note*: SN/PC/02832, 2 February 2012, 6. 'Honours: History and Reviews' *House of Commons Briefing Paper* Number 02832, 27 February 2017 <http://researchbriefings.files.parliament.uk/documents/SN02832/SN02832.pdf> accessed 1 June 2018.
[80] or bother to retract an honour bestowed in life which in death is shown to be unworthy?

'exonerate' not just the surviving supporters but the 96 who died.[81] The case was pursued tirelessly by the deceased's family members to prove that the dead were 'innocent' of the lies that had been advanced at the time and for many years subsequent. However, the 96 who died will never experience the pain of the lies or the pleasure of their exoneration. Why does society support such a tribunal and the consequent costs, why does it care about those who have died? It is suggested that it does not really matter why, just as Lord Hoffman was not concerned with 'the rationality of these feelings' society has them and they are 'deeply rooted in our ways of thinking…' meaning that they cannot be ignored, even by the law.[82] Thus the conclusion, when one looks at the positive in comparison to the negative, is that just as society, and in part the legal institutions, accept that the dead can be honoured and obtain justice they by analogy can surely be wronged or harmed.

The claim that there exists a close correlation between the philosophical account of harm which we are about to consider, and the intuitive feelings highlighted more often in law has a long pedigree. Aristotle made reference to the fact that:

> A dead man is popularly believed to be capable of experiencing both good and ill fortune – honour and dishonour, and prosperity and the loss of it among his children and decedents generally – in exactly the same way as if he were alive but unaware or unobservant of what was happening.[83]

With that in mind, we turn now to the thrust of this chapter, and of this thesis: our discussion on harm. More precisely a discussion of whether or not there can be harm suffered – and if so, how, by whom and when – through the revelation of private matters after death.

5. 3 Harm

> 'When a promise is broken, someone is wronged, and who if not the promisee? When a confidence is revealed, someone is betrayed, and who, if not the person whose

[81] David Conn, 'Hillsborough Inquests Jury Rules 96 Victims were Unlawfully Killed' *The Guardian* 26 April 2016 <http://www.theguardian.com/uk-news/2016/apr/26/hillsborough-inquests-jury-says-96-victims-were-unlawfully-killed> accessed 1 June 2018.

[82] *Bland* (n 12) 85.

[83] *Nichomachean Ethics* 1.10 in J. Jeremy Wisnewski, 'What We Owe the Dead' Journal of Applied Philosophy (2009) 26 (1) 54, 55. Wisnewski asserts that Aristotle is 'surely right' but what he says is also 'misleading' as the dead are not able to undergo 'harm in *exactly* the same way as the living person who is unaware that the harm is being inflicted.' This is because there is an identifiable living subject of the harm whereas there is not for the dead.

confidence it was? When a reputation is falsely blackened, someone is defamed, and who if not the person lied about?'[84]

There are two conceptions of post-humous harm that will considered in this section. The first is Joel Feinberg's 'harm principle' premised on the basis that interests are 'all those things in which one has a stake'[85] and which may survive death.[86] The theory concentrates on the interests that the individual *had,* when living, that they be treated in a particular way *after* their death, so for this thesis – that their privacy in certain matters be maintained. If after death this surviving interest is 'set back' or 'thwarted,'[87] it amounts to a harm.[88] The second theory is that of Barbara Baum Levenbook who argues that rather than the 'concept of interest' being used to 'elucidate the concept of harm,' there should be analysis of harm as a 'loss.' She sees the core of the concept of harm being two necessary conditions firstly, that the harmed person must lose or be deprived of something and secondly, this loss or deprivation must be bad for her.[89] There is in reality very little discernible difference between these two theories with the latter being developed, according to Fischer, to overcome 'the supposed metaphysical problem of interests surviving interest bearers…'[90] It is considered here because it too can support this thesis; however it is the Feinberg/Pitcher argument that is relied upon chiefly and to which we turn now.

5.3.1 Analysis of the Concept of Harm as a Setback or Thwarting of an 'Interest'

When defining harm as a setback to interests Feinberg distinguishes between two types of interests, ulterior and welfare. Ulterior interests are a '…person's more ultimate goals and aspirations…' so they 'protect the desire to attain as good a life as possible.'[91] Welfare interests 'protect everyone's minimum necessities' so are common to most, for example, an interest in one's health. Feinberg argues that the harm that occurs when an interest is set back or thwarted,

[84] Joel Feinberg, *The Moral Limits of the Criminal Law - Harm to Others,* Vol 1 (OUP 1984) 182-183.
[85] ibid 34.
[86] ibid 83.
[87] Feinberg sets out this analysis in chapter 1, ibid 31-64.
[88] it can actually be sufficient to justify the intervention of the criminal law: Jonathan Herring, 'Crimes Against the Dead' in Belinda Brooks-Gordon and others on behalf of the Cambridge Sociological Group (eds) *Death Rites and Rights* (Hart Publishing 2007) 219, 233.
[89] Barbara Baum Levenbook, 'Harming Someone after His Death.' Ethics, (1984) 94 (3) 407, 412. These are not the only necessary conditions for harm and indeed are not sufficient but for the purposes of her paper she says they are adequate.
[90] Josie Fischer, 'Harming and Benefitting the Dead' (2001) (25) Death Studies 557, 566.
[91] Feinberg (n 84) 37 (similar to Dworkin's 'critical interests' discussed in chapter 3).

derives from the 'badness' of the events rather than the *experience* of them. Events which harm can be *independent* of a subject's body and mind and thus, 'what a person does not experience while alive and cannot experience after death can still harm them,'[92] the so-called *independence* theory. The prominent independence/deprivation theorist Thomas Nagel is of the view that most would consider that they had been wronged, if they were 'ridiculed' behind their backs or 'betrayed' by their friends or defamed, all without the subject having knowledge that they had been.[93] Losses, deceptions, betrayals and ridicule are not just bad because people suffer as a result of knowing of them but '…they suffer the distress because they strongly disvalue what has happened, and not the other way about.'[94] Nagel says that the '...natural view is that the discovery of betrayal makes us unhappy because it is bad to be betrayed – not that betrayal is bad because its discovery makes us unhappy.'[95] Ernest Partridge, however sees betrayal as 'bad in both senses' as '…in our society the morally mature person perceives the 'badness' of betrayal as a generic evil that can happen to, and be bad for, anyone who shares our moral conceptions.'[96]

There is, however, the 'what you don't know can't hurt you,' critique of the harm theory. This posits that the dead are unable to be harmed because they are no longer in existences and therefore cannot experience or know of any so-called harmful events.[97] In response to this 'common sense' critique, the harm thesis places reliance on what has been called the 'unaffecting harms' principle, or as Taylor refers to it ' the anti-hedonistic intuition', outlined above, that some things can harm us without our being aware of them. It is argued convincingly, and in accordance with our everyday experience, that there are numerous interests of the living that are capable of being violated without them ever being aware that they have been.[98] For example, someone spreading defamatory comments about them, invading their privacy by reading and sharing their private diaries with others, or even stealing from them, can all harm

[92] Ibid.
[93] Thomas Nagel, *Mortal Questions* (CUP 1979) 4 – 5. If they do find out, the upset they suffer will be an additional harm.
[94] Scarre (n 3) 88.
[95] Nagel (n 93) 4 -5.
[96] Partridge (n 8) 257.
[97] Prominent anti-harm theorists include: Ernest Partridge (n 8) Joan Callahan (n 38), Walter Glannon, 'Persons, Lives, and Post-humous Harms' (2001) 32 (2) Journal of Social Philosophy 2; John Harris 'Law and Regulation of Retained Organs: the Ethical Issues' (2002) 22 LS 527; Stephen Winter, 'Against Post-humous Rights' (2010) 27 (2) Journal of Applied Philosophy, 186; Christopher Belshaw, *Annihilation the Sense and Significance of Death* (Acumen Publishing 2008)
[98] Smolensky (n 22).

the interests of the living without them having to have knowledge that they have been stolen from, defamed or their privacy invaded.[99] They have been even if they don't know about it. Thus, those who object to Feinberg's theory on the basis that the dead cannot be harmed as they cannot experience or know of any harm, wrongly presuppose that it is a necessary condition of something being good or bad for us that we know about it.[100] As Sperling says: 'The case of harming the dead is not different from any other situation in which harm is possible without our knowledge or awareness of its subject.'[101] As has been argued in chapter 3, the dead are capable of being interest holders and as privacy is a critical and thus continuing interest, it can be set back or thwarted thus causing harm, even without knowledge of its occurrence.

This philosophical concept of the living still being harmed by what they do not know follows a logical common-sense approach,[102] with Feinberg asking: 'How is the situation changed in any relevant way by the death of the person (defamed)? If knowledge is not a necessary condition of harm before one's death, why should it be necessary afterward?'[103] He uses the example of a woman who suffers the collapse of her entire life's work, 'the empire of her hopes,' one month before she dies and she is disgraced. However, she never knows of this because her friends conceal it from her.[104] Despite her lack of knowledge Feinberg argues that she is still harmed, at the point that her empire collapses, by this thwarting of her interests. He goes on to ask what the difference is if the facts of the example are the same save the events occur after her death. Feinberg argues that the same interests that were harmed in the first case are harmed in the second '…to exactly the same extent, and again the woman does not learn of the bad news, in this case because she is dead.'[105] He concludes that there is, therefore, no difference between the two scenarios – both harm the woman's interests. According to Partridge, this is Feinberg's most persuasive defence of 'posthumous harm' and 'posthumous

[99] Sperling (n 10) 16.
[100] T M Wilkinson, 'Last Rights: The Ethics of Research on the Dead [1]' (2002) 19 (1) Journal of Applied Philosophy 31, 33. Wilkinson say that the 'consensus in moral philosophy (and implicitly in writings on medical and research ethics)' is that the argument against the un-affecting harms theory is wrong. He says that the 'literature on medical and research ethics contains statements of values and duties, for instance about autonomy and privacy, that could not possibly be justified if this purported necessary condition was sound.' Ibid 40 (note 9, referring to J Griffin, *Well-Being* (Clarendon Press 1986) who rejects this 'experience requirement' in chapter 1)
[101] Sperling (n 10) 16.
[102] Feinberg uses the example of someone defaming a living person without them ever having knowledge of it. She is still 'injured in virtue of the harm done' to her 'interest in a good reputation' (n 84) 305-6.
[103] Partridge (n 8) 250.
[104] Feinberg (n 84) 88-89.
[105] Ibid.

interests' due to the 'ingenious reference' to supposed harms to the living, and the apparently compelling suitability of applying the concept of harm equally to the dead.[106] Indeed, Partridge is of the view that Feinberg 'succeeded so well in binding the cases of the unaffected living and the dead' that there was 'no logical wedge which could be inserted so as the former could be said to be 'harmed' and the latter could not.'[107] Therefore, either both can be harmed, or both cannot. That though led Partridge 'reluctantly' to draw the 'conclusion that both the dead and unaffected living 'victims' are not harmed,[108] upon the basis that he believes that the argument against harming the dead is 'sufficiently strong' to deny that 'the unaffected living' can be harmed either. Yet this is clearly neither the case nor logical; we have seen there are harms that occur which the living may be unaware of. They make them no less real or worthy of protection by the law. There is no requirement that one knows that their reputation has been ruined by defamatory comments, yet there is no denying that harm to the reputation has occurred,[109] nor that someone has stolen from you, but your interests are harmed because you have been. So, Partridge's conclusion appears illogical and unstainable, which may be why he has to follow it up by 'strenuously' affirming that 'un-affecting libels' etc, are 'morally wrong on other grounds.'[110] Having said that, Partridge's refusal to accept Feinberg's theory is understandable for, although it is possible to argue that the desire to protect one's privacy and interest therein exists prior to death, and thus can be thwarted after death, the problem of the subject then arises. If the dead no longer exist who is the subject of the harm perpetrated? This will be considered below.

5.3.2 Analysis of the Concept of Harm as a 'Loss'

So as to overcome this 'metaphysical difficulty' of there apparently being no subject that can suffer the harm, Levenbook argued that harm should be considered as a 'loss', on the basis that 'it is not incoherent to attribute losses to the dead.'[111] She uses murder as an example of something that 'ordinarily harms its victim a great deal.'[112] The harm of the killing comes

[106] ibid 252. It can be seen that there is 'symmetry' in this un-affecting harms approach: the concept of 'symmetry,' between the interests of the living and dead, is identified by Wilkinson as an appropriate guide to protecting the interests of the dead and is discussed later on in this chapter.
[107] Partridge (n 8) 251.
[108] ibid 251.
[109] It is accepted that knowledge is a requirement to bring a claim against the defamer.
[110] Partridge (n 8) 252.
[111] Fischer (n 90) 565.
[112] Levenbook (n 89) 412

mostly from the victim's 'loss of experiencing' and in the case of an instantaneous killing the loss occurs at the moment of death' which she defines as 'what occurs at the first moment at which A no longer exists.'[113] Levenbook therefore asserts that as A can lose something at the 'first moment' at which she 'no longer exists,' then she can be ascribed losses after that moment. As she loses something after death she can be harmed after death.[114] Levenbook cannot see that this assumption of losing things after death can be '…rejected on the grounds that there is no loser to do the losing, for there is no loser at the moment of death either.' She uses the example of Einstein not losing his reputation as a 'scientific genius' upon death, even though he had this up until his death. She asserts that he either cannot lose it now that he is dead or he could still lose his reputation subsequent to death. Callahan makes two points in rebuttal. First, whilst Levenbook's argument is 'intriguing' it nevertheless 'fails'[115] because she has 'been led astray by ordinary talk about the losses of the dead'[116] and is 'taking figurative talk inexcusably literally.'[117] Callahan argues that the 'scientific genius' reputation is **not** a 'description of something *Einstein* has or has not got; it is a description of *us* – that is, it is an assertion of what some in the existing community of believers believe.' So it is not Einstein who has something to lose but 'the living believers' who have 'beliefs that *we* could lose.'[118] This appears to be a logical argument against Levenbook's example but does not affect this thesis's assertion that the dead can 'lose' their privacy and thus be harmed by that loss. Privacy is in fact 'a description of something' X 'has or has not got; it is ***not*** a description of *us* – that is, it is ***not*** an assertion of what some in the existing community of believers believe.'[119] Privacy is not a matter of 'beliefs,' it is not something that relies about the 'living' believing in it as a concept, as it would be that Einstein is a scientific genius, and as such can be lost subsequent to death. One only has to look at the lengths to which society goes to protect the dignity and thus privacy of the dead when it comes to bodily integrity, for example, to conclude that it can indeed be lost upon death and subsequently.

[113] ibid 410. Callahan (n 38) 343, asserts that a more appropriate definition is 'the moment at which A ceases to exist'.
[114] Levenbook ibid.
[115] Callahan (n 38) 342.
[116] ibid.
[117] ibid.
[118] ibid 343.
[119] 'not' has been inserted into Callahan's argument as quoted immediately above.

Of Levenbook's assertion that things such as mental functioning can be 'lost' at the moment of death, Callahan's second criticism is that that is simply a flawed way of saying that her mental functioning 'ceased' at death. A's death is the termination of her and her capacity to lose or indeed gain. Therefore, Callahan would no doubt argue that at the moment of death her privacy has ceased and whilst, again, this may appear logical in relation to say mental functioning, it is not in relation to privacy. This thesis posits two reasons to make good its assertion that privacy does not cease, in all its forms, upon death. First, the law itself protects some elements of privacy post-mortem, for example bodily integrity. Secondly, as was shown in the first part of this chapter intuition plays a huge role in respecting and protecting the dead, including elements of their privacy.

This thesis therefore concludes that privacy is not only an 'interest' which can be thwarted after death in accordance with Feinberg's theory, but also can be 'lost' following Levenbook's argument. Both result in 'harm' to the living, as will be argued later in this chapter, and/or the dead – although as will be seen this thesis frames it as the former.[120] One of the reasons for this preference is the hurdle mentioned previously: 'the problem of the subject.' It is to that we now turn.

5.4 Subject

> '…after death, with the removal of a subject of harm and a bearer of interest, it would seem that there can be neither 'harm to' nor 'interests of' the decedent.'[121]

Death removes the subject, the person who had interests and could suffer harm; she is now merely a corpse and thus it is argued by Partridge that there no longer exists a subject upon which it can be said that harm can be inflicted.[122] There is no subject after death who can acquire interests. Callahan agrees: any interest a person had prior to death can only survive her death as an *interest* if they are carried on by living interest bearers, so her heirs, for example,

[120] Fischer (n 90) 567, argues that as Levenbook's theory was in response to the 'supposed failure to explain how interests can survive interest bearers' there is no need for her 'alternative account of post-humous harm' as there is 'a plausible account of interests-surviving interest bearers' as will be seen in the discussion of the 'subject ' in the next section.
[121] Partridge (n 8) 253, in part justifies his assertion by saying: 'Because in such a context, these phrases (i.e.: "harm to" and "interests of") use prepositions with no objects, they are strictly speaking senseless.'
[122] ibid.

would inherit her debts and copyrights. Her interests are passed onto 'other agents' so as they become those persons interests.[123] Postponing analysis of Callahan's substantive case momentarily, it is nevertheless possible to apply it to a privacy interest which could therefore survive the death of the person whose privacy is to be invaded. Callahan's argument would allow for the living to take up the deceased's privacy interest if it were to affect their own privacy, or possibly so that they might protect the dignity and privacy of the deceased by seeking to prevent an invasion of their own. In many instances, that invasion of a loved one's privacy affects our own interests. These arguments will be discussed fully in the next chapter dealing with the concept of post-mortem relational privacy.

5.4.1 Living Interest Bearers

Callahan concedes that her objection, outlined above, does not in itself however, defeat Feinberg's thesis of post-humous harm as his (Feinberg's) thesis utilises an argument proposed by Pitcher which uses living interest bearers. Feinberg argues that '[t]he subject of the harm in death is the living person ante mortem, whose interests are squelched,'[124] not the post-mortem person as defined. The 'harmed condition' began 'at the moment he first acquired the interests that death defeats.'[125] The argument is as follows: things which happen *after* a person's death can cast a 'backward shadow over his life' by flouting his lifetime interests.[126] It is the living ante-mortem[127] person who is harmed by 'being the subject of interests that were going to be defeated whether he knew it or not.'[128] The question is this: is it possible for something to happen after a person's death that harms the living person he was before he dies? Pitcher argues that it is, and considers the 'linguistic act of describing a dead person.'[129] There are two possibilities, that she is described: (i) as she was at some stage in her life, i.e. as the living person (ante-mortem person after her death) or (ii) as she is now, in death – a corpse (the post-mortem person after her death). Pitcher maintains that although both can be described after their death only the ante mortem person can be harmed after her death.[130] He uses the illustration of a spiteful neighbour who falsely and maliciously asserts that the now deceased

[123] Callahan (n 38) 344.
[124] Feinberg (n 84) 93.
[125] ibid 92.
[126] ibid 44.
[127] The living person who is now deceased: ibid 90.
[128] ibid 91.
[129] Pitcher (n 36) 183.
[130] ibid 184.

Mrs. Blue was anti-Semitic. By doing so he has wronged the ante-mortem Mrs. Blue, not the post-mortem person. He has falsely charged the *living* Mrs. Blue with being anti-Semitic and thus it is the *living* Mrs. Blue that is wronged. The neighbour has said nothing of the *dead* Mrs. Blue. Pitcher concludes that 'all wrongs committed against the dead are committed against their ante-mortem selves,'[131] and it is in fact 'impossible to wrong a post-mortem person.'[132] So the subject of the harm is not the deceased herself' (the corpse) but 'the *living person who no longer exists* at the moment of posthumous harm.'[133] Wilkinson uses 'memory' as a comparison to demonstrate this account of post-humous harm, citing his grandmother as a subject in his memory. He asks who he is remembering when he remembers her. It is not her as she is now, she is dead and therefore no-more, but he is remembering her as she was as a living person.[134] He concludes that we can make sense of harming the dead in the same way as remembering them.[135]

There is force in the assertion that the Feinberg's (and Pitcher's) 'ante mortem' theory actually '… supports the reverse contention to that which he propounds. By attributing harm suffered to the ante-mortem person he, in effect, concedes that the dead cannot be harmed'[136] and thus the argument is really '…powerful support for the view that only the living can be harmed.'[137] Instead, the subject of harm, including any post-humous harm, is the ante-mortem person, the living person as she was.[138]

5.4.2 Backward Causation

However, Callahan is amongst the critics who ask: 'Just how does a *postmortem* event harm an *ante mortem* subject?'[139] She, and Glannon,[140] argue that this is akin to a 'doctrine of backward causation.' If the person is harmed 'all along' then they are harmed before any harmful action actually takes place.[141] This would also mean that the person who later

[131] ibid.
[132] ibid.
[133] ibid
[134] Wilkinson (n 100) 34.
[135] ibid. This has echoes of the notion of the 'quasi human' status that is visited upon the dead which was discussed in chapter 3 or indeed Brecher's theory of continuity (n 25) discussed above.
[136] Callahan (n 38) 346; Sperling (n 10) 25.
[137] Callahan (n 38) 346.
[138] Sperling (n 10) 25.
[139] Callahan (n 38) 345.
[140] Glannon (n 97) 127.
[141] Callahan (n 38) 345.

'performs' the act which causes the 'harm' is responsible 'long before' actually '*doing'* it and placing the ante mortem subject in a harmed state.[142] Pitcher however says that there is no need to consider such a concept (if indeed there is such a thing as backward causation) because harming a living person after their death does not involve any such process.[143] The idea that it must rests on the 'wholly misleading picture of being harmed as a kind of alteration in one's 'metaphysical state.'[144] It clearly does not – we might think here of harm to reputation – and as has been seen it can also be said to be false to claim that in order to be harmed the victim must be aware that she has been. She may well be, but there is no requirement for her to be so, to have been harmed.

Scarre concurs by insisting that: 'The view that death harms the ante-mortem person involves no metaphysically objectionable notion of backwards causation.' This is because it is not being asserted that '…what happens in the future can causally affect what has happened in the past…'[145] but that it was 'true all along.'[146] Scarre explains this as '…just a special case of a more general phenomenon of retrospective signification.'[147] He uses a number of examples to explain his proposition: whether a boy is now studying successfully for his exam will depend upon whether the script he produces will satisfy his examiners; or a man's years of training to perform in the Olympics turn out to be in vain when he is paralysed in a road accident before he gets to compete.[148]

Pitcher uses the example of 'William' who is destined to die young.[149] His father, the ante mortem person, is harmed by William's death not because he suffers the misfortune of the death itself, but because he suffers the misfortune that his son is going to die young. Pitcher insists that we 'must avoid the mistake of supposing that it was his *knowing* that William was going to die young that was…' the father's only misfortune during the years before his son's death. It was of course a misfortune[150] but there was another, namely the fact that his son, '…so full of promise was going to die young.' This fact the father would never want to have existed

[142] ibid.
[143] Pitcher (n 36) 186.
[144] ibid 186.
[145] Scarre (n 3) 94.
[146] Feinberg (n 84) 91.
[147] Scarre (n 3) 94.
[148] ibid.
[149] Pitcher (n 36) 186.
[150] Pitcher says that the knowledge of the early death was a torture to the father 'precisely because he regarded it as a great misfortune that his son was going to die young', ibid 186.

and which was, '…totally against his interests (whether or not he knew of its existence). Therefore, it was a very real misfortune.'[151] Pitcher claims that the 'shadow of harm that an event casts can reach back across the chasm, even of a person's death and darken his ante-mortem life.'[152] So '(w)ithin the shadow, the misfortune was that William was going to die young…' not that he in fact did die young. [153] Thus, the ante mortem father is harmed by his son's early death 'not because he therefore suffers the misfortune of death, but because he therefore suffers the misfortune that his beloved son is going to die young.'[154]

5.4.3 What this Thesis says about the Subject

Following the logic of the Pitcher argument it can be seen that in the case of privacy, any intrusion resulting in a loss of the deceased's interest in maintaining her private life, means that she was harmed in life even if she did not know that this would occur. Be this as it may, the extension of this argument for the purposes of this thesis is much stronger, for as there is clearly no legal right in the UK to privacy after death, living people can actually be aware of the potential harm that can befall them subsequent thereto. This is unlike a testamentary wish not being honoured or the person's family not thriving, or their reputation being trashed, all of which they will not know of in life. An example of someone who will be aware of the risk that their privacy will be invaded upon their death, and thus can be harmed in life by this knowledge, is a person who has actually obtained an injunction under Article 8 to prevent the publication of private material during their life. They know that there is a risk that upon their death, and without the continued protection of the injunction, the matter will be published by the person/organisation that attempted to do so in their lifetime. There could also be occasions where a person harbours a secret in life but does not seek an injunction to protect it for a number of reasons, such as fear of the 'Streisand effect',[155] or lack of inclination or funds to take legal action, but they know that there is a possibility that as there is no privacy protection after death it could be revealed. This knowledge harms them in life. It could even be said that the possibility of post-humous revelation of private material may be more harmful than the ante-mortem revelation itself, as the person knows that if revealed upon death they are unable to proffer any excuse or explain their behaviour or provide comfort to their distressed loved ones.

[151] Pitcher (n 36) 186.
[152] ibid 187.
[153] ibid.
[154] ibid.
[155] Discussed in chapter 2 – meaning the taking of legal proceedings can, in itself, cause unwanted publicity.

So, the consequence of the after-death invasion of privacy, for the ante-mortem person, is an even greater harm than that envisaged in the Feinberg argument, 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, thereby defeating the rationales behind the privacy interests and rights outlined in chapter 2 (liberty of action: autonomy, mental health etc).

There does not, however, have to be a 'secret' in life that one fears revelation of in death for harm to occur. Just like we saw in chapter 2 the fear of being 'found out' can actually prevent someone from doing that which would cause anger, upset or ridicule and in that way a person's autonomy in life is hindered. The prospect of private matters/actions or words being revealed upon death may prevent one from partaking in them. Thus, the 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. The risk or threat of the revelation of private matters when dead,[156] can cause the subject 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 risk or threat. This can be said to therefore prevent them from living an autonomous 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.

Indeed, McGuinness and Brazier,[157] whose work is in research ethics, attempts to avoid what they call the 'conceptual challenges' presented by the posthumous harm theories and seek to 'refocus' on a 'less ambitious'[158] protection of the dead's 'interests.' Based on the premise that 'What will happen to us in death affects us in life'[159] they ask, 'what interest can the living have in what happens to them when they are dead?'[160] They assert that the prospect of posthumous harm occurring can actually cause harm to the interests of the living person. A person may 'experience harm in the sense of considerable anxiety and unhappiness whilst

[156] A person may fear such due to the effect it may have on her family or her reputation.
[157] In the context of bodily integrity after death and ethics.
[158] If it translates into the interests of the dead being recognised and protected it does not matter.
[159] Sheelagh McGuinness and Margaret Brazier, 'Respecting the Living Means Respecting the Dead Too' (2008) 28 (2) Oxford Journal of Legal Studies 297, 311.
[160] ibid.

alive.'[161] The thought of private matters becoming publicly available which may sully her reputation or embarrass, shock or disappoint her family and friends, could cause considerable anxiety and distress in life. This thesis brings this argument within the legal domain translating it from the realm of research ethics to underpin the legal concept of post-mortem privacy and show how it can be justified on the grounds of harm to the living.

Scarre makes the powerful argument '…that a right to privacy belongs to deceased persons in virtue of their moral status whilst alive and reflects their interest in the preservation of their dignity.'[162] He asserts that 'privacy interests and rights should be seen as possessions of the *living*, and that breaches of privacy after their deaths are morally significant for *ante mortem* persons.'[163] This is '...because people care what others think about them, they are naturally concerned about the intentional attitudes with which others hold towards them, not only while they are living but also after they are dead.'[164] People can be 'held in high or low esteem' and this is 'irrespective of whether' they are 'living or dead.'[165] He uses the example of a person who has sought to protect a private and embarrassing matter all her life, and observes that in such situations people are not normally '…sanguine about the prospect of this coming to light posthumously.' [166]And whilst if, as he says, the core of this unease was a 'fear of hurt feelings' it may be considered unreasonable, it is not however, when it invokes a 'fear of losing dignity.'[167] Scarre thus endorses Bloustein's observation that people care about their privacy because they care about their dignity.[168] Invasions of privacy threaten that dignity as they remove or reduce the control one has over how one is 'represented in public perception.' And of course, such perceptions outlast the individuals they concern. Thus the living '…are naturally concerned about how they will be represented after they are gone.'[169] This is because '…social relationships do not all evaporate when we die since the framework remains in which we can be remembered, discussed, honoured, praised or dispraised, retain our life time secrets intact or have our cover blown.'[170] Thus a person is not in fear that the revelation of something

[161] Donnelly and McDonagh (n 41) 46.
[162] Scarre (n 24) 1.
[163] ibid 22.
[164] ibid 19.
[165] ibid.
[166] ibid.
[167] ibid.
[168] ibid 10, citing Edward Bloustein 'Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser' (1964) 39 New York University Law Review 962.
[169] ibid 22.
[170] ibid 20.

they have hidden all their life will harm their 'ghost,' but the fear is that such revelation will 'negatively affect her standing… so that people will no longer think of her with the same respect as they previously did.'[171] She is therefore aware in life 'that her current good repute depends on her ability to mask the truth', she is aware that if the revelation comes about upon her death '…then her reputation is likely to be damaged not only through the revelation of the secret but also by the knowledge that she tried to conceal it.'[172] Scarre sums up the argument almost poetically: 'Their wish to maintain their dignity in others' eyes, is a wish to maintain it for as long as others have eyes to regard them.'[173] And of course the living's interest in maintaining privacy so as to maintain their dignity is 'especially vulnerable' to being defeated by posthumous events over which there is no control.[174]

This thesis argues that the position is heightened by the knowledge that even in life one cannot, in law, do anything about the prospective posthumous harm. So, a living person who suffers the threat of their privacy being wrongfully invaded in life can seek an injunction to prevent it. Even if a full injunction is granted in her favour, preventing publication of the private matters, she knows that upon her death that protection ceases. She is 'harmed' in life by this knowledge and indeed by not being able to do anything in life to control or limit access to that information in death.

That might of course depend on what form the information takes; a person might on or near her death destroy her own hard copy diaries, but anything in the hands of third parties remains exposed to revelation.[175] Price suggests that we wrongfully setback surviving interests when we fail to respect the wishes of ante-mortem individuals regarding posthumous matters over which they have a 'right of control.'[176] As was seen in chapter 2, the right to privacy can be considered from the right to limit access or the right to control who has access to the private information.[177] In life the autonomous person has the right to control, or limit access, to what

[171] ibid.
[172] ibid.
[173] ibid 22.
[174] ibid.
[175] The recipient of an email for example.
[176] David Price, 'Property, Harm and the Corpse' in Belinda Brooks-Gordon and others on behalf of the Cambridge Sociological Group (eds) *Death Rites and Rights* (Hart Publishing 2007) 199, 207.
[177] The difference being that one may not have 'control' over the private information and thus wish to limit access to it. In this thesis, as was said in chapter 2, both approaches capture 'essential aspects of privacy that we seem to

remains private in their life (and can take action in law to maintain their privacy). Why then should that not continue upon death? This thesis argues that the living person should have the right to control what happens to their privacy, or limit access to it, in death. The solution proffered here, to ensure that this happens, is to allow for the Article 8 right they have in life to extend into their death, so that anything that could be kept private in life (subject of course to the qualifications outlined in chapter 2) remains private when they are dead.

5.5 Time

A further concern propounded by the opponents of a theory of postmortem protection founded on harm is the temporal incidence of the harm suffered. The argument made here disputes the essentiality of that supposed disjuncture. In short harm can occur, or be referred to, in no particular time. It is irrelevant whether the subject who is being harmed exists at the moment of harm because this moment is not important, if it can be identified at all:

> A man's life includes much that does not take place within the boundaries of his body and his mind, and what happens to him can include much that does not take place within the boundaries of his life.[178]

Nagel believes that it is a mistaken assumption that there is a need for '…temporal relation between the subject of misfortune and the circumstances which constitute it.'[179] Whilst there are good and bad things of a 'simple kind' which a person will possess at a given time, this is not the case for all good and bad things. Nagel suggests that often one needs to know the person's '…history to tell whether something is a misfortune or not…'[180] Through the example of a man who has been reduced to the 'mental condition of a contented infant,' Nagel explores the position that most good and bad '…has as its subject a person identified by history and his possibilities, rather than merely by his categorical state of the moment.'[181] Unlike the person herself the goods and ills that befall her cannot always be located 'in a sequence of places and times…'[182] He asserts that we would see this intelligent man being reduced to such a state as a

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care about.' Helen Nissenbaum, *Privacy in Context: Technology, Policy and the Integrity of Social Life* (Stanford University Press 2010) 67, 71.

[178] Nagel (n 93) 6.

[179] ibid.

[180] ibid 5.

[181] ibid.

[182] ibid.

real misfortune, yet he himself does not mind his condition which, mentally, is the same as it was when he was three months old.[183] Nagel points out that critics of the harm thesis would have to assert that if we did not pity him when he was three months old '…why pity him now; in any case who is there to pity?'[184] It cannot be the intelligent adult as he is no longer in existence and the 'contented infant' is happy and therefore needs no pity yet, he continues, by considering the person the intelligent adult was, and the person he *could* be now, then his reduction to this state is a 'catastrophe.'[185] So, a harm can depend '…on a contrast between the reality and the possible alternatives.'[186] Nagel concludes therefore that this example shows that it is 'arbitrary to restrict the goods and evils that can befall a man to non-relational properties ascribable to him at particular times.'[187] Harm can occur, or be referred to, in no particular time. Thus, we can conclude that the person is in a harmed condition irrespective of whether the moment of harm occurred during or after her life.[188]

Nagel's deprivation theory further proposes that death can preclude the ante-mortem person from achieving future-orientated desires, such that these may be thwarted by events occurring after death. Nagel uses the example of a desire as to the disposition of one's cadaver being 'future orientated' and only capable of being thwarted after death.[189] Accordingly, we can argue that the desire to protect one's privacy exists prior to death and can be thwarted after death. The person is deprived of their right to privacy and thus their ability to complain or take action under Article 8 or obtain an injunction as they would have been entitled to in life.

In summary, therefore, the second part of this chapter has considered harm, subject and time. It has argued that harm can be caused to the living, in their lifetime, by their privacy being invaded after death – such that, they maintain an interest in life for it not to occur. Thus, it is argued, the living should have an Article 8 right for post-mortem privacy protection. There are two additional arguments that supplement those considered above and provide further support

[183] ibid 6.
[184] ibid.
[185] ibid.
[186] ibid.
[187] ibid.
[188] ibid.
[189] ibid.

for the post-mortem privacy right as contended. These will be explored in the final part of the chapter.

5.6 Symmetry and Societal Harm

Some elements of these have featured in the discussions above but are worthy of being considered in more detail. First, Wilkinson's symmetry theory, which argues that 'symmetry between the interests of the living and the dead' assists in showing not only *why* privacy protection for the dead should be implemented but also *how* that can be achieved - by mirroring what we do for the living. Secondly, there is the supplemental harm to society that must be considered, and which supports the maintenance of the institution of 'promise keeping' and, this thesis argues, privacy of the dead.

5.6.1 Symmetry

Wilkinson maintains that there is a 'symmetry between the interests of the living and the dead,' which he uses as a guide in how to protect the interests of the dead research subjects.[190] Wilkinson asserts that where the interests of the dead and living are similar they should be treated as the same, so symmetrically.[191] He sees three types of interests surviving death on this basis:[192] completely 'new interests', just as new interests can arise in life so too they can in death for example: an interest in not having ones remains desecrated;[193] those interests that have 'changed by death' for example, bodily integrity (dealt with in chapter 3), the nature of the interest changes when you die but you nevertheless still have an interest in bodily integrity and thirdly, those that remain partly the same across life and death. It is Wilkinson's third interest and his specific use of privacy as an example, which provides a 'partial identity' spanning across life and death. This calls into play his symmetry argument which rests on treating 'like cases alike'. People should be treated fairly and impartially, with no 'arbitrary

[190] Wilkinson (n 100) 31. Wilkinson's work is in relation to research ethics but his 'symmetry' theory is equally applicable to the discussion in this thesis. Wilkinson identifies that the dead can be the subject of research on their bodies as well as research that looks at their private papers or medical, financial or governmental records etc and also asking the surviving questions about the dead.
[191] ibid 34 and 35
[192] He discounts interest that are 'experiential' or involve 'acting or having the capacity to act' as the dead cannot experience nor act.
[193] The fact that the dead can acquire completely new interests supports the argument that they can have interests that can be harmed.

discrimination.'[194] This is the 'widely shared view about the right way to treat the interests of the living…' and Wilkinson sees no reason why this should not be extended to the dead's interests too. The concept of symmetry, therefore, enables answers to the questions what 'weight' should be given to a post-humous interest and how it can be 'institutionally protected' by looking at the protection given to the living. This provides a better model for protecting the dead.[195]

Wilkinson asserts that the only way the dead and living could be treated differently is if there were 'some morally significant difference between their interests.'[196] One such difference could be where a living person does not care about what happens to their interests when dead.[197] In these circumstances he calls upon symmetry as a guide to working out the duties owed by researchers (and others) and identifies the seeking of consent as being the most important. Just as consent is required from the living when it comes to waiving their interests for example, there is no reason why the living could not also provide, or refuse, consent to waive their interests when dead, to enable research to take place. In the context of this thesis, it would mean that the living could, in advance of their death, waive their privacy interests to allow the publication of private material, for example, upon their death. However a difficulty arises where the survivors do not know what the living wished to happen to their interests when dead as no prior consent was given. In these circumstances Wilkinson looks to similar difficulties with the living, such as where the person is vulnerable, incapacitated or inaccessible,[198] and outlines procedures that exist to overcome these problems, such as proxy consent based on 'judgement' or 'best interest.'[199] These, he says, can be used in the case of the dead.[200] So the problem of consent is surmountable when it comes to the living and Wilkinson says, by symmetry, it is too for the dead. In relation to post-mortem privacy the issue of consent, where the deceased's wishes were unknown, would not arise, as unless and until any matters in which

[194] ibid 35.
[195] ibid 35. Wilkinson does not see the lack of partial identity resulting in an impossibility to ascribe post humous interests.
[196] ibid.
[197] Ibid, although there might be a symmetry there, with some people neither caring in life nor in death?
[198] Wilkinson (n 100) 36.
[199] ibid.
[200] It is accepted that the issues raised by Harbinja (and discussed in chapter 4) arise here, namely what if it is the very person/people that the dead person wanted to keep the secret matter from that are in the position of making the choices about whether it should be disclosed etc.

a 'reasonable expectation of privacy' could be expected in accordance with Article 8, are shown to lose out to an Article 10 right, they remain private.[201]

It should be noted that Wilkinson uses privacy as an example of symmetry but only talks of 'interests in privacy' not a 'right to privacy' or 'duties for others.'[202] He asks the question whether interests in privacy can survive death and if so, whether they could be 'weighty enough to ground duties.'[203] As was seen in chapter 2 there are many reasons to value privacy, some of which could not apply to the dead, such as the avoidance of embarrassment, ridicule or rejection by others if the private information were to be known.[204] Wilkinson identifies safeguarding one's reputation as one value of privacy that can extend beyond death, as most people would not want their reputation damaged even if they were not to know of it.[205] He also identifies the value of privacy as being 'a good in itself.' Unconnected directly to Wilkinson's argument, but relevant, is Scarre's identification of nine positive and negative privacy rights of the living that 'might with moral plausibility be ascribed to the dead.'[206] They are grouped into rights to: a private space; the control of personal information; private communication; and bodily integrity. The latter was dealt with in chapter 3, where it was shown that the law does recognise and protect the dead's bodily integrity in a number of ways, including ensuring that dignity is maintained. In addition it was shown how the living and survivors often feel strongly about the prospect of a 'loss' of privacy,[207] so far as bodily integrity is concerned, when dead.[208] The other privacy interests for the living, which are relevant to this thesis and which were discussed in chapter 2 are identified by Scarre as the 'right of controlling personal information' in the form of the right to decide who has access to it, the right not to have 'embarrassing or shameful facts' disclosed and also the right 'not to be placed in a false light in the public eye by either misrepresentation or partial representations.'[209] Another in the form of the right not to have 'private communications disseminated to third parties,' for example for their commercial or marketing purposes could be added. Thus, there are, arguably a number of

[201] It could possibly become relevant within that argument if it is known that the deceased would in fact have wanted the matter to be revealed upon their death even though express consent had not been given in life.
[202] Wilkinson (n 100) 36.
[203] ibid 37.
[204] ibid.
[205] Wilkinson (n 100) 37.
[206] Scarre (n 24) 7 – 12 for full list and explanation.
[207] The analysis of the concept of harm as a loss was considered above.
[208] These would be considered by Wilkinson as those interests that have 'changed by death' the nature of the interest changes when you die but you nevertheless still have an interest in bodily integrity
[209] Scarre (n 24) 7.

identifiable functions of privacy that are applicable in life and death and which can cause harm if invaded post-mortem. Wilkinson argues that if it is reasonable to care about one's privacy in life regardless of knowledge of its invasion, '…how can it be simply unreasonable to care about one's posthumous privacy?'[210] This somewhat rhetorical question is the mainstay of this thesis and was partly answered in chapter 3. There we saw that the living do care about events post their death and such care is not generally considered to be unreasonable. The logical conclusion of Wilkinson's argument is that: 'If the interest is weighty enough to ground duties while the subjects are alive it is, by symmetry, weighty enough to ground duties when the subjects are dead.'[211] Privacy is most certainly of significant weight.

Another important aspect of Wilkinson's argument is that whilst there are protections for the dead relating to research on their bodies there are none relating to research on their lives.[212] He sees this as arbitrary[213] and particularly so if it is supposed that there are posthumous interests in privacy and reputation for example. There are echoes of Nagel's argument on 'biographical ruthlessness', whereby he contends that there is '…something wrong with our now having access to Bertrand Russell's desperate love letters, Wittgenstein's agonized expressions of self-hatred…'[214] and 'if we think it wrong to take Einstein's brain for ....research given that he almost certainly would not have wanted it taken, why would it not be wrong to publicise his marital difficulties?'[215] In addition, and as will be addressed in the next chapter, it is arguable that there is the potential for more harm to be inflicted upon the survivors if the research uncovers private details that are distressing to them and emotionally damaging long term.

The second supplemental argument in support of a post-mortem privacy right, to which we now turn, is the wider implication of the harm that is visited about society if its individual members are not protected.

[210] Wilkinson (n 100) 37.
[211] ibid.
[212] ibid 38.
[213] ibid 39.
[214] Thomas Nagel, 'Concealment and Exposure' 27 (1) 3 Philosophy and Public Affairs 22.
[215] Wilkinson (n 100) note 23: 'there is at least a case answer'.

5.6.2 Societal Harm

In chapter 2 we looked at the societal interest in maintaining privacy in life. In this section it is argued that breaching the continuing critical interest individuals have in their privacy being maintained post-mortem, causes a harm not only to themselves but to society as a whole. Thus a failure to honour the wishes of, or promises made to, the living after their death can, according to Young, cause a 'dignitary harm to society as whole.'[216] This is because it causes 'other living people to doubt that their own wishes will be protected.' So, there is a 'broader dignitary interest in carrying out the wishes of the dead' and it is argued here, this is equally applicable to the deceased's privacy. This is so because 'society has an interest in seeing itself in a certain light,' namely 'as people who respect the wishes of the dead'.[217] Thus it may well seem morally wrong for Soldier X's widow not to honour his wishes insofar as his burial is concerned or for his privacy not to be honoured when dead, for example. Society can be harmed by those acts that do not honour the dead's wishes.

Of course, the reason why society may be harmed by such acts will depend on why it values respecting the dead and the honouring of promises made to them, or the wishes they expressed whilst they were living. Partridge rejects the idea that the living have duties towards the dead but does accept that we have duties in regard to the dead.[218] Thus when we break a promise, made to a living person, we do not wrong the dead person, but commit a wrong by undermining the trust in the social utility of promise making. So, we are undermining the '…socially useful practice of promising'.[219] Brecher accepts that one of the reasons for honouring promises is so that we can rely on others keeping promises made to us when we are dead. We therefore 'want the institution of promising to be reliably maintained' and in this respect 'it is therefore that institution rather than directly to the dead that we have an obligation.'[220] He does however, suggest, that keeping promises to the dead is more fundamental and 'goes deeper' as we have made promises to that 'person' and it is they who are 'owed an obligation'.[221]

[216] Hilary Young, 'The Right to Posthumous Bodily Integrity and Implications of Whose Right It Is' (2013) 14 (2) Marquette Elder's Advisor 197, 223.
[217] ibid 201.
[218] Partridge (n 8).
[219] Scarre (n 24) 16.
[220] Brecher (n 25) 111.
[221] ibid.

Scarre criticises what he calls Partridge's 'metaphysical pretense' in that the dead have no genuine interests but must be treated as real for the sake of defending some socially useful practices. He argues Partridge's course is not calculated to 'sustain that other socially useful practice of telling the truth.'[222] He maintains that 'common sense morality' is not thinking that breaking a promise made on a death bed is wrong because it 'undermines the socially useful practice of promising,' but that it is wrong by the dead to do so. [223]

It is argued here that both aspects of the promise debate can apply equally to this thesis: we may not specifically 'promise' to keep the dead's privacy but intuitively we respect the dead and their dignity, which can be directly affected by invasions of their privacy. We do this not only to protect the dignity and thus privacy of the individual, but because if the dead were treated with disrespect and a lack of dignity by allowing their private matters to become public, a 'dignitary harm' would be inflicted upon 'society as a whole.'[224] The living protect the dead's privacy so as to 'effect' the 'assurance' that when they are dead their privacy will also be protected. Without these 'effecting assurances' we could see harm caused to society who rely upon them during their own life-time.

5.7 Conclusions

In conclusion it is submitted that this thesis can be built upon two different grounds, one involving 'knowledge' and the other involving 'no knowledge'. The main line of argument is: no harm actually has to occur to the 'dead' and lack of knowledge is not an issue, as the harm is to the living whilst alive because of the knowledge that in death her privacy can be invaded. Alternatively, the subject has no knowledge that her privacy can be invaded upon death but when it is, it is an interest that has been 'thwarted' which amounts to a 'harm' which can, according to the Feinberg/Pitcher theory, be attributed to the ante mortem person. Harm can thus be inflicted on the living in three ways: first, the loss of the deceased's interest in maintaining her private life means that she is harmed in life even if she did not know this would occur, for example: death scene images or an autopsy video being published on death. Secondly, in life the deceased has a reduced liberty of action because she is aware of the risk

[222] Scarre (n 24) 17
[223] ibid 16.
[224] Young (n 216) 223.

of post-mortem privacy invasion and thus does not do certain things for fear of them becoming known when she is dead. Thus, the consequent 'chilling effect' harms her autonomy in life. Finally, the person does do the things avoided in the second scenario above and thus has a 'secret' which she does not want revealed on death. She is harmed in life by the prospect of this being revealed upon death.

This thesis places emphasis on establishing harm as this is required in life to succeed in a claim under Article 8. As was seen in chapter 2 the interpretation of Article 8 by the ECtHR has broadened the scope of 'private and family life' significantly. One of the consequences of this, according to van der Sloot, is that it allows for a much more subjective harm to be actionable by virtue of the fact that the ECtHR have accepted that 'the right to develop one's identity and personality' in both the private and public sphere, as well as in the 'personal and the professional realm' is 'one of the core rationales underlying Article 8'. This he asserts is illustrative of the 'shift of the interpretation' from the original 'classic right to privacy…to a more encompassing personality right.'[225]

This chapter has also argued that intuitively we say that the living do have duties and obligations to the dead (not necessarily in a legal sense but grounded in morality and respect). As previously identified this theme runs through all the scholarship, on either side of the debate as well as from within the legal system itself. There are those that do not advocate posthumous interests or rights based on harm, but all do appear to advocate some sort of redress for the dead against actions that are morally wrong, although not considered to be harmful to the deceased.

It would seem therefore, that if society holds that the living are deserving of privacy, as enunciated in the current statutory and judicial provisions, then the logical extension of applying this posthumously would be thought to have little opposition. Surely our 'intuitive' feelings of respect for the dead would guide us to respect their privacy in death as we did in life? The argument is that in the absence of any legislative initiative, presently, could it not be society's beliefs in this respect that could form the foundation of change? All rights, duties,

[225] Bart 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(80) Utrecht Journal of International and European Law 25, 34.

legal or otherwise, can be said to be grounded in a normative force. Beliefs are powerful, they have normative force, compelling us to act in certain ways, and they have a motivating nature.[226] The teleological approach advanced by the ECtHR can, and should, it is argued, take account of these intuitions and beliefs and the societal changes brought about by the technological age, to ensure that its effect on privacy is ameliorated not only in life but also death.

As we have already seen in chapter 4 and above, it is not just the ante-mortem living person that can suffer harm by the post-mortem invasion of their privacy or indeed be the focus of societal intuitions about respect and dignity, but the living survivors too. Whereas for the former the harm takes place prior to the death, for the latter it takes place after the death but within the same context and with many overlapping consequences. It is this issue that the last substantive chapter of this thesis addresses.

[226] McGuinness and Brazier (n 159) 306.

Chapter 6

Post-mortem Relational Privacy

Soldier X

Soldier's X's lover seeks an injunction under Article 8 to prevent disclosure of his affair with the now deceased Soldier X.

Soldier X's widow wishes to prevent the disclosure of Soldier X's homosexuality and affair.

6.1 Introduction

This chapter looks at post-mortem relational privacy. Thus far it has been argued that the 'living ante-mortem person' can be harmed in life by not having privacy when dead. In this chapter it is argued that the 'living survivor' can have privacy interests, which relate to the disclosure of information about the deceased, that can be harmed and are thus worthy of protection under Article 8.[1] Of course, the survivors are entitled to their own Article 8 right as is any living person. The question is: are they capable, within Article 8, of possessing an actionable privacy interest that arises vicariously out of their relationship with the deceased person? In other words, does there exist, or could there, a post-mortem relational privacy right under Article 8?

In chapter 4 post-mortem relational privacy was conceptualised through consideration of the American jurisprudence and scholarship. It was seen how the courts had developed the concept over the past two decades to protect 'death related' information about the deceased, examples of which are the disclosure of autopsy records and photos, death scene images, transcripts and

[1] The focus of this thesis is on the right of privacy contained in the ECHR. A similarly worded general right - albeit without the qualifying conditions of ECHR Art 8(2) – can be found in Article 7 of the EU Charter. Of course, post Brexit the Charter will have little, if any traction, within the UK's legal order, which is the doctrinal focus of this PhD. It is possible that over time, Article 7 of the Charter might allow for more expansive protection by the EU but broadly they are likely to run hand in hand (perhaps with the ECHR as a minimum floor, as set out in Article 52(3). In *J McB v LE* (Case C-400/10 PPU) para 53, the CJEU asserted that 'Article 7 of the Charter must therefore be given the same meaning and scope as Article 8(1) of the ECHR, as interpreted by the case-law of the European Court of Human Rights.' Article 8 of the Charter provides specific protection for personal data; as has been averred previously, the focus of this thesis is broader, not limited to information in digital form or to 'data', more narrowly conceived.

recordings of dying words. This chapter draws support from the US literature in ascertaining the rationales and justifications for the concept argued herein but goes on to expand it beyond merely 'death related' information. It utilises the harm principle as it relates to the living relatives,[2] as well as recent ECtHR and UK jurisprudence, to develop a post-mortem relational right of privacy under Article 8 to include private matters about the deceased which affects the privacy interests of the relatives themselves.

In summary, this thesis argues that Article 8 can and should protect the living from the harm that is caused by an invasion of privacy in three ways: first through a straight forward Article 8 claim as discussed in chapter 2; secondly protecting their privacy when dead, as argued in chapter 5; and thirdly, protecting the surviving relatives as will be argued in this chapter. The importance of the discussion of post-mortem relational privacy in this thesis is once again three-fold: first, it highlights several cultural norms, intuitions and apparent legal fictions that have already been discussed, but which can also be seen as relating to the grieving survivors. These are put into context through real life examples garnered from the Leveson Inquiry and Kerslake Report, as well as American jurisprudence,[3] and recent cases of online sharing of death images. Secondly, in exploring what rights the relatives of the deceased have to protect their own interests, it becomes apparent that they consequentially protect the privacy of the deceased themselves. Thirdly, as will be seen, the ECtHR in cases such as *Putistin*,[4] have made tentative moves to extend Article 8 provision to the surviving relatives when it comes to reputational matters. Hugh Tomlinson QC sees this as '…potentially, a radical new development.'[5] Of course defamation of the deceased, and thus the consequent effect on the relatives, is a corollary to the focus of this thesis which is the privacy aspect of Article 8. However, the importance of the decision in *Putistin* is what Tomlinson describes as the ECtHR's 'expansive interpretation of Article 8',[6] something which was highlighted in chapter 2. It provides support for not only the arguments in this chapter but also for the extension of Article 8 to include post-mortem privacy for the deceased themselves, as the ECtHR is

[2] to include non-blood relations who have an identified 'close' relationship with the deceased.
[3] Where the concept of post-mortem relational privacy has been emerging since circa 1999.
[4] *Putistin v. Ukraine* [2013] ECHR 1154.
[5] 'Case Law, Strasbourg, *Putistin v Ukraine*: Court Recognises Claims for Defamation of the Dead' *Inform's Blog, The International Forum for Responsible Media Blog* (London, 22nd November 2013) <https://inforrm.org/2013/11/22/case-law-strasbourg-putitstin-v-ukraine-court-recognises-claims-for-defamation-of-the-dead-hugh-tomlinson-qc/> accessed 17 October 2019.
[6] ibid.

demonstrating a willingness to expand Article 8 further. This is in line with van der Sloot's view that its present, and continuing, expansive scope allows '…protection to a wide variety of matters related in general to the development of one's personality and identity…' thus it accepts '…not only the protection of welfare but also of ulterior interests…' as was discussed in chapter 5. Consequently, van der Sloot sees the ECtHR using an increasingly '…subjective notion, the quality of life, to determine whether complainants have suffered from particular privacy violations.'[7] This, as will be demonstrated, could allow for the post-mortem relational privacy right to infiltrate Article 8 as it stands presently, with no need to change its definition as would be the case with a post-mortem privacy right.

Ultimately, this chapter ascertains that post-mortem relational privacy can serve as a mechanism for indirect post-mortem privacy protection for the deceased as well as ensuring that the relatives of the deceased are protected from invasions of their own privacy by virtue of their relationship with the deceased. Establishing an Article 8 post-mortem relational privacy right would thus tangentially protect the privacy of the deceased and can run alongside the post-mortem privacy right being contended for in this thesis. This may, however, beg the question, why do we need both? As was identified in chapter 2 the law often proceeds 'incrementally' with the courts 'more willing to make a new law by adapting or extending existing doctrine rather than creating a new branch of law.'[8] The recognition of a post-mortem relational privacy right could be done easily from within the existing framework, by way of judicial interpretation through its expansive approach to Article 8. This would be less straight forward, albeit possible, for the main post-mortem privacy right argued herein. Additionally, there are obvious enforcement difficulties with the post-mortem privacy right that will be discussed in the concluding chapter. A post-mortem relational privacy right can overcome some of these. It is also suggested that it is a more readily comprehensible concept at present and thus more likely to engender support. Its protection, however, is of course more limited in scope than would be the post-mortem privacy right being ascribed to the living: whilst it may be the case that a post-mortem privacy right would cover all that the relational right would, the converse is certainly not the case.

[7] Bart van der Sloot, 'Privacy as Personality Right: why the ECHR's Focus on Ulterior Interests Might Prove Indispensable in the Age of Big Data' [2005] 31 Utrecht Journal of International and European Law 25, 47.
[8] R G Toulson and C M Phipps, *Confidentiality* (3rd edn, Sweet & Maxwell 2012) [2-2012]. It is with this rationale in mind that the basis of chapter 5 was the adoption of existing doctrine, namely Article 8 to protect privacy post-mortem.

The context in which post-mortem relational privacy is set is of course the same as that discussed for post-mortem privacy. However, although the harm in both takes place during the ante-mortem life; unlike post-mortem privacy it occurs 'after death' in post-mortem relational privacy. This means that those affected are dealing both with the death and the invasion of privacy which intuitively, if not legally, adds to the harm that can be inflicted. It is therefore important to consider the context specifically in relation to post-mortem relational privacy before discussing the harm that it seeks to prevent. In addition, some of the functions of privacy that were discussed in chapter 2, that are not applicable to the dead such as protection from ridicule, embarrassment, punishment or shunning and avoiding, are once again applicable when considering post-mortem relational privacy.

We looked at harm in the last chapter and will do so in this, but as it relates to the surviving relatives not the deceased or ante mortem person. The Leveson Inquiry, the Kerslake Report into the 'Preparedness for, and Emergency Response to, the Manchester Arena attack on 22nd May 2017'[9] and the Commissioner for Victims and Witnesses 'Review into the Needs of Families Bereaved by Homicide',[10] provide examples in this chapter of the harm that can be inflicted upon surviving relatives by invasions of the deceased's privacy. These are threefold: the harm caused by the thwarting of the surviving relatives desire to protect the dead from being treated with a lack of respect or dignity (Feinberg's 'other regarding' interests). Second is the direct harm inflicted upon them through the exposure of, for example, photographs of the deceased at their death scene, or revelations of a private matter about the deceased themselves to the public at large (Feinberg's other regarding and self-regarding interests) and third is the harm caused to society by the thwarting of effecting assurances. The latter causes a societal, as well as individual, harm as was discussed in chapter 5. The identified 'societal interest of maintaining the dignity of the deceased and of protecting the grieving of relatives'[11] was, in part, shown in chapter 2 insofar as there are societal interests in maintaining privacy as well as individual interests. Chapters 3 and 4 highlighted how society intuitively seeks to protect the dignity of the deceased and champions respect for the dead. The social good of a

[9] 27 March 2018 <https://www.fbu.org.uk/publication/kerslake-report-independent-review-preparedness-and-emergency-response-manchester-arena> accessed 12 November 2019.
[10] Louise Casey, July 2011 www.justice.gov.uk/downloads/news/press-releases/victims-com/review-needs-of-families-bereaved-by-homicide.pdf accessed 14 May 2018.
[11] Clay Calvert, 'The Privacy of Death: An Emergent Jurisprudence and Legal Rebuke to Media Exploitation and a Voyeuristic Culture' (2006) 26 Loyola of Los Angeles Entertainment Law Review 13, 151

privacy interest was argued to be applicable, in certain circumstances, to the dead themselves and once again can be seen to be applicable to the post-mortem relational privacy concept in this chapter. Emery argues that 'in light of new technology and its ability to feed the online demand for graphic and exploitative images of death, society must make a conscious decision to affirmatively protect the rights of grieving families.'[12]

As can be seen in relation to the Soldier X scenario above, his lover would likely have an Article 8 claim in relation to the disclosure of his homosexuality and affair with the now deceased Soldier X. It would be a simple claim in his own right. Soldier X's widow however, does not have such a straightforward claim and it is the post-mortem relational privacy right contended for in this chapter, which could potentially provide her with protection.

As has been stated previously, there is the potential issue of the relatives (who would have a post-mortem relational privacy right) being the very people from whom the deceased wished to keep matters private. However, this does not present itself as a problem in so far as post-mortem relational privacy is concerned, because the survivors need knowledge of the potential breach of privacy so as to make a claim under Article 8. Any matter which the deceased wished to keep private from her relatives would not be disclosed for the purpose of the post-mortem relational privacy right. This is so because this right is dealing solely with preventing the public disclosure of private matters about the deceased that affect the privacy interests of the relatives, of which the relative would necessarily already have knowledge.

6.2 Context in which Post-mortem Relational Privacy is Developed

In chapter 2 we saw the context in which privacy is functioning today and in chapter 4 how that has resulted in the post-mortem relational privacy jurisprudence developing in the US. It is of note that Calvert predicted that 'privacy rights pertaining to images of the dead' were 'likely to grow as the media's rights to access and publish them' receded.[13] He concluded that 'the news media sensational coverage of both the images of the dead and the words of the

[12] Christine Emery, 'Relational Privacy - A Right to Grieve in the Information Age: Halting the Digital Dissemination of Death-Scene Images' (2011) 42 Rutgers LJ 765, 805.
[13] Calvert (n 11) 145.

dying' was influencing 'the emerging jurisprudence of death'[14] and argued that the 'climate is ripe to develop the law surrounding the privacy of death.'[15] Similar criticism was laid at the feet of the British press in the Leveson Inquiry, albeit not in relation to death scene images. Calvert, in his 2006 article, identified that the American news media was likely to be 'reigned (sic) in by the law' as a result of various abuses and its emerging lack of credibility.[16] That was clearly the hope at the conclusion of the Leveson Inquiry, so far as the British press were concerned, but unfortunately, as will be seen, this appears to be some way off. However, Calvert saw the emergence in the US of a maxim that 'the more horrific, tragic, and unusual the circumstances surrounding the death, the more likely the courts will recognise the privacy interests of the relatives in the dignity of the dead.'[17] It will be seen later on in this chapter that this may well be true here also.

Of course, the obvious and most grotesque breaches of post-mortem relational privacy are those where death images are posted online for the world to see. We saw the case of Nicole Catsouras and Bianca Devins in previous chapters. Unfortunately, these are just two examples of many and there are entire websites dedicated to such gruesome images. There are other, less graphic examples that are found in the evidence before the Leveson Inquiry or in the Kerslake report which will be considered. Sadly, the internet and ubiquitous smart phone cameras have led to a proliferation of such breaches of a deceased person's privacy and consequent harm to the surviving relatives. The phenomenon of photographing tragic events and death scenes was evidenced in this country in August 2015 at the Shoreham Air show in West Sussex, when a Hawker Hunter jet smashed onto the A27 dual carriageway killing 11 people. Tony Kemp MBE, a senior nurse who was first on the scene, described a small number of bystanders filming on their mobile phones in the initial aftermath of the crash. He said that people '…found this behaviour quite grotesque and outrageous. Unfortunately [it] is a modern curse at the scene of many accidents.' He urged anyone who had such footage and photos to '…consider very carefully the ramifications of sharing these images with anyone, particularly on social media.'[18]

[14] ibid 148.
[15] ibid.
[16] As will be seen later in this chapter, the discussion in America over a decade ago, was echoed in the evidence before the Leveson Inquiry in 2012.
[17] Calvert (n 11) 161.
[18] 'Nurse describes being first on scene after air show crash' *Nursing Times* (London 24 August 2015) <www.nursingtimes.net/clinical-archive/accident-and-emergency/nurse-describes-being-first-on-scene-after-air-show-crash-24-08-2015/> accessed on 19 November 2019.

Thankfully no such images have emerged (to the author's knowledge) but as Emery highlights the technological age of smart phone cameras '…social networking sites, and blogs' have transformed everyone into a '…photojournalist with a more powerful voice and wider audience than Socrates could have achieved.'[19] As was seen from the American jurisprudence, both the courts and legislators showed 'concern for the potential injury that technology can cause by exploiting death and offending the privacy of the surviving family.'[20] Splichal and Terillis see the decisions in *Favish and Challenger* as 'striking examples' of judicial recognition of '…deep societal concerns regarding the privacy rights and feelings of family members—concerns heightened by technology… ' motivating '…judicial and legislative re-examinations of what amounted to relational or derivative privacy rights…'[21]

This shows the relevance now of post-mortem privacy and post-mortem relational privacy in the digital age, something which may not have been considered important, relevant or necessary in the non-digital world, given that the opportunity to share such images would have been minimal and far less instantaneous or durable. Secondly, the effect upon the surviving relatives (and friends and colleagues) can be catastrophic and is discussed below in the section on harm. The law, this thesis argues, can and should provide protection and relief.

6.3 Scope of Post-mortem Relational Privacy Right

The paucity of discussion of post-mortem relational privacy in UK legal scholarship is despite its emergence as a concept in the USA over 20 years ago, and more recently in 2013 in the ECtHR. Whilst post-mortem relational privacy, as a legal concept, did not really infiltrate the US academic conscious until the late 1990s, the New York Court of Appeals Division did recognise it as far back as 1895 in the case of *Schulyer v Curtis*.[22] The deceased's family wished to prevent the 'Women's Memorial Fund Association Institute' from erecting a statue in her

[19] Emery (n 12) 767
[20] David Hamill, 'The Privacy of Death on the Internet: A Legitimate Matter of Public Concern or Morbid Curiosity' (2011) 25 (4) Journal of Civil Rights and Economic Development 833, 840.
[21] Samuel A Terilli and Sigman L Splichal, 'Public Access to Autopsy and Death-Scene Photographs: Relational Privacy, Public Records and Avoidable Collisions' (2005) 10 COMM. L. & POL'Y 313, 341.
[22] *Schuyler v. Curtis*, 147 N.Y. 434, 447, 42 N.E. 22, 25 (1895).

honour. The Association denied that the relatives had standing to so object. The Court found against the family on the facts but adjudged the following:

> 'It is the right of the privacy of the living which is sought to enforce here. That right may in some cases be itself violated by improperly interfering with the character or memory of a deceased relative, but it is the right of the living, and not that of the dead, which is recognised. A privilege may be given the surviving relatives of a deceased person to protect his memory, but the privilege exists for the benefit of the living, to protect their feelings, and to prevent violation of their own rights in the character and memory of the deceased.'[23]

As will be seen the violation envisaged by the court in 1895 was wider in scope than what it appears the present-day courts are prepared to consider. In *Schulyer*, improper interference with the 'character' or 'memory' of a deceased could be a violation of the surviving rights that the court would be prepared to protect. However, modern day US law and public policy has limited the scope of post-mortem relational privacy to recognising and protecting the deceased's relatives' interests in the disclosure of 'death related' information about the deceased. Consequently, and as was seen in chapter 4 the jurisprudence relates to the disclosure of autopsy records and photos, death scene images, transcripts and recordings of dying words and photographs of the deceased in open caskets. This thesis contends that 'death related' information is only one aspect of post-mortem relational privacy and that a more expansive approach is needed to encompass, as its definition suggests, the privacy interests of relatives in relation to the deceased's private information *per se*.

It is this wider concept that the ECtHR appears to have recognised and applied in the Article 8 cases of *Plon,*[24] and more recently, albeit with a narrow focus on post-mortem defamation, in *Putistin*[25] and *Dzhugashvili.*[26] The latter two cases were considered in 2018 in the unreported

[23] Judge Peckham delivered the judgement of the court. This passage was quoted in *National Archives & Records Administration v. Favish* 541 U.S. 157 (2004) to be discussed. An interesting review of the case can be found in 'Schulyer against Curtis and the Right to Privacy' (1897) 12 The American Law Register and Review 745 <http://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=5551&context=penn_law_review> accessed 10 December 2019.
[24] *Editions Plon v. France* App no. 58148/00 (ECHR, 18 May 2004).
[25] *Putistin* (n 4) 1154.
[26] *Dzhugashvili v. Russia* [2014] ECHR 1448.

case of *Douglas v. News Group Newspapers,*[27] where Senior Master Fontaine, sitting in the QBD, determined these cases provided support for a statement relating to a deceased person to be read in open court, a first in British legal history. This case was in respect of a claim of misuse of private information/breach of confidence that had been issued prior to the death of the claimant and continued by her daughter as administrator of her estate. Consideration of, *inter alia*, these cases below will show that there is a tentative pathway towards the recognition of a post-mortem relational privacy claim under Article 8 and ultimately the recognition of a post-mortem privacy right as is argued in this thesis.

6.4 Harm to the Surviving Living

Having outlined the concept of post-mortem relational privacy and placed it within the context in which it has arisen, and will continue to develop, it is important to look at the harm which it seeks to prevent. In the previous chapter harm was considered in a theoretical and philosophical sense so as to construct the argument that the ante-mortem person can be harmed in life by matters which happen in death. Many of the considerations in that chapter apply to this but the focus here is on what Feinberg defines as 'other regarding' interests that can cause vicarious harm in life. These occur where for example '…C has invested a desire so strong, durable and stable in D's well-being, that he comes to have a personal stake in it himself.' [28] In addition, harm will be considered in the practical sense as enunciated by those who have suffered a breach of their post-mortem relational privacy, thus allowing for consideration of how these examples could fall within the scope of Article 8 protection.

Of course, harm to a person's own sense of privacy and emotional tranquillity (whether it be self or other regarding) is necessarily *after* the death of the relative and thus is not to the deceased but to the deceased's relatives. The harm to the individual is twofold: that caused by the thwarting of the surviving relatives' desire to protect the dead, which was highlighted in

[27] Parties reached a settlement on 26th March 2018 and the statement was read in open court. *Natasha Douglas (Administrator of the Estate for Susanne Hinte) v New Group Newspapers Limited* 10 May 2018 www.5rb.com/wp-content/uploads/2019/07/Douglas-v-News-Group-Newspapers-HQ17M02933.pdf accessed 12 December 2019.

[28] Feinberg offers a second way a person can have an interest in the wellbeing of another that is not relevant herein, namely where 'A is dependent upon the help of B for the advancement of his own (A's) interests, so that if B's fortunes should decline, B would be less likely to help A'. *The Moral Limits of the Criminal Law: Harm to Others*, Vol 1 (OUP 1984) 70.

chapter 3, from being treated with a lack of respect or dignity. This harm is to the survivors 'other regarding' interests and forms part of the main theoretical underpinning of the post-mortem relational privacy concept argued herein. Secondly, there is the direct harm inflicted upon the survivors through the exposure of, for example, photographs of the deceased at their death scene, or revelations of a private matter about the deceased themselves to the public at large. This constitutes harm to the 'self-regarding' interests but can also amount to a harm to the 'other regarding interests' and it is often the case that harm can occur to both simultaneously. The third harm is a societal one.

There is of course the argument put forward by Callahan, that was considered in chapter 5, whereby any interest a person had prior to death can only survive her death as an *interest* if they are carried on by living interest bearers, so her heirs, for example, would inherit her debts and copyrights. Her interests are passed onto 'other agents' so as they become those persons interests.[29] This would allow for the living to take up the deceased's privacy interest as if it were their own. This is not the basis upon which this thesis seeks to construct the relational post-mortem privacy right, although as will be seen in chapter 7 it is a potential solution to the inevitable enforcement difficulties which the post-mortem privacy right presents.

6.4.1 Thwarting the Survivor's 'Other Regarding' Interests

Other regarding interests are considered by Feinberg to be those that arise from a relationship between, for example, parent (P) and child (C) where P has 'invested a desire so strong, durable and stable' in C's well-being, that they come 'to have a personal stake in it' themselves. Thus, it becomes one of P's 'ulterior interests' or 'focal aims.'[30] To be a true 'other regarding' interest it must be 'an abiding interest of his own' in the well-being of C and not 'merely an episodic passing desire.' In addition, it does not result simply 'as a means to the promotion of other ulterior aims that are components of his own good, but quite sincerely as an end in itself.'[31] Anything that harms C directly can *ipso facto* harm P indirectly. Of course, this violation of an 'other regarding interest' can also 'instrumentally' damage 'various self-regarding interests…' such as, for example, maintaining one's emotional stability.

[29] Joan Callahan, 'On Harming the Dead' (1987) 97 (2) Ethics 341, 344.
[30] Feinberg (n 28) 70.
[31] ibid 71.

We can contrast 'other regarding interests' that can cause vicarious harm, and which form the basis of the post-mortem relational privacy right, 'with more common phenomenon of spontaneous sympathy, pity, or compassion which can be directed at total strangers.'[32] For example: it may make us unhappy to hear of people falling ill and dying of COVID-19 and we may 'from genuinely disinterested, compassionate motives'[33] do what we can to help the elderly and vulnerable who are at risk, but the harm that has been done to others is not also a harm that is done to us. 'Our interests have not been invaded by the harm done to others, but we have suffered some vicarious unhappiness on their behalf which will leave our own personal interests largely unaffected.' [34]

Feinberg notes that many people either discount or deny altogether these '(l)oving interests' as they are 'so commonly intertwined with, and reinforced by, instrumental essentially self-regarding interests…' [35] There are those who assert 'that there are no purely other regarding interests at all…' for human nature is such that 'no-one "really cares" about the well-being of other persons, except insofar as it affects his own self-regarding interests.'[36]A somewhat cynical view and one which Feinberg argues against, particularly when looking at the kinds of self-regarding interests that are very familiar, where there is a pooled interest, where 'separate persons are so related that they share a common lot.'[37] As is seen sometimes in 'marriages and family groups' each have a 'genuine stake of a not merely instrumental kind in the well-being of the others' but 'a stable ulterior goal, or focal aim, that the others flourish, partly as an end in itself, partly as a means to a great diversity of ends.' [38]

It is these other regarding interests that can, it is contended, often be found in familial relationships and which form the foundational basis of the post-mortem relational privacy right. The survivors 'strong, durable and stable' desire in their deceased relatives well-being whilst

[32] ibid.
[33] ibid.
[34] ibid 70 – 71.
[35] ibid 71.
[36] ibid.
[37] ibid 72.
[38] ibid. Feinberg addresses a number of arguments in relation to selfishness and self-regarding interests etc, ibid 72 – 77, which are of interest yet not directly relevant to the arguments put forward in this thesis.

they were alive can, it is argued here, include their privacy, which Feinberg contends can be a 'welfare interest' of the 'most vital kind.'[39] This 'other regarding' interest in their relative's well-being includes the maintenance of their privacy. This interest, it is argued, is capable of continuance beyond the deceased's relative's life by virtue of two of the main threads in this thesis: the death culture and our intuitions that the dead should be treated with respect and dignity and thus their privacy maintained. Thus, 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. We looked, in previous chapters, at the expansive teleological approach of the ECtHR's interpretation and its willingness to consider quite subjective harm as the basis of a claim under Article 8. This approach lends itself to allowing the relational post-mortem privacy right, on the basis of the harm enunciated and the arguments herein, to be actionable under Article 8.

Having established the theoretical basis of the harm which can be caused to surviving relatives, looking at practical examples of the actual harm that can occur will assist in demonstrating the importance of the right contended for in this thesis. Louise Casey's review provides insight into how grieving relatives can be harmed by publication of private photographs or details of the deceased. In the largest ever survey of bereaved families (over 400 in total) 32% '…found media intrusion to be one of the hardest things to deal with.'[40] Of course this review was only looking at families who had suffered a bereavement as a result of a violent crime, and thus media attention is at its highest, but there are many things that can be drawn from the report to show how bereaved relatives are affected and indeed harmed. The survey found that over 80 of the participants had suffered 'trauma-related symptoms'[41] and families often complained that the criminal justice system allowed the victim's reputation to be damaged or '…intimate family information was often revealed…' which '…often seemed to cast aspersions on the victim or other relatives which left them ashamed and enraged.'[42] In addition, as the victim could not stand up for themselves the relatives often '…feel they must 'do right' by their loved one. The dissection of details of the victims' life can cause enormous personal distress…' [43] It

[39] ibid 62. Feinberg lists several legally protectable interests such as to reputation, of property, domestic relations as well as the interests in privacy, ibid 62.
[40] ibid 30.
[41] ibid 5.
[42] ibid 41.
[43] ibid.

is then no huge leap for this thesis to suggest that these very same feelings of distress could be felt by families of dead relatives whose private matters are revealed to the world through the media. It matters not how they have died or how any private details surface, but that their privacy is being invaded. The relatives have other and self-regarding interests that have been harmed by the invasions that occurred. However, as has been seen, just because a potential harm can occur in any given circumstances does not mean that the law will necessarily intervene to prevent it; there may be competing interests that may take precedence such as the need to receive certain evidence in a criminal trial for justice to be done to the Defendant, for example. The aim should be to mitigate that harm in as far as possible. The report concludes that the Victim Support Service should 'continue to campaign for the right to privacy from the media for the families of homicide victims.'[44] This thesis aims to provide theoretical and legal argument to extend that to all bereaved relatives regardless of the way in which the deceased died.

Another way that it can be said that a survivor's interest can be thwarted and thus harmed is where the memory of the deceased is traduced, so more a reputational matter than privacy matter, although there can be a close inter connection. This was highlighted in the 1895 US case of *Schulyer* where it was said that the right to privacy may be 'violated by improperly interfering with the character or memory of a deceased relative.'[45] Jessica Berg makes reference to how '[t]he dead live on in the memories of the living. Harms to the memory of the deceased may entail very real harms to people now living who have an interest in preserving the original memory, such as relatives or close friends of the deceased.'[46] The scholarship surrounding memory and memory and death is vast and complex and becoming more so in light of the internet with issues such as the memorialisation on social media pages attracting increasing attention. There are issues such as individuals creating online identities that do not reflect their offline one and thus those who know the deceased may well have completely different versions and thus memories of them. The area of harm to the memory of the deceased is relevant to this thesis, in that it is a harm that can be caused to the surviving relatives and thus can come within the scope of post-mortem relational privacy, but a detailed analysis of it

[44] ibid 93.
[45] *Shulyer* (n 22).
[46] Jessica Berg, 'Grave Secrets: Legal and Ethical Analysis of Post-mortem Confidentiality' (2001) 34 Conn. L. Rev. 81, 99.

is beyond the scope of this thesis. It is however an area that could be developed within post-mortem relational privacy in the future.

6.4.2 Harm Inflicted upon the Survivors Self-Regarding Interests

The impact of the internet on post-mortem relational privacy was evident in the Nikki Catsouras case and unfortunately there are an increasing number of similar cases where relatives are having to endure the knowledge that there are death images of their deceased loved ones circulating on the internet. Hamill sees technology, and the internet in particular, as having created 'a virtual graveyard where accident videos can be viewed, and corpses can be closely scrutinized under the protection of the First Amendment.'[47] He sees the internet as 'aggressively attacking the privacy of decedent's relatives' as there is now a 'specialty market for gruesome, grisly, and highly disturbing death-images' in which, he argues, there can be no 'legitimate public interest' regardless of the 'fact that users are curious enough to view this content and perpetuate a demand for this market…'[48] In addition, the safeguards provided by media ethics and regulation of main-stream media outlets are not present with private individuals that share such images online and this presents a very serious issue for post-mortem relational privacy.

The harm that is caused can be said to fall within both the 'self-regarding' and 'other regarding' interests of the relatives. Of the cases looked at in chapter 4 the sister of Vince Foster, Sheila Foster Anthony, highlighted the impact and thus harm that can be caused to relatives upon the release of death related images. Her sworn declaration to the court was cited by Justice Kennedy in the *Favish* case. In it she said that she was '…horrified and devastated by [a] photograph [already] leaked to the press. Every time I see it, I have nightmares and heart-pounding insomnia as I visualize how he must have spent his last few minutes and seconds of his life.' She fought the release of the photographs as she was fearful that their disclosure 'would set off another round of intense scrutiny by the media. Undoubtedly, the photographs would be placed on the Internet for world consumption. Once again, my family would be the

[47] Hamill (n 22) 836.
[48] ibid 866. Emery (n 12) 769 – 770, cites numerous cases where photographs of the dead have been published, often in return for a hefty price tag, for example: Whitney Houston in an open casket for $500,000 and Brittany Murphy in a post-mortem state for $300,000.

focus of conceivably unsavory and distasteful media coverage.'[49] She saw the release of any photographs as constituting '…a painful unwarranted invasion' of not only her own privacy but that of her mother, sister, Foster's widow and three children. There is potentially 'other regarding harm', as discussed in the above section, in that the relative's interests in maintaining the dignity and privacy of the deceased are harmed by virtue of the deceased's privacy being breached through the disclosure of these very private images. There is also a potential breach of their own self-regarding (welfare) interests in maintaining their own well-being. The disclosure of the images can not only harm their own mental stability, which their privacy interests, inter alia, seek to protect, but by virtue of their connection to the deceased they become the focus of unwarranted publicity, perhaps family secrets are exposed through delving into the private lives of the deceased and his family.

Similarly, the harm to the Catsouras family was summed up by Associate Justice Eileen C. Moore of the Fourth District Court of Appeals:

> With her demise, the torment of her family members began. They endured not only her death, and the hideous manner of it, but also the unthinkable exploitation of the photographs of her decapitated remains. Those photographs were strewn about the Internet and spit back at the family members, accompanied by hateful messages…In order to protect the victims… courts must recognise that because death scene images necessarily expose the post-mortem details of family loss, they are inherently injurious and exceed the reasonable bounds of legitimate public concern.[50]

Thus, we can see that from the US courts the rationales and justifications for providing protection to the survivors for the release of such 'death related' images and records is based primarily on the 'exposure' of 'post-mortem details of family loss' which, it is argued here, does fall within the concept of private and family life within the expansive scope of Article 8.

[49] *Favish* (n 23) cited in Calvert (n 9) 146.
[50] *Catsouras v. Dept. of Cal. Highway Patrol*, 104 Cal. Rptr. 3d 352, 357 (cal. Ct App. 2010); Emery (n 12) 814.

6.4.3 Societal Harm

It was argued in the last chapter that societal harms can occur when a person's continuing critical interest in having their privacy maintained post-mortem is breached or thwarted. There is a 'broader dignitary interest in carrying out the wishes of the dead' and when these are thwarted there is a 'dignitary harm to society as a whole'.[51] Of course this is equally applicable to post-mortem relational privacy – if we breach or thwart the relative's interest in grieving and mourning in private and being able to treat their loved one with respect and dignity, then we are inflicting a harm on society. We are breaching the effecting assurances that we all have that we will be allowed to grieve for our loved ones in private and that we and they will be treated with dignity and respect. As a society (and as is demonstrated to a limited extent in the examples of real-life cases considered below) we wish to ensure that the dead are treated with dignity and respect and thus so too the grieving relatives. If we allow death images and private matters of the dead to be published and exploited, then we can expect the same for our loved ones. This would be abhorrent to most and thus the harm to society is in the fact that we know, without a post-mortem relational privacy protection, we could suffer the same fate when someone close to us dies.

Feinberg uses the term 'public interests' to describe those interests that 'are so important to the individuals who have them that they amount to elements of their individual welfare, and yet they are so widely shared that they can be said to be possessed by the community itself.'[52] He gives examples such as '(p)ublic peace, health and security' and it is argued here that privacy too comes within these interests for the reasons outlined in chapter 2 so far as the societal need for privacy is concerned.

6.5 Intuition

We have seen that there is a distinct societal intuition to protect the dignity of the deceased and ensure that they are treated with respect. This is affirmed within legal institutions, sometimes manifesting itself in legal fictions being implemented. So far as intuition is concerned, little more need be said than that which was in chapters 3 and 5, as society's intuitive desire to

[51] Hilary Young, 'The Right to Posthumous Bodily Integrity and Implications of Whose Right It Is' (2013) 14 (2) Marquette Elder's Advisor 197, 202.

[52] Feinberg (n 28) 63. He also identifies a 'second group of interests' which are 'normally ascribed to the government rather than the community' such as 'collecting taxes' and 'conducting trials and court hearings.'

respect the dead and maintain their dignity is directly translated onto their grieving relatives, along with its deepest sympathies. Similarly, legal institutions also feel compelled to protect the deceased families as was demonstrated by Lord Hutton in his inquiry into Dr David Kelly's death in 2003. This was a case that had parallel facts to that of *Favish*, considered in chapter 4, involving the Clinton's aide who committed suicide. On the 18 July 2003 the body of Dr Kelly, a chemical weapons expert who worked for the foreign office, was found dead in a wood near his home. Days before he had been questioned by the Select Committee of MPs about his contact with Andrew Gilligan a BBC journalist. Kelly had been exposed as the source of Gilligan's report that claimed the Government dossier, containing the assertion that Iraq could deploy weapons of mass destruction within 45 minutes, was exaggerated or 'sexed up' by the Blair administration. The Hutton Inquiry was set up to look into the circumstances of his death and found that he had committed suicide.[53] Some believed he had been murdered. [54]

At the conclusion of the Inquiry Lord Hutton directed, but did not publicly announce, that medical records, including the post-mortem reports and photographs of the body, should remain classified for 70 years.[55] In 2010, as the result of a group of British doctors and several forensic pathologists, who had not had access to the evidence, challenging his verdict, Hutton released the post-mortem and related documents. He stated: 'At the conclusion of the inquiry I requested (not 'ordered')[56] that the post-mortem report should not be disclosed for 70 years. I made this request solely in order to protect Dr Kelly's widow and daughters for the remainder of their lives (the daughters being in their 20s at that time) from the distress which they would suffer from further discussion of the details of Dr Kelly's death in the media.'[57] In 2010 he considered that '…the disclosure of the report to doctors and their legal advisers for the purposes of legal proceedings would not undermine the protection which I wished to give.' [58] It is clear that the

[53] Lord Hutton, *Report of the Inquiry into the Circumstances Surrounding the Death of Dr David Kelly C.M.G*. (Stationary Office 28 January 2004) <https://fas.org/irp/world/uk/huttonreport.pdf> accessed 16th June 2016

[54] There are still some who dispute this verdict see for example: Miles Goslett, 'Damning New Evidence that Dr Kelly DIDN'T Commit Suicide: The Disturbing Flaws in the Official Government Story surrounding the Death of Blair's Chemical Weapons Expert' *Daily Mail Online* (London, 12 January 2019) <www.dailymail.co.uk/news/article-6585263/Damning-new-evidence-Dr-Kelly-DIDNT-commit-suicide.html, accessed 19 December 2019.

[55] It is not apparent upon what legal basis, if any, he made such an order.

[56] ibid.

[57] 'Dr Kelly evidence: Lord Hutton statement in full' *BBC News* (London, 22 October 2010) <www.bbc.co.uk/news/uk-politics-11605918> accessed 12 June 2018.

[58] Kenneth Clarke, the Justice Secretary at the time, released the documents onto the internet stating 'While I firmly believe that the publication of these documents is in the public interest, I am mindful that the contents may be distressing. I hope that the privacy of Dr Kelly's family will be respected at this difficult time': 'Reaction: Dr

protection which Lord Hutton was seeking to provide the widow and daughters of the deceased was that which falls within the scope of the post-mortem relational privacy concept. It can be argued that the disclosure of the details would not only harm the relatives 'other regarding' interest in maintaining Dr Kelly's dignity and thus privacy but also their own self-regarding privacy interests would be harmed by the inevitable media intrusion. Lord Hutton apparently saw a need to provide the surviving relatives protection from the harm that would be visited upon them by disclosure in a modern-day digital era. It is with that in mind that we now turn to the decisions of the ECtHR which are demonstrating a similar inclination.

6.6 Tentative Shoots of a Post-mortem Relational Privacy Right Emerging under Article 8

This thesis provides the rationales and justifications for the extension of a person's Article 8 right into death and, in this chapter, for Article 8 to include a surviving relative's right to post-mortem relational privacy. What may have seemed impossible, on both fronts, prior to 2013, became more than just a possibility when the ECtHR delivered its judgment in the case of *Putistin v. Ukraine.*[59] Prior to then the only other case that really dealt with privacy issues concerning a dead person and his relatives, was that involving President Mitterrand.[60] Upon his death Mitterrand's widow and children sought an injunction preventing Dr Gubler, who had been his doctor whilst he was in office, from publishing a book which detailed the late Presidents medical history. Dr Gubler's book included the fact that Mitterrand had been diagnosed with cancer in 1981, a few months after he was first elected, and kept it a secret. The book was due to be published whilst Mitterrand was alive but in the end was published 9 days after his death on 8 January 1996. Mitterrand's widow and children were granted an urgent injunction preventing the publication of the book on the grounds that it was (a) a breach of medical confidentiality[61] (b) an invasion of Mitterrand's privacy and (c) would cause injury to the relative's feelings. The urgent applications judge said the following:

David Kelly reports' *BBC News* (London 22 October 2010) <www.bbc.co.uk/news/uk-11608328> accessed 16 June 2018.

[59] *Putistin* (n 4).

[60] *Plon* (n 24).

[61] in this respect Dr Gubler was subsequently convicted in criminal proceedings.

> All people, regardless of their rank, birth or function, have the right to respect for their private life. This protection extends to their relatives where the relatives are justified in asserting their right to respect for their own private [and] family life.[62]

The Judge went on to recognise that the information had been obtained during a relationship of confidentiality between the President, his family and Dr Gubler. Consequently, the disclosures in the book constituted a breach of the duty of professional confidentiality and were:

> …a particularly serious intrusion into the intimate sphere of President Francois Mitterrand's private family life and that of his wife and children. The resulting interference is especially intolerable in that it has occurred within a few days of President Mitterrand's death and burial.[63]

The ECtHR upheld the initial urgent injunction and considered it '…necessary in a democratic society for the protection of the rights of President Mitterrand and his heirs.'[64] They found that:

> …the interim injunction and the decision on the merits to keep the ban in force, were intended to protect the late President's honour, reputation and privacy, and that the national courts' assessment that these 'rights of others' were passed on to his family on his death does not appear in any way unreasonable or arbitrary.[65]

Consequently, the court concluded that there was no violation of Article 10 in relation to the interim injunction. However, the court also found that nine and half months after the death there was no longer a pressing social need justifying the continued ban and thus there was a breach of Article 10 in this respect. As has been found by the US courts, the passage of time can ameliorate the effect of disclosure on the relatives.[66]

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[62] *Plon* (n 24) [9].
[63] ibid.
[64] ibid [48].
[65] ibid [34].
[66] *Blethen Me. Newspaper, Inc. v. Maine*, 871 A 2.d 523, 525 (Me.2005) held that the disclosure was more likely to 'adversely affect the peace of mind of his or her family in the years immediately following the death [and] will have considerably less effect many years later'.

The importance of the *Plon* case for this thesis is three-fold: first, the language used by the court suggests that the dead President Mitterrand himself has privacy rights that the court is protecting; secondly, there is the apparent suggestion that these rights were passed onto his family,[67] and finally, it shows an apparent willingness by the court tangentially to maintain a dead person's privacy under Article 8. The latter been differentiated from the first in that it does not recognise a privacy right for the deceased President himself but provides one for him tangentially through upholding the relative's rights.

The judgment in the case of *Plon* is an illustration of the discussion in the previous chapter about legal fictions and the use of 'rights' based language when referring to the dead.[68] The court specifically said that the injunction had been necessary '…for the protection of the rights of President Mitterrand…' in addition to his surviving heirs, therefore apparently supporting the notion of a post-mortem right ascribed to the dead Mitterrand and a relational post-mortem relational right to his heirs. Consequently, the language suggests that the surviving relatives are able to bring an action on behalf of the deceased. However, although the court makes reference to the fact that the injunction granted by the national court was '...intended to protect the late President's honour, reputation and privacy….' and in time of public interest prevailing '…over the requirements of protecting the President's rights with regard to medical confidentiality…'[69] the overriding tenet of the judgment can be seen to relate to the claimant's rights, namely the wife and children of the deceased.[70]

Thus, the case of *Plon* was the first case to provide recognition, albeit not expressly, of both the need for post-mortem privacy and time limited post-mortem relational privacy, albeit in the context of medical confidentiality. It showed that grieving relatives may have a cause of action under Article 8 to protect private information of a deceased loved one. The next significant development in the law in this respect came about in 2013 in the case of *Putistin v. Ukraine.*[71] The case involved the so-called 'death match' which occurred in 1942. FC Start, a wartime

[67] Of course, this cannot be so as Article 8 rights are 'non-transferable as per *Sanles Sanles v. Spain* ((dec.) no. 48335/99 (ECHR 2000-XI); *Thevenon v. France* ((dec.), no.2476/02) (ECHR 28 Jun 2006).
[68] Kirsten Rabe Smolensky, 'Rights of the Dead' (2009) 37 (3) Hofstra Law Review 763.
[69] *Plon* (n 24) [34] and see (n 65) above for full quote.
[70] In addition, it must be noted that this case was dealing with a breach of medical confidentiality and the consequent ethical obligation to respect a patient's confidentiality, which as we saw in chapter 3 can attract protection after death but as a separate action not under the umbrella of privacy.
[71] *Putistin* (n 4).

bakery football team, formed mainly of Dynamo Kiev players, took on and beat their Nazi Occupiers. FC Start won but, it is said, suffered terrible repercussions including the execution of some of the players. The applicant complained of defamation of his father, in a 2001 newspaper article, who was one of the Dynamo Kiev players. The article, in commenting on a film starring Michael Caine, Bobby Moore and Sylvester Stallone called 'Escape to Victory,' had, the applicant alleged, discredited his father because it suggested some of the players, who had survived, which included his father, had worked for the Gestapo. The applicant argued that the publication '…discredited his father's memory, honour and reputation as well as compromising' his own reputation.[72] The Government accepted that 'the right to respect for the honour and dignity of a deceased relative was an element of the right to respect for private life guaranteed by Article 8.'[73] The Court made reference to the case of *Palade v Romania*[74] which considered, but did not decide upon, the question of whether the damage to the reputation of an applicant's family can be considered an interference with the right to respect for an applicant's private life.[75]

The Court accepted '…that the reputation of a deceased member of a person's family may, in certain circumstances, affect that persons' private life and identity, and thus come within the scope of Article 8.'[76] It was however emphasised, in the concurring opinion of Judge Lemmens, that '…such a situation will occur in relatively exceptional circumstances.'[77] No suggestion is made within the judgement as to what may amount to such 'exceptional circumstances.' However, what can be seen is that the ECtHR is willing to accept that such circumstances exist and that a surviving relative may bring a claim under Article 8 to protect the reputation, honour and dignity of a deceased relative where they themselves were affected. The court did not, however, find for the applicant on the facts as although it could accept that he was affected by the published article, his Article 8 rights were only '…marginally affected and only in an

[72] ibid [30].
[73] ibid [31].
[74] ((dec.), no. 37441/05, 25,31 August 2012) cited in *Putistin* ibid [33].
[75] ibid.
[76] ibid.
[77] ibid [1].

indirect manner…' [78] thus the 'level of impact was quite remote…'[79] Consequently, the Court held that there was no violation of Article 8.

Although the court did not find for the applicant, the case of *Putistin* is important as it indicates that in certain circumstances a state may be obliged to ensure effective respect for the reputations of deceased persons and their surviving relatives under Article 8. Clearly the need to strike a fair balance with Article 10 and proportionality will come into play. What can be discerned is the outline of a potentially significant new right of access to the courts, to defend a deceased's reputation, honour or dignity if the surviving relative's Article 8 right is impacted to a sufficient degree. This case of course was concerned with reputation and it was confirmed in *Pfeifer v Austria*[80] that a person's right to protection of his or her reputation is encompassed by Article 8 as part of the 'right to respect for private life.' Furthermore, in *Jelsevar and others v Slovenia* [81] the court stated that 'states have a positive obligation to protect individual's right to reputation, as an element of their 'private life' under Article 8.'

It is accepted that directly eliding reputational harms with privacy harms for the purposes of this thesis is problematic even though the former has been recognised by the ECtHR to come within the concept of a private life for the purpose of Article 8. It does of course seem clearer that, intuitively perhaps, a surviving relative can be affected by, and thus suffer harm from, damage to a deceased person's reputation by association. However, as has been argued above, there are self and other regarding interests that relatives can have, breach of which would fall within the scope of privacy harms for the purposes of Article 8. The fact that the ECtHR have shown a willingness to engage in the arguments put forward for recognition of post-mortem reputational harms provides that 'tentative shoot' of potential engagement and thus recognition of relational post-mortem privacy harms.

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[78] ibid [40] the court did consider the balancing exercise between Articles 8 and 10 and found that whilst the publication 'did not purport to contribute directly to an historical debate, it nevertheless constituted a form of participation in the cultural life of the Ukraine, in that it informed the public of the proposed film on an historical subject' [39] the court weighed the newspapers Article 10 right against the 'remoteness of the interference with the applicant's Article 8 right' [39].

[79] ibid [38]. The court found that the article did not suggest that the applicant's father worked for the Gestapo, and 'in order to interpret that article as claiming that the applicant's father had collaborated with the Gestapo, it would be necessary for a reader to know that the applicant's father's name had appeared on the original poster for the match.' This name was not identifiable from the photograph of the poster published [37].

[80] no. 12556/03, 35 (ECHR, 2007 – XII).

[81] [2014] ECHR 518 (11 March 2014) [32].

At the time of writing there is an absence of academic consideration of the *Putistin* case and its implications for either defamation or privacy claims under Article 8. There are some in the legal profession, however, who have proffered an opinion of its ramifications, albeit in relation to the possibility of it opening up claims for defamation of the dead.[82] All save one of the legal practioners that have published on this case see it as '…the outline of a potentially significant new right of access to the courts to defend a deceased's reputation…'[83] Hugh Tomlinson QC expressed the view that '…a serious defamatory allegation against a recently deceased person could constitute a breach of the family's Article 8 rights. This is, potentially, a radical new development.'[84] He sees the arguments against allowing for deceased relatives to sue for defamation and which succeeded in blocking such an amendment to the Defamation Bill in 2013, 'may now have been overtaken by the Court of Human Rights' expansive interpretation of Article 8.'[85] Of course defamation of the deceased, and thus the consequent effect on the relatives, is a corollary to the focus of this thesis which is the privacy aspect of Article 8. However the importance of the decision in *Putistin* is what Tomlinson describes as the ECtHR's 'expansive interpretation of Article 8.'[86] It is an indication that the court is willing to listen and adopt arguments that will expand Article 8 beyond its current scope and thus gives a forum to the arguments in this thesis for both post-mortem privacy and post-mortem relational privacy. It should also be noted that David Hart QC interpreted this case as the Strasbourg court finding that '…lack of respect for the honour and dignity of the dead relative may give rise to

[82] Julia Varley, an Associate at David Price Solicitors & Advocates, saw the decision as potentially a 'radical new development' as it is departing from the principle that reputation is personal. She predicted that it could open the way for claims for defamation of the dead, Catherine Baksi, 'Euro Ruling to Protect Reputation of Deceased' *Law Gazette* (London 17 February 2014) <www.lawgazette.co.uk/law/euro-ruling-to-protect-reputation-of-deceased/5039894.article> accessed 21st August 2019; Jill Bainbridge, a partner and head of the intellectual property group and trade mark prosecution team at Blake Morgan, considered the case as potentially providing 'a significant development….raising the possibility that relatives of the dead may be able to suppress adverse coverage', Jane Crinnion, 'Can you Defame the Dead' *Lexis Nexus Wipit BLOG Interview* (London, 28 January 2015) <www.lexisnexis.co.uk/blog/wipit/can-you-defame-the-dead> accessed 19th August 2019. The Guardian's media BLOG also covered the case in February 2014, with David Banks, a journalist and media consultant, commenting that it appeared to open '…the doors for bereaved relatives of the dead to take an action under Article 8 if the reputation of a relative is traduced by the media after their death: David Banks, 'Defaming the dead: could relatives get the right to sue?' *The Guardian* (London 18 February 2014) www.theguardian.com/media/media-blog/2014/feb/18/defaming-dead-relatives-european-ruling-right-sue accessed 20th August 2019.

[83] Barbara Hewson, 'Operation Yewtree: Defaming the Dead?' *Spiked* (London 8 May 2014) https://www.spiked-online.com/2014/05/08/operation-yewtree-defaming-the-dead/ accessed 10th September 2019.

[84] Tomlinson (n 5).

[85] Parliament rejected an amendment to the Defamation Act 2013 to allow for claims up to 12 months following the death of the deceased. In addition, as was held in *Smith v Dha [2013] EWHC 838 (QB*) if the deceased dies before the conclusion of proceedings for defamation the cause of action is abated and it cannot be continued by surviving relatives.

[86] Tomlinson (n 5).

a breach of Article 8 and its right to family life.'[87] This is, as this chapter has shown, a finding of a post-mortem relational right for the surviving relatives under Article 8.

To date there are no reported cases that have succeeded on the basis of the precedent in *Putistin* although some have considered it. The ECtHR in the case of *Dzhugashvili v. Russia*[88] re-affirmed the principle that in certain circumstances, publications concerning the reputation of a deceased family member might affect a person's 'private life and identity and thus come within the scope of Article 8.'[89] The complaint was brought by Joseph Stalin's grandson who had sued a newspaper in Russia for defamation. The publication accused Stalin (and other leaders of the Soviet Politburo) of being 'bound by much blood' in the execution of Polish prisoners of war in 1940. Stalin himself was described as a 'blood thirsty cannibal' and the article claimed that the leaders had 'evaded moral responsibility for the extremely serious crime.'[90]

The court considered *Dzhugashvili's* complaint to be twofold. First, he was asserting *locus standi* to bring a claim of a violation of the Convention rights of his deceased grandfather and secondly, he was claiming a breach of his own right to respect for his private and family life under Article 8. As to the *locus standi* issue the court considered the cases *of Sanles Sanles v. Spain*[91] and *Thevenon v. France*,[92] both of which confirmed that Article 8 rights were 'non-transferable.' Thus, the case law would not allow Dzhugashvili to pursue the case on his grandfather's behalf under Article 8. However, of interest to this thesis is that the ECtHR, in coming to their decision in this respect, said that they did not '…find *sufficient reasons*[93] to depart from its established case law in the instant case...' thus, indicating that there *may* be 'sufficient reasons' upon which the court would depart from the 'non-transferable' nature of an Article 8 right. This of course begs the question of what would amount to a sufficient reason. Of course, a corollary to the main argument of this thesis could be the provision of rationales

[87] David Hart, 'Strasbourg: Defaming the Dead, Football and Historical Revisionism', (*UK Human Rights Blog,* 26 November 2013) in <https://ukhumanrightsblog.com/2013/11/26/strasbourg-defaming-the-dead-football-and-historical-revisionism/> last accessed 17 October 2019.
[88] (n 26).
[89] ibid [27].
[90] Ibid [5].
[91] (n 67): the heir of the deceased complained in respect of the deceased's right to die in dignity which the court found was 'of an eminently personal nature' cited in *Dzhugashvili* (n 24) [22].
[92] (n 67): the court refused to allow a universal legatee 'to pursue an application lodged by the immediate victim in the case', cited in *Dzhugashvili* (n 24) [23].
[93] My emphasis.

and justifications that could form, or be part of, such 'sufficient reasons' to persuade the court to depart from the 'non-transferable' nature of an Article 8 right.

As to the second limb of the case, and the complainant's own right under Article 8, the ECtHR was not prepared to 'draw a parallel with the *Putistin* case,'[94] stating that that case dealt with the 'reputation of a private person…whose role in the relevant events was not the leading one but rather one of an ordinary participant.'[95] In addition, Stalin was a 'world-famous public figure' whereas Putistin's involvement was not a direct consequence of his political, military or other public career.'[96] The court therefore distinguished

> …between defamatory attacks on private persons, whose reputation as part and parcel of their families' reputation remains within the scope of Article 8, and legitimate criticism of public figures who, by taking up leadership roles, expose themselves to outside scrutiny.[97]

Of course there was also the balancing of Article 8 with Article 10 and the court found that as an 'integral part of freedom of expression' was to 'seek historical truth,'[98] the article had contributed to a 'historical debate.'[99] Accordingly, the court rejected the applicant's complaint.

Both these cases involved a claim in defamation within Article 8 and both involved 'historical debate' and it was emphasised by the courts in both that it was not their task to provide 'judgement on historical truth.'[100] It was not 'the court's role to arbitrate the underlying historical issues, which are part of a continuing debate between historians.'[101] This thesis therefore contends that less contentious situations that involve neither well known figures nor historical insight, may see the court prepared to use Article 8 to protect the relatives of the deceased to prevent intrusion into their private or family life as a result of their relationship with the deceased.

[94] *Dzhugashvili* (n 26) [28].
[95] ibid [29].
[96] ibid [29].
[97] ibid [30].
[98] ibid [33].
[99] ibid [31].
[100] *Putistin* (n 4) [2] Judge Lemmens concurring judgement.
[101] *Dzhugashvili* (n 26) [33].

In the case of *Jelsevar and others v Slovenia*[102] an author published a novel based on the life of a woman in whom the applicants recognised their mother. They alleged that the story was offensive to her memory and their family, it 'distorted the truth and blemished their family name in their local community.'[103] Like the court in *Putistin* it was accepted that an attack on the reputation of the applicant's deceased mother could affect the applicants own personality rights.[104] The court found that it was written as a work of fiction and not as a biography and the 'portrayals were not objectively offensive.'[105] It was noted that for Article 8 to come into play, the attack on personal honour and reputation must attain a certain level of seriousness and must have been carried out in a manner causing prejudice to personal enjoyment of the right to respect for private life.[106] In addition, whilst the historical debate aspect was absent in this case it was replaced by the equally high threshold of the 'artistic freedom enjoyed by, among others, authors of literary works is a value in itself, and thus attracts a high level of protection under the Convention.'[107] The court thus found that the applicant's reputation was not 'seriously affected' by the book and found no violation of Article 8.[108]

The cases of *Putistin* and *Dzhugashvili* were considered in the recent unreported case of *Douglas v News Group Newspapers,*[109] which saw, for the first time in British legal history, a statement read out in open court on behalf of a deceased person. Susanne Hinte died just days after issuing proceedings, in 2017, for misuse of private information, breach of confidence, breach of the Data Protection Act 1998 and infringement of copyright, in respect of articles and a photograph published in the Sun in April 2016. Her daughter Natasha Douglas, as Administrator of her mother's estate, continued the proceedings which related to sexually explicit photographs that had been provided to The Sun by Miss Hinte's former friend, Julie Howard, for the sum of £750.[110] The articles contained a photograph of Ms Hinte taking a topless 'selfie' of herself in a mirror using a mobile phone. In the printed article, Ms Hinte's nipples were masked by lottery balls (a none too subtle reference to her claimed status as lottery

[102] (n 81)
[103] ibid [24].
[104] ibid [37].
[105] ibid [37].
[106] ibid [31] and reference to cases of *A v Norway* no. 28070/06, 64, 9 April 2009, and *Axel Springer AG v Germany* [GC] (no. 39954/08, 83, 7 February 2012.
[107] *Jelsevar* [33].
[108] ibid [39].
[109] *Douglas* (n 27).
[110] Ms. Hinte came to the attention of the media, who dubbed her the 'Lotto Gran,' when she had sought to claim a winning lotto ticket had been through the laundry when it was not, in fact, a winning lottery ticket.

winner and millionaire) and in the online version, they were not masked but the photograph had been modified. The writer had also discussed the photograph and other sexually explicit images of Ms Hinte. The claimant alleged that the photographs and articles 'constituted information about her sexual life which was both confidential in nature and over which she enjoyed a reasonable expectation of privacy.'[111] As such their publication 'amounted to an unjustified intrusion into her private and family life, and breach of her rights pursuant to the DPA.' She also claimed that as the 'legal owner of all intellectual property rights in the photographs' her copyright had been infringed. [112]

Without an omission of liability, the parties reached a financial settlement on 26th March 2018, with the defendant also agreeing not to re-publish the information and to ensure, to the greatest extent possible, the deletion of the images. Ms Douglas applied for permission to read a statement in open court.[113] This application was determined, by Senior Master Fontaine,[114] on paper with witness statements from the legal representatives of the claimant and respondents. Mr McAleenan, on behalf of the claimant, stated that the statement being read in open court was very important for the claimant as she and her mother had both 'suffered enormous embarrassment and distress as a result of the publication of the articles…as did Ms Hinte's 21-year-old son.' He told the court that '…he was made aware by Ms Hinte before her death that the type of vindication provided by the reading of a statement in open court was very important to her, and for this reason also Ms Douglas feels strongly that justice will only be achieved for Ms Hinte's estate by the reading of a statement in open court.'[115]

The Senior Master considered the cases of *Putistin* and *Dzhugashvili* and said the following:

> Those decisions, whilst not on all fours with this case, provide some guidance when determining whether a statement should be permitted to be read in open court in respect

[111] <www.brettwilson.co.uk/wp-content/uploads/2018/07/Douglas-Hinte-v-NGN-SIOC-1.pdf>
[112] Ibid.
[113] The defendants did not object to the statement being read save for some parts which the Senior Master acceded to the deletion of two paragraphs that related to the defendants having not filed a defence and when Ms Hinte had become aware of the article.
[114] *Douglas* (n 27).
[115] ibid [5].

of breach of confidence/misuse of private information claim relating to a person who is deceased.[116]

As the case is unreported[117] there is no further insight into the arguments made, or the basis upon which the Senior Master decided that these cases provided guidance for her decision to allow the statement to be read. Firstly, unlike in the two cases cited, the breach of privacy complained of took place during Ms Hinte's life and had she not issued proceedings before her death Ms Douglas herself did not have a claim. She was substituted into the proceedings so as they could be continued on behalf of her mother's estate. Secondly, if it is surmised that the cases provided guidance by virtue of their principle of the reputation of a deceased family member being able to affect a surviving relative's own private life, then again, it is a principle which relates to post-mortem invasions of privacy which this is not. Of course, Ms Douglas was herself said to have been affected by the publication and thus the reading of the statement could be said to be recompense, but of course this was not her action: she was merely representing the estate of her mother. Of note was the evidence that Ms Douglas felt strongly about the statement being read out because prior to her death her mother had made her solicitor aware that this was the 'type of vindication' that was 'very important' to her. Albeit an understandable desire, this would not fall within the ambit of the two cases cited. If the reading of a statement in open court was upon the basis that it was very important to the deceased, then maybe we are within the realms of the dead being allowed to speak from the dead and even giving a nod in the direction of allowing some form of a legal concept of post-mortem privacy itself into the English courtroom. Time will tell.[118]

Another important ECtHR case that is edging closer towards recognising a post-mortem relational privacy right, or at the very least a judicial doctrine of interpretation, is that of *Genner v Austria.*[119] The applicant worked for an association that supported asylum seekers and refugees in Austria. A few days after the death of the Federal Minister for Interior Affairs he made several defamatory statements about her on the association's website, implying that she

[116] ibid [10].
[117] The sworn evidence was sought however access could not be obtained.
[118] The statement was read out in open court before HHJ Parkes QC sitting in the High Court, Queens Bench Division, on the 14 June 2018. Statement (n 111).
[119] *App no 55495/08 (ECHR, 6 June 2016).*

was motivated by racism and xenophobia and ordered, or approved of, torture and deportation of detainees. Mr Genner was convicted and ordered to pay a fine on the private defamation action that was brought by the deceased's husband. The ECtHR rejected his application that the conviction was a breach of his Article 10 rights. The court said that: 'Dealing appropriately with the dead out of respect for the feelings of the deceased's relative's falls within the scope of Article 8.'[120] The court is here making specific reference to that which would be encompassed in a post-mortem relational privacy right that falls within the scope of the Article 8. 'Appropriate dealing with the dead' is required so as to respect the surviving relative's feelings and of course reflects society's intuitive feelings that the dead themselves should be treated with respect and dignity, as well as their grieving relatives. Once again, this was a case dealing with defamation of the deceased that had a direct affect upon their relatives but once again the courts words can apply, with equal significance, to matters concerning a person's private life under Article 8. The court did acknowledge that a public figure must tolerate a greater degree of criticism but found that there is still '*a minimum degree of moderation and propriety'* afforded by Article 8.[121] The court also observed that the timing of the statements, a day after her death, and the expression of satisfaction at her death, were relevant in their consideration. The insult a day after her death 'intensified the impact of the words'[122] and 'contradicts elementary decency and respect to human beings[123] …and is an attack on the core of personality rights.'[124]

These cases are suggestive of support for the proposition that in certain circumstances the privacy of the deceased person will be extended beyond their death. This may only be for a limited time subsequent to the death and, in accordance with these cases, will require that a surviving relative has been impacted by the disclosure. Although these cases deal with defamation there is no apparent reason why they could not deal with privacy *per se* and thus prevent private information about the deceased from being published for a limited period after their death.

[120] ibid [35]. The court referred to the cases of *Hadri-Vionnet v. Switzerland* App no 55525/00 (ECHR 14 February 2008); *Plon* (n 24); *Putistin* (n 4).
[121] *Genner* (n 118) [35].
[122] ibid [44].
[123] *Plon* (n 22); *Leroy v. France* App no 36109/03 (ECHR, 2 October 2008).
[124] *Genner* (n 120) [45].

As was seen in chapter 3 when considering post-mortem medical confidentiality there is also the faint hint of an English court acceding to post-mortem relational privacy, indirectly it must be conceded at best, in a case involving possible survival of medical confidentiality on the death of a patient. Timothy Pitt-Payne,[125] asked 'whether information privacy should extend beyond the grave'[126] noting that 'English Law [was] surprisingly short of authority on the protection of information about the dead.'[127] Given the paucity of such authority he highlighted the case of *Bluck*[128] being of considerable interest. Although the focus of the case was once again on posthumous disclosure of medical records, he was of the opinion that the case 'may turn out to have wider implications.'[129] Pitt- Payne does contrast the case of *Bluck* with that of *Favish*, discussed earlier in this chapter. Five years after her death the mother of the deceased sought disclosure of her daughters' medical records under the Freedom of Information Act 2000. Her widower, and personal representative, refused consent to disclose and the NHS Trust therefore declined the request. The mother appealed to the Information Tribunal. The principal issue in the case was whether the duty of confidence survived the patient's death. If it did was it actionable and by whom. As discussed in chapter 3, the duty of medical confidence can survive the death of the patient and is enforceable by the personal representatives of the deceased. The court made reference to the case of *Plon*[130] and found that this decision allowed for the survival of the deceased's right to medical confidence and that an action can be brought on his behalf.

The NHS Trust also argued that disclosure would be in breach of Article 8, which was a statutory prohibition on disclosure for the purposes of section 44 of the FOIA and although the Tribunal did not find that Article 8 amounted to such, it did say that if they had been required to determine the point, they would have found that the widower's Article 8 rights would be breached by the disclosure. This is, of course, significant as it is in effect saying that an Article 8 right in post-mortem relational privacy would be established.

[125] a barrister at 11 Kings Bench Walk and visiting Professor at Northumbria University.
[126] 'Mother, I Sue Dead People' (2007) 157 (7295) The New Law Journal (2 November 2007) 1.
[127] ibid 3
[128] *Pauline Bluck v The Information Commissioner and Epsom and St Helier University NHS Trust,* (2007) 98 BMLR 1.
[129] It is noted that this case is now 13 years old and the case itself does not appear to have had any reported effect or wider implications presently.
[130] (n 24).

What can be seen from this decision is the notion 'that the deceased's own privacy right can survive her death and can be enforced by her next of kin.'[131] And the Tribunal did accept that this is so in respect of medical records. Of course, this case does not deal with other types of private information and it is arguable that only information arising from a confidential relationship would be covered. The court did briefly consider 'survivor privacy' where the surviving relatives may have their own free-standing privacy rights in respect of private information about the deceased. Although again, this was only considered in the context of the Freedom of Information Act, section 44.

6.7 Existing Protection in the UK

Whilst the legal concept of post-mortem relational privacy has not yet reached the UK our courts are dealing with matters that come squarely within its definition:

> 'I have seen photos of Emiliano's body leaked on Instagram…. I was sad as people were making jokes about it. I'll never erase the images from my head. My brother and mother can never forget about this. It's hard for me to live with this image'[132]

These are the words of Romina Sala, the sister of the 28 year old footballer Emiliano Sala who was killed in a plane crash, on the 21st January 2019. These words were contained in her victim impact statement, produced for Swindon Crown Court, in the case of Sherry Bray[133] and Christopher Ashford.[134] Both defendants had accessed, and watched footage of, Sala's post-mortem examination and took screenshots which they allowed others to see. These images then found their way into the public domain on various social media sites. The prosecutor, Anthony John described the defendant's actions as having '…caused immense suffering to Mr. Sala's family and friends with their deeply offensive actions. It is impossible to imagine why anyone

[131] Pitt-Payne (n 126) 8.

[132] Steven Morris and agency, 'Emiliano Sala's Sister Condemns Leaked Images of Footballer's Body', *The Guardian (London,* 20th September 2019) <www.theguardian.com/football/2019/sep/20/emiliano-salas-sister-condemns-leaked-images-of-brothers-body> accessed 12 October 2019.

[133] Bray was the Director of Camera Security Services Limited, which held an out-of-hours contract to monitor the cameras at the mortuary in Bournemouth. 'CCTV Company Director and her Employee Plead Guilty to Accessing Footage of Emiliano Sala's Body in the Mortuary', *CPS Online* (9 August 2019) <www.cps.gov.uk/wessex/news/cctv-company-director-and-her-employee-plead-guilty-accessing-footage-emiliano> accessed 12 October 2019.

[134] Ashford was an employee of Bray's company, ibid.

would wish to record or view these sorts of images in such a flagrant breach of confidentiality and human decency.'[135]

Few would disagree that intuitively this case involved an egregious breach of Emiliano Sala's privacy, resulting in the complete failure of him being treated with the dignity and respect he deserved as well as breaching his family's privacy interests. As was shown in chapter 5, the post-mortem privacy right advocated would protect the deceased Sala from such intrusions. According to the Feinberg/Pitcher theory he has an interest in life for the maintenance of his privacy in death; even if he did not know that this breach would occur it can still amount to a harm. His interest in life, that this gross invasion of his privacy did not occur in death, would provide Article 8 protection thus preventing this occurrence or providing redress for it (leaving aside for now the issues around enforcement which will be addressed in the next chapter). His relatives would also be protected by a post-mortem relational privacy right, on the basis that they have been caused harm by the thwarting of their other-regarding interests in preventing their relative Sala from being treated with such disrespect and indignity. Secondly, they have suffered direct self-regarding harm inflicted upon them through the exposure of the footage and images of Sala's autopsy and thirdly, societal harm has been caused by the thwarting of the effecting assurance that the living's private autopsy images/footage will be protected when they die.

Few would not condemn the actions of these defendants but it is unlikely, in the first instance, to be on the basis that they 'unlawfully accessed computer material,' which is the charge with which they both pleaded guilty.[136] Our intuitions probably tell us that the defendants in this

[135] 'CPS Statement following the Sentencing of Sherry Bray and Christopher Ashford' *CPS* (London, 23 September 2019) < www.cps.gov.uk/wessex/news/statement-following-sentencing-sherry-bray-and-christopher-ashford> accessed 12 October 2019.

[136] On 9th August 2019 Bray and Ashford entered guilty pleas to three counts of securing unauthorised access to computer material contrary to section 1 of the Computer Misuse Act 1990. Two of the charges against Bray related to her operating CCTV equipment at the mortuary to access the examination of Sala. The third charge related to her using the equipment and of viewing the post-mortem of another man. She also pleaded to one count of perverting the course of public justice which related to her deleting the images from her phone and instructing Ashford to do the same after she realised the images were circulating on social media. She also deleted the post-mortem cameras from the live feed camera facility at the mortuary. On 23rd September 2019 Bray was sentenced to 14 months' imprisonment and Ashford to five months imprisonment. Stephen Morris and agency, 'CCTV Firm Staff Jailed over Leaked Emiliano Sala Mortuary Photos' *The Guardian* (London, 23

case should be punished for what they have done because it is a flagrant invasion of privacy, rather than a misuse of the computer. Whilst, of course, the focus of this thesis is not on the criminal law, it is of note that neither it nor the civil law, as we have seen, would protect Emiliano Sala's privacy, *per se*, in these circumstances.[137] Any redress is necessarily shoe-horned into existing law dealing with other aspects such as computer misuse in a criminal context, or possibly breach of confidentiality in a medical context, or breach of contract in an employment situation or possibly nuisance,[138] but certainly nothing pertaining to the privacy of the deceased. There is of course also no provision under which the relatives could bring a claim on their own behalf. This case illustrates not only why we need the post-mortem privacy right already argued for but also why the post-mortem relational privacy right should be afforded to the deceased relatives. Of course, the latter could provide a civil law route which consequentially does protect the deceased's privacy, or provides redress for breach, or a deterrent, at the same time as protecting the surviving relatives from unnecessary intrusion and harm.

The sharing of grotesque images of the deceased online is not the only way in which survivors can be harmed. It is the most obvious and current but there are numerous examples that illustrate that the context of the digital era is not only relevant in relation to death images themselves when it comes to post-mortem relational privacy, as was highlighted at the Leveson Inquiry.[139] For example, the Inquiry heard evidence relating to the death of Sebastian Bowles, an 11-year-old boy who died in a coach crash in Switzerland whilst he was on a school trip in March 2012. His death occurred during the Leveson Inquiry itself and his father, through a representative,[140] gave evidence to the Inquiry about the media intrusion his son and family had suffered. Despite the family's appeal, a picture of Sebastian appeared on the front page of The Sun together with quotes from a school blog that was set up to allow parents to

September 2019) www.theguardian.com/football/2019/sep/23/cctv-company-staff-jailed-over-leaked-emiliano-sala-mortuary-photos accessed 12 October 2019.

[137] There does not appear to be any legal provision that would have prevented these images from being published if, for example, they had been obtained by the Defendants innocently and not through their misuse of the computer.

[138] *R v. Clark* [1883] 15 Cox 171, found that exposing a naked corpse in public was a public nuisance.

[139] Leveson Inquiry: Culture, Practice and Ethics of the Press (2012) <www.levesoninquiry.org.uk> accessed 10 March 2018.

[140] Witness Statement of Giles Crown, 25 June 2012 <http://webarchive.nationalarchives.gov.uk/20140122191055/http://www.levesoninquiry.org.uk/wp-content/uploads/2012/06/Witness-Statement-of-Giles-Crown.pdf> accessed 13th May 2017.

communicate with their children during the trip. 'Dearest Mama, Papa, Helena and Flopsy. I can already ski quite well. We had hot dogs ... it's really great here,' was Sebastian's posting just before he died. The photograph and 'last words' of Sebastian in the blog post are highly personal and private for the dead Sebastian and his surviving relatives, publication of which can (and in their own evidence did) cause harm to them.

In addition, a photograph, apparently taken on the private property of a hotel for the families of children who perished in the crash, was printed in the Mail and Telegraph. The picture showed Sebastian's younger sister crying while being comforted by her father. The Leveson Inquiry heard that the father found newspapers had gained access to his Facebook pictures and published holiday snaps including of their young daughter, which caused them distress. The family were also continually disturbed at home by journalists. The invasion of the family's privacy was as a direct result of their relationship to the dead Sebastian and a post-mortem relational privacy right should protect them, if their own Article 8 right would not do so. In this respect, and of particular note was that Lord Justice Leveson asked '…who should be considering these issues, the value of a complaint (the damage having been done and no regret being sufficient to remove the additional impact that the press coverage had) and the need for an enunciation of standards.'[141] And he repeated '…the proposition that if nobody will review editorial decisions in the absence of a formal complaint, (that would require energy to deal with by someone who has far greater issues to have to confront) it is, in my view, a serious lacuna in our approach to the maintenance of standards.'[142] Lord Justice Leveson was, in effect, castigating the media for breaching the family's post-mortem relational privacy right (although of course there is no such thing presently in the English law). His exasperation was clear that grieving relatives needed protection and currently there was little being given. Lord Justice Leveson confirmed that the reporting in this case raised issues under the Editors Code in relation to privacy and the reporting of grief and shock, as well as how appropriate it is to publish material from the school website which would not have been intended for public disclosure.

[141] Leveson (n 140) Volume 2, Part F, p 579 [7.13] <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/270941/0780_ii.pdf> accessed 13th April 2017.
[142] ibid [7.15].

Five years after Lord Justice Leveson had published his report the Kerslake Review was published into the 'preparedness for, and emergency response to, the Manchester Arena attack on 22nd May 2017.'[143] Part of this review looked at the experience of families with the media[144] in the wake of the attacks:

> 'The Panel was shocked and dismayed by the accounts of the families of their experience with some of the media. To have experienced such intrusive and overbearing behaviour at a time of enormous vulnerability seemed to us to be completely unacceptable.'[145]

It was found that some of the journalists' behaviour had fallen 'well short' of the Editors' Code of Practice, with Lord Kerslake adding that this 'cannot be as good as it gets.'[146] 'Most' families of those killed and injured in the attack had negative media experiences.[147] Pertinent examples are photographers taking photographs of families through the glass windows of the Etihad Stadium support centre as they being given news of bereavements, with an international media outlet using an image taken inside the foyer in which the deceased could be identified.[148] Families described their distress at the repeated use of their loved one's photo causing renewed upset each time and their anger at personal Facebook, and other social media accounts, being accessed and information and photos used without permission.[149] Bearing in mind the review took place less than three years after IPSO was established, it is very disappointing that there was a need for the recommendation that it 'should review the operation of its code in the light of the experiences described by contributors to the Review' as it was clearly not working as it should. It was also asked to 'consider developing a new code specifically to cover such events' as the Manchester Arena bombing.[150]

Clearly therefore, there is a need in the UK for a legal concept of post-mortem relational privacy so as to seek to prevent the occurrences described in this section. The context in which

[143] Kerslake (n 9)
[144] Detailed in 54-57 [2.30] – [2.40].
[145] ibid 198 [5.258].
[146] ibid 201 [5.266].
[147] ibid 55 [2.31].
[148] ibid 55 [2.33]
[149] ibid 56 [2.37]
[150] ibid 201 [5.266].

the need for such a concept is arising makes this ever more important, as does the harm that not having such protection is causing grieving relatives. The limited protection families have is provided under the IPSO Editors Code,[151] which although it does not cover activity by private individuals does provide some protection from mainstream press. Publishing pictures of the dead could conceivably contravene clause 4 of the Code, for example, which states that publication in times of grief or shock must be handled sensitively. Indeed, the old PCC upheld the complaint of the deceased's aunt[152] that an article published by the Daily Record in June 2011 and headlined: 'Arthur's Seat body find,' had intruded into her family's grief in breach of the then Clause 5 of the Editor's Code. The article reported that a body had been found on a footpath close to Arthur's Seat in Edinburgh and was accompanied by a photograph of the deceased loosely covered in sheeting with the outline of his arms and body clearly seen. The Commission found that the outline of the body through the sheeting would have been visible to readers and understood why this had caused the complainant and her family such distress. It considered that the use of this type of explicit image did not meet the Code's requirement of handling publication 'sensitively.'[153]

More recently IPSO considered the case of *Jones v Mail Online*,[154] where the son of a murder victim complained that the Mail online had breached Clause 4 when it published an article in October 2018, headlined, 'British woman faces the death penalty after 'stabbing her husband to death during an argument' in Malaysia.' The article reported that the named British man had been found in his home after allegedly being stabbed following a dispute with his wife. There was video footage, embedded from a foreign news site, which showed the crime scene and the victim lying on the floor, with the lower half of his body covered with a blanket but his chest exposed. His face was pixilated but his body was surrounded by blood stains. The complainant 'said that the video was deeply upsetting for the family and that there was no justification for images of his deceased father and the crime scene to be published.' The Committee agreed and found that this was 'gratuitous footage' which 'represented a failure to handle publication

[151] As was highlighted in chapter 2, after the Leveson Inquiry the Press Complaints Commission was replaced with IPSO.
[152] Susan Thomson and The Daily Record: Press Complaints Commission Adjudication (24 October 2011) <www.pcc.org.uk/cases/adjudicated.html?article=NzQyNA==&type=> accessed 9 November 2019.
[153] ibid.
[154] Decision of the Complaints Committee 07188-18 *Jones v Mail Online* (20 February 2019) <www.ipso.co.uk/rulings-and-resolution-statements/ruling/?id=07188-18> accessed 9 November 2019.

sensitively in breach of Clause 4. This breach was exacerbated by the fact that it was published so soon after the incident.'[155]

Matters of taste and decency do not fall within the remit of either the old PCC or the new IPSO. Members of the public are not able to complain about matters of editorial judgement, and complaint can only be made by individuals who are directly affected by journalistic practice which usually means being the subject of an article or an approach by a journalist.[156] The overseeing body's role was, and is, seen as 'assessing whether the newspaper has handled the publication sensitively at a time of grief and shock.' For example: a man's sister complained[157] in 2004 that an article published with the headline 'Starving pet starts to devour pensioner' was 'distressing' and included 'unnecessarily sensationalist' details about her 72 year old brother who had collapsed and died at his home.[158] The article included details of the body parts his trapped dog had started to eat. The PCC upheld the complaint, under the then Clause 5 of the Editors' Code, which covers intrusion into grief or shock and relates to 'both the manner in which news is gathered and to the publication of the news.' The PCC reasserted that the 'protection of the vulnerable was at the heart of the code and the commission recognised that close relatives of the deceased were particularly vulnerable in the immediate aftermath of a death.'[159] Factors that the PCC took into account were that the article was written very soon after the death, before the funeral and before any of the details had been put into the public domain through an inquest, for example.

What can be seen by these cases is that despite there being no verbalised concept of post-mortem relational privacy, the Editors Code does seek to protect an aspect of it. Consequently,

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[155] Ibid. 'The Committee considered that given the seriousness of the breach, the adjudication should be published on the publication's website, with a link to the full adjudication appearing on the top half of the homepage for 48 hours; it should then be archived in the usual way.'

[156] The PCC upheld numerous complaints by family members of breaches of Clause 5 of the PCC's Editors Code relating to 'intrusive' photographs being taken at funerals and being published. The family of Jade Goody settled their invasion of privacy action, in the sum of £35,000, against the Mirror Group Newspapers, over photographs that were published of her private burial: Mark Sweeney, 'Jade Goody Family Wins People Pay-out for Funeral Pics' *The Guardian* (London 22 October 2009) www.theguardian.com/media/2009/oct/22/jade-goody-people-privacy-damages accessed 1 November 2019.

[157] http://www.pcc.org.uk/cases/adjudicated.html?article=MjExOQ

[158] Dominic Ponsford, 'PCC Rap for Welsh Weekly over Story of Dog Eating Dead Man' *Press Gazette* (London, 25 March 2004 www.pressgazette.co.uk/pcc-rap-for-welsh-weekly-over-story-of-dog-eating-dead-man/ accessed 12 November 2019.

[159] ibid.

there is an obvious understanding and grounding for post-mortem relational privacy to develop as a legal concept. The implementation and enforcement of the Code is clearly inadequate to protect grieving relatives in today's world and IPSO, like the PCC before it, always expresses reluctance to interfere with editorial decisions. Ultimately, there is very little redress and certainly no means of preventing material being published that would come within an Article 8 post-mortem relational privacy right. This can be seen in the example of a 2006 case where a friend of the deceased complained to the PCC about articles published in the Evening Standard[160] which she said was intrusive at a time of grief in breach of Clause 5 of the Code. The articles reported on the suicide of the complainant's friend, Katherine Ward, who had jumped to her death from a London hotel. The articles included photographs showing her standing on a ledge and then during the fall. The initial publication took place before the death had been widely known or Ms Ward's identity publicly confirmed. The complainant considered the images to be 'horrifying and distressing', and their publication to be 'disgusting and voyeuristic.'[161] The PCC found no breach of code in respect of the broad question under clause 5 of whether the publication was handled sensitively under the terms. The 'simple fact of publishing photographs of what was a public incident did not, of itself, constitute a failure to be sensitive.' The newspaper had not sought to trivialise or sensationalise the death and had not 'presented the photographs in a gratuitously graphic manner.' The question one may ask in a post-mortem privacy context, is should this type of photograph be published at all? We saw in chapter 2 that in life we have a 'private sphere' and in the case of *Von Hannover* it was found that even in public we have a 'zone of interaction' which can fall within the scope of Article 8.[162] In that case the court were dealing with photographs that had been taken whilst in public which contained personal and intimate information of which the public had no legitimate interest in knowing. It is argued here that the same can be said for the publication of death scene images such as that of Katherine Ward. Her right to privacy should be extended to that moment of her death as should the relational post-mortem privacy right of her family.

A similar case is that of *Peck* who was filmed on CCTV in a public street moments after he has attempted to slash his wrists in an attempted suicide. The Council who operated the CCTV subsequently published two still photographs from the footage. The ECtHR found that the

[160] Marina Palomba and the Evening Standard: Adjudication of the Press Complaints Commission (2006) www.pcc.org.uk/cases/adjudicated.html?article=Mzg4Ng== accessed 17 October 2019.
[161] ibid.
[162] *Von Hannover v Germany* (2005) 40 EHRR 1.

disclosure of the CCTV had exposed Peck to an extent that far exceeded any exposure to a passer-by or security observation. It did constitute a serious interference with his Article 8 right to respect for private life. [163] If, it is argued, this CCTV had recorded his actual death (akin to the photographs of Katherine Ward) it would breach not only the post-mortem privacy right contended for herein, but also the relational privacy right.

Similarly, the case of the *Family of Tony Carroll v Mail Online*[164] saw IPSO reiterate that the terms of Clause 4 'do not prohibit reporting on distressing circumstances and events, but rather set out that such publication should be handled sensitively.' The family of the deceased complained that the Mail online had breached Clause 4 when it published an article headlined 'Seconds from death: Horrific moment man, 70, is mowed down and killed by police car while carrying presents home from the pub on Christmas Day.'[165] The article included a video of Mr Carroll stepping into the road whilst the car was approaching and faded out only a fraction of a second before the police car hit Mr Carroll. There were also a number of still images from the video as well as an image of Mr Carroll's shoes and trousers in the road after he had been knocked down. The newspaper did not accept that it had breached the Code but had removed the video two days after publication 'in response to concerns raised by members of the public.' The Committee accepted that the video must have been 'deeply distressing for the family to view,' it concluded that the publication of the video had been 'handled sensitively' - it was taken from 'some distance, in relatively low resolution, so that the man's features and appearance were not clear…' there was no sound. There was also 'no attempt to demean or humiliate the man who had been involved in the accident, or to make light of the circumstances of his death.' The Committee therefore found that neither the video nor the photographs breached Clause 4. It is interesting to note that the public raising concerns caused the newspaper to remove the video. Once again, the question can be asked whether this video and photographs should have been published at all given that they were clearly going to cause the grieving family distress and harm? It also appears that members of the public didn't want to see them either, maybe thinking the tragic last moments of this man's life were 'none of their business.'

[163] *Peck v United Kingdom* (2003) 36 EHRR 41; [2003] EMLR 287.
[164] Decision of the Complaints Committee 08070-18: *Family of Tony Carroll v Mail Online* (7 March 2019) <www.ipso.co.uk/rulings-and-resolution-statements/ruling/?id=08070-18 > accessed 11 November 2019.
[165] Published on 26 December 2018.

This is an illustration of the intuitive feeling's society has towards the dead and the surviving relatives, that they should be afforded respect and privacy. It could also be seen as the desire to maintain the effecting assurance that their relative's death would not be published or shown to the wider public in similar circumstances. As was seen in the Dale Earnhardt case societal pressure can have an effect on the publication of what the public see as inappropriate material. This was seen in the aftermath of the Westminster terror attack on 22nd March 2017 when the 'I' newspaper was shamed into changing its original front-page photograph, which showed a pool of blood next to the foot of a victim. The complaints centred on the fact that it was 'in poor taste and disrespectful to the apparently deceased man.'[166] The front page was changed to show the image of Foreign Office minister Tobias Ellwood attempting to save the life of the policeman killed.

6.8 **Conclusions**

This thesis argues that Article 8 can, and should, allow for post-mortem privacy to be protected and it advances two avenues for doing so, which can co-exist alongside each other: the recognition of an ante mortem right of post-mortem privacy and secondly, a post-mortem relational privacy right. The death culture, intuition and effecting assurances arguments advanced in previous chapters in relation the post-mortem privacy right, apply equally to the arguments in this. In fact, they are even more stark as the survivors are intimately involved with the deceased so can be said to have more invested in all three notions at the given time. It is they, rather than some abstract concept, that will advance the death culture by ensuring a decent burial for example, and observance of death rituals and respect for the deceased, it is they who will no doubt 'intuitively' wish to protect their loved one from a lack of dignity or privacy and it is they that will be keen to effect the assurance that they will be treated with respect when they are dead.

[166] Dominic Ponsford, *Westminster Terror Attack Front Pages: I Changes Front After Backlash* <www.pressgazette.co.uk/westminster-terror-attack-front-pages-i-changes-front-on-taste-grounds-standard-publishes-late-edition/ accessed 12 November 2019> accessed 12 December 2019.

Chapter 7

Conclusions

Dworkin opened the first chapter of this thesis and so too the last:

> *'It is a platitude that we live our whole lives in the shadow of death; it is also true that we die in the shadow of our whole lives. Death's central horror is oblivion – the terrifying, absolute dying of the light'.*[1]

Whilst death may be physical 'oblivion' this thesis has shown that modern day life does not allow for the 'absolute dying of the light' so far as our private lives are concerned. The 'shadow of our whole lives' is increasingly transparent, with the law offering little, if any, protection for our privacy post-mortem.

In the simplest of terms, this thesis posed the following questions:

(i) Why private matters that warrant protection under Article 8 in life cease to do so in death?

(ii) *Should* there be continued protection for those private matters in death, and if so *why*?

(iii) *Can* there be continued protection for those private matters in death, and if so *how*?

We saw how the ECtHR does not apply to the dead,[2] and how this is replicated in domestic law which affords protection for privacy only to the living. The main argument for this is that as the dead are no longer in existence, they cannot suffer harm as there is no subject to be harmed and thus no one that requires protection. We also saw, however, that in some contexts such as burials, organ donation, medical confidentiality and wills, domestic law does extend its protective reach into death. It was, therefore, the main contention of this thesis that the blanket

[1] Ronald Dworkin, *Life's Dominion - An Argument about Abortion and Euthanasia*, (Harper Collins Publishers 1993) 199.
[2] *Jaggi v. Switzerland*, App. No. 58757/00 (2006) 47 EHRR 30.

rule of denying absolutely any protection for privacy upon death is premised upon false, or at least rocky, foundations. This thesis has argued that there should be continued privacy protection precisely because of the harm effected by the lack of such protection in death but, and this is its critical point, the harm is to the living not the dead. It has presented a strong case for continued protection for private matters in death based on that rationale of harm, but it also drew on other justifications – the death culture, societal and legal intuition, as well as the notion of effecting assurances. The solution, it has been argued, is to ascribe the right of post-mortem privacy to the living ante-mortem person, thereby extending Article 8 protection beyond life.

Using the thematic example of Soldier X it was ascertained that whilst the solutions offered by the current post-mortem privacy scholarship protect the digital assets and data of the deceased they do not necessarily protect the information contained within, or indeed off-line post mortem privacy. Neither does that scholarship proffer solutions from within a human rights framework. Thus, in answering the questions above it was demonstrated that the narrow focus of current legal scholarship leaves a gap that needs to be filled if we are to arrive at comprehensive post-mortem privacy in the digital age. In order to fill that gap, this thesis constructed a theoretically sound post-mortem privacy right (encompassing off-line as well as on-line privacy) developed from within a human rights framework.

7.1 **Summary of the Post-mortem Privacy Right Constructed in this Thesis**

Human rights in general ensure that the living possess dignity and thus are respected. Whilst death may extinguish life it does not extinguish the living's intuitive belief that this dignity and respect *should* continue beyond their lives and into their death. The law, to some extent, facilitates this by providing, *inter alia*, that the dead should have decent burials, their organs should not be harvested without prior consent and their medical records should not be disclosed unless certain conditions apply. However, these provisions provide only patchy not comprehensive protection for those who have died, and their privacy remains unprotected.

Article 8 provides privacy for the living so as to ensure, *inter alia,* that they are afforded dignity and respect and that they are able to live autonomous and fulfilling lives, in as far as is possible. Given that privacy is a mechanism by which dignity and respect are afforded to the living, who

also desire the same for the dead, then logically the protection of post-mortem privacy would be in accordance with the death culture, intuition and the notion of effecting assurances that was discussed. Whilst these form part of the justification for 'why' there should be a post-mortem privacy right, the main tenet of the argument herein is that of 'harm'. That is, harm can be caused to the living person if such post-mortem privacy protection is not granted. The risk of harm has become increasingly apparent in the digital era, which has created a very real lacuna in privacy protection both in life and death. It can result in the potential to undermine the very dignity and respect to which the living are entitled under Article 8. It can also undermine the dignity and respect that the living believe the dead, and their grieving relatives, should be accorded. Ultimately, it can cause harm to living persons above and beyond that from which Article 8 presently seeks to provide protection. This context - the digital age - is accepted by the ECtHR as worthy of recognition within its teleological approach to interpretation[3] and thus, this thesis argued, can provide legitimate reason to consider the harm that it can cause to the living as a result of a lack of post-mortem privacy protection.

The harm that forms the basis of the post-mortem privacy protection can occur to a living person in four ways. First, it occurs as a result of the loss of the living's critical interest in maintaining her private life in death.[4] Secondly, the risk of the revelation of private matters when dead can cause a person to inhibit or change their behaviour in life, thereby preventing them from living an autonomous and fulfilling life. Harm is experienced in life by not having liberty of action by virtue of the fact that their actions may, or will, become public knowledge upon death.[5] Thirdly, the prospect of revelation on death of a secret held in life can cause the holder harm in life.[6] The final way in which the living can be harmed by the lack of post-mortem privacy relates to the surviving relatives. Their 'other regarding' as well as 'self-regarding' interests can be harmed as a result of the invasion of the deceased's privacy.[7]

[3] Outlined in Chapter 2, pages 25 – 26.
[4] '…critical judgments about what makes life good' rather than experiential preferences: Ronald Dworkin, *Life's Dominion: An Argument about Abortion and Euthanasia* (Harper Collins Publishers 1993) 201. See Chapter 3, pages 70-72 and 87-85.
[5] See Chapter 5, page 170.
[6] See Chapter 5, page 170 - 172.
[7] See Chapter 6, pages 189-196

Thus, this thesis argued that not only *should* there be continued privacy protection in death so as to overcome, or at least ameliorate, the potential harms identified, but there *could* be such by ascribing to the living the right to post-mortem privacy and to the surviving the right to relational post-mortem privacy. This thesis provided a route by which this can be done and introduced a new definition of post-mortem privacy under Article 8: 'the right of the person to respect for her private and family life post-mortem.'[8] It would allow for a person's ante-mortem privacy rights, under Article 8, to continue post-mortem. Allowing, therefore, for that which would be protected under Article 8 in life, to remain so in death. The theoretical underpinnings of this right mirror that which found the Article 8 right in life namely, autonomy, dignity and the harm principle. So far as the relational post-mortem privacy right is concerned it was shown that there is no need to redefine Article 8 or indeed reform the substantive law to enable the right to be actionable. It will require little more than the ECtHR, in pursuance of its teleological approach to interpretation, continuing along the pathway it began in the case of *Putistin*,[9] albeit perhaps rather more boldly, so as to allow Article 8 to fully encompass a relational post mortem privacy right.

7.2 **Route by which this Thesis Constructed the Post-mortem Privacy Right**

The theoretical concepts of privacy were the starting point in the journey to constructing the post-mortem privacy right contended for herein. The exploration of the rationales and justifications for privacy explored in chapter 2 formed the basis of the theoretical justifications for the post-mortem privacy right. These established the values and functions of privacy for the living individual and society, some of which were, in later chapters, shown to be equally applicable to the dead. Important functions of privacy were the advancement of personal autonomy and the maintenance of dignity.

Of course, not all theoretical concepts are capable of translation into legal ones and chapter 2 went on to explore the current legal provisions relating to privacy, in particular Article 8, and their historical foundations. The ECtHR's dynamic teleological approach to interpretation was seen to be an important component of this thesis, as it creates the opportunity for Article 8 to be interpreted to take account of the modern-day context in which privacy resides. Van de Sloot demonstrated how the

[8] There is no need to redefine Article 8 to allow for a relational post-mortem privacy right.
[9] *Putistin v. Ukraine* [2013] ECHR 1154.

ECtHR has developed Article 8, through the teleological approach, from the 'original classic right of privacy...to a more encompassing personality right.'[10] This in turn has allowed for a more subjective harm to be actionable, thereby potentially allowing for the post-mortem privacy right argued for herein. By taking account of the harm that can occur from the privacy invasions arising from the new technological era, the ECtHR could adapt the law to provide the necessary protection.

After looking at the privacy rights of the living, this thesis moved on (in chapter 3) to look at the historical foundations and development of four existing UK legal provisions that can be said to protect the dead in some form, and considered the views of those, such as Smolensky,[11] who hold that these are in fact 'rights' of the dead. The exploration of the notion of rights and interests in this chapter utilised a strict Hohfeldian framework which, it was argued, should be followed when seeking to ascertain whether a legal right exists in any given situation. Testamentary freedom, for example, which we see within current scholarship is argued as being analogous with post-mortem privacy and demonstrative of the concept of 'transitional autonomy,' was found to confer no legal right upon the dead.[12] It, along with the other existing provisions considered, provide rights to the living to affect events post-mortem but do not confer rights upon the dead themselves. Here, the 'problem of the subject' was identified and discussed in detail in chapter 5: the absence of a living human being able to hold a legal right or to suffer the consequences of a breach prevents the claim bearing required by the Hofeldian framework outlined. It was established that the 'problem of the subject' would prevent any ascription of a post-mortem privacy right to the dead themselves and thus another route would be required.

By examining the historical foundations of each of the provisions we uncovered a main thread within this thesis: the 'death culture', seen as reflecting societal and legal 'intuition' that although the dead are no longer here they are deserving of the living's respect and should be

[10] Bart 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(80) Utrecht Journal of International and European Law 25, 34.
[11] Kirsten Rabe Smolensky, 'Rights of the Dead' (2009) 37(3) Hofstra Law Review 763.
[12] Matthew Kramer, 'Do Animals and Dead People have Legal Rights?' (2001) 14 (1) Canadian Journal of Law and Jurisprudence 29, 31.

treated with dignity. It was subsequently argued in chapter 5 that the continuance of the deceased's privacy is a continuance of the person she was during her lifetime and thus society intuitively will wish to treat her with respect and dignity. Along with the 'death culture', chapter 3 saw the development of the notion of the effecting assurances, first highlighted in chapter 2 when looking at the theories relating to the privacy of the living, but which, it was argued, was equally applicable to the post-mortem situation. The notion conveys the idea that there is a potential 'mutual interest' in one another's privacy being maintained; the living rely upon the effecting assurance that if the deceased's privacy is protected then so too will theirs be when they die.[13]

Whilst chapters 2 and 3 looked respectively at the privacy rights of the living and rationales of the provisions that protect the dead in some form, chapter 4 moved on to look at how the concept of post-mortem privacy is currently constructed within legal scholarship and the solutions proffered by privacy scholars for its protection. It was found that the focus on the narrow application of the much wider concept of post-mortem privacy results in the post-mortem protection of digital assets and data protection but not post-mortem privacy *per se*, in for example off-line privacy: it would protect an email written to a lover just before death but not a death bed kiss. Thus, we were introduced to the novel contribution this thesis makes, a more comprehensive post-mortem privacy right under Article 8. That is not to say that the solutions offered by the current scholarship are inferior; they are very much part of the overall concept of post-mortem privacy protection and can run alongside, as well as within, the solution offered in this thesis. However, it is suggested that a more appropriate terminology for the focus of the current post-mortem scholarship would be that of 'digital privacy after death' or perhaps 'post-mortem digital privacy'.[14] This re-labelling would allow the general concept of post-mortem privacy argued, to encompass the much wider scope of both on-line and off-line privacy after death, with 'post-mortem digital privacy' forming a sub category of the wider concept.

[13] David Mead, 'A Socialised Conceptualisation of Individual Privacy: A Theoretical and Empirical Study of the Notion of the 'Public' in UK MoPI Cases' (2017) 9 (1) Journal of Media Law 100, 106.
[14] Natalie Banta, 'Death and Privacy in the Digital Age' (2016) 94 North Carolina Law Review 927, 930.

The key claim made in this thesis – that the Article 8 right to privacy in life can, and should, be extended into death – was argued in chapter 5, utilising the philosophical debate on harm as a basis for the construction of the legal arguments. This assisted in establishing the two alternative grounds upon which this thesis can be built namely, 'knowledge' and 'no knowledge'. This means that the living person can either have 'knowledge' that in death her privacy can be invaded or, alternatively, that she has 'no knowledge' that her privacy can be invaded upon death but it is an interest that can be 'thwarted' which amounts to a 'harm' to the ante-mortem person. It is upon that basis that the three instances of ante-mortem harm were constructed. First, the loss of the living's continuing critical interest in maintaining her private life post-mortem means that she is harmed in life even if she did not know this would occur. Secondly, the living person has a reduced liberty of action because she can be aware of the risk of post-mortem privacy invasion and thus avoids doing certain things for fear of them becoming known when she is dead. This so-called 'chilling effect' harms her autonomy in life. Finally, the person has a 'secret' in life (as a result of doing the things avoided in the second scenario) which she does not want revealed on death. She is harmed in life by the prospect of this being revealed upon death.

Intuition was also considered in this chapter placing it alongside the death culture and notion of effecting assurances, within the context of harm. A theme that ran through either side of the harm debate was that intuitively we say that the living do have duties and obligations to the dead. This was also evidenced in the legal system itself and often in the judicial language used, which Sperling identified as the judiciary following their own 'gut feelings' so as they 'stand for the dead by regarding them as the persons they were' rather than following the strict letter of the law and regarding them as no longer in existence in the eyes of the law.[15] Lord Hoffman for example, thought it a 'fallacy' to assume 'that we have no interests except in those things of which we have conscious experience' as this did 'not accord with most people's intuitive feelings about their lives and deaths.' He was unconcerned '…to analyse the rationality of these feelings' as they were so 'deeply rooted…that the law' could not 'possibly ignore them.'[16] This thesis argued that our 'intuitive' feelings of respect for the dead would guide us to respect their

[15] Daniel Sperling, *Posthumous Interests, Legal and Ethical Perspectives* (CUP 2008) 5.
[16] *Airedale N.H.S. Trust –v- Bland* [1993] AC 789, 829 [C].

privacy in death as we did in life and in the absence of any legislative initiative, presently, it may be that society's beliefs in this respect could form the foundation of change.

This thesis also demonstrated that it is not just the ante-mortem living person that can suffer harm by the post-mortem invasion of their privacy or indeed be the focus of societal intuitions about respect and dignity, but the surviving living also. Chapter 6 developed the exposition of the US jurisprudence and academic literature that had been outlined in chapter 4. Utilising the concepts of privacy discussed in chapter 2 and bringing back into the fray those that could not apply to the dead themselves, such as being humiliated or suffering ridicule, for example, this chapter constructed the post-mortem relational privacy right that, it was argued, can and should be encompassed within the current Article 8 right. Once again, the concepts of the death culture, intuition and effecting assurances were applied and shown to be even more stark; the survivors are intimately involved with the deceased so can be said to have more invested in all three notions at the given time. Additionally, the harm that is visited upon them is subsequent to the death and thus less abstract, adding enormously to the grief they may be suffering.

The exploration of relational post-mortem privacy highlighted that there are several cultural norms, intuitions and apparent legal fictions that were applicable to it in much the same way as they were to post-mortem privacy. These were put into context through real life examples garnered from the Leveson Inquiry and Kerslake Report, as well as American jurisprudence, and recent cases of online sharing of death images. Additionally, it was established that the ECtHR in cases such as *Putistin*[17] and *Dzhugashvili,*[18] has made tentative moves to extend Article 8 provision to the surviving relatives when it comes to reputational matters which was seen by some as '…potentially, a radical new development.'[19] These decisions are demonstrative of the 'expansive interpretation of Article 8'[20] that the ECtHR is prepared to pursue and which would allow for the post-mortem relational privacy right to infiltrate Article

[17] *Putistin v. Ukraine* [2013] ECHR 1154.
[18] *Dzhugashvili v. Russia* (2014) ECHR 1448.
[19]. Hugh Tomlinson QC **'**Case Law, Strasbourg, *Putistin v Ukraine*: Court Recognises Claims for Defamation of the Dead' *Inform's Blog, The International Forum for Responsible Media Blog* (London, 22nd November 2013) <https://inforrm.org/2013/11/22/case-law-strasbourg-putitstin-v-ukraine-court-recognises-claims-for-defamation-of-the-dead-hugh-tomlinson-qc/> accessed 17 October 2019.
[20] ibid.

8 as it stands presently, with no need to change its definition as would be the case with a post-mortem privacy right.

It was established that a post-mortem relational privacy right could tangentially protect the privacy of the deceased and can run alongside the post-mortem privacy right being contended for in this thesis. So, do we need both? As was identified in chapter 2 the law often proceeds 'incrementally' with the courts 'more willing to make a new law by adapting or extending existing doctrine rather than creating a new branch of law.'[21] The recognition of a post-mortem relational privacy right could be done easily from within the existing framework, by way of judicial interpretation through its expansive approach to Article 8. This would be less straight forward, albeit possible, for the main post-mortem privacy right argued herein. Additionally, at this stage, relational post-mortem privacy is a more readily comprehensible concept and thus more likely to engender support. Its protection, however, is more limited in scope than would be the post-mortem privacy right being ascribed to the living: whilst it may be the case that a post-mortem privacy right would cover all that the relational right would, the converse is certainly not the case.

This thesis, therefore, constructed two separate, but somewhat interlinked, rights under Article 8. The living's right to post-mortem privacy founded on the harm that can be caused to them without such protection and the survivor's post-mortem relational privacy right based on the harm that can be caused to their own interests as a result of the invasion of the deceased's privacy.

7.3 **Enforcement**

This thesis has proceeded to make good a claim to post-mortem privacy based, primarily, upon the philosophical nature of harm, allied with the notions of intuition and the 'death culture'. All of that has been a rather abstract discussion, albeit one infused with doctrinal analysis and real examples. It would nonetheless remain, to quote Jeremy Bentham in a very different

[21] R G Toulson and C M Phipps, *Confidentiality* (3rd edn, Sweet & Maxwell 2012) [2-2012]. It is with this rationale in mind that the basis of chapter 5 was the adoption of existing doctrine, namely Article 8 to protect privacy post-mortem.

context, 'nonsense upon stilts'[22] without considering of how, if at all, such a right or rights could be secured. The obvious issue in seeking to enforce a right under Article 8 that their post-mortem privacy be protected is this: how can the living enforce the right when it only arises on publication or revelation at or after death, and someone who is dead cannot institute proceedings?

As was outlined above, the harm that forms the basis of the post-mortem privacy right protection, can occur to a living person in four ways, three to the living person prior to death and one (relational post-mortem privacy) post death and to the survivors. The latter is capable of being enforced in the same manner as an ordinary Article 8 right in life and indeed would require little more than the ECtHR using its teleological approach to interpret Article 8 to allow for such a claim to be made, something which we saw in Chapter 6 is becoming a reality, albeit slowly and incrementally.

Enforcement to prevent, or at the very least ameliorate, the other three forms of harm is more problematic. Not least of all because the right to enforce does not arise until *after* the person who has that right has died. There can, of course, be a difference between the person who has the right and the person who can enforce it and whilst ordinarily they would be reposed in the same person that is not necessarily the case. The simplest method of enforcement, therefore, would be that which was argued by Callahan: the interest could survive death by way of its transfer onto 'other agents' so as they become those persons interests.[23] Thus the right of enforcement of the post-mortem privacy right could pass on to the surviving relatives/the deceased's estate in much the same way that they are able to enforce a debt owed, for example.[24] This would allow for the living to take up the deceased's privacy interest not only if it were to affect their own privacy giving them a relational right under Article 8, but also to protect the dignity and privacy of the deceased.

[22] Philip Schofield, Catherine Pease-Watkin, and Cyprian Blamires (eds) *Jeremy Bentham, Rights, Representation, and Reform: Nonsense upon Stilts and Other Writings on the French Revolution* (Oxford 2002).
[23] Joan Callahan, 'On Harming the Dead' (1987) 97 (2) Ethics 341, 344. Callahan (n 38) 344.
[24] Ibid, 344.

However, this route of enforcement does raise the dilemma highlighted in chapter 6 – what if the survivors are the very people that the deceased wished to keep the private matters from? It would, of course, be necessary for the survivors to know of the private matter in order to seek enforcement of the post-mortem privacy right of the now deceased person. Thus, although the transfer of the post-mortem privacy right to a relative or the deceased's estate would be a possibility where the deceased is happy for them to know of the matter, it would not be so where they are not.[25]

To overcome this issue, therefore, it is proposed that there be a 'guardian post-mortem' to protect and enforce the post-mortem privacy interests of the deceased.

Guardian post-mortem

The 'guardian post-mortem' would be charged with protecting and enforcing the Article 8 right of the now deceased person. They would be either be a nominated or public guardian post-mortem. The former would be appointed by a living person, in the same way they do an executor of their will, for example. This person would be someone that they trust and are happy to have knowledge of the private matter(s) that they wish to protect and who would be specifically responsible for enforcing the post-mortem privacy right on their behalf after their death. A nominated guardian post-mortem could seek to protect private matters relating to all three forms of harm enunciated, in so far as they have knowledge, or become aware post-death, of the private matter(s) for which protection is sought.

However, it may be that the living person trusts no-one with their privacy or wishes no-one who knows them to have knowledge of the private matters they seek to protect. In that case it is proposed that the best solution would be to have a public 'guardian post-mortem' which would be a public body akin to the state funded Official Solicitor,[26] with the responsibility to receive and act upon complaints about post-mortem, or potential post-mortem, privacy

[25] As was discussed in chapter 4, this is one of the reasons that the current scholarship is against the automatic transfer of the deceased's digital assets to the relatives or estate.
[26] The Official Solicitor is responsible for assisting 'people who are vulnerable because of their lack of mental capacity, or young age, to take advantage of the services offered by the justice system.' < www.gov.uk/government/organisations/official-solicitor-and-public-trustee/about> accessed 10 January 2020.

breaches referred by anyone from the deceased's relatives and friends to ordinary members of the public.

Whether it is the nominated or public guardian post-mortem that is utilised, the mechanics of this enforcement will depend on whether it is 'knowledge', 'no knowledge' or 'chilling effect' harm that is involved.

(a) '*Knowledge' Harm*

As we have seen 'knowledge' harm can arise where a living person has a private matter/secret that they wish to protect in life and death. In life they can seek to keep the matter private by way of obtaining an injunction under Article 8. However, knowledge that an injunction granted to protect their privacy in life will cease upon death, potentially enabling its revelation, can cause harm in life. The same can be said about a matter for which a person did not seek an injunction, possibly due to the costs of doing so or the fear of the Streisand effect discussed in chapter 2. They can 'keep a lid on it' in life but have the knowledge that once dead it could be revealed and thus, they are caused harm in life as a result thereof.

If injunctive relief is obtained in life, the post-mortem privacy right argued herein would extend that protection into death for a period of 70 years so as to account for the arguments in relation to archival and historical preservation and ensure an appropriate length of time for the diminution of the negative impact disclosure could cause the deceased's surviving relatives. Enforcement would be achieved through the maintenance of a register of all injunctions as a simple administrative task – the court who imposes the injunction would enter it on the register upon grant, upon being notified of a death the registrar would enter the name and date of birth of the deceased into the injunction database and should there be an injunction in place their date of death and expiry of the injunction is recorded. As when a person is living – a potential publisher is obliged to ensure that they do not contravene a court injunction and thus should avail themselves of any in existence. Thus, they too would be obliged, by checking the register, to ensure none exist in relation to the deceased or ensure compliance with the terms of any that do. The register should only disclose the name and expiry date of the injunction publicly, otherwise there is a risk of alerting people to the private matter that is to be protected. The

details should only be disclosed upon application by the publisher detailing that which they wish to publish and requiring notification of whether or not it is covered by the injunction. It would be the guardian post-mortem who would pursue any post-mortem breach of the injunction.

For those that did not in life pursue an injunction but do wish to protect their post-mortem privacy, it is proposed that they too would be able to register the private matter in much the same way that an injunction would be. Thus, anyone wishing to publish details pertaining to a deceased person who was registered would need to make an application to the guardian post-mortem highlighting the information that they sought to publish. If this information was that which appeared on the register, then the guardian post-mortem would issue proceedings to enjoin publication and would represent the deceased in any hearing. This would then enable the defendant to argue, for example, Article 10 justification as would be the case when such an application is made in life. If publication occurred without checking the register or making an application to the guardian post-mortem, sanctions, such as damages, could be imposed either directly by the guardian or it may need to be subject to a court hearing if, for example, there is an Article 10 dispute in relation to the information.

(b) '*No knowledge' Harm*

The second category of harm is what we earlier typified as 'no knowledge' and breach of the living's critical interest in maintaining their privacy after death, which can include death scene images and autopsy footage etc. This form of harm can to some extent be dealt with by the IPSO Editors Code that provides rules for reporting on death. However, not only does this apply to the mainstream press and not individuals but, as was seen in chapter 6, it is of limited use and was itself criticised in the Kerslake Report for its lack of success. However, there is an argument for future regulation to significantly improve its protection of post-mortem privacy. In addition, the guardian post-mortem would be responsible for receiving complaints from not only surviving relatives and friends, but also members of the public who were concerned that post-mortem privacy had been breached. Should it be adjudged that a possible breach has occurred the guardian post-mortem would have locus to bring a claim against the publisher on behalf of the deceased.

(c) 'Chilling Effect' Harm

The final form of harm highlighted is that of the 'chilling effect' of no post-mortem privacy protection. This of course, could be ameliorated by the living knowing that should they act in accordance with their autonomous wishes and do something that they would not want to be publicly revealed, there is recourse or preventive methods to stop its revelation post-mortem, as outlined above. Having such measures in place is also likely to have an impact on those that would wish to reveal private matters about the deceased. Over time, a culture of respect for the dead's privacy enforced through the measures outlined above, will go some way to establish societal expectations that private details are *not* to be revealed upon someone's death. This is, in part, already evidenced in the historical desire to protect the privacy and dignity of the dead as was highlighted in chapter 3 when looking at the foundations and development of a number of legal provisions as well as the notions of the death culture and effecting assurances.

It is accepted that the mechanics of the enforcement of a post-mortem privacy right clearly require greater consideration and more detailed research than is possible within the confines of this thesis. Nevertheless, the bones of suggested enforcement outlined above demonstrate that the post-mortem privacy right, as argued in this thesis, is capable of being more than a mere theoretical concept with no practical effect.

7.4 Recommendations for Further Research

Over the course of researching this thesis there were many avenues that were of interest, but which could not be pursued in any depth given both the confines of time and space. There is much that can be done to advance the research and thesis argued herein. Whilst it provides a theoretical basis for the protection of post-mortem privacy and has highlighted a discernible picture of the law protecting the interests and rights of the ante-mortem person into their post-mortem state, the next stage is to provide support by way of empirical research. Ultimately, post-mortem privacy as a legal concept is still within its embryonic stage. However, the aim must be to provide the evidence and justification to reform the law on privacy as the next in the cumulative picture of posthumous protection. That is, protection as a single overriding principle, rather than through piecemeal protection, and this thesis has provided the rationales

upon which that can be achieved. Ultimately, this thesis has sought to provide a source of theoretical and legal rationales and justifications for a post-mortem privacy right that allows us all to protect our privacy in death as we are able to in life - as a fundamental human right.

It is suggested that to properly inform the arguments in relation to societal intuition, the death culture and effecting assurances, empirical research should be undertaken. This would look at the extent to which people are aware of their privacy rights in life and their absence in death. What value, if any, do people place upon post-mortem privacy and why? To what extent do people 'intuitively' respect the dead and believe that their privacy should be maintained and why?

To advance the arguments relating to 'legal intuition' it is suggested that a study of the judicial interpretation of laws that can be said to protect some aspects post-mortem should be undertaken, to include consideration of the extent to which the decisions made and views expressed, can be said to contain an element of 'legal fiction' as discussed in chapter 5.[27] Could these 'legal fictions' advance the case for post-mortem privacy on the basis of legal intuition, which is supportive of the societal intuitions ascertained, for example?

'Memories' were looked at briefly in chapter 5,[28] where it was seen how people often look to the future beyond their death and seek to contribute to the memories that they will leave behind. Memories, therefore, were seen to interact with the privacy of the dead and are of significance in constructing the present and future. More detailed and specific research in this area would be an important addition in the understanding and development of the rationales for both post-mortem and relational post-mortem privacy.

[27] Pages 156 – 159.
[28] Catherine Exley, 'Testaments and Memories: Negotiating after-death identities' (1999) 4 (3) Mortality 250, 251. Page 151 herein.

In terms of future development, it remains more probable that the ECtHR will need to lead the way.[29] There has been a reluctance among the UK judiciary to "strike out' alone in advance of very clear steers and decisions from Strasbourg.[30] That being so, the likelier route to a fully or fuller fledged right of post mortem privacy remains incremental development of its *Putistin* jurisprudence, allied perhaps with an increasing recognition of the critical role for autonomy within the Convention itself, albeit of course not a freestanding right, that we can see as far back as *Pretty v UK*.[31] While inevitably the protection of digital privacy after death will increasingly come to the fore, as more and more of our lives move on-line, this will not be entirely the case for many of us. While the protection of our digital remains might seem to be taking the front seat in terms of reform and development, as this thesis has I hope demonstrated, such claims can only properly be seen as legitimate if viewed from within a prism of human rights and of in life harms. From that more naturally flows, I would argue, a more complete, more rounded and more coherently explicated general right of post-mortem privacy, the claims made throughout and at the heart of this thesis.

[29] While for many years, on and off, the future of the UK's relationship has been in question, recently the Lord Chancellor in evidence to the JCHR confirmed that the UK would remain signatories to the ECHR: 18 November, session available here https://parliamentlive.tv/Event/Index/c225dd21-7986-4665-802d-44cfccf33467

[30] See for example Baroness Hale in *R (Gentle) v Prime Minister* [2008] UKHL 20 [56]"Parliament is free to go further than Strasbourg if it wishes, but we are not free to foist upon Parliament or upon public authorities an interpretation of a Convention right which goes way beyond anything which we can reasonably foresee that Strasbourg might do" though compare Lord Brown in *Rabone v Pennine Care NHS Foundation Trust* [2012] UKSC 2 [112].

[31] (2002) 35 EHRR 1 [61]: "Although no previous case has established as such any right to self-determination as being contained in Article 8 of the Convention, the Court considers that the notion of autonomy is an important principle underlying the interpretation of its guarantees."

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