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What's wrong with death images? Privacy protection of photographic images of the dead

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1. Introduction

Today, almost every time there is a disaster or accident, particularly where a person sadly loses their life, the likelihood is that it will be witnessed by *someone*. More often than not, the person first on scene will not be a member of the emergency services, rather, a member of the public, armed with their smartphone and the ability to record images or video and share these with the world at large. Recent examples have thrown the matter firmly into the public domain, with instances such as the Westminster Bridge terrorist attacks,[1] and the Shoreham Air Disaster[2] sparking public debate on the matter. Further afield, photographs taken and released into the public domain in the aftermath of tragedies such as the helicopter crash in LA which tragically killed basketball star Kobe Bryant along with his daughter and seven others, only serve to exacerbate the family's grief.[3] Back in the UK, the mortuary images released of footballer Emiliano Sala[4] and crime scene death images of the Smallman sisters unlawfully published on WhatsApp groups by two police officers tasked with protecting the site, attracted public indignation.[5] Similar circumstances arose following the death of footballing legend Maradona.[6] The consequent mental distress which results on surviving family members as a result of sharing such unauthorised images is a matter which has received significant attention in the literature, particularly in the US, where protection is further advanced. For example, Calvert emphasises how 'the vast scope of Internet-based dissemination, as well as the virtual permanence of images transmitted on it, aggravate and compound the emotional harm suffered by families…that is caused by the posting of troubling death-scene images'.[7] A decade ago, Emery argued to strengthen relational privacy to protect the rights of grieving families, and to acknowledge the 'low-value content death-scene images possess',[8] particularly given the capabilities of technological developments, and their 'ability to feed the online demand for graphic and exploitative images of death'.[9] Since then, technology and the possibilities to intrude have

Abbreviations: Death Images, Unauthorised Publication.

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[1] See – 'London Attack: What We Know So Far' (*BBC News*, 7 April 2017) <https://www.bbc.co.uk/news/uk-39355108>.

[2] See 'Shoreham air crash: Man films Hunter hitting A27 road' (*BBC News*, 23 August 2015) <https://www.bbc.co.uk/news/av/uk-34034784>.

[3] See Herb Scribner, 'Los Angeles sheriff says he was 'devastated and heartbroken' over shared graphic photos of Kobe Bryant's death' (*Deseret News*, 03 March 2020) <https://www.deseret.com/u-s-world/2020/3/3/21162755/kobe-bryant-death-helicopter-crash-photos-images> accessed 12 February 2021.

[4] Steven Morris, 'CCTV firm staff jailed over leaked Emiliano Sala mortuary photos' (*The Guardian*, 23 September 2019) <https://www.theguardian.com/football/2019/sep/23/cctv-company-staff-jailed-over-leaked-emiliano-sala-mortuary-photos> accessed 17 February 2021.

[5] 'Bibaa Henry and Nicole Smallman: Met PCs jailed for crime scene images' (BBC News, 06 December 2021) https://www.bbc.uk/news/uk-england-london-59474472).

[6] –'Maradona: Anger over funeral home photos with legend's open coffin' (*BBC News*, 27 November 2020) <https://www.bbc.co.uk/news/world-latin-america-55100817> accessed 05 December 2020.

[7] Clay Calvert, 'Salvaging Privacy & Tranquility from the Wreckage: Images of Death, Emotions of Distress & Remedies of Tort in the Age of the Internet' (2010) Mich. St. L. Rev. 311, 332.

[8] Christine Emery, 'Relational privacy - a Right to Grieve in the Information Age: Halting the Digital Dissemination of Death-Scene Images' 42 Rutgers L.J. 765 (2011), at 814

[9] Ibid., at 805

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only grown further, and are combined with a rise in morbid fascination, described as a form of 'voyeurism'[10] and the internet creating a 'virtual graveyard where accident videos can be viewed and corpses can be closely scrutinized'.[11] The above situations have, in part, been brought about as a result of widespread use of smartphones by members of the public, thus denying both the tabloid media and the traditional "gatekeepers"/intermediaries of their erstwhile exclusive privilege to report such events, usually in a manner that keeps such images out of the public domain. Given the reasons outlined above, the impact of new technologies such as the internet, smartphones and ease of information dissemination, make the widespread publication and dissemination of death images in England and Wales, from both a legal and ethical perspective, an area ripe for change. To borrow an argument that has been propelled in the US, the internet has made a fundamental difference to this area - 'Before the advent of the Internet, the gruesome photographs…might have appeared for one or two days in local newspapers' – now, 'The Internet and the development of technology therefore have created unprecedented issues when it comes to privacy'.[12]

Whilst US law has begun to find ways to deal with such scenarios, as will be explored – such as through the concept of 'familial' or 'survivor' privacy, along with addressing the behaviour of the photographer (although to a large extent only focusing on photographs released by those acting within an 'official' capacity e.g. the police or emergency services) - the matter has received rather less attention within English and Welsh law, which has to date refused to recognise the privacy of a deceased person. Using the example of death images as a catalyst to explore the relevant issues, this paper will make the case that due to technological change, a paradigm shift in law is now required to recognise and protect the privacy of the dead.[13]

2. Photographic image as an aspect of personality

Traditionally, individuals have controlled the use of their image via personality rights although, as will be demonstrated, protection for this varies greatly between jurisdictions, legal systems and approaches towards privacy. As yet, no such protection has been widely available in England and Wales, although under Article 8 of the European Convention on Human Rights (ECtHR),[14] the right to respect for private and family life is recognised, which encompasses a number of aspects of an individual's development as requiring protection, from autonomy[15] through to protection of one's reputation and image. In relation to the latter, the European Court of Human Rights has observed that a person's image constitutes 'one of the chief attributes of his or her personality, as it reveals the person's unique characteristics and distinguishes the person from his or her peers'.[16]

Thus, it is recognised that in some circumstances, protection of images is required, the ECtHR acknowledging that:

> [F]reedom of expression includes the publication of photos…This is nonetheless an area in which the protection of the rights and reputation of others takes on particular importance, as the photos may contain very personal or even intimate information about an individual or his or her family…[17]

However, protection for image and personality rights has developed at differing rates globally and it is useful to trace developments in Germany, France, New Zealand and the US. In Germany, personality rights (Persönlichkeitsrecht) are protected under Articles 1(1) and 2(1) of the German Basic Law,[18] originally developing in response to the intrusion of journalists photographing the corpse of Chancellor Otto von Bismarck in 1898[19] where, in the absence of a right specifically for these circumstances, the matter was dealt with through the rather artificial route of trespass in order to provide some form of protection.[20] In *the Marlene Dietrich case*[21] Article 1 protection was granted to protect the honour of a deceased person, for both the non-commercial and commercial interests of the deceased (such as name, voice, image for financial gain). Conversely in France, the Court of Cassation held that 'the right to act in respect of privacy disappears when the person in ques-

[10] Clay Calvert, 'A Familial Privacy Right Over Death Images: Critiquing the Internet-Propelled Emergence of a Nascent Constitutional Right that Preserves Happy Memories and Emotions' 40 Hastings Const. L.Q. 475 (2013), 502.

[11] David Hamill, 'The Privacy of Death on the Internet: A Legitimate Matter of Public Concern or Morbid Curiosity', 25 J.C.R. & Econ.Dev. 833 (2011), 836.

[12] Catherine Leibowitz, '"A Right to be spared unhappiness": Images of Death and the Expansion of the Relational Right of Privacy' 32 Cardozo Arts & Ent. L.J. 347 (2013-2014), 348-9.

[13] It should be noted that the question of whether the dead have rights is a controversial proposition. By operation of the maxim: *actio personalis moritur cum persona*, the common law of England and Wales does not recognise a privacy right of action in tort after the victim's death; see *Ronex Properties Ltd. v John Laing Construction Ltd*. (1983) Q.B. 398. Although s.1 of the Law Reform (Miscellaneous Provisions) Act 1934 (as amended) provides for the survival of certain causes of action in tort, it is subject to the condition that the cause of action must be subsisting at the time of death. Thus, the statutory rule on survival of tort causes of action does not apply to the typical scenarios dealt with in this article in relation to privacy violations (death images) arising post-death.

[14] Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November1950, 213.

[15] See *Pretty v United Kingdom* (2002) 35 EHRR 1 at [61] and *Christine Goodwin v UK* (2002) App No 28957/95 ECHR 588 at [90].

[16] See *Reklos and Davourlis v Greece* [2009] ECHR 200 at [40].

[17] *Von Hannover v Germany (No 2)* [2012] EHRR 15 at [103].

[18] Article 1 and 2 (1) of the German Basic Law 1949.

[19] Katharina von Bassewitz, 'Hard times for paparazzi: two landmark decisions concerning privacy rights stir up the German and English media', IIC 2004, 35(6) at 643.

[20] Ibid., at 642-653. It should be noted that trespass in this sense does not relate to the Anglo-American understanding of 'trespass to the person', but instead refers to the concept of trespass to property.

[21] Marlene Dietrich case BGH 1 ZR 49/97 (01 December 1999) – see translation here: <https://law.utexas.edu/transnational/foreign-law-translations/german/case.php?id=726> accessed 06 May 2021.

tion, the sole holder of that right, dies',[22] however, the ECtHR in *Editions Plon v France* has indirectly protected the privacy of the deceased (via medical confidentiality).[23] Given the Continental approach taken by Civilian jurisdictions, which sees a more unified approach towards protection of dignitary interests more generally, perhaps such a development is not all that surprising.

Significantly, some Common law jurisdictions have also seen developments in this field. For example, countries such as New Zealand have recently seen the development of an intrusion-based privacy tort.[24] Other jurisdictions have seen protection focus on image rights, for example as in the US.[25] This concentrates on publicity rights, which are commercial and proprietary in character.[26] Although, technically, the right to publicity applies to all, Georgiades noted that, in practical terms, the right is effectively limited to celebrities as the harm suffered by the non-famous is unlikely to make it actionable.[27] Further, such laws do not prevent images being *taken* (a matter which is given further attention below in Section 3), but deal with the subsequent publication, which is seen as raising different legal issues.[28] On the other hand, English and Welsh law has been reticent to recognise such equivalent rights, instead seeing piecemeal development borrowed from different areas of law, from intellectual property[29] to tort.[30] Of course, today, the matter is not just of relevance to those in the public eye and celebrities, but there are instances where less high-profile individuals are subject to their image being shared after being involved in an accident, or committing suicide, a matter which becomes particularly problematic where the deceased's name and image are circulated online before the next-of-kin are informed. The lack of image rights has been subject to criticism, with Sherman and Kaganas observing in the early 1990s:

> In short, in today's world the image and other attributes of the personality are increasingly reified: UK law has, on the whole, failed to take account of this change. This failure is particularly marked when comparisons are made with other legal systems, for example, both France and Germany have developed rights of personality which, in appropriate circumstances, enable the individual to control the uses that are made of his or her attributes.[31]

Despite such criticisms, there was still reluctance to recognise image rights. However, privacy protection began to develop, most fundamentally through the tort of misuse of private information. Arising from the breach of confidence claim,[32] it no longer relied upon a confidential relationship for a claimant to benefit from protection, and was widely seen as developing in response to the incorporation of the European Convention on Human Rights into domestic law through the Human Rights Act 1998. As will be demonstrated, whilst photographs are protected in England and Wales under Article 8 ECHR, the protection for images through this mechanism falls short of protection seen in other jurisdictions, and does not currently provide rights for post-mortem privacy. One of the reasons given for this reluctance is that human rights only apply to the living, therefore protection cannot be extended to the dead, premised on the traditional notion that the dead cannot be harmed.[33] Furthermore, Buitelaar argues that the rights enshrined in the European Convention of Human Rights (ECHR) and the Universal Declaration of Human Rights (UDHR), cannot be limited to the rights of living human beings but persist in vicarious digital personae.[34] Alternatively, Gligorijević puts forward a different perspective – that privacy protection can be accommodated within tort law, and is not dependent on the Human Rights Act, with the courts already interpreting traditional breach of confidence so

[22] *SA Editions Plon v Mitterand* JCP 1977. II. 22894 (27 May 1997) see translation here: <https://law.utexas.edu/transnational/foreign-law-translations/french/case.php?id=1240> accessed 06 May 2021. A case concerning whether the claimants, M. and Mme Mitterand had title to protect the private life of M. François Mitterand, in attempting to prevent the publication of a book concerning the life of Mitterand. The Court of Cassation held that in this instance they could not justify prohibiting publication of the work as a whole.

[23] *Editions Plon v France,* App No. 58148/00 (2004).

[24] See *C v Holland* [2012] NZHC 2155 for the New Zealand tort of intrusion, which protects against intentional intrusions into a person's private space.

[25] The US tort has four categories, these being (1) intrusion upon the plaintiff's seclusion or solitude or into his private affairs; (2) public disclosure of embarrassing facts about the plaintiff; (3) publicity which places the plaintiff in a false light in the public eye; and (4) appropriation, for the defendant's advantage, of the plaintiff's name or likeness – as outlined in WL Prosser, 'Privacy'' (1960) 48 Calif. L. Rev. 383 at 389.

[26] The statutory form of the tort (appropriation of image or likeness) in the US requires prove that the claimant's image was used for 'advertising' or for 'purposes of trade' – WP Keeton, et al. *Prosser and Keeton on Torts, 5th ed.* (St. Paul, MN: West Publishing Co., 1984) at 852. However, the common law form of the tort is broader, merely requiring that the claimant's image had been used for the defendant's own advantage, which is usually pecuniary – *Prosser & Keeton*, at 852-853.

[27] Eugenia Georgiades, 'Protecting the image: applying a right of publicity to images uploaded on social networks' E.I.P.R. (2019) 41(4), 38, 39-41. The requirement of the US law that there needs to be a resulting injury means this is unlikely to be applicable to the dead – although there have been some developments in this area which are discussed below.

[28] Gill v Hearst Publishing, 40 Cal.2d 224 (1953); Gill v Curtis Publishing, 38 Cal.2d. 273 (1952)

[29] For example the tort of passing off as restated in *Reckitt & Colman Ltd v Borden Inc* [1990] 1 All ER 873 has been used to protect a celebrity's image in commercial terms – see *Irvine v Talksport* [2003] 2 All ER 881 (CA) and *Fenty v Arcadia Group Brands Limited* [2015] 1 WLR 3291 (CA).

[30] The tort of misuse of private information was developed in *Campbell v MGN* [2004] UKHL 22.

[31] Brad Sherman and Felicity Kaganas, 'The Protection of Personality and Image: An Opportunity Lost' (1991) 13 European Intellectual Property Review 340, 343. It should be noted that UK law, as an entity, does not exist and, the relevant laws for the purposes of this article are in relation to the laws of England and Wales.

[32] *Coco v AN Clark Engineers Ltd* (1968) F.S.R. 415.

[33] It is important to note that this argument has been subject to criticism – for example see Wilfred Waluchow, (1986). Feinberg's Theory of "Preposthumous" Harm. *Dialogue,* 25(4), 727-734.

[34] J. C. Buitelaar, 'Post-mortem privacy and informational self-determination' Ethics Inf Technol (2017) 19: 129

as to cater for better protection (which developed into misuse of private information).[35] Development in this manner removes the requirement for protection to be limited to the living, and paves the way for an extension of Article 8 rights, as seen within other jurisdictions.[36]

It is beneficial to trace the basis on which privacy protection is premised, to establish its compatibility with the development of post-mortem privacy. An important aspect of Article 8 is autonomy, with the ECtHR in *Pretty v United Kingdom* emphasising how '…the court considers that the notion of personal autonomy is an important principle underlying the interpretation of its guarantees'.[37] Closely linked to autonomy are ideas of dignity, self-determination and control – all of which are challenged by technology, which has the potential to intrude more than ever before. This is also intertwined with harm arguments, deriving from Mill's 'harm principle', which asserts that the law should only use its coercive power to prevent harm: 'the only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others'.[38] An obvious difficulty here in applying this post-mortem is whether the dead can be harmed and should have rights?[39]

From the right to be 'let alone' as described by Judge Cooley in Warren & Brandeis' seminal piece in 1890,[40] to early views of the image as 'stealing the soul',[41] privacy is, as a concept, something intrinsically important to each individual, but defining exactly what this means has proved challenging – to the courts, government and society. As Solove notes, the binary view of privacy is increasingly being abandoned and, instead, can be better understood as a continuum, dependent on the circumstances.[42] Over time, there has emerged a well-established body of jurisprudence which has given rise to several scenarios where English law will support a claim in privacy. Deriving from *Campbell v MGN,* the tort of misuse of private information will apply where the claimant has a reasonable expectation of privacy, that is not outweighed by the freedom of expression rights of the publisher.[43] In the *Campbell* judgement, Lord Nicholls outlined the special qualities of images as opposed to other forms of communication, saying '[i]n general photographs of people contain more information than textual description. That is why they are more vivid. That is why they are worth a thousand words'.[44] These words emphasise the unique nature of photographic images – an ability to communicate in a universally understood medium, to cross language and communication barriers – yet also to intrude, pry and disturb, particularly where images of individuals at their most vulnerable are concerned. The rise of the sharing culture brought about as a result of social media potentially leaves these vulnerabilities yet more exposed, with the possibility for images and personal information to 'go viral' instantaneously.[45]

English law takes a circumstantial approach towards misuse of private information, with all the circumstances of the case taken into account when considering whether a person has a reasonable expectation of privacy.[46] Of relevance would be factors including: the attributes of the person, the nature of the activity, the place the photograph is taken, the nature and purpose of the intrusion, the absence of consent and whether it was known/inferred and the effect on the person photographed and the circumstances in which and purposes for which the information came into the hands of the publisher.[47] As yet, whether the claimant is dead has not been a point given consideration, and whether the law develops in this way would be dependent on whether the dead are recognised as having rights. This means that an image of a person in distressing or harrowing circumstances can be protected by privacy law until the moment of death, but not beyond this. This is demonstrated through cases where photographs of the dead have been dealt with through a myriad of laws, which do not seem a natural fit to the issues arising. For example, a photograph of a Grenfell victim published online was dealt with under s 127 Communications Act 2003, for sending messages of a grossly offensive or of an indecent, obscene or menacing character[48] - with criminal law focusing on the behaviour of the photographer having caused an affront and offending those who saw the image, rather than a privacy concern of the deceased.

Despite the Metropolitan Police Service Photography Advice, which emphasises the freedom associated with photography, stating 'Members of the public and the media do not need a permit to film or photograph in public places and police have no power to stop them filming or photographing inci-

[35] Jelena Gligorijević, 'Privacy at the intersection of public law and private law' P.L. 2019, Jul, 563-580.

[36] For example, the ECtHR decision in *Putitstin v Ukraine (Application no. 16882/03) (2013)* held that Article 8 could be engaged in terms of defaming the dead.

[37] *Pretty v United Kingdom*, n15, at 61.

[38] John Stuart Mill, *On Liberty* (edited with an introduction by Gertrude Himmelfarb) (London: Penguin Books,1974), at 68.

[39] This is an area where interesting arguments are developing, particularly in terms of metaphysical arguments, but it is outside the scope of this paper to consider these. See for example Stephen Blatti 'Death's Distinctive Harm', *American Philosophical Quarterly,* October 2012, Vol. 49, No.4, 317-330.

[40] Samuel Warren and Louis Brandeis, 'The Right to Privacy' (1890) 4 Harvard Law Review 193, 195.

[41] Christina Michalos, *The Law of Photography and Digital Images* (Sweet & Maxwell 2004) 340-1.

[42] Daniel J Solove, *The Future of Reputation: Gossip, Rumor and Privacy on the Internet* (Yale University Press, 2008) 7.

[43] *Campbell v MGN* (2004) UKHL 22; misuse of private information was confirmed as a separate tort from breach of confidence in *Vidal-Hall v Google Inc* [2015] EWCA Civ 311.

[44] *Campbell v MGN*, n43 at 31.

[45] Mills observes how in a social media world, anyone has the potential to become a 'celebrity' or status as a public figure which results in a limited expectation of privacy e.g. headmasters, politicians, clergymen, Max Mills 'Sharing privately: the effect publication of social media has on expectations of privacy' Journal of Media Law (2017), 9:1, 45, 45-71.

[46] *Murray v Big Pictures* [2008] EWCA Civ 446.

[47] Ibid.

[48] See BBC News, –'Why I took Photos of Grenfell Victim' (*BBC News,* 18 September 2017) <https://www.bbc.co.uk/news/uk-41314418> accessed 01 December 2020. Here, Omega Mwaikambo photographed and posted online pictures of a body of a victim of the Grenfell fire on Facebook. He said he knew it was 'morally wrong', but was 'traumatised', and wanted to see if anyone knew the deceased person.

dents or police personnel',[49] few would dispute that until the point of death an individual involved in an accident or other disaster would benefit from the protection of privacy law, given the vulnerability of that person that would be laid bare in such circumstances.[50] In applying Altman's 'social interaction' theory to privacy, Hughes argues that privacy amounts to respect for barriers which, when penetrated, result in an invasion of privacy[51] – something which would clearly happen in such circumstances. However, one must question why this protection stops at the point where an individual is no longer able to defend their own rights. Had they survived, there is little doubt that recourse in privacy would be an option, but for the moment, it appears any such *privacy* protection is only effected through an ethical or moral obligation on the part of the photographer, rather than any legal protection given to the deceased. For example, journalistic Codes of Practice such as the IPSO Code of Practice and Ofcom Broadcasting Code contain provisions on grief and intrusion,[52] which have been applied in such situations.[53]

If, as outlined above, the development of law is not dependent upon human rights protection but rather derives through the law of tort, in theory the two-stage test in *Campbell* can apply to the dead. It is still possible to ask: firstly, whether the deceased has a reasonable expectation of privacy and, secondly, whether this should concede to the Article 10 rights of the publisher.

Moreham argues that the application of the reasonable expectation of privacy test is underpinned by two alternative, but usually mutually reinforcing, principles. These are (1) that a claimant will have a reasonable expectation of privacy if such an expectation is consistent with societal attitudes to the information or activity in question, and (2) by considering what signals the claimant gave that he or she regarded the information or activity as private and whether social norms would usually require such privacy signals to be respected.[54] Leaving the latter aside, as in many instances an occasion resulting in images of death being revealed to others would be outside the possible control of the deceased, the former would suggest that a reasonable expectation of privacy would *already* exist (i.e. most people would accept that taking and sharing photographs of the dead is *not* consistent with societal attitudes). Moreham has suggested further a number of factors that may contribute as to whether a person has a reasonable expectation of privacy *not* to have images taken in public disseminated at large, including: (i) the nature of location (whether only a few people could see/hear them); (ii) the nature of the claimant's activity – whether intimate, embarrassing or traumatic (where she argues there should be a *presumed* reasonable expectation of privacy), or whether as a result of one drawing attention to oneself; (iii) the way in which the image was obtained (e.g. was it obtained surreptitiously, using technological devices to break through self-presentation barriers or as part of a campaign of harassment?); and (iv) the extent to which the publication focused on the claimant (whether the photographed is the principal subject, or incidentally captured).[55]

In considering Lord Steyn's "ultimate balancing test" in *Re S*, where values under the qualified rights of Articles 8 and 10 of the ECHR are in conflict,[56] and also the criteria set out by the ECtHR in *Axel Springer AG v Germany*[57] and *von Hannover v Germany (No. 2)*,[58] when balancing the competing rights, these are as equally applicable to the dead as the living – with matters such as the contribution made to a debate of general interest, the role/function of the person, prior conduct, along with context and the method of obtaining the information all relevant points for consideration. Recent cases appear to signify a shift, to demonstrate that where there is private information revealed, and no legitimate public interest present, the balance will fall in favour of Article 8 protection.[59]

Indeed, it is difficult to understand circumstances where publication of such images may be justified, particularly when there exist challenges with the concept of public interest itself. Proving difficult to define or quantify, public interest has been a matter subject to much debate, particularly in recent years, with there being a general understanding that matters of public interest can trump privacy interests. However, understanding of what public interest constitutes is not altogether that clear, something which is criticised by *inter alia* Moosavian[60] and Wragg, on several grounds, including a lack of measurement, the subjectivity aspect, inconsistent cases, and a lack

[49] Metropolitan Police 'Photography Advice (*The Met*, Current Advice)<https://www.met.police.uk/advice/advice-and-information/ph/photography-advice/>.

[50] Categories of information currently protected include trauma, grief and strong emotion – see Nicole Moreham, 'Unpacking the Reasonable Expectation of Privacy Test' L.Q.R. 2018, 134 (Oct), 651-674 – where she sets out seven categories of information that are usually understood as private.

[51] Kirsty Hughes, 'A Behavioural Understanding of Privacy and Its Implications for Privacy Law' (2012) 75 The Modern Law Review 806, 809.

[52] Under the IPSO Editors' Code of Practice, section 4 'Intrusion into grief or shock', public interest is not a justification. IPSO 'Editors' Code of Practice' (*Code of Practice*, 1 January 2021) <https://www.ipso.co.uk/editors-code-of-practice/> accessed 19 March 2021.

[53] For example the IPSO Editors' Code of Practice (*Code of Practice*, 1 January 2021) <https://www.ipso.co.uk/editors-code-of-practice/> accessed 19 March 2021; Ofcom, 'Ofcom Broadcasting Code (with the Cross-promotion Code and the On Demand Programme Service Rules)' (*Code*, 31 December 2020) <https://www.ofcom.org.uk/tv-radio-and-on-demand/broadcast-codes/broadcast-code> accessed 19 March 2021. Under the Ofcom Broadcasting Code, complaints can be made on behalf of a deceased person under s111(2) Broadcasting Act 1996.

[54] Moreham, n50.

[55] Nicole Moreham, 'Privacy in Public Places' (2006) 65 Cambridge Law Journal 606, 621.

[56] *Re S (A Child)(Identification: Restrictions on Publication)* [2004] UKHL 47 Lord Steyn at [17].

[57] *Axel Springer AG v Germany App no* 39954/08 (2012) 227 ECHR at [89].

[58] *Von Hannover v Germany (No. 2)*, n12.

[59] See for example *Bull v Desporte* [2019] EWHC 1650 (QB), which illustrated that there is no public interest in "kiss and tell" stories; also, *McKennit v Ash* [2008] QB 73 and *PJS v News Group Newspapers* [2016] AC 1081.

[60] Rebecca Moosavian, 'Deconstructing "Public Interest" in the Article 8 vs Article 10Balancing Exercise' (2014) 6 Journal of Media law 234, 241

of definition.[61] Whilst public interest is not defined, Moosavian identifies a number of areas which are within the scope of public interest, including that publication: (1) Contributes to democratic debate; (2) Prevents the public from being misled; and (3) Reveals crime or serious misdeeds.[62] Wragg puts forward an alternative criteria for public interest, this being (1) preventing the public from being misled; (2) public figures as role models; and (3) freedom of the media to criticise others.[63] This is not a problem unique to England and Wales, and considering the matter in relation to the US, Calvert gives thought to the role of newsworthiness, concluding that in itself, it is a problematic term, difficulties primarily revolving around the 'amorphous nature of the concept of newsworthiness'.[64]

Taking the example of the Syrian child washed up on a beach, it can be asked whether the publication of such images can be justified in terms of public interest – informing and depicting the horrors of war. Are such images appropriate,[65] and can they create the profound change that is often attributed to their impact?[66]

3. Taking, retaining and publication of photographic images

Whilst the concept of images portraying more information than words alone has been recognised both at European[67] and domestic level,[68] as emphasised by the Metropolitan Police advice on photography,[69] the freedom to photograph has been a key part of English culture and courts have relied upon the New Zealand decision in *Hosking v Runting,* which held that photography in public is part of everyday life.[70] Thus, the English Courts have refused to accept that the taking of photographs (without more) can amount to a breach of privacy, with Baroness Hale in *Campbell* stating 'We have not so far held that the mere fact of covert photography is sufficient to make the information contained in the photograph confidential. The activity photographed must be private'.[71] In doing so, Baroness Hale highlighted that, (at least in the past), there must have been something *private* about the information revealed by the photograph – the mere fact of taking a photograph was not enough. In relation to death images, this arguably means that the mere taking of such images is not generally wrongful.

Further support is provided for this laissez faire stance towards photography through decisions of the ECtHR, with the Court in *Friedl v Austria* holding that an act of photography is seen as a 'trivial act which must be tolerated by others, although some persons may indeed consider it unpleasant that someone else should take their photograph',[72] and *Campbell* with Lord Hoffman's statement: '[t]he famous and even the not so famous who go out in public must accept that they may be photographed without their consent, just as they may be observed without their consent'.[73] However, when it is acknowledged that images have the potential to intrude in a 'peculiarly humiliating and damaging way',[74] and that 'for a long time the English courts have recognised the significance of photographs and their special status as a form of private information',[75] the question becomes when does something *trivial* become something more significant?

Thus far, within England and Wales at least, it has been the retention and publication of photographs that have created legal challenges, not the taking.

In *Murray,* the Court noted that:

> The essence of the complaint in virtually all of these cases centre on the degree of publicity which the occasion photographed ultimately receives. A photograph taken by a member of the public which remains the property of that person and is at most shown to family and friends does not infringe any right of privacy because it does not lead to any real public exposure of the events portrayed. They remain essentially private and unseen.[76]

Whilst the Court in *Douglas v Hello!* emphasised that the taking of the photograph, private possession and publication are entirely separate. Up until that point, at least, it had been the publication that had created problems.[77] The issue of the *taking* and *retention* of images was given specific focus in *Wood v Commissioner of Police for the Metropolis.*[78] Here, the claimant

[61] Paul Wragg, 'Protecting Private Information of Public Interest: Campbell's Great Promise,Unfulfilled' (2015) 7 Journal of Media Law 225, 226.

[62] Moosavian, n61 at 224-8.

[63] Paul Wragg, 'The Benefits of Privacy-Invading Expression' (2013) 64 Northern Ireland Legal Quarterly 187, 195.

[64] Clay Calvert, 'Revisiting the Voyeurism Value in the First Amendment: From the Sexually Sordid to the Details of death' 27 Seattle U.L. Rev. 721 (2004), 746.

[65] Helena Smith, 'Shocking Images of Drowned Syrian Boy Show Tragic Plight of Refugees' (*The Guardian,* 2 September 2015) <https://www.theguardian.com/world/2015/sep/02/shocking-image-of-drowned-syrian-boy-shows-tragic-plight-of-refugees>

[66] See Nicole Smith Dahman and Paul Slovic, 'How Much Power Can an Image Actually Wield?' (*The Conversation,* 14 April 2017) <http://theconversation.com/how-much-power-can-an-image-actually-wield-76069> accessed 05 July 2021.

[67] For example, the *Von Hannover judgments: Von Hannover v Germany* [2004] EMLR 379; (2005) 40 EHRR 1; *Von Hannover v Germany (No. 2)*, n59*; Von Hannover v Germany (No. 3)* (2013)Application No.8772/10.

[68] See *Campbell v MGN*, n43.

[69] Metropolitan Police 'Photography Advice (*The Met,* Current Advice)<https://www.met.police.uk/advice/advice-and-information/ph/photography-advice/>.

[70] *Hosking v Runting* (2003) 3 NZLR 385, 415 at [138] confirmed in *Campbell v MGN*, n43, Lord Hope at 22.

[71] *Campbell v MGN,* n43, Baroness Hale at 154.

[72] *Friedl v Austria*, App No 15225/89 (1995) 21 EHRR 83.

[73] *Campbell*, n43. A related point on observation without consent would be the *Fearn v Tate* [2019] EWHC 246 (Ch) judgment brought by the homeowners overlooked by the Tate Gallery. An action in privacy was not permissible, so an action was brought in private nuisance instead, which failed, with an appeal being dismissed [2020] EWCA Civ 104, the Court of Appeal holding that nuisance cannot support a breach of privacy action.

[74] *Theakston v MGN Ltd* [2002] EWHC 137 (QB) per Ouseley J.

[75] Kirsty Hughes, 'Publishing Photographs Without Consent' (2014) 6 Journal of Media Law180, 181.

[76] *Murray v Express Newspapers plc* [2007] EWHC 1908 (Ch) [37].

[77] *Douglas v Hello!* [2005] EWCA Civ 595 Lord Phillips MR at [106].

[78] *Wood v Commissioner of Police for the Metropolis* [2009] EWCA Civ 414.

(Wood) was a media co-ordinator for the Campaign against Arms Trade (CAAT), and was photographed by the police in the street outside an annual general meeting of a company which had been involved in organising trade fairs for various industries, including the arms trade. These photographs had been taken to enable the police to identify potential offenders if offences had been committed at the meeting, and potential offenders at the trade fair. Wood objected to his image being taken and stored in this way – and appealed against the finding that there was no interference under Art 8(1) (or that the interference was in accordance with Art 8(2). Before the Court of Appeal, Wood's appeal was allowed. Whilst the court held that the mere taking of a photograph in a public place without more could not engage Art 8,[79] the taking combined with retention was sufficient to engage his Art 8 rights. Furthermore, the interference was not justified under Art 8(2) for a timescale of more than a few days, despite being in pursuit of a legitimate aim (the prevention of disorder or crime). It should be noted here that these cases related to instances of the living, and one has more capability to object in relation to images of oneself being published in such circumstances, which perhaps provides a clearer delineation of the different acts (taking, retention, publication). One practical challenge in relation to death images relates to enforceability, and who would be capable of, or able to bring a claim in respect of such images. Arguably, as highlighted in Section 2 above, if a deceased person were recognised as having an enforceable right of privacy post-death, contrary to the maxim *actio personalis moritur cum persona*, then the deceased's privacy right of action might be enforced by their legal representatives (executor/administrator), by analogy to a legal representative's right to enforce certain tort's causes of action which were subsisting at the time of death of a deceased person under the Law Reform (Miscellaneous Provisions) Act 1934 (as amended).

Notwithstanding the above, there is, theoretically, nothing to prevent an action formed on the basis of the taking of images alone, as '…the disclosure of private material is not a prerequisite for an Article 8 claim: physical intrusion effected by filming, photographing or recording is in some circumstances actionable per se'.[80] In fact, Wragg has criticised the traditional distinction between "intrusion into seclusion" and "public disclosure of embarrassing facts", arguing that they occupy the same conceptual space, therefore misuse of private information should not be limited to informational privacy.[81] This has certainly been evident in other jurisdictions and ECtHR jurisprudence,[82] where the taking of photographs has created an actionable cause, with Article 8 protection extending to multiple aspects of personality, and *Von Hannover* observing that there still remains a 'zone of interaction' of a person with others, even in a public context, that may fall within the scope of 'private life'.[83] In *Reklos*, the taking of photographs was actionable itself, despite the baby being too young to appreciate any infringement of rights, the ECHR recognising that a person's image is protectable as an intrinsic part of their personality:

> The right to the protection of one's image is thus one of the essential components of personal development and presupposes the right to control the use of that image. Whilst in most cases the right to control such use involves the possibility for an individual to refuse publication of his or her image, it also covers the individual's right to object to the recording, conservation and reproduction of the image by another person. As a person's image is one of the characteristics attached to his or her personality, its effective protection presupposes, in principle and in circumstances such as those of the present case, obtaining the consent of the person concerned at the time the picture is taken and not simply if and when it is published. Otherwise an essential attribute of personality would be retained in the hands of a third party and the person concerned would have no control over any subsequent use of the image.[84]

Given the rise in the potential to take and share photographs in many different, and potentially intrusive situations, Moosavian suggests that this may give rise to standalone actions, as '…photographic recording – as distinct from publication – may become an increasingly important issue with the ubiquity of mobile phone camera and accompanying 'capture' culture'.[85] A further related point revolves around advances in technology, with the capability to 'live stream' events via social media and streaming platforms removing the traditional distinction between taking, retention and publication of images – the viewer watching content unfold as it happens, such as when the New Zealand Mosque attacks were live streamed via Facebook by the perpetrator in 2019, which led to 1.5 million videos of the attack circulating on social media, including images of the deceased.[86]

Might this change in technology mean that there is a greater need for the taking of images to be actionable *per se*, particularly in relation to images of the dead? Lord Kerr's statement in *Re JR38* gives some weighting to this idea:

> Prima facie, therefore, the taking and use of a photograph of an individual will lie within the ambit of article 8. The essential question is whether it is removed from that ambit because of the activity in which the person is engaged at the time the photograph was taken and because the person could not

[79] 'Accordingly I conclude that the bare act of taking the pictures, by whoever done, is not of itself capable of engaging Article 8(1) unless there are aggravating circumstances' *Wood v Commissioner of Police for the Metropolis*, n81, per Lord Justice Laws at 36, also see 39.

[80] Nicole Moreham, 'Beyond Information: Physical Privacy in English Law' (2014) 73 Cambridge Law Journal 350,357.

[81] Paul Wragg, 'Recognising a privacy-invasion tort: the conceptual unity of informational and intrusion claims' C.L.J. 2019, 78(2), 409-437.

[82] See for example *Reklos and Davourlis v Greece*, n16 (discussed below).

[83] *Von Hannover v Germany* [2004] ECHR 294 at [50].

[84] *Reklos and Davourlis v Greece*, n16 at 40.

[85] Rebecca Moosavian, 'Stealing Souls'? Article 8 and photographic intrusion' (2018), Northern Ireland Law Quarterly, 69(4): 531, 547.

[86] See for example 'Christchurch attacks: Facebook curbs Live feature' (BBC News, 15 May 2019) <https://www.bbc.co.uk/news/technology-48276802> accessed 05 February 2021.

have a reasonable expectation that his or her right to respect for a private life arose in those particular circumstances.[87]

If an analogy is drawn with other areas of misuse of private information, for example phone hacking, it has been suggested that the act of hacking itself has been held to be sufficient to constitute a misuse of private information, without the need to demonstrate harm.[88] If the act of taking photographs of the dead was recognised as an act intrusive to privacy itself, this would help to solve the harm conundrum discussed above.

Cultural change may also have an impact, with the general public increasingly desensitised to images of death, crimes, and harm. Cooper asks whether 'the graphic images that can be found online also mean that media imagery may be becoming more violent, something that seems to have been borne out when we recall the front pages of pictures of Saddam Hussein's execution or Colonel Gaddafi's death'.[89] The relationship between public interest and curiosity bordering on voyeuristic tendencies has long been recognised – but is this agenda set by the media? As Melville-Brown questions, '…does the public get what the public wants; or does the public want what the public gets?'[90] The normalisation of death images has existed for time immemorial,[91] from early depictions of the subjects of executions, to war scenes, but what has changed is the ability and possibility for this to be shared on a wider scale.

As Moosavian has noted, images can provide both 'full (i.e. very detailed) and *simultaneously* partial information (of mere appearances at one single moment',[92] a freezing of one moment in time; 'a snapshot, like any souvenir, is necessarily incomplete and partial'.[93] In France, the death in 1997 of Princess Diana in a car crash after being pursued by paparazzi, and the subsequent images that were taken of the scene, sparked a debate about privacy and press freedom, the issue relating to the taking of photographs in those circumstances. Although the photographs were confiscated and never published, the photographers faced time in jail and a significant fine as a result,[94] and, today, France has a very pro-privacy approach.[95] Other jurisdictions have focused more directly on the behaviour of the photographer as a mechanism to protect the photographed. For instance, also in France, the introduction of the so-called 'Guigou' Law[96] aims to protect victims of terror attacks by prohibiting the publication of images that show victims in a way that violates their 'human dignity'.[97] However, the protection offered by this law expires upon the death of the victim,[98] which again raises questions as to why protection stops at this moment.

The concept of consent can play a role. In *Reklos*,[99] the role of consent to the images was seen as fundamental to both their taking and later publication. In that instance, the child was too young to be aware of the photograph being taken. By analogy, here, in relation to death images, the dead cannot give permission for their image being either taken or shared. It also needs to be kept in mind that the type of image may have an impact here, particularly in relation to images of the dead, with some seen as more of an affront to dignity than others. This relates back to ideas such as the memento mori photographic portraiture in Victorian times discussed above, where photographs of the dead in such circumstances were seen as a sign of respect.

In English and Welsh law there have been advances in recent years towards greater protection for the individual's privacy, particularly where images play a role, especially given the 2015 decision in *Weller v Associated Newspapers Ltd*, where the court held that whether there was a reasonable expectation of privacy was a question of fact – emphasising that it is well-established in domestic and Strasbourg case law that 'there are some matters about which a person can have a reasonable expectation of privacy notwithstanding that they occur in public'.[100] Concerning photographs published on the *MailOnline* website showing the singer Paul Weller shopping in the street and relaxing in a café in California with his three

[87] *Re JR38* [2015] UKSC 42 Lord Kerr at [41].

[88] *Gulati v MGN Ltd* [2015] EWHC 1482 (Ch). However, it is important to note that this was a hearing concerning damages, where liability was admitted, therefore the matter of whether this constituted a misuse of private information was not in question.

[89] Glenda Cooper, 'Boxing Day Tsunami Heralded New Era of Citizen Journalism' (*The Conversation*, 28 December 2014) <https://theconversation.com/boxing-day-tsunami-heralded-new-era-of-citizen-journalism-35730>.

[90] See Amber Melville-Brown, 'A Picture of Grief and Shock Too Far' (*Inforrm*, 28 August 2015) <https://inforrm.org/2015/08/28/a-picture-of-grief-and-shock-too-far-amber-melville-brown/> accessed 10 December 2020, in discussing the footage of two journalists live on Television in America the day previous.

[91] In Victorian England, memento mori photographic portraiture became popular - where photographs of loved ones taken after death were seen as a way of commemorating the dead and easing the pain of grief – see Bethan Bell, 'Taken from life: The unsettling art of death photography' (*BBC News*, 4 June 2016) <https://www.bbc.co.uk/news/uk-england-36389581> accessed 09 February 2021.

[92] Moosavian, n88.

[93] Joe Moran, 'Childhood and Nostalgia in Contemporary Culture' (2002) 5 European Journal of Cultural Studies 155, 164-5.

[94] Claire Cozens, 'Diana crash photographers stand trial' (*The Guardian*, 24 October 2003) <https://www.theguardian.com/media/2003/oct/24/pressandpublishing.privacy> accessed 04 February 2021.

[95] United Nations Human Rights, Office of the High Commissioner, 'France's leading role in the protection of privacy, despite remaining concerns, says UN privacy expert' (17 November 2017) <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=22413&LangID=E> accessed 27 October 2021.

[96] Loi renforçant *la protection de la présomption d'innocence et les droits des victims 2000 516 du 15 juin 2000*.

[97] –'French Law Angers Media' (*BBC News*, 30 May 2000) <http://news.bbc.co.uk/1/hi/world/europe/770514.stm>.

[98] See for example Sarah Edkins, 'France: Troubling Criminal Charges against Photojournalist' (*PEN*, 17 May 2016) <https://pen.org/press-release/france-troubling-criminal-charges-against-photojournalist/>. Here, the French photojournalist Maya Vidon-White was subject to criminal charges for photographing victims receiving medical treatment in the aftermath of the Bataclan terrorist attack in November 2015 under the so-called 'Guigou law'. This was strongly criticised by the Press and Rights organisations, although eventually the charges were dropped on a technicality – as the victim had died.

[99] *Reklos and Davourlis v Greece*, n16.

[100] *Weller & Ors v Associated Newspapers Ltd* [2015] EWCA Civ 1176.

children (his daughter aged 16 years and 10 months old twins), the defendant newspaper was found liable for misuse of private information and breach of the Data Protection Act 1998, despite it being legal in California to take and publish photographs. As there was nothing inherently private about the photographs, taken in a public place, the media saw this as beginning to introduce an image right. However, the Court focused on the identification of the children by surname, along with their photograph, thus, rather than creating a new right, the decision can be interpreted as 'developing English law in line with the existing law on photography of children and in accordance with decisions of the European Court of Human Rights'.[101] Given these recent developments, it is perhaps the next logical step to extend protection to the dead.

4. Survivors interest in death images

An alternative view focuses upon the rights of survivors of the dead to enforce privacy in their own right and, in practical terms, it is perhaps the most logical solution in relation to enforcement. Familial (or "survivor") privacy is a concept already well-recognised in some jurisdictions in relation to death images, for example in the US, where the rights to familial privacy post-mortem has given rise to significant discussion, with cases both in favour, and contrary to, its development.[102] In the US, this concept gained traction back in the 1890s, with a decision from the New York Court of Appeals:

> Whatever right of privacy Mrs. Schuyler had died with her. Death deprives us all of rights, in the legal sense of that term; and, when Mrs. Schuyler died, her own individual right of privacy, whatever it may have been, expired at the same time. The right which survived (however extensive or limited) was a right pertaining to the living only. It is the right of privacy of the living which it 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 recognized.[103]

Since then, there exists a plethora of case law that establishes a right to familial/survivor privacy, recognised by the courts as a common law right,[104] but it is only recently that the power of the internet was seen as a 'game-changing force in the battle to preserve privacy',[105] and in *Marsh v County of San Diego, 100*[106] saw the court recognise familial/survivor privacy as a constitutional right. In *Marsh,* the mother of child who had died some twenty years previously, brought an action against the Deputy District Attorney and the County of San Diego under 42 U.S.C. § 1983 alleging that the copying and dissemination of her late son's autopsy photographs violated her Fourteenth Amendment Due Process rights.[107] To succeed under this provision, she needed to prove that she was 'deprived of a right secured by the Constitution or laws of the United States, and that the alleged deprivation was committed under the colour of state law'.[108] Up until that point, the court had not yet held that the right encompassed the power to control images of a dead family member.[109] Admittedly, previous decisions had come close, particularly with cases concerning the Freedom of Information Act (FOIA).[110] For example, in *National Archives and Records Administration v Favish,*[111] the Court found that the right to 'personal privacy' included the 'surviving family members' rights to personal privacy with respect to their close relative's death scene images' encompassing the survivors' memories and grief,[112] the death-scene images of the former Deputy White House Counsel Vincent W. Foster Jr, falling under an exemption to the FOIA's general requirement of public access to government information (at common

[101] Holly Hancock, 'Could image rights solve issues raised by unwanted photography?' J.I.P.L.P Vol. 15, No. 3 (2020) 204.

[102] It should be noted that there are cases which argue against the development of such a right or reject the idea outright. These include *Smith v City of Artesia,* 772 P.2d 373 (1989) 108 N.M. 339. Here, Hartz J rejected the idea that a young murder victim's parents were able to assert a claim against the City of Artesia police department for photographs circulated following her murder, either on behalf of their deceased daughter as her personal representative, or in their own right for invasion of privacy; *Justice v Belo Broad Corp.* 472 F. Supp. 145, 147 (N.D. Tex. 1979) where the Court held that privacy is a personal interest that dies with a decedent "[u]nder the majority view, the deceased's relatives may not maintain an action for invasion of privacy, either based on their own privacy interests or as a representative for the deceased..." and *Lawson v Meconi* Del. Ch. LEXIS 74 (Ct. of Chancery May 27 2005,). Also see *Kelly v Johnson Publishing Co* 325.P.2d 659 (Cal. Dist. Ct. App. 1958) and *Gruschus v Curtis Publishing Co* 342. F. 2d 775 (10th Cir. 1965) where actions brought by surviving family members were discussed on the basis that the right of privacy was a personal right that could not be asserted by the decedent's relatives. *Infante v Dignan* 782 F. Supp. 2d 32, 32, 35 (W.D.N.Y. 2011) and *Swichard v Wayne Cty Med Exam'r* 475 N.W.2d, 304, 312 (Mich. 1991) held that constitutional privacy rights do not persist after death.

[103] *Schuyler v Curtis* 147 N. Y. 434, 447, 42 N.E. 22 (1895) 447.

[104] See *Melton v Bd. Of Cnty. Comm'rs of Hamilton Cnty.,* 267 F.Supp.2d 859, 865 (S.D. Ohio 2003) and *Catsouras v Dep't of Cal. Highway Patrol,* 181 Cal. App. 4th 856, 874, 104 Cal. Rptr.3d 352 (2010). In Clay Calvert, 'A Familial Privacy Right Over Death Images: Critiquing the Internet-Propelled Emergence of a Nascent Constitutional Right that Preserves Happy Memories and Emotions' 40 Hastings Const. L.Q. 475 (2013), 477 it is discussed how the common law right 'had unhurriedly germinated for more than eighty years'.

[105] Calvert, ibid.

[106] No. 11-55395 (May 29, 2012) United States Court of Appeals, Ninth Circuit.

[107] The US Supreme Court had also recognised that an aspect of liberty protected by this clause is 'a right of personal privacy, or a guarantee of certain areas or zones of privacy' *Carey v Population Servs.* Int'l, 431 U.S. 678, 684, 97, S.Ct. 2010, 52 L.Ed.2d.675 (1977) quoting *Roe v Wade,* 410 U.S. 113, 152, 93 S.Ct. 705, 53 L.Ed.2d 147 (1973).

[108] *Am. Mfrs, Mut. Ins. Co v Sullivan,* 526 U.S. 40, 49-50, 119 S.Ct. 977, 143 L.Ed.2d 130 (1999).

[109] *Marsh v County of San Diego,* 771 F. Supp. 2d 1227 (S.D. Cal. 2011).

[110] Further cases on this matter include *Lesar v United States Department of Justice,* 455 F. Supp. 921 (D.D.C. 1978), aff'd, 636 F.2d 472 (D.C. Cir.1980), where the concept of survivor privacy was applied by the government in a case concerning an investigation into the assassination of Dr Martin Luther King Jr.

[111] *National Archives and Records Administration v Favish*, 541 U.S. 157, at 170-71 (2004).

[112] Ibid., at 170.

law).[113] This was as 'Family members have a personal stake in honouring and mourning their dead and objecting to unwarranted public exploitation that, by intruding upon their own grief, tends to degrade the rites and respect they seek to accord to the deceased person who was once their own.[114]

In *Marsh,* the Court clarified that the privacy right existing is not that of the deceased, but of the survivors, in terms of protecting memory and feelings, and extended this to find that family members have a constitutional right of control over the body and death images,[115] the Court stated:

Few things are more personal than the graphic details of a close family member's tragic death. Images of the body usually reveal a great deal about the manner of death and the decedent's suffering during his final moments—all matters of private grief not generally shared with the world at large.[116]

Specifically, in *Marsh,* a related point revolved around the parent/child relationship – with a parent's right to control a deceased child's remains and death images deriving from a substantive due process right to family integrity,[117] and in the present case was protected by the Constitution. A further point highlighted in *Marsh* related to the impact of the internet, with the Mother's fear that she may find her son's hideous autopsy photographs displayed on the Internet not being unreasonable, particularly 'given the viral nature of the Internet, where she might easily stumble upon photographs of her dead son on news websites, blogs or social media websites.'[118] This intrusion into her grief was enough to "shock the conscience", and without any legitimate government purpose violated her substantive due process right. The copying and retention of the autopsy photographs were also considered, and whilst an exemption was provided for under the California Code of Civil Procedure § 129 for use in a criminal action of proceeding which related to the death of that person', Coulter's use of the images had exceeded this, with the retention not given specific consideration. However, in the present case, as Coulter was not acting under the "colour of state law", and he was entitled to qualified immunity, despite there being a constitutionally protected right to privacy over Marsh's child's death images, in this instance, the claim had to be dismissed.[119] As highlighted by Leibowitz: 'once Coulter disseminated the photograph as a private citizen, these federal claims fell apart'[120]illustrating the limitations of the law; continuing to add: 'This jurisprudence will come to a critical point when a court is presented with a family who wants to bring a relational right of privacy claim against a private individual who disseminates a death image of their loved one'.[121]

Similarly, *Catsouras v Department of California Highway Patrol*[122] concerned photographs taken by the California Highway Patrol of a fatal car accident where an 18-year-old woman was decapitated, which, in addition to being sent to family members, were later spread on the Internet, including to over 2500 websites in the US and UK. In 2010, the court had held that 'family members have a common law privacy right in the death images of a decedent, subject to certain limitations',[123] but eventually the case settled, rather than go to trial. In relation to this case, Solove suggests that there may additionally be actions available to the family in such circumstances for 'intentional infliction of emotional distress against some of the individuals who engaged in some of the more egregious behaviour such as targeting the family with the pictures'.[124] As a result of these fears, some US states have seen recent changes in law, for example in California, which now has a law prohibiting first responders from taking and sharing images at accident scenes for purposes other than work.[125] A recurrent theme running throughout these cases relates to memory, and how individuals would want to remember their loved ones. As stated in *Marsh,* 'When tragedy strikes and a family members suffer a violent death, we try to remember our dearly departed as they were in life, not as they were at the end'.[126] In discussing this particular aspect, Calvert notes how the 'protection of the intangible interests of both emotional tranquillity and memory preservation' sets the 'familial privacy right over death-scene and autopsy images' apart from other types of constitutionally protected privacy interests that affect actions and autonomous decision-making,[127] and how 'the power to control negative images facilitates the power to preserve positive memories'.[128] He observes how this is a transformation of the traditional notion of informational privacy – from 'an *individual's ability* to control what others know about him' to 'a *relative's ability* to control what others see about the death of his or her late family members'.[129] Within this context, the impact of the Internet cannot be understated, and is seen as a fundamental factor in the recent change of approach of the US courts, caused by the establishment of a phenomenon labelled 'Internet spectatorship'.[130]

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[113] The exemption under FOIA 5 U.S.C. § 552(b)(7)(c) applied to law enforcement records or information that could reasonably be expected to constitute an unwarranted invasion of personal privacy.

[114] *National Archives and Records Administration v Favish*, n123 at 168.

[115] In focusing on the meaning of 'liberty' in the Due Process Clause, two types of privacy interest (informational control and familial integrity and decisional autonomy) were combined to produce a familial right to control information in the form of death images - *Marsh v County of San Diego* 100 No. 11-55395 (May 29, 2012) United States Court of Appeals, Ninth Circuit.

[116] Ibid.

[117] *Rosenbaum v Washoe County* 663 F.3d 1071 (9th Cir. 2011).

[118] *Marsh v County of San Diego* 100 No. 11-55395 (May 29, 2012) United States Court of Appeals, Ninth Circuit.

[119] Ibid.

[120] Leibowitz, n12 at 355.

[121] Ibid., at 363.

[122] *Catsouras v Dep't of Calif. Highway Patrol,* n116.

[123] Ibid., at 358.

[124] See Daniel Solove, 'Family Privacy Rights in Death-Scene Images of the Deceased' (*Teach Privacy,* 27 April 2009) <https://teachprivacy.com/family-privacy-rights/> accessed 09 February 2021.

[125] The so-called Kobe Bryant Act of September 2020, introduced 1 January 2021 - Section 647.9 is added to the Penal Code.

[126] *Marsh v County of San Diego* 100 No. 11-55395 (May 29, 2012) United States Court of Appeals, Ninth Circuit.

[127] Calvert, n10 at 477.

[128] Ibid., at 491.

[129] Clay Calvert, 'The Privacy of Death: An Emergent Jurisprudence and Legal Rebuke to Media Exploitation and a Voyeuristic Culture' 26 Loy. L.A. Ent.L.Review. 133 (2006) 134.

[130] See Sue Tait, 'Pornographies of Violence? Internet Spectatorship on Body Horror' 25 Critical Stud.in Media Comm.91 (2008) in Clay Calvert, 'A Familial Privacy Right Over Death Images: Cri-

Of course, the family may want certain images shown, as illustrated by the plea of the murder victim Reeva Steenkamp's father after she was shot dead by Oscar Pistorius, – telling the court "I want the world to see the photos of the wounds inflicted on her… To know my daughter's pain. To know what her last few seconds were like, so that this is stopped – so that others do not have to go through this ever".[131] It is hard to see a harm caused to Steenkamp after death, but, as is illustrated by Thamm – '…is there anything we can learn from seeing Reeva's corpse?…Reeva cannot give permission for millions to gaze upon her at her most vulnerable – in death. And if she cannot give permission, we should not look. We do not need to see to understand the trauma'.[132] As also noted, images cannot be unseen, the act of looking at such images viewed as 'voyeuristic',[133] which means that their use and potential impact must be carefully considered. In some circumstances, as outlined earlier in this article, there may be reasons why the images should be published – particularly when they revolve around matters of public concern, or are newsworthy. As propelled by Calvert in relation to US jurisprudence, he argues for a qualified right, rather than absolute, which 'would strike a balance between familial interests and potential intangible injury to memories and emotions, and the public's right to know important information'.[134] In considering the application of the US publicity right to the dead, Georgiades comments that the same challenges would be faced as in its application to the living – balancing freedom of expression and newsworthiness.[135]

Another point relates to how far this right should extend, e.g. in what context and to whom. Calvert observes that the impact of *Marsh* is not altogether clear – and whilst the common law right is well established, the constitutional right may be rather more limited than on first appearances. In focusing on the perceived departure from traditional informational privacy cases, he notes that 'for Judge Konzinski, the narrow and concise familial right preventing governmental disclosure of death images…' may be 'different from some larger, amorphous and "free-floating" general right of informational privacy that might thwart disclosure of other types of information',[136] the law only focusing on the release of images, not the collection or taking. If this were to apply only to the government release/disclosure of images, it may leave some situations without action, e.g. the release of crime scene photographs by members of the public in attendance. This point is highlighted by Leibowitz, who, in giving the example of the ubiquity of mobile phone cameras and technology posing greater challenges for law, comments:

> While most of the case law involves the government and its access to autopsy and crime scene photographs, neither statutes nor common law define the proper remedies for families who wish to bring a relational right of privacy claim against a private individual.[137]

Therefore, if a similar law were to be constructed in England and Wales, there would be a need for the law to go further than that currently seen in the US, and be more broadly defined, as the sharing of images by private individuals is one of the dangers of social media. Another question relates to *who* should enforce such a right? A survey of the US cases suggests that the right has been applied in relation to primarily the parent/child, husband/wife relationship,[138] with another case considering that the potential injury may extend to the 'intimate relatives'.[139] In *Favish,* the protection afforded by statute "extends to the memory of the deceased held by those tied closely to the deceased by blood or love."[140]

Returning the focus to Europe, 'relational privacy'[141] revolves around the idea that friends and family have an interest.[142] However, this can lead to a clash of interests, as

tiquing the Internet-Propelled Emergence of a Nascent Constitutional Right that Preserves Happy Memories and Emotions' 40 Hastings Const. L.Q. 475 (2013), 506.

[131] Marianne Thamm, 'The images of Reeva Steenkamp's corpse invade her privacy, even in death' (*The Guardian,* 17 June 2016) <https://www.theguardian.com/world/2016/jun/17/the-images-of-reeva-steenkamps-corpse-invade-her-privacy-even-in-death> accessed 06 February 2021.

[132] Marianne Thamm, 'The images of Reeva Steenkamp's corpse invade her privacy, even in death' (*The Guardian,* 17 June 2016) <https://www.theguardian.com/world/2016/jun/17/the-images-of-reeva-steenkamps-corpse-invade-her-privacy-even-in-death> accessed 06 February 2021.

[133] For Calvert, this is premised on the idea that '[t]he First Amendment increasingly safeguards or is called upon to safeguard, our right to peer and to gaze into places from which we are typically forbidden, and to facilitate our ability to see and to hear the innermost details of others' lives without fear of legal repercussion'. Calvert, n65.

[134] Calvert, n10 at 479.

[135] Georgiades, n27 at 45.

[136] Calvert, n10 at 515.

[137] Leibowitz, n12 at 349.

[138] See the example of Dale Earnhardt, a racing driver killed in a crash in February 2001. His widow argued that if the crash photographs were automatically released as public documents (the current situation at the time), she was concerned about these ending up on the Internet, leading to a change in Florida's law which generally exempted from public disclosure photographs, videos and audio recordings held by medical examiners. Other states have since followed suit – see discussion in Calvert, n105 at 498-502.

[139] *State v Rolling,* No. 91-3832 CF A, 1994 WL 722891 (Fla. Cir. Ct. July 27, 1994) at [4].

[140] *National Archives and Records Administration v Favish*, n123 at 163.

[141] See the recent European Court of Human Rights decision in *M.L v Slovakia* (2021), Application no. 34159/17 which emphasised the role of relational privacy, following an action brought by the applicant against several newspaper publishers which had published articles about her deceased son, a priest; and Jan Bikker, 'Disaster Victim Identification in the Information Age: The Use of Personal Data, Post-Mortem Privacy and the Rights of Victim's Relatives' (2013), 10: 1 *SCRIPTed* 57 and Elaine Kasket in Lilian Edwards & Edina Harbinja, 'Protecting Post-Mortem Privacy: Reconsidering the Privacy Interests of the Deceased in a Digital World' Cardozo Arts & Entertainment Law Journal, Vol. 32, No. 1, 2013, 137 – who consider that the issue relates not just to the privacy of the deceased, or family, but with all those who had digital relationships with the deceased. In the US, part of the reasoning behind the terminology 'relational privacy' relates to a right of privacy that seeks to protect people from suffering the unhappiness of unwanted publicity about their deceased relatives – *Metter v L.A. Exam'r* 95 P.2d 491, 495 (Cal. Ct. App. 1939).

[142] Elaine Kasket, 'Access to the Digital Self in Life and Death: Privacy in the Context of Posthumously Persistent Facebook Profiles' 10:1 SCRIPTed 7 (2013).

explained by Harbinja and Edwards, as, ultimately, protecting the privacy or rights of the dead may conflict with the wishes or needs of the living.[143] Indeed, there are a number of areas where it may not be appropriate for privacy rights to be enforced by the family, such as where the action, in reality, seeks to protect reputation as opposed to privacy. Moreham notes that privacy *can* protect reputation, but only incidentally[144] – thus to treat protection of reputation as a core function of a privacy right risks obfuscating what misuse of private information aims to do, with the protection of reputation being only incidental. This is an area that has seen recent developments, particularly in relation to the living.

Article 8 ECHR includes the right to *family* life, which extends to the right to have and maintain family relationships, whilst existing cases primarily relate to the relationship being amongst the living, the Convention being a living instrument means it is constantly developing, and thus provides the potential for the family, or survivors, to rely upon privacy rights.[145] If one accepts the viewpoint that the dead cannot be harmed, instead the focus needs to be on what - or rather who - can be harmed? Family members or survivors would be an obvious starting point, on whom the harms caused by the taking or sharing of such images can be seen to have a more perceptibly detrimental effect. In such an instance, the living (i.e. the relatives) could bring an action in respect of their own right to reputation, or their right to be protected against distress or identity injury, which has been held to fall under Article 8.[146]

This can arise where information revealed about a person may be detrimental to the surviving family's reputation. As Banta observes, ''There is a direct link between privacy and reputation: reputation consists of what people think about an individual, and people's thoughts about a person derives from what information they know–or don't know–about an individual.'[147] The ECtHR has found that '…dealing appropriately with the dead out of respect for the feelings of the deceased's relatives can fall within the scope of Article 8′ and, within such a context, Article 8 has been interpreted broadly; for example, in relation to returning the remains of the dead to their next-of-kin '…an excessive delay in the restitution of a body after an autopsy or of bodily samples on completion of the relevant criminal proceedings may constitute an interference with both the 'private life' and 'family life' of the surviving family members'.[148] This principle has been further developed in cases such as *Sabanchiyeva v Russia*,[149] where the ECtHR held that the refusal by the Russian authorities to return bodies of their deceased relatives to the claimants constituted an interference with the claimants' private and family life under Article 8.[150]

That said, the interests of third parties in respect of privacy – and particularly misuse of private information - is an area that has been given scant attention. Drawing upon the idea of 'inseparability theory', Bennett applies this to take a broader approach to family life under Article 8, and although considering this in relation to the unrepresented third party usually being a child, requires the reworking and broadening of understanding of the nature of Article 8 to embrace the integrity of the family unit.[151] According to this theory, a child's right is inseparable from that of the parent, and within this, the person bringing the action (here, the parent), is the sole primary party in name only; being the token claimant representing the collective family interest. By extension, such a theory would mean that the rights of the dead are inseparable from those of family members, acting in response to the integrity of the family unit.[152] Taking a similar view to this concept, Mead argues that individuals potentially have 'a mutual interest in one another's private information', there being a social utility of privacy[153] and, as Aplin suggests, there may be shared interests in protecting private information by spouses, partners, lovers, sexual acquaintances and close friends.[154] Indeed, some existing cases suggest that this concept of familial privacy is already being recognised by the courts, albeit in a slightly different context (not images). For example, in *Home Office v TLU*[155] the wife and daughter had a reasonable expectation of privacy and confidentiality in respect of their information revealed in a Home Office spreadsheet (their identities and claim for asylum), and in *Ali v Channel 5 Broadcast Ltd*, Channel 5 were liable

[143] Edwards & Harbinja, n158.

[144] See Nicole Moreham, 'Privacy, reputation and alleged wrongdoing: why police investigations should not be regarded as private', J.M.L. 2019, 11(2), 142-162.

[145] Generally: *Solska and Rybicka v Poland* (Applications nos. 30491/17 and 31083/17)(20 September 2018).

[146] See *Putistin v. Ukraine, n36. Here, a case was brought against Ukraine by Vladlen Putisten over an article that indirectly criticised his dead father, concerning the 'Death Match' in World War Two – see Cleland Thom, 'Watch out – ECHR rules that criticising the dead could undermine surviving family's Article 8 rights' (Press Gazette, 6 February 2014)* <https://www.pressgazette.co.uk/watch-out-echr-rules-that-criticising-the-dead-could-undermine-surviving-familys-article-8-rights/> *accessed 06 February 2021.*

[147] Natalie Banta, 'Death and Privacy in the Digital Age' 94 N.C.L. Rev 927 (2016) 938.

[148] Last Rights, 'The Dead, the Missing and the Bereaved at Europe's International Borders – Proposal for a Statement of the International legal obligations of States' (*Proposal,* May 2017) 14 <https://www.ohchr.org/Documents/Issues/Migration/36_42/TheLastRightsProject.pdf> accessed 20 January 2021.

[149] *Sabanchiyeva v Russia* (Application no. 38450/05)(2013).

[150] Also see *Petrova v Latvia* (Application no. 4605/05)(2014), where Article 8 ECHR was held to be the basis of a family's interest in the cadaver of a relative.

[151] Thomas D.C. Bennett, 'Privacy, third parties and judicial method: Wainwright's legacy of uncertainty' J.M.L. 2015, 7(2), 251-277.

[152] However, it should be noted that this does not appear to be the current approach of the English and Welsh Courts – for example in *Murray v Big Pictures* [2008] EWCA Civ 446 and *Weller* [2015] EWCA Civ 1176, where it was the child alone who could bring an action in privacy, not the parents.

[153] 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 Journal of Media Law 100, 104.

[154] Tanya Aplin, 'Filling the IP Gap: Privacy and Tabloidism' in Megan Richardson and SamRicketson (eds), *Research Handbook on Intellectual Property in Media and Entertainment*(Edward Elgar Publishing, Cheltenham, 2017) 409.

[155] [2018] EWCA Civ 2217

for misuse of private information in relation to distress caused to family members.[156]

There are indications that this approach has also been taken by the ECtHR, for example, *Hachette Filipacchi Associates v France* concerned photographs of a murder scene, and photographs of the deceased in an article about the murder.[157] The family of the victim complained successfully to their domestic court of a breach of Article 8. In finding that no violation of Article 10 had occurred, the ECtHR made no attempt to evaluate the significance of the image in public interest terms – instead concluding that the inclusion of the image had 'intensified' the trauma and grief suffered by the family to such a degree that the interference with Article 10 was justified.[158] Specifically, in relation to grieving and mourning, this was held to be encompassed by Article 8 in *Solska and Rybicka v Poland* '…the right to grieve and respect for that right owed to close relatives of a deceased person fell within the constitutional notion of "private and family life". In the event of the authorities interfering with that right, the individual concerned should be provided with a remedy'.[159] By extension, the existence of such a right can underpin the concept of familial privacy, which would be violated through the unjustifiable publication of death images due to their deleterious impact upon one's grieving and mourning. In discussing the recent case of *Brennan v City of Bradford Metropolitan District Council and Leeds Teaching Hospitals NHS Trust,*[160] Davey and Mead question the approach taken by the court in this case and others, as seeing protection deriving from rights reposed in surviving family, instead offering the view that 'greater coherence to the law might be achieved if we conceive of the survivors as the vehicle for the exercise of rights by the deceased', observing that under the current approach, it would be conceivable that a decedent with no surviving relatives, may have no recourse – asking 'is it only the dead with surviving family members that are affected who deserve the law to respect their dignity?'[161]

Constructing a right to privacy in the manner suggested above requires a departure from the traditional notion of privacy, which is seen as controlling personal information. This departure is marked in two ways – as it involves both '1. limiting access to images of *others* (specifically, deceased relatives) rather than images of oneself; and 2. controlling information about others (specifically, deceased relatives) rather than information relating to themselves and their own identity'.[162]

Another pertinent area for discussion relates to data protection – particularly in the context of data (or in this instance, images) which may survive a person's death. Whilst the General Data Protection Regulation[163] provides that post-mortem protection is a matter to be left to the discretion of Member States, this is not a provision that has been invoked in England and Wales.[164] Recital 27 of the GDPR provides: "This Regulation does not apply to the personal data of deceased persons. Members States may provide for rules regarding the processing of personal data of deceased persons".[165] Erdos observes that some form of protection for the deceased is provided in almost half of the EEA's population, although not including England and Wales.[166] Where such protection does exist, in some states it is time-limited, in others dependent upon the scope of the term 'data subject', and in others related to interests of the relatives. Dependence on the GDPR would enable certain rights of data subjects to be invoked by relatives or those acting on behalf of the deceased in relation to matters such as Article 17, the Right to Erasure, which would mean that where there is no compelling reason for the continuation of processing data, they could request that this is deleted.[167]

This is an area that has been subject to much academic debate and rigour, with arguments consistently propelled for a development in the law.[168] For this reason, these arguments are not progressed further here, except to add that such a development in England and Wales would, inevitably, assist those who find photographs of loved ones published online to have these removed. It also needs to be noted that some aspects of personal data have been held to extend beyond death, e.g. medical records – see *Lewis v Secretary of State for Health,*[169] which protected confidential information in the doctor-patient relationship under the common law, and under the Access to Health Records Act 1990. Relatedly, the Supreme Court of Florida held in *Weaver v Myers*[170] that the right to privacy that had attached during the life of a citizen cannot be retroactively destroyed by death.

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[156] *Ali v Channel 5 Broadcast Ltd* [2018] EWHC 298 (Ch); [2018] E.M.L.R. 17 (Ch D).

[157] *Hachette Filipacchi Associes v France* Ref 71111/01, [2007] ECHR 5567.

[158] Ibid..

[159] *Solska and Rybicka v Poland*, at 27.

[160] *Brennan v City of Bradford Metropolitan District Council and Leeds Teaching Hospitals NHS Trust* [2021] 1 WLUK 429.

[161] Tina Davey & David Mead, 'Whose Right Is It Anyway? The Duties Owed to a Deceased and to Surviving Family Members When Dealing with a Corpse: *Brennan v City of Bradford Metropolitan District Council and Leeds Teaching Hospitals NHS Trust* [2021] 1 WLUK 429', *Medical Law Review*, 29(4), 1-13.

[162] Calvert, n105 at 486.

[163] General Data Protection Regulation 2016/679.

[164] This is expressly excluded in English and Welsh law as Section 3(2) of the Data Protection Act 2018 defines personal data as 'information relating to an identified or identifiable living individual'.

[165] Recital 27 of Regulation (EU) 2016/679 (General Data Protection Regulation).

[166] A useful summary of the current law is provided by David Erdos in 'Dead ringers? Legal persons and the deceased in European data protection law' Computer Law & Security Review 40 (2021) see in particular pages 10-11.

[167] For example, in Italy, under section 2 IDPA the rights referred to in sections 15-22 GDPR can be activated by a data subject on behalf of a deceased person. There are suggestions that this right may be encompassed within the "expanding" boundaries of the privacy-protecting tort at common law – following *NT1 & NT2 v Google LLC* [2018] EWHC 799 (QB), [2018] 3 All ER 581 – see Stergios Aidinlis, 'The right to be forgotten as a fundamental right in the UK after Brexit' Comms. L. 2020, 25(2), 67-78.

[168] See Edina Harbinja, who argues for 'including the deceased's data in the scope of the definition of personal data in the proposal, and awarding a time-limited protection, with appropriate safeguards in relation to the other relevant interests (freedom of expression, archives and historical records, etc.)' in 'Does the EU Data Protection Regime Protect Post-Mortem Privacy and What Could Be The Potential Alternatives?' *SCRIPTed,* 2013, vol. 10, no. 1, pp. 19-38.

[169] *Lewis v Secretary of State for Health* [2008] EWHC 2196 (QB).

[170] *Weaver v Myers el al,* SC15-1538 (Supreme Court of Florida Nov. 9, 2017)

5. Conclusion

In sum, the observations above, which illustrate shortcomings in the law of England and Wales, combined with the development and recognition of a familial right of privacy in the US (and to a limited extent within Europe), demonstrate the importance of developing an equivalent right in England and Wales. This is particularly pertinent where English cases have failed to have an appropriate cause of action in similar circumstances. Although the potential for developing privacy rights of the dead is given consideration, whilst the basis for privacy law remains grounded in human rights, this is a challenging (albeit not impossible) area to develop. Consequently, a familial or survivors' right of privacy is perhaps the strongest basis on which to found an action for preventing widespread circulation of death images. Calvert describes how the emotions triggered by such images – 'ones tied to grief, grieving and memory' represent the 'intangible injury that a constitutional right of familial privacy over images of death guards against',[171] demonstrating the need for and importance of such a right. The development of the law in the US, although suffering from its limitations, is a significant improvement on the current situation in England and Wales. Combined with the perceived strength of images as a communication mechanism and the rise of the Internet, and potential intrusions into privacy of both the dead and living, this need is greater than ever. Fundamentally, Article 8 does encompass the right to "private and *family* life", the familial aspect to images of the dead being something that could be better recognised in terms of protection, and the development at the very least of familial or a survivor's right to privacy is long overdue and would serve to ameliorate the difficulties highlighted within this article.

Declaration of Competing Interest

As far as we know, there is no conflict of interests to declare, except that the first author is a guest editor for the journal.

Data Availability

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

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[171] Calvert, n10 at 490.