POST-MORTEM RELATIONAL PRIVACY: EXPANDING THE SPHERE OF PERSONAL INFORMATION PROTECTED BY PRIVACY LAW

By

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I ran a marathon a long time ago and swore I'd never do it again.  
I was wrong. A doctorate is a marathon, too.  
But just like the first time, the pain was worth it.  

To my parents, who inspired me to enter the race and cheered me around every corner.  
To Dr. Chamberlin, who mapped out the course and ran along side me the whole way.  
More selfless a coach there never has been.  
And to Steve, my wonderful husband, who helped me cross the finish line.
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Go Gators!
# TABLE OF CONTENTS

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>ACKNOWLEDGMENTS</td>
<td>4</td>
</tr>
<tr>
<td>TABLE OF CONTENTS</td>
<td>6</td>
</tr>
<tr>
<td>LIST OF TABLES</td>
<td>10</td>
</tr>
<tr>
<td>LIST OF FIGURES</td>
<td>11</td>
</tr>
<tr>
<td>ABSTRACT</td>
<td>12</td>
</tr>
<tr>
<td>CHAPTER</td>
<td></td>
</tr>
<tr>
<td>1 CONCEPTUALIZING POST-MORTEM RELATIONAL PRIVACY</td>
<td>14</td>
</tr>
<tr>
<td>Conceptualizing Post-Mortem Relational Privacy</td>
<td>17</td>
</tr>
<tr>
<td>Literature Review</td>
<td>21</td>
</tr>
<tr>
<td>Background to the Literature</td>
<td>23</td>
</tr>
<tr>
<td>Review of Relevant Literature</td>
<td>33</td>
</tr>
<tr>
<td>Statement of the Research Questions</td>
<td>46</td>
</tr>
<tr>
<td>Factors of a Post-Mortem Relational Privacy Dispute</td>
<td>47</td>
</tr>
<tr>
<td>Factor One: Competing Interests</td>
<td>48</td>
</tr>
<tr>
<td>Factor 2: Information at Issue</td>
<td>49</td>
</tr>
<tr>
<td>Factor 3: Law Governing Access to the Information</td>
<td>50</td>
</tr>
<tr>
<td>Factor 4: Degree of Public Access to the Information at Issue</td>
<td>50</td>
</tr>
<tr>
<td>Pre-request Phase</td>
<td>52</td>
</tr>
<tr>
<td>Pre-disclosure Phase</td>
<td>53</td>
</tr>
<tr>
<td>Pre-publication Phase</td>
<td>53</td>
</tr>
<tr>
<td>Post-publication Phase</td>
<td>55</td>
</tr>
<tr>
<td>Factor 5: Remedies Available to Surviving Relatives</td>
<td>55</td>
</tr>
<tr>
<td>Roadmap of the Dissertation</td>
<td>56</td>
</tr>
<tr>
<td>2 THEORETICAL FOUNDATIONS</td>
<td>61</td>
</tr>
<tr>
<td>Defining Privacy</td>
<td>62</td>
</tr>
<tr>
<td>The Personal Information Sphere</td>
<td>64</td>
</tr>
<tr>
<td>The Autonomy Sphere</td>
<td>69</td>
</tr>
<tr>
<td>Relational Privacy</td>
<td>71</td>
</tr>
<tr>
<td>The Purpose of Access to Government Information</td>
<td>72</td>
</tr>
<tr>
<td>First Amendment Theories</td>
<td>75</td>
</tr>
<tr>
<td>The Safety Valve</td>
<td>75</td>
</tr>
<tr>
<td>The Marketplace of Ideas</td>
<td>77</td>
</tr>
<tr>
<td>Self-governance</td>
<td>79</td>
</tr>
</tbody>
</table>
The Checking Value of the First Amendment.................................................................81
Autonomy ......................................................................................................................83
The Nexus Between Relational Privacy and Access to Government Information..........83

3 METHODOLOGY ..................................................................................................................88

Federal and State Statutes Legislating Public Access To Government-Held, Death-
Related Information .........................................................................................................90
Federal and State Court Decisions Interpreting Statutes ..............................................92
State Common Law Addressing Causes of Actions Brought By Injured Relatives..........93

4 PUBLIC ACCESS TO FEDERAL DEATH-RELATED RECORDS: A PRECURSOR,
THE PRECEDENT, AND A PRESIDENTIAL CASE STUDY ..............................................95

New York Times v. National Aeronautics & Space Administration ................................95
National Archives and Records Administration v. Favish ..........................................99
The Dover Policy: A Case Study ...................................................................................106

5 PUBLIC ACCESS TO AUTOPSY RECORDS AT THE STATE LEVEL: A 50-STATE
STUDY OF AUTOPSY ACCESS STATUTES .................................................................113

Statutory Study ................................................................................................................115
Method for the statutory research ................................................................................115
Step 1: Mapping the Law ..............................................................................................116
Step 2: Consolidating the Criteria ................................................................................117
Narrative Review of the Findings ..................................................................................118
Factors Controlling Access to Autopsy Records ........................................................121
Access based on type of information ...........................................................................122
Access based on circumstances surrounding the death ..............................................124
Access based on the effect of disclosure .......................................................................125
Access based on medium of record ..........................................................................126
Access based on person or agency requesting access ................................................128
Access based on purpose of request ..........................................................................129
Discussion: Trends in Statutory Regulation of Access to Autopsy Records ..............131
Court Interpretations of Statutes Regulating Public Access to Autopsy Records ........134
Methodology For the Case Interpretations Research ..................................................135
Narrative Review of the Findings ..................................................................................136
Court Interpretations Allowing Disclosure ..................................................................138
Court Interpretation Prohibiting Disclosure ................................................................146
Statute That Mooted Previous Case Law .....................................................................151
Discussion .....................................................................................................................154

6 CONSTITUTIONAL LIMITATIONS ON PREEMPTIVE RELIEF IN A POST-
MORTEM RELATIONAL PRIVACY DISPUTE ..............................................................159

The Doctrine of Prior Restraint ....................................................................................161
From English Licensing to a Presumption of Unconstitutionality ................................161
Overcoming the Presumption ......................................................................................167
The Unconstitutionality of Subsequent Punishment ............................................................ 169
Prior Restraint as a Preemptive Remedy for a Relational Privacy Dispute ....................... 175
  Application of *Near v. Minnesota* to the Relational Privacy Elements ....................... 177
  Application of *Nebraska Press Association v. Stuart* to a Relational Privacy Dispute .... 178
  Application of *United States v. Progressive, Inc.* to a Relational Privacy Dispute ..... 180

7 POST-PUBLICATION REMEDIES FOR SURVIVING RELATIVES .................................. 181

Requirements and Limitations of the Selected Torts .......................................................... 185
Narrative Discussion of the Findings .................................................................................. 188
  Florida .......................................................................................................................... 188
  Intentional Infliction of Emotional Distress and Appropriation ...................................... 188
  Publication of Private Facts and Intentional Infliction of Emotional Distress ................. 189
  Georgia: Invasion of Privacy and Intrusion ................................................................... 195
  Kentucky: Invasion of Privacy ..................................................................................... 196
  North Carolina: Intentional Infliction of Emotional Distress ........................................ 200
Discussion of Common Law Remedies .............................................................................. 204

8 CONCLUSION .................................................................................................................... 207

Multiple Remedies for Relatives ....................................................................................... 209
Foundations for the Research .......................................................................................... 212
Summary of the Chapters and Answers to the Research Questions .................................... 215
  Question 1: What are the factors comprising a post-mortem relational privacy dispute? ...................................................................................................................... 215
    Factor One: Competing Interests ............................................................................. 215
    Factor Two: Information at Issue .......................................................................... 216
    Factor Three: The Law Governing Access to the Information ............................... 216
    Factor Four: Degree of Public Access to the Information at Issue ...................... 217
    Factor Five: Remedies Available to Surviving Relatives ....................................... 219
  Question 2: In what contexts may a post-mortem relational privacy dispute occur? .... 220
  Question 3: What protective forms of relief may a surviving relative seek in a post-mortem relational privacy dispute? ................................................................. 221
  Question 4: What restorative forms of relief may a surviving relative seek in a post-mortem relational privacy dispute? ................................................................. 224
    Florida ...................................................................................................................... 226
    Georgia ..................................................................................................................... 227
    Kentucky .................................................................................................................. 228
    North Carolina ...................................................................................................... 228
    Washington ............................................................................................................. 229
  Question 5: What degree of access do citizens have to autopsy records in particular? .... 232
Question 6: To what extent has the sphere of protectable personal information expanded to include information about one's dead relatives in addition to information about oneself? ........................................................................................236
Significant Findings ...............................................................................................236
Potential for Future Expansion of the Concept and Implications for Access ......240
Question 7: What are the implications of increased relational privacy rights in the post-mortem context for the public's right to access government information? ......243
Post-mortem Relational Privacy: The Catsouras Family v. California Highway Patrol ......248
Contribution to the Intellectual and Theoretical Understandings of Privacy and the First Amendment ....................................................................................................................................................252
Recommended Future Research ................................................................................261
Potential Non-tort Remedies ......................................................................................262
Additional 50-state Studies ..........................................................................................263
Protecting Relational Privacy in the Age of Interest: A Proposal ....................................263

LIST OF REFERENCES .............................................................................................................269

Statutes ......................................................................................................................269
Cases ........................................................................................................................273
Books ........................................................................................................................278
Law Review and Journal Articles ................................................................................279
Newspaper Magazines and Miscellaneous Articles ..................................................281
Internet Sources ...........................................................................................................283
Interviews ....................................................................................................................286

BIOGRAPHICAL SKETCH ....................................................................................................287
# LIST OF TABLES

<table>
<thead>
<tr>
<th>Table</th>
<th>page</th>
</tr>
</thead>
<tbody>
<tr>
<td>4-2</td>
<td>157</td>
</tr>
</tbody>
</table>

- 4-2 Fifty-state study of public access to autopsy records...157
<table>
<thead>
<tr>
<th>Figure</th>
<th>Description</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>1-1</td>
<td>Competing Interests in a Post-Mortem Relational Privacy Dispute</td>
<td>59</td>
</tr>
<tr>
<td>1-2</td>
<td>Post-mortem Relational Privacy Dispute Continuum</td>
<td>60</td>
</tr>
<tr>
<td>2-1</td>
<td>Mills' Four Spheres of Privacy Model</td>
<td>87</td>
</tr>
<tr>
<td>3-1</td>
<td>Taxonomy of statutes regulating public access to autopsy records</td>
<td>94</td>
</tr>
<tr>
<td>4-1</td>
<td>An honor guard ceremony at Dover Air Force Base for U.S. service members</td>
<td>112</td>
</tr>
<tr>
<td></td>
<td>killed in action during the Iraq or Afghanistan conflicts</td>
<td></td>
</tr>
<tr>
<td>5-1</td>
<td>Organizational Chart of State-level Access to Autopsy Record Laws</td>
<td>156</td>
</tr>
<tr>
<td>8-1</td>
<td>Access-to-autopsy-record statutes - Category, Factor and Criteria Breakdown</td>
<td>268</td>
</tr>
</tbody>
</table>
This dissertation explores the concept of post-mortem relational privacy — the idea that family members have a privacy interest in death-related information about their deceased relatives. The researcher contends that the sphere of protectable information that an individual calls "private" includes information about one's dead relatives in addition to oneself. However, the extension of privacy rights to relatives is limited to certain contexts and jurisdictions and is often balanced with, or outweighed by, competing First Amendment and freedom of information interests.

For example, at the federal level, the Supreme Court has interpreted the Freedom of Information Act to protect the privacy interests of relatives of the dead; however, a balancing test was applied. The administrations of four contemporary presidents have established, at varying levels, policies that prohibit media coverage of homecoming ceremonies honoring American service members killed overseas. However, the current administration has removed the onus of authority from the government to the family members themselves. At the state level, all but four states regulate the public's access to autopsy records, and three state courts have granted common law remedies to relatives for injuries stemming from the publication of death-related information.
about their deceased relatives. However, these statutory and common law remedies are limited in scope and application.

This development has significant implications for the public's interest in accessing government information because expanded privacy rights encroach on the public's understanding of important governmental and social issues related to death. Balanced approaches in statutory construction, judicial interpretation of those statutes and common law remedies limit the extent to which relational privacy interests unnecessarily diminish the public's right to access government records. Such a balanced approach should maintain a presumption of openness while carefully weighing the possible threat to a family's privacy. Borrowing from the Federal Freedom of Information Act, access should be limited only when disclosure would constitute an unwarranted invasion of a relative's privacy. Legislators writing access-to-autopsy-record legislation as well as the Supreme Court interpreting Exemptions 6 and 7(c) of the Federal Freedom of Information Act can apply this philosophy.
CHAPTER 1
CONCEPTUALIZING POST-MORTEM RELATIONAL PRIVACY

The parents of 18-year-old Nikki Catsouras would prefer the world remember their daughter as a bright, beautiful young woman whose tragic death in a 100-mile-per-hour car crash did not define her short but meaningful life.\(^1\) The Internet is making that wish impossible, according to Nikki's parents, who say gruesome images of Nikki's dead, and nearly decapitated body at the scene of the crash circulate indiscriminately on the Web. The photos are public because two California Highway Patrol officers, who took the photos on digital cameras as part of the CHP's routine response to a fatal accident, forwarded them in unauthorized e-mails to computers and people outside their agency. Within weeks of the accident, Web sites that featured hardcore pornography, autopsies and other raw images posted the photos of Nikki's lifeless body.\(^2\)

The accident was so gruesome that the coroner did not allow Nikki's parents to identify her body at the morgue. Regardless of the coroner's efforts to shield them from seeing their daughter's mangled body, someone emailed the photos to Nikki's father along with a harassing statement that read: "Woohoo Daddy! Hey daddy, I'm still alive."\(^3\) The Catsouras family told Newsweek, "Knowing our daughter's photos are on 500,000 Web sites versus 5 million just doesn't matter anymore. They shouldn't have been on any."\(^4\) The Catsouras family filed a $20

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1 Jessica Bennett, *A Tragedy That Won't Fade Away*, NEWSWEEK, 38-40, May 4, 2009, available at http://www.newsweek.com/id/195073 (reporting that Nikki Catsouras' used cocaine the night before the accident and that her autopsy showed signs of cocaine in her system at the time of death).

2 A basic Google search for "Nikki Catsouras" resulted in more than a dozen hits among the first three Google pages. The Web sites, ranging in content from blogs to pornography, contained graphic, uncensored images from the scene of the Nikki Catsouras' crash site (June 2, 2009).


million lawsuit for negligence, invasion of privacy and infliction of emotional harm in Orange County Superior Court against the CHP, which admits its officers wrongfully leaked the photos.⁵ A superior court judge dismissed the suit in March 2009, holding that "privacy rights do not extend to the dead." The officers' conduct was "utterly irreprehensible," the judge said, but it did not violate any law.⁶ The Catsouras family appealed the ruling, claiming a right to privacy in the images of their deceased daughter.⁷ The family said that even if the lawsuit does not stop the spread of their daughter's images on the Internet, it hopes the legal action will deter similar leaks in the future.⁸

The Catsouras family's interest in the post-mortem affairs pertaining to their daughter is not without social and legal precedent. The idea that family members have rights, if not responsibilities, in the death of their relatives is grounded in natural law principles,⁹ social customs,¹⁰ and the practices of Judeo-Christian, Muslim, Hindu and Buddhist religions.¹¹ Similarly, the concept that family members have a privacy interest in matters dealing with each

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other while they are living is well entrenched in the United States' legal system as well, where the concept of relational privacy generally exists in many state and federal judicial decisions and statutes. For example, the U.S. Supreme Court recognized relational privacy in cases regarding one’s right to marry\textsuperscript{12} and rear one's children,\textsuperscript{13} resulting in protection for the individual's privacy interests with respect to one's spouse or child. This dissertation explores the concept that living individuals have a protectable privacy interest in information about their dead relatives, too.

The concept that the living have a privacy interest in information about their dead relatives is based on two underlying premises. First, individuals maintain their relational status with family members even after those relatives die.\textsuperscript{14} Second, although the dead no longer have a privacy interest in information about themselves, their surviving relatives may. One emerging trend in privacy jurisprudence and statutory regulation is to recognize that possibility. Accordingly, judges and legislators have provided a variety of preemptive and restorative remedies for surviving relatives who want to protect their privacy interests in information about their dead relatives. This dissertation calls this concept \textit{post-mortem relational privacy} and contends that the individual's sphere of protectable personal information has expanded in some contexts to include not only information about oneself, but also information about one's dead relatives. This is a significant development with implications for both individual privacy and the public's ability to access government records, specifically those involving the death of citizens.

\textsuperscript{12} See Griswold v. Connecticut, 381 U.S. 479 (1965) (holding that the specific guarantees of the Bill of Rights have penumbras that give those guarantees life and substance, creating zones of privacy. The right of marital privacy is included in these and cannot be subjected to regulations that are unnecessarily broad).

\textsuperscript{13} See Meyer v. Nebraska, 262 U.S. 390 (1923), Pierce v. Society of Sisters, 268 U.S. 510 (1925), and Farrington v. Tokushige, 273 U.S. 284 (1927), in which the U.S. Supreme Court invalidated state legislative efforts that limited parents from offering educational opportunities to their children.

\textsuperscript{14} This concept exists in the law of estates and trusts where surviving relatives of the dead have inheritance rights based on their relational status to the deceased.
Subsequent chapters of this dissertation explore generally the expansion of what privacy scholar Jon Mills calls the *informational* and *autonomy spheres* of privacy and its effect on freedom of information.\(^{15}\) Before examining the relationship between privacy and freedom of information, this introductory chapter explains the concept of post-mortem relational privacy, provides a general chronology of its significant developments in recent privacy jurisprudence, and reviews the existing literature on the subject.

**Conceptualizing Post-Mortem Relational Privacy**

Legal protections for relational privacy date back to the beginning of the 20th Century.\(^{16}\) These legal precedents protect an individual's privacy with regards to a living spouse or living children. Post-mortem relational privacy is related to these protections because the concept involves an individual's privacy with regard to one's *dead* relatives. However, the most significant developments with regard to post-mortem relational privacy have occurred more recently - in the latter part of the 20th Century - and coincide with two major developments: the enactment of federal and state freedom of information laws and the advent of the Internet.

Scholars have highlighted in the existing literature the relatively recent cases on relational privacy. These cases occurred predominately prior to disclosure in which a court interpreted an existing freedom of information law in light of a public record requests for death-related records. In many of the cases, the courts considered the threat to individual privacy that technological advancements such as the Internet posed. While the concept of post-mortem relational privacy also exists after government records are disclosed or private information is published, judicial adoption of the post-mortem relational privacy concept is most prevalent in cases where courts

\(^{15}\) See infra p. 63.

\(^{16}\) See infra p. 173.
have interpreted a statute that was applied to limit disclosure in order to protect the relational privacy interests of surviving relatives. In interpreting such statutes, courts have enjoined the release of government-held death related information in order to protect the interests of surviving relatives. For example, after the astronaut crew of the space shuttle Challenger perished in 1986, a U.S. District Court prohibited the public disclosure of the NASA tape recordings that captured the crew’s last communications with ground control. After deputy White House Counsel Vincent Foster was found dead in a D.C. park in 1993, the U.S. Supreme Court prohibited the disclosure of some of the death-scene photographs of his apparent suicide. After serial murderer Danny Rolling left a Florida college town gripped in fear in 1990, a Florida circuit court limited the conditions under which the public could view the victims' death-scene photos and prohibited copying of the records. When high-profile NASCAR driver Dale Earnhardt crashed and died during the last lap of the Daytona 500 in 2001, a Florida District Court of Appeal retroactively applied to Earnhardt a statute enacted by the Florida legislature in


21 Elizabeth Lowe and Terry L. McCoy, Eyes Of World on Gainesville; College Town Made Infamous By The Senseless Violence, OR. SENTINEL, Sept. 9, 1990 at G3.


24 Tony Fabrizio, Tragic Finish; Waltrip's win overshadowed by fatality, THE DALLAS MORNING NEWS, Feb. 19, 2001, at 1B.
the wake of his death that prohibited the public disclosure of visual records documenting autopsies conducted in the state.25

In each of these instances, a court restricted public access to government-held information about the dead – the disclosure of which, the courts reasoned, would have been an unwarranted invasion of the surviving relatives' privacy and caused them further suffering. It was enough, according to the respective courts, for the families of the Challenger crew to have endured the tragic death of their loved ones;26 that the Foster family lost their husband and father;27 that the parents of Rolling’s college-aged victims buried their children;28 and that Earnhardt’s family witnessed the crash that caused his death.29 While each of the courts' decisions has nuances specific to its own jurisdiction and case facts, and none is representative of all cases involving post-mortem relational privacy, the overriding theme among the courts' opinions is that an individual's privacy interests are not limited to information about him or herself. Based on these court decisions and numerous other statutory and common law evidence, the ambit of personal information for which an individual may seek protection includes information about one's dead relatives. This development is significant to the study of privacy and freedom of information for two reasons.

First, the emergence of this concept expands the traditional sphere of information that an individual may call personal or private,30 to include information not only about one's self but

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30 See infra p. 64, discussing Jon Mills, Privacy: The Lost Right 16 (2008) (illustrating the four spheres of privacy, including personal information).
also about one's dead relatives as well. Although the *Restatement (Second) Torts* established that privacy dies with the person,\(^{31}\) the post-mortem relational privacy concept recognizes that, although a person has died, information about him or her continues to exist and has posthumous value to the decedent's surviving relatives. Therefore, although the dead can no longer claim a privacy interest in the information, their surviving relatives' may. Thus, after the death of a relative, a surviving relative absorbs into his or her own sphere of personal information the death-related information about his or her deceased family members. However, this information is only protected in certain contexts, and deciphering which law protects whom in which instance is a complicated task, with state, federal and constitutional law governing various scenarios.

In addition to expanding the traditional sphere of protectable personal information to include information about one's dead relatives, another reason the emergence of the post-mortem relational privacy concept is significant is because it has negative implications for the public's ability to access information about its government. The government is often the custodian of death-related records, such as death certificates, death-scene photographs and autopsy records. An expansion of the sphere of protectable personal information has an inverse relationship with the public's access to government-held, death-related records. For example, the court decisions that were previously discussed - *Favish*, *Challenger*, *Rolling*, and *Earnhardt* - prohibited the public release of death-scene photos, audio recordings of a space shuttle crew's communications, crime scene records and autopsy photos, respectively, in order to protect the privacy interests of the decedents' surviving relatives. Thus, it is significant that some courts, including the U.S. Supreme Court, have sometimes preferred to protect a surviving relative's relational privacy interests instead of the public's right to know about its government's activities.

\(^{31}\) *Restatement (Second) of Torts* § 652B-E (1977).
Literature Review

Scholars first began conducting research about relational privacy specifically in the post-mortem context a little over a decade ago in the wake of the high-profile cases that the previous section introduced. The new strain of academic research examined why and how the courts in *Challenger, Favish, Rolling,* and *Earnhardt* prohibited the disclosure of government-held, death-related information about the deceased in order to protect the privacy interests of surviving relatives. Prior to these opinions, the argument that surviving relatives had a privacy interest in information about their dead relatives was obscure, surfacing in less than a dozen common law cases nationwide.\(^{32}\)

Since the burgeoning of academic scholarship about post-mortem relational privacy, scholars have called this kind of privacy interest a variety of terms including "familial privacy,"\(^{33}\) "survivors’ rights,"\(^{34}\) or "privacy in death."\(^{35}\) Scholars provided examples of how the concept has been codified into statutory protections, both at the federal and state levels, but none has examined how the concept has manifested with respect to certain death records within the statutes of each state and the District of Columbia. Moreover, no scholar has chronicled the development of the concept in state-level case law, either as a preemptive remedy, prohibiting the disclosure of records, or in the post-publication context, where relatives may seek recovery for injuries stemming from publication of information about their deceased relatives. In sum, no

\(^{32}\) A chronological discussion of earlier cases where the privacy interests of surviving relatives were addressed by the courts is presented in Chapters Five and Seven.


\(^{35}\) George J. Annas, *Family Privacy and Death - Antigone, War, and Medical Research,* THE NEW ENG. J. MED., Vol. 352:5 (2005). This dissertation introduces the term, "post-mortem relational privacy," into the academic literature in order to aggregate the previously used terms.
scholar has comprehensively “connected the dots” between the various federal and state cases, statutes, and common law rationales that legitimized the post-mortem relational privacy concept.

Therefore, the purpose of this dissertation is to contribute to the greater understanding of relational privacy by examining the significance and implications of this emerging concept both on its own and relative to state and federal freedom of information laws. The overarching goals of this dissertation are 1) to assess the extent to which courts have adopted and legislatures have codified the concept that personal information includes information about one's dead relatives and 2) the effect of this trend on public access to government information. To accomplish this, this dissertation confirms the genesis of the post-mortem relational privacy concept in the law, examines the codification of the concept in statutes that deal with public access to information about the deceased, discerns a taxonomy for evaluating state-level autopsy access laws, and maps the evolution of the concept of post-mortem relational privacy in federal and state case law that either interpret statutes or provide common law remedies. This research also provides the first graphical representation of the post-mortem relational privacy concept, detailing the various contexts in which a post-mortem relational privacy dispute may occur and the protective and restorative remedies available to surviving relatives.

Before reviewing the existing literature that provides the current understanding of the post-mortem relational privacy concept, it is necessary to more thoroughly review the pivotal cases examined within those works, several of which were mentioned already in the introduction of this chapter. The following section provides this background information and focuses on the high-profile cases that inspired the existing literature. Other less prominent cases that have not been extensively reviewed in the literature are discussed elsewhere in the dissertation.
Background to the Literature

Academic interest in the concept of post-mortem relational privacy - before it was called that in this dissertation - began in 1997, more than a decade after the high profile, death-record case involving the explosion of NASA's Space Shuttle Challenger.

In New York Times v. National Aeronautics & Space Administration, which this dissertation refers to as Challenger, the Times sought access to the black box recording of the Challenger crew's last moments. Rejecting the request, NASA argued that the crew's surviving relatives had a privacy interest in the audio recording. NASA invoked FOIA Exemption 6, which allows federal agencies to withhold “personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.” NASA did not dispute that the substantive information contained in the recording was technical and non-personal. For the most part, the conversation was specific to shuttle operations. NASA did not claim privacy for the last recorded utterance, when one astronaut said, “Uhoh,” just before all communication was lost. NASA argued, instead, that the privacy interest was not in the words themselves, but in the sound of the astronauts' voices captured by the audio recording. Given the probability that the media would rebroadcast the recordings if NASA disclosed them, NASA argued that the crew's surviving relatives would be subjected to hearing their relatives' voices indiscriminately on the radio and television. Such broadcasts could further traumatize the crew’s families, NASA said.

36 See infra p. 33.
The district court rejected NASA's argument and granted summary judgment in favor of the Times, finding the audio recording did not constitute a “similar file” under FOIA's Exemption 6 and, therefore, was not exempt from disclosure. On appeal, the U.S. Court of Appeals for the District of Columbia initially affirmed with a divided panel, but subsequently reversed en banc and remanded the case. The Court of Appeals instructed the lower court to determine whether "any invasion of the astronauts' (or their families') privacy that the disclosure of the Challenger tape would cause is or is not 'clearly unwarranted' when compared to the 'citizens' right to be informed about what their government is up to.'"

On remand, the district court weighed the purpose served by disclosure of the audio recording against the privacy interests of the families and, reversing their earlier decision, decided against disclosure. The district court held that the families of the deceased crewmembers had a substantial privacy interest in non-disclosure of the recordings. The manner in which the astronauts said what they did in those final moments before the explosion - the very sound of the astronauts' voices - constituted a privacy interest for the crew’s surviving relatives sufficient to warrant nondisclosure. Additionally, the court held that the public interest in the audio recording was speculative at best and, thus, insufficient to override the surviving relatives' privacy interests. Instead of releasing the recordings, the district court held that transcripts alone would satisfy the public’s right to access the information contained therein while safeguarding the relatives' privacy interests in the audio recording of the same information.

44 Id.
Although *Challenger* was not the first familial privacy dispute examined by the federal courts, the resulting lawsuit was the first pertaining to post-mortem relational privacy that garnered national media attention as well as the curiosity of First Amendment and privacy scholars. The *Challenger* decision is significant because the Supreme Court would later affirm in a different case the district court's rationale that nondisclosure of government-held, death-related records is warranted when the risk to a surviving relative's privacy outweighs the public's interest in the information.

In 2004, thirteen years after *Challenger*, the U.S. Supreme Court heard arguments concerning post-mortem relational privacy for the first time. In *Favish v. Office of Independent Counsel*, the Court ruled that some of the death-scene photographs of Deputy White House Counsel Vincent Foster were confidential under FOIA Exemption 7(c) for investigatory records. Foster was found dead from an apparent suicide in a Washington, D.C. park in 1993. The Court held that the disclosure of the death-scene photographs would be an unwarranted invasion of his surviving relatives' privacy. The Court cited the reasoning in the *Challenger*.

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45 See also *Katz v. Nat'l Archives and Records Admin.*, 862 F.Supp. 476, 485 (D.D.C.1994) (exempting from FOIA disclosure autopsy X-rays and photographs of President Kennedy on the ground that their release would cause 'additional anguish' to the surviving family), aff'd on other grounds, 68 F.3d 1438 (C.A.D.C.1995); *Lesar v. Department of Justice*, 636 F.2d 472, 487 (C.A.D.C.1980) (recognizing, with respect to the assassination of Dr. Martin Luther King, Jr., his survivors' privacy interests in avoiding 'annoyance or harassment').


47 *Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157 (2004); rev'd *Favish v. Office of Indep. Counsel*, 217 F.3d 1168, 1170-71 (9th Cir. 2000); *Accuracy in Media, Inc. v. Nat'l Park Serv.*, 194 F. 3d 120 (D.C. Cir. 1999). See generally Samuel Terilli and Sigman Splichal, *Public Access to Autopsy and Death-Scene Photographs: Relational Privacy, Public Records and Avoidable Collisions*, 10 COMM. L. & POL’Y 313, 324-325 (describing the legal history of *Favish*). Five separate government investigations concluded that the gunshot wound from which Foster died was self-inflicted. Nonetheless, the non-profit, grassroots citizens’ watchdog group, Accuracy In Media, requested the death-scene photographs under FOIA, claiming the investigations were incomplete. AIM’s lawsuit for disclosure of the records was successful only in part. All but about a dozen photos were released. An AIM lawyer, Allan Favish, made a second FOIA request for the remaining photographs, but was unsuccessful. *Favish v. Nat'l Archives & Records Admin.*, 368 F.3d 1072 (C.A. 2004).

opinions, as well as other decisions in which the Court of Appeals for the District of Columbia recognized relational privacy interests. The *Favish* decision set a precedent that a family member's privacy interest in information about his or her dead relative can, on balance, outweigh the public's interest in access to government records.

The *Favish* and *Challenger* courts interpreted whether a federal agency properly applied a FOIA exemption when it refused to disclose a federal record to a requesting citizen. The *Challenger* and *Favish* decisions stand for federal recognition that an individual's sphere of protectable personal information within the FOIA can include information about his or her deceased relatives in addition to information about him or herself. However, it must be noted that these cases involved one of four contexts in which a post-mortem relational privacy dispute may occur. Other circumstances in which a post-mortem relational privacy dispute may occur are discussed in a later section of this chapter. Both of these cases are discussed in further detail in Chapter 4.

In contrast to *Favish* and *Challenger*, in cases when the record in question is held, instead, by a state agency, the FOIA does not apply. The law of the individual state in which the record is held regulates whether the public has access to it. Likewise, the state legislature may also have enacted laws that recognize and protect a relative's privacy interest in information about a dead relative. In Florida, for example, the *Rolling* and *Earnhardt* cases are examples of post-mortem relational privacy disputes in which the privacy interests of surviving relatives conflicted with the public's interest in disclosure of death-related government records. Although, it is clear

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49 Nat'l Archives & Records Admin. v. Favish, 541 U.S. 157, 171 (citing New York Times Co. v. Nat'l Aeronautics & Space Admin., 782 F. Supp. 628, 631, 632 (D.D.C.1991) ("sustaining a privacy claim under the narrower Exemption 6 with respect to an audiotape of the Space Shuttle Challenger astronauts' last words, because '[e]xposure to the voice of a beloved family member immediately prior to that family member's death ... would cause the Challenger families pain' and inflict 'a disruption [to] their peace of mind every time a portion of the tape is played within their hearing'), on remand from 920 F.2d 1002 (C.A.D.C.1990).
that Florida's treatment of the issue is not binding on the rest of the states; these cases received considerable attention from First Amendment and privacy scholars who conducted some of the initial research on relational privacy in the post-mortem context.

In 1990, five college students were found brutally murdered in Gainesville, Florida. At the time, the graphic crime-scene and autopsy photographs depicting the victims’ mutilation and, in some cases decapitation, were public record under Florida law. Members of the media who sought access to the photographs said they had no intention of publishing them and only wanted to inspect the records in order to report accurately on the murder trial. Nonetheless, the parents of the victims asked the judge in State v. Rolling to prevent the photographs’ disclosure, arguing that it would unnecessarily subject them to re-victimization.

In deciding this issue, the Alachua Circuit Court addressed whether the victims' families had a privacy right "either derivative from the victims themselves or in their own right." Citing the U.S. District Court of the District of Columbia's decision in Challenger, the Rolling judge said the victims' families had a right of privacy based on their status as relatives to the deceased.

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50 Chapter 5 discusses state-level regulation of public access to death records (specifically autopsy records) in all 50 states and the District of Columbia.


52 FLA. STAT. ch. 119.011(1) and 119.07(1991). While judicial and investigatory records, including photographs in evidence, are subject to the rules of the court and to judicial precedent and not to Article 119 of the Public Records Law, the same photographs also may be in the possession of a state agency that is covered by Article 119, such as the coroner’s office. Therefore, those records in the custody of an agency subject to the Public Records Law were subject to disclosure unless there was a statutory exemption barring disclosure or a court order to that effect. At the time of the Rolling murders, there was no exemption barring release of crime scene photographs in the custody of the county coroner.

53 Howard Troxler, Gruesome images, thoughtful decision, ST. PETERSBURG TIMES, July 29, 1994, at 1B.

54 State v. Rolling, 695 So. 2d 278 (Fla. 1997).

55 Ron Word, Judge Weighs Releasing Files in Rolling Case, ST. PETERSBURG TIMES, Feb. 7, 1993, at 4B.


57 N.Y. Times v. Nat'l Aeronautics & Space Admin., 782 F.Supp. 628 (1991), (holding that a relative's right of privacy does exist and may be sufficient to prohibit disclosure of materials which would be subject to a right of privacy were the victim alive).
Although the judge in *Rolling* was not examining a FOIA exemption, he adopted the *Challenger* rationale and recognized that the decedents' surviving relatives had a privacy interest in the information about their deceased relatives. This was allowable, according to the court, because the murder victims would have standing - had they survived their attacks - to prevent disclosure of the photos. Therefore, their surviving relatives should have the same right posthumously.\(^58\)

Having established that the victims' families had a privacy interest in the records, the *Rolling* judge then weighed the relatives' privacy interest against the public’s interest in the information, which was public record under Florida law at the time.\(^59\) Just as the court in *Challenger* opted to disclose a less intimate version of the records at issue (transcripts instead of an audio recording), the *Rolling* court also opted for, what it considered, a less intrusive measure. The *Rolling* court decided to adopt a compromise that would "adequately protect the right to privacy on the part of the victims' families and, at the same time, [would] insure the media and interested public access to the photographs adequate for the purpose of insuring accountability of public officials."\(^60\) The judge instituted several provisions: 1) the public could access the records under the supervision of the records custodian, 2) the public could access only those records seen by the jury, and 3) the public could not remove or reproduce the records.\(^61\)

The *Rolling* decision was the basis for a subsequent Florida case in which a circuit court enjoined the release of death-related government records in order to protect the relational privacy interests of a decedent's surviving family members. In *Versace v. State Attorney of Florida*


\(^{59}\) [FLA. CONST. art. I, § 24. Florida provides a constitutional protection for the right of access to public records. See also, infra n. 43.]

\(^{60}\) State v. Rolling, 1994 WL 722891, 6 (Fla. Cir. Ct, Alachua County, July 27, 1994).

\(^{61}\) Id. at 7.
fashion mogul Gianni Versace was murdered on the steps of his residence in Miami Beach. After an exhaustive manhunt for his killer, the authorities identified Andrew Cunanan as the murderer. Before a trial ever ensued, Cunanan committed suicide. Like the *Rolling* case, the victim's surviving relatives petitioned the Miami-Dade circuit court to seal the investigative documents, crime-scene photographs and autopsy photos related to Versace's death, which were public record at the time. The *Rolling* court decided on strictly limited access for the public because the records were used in the penalty phase of the trial to impose the death penalty. In the case of Versace's murder, however, the suspected killer was already dead and there would be no trial. Therefore, Versace's family argued that the public interest in the records was far less salient and did not outweigh the family's privacy interests in the records. The circuit court closed the records completely.63

Survivor privacy rights were recognized in another high-profile Florida case in 2001. In *Earnhardt v. Volusia County, Office of the Medical Examiner*, the *Orlando Sentinel* sought access to the autopsy report of NASCAR star Dale Earnhardt, who died in a crash while racing in the Daytona 500.65 At the time of Earnhardt's death, autopsy records were a public record under Florida law. The *Orlando Sentinel* sought the records in order to have an independent pathologist conduct a separate inspection. The *Orlando Sentinel* contended that a non-biased

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63 Id.


analysis of Earnhardt’s autopsy photos could reveal a need for heightened NASCAR safety standards.66

Earnhardt’s family fervently opposed disclosure of the autopsy photographs, asserting a privacy interest in the records. Earnhardt's widow, Teresa, said she feared the records would “end up unprotected and published”67 on Web sites that feature death, like http://www.celebritymorgue.com and http://www.findadeath.com.68 To avoid what she contended would be exploitation of her husband’s death, she sought and obtained an injunction that barred medical examiners from making the photos public even though Florida law allowed it at the time of the records' creation.69 She asked NASCAR fans to contact the speaker of the Florida House of Representatives and the president of the Florida Senate, urging the "NASCAR Nation"70 “to protect the privacy of citizens by preventing the publication of autopsy photos.”71

66 Conflicting reports surfaced about the cause of Earnhardt’s death. In the nine months prior to Earnhardt’s death, three other NASCAR drivers died from violent head movement upon impact while racing. If Earnhardt died in the same manner, his death would be the fourth that might have been prevented by improved safety equipment. The controversy left some to think that an independent review of Earnhardt’s autopsy records was in order. See Amy C. Rippel, Racer's Widow Can Be Asked Why She Had Photos Sealed, Media Lawyers Said NASCAR’s Concerns May Have Influenced Publication of Earnhardt’s Actions, OR SENTINEL, May 16, 2001 at D1; Beth Kassab, Gary Taylor and E. Garrett Youngblood, Volusia Disputes NASCAR, The Racing Organization Claimed It Had Inspected The Earnhardt Autopsy Photos, A Volusia Spokesman Denied That, OR SENTINEL, Mar. 19, 2001 at B1; Jim Leusner, Henry Pierson Curtis and Ed Hinton, Expert: Seat Belt No Factor; Doctor At Odds With NASCAR Over Earnhardt's Fatal Crash, OR SENTINEL, Apr. 10, 2001, at A1.


69 Earnhardt v. Volusia County, Office of the Medical Examiner, No. 2001-30373-CICI, (Fla. 7th Cir. 2001).


In response to the lobbying efforts of Earnhardt's widow and feedback from Florida constituents, the Florida legislature hastily enacted legislation, called the Family Protection Act, prohibiting the disclosure of not only autopsy photos, but all photographic, video or audio recordings of an autopsy.\(^\text{72}\) According to the new law, if a member of the public wants access to the visual record of an autopsy in Florida, he or she must demonstrate to a court that "good cause" exists to disclose the record. The law provides guidance for a court charged with determining whether there is "good cause." A court must consider whether 1) such disclosure is necessary for the public evaluation of governmental performance; 2) the intrusion into the family's right to privacy is serious; 3) such disclosure is the least intrusive means available; and 4) similar information is available of in other public records, regardless of their form.\(^\text{73}\)

After passage of the regulation, the *Orlando Sentinel* petitioned the court for access to the autopsy photographs, as required by the statute, contending that there was "good cause" for their disclosure. The newspaper's specific request was eventually resolved out of court in a private mediation in which the Earnhardts agreed to allow the newspaper and its independent pathologist access to inspect the photos but not to copy them.\(^\text{74}\) The independent review of Earnhardt's autopsy photos found that he had not been killed from a broken seat belt restraint - as NASCAR and the original autopsy had reported - but instead by the violent head movement that occurred on contact when his racecar crashed.\(^\text{75}\)

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\(^\text{75}\) *See supra* p. 29. n. 66.
Although the *Orlando Sentinel* found some resolution in its quest to confirm the cause of Earnhardt's death,\(^{76}\) other media organizations were dissatisfied with the new law. Another newspaper, *The Independent Florida Alligator*, and the Web site operator for [http://www.websitecity.com](http://www.websitecity.com),\(^{77}\) petitioned the court, contending that the new law was overbroad and, therefore, unconstitutional. In *Campus Communications. v. Earnhardt*,\(^{78}\) the Florida District Court of Appeal retroactively applied the Family Protection Act to the Earnhardt autopsy photos and determined that *The Alligator* failed to show the "good cause" required by the law in order to gain the access it wanted. Additionally, the court ruled that the Family Protection Act was constitutional and dismissed the arguments of the media parties who brought the claim. The threat of widespread publication of Earnhardt’s autopsy photos on the Internet was the impetus for Earnhardt's family and fans to lobby the legislature to limit the public's right of access to the government-held records. In response, the Florida legislature codified the concept that relatives do have a privacy interest in information about their dead relatives.

The results of *Rolling, Versace* and *Earnhardt*, while significant to the study of post-mortem relational privacy in Florida, are not controlling in any other state. Every state treats privacy-in-death issues differently. The *Rolling, Versace* and *Earnhardt* cases are significant, though, because they captured the nation's attention, much like *Favish* and *Challenger* did. First Amendment and privacy scholars paid much attention to these cases, and conducted the foundational research for what this dissertation calls post-mortem relational privacy. Chapter 5

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\(^{78}\) Campus Commc'ns. v. Earnhardt, 821 So. 2d 388 (2002). Campus Commc'ns. v. Earnhardt, 848 So. 2d 1153; July 1, 2003, cert. denied.
lays out the national landscape for legislation dealing with autopsy records with a 50-state study. 79

**Review of Relevant Literature**

This section reviews all the secondary literature relevant to the subject of relational privacy in the post-mortem context. 80 Though a handful of First Amendment scholars have written on the subject of relational privacy in the post-mortem context, the current literature does not provide an expansive overview of the concept's development from its genesis until today, and information about the public's access to autopsy records - a common death-related record at issue in a post-mortem relational privacy dispute - is flawed and incomplete. The current literature also does not provide a conceptual model of post-mortem relational privacy. What the current literature does provide, however, is an in-depth overview of the seminal cases dealing with the issue and its conflict with the First Amendment principles supporting the public's right to know. The following review of the current literature provides a framework for our current understanding and reveals the gaps in the literature, some of which this dissertation seeks to resolve.

The seminal piece on relational privacy in the post-mortem context was written in 1997. Its authors examined cases in which individuals were able to assert a privacy interest in information about their dead relatives and how this trend might affect journalists attempting to access government records. In "Relational Privacy Cases and Freedom of Information," 81 scholars Matthew Bunker and Sigman L. Splichal looked at the implications of *Challenger* and

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79 See Chapter 5 for discussion of public access to autopsy records in the 50 states and the District of Columbia.

80 The researcher conducted a search in the Lexis law reviews and journals section using a key word search in natural language for "relational privacy" and "relative’s death and records" and "relatives and autopsy reports."

Rolling for freedom of information. They found that relational privacy reasoning, as it was applied in those cases, could curtail access to a broad range of government-held information that had traditionally been available under federal and state access laws. The authors made two additional assessments about the Challenger and Rolling decisions. First, the rationales upon which the courts ruled - albeit well intentioned - set "dangerous precedents for access."82 Second, the courts' decisions might be anomalies - reactions to the tragedies at the heart of the cases.83

More than a decade has passed since Bunker and Splichal first examined relational privacy. Since then, their first prediction - that the Supreme Court's decision in Challenger would serve as a foundation upon which other courts would rule in favor of familial privacy rights - came to fruition. As a result, their second prediction - that the Challenger and Rolling decisions were aberrations in privacy and access jurisprudence - did not. Since the publication of their article, several state and federal courts, including the U.S. Supreme Court in Favish, recognized the post-mortem relational privacy concept.

In 2005, following the Favish decision, Splichal updated the 1997 article that he wrote with Bunker. The new research was conducted with Samuel Terilli and analyzed the Favish and Earnhardt cases in light of the Challenger and Rolling precedents. The authors said the rulings

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82 Id. at 110.

83 Matthew Bunker and Sigman L. Splichal, Relational Privacy Cases and Freedom of Information, 18 NEWSPAPER RES. J. 109 (1997). Bunker and Splichal discuss several relevant decisions, including Badhwar v. U.S. Dept. of Air Force, 829 F. 2d 182 (D.C. Cir. 1987), Epps v. U.S. Dept. of Justice, 801 F.Supp. 787 (D.D.C. 1992) aff'd in part, vacated in part, 995 F. 2d. 308 (D.C. Cir. 1993), and Kiraly v. FBI, 728 F.2d 273 (6th Cir. 1984). As Bunker and Splichal explained, the relational privacy issue arose in each of those cases either in dicta, without substantive authority and analysis, or as a result of unique interests (e.g., not discouraging future government informants by disclosing files of deceased informants). In addition, several state court decisions addressed such claims and provided the common law roots for relational privacy interests, as the Supreme Court would later state in Nat'l Archives and Records Admin., 541 U.S. 157, 124 S.Ct. 1570, 1578 (2004) (citing Reid v. Pierce County, 261 P.2d 333 (Wash. 1958); McCambridge v. Little Rock, 766 S.W.2d 909 (Ark. 1989) (crime-scene photographs); Brazemore v. Savannah Hospital, 155 S.E. 194 (Ga. 1930) (per curiam) (photographs of deceased child’s body); and Schuyler v. Curtis, 147 N.Y. 434, 447 (1895) (statue of deceased relative)).
in these later cases were evidence of the Internet's impact on privacy concerns, strengthening the relational privacy interests of families of the deceased who feared widespread publication of information about their dead relatives. In their examination of the Earnhardt case, for example, Splichal and Terilli cited two reasons why Florida's legislature enacted the Family Protection Act: 1) public outcry against the potential Internet publication of Earnhardt’s autopsy photos and 2) the Orlando Sentinel's failure to assess and react consistently with public opinion in favor of limits on public access to autopsy photographs. Splichal and Terilli argued that these factors - the ease of Internet publication and the media's insensitivity to that fear - would result in further limits on the public's ability to access government-held information. 84

Another scholar looked at the Earnhardt case and evaluated the significance of the legislation's scope and retroactive application. Western New England College School of Law professor Barbara A. Noah compared the Earnhardt privacy-in-death controversy to the Terry Schiavo end-of-life controversy in her 2004 Miami Law Review article, "Politicizing the End of Life: Lessons from the Schiavo Controversy." 85 Terry Schiavo was a woman in a permanent vegetative state whose husband and parents disagreed on whether she should be maintained on life-support. In the Schiavo case, the Florida legislature interfered several days after Schiavo's feeding tube had been removed at the request of her husband, giving then-Governor Jeb Bush the authority to order the tube reinserted at the request of Schiavo's parents, who still had hope that their daughter would recover.

Professor Noah compared the legislature's interference with Schiavo and her husband's privacy interests in her end-of-life decision-making to its treatment of the Earnhardt controversy,

where the Florida legislature enacted legislation that appeared to contradict the public's state constitutional right to access government records. Noah also compared how the legislature retroactively applied both regulations to the respective cases and how those decisions were upheld as constitutional. The legislature's interference in the Schiavo case, Noah said, "offers a cautionary tale about the serious hazards associated with political meddling in individual bioethical controversies."  

The Earnhardt case was comparable, she said, because it involved political meddling in the individual's constitutional-protected interest in knowing about the government's activities.

The scholars thus far who reviewed the Challenger, Favish, Rolling, Versace and Earnhardt cases noted that fears of mass publication via the Internet fueled much of the debates and protections for relatives' privacy interests. According to Freedom of Information scholar and Pennsylvania State University Professor Clay Calvert, these fears are justified. In a 2004 article in the Seattle University Law Review entitled "Revisiting the Voyeurism Value in the First Amendment: From the Sexually Sordid to the Details of Death," Calvert examined the Earnhardt and Favish cases within the context of what he called the Voyeurism Value, which he first introduced in 1999. He suggested that the concept of privacy is a “prize to be won or lost” in a “fertile battlefield” where private persons are forced to defend themselves from a voyeuristic public. He said the families of both Earnhardt and Foster were thrust into this battlefield to fend for their privacy against the inevitability of mass publication via the Internet. Calvert said

86 Id. at 110.
that arguments in favor of access, such as the one posed by the Orlando Sentinel, were based on assumptions of newsworthiness and the public interest in its government's activities. These arguments pale in comparison to the fervor of privacy concerns, he argued. Calvert contends that the mass-publication potential of the Internet propelled by the public's seemingly insatiable appetite for all things sordid - and, in some cases, morbid - spurred the overriding fear that access to death-related government records would result in an invasion of the surviving relatives' privacy.90

Notwithstanding the scholarly work available on the topic of post-mortem relational privacy in general, research on autopsy records, in particular, is more limited. In "Not Getting to Yes: Why the Media Should Avoid Negotiating Access Rights,"91 Catherine Cameron, an assistant professor at Stetson Law School, argued that the media should be more aware of the public relations pitfalls that are inherent in high-profile cases involving death. She argued that negotiations for access to sensitive public records unnecessarily put access rights in the "cross-hairs."92 For example, in the Earnhardt case, the Orlando Sentinel made a public records request for Earnhardt's autopsy report. The media's intentions may have been in the right place, Cameron said, but the result was a backlash in public opinion. The collateral damage, according to Cameron, was Florida's public records law on public access to autopsy records. Cameron provides a summary review of autopsy access rights at the federal and state level, focusing specifically on Florida and a few other states. This dissertation builds on that contribution with the 50-state study of public access to autopsy records presented in Chapter 5.

90 Id. at 745.
92 Id. at 256.
Another article by Clay Calvert made the most significant contribution to our understanding of the post-mortem relational privacy concept. In "The Privacy of Death: An Emergent Concept and Legal Rebuke to Media Exploitation and a Voyeuristic Culture," Calvert examined what he called the "privacy-of-death" concept. He said recognizing relatives' privacy interests was an emergent area of family and privacy law, especially in light of the mass-publication capabilities of the Internet and the public's growing desire for sensational news about the dead and dying. Calvert's normative conclusion provides six elements that courts should consider when balancing relational privacy interests and public records requests. He drew the factors from cases as well as the basic principles of the tort of public disclosure of private facts and recommends that they be applied "holistically, with no single factor…weighing more than any other." The six factors, briefly stated, are: 1) Time Passage - the length of time since death, 2) Circumstances of Death - the gravity of events, 3) Content of the Communications - what is seen and heard, 4) The Relative Offended - closeness of connection to the decedent, 5) The Deceased - public prominence and voluntary attention, and 6) Justifications for Access - morbid interests and sensational prying. Calvert hoped the recommendations would lend some "consistency, predictably, and hopefully, coherence" to the relational privacy concept, especially scenarios concerning death records.

Additionally, Calvert reviewed several cases dealing with, what he called, "privacy-in-death" issues and provided a useful review of the facts behind each case and the reasoning.

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94 Id. at 165-66.
95 Id. at 166-68.
96 Id. at 169.
leading to the courts' decisions. Calvert highlighted the 104-year-old case, *Schuyler v. Curtis,*
which the *Favish* court cited, as an example of the reverence that common law has shown to relatives of the deceased. Research conducted for this dissertation confirmed that this is the earliest known case in which any court recognized that relatives might have a protectable privacy interest in information about their dead relatives. *Schuyler* and other opinions where courts assess the viability of a relative's privacy are discussed in greater detail in Chapter 6.

In his "Privacy of Death" article, Calvert also commented on the presidential policy established in 1991 by George H.W. Bush that prohibited media coverage of ceremonies honoring American service members when their remains returned from combat overseas. Bush, and every president since him who has upheld the ban in some form, said the policy protects the privacy interests of surviving relatives. Skeptical of the purported purpose of the ban, Calvert said, "It would be extremely difficult to conclude that any relational privacy rights were violated by photojournalists who took and published pictures of slain military personnel reposed inside pristine, closed flag-draped coffins at Dover Air Force Base in Delaware. These are not, to put it bluntly, graphic images of men and women with grotesque and lethal wounds." In the time since Calvert's article was published, the Obama Administration has modified the ban, giving the authority to decide whether the media may cover the honor guard ceremonies to the surviving

97 *Schuyler v. Curtis,* 42 N.E. 22 (N.Y. 1895).

98 *See generally,* Clay Calvert, *The Privacy of Death: An Emergent Concept and Legal Rebuke to Media Exploitation and a Voyeuristic Culture,* 26 LOY. OF L.A. ENT LAW REV (2005-2006). Nat’l Archives & Records Admin. v. Favish, 541 U.S. 157 (2004) at 169 (citing *Schuyler v. Curtis,* 42 N.E. 22 (1895). "In addition this well-established cultural tradition acknowledging a family's control over the body and death images of the deceased has long been recognized at common law… An early decision by the New York Court of Appeals is typical: '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. 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 a violation of their own rights in the character and memory of the deceased.'" Id. at 25.
family members. Chapter 4 discusses the policy in greater detail and updates Calvert's brief examination of the policy.\textsuperscript{99}

In a third article, Calvert echoed the predictions of Splichal and Terilli, who had warned that an increase in privacy fears during the Internet Age would result in more limits on the public's access to government records. In Calvert's 2005 article, "Victories for Privacy and Losses for Journalism? Five Privacy Controversies from 2004 and their Policy Implications for the Future of Reportage,"\textsuperscript{100} Calvert examined several judicial decisions that protected relatives' privacy interests by restricting public access to government records. He thought the judicial tendency to limit freedom of information in light of risks to individuals' privacy mirrored a shift in negative public opinion about the ethics of journalists. He thought the public distrust for journalists was manifesting in court decisions that limited the press' access to sensitive information about the dead. For example, he cited a 2004 poll asking participants to rate journalists' ethical standards as "high or very high." Only twenty-one percent of participants ranked journalists in the upper echelon. Bankers, auto mechanics, elected officials and nursing home operators ranked higher than journalists in the poll.\textsuperscript{101}

Throughout his articles, Calvert highlighted several examples of the public's appetite for sensational details about death. According to Case Western Reserve University Professor Jessica Berg, there are other, less prurient, reasons why a citizen would be interested in death-related records. In her 2001 Connecticut Law Review article, "Grave Secrets: Legal and Ethical

\textsuperscript{99} See discussion infra p. 96.


Analysis of Postmortem Confidentiality," Berg noted that relatives might be interested in learning about an inheritable medical condition that caused their relative to die. Researchers and medical providers may request autopsy records in order to study factors contributing to death or to examine issues involving patient care. She also said that journalists and biographers might request death records in an effort to inform the public about the reasons contributing to an individual’s demise.

Whatever the reason for which a person may request access death records, Berg noted, there are no uniform regulations among the 50 U.S. states and the District of Columbia proscribing who gets access to death-related health records, specifically autopsy records, and for what reasons. She said the lack of consistency poses a problem for the health care organizations responsible for a person’s health records, specifically those recording autopsies conducted by a health care organization licensed by the state. While Berg makes this generalization for state treatment of health and death-related records across the nation, she provides only anecdotal evidence to support her conclusion. This dissertation provides a 50-state study of public access to autopsy records and confirms her assessment regarding the general inconsistency among the states regarding the treatment of public access to autopsy records in particular. Chapter 5 discusses the findings of this research.

Another scholar examined the implications of the Favish decision on citizens' ability to access federal government records under the FOIA. First Amendment scholar and Pennsylvania State University Professor Martin Halstuk examined Favish in his 2005 University of Florida Journal of Law and Public Policy article, "When is an invasion of privacy unwarranted under the FOIA? An analysis of the Supreme Court’s 'Sufficient Reason' and 'Presumption of Legitimacy'".

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standards. Halstuk contended that the overarching goal of all open records laws, both at the state and federal level, is to ensure that the citizenry keeps informed of its government’s actions. *Favish*, unlike *Earnhardt*, which was decided in a Florida court, dealt with the disclosure of government records held by a federal agency. The *Favish* decision, Halstuk said, had a far-reaching, negative outcome on the public’s ability to access information about its government. Prior to *Favish*, government information was considered presumptively open to the public until the government could demonstrate that disclosure of a record would result in an unwarranted invasion of privacy. In *Favish*, the Court established a new and unprecedented “sufficient reason” test in which government information is presumptively confidential until the government deems that an invasion of privacy is warranted given a "sufficient reason." This was a significant reversal in FOIA policy, Halstuk argued, because it contradicted the established FOIA presumption favoring access.

Halstuk explained that the “sufficient reason” test puts the onus on the requestor of a record to prove that disclosure would advance the public interest. Halstuk said this standard restricts public access to government records and puts a disproportionate reliance on the judgment of the executive, legislative or judicial entity with custody of the record. He said the *Favish* decision “creates loopholes that could easily be exploited by government agencies with a

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104 The responsibility of conducting autopsies, including *Earnhardt’s*, is generally a service provided by and regulated by state governments. Therefore, a state agency is generally the custodian of the autopsy records generated by the final medical examination of the body. Catherine Cameron, *Not Getting to Yes: Why the Media Should Avoid Negotiating Access Rights*, 24 T.M. COOLEY L. REV. 237 (2007). However, in some circumstances, such as the *Favish* case, a federal agency is the custodian of autopsy and death-related documents. The U.S. Supreme Court’s ruling in *Favish* is the most recent and most authoritative federal decision balancing post-mortem relational privacy rights with those of the public’s right to know about its government. Nat’l Archives & Records Admin. v. Favish, 541 U.S. 157 (2004).

105 *Id.*
myopic view of the public interest in disclosure.”¹⁰⁶ Halstuk pointed out that Congress has recognized that some agencies tend to be overly protective of the information they possess, releasing their records only when faced with legal action.¹⁰⁷

The most recent academic work discussing relational privacy in the post-mortem context was written by University of Florida Levin College of Law Professor Jon Mills. In his book, Privacy: The Lost Right,¹⁰⁸ which was published in 2008, Mills argued that the "assault on privacy is on the upswing."¹⁰⁹ Mills provided an overview of privacy jurisprudence amidst what he characterized as the increasingly intrusive technologies of the 21st Century. As an attorney, Mills represented several plaintiffs who sought protective relief from the court in order to prevent the release of autopsy records,¹¹⁰ criminal investigatory files¹¹¹ and death-scene photographs¹¹² about their deceased family members. His first-hand understanding of the surviving relatives' privacy interests in cases involving Rolling, Versace and Earnhardt, and several others discussed in subsequent chapters of this dissertation. In his book, Mills described a general diminishment of privacy rights in a world in which technological advances allow any person to invade any other person's privacy.¹¹³

¹⁰⁶ Id. at 399.
¹⁰⁷ Id. citing S. Rep. No. 89-813, at 3 (1965); Dep’t of Air Force v. Rose, 425 U.S. 352, 362 (1976); EPA v. Mink, 410 U.S. 73, 80 (1973). See also, the discussion infra p. 107 discussing the Dover Policy.
¹⁰⁹ Id.
¹¹¹ See Complaint of Plaintiff, Versace v. State Attorney of Florida (Dade County), No. 97-29417 CA 32 (Fla. Cir. Ct. filed Dec. 30, 1997), http://courttv.com/archive/legaldocs/news-makers/Versace.html. Autopsy records and death-scene photographs were also at issue in this case. Id.
Mills' text is a conceptual overview of privacy theory amid a contemporary backdrop of recent cases that illuminate the technological and social developments that are redefining privacy interests and protections. Mills provided overviews of the high-profile cases in which he participated as legal counsel and numerous others that deal with privacy issues. These cases are presented within the context of what he called "overlapping spheres of protection."\textsuperscript{114} The four spheres of privacy encompass property, physical space, autonomy and personal information. The overlapping region between the third and fourth spheres - autonomy and personal information - is the area of privacy law that this dissertation explores specifically.

In discussing the interplay between relational privacy and public access to government records, he said, "Public policy supports public access to government records in order to foster accountability and encourage public debate."\textsuperscript{115} He added, however, that this access is limited by exceptions to the public records laws, which sometimes serve privacy interests.\textsuperscript{116} Mills described the statutory restrictions that limit intrusions on personal information and the common law forms of relief that a plaintiff might seek.

The majority of states have legislated the public's access to autopsy records, in particular. There are just a few studies available that discern this kind of legislation. In 2006, the Reporters Committee for Freedom of the Press, a non-profit organization that advocates for public access to government records, published an online, state-by-state summary of statutes, case law and attorney general opinions pertinent to public access to autopsy records.\textsuperscript{117} However, the study

\textsuperscript{114} Jon Mills, Privacy: The Lost Right 241, 14 (2008).

\textsuperscript{115} Id.

\textsuperscript{116} Id.

did not include a comparative analysis of the state statutes or the rationale that legislatures relied upon in enacting such legislation or that courts applied in making their decisions. The RCFP also limited its study to state-level treatment of the issue, and did not discuss any federal legislation like *Favish* or *Challenger*. Although the RCFP research provides a state-by-state review of statutes pertaining to public access and autopsy records, the center has only updated its research sporadically. The case law included in the RCFP's research served as a starting point for some of the case law research conducted in this dissertation, but any analysis provided by RCFP was limited mostly to one-sentence holdings, excluding in-depth explanations of the courts' analysis. This dissertation provides a thorough review of the relevant cases in Chapters Four and Six.

The National Coalition Acting Autopsy Privacy (NCAAP) generated another study on the topic of public access to autopsy records. In contrast to the RCFP, this organization advocated for restricted access to autopsy photographs. The organization's Web site, although no longer available online, used to provide links to each state’s autopsy-related legislation along with a state-by-state interpretation of the statute. After comparing the web site's information to the data collected for this dissertation, the research revealed that the NCAAP's Web site contained several inaccuracies. Though not a reliable resource, its existence is an example of the type of grassroots support that exists for greater protection surviving relatives' privacy interests.

The Marion Brechner Citizen Access Project (MBCAP) maintains the most up-to-date resource on public access to autopsy records. The MBCAP website reflects the research findings

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118 The National Coalition Acting for Autopsy Privacy lists Alabama as a state that does not allow for public inspection of autopsy photos, even though the Alabama Code states otherwise, [http://www.ncaap.com/ALABAMA.html](http://www.ncaap.com/ALABAMA.html) (last visited Aug. 4, 2007). "The director shall keep photographed or microphotographed reproductions of original reports of all investigations that he conducts in his office. Reproductions of such materials shall be public records and shall be open to public inspection at all reasonable times. Any person desiring reproductions of original reports shall be furnished same upon payment of the fee now prescribed by law." ALA. CODE § 36-18-2 (2007).
on public access to autopsy records that the researcher conducted for this dissertation. MBCAP offers a cross-referenced, interactive database with interpretations of state statutes through the 2008 legislative session. It is the most reliable data currently available on the subject of public access to autopsy records. The Web site outlines statutes enacted at the state level that prohibit or provide for public access to autopsy records. The same information is provided in a narrative discussion in Chapter 5.

In summary, a handful of scholars have surveyed the significant high-profile cases in which relatives of the deceased were able to successfully argue for protections of their privacy interests, resulting in court decisions and legislation that kept information and/or pictures about deceased relatives out of public view. Most of the existing literature focused on the Rolling, Earnhardt, Favish and Challenger cases, which represent preemptive forms of relief at the state or federal level. Until the publication of Jon Mill's 2008 book on privacy, no other scholar had explored restorative remedies for surviving relatives, such as tort actions after publication. Additionally, Mills examined several other significant relational privacy cases that previous scholars had not reviewed. These scholars' examinations provide the foundational understanding of the post-mortem relational privacy concept. However, a review of the literature has revealed several remaining questions about the concept, several of which this dissertation seeks to answer. The following section reviews the six research questions developed after conducting the literature review.

**Statement of the Research Questions**

This dissertation examines the following research questions:

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119 A comparative 50-state study of public access to autopsy records is available from The Marion Brechner Citizen Access Project, [http://www.citizenaccess.org](http://www.citizenaccess.org) (last visited April 5, 2009). MBCAP, through donor Marion Brechner, an Orlando broadcasting executive, funded the research for this dissertation.
1. What are the factors comprising a post-mortem relational privacy dispute?

2. In what contexts may such a dispute occur?

3. What protective forms of relief may a surviving relative seek in a post-mortem relational privacy dispute?

4. What restorative forms of relief may a surviving relative seek in a post-mortem relational privacy dispute?

5. What degree of access do citizens have to autopsy records in particular?

6. Has the sphere of protectable personal information expanded to include information about one's dead relatives in addition to information about oneself, and, if so, to what extent?

7. What are the implications of increased relational privacy rights in the post-mortem context for the public's right to access government information?

The answers to these questions are presented within this and subsequent chapters of this dissertation. Additionally, they are summarized and reiterated in the Chapter 8. The following section answers the first research question regarding the factors that comprise a post-mortem relational privacy dispute. It is presented early on in the dissertation so that it may serve as a framework for the remainder of the chapters.

Factors of a Post-Mortem Relational Privacy Dispute

In the five high-profile cases introduced in this chapter - Challenger, Favish, Rolling, Versace and Earnhardt, the researcher identified five recurring factors that comprised the basis for each of the post-mortem relational privacy disputes. In later portions of the dissertation research, the researcher used these factors as the parameters for identifying other post-mortem relational privacy disputes. The five factors are: 1) the competing interests who seek control of the information, 2) the information itself, 3) the law governing the agency that has custody of the information, 4) the degree of access that the public has to the information, and 5) the preemptive or restorative remedies available to the deceased's surviving relatives who claim a privacy
interest in the information about their dead relative. The following sections explain each of these factors in detail.

**Factor One: Competing Interests**

Different parties represent varying degrees of interest in the government-held, death-related information about a decedent. One party, usually a relative of the deceased or the government agency with custody of the record, has an interest in limiting, or preventing entirely, the public's access to the information. Another party to the dispute, who is usually a non-relative of the decedent, may want to access to the information for a variety of reasons, raging from journalistic purposes and science and medical research to voyeuristic tabloid news and Internet sites that feature death-related information. When the interests of these various parties do not align, the conflict results in a post-mortem relational privacy dispute. Post-mortem relational privacy cases, including *Challenger, Favish, Rolling, Versace* and *Earnhardt*, are all examples of the tension that exists between the decedents' families and the public.

There are three important clarifications that are critical to understanding the competing interests involved in a post-mortem relational privacy dispute. First, when discussing the privacy interests of surviving family members, it is important to reiterate that post-mortem relational privacy pertains to the privacy interests of surviving relatives, not the decedent. The common law established that a person's right of privacy expires with him.  

The second important clarification regards the public's access to government records. The Supreme Court has held that the First Amendment does not guarantee the public or the press a right to obtain government information. Certain federal and state statutes, court decisions

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120 Restatement (Second) of Torts § 652B-E (1977).
interpreting those statutes, and state constitutional laws establish the public's right to know.\textsuperscript{121} Furthermore, the Supreme Court said in 1972 in \textit{Branzburg v. Hayes} that "the First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally…."\textsuperscript{122} In \textit{Branzburg}, and a series of cases dealing with media access to prisons,\textsuperscript{123} the Supreme Court also set forth the principle that the public's interest in accessing government information must be balanced against competing social necessities.

The third significant distinction is that the conflicting interests of privacy and access do not always contradict each other in such a manner that only the interests of one side can be met. In other words, a post-mortem relational privacy dispute is not necessarily a zero-sum game for the parties. In some disputes, parties with a privacy interest are satisfied with resolutions that limit public access to the records but do not exclude such access all together. Likewise, the parties seeking access may be satisfied with supervised access to the records because publication of the information or photographs is not the primary goal.

\textbf{Factor 2: Information at Issue}

The second factor comprising a post-mortem relational privacy dispute is the character of the information at issue. What is the information is about? Does it disclose how the person died or health-related information about him or her? Characteristics of the information also include the type of record in which the information is contained, such as an autopsy report or an investigatory file. Also, the medium of the record is a significant characteristic, such as visual,

\textsuperscript{121} Chapter 2 provides more detail about the American political theories that support public access to government information.


\textsuperscript{123} \textit{id.}; see also \textit{Pell v. Procunier}, 417 U.S. 817 (1984) and \textit{Saxbe v. Washington Post}, 417 U.S. 843 (1974) (both holding that the First Amendment does not guarantee the press more access to prisons and inmates than is made available to every other citizen).
audio or narrative. The cases already discussed provide some examples of these characteristics. For instance, in *Challenger*, the parties were concerned with public disclosure of the audio recording that captured the crewmembers' last moments before their space shuttle exploded. In *Favish*, the parties were interested in the death-scene photographs of a White House aid that apparently committed suicide in a D.C. park. In *Rolling*, the parties were interested in the crime-scene photographs of the murders. In *Versace*, the parties weren't interested in the investigatory, autopsy and death-scene records. In *Earnhardt*, the parties were interested in the autopsy photos of Dale Earnhardt.

**Factor 3: Law Governing Access to the Information**

The third factor of a post-mortem relational privacy dispute is the record's custodial agency. The law governing access to government records depends on the jurisdiction in which the custodial agency operates. For example, in *Favish* and *Challenger*, the custodians of the records at issue were federal agencies - the National Park Service and NASA, respectively. Therefore, the applicable law was the FOIA. In *Rolling* and *Earnhardt* - both Florida-state cases - the custodians were medical examiner offices, which are county agencies. Therefore, the public records law of Florida governed public access to the records at issue. The fifty states have 50 different laws regarding post mortem privacy issues and different agencies within the states have different operating policies, although the latter are not the focus of this study.

**Factor 4: Degree of Public Access to the Information at Issue**

The fourth factor of a post-mortem relational privacy dispute is the degree of access that the public has to the information at issue. The degree to which the public may access a record is dependent on whether the record is considered public under the law that governs the record's custodial agency. If so, has a member of the public requested it, and has the custodial agency
released the record to the requesting party? If the record has been released, has someone published the information in the record?

The degree of access that the public has to a death-related record also depends on whether the record was a government-held record to begin with. An alternative non-governmental scenario may also exist if, for instance, a newspaper photographer takes pictures of the deceased at the scene of a fatal car crash. In this circumstance, the photographs were never in government custody, and therefore the information is privately held.

Whether the information is in a government record, or privately held, there are chronological phases that comprise the process for collecting and disseminating the information at issue. The following paragraph describes each of the phases briefly and is followed by a graphic representation and more detailed explanations of each phase.

For the purposes of this dissertation, the first phase in the relational privacy continuum is called *Pre-request* - the point in time when either a government agency or a private person generates or becomes in control of information about a dead person. If the information is government-generated, it is contained in a government record that has not yet been requested by a member of the public. If the information is privately held, the person with control of the information has not yet made it public. The second phase of the post-mortem relational privacy continuum is called *Pre-disclosure* - the point in time when a member of the public has requested the government record, but the custodial agency has not yet disclosed it. The same is true for privately held information - the person in control of the information has not yet made it public, but an outside party may have "requested" it from them. Note, however, that the term "request" is not used here in the official sense of a public records request. The third phase is called *Pre-publication* - the point in time when the custodian has disclosed the record to the requesting
party, but the information contained in the record has not yet been "made public." Similarly, a private person with control over death-related information about another person also has not made the information public. Finally, the fourth phase is called Post-publication. Here, someone has published the record to a mass audience.

The remainder of this dissertation explores these four distinct phases. Figure 1-2, which is located at the end of this chapter, is a graphic representation of the phases in the continuum.

**Pre-request Phase**

The pre-request phase in the continuum begins after a person dies. Either a state or federal agency creates a record with information about the person's death. Alternatively, a private person—including a relative—may generate or gain control over such information. The pre-request phase lasts until a member of the public requests the record from the custodial government agency or the information from the private person with control of it. Where the information is government held, disclosure of the record is governed by federal and state-level civil and criminal statutes, which proscribe, in part, 1) when and why a government entity should create a record, 2) whether or not that record is public, and 3) what exemptions or exceptions may apply. During the pre-request phase, public disclosure of the record is only a possibility because, by definition, there is no pending request. However, it is possible that even before a member of the public requests a government record, a relative of the deceased person about whom the information pertains could petition a court to seal the record in order to prevent its future disclosure. Where the information is privately held, there is no applicable law in this

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124 The term "made public" is used here to mean the same thing as in the privacy tort of publication of private facts, in which publicity requires dissemination greater than to a third party. See discussion in text infra p. 55.

125 Chapter 4 discusses Phases I and II (Pre-request and Pre-disclosure) at the federal level. Chapter 5 explores Phase I and II at the state level. Chapter 5 discusses Phase III (Pre-publication). Chapter 6 explores Phase IV (Post-publication).
phase governing the private custody of non-government information about a deceased person. In fact, a relative could release information, at the consent of, or in opposition to, other relatives.

**Pre-disclosure Phase**

The second phase begins when a member of the public makes a public record request and continues as long as the request is pending completion. When a member of the public requests a record from the record's custodial agency, the possibility of disclosure is imminent, through either an informal process or one governed by law. At this point in time, a surviving relative may seek a preemptive remedy, such as a court injunction prohibiting release, to prevent the disclosure of the record. State and federal civil and criminal statutes that prohibit or require disclosure of certain records govern Phase II.

When information is privately held, another member of the public may "request" it, although this is dissimilar from the public records request/disclosure process. If a surviving relative is unsuccessful in obtaining information voluntarily, then he or she could pursue a private suit to either gain control of the information, not an issue in this dissertation, or stop the dissemination of it. If a record is not disclosed to the requesting party, then the dispute ends in the second phase of the continuum. If a surviving relative is unsuccessful in his or her request at the pre-disclosure phase, and the record is disclosed if required by law or dispute settlement mechanism, then this phase ends and the dispute enters the third phase of the continuum.

**Pre-publication Phase**

The third phase of the post-mortem relational privacy continuum, pre-publication, begins once a government agency has disclosed a record to a requesting party. This phase ends once the information contained in the record is published. In this phase, the record has not yet been “made public” and is still within the control of the party to whom it was disclosed. Similarly, if the information is privately held, the person in control of the information also has not published
it widely. "Published widely," as it is used in this dissertation, differs from the kind of "publication" that is used in connection with liability for defamation.126 "Publication," in that sense, is a term of art, which includes any communication by the defendant to a third person. In contrast, when a record is "made public," as the term is used here, it is akin to "publicity," as it is used in the tort of public disclosure of private facts. As in that tort, it means "that the matter is made public, by communicating it to the public at large, or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge. The difference is not one of the means of communication, which may be oral, written or by any other means. It is one of a communication that reaches, or is sure to reach, the public."127

During the pre-publication phase, the risk that information about a deceased relative will become publicly available is the greater than it has been up until now. Although a relative of the deceased still has an opportunity to prevent the publication of the information by seeking an injunction on its publication, such a remedy is highly unlikely. In order to show a court that a prior restraint is warranted, the family of the deceased would have a very high burden of proof. A prior restraint, whether sought against the government or a private party, presumptively violates the First Amendment. This remedy is discussed further in Chapter 5.

If a requesting party obtains an injunction, then the post-mortem relational privacy dispute ends in this phase. However, if the requesting party is unable to meet the high burden to overcome the presumption of unconstitutionality for a prior restraint, then the information presumably will be published. Once the publication occurs, the dispute moves into the forth and final phase of the continuum.

126 Restatement (Second) of Torts § 577 (1977).
127 Restatement (Second) of Torts § 652D, cmt. a. (1977).
Post-publication Phase

The post-publication phase of the relational privacy dispute continuum begins after someone publishes the information about the deceased person that is at issue. Publication must make the "matter…public, by communicating it to the public at large, or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge." 128 After publication occurs, a surviving relative of the deceased may seek a restorative remedy for the injury caused by such a publication. Chapter 7 explores the four privacy torts and the torts of outrage (intentional and negligent infliction of emotional distress) to determine whether they are feasible remedies for a surviving relative. Possible non-tort alternative remedies are offered in Chapter 8 as areas for further research.

This is the final phase in which a post-mortem relational privacy dispute may occur. The following section returns to the factors that comprise a post-mortem relational privacy dispute. The four factors reviewed so far, before discussing the phases of a the post-mortem relational privacy dispute, are 1) the competing interests who seek control of the information, 2) the information itself, 3) the law governing the agency that has custody of the information, and 4) the degree of access that the public has to the information. The fifth and final factor describes the types of remedies that may be available to surviving relatives during each of the four phases in the post-mortem relational privacy continuum.

Factor 5: Remedies Available to Surviving Relatives

The fifth and final factor in a post-mortem relational privacy dispute entails the remedies that are available to surviving relatives of the deceased who seek to either prevent the disclosure of information about their relatives or seek a restorative remedy after an injury stemming from

128 Id.
the publication of the information. Of the two general types of remedies available to relatives, preemptive remedies exist in the first three phases of the relational privacy dispute continuum (pre-request, pre-disclosure, and pre-publication). For example, if a member of the public has requested access to a death-related record, but the record custodian has not yet disclosed, the decedent's relative may seek an injunction to prohibit public disclosure of the information.

The second kind of remedy is restorative in nature. Here, the information at issue has already been published. A surviving relative may seek recovery through a tort action for an injury stemming from the publication of the information. Chapter 7 discusses the possible, although limited, tort remedies available to surviving relatives who allege an injury as a result of the publication of death-related information about their relatives.

In summary, the five factors of a post-mortem relational privacy dispute are: 1) the competing interests, 2) the information at issue, 3) the law governing access to the information, 4) the degree of public access to the information at issue, and 5) the remedies available to the decedent's surviving relatives. Additionally, a post-mortem relational dispute may take place in any one of four phases along the post-mortem relational privacy continuum, which are 1) pre-request, 2) pre-disclosure, 3) pre-publication, and 4) post-publication. When these phases begin and end is determined by the level of access that the public has to the information at issue. Subsequent chapters of the dissertation explore each of these phases, and the chapters are organized in the same chronological manner reflecting the order of the continuum. The next section outlines remainder of the dissertation.

**Roadmap of the Dissertation**

Before reviewing the individual phases of the relational privacy dispute continuum, Chapter 2 reviews the theories that informed this research, and Chapter 3 explains the
methodological approach to each research question. Then, Chapters 4 through 7 review the individual phases of the continuum.

For instance, Chapters Four and Five examine the preemptive remedies available in phases I and II (pre-request and pre-disclosure) of the continuum. Chapter 4 looks at federal precedent supporting protection of relatives' privacy interests, including the Supreme Court decision in Favish that affirmed the application of two FOIA exemptions to protect survivor privacy interests. Chapter 4 explains two important distinctions in the analysis of post-mortem relational privacy disputes: 1) access to federal records is controlled by federal statutes and the case law interpreting those statutes, and 2) access to state records is controlled by state statutes enacted by each individual state and the individual state courts interpreting those statutes. Chapter 4 also presents a case study of a contemporary post-mortem relational privacy dispute in which the administrations of the current and preceding three presidencies have adopted the post-mortem relational privacy rationale.

Chapter 5, like Chapter 4, examines the pre-request and pre-disclosure phases of the continuum. However, the analysis in this chapter is at the state level identifying within the statutes of each of the 50 states and the District of Columbia how the state legislature regulates public access to death records. The 50-state study is focused on one type of death record in particular, autopsy records, because they contain the type of detailed and graphic information that makes them the object of public records requests and the subject of legislation pertaining to public access.

Chapter 6 explores the third phase in the continuum - pre-publication - where the remedy available to a relative is a prior restraint. Such a remedy triggers strict constitutional scrutiny. This chapter reviews the precedent for such a high burden and evaluates whether a post-mortem
relational privacy dispute is likely to overcome that burden. Then, Chapter 7 explores the fourth and final phase in the continuum - post-publication - and the restorative remedies that surviving relatives may seek for an injury stemming from the publication of information about their dead relatives.

Finally, after discussing the individual phases of the continuum, Chapter 8 reviews the answers to each of the dissertation's research questions, including an analysis of the implications that expanded relational privacy rights has for the public's ability to access to government records. This chapter also reviews a model access-to-autopsy-records law that attempts to balance the privacy interests of relatives with the access interests of the public. This chapter also explores areas available for future research, including alternative non-tort remedies for relatives seeking protections for information about their relatives. Also the chapter proposes additional 50-state study topics that would provide further insight into this area of the law.

The dissertation concludes that the post-mortem relational privacy concept has expanded the sphere of protectable personal information to include information about one's dead relatives in addition to oneself. However, the research showed that this expansion occurred predominately in the pre-disclosure context, in which two kinds of remedies are available to a relative: 1) statutory regulations that prohibit the disclosure of information that threatens the privacy interests of relatives, and 2) court ordered injunctions prohibiting the release of the information in question.

The dissertation also concluded that in the post-publication context, remedies for injuries stemming from the publication of death-related information are far less likely than in the preemptive contexts. Moreover, they are a less desirable cure for relatives of the deceased because the injury to their privacy has already occurred. These conclusions are discussed in the
subsequent chapters and more fully in Chapter 8. The next two chapters discuss the theory contributing to this dissertation and the methodology that was used to answer the research questions.

Figure 1-1. Competing Interests in a Post-Mortem Relational Privacy Dispute
Figure 1-2. Post-mortem Relational Privacy Dispute Continuum

Pre-request Phase
Government agency creates a record of the death.

Pre-disclosure Phase
Member of the public requests the record from custodial agency

Pre-Publication Phase
Record custodian discloses the record to the requesting party.

Publication Phase
Record is made public by publication
Survivors seeks remedy for injury resulting from publication

Preemptive Remedies: statutory limitations on record disclosure and court-ordered injunctions

Triggers First Amendment implications because prior restraints are presumptively unconstitutional

Governed by federal & state civil and criminal statutes proscribing when a record should be created, when it is available for public disclosure, and penalties for violations of those regulations

Restorative Remedies:
- Privacy Torts
- Intentional Infliction of Emotional Distress
- Non-tort remedies

Governed by state statutory and common law

Preemptive Protections for Post-mortem relational Privacy

Restorative Remedies available to surviving relatives

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CHAPTER 2
THEORETICAL FOUNDATIONS

When a member of the public seeks access to the government-held, death related record of a deceased citizen, the requesting party's interest in the information may conflict with the interests of the decedent's living relatives, who might want to keep that information private. For example, a citizen may want to know about how his or her local government conducts accident investigations pertaining to fatal deaths, or understand how a jury came to a conclusion in a death penalty case involving a murder. A researcher may want to conduct a genealogical history on hereditary diseases or report on the outbreak of a communicable disease. There are a variety of issues that involve the community and its government that can be illuminated by access to public records.

Conversely, the same records that provide insights into a society and its citizens may also reveal personal information about decedents that their family members would rather be left private. For example, the investigatory files of a murder might include lurid details about the victim's personal life. Those details may embarrass the surviving relatives or cast the decedent in a less favorable light than was publicly known prior to death. The health information revealed in an autopsy may include evidence of a person's prior suicide attempts. An accident photo could cause emotional distress to the surviving relatives of a car crash victim.

This chapter discusses the broader theoretical concepts represented in the conflict between access to information and relational privacy interests. The following sections discuss the scholarly work of judges, lawyers, and academics on the theories of privacy and the First Amendment, specifically how freedom of information supports free expression theories. The chapter focuses on familial privacy issues related to the death of a relative and the purpose
served by allowing the public to access these kinds of government records. The chapter concludes with a discussion of the nexus between the two theories.

**Defining Privacy**

The U.S. law protects a variety of interests related to privacy, ranging from property ownership and the boundaries of physical space to self-determination and control over information about oneself. That variety of interests is reflected in the numerous descriptions that exist for privacy. For example, New York University Law School Professor Diane Zimmerman described privacy as “rich in symbolic value,” but she noted that privacy “has little particularized meaning.”¹ She said it could mean the right to control the spread of information about oneself.² Washington and Lee University School of Law Dean and Professor Rodney Smolla noted that the term privacy has multiple meanings in American law.³ For example, Smolla said privacy, as it is used in American law, could relate to the protection of one’s seclusion or “personal space.”⁴ He also said privacy could be defined as freedom from “government interference.”⁵

For some, privacy pertains to information about themselves and those related to them and whether or not others may access that information. Yale law school Professor Paul Gewirtz said privacy is the “power to choose [one's] audience.”⁶ For example, Judge Richard Posner said privacy might mean “the right to conceal discreditable facts about [one]self.”⁷ He said

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⁴ *Id.* at 120.

⁵ *Id.*


⁷ RICHARD POSNER, *ECONOMIC ANALYSIS OF LAW* 46 (1998). Posner compares the "efforts of sellers to conceal defects in their products" to the efforts of a person concealing unfavorable information about themselves. *Id.* at 46.
Disclosure of personal information about an individual helps other people make more rational judgments about them than that individual might want. Posner argues, "When people today decry lack of privacy, what they want, I think, is mainly something quite different from seclusion: they want more power to conceal information about themselves that others might use to their disadvantage. University of Chicago law school Professor Richard Epstein posited that privacy is a right to “misrepresent one’s self to the world.”

Scholar Daniel Solove said "privacy is not reducible to a singular essence; it is a plurality of different things that do not share one element in common but that nevertheless bear a resemblance to each other." Therefore, Solove organized a taxonomy of six categories, none of which is all encompassing, and all of which are related to one another in some manner: 1) the right to be let alone; 2) limited access to the physical self, 3) secrecy and the concealment of certain matters from others; 4) control over personal information or the ability to exercise control over information about oneself; 5) personhood, or the protection of one's personality, individuality, and dignity; and 6) intimacy, or control over, or limited access to, one's intimate relationships or aspects of life.

University of Florida law school Dean and Professor Jon Mills provides another organized overview of the varied interests that privacy encompasses in his recent book, Privacy: The Lost

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8 Id. at 660-63.
12 Referring to Samuel Warren and Louis Brandeis who authored The Right to Privacy, 4 HARV. L. REV. 193 (1890).
He explained that scholars have divided the wide variety of interests related to privacy into two overarching categories: decisional privacy and informational privacy. Building on that dichotomy, Mills developed a four-part model to organize the variety of interests that comprise decisional and informational privacy. The model (Figure 2-1) takes the form of a Venn diagram comprised of four spheres: autonomy, personal information, property, and physical space. The spheres overlap where an interest implicates more than one realm of privacy.

This dissertation builds on Mills' model, and was informed by the various other scholarly perspectives on privacy. The research examines the convergence of two of Mills' four spheres - autonomy and personal information. In the overlapping region between these two realms lays familial privacy, which involves both issues of autonomy with respect to one's familial decisions and issues of informational privacy with respect to control that information. The topic of this dissertation - post-mortem relational privacy - is a subset of familial privacy interests because it involves one's relationship with deceased relatives and the control of information about them.

The following sections describe the personal information and autonomy spheres in more detail, followed by a section discussing their convergence and post-mortem relational privacy.

**The Personal Information Sphere**

One of the four spheres in Mills' model is the personal information sphere. This sphere includes, in part, the control of personal information, either through the prevention of its disclosure or in the recovery of damages for an injury stemming from its disclosure. Information that is considered "personal" ranges from personal thoughts, which a person selectively shares with other individuals not expecting them to be made public, to information freely given to

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15 *Id.* at 14, n.40.
private and governmental agencies in exchange for other valuable privileges such as obtaining a line of credit or a license to drive. Grocery stores collect consumer-purchasing habits with electronic swipe cards in exchange for coupons based on consumer purchases. Here, the individual also has an expectation that their personal information will not necessarily be made available to the general public.16

Contemporary protections for informational privacy interests have their origins in the late 1880s, beginning with Judge Thomas Cooley, who wrote that privacy was "a right of complete immunity: to be let alone."17 However, Cooley seems to have been more focused on physical intrusion than the kind that can cause injury by psychological intrusion. Nonetheless, Cooley's commentary would inspire later articulations on the concept of privacy.18 A year later, the Michigan Supreme Court recognized the right of privacy in De May v. Roberts,19 holding that a woman giving birth had a right of privacy in her apartment and that an unmarried man who was presumed to be a medical assistant and was present in her apartment at the time of her delivery had invaded her privacy right. "The plaintiff had a legal right to the privacy of her apartment at such a time and the law secures to her this right by requiring others to observe it."20

In 1890, E. L. Godkin, an influential journalist, editor and publisher,21 professed the need for state protection for a citizen's good reputation. Godkin said

20 Id. at 149.
the ambition of nearly all civilized men and women…[to determine] for themselves how much or how little publicity should surround their daily lives….The right to decide how much knowledge of this personal thought and feeling, and how much knowledge, therefore, of his tastes, and habits, of his own private doings and affairs, and those of his family living under his rood, the public at large shall have is as much one of his natural rights as his right to decide how he shall eat and drink, what he shall wear, and in what manner he shall pass his leisure hours.22

Samuel D. Warren and Louis D. Brandeis rearticulated Cooley's classic definition about privacy being "the right to be let alone" in their renowned 1890 article, which would later become the classic definition of privacy.23 In reaction to what they thought had become an increasingly invasive media, Warren and Brandeis thought there was a need to be able to protect individual privacy.24 They criticized the press for "overstepping in every direction the obvious bounds of propriety and of decency."25 They argued that an individual should have the right to prevent from publication those matters that “concern the private life, habits, acts and relations of an individual.”26 Further, if a person’s privacy was violated, they thought that the person should be able to sue for a restorative remedy. Warren and Brandeis determined that society should recognize privacy rights beyond those afforded to the individual by traditional contract and property law. They contended that the common law afforded an individual the right to decide “to what extent his thoughts, sentiments, and emotions shall be communicated to others” - a right to privacy that natural law already provided.27


24 Id. at 216.

25 Id. at 196.

26 Id. at 216.

27 Id. at 219.
The same year the Warren-Brandeis article was published, a New York trial court in *Manola v. Stevens* became the first to permit recovery on privacy grounds. In *Manola*, an unreported decision, the court enjoined a stage manager from publishing for commercial purposes a photograph of a “scandalously” dressed actress, an actress wearing tights. The victory for privacy in New York was short-lived. In 1902, the New York Court of Appeals, the highest court in the state decided *Roberson v. Rochester Folding Box Co.*, which had similar facts to *Manola*. In *Roberson*, the defendant used a picture of a young woman to promote a brand of flour. In a 4-3 decision, the appellate court rejected the privacy ideal that Warren and Brandeis has posited, holding that the plaintiff did not have a privacy interest in her image as captured in the photograph that was used without her consent. Furthermore, the appellate court rejected the notion of an independent right of privacy, deferring the establishment of such a right to a legislative body. The appellate court's main justification was the lack of precedent, noting that there was no mention of an individual right of privacy by any notable jurist or prior to the 1890 Warren and Brandeis article.

However, another state court did adopt the notion that the individual had an inherent right to privacy. In 1905, in *Pavesich v. New England Life Insurance Co.*, the Georgia Supreme Court stated that the “right to privacy has its foundation in the instincts in nature.”

In 1891, the U.S. Supreme Court specifically addressed the "right to be let alone" in *Union Pacific Railroad v. Botsford*. The Court held that a plaintiff seeking damages against a railroad company for personal injuries could not be required to participate in a medical examination.

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29 Roberson v. Rochester Folding Box Company, 64 N.E 442 (N.Y. 1902).
Justice Horace Gray wrote that "no right is held more sacred, or is more carefully guarded, by the common law, that the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law." Justice Gray went on to quote Cooley: "The right to one's person may be said to be a right of complete immunity: to be let alone."

In 1939, the right to privacy was adopted in the Restatement of Torts. Section 867 of The Restatement provides that an individual who "unreasonably and seriously interferes with another’s interest in not having his affairs known to others or his likeness exhibited to the public is liable to the other."

In 1960, William Prosser examined the evolution of privacy jurisprudence. In Privacy, Prosser opined that the right to privacy should be categorized as four separate torts. In 1977, the American Law Institute adopted Prosser’s organization in the Restatement (Second) of Torts, providing that "[a] person who unreasonably and seriously interferes with another's interest in not having his affairs known to others or his likeness exhibited to the public is liable to the other." Thus, an individual would have a claim for the following: 1) an unreasonable intrusion upon the seclusion of another, 2) an appropriation of the other’s name or likeness, 3) unreasonable publicity given to the other’s private life, and 4) publicity that unreasonably places the other in a false light before the public. Chapter 7 examines these tort actions to determine

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32 Id. at 251.
33 Id.
34 Restatement of Torts § 867 (1939).
36 Restatement (Second) of Torts § 867 (1977).
whether they are feasible forms of relief for a person who claims an invasion of his privacy because of the publication of information about his deceased relative.

The definitions for privacy that Cooley, Warren and Brandeis initiated, Prosser developed, and The Restatement adopted serve as the foundations for informational privacy's contemporary meanings and legal parameters. The next section discusses an other realm of privacy that deals with the self. Then, a later section will discuss the intersection of these two areas.

**The Autonomy Sphere**

Another realm of distinct privacy interests in Mills' model is the autonomy sphere. These interests are inherent to one's personal identity and the exercise of personal choice. The U.S. Constitution does not explicitly provide for a right of privacy. Nevertheless, the U.S. Supreme Court has interpreted the U.S. Constitution to provide a right of privacy, culling from the "penumbra" of the Constitution's various explicitly stated freedoms - speech, religion, association and others. The Court has referred to privacy as “independence in making certain kinds of important decisions.” The Court has also defined privacy differently with respect to the expectation that a citizen has to privacy in the criminal records compiled about him or her.

The autonomy sphere includes post-mortem relational privacy because autonomy includes a person's freedom to choose to die and how. For example, the Supreme Court has recognized a person's right to refuse medical treatment even if the decision would result in death. The autonomy sphere also involves decisions related to the family, like child rearing, the use of

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37 Griswold v. Connecticut, 381 U.S. 479, 484 (1965) (holding that married persons have a right to use contraceptives).

38 Whalen v. Roe, 429 U.S. 589 (1977) (holding that compulsory disclosure of patients' medical records does not necessarily constitute invasion of Constitutional right to privacy).


40 Cruzan v. Director, Mo. Dep't of Health, 497 U.S. 261 (1990), cited by Mills in PRIVACY: THE LOST RIGHT 16 (2008), n.50.
contraception, and the decision to procreate.\textsuperscript{41} The death and family interests converge when a family member dies and the surviving relatives have a privacy interest in the decedent such as the right to control how the remains of a deceased family member are handled. These interests exist in the autonomy sphere, but they also exists in the part of the informational sphere that overlaps with the autonomy sphere because the surviving relatives may also have a privacy interest in the death-related information about a dead relative. Mills calls the privacy interest that one has in information about a dead relative \textit{relational privacy}.\textsuperscript{42} For the purposes of this dissertation, the convergence of the \textit{autonomy} and \textit{informational privacy} interests in the post-mortem context is called as \textit{post-mortem relational privacy}.

While the interests that exist in the \textit{autonomy} and \textit{personal information} spheres have distinctive characteristics, they are "not entirely separate" from each other.\textsuperscript{43} In Mills' privacy model, privacy interests related to "marriage, family and sexuality"\textsuperscript{44} exist in the overlapping realm between the \textit{autonomy} and \textit{personal information} spheres. For example, an individual's decision to use contraception has implications for both the autonomy privacy interest (the choice to procreate) and the personal information privacy interests (control over who knows about that choice). Similarly, post-mortem relational privacy, which is a subset of familial privacy, involves both autonomy privacy interests (the familial link to a deceased relative's memory and remains), and informational privacy interests (the right to control information that is personal to oneself about that dead relative).

\begin{itemize}
\item \textsuperscript{41} \textit{See supra} p. 16.
\item \textsuperscript{42} Jon Mills, Privacy: The Lost Right 200 (2008).
\item \textsuperscript{43} \textit{Id.} at 14.
\item \textsuperscript{44} Jon Mills, Privacy: The Lost Right 14 (2008).
\end{itemize}
Relational Privacy

The academic literature on privacy provides a limited discussion of relational privacy in the post-mortem context, commenting mostly on the scope and effect of cases in which a court interpreted a statute in order to determine whether the public could access a government-held, death-related record. These high-profile cases were discussed in Chapter One's Background to the Literature section. Of the existing literature, Jon Mills provided the most thorough explanation of the relational privacy interest and its interplay with First Amendment and freedom of information interests, especially in the post-mortem context. Mills defined relational privacy as "a judicial doctrine that treats harm to a close relative as a harmful intrusion to the individual." In other words, the fact that a person is dead does not preclude his or her surviving family members from having a privacy interest in the information about the deceased relative. Therefore, the relational privacy interest concerns control over death-related information about one's family members in order to protect one's own privacy.

Mills said relational privacy is "not an actual common-law remedy as much as it is an approach to protect intrusions that occur to relatives of a deceased person." Although Mills characterizes relational privacy as a legal "approach," this dissertation specifies areas of the law in which the relational privacy concept has manifested as a limited remedy. Such remedies are found in four distinct areas of the law: 1) federal and state statutes regulating public access to government-held, death-related information, 2) judicial interpretation of those statutes, and 3) common law remedies in tort for injuries caused by the publication of information about a deceased relative. A fourth area, prior restraint on publication, provides an additional remedy,

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45 See supra p. 23, Background to the Literature.
47 Id. at 200.
although it has not manifested in a practical way thus far and has strict constitutional barriers. However, before introducing those remedies and their theoretical roots, the next section introduces the countervailing interest to post-mortem relational privacy, which creates the need for such remedies.

**The Purpose of Access to Government Information**

*Post-mortem relational privacy* - a surviving relative's interest in controlling death-related information about a deceased family member - is threatened when a person unrelated to the deceased wants access to information about the decedent. As scholar Jessica Berg noted, there are a variety of reasons why someone unrelated to the deceased would want access to death-related information about another person. For example, if a person dies from a communicable disease, the media might want access to that person's autopsy records in order to learn about the cause of death and to report upon it for the public's benefit. In this case, members of the public has an interest in understanding whether there is a threat to them. Additionally, the public has an interest in knowing how a coroner performed his or her duties in conducting an autopsy or how the police conducted the investigation about the circumstances leading to the death which has implications for understanding the scope and certainty of the disease to the public. Thus, the relational privacy interests that a relative may have in the information about a dead relative may, at times, conflict with the interest that the public has in the government information about the deceased. This frequently arises in getting access to government information, discussed next.

The First Amendment to the U.S. Constitution states, in part, that, "Congress shall make no law… abridging the freedom of speech, or of the press." While the First Amendment is

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49 U.S. CONST. amen. I.
succinct and economical in its statement, it, like the word *privacy*, has been the subject of a variety of interpretations from judges and scholars seeking to define its scope and meaning. Scholar William Van Alstyne believes that the First Amendment is “simple, straightforward, complete and absolute.” Its phrasing is “unequivocal,” he said, but he concedes that the First Amendment, as interpreted by the U.S. Supreme Court, does not necessarily protect every everything said.\(^{50}\) For example, in 1919 Justice Oliver Wendell Holmes wrote that the First Amendment would not protect a person who falsely yelled “Fire!” in a crowded theater solely for the amusement of watching the chaos he caused.\(^{51}\) Furthermore, the Court has ruled that particular categories of speech, specifically “fighting words”\(^{52}\) and obscenity,\(^{53}\) do not deserve full First Amendment protections. The Court has also held that that defamation of private persons does not necessarily receive constitutional protection; nor does some false defamation of public officials; some false light speech and negligent speech about personal affairs.

Professor Eugene Volokh\(^{54}\) believes that invasion of privacy laws innately contradict the First Amendment. He has said that laws prohibiting the disclosure and publication of private facts give the government excessive power, allowing it to direct whether and how a person may speak about others. According to Volokh, the protection of free speech is a right explicitly

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\(^{51}\) Schenck v. United States, 249 U.S. 47, 52 (1919) (holding that distribution of a leaflet tending to obstruct the draft was not protected under the First Amendment because circumstances of clear and present danger allowed for Congress’s regulation through the Espionage Act).

\(^{52}\) Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) (holding that "fighting words" did not deserve First Amendment protection).


\(^{54}\) Eugene Volokh is a law professor at the University of California at Los Angeles. His research focuses on privacy and First Amendment issues, [http://www.law.ucla.edu/volokh/](http://www.law.ucla.edu/volokh/) (last visited March 28, 2009).
articulated in the U.S. Constitution, and, therefore, it supersedes any privacy fears that, in contrast, are not expressly declared.\textsuperscript{55}

Scholar Leonard Levy wrote that, "[b]y freedom of the press the Framers meant a right to engage in rasping, corrosive, and offensive discussions on all topics of public interest."\textsuperscript{56} Countering any skepticism about the scope of the freedom the Framers intended, Levy said "it is enough that [the Framers] gave constitutional recognition to the principle of freedom of speech and press in unqualified and undefined terms."\textsuperscript{57}

First Amendment theorist Alexander Meiklejohn offered some limits to what constitutional protection meant:

When self-governing men demand freedom of speech they are not saying that every individual has an unalienable right to speak whenever, wherever, however he chooses. They do not declare that any man may talk as he pleases, when he pleases, about what he pleases, about whom he pleases, to whom he pleases. The common sense of any reasonable society would deny the existence of that unqualified right.\textsuperscript{58}

For example, Vincent Blasi stressed the significance of a free press as a check on the government.\textsuperscript{59} Lee Bollinger emphasized the value of free expression in the creation of a "tolerant society" comprised of an open-minded citizenry that is willing to hear all voices but is still conscious of the inclinations of a majority.\textsuperscript{60} Frederick Schauer said that the First Amendment has several purposes, each encompassing different circumstances and supported by different theories. For example, in one context, the First Amendment serves the individual's


\textsuperscript{56} LEONARD LEVY, \textit{EMERGENCE OF A FREE PRESS} (1985).

\textsuperscript{57} \textit{Id.} at 349.

\textsuperscript{58} ALEXANDER MEIKLEJOHN, \textit{FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT} 24 (1948).


\textsuperscript{60} LEE BOLLINGER, \textit{THE TOLERANT SOCIETY} (1986).
ability to express him or herself artistically. In another context, he said the First Amendment protects the populace's ability to self-govern. Another context yields a "marketplace of ideas" in which a free flow of information facilitates a search for truth. The following sections explore several First Amendment theories that relate to conflict that exists in post-mortem relational privacy dispute where one party has an interest in keeping information about a deceased relative private and another party - a non-relative - has an interest in accessing that information and possibly disseminating it to the general public.

**First Amendment Theories**

A post-mortem relational privacy dispute occurs when the access interests of a non-relative threaten the privacy interests of a surviving relative. Several First Amendment theories support the notion that citizens should be informed about their government's activities, and therefore, the public should have access to its government's information, and, once known, the First Amendment protects the freedom to publish it. The following sections discuss various First Amendment theories that support that concept. The following sections review those concepts.

**The Safety Valve**

The safety valve theory supports the idea of protecting public access to government records and the free expression to discuss it. Free speech philosopher Thomas Emerson believed that one of the functions of the First Amendment was to protect speech so that exchanges of power in the government occurred peacefully. In the safety valve metaphor, information enters society through a pipeline on which the government controls a valve. If the valve is closed (i.e. the government censors expression of information related to the government), the tension will


build up as unpopular and unprotected speech is restricted from passing through the pipeline. The censorship forces the unpopular expression to find other, less peaceful means to be heard. However, if the valve is open (i.e. the government protects the flow of information), then a variety of perspectives are exchanged by peaceful means. Emerson argued that free expression facilitates peaceful change in a democratic society because it allows a variety of ideas about political, economic and social issues to be exchanged instead of forcing the less popular ideas about those issues underground.

In a post-mortem relational privacy dispute, the safety valve theory applies to the flow of information about the government's conduct when it pertains to the death of a citizen. If the government closes the valve that controls the flow of that information, the tension behind the valve builds as the information is suppressed. In this instance, the closed valve protects the privacy of the decedents' relatives at the expense of the citizenry's education about its government's conduct related to that death. In contrast, if the valve is open, the citizenry is informed about what its government does but the relatives' privacy is vulnerable to invasion. For example, in an election of a government official, information about the candidates flows into society through a variety of mediums. Proponents of one candidate or political party put forth their notions of why one candidate should be elected over another. Conversely, supporters of the opposing party or candidate will do the same. Meanwhile, citizens who support less mainstream candidates and political parties also want to have their ideas and opinions heard. If the government "shuts the valve" on their ability to express themselves, they may seek more

63 Id.

subversive avenues to reach the population, methods that could cause unrest and instability in the democratic system.

**The Marketplace of Ideas**

Justice Oliver Wendell Holmes’s introduced the marketplace of ideas metaphor into U.S. jurisprudence in 1919 in his dissenting opinion in *Abrams v. United States.*\(^{65}\) Abrams and several other Russian immigrants were convicted of conspiring to violate the Espionage Act after publishing pamphlets that "intended to incite, provoke, and encourage resistance to the United States in the war with Germany."\(^{66}\) Although a majority of the U.S. Supreme Court upheld the convictions,\(^{67}\) Justice Holmes dissented, arguing that the pamphlets were not seditious because they did not hinder the U.S. government or its war effort.\(^{68}\)

Justice Louis Brandeis, who co-authored the seminal *Harvard Law Review* article on privacy,\(^ {69}\) joined Justice Holmes, who wrote, “[T]he ultimate good desired is better reached by free trade in ideas - that the best test of truth is the power of the thought to get itself accepted in the competition of the market.”\(^ {70}\) In 1943, Judge Leonard Hand echoed that reverence for a free marketplace of ideas in the antitrust case, *United States v. Associated Press.*\(^ {71}\) Justice Hand wrote that the First Amendment “presupposes that right conclusions are more likely to be

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\(^{66}\)*Id.* at 617.

\(^{67}\)*Id.* at 616.

\(^{68}\)*Id.* at 624.


\(^{70}\)*Id.* at 630.

\(^{71}\)*United States v. Associated Press*, 52 F. Supp. 362 (S.D.N.Y. 1943) (denying the motion for summary judgement by *The Associated Press*, which the government enjoined under the Sherman Antitrust Act and the Clayton Act); *judgment aff'd by Associated Press v. U.S.*, 326 U.S. 1 (1945) (holding that the AP had violated the Sherman Antitrust Act by prohibiting member newspapers from selling or providing news to non-member organizations and because it made it very difficult for non-member newspapers to join the AP); *reh'g den'd by Associated Press v. United States*, 326 U.S. 802 (1945); *reh'g den'd by* Tribune Company v. United States, 326 U.S. 803 (1945).
gathered out of a multitude of tongues, than through any kind of authoritative selection.” The marketplace of ideas metaphor supports the idea that the public should have access to information about its government's activities. Without access to government information, information about the government would never make it to the marketplace to be considered.

Milton's pamphlet, *Areopagitica*, which was published in the mid-seventeenth Century in England, was a response to criticism he received for publishing without a government license. Milton criticized the fact that the government allowed debtors and delinquents to coexist with other men in society while inoffensive books required the government’s approval to do the same. Milton argued that it was the free and uncensored competition between ideas that propelled the quest for truth. He said, "Let [Truth] and Falsehood grapple…in a free and open encounter.”

In the mid-nineteenth Century, John Stewart Mill addressed the extent to which the government's authority should be used to limit speech. In his treatise, *On Liberty*, Mill believed that the goal of society should be to maximize the amount of happiness for the greatest number of people. *On Liberty* included an impassioned defense of free speech and how it facilitated a variety of ideas in society, which were necessary for social and intellectual progress. Although Mill did not reiterate Milton's belief that the truth would always prevail amongst a variety of ideas, he argued that without free expression, the truth could never have the opportunity to surface, be tested, and be reaffirmed. Mill believed that even citizens' false

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72 Id. at 372.


74 Id.

75 Id.

76 JOHN STUART MILL, ON LIBERTY (1859) (1958).
contributions to discussion are essential to the well being of a society.\textsuperscript{77} He argued that false opinions were actually productive because people engaged in an open exchange of ideas, good and bad, were more likely to discard the inferior ones. And open exchange of ideas would foster debate, Mill contended, which would force individuals to examine and reaffirm their beliefs so as to affirmatively adopt one's belief after careful examination and understanding. He believed that an individual has a right to self-expression, even if that expression is false, as long as he does not injure others. However, he did not elaborate on the type of harm one could do with speech.\textsuperscript{78}

**Self-governance**

In addition to facilitating the search for truth amongst a variety of ideas, some theorists believe that freedom of expression also facilitates democratic governance. Philosopher and academic scholar Alexander Meiklejohn is a prominent advocate of this idea. He argued that the contribution to self-governance is the most valuable purpose assigned to the First Amendment speech and press clauses. The purpose of the First Amendment, he wrote, is "to give to every voting member of the body politic the fullest possible participation in the understanding of those problems with which the citizens of a self-governing society must deal."\textsuperscript{79} Therefore, in order to ensure that information relevant to the political community is delivered to citizens, it should

\textsuperscript{77}Id. at 68. The marketplace of ideas is not without criticism, however. The Commission on Freedom of the Press, which was formed in 1942 to study the freedom and accountability of the press, warned that increasing conglomeration of the press threatened to restrict speakers from reaching mass audiences. The control that a relatively few people and corporations had over what was said in the mass media was a form of private censorship just as dangerous as government censorship. Commission on Freedom of the Press, A FREE AND RESPONSIBLE PRESS (1947). Professor Jerome Barron criticized the marketplace metaphor, arguing that segments of society who cannot access the means of communication do not benefit from the free flow of ideas that the market place of ideas facilitates. See Jerome Barron, FREEDOM OF THE PRESS FOR WHOM? 6 (1973). See also Jerome Barron, Access to the Press - a New First Amendment Right, 80 HARV. L. REV. 1641 (1967). See also C. Edwin Baker, HUMAN LIBERTY AND FREEDOM OF SPEECH, (1992) (criticizing the dominant marketplace of ideas theory and the assumptions it requires and calling it unpersuasive).


\textsuperscript{79}Alexander Meiklejohn, Free Speech and Its Relation to Self-Government 88-89 (1948).
receive absolute protection. However, Meiklejohn did not argue that all speech should be protected. Under the theory of self-governance, only speech that helps further political understanding deserves constitutional protection. Meiklejohn would eventually expand his view to include private speech about science, philosophy, and the arts - anything that would contribute to a voters' "sane and objective judgment" when called to make decisions about their own governance.81

Under Meiklejohn's self-governance theory, public access to any government information that furthers the public's understanding about its government should reach the marketplace. Therefore, under Meiklejohn's theory the public should be able to access any government records that deal with life or death issues. Such records encompass much more beyond the obvious autopsy or death-scene investigation. For example, the Department of Transportation investigates public safety issues such as motor care issues, bridge maintenance and roadway safety. The local health inspector conducts sanitation inspections on restaurants and school cafeterias. The Federal Airline Administration inspects airline safety requirements. The local school board hires teachers and bus drivers to teach and transport children. Prisons and jails are responsible for the safety and security of criminals. These examples are among many government responsibilities that either directly or indirectly affect the health, safety and ultimate life or death of citizens. Meiklejohn's theory of self-governance supports the notion that citizens should have access to such information.

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80 See e.g., ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE (1960).
81 Id.
The Checking Value of the First Amendment

Columbia University law professor and First Amendment scholar Vincent Blasi said the value of First Amendment protection for speech is that such speech acts as a countervailing force to the power and vulnerability of government corruption. Blasi conceptualized the checking value, which supports the notion that free speech allows the citizenry to openly discuss the conduct and decisions of its government. If the government's actions are openly discussed and scrutinized, Blasi said corruption and poor performance are more likely to be exposed, thereby keeping the government in check.82 This is important, Blasi said, because abuses by the government are especially harmful and widespread compared to those that occur in the private sector because the effects of government corruption are much more far-reaching than abuses by any one private entity. For example, only the government, not a corporation, has the legal authority to wage war, he said. Furthermore, Blasi said that when the government is most susceptible to fraud, secrecy, and corruption, such as times of war or social turmoil, then free expression is most at risk of government suppression. Likewise, it is under these circumstances that it is most critical that free expression allows the press to act as a check on government actions.83

In a post-mortem relational privacy dispute, there are a variety of public policy and personal reasons why the public should and should not be able to access government records that are either directly or indirectly related to death. Such records can serve the purpose of informing the public about the government's conduct with respect to not only deceased citizens but also important social issues that can lead or prevent death such as disease control, natural disaster

relief, crime and safety warnings, national security threats, evacuation plans, and preventative health campaigns.

Public policy also supports confidentiality in certain government records. For example, patient-client, clergy, and attorney-client confidentiality foster open communication within a fiduciary relationship. Rape shield laws may encourage victims to report crime. Whistleblower laws harbor government employees from retaliation.

There are also a variety of reasons why relatives of the diseased would want to keep information about their dead relatives confidential. For example, relatives may want to keep details of a family member's death private if the relative was a homicide victim, a child, a celebrity, a politician, or a rape victim. Relatives may want to limit access to records of a family member's death if the family member died of a communicable disease such as AIDS or tuberculosis, during a lurid sex act, or while committing an act of moral turpitude. A relative may want to keep information about a relative's death private so that he or she are not subjected if it is republished such as on the Internet or television.

Reasons also exist for some families to want transparency of certain death-related records. If a family member dies while serving in the military and the death is suspicious or unexplained, the family might want the records disclosed to the public. If a relative dies while in state custody, the family may want the public to be able to scrutinize the government's actions. Some families may feel the transparency and publicity of their relative's death might serve a greater public good by contributing to safety awareness or crime prevention.

The final First Amendment theory presented involves the individual's autonomy. This theory is similar to the autonomy sphere conceptualized by Jon Mills in his four-sphere privacy model.
Autonomy

Free expression also fosters each individual's autonomy. Thomas Emerson contended that self-expression enables a person to understand his or her own character and his or her capacity as an individual. The introduction to this chapter discussed the concept of autonomy as a facet of Jon Mills' four-sphere privacy model, which encompassed an individual's privacy interests related to marriage, family and sexuality as well as freedom of choice. The First Amendment is related to those interests because it protects the self-expression that ultimately serves self-fulfillment. If expression is stifled, they lose the ability to discuss and understand their government's activities and how those actions affect them.

The Nexus Between Relational Privacy and Access to Government Information

When death-related information like an autopsy report or a criminal investigation about a deceased citizen is contained in a government record, that record may be available to any member of the public depending on the public records law of a given jurisdiction. At the federal level, the Freedom of Information Act presumes that government records are open to the public unless one of the enumerated FOIA exemptions applies. For example, NASA invoked FOIA's Exemption 6 for personnel, medical and similar records in order to prevent disclosure of an audiotape that recorded the last words of the Challenger crewmembers just before their shuttle exploded. The National Park Service invoked FOIA Exemption 7(c) for investigatory records in order to prevent the disclosure of death-scene photographs of a White House aide. At the

85 See supra p. 64.
state level, all but four states have chosen to legislate the public's access to autopsy records.88 For example, the statutes of Alabama expressly provide for disclosure of autopsy records to the public upon request,89 while Idaho's statutes prohibit public access to such records except in certain circumstances.90

Laws that provide for public access to government-held, death-related records may threaten privacy interests of relatives of the deceased who want to control the information about the deceased. This conflict - between those with an interest in access and those with an interest in privacy - is the basic premise of a post-mortem relational-privacy dispute. There is no one remedy for this conflict, but courts and legislatures have sometimes tried to find answers resolve some of the conflicts. In general, the issue of post mortem privacy has not been at the top of public policy agendas.

Jon Mills said, "The form and effect of [the relational privacy] remedies is important."91 For those with relational privacy interests, (i.e. the family members of the deceased), Mills said preemptive remedies - those that prohibit disclosure of government-held, death-related records - are ideal. Preemptive remedies either prevent the release of government-held, death-related records or prevent the publication of the information contained in those records. Restorative remedies provide relief only after the information has been published and an injury stemming from that publication has occurred.

88 Chapter 4 discusses the federal regulation of public access to such records, and Chapter 5 discusses state-level regulation of public access to autopsy records in particular.
90 Idaho Code Ann. § 39-270 (2008). In Idaho, autopsy records are presumptively closed. However, the statutes allow disclosure when there is a possibility of fraud related to benefit payments stemming from the death. Idaho Code § 39-270 (2008).
If, however, statutes or case law do not prohibit disclosure of the record or expressly provide that the record is open to the public, then the custodial agency may release the record to a requesting party. Before this occurs, a relative may seek another remedy in the form of a court injunction in order to prevent the disclosure of the record and protect his or her privacy interests in the information contained within. If the custodial agency releases the record, either by the authority of the statute or after a court has rejected a request for injunctive release - or in contradiction to the law all together - then another injunctive remedy is a prior restraint to prevent publication of the information. Preemptive remedies may limit the public's access to government records.

If, however, none of the preemptive remedies are available to relatives of deceased persons, and someone publishes the information about the deceased, it may result in an injury to the decedent's surviving relatives. If this occurs, then the only legal recourse for a relative is to seek recovery for the injury. As Mills noted, restorative measures, such as the privacy torts and a few others, offer limited relief to surviving relatives. Chapter 7 discusses these remedies further.

While these remedies represent forms of relief that serve the interests of relatives of the deceased, citizens with an interest in accessing government-held, death-related information also have a stake in how a court or legislature balances the privacy interests of relatives with the principles and statutory protections for public access to such information. Frederick Schauer said "There is no way around the difficult task of evaluating the strength of the free speech interest, the strength of the opposing interests, and the balance between the two."92 Alstyne said

"at some point in the analysis a balance must be struck between the freedom in question and the countervailing public interest."93

If a non-relative seeks access to a record via a public records request, the first question is what law governs whether access will be granted. The FOIA governs public access to federal records. Individual state laws govern public access to state records. At both levels, the respective courts may also provide interpretive rulings that further define or invalidate such statutory requirements. If at the onset of the request, a non-relative is denied access, the requestor may, according to the law of the applicable jurisdiction, seek review of the decision by an administrative board attorney general, or court, among others.

Figure 2-1. Mills' Four Spheres of Privacy Model

\[94\] JON MILLS, PRIVACY: THE LOST RIGHT 14 (2008), adapted for reproduction.
CHAPTER 3
METHODOLOGY

The concept of post-mortem relational privacy - before it was called that in this dissertation - surfaced in obscure cases, beginning in the late Nineteenth Century and sporadically throughout the Twentieth.\(^1\) During the past three decades, however, a few cases dealing with the privacy interests of surviving relatives garnered national attention, elevating the concept of relational privacy in the post-mortem context from obscurity into the national spotlight. In cases such as Favish v. Office of Independent Counsel,\(^2\) Challenger,\(^3\) State v. Rolling,\(^4\) Versace v. State Attorney of Florida (Dade County),\(^5\) and Earnhardt v. Volusia County Office of the Medical Examiner,\(^6\) state and federal courts interpreted statutes regulating public access to death-related information and determined that surviving relatives had a protectable privacy interest in the government-held information about their dead relatives. These cases sparked the academic interest of First Amendment and privacy scholars, who conducted scholarship that examined the significance of the cases.\(^7\)

That scholarship provided a starting point for the research conducted in this dissertation, which examines the concept of post-mortem relational privacy on a broader level in order to contribute to privacy and First Amendment literature and understanding. The researcher

\(^1\) See Chapters Four, Five and Six for related cases.


\(^7\) See supra p. 21, Literature Review.
employed a legal research methodology, which was designed to 1) identify the factors comprising a post-mortem relational privacy dispute, 2) determine the contexts in which such a dispute may occur, 3) identify the protective and restorative forms of relief that a surviving relative may seek in a post-mortem relational privacy dispute, and 4) determine the degree of access that citizens have to autopsy records. The researcher assessed these findings in order to determine whether the individual's sphere of protectable personal information, which traditionally includes only information about oneself, has expanded to include information about one's dead relatives as well. Additionally, the findings resulted in a model access-to-autopsy-records law and were the basis of further conclusions about the effect that expanded relational privacy rights has on freedom of information.

The five post-mortem relational privacy cases introduced thus far were the starting points for the remainder of the research in this dissertation. At the same time, they represent only a portion of the contextual understanding of the concept. From the Challenger and Favish cases, the latter of which was decided by the U.S. Supreme Court, it is apparent that the concept of post-mortem relational privacy has been legitimized at the federal level within the framework of protections offered by the FOIA. These are cases in which the federal government was the custodian of death-related information and a federal court interpreted the federal statute regulating public access to that information. Comparatively, Rolling, Versace and Earnhardt are similar to in context to Favish and Challenger, however in these cases the death-related information at issue was in the custody of a state agency and a state court determined whether the public could access the records at issue. These five cases, and a few others, are the highlights of the majority of the existing literature on the subject of post-mortem relational privacy, but

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8 See supra p. 46, Statement of the Research Questions.
they are limited in their scope and application to preemptive contexts. Nonetheless, they served as excellent starting points for the research in this dissertation and were used to amass a string of cases for further research as well as key words to use as search terms. This dissertation identifies and examines the other contexts in which a post-mortem relational privacy dispute may occur.

Therefore, after careful review of a variety of cases in which survivor privacy interests were at issue, the researcher identified the four distinct contexts in which survivor privacy rights may be addressed: the pre-request and pre-disclosure phases, in which federal and state statutes legislate public access to government-held, death-related information and federal and state court decisions interpret those statutes; the pre-publication phase, in which federal and state court decisions assess the constitutionality of prior restraints on the publication of death-related information, and the post-publication phases, in which state courts redress injured surviving relatives with common law remedies. The following sections address the methodology applied in each of these contexts.

**Federal and State Statutes Legislating Public Access To Government-Held, Death-Related Information**

In order to determine which federal and state statutes legislate public access to government-held, death-related information, the researcher devised a Lexis key-word search within the federal statutes and the statutes of each of the 50 states and the District of Columbia. The search began with the "natural language" option and utilized the following search terms: "autopsy and public record," and "death and public record," and "death and privacy," and "record and relative," and "record and next of kin," and "disclosure and death." The researcher carefully examined each set of findings, which resulted in 52 data sets, to determine relevance to the research.
The results of the search that was conducted within the federal statutes are explained in Chapter 4. The results of the search within the state statutes are discussed in Chapter 5.

However the methodology for the state-level research was far more complicated than the federal search because of the intricacy of 51 different data sets involving the 50 states and the District of Columbia versus the one data set of the federal statutes. Therefore, the following section provides additional explanation of the methodological framework for the state-level research.

Research Question Five asked, "What degree of access do citizens have to autopsy records in particular? This question is answered specifically in Chapter 5. The appropriate methodology for this question was a 50-state study, which provided a national overview on the issue in question. A 50-state study is a methodical examination of the statutes of each of the 50 states and the District of Columbia with attention paid specifically to one area of the law, the results of which provide comparable data for further analysis.

One of the limitations in the scope of this question was that it focused on just one type of death-related record, rather than all of them. There are a variety of records in this category, such as death-scene photographs, death certificates, and investigatory records - the aggregate of which was too large to tackle within this dissertation. Therefore, the dissertation focuses on one type of death record in order to provide an example of how states treat public access to a death-related record. After some initial research into statutory regulations on death records, the researcher chose to focus on autopsy records because that type of record was most often the subject of specific legislative regulation regarding public access. Although this dissertation did not attempt a legislative history on statutes dealing with public access to autopsy records, it does provide a current landscape on the issue. In Chapter 8, the researcher suggests such a legislative history
for further research, as well as other potential topics for 50-state studies that would complement the findings of this dissertation on public access to autopsy records.

It is important to note, however, that the topic of death-related records carried with it an inherent danger that a disproportionate amount of research for this dissertation would be Florida centric given the significance of the Earnhardt and Rolling cases. Selecting a methodological model that explored the issue of public access to autopsy records within all 50 states and the District of Columbia mitigated this risk.

In reviewing the results of the search, the researcher first established whether autopsy records within a state are presumptively open or closed to the public in that state. Then, the researcher identified any exemptions that prohibit disclosure of those records, or exceptions to the law that allowed for disclosure. The results were compiled and analyzes state-by-state. These results were reviewed for themes that emerged among the statutes, both in types of exemptions that prohibited disclosure and types of exceptions that allowed it. For example, a statute in one state may proscribe that autopsy records are presumptively open, but it may then also itemize exemptions to the law, prohibiting disclosure of such records for specified reasons. The exemptions and exceptions to the law in each state were organized into categories, which are presented in Figure 3-1, which is located at the end of this chapter. The various types of exemptions and exceptions to the laws of each state are defined further in Chapter 5, which presents the findings of the 50-state study of public access to autopsy records.

**Federal and State Court Decisions Interpreting Statutes**

The same search string used in the federal and state statute search was also applied to federal and state cases in order to identify the federal and state-level court decisions interpreting those statutes. Often times, these cases were also identified in the notes to the states themselves as well. The results of this search produced 52 data sets, which were organized and compared to
the results of the statute search. Chapters Four and Six discuss the results of the federal research, opinions interpreting those statutes, including their constitutionality. In order to complement the state-level statutory research that was conducted for this dissertation, the search for state court decisions interpreting statutes was limited to decisions related to statutes regulating public access to autopsy records. The findings of this search are presented in Chapter 5.

**State Common Law Addressing Causes of Actions Brought By Injured Relatives**

The final search was conducted in the realm of state common law decisions that addressed causes of action brought by injured relatives. This is the only legal context that involved restorative remedies after the publication of death-related information about a relative. The searches utilized the same key word search used in the previous searches and were conducted in a methodical manner within each state. The results of these searches garnered 51 data sets, which were then examined for relevance to the post-mortem relational privacy concept. Unlike the state-level statutory research, which was limited to the study of public access to autopsy records because a larger examination was beyond the scope of the dissertation, it was well within the scope of this dissertation to examine any case law that was relevant to post-mortem relational privacy, regardless of type of death record at issue. Furthermore, the case law dealing with privacy and death-related records is relatively limited. The results of the state common law search are presented in Chapter 7.

The next chapter examines the preemptive remedies available to relatives at the federal level. The cases discussed here both outline the status of the law at the federal level and provide a context for a case study of a recent post-mortem relational privacy dispute.
Figure 3-1. Taxonomy of statutes regulating public access to autopsy records
CHAPTER 4
PUBLIC ACCESS TO FEDERAL DEATH-RELATED RECORDS: A PRECURSOR, THE PRECEDENT, AND A PRESIDENTIAL CASE STUDY

The Freedom of Information Act, which governs public access to records held by federal agencies, presumes that federal records are public unless one of the nine listed exemptions applies. The FOIA does not address death-related records explicitly, nor does it expressly provide an exemption for surviving relatives of the deceased. However, the Supreme Court has interpreted the FOIA to preclude the disclosure of death-related information in order to safeguard the privacy interests of surviving relatives when, on balance, those interests outweigh the public's interest in the information. Similarly, the U.S. District Court for the District of Columbia also upheld the application of another FOIA exemption resulting in the non-disclosure on privacy grounds of certain federal death-related records. The first half of this chapter examines these seminal cases and the statutes upon which they were premised. The statutory interpretations provide context for a case study in the latter half of the chapter that explores a contemporary and ongoing relational privacy dispute.

New York Times v. National Aeronautics & Space Administration

This dissertation first referred to New York Times v. Nat'l Aeronautics & Space Admin. in Chapter 1 as "Challenger." This case is significant in the history of post-mortem relational privacy because it was a precursor to the subsequent Supreme Court decision that affirmed that

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1 The Freedom of Information Act, 5 U.S.C. § 552, Exemption (b)(1) - National Security Information; Exemption (b)(2) - Internal Personnel Rules and Practices- "High" (b)(2) - Substantial internal matters, disclosure would risk circumvention of a legal requirement- "Low" (b)(2) - Internal matters that are essentially trivial in nature; Exemption (b)(3) - Information exempt under other law; Exemption (b)(4) - Confidential Business Information; Exemption (b)(5) - Inter or intra agency communication that is subject to deliberative process, litigation, and other privileges; Exemption (b)(6) - Personal Privacy; Exemption (b)(7) - Law Enforcement Records that implicate one of 6 enumerated concerns; Exemption (b)(8) - Financial Institutions; Exemption (b)(9) - Geological Information.


3 See supra p. 23.
the government may limit public access to government records when familial privacy interests outweigh the public's interest in accessing government information.

In *Challenger*, the record in question was a NASA audio recording that captured the last moments of the Challenger Space Shuttle crew's communications with ground control before the shuttle exploded.\(^4\) In the wake of the tragedy, NASA issued a series of contradictory reports about the crew's demise, reporting in some that the crew survived the initial explosion, and in others that the crew died instantly.\(^5\) In an effort to clarify the ultimate fate of the crew, *The New York Times* made a FOIA request for the shuttle's black box recording, which contained the actual dialogue of those last moments.

NASA denied the request, arguing that the crew's surviving family members had a privacy interest in the sound of the astronauts' voices that were captured on tape. Given the probability that the media would rebroadcast the recordings if NASA disclosed them, NASA contended that the crew's surviving relatives would be subjected indiscriminately to hearing their relatives' voices during their final living moments on the radio and television. Such broadcasts would be "an intrusion on their grief which certainly would exacerbate feelings of hurt and loss," NASA argued.\(^6\) Therefore, NASA applied FOIA Exemption 6, which prohibits the disclosure of information in "personnel, medical and similar" files that, if disclosed, "would constitute a clearly unwarranted invasion of personal privacy."\(^7\) NASA did not argue that the tapes contained personnel or medical information, but said that the nature of the voices themselves constituted a "similar" file, eligible for protection from disclosure.


\(^5\) *Id.*


The issue before the U.S. District Court for the District of Columbia was whether NASA's withholding of the recording was proper. According to the FOIA, the analysis for Exemption 6 requires two steps. First, the court must make a threshold determination whether the information withheld is contained in a personnel, medical, or similar file, and if so, 2) the court must then proceed to determine whether its release would be clearly unwarranted invasion of personal privacy.\(^8\)

In making determining if the record met the threshold, the district court relied on the Supreme Court's interpretation of FOIA Exemption 6 in *Department of State v. Washington Post Co.*,\(^9\) in which the Court concluded that Congress did not intend to limit “similar files” “to a narrow class of files containing only a discrete kind of personal information.”\(^10\) Nonetheless, the district court found that voices of the astronauts did not convey anything of a personal nature about the astronauts or their family members, and therefore did not satisfy the threshold requirement for protection under the FOIA exemption. Accordingly, the district court ordered the tape released under the FOIA disclosure requirements. Since the file did not satisfy the first prong of the analysis, the district court did not consider the impact that the release of the tape might have on the families of the dead astronauts.\(^11\)

On appeal, the U.S. Court of Appeals for the District of Columbia initially affirmed the district court's decision with a divided panel. Like the district court, the appeals court also relied on the Supreme Court's broad interpretation of FOIA Exemption 6 in *Department of State v.*

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\(^10\) Id. at 602.

Washington Post Co., but it found that there was nothing in the recording that would meet the threshold requirement for nondisclosure.\textsuperscript{12}

However, the Court of Appeals granted NASA a rehearing en banc\textsuperscript{13} and on rehearing remanded the case, finding that the \textsuperscript{14}

[v]oices of astronauts, and whatever those voices might reveal of their thoughts and feelings at moments of their deaths in Challenger space shuttle disaster, constituted information which applied to particular individuals and thus [the] file involved was [a] “similar file” within Exemption 6 of the Freedom of Information Act, applicable to personnel and medical files and similar files.\textsuperscript{15}

Therefore, the Court of Appeals held that because the record met the initial threshold, NASA was entitled to an opportunity to prove that release of the tape itself would invade the privacy of the deceased astronauts' families and that the district court was required to consider the strength of the private and public interests involved. The Court of Appeals instructed the district court to determine "whether any invasion of the astronauts' (or their families') privacy that the disclosure of the Challenger tape would cause is or is not 'clearly unwarranted' when compared to the 'citizens' right to be informed about what their government is up to.'"\textsuperscript{16}

On remand, the district court weighed the purpose served by disclosure of the audio recording against the privacy interests of the families, holding that the families of the deceased crewmembers had a substantial privacy interest in non-disclosure of the recordings.\textsuperscript{17} The district court held that manner in which the astronauts said what they did in those final moments


\textsuperscript{15} Id. at 1003.


before the explosion - the very sound of the astronauts' voices - constituted a privacy interest for the crew’s surviving relatives sufficient to warrant nondisclosure.\(^\text{18}\) Additionally, the district court held that the public interest in the audio recording was "at best mere speculation" and, thus, insufficient to override the surviving relatives' privacy interests.\(^\text{19}\)

Instead of releasing the recordings, the district court held that transcripts alone would satisfy the public’s right to access the information contained therein while safeguarding the relatives' privacy interests in the audio recording of the same information. Almost two decades later, the U.S. Supreme Court affirmed the district court's rationale in *Challenger* when it interpreted another FOIA exemption that dealt with privacy issues.

**National Archives and Records Administration v. Favish**

Like the *Challenger* court, the U.S. Supreme Court in *Favish* interpreted the application of a FOIA exemption with regards to nondisclosure of a federally held death-related record. In this case, however, the Court interpreted FOIA Exemption 7(c), which protects law enforcement records the release of which “could reasonably be expected to constitute an unwarranted invasion of personal privacy.” The Court had to balance the effect of the records' release on the privacy of decedent's surviving family against any public benefit to be obtained by their release.

In this case, the decedent was Vincent Foster, deputy counsel to President Clinton. Foster was found dead in a D.C. park from an apparent suicide. Attorney Allan J. Favish filed a FOIA request for Foster's death-scene photographs.\(^\text{20}\) The custodian of the records, the National Park

\(^{18}\) *Id.* at 631.

\(^{19}\) *Id.* at 633.

\(^{20}\) See *Accuracy in Media v. Nat'l Park Service*, 194 F.3d 120 (D.C.Cir. 1999). The National Park Service, the Federal Bureau of Investigation, and a committee of the House and a committee of the Senate investigated Foster's death. It was also investigated twice by the OIC. These inquiries all concluded that Foster committed suicide. In an earlier proceeding, Favish was the associate counsel for *Accuracy in Media* (AIM), which applied under FOIA for Foster's death-scene photographs. After the National Park Service, which maintained custody of the pictures,
Service, rejected Favish's request under Exception 7 of the FOIA for investigatory records. Favish sued the Office of Independent Counsel (OIC) under the FOIA. The U.S. District Court for the Central District of California granted summary judgment for the OIC, allowing it to withhold disclosure of ten photographs, and Favish appealed.

On appeal, the U.S. Court of Appeals for the Ninth Circuit reversed and remanded, holding, in part, that under FOIA's personal privacy exemption personal privacy extends to the memory of the deceased held by those tied closely to the deceased by blood or love. The Ninth Circuit said the district court was required to view disputed photographs in camera in order to balance family members' interests against public benefit. The appeals court recognized that the FOIA does not identify whose personal privacy may not be unjustifiably invaded, which "leaves open the possibility that the exemption does extend to others than the person to whom the information relates..."

Other federal appellate courts had faced similar issues. The U.S. Court of Appeals for the District of Columbia had held in 1995 that the photographs of President John F. Kennedy after his assassination were private to the members of the Kennedy family. Additionally, the U.S.

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22 Favish v. Office of Indep. Counsel, 217 F.3d 1168 (9th Cir. 2000).
23 Id. at 1173.
24 Katz v. Nat'l Archives & Records Admin., 862 F. Supp. 476, 485 (D.D.C. 1994) (holding that President Kennedy’s autopsy material was exempt from disclosure because, among other things, it would cause “additional
Court of Appeals for the District of Columbia affirmed the withholding of the audio recording from the Challenger Space Shuttle because its disclosure would invade the privacy of their families.25 Accordingly, the Ninth Circuit in *Favish* said

What the cases point to is a zone of privacy in which a spouse, a parent, a child, a brother or a sister preserves the memory of the deceased loved one. To violate that memory is to invade the personality of the survivor. The intrusion of the media would constitute invasion of an aspect of human personality essential to being human, the survivor's memory of the beloved dead.26

The Ninth Circuit Court of Appeals held that the FOIA exemption for personal privacy in investigatory records extends to the memory of the deceased held by those tied closely to the deceased by blood or love and therefore that the expectable invasion of their privacy caused by the release of records made for law enforcement must be balanced against the public purpose to be served by disclosure.27

The appeals court remanded the case to the district court with instructions to balance family members' interests against public benefit.

On remand to the U.S. District Court for the Central District of California, the district court found that five of the 10 photos at issue were not discoverable because disclosure would violate the surviving relatives' privacy.28 On appeal, the Ninth Circuit Court of Appeals affirmed the release of four of the five photos, bringing the total number of photos being withheld from Favish to four.29 Favish appealed, and the U.S. Supreme Court granted certiorari.30

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27 *Id.*


In a unanimous decision, the U.S. Supreme Court reversed the decision of the Court of Appeals, which had affirmed the release of six of the 10 photos at issue, and remanded the case with instructions to grant the OIC's motion for summary judgment with respect to the four photographs still in dispute.\textsuperscript{31} The Court held that: 1) the FOIA recognizes surviving family members' right to personal privacy with respect to their close relative's death-scene images, and 2) the Foster family's privacy interest outweighs the public interest in disclosure.\textsuperscript{32}

Writing for the Court, Justice Anthony Kennedy said that the FOIA recognizes survivor privacy interests and that Favish's interpretation of FOIA Exemption 7(c)'s personal privacy right was too narrow. Favish depended on the Court's interpretation of Exemption 7(c) in Dep't of Justice v. Reporters Comm. for Freedom of Press,\textsuperscript{33} in which the Court held that the personal privacy concept must encompass an individual's control of information about himself. However, Kennedy wrote, the Reporters Committee Court did not have the opportunity to consider whether individuals whose personal data are not in the requested materials also have a recognized privacy interest under the exemption. The Court reiterated that the Reporters Committee Court did explain "Exemption 7(C)'s concept of privacy is not a limited or cramped notion."\textsuperscript{34}

The Court compared FOIA's Exemption 7(c) for privacy with Exemption 6, which requires withholding of personnel, medical and similar files only if disclosure "would constitute a clearly

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\item[\textsuperscript{31}] Nat'l Archives & Records Admin. v. Favish, 541 U.S. 157, 175 (2004).
\item[\textsuperscript{32}] Id. at 157-58.
\item[\textsuperscript{33}] Dep't of Justice v. Reporters Comm. for Freedom of Press, 489 U.S. 749 (1989).
\item[\textsuperscript{34}] Nat'l Archives & Records Admin. v. Favish, 541 U.S. 157, 157 (2004).
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\end{footnotesize}
unwarranted invasion of personal privacy." Exemption 7(C) does not include the word “clearly” and uses the phrase “could reasonably be expected to constitute” instead of “would constitute,” resulting in a greater breadth of information that falls under the 7(c) privacy exception for investigatory records. Such comparable breadth is necessary, the Court said, because law enforcement documents often contain information about individuals whose inclusion is the result of coincidence. Therefore, 7(c) provides an exemption to protect “intimate personal data, to which the public does not have a general right of access in the ordinary course [of business]” as opposed to Exemption 6, which protects personnel and medical files.

The Court said that Foster's surviving relatives have a privacy interest in the images of his dead body. Prohibiting disclosure of the Foster death-scene photos was the appropriate remedy in order to "secure [Foster's relatives']...refuge from a sensation-seeking culture for their...peace of mind and tranquility, not for the sake of Foster's reputation or some other interest personal to him." The Court said

This does not mean that the family is in the same position as the individual who is the disclosure's subject. However, this Court has little difficulty in finding in case law and traditions the right of family members to direct and control disposition of a deceased's body and to limit attempts to exploit pictures of the deceased's remains for public purposes. The well-established cultural tradition of acknowledging a family's control over the body and the deceased's death images has long been recognized at common law.

The Court qualified its conclusion, recognizing that Exemption 7(c) provides a statutory privacy right that extends beyond the common law and the Constitution, the Court said. Furthermore, the Court noted that if Exemption 7(c) did not apply in this case and circumstances

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35 Id. at 157-58.
36 Id. at 158.
37 Id.
38 Id.
39 Id.
like it, records of decedents could be obtained by anyone, including violent criminals, because FOIA withholding cannot be based on a requester's identity. The lack of the provision would come at the expense of surviving family members' personal privacy.\textsuperscript{40}

Having found that Exemption 7(c) does recognize survivor privacy rights, the Court's next main finding regarded whether the Foster family's privacy interest outweighed the public interest in disclosure of the Foster death-scene photographs. The Court noted that citizens who request access to a government record via a FOIA request are not required to provide an explanation for their request. However, when the federal agency with custody of the record invokes the privacy concerns under Exemption 7(c), the requesting party is required to demonstrate "that the public interest sought to be advanced is a significant one, an interest more specific than having the information for its own sake, and that the information is likely to advance that interest."\textsuperscript{41}

The Court admitted that it was not attempting in the \textit{Favish} decision to define what reasons would suffice or the necessary connection between the requested information and the public interest that would be result from disclosure. The Court did say, however, that there "must be some stability with respect to both the specific category of privacy interests protected and the specific category of public interests that could outweigh the privacy claim."\textsuperscript{42}

The Court said that the Ninth Circuit was correct in its ruling that Foster's family has a protectable privacy interest as well as its finding that there was a significant public interest in uncovering any deficiencies or misfeasance in the Government's investigations into Foster's death. However, the Court said the Ninth Circuit needed to require particular evidence of some actual misfeasance or other impropriety. Otherwise, the holding leaves Exemption 7(C) with

\textsuperscript{40} Id.

\textsuperscript{41} Nat'l Archives & Records Admin. v. Favish, 541 U.S. 157, 159 (2004).

\textsuperscript{42} Id.
"little force or content." The Court said that where the "invasion of privacy would be extensive," the requestor must show "evidence that would warrant a belief by a reasonable person that the alleged Government impropriety might have occurred." The Court found that Favish had failed to produce any evidence that could demonstrate government impropriety. Therefore, the Court held that the district court was correct in its first order when it prohibited the disclosure of all 10 photos at issue. The Court affirmed the decision of the U.S. Court of Appeals for the Ninth Circuit. The Court's holding was consistent with the view of the U.S. District Court for the District of Columbia and a lower circuit court that had addressed the question of survivor privacy rights as well.

_Favish_ is the first case in which the Supreme Court interpreted the application of a FOIA exemption in the context of survivor privacy rights, but the concept that survivors have a privacy interest in death-related information about their relatives was in practice at the federal level more than a decade before the _Favish_ decision. In February 1991, the same year that the U.S. District Court for the District of Columbia decided _Challenger_, President George H.W. Bush established

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43 Id.


47 Nat'l Archives & Records Admin. v. Favish, 541 U.S. 157, 171 (2004), citing "New York Times Co. v. Nat'l Aeronautics & Space Admin., 782 F.Supp. 628, 631, 632 (D.D.C.1991) (sustaining a privacy claim under the narrower Exemption 6 with respect to an audiotape of the Space Shuttle Challenger astronauts' last words, because "[c]hanneling the voice of a beloved family member immediately prior to that family member's death ... would cause the Challenger families pain" and inflict "a disruption [to] their peace of mind every time a portion of the tape is played within their hearing"), on remand from 920 F.2d 1002 (C.A.D.C.1990); Katz v. Nat'l Archives & Records Admin., 862 F.Supp. 476, 485 (D.D.C.1994) (exempting from FOIA disclosure autopsy X-rays and photographs of President Kennedy on the ground that their release would cause "additional anguish" to the surviving family), aff'd on other grounds, 68 F.3d 1438 (C.A.D.C.1995); Lesar v. Dep't of Justice, 636 F.2d 472, 487 (C.A.D.C.1980) (recognizing, with respect to the assassination of Dr. Martin Luther King, Jr., his survivors' privacy interests in avoiding "annoyance or harassment"). Neither the deceased's former status as a public official, nor the fact that other pictures had been made public, detracts from the weighty privacy interests involved."
an executive order restricting public access to the honor guard ceremonies honoring fallen American service members when their remains arrived to Dover Air Force Base from conflicts overseas. According to the order, which was known colloquially as the "Dover Policy," public access to the ceremonies was restricted in order to safeguard the privacy of service members' surviving relatives. Both the Clinton and George W. Bush Administrations adopted the ban, expanding it to prohibit the disclosure of government-generated photographs of the ceremonies as well. Then, in February 2009 - 18 years after the Bush Administration first enacted the Dover Policy - President Barack Obama modified it, stating that he would leave it up to the families of the deceased service members, not the Department of Defense, to decide if the public could witness the honor guard ceremonies. The following case study explores the Dover Policy's history, the lawsuits resulting from the controversy, and its significance to the understanding of the post-mortem relational privacy concept.

The Dover Policy: A Case Study

Under the direction of President George H.W. Bush, Defense Secretary Richard B. Cheney imposed the ban on media coverage of honor guard ceremonies at Dover in 1991 at the onset of the Persian Gulf War despite a long tradition of media coverage of such events. The Bush Administration said the ban was necessary to protect the privacy interests of surviving family members. However, one of the main critics of the ban, The National Archives, posted a chronology of related events prior to and since the ban was instituted on its Web site. The chronology infers that the policy was a response to an embarrassing incident two years earlier in


49 Media coverage of the arrival of remains at the port of entry or at the interim stops will not be permitted...Public Affairs Guidance - Operation Desert Storm, Casualty and Mortuary Affairs, Office of the Secretary of Defense (Arlington, VA), Feb. 2, 1991. See also, supra p. 81, n.15 (discussing that media access to honor guard ceremonies had been the DOD tradition since World War II until the ban imposed by President George W. H. Bush in 1991.)
which the national media aired a split-screen picture of President Bush joking at a White House news conference while the second half of the split screen aired an honor guard ceremony that was occurring simultaneously at Dover AFB.50 Citizens called the White House criticizing the president's less-than-solemn demeanor. In response, Bush complained to the media outlets about their editorial decision to juxtapose his "frivolous comments" with the Dover ceremony.51

In the time since Bush enacted the policy, both the democratic administration of Bill Clinton and the republican administration of George W. Bush maintained it. However, both made numerous exceptions to the policy, allowing the media to publish images from the ceremonies of both military and civilian casualties.52 For example, in November 2001, the media was given access to Andrews AFB for the arrival and transfer of the first American to die in the invasion of Afghanistan. In both March and April of 2002, the media photographed the arrival at Ramstein AFB, Germany of flag-draped coffins that carried the remains of four U.S. soldiers killed in Afghanistan.53 In an honor guard ceremony unrelated to military action, NASA disclosed photographs showing the transfer of the space shuttle Columbia astronauts' remains at Dover AFB in February 2003. That same month, the media was permitted to photograph the

50 Id. On Dec. 21, 1989, the day after the U.S. invaded Panama, the first U.S. casualties from the action were returned to Dover Air Force Base. At the same time, President George H.W. Bush held his first news conference since the invasion. Three networks (ABC, CBS and CNN) broadcast the two events in split screen, which allowed both events to be viewed at the same time. President Bush appeared to be joking during the news conference, despite the honor guard ceremony taking place simultaneously. The White House received calls from viewers complaining about the President's demeanor. See Return of the Fallen, The National Security Archive, http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB152/index.htm (last visited Apr. 1, 2009).


52 Id. In April 1996 the media photographed the arrival and transfer ceremony at Dover AFB for the remains of Commerce Secretary Ron Brown and 32 other Americans killed when their plane crashed in Croatia. President Clinton was present to receive the flag-draped caskets. In August 1998, the media photographed the arrival ceremony at Andrews AFB for Americans killed in simultaneous bombings of U.S. embassies in Tanzania and Kenya. The Pentagon disclosed a number of photographs as well, including one showing the transfer of the coffins at Ramstein AFB, Germany. In March 2001, the DOD disclosed photographs of caskets containing the remains of six military personnel killed in a training accident in Kuwait. In September 2001, the Department of the Air Force published a photograph of the arrival and transfer at Dover AFB of the remains of a victim in the Sept. 11, 2001 attack on the Pentagon.

53 Id.
loading of six flag-draped coffins in Kabul, Afghanistan destined for Dover AFB. The string of exceptions to the policy ended with the onset of the Iraq War in March 2003.

When the Iraq War commenced, the DOD vowed to “tighten” its enforcement of the policy. The Deputy Under Secretary of Defense for Military Community and Family Policy addressed the ban on media coverage as part of a broader discussion of casualty notification procedures. In light of the DOD's less-than-strict adherence to the policy, the media posed asked whether exceptions would be made. The Deputy Under Secretary of Defense for Military Community and Family Policy said, "I don't know that there's a general standard or a threshold through which you have to pass….There have been exceptions to the policy, you're absolutely correct….I don't know what would go in to say that we've crossed that threshold.”

A year after the Iraq War began, the DOD had made no exceptions to the Dover Policy. Russ Kick, who maintained a Web site called http://www.thememoryhole.org, filed a FOIA request for the government-generated photos of the Dover honor guard ceremonies. The Air Force Mobility Command forwarded Kick's request to the Air Force’s main FOI Office, which denied it. Kick appealed. Then, in direct contradiction to the policy, the Air Force released 288 of the photos he requested. Kick posted them on his Web site, which states its purpose is to "preserve and spread material that is in danger of being lost, is hard to find, or is not widely known.”

DOD officials, who called the disclosure a mistake, promised that it would deny

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54 Id.
55 Id. The National Security Archive states that this briefing appears to be the first public discussion of the policy by the military since the initiation of the 2001 Afghanistan and 2003 Iraq conflicts.
56 Id. (describing Deputy Under Secretary of Defense for Military Community and Family Policy Molino Briefing on Remains Transfer Policy in response to questions about exceptions to the media ban, Apr. 22, 2004).
subsequent FOIA requests for government-generated photographs of the honor guard ceremonies and that neither the general public nor the media would be granted access to Dover AFB for the purpose of attending the events.60

Critics of the policy argue that the DOD'S logic is incongruous considering that identification of the deceased during a Dover honor guard ceremony is nearly impossible. For example, in November 2003 - while the Iraq War was ongoing and there was no media coverage of US casualties of the war - the DOD disclosed photographs of an honor guard ceremony at Hickam Air Force Base, Hawaii that paid tribute to the remains of a U.S. service member who had been killed during the Korean War. The coffin was draped with a flag and had no personally identifying information. The coffin of the Korean War soldier was draped in given the identical treatment given to caskets of Iraq War casualties.

Thememoryhole.com contends that another irony of the policy is that the DOD participated in proactive disclosure of the documents at the same time that there was a DOD policy banning it. As of March 29, 2004, the Dover Air Force Base Mortuary maintained a home page that included a photograph of flag draped caskets being returned to Dover AFB in a transport aircraft. This Web site has since been taken offline.61

The Pentagon's admonishment of the disclosure prompted University of Delaware Professor, and former journalist, Ralph Begleiter62 and the National Security Archive to


61 See The Photos You're Not Supposed to See, http://www.exit.com/Archives/caskets/ (displaying the final image the Dover AFB had posted on its site before it went inactive, Apr. 1, 2009.

challenge the policy.  Begleiter made several FOIA requests similar to those filed by thememoryhole.com. The DOD rejected the requests, so Begleiter filed suit against the DOD.

In *Begleiter v. Department of Defense*, Begleiter alleged that the Pentagon failed to comply with the FOIA.  Begleiter said:

> There is nothing macabre or ghoulish about these images. These are among the most respectful images created of American casualties of war - far less wrenching than images we regularly see from the battlefield. They're taken under carefully controlled circumstances by military photographers covering honor ceremonies.

On April 18, 2005, six months after the suit was filed, the Pentagon preempted a court ruling by releasing 700 previously exempt images of the Dover honor guard ceremonies. In response to the Pentagon’s disclosure of the photos, Begleiter said:

> This is an important victory for the American people, for the families of troops killed in the line of duty during wartime, and for the honor of those who have made the ultimate sacrifice for their country. This significant decision by the Pentagon should make it difficult, if not impossible, for any U.S. government in the future to hide the human cost of war from the American people.

According to the National Security Archive, the disclosure confirmed “that images of their flag-draped coffins are rightfully part of the public record, despite [the DOD's] earlier insistence that such images should be kept secret.” The National Security Archive Director Thomas Blanton said that by releasing the photos the government essentially admitted that its policy was flawed. He said:

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63 Id.

64 The Freedom of Information Act case was filed in Federal District Court for the District of Columbia [Case No. 1:04-cv-01697 (EGS)], [http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB152/index.htm](http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB152/index.htm) (last visited Oct 31, 2006).


66 See The National Security Archive special Exhibition for a complete gallery of the images released to Begleiter, [http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB152/casket_exhibit.html](http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB152/casket_exhibit.html)(last access Apr. 2, 2009).

67 Id.

Hiding the cost of war doesn't make that cost any less. Banning the photos keeps flag-draped coffins off the evening news, but it fundamentally disrespects those who have made the ultimate sacrifice.69

However, after releasing the 700 photos, the DOD appears to have stopped photographing the honor guard ceremonies all together. Begleiter said in his online account of the events surrounding his request for the photos that military officials have admitted to both him and the news media that the military ceased photographing honor guard ceremonies after his April 2004 FOIA request. As a result, there would no longer be any visual documentation of the ceremonies to release. The Dover Policy has continued to be in effect since that time with no exceptions.

When Barack Obama took office, he asked the DOD to review the Dover Policy. Defense Secretary Robert Gates, who also served as President Bush's Defense Chief, said he had previously deferred to Pentagon advisers, who said "letting the news media take pictures might compel families to travel to Dover to be there to receive their loved ones' remains rather than wait for them to arrive home." Gates also said advisors had told him the policy was meant to protect the privacy of grieving families."70 However, after reviewing the policy for President Obama, Gates recommended that the Dover ceremonies be treated like the funerals at Arlington National Cemetery, where families, not the government, decide whether the news media may attend. "I was never comfortable with the justification," Gates said. "We should not presume to make the decision for the families. We should actually let them make it."71

President Obama accepted Gates' recommendation, and in late February 2009, Gates announced that President Obama would lift the ban on news coverage of the Dover honor guard ceremonies.

69 Id.
70 Id.
ceremonies, leaving the decision to allow media coverage to the families of the dead service members.72 In response to the announcement, Begleiter urged the Pentagon to resume fully documenting the return of American casualties.73

![Figure 4-1. An honor guard ceremony at Dover Air Force Base for U.S. service members killed in action during the Iraq or Afghanistan conflicts. Identities of the deceased cannot be deciphered from the photographs disclosed to the public.74](image)


CHAPTER 5
PUBLIC ACCESS TO AUTOPSY RECORDS AT THE STATE LEVEL: A 50-STATE STUDY OF AUTOPSY ACCESS STATUTES

Many of the issues related to the death of a citizen are the responsibility of the state government in the jurisdiction in which the person died. For example, states are responsible for issuing death certificates, conducting autopsies, and keeping vital data on deceased citizens. Also, state law enforcement agencies usually have jurisdiction over accidents or criminal investigations pertaining to deaths that occur within their state. In the process of documenting these activities, a state government generates a variety of records, including death certificates, photographs of death scenes and autopsy reports. Additionally, states legislate how the bodily remains of a decedent should be handled and what information about a death must be reported and to whom.

Relatives of the deceased may have a privacy interest in the disclosure of this kind of information. Non-relative citizens may also have a competing interest in being able to access the same information. Determining which interest prevails is sometimes addressed preemptively by state legislatures who enact legislation to regulate public access to such records. This chapter examines the extent to which state legislatures have recognized relational privacy interests in the post-mortem context and codified legal protections for those interests. This chapter also discusses how state legislatures have balanced these interests with the public's interest in accessing government records.

It is beyond the scope of this dissertation, however, to examine how each state regulates public access to every type of death record that it generates. For example, a comparable study of public access to death-scene photographs would be an appropriate companion to this study because death-scene records are characteristically similar to autopsy records. Such a study could provide additional insights and is recommended in the conclusion chapter for further research.
However, the magnitude of such a study is beyond the immediate goals of this dissertation. For now, this chapter presents the findings of a study conducted to examine how each state and the District of Columbia treats public access to one type of death record in particular - autopsy reports. Although this study actually includes 51 jurisdictions - 50 states and the District of Columbia - for the purposes of this dissertation, this method of examination is referred to as a 50-state study.

The researcher chose to examine statutes regulating public access to autopsy records in particular for two reasons. First, autopsy records contain information of such a revealing nature that the public has a variety of reasons for requesting them on a regular basis. Autopsy records explain a person's death in both narrative and audio-visual terms. They allow pathologists to “see for [themselves]” what caused a person's death. In contrast, other types of death-related records, like death certificates, contain limited data such as the time, place and cause of death.

The second reason the 50-state study focused on autopsy records instead of any other type of death records is because the vast majority of states have addressed public access to these types of records. Overall, 46 states and the District of Columbia legislate public access to autopsy records in some manner. Therefore, autopsy records offered sufficient data for a comprehensive examination of related access statutes.

The 50-state study of public access to autopsy records was conducted in two parts. The first part of the study provides an initial understanding of how state legislatures regulate public

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1 See supra p. 40 for discussion on the variety of health-related and investigatory reasons why a member of the public might request an autopsy record. See also, supra p. 30 for discussion of more prurient reasons for an autopsy request.

2 Autopsy derives from the Greek for "to see for yourself." Ed Friedlander, M.D., Pathologist, Autopsy, http://www.pathguy.com/autopsy.htm (last visited Mar. 29, 2009). Within the law, one statutory definition of "autopsy" is that it is "a post-mortem dissection of a dead human body in order to determine the cause, seat or nature of disease or injury and includes the retention of tissues customarily removed during the course of autopsy for evidentiary, identification, diagnosis, scientific or therapeutic purposes." N.M. Stat. Ann. § 24-12-4 (2008).
access to such records. However, the actual degree of access that a citizen has to such records is determined only in part by the statutory regulations. State court interpretations of those statutes, when they exist, provide a necessary additional level of understanding. Therefore, the second part of the study looked at the case law of each state and identified precedential cases in which court interpreted the relevant statutes.

Statutory Study

Method for the statutory research

The first step in the 50-state study was a database search within the statutes of each individual state for legislation reflecting the specific search terms devised for this study. The researcher designed a search string that isolated the relevant language within each states' statutes. The researcher looked through all of the states’ statutes, and not simply in the open records law. The dissertation makes an effort to use the language of an individual statute whenever discussing its statutes specifically. Therefore, the terms “autopsy report,” “coroner’s report” and “post-mortem inspection” are interchangeable. Furthermore, no state distinguished between forensic and clinical autopsies when regulating public access to such records, so for the purposes of this dissertation, the study treated them equally as well. The term “death certificate,” however, is not synonymous with any of these terms because it is not a record of a post-mortem examination.

The researcher reviewed the findings of the search in order to determine the degree to which each state allowed the public access the state's autopsy records. First, the researcher

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3 A Lexis search was conducted for the following terms: "autopsy and public record," and "death and public record," and "death and record," and "record and relative," and "record and next of kin," and "release and death," and "coroner and record," and post-mortem inspection and record."

4 A forensic autopsy is conducted for medical-legal purposes.

5 A clinical autopsy is usually performed in hospitals to determine a cause of death or for research and study purposes.
looked for any language discussing autopsy records and isolated language that specifically addressed public access to such records. Then, the researcher followed a specific pattern of organization to analyze the findings. The researcher developed a taxonomy in order to organize the myriad of ways the states regulate access to autopsy records. The organizational chart of that taxonomy is illustrated below and depicts the categories, factors, and criteria into which the statutes were dissected. The organizational process was comprised of two steps. First, the researcher mapped out the law of each state, determining whether the statutes expressly mentioned access to autopsy records, and if they did, whether they expressly stated the presumptive status of the law. Second, the researcher consolidated the variety of criteria that states used to determine whether access would be granted. Each state used its own language and formulation, but six factors were identified amongst them consolidating the various criteria.

**Step 1: Mapping the Law**

1. The researcher established whether a state's statutes either did, or did not, mention public access to autopsy records.

2. In those states whose statutes mentioned public access to autopsy records, the researcher determined whether the statutes stated a presumption of whether the records were open or closed to the public.
   a. If the presumption was specifically stated, the researcher looked for any additional explanation of access. In other words, what were the parameters established for granting or denying access.
   b. If no presumption was stated, the researcher looked for any other articulation access to autopsy records in the state’s statutes.

Given this organizational structure, there were six possible categories into which a state could be organized: 1) the statutes make no mention of public access to autopsy records, 2) the statutes expressly state that autopsy records are presumptively open, but there are no more specific criteria established for the public's access to such records, 3) the statutes expressly state that autopsy records are presumptively open and there are more specific criteria spelling out the
public's access, 4) the statutes expressly state that autopsy records are presumptively closed but there are no specific criteria established for the public's access, 5) the statutes expressly state that autopsy records are presumptively closed and there are more specific criteria spelling out the public's access, and 6) the statutes do not expressly state whether autopsy records are presumptively open or closed but the statutes do discuss in some way the criteria controlling of the public's access to such records.

In states where the statutes discussed the public's access to autopsy records beyond a presumptively open or closed status, the following taxonomy was used to organize the various criteria used.

**Step 2: Consolidating the Criteria**

The researcher identified six common factors among the criteria in the states' statutes upon which a record custodian, acting in accordance with the statute, grants or denies a requesting party access to an autopsy record. A state could use more than one of these factors.

1. **Access based on the type of information** - The statute specifies which types of information may or may not be disclosed. Such categories may include the name, age and gender of decedent.

2. **Access based on circumstances of death** - The statute specifies whether a record may or may not be disclosed depending on the circumstances that surrounded the death.

3. **Access based on the effect of disclosure** - The statute specifies whether specific effects resulting from disclosure of the autopsy record, such as an invasion of privacy or putting an investigation in jeopardy, prohibit or allow for disclosure of the record.

4. **Access based on medium of record** - The statute specifies whether access is granted to information stored in a certain medium such as written transcript, photograph or x-ray.

5. **Access based on person or agency granted access** - The statute specifies the specific person or agency that may or may not be granted access to an autopsy record.

6. **Access based on purpose of request** - The statute specifies the purpose for which an autopsy record must be used in order for access to be granted.
The organizational chart at the end of this chapter represents the taxonomy described in two parts above. First, this chart was developed to visually depict the categories that mapped out the law with regard to whether access to autopsy records was included in a state's statutes and, if so, whether the statutes expressly stated a presumptive status and/or specific criteria to further explain access. Second, the organization was further defined by the factors that consolidated the criteria used by states to further explain access to autopsy records.

After completing the organizational framework of access to autopsy records in the 50-states and the District of Columbia, the researcher organized the findings within each state according to the taxonomy of categories, factors and criteria. The chart below represents the findings according to this organization scheme. The first step of the organizational process, mapping out the law, is represented in the chart in a three-color system as well as the acronyms for "No Mention" (NO), "No Presumption" (NP), "presumptively open (PO), "presumptively and closed (PC). Those color codes are listed in the legend States are listed in alphabetical order.

The second step in the organization process, consolidating the criteria, was also charted. That chart is also available at the end of this chapter. The six factors, which consolidate the specific criteria included in each state's statutes, are listed in columns along the top row. An asterisk ("*"} marks each factor that exists in the statutes of a state. The specific statutes are included in the following narrative.

**Narrative Review of the Findings**

As described in the previous methodology section, the first step in assessing the degree public access to autopsy records in a given state was to determine whether the statute included a presumption of public access to the record, and if so, whether the presumption was open or closed. Of the 50 states and the District of Columbia, only four states make no mention of public
access to autopsy records.⁶ That means the vast majority of states, 90 percent, legislate public access to autopsy records to some degree. The following sections discuss the states that expressly mention whether their autopsy records are presumptively open or presumptively closed to the public.

Twenty-four states, almost half, explicitly proscribe that their autopsy records are either presumptively open or presumptively closed.⁷ For example, Alabama is one of 16 states with autopsy records presumptively open to the public. Alabama's statute states

The director [of the Department of Forensic Sciences] shall keep photographed or microphotographed reproductions of original reports of all investigations that he conducts in his office. Reproductions of such materials shall be public records and shall be open to public inspection at all reasonable times. Any person desiring reproductions of original reports shall be furnished [the] same upon payment of the fee now prescribed by law.⁸

More than two-thirds of the states whose autopsy records are presumptively open also include further criteria controlling access on access. For example, Maryland statutes provide that autopsy records are open to the public.⁹ However, such records are exempted if disclosure could interfere with law enforcement functions or litigation. Disclosure is also prohibited if it would constitute an unwarranted invasion of privacy, disclose a confidential source, or endanger an individual.¹⁰

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⁶ Massachusetts, Michigan, Nevada, and Wisconsin make no mention of public access to autopsy records. The researcher applied the specified search string to these states statutes. After finding no relevant statutes, the researcher made a secondary search through the table of contents of these states' statutes and the states' case law in order to confirm that there were no statutes regarding public access to autopsy records.

⁷ Of the 24 states that expressly stated the presumptive status of autopsy records in their state, 16 are presumptively open and eight are presumptively closed.


⁹ MD. CODE. ANN. § 10-617(b) (2009).

¹⁰ Id. at (j)(4).
Eight states have enacted statutes proscribing that their autopsy records are presumptively closed. Yet all of these states' statutes spell out criteria for access.\textsuperscript{11} For example, California's autopsy records are presumptively closed. However, the statutes provide an exception to non-disclosure when the records will be used in a criminal action or proceeding in that state that relates to the death of the person who is the subject of the autopsy, or “after good cause has been shown.”\textsuperscript{12} Additionally, California's statutes allow disclosure if the purpose is for use in the field of forensic pathology, medicine, scientific education or research, or for use by any law enforcement agency in California or any other state in the United States.\textsuperscript{13}

While the laws in Maryland and California are explicitly clear about whether or not the public has a presumptive right of access to their autopsy records, other states' statutes are more ambiguous. Twenty-two states and the District of Columbia do not expressly declare whether their autopsy records are presumptively open or closed. However, the twenty-two plus the District of Columbia have enacted statutes that include some criteria on the public's access to autopsy records.

For example, Arizona statutes do not expressly state whether the public may access autopsy records, however its statutes do state that autopsy records may be disclosed to county attorneys.\textsuperscript{14} Also, its statutes expressly state that record of an autopsy that was ordered as a result of the filing of a claim for compensation for death from an industrial injury or occupational


\textsuperscript{12} CAL CODE CIV. PROC. § 129 (2008).

\textsuperscript{13} Id.

\textsuperscript{14} ARIZ. REV. STAT. § 11-597 (2009).
disease is also available to the public. Additionally, its statutes mention that the state does not consider autopsy records "vital records," which are confidential. Therefore autopsy records are neither presumptively "open" nor "closed" in Arizona, according to the state's statutes, but the statute does contain criteria that provide limited access for some people and under some circumstances.

The following section examines the different criteria the states have adopted, organized by the six factors mentioned above.

Factors Controlling Access to Autopsy Records

Assessing whether a state’s autopsy records are presumptively open or closed provides an initial reference point by which to evaluate a state’s treatment of public access to autopsy records. The general assumption that a state either provides or doesn’t provides access to autopsy records is significant because it determines whether a citizen who is seeking a record starts the request process with an advantage or disadvantage. If the state's statute proscribes that autopsy records are presumptively open, the burden is on the custodial agency to invoke an exemption. Upon challenge, the custodial agency would have the burden to prove the applicability of the exemption. In contrast, if the state's statutes proscribe that autopsy records are presumptively closed, then the burden is on the requesting party to show why an exemption does not apply, or, depending on the criteria, whether there is a public interest or good cause for disclosure. In the latter circumstance, the custodial agency is the first decision maker as to whether a requesting party meets the burden. A citizen does have the option to then appeal an

16 ARIZ. REV. STAT. § 36-301 (2008).
unfavorable decision to a court, to which the citizen must also meet an established burden such as public interest or good cause.

However, the insight provided by expressly stated presumptive statuses is complicated by the fact that 10 out of 15 presumptively open states and the District of Columbia, and all eight of the presumptively closed states, have enacted additional criteria. The individual criteria themselves can delineate exactly who will be granted access to a record under what circumstances. A criterion can name an occupation such as “coroner,” or type of record such as “age,” or circumstance of death such as “crime.” However, criteria themselves sometimes use terms of art, such as "good cause," to articulate the purpose of releasing the record, without defining the term and therefore fostering ambiguity, and perhaps confusion, for the records custodian. The next six sections provide more detailed explanations and examples of the several criteria, organized into six factors that states employ to determine whether the public may access its autopsy records. Each section provides an initial number of states that determine access according to the respective factor. The subsequent examples describe the variety of criteria that fall under those factors. The previous chart included the factors that each state depends upon for determining access.

**Access based on type of information**

Access to autopsy records in a specific state may depend on the type of information that is contained in the autopsy record. In Texas, for example, records of autopsies conducted by a county coroner are subject to public disclosure, but the legislature expressly required that records of an autopsy conducted on a child 12 months or younger be provided to the child’s

parents or legal guardians.\textsuperscript{19} Here, the age of the decedent is the \textit{type of information} that determines whether a requesting party is granted access to the record.\textsuperscript{20} Eight states have enacted statutes that either increase or decrease disclosure based on this factor.\textsuperscript{21}

Other examples where states granted access based on the type of information contained in the record exist in Indiana and Minnesota. Indiana statutes provide that a coroner who investigates a death is required to make available for public inspection a limited amount of information, including, but not limited to, the date and time of a death, the specific location of the death, and immediate facts and circumstances surrounding a crime or incident resulting in death.\textsuperscript{22} Minnesota statutes require that a coroner who investigates a death make available for public inspection a limited amount of “medical examiner data” relating to deceased individuals. This includes, but is not limited to, date and time of death, specific location of the death, and immediate facts and circumstances surrounding a crime or incident resulting in death. In Minnesota, other types of data not specifically listed in the statute are exempt from disclosure except by court order or for investigative purposes.\textsuperscript{23}

These statutes are examples of one of six factors -- the type of information -- that helps organize the kinds of criteria that is used by a records custodian to determine whether autopsy records ought to be released to the public. Another factor that states have used to determine access is the circumstance surrounding the death.

\textsuperscript{19} \textsc{Tex. Health & Safety Code} § 673.002 (2009).
\textsuperscript{20} The other factors and criteria involved in this example will be illustrated in the coming pages.
\textsuperscript{22} Ind. Code § 36-2-14-18 (2009).
\textsuperscript{23} Minn. Stat. § 13.82(2) (2008).
Access based on circumstances surrounding the death

Access to autopsy records may also depend on the circumstances surrounding the death, which can also be described as the manner in which the person died. Ten states, almost 20 percent, contain statutes determining access based on this factor. In Idaho, for example, where autopsy records are presumptively closed, the disclosure is allowed when there is a possibility of fraud related to benefit payments stemming from the death. Kansas requires disclosure when an autopsy is necessary to “accurately and scientifically” determine the cause of death after a claim is made for compensation for death from an occupational disease. In New Hampshire, autopsy reports of a murder victim may be disclosed on a limited basis. In Louisiana records are not expressly open or closed, however exemptions prohibit disclosure of autopsy records in two circumstances: 1) when the death is a “non-coroner case” and 2) when the cause of death is natural. In Idaho, where autopsy records are presumptively closed, disclosure is allowed in certain circumstances. For example, when an autopsy is conducted in connection with the filing of a claim for compensation for death from an occupational disease, the public can gain access to the record.

In addition to the circumstances surrounding the death, some states also determine access based on the effect the disclosure of the record may have.


Access based on the effect of disclosure

The presumed effect of a record’s disclosure is also a determinative factor for access to autopsy records in some states. Seven states and the District of Columbia, or 16 percent, determine whether access is granted on this factor.30

The District of Columbia and four states have enacted explicit provisions that prohibit disclosure if it would constitute an invasion of privacy.31 However, in the District of Columbia any person with a "legitimate interest" can gain access to autopsy reports.32 West Virginia statutes prohibit disclosure of information of a “personal nature” that is kept in a "personal, medical or similar file," if its disclosure would constitute an unreasonable invasion of privacy. To overcome this presumed effect in West Virginia, the requesting party must show by clear and convincing evidence that disclosure is necessary for the "public interest.”33 The Illinois statutes do not address the disclosure of autopsy records specifically, but they provide a privacy exemption that prohibits the disclosure of “files and personal information” maintained with respect to patients who receive medical care or services “directly or indirectly from federal agencies or public bodies.”34

Three states - Georgia, Iowa, and Maryland - provide exemptions from disclosure when the record affects an investigation in particular. Georgia law provides that “official copies of records

31 District of Columbia, Georgia, Illinois, Maryland, and West Virginia.
32 D.C. CODE ANN. § 5-1412(c) (2009).
34 ILL. COMP. STAT. 5 140/7(1)b(i) (2009).
of deaths...shall remain accessible to the public.” 35 However, in closed investigations, disclosure is allowed if a superior court finds that the public interest served by disclosure outweighs any privacy interest that may be asserted by the decedent’s next of kin. 36 In Tennessee, disclosure is prohibited if it would “impede or impair” an investigation. 37 Iowa prohibits disclosure of the cause or manner of death if it would “seriously jeopardize an investigation or pose a clear and present danger to the public safety or the safety of an individual.” 38 Maryland prohibits disclosure if it would interfere with a law enforcement function, investigation, or litigation. Disclosure is also prohibited if it would 1) constitute an unwarranted invasion of privacy, 2) disclose a confidential source, 3) disclose an investigative technique or procedure, or 4) endanger an individual. 39

**Access based on medium of record**

Access to an autopsy record may depend on the medium, or format, in which its contents are stored. Ten states, or 20 percent, determine whether a record is available to the public based on the medium of the contents. 40 There are a variety of formats in which an autopsy may be recorded, including the written record, audio and visual recording, photographs or x-rays.

In Florida, for example, the statutes prohibit disclosure of photographs, video, or audio recordings of an autopsy that are in the custody of a medical examiner. However, a court may

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38 Iowa Code § 22.7 (2008).
grant any person access to such files if that person demonstrates “good cause.”\textsuperscript{41} Similarly, North Carolina also prohibits the disclosure of audio-visual portions of an autopsy record, except when the requester can show “good cause.”\textsuperscript{42} This type of caveat for "good cause" is discussed in a subsequent section of this chapter and qualifies as a distinctive factor for determining access, called \textit{purpose of disclosure}. 

The states of Indiana,\textsuperscript{43} New Jersey,\textsuperscript{44} and South Carolina\textsuperscript{45} also prohibit the disclosure of autopsy photos, video recordings and audio recordings, but they do not include any exceptions allowing for either “good cause” or the “public interest.” Texas also prohibits the disclosure of audio-visual portions of an autopsy record. However, it is the only state that allows the disclosure of autopsy photographs and related audio-visual materials when the records are 1) under subpoena or 2) of a person who died while in the custody of law enforcement. The records also may be disclosed when “under authority of other law,” although clarification on this term does not exist in the statutes.\textsuperscript{46}

In Georgia, access to autopsy photographs is prohibited except in a handful of specific cases, including if a superior court finds that disclosure would favor a “public interest” and would outweigh any privacy interest that may be asserted by the decedent’s next of kin.\textsuperscript{47} North

\textsuperscript{41} FLA. STAT. § 406.135(2) (2009) (proscribing that "in determining good cause, the court shall consider whether such disclosure is necessary for the public evaluation of governmental performance; the seriousness of the intrusion into the family's right to privacy and whether such disclosure is the least intrusive means available; and the availability of similar information in other public records, regardless of form.") This exemption is tempered with a requirement that the deceased's next of kin shall be given reasonable notice of a petition filed with the court to view or copy the audio-visual portions of an autopsy record. \textit{Id.}

\textsuperscript{42} N.C. GEN STAT. § 130A-389.1 (2009).

\textsuperscript{43} IND. CODE § 36-2-14-18 (2009).


\textsuperscript{45} S.C. CODE ANN. § 30-4-40 (2008).

\textsuperscript{46} TEX. CODE CRIM. PROC. art. 49.25 (2009).

\textsuperscript{47} GA. CODE. ANN. § 45-16-27 (2009).
Dakota prohibits the disclosure of autopsy photographs and visual images, but provides an exception for a criminal justice agency or for the purpose of an investigation or prosecution.\textsuperscript{48}

A Louisiana statute prohibits the disclosure of photographs, video and other visual images, in whatever form, of or relating to, an autopsy conducted under the authority of the office of the coroner. The statute prescribes that such images may only be released to 1) a family member of the deceased or his designee, 2) the succession representative of the deceased's estate or his designee, 3) a law enforcement agency for official use, or 4) as directed by a court order or subpoena.\textsuperscript{49}

Maine only grants access to photographs and related audio-visual materials to 1) the decedent's next of kin, 2) an insurer that may be responsible for payment of benefits as a result of a death if relevant to the payment obligation, 3) an attorney representing the estate of the decedent or the decedent's property if relevant to the representation, or 4) an attorney representing a person or a person's estate and exploring a possible civil action against the estate of the decedent if relevant to the representation.\textsuperscript{50} This exception is related tangentially to the next factor, which determines access based on the person or agency.

\textbf{Access based on person or agency requesting access}

Access to autopsy records may depend on the specific persons or agency requesting the record. Twenty-three states and the District of Columbia, or 47 percent of all the jurisdictions, contain directions for access to autopsy records by identifying specific persons or agencies that are granted access to such records.\textsuperscript{51} This study identified statutes based on this factor twice as

\begin{itemize}
\item \textsuperscript{48} N.D. CENT. CODE § 44-04-18.18 (2009).
\item \textsuperscript{49} LA. REV. STAT. ANN. 44:19 (2008).
\item \textsuperscript{50} ME. REV. STAT. ANN. 22, § 3022 (2008).
\item \textsuperscript{51} Alaska, ALASKA STAT. § 12.65.020 (2009); Arizona, ARIZ. REV. STAT. ANN. § 11-597 (2009); Arkansas, ARK. CODE ANN. § 12-12-312 (a)(1)(B)(i) (2008); District of Columbia, D.C. CODE ANN. § 5-1412(c) (2009); Florida,
often as the next most prevalent category - purpose of request, which exists in 12 states. The most often cited agencies to which access was expressly granted were state crime labs, police departments specifically, law enforcement agencies in general, child fatality review committees, medical schools, medical facilities, insurance companies investigating a claim arising from the death, and various government-operated medical divisions.

Various statutes provide access to public officers and public employees, including state medical examiners for the sake of, or in order to perform, a public purpose. Also, access is provided by some states to persons related to the deceased. Private, non-relative persons, who are granted access by a statute, include persons who have a financial or personal interest in the estate of the decease, attorneys, persons who may be criminally or civilly liable in the death, or their attorneys, and physicians for medical purposes.

The sixth and final factor that states use to determine access is the purpose for the request.

**Access based on purpose of request**

Eleven states allow access to autopsy records based on the purpose of the request. This type of exemption or exception is the second most common among the states, after person or agency requesting record. In California, for example, disclosure is expressly allowed when the

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52 See infra p. 135.

purpose of the request is to use the records in a criminal proceeding that relates to the death of
the person on whom the autopsy was conducted.54 Also, California allows disclosure when the
purpose of the request is to use the record in the fields of forensic pathology, medicine, scientific
education, or research.55 Maine has a similar exception, allowing disclosure of autopsy records
to limited agencies for the administration of criminal or juvenile justice.56

Several states use terms of art to describe the purpose for which a record may be disclosed.
For example, New York57 and West Virginia58 allow disclosure when the person making the
request can show a “substantial interest” in the records, although the statute does not define the
term further. California59 and Florida60 allow disclosure of visual records when the purpose is a
“good cause,” although neither state defines this term further.

Some states require a specific purpose when the request is for audio or visual records of an
autopsy. For example, Florida contains an exception allowing for the disclosure of audio-visual
records when the purpose of the request is to act in the furtherance of the official duties of the
local, state, or federal entity or agency requesting the record.61 Georgia allows for the disclosure
of audio-visual portions of an autopsy record to persons other than law enforcement when the
purpose of disclosure is in the public interest and that disclosure outweighs any privacy interest
that may be asserted by the deceased’s next of kin.62

54 CAL CODE CIV. PROC. § 129 (2008).
55 Id.
57 N.Y. COUNTY LAW § 677 (3)(b) (2009).
58 W. VA. CODE § 61-12-10(e) (2008).
59 CAL CODE CIV. PROC. § 129 (2008).
60 FLA. STAT. § 406.135 (2009).
61 Id.
In several other states, there are a variety of other stated purposes for which an autopsy record may be disclosed. For example, Illinois statutes allow for disclosure of autopsy records for several health-related purposes, including Alzheimer's treatment and research, and when the death of the person about whom the record pertains was a result of silica or asbestos dust and the Industrial Commission has appointed a pathologist to determine the cause of death. New Mexico has a similar statute that allows for disclosure of vital statistics derived from an autopsy that was conducted as a result of a claim for compensation for death from an occupational disease. In Delaware, autopsy information is disclosed when the purpose is to inform about the decedent as a possible donor of an anatomical gift.

Other health-related exceptions exist in Maine's statutes, which allow for the disclosure of an autopsy record when the purpose of obtaining the record is to carry out the medical examiner duties or to facilitate the harvesting of a decedent’s organs and other tissues. North Dakota allows disclosure of unidentifiable autopsy records for the purposes of 1) medical or scientific teaching or training, 2) teaching or training of law enforcement personnel, attorneys, or others with a "bona fide need" to use or understand forensic science, 3) conferring with medical or scientific experts, or 4) publication in a scientific or medical journal.

**Discussion: Trends in Statutory Regulation of Access to Autopsy Records**

Two main steps comprised this 50-state study. First, the researcher established the degree of access articulated in each state, which meant determining whether the statutes addressed

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63 20 ILL. COMP. STAT. 2310/2310-335 (2009).
64 820 ILL. COMP. STAT. 3110/12 (2009).
65 N.M. STAT. § 52-3-40 (2008).
public access to autopsy records in any way and, if they do, whether they state the presumptive status of access to the records. The findings of this 50-state study demonstrate that the vast majority of states, 92 percent, have addressed the issue of access to autopsy records in some manner. In those states where statutes expressly mentioned a presumption of public access to autopsy records, 16 states are presumptively open and eight presumptively closed. The second step was to identify whether a state legislature provided any further explanation of how access to such records was determined. The researcher discovered a number of criteria in the various states and, from those criteria, identified six factors that states use to determine whether to disclose an autopsy record.

The overall findings of the 50-state study reveal that public access to autopsy records comprises a range of treatments. States that have not addressed public access to autopsy records at all fall at one end of this range. Only four states - Massachusetts, Michigan, Nevada and Wisconsin - have yet to regulate public access to autopsy records in any way, leaving citizens in those states without statutory guidance of their rights, or of their states' responsibilities, pertaining to this type of death record. At the other end of the access-to-autopsy-record range are five states - Alabama, Colorado, Delaware, Hawaii and Ohio 69 - that expressly state that their autopsy records are open and provide no limitation on access.

In between the two extremes lie 41 states and the District of Columbia. Autopsy records are presumptively open in eleven states that include criteria for limitations on access. Autopsy records are presumptively closed to the public, automatically limiting public access to autopsy records, in eight states. However, all of these states also include other criteria regarding disclosure. Twenty-two states and the District of Columbia did not expressly indicate whether

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their autopsy records were presumptively open or closed, but 17 of those states and the District of Columbia included at least one criterion for openness or closure that fit into six factors identified in this study.

Some of the criteria favor disclosure of records. For example, the evidence shows that 16 state legislatures protect the public's ability to access autopsy records when the purpose of the request is for use by law enforcement. Six state legislatures protect the public's ability to access autopsy records or when determinations must be made for insurance purposes about occupational injuries or diseases. Access is also protected in three states when individuals die while in state custody. Five states protect the rights of defendants to access autopsy records if they are criminally liable for the cause of death of the person who is the subject of the autopsy. Statutes such as these support some of the First Amendment theories discussed in Chapter 2 such as autonomy, self-governance, and the checking value of the First Amendment on government. While the criteria in some states provides for access, criteria in other statutes

70 California, CAL CODE CIV PROC § 129 (2006); Georgia, O.C.G.A. § 45-16-27 (2005); Iowa, IOWA CODE § 22.7 (2005); KENTUCKY, KRS 17.150(2) (2009); Maine, 22 M.R.S. § 2842(3) (2005); Maryland, Md. CODE ANN. § 10-617(b)(2006); Missouri, Mo. REV. STAT. § 194.117 (2005); Nebraska, Neb. REV. STAT. § 84-712.05(2)(2005); North Dakota, N.D. CENT. CODE, § 44-04.18 (2005); Oklahoma, Okla. STAT. 63 § 949 (2005); South Carolina, S.C. CODE ANN. § 30-4-40 (2008); Texas, TEX. CODE CRIM. PROC. art. 49.25 (2009); Utah, UTAH CODE ANN. § 26-4-17 (2006); Virginia, VA. CODE ANN. § 32.1-285 (2006); Washington, WASH. REV. CODE 68.50.103; WASH. REV. CODE 68.50.105 (2005); West Virginia, W. VA. CODE § 61-12-10(b-e, g) (2006).


72 Connecticut, CONN. GEN. STAT. § 19a-411 (2006); Texas, TEX. CODE CRIM. PROC. art. 49.25 (2009); Vermont, VT. STAT. ANN. tit.18, § 5205(g) (2006).


74 See supra p. 72.
protects the privacy interests of relatives of the deceased. For example, four states and the District of Columbia expressly provide exemptions from disclosure based on privacy grounds.\textsuperscript{75}

Thus far, this chapter has deciphered the complexities of state-level statutory regulation regarding public access to autopsy records. The Marion Brechner Citizen Access Project at the University of Florida has used this data to rank the states and their approach to public access with regard to autopsy records. The results of this ranking are available online and offer insight as to how different states compare against the rest of the nation over all and in each of the six factor categories.\textsuperscript{76}

Analysis of the relevant state statutes provided an initial understanding of whether, and to what extent, each state regulates the public's access to autopsy records. These laws are significant in the study of post-mortem relational privacy because they provide citizens guidance as to a record's availability and the government's responsibility to provide records. Furthermore, the statutes provide guidance to relatives of the deceased who have a privacy interest in the death-related information contained in those records. The statutes are not, however, entirely determinative of whether access will be granted or denied. Court analysis of those statutes may further define the statutes or invalidate them all together. For that reason, it is equally significant to analyze the court cases that are relevant to the statutory regulations of public access to autopsy records.

**Court Interpretations of Statutes Regulating Public Access to Autopsy Records**

Statutes are significant in the pre-request and pre-disclosure phases of the post-mortem relational privacy continuum - the periods during which a citizen has not yet made a request for

\textsuperscript{75} District of Columbia, Georgia, Illinois, Maryland, and West Virginia.

\textsuperscript{76} The Marion Brechner Citizen Access Project, \url{http://www.citizenaccess.org}, funded the research for this 50-state study of statutes and cases pertaining to access to autopsy records.
the record, or such a request has been made, but the custodial agency has not yet disclosed it to the requesting party. A post-mortem relational privacy dispute may occur within this time frame if a non-relative seeks access to the government-held, death related records of a decedent's autopsy, and a surviving relative of the decedent objects to such a disclosure. Whether the custodial agency will grant access to the requesting party depends in large part on the statutes of the state in which the records are held. As the statutory analysis presented in this chapter demonstrated, if the state's statutes mention access to autopsy records at all, they may expressly state that such records are presumptively open or closed. Furthermore, the statutes may include other details on the issue such as exemptions that prohibit disclosure or exceptions that allow for disclosure. If the statutes do not state a presumption, they may still provide some further articulation as to whether the custodial agency may disclose the record. As the statutory analysis demonstrated, most of states and the District of Columbia each legislate public access to autopsy records in a distinctive manner.

The second remedy available to a relative in the pre-request and pre-disclosure phases is a court-ordered injunction on the disclosure of the record from a court with jurisdiction over the government agency with custody of the record. An injunction is feasible in two circumstances: 1) when an access-to-autopsy-record statute already exists in the state, and a court needs to interpret it, or 2) no access-to-autopsy-record statute exists in the state, and a court considers whether disclosure is appropriate. The court's interpretation of the statute will not only determine whether access will be granted in the instant case, but it may also set precedent for future requests for such records.

**Methodology For the Case Interpretations Research**

The method used to review the states' case law is similar in design to that which was used to analyze the states' statutes. First, the researcher reviewed the statutes collected in the statutory
analysis for any annotations to relevant court cases. Then, the researcher applied the same search string to the state-level case law of each state. The researcher was specifically looking for cases in which the state courts were addressing questions of statutory interpretation. The search excluded cases in which the court's primary task was to interpret the statute in accordance with its plain and ordinary meaning such as a petition for disclosure under the provisions of the statute where no question existed as to the scope and application of the statute. It was beyond the scope of this dissertation to evaluate every state-level case that involved a judicial grant or denial of access to an autopsy record. Therefore, the parameters of the study included only cases in which the court's determination either invalidated the statute or interpreted it to mean something that was not already established in the plain and ordinary meaning of the statute.

**Narrative Review of the Findings**

In 38 states, no case law existed in which a state court interpreted the access-to-autopsy-record statutes of the state. Therefore, in those states, only the statutes currently enacted dictate the public accessibility of autopsy records. Of the four states that do not have any statutes pertaining to the public's access to autopsy records, Nevada is the only state that also does not have any case law on the subject either. The three other states - Michigan, Massachusetts and Wisconsin - whose statutes make no mention of public accessibility to autopsy records, do have case law on the subject.

**Michigan**: The Michigan statutes make no mention of public access to autopsy records. However, in *Swickard v. Wayne County Medical Examiner*, the Michigan Supreme Court held

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77 See supra p. 117, n.77.


that autopsy records were open to the public if disclosure would not bring the decedent's surviving relatives into "unjustifiable publicity."\textsuperscript{80} In Swickard, a chief district court judge was found shot to death, and the postmortem examination found that the gunshot was self-inflicted. A newspaper reporter filed an action under the state's Freedom of Information Act, seeking disclosure of the coroner's report.\textsuperscript{81} The Michigan Supreme Court held that the decedent's common law privacy rights could not be maintained after his death, and the relatives of the deceased, who were objects of publicity, could not maintain actions for invasion of privacy unless their own privacy was violated. Further, the Court held that only the person whose rights had been violated could assert the constitutional right of privacy. The Court found that no private facts of the decedent's relatives would be revealed by disclosure of the records; the report would not reflect upon the lifestyle of any relatives; and the circumstances of the death were a matter of legitimate public concern. Therefore, in Michigan, because there is no statutory basis by which to regulate public access to autopsy records, the decision by the state supreme court in Swickard, which held that autopsy reports are public record unless a relative can show that there own rights will be violated by disclosure, is the binding precedent in the state.

**Massachusetts:** In Globe Newspaper Co. v. Chief Medical Examiner, the Massachusetts Supreme Court held that reports of autopsies conducted by the medical examiner are "medical files and information" and are exempt from disclosure under the state's public records statute.\textsuperscript{82} In this case, a newspaper brought an action for a declaratory judgment that it was entitled to the

\textsuperscript{80} Id. at 310.

\textsuperscript{81} MICH. COMP. LAWS § 15.231 (2009).

autopsy record under the state statute.\footnote{MASS. GEN. LAWS ch. 66, § 10(a) (2009).} Therefore, in Massachusetts, because there is no statutory basis by which to regulate public access to autopsy records, the decision by the state supreme court in \textit{Globe}, which held that autopsy reports conducted by a medical examiner are confidential, is the binding precedent in the state.

**Wisconsin:** In \textit{Journal/Sentinel Inc. v. Aagerup}, the Court of Appeals of Wisconsin held that a balancing test is required when determining whether an autopsy reports should be disclosed to the public.\footnote{Journal/Sentinel Inc. v. Aagerup, 429 N.W.2d 772 (Wis. Ct. App. 1988).} There was no relational privacy issue in this case. A journalist had requested a copy of an autopsy report and other documents related to the death of a murdered woman. The record's custodian denied the request on the grounds that the report contained information regarding crime detection, which was exempted from disclosure under state statute.\footnote{Id. at 821.} The trial court upheld the denial, and the journalist appealed. The appeals court affirmed the trial court's ruling, holding that the potential harm to the public interest in maintaining the confidentiality of crime detention techniques outweighed the benefits of disclosure. Disclosure, the appellate court reasoned, could give criminals information that would allow them to alter their actions to avoid detection. In Wisconsin there is no statutory basis to regulate public access to autopsy records. Therefore, the decision by the Court of Appeals in \textit{Aagerup}, which requires a balancing test for autopsy disclosure, is the binding precedent in the jurisdiction governed by this court and persuasive in other jurisdictions in the state.

**Court Interpretations Allowing Disclosure**

There is case law in five states in which a court interpreted the states' access-to-autopsy record statutes and found that the state legislature's intent was to allow disclosure of the state's
autopsy records.\textsuperscript{86} One important distinction in the readings of these court cases is that the findings, which occur at various levels of the state court systems, are binding in those respective jurisdictions only and are persuasive elsewhere in their respective states.

\textbf{Arizona}: Arizona statutes do not expressly state whether the public may access autopsy records, but there are individual statutes that would appear to provide criteria for determining whether access should be granted. For example, although the statutes, in general, do not expressly prohibit disclosure of autopsy reports, one statute in particular does distinguish that autopsy reports are not "vital records,"\textsuperscript{87} which are confidential.\textsuperscript{88} Another Arizona statute expressly provides for the disclosure of autopsy records to county attorneys.\textsuperscript{89} Yet another Arizona statute expressly provides for disclosure when an autopsy is ordered as a result of the filing of a legal claim for compensation for death from an industrial injury or occupational disease.\textsuperscript{90} However, in \textit{Star Publishing Co. v. Parks},\textsuperscript{91} the Court of Appeals of Arizona held that "autopsy reports are public records"\textsuperscript{92} and that the County Forensic Center cannot delay disclosure pending notification of relatives unless it can "point to specific risks with respect to a specific disclosure; it is insufficient to hypothesize cases where secrecy might prevail and then contend that the hypothetical controls all cases."\textsuperscript{93} Therefore, although the Arizona statutes do not expressly state that autopsy records are public, the Court of Appeals of Arizona, Division

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\textsuperscript{86} Arizona, California, Colorado, District of Columbia, Georgia, Louisiana and Pennsylvania.
\textsuperscript{88} ARIZ. REV. STAT. § 36-342 (2009).
\textsuperscript{89} ARIZ. REV. STAT. § 11-597 (2009).
\textsuperscript{90} ARIZ. REV. STAT. § 23-1072 (2008).
\textsuperscript{92} \textit{Id.} at 2.
\textsuperscript{93} \textit{Id.}
\end{flushleft}
two, did. Furthermore, the appeals court provided limited clarification of when the coroner is able to exempt such a record based on a risk to relational privacy interests. This holding is binding in the jurisdiction of this court and persuasive in other jurisdictions in the state.

**Colorado:** In Colorado, the access-to-autopsy-record statute proscribes that coroners' autopsy reports are specifically excluded from the general medical records exemption and are, therefore, public record. The Colorado Supreme Court held in *Denver Publishing Co. v. Dreyfus* that the statute demonstrates the clear intent of the legislature to classify autopsy reports, in general, as public records that are open to inspection. In 1987, in *Freedom Newspapers Inc. v. Bowerman*, Division Two of the Court of Appeals of Colorado held that autopsy reports are not criminal justice records, which were excluded from disclosure by the state's open records law. The appellate court concluded that the general assembly that had amended the Open Records Act to provide a specific exemption for criminal justice records would not have retained the specific reference to coroners' autopsy reports in the open records law if it had intended for the reports to be covered under the Criminal Justice Records Act.

In 2000, in *Bodelson v. Denver Post Corporation*, after the Columbine High School massacre, the Fourth Division of the Court of Appeals of Colorado held that the unique public grieving in the immediate aftermath of the shootings justified non-disclosure of the victims' autopsies. Five weeks after the Columbine High School tragedy, plaintiffs, county custodians and the victims' friends petitioned to restrict public inspection and disclosure of the victims'

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97 Id.
autopsy reports under the Colorado statute\textsuperscript{99} that provided for disclosure of the records. Several newspapers opposed the petition. The trial court found that release of the reports would cause substantial injury to the public interest and granted the petition for non-disclosure.

On appeal, the Fourth Division of the Court of Appeals of Colorado affirmed the trial court's grant of the petition to seal the records, holding that disclosure of the victims' autopsy reports could be restricted under the substantial injury to the public interest exemption.\textsuperscript{100} Although, "substantial injury to the public interest" is not defined in the Colorado statutes, the appellate court held that it is to be used only in those extraordinary situations, such as the Columbine massacre, which the state legislature could not have identified in advance.\textsuperscript{101}

In summary, Division Four of the Appellate Court interpreted the statute to provide an exemption for a situation that would cause substantial harm to the public interest. The Colorado Supreme Court clarified the statutes, holding that autopsy records are not exempted under the medical record exemption.

**Georgia:** In Georgia, the state's statutes proscribe that autopsy records are open to the public.\textsuperscript{102} In *Kilgore v. R. W. Page Corp.*,\textsuperscript{103} a newspaper filed an action against the coroner that sought to prohibit him from closing to the public a scheduled inquest, which the coroner had planned to close in order to avoid compromising an on-going criminal investigation. The Georgia Supreme Court held that the Georgia Open Records Act applies to the office of the

\textsuperscript{99} COLO. REV. STAT. § 24-72-204(6)(a) (1999).

\textsuperscript{100} Id.


\textsuperscript{102} GA. COD ANN. § 31-10-25

\textsuperscript{103} Kilgore v. R. W. Page Corp., 385 S.E.2d 406 (Ga. 1989).
coroner and that the coroner's inquest constituted a "meeting" within the meaning of the Act.\textsuperscript{104} Therefore, in Georgia the state supreme court affirmed the plain reading of the statute and clarified that an inquest is considered a meeting under the state freedom of information law.

**Louisiana:** Louisiana statutes do not expressly state that their autopsy records are open or closed to the public. However, they do provide that a coroner is required to make available for public inspection a limited amount of information, including but not limited to the date, time, specific location, and immediate facts and circumstances surrounding a crime or incident resulting in death.\textsuperscript{105} The statute also provides for several exemptions from disclosure, including autopsy reports pertaining to criminal litigation, autopsy reports in which the death is a non-coroner case,\textsuperscript{106} and autopsy reports in which the classification of death is that of natural causes, except upon the request of the next of kin. The state's statutes also exempts from disclosure audio and visual images of an autopsy\textsuperscript{107} and records of an autopsy on a child less than seven years of age if the child who died an "unexpected death…which is a result of undiagnosed disease, or trauma in which the surrounding circumstances are suspicious, obscure, or otherwise unexplained," or SIDS.\textsuperscript{108}

In 1998, in *Everett v. Southern Transplant Service, Inc.*,\textsuperscript{109} a mother alleged that employees of a coroner and a transplant company removed pieces of bones from the body of her deceased son and sent the bones to a hospital for use in surgery without her consent. The mother

\textsuperscript{104} GA. CODE ANN. § 50-14-1(a)(2) (2009).

\textsuperscript{105} LA. REV. STAT. ANN. § 33:1563(J) (2009).

\textsuperscript{106} A non-coroner case is a post-mortem examination conducted by a physician not under the authority of the state coroner's office.

\textsuperscript{107} LA. REV. STAT. ANN. 44:19 (2009).


sought to proceed in a class action on behalf of all survivors of decedents whose body parts were harvested without their consent. In the process of discovery, the mother sought to obtain copies of various documents from the coroner and the transplant company. The trial court held that the coroner's records and transplant company's documents were discoverable.\footnote{Everett v. Southern Transplant Serv., 700 So. 2d 909 (La.App. 4 Cir. 1997).}

The Fourth Circuit Court of Appeals of Louisiana vacated the judgment against the coroner on the grounds that a member of the public did not have a right to know the personal information contained in an autopsy report, such as whether the decedent had AIDS or whether the body contained an illegal drug. Moreover, the appellate court found that the mother did not show why she needed to see all the autopsy reports since a class action suit had not yet been certified. Ultimately, the appellate court amended the judgment against the transplant company to permit the company to delete from its consent forms the names of the deceased. As amended, the court affirmed the judgment against the transplant company.\footnote{Everett v. Southern Transplant Service, Inc., 709 So. 2d 764 (La. 1998).}

Therefore, in Louisiana, the state supreme court has held that given the variety of privacy exemptions that exist in the state's statutes autopsy records may be disclosed when steps to redact personally identifiable information are taken.

**New Jersey:** In New Jersey, the state's statutes proscribe that autopsy records are open to public inspection.\footnote{N.J. STAT. ANN. § 52:17B-88 (2009).} However, photographs, video recordings and audio recordings are exempt from disclosure. An exemption also exists for records used in the state in a criminal action or proceeding that relates to the death of that person.\footnote{N.J. STAT. ANN. § 47:1A-1.1 (2009).} In *Home News v. New Jersey Dept. of Health*, the New Jersey Supreme Court held that "a citizen's concern about a public problem is
sufficient" to warrant disclosure of cause-of-death information, in particular, where no particular confidentiality consideration outweighs the requesting citizens' common law right to the information requested.\textsuperscript{114}

In \textit{Home News}, a boy who had disappeared was found dead. The newspaper requested a copy of the boy's death certificate from the Registrar of Vital Statistics. A New Jersey statute requires that state registrars or other custodians of vital records supply certified copies of records, including records of death, to "any applicant."\textsuperscript{115} The registrar provided the newspaper with a copy, but did not include the cause of death on the grounds that the information was exempted from disclosure except when specifically named persons request the information.\textsuperscript{116}

The New Jersey Supreme Court, relying on the common law right to inspect documents and found that the newspaper had the requisite interest in the subject matter due to the unusual circumstances surrounding this particular death and the public interest in the information. Additionally, the Court found that the public interest was not outweighed by any confidentiality considerations since the decedent did not die of AIDS or a similar illness that would raise such concerns. The Court held that the entire death certificate should be provided because the requesting party had a statutory and common law right to inspect the death certificate, which was not curtailed by confidentiality considerations.\textsuperscript{117} Therefore, in New Jersey the state supreme court held that autopsy records are public. However, when there is a privacy consideration as to


\textsuperscript{116} N.J.A.C.8:2A-1.2 (2009) (providing that information concerning the cause of death is to be omitted from death certificates unless the applicant is the decedent's executor, surviving spouse or parent, or one who receives the consent of one of the listed persons).

the cause-of-death information contained in the record, the court must balance that interest against the public interest in the information.

**Pennsylvania:** In Pennsylvania, the statutes do not specify whether autopsy records are presumptively open or closed, however the state's access-to-autopsy record statute requires county coroners to transmit all autopsy records annually to the prothonotary\(^\text{118}\) for public inspection within 30 days of the close of the calendar year.\(^\text{119}\) Also, autopsy reports may be subject to the law enforcement exception in the state's Open Records Law.\(^\text{120}\) In *In re Buchanan*, a newspaper unsuccessfully requested the release of the autopsy report of a murder victim. On appeal, the Pennsylvania Supreme Court remanded the case to the trial court with instructions to determine whether the Commonwealth was able to establish that the release of the coroner's report to the newspaper actually posed a threat of "substantially hindering or jeopardizing the ongoing investigation."\(^\text{121}\)

The Pennsylvania Supreme Court held that coroners are required to make autopsy reports public, but that the legislature did not intend to eliminate the trial courts' inherent power to limit the public's right of access to the coroners' records by judicial discretion and necessity, although it failed to mention the authority in the statute. The Court held that the state's public records law was plain and unambiguous and facially did not provide for any exceptions to its general rule of

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\(^{118}\) The title *Prothonotary* means "first officer." The Prothonotary generally has the power to sign and affix the seal of the court to all writs and processes, and, also to the exemplifications of all records and process. Prothonotary, York Judicial Center, Pennsylvania, [http://www.york-county.org/departments/courts/proth.htm](http://www.york-county.org/departments/courts/proth.htm) (last access June 18, 2009).

\(^{119}\) 16 PA. CONS. STAT. § 1251 (2008).

\(^{120}\) 16 PA. CONS. STAT. § 1238 (2008).

\(^{121}\) *In re Buchanan*, 880 A.2d 568, 577-78 (Pa. 2005).
disclosure. The decision also reinforced that courts have discretion to exempt certain records on
the grounds that disclosure would jeopardize an ongoing investigation.  

**Court Interpretation Prohibiting Disclosure**

In five states, courts have interpreted statutes to mean that the public did not have access to autopsy records.  

**Connecticut:** In Connecticut, one state law provides that any person may obtain autopsy reports, and another state law provides that autopsy records are exempt from disclosure in certain circumstances. In *Galvin v. FOIC*, the Connecticut Supreme Court interpreted the statutes and held that the statutes embodied a policy of conditional rather than unfettered disclosure. In *Galvin*, a 16-year-old boy was shot and killed by a police officer. A newspaper reporter requested a copy of the teen's autopsy report, but the medical examiner refused on the grounds that the record was exempt as an investigatory file under General Statutes § 19a-411. The reporter contended that autopsy records were public under a different state statute, General Statutes § 1-19 (a), which provides that all records kept on file by public agencies shall be public records notwithstanding exemptions otherwise provided by any federal law or state statute. The Connecticut Appellate Court held in favor of the newspaper, finding that the provisions of § 1-19 had invalidated any contradictory provisions of General Statutes § 19a-411. However, on appeal, the Connecticut Supreme Court held that General Statutes § 19a-411 were not invalidated

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122 *Id.*

123 Connecticut, Delaware, New York, Iowa, and Ohio.

124 CONN. GEN. STAT. § 1-19 (a) (2008).

125 CONN. GEN. STAT. § 19a-411 (2008).


by contradictory statements in General Statutes § 1-19 and instead provided for exemptions for investigatory purposes.\footnote{Id. at 71.}

**Delaware:** In 2006, in *Lawson v. Meconi*, the Delaware Supreme Court held that the state's medical examiner statutes\footnote{Del. Code Ann. tit. 29, §§ 4706 (2009); Del. Code Ann. tit. 29, §§ 4707 (2009).} protected decedents' families by prohibiting the public disclosure of autopsy information.\footnote{Lawson v. Meconi, 897 A.2d 740 (Del. 2006).} At the time that Lawson was argued, the state's Health Records Privacy Law proscribed that autopsy records were public. In *Lawson*, a medical examiner determined that a man's death in a car fire was accidental. Subsequent to the finding, and in accordance with the statute proscribing that such records are public, a coroner's department official planned to issue a press release that contained information related to the man's cause of death. The decedent's widow filed a petition to prevent the disclosure of the autopsy report and any related confidential information that it contained.

At the trial court level, the Court of Chancery of the State of Delaware interpreted the Delaware Medical Examiners statute to 1)\footnote{Del. Code Ann. tit. 29, § 4701 (1) (2009).} allow a medical examiner who investigated the cause of a death to share autopsy information with a police agency on a confidential basis, and 2) that the statute created no privacy right in the autopsy information under the circumstances. The Delaware Supreme Court affirmed the first holding but not the second. The Court interpreted another related statute, the Delaware Health Record Privacy Statute,\footnote{Del. Code Ann. tit. 16, § 1232(e) (2009).} to permit release of otherwise protected information to authorized persons for the purpose of creating an autopsy report, but the information was otherwise protected. The Court also interpreted the Medical
Examiners statute\textsuperscript{133} to protect decedents' families by prohibiting the public disclosure of autopsy information. The Court cited the U.S. Supreme Court's decision in \textit{National Archives and Records Administration v. Favish},\textsuperscript{134} which recognized that the Freedom of Information Act, a federal statute, provided personal privacy protections for a decedent's family members. The Delaware Supreme Court said, "the power of Sophocles' story in Antigone maintains its hold to this day because of the universal acceptance of the heroine's right to insist on respect for the body of her brother." Therefore, although the state's Health Records Privacy Law proscribes that autopsy records are public, the Delaware Supreme Court interpreted the Medical Examiner's statute to create a right of privacy in the information for the decedent's surviving relatives.

\textbf{Illinois:} The Illinois statutes do not expressly mention the disclosure of autopsy records, but they do provide a privacy exemption that excludes from the public record “files and personal information” maintained with respect to patients who receive medical care or services “directly or indirectly from federal agencies or public bodies.”\textsuperscript{135} An exemption for disclosure may also exist if the records are part of a pending criminal investigation\textsuperscript{136} or an autopsy is conducted in a public hospital.\textsuperscript{137}

In \textit{Trent v. Office of the Coroner}, a trial court concluded, in part, and the Illinois Supreme Court affirmed that a mother convicted of murdering her child was not entitled to obtain the deceased child's medical records under the Illinois Freedom of Information Act\textsuperscript{138} because she

\begin{itemize}
\item \textsuperscript{133} Del. Code Ann. tit. 29, §§ 4706 and 4707 (2009).
\item \textsuperscript{134} Nat'l Archives & Records Admin. v. Favish, 541 U.S. 157, 168-69 (2003).
\item \textsuperscript{135} 5 ILL. COMP. STAT. 140/7(1)(b)(i) (2009).
\item \textsuperscript{136} 5 ILL. COMP. STAT. 140/7(1)(c) (2009).
\item \textsuperscript{137} 5 ILL. COMP. STAT. 140/7(1)(b) (2009).
\item \textsuperscript{138} 5 ILL. COMP. STAT. 140/1 (2009).
\end{itemize}
did not possess written consent from the deceased child.\textsuperscript{139} Therefore, in Illinois, the state supreme court interpreted the state access-to-autopsy statutes and the case facts of Trent to say that personal records were confidential and next of kin did not have authority to access them beyond the rights of other citizens.

**New York:** New York statutes do not expressly state that autopsy records are open to the public, but they enumerate the specific persons to whom access "shall" be granted, including the district attorney of the county; the decedent’s personal representative; spouse or next of kin; any person who is or may be affected in a civil or criminal action by the contents of the record of any investigation; or any person having a "substantial interest" in such record.\textsuperscript{140} However, in *Spencer v. New York State Police*, the New York Supreme Court Appellate Division held that portions of police files regarding autopsies performed on murder victims exempt from disclosure to citizens.\textsuperscript{141}

In *Spencer*, a prisoner was convicted of murder and sought disclosure pursuant to the state's freedom of information law, of the investigatory file compiled by the state police, which led to his arrest and subsequent conviction. The trial court held that the prisoner was entitled to disclosure of most of the file, with the exception of the victims' autopsy reports, statements of witnesses who did not testify at trial, and addresses and telephone numbers of witnesses who testified at trial. The state police appealed. After reviewing the investigatory file in camera, the court concluded that disclosure of portions of the file would reveal non-routine investigative procedures. Therefore, in New York there are limitations to a full understanding of whether autopsy records are public. Not only does the statute rely on vague language, the court appears

\textsuperscript{139} Trent v. Office of the Coroner, 812 N.E.2d 21 (3 Dist. 2004), appeal den'd, 824 N.E.2d 292 (Ill. 2004).

\textsuperscript{140} NY CLS LAW § 677(3)(b) (2009).

to create a non-statutory exemption for disclosure when it held that such records are exempt from "non-routine investigative procedures."\textsuperscript{142}

**Ohio**: The Ohio statute requires the disclosure of autopsy records.\textsuperscript{143} However, the statutes contain several exemptions for records such as suicide notes and photographs.\textsuperscript{144} Also, if an autopsy record is part of an “investigatory work product,” the statutes preclude disclosure.\textsuperscript{145} In *Dayton Newspapers Inc. v. Rauch*,\textsuperscript{146} a newspaper reporter requested the autopsy reports of two homicide victims. The coroner released some information about decedents but refused to release copies of the actual autopsy reports on the grounds that the reports are exempt from disclosure as confidential law enforcement records because their release would disclose "[s]pecific confidential investigatory techniques or procedures or specific investigatory work product."\textsuperscript{147} The coroner said that autopsy report contains information about the type of wound and how it was inflicted, which aid law enforcement personnel in conducting their investigation. Furthermore, the coroner said the report is used to test the credibility of witnesses.

The Ohio Supreme Court held that autopsy reports are investigations separate from the records that a coroner is required to keep as public record under the Ohio statute.\textsuperscript{148} The Ohio statutes exempted from disclosure law enforcement investigatory work product. The Court also

\textsuperscript{142}Spencer v. New York State Police, 591 N.Y.S.2d 207 (N.Y. App. Div. 1992) (not defining the term "non-routine investigative procedures").

\textsuperscript{143}Ohio Rev. Code Ann. \textsuperscript{\textbullet} 149.43(B) (2009); Ohio Rev. Code Ann. \textsuperscript{\textbullet} 313.09 (2009); Ohio Rev. Code Ann. \textsuperscript{\textbullet} 313.10 (2009).

\textsuperscript{144}Ohio Rev. Code Ann. \textsuperscript{\textbullet} 313.10 (2009); Ohio Rev. Code Ann. \textsuperscript{\textbullet} 313.091 (2009).


\textsuperscript{146}Dayton Newspapers Inc. v. Rauch, 465 N.E.2d 458 (Ohio 1984).

\textsuperscript{147}Ibid. at 459, citing Ohio Rev. Code Ann. \textsuperscript{\textbullet} 149.43(A)(2)(c).

\textsuperscript{148}Ohio Rev. Code Ann. \textsuperscript{\textbullet} 149.43(A)(2)(c), (B) (2009).
noted that the reports and records of autopsies were distinct from the other information, such as the name and age of a victim, the place where his body was found, and the causes of death, that a coroner kept, which could be disclosed to the public.\textsuperscript{149}

Therefore, the Ohio Supreme Court interpreted the state's statutes to mean that autopsy records were confidential investigatory work product, but that specifically named information from the reports was public independent of the report.

\textbf{Statute That Mooted Previous Case Law}

\textbf{Florida:} In Florida, autopsy reports created by a district examiner are public record. However, one of the exemptions provided by the Florida statutes precludes from disclosure any audio-visual portions of an autopsy record in the possession of the medical examiner.\textsuperscript{150} A court may grant any person access to such files if that person demonstrates “good cause.”\textsuperscript{151} The exemption was adopted as an amendment to the Florida statute in 2001, after the death of NASCAR racer Dale Earnhardt,\textsuperscript{152} effectively mooting the precedent in the Fifth District Court of Appeals that had been created in Williams v. City of Minneola ten years earlier.\textsuperscript{153}

In Williams, the mother and sister of a deceased 14-year-old boy sued the Minneola Police Department for intentional infliction of emotional distress and publication of private facts after learning that two of the department's officers investigating the teen's death shared photographs

\begin{flushright}
\textsuperscript{149} Dayton Newspapers Inc. v. Rauch, 465 N.E.2d 458, 459-60 (Ohio 1984).
\textsuperscript{150} Florida, FLA. STAT. § 406.135(2) (2009).
\textsuperscript{151} FLA. STAT. § 406.135(2) (2009) (proscribing that “in determining good cause, the court shall consider whether such disclosure is necessary for the public evaluation of governmental performance; the seriousness of the intrusion into the family's right to privacy and whether such disclosure is the least intrusive means available; and the availability of similar information in other public records, regardless of form.”) This exemption is tempered with a requirement that the deceased’s next of kin shall be given reasonable notice of a petition filed with the court to view or copy the audio-visual portions of an autopsy record. \textit{Id.}
\textsuperscript{152} See infra p. 29 for discussion of the history of the amendment.
\end{flushright}
and a video recording of the boy's autopsy with unauthorized people. One of the officers took the video recording to his home, and on the day after the autopsy, conducted a viewing of the tape for a group of four persons unrelated to the investigation. The Orlando Sentinel reported that the viewing at the officer's home took place in a "party atmosphere where the audience joked and laughed." In a separate incident, another officer showed the still photographs of the child's autopsy to the police department custodian and asked, "Do you want something to eat?" The Fifth District Court of Appeal in Williams held in favor of the defendant police officers because the records were already public under the Florida statute, and the officers had only shown the photos and video to a small group of people.

One Florida case appears to stand out as an anomaly amongst the autopsy-related case law. While it doesn't necessarily moot previous case law, it doesn't neatly fit in with the existing case law or statutory framework either. In 2004, Eleven-year-old Carlie Brucia was kidnapped in Sarasota as she was walking home from a friend's house. The abduction was captured on videotape by a carwash security camera. The video showed 39-year-old Joseph Smith approaching her. Ultimately, Carlie's partially naked body was found four days later. The video was broadcast worldwide and led to Smith's arrest.

Smith was found guilty of first-degree murder, sexual battery of a child less than 12 years of age and kidnapping with infliction of bodily harm and/or with commission of felony on the child. As the penalty phase of the trial commenced and Smith's faced possibility of the death penalty.

154 Id. at 685.
155 Id. at 686.
156 Id.
penalty, several media outlets in Florida - *The Sarasota Herald-Tribune, Tampa Tribune, Bradenton Herald* and *WFLA-TV News Channel 8* - petitioned to inspect crime scene and autopsy images of the 11-year-old murder victim, records which would be introduced as evidence to the jury, but the records request was rejected on the grounds that Florida's Family Protection Act prohibited the disclosure of autopsy records precluded the release of Bruschia's death-records as well. The requesting media parties argued Florida's Family Protection Law applied only to material in custody of medical examiners. The records in question were part of the trial evidence against Smith that was in the court clerk's custody. The 2nd District Court of Appeals cited a conflict between the privacy rights of Bruschia's family and the First Amendment rights of the public. The appeals court asked the Florida Supreme Court to resolve the conflict as a "matter of great public importance."\(^\text{159}\)

The Florida Supreme Court decided to not review the issue and lifted a provisional stay on disclosure of the records. Florida Attorney General Charlie Crist then asked the U.S. Supreme Court for a further stay on the records' disclosure. "Florida's Constitution expressly provides a right to privacy, a privilege which the Legislature has determined creates in victims a right to non-disclosure of private images of the victim taken at the crime scene and or during an autopsy," Crist's motion said. Crist also warned that allowing such records to be publicly disclosed might deter families from consenting to the inclusion of such records into evidence for fear that they would be published widely. However, Justice Kennedy, whose jurisdiction includes Florida, rejected the appeal. As a result, the four requesting media organizations were

\(^{159}\) *Id.*
allowed to view the records under the supervision of the records custodian, but were not allowed to make copies or publish the information.\textsuperscript{160}

**Discussion**

The latter part of this chapter examined case law in which state courts interpreted the access-to-autopsy-record statutes of their respective states, and, where no such statutes existed, case law in which the courts determined whether autopsy records were, at least in part, public record. Courts in six states interpreted their states' respective statutes to allow for disclosure. Courts in five states interpreted their state's respective statutes to limit disclosure. In one state, a newly enacted statute mooted the previous precedential case law on the subject.

In the four states that did not have any statutes pertaining to the public accessibility of autopsy records, three of the states had case law in which the states made a determination on accessibility of the records. A court in one of those states determined that autopsy records were public. A court in another one of those states determined that such records are closed. And a court in the third state determined that a balancing test must be applied to determine disclosure.

In the District of Columbia and in 35 states, no case law existed that interpreted the state's access-to-autopsy-record statutes.

Chapter 6 examines the third phase of the post-mortem relational privacy continuum - pre-publication. It contains relatively less findings than other chapters that explored the first and second phases of the continuum, mostly because there is neither case law nor statutory examples that are exactly on point with a pre-publication post-mortem relational privacy dispute. The research in the next chapter does, however, explore the case law on the subject of prior restraints,

\textsuperscript{160} Id.
which is well established in American jurisprudence, and examines the feasibility of such an extreme remedy in the context of a post-mortem relational privacy dispute.
Figure 5-1 Organizational Chart of State-level Access to Autopsy Record Laws
LEGEND:

1. NM - No mention of public access to autopsy records (grey)
2. NP - No presumption on access stated (green)
3. PO- Presumptively open autopsy records (yellow)
4. PC- Presumptively closed autopsy records (purple)
5. SC - Specific criteria exists to determine access
6. NSC- No specific criteria on access exists

Table 4-2. Fifty-state study of public access to autopsy records.

<table>
<thead>
<tr>
<th>State</th>
<th>Categories</th>
<th>Type of information</th>
<th>Circumstance of death</th>
<th>Effect of Disclosure</th>
<th>Medium of record</th>
<th>Person or agency</th>
<th>Purpose of the disclosure</th>
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CHAPTER 6
CONSTITUTIONAL LIMITATIONS ON PREEMPTIVE RELIEF IN A POST-MORTEM RELATIONAL PRIVACY DISPUTE

The two previous chapters explored the pre-request and pre-disclosure phases of the relational privacy dispute continuum. In those phases, a government agency – either federal or state – has created, or has custody of, a death-related record, and a member of the public has requested the record, but the custodian has not yet disclosed it. Additionally, the two previous chapters discussed the two preemptive remedies available to relatives of the deceased in the pre-request and pre-disclosure phases of the continuum: 1) federal and state statutes that prohibit the disclosure of records on relational privacy grounds and 2) court interpretations of those statutes enjoining such a disclosure under the same rationale. If, however, no such statute exists, or a court rejects a relative's argument for non-disclosure, then the record custodian is authorized to disclose the record to the requesting party. The disclosure of the record triggers the record's movement along the post-mortem relational privacy dispute continuum from the second phase, pre-disclosure, into the third, pre-publication.

The pre-publication phase encompasses the period of time between the disclosure of the record to the requesting party and the publication of the information in that record to a wide audience. The term "publication," as it is used in this dissertation, differs from the kind of "publication" that pertains to liability for defamation. In defamation, "publication" is a term of art, which includes any communication by the defendant to a third person. In a post-mortem relational privacy dispute, "publication" is similar in meaning to the element by the same name in the tort of public disclosure of private facts, where "the matter is made public, by

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1 Restatement (Second) of Torts § 577 (1977).
communicating it to the public at large, or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge…."

While in the pre-publication phase, the record is at the greatest risk of becoming "public knowledge." Tools of mass communication such as the Internet make dissemination of information to "the public at large" just a mouse click away. Given the imminent threat of publication, a surviving relative with a privacy interest in the information about the decedent would likely prefer to have obtained one of the remedies available in the previous phase, pre-disclosure, such as an injunction. Nonetheless, in the pre-publication phase, there is – at least in theory – another remedy that a surviving relative may seek: a prior restraint on publication. However, prior restraints are presumed unconstitutional, and there is a very high burden to overcome the presumption. Once the information is out of government control, the First Amendment protects the right to publish it. Furthermore, there are a few and limited circumstances in which the U.S. Supreme Court has said such a restriction may be warranted.

There are no examples in U.S. law where a court has addressed the constitutionality of a prior restraint in a post-mortem relational privacy context. So, this chapter reviews the history of the prior restraint and the precedential law and asks, in light of the constitutional barriers against a prior restraint, whether such an injunction is a feasible remedy in a post-mortem relation privacy dispute for a relative seeking to preclude publication of information about a deceased relative. The following section reviews the evolution of the prior restraint doctrine.

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2 Restatement (Second) of Torts § 652D, cmt. a. (1977).
3 See Jon Mills, Privacy: The Lost Right 200 (2008) (discussing that prevention of the release of information about a deceased relative is a "critical threshold" for a relative seeking to protect his or her privacy interest).
The Doctrine of Prior Restraint

A prior restraint is a government action to restrict the publication of speech. In 20th Century First Amendment jurisprudence, prior restraint has been manifested in two forms: 1) government actions, such as an injunction, that occur before publication and that intend to halt it, and 2) government actions, such as a tax or criminal penalty, that occur subsequent to publication and intend to punish it. Beginning in 1931, the Court has consistently held that government actions to restrict publication in either form are presumed unconstitutional. The Court has deemed prior restraints "the most serious and the least tolerable infringement on First Amendment rights."5 However, this was not always the case.

From English Licensing to a Presumption of Unconstitutionality

The history of the United State's licensure of the press begins in 13th Century England when criticism of the English government was prohibited, and the government criminalized unauthorized publications.6 English proponents of free speech at that time, like John Milton, condemned such licensing requirements. In Areopagitica, Milton argued, "And though all the winds of doctrine were let loose to play upon the earth, so Truth be in the field, we do injuriously, by licensing and prohibiting, to misdoubt her strength."7 In 1769, English jurist Sir William Blackstone wrote on behalf of a free press, "The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no previous restraints on publications, and

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6 For a history of prior restraints in the United States, see LEONARD LEVY, EMERGENCE OF A FREE PRESS 6 (1985).
7 JOHN MILTON, AREOPAGITICA (1644), http://www.uoregon.edu/~rbear/areopagitica.html (last visited April 12, 2009).
not in freedom from censure for criminal matter when published….”

Blackstone’s definition of prior restraint encompassed the idea that the government should not be able to give an administrative body authority to oversee who published what. However, he did not entirely rebuff the idea that the press could be subject to post-publication punishment.

In 1791, when the Bill of Rights was adopted as part of the new U.S. Constitution, the First Amendment said “Congress shall make no law…abridging the freedom of speech, or of the press…. First Amendment scholar Leonard Levy posited that it is likely - and there is historical evidence to prove - that when the framers of the Constitution included protection for “freedom of the press,” they meant freedom from prior restraint and also much more, expanding Blackstone's view. Despite this intention, however, the U.S. Supreme Court adopted a limited interpretation of the First Amendment, ascribing to the free speech and press clauses the power to protect against pre-publication restrictions but not subsequent punishment.

However, by the 1930's, the Court began to back off the position that a prior restraint encompassed only pre-publication censorship and not post-publication punishment. Beginning in 1931, in Near v. Minnesota, the Supreme Court found that governmental actions to prohibit publication are presumed unconstitutional. In Near, a Minnesota prosecutor sought to stop the publication of a newspaper that alleged dereliction of duty by local government officials and law

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8 4 William Blackstone, Commentaries 151, 152.

9 U.S. Const. amend. I.

10 Leonard Levy, Emergence of a Free Press xi (1985), (reversing his position in Legacy of Suppression: Freedom of Speech and Press in Early American History (1960), in which he posited that the First Amendment was meant to provide only freedom from prior restraints). See New York Times Co. v. United States, 403 U.S. 713 (1971).

11 See e.g. Patterson v. Colorado, 205 U.S. 454 (1907) (holding that government fines against the publisher of a newspaper that printed editorials critical of the Colorado Supreme Court did not constitute a prior restraint, and were, therefore, constitutional).

enforcement.\textsuperscript{13} However, the Near Court said that the First Amendment’s prohibition against prior restraints could only be overcome in “exceptional cases,” such as threats to national security, control of obscenity, or incitement of violence.\textsuperscript{14} For example, the Court noted that publication of troop movements in times of war could justify a prior restraint if it were shown that releasing such information might threaten national security.\textsuperscript{15}

Since Near, the Court has repeatedly upheld this presumption.\textsuperscript{16} In 1936 in Grosjean v. American Press Co., the Court held that a post-publication penalty in the form of a separate tax on newspapers with a circulation of over 20,000 constituted a prior restraint and was also unconstitutional.\textsuperscript{17} The exception for national security was tested in earnest in 1971, in New York Times v. United States.\textsuperscript{18} The New York Times came into possession of a voluminous, classified government report detailing U.S. policy during the Vietnam War. The report, which was a Pentagon study chronicling three decades of increasing U.S. involvement in Vietnam, came to be known as the “Pentagon Papers.”\textsuperscript{19} The Times began publishing articles based on its contents. Soon after, the Justice Department sought to enjoin its publication, citing concerns that the information, if disclosed, would threaten national security. Although a New York district

\begin{itemize}
  \item \textsuperscript{13} Id. at 251.
  \item \textsuperscript{14} Near v. Minnesota, 283 U.S. 716 (1931).
  \item \textsuperscript{15} Id.
  \item \textsuperscript{18} The New York Times v. United States, 403 U.S. 713 (1971), [heretofore the "Pentagon Papers" case].
  \item \textsuperscript{19} The Pentagon Papers: Secrets, Lies, and Audiotapes, National Security Archives, Electronic Briefing Book No. 48, http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB48/ (last visited April 12, 2009).
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court denied the injunction, publication was temporarily halted pending appeal.\textsuperscript{20} The U.S. Court of Appeals for the Second Circuit granted the injunction.\textsuperscript{21}

During the litigation with the Times, the Washington Post obtained the same government report, and it, too, began publishing articles based on its contents. The Justice Department moved to enjoin the Post's publication as well. The District Court for the District of Columbia and the U.S. Court of Appeals for the District of Columbia Circuit held that the Government had not met the heavy burden justifying a prior restraint. On certiorari to the U.S. Supreme Court, the New York Times case was consolidated with The Washington Post case.\textsuperscript{22} In a per curiam opinion, the Court rejected the government's argument that further publication relating contents of the Pentagon report would endanger U.S. national security.\textsuperscript{23} The Court wrote, “Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity.”\textsuperscript{24} In order to overcome that presumption, the Court said, the government “carries a heavy burden of showing justification for the imposition of such a restraint.”\textsuperscript{25} The Court affirmed the judgment of the Court of Appeals for the District of Columbia and reversed the order of the Court of Appeals for the Second Circuit, remanding the case with directions to


enter a judgment affirming the judgment of the District Court for the Southern District of New York. 26

In 1976, the Court struck down another prior restraint. In Nebraska Press Association v. Stuart, 27 the Court addressed the constitutionality of an injunction ordering the media not to publish or broadcast a defendant's murder confession in order to protect the defendant's Sixth Amendment right to a fair trial. 28 The Court said an attempt to enjoin publication carries a “heavy presumption against constitutional validity,” 29 and a party seeking such a remedy must meet “a heavy burden of showing justification.” 30 Writing for the Court, Chief Justice Warren Burger stated that prior restraint is “one of the most extraordinary remedies known to our jurisprudence.” 31 He went on to say, "prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights." 32

In determining whether the injunction was warranted, the Court articulated a three-part analytical framework, which imposed a heavy burden on the party seeking to restrain the press. The Court asked whether "the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger." 33 In a form of the "clear and present


28 The Nebraska Supreme Court modified the district court's order to prohibit reporting of confessions or admissions made by the defendant or facts "strongly implicative" of him. Nebraska Press Ass’n v. Stuart, 427 U.S. 568 (1976).

29 Id. at 558.

30 Id.


33 Id. at 562, citing United States v. Dennis, 183 F. 2d 201 (CA2 1950), aff’d 341 U.S. 494 (1951) and LEONARD HAND, THE BILL OF RIGHTS 58-61 (1958).
danger" test, the Court first examined "the nature and extent of the pretrial news coverage." Second, the Court considered whether other less restrictive measures would have alleviated the effects of pretrial publicity. Finally, the Court considered the effectiveness of a restraining order in preventing the threatened danger.

The Near, Grosjean, Pentagon Papers, and Nebraska Press Association decisions illustrate the heavy burden against prior restraints. Nonetheless, the Supreme Court has said that the First Amendment does not prohibit all restrictions. In Branzburg v. Hayes, the Supreme Court ruled against a special First Amendment privilege that would allow the press to refuse to answer grand jury questions concerning news sources. The Court said "the First Amendment does not invalidate every incidental burdening of the press that may result from the enforcement of civil or criminal statutes of general applicability… valid laws serving substantial public interests may be enforced against the press as against others, despite the possible burden that may be imposed…."

The Court has also emphasized that "the publisher of a newspaper…has no special privilege to invade the rights and liberties of others."

In a few specific areas of the law where First Amendment concerns are less pronounced and government regulation of expression is less restricted, prior restraints are scrutinized less strictly. For example, in the area of copyright law, Section 502 of the Copyright Act specifically authorizes injunctions in order to protect the rights of owners of original expressions.

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34 Nebraska Press Ass’n v. Stuart, 427 U.S. 539, 563 (1976) (citing the clear and present danger test applied by Justice Learned Hand in United States v. Dennis, 183 F. 2d 201, 212 (CA2 1950), aff’d, 341 U.S. 494 (1951); see also Schenck v. United States, 249 U.S. 47 (1919).

35 Id. at 562.


38 U.S. Copyright Act § 502(a).
Similarly, in trade secret law, it is possible to enjoin a former employee from divulging confidential information.\textsuperscript{39} The very limited circumstances in which a prior restraint may be warranted include national security. In the late 1970's a federal district court decided that the government was able to overcome the presumption against constitutionality. However, the court that held that the prior restraint was warranted in that specific case was highly circumspect about its decision to restrict speech.

**Overcoming the Presumption**

The 1979 case of *United States v. Progressive, Inc.*\textsuperscript{40} is one of the few cases in which a U.S. court, although it was only a trial court, upheld a prior restraint. In *Progressive*, the government sought to enjoin *The Progressive* magazine from publishing an article called “The H Bomb Secret: How We Got It, Why We’re Telling It.” The article's author purported that it revealed the hydrogen bomb's design and instructions - information the *Progressive* argued was already public information. The government argued that much of the information in the article was not publicly available and had never been published. Even if it had been, the government contended that aggregating the individual pieces of information into one collected source would aid enemies who may not have otherwise had all the information in one accessible format. *The Progressive* argued that the content of the publication did not "rise to the level of immediate, direct and irreparable harm which could justify incursion into First Amendment freedoms."\textsuperscript{41}


\textsuperscript{40} United States v. The Progressive, Inc., 467 F. Supp. 990 (W.D. Wis. 1979).

\textsuperscript{41} Id. at 992.
The District Court for the Western District of Wisconsin emphasized that the *Pentagon Papers* case, in which the Supreme Court invalidated a prior restraint that had been sought on national security grounds, was different than the case at hand. The district court said the information at issue in *Pentagon Papers* focused on the past – U.S. policy during the Vietnam War – while *The Progressive* article focused on a future threat to the nation’s security. Also, Section 2274 of The Atomic Energy Act authorized injunctions against disclosure of restricted information related to nuclear weapons if there was "reason to believe such data [would] be utilized to injure the United States or to secure an advantage to any foreign nation." The district court noted that there was no equivalent statutory injunction for the government to apply in the situation presented in the *Pentagon Papers* case. The district court analogized the potential risk posed by the publication of the nuclear information to the publication of troop movements in time of war, which, the Supreme Court noted in both *Near* and *Pentagon Papers* would threaten national security and could therefore be restrained. The district court said, "Times have changed significantly since 1931 when *Near* was decided. Now war by foot soldiers has been replaced in large part by war by machines and bombs. No longer need there be any advance warning or any preparation time before a nuclear war could be commenced."

The district court upheld the injunction, predicting that it would ultimately be heard by the U.S. Supreme Court because of the gravity of the holding, but the government ultimately

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42 *Id.* at 994.


44 *Id.* at 996.

45 *Id.*
withdrew its complaint because several other publications either published the material at issue in the case or announced that they had plans to do so.\textsuperscript{46}

Prior restraints manifest as restrictions on the press prior to publication and subsequent to publication as well. For example criminal prosecution or fines for publications of certain information may act as a deterrent on speech. The U.S. Supreme Court has made that point several times, including in cases related to privacy.

**The Unconstitutionality of Subsequent Punishment**

In 1975 in *Cox Broadcasting Corp. v. Cohn*, the U.S. Supreme Court held that a suit for invasion of privacy against a television news station that broadcast the legally obtained name of a rape victim from a public document was unconstitutional.\textsuperscript{47} Four years earlier, a 17 year-old high school student was sexually assaulted and murdered in Georgia. A reporter covering the murder trial requested and received a copy of the indictment documents from the court clerk. In a subsequent broadcast regarding the trial, the reporter broadcast the name of the victim, relying on the documents given to him by the clerk. At the time of the broadcast, a Georgia law made it a misdemeanor to publish or broadcast the name or identity of a rape victim.\textsuperscript{48} The victim's father sued the station for money damages pursuant to the statute, claiming the broadcast identifying the victim, his daughter, was an invasion of his privacy.

The issue before the trial court was whether the state could allow a claim for invasion of privacy over the publication of the name of a deceased rape victim already publicly revealed in public law enforcement records. The trial court rejected the broadcasting company's claims that

\textsuperscript{46} United States v. Progressive, Inc., 467 F. Supp. 990 (W.D. Wis. 1979) (granting preliminary injunction to prevent publication of method of manufacturing nuclear weapon); appeal denied without opinion, 610 F.2d 819 (7th Cir. 1979).

\textsuperscript{47} Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975).

\textsuperscript{48} GA. CODE ANN. § 26-9901 (1972).
the broadcast was privileged under the First and Fourteenth Amendments and held that the Georgia statute provided a civil remedy to those injured by its violation. On appeal, the Georgia Supreme Court at first held that the trial court erred in construing the Georgia statute to extend a cause of action for invasion of privacy. However, the Georgia Supreme Court said the First and Fourteenth Amendments did not bar the complaint of a common-law invasion of privacy. On a motion for rehearing, the broadcasting company argued that a rape victim's name was a matter of public interest. This time the Georgia Supreme Court denied the motion on the ground that the Georgia statute had declared a state policy that a rape victim's name was not a matter of public concern. The Court sustained the statute as a legitimate limitation on the First Amendment's freedom of expression.\(^{49}\)

The U.S. Supreme Court reversed the judgment of the Georgia Supreme Court, holding that the common law cause of action for invasion of privacy through public disclosure of the name of a rape victim imposed sanctions on pure expression, the content of a publication.\(^{50}\) The Court said that it was unconstitutional for the state to impose sanctions on the accurate publication of a rape victim's name obtained from judicial records maintained in connection with a public prosecution and that are open to public inspection. Furthermore, the Court said that the commission of a crime, prosecutions resulting from that crime, and judicial proceedings arising from the prosecutions are events of legitimate concern to the public. Consequently, the Court said, they fall within the press' responsibility to report the operations of government.\(^{51}\)

In *Landmark Communications v. Virginia* in 1978, the U.S. Supreme Court invalidated a state statute that criminalized the publication of a pending inquiry by a review board that

\(^{49}\) Id. at 495.

\(^{50}\) Id. at 487-497.

\(^{51}\) Id. at 492-493.
identified a judge under investigation.\footnote{Landmark Commc'n v. Virginia, 435 U.S. 829 (1978).} Norfolk's \textit{The Virginian-Pilot} was convicted and fined for violating the confidentiality provisions of a Virginia statute.\footnote{VA. CODE ANN. § 2.1-37.13.} The Virginia Supreme Court's affirmed the conviction, but the U.S. Supreme Court concluded that the publication that the state sought to punish was core political speech protected by the First Amendment. Furthermore, the Court found that the neither the state's interest - protecting the reputation of its judges and maintaining the institutional integrity of its courts - was sufficient to justify the subsequent punishment of speech. The Court found that the article provided accurate and factual information about a legislatively authorized inquiry pending before the Commission and that the publication of such information served the interests of public scrutiny and the discussion of governmental affairs, which the First Amendment was adopted to protect.

In \textit{Smith v. Daily Mail Publishing Co.} in 1979, the U.S. Supreme Court held that a state interest in protecting the anonymity of a juvenile offender could not justify the imposition of criminal sanctions on the truthful publication of an alleged juvenile delinquent's name that was lawfully obtained.\footnote{Smith v. Daily Mail Publ'g Co., 443 U.S. 97 (1979).} Two newspapers published the name a 14-year-old boy who was the alleged assailant in a school shooting. A grand jury indicted the newspapers for knowingly publishing the name of a minor involved in a juvenile proceeding in violation of a state statute.\footnote{W. VA. CODE § 49-7-3 (1976).} The West Virginia Supreme Court held that the statute unconstitutionally abridged the freedom of the press. On appeal, the U.S. Supreme Court affirmed the state supreme court's judgment. The Court further held that even if the statute served “a state interest of the highest order,”\footnote{Smith v. Daily Mail Publ'g Co., 443 U.S. 97, 103 (1979).} it
did not achieve its purpose because it did not limit other forms of publications, such as electronic media, and there was no evidence that criminal penalties were necessary to achieve the stated purpose. Writing for the Court, Chief Justice Burger said governmental attempts to restrict the publication of truthful information "seldom can satisfy constitutional standards."\(^{57}\)

In *Florida Star v. BJF* in 1989, the U.S. Supreme Court held that a state statute that punished the press for truthful publication of crime and official misconduct violated the First Amendment.\(^{58}\) A newspaper printed an article on a rape and included the rape victim's name. The newspaper obtained the information about the rape from a police report provided by the police in the police station's pressroom. The rape victim sued the newspaper for violating a state statute that prohibited instruments of mass communication from publishing the names of rape victims, a statute that was posted just above the police reports in the station's pressroom.\(^{59}\) A trial court ruled in favor of the victim, and the First District Court of Appeal affirmed. The Florida Supreme Court declined to hear the case.

On certiorari to the U.S. Supreme Court reversed the First District Court of Appeal's decision and held that the newspaper could not be held liable without violating its First Amendment rights. The Court said that whether the victim's right to privacy outweighed the newspaper's First Amendment right to publish the victim's name had to be determined on the facts of the case. Here, the newspaper lawfully obtained the victim's name from a government source. Therefore, it had the right to assume that it was lawful to publish the information included in the report, including the victim's name. Furthermore, reporting on the crime was a matter of public significance. The Court did note, however that in a different case with different

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\(^{57}\) Smith v. Daily Mail Publ'g Co., 443 U.S. 97, 102 (1979).


\(^{59}\) FLA. STAT. ANN. § 794.03 (1987).
facts the results might be different. The Court noted its decision in *Cox* and recognized that "privacy interests fade once information already appears on the public record, and that making public records generally available to the media while allowing their publication to be punished if offensive would invite 'self-censorship and very likely lead to the suppression of many items that . . . should be made available to the public.'"60

While *BJF* involved the publication of information contained in a public record, another case, *Bartnicki v. Vopper*,61 involved the publication of information illegally obtained by a third party and published by a newspaper that was not involved in the wiretapping. During a phone call between a teacher's union representative and a teacher, the teacher said about the school board with which they were bargaining, "We're gonna have to go to their, their homes . . . [t]o blow off their front porches...." An unknown third party intercepted and recorded the conversation and delivered the recording to the president of a local citizens' organization that was in opposition to the union's proposals. The organization's president gave a copy of the recording to a local radio commentator, who broadcast the recording on his public affairs talk show. Another radio show also played the recording and a local newspaper published a transcript of the recording. As a result of the broadcasts, the union negotiator and the teacher sued the radio commentator, the radio stations, and the citizen organization's president in the District Court for the Middle District of Pennsylvania under federal and state wiretapping statutes.62

The district court denied the defendant's request for a summary judgment, holding that an individual who disclosed an illegally intercepted electronic communication could be criminally

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62 Id.
liable under the wiretapping statute even if the person had not been involved in the original interception. Furthermore, the district court held that imposing liability on the defendants would not violate the First Amendment.\textsuperscript{63} On appeal, the U.S. Court of Appeals for the Third Circuit reversed the district court's order, holding that both the federal and state wiretapping statutes were invalid under the First Amendment because they deterred significantly more speech than necessary to protect the privacy interests at stake.\textsuperscript{64} The appellate court reasoned that the provisions were likely to deter the media from publishing material that was lawfully obtained only because reporters often will not know the precise origins of information they receive from sources.\textsuperscript{65}

The U.S. Supreme Court affirmed the appellate court's ruling, holding that under the circumstances presented, 1) the First Amendment protected the disclosure of the contents of the conversation; and 2) the application of the federal and state statute violated the First Amendment because their application was not be justified. The Court reasoned that the fact that the negotiations in question were a matter of public concern outweighed the government's interest in minimizing the harm to persons whose conversations have been illegally intercepted. The Court recognized the state has "a significant interest in protecting...the right not to have intimate facts concerning one's life disclosed without one's consent." Also, "the prohibition on using or disclosing the contents of an illegally intercepted communication serves that interest by deterring the publicizing of private facts."\textsuperscript{66} However, the Court found that the privacy concerns in this case in particular were, on balance, less significant than the interest in publishing matters of


\textsuperscript{64} Bartnicki v. Vopper, 200 F.3d 109 (3d Cir. Pa. 1999).

\textsuperscript{65} Id. at 127.

\textsuperscript{66} Id. at 122.
public importance. Furthermore, the Court reasoned that there was no basis for presuming that sanctions for the disclosure of such communications would deter a would-be interceptor. 67

**Prior Restraint as a Preemptive Remedy for a Relational Privacy Dispute**

The previous sections of this chapter outlined the legal tests for determining the constitutionality of a prior restraint both prior and subsequent to publication. There is no example in the existing case law of any court upholding a prior restraint on the publication of death-related information. There is, however, a significant example of an instance when a court rejected such a remedy.

*Schuyler v. Curtis,* 68 which was decided in 1895, is the earliest known case recognizing that survivors have a right of privacy in information about their deceased relatives. Here, the defendants sought to have a statue erected to honor the memory of the plaintiff’s deceased aunt, a philanthropist. The plaintiff claimed such a statue would violate his right of privacy. The trial court granted the plaintiff a perpetual injunction against defendant prohibiting him from building the statute. 69

On appeal, the Court of Appeals of New York reversed, finding that a statue of a deceased person was not so offensive that it would meet the standards of being highly offensive to a reasonable person, a required element in the cause of action for invasion of privacy. 70 The appellate court held that whatever the rights of the nephew may be, they were not rights that once belonged to his deceased aunt. Moreover, the appellate court held that whatever right of privacy the deceased had died with her.

67 *Id.* at 126.

68 Schuyler v. Curtis, 42 N.E. 22 (N.Y. 1895).


70 *Id.*
However, the appellate court did note that the right of privacy of the living could have been violated by improperly interfering with the character or memory of a deceased relative, but there must have been some reasonable and plausible ground for the existence of mental distress and injury. Also, the appellate court said that that plaintiff must show that some right of his own was violated by the defendant's actions, and that they would have caused the decedent pain if she were living. Thus, the appellate court concluded that it was not necessary for defendants to procure the consent of the decedent's surviving relative to build the statue.\textsuperscript{71} Thus, the appellate court reversed the injunction and held in favor of the defendant who wished to erect a statue in honor of the decedent.

\textit{Schuyler} is significant because it represents the earliest known legal assessment of the post-mortem relational privacy concept and because it is an example of an injury in a post-mortem relational privacy context. However, it was decided long before any of the precedential U.S. Supreme Court case law on prior restraint, so the court's analysis does not reflect on the established prior restraint precedents developed in \textit{Near}, \textit{Grojean}, \textit{Pentagon Papers} and \textit{Nebraska}. Relatives who want to prevent the publication of death-related information about their family members can petition a court to enjoin publication of the information. However, there is a heavy presumption of unconstitutionality against prior restraints. The following two sections reiterate the tests used by the Supreme Court in the seminal prior restraint cases and apply the tests to the factors of a relational privacy dispute, which were first outlined in Chapter One.\textsuperscript{72}

\textsuperscript{71} \textit{Id.}

\textsuperscript{72} \textit{See supra} p. 14, discussion in the text of the five elements of a post-mortem relational privacy dispute.
Application of Near v. Minnesota to the Relational Privacy Elements

In Near v. Minnesota, the Supreme Court held that newspapers may not be censored before publishing except under extreme situations such as 1) harm to national security, 2) incitement of violence, or 3) publication of obscene material. The following section assesses whether a claim by a relative in a post-mortem relational privacy dispute could withstand the constitutional scrutiny required for a prior restraint.

The first element of a post-mortem relational privacy dispute is comprised of two competing interests: 1) a surviving relative's privacy interest in death-related information about his or her deceased relative and 2) the public's interest in accessing government records. It is conceivable that any one of the three areas in which the Near Court said a prior restraint may be upheld - national security, incitement of violence or obscenity - could involve death-related information about a decedent.

The second element of a post-mortem relational privacy dispute is the information at issue. A post-mortem relational privacy dispute could involve government documents that reveal sensitive national security information. The information could contain dramatic visual images or language that might be capable of inciting an audience to violence. The information might be of an obscene nature, picturing a death scene involving nudity in an obscene sexual context.

The third factor of a post-mortem relational privacy dispute is the law governing the custodial agency. In the pre-publication phase, the First Amendment of the U.S. Constitution is the applicable law to evaluate the constitutionality of a prior restraint.

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73 But see Brandenburg v. Ohio, 395 U.S. 444 (1969) (per curiam) (holding that "the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.") Id. at 447.
The fourth element in a post-mortem relational privacy dispute is the context in which the dispute occurs. A relative may seek an injunction from a court to prevent publication in the pre-publication phase of the relational privacy continuum. However, if the information is already available in other publications, such as was argued - albeit unsuccessfully - by the defendant magazine in Progressive, there may be a contention that a prior restraint would be moot. In Progressive, the government ultimately rescinded its complaint after other publications began publishing the information at issue.

Finally, the fifth element of a post-mortem relational privacy dispute is the remedy that is available to the relative of the deceased person about whom the information at issue pertains. This element is the subject of the discussion in this chapter. Thus, given the dissimilarity of the elements in a post-mortem relational privacy dispute with the elements that the Near Court said might warrant a prior restraint, it is unlikely that a relative seeking to prevent publication of death-related information about a relative would be able to argue that a prior restraint was constitutional.

**Application of Nebraska Press Association v. Stuart to a Relational Privacy Dispute**

When the Nebraska Court examined the constitutionality of a prior restraint issued to protect the Sixth Amendment rights of a criminal defendant, it applied a form of the "clear and present danger" test. The Court asked whether "the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger."74

As stated earlier, there are no examples in the law where any court enjoined publication of death-related information about a person because it posed an imminent threat to the privacy of a surviving relative. However, it is conceivable that a relative of a homicide victim could see the

74 See supra p.166.
release of death-related information about his or her deceased relative in order to call attention to the criminal case against a suspect or government conduct. In such a situation, the Sixth Amendment rights of a criminal defendant could be jeopardized by such a disclosure and the Nebraska test would apply. However, this is not typically the perspective of relatives in a post-mortem relational privacy dispute. In such an instance, the Nebraska test can be examined in three parts.

First, the "gravity of the evil" could be equated to the means by which the information was obtained such as an illegal wire interception or stealing the public record. More likely, the "gravity of the evil" could concern the injury that would result if the publication were not enjoined such as an invasion of privacy or infliction of emotional distress. The second element is the "improbability" of the evil occurring. In the case of a relational privacy dispute, a relative would have to 1) show that the invasion is imminent and likely to occur and 2) negate any argument that it is improbable. Third, a court would have to determine if the "evil...justifies such invasion of free speech as is necessary to avoid the danger." In a relational privacy dispute, this would balance the harm that would be caused by the invasion of privacy to the relative against the harm that would be caused by the prior restraint to the potential publisher of the information and those who would no longer be able to receive the information. In Nebraska, which dealt with the constitutional rights of a criminal defendant to a fair trial, Chief Justice Warren Burger emphasized the harm that a prior restraint can cause: "If it can be said that a threat of criminal or civil sanctions after publication 'chills' speech, prior restraint 'freezes' it at least for the time." 75

Application of *United States v. Progressive, Inc.* to a Relational Privacy Dispute

In *United States v. Progressive, Inc.* the district court held that publication of the content of the impending publication, which would include information about developing a hydrogen bomb, "will result in direct, immediate and irreparable damage to the United States by accelerating the capacity of certain non-thermonuclear nations to manufacture thermonuclear weapons." The test was first put forth by Justice Stewart in the Pentagon Papers case. In *Progressive*, the District Court for the Western District of Wisconsin ultimately held in favor of the government. An appeal was never heard because the government removed its complaint after other publications published the information at issue. A test similar to the *Progressive* test - immediate, irreparable harm to the national security interests of the U.S. – could well be applied again to a prior restraint case. A post-mortem relational privacy dispute could conceivably involve information that might be of an "immediate" threat the release of which would cause "irreparable harm." However, a relative's personal claims that such publication would injure his or privacy or inflict emotional distress would be highly unlikely to satisfy the *Progressive* Test at a national level.

In sum, this chapter explored whether a prior restraint is a feasible remedy for a relative in a post-mortem relational privacy dispute. The cases discussed in this chapter illustrate the improbability that such a remedy would meet the high burden to overcome the presumption of unconstitutionality. The next chapter explores what remedies might exist once the publication of the death-related information occurs.

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77 *Id.* at 999.

CHAPTER 7
POST-PUBLICATION REMEDIES FOR SURVIVING RELATIVES

Once death-related information about a decedent is published, the remedies that are available to the decedent's relatives are restorative in nature. The alleged injury can no longer be prevented, but some state-level common law actions allow for recovery where one party publishes information that injures another. In the post-publication phase of the post-mortem relational privacy continuum, a relative might seek to redress injuries suffered from such a publication.

For example, in June 2009, U.S. actor David Carradine was found dead in a Thai hotel. A Thai tabloid published what it said was a photograph of Carradine's death scene. The grainy photograph showed a naked man with both hands bound at the wrist and suspended above the head.\(^1\) The tabloid blacked out the man's face and obscured other areas. Thai police said a member of the forensic team took the photo and leaked it to the media. Keith Carradine, the actor's half brother, said in a statement that his family was "profoundly disturbed by the release in Thailand of photographs taken at the scene of David Carradine's death." In a statement, Keith Carradine threatened legal action against any publication that republished the photograph. "The family wants it understood that…any persons, publications or media outlets will be fully prosecuted for invasion of privacy and severe emotional distress if the photos are published."\(^2\)

Despite Keith Carradine's efforts to quell publicity of his brother's death, the photo of his brother's lifeless body, along with a photo of an apparent autopsy conducted on Carradine in

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Thailand, are now available via the Internet on the web site of a British tabloid. U.S. law does not apply to either publication. The pertinent question, then, for the purposes of this dissertation, is whether any U.S. law would, in light of the First Amendment protections for speech, support an action for damages against a U.S.-based publication or citizen that republished the photographs of Carradine's death scene or autopsy. How the law balances the First Amendment rights of free speech and a free press with the privacy interests of surviving relatives is the context of the fourth and final phase of the post-mortem relational privacy continuum. In this phase, relatives may seek restorative remedies for injuries stemming from the publication of death-related information about their deceased family members. This chapter examines whether state jurisdictions have recognized such injuries and redressed them under the common law tort actions of their jurisdictions.

Chapters 3, 4, 5 and 6 reviewed the first three phases of the relational privacy continuum where information about a deceased person existed in a state of pre-publication limbo. In those phases, legislatures crafted laws regulating the public's access to death-related records, and courts interpreted those laws and evaluated petitions for injunctions on disclosure and publication. Those decisions entailed weighing the privacy interests of surviving relatives such as protection from disclosure of private facts and re-traumatization. Legislatures and courts also assessed the value of the public's interest in accessing its government's records such as interest in crime prevention, the conduct of law enforcement and health issues regarding pandemic concerns.

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This chapter explores the post-publication phase, the start of which is triggered by the publication of death-related information about a deceased person. Here, state legislatures enact statutes that establish a citizen's right to sue under specific causes of action. Courts address whether citizens may recover under those causes of action for alleged injuries suffered by the publications of death-related information about deceased relatives. Courts also can develop their own court-made law. In the post-publication phase, courts must balance individuals' rights, depending on jurisdiction, to live free from personal intrusions and inflictions of distress with the First Amendment rights of free speech and a free press.

Therefore, the research in this chapter ascertains whether, and to what extent, U.S. state-level statutory and common law provides remedies to relatives who allege an injury resulting from the publication of information about their deceased family members. In reviewing the state and federal case law that scholars highlighted in the existing literature on post-mortem relational privacy- Favish, Challenger, Rolling, Versace, Earnhardt, Schuyler - the researcher has recognized that the courts in those cases weighed the interests that would be served by disclosure with the presumable harm that would result from such disclosure. The harm related to the invasion of the relatives' privacy such as publication of private information and the emotional distress that would be inflicted upon the relatives. Thus, in examining the post-publication remedies that might be available to relatives, the researcher matched up the potential injuries that were discussed in those representative federal and state cases with common law tort actions that seek to redress similar types of injuries. Six causes of action redress the type of injuries that are commonly alleged in a post-mortem relational privacy dispute. They include the four privacy torts: 1) publication of private facts, 2) intrusion upon seclusion, 3) appropriation, 4) false light.

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4 See supra p. 220, n.410, discussing the particular definition of "publication" in this context.
They also include the two torts of outrage of 1) intentional infliction of emotional distress and 2) negligent infliction of emotional distress.\(^5\)

The researcher searched for relevant cases within each state and the District of Columbia using predetermined search terms in the Lexis database.\(^6\) The researcher developed the search terms while conducting the literature review for this dissertation and examining the precedential federal cases and high profile states cases that scholars focused on in the existing literature. The search terms were selected to identify cases in which: 1) at least one of the parties to the dispute was a surviving relative of the deceased person about whom the information at issue pertained; 2) that relative filed a damage suit against the person or publication that published the information; 3) the cause of action was one of the six tort actions identified in the research parameters;\(^7\) 4) the issue before the court was whether the relative can recover for the alleged injury stemming from the publication of the information; and 5) the dispute was resolved in a court decision as opposed to an alternative dispute resolution. The court decisions were examined to ascertain, by state, how post-mortem issues and their development fit privacy and related tort law and how courts balance the First Amendment rights of publishers with the interests of surviving relatives who allege injury from such publications.

In general, the findings show that a limited number of states, just five out of 50 and the District of Columbia, have addressed a claim for an injury under either the privacy torts and or the torts of outrage. However, of those states whose courts have heard such claims, four out of

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\(^5\) See supra p. 186 explaining each of the dignitary torts.

\(^6\) The researcher conducted a search in the Lexis state cases using a key word search in natural language for "relational privacy" and "relative’s death and records" and "relatives and autopsy reports" "autopsy and public record," and "death and public record," and "death and record," and "record and relative," and "record and next of kin," and "release and death," and "coroner and record," and post-mortem inspection and record."

\(^7\) Publication of Private Facts, Intrusion Upon Seclusion, Appropriation, False Light, Intentional Infliction of Emotional Distress, or Negligent Infliction of Emotional Distress.
the five recognized that relatives have a right to make a claim for such damages. The remainder of this chapter reviews those cases in detail and the torts under which the claims were brought, beginning in the next section with a brief review of the specific torts examined in this study.

Requirements and Limitations of the Selected Torts

Seventy years after the Warren and Brandeis article expressed the need for legal protections for personal privacy, legal scholar William Prosser rearticulated the meaning of privacy in a set of legal principals. Prosser examined the cases decided in the period since the Warren and Brandeis article and published, "Privacy," which outlined four separate privacy torts under which a plaintiff might recover for a privacy invasion. These torts were later incorporated into the Restatement of Torts and ultimately into sections 652B through 652E of the Restatement (Second) of Torts. They are:

1. public disclosure of private facts,
2. intrusion upon seclusion,
3. appropriation of name or likeness, and
4. false light.

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10 Restatement (Second) of Torts § 652B-E (1977).
11 Restatement (Second) of Torts § 652D (1977) (defining the tort of public disclosure of private facts as: "One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public.
12 Restatement (Second) of Torts § 652B (1977) (defining the tort of intrusion upon seclusion as: "One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person."). This form of invasion "does not depend upon any publicity" and consists solely of a intentional interference with a person's "interest in solitude or seclusion." Id. at cmt. a.
13 Restatement (Second) of Torts § 652C (1977) (defining the tort of appropriation of likeness as: "One who appropriates to his own use or benefit the name or likeness of another is subject to liability to the other for invasion of his privacy."). The interest protected is "the interest of the individual in the exclusive use of his own identity, in so far as it is represented by his name or likeness, and in so far as the use may be of benefit to him or to others." Id. at cmt. a.
14 Restatement (Second) of Torts § 652D (1977) (defining the tort of false light as: "One who gives publicity to a matter concerning another that places the other before the public in a false light is subject to liability to the other for
There are several limitations on the extent to which these torts may serve as restorative relief in a post-mortem relational privacy dispute. First, the *Restatement (Second) of Torts* states that "[e]xcept for the appropriation of one's name or likeness, an action for invasion of privacy can be maintained only by a living individual whose privacy is invaded."\(^{15}\) Furthermore, Comment a to section 6521 states that the action is a "personal right, peculiar to the individual whose privacy is invaded, and that the cause of action cannot be maintained by members of the individual's family unless their own privacy is invaded along with his."\(^{16}\) Another limitation on whether these torts are feasible remedies for a surviving relative is the fact that these remedies are governed by state statute. Comment b indicates that in the absence of statute, the action for invasion of privacy "cannot be maintained after the death of the individual whose privacy is invaded."\(^{17}\)

In addition to the four privacy torts, two other torts - intentional and negligent infliction of emotional distress\(^{18}\) - are also included within the research parameters of this study because they, too, encompass the type of injuries that a relative might suffer as a result of publication of death-related information about a relative. The *Restatement (Second) of Torts* states, "One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to

\(^{15}\) Restatement (Second) Torts § 652.

\(^{16}\) *Id.* at cmt. a.

\(^{17}\) *Id.* at cmt. b. *See also,* The Media Law Resource Center publishes an annual report compiling the statutory and common law tort actions recognizes by each state jurisdiction, among others.

another is subject to liability for such emotional distress."^{19} The tort of intentional infliction of emotional distress (IIED) has four elements:

1. extreme and outrageous conduct;
2. intent to cause, or disregard of a substantial probability of causing, severe emotional distress;
3. a causal connection between the conduct and injury; and
4. severe emotional distress.^{20}

The elements of negligent infliction of emotional distress (NIED) are identical to those of IIED except for one respect; NIED does not require a showing of *mens rea*, or intent. A relative seeking to recover damages under the NIED must prove negligence instead. Where a plaintiff alleges negligent infliction of emotional distress, his or her claim is tested against the established concepts of duty, breach, proximate cause, and damage or injury.^{21}

Not all 50 states recognize each of the six torts examined in this study. Therefore, whether or not a relative may even bring such claims depends on the law of the jurisdiction in which their suit may be brought. Additionally, where the issue of lawful disclosure of public records is at issue in a post-mortem relational privacy dispute, the distinction between state laws is further complicated by the fact that each state legislates access to death-related government records individually, as Chapter 5 demonstrated with respect to autopsy records. The framework for this study did not support an exhaustive examination of state-level statutes regulating public access to all death related records. Chapter 8 offers additional death records that are ripe for examination.

The following section reviews the findings of the 50-state study, which was devised to ascertain how state courts balance the post-publication privacy interests of surviving relatives

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^{19} Restatement (2d) of Torts § 46(1) (1965).

^{20} Id.

^{21} Restatement (2d) of Torts §§ 312, 313, 436, and 436A (1965).
with the First Amendment rights of free speech and a free press. Specifically, the study identified state common law cases in which a surviving relative brought a claim brought a claim against the publisher of death-related information about a deceased relative for at least one of the four privacy torts and/or at least one of the two torts of outrage. The study is exhaustive at the state appellate level, although it did not necessarily cull all trial court level decisions that were not reported.

**Narrative Discussion of the Findings**

State courts in five states have addressed whether the common law provides a remedy for surviving relatives in the post-mortem relational privacy context. The precedential cases of these states are discussed in the following sections. Each states' section organizes the relevant cases according to the cause or causes of action under which the plaintiff filed the suit. In some circumstances, more than one cause of action is grouped together because the suit included several claims.

**Florida**

In Florida, appellate courts have addressed the privacy torts of appropriation and publication of private facts as well as the emotional distress torts of intentional infliction of emotional distress.

**Intentional Infliction of Emotional Distress and Appropriation**

In 1981 in *Loft v. Fuller*, the relatives of a decedent filed appropriation and IIED claims against an author and publisher, alleging unauthorized publication of the name and likeness of their deceased relative, who was called a reappearing ghost in a book and movie. The Circuit Court for Broward County (Florida) dismissed their complaints, and the relatives appealed. The

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22 *Loft v. Fuller*, 408 So.2d 619 (Fla. 4th DCA 1981), rev. den'd, 419 So.2d 1198 (Fla. 1982).
Fourth District Court of Appeal concluded that the publication of the decedent's name and likeness was not barred by the Florida statute for appropriation and held that the decedent's relatives had not stated a cause of action.\(^23\)

On the cause of action for IIED, the Fourth District Court of Appeal held that the decedent's relatives had not alleged any independent violation of their own personal privacy rights other than what was alleged to have occurred indirectly by virtue of the publicity given to the deceased's alleged reappearance as a ghost. The appellate court stated

> A cause of action for invasion of the common law right of privacy is strictly personal and may be asserted only by the person who is the subject to the challenged publication. Relatives of a deceased person have no right of action for invasion of privacy of the deceased person regardless of how close such personal relationship was with the deceased.\(^24\)

**Publication of Private Facts and Intentional Infliction of Emotional Distress**

In *Williams v. City of Mineola*,\(^25\) Florida's Fifth District Court of Appeal addressed claims of publication of private facts and intentional infliction of emotional distress from the mother and sister of a deceased 14-year-old boy against the city of Mineola and two of its police officers, which investigated the boy's death. The officers named in the suit participated in the investigation of the boy's murder and attended his autopsy, during which they took photographs and a video recording for allegedly investigatory purposes.\(^26\) One of the officers took the video recording to his home, and on the day after the autopsy, conducted a viewing of the tape for a group of four persons unrelated to the investigation. *The Orlando Sentinel* reported that the viewing at the officer's home took place in a "party atmosphere where the audience joked and

\(^{23}\) FLA. STAT. § 540.08 (1977).

\(^{24}\) Loft v. Fuller, 408 So.2d 619, 621 (Fla. 4th DCA 1981).

\(^{25}\) Williams v. City of Mineola, 575 So.2d 683 (Fla. 5th DCA 1991).

\(^{26}\) *Id.* at 685.
laughed." In a separate incident, another officer showed the still photographs of the child's autopsy to the police department custodian and asked, "Do you want something to eat?" The deceased child's mother and sister sued the police department under the causes of action for publication of private facts and intentional infliction of emotional distress, among other non-privacy related claims. The Circuit Court for Lake County (Florida) granted summary judgment in favor of the city and police officers, and the relatives of the decedent challenged the order to the Fifth District Court of Appeals.

In assessing the claims for publication of private facts, the Fifth District Court of Appeal said that it agreed with the Florida's Fourth District Court of Appeal in *Loft v. Fuller,* in which that appellate court recognized that an "exception [to the Restatement's limitation on privacy] occurs when plaintiffs experience an independent violation of their own personal privacy rights other than the violation alleged to have occurred indirectly by virtue of the publicity given to the deceased." The Fifth District Court of Appeal relied on the Fourth District Court of Appeal in *Loft,* where it said:

[T]he relatives of the deceased have their own privacy interest in protecting their rights in the character and memory of the deceased as well as the right to recover for their own humiliation and wounded feelings caused by the publication.

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27 *Id.* at 686.
28 *Id.*
29 *Id.*
30 *Loft v. Fuller,* 408 So.2d 619 (Fla. 4th DCA 1981), rev. den'd, 419 So.2d 1198 (Fla. 1982).
31 *Williams v. City of Mineola,* 575 So.2d 683, 689 (Fla. 5th DCA 1991).
32 *Id.* at 689-90, citing *Loft v. Fuller,* 408 So.2d 619 (Fla. 4th DCA 1981).
The Fifth District Court also agreed with the distinction made by the Fourth District Court that "relatives must shoulder a heavy burden in establishing a [publication of private facts] cause of action."\textsuperscript{33}

In defense to the claim for publication of private facts, the defendant police station argued, in part, that the videotape and photographs were public record, which eliminated the possibility of a tort action against the police since the information was already available to the public.\textsuperscript{34} The Fifth District Court of Appeal found that the videotape and photographs were public records pursuant to Florida's Public Records Act.\textsuperscript{35} However, the appellate court also found that "neither the Public Records Act nor the Florida Constitution grants a custodian protection against tort liability resulting from that person's intentionally communicating public records or their contents to someone outside the agency which is responsible for the records."\textsuperscript{36} Liability would only be waived, the appellate court said, if 1) the person inspecting the records has made a bona fide request to inspect them, or 2) it is necessary to the agency's transaction of its official business to reveal the records to a person who has not requested to see them.\textsuperscript{37} Therefore, the appellate court reversed the summary judgment order as to the publication of private facts claim and remanded because the defendants were not immune from tort liability for showing pictures if there was not a bona fide request to view them.\textsuperscript{38}

\textsuperscript{33} Williams v. Minneola, 575 So. 2d 683, 690 (Fla. 5th DCA 1991), citing Loft v. Fuller, 408 So.2d 619, 624 (Fla. 4th DCA 1981).

\textsuperscript{34} Id.


\textsuperscript{36} Williams v. City of Mineola, 575 So.2d 683, 687 (Fla. 5th DCA 1991).

\textsuperscript{37} Id.

\textsuperscript{38} Williams v. City of Mineola, 575 So.2d 683, 687 (Fla. 5th DCA 1991).
On the claim for intentional infliction of emotional distress, the appellate court also reversed the lower court's dismissal, holding that the outrageousness element of the cause of action was the threshold issue and was, among the other elements, satisfied.

[O]ur society…shows a particular solicitude for the emotional vulnerability of survivors regarding improper behavior toward the dead body of a loved one, and the special deference paid by courts to family feelings where rights involving dead bodies are concerned is central to our decision. This area is unique, and once it is entered, behavior which in other circumstances might be merely insulting, frivolous, or careless becomes indecent, outrageous and intolerable.  

The same year that the Fifth District Court of Appeal decided Williams, it heard Armstrong v. H & C Communications, Inc., which involved the videotaping and broadcast on the evening news of a six-year-old murder victim's skull. The family members of the deceased child, who saw the broadcast without any warning from the news station, sued the station under the causes of action for IIED and publication of private facts. The trial court dismissed the family member's complaint, and they sought review.

The appellate court acknowledged that the emotional impact of seeing their dead child's skull was devastating to the family. The deceased child's 12-year-old sister fled from the room upon seeing the footage screaming "that cannot be my sister." The appellate court noted that many members of the public, including journalists and experienced police officials, expressed outrage at the news station's decision to broadcast of the skull. The family alleged that the news station "knew or should have known that the Armstrong family members did not wish to view the skull or have it placed on display." In assessing the nature of the news station's conduct, the appellate court said

39 Id. at 691 (Fla. 5th DCA 1991) (citation omitted).

40 Armstrong v. H & C Communic'ns, Inc., 575 So.2d 280 (Fla. 5th DCA 1991).

41 Id. at 281.
Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, 'Outrageous!'

The appellate court found that the news station's conduct was "outrageous" and stated that "if the facts as alleged herein do not constitute the tort of [intentional infliction of emotional distress], then there is no such tort." Therefore, the appellate court reversed the trial court's dismissal of the family members' IIED claim and remanded for further proceedings.

However, on the claim of publication of private facts - which requires, in part, a showing that the publicized information would be highly offensive to a reasonable person and is not of legitimate concern to the public - the appellate court said the discovery of the child's remains was a legitimate matter of public interest because of the criminal investigation surrounding her abduction and murder. Therefore, the appellate court affirmed the lower court's dismissal of relative's publication of private facts claim.

In summary, Florida's Fourth and Fifth District Courts of Appeal have both addressed claims of invasion of privacy under the intentional infliction of emotional distress tort in a post-mortem relational privacy context. The Fourth District Court also addressed an appropriation claim and the Fifth District also addressed a publication of private facts claim. The Fourth District Court rejected claims in Loft for IIED on the grounds that the plaintiffs failed to allege any independent violation of their own personal privacy when death-related information about their relative was published. In the same case, the appellate court also rejected a claim for appropriation on the grounds that the plaintiff failed to state a claim and the Florida statute did

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42 Id. at 282.
43 Id. at 282.
not prohibit the publication of a deceased person's name and likeness. The Fifth District Court of Appeal held in Williams that the relative of a decedent could make a claim under the tort of publication of private facts. In the same case, the appellate court also upheld a claim for intentional infliction of emotional distress because of the outrageous character of the defendant's conduct toward the body the plaintiffs' deceased relative. The Fifth District Court of Appeal upheld another IIED claim in Armstrong, recognizing the interests of surviving relatives to not have the body of a deceased relative treated without respect and to not be subjected to viewing such behavior. In the same case, however, the Fifth District Court rejected the relatives' claim for publication of private facts because the information about their deceased relative was newsworthy.

Therefore, in the Fourth District the tort of appropriation does not support a claim for publicizing the name and likeness of a decedent.\textsuperscript{44} Also, in order for a relative to claim a cause of action for intentional infliction of emotional distress, he or she must show an independent cause of action separate from that of the decedent.\textsuperscript{45} In the Fifth District, the appellate court held that liability under the tort of publication of private facts would only be waived for a records custodian who published the information contained in the record if 1) the person inspecting the records has made a bona fide request to inspect them, or 2) it is necessary to the agency's transaction of its official business to reveal the records to a person who has not requested to see them.\textsuperscript{46} Furthermore, whether a relative may succeed in a cause of action for publication of private facts depends on the newsworthiness of the information at issue.\textsuperscript{47} In the Fifth District,

\textsuperscript{44} See Loft v. Fuller, 408 So.2d 619 (Fla. 4th DCA 1981).

\textsuperscript{45} Id.

\textsuperscript{46} See Williams v. City of Mineola, 575 So.2d 683 (Fla. 5th DCA 1991).

\textsuperscript{47} Id.
the outrageousness of the conduct is the threshold issue in an intentional infliction of emotional distress claim. The court recognized the unique grievance that is caused when a person sees the body of a deceased relative treated without respect.\textsuperscript{48}

**Georgia: Invasion of Privacy and Intrusion**

The Georgia Supreme Court has twice addressed survivor rights in post-publication actions for invasion of privacy, although in both cases, the cause of action was invasion of privacy generally, and did not specifically identify one of the four privacy torts. In 1930 in Bazemore v. Savannah Hospital,\textsuperscript{49} the Georgia Supreme Court held that the parents of a deceased child could bring an action for invasion of privacy against a newspaper, a photographer, and a hospital after the photographer took a picture of a disfigured child without the parent’s consent. The photographer sold several of the pictures of the deceased child causing the child's parents "chagrin, mortification, humiliation, insult and injury."\textsuperscript{50} The Georgia Supreme Court noted that as a result of the defendants unauthorized actions [the parents'] good name has been attacked; that they have been greatly shocked, humiliated, and made sick, and have been obliged to employ a physician for their treatment….\textsuperscript{51}

The Court specifically addressed whether or not the right of privacy survived the child’s death. The Court said, “In this case, the child was dead when the unauthorized acts were committed and the right of action could not be in the child, but in the parents.”\textsuperscript{52} Thus, the Court

\textsuperscript{48} See Armstrong v. H & C Commc'ns, Inc., 575 So.2d 280 (Fla. 5th DCA 1991).

\textsuperscript{49} Bazemore v. Savannah Hospital, 155 S.E. 194 (Ga. 1930) (per curiam) (recognizing parents' right of privacy in photographs of their deceased child's body).

\textsuperscript{50} Id. at 196.

\textsuperscript{51} Id.

\textsuperscript{52} Id. at 262.
found that publication of the unauthorized photograph was a violation of the parents’ right of privacy.

More than 40 years later in 1973, the Georgia Supreme Court upheld a father’s right to bring an action for invasion of privacy and intrusion in Cox Broadcasting Corp. v. Cohn,\(^53\) although the holding would later be reversed by the U.S. Supreme Court on other grounds. In Cox, the father of a deceased rape victim sued a television news station that broadcast his daughter's name, identifying her as a rape victim. The father argued that "the public disclosure of the identity and involvement of his daughter eight months after the fact invaded his right to privacy and intruded upon his right to be left alone, free from and unconnected with the sad and unpleasant event that had previously occurred."\(^{54}\)

The father's suit was ultimately unsuccessful before the U.S. Supreme Court,\(^55\) which held that there was no cause of action because the reporter legally obtained the records from court documents and therefore her identity was already a matter of public record. Nonetheless, the case stands for recognition by the Georgia Supreme Court that a surviving relative may bring a privacy action in a post-mortem context.

In summary, the Georgia Supreme Court has twice recognized the privacy interests of parents of a deceased child.

**Kentucky: Invasion of Privacy**

In 1912 in *Douglas v. Stokes*, the parents of conjoined twin boys, who were connected at the sternum and subsequently died, hired a photographer to take a picture of their infants in a


\(^{54}\) Cox Broadcasting Corp. v. Cohn, 200 S.E.2d 127, 130 (Ga. 1973).

\(^{55}\) Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975).
nude state shortly after their death. The parents' agreement with the photographer was to create one photo for their personal use. The photographer took the authorized photo but made an additional copy from the negative for himself, for which he obtained a copyright from the U.S. Copyright office. The photographer subsequently sold copies of the photo for his own gain. The parents of the deceased twins sued the photographer for an injunction from further use of the photograph of their children and for invasion of privacy, claiming that because of "the exposure of the photographs they had been humiliated and their feelings and sensibilities had been wounded." The parents claimed that the photographer’s use of that photograph exposed them to humiliation and injured their feelings.

The Court of Appeals of Kentucky dismissed any copyright issue, holding that the photographer had a right to obtain the copyright, but concluded that the photographer invaded the plaintiffs' right of privacy when he exceeded his authority by publishing the photograph and selling it for his own benefit. The Court compared the photographer’s unauthorized use of the photograph of the deceased children to a hypothetical situation in which he exposed the lifeless body of the conjoined twins to public view. The injury was different "in degree but not in kind," the court stated, because the "most tender affections of the human heart cluster about the body of one’s dead child."

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57 Id.
58 Id.
59 Id.
60 Id. at 850.
61 Id.
62 Id.
63 Id.
Fifteen years after the Court of Appeals of Kentucky decided *Douglas*, the Kentucky Supreme Court referred approvingly to the *Douglas* decision in the case of *Brents v. Morgan*. While *Brents* was an action for invasion of privacy, it did not involve a post-mortem relational privacy dispute. Nonetheless, it is relevant to the discussion in this chapter because the Kentucky Supreme Court affirmed the *Douglas* decision, stating that "[t]here is no property right in a dead body, and the opinion in *Douglas v. Stokes*…could have been put on no ground other than the unwarranted invasion of the right of privacy." More than forty years later, the Court of Appeals of Kentucky addressed a comparable invasion of privacy claim for the publication of graphic photographs of a deceased child in the 1959 case of *Seller’s v. Henry*. *Sellers* involved a police officer who photographed, in the course of his official duties, a mutilated child at the scene of the vehicle accident that caused her death. The officer later shared those photographs with others. Although it was unclear in the record with whom the officer shared the photos, and the plaintiffs conceded that the child’s face was unrecognizable in the photos, the plaintiffs brought an action for invasion of privacy against the police officers.

The trial court granted summary judgment for the defendants, ruling that the photos regarded an occurrence of general and public interest. However, the Court of Appeals of Kentucky reversed the decision and held that the trial court erred when it dismissed the parents’ privacy claim because there were genuine issues of material facts as to whether the photos were

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64 *Brents v. Morgan*, 299 S.W. 967 (Ky. 1927).
65 *Id.* at 773.
67 *Id.* at 215.
of “public interest.”

Although there was no published subsequent appellate history for the case, the appellate decision stands for two significant conclusions as to the applicability of the invasion of privacy tort in the post-mortem context in Kentucky. First, the appellate court noted that the fact that the child's face was unrecognizable in the photograph precluded the child's parents from filing an action under invasion of privacy because identification of the person whose invasion has been invaded is a required element of the tort.

Second, the appellate court emphasized the outstanding question as to whether the purpose for the publication of the photograph was newsworthy. Therefore, in this case, there was no issue of whether the parents of the child could bring the case for an invasion to their own privacy right and the case was remanded on other grounds regarding the newsworthiness of the published information.

Newsworthiness was also the threshold issue in an unreported decision by the Appeals Court of Kentucky in 1991. The appellate court held in Barger v. Courier-Journal that the widow of a man who was murdered in an office massacre did not have a cause of action for intentional infliction of emotional distress against a newspaper that published photographs of the man's corpse because the murder was a matter of public concern.

In summary, the Kentucky Court of Appeals in Douglas upheld an invasion of privacy claim brought by parents of deceased conjoined twins on the grounds that the photographer who made and sold unauthorized copies from the negative of the photograph he was hired to take

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68 Id. at 216.

69 Id.

70 Id. at 217.


exceeded his authority. The Kentucky Supreme Court affirmed the decision in Douglas in a different invasion of privacy case, Brents v. Morgan. In Seller's v. Henry, the Kentucky Court of Appeals reversed a trial court decision that had dismissed a cause of action for invasion of privacy. The appellate court held that the summary judgment was incorrect because there remained an issue as to whether the information at issue was newsworthy. The appellate court in Seller's also noted that identification of the person whose privacy had been invaded is required in an invasion of privacy claim and emphasized the requirement for careful consideration of whether the information at issue is newsworthy.

The Kentucky courts have recognized that individuals may bring claims for invasion of privacy resulting from the publication of private facts about their deceased relatives. However, the success of such claims is tempered by the newsworthiness of the information at issue, which the Kentucky Court of Appeal noted in two separate opinions. Good. We need to get this on the record for your conclusion and evaluation.

**North Carolina: Intentional Infliction of Emotional Distress**

In Briggs v. Rosenthal, the Court of Appeals of North Carolina affirmed the dismissal of an intentional infliction of emotional distress claim against the Sun Publishing Company by the parents of a man killed in an automobile accident. A magazine-periodical, called The Sum, which was published by the Sun Publishing Company, published an article about saying goodbye to the parents' deceased son. According to the parent's complaint, the article described several unpleasant characteristics of [their son] in an unpleasant and insulting manner calculated to cause outrage. It was published in a reckless and irresponsible manner, and defendants knew or should have known that the article would cause great pain and

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suffering… The plaintiffs have suffered and will continue to suffer severe anguish and emotional distress from reading the article, and from its public distribution. 74

The parents filed an action for intentional infliction of emotional distress. Defendants filed a motion to dismiss for failure to state a claim, which the trial court granted. 75

On appeal, the North Carolina Court of Appeals affirmed the trial court's judgment. The appellate court found that the article could not be reasonably regarded as extreme or outrageous, a required element of the claim. "Although perhaps not flattering, the article was honest, sincere and sensitive." 76 To the grieving parents, the article may have been offensive, the appellate court said, but it did not reach the level of extreme and outrageous conduct necessary to sustain a cause of action for intentional infliction of emotional distress. 77

In evaluating whether the parents could bring the claim in the first instance, the appellate court noted that the defendants' article was published in a periodical magazine intended for the public and the plaintiff parents were not the subject of the article. "Their claim is that of third party family members distressed because they feel their deceased son is disparaged in defendants' article." 78 The appellate court said "recovery to third parties 'is clearly limited to the most extreme cases of violent attack, where there is some especial likelihood of fright or shock.' In the instant case there was no physical act committed against plaintiffs' son, nor was the article directed to the parents." 79

74 Id. at 2.
77 Id.
78 Id.
79 Id., citing PROSSER AND KEETON, LAW OF TORTS, § 12 (5th ed. 1984),
In summary, the Court of Appeals of North Carolina has heard a claim for invasion of privacy in a post-mortem relational privacy context. The appellate court rejected the claim on the grounds that the defendant's conduct did not satisfy the outrageousness element of the intentional infliction of emotional distress claim. More pertinent to the discussion here is that the appellate court also rejected the claim on the ground that the parents of the decedent were third-party family members. In order to bring the claim for intentional infliction of emotional distress, there had to be some manifestation of "fright or shock" by physical act against the son or parents. There had been none, so their claim failed.


In 1998 Reid v. Pierce County, the Supreme Court of Washington held the immediate relatives of a deceased former governor of the state had a protectable privacy interest in the decedent's autopsy records. In Reid, the niece of the former governor filed a claim against Pierce County for invasion of privacy, appropriation, and negligent infliction of emotional distress (NIED). The niece's complaint alleged that for at least 10 years employees of the Pierce County Medical Examiner's office confiscated autopsy photographs of corpses, including her deceased uncle's, for their own personal use, showing the pictures at cocktail parties and using them to create personal scrapbooks. The Reid family became aware of their unauthorized use of the autopsy photographs after newspapers reported that county attorneys in an unrelated employment discrimination suit had threatened a medical examiner employee with allegations about the unauthorized use of the autopsy photos in order to obtain a more favorable settlement.

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80 *Id.*, citing PROSSER AND KEETON, LAW OF TORTS, § 12 (5th ed. 1984),

81 Reid v. Pierce County, 961 P.2d 333 (Wa. 1998).
for the county.\textsuperscript{82} The claims of the niece were consolidated on appeal to the Washington Supreme Court with several similar claims by relatives of other decedents whose autopsy photos were confiscated by the coroner's employees.\textsuperscript{83} The Superior Court of King County (Washington) dismissed Reid's claims and granted summary judgment to the county and its employees. Reid appealed.

The Supreme Court reversed the superior court's order on the invasion of privacy claim, holding that the decedent's immediate relatives had a protectable privacy interest in the autopsy records of the decedents and sufficient facts were alleged to require trial on the issue. The Court said, "That protectable privacy interest is grounded in maintaining the dignity of the deceased."\textsuperscript{84}

The Court went on to say that

\begin{quote}
It is clear that had the County employees physically mutilated or otherwise physically interfered with the corpses of the Plaintiffs' relatives, liability would certainly exist. However, the County asserts that because the actions here involved photographs only, no harm was done. That argument is one of degree, not of distinction.\textsuperscript{85}
\end{quote}

On the claims of NIED and appropriation, the Washington Supreme Court affirmed the grant of summary judgment against the plaintiffs, holding that because plaintiffs were not present when the alleged conduct occurred, they were unable to maintain an NIED claim. The Court did not discuss the rationale behind its decision to affirm the lower court's dismissal of the appropriation claim.\textsuperscript{86}

Therefore, the Washington Supreme Court held in Reid that relatives of the deceased can make a claim for invasion of privacy based on the publication of death-related information about

\textsuperscript{82} Id. at 335.

\textsuperscript{83} Id. at 336.

\textsuperscript{84} Id. at 342.

\textsuperscript{85} Id. at 338-39 (citation omitted).

\textsuperscript{86} Id. at 338.
a deceased relative. However, the claim of negligent infliction of emotional distress requires that the relative be present during the conduct at issue. The Court also held in Reid that the plaintiff relative could not make a claim for appropriation, but did not give a rationale for the holding.

**Discussion of Common Law Remedies**

In summary, state courts in 45 states - 90 percent overall - and the District of Columbia have not considered the invasion of privacy torts or torts of outrage in a post-mortem relational privacy context. The case law of five states - Florida, Georgia, Kentucky, North Carolina, and Washington - reveals common law cases that address claims by the surviving relatives of decedents claiming tortuous publication of death-related information about their relatives. Among these five states, case law evaluates causes of action for publication of private facts, intrusion, appropriation, intentional infliction of emotional distress, and negligent infliction of emotional distress. The research found that surviving relatives had brought claims almost exclusively under the torts of public disclosure of private facts, intentional infliction of emotional distress and appropriation. The majority of successful tort actions were under intentional infliction of emotional distress, where courts identified that the conduct at issue - whether by sharing autopsy photos at a cocktail party or broadcasting images of a skeleton on the news - was outrageous in nature.

Not every one of these states has considered all of these torts. The only tort of those selected for examination in this study that was not addressed by any state court was the cause of action for false light. Interestingly, several of the claims that were brought in these five states did not specifically assign one of the privacy torts in particular as the cause of action. Instead, some of the claims were brought under the tort of invasion of privacy generally.

Overall, the study shows that once someone has published death-related information about a person the remedies available to relatives for a redress of injury are limited. For example, the
term *remedy* is somewhat of a misnomer since the alleged injury has already occurred and can't be taken back. The cases examined in this study show that the relatives who brought claims against persons and entities that published information about their deceased relatives were never in a position to "prevent" the publication. The only remedy is damages, intended to put an injured party back into the position he or she would have been in if the damage had not occurred.

Four out of the five states that have addressed privacy and emotional distress torts in the post-mortem context recognized that a relative may bring a claim for an injury resulting from the publication of death-related information about a deceased relative. However, this remains a small percentage over all of the number of states, 50, since 45 have not addressed the cases at all. Even if a claim may be brought in these four states by a relative, the plaintiff must still satisfy the elements of the cause of action. In the publication of private facts tort, for example, courts must assess, in part, if the matter publicized is of a kind that would be highly offensive to a reasonable person and is not of legitimate concern to the public. In the tort for intentional infliction of emotional distress, the court must determine, in part, if the conduct at issue is extreme and outrageous and if the defendant had the intent to cause - or disregarded the substantial probability of causing - severe emotional distress to the plaintiff.

The remedies available to a relative in the post-publication context are jurisdiction-specific because they are proscribed by state statute and state common law. Thus, a person bringing a claim for invasion of privacy in Georgia can rely on the precedent set in *Bazemore v. Savannah Hospital* in which the Georgia Supreme Court held that unauthorized publication of a photograph of a deceased child violated the parents' right of privacy. However, a person bringing a similar claim in another state, such as Alabama, which does not have any common law precedents in the

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87 See Bazemore v. Savannah Hospital, 155 S.E. 194 (Ga. 1930) (per curiam) (recognizing parents' right of privacy in photographs of their deceased child's body).
post-mortem relational privacy context, would not be able to apply the remedy established in *Bazemore*.

Furthermore, the cases that were examined within the five states that did have case law examining relational privacy claims in the post-mortem context established precedents specific to their jurisdictions within their respective states. In fact, non-supreme court and appellate court cases in the same state are not required precedent for their equivalents in the same state. So a citizen bringing a claim in Florida's Fourth District Court of Appeal, which has not yet addressed a case regarding publication of private facts in the post-mortem context, would not be able to rely on the precedent set by the Fifth District Court of Appeals. In that jurisdiction, the appellate court held in *Williams v. Mineola* that a records custodian who shares a public record with another person is not immune from liability unless the outside person made a bona fide request for the record.  88 The Fifth District opinion could be persuasive in the Fourth District, however.

In sum, this chapter examined the context and remedies in the fourth and final phase of the post-mortem relational privacy continuum. Chapter 8 concludes the dissertation with a review of the four phases of the post-mortem relational privacy continuum, answers to the research questions, an evaluation of the implications of the findings, and recommendations for further research.

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88 *See Williams v. City of Minneola*, 575 So.2d 683 (Fla. 5th DCA 1991).
CHAPTER 8
CONCLUSION

*Post-mortem relational privacy*, a term introduced with this dissertation, describes the concept that family members have a privacy interest in information about their dead relatives. Conflict between surviving relatives and non-relatives over who should control and have access to information about the dead is found in American jurisprudence as early as 1895. In *Schuyler v. Curtis*, the nephew of a deceased philanthropist sought an injunction and damages for invasion of privacy against an artist who wanted to erect a statue in honor of the plaintiff's aunt.\(^1\) While Ms. Schuyler's nephew objected to a statue in his aunt's honor, modern families such as the Catsouras' of California are threatened with the indiscriminate dissemination via the Internet of full-color photographs picturing their 18-year-old daughter, Nikki Catsouras, nearly decapitated in the wreckage of a high-speed vehicle crash.\(^2\) Web sites such as [http://www.NewsnIdea.com](http://www.NewsnIdea.com), which posted her death-scene photo, allow anyone in the world to virtually "slow down as they drive by" to see the scene of Nikki's death.\(^3\) Having the likeness of a deceased relative preserved in an honorary statue is hardly daunting compared to the threats that modern-day technologies and voyeuristic pop culture present. Nonetheless, the rationale behind the privacy concerns of surviving relatives such as Ms. Schuyler's nephew and Nikki Catsouras' parents and siblings stem from the same interest - when a relative dies, information about them takes on a life of its own.

In addition to the ease and efficiency of communication facilitated by the Internet and the slew of Web sites that feed an anonymous audience of interested onlookers, post-mortem

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relational privacy interests are opposed on another front as well. U.S. law has developed statutory regulations that provide citizens protections for their right to know about their government's activities. Many Freedom of Information laws give citizens access to state and federal government records, including those that document the death of citizens such as autopsies, death-scene investigations and criminal reports. Coupled with the advancement of technology, these two developments threaten the privacy interests of families who wish to keep information about their dead relatives private.

While the plight of surviving relatives such as the Catsouras' family is dramatic and sympathetic, there are equally compelling arguments for the legal protections given to the public's right to access government information. Without such access, the public is unable to see firsthand how its federal government operates, spends the taxpayers' dollars, and executes critical national and foreign policy initiatives. Similarly, at the state level, public access to government records documenting such activities as autopsies, criminal investigations and accident reports provides citizens with crucial information about their state and local governments' conduct. The press - as a surrogate of the public in many public records requests - plays a critical role in this process, seeking out government records and reporting on them. Furthermore, the public's right to know about its government's activities is strongly related to the First Amendment rights of free speech and a free press. The right to access the government's records is stymied if the public cannot freely discuss and disseminate that information. First Amendment theorist Vincent Blasi called this function the checking value of the First Amendment.

The crux of the conflict between the public's interest in being able to access government information and the privacy interests of families lies in determining whose interests outweighs the others - the surviving relatives of the decedents about whom the death certificates, autopsy
reports, homicide investigations, and death-scene reports pertain, or the citizens whose government generates and maintains those records. The interests of both parties are protected by the American legal system, where the Supreme Court has on separate occasions recognized that individuals have both a right to privacy and a right to know what their government is up to. This dissertation asked whether and to what extent the right to privacy - or, as scholar Jon Mills' called it, the individual's "personal information sphere" - has expanded to include information about one's dead relatives in addition to information about one's self. Furthermore, how do courts and legislatures balance privacy interests with freedom of information principles?

**Multiple Remedies for Relatives**

Two forms of preemptive remedies for surviving relatives in post-mortem relational privacy disputes developed during the 20th Century in reaction to state and federal public records laws that provide citizens with access to government records, including those that contain death-related information such as autopsy records, death-scene photos and criminal investigatory reports. At the state level, one preemptive remedy is a statutory records exemption. Although this dissertation did not explore the statutory regulations pertaining to all death-related records in the custody of state agencies, the research did examine regulation of public access to autopsy records, in particular, because the vast majority of states have enacted statutory restrictions on public access to such records. Another preemptive remedy available at the state-level is a court injunction on the release of a record. A relative may seek a court order to prevent the release of a government-held, death-related record in order to prevent a predictable harm such as an invasion of his or her privacy.

At the federal level, the same dichotomy of preemptive remedies also exists. Congress passed the Freedom of Information Act in 1976, providing public access to federal government records. The presumption, according to the Act, is openness, unless one of the nine enumerated
exemptions, two of which expressly provide protections for privacy, applies. In a series of federal cases during the last two decades of the 20th Century and the first decade of the 21st, federal courts interpreted the government's application of the FOIA exemptions for privacy in post-mortem relational privacy contexts and found that the privacy interests of relatives outweighed the public's interest in the information at issue. The Supreme Court adopted the post-mortem relational privacy rationale in 2004, affirming the decisions of the lower courts in the previous cases. The Court held in *National Archives & Records Administration v. Favish* that the FOIA did, on balance, provide protection for the privacy interests of surviving relatives.

The application of such statutory and injunctive remedies and the resulting encroachment on the public's access to government records coincided with the burgeoning of the Internet. The sage warnings of Samuel D. Warren and Louis D. Brandeis in their 1890 law review article against, what they believed, was an increasingly intrusive media foreshadowed the role that modern technologies would play in privacy disputes. *Favish* is a clear example of the threat posed by the Internet as a means of efficient mass publication of information about the dead. Fear of widespread electronic publication of death-related information was a driving force in several state-level cases as well, including *Rolling, Versace and Earnhardt*.

In addition to statutory and injunctive relief, a third preemptive remedy is also a possible, although only in theory at this point. In the pre-publication phase of the post-mortem relational privacy continuum, a relative may seek a court injunction on the publication of death-related information about a relative. This form of prior restraint is presumptively unconstitutional and carries with it a high burden to overcome the presumption. No U.S. court has ever upheld a prior restraint in a post-mortem relational privacy context.
While protective measures for relational privacy in post-mortem contexts appear to have developed primarily in reaction to the burgeoning of freedom of information laws and the Internet, post-publication remedies - or restorative remedies - were in existence long before these developments. The earliest known case in which a U.S. court both addressed and granted post-publication relief for a relative in a post-mortem relational privacy dispute occurred in *Douglas v. Stokes* in 1912 in Kentucky. The parents of conjoined twin boys brought a claim of invasion of privacy against a photographer who, after being hired by the parents to take a photo of their children shortly after their death, made an unauthorized photo from the negative for himself and obtained a copyright from the U.S. Copyright office. The Court of Appeals of Kentucky dismissed any copyright issue, but concluded that the photographer did invade the plaintiffs' right of privacy when he exceeded his authority because the "most tender affections of the human heart cluster about the body of one’s dead child."  

Appellate courts in four other states - Florida, Georgia, North Carolina and Washington - have addressed whether relatives of the deceased may receive restorative remedies for injuries stemming from the publication of information about their dead relatives. The Supreme Court of Georgia and appellate courts in Florida and Kentucky have upheld tort relief for surviving relatives. However, the extent to which the privacy torts (publication of private facts, intrusion, false light, and appropriation) and the torts of outrage (intentional and negligent infliction of emotional distress) serve as feasible remedies in the post-publication context is limited. Not all states and the District of Columbia recognize the privacy torts and the torts of outrage, which are commonly the causes of action under which relatives have sought recovery for an injury

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5 *Id.*

6 *Id.* at 850.
stemming from the publication of information about a dead relative. Additionally, restorative remedies are inherently past looking, so the injury to the relative must occur for the remedy to be possible. In contrast, preemptive remedies prevent the injury from ever occurring, which is ideal for a relative, according to scholar and privacy advocate Jon Mills.⁷

**Foundations for the Research**

In the wake of *Favish* and other high profile, death-related cases, several First Amendment scholars conducted research on the topic of relational privacy in the post-mortem context. Chapter 1 reviewed the existing scholarly research with particular attention to the scholars' examination of the courts' rationales. This dissertation built on the existing research, especially Jon Mills' four-sphere privacy model. Mills model depicts four spheres - personal information, autonomy, physical space and property - which encompass the variety of interests which are represented by the overall theme of privacy.

Relational privacy exists in the overlapping region between the informational and autonomy spheres where issues of family privacy intersect with issues of informational privacy. Naturally, post-mortem relational privacy exists as a subcategory of relational privacy, encompassing the privacy interests of a person with regards to deceased relatives and control over the death-related information about them.

This dissertation asked to what extent the individual's sphere of protectable personal information has expanded to include government-held, death-related information about his or her dead relatives, in addition to information about him or herself. Furthermore, the research questions asked what the development of such privacy protections implies for the public's interest in access to information about its government's activities, including those that document

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⁷ *See supra* p. 85.
the death of its citizens and the behavior of such government officials as coroners. To answer these overarching questions, the researcher posed seven research questions that probe the nature of a post-mortem relational privacy dispute and the manner in which the concept is balanced with First Amendment issues in the law.

The legal research conducted to answer these questions was executed in the following manner. First, the researcher became familiarized with the academic literature on the topic of relational privacy for surviving relatives, relying on the existing literature to provide starting points for further research. After developing a general understanding of the concept, the researcher chose search terms to be used in the Lexis legal database. The researcher conducted a methodical study of the 50 states and the District of Columbia to ascertain the extent to which state legislatures have recognized the privacy interests of surviving relatives. The statutory research was limited in scope to regulation of public access to autopsy records because the amount of legislation dealing with death-related records was beyond the scope of research feasible for this dissertation.

The researcher also conducted a review of the pertinent case law at both the state and federal levels, investigating all found cases in which courts examined the privacy interests of surviving family members relative to the public's interest in accessing government-held, death related records about the deceased. This research was not limited to one type of death record because the number of cases dealing with this issue is relatively minimal in comparison to the statutes dealing with survivor rights. Third, the researcher conducted a case study of the "Dover Policy," which detailed presidential policy regarding public access to honor guard ceremonies for U.S. service members killed in overseas conflicts.
The dissertation's findings were culled predominantly from statutory regulation of public access to government-held, death related records. At the federal level, there are some general statutes related to privacy, including the FOIA's Exemptions 6 and 7. The majority of the findings at this level resulted from examining a select number of precedential cases in which federal courts interpreted the application of privacy exemptions to the non-disclosure of public records. A case study of the Department of Defense's Dover Policy provided an example of a current relational privacy dispute and a trend in executive policy to support relational privacy rights in the post-mortem context.

At the state level, the 50-state study of access-to-autopsy-record statutes demonstrated how some legislatures have codified the concept of post-mortem relational privacy. For example, some statutes prohibit disclosure of autopsy records all together on the grounds of relational privacy. The District of Columbia and four states have enacted explicit provisions that prohibit disclosure if it would constitute an invasion of privacy.\(^8\) Other statutes require a balancing of the public interest in disclosure with other concerns, including relational privacy, the integrity of ongoing investigations.\(^9\) At the state level, there were also a limited number of cases in the pre-disclosure context that limited public access to autopsy records because of the threat disclosure posed to surviving relatives' privacy interests. In the post-publication context, the courts in five states have addressed claims by relatives against the publishers of death-related information about their deceased relatives. Four of those five states allowed for recovery under various common law privacy and emotional distress torts The following sections discuss these findings in more detail and put the findings into context to answer to the dissertation's research questions.

\(^8\) District of Columbia, Georgia, Illinois, Maryland, and West Virginia.

\(^9\) See supra p. 131-32.
Summary of the Chapters and Answers to the Research Questions

Question 1: What are the factors comprising a post-mortem relational privacy dispute?

Based on a comprehensive survey of U.S. state and federal cases involving either pre-publication injunctions or post-publication remedies, the researcher identified five common factors comprising a post-mortem relational privacy dispute. The five factors are: 1) the competing interests who seek control of the information, 2) the information itself, 3) the law governing the agency that has custody of the information, 4) the degree of access that the public has to the information, and 5) the preemptive or restorative remedies available to the decedent's surviving relatives who claim a privacy interest in the information about their dead relative.

Factor One: Competing Interests

A variety of parties can take an interest in whether government-held, death-related information about a decedent is disclosed to the public. A relative of the deceased may want the investigatory record of a relative's murder sealed. The government agency with custody of the record may want to limit disclosure until an investigation involving the death at issue is resolved in order to not compromise investigatory practices. A journalist might want to report on the circumstances surrounding a suspicious death. A scientist or doctor may want to conduct research on a communicable disease. A Web site operator might want to post the salacious photos of an autopsy on the Internet. The interests of these various parties cannot all be satisfied completely. When there is a conflict as to the degree of access that the public has to a government-held, death-related record, the result is a post-mortem relational privacy dispute.

There are three important clarifications that are critical to understanding the competing interests involved in this context. First, post-mortem relational privacy pertains to the privacy
interests of surviving relatives, not the decedent. Second, the Supreme Court has held that the First Amendment does not guarantee the public or the press a right to obtain government information. Certain federal and state statutes, court decisions interpreting those statutes, and state constitutional laws establish the public's right to know. Third, the Supreme Court also set forth the principle that the public's interest in accessing government information must be balanced against competing social necessities. Fourth, conflicting interests of privacy and access do not always contradict each other in such a manner that only the interests of one side can be met; compromises are sometimes possible to meet the primary concerns of each party.

**Factor Two: Information at Issue**

The second factor comprising a post-mortem relational privacy dispute is the character of the information at issue. In what type of record and in what medium is the information is contained? For example, the record may be a criminal investigatory file containing audio transcripts and photographs, or it could be an autopsy report, or 911 tapes that captured a death. The types of records at issue in *Challenger* (autopsy tapes), *Rolling* (death-scene photos), *Versace* (investigatory files and photos), and *Earnhardt* (autopsy photos) represent some of the types and mediums of death-related records that may be at issue in a post-mortem relational privacy dispute.

**Factor Three: The Law Governing Access to the Information**

The third factor in a post-mortem relational privacy dispute is the law governing who has access to the death-related records, which depends on the jurisdiction in which the custodial

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10 Restatement (Second) of Torts § 652B-E (1977).

11 Chapter 2 provides more detail about the American political theories that support public access to government information. *See supra* p. 72.

12 *Id. See also* Pell v. Procunier, 417 U.S. 817 (1984) and Saxbe v. Washington Post, 417 U.S. 843 (1974) (both holding that the First Amendment does not guarantee the press more access to prisons and inmates than is made available to every other citizen).
agency operates. For example, where the records custodian is a federal agency such as the National Park Service or NASA, the applicable law is the Freedom of Information Act. Where the custodian is a county medical examiner, for example, the public records law of the state in which the autopsy is conducted controls who has access to the record at issue.

**Factor Four: Degree of Public Access to the Information at Issue**

The fourth factor in a post-mortem relational privacy dispute is the degree of access that the public has to the information at issue. The degree of access can be conceptualized as a continuum on which a record moves chronologically through time, beginning with the death of a person and the creation of a death-related record about him or her. This continuum of time is called, for the purposes of this dissertation, the *post-mortem relational privacy continuum*. The continuum encompasses 1) the process in which death-related information is collected and disseminated, 2) the phases in which a dispute between competing interests may occur, and 3) the different remedies available to those parties in each of those phases.

**Pre-request Phase:** The first phase in the post-mortem relational privacy continuum is called *Pre-request* - the point in time when either a government agency or a private person generates or comes into control of information about a dead person. If the information is government-generated, it is contained in a government record that has not yet been requested by a member of the public. If the information is privately held, the person with control of the information has not yet made it public. The pre-request phase lasts until a member of the public requests the record from the custodial government agency or from the private person with control of it.

**Pre-disclosure Phase:** The second phase of the post-mortem relational privacy continuum is called *Pre-disclosure* - the point in time when a member of the public has requested the government record, but the custodial agency has not yet disclosed it. The same is true for
privately held information - the person in control of the information has not yet made it public. The second phase of the continuum begins when a member of the public makes a public record request and continues as long as the request is pending completion. State and federal civil and criminal statutes that prohibit or require disclosure of certain records govern this phase. At this point in time, a surviving relative may depend on a state or federal statute that regulates public access to the death-related record. If the existing statute does not prevent disclosure, or does not exist at all, a relative may seek another form of preemptive remedy - a court injunction prohibiting disclosure of the record. If law or court order requires disclosure of the record, then this phase ends, and the dispute enters the third phase of the continuum.

Pre-publication Phase: The third phase is called Pre-publication. It begins once a government agency or private citizen has disclosed a record to a requesting party. This phase ends once the information contained in the record is published. In this phase, the record has not yet been “made public” and is still within the control of the party to whom it was disclosed. Similarly, if the information is privately held, the person in control of the information also has not published it widely. During the pre-publication phase, a relative of the deceased may seek an injunction on its publication, however such a remedy is highly unlikely because it is presumptively unconstitutional. Once the publication occurs, the dispute moves into the fourth and final phase of the continuum.

13 Restatement (Second) of Torts § 577 (1977). "Published widely," as it is used in this dissertation, differs from the kind of "publication" that is used in connection with liability for defamation. Restatement (Second) of Torts § 652D, cmt. a. (1977). "Publication," in that sense, is a term of art, which includes any communication by the defendant to a third person. In contrast, when a record is "made public," as the term is used here, it is akin to "publicity," as it is used in the tort of public disclosure of private facts. As in that tort, it means "that the matter is made public, by communicating it to the public at large, or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge. The difference is not one of the means of communication, which may be oral, written or by any other means. It is one of a communication that reaches, or is sure to reach, the public."
**Post-publication Phase:** In the fourth phase, *post-publication*, the information at issue has been published widely. The post-publication phase begins after someone publishes the information about a deceased person. After publication occurs, a surviving relative of the deceased may seek a restorative remedy for the injury caused by the publication under a variety of causes of action, including the four privacy torts and the torts of outrage.

The following section returns to the factors that comprise a post-mortem relational privacy dispute. The four factors reviewed so far, before discussing the phases of a the post-mortem relational privacy dispute, are 1) the competing interests who seek control of the information, 2) the information itself, 3) the law governing the agency that has custody of the information, and 4) the degree of access that the public has to the information. The fifth and final factor describes the types of remedies that may be available to surviving relatives during each of the four phases in the post-mortem relational privacy continuum.

**Factor Five: Remedies Available to Surviving Relatives**

The fifth and final factor in a post-mortem relational privacy dispute entails the remedies that are available to surviving relatives of the deceased who seek to either prevent the disclosure of information about their relatives or seek a restorative remedy for an injury stemming from the publication of the information. Of the two general types of remedies available to relatives, preemptive remedies and restorative remedies, the former is available in the first three phases of the post-mortem relational privacy dispute continuum (pre-request, pre-disclosure, and pre-publication). Restorative remedies are available in the fourth phase - post-publication.

In summary, the five factors of a post-mortem relational privacy dispute are: 1) the competing interests, 2) the information at issue, 3) the law governing access to the information, 4) the context in which a dispute may occur, and 5) the remedies available to the decedent's surviving relatives. Additionally, a post-mortem relational privacy dispute may take place in any
one of four phases along the post-mortem relational privacy continuum, which are 1) pre-request, 2) pre-disclosure, 3) pre-publication, and 4) post-publication. The degree of access that the competing interests have to the information at issue determines when these phases begin and end.

**Question 2: In what contexts may a post-mortem relational privacy dispute occur?**

A post-mortem relational privacy dispute may occur in one of four contexts. These contexts are represented by the phases of the post-mortem relational privacy continuum explained in the first research question. The phases of the continuum - pre-request, pre-disclosure, pre-publication, and post-publication - represent distinct periods of time after a person dies and a government agency or private person generates or comes into control of death-related information about that person. When the interests of the person or entity with custody of that information conflict with the interests of the decedent's surviving relative, a dispute occurs. The dispute can occur at the outset, when the record has not yet been disclosed to the public at large, at a later phase in the continuum such as pre-publication, or after publication has already occurred.

The point in time along the continuum in which the dispute occurs is critical to the resolution of the conflict because different laws control each phase and the governing law dictates what type of remedy is appropriate. For example, in the pre-request and pre-disclosure phases, the law governing the agency with custody of the record determines who has access to a death-related record. The Freedom of Information Act governs federal records in the pre-release and pre-disclosure phases. Similarly, state public records law govern state records prior to disclosure. In the pre-publication phase where the record has been released from government custody but has not yet been published widely, constitutional law governs whether the government may enjoin the publication of the information. The First Amendment governs
injunctions in the pre-publication phase and subsequent punishments in the post-publication phase. In the post-publication phase of the continuum, where the information has been published, and presumably, an alleged injury to the surviving relatives of the decedent has already occurred as a result of that publication, the tort law of each state governs whether a surviving relative has a cause of action against the publisher.

In summary, a post-mortem relational privacy dispute may occur in one of four contexts, which are represented as phases along the post-mortem relational privacy dispute continuum. The point in time along the continuum in which a dispute occurs dictates several legal issues: 1) whether the public has a statutorily provided right to access death-related records, 2) whether the First Amendment affords a citizen the right to publish the information contained therein, and 3) the type of protective or restorative relief that is available to a surviving relative seeking relief.

**Question 3: What protective forms of relief may a surviving relative seek in a post-mortem relational privacy dispute?**

There are three protective forms of relief available to a surviving relative in a post-mortem relational privacy dispute. Two of them - either a statute or court-ordered injunction that prohibit disclosure - are possible in the pre-request and pre-release phases of the continuum. The third protective remedy - a court-ordered injunction on publication, or a prior restraint - is only available in the third phase of the continuum, pre-publication. The availability of these remedies is dependent, in part, on the law of the jurisdiction in which the post-mortem relational privacy dispute is occurring.

For example, in the pre-release and pre-disclosure phases, a relative of the decedent may find relief in a statute that prohibits the release of specific government-held, death-related information. If the information at issue is contained within a federal record, the FOIA presumes that such a record is public unless one of the nine enumerated exemptions applies. Two of those
exemptions - Exemption 6 for personnel, medical and similar files, and Exemption 7 for investigatory records - are specifically tailored to privacy concerns. The U.S. Supreme Court held in *Favish* that the FOIA can protect family members who have a privacy interest in the information about their dead relatives. In *Favish*, the privacy interest involved death-scene photographs exempted from disclosure by their custodial agency under the FOIA's Exception 7 for investigatory records. Exemption 7(c) protects from disclosure law enforcement records, such as the death-scene photographs at issue in *Favish*, if their production "could reasonably be expected to constitute an unwarranted invasion of personal privacy."\(^1^4\) In applying Exemption 7(c), courts must balance the public interest in the documents against the intrusion on privacy that disclosure would cause.\(^1^5\)

At the state level, legislatures may enact statutes regulating the public's access to death-related records. Such states may take a pro-access approach, proscribing that such records are presumptively open to the public. Other statutes may be more protective in form, limiting access presumptively. Although this dissertation did not examine statutes regulating all types of death-related records, the 50-state study presented in Chapter 5 on autopsy records revealed that 46 states and the District of Columbia have enacted statutes that regulate public access to autopsy records. The study identified various criteria by which a custodian may determine access. If, however, no statute protecting against the disclosure of a relative’s death record exists, a surviving relative may ask a court to enjoin the release of the information under the available provisions of the respective state.

\(^1^4\) 5 U.S.C. 552(b)(7)(C).

Finally, if neither a statutory or court-ordered injunction exists, a third, although less probable, remedy still remains. Assuming the information at issue has been released to the requesting party but has not been widely published, a relative of the deceased about whom the information pertains can seek an injunction from the court to prevent its publication. Such an order is a prior restraint on publication and is presumptively unconstitutional. The government - or anyone else - has a heavy burden to overcome to show the need for a prior restraint on publication. Ironically, the earliest known case in U.S. law addressing an issue of post-mortem relational privacy deals with a possible prior restraint on a death-related expression. In the 104-year-old case, *Schuyler v. Curtis*, the New York Court of Appeals held that a defendant seeking to erect a statue in honor of a deceased philanthropist did not need to the approval of the decedent's nephew, who claimed such a statue would invade his privacy.

The precedent in this area of the law provides only a few specific examples, such as national security issues, in which a prior restraint may be warranted. In comparison, it is highly unlikely that the type of information at issue in a post-mortem relational privacy dispute would be the type of information that would satisfy the constitutional barrier that a prior restraint must overcome. No direct precedent exists that suggests a court would uphold a prior restraint in order to protect an individual's privacy interests in a decedent's information.

If none of the three types of preemptive remedies - statute, court-ordered injunction on disclosure, or prior restraint - is available to a surviving relative at the state or federal level, the information at issue may be released and subsequently published. If publication occurs, a surviving relative may allege that an injury occurred as a result. In some jurisdictions, the relative may seek a restorative remedy through a common law tort action. The next research

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16 Schuyler v. Curtis, 42 N.E. 22 (N.Y. 1895).
question explores six common law causes of action under which a surviving relative may seek restorative relief.

**Question 4: What restorative forms of relief may a surviving relative seek in a post-mortem relational privacy dispute?**

The fourth and final phase of the post-mortem relational privacy continuum - post-publication - begins when someone publishes death-related information about a non-relative. At this point, the legal remedy available to a relative of the decedent for an injury resulting from such a publication is restorative in nature. For the purposes of this dissertation, the researcher focused on six common law tort remedies that redress the types of injuries that are often alleged in a post-mortem relational privacy dispute. These injuries and the torts that redress them were identified in the research conducted for the literature review. The research identified cases dealing with the common law invasion of privacy torts - publication of private facts, intrusion, false light, and appropriation - as well as the common law torts of outrage - intentional and negligent infliction of emotional distress. While other remedies in the realms of contracts and property law also might be available to a relative, the invasion of privacy and emotional distress torts redress the types of injuries typically alleged in a post-mortem relational privacy dispute.

The researcher identified the types of potential injuries that were at issue in several pre-publication cases such as Favish, Challenger, Rolling, Versace and Earnhardt and matched them up with the common law torts that typically address such injuries. Several privacy scholars whose work was discussed in the literature review have noted that many courts, including the U.S. Supreme Court in Favish, addressed relatives' fears of invasion of privacy or emotional distress when arguing for protective measures. A broader search using key words for other remedies was beyond the scope of this study, but is recommended in a later section in this chapter. For example, relatives may find feasible remedies in the law of contracts or property
where the injury stems from a breach of contract related to the decedent or a property interest in the body or likeness of the decedent.

Common law tort remedies are governed by state statute. Therefore, to ascertain whether states recognize the post-mortem relational privacy concept as a ground for recovery under one of these torts, the researcher conducted a 50-state study of common law cases in which: 1) at least one of the parties to the dispute was a surviving relative of the deceased person about whom the information at issue pertained; 2) that relative filed a damage suit against the person or publication that published the information; 3) the cause of action was one of the six tort actions identified in the research parameters; 4) the issue before the court was whether the relative can recover for the alleged injury stemming from the publication of the information; and 5) the dispute was resolved in a court decision as opposed to an alternative dispute resolution. The court decisions were examined to ascertain, by state, whether a state allows a relative to make a claim for damages under the privacy and/or emotional distress torts and, if so, how courts balance First Amendment rights of speech and a free press with the privacy interests of surviving relatives. The research found that state courts in five states have addressed whether their common law provides a remedy for surviving relatives in the post-mortem relational privacy context. Forty-five states and the District of Columbia have not addressed relational privacy claims for invasion of privacy or the emotional distress torts. The fact that only ten percent of states have case law addressing whether a relative may make a claim for an injury caused by the publication of information about a deceased relative does not necessarily mean that post-publication remedies are a limited avenue for relatives seeking redress for their injuries. This

finding does not necessarily reflect a refusal of the court system to deal with the issue, but it does show that those cases are not being brought to the courts, at least not at the appellate level.

Alternatively, the fact that four out those five states do allow a relative to recover for such injuries shows that, when given the opportunity to address the issue, state courts have often acknowledged that relatives have a privacy interest in information about their dead relatives separate and apart from any claim that the decedent may have had in the information prior to death. The following sections briefly review the findings in the five states that have addressed claims by relatives for injuries resulting from the publication of information about their deceased relatives.

**Florida**

Florida's Fourth and Fifth District Courts of Appeal have both addressed claims of invasion of privacy under the appropriation and publication of private facts torts, and under the intentional infliction of emotional distress tort, in a post-mortem relational privacy context. Florida's Fourth District Court of Appeal rejected a claim for intentional infliction of emotional distress in *Loft v. Fuller* on the ground that the plaintiffs failed to allege any independent violation of their own personal privacy. The appellate court also rejected a claim in *Loft* for appropriation on the grounds that the Florida statute did not prohibit the publication of a deceased person's name and likeness and the plaintiff failed to state a claim.

Florida's Fifth District Court of Appeal allowed a claim for publication of private facts in *Williams v. City of Mineola* on the ground a records custodian is not immune from tort liability resulting from that person's intentionally communicating public records or their contents to

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18 Loft v. Fuller, 408 So.2d 619 (Fla. 4th DCA 1981), rev. den'd, 419 So.2d 1198 (Fla. 1982).
19 Williams v. City of Mineola, 575 So.2d 683 (Fla. 5th DCA 1991).
someone outside the agency which is responsible for the records. Liability would only be waived, the appellate court said, if 1) the person inspecting the records has made a bona fide request to inspect them, or 2) it is necessary to the agency's transaction of its official business to reveal the records to a person who has not requested to see them. The appellate court also upheld a claim in the same case for intentional infliction of emotional distress because of the outrageous character of the conduct at issue.

The Fifth District Court of Appeal also upheld a decision in Armstrong v. H & C Communications, Inc., recognizing the privacy interests of surviving relatives in an intentional infliction of emotional distress claim but rejecting a claim for publication of private facts because the information was newsworthy.

**Georgia**

The Georgia Supreme Court recognized the privacy interests of parents of a deceased child in Bazemore v. Savannah Hospital, upholding their claim for invasion of privacy. The state supreme court also recognized in Cox Broadcasting Corp. v. Cohn that a surviving relative may bring a privacy action in a post-mortem context, although that decision was reversed on other grounds by the U.S. Supreme Court.

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20 Williams v. City of Mineola, 575 So.2d 683, 687 (Fla. 5th DCA 1991).
21 Id.
23 Bazemore v. Savannah Hospital, 155 S.E. 194 (Ga. 1930) (per curiam) (recognizing parents' right of privacy in photographs of their deceased child's body).
Kentucky

The Kentucky Courts of Appeal has twice addressed claims of invasion of privacy in a post-mortem relational privacy context. The Kentucky Court of Appeals in Douglas v. Stokes\(^{25}\) upheld an invasion of privacy claim brought by parents of deceased conjoined twins on the grounds that the photographer who made an unauthorized copy from a negative and sold it for his own gain exceeded his authority. The Kentucky Supreme Court favorably acknowledged the decision in Douglas in a different invasion of privacy case, Brents v. Morgan.\(^{26}\) The Kentucky Court of Appeals also allowed a relative to make a claim for invasion of privacy in Seller's v. Henry,\(^{27}\) which involved a police officer who photographed, in the course of his official duties, a mutilated child at the scene of the vehicle accident that caused her death and later shared the photographs with others.\(^{28}\) The appellate court reversed the trial court decision that had dismissed the relative's cause of action for invasion of privacy, holding that the summary judgment was incorrect because there remained an issue as to whether the information at issue was newsworthy. The appellate court in Seller's also noted that identification of the person whose privacy had been invaded - in this case, the relative's - is required in an invasion of privacy claim, but that the child's face was unrecognizable. The appellate court also emphasized the requirement for careful consideration of whether the information at issue is newsworthy.

North Carolina

In Briggs v. Rosenthal, the Court of Appeals of North Carolina affirmed the dismissal of an intentional infliction of emotional distress claim against a publishing company by the parents of


\(^{26}\) Brents v. Morgan, 299 S.W. 967 (Ky. 1927).


\(^{28}\) Id. at 215.
a man killed in an automobile accident.\textsuperscript{29} A magazine published an article about saying good-bye to the parents' deceased son. According to the parent's complaint, the article described "several unpleasant characteristics of [their son] in an unpleasant and insulting manner calculated to cause outrage."\textsuperscript{30} The North Carolina Court of Appeals found that the article could not be reasonably regarded as extreme or outrageous, a required element of the claim. To the grieving parents, the article may have been offensive, the appellate court said, but it did not reach the level of extreme and outrageous conduct necessary to sustain a cause of action for intentional infliction of emotional distress.\textsuperscript{31} The appellate court also rejected the claim on the ground that the parents of the decedent were third-party family members. In order to bring the claim for intentional infliction of emotional distress, there had to be some manifestation of "fright or shock" by physical act against the son or parents.\textsuperscript{32} There had been none, so their claim failed.

\textbf{Washington}

The Supreme Court of Washington held that the immediate relatives of a decedent have a protectable privacy interest in the decedent's autopsy records in \textit{Reid v. Pierce County}.\textsuperscript{33} The Court reversed the superior court's order that granted summary judgment for defendants on the invasion of privacy claim because the decedent's immediate relatives had a protectable privacy interest in the autopsy records of the decedents, and sufficient facts were alleged to require trial on the issue. The Court affirmed the grant of summary judgment against plaintiffs on the claims of appropriation and negligent infliction of emotional distress. The Court held that because

\begin{footnotes}
\item[30] \textit{Id.} at 2.
\item[31] \textit{Id.}
\item[32] \textit{Id.}, citing PROSSER AND KEETON, LAW OF TORTS, § 12 (5th ed. 1984).
\item[33] Reid v. Pierce County, 961 P.2d 333 (Wa. 1998).
\end{footnotes}
plaintiffs were not present when the alleged conduct occurred, they were unable to maintain an
negligent infliction of emotional distress claim.\textsuperscript{34}

In summary, state courts in 45 states - 90 percent overall - and the District of Columbia
have not considered the invasion of privacy torts or torts of outrage in a post-mortem relational
privacy context. The case law of five states - Florida, Georgia, Kentucky, North Carolina, and
Washington - reveals common law cases that address claims by the surviving relatives of
decedents claiming tortuous publication of death-related information about their relatives.
Among these five states, case law evaluates causes of action for publication of private facts,
intrusion, appropriation, intentional infliction of emotional distress, and negligent infliction of
emotional distress.

Not every one of these states has considered all of these torts. The only tort of those
selected for examination in this study that was not addressed by any state court was the cause of
action for false light. Interestingly, several of the claims that were brought in these five states
did not specifically assign one of the privacy torts in particular as the cause of action. Instead,
some of the claims were brought under the tort of invasion of privacy generally.

Overall, the study shows that once someone has published death-related information about
a person, the remedies available to relatives for a redress of injury are limited. For example, the
term \textit{remedy} is somewhat of a misnomer since the alleged injury has already occurred and can't
be taken back. The cases examined in this study show that the relatives who brought claims
against persons and entities that published information about their deceased relatives were never
in a position to "prevent" the publication. The only \textit{remedy} is damages, intended to put an
injured party back into the position he or she would have been in if the damage had not occurred.

\textsuperscript{34} Id. at 202.
Four out of the five states that have addressed privacy and emotional distress torts in the post-mortem context recognized that a relative may bring a claim for an injury resulting from the publication of death-related information about a deceased relative. However, this remains a small percentage over all of the number of states, 50, since 45 have not addressed the cases at all. Even if a claim may be brought in these four states by a relative, the plaintiff must still satisfy the elements of the cause of action. In the publication of private facts tort, for example, courts must assess, in part, if the matter publicized is of a kind that would be highly offensive to a reasonable person and is not of legitimate concern to the public. In the tort for intentional infliction of emotional distress, the court must determine, in part, if the conduct at issue is extreme and outrageous and if the defendant had the intent to cause - or disregarded the substantial probability of causing - severe emotional distress to the plaintiff.

The remedies available to a relative in the post-publication context are jurisdiction-specific because they are proscribed by state statute and state common law. Thus, a person bringing a claim for invasion of privacy in Georgia can rely on the precedent set in *Bazemore v. Savannah Hospital* in which the Georgia Supreme Court held that unauthorized publication of a photograph of a deceased child violated the parents' right of privacy. However, a person bringing a similar claim in another state, such as Alabama, which does not have any common law precedents in the post-mortem relational privacy context, would not be able to apply the remedy established in *Bazemore*.

Furthermore, the cases that were examined within the five states that did have case law examining relational privacy claims in the post-mortem context established precedents specific to their jurisdictions within their respective states. In fact, non-supreme court and appellate court

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35 *Bazemore v. Savannah Hospital*, 155 S.E. 194 (Ga. 1930) (per curiam) (recognizing parents' right of privacy in photographs of their deceased child's body).
cases in the same state are not required precedent for their equivalents in the same state. So a citizen bringing a claim in Florida's Fourth District Court of Appeal, which has not yet addressed a case regarding publication of private facts in the post-mortem context, would not be able to rely on the precedent set by the Fifth District Court of Appeals. In that jurisdiction, the appellate court held in *Williams v. City of Mineola* that a records custodian who shares a public record with another person is not immune from liability unless the outside person made a bona fide request for the record.  

36 The Fifth District opinion could be persuasive in the Fourth District, however.

**Question 5: What degree of access do citizens have to autopsy records in particular?**

To demonstrate how state governments balance the competing interests of relational privacy and public access to government information, the researcher conducted a 50-state study of state statutes regulating public access to one kind of death-related record. The researcher chose autopsy records as the subject of the study because 1) they are often the type of record at issue in post-mortem relational privacy disputes, 2) access to such records is legislated by almost all states and the District of Columbia, and 3) they contain the type of detailed information in a variety of mediums such as photographs and transcripts that make them highly informative and therefore resourceful for those interested in death-related information about a decedent.

The study showed that public access to autopsy records is regulated in 46 states and the District of Columbia. Only four states make no mention of this issue in their statutes.  

37 Assessing the national landscape of public access to autopsy records cannot be stated briefly, as every state - notwithstanding the four that do not address the issue at all - has its own legislative.

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36 *See* Williams v. City of Minneola, 575 So.2d 683 (Fla. 5th DCA 1991).

37 Massachusetts, Michigan, Nevada and Wisconsin.
approach. The vast majority of states, 92 percent, have addressed the issue of access to autopsy records in some manner. In those states where statutes expressly mentioned a presumption regarding accessibility to autopsy records, the researcher distinguished whether that presumption was open or closed. The autopsy records in 16 states are presumptively open, and the autopsy records in eight states are presumptively closed. The presumptive status of autopsy records in a given state is significant because it establishes a starting point from which a citizen may determine the actual degree of access that the public has to the record.

The language of statutes dealing with access to autopsy records is unique from state to state. In order to compare the states' treatment of this issue, the researcher identified the criteria that each state used to determine access. In an effort to consolidate the various criteria among the states, the researcher developed a set of uniform factors into which the criteria could be organized. Organizing the criteria allowed the researcher to count and organize the states among factors for further understanding and comparison. For example, in some states the statutes proscribe that access is granted to a defendant's attorney if the defendant is potentially liable in the death of the person about whom the autopsy pertains. In other states, access is granted to the decedent's next of kin. Each of these criterion relate to the person or agency granted access to the record. Therefore, "person or agency" became a factor for determining access. Another example of criteria used to determine access is the effect of disclosure. For example, four states and the District of Columbia expressly prohibit disclosure of autopsy records when the disclosure would result in an unwarranted invasion of privacy.\textsuperscript{38}

The findings were organized into six overall categories of states that 1) make no mention of public access to autopsy records, 2) expressly state that autopsy records are presumptively

\textsuperscript{38} District of Columbia, Georgia, Illinois, Maryland, and West Virginia.
open, and that do not include more specific criteria for determining access, 3) expressly state that autopsy records are presumptively open and do include more specific criteria for determining access, 4) expressly state that autopsy records are presumptively closed but do not include specific criteria for determining access, 5) expressly state that autopsy records are presumptively closed and do include specific criteria for determining access, and 6) do not expressly state whether autopsy records are presumptively open or closed but do contain criteria for determining access.

Six factors were identified among the statutes to determine whether to disclose an autopsy record. The researcher organized the criteria within each state into the following six factors: 1) type of information in the record, 2) person or agency granted access, 3) medium of the record, 4) circumstances of death, 5) effect of disclosure, and 6) purpose of disclosure.

Using this framework, the overall findings of the 50-state study reveal that public access to autopsy records comprises a range of treatments (Figure 8-1). States that have not addressed public access to autopsy records at all fall at one end of this range. Only four states - Massachusetts, Michigan, Nevada and Wisconsin - have yet to regulate public access to autopsy records in any way, leaving citizens in those states without statutory guidance of their rights, or of their states' responsibilities, pertaining to this type of death record. These states make no mention of public access to autopsy records. At the other end of the access-to-autopsy-record range are five states - Alabama, Colorado, Delaware, Hawaii, and Ohio - that expressly state that their autopsy records are presumptively open to the public, but they provide no other criteria that expounds upon this presumption. 39

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In between the two extremes lie 41 states and the District of Columbia. Autopsy records are presumptively open in eleven states in this range, but the statutes in these states also include criteria that limit access. Autopsy records are presumptively closed to the public in eight states in this range. All of the closed states' statutes include additional criteria that provide for some disclosure. Thus, there are no presumptively closed states that do not provide some further criteria for determining if access should be granted. Twenty-two states in this range and the District of Columbia do not expressly indicate whether their autopsy records were presumptively open or closed, but they do include at least one criterion that either expanded or limited access to the respective state's autopsy records. That means four states did not state a presumption, and also did not include any criteria upon which to determine, whether access would be granted.

Hawaii is an example of a state that is strictly presumptively open, at least from a reading of its statute. In other words, the state's statutes mention that autopsy records are presumptively open to the public but there is no mention of specific criteria that would limit that access. New Hampshire is an example of a presumptively closed state. There are no presumptively closed states that do not mention specific criteria for some kind of limited disclosure of records; they all include at least one specific criterion that would allow access. For example, the New Hampshire statute provides that autopsy reports involving a homicide are available, but only to the Department of Justice.\(^{40}\)

Finally, the findings regarding presumptive status (presumptively open or presumptively closed) and those regarding the six factors for determining access were organized into six overall categories of states. Those categories consist of states that 1) make no mention of public access to autopsy records, 2) expressly state that autopsy records are presumptively open, and that do

not include more specific criteria for determining access, 3) expressly state that autopsy records are presumptively open and do include more specific criteria for determining access, 4) expressly state that autopsy records are presumptively closed but do not include specific criteria for determining access, 5) expressly state that autopsy records are presumptively closed and do include specific criteria for determining access, and 6) do not expressly state whether autopsy records are presumptively open or closed but do contain criteria for determining access.

**Question 6: To what extent has the sphere of protectable personal information expanded to include information about one's dead relatives in addition to information about oneself?**

The legal research conducted for this dissertation concluded that the individual's sphere of protectable personal information has expanded in certain contexts and jurisdictions to include information about one's dead relatives. However, this conclusion is limited in scope and application; the findings are limited to certain jurisdictions, case facts and contexts. In many respects, U.S. law does recognize and protect the privacy interests of surviving relatives. However, in others, the concept receives limited protections. The significant findings of the dissertation are summarized below with explanations of their significance to the overall conclusion.

**Significant Findings**

**Federal-level application of the policy:** Since the development of the Internet and the enactment of the federal Freedom of Information Act in the latter half of the 20th Century, a handful of significant federal court decisions, including the U.S. Supreme Court's ruling in *Favish*, prohibited the release of government-held, death-related records in order to protect the relational privacy interests of surviving relatives. The recognition by the Supreme Court in *Favish*, in particular, of the post-mortem relational privacy concept is significant because of the precedential value of the Court's holding. The test put forth by the Supreme Court that FOIA
Exemptions 6 or 7(c) could be used to preclude disclosure of a record was a complete reversal of established FOIA procedure. Instead of presuming that the record was open unless and until the government could apply a specific FOIA exemption, the Favish Court held that the record at issue was confidential unless and until the requesting party could show that there was a sufficient public interest in the record.

Another significant application of the post-mortem relational privacy concept at the federal level concerns the remains of American service members returning from overseas combat. The presidents of the last three administrations and the current president, Barack Obama, have established executive policies that limited public access to military ceremonies honoring dead U.S. service members. President George H.W. Bush enacted the policy, which has been continued with varying degrees of application from one administration to the next. It is known as the "Dover Policy" because it refers to Dover Air Force Base where the remains of service members killed over seas return before traveling to their final resting place in the U.S. The policy has been based on the principle that media coverage of the events would invade the relational privacy interests of the service members' families.41 Most recently, the Obama Administration modified the 18-year-old policy by relinquishing the authority to determine whether the media would cover these events. That decision, the Obama Administration announced, would be left to the decedents' surviving family members. Nonetheless, the policy favoring the relational privacy interests of the family members is still in play, albeit with less governmental control.

State-level application of the policy: At the state level, the dissertation research found that 46 states and the District of Columbia regulate public access to autopsy records in some

41 See supra p. 107.
manner.\textsuperscript{42} In those states that do not statutorily regulate public access to autopsy records, three of the four states do have case law on the issue.\textsuperscript{43} The study provides a national picture of access to autopsy records, depicting how each state treats public access to autopsy records and examining them in a uniform manner. Four states do not mention access to autopsy records in their statutes at all. Eight states have enacted statutes that make autopsy records presumptively closed, and they all include specific criteria by which to determine whether access should be granted. Twenty-two states and the District of Columbia have enacted statutes that do not state a presumptive status but do contain specific criteria as to whether access should be granted. Eleven states contain statutes that state that autopsy records are presumptively open and contain specific criteria as to determining whether the records will be disclosed. Finally, five states contain statutes that make autopsy records presumptively open without any further specific criteria.

There are no examples in the U.S. law of prior restraints on the publication of death-related information. Since prior restraints are presumed unconstitutional, and that presumption has usually only been tested at the appellate level involving national security issues and constitutional matters such as fair trial/free press, it is unlikely that the factors comprising a post-mortem relational privacy complaint would satisfy the high burden required for a court to uphold such a restriction on the press. While unlikely, it is not entirely inconceivable, however. For example, if a U.S. citizen were to die while in the military or some other form of government service, and someone outside of the government had access to the investigatory report and autopsy records relating to the death, it is possible that the U.S. government could intervene in

\textsuperscript{42} See supra p. 124.

\textsuperscript{43} See supra p. 143.
such a situation and petition a court to enjoin the publication of such information on the ground that its public disclosure could jeopardize national security. In this case, the court evaluating the government's petition for a prior restraint would likely have to determine if the disclosure would result in immediate, irreparable harm to the national security interests of the U.S., a test established by Justice Stewart in his dissent in the *Pentagon Papers* case and later adopted by the District Court for the Western District of Wisconsin in *Progressive*.

State-level courts in five states have addressed restorative remedies for relatives of the deceased in post-mortem relational privacy disputes. Four of those states have recognized that relatives may make a common-law claim for damages as a result of injuries resulting from the publication of death-related information about a deceased relative. However, those holdings are limited to their respective jurisdictions. The research found that surviving relatives had brought claims almost exclusively under the torts of public disclosure of private facts, intentional infliction of emotional distress and appropriation. The majority of successful tort actions were under intentional infliction of emotional distress, where courts identified that the conduct at issue was outrageous in nature.44

The fact that only ten percent of states have case law addressing whether a relative may make a claim for an injury caused by the publication of information about a deceased relative does not necessarily mean that post-publication remedies are a limited avenue for relatives seeking redress for their injuries. The finding also does not necessarily reflect a refusal of the court system to deal with the issue. However, it does show that those types of cases are not being brought to the courts, at least not at the appellate level.

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44 *See supra* p. 182.
Alternatively, the fact that four out those five states do allow a relative to recover for such injuries shows that, when given the opportunity to address the issue, the majority of the state courts acknowledged that relatives have a privacy interest in information about their dead relatives.

Thus, once death-related information about a relative has been published, the recourse available to a relative is severely limited under existing tort theory. The findings do not show that such remedies are impossible in the 45 states that have not yet addressed such cases. Indeed, in four out of the five states that have addressed such cases, the relatives were allowed to make their claim. However, even if relatives is allowed to make their claim they must still meet the elements of the claim, which often take into consideration the First Amendment implications of newsworthiness and require a showing of offensiveness.

**Potential for Future Expansion of the Concept and Implications for Access**

Given the protections for publication of legally obtained information and the constitutional presumptions against prior restraint, if any area of remedies for privacy interest is likely to grow, it will most likely occur in the preemptive phases of the post-mortem relational privacy spectrum where legislatures can enact legislation that expressly states whether certain death-related records such as autopsy reports are available to the public. Pre-publication remedies developed by the legislature serve several purposes in favor of relatives. First, they prevent the information at issue from being disclosed in the first instance. As the research showed, once death-related information is out of government control, the threat of imminent publication is greatest and the barriers against prior restraint are high. Second, legislatures may craft statutes that serve relational privacy interests completely, or balance those privacy interests with access interests with enumerated exceptions that allow for disclosure for certain purposes, to specific persons or agencies, under certain circumstances. From the perspective of the public, increased legislation
in this area is a double-edged sword. On the one hand, it would serve the public's interest to have concrete guidance as to who is allowed access to what and when, but such legislation may be restrictive in nature such as a presumptively closed statute with few or no exceptions for disclosure. Seeking out a statutory remedy after a post-mortem relational privacy dispute has commenced is not traditionally the means by which relatives or interested citizens may affect whether disclosure is granted or not since it is accomplished through the legislative process. However, it is not out of the reach of citizens and relatives who want to effect change through their respective state's legislative representatives. The Dale Earnhardt case does provide one example of a grassroots lobbying movement that resulted in the enactment of a statute favoring relational privacy interests.

In the preemptive stage, court interpretations of statutes, and where no statute exists, the court determination on whether access should be granted is another likely area in which precedent will be established. This context allows a relative to make a more direct case for their relational privacy interests to a court, as opposed to a legislative body, prior to disclosure. Likewise, provides a citizen such as a journalist a means by which to petition a court for disclosure.

It is in the preemptive stages of the post-mortem relational privacy continuum that courts are likely to take another major role in the balance between privacy interests and relational privacy concerns. For example, in cases such as Challenger, the federal court decided that the release of a transcript of the audio recording at issue would 1) satisfy the public interest in knowing what was said by the crewmembers in the last moments before the Challenger Space Shuttle exploded and 2) protect the privacy concerns of the relatives of the deceased space shuttle crew who would be certain that they would not be exposed to hearing the audio recording
being rebroadcast by the media. A similar balance was struck in the Florida case of *Rolling*, in which the court allowed interested media parties to see the photographs of the murdered college students' death scenes but only under direct supervision from the records custodian and without any privileges to copy the information. This served the public interest in knowing what evidence was presented to the jury in the death-sentencing portion of the trial as well as the relatives' interest in knowing that the death-scene images of their murdered family members, which were gruesome, would not be republished in any form.

Notwithstanding the nearly impossible suggestion that a court would uphold a prior restraint on the publication of death-related information, the next least likely - although not impossible - area in which increased protections are likely to develop for relational privacy interests is in the post-publication common law realm. To date, only 10 percent of states have addressed claims by relatives in this context. Of those five states, four recognized that a relative could bring a claim for one of the privacy torts or the torts of outrage. There may be, however, with the continuous advancement of Internet technologies and the expansive nature of digital communications, more claims being brought by families of the deceased, as is currently playing out in California with the Catsouras family and with the family of David Carradine.

One of the major dimensions in the development of post-mortem relational privacy is the intercession of professional journalism values with the issue of publishing death-related information. While many newspapers, such as the Orlando Sentinel in *Earnhardt* and several media organizations in *Rolling* did not intend to publish the requested death-related records, other media outlets, like Internet Web sites that featured death-related information did - and likely would have - had the records become public. Similarly, the emergence of bloggers and
non-traditional media, the standard newsroom editorial filter is not present to debate, contemplate and evaluate the public worth of such publications.

Increased recognition of post-publication tort remedies, further codification of protections for post-mortem relational privacy, and judicial recognition of the interest in interpretive cases has serious implications for the public's right to access government information. The following section explores how such developments encroach on the public's right to know.

**Question 7: What are the implications of increased relational privacy rights in the post-mortem context for the public's right to access government information?**

Prior to the U.S. Supreme Court's ruling in *National Archives & Records Administration v. Favish* in 2004, the Freedom of Information Act considered federal government records open to the public unless and until the government could demonstrate that one of the nine enumerated exemptions applied. Pre-*Favish*, a citizen was not theoretically required to disclose the purpose for a federal public records request. However, when courts examined whether a disclosure was warranted under the FOIA's privacy Exemptions 6 and 7(c), the question of how the information was going to be used was almost inevitably raised. The contention in determining whether government-held information should be disclosed focuses on two main questions: 1) how requestors use the information and 2) what the resulting consequences might be for the individuals named in the records. FOI scholars have conceptualized these concerns as "derivative uses" and "secondary effects" of disclosure, respectively. Making decisions about disclosure based on the derivative uses or secondary effects of the disclosure is a dangerous

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approach, according to some scholars, who caution that "if courts explicitly decide that derivative-use and secondary-effect considerations are permissible, then federal agencies could exploit the uses and effects of disclosure as an excuse to deny access to the records." 48

The *Favish* Court held that the FOIA's privacy exemptions - Exemption 6 for personnel, medical and similar files, or Exemption 7(c) for investigatory files, where the disclosure of such records would result in unwarranted invasion of privacy - could be invoked to prevent the disclosure on relational privacy grounds. In interpreting the FOIA and application of exemption 7(c) in *Favish*, the Court established a new and unprecedented “sufficient reason” test in which government information is presumptively confidential until a requestor can show, and the government deems, that an invasion of privacy is warranted. The “sufficient reason” test removed the responsibility from the government custodian, who traditionally had to prove that an unwarranted privacy invasion would result from disclosure, to the requestor of the record, who now has the duty to show a "sufficient reason" as to how such a disclosure would advance the public interest and overcome the presumption against disclosure. The *Favish* Court said

Where the privacy concerns addressed by Exemption 7(C) are present, the exemption requires the person requesting the information to establish a sufficient reason for the disclosure. First, the citizen must show that the public interest sought to be advanced is a significant one, an interest more specific than having the information for its own sake. Second, the citizen must show the information is likely to advance that interest. Otherwise, the invasion of privacy is unwarranted. 49

Thus, under *Favish*, citizens requesting records that fall under Exemption 7(c) are required to disclose the purpose for the request. The agency has the discretion to determine if the stated purpose is "sufficiently" in the public interest. This new test essentially puts the fox in charge of

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49 *Id.* at 172.
the hen house. Under the *Favish* rationale, a federal agency may be under public scrutiny when a requestor asks for a record under its control. Sometimes, the scrutiny is simply for how the agency handles a records request. Other times, the agency generated the record, such as a death-scene investigatory report, and the requesting party is interested in how the agency executed its duty in that respect. If a federal agency rejects a citizen's records request, finding that disclosure would not serve the public interest, the citizen has the option to petition a court for access to the record, but the same test applies.

The new *Favish* rationale errs on the side of caution instead of disclosure, limiting the access that the public has to such records by decreasing the responsibility of the government to prove why a citizen's record request should not be granted and increasing the public's burden to show why it should. Although the decision to some degree only mandates and elucidates what had heretofore been a practice of looking at the purpose of the request, the decision was in step with a trend toward protecting privacy despite the cost to the public's ability to access government records.\(^{50}\) As other scholars have noted,\(^ {51}\) this reversal of the FOIA policy of not seeking the reasons for a document request has significant implications for the public's ability to access government information, and ultimately the First Amendment, because it contradicts the established FOIA presumption favoring access. Given that the National Security Archive is able to consistently highlight on an annual basis the decentralized, disorganized, and delayed

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responses of many federal agencies to FOIA requests, the *Favish* rationale extends the bureaucratic maze that citizens have to deal with.

The rationale in the *Favish* decision, which governs federal records, exists in a similar fashion in state statutes that govern public access to one particular record - autopsy reports. The 50-state study on public access to autopsy records conducted for this dissertation showed that 11 states, almost one quarter, have enacted statutes that either allow or prohibit disclosure based on the "purpose" that the disclosure will serve. The *Favish* decision and state laws that presume such records are confidential unless and until a requesting party can prove the public interest that would be served by disclosure put the citizen at a disadvantage. These kinds of judicial decisions and statutory regulations favor the surviving relatives of the decedent and the government agencies responsible for documenting citizens' deaths.

From the perspective of a relative whose family member is the subject of the death record, initially classifying the record as confidential in the state's statute and making it harder to retrieve is the ideal remedy. Indeed, the chances of injury are severely diminished if the record is never released and remains in government custody. Similarly, unauthorized disclosure is deterred if the governing law punishes through either criminal or civil penalties an unauthorized release of the record. For example, in Florida, unauthorized disclosure of the audio-visual records of an autopsy is a third-degree felony.

Such laws and judicial interpretations of those laws are unnecessarily strict in some cases. The privacy interests of relatives and the access interests of citizens do not necessarily contradict

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53 *See supra* p. 136.

54 FLA. STAT. § 406.135 (2009).
each other from polar extremes in every case. For example, in April 2004 when Army Ranger, and former NFL football player, Pat Tillman was killed in combat in Afghanistan, official military reports said he died as a result of enemy fire. Months after Tillman's death, contradictory reports surfaced, revealing that he was killed in an act of fratricide and not by enemy fighters as was originally reported by the Army. Tillman's family has been very vocal, including their use of the media, about the lack of transparency regarding his death and their desire to have more records about the shooting and the alleged subsequent cover up released to the public.55

In some cases, the interests of relatives and the media can be met with a compromise on the degree of access that is granted. For example, in the Florida serial murder case State v. Rolling, the Alachua Circuit Court - with consultation from media and FOI advocates and academics - developed a compromise regarding access to the gruesome death-scene photos of five co-eds.56 The victims' families did not want the photos disseminated to the public at large, but the records were public in Florida at the time. Media representatives covering the murder trial wanted access to records that were presented to the jury, including the death-scene photos. The mainstream media such as the Orlando Sentinel did not, however, want to publish the photos.57 To satisfy the concerns of the families and meet the request of the media covering the trial, the Rolling court allowed supervised inspection of the records and prohibited duplication or removal of the files.58


56 Interview with Jim Leusner, Orlando Sentinel (retired), who helped negotiate the agreement with the Alachua County Court during the Danny Rolling murder trial, June 22, 2009.

57 Id.

58 Id.
In another Florida case, *Earnhardt v. Volusia County*, the Earnhardt family's fear that Dale Earnhardt's autopsy photos, which were public record at the time of his death, would be spread across the Internet were resolved by the Florida legislature, which enacted a prohibition against the release of autopsy photos, and a court decision to retroactively applied that new law to the Earnhardt autopsy records. But out of court, the *Orlando Sentinel* was able to negotiate an agreement with the Earnhardt family to be able to have an independent pathologist examine Earnhardt's autopsy records. The negotiated agreement met the concerns of the family, which did not want the photos published, and those of the *Orlando Sentinel*, which wanted to investigate whether NASCAR safety standards contributed to the racer's death, but not publish the photographs.

While these are instances where families and the media have common ground in the pre-disclosure phase of their dispute, once the information at issue is released and published, the opportunity for compromise between relatives and the public is less feasible. The alleged harm has occurred and relatives, at this point, may seek redress. A current post-mortem relational privacy dispute that is on appeal in California is ripe for examination within the context of what has been learned about post-mortem relational privacy.

**Post-mortem Relational Privacy: The Catsouras Family v. California Highway Patrol**

Death creates of many powerful emotions: fear of the unknown, anger at a life taken too early, guilt over regrets, and relief that suffering has ended. The sense of loss that death can generate can be powerful, even overwhelming. These emotions can be multiplied when

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59 See supra p. 20.

combined with additional fears that the memory or legacy of a deceased loved one - a spouse, a sibling, a parent, or child - might be exploited. Indeed, there is great sympathy for the idea that a surviving relative would be concerned that autopsy photos or crash scene images picturing a dead relative might be available for any person to view anonymously on an Internet site such as http://www.morguecity.com, which serves the macabre subculture of death voyeurism. This example is a real fear for relatives of the deceased. At the same time, however, there is logic behind the idea that such photos - because of their gruesome and raw details - serve a public interest in deterring unsafe driving practices.

In the media, this fear has been highlighted in cases such as that of the Catsouras family of California, whose 18-year-old daughter died in a high-speed car accident in 2006. California Highway Patrol officers leaked photos of the crash site, and the pictures now circulate virally on the Web. The Catsouras family filed a $20 million lawsuit against the CHP, and the officers, for negligence, invasion of privacy and infliction of emotional harm. It is unclear whether or not the CHP has an internal policy regarding the disclosure of accident-scene photographs, but a California Superior Court has held that the CHP officers' conduct, although "utterly irreprehensible," did not violate any law. The Catsouras family has appealed the ruling, arguing that they have a protectable privacy interest in information about their daughter although there is no common law precedent in California for that argument.

62 Interview with Fran Claytor, California Highway Patrol press officer, June 17, 2009 (stating that she could not comment as to whether the CHP had an internal policy regarding the disclosure of accident scene photos at the time of Nikki Catsouras' car accident because of on ongoing litigation).
64 Id.
However, the Catsouras' family's contention may have some - albeit hypothetical - basis in California statutory law. While it is not illegal in California to release accident scene photographs, it is illegal to release those of an autopsy.  

Given the law in California regarding public access to autopsy records, the Catsouras family may argue that Nikki Catsouras' death scene photos, which show her nearly decapitated head dangling over the side of her mangled Porsche, are equivalent in nature to that of an autopsy photo and should, therefore, be confidential. CHP might argue that the accident, unlike an autopsy conducted by a coroner in a morgue, which is not open to the public, took place on a public roadway from which any passerby could have been able to take a photograph.

There are a few exceptions to California's ban on the public disclosure of autopsy records. A California statute allows disclosure of autopsy records when the purpose of the request is to use the records in a criminal proceeding that relates to the death of the person on whom the autopsy was conducted. The Catsouras family could argue that, if the court adopted the rationale that Nikki's crash scene photo should be treated with the same confidentiality afforded to autopsy records, then the exception for criminal proceedings would not apply because there is no criminal proceeding involved in either the circumstances that led to the crash itself or the officer's actions in disclosing the records. The CHP officer who emailed the photos of the crash to his home computer, but did not share them with others, was suspended without pay for 25

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65 CAL CODE CIV. PROC. § 129 (2008).

66 Interview with Fran Claytor, California Highway Patrol press officer, June 17, 2009 (stating that the roadway on which Nikki Catsouras' accident occurred was public and any person driving by could have taken a photograph).

67 CAL CODE CIV. PROC. § 129 (2008).
days. The second officer involved, who emailed the photos to family and friends, resigned shortly after the CHP received a complaint from Nikki’s family about the photographs' release.68

The same California statute that allows disclosure of autopsy records for use in a criminal proceeding allows disclosure when the purpose is to use the record in the fields of forensic pathology, medicine, scientific education, or research.69 The California statute also allows disclosure of visual records of an autopsy when the purpose is a “good cause,” although the statutes do not define this term further.70 The Catsouras family could argue that there is neither a plausible use for the records in the fields of forensic pathology, medicine, scientific education, or research nor "good cause" for their disclosure.

However, in contrast, it could be argued that there is a public interest in sharing these photos with drivers to show them the consequences of negligent driving, as was the case in the car crash that killed Nikki Catsouras. She was reported as driving 100 miles per hour at the time of the crash, and her autopsy showed signs of recent cocaine use.71 Indeed, the newsworthy angle is being offered by one of the CHP officers who leaked the Catsouras photos. According to the lawyer for the officer who resigned from CHP shortly after the Catsouras family sent their initial complaint about the photos, the officer "sent the [via email] images to relatives and friends to warn them of the dangers of the road."72 The attorney said, "It was a cautionary tale…Any

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69 Id.

70 Id.

71 Jessica Bennett, A Tragedy That Won't Fade Away, NEWSWEEK, 38-40, May 4, 2009, available at http://www.newsweek.com/id/195073 (reporting that Nikki Catsouras' used cocaine the night before the accident and that her autopsy showed signs of cocaine in her system at the time of death).

young person that sees these photos and is goaded into driving more cautiously or less recklessly - that's a public service," the attorney told Newsweek. 73

In making the analogy that Nikki Catsouras' death-scene photos are equivalent in nature to autopsy photos and should therefore be confidential under California law, the Catsouras family might also cite to examples of similar laws in other states. The statutes of two other states in which autopsy records are presumptively closed to the public contain exemptions based on the purpose of the request. In Maine, autopsy records are confidential, but Maine statutes allow disclosure of such records to limited agencies for the administration of criminal or juvenile justice. 74 A Mississippi statute prohibits the release of autopsy records in order to protect doctor-patient privilege. However, it also requires disclosure of autopsy records to the state Medical Examiner and to appropriate authorities, including police and child protective services, in the death of a child under the age of two years when the death resulted from an unknown cause or when the circumstances surrounding the death indicate that sudden infant death syndrome may be the cause of death. 75

**Contribution to the Intellectual and Theoretical Understandings of Privacy and the First Amendment**

This dissertation explored the concept of *post-mortem relational privacy* - the idea that family members have a privacy interest in death-related information about their deceased relatives. The research in this dissertation contributed to the theory of privacy a conceptualization of post-mortem relational privacy, including identification and explanation of 1) the five elements inherent to a post-mortem relational privacy dispute, 2) the four distinct

73 Id.


contexts in which such a dispute may occur, and 3) the preemptive or restorative legal remedies that are available to a surviving relative during each of those four contexts. In addition to identifying the distinct contexts in which a relational privacy dispute may occur and the legal remedies unique to each, the researcher also examined them in light of each other, identifying the synergy between the different phases of the post-mortem relational privacy continuum.

The research conducted for this dissertation provided a body of intellectual knowledge regarding relational privacy issues in the post-mortem context. The dissertation included several individual studies that provide a useful understanding of distinct areas of the law. For example, in Chapter 4 the examination of preemptive remedies at the federal level examined the development and significance of Supreme Court recognition of the post-mortem relational privacy concept. The case study in the same chapter on the Dover Policy illuminated a contemporary post-mortem relational privacy dispute. In Chapter 5, the 50-state study on access to autopsy records provided not only a means by which to evaluate and decipher the public records laws of each state and the District of Columbia regarding autopsy records, but also generated data that is used by academics, journalists and other citizens to compare and contrast the states' approaches to this regulatory issue. The research in this chapter also identified the precedential cases in each state in which a state court interpreted the relevant statute or decided cases when no such statute existed. In Chapter 6, the researcher looked briefly at the history of prior restraints and applied the legal tests devised by the U.S. Supreme Court to the factors comprising a post-mortem relational privacy dispute. In Chapter 7, the researcher conducted another 50-state study that identified every state-level case in which a court addressed a post-mortem relational privacy dispute brought under one of the four privacy torts and/or two torts of
outrage. That research confirmed the earliest known common law remedy granted by a court in such a dispute and evaluated the rationales behind each grant or denial of remedy since.

These independent studies represent an accumulation of intellectual information and wisdom. They provide a collective descriptive of the law pertaining to post-mortem relational privacy and its intersection with First Amendment and freedom of information issues that has not existed until now. Considering the implications of these independent studies in concert with each other, the findings also present a qualitative, deeper understanding of the salient phenomenon and events that have shaped the post-mortem relational privacy concept. The findings revealed new understandings about old traditions such as the beliefs that the dead - and their relatives - should be revered. For example, the understandings gained by the research add context to the idea that people are "survived by" their relatives and that this role is accompanied by certain privacy rights and even responsibilities. This research is a different lens through which to understand why and how people "pay their respects" to the dead and a decedent's next of kin. Also, there was something to be learned from the studies about the uncertainty, irregularity and unpredictability of the social behaviors that contribute to a post-mortem relational privacy dispute. What compels a reporter to put a child's skull on display? For example, what satisfaction would coroners gain from scrapbooking photos from the morgue?

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77 See Armstrong v. H & C Commc'ns, Inc., 575 So.2d 280 (Fla. 5th DCA 1991).

78 See Reid v. Pierce County, 961 P.2d 333 (Wa. 1998).
Why are Web sites that feature raw and uncensored autopsy photos thriving? Why do Internet users forward emails brandishing video footage of the latest gruesome death?

The ability of citizens, and the media, to access government records and publish the information contained within is affected by relational privacy concerns. Relatives of the deceased have a personal stake in the treatment of death-related information about their loved ones. For example, why does a decedent's surviving relatives want to prevent the disclosure of death-scene photos of their loved ones? If their death was the result of a gruesome murder, is the motive to protect the image and memory of their relative? Do they want to guard against other relatives, maybe children of the decedent, being exposed and re-traumatized? If the death was under suspicious or prurient circumstances involving sexual deviance, is the motive to limit the family's embarrassment? There may even be circumstances in which it could be conceived that a family would want death-related information about a deceased relative disclosed. Perhaps the relative died under suspicious circumstances while in state custody or in combat while serving in the U.S. military.

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80 See http://www.findadeath.com (featuring death-scene images and related death information about celebrities).


At a theoretical level, the concept of post-mortem relation privacy has a place within some of the definitions proposed by scholars for privacy. In his own conceptualization, Daniel Solove contends that privacy cannot be reduced to a "singular essence." He offered six privacy categories that have unique characteristics but that are nevertheless interrelated to one another. Some of the categories echo some of the characteristics that are represented in the concept of post-mortem relational privacy. For example, Solove says one meaning of privacy is "intimacy, or control over, or limited access to, one's intimate relationships or aspects of life." The theory underlying post-mortem relational privacy shares this characteristic. The intimacy shared between two spouses, a parent and child, or siblings is not eviscerated by the death of one of the parties. Indeed, the memory of the relationship is all that survives.

Solove also said, privacy is "personhood, or the protection of one's personality, individuality and dignity." The post-mortem relational privacy concept shares this characteristic as well because it is based on the assumption that one of the reasons an individual may seek to protect death-related information about his or her relatives is protection of his or her own individual dignity. A necessary distinction is that such individuals are not acting "on behalf" of a deceased relative, although tangentially they may feel some responsibility to a deceased relative to protect their memory. The common law is clear that an individual's privacy


86 See supra p. 63, n.11.

87 See supra p. 63, n.13.

88 See supra p. 63, n.13.
dies with him or her. In asserting a privacy interest in information about a dead relative, an individual is seeking to protect aspects of his or her own "personhood." If the memory or legacy of a dead relative is tarnished or disrespected, then the surviving relative may feel that his or her own individuality and dignity is injured as well.

Solove also said privacy is the "secrecy and concealment of certain matters from others." An individual asserting a relational privacy interest in information about a dead relative may want to keep information confidential for a variety of informational purposes. For example, death records may contain information about a hereditary disease to which the surviving relatives may still be susceptible and do not want others to know about. The decedent may have been pregnant - information that a relative such as a spouse or parent might want to conceal because of sadness, fear of scrutiny or embarrassment, or simply because it was information confidential to their relationship and no other persons. A relative may not want the public to know if a death resulted from suicide. In the case of the murder of a relative, an individual may want to hide painful information about how a relative died from other relatives such as children and siblings.

Another privacy scholar, Jon Mills, conceptualized the Four Spheres of Privacy, in which he placed issues pertaining to family in the overlapping region between autonomy and personal information. Relational privacy, and for the purposes of this dissertation - post-mortem relational privacy - also exists in this dual-purpose realm. A relative wants to control who has access to, and how others may use, death-related information about his or her dead relative. At the same time, being able to control such information - or to be free from injury as a result of its disclosure - is an issue of autonomy. The person wants freedom of choice in determining

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89 Id.

90 See supra p. 64, n.16.
whether personal information about a relative is public knowledge and for what purposes it is used. The idea that a person should have freedom of choice, or autonomy, in decisions about relatives after their death is an extension of the idea that people have autonomy in decisions that they make with living relatives. For example, sexual intimacy, the decision to marry, the decision to use contraceptives or to procreate are personal choices between two people. The post-mortem relational privacy concept extends that idea of privacy to one's dead relatives, too, with regard to controlling death-related information about them.

Post-mortem relational privacy not only involves privacy concepts, but also First Amendment theory. Support for freedom of information is expressed in Vincent Blasi's checking value concept. Blasi stressed that the significance of a free press is found in its ability to act as a check on government.91 The public, which is often represented by the media, has an interest in being able to access government records, including those that document death, in order to inspect and scrutinize government activities and the conduct of its duties. For example, death records helped journalists uncover government fraud and abuse of funds after the 2004 hurricanes that devastated Florida.92 Criminal investigatory reports and death certificates helped a newspaper discover that the county it covered had the highest murder rate in the state in 12 of the last 17 years, helping to raise questions about the effectiveness of the county's law enforcement agencies.93 Autopsy reports helped journalists expose how a man was killed by

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91 See supra p. 75, n.60.

92 Interviews with Sally Kestin and Megan O'Matz, SUN-SENTINEL, June 2007, The Story Behind the Stories, The Brechner Center for Freedom of Information, http://www.brechner.org/top30/winners.html. See, Sally Kestin and Megan O'Matz, FEMA: A legacy of waste, SUN-SENTINEL, Sept 2005 - Oct 2006 ( Revealing that FEMA had paid out $31 million in Miami-Dade County for a hurricane that actually struck more than 100 miles away. The more the Sun-Sentinel probed, the more reluctant FEMA officials were to cooperate. Reporters also found that FEMA inspectors had little or no training; that thousands of dollars were paid for funerals involving deaths that had nothing to do with the storm; and some inspectors even had criminal records, among other problems.)

police after being shocked 13 times with a Taser gun.  

Public records showed a breakdown in child protective services that led to the beating death of a toddler days after the child was returned to his abusive home.  

The information that is gained from public records, including those related to death, also facilitates the process of self-governance - a First Amendment theory espoused by philosopher and academic scholar Alexander Meiklejohn.  

For example, government information about criminal investigations, law enforcement, post-mortem examinations, prisoner treatment, and child protective services, facilitates informed voter choices about elected officials, expenditures, and domestic and foreign policy.  Meiklejohn's supported the idea that all speech related to the political community should receive absolute protection.  Therefore, in a post-mortem relational privacy dispute, where death-related records are at issue, the self-governance theory would support the protection of speech that would help the citizenry be involved in the political process.  

According to Meiklejohn, when citizens learn and understand through the information contained

(Gasp), THE FLORIDA-TIMES UNION, Aug. 25, 2005 (exposing on the editorial page 20 years of Florida Department of Law Enforcement crime reports and per capita data that revealed to the surprise of many that Duval County had led the state in murder rates for 12 of the last 17 years, including the last six in a row. Duval had finished second to Miami-Dade the other years. This report exposed the deep roots of Duval's problems and helped draw national attention, including from President George W. Bush.)

94 Interview with Henry Pierson Curtis, ORLANDO SENTINEL, June 2007, The Story Behind the Stories, The Brechner Center for Freedom of Information, http://www.brechner.org/top30/winners.html. See, Henry Pierson Curtis and Pamela J. Johnson, Autopsy: Suspect died of asphyxia, OR. SENTINEL, Aug. 7, 2002. (relying on an autopsy report from the medical examiner that showed a man shocked 13 times with a Taser gun by Orange County sheriff's deputies suffocated from being strapped facedown on an ambulance stretcher. The story showed how autopsy reports are crucial public resources that explain how people died in unusual - and often controversial - circumstances.)

95 Barbara Boyer, Toddler beaten after taken home, THE TAMPA TRIBUNE, Jan. 27, 1997. See, The Story Behind the Stories, The Brechner Center for Freedom of Information, http://www.brechner.org/top30/winners.html. (reporting on public records about a father who beat his son days after the child being returned to him only to have a judge sealing the court file and reprimanding reporter, ordering her not to publish the information. The Tribune ignored the order, citing a compelling public interest. The Tribune went on to discover breakdowns in the system, including that the case was passed on from caseworker to caseworker and judge to judge. As a result, DCF announced it would assign only one caseworker per family and provide better employee training.)

96 See supra p. 80, n.80.
in public records about their government's conduct, both good and bad, they are more apt to make informed decisions and contribute to self-governing.

The ideas of Justice Holmes contributed to the conceptualization of the marketplace of ideas, particularly within the U.S. legal system. He believed that a free trade of ideas is "the best test of truth." In a post-mortem relational privacy dispute, this trade of ideas may very well include death-related information derived from government records about deceased citizens. There are a myriad of reasons why such information would make it into "the market." For example, morbid Web sites can request such records to serve the prurient interests of anonymous Internet surfers. Mainstream journalists can use the same information to uncover crime or fraud in the government. A relative might use such records to learn about an inheritable disease. A researcher might use the record for scientific or medical purposes. Under the marketplace of ideas theory, all of these purposes - lurid and laudable, depending on the perspective - should be respected, at least as much as necessary to get the information into the market. Once the information is in the market, it is up to the citizenry to decide where to place its attention and trust.

In summary, the conceptualization of post-mortem relational privacy theory has contributed to the field of privacy theory an understanding of the post-mortem relational privacy and its inclusion into larger privacy theories. The post-mortem relational privacy concept recognizes that death does not eliminate the relationship between relatives. Indeed, where money is concerned, inheritances protect property rights after a relative dies. In addition, the living still have a privacy interest in the memory of the deceased. Where privacy is concerned, the post-mortem relational privacy concept protects the intimacy of family relationships after death.

97 See supra p. 78.
Solove's conceptualization of privacy identifies, in general, several underlying fundamentals that represent the relational privacy interests of relatives.

Post-mortem information can be used to illustrate major concepts in First Amendment theory by applying theoretical concepts for the purposes of the First Amendment to a relatively narrow, but significant issue. Meiklejohn may not have envisioned an instance in which death-scene photos of a presidential aid would be the basis for uncovering a suspected government conspiracy or that the media would request the audio recording of a space shuttle crew's last living moments, but he did envision a world in which communicating such information would protected.

**Recommended Future Research**

This dissertation explored some of the common law tort remedies under which a surviving relative might seek recovery for an injury resulting from the publication of death-related information about a dead relative. Only five states, 10 percent overall, have addressed post-mortem relational privacy issues within the context of a common law privacy and emotional distress torts. Of those, four state courts recognized the relative's right to bring a claim. Those holdings are limited to their respective jurisdictions within those states. Why have there been so few suits within this context? In the claims for publication of private facts and intentional infliction of emotional distress the newsworthiness element was a threshold issue. Plaintiffs had less success showing the information at issue was not newsworthy in a publication of private facts action than they did showing that the conduct was outrageous in an intentional infliction of emotional distress claim. An examination can be conducted to compare and contrast the publication of private facts claims and intentional infliction of emotional distress claim as a feasible remedy for a relative. The fact that courts in only five states have addressed such claims leaves open for judicial interpretation in 45 states and the District of Columbia the legitimacy of
a relative's claim for invasion of privacy or emotional distress. Indeed, in California, the Catsouras family is attempting to set precedent where there is none regarding this issue.

Some of the other possible remedies that a relative may utilize to seek redress for injuries stemming for the publication of death-related information about a relative are highlighted in a case out of Tennessee - Perkins v. Principal Media Group. In Perkins, the parents and sister of a woman who fell to her death from her hotel room with her husband, who also died, sued a cable television station for airing footage of her crushed and seminude body. The decedents, who were filmed at their death-scene and at the morgue, were the subject of a Learning Channel television show called True Stories from the Morgue.

In addition to making claims for intrusion, public disclosure of private facts, and negligent and intentional infliction of emotional distress, the plaintiffs also attempted actions against the show for invasion of family privacy, invasion of medical records, their right of publicity, violation of a statute preventing and involuntary filming, statutory misuse of a corpse, conversion, and deceptive trade practices under state statute. The plaintiffs also filed a civil action against the medical examiner for deprivation of right under 42 U.S.C. § 1983. While several of these causes of action failed at the outset because they protect personal rights that do not survive the death of the individual, the plaintiffs may have standing under some of these claims.

**Potential Non-tort Remedies**

Alternative options for surviving relatives of the deceased such as those listed in the paragraph above might focus on the action or conduct of the defendant rather than the speech,

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8 See Perkins v. Principal Media Group, No. 3:03-CV-00578 (M.D. Tenn., May 12, 2005).

claims that would not face the same constitutional scrutiny that speech restrictions face. Relatives of the deceased may be able to obtain redress in the areas of contract or property law. For example, the web site Legacy Locker, allows users to set up a sort of "online will, with beneficiaries that would receive the customer's account information and passwords after they die." The service allows surviving relatives to protect a deceased relative in the "virtual after life." This type of service involves both contract and property rights in which a relative of the deceased would have an interest.

**Additional 50-state Studies**

This dissertation included a 50-state study of statutes that regulate public access to autopsy records. There are several other types of death-scene records that could provide additional insights into the state-level approaches to relational privacy issues in the post-mortem context. For example, crime-scene and accident-scene records, which may include photographic records, are similar in nature to autopsy records. Surviving relatives might have a comparable interest in the confidentiality of a crime-scene photo picturing a deceased relative as they would to an autopsy photo. Some death records, however, might not be as informative in nature. For example, a 50-state study on public access to death certificates, which typically include only vital data information about a death - name, date of birth, date of death, location of death - would, in comparison to a death-scene photo, not pose the same threat to the relational privacy issues of a surviving relative.

**Protecting Relational Privacy in the Age of Interest: A Proposal**

The researcher contends that the sphere of protectable information that an individual calls "private" includes information about one's dead relatives in addition to oneself. For example, at

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the state level, a significant number of legislatures have codified limitations on the public's access to autopsy records in particular. State courts have interpreted those statutes, in some cases, to provide disclosure. At the federal level, the Supreme Court has interpreted the Freedom of Information Act to protect the privacy interests of relatives of the dead. Also, the administrations of four contemporary presidents have established policies that protect the privacy interests of surviving relatives of American service members killed in military action overseas. Finally, although not a nation-wide trend, in four states out of the five states that have addressed claims by relatives for invasion of privacy or emotional distress, courts have recognized the right of relatives to bring relational privacy claims for injuries resulting from the publication of death-related information about their deceased relatives. Thus, there is evidence to support the finding that the individual's sphere of protectable personal information includes information about one's dead relatives in addition to one's self. Furthermore, there is limited evidence that the post-mortem relational privacy concept has expanded - mostly in federal interpretive case law and executive policy - since the advent of the Internet and the enactment of the FOIA.

The conceptualization and conclusions are based, in part, on a 50-state study of access-to-autopsy-record laws, a state-by-state review of courts' interpretations of those statutes, executive application of the concept and the common law approaches to remedying post-mortem relational privacy disputes. The major contention of this dissertation - that the individual's protectable sphere of personal information includes information about one's dead relatives - has significant implications for the public's interest in accessing government information because expanded privacy rights encroach on the public's understanding of important governmental and social issues related to death. The researcher proposes that a balanced approach in statutory construction and judicial interpretation of those statutes and the application of common law
remedies can limit the extent to which relational privacy interests unnecessarily diminish the public's right to access government records and publish their contents. The balanced approach the researcher proposes should maintain a presumption of openness while carefully weighing the possible threat to a family's privacy. Borrowing from the Federal Freedom of Information Act's Exemption 7(c) for investigatory records, access to death-related information about a deceased person should be limited only when disclosure would constitute an unwarranted invasion of a relative's privacy. This exemption is distinct from the exemption in FOIA's Exemption 6, which requires a more restrictive "clearly unwarranted invasion." Also, this suggested model is applicable to relational privacy disputes and does not, of course, preclude other possible circumstances under which access should be limited such as when disclosure might identify a government informant or otherwise secret criminal detection techniques.

The research does not propose, however, to adopt as a model the shift in the burden that occurred in *Favish*. The Court in *Favish* removed the burden from the custodian, who had to show that an exemption applied, to the requestor, who had to show that there was a sufficient reason to disclose the record. History has shown, even before *Favish*, that exceptions like the one styled in *Favish* are not favorable for access. In contrast, the researcher proposes a balancing model in which 1) the presumption is openness, and 2) an exemption for relational privacy interests exists, but 3) the custodian - not the requestor - retains the burden. The researcher does not recommend adoption of a model in which the onus is on the requesting party to show the purpose for which the request is made or satisfy a discretionary sufficiency test. Such a

requirement takes for granted the overly cautious tendencies of custodial agencies in answering requests.\(^{102}\)

A model in which openness is the presumption puts the requestor, the citizen, at an advantage because the records custodian has to show that an exemption applies. This is preferable for access advocates, but should assuage the fears of privacy advocates as well. For example, a state access-to-autopsy-record statute that presumes openness, while providing for exemptions when disclosure would not be warranted, favors the public's interest in access to government records while providing a means by which to protect relational privacy. The opposite scenario - a state statute that presumes closure - puts the requesting citizen at a disadvantage because he or she automatically has to show that one of the presumable disclosure exceptions to the rule applies. Worst, the requestor might have to prove that his or her purpose is worthy. The latter construction gives the custodial agency gratuitous discretion, while the former - a presumption of openness with the burden of showing that an exemption applies on the custodial agency - diminishes the possibility for unwarranted closure. When an agency does invoke an exemption, the requestor has the option to petition a court for interpretation of the custodial agency's decision. Access advocates should prefer this option in which a disinterested court decides whether disclosure would result in an unwarranted invasion of privacy.

Therefore, the researcher proposes a statutory construct in which the presumption is openness and exemptions exist for relational privacy because such a model provides records custodians with an opportunity to protect against unwarranted invasions of privacy. Additionally, the model should include exemptions, which allow families of the deceased to

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petition a court for nondisclosure. In interpreting the scope and application of the statute, the court would then weigh the public's interest in the record with the risk that disclosure would pose to the decedent's surviving relatives.

Legislators writing access-to-death-record laws as well as courts interpreting those statutes should apply this access-oriented, but privacy-sensitive philosophy. The alternative approach is to neglect the evidence that 1) protectable personal information includes information about one's deceased relatives in several contexts, 2) adoption of the post-mortem relational privacy concept has expanded, at least at the federal and executive levels, and 3) the increasingly voyeuristic tendencies of media and society exacerbate the fears of families who cringe at the idea that non-relatives around the world would be able to gawk at images of their relatives' autopsy or death scene photos. Access advocates should not disregard the veracity with which relatives will defend the memory and legacy of their deceased mothers, fathers, spouses, and children or the protective means by which legislatures might respond to constituents concerns in the aftermath of a tragedy. A responsive approach when emotions are the most salient, rather than proactive one, could result in statutes, interpretive case law, and common law remedies that far exceed that restrictions on access that would otherwise be implemented.

Statutory and common law protections for relatives' privacy have significant implications for the public's interest in information about its government's activities, including those that document death. The very personal nature of death, especially when it involves relatives, exacerbates the fear of exploitation by non-relatives for prurient purposes and may result in overly restrictive legal remedies. If the individuals’ sphere of protectable includes information about one's dead relatives in addition to one's self, then the public's ability to access information about the deceased - and all the government functions that document death - diminishes. When
that information pertains to government activities about the death of citizens such as the conduct of autopsies, crime scene investigations, disease, health care, and a myriad of other social concerns that involve death, the citizenry is less informed about its government. There is validity in an argument that death records should be released if it means uncovering government fraud, understanding the risks of a communicable disease, preventing future vehicle accidents, or catching a criminal. At the same time, serving this interest may be circumscribed by the fear that releasing such information would traumatize the family of a murder victim, tarnish the memory of a loved one by making death images available on a voyeuristic web site, or hinder the investigatory practices of a law enforcement agency that might otherwise have been able to catch a criminal. In the "age of interest,"\textsuperscript{103} where autopsy records of a dead president, nude photos of a dead actor, and grizzly images of a dead teenager flourish virally on the Web, the competing interests of privacy and access to information are essential to the living of life and the understanding of death.

Figure 8-1. Access-to-autopsy-record statutes - Category, Factor and Criteria Breakdown

\textsuperscript{103} Interview with Bill F. Chamberlin, Joseph L. Brechner Freedom of Information Professor Emeritus, College of Journalism and Communications, University of Florida, June 21, 2009.
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BIOGRAPHICAL SKETCH

Ana-Klara Hering received her law degree from the Levin College of Law and doctorate in media law and policy from the College of Journalism and Communications in 2009. She received a Masters of Arts in Mass Communication from the University of Florida in 2006 and a bachelor's degree in international affairs with a minor in journalism from The George Washington University in 2000. During her graduate studies, she was a research assistant at The Joseph L. Brechner Center for Freedom of Information and the Marion Brechner Citizen Access Project. She was also the editor of The Brechner Report and a 2007 Freedom on Information Summit Scholar.

In 2008, Hering was one of six finalists in the Madelyn Lockhart Dissertation Fellowship competition. She was also the recipient of the American Bar Association’s national First Amendment Scholarship to the 2008 ABA Forum on Communications Conference.

Hering is a veteran of the U.S. Marine Corps, in which she served as an officer and deployed to Kuwait and Iraq in 2003 during the Iraq War. Her first-person accounts of the war were featured in Women’s World and The Palm Beach Post. She interned for the South Florida Sun-Sentinel, Miami Herald and Dallas Morning News. She also worked as a news clerk for The Washington Post and as an intern for Senator Connie Mack.

Hering served as president of the North Central Florida Society of Professional Journalists professional chapter in 2008-09 and is a member of the Florida Press Club. She currently serves on the SPJ national Freedom of Information committee. She has been an instructor of record for public speaking at UF and a teaching assistant in appellate advocacy, media law, and mass communication. She presented her legal and qualitative research in media law at national and international conferences of the Association for Education in Journalism and Mass
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Hering will begin professional practice as a litigation associate with the First Amendment law firm of Thomas, LoCicero & Bralow, PL in Tampa, Florida in the fall of 2009.