

Patrick O'Callaghan

# Refining Privacy in Tort Law

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Patrick O'Callaghan  
Newcastle Law School  
Newcastle University  
Newcastle Upon Tyne  
United Kingdom

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1st Supervisor: Prof. Dr. Gert Brüggemeier  
2nd Supervisor: Prof. Dr. Lesley Jane Smith  
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*For my parents*



Edel sei der Mensch  
Hilfreich und gut!  
Denn das allein  
Unterscheidet ihn  
Von allen Wesen,  
Die wir kennen.

Der edle Mensch  
Sei hilfreich und gut!  
Unermüdet schaff er  
Das Nützliche, Rechte,  
Sei uns ein Vorbild  
Jener gehahneten Wesen.

Goethe, *Das Göttliche*





# Preface

This is a book about privacy interests in English tort law. Despite the recent recognition of a misuse of private information tort, English law remains underdeveloped. The presence of gaps in the law can be explained, to some extent, by a failure on the part of courts and legal academics to reflect on the meaning of privacy. Through comparative, critical and historical analysis, this book seeks to refine our understanding of privacy by considering our shared experience of it. To this end, the book draws on the work of Norbert Elias and Karl Popper among others and compares the English law of privacy with the highly elaborate German law. In doing so, the book reaches the conclusion that an unfortunate consequence of the way English privacy law has developed is that it gives the impression that justice is only for the rich and famous. If English courts are to ensure equalitarian justice, the book argues that they must reflect on the value of privacy and explore the bounds of legal possibility.

Chapter 1 provides the methodology for this study and explains why privacy needs to be conceptualised. I argue that it is not possible to provide a precise definition of the concept. Drawing on Karl Popper's critical rationalism, I suggest that the scholar's task is to refine privacy and the methods of legal protection. We do this by reflecting on privacy's content: our shared experience of it. In Chap. 2, I propose three 'genuine conjectures' about our shared experience. First, I argue that privacy is an essential constituent of personhood—normative agency depends on it. Second, privacy has proprietary characteristics. My third conjecture is that personality (and therefore privacy) is ontologically dependent on the community. These conjectures are not analytically distinct; they overlap to a considerable extent. For this reason, I argue that if we neglect even one of these informing purposes in our privacy laws, we are failing in our task to probe the Rawlsian 'limits of the practicably possible'. Drawing on the work of Norbert Elias, in Chap. 3 I suggest that since antiquity there has been a 'privacy curve'. As the curve inclines, the individual gradually emerges from the collective and concern for personal privacy becomes more pronounced. I seek to establish gradients in this privacy curve by paying close attention to the history of laws and legal literature on personality rights. The chapter provides support for the proposition that my three conjectures

shed light on our shared experience of privacy. In Chap. 4, I seek to ‘test’ the methods of legal protection in English tort law by considering how three hard cases might be decided by a German court. This provides us with instructive insights about English law and helps us to identify gaps in protection. Finally, in Chap. 5, I consider whether English law adheres to the regulative ideals of justice and the rule of law. I conclude that the narrow focus on protecting informational privacy means that privacy law is seen as being the preserve of the rich and famous. This would be bad enough on its own but this state of affairs is particularly troubling given the egalitarian justifications for the introduction of the Human Rights Act.

The book is based on my doctoral dissertation, defended at the University of Bremen on 27 March 2009. In the meantime, I have revised the structure and updated the text. I have already published portions of Chaps. 4 and 5 of this book in ‘Privacy in Pursuit of a Purpose’ (2009) 17 (2) *Tort Law Review* 100–113. I am grateful to Thomson Reuters (Australia) for the permission to reproduce this material here.

I owe a debt to my doctoral supervisor Gert Brüggemeier who has encouraged me to think hard about tort law within its historical, economic and social contexts. I have been inspired by his approach to scholarship and am deeply grateful for his guidance. I must also express my gratitude to Aurelia Colombi Ciacchi for making my stay in Bremen possible in the first place and for her continued support. I am particularly grateful to my mentor and friend, Richard Mullender, from whom I have learned a great deal. At various times over the past few years, I am fortunate to have benefitted from collaboration and conversations with a number of friends and colleagues. Sincere thanks are due to Lesley Jane Smith, Mel Kenny, Sjeff van Erp, Giovanni Comandé, Peter Rott, Nuno Ferreira and Joanna Krzeminska-Vamvaka. I am also grateful to Prof John Blackie for participating in the Kolloquium in 2009.

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I cannot thank Carol enough for her help and support and for reading earlier drafts with such a critical eye. Thanks also to my brother and sisters for their care and encouragement. But my deepest gratitude goes to my parents; they taught me more than any book ever could. This book is dedicated to them.

Newcastle-upon-Tyne  
May 2012

Patrick O’Callaghan

## Author's Note

A comparativist faces many hurdles in his research, not least those of a linguistic variety. In places, I have drawn on the expertise of others, particularly the helpful translations of major German court decisions on the web site of the Institute for Transnational Law, University of Texas ([www.utexas.edu/law/academics/centers/transnational](http://www.utexas.edu/law/academics/centers/transnational)). As a general rule, however, all translations are my own unless otherwise indicated.

In opting for particular terms of art, I have taken what I regard as pragmatic decisions. I refer to 'tort law' rather than civil liability but I am mindful that this is a common law construct and is not an entirely appropriate way to describe the delictual branch of the German law of obligations. The attentive reader may notice other curious terms. The way privacy laws are structured means I have to distinguish between 'public persons' (which includes public figures and celebrities) and the potentially oxymoronic 'non-public persons' (by which I simply mean individuals who are not subjected to media attention and/or do not actively seek it).

As for more technical details, I have used short title referencing in this book. Full references can be found in the bibliography at the end. Where possible, I have used the *Neue Juristische Wochenschrift* (NJW) citations for German cases.



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# Abbreviations

§/§§	paragraph/paragraphs
a	article
ABGB	Allgemeines Bürgerliches Gesetzbuch
AC	Law Reports, Appeal Cases
ad	adversus (objection)
AfP	Archiv für Presserecht
All ER	All England Law Reports
ALR	Allgemeines Landrecht
Amb	Ambler's Chancery Reports
Art/Arts	Article/Articles
Atk	Atkyns' Chancery Reports
BAG	Bundesarbeitsgericht
Bd	Band (Volume)
BGB	Bürgerliches Gesetzbuch
BGH	Bundesgerichtshof
BGHZ	Entscheidungen des Bundesgerichtshofs in Zivilsachen
Burrow	Burrow's King's Bench Reports
BVerfG	Bundesverfassungsgericht
BVerfGE	Entscheidungen des Bundesverfassungsgerichts
C civ	Code civil
CA	Court of Appeal
Cass Civ	Cour de Cassation
Ch/ Ch D	Law Reports, Chancery Division
ch/chs	chapter/chapters
Comm	Commentary
CPD	Law Reports, Common Pleas Division
Croke Jac	Croke's King's Bench Reports tempore James
De Gex & Smale	De Gex & Smale's Chancery Reports
De GF & J	De Gex, Fisher & Jones Chancery Reports
Dyer	Dyer's King's Bench Reports



ECHR	European Convention on Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights
edn	editor/eds editor/editors
EGStPO	edition
EHRH	Einführungsgesetz zur Strafprozessordnung
Eliz	European Human Rights Reports
EMLR	Elizabeth (Queen)
Eq	Entertainment & Media Law Reports
ER	Equity Cases, Law Reports
EWCA Civ	English Reports
EWHC	England and Wales Court of Appeal, Civil Division
EWHC (Admin)	England and Wales High Court
f/ff	England and Wales High Court (Administrative Court)
FLR	folio/folios
FSR	Family Law Reports
Gai	Fleet Street Reports
GG	Gaius
GRUR	Grundgesetz
Hare	Gewerblicher Rechtsschutz und Urheberrecht
Hen	Hare's Reports
Hil	Henry (King)
HL	Hilary Term
HL Deb	House of Lords
HLC	House of Lords Debates
HRA	Clark & Finnelly's House of Lords Reports New Series
JZ	Human Rights Act
KB	Juristen-Zeitung
Keilw	Law Reports, King's Bench
KG JW	Keilwey's King's Bench Reports
KUG	Kammergericht Juristische Wochenschrift
LG	Kunsturhebergesetz
lib	Landgericht
LJCh (NS)	liber (book)
Lofft	Law Journal Reports, Chancery (New Series)
LR	Lofft's King's Bench Reports
LT	Law Reports
LUG	Law Times Reports
m	Literatururhebergesetz
Macnaghten & Gordon	memorandum
Mer	Macnaghten & Gordon's Chancery Reports
NJW	Merivale's Chancery Reports
NJW-RR	Neue Juristische Wochenschrift
no	Neue Juristische Wochenschrift—Rechtsprechungsreport number

NZLR	New Zealand Law Reports
OLG	Oberlandesgericht
para/paras	paragraph/paragraphs
pl	plea
pt	part
Q	Question
QB	Law Reports, Queen's Bench
Rep	Report
Res	Resolution
rev	revised
RG	Reichsgericht
RGBI	Reichsgesetzblatt
RGZ	Entscheidungen des Reichsgerichts in Zivilsachen
RPC	Reports of Patent, Design and Trade Mark Cases
StGB	Strafgesetzbuch
Swanston	Swanston's Chancery Reports
T	Title
Tab	Table
Taunton	Taunton's Common Pleas Reports
tit	titulus (title)
TLR	Times Law Report
Trin	Trinity Term
Ulp D	Ulpian Digesta
VC	Vice-chancellor
Vol/Vols	Volume/Volumes
WBI	William Blackstone's King's Bench Reports
Wils KB	Wilson's King's Bench and Common Pleas Reports
WLR	Weekly Law Reports
YB	Yearbooks
ZUM	Zeitschrift für Urheber- und Medienrecht?

