Patrick O'Callaghan

Refining Privacy in Tort Law

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Refining Privacy in Tort Law

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

Chapter 1
Refining Privacy

The gods did not reveal, from the beginning, all things to us; but in the course of time through seeking we may learn and know things better. But as for certain truth, no man has known it, nor shall he know it; and even if by chance he were to utter the final truth, he would himself not know it: for all is but a woven web of guesses

- Xenophanes

1.1 Introduction

In his seminal essay on privacy, Bloustein notes that 'the words we use to identify and describe basic human values are necessarily vague and ill-defined.'[1] What does he mean by this? A sceptical interpretation is that 'abstract concepts' lack any 'natural content' and so can mean whatever we want them to mean.[2] But I prefer a second interpretation. On this account, words such as *dignity* and *liberty* have sufficient force so that we are in some measure cognisant of their content. But the words are sufficiently vague at the same time so that some degree of reasonable disagreement about what they represent can be accommodated. In this way, these words project *universality* but allow for *reasonable pluralism*.[3] When human rights lawyers talk about dignity, for instance, they do so in a way that suggests they are certain that there is either some objective definition of it, or, at the very least, that others intuitively know what they mean. But if they are asked to describe its content in more precise terms, some degree of doubt and disagreement will inevitably emerge—*Quot homines, tot sententiae*!

[1] Bloustein, 'Privacy as an Aspect of Human Dignity' (1964) at 1001.

[2] Fish, *There's No Such Thing as Free Speech* (1994) p 102.

[3] On reasonable pluralism, see Rawls, *Political Liberalism* (1993).

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This is not an essentialist argument in the Aristotelian sense. I do not claim that abstract concepts have an essence or a true meaning, for which we can provide an exhaustive definition.[4] How can we ever prove that we have found the truth of a concept if human fallibility means we are infinitely ignorant?[5] Moreover, once a scholar claims that he has found a concept's essence, he closes down dialogue and this leaves little room for reasonable disagreement. But abstract concepts must have content.[6] This is because these concepts are what Elias calls 'efficient instruments' that we have developed over the course of millennia. These instruments express what generations of people have 'jointly experienced' and 'wanted to communicate.'[7] I will argue that it is this shared experience which forms the content of an abstract concept.[8]

For more than a century, the ideal of a precise definition of another abstract concept, that of privacy, has lured lawyers into a privacy 'swamp', as one commentator has put it.[9] As we shall see, a search of the literature reveals a myriad of definitions ranging from the vague theories to the uncompromising taxonomies. But my thesis is that if we confine our task to *defining* privacy we risk entering the murky cave of Polyphemus searching for a definition, never to emerge again.[10] This first chapter provides a methodology for our study—this book's task is to refine privacy, to reflect upon our shared experience and, by means of critical rationalist thinking, to assess the methods of legal protection. But before we consider this task in greater detail, I must explain why privacy needs to be conceptualised in the first place.

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[4] We must refrain from making essentialist arguments about the meaning of privacy as this leads to infinite regress. On this point, see Popper, 'Two Kinds of Definitions' (1987).

[5] Popper, *Conjectures and Refutations* (2002) p 38.

[6] Even anti-essentialists would admit that these concepts have content. Indeed, how could it be otherwise? Referring to terms such as 'democracy' and 'liberty', Popper says that they are 'much misused'. He implies, then, there are better ways of *using* these words. See Popper, 'Two Kinds of Definitions' (1987) p 96.

[7] Elias, *The Civilizing Process* (2000) p 8.

[8] Popper warns against becoming embroiled in an 'empty controversy about words'. On his account, this leads to verbiage—we end up substituting a 'merely verbal problem for a factual one.' See Popper, 'Two Kinds of Definitions' (1987) p 96. But often in law the verbal problem *is* the factual problem. If one party claims that he has suffered a legal wrong of invasion of privacy, the judge must know the scope of privacy as a legal right before she can pass judgment.

[9] Inness, *Privacy, Intimacy and Isolation* (1992) p 3. It is not just scholars who seek to provide a precise definition of privacy. In a recent parliamentary report on privacy, the committee sees the merits in providing a statutory definition of privacy (though they do not recommend it in the end). On their account, such a definition 'would have the advantage of perhaps creating more certainty in the law: editors might be able better to assess whether a proposed article is likely to infringe privacy or not.' See *House of Lords and House of Commons Report on Privacy and Injunctions* (2012).

[10] In his lectures on romanticism, Isaiah Berlin begins by stating that he 'does not propose to walk into the particular trap' of attempting to define romanticism. He calls it a 'dangerous and confused subject, in which many have lost. . .their sense of direction.' See Berlin, *The Roots of Romanticism* (2000) p 1.

1.2 Why Conceptualise Privacy?

1.2.1 Contemporary Context and Conceptual Confusion

In a recently published book on privacy law,[11] Carolan and Delany begin by quoting the philosopher Glenn Negley, who describes privacy as a 'distinctly contemporary' concept.[12] This is certainly a reasonable way to introduce the subject; it is, after all, a widely-held assumption. But is it accurate? A Google search of the word 'privacy', while perhaps not a scientifically sound method of ascertaining its contemporary relevance, can tell us something, nonetheless, about its place in our social milieu. A simple search of the word 'privacy' yields over 5.7 billion results. By contrast a search for 'liberty' results in 746 million hits, while 'dignity' provides 119 million. Searching 'privacy' with the Google timeline function, which tracks the years mentioned within web documents, produces an intriguing timeline graph indicating that the majority of these 5.7 billion privacy-related documents were produced during, or mention the years, 1990–2012. Documents produced during, or referring to the years, 1930–1950 have the fewest references to privacy, while references peak during the period 2001–2004.

We can debate these figures, of course. What about confounding factors? Should we not control, for instance, for the number of websites that have 'privacy policies', something that will inevitably contribute to the number of hits? We can also speculate about the figures. Does the peak during the period 2001–2004 point to increased concerns about individual privacy following government responses to the 11 September 2001 terrorist attacks? Some degree of debate and speculation is certainly possible but can we use these statistics to *prove* that privacy is a 'distinctly contemporary' concept?

We should bear in mind that statistical analysis provides us with a general overview only. Arendt reminds us that within this overview, acts and events can 'appear only as deviations or fluctuations' and these statistical peaks and troughs tell us almost nothing about the subject matter of the acts and events themselves.[13] The slightest deviation or fluctuation can often represent a profound act or event as 'the meaningfulness of everyday relationships is disclosed not in everyday life but in rare deeds, just as the significance of a historical period shows itself only in the few events that illuminate it.'[14] For Arendt, then, the application of the law of statistics to politics or history 'signifies nothing less than the wilful obliteration of their subject matter, and it is a hopeless enterprise to search for meaning in politics or significance in history when everything that is not everyday behavior or automatic trends has been ruled out as immaterial.'[15]

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[11] Carolan & Delany, *The Right to Privacy* (2008).

[12] Negley, 'Philosophical Views on the Value of Privacy' (1966) at 319.

[13] Arendt, *The Human Condition* (1999) p 42.

[14] *Ibid.*

[15] *Ibid.*