

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.

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