resulting Act, produced its own crop of cutting comment, some of which he quotes. These comments can be summed up in the words of a critic of another project: 'The Law Commission was meant to be the architect of the new law – not the jobbing builder to the old'.

How should we judge the 1971 reform after 40 years? In two well-known respects it clearly made a mess of things, or at least, failed to correct a mess that was already there. One is section 2(2) of the Animals Act, which provides for a limited degree of strict liability for the harm done by a domestic animal. The general idea behind this provision was to make the keeper of domestic animal strictly liable for the harm it does if, contrary to the nature of its kind, it has a vicious streak, and the keeper knows of it: a rule which is quite sensible. But the effect of it as literally interpreted by a majority of the House of Lords in *Mirvahedy v Henley* (2003) is to make the owner strictly liable where his animal behaves in just the sort of way that animals of this type behave when challenged, scared, or teased, if this is why the beast in question bolted, kicked or bit: a rule which, by contrast, appears to make no sense at all. This decision is analysed in chapter 2, together with the various unsuccessful attempts that have been made to reverse the effect of it by legislation. The second oddity is section 3, which – reproducing the strange rule first enacted in the memorably-entitled Dogs Act and Dogs (Amendment) Act – makes the owner of a dog strictly liable if it kills or injures livestock, but not if it kills or injures human beings. This anomaly is discussed in chapter 7, where the author also tells us how the Republic of Ireland, where the same rule also formerly applied, has now changed the law to make dog-owners strictly liable for dog attacks on humans too.

On the other sections of the Act there have been few reported cases and little academic comment. This suggests that the rules contained in them are clear and the results which they produce are not perceived to be unjust. And from this the correct deduction, I believe, is that the 1971 reform was mainly a success. From this lack of discussion, law teachers wanting to reduce the size of syllabuses sometimes deduce that liability for animals can be safely dropped. But if this part of the law works smoothly, that surely does not mean that it should be dismissed as unimportant. With an estimated million horses, 10 million cats, 10 million dogs and 900 million farm animals in this country, damage done by animals must be a significant area of legal business, even if the resulting cases never reach the courts, let alone the law reports. So the new edition of North's book will be a useful addition to the lawyer's library.

Provided, that is, they are prepared to buy it. Whereas the original, a hardback, cost £3.20p for 229 pages, the new one, a paperback, costs £55 for 210: a high price for a small book, even if it is a good one.

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Refining Privacy in Tort Law. by Patrick O'Callaghan. [Springer, 2013. 169 pp. Hardback £72. ISBN 978-3-642-31883-2.]

In *Campbell v MGN* [2004] 2 AC 457, the House of Lords modified the traditional elements of the equitable action for breach of confidence to afford a remedy to a supermodel whose private information was published by a tabloid without her consent. More than a dozen cases, many of them at the appellate

level, have subsequently refined this action in several respects. Nevertheless, much uncertainty remains. Courts have, for instance, struggled with whether this action can extend to bare intrusions into private spaces in addition to disclosures of private information; agonized over the meaning, and relevance, of those deemed to be "public figures"; and largely avoided analysing the complex relationship between privacy and the broader notion of the right to one's image.

In this monograph, Patrick O'Callaghan sets out to "refine privacy in tort law" with a view to informing the law's response to these, and other, contested privacy issues. O'Callaghan approaches his subject from three broad perspectives: (i) a conceptual, or theoretical, lens, which aims to elucidate privacy's shared meaning and underlying values; (ii) an historical approach, which maps, in broad strokes, the evolution of the concern for privacy in Western civilization; and (iii) a doctrinal framework, which seeks to expose gaps in the current English approach to privacy torts by comparing this jurisdiction's treatment of several "hard cases" to the approach followed in Germany, which has long had a civil action for the invasion of privacy.

Chapter one surveys some of the notorious difficulties that theorists have encountered when attempting to offer conceptual articulations of "privacy". The author asserts that searching for an abstract *definition* is problematic, for, in doing so, the theorist is necessarily compromised by her own "agent-relativity" based on intuitive assumptions and subjective linguistic analyses (pp. 5–7). Moreover, he is critical of recent scholarly attempts to circumvent these difficulties by offering *taxonomies* of privacy invasions in place of abstract definitions. Of these, he says they too are inherently normative, and hence afflicted by arbitrariness and subjectivity, although he does concede that taxonomies may nevertheless have some value insofar as they highlight forms of privacy invasion which can act as reference points for refining tort doctrine (pp. 17–8). Instead of conceptual definitions and taxonomies of invasion, O'Callaghan proposes to focus instead on the values underpinning privacy, and, with these in mind, to "test" how well these are protected in English and German law, by comparing their respective responses to three "hard cases" (pp. 21). As all of that work is delegated to other chapters, the reader is left, after the first chapter at least, without any positive advancement toward "refining privacy in tort law".

Chapter two purports to elucidate the values underpinning privacy. While the author is surely right to argue that a proper understanding of these values will inevitably assist in shaping our understanding of privacy, and probably also inform approaches to its legal protection, he overstates the contribution this makes to the existing literature when he asserts "little attention" has hitherto been paid to these values (p. 25). The literature on privacy's underlying values is actually formidable, both in terms of volume and sophistication (early, influential examples— to say nothing of the many important recent works—include: J. Pennock and J. Chapman, eds., *Privacy Nomos XIII* (Atherton, 1971); J. Rachels, "Why is Privacy Important?" (1975) 4 Phil. & Pub. Aff. 323; J. Reiman, "Privacy, Intimacy and Personhood" (1976) 6 Phil. & Pub. Aff. 26; E. Bloustein, "Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser" (1964) 39 NYULR 962). O'Callaghan identifies three clusters of values underpinning privacy. First, privacy is said to be essential to personhood, and an absence of it threatens dignity and autonomy (p. 32). This is no doubt true, as many influential theorists have previously argued in considerable detail. Second, the author argues that, if privacy is essential for

autonomy, it follows that it must have some proprietary aspects too, since property is also essential for autonomy (pp. 32, 38–42). I have some difficulty with this assertion for two reasons. First, it appears to be something of a *non-sequitur*: petrol and wheels are both essential for the operation of most motor cars, but it does not necessarily follow that, because of this, petrol and wheels share any common characteristics. Second, and in any event, in order to make good this claim, the author could have explored in much greater detail the complex literature that criticises a proprietary understanding of privacy. Despite these criticisms, O'Callaghan does make some interesting points about the conceptual difficulties concerning the right to commodify one's image—doing so is said to offend human dignity; but denial of this right is said to offend human agency and autonomy—and concludes, sensibly, that image rights be seen as examples of "incomplete commodification" that allows for the "coexistence of dignitarian and proprietary interests" (pp. 41). Third, and finally, O'Callaghan discusses the important role "community" plays in shaping the individual's sense of self, and of privacy, which are in turn critical to the development of one's subjective personhood (pp. 42–5). As with the dignitary arguments advanced above, this assertion, while no doubt true, is already well-established in the socio-legal literature, and this monograph would benefit from a deeper engagement with the same.

In Chapter three the author explicates what he calls a "privacy curve" (p. 49). Starting with ancient Rome, and ending in the mid 20th century, he demonstrates a steady evolution in Western Society's concern for privacy, and for the well-being, dignity and autonomy of the individual more generally. Through this historical work he also goes some way toward demonstrating that current legal approaches to protecting privacy— both in England and Germany—are grounded, historically, in a concern for the relationship between privacy and the underlying values identified in the previous chapter. This chapter is probably the most original, and also the densest, in the text, and in my view deserves a wide readership.

In Chapter four O'Callaghan examines three English "hard cases" and speculates how these would be decided in Germany. First, there is the notorious case *Mosley v MGN* [2008] EWHC 1777, which involved a high profile figure's successful claim that a tabloid invaded his privacy by *disclosing* details of his sex romp with prostitutes. O'Callaghan criticises this case, and English law generally, for failing to have a clearly articulated doctrine of "public figures"— that is, a clear test of who qualifies as such, and, if they do, what precise effect this has on balancing privacy and free speech (p. 107). He asserts that German law is preferable here, for it is more clearly committed to scrutinising the claimant's status when adjudicating privacy claims (p. 127). More generally, O'Callaghan argues that German law is preferable because it has a clearer set of criteria applicable to balancing privacy and speech, whereas English courts rely on vague pronouncements from the Strasbourg court, which renders their decisions impressionistic and less principled. While there is some merit to these criticisms, O'Callaghan's arguments are undermined by his conclusion that German courts would likely come to the same conclusion as Eady J did in *Mosley*, and by his acknowledgement that many of the same considerations in fact influence the analysis in the same way in both jurisdictions (pp. 116–119, 128).

The second "hard case", *Kaye v Robertson* [1991] FSR 62 (CA), is equally notorious— it involved an unauthorised photographic *intrusion* into the claimant's hospital room when he was lying in a state of semi-consciousness.

O'Callaghan notes that such bare intrusions have long been actionable in Germany, and asserts that England's failure to capture the same under its civil action for the misuse of private information is a glaring example of a gap in need of filling (p. 134). While it is true that such bare *intrusions* fall within almost every theorist's conceptual articulation of privacy, and thus in principle ought to be actionable alongside *disclosures*, there have in fact been several comments in recent English decisions (not mentioned by O'Callaghan) that suggest English law *is* evolving to capture intrusions (see, for instance: *Imerman v Tchenguiz*, [2010] EWCA Civ 908, para. 65; *Wood v Metropolitan Police Commissioner*, [2009] EWCA Civ 414, para. 34; *CTB v News Group*, [2011] EWHC 1326, para. 23). Moreover, since English courts have committed to taking guidance from Strasbourg on the minimum content of article 8 (*McKennitt v Ash*, [2006] EWCA Civ 1714, para. 11) and given Strasbourg's finding that bare intrusions can in principle constitute a violation of the same (*Wainwright v United Kingdom*, [2007] 44 EHRR 40; *Reklos v Greece*, [2009] EMLR 290), it seems inevitable that English courts would in fact provide a remedy to a claimant in Kaye's situation if the case were decided today. Accordingly, it is fair to say that the alleged "intrusion gap" is less of a shortcoming than the author claims.

The third "hard case" is the Douglas and Zeta-Jones saga (culminating in *Douglas v Hello! (No 3)* [2008] 1 AC 1 (HL)), which involved a surreptitious paparazzo taking illicit photographs of a celebrity wedding and selling these to a tabloid magazine. O'Callaghan makes a convincing case that English courts have generally failed to grapple with the complex relationship between dignity-based privacy rights and property-based image rights, and that the English approach, which sees a bifurcation between these two claims (as is evident in *Douglas*), is both unprincipled and impractical. O'Callaghan argues, with some merit, that the modern German approach, which locates both species of claim under the genus of a "personality" right, is preferable to the artificial and under-analysed English approach.

Chapter five concludes the monograph with a short reiteration of the main arguments discussed above, and a final indictment of English law under the heading "privacy and rank" (p. 153). The author repeats his criticism that, "so far as [he is] aware, there is absolutely nothing in recent case law to suggest that [England's privacy tort] could potentially encompass [bare intrusions and image rights]" (p. 155); and asserts that, because only disclosures are actionable, and these happen in fact to be brought by celebrities, English law is "left with a skewed understanding of privacy as a preserve of the rich and famous" (p. 155). Neither of these conclusions is convincing. Regarding the first, while it is true English courts have rejected a freestanding image right, they will (as *Douglas* shows) afford some protection to these claims if they can be fitted into traditional breach of confidence/trade secret doctrine; and, as mentioned above, there have been several recent statements of principle suggesting English law is evolving to capture bare intrusions into privacy. As a result, the first conclusion is considerably overstated. Regarding the second conclusion, it seems at odds with much of the dicta—repeatedly emphasised in virtually every single English privacy case— that such claims are grounded, "horizontally", in the *Human Rights Act*, and derive normative force from privacy's underlying values of dignity and autonomy. Such statements are universal in application, and about as far from elitist as can be imagined.

These shortcomings notwithstanding, this is a timely, and instructive, monograph. Jurists interested in the evolving English approach to adjudicating

civil claims for invasion of privacy will find some real value in it, especially those parts that contrast English and German doctrine.

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Gurry on Breach of Confidence: The Protection of Confidential Information. by TANYA APLIN, LIONEL BENTLY, PHILLIP JOHNSON, and SIMON MALYNICZ. [Oxford: Oxford University Press. 2012. lxxxix, 881 pp. Hardback. ISBN 978-0-19-929766-5.]

THE tone for this excellent book is set by an elegant, thoughtful Foreword by the author of the first edition, and the second edition's namesake, Francis Gurry. As he points out, since the first edition was published in 1984, a technological revolution has fundamentally changed the way information is created, communicated and stored. Creating a coherent and accessible account of how the law has developed during that 28 year period is a therefore an ambitious undertaking. As he acknowledges, the authors of this second edition – two academics and two practising barristers – rise to the task admirably.

As a testament to the enduring value of Gurry's work, the structure of the second edition echoes that of the first. Inevitably though, this edition is much longer including Part I which contextualises in welcome detail the discussion that follows. The authors, led here by Professor Bently, begin by explaining the role played by breach of confidence in the protection of commercially valuable ideas, state secrets, and private life and in the determination of immunity from many obligations of disclosure. They then provide a detailed history of the action, establishing persuasively that the protection of confidence was embedded in English law well before *Prince Albert v Strange* (1849) 2 De G & SM 652; 1 Mac & G 25; 1 H & Tw 1; was decided. The authors then consider the various philosophical bases for the protection of confidence, concluding, however, that none is entirely satisfactory. Part II, led by Professor Aplin, also examines an important foundational question; the jurisdictional basis of the action. A clear conclusion on this difficult issue is reached: the authors submit, consistently with the first edition, that the "policy of the law" is the basis of the courts' jurisdiction and that the jurisdictional sources on which the courts rely are secondary mechanisms by which that policy is enforced. In other words, the action is *sui generis*.

Parts III and IV, led in the main by Professor Aplin, form the heart of the book. In Part III, the authors identify the principles which determine when information will be "confidential". They look, first, at the general characteristics of the requirement of "inaccessibility" and, then, at how that requirement is applied to trade secrets, artistic and literary information, government secrets, and personal information. The rationale for this categorical approach is clearly explained. Whilst inaccessibility is the fundamental attribute of confidential information, its existence, the authors say, is determined by reference to the different policy considerations underlying each category. The exception, they argue, is personal information: in this context, harm, not inaccessibility, is now the touchstone. In Part IV, the scope of the obligation of confidence is explored. Here, the authors identify a central, unifying test for identifying non-contractual obligations of confidence: namely, whether the circumstances in