

# A socio-legal critique of privacy and data protection law

Philip Leith  
Queen's University  
Belfast





# 1. Socio-legal approach

# Why a sociological approach?

- “Nowadays men often feel that their private lives are a series of traps. They sense that within their everyday worlds, they cannot overcome their troubles, and in this feeling, they are often quite correct: What ordinary men are directly aware of and what they try to do are bounded by the private orbits in which they live; their visions and their powers are limited to the close-up scenes of job, family, neighborhood; in other milieux, they move vicariously and remain spectators. And the more aware they become, however vaguely, of ambitions and of threats which transcend their immediate locales, the more trapped they seem to feel.”

**C. Wright Mills, *The Sociological Imagination*, 1959.**

## **Sociological concerns include:**

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- Interpersonal relationships and how they combine into larger societal relationships;
- The relationship between self and society;
- Power, authority and role in society.
- These are the very issues which are at the heart of notions of privacy.
- So why so little use of sociology in the privacy and data protection debate?

## A socio-legal approach might:

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- Provide some critical assessment of the pressures which give rise to legislating;
- Judge the effect of legislation upon the target behaviour;
- Provide a theory of privacy which is based on notions of self and society.



## **2. Pressures which give rise to legislating**

## Younger Committee can be seen as using basic sociological techniques:

- Letters to Younger from public related to complaints against various record holding/publishing agencies:
  - The Press: 27
  - Broadcasting: 6 (all BBC)
  - Credit Agencies: 20
  - Banks: 0
  - Employment: 10
  - Education: 0
  - Neighbours, landlords and others: 12
- Younger basically found that there was little requirement for a privacy law – little wonder given the lack of evidence of real harm.

## Yet when ‘perceptions’ elicited:

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- 46% thought the following was an invasion of privacy:
  - “Suppose you had wanted to buy a new washing machine recently and you had asked for hire purchase terms, and the dealer told you that before giving you credit he would have to check with a credit rating agency. Would you regard [this] as an invasion of privacy?”
- 37% thought it should be made illegal.



# Most current socio-empirical research appears to be focused on ‘perceptions’

- For example, ICO funded research into what constitutes ‘personal data’ carried out a large scale trans-national study\* .
- Interesting results, but really tells us little about how the individuals actually use or provide their data (perhaps bemoaning the lack of privacy as they hand over their Tesco club card, for example).
- Does not provide a ‘theory of privacy’ which allows us to make sense of the data.

\* What are ‘Personal Data’? A study conducted for the UK Information Commissioner, S. Booth et al, 2004.

Always	Never	Sometimes
Name		Details of time, place and cause of death of data subject
Home telephone number		Computer IP address
Shoe size		
National registration number		
Blood group		
Countries visited in the last 5 years		
Salary details		
Head and shoulders Photograph		
Political party voted in the last election		
Car registration/licence plate number		
Email username and password		
TV viewing habits		
Dental record		
Sexual orientation		
Religion		
Parents names		
Credit card number		
History of addiction		
DNA profile		
Education/qualifications		
E-commerce transactions		
Mother's maiden name		
Fingerprint		
Medical history of family members		
Bank account details		
State benefit received		
Alias/pseudonym used in internet chat room		
Football team supported		
Family portrait (painting)		
Vehicle ownership (make, model and colour)		
Date of birth		
Still image taken from CCTV		
Natural hair colour		

“Country 7” ,

What are ‘Personal Data’?

Always	Never	Sometimes
Name		Home telephone number
National registration number		Shoe size
Head and shoulders Photograph		Blood group
Dental record		Countries visited in the last 5 years
Parents names		Salary details
DNA profile		Political party voted in the last election
Details of time, place and cause of death of data subject		Car registration/licence plate number
Fingerprint		Email username and password
Medical history of family members		TV viewing habits
Bank account details		Sexual orientation
State benefit received		Religion
Family portrait (painting)		Credit card number
Vehicle ownership (make, model and colour)		History of addiction
		Education/qualifications
		E-commerce transactions
		Mother's maiden name
		Computer IP address
		Alias/pseudonym used in internet chat room
		Football team supported
		Date of birth
		Still image taken from CCTV
		Natural hair colour

“Country 27” ,

What are  
‘Personal Data’?

## But other studies do relate perceptions to social situation

- For example, Barron’s critique of Warren & Brandeis article suggested:
  - There was no evidence of press excess (and no daughter’s wedding);
  - Warren was extremely hypersensitive;
  - That the article related to a time of political infighting in the Republican party (‘mugwumpery’);
  - They were “clinging to a minority view of newsworthiness” .

# So why the rise in legislating?

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- Appears to be the rise of individual perceptions of ‘real problems’ and partly fear over the centralised state;
- Publishing (academic as well as popular texts) in 1960s to date focused on raising perceptions of danger and used anecdotal evidence (never the most reliable);
- But little hard evidence of real harm.

# A clear need for socio-legal study?

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- Is there, then, a clear need for more investigation of the basis and assumptions behind DP/privacy law?
- I suggest so, and that a more robust analysis of the claims and rhetoric for DP/privacy will change our attitudes towards this growing field.



### **3. The effect of legislation upon the target and other behaviour**

## **DP/Privacy law changing the landscape**

### **– needs socio-legal study**

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- Wide definition includes behaviour not originally considered harmful (e.g. teenage blogs after Lindqvist).
- State criminalising activities which previously were civil actions yet many activities at the heart of data protection perceptions are unchanged (e.g. access to credit agency information).



# Equifax Locate

The quickest, most reliable and flexible way to trace individuals

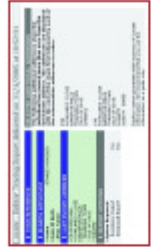
For many organisations, keeping track of the whereabouts of individuals is key to the successful operation of their business – whether the organisation is a credit grantor, a debt collection agency or one of the many other bodies that are dependent on up-to-date and accurate details on the location of individuals. Regardless of whether individuals have genuinely moved and have failed to inform an organisation of their change of address, or are pretending to move but remain active at their current residence, not knowing their whereabouts will cause organisations untold problems.

In addition, many organisations may want to find the whereabouts of individuals to inform them of beneficial information – assets or money due, for example.

Equifax Locate offers the quickest and most reliable and flexible way for businesses to trace gone-away individuals and re-establish contact with them.

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- ▶ Consumer credit agreements.
- ▶ County Court Judgments.
- ▶ Searches.
- ▶ Address links.
- ▶ Financial associates and alias names.

### Quick and Convenient

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### compliant

Equifax Locate is fully compliant with Data Protection legislation and the use of it is subject to compliance with the Locate product rules.

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“Over 500 million records ...”

“Equifax is fully compliant with data protection legislation ...”

“With a database of in excess of 500 million recent and live records derived from an extensive data source, Equifax can offer flexible and reliable solutions to the problem of tracing gone-away individuals ...”  
Equifax UK web site.

## Has DP law biased information processing in favour of capital?

- Tools such as data mining, matching and processing of data require large data sets.
- These tools are advantageous to business in allowing them to target customer need.
- The companies most able to perform these tasks effectively are those with large data sets – that is, well capitalised and with a large commercial presence.
- DP law will always – in terms of information utilisation – favour Tesco over the local corner shop.

# Is DP Law replacing commercial confidence law?

- Recent UK prosecutions by the ICO included a travel agent who removed details from his employer:

“Mr Soltysik, from Mapperley, Nottinghamshire removed a database of customer details from his previous employer Quality Travel in Grantham. He then used the database to send marketing material to Quality Travel’s customers when he and his wife set up their own travel agents, New Style Travel. Quality Travel warned Mr Soltysik that his actions were breaching DPA but, as he continued to use the customer details, Quality Travel reported the case to the Information Commissioner’s Office (ICO). The ICO investigated and prosecuted Mr Soltysik under the DPA.”

## ... Personal Privacy?

- The Information Commissioner, Richard Thomas, said:

“I am pleased to see that this case was viewed so seriously that it was committed to the crown court for sentencing. Obtaining and disclosing personal information can have serious consequences and data protection laws protect an individual’s right to personal privacy. The result of this prosecution by my office sends out the clear message to those engaged in similar activity that ***such sharp practice in handling personal information, involving invasion of people’s privacy, will not be tolerated by me, or by the Courts.***”

## ... or commercial secrecy?

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- There appears to have been no complaint from data subjects.
- Data subjects may well receive better and cheaper service from a new company, so prosecution not necessarily in interests of customers.
- Could be seen as litigation on behalf of the ex-employers, saving them the costs and concerns of civil litigation (at the expense of the public purse).

# Is DP Law providing cover for debtors?

- Another UK ICO prosecution involved ‘people tracers’ (V Chasers). Perhaps less understandable than other cases, it involved deception of government department.
- However, it is clear from various reports from Dept. for Constitutional Affairs that debt collection in the UK is not working, even after successful court proceedings:

“The study reveals a bleak picture of the effectiveness of enforcement procedures with only a small proportion of the county court and High Court claimants receiving full payment from the defendant in the time period specified in the court order. Steps taken to enforce default judgments did not prove effective either. Such failure led to the expression of frustration, disenchantment and some bitterness amongst claimants.”

# ... and requiring correction from Government

- About 60 per cent of enforcement in the county courts is ineffective because the claimant cannot find the necessary information about the debtor to enable them to take the right method of enforcement. **LCD's review of enforcement proposes allowing a regulated enforcement agent, as an officer of the court, to have a limited ability to access information from designated third parties in order to confirm that the data provided by the creditor on the identity and whereabouts of the debtor are accurate** so that the enforcement agent can make initial contact with the debtor.

“**Privacy and data-sharing: The way forward for public services**”, Cabinet Office, 2002.

## Is DP law chilling communications?

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- Soham murder enquiry held up – police claim
  - by worry over DP Act,
- ICO describe this as ‘nonsense’.
- However, the continuing changing nature of DP interpretation (such cases as Lindqvist) must lead to confusion over exactly what is personal data and what isn’t. We see this confusion in the ICO’s own funded research.



# What's wrong with fiduciary relationships?

- Recent ICO Prosecutions have included solicitors who have not registered. A quick search shows that this remains the case.
- Solicitors would not strike one as traditional 'data processors' – and are in fiduciary relationships with clients anyway – so registration appears pointless: “Increasingly, notification is seen as burden for data controllers which serves no, or very little, data protection purpose.” DCA, 2002.
- EU has already told UK government that it is not obliged to have total registration (has anyone told the ICO this?)

## The IC's View

- “I am pleased that the magistrates’ court has recognised the seriousness of a failure to notify. Complying with the Data Protection Act ensures that individuals’ personal information is secure, accurate, up-to-date and is processed fairly. This prosecution should remind solicitors and other organisations of their responsibilities under the Act.”



## 4. A socio-legal theory of privacy?

## Clearly problems with legal conceptions of privacy

- DIRECTIVE 2002/58/EC – language of ‘fundamental rights’;
- Difficulties with philosophical definitions of privacy (evidenced by large literature) –
  - Information control
  - ‘Private life’ vs. ‘Privacy’
  - Constrained by freedom of expression, etc.
- Can sociology provide a more coherent conception or definition?

## **We need to focus on the interaction between self and society**

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- Various social theorists have examined this – particularly G.H.Mead and Erving Goffman.
- This approach seems – to me – to offer an explanation for the various situations located around ‘privacy’.
- For example, Goffman provides a picture which is related to informational control and presentation and definition of self in society.

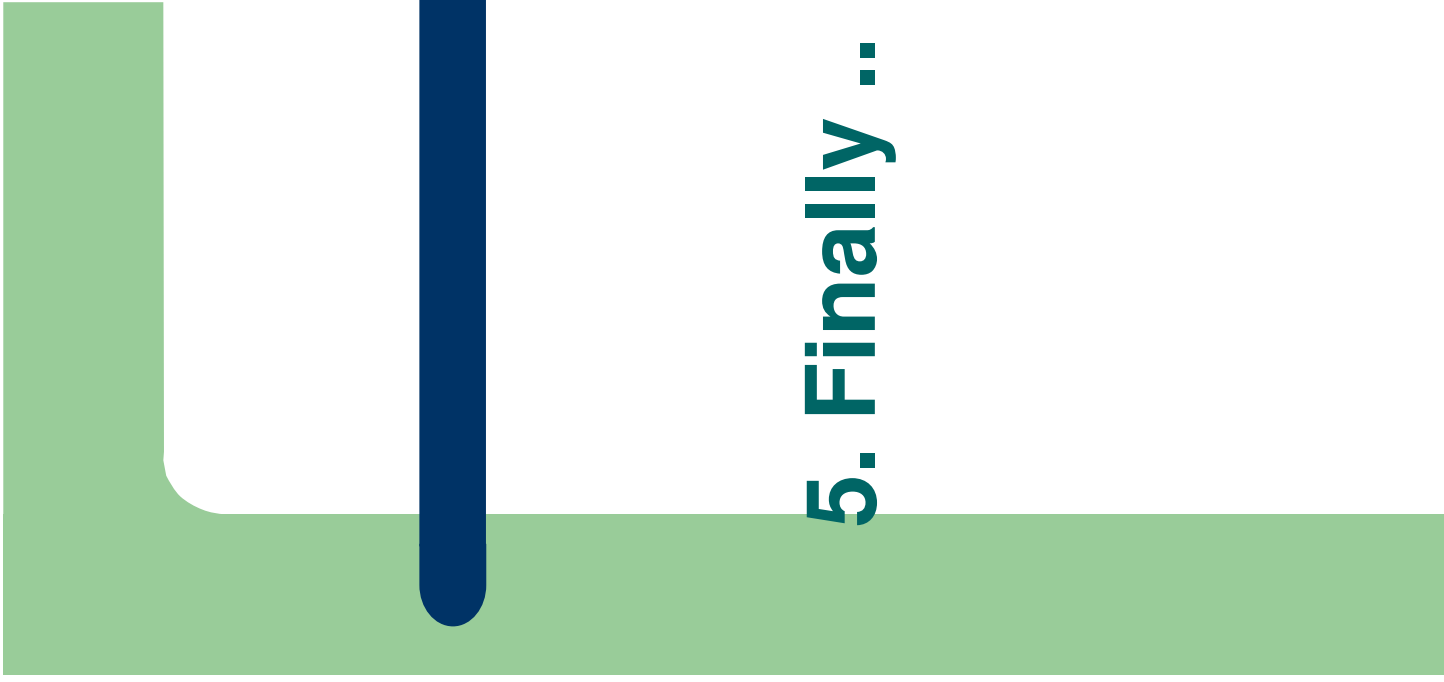
## Goffman's thesis

“Underlying all social interaction there seems to be a fundamental dialectic. When one individual enters the presence of others, he will want to discover the facts of the situation. Were he to possess this information, he could know, and make allowances for, what will come to happen and he could give the others present as much of their due as is consistent with his enlightened self-interest. To uncover fully the factual nature of the situation, it would be necessary for the individual to know all the relevant social data about the others.” (Presentation of Self, 249)

# Beyond face to face interaction

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- Goffman was particularly interested in face to face interaction;
- However, it can be seen that this interaction is in all social (e.g. bureaucratic, commercial, fan/celebrity) interactions.
- It develops a picture of the demand for privacy as part of an ongoing social relationship (attempting to control perception) rather than a fundamental right.
- It provides – on my reading – the context for reading the privacy/freedom of expression debate.



**5. Finally ..**



## Socio-legal investigation best offers a critique

- It attempts to unpick social representations which lack an evidential basis.
- It provides techniques for this unpicking process.
- It can provide an analytical framework for understanding legal context which is free from/or highlights legal fictions.
- It seems to me that the field of data protection/privacy is in much need of this kind of investigation.