



Raymond Wacks

# PRIVACY

A Very Short Introduction

OXFORD

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## Privacy: A Very Short Introduction

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# Preface

Scarcely a day passes without reports of yet another onslaught on our privacy. Almost exactly thirty years ago I published another small book on this contentious subject. Reading *The Protection of Privacy* now, one is inescapably struck by the tectonic shifts wrought by advances in technology. Most conspicuous, of course, is the fragility of personal information online. Other threats generated by the digital world abound: innovations in biometrics, CCTV surveillance, Radio Frequency Identification (RFID) systems, smart identity cards, and the manifold anti-terrorist measures all pose threats to this fundamental value – even in democratic societies. At the same time, however, the disconcerting explosion of private data through the growth of blogs, social networking sites, such as MySpace, Facebook, YouTube, Twitter, and other contrivances of the Information Age render simple generalities about the significance of privacy problematic. The advent of Web 2.0 has enlarged the Internet from an information provider to a community creator. And the insatiable hunger for gossip continues to fuel sensationalist media that frequently degrade the notion of a private domain to which we legitimately lay claim. Celebrity is indefensibly deemed a licence to intrude.

The manner in which information is collected, stored, exchanged, and used has changed forever – and with it, the character of the threats to individual privacy. But while the electronic revolution

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touches almost every part of our lives, it is not, of course, technology itself that is the villain, but the uses to which it is put. Only this week I learned of a proposal in the Philippines to employ RFID chips, widely used for tracking goods and patients' medical data, to protect school pupils against kidnapping. Inserting a chip below the skin (like my dog has) would plainly have several positive advantages in tracing missing individuals, including those afflicted with dementia. But is the price too high? Do we remain a free society when we surrender our right to be unobserved – even when the ends are beneficial?

Notwithstanding these extraordinary technical developments, many of the problems I considered in 1980 have not fundamentally altered. Indeed, it is mildly reassuring to discover that I can find little to disagree with in my analysis of the central questions of privacy in that book and other writings over the last three decades! I could, of course, be wrong. But, despite the passage of more than thirty years, I still think that the generous extension of privacy to 'decisional' matters (abortion, contraception, sexual preference), and the (understandable) conflation with freedom and autonomy that it engenders, is a mistake. And I draw some comfort from the fact that in the ever-increasing dystopian prognoses of privacy's decline, rarely is mention made of these and other 'decisional' matters that often infiltrate into the province of privacy. Privacy advocates seldom agonize about these questions, important though they are, when they warn of the countless dangers posed by our information society. Is this a tacit acknowledgment that the true meaning of privacy corresponds with our intuitive understanding and use of the concept? Is privacy not primarily an interest in protecting sensitive information? When we lament its demise, do we not mourn the loss of control over intimate facts about ourselves? And the essence of that control is the explicit exercise of autonomy in respect of our most intimate particulars, whether they be pried upon or gratuitously published.

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But perhaps this approach is misguided? Why should disparate privacy rights be unable to co-exist as different, but related, dimensions of the same fundamental idea? Why not allow ‘informational privacy’ to live in peace with ‘decisional privacy’? Ironically, I think the lop-sided neglect of the former, and constitutional acceleration of the latter by the United States Supreme Court may now have come full circle, and that there are small signs of a belated recognition of the urgent need legally to protect personal information along European lines, as described in the pages that follow. It is important to clarify that my resistance to the equation of privacy and autonomy springs not from a denial of the importance of rights or even their formulation in broad terms which facilitate their legal recognition. It rests instead on the belief that by addressing the problem as the protection of personal information, the pervasive difficulties that are generally forced into the straitjacket of privacy might more readily be resolved. The concept of privacy has become too vague and unwieldy a concept to perform useful analytical work. This ambiguity has actually undermined the importance of this value and encumbered its effective protection.

My association with privacy and data protection has largely been from a legal perspective. But, although the law is an indispensable instrument in the protection of privacy, the subject obviously teems with a number of other dimensions – social, cultural, political, psychological, and philosophical, and I attempt here to consider these – and several other – forces that shape our understanding of this challenging concept.

My privacy journey began many moons ago as a research student in Oxford. Both the literature (predominantly American) and the legislation (principally Scandinavian) were thin on the ground. The first generation of data protection laws were still embryonic. Since those innocent days the position has, of course, changed beyond recognition. To describe this phenomenon as an explosion is no hyperbole. My foray into the field originated as an academic

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endeavour to elucidate the elusive notion of privacy. But the practical dimensions of this increasingly vulnerable right were never far away. Nor could they be; the Information Age was looming. The binary universe and its manifold digital incarnations along with new, sophisticated electronic surveillance devices and an audaciously invasive press rendered any complacency about the security of personal information ingenuous. I have, moreover, been fortunate to serve on a number of law reform and other committees dedicated to illuminating the protean nature of privacy, and formulating measures by which it might be protected. The experience gained from these opportunities has exerted a powerful influence on my understanding of and judgment about privacy and data protection. I am grateful to members of the Law Reform Commission of Hong Kong privacy sub-committee from whom I have learned so much.

The campaign to defend and preserve our privacy is indefatigably waged by several public interest research and advocacy groups around the world. This precarious frontline is patrolled by various remarkable individuals to whom a considerable debt is owed. Not only do these organizations, notably the Electronic Privacy Information Center (EPIC) in the United States, and Privacy International in Britain, champion the cause of privacy, but they undertake scrupulous research into, and provide regular intelligence on, almost every conceivable aspect of the subject, including the – often parlous – state of privacy in many jurisdictions. I salute, in particular, David Banisar, Roger Clarke, Simon Davies, Gus Hosein, and Marc Rotenberg. Among the numerous fruits of the labour of these and other individuals and groups is an important recent declaration on the future of privacy signed in Madrid in November 2009 by more than a hundred non-governmental organizations and privacy experts from over 40 countries. Though it was finalized only after this book was in press, it has been possible to include the text as an annex.

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A distinguished group of colleagues, privacy commissioners, and other boffins have, over the years, provided encouragement, advice, and assistance in countless ways. Thanks are due to John Bacon-Shone, Eric Barendt, Colin Bennett, Mark Berthold, Jon Bing, the late Peter Birks, Michael Bryan, Ann Cavoukian, David Flaherty, Graham Greenleaf, Godfrey Kan, Michael Kirby, Stephen Lau, Charles Raab, Megan Richardson, Stefano Rodotà, Jamie Smith, and Nigel Waters. None should be indicted as a co-defendant for the transgressions I have committed here and elsewhere.

As always, members of Oxford University Press have been congenial collaborators in this project. I am especially grateful to Andrea Keegan, Emma Marchant, Keira Dickinson, Kerstin Demata, and Deborah Protheroe. Not for the first time, Kartiga Ramalingam and her team at SPI have done a superb job of transforming my text and images into this handsome volume.

Since putting the finishing touches to the manuscript – and even while reading the proofs – accounts of innumerable invasions relentlessly proliferated. Reader, be warned: the topic of the book in your hands is highly volatile. Fresh challenges to personal privacy lie in wait. The quest to protect and preserve this indispensable democratic ideal demands vigilance and resolve.

Raymond Wacks

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# Chapter 1

## The assault

Once upon a time, passengers boarded an aircraft without a search. Hacking described a cough – probably caused by a virus; and cookies were to be eaten rather than feared.

You are being watched. The ubiquity of Big Brother no longer shocks. 'Low-tech' collection of transactional data in both the public and private sector has become commonplace. In addition to the routine surveillance by CCTV in public places, the monitoring of mobile telephones, the workplace, vehicles, electronic communications, and online activity has swiftly become widespread in most advanced societies.

Privacy in its broadest sense extends beyond these sorts of intrusions whose principal pursuit is personal information. It would include a multiplicity of incursions into the private domain – especially by the government – captured in Warren and Brandeis's phrase 'the right to be let alone'. This comprehensive notion, redolent of the celebrated 17th-century declaration by Sir Edward Coke that 'a man's house is his castle', embraces a wide range of invasions that encroach not only upon 'spatial' and 'locational' privacy, but also interfere with 'decisional' matters often of a moral character such as abortion, contraception, and sexual preference.

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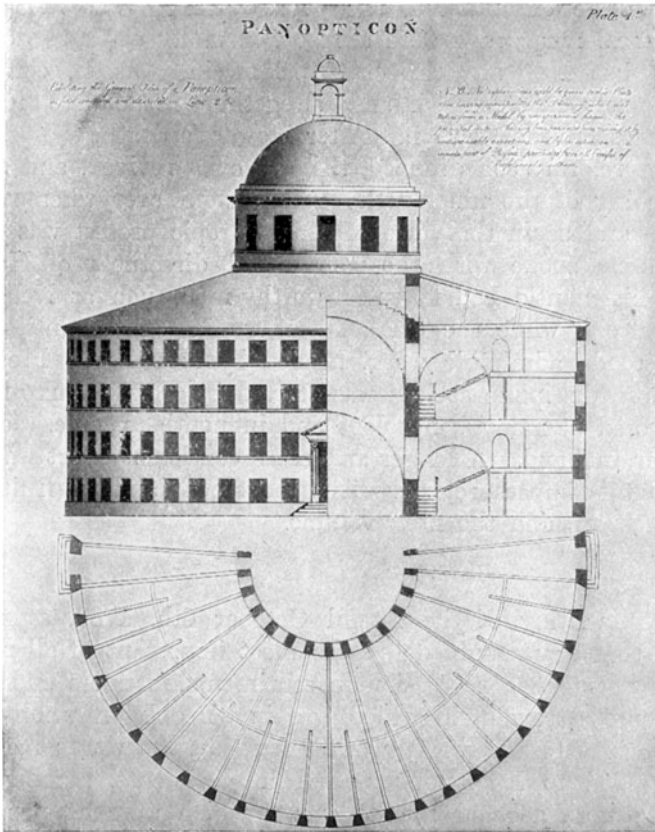
In the case of surveillance, a moment's reflection will reveal some of its many ironies – and difficulties. Its nature – and our reaction to it – is neither straightforward nor obvious. Is 'Big Brother is Watching You' a threat, a statement of fact, or merely mendacious intimidation? Does it make any difference? Is it the knowledge that I am being observed by, say, a CCTV camera, that violates my privacy? What if the camera is a (now widely available) imitation that credibly simulates the action of the genuine article: flashing light, probing lens, menacing swing? Nothing is recorded, but I am unaware of its innocence. What is my objection? Or suppose the camera is real, but faulty – and no images are made, stored, or used? My actions have not been monitored, yet subjectively my equanimity has been disturbed. The mere presence of a device that appears to be observing and recording my behaviour is surely tantamount to the reality of my unease.

Privacy

In other words, it is the *belief* that I am being watched that is my grievance. It is immaterial whether I am in fact the subject of surveillance. My objection is therefore not that I am being observed – for I am not – but the possibility that I may be.

In this respect, being watched by a visible CCTV camera differs from that other indispensable instrument of the spy: the electronic listening device. When my room or office is bugged, or my telephone is tapped, I am – by definition – usually oblivious to this infringement of my privacy. Yet my ignorance does not, of course, render the practice inoffensive. Unlike the case of the fake or non-functioning camera, however, I *have* been subjected to surveillance: my private conversations have been recorded or intercepted, albeit unconsciously. The same would be true of the surreptitious interception of my correspondence: email or snail mail.

In the former case, no personal information has been captured; in the latter, it has, but I may never know. Both practices are subsumed in the category of 'intrusion', yet each exhibits a distinctive apprehension. Indeed, the more one examines this



The assault

1. The English Utilitarian Jeremy Bentham designed a prison that facilitates the surreptitious observation of inmates. The term 'panopticon' is used metaphorically in a pejorative sense to describe the monitoring of individuals' personal information, especially online

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(neglected) problem, the less cohesive the subject of 'intrusion' becomes. Each activity requires a separate analysis; each entails a discrete set of concerns, though they are united in a general anxiety that one's society may be approaching, or already displays features of, the Orwellian horror of relentless scrutiny.

The question is fundamentally one of perception and its consequences. Although my conviction that I am being monitored by CCTV is based on palpable evidence, and my ignorance of the interception of my correspondence or conversations is plainly not, the discomfort is similar. In both cases, it is the distasteful recognition that one needs to adjust one's behaviour – on the assumption that one's words or deeds are being monitored. During the darkest years of repression in apartheid South Africa, for example, the telephones of anti-government activists were routinely tapped by the security services. One's conversations were therefore conducted with circumspection and trepidation. This inevitably rendered dialogue stilted and unnatural. It is this requirement to adapt or adjust one's behaviour in public (in the case of CCTV) or in private (on the telephone, in one's home, or online) that is the disquieting result of a state that fails properly to regulate the exercise of surveillance.

Privacy

The increasing use of such surveillance in the workplace, for instance, is changing not only the character of that environment, but also the very nature of what we do and how we do it. The knowledge that our activities are, or even may be, monitored undermines our psychological and emotional autonomy:

Free conversation is often characterized by exaggeration, obscenity, agreeable falsehoods, and the expression of antisocial desires or views not intended to be taken seriously. The unedited quality of conversation is essential if it is to preserve its intimate, personal and informal character.

Indeed, the slide towards electronic supervision may fundamentally alter our relationships and our identity. In such

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a world, employees are arguably less likely to execute their duties effectively. If that occurs, the snooping employer will, in the end, secure the precise opposite of what he hopes to achieve.

## Wiretapping

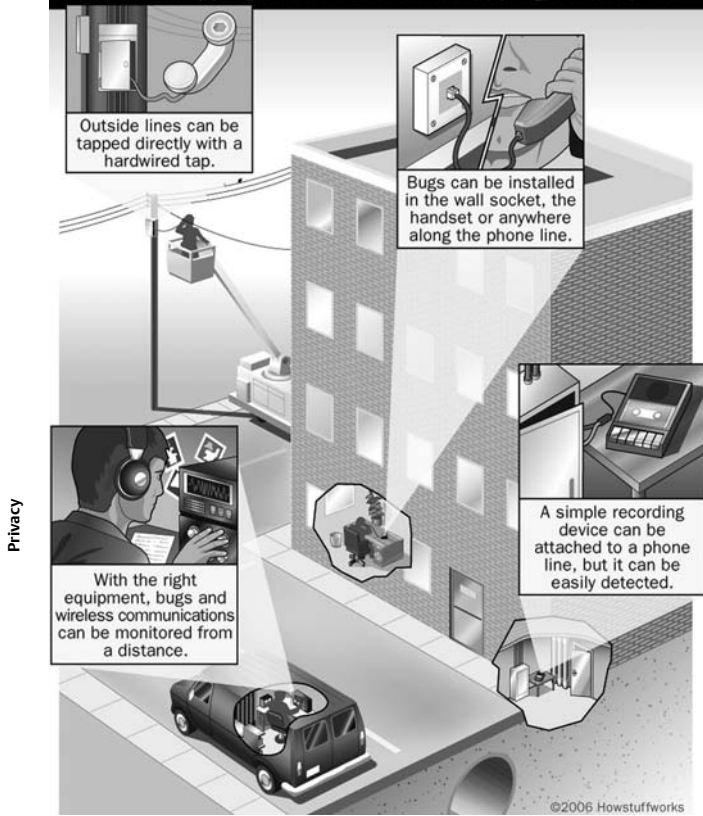
Both landlines and mobile phones are easy prey to the eavesdropper. In the case of the former, the connection is simply a long circuit comprising a pair of copper wires that form a loop. The circuit carrying your conversation flows out of your home through numerous switching stations between you and the instrument on the other end. At any point a snoop can attach a new load to the circuit board, much in the way one plugs in an additional appliance into an extension cord. In the case of wiretapping, that load is a mechanism that converts the electrical circuit back into the sound of your conversation. The chief shortcoming of this primitive form of interception is that the spy needs to know when the subject is going to use the phone. He needs to be at his post to listen in.

The assault

A less inconvenient and more sophisticated method is to install a recording device on the line. Like an answering machine, it picks up the electrical signal from the telephone line and encodes it as magnetic pulses on audiotape. The disadvantage of this method is that the intruder needs to keep the recorder running continuously in order to monitor any conversations. Few cassettes are large enough. Hence a voice-activated recorder provides a more practical alternative. But here too the tape is unlikely to endure long enough to capture the subject's conversations.

The obvious answer is a bug that receives audio information and broadcasts it using radio waves. Bugs normally have diminutive microphones that pick up sound waves directly. The current is sent to a radio transmitter that conveys a signal that varies with the current. The spy sets up a radio receiver in the vicinity that picks up

## How Wiretapping Works Basic Wiretapping Techniques



Privacy

### 2. Tapping a telephone is a fairly simple operation

this signal and transmits it to a speaker or encodes it on a tape. A bug with a microphone is especially valuable since it will hear any conversation in the room, regardless of whether the subject is on the phone. A conventional wiretapping bug, however, can operate without its own microphone, since the telephone has one. All the wiretapper needs to do is to connect the bug anywhere along the phone line, since it receives the electrical current

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directly. Normally, the spy will connect the bug to the wires inside the telephone.

This is the classic approach. It obviates the need for the spy to revisit the site; his recording equipment may be concealed in a van that typically is parked outside the victim's home or office.

Tapping mobile phones requires the interception of radio signals carried from and to the handsets, and converting them back into sound. The analogue mobile phones of the 1990s were susceptible to easy interception, but their contemporary digital counterparts are much less vulnerable. To read the signals, the digital computer bits need to be converted into sound – a fairly complex and expensive operation. But mobile phone calls may be intercepted at the mobile operator's servers, or on a fixed-line section that carries encrypted voice data for wireless communication.

When you call someone on your mobile phone, your voice is digitized and sent to the nearest base station. It transmits it to another base station adjacent to the recipient's via the mobile carrier's switch operators. Between the base stations, transmission of voice data is effected on landlines, as occurs in the case of fixed-line phone calls. It seems that if an eavesdropper listens to such calls over the landline connection segment, mobile phones are not dissimilar to conventional phones – and as vulnerable.

The assault

## The privacy prognosis

The future of surveillance seems daunting. It promises more sophisticated and alarming intrusions into our private lives, including the greater use of biometrics, and sense-enhanced searches such as satellite monitoring, penetrating walls and clothing, and 'smart dust' devices – minuscule wireless micro-electromechanical sensors (MEMS) that can detect everything



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