Why Privacy's Past Matters to Our Present

Sarah E. Igo*

In a world awash in new technologies and associated privacy perils—geolocation data, aerial drones, DNA phenotyping, predictive algorithms, wearable technologies, facial recognition software, digital assistants and other ‘always-on’ devices—it is a fair question as to how history might help us, or is even relevant. So many of our dilemmas around data privacy seem urgently new, uniquely of the present, or, to use an overused term of our moment, ‘unprecedented.’

I want to make the pitch, however (no matter how predictable, coming from a professional historian), that we are aided in our present challenges by the longer, broader, and clarifying view that history provides. I do not refer to vague admonitions about history repeating itself. Nor do I believe that there are lessons just waiting to be plucked from the past and applied to contemporary concerns. Instead, I would argue that historical ways of thinking are critical for seeing our present circumstances plainly, which is a necessary prerequisite for confronting any complex social problem.

There are four ways that a historical sensibility can—indeed, *should*—be brought to bear on our discussions about the contemporary state of data privacy. A knowledge of history, perhaps most obviously, offers us precedents and analogies: that is the first point. But a historical perspective also helps us recognize the broader forces undergirding seemingly separate developments; destabilizes our working concepts in productive ways; and reacquaints us with important debates and ideas that have been lost.

Precedents and Parallels

Let me begin with the obvious. To the historian of the modern United States, at least, many of today's cutting-edge discussions around technology, privacy, and regulation seem awfully familiar. Virtual transgressions, unauthorized information flows, and government and corporate surveillance of citizens are hardly creations of the present. We can turn back to the late nineteenth century, an origin point for some of our enduring dilemmas around technology and civil liberties, for three intriguing parallels.

Consider today's debates over intercepting communications. Long before Edward Snowden revealed the extent of National Security Administration surveillance on U.S.

citizens, the possibility was opened up by the invention of the commercial telegraph in 1874 and the ‘Harmonic Telegraph’ or telephone, in 1876. By these means, ‘private’ messages were disseminated much more swiftly and smoothly—but also less securely.¹ Tapping the telephone wires allowed listening in by urban police forces and criminals, as well as governments on national security grounds. In the United States there was also early collaboration between the government and telegraph corporations to intercept telegrams or to subpoena ‘stored communications.’² The contemporary analogy to tech companies such as Apple and Google is not hard to see. A privacy debate was soon sparked by these practices of interception: namely, did information that traveled over wires or cables deserve the same legal protections as standard written correspondence? Wiretapping, in a famous U.S. Supreme Court case of 1928, *Olmstead v. United States*, was not judged an invasion of privacy because there was no physical intrusion.³ Spoken words were not ‘material things’ and the telephone wires in any case extended out beyond one’s private residence. The ruling would not be overturned until 1967.

Consider next the problem of the state tracking of private citizens through their DNA, which has parallels in early biometric identifiers such as fingerprinting. Fingerprinting—like telephony, an innovation of the late nineteenth century—permitted a person to be identified through a unique pattern on the tip of a finger.⁴ Eagerly embraced by law enforcement agents, the technique introduced the prospect of widespread biometric tracking. Initially, fingerprinting was reserved for those such as criminals, aliens, anarchists, immigrants, and union organizers. Soon enough, however, ‘good government’ advocates and J. Edgar Hoover’s Federal Bureau of Investigation proposed to extend fingerprinting to all. By the 1930s, calls from various quarters to ink the fingers of every school child (to note just one example), set off a political struggle joined by workers, unions, and the American Civil Liberties Union.⁵ In part because of such protests, Hoover’s universal fingerprint bank did not come to be. However, other default identifiers now exist for nearly every American, and biometric techniques of identification have come back in vogue.⁶ Fingerprints themselves, once bitterly resisted as a technique for monitoring criminals, now routinely open a phone or a laptop.

Finally, consider contemporary questions about the right to one’s reputation and image. They too have a long pedigree. More than a century before the framing of a ‘right to be forgotten’ for digital-age citizens, demands for a right to privacy in the United States were triggered by a host of new media and technologies that threatened individuals’ control over their reputations. ‘A Bill to Protect Ladies,’ introduced in the U.S.

1 David Hochfelder, *The Telegraph in America, 1832-1920* (Baltimore: Johns Hopkins University Press, 2013); Simone Müller, *Wiring the World: The Social and Cultural Creation of Global Telegraph Networks* (New York: Columbia University Press, 2016).

2 David J. Seipp, ‘The Right to Privacy in American History’ (Cambridge, Mass.: Center for Information Policy Research, 1981), 105-108.

3 *Olmstead v. United States*, 277 U.S. 438 (1928).

4 See Simon A. Cole, *Suspect Identities: A History of Fingerprinting and Criminal Identification* (Cambridge, MA: Harvard University Press, 2001).

5 See for example, American Civil Liberties Union, *Thumbs Down! The Fingerprint Menace to Civil Liberties* (New York, 1938).

6 David Lyon, ‘Under My Skin: From Identification Papers to Body Surveillance,’ in *Documenting Individual Identity: The Development of State Practices*, ed. Jane Caplan and John Torpey (Princeton: Princeton University Press, 2001), 291.

House of Representatives in 1888, was designed to bar women's images from being used in commerce without written consent.⁷ New formulations of a right to privacy, circa 1890, were directly tied to new uses of the camera and newsprint. A flurry of law suits would be lodged regarding the violation to one's public image from 'instantaneous photography' and the unauthorized dissemination of photos in the mass press and commercial advertising. The fear of intimate, embarrassing, or shameful images making their way to a broader public was at the root of the late-nineteenth-century 'crisis of the circulating portrait' and endures in today's struggles over social media, cyberbullying, and fake news.⁸

Patterns

Further examples could be marshalled to make the case for a long-standing pattern of new technologies raising privacy questions. Yet the questions themselves, it turns out, are not particularly novel.

The important point is *not* that there is nothing new under the sun. DNA identification is different than fingerprinting; the journalism of the nineteenth century is not the social media of the twenty-first. Rather, such echoes of the past in the present shed light on the broader forces reworking social relations in modern publics. Events that at first appear isolated or self-contained—a wiretapping regulation, a fingerprinting protest, a lawsuit against an advertiser—emerge as moments in an ongoing political debate.

Such episodes, that is, reveal not just reactions to new technologies but persistent tensions. What are the proper boundaries between citizen and society? How should we calculate the social costs of efficiency and convenience? What kind of sovereignty ought individuals be able to exercise over their personal information?

That is to say: technological innovations — which have often improved people's lives and been eagerly sought out by private citizens — have at the same time insistently raised questions of rights and liberties. Reckoning with this history should inform contemporary policy-making. When the next privacy crisis arrives (and it will!), we will be less surprised and more prepared if armed with an understanding of past problems and the varied proposals put forth to resolve them.

A working knowledge of the past equips us not simply to react, but to think proactively through the consequences of novel inventions, means of communication, and scientific practices. Historical mindedness encourages thoughtful vigilance rather than alarmism — a standing conversation rather than a quest for the quick fix.

Pliability

7 Jessica Lake, *The Face That Launched a Thousand Lawsuits: The American Women Who Forged a Right to Privacy* (New Haven: Yale University Press, 2016), 46.

8 Samantha Barbas, *Laws of Image: Privacy and Publicity in America* (Stanford, CA: Stanford University Press, 2015), 45-62.

Many people, if not the readers of *EDPL*, assume a stability and a kind of naturalness to privacy. It is something we used to have, or had more of before the government, or big corporations or data miners took it away—or before online exhibitionists gave it away.

But an insistence on privacy's fixedness does not hold up to the facts on the ground. Historically, the concept has proved quite variable. Looking back over the past century and a half in the United States, for instance, privacy has expanded to encompass ideas of psychological freedom, decisional autonomy, and virtual identity. Privacy has been democratized in the sense of who is covered by it. And it has shape-shifted, such that certain items have gradually come to be considered less private (say, a same-sex intimacy) and others more so (for example, one's home address, telephone number, or similar identifying information).⁹

Despite the fact that we tend to treat privacy as essential and fundamental, it is surprisingly fungible in practice. This is recognized in U.S. constitutional law, where since 1967 a 'reasonable expectation' standard determines whether one's right to privacy has been infringed upon.¹⁰ Privacy, as understood at any given moment, is an outcome of specific social processes, an always-evolving legal, political, cultural, and psychological category.

Legal scholar Frederick Schauer noted long ago that privacy may simply be 'more socially contingent, more socially constructed, and more culturally relative than other rights.'¹¹ To grasp that privacy is a moving target, always in dialogue with new technologies, modes of governance, and social behaviors, is not necessarily to weaken one's commitment to it. It is only to appreciate that it is regularly remade by human beings—and by history.

Provocations

One unacknowledged privacy harm in the present, I would argue, is to the concept itself. History can assist us in this domain too.

For all the current worry about privacy slipping away, contemporary observers often fail to notice how very cramped our understanding of privacy has become. This is because we have let the concept be defined by the invaders of the moment. The result is that in 2020, privacy has been reduced to something like anonymity or invisibility: the state of not being tracked or sensed, the ability to evade prediction by an algorithm or an ad. But as the historical archive reveals, this is by no means the only way available to us to think about privacy.

9 For a fuller account, see Sarah E. Igo, *The Known Citizen: A History of Privacy in Modern America* (Harvard University Press, 2018).

10 *Katz v. United States*, 389 U.S. 347 (1967).

11 Frederick Schauer, 'Free Speech and the Social Construction of Privacy,' *Social Research* 68: 1 (Spring 2001), 221.

In the United States, the case I know best, privacy has always been a reactive kind of public good, articulated only when under pressure. Changing conditions—today's social media platforms and techniques of artificial intelligence, for instance—certainly affect our expectations of how much of our private lives can be sheltered from exposure. But, as a first step in tackling the dilemmas of the digital age, we must reassess whether and how much those forces ought to be allowed to delimit a core (which is not to say an unchanging) social value.

If we want to restore a sense of privacy as more than anonymity, we will need to think outside conventional containers. We should also think beyond our present moment by tapping into the long and rich history of debates over privacy. Arguments in the United States about the importance of privacy to the quality of public discourse in the 1890s, to the integrity of the psyche in the postwar years, and even to peace of mind in the 1960s forcefully remind us why privacy has mattered in both political and personal life. *These* expectations of privacy, fully reasonable in their time, can act as a check on the constraints of presentism and the normalizing of new invasions. We might, in looking backwards, even recapture privacy from those who would define it away.

Whether as precedent, pattern, or provocation—or simply as a reminder of the pliability of our concepts—history has dividends for those who care about the fate of privacy. It is time to recognize that even our newest privacy dilemmas arrive shadowed by, but also clarified by, the past.