

# Post-Pandemic Simveillance: A position statement on the lasting impact of Covid-19 Apps on an individual's social identity

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## Introduction

In this position statement, I examine the privacy issues arising out of health surveillance carried out by Covid-19 Apps from the perspective of their impact on the social identity of an individual. I contend that while the extraordinary circumstances of the pandemic permit a limited time exception to privacy, they do not provide an everlasting justification for reducing the identity of an individual to a potential disease carrier.<sup>1</sup> I argue against the post-pandemic secondary usage of the data collected as part of the global health surveillance effort and assert that the ambivalence regarding existence of surveillance surrounding an individual's social identity can leave her in a perpetual state of simulated surveillance (simveillance). Lastly, I state that privacy challenge posed by Covid-19 Apps has helped us realize that while limited exceptions to privacy maybe carved out in grave emergencies, there is no justification for round the clock surveillance of an individual's existence by Big Data Analytics.

## Factual Overview

In the aftermath of the Covid-19 pandemic, many countries launched health surveillance apps, as part of the effort to contain the spread of the virus through contact tracing.<sup>2</sup> Experts disagree on the feasibility and desirability of such apps.<sup>3</sup> While proponents of these apps point to their potential efficacy, privacy scholars have voiced their concerns regarding their potential overreach.<sup>4</sup> It is also worth noting that while some countries have steadfastly proceeded with this techno-legal solution others have been far

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<sup>1</sup> Anuj Puri, *A theory of privacy*, CORNELL JOURNAL OF LAW & PUBLIC POLICY (Forthcoming 2021).

<sup>2</sup> Paul Schwartz, Protecting privacy on COVID-19 surveillance apps, IAPP (May 8, 2020)

<https://iapp.org/news/a/protecting-privacy-on-covid-surveillance-apps/>

<sup>3</sup> Ferreti *et al*, *Quantifying SARS-CoV-2 transmission suggests epidemic control with digital contact tracing*, 368 SCIENCE 619 (2020). Sapiezynski *et al*, *The Fallibility of Contact-Tracing Apps* May 27, 2020 ARXIV.

<sup>4</sup> Neema Singh Guliani, *ACLU Government Safeguards for Tech-Assisted Contact Tracing*, ACLU (May 18, 2020) <https://www.aclu.org/other/aclu-white-paper-government-safeguards-tech-assisted-contact-tracing>

more circumspect, with Norway even abandoning the project on account of privacy concerns.<sup>5</sup>

## Pandemic and Social Identity

I concur with Parker *et al's* summation of the ethical dilemma surrounding the Covid-19 Apps that any justification of privacy infringement needs to be necessary either to save lives or reduce suffering and the measure should be significantly more effective than the alternatives.<sup>6</sup> I believe that while a limited time emergency exception to privacy maybe justified during the extraordinary course of the pandemic, the post-pandemic world must be built on greater privacy safeguards.

Towards this end, it is critical to note that there are some important differences between the functioning of Big Data Analytics and the Covid-19 Apps. Big Data Analytics control our access to the physical realm through the virtual. On the other hand, Covid-19 Apps exercise direct control over our participation in the physical realm. In ordinary circumstances, an individual participates in the social sphere through the various roles that she performs such as a parent or a professor. The control over determination of her social identity is a fundamental aspect of an individual's autonomy, which is protected through privacy.<sup>7</sup> However, during the extraordinary course of the pandemic an individual's participation in the social sphere becomes contingent on her status as a potential disease carrier as determined by the Covid-19 Apps. One could argue that the diminished individual control over social identity is not the result of Covid-19 Apps but the pandemic. However, such a claim would not be entirely correct. While the extraordinary circumstances of pandemic certainly play a part in diminishing individual autonomy, it is the technical surveillance solutions such as the Covid-19 Apps that make the pandemic relevant from privacy studies perspective. Covid-19 Apps are technological embodiments of Foucault's *medical gaze*, the accumulation of medical knowledge through the medical

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<sup>5</sup> Agence France-Presse in Oslo, *Norway suspends virus-tracing app due to privacy concerns*, GUARDIAN (June 15, 2020) <https://www.theguardian.com/world/2020/jun/15/norway-suspends-virus-tracing-app-due-to-privacy-concerns>

<sup>6</sup> Puri, *supra* note 1. Parker *et al*, *Ethics of instantaneous contact tracing using mobile phone apps in the control of the COVID-19 pandemic* 46(7) Journal of Medical Ethics 427, 428 (discussing ethical implications of the use of mobile phone apps in the control of the COVID-19 pandemic).

<sup>7</sup> An individual's social identity arises out of her membership in social groups. M.A. Hogg, *Social Identity Theory*, in UNDERSTANDING PEACE AND CONFLICT THROUGH SOCIAL IDENTITY THEORY-CONTEMPORARY GLOBAL PERSPECTIVES 3, 6 (Mckewon et al ed. 2016) (describing the core tenets of social identity theory.)

separation between a patient's body and his identity.<sup>8</sup> Unlike Big Data Analytics, which deploy manipulative strategies to diminish individual autonomy, Covid-19 Apps exercise direct control. While most countries have made the installation of these Apps as voluntary, privacy scholars have decried this consent as illusory.<sup>9</sup> This illusory consent and the resultant compulsory installation of these Apps places a limitation on an individual's right to informational self-determination.

### Post-Pandemic Simveillance

A surveillance app that limits an individual's identity to a potential disease carrier, and acts as a gatekeeper to her participation in the social sphere, faces an enormous moral challenge. The right to determine and decide the course of one's identity is a fundamental human right. Any app seeking to temporarily suspend that right needs to meet a much higher benchmark than anonymity guaranteed in privacy regulation. It must be in conformity with the morality of freedom.<sup>10</sup> As Foucault noted, in the study of human beings, the goals of power and the goals of knowledge cannot be separated.<sup>11</sup> In the post-pandemic world, there may be great temptations to use the data for secondary purposes.<sup>12</sup> But no matter how laudable the objective, a database which is a living account of the global citizenry's day to day existence is inherently dangerous. The post-coronavirus world cannot be built on the edifice of residual surveillance that will result in self-censorship and heightened states of paranoia.

In the absence of legal measures safeguarding the individual's social identity in the post-pandemic world, she would be left in a state of *simveillance*.<sup>13</sup> The formulation of our social identity is dependent upon our participation in the social realm. But if we cannot do so without being constantly monitored, then the surveillance would become such a 'natural'

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<sup>8</sup> Black Hawk Hancock, *Michel Foucault and the Problematics of Power: Theorizing DTCA and Medicalized Subjectivity*, 43 JOURNAL OF MEDICINE AND PHILOSOPHY 439, 443 (2018) (exploring Foucault's different notions of power.)

<sup>9</sup> As per Schwartz, "...the critical issue is how the government and private sector will restrict access to spaces and opportunities based on whether or not one "consents" to the use of an app or other monitoring device." Paul Schwartz, *Illusions of consent and COVID-19-tracking apps*, IAPP (May 19, 2020) <https://iapp.org/news/a/illusions-of-consent-and-covid-tracking-apps/>

<sup>10</sup> Puri, *supra* note 1. "Morality is...concerned with the advancement of the well-being of individuals." Joseph Raz, THE MORALITY OF FREEDOM 267 (1986).

<sup>11</sup> In knowing we control and in controlling we know. See: Gary Gutting & Johanna Oksala, *Michel Foucault*, STAN ENCYCLOPEDIA PHIL. (Edward N. Zalta ed. Spring 2019 ed.).

<sup>12</sup> Lauren Kaufman, *Should Public Health Outweigh Data Privacy in Crisis?*, MEDIUM (March 9, 2020) <https://medium.com/popular-privacy/coronavirus-is-a-privacy-problem-a396aa44ff88>.

<sup>13</sup> The portmanteau simveillance arises out of simulation and surveillance. William Bogard, THE SIMULATION OF SURVEILLANCE-HYPERCONTROL IN TELEMATIC SOCIETIES, 4 (1996).

part of the formation of our social identity that perhaps in the future we would be unable to form our social identities in its absence. Our internalization of this surveillance would mean that we would continue to simulate the surveillance, even in its absence, for there never would be a way to conclusively end the skepticism about its existence. In this simulacrum, unlike Bentham's panopticon, even the illusion of surveillance will not be needed.<sup>14</sup>

I believe that the Covid-19 Apps can prove to be a turning point in the privacy discourse. Either as stated above they would leave us in a state of simveillance or we can use them as a frame of reference to question existing privacy norms. If it takes a pandemic to justify a limited time exception to privacy, then certainly there is no moral justification for the present round the clock surveillance of individual existence by Big Data Analytics.

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<sup>14</sup> Puri, *supra* note 1. Nathan Radke, *Simveillance in Hyperreal Las Vegas*, 2 International Journal of Baudrillard Studies (2005) <https://baudrillardstudies.ubishops.ca/simveillance-in-hyperreal-las-vegas/>. While distinguishing simveillance from Bentham's panopticon, Radke states, "The reason that the panopticon uses the illusion of constant vigilance is because of the physical problems such vigilance would have posed; Bentham argues that the fiction of observation is as potent as actual observation. When simveillance makes constant vigilance possible, it is no longer necessary to reinforce the illusion of the fiction."