

PRIVACY AND THE PANDEMIC

By Prof. Natalie Ram



AS THE UNITED States struggles to contain the spread of COVID-19, epidemiological surveillance programs like digital contact tracing have been touted as a critical tool to enable states not only to reopen their economies, but also to do so without a resurgence of infections. During May and June 2020, members of Congress introduced multiple bills to regulate data collection, processing, and use in connection with the COVID-19 pandemic, including for digital contact tracing.

Contact tracing has long been a central component of public health response to infectious disease. Traditionally, a contact tracer interviews infected individuals to identify all other individuals with whom they may have been in contact. A contact tracer then notifies these contacts that they may be infected, assists in monitoring for symptoms, and may instruct contacts to quarantine. Traditional contact tracing thus relies on skilled workers. Done well, contact tracing, in combination with widespread testing and quarantining of contacts, can short circuit pathways of infection. As of June 2020, more than 1,400 contact tracers were already at work throughout the state of Maryland.

Many jurisdictions have also expressed interest in utilizing digital data to assist the work of human contact tracers, if not replace it. Should the United States—or any individual state—embrace digital contact tracing, and how might such a program be structured to maximize its asserted benefits while limiting its harms? In a recent paper, my Maryland Carey Law colleague David Gray and I argue that the Fourth Amendment of the U.S. Constitution supplies an answer.

The Fourth Amendment guarantees that “[t]he right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated.” This protection likely regulates the use of location data for epidemiological purposes, as private app developers are likely to be deemed state agents for purposes of the Fourth Amendment. Policymakers nonetheless have substantial latitude to develop these epidemiological programs within the broad constraints of the “special needs” doctrine. Significantly, special needs searches generally do not require a warrant.

But the special doctrine does not sign a constitutional blank check, permitting unregulated and mass digital location tracking. The Fourth Amendment requires prospective constraints on searches and the discretionary authority of agents to conduct them. Policymakers must ask hard questions about efficacy, including the comparative advantages of digital location tracking versus

more traditional contact tracing methods. There are good reasons to be skeptical. Current consumer location tracking tools—whether GPS or Bluetooth—are insufficiently precise to capture only close contacts, and they cannot account for beneficial features like mask wearing. Moreover, a lack of robust social supports may make quarantine economically infeasible for many. Without appropriate technological and social infrastructure, digital contact tracing is likely to sacrifice substantial privacy for only a myth of public health benefit.

Even if the public health benefits of digital contact tracing can be established, the Fourth Amendment requires that policymakers take threats to privacy seriously. Robust programmatic safeguards must be put in place to secure both privacy and liberty, including limitations on data gathering, aggregation, storage, access, analysis, and use. In particular, data gathered and stored for contact tracing must not be used beyond its justified purpose. Permitting law enforcement or immigration officials to access this data would both undermine public trust (and hence the efficacy of any program) and make such searches constitutionally unjustified.

Finally, policymakers must set clear plans for decommissioning surveillance programs. Under such a framework, we may yet achieve legitimate public health goals as we face COVID-19 while also living up to our constitutional commitments. ■