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How Privacy Can Become Antiracist

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A View From Juneteenth and July 4th, 2020

"...And there are days—this is one of them—when you wonder what your role is in this country and what your future is in it. How, precisely, are you going to reconcile yourself to your situation here? ... And to be here means you that can't be anywhere else..." James Baldwin, June 24, 1963.

Privacy contains some of the wellsprings of antiracism. The privacy profession in the U.S. may well be racist, but we can make it antiracist by taking off the blinders that have protected us against dealing with the real privacy crises that surround us. The largest of these crises has surrounded us since before the country was born, but we are able to stop hiding from it now if we choose to do so.

1. How Could *Privacy* Become "Almost Irrelevant" Now?

Last year, privacy was one of the main foci of public attention in the U.S. Tens of states were scrambling to pass new privacy laws and the professional association and law firms were putting lots of maps and charts full of all the critical information you needed about the progress of every state bill. Even a Congress that could not pass any legislation tried hard to pass privacy legislation (although it really did not know what it wanted to pass). Privacy professors continued their frustrating work of inventing privacy harms and rights that our courts – this Congress's only product – could not accept. But privacy was much-discussed.

Then came COVID-19, and privacy social distanced long before the rest of the nation did so, taking a back seat in a year that may be one of our greatest years of social change. Privacy professionals and regulators around the world all recited their scripts for security crises and pandemics, i.e., that limitations on surveillance will be reasonably and proportionately relaxed during the time necessary to address the virus, after which privacy norms will be reestablished.

Because privacy professionals have learned to focus only on data protection, almost all of their attention during COVID-19 has been on what in the U.S. will remain a complete non-issue until 2021 at earliest – and it is finally dawning on everyone that it may remain irrelevant to COVID-19 everywhere but in China – the contact tracing or proximity sensing apps. The obstacles to the effectiveness of those apps in the U.S. are far greater than in places like South Korea, Taiwan, Singapore and New Zealand, because those countries used testing and manual contact tracing effectively, and U.S. app adoption levels will likely be even lower than in those countries.

2. Wellsprings of Antiracism

Meanwhile, huge changes were at work in privacy in the U.S., but the privacy profession and regulators could not see them. Although Warren and Brandeis defined privacy as "the right to be let alone" in 1890, it was the right of elites to avoid reporters with cameras, Brandeis never evolved in his racism, and privacy has always thereafter been about technology. Without doubt, data protection -- the collection, use and dissemination of the data of individuals -- has indeed been a critical and demanding privacy issue over the past 100 years. This year, however, we moved suddenly from transformation by technology to transformation by disease, and the principle victims of the disease are not the elites. With that shock, highly visible privacy issues began a return to what the cyberpunks called the "meatspace," and soon thereafter most of American society if not the privacy profession discovered that meatspace privacy has been our central, repressed privacy issue all along.

Meatspace privacy has always been recognized in U.S. law, principally in stigmatized medical conditions and some other sensitive or special categories of personal data such as, in the U.S., HIV status, psychiatric notes and chemical dependency treatment records. The new meatspace privacy issue, however, has not been principally about the marginalized few, or even really about who has the disease. Privacy's professional association, the IAPP, just published a white paper on COVID-19 privacy issues, the first privacy publication we have seen that begins to sniff out the current meatspace privacy issues by focusing, at the end, on the stigmatization of Asian Americans. But by focusing on stigmatization, the IAPP missed where meatspace privacy went in COVID-19. I see it as *repressing* the issues because the cover of the white paper is a silent depiction of what became and remains the biggest COVID-19 privacy issue, the issue that, more than any other, will have contributed to the deaths of hundreds of thousands of Americans: our mask wars. Precisely when businesses began the struggle to reopen and science finally determined that masks are the only thing that will get us through COVID-19 without huge numbers of unnecessary deaths or shutting down again, political leaders assured that masks would become a political issue. It was easy to do; privileged, entitled whites in the U.S. were already angry because of the shutdowns, angry because of the disease threat, angry because of the inconvenience. Do not blame the mask warriors; "it is too easy [for both us and them] to focus on people making bad choices rather than on people *having* bad choices." The mask wars gave them both a symbol on which to focus their anger and a way to express the anger through aerosol projectiles. In brief, COVID-19 established zones of meatspace privacy in order to protect others and oneself, and the mask wars are privacy wars that – unlike the battle between Warren and Brandeis and the first paparazzi – represent a threat to almost everyone rather than only to elites.

Then on May 25th the true repressed privacy issue at the heart of American society spoke to angry, anxious America and the rest of the world in the most powerful way possible. For more than 8 minutes, a white police officer brutally murdered an African American man who was not resisting arrest by preventing him from breathing, knee on his neck, ignoring all of his pleas, the officer's sunglasses casually propped on his forehead and his hand in his pocket. The murder of George Floyd started an unprecedented broad and pragmatically-focused dialogue about the racism which has always been and remains the most difficult truth at the heart of American society, our most troubling privacy issue as evidenced by our never having recognized it as such.

3. Why Privacy Will Want to Become Antiracist

Recognizing that race in America is a foundational privacy issue would transform privacy in many ways; I will focus on just three of them:

1. **Rediscover Government**: The complete failure in recent years of all visible "privacy" and "data protection" bills and laws at the state and federal levels to address abuses of government power would at last be addressed. Earlier privacy laws such as the Privacy Act of 1974 addressed government, and HIPAA and some of the state breach notification laws (like the GDPR) address government and the private sector equally; not so any recent state or federal privacy or data protection law. Perhaps the abstraction from privacy to data protection has permitted a focus only on the data practices of corporations, obscuring the knee of government on our brothers' and sisters' necks. To be sure, there are many legal restrictions on abuses of government power, but should we not demand the same transparency from secret FISA courts or opinions from the Office of Legal Counsel of the current Justice Department that we want from data brokers? And how can the Federal Trade Commission be our national privacy regulator if it does not focus at all on abuses by government?
2. **No More Running Away in the Hard Times**: If the privacy profession gave race in America the attention it deserves, privacy would not be sitting on the sidelines debating contact tracing or proximity-sensing apps of no practical importance in the U.S. as discussed above. Privacy legislation could even be seen as more fundamentally important than the concrete police reforms that are having trouble on their way through Congress, because they would be seen as prevention of abuses by government and private actors against any and all Americans. That is not at all to say that data protection law's current focus regarding racism – chiefly on discriminatory algorithms – is not critical; it is just to say that if racism were recognized as at the heart of our privacy issues in the meatspace as well, our ability to pass comprehensive privacy legislation –including good public health and police reform – might be much greater.
3. **Remain the Place Where the Change Agents Want to Stand**: From nowhere, the privacy profession has become the place from which the most effective ethical influences on technology are launched. It is rightly proud as well of the extent to which it is led by women. If you believe, however, that we will not unlearn what we have learned in the past six months, and you believe that as a result the U.S. will make substantial progress toward antiracism, you want privacy to be a major contributor to those changes and attractor of those who want to envision and lead them.

As Baldwin said, we are the ones who are here and who can't be anywhere else, can no longer escape our most difficult privacy issue as we have for hundreds of years. Now Europe has blocked our bodies from being there, and in a few days may block their data from being here. If Europe does so, it will be just one more burden we must bear as we walk the long road to healing.