

A Proportionality-Based Framework for Government Regulation of Digital Tracing Apps in Times of Emergency

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ABSTRACT

Times of emergency present an inherent conflict between the public interest and the preservation of individual rights. Such times require granting emergency powers to the government on behalf of the public interest and relaxing safeguards against government actions that infringe rights. The lack of theoretical framework to assess governmental decisions in times of emergency leads to a polarized and politicized discourse about potential policies, and often, to public distrust and lack of compliance. Such a discourse was evident regarding Digital Tracing Apps (“DTAs”), which are apps installed on cellular phones to alert users that they were exposed to people who tested positive for COVID-19. DTAs collect the most sensitive types of information, such as health-related and location or proximity information, which violates the right to privacy and the right to be free of surveillance. This sensitive information is normally legally protected. But in emergencies there are no legal restrictions limiting the collection of such data. The common privacy-law approach supports DTA implementation under the condition that the technology preserves the privacy of users. But this Article suggests that the privacy approach focuses on micro considerations and under-addresses the implications of DTA-based policy.

Instead, this Article suggests rethinking DTA implementation during COVID-19 through the doctrine of proportionality. Often used by European Union courts in areas where decisions entail meaningful implications to individual rights, the doctrine offers a clear and workable normative evaluation of tradeoffs in a more nuanced, explicable, and transparent way. Highlighting macro considerations, the doctrine of proportionality suggests that 1) DTA-based policy is less proportionate compared to traditional contact-tracing methods; 2) policies created while relying on smartphones are inequitable and biased; and 3) the sharing of sensitive personal information with private companies will have irreversible social surveillance implications. Additionally, the proportionality method not only provides a flexible methodological tool to evaluate government decisions in times of emergency but also offers an opportunity to examine how governments achieve and justify the acceptance and assimilation of new technological policy measures, which may take societies in new directions.