

# RACE, FACE, AND RAWLS

*Anita L. Allen\**

## INTRODUCTION

It was just shy of one hundred years ago that a state supreme court explicitly recognized the right of privacy for the very first time.<sup>1</sup> Social contract theory played an interesting role in the Georgia Supreme Court's historic natural law argument in favor of the new right. Privacy, the court suggested, is one of the things individuals in a "state of nature" would expect a government they willingly embraced to protect;<sup>2</sup> for who would give up natural freedom to live under a sovereign that failed to safeguard interests so vital as the interest in privacy?

Perhaps social contract theory can once again play a rhetorical role in illuminating the case for the legal protection of privacy. In the last century, the Georgia high court adduced contractarian philosophy to help make a case for the privacy of a person's face. In this Essay, I propose to ask, with the contractarian philosopher John Rawls in mind, whether it is time to recognize the privacy of a person's race.

Race was a major theme in the public policy of the United States during John Rawls's adult life. Moreover, privacy emerged as a major theme during his period of greatest fame.<sup>3</sup> Rawls chose to make extensive studies of neither race nor privacy. That Rawls had so little to say about race law, policy, and values is especially remarkable given the overall preoccupation of his work with equal opportunity, the least advantaged members of society, and political conceptions of just institutions and practices.

It is not the late John Rawls, but David A.J. Richards who has made the most extensive, philosophically informed study of the implications of social contractarianism for some aspect of privacy law.<sup>4</sup> Richards has deeply engaged the social contract tradition to make an

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1. *Pavesich v. New Eng. Life Ins. Co.*, 50 S.E. 68 (Ga. 1905).

2. *Id.* at 69.

3. Cf. Anita L. Allen, *Privacy*, in *Oxford Handbook of Practical Ethics* (Hugh LaFollette ed., 2003) (describing the emergence of privacy as a theme within academic philosophy in response to developments in society).

4. See David A.J. Richards, *Toleration and the Constitution* (1986).

historical and normative case for expanding constitutional protection of decisional privacy, arguing for laws tolerating abortion as well as sexual autonomy for gays and lesbians.<sup>5</sup> Tolerance, Richards persuasively claims, is a core contractarian ideal and an original constitutional principle.<sup>6</sup>

Toleration may indeed be an important principle implicit in the contractarian intellectual traditions that influenced the American Constitution. However, the contractarian intellectual tradition is not inherently liberal. As an historical matter, famous social contract theorists have not had a lot to say about race or the betterment of disadvantaged racial minorities, and what they have had to say has often been disheartening.<sup>7</sup>

Pragmatic uses of contract theory by American courts have often been disheartening as well. Most notably, contractarian arguments were employed by the antebellum courts to justify slavery and political exclusion. Social contract rationalizations “validated” slavery by characterizing blacks as outside of the American social contract or as parties to a social contract under which they consented to bondage in exchange for protection.<sup>8</sup> These uses of the social contract metaphor are objectionable because of what they hide and repress. It was plain wrong to resign people to human slavery through self-serving contractarian ideals of consent and self-interest.<sup>9</sup>

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5. *Id.* at 261-80.

6. *Id.* at 252-53.

7. See generally Anita L. Allen, *Social Contract Theory in American Case Law*, 51 Fla. L. Rev. 1 (1999); Anita L. Allen & Thaddeus Pope, *Social Contract Theory, Slavery, and the Antebellum Courts*, in *A Companion to African-American Philosophy* 125 (Tommy L. Lott & John P. Pittman eds., 2003) (studying the role of social contract theory in American case law and legal thought).

8. See *Pendleton v. State*, 6 Ark. 509 (1846); *Jackson v. Bulloch*, 12 Conn. 38 (1837). Cf. *Vance v. Crawford*, 4 Ga. 445, 459 (1848); *Mitchell v. Wells*, 37 Miss. 235, 250 (1859); *Anderson v. Poindexter*, 6 Ohio St. 622 (1856). See generally *The Constitution: A Pro-Slavery Compact* (Wendell Phillips ed., 1856).

The Supreme Court applied social contract thinking to the question of black citizenship in the infamous case of *Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856), in which Justice Taney argued that slaveholding states would not have agreed to the Constitution if they had thought the word “citizens” included free blacks.

9. See *State v. Post*, 20 N.J.L. 368 (1845); cf. Jonas Bernstein, *New Study Sweeps Arab Slaving out from Under the Carpet*, Wash. Times, July 3, 1989, at D7 (finding a paternalistic contractarian justification for slavery in Arab culture). Some courts argued that slaves were actually benefited by their “consent” to bondage. See *Hervy v. Armstrong*, 15 Ark. 162, 168 (1854) (“The elevation of the white race, and the happiness of the slave, vitally depend upon maintaining the ascendancy of one and the submission of the other.”); *Pendleton*, 6 Ark. at 512 (“The two races differing as they do in complexion, habits, conformation and intellectual endowments, could not nor ever will live together upon terms of social or political equality.”); *Collins v. Hutchins*, 21 Ga. 270, 274 (1857) (“A negro . . . [has] the power of thought and volition . . . but does not generally have judgment to direct him in what is proper for him, or prudence and self-denial to restrain him from the use of what is injurious.”); *Bryan v. Walton*, 14 Ga. 185, 205-06 (1853) (“[T]he slave who receives the care and protection of a tolerable master, is superior in comfort to the free negro.”); Gorman

John Rawls's magnificent theory of justice as fairness is importantly egalitarian and mindful of the requirements of liberty in the political realm. Still, progressive lawyers and philosophers interested in racial justice have not often engaged Rawls, whether to embrace or to reject his project. Rawls self-consciously subordinated racial justice to economic justice, and there is no bounty of specific race perspectives in the Rawls corpus for anyone to engage. Racial justice as such was not one of the urgent priorities of Rawls's abstract, idealistic, and modernist philosophy. There is little point to turning to Rawls for insights about the meaning and nature of race, the significance of racial identity, or optimal race-related law and public policies. Other contemporary philosophers—Kwame Anthony Appiah,<sup>10</sup> Lucius Outlaw,<sup>11</sup> Naomi Zack,<sup>12</sup> Adrian Piper,<sup>13</sup> and Bernard Boxill<sup>14</sup>—have contributed important insights about race.

Rawls's brilliant and subtle prescriptions offer no distinct progressive or conservative resolution to the concrete legal and policy race problems of our times. Among undergraduate philosophy teachers in the 1970s and 1980s, a favorite exercise was to ask students whether affirmative action would pass muster with Rawls's theory of justice. Perhaps the relevant test of the practical value of an abstract, general theory of justice is whether it provides a conceptual and normative framework for illuminating worldly debates about the requirements of justice, debates it may not expressly address. In a very, very general way Rawls can help clarify what is at stake in the affirmative action debates; his work is similarly—but no more—helpful to the related emerging racial privacy debates.

## I. FACIAL PRIVACY

An artist named Paolo Pavesich awoke one day in 1904 to discover that a photograph of him taken by a professional photographer named J.Q. Adams was included in an advertisement for insurance.<sup>15</sup> The advertisement appeared in Atlanta's main newspaper, the *Atlanta*

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v. Campbell, 14 Ga. 137, 143 (1853) ("We must . . . [make] it the interest of all who employ slaves, to watch over their lives and safety. Their improvidence demands it. They are incapable of self-preservation, either in danger or in disease."); Neal v. Farmer, 9 Ga. 555, 582 (1851); *Vance*, 4 Ga. at 459 ("[W]e concede that the condition of our slaves is humble, still it is infinitely better than it would have been, but for this very system of bondage, better than the lower orders in Europe, and better far than it would be, if they were emancipated here . . ."); Peter v. Hargrave, 46 Va. (5 Gratt.) 12, 19 (1848); Spencer v. Pilcher, 35 Va. (8 Leigh) 565, 584 (1837).

10. See, e.g., K. Anthony Appiah & Amy Guttmann, *Color Conscious: The Political Morality of Race* (1996).

11. See, e.g., Lucius T. Outlaw, Jr., *On Race and Philosophy* (1996).

12. See, e.g., Naomi Zack, *Philosophy of Science and Race* (2002).

13. See, e.g., Adrian Piper, *Passing for White, Passing for Black, in Passing and the Fictions of Identity* (Elaine K. Ginsberg ed., 1996).

14. See, e.g., Bernard R. Boxill, *Blacks and Social Justice* (1984).

15. See *Pavesich v. New Eng. Life Ins. Co.*, 50 S.E. 68, 68 (Ga. 1905).

*Constitution*.<sup>16</sup> Accompanying the photograph was the following statement, supposedly a quote from Pavesich: "In my healthy and productive period of life I bought insurance in the New England Mutual Life Insurance Co., of Boston, Mass., and to-day my family is protected and I am drawing an annual dividend on my paid-up policies."<sup>17</sup> In reality, Pavesich had never purchased insurance from New England Mutual Life, nor had he given Adams or the insurance company permission to use his photograph.<sup>18</sup>

Pavesich sued the photographer, the general agent of the insurance company, whose name appeared in the ad, and the insurance company, seeking \$25,000 in damages.<sup>19</sup> Pavesich alleged "a trespass upon [his] right of privacy," as well as "breach of confidence and trust."<sup>20</sup> The trial court had thrown out the claims but on appeal to the Georgia Supreme Court, Pavesich won a reversal.<sup>21</sup>

That Pavesich prevailed was remarkable. Just a few years earlier, the New York Court of Appeals had refused to recognize a right to privacy claimed by a woman whose photograph was used without her consent on packaging for flour.<sup>22</sup> The New York court declared in good positivistic fashion that "[t]here is no precedent for such an action to be found in the decisions of this court."<sup>23</sup> A dissenting judge was prepared to recognize a right to privacy, since "new conditions affecting the relations of persons demand the broader extension of those legal principles which underlie the immunity of one's person from attack."<sup>24</sup>

Unrestrained by positivism, the Georgia high court bravely announced that a right to privacy protecting the human face must be recognized as a matter of fair inference from common law principles.<sup>25</sup> Moreover, the right to privacy has roots in natural instincts, the court argued.<sup>26</sup> A person's face is a private matter, and an aspect of liberty.

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16. *Id.*

17. *Id.* at 69.

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.* at 81.

22. *Roberson v. Rochester Folding Box Co.*, 64 N.E. 442 (N.Y. 1902).

23. *Id.* at 443.

24. *Id.* at 450.

25. *Pavesich*, 50 S.E. at 69-70.

While neither Sir William Blackstone nor any of the other writers on the principles of the common law have referred in terms to the right of privacy, the illustrations given by them as to what would be a violation of the absolute rights of individuals are not to be taken as exhaustive, but the language should be allowed to include any instance of a violation of such rights which is clearly within the true meaning and intent of the words used to declare the principle.

*Id.* at 70.

26. In the court's words:

The right of privacy has its foundation in the instincts of nature. It is

A photographic representation of a person's face circulated to the general public without consent violates the person's general liberty to choose the manner in which he or she lives:

One may desire to live a life of seclusion; another may desire to live a life of publicity; still another may wish to live a life of privacy as to certain matters, and of publicity as to others. One may wish to live a life of toil where his work is of a nature that keeps him constantly before the public gaze, while another may wish to live a life of research and contemplation, only moving before the public at such times and under such circumstances as may be necessary to his actual existence. Each is entitled to a liberty of choice as to his manner of life, and neither an individual nor the public has a right to arbitrarily take away from him his liberty.<sup>27</sup>

Who would voluntarily surrender the natural liberty of the state of nature—liberty to choose between seclusion and publicity—to a sovereign who was not bound to protect him? No rational man would do so, the court reasoned in classic contractarian fashion.<sup>28</sup> Neither a photograph nor “the body of a person can . . . be put on exhibition at any time or at any place without his consent.”<sup>29</sup> For “[t]he right of one to exhibit himself to the public at all proper times, in all proper places, and in a proper manner is embraced within the right of personal liberty,” and “[t]he right to withdraw from the public gaze at such times as a person may see fit, when his presence in public is not

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recognized intuitively, consciousness being the witness that can be called to establish its existence. Any person whose intellect is in a normal condition recognizes at once that as to each individual member of society there are matters private, and there are matters public so far as the individual is concerned. Each individual as instinctively resents any encroachment by the public upon his rights which are of a private nature as he does the withdrawal of those of his rights which are of a public nature. A right of privacy in matters purely private is therefore derived from natural law.

*Id.* at 69-70.

27. *Id.* at 70. Of course, in Georgia at the time, the typical African-American would have had little choice but to toil in view of others, as menial laborers, servants and caretakers.

28. *Id.* at 69.

The individual surrenders to society many rights and privileges which he would be free to exercise in a state of nature, in exchange for the benefits which he receives as a member of society. But he is not presumed to surrender all those rights, and the public has no more right, without his consent, to invade the domain of those rights which it is necessarily to be presumed he has reserved than he has to violate the valid regulations of the organized government under which he lives.

*Id.*

29. *Cf.* *Manola v. Stevens & Meyers* (N.Y. Sup. Ct. 1890) (unpublished opinion) (enjoining employer's display of photograph of stage dancer taken without her consent), *cited in* Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 *Harv. L. Rev.* 193, 195 n.7 (1890).

demanded by any rule of law, is also embraced within the right of personal liberty."<sup>30</sup>

The *Pavesich* decision essentially created the right to privacy tort. Born as a right to be free from unwanted commercial use of one's face, within just a few decades the right broadened into a cluster of rights which most states recognize—to be free from: (1) appropriation of name, likeness or identity, (2) intrusion upon seclusion, (3) publicity placing one in a false light, and (4) unwanted publication of private facts.<sup>31</sup> Tort law includes protection for privacy, and so, too, does statutory and constitutional law. State and federal constitutional provisions protect a number of decisional, informational and physical privacy interests. An expanding number of state and federal statutes protect interests in informational privacy. Federal statutes create privacy protections for health data,<sup>32</sup> financial data,<sup>33</sup> school records,<sup>34</sup> video rental records,<sup>35</sup> and electronic communications.<sup>36</sup> A New York statute extends privacy protection to a person's name and likeness.<sup>37</sup>

Although contemporary American tort law recognizes a right to control commercial uses of a person's face, there are limits placed on the right. News media may profit handsomely from photographic images taken without the subject's consent where the subject is caught up in a news story.<sup>38</sup> Because news publications enjoy a constitutional and common law privilege, a person caught up willy nilly in a news event may find her photo in the newspaper and have no valid legal claim against anyone. The level of her outrage, embarrassment or humiliation is irrelevant.

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30. *Pavesich*, 50 S.E. at 70.

All will admit that the individual who desires to live a life of seclusion can not be compelled, against his consent, to exhibit his person in any public place, unless such exhibition is demanded by the law of the land. He may be required to come from his place of seclusion to perform public duties—to serve as a juror and to testify as a witness, and the like; but when the public duty is once performed, if he exercises his liberty to go again into seclusion, no one can deny him the right. One who desires to live a life of partial seclusion has a right to choose the times, places, and manner in which and at which he will submit himself to the public gaze.

*Id.*

31. William L. Prosser, *Privacy*, 48 Cal. L. Rev. 383 (1960); *see also* Restatement (Second) of Torts § 652B-652E.

32. 42 U.S.C. § 290dd-2 (2000).

33. 12 U.S.C. § 3403 (2000).

34. 20 U.S.C. § 1232g-1232h (2000).

35. 18 U.S.C. § 2710 (2000).

36. *Id.* § 2701.

37. N.Y. Civ. Rights Law § 50 (McKinney 1992).

38. *See, e.g.,* Weil v. Johnson, N.Y. Slip. Op. 50513(U), 2002 WL 31972157, at \*4 (N.Y. Sup. Ct. Sept. 27, 2002) (explaining why reporting on newsworthy events does not violate New York's privacy statute). *See generally* Anita L. Allen, *Why Journalists Can't Protect Privacy*, in *Journalism and the Debate Over Privacy* 69 (Craig L. LaMay ed., 2003) (describing financial and other pressures that lead news media to intrude into personal lives).

While there are legal limits on nonconsensual publication of our photographs, no legal right bars others from gazing at our faces in public places. Law enforcement authorities used FaceFinder “facial recognition technology” to scan the crowd at the Tampa football stadium that hosted Superbowl XXXV.<sup>39</sup> By comparing the faces in the crowd to a data bank of the faces of individuals being sought in connection with crimes, authorities identified nineteen known criminals.<sup>40</sup> Some people cried foul, but one can just as easily view as fair that people who attend televised public events with tens of thousands of others should have no expectation of privacy in their faces.<sup>41</sup> Yet the use of technology like FaceFinder rewrites the rules of social exchange, adding to the costs and risks of appearing in public. People would opt for radically different modes of life if they believed government and commercial concerns routinely used facial recognition technology to identify individuals in crowds and thereby monitor their comings and goings. Widespread use of facial recognition technologies and ordinary video surveillance cameras evoke an Orwellian/*Minority Report* nightmare of over-monitored existence that can make us feel less free.

## II. RACIAL PRIVACY

Richard M. Daley was a candidate for mayor of Chicago.<sup>42</sup> He was also the State’s Attorney for Illinois.<sup>43</sup> Media giant CBS wanted to investigate candidate Daley’s record on minority employment and decided to look into how many of his assistant State’s Attorneys had been members of racial minority groups.<sup>44</sup> CBS therefore filed a request under the Illinois Freedom of Information Act to obtain the data.<sup>45</sup> Like the federal Freedom of Information Act (“FOIA”),<sup>46</sup> the

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39. See Kathleen Carroll, *Finding A Criminal in a Crowd of Faces*, N.Y. Times, Nov. 11, 2001, at C2; cf. Adrea Uhde & Sharon Turco, *Ballpark Kiss Was Parolee’s Goodbye*, Cincinnati Enq., May 30, 2003, at D2 (discussing arrest of an individual for outstanding parole violations when a “Kiss Cam” surveillance device identified him in the stands of a baseball game).

40. See Carroll, *supra* note 39.

41. See *id.*

42. See CBS, Inc., v. Partee, 556 N.E.2d 648 (Ill. App. 1990); see also City Mayors: Richard M. Daley Mayor of Chicago (chronicling Daley’s political career), at <http://www.citymayors.com/usa/chicago.html> (last visited Jan. 28, 2004).

43. See CBS, 556 N.E.2d at 648.

44. *Id.*

45. *Id.* at 649.

In January 1989 the plaintiff requested the following information from the State’s Attorney: (1) the names of all assistant State’s Attorneys; (2) the race of each assistant State’s Attorney; (3) the names of the “First Chair” assistant State’s Attorneys; (4) the names of the assistant State’s Attorneys in supervisory positions to be identified by title and department; and (5) the most recent salaries of each assistant State’s Attorney and the dates of hire. The defendant gave the plaintiff the names, titles, most recent salaries and

Illinois counterpart seeks to make the machinations of government transparent and hold officials accountable through granting the public access to government records.<sup>47</sup> Also like its federal counterpart, the Illinois statute does not permit the government responding to a FOIA request to disclose personal information about individuals, such as medical and employment information.<sup>48</sup>

The government possessed the race data CBS requested; the data had been collected and compiled for purposes of federal EEOC compliance.<sup>49</sup> However, the government refused to give CBS precisely what it wanted, which was a list of the names of individual assistant State's Attorneys, each identified by his or her race.<sup>50</sup> The government was willing only to provide CBS with what it gave the EEOC—the aggregate number of minorities in each of five federally specified categories: white, African American, Asian, Hispanic, and Native American.<sup>51</sup> Asserting a right to independently verify statistics reported to the EEOC, CBS sued in Cook County Circuit Court for an injunction mandating disclosure of the names and races of individuals.<sup>52</sup> The court dismissed the suit and CBS appealed.<sup>53</sup> An Illinois appeals court held that the lower court had not abused its discretion in finding that the Illinois FOIA exempts from disclosure personnel information that is private, including information about a person's race.<sup>54</sup>

The state appeals court relied heavily on a U.S. Supreme Court

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the dates of hire of all assistant State's Attorneys but refused to identify any assistant State's Attorneys by race.

*Id.*

46. 5 U.S.C. § 552 (1996).

47. *See CBS*, 556 N.E.2d at 650.

48. *See id.* According to the court:

This case hinges on the interpretation of section 7 of the FOIA, which provides, in part, as follows:

The following shall be exempt from inspection and copying:

...

(b) Information which, if disclosed, would constitute a clearly unwarranted invasion of personal privacy, unless such disclosure is consented to in writing by the individual subjects of such information. The disclosure of information that bears on the public duties of public employees and officials shall not be considered an invasion of personal privacy. Information exempted under this subsection (b) shall include but is not limited to:

...

(ii) personnel files and personal information maintained with respect to employees, appointees or elected officials of any public body or applicants for such positions . . . .

*Id.* (internal citations omitted).

49. *See id.* at 651.

50. *Id.* at 649.

51. *See id.* at 651.

52. *Id.* at 650.

53. *Id.* at 649-50.

54. *Id.* at 656.

case, *United States Department of Justice v. Reporters Committee for Freedom of the Press*, in which the Supreme Court denied a media plaintiff's FOIA request seeking from the Justice Department copies of its "rap sheets" on four members of the Medico crime family.<sup>55</sup> All the information contained in the Medico criminal histories was a matter of public record, a rap sheet being little more than a compilation of arrests, charges, convictions, and incarcerations, plus the date of birth and physical characteristics of the record subject.<sup>56</sup> The secreting of government rap sheets potentially furthered effective criminal investigations, but in the *Reporters Committee* case the government emphasized that concealment protected the record subjects' interest in "practical obscurity."<sup>57</sup>

The Court appears to have had something like this in mind. When publicly available information about a person is aggregated and the aggregation publicized, that person's life becomes, as a practical matter, less private. New attention is paid the person. Certain forms of repackaging and republication of publicly available information are offensive to privacy,<sup>58</sup> even though the individual facts revealed are a matter of public record. Extending the reasoning of *Reporters Committee* to the facts at hand in *CBS*, the Illinois court concluded that even if the fact of a person's race is a matter of public observation or record, it would not follow that a government record documenting his or her race should be revealed to the public through the media.<sup>59</sup> For that would call attention to individuals' races and diminish their privacy; the government's publication of racial data would have implications for the level of privacy those people enjoy. Government should not act so as to call attention to facts on record about a person that will result in the person's being an object of perhaps unwanted, perhaps negative scrutiny.

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55. *United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989).

56. *Id.* at 752.

57. *Id.* at 762. "[T]he fact that '[information] is not wholly "private" does not mean that an individual has no interest in limiting disclosure or dissemination of the information.'" *Id.* at 770 (citations omitted).

58. *See CBS*, 556 N.E.2d at 652.

This is especially true in the setting in which this case arose. The then State's Attorney, Richard M. Daley, was a candidate for mayor of Chicago, and the question of the racial composition of his office became a political issue. It is not unreasonable to assume that many assistant State's Attorneys did not want their names and races to be drawn publicly into a political dispute. Again judging from the EEOC Compliance Manual, experience has shown that some persons do not want to disclose their race, *even to the interviewer*.

*Id.*

59. *Id.* at 653.

### III. GOVERNMENT MANDATED RACIAL PRIVACY: A GOOD IDEA?

Is their race something about which people are sometimes sensitive, much as they are often sensitive about their criminal histories and employment, medical or financial information? There are people who go to lengths to conceal their race and ancestry;<sup>60</sup> however, Americans do not generally consider race a private matter. No federal statute has been enacted to extend privacy protection to race information. Disclosing another's race is not grounds for civil liability, criminal punishment or constitutional objection in the United States. In some social settings, bringing up race can be impolite and impolitic. But where there is no suspicion of bias, Americans freely disclose and discuss information about one another's race and ethnicity all the time.

Under The Civil Rights Act of 1964, neither state nor federal government,<sup>61</sup> larger employers,<sup>62</sup> nor places of public accommodations<sup>63</sup> are permitted to discriminate on the basis of race. Schools receiving public funding are not permitted to discriminate.<sup>64</sup> However, collecting and revealing information about race is not regarded by law as per se racial discrimination. Indeed, governmental entities freely collect racial, ethnic and national origin data about individuals and use the data that they collect for a variety of public purposes.<sup>65</sup>

Race is widely considered sensitive, but it is not widely considered private. Should it be? Ought a society with a medical privacy statute, a financial privacy statute, an electronic information privacy statute, a video rental privacy statute, and an educational record privacy statute also move to enact racial privacy laws? There has been no great clamoring for laws protecting racial privacy in the United States, although the debates over the justice of color-conscious public policies, such as affirmative action and minority set-asides, have been heated and long-standing.

California affirmative action foe Ward Connerly spear-headed an unsuccessful effort to enact a "racial privacy" law in California.<sup>66</sup> In

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60. See generally Brooke Kroeger, *Passing: When People Can't Be Who They Are* (2003).

61. 42 U.S.C. § 2000a-1 (2000).

62. *Id.* § 2000e-2.

63. *Id.* § 2000a.

64. *Id.* § 2000d.

65. The federal law entitled the "No Child Left Behind Act" requires that states release standardized test scores for all students and groups including racial and ethnic minorities, the poor, special education students, and students learning English as a second language. 20 U.S.C. § 6311(b)(3) (2000). The release of test scores has revealed significant achievement gaps between whites and some minority groups. See *infra* note 79.

66. See Racial Privacy Initiative, at [www.racialprivacy.org](http://www.racialprivacy.org) (last visited Jan. 28, 2004).

an October 2003 special election Californians replaced former governor Gray Davis with Arnold Schwarzenegger;<sup>67</sup> they also rejected Proposition 54, the so-called “Racial Privacy Initiative.”<sup>68</sup> Had the controversial referendum been approved by voters, the state constitution would have been amended to prohibit state officials from collecting data about a person’s race.<sup>69</sup> Proposition 54 would have

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67. See Homepage of the California Secretary of State (detailing election results), at <http://vote2003.ss.ca.gov> (last visited Jan. 28, 2004).

68. *Id.*

69. For a full description of Proposition 54, see the California Legislative Analyst’s Office Report (Aug. 11, 2003), available at [www.lao.ca.gov/initiatives/2003/54\\_10\\_2003.htm](http://www.lao.ca.gov/initiatives/2003/54_10_2003.htm). The Proposition was worded as follows:

Section 32 is added to Article I of the California Constitution as follows:

Sec. 32. (a) The state shall not classify any individual by race, ethnicity, color or national origin in the operation of public education, public contracting or public employment.

(b) The state shall not classify any individual by race, ethnicity, color or national origin in the operation of any other state operations, unless the legislature specifically determines that said classification serves a compelling state interest and approves said classification by a 2/3 majority in both houses of the legislature, and said classification is subsequently approved by the governor.

(c) For purposes of this section, “classifying” by race, ethnicity, color or national origin shall be defined as the act of separating, sorting or organizing by race, ethnicity, color or national origin including, but not limited to, inquiring, profiling, or collecting such data on government forms.

(d) For purposes of subsection (a), “individual” refers to current or prospective students, contractors or employees. For purposes of subsection (b), “individual” refers to persons subject to the state operations referred to in subsection (b).

(e) The Department of Fair Employment and Housing (DFEH) shall be exempt from this section with respect to DFEH-conducted classifications in place as of March 5, 2002.

(1) Unless specifically extended by the legislature, this exemption shall expire ten years after the effective date of this measure.

(2) Notwithstanding DFEH’s exemption from this section, DFEH shall not impute a race, color, ethnicity or national origin to any individual.

(f) Otherwise lawful classification of medical research subjects and patients shall be exempt from this section.

(g) Nothing in this section shall prevent law enforcement officers, while carrying out their law enforcement duties, from describing particular persons in otherwise lawful ways. Neither the governor, the legislature nor any statewide agency shall require law enforcement officers to maintain records that track individuals on the basis of said classifications, nor shall the governor, the legislature or any statewide agency withhold funding to law enforcement agencies on the basis of the failure to maintain such records.

(h) Otherwise lawful assignment of prisoners and undercover law enforcement officers shall be exempt from this section.

(i) Nothing in this section shall be interpreted as prohibiting action which must be taken to comply with federal law, or establish or maintain eligibility for any federal program, where ineligibility would result in a loss of federal funds to the state.

prohibited the state university system from collecting racial data from its current or prospective students.<sup>70</sup> A number of prominent opponents of affirmative action supported the measure, including Shelby Steele, George Will, and Thomas Sowell.<sup>71</sup>

The National Association for the Advancement of Colored People (“NAACP”) voted to oppose the Racial Privacy Initiative.<sup>72</sup> The NAACP concluded that a limit on state race data collection would mean that authorities would not be able to “understand the positive or negative impacts of their policies or programs on ethnic communities including in the area of education, delivery of public services and public assistance.”<sup>73</sup> African-American leader Julian Bond blasted the racial privacy initiative as a “deceptively titled” effort to “eviscerate civil rights enforcement.”<sup>74</sup> “As long as race counts, we have to count race,” Bond said.<sup>75</sup>

Even though there does not appear to be widespread support for “racial privacy” at the moment, the defeat of Proposition 54 is unlikely to act as the nail in the coffin of a bad idea. It is therefore worth asking whether there are any good arguments for public policies that treat a person’s race as private information. Should racial privacy be protected?

#### IV. ARGUMENTS FOR RACIAL PRIVACY

In many instances a person has to tell you whether some of his or her ancestors came from North America, Europe, Africa, or Asia; you could never guess it by looking. A prominent lawyer and educator,

(j) Nothing in this section shall be interpreted as invalidating any valid consent decree or court order which is in force as of the effective date of this section.

(k) For the purposes of this section, “state” shall include, but not necessarily be limited to, the state itself, any city, county, city and county, public university system, including the University of California, California State University, community college district, school district, special district, or any other political subdivision or governmental instrumentality of or within the state.

(l) This section shall become effective January 1, 2005.

(m) This section shall be self-executing. If any part or parts of this section are found to be in conflict with federal law or the United States Constitution, the section shall be implemented to the maximum extent that federal law and the United States Constitution permit. Any provision held invalid shall be severable from the remaining portions of this section.

Proposition 54, *available at* Racial Privacy Initiative, [www.racialprivacy.org/content/language.php](http://www.racialprivacy.org/content/language.php) (last visited Jan. 28, 2004).

70. *See* [www.racialprivacy.org/content/legal/index.php](http://www.racialprivacy.org/content/legal/index.php) (last visited Jan. 28, 2004).

71. *See* [www.racialprivacy.org](http://www.racialprivacy.org) (last visited Jan. 28, 2004).

72. *See* Deborah Kong, *NAACP Opposes California Initiative to Bar Racial Classifying*, Associated Press St. & Loc. Wire, July 10, 2002, *available at* LEXIS, News: Wire Service Stories (last accessed Jan. 28, 2004).

73. *Id.* (internal quotation marks and citations omitted).

74. *Id.*

75. *Id.*

Greg Williams, looks completely Caucasian. However, his father was a fair-skinned man of part African ancestry, and his mother white. In his book, *Life on the Color Line*, Williams described living first as a “white” child in a community in which his father was a stranger, and then as a “black” child, in his father’s home town.<sup>76</sup>

Philosopher Adrian Piper also knows what it is like to walk the “color line”; she has incorporated her personal story into compelling art work. Piper, who looks white, has a strong African-American identity and is the daughter of fair skinned African, white, and east Indian ancestry parents who raised her in Harlem.<sup>77</sup> Face does not always reveal race and ethnic heritage.

#### A. *De Facto Concealability*

Racial identity and heritage are not always discernable from appearance alone. This bare fact might be thought to constitute an argument for prohibiting race data collection by the state. Since race can be a secret, perhaps the state should not seek to know it. Yet race is not usually capable of being hidden, and even if it were, that reality alone would have no implications for public policy.

The social significance of racial categories has a lot to do with the fact that what we call “race” is generally not capable of being hidden. Many people consider race a matter of ancestry rather than appearance, but nevertheless use facial appearance as an index of ancestry. The “look and see” test of race works pretty well in most instances. Not only is race often on the face; a person’s race is also often a matter of common knowledge in his or her community of origin and documented in a diverse assortment of official and unofficial sources. The inherently and largely public character of what we call race in the United States might imply the foolishness of public policies that treat race as a private matter, even in a society with color-blind political aspirations.

Yet suppose race were something every individual could secret at will, or something to which individuals had privileged access. Would we then have a reason to treat race as a matter that ought to be considered private as a matter of public policy? Many facts about persons are capable of being concealed, but are uninteresting and unsuitable for special protection. That someone has a sweet tooth, for example is not a fact that cries out for protecting through public policies. If we are going to have racial privacy laws, the case for them needs a stronger foundation than de facto concealability.

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76. See Gregory Howard Williams, *Life On the Color Line: The True Story of a White Boy Who Discovered He Was Black* (1995).

77. See Piper, *supra* note 13, at 234-69.

### B. *De Facto Preferences*

Perhaps the point is not concealability, but preference. A second, stronger argument for racial privacy would be this: Racial information merits privacy because some people prefer the privacy of their race, and if people prefer the privacy of race, government should respect that preference by refusing to document race. The argument for racial privacy could be premised on the assumption that racial privacy is not a majority preference, but a vitally important minority preference worth protecting.

In my experience, very few people care if others know their race. However some people do prefer the privacy of race, at least in selected contexts. Many people travel the Internet under intentionally assumed identities. They conceal or fake their race in their online communications. The rewards of racial anonymity have been touted (and the pitfalls acknowledged).<sup>78</sup> The same person who enjoys racially anonymous Internet surfing in her private life, however, might favor race data collection for benign remedial or welfare-enhancing purposes by government in her life as citizen voter. The No Child Left Behind Act requires that the race of school children be collected and reported;<sup>79</sup> the same person who enjoys anonymous Web surfing might be very glad that racial data collection enables her community to discern and address achievement gaps between black and white school children.<sup>80</sup>

Quite apart from the cyberworld, there are individuals and families who build lives around the concealment of race or ethnicity. Some “blacks” live their whole lives posing, or passing, as “white.” Moreover, I have known mixed-race “blacks” who did not speak about their “white” parents and have heard of “whites” concealing African or Jewish ancestry. Racial information should be treated as private, the argument goes, because some people regard their racial ancestry as private and should be at liberty to conceal it.

In considering whether to respect a preference, it is important to consider why the preference is held. Why do the people who prefer racial privacy prefer it? They do not prefer it out of modesty or shame or a sense of intimacy—that’s the territory of sexual privacy. They are indifferent to racial disclosures as such, I believe; they care

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78. See Jerry Kang, *Cyber-Race*, 113 Harv. L. Rev. 1130 (2000). Many people go online for the purpose of finding same-race partners; they want their actual racial identities to be known and valued. See *id.* at 1140.

79. See 20 U.S.C. § 6311(b)(3) (2000).

80. When official No Child Left Behind Act-mandated achievement gap data was reported in the *Philadelphia Inquirer* last year, I learned that the schools my two children attend in suburban Philadelphia are burdened with the region’s widest achievement gaps between blacks and whites in reading and math, as measured by the Pennsylvania System of School Assessment tests. See *Achievement Gap*, Phila. Inquirer, Dec. 14, 2003, at CB5.

about racial disclosures only to the extent that they believe racial information will be used to harm or disparage. Concerns about racial discrimination and disparagement are not irrational. Racial information has been used in the U.S. and other countries as a instrument of public evil.

The EEOC guidelines for racial data reporting cited in the *CBS* case<sup>81</sup> try to reconcile respect for the preference not to disclose racial information with the public need for race data to enforce civil rights laws. The guidelines presuppose that race is usually visible and that most people will identify themselves by race and ethnicity if asked, but that a minority of people will not want to disclose their race to their employers. Out of respect for that preference, employers are not authorized to compel disclosure of race;<sup>82</sup> however, if an employee declines to provide the information, the federal guidelines require that the employer ascertain the person's race by visual inspection.<sup>83</sup> This policy against compelling racial self-disclosure costs the government little since the fact of race will be apparent to the eye (and ear) in the vast majority of cases. Again, race is in the face. Race is so much in the face that, while racial data collectors are not supposed to second-guess racial classification asserted by an individual, an exception applies if a person asserts a racial identity that is "patently" inaccurate.<sup>84</sup>

### C. *A Right Against Unwanted Race Data Collection*

Since most people cannot conceal what officials will call their "race" and most do not care to, I believe we need to search harder for the rationale for racial privacy. A third argument for racial privacy is that people have a moral *right* to control the collection and use of identifying information injurious to their interests in dignity, security, or non-discrimination. Racial information, like medical and financial information is of this type, the argument might go.<sup>85</sup>

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81. *CBS, Inc. v. Partee*, 556 N.E.2d 648, 650 (Ill. App. 1990).

82. *Id.* at 651.

83. *Id.* at 652.

84. According to the guidelines:

Self-identification is the preferred method of obtaining information necessary to identify an individual by race, sex, or ethnic group. Where information is not provided by an individual that indicates affiliation with a race, sex, or ethnic group, the person requesting the information should, where possible, secure and record the information through observation.

Note, the person attempting to secure information regarding race, sex, or ethnic affiliation should not second guess or in any other way change a self declaration made by an applicant or employee as to race, sex, or ethnic background. An exception to this rule can be made where the declaration by the applicant or employee is patently false.

*Id.* at 652 (quoting EEOC Compliance Man. (CCH) par. 5403, at § 632.3(b)(2)(iii) (Mar. 1987)).

85. *See, e.g., Wash. Post Co. v. Minority Bus. Opportunity Comm'n*, 560 A.2d 517,

We know that in some contexts racial and ethnic disclosures can unfairly disadvantage people, as the European Jews discovered en route to the Holocaust, and Homer Plessy of *Plessy v. Ferguson*<sup>86</sup> fame discovered aboard a Louisiana train. Identifying oneself as Cherokee (Trail of Tears) or Japanese-American (World War II internment) has led to loss of property and home in the American past.

People might wish to control the use of racial data because they disapprove of the private or public purposes to which racial data would be put. They might not wish, as the *CBS* court pointed out, to have their race become a matter of public debate.<sup>87</sup> They might not wish to facilitate race-specific medical, scientific, or social science research. They might oppose race-based public programs, like affirmative action or minority set-asides. They might prefer a color-blind society. They might believe race is a myth. The ultimate questions are what justice allows and what it requires.

#### V. RAWLS ON RACE

Rawls famously presented his two main principles of justice as principles that would be adopted by persons in “the original position,” placed behind the “veil of ignorance.”<sup>88</sup> In traditional social contract theory, we are not asked to imagine that parties to the social contract are ignorant about their own characteristics. However, persons in the Rawlsian analogue—the original position—are ignorant about race and other social identities:

In the original position, the parties are not allowed to know the social positions or the particular comprehensive doctrines of the persons they represent. They also do not know persons' race and

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523 (D.C. App. 1989) (defendants and two intervenors alleged that disclosure of race would lead to competitive disadvantages, but the court of appeals held that it was “not persuaded that disclosure of the race, *per se*, of the principals of an enterprise would lead to competitive injury”).

86. 163 U.S. 537 (1896).

87. *CBS*, 556 N.E.2d at 653.

It is our holding, therefore, that it cannot be said, as a matter of law, that the assistant State's Attorneys, or any public employees, for that matter, have no reasonable expectation that their racial identification will not be made the subject of a public debate. To the contrary, they have a reasonable expectation that they will have some say as to “when, how or to what extent [such] information about them is communicated to others.” It is also our holding that the judge's finding that the dissemination of the information sought by the plaintiff would be an invasion of privacy is not against the manifest weight of the evidence. Whether it constituted a “clearly unwarranted invasion of privacy” depends on the weighing of other factors which will be discussed later.

*Id.* (citing *United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 764 n.16 (1989)).

88. John Rawls, *Justice as Fairness: A Restatement* § 6, at 14 (Erin Kelly ed., 2001).

ethnic group, sex or various native endowments such as strength and intelligence . . . .<sup>89</sup>

They are “veiled” against information and points of view that could result in bias in the design of political justice. Rawls assumed that the end product of the original position would reflect some sort of bias if the parties possessed racial (or ethnic) information. Thus, he stipulated ignorance about the parties’ own racial identities. Note that it does not follow that Rawls understood thoroughgoing colorblindness to be a requirement of substantive justice. The race-ignorance stipulation does not flow from a general principle mandating colorblindness in all government affairs. It is an open question whether a just, well-ordered society based on Rawlsian principles would permit government to collect race data vital for, for example, securing the health, educational achievement, or economic well-being of all its citizens.

The first principle of justice emerging from the original position is this: “Each person has the same infeasible claim to a fully adequate scheme of equal basic liberties, which scheme is compatible with the same scheme of liberties for all.”<sup>90</sup> A person’s race will be irrelevant to the strength of his or her claim on basic liberties. Racial data collection aimed at treating some people unequally with others would be prima facie unjust, much as the use of gender data collection criteria or hair color data collection or family connections data collection would be unjust. However, racial data collection with other purposes, objectives, and consequences is not obviously ruled out.

Is racial privacy a basic liberty, though? If it were, we would have to worry about racial data collection both because of its potential for facilitating unequal treatment, and for its implications for liberty itself. Among those basic constitutional liberties could be the liberty imagined by the *Pavesich* court—equal basic liberty to choose the manner of one’s life, whether to live in relative seclusion or in the public eye. But to argue that basic liberties include rights of informational privacy, as they surely do, does not lead in any straightforward manner to claims for the protection of racial privacy. At a minimum, race has to be understood as something that is amenable to meaningful concealment. In addition, it is partly an empirical question whether some state data collection is benign. Racial labeling could be a feature of a society in which “the political and social conditions essential for the adequate development and full exercise of the two moral powers of free and equal persons” is satisfied.<sup>91</sup> Freedom not to be labeled by any racial or ethnic category by the state would not appear to be a basic liberty in the abstract.

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89. *Id.* § 6.2, at 15.

90. *Id.* § 13, at 42.

91. *Id.* § 13.4, at 45.

A society could find that race and ethnic information is pertinent to legislative efforts to secure equal basic constitutional liberties. It could also find that affirmative action programs and minority business set-asides are called for by the first principle of justice and pass muster with the second.

Rawls's second principle is this: "Social and economic inequalities are to satisfy two conditions. First, they are to be attached to offices and positions open to all under conditions of fair equality of opportunity; and second, they are to be to the greatest benefit of the least-advantaged members of society (the difference principle)."<sup>92</sup>

Government collection of racial data may serve benign purposes tied to public health and the delivery of social services. Knowing the racial and ethnic background of newborns and fully grown adults can be pertinent to their care, as some medical abnormalities are more common among some groups than others. A public hospital might want to collect such information. In addition, taking into account ethnic customs, religions, diets and lifestyles might be relevant to fair, efficient and sensitive delivery of social services. Making free flu shots available to a community on its day of religious worship is probably a bad idea. Government needs to take notice of facts that bear on social identities.

Racial minorities are not inherently among Rawls's least advantaged. Opponents of affirmative action and proponents of the racial privacy initiative seem to think race is a poor proxy for need and disadvantage today. Rawls looks "conservative" to the extent that he operates in the world of ideal theory in which neither race nor gender are among the contingencies that (predictably and negatively) affect life prospects: "Justice as fairness focuses on inequalities in citizens' life prospects—their prospects over a complete life . . . —as these prospects are affected by three kinds of contingencies: . . . (a) . . . social class . . . ; (b) native endowments . . . ; (c) . . . good or ill fortune . . . ."<sup>93</sup>

Rawls was aware that his American readers might wonder at the exclusion of gender and race from the list of major contingencies affecting life prospects. Thus, several pages later he writes:

It is natural to ask: Why are distinctions of race and gender not explicitly included among the three contingencies noted earlier (§ 16)? How can one ignore such historical facts as slavery—in the antebellum South) and the inequalities between men and women resulting from the absence of provisions to make good women's extra burden in the bearing, raising, and educating of children so as to secure their fair equality of opportunity?<sup>94</sup>

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92. *Id.* § 13, at 42-43.

93. *Id.* § 16, at 55.

94. *Id.* § 18.4, at 64-65.

Rawls came to his own defense, justifying the exclusion on the ground that his primary concern is “ideal” theory and the well-ordered society,<sup>95</sup> not “partial compliance theory.”<sup>96</sup> The least advantaged are defined, he further explained, by deficits of wealth and income, not properties of race or gender, for the least advantaged “share with other citizens the basic equal liberties and fair opportunities but have the least income and wealth.”<sup>97</sup>

At the same time, Rawls barely acknowledged the actual malfunctioning of race and gender traits in our society, in the form of a supposition he does not firmly assert as a reality:

Suppose, for example, that certain fixed natural characteristics are used as grounds for assigning unequal basic rights, or allowing some persons only lesser opportunities; then such inequalities will single out relevant positions. Those characteristics cannot be changed, and so the positions they specify are points of view from which the basic structure must be judged.

Distinctions based on gender and race are of this kind. Thus if men, say, have greater basic rights or greater opportunities than women, these inequalities can be justified only if they are to the advantage of women and acceptable from their point of view. Similarly for unequal basic rights and opportunities founded on race. It appears that historically these inequalities have arisen from inequalities in political power and control of economic resources. They are not now, and it would seem never have been, to the advantage of women or less favored races.<sup>98</sup>

It is pretty clear from reading Rawls that he did not want race to matter in just societies. But I see nothing in Rawls to rule out race-conscious programs that stand to benefit the least advantaged in society.<sup>99</sup>

Rawls offered “hope that in a well ordered society under favorable conditions, with the equal basic liberties and fair equality of opportunity secured, gender and race would not specify relevant points of view.”<sup>100</sup> And yet in a society that is not perfectly well-ordered, in which equal basic liberties and fair equality of opportunity have not been secured, race and gender may specify relevant points of view. Far from furthering justice, a law like the constitutional amendment Proposition 54 contemplated<sup>101</sup> could limit the kinds of

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95. *Id.* § 18.4, at 65.

96. *Id.* § 18.6, at 66.

97. *Id.* § 18.4, at 65.

98. *Id.* § 18.5, at 65 (internal citations omitted).

99. Some scholars have speculated further on this idea. *See, e.g.*, Robert Allen, Rawlsian Affirmative Action: Compensatory Justice as Seen from the Original Position, available at <http://www.bu.edu/wcp/Papers/Soci/SociAlle.htm>. (last visited Jan. 28, 2004).

100. Rawls, Justice as Fairness: A Restatement, *supra* note 88, § 18.6, at 66.

101. *See supra* notes 65-74 and accompanying text (discussing Proposition 54).

remedial measures a society can take to extend equality of opportunity. Racial minority group members have often lacked an important primary good, “the social bases of self respect” and a “lively sense of their worth as persons . . . able to advance their ends with self-confidence.”<sup>102</sup> And while many privacy rights are surely among primary goods, racial privacy—with its impracticalities, lack of appeal and inconsistency with robust egalitarianism—is not a condition of the social contract.

#### VI. RACIAL PRIVACY—A VERY CONTINGENT, IMPRACTICAL GOOD

Rawls illuminates why Pavesich should have won, as indeed he did win.<sup>103</sup> The interest in not appearing in advertisements for products one does not endorse, and without notice, consent or compensation is an interest that goes to dignity and self-respect. Government should protect us from such assaults. Being discriminated against arbitrarily on the basis of race clearly violates Rawlsian principles, and when racial labeling by government is a handmaiden of wrongful discrimination, it is plainly unjust.

Rights to physical, informational, decisional, and proprietary privacy that are critical to the enjoyment of equal liberty and equality are rights the parties to the social contract and parties in the original position would wish a just society to protect. Strangers who can use our photographs for commercial advertising without permission are, in effect, running our lives. They risk misleading the general public, as well as embarrassing, humiliating and shaming us. We still run our own lives, typically, when others learn about our race, ethnicity or ancestry. Indeed, in the United States, we may live more proudly and independently precisely because government officials lawfully possess socially, economically and politically relevant race data about individuals. In the present context, barring discrimination based on race, not barring public race data collection, is the way to go.

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102. Rawls, *Justice as Fairness: A Restatement*, *supra* note 88, § 17.2, at 59.

103. *Pavesich v. New Eng. Life Ins. Co.*, 50 S.E. 68, 81 (Ga. 1905); *see also supra* Part I.