Columbia Law School
Scholarship Archive

Books | Faculty Publications

2020

Law in the Time of COVID-19

Katharina Pistor
Columbia Law School, kpisto@law.columbia.edu

Follow this and additional works at: https://scholarship.law.columbia.edu/books

Part of the Bankruptcy Law Commons, Business Organizations Law Commons, Civil Rights and Discrimination Commons, Commercial Law Commons, Contracts Commons, Criminal Law Commons, Criminal Procedure Commons, Disability Law Commons, Disaster Law Commons, Dispute Resolution and Arbitration Commons, Education Law Commons, Election Law Commons, Environmental Law Commons, Family Law Commons, Health Law and Policy Commons, Housing Law Commons, Human Rights Law Commons, Immigration Law Commons, Juvenile Law Commons, Labor and Employment Law Commons, Law and Economics Commons, Law and Society Commons, Privacy Law Commons, Public Law and Legal Theory Commons, Sexuality and the Law Commons, and the Social Welfare Law Commons

Recommended Citation
Pistor, Katharina, "Law in the Time of COVID-19" (2020). *Books*. 240.
https://scholarship.law.columbia.edu/books/240

This Book is brought to you for free and open access by the Faculty Publications at Scholarship Archive. It has been accepted for inclusion in Books by an authorized administrator of Scholarship Archive. For more information, please contact cls2184@columbia.edu.

LAW IN THE TIME OF COVID-19

Columbia **Law School**

This is a free ebook published by Columbia Law School.

The author or co-authors of each chapter reserve all copyright rights in that chapter.

Law in the Time of COVID-19

- Foreword
  Gillian Lester

- Introduction
  Katharina Pistor

Human Rights Under Strain

- Covid-19 and Prisoners' Rights
  Gregory Bernstein, Stephanie Guzman, Maggie Hadley, Rosalyn M. Huff, Alison Hung, and Anita N.H. Yandle, with Alexis Hoag and Bernard E. Harcourt

- Linked Fate: Justice and the Criminal Legal System During the COVID-19 Pandemic
  Susan Sturm, Faiz Pirani, Hyun Kim, Natalie Behr, Zachary D. Hardwick

- Immigration in the Time of COVID-19
  Shoba Sivaprasad Wadhia

Public Life and Social Welfare

- Covid-19 and the Law: Elections
  Richard Briffault

- The New "Essential": Rethinking Social Goods in the Wake of Covid-19
  Olatunde Johnson

- Public Health Law Tools: A Brief Guide
  Kristen Underhill

- Child Welfare and Covid-19: An Unexpected Opportunity for Systemic Change
  Jane Spinak

- Emergency Exemptions from Environmental Laws
  Michael Gerrard

Private Life

- Privacy and Pandemics
  Clarisa Long

- COVID-19 and LGBT Rights
  Suzanne Goldberg

The Economy Under Lock-down

- How to Help Small Businesses Survive COVID-19
  Todd Baker and Kathryn Judge

- Bankruptcy's Role in the COVID-19 Crisis
  Edward R. Morrison and Andrea C. Saavedra

- COVID-19 as a *Force Majeure* in Corporate Transactions
  Matthew Jennejohn, Julian Nyarko, Eric Talley

- A Comparative Perspective on Commercial Contracts and the Impact of Covid-19 - Change of Circumstances, Force Majeure, or What?
  Christian Twigg-Flesner

- Dispute Resolution in Pandemic Circumstances
  George Bermann

- Driver for Contactless Payments
  Ronald Mann

Appendix

- Appendix 1: COVID Legal Alerts From Top 20 Law Firms & CPRBLOG organized by TOC
  Links provided by Professor Michael Gerrard; Compiled by topic by Dana Neacsu and Michael Paul McParlane

- Appendix 2: New York-Based Legal Information
  Compiled by topic by Dana Neacsu

- Appendix 3: Rules Regarding Medical Labs Running COVID-19 tests
  Links provided by Professor Michael Gerrard; Compiled by topic by Dana Neacsu

- Appendix 4: Additional Resources
  Links provided by contributors; Compiled by Michael Paul McParlane

  Legal Issues for Workers & COVID-19 Martials and Resources
  AFL-CIO slides and resources in link above, made available by Mark Barenberg

Foreword

The spread of the new coronavirus in the spring of 2020 upended nearly every aspect of life as we know it. On March 11, as contagion traversed the globe with shocking speed, scale, and severity, the World Health Organization declared COVID-19 a pandemic.

That same day, Columbia Law School began moving our entire curriculum online—more than 300 courses—for the first time in our history. Not only did we transform our teaching, but our faculty also turned its gaze outward, to the plight of individuals and communities in the United States and elsewhere facing new and urgent challenges wrought by the pandemic.

Against this backdrop, a group of colleagues joined forces to publish an e-book addressing myriad legal questions the coronavirus pandemic would introduce. Scholars across the faculty drew on their deep expertise to identify and examine a range of vital legal issues implicated by COVID-19. They were joined in this effort by a few academics from other schools. What's more, Columbia Law students jumped at the opportunity to participate.

Mindful of the need to match the fast-moving impact of the virus, our professors worked at record speed to turn their analyses and insights into the essays that make up this collection. After just one month, we present, "Law in the Time of COVID-19". Covering a host of timely topics, including prisoners' rights, elections, privacy, public health law, *force majeure* in contracts, bankruptcy, and more, we believe this reference guide may be the first of its kind produced by a law school.

Columbia Law School offers these insights to the legal community and the public as our contribution to understanding and confronting the profound disruption to our society and our legal system of COVID-19.

I am grateful to my colleague, Katharina Pistor, for her foresight and fortitude in launching this e-book project, and deeply appreciative of all those who contributed to this important undertaking. We hope you will find it valuable.

Gillian Lester
Dean and the Lucy G. Moses Professor of Law
Columbia Law School
April 20, 2020

Introduction

Katharina Pistor, Edwin B. Parker Professor of Comparative Law;
Director, Center on Global Legal Transformation, Columbia Law School

The COVID-19 crisis has ended and upended lives around the globe. As of April 20, 2020, the virus has killed more than 160,000 people, more than 35,000 in the United States alone. The secondary effects have also been devastating. Borders have been closed, impeding the flow of goods, people, and services. Entire countries have been placed under lockdown, bringing economic life almost to a standstill; challenging electoral, legislative, and judicial processes; and limiting direct social interactions to the nuclear family. Electronic trading technology has allowed financial markets to remain open; without the lifelines from central banks, they would have crashed.

The pandemic's secondary effects pose fundamental challenges to the rules that govern our social, political, and economic lives. These rules are the domain of lawyers. **Law in the Time of COVID-19** is the product of a joint effort by members of the faculty of Columbia Law School and several law professors from other schools. As academic lawyers we wanted to share our knowledge and insights about how law shapes responses to—and is itself shaped by—the unfolding crisis.

This volume offers guidance for thinking about some the most pressing legal issues the pandemic has raised, especially (though not exclusively) for law in the United States: from the rights of prison inmates who live under conditions that make them exceptionally vulnerable to the highly contagious virus to the options for contracting parties who now face circumstances that make it impossible for them to live up to their past commitments. The book does not give legal advice. Instead, it identifies critical legal issues that affect many peoples' lives, offers fresh perspectives for thinking about those issues, and provides guidance to legislatures and policy makers about the legal challenges ahead.

Although written by professors, this volume is meant to be a reference book, not an academic treatise. The topics range widely and include issues related to human rights, public life and social welfare, private life, and the economy. The authors focused their knowledge on specific areas of the law. Many were joined by their students, who either helped draft a chapter or compiled further resources that are referenced in the chapters. The Appendices to the volume include links to additional resources including guidance about workers' rights that the Lawyers Coordinating Committee of the AFL-CIO has put together[1] as well as links to memoranda that law firms have written to their clients on COVID-19 relevant issues.[2]

This volume was put together quickly; it is a response to what we perceived to be an urgent need for more legal information and analysis in the midst of the COVID-19 pandemic. Many helped bring it to the finish line: The authors who volunteered to write individual chapters on short notice and with tight deadlines; my colleagues, Bert Huang and Lance Liebman, who copy-edited the contributions; Dana Neacsu, reference librarian and lecturer-in-law, together with faculty coordinator Michael McParlane, who compiled the additional resources in the Appendices and formatted the book; the team at Columbia Creative who produced the cover; Carole Steinfield, who ensured online publication on the law school's research repository and Columbia University's academic commons; and Dean Gillian Lester, who enthusiastically supported this endeavor.

I owe all of them a big thank you—and hope that more lawyers in the United States and elsewhere will follow suit and share their thoughts and insights widely in these difficult times.

New York City, April 20, 2020.

---

[1] See https://lcc-aflcio.org/covid-19-legal-issues-webinar-materials/. We thank our colleague Mark Barenberg for alerting us to these materials.

[2] See also http://covidmemo.law.stanford.edu/ for a related effort to make law firm memoranda more widely available.

COVID-19 and Prisoners' Rights

Gregory Bernstein, JD ’21, Stephanie Guzman, JD ’22, Maggie Hadley, JD ’22, Rosalyn M. Huff, CC ’20, Alison Hung, JD ’22, and Anita N.H. Yandle, JD ’21, Columbia Law School

Alexis Hoag, Lecturer in Law; Practitioner-in-Residence, Eric Holder Initiative for Civil & Political Rights, Columbia Law School

Bernard E. Harcourt, Isidor and Seville Sulzbacher Professor of Law, Columbia Law School

Abstract

As COVID-19 continues to spread rapidly across the country, the crowded and unsanitary conditions in prisons, jails, juvenile detention, and immigration detention centers leave incarcerated individuals especially vulnerable. This chapter will discuss potential avenues for detained persons and their lawyers seeking to use the legal system to obtain relief, including potential release, during this extraordinary, unprecedented crisis.

I. Background: Overview of COVID-19 situation in jails and prisons

In the wake of the global COVID-19 pandemic, the Centers for Disease Control and Prevention have emphasized social distancing and increased sanitization as the best practices to slow the transmission of the virus and keep communities as safe and healthy as possible. Among the most vulnerable are people in jails, prisons, juvenile detention, and immigration detention facilities, who must face the threat of this highly contagious disease while being held in an environment that makes basic measures of personal protection impossible.

In the United States, many correctional facilities operate through the use of communal and shared spaces. Incarcerated individuals are often held in shared cells, sleeping only a few feet away from each other. Bathrooms, cafeterias, and recreational areas are all communal. These conditions make social distancing—which the CDC considers the single most effective measure

in preventing the spread of COVID-19—extremely difficult, if not impossible. Many facilities also lack the conditions necessary to maintain a sanitary environment. For example, incarcerated individuals have reported being held in facilities with no soap, sanitation supplies, or even working sinks. In fact, in most prison systems, hand sanitizer is considered contraband. Without the ability to avoid crowded areas, wash their hands on a regular basis, and maintain sanitary living conditions, incarcerated individuals will remain at high risk of contracting and transmitting COVID-19.

As of April 6, 2020, over 230 detained people at New York City jails have tested positive for COVID-19. The transmission rate within that population is eight times the transmission rate in the general population of New York City, which is the current epicenter. The medical building at Rikers Island, which houses the jail's only contagious disease unit, showcases the egregious inability of jails in New York City to adequately treat individuals infected with the coronavirus. The building contains 88 beds, meaning that treating the more than 800 men quarantined on Rikers Island because someone in their building tested positive would be impossible, likely resulting in suffering and death.

In California, a state caught in the early wave of the pandemic, dozens of incarcerated persons and detention center employees have tested positive. The state ordered early release of thousands of individuals from jails and prisons in order to slow the spread of the disease. Facilities in many other states have also reported positive tests, including Pennsylvania, Illinois, and Ohio. Like California, some of these states have released large numbers of detainees. In early April, the death toll in state and federal facilities around the country has continued to rise, with multiple deaths at the Oakdale facility in Louisiana. This is unsurprising given that individuals incarcerated at the prison, which is located 200 miles west of New Orleans, reported that coughing or feverish men were not always separated from their healthy cellmates, and cells continued to hold six men at a time. Some men tried to fashion masks from their own clothing because they were not provided masks by prison officials. Stories and testimonies of prisons' shortcomings in the face of a deadly pandemic and the desperate attempts of incarcerated people to protect themselves are commonplace.

II. Prisoners' Rights in the Time of COVID-19

Even as the pandemic unfolds and COVID-19 spreads throughout detention facilities, incarcerated people retain their constitutional rights, including the right to be free from cruel and unusual punishment. To vindicate this right, prisoners may bring suits challenging the conditions of their confinement. To prevail in such suits, prisoners must show that prison officials, acting with deliberate indifference, exposed prisoners to a substantial risk of serious harm. If such a showing is made, courts have the responsibility of fashioning appropriate relief to remedy the serious risk of harm.

In order to challenge conditions of confinement under the Eighth Amendment, prisoners and their attorneys must show that "prison officials, acting with deliberate indifference, exposed a prisoner to a sufficiently substantial 'risk of serious damage to his future health[.]'" *Farmer v. Brennan*, 511 U.S. 825, 843 (1994) (*quoting Helling v. McKinney*, 509 U.S. 25, 35 (1993)). To prevail on a conditions of confinement claim, a plaintiff must satisfy both an objective element, that the alleged deprivation is "sufficiently serious," and a subjective element, that prison officials have a "sufficiently culpable state of mind," such as that of deliberate indifference to the detainee's health or safety. *See Farmer*, 511 U.S. at 834.

A. What Harms Are Sufficiently Serious?

To be sufficiently serious, the act or omission by an official "must result in the denial of the minimal civilized measure of life's necessities." *Farmer*, 511 U.S. at 834. Most circuits have held that a serious medical need can be either a condition for which a physician has mandated treatment or a need that is "so obvious that even a lay person would easily recognize the necessity for a doctor's attention." *See, e.g.*, *Leite v. Bergeron*, 911 F.3d 47, 52 (1st Cir. 2018); *Al-Turki v. Robinson*, 762 F.3d 1188, 1192 (10th Cir. 2014); *Kuhne v. Dep't of Corr.*, 745 F.3d 1091, 1096 (11th Cir. 2014); *Jackson v. Lightsey*, 775 F.3d 170, 178 (4th Cir. 2014); *Santiago v. Ringle*, 734 F.3d 585, 590 (6th Cir. 2013); *King v. Kramer*, 680 F.3d 1013, 1018 (7th Cir. 2012). Outside of the realm of infectious diseases, circuit courts have found sufficient seriousness in conditions such as appendicitis, an infected cyst, and a tooth cavity, some of which could be life-threatening and some of which could result in severe pain. *See Blackmore v. Kalamazoo*

Cty., 390 F.3d 890 (6th Cir. 2004); *Gutierrez v. Peters*, 111 F.3d 1364 (7th Cir. 1997); *Harrison v. Barkley*, 219 F.3d 132 (2d Cir. 2000).

a. Predicting Future Harms

A prisoner concerned about contracting COVID-19 in prison may satisfy the "sufficiently serious" prong by showing that they face a substantial risk of serious harm in the future, even if they are not currently infected or suffering. A plaintiff can obtain preventative relief even without the threatened injury. *Farmer v. Brennan* 511 U.S., 825, 845 (*quoting Pennsylvania v. West Virginia*, 262 U.S. 553, 593 (1922)).

In order to demonstrate sufficient seriousness with respect to exposure to future harm, a prisoner "must show that he himself is being exposed" to an unreasonable risk of serious harm. *Helling v. McKinney*, 509 U.S. at 35. Once this showing is made, the court must inquire into both the seriousness and likelihood of the potential harm, considering whether the risk is "so grave that it violates contemporary standards of decency to expose *anyone* unwillingly to such a risk." *Id.* at 36 (emphasis in original). Similarly, while courts have generally recognized that the finding of a serious risk is tied to an individual's health conditions, the Supreme Court has held that it is not relevant "whether a prisoner faces an excessive risk of [harm] for reasons personal to him or because all prisoners in his situation face such a risk." *Farmer*, 511 U.S. at 843.

Mere exposure to infectious diseases can constitute a sufficiently serious deprivation and officials cannot be deliberately indifferent to such a risk, even if someone does not show serious symptoms. *See Hutto v. Finney*, 427 U.S. 678 (1978); *Helling v. McKinney*, 509 U.S. at 35 (1993). In *Helling*, the Supreme Court rejected the proposition that prison officials "may ignore a condition of confinement that is sure or very likely to cause serious illness" in the future. 509 U.S. 25, 33.

Lower courts have recognized that a wide array of communicable diseases can present a substantial risk of serious harm to inmates. *See, e.g., Jeffries v. Block*, 940 F. Supp. 1509, 1514 (C.D. Cal. 1996) (recognizing that "tuberculosis presents a substantial risk of serious harm" to inmates, and that tuberculosis "is particularly dangerous in a prison environment, where

overcrowding and poor ventilation can hasten the spread of this airborne disease."); *Kimble v. Tennis*, No. CIV. 4:CV-05-1871, 2006 WL 1548950, at *4 (M.D. Pa. June 5, 2006) (concluding that "an inmate infected with MRSA and with open sores could constitute a serious health risk[.]"). Applying the standard articulated in *Helling*, a district court in the Third Circuit concluded that the infectious skin disease scabies clearly constituted an unreasonable risk to the plaintiff where over 100 prisoners and guards had already contracted the disease. *Hemphill v. Rogers*, No. CIV.A.07-2162JAG, 2008 WL 2668952, at *11 (D.N.J. June 27, 2008). However, prisoners should not need to show that other incidents of harm have occurred at prison. The Fifth Circuit held in *Ball v. LeBlanc* that, especially in cases where the harm can have a sudden onset, a showing of prior death or injury was not necessary. 792 F.3d 584, 593 (5th Cir. 2015). In *Ball*, which concerned the risk of heat-related illnesses, the Fifth Circuit made clear that the lack of any prior heat-related incidents at a prison did not preclude the court from concluding that the prisoners were at substantial risk of serious harm. *Id*.

At least one court has found that plaintiffs who alleged they were exposed to valley fever had a cognizable claim under the Eighth Amendment. *Beagle v. Schwarzenegger*, 107 F. Supp. 3d 1056, 1069 (E.D. Cal. 2014); *see also Allen v. Kramer*, No. 115CV01609DADMJSPC, 2016 WL 4613360, at *11 (E.D. Cal. Aug. 17, 2016) (finding that the plaintiff had stated an Eighth Amendment claim based on the defendants' failure to implement adequate measures to limit exposure to valley fever.) In *Beagle*, the court underscored that plaintiffs "need not demonstrate that they are at a higher risk of contracting Valley Fever or a more severe form of the disease to state an Eighth Amendment claim." *Beagle*, 107 F. Supp. 3d. at 1069. Even plaintiffs who are relatively less susceptible to contracting the disease or developing a serious illness as a result of infection may nonetheless experience a "constitutionally unacceptable level of risk" and need not show that they have an increased risk of infection or severity. *Id*.

Both the level of communicability of the disease and the infection rate in the detention facility may factor into a court's application of the *Helling* test. One court found in a motion for summary judgment that while Methicillin–Resistant Staphylococcus Aureus (MRSA) was a sufficiently serious condition, the plaintiff had not been exposed to a substantial risk of

contracting it from his infected cellmate. *See Lopez v. McGrath*, No. C 04-4782 MHP (N.D. Cal. May 30, 2007). Due to MRSA's relatively low infectiousness and the hygiene precautions taken by the facility, the court determined that no additional measures were needed to reduce plaintiff's risk "to a constitutionally permissible level." *Lopez*, No. C 04-4782 MHP at 24. In regard to *Farmer*'s subjective prong, the Sixth Circuit relied on a jail's comparatively low infection rate (0.19% of the jail population) to find that prison officials had no reason to infer that conditions in the jail posed an unreasonable risk that inmates would contract MRSA. *Bowers v. Livingston Cty.*, 426 F. App'x 371, 373 (6th Cir. 2011); *Cf. Duvall v. Dallas Cty.*, 631 F.3d 203, 206 (5th Cir. 2011) (finding "serious, extensive and extended" violations of a pre-trial detainee's Fifth Amendment rights in a case where the jail's MRSA infection rate was close to 20%). As of April 11th, 2020, the infection rate in the jail on Rikers Island is 7.7% and climbing daily.

b. Risk of Exposure to COVID-19 in Detention Facilities

Courts have already begun to recognize COVID-19 as a substantial health risk in Fifth Amendment claims for civil detainees. The U.S. District Court for the Southern District of New York found that the chance of exposure to COVID-19 in an Immigration and Customs Enforcement (ICE) facility where detainees or staff had tested positive for the virus posed an unreasonable health risk to detainees. *Basank v. Decker*, 2020 U.S. Dist. LEXIS 53191 (S.D.N.Y. Mar. 26, 2020) (*quoting Phelps v. Kapnolas*, 308 F.3d 180, 185 (2d Cir. 2002). In the case, which Plaintiffs brought as a Fifth Amendment Due Process habeas claim, the court observed, "the risk of contracting COVID-19 in tightly-confined spaces, especially jails, is now exceedingly obvious… It can no longer be denied that Petitioners, who suffer from underlying illnesses, are caught in the midst of a rapidly-unfolding public health crisis." *Id*. at *16.

A day later, in *Castillo v. Barr,* another court ruled in favor of an ICE detainee's Fifth Amendment claim due to COVID-19 risk. *See Castillo v. Barr*, 2020 U.S. Dist. LEXIS 54425 (C.D. Cal. Mar. 27, 2020). The court concluded that detainees faced a serious risk of harm, noting, "the science is well established—infected, asymptomatic carriers of the coronavirus are highly contagious. Moreover, the Petitioners presently before the Court are suffering from a condition

of confinement that takes away, inter alia, their ability to socially distance." *Castillo v. Barr*, 2020 U.S. Dist. LEXIS 54425 at 13.

B. What Is "Deliberate Indifference"?

The second prong of a conditions of confinement claim brought under the Eighth Amendment asks whether prison officials acted with a sufficiently culpable state of mind, such as that of deliberate indifference. The Supreme Court has held that a prison official acts with deliberate indifference when "the official knows of and disregards an excessive risk to inmate health or safety." *Farmer v. Brennan*, 511 U.S. 825, 837 (1994). To act with deliberate indifference, the official "must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." *Id*.

a. Prison Officials' Knowledge of Excessive Risks to Inmate Health

To act with deliberate indifference, officials must have knowledge of the risks to inmate health or of the circumstances pointing to the existence of such risks. In determining whether prison officials acted with deliberate indifference, courts tend to look at whether those officials had actual knowledge of the asserted serious needs of inmates or of circumstances clearly indicating the existence of such needs. *Blackmore v. Kalamazoo Cty.*, 390 F.3d 890, 895–96 (6th Cir. 2004).

Prisoners can prove an official's "actual knowledge of a substantial risk to his safety" through inference from circumstantial evidence. *Bistrian v. Levi*, 696 F.3d 352, 367 (3d Cir. 2012). In cases where the prison officials fail to provide treatment, there is often little or no evidence about what inferences the defendant in fact drew. Nonetheless, "in those cases, a genuine issue of material fact as to deliberate indifference can be based on a strong showing on the objective component." *Estate of Carter v. City of Detroit*, 408 F.3d 305, 313 (6th Cir. 2005). This principle is based on the *Farmer* court's statement that a prison official cannot escape liability by choosing not to learn more about the situation. *Farmer*, 511 U.S. at 843, n.6 (1994).

b. Prison Officials' Denial of Medical Treatment or Failure to Comply With Accepted Medical Protocols

Prison officials disregard an excessive risk to inmate health and safety when they deny, delay, or intentionally interfere with medical treatment, or fail to follow accepted medical standards and protocols. *See, e.g. Estelle v. Gamble,* 429 U.S. 97, 105 (1976); *Hernandez v. County of Monterey*, 110 F. Supp. 3d 929, 943 (N.D. Cal. 2015) (finding that known noncompliance with generally accepted guidelines for inmate health strongly indicates deliberate indifference to a substantial risk of serious harm); *Holland v. Hanks*, No. 97-3660, 1998 WL 93974, at *4 (7th Cir. 1998) (suggesting that a failure to comply with treatment protocols for tuberculosis would be sufficient to show deliberate indifference).

While an inadvertent failure to take action, standing alone, does not constitute deliberate indifference, a consistent pattern of reckless or negligent conduct is sufficient to establish deliberate indifference. *See DeGidio v. Pung*, 920 F.2d 525, 533 (8th Cir. 1990). To prove deliberate indifference, a prisoner need not show a complete failure on the part of prison officials to respond or provide even minimal medical care. *Id.* In *DeGidio,* the Eighth Circuit affirmed the district court's finding that the prison officials' response to a tuberculosis outbreak, considered as a whole, constituted deliberate indifference to the safety and medical needs of the inmates, pointing to the prison officials' failure to test all inmates for tuberculosis after an inmate was diagnosed with tuberculosis, to develop written infection-control policies, to keep adequate medical records and charts, and to provide a full-time doctor and medical director. *Id.* at 531.

One court has found that failure to provide inmates with their preferred method of treatment may not constitute deliberate indifference. In *Forbes v. Edgar*, the Seventh Circuit held that prison officials were not deliberately indifferent to an inmate's serious medical needs despite her claims that prison officials allowed tuberculosis to spread throughout the prison and that officials denied her a preferred medical treatment. 112 F.3d 262, 267 (7th Cir. 1997). Importantly, however, the tuberculosis control procedures implemented by the *Forbes* defendants were consistent with the protocols recommended by the Center for Disease Control

(CDC) and the American Thoracic Society, and the treatment provided to the petitioner was approved by the CDC. *Forbes*, 112 F.3d at 267. The Seventh Circuit held that while prisoners are not entitled to demand specific care, they are "entitled to reasonable measures to meet a substantial risk of serious harm to [the prisoner]." *Id.*

With regard to COVID-19, courts have found deliberate indifference in a Fifth Amendment claim when ICE detention facilities failed to adequately protect prisoners by following the CDC's recommended preventative measures. In *Basank v. Decker*, the District Court for the Southern District of New York held that the officials in that case were deliberately indifferent in their response to COVID-19 because, though they did take some measures, including providing soap and hand sanitizer to inmates and increasing the frequency and intensity of cleaning, they could not show that detainees could not remain the CDC-recommended six feet apart from each other in the facilities. *Basank v. Decker*, 2020 U.S. Dist. LEXIS 53191 at *5 (S.D.N.Y. Mar. 26, 2020).

III. Conditions of Confinement for Pretrial Detainees

Pretrial detainees are also protected from unconstitutional conditions of confinement. Conditions of confinement claims brought by pretrial detainees are governed by the Fourteenth Amendment's Due Process Clause, rather than the Eighth Amendment's Cruel and Unusual Punishments Clause. *Darnell v. Pineiro*, 849 F.3d 17, 29 (2d Cir. 2017). The Supreme Court has recognized that a detainee's rights are "at least as great as the Eighth Amendment protections available to a convicted prisoner." *City of Revere v. Mass. Gen. Hosp.*, 463 U.S. 239, 244, (1983). The test for whether a detainee's conditions of confinement are unconstitutional relies on the same two prongs as those articulated in *Farmer*—substantial risk of serious harm and deliberate indifference. *See Darnell*, 849 F.3d at 29. Importantly, however, the deliberate indifference prong can be satisfied if a pretrial detainee shows that prison officials knew *or* should have known that the condition posed an excessive risk to health or safety. Darnell, 849 F.3d at 35; *see also Kingsley v. Hendrickson*, 576 U.S. 389 (2015) (adopting an objective standard for determining whether use of force against a pretrial detainee was excessive under

the Due Process Clause of the Fourteenth Amendment). In other words, *Farmer*'s "subjective" prong is measured objectively for detainees.

IV. Remedies

Prisoners seeking release due to the risk of COVID-19 will have to comply with guidelines set by the Prison Litigation Reform Act, 18 U.S.C. § 3626 (PLRA). Courts normally only order release as a last resort as a remedy for medical risks, and some district courts have declined to recognize an independent right of action under the prevailing Supreme Court case on prisoner release, *Brown v. Plata*, 563 U.S. 493, 502 (2011).

A. When Can A Court Order Prisoner Release?

A court will require special circumstances to order prisoner release as a remedy for an Eighth Amendment violation. The PLRA outlines the requirements that must be satisfied for a court to grant relief in a civil action regarding prison conditions. First, only a three-judge district court may enter a prisoner release order. 18 U.S.C. § 3626(a)(3)(B). A three-judge district court may be convened once (1) a court has previously entered an order for "less intrusive relief" that has failed to remedy the deprivation at issue and (2) the defendant has had a "reasonable amount of time" to comply with previous orders. 18 U.S.C. § 3626(a)(3)(A). Once convened, the three-judge court can impose a population limit if it finds that (1) crowding is the primary cause of the constitutional violation, and (2) no other relief will remedy the violation. 18 U.S.C. § 3626(a)(3)(E).

In *Brown v. Plata*, the Supreme Court held that a remedial order imposing a population limit on the California prison system was consistent with the requirements of the PLRA. *See Brown v. Plata*, 563 U.S. 493, 502 (2011). The Court cited the exceptional degree of overcrowding in California prisons, which had operated at around 200% of capacity for at least 11 years; the unsanitary and unsafe prison conditions resulted in an increased risk for the transmission of serious infectious diseases, approximately one suicide per week, and the failure of prisons to provide adequate medical and mental health care to prisoners. *Id*. at 502–504. After years of ongoing but ultimately unsuccessful efforts to solve the crisis through construction, hiring, and

procedural reforms, the Court found that it was appropriate to convene a three-judge court and for that court to order the release of some prisoners to address the problem of overcrowding. *Id.* at 514–515.

Brown v. Plata limited federal district court management of state prisons, making it clear that prison caps—and prisoner release orders—must be "the remedy of last resort." *Id.* at 526. While a federal court retains the authority to order release when it is truly necessary to remedy a violation of a prisoner's constitutional rights, state prison administrators are entitled to a certain amount of deference in the adoption of practices that, in their judgment, are needed to accomplish the legitimate goals of a prison system. *See, e.g.*, *Griffin v. Gomez*, 741 F.3d 10, 20 (9th Cir. 2014) (holding that a district court's order requiring the state to release an inmate from the security housing unit was an abuse of discretion and that the court had improperly impeded state prison management). *But see Huerta v. Ewing*, No. 216CV00397JMSMJD, 2018 U.S. Dist. LEXIS 174120, at *26-28 (S.D. Ind. Oct. 10, 2018) (recognizing that a district court must exercise restraint in granting relief, but that county jail officials' failure to take the ordered measures may entitle prisoners to petition the court for additional relief, including the convening of a three-judge panel to issue a prisoner release order).

a. 18 U.S.C. § 3626's Three-Judge Court Requirement

A three-judge district court may enter a prisoner-release order to remedy overcrowding under 18 U.S.C. § 3626. Once a court has entered an order for "less intrusive relief" that has failed to remedy the deprivation at issue and the defendant has had an undefined "reasonable amount of time" to comply with the previous orders, a three-judge district court may convene to order release of prisoners as a remedy to cure an Eighth Amendment violation. *Plata*, 563 U.S. at 512. *See also Butler v. Kelso*, No. 11CV02684 CAB RBB, 2013 WL 1883233, at *10 (S.D. Cal. May 2, 2013) (denying plaintiff's motion to amend his complaint alleging that California state prison officials acted with deliberate indifference to his serious medical needs to include a request for prison release order); *Nagast v. Dep't of Corr.*, No. ED CV 09-1044-CJC, 2012 U.S. Dist. LEXIS 59309, at *8 (C.D. Cal. Feb. 27, 2012) (holding that a California prison inmate could not bring a §

3626 claim because he did not satisfy the requirements needed to convene a three-judge court).

Additionally, the defendant must have had a reasonable amount of time to comply with the previous orders for less intrusive relief. In *Gillette v. Prosper,* a plaintiff seeking reforms to his facility, which had been mandated by a court order two and a half years earlier, was not granted relief because the facility was entitled to more time to comply with the order. *Gillette v. Prosper*, Civil Action No. 2014-00110, 2016 U.S. Dist. LEXIS 27776 (D.V.I. Mar. 4, 2016) (distinguishing the timeline from *Coleman v. Schwarzenegger*, 922 F. Supp. 2d 882, 889 (E.D. Cal. 2009) where there were 12 years for compliance, and from *Brown v. Plata*'s five years for compliance).

b. ***Plata*'s Limits**

District courts in California maintain that *Plata* by itself does not provide any substantive right on which a prisoner can rely for an independent cause of action. In *Shafer v. Avenal State Prison*, the Eastern District Court expressed that *Plata* does not "provide any substantive right" for plaintiffs nor does it "stand for the proposition that federal district courts can order state officials to release specific prisoners." 2014 U.S. Dist. LEXIS 95630 (E.D. Cal. July 11, 2014).

The next year, in *Thomas v. Alameda County*, the Northern District Court in California denied a prisoner's request for injunctive relief in which he cited *Plata*; the court ruled that the plaintiff's claim of general prison overcrowding failed because *Plata* does not provide a substantive right. *Thomas v. Alameda County*, 2015 U.S. Dist. LEXIS 32182, at *8 (N.D. Cal. Mar. 16, 2015). The decision cited a case before the court three years earlier that stated a remedial § 1983 court order could not, standing alone, serve as a basis for liability because "such orders do not create 'rights, privileges or immunities secured by the Constitution and laws' of the United States." *Id.* Finally, the Southern District Court took the same stance in 2018. *Gomez v. Paramo*, No. 17-cv-0834-BAS-MDD, 2018 U.S. Dist. LEXIS 129295, at *20 (S.D. Cal. Aug. 1, 2018).

c. Release in Habeas Proceedings

Release is typically unavailable as a remedy for Eighth Amendment violations in habeas proceedings. Courts have thus far refused to consider Eighth Amendment medical claims as grounds for release of individual prisoners in habeas proceedings. In *Glaus v. Anderson,* a prisoner who claimed that his facility failed to treat his Hepatitis C could not appropriately seek release as a remedy. The court noted, "If an inmate established that his medical treatment amounts to cruel and unusual punishment, the appropriate remedy would be to call for proper treatment, or to award him damages; release from custody is not an option." *Glaus v. Anderson*, 408 F.3d 382, 387 (7th Cir. 2005).

In *Seifert v. Spaulding*, similarly, a plaintiff claimed that the physicians at his facility denied his diagnosis and refused to treat him could not gain release. The court concluded, "Even where a prisoner claims that his only hope of obtaining adequate medical treatment is through release, a court cannot order release as a remedy for conditions of confinement that violate the Eighth Amendment violation." *Seifert v. Spaulding*, No. 18-11600-MGM, 2018 U.S. Dist. LEXIS 221340, 3 (D. Mass. Sep. 11, 2018).

B. Release of Detainees During COVID-19 Pandemic

Recently, courts have granted remedy in the form of release to civil detainees as a remedy for Eighth or Fifth Amendment violations caused by the COVID-19 pandemic. *See Coronel v. Decker*, No. 20-cv-2472 (AJN), 2020 U.S. Dist. LEXIS 53954 (S.D.N.Y. Mar. 27, 2020); *Hernandez v. Decker*, No. 20-CV-1589 (JPO), 2020 U.S. Dist. LEXIS 57122 (S.D.N.Y. Apr. 1, 2020). Notably, however, the Prison Litigation Reform Act does not apply to civil detainees.

On April 4th, the original three-judge panel in *Plata v. Brown* dismissed an emergency motion for release filed by plaintiffs in the California prison system. *Coleman v. Newsom*, Case No. 2:90-cv-0520 KJM DB P, (E.D. Cal. Apr. 4, 2020); *Plata v. Newsom*, Case No. 01-cv-01351-JST (N.D. Cal. Apr. 4, 2020). The plaintiffs claimed that the threat of COVID-19 in prisons called for a modification of the population reduction order in *Plata v. Brown*. *Id*. at 2. The three-judge panel

ruled that "because Plaintiffs' motion seeks a release order to redress a different constitutional injury than those previously found in the Coleman and Plata proceedings, that relief cannot be granted through a modification to our prior remedial order." *Id*. at 9. Plaintiffs were instructed to bring a claim before a single judge. *Id*. at 12. If this single-judge court found a constitutional violation, the panel continued, it would only be authorized to order defendants "to take steps short of release necessary to remedy that violation." *Id.* at 13. Only if such steps proved inadequate could a three-judge panel be convened. *Id*. at 12–13.

C. Compassionate Release Under 18 U.S.C. § 3582

Another potential remedy is compassionate release. 18 U.S.C. § 3852 allows a court to reduce a federal inmate's sentence if the court finds that "extraordinary and compelling reasons" warrant a reduction, and that a reduction would be "consistent with any applicable policy statements issued by the Sentencing Commission[.]" 18 U.S.C. § 3852(c)(1)(A)(i). A court must also consider the applicable factors set forth in § 3553(a). This provision provides courts with the statutory authority to grant the compassionate release of certain prisoners. A growing number of courts have used § 3852 to order the release of federal prisoners who, due to their age and/or health status, are at high risk of developing serious illness or death if they contract COVID-19. *See, e.g. United State v. Rodriguez*, No. 2:03-CR-00271-AB-1, 2020 U.S. Dist. LEXIS 58718 (E.D. Pa. Apr. 1, 2020); *United States v. Resnick*, No. 14 CR 810 (CM), 2020 U.S. Dist. LEXIS 59091 (S.D.N.Y. Apr. 2, 2020); *United States v. Colvin*, 2020 U.S. Dist. LEXIS 57962 (D. Conn., Apr. 2, 2020); *United States v. McCarthy*, 2020 U.S. Dist. LEXIS 61759 (D. Conn., Apr. 8, 2020); *United States v. Daly*, 2020 U.S. Dist. LEXIS 61804 (S.D.N.Y. Apr. 7, 2020).

The recently enacted First Step Act amended § 3852 to remove the Bureau of Prisons' exclusive gatekeeping function over motions seeking compassionate relief. As amended, § 3852 allows prisoners to request that the BOP file a motion seeking compassionate release. If the BOP does not file such a motion, the prisoner may then (1) file a motion after fully exhausting administrative appeals of the BOP's decision not to file a motion, or (2) file a motion after "the lapse of 30 days from the receipt ... of such a request" by the warden of the defendant's facility,

“whichever is earlier.” 18 U.S.C. § 3852(c)(1)(A); *see also Rodriguez*, 2020 U.S. Dist. LEXIS 58718 at *3.

Congress tasked the U.S. Sentencing Commission with determining what constitutes “extraordinary and compelling reasons.” In an application note to the sentencing guidelines, the U.S. Sentencing Commission listed three specific categories of extraordinary and compelling reasons and created a catch-all provision that allows the Director of the Bureau of Prisons to determine when extraordinary and compelling reasons other than those explicitly included in the application note exist. U.S.S.G. § 1B1.13 cmt. n.1(D). A majority of district courts that have considered the meaning of “extraordinary and compelling reasons” since the enactment of the First Step Act have concluded that “the most natural reading of the amended § 3582(c) ... is that the district court assumes the same discretion as the BOP Director when it considers a compassionate release motion properly before it.” *United States v. Brown*, 411 F. Supp. 3d 446, 451 (S.D. Iowa 2019); *see also United States v. Young*, No. 2:00-CR-00002-1, 2020 WL 1047815, at *6 (M.D. Tenn. Mar. 4, 2020) (concluding that “district courts themselves have the power to determine what constitute[s] extraordinary and compelling reasons for compassionate release.”); *United States v. Redd*, No. 1:97-CR-00006-AJT, 2020 WL 1248493, at *8 (E.D. Va. Mar. 16, 2020) (concluding that a court may find that "compelling reasons exist based on facts and circumstances other than those set forth in U.S.S.G. § 1B1.13 cmt. n.1(A)-(C)[.]”).

Courts have used the authority conferred by § 3852 to grant compassionate release sought by prisoners who are particularly vulnerable to COVID-19. The U.S. District Court for the Eastern District of Pennsylvania granted a sentence reduction and ordered the immediate release of a prisoner who has diabetes, high blood pressure, and liver abnormalities, and was in the seventeenth year of a twenty-year sentence. *United State v. Rodriguez*, No. 2:03-CR-00271-AB-1, 2020 WL 1627331 (E.D. Pa. Apr. 1, 2020) The U.S. District Court for the Southern District of New York granted a sentence reduction and ordered the immediate release of a prisoner who suffers from diabetes and related end-stage liver disease, and has served three years and nine months of his six-year sentence. *United States v. Resnick*, No. 14 CR 810 (CM), 2020 U.S. Dist. LEXIS 59091 (S.D.N.Y. Apr. 2, 2020). Both courts recognized that the petitioners’ medical

conditions, in combination with the ongoing coronavirus pandemic, constituted extraordinary and compelling reasons. In both instances, the petitioners filed motions in federal court pursuant to § 3852's 30-day lapse provision. *See* 18 U.S.C. § 3852(c)(1)(A).

The U.S. District Court for the Eastern District of Michigan granted compassionate release to a prisoner who had requested relief and exhausted his administrative remedies prior to the outbreak of COVID-19. Miller v. United States., No. CR 16-20222-1, 2020 WL 1814084 (E.D. Mich. Apr. 9, 2020). In that instance, the prisoner suffered from a number of underlying medical conditions and the court found that it would be futile to require "him to submit yet another petition to merely indicate his heightened vulnerability due to COVID-19[.]" *Id.*

Conclusion

The Eighth Amendment's prohibition on cruel and unusual punishment preserves prisoners' right to basic safety. Prison officials violate this right when they fail to adequately protect prisoners from an unreasonable risk of serious harm, either by denying needed medical care or failing to comply with accepted protocols. Meanwhile, pre-trial and civil detainees, and prisoners awaiting sentencing or appeal, have a greater ability to seek release. Despite the fact that prisoners may face significant barriers in attempting to secure release through the courts, some federal prisoners—those who are elderly and/or have pre-existing conditions that place them at a higher risk of developing serious illness due to COVID-19—may be more likely to secure relief by asking a court for compassionate release.

Linked Fate: Justice and the Criminal Legal System During the COVID-19 Pandemic

Susan Sturm, George M. Jaffin Professor of Law and Social Responsibility, Columbia Law School;
Faiz Pirani, CLS '22, Hyun Kim, CLS '22, Natalie Behr, CLS '21, Zachary D. Hardwick, CLS '22

This essay is a companion to a report entitled
LEGAL AND SOCIAL RESOURCES FOR PEOPLE AFFECTED BY INCARCERATION, available at
https://change-center.law.columbia.edu/node/58

Introduction

The concept of "linked fate" has taken on new meaning in the face of the COVID-19 pandemic.[1] People all over the world—from every walk of life, spanning class, race, gender, and nationality—face a potentially deadly threat requiring cooperation and sacrifice. The plight of the most vulnerable among us affects the capacity of the larger community to cope with, recover, and learn from COVID-19's devastating impact. COVID-19 makes visible and urgent the need to embrace our linked fate, "develop a sense of commonality and shared circumstances,"[2] and unstick dysfunctional and inequitable political and legal systems.

Nowhere is the hazard of failing to recognize linked fate more urgent than in the criminal legal system. COVID-19 pandemic has hit people who live and work in correctional institutions particularly hard. The government bears legal and moral responsibility for people incarcerated in prisons, jails, and juvenile detention facilities, who cannot leave and must depend for their survival of the pandemic on the state. The movement in and out of correctional facilities by those employed to fulfill government's responsibility also ensures the spread of infection. One study,

---

[1] Michael C. Dawson, Behind the Mule: Race, Class and African American Politics. Princeton, NJ: Princeton University Press; 1994.

[2] Id.

for example, found that "increases in a county's jail incarceration rate were associated with significant increases in county rates of infectious disease deaths.[3] The collective failure to attend to the circumstances that enmesh people in the criminal legal system—poverty, racial discrimination, poor health and mental health care—also make prisons and jails a ground zero of the pandemic's spread.

COVID-19's spread shows the futility of efforts to treat incarceration as affecting only those behind the prison walls, or to avoid the government's responsibility for failure to take action. The imminent public health catastrophe—and the undeniable relationship between the health of incarcerated individuals and public health—has produced unlikely alliances and collective mobilization of community members, advocates, public health experts, academics, lawyers, and artists. These advocacy efforts have included some currently in public office, such as the Brooklyn and Manhattan District Attorneys and the Board of Correction of the City of New York. They have focused attention on convincing less responsive public officials to exercise their existing power to release people from institutions wherever possible, and to provide adequate safety precautions and treatment for those who will not be released. They also create the potential for learning from the pandemic about how to address the systemic failures that have contributed to mass incarceration.

These coalitions face the daunting challenge of garnering public and governmental support for a stigmatized group at a time of universal fear and seemingly scarce resources. Flawed and inequitable definitions of risk, sometimes based on discriminatory measures and offenses occurring decades ago, have fueled resistance to compassionate release from a subset of government officials. The punitive and dehumanizing impulse that produced mass incarceration is showing up in some public responses to the crisis. Some public officials have yet to respond to pleas for action to forestall disaster. Some have taken the position that supporting the health of people in prison and jail should take a back seat to the health concerns of more "worthy"

[3] Sandhya Kajeepeta & Seth J. Prins, Why Coronavirus in Jails Should Concern All of Us, The Appeal (March 24, 2020), at https://theappeal.org/coronavirus-jails-public-health/

citizens.[4] Some public responses have taken a more punitive tone, such as President Trump's refusal to allow people with a criminal record to receive benefits for their small businesses under the CARE act.[5] Given our linked fates, the larger community will pay the price along with the communities more directly tied to those who are incarcerated, if we continue this deliberate indifference.

Deliberate indifference is not the only obstacle to stepping up to the challenges accompanying COVID 19 in an era of mass incarceration. Byzantine, politically deadlocked, and fragmented bureaucracies have also hampered the governmental response. Reports suggest that some public officials have responded only after a death or spread of COVID-19 in their facilities. There is evidence that public officials have erected cumbersome processes for releasing people at high risk of serious illness or death, and that crucial health and safety measures within corrections institutions have not been implemented. There is also a dearth of information provided to incarcerated individuals and their family members, making it harder for them to take steps to minimize harm that might be within their control. There is much to be learned about the need to reimagine the criminal justice system from the government's inability to react nimbly and humanely when people's lives are so clearly on the line.

In the wake of governments' limited response, community based organizations, mutual aid societies, foundations, and other parts of civic society have stepped up their efforts to support communities affected by mass incarceration. This response has underscored the wisdom of the idea that "those closest to the problem are closest to the solution." Coalitions and community-based organizations populated by those who have experienced incarceration have emerged as

[4] Jacob Meisner, *Federal judge orders testing measures at Cook County Jail, but rejects request to order immediate releases due to coronavirus,* CHICAGO TRIBUNE, April 10, 2020, available at https://www.chicagotribune.com/coronavirus/ct-cook-county-jail-coronavirus-lawsuit-ruling-20200409-sjwieu2sujhwhacvulsuzwhc54-story.html

[5] SBA's bumpy guidance on criminal history requirements for stimulus loans, available at http://ccresourcecenter.org/2020/04/03/sbas-bumpy-guidance-on-criminal-history-requirements-for-stimulus-loans/

the bulwark of efforts to support people inside prisons and jails. These efforts, heroic though they may be, cannot substitute for an effective, humane, and just governmental response.

These perspectives about the paradox of linked fate alongside deliberate indifference emerged as part of the process of assembling the legal and social resources available to support incarcerated individuals and their families and communities during the COVID-19 crisis. The authors of this essay—faculty and students at Columbia Law School—undertook to gather and update the resources available online, in an effort to fill a perceived need for a resource targeting current and formerly incarcerated people with urgent and immediate needs, along with those in a position to advocate for them. That complete resource is available on the website of the Center for Institutional and Social Change: https://change-center.law.columbia.edu/content/covid-19-legal-and-social-resources-people-affected-incarceration.

The remainder of this essay shares highlights from that Report, which includes legal and social resources concerning: (1) release of people currently incarcerated or threatened with incarceration, (2) health and safety resources for people in and after incarceration, (3) benefits and the social safety net, and (4) domestic violence.

We quickly learned that, to be concretely useful, the resource would have to focus on the local community—the legal and social resources available in New York City—and at the same time, convey information linking those local actors with statewide and national mobilization. We also learned that, to be effective in stemming the impact of the pandemic, efforts to support the community affected by incarceration had to extend beyond the remedy of release. People coming home required a place to live, health and mental health resources, means to support themselves, and protection from domestic violence. Our hope is that the information provided here will increase understanding of how the fate of the larger community is bound up with how we respond to the public health nightmare unfolding in prisons, jails, and juvenile detention facilities.

Understanding the extent of the public health crisis in corrections institutions

A growing group of individuals and organizations have been compiling information and resources related to the impact of COVID-19 on incarcerated individuals. Much of that information has focused on efforts to influence public officials to release people from prisons and jails, and avoid incarceration in the first place. That information, summarized below and more fully in the companion online Report, builds the case for demanding that public officials take necessary action to avoid a public health disaster. It will also lay the foundation for longer term efforts to build a more humane, equitable, and just criminal legal system.

The COVID-19 crisis poses an imminent risk of serious illness or death for people incarcerated or working in correctional facilities. According to data gathered by the Legal Aid Society, "the infection rate at local jails is more than seven times higher than the rate citywide and 87 times higher than the country at large." Based on this analysis, "New York City's jails have become the epicenter of COVID-19." Federal prisons and prisons across the country are reporting exponential increases in rates of infection among incarcerated individuals and employees working in these institutions. High rates of infection in New York City's jails are a bellwether for other corrections facilities.

Prisons and jails "contain high concentrations of people in close proximity and are breeding grounds for uncontrolled transmission [of infection." This situation puts anyone who is currently incarcerated at a heightened risk of exposure. Moreover, many incarcerated people are elderly and have chronic health conditions that put them at an increased risk of serious illness or death from COVID-19. Inadequate health care in jails and prisons compounds these risks even further. According to a report issued by the Osborne Association, New York alone has 10,337 incarcerated older people and is among five states in the union with an incarcerated older population in excess of 10,000 people, including Texas (28,502), California (27,806), Florida (21,620), and Pennsylvania (10,214). According to data from the Marshall Project, in 2016 nearly 150,000 people incarcerated in state facilities were 55 or older. Similarly, 11 percent of the federal prison

population—more than 20,000 people—is 56 or older. A letter on behalf of Federal Defenders reports approximately 10,000 individuals over the age of 60 presently in federal custody, with one third of all individuals in federal custody exhibiting preexisting conditions. Additionally, jails and prisons often have a higher prevalence of underlying health conditions than the non-incarcerated population, as shown by the chart below:

<table>
<tr><th rowspan="2">Health condition</th><th colspan="4">Prevalence of health condition by population</th></tr>
<tr><th>Jails</th><th>State prisons</th><th>Federal prisons</th><th>United States</th></tr>
<tr><td>Ever tested positive for Tuberculosis</td><td>2.5%</td><td colspan="2">6.0%</td><td>0.5%</td></tr>
<tr><td>Asthma</td><td>20.1%</td><td colspan="2">14.9%</td><td>10.2%</td></tr>
<tr><td>Cigarette smoking</td><td>n/a</td><td>64.7%</td><td>45.2%</td><td>21.2%</td></tr>
<tr><td>HIV positive</td><td>1.3%</td><td colspan="2">1.3%</td><td>0.4%</td></tr>
<tr><td>High blood pressure/hypertension</td><td>30.2%</td><td colspan="2">26.3%</td><td>18.1%</td></tr>
<tr><td>Diabetes/high blood sugar</td><td>7.2%</td><td colspan="2">9.0%</td><td>6.5%</td></tr>
<tr><td>Heart-related problems</td><td>10.4%</td><td colspan="2">9.8%</td><td>2.9%</td></tr>
<tr><td>Pregnancy</td><td>5.0%</td><td>4.0%</td><td>3.0%</td><td>3.9%</td></tr>
</table>

Source: Prison Policy Initiative

While there are ways to reduce the risk of COVID-19 exposure, much of the recommended hygienic and protective equipment is unavailable or difficult to obtain for those who are currently incarcerated. Reports indicate a shortage of toilet paper as well as a lack of alcohol wipes, hand sanitizer, and soap in jails and prisons. According to the CDC, "many facilities restrict access to soap and paper towels and prohibit alcohol-based hand sanitizer and many disinfectants." Additionally, protective measures like social distancing and self-quarantining are difficult or impossible to follow while incarcerated.

The public health crisis in corrections institutions is both predictable and lethal, leading the Board of Corrections and chief medical officers to beg city and state officials to release as many vulnerable inmates as possible. Prominent public officials have called prisons and jails "death traps," "petri dishes," "ticking time bombs" and "death sentences." March 28, 2020, marked a grim milestone. Patrick Estell Jones, 49, became the first individual in BOP custody to die of COVID-19. He was serving a sentence in a low-security facility for a non-violent crack cocaine

offense. April 5 marked the first COVID-19 related death of a person incarcerated in a New York City jail—a person who was held on a parole violation for which the Legal Aid Society had requested immediate release.

Advocacy and avenues for redress

The exigencies of this situation require public officials to respond with uncharacteristic speed, decisiveness, and humanity under conditions of uncertainty. Correctional institutions, public officials, advocates, and community based organizations must respond quickly and courageously if they are to minimize the devastating impact of COVID-19 on individuals, families, and communities affected by incarceration.

A remarkable coalition of advocates, public health experts, religious leaders, academics, artists, and public officials has emerged. They are marshaling data, scientific evidence, and personal stories to pressure public officials to head off a disaster of catastrophic proportion. Public defender offices, prosecutors, and other legal service and advocacy groups have been pushing for the release of large numbers of incarcerated individuals, especially those who are older and have pre-existing medical conditions. They are also advocating for immediate action to provide greater protection and access to health care for those who contract COVID-19 while incarcerated.

Advocates, community leaders, public health experts, and many public officials have called for immediate action to reduce the spread of the virus to those who are incarcerated and their families, to those who work in correctional and detention facilities, and to the community at large. Vendors, staff, corrections health care workers, and corrections officers coming into and leaving the facilities face considerable risks of infection themselves, and of spreading the infection to others they come in contact with outside the facilities. People released from incarceration are more likely to be homeless or housed in shelters or transitional facilities that themselves pose serious risks of infection.

Legal remedies for reducing incarceration are key, many falling within the discretion of executive officials and judges. The United States Attorney General has the authority, under the CARES Act, to allow the Bureau of Prisons “to transfer many more people to the relative safety of home confinement.”[6] Corrections Commissioners have the power to remove incarcerated individuals from their place of confinement in case of contagious disease.[7] Courts have the power to (1) order the release of anyone who does not present a greater danger to themselves or others than they would if they were infected,[8] and (2) radically decrease the number of people being sent into incarceration who don’t require immediate confinement. They can also intervene by enforcing the Eighth Amendment prohibition against cruel and unusual punishment.[9] Prosecutors can exercise their power by not seeking incarceration of people who do not present an imminent threat. Governors and mayors can exercise their power to grant release or clemency.[10]

Although some public officials have taken steps to respond to the crisis in time to minimize these extreme harms, many have yet to take the steps necessary to avoid irreparable harm to individuals and families, including death.

---

[6] The United States Attorney General has the authority, under the CARES Act, See H.R. 748 § 6002 at Div. B, Tit. II, Sec. 12003(b)(2), to allow the Bureau of Prisons “to transfer many more people to the relative safety of home confinement.”

[7] N.Y. Correct. Law § 141 provides the Commissioner of DOCCS with the authority to temporarily remove incarcerated persons from their place of confinement "[i]n case any pestilence or contagious disease shall break out among the inmates in any of the correctional facilities, or in the vicinity of such facilities.”

[8] A federal court may modify a person’s sentence because of “extraordinary and compelling reasons,” under a statutory provision known colloquially as “compassionate release.” 18 U.S.C. sec. 3582(c)(1)(A)(i).

[9] For an overview of Eighth Amendment jurisprudence relating to the failure to provide medical care or release people in imminent danger, *see* Gregory Bernstein et al, *COVID-19 and Prisoners’ Rights,* this volume.

[10] The Constitution of the State of New York vests the governor with authority “to grant reprieves, commutations and pardons after conviction, for all offenses except treason and cases of impeachment, upon such conditions and with such restrictions and limitations, as he or she may think proper, subject to such regulations as may be provided by law relative to the manner of applying for pardons.” N.Y. Const. art. IV, § 4. A Report by https://www.law.nyu.edu/sites/default/files/Reprieve%20Power%20%28to%20post%29%20.pdf

Social and economic supports during and after incarceration

In addition to those legal remedies, services and supports are necessary for people when they do get released from prison. People impacted by the criminal justice system—including individuals who have experienced incarceration and their families—require tailored support to meet their unique challenges.

Coming home after decades behind bars is always disorienting. But for the people being released in the time of coronavirus, the experience is particularly jarring—trading the fear of getting sick in captivity for a curtailed, isolated kind of freedom. Nonprofits and social service agencies that support them are overwhelmed, short-staffed or moving most of their programs online. Family members they've waited years to reunite with are huddled at home. Food service and other industries that might hire a formerly incarcerated applicant have been decimated. And many small, everyday liberties are now a public health risk.

Non-profit organizations supporting people upon reentry now play a critical role in providing this kind of assistance. After release, individuals need access to information that they trust about COVID-19 and the protective measures minimizing its spread. They need a safe place where they can be sheltered, consistent with the requirements of their release. They need medical support, benefits, and services to sustain themselves, and to avoid spread of the infection. They need resources enabling them to survive.

Many nonprofit organizations continue providing services despite the COVID-19 interruption, sometimes as the only organizations in a position to provide any direct support in the community. Community re-entry and support organizations operate on the frontlines of supporting the formerly incarcerated population transition back into society. These organizations serve as a lifeline to services and information for people after release, and have been hard at work during the pandemic to continue serving both current and new clients. Although many are

struggling with limited resources and mobility, they continue to provide crucial day-to-day support for people who have experienced incarceration, as well as leadership in advocating for policy change.

The crisis has led government agencies to substitute online or telephone interactions for in-person interactions. To cope with the crisis, agencies are using methods to maintain access to benefits or meet community supervision requirements that do not require people to come into the office, and that could hold promise as a way to minimize the negative impact of bureaucratic requirements on people's ability to pursue employment and education. Reentry organizations, advocacy groups, public health sources, law schools, public agencies, and other sources also must rely on on-line communication, counseling, and provision of public resources. As a result, those who do not have access to the internet are likely to struggle even further to obtain the resources they need to survive.

Institutions charged with providing the social safety net, both public and private, are straining to respond to the increased demand. The current patchwork of legal and social responses and the reliance on an under-funded network of nonprofit advocacy groups and service providers. In addition, some social supports provided to help people cope with the financial hardships of COVID-19 have specifically excluded people with criminal records.

The COVID-19 crisis thus highlights the inadequacy of the social safety net, the need for greater levels of funding and support for these services, and better coordination between government, communities, and the public and private sector. Organizations and coalitions with "inside-out" leadership by people who have experienced incarceration play a crucial role in providing information, knowledge, and ability to respond quickly and effectively to urgent needs. Hopefully the mobilization of concern and response needed to address the COVID-19 crisis will be sustained after the direct crisis has subsided, and will lay the foundation for more fundamental systemic change needed to address the inequities and injustices that are contributing to the devastating impact of COVID-19.

Immigration in the Time of COVID-19

Shoba Sivaprasad Wadhia, Samuel Weiss Faculty Scholar & Clinical Professor of Law; Founding Director, Center for Immigrants' Rights Clinic, Penn State Law in University Park [1]

Current as of April 8

The Coronavirus outbreak has impacted the U.S. legal system in profound ways and immigration is no exception. Congress wrote a statute called the Immigration and Nationality Act, which outlines the primary categories in which a person can seek admission to the United States, the reasons a person might be deported, or the bases for applying for relief from the government. Congress delegated much of the administration of immigration law to federal agencies. Three federal agencies that play a significant role in making decisions affecting immigration are the Department of Homeland Security (DHS), Department of Justice (DOJ), and Department of State (DOS).[2] These same agencies have played a pivotal role in making or revising immigration policy in the time of COVID-19.

DHS. DHS is an agency created in the wake of September 11, 2001, and effective March 1, 2003. DHS houses important immigration agencies in the realms of services and enforcement. In the wake of COVID-19, DHS has used social media or electronic means to communicate office closures and changes for the immigrants they serve and the attorneys who represent them. In the time of COVID-19, it is crucial that DHS maximize its use of prosecutorial discretion for vulnerable immigrants. Prosecutorial discretion is a powerful sword and a vital part of the immigration system. Because of limited resources, DHS has historically set priorities for whom it

[1]* Mother of two kids going to remote school with little supervision. Author of 'Beyond Deportation: The Role of Prosecutorial Discretion in Immigration Cases' (NYU Press) and 'Banned: Immigration Enforcement in the Time of Trump' (NYU Press). This contribution builds upon piece that appeared in the blog of NYU Press: Shoba Sivaprasad Wadhia, *The Trump Administration Has Prosecutorial Discretion in Immigration Matters During COVID-19, They Should Use it*, NYU PRESS BLOG (Mar. 27, 2020), https://www.fromthesquare.org/prosecutorial-discretion-during-covid-19/#.XoZATIhKhPY. The author thanks Kaitlyn Box ('20) for her research assistance for this paper.

[2] Megan Davy, Deborah W. Meyers, and Jeanne Batalova, *Who Does What in U.S. Immigration*, MIGRATION POL'Y INST. (Dec. 1, 2005), https://www.migrationpolicy.org/article/who-does-what-us-immigration.

will target for immigration enforcement and whom it will leave alone.[3] Humanitarian factors and events that include long term residence in the United States, natural disasters, seriously ill children, and survivors of sexual assault are among the reasons DHS has used discretion to protect people without an immigration status.[4]

USCIS. U.S. Citizenship and Immigration Services (USCIS) is a hub in DHS handling immigration benefits and applications that include asylum, Deferred Action for Childhood Arrivals (DACA), and green cards. Due to COVID-19, USCIS suspended in-person services like marriage-based green card interviews and affirmative asylum interviews, with current plans to reopen offices on May 4, 2020.[5]

USCIS also announced that it would extend the deadlines by 60 days for attorneys and immigrants to provide responses to requests for more evidence or notices to deny, revoke, or terminate a benefit for requests dated March 1, 2020, through May 1, 2020.[6] In the wake of COVID-19, USCIS also announced that it would use previously submitted "biometrics" (fingerprints) for people who applied to extend their work authorization but are unable to go to a regularly scheduled fingerprint appointment due to office closures. This will make a huge difference for noncitizens who are employed in the United States and dependent on having work authorization.[7] Notably, 27,000 people with DACA work in the healthcare industry, are in the frontlines during this pandemic, and are dependent on these work permits.[8] USCIS has made steps in the right direction, but there is so much more it can do.

---

[3] Memorandum from Jeh Charles Johnson, Sec'y of the Dep't. Homeland Security to Thomas S. Winkowski, Acting Director, U.S. Citizenship and Immigration Servs., R. Gil Kerlikowske, Commissioner, U.S. Customs and Border Protection, Leon Rodriguez, Director, U.S. Citizenship and Immigration Servs., and Alan D. Bersin, Acting Assistant Sec'y for Pol'y (Nov. 20, 2014), https://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf.

[4] SHOBA SIVAPRASAD WADHIA, BEYOND DEPORTATION: THE ROLE OF PROSECUTORIAL DISCRETION IN IMMIGRATION CASES (2015).

[5] *USCIS Response to Coronavirus 2019 (COVID-19)*, U.S. CITIZENSHIP AND IMMIGRATION SERVS. (Apr. 1, 2020), https://www.uscis.gov/about-us/uscis-response-coronavirus-2019-covid-19.

[6] *Id.*

[7] *Id*.

[8] Adam Liptak, *Dreamers' Tell Supreme Court Ending DACA During Pandemic Would Be 'Catastrophic'*, N.Y. TIMES (Mar. 27, 2020), https://www.nytimes.com/2020/03/27/us/dreamers-supreme-court-daca.html.

On April 3, 2020, the immigration bar association known as the American Immigration Lawyers Association (AILA) filed a lawsuit in the federal district court for the District of Columbia challenging the inaction by USCIS as a violation of administrative law and procedural due process.[9] The complaint argues in part: "Defendants' decision not to toll deadlines, expiration dates, and otherwise hold time-sensitive applications and communication in abeyance during the COVID-19 national emergency is wholly irrational and damaging to the safety of Plaintiff's members, their staff, and their clients, and possibly USCIS employees as well."[10] In the lawsuit, AILA requested that the Court order USCIS to recognize the global pandemic as an "extraordinary circumstance" and to toll the deadlines for immigration benefits and requests in its jurisdiction.[11]

Now is the most critical time for USCIS to use their discretion to automatically extend status, postpone deadlines, or automatically renew benefits. Since the outbreak of COVID-19, this author has interacted with dozens of people residing in the United States with a temporary immigration status who are afraid of the future and of their ability to preserve their legal status. Meanwhile, DACA recipients with pending renewals are unsure about receiving a timely decision or losing the jobs that support them or their families. USCIS should also renew or grant those requesting deferred action protection outside of DACA. Last September, this author testified before Congress, along with several brave patients and advocates to highlight the history of deferred action and the way it serves as a life-saving form of protection.[12]

ICE. Immigration and Customs Enforcement (ICE) is an arm of DHS with the responsibility to arrest, detain, and deport immigrants from the United States. Early memos from the Trump administration created the possibility that any person with a criminal history, arrest, plausible crime, or removal order would be a priority for removal.[13] In the wake of COVID-19, ICE scaled

---

[9] *AILA Files Complaint Seeking Maintenance of Status, Extended Deadlines from USCIS*, AM. IMMIGRATION LAW. ASS'N (Apr. 3, 2020), https://www.aila.org/infonet/aila-files-complaint-seeking-maintenance-of-status.
[10] *Id*.
[11] *Id*., at 28.
[12] *Hearing on The Administration's Apparent Revocation of Medical Deferred Action for Critically Ill Children*, 116th Cong. (2019) (testimony of Shoba Sivaprasad Wadhia, Clinical Professor of Law and Director, Center for Immigrants' Rights Clinic, Penn State Law).
[13] Exec. Order No. 13,768, 82 Fed. Reg. 8799 (Jan. 25, 2017).

back by issuing a directive that ICE will refrain from taking immigration enforcement actions again noncitizens except for those who are a risk to public safety or are subject to mandatory detention for criminal reasons.[14] ICE has also stated that it will not conduct enforcement at medical facilities, including hospitals, except under "extraordinary circumstances."[15] So much more will be needed to ensure that immigrants feel safe to come forward to request medical help or be confident that ICE will in fact implement this new enforcement directive. How will the immigrant community and in particular those living in undocumented or mixed status families shift their perspective from one that fears ICE to one that trusts them? This kind of shift will require something more than a website publication announcing policy changes.

ICE also has prosecutorial discretion about whether to release or detain immigrants who are incarcerated. Yet ICE continues to keep immigrants in detention even when health and safety are at risk. Further, the continued detention of immigrants appears to violate ICE's own recent policy to limit immigration enforcement to only those who pose a public safety risk or subject to mandatory detention on criminal grounds. The most recently available data indicates that in March 2020, 61.2% of the roughly 35,000 immigrants in detention had no criminal conviction.[16] In pointing out this contradiction, the author does not suggest (or support) incarcerating immigrants with criminal convictions during a global pandemic.

As of April 8, 2020, ICE has reported 74 confirmed cases of COVID-19 among ICE employees and 32 confirmed cases of COVID-19 among immigration detainees, five of whom include immigrants held in Pike County Jail.[17] Pike County Jail is one of several facilities in Pennsylvania (where I am based) that contracts with ICE to incarcerate immigrants. The discovery of ICE staff and detainees testing positive for the novel COVID-19 virus should be more than a wake-up call that ICE must

---

[14] *ICE Guidance on COVID-19*, U.S. CUSTOMS AND IMMIGRATION ENFORCEMENT (Apr. 7, 2020), https://www.ice.gov/coronavirus.
[15] *Id.*
[16] TRAC Immigration. *Decline in ICE Detainees with Criminal Records Could Shape Agency's Response to COVID-19 Pandemic,* (Apr. 3, 2020) https://trac.syr.edu/immigration/reports/601/
[17] *Id*.

use its discretion to release, especially in cases where individuals and families do not pose public safety risks.[18]

In addition to the continued detention of adult immigrants in Pennsylvania and across the country is the choice by ICE to continue detaining families. Berks County Residential Center (Berks) is a family detention center based in Leesport, PA, and one of three in the country. Despite the issuance of a "stay at home" order by Pennsylvania Governor Tom Wolf, Berks continues to detain babies, children, and parents who should be released. Keeping immigrants in detention even when their health and safety are at risk is an abuse of discretion and, according to several lawsuits filed around the country demanding release of individuals, violates federal statutes and the U.S. Constitution.

Though several immigration detainees have been released as a result of these lawsuits, there has not been uniform effort by the administration to release immigration detainees despite ICE's discretionary authority to release.[19] Said Bridget Cambria, immigration attorney and Executive Director of ALDEA- The People's Justice Center in Reading, PA whose organization is in the trenches representing detained immigrants in Pennsylvania, "Anything short of immediately releasing every person detained in ICE custody at this point is irresponsible and will result in the deaths of people who are in civil custody."[20]

CBP. Customs and Border Protection (CBP) is another leg of DHS. They are responsible for arrests at the border, "short term" detentions, and decisions on admission along with other responsibilities. CBP plays a role in facilitating a new policy to shut down non-essential travel at

---

[18] *Id*.

[19] Kim Langona, *Ongoing Litigation Over Migrants' Release Amid COVID-19*, crImmigration (Apr. 3, 2020, 11:40 AM), http://crimmigration.com/2020/04/03/ongoing-litigation-over-migrants-release-amid-covid-19/; *See also, Thakker, et al., v Doll, et al.* https://www.aclupa.org/en/cases/thakker-et-al-v-doll-et-al; *Hope, et al., v. Doll, et al.* https://www.aclupa.org/en/cases/hope-et-al-v-doll-et-al

[20] Jeff Gammage, *Five migrants test positive for COVID-19 in ICE detention centers in Penn*sylvania, Philadelphia Inquirer (Apr. 4, 2020)

the southern and northern borders of the United States.[21] These changes have been compounded by new rules issued by the Center for Disease Control to return any person who "introduces" themselves at the border without permission or valid documents. The implications are significant and may in fact violate other statutes such as the Refugee Act of 1980. Beyond the statutes, CBP has the prosecutorial discretion to allow the entry of individuals on the micro level or implement policies at the macro level that protect immigrants and public health.[22] CBP can choose to place people in regular removal proceedings without subjecting them to speedy removal such as "expedited removal" or dangerous new inventions (a discretionary choice) like "Migration Protection Protocols" (MPP), where asylum seekers are forced to wait in Mexico pending their removal hearings.

DOJ. The Department of Justice (DOJ) is an agency with an important role in immigration matters. A hub in DOJ called the Executive Office for Immigration Review (EOIR) houses more than 60 courts and employs nearly 400 immigration judges across the country.[23] Immigration judges hold a variety of hearings, the most common of which are called "removal proceedings."[24] For example a person charged under the immigration statute for overstaying a tourist visa or committing certain crimes might be placed in removal proceedings and be scheduled to go before an immigration judge in the EOIR. In the wake of COVID-19, EOIR has delayed non-detained hearings as well as MPP hearings through May 1, 2020.[25] Further, EOIR has set up temporary email accounts for the immigration courts nationwide and the appellate unit known as the Board of Immigration Appeals (BIA) to facilitate electronic filing due to COVID-19.[26]

---

[21] *Fact Sheet: DHS Measures on the Border to Limit the Further Spread of Coronavirus*, U.S. DEP'T. HOMELAND SECURITY (Mar. 23, 2020), https://www.dhs.gov/news/2020/03/23/fact-sheet-dhs-measures-border-limit-further-spread-coronavirus.

[22] Shoba Sivaprasad Wadhia, *The Role of Prosecutorial Discretion in Immigration Law*, 9 CONN. PUB. L. J. 243 (2010).

[23] *Office of the Chief Immigration Judge*, U.S. DEP'T. JUST. (Jan. 21, 2020), https://www.justice.gov/eoir/office-of-the-chief-immigration-judge.

[24] I.N.A. § 240; *see also Statistics Yearbook: Fiscal Year 2018*, U.S. DEP'T. JUST, EXEC. OFF. IMMIGRATION REV., https://www.justice.gov/eoir/file/1198896/download.

[25] *Office of the Chief Immigration Judge*, U.S. DEP'T. JUST. (Jan. 21, 2020), https://www.justice.gov/eoir/office-of-the-chief-immigration-judge.

[26] U.S. DEP'T. JUST, EXEC. OFF. IMMIGRATION REV., *EOIR OPERATIONAL STATUS DURING CORONAVIRUS PANDEMIC,* https://www.justice.gov/eoir/eoir-operational-status-during-coronavirus-pandemic

Many immigration detainees are scheduled for hearings before immigration judges. As of this writing, DOJ has continued to hold these hearings, placing a variety of players at risk: immigration judges, court staff, detained immigrants, ICE trial attorneys (who represent the government in removal proceedings), and immigration attorneys. Immigration attorneys, prosecutors and immigration judges have been unified in their demand that DOJ close the immigration courts.[27] Said one immigration judge "I don't say this lightly, but EOIR has demonstrated that they need to be gutted and rebuilt from the ashes. I've never witnessed an utter lack of concern for people like I have here. In my former life, we treated captured Taliban and ISIS with more humanity. Moreover, I've never seen worse leadership. A crisis usually brings good and bad to the light. We have seen nothing but darkness."[28] On April 7, 2020, immigration advocacy organizations filed an emergency motion demanding that DOJ pause in-person hearings for immigration detainees and allow hearings to proceed remotely.[29]

DOS. Department of State is responsible for issuing visas to foreign nationals seeking admission into the United States. DOS officers work at U.S. embassies and consulates around the world.[30] On March 20, 2020, DOS suspended routine visa services around the world.[31] This suspension will have profound effects on the ability of green card holders to obtain a visa and enter the United States based on a qualifying relationship to a family member or employer. The visa suspension also affects the ability of scores of foreign nationals to enter the United States temporarily. This applies to students, scholars, exchange visitors, tourists, and those traveling for business reasons. Of note, DOS has carved out an exception for medical professionals seeking

---

[27] *Immigration Judges, Prosecutors, and Attorneys Call for the Nationwide Closure of All Immigration Courts*, AM. IMMIGRATION LAW. ASS'N (Mar. 15, 2020), https://www.aila.org/advo-media/aila-correspondence/2020/ijs-prosecutors-and-attorneys-call-for-nationwid.

[28] Communication to NAIJ [National Association of Immigration Judges] from Immigration Judge (Name Withheld), (March. 30, 2020)

[29] *Temporary Restraining Order Requested to Stop Dangerous EOIR and ICE Policies During the COVID-19 Pandemic*, NATIONAL IMMIGRATION PROJECT ET AL., (Apr. 8, 2020), https://nipnlg.org/pr/2020_08Apr_nipnlg-v-eoir-tro.html

[30] *About Us – Bureau of Consular Affairs*, U.S. DEP'T. ST., https://www.state.gov/about-us-bureau-of-consular-affairs/.

[31] *Suspension of Routine Visa Services*, U.S. DEP'T. ST., BUREAU OF CONSULAR AFF. (Mar. 20, 2020), https://travel.state.gov/content/travel/en/News/visas-news/suspension-of-routine-visa-services.html.

admission to the United States based on approved immigration petitions, advising such foreign nationals to check with their closest embassy or consulate to request an emergency visa appointment.[32]

DOS has also delivered information about presidential proclamations[33] restricting entry to certain individuals who were physically present in China, Iran, the Schengen Area, the United Kingdom, or Ireland.[34] U.S. citizens and lawful permanent residents (green card holders) are among those exempt from the entry restrictions.

Conclusion. The COVID-19 pandemic has had a huge impact on the immigration system. Many of the changes have been implemented by agencies in the executive branch. Moving forward, agencies must make decisions that prioritize the health and safety of government employees, noncitizens, and immigration attorneys while preserving fairness and due process.

---

[32] *Update for Visas for Medical Professionals,* U.S. DEP'T. ST., U.S. Visas News, (Apr. 8, 2020), https://travel.state.gov/content/travel/en/News/visas-news/update-on-h-and-j-visas-for-medical-professionals.html

[33] Proclamation No. 9984, 85 Fed. Reg. 6,709 (Jan. 31, 2020); Proclamation No. 9992, 85 Fed. Reg. 12,855 (Feb. 29, 2020); Proclamation No. 9993 (Mar. 11, 2020); Proclamation No. 9996, 85 Fed. Reg. 15,341 (Mar. 14, 2020); *see also Presidential Proclamation on Novel Coronavirus*, U.S. DEP'T. ST., BUREAU OF CONSULAR AFF., https://travel.state.gov/content/travel/en/traveladvisories/ea/Presidential-Proclamation-Coronavirus.html.

[34] *Presidential Proclamation on Novel Coronavirus,* U.S. DEP'T. ST., BUREAU OF CONSULAR AFF., https://travel.state.gov/content/travel/en/traveladvisories/ea/Presidential-Proclamation-Coronavirus.html

COVID-19 and the Law: Elections

Richard Briffault, Joseph P. Chamberlain Professor of Legislation, Columbia Law School

I. Introduction

With one Supreme Court decision, lower federal and state court decisions, pending litigation, and proposals around the country for major changes in how elections are conducted, COVID-19 has already had and likely will continue to have a significant impact on election law.

The discussion that follows proceeds in two parts. The first addresses the initial consequences of COVID-19 as an electoral emergency. Voters were due to go to the polls in states around the country just as the pandemic was gathering force and governors and mayors were calling on people to stay at home and avoid large gatherings – which, of course, often occur at crowded polling places during contested elections. Although many states managed to move their late March and April elections to May, June, or later without incident, heated political and legal battles broke out in Ohio and Wisconsin over changing election dates and formats, with the Wisconsin dispute winding up in both the state and United States Supreme Courts the day before the election, and Wisconsin conducting an in-person election in the middle of a pandemic.

The second part looks beyond the immediate effects of COVID-19 to the middle term, that is, to the host of changes to election laws that will be needed for the November 2020 election if, due to the pandemic, large gatherings remain a public health threat. Some form of primarily vote-by-mail system will be needed, but such a system is currently in place only in five states, and those states took several election cycles to make the transition from traditional polling-place voting. Indeed, right now, one-third of the states permit only voters with one of a limited number of excuses specified in the states' statutes to obtain a mail-in ballot. Widespread changes in voting laws will be necessary if the November elections are to be safe, fair, and secure. Yet,

partisan opposition encouraged by President Trump's error-filled misstatements about voting-by-mail[1] makes it unclear whether these changes will be made.

II. COVID-19 as Election Emergency

COVID-19 first became a factor in the 2020 elections on March 17, when four major states – Arizona, Florida, Illinois, and Ohio – were set to hold their presidential primaries and other elections. Voting went ahead in the first three states, although the process was troubled in many places by the failure of poll workers – many of whom are over sixty – to report for duty, the resulting last-minute closure of some polling places, and the shortage of hand sanitizer and wipes for the voting machines.[2] In Arizona and Florida – states with previously high levels of voting by mail and early in-person voting – overall turnout was strong even though there were fewer in-person voters than in the 2016 primaries. Turnout was considerably lower in Illinois, where most voters vote in person on election day and, due to COVID-19 anxieties, many were unable or unwilling to do so.

The situation in Ohio was more complicated. On March 16, Governor DeWine announced at a press conference that it was unsafe to hold the election scheduled for the following day. Although he said he lacked the authority to reschedule the election, he anticipated (and would not contest) a private lawsuit claiming that requiring voters at risk of coronavirus to come to the polls is unconstitutional and seeking a postponement of the election. However, later that day, the Franklin County Court of Common Pleas rejected the suit, finding that it would set a "terrible precedent" to postpone an election 12 hours before polling places were scheduled to open.[3] Then, just when it looked like the election would be held as scheduled, the Director of the Ohio Department of Health, presumably acting at the behest of the governor, issued an order closing

---

[1] https://www.nytimes.com/article/mail-in-voting-explained.html?searchResultPosition=1

[2] https://www.washingtonpost.com/politics/shuttered-polling-places-and-a-dearth-of-cleaning-supplies-voters-confront-pandemic-fueled-confusion-at-the-polls/2020/03/17/55dba1f6-685f-11ea-b313-df458622c2cc_story.html

[3] https://thehill.com/homenews/campaign/487929-judge-refuses-to-reschedule-ohio-primary-amid-coronavirus-fears

all polling places on health grounds. The Secretary of State – the state's chief elections officer – followed up with another order rescheduling in-person voting for the 2020 primaries for June 2, 2020; allowing absentee balloting to continue until then; and extending the deadlines for requesting absentee ballots, counting them, canvassing them, and certifying election results.

The secretary most likely lacked the statutory authority to do any of this, and suits were filed challenging his action. On March 21, he sent a letter to the legislature requesting that it set a June 2 primary, allow in-person voting on that day, but also facilitate vote-by-mail by providing that every registered voter be mailed a postage-paid absentee ballot application. He explained that under current public health conditions it would be logistically impossible for election officials to handle the anticipated surge in requests for mail-in ballots any earlier. The Ohio legislature, however, ignored the Secretary's request – which had been supported by Ohio's local election officials -- and on March 25 voted to re-set the primary as a nearly all vote-by-mail election for April 28. The governor signed the new law into effect on March 27, but a collection of civil and voting rights groups immediately brought suit challenging the new law. The plaintiffs contended that the law's "cumbersome, multi-step process for voting by mail" – which requires millions of voters to obtain an absentee ballot application, and then complete and submit it; election officials to review and approve the application, and mail the ballot to the voter; and have the voter receive, complete and return the ballot within a month – would inevitably result in many voters being denied the ability to participate in the election.

On April 3, the federal district court for the Southern District of Ohio rejected the suit. Judge Watson acknowledged that "the compressed timeframe for the completion of absentee voting does pose a burden on voters," but concluded that the state's interest in making sure the voting process was resolved in time to have delegates selected for the national party conventions justified the earlier deadline. Nor did the state have to simplify the vote-by-mail process to make it easier for voters to use. "Given the upheaval that the change to the voting process has already created, the Court agrees that the State has a strong interest in minimizing disorder and easing the burdens on county boards of elections. By permitting the boards of elections to continue to use the absentee-balloting system already in place and changing only the deadline for accepting those ballots, H.B. 197 furthers that interest.." In short, Judge Watson concluded "the

Constitution does not require the best plan, just a lawful one," and the legislature's plan crossed that low bar.[4]

If Ohio's response to COVID-19 was messy, Wisconsin's was a train-wreck. On April 7, Wisconsin was scheduled to hold its spring election, which included a presidential primary, a hotly-contested partisan race for the state supreme court, elections for three seats on the state court of appeals, one statewide and more than one hundred local referenda, and close to three thousand elections for lower court, county, town, village, and school district board positions. On March 12, Governor Evers declared a public health emergency in the state; on March 25 he issued a stay-at-home order, and on April 4, FEMA issued a major disaster declaration for the entire State of Wisconsin as a result of the COVID-19 pandemic. The governor, however, initially declined to postpone the election, explaining that he lacked the authority to do so, and called on the legislature to adopt universal vote-by-mail. At that point, there had already been an unprecedented level of requests for mail-in ballots – nearly five times the level in 2016, and state election officials were having difficulty coping with the demand.

On April 2, a federal judge in the Western District of Wisconsin responded to suits brought by the national and state Democratic parties, voting rights groups, and individual voters by issuing an order modifying Wisconsin's election law to deal with the surge in demand for mail-in ballots. Specifically, Judge Conley found that due to the backlog in processing ballot requests, it was likely that thousands of voters would not get their ballots in time to have them returned to election offices by 8 pm on Election Day, and so he ordered that ballots be accepted if received up to six days later. In addition, he declined to add a requirement that the ballots be postmarked on Election Day; a ballot would be counted if received by the new deadline, April 13, even if mailed after Election Day. He also extended by one day the deadline for the receipt of absentee ballot applications, and eased the requirement that the ballot be witnessed. The court, however,

[4] League of Women Voters v. LaRose, (E.D. Ohio) (Watson., J.), Case: 2:20-cv-01638-MHW-EPD Doc #: 57 Filed: 04/03/20.

declined to postpone the election, or to modify the state's photo ID requirement.[5] The national and state Republican parties immediately moved to block the court's order.

On Friday, April 3, the governor called the legislature into special session to adopt universal vote-by-mail for the election. The legislature met on Saturday, April 4, and without debate or discussion immediately adjourned.[6] On Monday, April 6, with conditions in Wisconsin worsening – due to a lack of poll workers, Milwaukee had reduced the number of polling places from 181 to 5, and Green Bay had consolidated its polling places from 31 to 2 – the governor, relying on his constitutional authority as chief executive and a statute authorizing him to take such action in an emergency as "he or she deems necessary for the security of persons and property," issued an executive order suspending the April 7 election until June 9, authorizing voters to continue to apply for and return absentee ballots until the election, and calling the legislature back into session.[7] The Republican-led state legislature promptly sued in the state supreme court to block the governor's action.

On April 6, the two Supreme Courts – Wisconsin and United States – dividing on party lines[8] blocked the key emergency actions of, respectively, the governor and the federal district court. The state supreme court, by a 4-2 vote, held that none of the state constitutional provisions the governor invoked gave him the power to suspend or rewrite the state's election laws. As for his statutory claim, the majority determined that the broad grant in the quoted provision was limited by another subsection of the same law which specifically authorized the governor to "suspend the provisions of any administrative rule" in emergencies. If the broad power to act in an emergency that the governor claimed included the power to suspend statutes, the specific grant of power to suspend administrative rules would have been "pure surplusage." In other words, by

[5] Democratic National Comm. v. Bostelman, 20-cv-249-wmc, (W.D. Wisc.) (Conley, J.) (April 2, 2020), https://www.courtlistener.com/recap/gov.uscourts.wiwd.45522/gov.uscourts.wiwd.45522.170.0.pdf.

[6] https://www.commondreams.org/news/2020/04/03/wisconsin-governor-finally-moves-postpone-states-primary-elections-shift-vote-mail.

[7] https://evers.wi.gov/Documents/COVID19/EO074-SuspendingInPersonVotingAndSpecialSession.pdf.

[8] Justices of the Wisconsin Supreme Court are elected. The election is technically nonpartisan, but the candidates run as partisans with party support. The four judges in the majority were elected with Republican support; the two dissenters with Democratic support. For the U.S. Supreme Court, "party" refers to the party of the appointing president.

granting the power to suspend rules the law implicitly denied the power to suspend statutes. The dissenters unsuccessfully argued that as a matter of textual interpretation the statutory grant of authority to protect the "security of persons" included the power to protect voters from the danger of exposure to COVID-19; they also contended that the statutory authority of the state health department to "forbid public gatherings" in order to control the spread of communicable diseases surely meant that the governor could for the same reason bar public gatherings at polling places.[9]

The issue before the United States Supreme Court in the aptly named *Republican National Committee v. Democratic National Committee*[10] was whether to stay the portion of Judge Conley's order directing Wisconsin election officials to accept absentee ballots through April 13, the new deadline for the receipt of such ballots, even if they were mailed or postmarked after April 7, the original Wisconsin election day. (The portion of the order directing acceptance of ballots arriving after April 7 was not challenged). Like the Wisconsin Supreme Court, the United States Supreme Court also divided along partisan lines, with the five-member majority determining that the district court's order violated the so-called *Purcell* principle – the rule, based on the Court's decision in *Purcell v. Gonzalez*, 549 U. S. 1 (2006), "that lower federal courts should ordinarily not alter the election rules on the eve of an election." As the *per curiam* opinion explained, the *Purcell* principle is intended to prevent the "kind of judicially created confusion" that can result from election law changes on the eve of an election.[11] Without acknowledging that the Wisconsin election was probably far more disrupted by the pandemic itself than by the district court's order, the Court emphasized that allowing voters to mail ballots after election day "is extraordinary relief and would fundamentally alter the nature of the election."[12] Justice Ginsburg, writing for the four dissenters, emphasized how the unprecedented surge in absentee ballot requests had overwhelmed election administrators, so that tens of thousands of voters

[9] Wisconsin Legislature v. Evers, Wisconsin Sup. Ct., No. 2020AP608-OA, April 6, 2020, https://www.wicourts.gov/news/docs/2020AP608_2.pdf.

[10] 589 U.S. ____ (2020), No. 19A1016, April 6, 2020 (granting stay of district court order granting preliminary injunction).

[11] Id. at 2-3.

[12] Id. at 4.

were unlikely to receive their ballots in time to return them by the April 7 deadline.[13] As a result, "they will have to brave the polls, endangering their own and others' safety. Or they will lose their right to vote, through no fault of their own."[14]

The Ohio and Wisconsin experiences with their COVID-19-impacted elections were, fortunately, atypical. At least nineteen states managed to reschedule their primaries or other elections to later dates or to shift from in-person to all-mail elections without the *Sturm und Drang* that marked these two Midwestern states.[15] Nonetheless, the Ohio and Wisconsin cases do provide some important lessons. First, in our federal system it is the states that write the election laws. State election laws also govern elections to federal offices, unless changed by Congress. Many states lack clear rules for delaying or rescheduling an election in the event an emergency makes holding the election as originally scheduled dangerous or impossible.[16] There are certainly reasons to be extremely cautious about enabling a partisan official to postpone an election or rewrite the election laws at the last minute on his or her own. And as the *Purcell* principle confirms, those concerns are not limited to actions by officials elected on partisan lines. Last-minute changes are disruptive and may be seen as having partisan consequences whatever the intention. All states should have rules in place to deal with emergencies, but as the Ohio and Wisconsin experiences indicate, many states do not.

Second, in the absence of clear rules, decisions dealing with an electoral emergency as it unfolds can take on a partisan cast. That was less true in Ohio, where all the major actors – the governor who postponed the election and the secretary of state who sought a long delay, and the legislature which moved up the date for the new election – were Republican, but the partisan divide was evident in Wisconsin between the Democratic governor and the Republican legislature and Republican-dominated state supreme court. Surely the legislature resisted and the state and national Republican parties sued to block the election delay and the liberalization of the rules

[13] According to one press account published shortly after the election, at least 9,000 ballots were never mailed to voters, and thousands more not returned or nullified because returned too late to count. https://www.nytimes.com/2020/04/09/us/politics/wisconsin-election-absentee-coronavirus.html.

[14] Ginsburg, J., dissenting at 6.

[15] https://www.ncsl.org/research/elections-and-campaigns/2020-state-primary-election-dates.aspx.

[16] https://www.ncsl.org/research/elections-and-campaigns/election-emergencies.aspx

governing voting-by-mail ballots at least in part because they assumed they would benefit electorally from the depressed turnout in urban centers like Milwaukee that were particularly hard-hit by COVID-19.[17] This seems to be a national Republican strategy as well.[18]

Finally, as Ohio and Wisconsin illustrate, any shift from a predominantly vote-in-person to a predominantly vote-by-mail system will require significant legal and administrative adaptations of the processes by which voters obtain and submit – and administrators transmit and review – mailed-in ballots. The questions that need to be resolved in order to make vote-by-mail widely available this November are the focus of the next section.

III. Moving to Voting-by-Mail

Traditionally, Americans voted by going to a designated neighborhood polling place on a specific date and casting their ballots at that place. Over time, new forms of voting were authorized. Absentee voting enables voters who cannot make it to the polls, such as because of illness or disability or absence from home, to obtain a ballot and mail it in. Over time, the rules governing absentee voting have been liberalized and today twenty-eight states and the District of Columbia provide for so-called "no-excuses" absentee voting, in which anyone can request that a ballot be mailed to them without having to give a reason. In an additional five states – Colorado, Hawaii, Oregon, Utah, and Washington – elections are conducted entirely by mail; ballots are simply mailed to all registered voters at their home addresses several weeks before the election. Seventeen states continue to require the voter to have one of the statutorily determined excuses in order to vote absentee.[19] Many states have also implemented procedures for "early in-person voting" which enables the voter to vote at central locations during a designated period before Election Day. Currently, forty-one states and the District of Columbia authorize early in-person voting.

---

[17] That strategy appeared to fail in the election for the most important state office on the April 7 ballot, justice on the Wisconsin Supreme Court, https://www.cnn.com/2020/04/13/politics/wisconsin-election-results-biden/index.html

[18] https://www.nytimes.com/2020/04/08/us/politics/republicans-vote-by-mail.html

[19] https://www.vote.org/absentee-voting-rules/.

In the last three election cycles, approximately one-quarter of all ballots were cast by mail, with particularly heavy usage in a handful of western states, including the all-mail voting states.[20] In 2018, another one-fifth of voters voted at early in-person voting sites. That, however, means that roughly 55% of voters voted at a polling place on Election Day. In most states that fraction is far higher; in 2018, in 31 states fewer than 15% of ballots were cast by mail.[21]

If the pandemic persists into the fall, it will be impossible for the November elections to be held in a fair and safe manner unless early in-person voting and especially voting-by-mail are available to all Americans. Fifty-eight percent of poll workers are 61 or older – 27% are over 70 – the group at greatest risk of serious illness or death from COVID-19. And of course millions of Americans will reasonably be reluctant to risk their health and that of their families by coming to a crowded polling place. Widespread revision of voting laws to facilitate voting-by-mail is essential.

Among the multiple legislative or regulatory changes many states will need to make are: (i) making it easier for voters to obtain mail-in ballots; (ii) setting reasonable deadlines for voters to request and return ballots; and (iii) adopting procedures for resolving disputes over whether the signature on the voter's application or returned ballot matches the signature on file and for giving voters an opportunity to challenge the rejection of ballots on signature mismatch grounds; and (iv) modifying burdensome voter ID and witnessing requirements, as well as restrictions on the ability of community groups to collect and submit ballots.

On the first point, in many states, the voter has to take the first step of requesting a mail-in ballot. Although in some places this can be done by filing an online application, that option may not be available to voters without internet access; other states require that the voter first request an application, which must be mailed in. One way to deal with this would be for the state to mail a ballot, or at least a ballot application, to all registered voters. The all vote-by-mail States use the former process. Election law specialists concerned about the prospect of ballots being sent

---

[20] U.S. Election Assistance Commission, Election Administration and Voting Survey 2018 Comprehensive Report, https://www.eac.gov/sites/default/files/eac_assets/1/6/2018_EAVS_Report.pdf at 12-15.

[21] https://publicintegrity.org/health/coronavirus-and-inequality/the-coronavirus-supercharges-vote-by-mail-efforts-but-barriers-remain/.

to addresses from which the voters have moved or to voters who have died, so that the ballots could be subject to fraudulent misuse, object to such mass mailing of ballots (although there is little evidence of fraud in the all-mail states). Mass mailing of applications (ideally with a postage-paid self-sealing envelope) would still place a burden on the voter to apply, but it would at least eliminate one step in the process. Moreover, as long as in-person voting remains an option, it has the advantage of avoiding mailing an unnecessary ballot to a voter who intends to vote in person.

As the Wisconsin litigation indicates, the return date for mail-in ballots is a critical question. Some states require that the ballot be *received* by Election Day; others only that it be *mailed* by Election Day, and received within a defined number of days after Election Day. Giving the voter more time is surely more consistent with protecting the right to vote, especially given the likelihood of delays in postal deliveries of ballots to and returns by voters; it may give election administrators more time to handle a flood of mailed-in ballots. And many voters are likely to fix on Election Day as the day to vote; others may be hesitating between voting in person or by mail. The main downside of the Election Day mailing deadline is that means that the results of some elections may not be known until days after Election Day.

Other new administrative rules or laws are likely to be necessary to standardize the procedures by which election officials check signatures on applications or ballot envelopes to see if they match those on file, and to give voters the opportunity to challenge rejections. Signature-match laws that fail to give voters an adequate opportunity to challenge rejections were already subject to litigation before COVID-19.[22] Similarly, at a time when, due to social distancing requirements and the closure of public libraries and similar facilities, it may be difficult for voters to obtain the signatures of witnesses or submit copies of their photo IDs as some states require. One component of the district court preliminary injunction in the Wisconsin litigation, not at issue in the Supreme Court, was the court's order lifting the witnessing requirement for voters attesting that a witness was unavailable. Similarly, restrictions on the ability of community groups to collect and submit absentee ballots – justified by an asserted need to prevent fraud – may

[22] https://moritzlaw.osu.edu/electionlaw/litigation/documents/Georgia_Coalition_for_the_Peo-1.pdf.

need to be modified because of the burdens on some voters, such as Native Americans who live in rural areas without adequate mail service. Rules such as these had been challenged by voting rights groups even before COVID-19 became a factor.

At least as important as legal changes will be the significant costs that will have to be incurred in order to switch to a primarily vote-by-mail election. "The equipment that states have to conduct in-person elections won't work for mail-in elections. The scanners many states have to count ballots in each polling place can't handle counting ballots en masse from the whole county or state. The kind of scanner that can do that heavy work costs $500,000 to $1 million . . . . Also, states can't just mail out the ballots they already have printed. They have to design ballots that can be folded into an envelope. They also need to print instructions for how to fill it out and send it back. And they need to design the ballot to work with the Postal Service."[23] As one state election official contemplating the switch to vote-by-mail also noted, "part of that calculation is figuring out how to pay for postage for those ballots, so no one has to go out and buy stamps."[24] And, moving rapidly to a primarily vote-by-mail system will require mass retraining of poll workers and education of voters.

All this will cost money. The Brennan Center for Justice estimates that the cost of moving to a primarily vote-by-mail election this year will be between $1 billion and $1.4 billion – with most of the expenditure going to ballot processing, secure ballot storage, additional staffing, public education, and, especially, postage costs.[25] The Brennan Center study also emphasizes that an estimated $270 million will need to be spent to assure that in-person voting – which will remain the preferred form of voting for many Americans – is safe and secure, with the money going to make sure polling places comply with public health standards, hire poll workers, and increase access to early in-person voting.[26]

---

[23] https://www.washingtonpost.com/politics/2020/04/03/vote-by-mail-difficulties/.
[24] Id.
[25] https://www.brennancenter.org/our-work/research-reports/estimated-costs-covid-19-election-resiliency-measures.
[26] Id.

Responding to COVID-19 will also likely require legal changes and new resources to improve voter registration systems. Typically, in the run-up to a presidential election, millions of people update their voter registration information or register to vote for the first time. COVID-19 could severely disrupt this process, making it difficult for Americans to submit timely registration applications or for elections officials to process those applications. The outbreak will certainly reduce access to government offices that provide voter registration services. Although thirty-nine states and the District of Columbia have either fully implemented online voter registration or are in the process of doing so, the other eleven states need to do so before the fall. And all states with online voter registration systems will need to test and bolster their capacity to ensure they can handle the likely surge in usage.

With the states already incurring significant costs in addressing the health crisis posed by COVID-19 while sustaining massive losses in revenues from sales and income taxes due to the pandemic's impact on commerce and employment, some of the funding for addressing COVID-19's impact on our electoral system ought to come from the federal government. Senators Wyden and Klobuchar have introduced legislation that would require all states to offer voting-by-mail and early in-person voting if twenty-five percent of the states have declared a state of emergency due to COVID-19, and would provide federal funds to cover the cost.[27]

In the negotiations over the development of the CARES Act – the $2.1 trillion COVID-19 response law enacted in late March – the House of Representatives proposed to appropriate $4 billion for election safety and security measures that would require all states to institute vote-by-mail, early-in-person voting, and online voter registration. The Senate initially offered only $140 million. The final bill provided $400 million but with no requirements for improved access to the ballot or voter registration. That was a step in the right direction but likely inadequate to the full task of conducting fair and secure elections in the face of a pandemic.

The prospects that our election laws will be made COVID-19-ready are uncertain. President Trump has slammed mail-in voting, tweeting that it "doesn't work out well for

[27] https://www.klobuchar.senate.gov/public/_cache/files/9/1/91a07f05-b6b3-4c6e-a363-652ecbe16ac0/142B6E0F07685857CC10772388587756.natural-disaster-and-emergency-ballot-act-of-2020.pdf?eType=EmailBlastContent&eId=0037c6a8-2c01-4ea9-ad12-e02c7a69df44.

Republicans,"[28] and other Republican leaders have followed suit, with House Republican leader Kevin McCarthy calling the continued push by Democrats to include more funding for voting-by-mail in the next COVID-19 relief bill "disgusting."[29] In recent decades, election laws have frequently been assessed in partisan terms, and the response to COVID-19 seems to already be caught up in the partisan divide. If that remains the case, then COVID-19 may turn out to be an even greater disaster for American democracy than it has been for public health.

---

[28] https://www.cnbc.com/2020/04/08/trump-slams-mail-in-voting-says-it-doesnt-work-out-well-for-republicans.html.

[29] https://www.cnbc.com/2020/04/08/trump-slams-mail-in-voting-says-it-doesnt-work-out-well-for-republicans.html.

The New "Essential"
Rethinking Social Goods in the Wake of Covid-19

Olatunde Johnson, Jerome B. Sherman Professor of Law, Columbia Law School

Introduction

The Covid-19 crisis has laid bare the fragility of social insurance systems in the United States and the lack of income security and basic benefits for many workers and residents. The United States has long had weaker protections for workers compared to other liberal democracies, and the pandemic makes plain the health, economic, and moral consequences of these arrangements. In recent weeks, the United States has seen dramatic economic dislocation, food insecurity, and the dire effects of an inadequate health care system. There is already evidence of racial and economic disparities among those most affected by these dislocations (analyses are hampered by a paucity of demographic data). Those who were socially and economically vulnerable before the pandemic (for example due to homelessness, immigration status, or incarceration) are likely to suffer the most harm. Changes in workplace conditions as a result of the pandemic are borne disproportionality by low-income workers and workers of color. For instance, lower-income workers are more likely to be employed in jobs that increase their risk of exposure to the virus such as working in sanitation and janitorial services, food services and grocery stores, and in delivery. Yet the pandemic also eschews the imagined categories of who is deemed vulnerable or not. Its effects cannot be so easily contained, extending broadly into society – affecting a wide array of "gig" and service workers, health care workers, tenants, and students – and revealing our inevitable connections to one other.

One consequence for law and policy is that addressing the effects of the pandemic might lead to profound changes in what Americans consider essential goods for a sustainable society. Most clearly, the Covid-19 pandemic exposes the weaknesses in the United States' health care

infrastructure, including the continuing problem of underinsurance, the problems raised by tethering health care to work, and the underfunding of the public health delivery system. The pandemic also reveals the limitations of a set of other structures that sustain workers and families and that allow individuals and families to access necessary benefits. Declining unionization and the rise of contract work and the "gig" economy mean that many workers lack the ability to bargain for their work conditions or sometimes even to obtain the legal status of 'employee'. The United States also lacks social benefits that might help mitigate both the effects of sickness on individuals and families as well as the spread of infection and disease. For instance, the United States lacks guarantees for housing for those who cannot afford it (and was in the midst of an affordable housing crisis before the pandemic), lacks federally mandated permanent paid sick and family leave, and lacks entitlements to key utilities such as water.

The current crisis has led to government efforts to buttress the social infrastructure. To respond to the virus, the federal government enacted, in March 2020, two significant responsive measures—the Families First Coronavirus Response Act (FFCRA) and the Coronavirus Aid, Relief, and Economic Security Act (CARES) – including for the first time federally mandated paid sick leave (the new program expires on December 31st, 2020). Some state and local jurisdictions are now requiring forms of paid family, medical, and sick leave; placing moratoriums on housing evictions and foreclosure; and, limiting the ability of service providers to cut off essential utilities such as water. As the pandemic leads to orders that Americans stay in their houses, the crisis is also broadening notions of what constitutes an essential good as regulators have pressed private companies to expand broadband, and as advocates and municipalities are advancing strategies to expand quality broadband access to underserved communities even beyond the current crisis. Some of the responsive initiatives take a universalist approach, increasing benefits and providing direct payments to a wide swath of workers and taxpayers.

Whether this emergent response will be sufficient to sustain workers and families during the outbreak and in the recession that will likely follow remains to be seen. Some limitations of the response are already apparent. First, there is a patchwork of protections across levels of

government and jurisdictions, leaving many individuals uncovered. The federal government has stepped in to provide important protections such as direct payments to households, protections for renters and households in homes backed by federal mortgages, and temporary, limited sick leave protections.

Some remain unprotected by these changes. For instance, workers from companies with more than 500 employees are exempted from the obligation to provide family and medical leave, leaving out many workers whose workplaces do not provide such leave voluntarily. States and localities differ in the amount of protection and benefits provided to workers and households. Even some of the most significant provisions adopted during the pandemic operate more as a "pause"– preventing additional forms of displacement, but not affirmatively creating safe or healthy spaces for those who lacked them in the first place. For instance, state moratoria on evictions are an important intervention, even though they do not extend to providing housing for those who are homeless or in overcrowded/substandard housing. (Some important new federal money expands homelessness prevention programs and emergency shelter for the crisis.) In addition, the main providers of social services—state and local governments—are already suffering financially from the crisis and are likely to be strained for some time, even with additional federal payments.

Second, many of these provisions depend on voluntary compliance by employers or housing providers, or on the ability of workers and others to understand their rights and enforce them. Lawyers, service providers, and others are mobilizing education and advocacy efforts, but that infrastructure of legal service and advocacy was strained even before the crisis. In addition, the most vulnerable groups (undocumented workers, homeless populations) often lack knowledge of their rights and also face barriers in accessing advocates or other service providers. Where goods are controlled by private actors (such as lenders and broadband service providers), changes are often precatory, and municipalities have not always stepped up regulation or provided public alternatives.

Lastly, it is unclear how enduring these reforms will be. Families, tenants, workers, and others most affected are likely to endure long-term effects, and many of the new benefits adopted as a result of Covid-19 are time-limited. Advocates had encouraged provisions like paid sick leave long before the current crisis, and a growing number of jurisdictions have required this protection in recent years. These new efforts could simply be a short term bandage or they could represent a more fundamental shift in how governments, markets, and private actors understand and secure "essential" social goods. Some signs of the latter include the New York State legislature's decision in the midst of the pandemic to require most employers to provide permanent paid sick leave.

Guide

What follows is a guide to key legal changes relevant to tenants, workers, low-income individuals, families, and those with disabilities.[1] This Part omits health which is addressed in a separate chapter of this e-book. This guide also does not cover the important category of education. Information regarding K-12 equity concerns raised by Covid-19 can be found here.

Employment

Paid Sick, Medical, & Family Leave. In response to Covid-19, the federal government enacted in March 2020 the Families First Coronavirus Response Act (FFCRA) and the Coronavirus Aid, Relief, and Economic Security Act (CARES Act). As a result, federal law as of April 1, 2020, provides for coverage for paid sick leave related to Covid-19 for approximately 50% of US workers and extended paid family and medical leave for some parents with children who are no longer in school due to the virus. The FFCRA exempts companies employing more than 500 workers from complying with the emergency paid sick days requirement (this includes many food service, retail

[1] Compiled by Margaret Gould, CLS '21, Chizoba Ukairo, CLS '21, and Olatunde Johnson, Columbia Law School. Note that the information is not comprehensive and some of the information is evolving. Many of the links are to live, updating sources. We thank Christopher Dinkel, CLS'22, Nicandro Iannacci, CLS '20, Columbia Law Visiting Associate Clinical Professor Emily Benfer, and Columbia Law Professor Mark Barenberg for their assistance.

and hospitality workers, grocery workers, delivery workers, and pharmacy workers). The Labor Department contends that 89% of workers employed at companies with more than 500 employees may access some paid sick leave, with an average offering of eight days covered — falling short of the 14-day quarantine prescribed for those who may have the coronavirus. Coverage extends until December 31, 2020.

The Labor Department has issued guidance on the Act specifying coverage and exemptions (including important exemptions for businesses with less than 50 employees where the leave requirements would "jeopardize the viability of the business as a going concern"). Other limitations of the federal legislation include the fact that FFCRA does not apply retroactively, does not cover any employee who has been furloughed, and does not cover employees whose worksites have been closed. Prior to the crisis, federal law only allowed 12 weeks of unpaid family and medical leave. A set of proposals in Congress including the PAID Leave Act propose a permanent leave system that would create a system of paid sick days and 12 weeks of paid family and medical leave.

The pandemic has placed a particular focus on the lack of a uniform system of paid sick leave in the United States. Twelve states and the District of Columbia had some forms of paid sick leave before the pandemic, some of which expansively define 'employee' to include independent contractors. Several municipalities also provided paid sick leave coverage. In response to the pandemic, some states and localities have begun to create emergency sick leave provisions or make clear that their existing provisions apply to independent contractors. Some large employers – including Walmart, Kroger, Home Depot, Target, UPS, Amazon, and others – have revised their policies by offering some form of paid sick leave for Covid-19-related illness or quarantine.

Anti-Discrimination & Safety. The pandemic places employees at risk of sickness or other injuries in their workplaces due to the virus or the demands placed on their conditions in the wake of the virus. Low-wage workers and those who are not unionized bear greater risks as higher-income

workers find it more possible to work remotely from home. The pandemic has also increased demand in certain industries that often lack employment safeguards or have poor conditions including the warehouse and delivery workers employed in the burgeoning delivery economy. The federal Department of Labor has issued advisory guidance on protecting workers from contracting or spreading the virus in the workplace. In addition, workers are vulnerable to discrimination in the workplace. The federal Families First Coronavirus Response Act prohibits retaliation against employees who exercise their rights to paid sick leave under the statute. The EEOC updated its pandemic guidance on how to protect employees and others from the virus while accommodating and avoiding discrimination against those with disabilities.

Unemployment Insurance/Income Security. The CARES Act expands the current federal-state Unemployment Insurance (UI) program by providing an additional 13 weeks of unemployment insurance after an individual exhausts their current UI. The Act also creates a new Pandemic Unemployment Assistance (PUA) program, in effect through December 31, 2020, for those who are not eligible for their state's existing UI program. Significantly, the PUA covers self-employed workers, part-time workers, freelancers, and independent contractors. The Act also provides another $600 a week of emergency unemployment insurance through July 31st, 2020, for which regular UI claimants as well as PUA claimants are eligible.

The CARES Act also provides "recovery rebates" --income assistance to low- and moderate-income families. The amount is up to $1,200 per adult ($2,400 for a married couple) and $500 for each dependent child under 17. As noted by poverty analysts, the Act has important new benefits but the rebate program excludes a significant number of immigrant families, and by only providing automatic payments to those who filed income tax returns in 2019 or 2018, creates administrative hurdles for some very low-income households.

Housing & Utilities

Housing. Federal, state, and local governments have initiated temporary relief efforts to protect renters and homeowners from eviction or foreclosure due to the health and economic impacts of Covid-19. The federal government has temporarily suspended foreclosure and evictions in

federally backed housing loan programs and instituted a deferral program for mortgage payments. The federal government has also provided $4 billion in increased funding to the states for emergency shelter and homelessness prevention programs. Multiple states and localities have taken actions with respect to evictions and foreclosure, ranging from temporary suspension of all evictions and foreclosures to suspending them on proof that non-payment is due to Covid-19. Some jurisdictions have also provided new funding for direct housing assistance payments to low-income families and increased funding to serve homeless persons or prevent homelessness. At the time of writing, the City of Los Angeles had instituted a temporary freeze on rent increases in apartments subject to local rent stabilization. Several private banks and lenders have initiated hardship or deferral programs.

Utilities: Electricity, Gas & Water. Gas and electricity companies across many states are temporarily suspending disconnections and late fees or requiring reconnections. Some have been ordered by governors or regulators to do so. Many state and local governments have issued orders forbidding water shut-offs during the emergency and requiring the restoration of services. Significantly, the Governor of Michigan – the state that prominently failed to guarantee Flint residents safe drinking water – has issued an executive order to restore water service to occupied residences in the midst of COVID-19.

Broadband & Connectivity. In the wake of stay-at-home orders and the closure of schools, broadband service has become more crucial in allowing individuals to access work and schooling. There are long-standing racial, economic, and geographic disparities in access to high-speed internet, with attendant impact on the ability to obtain on-line information, conduct job searches, or do homework. With the crisis the Federal Communications Commission's Chairman has asked broadband and telephone service providers to take the Keep Americans Connected Pledge. More than 50 companies have pledged to limit service termination and late fees during the pandemic and to open up additional Wi-Fi hotspots. States are providing information to the public and consumers about positive actions taken by private broadband providers as well as public wifi hotspots. Even before the crisis, dozens of municipalities had created public hotspots

or low-cost internet access. However, nineteen states preempt localities from providing municipal networks.

Additional Resources

COVID-19 and Your Workplace Rights: Caring for Yourself and Your Family, A Better Balance (March 19, 2020),https://www.abetterbalance.org/covid19/.

Federal and State Resources for Workers, AFL-CIO (Last accessed April 23, 2020), https://aflcio.org/covid-19/state-resources.

COVID-19 and the American Workplace, U.S. Dept of Labor (Last accessed April 23, 2020), https://www.dol.gov/agencies/whd/pandemic.

Coronavirus: What You Need to Know, National Governors Association (April 23, 2020), https://www.nga.org/coronavirus/#states.

State Workforce Agencies Respond to Coronavirus (COVID-19), National Association of Workforce Agencies (April 22, 2020), https://www.naswa.org/resources/coronavirus.

Resources to Support Workers During the Coronavirus Pandemic, National Employment Law Project (Last accessed April 23, 2020), https://www.nelp.org/resources-to-support-workers-during-the-coronavirus-pandemic/.

Claire Cain Miller, *The Upshot: Who Qualifies for Paid Leave Under the New Coronavirus Law,* N.Y. Times (March 19, 2020), https://www.nytimes.com/2020/03/19/upshot/coronavirus-paid-leave-guide.html?searchResultPosition=6.

New York State's Paid Sick Leave Law, A Better Balance (April 2, 2020), https://www.abetterbalance.org/resources/fact-sheet-new-york-states-paid-sick-leave-law/

New Paid Leave for COVID-19, Information on Novel Coronavirus, New York State, https://paidfamilyleave.ny.gov/covid19.

Roselyn Miller et al., *Which Companies Still Aren't Offering Paid Sick Days? Tracking the Corporate Response to the COVID-19 Pandemic*, Better Life Lab (April 2, 2020), https://www.newamerica.org/better-life-lab/reports/which-companies-still-arent-offering-paid-sick-days/.

Anuj Gangopadhyaya and Elaine Waxman, *Supporting Food Service and Preparation Workers during the COVID-19 Pandemic*, Urban Institute (March 2020), https://www.urban.org/sites/default/files/publication/101931/supporting_food_service_workers_during_covid-19_pandemic.pdf.

Eviction Lab, COVID-19 and Changing Eviction Policies Around the Nation (last accessed April 24, 2020), https://evictionlab.org/covid-eviction-policies/

U.S. Department of Veterans' Affairs, *Special Relief for those Potentially Impacted by COVID-19* (Last accessed April 24, 2020), https://www.benefits.va.gov/HOMELOANS/documents/circulars/26_20_7.pdf

Food and Water Watch, *We Need a Country-Wide Moratorium on Water Shutoffs Amid Coronavirus* (Last accessed April 24, 2020), https://www.foodandwaterwatch.org/news/we-need-country-wide-moratorium-water-shutoffs-amid-coronavirus.

Emily A. Benfer & Lindsay F. Wiley, *Health Justice Strategies To Combat Covid-19: Protecting Vulnerable Communities During a Pandemic* (Mar. 2020). Available at:

https://www.healthaffairs.org/do/10.1377/hblog20200319.757883/full/.

COVID-19: Coronavirus and Housing/Homelessness, National Low Income Housing Coalition, https://nlihc.org/coronavirus-and-housing-homelessness.

Rural Development COVID-19 Response, U.S. Department of Agriculture (USDA) Rural Development (April 17, 2020), https://www.rd.usda.gov/coronavirus.

Public Health Law Tools: A Brief Guide

Kristen Underhill, Associate Professor of Law, Columbia Law School

The COVID-19 pandemic offers a threat with few precedents in modern times and tests the tools of modern surveillance and public health law. The goal of this chapter is to provide a brief overview of the types of measures that state and federal governments can invoke to treat and prevent the spread of infectious disease. The following sections will provide an orientation to domestic public health law followed by the types of measures available to state and federal public health authorities.

Although this chapter does not consider international institutions, treaties, or norms that affect public health, these are also essential to the overall pandemic response. (See here for a helpful overview of the structure of global health law.)

Old and New Public Health Law

Public health law is sometimes divided into "old public health" and "new public health." Old public health law refers to the classic functions of government to limit the transmission of infectious disease and environmental hazards: these are measures like quarantines, vaccination, public sanitation, and food safety. These government policies pose "tragedy of the commons" issues: they require collective action or infrastructure that is unlikely or impossible without central coordination. COVID-19 and the person-to-person spread of the virus that causes it (SARS-Cov-2) meet this definition precisely. For any given individual, the costs of protective measures (like quarantine or self-isolation) may be greater than the risks posed by continuing ordinary life. But for the population as a whole, continuing life as usual will result in a large number of infections and/or deaths. As we have learned from past epidemics, these infections and deaths are often more concentrated in groups with preexisting vulnerabilities, including

people who are poor, ill, disabled, elderly, experiencing discrimination, or living in communities with poor infrastructure.

By contrast, "new" public health refers to governmental efforts to reduce risk factors leading to morbidity and mortality that are not infectious or transmitted by environmental hazards. Those risk factors include mental health problems, substance use disorders, and chronic noncommunicable conditions such as heart disease and cancer. These human problems may also benefit from centralized coordination, particularly in addressing social determinants of health (e.g., socioeconomic inequality). But "new" public health problems have more complex causes, and although government action can influence predictors of chronic and noncommunicable disease, these efforts are different in kind from efforts to limit agents of infectious or environmental disease.

Government policies that address "old" public health threats can be broad and sometimes coercive, including invasive interventions into daily life. But these actions rest on a solid foundation of case law that recognizes the unique capacity of government—particularly state government—to play a coordinating role in times when individual actions pose society-wide risks. Where there is a visceral threat to society as a whole, governments have wide latitude to protect the population. By contrast, efforts to address "new" public health problems tend to be perceived as less urgent and therefore draw greater opposition on the basis of personal autonomy. In the US context, some people also perceive new public health problems to be caused by irresponsible individual behaviors (e.g., lack of exercise or alcohol use) instead of being driven social determinants. This view tends to characterize government actions as paternalistic and detrimental to personal responsibility, and so appeals to solidarity may be less effective than in the infectious disease context.

Public Health Law Interventions in the US

In the US legal system, states have primary authority to address infectious public health threats as part of what is known as the "police power"—plenary authority to provide for the well-being of state citizens. The federal government can also address infectious disease but within a more

limited remit of actions that affect interstate commerce and/or the spread to the United States of infections transferred from other nations. The federal government, for example, can quarantine and test international travelers (including US citizens; see here for a sample quarantine order) and goods, limit entry by sea at US ports, bar air travel by infected people, and bar noncitizens from entering the country. The federal government has authority, through the Surgeon General, to "make and enforce such regulations as in his judgment are necessary" to prevent the interstate spread of infectious diseases (including testing people "reasonably believed to be infected" and isolating people actually infected). An executive order specifies the infections that qualify for federal quarantine; these include "severe acute respiratory syndromes" and the virus causing COVID-19. Federal quarantine authority has been used rarely, however, as the threat of infectious disease declined and as the federal government invested fewer resources in enforcement throughout the 20th century. The most recent use of widespread federal isolation and quarantine measures was during the Spanish flu pandemic a century ago. Restrictions at the federal level are more tenuous when applied to activities and corporations that act only in one state. In modern practice, the federal government assumes broad responsibility for limiting the risks of infection spread by the international movement of goods and people while states take the lead in responding to threats internal to the US.

This division of responsibility explains why infectious disease responses like vaccination and quarantine mandates are set by states (and, in some states, county or municipal governments), and why the US response to COVID-19 has varied so much across state lines. There are nonetheless many actions available to the federal government in pandemic times. These include providing services, funds, expertise, equipment, and resources (including, for example, compulsory licensing of patented drugs or requiring businesses to accept contracts to produce goods such as masks and ventilators); purchasing and distributing essential goods; enforcing laws that prohibit epidemic responses that discriminate against protected groups; enforcing statutes that bar hoarding or price gouging of designated goods; supporting surveillance and research; supporting the enforcement of state-ordered quarantines; coordinating state actions; providing direct messaging to the public; and taking actions that affect national markets and the social safety net. Federal actions that respond to COVID-19 are collated here.

State governments have a number of tools to reduce the transmission of infectious disease and they have used many of these during the COVID-19 epidemic. State power is at its strongest in laws that seek to protect public health against serious contagious disease. When state authorities reasonably believe that there is a threat of disease, courts tend to uphold state actions that are not shown to be abusive, in bad faith, or a pretext for discrimination. This is true even when state actions are later found to be erroneous. Individual health officers, members of state and local boards of health, and municipalities themselves are not liable for errors of judgment as long as they act in good faith and take only the actions within their authority.

In some states, state legislation has delegated authority to local governments to take some or all of these actions—culminating in a national response that involves the participation of more than 2,600 state, local, and tribal authorities. The need to coordinate these governmental units can severely complicate the rapid response needed to contain a fast-moving epidemic, as COVID-19 has illustrated.

The following public health measures are available at the state level for an infectious disease response, and many are used continuously for the monitoring and control of endemic infectious diseases.

State Spending and Legislation. States can (and must) spend funds or forgo income to support the response to an epidemic, including direct financing of public insurance, public health surveillance activities, grants to public and private hospitals and clinics, and the purchase of equipment (e.g., ventilators and masks). State efforts to shore up public safety nets, including health insurance coverage, nutritional assistance, unemployment benefits, and housing assistance also require public spending and may be an essential part of enabling people to comply safely with more restrictive measures such as quarantines. State legislation can also reduce individuals' exposure to the financial costs of the epidemic by requiring health insurance coverage for infection-related expense. These actions apply to insurance plans that are not subject to federal regulation under the Affordable Care Act. Lifting sanctions for criminal laws can also enable fuller compliance by populations who may fear contact with governmental institutions.

State Public Health Activities. State and municipal departments of public health conduct essential activities directly. These include providing centralized counts of infections and tracking of infection spread, engaging in contact tracing, notifying people who may have been exposed, and enforcing more invasive measures such as vaccination requirements and quarantines. These activities demand increased resources during pandemics, requiring further spending, borrowing, and perhaps taxing by states and cities.

State Speech and Regulation of Speech. States always have authority to warn and educate the public directly about infectious disease, modes of transmission, and preventive measures. States in pandemic times may also consider measures such as restricting erroneous or dangerous speech (e.g., prosecuting hoaxes and fraudulent claims about possible cures), or requiring speech by private parties (e.g., mandating posted warnings in hospitals or grocery stores). Any speech restrictions or compulsory speech are subject to constitutional limitations.

State Regulation and Control of the Built Environment. States can use the levers of licenses, permits, zoning laws, and building codes to require structural changes that may be needed to reduce infectious disease. States and cities can also make some changes to the environment directly, such as practices for cleaning, opening, and maintaining public facilities (e.g., transit systems, schools, parks, and public buildings).

State Courts. State court systems can also shape some areas of pandemic response such as by providing a functioning tort system that shapes medical practice (e.g., through medical malpractice claims that recognize standards of care), consumer protection (e.g., through products liability law and penalties for fraud and misrepresentation), and sometimes the direct transmission of infection (e.g., through tort penalties for people who negligently or purposely expose others to infectious disease). The tort system is slow-moving and relies on litigation by private parties, making it a cumbersome tool for the rapid response needed in a pandemic. Courts also provide a forum for individuals or groups to challenge public health regulations that are burdensome to individuals or corporations or that may be designed or implemented in a way that discriminates against protected classes. Lawsuits alleging that states have overstepped in their response to COVID-19 are already underway. Under some state laws, courts must issue

emergency orders to allow other uses of state power, such as quarantines. Courts are also central to modifying terms or conditions of imprisonment in order to lessen the threats of infectious disease in detention settings.

State Regulation of Individuals. In pandemic times, state and local actions that exert direct control over individuals and corporations are highly visible. States continuously and quietly engage in many of these actions in non-epidemic times, including the surveillance of infectious and chronic disease rates, enforcing mandates for screening and testing (e.g., mandatory testing in detention facilities), providing for (or sometimes mandating) the treatment of infectious diseases (e.g., tuberculosis), setting and enforcing vaccine schedules, tracing contacts and notifying possibly exposed persons, inspecting premises (e.g., restaurants), and enforcing other criminal and civil laws intended to minimize the spread of infectious disease (e.g., public nuisance laws). But in pandemic times, the use of more coercive measures can escalate, including business closures, social distancing and travel restrictions, limitations on gatherings (as long as such bans are content-neutral), curfews, quarantines for people visiting from out of state, isolation orders for infected individuals, and vaccination mandates. With the exception of vaccination (as no vaccine is yet available), a majority of states have now enacted some or all of these measures to respond to COVID-19. Although states may retain authority to create sanitary cordons—isolated geographic zones with bars on entry and exit—states have not yet taken this measure in the current pandemic.

All of these state approaches are bounded by the limits of the federal constitution as well as by the constitutions of individual states. Where states reasonably believe that there is a serious public health threat, however, courts tend to be deferential, as the state's interest in public health tends to outweigh individual freedoms. Penalties for individual violations of these mandates may include civil fines, criminal fines, or jail time, as long as these penalties are permitted under state legislation and set in advance. But notably, criminalization of infectious disease exposure (even intentional exposure) may undermine other state efforts to control infection (e.g., contact tracing, testing, and treatment), which may be illustrated by state efforts since the 1980s to criminalize HIV exposure. Several federal and state efforts to prosecute individuals for intentional coronavirus exposure are underway using charges such as assault, and

the federal government may prosecute these offenses under anti-terrorism laws (e.g., use of weapons of mass destruction).

Quarantine, Isolation, and Social Distancing

State laws enabling quarantines, isolation, and social distancing measures have been significant in the COVID-19 response. State quarantine laws vary greatly along lines such as the duration and location of quarantine, enforcement penalties, application to individuals and/or groups, additional authorities available after emergency declarations, and availability of administrative review. State quarantine laws are collated and searchable here.

Although quarantines, isolation, and other social distancing measures can interfere with many rights—including freedom of assembly, freedom of religion, freedom of contract, and the right to travel—courts usually find that states' interest in public health outweighs these freedoms. As a result, social distancing orders are usually upheld as long as they are reasonable in relation to the threat to public health. Judicial decisions in New Jersey and Maine pertaining to the same individual during the 2014 Ebola epidemic illustrate the court approaches. Although quarantines must not be a pretext for discrimination against any protected class, religious exemptions are not required. In order for quarantine regulations to survive judicial review, authorities must reasonably believe that the public is in danger of an epidemic and that quarantined people have been exposed; mere suspicion of infection or exposure is insufficient. Courts also agree that some procedural due process is needed; hearings, however, are usually limited to the question of whether authorities were reasonable in their belief that a quarantine was needed. State statutes structure the ways in which quarantines are enforced and federal law specifies that state and federal governments may (and should) support each other in quarantine enforcement.

Vaccination Laws

Although no vaccine is yet available for SARS-CoV-2, states' authority to mandate vaccination may apply to the COVID-19 response in the future. Should a vaccine be developed, states could

permissibly require individuals to receive the vaccine (enforceable by fines or even compulsorily required), as long as there are exemptions for people who are medically unable to be vaccinated. Multiple courts have found that Religious exemptions from state vaccination mandates are not required by the 14th Amendment. Courts are also wary of second-guessing state legislatures' belief that vaccination is sufficiently safe and needed as part of a pandemic response.

Emergency Declarations

Emergency declarations at the state and federal levels can allow states to access additional resources. Those declarations also expand the powers granted to the executive branch in times of a pandemic. The goal of such declarations—enabled by more than 100 federal laws—is to enable a nimbler and faster response to changing conditions without requiring the more cumbersome machinery of the legislature and courts. The White House and all 50 state governors have now declared COVID-19 to be a public health emergency and the White House has deemed it both a public health emergency under the Public Health Service Act and a "major disaster" qualifying under the terms of the Stafford Act.

Federal emergency preparations (see here and here for overviews) changed dramatically in the wake of the 9/11 attacks and the anthrax exposures in 2001 and subsequent legislation included the Federal Public Health Security and Bioterrorism Preparedness and Response Act of 2002 (which established the National Disaster Medical System and the Strategic National Stockpile of medical supplies); the Project BioShield Act of 2004 (which allows the FDA to issue emergency use authorizations for drugs and devices); amendments to the Stafford Act; the National Emergencies Act; the Public Health Service Act, and the Pandemic and All-Hazards Preparedness Act (PAHPA). The Stafford Act declaration enables the Federal Emergency Management Agency to coordinate the national response to COVID-19 in affected states that request support and to certify that the emergency has overwhelmed state capacity. Each of these declarations enables federal executive actions that ease constraints on public health insurance (e.g., Medicaid § 1135 waivers or waivers of obligations under the Emergency Medical Treatment and Active Labor Act or HIPA), allow additional expenditures, grant increased authority to enact quarantines, alleviate

tort liability for products and persons involved in the response, and provide for the reallocation of resources and personnel. Federal emergency powers under the Defense Production Act also give the executive branch the authority to take control of industries and to require contractors to prioritize federal contracts. The federal government response to the COVID-19 epidemic has lagged but is increasingly scaling up to use these authorities. Congress can also grant agencies more powers in times of crisis (see, for example, the request by the Department of Justice for authority to extend statutes of limitation and detention periods for defendants with delayed trials).

States have their own emergency statutes, and a number of states adopted versions of the Model State Emergency Health Powers Act (MSEHPA) after its drafting in 2001. State definitions of emergency vary, with many states leaving the term undefined, but most states require an exigent situation, potential calamitous harm, and an inability to avoid the harm through ordinary measures. At the state level, declarations of a state emergency expand the powers of governors, health officers, and boards of health. These powers vary, but generally include the power to quarantine exposed people, isolate or treat infected people, vaccinate against infectious disease, institute distancing measures, ease licensure restrictions on clinicians from other states, educate the public, spend state funds, and engage in takings. (For a useful overview of state and federal emergency powers, see here.)

The expansive grants of federal and state executive power during emergencies can raise concerns that agencies, governors, or the President will misuse these temporary authorities to enact policy changes that were impermissible in normal times. But as the Congressional response to COVID-19 has shown, legislative action can also be too slow and unwieldy in times of crisis. Federal coordination is essential for responding to epidemics that cross domestic and international borders and that outmatch states' resources to respond. The COVID-19 emergency is one such epidemic, and both federal and state efforts will be crucial for an effective and durable response.

Additional Resources

General public health law related to COVID-19:

https://www.healthaffairs.org/do/10.1377/hblog20200319.757883/full/

https://jamanetwork.com/journals/jama/fullarticle/2764283

https://www.nejm.org/doi/full/10.1056/NEJMra1314094

https://www.ncsl.org/research/health/ncsl-coronavirus-covid-19-resources.aspx

https://www.nejm.org/doi/full/10.1056/NEJMp2006740

Emergency law:

https://www.train.org/cdctrain/training_plan/4120

https://law.emory.edu/elj/content/volume-67/issue-3/index.html

https://www.ncsl.org/research/health/public-health-chart.aspx

CDC and NIH resources:

https://www.cdc.gov/quarantine/aboutlawsregulationsquarantineisolation.html

https://www.cdc.gov/quarantine/pdf/Public-Health-Order_Generic_FINAL_02-13-2020-p.pdf

https://www.cdc.gov/quarantine/specificlawsregulations.html

Resources on state law:

https://www.ncsl.org/research/health/state-quarantine-and-isolation-statutes.aspx

https://www.ncsc.org/Newsroom/Public-health-emergency.aspx

https://www.ncsc.org/~/media/Files/PDF/Topics/Courthouse%20Facilities/State-Law-Pandemic-Response.ashx

https://www.kff.org/health-costs/issue-brief/state-data-and-policy-actions-to-address-coronavirus/

Resources on quarantine law:

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3157182

https://www.theatlantic.com/ideas/archive/2020/02/coronavirus-quarantine-america-could-be-giant-legal-mess/606595/

https://dash.harvard.edu/bitstream/handle/1/8852098/vanderhook2.html?sequence=4

https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5886825/

https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6687239/

Child Welfare and COVID-19: An Unexpected Opportunity for Systemic Change

Jane M. Spinak, Edward Ross Aranow Clinical Professor of Law, Columbia Law School

Introduction

A couple of weeks into "shelter in place" orders, my husband forwarded to me a photo posted online. A young mother, her blond hair swept up into a messy bun, stares intently at her desktop screen. She sits at an antique wood table in her sweats and slippers, headphones in place, working while the sun streams in through sliding porch doors. Behind her, her five or six year old son is bound and gagged and duct taped to the floor. The joke is clear; staying at home with children during a pandemic while trying to get your work done, making sure they are keeping up with their school assignments, and remaining sane requires immense patience and fortitude or drastic measures. No black family would ever post such an image.

Posting an image of abusing your young child and knowing that it will be seen as a joke is a luxury most parents of color would never believe they have, especially parents living in poverty who are under the constant surveillance of the government. These parents live in heavily policed but underserved neighborhoods; they live in public housing, receive food stamps or cash assistance, and use public hospitals and clinics, head start programs, and food pantries; they have two or three jobs that until very recently were considered inconsequential and now are being touted as "essential" for the rest of us. Every decision they make has outsized consequences: pay rent or pay the dentist; leave the ten-year-old watching the three-year-old for fifteen minutes to buy groceries or put the laundry in the dryer at the laundromat down the street, or risk having no food in the fridge or clean clothes in the house when the visiting nurse comes to check on the asthmatic baby. In many of these neighborhoods, the consequences are called "catching a case," which means being investigated by child protective services for neglecting or abusing your child, frequently leading to a proceeding in family court that can result in your children being removed from your care, participation in mandated services or treatment, court and agency supervision, and months or years of family disruption and surveillance. No joking around.

The COVID-19 pandemic has already wrecked greater havoc in poor neighborhoods of color, where pre-existing conditions exacerbate the disease's spread. Crowded housing and homelessness, less access to health care and insurance, and underlying health conditions are all factors that worsen the chances of remaining healthy.[1] Workers desperate for income continue to work without sufficient protective measures, moving in and out of these neighborhoods, putting themselves and their families at risk. During periods of greater disruption, tensions are heightened and violence more prevalent. Already some experts are warning of an onslaught of child maltreatment cases, citing earlier examples of spikes in foster care during drug epidemics and economic recessions.[2] Instead of panicking, thinking creatively and thoughtfully about appropriate responses and using the information and resources we already have may help to diminish such fears and improve the safeguards that are needed to protect the integrity of families and keep children safe.

Thoughtful guidance on moving forward has come from an unlikely source: the federal government. The Children's Bureau (CB) released a letter on March 27, 2020, informing state and local governments and courts that the federal statutory funding mandates pursuant to title IV-E of the Social Security Act for the provision of specified judicial hearings and determinations must be followed, balancing child-safety with public health directives. Child welfare agencies and courts can't just throw up their hands or close down in the face of disruption. "Prolonged or indefinite delays in delivering services and postponements of judicial oversight place children's safety and well-being in jeopardy; may lead to unnecessarily long stays in foster care; and are inconsistent with statutory and regulatory requirements."[3] Sweeping orders ceasing, suspending,

[1] Sam Baker, Alison Snyder, Coronavirus Hits Poor, Minority Communities Harder, https://www.axios.com/coronavirus-cases-deaths-race-income-disparities-unequal-f6fb6977-56a1-4be9-8fdd-844604c677ec.html; Rate of Deaths, Illness Among Black Residents Alarms Cities, https://www.nytimes.com/aponline/2020/04/06/us/ap-us-virus-outbreak-illinois-1st-ld-writethru.html?searchResultPosition=7

[2] Fred Wulczyn, Looking Ahead: The Nation's Child Welfare Systems after Coronavirus https://chronicleofsocialchange.org/child-welfare-2/looking-ahead-the-nations-child-welfare-systems-after-coronavirus/41738; Nina Agrawal, The Coronavirus Could Cause a Child Abuse Epidemic, https://www.nytimes.com/2020/04/07/opinion/coronavirus-child-abuse.html?referringSource=articleShare

[3] March 27, 2020 Letter of Commissioner Jerry Milner to Child Welfare Legal and Judicial Leaders https://drive.google.com/file/d/1FJw04Hi795BodPcZ-EOKSGEbjBmJ9ICD/view

or delaying court proceedings, the provision of essential preventive and rehabilitative services, or family time (visitation) between children in foster care and their parents and siblings should be avoided to diminish the likelihood that progress will be halted in preventing family disruption, reunifying families, or securing other permanency goals. Several of the CB's specific recommendations – access to counsel for parents and children, access to technological assistance without costs, creative approaches for visiting and services, and maintaining court processes – will be discussed at points throughout this chapter. What is worth noting overall is the CB's high expectations for child welfare agencies and the courts that monitor these agency actions to protect not just child safety but also family integrity.

Three R's Worth Reconsidering under COVID-19: Reporting, Reasonable Efforts, and Reunification

The complex system of child welfare and foster care has key points where life-altering decisions are made and where COVID-19 will have an impact now and for a long time to come. Looking at three of them sequentially provides a roadmap for how child welfare decisions are made and how the pandemic will affect them now and into the future. They also provide opportunities to rethink the ways in which child welfare and family court systems have continuously failed families and children.

1. Reporting

Every state has some form of registry for reporting potential abuse and neglect and maintaining records of those reports. Most states maintain a central registry that accepts reports by "mandatory" reporters, like doctors and teachers, or voluntary reporters, who may be allowed to report anonymously. The reports are used not only in child protection investigations but also later to screen individuals on the registry for jobs that involve children or other vulnerable populations.[4] In 2018, over 4.3 million children were reported, though almost 1.9 million of those reports were "screened out" and not subject to further investigation. Of the reports left, after further investigation, sufficient evidence of risk of or actual maltreatment existed to "substantiate" the report or provide an alternative response of assistance to approximately

[4] Establishment and Maintenance of Central Registries for Child Abuse or Neglect Reports, https://www.childwelfare.gov/pubPDFs/centreg.pdf

678,000 children.[5] Even these numbers do not provide an accurate assessment of actual maltreatment. Some states require almost no evidence to substantiate a report and others have a very high standard. The percentage of these cases that will eventually be brought to court also varies tremendously, meaning that even with a substantiated report a parent may not be found to have maltreated their child by a court. Only about a quarter of the victims with "substantiated" reports resulted in any court action.[6]

How can these numbers help us think about the risk to children of greater maltreatment during the COVID-19 period and the likelihood that there will be less reporting during the widespread "shelter in place" practices being instituted? First, it is clear that the vast majority of reports do not result in state action because a child has been mistreated; there is a lot of noise in reporting. Hunches, vague suspicions, better-safe-than-sorry beliefs, passing the buck to someone else instead of figuring out how to be helpful, anonymous calls and instances of malicious false reporting still require state investigations that cost time and money. Reducing those types of reports because children are not as casually observed will reduce unnecessary family disruption and trauma and will give investigators more time to scrutinize when children are actually in danger, usually of serious physical or sexual abuse. Fewer reports based on unsubstantiated feelings and just passing the buck will also mean workers will have to do fewer in-person investigations, leaving them and the families they are investigating less exposed to COVID-19. Finally, and in particular in those states that have a very low threshold for substantiation, fewer parents will find themselves with records that prevent them from securing jobs in caretaking positions, often the only jobs available for low-income workers, especially women. When we come to the other side of the pandemic, if we've reduced unnecessary reporting and investigations, we can incorporate what we've learned to disrupt fewer families and keep children at risk actually safer.

---

[5] Child Maltreatment 2018, Chapter 2, https://www.acf.hhs.gov/sites/default/files/cb/cm2018.pdf

[6] Child Maltreatment 2018, Table 6-5 https://www.acf.hhs.gov/sites/default/files/cb/cm2018.pdf

2. Reasonable Efforts

Federal funding mandates require that before children can be separated from their families, except in clear emergencies, child protective services must make reasonable efforts to keep children safely at home. If a child is removed from a parent, reasonable efforts to reunify a family or, if this is not possible, to find another permanency option other than extended foster care, is also required.[7] Since neglect is by far the most common form of maltreatment alleged (rather than physical or sexual abuse) and "no single fact about child abuse and neglect…has been better documented and established than their strong relationship to poverty and low income,"[8] it would be a fair assumption that financial assistance and services would be the most reasonable of reasonable efforts. That, unfortunately is not the case. Instead, casework counseling, referrals to mental health and substance use services, and parenting classes are standard fare. Any of these may be necessary but the primary prevention of adequate income along with decent shelter, child care, and health care would do far more to reduce the relationship of poverty to child maltreatment. As COVID-19 sweeps through the poorest and least healthy neighborhoods, primary prevention is in even greater need. Some of the stopgap measures being adopted – one-time stimulus checks to low income families, loosened health insurance requirements for treatment, moratoriums on evictions and some debt, greater flexibility for unemployment insurance – could assist vulnerable families now and provide a template for greater government and societal financial responsibility going forward.

In the meantime, the secondary prevention measures that are often crucial to keeping children safely at home still need to be employed effectively. The CB letter urges all government authorities to be proactive in monitoring the availability of services and treatment, to utilize technology at no or reduced cost to enable greater participation in treatment and services, and to help facilitate resources for parents to access virtual arrangements. Of even greater importance are reasonable efforts to maintain family connections. In 1978, Drs. David Fanshel

[7] Child Welfare Information Gateway. (2017). Child Maltreatment Prevention: Past, Present, and Future, at https://www.childwelfare.gov/pubPDFs/cm_prevention.pdf#page=6&view=Prevention%20today

[8] Pelton, L. H. (1994). The Role of Material Factors in Child Abuse and Neglect. In G. B. Melton et al. (eds.), Protecting Children from Abuse and Neglect: Foundations for a New Strategy (pp. 131-181). New York: Guilford. See also, Slack et al., Understanding the Risks of Child Neglect: An Exploration of Poverty and Parenting Characteristics, at https://journals.sagepub.com/doi/pdf/10.1177/1077559504269193

and Eugene Shinn of the Columbia School of Social Work published a ground-breaking study of children in foster care, concluding that the important determinant of how well children fare in foster care and how likely they were to return home was parental visitation.[9] Visitation, or what is now more appropriately being called family time, is ordinarily challenging to accomplish. Busy parents work, participate in programs or treatment, may have other family responsibilities, and often travel long distances to see their children. Children have school and afterschool activities, their foster parents or caseworkers may be unavailable to facilitate visits, visits can often trigger conflicting emotions and trauma for adults and children that require special attention, and coordinating outside of business hours is often impossible. Recognizing the crucial importance of family time – especially during times of crisis – the CB is encouraging creative solutions: figuring out which families may still be able to meet in person (including outdoors); whether there are relatives rather than staff who can facilitate contact; and maximizing the use of technological tools to connect families face-to-face.[10]

To reinforce the CB's position on family time, on April 6, 2020, the Commissioner of the CB, Jerry Milner, and his top aide, David Kelly, published a remarkable editorial on family integrity. Any discussion of child welfare during this pandemic period must include an acknowledgement of this editorial. In the forty years that I have practiced and taught in the child welfare realm, I cannot ever remember federal officials declaring unequivocally the importance of protecting the relationship of parents and children who have been separated by child welfare authorities and the destructive impact of even necessary separations.

> When children are removed from their parents, even when necessary for their safety, and artificial visiting arrangements are imposed that prevent parents from being parents and children from being children, they become distanced and that can be harmful to parents and children alike. The effects of such distancing shows up in trauma responses, in hopelessness, in destructive behaviors, in increasing needs for clinical interventions, and in repeated cycles of difficulty within families…Further, it is not merely

[9] Fanshel, D. and Shinn, E. *Children in Foster Care: A Longitudinal Investigation.* New York: Columbia University Press (1978)

[10] March 27, 2020 Letter of Commissioner Jerry Milner to Child Welfare Legal and Judicial Leaders https://drive.google.com/file/d/1FJw04Hi795BodPcZ-EOKSGEbjBmJ9ICD/view at 2-3

a matter of longing for contact, it is a matter of healthy brain development, maintaining critical bonds, and prevention of trauma that can persist for generations.[11]

The March 27 CB letter identifies lawyers – for agencies, for parents and for children – as central to ensuring that reasonable efforts to receive services and to maintain contact are enforced. They are expected not only to stay in close contact with their clients but to guarantee that family courts hear and determine cases. While neither parents nor children have a constitutional right to counsel in child protective proceedings,[12] many states have statutory mandates for the provision of counsel to both. In the last two decades, there has been a burgeoning movement to develop high quality institutional parent representation – now called family defense – that has begun to hold family court proceedings to high standards of due process as well as to safeguard the provision of reasonable efforts before, during, and after these proceedings. Many of these offices staff interdisciplinary teams of lawyer, social workers, and parent peer advocates to provide holistic representation. Family defense practitioners, as well as child advocates who are not "child savers" but "family savers", have mobilized swiftly to follow the CB's letter. They are challenging blanket court closures or suspensions of hearings, filing emergency writs and motions, pressuring for increased virtual access to courts, and demanding statewide adherence to the CB's letter.[13] This pressure has begun to have significant results: New York City Family Court has recently increased the number of virtual courtrooms available for essential and emergency matters and has increased the availability of reviewing on submission

---

[11] Jerry Milner and David Kelly, Top Federal Child Welfare Officials: Family is a Compelling Reason, The Chronicle of Social Change (April 6, 2020) https://chronicleofsocialchange.org/child-welfare-2/family-is-a-compelling-reason/42119

[12] See Lassiter v. Department of Social Services, 452 US 18 (1981)

[13] Homepage of the Center for Family Representation at https://www.cfrny.org/; Systemhttps://citylimits.org/2020/03/30/covid-19-creates-deep-uncertainty-in-nycs-child-welfare-system/; Rachel Blaustein, COVID-19 Creates Deep Uncertainty in NYC's Child-Welfare (March 30, 2020); Texas Public Policy Foundation Letter to Jaime Masters, Commissioner Texas Department of Family and Protective Services (March 27, 2020) https://chronicleofsocialchange.org/wp-content/uploads/2020/03/TPPF-Family-Advocates-Letter-to-DFPS-re-COVID-19.pdf; Office of the Maryland Public Defender Parental Defense Division to Ms. Lourdes R. Padilla, Secretary, Department of Human Services https://drive.google.com/file/d/1CaZIagytCiDz8atUdKzZ9DHVdHRiFnXL/view

orders to show cause requesting emergency relief and stipulations.[14] The California Judicial Council approved on April 7, 2020, new rules that certain dependency court proceedings must be held on their normal timeline to ensure the safety of children, including hearings on removals of children from their families; medical and medication-use requests; some motions to reunify families or terminate parental rights; and requests by former foster youth to re-enter care. Decisions about in-person family time must be made on a case-by-case basis, not by blanket order.[15]

3. Reunification

The Adoption and Safe Families Act (ASFA) was enacted in 1997, the Clinton Administration's response to children experiencing multiple placements and remaining far too long in foster care. The mandate was first and foremost to improve the permanency outcomes of children.[16] And while reunification with parents nominally remained the primary goal of permanency, the time frames for reunification before considering termination of parental rights (TPRs) and potential adoption were accelerated dramatically, resulting in fewer reunifications of families and far more adoptions. ASFA's requirements that TPRs be instituted if a child has been in foster care 15 of the most recent 22 months were adopted with only some states instituting exceptions permitted by the law.[17] In the decades since, the arbitrariness of these deadlines has precluded sufficient time for services and treatment to support successful family reunification and resulted in an entire generation of legal orphans, children neither returned home nor adopted as well as thousands of broken adoptions. Dr. Mark Testa has called this permanency focus on favoring adoption over other permanency goals as mistaking legally binding connections with psychologically lasting ones.[18]

---

[14] New York State Courts Remain Open for Essential Business (April 6, 2020) http://nycourts.gov/

[15] John Kelly, California Courts Must Hold Some Child Welfare Hearings, Try to Continue In-Person Family Visits, The Chronicle of Social Change (April 7, 2020) https://chronicleofsocialchange.org/child-welfare-2/california-courts-must-hold-some-child-welfare-hearings-try-to-continue-in-person-family-visits/42135

[16] Public Law 105-89, The Adoption and Safe Families Act of 1997, https://www.acf.hhs.gov/sites/default/files/cb/pi9802.pdf

[17] Intentions and Results A Look Back at the Adoption and Safe Families Act, https://www.urban.org/sites/default/files/publication/30016/1001351-Intentions-and-Results-A-Look-Back-at-the-Adoption-and-Safe-Families-Act.PDF

[18] Post and Zimmerman, The Revolving Doors of Family Court, Confronting Broken Adoptions, https://www.clcny.org/files/118689205.pdf; Mark F. Testa, The Quality of Permanence--Lasting or Binding?

The COVID-19 emergency allows us to reconsider permanency priorities. It is easy to imagine many child welfare agencies and courts suspending some of the time frames for ASFA's permanency goals because of the lack of access to services and treatment or the inability to reboot suspended court calendars. But if, as Milner and Kelly say in their editorial, that the ASFA timelines do not "reflect what we know about treatment and recovery and do not reflect the contextual factors that are directly relevant to successful reunification…and the research lessons…that have revealed the timelines as lacking alignment with what many children and families need," then this is not about interim solutions before returning to old practices. Instead it is an opportunity to acknowledge the ways in which ASFA has failed to serve the needs of vulnerable children and families for almost a quarter of a century and to radically reconsider the ways child welfare systems surveil, supervise, and separate families.

Milner and Kelly's message is clear. Child welfare systems are not to stay calm and carry on. Instead, "This is a defining moment for us as a system; it has laid threadbare our lack of agility to meet family needs. We cannot allow our shortcomings to be held against families — to do so is the height of injustice and compromises the legitimacy of our system in our own eyes and those of the families we are privileged to serve."

Subsidized Guardianship and Kinship Foster Care As Alternatives to Adoption, 12 Va. J. Soc. Pol'y & L. 499, 499 (2005)

Emergency Exemptions From Environmental Laws

Michael B. Gerrard[1], Andrew Sabin Professor of Professional Practice;

Faculty Director, Sabin Center for Climate Change Law, Columbia Law School

The national response to the coronavirus crisis may face several impediments but federal and state environmental laws should not be among them. Most of these laws have emergency exemptions that allow the usual (and sometimes lengthy) procedures to be bypassed, and some substantive requirements to be waived, in instances of true urgency. However, there is concern that some agencies and corporations will use this as an excuse to bypass environmental laws that aren't actually getting in the way of responses to the crisis.

Statutes and Regulations

It is too early to know all that must be done to cope with this crisis but some that can be imagined would ordinarily be subject to environmental regulation.

To pick one example that is already apparent, if some of the more dire predictions of the virus's spread come true, the nation's supply of hospital beds will be overwhelmed and it will be necessary to build many new medical treatment facilities. If this was to be done with federal money, it could ordinarily be deemed to be a major federal action (or perhaps many actions – one for each facility) requiring environmental impact statements (EISs) under the National Environmental Policy Act (NEPA).

[1] Senior Counsel in the New York office of Arnold & Porter.
Brian D. Israel and Francesca Bochner-Brown of Arnold & Porter assisted in the preparation of this chapter.

However, President Trump's declaration of a national emergency on March 13 invoked the Robert T. Stafford Disaster Relief and Emergency Assistance Act. In addition to giving many powers to the Federal Emergency Management Agency, the Stafford Act provides an exemption from NEPA for immediate response actions. (The legal citation for this exemption, and for most of the other laws and regulations cited in this chapter, can be found here)
Many of these facilities might be built in existing hospital parking lots or on other open land. However it is possible that some will require demolishing existing buildings. The Stafford Act also authorizes the President to clear debris and wreckage resulting from major disasters.

The text of NEPA contains no emergency exemptions. However the implementing regulations issued by the Council on Environmental Quality (an office in the White House) authorize lead agencies to make "alternative arrangements" in emergency situations. For disasters and other emergencies abroad, a presidential executive order provides for exemptions from environmental review requirements for relief action.

Several states have laws comparable to NEPA that govern actions requiring discretionary state or local approval. These might otherwise require environmental review of new construction but these too tend to have emergency exemptions.

One example is New York's State Environmental Quality Review Act (SEQRA). The regulations under it exempt from the EIS requirement "emergency actions that are immediately necessary on a limited and temporary basis for the protection or preservation of life, health, property or natural resources, provided that such actions are directly related to the emergency and are performed to cause the least change or disturbance, practicable under the circumstances, to the environment." The courts have interpreted this provision broadly to encompass events that at first glance do not look much like emergencies (such as prison overcrowding and homelessness), but obviously the response to the coronavirus would qualify.

Likewise, the California Environmental Quality Act (CEQA) exempts from the environmental impact report (EIR) requirement "emergency repairs to public service facilities necessary to maintain service" as well as "specific actions necessary to prevent or mitigate an emergency." CEQA defines an emergency as a "sudden, unexpected occurrence, involving a clear and imminent danger, demanding immediate action to prevent or mitigate loss of, or damage to, life, health, property, or essential public services." The CEQA Guidelines elaborate that "emergency projects . . . exempt from the requirements of CEQA" include "emergency repairs to public or privately owned service facilities necessary to maintain service essential to the public health, safety or welfare" including those "that require a reasonable amount of planning to address an anticipated emergency." As in New York, California state courts have interpreted the emergency exemptions broadly to encompass events that at first glance do not seem like emergencies (such as prison overcrowding and beach erosion), but the response to the coronavirus would clearly qualify.

The Massachusetts Environmental Policy Act (MEPA) provides for a more limited emergency exemption in the "rare cases" when it is "essential to avoid or eliminate an imminent threat to environmental resources or quality or public health or safety[.]" However the project proponent must "limit any emergency action taken without due compliance with MEPA . . .to the minimum action necessary to avoid or eliminate the eminent threat." Additionally, the proponent must file an initial environmental notification form within 10 days of commencing the action and must later file an EIR after the emergency action is taken.

By comparison, the Washington State Environmental Policy Act (SEPA) does not include any relevant statutory or regulatory provisions that would exempt emergency actions. However the Washington Department of Ecology guidance on SEPA provides that a lead agency can grant an emergency exemption if an action meets two conditions: First, the action must be "needed to avoid an imminent threat to public health or safety" and second, there must not be "adequate time to complete SEPA procedures."

Many states have laws that provide for broad exemptions from a wide variety of laws in the event of emergency. For example a New York statute provides that:

> Subject to the state constitution, the federal constitution and federal statutes and regulations . . . the governor may by executive order temporarily suspend specific provisions of any statute, local law, ordinance, or orders, rules or regulations, or parts thereof, of any agency during a state disaster emergency, if compliance with such provisions would prevent, hinder, or delay action necessary to cope with the disaster.

After the destruction of the World Trade Center on September 11, 2001, Governor George Pataki used this law on September 12 to suspend many statutes of limitations and on October 9 he used it to suspend certain regulations regarding transportation and handling of solid wastes in order to facilitate the WTC removal operation. It became clear, however, that the SEQRA process was about to delay the start of replacement of 7 World Trade Center, one of the buildings that had collapsed. This was a serious matter because that building had been built atop a Consolidated Edison Co. electrical substation that provided electricity to much of Lower Manhattan. Until that substation could be rebuilt, electricity service was provided through a jerry-rigged system of cables running on the surface of the streets. This was an intrinsically unstable situation. Thus the state invoked SEQRA's emergency provision and allowed site preparation activities to go forward before the completion of the SEQRA process. Ultimately the state decided that no EIS was necessary because the new 7 WTC, though taller than the original, had less square footage and therefore generated less traffic and sewage, used less water and energy, and otherwise had fewer impacts. Thus SEQRA did not delay the reconstruction of 7 World Trade Center.

Additionally, after 9/11 the Environmental Protection Agency (EPA) used its enforcement discretion and issued "no action assurances" to allow certain actions that would otherwise violate the Clean Air Act. This included, for example, rules regarding vapor recovery at gasoline pumps and certification rules for tank truck carriers.

Similarly, after major disasters, states issue many waivers. For example, after Hurricane Katrina the Louisiana Department of Environmental Quality granted relief from the rules applicable to

wastewater discharges; air emissions relating to repair activities and temporary power sources; on-site solid and hazardous waste management; inspection and rehabilitation of underground storage tanks; and numerous inspection, monitoring, and discharge reporting requirements.

The emergency exemptions in environmental law fall into two broad categories—the generic and the case-specific. The generic exemptions, in turn, come in four types: exemptions from permitting requirements; relaxation of substantive standards; exemptions from, or acceleration of, certain processes; and releases from liability. The case-specific exemptions are aimed at specific projects or geographic areas. Examples included congressional declarations of non-navigability that shielded certain areas from Corps of Engineers permitting requirements and congressional and state legislative declarations that certain projects did not need to go through the standard environmental review process.

Few of these exemptions are self-executing. Most require a declaration or finding of the administrator of EPA (either acting on her own authority, or under a delegation from the President or from another high federal official. In the absence of such a federal action, regulated entities generally cannot simply plead that the environmental laws do not apply to them. A notable exception is the Act of God or war defense that is found in most of the federal statutes that confer environmental liability.

The National Historic Preservation Act applies to a broad array of federal actions. The regulations of the Advisory Council on Historic Preservation provide for emergency procedures.

Most of the substantive environmental laws and their implementing regulations contain emergency exemptions of various sorts. Many of them have been used after disasters like hurricanes and earthquakes.

Under the Clean Air Act, the available waivers include:

- from national emission standards for hazardous air pollutants from stationary sources when in the interests of national security,

- for federal emission sources where “in the paramount interest of the United States,”
- from certain of the requirements under the National Emissions Standards for Hazardous Air Pollutants for the demolition of asbestos-containing buildings when the building has been ordered torn down because it “is structurally unsound and in danger of imminent collapse.”
- for federal procurement when in the paramount national interest.

The Clean Water Act and its regulations have several exemptions. Among them are:

- Act of God or war.
- emergencies that require expedited procedures for the processing of permit applications by the Corps of Engineers.
- emergencies requiring expedited direct action by the Corps of Engineers.
- exigent discharges of oil and hazardous substances.

The Comprehensive Environmental Response, Compensation and Liability Act, which governs the cleanup of the most contaminated sites and dictates who pays for the cleanup, also has an Act of God or war defense. It also allows emergency removal actions – i.e. fast actions to address an immediate threat.

The Coastal Zone Management Act allows the President to authorize federal actions that are inconsistent with state coastal plans if the President finds it is in the paramount interest of the country or the Secretary of Commerce determines it is a matter of national security.

The Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) allows EPA to exempt federal and state agencies from any requirement of the statute if EPA determines that emergency conditions exist that require such exemption. On March 13, EPA announced that it had used expedited procedures under FIFRA to expand the list of approved disinfectant products for use in combating the COVID-19 virus. Since then EPA has allowed several other disinfectants to rush through the approval process.

The Resource Conservation and Recovery Act allows the President to determine it to be in the "paramount interest" of the nation to exempt any federal solid waste management facility. This authority also extends to federal underground storage tanks. EPA may issue temporary emergency permits to allow treatment, storage or disposal of hazardous wastes where there is imminent and substantial endangerment to human health or the environment. The standards applicable to treatment, storage, and disposal facilities may also give way in time of emergency.

The Safe Drinking Water Act allows states to exempt public water supply systems from maximum contaminant levels due to "compelling factors," including "urgent threats to public health."

Enforcement

Even where there is no explicit exemption, the environmental authorities have generally made it clear that they will take no enforcement action that could impede the immediate response to a major disaster. However EPA took that a step further on March 26, 2020, when it issued a memorandum saying it will exercise "enforcement discretion" in connection with violations of otherwise applicable laws during the pandemic. This covered civil violations; routine compliance monitoring and reporting by regulated entities; reporting obligations and milestones imposed by settlement agreements and consent decrees; failure of air emission controls or wastewater or waste treatment systems or other equipment; hazardous waste storage rules; and many other requirements.

The EPA memorandum stated that it will exercise its discretion not to enforce the environmental laws only if the COVID-19 crisis was really the reason for the violation and that regulated companies should do the best they can under the circumstances. It also said that criminal penalties would still apply if applicable. However the memorandum was met with protests and petitions by many groups that do not trust today's EPA and that feared that companies had been given a blank check to pollute for however long the crisis lasts.

Companies may also use the crisis to avoid local requirements. One example of how this can play out came in Georgia. A medical sterilizer company wanted to use ethylene oxide, a toxic substance, to clean medical equipment for use in COVID-19 treatment. The county where the plant is located limited the plant's operations until it installed upgraded emissions controls to prevent fugitive releases of ethylene oxide from drifting into the nearby residential community. On March 30 the U.S. District Court in Georgia issued a temporary restraining order against the county, preventing it from enforcing this limitation and allowing the plant "to sterilize medical products without interference" from the county.

Past experience lends credence to the concern that some will abuse these exemptions. For example, in August 2017, Governor Greg Abbott of Texas declared a state of emergency as Hurricane Harvey approached, suspending dozens of environmental rules. However, this suspension was still in effect months after the hurricane had left, the area had dried out, and electricity had been restored. Later investigations discovered more than 100 toxic releases. Some of them may well have occurred after the hurricane and many were in the sorts of low-income communities that have long been disproportionately exposed to toxic hazards and other forms of pollution.

It may not require excessive cynicism to be concerned that the Trump Administration, which has shown little enthusiasm either for environmental enforcement or for minority communities, may look the other way as companies take advantage of the emergency to save the money that environmental compliance requires, with negative health impacts on their neighbors. Some states may similarly relax their environmental vigilance to a greater extent than the crisis demands. Time will tell.

Privacy and Pandemics

Clarisa Long, Max Mendel Shaye Professor of Intellectual Property Law, Columbia Law School;
Editor, Genetic Testing and the Use of Information

The current COVID-19 pandemic has created an unprecedented opportunity for governments to justify post-pandemic expansion of their surveillance and collection of data on citizens and noncitizens alike. The data collected could take multiple forms, but I will focus on two specific types of data collection.

The first is governmental mass collection of nonanonymized cell phone location data showing the physical location of people in a community without the consent of the surveilled, who are not suspected of any crime. The second is state-collected nonanonymized data on people's health or immunity status. Both of these raise fundamental information privacy and health privacy concerns. Both would require amendments of existing laws and regulations, or passage of sweeping new laws, in order to pass legal muster. Post-pandemic, governments may try to do exactly this.

In the information privacy community the relevant unit of data is "personally identifiable information," or PII.[1] In the health context, the relevant unit of data is called "protected health information," or PHI.[2] In times of national or global emergency, such as a pandemic, governmental collection of PII or PHI that in normal times would be either prohibited by law or questionable under social norms may become normalized and desirable to combat the spread of disease.

---

[1] See Paul M. Schwartz & Daniel J. Solove, The PII Problem: Privacy and a New Concept of Personally Identifiable Information, 86 N.Y.U. L. Rev. 1814 (2011) (stating that "PII is one of the most central concepts in privacy regulation. It defines the scope and boundaries of a large range of privacy statutes and regulations.").

[2] See HIPAA Guidelines, 45 C.F.R. § 160.103 ("*Protected health information* means individually identifiable health information.") (emphasis in original).

In times of pandemic, extensive data collection, either of individuals' physical location or health status, may be desirable from a public health perspective.

Evidence is emerging that countries that tested for COVID-19 early and monitored the movements of their citizens had better outcomes, both as to infection rates and as to death rates, than countries like the U.S. that did not engage in early testing and monitoring. In the *New York Times*, Anna Sauerbrey says, "Early and persistent testing helps. And so does tracking people."[3] *The Atlantic* magazine argues, "More transmissible and fatal than seasonal influenza, the new coronavirus is also stealthier, spreading from one host to another for several days before triggering obvious symptoms. To contain such a pathogen, nations must develop a test and use it to identify infected people, isolate them, and trace those they've had contact with. That is what South Korea, Singapore, and Hong Kong did to tremendous effect. It is what the United States did not."[4]

Governments around the world are collecting location and tracking data on people in order to stem the spread of COVID-19.

Contact tracing of infected individuals can be done by using cellphone location data. For example, government agencies in South Korea used "surveillance-camera footage, smartphone location data and credit card purchase records to help trace the recent movements of coronavirus patients and establish virus transmission chains," according to the New York Times, whereas Israel is looking to use previously-collected cell phone location data[5] to attempt contact

---

[3] Anna Sauerbrey, "Germany Has Relatively Few Deaths From Coronavirus. Why?," New York Times, March 28, 2020, available at https://www.nytimes.com/2020/03/28/opinion/germany-coronavirus.html (arguing that aggressive early testing and tracking individuals' locations was responsible for the relatively death rate from COVID-19 infection in Germany).

[4] Ed Yong, How the Pandemic Will End, The Atlantic (March 25, 2020), available at https://www.theatlantic.com/health/archive/2020/03/how-will-coronavirus-end/608719/.

[5] See David M. Halbfinger, Isabel Kershner & Ronen Bergman, "To Track Coronavirus, Israel Moves to Tap Secret Trove of Cellphone Data," New York Times, March 16, 2020, available at https://www.nytimes.com/2020/03/16/world/middleeast/israel-coronavirus-cellphone-tracking.html.

tracing of individuals potentially infected with COVID-19.[6] Local governmental authorities in Italy are reported to be using citizens cellphone location data to analyze the degree of compliance with official lockdown orders.[7] The government of Delhi has started tracking cellphone location data of people who are thought to be infected with COVID-19 and who have been quarantined at home.[8] More governments may choose to do the same.

In the U.S., Google -- a private sector entity, not the government -- says it will be publishing cell phone location data, but this data is not tied to any one single person. According to CNN, Google has "said the findings are 'created with aggregated, anonymized sets of data from users who have turned on the location history setting, which is off by default' in Google's services."[9]

Such monitoring and tracking of individuals' movements, especially in the early stage of a pandemic, can be effective, even dramatically effective in slowing the spread of the virus. It is even more effective and can be targeted when nonanonymized. In such public health emergencies, data collection of PII can have enormous social benefits. But under existing U.S. law, however, the U.S. Supreme Court has ruled that *nonanonymized* collection of cell phone location data by governmental entities is a search protected by the Fourth Amendment of the U.S. Constitution, and as such, requires a warrant supported by probable cause.[10]

---

[6] Ed Yong, How the Pandemic Will End, The Atlantic (March 25, 2020), available at https://www.theatlantic.com/health/archive/2020/03/how-will-coronavirus-end/608719/.

[7] Id. (citing https://milano.corriere.it/notizie/cronaca/20_marzo_17/coronavirus-gallera-in-lombardia-1640-decessi- 16620-positivi-e3875744-686d-11ea-9725-c592292e4a85.shtml?refresh_ce-cp).

[8] See Swati Gupta, "At Least One Indian Territory is Tracking the Phones of Suspected Coronavirus Patients," CNN, April 1, 2020, available at https://us.cnn.com/world/live-news/coronavirus-pandemic-04-01-20-intl/index. html (quoting Delhi chief minister Arvind Kejriwal as saying "We have made a decision and with help from the police, people who have been asked to quarantine themselves at home, we will track their phones over the past few days to ensure that they were staying at home.").

[9] Amy Woodyatt, Google to release your location data to help fight coronavirus pandemic, CNN Business, April 3, 2020, available at https://www.cnn.com/2020/04/03/tech/coronavirus-google-data-sharing-intl-scli/index.html.

[10] See Carpenter v. U.S., 138 S. Ct. 2206 (2018) (holding that "The Government's acquisition of the cell-site records was a search within the meaning of the Fourth Amendment.").

In the lengthy and usually-unread terms of service that cell phone customers have to sign, cell phone users give wireless companies the ability to collect and sell their location data.[11] Private sector firms that currently collect cell phone location data generally take the position that the data are anonymized,[12] although some privacy experts believe that even anonymized cellphone location data, because it is often collected with a high degree of granularity, can be used to identify individuals.[13] But app creators could write clauses into their Terms of Service saying that users consent to their nonanonymized cell location data being shared with federal and state authorities, law enforcement or otherwise, in the absence of a warrant. (The degree to which clauses that require individuals to consent in advance to waive their Fourth Amendment rights, in exchange for receiving cellphone services, are themselves enforceable is another matter.)

Once surveillance and data collection mechanisms become established, however, they could become permanent.

The threats to information privacy, whether in the collection of nonanonymized cellphone location data or of health status, arise after the pandemic is over. Once the mechanisms to gather and use PII and PHI have been established to meet a public health emergency, they may well prove difficult if not impossible to dismantle. And governments face every temptation to leave surveillance protocols in place. History teaches us that once established, governmental powers of surveillance of, and data collection on, its citizens and residents is unlikely to be voluntarily scaled back.[14] And history has also taught us that once data is collected for one purpose it is difficult to prevent it from being used for other unrelated purposes.

---

[11] Shannon Liao, "New York City Might Ban Wireless Companies From Selling Your Location Data," CNN Business, July 24, 2019, available at https://www.cnn.com/2019/07/24/tech/nyc-cellphone-location-data-sale-ban/index.html.

[12] See, e.g., Donie O'Sullivan, "How the Cell Phones of Spring Breakers Who Flouted Coronavirus Warnings Were Tracked," CNN, April 4, 2020, available at https://www.cnn.com/2020/04/04/tech/location-tracking-florida-coronavirus/index.html.

[13] See, e.g., Jennifer Valentino-Devries, Natasha Singer, Michael H. Keller & Aaron Krolik, "Your Apps Know Where You Were Last Night, and They're Not Keeping It Secret," New York Times, Dec. 10, 2018, available at https://www.nytimes.com/interactive/2018/12/10/business/location-data-privacy-apps.html.

[14] See, e.g., the Foreign Intelligence Surveillance Act Amendments of 2008, 50 U.S.C. § 1881-81g (2020), which have been extended several times since their creation, despite "sunset" provisions written into the legislation.

In addition to collecting PII in the form of cell phone location data, governments might also collect PHI in the form of COVID-19 test results or immunity results.

An idea that is increasingly gaining traction, both in the U.S. and elsewhere, is that of creating a nonanonymized database of names of individuals who have recovered from the virus and are thus presumably immune. Dr. Anthony Fauci, the Director of the National Institute of Allergy and Infectious Diseases (NIAID) at the National Institute of Health and the U.S. government's top infectious-disease official, has said he believes that such "conferred immunity" protects against reinfection.[15]

Germany, for example, is contemplating a proposal to issue "immunity certificates" that would allow individuals who had tested positive for antibodies to the virus to leave lockdown.[16] According to the German newspaper Der Spiegel,[17] researchers at the Helmholtz Centre for Infection Research in Braunschweig, Germany "want to send out hundreds of thousands of antibody tests over the coming weeks that could allow people to break free of the lockdowns."[18] Italy is reported to be considering a similar strategy.[19]

For such health care measures to work and to avoid fraud, however, governmental authorities would need to keep a database, similar to driver's license databases, on who holds an immunity

---

[15] See Joshua M. Epstein, Are We Already Missing the Next Epidemic?, Politico Magazine, March 31, 2020, available at https://www.politico.com/news/magazine/2020/03/31/coronavirus-americafear-contagion-can-we-handle-it-157711.

[16] See Daniel Wighton & David Chazan, "Germany Will Issue Coronavirus Antibody Certificates to Allow Quarantined to Re-Enter Society: Researchers to Test Thousands for Immunity As Berlin Plans Exit Strategy for Pandemic Lock Down," The Telegraph, March 29, 2020, available at https://www.telegraph.co.uk/news/2020/03/29/ germany-will-issue-coronavirus-antibody-certificates-allow-quarantined/.

[17] See Sauerbrey, note 3 supra.

[18] See Adam Bienkov, "Germany Could Issue Thousands of People Coronavirus 'Immunity Certificates' So They Can Leave the Lockdown Early," Business Insider (March 30, 2020), available at https://www.businessinsider.com/coronavirus-germany-covid-19-immunity-certificates-testing-social-distancing-lockdown-2020-3.

[19] See Jason Horowitz, "In Italy, Going Back to Work May Depend on Having the Right Antibodies, New York Times," April 4, 2020, available at https://www.nytimes.com/2020/04/04/world/europe/italy-coronavirus-antibodies.html?action=click&module=Top%20Stories&pgtype=Homepage.

certificate and who does not. That means collecting and recording, in *non-anonymized form*, the PHI of individuals and their antibody status regarding COVID-19. This is necessary in order to minimize the opportunity for fraud by people eager to return to work. (Another concern that has been raised surrounding immunity certificates is "whether people might deliberately seek to get infected in order to -- hopefully -- recover and go back to work," which could undermine the flattening of the infection curve that governments and health experts are trying to achieve by requiring social distancing.[20]) And such a database would provide a juicy target for hackers and trolls.

Immunity databases in times of pandemic -- and even post-pandemic -- could provide public health officials with a powerful tool to fine-tune quarantine efforts. Large scale quarantines can be disastrous for the economy even as they are necessary from a public health perspective. Premature lifting of quarantines and stay-at-home orders could allow COVID-19 to return with a vengeance. Yet at the same time, the longer people are out of work and non-essential businesses are shut down, the harder it will be for them to recover financially and for the economy to turn around. Allowing people who have obtained immunity to COVID-19 to return to work would allow economies around the world to recover faster, and at least as importantly, would allow individuals to regain their own financial equilibria.

This raises important issues and challenges to information privacy and health privacy law.

Post-pandemic, how can federal, state, and local governments thread the needle of mounting effective and timely responses to a fast-moving public health crisis, while simultaneously protecting (or at least not worsening) existing legal protection for PHI? Existing state-level models may provide a template for further exploration.

---

[20] Laura Smith-Spark, "Is an 'Immunity Certificate' the Way to Get Out of Coronavirus Lockdown?," CNN, April 3, 2020, available at https://www.cnn.com/2020/04/03/health/immunity-passport-coronavirus-lockdown-intl/index.html.

Several states have laws requiring medical professionals to provide health risk information to potentially affected individuals through contact tracing.[21] For instance, New York State's HIV Reporting and Partner Notification law (HIVRPN) law allows for contact tracing of cases of AIDS, HIV related illness or HIV infection.[22] It requires that "[d]octors and labs must report to the Health Department the names of persons with HIV infection, HIV illness and AIDS" and "must also report the names of sex and needle-sharing partners of people who test HIV positive that are known to the doctor."[23] The HIVRPN has been described as "one of the most aggressive statutes to protect the public . . . [o]n a spectrum that puts individual patient confidentiality on one end and public health protection on the other."[24] Although not without controversy, the HIVRPN has been lauded in the affected communities as a public health success,[25] and the New York State Department of Health takes the information privacy requirements of the Health Insurance Portability and Accountability Act (HIPAA) into account when enforcing state public health laws.[26]

Post-pandemic, one key issue that must be addressed head on, should governmental database(s) of immunity status be created at the federal or state level, is obtaining informed consent from each of the individuals in such a database to share their nonanonymized testing results with state authorities. This might seem like a no-brainer -- who would not mind the state knowing their antibody status if it meant they could return to work earlier and be released from stay-at-home

[21] See, e.g., N.Y. Pub. Health Law § 2130: Communicable diseases; control of dangerous and careless patients; commitment.

[22] See N.Y. Pub Health § 2133: Contact tracing of cases of AIDS, HIV related illness or HIV infection.

[23] N.Y. State: Dep't of Pub. Health, What Is Partner Notification?, available at https://www.health.ny.gov/ diseases/aids/providers/regulations/reporting_and_notification/about_the_law.htm#quest2 (stating that "[d]octors and labs must report to the Health Department the names of persons with HIV infection, HIV illness and AIDS" and "must also report the names of sex and needle-sharing partners of people who test HIV positive that are known to the doctor").

[24] Jacquelyn Burke, Discretion to Warn: Balancing Privacy Rights with the Need to Warn Unaware Partners of Likely HIV/AIDS Exposure, 35 B.C. J.L. & Soc. Just. 89, 105 (2015).

[25] See N.Y. State Dep't of Health Aids Inst., The Impact Of New York's HIV Reporting And Partner Notification (Hivrpn) Law: General Findings Report 5 (2006), available at https://www.health.ny.gov/diseases/aids/providers/regulations/reporting_and_notification/docs/impactreport.pdf (showing that "[a] study of 132 partners of HIV-positive individuals located through health department notification found that 87% thought the Health Department did the right thing in telling them about their exposure, and 92% thought that the Health Department should continue to notify persons exposed to HIV.").

[26] See Office of Mental Health, New York State, "Information for Consumers: Privacy Rule," available at https://omh.ny.gov/omhweb/hipaa/consumers/privacy/.

orders? -- but the underlying issues and implications are not so simple. Given how little the scientific community knows about COVID-19, it is not clear that even a positive test for antibodies is a guarantee of immunity. Similarly, false positive tests -- in which a person inaccurately tests positive for the antibody, and therefore appears immune when in fact they are not -- could undermine the effectiveness of an immunity database. And because all viruses mutate, individuals' immunity status would have to be updated periodically as the virus mutates over time, so reporting immunity status would likely not be a one-time event.

Like HIV, COVID-19 is a transmissible virus that can be readily diagnosed, and for which early detection and treatment are clearly beneficial. Because immunity, whether from vaccination or from successful recovering from a COVID-19 infection, would be viewed as a desirable status, this does not present some of the concerns of social or economic discrimination that a database of results like HIV-positive status present. Even so, such a database of non-anonymized PHI, available to an array of government actors, represent a departure from existing laws and norms regarding the treatment of PHI.

The least controversial route, from a privacy perspective, would be to create a voluntary opt-in government database of people with immunity status, with no penalties for declining to opt in. But as a public health response to monitoring seropositive status after the current pandemic, voluntary self-reporting of non-anonymized immunity status would be only a partial solution. Public health responses that rely on voluntary cooperation of mass numbers of people, some of whom may not have cellphones or even internet access, will not be as effective as mass mandatory self-reporting.[27]

Legal rules and social norms regarding state collection of nonanonymized PHI might not necessarily stop with COVID-19. COVID-19 is not the only transmissible virus. The slope from non-anonymized COVID-19 immunity databases, to governmental collection of non-anonymized

---

[27] The Associated Press, School Shutdowns Raise Stakes of Digital Divide for Students, New York Times, March 30, 2020, available at https://www.nytimes.com/aponline/2020/03/30/us/ap-us-virus-outbreak-digital-divide.html.

information about individuals' immunity status to other viruses, then to their vaccination records, then to their public health wellness generally, is a slippery one indeed.

These issues will not be going away.

There will always be a next pandemic at some point in the future, if not of COVID-19 then of some other infectious agent. The challenges that pandemics present to information privacy are not going to go away or lessen any time soon. After the current pandemic is over, lawmakers, public health experts, and information privacy advocates need to address these issues and balance privacy protection with public health concerns so that the U.S. can be better prepared for the next pandemic, whenever it may come.

COVID-19 and LGBT Rights

Suzanne B. Goldberg, Herbert and Doris Wechsler Clinical Professor of Law; Founder, Sexuality & Gender Law Clinic, Columbia Law School

Even in the best of times, LGBT individuals have legal vulnerabilities in employment, housing, healthcare and other domains resulting from a combination of persistent bias and uneven protection against discrimination.[1] In this time of COVID-19, these vulnerabilities combine to amplify both the legal and health risks that LGBT people face.

This essay focuses on several risks that are particularly linked to being lesbian, gay, bisexual, or transgender, with the recognition that these vulnerabilities are often intensified by discrimination based on race, ethnicity, age, disability, immigration status and other aspects of identity. Topics include: 1) federal withdrawal of antidiscrimination protections; 2) heightened health risks and vulnerabilities seeking healthcare; 3) family recognition and COVID-19; 4) employment discrimination; and 5) populations at special risk.

It also bears noting at the outset that LGBT people already have close and long-lasting experience with HIV/AIDS, which has been described by many as a pandemic[2] and which brought with it enduring stigma and many forms of discrimination and other harms.[3] Even Dr. Anthony

---

[1] Although this chapter generally refers to LGBT people, some of the organizations referred to use an extended acronym with additional letters, including Q (queer and questioning), I (intersex), 2S (two-spirit), and "+" to indicate these and other related aspects of identity. For more information on some of these terms, see the GLAAD Media Reference Guide, https://www.glaad.org/reference/lgbtq and the Glossary of Terms from Egale, the Canada Human Rights Trust, https://egale.ca/wp-content/uploads/2017/03/Egales-Glossary-of-Terms.pdf.
My thanks to Jon Davidson, Chief Counsel of Freedom for All Americans, who provided some of the sources that were foundational for the preparation of this chapter.
[2] Centers for Disease Control, The Global HIV/AIDS Pandemic, 2006, https://www.cdc.gov/mmwr/preview/mmwrhtml/mm5531a1.htm.
[3] Jacob Bernstein, For HIV Survivors, A Feeling of Weary Déjà Vu, NY Times, April 9, 2020, https://www.nytimes.com/2020/04/08/style/coronavirus-hiv.html.

Fauci, who is a new hero to many Americans for his clarity in press briefings on COVID-19,[4] is a familiar presence for AIDS activists because of his role in the 1980s and 90s as a leader of the federal government's response to HIV/AIDS.[5]

Federal withdrawal of antidiscrimination protections

A recent move by the Trump administration's Department of Health and Human Services (HHS) to withdraw important legal protections for LGBT people in key areas of health and human services[6] has made a challenging situation even more precarious. Some quick background may be useful here to put this withdrawal in perspective:

During the Obama administration, HHS adopted a regulation to prohibit discrimination based on sexual orientation, gender identity and other grounds by entities that receive HHS grant funding.[7] These entities include homeless shelters, child welfare services that support young adults, and services for aging people that provide nutrition, social connection and care, among many others.

The 2016 regulation provides, in essence, that organizations receiving HHS grants may not discriminate in their programs based on "non-merit factors," including sexual orientation and gender identity. The full text sets these requirements out in detail:

> It is a public policy requirement of HHS that no person otherwise eligible will be excluded from participation in, denied the benefits of, or subjected to discrimination in the

[4] Aylin Woodward, The life and rise of Dr. Anthony Fauci, the public-health hero who has become the face of America's coronavirus response team, Business Insider, March 27, 2020, https://www.businessinsider.com/who-is-anthony-fauci-speech-controlled-by-trump-coronavirus-2020-2.

[5] Tim Murphy, America, Meet Tony Fauci. HIV/AIDS Activists Have Known Him a Long Time, The Body Pro, March 20, 2020, https://www.thebodypro.com/article/tony-fauci-md-coronavirus.

[6] Notice of Nonenforcement of Health and Human Services Grants Regulation, 84 Fed. Reg. 63809-01 (Nov. 19, 2019) ("Notice of Nonenforcement"), https://www.hhs.gov/sites/default/files/hhs-grants-regulation-notice-of-nonenforcement.pdf.

[7] Health and Human Services is "the largest grant-making agency" in the United States. *See* HHS Grants, https://www.hhs.gov/grants/grants/index.html.

administration of HHS programs and services based on non-merit factors such as age, disability, sex, race, color, national origin, religion, gender identity, or sexual orientation. Recipients must comply with this public policy requirement in the administration of programs supported by HHS awards.[8]

At the time, HHS explained that it already had a similar nondiscrimination policy for HHS contractors and that its goal was to make clear that the same policy applied to grant recipients.[9] The agency also required that all HHS grant recipients "must treat as valid the marriages of same-sex couples."[10]

In November 2019, the Trump administration issued a "Notice of Nonenforcement," saying that it would not enforce these antidiscrimination protections for HHS-funded grant programs.[11] At the same time, HHS issued a notice of proposed rulemaking that would eliminate the list of protections and limit other antidiscrimination protections to those set out specifically in federal laws that authorize grant programs.[12]

While HHS maintains that the purpose of both actions was to "eliminat[e] regulatory burden, including burden on the free exercise of religion,"[13] the LGBTQ organizations that sued HHS in March 2020 to challenge these changes argue that "HHS's actions give recipients of federal funds a license to discriminate in their provision of government-funded services to millions of

---

[8] Health and Human Services Grants Regulation, 81 Fed. Reg. 89393 (Dec. 12, 2016) ("2016 Grants Rule"). This provision was codified at 45 C.F.R. § 75.300(c).

[9] 81 Fed. Reg. at 45271. *See also* 45 C.F.R. § 75.300(c).

[10] The provision's full text linked this requirement to the Supreme Court's decisions regarding marriage equality for same-sex couples: "In accordance with the Supreme Court decisions in United States v. Windsor and in Obergefell v. Hodges, all recipients must treat as valid the marriages of same-sex couples." 81 Fed. Reg. at 45271. *See also* 45 C.F.R. § 75.300(d)

[11] *See supra* n.6.

[12] https://www.hhs.gov/sites/default/files/hhs-grants-regulation-nprm.pdf

[13] HHS Press Office, HHS Issues Proposed Rule to Align Grants Regulation with New Legislation, Nondiscrimination Laws, and Supreme Court Decisions, https://www.hhs.gov/about/news/2019/11/01/hhs-issues-proposed-rule-to-align-grants-regulation.html (Nov. 1, 2019).

people."[14] They argue, too, that HHS's actions "have strongly signaled that service providers need not concern themselves with understanding and preventing LGBTQ discrimination."[15]

The complaint identifies LGBTQ individuals and families who are most at risk as a result of this withdrawal of legal protection:

> Among those most likely to be impacted are *LGBTQ children and youth*. Those children and youth are particularly vulnerable when placed *in out-of-home care or while experiencing homelessness,* where they are dependent on grantees for care and services. In addition, *LGBTQ families interacting with the child welfare system* are likely to be subjected to discrimination. Finally, HHS's actions invite discrimination against vulnerable *LGBTQ older people who depend on critical aging services* to obtain nutrition, address social isolation, and receive holistic care.[16]

The organizations argue that HHS's notice of nonenforcement is arbitrary and capricious in violation of the Administrative Procedure Act and that the government's only rationale for withdrawing protections – that the earlier regulations did not provide information required to comply with the Regulatory Flexibility Act, which requires special consideration of regulations' impact on small businesses – is factually and legally incorrect.[17]

In its description of the lawsuit, Lambda Legal explains that the withdrawal of protections creates specific risks related directly to COVID-19, including these:

- Students experiencing homelessness are susceptible to discrimination as they seek shelter through HHS' Runaway and Homeless Program, at a time when colleges and universities have shut down housing to help halt the spread of COVID-19.
- LGBTQ older adults are now vulnerable to providers that subject them to harassment or refuse to offer services, such as home delivered meals, on the basis of their sexual

[14] *See* Family Equality, et al. v. Azar, Case 1:20-cv-2403 para. 6 (S.D.N.Y., filed Mar. 19, 2020). For a copy of the complaint, see https://www.lambdalegal.org/in-court/legal-docs/family_ny_20200319_complaint
[15] *Id.* at para. 86.
[16] *Id.* at para. 6 (emphasis added).
[17] *Id.* at para. 7.

orientation or gender identity, at a time when senior centers are shutting down in major metropolitan centers to help combat the spread of COVID-19.[18]

There is also, as noted above, a harmful signaling effect from the withdrawal of antidiscrimination protections.[19] This effect reverberates not only among grantees, who are newly freed to discriminate but also among LGBT people who may be reluctant to seek necessary help from a federal government that has repeatedly expressed hostility through legal action and by other means.[20]

Heightened health risks and vulnerabilities in seeking healthcare

Shortly after COVID-19's dangers became clear in the United States, LGBTQ health organizations began to report on the heightened risks faced by LGBTQ people. Notably, these risks are not tied to medical vulnerabilities associated with sexual orientation or gender identity as such, but rather with stigma and discrimination often experienced by people who are LGBTQ that in turn affect health behaviors and access to medical care.[21]

Most basically, as one report explained, LGBTQ Americans are more likely than the general population to live in poverty and lack access to adequate medical care, paid medical leave, and basic necessities during the pandemic.[22] These findings were reiterated in a study of

---

[18] *See* Family Equality v. Azar, https://www.lambdalegal.org/in-court/cases/family-equality-v-azar. For more on the experience of transgender students returning home from college, see, e.g., https://www.buzzfeednews.com/article/mollyhensleyclancy/coronavirus-college-closures-trans-students?ref=hpsplash&origin=spl

[19] *See, e.g., supra* n.15

[20] *See, e.g.,* Lola Fadulu, Trump's Rollback of Transgender Rights Extends through Entire Government, N.Y. Times, Dec. 6, 2019, https://www.nytimes.com/2019/12/06/us/politics/trump-transgender-rights.html; Michael D. Shear and Charlie Savage, In One Day, Trump Lands Three Punches Against Gay Rights, July 27, 2017, https://www.nytimes.com/2017/07/27/us/politics/white-house-lgbt-rights-military-civil-rights-act.html.

[21] For discussion of the negative physical and mental health consequences of stigma on LGBT and other populations, see, e.g., Karen I. Fredriksen-Goldsen, et. all, The Cascading Effects of Marginalization and Pathways of Resilience in Attaining Good Health Among LGBT Older Adults, 57 *The Gerontologist* S72 (Feb. 2017), https://academic.oup.com/gerontologist/article/57/suppl_1/S72/2904646; Mark L. Hatzenbuehler et al., *Stigma as a Fundamental Cause of Population Health Inequalities*, 103 AM. J. PUB. HEALTH 813, 813, 816 (2013), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3682466/.

[22] Human Rights Campaign Foundation, The Lives and Livelihood of Many in the LGBT Community are at Risk Amidst the COVID-19 Crisis, https://assets2.hrc.org/files/assets/resources/COVID19-IssueBrief-032020-FINAL.pdf?_ga=2.30688191.1062621009.1585758332-1613644810.1567783041.

Canadian LGBTQI2S individuals, which reported "greater current and expected impacts of COVID-19 on their physical and mental health, and overall quality of life" than in the general Canadian population.[23]

To help raise awareness, dozens of U.S. organizations issued an open letter about the coronavirus and LGBTQ+ communities outlining three factors that create increased vulnerability related to COVID-19:[24]

1. The LGBTQ+ population uses tobacco at rates that are 50% higher than the general population. COVID-19 is a respiratory illness that has proven particularly harmful to smokers.
2. The LGBTQ+ population has higher rates of HIV and cancer, which means a greater number of us may have compromised immune systems, leaving us more vulnerable to COVID-19 infections.
3. LGBTQ+ people continue to experience discrimination, unwelcoming attitudes, and lack of understanding from providers and staff in many health care settings, and as a result, many are reluctant to seek medical care except in situations that feel urgent – and perhaps not even then.

LGBTQ populations also face additional risks related to conditions that are often associated with complications from COVID-19. An analysis of data from the 2018 Behavioral Risk Factor Surveillance System, which collects state-level data about U.S. residents regarding health-related risk behaviors, chronic health conditions, and use of preventive services,[25] showed, for example, that one in five LGBTQ adults aged 50 and above has diabetes,[26] a factor that raises the risk of complications for individuals diagnosed with COVID-19.[27]

---

[23] Egale and Innovative Research Group, Impact of COVID-19, Canada's LGBTQI2S Community in Focus, April 6, 2020, https://egale.ca/egale-in-action/covid19-impact-report/.

[24] LGBT Cancer Network, Coronavirus Information, https://cancer-network.org/coronavirus-2019-lgbtq-info/.

[25] For more information, see Centers for Disease Control and Prevention, on the Behavioral Risk Factor Surveillance System, https://www.cdc.gov/brfss/index.html.

[26] *See supra* n.22 at 5.

[27] Centers for Disease Control and Prevention, Groups at Higher Risk for Severe Illness, https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-at-higher-risk.html.

A brief from The Fenway Institute also identifies special concerns for older LGBT adults who "already experience higher rates of social isolation than straight and cisgender age peers," adding that the increase in isolation as a result of social distancing can "exacerbate underlying mental health issues such as suicidal ideation and substance use."[28]

That report and others recognize, too, that while the interaction between COVID-19 and HIV is not yet known, people with HIV may be at heightened risk from other conditions, including cardiovascular and chronic lung disease and immune suppression.[29]

***

In light of these data, and in the midst of the COVID-19 pandemic, the absence of standardized protections against discrimination by healthcare providers is all the more disturbing. While a 2016 report from HHS reinforced the importance of nondiscrimination rules in enabling LGBTQ people to access healthcare,[30] federal legal protections against healthcare discrimination based on sexual orientation and gender identity have been substantially diminished, as discussed above. Adding to these challenges, state-based protections are

---

[28] The Fenway Institute, Coronavirus, COVID-19, and Considerations for People Living with HIV and LGBTQIA+ People 7 (footnotes and citations omitted) (March 25, 2020) https://fenwayhealth.org/wp-content/uploads/C19MC-9_COVID-19and-LGBTQIA-and-People-Living-with-HIV-Brief_final2_links.pdf.

[29] California Office of AIDS, COVID-19, Information for People Living with HIV, https://www.cdph.ca.gov/Programs/CID/DOA/CDPH%20Document%20Library/COVID19forHIVPoz_ADA.pdf. *See also* Centers for Disease Control and Prevention, What to Know about COVID-19 and HIV, https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/hiv.html; Scott Schoettes, The Current Pandemic Underscores That We Still Haven't Resolved the Last One, https://www.lambdalegal.org/blog/20200327_coronavirus-pandemic-hiv.

[30] Health and Human Services LGBT Policy Coordinating Committee, *Advancing LGBT Health and Well-Being* 8 (2016) (https://www.hhs.gov/sites/default/files/2016-report-with-cover.pdf (observing that "[r]educing barriers to discrimination and helping more LGBT people get access to care and coverage is ultimately only a first step" toward strengthening health outcomes for LGBT people).

inconsistent across the United States,[31] and discrimination by healthcare providers remains a significant challenge for LGBT individuals and families.[32]

Family recognition and COVID-19

Although same-sex couples have had the right to marry anywhere in the United States since the U.S. Supreme Court decided *Obergefell v. Hodges* in 2015,[33] discrimination against same-sex couples – both married and unmarried – continues to be an issue. With some frequency, employers and service-providers have claimed that faith-based exemptions to antidiscrimination laws entitle them to refuse goods or services to same-sex couples.[34] Some states have also persisted in refusing to recognize the marriages of same-sex couples, offering an assortment of other reasons when their actions have been challenged in court.[35]

The special concern around COVID-19 involves situations where one member of a couple may be hospitalized and the other may be unable to obtain information about their partner's health. This is a particular risk for unmarried same-sex partners. While unmarried different-sex partners are often presumed by hospital personnel to be married and therefore entitled to personal health information about their spouse, the same presumption may not be as likely to be made about same-sex partners.[36]

---

[31] *See* Movement Advancement Project, Snapshot: LGBT Equality By State, https://www.lgbtmap.org/equality-maps. For more specific information about healthcare-related protections, select the "choose an issue" tab and choose among healthcare options there.

[32] *See* Human Rights Watch, "'You Don't Want Second Best'" Anti-LGBT Discrimination in US Healthcare (July 23, 2018), https://www.hrw.org/report/2018/07/23/you-dont-want-second-best/anti-lgbt-discrimination-us-health-care.

[33] Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

[34] *See, e.g.,* Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n, 138 S. Ct. 1719 (2018); *see also* Human Rights Watch, "All We Want Is Equality": Religious Exemptions and Discrimination Against LGBT People in the United States (2018), https://www.hrw.org/report/2018/02/19/all-we-want-equality/religious-exemptions-and-discrimination-against-lgbt-people.

[35] *See, e.g.,* Mark Joseph Stern, Alaska's Discrimination Against a Gay Couple Shows the Continued Threats to Marriage Equality, Nov. 23, 2019, https://slate.com/news-and-politics/2019/11/alaska-marriage-equality-supreme-court.html; Mark Joseph Stern, Marriage Equality May Soon Be in Peril, July 5, 2017, https://slate.com/news-and-politics/2017/07/how-the-supreme-court-could-overturn-obergefell-v-hodges.html.

[36] Tara Parker-Pope, Kept from a Dying Partner's Bedside, N.Y. Times, May 18, 2009, https://www.nytimes.com/2009/05/19/health/19well.html. Parker-Pope's article describes the experience of Janice Langbehn, a woman who was barred from seeing her partner in the hospital and from bringing the couple's children to see their other mother. In the lawsuit challenging the hospital's action, Langbehn alleged that a social worker at the hospital told her that she was in an "antigay city and state" and that she would need a health care proxy to get information." *Id.* For more on the lawsuit, which was ultimately dismissed, see Lambda Legal,

For this reason, LGBT advocacy organizations have offered additional resources to support same-sex couples in planning to secure recognition for their relationship should either partner be hospitalized with complications from COVID-19.[37] These resources also provide guidance for couples who are parenting a child together but only one of the two has a legally recognized relationship with the child. This is not uncommon in same-sex couples raising children together, where the "non-legal" parent may not be accorded legal recognition of their parental rights without taking the additional step of obtaining a second-parent adoption.[38]

At least one advocacy organization is also offering analysis of COVID-19 related legislation that includes attention to the concerns of LGBT families.[39]

Employment discrimination

The combination of bias toward LGBT people and limited antidiscrimination protections means that LGBT people are also more vulnerable to joblessness in the wake of the dramatic economic downturn as a result of COVID-19's spread. At least one report has indicated that LGBTQ people "are more likely to work in jobs in highly affected industries, often with more exposure and/or higher economic sensitivity to the COVID-19 crisis."[40] Although there have been substantial advances in equality of LGBT people in the past decade, legal protections remain uneven, with many LGBT people living in jurisdictions that do not expressly prohibit discrimination based on sexual orientation or gender identity.[41]

Populations at special risk

Langbehn v. Jackson Memorial Hospital," https://www.lambdalegal.org/in-court/cases/langbehn-v-jackson-memorial.

[37] *See, e.g.,* National Center for Lesbian Rights, FAQ: Documents and Protections for LGBTQ People and Their Families During COVID-19 Crisis, http://www.nclrights.org/legal-help-resources/resource/faq-documents-and-protections-for-lgbtq-people-and-their-families-during-covid-19-crisis/

[38] National Center for Lesbian Rights, Family & Relationship Resources, http://www.nclrights.org/our-work/family-relationships/family-relationships-resources/#parentingnational.

[39] Family Equality, COVID-19 Response Legislation Overview, https://www.familyequality.org/covid-legislation/.

[40] *See* Human Rights Campaign Foundation Report at 2, *supra* n. 22

[41] Movement Advancement Project, Nondiscrimination Laws, https://www.lgbtmap.org/equality-maps/non_discrimination_laws. *See also* Sejal Singh and Laura E. Durso, Widespread Discrimination Continues to Shape LGBT People's Lives in Both Subtle and Significant Ways, Center for American Progress, May 2, 2017, https://www.americanprogress.org/issues/lgbtq-rights/news/2017/05/02/429529/widespread-discrimination-continues-shape-lgbt-peoples-lives-subtle-significant-ways/.

LGBT youth and elders are among the most vulnerable because of heightened risks related to homelessness, poverty and social isolation, as described at length in the lawsuit that challenges the federal government's decision not to enforce antidiscrimination protections that cover HHS grant recipients.[42] Each of these risks, as discussed above, may be exacerbated by the coronavirus pandemic.

Transgender individuals are also among the most vulnerable within LGBT communities to discrimination, violence and other harms. The Transgender Legal Defense and Education Fund has released a special "Know Your Rights Guide for Transgender People Navigating COVID-19" that addresses healthcare needs of transgender individuals, including information on delays to gender-affirming surgery and legal name-changes in this time, along with information about many other issues and concerns.[43]

LGBTQ immigrants in the United States who may be in detention or needing legal assistance related to their immigration status may also find useful resources from Immigration Equality,[44] the leading advocacy organization for LGBTQ immigrants in the United States.

Conclusion

Managing the challenges presented by COVID-19 is daunting for nearly everyone in the United States and elsewhere. For many LGBT people in the U.S., the backdrop of stigma and discrimination can make access to healthcare, social services and basic legal protections especially difficult.

At the same time, LGBT communities have developed extraordinary resilience over decades of responding to the pandemic of HIV/AIDS, pushing back against stigma, and making claims for equality and basic human dignity. Legal protections, community-based resources and social support networks exist in 2020 in a way we could not have imagined when our communities first confronted AIDS nearly 40 years ago. Especially in this difficult time, this difficult history and its hard-earned lessons may offer both hope and guidance as we navigate the complex path that lies ahead.

---

[42] *See* Family Equality Council et al. v. Azar, *supra* n. 14

[43] Transgender Legal Defense and Education Fund, https://www.lgbtmap.org/equality-maps/non_discrimination_laws.

[44] Immigration Equality, COVID-19 Alert, Information and Updates, https://www.immigrationequality.org/.

How to Help Small Businesses Survive COVID-19

Todd Baker, Senior Fellow, Richard Paul Richman Center for Business, Law and Public Policy, Columbia Law School

Kathryn Judge, Harvey J. Goldschmid Professor of Law[1], Columbia Law School

Small businesses are among the hardest hit by the COVID-19 crisis. Many are shuttered, and far more face cash flow constraints, raising questions about just how many will survive this recession. The government has responded with a critical forgivable loan program but for many of these businesses, this program alone will not provide the cash they need to retain workers, pay rent, and help their business come back to life when Americans are no longer sheltering in place. This essay calls on regulators to find new and creative ways to work with existing intermediaries, including banks and online lenders, who have the infrastructure and tools needed to help small businesses get the additional loans they need to survive and thrive. Leveraging existing institutions could enhance the speed, scale, and scope of the government's response, all critical virtues in the efforts to support small business.

[1]** The authors are grateful to Katharina Pistor for helpful comments on earlier drafts and to Clare Curran for timely and helpful research assistance.

The public health crisis posed by COVID-19 may soon be overshadowed by the massive economic disruption that lies in its wake. A severe recession is certain but questions remain about just how deep it will sear, how long it will last, and how it will reshape the economy that emerges. Among the critical questions policy makers are facing are how best to support small businesses and how to reduce the number of otherwise viable businesses that will be forced into bankruptcy as a result of COVID-19 and efforts to slow its spread.

We argue that in order to minimize the adverse impact on small businesses, lawmakers should harness existing mechanisms for extending credit to companies with the potential to succeed and for renegotiating the terms of existing loans. The core idea is that grants to support small businesses such as the Paycheck Protection Program ("PPP") are a critical but insufficient response to the cash flow needs of small businesses. No one yet knows just how long the threat posed by COVID-19 and associated activity constraints will last and whether a second or even third wave will arise after this one. Nor can anyone foresee what the economy will look like when people emerge from their shelters. The government lacks the means to provide full support to all of the people and businesses that will suffer so, over the longer term, it must consider how best to leverage the money it is investing to get the economy back on track and to help people in need. Banks and other lenders, particularly the new breed of online lenders, can help.

Banks and online lenders have the relationships, information, expertise, and infrastructure needed to help get cash into the hands of the small and mid-sized businesses that need it. Providing appropriate support to banks and online lenders could also go a long way in softening the blow to small and mid-sized businesses as obligations to pay outstanding loans can be among the more significant ongoing liabilities these businesses face. Further, making an effort to work with a diverse array of intermediaries could expand the pool of businesses that ultimately receive help and could also reduce the tendency for the government's needed interventions to distort an already uneven playing field.

The challenge is that banks and online lenders face their own liquidity and capital constraints, limiting their capacity to provide the type of aid small businesses so desperately need. We provide an overview of why these institutions are critical and how the government can best leverage them to maximize the impact of governmental support on the long-term success of the small businesses threatened by recent developments. The aim is to provide a frame for understanding both the efforts underway and the further steps that could be taken. Much of what is called for could be implemented through facilities authorized by the Coronavirus Aid, Relief, and Economic Security Act ("CARES Act"), including the PPP administered by the Small Business Administration ("SBA"), but we also point to additional interventions policymakers should consider as they contemplate new legislation or other regulatory efforts to support small businesses through these difficult times. Finally, we point to policies that may be needed to reduce the systemic risks created by the recent rise of online small business lenders.

Background

COVID-19 has quickly evolved into the greatest global economic threat of the century. These challenges arise in part from the suffering and sometimes passing of those who contract COVID-19 but even more from the type of government interventions and behavioral changes needed to stop its spread. Among the hardest hit are small and mid-sized businesses, often defined as those businesses that have less than 500 employees. According to the Census Bureau there are roughly six million such businesses currently operating in the United States. Helping these businesses has been a central focus of the government's interventions.[2] One reason is the critical role these firms play in the economy. Small businesses are a key driver of economic activity. They support the growth and vitality of our neighborhoods, spark innovation, and provide a proven pathway for many people — particularly women and minorities — to achieve financial success and independence. In recent years, almost one-half of the U.S.

[2] Nellie Liang, The Federal Reserve, Which Already has Moved Aggressively, Can Do More for Small Businesses, Brookings (March 30, 2020), https://www.brookings.edu/blog/up-front/2020/03/30/the-federal-reserve-which-already-has-moved-aggressively-can-do-more-for-small-businesses//.

workforce worked in a small business and small businesses collectively produced 45% of U.S. GDP.[3]

A related reason for the emphasis on small businesses, also reflected in the CARES Act, is that small businesses embody and reflect certain American ideals. Particularly given concerns that the United States has become excessively dominated by large businesses and that those businesses exercise too much influence over policy making, many see small businesses as critical to the long-term vibrancy of democratic institutions.[4] Finding ways to help these businesses get the cash they need to survive, while also ensuring their owners are not saddled with excessive personal debt in the process, is at the forefront of the current economic policy challenges.

In its early efforts to minimize the economic costs of COVID-19, Congress passed a series of laws that provide extensive fiscal support to businesses and individuals. The CARES Act is the most important of the interventions to date, although further congressional action appears likely as the economic toll of COVID-19 materializes. In broad terms, the CARES Act seeks to help small businesses in two ways. One is through the PPP's forgivable loans, which effectively operate as grants to help small firms retain most of their employees and weather the other short-term challenges they face. Although a critical first step, these loans alone are unlikely to satisfy the medium and longer-term cash-flow and other needs of these businesses.[5] Given the fluidity of the situation, we explain here in broad terms why it is so critical for policy makers to harness existing institutions to meet these needs, and then propose some of the ways they can do so. Longer term, we encourage policy makers to think creatively about the country's reliance on powerful middlemen, in finance and elsewhere. We also recognize the importance of potential conflicts of issue that can sometimes arise when the government works closely with these institutions to provide aid. For now, however, we believe the focus must be on finding

---

[3] JPMorgan Chase & Co., Small Businesses are an Anchor of the US Economy, https://www.jpmorganchase.com/corporate/institute/small-business-economic.htm.

[4] Thomas Philippon, The Great Reversal: How America Gave Up on Free Markets (2019).

[5] Although much uncertainty remains, preliminary survey results show that both service and manufacturing firms are facing meaningful financial challenges as a result of the COVID-19 crisis.

the most viable avenues possible for supporting small businesses. We make specific recommendations to illustrate what is possible and how, even for these proposals, the tradeoffs at stake will need to be evaluated in context.

A. Lessons on the Importance of Harnessing Existing Institutions

History, both recent and distant, suggests that the government's ability to harness existing institutions can be key to achieving particular policy goals. During the 2008 financial crisis, for example, then Treasury Secretary Paulson asked Congress for $700 billion to buy mortgage-backed securities and other troubled assets with the aim of putting a floor under the price of those assets. After being given this authority in the Emergency Economic Stabilization Act ("EESA"), however, Treasury quickly changed course, recognizing it was impossible to erect its own facilities for valuing and buying up those assets in a manner fast enough to calm markets, particularly given the liquidity strains and informational challenges of the time.

Less than two weeks after EESA became law, the Treasury Secretary interpreted the Department's authority to buy "troubled assets" as sufficient basis for a massive recapitalization of the banking system. These interventions proved to be an effective and timely way to restore market functioning and allowed the banking system to play a role in the recovery that followed.[6] Other programs to stabilize markets such as the Term Asset-Backed Securities Loan Facility ("TALF") were established by the Federal Reserve and supported by Treasury and its provision of Troubled Asset Relief Program ("TARP") funds to absorb possible losses. Under the TALF program, the Federal Reserve issued nonrecourse loans with a term of up to five years to holders of eligible asset-backed securities ("ABS"). TALF financing was intended to support new ABS issuance and increase the flow of credit to consumer and business borrowers. Any U.S. company that owned eligible ABS collateral was able to request a TALF loan. In the words of the Federal Reserve: "While TALF borrowers benefited from the leverage provided by the facility, they served primarily as conduits…. The[] issuers and sponsors

[6] For more information on the passage of EESA and how the Treasury Department interpreted its authority, see Eric A. Posner & Adrian Vermeule, The Executive Unbound: After the Madisonian Republic (2011).

of newly issued ABS were the beneficiaries of the program."[7] This is a great example, and one being invoked again, of the Federal Reserve and Treasury working together to harness existing institutional capacity to promote the extension of credit needed to support the real economy. The most relevant lesson is that it is very hard for the government on its own to develop the expertise and infrastructure to do what private financial institutions specialize in—assessing the value of financial instruments and the creditworthiness of potential borrowers. An additional lesson is that a well-capitalized banking system is key for economic recovery.

Looking further back, we see that the Federal Reserve has attempted to make loans directly but with very mixed results. Between 1934 and 1958, pursuant to what was Section 13(b) of the Federal Reserve Act, the Federal Reserve was authorized to provide working capital loans directly to nonfinancial firms.[8] In a recent analysis of Section 13(b), George Selgin closely details just how difficult it was for the Fed to determine who should get funds—resulting in widespread denials of applications—and how poorly those loans nonetheless performed. When Congress took away the Fed's power in 1958, it was acting in accord with, not contrary to, the wishes of respected Fed Chairman William McChesney Martin, who had testified that the program was inconsistent with "good government" as well as "good central banking." Both of Martin's critiques pushed for a Fed that was more focused on its core mandates.

None of this is to belittle the value of government-run programs. Just the opposite—public options can be a critical way to provide services and can spur private activity.[9] Depending on how the next few months play out, a critical reassessment of the country's reliance on financial middlemen may well be warranted. For now, however, the government's capacity to extend credit and provide other aid to businesses in need will likely depend on how successfully it harnesses and directs existing intermediary structures. Failure to engage with institutions specifically well designed to aid small business could result in a post-COVID-19 world with far

---

[7] Board of Governors of the Federal Reserve System, Term Asset-Backed Securities Loan Facility (TALF), https://www.federalreserve.gov/regreform/reform-talf.htm.

[8] George Selgin, When the Fed Tried to Save Main Street, Alt-M (March 30, 2020), https://www.alt-m.org/2020/03/30/when-the-fed-tried-to-save-main-street/.

[9] Ganesh Sitaraman & Anne L. Alstott, The Public Option: How to Expand Freedom, Increase Opportunity, and Promote Equality (2019).

more large, powerful businesses and far fewer small businesses critical to the vibrancy of our economy and society.

B. Banks Remain Critical

That banks are critical is reflected in many of the legislative and regulatory interventions to date. The challenges here will be finding new ways to harness bank capacity and ensuring banks remain sufficiently well capitalized to work with existing small-business borrowers and extend new loans.

The difficult balance in ensuring banks have both the capital cushions needed to survive and lend and the flexibility to make accommodations when appropriate is already leading to heated debates. One aspect of the challenge is the need to maintain a long-term perspective that reflects the genuine uncertainty of the public health crisis the country and world is facing and hence the possibility of greater losses ahead. So far, there has been a tendency to focus on ways that banks can help their clients and themselves at the same time. But the more difficult and important decisions entail tradeoffs between these groups. If Congress wants to do more to help small businesses, and more effectively leverage banks in that process, it must to find ways to encourage banks to act even when it is costly for them to do so. This requires far more than moral suasion, which could even be counterproductive longer term if banks become under-capitalized in the process. Figuring out ways both through and beyond the CARES Act to provide targeted subsidies to reward banks for making costly modifications or extending certain new loans to small businesses could be a critical complement to the efforts already underway.

A more troubling development is that, in addition to encouraging banks to work with customers, Congress and regulators are giving banks the freedom to renegotiate loans without adhering to appropriate accounting standards and are otherwise weakening capital standards.[10] On the one hand, capital and liquidity requirements often act as a buffer, so modest relaxations during finite periods of distress may at times be justified. Similarly, excessively rigid adherence

[10] E.g., CARES Act, Sections 4012–4014.

to existing and new rules may discourage precisely the type of long-term value-creating workarounds that all want to see. On the other hand, these developments can lead in dangerous directions. Banks, for example, may opportunistically use these temporary relaxations in accounting and other standards to restructure loans that are problematic for other reasons. The weakest and worst-run banks may be most likely to engage in such concerning behavior. More broadly, an undercapitalized banking system could inhibit recovery in the real economy, as vividly illustrated by Japan's lost decade. Finally, by softening standards in ways that reduce the informativeness of banks' financial statements, these developments could breed the type of unknowns that can exacerbate market dysfunction. Take away the credibility of the information available and that too could lead to doubt about the banking sector and a prolonged crisis.[11]

Apart from these dynamics, there are questions about whether the Treasury and Federal Reserve could do more to harness banks' infrastructure for making loans. The big problem, again, is that banks' incentives and society's interests are not well aligned. Banks cannot be expected to do what needs to be done without financial incentives to do so. This is an important area for further exploration: Treasury and the Federal Reserve should find ways to encourage the extension of new loans to small businesses, with terms that are friendlier than what a bank could make on its own, by finding a way for banks to quickly unload such loans. This approach could be a good way to help small businesses without threatening bank health.

The final point to note is that even though banks are critical, they are also not dis-interested. This has already come through in their role in helping small businesses access PPP loans. On the one hand, banks have played a critical role in enabling the program to work and in getting money into hands of small businesses in a timely way. Without banks, the program as designed would not work. On the other hand, the program and banks involved have run into operational challenges that are delaying the distribution of these funds. More disturbingly, banks are favoring their own clients, particularly clients with outstanding loans. This is not only

---

[11] Kathryn Judge, Information Gaps and Shadow Banking, 103 Virginia Law Review 411 (2017); Kathryn Judge, The Role of a Modern Lender of Last Resort, 116 Columbia Law Review 843 (2016).

because it is easier for banks to process these applications—the rationale most provide—but also because those banks stand to benefit from the PPP funds. By improving the liquidity and solvency of firms receiving the funds, PPP funds make it less likely that a bank's outstanding loan will go into default. These types of conflicts are not a reason to bypass banks in the short run but they are a reminder of the importance of identifying and, when appropriate, minimizing conflicts when they inevitably arise.

Overall, the evidence suggests that better capitalized banks do a better job lending through the cycle.[12] Excessively relaxing capital requirements or allowing troubled banks to opportunistically renegotiate with weak borrowers is unlikely to pave the road to long-term success. Instead, the aim should be to devise tools that utilize bank expertise and provide appropriate incentives for helping businesses in need.

C. Online Lenders are a Critical and Growing Part of the Small Business Credit Ecosystem

The situation with online small business lenders is significantly more complicated. Online small business lenders are the main source of credit for a large and highly vulnerable part of the small business ecosystem that banks can't or won't serve effectively.[13] Due to their capital markets-dependent business model as nonbank finance companies, online small business lenders will be forced out of the market just when the liquidity they provide is needed most. Online lenders have already curtailed or ceased lending as their ABS are downgraded and funding costs rise precipitously.[14] Accordingly, unless the government finds a way to utilize

---

[12] Leonardo Gambacorta & Hyun Song Shin, Why Bank Capital Matters for Monetary Policy, BIS Working Paper No. 558 (April 2016), https://www.bis.org/publ/work558.pdf.

[13] Online lenders include the new breed of standalone non-bank "fintech" small business lenders like FundingCircle, OnDeck, Fundation, Kabbage, BlueVine, Can Capital, StreetShares, Lendio, and Biz2Credit, as well as more established tech and fintech companies like Square, PayPal, Stripe, Intuit, and Amazon, which include lending as part of their service.

[14] Robert Armstrong, Online Lender Stops Making Loans to Small U.S. Businesses, Financial Times (April 1, 2020), https://www.ft.com/content/c31a20cf-cb17-4958-9454-73763302b5dc.
Kroll Bond Rating Agency, 10 U.S. Small Business ABS Deals on Watch Downgrade Due to COVID-19 Concerns (March 30, 2020), https://www.krollbondratings.com/documents/report/32339/abs-u-s-small-business-abs-watch-downgrade-surveillance-report.

and support these lenders, a wide swath of small business borrowers may face a dire cash shortage. As a longer-term matter, it may be advisable to consider reducing the systemic risks created by small business lenders that are dependent on the capital markets and thus disabled in a crisis. It may be more prudent to force these lenders into the regulated banking system where access to deposit funding and effective capital and liquidity rules will prevent lending paralysis.

It is important to be clear-eyed about how the small business credit market has changed since 2008. Banks are no longer the only source of credit for true small businesses, especially the type of very small "Mom & Pop" corner stores, laundromats, beauty salons, and coffee and sandwich shops that line main streets. Over the last decade, the smallest enterprises have increasingly turned to online lenders for their credit needs. The most recent Federal Reserve Banks' Small Business Credit Survey indicated that, in 2018, nearly one-third of small businesses that applied for credit sought it from an online lender.[15] For less traditionally credit-worthy businesses, the number was closer to one-half.[16] Despite an average loan size much smaller than that of a typical bank,[17] online lenders extended more than $20 billion in loans to small businesses in 2019, overwhelmingly to very small enterprises. Combined with the approximately $12-15 billion in aggregate merchant cash advances made to small retail businesses in 2019, nonbank lenders provided somewhere between a quarter and a third of all credit to the smallest businesses.

All this growth has brought systemic fragility with it. If you peel back the skin of an online lender, what you find underneath is a finance company, simply a nonbank lender that gets all of its funding from the capital markets. Leading finance company names from the past like Household, GE Capital, CIT, MBNA, Countrywide, Money Store, and GMAC all relied on the

---

[15] Federal Reserve Banks, Small Business Credit Survey (2019), https://www.fedsmallbusiness.org/medialibrary/fedsmallbusiness/files/2019/sbcs-employer-firms-report.pdf.

[16] According to the Federal Reserve's 2019 study, "[m]edium- and high-credit-risk applicants seeking loan or line of credit financing were as likely to apply to an online lender as to a large bank (54% and 50%, respectively), and more likely to apply to an online lender than to a small bank (41%), CDFI (5%), or credit union (12%)." Federal Reserve Banks, supra note 14 at iii.

[17] Maddie Shephard, Average Small Business Loan Amounts, Broken Down and Explained, Fundera (April 4, 2020), https://www.fundera.com/business-loans/guides/average-small-business-loan-amount.

same liquidity model: borrow in the capital markets and lend that money to customers. In good times, this model works well. But when funding in the capital markets is unavailable or prohibitively expensive, a finance company quickly hits the wall.[18] That's why the finance companies of the past moved, though not always voluntarily, into the banking system to get access to the stable deposit funding they needed to survive and prosper, or they failed.[19]

Because they are so important to the small business credit ecosystem and because they are liquidity-challenged relative to banks, online small business lenders will need both short and medium-term assistance from the Federal government in order to play a meaningful role in any small business credit and economic recovery. The most immediate short-term solution for these lenders and their customers is direct participation by online lenders in the PPP, as authorized by the CARES Act.[20] The speed and simplicity of online lenders' processes would be a significant advantage relative to the often more bureaucratic loan origination practices of banks. While online lenders have the same incentives as banks to provide PPP loans to their existing customers as a means of reducing potential defaults, they also have significant financial incentives to make PPP loans to new customers. This is because, as monoline lenders unable to fund traditional loans and without other revenue sources, they need the revenue from PPP lending to "keep the lights on" in their origination operations until conditions improve.

---

[18] For examples of the instability of capital markets funding for online lenders, see Lawrence Delevingne, Eyeing Defaults, U.S. Direct Lender Colchis Capital to Shut Funds, Reuters (April 7, 2020), https://www.reuters.com/article/us-health-coronavirus-colchiscapital-exc/exclusive-eyeing-defaults-us-direct-lender-colchis-capital-to-shut-funds-idUSKBN21P21X; Diana Asatryan, Kabbage Bond Tumbles to Pennies, as the Rest of SMB is 'On Hold', Debtwire (April 2, 2020).

[19] Unfortunately, some of today's online small business lenders—the so-called "marketplace lenders"—are even more fragile in a crisis than their more traditional predecessors. A marketplace lender has to keep issuing loans to survive. It can't slow down lending and slash operating costs to stay afloat while collecting cash from existing loans, like a traditional finance company, because it typically doesn't own many loans and relies on transaction fees or "gain on sale" for its main source of revenue. If the capital markets stop buying a marketplace lender's loans and securitizations, or charge too much for the privilege, the music stops and the lender stops lending. Todd H. Baker, Marketplace Lenders Are a Systemic Risk, American Banker (August 17, 2015), https://www.americanbanker.com/opinion/marketplace-lenders-are-a-systemic-risk; Todd H. Baker, OK, Marketplace Lenders, I'll Say It: Told You So, American Banker (May 4, 2016), https://www.americanbanker.com/opinion/ok-marketplace-lenders-ill-say-it-told-you-so.

[20] The CARES Act permits "other lenders" to become licensed to make 100% guaranteed PPP SBA loans. CARES Act. Section 1109(b). The Interim Final Rule sets out the terms and conditions on which "additional lenders" under Section 1102(a)(1)(F)(iii) of the CARES Act may participate in the PPP program. U.S. Small Business Administration, Business Loan Program Temporary Changes; Paycheck Protection Program, Docket No. SBA-2020-0015, https://www.sba.gov/sites/default/files/2020-04/PPP--IFRN%20FINAL.pdf.

Recent actions by the Treasury, SBA, and Federal Reserve with regard to both the PPP and the related Paycheck Protection Program Liquidity Facility ("PPPLF") appear designed eventually to allow online and other nonbank lenders to participate in both programs, although online lenders are subject to various application requirements and other conditions (principally related to Bank Secrecy Act compliance) which have delayed their participation relative to banks. [21]

The problem becomes more complex in the medium term when the immediate COVID-19 crisis begins to abate but loan performance and economic activity are still depressed. Additional term loans and other types of credit will be needed as small businesses begin to emerge from lockdown and contemplate a return to more active operations. But loan losses in the online lenders' historical books (the credit risk of which was largely transferred to the capital markets) will remain very high. The loan-secured "warehouse" facilities from banks, which these lenders typically use as a source of cash to fund loans in good times, are unlikely to be available so long as historic portfolio losses remain a problem. Such facilities are tied to quickly funded loan sales/securitizations into the capital markets, and the capital markets will not provide funding for new loans in an amount and at a price adequate to support non-guaranteed lending by online lenders until the economy is fully recovered and credit risks return to a more normal range. Government solutions will be needed for an indeterminate amount of time. We suggest two potential solutions to this problem: one involving direct support to online lenders and one supporting capital markets funding as markets recover.

One way to help small business customers of online lenders secure the financing they need would be for the Fed to provide for a limited period a direct secured line of credit facility with a 100% advance rate and a concessionary interest rate available to any online lender that meets the SBA 7(a) lending volume test for nonbank lenders included in the PPP. Treasury should provide direction and loss absorption and online lenders should be required to use the

[21] See, e.g., U.S. Small Business Administration, supra note 19; Board of Governors of the Federal Reserve System, Federal Reserve Takes Additional Actions to Provide up to $2.3 Trillion in Loans to Support the Economy (April 9, 2020), https://www.federalreserve.gov/newsevents/pressreleases/monetary20200409a.htm. Under the PPPLF, established April 9, 2020, the Fed will extend credit to eligible financial institutions that originate PPP loans, taking the loans as collateral at face value. While banks are included in the PPPLF at commencement, the Fed's release indicates that it is working to include other lenders originating PPP loans "in the near future."

credit for extending small business loans to existing customers.[22] This should help online lenders keep credit flowing to existing borrowers who would otherwise be cut off because of the lenders' inability to access market capital. It is important to recognize that the Fed normally should not engage in lending of this type, which involves the central bank in what could fairly be called the amelioration of business model failure rather than market failure. However, the emergency circumstances, the large number of businesses affected, and the Treasury loss absorption guarantee make this the best immediate solution.

Another way that Treasury and the Fed could utilize their current authority would be to expand the category of loans eligible for the TALF to include investment grade non-SBA-guaranteed small business loans, which are currently not included in the program. Adding these loans to the TALF would increase capital markets' confidence in the ABS issued by online small business lenders and improve pricing and funding availability, especially as the economy revives and credit outcomes become more predictable. Specifically, the TALF would need to be changed in three ways:

- Non-SBA-guaranteed small business loans would be included in the loan types eligible for TALF ABS lending. The current list includes SBA loans, auto loans, student loans, credit cards, and even insurance premium finance loans (a tiny business in relative terms), but not normal small business loans. This provision would also help banks, credit unions, and other small business lenders who make such loans.
- All investment grade consumer loan ABS would become eligible for lending. The TALF rules only allow ABS rated AAA by two rating agencies. For many reasons, the ABS issued by nonbank small business lenders typically don't reach that type of rating and are therefore ineligible. It may even be necessary to add some non-investment grade securities to the program, especially those ABS that were investment grade but subsequently downgraded as a result of the crisis.

[22] To avoid unanticipated competitive effects, we believe that this facility should be limited to existing customers of the online lenders, defined as any small business that has had a loan from the lender at any time within the last 2 years.

- The TALF program would need to clarify that privately (Rule 144A) issued and institutionally traded ABS are eligible. TALF in 2008 was limited to buying the publicly traded ABS, which dominated the market at the time. That's no longer the case today.

These changes would alter the nature of the current TALF significantly by adding an element of credit risk that, theoretically, does not exist for today's TALF-eligible, AAA-rated ABS and may arguably be beyond the Fed's 13(3) authority. For this reason, and to protect future Fed independence, it would be preferable to create a new, parallel Fed lending facility specifically for investment grade ABS backed by small business loans (and perhaps for consumer installment loans, where there are similar issues)[23] with funding and/or loss absorption provided by the Treasury.

Finally, policymakers need to come to terms with the systemic risks associated with allowing fragile, capital-market dependent lenders to play a significant role in the provision of credit to small businesses.[24] There can be little question that allowing a large portion of lending to a critical area of the economy to be provided by companies (a) beyond direct federal control and (b) doing business in an inherently fragile and procyclical manner creates systemic risks. We are seeing these risks play out today.

It may be time to insist that lending to critical areas of the economy belongs in regulated banks, where funding is stable and a regulatory regime intended to support lending in crises and recessions is in place. [25] While the COVID-19 crisis situation is unprecedented and there are cogent innovation-based arguments to the contrary, it is hard to understand why government should be responsible for rescuing lenders that could have designed their businesses to be more resilient to liquidity and credit shocks. One might, and should, also ask why the Financial

---

[23] Todd H. Baker, Fed's New TALF has a Major Gap, American Banker (March 26, 2020), https://www.americanbanker.com/opinion/feds-new-talf-has-a-major-gap.

[24] This is just one aspect of a larger problem involving the resiliency of capital markets in the face of major crises. In recent weeks, commercial paper, Fed funds, and mortgage and other markets have struggled to function effectively, requiring intervention from the Fed and Treasury.

[25] This same argument could be made about other areas of financial markets, such as money-market mutual funds, that have repeatedly required government assistance in crises.

Stability Oversight Council ("FSOC") did not do more to identify and address the systemic risks posed by the rise of online small business lending.

There is no easy way for the government to readily provide the perfect amount of support and credit to small businesses. Every path forward is fraught. But failing to provide sufficient access to credit poses much greater downside risk than the complications that will inevitably arise in efforts to harness the infrastructure embedded in banks and online lenders. This paper presents just a few of the ways that the government could more effectively use existing intermediaries to help small businesses get the credit they need to survive this unprecedented shock.

Sources:

Robert Armstrong, Online Lender Stops Making Loans to Small U.S. Businesses, Financial Times (April 1, 2020),
https://www.ft.com/content/c31a20cf-cb17-4958-9454-73763302b5dc.

Diana Asatryan, Kabbage Bond Tumbles to Pennies, as the Rest of SMB is 'On Hold', Debtwire (April 2, 2020).

Todd H. Baker, Fed's New TALF has a Major Gap, American Banker (March 26, 2020), https://www.americanbanker.com/opinion/feds-new-talf-has-a-major-gap.

Todd H. Baker, Marketplace Lenders Are a Systemic Risk, American Banker (August 17, 2015), https://www.americanbanker.com/opinion/marketplace-lenders-are-a-systemic-risk.

Todd H. Baker, OK, Marketplace Lenders, I'll Say It: Told You So, American Banker (May 4, 2016), https://www.americanbanker.com/opinion/ok-marketplace-lenders-ill-say-it-told-you-so.

Board of Governors of the Federal Reserve System, Federal Reserve Takes Additional Actions to Provide up to $2.3 Trillion in Loans to Support the Economy (April 9, 2020), https://www.federalreserve.gov/newsevents/pressreleases/monetary20200409a.htm.

Board of Governors of the Federal Reserve System, Term Asset-Backed Securities Loan Facility (TALF), https://www.federalreserve.gov/regreform/reform-talf.htm.

Coronavirus Aid, Relief, and Economic Security (CARES) Act (2020).

Lawrence Delevingne, Eyeing Defaults, U.S. Direct Lender Colchis Capital to Shut Funds, Reuters (April 7, 2020), https://www.reuters.com/article/us-health-coronavirus-colchiscapital-exc/exclusive-eyeing-defaults-us-direct-lender-colchis-capital-to-shut-funds-idUSKBN21P21X.
Federal Reserve Banks, Small Business Credit Survey (2019), https://www.fedsmallbusiness.org/medialibrary/fedsmallbusiness/files/2019/sbcs-employer-firms-report.pdf.

Leonardo Gambacorta & Hyun Song Shin, Why Bank Capital Matters for Monetary Policy, BIS Working Paper No. 558 (April 2016), https://www.bis.org/publ/work558.pdf.

JPMorgan Chase & Co., Small Businesses are an Anchor of the US Economy, https://www.jpmorganchase.com/corporate/institute/small-business-economic.htm.

Kathryn Judge, Information Gaps and Shadow Banking, 103 Virginia Law Review 411 (2017).

Kathryn Judge, The Role of a Modern Lender of Last Resort, 116 Columbia Law Review 843 (2016).

Kroll Bond Rating Agency, 10 U.S. Small Business ABS Deals on Watch Downgrade Due to COVID-19 Concerns (March 30, 2020), https://www.krollbondratings.com/documents/report/32339/abs-u-s-small-business-abs-watch-downgrade-surveillance-report.

Nellie Liang, The Federal Reserve, Which Already has Moved Aggressively, Can Do More for Small Businesses, Brookings (March 30, 2020), https://www.brookings.edu/blog/up-front/2020/03/30/the-federal-reserve-which-already-has-moved-aggressively-can-do-more-for-small-businesses//.

Thomas Philippon, The Great Reversal: How America Gave Up on Free Markets (2019).

Eric A. Posner & Adrian Vermeule, The Executive Unbound: After the Madisonian Republic (2011).

George Selgin, When the Fed Tried to Save Main Street, Alt-M (March 30, 2020), https://www.alt-m.org/2020/03/30/when-the-fed-tried-to-save-main-street/.

Maddie Shephard, Average Small Business Loan Amounts, Broken Down and Explained, Fundera (April 4, 2020), https://www.fundera.com/business-loans/guides/average-small-business-loan-amount.

Ganesh Sitaraman & Anne L. Alstott, The Public Option: How to Expand Freedom, Increase Opportunity, and Promote Equality (2019).

U.S. Small Business Administration, Business Loan Program Temporary Changes; Paycheck Protection Program, Docket No. SBA-2020-0015, https://www.sba.gov/sites/default/files/2020-04/PPP--IFRN%20FINAL.pdf.

Bankruptcy's Role in the COVID-19 Crisis

Edward R. Morrison,Charles Evans Gerber Professor of Law, Columbia Law School

Andrea C. Saavedra, Assistant Dean and Dean of Judicial Clerkships, Columbia Law School[1]

Abstract

Policymakers presently minimize the role of bankruptcy law in mitigating the financial fallout from COVID-19. Scholars too are unsure about the merits of bankruptcy, especially Chapter 11, in resolving business distress. We argue that Chapter 11 complements current stimulus policies for large corporations, such as airlines, and that Treasury should consider making it a precondition for receiving government-backed financing, particularly when the corporation was highly leveraged prior to the crisis. For these borrowers, Chapter 11 offers a flexible, speedy, and crisis-tested tool for preserving businesses and restructuring liabilities, permitting them to shed drags on their innovation, while ensuring that the costs of those improvements are borne primarily by investors, not taxpayers. For consumers and small businesses, however, bankruptcy should serve as a backstop to other policies, such as the CARES Act. Consumer bankruptcy law's primary goal is to discharge debts, but that's not what most consumers need right now. What they need is bridge financing and forbearance until the crisis ends and they get back to work. These key policy levers—bridge financing and forbearance—are available in theory to small businesses in Chapter 11 as well. The practical reality, however, is that bankruptcy is unattractive to many owner-managers who are essential to the business but may have their ownership interests wiped out in bankruptcy. Even putting that issue aside, our bankruptcy courts likely lack the capacity to serve a deluge of small business bankruptcy cases. Although we believe that bankruptcy should serve as a backstop during the current crisis, this backstop may be used heavily in the months ahead. We therefore encourage policymakers to ensure adequate funding for our courts, which may need a greater number of judges and trustees.

1. **Introduction**

Social distancing guidelines have shut down large sectors of the American economy.[2] Many U.S. households and businesses are now experiencing a sudden decline in income and, with it, a mounting inability to pay debts. This is a problem that bankruptcy law can address. For

[1] We thank Ken Ayotte, Douglas Baird, Vince Buccola, Tony Casey, Jared Ellias, Katharina Pistor, David Skeel, and Kate Waldock for helpful comments.

[2] *See, e.g.,* Michael D. Shear, *Trump Extends Social Distancing Guidelines through End of April*, NEW YORK TIMES, Mar. 29, 2020 (available here).

households, bankruptcy is a pathway to eliminate financial stress: the law can halt collection efforts and reduce or discharge debts in exchange for assets or future income. For businesses, bankruptcy resets the bargaining table with creditors: Companies are given time to renegotiate debts, renovate operations, renegotiate contracts, and propose a repayment plan consistent with their ability to pay. This typically involves wiping out the rights of old shareholders and converting old debt into new equity. Through these procedures, debtors receive a "fresh start" and the economy is, presumptively, better off.

These solutions are time tested. When the financial crisis of 2008 threatened some of the largest U.S. industrial corporations, including General Motors and Chrysler, bankruptcy was the solution.[3] When industry-wide distress destabilized the airline industry during the early 2000s, bankruptcy was the solution for Delta, United, Northwest, and U.S. Air, among others.

Should policymakers rely on our bankruptcy laws to help mitigate the financial stress suffered by consumers, small businesses, and large corporations today?[4] We offer two answers: Bankruptcy should be a central part of policies targeting large corporations but should be used only as a backup to other policies for consumers and small businesses.

Before explaining these punchlines, we provide an overview of how bankruptcy works.

2. **How It Works: Consumer and Corporate Bankruptcy**

Three "chapters" of the U.S. bankruptcy law provide the primary avenues of relief for distressed consumers and businesses:

---

[3] And the federal government assisted these businesses *through* the bankruptcy process, as discussed later in this essay.

[4] Our essay is related to the work of Ken Ayotte and David Skeel, who analyzed the pros and cons of bankruptcy versus bailouts for financial institutions during the 2008 financial crisis. Kenneth Ayotte and David A. Skeel, Jr., *Bankruptcy or Bailouts?*, 35 J. Corp. Law. 469 (2010).

- Chapter 7 (a liquidation proceeding available to both individuals and businesses);[5]
- Chapter 11 (a restructuring proceeding used primarily by corporations);[6] and
- Chapter 13 (a repayment plan available to individuals with regular income).[7]

A bankruptcy petition triggers an "automatic stay," halting collection efforts by all creditors anywhere in the world.[8] For individuals, the automatic stay gives the debtor time to assess his or her situation, negotiate with creditors (especially secured creditors), and either liquidate assets (Chapter 7) or propose a plan of repayment (Chapter 13). For businesses in Chapter 11, the stay affords time to assess firm value, determine claim amounts, restructure operations or contracts or leases, and propose a plan of reorganization.

The automatic stay may be the most important benefit of a bankruptcy filing, especially during the COVID-19 crisis, because it prevents most creditors from collecting or liquidating their debts. During a crisis that is expected to be temporary, this "pause button" may be all that many debtors and businesses need. Equally important, it is a benefit that debtors obtain simply by filing a bankruptcy petition; no judicial action is needed.

For consumers, Chapters 7 and 13 offer different kinds of trade-offs. Both discharge virtually all of the consumer's debts but at different costs. In Chapter 7, the consumer must relinquish assets that exceed what state or federal law says the consumer absolutely needs for his or her fresh start. She will also lose some assets, such as a home or car, if these are subject to mortgages or liens. The process is speedy: For the honest debtor who discloses all assets to the court, it can be completed within a matter of weeks.

---

[5] 11 U.S.C. §§ 701 *et seq.*
[6] §§ 1101 *et seq.*
[7] §§ 1301 *et seq.*
[8] § 362. There are important exemptions to the automatic stay. One permits the counterparties to swaps, repos, and other financial contracts to terminate the contracts and seize collateral. *See generally* Edward R. Morrison, Mark, J. Roe, and Christopher S. Sontchi, *Rolling Back the Repo Safe Harbors*, 69 Bus. Lawyer 1015 (2014). This exception was critically important during the previous crisis, which began in the banking sector where many financial contracts loom large, but will likely play a less significant role in this current crisis because, presently, bank insolvency is not a precipitating factor.

For consumers who want to retain assets that would be lost in Chapter 7, the better option is Chapter 13. Instead of giving up assets, the consumer gives up "disposable income" for a period of three to five years.[9] Every month, the consumer pays off secured creditors and, if any income remains after covering living expenses, pays the remainder to unsecured creditors.[10] This isn't easy. Legal fees are substantially higher in Chapter 13 as compared to Chapter 7.[11] Worse, roughly two-thirds of consumers are unable to make the payments required by Chapter 13.[12] Their cases are dismissed or converted to Chapter 7.

For businesses, the choice between Chapters 7 and 11 is more straightforward. Chapter 7 is a funeral; Chapter 11 is a shot at renewal. Specifically, Chapter 7 turns the business over to a trustee, who is charged with liquidating its assets and distributing proceeds to creditors. Chapter 11 leaves the business in the hands of management, which is given an opportunity to obtain new, senior financing[13] and propose a reorganization plan that values the going concern firm, reduces debts to a level consistent with the firm's ability to pay, and implements essential operational changes (e.g,, renegotiating labor contracts). Creditors vote on the proposed plan. If the court approves the plan, the reorganized firm exits bankruptcy with a new capital structure: Old debts are eliminated and replaced with new debts owed by the newly reorganized firm; old shares are deleted and replaced with new shares issued by the reorganized firm. One fundamental rule looms in the background as management crafts a plan: Senior creditors must be paid before junior creditors who must be paid before shareholders receive anything. This is the "absolute priority rule," which generally means that shareholders are wiped out in Chapter 11 reorganizations.[14] Junior debt may be wiped out too. The only creditors who retain rights after

---

[9] § 1325(b)(2). *See also* Official Form 122C-2, available here.
[10] § 1326.
[11] *See, e.g.,* Pamela Foohey, Robert M. Lawless, Katherine Porter, and Deborah Thorne, *"No Money Down" Bankruptcy,* 90 S. Cal. L. Rev 1055 (2016).
[12] *See, e.g.*, Edward R. Morrison and Antoine Uettwiller, *Consumer Bankruptcy Pathologies*, 173 J. Instit. & Theoret. Econ. 174 (2017), and sources cited therein.
[13] The liquidity-enhancing role of Chapter 11 is the focus of Kenneth Ayotte and David A. Skeel, Jr., *Bankruptcy Law as Liquidity Provider*, 80 U. Chi. L. Rev. 1557 (2013).
[14] *See, e.g.,* Barry E. Adler, Vedran Capkun, and Lawrence A. Weiss, *Value Destruction in the New Era of Chapter 11*, 29 J. L., Econ. & Org. 461 (2013).

the firm is reorganized are those whose claims are (a) most senior and (b) collectively consistent with the firm's ability to pay. Among these creditors, equity in the reorganized firm is typically transferred to the most junior creditors.

The Chapter 11 process was designed with large corporations in mind (indeed, it is modeled on old rules for restructuring railroads) and during the past forty years the process has become user-friendly for these businesses. Large corporate Chapter 11 cases tend to be speedy because, among other things, most of the businesses have professional support and the foresight to negotiate with creditors before a bankruptcy filing, thereby clearing the way for a less controversial, or even pre-approved, reorganization plan (these are called "prenegotiated" and "prepackaged" cases). Frequently, this negotiation will not only clear away creditor objections, but will also involve the debtor's commitment to sell the firm quickly after the bankruptcy filing.[15] Proceeds from the sale will then be distributed to creditors in order of lien rights and payment priority.

Some of the largest U.S. corporations have used Chapter 11 to remedy distress and emerge financially healthier. These corporations include airlines (such as United and Delta), car manufacturers (General Motors and Chrysler), financial institutions (CIT Group), and oil companies (Texaco). Other major corporations have used Chapter 11 as a quick way to merge themselves with other corporations via a 363 sale. A good example is American Airlines. It acquired TWA through a 363 sale. Subsequently, during its own Chapter 11 case, American merged with U.S. Airways.

Chapter 11 works well in crises too. General Motors and Chrysler provide good illustrations. Both neared death during the 2008 financial crisis but were taken into Chapter 11 where each received

---

[15] *See, e.g.,* Melissa B. Jacoby and Edward J. Janger, *Ice Cube Bonds: Allocating the Price of Process in Chapter 11 Bankruptcy*, 123 Yale L. J. 862 (2014); Douglas G. Baird and Robert K. Rasmussen, *The End of Bankruptcy*, 55 Stan L Rev 751, 777–88 (2002).

financial support from the federal government.[16] Each was sold off to a buyer within weeks.[17] The speedy bankruptcies, financed by the federal government, allowed both companies to renegotiate or shed legacy liabilities that had been a drag on innovation for decades. In the process, the U.S. government was also able to, in essence, rescue the supply-side chain of these auto giants, thereby preserving jobs up and down the entire auto industry. Whatever the federal government decides to do now for the aerospace or airlines industries, this is recent precedent that government-supported restructurings can help stabilize the American economy – and prove a good investment for taxpayer funds.

This is not to say that Chapter 11 is perfect. It can generate important disruptions in operations as investors jockey for recoveries. One study, for example, finds that workers suffer long-term declines in wages when their firms enter bankruptcy.[18] Additionally, scholars have shown that the dynamics of a Chapter 11 case, including its duration, costs, and ultimate outcome, depend on contestable and hard-to-predict judicial decisions about creditor priority and firm value.[19] Finally, scholarship has shown that secured creditors have outsized influence over the process. This is because the firm's pre-bankruptcy secured creditors are typically the same financiers (and usually the only available financiers) of the bankrupt business. This gives them outsized influence, which can lead to quick sales at "fire sale" prices instead of reorganization.[20]

Although these downsides of Chapter 11 are important, we think they can be managed during the current crisis. Workers suffer large declines in wages when their firms become unprofitable, regardless of whether the firms file for bankruptcy. Although a filing can exacerbate this wage decline in normal times, it's unclear whether to expect the same effect during this crisis,

[16] Many other businesses also used Chapter 11 successfully during the crisis, but received no government support, including Lear Corp. and Visteon Corp. in the auto parts industry and Tronox Inc. in the chemicals industry.

[17] *See* Anthony J. Casey and Eric A. Posner, *A Framework for Bailout Regulation,* 91 Notre Dame L. Rev. 479 (2015).

[18] The same authors find that workers receive wage premiums at firms with high bankruptcy risk. John R. Graham, Hyunseob Kim, Si Li, and Jiaping Qiu, "Employee Costs of Corporate Bankruptcy," working paper (available here).

[19] *See, e.g.,* Anthony J. Casey and Julia Simon-Kerr, *A Simple Theory of Complex Valuation*, 113 Mich. L. Rev. 1175 (2015); Douglas G. Baird and Donald S. Bernstein, *Absolute Priority, Valuation Uncertainty, and the Reorganization Bargain*, 115 Yale L. J. 1930 (2006).

[20] *See, e.g.*, Kenneth Ayotte and Jared A. Ellias, "Bankruptcy Process for Sale," working paper (2020); Kenneth M. Ayotte and Edward R. Morrison, *Creditor Control and Conflict in Chapter 11*, 2 J. LEGAL ANAL. 511 (2009).

especially if the government is the primary supplier of liquidity to the bankrupt firm and uses that power as leverage to influence payroll (as it is currently doing under the CARES Act). The risk of "fire sales" in the current environment depends on the influence exerted by secured lenders. If they too are stressed, the lenders may prefer quick cash from fire sales instead of illiquid (but higher valued) claims against the reorganized firm. The risk of fire sales, therefore, depends critically on the extent to which government policy (through action by the Federal Reserve) mitigates financial stress in the financial sector. Additionally, if a stressed banking sector is unwilling to finance firms in Chapter 11, the government can play an essential role in providing that financing and, at the same time, prevent unnecessary fire sales and preserve jobs.

A more fundamental weakness of Chapter 11 is that it offers a poor fit for many small businesses. Thirty percent of firm value can be burned up by professional fees.[21] Additionally, around two-thirds of all small-business Chapter 11s terminate in liquidation or dismissal (which leads to liquidation under state law).[22] These outcomes are due in part to the fact that most small businesses do not undergo regular audits and have few or no human resources dedicated to financial management.[23] Thus, when they enter Chapter 11, their financial affairs are difficult to unscramble. As a result, the vast majority never file a bankruptcy petition; they simply close shop.[24] This is one reason why we are skeptical that bankruptcy is an appropriate remedy for small businesses during the current crisis.

Congress has taken steps to mitigate the weaknesses in Chapter 11 for small businesses. Last summer, it passed the "Small Business Reorganization Act of 2019,"[25] which went online on February 19, 2020. The Act's central feature is that it eliminates part of the absolute priority rule

---

[21] Arturo Bris, Ivo Welch, and Ning Zhu, *The Costs of Bankruptcy*, 61 J. Fin. 1253 (2006).

[22] Elizabeth Warren and Jay Lawrence Westbrook, *The Success of Chapter 11: A Challenge to the Critics*, 107 Mich. L. Rev. 603 (2009); Douglas G. Baird and Edward R. Morrison, *Serial Entrepreneurs and Small Business Bankruptcy*, 105 Colum. L. Rev. 2310 (2005) ("Serial Entrepreneurs"); Edward R. Morrison, *Bankruptcy Decision Making: An Empirical Study of Continuation Bias in Small Business Bankruptcies*, 50 J. L. & Econ. 381 (2007) ("Bankruptcy Decision Making").

[23] Baird and Morrison, *Serial Entrepreneurs*, *supra*; Morrison, *Bankruptcy Decision Making*, *supra*.

[24] Edward R. Morrison, *Bargaining around Bankruptcy: Small Business Distress and State Law*, 38 J. Legal Stud. 255 (2009).

[25] It is now Subchapter V of Chapter 11.

in bankruptcy. This is important because many businesses are organized around the skills of the owner-manager. Without her there is no business. An absolute priority rule that wipes out the owner-manager is a rule that strongly discourages her from helping the business navigate its way through bankruptcy. Under the new law, by contrast, a small business owner can retain her equity interest even if unsecured creditors will not be paid in full, so long as the Chapter 11 plan commits all of the business's "disposable income" to these creditors for a three to five-year period. This abrogation of the absolute priority rule makes Chapter 11 substantially more attractive to small businesses for two reasons: first, a business owner will no longer be deterred for fear of losing ownership. Second, by retaining her interest, she has a stronger incentive to help the firm revive itself, including paying off its remaining debts.

The trouble with the new law is its limited scope. Originally it applied only to businesses with debt under about $2.7 million; the CARES Act raised the debt limit to $7.5 million. Even at that limit, however, scholars estimate that only 59 percent of all Chapter 11 cases would qualify,[26] and the vast majority of cases are filed by small businesses. Moreover, the Act has some administrative challenges: It appoints a "standing trustee" to monitor the debtor's progress in proposing and completing the multi-year plan of reorganization. The trustee may help identify nonviable businesses early on (seeking their dismissal or conversion to Chapter 7), and help viable businesses craft a feasible plan. It is unclear whether there are adequate standing trustees to assist with the potential increase in post-COVID-19 filings by small businesses. What we do know, however, is that neither these trustees nor the bankruptcy courts have substantial experience in administering these cases.

3. **The Limits of Bankruptcy Law During a Crisis**

The weaknesses of bankruptcy law fall into three categories. First is the take-up problem. Those who could benefit from bankruptcy may avoid it because of its costs. This is a big problem in

[26] Robert Lawless, "The Small Business Reorganization Act of 2019 and COVID-19," Credit Slips blog post (available here).

normal times and could exacerbate the current crisis. For consumers, there has long been a perceived stigma associated with a filing. Additionally, a bankruptcy filing is a "flag" on credit reports for many years. As a result, studies have shown that only a fraction of consumers who could benefit from bankruptcy actually petition for bankruptcy protection.[27]

The take-up problem looms large for businesses too because shareholders' rights take a backseat to creditor demands, particularly if the business is insolvent or undercapitalized. Owners and shareholders of any size business are likely to resist a process that wipes out their rights, especially if they think the business could possibly recover in the near term. Indeed, because shareholders are typically wiped out in bankruptcy, a corporation's directors may delay filing in an effort to preserve share value.

A second weakness is liquidity: For consumers, the "fresh start" of bankruptcy is a discharge of old debts and not access to cash necessary to pay expenses when income has fallen during a crisis. Indeed, for many consumers, a discharge of debts is the wrong prescription for their stress:[28] After the crisis ends and they get back to work, they will be able to pay their debts. What they need is financial assistance and perhaps forbearance with respect to debts that are coming due now. For businesses, too, liquidity is a key problem: Their ability to survive depends critically on access to loans (or cash collateral) that allow the firm to make payroll, pay rent, purchase inputs, etc. The current crisis may make banks reluctant to extend credit. To the extent that the crisis harms the financial condition of banks themselves, moreover, we may find that cash-strapped banks are not only reluctant to lend but also aggressively seek liquidation of firms in bankruptcy. We saw this during the previous crisis.[29]

[27] *See, e.g.,* Michelle J. White, *Why Don't More Households File for Bankruptcy?*, 14 J. L. Econ. & Org. 205 (1998).
[28] Both consumers and creditors are harmed by an unnecessary bankruptcy discharge: Consumers become ineligible to obtain another discharge for many years (8 years must pass between Chapter 7 discharges); creditors receive only a fraction of what they are owed in the typical consumer bankruptcy.
[29] Sarah Pei Woo, *Regulatory Bankruptcy: How Bank Regulation Causes Fire Sales*, 99 Geo. L.J. 1615 (2011); Sarah Pei Woo, *Simultaneous Distress of Residential Developers and Their Secured Lenders: An Analysis of Bankruptcy and Bank Regulation*, 15 Fordham J. Corp. & Fin. L. 617 (2010).

A third weakness is the limited capacity of our bankruptcy courts. The bankruptcy process is a bargaining environment, overseen by a judge, where creditors and shareholders jockey for payoffs as they decide the fate of the firm. Judges are called on to make critical decisions, under extreme time pressure, based on potentially-biased and highly-contested information supplied by the parties. This is true in normal economic times. The burden on the judicial system will be extreme during a crisis that brings an unprecedented flood of cases into the courts. We know, for example, that judges change their behavior when caseloads spike: A sudden increase in caseloads makes courts more likely to liquidate small firms, reorganize big firms (but take longer to do so), and terminate cases of firms that end up filing for bankruptcy again.[30] If these decisions by time-strapped judges are errors, we should worry about the errors that may occur when courts are inundated by filings.

These weaknesses—take-up, liquidity, and system capacity—mean that bankruptcy law cannot serve as a primary policy response for the stress faced by consumers and small businesses today. For consumers, bankruptcy doesn't provide the essential remedies that they need right now: liquidity and forbearance. For small businesses, it may be possible to tap liquidity from government-backed lenders in bankruptcy but the flood of cases would overwhelm the bankruptcy courts. Equally important, the prototypical small business is run by an owner-manager whose participation is essential to the business survival. Unless the absolute priority rule is modified for small businesses generally (currently it is modified only for businesses with debt under $7.5 million), small business owners may prefer to liquidate their businesses outside of bankruptcy rather than lose their ownership interests in bankruptcy.

For these reasons, we think non-bankruptcy policies, especially those extending liquidity and forbearance, are the optimal response to the distress of consumers and small businesses.[31] Specifically, we recommend that Congress enact policies that create an automatic stay for the

---

[30] Benjamin Iverson, *Get in Line: Chapter 11 Restructuring in Crowded Bankruptcy Courts*, 64 Mgmt. Science 5370 (2018).

[31] The National Bankruptcy Conference (NBC) has made the same recommendation in a recent letter to Congress (available here). (Disclosure: Morrison is a member of the NBC.)

benefit of consumers and small businesses. Congress did this for members of the military through the Servicemembers Civil Relief Act of 2003. It is time to do it again but for consumers and small businesses generally. Many may still file for bankruptcy, especially if government policies are inadequate. For them, bankruptcy can serve as a relief-valve, provided the government takes steps immediately to expand the capacity of our judicial system.

We are more optimistic about the role of bankruptcy law in resolving the distress of large corporations. The crisis has destabilized all businesses but many were likely to suffer distress regardless of a pandemic. The past decade saw a dramatic increase in corporate debt, especially leveraged loans, that allowed financially distressed "zombie companies" to survive without filing for bankruptcy by repeatedly refinancing their debts. By some estimates, zombies account for sixteen percent of publicly traded U.S. firms.[32] By the end of 2019, a large proportion of even *investment grade* debt was vulnerable to a ratings downgrade.[33] These statistics imply that a substantial proportion of stressed businesses today merit financial restructuring (or even liquidation) in bankruptcy instead of, or in addition to, financial aid from the federal government, such as the CARES Act.[34] It would, in our view, be a mistake to extend further financing without requiring a simultaneous bankruptcy filing: The financing would allow these firms to use public funds to further delay a necessary restructuring.[35]

The government should therefore treat Chapter 11 as a tool that works in tandem with other policies to mitigate financial stress in the corporate sector, particularly for large corporations that were approaching distress prior to COVID-19. For those businesses that need restructuring, the

---

[32] *See* "International banking and financial market developments," BIS Quarterly Review (September 2017). *See also* Ryan Bannerjee and Boris Hoffman, *Zombie Firms: Causes and Consequences*, BIS Quarterly Review (September 2018).

[33] *See, e.g.,* Edward I. Altman, "The Credit Cycle Before And After The Market's Awareness Of The Coronavirus Crisis In The U.S.," working paper (April 2, 2020).

[34] *See* Sec. 1105, Senate Bill No. 3548, 116th Congress (Proposed March 19, 2020), available here, and H.R. 748, 116th Congress (signed into law March 27, 2020), available here.

[35] Our point extends beyond corporations that took on excess leverage. It applies as well to companies that, prior to the crisis, were experiencing operational problems or facing large liability for past errors. Chapter 11 is an appropriate venue for resolving these problems while also receiving government financial assistance. Absent a Chapter 11 filing, government financial assistance will be doing double-duty: (i) mitigating the liquidity shock arising from the COVID-19 crisis and (ii) funding the firm's efforts to resolve pre-crisis mistakes.

government can still provide liquidity but in the context of a bankruptcy proceeding that enables financial restructuring, facilitates operational changes necessary to cope with a post-COVID-19 world,[36] and forces investors to shoulder the costs of distress that was exacerbated by excess leverage.

Although a large number of big corporate cases would tax our bankruptcy courts, these cases come with professionals (lawyers, accountants, investment bankers) who reduce some of the burden on the courts.[37] More importantly, the speed of a bankruptcy case is largely dictated by the institution providing the liquidity. Cash is king. The government, therefore, could play an important role in preventing unnecessary asset fires sales and pushing the process toward a reorganization that preserves viable firms (and American jobs). This is precisely what we saw in the Chrysler and GM cases. Nonetheless, even if the administrative costs of Chapter 11 would not be low, we think they are offset by an important benefit of a bankruptcy process that permits government-assistance but forces investors to shoulder the costs of the firm's distress.

4. **Conclusion**

Federal, state, and local governments are already implementing policies, including financial assistance and forbearance, that will help stabilize household and business finances and limit the need for bankruptcy filings. Nonetheless, bankruptcy undoubtedly has an important role to play in the fallout from the COVID-19 crisis. Many consumers and businesses will file for bankruptcy when their inability to pay debts results in default or otherwise triggers creditor debt collection efforts such as foreclosure.

---

[36] For example, bankruptcy law gives the firm special powers (unavailable outside of bankruptcy) to renegotiate contracts and labor agreements and jettison assets that are incompatible with expected changes in the economic environment.

[37] Costs might also be mitigated if cases are filed in bankruptcy courts with substantial accumulated expertise with corporate distress such as Delaware and the Southern District of New York. Though controversial, "forum shopping" by corporations has resulted in a large flow of complex corporate bankruptcies to these courts, allowing them to develop expertise that's needed in a crisis. General Motors, for example, is a Detroit corporation that filed for bankruptcy in New York during the 2008 financial crisis. *See* Jared A. Ellias, *What Drives Bankruptcy Forum Shopping? Evidence from Market Data*, 47 J. Legal Stud. 119 (2018).

Accordingly, it is important for lawmakers to consider how best to prepare the landscape for this new, and likely historic, wave of distress. For large corporations, Chapter 11 should be openly and seriously considered as an optimizing tool to prevent firm liquidation and equally protect the public fisc, particularly for businesses that require more than short-term liquidity to survive post-COVID-19. In fact, Chapter 11 may even pave the way for industry consolidation or other innovations to operations. While shareholders may lose their investments, businesses and jobs will be preserved.

Similarly, for consumers and small businesses, while bankruptcy is not as immediately helpful as forbearance or direct income supplements, it will certainly be utilized if this short-term liquidity crisis becomes long term.[38] For this reason, we believe it's equally important for lawmakers to expand the capacity of the courts to administer this influx of cases, particularly if lawmakers want to see small businesses take-up the benefits of SBRA.

[38] Indeed, the CARES Act has taken steps to make the bankruptcy code more attractive to distressed consumers. The Act amends the code to exclude emergency payments to individuals from the code's income eligibility thresholds. The Act also permits existing Chapter 13 debtors to request plan modifications based on changes in income due to COVID-19. *See* CARES Act, § 1113.

COVID-19 as a *Force Majeure* in Corporate Transactions[1]

Matthew Jennejohn, Professor of Law, BYU Law School

Julian Nyarko, Assistant Professor of Law, Stanford Law School

Eric Talley, Isidor and Seville Sulzbacher Professor of Law; Co-Director, Millstein Center for Global Markets and Corporate Ownership, Columbia Law School

A folk proverb from the American West teaches that the most important ingredient of a successful rain dance is *timing.* And the timing couldn't be worse for signed corporate deals hanging in the balance at the onset of the novel coronavirus pandemic. As of March 2020, we estimate that there were over 300 significant mergers and acquisitions (M&A) transactions signed and waiting to close, representing over half a trillion US dollars in economic value. The fate of these deals has been thrown into considerable doubt by the COVID-19 crisis. And, in an uncanny resemblance to the onset of the financial crisis in fall 2008, corporate lawyers everywhere are spending their shelter-in-place hours scouring the terms of these deals in a frenzied search for an escape hatch that might unwind the transaction.

In *lawyer*-speak, the most likely candidate for an escape-hatch is something called a *force majeure* (or "Act of God") provision, which governs when changed circumstances are deemed so significant as to obliterate an otherwise enforceable contract. In *business lawyer*-speak, *force majeures* are usually called "material adverse change/material adverse effect" (hereinafter MAE) provisions; but they work pretty much the same way, conditioning a party's (usually the buyer's) duty to close a deal on the non-occurrence of a specific set of contingencies. MAEs are virtually ubiquitous in M&A; and—unlike many other boilerplate terms—they are heavily negotiated at the time of the transaction. This is for good reason: when an MAE is triggered, billions of dollars can hang in the balance.

[1] This chapter is based on a series of blog entries we originally posted on the Columbia Blue Sky Blog. The original entries can be found here and here.

Some recent deals—such as Morgan Stanley's acquisition of E*Trade (announced on February 20)—explicitly account for COVID-19 through their MAE, typically deeming it not to constitute a *force majeure.* But most "legacy" transactions—signed up before the coronavirus threat exploded—are far more opaque. Consider, for example, LVMH's pending $16 billion acquisition of Tiffany & Co., announced in late 2019 and subsequently approved by Tiffany shareholders, but still not closed. The MAE in that deal is representative, featuring both affirmative and negative provisos that can be thought of metaphorically as something akin to a slice of Swiss cheese:

- The affirmative terms represent the cheese, and they lay out situations that *would* allow LVMH to walk away. Included are contingencies that would materially affect the "business, condition (financial or otherwise), properties, assets, liabilities (contingent or otherwise), business operations or results of operations of Tiffany and its subsidiaries, taken as a whole." Also included are contingencies that "would reasonably be expected to prevent, materially delay or materially impair" the closing of the deal.

- The negative terms represent the holes in the cheese, and they specify specific *carve outs* or exceptions to the affirmative provisions. Like many MAEs, the carve outs are far more numerous, and they include
    - changes or conditions generally affecting Tiffany's industry
    - general economic or political conditions in any country where Tiffany operates (including China);
    - changes in the market price or trading volume of the Tiffany's securities or credit ratings
    - geopolitical conditions, including the outbreak or escalation of hostilities, acts of war, sabotage, terrorism;
    - natural disasters, including hurricane, tornado, flood, earthquake or "other natural disaster".

Conspicuously absent from either the cheese or the holes in the Tiffany deal is any explicit mention of a global pandemic. It seems likely that colorable arguments might be made on both sides. Although many of the items enumerated in the affirmative provisions may well be captured by the COVID-19 outbreak, several exclusions could touch on it as well. This deal may thus fall into a relatively difficult and far grayer (if not Gruyère) zone.

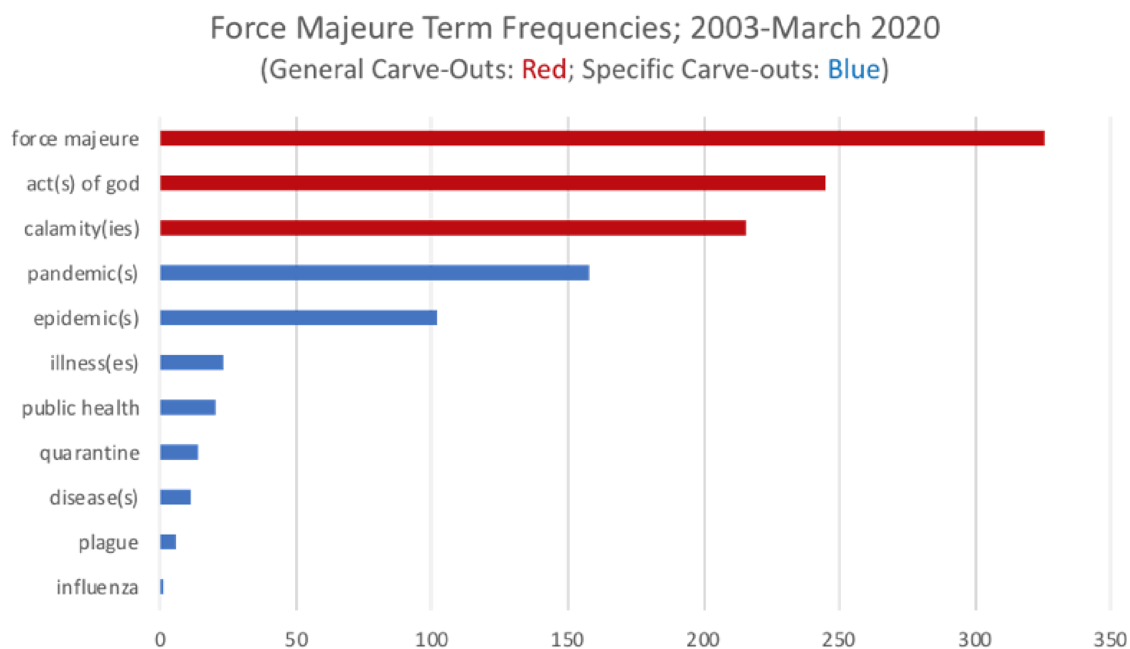
And that begs the question of whether the language of MAE provisions *in the aggregate* might be used to unwind signed deals in the face of a pandemic. To get a handle on this question, we deployed some tools of machine learning and natural language processing, an approach that has already been shown to be helpful in studying MAE provisions as well as other business contracts.

To take on this question, we updated a data set that we had already been collecting and cleaning, consisting of announced transactions and meta information associated with the deals (all drawn from FactSet). The combined volume of the deals is around 10 trillion USD. The dataset covers acquisitions in two dozen distinct industries for deals spanning the years 2003 through the end of 2020, thus providing a broad view of over fifteen years of market practice (including, importantly, the financial crisis). In all, our data set consists of 1702 MAE provisions over an 18-year time span (including about 80 of relatively larger deals representing around $250 billion).[2]

In analyzing the MAEs, we first focused on language that expressly captures a global pandemic like COVID-19. To ensure that we capture all (or nearly all) of the language relevant to COVID-19, we assembled a list of the terms most similar to the words “disease” and “pandemic” from three data sources: (i) WordNet, a large lexical database of English maintained by language

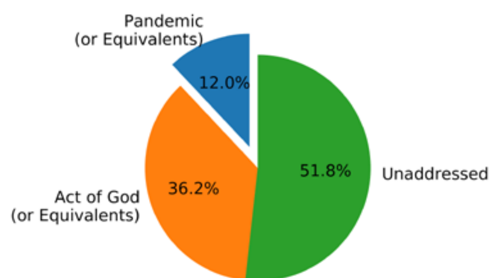
[2] As referenced above, FactSet lists over 300 transactions that are pending as of March 2020, representing around $550 billion in value. There can be considerable latency in the public disclosure of these deals, however (particularly for companies not traded in the US), which reduces the number of pending deals with observable contractual terms.

experts; (ii) GloVe, a representation of ordinary English language; (iii) Contracts-word2vec, a language model based on roughly half a million agreements submitted to the SEC by publicly registered companies. We then verified the results by hand. The resulting vocabulary includes terms specific to the outbreak of a contagious disease, such as “pandemic,” “epidemic,” and “public health.” But our list also includes broader, more general terms such as “act of god” and “force majeure”—gray area terms that do not explicitly cover pandemics but one might imagine arguments going either way. The complete list includes a total of 50 key terms. Within our data set, 15 of these terms appear with positive frequency, as reflected in the figure below. The figure further subdivides between (i) general terms (pictured in red), that arguably carve out a variety of force majeure events including pandemics; and (ii) specific terms (pictured in blue) that explicitly invoke the term “pandemic” or its semantic equivalents.

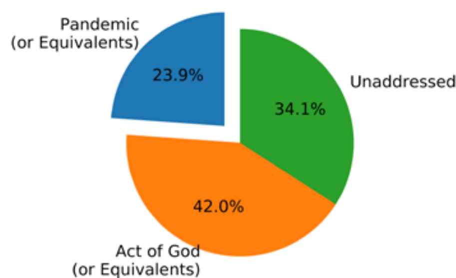


Applying this list to our MAE data, our key finding is that—like the LVMH/Tiffany agreement discussed above—*less than one out of eight MAE provisions in our data set explicitly carve out pandemics from force majeure events*. Indeed, as the left-hand panel of the figure below shows, the majority of definitional carve-outs—a little more than half—*do not even* address a pandemic (or pandemic-like) outbreak—either with explicit terms or with “catch-all” terms

(such as “Act of God”, “Calamity”, or “*Force Majeure*”) that arguably have sufficient breadth and scope to do so. Of the remainder that arguably address COVID19, the trigger usually comes through the broad, catch-all provisions (36.2%) rather than through an explicit phrase related to pandemics (12%). That said, as the right-hand panel of the figure illustrates, pending deals appear to skew much more discernibly towards carve-outs (of both species): Nearly 24% of pending deals carve out pandemic (or pandemic-like) contingencies explicitly, and 42% contain the more general “act of god” carve-out language.

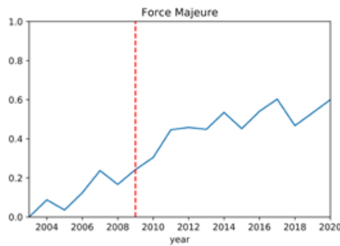


Panel A. Full Data Set (2003-Pres.)

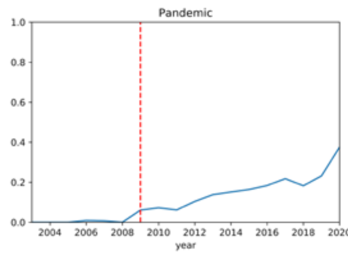


Panel B. Pending Deals (as of 3/26/2020)

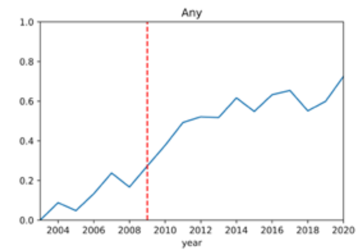
Digging a little deeper, it becomes evident that the shift in carve-outs is actually part of a longer-term sea change whose seeds were sown over a decade ago. The time series charts below track the year-by-year prevalence of general carve-outs (left panel), pandemic-specific carve-outs (center panel), and their union (right panel) since 2003. General *force majeure* carve-outs became significantly more prevalent around 2009 – coinciding with the emergence from the great recession (well, at least the last one). But note that pandemic-specific carve-outs also started to go viral at around the same time (having been virtually non-existent prior to 2009). Although global economic conditions had much to do with the rapid adoption of general *force majeure* language, the pandemic-specific trend was more likely a byproduct of the contemporaneous H1N1 crisis that unfolded during the spring of 2009. And this fraction continued to rise through the two waves of the MERS crisis (first in 2012 and then again in 2015). By 2019, *fully 23% of deals specifically carved out pandemics from coverage in the MAE*.



A. General Carve-Outs



B. Pandemic-Explicit Carve-Outs



C. General or Explicit Carve-Outs

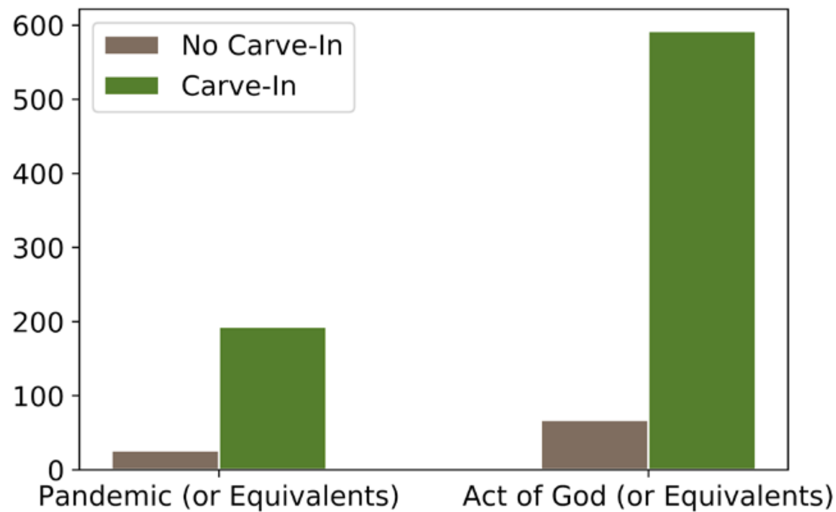
It is worth reiterating that when an MAE provision features language bearing on a pandemic (via either explicit or general terms), our data suggest that it invariably enters through a *carve out* to the MAE (the holes in the cheese) rather than through an affirmative provision (the cheese itself). Consequently, when present, such provisions would appear to push pandemic-related risks onto the buyer (and away from the seller). A typical example of an explicit pandemic-like provision is the private equity acquisition of the telecom company ComScope in 2010. That provision reads (in relevant part):

> "Company Material Adverse Effect" means a change, event or occurrence that has a material adverse effect on the financial condition, business or results of operations of the Company and its Subsidiaries taken as a whole; provided, however, that none of the following, and no changes, events or occurrences, individually or in the aggregate, to the extent arising out of, resulting from or attributable to any of the following shall constitute or be taken into account in determining whether a Company Material Adverse Effect has occurred or may, would or could occur:
>
> …
>
> (3) epidemics, pandemics, earthquakes, hurricanes, tornados or other natural disasters
>
> …
>
> provided, further, that, with respect to [clause (3) above, *inter alia*], such changes, events or occurrences do not materially and disproportionately adversely affect the Company and its Subsidiaries, taken as a whole, compared to other companies operating in the industries in which the Company and its Subsidiaries operate.

This clause is a good indication of the typical location of an explicit provision (in the carved-out Swiss-cheese holes in the MAE). But it *also* exposes the fact that carve-outs can come with a significant lawyerly grain of salt: After expressly carving out contingency from the definition of an MAE, the ComScope provision proceeds to *carve it right back in if the pandemic affects the seller disproportionally*, relative to a benchmark of other competitors in the industry.

Carve-ins like the one above are far from aberrational. Indeed, a significant fraction of MAEs that purportedly exempt a laundry list of enumerated risks *carve back in* aspects of those same risks through similar "disproportional effects" qualifiers (whereby an excluded contingency still counts as a *force majeure* if the target suffers hardships that are disproportionate to some class of peers). The figure below demonstrates that ComScope deal's language is far from anomalous, by assessing prevalence with which MAE terms that invoke a general or specific carve-out then include a "disproportional effects" modifier after the carve-out.[3] Note that the strong tendency towards carve-ins for disproportional effects appears to hold even when the carve-out uses more general provisions (right-hand panel), focusing on broad *act of god* contingencies (rather than pandemics in particular). Our preliminary analysis suggests, moreover, that disproportionate-effects carve-ins appear with roughly the same frequency (or perhaps a little higher) in pending deals. Thus, while carve-outs have no doubt become more prevalent over time, a portion of their impact has been blunted mechanically by carve-ins that are typically riding shotgun.

[3] The results reported on here do not reflect a tedious hand-verification that the disproportional-effects language modifies the pandemic/act-of-god carve-out (rather than some other carve-out), we have performed this tedious verification on a sub-sample and the results of the two approaches are substantively identical.

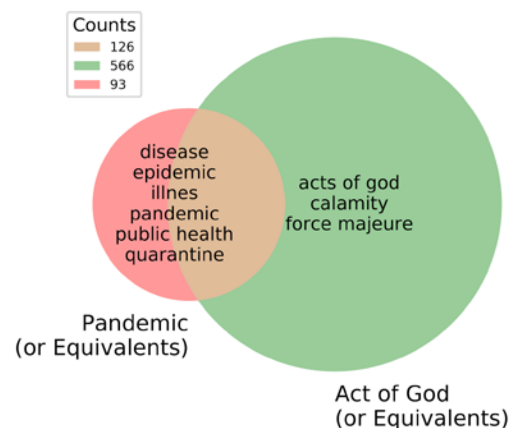


Disproportional Effects Carve-In

(2003-Pres.)

The upshot of this observation is that, for most deals, the question of whether COVID-19 triggers the MAE clause may turn further on a finely-grained analysis of how the pandemic has affected a company vis-à-vis its peers. For targets that are *especially* susceptible to pandemic risks relative to others in the industry, then, the "disproportional effects" carve-in may shift risk right back to the seller.

A second pressing question is whether the more general language carving out acts of god and force majeure events from the MAE definition should be read to apply to COVID-19 in the first place. In other words, should one of these general terms be interpreted as a semantic substitute for an explicit term that invokes pandemics? One way to get at that question is to look at the text of the MAE definitions themselves—and in particular the frequency with which we observe pandemic-specific language enumerated as an example of an act of god or force majeure event versus a stand-alone phenomenon. The figure below displays the relative degree to which explicit and catch-all language are used as complements versus substitutes.



Overlap in General and Specific Terms (2003-Pres.)

As the figure demonstrates, when specific language is invoked, it tends to be split evenly between (a) being an enumerated example of a general *force majeure* provision (57% of the time); and (b) standing alone without also invoking the more general language (43% of the time). Although this result may be consistent with a variety of interpretive theories, it does seem inconsistent with some of them. For example, it would seem to cast doubt on the argument that general *force majeure* language can **never** be interpreted as reading on pandemic risks, since a large fraction of MAE provisions make the connection explicitly. But it also casts some doubt on the opposite proposition that general language **always** captures specific pandemic risks: indeed, in our reading, the vast majority of provisions with general language tend to enumerate a variety of *different* specific contingencies (such as weather, climate change, terrorism, and the like), perhaps making it telling that the pandemic language is *not* included as an enumerated example.

Although it is easy to get caught up in the quantitative structure of MAE provisions to the exclusion of other considerations, it is important not to lose sight of the broader institutional setting that frames these disputes. Some relevant considerations include the following:

- *Judicial Reticence.* By any account, common-law courts aren't pushovers when it comes to nullifying contractual obligations. Contract law has long resisted the temptation to rescue a regretful party once foundational risk allocation decisions seem locked in. This canonical attribute of contract law carries over to M&A, too: for at least two decades, Delaware courts have consistently held that buyers wishing to bail out of a deal "ought to have to make a strong showing to invoke a Material Adverse Effect".

- *Burdens of Proof*. Consistent with the foregoing view, MAEs are generally interpreted by courts to constitute *conditions subsequent* to the obligation to close (rather than as *conditions precedent*, as many often mis-label them). The key upshot of this designation is that the initial burden of proof to invoke an MAE rests squarely on the shoulders of the party alleging excuse (almost always the buyer). And if the underlying evidentiary case is unclear, or if competing arguments produce an approximate stalemate on the merits, then the case is resolved in favor of the party seeking enforcement of the contract (usually the seller).

- *Durational Significance*. One of the few consistent lodestars in existing MAE jurisprudence is that the target's unanticipated hardship must be *durationally significant*, and not merely a hiccup in revenues or earnings over a quarter or two. But the economic dislocation caused by COVID-19 is so fresh and unfamiliar that reliable forecasts of long-term implications are largely impossible. (The historic and careening volatility in the financial markets of late ably attests to this fact.) And thus, as of this writing at least, many buyers are likely to find themselves unable to scare up the evidence needed to carry their burden of proving a durationally significant adverse effect in the post-COVID world. (Though tourism-intensive industries may have the best shot).

- *Precedential Tea Leaves.* Finally, as we noted in our prior post, the time span of our original data set also coincided with an era in which *no Delaware opinion had ever found*

an MAE to have been triggered. Like many other hot streaks, however, this one eventually came to an end in the fall of 2018, with the Chancery Court's *Akorn v. Fresenius* opinion. The precedent has no doubt bolstered the confidence of rueful buyers in pending deals who are now contemplating invoking their MAEs. (And we note in passing that the MAE in *Akorn* specifically carved out pandemics, subjecting the exclusion to a "disproportionate effects" carve-in.) Nevertheless, it is important to understand that while *Akorn* no doubt sent a message that the "MAC is Back" as a front-line issue for M&A doctrine, the underlying facts of the case diverge considerably from current circumstances (involving highly target-specific issues pertaining to regulatory clearance and outright regulatory fraud).

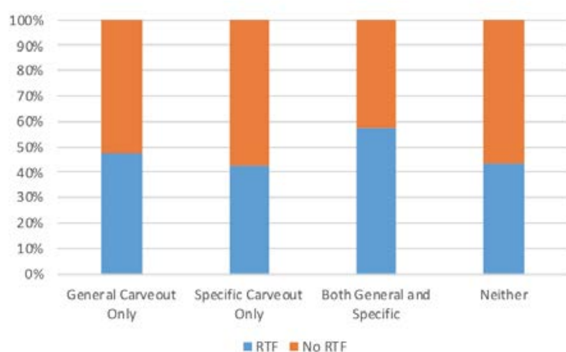
In the light of above points, we conjecture that the average M&A buyer will face a heavy slog in asserting that COVID-19 represents a deal-killing *force majeure*, even when the MAE contains no carve outs for pandemics (general or specific). The odds grow longer still, of course, in the presence of such carve-outs.

So this must imply that savvy acquirors need to abandon all plans to declare an MAE, right? *Not so fast:* notwithstanding the uphill battle (and long odds) faced by buyers asserting MAEs, we can think of several reasons why rational and sophisticated parties might still pursue this strategy:

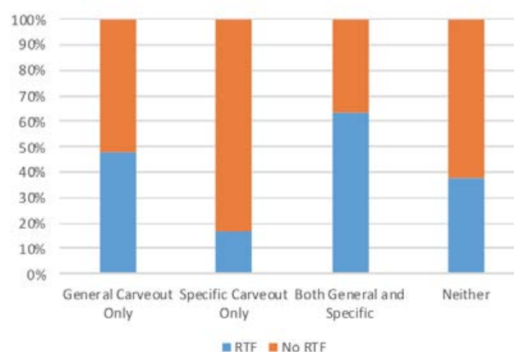
- First, pressing the MAE issue can buy precious time for the acquirer. Although MAE litigation moves substantially faster in Delaware Chancery Court than does commercial litigation in other venues, the process is still far from instantaneous. Moreover, the temporary closure of courthouses in Delaware and potential delays in litigation schedules due to the outbreak may well lead to unusually protracted timelines. That, in turn, could afford buyers an opportunity to amass additional evidence about the durational significance of the COVID-19 crisis (while preserving the option to abandon the strategy down the road).

- Second, even if the current saga proves to be short-lived, it is already raising fears of a medium-term liquidity crunch. The potential delaying effect of an MAE kerfuffle can also be a hidden source of liquidity for cash buyers, at least until the current market tumult resolves and greater sense of order returns to capital markets.

- Finally, invoking the MAE may be part of a larger portfolio of strategies that buyers might deploy in attempting to walk from – or potentially restructure – a signed deal. Several other strategies suggest themselves too, including asserting the failure of other closing conditions (related to, *inter alia*, financing, regulatory clearance, solvency, and tax status). Moreover, in many deals acquirors could conceivably threaten a backup strategy of using a "reverse termination fee" ("RTF") to permit them to exit a deal in exchange for paying what amounts to liquidated damages to break away. The figures below plot the prevalence of reverse termination fees as a function of each type of MAE carve-out, concentrating on both all deals in our data set (left panel) and pending deals (right panel). As illustrated in the figures, RTFs appear to be most common in deals where there are both general and specific carve-outs – *i.e.*, those deals that would (all else held constant) be least amenable to granting *force majeure* walking rights. Moreover, the deals that have neither general nor specific carve-outs for pandemic risks tend on the whole to be more likely to offer RTFs to compensate.

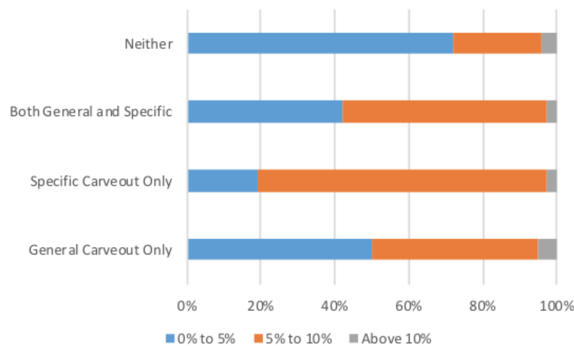


A. Prevalence of RTFs by Carve-Out Type (2003-Pres)



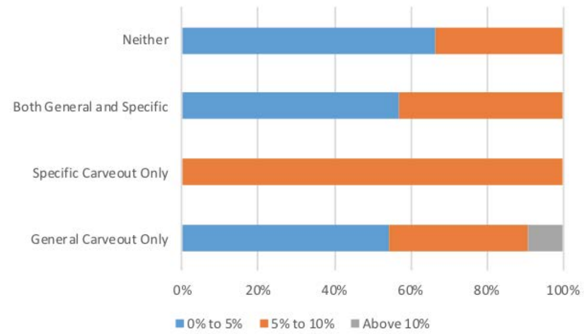
B. Prevalence of RTFs by Carve-Out Type (Pending Deals; 3/2020)

For the deals that include RTFs, one can drill further to assess the relative *size* of the RTF (as a percentage of the transaction value) by carve-out type. As the figures below demonstrate, RTFs tend to be the lowest when there is *neither* a general nor a specific carve out. Recall that this same group as a whole was relatively less likely to have an RTF to begin with. On the whole, then, RTFs and MAEs tend to operate as weak substitutes for one another; but there is still ample room for many buyers to use them together as part of a multi-pronged approach to busting up a deal (or, more likely, to get it restructured).



A. Size of RTF by Carve-Out Type

(2003-Pres.)



B. Size of RTF by Carve-Out Type

(Pending Deals, 3/2020)

We close by reminding readers of two additional points. First, M&A is but one domain where *force majeure* provisions are ubiquitous. One can also find them in financing contracts, supply contracts, consumer contracts, employment contracts and many others. In these other settings, another factor may play a critical role as well: the presence of a long-term relationship, in which both parties may interact over the course of months, years, or even decades. In such contexts, non-legal considerations may be as important (if not more so) than legal ones. Thus, even if a party believes that it may have the *legal* ability to walk away from a deal on the basis of an MAE, doing so may sabotage a long-term business relationship that is far more valuable in the long run.

Second, it is important to remember that this area of law remains − much like *force majeure* terms themselves − relatively opaque and open to competing arguments. We doubt that this core feature (or is it a bug?) will resolve itself any time soon. In the meantime, much may be left up to courts and lawyers to work out, if (as we expect) buyers begin to assert walking rights on the basis of a less-than-clear MAE. And that observation brings us to a final prediction, which our analysis permits us to state with some degree of confidence: If you are an M&A litigators on either the plaintiff or defendant side (and you remain healthy over the next few months), your timing couldn't be better.

A comparative Perspective on Commercial Contracts and the impact of COVID-19 - Change of Circumstances, *Force Majeure*, or what?

Christian Twigg-Flesner, Professor of International Commercial Law, University of Warwick

Introduction: Contracts and the Pandemic

The COVID-19 pandemic which has spread rapidly around the globe will be devastating for millions of people. Some will contract the Sars-Cov-2 virus and a vast number will be affected by the wide economic consequences the pandemic will bring. A key issue affecting businesses (and consumers) is the impact of the pandemic and its consequences on many existing contracts, particularly those where performance is to occur over a period of time and/or to commence at some point in the future. For contracting parties, the pandemic and its consequences could not have been foreseen. A party which cannot perform as agreed will seek to be excused from doing so and to escape liability for breach of contract. In the context of many commercial relationships, there will be scope for negotiations and agreed adjustments to existing contracts.[1] Failing such negotiations, there are two common contract law devices which will be pressed into service: (i) contractual provision for unforeseen events in the case of *force majeure* or hardship; and (ii) provisions of the applicable domestic contract law dealing with unforeseen or unforeseeable events arising after a contract has been concluded. Where neither the contract nor the applicable law provides a solution, a failure to perform will trigger whichever remedies are provided by the applicable law as well as a duty on the aggrieved party to act to mitigate the extent of its losses.[2] The robustness of the contract laws around the world in providing workable solutions will be tested by the pandemic. This could prompt either a recalibration of existing doctrines or the development of new rules (whether limited to the consequences of this pandemic[3] or as a

[1] For contract law scholars in the common law world, the implications for the doctrine of consideration, as well as promissory estoppel, will be interesting.

[2] Space precludes a discussion in this paper of the particular issues which might arise with regard to remedies for non-performance/breach of contract, e.g., in applying the remoteness test for contract damages, or the extent of the duty to mitigate.

[3] For example, Germany has already made COVID-19 specific changes to the Introductory Law to the Civil Code which permit consumers and small businesses to withhold performance in certain circumstances. These changes are currently set to expire at the end of June 2020 (see Art.240, §1 “Moratorium”).

general revision of the law). This paper will provide a brief comparative perspective of relevant provisions for commercial contracts, focusing on the international dimension as well as selected national rules.

Contractual Risk Allocation: *Force Majeure* clauses

Most commercial contracts contain a *force majeure* clause of some kind to deal with events occurring after a contract has been concluded and which are beyond the reasonable control of the parties. The effect of such events will affect the ability of either or both parties to a contract to perform their obligations as agreed, whether that be by making performance more onerous, more costly, or altogether impossible. A *force majeure* clause will stipulate how the occurrence of such an event will affect the contract, e.g., by permitting the parties to suspend performance, requiring cost adjustments or the renegotiation of elements of the contract, precluding termination for breach where that breach is caused by the event, or even bringing the contract to an end.[4] The precise effects of invoking a *force majeure* clause may depend on the duration of the event triggering the clause – if it is of limited temporary effect, then contract performance might merely be suspended, but if its duration cannot be determined, the contract may be terminated. The International Chamber of Commerce (ICC) issued an updated *force majeure* clause in March 2020 (an update to the 2003 version[5]) in response to the pandemic[6] and recommended its use in international commercial contracts.

There is, however, no uniform conception of *force majeure*. The ICC's 2020 clause defines a *force majeure* event as "the occurrence of an event or circumstance that prevents or impedes a party from performing one or more of its contractual obligations under the contract."[7] The impediment must have been (i) beyond the reasonable control of the party seeking to rely on the clause and (ii) one that could not reasonably have been foreseen at the time of contract conclusion and (iii)

---

[4] See e.g, the International Chamber of Commerce (ICC) *ICC Force Majeure Clause 2003* for a range of consequences arising from a *force majeure* event.

[5] Available at https://iccwbo.org/resources-for-business/model-contracts-clauses/force-majeure/ [accessed 13 April 2020]

[6] Available at https://iccwbo.org/publication/icc-force-majeure-and-hardship-clauses/ [accessed 13 April 2020]

[7] Paragraph 1 of the *ICC Force Majeure Clause 2020*.

with effects that could not reasonably have been avoided or overcome by the affected party.[8] The first two aspects are satisfied if one of the specific events listed in paragraph 3 of the clause has occurred. Indeed, *force majeure* clauses frequently spell out in some detail the kinds of events that will trigger it, often based on previous occurrences which had a significant impact on contract performance.

Relevant events might include political or societal disruption (war, border closures, closure of key shipping routes; strikes or rioting), legal disruption (major changes to the legal context for the transaction), or natural events (floods, earthquakes). Whether the particular event which has occurred triggers a *force majeure* clause will depend on the wording of that clause, i.e., whether the event which impedes performance is listed in the clause.

In the case of the COVID-19 pandemic, a *force majeure* clause which expressly mentions pandemics would be applicable and triggered by the COVID-19 pandemic. However, if the contract does not mention pandemic specifically, it may be possible for a party to rely on another event mentioned in the clause. The *ICC Force Majeure Clause 2003*, which will be the relevant clause in most international commercial contracts rather than the 2020 version, includes "epidemics" among the list of factors deemed to constitute a *force majeure* event but not a "pandemic". This is also the case in the March 2020 version. However, as a pandemic is an epidemic of global proportions, the clause might still be triggered. Alternatively, other events, such as "prolonged break-down of transport"[9] might trigger the clause: if the goods supplied under the contract rely on air freight and airports are closed because of the pandemic, the clause would apply on that basis. Some clauses contain a catch-all rider along the lines of "any other event beyond the control of the parties" or similar, which should cover the COVID-19 pandemic.

It will next be essential to establish a causal link between the trigger event and the ability of a party to perform the contract as agreed. The fact that an event listed in a *force majeure* clause

[8] These aspects resemble the conditions under which a party is exempt from liability for non-performance under Art.79 CISG (see below).

[9] Also mentioned in both the 2003 and 2020 versions of the *ICC Force Majeure Clause*.

has occurred will not suffice unless there is an impact on the ability of the parties to perform. It will be necessary to show that the reason why a party cannot perform is caused by the trigger event, so if the event relied upon in the clause is a "pandemic," then the reason why the party is unable to perform must be related to the pandemic. For example, social distancing rules and restrictions to non-essential business activities might make it impossible to perform the contract during the period when these restrictions are in place. On the other hand, the fact that the price of goods or components required for performance has changed might not be sufficient.

Finally, the party seeking to rely on the *force majeure* clause would have to demonstrate that there are no reasonable alternative steps available to it to avoid the consequences of the trigger event, or at least to mitigate its effects. For example, it may be possible to source goods or components from a different supplier.

If a *force majeure* clause can be relied upon successfully, then the precise consequences will depend on the outcome the clause provides for. The clause may merely suspend performance without either party incurring liability for non-performance, exonerate a party from any liability for non-performance, or bring the contract to an end. Both the 2003 and 2020 versions of the ICC limit relief from performance and liability for non-performance to the duration of the impediment.

Legal rules for cases of unforeseen events after contract formation

Should a contract not contain a *force majeure* clause at all, or should the clause be drafted in such a way as not to capture the impact of the COVID-19 pandemic, the parties could seek to rely on the legal rules of the law governing the contract which deal with this situation. For example, in English Law, the doctrine of frustration applies in some narrow circumstances where an event occurs after a contract has been concluded which makes the contract impossible to perform[10] (e.g., due to the loss of the subject-matter of the contract, or commercial impossibility), or would

[10] *Taylor v Caldwell* (1863) 3 B & S 826.

make performance "radically different"[11] from what was agreed in the contract. Mere financial hardship for one of the parties would not suffice. The event in question must have been unforeseen, or even unforeseeable,[12] by the parties, and neither party must have directly or indirectly brought about the event relied on. Where the doctrine operates, the effect is that the contract is terminated as a matter of law. The threshold for engaging the doctrine of frustration is high,[13] and it will not assist if one of the parties has assumed the risk of the event occurring, or its consequences,[14] under the contract.

In contrast, Art.313 of the German Civil Code (BGB)[15] deals with the consequences of a significant change in the circumstances forming the basis of the contract ("Störung der Geschäftsgrundlage"). If the parties would not have entered into the contract at all or only on different terms, had they foreseen this change, then modification of the contract can be demanded. This is subject to the requirement that, taking account of all the circumstances of the particular case including the contractual risk-allocation, upholding the contract would not be acceptable to one of the parties.[16] If it is not possible to modify the contract, or if the modification cannot reasonably be expected to be imposed on the party affected, then that party may withdraw from the contract or, in the case of a long-term contract, terminate by giving notice.[17] In French Law, Art.1218 of the French Civil Code contains a statutory provision for *force majeure* for events beyond the control of the parties which were unforeseeable at the time of contract formation and which make performance impossible. If performance would still be possible but unduly onerous on one party, then that party could plead hardship under Art.1195 of the French

---

[11] E.g., *Davis Contractors Ltd v Fareham UDC* [1956] AC 696 and *The Sea Angel* [2007] EWCA Civ 547.

[12] *Walton Harvey Ltd v Walker and Homfrays* [1931] 1 Ch 274; *Amalgamated Investment and Property Co Ltd v John Walker & Sons Ltd* [1977] 1 WLR 164.

[13] *The Sea Angel* [2007] EWCA Civ 547.

[14] See *Canary Wharf v European Medicines Agency* [2019] EWHC 335, a case arising out of the UK's withdrawal from the EU. The European Medicines Agency, which was headquartered in London, moved to Amsterdam and sought to escape a 25-year lease on its premises. The judge concluded that, whilst withdrawal from the EU was not foreseeable in 2011, when the lease was entered into, the parties has foreseen the possibility that the EMA might vacate its premise early and provided for this in the lease. Consequently, the lease had not been frustrated.

[15] An English translation is available at https://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.htm [accessed 13 April 2020].

[16] Art.313(1) BGB.

[17] See Art.313(3) BGB,

Civil Code. Where *force majeure* is invoked, contract performance is either suspended if the event is temporary or the contract is terminated. In a hardship situation, the affected party can request renegotiation of the contract. Where this is rejected by the other party or unsuccessful, the parties can agree to request judicial assistance or terminate the contract.

In the context of international commercial law, Article 79 of the United Nations Convention on the International Sale of Goods (CISG)[18] exempts a party from liability for non-performance where "the failure was due to an impediment beyond his control and … he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it, or its consequences."[19] This exemption lasts for the duration of the impediment only.[20] The effect of Art.79 CISG is that there is no liability for damages but the other party can exercise any of the other rights in respect of non-performance.[21] Consequently, if the impediment is such that the non-performance amounts to a fundamental breach,[22] the contract may be avoided.[23]

By way of comparison, according to Art.7.1.7 of the *UNIDROIT Principles of International Commercial Contracts* (UPICC), a party's non-performance is excused if this was "due to an impediment beyond its control".[24] This is subject to the proviso that the non-performing party "could not reasonably be expected to have taken the impediment into account at time of the conclusion of the contract"[25] or have mitigated the impediment or its consequences. Furthermore, Art. 6.2.2 UPICC deals with hardship, which occurs "where the occurrence of events fundamentally alters the equilibrium of the contract," either because the cost of performing has increased or the value of the performance provided has been reduced. The event in question (i)

[18] Applicable to international commercial contracts for the sale of goods; ratified by 93 states.
[19] Art.79(1) CISG. Compare the definition of "force majeure" in the ICC's *Force Majeure Clause 2020*, paragraph1 (see above).
[20] Art.79(3) CISG.
[21] Art.79(5) CISG.
[22] As defined in Art.25 CISG.
[23] Arts.49 and 64 CISG.
[24] Art. 7.1.7(1) UPICC.
[25] *Ibid*. Presumably, this includes making appropriate provision for this in the contract, suggesting that the impediment was not foreseen or reasonably foreseeable.

must have occurred or become known after the contract was concluded; (ii) could not reasonably have been taken into account before the contract was concluded; (iii) is beyond the control of the party suffering hardship; and (iv) must be one in respect of which the party suffering hardship did not assume the risk.[26]

The examples from these legal regimes show that there are several common features, although there are differences in the detail, and their application will, of course, vary in light of relevant case-law. However, for present purposes, a number of broadly comparable common features can be noted. First, the event or impediment must have arisen after the contract had been concluded. Second, the event must at least have been unforeseen at the time of conclusion or even not reasonably foreseeable. There is some variation in what precisely is required in this regard – to say that the event/impediment was not foreseen sets the bar lower than to say that the event/impediment was not reasonably foreseeable – something can be foreseeable without having been foreseen. Third, there must be no provision in the contract in respect of the event/impediment or its consequences, i.e., no *force majeure* and/or hardship clause, nor specific contractual risk allocation of the consequences of the event/impediment. If the contract does make such provision, then the parties can no longer rely on whatever background provisions for unforeseen events there might be under the governing law.

In the context of the COVID-19 pandemic, these three aspects raise particular issues. The pandemic was declared by the World Health Organisation on 11 March 2020, although the effects of the spread of the Sars-Cov-2 virus could be felt long before then. In respect of many contracts concluded from mid-to-late February onwards, it may be difficult to argue that the event/impediment only occurred after such contracts were concluded. That said, it may be arguable that the stringent social distancing measures and increasing restrictions of commercial activities could be treated as separate events/impediments which could not be relied on in respect of any contracts concluded after such measures had been announced but might be

[26] Similar provisions can also be found in the *Principles of European Contract Law*, Art. 6:111 (change of circumstances) and Art.8:108 (excuse due to an impediment).

relevant impediments in respect of contracts concluded earlier. However, the rapid pace of developments from the emergence of the virus to a full-blown pandemic would make such distinctions of limited relevance in practice.

Secondly, the question of whether the pandemic and its consequences were foreseen, or reasonably foreseeable, will matter. Indeed, clarity about whether the requirement is that it was foreseen or reasonably foreseeable will be crucial: a party seeking to rely on frustration, *force majeure,* or hardship will be able to do so more readily if it can show that the event/impediment was not foreseen even if it was reasonably foreseeable. Of course, if an event/impediment was reasonably foreseeable, arguing successfully that it was not foreseen would mean having to overcome a high evidentiary threshold. The fact that something was reasonably foreseeable will effectively raise a rebuttable presumption that it was foreseen. But clarity on what the relevant standard is will be important.

Furthermore, it will be essential to determine what precisely must have been reasonably foreseeable: would it suffice that there was a possibility that there might be *a* pandemic which could be seriously disruptive or would it be necessary that a pandemic caused by a novel type of coronavirus spreading rapidly around the globe was reasonably foreseeable? In respect of any contracts concluded before December 2019, the COVID-19 pandemic was certainly not foreseen, nor was it reasonably foreseeable that there would be a COVID-19 pandemic let alone its severe and immediate impact on ordinary activities. However, it is less obvious that the possibility of *a* pandemic was not foreseeable. Only 11 years ago, the Swine Flu (H1N1 influenza) pandemic affected many countries around the world. In the intervening years, there were outbreaks of SARS and MERS which were contained. In that sense, the possibility that a pandemic, whether from an influenza virus or coronavirus, might occur at some point was not unforeseeable. However, the question would have to be whether any kind of pandemic during the contract period was not only foreseeable but whether it was *reasonably* foreseeable by the parties. The point here is that the question of whether the event/impediment was foreseeable may depend on the degree of precision that is required to identify the event/impediment. A low standard of

precision would mean that the law would rarely be of assistance whereas too high a degree of precision might, in contrast, make it too easy to invoke frustration or hardship. So while a relatively high degree of precision would be justified, it should not be too high.[27] Consequently, the question should be whether the rapid development of a pandemic which would necessitate measures causing serious disruption was reasonably foreseeable. The answer to this is almost certainly going to be that it was not.

This leaves the third question, whether the risk of serious disruption as a result of the pandemic were assumed by either party under the terms of the contract. What matters here is whether there was an assumption of risk regarding the consequences of the pandemic, e.g., with regard to the possibility to continue normal business operations, suspension of activities etc. If the contract makes provision for this, then the contractual risk allocation will govern the situation and frustration/hardship no longer apply.

In short, for many contracts concluded before December 2019, there is a reasonable prospect that rules on frustration, hardship, or something similar will be of assistance. The difficulty may lie in respect of the legal consequences arising from the application of these rules. The consequence of frustration in English law is that the contract is terminated by operation of law and the rather complex adjustments under the Law Reform (Frustrated Contracts) Act 1943 might come into play for financial adjustments. There is no scope for suspending performance, liability for breach, or to provide an opportunity for renegotiation. Under Art.79 (5) CISG, a party unable to perform is exempt from liability in damages for breach of contract. In contrast, under Art. 6.2.3 UPICC, in the case of hardship, renegotiation would be the first step, and if that failed, a court could either bring the contract to an end on terms or amend the contract “with a view to restoring its equilibrium”.[28] If the situation falls under the force majeure provision of Art. 7.1.7 UPICC, non-performance is excused, although the other party may terminate the contract for a fundamental

[27] Note Marcus Smith J’s observations that “There will, no doubt, be many cases where something can be foreseen as a theoretical possibility, but where neither party can be criticised for failing to take it into account. The court must also beware of framing questions of foreseeability too closely to the exact, specific, nature of the supervening event that ultimately occurred.” (*Canary Wharf v European Medicines Agency* [2019] EWHC 335, paras [211]-[212].
[28] Art. 6.2.3(4)(b) UPICC.

non-performance. Whether immediate termination is preferable to renegotiation or contract variation by court order will depend on the circumstances of each contract and its wider economic context.

Is a different approach needed for the COVID-19 pandemic?

In responding to novel circumstances, the instinctive reaction of lawyers is to delve into their legal toolbox to see which tools they can use to solve the legal problems which have arisen. However, for some problems, the tools they have may not be sufficient and new tools may have to be created. The brief discussion above reveals that when contracts are considered individually, reliance on appropriately drafted *force majeure* clauses and the background rules of the applicable law for post-formation unforeseen events will cover many contracts affected by the impact of the Covid-19 pandemic and might also provide an appropriate solution for many of those contracts. However, the impact of the COVID-19 pandemic is such that the number of contracts affected will be enormous. Moreover, it is not just a selected category of contracts which is affected but a wide-range of contracts across the economy. This will include many contracts which are part of contractual networks or supply chains. With so much commercial activity slowing down or grinding to a halt altogether, this will be an instance where lawyers and law-makers will have to be creative and think beyond the current law to develop new legal solutions. Such solutions could be limited in scope to the current COVID-19 epidemic, but they could also be of a more general nature, i.e., the pandemic could be the impetus to strengthen contract law now in case of any future severe-impact global disruption. The COVID-19 pandemic might feel unique to us but chances are this will not be the last global disruption on this scale.

An immediate solution that might be appropriate in many instances would be to enable the suspension of obligations under a contract for a period of time without penalty/liability. In other words, performance could effectively be frozen until it becomes possible to relax restrictions and allow commercial activity to resume again. One example of a specific COVID-19 response along these lines are the temporary changes made to German law permitting consumers and small enterprises to withhold performance on defined economic grounds until 30 June 2020 in respect

of contracts entered into before 8 March 2020.[29] This right to withhold performance is only available if the other contracting party's economic situation would not be unduly affected as a result.[30] Any related litigation would provide some indication of how this kind of approach would work practically. It is, however, a fairly cautious approach, and, for now, limited to a brief period – although on current projections, a longer period might be needed.

Conclusion

The key message of this note is that there are Contract Law mechanisms available to deal with the impact of the COVID-19 pandemic on many contracts. Whether these solutions are suitable in light of the economic context resulting from the measures taken by governments around the world to stem the spread of the virus remains to be seen. The crisis may provide the impetus for a review of how contract law regimes deal with the impact of major unforeseeable events on existing contracts. Short-term responses will be most appropriate for now, but they would not obviate the need for a more thorough look at this issue with a view to reviewing national rules on unforeseen post-formation circumstances.

[29] Introductory Law to the Civil Code, Art.240, §1(1) and (2). For a brief analysis (in German), see M. Schmidt-Kessel and C. Möllnitz, "Coronavertragsrecht – Sonderregeln für Verbraucher und Kleinstunternehmen" (2020) *NJW* 1103.
[30] Introductory Law to the Civil Code, Art.240, §1(3).

Dispute Resolution in Pandemic Circumstances

George A. Bermann, Jean Monnet Professor of EU Law, Walter Gellhorn Professor of Law; Director, Center for International Commercial and Investment Arbitration, Columbia Law School

The peaceful resolution of disputes is among the most important earmarks of a regime attached to the rule of law. Even in countries in which, for one reason or another, courts do not work especially well, civil peace is of paramount importance. The absence of effective institutions for the administration of justice between and among private parties would spell a high degree of social disorder.

Even in the absence of a crisis such as we are experiencing, justice systems face a number of challenges in this day and age. Does a jurisdiction have a sufficient number of persons qualified to administer justice, and what are the consequences of a shortfall? In the same vein, is civil justice operating under formalities that generate delays disproportionate to the purposes they serve? Do the procedures that are in place sufficiently allow parties to adequately present their case and adequately rebut their adversary's? Is access to justice prohibitively expensive, most likely due less to court costs than to costs of representation by counsel? Are there safeguards in place to ensure the independence and impartiality of decisionmakers, and do they work? Is institutional bias or corruption a problem? Overall, does a justice system exhibit the qualities widely viewed as essential: procedural fairness, accuracy, and efficiency?

Long-distance Justice

These are concerns we have even in ordinary times, and irrespective of any exogenous factors may come into play. It is on top of these concerns that there have now emerged a whole new set of concerns traceable to the circumstances in which the prevalence of the Coronavirus has placed us. Some of these have never arisen before, at least not in the magnitude we are experiencing. How great a threat are they to the principles upon which our justice systems have

been built, and how can they be addressed most fairly and workably? How must we alter our modes of conduct in order to serve the purposes that our activities are meant to achieve, and to what extent are those changes technologically and humanly feasible?

In the discussion thus far, reference has been made, if only implicitly, to courts of law. However, civil disputes are obviously no longer resolved solely in national courts. They can be resolved amicably or through mediation or conciliation. But, especially in international transactions, arbitration has become an especially favored mode of dispute resolution.

The most important challenges for the administration of justice, whether judicial or arbitral, is obviously technological. As a result of the pandemic, the great majority of business and professional interactions are now taking place strictly online, and the administration of justice is no exception. This means big change. This is due largely to the fact that, particularly in litigation, but much less so in arbitration, we have traditionally operated on the assumption that the proceedings associated with the administration of justice take place in-person, with parties, counsel, witnesses, and court reporters all performing their roles in the presence of one another and, of course, in the presence of the adjudicator. This assumption must be jettisoned.

Virtual Proceedings

It is important to distinguish at the outset between phases of litigation or arbitration that are conducted “before” a judge or arbitrator and those that are not. In a great many circumstances, counsel traditionally perform their tasks and interact directly with opposing counsel without involvement of a court or tribunal. Pleadings, briefs and memorials are as easily submitted to the court or tribunal as well as opposing counsel as they have been up to now, i.e., remotely, via email or courier service. That is equally the case for pre-trial discovery and settlement negotiations.

Attention is therefore best focused on those moments in which proceedings ordinarily take place before a court or tribunal. Some proceedings before a court or tribunal, such as case management conferences, have also for a long while been performed at a distance, whether telephonically or online. Therefore, what remains to be considered are mostly hearings

themselves. These are the occasions when "change of venue" from a physical courtroom to a virtual courtroom stands to be most disruptive.

Even so, thanks to available platforms such as Zoom, there is no obvious reason why what transpires in a physical courtroom or hearing room cannot largely be replicated online. All that is required is that the judge or tribunal chair establish a meeting and invite all relevant parties to participate. These platforms appear to accommodate as many persons as are ever likely to participate in any given proceeding. As a result, an online hearing should unfold mostly as it would in person. Oral argument can obviously be performed online, as can examination and cross-examination of witnesses, transcription by a court reporter, or interpretation to and from a foreign language, with no one needing to be in the same room. To this extent, the situation is not unlike those university professors, such as myself, who conduct their classes online.

The Arbitration Scene

The use of video-conferenced hearings in arbitration was already well advanced when the pandemic struck. Online hearings have been a technological reality for some time. The International Center for the Settlement of Investment Disputes (ICSID), which administers the lion's share of investor-State arbitrations, reports that it sees every year a steady uptick in the number of hearings online. In 2019, about 60 per cent of the 200 hearings and sessions organized by ICSID were held by video-conference. Indeed, "block-chain" arbitration, which is obviously 100% online, is a reality, if by no means yet a widely popular one.

ICSID reports that its video-conferencing platform does not require special hardware or software and that a computer with an internet connection and webcam is sufficient for effective and secure participation. Hearings with hundreds of participants have been held online. The available platforms are sufficiently sophisticated for the purpose. All participants have the ability to share audio and video, as well as content such as PowerPoint presentations. A virtual chat function allows participants to communicate individually strictly with one another or with the entire group. A virtual court stenographer provides a real-time transcript of the proceeding, visible to all participants on the video-conference. Particularly in arbitration, but also in litigation,

demonstratives, as they are called, are increasingly in use. It makes little difference whether they are exhibited by power-point online rather than in a hearing room.

Thus, arbitral chairs (and solo arbitrators) are readily acting as hosts, convening sessions online, by inviting participants in whatever manner the platform in use provides. It is not proving particularly difficult for participants to learn how to navigate the platform that an arbitrator selects, whatever shape individual learning curves may take. This process is well underway in a large number of arbitral proceedings, with no particular technical difficulties.

Although individual arbitrators are proving capable of launching and managing an online arbitration, nothing prevents the arbitral institutions, such as the American Arbitration Association or the International Chamber of Commerce International Court of Arbitration, under whose aegis the vast majority of arbitrations take place, from establishing an institution-wide system available to all tribunals proceeding under their auspices. This is happening in ICSID, which has its own online system, that it is making available also to arbitrations conducted under other institutional rules or the UNCITRAL Rules. There is an ICSID hearings team that works directly not only with the tribunal, but also with the parties, so that they perform their role with confidence. ICSID IT staff members are present throughout hearings to ensure they run smoothly. It is already apparent that all the other leading arbitral institutions are heading down the same path.

The Litigation Scene

Arbitral institutions appear to be significantly ahead of the courts. According to reports, at present, judges are scrambling individually to equip themselves with Zoom and like technologies, and it is not clear that courts are developing video-conference systems for use by all their individual judges in the fashion in which arbitral institutions are developing such systems for their tribunals. It would clearly be advisable for them to do so.

The Administrative Office of the US Courts recently made the following recommendations to all federal courts, urging them:

- to hold in-person court proceedings only when absolutely necessary, utilizing videoconferencing or audio-conferencing capabilities where practicable
- to conduct jury proceedings only in exceptional circumstances
- to limit the number of family members who attend proceedings
- to stagger scheduling of critical court proceedings to reduce the number of people in seating galleries, wells of courtrooms, conference rooms, and public waiting areas, and
- to limit staff at critical courtroom proceedings to fewer than 10 people, and ensure that they are at least six feet apart.[1]

As can be seen from this inventory, it is by no means anticipated that all judicial proceedings will take place online. While in-person court proceedings are to take place "only when absolutely necessary," they are evidently expected, at least to some extent, to continue. Only if they were to continue, would, for example, it be necessary to "stagger scheduling of critical court proceedings to reduce the number of people in seating galleries, wells of courtrooms, conference rooms, and public waiting areas" or "limit staff at critical courtroom proceedings to fewer than 10 people, and ensure that they are at least six feet apart." State court systems are moving at different rhythms; some have no choice but to go online (or else suspend activity altogether, at least temporarily), since some state courthouses are closed due to the fact that persons found to be virus-infected had recently attended proceedings there. But there is progress. The American Bar Association very recently conducted an instructional webinar in which 500 judges participated.

Changes Nonetheless

The fact that courts and tribunals are equipped to carry on business reasonably well does not mean that nothing changes. One need only visualize how court and arbitral proceedings ordinarily unfold. Consider witness testimony. A witness may be examined remotely, but something is inevitably lost in the process. Clearly the opportunity for counsel and court or

[1] https://www.uscourts.gov/news/2020/03/12/judiciary-preparedness-coronavirus-covid-19 (last consulted March 22, 2020).

tribunal to observe a witness' demeanor is greatly reduced. Body-language remains unseen. Nor is there any way to know to what extent, if at all, a witness, in testifying is being coached by someone sitting next to him or her, but not visible on a screen, or is consulting documents that he or she would not be permitted to consult in a courtroom or hearing room.

There is much discussion of the impact of the pandemic on the conduct of jury trials. It is entirely possible for jurors to observe civil and criminal proceedings on line, once their home computers are equipped, or even to deliberate online, but the absence of physical proximity between jurors and witnesses, as well as among jurors while deliberating, cannot help but make a difference. Moreover, many of the ground rules governing the conduct of jury trials presuppose a degree of sequestration of jurors from others – though, ironically not much of a problem with the current prevalence of shelter-in-place orders.

In litigation, counsel may approach the bench to address the judge beyond hearing by others. Similarly, in arbitration, members of the tribunal, faced with a difficult objection by counsel, will retire from the hearing to the tribunal's breakout room, or simply the corridor, to exchange views and reach a ruling. Ways must be developed by which this can take place without hearing by others in the "room". It is common, again in arbitration, for fact witnesses to be sequestered while other fact witnesses testify, so as to disable witnesses from molding or tailoring their testimony in accordance with what another witness may have said. Now, the witness will need to be removed from the room technologically.

Similarly, counsel ordinarily take signals from the way in which adjudicators physically react to their oral advocacy or examination of witnesses, whether by grimaces or raised eyebrows, or hopefully a benign countenance. There can essentially be no movement on the part of those who are speaking. Changes in advocacy styles may well result. Put more simply, we are accustomed to experiencing litigation and arbitration as theater. Much of the cast will be present at all times during online hearings, but not all visible to one another, with the element of drama necessarily subsiding. With the move to online adjudication, the atmosphere will have undergone a profound, if subtle, change, in these and so many other ways, the implications of which will only be fully understood with the passage of time.

Deadlines

One of the first things courts and tribunals do, once assembled, is establish a calendar for the proceedings. Arbitral tribunals, more so than courts, are likely to produce early on a calendar reflecting the entire length of the proceedings, from beginning to end, procedural step by procedural step. Deadlines abound, not only in the calendar, but over time. Uncalendared motions will be made, in the wake of which all parties will be given a fixed deadline by which to state a position.

Some proceedings will have been well underway by the time the dislocation and disruption occasioned by the pandemic have occurred. The proceedings will have to be conducted differently midstream. Short-term delays are inevitable. But for all the reasons stated above, courts and tribunals have it largely within their means to adapt usual litigation and arbitration activities to the demands of the technologies that will now govern. We have no choice but to believe that courts and tribunals will exercise the good judgment and common sense we ascribe to them in making the necessary rulings on requests for relaxing the ground rules and, in doing so, striking a sound balance between efficiency and fairness.

It is also a watchword of both litigation and arbitration that the parties to a dispute must enjoy "equality of arms," i.e., an equal opportunity to make their case and refute their opponent's. As courts and tribunals make whatever adjustments they do to the calendar, they need to be correspondingly sensitive to due process in all its manifestations.

Conclusion

It is useful in conclusion to put what has been said in a somewhat larger perspective.

First, how does the magnitude of the "upheaval" – to use a somewhat hyperbolic term – in the administration of justice compare to the upheaval to be experienced in other fields of endeavor. Some fields of endeavor may be adapted to the technologies at our disposal more readily than others and, conversely, technologies may be adapted to some fields more readily than others.

It may work to the advantage of litigation and arbitration that both entail well-established staged forms of activity, marked by a more or less recurring set of discrete steps. No litigation or arbitration is "routine," but these activities do tend to be "routinized." No less important, dispute resolution is largely a matter of words, oral or written. A sphere of activity in which words loom so large lends itself well to the technology to which we are all turning for the conduct of business and professional activity under present circumstances.

Second, some activities were already set on a novel technological path long before the pandemic occurred. Such is the case of arbitration and, unfortunately, much less so in the case of litigation. Already years ago, the arbitration community was on a quest to make fuller use of available technologies. A law journal dedicated to that very purpose – *The Journal of Technology in International Arbitration* – was established some time ago and is prospering. The motivation for technological innovation in arbitration, much like the motivation for "expedited" or "fast-track" proceedings, was largely one of economy in time and cost, to which concerns over consumer arbitration have contributed. Thus, adaptation to a pandemic was not required in order for this transformation to take place. In other words, greater and better use of technology was already identified as distinctly in arbitration's best interests and, according to some, inevitable. If that is the case, the present pandemic is only hastening arbitration's progress, albeit somewhat precipitously, down a path it was destined to travel anyway.

Reform in civil procedure reform has always moved at a distinctly slower pace than reform in arbitral procedure. Arbitral institutions operate in a highly competitive market, revising their rules every several years, if only to borrow innovations that other arbitral institutions will have recently introduced. For the most part no such competition prevails in civil litigation at the national level, and the intervals between procedural reforms are decades – many decades – rather than years. For these and other reasons, modernization in civil litigation has not kept pace with modernization in arbitration. But the functionality of national court systems depends on closing that gap. The present crisis makes that only more apparent and can be a catalyst for change.

Driver for Contactless Payments

Ronald Mann, Albert E. Cinelli Enterprise Professor of Law;

Co-Director, Charles Evans Gerber Program in Transactional Studies, Columbia Law School

Before the virus, my payments course discussed why so few of us paid for purchases with cash. Those conversations emphasized the inconvenience of carrying and using cash. When the course turned to payment cards, we discussed how the increasing speed of card-based transactions had made cards relatively more attractive to merchants. More broadly, my scholarly writings on the subject emphasized the societal downside of cash, the likely connection between crime and the dependence of an economy on cash transactions; that might be true because of the utility of cash either for sheltering criminal transactions or for avoiding taxation.[1]

As a consumer, my primary experience with cash before the virus was standing in checkout lines observing the sluggish pace of cash transactions in front of me. Like so many things in our lives, the advent of the virus has changed the situation markedly. From the earliest days of infection, it has been far more unsettling to observe cash transactions knowing that the virus persists on paper and metal surfaces for days.[2]

The dynamic that has driven the choices merchants offer in face-to-face retail transactions will change as well. Driven by the private exigencies of the retail environment, the last few decades have witnessed private mechanisms spreading cash-less retail transactions, predominantly card-based. In some countries, policymakers have supported that spread, reacting to the societal costs of a heavy reliance on cash by adopting rules that limit or even aim to eliminate the use of cash.[3] More recently in this country, however, as a few businesses have

---

[1] *See* RONALD J. MANN, CHARGING AHEAD: THE GROWTH AND REGULATION OF PAYMENT CARD MARKETS 102-05 (Cambridge Univ. Press 2006).

[2] *See* Neeltje van Doremalen, et al., *Aerosol and surface stability of HCoV-19 (SARS-CoV-2) compared to SARS-CoV-1,* New Engl. J. Med. (Mar. 17, 2020) (DOI: 10.1056/NEJMc2004973).

[3] *See*, *e.g.*, *See* Jon Henley, *Sweden Leads the Race to Become Cashless Society*, Guardian (June 4, 2016), https://www.theguardian.com/business/2016/jun/04/sweden-cashless-society-cards-phone-apps-leading-europe;

refused to accept cash, local policymakers have pushed back, reasoning that a refusal to accept cash excludes less affluent purchasers (frequently unbanked) from fair access to commerce. Among others, Massachusetts,[4] New Jersey,[5] New York,[6] Philadelphia,[7] and San Francisco[8] have banned cashless businesses. Indeed, the present Congress has considered two bills that would extend such a ban to the federal level.[9] The likelihood that Amazon's cashier-less stores (Amazon Go) would refuse cash payments has been a particular stimulant to those bills.[10]

This essay makes two basic points about the effect of the virus on that mix of policy, legal, and institutional arrangements. First, policies fostering the use of cash in retail transactions are much harder to justify in the world of the virus, as it is harder to make those transactions safe for purchasers, cashiers, or the populace in general. Second, the slow pace of the shift from card-based payments from swipe to chip, with the slower drift to phone-based payments, is more worrisome now, where fully contactless payments are safer for all involved than authentication either by swipe or chip.

Virginia Harrison, *This Could Be the First Country to Go Cashless*, CNN Money (June 2, 2015), http://money.cnn.com/2015/06/02/technology/cashless-society-denmark/; Abigail Adams, *Norway's Biggest Bank Calls for Country to Stop Using Cash*, Int'l Bus. Times (Jan. 22, 2016), http://www.ibtimes.com/norways-biggest-bank-calls-country-stop-using-cash-2276140.

[4] *See* Ed Shanahan & Jeffery C. Mays, *Cashless Businesses? City Council Says No*, N.Y. Times, Jan. 24, 2020, at A21.

[5] *See* Aaron Moselle, *US Ban Proposed on Cashless Businesses*, Phila. Tribune, May 21, 2019, at 2B.

[6] *See* Shanahan & Mays, *supra* note 4.

[7] *See* Moselle, *supra* note 5; Christian Hetrick, *Phila. Passes Ban on Cashless Stores*, Phila. Inquirer, Mar. 1, 2019, at A7.

[8] *See* Joshua Sabatini, *SF Approves Ban on Cashless Stores*, S.F. Examiner, May 7, 2019.

[9] Payment Choice Act of 2019, H.R. 2650 ((116th Cong., 1st Sess.); Cash Always Should Be Honored Act, H.R. 2630 (116th Cong., 1st Sess.).

[10] *See* Sabatini, *supra* note 8; Robert Channick, *Amazon Go Stores Will Give Accepting Cash a Go*, Chi. Trib., Apr. 11, 2019, at 1.

I. Cash Payments

As mentioned above, the willingness of businesses to accept cash before the virus reflected the intersection of two conflicting trends: the creeping superiority of card-based payments from the merchant's perspective and the increasing perception of policymakers that a refusal to accept cash disproportionately affects the large underbanked segment of the populace.[11] The advent of the virus shifts the relevant considerations markedly. Now, cash payments are a danger not only to the individuals directly involved, but to society at large, as they spread the virus through the population. Nor is it a simple matter to sanitize those transactions, given the difficulty of removing the virus from paper, especially the cotton-and-linen weave of American currency.[12] Relatively speaking, the card-based payment is much safer, as the cashier typically need not touch the card and the cardholding purchaser can disinfect the card after any contact with a terminal at the point of sale.

That new factor — the contagion of cash transactions — should change the reaction of local policymakers, who now should discourage cash payments and welcome the efforts of merchants to shift purchasers toward card-based payments. I doubt legislators will take seriously the notion of obligating merchants to refuse cash payments. Nor do I consider it realistic for the United States to move rapidly toward the eradication of the domestic currency. I do see, though, a few initiatives that might align the public and private interests to accelerate the trend away from cash.

A. Public Policies

The increasing societal cost of cash transactions justifies the use of policy levers to reduce the use of cash. The most obvious response would repeal the cash-obligating ordinances several

---

[11] *See* Shanahan & May, *supra* note 4 (noting that one in nine NYC households has no bank account); Sabatini, *supra* note 9; Hetrick, *supra* note 7.

[12] Jenny Surane et al., *Is It Safe to Use Cash During Outbreak?*, L.A. Times, Mar. 15, 2020, at C2.. Perhaps the problem would be different in the United Kingdom or one of the other countries that now issue currency made of plastic rather than paper. *See* Kirill Adamovich, *Which Countries Use Polymer Banknotes*, PaySpace Mag., Feb. 10, 2020, *available at* https://payspacemagazine.com/banks/which-countries-use-polymer-banknotes/

cities and States recently have passed. The most prominent of those probably is the New York City ordinance, which ironically came into effect this winter, just weeks before the virus spread through the city.[13] If that recommendation seems obvious and overdetermined, consider the remarkable circumstances of the Delaware legislature, in which a legislator introduced a bill obligating businesses to accept cash in March of 2020, well after the pandemic had reached our shores.[14]

The second proposed response reflects the relatively arbitrary choice between cash and card. For most of us, the choice between using cash or a card often reflects much less of a rational calculation about the costs and benefits of the competing payment devices than it does some combination of habit and rough rule of thumb. Most suggest, for example, that they use cash for transactions below a certain threshold. In part, that habit might have developed because merchants often have prohibited purchasers from using payment cards for small transactions.[15]

To the extent the choice for cash is a "soft" choice founded in habit rather than calculation, policymakers should be able to alter that choice for many transactions by raising awareness about the private and social costs of payments with cash: they are dangerous not only for the purchaser that pays with cash, but for society more broadly. In the same way that we accept the costs of social distancing as a group, even though third parties reap most of the benefits, appreciation of the risks of cash should lead to a cognizable shift away from cash and toward card-based payments.[16] That suggests that public-service announcements and advertisements might substantially alter behavior. At the same time, to facilitate the use of cards in small

---

[13] The City Council passed the bill on January 23, 2020. *See* Shanahan & May, *supra* note 4.

[14] Sarah Gamard, *Proposed Del. Bill Would Ban Stores from Refusing Cash*, Wilmington News J., Mar. 11, 2020, at A3 (discussing the introduction of Senate Bill 220 on March 10).

[15] *See* 15 U.S.C. 1693*o*-2(b)(3)(A) (preventing network rules that bar surcharge for accepting credit cards on transactions below ten dollars).

[16] I would expect the apparent riskiness to cash to drive a shift toward card-based payments even without government support. It will be quite some time, though, before data would document such a shift.

transactions, Congress should reconsider the Dodd-Frank provision validating merchant payment-card minima.[17]

It is harder to address the limited access of the unbanked to payment cards.[18] It is beyond the scope of this essay to recapitulate the causes of that problem or the various solutions that other scholars have proposed. I should mention, though, the ready ability of stored-value cards as a mechanism for mitigating that problem. As I have written in previous work with Liran Haim, stored-value cards provide a simple way to get those without bank accounts into the mainstream of modern payments. As we explain, stored-value cards already are used successfully for all federal payments to unbanked individuals. They also are commonly used for recurring salary payments to the unbanked.[19] Rolling out similar programs at the state and local level should put an even larger share of the populace in a position to choose card-based payments over cash.

B. Merchant Initiatives

Public policy and legislation has played only a minor role in the shift over the last half century from cash to payment card at the point of sale. Rather, the dominant force driving that shift was the relative desirability of those transactions for merchants and purchasers. Hence, initiatives that accelerate that shift are at least as likely to come from merchants as they are to come from legislators.

One key point is the likely alignment of the public and private interests in sanitizing retail payment transactions. Merchants understand that our choices among competing retailers rest in part on our perception about the safety of those retailers. Retailers that mandate social distancing and offer conspicuous disinfection of their stores are more attractive than those that do not. The same will be increasingly true for payments, as purchasers gain awareness of the relative risk of cash payments as opposed to card-based payments. A few likely merchant responses come to mind.

---

[17] *See supra* note 15.

[18] *See*, *e.g.*, Shanahan & May, *supra* note 4.

[19] *Putting Stored Value Cards in Their Place*, 18 LEWIS & CLARK L. REV. 989 (2014).

The first is softer, parallel to the informational response suggested above: when purchasers offer to pay with cash, cashiers could suggest that they pay instead with a card.[20] That would parallel the common efforts of merchants in recent decades to shift payments from credit cards to debit cards. In this context, though, the savings would come not from decreased out-of-pocket costs, but rather from the safety to the store's own employees (who would touch the currency of fewer purchasers) and from the increased perception of the store's safety (as customers less commonly observe contagion-preferent cash transactions).

A second initiative, parallel to retailer segregation of checkout lines by payment type, would be to funnel all cash payments to separate "cash-only" payment lines. That would reassure card-using purchasers that they could pass through a checkout line that had not been infected with currency-borne virus. Similarly, it would support more careful disinfectant procedures for the cash-only transactions. It might be easier for a merchant to more rigorously sanitize the checkout station and cash drawer after each transaction involving the receipt or distribution of cash if the cost of slowing the pace of transactions was borne largely by the purchasers making the relatively risky choice to pay with currency.

II. Card-Based Payments

It is only a first step to support the shift from cash payments (with their inherent contact) to card-based payments (at least potentially contactless). Concerns about contagion create a new fault line in the ongoing deployment of advancing technologies for card-based payments. Specifically, where the advances of the last few decades have been driven by concerns about enhancing security, the circumstances the industry now confronts suggest an entirely new motivation for accelerating the use of advancing technologies.

To explain, the most important story of the century to date has been the shift away from the authentication of retail card transactions by a swipe of a magnetic strip on the back of the card. The basic problem with swipe-dependent authentication always has been that malfeasors easily could produce forged cards that readily could be used to conduct transactions at retail

[20] This is already happening. *See* Surane et al., *supra* note 12 (discussing Dick's Drive-in in Seattle).

stores without detection by conventional payment terminals. Most of the world shifted to chip-laden cards early in the century, implementing an encryption system that is impervious to forgery, at least under current technological conditions. The United States, though, did not shift to that technology until 2015. That technology is now widely deployed in retail establishments in the United States, as substantially all issuers of credit and debit cards have replaced stripe-bearing cards with chip-laden cards, and the great majority of retail merchants now use terminals that interrogate the chip to validate the authenticity of the card.[21]

A few years later, Apple released the Apple Pay application on its cellphones, subsequently mirrored by Android Pay and Samsung Pay for phones from other manufacturers. That technology essentially mimics the authentication of the chip cards so that transactions conducted by any of the phone-pay applications are as secure as transactions conducted with chip cards (assuming that the holder of the phone is an authorized user of the card).

The deployment of those technologies left a wide gap in retail authentication regimes between the great majority of retail commerce (in which transactions are secure - authenticated by a chip or phone) and those lingering pockets of retail commerce at which terminals rely on a swipe as opposed to the chip (at this point, most of those transactions occur at gasoline stations). But the advent of the virus brings a different dichotomy, between the transactions in which the card contacts the payment terminal (those in which a card is swiped or a chip inserted) and the phone-based transactions that are wholly contactless. In the former case, the card necessarily contacts a terminal that has contacted numerous previous cards, each of them a plastic surface possibly carrying the virus. In the latter case, the purchaser need not contact any surface at all to complete the payment transaction.[22] The new milieu, then, is one in which cardholding purchasers, and thus the merchants that wish to attract them, have a strong incentive to ramp up their acceptance of phone-based payment applications.

---

[21] *See*, *e.g.*, MRONALD J. MANN PAYMENT SYSTEMS AND OTHER FINANCIAL TRANSACTIONS 8-9 (7th ed. 2020); Visa Chip Card Update (Dec. 2018), *available at*
https://usa.visa.com/dam/VCOM/regional/na/us/visa-everywhere/documents/emv-chip-infographic-q4.pdf.

[22] I do not consider the intermediate step of contactless “tap-and-pay” transactions, which are available at a much larger group of merchants than phone-pay transactions. In my experience, it is not routinely practicable to conduct those transactions without the surface of the card firmly contacting the terminal.

To date, the use and acceptance of those applications has increased incrementally.[23] The relatively limited use of those applications by consumers has limited the incentives of merchants to expend the resources to upgrade their payment terminals to accept the phone-based applications. The discussion above suggests that the increased consumer awareness of the relative safety of wholly contactless payment transactions might change both sides of that dynamic. As cardholding purchasers seek to avoid contact with objects in the retail establishments that they patronize, they should increase the frequency with which they use those applications. Similarly, as merchants compete to attract customers by enhancing the apparent safety of their establishments, they will have an increased incentive to be seen to embrace those applications as the safest possible instrumentalities of payment.

III. Conclusion

The pressure for contactless payments well might affect areas other than the two I emphasize above. Among other things, it might accelerate the decline of check usage, interpose another obstacle to merchant preference for PIN-based authentication of payment-card transactions, or spur more restaurant owners to adopt European-style pay-at-the-table card terminals. It is enough for this short piece if I have illustrated a few of the most important changes it might support.

[23] *See*, *e.g.*, Chance Miller, *Apple Pay Usage Continues to Lag in the United States, New Data Suggests*, 9to5Mac, Aug. 29, 2019, *available at* https://9to5mac.com/2019/08/29/apple-pay-adoption-united-states/.

Appendix 1: COVID legal alerts from top 20 law firms + CPRBLOG organized by TOC

Politics and Elections

- Election law and pandemics
  - Skkaden: Political Law Considerations
  - CPRBLOG: Presidential Power in a Pandemic

Economic Life

- Payments in a Post-virus World
  - Arnold & Porter: Policy Developments Related to the Coronavirus Pandemic Part II: The CARES Act

- Contract Re-negotiations
  - Covington: COVID-19: Preparing for Its Effects on Government Contracts (nothing available yet)
  - Dechert: Will Global Pandemic Excuse Contractual Performance?

- Harnessing Lending Capacity
  - Paul Weiss: Gov. Cuomo Requires New York-Regulated Banks to Grant Forbearances in Light of the COVID-19 Pandemic and Issues Related Directives to NY DFS

- Small Business Bankruptcy
  - Arnold & Porter: EU Commission Adopts Emergency State Aid Framework to Enable EU Member States to Support Businesses in the COVID-19 Outbreak
  - Paul Weiss: What Does New York's Declaration of a State of Emergency Mean for Business?

Environmental Issues

  - Baker McKenzie
    - Managing Environmental Compliance Amidst COVID-19 Operational Disruptions
    - Amidst Coronavirus Setbacks, Sustainability Remains Key to the Future of Belt and Road Initiative | Newsroom

  - Covington: Inside Energy & Environment: Developments in law and policy of energy, commodities and environment

- Hogan Lovells: A review of MAC Clauses in a COVID-19 Climate in Japan

- Kirkland
  - COVID-19 Resource Center
  - Compensation Challenges in the Current Frozen Energy World | Publications
  - COVID-19: Latest Updates on Energy Regulatory Agencies and Electric Grid Operators | Publications
  - Department of Energy Announces Purchase of Crude Oil for the Strategic Petroleum Reserves | Publications

- Morgan Lewis: Challenges to Environmental Investigations and Cleanups During the COVID-19 Crisis

- Sidley: Environmental Settlements: Force Majeure Claims Related to COVID-19

- Skkaden: Impact on Energy and Infrastructure Projects

- CPRBLOG
  - Trump's Bungling o Coronavirus Response Mirrors His Approach to Climate Crisis
  - CPR, Allies Call on Trump Administration to Hold Open Public Comment Process During COVID-19 Pandemic

Health

- Health Insurance in times of crisis
  - Arnold & Porter: Latest Guidance of the EMA and European and UK National Authorities on Crisis Management of Clinical Trials and Medicine Supplies During the COVID-19 Pandemic
  - Debevoise: Coronavirus Response Act Signed Into Law: Employers' New Obligations Regarding Paid Sick Leave and FMLA Amendments
  - Greenberg Traurig: Government, Regulatory, and Tax
  - Jones Day: HHS Issues Limited Waivers of HIPAA Sanctions and Penalties for Hospitals in Response to COVID-19
  - Morgan Lewis: COVID-19 Healthcare Provider Update Webinars

Housing

- Paul Weiss: New York State Legislature Considers Bill Affecting Certain Rents and Mortgage Payments During the Coronavirus Pandemic

Families

- Arnold & Porter: DOL Issues First Guidance on Paid Sick Leave and Expanded Family and Medical Leave Under the Families First Coronavirus Response Act

Work

- Arnold & Porter
  - Coronavirus and Declining Work—What Options Are Open to UK Employers?
  - California Employers Who Shut Down or Conducted a Mass Layoff on or After March 4 Must Still Provide Notice Under Cal-WARN to Take Advantage of Executive Order
- Baker McKenzie: COVID-19 Global Employer Guide
- Covington: Workplace Guide to COVID-19: Solutions to Employment and Benefits Challenges (Download the **audio recording** and **presentation**.)
- Dechert: Coronavirus Response Act Signed Into Law: Employers' New Obligations Regarding Paid Sick Leave and FMLA Amendments
- DLA Piper: Workforce and Employment
- Morgan Lewis
  - Labor-Management Relations in the Midst of a Pandemic Conflict or Accommodation
  - Responding to the 2019 Novel Coronavirus: Top-of-Mind Employee Benefits Questions for Employers
- Paul Weiss
  - New York Passes Emergency Paid Sick Leave Law for COVID-19 Relief
  - COVID-19: Layoff and Furlough Considerations for Employers
- CPRBLOG
  - Safeguarding Workers and Our Economy from the Coronavirus - Part I
  - EPA Is "Especially Concerned" About FIFRA Noncompliance in Light of COVID-19 Pandemic

Corporate Challenges

- Force Majeure in Corporate Deals
  - Arnold & Porter: The Impact of Coronavirus on Existing Commercial Leases
  - Baker McKenzie: Coronavirus Outbreak: Global Guide to Force Majeure and International Commercial Contracts
  - Hogan Lovells: COVID-19 and the supply chain – contracts and force majeure (future webinar)
  - Dechert: COVID-19 Coronavirus: The Consequences on Contract Performance and the Resolution of Disputes
  - Paul Weiss: Force Majeure Under the Coronavirus (COVID-19) Pandemic

- Shearman: The COVID-19 Crisis and Force Majeure in Credit Agreements

Solving Disputes

- Litigation & arbitration under lockdown
    - Latham & Watkins COVID-19: RESOURCES FOR RESPONDING TO BUSINESS AND LEGAL ISSUES
    - Paul Weiss New York and Delaware Take Steps to Toll Limitations Periods and Extend Other Deadlines in Light of COVID-19 Emergency
    - Shearman New York Issues Important Orders Regarding Court Filings and Limitations Periods In Light of COVID-19 with Potentially Far-Reaching Consequences
    - Skkaden Judicial Response to COVID-19 Crisis

Prisons and Incarceration

- Criminal law in times of health crisis

Human rights without borders

- Immigration and border controls
- Poverty, human rights, and Health

Risk Management

- Arnold & Porter: Managing Financial Distress in the Coronavirus Crisis—Reconsidering Fiduciary Duties and Liability Management Transactions
- Baker McKenzie: Coronavirus (COVID-19) - Addressing Implications and Mitigating Risks on Critical Transactions
- DLA Piper: Corporate Governance, Disclosure, and Risk Management

Tax Measures

- Arnold & Porter: COVID-19: Tax Measures Package for Companies
- Davis Polk
    - Tax Relief: Senate Passes CARES Act

      Client Memorandum, March 26, 2020
    - Tax Provisions of the Senate Stimulus Bill

      Audio Recording with Partners Rachel Kleinberg & Michael Mollerus, March 26, 2020

- Internal Revenue Service Permits Taxpayers to Defer Certain April 15th Tax Payments
  Client Memorandum, March 19, 2020
- **E**state Planning Considerations in the Current Environment
  Client Memorandum, March 19, 2020

- Shearman: Current Estate Planning Opportunities
- Skadden: Reduced IRS Audits and Litigation

Appendix 2: New York-Based Legal Information

1. Access to
   a. Free legal services: https://www.nycbar.org/for-the-public/free-legal-services
   b. Low cost legal services: https://www.nycbar.org/for-the-public/low-cost-legal-services
   c. Alternative dispute resolution:
      i. Co-op and Condo Mediation
      ii. Housing and ADR
      iii. Employment and ADR
      iv. Consumer Issues and ADR
      v. Family Issues/Divorce and ADR
      vi. Worker's Compensation and ADR
      vii. Environmental Issues and ADR
      viii. Small Claims and ADR
      ix. Can I use ADR if I am already in trial, litigation or administrative proceedings?
      x. Find a mediator
      xi. ADR News/Media/Research
   d. Legal Forms & Resources
      i. Small Claims Court Guide: https://www.nycbar.org/for-the-public/legal-forms-and-resources/small-claims-court-guide-overview
      ii. Glossary of terms: https://www.nycbar.org/for-the-public/legal-forms-and-resources/small-claims-court-guide-overview/glossary
      iii. Real estate forms: https://www.nycbar.org/for-the-public/legal-forms-and-resources/real-estate-forms
      iv. Statute of limitations - The NY Governor has signed Executive Order 202.8, TOLLING statutes of limitation until April 19, 2020.

> I hereby temporarily suspend or modify, for the period from the date of this Executive Order through April 19, 2020 the following:In accordance with the directive of the Chief Judge of the State to limit court operations to essential matters during the pendency of the COVID-19 health crisis, any specific time limit for the commencement, filing, or service of any legal action, notice, motion, or other process or proceeding, as prescribed by the procedural laws of the state, including but not limited to the criminal procedure law, the family court act, the civil practice law and rules, the court of claims act, the surrogate's court procedure act, and the uniform court acts, or by any other statute, local law, ordinance, order, rule, or regulation, or part thereof, is hereby tolled from the date of this executive order until April 19, 2020;
>
> The date of the Executive Order is March 20, 2020.

2. COVID19 court announcements are also available at: www.trialacademy.org/covid19.

3. COVID-19 and the NY Court System: http://www.courts.state.ny.us/.

4. NY City Executive Orders

- Executive Order NO. 55 -3/8/2020
- Emergency Executive Order NO. 98 - 3/12/2020
- Emergency Executive Order NO. 99 - 3/15/2020
- Emergency Executive Order NO. 100 - 3/26/2020
- Emergency Executive Order NO. 101 - 3/17/2020
- Emergency Executive Order NO. 102 - 3/20/2020
- Emergency Executive Order NO. 103 - 3/25/2020

Appendix 3: Rules Regarding Medical Labs Running COVID-19 tests

http://www.cidrap.umn.edu/news-perspective/2020/02/feds-allow-state-public-health-labs-test-covid-19 (Feds to allow state public health labs to test for COVID-19, Feb 19, 2020) (**https://perma.cc/BVE9-TSRH)**

https://www.massdevice.com/fda-lets-states-approve-covid-19-tests/ GUIDANCE DOCUMENT - Policy for Diagnostic Tests for Coronavirus Disease-2019 during the Public Health Emergency Immediately in Effect Guidance for Clinical Laboratories, Commercial Manufacturers, and Food and Drug Administration Staff (MARCH, 2020) (**https://perma.cc/UH38-RJX3)**

- https://www.fda.gov/media/135659/download Policy for Diagnostic Tests for Coronavirus Disease-2019 during the Public Health Emergency Immediately in Effect Guidance for Clinical Laboratories, Commercial Manufacturers, and Food and Drug Administration Staff (March 16, 2020) (**https://perma.cc/WA8Y-VACB)**

https://coronavirus.health.ny.gov/covid-19-testing (**https://perma.cc/Z5HP-USXQ**)

- The FDA letter approving New York State to authorize the state's 28 public and private labs to begin manual, semi-automated and automated testing for novel coronavirus, or COVID-19. https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/Jill_Taylor_Letter.pdf (**https://perma.cc/ZSG9-CGVM)**

Interim Laboratory Biosafety Guidelines for Handling and Processing Specimens Associated with Coronavirus Disease 2019 (COVID-19) (March 31, 2020) https://www.cdc.gov/coronavirus/2019-ncov/lab/lab-biosafety-guidelines.html (**https://perma.cc/43TP-JS2F)**

Guidance for COVID-19 Testing for CAP-Accredited Laboratories https://www.cap.org/laboratory-improvement/news-and-updates/guidance-for-covid-19-testing-for-cap-accredited-laboratories (April 7, 2020) (**https://perma.cc/5EPR-9KDC)**

Appendix 4: Additional Resources

Human Rights under Strain

Immigration and Travel

Update on Visas for Medical Professionals, U.S. Department of State, Bureau of Consular Affairs

Immigration Equality - COVID-19 Alert Information and Updates, Immigration Equality

LGBT Issues

Coronavirus Information, National LGBT Cancer Network

COVID-19 Information For People Living with HIV - 03/16/2020, California Office of AIDS

What to Know About HIV and COVID-19, Centers for Disease Control and Prevention

FAQ: Documents and Protections for LGBTQ People and Their Families During COVID-19 Crisis, National Center for Lesbian Rights

Public Life and Social Welfare

Elections and Voters Rights

2020 State Primary Election Dates, National Conference of State Legislatures

Election Emergencies, National Conference of State Legislatures

https://www.vote.org/absentee-voting-rules/, Vote.org

General public health law related to COVID-19

Health Justice Strategies To Combat COVID-19: Protecting Vulnerable Communities During A Pandemic, Benfer, Emily A. & Lindsay F. Wiley, Health Affairs (March 19, 2020)

Governmental Public Health Powers in the COVID-19 Pandemic—Stay-at-home Orders and Business Closures, Gostin, Lawrence O., JD; Lindsay F. Wiley, JD, MPH, JAMA Network (April 2, 2020)

Global Health and the Law, Lawrence O. Gostin, J.D., and Devi Sridhar, Ph.D., New England Journal of Medicine (May 1, 2014)

NCSL Coronavirus (COVID-19) Resources for States, National Conference of State Legislatures

Thinking Globally, Acting Locally — The US Response to Covid-19, Rebecca L. Haffajee, J.D., Ph.D., M.P.H., and Michelle M. Mello, J.D., Ph.D, New England Journal of Medicine (April 2, 2020)

Privacy in Health Care

Information for Consumers: Privacy Rule, New York State Office of Mental Health

Emergency law

Public Health Emergency Law (PHEL), CDC Train

Issue 3 | Emory University School of Law | Atlanta, GA, Emory Law Journal

Responsibilities in a Public Health Emergency, National Conference of State Legislatures

CDC and NIH resources

Legal Authorities for Isolation and Quarantine | Quarantine, Centers for Disease Control and Prevention

Order for Quarantine Under Section 361 of the Public Health Service Act 42 Code of Federal Regulations Part 70 (Interstate), Centers for Disease Control and Prevention

Specific Laws and Regulations Governing the Control of Communicable Diseases | Quarantine, Centers for Disease Control and Prevention

Resources on state law

State Quarantine and Isolation Statutes, National Conference of State Legislatures

Coronavirus and the courts, National Conference of State Legislatures

State Law in a Pandemic Response, National Conference of State Legislatures

State Data and Policy Actions to Address Coronavirus, Kaiser Family Foundation (April 16, 2020)

Resources on quarantine law

Do State Lines Make Public Health Emergencies Worse? Federal Versus State Control of Quarantine by Polly J. Price, Price, Polly J., Emory Law Journal (April 25, 2018)

A Coronavirus Quarantine in America Could Be a Giant Legal Mess, Price, Polly J., The Atlantic (February 16, 2020)

Origins of Federal Quarantine and Inspection Laws, Harvard Law School

Raising the Yellow Flag: State Variation in Quarantine Laws, Katz, Rebecca, PhD, MPH, Andrea Vaught, MPH, Adrienne Formentos, MS, and Jordan Capizola, Journal of Public Health (July 1, 2019)

Ensuring Compliance With Quarantine by Undocumented Immigrants and Other Vulnerable Groups: Public Health Versus Politics, Rothstein,Mark A., JD and Christine N. Coughlin, JD, American Journal of Public Health (September 2019)

Employment rights

COVID-19 and Your Workplace Rights: Caring for Yourself and Your Family (Including FAQs), A Better Balance (March 19, 2020)

Resources for Workers Impacted by COVID-19, AFLCIO

COVID-19 and the American Workplace, U.S. Dept of Labor

Coronavirus: What You Need to Know, National Governors Association

State Workforce Agencies Respond to Coronavirus (COVID-19), National Association of Workforce Agencies

Resources for Policymakers to Support Workers During the Coronavirus Pandemic, National Employment Law Project

The Upshot: Who Qualifies for Paid Leave Under the New Coronavirus Law, Claire Cain Miller, N.Y. Times (March 19, 2020)

FACT SHEET: New York State's Paid Sick Leave Law, A Better Balance (April 2, 2020)

New Paid Leave for COVID-19 | Paid Family Leave, New York State

Which Companies Still Aren't Offering Paid Sick Days?, Roselyn Miller et al., Better Life Lab (April 2, 2020)

Supporting Food Service and Preparation Workers during the COVID-19 Pandemic, Anuj Gangopadhyaya and Elaine Waxman, Urban Institute (March 2020)

Housing and Eviction

COVID-19 and Changing Eviction Policies Around the Nation, Princeton University, Eviction Lab

Special Relief for those Potentially Impacted by COVID-19, U.S. Department of Veterans' Affairs

We Need a Country-Wide Moratorium on Water Shutoffs Amid Coronavirus Food and Water Watch

Health Justice Strategies To Combat COVID-19: Protecting Vulnerable Communities During A Pandemic, Emily A. Benfer & Lindsay F. Wiley, (March 2020)

COVID-19: Coronavirus and Housing/Homelessness, National Low Income Housing Coalition

Rural Development COVID-19 Response, U.S. Department of Agriculture (USDA) Rural Development

The Economy Under Lock-down

Contracts during COVID-19

ICC Force Majeure and Hardship Clauses - ICC, International Chamber of Commerce

US Courts during COVID-19

Judiciary Preparedness for Coronavirus (COVID-19), United States Courts

Columbia **Law School**