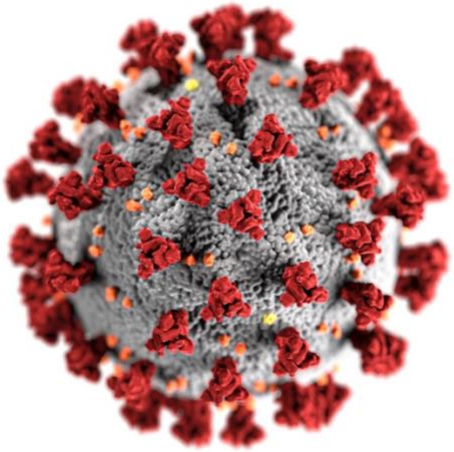
SPECIAL JOINT COVID-19 ISSUE SUMMER 2020



ARTICLES

INTER-AMERICAN COMMISSION ON HUMAN RIGHTS RESPONSE TO COVID-19
Julio A. Sanchez 1

THE RISKS OF CRIMINALIZING COVID-19 EXPOSURE: LESSONS FROM HIV
Naomi Seiler, Anya Vanecek, Claire Heyison, & Katherine Horton 5

HUMAN RIGHTS AND COVID-19 RESPONSES: CHALLENGES, ADVANTAGES, AND AN UNEXPECTED OPPORTUNITY
Ingrid Nifosi-Sutton 18

STATES OF EMERGENCY AND HUMAN RIGHTS DURING A PANDEMIC: A HUNGARIAN CASE STUDY
Megan Cox 32

FROM CIVIL RIGHTS TO HUMAN RIGHTS: THE PANDEMIC'S AFTERMATH REQUIRES ENVIRONMENTAL AND REPRODUCTIVE JUSTICE MECHANISMS TO REINFORCE GLOBAL PUBLIC HEALTH
Elena D. Gartner 42

A HEALTH JUSTICE PERSPECTIVE OF ASTHMA AND COVID-19
Elizabeth Raterman 49

HEALTH LAW & POLICY BRIEF
EST. 2007
WASHINGTON COLLEGE OF LAW

AMERICAN UNIVERSITY
WASHINGTON COLLEGE OF LAW

HUMAN RIGHTS BRIEF

This issue is dedicated to frontline workers, essential workers, and all those hurt by the pandemic around the world.

Copyright © 2020 Health Law & Policy Brief
Copyright © 2020 Human Rights Brief

Cite As:
15 Health Law & Policy Brief Special Joint COVID-19 Issue (2020).
or
24 Human Rights Brief Special Joint COVID-19 Issue (2020).

Acknowledgements:
We would like to thank our advisors, Professor Lindsay F. Wiley and Professor Macarena Saez for their support. We are also grateful to the American University Washington College of Law for providing a legal education that empowers us to champion what matters.

Visit Us:
Health Law & Policy Brief
www.healthlawpolicy.org

Human Rights Brief
www.hrbrief.org

2020 – 2021

Editor-in-Chief

CALE COPPAGE

Executive Editor

ELIZABETH RATERMAN

Managing Editor

SHELBY TAYLOR

Marketing Director

ERIN DONNELLY

Symposium Director

JAMES CAMPBELL

Articles Editors

REGINA DESANTIS
ANDREW FLORA
MARIANA TERAN

Staff

ALICIA ESPINOSA
KATHERINE FREITAS
LAUREN HEIDE
SARAH KNARZER
BYRON MOBLEY
SARAH SPARDY
JULIO TORRES
CAROLINE TRABUCCO

Faculty Advisor

LINDSAY WILEY

HUMAN RIGHTS BRIEF

Center for Human Rights and Humanitarian Law | Washington College of Law
4300 Nebraska Avenue NW, CT-7 | Washington, D.C. 20016 www.hrbrief.org

VOLUME 24

SAMIRA ELHOSARY
KATE MORROW
Co-Editors-in-Chief

CORRIN CHOW
Managing Editor

CHRIS BAUMOHL
Executive Editor

ELENA GARTNER & MAYA MARTIN TSUKAZAKI
Senior Column Editors

HAILEY FERGUSON
Senior Articles & Partnerships Editor

NORA ELMUBARAK
Symposium & Education Editor

JULIO SANCHEZ
Regional Systems Editor

JULIANA CARVAJAL YEPES
Communications & Media Editor

KÜBRA BABATURK & LAUREN LAVARE
Podcast Editors

Deputy Editors

MADISON BINGLE
SYDNEY HELSEL

Staff

Yara Calcano	Valentina Capotosto	Autumn Claybaugh
Cassady Cohick	Sydney Delin	Kaitlin Fusco
Caroline Gillis	Margaret Horstman	Adrian Lewis
Vanesa Martinez-Chacon	Meagan McCullough	Gaelen Molina
Lucette Moran	Krishna Pathak	Shannon Quinn

* * *

LETTER FROM THE EDITORS

Dear Readers:

When we first discussed working on a joint issue to address the COVID-19 pandemic in early May, our biggest concern was that by the time we finished the production process, the issue would be less relevant to our daily lives. As we begin a new school year virtually, COVID-19 has kept courts, businesses, and governments from returning to "normal." The pandemic has both demonstrated and exacerbated massive inequalities in our global system; it has provided an excuse for governments to claim authoritarian powers, and it has caused vulnerable communities to suffer disproportionally. This issue aims to provide both an overview of a few responses to the pandemic as well as a few legal frameworks in which to begin to address the underlying problems.

As editors, part of our goal in this joint issue was to create a space where public health law and human rights legal systems could freely intermingle. The result — an examination of criminalizing infection; an analysis of state powers in states of emergency; a detailed look at Hungary's authoritarian power grab; an exploration of the relationship between access to community resources and managing health conditions; a proposal for an inclusive and just approach to future advocacy efforts; and an overview of COVID-19 responses in the Inter-American human rights system — both helped us understand the gaps in our domestic, regional, and international legal systems and the ways that legal systems can provide some stability and accountability in times of global crisis.

We hope that you find the interdisciplinary nature of these issues as thought-provoking as we have, and that we leave you with further questions to explore. In the meantime, stay safe, stay well, and take care of each other.

Sincerely,
Samira, Kate, Cale, and Elizabeth

Samira Elhosary & Kate Morrow
Co-Editors-in-Chief, Human Rights Brief

Cale Coppage & Elizabeth Raterman
Editor-in-Chief & Executive Editor, Health Law & Policy Brief

* * *

Inter-American Commission on Human Rights Response to COVID-19

Julio A. Sanchez[*]

[*] Julio A. Sanchez is a third-year law student at the American University Washington College of Law. He received his bachelor's in International Studies from the University of South Carolina. He dedicates this Article to his mother.

The COVID-19 pandemic is a unique challenge for the Inter-American System. Like most regional human rights systems, the very nature of the virus has changed how the Inter-American Commission on Human Rights (IACHR or "the Commission") and the Inter-American Court of Human Rights (IACtHR or "the Court") operate. Both bodies have suspended their sessions as a response to the virus. The 176th session was postponed until July and took place online. The IACtHR also suspended its session from April to May and rescheduled its 135th session from June 1 to July 31.[1] This has delayed any COVID-19 related cases from being directly addressed by either body in its entirety.

However, this does not mean that the IACHR or IACtHR has been silent on the issue. The IACHR has created a new task force called the Rapid Integrated Response Coordination Unit, or SACROI, to deal with the COVID-19 public health emergency and ensure the protection of human rights.[2] Their primary responsibility is to coordinate a response to the pandemic, gather evidence on the Commissions impact in dealing with COVID, to observe the responses of States to the crisis, and to identify urgent cases that may warrant precautionary measures under Article 25 of the Inter-American Convention.[3] The most significant impact of SACROI thus far is the creation and adoption of Resolution 1/2020 "Pandemics and Human Rights in the Americas" (the Resolution), which SACROI wrote and the Commission subsequently adopted.[4]

The resolution clarified that the American Convention applies in cases of pandemics. In particular, it clarified how states of emergencies operate in cases of pandemics or public health emergencies.[5] The Resolution also presents guidelines for the permissible behavior of States during the pandemic.[6] The resolution seeks to balance the protection of individual and collective rights during a pandemic.[7] The guidelines in the resolution follow the language present in Article 27, "Suspension of Guarantees" in the American Convention on Human Rights, which governs states of emergencies.[8] Article 27 outlines the authority States have to suspend or modify rights during a state of emergency.[9] Following the language of Article 27, the Resolution stresses that any State measures in response to a state of emergency must be proportional, temporary, non-discriminatory, and within the confines of existing laws.[10]

---

[1] *Press Release: IACHR Will Hold Its 135th Regular Session*, IACHR (May 25, 2020), http://www.corteidh.or.cr/docs/comunicados/cp_39_2020_eng.pdf.
[2] *SACROI COVID-19*, INTER-AMERICAN COUNSEL HUM. RTS. (2020), http://www.oas.org/en/iachr/SACROI_COVID19/ [hereinafter *SACROI COVID-19*] (describing the creation of the Rapid and Integrated Response Coordination Unit, called SACROI due to its Spanish acronym).
[3] American Convention on Human Rights "Pact of San Jose, Costa Rica," art. 25, November 22, 1969, 1144 U.N.T.S.123 [hereinafter American Convention].
[4] IACHR, *Pandemic and Human Rights in the Americas*, Res. No. 1/2020 (April 10, 2020) ("The measures adopted by the countries to deal with and contain the pandemic should center on full respect for human rights.").
[5] *Id*.
[6] *Id.*
[7] *Id.* ("[States should ensure] rights such as access to drinking water, nutritious food, access to means of cleaning, adequate housing, community cooperation, mental health support, and integration of public health services; as well as . . . ensuring effective social protection, . . . provision of subsidies, basic rental or other economic support measures").
[8] American Convention, *supra* note 3, at art. 27.
[9] *Id.*
[10] IACHR, *Pandemic and Human Rights in the Americas*, Res. No. 1/2020, at 10-11 (April 10, 2020).

Political Participation was also addressed in the resolution including, the right to vote. Unlike Article 4 of the International Convention on Civil and Political Rights and Article 15 of the European Convention on Human Rights, Article 27 codifies the absolute right to participate in government.[11] This means that states cannot indefinitely suspend elections during the COVID-19 crisis. The IACHR has expressed concern regarding this issue, since the COVID-19 crisis may lead to the suppression of valid political participation or the restriction of voting rights in the name of public safety.[12] In a recent press release, the IACHR expressed concern that government authorities are taking the opportunity to challenge separation of powers, reducing political participation and interfering with judicial institutions.[13] While public safety is important, government authorities should not use the pandemic as a way to circumvent checks and balances. Furthermore, although some modifications are necessary to insure safe political participation, the pandemic does not give states license to completely restrict political participation.

The Resolution also provides for the rights of persons who are imprisoned and ensures that women and Indigenous communities are included in any State response to the pandemic.[14] The Commission was concerned with the possibility of an increase in cases of domestic violence because of the stay at home orders[15] It was also concerned that Indigenous populations would not have access to proper information about the pandemic and wanted to ensure that Indigenous communities have access to culturally appropriate health care during the crisis.[16]Depending on the actions of States during the pandemic any of these areas of interest could develop into possible cases or topics of hearings. .

Many Prisons in Latin America are overcrowded, presenting the perfect environment for large COVID-19 outbreaks and, if not handled properly, these conditions could result in human rights violations.[17] As a result of the outbreaks, many Latin American countries have had to lower the strain on the prison system by releasing some prisoners.[18] For example, Argentina, Honduras, and Mexico have all released about one percent of their inmate population to stop the spread of

[11] *See generally*, International Covenant on Civil and Political Rights, art. 4, Dec. 16, 1966, 999 U.N.T.S. 171; S. Exec. Doc. E, 95-2 (1978); S. Treaty Doc. 95-20; 6 I.L.M. 368 (1967); Convention for the Protection of Human Rights and Fundamental Freedoms, November 4, 1950 (European Convention on Human Rights), art. 15. Both Conventions place the right to participate in government as a non-derogable right under a state of emergency.
[12] *Press Release: OAS, IACHR Calls for Guarantees for Democracy and the Rule of Law During the COVID-19 Pandemic*, OAS (June 10, 2020) http://www.oas.org/en/iachr/media_center/PReleases/2020/130.asp [hereinafter June 10 IACHR Press Release].
[13] *Id.*
[14] IACHR, *Pandemic and Human Rights in the Americas*, Res. No. 1/2020 (April 10, 2020).
[15] *See* June 10 IACHR Press Release, *supra* note 12.
[16] *Id.*
[17] José Miguel Vivanco & César Muñoz, *How to Prevent Covid-19 Outbreaks in Latin America's Prisons*, HUM. RTS. WATCH (May 21, 2020), https://www.hrw.org/news/2020/05/21/how-prevent-covid-19-outbreaks-latin-americas-prisons.
[18] *See* Ernesto Londoño et al., *As Coronavirus Strikes Prisons, Hundreds of Thousands Are Released*, N.Y. TIMES (Apr. 26, 2020), https://www.nytimes.com/2020/04/26/world/americas/coronavirus-brazil-prisons.html (describing the overcrowded prison situations in Brazil, Colombia, and Argentina during the pandemic).

COVID-19 in their prisons.[19] Additionally, conditions in prisons have caused prison riots , and the possibility of further human rights violations within the prisons still exists.[20]

Domestic violence has long been a pervasive issue in the Americas. The pandemic has only made the situation worse by giving many women an impossible choice of either staying in their homes or risking exposure to COVID-19. As a result there has been an increase in the amount of reported instances of domestic violence in many Latin American countries.[21] One example of this is Colombia, where calls to the domestic violence hotline have increased by a hundred and thirty percent after the stay-at-home order was instituted.[22] These situations could and should be addressed in the coming Commission sessions if States fail to meet their obligations.

COVID-19 has presented a unique challenge for all regional human rights bodies. The crisis has restricted the ability of the bodies to meet, and it has shifted existing priorities. Additionally, there are new and unique challenges for addressing pandemics within the existing Convention and ensuring public health while protecting individual rights. The IACHR is no exception, and, as the suspension of the upcoming hearings demonstrates, the current crisis has affected its operations. Nevertheless, the IACHR has taken steps towards the protection of human rights during the crisis. It has done this through Resolution 1/2020 "Pandemics and Human Rights in the Americas," which outlines state responsibilities during pandemics.[23] The IACHR has also ensured, through the creation of SACROI, that there is oversight of States during the pandemic, and it has continued to preserve the Commission's core functions, to prevent any serious violations.[24]

[19] *See* Vivanco & Muñoz, *supra* note 17 ("Judges in Argentina and Honduras have released or granted house arrest to about 1 percent of the prison population. In Mexico, judges have released about 2,000 people — also about 1 percent of the prison population — at the request of state governments.").
[20] *Id*.
[21] Lucila Sigal et al., *Another Pandemic: In Latin America, Domestic Abuse Rises Amid Lockdown*, REUTERS (Apr. 27, 2020), https://www.reuters.com/article/us-health-coronavirus-latam-domesticviol/another-pandemic-in-latin-america-domestic-abuse-rises-amid-lockdown-idUSKCN2291JS.
[22] *Id*.
[23] IACHR, *Pandemic and Human Rights in the Americas*, Res. No. 1/2020 (April 10, 2020).
[24] *See SACROI COVID-19, supra* note 2.

The Risks of Criminalizing COVID-19 Exposure: Lessons from HIV

Naomi Seiler, Anya Vanecek, Claire Heyison, & Katherine Horton[*]

[*] Naomi Seiler is an Associate Professor in the Department of Health Policy and Management at George Washington University. Her primary focus is HIV policy, and she has done extensive work on law and policy related to substance use disorder, chronic disease, and other health priorities, both in her current role and while serving as counsel in the U.S. House of Representatives. She is a graduate of Harvard College and Yale Law School and completed a postdoctoral fellowship in Bioethics and Health Policy at the Johns Hopkins Bloomberg School of Public Health. Anya Vanecek is a Senior Research Associate in the Department of Health Policy and Management at George Washington University. She earned a degree in Anthropology from Grinnell College and a Master's in Public Health from the George Washington University School of Public Health. Claire Heyison is a Senior Research Associate in the Department of Health Policy and Management at George Washington University. She holds a Master of Public Health degree from the George Washington University and an undergraduate degree from Barnard College. Katie Horton is a Research Professor in the Department of Health Policy and Management. Prior to joining the department, she was president of Health Policy R&D, a health policy firm in Washington, D.C. and also served as senior professional health staff for the United States Senate Committee on Finance and as a Legislative Director for Congressman Pete Stark (D-CA) in the House of Representatives. Professor Horton's research focuses on access to care issues with particular focus on those with chronic illness.

TABLE OF CONTENTS

Introduction 7

I. Background: A History of HIV Criminalization in the United States 8

II. Analysis 10

A. COVID-19 Criminalization Would Have Inequitable Impacts 10

B. Prosecuting COVID-19 Exposure Absent "Intent to Transmit" Risks Broad Criminalization 12

C. Potential Affirmative Defenses Are Not Equitably Available 13

D. Criminalization May Discourage COVID-19 Testing 15

1. Criminalization Compounds Stigma 15

2. Penalties for Violating Public Health Orders Already Exist 16

Conclusion 17

Introduction

On March 24, 2020, U.S. Deputy Attorney General Jeffrey Rosen released a memo on U.S. Department of Justice enforcement actions related to COVID-19. Among other "reprehensible" COVID-19 related behavior such as fraud, he noted that the "purposeful exposure and infection of others with COVID-19" could "potentially implicate the Nation's terrorism-related statutes."[1] Meanwhile, prosecutors have already brought multiple state criminal cases against individuals acting or threatening to intentionally infect others with COVID-19,[2] and legislators in at least one state have introduced a COVID-19-specific "terrorist threat" bill.[3]

Criminalizing COVID-19 exposure may seem reasonable in cases when a person appears to have deliberately tried or threatened to infect others. However, using the criminal law as a tool to address COVID-19 more broadly warrants concern.

We argue in this Article, drawing on lessons from HIV criminalization in the United States, that a response that too broadly criminalizes COVID-19 would likely impose inequitable infringements of individual rights, particularly among those most socially and economically vulnerable. As the UN program on AIDS stated in a recent analysis of COVID-19 and human rights, "the overuse of criminal law can often have significant negative outcomes both for the individual and for the response as a whole and often fails to recognize the reality of people's lives."[4] In the United States, the reality of people's lives includes vast disparities in healthcare, employment, and the criminal justice system that would render COVID-19 criminalization a highly problematic approach.

We begin with detailed background on the development and application of HIV-specific criminal laws in the United States, along with prosecutions under general criminal statutes. We then lay out a range of considerations for policymakers, prosecutors, and others, starting with the most important: COVID-19 criminalization risks overlaying the major racial disparities in COVID-19 outcomes with the already deeply inequitable application of criminal law. Additional

---

[1] Memorandum from the Deputy Attorney Gen. on Department of Justice Enforcement Actions Related to COVID-19 (March 24, 2020), https://www.politico.com/f/?id=00000171-128a-d911-aff1-becb9b530000.

[2] *See, e.g.,* Press Release, The State of New Jersey, Man Charged with Terroristic Threats for Allegedly Coughing on Food Store Employee and Telling Her He Has Coronavirus (March 24, 2020), https://www.nj.gov/oag/newsreleases20/pr20200324b.html; Doyle Murphy, *Missouri Walmart Coronavirus Licker Charged with 'Terrorist Threat'*, RIVERFRONT TIMES (March 24, 2020), https://www.riverfronttimes.com/newsblog/2020/03/24/missouri-walmart-coronavirus-licker-charged-with-terrorist-threat; Kaelan Deese, *Woman Accused of Coughing on Store's Food Jailed, Charged with Terroristic Threats*, THE HILL (March 28, 2020, 11:30 AM), https://thehill.com/homenews/news/489981-woman-accused-of-coughing-on-stores-food-jailed-charged-with-terrorist-threats.

[3] S. 2361, 219th Leg., Reg. Sess. (N.J. 2020), https://legiscan.com/NJ/text/S2361/id/2178616.

[4] UNAIDS, *Rights in the Time of COVID-19 Lessons from HIV for an Effective, Community-led Response* (2020), https://www.unaids.org/sites/default/files/media_asset/human-rights-and-covid-19_en.pdf. *See also* Scott Skinner-Thompson, *Don't Criminalize COVID-19*, SLATE (Mar. 27, 2020, 4:53 PM), https://slate.com/news-and-politics/2020/03/criminalize-coronavirus-hiv-stigma.html; Trenton Straube, *COVID-19 Criminalization: Seven Lessons from the HIV Response*, POZ (March 30, 2020), https://www.poz.com/article/covid19-criminalization-seven-lessons-hiv-response.

considerations include overbroad prosecutions for "knowing" exposure rather than intent to transmit; inequities in the availability of potential affirmative defenses; the potential impact of criminalization on COVID-19 testing rates; the creation of stigma that could hinder public health efforts to contain the spread of COVID-19; and the existing evidence of disparate enforcement of social distancing requirements. We close with a reminder that any individual decision made by a person with COVID-19 should not be considered in isolation from the structural and social factors influencing that person's health and personal choices.

I. Background: A History of HIV Criminalization in the United States

In 1988, the Presidential Commission on the HIV Epidemic argued that criminalizing "failure to comply with clearly set standards of conduct" could help limit the spread of HIV by deterring high-risk behaviors.[5] Due to "the problems in applying traditional criminal law to HIV transmission" — namely that charges such as attempted murder necessitated too high a burden of proof, and assault charges carried too lenient a penalty — the Commission stated that some states might need to consider enacting new HIV-specific laws to "provide clear notice of socially unacceptable standards of behavior . . . and tailor punishment to the specific crime of HIV transmission."[6] The report noted that such laws should be "carefully drawn" to address instances that public health and civil actions could not and were not to substitute for effective public health measures to prevent transmission.[7]

Echoing the Commission's argument, the Ryan White Care Act of 1990, which created a program to support care and treatment for people with HIV, required as a condition of funding that states certify they have a legal mechanism — HIV-specific or otherwise — to prosecute HIV-infected individuals who intentionally expose others to HIV without disclosure.[8]

---

[5] Presidential Commission on the Human Immunodeficiency Virus Epidemic 139 (Lary J. Tomayko et al. eds., 1988), https://files.eric.ed.gov/fulltext/ED299531.pdf.

[6] *Id.*

[7] *Id.*

[8] Ryan White Comprehensive AIDS Resources Emergency Act of 1990, Pub. L. No. 101–381, § 301(a), 104 Stat. 603, https://www.govinfo.gov/content/pkg/STATUTE-104/pdf/STATUTE-104-Pg576.pdf. The requirement was removed from the Act during the reauthorization in 2000. Pub. L. 106–345, title III, § 301(a), Oct. 20, 2000, 114 Stat. 1345:

> (a) IN GENERAL. — The Secretary may not make a grant under section 2641 to a State unless the chief executive officer determines that the criminal laws of the State are adequate to prosecute any HIV infected individual, subject to the condition described in subsection (b), who — …(2) *engages in sexual activity if the individual knows that he or she is infected with HIV and intends, through such sexual activity, to expose another to HIV*; (b) CONSENT TO RISK OF TRANSMISSION. — The State laws described in subsection (a) need not apply to circumstances under which the conduct described in paragraphs (1) through (3) of subsection (a) *if the individual who is subjected to the behavior involved knows that the other individual is infected and provides prior informed consent to the activity*.

Today, twenty-nine states have HIV-specific criminal laws, [9] nine have HIV-specific sentencing enhancements, and twenty-four states have prosecuted people living with HIV under general criminal laws.[10] These laws generally criminalize nondisclosure of HIV status or potential exposure of another to HIV, regardless of intent to transmit or whether transmission actually occurs, and even for behaviors that cannot transmit HIV, such as spitting. In eighteen states, violation of these laws can result in a maximum sentence of up to ten years; five states offer a maximum sentence of greater than twenty years. [15] From 2008 to 2019, there were at least 411 criminal prosecutions of HIV transmission, under HIV-specific laws or under general criminal statutes such as battery or assault, in twenty-two states.[11]

Some states also expanded HIV criminalization through sentence enhancements, particularly for sex work, increasing penalties for people who are convicted of prostitution or sex solicitation if the defendant is HIV positive.[12] In addition, six states require that any person incarcerated for HIV non-disclosure must register as a sex offender upon release from prison.[16]
Public health experts and legal scholars have debated the constitutionality and effectiveness of HIV-based criminal laws and prosecutions.[13] There have been multiple constitutional challenges to HIV criminalization laws based on vagueness and overbreadth, First Amendment questions, challenges involving equal protection, the Eighth Amendment, and due process, though most have failed in court.[14] Outside the justice system, multiple scholars and advocates have advanced human rights arguments against HIV criminalization, focusing primarily on these cases as discriminatory based on health status or disability.[15]

[9]Alabama, Alaska, Arkansas, California, Colorado, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kentucky, Louisiana, Michigan, Minnesota, Mississippi, Missouri, New Jersey, New York, North Dakota, Ohio, Oklahoma, Oregon, South Carolina, South Dakota, Utah, Vermont, Virginia, Washington, Wisconsin. *See* Center for HIV Law and Policy, *HIV Criminalization in the United States: A Sourcebook on State and Federal HIV Criminal Law and Practice* (2020), hivlawandpolicy.org/sourcebook.
[10] Center for HIV Law and Policy, *HIV Criminalization in the United States* (2020), http://www.hivlawandpolicy.org/sites/default/files/CHLP%20HIV%20Crim%20Map%20033120.pdf.
[11] *Id.*
[12] *Id.*
[13] *See, e.g.,* Andre A Panossian, et al., *Criminalization of Perinatal HIV Transmission*, 19 J. LEGAL MED. 223 (1998); Joseph Allen Garmon, *The Laws of the Past Versus the Medicine of Today: Eradicating the Criminalization of HIV/AIDS*, 57 HOW. L.J. 665 (2014); Stephen Frost, *HIV Criminalization Laws: A Poor Public Policy Choice in the New Era of PrEP,* 6 WAKE FOREST J.L. & POL'Y 319 (2016); Mario Brito, *On an Alternative to a Punitive State in Response to a Modern Understanding of the HIV/AIDS Epidemic in Florida*, 40 NOVA L. REV. 285 (2016).
[14] Joseph Payne, *Criminal HIV Transmission Statutes and Covert Online Investigations: A Due Process Analysis*, 49 COLUM. HUM. RTS. L. REV. 324, 326 (2018).
[15] Nolan v. State of New York, 2018 N.Y. Slip Op. 00269 (N.Y. App. Div. January 16, 2018). For human rights arguments against HIV criminalization, *see, e.g.*, Jürgens R. et al. *Ten Reasons to Oppose the Criminalization of HIV Exposure or Transmission*, 17 REPROD. HEALTH MATTERS 163 (2009); *Judging the Epidemic: A Judicial Handbook on HIV, Human Rights and the Law*, UNAIDS (2013), https://www.unaids.org/sites/default/files/media_asset/201305_Judging-epidemic_en_0.pdf.

II. Analysis

A. COVID-19 Criminalization Would Have Inequitable Impacts

Given racial disparities in disease prevalence combined with persistent over-policing of Black and Latinx individuals, laws that criminalize COVID-19 exposure or transmission could, like HIV criminalization, exacerbate issues of disparate enforcement, infringing on the right to equality under the law.

In the United States, people of color are more likely to experience negative outcomes at nearly every point in the American criminal justice system. A national evaluation of traffic and street stops found that Black people are more likely to be stopped by police than white people, and both Black and Hispanic individuals are more likely to be searched during these stops.[16] African Americans are more likely than white Americans to be arrested, despite little evidence to suggest that they commit more crimes: African Americans have similar rates of drug use, lower contraband hit rates in searches, and higher rates of exonerations than white Americans.[17] Yet once arrested, courts are more likely to convict African Americans; and upon conviction, African Americans are more likely to experience lengthy prison sentences.[18] Compared to white Americans, Black Americans are 5.2 times more likely to be incarcerated, and Hispanics are 2.5 times more likely to be incarcerated.[19]

Existing evidence suggests that penalties associated with HIV-specific statutes have fallen mostly on people of color: in California, Black and Latinx individuals made up fifty-one percent of the people living with HIV between 1988 to 2014 but made up sixty-seven percent of people charged with HIV-related offenses;[20] in Georgia, Black men are nearly twice as likely to be convicted of an HIV-related offense as white men.[21]

Meanwhile, in the COVID epidemic, people of color in the United States are experiencing higher risks of contracting COVID-19, being hospitalized, and dying.[22] In the majority of states that report

[16] The Sentencing Project, *Report to the United Nations on Racial Disparities in the U.S. Criminal Justice System* (April 18, 2018), https://www.sentencingproject.org/publications/un-report-on-racial-disparities/.
[17] *Id.*
[18] *Id.*
[19] E. Ann Carson, *Prisoners in 2018*, U.S. DEP'T JUST. OFF. JUST. PROGRAMS (April 2020), https://www.bjs.gov/content/pub/pdf/p18.pdf.
[20] Amira Hasenbush, Ayako Miyashita, & Bianca D.M. Wilson, *HIV Criminalization in California*, CENTER HIV L. & POL'Y (December 2015), https://www.hivlawandpolicy.org/sites/default/files/HIV%20Criminalization%20in%20CA%202015.pdf.
[21] *Id.*
[22] Samantha Artiga, et al., *Growing Data Underscore that Communities of Color are Being Harder Hit by COVID-19*, KAISER FAM. FOUND. (Apr. 21, 2020), https://www.kff.org/coronavirus-policy-watch/growing-data-underscore-communities-color-harder-hit-covid-19/; *COVID-19 in Racial and Ethnic Minority Groups*, CDC (June 4, 2020), https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/racial-ethnic-minorities.html.

COVID-19 data by race and ethnicity, Black people account for a disproportionate share of confirmed cases, hospitalizations, and deaths.[23] Although there is a lack of national data on the impact of COVID-19 on Latinx and Asian communities, local reports suggest that these groups account for high percentages of cases and deaths in some parts of the country.[24] For example, one neighborhood-level study in San Francisco found that although Latinx individuals make up only fifty-eight percent of the neighborhood population, they accounted for ninety-five percent of people who tested positive for COVID-19.[25]

Higher risk of COVID-19 infection is driven by a mix of structural factors. People of color are more likely to live in densely populated, segregated neighborhoods; have incomes below the federal poverty limit; lack access to health insurance or paid sick leave; and experience chronic health conditions — all of which increase risks of contracting COVID-19 and of developing severe complications.[26] In addition, Black and Hispanic individuals are overrepresented among essential workers and service industry workers and are far less likely to be able to telework than white individuals, resulting in greater exposure to COVID-19.[27]

The negative health consequences of COVID-19 in communities of color have been compounded by economic devastation, which in turn may disproportionately impel people to work despite potential vulnerability to infection. In April 2020, sixty-one percent of Hispanic Americans and forty-four percent of Black Americans experienced a job loss or decrease in income due to COVID-19, compared to thirty-eight percent of white Americans.[28] Black and Hispanic Americans are also less likely than white Americans to have financial reserves to cover their expenses during emergencies. Meanwhile, undocumented immigrants and people in mixed-status families[29] are ineligible for the individual recovery rebates authorized by the CARES Act.[30] As states and

---

[23] Samantha Artiga, *supra* note 22; *COVID-19 in Racial and Ethnic Minority Groups*, *supra* note 22.
[24] Samantha Artiga, *supra* note 22.
[25] Usha Lee McFarling, *When Hard Data Are 'Heartbreaking': Testing Blitz in San Francisco Shows Covid-19 Struck Mostly Low-wage Workers*, STAT NEWS (May 28, 2020), https://www.statnews.com/2020/05/28/sobering-finding-covid19-struck-mostly-low-wage-essential-workers-san-francisco/.
[26] Samantha Artiga, *supra* note 22; *COVID-19 in Racial and Ethnic Minority Groups*, *supra* note 22.
[27] Samantha Artiga, *supra* note 22; Bureau of Labor Statistics, *Report 1082: Labor Force Characteristics by Race and Ethnicity, 2018*, BLS REP. (October 2019), https://www.bls.gov/opub/reports/race-and-ethnicity/2018/home.htm; Elise Gould & Heidi Shierholz, *Not Everybody Can Work From Home*, ECON. POL'Y INST. (March 19, 2020), https://www.epi.org/blog/black-and-hispanic-workers-are-much-less-likely-to-be-able-to-work-from-home/; *Job Flexibilities and Work Schedules Summary*, US BUREAU LAB. STAT. (Sept. 24, 2019), https://www.bls.gov/news.release/flex2.nr0.htm.
[28] Mark Hugo Lopez et al., *Financial and Health Impacts of COVID-19 Vary Widely by Race and Ethnicity*, PEW RES. CTR. (May 5, 2020), https://www.pewresearch.org/fact-tank/2020/05/05/financial-and-health-impacts-of-covid-19-vary-widely-by-race-and-ethnicity/.
[29] *MALDEF Sues Federal Government Over Denial of COVID-19 Relief to Mixed-Status Married Couples*, MALDEF (April 28, 2020), https://www.maldef.org/2020/04/maldef-sues-federal-government-over-denial-of-covid-19-relief-to-mixed-status-married-couples/; *Mixed-Status Families Ineligible for CARES Act Federal Pandemic Stimulus Checks*, MIGRATION POL'Y INST. (May 2020), https://www.migrationpolicy.org/content/mixed-status-families-ineligible-pandemic-stimulus-checks.
[30] P.L.116-136. Sect. 6428(d)(1) "2020 Recovery Rebates for Individuals" (March 27, 2020), https://www.congress.gov/bill/116th-congress/house-bill/748/text/enr#toc-H25CA409D9D2844399CF965A38F83F6C6.

localities begin to reopen and the federal Pandemic Unemployment Assistance program expires, people who have been hit hardest economically will likely feel the most pressure to return to work, even if that means risking exposure to COVID-19.

Given the racial disparities in disease prevalence, combined with persistent over-policing of Black and Latinx individuals as well as the disparate economic pressures to continue or to return to work, it is highly likely that people of color could bear the brunt of COVID-19 criminalization efforts, as they have for HIV criminalization efforts.

B. Prosecuting COVID-19 Exposure Absent "Intent to Transmit" Risks Broad Criminalization

While proposals to criminalize COVID-19 exposure might focus on the most egregious hypotheticals, the history of HIV exposure prosecutions suggests that in practice, prosecutions may expand from "intent to transmit" to "knowing exposure," rendering a far broader swath of people vulnerable to prosecution.

There would likely be significant consensus — among the public, and among policymakers — that exposing another to a potentially deadly virus with the *intent* to transmit the infection might warrant criminal liability. As noted in the introduction, several reported prosecutions have focused on people who threatened to expose others to COVID-19, regardless of whether the defendants were in fact COVID-positive.[31] Similarly, a bill introduced in the New Jersey State Legislature would make it a "terrorist threat" to threaten to infect another person with COVID-19 — or another disease triggering a public health emergency — punishable by up to ten years imprisonment, a fine of up to $150,000, or both.[32]

These cases echo the recommendations of the President's Commission and of the Ryan White Care Act early in the HIV epidemic to ensure that cases of intentional transmission are punished. However, the vast majority of HIV laws and prosecutions hinge not on the intent to transmit HIV but on *knowing* exposure to HIV and alleged nondisclosure.[33] Some statutes and prosecutions have

---

[31] *See, e.g., Man Charged with Terroristic Threats for Allegedly Coughing on Food Store Employee and Telling Her He Has Coronavirus* (Mar. 24, 2020), https://www.nj.gov/oag/newsreleases20/pr20200324b.html; Kaelan Deese, *Woman Accused of Coughing on Store's Food Jailed, Charged with Terroristic Threats*, THE HILL (Mar. 28, 2020), https://thehill.com/homenews/news/489981-woman-accused-of-coughing-on-stores-food-jailed-charged-with-terrorist-threats; Doyle Murphy, *Missouri Walmart Coronavirus Licker Charged with 'Terrorist Threat'*, RIVERFRONT TIMES (Mar. 24, 2020), https://www.riverfronttimes.com/newsblog/2020/03/24/missouri-walmart-coronavirus-licker-charged-with-terrorist-threat.

[32] NJ S2361, (2020–21) https://legiscan.com/NJ/text/S2361/id/2178616. The bill would apply when the threat is made "with the purpose to put [another] in imminent fear of serious bodily injury or death under circumstances reasonably causing the victim to believe the immediacy of the threat and the likelihood that it will be carried out."

[33] *See generally HIV Criminalization in the United States: A Sourcebook on State and Federal HIV Criminal Law and Practice*, CENTER HIV LAW & POL'Y (2020), hivlawandpolicy.org/sourcebook (several state statutes ascribing a "Knowingly" mindset required for conviction).

even been based on activities that cannot in fact transmit HIV, such as spitting.[34] It is easy to imagine similar patterns emerging in the development of COVID-19-specific criminal laws or in COVID-19 exposure prosecutions: simply knowing one's COVID-19 status when allegedly exposing others could lead to prosecution, even absent any evidence of malicious intent. In addition, like for HIV, prosecutions could proceed based on faulty evidence or misunderstandings about the science behind COVID-19 transmission or epidemiology.

C. Potential Affirmative Defenses Are Not Equitably Available

While social distancing and wearing masks can help lower the risk of COVID-19 transmission and could in theory serve as defenses to criminal liability for exposure, these measures are not equitably available. The availability of affirmative defenses in COVID-19 cases could have unintended negative consequences for relatively disempowered or underserved people.

In the HIV context, criminal liability often hinges on nondisclosure: informing a sexual partner of one's HIV status is typically an affirmative defense — though one that may be difficult to prove in court.[35] In a few states, condom use can also be an affirmative defense.[36] More recently, as evidence has made clear that anti-retroviral therapy can also reduce a person's viral load to undetectable levels and thus not transmittable through sexual contact, evidence of suppressed viral load has become an affirmative defense in a handful of states.[37]

However, these tools for reducing the risk of being a defense to HIV transmission may be unavailable to certain individuals. Persuading a court that HIV-status disclosure occurred in a private setting is challenging, particularly for defendants who are seen as less credible by judges or juries. Negotiating, or even suggesting, condom use can be fraught or dangerous for some women or for sex workers, potentially rendering that defense unavailable. Even when condoms are used, there are numerous criminal convictions for HIV transmission, exposure, or nondisclosure.[38] Meanwhile, undetectable viral load is associated with access to healthcare and

---

[34] *Id.*
[35] *HIV Criminalization Fact Sheet*, CENTER HIV L. & POL'Y & POSITIVE JUST. PROJECT, https://www.hivlawandpolicy.org/sites/default/files/PJP%20fact%20sheet_11.14.2012.pdf.
[36] *See generally HIV Criminalization in the United States: A Sourcebook on State and Federal HIV Criminal Law and Practice*, CENTER FOR HIV LAW & POL'Y (2020), hivlawandpolicy.org/sourcebook (stating statutes negating specific intent to transmit disease if a condom was used in the course of sexual intercourse).
[37] *HIV Treatment as Prevention*, HIV.GOV, hiv.gov/tasp; *see, e.g.*, Myron S. Cohen et al., *HIV Treatment as Prevention and HPTN 052*, CURRENT OPINION HIV AIDS 7(2), 99–105 (2012), https://doi.org/10.1097/COH.0b013e32834f5cf2; Alison J. Rodger, M.D. et al., *Sexual Activity Without Condoms and Risk of HIV Transmission in Serodifferent Couples When the HIV-Positive Partner Is Using Suppressive Antiretroviral Therapy*, JAMA 316(2), 171–181 (2016), doi:10.1001/jama.2016.5148; Alison J. Rodger, M.D. et al., *Risk of HIV Transmission Through Condomless Sex in Serodifferent Gay Couples with the HIV-Positive Partner Taking Suppressive Antiretroviral Therapy (PARTNER): Final Results of a Multicentre, Prospective, Observational Study*, THE LANCET 393 (10189), 2428-2438 (2019), https://doi.org/10.1016/S0140-6736(19)30418-0.
[38] Sarah J. Newman, *Prevention, Not Prejudice: The Role of Federal Guidelines in HIV-Criminalization Reform*, 107 NW. U. L. R. 1403, 1405–1406 (2013).

race.[39] Considering viral load as a mitigating factor can further shift the burden of HIV criminal laws to people of color.

In theory, laws regarding the exposure to COVID-19 could include affirmative defenses that consider attempts on the part of the person with COVID-19 to reduce transmission to others. The role of disclosure might be similar to disclosure for HIV. However, because COVID-19 can be spread simply by breathing, it is difficult to contemplate how broadly someone with COVID-19 could reasonably be expected to disclose their status. A more favored tool is isolation — the CDC advises people with a known COVID-19 infection to self-isolate for at least ten days after symptom onset.[40] It is also widely recommended that people engage in social distancing and wear masks as people may be contagious even before exhibiting symptoms or when only mildly symptomatic.[41]

However, not all people with COVID-19 are equitably situated to take these measures to protect others. As discussed above, people at lower income levels and people of color are less likely to be able to telework or otherwise stay home without losing income or their jobs. The Families First Coronavirus Response Act of 2020 guaranteed up to eighty hours of fully-paid COVID-19-related sick leave to certain employees.[42] However, many categories of employees are not covered; benefits may not extend for the full duration a person needs to recover and become noncontagious; and benefits do not apply to non-sick people who are quarantining because of a known exposure.[43] Therefore, many people are still left with a choice between isolating — or quarantining — and keeping their income.[44] In addition, people have little control over their distance from coworkers in certain sectors. For example, news outlets report that many meat industry workers must work "shoulder to shoulder."[45] As for masks, people of color, particularly men who wear masks, may be subjected to heightened racial profiling and the attendant physical risks.[46]

---

[39] Kate Buchacz et al., *Disparities in HIV Viral Load Suppression by Race/ethnicity among Men who Have Sex with Men in the HIV Outpatient Study*, AIDS RES. HUM. RETROVIRUSES (Jan. 9, 2018).
[40] *Duration of Isolation and Precautions for Adults with COVID-19*, CDC (Last visited July 22, 2020), https://www.cdc.gov/coronavirus/2019-ncov/community/strategy-discontinue-isolation.html.
[41] *Frequently Asked Questions About Novel Coronavirus (COVID-19)*, NAT'L INST. INFECTIOUS DISEASES (June 25, 2020), https://www.nfid.org/infectious-diseases/frequently-asked-questions-about-novel-coronavirus-2019-ncov/.
[42] The Families First Coronavirus Response Act is applicable to certain public employers and private employers with fewer than 500 employees. Employers of fewer than fifty employees may seek exemption from the rule. Approximately 6.5 million people who work for companies with more than 500 employees do not have access to paid sick leave. While some companies have voluntarily extended paid sick leave benefits, this option is by no means universally available among lower-income workers. *See* Abby Vesoulis, *Trump Signs Law to Grant Paid Leave Benefits Amid Coronavirus Crisis – But Millions Won't Be Eligible*, TIME (Mar. 18, 2020, 9:16 PM), https://time.com/5803671/paid-leave-imminent-coronavirus/.
[43] *Families First Coronavirus Response Act: Employee Paid Leave Rights, COVID-19 and the American Workplace* U.S. DEP'T LABOR, https://www.dol.gov/agencies/whd/pandemic/ffcra-employee-paid-leave. In addition, as of 2018, only ten states had laws protecting workers from losing their job in case of medical quarantine.
[44] Rebecca Katz et al., *Raising the Yellow Flag: State Variation in Quarantine Laws* 24 J. PUB. HEALTH MGMT. & PRAC. 380, 383 (2018), https://doi.org/10.1097/PHH.0000000000000699.
[45] Megan Molteni, *Why Meatpacking Plants Have Become Covid-19 Hot Spots*, WIRED MAG. (May 7, 2020), https://www.wired.com/story/why-meatpacking-plants-have-become-covid-19-hot-spots/.
[46] Derrick Bryson Taylor, *For Black Men, Fear That Masks Will Invite Racial Profiling*, N.Y. TIMES (April 14, 2020), https://www.nytimes.com/2020/04/14/us/coronavirus-masks-racism-african-americans.html.

Furthermore, even if a COVID-19-specific criminal statute accounted for isolating, quarantining, social distancing, and masks, a statute written now would not reflect advances in scientific understanding of, and responses to, coronavirus in the future.

D. Criminalization May Discourage COVID-19 Testing

In the context of HIV criminalization, advocates have long argued that criminalizing knowing exposure could disincentivize testing: if knowing one's HIV status would trigger criminal liability for exposure, individuals may choose not to be tested in order to avoid liability.[47] This argument was particularly compelling before the development of effective antiretroviral therapy — with no meaningful treatment options available, people might already question the value of testing. Since the majority of people diagnosed with HIV modify their behaviors to protect others, lower testing rates would negatively impact overall transmission rates and, given the treatments available today, hurt the individual as well.[48]

There is scant empirical evidence of a direct link between HIV criminalization and testing rates.[49] However, it is worth considering whether criminalizing COVID-19 exposure would disincentivize testing, particularly since, unlike HIV, there is currently no highly effective treatment to otherwise motivate testing. COVID-19 testing is considered a crucial public health strategy to reduce transmission by appropriately identifying and isolating those who are infected and tracing their contacts to stem the spread of the virus.[50] If knowing exposure is criminalized, the risk of punishment may disincentive testing by tipping the balance away from adherence with public health efforts and towards avoiding criminal liability.

1. Criminalization Compounds Stigma

HIV criminalization has been broadly criticized for both reflecting and perpetuating stigma around HIV. Stigma against people living with HIV can result in a range of human rights violations, such as hindering access to housing, employment, healthcare and other basic needs.[51] Given the widespread discrimination against people with HIV since the beginning of the epidemic, increasing stigma through prosecutions or sentencing enhancements solely on the basis of HIV status is a major concern. Perpetuating stigma in the name of reducing transmission is particularly unfounded when HIV is, for those with access to healthcare, a chronic and manageable disease. While

---

[47] *See, e.g.,* Zita Lazzarini et al., *Criminalization of HIV Transmission and Exposure: Research and Policy Agenda*, 103 AM. J. PUB. HEALTH 1350, 1350–51 (tracking a Canadian study and the effect of disincentivization on testing and clinical-patient relationships).
[48] Lisa A. Eaton & Seth C. Kalichman, *Changes in Transmission Risk Behaviors Across Stages of HIV Disease Among People Living with HIV/AIDS*, 20 J. ASS'N NURSES AIDS CARE 39, 43–44 (2009).
[49] Dini Harsono et al., *Criminalization of HIV Exposure: A Review of Empirical Studies in the United States*, 21 AIDS BEHAV. 27, 35 (2017).
[50] Health Policy & Public Health COVID-19 Advisory Panel, *Key Public Health Strategies for Responding to COVID-19*, VAND. U. SCH. MED. (Mar. 27, 2020), https://www.vumc.org/health-policy/sites/default/files/public_files/COVID%20Memo%20-%20Sources-Strategies-final.pdf.
[51] *HIV/AIDS and Human Rights*, UNITED NATIONS OFF. HIGH COMMISSIONER HUM. RTS., https://www.ohchr.org/EN/Issues/HIV/Pages/HIVIndex.aspx.

prosecutions under criminal laws of general application raise this concern, arguably the existence of HIV-*specific* criminal laws is distinctly problematic in that such laws signify a particular category of blame for people living with HIV.

Criminalizing COVID-19 exposure could similarly create unproductive stigma around COVID-19. Given the massive racial and socioeconomic disparities in COVID-19's impact in the United States criminalizing exposure could compound the burden experienced by the most affected communities.

2. Penalties for Violating Public Health Orders Already Exist

Finally, any development of criminal penalties for COVID-19 exposure must consider the backdrop of existing penalties for violating public health orders related to the pandemic. The CDC has authority to impose federal isolation and quarantine orders related to international or interstate travel, and violation of those orders can result in a fine of up to $1,000.00, imprisonment of up to one year, or both.[52] Multiple states and localities enacted similar laws that make violation of social distancing requirements an offense punishable by fines and/or jail.[53] At the state level, violation of quarantine or isolation orders is a misdemeanor in many states and a felony in several, and can result in fines as high as $10,000 or a range of prison terms.[54]

Quarantine and isolation, as well as the current social distancing laws, can be important public health tools when applied fairly and scientifically. However, these approaches can also raise equity issues. For example, there have been multiple reports of inequitable enforcement of social distancing, including increasing surveillance and enforcement against people of color in jurisdictions across the country.[55] Layering additional criminal liability on top of existing enforcement regimes may compound these equity concerns.[56]

---

[52] 42 U.S.C. § 271(a) (2018).

[53] *See, e.g.*, Exec. Order HI 505 2020 (Apr. 16, 2020), https://custom.statenet.com/public/resources.cgi?id=ID:exec_order:HI2020505&mode=current_text ("[A]ny person violating any rule set forth in this Proclamation shall be guilty of a misdemeanor, and upon conviction, the person shall be fined not more than 5,000, or imprisoned not more than one year, or both.");
Enforcement of Social Distancing Orders (Apr. 10, 2020), https://regs.health.ny.gov/sites/default/files/pdf/emergency_regulations/20-07_social_distancing_measures_0.pdf; Second Amended Order 20-01 (holding individuals who violate the New York mandate to a maximum fine of $1,000 for each violation); Quinton D. Lucas, *Second Amended Order*, KCMO.GOV (Mar. 12, 2020), https://www.kcmo.gov/home/showdocument?id=4065 (violating the Kansas City order constitutes an imminent threat).

[54] *See* National Council of State Legislatures, *State Quarantine and Isolation Statutes* (Feb. 27, 2020), https://www.ncsl.org/research/health/state-quarantine-and-isolation-statutes.aspx (Wisconsin).

[55] *See, e.g.*, Janell Ross, *Pattern of Uneven Social Distancing Enforcement Coming into View, Civil Rights Experts Say*, NBC NEWS (May 28, 2020), https://www.nbcnews.com/news/nbcblk/pattern-uneven-social-distancing-enforcement-coming-view-civil-rights-experts-n1216506 (comparing New York City, Chicago, and Philadelphia); Office of the Attorney General, *AG James Calls on the NYPD to Ensure Equal Social Distancing Enforcement in NYC Communities*, https://ag.ny.gov/press-release/2020/ag-james-calls-nypd-ensure-equal-social-distancing-enforcement-nyc-communities (discussing New York).

[56] Betsy Pearl et al., *The Enforcement of COVID-19 Stay-at-Home Orders*, CTR. AM. PROGRESS (Apr. 2, 2020), https://www.americanprogress.org/issues/criminal-justice/news/2020/04/02/482558/enforcement-covid-19-stay-home-orders.

Conclusion

Applying potential criminal liability for COVID-19 runs into the same problem as the criminal law often does more broadly: it seeks to assign culpability to an individual with little or no regard to the structural context of that person's decisions. Like HIV, the nature of COVID-19 infections and the decisions people face during this pandemic are influenced by a confluence of community, public health, and national factors.

The COVID-19 epidemic in the United States, to date, is characterized by massive failures of federal leadership and planning, shortages of medical equipment and gear, an inconsistent patchwork of state and city approaches, and the politicization of basic public health advice and precautions. These factors overlap with persistent racial and ethnic disparities in underlying risk factors for severe COVID-19 illness, access to healthcare, and people's economic ability to stay at home. Meanwhile, politicians and business owners are making decisions daily — from requiring or disparaging mask use, continuing or ending unemployment assistance, reopening or not in the face of new spikes in infection — that influence community risk and the economic choices far beyond any one person's decisions. Given this context, in most cases the value of punishing individuals for COVID-19 exposure does not justify the multiple inequities and infringements that criminalization would impose on individuals and communities.

Human Rights and COVID-19 Responses: Challenges, Advantages, and an Unexpected Opportunity

Ingrid Nifosi-Sutton[*]

TABLE OF CONTENTS

Introduction 19

I. Challenges to the Realization of the Right to Health 20

A. Assessment Through the Lens of the Right to Health 21

II. Groups Disproportionately Affected by Responses to COVID-19 23

A. Persons with Disabilities 23

B. Indigenous Peoples 25

C. Women and Girls 27

Conclusions 30

[*] Adjunct Professor of Law, American University Washington College of Law.

Introduction

The World Health Organization officially declared the COVID-19 pandemic on March 11, 2020,[1] as the novel coronavirus was causing deterioration of people's health and deaths at an alarming rate and forcing governments and communities worldwide to introduce drastic changes in everyday life. With the pandemic ravaging the world, U.N. and regional human rights bodies and experts became increasingly concerned that its management was resulting in violations of international human rights or would give rise to their infringement. They urged States to pay special attention to their obligations under human rights law and not to leave anyone behind.[2]

Drawing on these developments, this Article discusses human rights implications of COVID-19 and argues that the pandemic should be addressed through implementation of a rights-based approach. Section I focuses on the right that is inherently and primarily at stake during the pandemic: the right to health. Section I explores challenges to the realization of this right resulting from governments' responses to the pandemic, specifically the lack of access to accurate information on the COVID-19 infection and the lack of universal access to healthcare. Section I first illustrates these problems by showing how they unfolded in Mexico and in the United States. In an effort to emphasize the advantages of a rights-based approach, Section I subsequently analyzes these problems through the lens of the right to health, as enshrined in Article l2 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), or implied in Article 26 of the International Covenant on Civil and Political Rights (ICCPR) on the right to equal protection of the law.[3]

---

[1] *See Timeline of WHO's Response to Covid-19*, WORLD HEALTH ORG. (June 30, 2020), https://www.who.int/news-room/detail/29-06-2020-covidtimeline.

[2] Committee on Economic, Social, and Cultural Rights, *Statement on the Coronavirus Disease (COVID-19) Pandemic and Economic, Social, and Cultural Rights*, E/C.12/2020/1 at ¶ 2 (Apr. 17, 2020) [hereinafter *Statement on the Coronavirus Disease*]; *No Exceptions with COVID-19: Everyone Has the Right to Life-Saving Interventions*, U.N. HUM. RTS. OFFICE HIGH COMM'R (Mar. 26, 2020), https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25746&LangID=E [hereinafter *Life-Saving Interventions*]; Committee on the Rights of the Child*, The Committee on the Rights of the Child Warns of the Grave Physical, Emotional and Psychological Effect of the COVID-19 Pandemic on Children and Calls on States to Protect the Rights of Children*, U.N. HUM. RTS. OFFICE HIGH COMM'R (Apr. 8, 2020), https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=INT/CRC/STA/9095&Lang=en; Committee on the Elimination of Discrimination against Women, *Call for Joint Action in the Times of the COVID-19 Pandemic*, U.N. HUM. RTS. OFFICE HIGH COMM'R (Apr. 21, 2020), https://www.ohchr.org/en/hrbodies/cedaw/pages/cedawindex.aspx; *see also* Lisa Reinsberg, *Mapping the Proliferation of Human Rights Bodies' Guidance on COVID-19 Mitigation*, JUST SECURITY (May 22, 2020), https://www.justsecurity.org/70170/mapping-the-proliferation-of-human-rights-bodies-guidance-on-covid-19-mitigation/?fbclid=IwAR1C9ZWoUhd46guC-5vTll8O8MH79f1NARjw9AGMxeBkeUD5dvervnQ4MvM (providing an overview of the various statements on COVID-19 by UN and regional human rights monitoring bodies and experts).

[3] *See* International Covenant on Economic, Social, and Cultural Rights, art. 12, *opened for signing* Dec. 16, 1966, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976) [hereinafter ICESCR]; International Covenant on Civil and Political Rights, art. 26, *opened for signing* Dec. 16, 1966, 999 U.N.T.S. 171 (entered into Force Mar. 23, 1976) [hereinafter ICCPR].

Section II emphasizes the importance of applying a rights-based approach in cases where governments' management of the COVID-19 pandemic has disproportionally affected the enjoyment of the human rights of certain groups of persons. While these groups are numerous, Section II does not purport to offer an exhaustive investigation of all their situations. For analytical purposes, Section II specifically and exclusively examines how responses to the pandemic have: (a) deprioritized the rights to health and life of persons with disabilities; (b) prevented Indigenous leaders from exercising fundamental civil rights to protect the territories of their communities against illegal mining; and (c) led to a dramatic increase of instances of gender-based violence against women and girls. Section II illuminates the added value of a rights-based approach to the COVID-19 pandemic by assessing the above groups' predicaments in light of the Convention on the Rights of Persons with Disabilities (CRPD), the ICCPR, and the Convention on the Elimination of All Forms of Discrimination against Women (Women Convention). This Article concludes that a rights-based approach to the management of the pandemic leads to more effective domestic responses and constitutes a tremendous opportunity to renew efforts to effectively realize international human rights.

I. Challenges to the Realization of the Right to Health

Governments' responses to the COVID-19 pandemic highlight two problems that are especially relevant to an effective realization of the right to health under human rights law: lack of access to reliable information on the pandemic, and lack of universal access to healthcare.

As the pandemic unfolded, government authorities in various countries downplayed its severity and failed to provide important information to the public on how to minimize its spreading. Circumstances in Mexico illustrate this point. There, President López Obrador contradicted health professionals' recommendations on the containment of the COVID-19 infection.[4] He told Mexican people that COVID-19 was less dangerous than the flu and that they should continue to live their lives as nothing was happening.[5] The president blamed the press and the opposition for raising the alarm about the virus in an effort to politically damage his government.[6] Mexican NGOs obtained three court rulings ordering the government to adopt basic COVID-19 preventive measures.[7] Following these rulings, President López Obrador's administration acknowledged that the pandemic was affecting Mexico.[8]

In some countries, healthcare is not accessible to everyone making it impossible for certain persons to be tested or treated for COVID-19. The United States is a case in point. According to Human

[4] *See Mexico: Mexicans Need Accurate COVID-19 Information*, HUM. RTS. WATCH (March 26, 2020), https://www.hrw.org/news/2020/03/26/mexico-mexicans-need-accurate-covid-19-information (continuing to hold rallies where he came into close contact with large crowds).
[5] *See id.* (advising the public to continue going out, eating at restaurants, and hugging others).
[6] *See id.* (claiming that the opposition was looking to "distort, alarm, and question the government").
[7] *See id.* (explaining that competent judicial authorities have found "that the government has failed to take basic action to detect or respond to the COVID-19 pandemic").
[8] *See id.* According to the Pan American Health Organization, Mexico may have 700,000 serious cases of COVID-19 requiring respiratory support; however, the public health system only has about 5,500 ventilators.

Rights Watch, millions of people in the United States do not have medical insurance and cannot obtain state-funded healthcare if infected with COVID-19.[9]

COVID-19 testing and treatment for these persons may cost approximately $35,000.[10] Uninsured persons in the United States are frequently those with a lower income and often include immigrants.[11]

A. Assessment Through the Lens of the Right to Health

The right to health is set forth in Article 12 of the ICESCR.[12] The Committee on Economic, Social, and Cultural Rights, the body that monitors States Parties' compliance with the Covenant,[13] has interpreted this right in its General Comment No. 14 of May 12, 2000. The Committee has made clear that the right to health incorporates, among its essential elements, access to information, which implies a right to seek and receive information about health issues.[14] When implementing this right, States Parties to the ICESCR are obligated to provide "access to information concerning the main health problems in the community, including methods of preventing and controlling them."[15] This obligation has to be fulfilled as a matter of priority and, based on paragraph 2(c) of Article 12, includes providing information to the public on controlling and preventing epidemics.[16] In the Committee's interpretation, a State Party to the ICESCR would violate the right to health if competent authorities withhold or intentionally misrepresent health-related information, thereby suggesting that the right to seek and receive information about health issues is a right to seek and receive accurate information about health issues.[17] Mexico is a party to the ICESCR and has

[9] *See COVID-19: A Human Rights Checklist*, HUM. RTS. WATCH (Apr. 14, 2020), https://www.hrw.org/news/2020/04/14/covid-19-human-rights-checklist [hereinafter *COVID-19: A Human Rights Checklist*] (providing an overview of healthcare access and pandemic responses in various countries).
[10] *See* Komala Ramachandra, *A Deadly Lack of Affordable COVID-19 Treatment in the US*, HUM. RTS. WATCH (Mar. 30, 2020, 5:09 PM), https://www.hrw.org/news/2020/03/30/deadly-lack-affordable-covid-19-treatment-us (reporting the costs incurred by one uninsured woman for her COVID-19 treatment).
[11] *See* Jennifer Tolbert et al., *Key Facts about the Uninsured Population*, HENRY J. KAISER FAMILY FOUND. (Dec. 13, 2019), https://www.kff.org/uninsured/issue-brief/key-facts-about-the-uninsured-population/ (accounting for twenty-four percent of the uninsured are non-citizens).
[12] *See* ICESCR, *supra* note 3, at art. 12 (recognizing the right to the "highest attainable standard of physical and mental health").
[13] *See* Committee on Economic, Social and Cultural Rights, Report on the forty-fourth and forty-fifth sessions, Doc. E/2011/22 E/C.12/210/3, ¶¶ 19-59 (2011); *see also* Eibe Riedel et al., *Economic, Social and Cultural Rights in International Law: Contemporary Issues and Developments*, Chapter I, (2014) (analyzing the practice of the Committee on ESCR).
[14] *See* Committee on Economic, Social, and Cultural Rights, General Comment No. 14, The Right to the Highest Attainable Standard of Health, art. 12 of the International Covenant on Economic, Social and Cultural Rights, ¶ 12 (b) (iv), Doc. E/C.12/2000/4 (Aug. 11, 2000) (emphasizing that access should not impair the right to privacy and confidentiality).
[15] *Id*. at ¶ 44 (d).
[16] *See id*. at ¶ 44. Paragraph 2 (c) of Article 12 is concerned with the obligation to adopt measures necessary for the prevention, treatment and control of epidemic, endemic, occupational and other diseases.
[17] *See id.* at ¶ 34.

violated one of the most critical dimensions of Article 12 during the COVID-19 pandemic.[18] Competent authorities have infringed upon the right to receive accurate information about health issues by recklessly providing information that underestimated the deadly impact of COVID-19 and the importance of controlling the infection for political expediency.

While the United States is not a party to the ICESCR, its conduct during the COVID-19 pandemic can be examined through the lens of Article 26 of the ICCPR, which the United States ratified in 1992.[19] This provision is concerned with all persons' equality before the law and their entitlement, without any discrimination, to the equal protection of the law.[20] Specifically, this provision prohibits any kind of discrimination, based on the internationally recognized grounds, "in law or in fact in any field regulated and protected by public authorities."[21] Internationally prohibited grounds of discrimination include, *inter alia*, race, sex, social origin, or other status.[22] In its concluding observations made following analysis of the United States' periodic reports on the implementation of the ICCPR, the Human Rights Committee (HRC)[23] indicated that Article 26 encompasses the right of people who are poor, under relevant domestic legislation and policies, to access healthcare, and that the United States should increase efforts to realize this right.[24] The staggering number of persons without medical insurance and the exorbitant cost of COVID-19 treatment demonstrate that in the United States, during the pandemic, a large group of individuals cannot enjoy access to government-funded health care on an equal basis because of their socio-economic status, which often intersects with migrant status. Consequently, the United States is failing to fulfill the right to access healthcare without discrimination of any kind as required under Article 26.[25] The United States should be more mindful of its obligations under the ICCPR and

---

[18] *See generally* ICESCR, *supra* note 3, at art. 12. Mexico acceded to the ICESCR in 1981.
[19] *See* ICCPR, *supra* note 3, at art. 26.
[20] "All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." *See* ICCPR, *supra* note 3, at art. 26.
[21] Human Rights Committee, General Comment No. 18: Non-Discrimination, ¶ 12, U.N. Doc. HRI/GEN/1/Rev.9 (Vol. I) (Nov. 10, 1989).
[22] *See* quoted material *supra* note 20.
[23] The Human Rights Committee monitors compliance with the ICCPR by States Parties. *See* Human Rights Committee, *Working Methods*, U.N.
HUM. RTS. OFFICE HIGH COMM'R 4, https://www.ohchr.org/EN/HRBodies/CCPR/Pages/WorkingMethods.aspx.
[24] In 2006, the Human Rights Committee reviewed the United States and recommended that "[i]n the aftermath of Hurricane Katrina, the State party should increase its efforts to ensure that the rights of the poor, and in particular African-Americans, are fully taken into consideration in the reconstruction plans with regard to access to housing, education and healthcare."
Human Rights Committee, *Concluding Observations on the Second and Third Periodic Report of the U.S.*, U.N. Doc. CCPR/C/USA/CO/3/Rev.1, ¶ 26 (Dec. 2006). *See also* Human Rights Committee, *Concluding Observations on the Fourth Periodic Report of the U.S.*, U.N. Doc. CCPR/C/USA/CO/4, ¶ 15 (Apr. 23, 2014) [hereinafter *Fourth Periodic Report*].
[25] The Committee on Economic, Social, and Cultural Rights corroborates the point that international human rights law requires States to ensure the right of access to healthcare for non-nationals. The Committee has held that "[a]ll persons, irrespective of their nationality, residency or immigration status, are entitled to primary and emergency medical care." *See* Committee on Econmic, Social, and Cultural Rights, General Comment No. 19, The Right to Social Security, art. 9, ¶ 37, U.N. Doc. E/C.12/GC/19 (Feb. 4, 2008).

heed the U.N. Special Procedures' warning that the use of insurance schemes during the pandemic should never lead to discrimination against certain patients,[26] since "[e]verybody has the right to health."[27]

Effective realization of the right to health is not simply a technical legal issue or a moral imperative. It leads to a more robust response to the COVID-19 pandemic. As the Committee on Economic, Social, and Cultural Rights has maintained in its latest statement on COVID-19, the right to receive accurate information about health issues is of critical importance since "[a]ccurate and accessible information about the pandemic is essential . . . to reduce the risk of transmission of the virus."[28] Similarly, ensuring universal access to COVID-19 prevention and treatment can result in more successful management of the pandemic. Given the high contagiousness of the virus, failure to provide access to COVID-19 prevention and treatment to certain persons would dramatically increase the risk of infection for other communities. Some States have understood this problem and expanded coverage of their national health systems. Thus, in an effort to further limit the spreading of COVID-19, the Portuguese government issued an order in March 2020 guaranteeing that all individuals who had applied for residency and asylum had access to health care under the national system on an equal basis with permanent residents until June 30, 2020.[29]

In sum, realizing the right to receive accurate information about the COVID-19 pandemic, implied in Article 12 of the ICESCR, and facilitating universal access to healthcare in compliance with Article 26 of the ICCPR, constitute indispensable steps that should be at the heart of any response to the pandemic.

II. Groups Disproportionately Affected by Responses to COVID-19

Governments' responses to the COVID-19 pandemic have resulted in violations of fundamental rights of certain populations. For the purposes of this Article this Section considers: the situations of persons with disabilities, Indigenous Peoples, and women and girls. This Article further analyzes violations of rights suffered by these groups through the lens of relevant U.N. human rights treaties to further highlight the added value of a rights-based approach to the pandemic.

A. Persons with Disabilities

More than one billion persons with disabilities are at a heightened risk of contracting COVID-19 and dying if infected. [30] Risk factors specific to persons with disabilities include old age, pre-

[26] *Life-Saving Interventions*, *supra* note 2.
[27] *Id*.
[28] *Statement on the Coronavirus Disease*, *supra* note 2, at ¶ 18.
[29] *See COVID-19: A Human Rights Checklist*, *supra* note 9.
[30] *Statement on Persons with Disabilities in the COVID-19 Outbreak and Response*, GLOB. ACTION DISABILITY NETWORK (2020), https://gladnetwork.net/search/resources/glad-network-statement-persons-disabilities-covid-19-outbreak-and-response.

existing health conditions, or living in residential institutions.[31] U.N. experts and NGOs have indicated that persons with disabilities in residential institutions are a "significant portion of the total infection cases and fatalities"[32] owing to the "high risk of contamination [due to overcrowding] and the lack of external oversight."[33]

In some instances, these persons' survival may not be a priority for authorities who are responding to the COVID-19 pandemic. Reports indicate that persons with disabilities have been "de-prioritized in health services." [34] In Italy, the professional organization that sets guidelines for intensive care has concluded that intensive care treatment should prioritize COVID-19 patients with the highest chance of "therapeutic success."[35] This may mean, in the view of some experts, that if persons with disabilities have a pre-existing health condition or their disability reduces chances of recovery, they may not receive intensive care treatment.[36]

The situation of persons with disabilities during the pandemic should be dealt with in accordance with the CRPD when affected States, such as Italy, are parties to this treaty. Relevant provisions include Articles 10, 11, and 25.[37] Article 11 requires States Parties to take all necessary measures to ensure the protection and safety of persons with disabilities in situations of risk.[38] Article 10 sets forth the right to life and the duty to "take all necessary measures to guarantee its effective enjoyment by persons with disabilities on an equal basis with others."[39] This Article should be read together with Article 25 enshrining the right to health and obligating States Parties to provide persons with disabilities with the same range, quality, and standard of free or affordable health care as provided to other persons.[40]

The Chair of the U.N. Committee on the Rights of Persons with Disabilities has clarified the concrete import of these provisions during the COVID-19 pandemic, which can be regarded as a "situation of risk" within the meaning of Article 11.[41] Ensuring safety of persons with disabilities

---

[31] *Id*.
[32] *Id*.
[33] Catalina Devandas, *COVID-19: Who Is Protecting the People with Disabilities?*, U.N. HUM. RTS. OFFICE HIGH COMM'R (Mar. 17, 2020), https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25725&LangID=E.
[34] Helen Dickinson & Anne Kavanagh, *People with Disabilities Are More Likely to Die from Coronavirus – but We Can Reduce the Risk*, NEWSROOM (Mar. 27, 2020), https://newsroom.unsw.edu.au/news/health/people-disability-are-more-likely-die-coronavirus-–-we-can-reduce-risk.
[35] *Id*.
[36] *Id*.
[37] Convention on the Rights of Persons with Disabilities, arts. 10–11, 25, *adopted by the general assembly* Dec. 13, 2006, 2515 U.N.T.S. 3 (entered into force May 3, 2008) [hereinafter CRPD]; s*ee also* Frédéric Mégret, *The Disabilities Convention: Human Rights of Persons with Disabilities or Disability Rights?* 30 HUM. RTS. QUARTERLY, 494 (2008) (discussing the nature of the rights set out in the Convention).
[38] CRPD, *supra* note 37.
[39] *Id*.
[40] *Id*.
[41] *Id*.

in residential homes would entail acceleration of their deinstitutionalization.[42] Effective implementation of Articles 25 and 10 would require competent authorities to refrain from discriminatory denial of health care or life-saving services on the basis of disability.[43]

Persons with disabilities "are at a much higher risk from COVID-19."[44] Implementing a rights-based approach to protect their safety and well-being would ensure that they are not neglected or dismissed because of their disability while responses to the pandemic are truly inclusive.

B. Indigenous Peoples

Arbitrary enforcement of anti-COVID-19 measures is making it harder for Indigenous leaders to exercise fundamental civil rights to protect Indigenous territories from illegal mining. Human rights-monitoring bodies have deemed these territories to constitute essential elements of Indigenous Peoples' right to enjoy their own culture.[45]

U.N. experts reported that on April 6, 2020, approximately 100 police forcibly dispersed thirty Indigenous and environmental defenders who were blocking fuel tankers of OceanaGold Philippines Inc. from entering the Oceanagold Didipio mining site located in the northern part of the Philippines.[46] The mine, which has been operating on the ancestral lands of a local Indigenous community without its consent, has been blockaded by the community since June 2019, "when the company continued mining while it waited for renewal of an expired permit."[47] President Duterte's office authorized the entry of the mining company's vehicles, irrespective of the government-imposed locked down.[48] Protesters were injured by the police, and one Indigenous leader was charged with ignoring isolation measures, such as quaranitine.[49]

---

[42] Danlami Basharu & María Soledad Cisternas Reyes, *Joint Statement: Persons with Disabilities and COVID-19 by the Chair of the U.N. Comm. on the Rights of Persons with Disabilities and the Special Envoy of the United Nations Secretary-General on Disability and Accessibility*, U.N. HUM. RTS. OFFICE HIGH COMM'R ¶ 5, https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25765&LangID=E.

[43] *Id*. at ¶ 7. The Committee on the Rights of Persons with Disabilities monitors States Parties' compliance with the CRPD. *See* Committee on the Rights of Persons with Disabilities, *Questions and Answers*, U.N. HUM. RTS. OFFICE HIGH COMM'R, https://www.ohchr.org/en/hrbodies/crpd/pages/crpdindex.aspx.

[44] U.N. Office of the High Commissioner for Human Rights, *COVID-19 Guidance*, U.N. HUM. RTS. OFFICE HIGH COMM'R 2 (Mar. 31, 2020), https://www.ohchr.org/Documents/Events/COVID-19_Guidance.pdf.

[45] Human Rights Committee, General Comment No. 23 (50), art. 27, ¶¶ 3.2, 7, CCPR/C/21/Rev.1/Add. 5 (Apr. 26, 1994).

[46] Special Rapporteur on the rights of Indigenous Peoples, Special Rapporteur on the rights to peaceful assembly and freedom of association, and Special Rapporteur on human rights and the environment, *Philippines Mine Standoff: Indigenous and Environmental Rights Must Be Respected, Say UN Experts*, U.N. HUM. RTS. OFFICE HIGH COMM'R (Apr. 30, 2020), https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25850&LangID=E [hereinafter *Philippines Mine Standoff*].

[47] *Id.*

[48] *Id.; see also Standoff Over Philippines Didipio Mines Escalates Despite Covid-19 Lockdown*, MONGABAY (Apr. 6, 2020), https://news.mongabay.com/2020/04/standoff-over-philippines-didipio-mines-escalates-despite-covid-19-lockdown/.

[49] *Phillippines Mine Standoff*, *supra* note 46.

The above situation violates the right of peaceful assembly enshrined in Article 21 of the ICCPR, to which the Philippines is a party.[50] This right requires that resort to the use of force for the purpose of "policing assemblies" must always be reasonably necessary to achieve a given law enforcement objective and proportional to the objective to be attained.[51] In this situation, the Philippines breached Article 21 because the use of force by the police to enforce anti-COVID-19 measures against the protesters "was unnecessary and disproportionate."[52] The Philippine government should have engaged with the protesters "in peaceful and constructive talks instead of dispersing [them] forcefully" [53] and injuring them.

The Indigenous defenders' right to freedom of expression, under paragraph 2 of Article 19 of the ICCPR, is also at stake since the defenders were advocating for Indigenous Peoples' rights and the Philippine government silenced them by arbitrarily resorting to the use of force to enforce anti-COVID-19 measures.[54] This conclusion is in line with the HRC's point that, while the right to freedom of expression as set out in Article 19 can be restricted to protect public health, restrictions may never be invoked, and by extension enforced, "as a justification for the muzzling of any advocacy of . . . human rights."[55] Moreover, the HRC has recently asserted that freedom of expression and the right of peaceful assembly "constitute important safeguards for ensuring that States Parties resorting to emergency powers in connection with the COVID-19 pandemic comply with [rights and] their obligations under the Covenant."[56]

The rights the Indigenous defenders were upholding are contained in Article 27 of the ICCPR, concerned with individuals belonging to ethnic, religious, and linguistic minorities. The HRC has construed Article 27 to imply the right to enjoy a particular culture, which, when it comes to Indigenous communities and their members, may consist of a way of life closely associated with territory and use of its resources.[57] The HRC's practice shows that Article 27 requires contracting States to effectively protect sacred areas of Indigenous Peoples from mining.[58] By authorizing tankers of OceanaGold Philippines Inc. to enter the mining site located on Indigenous lands without the consent of the local Indigenous community, the Philippines violated Article 27. The

[50] The Philippines ratified the ICCPR in 1986. *See* ICCPR*, supra* note 3.
[51] Maina Kiai & Christof Heyns, *Joint Report of the Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association and the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions on the Proper Management of Assemblies*, U.N. Doc. A/HRC/31/66, § E, ¶¶ 50, 57–58, (Feb. 4, 2016).
[52] *Philippines Mine Standoff*, *supra* note 46.
[53] *Id.*
[54] The Human Rights Committee has taken the view that the right to freedom of expression encompasses, inter alia, human rights advocacy. *See* Human Rights Committee, General Comment No. 34, Freedoms of Opinion and Expression, art. 19, ¶ 23, U.N. Doc. CCPR/C/GC/34 (Sept. 12, 2011).
[55] *Id.*
[56] Human Rights Committee, *Statement on Derogations from the Covenant in Connection with the COVID-19 Pandemic*, ¶ 2(f), U.N. Doc. CCPR/C/128/2 (Apr. 30, 2020), https://www.ohchr.org/Documents/HRBodies/CCPR/COVIDstatementEN.pdf.
[57] Human Rights Committee, *supra* note 45.
[58] Human Rights Committee, *Concluding Observations on the Consolidated Second and Third Periodic Reports of the Philippines*, U.N. Doc. CCPR/CO/79/PHL, ¶ 16 (Dec. 1, 2003); *Fourth Periodic Report*, *supra* note 24, at ¶ 25.

government should put an end to this violation by stopping the company's operations until consultations with the Indigenous community have been held "and [its] consent obtained."[59]

The Philippines also violated paragraph 3 of Article 12 of the ICCPR on freedom of movement. This provision necessitates that restrictions on freedom of movement implemented to protect public health are not discriminatory.[60] There is a breach of this provision because the Philippine government enforced quarantine and other isolation measures against one of the Indigenous leaders but failed to similarly enforce them against workers of the mining company. As the U.N. experts put it, "[t]he [Indigenous] community is left with the impression that the COVID-19 restrictions are more strictly enforced against them, than against businesses operating on their lands without their consent."[61]

"Indigenous peoples are [disproportionately] impacted in the COVID-19 pandemic."[62] The rights-based approach requires that their leaders fully exercise civil rights and denounce governments that take advantage of the pandemic to threaten Indigenous communities' way of life. This guarantees that pandemic responses are fair and predicated on the rule of law.

C. Women and Girls

On March 18, 2020, the Committee of Experts of the Follow-up Mechanism of the Belém do Pará Convention (MESECVI), issued a statement in which it warned that measures adopted to mitigate the consequences of COVID-19 would intensify violence against women and girls in the Americas.[63] The Committee was specifically concerned that social distancing and quarantine mandates would place women "at a very high risk of extreme violence by forcing full time cohabitation with their aggressors."[64]

The Committee's warning was prophetic, as available statistics show a dramatic worldwide increase of instances of violence against women, especially domestic violence, during the pandemic. According to U.N. Women in Argentina, emergency calls for domestic violence have

[59] *Philippines Mine Standoff, supra* note 46.
[60] Human Rights Committee, General Comment No. 27, Freedom of Movement, art. 12, ¶ 18, U.N. Doc. CCPR/C/21/Rev.1/Add.9 (Nov. 1, 1999); *see* Adina Ponta, *Human Rights Law in the Time of Coronavirus*, 24 AM. SOC'Y INT'L L.: INSIGHT 5 (Apr. 20, 20220), https://www.asil.org/insights/volume/24/issue/5/human-rights-law-time-coronavirus (examining derogations under the ICCPR and limitations on rights under the ICESCR).
[61] *Philippines Mine Standoff, supra* note 46.
[62] *Id.*
[63] *See* Committee of Experts, *Committee of Experts Urges the Incorporation of the Gender Perspective in the Measures Taken to Mitigate COVID-19 and the Strengthening of Actions for the Prevention and Care of Gender-based Violence*, ORG. AM. STATES MESECVI (Mar. 18, 2020), https://mailchi.mp/dist/communiquecovid-19-and-the-prevention-of-gender-based-violence?e=148d9c4077 (listing factors that contribute to increased violence against women and girls and providing measures States can implement to prevent this type of violence).
[64] *Id.*

increased by twenty-five percent since the March 20, 2020 lockdown began.[65] In Cyprus and Singapore, help lines have registered an increase of respectively thirty percent and thirty-five percent.[66] In France, there has been a spike of thirty percent in cases involving domestic violence against women since the March 17, 2020 lockdown.[67] In South Africa, police statistics indicate that "they received 460 calls a day to their gender-based violence hotline in the first five days of the lockdown alone, nearly double from the weeks prior."[68] These statistics prompted Ndileka Mandela, Nelson Mandela's grand-daughter, to use social media to let women stuck at home with abusers know that "they [were] not alone, and to encourage them to call police hotlines for help."[69]

Lockdowns can also exacerbate instances of gender-based violence against women and girls by men other than those who are within the family circle, thereby aggravating women and girls' objectification and dehumanization. What happen to Juliet M., a sixteen-year-old Kenyan girl, illustrates this point.[70] For four days, Juliet was kidnapped, held in captivity, and sexually abused by a man.[71] The perpetrator reportedly explained that "he kidnapped [Juliet] because he needed female company to get through the government-imposed COVID-19 lockdown."[72] Neighbors rescued Juliet and sheltered her in a safe house in Nairobi.[73]

Gender-based violence against women (GBV) is a form of discrimination against women and girls prohibited under Article 1 of the Women Convention to which all the above States are parties. [74] As the Committee on the Elimination of Discrimination against Women (CEDAW)[75] has pointed out, GBV is violence "directed against a woman [or a girl] because she is a woman [or a girl] or

---

[65] *Infographic: The Shadow Pandemic-Violence against Women and Girls and COVID-19*, U.N. WOMEN (Apr. 6, 2020), https://www.unwomen.org/en/digital-library/multimedia/2020/4/infographic-covid19-violence-against-women-and-girls.
[66] *Id.*
[67] *Id.*
[68] Kim Harrisberg, *Mandela's Granddaughter Ndileka Uses Social Media during Lockdown to Help Abused Women*, REUTERS (Apr. 23, 2020), https://www.reuters.com/article/us-health-coronavirus-safrica-women-trfn/mandelas-granddaughter-ndileka-uses-social-media-during-lockdown-to-help-abused-women-idUSKCN2251W6.
[69] *Id.*
[70] Agnes Odhiambo, *Tackling Kenya's Domestic Violence Amid COVID-19 Crisis*, HUM. RTS. WATCH (Apr. 8, 2020), https://www.hrw.org/news/2020/04/08/tackling-kenyas-domestic-violence-amid-covid-19-crisis#.
[71] *Id.*
[72] *Id.*
[73] *Id.*
[74] Committee on the Elimination of Discrimination against Women, *General Recommendation No. 35, Gender-based Violence against Women, Updating General Recommendation No. 19*, 67th sess., U.N. Doc. CEDAW/C/GR/35, ¶ 1 (July 26, 2017); United Nations Convention on the Elimination of All Forms of Discrimination against Women, art. 1, *opened for signature* Dec. 18, 1979, 1249 U.N.T.S. 13 (1980) [hereinafter Women Convention]; s*ee also Convention on the Elimination of All Forms of Discrimination against Women*, U.N. TREATY COLLECTION, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4 (last visited July 13, 2020) (listing the countries that are members of the Convention).
[75] *See generally* Andrew Byrnes, *The Committee on the Elimination of Discrimination against Women*, WOMEN'S HUM. RTS.: CEDAW INT'L, REGIONAL NAT'L L. 27 (Anne Hellum & Henriette Sinding Aase eds. 2013) (discussing how CEDAW functions and its potential added value).

that affects women [and girls] disproportionately."[76] Gender-based violence prevents women and girls from achieving substantive equality and enjoying human rights and fundamental freedoms set out in the Women Convention. These rights and freedoms include primarily the right to a life free from gender-based violence;[77] the rights to life, health, and liberty; freedom from torture;[78] and freedom of movement.[79] What happened to Juliet, specifically the fact that she was kidnapped and held captive for four days, is a clear example of how being subjected to gender-based violence may cause women and girls to experience violations of the right to liberty meant as "freedom from confinement of the body."[80] Juliet's right to be free from torture has been violated too. Torture, for the purposes of human rights law, is treatment that inflicts severe physical and mental suffering for a certain purpose. [81] Purposes include extracting information and any reason based on discrimination of any kind.[82] The perpetrator can be a state official[83] or a private actor.[84] Juliet's right to be free from torture is undoubtedly at stake. She was subjected to protracted sexual abuse inflicting severe physical and mental suffering because, owing to her gender, the perpetrator thought he could dispose of her as his individual property.

The CEDAW has specified in its latest guidance note on COVID-19 that States Parties to the Women Convention have to protect women and girls from gender-based violence during the pandemic. Given that all the countries considered in this Section are parties to the Women Convention, these countries must act with due diligence to prevent and protect "women from, and

---

[76] Committee on the Elimination of Discrimination against Women, *supra* note 74; *see also* Committee on the Elimination of Discrimination against Women, *General Recommendation No. 19, Violence against Women,* 11th sess., U.N. Doc. CEDAW/C/GR/19, ¶ 6 (1992).

[77] The Committee on the Elimination of Discrimination against Women has derived this right from the prohibition of gender-based violence against women implied in Article 1 of the Women Convention. Committee on the Elimination of Discrimination against Women, *supra* note 74, ¶ 15.

[78] *Id*. *See* Juan E. Mendez, *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading, Treatment or Punishment*, U.N. Doc. A/HRC/31/57, ¶ 51 (Jan. 5, 2016) (maintaining that gender-based violence, including rape and other forms of sexual violence, amounts to torture); *see also* Committee Against Torture, General Comment No.2, Implementation of Article 2 by State Parties, ¶ 18, U.N. Doc. CAT/C/GC/2 (Jan. 24, 2008), [hereinafter Committee Against Torture].

[79] Committee on the Elimination of Discrimination against Women, *supra* note 74, ¶ 15.

[80] Human Rights Committee, General Comment No. 35, Liberty and Security of Persons, art. 9, ¶ 3, U.N. Doc. CCPR/C/GC/35 (Dec. 16, 2014). *See also* Odhiambo, *supra* note 70 (describing the kidnap of Juliet).

[81] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 1, *opened for signing* Dec. 10, 1984, 1465 U.N.T.S. 85, 113 (1988) ("For the purposes of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.").

[82] *Id.*

[83] *Id.*

[84] *See* Mendez, *supra* note 78 (noting that State authorities have to exercise due diligence to investigate, prosecute and punish private actors); *see also* Committee Against Torture, *supra* note 78 (describing how States that fail to exercise due diligence are considered complicit or otherwise responsible for consenting to or acquiescing in impermissible acts of torture by non-State actors).

hold perpetrators accountable for, gender-based violence."[85] These countries should make sure that women and girls who have been subjected to, or are at risk of, GBV have effective access to justice, in particular to protection orders, medical and psycho-social assistance, shelters, and rehabilitation programs.[86] Moreover, national response plans to COVID-19 should prioritize "availability of safe shelters, hotlines[,] and remote psychological counselling services and inclusive and accessible specialised and effective security systems"[87] to avoid exacerbating women and girls' exposure to violence during quarantine and lockdowns.[88] Where reservations to the Women Convention hamper operationalization of the above measures, reserving States should withdraw them promptly.[89]

III. Conclusions

The challenges posed by government management of the COVID-19 pandemic highlight the importance of applying a rights-based approach to the pandemic response. Implementing the right to receive accurate information about the pandemic, implied in Article 12 of the ICESCR, and facilitating universal access to healthcare in compliance with Article 26 of the ICCPR, are essential steps to contain and respond to the pandemic. Through guaranteeing non-discriminatory enjoyment of the rights to health and life, in pursuance of the CRPD, governments can ensure that they do not overlook the health needs of persons with disabilities, a group who is historically marginalized and at a higher risk of contracting COVID-19. Governments must give these persons priority consideration and adopt measures specifically tailored to their predicament. By exercising civil rights under the ICCPR, Indigenous leaders can hold governments accountable when the governments take advantage of the COVID-19 emergency to deprive Indigenous communities of their right to preserve and enjoy their way of life. The rights-based approach also better equips governments to prevent and tackle GBV during pandemics by requiring them to prioritize protecting against this egregious form of discrimination against women.

The rights-based approach renders management of the pandemic more participatory, inclusive, fair, predicated upon the rule of law, and, hence, more effective. This approach may also create, given the long-term repercussions of the pandemic, the opportunity for States to renew efforts to

---

[85] Committee on the Elimination of Discrimination against Women, *Guidance Note on the Women Convention and COVID-19,* U.N. HUM. RTS. OFFICE HIGH COMM'R., ¶ 3, https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=INT/CEDAW/STA/9156&Lang=en (last visited Aug. 18, 2020).
[86] *Id.*
[87] *Id.*
[88] *Id.*
[89] Singapore entered a reservation to Article 2(e) of the Women Convention, requiring elimination of discrimination against women by non-State actors, that may hamper efforts to tackle GBV during the COVID-19 pandemic. *See Singapore Reservations to the Convention on the Elimination of All Forms of Discrimination against Women*, *Status of Ratification Interactive Dashboard,* U.N. HUM. RTS. OFFICE HIGH COMM'R, https://indicators.ohchr.org/ (select CEDAW under "Select a Treaty", and follow "Singapore" hyperlink under "Countries") ("In the context of Singapore's multiracial and multi-religious society and the need to respect the freedom of minorities to practice their religious and personal laws, the Republic of Singapore reserves the right not to apply the provisions of Article 2, paragraphs (a) to (f), […] where compliance with these provisions would be contrary to their religious or personal laws.").

realize international rights "to lay the foundation for achieving the ideal enshrined in the Universal Declaration of Human Rights of . . . a world of free human beings enjoying 'freedom from fear and want.'"[90]

[90] *Statement on the Coronavirus Disease, supra* note 2, at ¶ 25. *See* Kenneth Roth, *We Can Beat the Virus Only by Protecting Human Rights*, WASH. POST (May 6, 2020), https://www.washingtonpost.com/opinions/2020/05/06/we-can-beat-virus-only-by-protecting-human-rights/ (analyzing a rights-based approach to pandemic response).

States of Emergency and Human Rights During a Pandemic: A Hungarian Case Study

Megan Cox[*]

[*] Megan Cox is a dual-degree student at American University concurrently earning her law degree from the Washington College of Law and her master's degree in international affairs from the School of International Service. Her career focus is on post-conflict transitional justice and international human rights and humanitarian law.

Late in the day on March 11, 2020, the Hungarian government issued Decree no. 40/2020, declaring a "state of danger"[1] in the growing coronavirus pandemic.[2] Soon after, on March 20, the Hungarian government submitted Bill T/9790[3] to Parliament, seeking parliamentary authorization to extend the effect of government decrees beyond the limits prescribed in the Fundamental Law — essentially, government decrees could be executed without parliamentary control under the pretext of public health protection. By March 30, the governing Fidesz party secured the requisite two-thirds majority of Parliament to approve the bill.[4] The law entered into force immediately, and it faced extreme international criticism.[5]

This Article will offer a brief background on the impact of COVID-19 in Hungary, the characteristics of the "coronavirus bill," T/9790, and an overview of how international human rights law deals with states of emergency. This Article will then analyze the provisions of T/9790 against international human rights law obligations as well as against Hungary's Constitution by addressing the specific rights of freedom of expression, freedom of the press, and right to a fair trial. This Article considers whether, under both international treaties and the Constitution, Hungary has met its obligations to protect fundamental human rights during a state of emergency by enforcing T/9790.

In June of 2020, the total number of confirmed coronavirus cases in Hungary stood at 4,027, with 2,391 recoveries and 551 deaths.[6] On March 11, the beginning of the state of danger, there was just one confirmed case.[7] Hungary found itself in the middle of the pack of states hit by COVID-19, trailing behind most Western European countries in its case count.[8]

While facing fewer cases compared to neighboring European countries, Prime Minister Viktor Orbán has taken the pandemic as an opportunity to consolidate government power indefinitely under the guise of a state of emergency. Orbán, a founding member of the anticommunist Fidesz party, was re-elected as prime minister in 2010.[9] A self-described illiberal leader known for anti-migrant rhetoric and severe economic austerity measures, Orbán has faced accusations of

[1] The Hungarian Constitution, known as the Fundamental Law, refers to a state of emergency as a "state of danger." Magyarország Alaptörvénye [hereinafter "M.A."], 53. cikk (Fundamental Law, art. 53).
[2] 40/2020. (III. 11.) Korm. r. a Veszélyhelyzet Megállapításáról (Government Decree No. 40/2020 (III. 11.) on the Declaration of a State of Danger).
[3] 2020. évi T/9790. törvényjavaslat a Koronavírus Elleni Védekezésről (Bill T/9790 of 2020 on Protection Against Coronavirus) [hereinafter "T/9790"]. States of danger are only effective for fifteen days unless extended for another fifteen days by a two-thirds parliamentary vote.
[4] Amnesty International, *Hungary: Government Must Not Use Extraordinary Power to Roll Back Human Rights Amid COVID-19 Emergency*, Public Statement (March 31, 2020), https://www.amnestyusa.org/wp-content/uploads/2020/03/EUR-27-2046-2020-Amnesty-International-Public-statement-Hungary-COVID19-bill-grants-the-government-extraordinary-power.pdf.
[5] 2020. évi XII. törvény a Koronavírus Elszigetelése (Act XII of 2020 on Containment of Coronavirus).
[6] World Health Organization: Coronavirus Disease (COVID-19) Dashboard, Hungary, https://covid19.who.int/region/euro/country/hu (last visited Jun 14, 2020, 1:57 PM).
[7] *Id*.
[8] *Id*.
[9] The Editors of Encyclopedia Britannica, *Viktor Orbán*, BRITANNICA, https://www.britannica.com/biography/Viktor-Orban (last visited July 22, 2020).

authoritarianism from European leaders for a decade.[10] Bill T/9790 grants him unchecked power to silence dissenting voices, especially in the media, and restrict the fundamental human rights of freedom of expression, freedom of the press, and the right to a fair trial, which international law protects.

T/9790, or the Bill on Protection Against the Coronavirus, absolves the Hungarian government from parliamentary scrutiny during the declared state of emergency, effectively widening the government's power to rule by decree.[11] Neither the bill nor the decree declaring the state of danger has a defined end date, known as a sunset provision.[12] Arguably more concerning, the bill enacts two new crimes related to the COVID-19 crisis. The first provision, amending the Hungarian Criminal Code, applies the crime of imparting or conveying false information "with a reckless disregard for its truth or falsity"[13] to acts that "obstruct or frustrate" the successful protection of the public or might incite the public to action during the state of danger.[14] This crime could be punished by up to five years in prison.[15] The second provision states that any person who interferes with quarantine enforcement may be sentenced to up to three years in prison, five years if such an act is committed by a group, and eight years if anyone dies as a result of quarantine interference.[16] The bill does not elaborate on what defines false information, quarantine interference, or the successful protection of the public, leaving law enforcement broad discretion on how to apply T/9790. The bill also does not discuss any investigation or arrest meters, any rights of those suspected of violating the bill, or how the bill's enforcement will not tread on the internationally protected rights of freedom of expression, the press, or right to a fair trial.

Further, the bill allows the government to suspend the application of any law beyond the specific regulations listed in Act CXXVIII of 2011, the Management of Natural Disasters.[17] The Act was intended to apply to forces of nature, but its language easily applies to national health crises.[18] The Act lists specific rights that the government can suspend during a natural disaster, including the right to assemble in public, the right to travel, the right to property, and the right to education.[19] T/9790 allows for the erosion of more rights during this state of danger and places Hungary's

---

[10] *Id*.
[11] T/9790 § 2; *Hungary: Government Must Not Use Extraordinary Power to Roll Back Human Rights Amid COVID-19 Emergency*, AMNESTY INT'L (Mar. 31, 2020), https://www.amnesty.org/download/Documents/EUR2720462020ENGLISH.PDF (stating that T/9790 authorizes the Hungarian government to rule by decree with no clear cut-off date).
[12] *Id.* §§ 3, 8.
[13] 2012. évi C. torvény a Büntető Törvénykönyv, 337. cikk (Act C of 2012 on the Criminal Code, Article 337).
[14] T/9790 §§ 10(1), 10(2); Akos Keller-Alant, *Hungarian Coronavirus Bill Will Have "Chilling Effect" on Media*, BALKANINSIGHT (Mar. 26, 2020), https://balkaninsight.com/2020/03/26/hungarian-coronavirus-bill-will-have-chilling-effect-on-media/ (reporting that T/9790 gives the Hungarian government authority to imprison anyone for spreading misinformation that obstructs efforts to combat the virus).
[15] T/9790 § 10(2).
[16] *Id*. § 10(1).
[17] T/9790 § (2)(1); 2011. évi CXXVIII. torvény a Katasztrófavédelemről és a Hozzá Kapcsolódó Egyes Törvények Módosításáról, 24. alfejezet (Act CXXVIII of 2011 on Disaster Protection and Amending Certain Related Laws, Subchapter 24).
[18] Act CXXVIII of 2011 on Disaster Protection and Amending Certain Related Laws, Subchapter 24.
[19] *See id.*

already-notorious human rights record into further turmoil; in discussing the new criminal laws, the bill's vague language and its broad scope gives the government unchecked ability to restrict the rights of individuals and groups critical of the government.

The Hungarian Constitution, known as the Fundamental Law, protects many of the rights threatened by T/9790, including freedom of expression and freedom of the press.[20] The Fundamental Law, like ninety percent of the world's constitutions, contains a provision on executing a state of emergency.[21] Article 53 of the Fundamental Law asserts that the government has a right to rule by decree in a "state of danger," a special legal order that allows the government to introduce extraordinary measures by decree and suspend certain laws in order to resolve the emergency.[22] To guard against power vacuums, the Fundamental Law prescribes a fifteen-day effective period for orders by decree during a state of danger, after which only a parliamentary mandate can allow extensions.[23] All emergency decrees are to expire once the crisis and the attendant state of danger are over.[24] T/9790 bypasses these legal safeguards altogether by foregoing a sunset clause or any expiration measures. Under the Fundamental Law, Parliament must still maintain constitutional oversight and fulfill its normal functions during a special legal order,[25] and any members of Parliament may initiate a constitutional review procedure by the Constitutional Court — a special court created solely to protect the rule of law, constitutional integrity, and the balance of power.[26] In theory, Parliament and the Constitutional Court should act as counterbalances to the government during states of danger, in which the central government has extreme powers. This system of checks-and-balances is unlikely to yield results, given Orbán's tightening grasp on authoritarian-like command and that Parliament alone elects the members of the Constitutional Court.[27] As one journalist noted:

> the [C]onstitutional [C]ourt could theoretically overrule the decisions implemented during the state of emergency, but given that its rights have been curbed and it has been stuffed with pro-government loyalists in recent years, we cannot expect that it will serve as an effective counterweight to the cabinet's power. Likewise, although the parliament could officially terminate the state of emergency, it won't. Orbán's Fidesz-KDNP has a comfortable and loyal majority; there has been not a single case in the past 10 years when Fidesz MPs have not supported a governmental decision.[28]

---

[20] MAGYARORSZÁG ALAPTÖRVÉNYE, THE FUNDAMENTAL LAW OF HUNGARY, ALAPTÖRVÉNY.
[21] M.A., *supra* note 1; Christain Bjørnskov & Stefan Voigt, *The Architecture of Emergency Constitutions*, 16 INT'L J. CONST. L. 101, 101 (2018).
[22] MAGYARORSZÁG ALAPTÖRVÉNYE, THE FUNDAMENTAL LAW OF HUNGARY, ALAPTÖRVÉNY.
[23] *Id*.
[24] *Id*.
[25] *Id*.
[26] *Id*.; EUR. L. INST., *The Constitutional Court of Hungary*, https://www.europeanlawinstitute.eu/membership/institutional-members/the-constitutional-court-of-hungary/ (last visited June 14, 2020).
[27] EUR. L. INST., *supra* note 26.
[28] Péter Krekó, *The World Must Not Let Viktor Orbán Get Away with His Pandemic Power-Grab,* THE GUARDIAN (April 1, 2020), https://www.theguardian.com/commentisfree/2020/apr/01/viktor-orban-pandemic-power-grab-hungary.

While the Constitutional Court may offer little hope of enforcing the Fundamental Law's provisions, the Fundamental Law explicitly enumerates some non-derogable rights. Article 54 lists two groups of rights not subject to derogation under a state of danger.[29] The first group protects the right to life and human dignity, preserving life at the point of conception.[30] The second group protects against torture, inhuman and degrading treatment, enslavement, human trafficking, non-consensual scientific experimentation, selling human body parts, eugenics, and human cloning.[31] The Fundamental Law enumerates other rights considered essential in international law, but none of those are protected as non-derogable rights under Article 54. These include freedom of the press,[32] freedom of expression,[33] freedom to peacefully gather,[34] and freedom to peacefully join organizations.[35]

Hungary has an obligation to protect these non-derogable rights under international law. International law — through conventions, treaties, and customary law — protects these rights as fundamental to the preservation of human dignity.[36] Orbán has implemented T/9790 as a simple pretext, using the threat of a pandemic to justify the careful erosion of human rights, ultimately securing unchecked governmental control. Under neither international law nor its own constitution has Hungary adequately balanced its dual responsibilities of protecting public health and safeguarding human rights by implementing T/9790. International law prescribes the proper method for invoking a state of emergency and further protects inalienable rights from derogation under such state.[37] T/9790, with its ambiguous directives and sweeping criminal consequences, deviates severely from both establishing a proper state of emergency and protecting human rights during its state of danger.

Three principal elements unify nearly all international law regarding the declaration of states of emergency that require a derogation from certain rights: necessity, proportionality, and duration.[38] First, it must be necessary to restrict certain rights given the nature of the emergency. Article 15 of the European Convention on Human Rights stipulates that Hungary may take some measures to curtail certain human rights obligations during a "public emergency threatening the life of the nation," but rights derogations must not exceed "the extent strictly required by the exigencies of the situation" and must also comply with Hungary's other international human rights obligations.[39] For a state facing relatively small numbers of infection and a history of ruling by decree,

[29] Magyarország Alaptörvénye, THE FUNDAMENTAL LAW OF HUNGARY, ALAPTÖRVÉNY.
[30] *Id.*
[31] *Id.*
[32] *Id.*
[33] *Id.*
[34] *Id.*
[35] *Id.*
[36] International Covenant on Civil and Political Rights [hereinafter "ICCPR"] arts. 4(2), 8, 11, 15, 18, Dec. 16, 1966, 999 U.N.T.S. 171; European Convention on Human Rights [hereinafter "ECHR"] art. 15(2), Nov. 4, 1950, 213 U.N.T.S. 221.
[37] *See*, *e.g.*, ICCPR, *supra* note 36, at 174; ECHR, *supra* note 36, at 232.
[38] U.N. Human Rights Committee, CCPR General Comment No. 29: Article 4: Derogations during a State of Emergency, ¶ 4, U.N. Doc. CCPR/C/21/Rev.1/Add. 11 (Aug. 31, 2001).
[39] ECHR Art. 15(1); *see also* European Social Charter, art. 30, October 18, 1961, E.T.S. No. 035; European Social Charter (revised), Part V, art. F, March 5, 1996, E.T.S. No. 163.

criminalizing the freedom of expression and the freedom of the press is an extreme and undue response clearly invoked to further political agenda. As mandated by the Parliamentary Assembly of the Council of Europe, Hungary must periodically review whether the public health crisis continues to necessitate the declared state of danger, and whether the strict measures in place to contain the virus's spread can be loosened or withdrawn completely.[40] The process of determining the necessity of rights derogations during an ongoing emergency should include meaningful scrutiny by multiple branches of government.[41]

Second, the derogation of rights must be proportional to the needs of the emergency situation.[42] Similarly, the erosion of such basic human rights is disproportionate to the needs of the emergency in Hungary. António Guterres, the Secretary General of the United Nations, asserted in a recent speech that "no one during this pandemic can take the place of the media to transmit information and analysis to the public, and to counter rumors and misrepresentation."[43] The media itself is necessary to fight the pandemic — limiting its reach is incongruent with the stated mission of T/9790.[44] Finally, the principle of duration holds that a state of emergency should only continue so long as the emergency itself persists. As stated in ICCPR General Comment No. 29, "the restoration of a state of normalcy where full respect for the Covenant can again be secured must be the *predominant objective* of a State party derogating from the Covenant."[45] T/9790's lack of durational limitations contradict the standards of international law as well as Hungary's constitutional requirement.[46] Whenever a state of emergency lacks one of these essential elements in international law, international legal enforcement bodies must judge the actions of the government in question in light of its ordinary treaty obligations rather than through the special lens of a legitimate state of emergency. Governments cannot escape treaty obligations at will; the right to derogate is circumscribed by several conditions: "[f]undamental safeguards of the rule of law, in particular legality, effective parliamentary oversight, independent judicial control and effective domestic remedies, must be maintained during a state of emergency."[47]

Hungary has already acted under T/9790 and deprived individuals of their fundamental human rights. In April, the Hungarian public news broadcaster Híradó, a notoriously pro-government program, debuted a "fake news monitor" to disprove false information about the pandemic.[48] Many

---

[40] Eur. Parl. Ass., *State of Emergency: Proportionality Issues Concerning Derogations Under Article 15 of the European Convention on Human Rights*, ¶ 19.4, 2018 Ordinary Sess. (second sitting), Resolution 2209 (2018) [hereinafter "PACE"].
[41] *Id.* ¶ 19.6.
[42] *See, e.g.*, PACE Resolution 2209, *supra* note 40.
[43] U.N. Secretary General, Remarks on Press Freedom and Tackling Disinformation in the COVID-19 Context (May 4, 2020), https://www.un.org/sg/en/content/sg/statement/2020-05-04/secretary-generals-remarks-high-level-dialogue-press-freedom-and-tackling-disinformation-the-covid-19-context-bilingual-delivered-scroll-down-for-english-and-french.
[44] *Id*. ("Journalists and media workers of all kinds are crucial to helping us make informed decisions. In a pandemic, those decisions can save lives.").
[45] U.N. GAOR, 56th Sess., supp. no. 40 at 202 ¶ 1, U.N. Doc. A/56/40 (July 2001) (emphasis added).
[46] CCPR General Comment No. 29, *supra* note 38; M.A. 53(3).
[47] PACE Resolution 2209, ¶ 3, *supra* note 40.
[48] Justin Spike, *COVID Pandemic Adds to Pressure on Hungarian Media*, VOA NEWS (June 1, 2020), https://www.voanews.com/press-freedom/covid-pandemic-adds-pressure-hungarian-media.

of the issues targeted come from politicians opposing President Orbán or articles by news organizations that are critical of the government. The monitor demonstrates how Hungary has used the legitimate battle against coronavirus misinformation to mask its efforts to label watchdog journalism as "fake news." In May, police used T/9790 to detain two men for "scaremongering" in social media posts that criticized the government. One of the men, Janos Csoka-Szucs, a member of the Hungarian Momentum Party, which opposes President Orbán, was interrogated for several hours while police seized his phone and computer.[49] The growing animus toward non-government-sponsored news outlets is emboldened by T/9790's passage. As one Hungarian media researcher noted, "[t]he legitimate goal [of countering fake news] is being confused with incitement against journalists and opposition politicians, which is terribly dangerous."[50]

These incidents raise serious concerns in international law, which widely condemns any disintegration of the freedom of opinion and expression, the freedom of the press, and the fair application of the rule of law. The freedom of opinion and expression is considered a fundamental right under Article 18 of the ICCPR,[51] Article 15 of the ICESCR,[52] and Article 11 of the European Union Charter of Fundamental Rights,[53] to all of which Hungary is a party.[54] The freedom of the press is also protected under Article 19 of the Universal Declaration of Human Rights, wherein "[e]veryone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers."[55] By criminalizing citizens who voice their own opinions and doubts through social media and journalism, T/9790 clearly infringes on individuals' right to freely express their opinions "without interference," as well as independent news organizations' freedom to "impart information and ideas through any media."[56]

The arbitrary detention of Csoka-Szucs and the threatened detention of independent journalists across Hungary also illustrates derogation from another fundamental principle of international law: adherence to the established tenants of the rule of law during an emergency, including the right to a fair trial.[57] The United Nations Human Rights Committee states in CCPR General Comment 29 that arbitrary detentions, even for brief interrogations, infringe on the right to a fair trial.[58] General

---

[49] Joanna Kakissis, *European Parliament Lawmakers Demand Punishment for Hungary Over Emergency Powers*, NPR (May 14, 2020), https://www.npr.org/sections/coronavirus-live-updates/2020/05/14/855918912/european-parliament-lawmakers-demand-punishment-for-hungary-over-emergency-power.
[50] *Id.*
[51] ICCPR art. 18, *supra* note 36.
[52] International Covenant on Economic, Social and Cultural Rights art. 15, Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter "ICESCR"].
[53] Charter of Fundamental Rights of the European Union, art. 11(1), 2012 O.J. (C 326). [hereinafter "EUCFR"].
[54] *See also* G.A. Res. 217 (III) A, Universal Declaration of Human Rights art. 19 (Dec. 10, 1948) [hereinafter "UDHR"].
[55] *Id.*; *see also* EUCFR art. 11(2), *supra* note 53.
[56] UDHR, *supra* note 54.
[57] Shaun Walker, *Hungarian Journalists Fear Coronavirus Law May Be Used to Jail Them*, THE GUARDIAN (April 3, 2020), https://www.theguardian.com/world/2020/apr/03/hungarian-journalists-fear-coronavirus-law-may-be-used-to-jail-them.
[58] CCPR General Comment No. 29, ¶¶ 11, 16, *supra* note 38.

Comment 24 considers this principle to be customary international law.[59] Additionally, Article 9 of the ICCPR protects against arbitrary arrest and security of person, an obligation that T/9790 fails to meet because its specious new crimes are vaguely-worded and violate other international legal rights.[60] T/9790's language criminalizing the "imparting or conveying [of] false information" that "obstructs or frustrates" the successful protection of the public does little to define how information is deemed false and what is considered an obstruction of the "successful protection" of the public.[61] Further, the provision that criminalizes "interfere[nce] with quarantine enforcement" does not define what constitutes interference and does not elaborate on how such interference could be tied with the death of another person to attain the eight-year prison sentence, considering that the virus has a fourteen-day incubation period and could already have infected the deceased person.[62] The fundamental requirements of the rule of law must be respected during a state of emergency — anyone detained, charged, or imprisoned under T/9790 is wrongly criminalized, as the criminal provisions of the law itself do not meet international standards during a state of emergency.

The international community's response to T/9790 has brought harsh criticism to Orbán's leadership during the pandemic. European Union Parliament lawmakers have demanded official denunciation and punishment for Hungary over this law, with Hungarian members calling to slash Hungary's EU funds.[63] One Hungarian member of the European Parliament, who represents the country's Momentum Party, charged Orbán with using the law as a smokescreen for consolidating authority: "[t]his law is meant to intimidate and silence dissenting voices because the prime minister is scared to lose his power."[64] Civil society in Hungary and around the world have sounded the alarm on the chilling effects of T/9790 on basic freedoms. In a joint statement, the Hungarian Helsinki Committee, Civil Liberties Union, Eötvös Károly Institute, and Amnesty International Hungary condemned the law, calling for domestic and international accountability measures.[65] An online protest letter has garnered 100,000 signatures, and thousands have watched online protests.[66] Other international institutions have criticized T/9790, including the UN Human

[59] Human Rights Comm., CCPR General Comment No. 24: Issues Relating to Reservations Made upon Ratification or Accession to the Covenant or the Optional Protocols thereto, or in Relation to Declarations under Article 41 of the Covenant, ¶ 8, U.N. Doc. CCPR/C/21/Rev.1/Add. 6 (Nov. 4, 1994).
[60] ICCPR art. 9, *supra* note 36; T/9790, *supra* note 3.
[61] T/9790, *supra* note 3.
[62] *Id.*; *Interim Clinical Guidance for Management of Patients with Confirmed Coronavirus Disease (COVID-19)*, Coronavirus Disease 2019 CDC.gov, https://www.cdc.gov/coronavirus/2019-ncov/hcp/clinical-guidance-management-patients.html (updated June 30, 2020).
[63] Joanna Kakissis, NPR, *supra* note 47.
[64] *Id.*
[65] Amnesty International Hungary, Eötvös Károly Institute, Hungarian Civil Liberties Union & Hungarian Helsinki Committee, *Unlimited Power Is Not the Panacea: Assessment of the Proposed Law to Extend the State of Emergency and Its Constitutional Preconditions*, COVID-19, The Hungarian Helsinki Committee (Mar. 23, 2020), https://www.helsinki.hu/en/unlimited-power-is-not-the-panacea/.
[66] *Hungary: Government Must Not Use Extraordinary Power to Roll Back Human Rights Amid COVID-19 Emergency,* AMNESTY INT'L (Mar. 31, 2020), https://www.amnesty.org/download/Documents/EUR27204620 20ENGLISH.PDF.

Rights Commissioner, the Secretary General of the Council of Europe, the Civil Liberties Committee of the European Parliament, Reporters Without Borders, and Human Rights Watch.[67]

Because Hungary has failed to meet the standard for derogation of rights during a state of emergency, treaty bodies should act as prescribed in their respective treaties for addressing aberrant behavior by member states. Moreover, detained Hungarians may bring grievances regarding their unlawful detention, as emphasized in the United Nations Human Rights Committee's General Comment 29 and General Comment 35.[68]

One venue for recourse could be the European Court of Human Rights ("ECtHR"). The ECtHR is empowered to rule on whether Hungary has gone beyond the extent strictly required by the exigencies of the crisis.[69] When determining whether a state has gone beyond what the situation strictly requires, "the Court must give appropriate weight to such relevant factors such as the nature of the rights affected by the derogation, the circumstances leading to, and the duration of, the emergency situation."[70] The ECtHR has also charged domestic courts with the responsibility to carry the same analysis in similar cases, stating that national courts should scrutinize emergency measures by the executive and assess whether the measures taken are proportional to the nature of the threat posed by the emergency.[71]

Because the Hungarian Parliament can no longer check the government's actions, the Constitutional Court must intervene to quickly and constructively assess the constitutionality of any decisions made or individual measures taken pertaining to the state of emergency. Following the recommendations enumerated in the joint statement issued by civil society institutions, the measures to enable the Constitutional Court's intervention should include (1) allowing any members of Parliament or the head of parliamentary groups to initiate a constitutional review process in the Court, and (2) shortening the deadlines by which the Constitutional Court must rule on petitions regarding T/9790 and any related measures.[72] Additionally, the Court must exercise its authority to find that Parliament may only grant an extraordinary legal mandate to the government — such as T/9790 — for a predefined period of time so as to eliminate any threat of renewing a special legal order ad infinitum.

Regardless of the recourse sought by affected Hungarians or concerned treaty bodies, no court or parliamentary body should be satisfied by Hungary's recent attempt to assuage international criticism. Just before midnight on May 26, 2020, Hungary announced plans to revoke T/9790. However, the replacement law would implement nearly identical provisions as T/9790.[73] While

---

[67] *Id.*
[68] Human Rights Comm., CCPR General Comment No. 29: Article 4: States of Emergency, ¶ 16, U.N. Doc. CCPR/C/21/Rev.1/Add. 11 (Aug. 31, 2001); Human Rights Comm., CCPR General Comment No. 35: Article 9: Liberty and Security of Person, ¶ 5, U.N. Doc. CCPR/C/GC/35 (Dec. 16, 2014).
[69] Ireland v. United Kingdom, 25 Eur. Ct. H.R. (ser. A) ¶ 207 (1978).
[70] Brannigan & McBride v. United Kingdom, 258-B Eur. Ct. H.R. (ser. A), ¶ 43 (1993).
[71] A and others v. United Kingdom, 49 Eur. H.R. Rep. 29, ¶¶ 173-–74, 184 (2009).
[72] As permitted under M.A., 24(2)(g). cikk (Fundamental Law, art. 24(2)(g)).
[73] Lydia Gall, *Ending Hungary's State of Emergency Won't End Authoritarianism*, HUM. RTS. WATCH (May 29, 2020), https://www.hrw.org/news/2020/05/29/ending-hungarys-state-emergency-wont-end-authoritarianism.

the government would formally end the state of emergency, the new bill would maintain Prime Minister Orbán's power to rule by decree "for an undefined period of time with minimal judicial and parliamentary scrutiny."[74] In addition to its repetition of T/9790's provisions, the bill would allow the government to declare a "state of medical emergency" via the Chief Medical Officer of the state, a position that is under government control.[75] Such a declaration would, like any state of danger, give the government permission to curtail fundamental rights for six months, renewable indefinitely.[76] Renewal would be entirely up to the government without parliamentary or judicial oversight.[77] As the "little sister"[78] law to T/9790, this bill would enact the same internationally-illegal measures, simply under a different name. As Orbán told an interviewer in 2013, "in a crisis, you don't need governance by institutions."[79] Under T/9790, and with international accountability slow moving, that statement has proved to be true for Hungary during the coronavirus pandemic.

[74] *Id*.
[75] *Id*.
[76] *Id*.
[77] *Id*.
[78] Hungarian Helsinki Committee, Hungarian Civil Liberties Union, Amnesty International Hungary, *Never-Ending Story: Rapid analysis of the Bill on Terminating the State of Danger (T/10747) & the Bill on Transitional Provisions related to the Termination of the State of Danger (T/10748)*, COVID-19, THE HUNGARIAN HELSINKI COMMITTEE (May 27, 2020), https://www.helsinki.hu/en/never-ending-story/.
[79] James Kirchick, *Europe's Other Strongman,* WALL ST. J. (Mar. 22, 2018), at A.17.

From Civil Rights to Human Rights: The Pandemic's Aftermath Requires Environmental and Reproductive Justice Mechanisms to Reinforce Global Public Health

Elena D. Gartner[*]

TABLE OF CONTENTS

Introduction 43

I. There Are Shared Strategic Interests Between Environmental and Reproductive Justice Movements. 44

II. The Reproductive and Environmental Justice Movements Breathe Life into International Environmental Legal Efforts. 46

III. Tackling Global Health, Environmental, and Reproductive Injustice Is Possible Through an International Rights-Based Framework. 47

[*] Elena D. Gartner is a J.D. student at American University Washington College of Law interested in environmental law as it relates to human rights. She has worked with grassroots environmental campaigners in Iowa as well as across the Mekong Region in Southeast Asia. She wants to thank Professor David Hunter for inspiring her to think creatively, interdisciplinarily, and transnationally in his International Environmental Law course, for which this Article was originally written.

Introduction

Environmental law has antiracist work to do. This work requires integrating reproductive justice[1] into environmental advocacy, dissolving mainstream disciplinary distinctions in order to center racial justice in environmental law. Environmental issues — which are essentially issues of public health — are inextricable from race, class, and fundamental rights. In the era of COVID-19, public health is the paramount global concern from the grassroots to the international level, and the growing awareness of linkages between environmental issues, social injustices, and health emergencies could create the political will necessary to push for international legal change that can amplify grassroots campaigns around the world.[2] Thus, the current global political climate presents a window of opportunity for environmental lawyers to work with reproductive justice advocates to advance new international legal levers in order to facilitate future environmental litigation that addresses the multiple dimensions of social inequality. Global mechanisms, like an international agreement on global health and an updated Rio Declaration, should incorporate rights-based environmental and reproductive justice provisions which litigators can refer to in crafting legal arguments on behalf of grassroots clients,

Part I of this Article argues that environmental justice and reproductive justice lawyers share common goals, and Part II shows that the time has arrived for international environmental law to embrace this new framework. Part III proposes an international and intersectional[3] response to public health crises through a rights-based approach.

---

[1] SisterSong Women of Color Reproductive Justice Collective (a network of eighty grassroots organizations) defines reproductive justice as "the human right to maintain personal bodily autonomy, have children, not have children, and parent the children we have in safe and sustainable communities." SISTERSONG, https://www.sistersong.net/reproductive-justice (last visited July 20, 2020).

[2] Madeleine Somerville, *Want to Help Fight Climate Change? Start with Reproductive Rights*, THE GUARDIAN (May 31, 2016), https://www.theguardian.com/lifeandstyle/2016/may/31/climate-change-women-reproductive-rights-birth-control (citing then-Chilean president Michelle Bachelet's remarks at the 2014 UN Climate Summit regarding the vulnerability of women in the event of a global climate crisis, given that women and children are 14 times more vulnerable than men in floods or droughts; women are more likely to die in natural disasters; women are more likely to become caregivers for the sick or wounded; and women have so much more to lose in the event of environmental catastrophe — particularly in the realm of unwanted pregnancies and access to reproductive services); Bailey Borchardt, *Fighting for the Future of Our Planet is Reproductive Justice*, REWIRE.NEWS (Oct. 9, 2019, 1:16 PM), https://rewire.news/article/2019/10/09/climate-change-reproductive-justice/.

[3] Law professor Kimberlé Crenshaw coined the term "intersectionality" over 30 years ago and recently described it as "basically a lens, a prism, for seeing the way in which various forms of inequality often operate together and exacerbate each other." Steinmetz, Katy, *She Coined the Term 'Intersectionality' Over 30 Years Ago. Here's What It Means to Her Today*, TIME (Feb. 20, 2020), https://time.com/5786710/kimberle-crenshaw-intersectionality/. Thus, bringing an intersectional lens to environmental litigation would draw from intersectional feminist approaches and de-center white environmentalist thought throughout the litigation process.

I. There Are Shared Strategic Interests Between Environmental and Reproductive Justice Movements.

Environmental and reproductive justice lawyers share overlapping goals. They both want to stop harmful pollution and stabilize the climate for the well-being of future generations, increase public participation, transparency, access to lawyers, and proper dissemination of data and medical research.[4]

Even prior to COVID-19, advocates from the environmental and reproductive justice[5] fields have called attention to the intersectional relationship between reproductive health and environmental harms.[6] Already, a growing body of scientific data reveals how structural and environmental

[4] *See*, *e.g.*, NYLPI, https://nylpi.org/our-work/ (last visited July 20, 2020) ("NYLPI works to eliminate the unfair burden of environmental hazards borne by low-income communities and communities of color, and to create a more equitable and sustainable city."); EARTHJUSTICE, https://earthjustice.org/ (last visited July 20, 2020) (describing Earthjustice as the "legal backbone for the environmental movement, representing [its] clients free of charge" since 1971 because "the earth needs a good lawyer."); IF/WHEN/HOW, https://www.ifwhenhow.org/ (last visited July 20, 2020) (describing the mission of the organization, which has chapters in law schools across the United States, being to "transform the law and policy landscape through advocacy, support, and organizing so all people have the power to determine if, when, and how to define, create, and sustain families with dignity and to actualize sexual and reproductive wellbeing on their own terms"); Abigail Abrams, '*We Are Grabbing Our Own Microphones': How Advocates of Reproductive Justice Stepped Into the Spotlight*, TIME (Nov. 21, 2019, 7:33 AM), https://time.com/5735432/reproductive-justice-groups/ ("The framework demands consideration of all the ways reproductive health can be affected by other factors, from race, religion or sexual orientation to financial, immigration or disability status to environmental conditions."); Borchardt, *supra* note 2 (discussing how one way to ensure that anyone can raise their families in safe, sustainable communities is "addressing major issues like climate change through a reproductive justice lens . . . ."). Health lawyers have also recognized important lessons from environmental and reproductive justice. Lindsay F. Wiley, *Health Law as Social Justice*, 24 CORNELL J. L. & PUB. POL'Y 47, 53-63 (2014) (encouraging health law to look to the fields of environmental justice and reproductive justice in reimagining the goals and boundaries of the subject).

[5] *See* A. Tianna Scozzaro, *Reproductive Rights and Environmental Justice Are Deeply Connected*, SIERRA CLUB (May 22, 2019), https://www.sierraclub.org/articles/2019/05/reproductive-rights-and-environmental-justice-are-deeply-connected (last visited July 20, 2020) (noting that protecting "access to health care–including comprehensive reproductive health services– is essential to [environmental and social justice] . . . ."); Alice Kurima Newberry, *Why We Can't Have Environmental Justice Without Reproductive Justice*, GREENPEACE (May 31, 2019), https://www.greenpeace.org/usa/envirojusticexreprojustice/ ("Access to abortion and reproductive healthcare is fundamentally tied to environmental justice" because "autonomy and choice to people's bodies [ensures] they are making reproductive decisions without fear of environmental factors."); *If You Really Care about Environmental Justice, You Should Care about Reproductive Justice*, Nat'l Women's Law Center and Law Students for Reprod. Justice, https://nwlc.org/wp-content/uploads/2015/08/FactSheetEnvironmentalJusticeandReproJustice.pdf (last visited July 20, 2020) (discussing reproductive justice as an environmental justice issue because "[b]y endorsing the principles of Reproductive Justice — including the right to bear and raise children in healthy environments — you are advancing [e]nvironmental [j]ustice").

[6] *See*, *e.g.*, Colin Dwyer, *New York City's Latinx Residents Hit Hardest By Coronavirus Deaths*, NPR (Apr. 8, 2020, 1:06 PM), https://www.npr.org/2020/04/08/829726964/new-york-citys-latinx-residents-hit-hardest-by-coronavirus-deaths (discussing the disproportionate impact Coronavirus has had on the Latinx community — which represents twenty-nine percent of New York City's population but thirty-four percent of its COVID-19 deaths — and the Black community — which represents about twenty-four percent of the city's population but almost twenty-eight percent of its known COVID-19 deaths); John Eligon et al., *Black Americans Face Alarming Rates of Coronavirus Infection in Some States*, N.Y. TIMES (Apr. 7, 2020), https://www.nytimes.com/2020/04/07/us/coronavirus-race.html (noting

factors lead to marginalized populations being among those most susceptible to and harmed by COVID-19, such as Black, brown, and Indigenous communities in the United States [7] as well as around the world, such as in the socially excluded populations of Singapore and Peru.[8]

In the United States, infectious diseases like COVID-19 are just one of many health hazards rooted in environmental problems in non-white communities that the law has failed to address. Specifically, Black and brown women have disproportionately suffered the harms of chemical spills, toxic waste, and air pollution due to environmental racism;[9] these harms are compounded

---

that the University of Wisconsin Population Health Institute's analysis of County Health Rankings conducted before Coronavirus determined that "high levels of segregation" is why "white Chicagoans had an average life expectancy of 8.8 years longer than [B]lack residents"); Rebecca Nagle*, Native Americans Being Left Out of US Coronavirus Data and Labelled as "Other"*, THE GUARDIAN (Apr. 24, 2020), https://www.theguardian.com/us-news/2020/apr/24/us-native-americans-left-out-coronavirus-data (discussing the problems with categorizing Native Americans under the "other" label in many of the state health departments' released racial demographic data that analyzes Coronavirus' impact).

[7] A Harvard study found that a small increase in long-term exposure to air pollution leads to a large increase in COVID-19 death rate, and counties that already had high levels of air pollution before COVID-19 have higher death rates. *A National Study on Long-Term Exposure to Air Pollution and COVID-19 Mortality in the United States*, https://projects.iq.harvard.edu/covid-pm. In the United States, nonwhite women make up most of low-income essential workers; 83 percent of healthcare workers who earn less than $30,000 are women, while 50% are nonwhite. Campbell Robertson & Robert Gebeloff, *How Millions of Women Became the Most Essential Workers in America*, N.Y. TIMES (Apr. 18, 2020), https://www.nytimes.com/2020/04/18/us/coronavirus-women-essential-workers.html. Nearly one-third of nursing assistants are Black women. *U.S. Nursing Assistants Employed in Nursing Homes: Key Facts*, https://phinational.org/wp-content/uploads/legacy/phi-nursing-assistants-key-facts.pdf. Black people suffer from higher rates of contracting and dying from COVID-19. Matt Blitz, *Black D.C. Residents Have Been Diagnosed With COVID-19 at Twice the Rate of Their White Peers*, DCIST (Apr. 8, 2020, 1:52 PM), https://dcist.com/story/20/04/08/black-d-c-residents-have-been-diagnosed-with-covid-19-at-twice-the-rate-of-their-white-peers/. According to recent EPA studies, Black communities are exposed to 1.54 times more fine-particle pollution in the air than the overall population, as compared to non-white communities generally — 1.28 time more than overall population — and communities living under the poverty line — 1.35 times more than overall population. Natasha Geiling, *EPA Study Shows Dangerous Air Pollution Overwhelmingly Impacts Communities of Color*, THINKPROGRESS (Feb. 23, 2018, 10:52 AM), https://thinkprogress.org/epa-study-pollution-impacts-communities-of-color-59fe867d560d/. Coal-fired power plants are disproportionately concentrated near communities of color. Brett Israel, *Coal Plants Smother Communities of Color*, SCI. AM. (Nov. 16, 2012), https://www.scientificamerican.com/article/coal-plants-smother-communities-of-color/.

[8] Kirsten Han, *A Perfect Storm for an Outbreak*, WE, THE CITIZENS (Apr. 23, 2020), https://wethecitizens.substack.com/p/wtc-long-read-a-perfect-storm-for; Maria Cervantes, *Peru Indigenous Warn of "Ethnocide by Inaction" as Coronavirus Hits Amazon Tribes*, REUTERS (Apr. 24, 2020, 4:38 PM), https://www.reuters.com/article/us-health-coronavirus-peru-indigenous/peru-indigenous-warn-of-ethnocide-by-inaction-as-coronavirus-hits-amazon-tribes-idUSKCN22639A.

[9] Megan Mayhew Bergman, *"They Chose Us Because We Were Rural and Poor:" When Environmental Racism and Climate Change Collide*, THE GUARDIAN (Mar. 8, 2019), https://www.theguardian.com/environment/2019/mar/08/climate-changed-racism-environment-south; *Environmental Racism in America: An Overview of the Environmental Justice Movement and the Role of Race in Environmental Policies*, GOLDMAN ENVTL. PRIZE (last visited July 20, 2020), https://www.goldmanprize.org/blog/environmental-racism-in-america-an-overview-of-the-environmental-justice-movement-and-the-role-of-race-in-environmental-policies/; Vann R. Newkirk II, *Trump's EPA Concludes Environmental Racism Is Real*, THE ATLANTIC (Feb. 28, 2018),

by other factors such as interpersonal prejudice, lack of legal representation, and poorly functioning or nonexistent legal protections.[10]

II. The Reproductive and Environmental Justice Movements Breathe Life into International Environmental Legal Efforts.

The environmental concept of "sustainable development," while historically instrumental in bringing about a shift in understanding,[11] has long been criticized for lacking inclusivity — in contrast, grassroots movements based in the global south or led by communities of color have been using the terms "environmental justice" and "reproductive justice."[12] While environmental lawyers have historically operated in institutional silos led by predominantly white and privileged lawyers based in Europe and North America, a new approach is needed given persistent growing global inequalities.

Thus, international environmental law needs an update in order to align with grassroots movements and meet the needs of this current moment. Historically, public support has fueled the development of this area of law: environmental law rode a wave of momentum in the 1970s in the United States and international environmental law experienced a similar groundswell of support through the 90s and 2000s.[13] But recently, the Trump Administration's dismantling of domestic legal protections

---

https://www.theatlantic.com/politics/archive/2018/02/the-trump-administration-finds-that-environmental-racism-is-real/554315/.

[10] *Intersections in an American Indian Community Impacted by Environmental Contamination*, https://www.tandfonline.com/doi/abs/10.1080/23251042.2017.1381898?tab=permissions&scroll=top; Kristen Zimmerman & Vera Miao, *Fertile Ground: Women Organizing at the Intersection of Environmental Justice and Reproductive Justice*, https://www.racialequitytools.org/resourcefiles/zimmerman.pdf.

[11] David Hunter et al., INT'L ENVTL. L. 169 (Foundation Press, 5th ed. 2015) (discussing sustainable development after the UN Conference on Environment and Development).

[12] *See* Samantha Willis, *Black Women Are Leading the Way in Environmental Justice*, ESSENCE (Jan. 11, 2019), https://www.essence.com/news/black-women-are-leading-the-way-in-environmental-justice/ ("what began in 1982 as a small group of Black men and women protesting the construction of a hazardous-waste center in their Warren County, North Carolina, community is now widely regarded as the catalyst of the environmental-justice movement"); *see also* Borchardt, *supra* note 2 ("[B]y addressing major issues like climate change through a reproductive justice lens, our solutions can be all-encompassing."). These movements are transnational and deeply understand the interrelationships between environmental issues and reproductive justice. *See e.g. Realizing Sexual and Reproductive Justice* (last visited August 14, 2020), http://resurj.org/pages/about-us ("Our members [are feminist activists] . . . working for sexual and reproductive justice through national, regional, and international advocacy and movement building strategies in Africa, Asia, Pacific, Latin America, Europe, and the Middle East . . . [and] are engaged in different movements . . . for example, women, youth, human rights, HIV, development, economic ecological and environmental justice. . .").

[13] S*ee* Edith Brown Weiss, *The Evolution of International Environmental Law,* 54 JAPANESE Y.B. INT'L L. 1, 4, 10 (2011) (explaining that the 1972 UN Stockholm Conference on the Human Environment marked the beginning of the development of the basic framework for international environmental law, and the 1992 UN Rio Conference on Environment and Development kicked off a period of nearly two decades of maturation of international environmental law); Brett Milano, *The Evolution of American Environmental Law from Nixon to Trump,* HARV. L. TODAY (Nov. 7, 2017), https://today.law.harvard.edu/evolution-american-environmental-law-nixon-trump/ ("[T]he environmental movement barely existed before 1970, the year of the first Earth Day. The impetus was a string of

has captivated the public gaze and caused U.S. lawyers to focus their advocacy inwards. Yet, the COVID-19 pandemic brings into sharp focus how international environmental health issues intersect with existing inequalities to devastating effect, highlighting the need for stronger international coordination and safeguards.

III. Tackling Global Health, Environmental, and Reproductive Injustice Is Possible Through an International Rights-Based Framework.

The pandemic reveals the gulf in life experiences between those who are protected by environmental laws and those who the law systematically leaves behind. The growing body of scientific evidence that links environmental pollution with issues of women's health, fertility, and morbidity[14] will aid in making legal arguments for redressability and damages for environmental harms. The technical expertise of environmental law[15] can complement efforts to improve public health infrastructure for women. Doing so would allow lawyers to build cases that push for changes in international law to address this gulf. For instance, lawyers experienced with environmental torts cases that require a high bar for medical evidence to prove causation[16] can contribute to reproductive justice arguments that relate to broader environmental health problems such as air pollution.

Amidst the COVID-19 pandemic, countries may be more willing to enter into a binding treaty that provides for tort-like liability framed around public health, but that explicitly addresses race, gender, and class. Environmental and reproductive justice lawyers should advocate for new international legal instruments to complement existing advocacy at the grassroots level and growing public awareness of the ties between legal disempowerment and uneven public health outcomes. For example, imagine an international public health treaty that closes the legal gaps that created the structural conditions for the pandemic's disproportionate impact on communities of

---

environmental disasters: The Cuyahoga River catching fire, the Santa Barbara oil spill, the near-death of Lake Erie and the near-extinction of the bald eagle.").

[14] Am. Acad. of Pediatrics Council on Envtl. Health, *Toxic or Environmental Preconceptional and Prenatal Exposures*, PEDIATRIC ENVIRONMENTAL HEALTH, 4th ed., Etzel RA (Ed) (2019); Aolin Wang, Amy Padula, Marina Sirota, & Tracey J. Woodruff, *Environmental Influences on Reproductive Health: the Importance of Chemical Exposures*, 106 FERTILITY & STERILITY 905 (2016); *Reproductive and Birth Outcomes and the Environment*, CTRS. FOR DISEASE CONTROL AND PREVENTION, https://ephtracking.cdc.gov/showRbBirthOutcomeEnv.action (last updated Nov. 8, 2017).

[15] *Chapter 1: An Overview of Environmental Law*, YALE LAW SCHOOL (2018), *available at* https://law.yale.edu/sites/default/files/area/department/cdo/document/cdo_environmental_law_public.pdf ("environmental law practice often requires extensive knowledge of administrative law and aspects of tort law, property, constitutional law, and land use law").

[16] *See*, *e.g*. *Sterling v. Velsicol Chemical Corp*., 1988 U.S. App. LEXIS 6957, at *58 (6th Cir. 1988) (finding that calculations of plaintiffs' damages on increased susceptibility to cancer and other diseases after drinking contaminated water needed to be based upon a *reasonable medical certainty* that the future disease or condition would occur) (emphasis added).

color. Such a mechanism would create institutional space and financial resources for lawyers to provide services to the most vulnerable communities affected by environmental pollution, and perhaps the associated harms of climate change. This instrument would create legal hooks for domestic litigation and an impetus for national governments to enact legislation that implements the treaty and strengthens domestic law. Litigators could bring cases complaining of tangible and localized harms to their environmental and reproductive rights, citing the treaty and any implementing legislation, for damages or injunctive relief.

To do this, governments should negotiate a mechanism that utilizes a rights-based framework and strengthen the ones that already exist. A rights-based approach has already proven useful in the realm of international environmental law, particularly in the Inter-American system.[17] Human rights instruments such as the Convention on the Elimination of Discrimination against Women[18] and the Escazú Agreement on Environment and Human Rights,[19] will be instructive in helping lawyers craft provisions into new international law. Additionally, the upcoming 50th anniversary of the Stockholm Convention in 2022 provides an opportunity for international environmental lawyers to push for a binding Rio Declaration that includes similar provisions.[20] For now, environmental lawyers must play the right cards in the immediate aftermath of COVID-19 — including reaching out to and strengthening bonds with reproductive justice lawyers. The public health challenges facing society are intertwined and our response must be similarly unified.

[17] *See* David Hunter et al., INT'L ENVTL. L. 1323 (Foundation Press, 5th ed. 2015) (discussing the interrelationship between human rights and the environment in international law).
[18] Convention on the Elimination of All Forms of Discrimination against Women, Dec. 18, 1979, 1249 U.N.T.S. 13.
[19] Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean, (Escazú), art. 1, Mar. 4, 2018, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-18&chapter=27&clang=_en
[20] Declaration of the United Nations Conference on the Human Environment, adopted June 16, 1972, U.N. Docs. A/CONF.48/14, reprinted in 11 I.L.M. 1416 (1972); Rio Declaration on Environment and Development, adopted June 14, 1992, U.N. Doc. A/CONF.151/5/Rev. 1 (1992).

A Health Justice Perspective of Asthma and COVID-19

Elizabeth Raterman[*]

TABLE OF CONTENTS

Introduction 50

Population Perspective 51

Prevention Orientation 53

Conclusion 58

[*] Elizabeth Raterman is a third-year law student at the American University Washington College of Law. Elizabeth would like to acknowledge her parents, Lisa and Tom, and her sibling, MC, for all their support. She would also like to acknowledge her cats, Gazpacho and Pepper.

Introduction

As the coronavirus, or COVID-19, has spread though the United States, many public figures like Madonna[1] and Governor Andrew Cuomo[2] have described the virus as "the great equalizer." While this statement may be somewhat true because the virus does not distinguish between the individuals it infects, referring to COVID-19 as an equalizer lacks important nuance and ignores how social determinants of health influence pre-existing conditions, which increase the severity of COVID-19 infections. People with asthma, a condition that affects the lungs and impacts breathing, may be at higher risk of COVID-19 complications, hospitalization, and death.[3] Asthma rates are higher in low-income areas, and poverty can influence the development of asthma and the options to manage it.[4] Individuals with lower incomes are more likely to develop asthma, and asthma symptoms may be exacerbated with nationwide shelter-in-place orders, consequently leading to deadlier outcomes from a COVID-19 infection. While many individuals cannot alone address this, federal and state governments can act to support and protect these individuals by creating asthma-friendly entitlement programs.[5]

This Article will examine the links between asthma, income, and COVID-19 in three ways. First, it will provide a population perspective, which will highlight asthma incidence rates in the United States overall and further break down asthma rates by income level. In the practice of public health, population health is defined as "the health outcomes of a group of individuals, including the distribution of such outcomes within the group."[6] Compared to individualized medicine, public health concerns the population at large and seeks to understand how societal factors contribute to community health outcomes.[7] Next, this Article will rely on a prevention orientation lens to explore three proposed measures that would improve asthma management for low-income individuals; these measures are critical to address both COVID-19 and people spending more time at home. Prevention orientation is a public health concept that considers the root causes of disease and addresses these to prevent the disease from taking hold or from progressing further.[8] Prevention orientation acknowledges that there is an overlap between public policies, so it emphasizes how education policy, health policy, and housing policy can all influence community health outcomes.[9]

---

[1] Toyin Owoseje, *Coronavirus Is the 'Great Equalizer,' Madonna Tells Fans from Her Bathtub*, CNN (Mar. 23, 2020), https://www.cnn.com/2020/03/23/entertainment/madonna-coronavirus-video-intl-scli/index.html.
[2] Brittany Jones, *Governor Cuomo Is Wrong, COVID-19 Is Anything but an Equalizer*, WASH. POST (Apr. 5, 2020), https://www.washingtonpost.com/outlook/2020/04/05/gov-cuomo-is-wrong-covid-19-is-anything-an-equalizer/.
[3] *People with Certain Medical Conditions*, CTRS DISEASE CONTROL & PREVENTION (July 17, 2020), https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html#asthma.
[4] *Asthma Capitals 2019: Poverty*, ASTHMA & ALLERGY FOUND. AM., https://www.aafa.org/asthma-capitals-poverty/ (last visited Aug. 28, 2020) [hereinafter *Asthma*].
[5] Emily A. Benfer & Lindsay F. Wiley, *Health Justice Strategies to Combat COVID-19: Protecting Vulnerable Communities During a Pandemic,* HEALTH AFF. (Mar. 19, 2020), https://www.healthaffairs.org/do/10.1377/hblog20200319.757883/full/.
[6] *What is Population Health?*, IMPROVING POPULATION HEALTH, https://www.improvingpopulationhealth.org/blog/what-is-population-health.html.
[7] *Id.*
[8] Lawrence O. Gostin & Lindsay F. Wiley, *Public Health Law: Power, Duty, Restraint* (3d ed. 2016).
[9] *Id.*

Finally, this Article will analyze the legal considerations for implementing three asthma-friendly protocols.

Population Perspective

Asthma is a condition that causes swelling of the airways, which makes it hard to breathe.[10] Allergens, poor air quality, and debris can trigger asthma symptoms including trouble breathing, wheezing, tightness in the chest, and in some cases, death.[11] According to 2018 Centers for Disease Control and Prevention (CDC) data, one in thirteen people have asthma, and in 2018, more than twenty-five million Americans were reported to have the condition.[12] Asthma rates have been rising since the 1980s in all age, sex, and racial groups, likely due to urban air pollution and changes in climate that trigger a rise in pollen levels.[13]

While there are many risk factors associated with asthma, poverty may play an increasingly large role in developing asthma and the ability to manage the condition.[14] CDC data from 2017 demonstrates that Americans, children and adults included, who live below 249 percent of the federal poverty line experience asthma at a higher rate than Americans who live over 450 percent of the poverty line.[15] Additionally, studies have demonstrated that asthma mortality is greater among people of ethnic minorities and people living below the poverty line in the United States.[16] Not only are mortality rates higher among individuals with lower incomes, but hospital admissions for asthma are significantly related to poverty.[17] These rates may be due to how poverty affects lower income individual's access to health care facilities and the environmental agitators in those communities.[18]

Poverty and housing quality are closely linked and both impact asthma rates and severity. Studies have highlighted a strong relationship between housing and rental property quality and health outcomes.[19] A 2004 Joint Center for Housing Studies of Harvard University report showed that

---

[10] *Asthma*, CTRS. DISEASE CONTROL & PREVENTION (May 7, 2020), https://www.cdc.gov/asthma/default.htm.
[11] *Id.*
[12] *Asthma Surveillance Data*, CTRS. DISEASE CONTROL & PREVENTION (Mar. 24, 2020), https://www.cdc.gov/asthma/most_recent_national_asthma_data.htm.
[13] *See Asthma*, *supra* note 4.
[14] *Id.*
[15] *Asthma Prevalence,* CTRS. DISEASE CONTROL & PREVENTION (Oct. 17, 2019), https://www.cdc.gov/asthma/data-visualizations/prevalence.htm (showing data that illustrates that 11.7 percent of Americans, children and adults included, live below 100 percent of the federal poverty line and experience asthma. Meanwhile, 7.9 percent of Americans live between 100 to 249 percent of the federal poverty line and experience asthma. These rates are compared to the 6.8 percent of Americans who live over 450 percent of the federal poverty line and experience asthma.)
[16] Roberto J. Rona, *Asthma and Poverty*, NAT'L CTR. BIOTECHNOLOGY INFO, 243. (Mar. 2000), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1745704/pdf/v055p00239.pdf.
[17] *Id.* at 231.
[18] *Id.* at 241.
[19] *See* James K. Krieger et al., *The Seattle-King County Healthy Homes Project: Implementation of a Comprehensive Approach to Improving Indoor Environmental Quality for Low-income Children with Asthma*, 110 ENVTL. HEALTH PERSPECTIVES 311 (2002).

approximately one in ten low-income families live in inadequate housing.[20] Nearly half of these reported families spend more than half their income on their housing payments,[21] which makes it challenging to fix housing inadequacies.[22]

Substandard housing and poor indoor air quality are linked to increased allergen exposure and sensitization, [23] which result in greater asthma morbidity and mortality for low-income individuals.[24] Poor quality housing often has mites, mold, and cockroaches, and cracks allow for bugs and rodents to enter the property.[25] Further, poor ventilation leads to high concentrations of tobacco smoke, carbon dioxide, and allergens.[26] In addition to lower-income families living in substandard housing with higher amounts of pests and environmental exposures, underresourced neighborhoods are often situated next to highways and bus depots, resulting in diesel fumes and particulate matter entering the home.[27] One study found that roughly thirty-nine percent of doctor-diagnosed asthma cases among children could be avoided by eliminating these environmental exposures.[28]

The links between poverty, substandard housing, and asthma have a significant impact for low-income individuals during the COVID-19 pandemic. Many low-income individuals and families confront substantial challenges that prevent them from adequately protecting themselves and others from COVID-19.[29] During this time of social distancing, many Americans have been relegated to working from home and limiting time in public. While many low-income individuals are unable to work from home, those who are able to stay at home may face living in unsafe housing conditions or risk their housing security because they have lost their jobs.[30] Being largely confined to their houses can increase allergen exposure, worsen the severity of asthma symptoms, and make it more difficult to manage asthma.[31] An initial review of COVID-19 cases showed that people with chronic lung diseases, like asthma, are at increased risk of hospitalization for

[20] *The State of the Nation's Housing 2004*, JOINT CTR. HOUS. STUDIES HARV. UNIV., at 4 https://www.jchs.harvard.edu/sites/default/files/son2004.pdf.
[21] *Id.* at 19.
[22] *See* W.D. Miller et al., *Healthy Homes and Communities: Putting the Pieces Together*, 40 AM. J. PREVENTIVE MED. S48, S51 (2011).
[23] *See* U.M. Sahiner et al., *The Spectrum of Aeroallergen Sensitization in Children Diagnosed with Asthma During the First 2 Years of Life*, 34 ALLERGY & ASTHMA PROC. 356 (2013).
[24] *See* J. Northridge et al., *The Role of Housing Type and Quality in Urban Children with Asthma*, 87 J. URBAN HEALTH 211, 212 (2010).
[25] *Id*. at 212.
[26] *See* Krieger, *supra* note 19, at 312.
[27] *See* Miller, *supra* note 22, at S51.
[28] B.P. Lanphear et al., *Residential Exposures Associated with Asthma in US Children*, 107 PEDIATRICS 505 (2001).
[29] *See* Emily A. Benfer & Lindsay F. Wiley, *Health Justice Strategies to Combat COVID-19: Protecting Vulnerable Communities During a Pandemic,* HEALTH AFFAIRS (Mar. 19, 2020), https://www.healthaffairs.org/do/10.1377/hblog20200319.757883/full/.
[30] Abha Bhattarai et al., *The First U.S. Layoffs from the Coronavirus Are Here*, WASH. POST, (Mar. 11, 2020), https://www.washingtonpost.com/business/2020/03/11/layoffs-coronavirus/.
[31] *See* Benfer & Wiley, *supra* note 29.

COVID-19.[32] Thus, those with asthma who are lower income are at higher risk of COVID-19 complications, and being forced to stay at home will make outcomes worse by potentially increasing asthma symptoms, lung damage, and consequently more severe COVID-19 outcomes. To address asthma patients who are lower-income, the government must engage in asthma-friendly initiatives that reduce environmental asthma triggers while people spend more time at home and thereby mitigate some COVID-19 complications.

Prevention Orientation

Wide-scale asthma treatment measures and COVID-19 response efforts demand commitment from the government, clinicians, and community members to support particularly vulnerable individuals, such as those who are low-income. The health justice approach to reducing asthma symptoms and further decreasing the harm from COVID-19 involves using community programing and policy to eliminate health disparities.[33] The prevention orientation lens for targeting asthma requires cooperation from federal, state, and local governments and community partners to promote asthma education programs, implement community-led initiatives, and support asthma-friendly home construction.[34] Below, this article will examine how these three methods can improve asthma management, which in turn will reduce COVID-19 harms during future pandemic waves.

Asthma tends to be less controlled among individuals who have lower health literacy, difficulty understanding information regarding asthma and housing conditions, and lack of access to health services.[35] However, educational programs led by community health workers and treatment action plans may improve asthma management.[36] The study found that the group who had received high-intensity training showed significant improvement in dust control measures, vacuuming, use of allergy control covers, use of mattress and pillow covers for dust mites, and use of doormats.[37] Additionally, the higher-intensity group demonstrated a marked decrease in household condensation, roaches, and dust weight; this group's asthma trigger composite score decreased by 0.37 points (from 1.56 to 1.19) compared to the lower-intensity group's score decrease by 0.20 points (from 1.65 to 1.43).[38] This demonstrates that educational trainings led by community health workers are an effective measure to reduce asthma trigger exposure in low-income individuals.[39]

---

[32] *See Preliminary Estimates of the Prevalence of Selected Underlying Health Conditions Among Patients with Coronavirus Disease 2019 – United States, February 12-March 28, 2020*, CTRS. DISEASE CONTROL & PREVENTION (Apr. 2020), https://www.cdc.gov/mmwr/volumes/69/wr/mm6913e2.htm?s_cid=mm6913e2_w.
[33] *See* Benfer & Wiley, *supra* note 29.
[34] *See* Benfer & Wiley, *supra* note 29.
[35] I. Poureslami et al., *Effectiveness of Educational Interventions on Asthma Self-Management in Punjabi and Chinese Asthma Patients: A Randomized Controlled Trial,* 49 J. ASTHMA 542 (2012).
[36] Tim K. Takaro et al., *Effect of Environmental Interventions to Reduce Exposure to Asthma Triggers in Homes of Low-income Children in Seattle,* 14 J. EXPOSURE SCI. & ENVTL. EPIDEMIOLOGY 14 (2004).
[37] *See id.* at 14 (examining disparities between a group that had received high-intensity training on asthma triggers and a second group that received low-intensity training).
[38] *Id.*
[39] *Id.*

Community-sponsored initiatives, like Massachusetts's Breathe Easy at Home intervention, have called upon community stakeholders and improved both the home environment and asthma outcomes for the projects' participants.[40] Massachusetts's Breathe Easy at Home initiative encourages clinicians to refer patients to the Boston Inspectional Service if the clinicians suspect housing conditions trigger asthma symptoms.[41] Because the home is a focus for asthma interventions, many health care providers have recommended programs that involve home visits which aim to identify and reduce asthma triggers.[42] One review found that these interventions yielded improvements in "symptom-free days, reductions in school days missed because of asthma, and reduction in acute care visits."[43] Because asthma is a complicated, multi-factorial condition, the best programs require care coordination across community stakeholders.[44]

The most effective asthma programs engage with community organizations, integrate with local clinics, provide asthma training to practitioners, collaborate with government, respect patients' cultures, and include assessments of the home environment.[45] Community-coordinated programs, like Breathe Easy at Home, involve social workers and community health workers who perform home visits, clinicians who screen asthmatic patients, and building inspectors who report building owners whose rental properties contain asthma triggers.[46] Effective interventions include components such as integration with general practitioner care, collaboration between community organizations, and a patient support team made of doctors and community health workers.[47] As examined above, asthma disproportionately impacts low-income populations, and many lower income individuals lack health care resources and are burdened with higher environmental pollutants and poor housing quality.[48] With that in mind, these multi-component interventions are effective because they provide community level action that engages both patients and stakeholders; they also incorporate building inspectors to hold property owners responsible for correcting violations.[49]

Asthma-friendly public housing developments drastically improve asthma symptoms and increase individuals' ability to manage their condition. Seattle's Breathe-Easy Home project, which

---

[40] Anna Rosofsky et al., *Breath Easy at Home: A Qualitative Evaluation of a Pediatric Asthma Intervention*, GLOBAL QUALITATIVE NURSING RES. (Nov. 16, 2016), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5342293/.
[41] *Id.*
[42] *Id.*
[43] *Id.* (citing D.D. Croker et al., *Effectiveness of Home-Based, Multi-Trigger, Multicomponent Interventions with an Environmental Focus for Reducing Asthma Morbidity: A Community Guide Systematic Review*, AM. J. PREVENTATIVE MED. (Aug. 2011), https://www.ncbi.nlm.nih.gov/pubmed/21767736/.)
[44] *Id.*
[45] *Id.* (citing Clark et al., *Characteristics of successful asthma programs*, PUB. HEALTH REPS. (2009), https://www.ncbi.nlm.nih.gov/pubmed/19894421/).
[46] *Id.*
[47] *Id.*
[48] G. Adamkiewicz et al., *Moving Environmental Justice Indoors: Understanding Structural Influences on Residential Exposure Patterns in Low-Income Communities*, AM. PUB. HEALTH J. (Dec. 2011), https://www.ncbi.nlm.nih.gov/pubmed/21836112/; L.C. Messer et al., *The Development of a Standardized Neighborhood Deprivation Index*, J. URB. HEALTH (Nov. 2006), https://www.ncbi.nlm.nih.gov/pubmed/17031568/.
[49] *See* Rosofsky, *supra* note 40.

transformed a public-housing redevelopment project into asthma-friendly homes, serves as a model for asthma-friendly public works.[50] While education programs and home visits by community health workers help asthma patients implement actions that reduce asthma triggers and help manage the disease, substandard housing remains a barrier to optimal asthma management for low-income individuals.[51] The High Point development in Seattle is an example of how Breathe-Easy Homes can significantly improve asthma management. When the High Point community was redeveloped, a subset of the housing units was designated as Breathe-Easy Homes.[52] All High Point homes included energy efficient features and use of sustainable products, but the Breathe-Easy Homes contained additional features.[53] Eligibility criteria for the Breathe-Easy Homes group consisted of the presence of a child aged two to seventeen years with diagnosed persistent asthma, eligibility for residence in Seattle Housing Authority housing, and residence in King County, Washington.[54] Eligibility for the remaining High Point homes consisted of the presence of a child aged three to thirteen with diagnosed persistent asthma, income below two hundred percent of the 2001 federal poverty line, and residence in King County, Washington.[55] After one year of living in the Breathe-Easy Homes, participants reported fewer urgent care visits, more symptom-free days, and decreased exposure to asthma triggers compared to families who received evidence-based home education.[56] This suggests that the Breathe-Easy Home intervention provided benefits beyond the benefits provided by in-home asthma education alone.[57]

The asthma interventions outlined in the Prevention Orientation section of this Article require the government to provide individuals with education programs and safe housing options, which goes against the typical human rights framework in the United States that protects negative rights instead of providing positive rights.[58] The prevailing understanding of the United States Constitution is that it guarantees only negative rights, which stands in contrast to the positive rights to health and fundamental necessities of life promised by many other countries, such as those who have ratified the International Covenant on Economics, Social and Cultural Rights (ICESCR).[59]

---

[50] Tim K. Takaro et al., *The Breath-Easy Home: The Impact of Asthma-Friendly Home Construction on Clinical Outcomes and Trigger Exposure*, AM. J. PUB. HEALTH (Jan. 2011), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3000722/.

[51] *See id.*; *Community Preventive Services Task Force Publishes Findings on Home-based Asthma Programs*, COMMUNITY GUIDE, https://www.thecommunityguide.org/content/task-force-publishes-findings-on-home-based-asthma-programs (last visited Aug. 28, 2020).

[52] *See* Takaro, *supra* note 50.

[53] *Id.* ("[A]dditional features include (1) an enhanced exterior envelope to optimize moisture-proofing; (2) interior finishes, flooring, and other materials that minimized dust accumulation and off-gassing; and (3) an energy-efficient heat-exchange ventilation system with filtration and continuous fresh air supply . . .").

[54] *Id.*

[55] *Id.*

[56] *Id.*

[57] *Id.*

[58] Peter Sagal, *Constitution USA with Peter Sagal*, PBS, https://www.pbs.org/tpt/constitution-usa-peter-sagal/rights/#.Xyx7DJ5KhPY (stating that negative rights say what the government cannot do; positive rights, conversely, mandate the government to provide jobs, education, and healthcare).

[59] *Id.*; Office of the High Commissioner for Human Rights, *International Covenant on Economic, Social and Cultural Rights*, U.N. HUM. RHTS OFFICE HIGH COMM'R,

While Article 12 of the ICESCR requires governments to respect, protect, and fulfill the right to health for their citizens, the United States, which has not ratified the Convention, imposes no such requirements.[60] Despite no express commitment to promise the right to health, Congress has passed legislation that creates entitlement programs like Medicare, Medicaid, the Supplemental Nutrition Assistance Program, and public housing. Because Congress has created the statutory framework for promising positive rights like food, healthcare, and housing, it may be possible to pass a law creating an entitlement program for asthma-protective measures.

Passing new legislation or amending existing legislation can be delayed, especially during the COVID-19 pandemic. Congress may delegate power to agencies and empower them to promulgate a rule, which may be a more efficient way to create an entitlement program.[61] Congress's ability to delegate legislative power to agencies facilitates the executive branch's ability to make agency rules that more efficiently and effectively address an issue.[62] Once the agency has been delegated authority through an authorizing statute, it may use its informal rule-making powers to propose a new rule regarding asthma-friendly initiatives.[63] Thus, for example, the Department of Housing and Urban Development, which would likely have jurisdiction over this program, may rely on its existing statutory authority to promulgate rules allowing for expanded grant programs and promoting asthma-friendly construction projects like Seattle's Breathe-Easy Home intervention.

Like Medicaid and the Supplemental Nutrition Assistance Program, asthma-friendly initiatives to help individuals with lower-incomes manage asthma and further reduce the severity of a COVID-19 infection would likely be an entitlement program. Although the United States has not ratified any international treaties that require a State to provide healthcare or housing,[64] it has passed domestic legislation and regulations consistent with some of the principles outlined in Article 12 of ICESCR, including the obligation to fulfill health needs by allocating resources to vulnerable and marginalized individuals.[65] The United States has created federal, state, and local entitlement programs to provide eligible individuals with access to food, housing, and healthcare, which enables these individuals to enjoy widely recognized human rights.[66]

If the government were to create an entitlement program that protects low-income individuals and provides action plans created by clinicians, a community health care worker serving as a case manager, and even an asthma friendly home, due process rights would attach. Qualification for welfare or entitlement programs, which is what this proposed program would be, is based on

---

https://www.ohchr.org/en/professionalinterest/pages/cescr.aspx [hereinafter *International Covenant*]. Article 12 requires countries who have ratified ICESCR to recognize "the right of everyone to the enjoyment of the highest attainable standard of physical and mental health" and take necessary steps to fulfill this. *Id.*

[60] *Id*.

[61] *Delegation Doctrine Law and Legal Definition*, USLEGAL, https://definitions.uslegal.com/d/delegation-doctrine/ (last visited Aug. 6, 2020).

[62] Michael Asimow & Ronald M. Levin, *State and Federal Administrative Law* 429–30 (4th ed. 2014).

[63] *Id.* at 266.

[64] *United States Ratification of International Human Rights Treaties*, HUM. RTS. WATCH, https://www.hrw.org/news/2009/07/24/united-states-ratification-international-human-rights-treaties#.

[65] *See International Covenant*, *supra* note 59.

[66] *Id.*

need;[67] because those in need of these asthma benefits are lower-income, this is consistent with existing welfare-style entitlement programs. Under *Goldberg v. Kelly*, procedural due process rights attach to these sorts of benefits, and beneficiaries are entitled to uninterrupted services of essential food, clothing, housing, and medical care.[68] Additionally, *Mathews v. Eldridge* reinforced the idea that these benefits give rise to a property right and that procedural due process protections apply.[69] To ensure proper procedure is given, courts will consider the individual's interest in retaining her benefits and the degree to which she would be harmed if deprived, the strength of the government interest, and the risk of error under current procedures and how additional procedures could reduce the risk of error.[70] Because the strategies outlined in the prevention orientation section of this Article mirror government entitlement programs, the due process framework proposed in *Goldberg* and *Mathews* would apply to government-sponsored asthma programs. This is an important consideration for how governments might address these programs because it may create an increased administrative burden for the state.[71]

An asthma friendly program that engages community partners and state and local officials requires government funding for the success and longevity of the program. Congress currently allocates funding annually to address lead hazards, and it could also allocate similar funds to address allergens and asthma triggers and create healthy homes programs.[72] Currently, the Department of Housing and Urban Development (HUD) uses funds to provide grants to states for lead control and elimination.[73]

While the Department of Housing and Urban Development cannot rely on the grant programs authorized by the Lead-Based Paint Hazard Reduction Act, there are other grant programs available to fund asthma-friendly initiatives. The Healthy Homes Supplemental Funds provide grants to non-profits, for-profit firms, and state and local governments to remediate home-based environmental hazards that lead to asthma episodes and prevent proper condition management.[74] In 2018, HUD proposed to use these funds to mitigate hazardous conditions in 6,700 low-income older homes and make these homes healthier.[75] The proposed Breathe-Easy Homes projects fall into HUD's objectives and requirements for this grant program, and thus would likely be funded through the Healthy Homes Supplemental Funds.

Beyond supplemental funds, these projects could rely on the Community Development Block Grant Program. This program supports safer housing in lower-income communities, and the funds

[67] *See* Asimow & Levin, *supra* note 62, at 17.
[68] *Id.*; *Goldberg v. Kelly*, 397 U.S. 254 (1970).
[69] *Mathews v. Eldridge*, 424 U.S. 319 (1976) (requiring the government to go through certain procedures before terminating an individual's benefits).
[70] *Id.*
[71] *Id.* at 335.
[72] Emily A. Benfer et al., *The Duty to Protect: Enhancing the Federal Framework to Prevent Childhood Lead Poisoning and Exposure to Environmental Harm*, YALE J. HEALTH POL'Y L. & ETHICS (2019), https://www.greenandhealthyhomes.org/wp-content/uploads/Duty-to-Protect.pdf.
[73] *Id.*
[74] *Id.*
[75] *Id.*

may be used directly to fund asthma-trigger identification and abatement activities.[76] This program can be used as an opportunity to give federal support to local organizations and agencies designed to reduce and eliminate environmental hazards.[77] Funds from this program could be used to support increased asthma-friendly community partnerships and construction projects.

The projects outlined in the Prevention Orientation section can be authorized by Congress, administered by agencies, and considered an entitlement for its beneficiaries. These programs can be funded through HUD grant programs and supplemental funds, as well as funding from other government agencies. Funding and coordination between federal, state, and local governments will contribute to the success of these initiatives, thus reducing environmental asthma triggers, improving the health of lower-income asthma patients, and hopefully mitigating some risk associated with COVID-19 infections.

Conclusion

Asthma is a non-curable condition that disproportionately impacts lower-income individuals and, along with other social and economic factors, places these individuals at higher risk for COVID-19 infection complications.[78] While there is no cure for asthma, lower-income individuals can see lower rates of the condition and improved condition management with education by community health workers, partnerships between community groups and local governments, and government-funded healthy homes projects. With cooperation between federal, state, and local governments, adequate funding, and input from community members, asthma-friendly initiatives can be implemented to improve condition management and subsequently decrease severe COVID-19 health outcomes.

[76] *Id.*
[77] *See* Benfer, *supra* note 72.
[78] *People with Certain Medical Conditions*, CTRS. DISEASE CONTROL & PREVENTION (July 17, 2020), https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html#asthma.

* * *