Post-COVID U.S. Legal Reforms Promoting Public Health and Equity

Public Health and the Law

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There is no clear silver lining to the COVID-19 pandemic. Millions of cases, hundreds of thousands of deaths, and long-term physical and mental health impairments for millions more Americans preclude such a conclusion.[1] Domestic mismanagement bordering on criminal neglect and omissions at the highest levels of U.S. government are primary contributing factors to excess mortality. As the pandemic rages on in the heat of the national presidential election, many government actors seem intent on shifting political blame instead of taking decisive public health action. Americans must wonder what's worse — the actual risks of coronavirus or national failures to control its spread despite known, efficacious interventions.

Looking for upsides to the worst pandemic in over a century seems specious, almost disingenuous. Yet, arising from the crisis are substantial changes in laws and policies to improve public health responses and advance health equity. Some seismic legal shifts are already underway; others are in conceptual stages. We propose and explore ten major areas of legal and policy reforms precipitated by unprecedented responses and experiences underlying the COVID-19 pandemic. These include (1) constitutional assurances to abate health inequities; (2) extensive reconsideration of national and state emergency public health laws and policies; (3) development of emergency measures to counter-balance economic impacts; (4) tax laws and policies supporting wider provision of health services; (5) unification of data gathering, reporting, and sharing practices; (6) greater access to basic health care services; (7) enhanced reproductive health protections; (8) elimination of structural racial inequities impacting health outcomes; (9) law enforcement approaches promoting social justice; and (10) renewed acclimation of "health-in-all-policies."

Constitutional Assurances

For decades, U.S. public health officials and others have chronicled major health disparities among vulnerable populations, yet proposals for corrective actions were often unheard.[2] Even as the COVID-19 pandemic exposes gross inequities in morbidity and mortality,[3] many Americans face extreme obstacles to accessing basic public health services (e.g., testing, screening, vaccination, treatment) and sustenance. Widespread denials of essential health measures contributing to clear health disparities are constitutionally indefensible. Beyond equal protection and due process arguments is the potential to generate a plausible and purposeful constitutional right to public health.[4] Framed around public sector duties to protect communal health, such a right would be a vanguard against government misdeeds, lapses, and omissions tied to inequitable health outcomes, particularly in emergencies when lives lost to government malfeasance are inexcusable.

Revamping Public Health Services

While the emergence of a constitutional right to public health is inde-

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terminate, especially given changes among members of the Supreme Court, substantial shifts in core public health powers are already underway at every level of government. A primary objective is to clarify the constitutional array of measures that can be taken to abate public health emergencies (PHEs) without derailing economic livelihoods or invading individual rights.[5] It is a tenuous balance, especially concerning controversial social distancing powers (e.g., closures, stay-home orders, curfews) under review by the Uniform Law Commission for state model law development.[6] Historically, states have a dominant role in public health emergency protections. Whether the federal government is primarily in charge when national economic or security interests are at stake, however, is an open question. Increased nationalization of pandemic response efforts ensconced in presidential candidate Joe Biden's COVID-19 plan[7] center on consistent uses of scientifically-validated interventions (e.g., face masks, border regulations) determined largely at the federal level.

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Economic Protections

In addition to reconsidering public health powers, emergency fiscal protections are necessary to circumvent national and global economic collapse. In April 2020, the International Monetary Fund projected a COVID-19-related economic fallout comparable to the Great Depression.[8] Economic legal protections against job and income losses, especially among low-income households, are critical. Congress enacted the CARES Act on March 27 to provide income-based economic support capped at $1,200 for adults and $500 per child under age seventeen.[9] On May 12, Representative Nita Lowey (D-NY) introduced the Heroes Act, which includes protections for essential workers regarding pay, family care, and sick leave.[10] Additionally, the Centers for Disease Control and Prevention (CDC)[11] and several states[12] have temporarily restricted residential evictions. Assuring these types of economic protections now and during future PHEs may directly improve health outcomes and equity.

Equitable Tax Incentives

Economic protections can limit damages during emergencies, but equitable tax incentives provide a means of affirmatively encouraging healthy behaviors. Congressional uses of taxing and spending powers to incentivize individual behaviors, as well as raise revenue, are unquestionably constitutional.[13] On April 27, Representative Steven Horsford (D-NV) suggested a "worker-training tax credit" for health care employers facing skilled worker shortages.[14] The Frontline Heroes Appreciation Act, introduced by Representative Sean Patrick Maloney (D-NY) on May 6, would provide federal income tax relief to qualifying workers.[15] On June 16, Senator Ted Cruz (R-TX) introduced the Work Safe Act to provide tax breaks for businesses whose employees receive COVID-19 testing,[16] followed a month later by a similar House bill presented by Representative David Schweikert (R-AZ).[17] These and other legislative interventions reveal the immense capacity to wield tax and spend powers to incentivize greater provision and use of health services equitably across populations.

Data Unification Policies

Efficiently assessing and disseminating massive amounts of COVID-related health data protect the public's health, but patient privacy must also be assured. The pandemic is exposing rifts in achieving this balance. National standards framed in the HIPAA Privacy Rule[18] are increasingly outdated. Automated online programs collecting user data to guide public health and medical responses present new challenges.[19] The Department of Health and Human Services' (HHS) extensive COVID-19 data portal, configured in April as an alternative to CDC surveillance, was criticized for insufficient privacy safeguards and unwarranted data acquisitions.[20] Ensuring patient privacy is paramount as reflected in ultra-modern data sharing laws and policies. Senator Elizabeth Warren (D-MA) proposed the Equitable Data Collection and Disclosure on COVID-19 Act on April 21. It would overhaul comprehensive data practices to disaggregate health information along demographic lines to ensure equitable public health responses while strictly adhering to privacy protections.[21]

Improving Access to Health Care and Public Health Services

Long-standing, glaring flaws in equitable access to health care and public health services in the U.S. are exacerbated by the COVID-19 pandemic. Despite passage of the Affordable

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Care Act in 2010,[22] millions of Americans risk infection without health insurance or access to basic health services.[23] In April, the Centers for Medicare and Medicaid Services introduced several temporary directives to break down access barriers through expanded telehealth services and reimbursement options for beneficiaries.[24] On August 3, President Trump issued the Executive Order on Improving Rural Health and Telehealth Access.[25] It calls for a revitalized framework of health care delivery in rural communities, removing regulatory burdens that stymie telehealth initiatives. Health advocates support permanently affixing policies adopting technology-based health care delivery methods as a dominant feature of the U.S. health system post-COVID.[26]

Reproductive Health Interests

As stay-at-home and business closure orders arose nationally to quell the meteoric spread of COVID-19, several states (e.g., Ohio,[27] Texas[28]) disrupted provision of abortion services, identifying them as "elective" or "non- essential." Judges generally struck down these specious arguments, but the federal Eighth Circuit Court of Appeals and select other courts sided with state governments that ceased these services.[29] Legislative efforts protecting reproductive rights could prevent politicization of constitutionally-assured services. This includes support for tele-abortion practices, whereby patients self-administer abortifacients prescribed by health practitioners.[30] The Food and Drug Administration (FDA) currently requires such drugs to be dispensed only in clinic or hospital settings. On July 13, however, a federal court in Maryland blocked enforcement of FDA's rule.[31] FDA's request for a stay of the order was rejected by an appellate court; an additional request for stay filed in the Supreme Court is being held in abeyance.[32] How the Court may ultimately decide such issues is unclear, especially with the passing of Associate Justice Ruth Bader Ginsburg, and confirmation of Justice Amy Coney Barrett. Advance legislative determinations may better protect reproductive health interests.

Addressing Structural Racial Inequities

Roughly one-fifth of U.S. counties that are predominantly Black account for nearly half of U.S. COVID-19 cases, and 60% of deaths.[33] Disparate impacts of COVID-19 on Black communities are tied to poverty, crowded living conditions, un-insurance rates, and employment status.[34] Black Americans are overly represented in high-exposure jobs deemed essential during the pandemic.[35] Many of these same service and manufacturing jobs are low-wage and lack health benefits, diminishing health care access among populations at high risk of COVID-19. Other minorities face similar challenges during the pandemic. Federal responses to date offer patchwork fixes, but not long-term solutions. Under the aforementioned CARES Act, for example, uninsured individuals receive certain COVID-19 testing and treatment at no cost.[36] Yet, these temporary protections do not extend to all essential workers.[37] Significant legal reforms must address health inequities tied to structural discrimination by assuring employee protections and health care access post-COVID.

Law Enforcement Reform

Racial injustices underlying disparate impacts of COVID-19 likewise contribute to high rates of police brutality against Black and other populations.[38] Protests following the death of George Floyd on May 25 brought significant and ongoing efforts by jurisdictions to scale back police forces.[39] On June 26, the Minneapolis City Council approved a ballot measure to amend the city's charter to eliminate the police department and create a new Department of Community Safety and Violence Prevention.[40] It would take a "holistic, public health-oriented approach" in the provision of public safety services.[41] While injustices persist within law enforcement and criminal justice systems, increased recognition of the role of public health to ameliorate racially-driven police brutality represents significant change. Ultimately, these reforms may help dispel disparities across populations reflected in inequitable disease burdens, unwarranted police interventions, and resulting protests.

Health in All Policies (HiAP)

HiAP represents a whole-of-government approach to address health challenges where multiple public sectors coordinate to accomplish shared goals.[42] Non-health agencies, departments, and offices have re-focused their efforts to address the COVID-19 pandemic. In Rochester, Minnesota, public libraries partnered with local human services agencies to connect people to housing, food, and health, legal, and employment services.[43] In cities like Dallas and Chicago, multi-sector task forces arose to meet immediate and lasting health and economic needs of their communities.[44] A task force in Flint, Michigan, for example, aimed to (1) increase equitable access to COVID-19 testing, treatment, and vaccines, and (2) develop a plan to revitalize the economy through municipal, business, and philanthropic organizations.[45] Viable HiAP local task forces post-emergency can enable cross-sector data sharing, redistribute funding, and identify strategic health policies.

The COVID-19 pandemic reveals how substantial legal and policy changes in response to critical challenges may obviate future threats. Law and policy reforms at play (or under consideration) hold the promise of a revitalized public health and health care system promoting health equity as an achievable, twenty-first century objective. Diminishing health disparities is not easily accomplished normally, much less during a pandemic. Yet, core legal and policy themes essential to accomplishing this feat are becoming clearer as pathways to a healthier, more equitable society emerge.

Note

The authors have no conflicts to disclose.

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