

The Pandemic and Privacy: The Global Culture of Intrusion

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I. Introduction: Crisis, Intrusion and the Constitution¹

Intrusions are a part of a government's response to most emergencies.² Whether it is a global pandemic or a forest fire, government is empowered to make decisions to protect the safety and welfare of its citizens, and that often results in intruding on someone's rights. Because of the COVID-19 pandemic, millions died, businesses went bankrupt, and the whole world changed the way it lived.³ Cities locked down.⁴ Borders closed.⁵ Children could not visit their dying parents.⁶ Zoom became a verb.⁷ Business travel changed.⁸ Some things will go back to "normal", and some things will be permanently changed. Because of the pandemic, governmental intrusions on

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² In the wake of in the wake of 9/11, the United States Congress passed the USA PATRIOT Act, which authorized the U.S. government to spy on individuals without identifying to any court either the targeted individual or the communication devices to be tapped. H.R. 3162, 107th Cong. (2001).

³ Lee Clifford and Phil Wahba, *A running list of companies that have filed for bankruptcy during the coronavirus pandemic*, FORTUNE, Oct. 8, 2020, <https://fortune.com/2020/08/04/companies-filing-bankruptcy-2020-due-to-covid-list-filed-chapter-11-coronavirus-pandemic>.

⁴ Chico Harlan and Stefano Pitrelli, *Italy extends coronavirus lockdown to entire country, imposing restrictions on 60 million people*, THE WASHINGTON POST, March 9, 2020, https://www.washingtonpost.com/world/europe/italy-extends-coronavirus-lockdown-to-entire-country-imposing-restrictions-on-60-million-people/2020/03/09/baa10058-6248-11ea-8a8e-5c5336b32760_story.html; *New York City to Close Schools, Restaurants and Bars*, THE NEW YORK TIMES, March 15, 2020, <https://www.nytimes.com/2020/03/15/nyregion/new-york-coronavirus.html>; Cal. Exec. Order No. 33-20 (March 4, 2020).

⁵ United States Department of Homeland Security, *Fact Sheet: DHS Measures on the Border to Limit the Further Spread of Coronavirus*, UNITED STATES DEPARTMENT OF HOMELAND SECURITY, Oct. 19, 2020, <https://www.dhs.gov/news/2020/10/19/fact-sheet-dhs-measures-border-limit-further-spread-coronavirus>; U.S. Embassy and Consulates in France, *The Department of State has issued COVID-19 Traveler Information and advises all U.S. citizens to read the country-specific Travel Advisories and U.S. Embassy COVID pages for updates on the impact of COVID-19 worldwide*, U.S. EMBASSY & CONSULATES IN FRANCE, Jan. 19, 2021, <https://fr.usembassy.gov/covid-19-information/>.

⁶ Katie Hafner, *A Heart-Wrenching Thing': Hospital Bans on Visits Devastate Families*, THE NEW YORK TIMES, March 29, 2020, <https://www.nytimes.com/2020/03/29/health/coronavirus-hospital-visit-ban.html>.

⁷ *How coronavirus made 'zoom' a verb and other ways the pandemic has changed our language*, THE PHILADELPHIA INQUIRER, April 29, 2020, <https://www.inquirer.com/opinion/coronavirus-covid-zoom-pandemic-words-linguistic-20200429.html>.

⁸ *Airline mask requirements: Check the policies for 11 US carriers*, USA TODAY, Sept. 8, 2020, <https://www.usatoday.com/picture-gallery/travel/airline-news/2020/05/05/coronavirus-these-airlines-require-passengers-wear-face-masks/3085794001/>.

individual liberties increased.⁹ To be sure, many of those intrusions have been justified to save lives and to prevent the continued spread of COVID-19.¹⁰

As with other historical emergencies and threats to health and security, legal issues will take a backseat to rapid responses to protect health and safety. After the September 11 Terrorist Attacks, there was little public concern about electronic intrusion, but there was enormous concern about catching terrorists.¹¹ The Government grounded all commercial flights in the United States for seven days, and it argued that its compelling state interest to prevent other planes from being used as weapons justified this measure.¹² The Government also implemented intrusive surveillance strategies to oversee and monitor private communications of foreign and domestic individuals in the United States, costing all Americans some of their privacy.¹³

The COVID-19 pandemic presents a unique set of legal issues because it occurs in a 2020 world that is interconnected and technologically intertwined. Much like the commerce and communication of 2020, COVID-19 is not limited by national boundaries. Pandemic-based privacy intrusions include limitations on personal freedoms like the right to travel and the gathering of personal information through contact tracing. Different technologies have been used to gather large amounts of personal health data. Government and public health officials have

⁹ These intrusions will be discussed further throughout the article.

¹⁰ “According to media reports, drone surveillance has been deployed in the United States, Mexico, Malaysia, Spain, Italy and the UK.” Tatsiana Ziniakova, *Privacy, Mass Electronic Surveillance, and the Rule of Law in Times of COVID-19*, WORLD JUSTICE PROJECT at 9, November 30, 2020.

¹¹ For instance, we can cite the Terrorist Surveillance Program created during the Bush Administration, that authorized electronic surveillance without judicial approval as an effort to catch terrorists. Tracey Maclin, *The Bush Administration’s Terrorist Surveillance Program and the Fourth Amendment’s Warrant Requirement: Lessons from Justice Powell and the Keith Case*, 41 U.C. DAVIS L. REV. 1259, 1293 (2007).

¹² *All flights stopped nationwide*, CNN, Sept. 11, 2001, <https://www.cnn.com/2001/TRAVEL/NEWS/09/11/faa.airports/>.

¹³ *Supra* note 11.

justified these intrusions because information on hospitalization, infection, and mortality rates helps them implement the best defenses against COVID-19 and its spread.¹⁴

COVID –19 brings in to focus the most critical issues of personal privacy, and it does so in a way that magnifies the realities of the modern world. The purpose of this article is to evaluate and identify intrusions during the pandemic and to put a microscope on the fault lines of the legal structures struggling with the pandemic. This article will also focus on how the pandemic pushes the constitutional limits of government.

United States courts have already begun to weigh in on the limits. By the end of this particular pandemic we will have a new jurisprudence that, at least preliminarily, defines the boundaries of governmental authority, tests the utility of federalism in a nationwide crises, and defines a series of rights, including personal autonomy, data privacy, freedom of movement, freedom of religion, and personal property rights.

Notably, there is a lack of universal agreement among government and health officials regarding the effectiveness of policies put in place to stop the spread of COVID-19. In order to balance the advantages and disadvantages of such measures, one must determine how dangerous a threat must be to justify restrictions on people’s fundamental rights, including the right to privacy. There must also be a determination of the duration of the restrictions being enforced. In the context of the COVID-19 Pandemic, a determination must be made on whether a virus provides enough legal justification to allow governments restrictions on privacy and justification for the

¹⁴ The Center for Disease Control and Prevention’s states, “Contact tracing is a key component of controlling transmission of infectious diseases. Contact tracing for the current COVID-19 pandemic.” *Operational Considerations for Adapting a Contact Tracing Program to Respond to the COVID-19 Pandemic*, CENTERS FOR DISEASE CONTROL AND PREVENTION, Dec. 9, 2020, <https://www.cdc.gov/coronavirus/2019-ncov/global-covid-19/operational-considerations-contact-tracing.html>.

severity of the restrictions. After all, part of the legal test to restrict a fundamental right is to restrict that right by the least intrusive means.¹⁵

The final determinations will vary greatly depending on the government regime and culture of a nation. Governments have a duty to make decisions for the common good of their citizens,¹⁶ but Government action is not the only indicator of how a country will be affected in a pandemic. Culture is a central element to privacy invasions in the pandemic.¹⁷ Some cultures have already experienced lost freedoms and reduced privacy rights before COVID-19.¹⁸ The pandemic allows some governments to further their surveillance state under the guise of protecting public health.¹⁹ Some citizens in various cultures have accepted government or health care guidance, and citizens have voluntarily restricted their personal lives and activities,²⁰ while others obey the governmental

¹⁵ *Stanley v. Georgia*, 394 U.S. 557, 564-65 (1969).

¹⁶ The common good is an important concept of political philosophy discussed in the literature by many philosophers such as Plato, Aristotle, John Locke, J.J. Rousseau, Adam Smith, G.W.F. Hegel, John Rawls and Michael Walzer. Hussain Waheed, *The Common Good*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY, Feb. 26, 2018, <https://plato.stanford.edu/entries/common-good/>.

¹⁷ *Infra* Section II (these intrusions will be discussed further throughout the article).

¹⁸ China is certainly the greatest example of mass surveillance by the government. Charlie Campbell, *'The Entire System Is Designed to Suppress Us.'* *What the Chinese Surveillance State Means for the Rest of the World*, TIME, Nov. 21, 2019, <https://time.com/5735411/china-surveillance-privacy-issues/>.

¹⁹ In the wake of COVID-19, many apps that aimed to control the spread of COVID-19 were created. As reported by Privacy International, “the self-testing web app issued by Argentina’s Secretariat of Public Innovation, asked for national ID number, email and phone as mandatory fields in order to submit the test, while the Android version required numerous permissions, including contacts, geolocation data (both network-based and GPS), and access to the microphone and camera.” *There’s an app for that: Coronavirus apps*, PRIVACY INTERNATIONAL, April 20, 2020, <https://privacyinternational.org/long-read/3675/theres-app-coronavirus-apps>.

²⁰ *How Taiwan, a non-WHO member, takes actions in response to COVID-19*, June 17, 2020, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7307800/>; *COVID-19 versus Japan’s culture of collectivism*, May 22, 2020, <https://www.japantimes.co.jp/opinion/2020/05/22/commentary/japan-commentary/covid-19-versus-japans-culture-collectivism/>.

mandates to wear masks, avoid crowds, and social distance with no pushback.²¹ Conversely, there are cultures that seem to inherently distrust government and revere individual freedom.²²

As data and the pandemic are borderless, so is this article. This article will analyze personal data violations through the lens of the legal frameworks of America, Europe, and Brazil. To accomplish this goal, this article will address (i) the Government's authority under state of emergency; (ii) the influence of culture on the enforcement of policies; (iii) the intrusive impact of the central medical responses to COVID (testing, treating and tracking); (iii) the use of tracking technologies through a privacy lens; and (iv) the strategy for addressing the next pandemic.

II. Crisis and the Law of Emergencies

Extraordinary times require extraordinary measures. In fact, most countries have policies for emergencies, and those policies prioritize swift action.²³ Because emergencies, by definition, require rapid action, emergency actions are most often granted to the Executive branches.²⁴ Legislatures are not inherently rapid response entities, and courts are more deliberative and reactive. The balance of power in emergencies is given or taken by the executive branches of government.²⁵ By design, Presidents, governors, and mayors are the focal point of emergency.²⁶

²¹ *Response to COVID-19 in South Korea and implications for lifting stringent interventions*, October 9, 2020, <https://bmcmmedicine.biomedcentral.com/articles/10.1186/s12916-020-01791-8>; *Israel Exemplifies how to respond to the coronavirus*, March 12, 2020, <https://www.atlanticcouncil.org/blogs/menasource/israel-exemplifies-how-to-respond-to-the-coronavirus/>.

²² For example, Brazilians demonstrated that they do not believe that health crises justify intrusions upon the privacy of their homes and bodies. In 1904, the Brazilian National Congress passed a law establishing mandatory vaccination, aiming to combat the smallpox outbreak in the country. Health authorities and police officers were authorized to enter homes and forcibly vaccinate members of the home. The people responded with violence. Because the people were not culturally accustomed to such intrusions, the response was so severe that the Government had to suspend the law and stop mandatory vaccinations. *What a 1904 Vaccine Effort Can Teach Brazil Today*, December 7, 2020, <https://www.usnews.com/news/best-countries/articles/2020-12-07/brazils-leader-ignores-deadly-virus-lessons-from-the-past>.

²³ *COVID-19 Civic Freedom Tracker: Keep Civic Space Healthy*, February 11, 2021 <https://www.icnl.org/covid19tracker/?issue=5>.

²⁴ *Supra* note 22.

²⁵ *Infra* Section VI (these aspects will be discussed further throughout the article).

²⁶ *Id.*

These provisions intend to increase agility during times of emergency.²⁷ The United States and Brazil are two countries that increase the power of the executive branch during emergencies.²⁸ Laws during emergencies may be certain regarding the enlargement of the executive power, but there is still great ambiguity and uncertainty regarding the exact definition of emergency and the extent of emergency powers.

a. United States

A1. Federal Government

The Constitution of the United States does not expressly provide for emergency powers, but the enlargement of the federal executive powers during extraordinary times is recognized by statute.²⁹ The National Emergencies Act provides that Congress is authorized to grant the President any special or extraordinary power during national emergencies,³⁰ yet there is no detailed definition of emergency.

American law provides an exceedingly broad definition of emergency. The Stafford Act defines emergency as:

[A]ny occasion or instance for which, in the determination of the President, Federal assistance is needed to supplement State and local efforts and capabilities to save lives and to protect property and public health and safety, or to lessen or avert the threat of a catastrophe in any part of the United States.³¹

Pursuant to the law, the President has wide authority to use emergency powers as long as the measures aim to save lives, protect property, ensure safety and health, or lessen the threat of a

²⁷ Fighting COVID-19 with Agility, Transparency, and Participation: Wicked Policy Problems and New Governance Challenges, May 20, 2020, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7267241/>.

²⁸ *Infra* notes 29 and 111.

²⁹ The National Emergencies Act, 50 U.S.C. §§ 1601-1651 (1976); The Public Health Service Act, §§ 319 - 361.

³⁰ 50 U.S.C. §1621.

³¹ 42 U.S.C. § 5122.

catastrophe in the United States.³² This language suggests the uncertainty related to the definition of emergency also applies to the extent of emergency powers. The President has discretion in defining an emergency as well as latitude in designing responses to the emergency.

The language of the Stafford Act is unclear regarding the extent of the emergency powers. First, the statute provides that the President is authorized to establish a program of disaster preparedness that utilizes services of “all appropriate agencies.”³³ The term “appropriate” is discretionary and allows the President to exercise control over any agency he or she deems “appropriate.”

The statute also provides that the President may coordinate federal programs of disaster preparedness, and programs run by State and local authorities.³⁴ Depending on the political philosophy of the President, this “coordination” could result in highly centralized authority. That has not been the case in the current pandemic. In fact, it has been governors and mayors who have enacted the most severe measures, and there is substantial criticism for the national government not providing enough guidance or leadership.³⁵ But, based on the statutory structure, there must be an awareness that overreach by a different federal executive could be intrusive.

Finally, the statute expressly provides that the President has the authority to apply science and technology to address the emergency.³⁶ That statement seems rational, especially when dealing with a crisis that needs scientific answers. But does this broad authority facilitate potential abuses of technology like CCTV coverage with thermal imaging to detect individuals with elevated

³² Supra note 10.

³³ 42 U.S.C. § 5131.

³⁴ 42 U.S.C. § 5131, (5).

³⁵ Phillip A. Wallach and Justus Myers, *The Federal Government’s Coronavirus Response—Public Health Timeline*, BROOKINGS, March 31, 2020, <https://www.brookings.edu/research/the-federal-governments-coronavirus-actions-and-failures-timeline-and-themes/>.

³⁶ 42 U.S.C. § 5131, (6).

temperatures, drones to identify where crowds gather in violation of social distancing standards, and use of internet surveillance to identify geographical concentrations of the disease.³⁷ All of these uses could be reasonable but each could be the basis for future intrusion concerns.

In addition to emergency powers, the Stafford Act provides powers to address a “major disaster.”³⁸ Major disaster means any natural catastrophe, which, “in determination of the President,” causes damage of sufficient severity and magnitude to warrant major disaster assistance.³⁹ Like the definition of emergency, the definition of major disaster relies upon the determination of the President.⁴⁰ Unlike the emergency powers, the extent of the major disaster powers is much more limited.⁴¹ In a major disaster, the President is authorized to supplement efforts and available resources of States, local governments, and disaster relief organizations in alleviating the damage, loss, hardship, or suffering caused therein.⁴² While emergency powers may affect the separation of powers between federal and state levels of government and impact fundamental rights, the major disaster powers exist primarily to provide federal support to the States, local authorities, and organizations.⁴³ The aid usually occurs through transferring of funds and/or providing tax benefits.⁴⁴

The Public Health Service Act also grants extraordinary powers to combat emergencies. The statute authorizes the Secretary of Health and Human Services (“Secretary”) to lead the federal

³⁷ *Thermal Imaging Systems (Infrared Thermographic Systems / Thermal Imaging Cameras)*, January 12, 2021, <https://www.fda.gov/medical-devices/general-hospital-devices-and-supplies/thermal-imaging-systems-infrared-thermographic-systems-thermal-imaging-cameras>; *Drones Become Part of Local U.S. Responses to COVID-19*, April 22, 2020, <https://www.govtech.com/products/Drones-Become-Part-of-Local-US-Responses-to-COVID-19.html>; *Apps and COVID-19*, <https://privacyinternational.org/examples/apps-and-covid-19>.

³⁸ 42 U.S.C. §§ 5121 et. seq. (1988).

³⁹ 42 U.S.C. § 5122, (2).

⁴⁰ 42 U.S.C. § 5122.

⁴¹ 42 U.S.C. § 5122.

⁴² 42 U.S.C. § 5121, (b).

⁴³ 42 U.S.C. § 5196.

⁴⁴ 42 U.S.C. § 5122.

public health and medical responses related to public health emergencies.⁴⁵ The Secretary is authorized to declare a public health emergency when a disease or disorder presents danger to the public health or when there are outbreaks of infectious diseases or bioterrorist attacks.⁴⁶ The statute also provides a wide range of measures to be taken by the Surgeon General upon the Secretary's approval.⁴⁷ To prevent the introduction and spread of communicable diseases in the United States, the Surgeon General can order inspection, fumigation, disinfection, sanitation, pest extermination, destruction of animals and articles, suspension of entries and imports, creation of quarantine stations, and other measures, as he or she deems necessary.⁴⁸

As a result of the confirmed cases of COVID-19, the Secretary declared a public health emergency exists.⁴⁹ Subsequently, President Trump designated COVID-19 as an emergency and a major disaster.⁵⁰ According to President Trump, the number of infections in the United States was sufficient to threaten the nation's healthcare system, forming the circumstances necessary to declare a national emergency under the National Emergencies Act.⁵¹ The President determined that the severity and magnitude of the impacts of COVID-19 support the declaration of a major disaster under the Stafford Act.⁵²

President Trump took a number of measures during the COVID-19 pandemic, utilizing the emergency and major disaster powers. Under the Social Security Act and the Health Insurance

⁴⁵ Public Health Emergency Act, Section 319.

⁴⁶ Public Health Emergency Act, Section 319, (a).

⁴⁷ Public Health Emergency Act, Section 361.

⁴⁸ Public Health Emergency Act, Section 361, 362, and 364.

⁴⁹ *Determination that a Public Health Emergency Exists*, January 31, 2020, <https://www.phe.gov/emergency/news/healthactions/phe/Pages/2019-nCoV.aspx>.

⁵⁰ Proclamation No. 9994 Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID 19) Outbreak (2020).

⁵¹ *Infra* note 85.

⁵² Letter from President Donald J. Trump on Emergency Determination Under the Stafford Act, issued on March 13, 2020.

Portability and Accountability Act, the President authorized the Secretary to waive or modify certain requirements of Medicare, Medicaid, and Children’s Health Insurance programs.⁵³ Under the Stafford Act, the President encouraged States and local governments to activate their Emergency Operations Centers, to review emergency preparedness plans, and to request Federal assistance.⁵⁴ In voicing the Defense Production Act of 1950, the President prioritized the allocation of health and medical materials, services, and facilities deemed “necessary or appropriate to promote national defense.”⁵⁵

The protection over individuals’ private health information was altered for the pandemic.⁵⁶ Under the Health Insurance and Accountability Act (HIPAA), a covered entity⁵⁷ may disclose protected health information without the individual’s authorization (i) to a public health authority for the purpose of preventing or controlling disease⁵⁸ and (ii) to a person who may have been exposed to a communicable disease or may otherwise be at risk of contracting or spreading.⁵⁹ Under the COVID-19 emergency, hospitals and clinics, for example, may disclose a broad range of medical information, including identifying information, of individuals who have been infected with, or exposed to the virus.⁶⁰

⁵³ 42 U.S.C. § 1135 (b).

⁵⁴ 42 U.S.C. § 5131.

⁵⁵ Executive Order on Prioritizing and Allocating Health and Medical Resources to Respond to the Spread of Covid-19. Issued on March 18, 2020.

⁵⁶ 45 C.F.R. § 164.

⁵⁷ 45 C.F.R. § 160.103.

⁵⁸ 45 C.F.R. § 164.512 (b) (1) (i).

⁵⁹ 45 C.F.R. § 164.512 (b) (1) (iv).

⁶⁰ *COVID-19 and HIPAA: Disclosures to law enforcement, paramedics, other first responders and public health authorities*, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES OFFICE FOR CIVIL RIGHTS, <https://www.hhs.gov/sites/default/files/covid-19-hipaa-and-first-responders-508.pdf> (Retrieved January 14th, 2021).

There should be limitations on the exercise of emergency and disaster relief. After all, the powers granted are extraordinary and authorized for a specific purpose. Any emergency policy should be measured by the following three standards:

- (i) First, the measures taken must be within the defined and designated powers of the statutes.
- (ii) Second, the measure must be taken to accomplish purposes of the act and should not engage in unnecessary excessive intrusions on personal rights. The measures should be limited in scope.
- (iii) Third, the powers exercised should be of limited duration. Frequently, emergency measures require renewal of emergency declarations in the text of the legislation. Extraordinary powers must be legitimized only for as long as the conditions that formed the emergency or major disaster endure. The measures taken under emergencies or major disasters must have a time limit.

As an example, it appears that actions taken by the President at the beginning of the pandemic are consistent with these principles.⁶¹ The measures find support in the law, intend to increase the access to the health care system for the general population, and provide options for States to obtain federal monetary assistance. The measures also contained time limits that required renewal and in fact, because of the duration of the pandemic, were renewed.⁶²

A2. State and Local Government

⁶¹ *Supra* notes 19-21.

⁶² *Supra* notes 53-55.

Emergency powers are also granted to states and local authorities, and those powers are defined very broadly.⁶³ The issue of local control has come into sharp focus during the pandemic because of the dramatic differences in approach by various states and local governments. Some localities, like San Francisco, went on almost total lockdown.⁶⁴ Other areas imposed very few restrictions.⁶⁵ There are rational reasons for different approaches based on the degree of outbreak, density of population and other factors. The legal basis for these actions depends upon state laws and local ordinances as well as how the local actions interact with Federal policies.

Florida provides an example of a large state with multiple large municipalities and counties that take varied approaches. Florida defines emergency as “any occurrence, or threat thereof, whether natural, technological, or manmade, in war or in peace, which results or may result in substantial injury or harm to the population or substantial damage to or loss of property.”⁶⁶ Florida Governor Ron DeSantis declared that COVID-19 justified a state of emergency.⁶⁷ Under the state of emergency, Governor DeSantis took several measures. Initially some of the state measures were more intrusive than federal measures.

Under Chapter 252, Section 36 (5)(k) of the Florida Statutes, Governor DeSantis issued a “stay at home” measure, ordering senior citizens and individuals with fragile health to stay at home and take all measures to limit the risk of exposure.⁶⁸ The measure required that all persons in Florida

⁶³ Supra Section II, A1.

⁶⁴ Heather Kelly and Rachel Lerman, *San Francisco flattened the curve early. Now, coronavirus cases are surging*, THE WASHINGTON POST, Aug. 2, 2020, <https://www.washingtonpost.com/technology/2020/08/02/san-francisco-coronavirus-surge/>.

⁶⁵ i.g. South Dakota, Utah and Oklahoma. Ayla Ellison. *10 states with the fewest, most COVID-19 restrictions*, September 15th, 2020, <https://www.beckershospitalreview.com/rankings-and-ratings/10-state-with-the-fewest-most-covid-19-restrictions-091520.html>.

⁶⁶ Fla. Stat. 252.36 (5)(k).

⁶⁷ Fla. Exec. Order No. 20-52, March 9, 2020.

⁶⁸ Fla. Exec. Order No. 20-83, March 24, 2020.

limit their movements to those necessary to obtain or provide essential services or conduct essential activities.⁶⁹ Social gatherings were prohibited.⁷⁰

Generally under Chapter 252 of the Florida Statutes, Governor DeSantis ordered vacation rental businesses to stop activities, including advertisement and the making of future reservations.⁷¹ Governor DeSantis also ordered the suspension of mortgage foreclosures and evictions.⁷² Each measure taken by Governor DeSantis may or may not be considered appropriate under the three-prong test.

The first prong requires that measures taken must be within the defined and designated powers of the statutes. Governor Desantis's "stay at home" measure finds statutory support. According to Florida law:

In addition to any other powers conferred upon de Governor by law, he or she may (...) Take measures concerning the conduct of civilians, the movement and cessation of movement of pedestrian and vehicular traffic prior to, during, and subsequent to drills and actual or threatened emergencies, the calling of public meetings and gatherings, and the evacuation and reception of civilian population.⁷³

The statute explicitly grants the governor to power to control the movement of the population during a state of emergency.⁷⁴ Considering that the governor declared a state of emergency in reaction to COVID-19, the measure appears to be aligned with the law.

The second prong requires an evaluation of whether the measures taken justify the limitations and intrusions on personal liberties. In other words, do measures such as quarantining and social

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ Fla. Exec. Order No. 20-87, March 27, 2020.

⁷² Fla. Exec. Order No. 20-94, April 2, 2020.

⁷³ Fla. Stat. 252.36 (k).

⁷⁴ *Id.*

distancing help limit the spread of COVID? Part of what makes the issue of addressing the pandemic so difficult and controversial is the lack of certainty about COVID-19. In 2019, COVID-19 was new. Medical professionals and public health specialists had to determine how to stop the pandemic, how to reduce individual's chances of exposure, and how to make the health system able to address the issues of a pandemic.⁷⁵ All of these complex health issues also had to be addressed and mitigated by governmental officials.⁷⁶ Government officials had to use their powers to make decisions based on information from health professionals, who were updating officials as more was learned about COVID-19.⁷⁷ In retrospect, some of those decisions will look good and others will look bad. History will do the long-term assessment, but the legal system must evaluate the exercise of government powers during the pandemic as they are implemented and challenged

The third prong requires an analysis of whether the measures have a time limit. A state of emergency proclaimed by Florida's governor has a time limit of sixty days,⁷⁸ but Governor DeSantis's state of emergency in response to COVID-19 has been extended five times, extending to over 500 days.⁷⁹ However, COVID-19 may justify these intrusions upon citizens' freedom of movement for long periods of time. There may also be conditions in place to justify the extension of quarantine and social distancing. Yet, the only justifications provided relate to the continuing threat to the health, safety and welfare.⁸⁰

⁷⁵ *CDC's Response: Preparing first responders, healthcare providers, and health systems*, CENTERS FOR DISEASE CONTROL AND PREVENTION, Dec. 31, 2020, <https://www.cdc.gov/coronavirus/2019-ncov/cdcresponse/index.html>.

⁷⁶ NPR interviewed three global leaders who shared how their countries are addressing COVID-19. Morning Edition, *The Global Leaders Who Have Been Effective During the Coronavirus*, NPR, April 16, 2020, <https://www.npr.org/2020/04/16/835710001/the-world-leaders-who-have-been-effective-during-the-coronavirus>.

⁷⁷ *Id.*

⁷⁸ Fla. Stat. § 252.36 (2).

⁷⁹ Fla. Exec. Order 20-114, May 8, 2020; Fla. Exec. Order 20-166, July 7, 2020; Fla.Exec. Order 20-213, September 4, 2020; Fla. Exec. Order 20-276, November 3, 2020; Fla. Exec. Order 20-316, December 29, 2020.

⁸⁰ *Supra* note 26.

Florida provides an example of the legal boundaries of the COVID-19 response. Challenges have been raised against local orders for business closings and mask orders.⁸¹ Those challenges have been grounded in privacy and liberty arguments.⁸² Florida courts have been reluctant to overturn emergency actions in the middle of a pandemic,⁸³ and that has been true nationwide.⁸⁴ Overall, the quarantine and social distancing mandates issued by Governor DeSantis and other governors may be considered appropriate. These mandates appear to be within the statutory definitions of emergency powers and can be justified as reasonable methods to address the issues arising from COVID-19.

The legitimacy of government mandates depends on the actual circumstances of the pandemic and whether the measures continue to be justified by the facts. In some cities that had additional spread or spikes in COVID, quarantining and social distancing mandates were reinstated.⁸⁵ However, these and other measures may be subject to severe scrutiny as they extend to longer periods. For example, the closure of restaurants and vacation rentals and the suspending mortgage foreclosures and evictions may be an overreach of emergency powers, particularly if the restrictions are extended.⁸⁶ Ordering business closures and suspending the rights of landlords over

⁸¹ Erwin Chemerinsky, *Op-Ed: Yes, the government can restrict your liberty to protect public health*, LOS ANGELES TIMES, April 20, 2020, <https://www.latimes.com/opinion/story/2020-04-20/government-can-restrict-your-liberty-to-protect-public-health-courts-have-made-that-clear>; Stephanie Wylie, *The Supreme Court Should not Politicize Valid Public Health Orders*, CENTER FOR AMERICAN PROGRESS, Sept. 2, 2020, <https://www.americanprogress.org/issues/courts/reports/2020/09/02/489964/supreme-court-not-politicize-valid-public-health-orders/>. See also *infra* notes 83 and 106.

⁸² *Supra* note 80, Chemerinsky.

⁸³ *Machovec v. Palm Beach Cty.*, No. 4D20-1765, 2021 Fla. App. LEXIS 1088 (Dist. Ct. App. Jan. 27, 2021); *Jackson v. Orange County*, No. 48-2020-CA-006427-A001-OX (Fla. 9th Jud. Cir. Ct. 2020); *Power v. Leon County*, No. 37-2020-CA-001200 (Fla. 2d Jud. Cir. Ct. 2020); *County of Ventura v. Godspcak Calvary Chapel*, 2020 WL 6557826 (Cal. Sup. Ct. 2020); *4 Aces Enters., LLC v. Edwards*, No. 20-2150, 2020 U.S. Dist. LEXIS 147721 (E.D. La. Aug. 17, 2020).

⁸⁴ *Supra* note 80.

⁸⁵ Corky Siemaszko, *New Lockdowns and restrictions sweep across the country as COVID-19 cases continue to rise*, NBC NEWS, Nov. 16, 2020, <https://www.nbcnews.com/news/us-news/new-lockdowns-restrictions-sweep-across-country-covid-19-cases-continue-n1247919>.

⁸⁶ Fla. Exec. Order 20-87, March 27, 2020; Fla. Exec. Order 20-103, April 10, 2020; Fla. Exec. Order 20-94, April 2, 2020; Fla. Exec. Order 20-91, April 21, 2020.

their own property are very serious measures. There are no specific provisions permitting governors to take such actions, although statutes do accord general emergency powers .

COVID-19 has had a dramatic effect on the economy. When “non-essential” businesses were temporarily shut down, millions of people lost their jobs, and the American economy took a downward turn.⁸⁷ The government took steps to alleviate the economic hardships caused by the pandemic by suspending foreclosures and eviction and by issuing stimulus checks.⁸⁸ The economic impact COVID-19 and government decisions had raises the question: how do leaders balance economic security with public health, and what authority do they have to make those calls?

While the federal and state governments enacted emergency policies, local governments took their own steps. Part of the ultimate legal story is the interaction of federal, state and local policies. In many ways, the national government has allowed local and state governments to make decisions for their communities without intervening.⁸⁹

One example of a local official using local authority to implement COVID- 19 policies is Mayor Giménez of Miami Dade County in Florida. Under Section 8B 7(2)(f) of the Miami Code, Mayor Giménez ordered the closure of all non-essential retail and commercial establishments.⁹⁰ Without any specific legal authority, Mayor Giménez ordered the use of facial masks where social distancing was not possible.⁹¹ Mayor Giménez also ordered the use of facial masks everywhere

⁸⁷ Michael Ettlinger and Jordan Hensley, *COVID-19 Economic Crisis: By State*, University of New Hampshire Carsey School of Public Policy, January 13, 2021, <https://carsey.unh.edu/COVID-19-Economic-Impact-By-State>

⁸⁸ Supra note 80.

⁸⁹ Infra Section V.

⁹⁰ Order 07-20 of May 31st, 2020.

⁹¹ Order 20-20 of April 9th, 2020.

under the penalty of arrest and monetary penalties without a specific statutory provision giving him the authority to make this type of mandate.⁹²

The business closure measure is supported in the Miami-Dade County Code of Ordinances.

The statute provides:

Once a Local State of Emergency has been declared, the Manager is authorized by the Mayor and the Board to order any or all of the following actions: (...) An order requiring any or all commercial establishments located in areas of imminent or actual danger to close and remain closed until further order.⁹³

Mayor Giménez is authorized by the ordinance to order business closure under a state of emergency. The first prong of our analysis is, therefore, properly met.

The second issue is whether the severity of the specific measures was justified to address issues arising from COVID-19. At the time of the closures, there were serious concerns about their efficacy in reducing the spread and the potential negative impact the closures would have on local businesses.⁹⁴ Studies have shown that business closure measures were effective in conjunction with stay at home orders and the prohibition of public gatherings, but the effectiveness of particular closings is still debated.⁹⁵ The limited proof of effectiveness seem not to justify the order of business closures at expense of property rights.

Conversely, Mayor Giménez's facial mask measure may be appropriate. Studies suggest that masks are beneficial to reducing the spread of COVID-19, so facial mask measures are

⁹² Order 20-16 of June 25th, 2020.

⁹³ Miami, Florida Municipal Code Chapter 8B, Section 8B – 7, (2020).

⁹⁴ Alexander W. Bartik, *et al*, *The impact of COVID-19 on small business outcomes and expectations*, July 28, 2020, <https://www.pnas.org/content/117/30/17656>.

⁹⁵ J.M. Braunder, *et al.*, *Inferring the effectiveness of government interventions against COVID-19*, SCIENCE, Dec. 15, 2020, <https://science.sciencemag.org/content/sci/early/2020/12/15/science.abd9338.full.pdf>, on January 17, 2021; Bundgaard Henning, *et al*, *Effectiveness of Adding a Mask Recommendation to Other Public Health Measures to Prevent SARS-CoV-2 Infection in Danish Wearers*, on February 6, 2021, <https://www.acpjournals.org/doi/10.7326/m20-6817>

justifiable.⁹⁶ However, the measures may not be as justified when the recommendations become rules with penalties for being broken. Some cities have civil fines.⁹⁷ Others have started criminalizing the non-use of masks.⁹⁸ It is understandable that this criminalization has occurred in the name of public health and safety. However, those criminalized violations were not widely supported and not actually enforced in most places.⁹⁹ While enforcement during a pandemic is important, there are questions about criminalizing an activity through executive order not based on a statute or ordinance.¹⁰⁰

The third prong requires an analysis of the business closure and mask measures' time limit. Neither the business closure measure nor the mask measure specifies a time limit.¹⁰¹ Instead, the executive orders establishing those measures provide that they shall expire upon the expiration of the existing Miami-Dade County State of Local Emergency.¹⁰² In addition, when the State of Local Emergency is extended, those measures shall also be extended. Because there is no defined time limit or limit on extensions of States of Local Emergencies, the business closures and facial mask measures issued by the Miami-Dade County Mayor may fail to meet the third prong of our analysis.

⁹⁶ Infra note 272.

⁹⁷ City of Miami Order No. 20-16, June 26th, 2020.

⁹⁸ Iván Espinoza-Madrigal, *Don't Criminalize the Coronavirus*, WBUR, April 16, 2020, <https://www.wbur.org/cognoscenti/2020/04/16/police-coronavirus-ivan-espinoza-madrigal>.

⁹⁹ Kristine Phillips, *Many face mask mandates go unenforced as police feel political, economic pressure*, September 16th, 2020, <https://www.usatoday.com/story/news/politics/2020/09/16/covid-19-face-mask-mandates-go-unenforced-police-under-pressure/5714736002/>.

¹⁰⁰ American Bar Association, *What is an Executive Order?* January 25, 2021, https://www.americanbar.org/groups/public_education/publications/teaching-legal-docs/what-is-an-executive-order/.

¹⁰¹ Supra notes 84 and 86.

¹⁰² Supra notes 136 and 137.

It is reasonable and necessary for freedoms to be temporarily limited during a pandemic.¹⁰³ Government at all levels has been confronted with an unprecedented crisis and compelled to make choices that affect public health, private rights and the economic wellbeing of the states and the nation. This crisis demanded decisions be made while science are circumstances were evolving rapidly. The difficulty of decisions made in the middle of an emergency cannot be minimized. Ask a professional pilot or military commander who must make life and death decisions in a split second with whatever information is available. History will say if live were lost to protect the economy or whether shutdowns were overly restrictive and hurt employment and the economy. Given the range of decisions, there will likely be examples of both.

For the future, measures taken in the United States should be analyzed thoroughly to identify serious intrusions upon freedoms of movement, property rights, and personal data rights that could be avoided in the next pandemic.

A3. Judiciary

Inevitably, courts are drawn to high-level conflicts involving government actions and individual rights. United States courts have been asked to analyze and rule on various COVID-19 measures, and the courts are showing support for government policies.¹⁰⁴ The United States Supreme Court upheld the California Governor's COVID-19 restrictions on religious gatherings in a suit filed by a church in California.¹⁰⁵ Following a similar path, in *Power v. Leon County*, the Second Judicial Circuit Court in Florida denied a motion to enjoin Leon County's mask

¹⁰³ Supra Section II.

¹⁰⁴ *Lawsuits about state actions and policies in response to the coronavirus (COVID-19) pandemic, 2020-2021*, BALLOTPEdia, [https://ballotpedia.org/Lawsuits_about_state_actions_and_policies_in_response_to_the_coronavirus_\(COVID-19\)_pandemic,_2020](https://ballotpedia.org/Lawsuits_about_state_actions_and_policies_in_response_to_the_coronavirus_(COVID-19)_pandemic,_2020).

¹⁰⁵ *County of Ventura v. Godspcak Calvary Chapel*, 2020 WL 6557826 (Cal. Sup. Ct. 2020).

ordinance.¹⁰⁶ The plaintiff had argued that the ordinance violated guarantees of privacy, due process, religious freedom, and equal protection under the Florida Constitution.¹⁰⁷

New York's Governor has been party to a number of cases that challenged his COVID-19 mandates. The United States District Court upheld the New York Governor's imposition of a two-week quarantine order on people entering New York from states that have high levels of coronavirus.¹⁰⁸ In upholding the governor's order, the federal judge cited support from the 1905 Supreme Court case *Jacobson v. Commonwealth of Massachusetts*.¹⁰⁹ In *Jacobson*, the Court upheld the authority of states to enforce a compulsory vaccination order in Massachusetts when the government was combatting a smallpox outbreak.¹¹⁰ At that time, the city government in Cambridge, Massachusetts, mandated that all adults be vaccinated against smallpox, and the failure to do so would result in a five-dollar fine.¹¹¹ Surprisingly, *Jacobson*, which has previously been considered obsolete, is back in the spotlight, and it is being used to address current issues more than a hundred years later, as some civil rights advocates fear a possible mandatory vaccine in the near future.¹¹²

Roman Catholic Diocese v. Cuomo presents an array of issues suitable for a constitutional law exam, and it highlights how courts are handling COVID-19 and constitutional rights.¹¹³ The issues include the authority of states, the use of executive authority, the deference of courts to the political

¹⁰⁶ *Power v. Leon County*, 2020 WL 4919774 (Fla. Cir. 2020).

¹⁰⁷ *Id.*

¹⁰⁸ *Page v. Cuomo*, 2020 WL 4589329 (N.D.N.Y. 2020).

¹⁰⁹ *Id.* at *8 (citing *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11 (1905)).

¹¹⁰ 197 U.S. 11 (1905).

¹¹¹ *Toward a Twenty-First Century Jacobson v. Massachusetts*, 121 HARV. L. REV. 1820 (2008).

¹¹² Jillian Kramer, *COVID-19 vaccines could become mandatory. Here's how it might work*, NATIONAL GEOGRAPHIC, August 19, 2020, <https://www.nationalgeographic.com/science/2020/08/how-coronavirus-covid-vaccine-mandate-would-actually-work-cvd/>.

¹¹³ *Roman Catholic Diocese of Brooklyn v. Cuomo*, No. 20-CV-4844, 2020 WL 6120167 at *4, 11 (E.D.N.Y. Oct. 16, 2020).

branches in a technical setting, the definition of emergency, and the limits of free exercise of religion.¹¹⁴ The battle between liberty interests and health policy is squarely joined. The majority said that restrictions on houses of worship violate the free exercise clause and said that the Constitution does not “take a sabbatical” during a pandemic.¹¹⁵ The dissent argued that houses of worship are treated equally with the same kind of secular gatherings.¹¹⁶ The dissent claimed that indoor gatherings or large groups for extended periods of time are treated the same whether secular or religious;¹¹⁷ the majority’s comparison of religious services to bicycle shops and liquor stores misses the point entirely. Finally, the dissent says that on urgent technical medical issues the Court should defer to the branches with expertise and resources.

It is clear that courts are reluctant participants in the crisis but nonetheless may be necessary to provide boundaries. Even though courts defer to executive decisions and compelling interests of public health and safety, the courts and the Constitution cannot “take a sabbatical.”

b. Brazil

Brazil and the United States have similar federal government systems, and both countries have been largely affected by COVID-19. In fact, Brazil has found itself at the center of the largest COVID-19 outbreak in the Southern Hemisphere.¹¹⁸ An analysis of Brazilian history, government, and culture shows a striking similarity to the United States, and the country’s handling of the COVID-19 pandemic provides a look into another federal government’s approach to this pandemic.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ Manuela Andreoni, *Corona Virus in Brazil: What You Need to Know*, NEW YORK TIMES, January 10, 2021, <https://www.nytimes.com/article/brazil-coronavirus-cases.html>.

Brazil's Federal Constitution asserts that during extraordinary circumstances that threaten the health, peace, and safety of the Brazilian people, a state of emergency can be implemented.¹¹⁹ Congress can declare one of the following situations: State of Calamity, State of Emergency, State of Siege, and State of Defense.¹²⁰

On March 20, 2020, Brazil's Congress declared a State of Public Calamity due to COVID-19. The measure was taken for financial reasons¹²¹ given that under a State of Public Calamity, the Federal Government can increase public spending to combat the spread of damage, and the Federal Administration does not have to meet the fiscal target established for 2020.¹²² In addition, emergency funds can be accessed, and States and municipalities can obtain assistance from the Federal Government.¹²³

Restrictions of individual rights, freedoms, and constitutional guarantees can occur temporarily during a State of Public Calamity.¹²⁴ Like American law, Brazilian law enlarges the executive powers during states of emergency,¹²⁵ and like American law, Brazilian law has an ambiguous definition of emergency and emergency powers.¹²⁶

¹¹⁹ Brazil, Constitution of the Federative Republic of Brazil art. 21, V.
http://www.planalto.gov.br/ccivil_03/constituicao/constituicaocompilado.html.

¹²⁰ *Id.*

¹²¹ Congresso Nacional, Decreto Legislativo, No. 6 (2020).

¹²² Redacao Migalhas, *Congresso aprova estado de calamidade pública*, Migalhas, May 20, 2020, <https://migalhas.uol.com.br/quentes/322271/congresso-aprova-estado-de-calamidade-publica>.

¹²³ *Supra* note 114.

¹²⁴ The State of public calamity is a legal measure, instituted by the Presidential Decree n° 7.257/2010 - through Legislative Decree 6, of March 20, 2020, President Bolsonaro officially instituted the state of public calamity in Brazil due to Covid-19. In addition to easing budget limits and allowing the exceptional allocation of more resources to health without committing a crime of fiscal responsibility, the measure also legitimizes the establishment of urgent and provisional legal regimes, in order to contain the impacts of the dire situation. Circulation rights can be suspended and curfews can be implemented for instance.

¹²⁵ *Supra* note 19.

¹²⁶ That will be discussed further throughout the article as we state that there no clear definitions of what types of situations should be considered an emergency

A great concern in Brazil is related to how long a State of Emergency should endure.¹²⁷ The State of Calamity or State of Emergency should end immediately after the source of the emergency ceases to exist. After the emergency ends, the powers between branches of government should quickly be rebalanced. However, rebalancing may be hard when a threat to public health and safety seems to be more than just temporary. COVID continues to recur and the duration of strict controls gets more controversial the longer the pandemic lasts.

Judicial oversight of COVID-19 policies has been sought in both Brazil much like the United States. The courts have issued numerous rulings resolving disputes related to social gatherings, business closures, lockdowns, curfews, and face coverings and COVID-19 mandates.¹²⁸ A lawsuit was filed against Brazil's President. It sought to require him to wear a facemask while in public.¹²⁹ Although the district court had ruled in favor of the plaintiff, the decree was later overruled by the Court of Appeals, and the President was not required to wear a mask.

As Brazil, the United States and the rest of the world adapt to a “new normal,” companies are launching new technologies to address the pandemic. From contact-tracing apps, to temperature sensing cameras, to social distancing and facemask detection technology, the ever-growing artificial intelligence has been relied on and adopted on a large scale by private and public organizations worldwide.¹³⁰ The dramatic impact of the pandemic is forcing a wide range of personal and technological intrusions on citizens.

¹²⁷ Unlike the State of Emergency, State of Siege, and State of Defense, the State of Calamity has as undefined duration

¹²⁸ See 120 and 125-128

¹²⁹ Mateus Silva Laves, *Liminar obriga Jair Bolsonaro a usar máscara de proteção contra a Covid-19*, CONSULTOR JURÍDICO, June 23, 2020, <https://www.conjur.com.br/2020-jun-23/liminar-obriga-bolsonaro-usar-mascara-protecao-covid-19>

¹³⁰ These intrusions will be discussed further in the topic “How the primary medical responses to Covid-19 facilitate government intrusion – The TTT Method: Testing, Treating and Tracking.”

Understandably, crisis may demand drastic measures. The September 11 terrorist attacks in the United States changed airport security measures worldwide.¹³¹ The airport routine changed drastically, and highly intrusive surveillance became the norm.¹³² The pandemic has caused government intrusions in Brazil that are not universally accepted. Like the United States, Brazil is a diverse country with different regions having widely ranging views of politics and government. The personality and culture of different regions and nations affects outcomes, enforcement and acceptance of governmental actions and policies. Culture is important. Laws matter but how individuals react to those laws may be even more critical.

III. Is Culture More Important than Law in Responding to a Pandemic?

The World Health Organization has stated that individual behavior is crucial to control the spread of COVID-19.¹³³ Individual behavior is affected by laws and by culture. The pandemic provides a global example of how individuals react to laws, leadership, and cultural practices. Some nations followed legal restrictions on personal conduct, and some resisted the restrictions. In certain countries there is a culture of compliance, and in other countries, there is a culture of defiance. Some of the explanation for defiance is rooted in failures of governmental leadership to persuade individuals to comply,¹³⁴ but more explanation can be found in a nation's culture.

¹³³ The World Health Organization stated on its Covid-19 Strategy Update virtual booklet that “Individuals must protect themselves and others by adopting behaviours such as washing hands, avoiding touching their face, practicing good respiratory etiquette, individual level distancing, isolating in a community facility or at home if they are sick, identifying themselves as a contact of a confirmed case when appropriate, and cooperating with physical distancing measures and movement restrictions when called on to do so.” https://www.who.int/docs/default-source/coronaviruse/covid-strategy-update-14april2020.pdf?sfvrsn=29da3ba0_19

¹³⁴ The United States and Brazil are examples of countries where there has been a culture of defiance. In contrast 한승범 (“Seungbum Han”), a South-Korean citizen, stated that high compliance rate to government guidelines is a

As a pandemic-response, governments worldwide implemented similar restrictions such as limiting private business hours of operation and capacity, imposing travel bans, restraining school attendance, imposing face coverings in public and private places, prohibiting large social gatherings, developing tracing applications, and forcing mandatory quarantines. All of these measures restrict personal autonomy.

Because COVID-19 was a new virus and there was no ready cure, public health officials and governments used the playbook used for other pandemics to combat COVID-19. The focus was to isolate and limit human contact with the goal of “flattening the curve.”¹³⁵ Flattening the curve is not curing the disease—it is buying time by preventing large spikes in infection. It reduces the burden on the healthcare system.¹³⁶

Culture and governments provide different explanations of how places and individuals comply with restrictive safety measures. Some political structures are based on centralized authority or dictatorial imposition of restrictions. If a governmental system has already achieved a level of suppression of dissent and limited civil liberties, there is reason to believe it will achieve a high level of compliance in pandemic restrictions. The populace is used to government intrusion and the consequences of noncompliance have been observed. Fear is a motivator. Governments that celebrate and support civil liberties have a different issue. In a pluralistic society with a history of individualism, compliance with broad government intrusions is not welcomed.

great characteristic of Korean culture, and he attributes that to one of the main reasons why the country was able to control the COVID-19 pandemic. Interview with **Seungbam Han** Oct. 25, 2020.

¹³⁵ *Covid-19 Strategy Update*, WORLD HEALTH ORGANIZATION, April 14, 2020, https://www.who.int/docs/default-source/coronaviruse/covid-strategy-update-14april2020.pdf?sfvrsn=29da3ba0_12; *Supra* note 139.

¹³⁶ Kara Gavin, *Flattening The Curve for COVID-19: What Does It Mean and How Can You Help?* Michigan Health March 11, 2020, <https://healthblog.uofmhealth.org/wellness-prevention/flattening-curve-for-covid-19-what-does-it-mean-and-how-can-you-help>.

University of Maryland Professor of Psychology Michele Gelfand states that the world can be divided into tight and loose cultures.¹³⁷ In a tight culture, social norms are clearly defined and reliably imposed, leaving little room for individual improvisation and interpretation.¹³⁸ Loose cultures have social norms that are flexible and informal. Loose cultures propose expectations but permit individuals to define the range of tolerable behavior within which they may exercise their own preferences.¹³⁹

A recent study funded by University of Economics Ho Chi Minh City and published by *Safety Science* reveals that cultural determinants play an important role in controlling infection behavior.¹⁴⁰ According to that study, countries with higher a “Uncertainty Avoidance Index” will have the lower proportion of people gathering in public such as retail and recreation, grocery and pharmacy, parks, transit stations, and workplaces.

Previous studies indicate that a tight culture is associated with success during natural disasters, invasions, population density, and pathogen outbreaks.¹⁴¹ Therefore, these countries will form the group to coordinate as well as collaborate to keep people together during a crisis. For example, China, a country with a tight culture, was the first country to report a COVID-19 outbreak, and they were also one of the first countries to have the virus under control. A great compliance rate

¹³⁷ Michele Gelfand, *Rule Makers Rule Breakers: How Tight and Loose Cultures Wire Our World* (2018).

¹³⁸ *Supra* note 130.

¹³⁹ *Supra* note 130.

¹⁴⁰ Toan Luu Duc Huynh, *Does culture matter social distancing under the COVID-19 pandemic?*, ELSEVIER PUBLIC HEALTH EMERGENCY COLLECTION, June 10, 2020., <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7284251/>.

¹⁴¹ Harrington J.R., Gelfand M.J. Tightness–looseness across the 50 United States. *Proc. Natl. Acad. Sci.* 2014;111(22):7990–7995.

with the government recommendations seems to be the main reason why China was able to “flatten the curve” of the first wave of COVID-19 faster than most nations.¹⁴²

Chinese society is a great example of living in a tight culture, in which government surveillance and privacy-invasive measures have become a commonplace.¹⁴³ Its highly regulated culture plays an important role in pandemic times when the government is trying to enforce health measures. Certainly, there are the factors connecting culture and compliance such as cultural heritage of a community and reliance on government. China provides an example of a combination of authoritarian government as well as a cultural heritage of accepting rules and complying with the government’s orders.

In contrast, a loose culture will prioritize the privacy and freedom of each individual. Many nations find themselves struggling to control the virus outbreak, even after months since their first-identified cases. There is evidence that the spread of COVID-19 began in the United States in January of 2020.¹⁴⁴ Yet months later, the country was still setting daily records of new cases while the country’s citizens debate about whether or not the government’s measures to control the spread of a pandemic are undermining their privacy and civil rights. For example, in May of 2020, armed protesters took the streets of Michigan to protest the Governor’s order to extend the stay-at-home

¹⁴² Dan Chen, *China’s coronavirus response could build public support for its government*, THE WASHINGTON POST, March 27, 2020, <https://www.washingtonpost.com/politics/2020/03/27/chinas-coronavirus-response-could-build-public-support-its-government/>.

¹⁴³ Ronald Goldfarb, et. al., *After Snowden: Privacy, Secrecy, and Security in the Information Age*, THOMAS DUNNE BOOKS (2015).

¹⁴⁴ *First Travel-related Case of 2019 Novel Coronavirus Detected in United States*, CENTERS FOR DISEASE CONTROL AND PREVENTION, Jan. 21, 2020, <https://www.cdc.gov/media/releases/2020/p0121-novel-coronavirus-travel-case.html>.

and social distance mandate.¹⁴⁵ This order forced businesses to remain closed, which protestors argued directly affected people's freedom.¹⁴⁶

A lack of a unified approach is one of the main reasons why COVID-19 numbers keep rising.¹⁴⁷ A decentralized decision-making process is part of federalism, which is fundamental to the system of government established by the United States Constitution. The result of government decentralization in a pandemic is dramatically different policies in different jurisdictions. In 2020, some cities were completely shut down and quarantined¹⁴⁸ while other states had virtually no restrictions.¹⁴⁹

In addition, decentralized decision-making causes jurisdiction issues. Can states supersede cities' determinations of mask ordinances? Can the federal government order a state to lift restrictions on business? Can the federal government order a state to implement a stay-at-home order? These legal issues are important to address as we consider how future pandemics might be handled. The critical policy issue is whether this type of diverse decision-making works during a pandemic. Diverse decision making may be suitable for certain issues such as public education,

¹⁴⁵ Lois Beckett, *Armed protesters demonstrate against Covid-19 lockdown at Michigan capitol*, THE GUARDIAN, June 2, 2020, <https://www.theguardian.com/us-news/2020/apr/30/michigan-protests-coronavirus-lockdown-armed-capitol>.

¹⁴⁶ *Coronavirus: Armed protesters enter Michigan statehouse*, BBC NEWS, May 1, 2020, <https://www.bbc.com/news/world-us-canada-52496514>.

¹⁴⁷ See Rebecca L. Haffajee & Michelle M. Mello, *Thinking Globally, Acting Locally—The U.S. Response to COVID-19*, The New England Journal of Medicine, May 28, 2020, <https://www.nejm.org/doi/full/10.1056/NEJMp2006740> (highlighting how the United States' failure to have a unified approach to COVID-19 caused more harm and confusion during the pandemic).

¹⁴⁸ San Francisco Bay Area can be noted as one of the places with stricter and longer lockdown in the United States with the most stringent isolation orders in the country taking effect on March 17, 2020. As of February 10th, 2021 the Bay Area is not fully reopened as data shows on San Francisco's government website <https://sf.gov/step-by-step/reopening-san-francisco>.

¹⁴⁹ The North Dakota the Governors held off on imposing stay-at-home orders in the beginning of the COVID-19 contamination in the U.S. and later took very few restrictive measures to control the spike of the virus - Sarah Mervosh, Denise Lu and Vanessa Swales, *See Which States and Cities Have Told Residents to Stay at Home* <https://www.nytimes.com/interactive/2020/us/coronavirus-stay-at-home-order.html>

drinking laws, or other localized issues. But for a pandemic that crosses state borders, a bad policy in one state can infect the neighboring state and cause a virus spike in certain regions that were otherwise containing the spread of COVID-19.

State borders do not stop COVID-19 from spreading. Without uniform, national consensus or direction, the virus will continue to spread across governmental boundaries because individuals will react differently depending on the States rules. A study published in 2009 stated that British and American citizens are unlikely to stay at home to work if they think that the risk of illness transmission is uncertain.¹⁵⁰ Loose cultures with a commitment to individual liberty are a stark contrast to “tight” cultures with dictatorial governments. This reality is not an endorsement of dictatorships as the best means to address pandemics. Rather, it is a recognition that a national emergency capable of crossing state boundaries requires national policies and guidance. In addition to the national need, there is also a need for a mutual understanding of policies across jurisdictions and how they should be shaped depending on each population. The policy appropriate to a densely populated urban environment may be quite different from the policy in a small rural city.

Latin America has also been heavily struck by COVID-19, and strict lockdown measures have been enacted. In Honduras, the government instituted a nationwide centralized, militarized lockdown, devoid of oversight.¹⁵¹ The lockdown allocated specific days in which people could leave their homes to get food.¹⁵² Similarly, Chile has instituted a strict curfew, and its residents

¹⁵⁰ *Supra* note 133.

¹⁵¹ See Lisa Haugaard, *Honduras: Repression in the Time of COVID-19*, <https://www.lawg.org/honduras-repression-in-the-time-of-covid-19-2/>

¹⁵² Lisa Haugaard, *Honduras: Repression in the Time of COVID-19*, April 22, 2020, <https://www.lawg.org/honduras-repression-in-the-time-of-covid-19-2/>.

must obtain a permit to leave home for very specific reasons.¹⁵³ In Brazil, numerous local governments have placed travel barriers on the borders of the cities, restricting the circulation of people as a response to COVID-19.¹⁵⁴ Additionally, interstate private transportation buses have been restricted, and interstate roads have been closed.¹⁵⁵ Many citizens have also protested the face-covering impositions and movement-restrictions measures.¹⁵⁶

Compare the Latin American countries' responses to the response of Asian countries' responses. For residents in many Asian countries, some of which are tight-cultured countries, wearing a mask and government's privacy-invasive measures are not unusual and they comply.¹⁵⁷ There is a pressure to conform. However, residents of loose-cultured countries have shown they are less likely to abide to government rules that implicate a limitation of privacy, freedom, or civil rights.

Government trustworthiness plays a crucial role in how countries deal with the pandemic. Tight cultures have strong social norms, little tolerance for deviance and people have more trust in the government, but loose cultures are more permissive to varying social norms. In loose cultures people there can be political polarization, which causes a divide in their society and the

¹⁵³ Lidia Casas Becerra, *The Novel Coronavirus and Civil Rights: A Snapshot from Chile*, HARVARD LAW PETRIE-FLOM CENTER BILL OF HEALTH, May 14, 2020, <https://blog.petrieflom.law.harvard.edu/2020/05/14/chile-global-responses-covid19/>

¹⁵⁴ GOVERNO DO ESTADO MATO GROSSO DO SUL, *Ações nas barreiras sanitárias são intensificadas no combate à Covid-19*, <http://www.ms.gov.br/acoes-nas-barreiras-sanitarias-sao-intensificadas-no-combate-a-covid-19/>

¹⁵⁵ Folha de São Paulo, *Governadores fecham estradas e vetam ônibus de outros Estados*, FOLHA DE S.PAULO, March 24, 2020, <https://www1.folha.uol.com.br/cotidiano/2020/03/governadores-fecham-estradas-e-vetam-onibus-de-outros-estados.shtml>.

¹⁵⁶ Por Da Redação Atualizado, *Coronavírus: durante quarentena, manifestantes fazem buzinação em São Paulo* VEJA, April 11, 2020, <https://veja.abril.com.br/brasil/coronavirus-durante-quarentena-manifestantes-fazem-buzinaco-em-sao-paulo/>; *Contrariando orientações da OMS, apoiadores de Bolsonaro protestam em SP contra isolamento social*, O GLOBO, November 4, 2020, <https://oglobo.globo.com/brasil/contrariando-orientacoes-da-oms-apoiadores-de-bolsonaro-protestam-em-sp-contrain-isolamento-social-24366136>.

¹⁵⁷ *Supra* note 126.

society's reaction to government policies.¹⁵⁸ Moreover, studies show that tight cultures have “more law enforcement per capita, desire greater media restriction and endorse the use of any force necessary to maintain law and order, . . . and have higher conscientiousness.”¹⁵⁹ Conversely, looser cultures are more open and tolerate other culture's values, beliefs, and experiences.¹⁶⁰

Therefore, when companies like Google, Facebook, and Apple announced in loose culture countries that they teamed up to create a contact tracing software applications that could be used by governments around the world, privacy fears arose almost immediately.¹⁶¹ It is uncertain how governments will use the data collected, for how long the data will be stored, and if governments will use it only for COVID-19 controlling measures.

IV. How the primary medical responses to Covid-19 facilitate government intrusion – The TTT Method: Testing, Treating and Tracking

There appears to be a medical consensus on how to react to the COVID-19 pandemic. Public health specialists have used the Testing, Treating, and Tracking Method (“The TTT Method”) in pandemics for decades, including the 1917 flu pandemic.¹⁶² Before there is a vaccine that prevents infection,¹⁶³ the logical method is to identify disease through testing, treat those who are sick, and

¹⁵⁸ Thomas Carothers, Andrew O'Donohue, How to Understand the Global Spread of Political Polarization (October 10, 2020, 6:30 pm), <https://carnegieendowment.org/2019/10/01/how-to-understand-global-spread-of-political-polarization-pub-79893>; SEE FOOTNOTE LATER ABOUT ACCEPTANCE OF MASKS BY PARTY REGISTRATION IN THE US

¹⁵⁹ Michele J. Gelfand, *Universal and culture-specific patterns of tightness-looseness across the 31 Chinese provinces*, in RAPID ADAPTATION AND TRANSPOSABLE ELEMENTS, 6522-6524 (PNAS 2019).

¹⁶⁰ *Id.*

¹⁶¹ Mike Feibus, *Are coronavirus contact tracing apps doomed to fail in America?*, USA Today, June 25, 2020, <https://www.usatoday.com/story/tech/columnist/2020/06/24/apple-google-contact-tracing-apps-privacy/3253088001/>; Geoffrey A. Fowler, *A covid-fighting tool is buried in your phone. Turn it on*, THE WASHINGTON POST, Jan. 22, 2021, <https://www.washingtonpost.com/technology/2020/11/18/coronavirus-app-exposure-alerts/>.

¹⁶² Douglas Jordan, *The Deadliest Flu: The Complete Story of the Discovery and Reconstruction of the 1918 Pandemic Virus*, Centers for Disease Control and Prevention, <https://www.cdc.gov/flu/pandemic-resources/reconstruction-1918-virus.html>.

¹⁶³ Even with the successes of Pfizer and Moderna Vaccines for COVID-19, testing will play a critical role in any future pandemic.

track contacts to reduce the further spread of the disease. Each of these activities entails some intrusion. The public seems more accepting of testing. Almost everyone who is sick wants to be treated, and individuals are likely to want to know if they were exposed to the virus. Each of these actions involves the use of information.

One example of government taking a highly intrusive health measure was Brazil's mandatory vaccination program during the smallpox outbreak of 1904.¹⁶⁴ Intense debate and strong opposition preceded the passage of the mandatory vaccination law in October 1904. The publication of the proposed law in the newspapers set off a popular rebellion, known as *Vaccine Revolt*.¹⁶⁵ A variety of groups with different motivations¹⁶⁶ were brought together against the measures instituted by the new law – popularly referred to as the “*Torture Code*.”¹⁶⁷ The new law contained severe penalties, including fines for non-compliance, and it required a person have vaccination certificate to have access to public education and employment in public institutions,¹⁶⁸ Vaccination certificates were even required to get married and for travel.¹⁶⁹ Additionally, the law authorized sanitary officials and police officers to enter private residences to vaccinate the residents.¹⁷⁰

The invasion of homes and forced application of vaccines were measures well beyond what was considered acceptable in Brazil.¹⁷¹ From November 10 to 16, 1904, Brazilian citizens responded with violence, causing a state of siege to be declared in the state of Rio de Janeiro. The smallpox vaccination continued to be implemented and incorporated into the daily life of Rio de

¹⁶⁴ Gilberto Hochman, *Priority, Invisibility and Eradication: The History of Smallpox and the Brazilian Public Health Agenda*, 53 MEDICAL HISTORY 2 (2011).

¹⁶⁵ Gilberto Hochman, *Priority, Invisibility, and Eradication: The History of Smallpox and the Brazilian Public Health Agenda*, 53 MEDICAL HISTORY CAMBRIDGE UNIV. 2 (2011).

¹⁶⁶ Anti-vaccinationists, military, civil monarchists, positivists, trade unionists, clergy, and political elite.

¹⁶⁷ *Supra* note 166, Hochman.

¹⁶⁸ *Supra* note 161.

¹⁶⁹ *Id.*

¹⁷⁰ *Supra* note 161.

¹⁷¹ *Supra* note 21.

Janeiro and other main cities of Brazil.¹⁷² While there was considerable opposition to the forced vaccinations in Brazil, the government did ultimately succeed in reducing mortality rates, reaching near zero in 1906.¹⁷³

After 1904, Brazilian authorities decided the TTT Method would be used to combat the next outbreak.¹⁷⁴ The TTT Method is a result of practices developed during other historical disease outbreaks.¹⁷⁵ Examples of serious outbreaks include cholera, typhoid, influenza, tuberculosis, diphtheria, polio, measles, HIV, and the former coronavirus.¹⁷⁶ Some of these diseases have been controlled, and some of them still cause thousands of deaths annually. The TTT Method promises to mitigate the impacts of the outbreaks, as it is seen as the epidemic gold standard.¹⁷⁷

The effectiveness of the TTT Method may vary significantly depending on the political regime and culture of a nation. For example, the TTT Method should be very effective in China. In China, the Government controls people's freedoms.¹⁷⁸ Some cultures are inclined to accept limitations on freedom as expected. But others, like the US are grounded in principles such as the unalienable rights of life, liberty, and the pursuit of happiness.¹⁷⁹ Americans are culturally inclined to reject authoritarian measures and question governmental authority. Cultural tendencies combined with legal structure largely defines the success and acceptance of the TTT Method.

¹⁷² *Supra* note 166, Hochman.

¹⁷³ *Supra* note 161.

¹⁷⁴ *Supra* note 67.

¹⁷⁵ *History of Quarantine*, CENTERS FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/quarantine/historyquarantine.html>.

¹⁷⁶ *CDC Current Outbreak List*, CENTERS FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/outbreaks/index.html>.

¹⁷⁷ *Supra* note 159.

¹⁷⁸ Human Rights Watch, *China's Global Threat to Human Rights*, <https://www.hrw.org/world-report/2020/country-chapters/global#>.

¹⁷⁹ U.S. CONST. amend. XIV.

Regardless of the laws and culture of a nation, the fight against disease outbreaks usually starts with quarantine and social distancing measures. Studies carried out during the 1918 Spanish Influenza, the deadliest pandemic in history, suggested that quarantine and social distancing might help ease the strain on the public health care system. These measures may also provide time for the development of a vaccine. The general belief is that isolation can help.¹⁸⁰ Once isolation policies begin, at that point governments begin implementation of the basic three elements of the TTT Method: testing, treating, and tracking.

Testing. Public health officials have pressed for increased testing from the beginning of the pandemic.¹⁸¹ Testing not only identifies individuals who need treatment but can identify geographical outbreaks that may require more general controls and emergency measures.¹⁸²

COVID testing has garnered less enthusiasm because of skepticism about the disease itself. Not all people who have COVID-19 have symptoms of COVID-19, which makes getting people to take tests harder. An individual can be infected and asymptomatic. That individual may not feel ill but he or she may spread the virus to others. Many COVID cases have mild symptoms, so the need for the test may not be apparent to the individual, but widespread testing of the population is essential to finding where the disease is spreading.¹⁸³ While other COVID cases are severe and require hospitalization. Therefore, mass testing is about more than just the individual health of a person—it is a priority to prevent spread of the virus.

¹⁸⁰ John M. Barry, *THE GREAT INFLUENZA: THE STORY OF THE DEADLIEST PANDEMIC IN HISTORY* (Penguin Books, 2018)

¹⁸¹ World Health Organization, *WHO publishes new Essential Diagnostics List and urges countries to prioritize investments in testing*, January 29th, 2021, <https://www.who.int/news/item/29-01-2021-who-publishes-new-essential-diagnostics-list-and-urges-countries-to-prioritize-investments-in-testing>.

¹⁸² U.S. Department of Health and Human Resources, *Why COVID-19 testing is the key to getting back to normal*, September 4th, 2020, <https://www.hhs.gov/news/2020/09/04/covid-19-testing-key-getting-back-normal>.

¹⁸³ *Supra* note 166.

Testing identifies individuals who are infected. An individual who is infected should quarantine and is necessary required to identify individuals who may have exposed to the virus. Therefore, once diagnosed there are significant intrusions into the infected individual's life. The person will be restricted in personal movements. The individual's health care records will be examined. Health authorities will want to know all contacts with other persons.

Treating. After receiving a positive result, an individual will be encouraged to initiate treatment. The seriously ill will seek treatment and the high numbers of seriously ill stresses health care systems.¹⁸⁴ However, many individuals with the disease do not require extensive treatment. As a legal matter, the government cannot force treatment. There is an established constitutional right to refuse treatment¹⁸⁵ that is consistent with the international human right to bodily integrity.¹⁸⁶

The rules of confidentiality change during a pandemic because of the need to know characteristics of the individuals affected, how the virus affects different groups, and the mortality rate among different demographics.¹⁸⁷ Privacy gives way to the emergency needs of a pandemic. The personal information about those treated is part of a database used to predict impacts, inform treatments, and control the spread of the virus. There can and should be rational limits. Health professionals should have limited access to some information while other information could be anonymized.

¹⁸⁴ Sean McMinn, *et al*, Many Hospitals Are Still Overwhelmed By COVID-19 Patients. Is Yours?, February 8th, 2021; <https://www.npr.org/sections/health-shots/2020/12/09/944379919/new-data-reveal-which-hospitals-are-dangerously-full-is-yours>.

¹⁸⁵ Also known as bodily integrity.

¹⁸⁶ *Bodily Integrity*, CHILD RIGHTS INTERNATIONAL NETWORK, <https://archive.crin.org/en/home/what-we-do/policy/bodily-integrity.html#:~:text=The%20principle%20of%20bodily%20integrity,as%20a%20human%20rights%20violation>.

¹⁸⁷ U.S. Department of Health and Human Resources, *HIPAA, Health Information Exchanges, and Disclosures of Protected Health Information for Public Health Purposes*, <https://www.hhs.gov/sites/default/files/hie-faqs.pdf>.

Tracking. Tracking and contact tracing have always been a part of pandemic response. A traditional tracking practice would involve a health care official filling out forms with patient's information. Tracking involves questions regarding that patient's whereabouts, home and work addresses, people contacted in the past few days, allergies, infirmities, and sampling. However, in the digital age, new tracking methods are now available through technology.

Ever since COVID-19 became a global pandemic, there have been a staggering number of surveillance technologies launched and accepted across the world.¹⁸⁸ Even before the pandemic pervasive use of technology has diminished individual privacy, and much of that diminution has been voluntary as people increasingly live their lives on social media and on their smart phones.¹⁸⁹

Tracking might be technically easy with the current technology, but a question arises: what are the limits to it? For instance, a major personal privacy concern is the disclosure of personal activities and locations. The government cannot track an individual's movements without a warrant.¹⁹⁰ However, tracking people's personal data is a necessary part of fighting a virus. After all, what is the effectiveness of testing without tracking?

China is one of the countries taking full advantage of technology in fighting the pandemic. For instance, its residents are assigned a QR code based on a combination of big data consistent of information submitted by the users themselves and by third parties.¹⁹¹ Moreover, the country utilizes thermal cameras that can identify individual's body temperatures from a distance and

¹⁸⁸ Adam Schwartz, *COVID-19 and surveillance Tech: Year in Review 2020*, January 5, 2021, <https://www.eff.org/deeplinks/2020/12/covid-19-and-surveillance-tech-year-review-2020>.

¹⁸⁹ Laura Silver, *et al*, *Use of smartphones and social media is common across most emerging economies*, March 7th, 2019, <https://www.pewresearch.org/internet/2019/03/07/use-of-smartphones-and-social-media-is-common-across-most-emerging-economies/>.

¹⁹⁰ *United States v. Jones*, 565 U.S. 400 (2012).

¹⁹¹ Joana Molgaard, who lives in Shanghai and with I had the pleasure to speak with, informed me that a few days ago she had cough and went to a private hospital that -technically- has no relationship with the government and her medical condition was immediately uploaded on the QR code, which she noticed only a few days later.

immediately notify authorities in case abnormalities are detected.¹⁹² Other cameras verify whether people are obeying social distance policies in public spaces.¹⁹³ Drones verify the proper use of masks as well as detect different types of coughing.¹⁹⁴ Contact tracing apps can trace our movements constantly, relying on the GPS embedded in all cell phones.¹⁹⁵ There is also comprehensive health monitoring using phones, facial recognition and CCTV.

Other countries are also relying on different technologies to collect and process personal data as a way to combat the pandemic. In that sense, Contact Tracing Apps and Contact Notification Apps have been developed. With them, individuals can upload their personal information, including their live location, through applications downloaded on their cellphones and the apps may send an “exposure notification” if the individual has come in contact with someone carrying the virus.¹⁹⁶

The developer of the Contact Tracing App is able to identify the user of the app, and the developer of the Contact Notification App pseudonymizes the use.¹⁹⁷ Thus, the developer of the Contact Notification App will arguably have access to an individual’s personal information, but it will not be able to identify the individual. Another difference between Contact Tracing Apps and Contact Notification Apps relates to the device utilized to verify the exposure. Contact Tracing Apps utilize the GPS embedded in cellphones. By knowing a phone’s current location, the app

¹⁹² Claudia Glover, *China to Roll Out Temperature-Taking Infrared Cameras*, March 31st, 2020, <https://www.cbronline.com/news/china-to-roll-out-temperature-taking-infrared-cameras>.

¹⁹³ Lydia Khalil, *Digital Authoritarianism, China and COVID*, November 2020, <https://www.lowyinstitute.org/publications/digital-authoritarianism-china-and-covid>.

¹⁹⁴ Supra note 178.

¹⁹⁵ Supra note 178.

¹⁹⁶ Apple and Google partnered to create a Privacy-Preserving Contact Tracing technology. It is argued that the two tech giants aim to help governments and health agencies reduce the spread of the virus, with user privacy and security as central to the design. <https://covid19.apple.com/contacttracing>.

¹⁹⁷ Proper pseudonymization should be done in such a way that it is impossible (or extremely impractical) to identify the data subject. GDPR Article 4 and Recital 26.

should be able to identify whether the owner has come in contact with an individual who has tested positive for COVID-19. On the other hand, Contact Notification Apps utilize Bluetooth. An owner's phone and the phone of the individual close to him or her will exchange information. If the individual close to the owner has tested positive and has informed the app, the owner will receive an "exposure notification."¹⁹⁸

Apple and Google advocate for Contact Notification Apps. The two tech giants argue that the method is privacy protective because the user will be pseudonymized and because individuals would not be traced constantly. Instead, their personal information would be exchanged with cellphones of individuals they are proximate to for a certain period of time.

There is also a concern about what information is considered COVID-related and should be collected. Apple and Google would define what information is COVID related for their technology. The definition will probably be crafted in complicated terms and injected into digital terms of agreement. Usually, users tend not to read through before clicking "I agree,"¹⁹⁹ but the next "I agree" may put the users privacy at increased risk.

Moreover, apprehension concerning where the data will be stored is also a factor. In terms of data storage, we may categorize apps as Centralized and Decentralized. Centralized apps will concentrate all the information collected into one single database that is controlled by the Government. The United Kingdom, France, and Norway are utilizing centralized apps.²⁰⁰

¹⁹⁸ Governor Murphy and Governor Cuomo Launch Exposure Notification Apps to Help Stop the Spread of COVID-19, STATE OF NEW JERSEY DEPARTMENT OF HEALTH, October 1, 2020, <https://www.nj.gov/health/news/2020/approved/20201001a.shtml>.

¹⁹⁹ David Berreby, *Click to agree with what? No one reads terms of service, studies confirm*, THE GUARDIAN, March 3, 2017, <https://www.theguardian.com/technology/2017/mar/03/terms-of-service-online-contracts-fine-print>; Caroline Cakebread, *You're not alone, no one reads terms of service agreements*, BUSINESS INSIDER, November 15, 2017, <https://www.businessinsider.com/deloitte-study-91-percent-agree-terms-of-service-without-reading-2017-11>.

²⁰⁰ Cristina Criddle and Leo Kelion, *Coronavirus contact-tracing: World split between two types of app*, May 7th, 2020, <https://www.bbc.com/news/technology-52355028>.

On the other hand, the Decentralized Apps promise to keep personal information stored on the individual's phone.²⁰¹ Countries such as Austria, Croatia, Denmark, Ireland and Italy are utilizing Decentralized Apps in order to track the spread of COVID-19²⁰²

Considering the United States, it is important to note that The Fourth Amendment protection does not apply to the private sector.²⁰³ The private surveillance industry has the ability to gather personal information without the Fourth Amendment restrictions placed on the government restrictions.²⁰⁴ The industry may end up sharing the personal information collected with anyone consistent with terms of service, including, in certain circumstances, the government²⁰⁵. Decentralized Apps might be more privacy intrusive than they appear.

Mass collection of data and analyzing that data is a major focus of governments and industry. Information provides the ability to predict conduct and to even identify individuals who are considered threats. An evaluation of the new surveillance society is beyond the scope of this article. What we intend is to identify how the pandemic has justified increased surveillance, information gathering and monitoring. The purposes are noble. However, it is necessary to be aware of the potential for abuses and misuses of information.

The European Union ("EU") leads the way towards emphasizing informed consent among other privacy protections²⁰⁶ in the Global Data Protection Regulation ("GDPR").²⁰⁷ Although

²⁰¹ *Supra* note 185.

²⁰² *Mobile applications to support contact tracing in the EU's fight against COVID-19: Progress reporting June 2020*, EUROPEAN COMMISSION (June 2020).

²⁰³ *United States v. Miller*, 152 F.3d 813, 815 (8th Cir. 1998); *United States v. Jacobsen*, 466 U.S. 109, 113 (1984).

²⁰⁴ Jon L. Mills, *PRIVACY: THE LOST RIGHT*, 271 (Oxford University Press, 2008)

²⁰⁵ *Supra* note 229, Chapter III, § A-2.

²⁰⁶ *See* GDPR Article 8.

²⁰⁷ (EU 2016/679).

leading in global privacy protections, even EU members authorized the use of technologies to collect and process individuals' personal information during the pandemic.

The ability to undermine privacy rights is proportional to the importance that society gives to privacy. Privacy and individual liberty are among the accepted rights in the United States and internationally. Legally, privacy and individual liberty can be a fundamental right. As a fundamental right, government must show the highest level of justification—a compelling state interest for the intrusion. There is no doubt that tracking can be an intrusion as can other issues raised by COVID. The legal issue is whether tracking is justified by a compelling state interest in this case fighting a deadly pandemic.

V. Legal Issues In A Pandemic – The Basis of Government Authority and The Effect on Individual Rights

Protecting safety, security and health is a fundamental element of the social contract. Individuals give up certain liberties to be part of an ordered society. Restrictions range from prohibiting using cell phones while driving to making assisted suicide unlawful. We pay taxes with the expectation that we receive government services like education, national security and police protection. There are constitutional limits that are designed to prevent government from inordinately invading civil liberties. In the United States, due process and liberty interests are constitutionally protected as they are in most democratic societies.²⁰⁸ Emergencies like COVID-19 stress the balancing of liberties and governmental duties to protect the health and welfare of the entire community.²⁰⁹

²⁰⁸ U.S. CONST. Amend. XIV.

²⁰⁹ Humans Rights Watch, *Human Rights Dimensions of COVID-19 Response*, March 19th, 2020, <https://www.hrw.org/news/2020/03/19/human-rights-dimensions-covid-19-response>.

a. Executive Authority

Because emergencies by their nature demand quick action, governments turn to executive actions. That has been the case during the pandemic. Presidents, governors and mayors are granted emergency powers within their jurisdictions to protect the health and welfare of their constituents. There are limitations on duration and limitation of authority as was discussed above.²¹⁰ The mode of policy making is through executive orders or proclamations as authorized by law. In the pandemic these executive policies clashed with individual rights on a regular basis.²¹¹

At the federal level, the issue of extraordinary powers is supported by the executive power through the Vesting Clause,²¹² the Stafford Act,²¹³ and the Public Health Service Act.²¹⁴ The Constitution makes it clear that general welfare is a pillar of the Government. Considering that the executive power is vested in the President, arguably the Vesting Clause grants the President the authority to issue extraordinary measures aimed to protect the people.²¹⁵ Scholars refer to these extraordinary powers as inherent powers of the President.²¹⁶ The Stafford Act provides legislative authorization that grants the President wide authority to execute measures in order to save lives, protect property, and ensure safety and health.²¹⁷ The Public Health Service Act authorizes the Surgeon General, upon approval of the Secretary of Health and Human Services, to make and

²¹⁰ *Supra* Section II.

²¹¹ *Supra* note 194.

²¹² U.S. CONST. Art. II, Section 1.

²¹³ *Supra* note Section II (a), (A1).

²¹⁴ Public Health Service Act, <https://www.govinfo.gov/content/pkg/COMPS-8773/pdf/COMPS-8773.pdf>.

²¹⁵ Steven G. Calabresit and Saikrishna B. Prakash, *The President's Power To Execute the Laws*, *The Yale Law Journal* Vol 104: 541, <https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=7593&context=yjlj>.

²¹⁶ *Supra* note 201.

²¹⁷ *Supra* Section II (a).

enforce measures in his judgment necessary to prevent the introduction, transmission, or spread of communicable diseases.²¹⁸

The Commerce Clause²¹⁹ provides a constitutional basis for Congress to regulate emergencies because they tend to affect interstate commerce or commerce with foreign nations.²²⁰ According to the Constitution, Congress can regulate “commerce with foreign nations, and among the several states, and with the Indian tribes.”²²¹ The Constitution also recognizes the residual power of the states and the states have exercised significant authority during the pandemic.²²²

In Brazil, the Federal Constitution asserts that during extraordinary circumstances that threaten the health, peace, and safety of the Brazilian people, a state of exception can be implemented, and Congress can declare one of the following situations: State of Calamity, State of Emergency, State of Siege, or State of Defense.²²³ Similarly, the United States legislation also contains grant of exceptional power provisions in case of State of Emergency.²²⁴

The exceptionality and the time limit are the main characteristics of Brazil’s State of Exception measures, as restrictions of individual rights, freedom, and constitutional guarantees can temporarily occur during its effectiveness.²²⁵ Moreover, when there is a declaration of a State of Emergency, the extraordinary administration of power is concentrated in the Federal branch and its authority becomes very broad. The concentration of power leads to a fear of possible abuses

²¹⁸ Public Health Service Act, Section 361.

²¹⁹ U.S. CONST. ART. I, Section 8.

²²⁰ American Bar Association, *Two centuries of law guide legal approach to modern pandemic*, April 2020, <https://www.americanbar.org/news/abanews/publications/youraba/2020/youraba-april-2020/law-guides-legal-approach-to-pandemic/>.

²²¹ U.S. CONST. Art. I, Section 8.

²²² William N. Eskridge, Jr. and Neomi Rao, *Common Interpretation: Article I, Section 1: General Principles*, <https://constitutioncenter.org/interactive-constitution/interpretation/article-i/clauses/749>.

²²³ Constituição da Republica Federativa do Brasil de 1988.

²²⁴ *Supra* note 9.

based on a presidential decision made during a State of Emergency. In that scenario, the judiciary will be the only organization capable of challenging the executive decision.

As explained above, statutes, supported by jurisprudence, have shown that governments across the world can be granted additional power to temporarily curtail constitutional rights when dealing with a public-health emergency.²²⁶ Courts have shown support to the broad authority given to government, which leaves the populations of loose-cultured democratic countries in similar situation as the residents of tight-cultured nations.²²⁷ Therefore, the legal issues caused by a lasting global pandemic need to be carefully analyzed. Intrusions are part of the response to most emergencies. COVID-19 is showing the world that a microscopic virus is capable of affecting billions of lives.

Constitutions and human rights laws are not suspended during a pandemic. However, as the COVID-19 virus spread around the world, executive branches of governments gained power to implement privacy-restrictive measures.²²⁸ When society faces emergencies and disasters, the interests of the individuals tend to be drastically diminished. The collective interests will prevail over individual interests during emergencies and disasters. At present, numerous scientists say that COVID-19 has no sign of ending and future pandemics are a virtual certainty.²²⁹ Nonetheless, limits must be in place to guarantee a proper protection of fundamental rights. .

b. Restrictions on personal movement: Quarantine, Lockdown, and Travel Restrictions

²²⁶ Supra Section II.

²²⁷ Supra notes 41, 42, 43, 44.

²²⁸ *Territorial Impact of COVID-19: Managing the Crisis Across Levels of Government*, OECD, November 20, 2020, <http://www.oecd.org/coronavirus/policy-responses/the-territorial-impact-of-covid-19-managing-the-crisis-across-levels-of-government-d3e314e1/>.

²²⁹ Daily Briefing, *Why the coronavirus may never “go away”*, Advisory Board, August 6, 2020, <https://www.advisory.com/daily-briefing/2020/08/06/coronavirus-future>.

Restriction of personal movement is a basic strategy to fight a pandemic. Events that bring people into closer contact increase the odds of transmitting the virus. That fact seems to be confirmed by “super spreader events” that have resulted in the outbreak of multiple cases of the virus.²³⁰ Quarantines have long been held legal in the realm of infectious disease.²³¹ However, quarantining has been more controversial during the COVID outbreak because of the rampant skepticism about the dangers of the disease.

One strategy implemented to stop the rapid spread of COVID-19 in communities was establishing lockdowns.²³² The term “lockdown” entails various practices like requiring mandatory quarantines, recommending individuals stay at home, maintaining social distancing, closing businesses, and banning events and gatherings.²³³ At the end of 2019, when the first cases of COVID-19 were detected in China, a lockdown seemed like an unlikely scenario.²³⁴ Four months later, lockdowns were the most common strategies to slow down the outbreak, forcing millions of people across the world to isolate.²³⁵

While some dispute the effectiveness of lockdowns,²³⁶ it is certain that the lockdowns raise legal issues. The government does have a duty to protect people’s health and security. However, the current practices implemented represent a direct intrusion upon freedom of movement, which

²³⁰ Angela Laguipo, *Genomic sequence of the White House "superspreader" event*, <https://www.news-medical.net/news/20201102/Genomic-sequence-of-the-White-House-superspreader-event.aspx>;

²³¹ Ethen Lieser, *Study: 2020 Mardi Gras Was a Coronavirus Super-Spreader Event*, February 11th, 2021 <https://nationalinterest.org/blog/coronavirus/study-2020-mardi-gras-was-coronavirus-super-spreader-event-178078>.

²³² Stacey Lastoe, *What quarantining around the world really looks like*, September 1, 2020, CNN TRAVEL, <https://www.cnn.com/travel/article/quarantining-around-the-world-reader-images/index.html>.

²³³ World Health Organization Coronavirus disease (COVID-19): Herd immunity, lockdowns and COVID-19, December 31, 2020, <https://www.who.int/news-room/q-a-detail/herd-immunity-lockdowns-and-covid-19>.

²³⁴ Berkeley Lovelace Jr and Noah Higgins-Dunn, *Trump says nationwide lockdown would ‘ultimately inflict more harm than it would prevent’*, CNBC, August 3, 2020, <https://www.cnbc.com/2020/08/03/trump-says-nationwide-lockdown-would-ultimately-inflict-more-harm-than-it-would-prevent.html>.

²³⁵ Global COVID-19 Lockdown Tracker, as of February 11, 2021, <https://auravision.ai/covid19-lockdown-tracker/>.

²³⁶ Vincenzo Alfano and Salvatore Ercolano, *The Efficacy of Lockdown Against COVID-19: A Cross-Country Panel Analysis*, June 3, 2020, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7268966/>.

has been found to be a fundamental right.²³⁷ Balancing constitutional rights with public health requirements is difficult but necessary.

Constitutional scholars argue that because disasters affect interstate commerce, there is a constitutional basis to regulate emergencies found in the Commerce Clause.²³⁸ It is undeniable that COVID-19 generated profound impacts on commerce among the several states.²³⁹ The pandemic also compromised commerce with foreign nations.²⁴⁰ The rapidly increasing number of people infected and sudden deaths produced fear. As a result, the exchange of goods and commodities had a sharp downturn both nationally and internationally.²⁴¹ Economies took a downward turn, the stock market dropped, and thousands of laborers were fired.²⁴²

The freedom of movement is a recognized fundamental constitutional right under the Privileges and Immunities Clause, which states, “The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.”²⁴³ In *Paul v. Virginia*, the Supreme Court defined freedom of movement as “right of free ingress to other States, and egress from them.”²⁴⁴ The COVID-19 lockdowns operate directly against the freedom of movement. By being ordered to self-isolate, an individual has his right to free ingress and egress from other states directly limited. The establishment of travel bans reinforces the intrusion.

²³⁷ *Crandall v. Nevada*, 73 U.S. 35 (1867) (finding that movement is a fundamental right of the people, so a state cannot tax people entering or exiting state borders).

²³⁸ *Supra* note 205.

²³⁹ Lauren Bauer, *et al*, *Ten facts about COVID-19 and the U.S. economy*, September 17, 2020, [https://www.brookings.edu/research/ten-facts-about-covid-19-and-the-u-s-economy/#:~:text=The%20pandemic%20has%20disrupted%20lives,\(Johns%20Hopkins%20University%20n.d.\)](https://www.brookings.edu/research/ten-facts-about-covid-19-and-the-u-s-economy/#:~:text=The%20pandemic%20has%20disrupted%20lives,(Johns%20Hopkins%20University%20n.d.)).

²⁴⁰ United Nations, *Impact of COVID-19 Pandemic on Trade and Development*, https://unctad.org/system/files/official-document/sg2020d1_en.pdf.

²⁴¹ *Supra* note 227.

²⁴² *Supra* note 227.

²⁴³ U.S. CONST. Article IV, Section 2; *see also* *Corfield v. Coryell*, 6 Fed. Cas. 546 (1823).

²⁴⁴ 75 U.S. 168 (1869).

According to the United States Code, individuals may be apprehended or detained for the purpose of preventing the introduction, transmission, or spread of a communicable disease.²⁴⁵ The order depends on the decision of the President upon the recommendation of the Secretary of Health and Human Services, in consultation with the Surgeon General.²⁴⁶ The law gives permission to the Government to apprehend and forcibly examine individuals reasonably believed to be infected in a qualifying stage and reasonably believed to be moving or about to move from one State to another or to be a probable source of infection to individuals who are moving or are about to move to other State.²⁴⁷ Therefore, in a pandemic, the government may have the authority to apprehend and forcibly examine a contaminated individual.

Critically, this law does not define the communicable disease. Based on the vague text, any communicable disease could justify an executive order permitting apprehension and forced examination. Some diseases would certainly justify such measures. Medical literature has demonstrated, for instance, that Ebola is one of the deadliest diseases on the planet²⁴⁸ Ebola is understood to be incredibly severe and often fatal.²⁴⁹ An executive order allowing the apprehension and forced examination of a person suspected to have Ebola might be issues. Although the order would affect several constitutional rights, including the right of movement the lethal nature of Ebola provides a compelling state interest for the intrusion. Conversely, detaining a person contaminated with a seasonal flu would be excessive. Future pandemics may provide tougher questions.

²⁴⁵ 42 U.S.C. § 264.

²⁴⁶ 42 U.S.C. § 264, (b)

²⁴⁷ *Supra* note 103.

²⁴⁸ *History of Ebola Virus Disease*, CENTERS FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/vhf/ebola/history/summaries.html>.

²⁴⁹ *Supra* note 89.

Thus far there is no movement to detain COVID-19 patients although an infected individual is expected to quarantine. Could the US government require universal testing for COVID-19?²⁵⁰ The federal government did not require mandatory examinations, but perhaps it could have based on current laws.²⁵¹ Other nations have implemented mandatory testing or conditioned travel on testing. For example, a test may be required to travel by plane.²⁵² Conditioning travel on testing is far different than compelling a physical intrusion. Any ambiguity should be clarified to avoid problems in the future.

COVID created an unprecedented global emergency. Medical professionals prescribed restrictions on personal movement to reduce the spread of the disease.²⁵³ The challenge is to balance individual rights to gather, travel, and freely move with the need to employ medically necessary standards. The standards and definitions must be established.

c. Restrictions on Business operations: closures, regulated occupancy, regulated operations

Limitations and closing of businesses have been a frequent feature of pandemic remedies. In some locations, closing and quarantines totally closed businesses. The affect on individual

²⁵⁰ The exam involves a six-inch cotton swab being inserted into a patient's nose. The nurse practitioner inserts the swab in both sides of a person's nose and twists for about fifteen seconds. *Coronavirus (COVID-19) testing: What you should know*, UC DAVIS HEALTH, November 23, 2020, <https://health.ucdavis.edu/coronavirus/coronavirus-testing.html>.

²⁵¹ By utilizing the Vesting Clause, Commerce Clause and current statutes on emergencies and disasters. *Supra* notes 199 and 200, and Section II.

²⁵² Center for Disease Control and Prevention - CDC, *Requirement for Proof of Negative COVID-19 Test or Recovery from COVID-19 for All Air Passengers Arriving in the United States*, February 5, 2021, <https://www.cdc.gov/coronavirus/2019-ncov/travelers/testing-international-air-travelers.html>.

²⁵³ *Preventing the Spread of the Coronavirus*, HARVARD HEALTH PUBLISHING: HARVARD MEDICAL SCHOOL, Feb. 12, 2021, <https://www.health.harvard.edu/diseases-and-conditions/preventing-the-spread-of-the-coronavirus>.

businesses has been devastating. Some estimates suggest 17% of restaurants may be permanently out of business.²⁵⁴

There are limitations on business closings and a general executive order mandating business closure is likely unconstitutional.²⁵⁵ The federal government did not issue any executive order directing business closure during COVID-19 but there are arguments against general federal authority to close businesses. The general due process language that provides that “no person shall [...] be deprived of life, liberty, or property, without due process of law.”²⁵⁶ is a clear protection of personal property. The federal government is prohibited from issuing orders taking away individuals’ property without proper process.²⁵⁷ Both the businesses *per se* and the incomes from businesses constitute property. However, if there is a compelling interest or if a business has violated a federal law, a business could be penalized or closed. A business affecting interstate commerce that directly affected welfare and safety would be subject to regulation. For examples, airlines could have passenger limits imposed.

Even in exceptional circumstances, the authority of the President has limits. In *Youngstown Sheet & Tube v. Sawyer*,²⁵⁸ President Truman issued an executive order directing the Secretary of Commerce Sawyer to seize and operate most of the nation’s steel mills.²⁵⁹ The act was issued during the Korean War, and its objective was to avert the expected effects of a strike by the United Steelworkers of America.²⁶⁰ The Supreme Court of the United States held that the President did

²⁵⁴ *Restaurant Industry in Freefall; 10,000 Close in Three Months*, National Restaurant Association, December 7, 2020, <https://restaurant.org/news/pressroom/press-releases/restaurant-industry-in-free-fall-10000-close-in>.

²⁵⁵ Notably, it would not be unconstitutional if the business violated a valid U.S law or an order from the Center for Disease Control and Prevention to implement certain safety measures.

²⁵⁶ U.S. CONST. Amend. V.

²⁵⁷ Henry Brannon, *Due Process of Law*, TREATISE ON THE RIGHTS AND PRIVILEGES GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES, 138 (1901).

²⁵⁸ 343 U.S. 579 (1952).

²⁵⁹ *Supra* note 118.

²⁶⁰ *Supra* note 118.

not have the authority to issue such an order.²⁶¹ The holding is a strong statement for the importance of private property and business even in times of crisis.²⁶² The Court added, “the President’s power to see that the laws are faithfully executed [Article II, Section 3] refutes the idea that he is to be a lawmaker.”²⁶³ The holding is a limitation on executive powers, even when based on war powers.²⁶⁴ Certainly there may be federal policies on business practices and policies based on the effect on interstate commerce, but a general closing seems beyond the enumerated or inherent powers of the federal government.

At the state level, however, business closure measures were widely utilized. During COVID-19, at least forty-six out of the fifty states ordered non-essential businesses to close.²⁶⁵ The restrictions imposed by the states have ranged from closure. For example, New York.²⁶⁶ But also, states have implemented limitations on capacity to limit crowds. Unquestionably, limitations and closures have caused economic hardship. The health issues caused by COVID and general public fear caused economic hardship as well.

Even though states have broad authority under police powers, lengthy or total closings may be subject to constitutional issues such as takings or due process arguments under the fourteenth amendment. *In 4 Aces Enters. LLC v. Edwards*,²⁶⁷ ten Louisiana bar owners filed a motion to enjoin Louisiana Governor John Bel Edwards and Louisiana State Fire Marshal H. “Butch” Browning Jr. from enforcing orders banning the on-site consumption of food and drinks at bars

²⁶¹ *Supra* note 118.

²⁶² *Supra* note 118.

²⁶³ *Supra* note 118.

²⁶⁴ There are taking of property for imminent domain, etc.

²⁶⁵ Erin Schumaker, *Here are the states that have shut down nonessential businesses*, ABC NEWS, April 2, 2020, <https://abcnews.go.com/Health/states-shut-essential-businesses-map/story?id=69770806..>

²⁶⁶ Executive Order 202.6, March 18, 2020, <https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/EO202.6.pdf>.

²⁶⁷ *4 Aces Enters., LLC v. Edwards*, No. 20-2150 (E.D. Louisiana 2020).

and determining closure of “non-essential” businesses.²⁶⁸ The plaintiffs argued they were denied substantive due process because the ban prevented them from profiting from their businesses.²⁶⁹ They argued they were denied procedural due process because the bans were issued without notice, and they argued their equal protection rights were violated because the ban singled out their type of businesses.²⁷⁰

Utilizing the precedents in *Jacobson*²⁷¹ and *Abbott*²⁷² the court noted that the police power precludes the judiciary “from second-guessing the wisdom or efficacy of measures taken by state officials in response to the COVID-19 pandemic.”²⁷³ The court recognized that the bar owners have a constitutionally protected property interest in the profits of their own business, but the presence of great danger like a pandemic justifies the ban.²⁷⁴ The court noted that the bar owners did not have the opportunity to be heard, but found no due process violation because of the circumstances created by the COVID-19 pandemic.²⁷⁵ Finally, the court found the singling-out of plaintiffs’ businesses to be justified during the COVID-19 pandemic, citing TTT data and information from the White House Coronavirus Task Force.²⁷⁶ .

d. Restrictions on personal conduct: Masking requirements

Another common measure utilized globally is the mandatory use of facial masks in public settings where social distancing measures are difficult to maintain.²⁷⁷ Many health professionals

²⁶⁸ *Id.*

²⁶⁹ *Id.*

²⁷⁰ *Id.*

²⁷¹ *Jacobson v. Massachusetts*, 197 U.S. 11, 25 S. Ct. 358, 49 L. Ed. 643 (1905).

²⁷² *In re Abbott*, 954 F.3d 772 (5th Cir. 2020).

²⁷³ *4 Aces*, No. 20-2150.

²⁷⁴ *Id.*

²⁷⁵ *Id.*

²⁷⁶ *Id.*

²⁷⁷ Elaine He and Lionel Laurent, *The World is Masking Up, Some are Opting Out*, BLOOMBERG OPINION, July 17, 2020, <https://www.bloomberg.com/graphics/2020-opinion-coronavirus-global-face-mask-adoption/>.

argue that masking is fundamental to contain COVID-19 from spreading because masks block droplets coming from the mouths and noses of infected individuals.²⁷⁸ The same argument was utilized to require the population to wear facial masks as the influenza pandemic raged across the United States in 1918 and 1919.²⁷⁹ After a century, governments continue to argue for masks²⁸⁰ and individuals argue against them, claiming violation of personal freedom and social control.²⁸¹

There are two arguments that have been used to resist mask wearing. The first is based on a violation of the First Amendment's freedom of speech.²⁸² Under this theory, masks create a barrier to sharing ideas, thereby abridging the freedom of speech.²⁸³ As of this writing, several courts have addressed and rejected this argument.

In *KOA v. HOGAN*,²⁸⁴ the plaintiffs ask the Maryland courts to enjoin the governor's executive orders mandating use of facial masks. The court denied the request to enjoin.²⁸⁵ Quoting *Jacobson v. Commonwealth of Massachusetts*,²⁸⁶ the court argued that "real liberty for all could not exist under the operation of a principle which recognizes the right of each individual person to use his own, whether in respect of his person or his property, regardless of the injury that may be done to others."²⁸⁷ This analysis embodies reasoning that policies during the pandemic can impair individual freedoms to protect the welfare of the general public. According to the court, "to

²⁷⁸ Talib Dbouk and Dimitris Drikakis, *On respiratory droplets and face masks*, 32 PHYS FLUIDS 6 (1994).

²⁷⁹ Christine Hauser, *The Mask Slackers of 1918*, THE NEW YORK TIMES, December 10, 2020, <https://www.nytimes.com/2020/08/03/us/mask-protests-1918.html>.

²⁸⁰ Congressional Research Service, *Could the President or Congress Enact a Nationwide Mask Mandate?* August 6, 2020, <https://crsreports.congress.gov/product/pdf/LSB/LSB10530>.

²⁸¹ Jonathan Jerry, *Why some people choose not to wear a mask*, September 3, 2020, <https://www.mcgill.ca/oss/article/covid-19-health/why-some-people-choose-not-wear-mask>.

²⁸² U.S. CONST. Amend. I.

²⁸³ Polly J. Price and Patrick C. Diaz, *Face-Covering Requirements and the Constitution*, EXPERTFORUM LAW AND POLICY ANALYSIS, June 3, 2020, <https://www.acslaw.org/expertforum/face-covering-requirements-and-the-constitution/>.

²⁸⁴ In *Antietam Battlefield KOA, et al v. Lawrence J. Hogan* (Civil Action No. CCB-20-1130).

²⁸⁵ *Supra* note 135.

²⁸⁶ 197 U.S. 11, 26 (1905).

²⁸⁷ *Supra* note 135.

overturn the Governor's orders, those who disagree with them must show that they have no real or substantial relation to protecting public health, or that they are beyond all question, a plain, palpable invasion of rights secured by the fundamental law.”²⁸⁸

The court recognized the freedom of speech as a fundamental right, but it did not interpret the mandatory use of masks as “plain, palpable invasion of rights secured by the fundamental law.”²⁸⁹ The court concluded that the orders at issue regulated conduct, not speech²⁹⁰ and that the executive orders do not restrain the speech of a certain group of people or of certain content; it merely regulates a conduct aiming to protect public health.²⁹¹

The second major argument related to the violation of freedoms involves the freedom of movement.²⁹² Individuals argue that mandating masks compels a person to make a decision to either to wear a facial covering or stay home.²⁹³ No case has upheld this argument yet. In comparison to the lockdown and business closure measures, however, mandatory masking is less restrictive. Some people may argue wearing masks is uncomfortable,²⁹⁴ but COVID-19 is a disease transmitted through the air.²⁹⁵ Masks reduce the amount of virus particles in the air,²⁹⁶ which results in a reduced number of individuals infected. Moreover, the mandatory masking measure will end as the pandemic fades away. Based on the sliding scale test,²⁹⁷ mandatory masking orders

²⁸⁸ *Supra* note 135.

²⁸⁹ *Supra* note 135.

²⁹⁰ *Supra* note 135.

²⁹¹ *Supra* note 135.

²⁹² *Supra* note 102.

²⁹³ *Arguments against mask requirements during the coronavirus (COVID-19) pandemic, 2020*, BALLOTPEDIA, [https://ballotpedia.org/Arguments_against_mask_requirements_during_the_coronavirus_\(COVID-19\)_pandemic,_2020](https://ballotpedia.org/Arguments_against_mask_requirements_during_the_coronavirus_(COVID-19)_pandemic,_2020).

²⁹⁴ *Considerations for Wearing Masks*, CENTERS FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/cloth-face-cover-guidance.html>.

²⁹⁵ *Supra* note 146.

²⁹⁶ *Supra* note 148.

²⁹⁷ *Supra* page 39.

are constitutional because there is a proven communicable disease that poses an abnormal risk to the public health.

While lockdowns, business closures, and mandatory masking orders are likely to disappear, the intrusions enforced upon privacy rights may remain as society moves into the new normal. Because people tend to accept privacy intrusions to address emergencies²⁹⁸ it is critical to prevent short-term acceptance during an emergency from becoming long-term privacy intrusions.

e. Obtaining personal information: medical information, tracking movement information, tracing information

Logically, emergency measures taken through the declaration of a State of Calamity or a State of Emergency should stop when the emergency ends. But, when does the threat to public health end when there is a pandemic like COVID-19?

The September 11 terrorist attacks created an ongoing and permanent threat to the United States, and privacy-invasive measures were permanently adopted. The airport routine has changed drastically since the attacks, and highly intrusive surveillance became commonplace.²⁹⁹ The COVID-19 outbreak in 2020 is not the last dangerous virus or pandemic. It is reasonable to fear that intrusive policies in this emergency will survive the emergency.

Artificial intelligence with data from contact-tracing apps, temperature-sensing cameras, and location detection technology is now a significant tool to fight to pandemic.³⁰⁰ The heightened

²⁹⁸ *Supra* note 124.

²⁹⁹ David P. Pekoske, Administrator, *Preventing the Next Attack: TSA's Role in Keeping Our Transportation Systems Secure*, TRANSPORTATION SECURITY ADMINISTRATION, Nov. 8, 2017, <https://www.tsa.gov/news/press/testimony/2017/11/08/preventing-next-attack-tsas-role-keeping-our-transportation-systems>; See also *After Snowden: Privacy, Secrecy and Security in the Information Age*, p 210-2017.

³⁰⁰ Kayleigh Shooter, *Artificial Intelligence vs Covid-19*, HEALTHCARE, September 22, 2020, <https://www.healthcareglobal.com/technology-and-ai-3/artificial-intelligence-vs-covid-19>.

sense of danger to public health supports using more intrusive new technology. How long will data collected and produced to fight the pandemic be maintained?

Clearly governments must address the public health emergency and generally the public sentiment is to protect health risks while there is limited public outcry to protect privacy. Ultimately, policy for the next pandemic must address limitations on data use and storage.

Some countries, including China, South Korea, and Singapore quickly began using advanced technology to impose quarantine measures and maintain social distancing.³⁰¹ Google and Apple also partnered to create an exposure notification API that can be used by different apps for contact tracing. More than forty countries launched Google and Apple's API apps.³⁰²

A central element of contact tracing is location monitoring. Location monitoring is potentially highly intrusive. Contact tracing can be used to define political leanings, religious beliefs or personal habits. In fact, China uses location information combined with artificial intelligence to gather this type of information.

In the United States, governmental monitoring of individual movement without a warrant is unconstitutional.³⁰³ In *United States v. Jones*,³⁰⁴ the Supreme Court held that, under the Fourth Amendment, "longer term GPS monitoring in investigations of most offenses impinges on

³⁰¹ Gov Tech Singapore, *Responding to COVID-19 With Tech*, <https://www.tech.gov.sg/products-and-services/responding-to-covid-19-with-tech>; Government of Korea, *All about Korea's Response to COVID-19*, <http://www.korea.net/Government/Current-Affairs/National-Affairs/view?articleId=56914&subId=6&affairId=2034&pageIndex=1>; June Ko, *How China used technology to combat COVID-19 – and tighten its grip on citizens*, <https://www.amnesty.org/en/latest/news/2020/04/how-china-used-technology-to-combat-covid-19-and-tighten-its-grip-on-citizens/>.

³⁰² Mishaal Rahman, *Here are the countries using Google and Apple's COVID-19 Contact Tracing API*, QXDA, December 28, 2020, <https://www.xda-developers.com/google-apple-covid-19-contact-tracing-exposure-notifications-api-app-list-countries>.

³⁰³ *United States v. Jones*, 565 U.S. 400 (2012).

³⁰⁴ *Id.*

expectation of privacy.”³⁰⁵ The case involved the warrantless installation of a GPS on the defendant’s vehicle in order to produce evidence of the investigated crime.³⁰⁶

In a concurrence, Justice Sotomayor discussed privacy expectations under the current stage of technological development.³⁰⁷ According to her, “new technology may provide increased convenience or security at the expense of privacy, and many people may find the tradeoff worthwhile.”³⁰⁸ But general public acceptance does not forgive unwarranted government surveillance. The reasoning of the privacy under the Fourth Amendment should inform the analysis of government surveillance for other purposes such as public health.

During COVID-19, the world has opted for the security and convenience provided by contact-tracing apps at the expense of privacy.³⁰⁹ With the growing use of contact-tracing apps, individuals potentially forfeit their protected right to privacy in their movement. The convenience of the apps provides for an excellent way to slow the spread of COVID-19. In the long term, future policies should assure that contract tracing data is only used for medical purposes and that when the data is no longer valuable for that purpose, it should be destroyed

The number of personal privacy breaches in recent years demonstrates the dangers of private data collection. In 2018, the Facebook-Cambridge Analytica data breach showed the world how companies can harvest valuable personal information without an individual’s knowledge.³¹⁰

³⁰⁵ *Id.* at 412.

³⁰⁶ *Jones*, 565 U.S. at 427, (2012).

³⁰⁷ *Supra* note 333

³⁰⁸ *Jones*, 565 U.S. at 427.

³⁰⁹ Patrick Howell O’Neill, Tate Ryan-Mosley, and Bobbie Johnson, *A flood of coronavirus apps are tracking us. Now it’s time to keep track of them.*, MIT TECHNOLOGY REVIEW, May 7, 2020, <https://www.technologyreview.com/2020/05/07/1000961/launching-mitr-covid-tracing-tracker/>.

³¹⁰ Carole Cadwalladr and Emma Graham-Harrison, *50 million Facebook profiles harvested for Cambridge Analytica in major data breach*, BENTON INSTITUTE FOR BROADBAND & SOCIETY, March 18, 2020, <https://www.benton.org/headlines/50-million-facebook-profiles-harvested-cambridge-analytica-major-data-breach>.

Lawsuits have been filed against big tech companies for improper data collection, demonstrating a growing distrust of large companies and their handling of personal data.³¹¹ It only makes sense to set policies to assure that data gathered in health emergencies cannot be abused.

f. Administrating Vaccines

Scientists across the globe were part of a vaccine race and in December of 2020 the United Kingdom was the first country to authorize the emergency use for the COVID-19 vaccine³¹². Despite the global effort to develop a vaccine able to combat the SARS-CoV-2 infection and end the pandemic, some of the challenges that countries face are vaccine skepticism and privacy concerns. Some nations are imposed new lockdowns even after vaccines rolled out,³¹³ and legal challenges concerning whether the vaccination policies are being filed in courts.³¹⁴

A survey³¹⁵ conducted by KFF in the United States from November 30- December 8, 2020 revealed that about a quarter (27%) of the public is vaccine hesitant, saying they probably not or definitely would not get a COVID-19 vaccine even if it were available for free and deemed safe by scientists.³¹⁶ Vaccine hesitancy is highest among Republicans (42%), those ages 30-49 (36%), and rural residents (35%).³¹⁷

³¹¹ Clare Duffy, *Google agrees to pay \$13 million in Street View privacy case*, CNN BUSINESS, July 25, 2019, <https://www.cnn.com/2019/07/22/tech/google-street-view-privacy-lawsuit-settlement/index.html>

³¹² Emma Reynolds, Stephanie Halasz, Frederick Pleitgen, and Lindsay Isaac, *UK becomes first country to authorize Pfizer/BioNTech's Covid-19 vaccine, first shots roll out next week*, CNN, December 3, 2020, <https://www.cnn.com/2020/12/02/uk/pfizer-coronavirus-vaccine-uk-intl-hnk/index.html>.

³¹³ Elizabeth Melimopoulos and Usaid Siddiqui, *COVID: Israel enters third lockdown amid vaccination drive*, ALJAZEERA, Dec. 27, 2020, <https://www.aljazeera.com/news/2020/12/27/japans-halts-foreign-arrivals-over-new-covid-strain-live-news>.

³¹⁴ *Supra* note 297.

³¹⁵ Liz Hamel, Ashley Kirzinger, Calley Muñana, and Mollyann Brodie, *KFF COVID-19 Vaccine Monitor: December 2020*, KFF, December 15, 2020, <https://www.kff.org/report-section/kff-covid-19-vaccine-monitor-december-2020-methodology/>.

³¹⁶ *Id.*

³¹⁷ *Id.*

In Brazil, a legal challenge regarding compelling vaccinations was filed in the Supreme Court even before the vaccine was approved in the country.³¹⁸ The Supreme Court upheld the constitutionality of mandatory vaccination and held that it is constitutional for the State to impose restrictive measures such as fines, prohibitions to be in certain places or enroll children in school. However, the State cannot forcibly immunize its citizens³¹⁹. According to Justice Luís Roberto Barroso, although the Brazilian Federal Constitution protects the right of every citizen to maintain their philosophical, religious, moral and existential convictions, society's rights must prevail over individual rights.³²⁰ Therefore, the State can, in exceptional situations, protect people, even against their will – as it does by forcing the use of car seat belts, for instance. This is the same logic that is used by US courts to uphold intrusions during the pandemic.

As mentioned above,³²¹ the United States Supreme Court ruled on vaccine mandates in 1905 in the case *Jacobson v. Massachusetts*. However, scholars argue that *Jacobson* is not a strong precedent for broad compulsory vaccination policies because the penalty in that case was a small fine; the consequence of limiting children's access to school is much more consequential.³²² It appears unlikely that there will be a nationwide compulsory vaccination. If there were, it would certainly be challenged and depending on its restrictions probably declared unconstitutional.

VI. The Next Pandemic

³¹⁸ Emergency use of COVID-19 vaccine was approved in Brazil on January 17, 2021, and Brazil's Supreme Court case's decision was published on December 17, 2020.

³¹⁹ Democratic Labor Party x Brazil, "Ação Direta De Inconstitucionalidade 6.586 Distrito Federal" <http://www.stf.jus.br/arquivo/cms/noticiaNoticiaStf/anexo/ADI6586vacinaobrigatoriedade.pdf>.

³²⁰ NEED SOURCE.

³²¹ *Supra* note 180.

³²² Mary Holland, *Compulsory Vaccination, the Constitution, and the Hepatitis B Mandate for Infants and Young Children*, 12 YALE J. HEALTH POL'S L. & ETHICS 39 (20120).

The reaction to the pandemic has been chaotic and uneven, Different nations made different decisions with different consequences. We can learn from the mistakes, and we can learn from what worked. With the perspective of hindsight, we can better make policies for the next pandemic.

a. Authority to Act

Both Brazil and the United States are federalist nations. A federalist country divides power between multiple vertical layers of government. In the time of a pandemic, that can be an advantage and it can also a source of confusion and disparate treatment.

The COVID-19 virus highlighted the difficulty that federalist countries face when determining authority to act on a subject that has national collective interest. For instance, Sao Paulo, Brazil's most populous State, went into lockdown for several months³²³ after both the Mayor and the Governor announced stay at home orders, but the President of Brazil continuously attacked the lockdowns and social distance measures that were adopted amid the pandemic.³²⁴

In fact, when Brazil's President had COVID-19, he was seen outside without a mask, talking to other people.³²⁵ Most states were enforcing strict quarantine at this time, so the President's actions created a very ambiguous message to Brazilian citizens about how to act during the pandemic and what policies to follow. The lack of a uniform measure to fight the spike of the virus has been identified as one of the causes for the high number of people infected in Brazil.³²⁶

³²³ Lisandra Paraguassa, *Major Brazilian cities set lockdowns as virus spreads*, REUTERS, May 5, 2020, <https://www.reuters.com/article/us-health-coronavirus-brazil-lockdown/major-brazilian-cities-set-lockdowns-as-virus-spreads-idUSKBN22H2V3>.

³²⁴ Maria Carolina Marcello and Leonardo Benassatto, *Brazil' Bolsonaro attacks coronavirus lockdowns as supporters take to streets*, REUTERS, April 19, 2020, <https://www.reuters.com/article/us-health-coronavirus-brazil/brazils-bolsonaro-attacks-coronavirus-lockdowns-as-supporters-take-to-streets-idUSKBN2210V1>.

³²⁵ *Id.*

³²⁶ Juliana Gagnan, iBBC News, [Coronavírus: os sete erros que põem Brasil na rota do 'lockdown', segundo especialistas](https://www.bbc.com/portuguese/brasil-52551974), <https://www.bbc.com/portuguese/brasil-52551974>

The misalignment in policy making throughout the country extended to vaccine distribution. In September of 2020, Sao Paulo's Governor signed an agreement with the Chinese pharmaceutical Sinovac Biotech for the supply of 46 million doses of the vaccine named Coronovac.³²⁷ The vaccine will be manufactured by Instituto Butanta – a Sao Paulo-based research institute. However, while this governor is working to get vaccines, Brazil's President has started a “vaccine war” against Sao Paulo's Governor, announcing that the Federal Government would purchase a vaccine developed by the pharmaceutical Astrazeneca and the Oxford University.³²⁸

In another local-national conflict, Sao Paulo was the only State to take steps to obtain a COVID-19 vaccine.³²⁹ Meanwhile, the President started a “vaccine war” against Sao Paulo's Governor and repeatedly questioned Coronovac, publicly saying he had no intentions to purchase it³³⁰. However, when the Coronovac vaccine was cleared, the Federal Government claimed the vaccine for national distribution.³³¹

The United States faced similar challenges because of the lack of uniformity in federal, state, and local approaches to COVID. On May 4, 2020, Florida restaurants were allowed to offer outdoor dining at 25% capacity and retailers could operate at 25% of indoor capacity. The Governor's reopening order gradually increased until the state's stay-at-home order ended on April

³²⁷ SÃO PAULO, SP [assina acordo por 46 milhões de doses de vacina contra o coronavírus até dezembro](https://www.saopaulo.sp.gov.br/ultimas-noticias/governo-do-estado-apresenta-informacoes-sobre-o-combate-ao-coronavirus-8/)
<https://www.saopaulo.sp.gov.br/ultimas-noticias/governo-do-estado-apresenta-informacoes-sobre-o-combate-ao-coronavirus-8/>.

³²⁸ Tom Hennigan, *COVID-19: Bolsonaro caught up in 'vaccine war' with Brazil's institutions*, THE IRISH TIMES, November 3, 2020, <https://www.irishtimes.com/news/world/covid-19-bolsonaro-caught-up-in-vaccine-war-with-brazil-s-institutions-1.4398936>.

³²⁹ *Should a coronavirus vaccine be mandatory? In Brazil's Most Populous State, It Will Be*. THE WASHINGTON POST, https://www.washingtonpost.com/world/the_americas/virus-mandatory-vaccine-brazil-bolsonaro/2020/12/06/31767b4a-33e5-11eb-8d38-6aea1adb3839_story.html.

³³⁰ UOL, *Bolsonaro desautoriza acordo de Pazuella e diz que não comprará CoronaVac*, <https://noticias.uol.com.br/politica/ultimas-noticias/2020/10/21/bolsonaro-responde-a-criticas-sobre-vacina-chinesa-nao-sera-comprada.htm?cmpid=copiaecola>.

³³¹ *Id.*

30, 2020.³³² Walt Disney World parks reopened in Orlando on July 11, 2020 and July 15, 2020³³³. California's governor, on the other hand, issued a stay-at-home order on March 19, 2020 that lasted until January 25, 2021. Disneyland California remains closed.³³⁴

Compare the United States and Brazil to New Zealand, a unitary country. New Zealand has been praised for its success in controlling COVID-19 as a result of strict nationwide measures.³³⁵. Thus, a question is raised: Should federalist countries take early and unified measures in case of a pandemic? Should legislation be taken in place in place to allow federal policies to be taken in place in event of a global crises that hits an entire country?

b. Proposals: Authority, Time and Jurisdiction

In federalist countries, the misalignment in policy making can be solved with the refinement of the federal policies on the definition and declaration of emergencies and disasters.

A first step is to define the separate the different types of emergencies. Earthquakes, hurricanes, and pandemics are very different emergencies. Each one of these extraordinary occurrences affects the people in different ways. For example, while earthquakes and hurricanes end in hours, pandemics may last months; while earthquakes and hurricanes depend on quick evacuations, pandemics may require people to stay at home as much as possible. Emergencies are different and the federal law should treat them differently.

³³² Alaa Elassar, CNN, *This is where each state is during its phased reopening*, <https://www.cnn.com/interactive/2020/us/states-reopen-coronavirus-trnd/>

³³³ Walt Disney World, <https://www.wdwinfo.com/disney-world/reopening-information-updates.htm#:~:text=EPCOT%20and%20Disney's%20Hollywood%20Studios,extended%20to%20September%2026%2C%202021.>

³³⁴ Disneyland, <https://disneyland.disney.go.com/travel-information/>.

³³⁵ World Health Organization, *New Zealand takes early and hard action to tackle COVID-19* [https://www.who.int/westernpacific/news/feature-stories/detail/new-zealand-takes-early-and-hard-action-to-tackle-covid-19.](https://www.who.int/westernpacific/news/feature-stories/detail/new-zealand-takes-early-and-hard-action-to-tackle-covid-19)

In defining public health emergencies, a statute should categorize threats according to its levels of danger and transmissibility. Although it is clearly not possible to predict the exact nature of the next pandemic, what we have learned a number of things from COVID-19. A sliding scale test should be established to address a particular threat. As hurricanes and earthquakes have different categories, viruses and infectious diseases could also be categorized. Science and medical experts can indicate threat levels.

There are pandemics and epidemics that would certainly be categorized as highly dangerous. For instance, a pandemic like Ebola is extremely transmissible and dangerous. The Ebola virus disease is rare, yet severe, and has a death rate of up to 90% in humans. The danger provided by Ebola makes it easier for society to accept intrusions upon individuals with the disease. To protect the general welfare, the public is unlikely to resist the application of quarantine, mandatory use of masks, and tracking measures to deal with Ebola and Ebola patients. A major issue is public acceptance and understanding of a threat.

While institutions exist now to make these assessments, such as the Center for Disease Control, it would be wise to create a panel of experts with public credibility to present conclusions and assessments. Time is of the essence so such an entity would be designed to act quickly.

The objective of the organization would be (i) to assess the danger and transmissibility related to the threat, according to a set of standards; and (ii) to inform the Secretary of Health and Human Services (“HHS”) whether a public health emergency exists, and if so, provide a threat assessment.

The following standards are utilized by the World Health Organization when assessing the existence of a Public Health Emergency of International Concern³³⁶ and can be the basis for

³³⁶ *International Health Regulations (2005)*, <https://www.who.int/publications/i/item/9789241580496>.

assessing public health emergencies: Is the number of cases and/or deaths for this type of event large for the given place, time or population? Has the event potential to have a high public health impact? Is cooperation among states needed to detect, investigate, respond and control the current event, or prevent new cases?³³⁷

To assess whether the event has the potential to have a high public health impact, the following criteria may be applied: The event is caused by a pathogen with high potential to cause epidemic (infectiousness, fatality, multiple transmission routes or carriers); there is an indication of treatment failure (new or emerging antibiotic resistance, vaccine failure, antidote resistance or failure); there are cases reported among health staff; the event is in an area with high population density; the population at risk is especially vulnerable (refugees, low level immunization, children, elderly, low immunity, undernourished).³³⁸

An advisory entity could also assess the type and level of engagement necessary with state and local governments. The following factors are used to assess the need for cooperation between national sovereigns. The same concepts may be applied to a division of talks between the federal and local governments. To assess whether cooperation among states is required, the following factors may be evaluated: locally insufficient human, financial or technical resources; insufficient laboratory and epidemiological capacity to investigate the event; insufficient antidotes, drugs and/or vaccine and/or protective equipment, decontamination equipment, or supportive equipment to cover estimated needs; existing surveillance system is inadequate to detect new cases in a timely manner.³³⁹ For example, it makes sense for the federal government to support research on and

³³⁷ *Id.*

³³⁸ *Id.*

³³⁹ *Id.*

facilitate the acquisition of treatments and vaccines. To encourage states to execute the measures, federal funds can be granted to the states for implementing elements of the plan.³⁴⁰

The panel could categorize the pathogen and submit its recommendation to the Secretary. Upon the recommendation of the Secretary, the President would decide whether to declare a nationwide Public Health Emergency, recommending the measures to be implemented by the states according to the category of the threat.

The elements of policy for the next pandemic include the following:

1. Define various emergencies in statute. The general definition of emergency is too vague.
2. Define governmental authority to address the pandemic. The time to define limits of authority is before the emergency occurs with a clear vision of options and with the perspective of learning from the past. There are limits to governmental intrusions and they should be articulated for the time when there is not a crisis.
3. Place a time limit appropriate to the emergency with provision for extensions.
4. Create a publicly credible emergency entity comprised of experts and citizens to make a rapid recommendation for the specific emergency.
5. Policies to limit data intrusions should be enacted. Those issues are addressed in the next section of this article.

The COVID-19 pandemic put a substantial stress on governmental systems. The lessons learned should be enacted and implemented in a deliberate manner so that when rapid action is necessary the limits and policies already exist.

³⁴⁰ Power of the Purse. See U.S. Const. Article I, Section 7, clause 1 and Section 9, clause 7; See also *South Dakota v. Dole*, 483 U.S. 203, 205, 107 S. Ct. 2793, 2795 (1987); *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 132 S. Ct. 2566 (2012).

c. Data Privacy Proposals

The consequences of data privacy from the worldwide pandemic have been profound³⁴¹. Gathering and using medical data in a medical emergency is entirely necessary³⁴². Privacy laws gave way to the medical emergency³⁴³. Countries of the European Union suspended its landmark privacy policies in the GDPR for the emergency³⁴⁴. When the emergency is over it is unlikely privacy protections will return to normal immediately³⁴⁵. It makes sense to create a data policy for pandemics, so they do not have to be made during an emergency. A thoughtful data privacy plan will avoid unnecessary intrusions and will provide more comfort to citizens who are already afraid and potentially skeptical of government intrusions.

Some of the fundamental principles that are articulated by the goals of privacy policies as expressed by scholars' and governments can be the baseline.

1. Minimize collection- Privacy is best served when only needed data is collected. In a pandemic sensitive health data must be collected. Limits on collection limit intrusion.

During a pandemic, government does not need to collect health care information on every

³⁴¹ Benjamin Bourdeaux, *et al*, Data Privacy During Pandemics: A Scorecard Approach for Evaluating the Privacy Implications of COVID-19 Mobile Phone Surveillance Programs, https://www.rand.org/content/dam/rand/pubs/research_reports/RR300/RR365-1/RAND_RRA365-1.pdf.

³⁴² Centers for Disease Control and Prevention, Monitoring and tracking the disease, July 1st, 2020, <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/about-epidemiology/monitoring-and-tracking.html>.

³⁴³ Supra note 326.

³⁴⁴ Article 9 (2) (i) of the GDPR authorizes the temporary suspension of data-protection rights in times of public health emergencies. To cope with the COVID-19 pandemic, countries like Italy, France, Germany and Hungary lifted restrictions on processing and sharing personal data. Axel Spies, *Corona Virus: Whatever Happens, The Crisis Has an Impact on Data Protection Rights*, <https://www.aicgs.org/2020/02/corona-virus-whatever-happens-the-crisis-has-an-impact-on-data-protection-rights/>; Privacy International, *Hungarian government suspends some aspects of GDPR*, May 9th, 2020, <https://privacyinternational.org/examples/3837/hungarian-government-suspends-some-aspects-gdpr>; Clara Hainsdorf, *COVID-19 and Data Protection Compliance in France*, April 20th, 2020, <https://www.whitecase.com/publications/alert/covid-19-and-data-protection-compliance-france>.

³⁴⁵ Supra Section V (e).

citizen and monitor every citizens' movement. The nature of data collected during a pandemic is intrusive: health data, location data and personal association data. Before the emergency starts, establish the limits.

2. Define use of data- Data collected for health care purposes should not be used for any other purpose³⁴⁶. In some countries, the massive amounts of information are being collected and maintained. That information could be abused by government in a surveillance state to increase the already expansive amount of data on individuals.
3. Anonymize Data- Not all data needed during a pandemic need to be individualized. There were examples in this pandemic where programs assessed community wide compliance with stay-at-home orders without identifying individuals³⁴⁷.
4. Destroy data when no longer needed- While there may be long term uses for health data on individuals and demographic groups, the retention of individualized data should be limited or anonymized³⁴⁸. Potential misuses can be avoided if data is not individualized. We recognize the capability of taking pieces of data and combining them to identify individuals. Nonetheless, it is good policy to delete and destroy unneeded data.
5. Be transparent about data collection- Data collection is important in fighting a pandemic. Testing and contact tracing are necessary and clearly gather sensitive information. Testing and tracing are effective weapons in fighting a pandemic³⁴⁹ and require support and participation from citizens. The more transparent government is about data collection, the

³⁴⁶ e.g. marketing.

³⁴⁷ European Data Protection Board, *Guidelines 04/2020 on the use of location data and contact tracing tools in the context of the COVID-19 outbreak*, April 21, 2020, https://edpb.europa.eu/sites/edpb/files/files/file1/edpb_guidelines_20200420_contact_tracing_covid_with_annex_en.pdf.

³⁴⁸ *Id.*

³⁴⁹ *Id.*

higher the level of citizen cooperation. Except where government can dictate citizens' conduct, good faith and cooperation are key.

Establishing specific data policies before the next pandemic makes sense. There will be time to learn from the mistakes of this pandemic, take the best data policies, and provide a blueprint for the future that will facilitate rapid and rational actions with greater understanding and cooperation from citizens.

VII. Conclusion

This article focused on protecting and refining the social contract in times of emergencies. It is undeniable that communicable diseases like COVID-19 cause harm to the public health and safety. National policies grant substantial authority to executives during emergencies, including presidents, governors, and mayors. During emergencies, individual rights have been constrained- COVID is no different. This article examines the source of the authority to constrain individuals and businesses to protect the greater good. The issue now and in the future is balancing. The severe consequences of lockdowns, closings and quarantines are undeniable. So are the social, community and individual consequences of a pandemic that kills millions worldwide. Balancing is a necessity, and the Constitution should not take a sabbatical. Therefore, the courts are asked to play the uncomfortable role of medical policy arbiter.

During COVID-19, countries have required business closure and limited hours of operation, issued mandates requesting mandatory use of masks and long-term isolation. In addition, it is common to identify excessive collection of sensitive personal data. These measures drastically affect individual's rights such as property, self-determination, movement, and privacy. These are critical rights for maintaining democratic societies.

The law on emergencies is general and vague. The current definitions of state of emergency and disasters grant the governments almost unrestricted authority to intrude upon individual rights. In addition, the extraordinary powers granted are broadly defined.

It is timely to reassess emergency powers vis a vis personal liberty. COVID-19 has been a warning that emergency powers can generate rational policies but also can produce highly intrusive government practices. The future holds more crises, more emergencies, more pandemics and more governmental intrusions. In some countries, that is just business as usual. But in democratic societies now is the time to address balancing individual liberties with responses to public health crisis. The intrusions on personal liberties have been pervasive and unprecedented during the COVID pandemic. Arguably, most are necessary. However, the absence of established policy added to the ambiguity and anguish of the citizens of every country. What are the rules? Who is in charge? What are the limits?

The overall response to the COVID crisis cannot be considered a success. There are multiple reasons. Some failures were based on poor leadership, some successes were a result of cultural characteristics, but generally there is a vacuum of policy. Now is the time to define a policy that does three things: First, define the authority to implement emergency powers (state, federal and local). In the US there are constitutional limits and rational policy reasons to divide the duties and authority. The national government has authority under the commerce clause to make substantial overall policy decisions. Because a pandemic will have different impacts in different places, local governments and state governments should be empowered as well. Second, the nature of emergencies are that they are urgent and time sensitive. Therefore, there should be time limits on delegation of power, as there are in many statutes now. The limits may be different for different policies. Third, the policies must recognize and provide limits for personal freedom and privacy.

Rather than let policy be made by happenstance and random court decisions, it is critical to develop emergency policies with standards to be met and reviewed.

The policies must describe the personal liberties under protection; make explicit the issues of property rights and business closures; address the issues of individual data intrusions for testing and tracking; deal with the issue of limitation on personal freedom of movement for quarantine and travel bans; and determine the limits of intrusion on personal bodily control for testing and vaccination. These questions are difficult. But it is far better to address them comprehensively with the experience of the COVID pandemic and before the next international health emergency.