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Civil liberties at risk in coronavirus pandemic restrictions

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The coronavirus pandemic has taken a huge toll on the civil liberties Americans hold dear. But for now, most civil libertarians aren't complaining.

Can't go to church? Can't get an abortion? Can't buy a gun? Restrictions imposed in many states have not just made life difficult – they have infringed upon the most basic rights guaranteed under the Constitution.

Americans are told to stay home. Some states try to block residents of other states from entering. Those from New York are prime targets in many parts of the country, but try driving to Texas from Louisiana. Or to Rhode Island, period.

Enforcing the shutdown: Officials grapple with stay-at-home orders, social distancing

Government efforts to starve the pandemic of victims before thousands dead become hundreds of thousands have raised concerns among liberals and conservatives alike. Attorney General William Barr called them “draconian” Wednesday night and expressed a desire to bring them to an end next month.

“I think we have to allow people to adapt more than we have and not just tell people to go home and hide under the bed,” he said on Fox News.

But for the most part, even those whose jobs are to safeguard individual liberties aren't objecting too loudly. Yet.

“All kinds of constitutional liberties are being constrained right now. They are restricted because there's a reason to restrict them,” says David Cole, national legal director of the American Civil Liberties Union. “In a time like this, you have to defer substantially to public health experts.”

At the same time, Cole says, advocacy groups must be vigilant to prevent discriminatory practices, lest states begin to make judgment calls about who shall live and die based on age, health or disability.

Coronavirus goes to court: After lives and livelihoods come the lawsuits

The Trump administration settled a case Wednesday that had been lodged against Alabama over its use of a 10-year-old policy allowing ventilators in short supply to be denied to older people and those with intellectual disabilities and dementia. The state agreed to remove the document and comply with civil rights laws.

“Persons with disabilities have equal worth and dignity and should not be deprioritized for health care based on a supposedly lower ‘quality of life’ compared to persons without disabilities,” said Roger Severino, director of the Office for Civil Rights at the U.S. Department of Health and Human Services. “Older Americans in Alabama can take solace knowing that their state will not impose blunt age cutoffs for ventilator allocation if, God forbid, there is a shortage.”

Most of the policies put in place by state and local officials have been accepted by constituents as the price to pay for their health. If anything, questions have been raised when those policies, no matter how tough, have not been enforced effectively.

The balance between health and other forms of happiness – economic, social, academic, physical – probably will be an issue when the threat of contracting and dying from the coronavirus lessens, calling into question the severity of restrictions.

“Is the harm that we’re inflicting on ourselves worse than whatever the virus is doing to us?” says Ilya Shapiro, director of constitutional studies at the Cato Institute, a libertarian think tank. “That’s the \$64 trillion question. You don’t know how to run the cost-benefit analysis.”

Abortion, religion, guns

Though liberals and conservatives both worry about protecting civil liberties, they differ on which ones are most worth defending.

Liberals point to abortion rights, prisoner and detainee rights and voting rights. Conservatives point to religious freedom, property rights and the Second Amendment.

A three-judge panel of the U.S. Court of Appeals for the 5th Circuit ruled Tuesday that Texas was within its rights to **deem abortion nonessential** during the pandemic. The policy has forced some women to travel long distances out of state for treatment or risk carrying unwanted pregnancies.

“The bottom line is this: when faced with a society-threatening epidemic, a state may implement emergency measures that curtail constitutional rights so long as the measures have at least some ‘real or substantial relation’ to the public health crisis,” the panel said, citing a Supreme Court ruling in a Massachusetts case in 1905. “That settled rule allows the state to restrict, for example, one’s right to peaceably assemble, to publicly worship, to travel, and even to leave one’s home. The right to abortion is no exception.”

Grouping **religious institutions** in with “nonessential” businesses hasn’t been well received by some church officials. In Harris County, Texas, which includes Houston, several pastors filed a lawsuit.

“The free exercise of religion cannot be taken lightly and should not be sacrificed at the altar of political expediency,” they argued in court papers. “Our state and federal constitutions embody a fundamental commitment to religious liberty and guarantee the freedom to express diverse thoughts without governmental interference.”

Guns have been increasingly **in demand** during the pandemic as law enforcement agencies are overburdened and depleted by illness. Several states deemed gun stores essential businesses, others ordered them closed, and a third group has let them remain open only with required social distancing policies.

Civil liberties claims are raised not only when states change the status quo but when they do not. Lawsuits have been filed on behalf of **prisoners and migrant detainees** who face increased health risks because of normal crowded conditions.

“Being subjected to illness is not part of your sentence or punishment,” says Wendy Mariner, a professor of health law at Boston University who teaches at its schools of public health, law and medicine.

Similarly, objections were raised Tuesday when Wisconsin forced many voters to stand in line at a reduced number of polling places rather than expand opportunities for absentee and mail-in voting – a solution the **U.S. Supreme Court rejected**.

‘Warning sign’: Wisconsin’s messy primary shows what states could face in November

In dissent, **Associate Justice Ruth Bader Ginsburg** called it “a matter of utmost importance – to the constitutional rights of Wisconsin’s citizens, the integrity of the state’s election process, and in this most extraordinary time, the health of the nation.”

Tech’s potential, pitfalls

Broader battles over civil liberties could come into play if government officials do not ease restrictions, such as travel bans, when the health risk eases.

“You can argue that shutting down interstate travel will prevent the spread of the common cold,” Shapiro says – but that doesn’t make it right.

After the 9/11 terrorist attacks in 2001, the federal government rounded up thousands of **Muslim men as potential terrorists**, subjecting them to lengthy and harsh detention before most were released. That type of discrimination must be avoided, the ACLU’s Cole says.

“This is not the kind of threat that allows the government to scapegoat any particular minority or subset of our community,” he says. “To be effective, measures have to be broad-based. And because they have to be broad-based, that creates a kind of political check on the government going too far.”

Technology offers both potential and pitfalls for public health officials during a pandemic. Because of a shortage of tests to determine who is infected with the COVID-19 virus, some officials hope to track people through the **location of their cellphones**.

The ACLU released a report Wednesday calling the data that could come from location tracking “an enormously invasive and personal set of information about each of us, with the potential to reveal such things as people’s social, sexual, religious, and political associations.

“The potential for invasions of privacy, abuse, and stigmatization is enormous,” the report said. “Any uses of such data should be temporary, restricted to public health agencies and purposes, and should make the greatest possible use of available techniques that allow for privacy and anonymity to be protected.”

Another potential complication from the pandemic’s intrusion on civil liberties is the status of the nation’s **state and federal courts**. Most are physically closed and handling cases by phone or video. Trials with 12-person juries are, by definition, too close for comfort.

Besides, courts are unlikely to step in and overrule emergency actions, such as one state's restrictions on out-of-state travelers, says Anthony Kreis, visiting assistant law professor at Chicago-Kent College of Law.

"Federal courts are not going to enjoin these types of temporary measures," Kreis predicts. "The courts won't save us from bad decision-making."

Civil libertarians hope that the decisions public officials make to combat the coronavirus are allowed to expire when the threat diminishes.

"There is understandable concern for civil liberties, because emergencies are exceptions to the rule of law," Mariner says. "Depending on how long an emergency lasts, those exceptions can become normal."