

Democratizing, Protecting, and Supporting Communities: Improving the Government's Pandemic Response

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Lindsay F. Wiley, *Democratizing the Law of Social Distancing*, 20 **Yale J. of Health Policy, L. & Ethics** __ (2020), available at [SSRN](#).

Prior to the COVID-19 pandemic, U.S. emergency preparedness laws and plans to prevent, detect, manage, and contain the spread of communicable disease targeted individual actions, rather than community mitigation efforts. For example, the [Model State Emergency Health Powers Act](#) and state emergency preparedness laws concentrated on detecting, managing, and containing the spread of an infectious disease, in part, through the medical examination, testing, isolation, and quarantine of individuals. This began to change when Congress [amended](#) the Public Health Service Act in 2002 to provide states with financial support and strategies to prepare for and respond to public health emergencies. By 2004, the Centers for Disease Control and Prevention began to use the term [social distancing](#) as a way to describe a strategy to stop the community spread of disease.

Yet, as Professor Lindsay Wiley discusses in [Democratizing the Law of Social Distancing](#), social distancing was not widely implemented as a community containment strategy until the COVID-19 pandemic. Many states have begun to incorporate community mitigation efforts, such as stay-at-home/lockdown, mask, and social distancing orders, into emergency preparedness laws and plans to contain the community spread of COVID-19. These efforts have resulted in slowing the spread of COVID-19 in most communities. However, not only have the laws met with resistance from the public and the courts, but also these community mitigation efforts [have not been effective](#) in slowing the spread of COVID-19 in racial and ethnic minority communities.

Because these efforts were adopted during the pandemic, Professor Wiley argues that many of the measures lacked transparency and democratic accountability. Additionally, the efforts have also exacerbated [health inequities](#). State government officials have broad powers to address public health emergencies with community mitigation strategies, especially during a crisis. Nevertheless, to be effective in controlling the spread of disease while balancing the democratic ideals of individual freedoms, there is a need for accountability and support. Wiley's article is significant because it provides a thorough review of the history of public health laws addressing emergencies, from [Jacobson v. Massachusetts](#) through the COVID-19 pandemic; discusses the legal support for public health powers; integrates some of the principles from the [health justice framework](#); and provides solutions and a model for a range of community mitigation efforts.

Professor Wiley provides five key principles that should be used when adopting community mitigation laws, such as stay-at-home orders, to provide transparency, accountability, and supports. First, orders implementing community mitigation measures must provide clear and transparent reasoning for the measures. This can increase the public's trust in government action, and help ensure that orders are conditioned on a demonstrated threat of significant risk and a suitable fit between the means and clearly stated ends. Many of the current stay at home [orders](#) do not include an end date or information regarding evaluative measures for ending the orders. Thus, citizens [challenging the orders](#) have argued that the government's powers have no limit. To address this problem, Professor Wiley proposes that the orders include statements of the strategic purpose they are intended to serve, the scientific understanding on which they are based, and the criteria for when they can be lifted.

Second, statutes should provide officials with a graded range of alternatives to ensure a sustainable emergency response that can be tailored to evolving conditions and understanding. Professor Wiley provides a figure that links the

three levels of community transmission (minimal, moderate, and substantial) to the type of intervention (surveillance, altered operation of public facilities, restrictions on business, and restrictions on individuals). Linking the response to the level of transmission allows for a balance between prevention and individual rights, which allows for transparency. Third, statutes should provide substantive standards to ensure orders are neutral laws of general applicability that do not discriminate on the basis of religion. This builds on decisions by many courts, including the [Supreme Court](#), that orders specifically focused on religious activities violate the First Amendment.

Fourth, to enable widespread voluntary compliance and minimize unjust distribution of the benefits and burdens of public health interventions, statutes should mandate that restrictions must be accompanied by financial and other material supports, legal protections, and accommodations for safer alternatives to restricted activities to the greatest extent possible within available resources. One of the most significant failures of current community mitigation efforts is the lack of long-term supports for individuals who are required to stay at home during lockdown orders. The need for [supports](#) is one of the key principles in the health justice framework, which provides a mechanism for systems-level transformation of governmental responses to health disparities to achieve [health equity](#), in which “everyone has the opportunity to attain full health potential and no one is disadvantaged from achieving this potential because of social position or any other socially defined circumstance.”

Finally, statutes should authorize criminal enforcement against individuals who violate social distancing orders only if executive-branch officials establish that it is the least restrictive alternative available to achieve the government’s purpose. This will address the current problem where in some cities police officers have handed out free masks and advised, but not required, people gathering outdoors in predominately White affluent neighborhoods to wear the masks, but have [arrested and cracked down](#) on Black and Latino people for gathering and not wearing masks.

With these five principles, Professor Wiley offers readers a new framework for implementing community mitigation orders to address public health emergencies that provides accountability, financial supports, and community involvement. Most valuably, this article proposes a more democratic way to stop the spread of disease so that the entire population of the United States can achieve health and well-being.

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