Using Public Health Law to Minimize the Racially Disparate Impact of COVID-19

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Govind Persad, *Allocating Medicine Fairly in an Unfair Pandemic*, __ **Illinois L. Rev.** __ (forthcoming 2021), available at SSRN.

Since the start of the COVID-19 pandemic, there has been significant public debate about how to fairly allocate scarce medical resources. Questions about resource allocation have become even more pressing now that vaccines are finally being distributed. This has resulted in important body of scholarly work arguing that the allocation of scarce resources for the prevention and treatment of COVID-19 should prioritize groups that have been hardest-hit by the pandemic as a result of structural disadvantages like systemic racism.

Govind Persad's article, *Allocating Medicine Fairly in an Unfair Pandemic* (forthcoming in the University of Illinois Law Review) is a welcome addition to these conversations. Persad's article focuses on issues of racial justice in resource allocation, and applies a much-needed legal lens to the practicalities of distribution systems that are often addressed from a more theoretical perspective. Many commentators in the fields of medicine, medical ethics, and public health have proposed that racial disparities be taken into account in the criteria for resource distribution, but not all have the legal background to understand whether and how such criteria could actually be implemented. Persad's work offers valuable suggestions for how allocation priorities that minimize the disproportionate effects of COVID-19 on racial minorities might be implemented without being struck down on constitutional grounds.

This article echoes the recommendations of a September 2020 JAMA article in which Persad and colleagues Monica Peek and Ezekiel Emanuel argued that because distribution policies not only have a direct impact in preventing death and disability, but also "indirectly alleviate socioeconomic harms like unemployment, poverty and educational deprivation," these policies should be guided by ethical values. In his new article, Persad directly tackles the legal implications of these ethical recommendations.

Persad presents evidence of COVID-19's dramatically disproportionate impact on Black, Hispanic, and Native American populations, as well as the unequal distribution of scarce resources like testing, equipment, and personnel. Challenging what he calls an "imagined trade-off between preventing deaths and reducing disparities," Persad makes a compelling argument that random allocation of scarce resources is likely to exacerbate race-based disparities, resulting in more deaths overall as compared to alternative distribution models. Persad recognizes, however, that explicitly race-based allocation policies (except in the narrow context of Native American tribes) are not a viable solution to this problem given current Supreme Court jurisprudence on the Equal Protection clause and Title VI of the Civil Rights Act.

Instead, Persad proposes alternative mechanisms for crafting resource distribution policies that might serve to alleviate the racially disproportionate impact of COVID-19. He describes his approach as using "facially race-neutral criteria or aggregate neighborhood-level racial data" that have the goal of addressing racial disparities and, in turn, are likely to result in significant public health benefits. While recognizing that any sort of race-conscious classification would be subject to criticism, he argues that facially neutral policies are more likely to survive legal challenges under the current composition of the

Supreme Court. Persad suggests that "policies could be designed with the explicit goal of prioritizing locations or occupations that have been hard-hit by COVID-19, not as a proxy for race but as a form of justice that matters in itself." Such policies, according to Persad, "would be effectively insulated from equal protection concerns, even if they confer disparate benefits on racial minorities[.]"

Persad identifies two policies that might achieve these goals. First, what he calls "disparity-sensitive policies" similar to those used by school districts to address educational disparities. This approach would "prioritize individuals who live in disadvantaged geographic areas or work in occupations hard-hit by COVID-19, potentially alongside explicitly race-sensitive aggregate metrics like neighborhood segregation." Persad cites Castillo v. Whitmer, a recent Sixth Circuit case, to support his claim that race-neutral public health policies aimed at reducing disparities are likely to be upheld if challenged on Equal Protection grounds. In Castillo, the Sixth Circuit denied a motion for preliminary injunction against a state order that imposed testing protocols in some agricultural settings, which would have had a disparate impact on Latinos. The plaintiffs, agricultural workers and employees, argued that the order was motivated by discriminatory intent because the state had referenced the "the disproportionate impact COVID-19 has had on communities of color and the desire to improve racial equity in healthcare." The court rejected this argument, however, concluding that "considering the effects of government action on various racial groups is not evidence of improper purpose." Persad further supports the constitutionality of race-neutral but disparity-sensitive public health policies by citing several federal agencies and policies focused on addressing racial health disparities, including the Office of Minority Health and the United Network for Organ Sharing Minority Affairs Committee.

Persad's second suggestion is that resource distribution policies focus on the "distinctive and disparately suffered harm of death early in life from COVID-19." Persad presents dramatic evidence that those who die young as a result of COVID-19 are disproportionately more likely to be Black, Hispanic, Native American, and Asian/Pacific Islander. For example, he cites research demonstrating that the mortality rates of Black patients ages 25-54 are up to seven times higher than those of white patients. This evidence leads Persad to conclude that prioritizing vaccines for elderly patients based on "one-size-fits-all age cutoffs," as recommended by the WHO and CDC, "would inequitably assign higher-risk minority patients less priority than lower-risk non-minority patients," worsening racial disparities. Instead, Persad proposes that age be used as one of multiple factors to be taken into consideration – for example, by prioritizing elderly people living in multi-generational households, or those in geographic regions hardest hit by COVID-19.

Persad recognizes that his approach may meet resistance from critics who believe it doesn't go far enough. He rightfully acknowledges that the policies he proposes are less likely to be effective at reducing racial disparities as compared to explicitly race-based policies; but, he argues, the legal vulnerability of race-based alternatives is simply too great. Scholars across all disciplines who believe that public health law has a role to play in reducing racial disparities ought to consider Persad's argument.

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