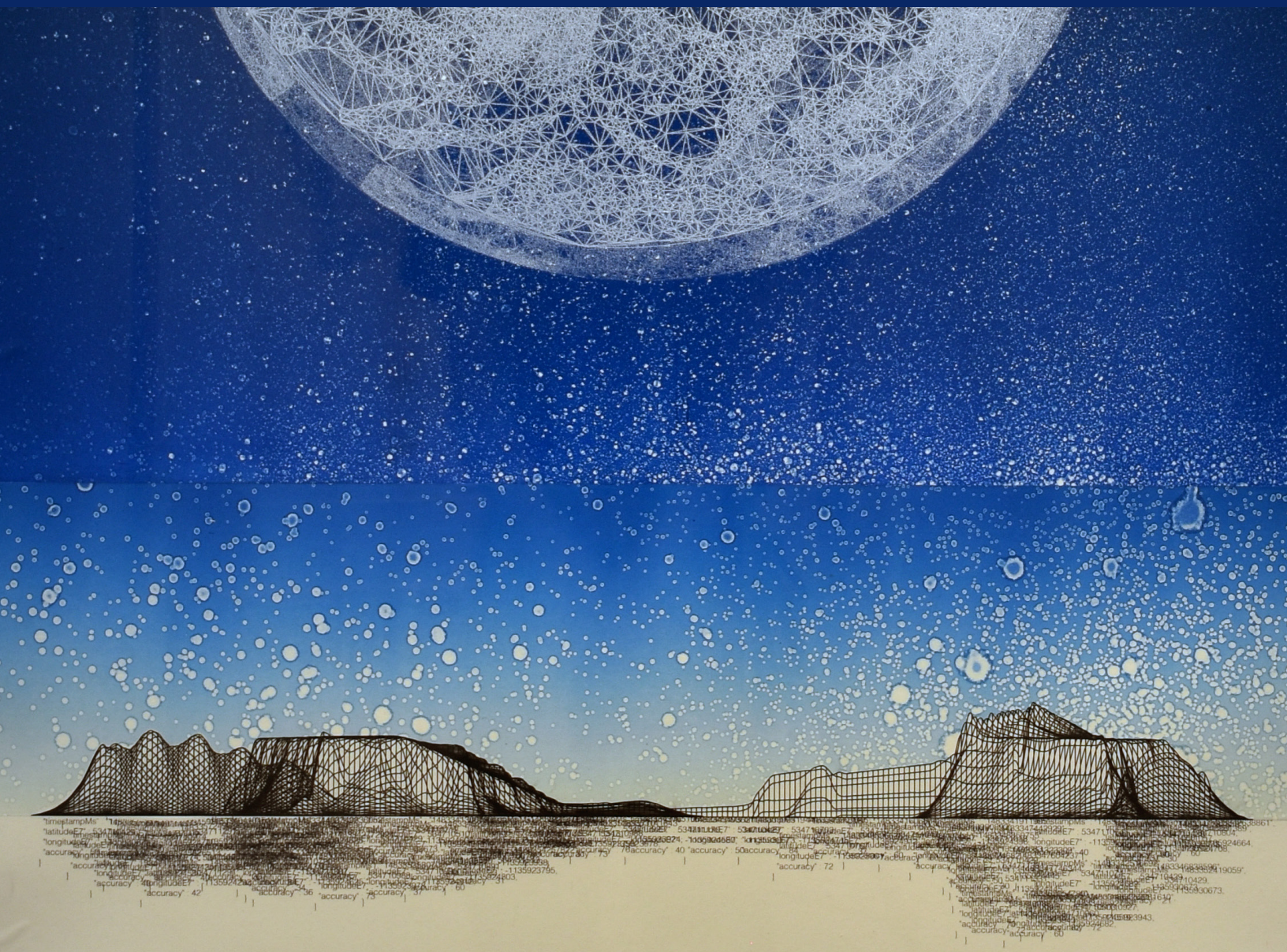


Reconciling Civil Liberties and Public Health in the Response to COVID-19

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An RSC Policy Briefing

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Cover Art

Daniel Evans, *Atenoux VIII* (2018)

Digital, relief, screenprint, chine collé

Daniel Evans' work explores the intersection of physical and virtual experience, focusing in particular on the relationship between an individual and their user data. The *Atenoux* series depicts a chain of islands, each procedurally generated from a modified 3D plot of 24 hours worth of location tracking data from the artist's Google user account. Each island's reflection is composed of a small fraction of the original text data used to generate the image. As a form of creative data visualization, the works aim to make visible and provide context for a small slice of the magnitude of data collection at play in our day-to-day lives, and to manifest it in a way that returns the data to what they represent—a spatialization of lived experience and motion.

Land Acknowledgement

The headquarters of the Royal Society of Canada is located in Ottawa, the traditional and unceded territory of the Algonquin Nation.

The opinions expressed in this report are those of the authors and do not necessarily represent those of the Royal Society of Canada.

Background on the Policy Briefing Report Process

Established by the President of the Royal Society of Canada in April 2020, the RSC Task Force on COVID-19 was mandated to provide evidence-informed perspectives on major societal challenges in response to and recovery from COVID-19.

The Task Force established a series of Working Groups to rapidly develop Policy Briefings, with the objective of supporting policy makers with evidence to inform their decisions.

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Note from the Authors

This paper is derived in part from two publications (1) Colleen M. Flood, Bryan Thomas & Kumanan Wilson, "Civil Liberties vs. Public Health" and (2) Vanessa MacDonnell, "Ensuring Executive and Legislative Accountability in a Pandemic" in Colleen M Flood, Vanessa MacDonnell, Jane Philpott, Sophie Theriault & Sridhar Venkatapuram, eds, *Vulnerable: The Policy, Law and Ethics of COVID-19* (Ottawa: University of Ottawa Press 2020), available here: Online: <https://press.uottawa.ca/vulnerable.html.html>

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Executive Summary

The COVID-19 pandemic has highlighted the challenges governments face in balancing civil liberties against the exigencies of public health amid the chaos of a public health emergency. Current and emerging pandemic response strategies engage diverse civil liberties, including mobility rights, freedom of assembly, freedom of religion, and the right to liberty and security of the person. As traditionally conceived, the discourses of civil rights and public health rest on opposite assumptions about the burden of proof. In the discourse of civil and political rights of the sort guaranteed under the *Canadian Charter of Rights and Freedoms*, the onus rests on government to show that any limitation on rights is justified. By contrast, public health discourse centers on the precautionary principle, which holds that intrusive measures may be taken—limits on social gatherings, for example—even in the absence of complete evidence of the benefits of the intervention or of the nature of the risk. In this report, we argue that the two principles are not so oppositional in practice. In testing for proportionality, courts recognize the need to defer to governments on complex policy matters, especially where the interests of vulnerable populations are at stake. For their part, public health experts have incorporated ideas of proportionality in their evolving understanding of the precautionary principle. Synthesizing these perspectives, we emphasize the importance of policy agility in the COVID-19 response, ensuring that measures taken are continually supported by the best evidence and continually recalibrated to avoid unnecessary interference with civil liberties.

Analysis and Conclusions

First, the *Charter* rights analysis and the precautionary principle in public health have more in common than first meets the eye. Both require governmental decision-makers to adopt means of controlling outbreaks that are least rights-infringing, and to revisit their decisions as new evidence and responses emerge. This is very important, as it means governments and public health officials cannot be complacent. For example, if evidence emerges that COVID-19 can be controlled without restricting movement across provincial borders, or that outbreaks can be contained without strict lockdowns as infection rates fall, then governments must recalibrate their precautionary measures to both protect against the virus and be respectful of civil liberties. At the same time, governments are entitled to take public health objectives seriously. It is evident that the decision to rapidly restore civil liberties in other countries, most notably the US, has actually harmed rights *and* the fight against COVID-19 in the long run, since it has necessitated the re-introduction of restrictive measures as cases re-emerge in even higher numbers than at the outset of the pandemic.

Second, public health officials need to understand that the burden of proof will be upon them in a *Charter* case to justify any rights infringement. They must be able to point to some evidence for their choices. This means staying on top of the evidence and being responsive.¹

Third, notwithstanding debates about courts' effectiveness in an emergency, it is essential that courts remain capable of hearing challenges to executive and legislative overreach during the pandemic.² Majoritarian political processes are not particularly effective at ensuring that differential impacts of policies on vulnerable groups are considered and addressed. Courts play an important role in hearing these types of challenges—it is a core component of their mandate under the *Charter*.³ While courts at all levels have done a remarkable job of adapting to the new

environment—moving a largely paper-based justice system online in a matter of weeks in the midst of a pandemic—they need to continue to prioritize and expedite the hearing of challenges to executive overreach and the constitutionality of legislation while also making progress on cases that were stalled as a result of COVID-19.⁴

Fourth, in a more pragmatic vein, we should acknowledge that sound public health policy will be respectful as possible of civil liberties, not just because that is what the law requires but because that is the best way to get “buy-in” from the public. By the same token, civil libertarians must be candid about the fact that right and freedoms have limits—the *Charter* does not commit us to “dying with our rights on” in the face of a deadly pandemic. We advocate for the continued effort of public health officials to strive for least restrictive measures, protecting public health while ensuring maximum freedom.

Fifth, and relatedly, any assessment of our COVID-19 response must attend to how these laws are enforced on the ground—and specifically, whether marginalized populations are disproportionately burdened, whether through discriminatory enforcement, or the sheer impossibility of complying with regulations that assume individuals can afford protective equipment, and have a home where they can safely shelter. It is unlikely that the courts will be an effective buttress against these concerns, given the cost and the difficulty of proving discriminatory enforcement, and so it will likely fall to civil society to track these issues and press for solutions. At the same time, it is important to recognize that marginalized populations have also been disproportionately affected by the pandemic, with substantially higher mortality rates amongst specific demographic groups. As such, those who argue that their rights are being infringed are creating risks for these vulnerable populations.

In conclusion, rights are not trumps against collective goal of public health; what rights demand of government, instead, is reasoned justification—evidence showing that interferences with civil liberties are proportionate to government aims. In this sense, the vigilant defense of civil liberties can encourage the timely revisiting of precautionary measures—something that has been a challenge in its application to public health. As such, a dynamic, evidence-based policy approach can be fully respectful of both civil liberties and the goals of public health.

Reconciling Civil Liberties and Public Health in the Response to COVID-19

Introduction

Within the span of a few months, a new virus named SARS-CoV-2 (which causes the disease COVID-19) has altered the course of nations and the world, introducing rapid and sweeping changes to our lives, social interactions, government functioning, and global relations. Most of us have accepted the need for measures designed to slow the pandemic's spread and buy ourselves time—time for our hospitals to treat cases without being overwhelmed, time to study the disease and develop treatments and (hopefully) a vaccine. But measures taken to “flatten the curve” have imposed real collateral damage, some in the register of public health: the cancellation of elective surgeries has stalled the treatment of life-threatening diseases, almost certainly putting lives at risk; lockdown orders have impacted mental health, causing some to suffer anxiety, depression and a heightened risk of suicide; “sheltering at home” poses a higher risk of physical harm for victims of domestic violence; and globally, the disruption of the economy and government services will exacerbate problems of food insecurity.⁵

Measures taken in response to COVID-19 also involve trade-offs between individual rights and the collective goals of public health. Such trade-offs are at play in the federal, provincial, territorial and municipal responses to COVID-19. Trade-offs between rights and government objectives are a common feature of policy making. In Canada, these trade-offs must comply with a range of laws, including the *Canadian Charter of Rights and Freedoms* [Charter]. Section 1 of the *Charter* allows individual rights to be limited provided that the limit is prescribed by law and proportionate.⁶ Many of the measures introduced as a result of COVID-19 limit individual rights in some way, and we are beginning to see court challenges on diverse legal grounds.⁷ The question is whether the limitation on rights is *justified* based on the information the government has available to it at the time.

In this briefing, we want to first outline some of the impacts on civil liberties resulting from this pandemic and response efforts, and then discuss the underlying legal principles that guide thinking about civil rights and public health. The term “civil liberties” refers to a range of activities that citizens are (or should be) generally free to engage in without government restraint—including things like freedom of religion, freedom of expression, freedom of assembly, and so on. Some civil liberties may be given legal protection through a range of legal sources, most fundamentally through entrenchment in the *Canadian Charter of Rights and Freedoms*. In the discussion that follows, we explore the interaction between civil liberties and collective goals of public health using the framework provided by the *Charter* to show that rights are not trump cards in the way it is often thought, and that they need to be balanced with public health goals such as protecting people from suffering and death from COVID-19. In many circumstances, moreover, public health goals are not just good public policy—they are rights-enhancing in their own way.⁸

An Overview of Civil Liberties Engaged by COVID-19

Freedom of Expression

From the very beginnings of the COVID-19 outbreak, the importance of freedom of expression has been starkly evident, as Chinese physician Li Wenliang went public with concerns over a SARS-like outbreak in Wuhan City, only to be detained by police and forced to recant in a

public statement. Li would die of coronavirus shortly thereafter. These events are a poignant illustration of how civil liberties are often integral to the advancement of public health. Closer to home, concerns around freedom of expression take a different form. One issue has been the proliferation, on social media, of misinformation and conspiracy theories about COVID-19.⁹ This in turn has prompted some discussion of enacting laws to punish individuals responsible for spreading pandemic misinformation.¹⁰ Such a law would clearly engage the *Charter's* guarantee of freedom of expression.

Freedom of Assembly

Canadian provinces and municipalities have imposed various restrictions which directly impact the *Charter* freedom of peaceful assembly: limitations on public gatherings; stopping visitors to long-term care homes; restrictions of recreational amenities; and mandatory quarantine orders against specific individuals.¹¹ The federal government, employing the *Quarantine Act*, has limited entry into the country and now imposes a 2-week quarantine on citizens returning from abroad. Many of these measures are enforced by significant fines (e.g., up to \$100,000 for a first offence and \$500,000 for a second offence in Alberta)¹² and even imprisonment (e.g., in addition to fines up to \$100,000, Ontario's shifting limits on the size of indoor and outdoor gatherings are punishable by up to a year's imprisonment).¹³

Freedom of Religion

The pandemic response—and specifically restrictions on public gatherings—also impinges on religious freedom. Both in Canada and the US, we have seen flare-ups of coronavirus from religious services,¹⁴ and yet some of the most vocal pressure to lift lockdown measures has come from religious groups.¹⁵ President Trump has drawn upon this pressure to galvanize his general push for a hasty reopening of the US economy.

When people suggest that these restrictions impair religious freedom, they are not wrong: section 2(a) of the *Charter* offers broad *prima facie* protection to religious freedom, which can only be limited in accordance with section 1 of the *Charter*.¹⁶

Mobility Rights

The federal government has also limited travel into the country—closing off borders to all foreign nationals—initially exempting the US but eventually including its residents. Canadian nationals and permanent residents are allowed re-entry but are required to self-quarantine for 14 days upon arrival. At points during the outbreak, some provinces (New Brunswick, Prince Edward Island, Newfoundland and Labrador and Quebec) have prohibited “non-essential” travel (tourism and social visits), implementing checkpoints at points of entry where travelers are questioned. More recently, the Atlantic provinces have established an “Atlantic bubble”, allowing residents of Newfoundland and Labrador, Prince Edward Island, Nova Scotia, and New Brunswick to travel without the 14-day quarantine imposed on visitors from non-Atlantic provinces. There are, however, signs that these restriction are being eased as the pandemic is brought under control: for example, Manitoba recently lifted its requirement that visitors self-quarantine for 14 days, limiting it to travelers with symptoms and/or prior exposure to COVID-19.¹⁷ Nevertheless, these restrictions represent a considerable interference with civil liberties, limiting mobility rights protected under section 6 of the *Charter* in a way that affects profound interests such as the ability to reunite with family, pursue a livelihood and so on.¹⁸

Rights to Liberty and Security of the Person

Many provinces have restricted visits to long-term care (LTC) homes, whether mandating that visits be outdoors and socially distanced, or preventing visits altogether.¹⁹ In Ontario, for example, public health officials have issued directives “strongly recommending” that LTC homes ban non-essential visits²⁰ and many Ontario LTC homes have implemented this recommendation. While *Charter* protections operate only against *government* action, it could be argued that the *Charter* applies to no-visitor policies in LTC homes. There is some precedent for (e.g.) hospitals being held accountable under the *Charter*. In *Eldridge*, the Supreme Court of Canada concluded that hospitals in British Columbia were required to provide sign language interpretation services in order to comply with the *Charter’s* section 15 guarantee of equality.²¹ Supposing nursing homes are treated analogously (on the basis that they perform the specific government function of providing health care, are largely publicly funded, and are extensively regulated by government), the right to have visitors could be protected by the *Charter’s* section 7 right to “life, liberty and security of the person, and the right not to be deprived thereof except in accordance with the principles of fundamental justice.”²² There is growing evidence that separating LTC home residents from their families has profound psychological consequences and can even prove fatal.²³ As concerns the s.7 interest in security of the person, residents of overcrowded LTC facilities may rely on regular visits from family and friends to provide care (bathing, feeding), and as a check on possible neglect. A more difficult question is whether this potential deprivation of life and security of the person is in accordance with the principles of fundamental justice. Limits on visitation were arguably justifiable as the pandemic unfolded, but as the outbreak comes under control, government has less intrusive measures available to it to protect residents and staff, such as requiring that visitors wear masks, to be screened for symptoms, etc. This suggests that no-visitor policies might be inconsistent with the prohibition on overbreadth and gross disproportionality, two principles of fundamental justice.²⁴

Municipalities have implemented a range of measures to promote physical distancing and limiting the use of public space. Many of these measures are backed by fines or even the possibility of imprisonment. These restrictions have a particularly acute impact on the homeless and precariously housed, who are more reliant on public space.²⁵ Such measures may also engage section 7. Specifically, measures which could result in imprisonment engage the liberty component of section 7,²⁶ whilst measures which have a significant impact on the psychological well-being of individuals engage security of the person.²⁷ The *Charter* jurisprudence tells us that measures which impair liberty and security of the person cannot be overbroad or grossly disproportionate.²⁸ It is unclear whether all municipal regulations meet these standards, especially as far as the homeless and precariously housed are concerned.

Privacy Rights

As the pandemic has unfolded it has become clearer that significant testing and contact tracing using cell phone apps may be an important tool in battling COVID-19, yet these technologies also raise privacy concerns. The requirement for a certain level of uptake in order for these technologies to be effective adds to the complexity of their use.²⁹ In some foreign jurisdictions (e.g. Spain) police have used drone technologies to monitor the population and enforce lockdown measures. Closer to home, the Ontario government initially provided first responders, including police, the names, addresses and dates of birth of those who have tested positive for COVID-19—an extraordinary breach of health information privacy which has unsurprisingly invited legal challenge.³⁰ In normal

times, such measures would seem like the stuff of dystopian science fiction. But these are not normal times. The question here, as with all of the interferences with civil liberties enumerated above, is whether government can furnish reasoned, evidence-based justification for the choices it makes.

Discriminatory Enforcement

Many of the measures described above share an important cross-cutting feature: they purport to regulate quotidian activities—social gatherings, shopping trips, workplace protocols—in part through moral suasion, but ultimately through police powers. The *Black Lives Matter* movement has recently drawn public attention to the racial and other biases that are endemic in policing and in the criminal justice system more broadly. There is good reason to worry that (e.g.) sweeping powers to police public gatherings might be used to harass marginalized populations.³¹ The *Policing the Pandemic Mapping Project*³² has tracked enforcement of COVID-19 response measures nationwide, and in a recent report jointly published with the Canadian Civil Liberties Association, details how enforcement by police in some provinces has disproportionately targeted Indigenous, Black, LGBTQ+ and other marginalized populations.³³ For a number of reasons, civil rights protections are not well-suited to preventing or redressing these sorts of systemic effects. Any given police interaction with members of a marginalized group may, in isolation, appear justified, notwithstanding a larger pattern of discriminatory policing in the aggregate.

A related concern is that police oversight of day-to-day activities may, in some instances, serve as kindling point for needless confrontations. Again, the *Black Lives Matter* movement has brought long overdue public attention to the unnecessary escalation of police use of force in settings ranging from traffic stops to mental health emergencies. Seemingly benign responses to COVID-19—such as the recent move, in several jurisdictions, to mandate face masks in indoor public settings—may encourage confrontations along similar lines, disproportionately impacting some groups.³⁴ While it is true that mask laws generally target store owners as opposed to individuals, there will undoubtedly be scenarios where individuals refuse to wear masks, the police are summoned, and the matter escalates to involve use of force. To be clear, the issue is not that mandating masks in indoor public settings is a serious infringement of (say) the *Charter* right to “life, liberty and security of the person”: it almost certainly is not,³⁵ given that comparable public health measures (seatbelt and helmet laws) withstand constitutional scrutiny.³⁶ Rather, the issue is that allowing police to regulate day-to-day activities can serve as a pretext for harassment of marginalized populations and needless escalations of force—and that courts are not well-equipped to monitor or prevent these eventualities. These considerations must be given weight as we balance the pros and cons, especially as far as enforcement measures are concerned.

Civil Liberties under Public Health Emergencies

In a fast-moving pandemic, governments are forced to make urgent policy maneuvers impacting civil liberties in a vortex of uncertainty, without the luxury of prolonged deliberation. Very often, actions are taken on the basis of executive orders, pursuant to emergencies legislation, even without legislative debate.³⁷ In such situations, decision-makers may be forced to lean more heavily on first principles—choosing to employ restrictive measures which may ultimately prove unnecessary or overreaching in deference to the precautionary principle, or deciding not to act in deference to civil liberties.

As traditionally conceived, the discourses of civil rights and public health rest on opposite assumptions about the burden of proof. In the discourse of civil liberties of the sort that are translated to rights protected under the *Charter*, the onus rests on government to show that any limitation on rights is justified. By contrast, public health discourse centers on the precautionary principle, which holds that action should be taken—even actions that impact civil liberties—to mitigate potentially catastrophic risks even in the absence of complete evidence of the benefits of the intervention or of the nature of the risk. Anthony Fauci, Director of the U.S. National Institute of Allergy and Infectious Diseases, captures the precautionary principle with his now-famous maxim, “If it looks like you’re overreacting, you’re probably doing the right thing.”³⁸

This ideological contrast between civil liberties and public health is not as stark as it first appears, however. In the domain of *Charter* rights, civil liberties do *not* actually operate as trumps. The possibility of limiting individual rights is made explicit in section 1 of the *Charter*, which states that *Charter* rights are subject to “such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.” But it is important to note that the government cannot rest on its laurels here—it will usually be required to marshal evidence in support of its actions to justify limitations on fundamental rights like privacy, freedom of religion or freedom of association. Specifically, government must be able to demonstrate that measures taken are directed toward a “pressing and substantial” objective, that the measures are rationally connected with that objective, that the measures are minimally impairing of the rights, and that the overall value of the measure is great than the cost of the rights infringement.³⁹ This decision-procedure, called the *Oakes* test after a leading 1986 ruling by the Supreme Court of Canada, is demanding of government—and so it should be, if we are to take rights seriously.

Having said that, it would be a mistake to suppose that the courts apply *uniform* standards to all section 1 analyses. In some cases, the courts will be less deferential to government at the section 1 stage, such as in criminal law matters—an area where the court feels most confident in its institutional competence, and where the state is the “singular antagonist” of the claimant’s rights.⁴⁰ By contrast, the courts can be more deferential to government in *Charter* cases that involve complex, “polycentric” trade-offs between multiple individuals⁴¹—particularly *vulnerable* individuals (e.g., low-skilled workers,⁴² children⁴³). This reflects, first, the view that courts cannot claim the same degree of institutional competence over polycentric questions, and, second, that laws protecting vulnerable people should be shown special deference lest the *Charter* “simply become an instrument of better situated individuals to roll back legislation which has as its object the improvement of the condition of less advantaged persons.”⁴⁴ The Court has also indicated that government should be granted wider latitude to justify measures enacted in response to national emergencies.⁴⁵ These considerations suggest that courts are likely to be deferential to government actions taken in response to COVID-19.⁴⁶ Such measures, designed to “flatten the curve” and achieve statistical improvements in survival rates, are quintessentially complex and polycentric. Likewise, the primary intended beneficiaries are paradigmatically vulnerable populations—the elderly and immunocompromised.

In the domain of public health, decision making has been guided by the *precautionary principle*—a principle which initially stood for the idea that, where there is serious risk, we should act even without full evidence before us because if the risk is real the consequences can be horrific. Emerging out of the environmental movement, the principle is increasingly being applied to public health. While in the environmental sector the trade-off is often adoption of a technology or an economic

benefit versus environmental protection, the dynamic is different in public health. In particular, the application of the precautionary principle in public health often fails to recognize that *precautions themselves may bear significant risks*.⁴⁷

For example: lockdown measures imposed as a precaution against COVID-19 may deter people seeking receiving essential health care, or trigger mental health issues, or even cause dangerous disruptions in the food supply. It has certainly caused huge economic shocks and the loss of jobs and income which will in the longer run have an impact on health. In other words, there are risks on both sides of the ledger. Wise public policy will interrogate all the risks and their probabilities. To ignore the costs of precautionary measures amounts to what behavioural economists call “probability neglect”. In the context of the current pandemic, the double-edged sword of precaution is becoming increasingly evident as the unintended consequences of the measures mount—medical care deferred, schools closed and parents’ ability to return to work impaired, increasing mental health impacts not to mention a federal deficit north of \$300 billion.

The public health community had been increasingly alive to these considerations, and its application of the precautionary principle has evolved to incorporate a more balanced accounting of the risks avoided and the risks *created* by precautionary measures. For example, the European Commission’s guidance on the precautionary principle⁴⁸ incorporates various sub-principles which echo the commitments of *Charter* law, including principles of proportionality, non-discrimination, and consistency with measures taken in areas where scientific data are available. Thus, the civil liberties and public health framings are best seen as complementary, and both can be advanced in tandem—provided decision-makers continually evaluate the necessity of intrusive measures and endeavor to minimize interferences with civil liberties. This may explain why there have not, to date, been successful legal challenges to intrusive public health measures taken in response to COVID-19. Of course, evidence around the efficacy of response measures is constantly evolving, and if governments are not responsive, it is possible that courts will intervene in the months and years to come.

Preliminary Thoughts on Balancing Civil Liberties and Public Health in the Management of the COVID-19 Pandemic

While in retrospect it is often easy to criticize the action of decision-makers, it is important to recognize the degree of uncertainty that they face at the time decisions have to be made. At the outset of the pandemic, COVID-19 posed an uncertain but potentially catastrophic risk, as made most evident by the experience of Italy. One could argue that Canada did not take aggressive enough precautionary actions: in particular, Canada has been criticized for not closing its borders earlier, for not adopting masking, and for not introducing more extensive measures to prevent spread in long-term care facilities⁴⁹ and correctional facilities.⁵⁰

As the pandemic evolved, so has Canada’s response, along with a calibration of its risk mitigation strategy—initially with very strict limitations on the numbers permitted to gather, followed by a gradual re-opening. This approach is consistent with precautionary decision-making and individual rights and, at present, has appeared to bring the epidemic under control. As we move forward, the focus will be on identifying least restrictive measures. One such measure is the introduction of mandatory masking indoors which may permit workplaces and businesses to re-open.⁵¹

From an individual rights perspective, it is not clear that laws requiring masking engage *Charter* rights at all.⁵² Section 7's guarantee of life, liberty and security of the person does not protect against what might be called "trivial" intrusions on liberty.⁵³ Rather, the section 7 liberty interest protects "only those matters that can properly be characterized as fundamentally or inherently personal such that, by their very nature, they implicate basic choices going to the core of what it means to enjoy individual dignity and independence."⁵⁴ It seems unlikely that choosing not to wear a mask in a pandemic qualifies as this type of choice. Given that municipal by-laws punish those who refuse to wear masks with a fine rather than imprisonment, there is no immediate deprivation of liberty in that respect either.⁵⁵

This is not to say that government should ignore liberty interests in developing masking policies, but only that the interests on this side of the ledger are not especially weighty, certainly when compared with the emerging evidence of the benefits of wearing masks to slow transmission of COVID-19 and the social benefits associated with re-opening schools and businesses.⁵⁶

It might also be argued that these fines constitute cruel and unusual punishment under section 12 and possibly section 7 of the *Charter* when applied to the impecunious because of their heightened exposure to such fines due to practical difficulties associated with accessing masks and their inability to pay fines.⁵⁷ Access to masks and ability to pay fines are therefore important considerations in fashioning and enforcing any masking by-law.

From the standpoint of both the precautionary principle and individual rights, then, properly crafted and enforced masking policies are sound policy given the present state of extant evidence. Moreover, to the extent that these policies allow individuals to get back to "normal life" more quickly, they may actually be rights-enhancing, in the sense of promoting the section 7 rights to life, liberty and security of the person, as well as free expression, movement and freedom of religion.⁵⁸

Analysis and Conclusion

Drawing together these observations about the theory and practice of civil rights and public health, five points stand out. First, the *Charter* rights analysis and the precautionary principle in public health have more in common than first meets the eye. Both require governmental decision-makers to adopt means of controlling outbreaks that are least rights-infringing, and to revisit their decisions as new evidence and responses emerge. This is very important, as it means governments and public health officials cannot be complacent. For example, if evidence emerges that COVID-19 can be controlled without restricting movement across provincial borders, or that outbreaks can be contained without strict lockdowns as infection rates fall, then governments must recalibrate their precautionary measures to both protect against the virus and be respectful of civil liberties. At the same time, governments are entitled to take public health objectives seriously. It is evident that the decision to rapidly restore civil liberties in other countries, most notably the US, has actually harmed rights *and* the fight against COVID-19 in the long run, since it has necessitated the re-introduction of restrictive measures as cases re-emerge in even higher numbers than at the outset of the pandemic.

Second, public health officials need to understand that the burden of proof will be upon them in a *Charter* case to justify any rights infringement. They must be able to point to some evidence for their choices. This means staying on top of the evidence and being responsive.⁵⁹

Third, notwithstanding debates about courts' effectiveness in an emergency, it is essential that courts remain capable of hearing challenges to executive and legislative overreach during the pandemic.⁶⁰ Majoritarian political processes are not particularly effective at ensuring that differential impacts of policies on vulnerable groups are considered and addressed. Courts play an important role in hearing these types of challenges—it is a core component of their mandate under the *Charter*.⁶¹ While courts at all levels have done a remarkable job of adapting to the new environment—moving a largely paper-based justice system online in a matter of weeks in the midst of a pandemic—they need to continue to prioritize and expedite the hearing of challenges to executive overreach and the constitutionality of legislation while also making progress on cases that were stalled as a result of COVID-19.⁶²

Fourth, in a more pragmatic vein, we should acknowledge that sound public health policy will be respectful as possible of civil liberties, not just because that is what the law requires but because that is the best way to get “buy-in” from the public. By the same token, civil libertarians must be candid about the fact that rights and freedoms have limits—the *Charter* does not commit us to “dying with our rights on” in the face of a deadly pandemic. We advocate for the continued effort of public health officials to strive for least restrictive measures, protecting public health while ensuring maximum freedom.

Fifth, and relatedly, any assessment of our COVID-19 response must attend to how these laws are enforced on the ground—and specifically, whether marginalized populations are disproportionately burdened, whether through discriminatory enforcement, or the sheer impossibility of complying with regulations that assume individuals can afford protective equipment, and have a home where they can safely shelter. It is unlikely that the courts will be an effective buttress against these concerns, given the cost and the difficulty of proving discriminatory enforcement, and so it will likely fall to civil society to track these issues and press for solutions. At the same time, it is important to recognize that marginalized populations have also been disproportionately affected by the pandemic, with substantially higher mortality rates amongst specific demographic groups. As such, those who argue that their rights are being infringed are creating risks for these vulnerable populations.

In conclusion, rights are not trumps against collective goal of public health; what rights demand of government, instead, is reasoned justification—evidence showing that interferences with civil liberties are proportionate to government aims. In this sense, the vigilant defense of civil liberties can encourage the timely revisiting of precautionary measures—something that has been a challenge in its application to public health. As such, a dynamic, evidence-based policy approach can be fully respectful of both civil liberties and the goals of public health.

References

1. See generally Jula Hughes and Vanessa MacDonnell, "Social Science Evidence in Constitutional Rights Cases in Germany and Canada: Some Comparative Observations" (2013) 32:1 National Journal of Constitutional Law 23.
2. Mark Tushnet refers to courts as "weak reads in a crisis"; see Mark Tushnet, "The Political Constitution of Emergency Powers: Parliamentary and Separation-of-Powers Regulation" (2007) 3:4 Intl J Law in Context 275 at 277 (internal quotation marks removed). But see Kent Roach, "Comparative Constitutional Law and the Challenges of Terrorism Law" in Rosalind Dixon & Tom Ginsburg, eds, *Comparative Constitutional Law* (Northampton, MA: Edward Elgar Publishing, 2011) 532.
3. Reference Re Secession of Quebec, [1998] 2 SCR 217; *United States v Carolene Products Co*, 304 US 144 (1938); Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Cambridge, MA: Harvard University Press, 2004), at 1-2.
4. Aedan Helmer, "'There is no Going Back': How COVID-19 Forced Courts into the Digital Age", *Ottawa Citizen* (16 May 2020), online: <<https://ottawacitizen.com/news/local-news/there-is-no-going-back-how-covid-19-forced-courts-into-the-digital-age>>; Paola Loriggio & Liam Casey, "COVID-19 Pandemic Forces Ontario Justice System 'Stuck in the 1970s' to Modernize", *CP24* (29 April 2020), online: <https://www.cp24.com/news/covid-19-pandemic-forces-ontario-justice-system-stuck-in-the-1970s-to-modernize-1.4917915>; Ontario Superior Court of Justice, "Notice to the Profession, the Public and the Media Regarding Civil and Family Proceedings – Update" (2 April 2020), online: <<https://www.ontariocourts.ca/scj/notice-to-the-profession-the-public-and-the-media-regarding-civil-and-family-proceedings-update>>.
5. The Lancet Global Health, "Food insecurity will be the sting in the tail of COVID-19", online: [https://www.thelancet.com/journals/langlo/article/PIIS2214-109X\(20\)30228-X/fulltext](https://www.thelancet.com/journals/langlo/article/PIIS2214-109X(20)30228-X/fulltext)
6. Section 1 of the Canadian Charter of Rights and Freedoms; *R v Oakes*, [1986] 1 S.C.R. 103.
7. See, e.g., *Sprague v. Her Majesty the Queen in right of Ontario*, 2020 ONSC 2335 (constitutional challenge to a hospital "no visitor" policy); *Ontario Nurses Association v. Eatonville/Henley Place*, 2020 ONSC 2467 (application by nurses at long-term care homes seeking to enforce Ministry directives regarding access to personal protective equipment (PPE), arguing that failure to provide adequate PPE violates the *Charter* and other legal obligations); *Vaccine Choice Canada et al. v Justin Trudeau, Prime Minister of Canada et al.*, Court File No. CV-20-00643451-0000 (constitutional challenge to various aspects of the federal and provincial COVID-19 response, including social distancing, masking, and lockdowns); *Taylor v. Newfoundland and Labrador*, 2020 NLSC 125 (upholding provincial restrictions on travel into Newfoundland); *Canadian Civil Liberties Association et al. v Attorney General of Canada*, Court File No. T-539-20 (constitutional challenge to the Correctional Service of Canada's failure to implement adequate COVID protection measures for prisoners); *Aboriginal Legal Services et al. v Attorney General of Ontario et al.*, Court File No. (challenge to decision to give first responders, including police, the ability to obtain information from a COVID-19 infection database, on constitutional and other legal grounds). This case was settled in May 2020: see <https://ccla.org/health-info-policing/>. See also *Sanctuary et al. v. Toronto (City) et al.*, 2020 ONSC 4708 (constitutional challenge to City shelter standards on the basis that the standards were insufficient to protect residents against COVID-19 and thus violated the *Charter*). This case was settled in May 2020: see <https://goldblattpartners.com/news-events/news/post/city-finally-commits-to-physical-distancing-standards-in-shelters>.
8. See also Daniel Weinstock and Vardit Ravitsky, "Should Immunity Licenses be an Ingredient in our Policy Response to COVID-19?" in Colleen M Flood, Vanessa MacDonnell, Jane Philpott, Sophie Theriault & Sridhar Venkatapuram, eds, *Vulnerable: The Policy, Law and Ethics of COVID-19* (Ottawa: University of Ottawa Press 2020). Available online: <https://press.uottawa.ca/vulnerable.html.html>.
9. See Tim Caulfield, "Does Debunking Work? Correcting COVID-19 Misinformation on Social Media" in Colleen M Flood, Vanessa MacDonnell, Jane Philpott, Sophie Theriault & Sridhar Venkatapuram, eds, *Vulnerable: The Policy, Law and Ethics of COVID-19* (Ottawa: University of Ottawa Press 2020). Online: <https://press.uottawa.ca/vulnerable.html.html>
10. Elizabeth Thompson, "Federal government open to new law to fight pandemic misinformation", *CBC News*, online: <https://www.cbc.ca/news/politics/covid-misinformation-disinformation-law-1.5532325>
11. Rob Ferguson, "Use Law to Impose COVID-19 Quarantines, Ontario's Chief Medical Officer Tells Local Health Officials", *Toronto Star* (1 April 2020), online: <www.thestar.com/politics/provincial/2020/04/01/ontarios-chief-medical-officer-dr-david-williams-strongly-urging-law-restricting-movements-of-covid-19-patients.html>; Health Protection and Promotion Act, RSO 1990, c H.7, s 22.
12. Public Health Act, RSA 2000, c P-37, s 73(3); Bill 10, Public Health (Emergency Powers) Amendment Act, 2nd Sess, 30th Leg, Alberta, 2020, s 9(b)(ii)-(iii) (assented to 2 April 2020).
13. Emergency Management and Civil Protection Act, RSO 1990, c E.9, s 7.0.11(1)(a).
14. Douglas Quan, "'God will protect us': Alberta prayer event now linked to at least 29 COVID-19 cases", *Toronto Star* (17 August 2020), online: www.thestar.com/news/canada/2020/08/17/god-will-protect-us-alberta-prayer-event-now-linked-to-at-least-17-covid-19-cases.html
15. See (e.g.) Tyler Dawson, "Legal group threatens court challenge over right of Ontario Orthodox Jews to worship during pandemic" *National Post* (29 May 2020), online: nationalpost.com/news/legal-group-threatens-court-challenge-over-right-of-ontario-orthodox-jews-to-worship-during-pandemic
16. *Syndicat Northcrest v Amselem* [2004] 2 S.C.R. 551.
17. Meghan Collie, "Can I go to another province? The latest coronavirus travel restrictions, by region", *Global News* 25 June 2020), online: www.globalnews.ca/news/7106284/coronavirus-provincial-travel/
18. Newfoundland and Labrador's travel restrictions were recently upheld by the province's Supreme Court. See, Taylor supra note 3.

19. Nicole Bogart, "Advocates demand family caregivers be given access to long-term care homes" CTV News (16 June 2020), online: <https://www.ctvnews.ca/health/coronavirus/advocates-demand-family-caregivers-be-given-access-to-long-term-care-homes-1.4987129>
20. Ontario, "OVID-19 action plan: long-term care homes", online: <https://www.ontario.ca/page/covid-19-action-plan-long-term-care-homes>.
21. Ibid.
22. See Sprague, supra note 3, for an analogous challenge to restrictions on visitations to hospitals.
23. Jill Mahoney, "What happened when families were blocked from Canada's long-term care homes" (3 June 2020), online: Globe and Mail <<https://www.theglobeandmail.com/canada/article-what-happened-when-families-were-blocked-from-long-term-care-homes/>>.
24. See Canada (AG) v Bedford, 2013 SCC 72.
25. Terry Skolnik, "The Punitive Impact of Physical Distancing Laws on Homeless People" in Colleen M Flood, Vanessa MacDonnell, Dr. Jane Philpott, Sophie Thériault & Sridhar Venkatapuram, eds, *Vulnerable: The Policy, Law and Ethics of COVID-19* (Ottawa: University of Ottawa Press 2020). Online: <https://press.uottawa.ca/vulnerable.html.html>
26. R v Levkovic, 2013 SCC 25.
27. New Brunswick (Minister of Health and Community Services) v. G. (J.), [1999] 3 S.C.R. 46; Rodriguez v. British Columbia (Attorney General), [1993] 3 SCR 519.
28. Canada (AG) v Bedford, 2013 SCC 72
29. Teresa Scassa, Jason Millar and Kelly Bronson, "Privacy, Ethics and Contract-tracing Apps" in Colleen M Flood, Vanessa MacDonnell, Dr. Jane Philpott, Sophie Thériault & Sridhar Venkatapuram, eds, *Vulnerable: The Policy, Law and Ethics of COVID-19* (Ottawa: University of Ottawa Press 2020). Online: <https://press.uottawa.ca/vulnerable.html.html>
30. Aboriginal Legal Services et al. supra note 3.
31. Mike Hall, "Tickets, fines for coronavirus rules target minorities: CCLA", CityNews (24 June 2020), online: <https://edmonton.citynews.ca/2020/06/24/tickets-fines-used-to-enforce-pandemic-rules-disproportionately-targeted-minorities/>; Steven D'Souza, "Police enforcement of physical distancing measures exposes old wounds in New York" CBC News Online (18 May 2020), online: www.cbc.ca/news/world/new-york-police-physical-distancing-enforcement-1.5572105
32. Alexander McClelland and Alex Luscombe, 2020, "Policing the Pandemic: Tracking the Policing of COVID-19 Across Canada", <https://doi.org/10.5683/SP2/KNJLWS>, Scholars Portal Dataverse.
33. CCLA, Canadian Rights During COVID-19 (June, 2020), online: <https://ccla.org/cclanewsites/wp-content/uploads/2020/06/June-2020-COVID-report-working-document.pdf>
34. See generally James Stribopoulos, "In Search of Dialogue: The Supreme Court, Police Powers and the Charter" (2005) 31 Queen's L.J. 1.
35. The Supreme Court of Canada has stated that s.7 protects only matters of fundamental personal concern, that engage the dignity of the individual. See (e.g.) R. v. Malmo Levine; R. v. Caine [2003] SCC 74.
36. R. v. Locke (2004), 375 A.R. 49 (PC).
37. Craig Forcese, "Repository of Canadian COVID-19 Emergency Orders" (last visited 13 May 2020), online (blog): Intrepid www.intrepidpodcast.com/blog/2020/3/19/repository-of-canadian-covid-19-emergency-orders.
38. "Face the Nation: Interview with Dr. Anthony Fauci" (15 March 2020) at 0m:53s, online (video): CBS News <www.cbsnews.com/news/transcript-dr-anthony-fauci-discusses-coronavirus-on-face-the-nation-march-15-2020/>.
39. R. v. Oakes [1986] 1 SCR 103.
40. "When striking a balance between the claims of competing groups, the choice of means, like the choice of ends, frequently will require an assessment of conflicting scientific evidence and differing justified demands on scarce resources. Democratic institutions are meant to let us all share in the responsibility for these difficult choices. Thus, as courts review the results of the legislature's deliberations, particularly with respect to the protection of vulnerable groups, they must be mindful of the legislature's representative function...In other cases, however, rather than mediating between different groups, the government is best characterized as the singular antagonist of the individual whose right has been infringed. For example, in justifying an infringement of legal rights enshrined in ss. 7 to 14 of the Charter, the state, on behalf of the whole community, typically will assert its responsibility for prosecuting crime whereas the individual will assert the paramountcy of principles of fundamental justice. There might not be any further competing claims among different groups. In such circumstances, and indeed whenever the government's purpose relates to maintaining the authority and impartiality of the judicial system, the courts can assess with some certainty whether the "least drastic means" for achieving the purpose have been chosen, especially given their accumulated experience in dealing with such questions." Irwin Toy Ltd v Quebec (Attorney General), [1989] 1 SCR 927 at 993-994. See also Alberta v. Hutterian Brethren of Wilson Colony [2009] 2 SCR 567 at para 53.
41. Christopher P Manfredi & Antonia Maioni, "Judicializing Health Policy: Unexpected Lessons and an Inconvenient Truth" in James B Kelly & Christopher P Manfredi, eds, *Contested Constitutionalism: Reflections on the Canadian Charter of Rights and Freedoms* (Vancouver: UBC Press, 2010) 129; Kent Roach, "The Challenges of Crafting Remedies for Violations of Socio-economic Rights" in Malcolm Langford, ed, *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (Cambridge: Cambridge University Press, 2008) 46.
42. R v Edwards Books and Art Ltd, [1986] 2 SCR 713, 35 DLR (4th) 1 [Edwards Books].
43. Irwin Toy Ltd v Quebec (Attorney General), [1989] 1 SCR 927, supra. See also Cambie Surgeries Corporation v. British Columbia (Attorney General), 2020 BCSC 1310 at para 2060.
44. Edwards Books, supra note 38.
45. R v Heywood, [1994] 3 SCR 761 at pp 802-3, 120 DLR (4th) 348; Reference Re BC Motor Vehicle Act, [1985] 2 SCR 486 at p 518, 24 DLR (4th) 536.

- 46.** Section 7 rights are very infrequently justified under s. 1. In part, this is because a similar analysis to s. 1 is conducted within s. 7 itself, namely an examination of whether the deprivation of a “right” is in accordance with the “principles of fundamental justice.” For example, the latter requires that the law or policy not be “overbroad” which is similar to one part of the s. 1 analysis that examines whether the law or policy is “minimally impairing”.
- 47.** K Wilson et al., “Problems with precaution: the transfusion medicine experience” (2018) *J Risk Res* 1, online: <https://pubmed.ncbi.nlm.nih.gov/29348731/>
- 48.** “EU’s Communication on Precautionary Principle” (2000), online: The Global Development Research Center <www.gdrc.org/u-gov/precaution-4.html>.
- 49.** Ontario Nurses Association v. Eatonville/Henley Place, *supra* note 3.
- 50.** Canadian Civil Liberties Association et al., *supra* note 3. At the municipal level, Toronto also faces a Charter challenge for failure to protect the health and safety of shelter clients. See, Sanctuary et al., *supra* note 3.
- 51.** DN Fisman, AL Greer, AR Tuite, “Bidirectional impact of imperfect mask use on reproduction number of COVID-19: A next generation matrix approach” (2020) *5 Infectious Disease Modelling* 405.
- 52.** Ewa Krajewska, Veronica Sjolin, Teagan Markin, “Making masks mandatory is not a civil liberties issue” (24 June 2020) *Toronto Star*, online: www.thestar.com.
- 53.** Frank I Michelman, “Residual Freedom and Constitutional Comparison” (2009) [unpublished, copy on file with authors]. See also Jamal Greene, “Americans are obsessed with ‘rights.’ In the pandemic, that’s killing us” (2 July 2020), online: *LA Times* <<https://www.latimes.com/opinion/story/2020-07-02/coronavirus-masks-rights-refusals-law>>.
- 54.** *Godbout v. Longueuil (City)*, [1997] 3 SCR 844, cited in Malmo-Levine; Caine, *supra* note 31.
- 55.** *Re B.C. Motor Vehicle Act*, [1985] 2 SCR 486.
- 56.** Nina Bai, “Still Confused About Masks? Here’s the Science Behind How Face Masks Prevent Coronavirus”, *UCFS News*, online: <https://www.ucsf.edu/news/2020/06/417906/still-confused-about-masks-heres-science-behind-how-face-masks-prevent>. See also Weinstock and Ravitsky, *supra* note 4.
- 57.** Skolnik, *supra* note 21; *R. v. Boudreault*, 2018 SCC 58.
- 58.** Weinstock & Ravitsky, *supra* note 4.
- 59.** See generally Julia Hughes and Vanessa MacDonnell, “Social Science Evidence in Constitutional Rights Cases in Germany and Canada: Some Comparative Observations” (2013) 32:1 *National Journal of Constitutional Law* 23.
- 60.** Mark Tushnet refers to courts as “weak reads in a crisis”; see Mark Tushnet, “The Political Constitution of Emergency Powers: Parliamentary and Separation-of-Powers Regulation” (2007) 3:4 *Intl J Law in Context* 275 at 277 (internal quotation marks removed). But see Kent Roach, “Comparative Constitutional Law and the Challenges of Terrorism Law” in Rosalind Dixon & Tom Ginsburg, eds, *Comparative Constitutional Law* (Northampton, MA: Edward Elgar Publishing, 2011) 532.
- 61.** Reference *Re Secession of Quebec*, [1998] 2 SCR 217; *United States v Carolene Products Co*, 304 US 144 (1938); Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Cambridge, MA: Harvard University Press, 2004), at 1-2.
- 62.** Aedan Helmer, “‘There is no Going Back’: How COVID-19 Forced Courts into the Digital Age”, *Ottawa Citizen* (16 May 2020), online: <<https://ottawacitizen.com/news/local-news/there-is-no-going-back-how-covid-19-forced-courts-into-the-digital-age>>; Paola Loriggio & Liam Casey, “COVID-19 Pandemic Forces Ontario Justice System ‘Stuck in the 1970s’ to Modernize”, *CP24* (29 April 2020), online: <https://www.cp24.com/news/covid-19-pandemic-forces-ontario-justice-system-stuck-in-the-1970s-to-modernize-1.4917915>; Ontario Superior Court of Justice, “Notice to the Profession, the Public and the Media Regarding Civil and Family Proceedings – Update” (2 April 2020), online: <<https://www.ontariocourts.ca/scj/notice-to-the-profession-the-public-and-the-media-regarding-civil-and-family-proceedings-update>>.



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