

REGIONAL **ETHICS BOWL** **CASES**

FALL 2020

Prepared by:

Michael Funke
Rhiannon Dodds Funke
Gretchen A. Myers
Greg Shafer
Becky Cox-White

© Association for Practical and Professional Ethics 2020

Editor's Note: Please note that source materials cited may be used multiple times, but only identified once per case.

1. Protests and Property Destruction

After George Floyd's murder by police was caught on camera and the video went viral, Black Lives Matter (BLM) protests erupted across the United States. These demonstrations against police violence and racial injustice may be the largest social justice movement in U.S. history: polls as of August 2020 show that about 15 to 26 million people have participated. The demonstrations have continued for weeks and have already started making real progress through both legal and cultural avenues. For example, many cities and states have banned police chokeholds, and public support for the BLM movement has skyrocketed.¹

Civil disobedience is a hallmark of these protests: protestors block roads, disobey curfews, and disrupt events in order to amplify their message.² In many instances, police have responded with brutality, further illustrating the protestors' point.³ Nonviolent protests have a long history in this country, and often include breaking unjust laws or demonstrating abuse of power in an organized manner, knowing that the police are likely to respond with violence. Indeed, these tactics were not only famously but also successfully used during the civil rights movement of the 1960s. However, in the chaos of many of the current protests, there has also been random looting and vandalism by a small minority of the protesters present according to eyewitness accounts. It is unclear who is committing these acts, and in many instances peaceful protestors have attempted to intervene to stop the vandalism.

Many believe that this type of indiscriminate destruction of property only serves to discredit the movement. As one author argues, "The violence and property damage associated with the civil unrest are inexcusable. The looting is indefensible. Both do incredible damage to any cause seeking justice, especially ones fighting to end police brutality and reform the criminal-justice system." In other words, "using peaceful protests as a cover for theft and destruction is actually violence perpetrated against the movement itself."⁴ These critics of looting would argue that looting and vandalism do not constitute legitimate civil disobedience, insofar as the laws against such acts are not inherently unjust.

According to Attorney General William Barr, "groups of outside radicals and agitators are exploiting the situation to pursue their own separate, violent and extremist agenda," and "the violence instigated and carried out by Antifa and other similar groups in connection with the rioting is domestic terrorism and will be treated accordingly."⁵ President Trump has blamed

¹ Larry Buchanan, Quoctrung Bui, and Jugal K. Patel, *Black Lives Matter May Be the Largest Movement in U.S. History*, The New York Times, July 3, 2020, <https://www.nytimes.com/interactive/2020/07/03/us/george-floyd-protests-crowd-size.html>

² Matthew Yglesias, *Vandalism and theft aren't helping*, Vox, June 4, 2020, <https://www.vox.com/2020/6/4/21278048/civil-disobedience-looting-vandalism>

³ Anthony L. Fisher, *Police rioted, justifying the point of the protests*, Business Insider, June 1, 2020, <https://www.businessinsider.com/police-rioted-george-floyd-riots-justifying-protests-2020-6>

⁴ Anthony Fisher, *Destruction swings at the system, but the punch lands on the peaceful protests*, Business Insider, June 14, 2020, <https://www.businessinsider.com/george-floyd-peaceful-protests-looting-riots-destruction-righteous-cause-2020-6>

⁵ Hollie McKay, *George Floyd unrest: How riot groups come together to loot, destroy*, Fox News, June 1, 2020, <https://www.foxnews.com/us/george-floyd-riots-looting-destroy>

Antifa and the “radical left” for the rioting, and announced that Antifa would be designated as a terrorist organization.⁶

But others have taken the stance that this type of property damage and theft are justified, considering the vital importance of fighting for black lives and the dire state of racial inequality in this country. One author argues that “the destruction of property should be taken seriously rather than treated as an unfortunate externality or the expression of regrettably unchecked passions.”⁷ The looting and burning of multinational chains and big box stores can be seen as acts of anger and rage directed at an unfair system, a bid for the redistribution of property, and a necessary escalation to get the attention of the broader community.⁸ As Trevor Noah has explained, “Black Americans watch time and time again how the contract that they have signed with society is not being honored by the society that has forced them to sign it with them.”⁹

⁶ Rob Blitzer, *Trump announces US to designate Antifa as terrorist organization following violent protests*, Fox News, May 31, 2020, <https://www.foxnews.com/politics/trump-announces-u-s-to-designate-antifa-as-terrorist-organization-following-violent-protests>

⁷ R.H. Lossin, *In Defense of Destroying Property*, The Nation, June 10, 2020, <https://www.thenation.com/article/activism/blm-looting-protest-vandalism/>

⁸ Olga Khazan, *Why People Loot*, The Atlantic, June 2, 2020, <https://www.theatlantic.com/health/archive/2020/06/why-people-loot/612577/>; Glenn Greenwald, *What is the Goal of the Protests, and Which Tactics are Morally Justified and Strategically Wise*, The Intercept, June 4, 2020, <https://theintercept.com/2020/06/04/what-is-the-goal-of-the-protests-and-which-tactics-are-morally-justified-and-strategically-wise/>

⁹ @TheDailyShow, “Society’s Broken Contract with Black America,” Twitter, May 31, 2020, <https://twitter.com/thedailyshow/status/1267078626203144199>; see also, “You broke the contract,” YouTube, uploaded by The Ferryman, June 8, 2020, <https://www.youtube.com/watch?v=EoDeVpvuEzI>

2. Mandatory Masks and Racial Profiling

Oregon's Lincoln County instituted a mandatory mask policy to reduce the spread of the novel coronavirus. The policy included an exemption for "people of color who have heightened concerns about racial profiling and harassment due to wearing face covering in public." Extreme backlash ensued. "The calls and comments fell into two main categories: 'There were people saying we were racist against white people,' said Lincoln County Commissioner Claire Hall. And on the opposite end of the spectrum, 'We got messages of, to the effect, "Why are you participating in a genocide plot to kill people of color?"' Ultimately, the exemption was removed.¹⁰

Long before the coronavirus outbreak, people of color—especially black men—have been adjusting their personal presentation in an effort to counteract racial stereotypes that lead many in their community to see them as a threat. For them, the recommendation that everyone should wear cloth face coverings to slow the spread of the coronavirus came with the added concern that homemade masks could exacerbate racial profiling. As one man explained, "The CDC coming to you and saying 'put a bandana over your face, walk out and that will make you more safe,' as a black man in New York City, it's like them saying put on a hoodie and walk behind a white grandma. That's not how life works for us."¹¹ Another man put it this way: "I don't feel safe wearing a handkerchief or something else that isn't CLEARLY a protective mask covering my face to the store because I am a Black man living in this world. I want to stay alive, but I also want to stay alive."¹²

At the same time, communities of color have suffered a disproportionate toll from the coronavirus pandemic. For example, in Chicago, black residents are falling ill with coronavirus at more than twice the rate of other groups, and black people account for almost seventy percent of coronavirus deaths in the city. As one professor of medicine explains, the disparate impact of the pandemic is the result of longstanding health disparities: "The roots of health disparity based in racial and socio-economic status are long and deep-seeded, ranging from pre-existing health conditions to access to health care."¹³

The Lincoln County exemption was an attempt to balance the protection of all citizens from the virus with the concerns of people of color worried that wearing a mask would put them at risk for violence. But the exemption was swiftly removed due to "unprecedented vitriol" and "horrifically racist commentary" that county leaders received. They explained that "The expressions of racism regarding the exception has created a ripple of fear throughout our

¹⁰ Erin Ross, *How Internet Outrage Led to A Change In Lincoln County's Face Mask Policy*, OPB, June 28, 2020, <https://www.opb.org/news/article/lincoln-county-face-mask-internet-media-outrage/>

¹¹ Gwen Aviles, *Black men fear homemade coronavirus masks could exacerbate racial profiling*, NBC News, April 9, 2020, <https://www.nbcnews.com/news/nbcblk/black-men-fear-homemade-masks-could-exacerbate-racial-profiling-n1179236>

¹² Derrick Bryson Taylor, *For Black Men, Fear That Mask Will Invite Racial Profiling*, The New York Times, May 26, 2020, <https://www.nytimes.com/2020/04/14/us/coronavirus-masks-racism-african-americans.html>

¹³ Erika Edwards, *African Americans 'disproportionately affected' by coronavirus, CDC report finds*, NBC News, April 8, 2020, <https://www.nbcnews.com/health/health-news/african-americans-disproportionately-affected-coronavirus-cdc-report-finds-n1179306?cid=related>

communities of color. The very policy meant to protect them, is now making them a target for further discrimination and harassment.”¹⁴

¹⁴ Scottie Andrew, *An Oregon county drops its mask exemption for people of color after racist response*,” CNN, June 26, 2020, <https://www.cnn.com/2020/06/24/us/oregon-county-people-of-color-mask-trnd/index.html>

4. Evictions and Foreclosures in the Time of Covid

Covid-19 has created an unprecedented shut down around the world as counties have struggled to contain the highly contagious virus. As businesses shut down, a large proportion of citizens found that their incomes were either dramatically reduced or outright erased, particularly in the lower income sectors like restaurant and other service workers. In response to the income reductions faced by so many, state and federal governments struggled with the appropriate level of relief response to prevent additional crises hitting Americans in the form of mass homelessness. Federally insured mortgages, like those underwritten by Fannie Mae (Federal National Mortgage Association or FNMA), and Freddie Mac (Federal Home Loan Mortgage Corporation or FHLMC),²³ the Federal Housing Administration (FHA)²⁴ and Veterans Administration (VA)²⁵ all imposed moratoria on foreclosures and evictions through the end of 2020, but not all home loans are underwritten by such agencies.

Some states filled the gap for homeowners who were struggling due to business closures and loss of income, but often these moratoria created additional uncertainty about what happened once the moratoria are lifted.²⁶ Since the Great Recession, state courts have often relied upon the filing fees associated with evictions and foreclosures, as well as traffic tickets, but with the moratoria and the significantly reduced traffic that has come from stay-at-home orders, many local courts have faced budget shortfalls that are creating significant delays for all court matters, not just traffic and housing issues.²⁷ Some have suggested that property taxes may provide a reasonable alternative to the filing fees paid by lenders and landlords, and traffic fines, but even this alternative may come with added unintended consequences, as homeowners may find themselves less capable of paying their annual tax bills under present economic circumstances.

As a final concern, landlords have complained that the moratoria that have been in place have impaired their ability to demand payment from tenants who are not suffering the impacts of Covid, which can impair the landlords' ability to maintain properties in a responsible manner, pay their own mortgages, and/or use the proceeds of rent to pay their own living expenses. While some argue that the loss of landlords might represent a net societal benefit, freeing up more properties for ownership by individuals who might otherwise not have access to affordable homeownership, many people choose to rent for the convenience of relying on a property manager or landlord to take care of maintenance and repairs. Furthermore, some property managers have invested heavily in their properties, sometimes foregoing more traditional

²³ Federal Housing Finance Agency, "FHFA Extends Foreclosure and REO Eviction Moratoriums," <https://www.fhfa.gov/Media/PublicAffairs/Pages/FHFA-Extends-Foreclosure-and-REO-Eviction-Moratoriums.aspx>, August 27, 2020.

²⁴ Dept. of Housing and Urban Development, "FHA Extends Foreclosure and Eviction Moratorium for Homeowners Through Year End," https://www.hud.gov/press/press_releases_media_advisories/HUD_No_20_134, August 27, 2020.

²⁵ Veteran Benefits Administration, "Extended Foreclosure Moratorium for Borrowers Affected by Covid-19," <https://www.benefits.va.gov/HOMELOANS/documents/circulars/26-20-30.pdf>, August 24, 2020.

²⁶ Perkins Coie, Covid-19 Eviction and Foreclosure Orders/Guidance 50-State Tracker, <https://www.perkinscoie.com/en/news-insights/covid-19-related-eviction-and-foreclosure-ordersguidance-50-state-tracker.html>, August 27, 2020.

²⁷ See e.g. Josh Rojas, Bay News 9, "Pinellas Clerk Says Budget Shortfall Will Delay Civil Court Actions," <https://www.baynews9.com/fl/tampa/news/2020/08/07/exclusive--pinellas-clerk-says-budget-shortfall-will-delay-civil-court-actions>, August 7, 2020.

retirement plans in favor of investment in real estate, and in so doing, may now well face significant instability and potential economic ruin themselves based upon such investments. As policymakers, state and federal governments may still face a long road of decisions ahead, trying to determine the most equitable and sustainable way to apportion the economic pain that Covid is inflicting on citizens, and the priorities may shift as time wears on.

8. The Good of the One v. The Good of the Many

Some medical centers have been considering policies to withhold resuscitation of COVID-19 patients who stop breathing or whose hearts stop beating—even if the patients or their families request it.³⁶ Typically, resuscitation attempts are assumed to pose no substantial risks to health care providers (HCPs) or other patients. However, “crisis standards during a major surge in Covid-19 patients challenge typical assumptions regarding resuscitation and default provision of CPR”.³⁷ For example, patients with airborne infectious diseases are often placed in negative pressure rooms (which keep room air from escaping into the larger setting); but many hospitals do not have such rooms, and hospitals that do typically have only one or two.

As hospitals are being inundated with patients infected with the COVID-19 virus, many are facing a severe shortage of personal protective equipment (PPE)—e.g., masks, gowns, gloves—for hospital personnel. HCPs are bound by oath—and sometimes by law—to do everything they can to try to save a patient’s life. When patients stop breathing or when their hearts stop beating, typically all available HCPs—usually 6-8, but sometimes dozens—rush to the bedside to begin life-saving procedures. These procedures typically include the often-bloody exercise of inserting more intravenous lines; inserting a tube (to attach to a ventilator) into the patient’s windpipe—which sprays virus-laden sputum throughout the room; and providing external heart massage that requires close contact with the patient’s body. As of August 11, 2020, 922 U.S. HCPs caring for COVID-19 patients have died.³⁸ Furthermore, during resuscitation HCPs use dozens of gloves, gowns, and masks that could be used to care for more patients and save more lives.

The American Medical Association’s basic Code of Ethics requires that:

... A physician shall, in the provision of appropriate patient care, except in emergencies, be free to choose whom to serve, with whom to associate, and the environment in which to provide medical care. [...] A physician shall, while caring for a patient, regard *responsibility to the patient as paramount*.³⁹

Similarly, “*The Code of Ethics for Nurses with Interpretive Statements* is the social contract that nurses have with the U.S. public. It exemplifies our profession's promise to and advocate for safe, quality care for all patients and communities.”⁴⁰ In particular, *The Code* requires:

Provision 1. The nurse, in all professional relationships, practices with compassion and respect for the inherent dignity, worth, and uniqueness of every individual, unrestricted by considerations of social or economic status, personal attributes, or *the nature of health problems* (emphasis added).

³⁶ Cha, A. E. (March 25, 2020). “Hospitals consider universal do-not-resuscitate orders for coronavirus patients” *The Washington Post* <https://www.washingtonpost.com/health/2020/03/25/coronavirus-patients-do-not-resuscitate/>

³⁷ CPR in the Covid-19 Era — An Ethical Framework. *N Engl J Med* 2020; 383: e6

DOI: 10.1056/NEJMp2010758

³⁸ “Lost on the frontline: Hundreds of US healthcare workers have died fighting Covid-19.” *The Guardian*. <https://www.theguardian.com/us-news/ng-interactive/2020/aug/11/lost-on-the-frontline-covid-19-coronavirus-us-healthcare-workers-deaths-database>

³⁹ <https://www.ama-assn.org/sites/ama-assn.org/files/corp/media-browser/principles-of-medical-ethics.pdf> Emphasis added.

⁴⁰ <https://www.nursingworld.org/practice-policy/nursing-excellence/ethics/> Emphasis added.

1.1 Respect for human dignity - A fundamental principle that underlies all nursing practice is respect for the inherent worth, dignity, and human rights of *every individual*.

[...]

1.3 The nature of health problems -The nurse respects the worth, dignity and rights of all human beings *irrespective of the nature of the health problem*. The worth of the person is not affected by disease, disability, functional status, or proximity to death.

1.4 The right to self-determination - Respect for human dignity requires the recognition of specific patient rights, *particularly, the right of self-determination*.

One factor complicating this issue is that survival rates for COVID-19 patients who experience cardiac or pulmonary arrests is uncertain. One study in Wuhan, China, reported a very low survival rate of 2.9%; but whether this same rate holds for patients in the U.S. is unclear.⁴¹ Common clinical practice and professional codes of ethics do not require HCPs to provide “futile” care—for example, care that has no chance of restoring the patient’s life. What, then, to do with COVID patients who suffer cardiac or pulmonary failure, but whose outcomes cannot be reliably predicted?

⁴¹ Shao, F., Xu, S., Ma, X., Xu, Z., Lyu, J., Ng, M., Cui, H., Yu, C., Zhang, Q., Sun, P., & Tang, Z. (2020). In-hospital cardiac arrest outcomes among patients with COVID-19 pneumonia in Wuhan, China. *Resuscitation*, 151, 18–23. <https://doi.org/10.1016/j.resuscitation.2020.04.005>

11. Here Comes the Judge

Robert Ruehlman, an Ohio Common Pleas Court Judge in Hamilton county Ohio claims he regularly calls U.S. Immigration and Customs Enforcement on defendants in his courtroom when he suspects they could be in the country illegally. "I call ICE in a minute. I have no problem calling ICE," said Judge Ruehlman, who states that he calls ICE "10 to 20" times a year. "I do. I do not think every judge does that. I think I'm the only judge that does that, but I do. I think it's important." Further, Ruehlman says that he depends on his own intuition as a guide for when to make such calls, and that he typically feels the need to call when the defendant speaks Spanish or needs an interpreter.⁴⁹

The Hamilton county sheriff has expressed concern about the practice, asserting that "anyone who is a victim or witness to a crime should be able to fully participate in the judicial process to further justice and remove dangerous criminals from our streets." The judge, on the other hand, stated, "I don't see where the outrage is. Number one, they're an illegal alien. They're not supposed to be here, so they're breaking the law. Number two, they're in front of me for a felony." He claims his hunches have never been wrong.⁵⁰

It is common practice across branches of law enforcement to rely on intuition, training, and experience in the pursuit of criminals. The subjective judgment of police officers is defended by law enforcement as a critical tool on which they depend to perform their jobs. However, the subjectivity of this tool has become increasingly difficult to defend in light of a long string of highly publicized police killings of unarmed people of color. American law enforcement has a long and troubled history with racial profiling.

"It's not racial profiling. It's just common sense," Ruehlman said. "They speak Spanish, they're charged with carrying a lot of drugs, and they're not from here. It's pretty clear they're illegal immigrants, you know, and if it turns out they are a citizen, then there's no harm, no foul." In a statement concerning Ruehlman, ICE spokesman Khaalid Walls said courthouses are often the only place agents can find a person, and visitors are typically screened upon entry to search for weapons and other contraband, so the safety risks for the arresting ICE officers and for the arrestee are substantially diminished.

Legally, the matter seems to be up to the discretion of the presiding judge concerning whether immigration police should be consulted when a suspected offender is present in court. Nancy Sullivan, an advocate for migrants, said she's conflicted in this case. "I don't think this is the best way to go about it," Sullivan said. "Nobody wants a convicted criminal on the street who hasn't served time or done whatever, but I think it has a very chilling effect on getting crime victims or

⁴⁹ Da Silva, Chantal (Jan. 24, 2020) "Judge Says 'It's Not Racial Profiling' to Call ICE If Defendants 'Speak Spanish' and Are Charged With Carrying Drugs" *Newsweek* <https://www.newsweek.com/cincinnati-judge-calls-ice-if-defendants-suspected-being-undocumented-1483825>

⁵⁰ Bellware, Kim (Jan. 25, 2020) "Ohio judge says he relies on a hunch to call ICE when he suspects defendants are undocumented" *The Washington Post* <https://www.washingtonpost.com/immigration/2020/01/25/robert-ruehlman-calls-ice/>

witnesses to come to court.”⁵¹ Judge Charles Kubicki, the presiding and administrative judge for Common Pleas Court, said that as far as he knows, there are no rules or laws that prevent judges from contacting immigration agents. He added there are also no laws *requiring* judges to do so, either.

⁵¹ Francisco, Courtney (Jan. 23, 2020) “Judge Robert Ruehlman says he calls ICE when he suspects defendants could be here illegally” WCPO ABC Cincinnati <https://www.wcpo.com/news/local-news/hamilton-county/judge-robert-ruehlman-says-he-calls-ice-when-he-suspects-defendants-could-be-here-illegally>

12. Mugshots in Media

Gov. Andrew Cuomo recently proposed a change in New York's freedom of information law that would block the public release of criminal mugshots and arrest records. Cuomo cited the rise of websites that post the information and then demand payment from the person in question to take the photo or booking information down. Mugshots remain in the public record, even if charges are dropped or the person has served their sentence.⁵²

The stated intention of the new law is to prevent the exploitation of arrested persons online. Groups that advocate for the rights of the formerly incarcerated support this law, and suggest that these photos can be used to damage the reputation of the arrested persons for the rest of their lives in exchange for little public benefit, but the new law is contentious for several reasons.

Public information advocates argue that the current arrangement serves two purposes: to inform citizens of potentially dangerous criminals in their neighborhoods, and as a method of holding law enforcement accountable by ensuring that their arrests remain public.

"It's not happy news that the governor wants to encourage secret arrests," said Diane Kennedy, president of the New York News Publishers Association. "Seems like an excellent way to ensure that the arrests of powerful, politically connected people remain secret. It also would allow arrests of suspected pedophiles and rapists to remain secret. That doesn't seem to serve the public very well."

Further, the new law complicates the matter by stopping short of a full ban on the public release of mugshots, but rather leaves the decision up to local police departments. Under the law, releasing mugshots is permissible when it "serves a law enforcement purpose." For example, if the police are requesting the public assistance in the arrest of a fugitive. Kennedy said it would be better for the state to ban websites from charging fees to someone who requests to have their photograph removed from the internet. She said the state attorney general's office also could be tasked with pursuing legal action against any companies that don't abide by such a law.

⁵² Lyons, Brendan (Jan. 18, 2019) "Cuomo proposes ban on release of mugshots, arrest info." *Times Union* <https://www.timesunion.com/news/article/Cuomo-proposes-ban-on-release-of-mugshots-arrest-13545073.php>

13. What's in the Pudding?

Dementia and psychosis are common diagnoses for individuals in residential treatment and inpatient facilities. Symptoms include emotional instability, disorientation, confusion, fear, and aggression. In the process of providing care, such individuals may be labeled as “non-compliant” because they are often resistant to taking medication. Patients may or may not have legitimate reasons for this resistance. Some dislike the side effects, others never consented in the first place, while others refuse as a way of simply maintaining bodily autonomy. Some patients however may consent and agree with their medical treatment during lucid moments, but at other times be resistant to medication due to symptoms of their psychosis or dementia. Staff frequently implement strategies to force compliance with treatment goals, including taking medications. (While over-medication is sometimes an issue, in general it is best that patients take their prescribed medications.) One such strategy is covert medication administrations—that is, concealing medication, mostly in food or drink, so that the patient does not know about the drug.⁵³

Dementia patients exhibit diminished decision-making capacity and autonomy (although the degree of impairment is both on a spectrum and can fluctuate). Nonetheless, this reduced capacity is often taken to justify paternalistic deceit about medication administration. It is generally considered better for patients if they do not become agitated and medication administration can be quite stressful. Nurses are also often understaffed and over-burdened. The process of administering medications to a non-compliant, disoriented patient is stressful, time consuming, and in extreme cases potentially dangerous. For these reasons some view covert administration of medication as a choice which provides benefits to the patient, staff, and other dependent patients.

Deception, such as covert medication administration, can negatively affect both the patient and the nurse. Patients have less power and knowledge than medical staff and must place their trust in the staff. When patients detect deception, trust in caregivers is broken. Once trust is broken, it can be challenging to repair: the patient may not be able to accept even the most basic care from that person again due to damaging the relationship with deception. The discovery of deception can go beyond the situation and affect the way that the individual perceives healthcare professionals in the future. Even when no discovery is made by the patient, there is a worry that deception in justifiable cases will lead to an erosion of staff commitment to veracity in general.⁵⁴

Research indicates that specific demographics of patients are more susceptible to covert medication administration in residential and inpatient treatment facilities. According to experts on covert medication Julia Simpson “There may be unintentional biases at work.”⁵⁵ On Simpson’s analysis of covert medication administration, race, age, and other medically irrelevant elements of diagnosis and treatment plans affect medical decision making about when deception is warranted. For example, evidence shows that black patients are more than twice as likely to be

⁵³ Munden, L. M. (2017). The Covert Administration of Medications: Legal and Ethical Complexities for Health Care Professionals. *The Journal of Law, Medicine & Ethics*, 45(2), 182–192.

⁵⁴ Sokol, D.K. (2007). Can deceiving patients be morally acceptable? *British Medical Journal* 2007; 334.

⁵⁵ Simpson, C. (2017). Covering It Up? Questions of Safety, Stigmatization, and Fairness in Covert Medication Administration. *The Journal of Law, Medicine & Ethics*, 45 (2): 204-211.

diagnosed with schizophrenia compared to white patients. And black men with schizophrenia are comparatively over medicated and receive less therapeutic interventions than white patients.⁵⁶

⁵⁶ Hoberman, 2012. Tweddle, F. (2009). Covert medication in older adults who lack decision-making capacity. *British Journal of Nursing*, 18(15), 936-939.

14. Organs at a Funeral

Organ transplantation is the process of removing a healthy organ from a donor who may be living or dead and implanting that organ in the body of a patient with organ failure. In the United States alone there are over 100,000 people with some stage of organ failure on the transplant waiting list. “On average 20 people die every day from the lack of available organs for transplant.”⁵⁷ Although most people support organ donation, most do not choose to register as organ donors. To address this apparent disconnect, on March 20, 2020, England enacted Max and Kierra’s Law which transitions their system of organ donation from opt-in to opt-out.⁵⁸

An opt-out system of organ donation presumes that, upon death, people would automatically consent to donating their organs to another person unless they had previously stated otherwise. In a presumed consent system one can still refuse to donate their organs but must explicitly opt-out. This contrasts with the opt-in model whereby one is presumed to refuse donation of their organs unless they have expressly consented to such a donation by registering as an organ donor. In 1979 Spain became the first country to adopt an opt-out system of organ donation. Spain now has the world’s highest rate of organ donation.

Over the last 40 years many countries across the EU, Oceania, and South America have moved from requiring expressed consent to presumed consent and have seen significant increases in organ donation. However, some opt-out countries such as Luxembourg and Bulgaria have unusually low rates of organ donation. This has led some to suggest that the general correlation between presumed consent laws and increased donation rates is indicative of a third causal factor and not a case of the law, *per se*, strongly improving donation rates. According to some such critics, “In the absence of strong evidence, time and effort spent on legislative change misses the opportunity to focus on non-legislative action, which could have greater impact.”⁵⁹ Examples of such non-legislative action include building a more robust procurement system including additional facilities, staff, and medical personnel trained and focused on recognizing potential organ donors.

Even granting evidence that suggests at least modest improvements in donation under presumed consent models, such systems raise questions about how, when, and why people may opt-out. For example, there is substantial disagreement about so-called “first person consent.” Under first person consent families cannot override the patients’ consent (presumed or express.) For example, “In Austria, the rate of donation quadrupled within 8 years of a presumed-consent policies being introduced. Under Austrian legislation, organs can be recovered irrespective of relatives’ objections.”⁶⁰ This is in stark contrast to the situation in other countries. For example, “Even if you are on the Australian Organ Donor Register donation won’t proceed without your family’s consent.” The difference in these countries policies make a substantial difference to some individuals and families.

⁵⁷ American Transplant Foundation (2019). Facts and Myths About Transplant. Online" at: <https://www.organdonor.gov/statistics-stories/statistics.html>

⁵⁸ <https://www.organdonation.nhs.uk/uk-laws/organ-donation-law-in-england/>

⁵⁹ Willis, B. H., & Quigley, M. (2014). Opt-out organ donation: on evidence and public policy. *Journal of the Royal Society of Medicine*, 107(2), 56–60. <https://doi.org/10.1177/0141076813507707>

⁶⁰ Zink, S., Zeehandelaar, R., & Wertlieb, S. (2005) Presumed vs Expressed Consent in the US and Internationally. *AMA Journal of Ethics*, 2005;7(9):610-614 <https://journalofethics.ama-assn.org/article/presumed-vs-expressed-consent-us-and-internationally/2005-09>

15. One for the Road

Canada takes impaired driving seriously. In 2008 impaired driving was the single largest category of criminal prosecution, accounting for 12% of criminal concerns.⁶¹ In 2010 the province of British Columbia moved to largely decriminalize drunk driving and Manitoba has also adopted a similar approach. In the decade following these changes there has been a 50% decrease in British Columbia's alcohol-related deaths. According to Andrew Murie, CEO of Mothers Against Drunk Driving (MADD) Canada, "That's an incredible accomplishment that hasn't been accomplished anywhere else in the world. We have way more people alive today than if BC hadn't changed their system. Our organization is all about stopping deaths, not punishing people."⁶²

According to H.L. Ross, an early advocate of decriminalization, "A major problem with the criminal justice system is that it fails to deliver punishment to drunk drivers with sufficient certainty and swiftness to support the credibility of the deterrent threat."⁶³ Rather than having impaired drivers face lengthy trials and criminal records, administrative procedures can result in the immediate revocation of drivers licenses and impounding of a vehicle. In such cases when a driver fails a blood alcohol content test, officers may immediately take the driver's license and impound the vehicle.

One benefit of decriminalization is that it streamlines the legal process, reducing pressure on an already overburdened justice system. Administrative penalties such as revocation and impound are not subject to the same evidentiary standards as criminal trials and therefore move much more swiftly. For example, following a roadside license revocation the police action can be submitted to appeal. Administrative hearings do not require attorneys, and the standard of proof would follow the "preponderance of the evidence" as opposed to a standard of "beyond a reasonable doubt." In such cases the only demonstration required is that the stop was legal and the test accurate and legally administered. This reduced standard makes upholding the revocation swifter and more likely.

According to the *National Post*, "It's obvious that decriminalizing drunk driving simply makes things a lot easier on the government, as well, which should raise some red flags."⁶⁴ The administrative process of responding to impaired driving makes punishment swift and certain at the expense of reducing procedural safeguards to the limitation of individual liberties. But others worry that this sort of decriminalization may erode the sort of retributive response that is appropriate for those who harm others with their reckless behavior.

⁶¹ Kenkel, Joseph F. (2008). *Impaired Driving in Canada*, 2009 Edition. Markham, Ontario: LexisNexis Canada. p. 1.

⁶² Kimiko Kidd. Why Would Alberta Consider Decriminalizing Drunk Driving? *The News Wheel* March 24, 2020. <https://thenewswheel.com/why-would-alberta-consider-decriminalising-drunk-driving/>

⁶³ Ross H. L. (1991). Decriminalizing drunk driving: a means to effective punishment. *Journal of applied behavior analysis*, 24(1), 89–90. <https://doi.org/10.1901/jaba.1991.24-89>

⁶⁴ Soupcoff, Marni (Mar. 3, 2020) Decriminalizing Drunk Driving Can Work, But Can Also Hurt the Vulnerable. *National Post* <https://nationalpost.com/opinion/marni-soupcoff-decriminalizing-drunk-driving-can-work-but-can-also-hurt-the-vulnerable>