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Foreword: Promoting and Defending Civil Rights in a Time of Coronavirus

Elizabeth M. Iglesias*

On March 11th, 2020, the World Health Organization announced that the rapidly unfolding outbreak of a novel coronavirus should be treated as a pandemic. As the rates of infection continued to rise, business closures and shelter-at-home orders issued forth in fragmentary and uneven ways around the world and across the United States. Both the outbreak and the responses of public and private actors across the world continue to raise serious questions regarding how global populations, both within the United States and abroad, can defend their civil rights and avert economic catastrophe, while complying, on the one hand with shelter-at-home orders in some cases enforced through coercive measures ranging from fines, to indefinite detentions, to beatings, while contending, on the other hand, with health risks arising from direct and indirect compulsion to continue providing “essential services” or from premature demands to return to “normal.” On March 29th, as chair of the Civil Rights Section of the AALS, I invited members of the section to establish a Working Group to examine the threats posed to civil and human rights by the Covid-19 pandemic and the differential responses of state, local, and national governments throughout the globe.¹

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¹ The working group enjoyed the participation of the following Civil Rights Section Members: Raquel E. Aldana, Professor of Law & Associate Vice Chancellor for Academic Diversity, U.C. Davis School of Law; Samuel Bagenstos, Professor of Law, University of Michigan; Alexa Van Brunt, Director, Roderick and Solange MacArthur Justice Center Clinic, Northwestern University Pritzkr School of Law; Katherine Culliton-Gonzalez, Chair, Civil Rights Section, Co-Chair, 2020 Initiative, Hispanic National Bar Association; Lia Epperson Professor of Law, American University – Washington College of Law; Leanne Fuith, Associate Professor at Mitchell Hamline School of Law and Dean of Career and Professional Development; Darren Hutchinson, Raymond & Miriam Ehrlich Eminent Scholar Chair, University of Florida Levin College of Law; Elizabeth M. Iglesias, Professor of Law, University of Miami Chair, Civil Rights Section of the AALS; Olatunde C. Johnson, Jerome B. Sherman Professor of Law, Columbia Law School; Solangel Maldonado, Eleanor Bontecou Professor of Law, Seton Hall University School of Law; Madeleine M. Plasencia, Law Professor, University of Miami; Catherine Powell, Professor of Law, Fordham Law School; Margo Schlanger, Wade H. and Dores M. McCree

Over the course of the spring and summer, the Working Group communicated by email, phone and zoom, exploring the implications of the pandemic for individuals and families detained pursuant to criminal and immigration enforcement practices not properly tailored to arrest the spread of the virus. We discussed issues of housing and employment discrimination, exacerbated by the very real risk of homelessness due to sudden loss of employment as a result of emergency shelter-at-home orders for “inessential workers.” We noted attacks on basic voting rights, raised concerns about suspended elections and questioned demands for in-person voting aimed at suppressing voter turn-out. We considered lessons to be learned from comparisons to be drawn (and not) between the Covid-19 crisis/scandal and the crisis/scandal of our national, local and international experience dealing with HIV. We confronted the international dimensions of the Covid-19 crisis/scandal and the im/potency of international human rights norms and institutions to secure basic civil rights on a global level; and took up the implications of the Covid-19 crisis/scandal for employment discrimination, harassment and related human rights.

All five of the articles in this symposium of the University of Miami Race and Social Justice Law Review are based on papers delivered at the September 17th Conference on *Defending and Promoting Civil Rights in a Time of Coronavirus*.² The September 17th all-day conference was itself a fruit of spring and summer discussions and planning in the Working Group of the Civil Rights Section. The conference’s four substantive panels, moderated by University of Miami law student leaders and law review members, reflect the wide range of civil and human rights issues civil rights lawyers and legal scholars have had to confront in order to meaningfully address the combined effects of the pandemic and the pre-existing reality of structural inequality, systemic racism, and institutional violence directed at the most vulnerable groups in our society and across the globe.

Tensions triggered by the outbreak of the pandemic were further intensified in the United States and across the world by the public murder of George Floyd on May 25, 2020 and the worldwide protests it triggered against police brutality and racial oppression. Two of the articles in this symposium deal directly with pre-existing legal structures that created the conditions of possibility for the abuses of civil and human rights manifested in the U.S. government’s response both to the pandemic and to

Collegiate Professor of Law; Scott Skinner-Thompson, Associate Professor, University of Colorado Law School.

² Defending and Promoting Civil Rights in a Time of Coronavirus
<https://www.law.miami.edu/academics/defending-promoting-human-rights-in-time-of-corona-virus>

the murder of George Floyd. In *Trump's Insurrection: Pandemic Violence, Presidential Incitement and the Republican Guarantee*,³ I examine the issue of presidential incitement to insurrection in light of the profoundly inconsistent responses with which the Trump administration reacted to the anti-shelter-in-place protests against police powers exercised by state and local officials to contain the contagious spread of Covid-19 in the months of March, April and May as contrasted to the administration's reaction to the Black Lives Matter protests against racially motivated police brutality that activated protests in cities across the country after Mr. Floyd's murder. This differential response not only warrants serious reflection on the requirements of equal protection under the law, but also calls into question the power delegated to the executive under current iterations of the Insurrection Act and the immunities allowed under current interpretations of the First Amendment—given the constitutional obligation to secure republican government. I offer a critical assessment of several legislative proposals introduced to deal with the abuse of presidential power to call forth the militia and armed forces of the United States and sketch the outline of a constitutional response to presidential incitement.

Professor Carrasco's contribution to this symposium also takes up a dimension of the pre-existing legal structure that creates the conditions of possibility for abuse of police power by officers like Derek Chauvin, who all too often escape liability to their victims because of the judicially invented doctrine of "qualified immunity."⁴ Even more significantly, the Supreme Court's increasing hostility to the doctrine of *Bivens v. Six unknown named agents of the Federal Bureau of Narcotics* has produced a series of decisions that create significant precedential hurdles to securing remedies for individuals whose constitutional rights are violated by federal agents. Carrasco traces this line of anti-*Bivens* cases, deconstructing the internal incoherence of the Court's analysis in each case. He notes that the cumulative effect of the cases is a judicial abdication of the founding principle of *Bivens*, which is grounded in the Court's own recognition in 1803, that "[t]he very essence of civil Liberty certainly consists in the right of every individual to claim the protection of the laws whenever he receives an injury."⁵

In response, Carrasco proposes a legislative fix, pointing to an asymmetry in the enforcement of constitutional rights. While constitutional violations committed by federal agents must overcome the Court's restrictive *Bivens* framework, state and/or local government

³ Elizabeth M. Iglesias, *Trump's Insurrection: Pandemic Violence, Presidential Incitement and the Republican Guarantee*, 11 U. MIA. RACE & SOC. JUST. L. REV. 7 (2021).

⁴ Gilbert Carrasco, *Bivens in the End Zone: The Court Punts to Congress to Make the Right (of Action) Play*, 11 U. MIA. RACE & SOC. JUST. L. REV. 56 (2021).

⁵ *Id.* at 63. (citing *Marbury v. Madison*)

agents can be sued pursuant to a private right of action established by the Ku Klux Klan Act of 1871, which is currently codified in title 42 of the U.S. Code, and more commonly known as §1983. Carrasco's proposal is to amend the text of Section 1983 to include five additional words, "*of the United States or*". His article explains exactly where the words should be added to the statute, its constitutional foundation, and the positive effects this simple amendment would have in reducing the degree of impunity currently obstructing accountability for the sorts of constitutional abuses the occurred in Oregon and throughout the country in response to the widespread civil rights protests triggered by Mr. Floyd's murder.

Professor Aldana situates her analysis of the devastating impact the pandemic has had worldwide on migrant health, safety and fundamental human rights in a decades long study of the forces linking the problem of forced migration from Central America to the long-term struggle for just nations in this region.⁶ This study informs, as well, her recommendations regarding immediate steps the new Biden Administration can take to ameliorate the suffering and reduce the vulnerability of people whose lives are in one way or another affected by the forces that produce and react to forced migration to and from the United States. Aldana's approach is interesting and provocative. Like the pre-existing structures of legal doctrines and statutes that establish and direct the terms upon which the use of force is deployed and rendered accountable (or not) in cases of police brutality or presidential incitement, the vulnerability of migrants is constructed by and embedded in pre-existing legal structures and the continuing effects of historical forces.

"Migrants" are not born that way. They are individuals whose "migrant" status is an artifact of legal categories superimposed on the push/pull forces that produce migration. In their countries of origin, violence and abuse are push forces attendant to the collapse of civil society in many ways linked to the historical and continuing effects of coloniality, corruption and Cold War conflicts; in the United States, familial relationships are among the pull forces that counteract and destabilize the effects of violence and abuse attendant to a hostile reception inflamed by defamatory rhetoric and policies implemented in violation of federal, constitutional and international law. In this complex array of forces, Aldana's recommendations identify two measures in particular that would enable the Biden Administration to immediately improve the current situation confronting migrant communities by addressing conditions in their countries of origin: stabilizing the flow of remittances from the U.S. to the region; and increasing and strategically reorienting foreign aid to

⁶ Raquel E. Aldana, *Border Solutions from the Inside*, 11 U. MIA. RACE & SOC. JUST. L. REV. 77 (2021).

these countries to the most vulnerable communities affected by the pandemic. Her article explains the logic and positive effects of these two concrete steps, even as her careful analysis of the empirical evidence and policy objectives provides substantial support for her recommendations.

Amid the compelling challenges revealed and/or exacerbated by the pandemic, including global homelessness, ecological destruction, health care inequalities both domestically within the United States and comparatively to other countries, Professor Plasencia's article focuses on the concerns that have occupied the U.S. Supreme Court.⁷ Plasencia develops her analysis of the Supreme Court's Covid-19 caselaw by identifying three categories of persons whose civil and human rights have been implicated by the risks of transmission: the deniers (or don't give a damn-ers) who refuse to comply with anticontagion public health measures; the medically vulnerable, who are at high-risk for severe symptoms if they contract the disease; and those who suffer dismissals, exclusion, evictions or other similar adverse or discriminatory action as a result of contracting or being perceived to have contracted Covid-19. In dealing with the complex array of compelling interests at stake in mediating the legal relations among these three categories, Plasencia asks what contribution the U.S. Supreme Court is making to the articulation of a jurisprudence adequate to the challenges the pandemic presents to civil and human rights?

Plasencia's article guides us through empirical data indicating who tends to appear in each of these three categories, noting that health vulnerabilities grounded in economic inequality correlating to race, sex and age are reflected in disproportionate rates of serious sickness and death among Black, Latinx and Native children and adults who contract the virus as compared to white persons. This empirical data provides a meaningful lens through which to assess the Court's chosen points of intervention. Judging from the line of cases emerging from the Court's emergency injunctive relief docket, today's Court is concerned with discrimination, but not against the vulnerable and disabled in the second and third categories Plasencia identifies. Instead, an increasing number of Justices are taking up the cause of persons in the first category, who desire to flout public health and safety restrictions—in the name of religious liberty. This increasing faction of the Court appears to view religious identity as a suspect class, not because of its increasing assertion as a surrogate for white supremacy, but rather as a class in need of the Court's special protection against the exercise of traditional police powers. Plasencia's

⁷ Madeleine M. Plasencia, *COVID-19, LYING, MASK-LESS EXPOSURES AND DIS/ABILITY DURING A PANDEMIC*, 11 U. MIA. RACE & SOC. JUST. L. REV. 119 (2021).

article assesses the line of Covid-19 cases emerging from the Court against the backdrop of established doctrines affirming the police power of the state to secure public health and safety through laws of general applicability and protecting disabled persons in a time of pandemic.

Professors Fuith and Trombley provide a fifth perspective on the way the pandemic has revealed and exacerbated pre-existing structural inequalities by focusing on the impact of both the pandemic and the reactions of public and private actors on the civil and human rights of caregivers.⁸ Caregiving responsibilities tend to be shouldered primarily by women in large part because enduring cultural expectations based on gendered identity roles assign these responsibilities to women. Fuith and Trombley provide compelling demographic data revealing grotesque gender inequality in the structure of the political economy. During the pandemic, jobs held by women disappeared faster than those held by men. Caregiving responsibilities contributed significantly to job losses and discrimination experienced by women in the workforce. According to Fuith and Trombley, discrimination based on caregiving responsibilities constitutes Family Responsibility Discrimination (FRD) which may violate cognizable civil rights under a complex and imperfect network of federal and state laws and regulations that need to be amended to provide more meaningful redress. Their article reviews the statutes and regulations that constitute this network, identifies gaps in the protection in light of the breadth and complexity of the problem revealed by the empirical data and offers recommendations aimed at ensuring a fuller and fairer protection is afforded to caregivers in our society.

As a documentary record of some of the themes and topics taken up during the live-event of the September 17th conference on *Defending and Promoting Civil Rights in a Time of Coronavirus*, this volume of the University of Miami Race and Social Justice Law Review reflects the commitment not only of the authors, whose works provide powerful lenses through which to understand, as well as tools with which to combat and transform, the forces of exclusion, oppression and discrimination that have pummeled our collective conscience during this fraught period, but the commitment as well of the law students whose participation in the live event and whose editorial support with the written works have helped make this symposium volume a reality.⁹

⁸ Leanne Fuith and Susan Trombley, *COVID-19 and the Caregiving Crisis: The Rights of our Nation's Social Safety Net and a Doorway to Reform*, 11 U. MIA. RACE & SOC. JUST. L. REV. 159 (2021).

⁹ Miami Law, *Miami Law Hosts Conference Focused on Civil Rights in Tumultuous Times* (Sept. 23, 2020), <https://www.law.miami.edu/news/2020/september/miami-law-hosts-conference-focused-civil-rights-tumultuous-times>.