The impact of the Covid-19 pandemic on daily life is stark: across the world, schools and businesses remain closed; gatherings have been downsized or banned; shelter-in-place requirements have been enacted; and governments have restricted interstate and international travel. While these measures have enabled some countries to effectively contain the spread of the novel coronavirus, this containment inherently comes at the expense of certain liberties and rights. In Germany and South Korea, for example, the deployment of targeted testing and contact tracing have broken chains of transmission, but the risk of continued surveillance after the pandemic has subsided remains an issue.

Historically, governments have reconfigured mechanisms of governance and power in times of crisis. In ancient Rome, for example, under the threat of war or civil strife, a government official could be authorized special powers to issue emergency decrees, levy troops, and prosecute and sentence citizens to death. Such emergency powers remain today across types of democratic government. The attacks on September 11, 2001 spurred counterterrorism legislation that expanded government surveillance and human rights abuses in the United States and other countries as well. Public health crises, in particular, also prompt emergency measures. During the 2003 severe acute respiratory syndrome (SARS) outbreak, an expansion of the Quarantine Act of 1872 authorized Canadian authorities to forcibly isolate more than 2,000 people, and “quarantine officers” stationed at the border were permitted to require medical exams of, or to detain, any persons suspected of having SARS. Similar powers were invoked in 2014 during the Ebola outbreak. The extraordinary circumstances of the Covid-19 pandemic have required innovative and often invasive public health approaches. These diverse strategies have been justified by the introduction of novel legislation, or through the mobilization of existing legislation, in order to expand traditional public health surveillance and enact new technological forms.

Commenting on the history of pandemics, political sociologist Rosemary C.R. Taylor writes that “nations develop inimitable ways of being and doing, so that their experience with disease comes to shape the strategies they choose and their sense of the possible when confronted with new ones.” Following Taylor, comparisons of national responses to Covid-19 should consider both past and present strategies and approaches and should pursue a range of questions, including: Is there recent experience with an epidemic or other public health
emergency? Is there a prior history of the use of new legislation or other emergency powers for public health surveillance and, if so, are these regarded by the citizenry as having been necessary for democracy or as having diminished it? Following the crisis, were rights restored to the pre-crisis status quo? What forms of technologically enabled public health surveillance have been used in the past? Are being used presently?

Different types of governments have been confronted with the difficult task of meeting the public health emergency posed by the Covid-19 pandemic while also protecting civil liberties, preventing injustice, bolstering economies, and sustaining the institutions necessary for democratic societies. Though liberties are never absolute, policies that address the current crisis frequently restrict rights to privacy, freedom of movement, and freedom of assembly—which may in turn suppress religious practice, political organizing, and the ability to avoid profiling and discrimination. Liberties may be restricted by policies themselves as, for example, when increased surveillance of individuals or groups limits privacy. Liberties and rights may also be infringed upon through the enforcement of laws (for example, the technological surveillance and punitive measures disproportionately used to police some groups and not others) or through the use of unlawful force. Privacy and freedom from arbitrary or unlawful surveillance are especially important to underscore as these rights historically enable the realization of other liberties, including freedom of expression and freedom of assembly. While liberties may be restricted through efforts to combat this pandemic—including masking and social-distancing mandates, restrictions on assembly and mobility, mandatory technological surveillance—taking no action infringes on the human right to health. Pandemics are extraordinary circumstances that necessitate changes in ordinary social structures and, therefore, pose unique challenges to and place a distinct strain on existing norms, policies, and laws. The variation in legal systems and public health policies among countries can have large impacts on individuals’ liberties and health.

Countries vary in how they arrange power and decision-making during emergencies, including which liberties they restrict, the extent to which they restrict them, and the length of time for which they are restricted. Some countries, such as Australia, have policies that allocate additional power to executives or disable traditional checks and balances during emergencies. Checks on this power vary by country. Emergency governance measures may include review by the judicial branch, but judicial branches, keeping proportionality in mind, may be sensitive to the magnitude of the emergency context. Scrutiny may also include the unofficial “check” of public opinion, underscoring the importance of government transparency and accountability, and citizens’ agency in ensuring just outcomes. Checks may also include “sunset” expirations of special powers and policies implemented during periods of crisis. Despite global attempts to check public health policy through the International Health Regulations.
(IHR) of 2005, many United Nations member countries have violated the IHR and otherwise disregarded its legal requirements in their pandemic policy responses.17

This primer offers an overview of the pandemic policy responses of three countries: South Korea, Australia, and the United States. These cases demonstrate how different approaches to Covid-19 may build on past experience with disease control, may lead to the generation of new regulations, and therefore may differently impact rights and liberties.

**South Korea: Epidemic Precedent, Technological Surveillance, and Open Society**

By wide agreement, South Korea has been incredibly successful in containing the spread of Covid-19, with fewer than 300 deaths in a country of over 51 million.18 Unlike many other countries, South Korea has not needed to enact restrictions on movement or assembly to suppress the pandemic, nor has it enacted “lockdown” measures or closed its economy. This success stems largely from norms and legislation developed after the country's response to the Middle East Respiratory Syndrome (MERS) outbreak in 2015 that initially stumbled, “lack[ing] both transparency and sufficient testing kits.”19 The government’s subsequent strategic response to MERS included the Infection Disease Control and Prevention Act of 2015 (IDCPA) that was later amended to address the novel coronavirus pandemic. The IDCPA explicitly invokes the public’s “right to know” by requiring prompt public disclosure of information about the spread of infectious diseases, including information about patients.20 The IDCPA enables the government to shut down locations or events where risk of disease spread is high, articulates the government’s obligation to disinfect potential sites of contamination, and states the right of all citizens to receive diagnoses and treatment of infectious disease at the government’s expense.21 The IDCPA also empowers public health authorities to require public and private organizations, as well as individuals, to provide information about patients and people suspected of being infected. The Act was amended in 2017, following the MERS outbreak, to allow public health authorities to collect a range of private data, including CCTV footage, cell phone records, granular geolocation information, and credit card receipts, without a warrant.22

Since the beginning of the Covid-19 pandemic, the South Korean government has amended the IDCPA twice more: once to create legal authority to make masks available to children and the elderly, and once to allow the government to criminally prosecute and fine suspected patients who refuse to take diagnostic tests and increase the penalties for breaking quarantine.23 Other regulatory infrastructure developed in response to MERS has been critical to containing Covid-19 in South Korea: an amendment to the Medical Devices Act promoted public-private partnerships that enabled the country to scale up testing quickly and at no expense to individ-
Surveillance data has been used for contact tracing and has also been released to the public to minimize activity in virus hotspots and build public trust. Also key to the effectiveness of the South Korean approach has been the expansion of existing technological infrastructure to new purposes. The Epidemic Investigation Support System, the data aggregation platform central to Korean public health surveillance, was “originally designed to let local authorities share urban planning information, from population to traffic and pollution.”

Privacy norms vary by culture and context, and polls of South Korean citizens suggest the public largely supports the government’s approach. Central to this public acceptance has been the government’s Transparency, Responsibility, United Action, Science, and Together in Solidarity (TRUST) strategy, an approach that it claims could be “a universal guiding principle that other countries can apply in their fight against COVID-19.” Yet, the country’s approach to surveillance and enforcement is not without criticism. South Korea’s National Human Rights Commission condemned the publication of detailed personal data—but not necessarily the collection of it—which led to protections from identifying information being publicized.

Australia: Technological Health Surveillance Without a Fundamental Right to Privacy

Although Covid-19 is beginning to surge in Australia, cases of infection initially fell dramatically after a swift, centralized response by the government that prioritized tracing and testing. Australia’s response was informed by a century of legislation governing agricultural and public health quarantining. Most recently, Parliament enacted the Biosecurity Act of 2015 in response to the influenza A virus subtype H1N1 (H1N1) pandemic. Under the Biosecurity Act, the head of the executive branch can declare a human biosecurity emergency of a period of three months, which disables the review and veto powers of Parliament and grants the Minister for Health power to implement emergency regulations. Regulations enacted in this period expire three months after the initial declaration of a biosecurity emergency. In June, the period of emergency was extended to September 17, 2020.

The central features of the Australian policy response are domestic and international travel restrictions, physical distancing and quarantining, and ongoing public health surveillance. Surveillance uses the capacity of existing institutions for case-based reporting, and syndromic and sentinel surveillance. Australia’s public health approach emphasizes centralized surveillance for contact tracing and targeted testing, which some believe has obviated the need for more rigid lockdowns or more intrusive surveillance.

The government released an app (COVIDSafe), modeled on Singapore’s TraceTogether, to trace the spread of Covid-19 using Bluetooth technology. Like Germany, Australia’s...
mitigation efforts had been moderately successful before the introduction of an app. The government encouraged all citizens to download the voluntary app; by mid-April, prior to this technological intervention being authorized by national law, more than 5.5 million Australians had done so. Since then, the app has been downloaded by 5.7 million people, or about 25 percent of the population. 38

Uniquely, there is no fundamental or constitutional right to privacy in Australian law and, accordingly, “a government-run surveillance system enabled by legislation cannot be challenged in Australian courts, or international courts, in any significant way.” 39 Thus, oversight of personal data collected for the purposes of public health surveillance falls to regional regulations or, in the case of the COVIDSafe app, a new legal assemblage, the Privacy Health Contact Information Bill (or COVIDSafe Act), that supersedes or cancels prior provisions. The COVIDSafe Act was not subject to typical legislative committee deliberations and was passed, unamended, 48 hours after it was introduced by the Australian Federal Parliament.

The COVIDSafe app is both decentralized (providing some privacy protection to app users until such time as they have an exposure contact, though with a weaker privacy preservation infrastructure than the Google/Apple model), 40 and centralized (providing data to federal entities the Department of Health and the National COVIDSafe Data Store (NCSDS)). There are limited legal protections to prevent misuse of the app, including the ability to protest coercion to use the app to a Privacy Commissioner and the narrowly defined use of the data (mostly to use by health authorities). (However, limited access by police authorities is permitted, raising concern about potential data creep.) There is a lack of clarity about the COVIDSafe app regarding how and when the data is deleted if it comes to the NCSDS. And, there is opaque and misleading information about the app. 41 For example, the documentation for COVIDSafe initially did not define sufficiently “proximity,” leaving citizens unable to determine how the app worked or how they were surveilled. 42

Non-compliance with regulation enacted under the Biosecurity Act, such as failing to comply with a strict 14-day quarantine, is considered a criminal offence punishable by fines or imprisonment. 43 There are also punitive measures tied to the Privacy Health Contact Information Bill: persons or institutions collecting, using, or disclosing data derived from the COVIDSafe app—beyond the narrowly prescribed uses—face imprisonment, steep fines of AU$63,000 (USD$43,000), or both.

The Australian government was prepared, by prior legal precedent and public health experience, to respond to this pandemic but doing so has required the restriction of some liberties and the creation of a surveillance system, the full impacts of which remain uncertain. Should aspects of the surveillance system be left in place, the response it engendered...
may unwittingly leave Australians with more privacy rights than in the time before the pandemic. For, in order to gain public trust in the app (to reach its participatory threshold for operational effectiveness), the COVIDSafe Act instilled stronger privacy protections than prior Australian law.

**United States: Federalism, Networked Authority, and Patchwork Surveillance**

The organization of public health in the United States is shaped by one of the country’s founding values: to limit the power of the executive by distributing legislative power across states. In contrast with South Korea, for example, the US federal government does not have regulatory levers at its disposal that would permit the executive branch to exclusively design and implement a strategy to combat Covid-19. However, both the National Emergencies Act and the Stafford Act potentially give the federal government many avenues for action. In addition, the Public Health Service Act empowers the US Secretary of Health and Human Services to declare a public health emergency and to respond with “appropriate” action. Against this backdrop, Taylor suggests that the “travel ban” may be the closest the US comes to federal action regarding infectious disease, noting the 1987 ban on the admission to the US of individuals with AIDS, which remained in place for more than two decades, and the more recent “China ban” instituted in response to the emergence of Covid-19.

The federal government is not granted powers for public health by the US Constitution; so, the federal government regulates public health through indirect means by, for example, distributing funding to states and monitoring its use. The work of state and county agencies was bolstered by cultural ideas that community factors were more important for monitoring public health than federal policy. Much of the responsibility of testing, tracing, and hospital capacity is left up to state and local officials, leading to a lack of a coordinated and effective effort and calls for a national surveillance system.

While some states and cities sharing metro areas have coordinated policy responses to the pandemic, other states that share a border have vastly different policies. Responding effectively to the pandemic has been further undercut by messages from public officials, including from the chief executive, that are untrue, conflicting, or that minimize the effect of the pandemic. This lack of coordination has led to millions of cases and more than 130,000 deaths nationwide and to a resurgence of infection in the southern and southwestern regions of the country.

States have developed their own approaches to public health surveillance, with different implications for liberties and rights. Some states, like Massachusetts, have hired a large workforce of manual contact tracers. New York uses large fines to enforce compliance with contact tracing efforts. Other states have shared health status information beyond contact tracing...
efforts, including 35 that shared the addresses of people who tested positive with police officers, firefighters, and emergency medical technicians, causing concern that this could lead to profiling of Black and Latinx communities.

Others have turned to technological solutions. A town in New Jersey used drones to monitor and enforce social distancing. Without evidence of their effectiveness, digital contact tracing and exposure notification systems may collect more information than they can use effectively. North Dakota released a contact tracing app, Care19, but the app was found to be sharing location and unique user identifiers with Foursquare and other data with Google and other companies. Integrating wearable devices for biometric surveillance could raise similar concerns.

Many hope for solutions from the private sector, like apps built on the Google/Apple infrastructure. Some, however, are concerned by the power of private companies like Apple and Google to prevent governments from implementing other contact tracing models digitally, despite praise for the decentralized model. At the national level, members of the US Congress have proposed three bills to protect personal health information shared via digital contact tracing and exposure notification applications but none have gained traction, leaving regulatory power over data collection, analysis, and reuse to the private sector. The lack of a centralized response in the United States has resulted in many different approaches that restrict different liberties or endanger the health of Americans.

Understanding how different countries have responded to the Covid-19 pandemic illustrates how different rights and liberties, including privacy, movement, assembly, and health, may be preserved or violated in the context of a pandemic crisis. Increasingly, civil and human rights organizations, public health ethicists, activists, and others are calling for restrictions of liberties to be proportionate to the crisis at hand and for their reinstatement as soon as the crisis has abated.

South Korea’s response has been effective, but the granularity of information collected about citizens diagnosed with (or suspected to be infected with) Covid-19 might be seen as a disproportionate violation of privacy in other contexts. Restricting movement can similarly be an effective tool, as countries like New Zealand demonstrate. Quarantine orders may restrict the movement of individuals rather than communities. In Australia, for example, individuals required to quarantine must remain in isolation for an entire two-week period, with exceptions only for emergencies. Restricting movement can have severe consequences and can,
too, be disproportionate: in the Philippines, the lockdown period has lasted four months, with an enormous economic impact on citizens but little support for them from the government.\textsuperscript{63}

Freedom of assembly may also be threatened. In Germany, for example, a ban on assemblies of more than two people who do not belong to the same household was overturned.\textsuperscript{64} Failure to act by governments also affects citizens’ rights. In Brazil, denial from the chief executive and lack of action has resulted in no proper testing strategy in place, a strained public health system, and tens of thousands of deaths.\textsuperscript{65}

Enforcement of public health policies can violate rights and lead to discriminatory outcomes. Many countries, including those mentioned here, may issue fines to compel compliance with public health directives, from masking to sheltering in place, but the cost of fines and the rate of enforcement varies among countries. Israel, for example, has issued fines equivalent to USD\$140 for failure to comply with lockdown measures,\textsuperscript{66} Australia has issued fines for USD\$1,150 for breaching lockdown orders,\textsuperscript{67} and South Korea may issue fines of up to USD\$8,100, jail time for citizens, or deportation for non-citizens for violating self-quarantine rules.\textsuperscript{68} Imprisonment is an especially troubling enforcement mechanism as incarcerated populations are among the most vulnerable to this pandemic.\textsuperscript{69} Mechanisms of enforcement themselves can violate rights, as Amnesty International has documented multiple cases of unlawful use of force to enforce lockdown measures.\textsuperscript{70}

Liberties and rights are often connected. Adhering to quarantine and lockdown orders may be more difficult for people with fewer financial resources or social supports, and so, without additional support from the state, penalties may disproportionately affect people who are poor or socially isolated. Surveillance policies may be used to enforce constraints on movement, as Indonesia used the TraceTogether app to log the movement of people diagnosed with Covid-19.\textsuperscript{71} In the Philippines, privacy is restricted as police perform house-to-house searches for people with Covid-19 and control their movements by bringing them to isolation facilities, under threat of imprisonment for failing to cooperate, rather than allowing them to self-isolate at home.\textsuperscript{72}

“Sunsets,” or other rules intended to enforce the expiration of technology or emergency powers, may be a useful check to prevent permanent restrictions of liberties, but they may be insufficient. Governments may regularly renew expiring regulations, as happened in Australia, while others may simply ignore sunsets. For example, South Korea’s Personal Information Protection Act, considered quite strict, states that the government must delete data after it has served the purpose for which it was collected. Yet, the government still retains information about MERS patients, even though no MERS cases have been reported in years.\textsuperscript{73} Additionally, sunsets do not necessarily address the restrictions of rights during emergency periods.
nor limit their abuses during the emergency period. In the Philippines, the president used emergency powers from the pandemic to pass an anti-terrorism bill that allows suspects to be detained without a judge’s approval for up to two weeks. Valid public health interventions may become disproportionate over time, as long lockdowns in the Philippines and prolonged retention of data in South Korea show.

To respond appropriately to the Covid-19 pandemic, governments have had to restrict liberties to some extent, but not all restrictions of liberties or violations of rights during this period have been necessary to contain the pandemic. While the distinction between necessary and unnecessary restrictions of liberties may be difficult to know in some cases, other violations of rights and abuses of emergency powers are quite clear. And taking no action results in unnecessary lives lost. Contextual and specific intersections of rights, law, and technology reflect—and will in turn refract and influence—local, national, and international politics and institutions well after the pandemic crisis has abated.

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ENDNOTES


2 The German government launched the voluntary Corona-Warn-App in mid-June, after it had already had modest success mitigating the pandemic through its testing and tracing approach. Based on Google/Apple API, the app is privacy-preserving, but nonetheless normalizes a new, expansive mode of technological surveillance. See, for example, “Germany Launches ‘Best’ Coronavirus Tracing App,” DW.com, June 16, 2020. In South Korea the expansive surveillance data and technology infrastructure, the Epidemic Investigation Support System, remains in place.


11 Amnesty International, Policing the Pandemic; see also, Alvaro Bedoya, “Privacy as Civil Right,” *New Mexico Law Review* 50, no. 3 (2020).


15 Allen et al., *Securing Justice*.


20 Ibid.

21 Ibid.


23 Kim, “South Korea Has.”

24 Ibid.


27 Oh, “South Korea’s Success.”


29 Jo, “South Korea’s Experiment.”


33 Scott Morrison, Update on Coronavirus Measures (Officer of the Prime Minister of Australia, 2020).


35 Syndromic surveillance refers to monitoring population health data for behaviors, symptoms, or other indicators of an infectious disease before confirmed diagnoses are made. Sentinel surveillance refers to using select reporting units to actively collect high-quality data about a particular disease. See, Australian National Disease Surveillance Plan for COVID-19 (Communicable Diseases Network Australia, 2020).

36 Ibid.

37 Rang et al., “COVID-19 from the Land ‘Down Under.’”
38 Morrison, “Update on Coronavirus.”


40 Greenleaf and Kemp, “Australia’s ‘COVIDSafe App.’”

41 Ibid.; see also, Edgar, “Disrupting Administrative Law.”

42 Greenleaf and Kemp, “Australia’s ‘COVIDSafe App.’”

43 Edgar, “Disrupting Administrative Law.”


45 Taylor, “History Lessons.”

46 Turnock and Atchison, “Governmental Public Health.”

47 Ibid.


56 Nelson and King, *Primer I*.


58 Lothar Wieler, Ute Rexroth, and Rene Gottschalk, *Emerging COVID-19 Success Story: Germany’s Strong Enabling Environment* (Our World in Data, 2020); see also, Hanson and Nelson, *Primer II*.


69 Allen et al., “Securing Justice.”

70 Amnesty International, *Policing the Pandemic*.


