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VIEWPOINT

Is It Lawful and Ethical to Prioritize Racial Minorities for COVID-19 Vaccines?

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Interview



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Coronavirus disease 2019 (COVID-19) has disproportionately affected racial minorities in the United States resulting in higher rates of infection, hospitalization, and death. With a limited supply after the initial approval of a safe and effective vaccine, difficult legal and ethical choices will have to be made on priority access for individuals.

The National Academies of Sciences, Engineering, and Medicine (NASEM) has recommended prioritization of racial minorities who are “worse off” socioeconomically and epidemiologically.¹ The World Health Organization (WHO) similarly cautioned that “colorblind” allocation frameworks could perpetuate or exacerbate existing injustices. Both NASEM and WHO urge policy makers to allocate vaccines in ways that reduce unjust health disparities.² The ethics and legality of race-based policies in the United States have been fraught with controversy.³ This Viewpoint considers how COVID-19 vaccine priority allocations could be implemented ethically and legally.

COVID-19 and Communities of Color

Compared with the rate of COVID-19–related deaths among non-Hispanic White individuals (mortality rate, 38/100 000) and adjusting for age, the mortality rate relative to population size is 3.4-fold higher among Black individuals (mortality rate, 131/100 000), 3.3-fold higher among Indigenous and Latino communities (mortality rate for both, 125/100 000), 2.9-fold higher among Pacific Islander individuals (mortality rate, 111/100 000), and 1.3 higher among Asian populations (mortality rate, 50/100 000).⁴ These elevated death rates are unlikely to be explained by biological differences¹ but more likely are influenced by social determinants of health, including economic privation and systemic bias. To avoid further compounding these disparities, the NASEM expressly includes “mitigation of health inequities” as 1 of the 3 foundational principles of its framework.¹

The Ethical Case for Considering Race

The ethical justification for prioritizing economically worse-off racial minorities rests on epidemiological, economic, and social justice grounds.^{1,2,5} Economically, worse-off groups are more dependent on regular income with little or no retirement or other savings, and less able to work remotely. Epidemiologically, worse-off groups are more likely to live with multiple generations in close proximity and are typically less able to physically distance at home, at work, and while commuting to work (if they are employed), and therefore at greater risk of contracting and spreading severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2).

Social justice rationales are based on the disparate outcomes that worse-off racial minorities, especially

Black persons in the United States, have experienced in terms of higher rates of COVID-19–related unemployment, housing evictions, and hospitalizations. Ignoring these effects in allocating vaccines could exacerbate these differences, with an influence lasting likely far beyond the end of the pandemic.⁵

NASEM Framework

The Centers for Disease Control and Prevention (CDC) and the National Institutes of Health (NIH) commissioned the NASEM to provide recommendations to the CDC’s Advisory Committee on Immunization Practices (ACIP). ACIP will issue national guidance, implemented by the states. ACIP has indicated it would be guided by the NASEM framework, particularly the way in which minorities will be prioritized.

The NASEM framework allocates vaccines in 4 sequential phases, with distinct priority populations. Within each population group, vaccine access would be prioritized for geographic areas identified as vulnerable through a statistical measure called the Social Vulnerability Index (SVI). The SVI (developed for public health emergencies such as hurricanes or earthquakes) identifies geographic areas of vulnerability based on 15 census variables “most linked to the disproportionate impact of COVID-19 on people of color and other vulnerable populations.”¹ The CDC advises state-level planners to draw on the NASEM and the ACIP frameworks, instructing planners to begin identifying “critical populations” including “people from racial and ethnic minority groups.”⁶ Race, therefore, could be among the explicit factors that health professionals will use to allocate scarce COVID-19 vaccines.

Are Race-Based Allocation Criteria Lawful?

The US Supreme Court uses a demanding legal standard in reviewing race-based classifications. There is no direct precedent in which courts have considered race in allocating scarce health care resources. The closest parallels are found in rulings on school access and university admissions. The critical question is whether government is permitted to consider race when seeking to ameliorate the effects of past and current discrimination. Often called “reverse discrimination,” the policy deliberately favors people of color.

In a series of cases, the court has vacillated as to whether race can be an express criterion for achieving greater equity and diversity. In striking down public school integration plans that explicitly included a student’s race, Chief Justice Roberts said, “The way to stop discrimination on the basis of race is to stop discriminating on the basis of race” (*Parents Involved in Community Schools v Seattle School District No. 1*, 551 US 701

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[2007]). Yet the court has permitted race to be one of multiple factors in ensuring diversity in universities.⁷

The court has increasingly moved toward limiting the explicit consideration of race, requiring policies categorizing individuals by race to meet a “strict scrutiny” standard. Under strict scrutiny, race-based policies must be narrowly tailored to achieve a compelling governmental interest. Even if the court were to rule that promoting equity is a compelling state interest, it would still require government, wherever possible, to use means other than race to achieve equitable outcomes. Likewise, the future of race-based discrimination to remedy past and future disadvantage remains uncertain. The consideration of race in COVID-19 vaccine allocation could be a potentially attractive test case for the court given its changing composition.⁷

Strict judicial scrutiny would not permit 2 vaccine priority strategies. First, a health care worker could not give priority to vaccinating persons from minority groups, for instance, by skipping White people waiting in line at a health care facility. Second, public health agencies could not provide vaccines exclusively, or in larger shares, to geographic areas identified by race alone. This would not preclude distribution in proportion to the population of a vaccine through community health centers, many of which serve largely urban minority populations.

For strategies that would increase the allocation ratio above that proportionate to the population, the Supreme Court is likely to uphold racially neutral vaccine allocation criteria, which are designed to capture worse-off minorities but not explicitly. A vaccine distribution formula, therefore, could lawfully prioritize populations based on factors like geography, socioeconomic status, and housing density that would favor racial minorities de facto, but not explicitly include race.

An example of such a legally permissible approach would be to use a measure called the Area Deprivation Index (ADI), which is similar to the SVI, but does not explicitly prioritize on the basis of race. The ADI reflects the level of socioeconomic deprivation of a geographic area at the block-group level (600-3000 people) and is associated with health outcomes.⁸ The index integrates income, education, employment, and housing quality. Although it does not use race as a variable, the ADI still captures structural disadvantage and systemic racism because racial minorities are far more likely to be economically worse off.^{1,2} The ADI therefore closely tracks racial and ethnic divides and significantly reduces potential legal concerns that are associated with using the SVI.

The methodological design of the SVI does not prescribe how its 4 domains (socioeconomic status, household composition, race/

ethnicity and language, and housing and transportation) that are focused on the census tract level (1200-8000 people) should be weighed. Current guidance suggests that states will have considerable discretion in allocations.^{1,6} Race could therefore account for as little as one-fifteenth of the overall SVI score (if all variables were considered equally) or, depending on how the index is configured by a planner, could become far more prominent, if not determinative.

It is not clear how the Supreme Court would rule on vaccine distribution based on either the ADI or SVI, but it is likely that the ADI would be more acceptable because it does not explicitly prioritize on the basis of race.

Race in the United States

The United States is experiencing an intense reckoning with structural racism, both because of the disparate health effects of COVID-19 on racial minorities and protests over police violence. Vaccine allocation strategies should not exacerbate racial divisions yet must consider socioeconomic and racial disadvantage. Protected litigation challenging vaccine allocation plans could disrupt the implementation of a COVID-19 vaccination plan. Before implementation, ACIP should model the performance of the SVI against racially neutral standards such as the ADI, in capturing vulnerable groups while minimizing legal and ethical risks.

Policy makers should also model how many more vaccines worse-off racial minorities should receive. NASEM suggests that 10% of all vaccines be reserved for the worst-off SVI quartile in each state. In addition, states should make “special efforts” to deliver vaccines to these areas. The more intense the priority that might be given to racial minorities, the deeper the legal scrutiny will be. In addition, a seemingly arbitrary arithmetic cutoff point can invite further legal concern. An equally pragmatic yet more meaningful approach would consider COVID-19’s effects to date (for example, in terms of deaths an ADI region incurred) on worse-off racial minorities. Grounding priority decisions in objective data help justify allocation formulas both for the general public and for the judiciary.

Public health agencies will have considerable discretion in rationing scarce COVID-19 vaccines. They could become agents of change toward improving social and racial justice. Or they can become complicit in allocation strategies that, once again, disproportionately favor the better-off, White majority. Racially neutral approaches must be implemented to advance social and racial justice in the United States.

ARTICLE INFORMATION

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