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The Demographics of Death: An Early Look at COVID-19, Cultural and Racial Bias in America

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The Demographics of Death: An Early Look at COVID-19, Cultural and Racial Bias in America

by U.S. CONGRESSWOMAN EDDIE BERNICE JOHNSON*
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Abstract

During late 2019, reports emerged that a mysterious coronavirus was resulting in high contagion and many deaths in Wuhan, China. In just a few weeks, cases rose quickly in Seattle, spread to California, and the first instance of the virus appeared in New York (from Iran) on March 1, 2020.

As the months pass, it is abundantly clear that less wealthy Americans have far fewer options amid the new normal of shelter-in-place orders, school closings, and shuttered businesses. For example, the poor and other populations may be genetically pre-disposed to heart disease and diabetic issues, but poverty also dictates cheaper diets high in carbohydrates (macaroni and cheese, pasta, rice, etc.) and more likely to result in poor nutrition. COVID-19 lays bare the fundamental racism in U.S. culture and public policy, but the virus does not care about personal wealth, religion, or race. Enlightened self-interest dictates that we take care of the least fortunate among us. From a global perspective, COVID-19 is an issue that impacts

and threatens us all. Census data reveals that sixty percent of Black Americans (42.5 million) live in just ten U.S. states. Is the super concentration of Black Americans in cities a factor in the disease ratios? Hyper-exposure to fast-food and sugary drinks is genuinely a factor in obesity and diabetes in old age. People use words such as apocalyptic to describe the 2020 American pandemic experience. As year 2021 begins, over 400,000 U.S. deaths have been reported and it is obvious that the U.S. caseload leads the world with over 25 million infected.

Keywords: African Americans, Asian Americans, Blacks, Centers for Disease Control (CDC), COVID-19, crisis, demographics, diseases of despair, economics, Ebola, employment, ethics, health insurance, herd immunity, Hispanic, homelessness, income disparity, Latinx, minorities, national security, Native Americans, pandemic, police violence, poverty, policy, public health, race, unemployment, virus, World Health Organization

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Introduction

Even though we face the difficulties of today and tomorrow, I still have a dream. It is a dream deeply rooted in the American dream. I have a dream that one day this nation will rise up and live out the true meaning of its creed: 'We hold these truths to be self-evident, that all men are created equal.'

- Dr. Martin Luther King, Jr.

Delivered at the March on Washington for Jobs and Freedom
Washington, D.C. August 28, 1963¹

During late 2019, reports began to emerge that a mysterious coronavirus was resulting in high contagion and mounting deaths in Wuhan, China.² *The New York Times* reports, “[o]n January 15, 2020, a man flew home to the Seattle area after visiting family in Wuhan. After a few days of mild symptoms, he tested positive . . . the first confirmed case of COVID-19 in the United States.”³ In just a few weeks, cases rose quickly in Seattle, spread to California, and the first case appeared in New York (from Iran) on March 1, 2020.⁴ By mid-March 2020, 7,769 U.S. COVID-19 cases were reported and 118 deaths.⁵ The U.S. government botched efforts to implement necessary widespread testing for the virus.⁶ Early reports emerge that:

[p]oliticians in Washington, well-known celebrities, social media influencers and even entire N.B.A. teams have been tested for the new coronavirus. But as that list of rich, famous and powerful people grows . . . so do questions about whether they are getting access to scarce testing that is denied to other Americans.⁷

Also abundantly clear, “Americans with less money have fewer options amid the new normal of school closings, shuttered businesses and shelter-in-

1. Dr. Martin Luther King, Jr., Remarks Delivered at the March on Washington for Jobs and Freedom (Aug. 28, 1963), in CLAYBORNE CARSON & KRIS SHEPARD, *CALL TO CONSCIENCE: THE LANDMARK SPEECHES OF DR. MARTIN LUTHER KING, JR.* 85 (Hatchette, eds. 2002).

2. Jonathan Corum & Carl Zimmer, *How the Coronavirus Mutates and Spreads*, N.Y. TIMES, May 12, 2020, at D8.

3. *Id.*

4. *Id.*

5. Jennifer Calfas, Catherine Lucey, & Lucy Craymer, *U.S. Looks to New Tools to Fight Fallout*, WALL STREET J., March 19, 2020, at A4.

6. Christopher Weaver, Betsy McKay, & Brianna Abbott, *America Needed Tests. The Government Failed*, WALL STREET J., March 19, 2020, at A1.

7. Megan Twohey et al., *At the Front of the Test Line: A Lot of A-Listers*, N.Y. TIMES, March 19, 2020, at A1.

place orders.”⁸ By April 24, 2020, the American Medical Association (AMA) writes, “[a]s racial and ethnic data on COVID-19 patients slowly begins to surface, it appears to confirm what public health experts expected: That poor and minority communities would be affected the most.”⁹ Within the next few months, people use words such as apocalyptic to describe the American coronavirus pandemic experience.¹⁰

As the number of confirmed COVID-19 cases climbed past 1.36 million and the death count soared to 82,000, Director of the National Institute of Allergy and Infectious Diseases Dr. Anthony Fauci testified before the U.S. Senate that “the number is likely higher.”¹¹ By April 2020, the U.S. unemployment rate reached 14.7%, the highest since the Great Depression of the 1930s, and “[a]t least twenty million Americans are unemployed and a large share of the nation’s small businesses are shut and facing possible insolvency.”¹² By mid-August 2020, *The New York Times* reported, “[a]cross the United States, at least 200,000 more people have died than usual since March. This is about 60,000 higher than the number that have been directly linked to the coronavirus during the same period.”¹³ These are referred to as “excessive deaths,” likely due to Covid; but, not classified as such.

Certain populations may be genetically pre-disposed to heart disease and diabetic issues, but poverty also dictates cheaper diets that may be high in carbohydrates (macaroni and cheese, pasta, rice, etc.) and, thus, more likely to result in poor nutrition. COVID-19 lays bare the fundamental racism in U.S. culture and public policy, but the virus does not care about personal wealth, religion, or race. Enlightened self-interest dictates that we take care of the least fortunate among us. From a global perspective, coronavirus is an issue that impacts and threatens us all. Census data reveals that sixty percent of Black Americans (42.5 million) live in just ten U.S. states. Can the super concentration of Black Americans in cities be a culprit in the disease ratios? What about hyper-exposure to fast-food and sugary drinks, which is genuinely linked to obesity and diabetes in old-age? By late May 2020, the United States suffered over 100,000 deaths attributable to the coronavirus. After several months of global experience confronting the COVID-

8. Manny Fernandez, *Skipping Meals So Her Children Can Have Theirs: In a Crisis, the Poor Are Left Further Behind*, N.Y. TIMES, March 21, 2020, at A1, A11.

9. Andis Robeznieks, *National COVID-19 Patient Data Vital to Fixing Inequity*, AM. MED. ASS’N (Apr. 24, 2020), <https://www.ama-assn.org/delivering-care/health-equity/national-COVID-19-patient-data-vital-fixing-inequity>.

10. Daniel Henninger, *After the Covid Apocalypse*, WALL STREET J. (May 27, 2020), <https://www.wsj.com/articles/after-the-covid-apocalypse-11590618090>.

11. Thomas M. Burton & Stephanie Armour, *Health Officials Cite Risks of Early Opening*, WALL STREET J., May 13, 2020, at A1 (describing data from April 2020).

12. Jim Tankersley, *A Bridge of Federal Relief May Crumble in Summer*, N.Y. TIMES, May 10, 2020, at A1 (discussing April 2020 data).

13. Denise Lu, *The True Toll of the Pandemic Climbs Past 200,000*, N.Y. TIMES, Aug. 14, 2020, at A6.

19 virus, “[e]pidemiologists pointed to one overarching reason for the decline in new cases: the success of widespread social distancing.”¹⁴ By July 29, 2020, *The New York Times* reports, “[a]s infections mount across the country, it is dawning on Americans that the epidemic is now unstoppable, and that no corner of the nation will be left untouched. As of . . . [July 29, 2020], the pathogen has infected at least 4.3 million Americans, killing more than 150,000.”¹⁵ As 2021 begins, over 400,000 Americans are dead from this virus; over 200,000 new cases present per day; the United States leads the world with almost twenty-six million cases; “and the daily death toll has surpassed 3,800.”¹⁶ However, positive developments include the approval and start of the administration of vaccines from Pfizer and Moderna.¹⁷

We learned on July 31, 2020, that after bringing a lawsuit against the Centers for Disease Control and Prevention (“CDC”), [t]he *[New York Times]* obtained a database with the characteristics of 1.5 million individuals who tested positive for the virus through the end of May . . . data showed that people who were Black or Latino were three times as likely to become infected as people who were white.¹⁸

By August 2020, the U.S. led the world in infections and deaths, with over five million infected.¹⁹ The *Wall Street Journal* reports, “[t]he U.S. continues to lead the world in number of confirmed cases, followed by Brazil with about three million cases and India with more than two million, according to data compiled by Johns Hopkins University.”²⁰

Our article proceeds in thirteen parts. First, we take a basic look at the COVID-19 virus. Second, we provide a demographic tour of America. Third, we discuss the ongoing issue of race in the United States. Fourth, we discuss income and wealth disparity. Fifth, what we know about health, race, and the COVID-19 pandemic. Sixth, we address the life-crippling impact of diseases responsible for chronic despair and addiction. Seventh, we explore

14. Julie Bosman et al., *New Cases in U.S. Slow, Posing Risk of Complacency*, N.Y. TIMES, May 17, 2020, at A6.

15. Donald G. McNeil Jr., *A Viral Epidemic Splinters into Deadly Pieces*, N.Y. TIMES, July 30, 2020, at A1.

16. Denise Grady et al., *Moderna Vaccine is Second to Get Cleared by F.D.A.*, N.Y. TIMES, Dec. 19, 2020, at A1. See also *COVID-19 Dashboard*, JOHNS HOPKINS U. CENTER FOR SYSTEMS SCIENCE AND ENGINEERING (CSSE), <https://coronavirus.jhu.edu/map.html> (last visited Jan. 29, 2021).

17. Thomas M. Burton & Peter Loftus, *Moderna COVID-19 Vaccine Endorsed By Panel*, WALL STREET J., Dec. 18, 2020, at A1.

18. Kate Conger et al., *Native Americans Feel Devastated by Illness, But Overlooked in Data*, N.Y. TIMES, July 31, 2020, at A5. See also Don Bambino Geno Tai, et al., *The Disproportionate Impact of COVID-19 on Racial and Ethnic Minorities in the United States*, 72 CLINICAL INFECTIOUS DISEASES 703–06 (2020).

19. Jacey Fortin & Manuela Andreoni, *U.S. Caseload Surpasses 5 Million, Leading World*, N.Y. TIMES, Aug. 9, 2020, at A12.

20. Shan Li & Jennifer Calfas, *U.S. Tops 5 Million Confirmed Infections*, WALL STREET J., Aug. 10, 2020, at A6.

issues related to employment and race. Eighth, is a discussion about the Trump Administration and COVID-19. Ninth, we discuss science and data, which is critical in a pandemic. Tenth, we devote a few pages to exploring the importance of technological challenges and opportunities in the coronavirus environment. Our eleventh topic focuses on police violence and civil unrest. Lastly, we explore policy prescriptions and make our conclusion.

I. Pandemic and COVID-19

*There are moments in our history so grim, so heart-wrenching,
that they're forever fixed in each of our hearts as shared grief.
Today is one of those moments. 100,000 lives have now been
lost to this virus . . . To those hurting, I'm so sorry for your loss.
The nation grieves with you.*

-Joe Biden
Former U.S. Vice President
May 27, 2020²¹

While the influenza virus may have been with us since the beginning of time, “across millennia, cholera, small-pox, typhus and other diseases have changed history’s course and reinforced human perceptions of frailty. The catalogue ranges over swine flu and avian flu, leprosy, measles and malaria.”²² According to many historians, the first recognized instance of pandemic influenza seems to be 500 years ago, in year 1510 A.D.²³ Public health doctor David M. Morens notes that “other influenza pandemics probably did occur earlier, and about those we can say that they are NOW recognized as probably being both influenza and being pandemic.”²⁴ Laurence Barton reports that, “there have been 10 pandemics over the past three centuries, the most notorious being the global flu of 1918 that killed tens of millions of people.”²⁵ Barton continues:

21. Sean Sullivan, *Joe Biden Says 100,000 Death Toll Could Have Been Averted if Trump Administration Acted Sooner*, WASH. POST, May 27, 2020.

22. Alan Cowell, *Chronicling Contagions’ Brutal Efficiency in a Century of Photos*, N.Y. TIMES (March 22, 2020), <https://www.nytimes.com/2020/03/20/world/europe/coronavirus-aids-spanish-flu-ebola-epidemics.html>.

23. See Lawrence J. Trautman, *The Board’s Responsibility for Crisis Governance*, 13 HASTINGS BUS. L. J. 275, 339 (2017) (citing David M. Morens et al., *Pandemic Influenza’s 500th Anniversary*, 51 CLINICAL INFECTIOUS DISEASES 1442–44 (2010)).

24. E-mail from David M. Morens, M.D., Senior Advisor to the Director, Office of the Director, National Institute of Allergy and Infectious Diseases at the National Institutes of Health, to Lawrence J. Trautman (July 6, 2015 10:18 CST) (on file with author).

25. See Trautman, *supra* note 23, at 339 (citing LAURENCE BARTON, CRISIS LEADERSHIP NOW: A REAL-WORLD GUIDE TO PREPARING FOR THREATS, DISASTER, SABOTAGE, AND SCANDAL 109 (2008)).

If you fast-forward to 1976, over 400 people died near the banks of the Ebola River in the Democratic Republic of the Congo as a result of a vicious, toxic pathogen. While 400 people may seem pithy compared to the death toll in 1918, it was the *manner* in which the victims of the Ebola virus died that should make you lose sleep; some medical journals reported that the organs of some of the victims poured out of their bodies within days of contracting the virus. Some in the medical community are concerned that if such a virus were to spread again (it had a whopping 95 percent fatality rate), the impact could be unprecedented. If local officials had not immediately burned affected bodies after the initial outbreak, some scientists have concluded that it was theoretically possible that the human race could have been obliterated within three months. This is no exaggeration: It was *that bad*.²⁶

More recent threats include the 2014–15 Ebola scare,²⁷ the 2015 South Korean outbreak of Middle East Respiratory Syndrome (“MERS”),²⁸ and the 2016 spread of Zika virus.²⁹ From these examples, it seems clear that the threat of pandemic influenza is a scenario that every thoughtful person and policy maker should contemplate and discuss. Regarding impact on businesses and job loss, Barton believes:

26. See Trautman, *supra* note 23, at 339 (citing LAURENCE BARTON, CRISIS LEADERSHIP NOW: A REAL-WORLD GUIDE TO PREPARING FOR THREATS, DISASTER, SABOTAGE, AND SCANDAL 109 (2008)).

27. See Betsy McKay & Peter Wonacott, *After Slow Ebola Response, World Seeks to Avoid Repeat*, WALL STREET J., Dec. 30, 2014, at A1; Betsy McKay, *West African Nations Struggle to Rebuild Health-Care After Ebola*, WALL STREET J., June 5, 2015, at A1; Jack Nicas et al., *New Push To Check Spread of Ebola*, WALL STREET J., Oct. 16, 2014, at A1; Drew Hinshaw, *For Want of Gloves, Ebola Doctors Die*, WALL STREET J., Aug. 16–17, 2014, at A1; Betsy McKay et al., *Ebola Case Puts Focus on Safeguards*, WALL STREET J., Oct. 13, 2014, at A1; Scott Gottlieb & Tevi Troy, Opinion, *Stopping Ebola Before It Turns Into a Pandemic*, WALL STREET J., Oct. 4–5, 2014, at A13; Bradley Hope, *Virus Hunter Goes After Epidemics*, WALL STREET J., May 21, 2015, at C2; Betsy McKay, *Ebola Proves Persistent in Guinea, Where Crisis Started*, WALL STREET J., Apr. 2, 2015, at A10; Manny Fernandez, *Ebola Crisis Brings Abundance of Caution Into a Dallas Community*, N.Y. TIMES, Oct. 4, 2014 at A13; Kevin Sack et al., *Life in Quarantine: 21 Days of Fear and Loathing*, N.Y. TIMES, Oct. 19, 2014, at A1; Manny Fernandez et al., *Texas Narrows Ebola Focus to 10 Considered to Be at Greatest Risk*, N.Y. TIMES, Oct. 4, 2014, at A1; Alan Feuer, News Analysis, *The Ebola Conspiracy Theories*, N.Y. TIMES, Oct. 19, 2014, at 5; Peter Loftus, *Ebola Drug Trial Is Suspended*, WALL STREET J. June 20–21, 2015, at B4.

28. See generally Alastair Gale & Kwanwoo Jun, *South Korea Said to Falter Early in Outbreak*, WALL STREET J., June 10, 2015, at A7.

29. Betsy McKay, *New Studies Tie Zika More Closely to Impairments*, WALL STREET J., Mar. 5–6, 2016, at A3.

Whenever “it” hits—whatever “it” is—its impact on the companies we own or work for will be devastating. The flu is a virus and as such will necessitate the mass development of a specific vaccine, a process that likely will take months to complete. Antibiotics are useful, but they are only effective in treating secondary illnesses caused by the flu. What’s more, their availability would likely be limited only to those who can afford them. Crossing national borders and traveling internationally could be indefinitely limited or suspended. A travel or shipping embargo could be enacted (Canada shuts its borders to all international air traffic in 2003 following a bird flu outbreak) once it becomes clear that the virus has infected an alarming number of victims . . . [M]ost companies have never taken the time to ask: What if 30 percent of all of our employees become sick and incapable of working? What if our products were impounded at port terminals and held for months? What if customers simply stop buying our product merely because *they* are hunkered down at home?

If a pandemic were to force curtailments in global trade, even for thirty days, imagine the impact: Commerce conducted via ports and worldwide rail stations could be suspended, and truck, tanker ship, and airliner traffic could be slowed or stopped. Products won’t be shipped (food rots in storage), services can’t be sold (your customers are home tending to the sick, and income will come to a halt) no mail or delivery service; IT servers may be on autopilot—but remember that your data recovery people are also out sick). Yet your employees will still expect to be paid, because somehow—magically!—the banks that oversee our mortgages and car payments will still expect *their* payments.³⁰

The U.S. financial regulators have recognized the serious threat of pandemic, observing:

For almost 100 years, the nation has not had reason to plan for a protracted absentee rate of 30 to 50 percent of a firm’s personnel for four to six weeks in waves over a 12 to 18-

30. See Trautman, *supra* note 23, at 339 (citing LAURENCE BARTON, CRISIS LEADERSHIP NOW: A REAL-WORLD GUIDE TO PREPARING FOR THREATS, DISASTER, SABOTAGE, AND SCANDAL 109 (2008)). See also Bradley J. Condon & Tapen Sinha, *Chronicle of a Pandemic Foretold: Lessons from the 2009 Influenza Epidemic* (Working Paper, 2009), <http://ssrn.com/abstract=1398445>.

month period; yet today firms are working to find ways to contain the spread of such an influenza, protect employees, and maintain continuity of critical business operations.³¹

Health emergencies over the years and early successful experience by South Korea and others with coronavirus all teach the importance of widespread testing to ensure quick detection, isolation, and treatment of infected individuals. Much like widespread testing, the practice of social distancing proves to be a fundamental tool in any program to successfully mitigate community spread of the coronavirus. These topics are more fully discussed later.³²

In combatting any pandemic virus, the threshold for herd immunity is met when “the virus can no longer spread widely.”³³ While scientists do not yet know the precise threshold for herd immunity against the coronavirus, several experts have said that it could be higher than sixty percent.³⁴ Some have even estimated herd immunity will require an eighty percent infection rate.³⁵ Contrast this with new studies indicating that in the United States “the percentage of people who have been infected so far is still in the single digits . . . [while] in some of the hardest-hit cities in the world, the studies suggest, a vast majority of people still remain vulnerable to the virus.”³⁶ According to results based on a survey conducted in grocery stores and community centers in New York City—which had the largest coronavirus outbreak in the United States—only twenty-percent of the city’s residents have been infected thus far.³⁷ Thus, the United States is still far away from the threshold for herd immunity.

II. A Demographic Tour of America

The failures of public policy and imagination have been stalking us for years, creating haves and have-nots: parents who don't have paid sick leave from work (only 10 states and the District of Columbia mandate it); a lack of affordable

31. See U.S. BD. OF GOVERNORS OF THE FED. RESERVE SYS., OFFICE OF THE COMPTROLLER OF THE CURRENCY, & SEC. AND EXCH. COMM’N, JOINT REPORT ON EFFORTS OF THE PRIVATE SECTOR TO IMPLEMENT THE INTERAGENCY PAPER ON SOUND PRACTICES TO STRENGTHEN THE RESILIENCE OF THE U.S. FINANCIAL SYSTEM, (Apr. 27, 2006), <http://www.sec.gov/news/press/studies/2006/soundpractices.pdf>.

32. See Chapters V and VIII, *infra*.

33. Nadja Popovich & Margot Sanger-Katz, *In Battling Outbreak, Herd Immunity Is Still a Distant Objective*, N.Y. TIMES, May 29, 2020, at A1.

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

childcare or sick child care; at least 28 million Americans living without insurance and nearly one-third of the population still underinsured; health protections that are not distributed evenly from region to region; and fear among undocumented immigrants regarding access to care.

- Richard E. Besser

Former Director, Centers for Disease Control and Prevention
President, Robert Wood Johnson Foundation³⁸

A. Who We Are: The Basics

We will now present a basic and very brief demographic overview. As we consider these statistics, a thoughtful reader will question whether and how COVID-19 may impact these trends and historical data.

B. Age and Growth of Racial Minorities

Unlike many other parts of the world, the population of the United States reflects the aging of the Baby Boomer generation and decline in birth rates during recent years. As we will more fully discuss, this trend is particularly important because:

older adults are especially susceptible to infection by the virus, and at higher risk of falling critically ill and dying, at least partially because their immune systems have lost strength with age . . . [S]cientists are concerned that a weakened immune system could also limit the effectiveness of a coronavirus vaccine³⁹

Baby Boomers have now been surpassed by Millennials as the nation's largest living adult generation . . . [At] July 1, 2019 . . . Millennials . . . ages 23 to 38 in 2019, numbered 72.1 million, and Boomers (ages 55 to 73)

38. Richard E. Besser, Opinion, *As Coronavirus Spreads, the Bill for Our Public Health Failures is Due*, WASH. POST, (Mar. 5, 2020), https://www.washingtonpost.com/opinions/as-coronavirus-spreads-the-bill-for-our-public-health-failures-is-due/2020/03/05/9da09ed6-5f10-11ea-b29b-9db42f7803a7_story.html.

39. Jared S. Hopkins, *Vaccine Efforts Turn to Seniors*, WALL STREET J., June 22, 2020 at A1. See also Matthew Dalton & Giovanni Legorano, *Nursing Homes in Europe Fight Surge in Cases*, WALL STREET J., Dec. 1, 2020, at A1.

numbered 71.6 million. Generation X (ages 39 to 54) numbered 65.2 million and is projected to pass the Boomers in population by 2028.⁴⁰

Exhibit 1

Hispanics made up more than half of total U.S. population growth from 2010 to 2019⁴¹

U.S. population change by race and ethnicity, 2010-2019

	2019 population	Change, 2010-19	Share of total increase
Hispanic	60,572,000	9,829,000	52%
Asian	18,906,000	4,145,000	22%
Black	41,147,000	3,134,000	17%
White	197,310,000	-79,000	<0%
Total	328,240,000	18,918,000	

Note: White, Black and Asian individuals include those who report being only one race and are not Hispanic. Hispanics are of any race. Population figures rounded to nearest 1,000. Shares of total increase are calculated from unrounded numbers and may not add to 100%. Source: Pew Research Center analysis of U.S. Census Bureau Vintage 2019 estimates for 2010-2019.

PEW RESEARCH CENTER

The Pew Research Center's analysis of minority population growth from 2010 to 2019 illustrates the growing political power of non-white population in the United States. Accordingly, Exhibit 1 discloses that "Hispanics have played a significant role in driving U.S. population growth over the past decade, though the group is not growing as quickly as it once did. From 2010 to 2019, the U.S. population increased by 18.9 million, and Hispanics accounted for more than half (52%) of this growth."⁴² The Pew Research Center reports:

40. Richard Fry, *Millennials Overtake Baby Boomers as America's Largest Generation*, PEW RES. CTR. (Apr. 28, 2020), <https://www.pewresearch.org/fact-tank/2020/04/28/millennials-overtake-baby-boomers-as-americas-largest-generation/>. See also Michael Papadopoulos et al., *Population Aging, Labor Demand, and the Structure of Wages* (Fed. Reserve Bank of Boston, Working Paper No. 17-1, 2017), <https://ssrn.com/abstract=2990303> (observing substantial shifts in the age distribution of the working-age population).

41. Jens Manuel Krogstad, *Hispanics Have Accounted for More Than Half of Total U.S. Population Growth Since 2010*, PEW RES. CTR. (July 10, 2020), <https://www.pewresearch.org/fact-tank/2020/07/10/hispanics-have-accounted-for-more-than-half-of-total-u-s-population-growth-since-2010/>.

42. Jens Manuel Krogstad, *Hispanics Have Accounted for More Than Half of Total U.S. Population Growth Since 2010*, PEW RES. CTR. (July 10, 2020), <https://www.pewresearch.org/fact-tank/2020/07/10/hispanics-have-accounted-for-more-than-half-of-total-u-s-population-growth-since-2010/>.

Asian Americans are the fastest growing segment of eligible voters out of the major racial and ethnic groups in the United States. More than 11 million will be able to vote [in 2020], making up nearly 5% of the nation's eligible voters . . . They are also the only major racial or ethnic group in which naturalized citizens—rather than the U.S. born—make up a majority of eligible voters . . .

From 2000 to 2020, the number of Asian American eligible voters more than doubled, growing by 139%. The Hispanic electorate grew at a similar rate (121%), but the black and white electorates grew far more slowly (33% and 7%).⁴³

Exhibit 2 shows estimates for U.S. White and Minority Populations, 1970–2050.

Exhibit 2
Estimates for U.S. White and Minority Populations, 1970-2050⁴⁴

43. Budiman, *Asian Americans Are the Fastest-Growing Racial or Ethnic Group in the U.S. Electorate*, PEW RES. CTR. (May 7, 2020), <https://www.pewresearch.org/fact-tank/2020/05/07/asian-americans-are-the-fastest-growing-racial-or-ethnic-group-in-the-u-s-electorate/>.

44. WILLIAM H. FREY, *DIVERSITY EXPLOSION: HOW NEW RACIAL DEMOGRAPHICS ARE REMAKING AMERICA 2* (Brookings, 2015).

University of Michigan Professor William H. Frey presents another view of population trend in Exhibit 3, U.S. Race Groups and Population Growth.

Exhibit 3
U.S. Race Groups and Population Growth 1970-2050⁴⁵
U.S. Race Groups and Projected Growth

Source: American Community Survey, 2015, and Census Bureau projections, released March 2018.

C. Infant Mortality and Life Expectancy

For many years, economists have used infant mortality statistics as a proxy for citizen's health wellbeing in developed countries. Measured before the coronavirus pandemic, the United States, which may spend more per person for healthcare than any other nation, ranked fifty-fifth out of 225 nations when comparing the number of deaths of infants under one year old in a given year per 1,000 live births in the same year.⁴⁶ For perspective, the best place to live based upon this measurement is: Monaco (1.80 deaths); Japan (ranks 2nd best); Iceland (3rd); Sweden (8th); South Korea (11th); France (13th); and Spain (14th).⁴⁷ The United States trails: Bosnia and Herzegovina (54th); New Caledonia (52nd); Slovakia (50th); Hungary (49th); and Greece (47th), just to name a few.⁴⁸ As another measure of the overall

45. FREY, *supra* note 44, at 41.

46. THE WORLD FACTBOOK 2020, U.S. CENT. INTELLIGENCE AGENCY, (2020), https://www.cia.gov/library/publications/the-world-factbook/docs/contributor_copyright.html.

47. *Id.*

48. THE WORLD FACTBOOK 2020, *supra* note 46.

quality of life, the United States ranks 43rd best in the world when measuring life expectancy at birth.⁴⁹

D. Gender, Education and the Homeless

We provide a detailed look at these issues later. However, as an introduction, consider Black and White Economic and Family Trends depicted in Exhibit 4.

Exhibit 4

Black and White Economic and Family Trends⁵⁰

Black and White Economic and Family Trends, 1970–2015

	1970	1990	2010	2015
<i>Median family income^a</i>				
Blacks	\$34,648	\$38,170	\$42,486	\$46,360
Whites	\$56,482	\$68,131	\$75,851	\$81,545
<i>Female-headed families^b</i>				
Blacks	28%	43%	46%	46%
Whites	9%	12%	14%	14%
PERSONS IN POVERTY				
<i>All ages</i>				
Blacks	34%	32%	27%	24%
Whites	10%	9%	10%	10%
<i>Children in families</i>				
Blacks	42%	44%	39%	33%
Whites	11%	12%	12%	12%

Source: 1970, 1990 U.S. censuses and American Community Survey, 2010 and 2015; "Persons in poverty" and "median family income" from Current Population Surveys, 1970, 1990, 2010, and 2015 (income adjusted to 2015 U.S. dollars).

^aincome adjusted for 2015 dollars.

^bFamilies (with or without children) with a female head, as percent of all families.

John Freeman writes, "America is broken. You don't need a fistful of statistics to know this. You just need eyes and ears and stories. Walk around any American city and evidence of the shattered compact with citizens will present itself."⁵¹ We have recently done this and concur:

There you will see broken roads, overloaded schools, police forces on edge, clusters and sometimes whole tent cities of homeless people camped in eyeshot of shopping districts

49. *Id.*

50. FREY, *supra* note 44, at 112.

51. JOHN FREEMAN, TALES OF TWO AMERICAS: STORIES OF INEQUALITY IN A DIVIDED NATION, x (Penguin Books 2017).

that are beginning to resemble ramparts of wealth rather than stores for all. Thick glass windows and security guards stand between aspirational goods and the people outside in Portland, Oregon; in San Francisco; in Seattle; Los Angeles; New York; and Miami. The soaring cost of living in these cities—which have become meccas for luxury and creative economy work, but depend on service labor to run their dream machine—has a lot to do with this state of affairs. Adjusting for rent and costs, the middle-class residents of these cities now have the lowest real earnings of any metropolitan area. And across the nation at large, America's top 10 percent earns nine times as much as the bottom 90 percent.⁵²

III. Race in America

Let's be honest—a disease like this just spotlights the underlying inequalities and extra burdens that black communities have historically had to deal with in this country.

- President Barack Obama
May 16, 2020⁵³

A poll conducted by the *Wall Street Journal* and NBC News in July 2020 found “[v]oters in growing numbers believe Black and Hispanic Americans are discriminated against, and a majority of 56% holds the view that American society is racist.”⁵⁴ Details revealed:

[That] Americans of all races and age groups share significant concerns about discrimination nearly two months after George Floyd, a Black man, was killed in police custody in Minneapolis. Nearly three-quarters of Americans, 71%, believe that race relations are either very or fairly bad, a 16 point increase since February [2020].

52. FREEMAN, *supra* note 51. See also Sara Rankin, *Punishing Homelessness*, 22 NEW CRIMINAL L. REV. 99 (2019) (observing people experiencing homelessness, particularly chronic homelessness, often lack reasonable alternatives to living in public); Gregory D. Squires & Charis Kubrin, *Privileged Places: Race, Uneven Development, and the Geography of Opportunity in Urban America*, 42 URBAN STUD. (2005) (observing ‘some neighborhoods are likely to kill you’).

53. Janet Hook, *Obama, in National Commencement Address, Decries Racial Impact of COVID-19 Deaths*, L.A. TIMES (May 16, 2020), <https://www.latimes.com/politics/story/2020-05-16/obama-first-major-public-speech-racial-impact-of-covid>.

54. Sabrina Siddiqui, *Majority of Americans View Society as Racist, Poll Finds*, WALL STREET J., July 21, 2020, at A4.

In other signs of substantial shifts in views on race, more voters see racial bias as a feature of American society and support protests aimed at addressing it. Nearly 60% in the survey said Black people face discrimination, and just over half said so of Hispanics, about double the shares from 2008.⁵⁵

Professor Darren Hutchinson writes:

[R]acism causes economic deprivation. Virtually every statistical measure of economic well-being shows that persons of color are worse off than whites.⁵⁶ An abundance of social science research links these disparities to racial injustice . . . the combination of race and poverty exacerbates the inequality of poor people of color.⁵⁷

As we have already seen with the high concentration of coronavirus cases in the Bronx, New York, “sociological research reveals that poor persons of color, unlike poor whites, tend to live in areas of concentrated poverty, where they lack access to important social resources, such as adequate education, housing and employment opportunities.”⁵⁸ Generational poverty has resulted from:

The lack of stabilizing social resources in these communities, as well as the inattention of U.S. power structures . . .

55. Siddiqui, *supra* note 54.

56. Darren Lenard Hutchinson, *Critical Race Histories: In and Out*, 54 AM. U. L. REV. 1187, 1210 (2004) (citing ANDREW HACKER, TWO NATIONS: BLACK AND WHITE, SEPARATE, HOSTILE, UNEQUAL (1992) (statistics show that earnings in white households are higher than earnings in black households and that even among similarly educated white and Blacks Americans the income of whites is much higher)); ORLANDO PATTERSON, THE ORDEAL OF INTEGRATION: PROGRESS AND RESENTMENT IN AMERICA’S “RACIAL” CRISIS 25 (1997) (discussing income statistics based on race, including that in 1995, the median income of all Black American families was 60.8% of the median income of European American families—only a 1.6% improvement from the 1967 ratio).

57. Hutchinson, *supra* note 56, at 1210 (citing WILLIAM J. WILSON, THE TRULY DISADVANTAGED: THE INNER CITY, THE UNDERCLASS, AND PUBLIC POLICY 136–37 (1987) (explaining that a person’s race and class group determines whether the person will have access to ‘organizational channels of privilege and influence’)); WILSON, *supra* note 57, at 196 (claiming that minorities do not have the resources to compete in the open job market because of the crushing effects of the challenges that they face due to their race and poverty).

58. Hutchinson, *supra* note 56, at 1210 (citing DOUGLASS S. MASSEY & NANCY A. DENTON, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS (1993)); see also Kimiko de Freytas-Tamura et al., *Bronx Bears City’s Heaviest Toll and ‘Death Towers’ Feel Brunt*, N.Y. TIMES, May 27, 2020, at A1-12 (observing “race and income are key factors in who survives and who does not . . . neighborhoods with large numbers of black, Latino or poor residents have the highest death rates”).

[T]he imperial capitalism has figured prominently in the subordination of persons of color. The decimation of Native Americans, the enslavement of Africans, the exploitation of Asian ‘immigrant’ labor, and the conquest of Latinos through westward expansion all demonstrate the linkage of race and class domination.⁵⁹

A. Centuries of Racism

In a letter to Health and Human Services (“HHS”) Secretary Alex Azar, the AMA joined with the National Medical Association, the Association of American Indian Physicians, the National Council of Asian Pacific Islander Physicians, and other physician organizations, stating, “It is well-documented that social and health inequities are long-standing and systemic disturbances to the wellness of marginalized, minoritized, and medically underserved communities.”⁶⁰ These physician groups observed, “that COVID-19 did not create the circumstances that led to inequities, but it continues to exacerbate them along racial and ethnic lines that affect housing stability, employment, health care access and food security.”⁶¹ The physicians urged “HHS to collect, analyze, and publicly post standardized data on COVID-19 patients’ race, ethnicity, and preferred language along with their COVID-19 testing status, hospitalization, and mortality.”⁶²

Academics such as Professor Hutchinson have held that “much of the racial hierarchy in the United States was concretized during slavery—though not exclusively.”⁶³ Professor Darren Hutchinson writes:

[A]nti-black racism provides an institutional and historical framework for the subordination of non-black persons of color . . . [and] [t]he formation of a rigid racial caste structure in the black/white context legitimizes racist practices against all persons of color⁶⁴ . . . persons of color do not exist in mutually exclusively groups. Latino communities, for

59. Hutchinson, *supra* note 56, at 1210–11 (citing Tayyab Mahmud, *Colonialism and Modern Construction of Race: A Preliminary Inquiry*, 53 U. MIAMI L. REV. 1219 (1999) (linking racial construction to colonial exploitation)).

60. Robeznieks, *supra* note 9.

61. *Id.*

62. *Id.*

63. Hutchinson, *supra* note 56, at 1202 (citing Janine Young Kim, *Are Asians Black?: The Asian-American Civil Rights Agenda and the Contemporary Significance of the Black-White Paradigm*, 108 YALE L.J. 2385, 2400 (1999) (noting that the most vivid example of white supremacy, “the history of the kidnapping, enslavement, and subhuman treatment of Africans by White European Americans,” is historically linked to the birth of the nation)).

64. *Id.*

example, have large populations of persons of African descent; thus, it is difficult to bifurcate Latino and black experiences.⁶⁵

Consider how “racial discourse in the United States fixates upon black/white racial issues, thereby marginalizing Latino, Native American, and Asian American experiences. Empirically, this observation is indisputable.”⁶⁶ This article includes the experiences of Asian Americans, Latinos, and Native Americans in the pages to follow, and embrace the observations made previously by Professor Hutchinson:

First, a multiracial discourse permits a full accounting of the problem of racial inequality and allows for the construction of adequate remedies for racial subordination. Although all people of color suffer racism, often in similar ways, racial hierarchies impact communities of color in diverse ways. A narrow focus on black/white subjugation severely limits the reach of antiracist remedies. The black/white paradigm also prevents persons of color from engaging in coalition politics. By treating racism as a problem that affects blacks primarily (or exclusively), racial discourse in the United States divides persons of color who could align to create formidable political forces in the battle for racial justice.⁶⁷

B. The Death of George Floyd and Widespread Violent Protests

During late May 2020, in the midst of the coronavirus pandemic, Americans witnessed the televised horrific spectacle of the death of Mr. George Floyd, a Black man, at the hands of four Minneapolis police officers. After

65. Hutchinson, *supra* note 56, at 1202. (citing Tanya Kateri Hernández, *Multiracial Matrix: The Role of Race Ideology in the Enforcement of Antidiscrimination Laws, A United States-Latin America Comparison*, 87 CORNELL L. REV. 1093 (2002) (comparing U.S. and Latin American models of race and discussing how racial classifications exist even in the absence of any public focus on race)).

66. *Id.* at 1200.

67. *Id.* (citing Chris K. Iijima, *The Era of We-Construction: Reclaiming the Politics of Asian Pacific American Identity and Reflections on the Critique of the Black/White Paradigm*, 29 COLUM. HUM. RTS. L. REV. 47, 68-69 (1997) (describing how immigration and the ensuing changes in the racial makeup of U.S. society have exposed the ways in which the black/white paradigm fails to provide an appropriate analytical framework)); Juan F. Perea, *The Black/White Binary Paradigm of Race: The “Normal Science” of American Racial Thought*, 85 CAL. L. REV. 1213, 1256 (1997) (arguing that multiracial coalition politics depends upon mutual understanding among persons of color and that the black/white paradigm prevents the development of such understanding). *See also* Ernesto Hernandez Lopez, *Trade War, PPE, and Race*, 16 NW. J. L. & SOCIAL POL’Y (forthcoming 2021) (observing PPE shortages exemplify the socio-economic effects of trade policies and add to COVID’s racial disparities).

almost nine minutes of Mr. Floyd pleading, “I can’t breathe,” because of the officer’s knee on his neck, the inability to breathe extinguished his life. Nationwide protests continued for days, as streets turned violent.⁶⁸ The AMA stated, “Recognizing that many who serve in law enforcement are committed to justice, the violence inflicted by police in news headlines today must be understood in relation to larger social and economic arrangements that put individuals and populations in harm’s way leading to premature illness and death.”⁶⁹ Consider the following excerpt:

Police violence is a striking reflection of our American legacy of racism—a system that assigns value and structures opportunity while unfairly advantaging some and disadvantaging others based on their skin color and “saps the strength of the whole society through the waste of human resources Importantly, racism is detrimental to health in all of its forms. In any season, police violence is an injustice, but its harm is elevated amidst the remarkable stress people are facing amidst the COVID-19 pandemic. Even now, there is evidence of increased police violence in the form of excessive police-initiated force and unwarranted shootings of civilians, some of which have been fatal. This violence not only contributes to the distrust of law enforcement by marginalized communities but distrust in the larger structure of government including for our critically important public health infrastructure. The disparate racial impact of police violence against Black and Brown people and their communities is insidiously viral-like in its frequency, and also deeply demoralizing, irrespective of race/ethnicity, age, LGBTQ or gender. Just as the disproportionate impact of COVID-19 on communities of color has put into stark relief health inequity in the U.S., the recent deaths of Breona Taylor, a Black woman and EMT in Louisville who was shot and killed in her own home due to mistaken identity by law enforcement, and George Floyd . . . killed at the hands of law enforcement, spotlight yet again where the deck is stacked against Black people. Floyd’s final words, “I can’t breathe,” echoed those of Eric Garner, killed by police in

68. See Neil MacFarquhar, Tim Arango & Manny Fernandez, *Officer Charged with Murder as Minneapolis Calls for Calm: Nation Must Address Longtime ‘Stain,’ Governor Says*, N.Y. TIMES, May 30, 2020, at A1.

69. Jesse M. Ehrenfeld & Patrice A. Harris, *Police Brutality Must Stop*, AM. MED. ASS’N (May 29, 2020), <https://www.ama-assn.org/about/leadership/police-brutality-must-stop>.

New York City in 2014—and many others before him. This tenor of atrocious injustice is haunting.⁷⁰

IV. Income and Wealth Disparity

Many businesses have closed, people have been asked to stay home, and basic social interactions are greatly curtailed. People are putting their lives and livelihoods on hold, at significant economic and personal cost. All of us are affected, but the burdens are falling most heavily on those least able to carry them.

- Jerome Powell

Chairman, Board of Governors

Federal Reserve System

April 29, 2020⁷¹

Journalist Chris McGreal reports in *The Guardian*, “[a]s millions of Americans apply for unemployment benefits, the coronavirus pandemic has brutally laid bare the extent of U.S.’s growing inequality, not only between the super-rich and the rest of the country, but in the quality of jobs and the social protections that come with them.”⁷²

A. The Widening Gap Between the Haves and Have-Nots

Former CDC Director Richard Besser warns, “Even when structural failures could imperil every American, the greatest strains will fall on certain demographics because of their economic, social or health status.”⁷³ According to the Pew Research Center’s analysis of Census Bureau data covering the past fifty years, “the highest-earning 20% of U.S. households have steadily brought in a larger share of the country’s total income. In 2018, households in the top fifth of earners (with incomes of \$130,001 or more that year) brought in 52% of all U.S. income, more than the lower four-fifths

70. Ehrenfeld & Harris, *supra* note 69.

71. Jerome Powell, Chair, Board of Governors of the Fed. Res. System, Press Conf. (Apr. 29, 2020).

72. Chris McGreal, *The Inequality Virus: How the Pandemic Hit America’s Poorest*, THE GUARDIAN (Apr. 9, 2020), <https://www.theguardian.com/world/2020/apr/09/america-inequality-laid-bare-coronavirus>. See also Elizabeth Oltmans Ananat et al., *Race-Specific Agglomeration Economies: Social Distance and the Black-White Wage Gap*, (U.S. Census Bureau Ctr. for Econ. Studies, Working Paper No. CES-WP-13-24, 2013) (relationship between city size and the Black-white wage gap); Mary Jo Bane, *Race, Poverty and Public Policy* (Harvard Univ. John F. Kennedy School of Gov’t., Working Paper No. RWP05-030, 2005) (poverty rates in the U.S. vary dramatically by race and ethnicity).

73. Besser, *supra* note 38.

combined.”⁷⁴ Contrasted with data from 1968, “the top-earning 20% of households brought in 43% of the nation’s income, while those in the lower four income quintiles accounted for 56%.”⁷⁵ By August 2020, *The Wall Street Journal* reports:

Despite federal relief, the pandemic exacerbated racial gaps in financial security. The typical Black household’s net worth was just 10% of the typical white family’s in 2016, according to Federal Reserve data, including illiquid assets like home equity. The corresponding figure for Hispanics was 12%. Less wealth meant a thinner cushion to soften the blow of unexpected expenses.⁷⁶

B. The Very Rich Have Better Options

It will come as no surprise to anyone that “[h]undreds of thousands of New York City residents, in particular those from the city’s wealthiest neighborhoods, left as the coronavirus pandemic hit”⁷⁷ Here are the details:

Roughly 5 percent of residents—or about 420,000 people—left the city between March 1 and May 1 [2020]. In the city’s very wealthiest blocks, in neighborhoods like the Upper East Side, the west Village, SoHo, and Brooklyn Heights, residential population decreased by 40 percent or more, while the rest of the city saw comparably modest changes. Some of those areas are typically home to lots of students, many of whom left as colleges and universities closed; other residents might have left to care for friends or family members across the country. But, on average income is a strong simple predictor of a neighborhood’s change: The higher-earning a neighborhood is, the more likely it is

74. Katherine Schaeffer, *6 Facts About Economic Inequality in the U.S.*, PEW RES. CTR. (Feb. 7, 2020), <https://www.pewresearch.org/fact-tank/2020/02/07/6-facts-about-economic-inequality-in-the-u-s/>.

75. *Id.*

76. Gwynn Guilford & Luis Melgar, *Financial-Security Gap Laid Bare*, WALL STREET J., Aug. 10, 2020, at A3. See also Michele Goodwin & Erwin Chemerinsky, *No Immunity: Race, Class, and Civil Liberties in Times of Health Crisis*, 129 HARV. L. REV. 956 (2016) (arguing, historically, fears of contagion and infection were as much rooted in racial and class fear and animus as genuine threat of health; intersection between minority rights and public health has a long and shameful history); Raj Chetty et al., *Race and Economic Opportunity in the United States: An Intergenerational Perspective*, (Nat’l. Bureau of Econ. Opportunity, Working Paper No. w24441, 2018).

77. Kevin Quealy, *As Virus Hit New York, the Rich Hit the Road*, N.Y. TIMES, May 16, 2020, at A16.

to have emptied out. Relatively few residents from blocks with median household incomes of about \$90,000 or less (in the 80th percentile or lower) left New York. This migration out of the city began in mid-March, and accelerated in the days after March 15, when Mayor Bill de Blasio announced that he was closing the city's schools. The highest-earning neighborhoods emptied first.⁷⁸

Early indications of special access to coronavirus testing for the very wealthy and well connected reflects the privilege that wealth brings in a life-or-death situation. As *The New York Times* reports on March 19, 2020:

Politicians in Washington, well-known celebrities, social media influencers and even entire N.B.A. teams have been tested for the new coronavirus. But as that list of rich, famous and powerful people grows . . . so do questions about whether they are getting access to testing that is denied to other Americans. But with testing in short supply in areas of the country, leaving health care workers and many sick people unable to get diagnoses, some prominent personalities obtained tests without exhibiting symptoms or having known contact with someone who has the virus, as required by some testing guidelines. Others have refused to specify how they were tested. Those cases have provoked accusations of elitism and preferential treatment about a testing system that has already been plagued with delays and confusion, and now stirred a new national debate that has reached the White House—with President Trump being asked at a Wednesday news conference whether ‘the well-connected go to the front of the line.’⁷⁹

C. The Demographics of Poverty, Health, and Health Insurance

As we will more fully explore in the next Chapter,⁸⁰ the poor tend to have inferior diets, often have little or no health care options nor health insurance (particularly after the recent widespread job loss), and are generally more vulnerable and likely to die as a result of this pandemic. The Pew Research Center reports, “[t]he COVID-19 economic downturn has made it

78. Quealy, *supra* note 77.

79. Megan Twohey et al., *At the Front of the Test Line: A Lot of A-Listers*, N.Y. TIMES, Mar. 19, 2020, at A1.

80. See *infra* Chapter V.

harder for some Americans to pay their monthly bills. Black (48%) and Hispanic adults (44%) were more likely than white adults (26%) to say they ‘cannot pay some bills or can only make partial payments on some of them this month.’⁸¹ Pew Research results indicate, “[f]or Hispanics, this was a considerably greater share than the 28% who said they have trouble paying their bills in a typical month.”⁸² In addition, “Hispanic and Black adults who use [cellphone and home broadband] were more likely than white users to say they worry a lot or some about paying bills for these services.”⁸³ This metric seems particularly important given that their children likely need these technologies as schools reopen offering virtual classes only. Of concern, the Pew survey revealed:

sharp racial and ethnic differences in personal experiences with COVID-19 and in concerns about spreading or catching the virus . . . about one-in-four black adults (27%) said they personally knew someone who had been hospitalized or died . . . from COVID-19, roughly double the shares . . . among Hispanic or white adults (13% each).⁸⁴

In addition, “Hispanic Americans expressed greater concern than other groups about contracting COVID-19 and requiring hospitalization. Hispanics were also more likely than blacks or whites to be worried that they might unknowingly spread COVID-19 to others.”⁸⁵

Data on the COVID-19’s impact on health insurance coverage became available by mid-July 2020, causing great concern. *The New York Times* reports that, “The coronavirus pandemic stripped an estimated 5.4 million American workers of their health insurance between February and May, a stretch in which more adults became uninsured because of job losses than have ever lost coverage in a single year.”⁸⁶ According to Families USA, a nonpartisan consumer advocacy organization, “the estimated increase in uninsured workers from February to May was nearly 40 percent higher than the highest previous increase, which occurred during the recession of 2008 and 2009, when 3.9 million adults lost insurance.”⁸⁷ Kaiser Family Foundation estimated that “27 million Americans have lost coverage . . . [taking] into

81. Mark Hugo Lopez et al., *Financial and Health Impacts of COVID-19 Vary Widely by Race and Ethnicity*, PEW RES. CTR. (May 5, 2020), <https://www.pewresearch.org/fact-tank/2020/05/05/financial-and-health-impacts-of-COVID-19-vary-widely-by-race-and-ethnicity/>.

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. Sheryl Gay Stolberg, *5.4 Million Americans Lost Health Insurance in 4 Months, Shattering a Record*, N.Y. TIMES, July 14, 2020, at A6.

87. Stolberg, *supra* note 86.

account family members of the insured.”⁸⁸ Another analysis, published by the Urban Institute and the Robert Wood Johnson Foundation “projected that by the end of 2020, 10.1 million will no longer have employer-sponsored health insurance . . . tied to a job they lost.”⁸⁹ Journalist Sheryl Gay Stolberg warns “those losing coverage could face staggering costs if they are struck by COVID-19, which has sent the seriously ill to hospital intensive care units for weeks, sometimes months.”⁹⁰ Ezekiel Emmanuel writes, “Last year [2019], roughly 160 million American workers and their dependents were insured through employers. With unemployment now skyrocketing, the Kaiser Family Foundation estimates that some 50 million American workers and their dependents will lose their health insurance.”⁹¹

V. Health, Race, and Pandemic

It is important to have this type of demographic data because health disparities are avoidable. Health and public health professionals, administrators, employers, policymakers, and even community advocates can use these data to determine how best to use the vast resources we have in this country to improve the lives of our people. We can use the data to help us better understand who is at risk for poor health. It can help us determine which factors—at the level of individuals, families, neighborhoods, organizations (including health care), communities, and local, regional, and national policies—could be contributing to poor health across our country, and how we might intervene on all of these levels to remove barriers and enhance the facilitators of good health for everyone in our society. Health equity is “when every person has the opportunity to ‘attain his or her full health potential’ and no one is ‘disadvantaged from achieving this potential because of social position or other socially determined circumstances.’

- Dr. Lisa A. Cooper

Distinguished Professor

Johns Hopkins Bloomberg School of Public Health and
School of Medicine⁹²

88. Rachel Garfield, Gary Claxton & Larry Levitt, *Eligibility for ACA Health Coverage Following Job Loss*, KFF: CORONAVIRUS (COVID-19) (May 13, 2020), <https://www.kff.org/coronavirus-covid-19/issue-brief/eligibility-for-aca-health-coverage-following-job-loss/>.

89. Stolberg, *supra* note 86.

90. *Id.*

91. Ezekiel Emanuel, *The Pandemic Will Transform Health Insurance As We Know It*, WALL STREET J., June 27–28, 2020, at C4.

92. Dr. Lisa A. Cooper, *Maps and Trends: Racial Data Transparency*, JOHNS HOPKINS U., <https://coronavirus.jhu.edu/data/racial-data-transparency> (last visited May 25, 2020).

Doctor Lisa A. Cooper writes, “We have data that documents how most public health challenges affect different groups in our society. For example, we know that rates of conditions such as high blood pressure, heart disease, diabetes, and cancer increase with age.”⁹³ An analysis of the data reveals, “that conditions such as depression and obesity are more common among women than among men. An extensive amount of data shows disparities in health by race, ethnicity, and social class, across the lifespan.”⁹⁴

A. The Most Vulnerable Among Us

Economic Policy Institute economist Elise Gould observes the coronavirus brings “into focus those disparities in a way that it’s not just about jobs, it’s not just about wages. It’s about health and working conditions and access to health insurance. All of these things highlight that there’s two different societies in [America]. Because of rising inequality, more people are vulnerable.”⁹⁵ Professor Lisa Cooper contends that, “[a]s more data about the impact of the COVID-19 pandemic becomes available, it is increasingly clear that the disease is hitting the most vulnerable and disadvantaged populations in the U.S. the hardest.”⁹⁶

B. Blacks and Latinos

A study of U.S. history teaches that, “[w]hat’s been going on for hundreds of years is the systematic neglect of Black American’s health. In 2018, Black people died at higher age-adjusted rates than white people from nine of the top 15 causes of death.”⁹⁷ Exhibit 5 illustrates how, since 1900, the gap has caused 8.8 million Black Americans to die prematurely.⁹⁸ Therefore, “If Black people had died at the same age-adjusted rate as white people in 2018, they would have avoided 65,000 premature, excessive deaths—the

93. *Id.*

94. *Id.*

95. McGreal, *supra* note 72. See also Emily Wiemers et al., *Disparities in Vulnerability to Severe Complications from COVID-19 in the United States* (NBER, Working Paper No. w27294 2020) (estimates of vulnerability to severe complications from COVID-19 overall and across race-ethnicity and socioeconomic status).

96. See Cooper, *supra* note 92. See also Emily Benfer et al., *Health Justice Strategies to Combat the Pandemic: Eliminating Discrimination, Poverty, and Health Disparities During and After COVID-19*, 19 YALE J. HEALTH POL’Y, L. & ETHICS 121 (forthcoming 2021). But see Erick Kitenge, *COVID-19: A Virus for the Rich and the Poor* (Prairie View A&M University, College of Business, Working Paper No. 09-01-2020, 2020).

97. Gus Wezerek, Opinion, *Racism’s Hidden Toll*, N.Y. TIMES, Aug. 16, 2020, at SR3.

98. *Id.*

equivalent of three coach buses filled with Black people crashing and killing them all every day of the year.”⁹⁹

Exhibit 5
Since 1900, Unnecessary Premature Deaths of 8.8 million U.S. Black People

Note: Estimates based on age- and sex-specific mortality rates for ages 0-79. - Source: Mary R. Jackman and Kimberlee A. Shauman, "The Toll of Inequality: Excess African American Deaths in the United States over the Twentieth Century."

Exhibit 6 demonstrates major causes in premature deaths in the U.S. Black population, resulting primarily from elevated levels of heart disease, diabetes and cancer—followed by homicide, stroke, kidney disease, hypertension, septicemia, flu and pneumonia.¹⁰⁰

99. Wezerek, *supra* note 97. See also Kimani Paul-Emile, 106 GEO. L.J. 293 (2018) (being Black increases the odds of living in poverty, attending failing schools, experiencing housing discrimination, being denied a job interview, being stopped by the police, receiving inferior medical care, living in substandard conditions and polluted environments, being unemployed, and having a lower life expectancy).

100. *Id.*

Exhibit 6
Causes of Higher Rates of Deaths Among American Blacks than Whites

Note: For non-Hispanic Black and white people in 2018. Rates have been adjusted for age and sex. Source: Centers for Disease Control and Prevention

As preliminary coronavirus case and death data became available “a pattern emerged. In cities like New York, Chicago and the District [of Columbia], coronavirus deaths were disproportionately affecting black and brown communities. Additional data suggested that certain chronic health conditions . . . hypertension, diabetes and others, were associated with complications from [C]ovid-19.”¹⁰¹ Doctor Lisa Cooper reports:

101. Aaron Williams & Adrian Blanco, *How the Coronavirus Exposed Health Disparities in Communities of Color*, WASH. POST (May 26, 2020), <https://www.washingtonpost.com/graphics/2020/investigations/coronavirus-race-data-map/>.

Every year, thousands of African American, American Indian, and Latino babies are born into poverty and other adverse circumstances, putting them at risk for obesity, heart disease, diabetes, and asthma. Adolescents and young adults from disadvantaged backgrounds, compared to more affluent and educated peers, struggle much more with health problems including obesity, asthma, neurocognitive disorders, and mental health diagnoses. Across adulthood, African Americans are more likely to die from all causes than their white counterparts. They suffer from higher rates, at younger ages, of high blood pressure, heart disease, kidney disease, and colon cancer than white Americans. Latinx communities and Native Americans suffer from higher rates of obesity and diabetes than whites. In old age, millions of older African Americans, Native Americans, and Latinx Americans suffer more than do older whites from disease and disability. These health disparities are “preventable differences in the burden of disease, injury, violence, or in opportunities to achieve optimal health that are experienced by socially disadvantaged populations.”¹⁰²

On April 24, 2020, the AMA wrote, “[i]n Michigan, only 14% of the population is black, but black people account for 33% of the COVID-19 cases and 41% of the deaths. In Chicago, one third of the city is black, but they accounted for half of COVID-19 cases and 70% of deaths last month.”¹⁰³ The AMA stated, “[t]his [racial] data is central to understanding injustice and ensuring the optimal health of people, but it is gravely missing in this crisis—missing from health department websites, daily updates by political leaders and, until recently, news reports.”¹⁰⁴ The Pew Research Center finds:

The coronavirus outbreak has altered life in the United States in many ways, but in key respects it has affected black and Hispanic Americans more than others. The financial shocks of the outbreak have hit Hispanic and black Americans especially hard. When it comes to public health, black Americans appear to account for a larger share of COVID-19 hospitalizations nationally than their share of the

102. Cooper, *supra* note 92.

103. Robeznieks, *supra* note 9.

104. *Id.*

population. And in New York City, death rates per 100,000 people are highest among blacks and Hispanics.

As the coronavirus sweeps through the country . . . The surveys have revealed notable racial and ethnic differences in experiences with the illness or death of loved ones, as well as job losses and pay cuts. There is also new evidence of long-standing differences among racial and ethnic groups, in some cases tied to underlying economic, geographic and health circumstances.¹⁰⁵

By May 26, 2020, *The Washington Post* observes that “[w]hat once was perceived as a disease that affected only the elderly in a few areas was now wreaking havoc in the bodies of 20- and 30-year-old people of color across the nation.”¹⁰⁶ Professor Cooper reports that while “racial and ethnic information is currently available for only about 35% of the total deaths in the U.S., even this limited sample shows that Black Americans and other historically disadvantaged groups are experiencing infection and death rates that are disproportionately high for their share of the total population.”¹⁰⁷ Of concern “while Black Americans represent only about 13 percent of the population in the states reporting racial/ethnic information, they account for about 34 percent of total COVID-19 deaths in those states.”¹⁰⁸ Journalists Aaron Williams and Adrian Blanco observe, “[c]ommunities of color may be more likely to live in densely populated areas in cities because of the history of racial segregation in the United States. And black and Latinx Americans are also two to three times more likely than white Americans to be uninsured.”¹⁰⁹

By the end of May 2020, *The Wall Street Journal* reports that, “New Orleans and Louisiana are taking a direct hit from the coronavirus pandemic. More people in the state are currently on unemployment rolls—300,000—and more have died—2,500—than when Hurricane Katrina slammed the shores 15 years ago.”¹¹⁰ Earlier in the year, the New Orleans area accounted for the worst U.S. coronavirus death rate and to no surprise, as was the case “with Katrina, the burden is falling disproportionately on black Louisianians.”¹¹¹ Consider these statistics:

105. Lopez et al., *supra* note 81.

106. Williams & Blanco, *supra* note 101.

107. Cooper, *supra* note 92.

108. *Id.*

109. Williams & Blanco, *supra* note 101.

110. David Benoit, *Coronavirus Devastates Black New Orleans: ‘This is Bigger Than Katrina,’* WALL STREET J. (May 23, 2020), <https://www.wsj.com/articles/coronavirus-is-a-medical-and-financial-disaster-for-blacks-in-new-orleans-11590226200>.

111. Benoit, *supra* note 110.

Black residents make up 32% of [Louisiana's] population but [account for] 55% of its deaths from COVID-19 . . . The numbers are similar in New York, Chicago and across the country. Economists and civic leaders are warning that the deaths are only the start of what could be a devastating setback to Black communities in America. Black workers are losing jobs at elevated rates and are less prepared for the shock . . . A recent study showed how little they have to fall back on. Black families have a median of only 32 cents in available cash or other liquid assets for every \$1 a white family has, according to the JPMorgan Chase Institute . . . Black families in New Orleans had only 27 cents.¹¹²

A collaborative study conducted by *The New York Times*, *Baltimore Sun*, *KPPC/LAist*, and *The Southern Illinoian* reported in May 2020 that the American coronavirus experience “has been particularly virulent toward African Americans and Latinos; nursing homes where those groups make up a significant portion of the residents—no matter their location . . . size . . . government rating—have been twice as likely to get hit by the coronavirus as those where the population is overwhelmingly white.”¹¹³ The study reveals:

More than 60% of nursing homes where at least one-quarter of the residents are black or Latino have reported at least one coronavirus case . . . That is double the rate of homes where black and Latino people make up less than 5% of the population. And in nursing homes, a single case often leads to a handful of cases and then a full-fledged outbreak.

The nation's nursing homes, like many of its schools, churches and neighborhoods, are largely segregated. And those that serve predominantly black and Latino residents tend to receive fewer stars on government ratings. Those facilities also tend to house more residents and to be located in urban areas, which are risk factors in the pandemic . . .

112. *Id.* See also Eric Joseph van Holm et al., *Neighborhood Conditions and the Initial Outbreak of COVID-19: The Case of Louisiana* (Working Paper, 2020), <https://ssrn.com/abstract=3625990> (finding a particularly high association between race and COVID-19 cases, as high minority share neighborhoods show a positive association, robust to model specification and spatial autocorrelation. In addition, neighborhoods with lower rates of poverty and those with fewer residents over seventy have fewer cases).

113. Richard A. Oppel Jr. et al., *The Fullest Look Yet at the Racial Inequity of Coronavirus*, N.Y. TIMES (May 21, 2020), <https://www.nytimes.com/interactive/2020/07/05/us/coronavirus-latinos-african-americans-cdc-data.html>.

But the Times analysis found that a racial disparity remained even after accounting for a variety of factors, including the size of a nursing home, the inflection rate in the surrounding county, the population density of the neighborhood, and how many residents had Medicaid or Medicare.¹¹⁴

By late June 2020 we learn that “in the last two weeks, counties across the country where at least a quarter of the population is Latino have recorded an increase of 32 percent in new cases, compared to a 15 percent increase for all other counties”¹¹⁵ Additional analysis reveals:

The disparity is particularly stark in populous states like California, Florida and Texas. But it also has sprung up elsewhere. In North Carolina, Latinos make up 10 percent of the population, but 46 percent of infections. In Wisconsin, they are 7 percent of the population and 33 percent of cases. In Yakima County, Wash., the site of the state’s worst outbreak, half the residents are Latino. In Santa Cruz County, which has Arizona’s highest rate of cases, the Hispanic share of the population is 84 percent.

Detailed coronavirus data broken down by ethnicity is incomplete in many places, making it difficult to know why Latinos have been infected at higher rates. Counties with a high proportion of Latinos also tend to have attributes that have made counties vulnerable to the recent surge: crowded households, younger populations and hotter weather that drives people indoors Contact tracers in some areas also have associated spikes in infection with large family gatherings.¹¹⁶

In July 2020, the *New York Times* brought a lawsuit against the CDC, seeking to more fully document racial disparities in coronavirus cases. In the course of this lawsuit, it was discovered that “Black and Latino people have been disproportionately affected by the coronavirus in a widespread manner span[ning] hundreds of counties in urban, suburban and rural areas, and across all age groups. [U.S.] Latino and African-American residents . . . have been three times as likely to become infected as their white

114. Oppel Jr., *supra* note 113.

115. Shawn Hubler et al., *Many Latinos Couldn’t Stay Home. Now Virus Cases Are Soaring in Their Communities*, N.Y. TIMES (June 26, 2020), <https://www.nytimes.com/2020/06/26/us/corona-virus-latinos.html>.

116. *Id.*

neighbors”¹¹⁷ On July 20, 2020, *The New York Times* reports, “[a]s the coronavirus expands its destructive path across the United States, it is bearing down on some of the places most vulnerable to its devastation—place like the southernmost wedge of Texas, on the border with Mexico, which has seen a punishing surge in infections.”¹¹⁸ As just one example:

In the Rio Grande Valley, more than a third of families live in poverty. Up to half of residents have no health insurance, including at least 100,000 undocumented people, who often rely on under-resourced community clinics or emergency rooms for care. Tick off the list of risk factors for developing severe complications from the virus and you will have described this margin of the country: [m]ore than 60 percent of residents are diabetic or prediabetic. The rates of obesity and heart disease are among the nation’s highest. More than 90 percent of the population is Latino, a group that is dying from the virus at higher rates than white Americans are.¹¹⁹

By mid-August 2020, a nation-wide pattern is observed “[w]here Black people [are] three times more likely than white people to contract the coronavirus, six times more likely to be hospitalized as a result and twice as likely to die of COVID-19.”¹²⁰

Black and Latino communities are disproportionately affected both in nursing homes and among younger generations. Exhibit 7 illustrates the disproportionate impact on minorities in nursing homes. By mid-August 2020, *The New York Times* looks at statistics for the State of Florida and reports that deaths of younger people “were disproportionately Black. Among people age 25 to 44, African-Americans make up 18 percent of Florida’s population but have accounted for 44 percent of deaths. Black Floridians over 65 are dying at twice the rate of white residents, but among younger adults, the death rate is nearly three times [higher].”¹²¹ African-Americans comprise 15.5 percent of Florida’s population and 19.4 percent of deaths from the

117. Richard A. Oppel Jr. et al., *Racial Disparity in Cases Stretches All Across Board: Fuller C.D.C. Data Shows Alarming Impact of Virus on Black and Latino People*, N.Y. TIMES, July 6, 2020, A1.

118. Caitlin Dickerson & Lynsey Addario, *Vulnerable Border Community Battles Virus on ‘A Straight Up Trajectory’*, N.Y. TIMES (July 19, 2020), <https://www.nytimes.com/2020/07/19/us/coronavirus-texas-rio-grande-valley.html>.

119. *Id.*

120. Wezerek, *supra* note 97. See also Ewen M. Harrison et al., *Ethnicity and Outcomes from COVID-19: The ISARIC CCP-UK Prospective Observational Cohort Study of Hospitalised Patients* (The Lancet, Working Paper No. D-20-12331, 2020).

121. Frances Robles, Robert Gebeloff, Danielle Ivory, & Kimiko de Freytas-Tamura, *The Virus Is Killing Young Floridians. Race Is a Big Factor*, N.Y. TIMES (Aug. 12, 2020), <https://www.nytimes.com/2020/08/11/us/virus-young-deaths.html>.

virus. Yet a closer look, as shown by Exhibit 8, reveals that the disparity is even more pronounced when age is considered.¹²²

Exhibit 7
Disparity in the Share of Nursing Home COVID-19 Cases¹²³

State	Homes that are:		=	Gap (in percentage points)	
	At least 25% black and Latino	Less than 5% black and Latino			
New York	84%	33%	=	52	
Illinois	75	24	=	51	
Michigan	73	24	=	48	
Minnesota	62	18	=	44	
Maryland	80	37	=	43	
Connecticut	97	58	=	39	
Georgia	70	38	=	32	
Colorado	56	27	=	30	
Nevada	56	26	=	29	
California	47	18	=	29	
South Carolina	36	13	=	23	
Florida	57	40	=	17	
Ohio	35	19	=	16	
Massachusetts	93	78	=	15	
Kentucky	38	24	=	14	
New Jersey	87	84	=	3	
New Mexico	16	45	=	-29	
Total	61	32	=	29	

122. *Id.*

123. *The Striking Racial Divide in How COVID-19 Has Hit Nursing Homes*, N.Y. TIMES, May 22, 2020, at A1.

Exhibit 8
Deaths Among Florida Black Young Adults Are Disproportionately
Higher¹²⁴

Source: Florida Department of Health; Census Bureau • By Jugal K. Patel

C. The Requirement for Widespread Testing

Dr. David L. Heymann, who chairs an expert panel advising the World Health Organization (“WHO”) on emergencies, suggests adopting lessons gained from defending against prior contagions and notes, “Although there are incidents of rampant spread, as happened on the cruise ship *Diamond Princess*, the coronavirus more often infects clusters of family members, friends and work colleagues.”¹²⁵ In addition, “you can contain clusters . . . you need to identify and stop discrete outbreaks, and then do rigorous contract tracing.’ But doing so takes intelligent, rapidly adaptive work by health officials, and near-total cooperation from the populace.”¹²⁶ Americans and all global citizens must come to realize that survival of the species may require containment and “that working together is the only way to protect themselves and their loved ones.”¹²⁷ Global leading epidemic health experts appear united in their view that “Americans must be persuaded to stay home . . . and a system put in place to isolate the infected and care for them outside the home. Travel restrictions should be extended . . . productions of masks

124. *The Striking Racial Divide in How COVID-19 Has Hit Nursing Homes*, N.Y. TIMES, May 22, 2020, at A1.

125. Donald G. McNeil Jr., *The Virus Can Be Stopped, but Only with Harsh Steps*, N.Y. TIMES (Mar. 22, 2020), <https://www.nytimes.com/2020/03/22/health/coronavirus-restrictions-us.html>.

126. *Id.*

127. *Id.*

and ventilators must be accelerated and testing problems must be resolved.”¹²⁸

D. The Elderly

Former Director for the CDC Richard Besser warns that the “elderly and disabled are at particular risk when their daily lives and support systems are disrupted. Those without easy access to health care, including rural and native communities, might face daunting distances at times of need.”¹²⁹ In Kirkland, Washington, the 2020 Mardi Gras party at the Life Care Center nursing home produced particularly memorable results this year, as “[w]ithin days, nurses were calling in sick, and calls to 911 were spiking for ailing residents. By March 9 [2020], 129 people were infected with . . . coronavirus, including 81 residents, 34 staff members . . . and 14 visitors, testing showed . . . 35 deaths were tied to the home,” as reported on March 24, 2020.¹³⁰ On March 27, 2020, the CDC reported, “[e]arly data from China suggest that a majority of coronavirus disease 2019 (COVID-19) deaths have occurred among adults aged [equal to or greater than] 60 years and among persons with serious underlying health conditions.”¹³¹ Exhibit 9 presents CDC data from early in the outbreak, Coronavirus Disease 2019 (“COVID-19”) hospitalizations, intensive care unit (“ICU”) admissions, and deaths, by age group—United States.

128. McNeil, *supra* note 125.

129. Besser, *supra* note 38.

130. Elizabeth Koh et al., *One Nursing Home, 35 Coronavirus Deaths: Inside the Kirkland Disaster*, WALL STREET J. (Mar. 23, 2020), <https://www.wsj.com/articles/one-nursing-home-35-coronavirus-deaths-inside-the-kirkland-disaster-11584982494>.

131. *Severe Outcomes Among Patients with Coronavirus Disease 2019 (COVID-19)—United States, February 12–March 16, 2020*, CTRS. FOR DISEASE CONTROL AND PREVENTION (Mar. 27, 2020), https://www.cdc.gov/mmwr/volumes/69/wr/mm6912e2.htm?s_cid=mm6912e2_w.

Exhibit 9
 COVID-19 Hospitalizations,
 Intensive Care Unit (“ICU”) Admissions, and Deaths,
 by Age Group—United States,
 February 12–March 16, 2020

* Hospitalization status missing or unknown for 1,514 cases.

† ICU status missing or unknown for 2,253 cases.

‡ Illness outcome or death missing or unknown for 2,001 cases.

Early-on, after the Seattle-area nursing home infections, it became apparent that “[t]he pandemic is forcing the nation’s most vulnerable generations—52 million adults ages 65 and older—into an extreme retreat from the outside world, cutting them off from family, friends, social activities and daily routines.”¹³² *The Wall Street Journal* reports:

Especially at risk are those who live in congregate settings, like nursing facilities, and have underlying health conditions, making the need for caution greater. Thirty-five deaths were tied to the Life Care Center nursing facility in Kirkland, Wash., where dozens of residents, workers and visitors tested positive. Scores of outbreaks have hit other nursing homes in Illinois, Oregon and Wyoming. The Centers for Medicare and Medicaid Services recently took the

132. Clare Ansberry, *Coronavirus Leaves Older Americans Cut Off: ‘We Have Been Trying to Fill That Void,’* WALL STREET J. (Mar. 26, 2020), <https://www.wsj.com/articles/trying-to-fill-that-void-coronavirus-isolates-older-americans-11585165692#:~:text=The%20pandemic%20is%20forcing%20the,social%20activities%20and%20daily%20routines>.

unprecedented step of banning all visitors to the nation's 15,600 nursing-care facilities, serving 1.3 million people.¹³³

Here, “[i]n the past few years, doctors and researchers have warned about the toll loneliness can take on mental and physical health, especially at an older age. Yet older Americans are more isolated now than any other group—frustrating many of them, and worrying their families.”¹³⁴ This acute isolation and loneliness may result in greater instances of diseases of despair, as discussed below. During March 2020, “[a]n estimated 80% of the deaths reported in the U.S . . . have been in adults 65 years and older, with the largest percentage among those 85 and older, according to the CDC.”¹³⁵ New York is particularly hard hit, with “1.73 million residents over age 60, more than the total population of Boston and San Francisco combined, with a demographic profile that is getting poorer and older. The coronavirus pandemic stretches the gaps in a system that is already under pressure.”¹³⁶ *The New York Times* explains:

Shortages in supermarkets [and the closing of] public facilities—all take an extra toll on elders, especially those with limited means: One in five New Yorkers over age 65 lives in poverty, twice the national average. The difficulties cascade: When schools close, home-care workers have to stay with their children, leaving frail elders isolated in homes they cannot manage. All of it rests on an especially fragile work force of volunteers and low-wage workers who provide essential meals, home care, and social companionship to elders at home—exposed to long subway rides and managing their own child care. If they falter, there is often no net below for their clients. For 30,000 elders each day, senior centers were an outlet from their homes. And now, by order of the mayor, all on-site activities are closed, though the centers can still provide meals to go . . . It is a terrible [situation] that for older adults, steps to prevent the spread of COVID-19 increase the risks of social isolation, which carries its own devastating health effects . . . Public libraries, houses of worship, neighborhood cafes—all social spots for

133. Ansberry, *supra* note 132.

134. *Id.*

135. *Id.* See also Elizabeth Koh, *Among Nursing Homes Hit by COVID-19, Veterans Homes Struggled the Most*, WALL STREET J. (Dec. 14, 2020), <https://www.wsj.com/articles/among-nursing-homes-hit-by-covid-veterans-homes-struggled-the-most-11607977327>.

136. John Leland, *'I'm Really Isolated Now': When Elders Have to Fight Coronavirus Alone*, N.Y. TIMES (Mar. 18, 2020), <https://www.nytimes.com/2020/03/18/nyregion/coronavirus-elderly-nyc.html>.

elders—are also closed, pushing older people back into what are often lonely apartments: 30 percent of New Yorkers over 65, and 43 percent of those over 85, live alone, according to the Department for the Aging.¹³⁷

As the pandemic progresses, during the period “March and mid-June [2020], Americans over the age of 65 had the highest rate of hospitalization among all age groups, about double the rate for people 50 to 64 years old and five times the rate for 18 to 49 year-olds, according to the [CDC].”¹³⁸ Consider that, “the loss of immune system strength makes older adults more susceptible to bacterial and viral infections such as influenza. Some 90 percent of flu deaths in the U.S. each year are of people over the age of 65.”¹³⁹ We learn from research that, “vaccines protect between 70% and 90% of children and younger adults, but 30% to 50% of adults over 65.”¹⁴⁰ We learn by July 2020, “[a]t least 15,000 more Americans have died in recent months from Alzheimer’s disease and dementia than otherwise would have, health officials believe, pointing to how the coronavirus pandemic has exacted a higher fatality toll than official numbers have shown.”¹⁴¹ By August 2020, “Daily fatality counts from elder-care facilities in Florida climbed to their highest level so far in the past week . . . about triple the average a month ago . . . Total long-term-care deaths rose to 3,155 on Monday, representing about 42% of the state’s 7,526 fatalities overall.”¹⁴² *The New York Times* observes, “In recent months, the coronavirus outbreak in the United States has dominated global attention, as the world’s richest nation blundered its way into the world’s largest death toll. Some 40 percent of those fatalities have been linked to long-term-care facilities.”¹⁴³

E. Prison Populations

During early March 2020, former CDC Director Richard Besser writes, “People living in close quarters—whether in public housing, nursing homes, jails, shelters or even the homeless on the streets—might suffer in waves, as

137. Leland, *supra* note 136.

138. Hopkins, *supra* note 39.

139. *Id.*

140. *Id.*

141. Jon Kamp & Paul Overberg, *Coronavirus Pandemic Led to Surge in Alzheimer’s Deaths*, WALL STREET J. (June 28, 2020), <https://www.wsj.com/articles/coronavirus-pandemic-led-to-surge-in-alzheimers-deaths-11593345601>.

142. Arian Campo-Flores, *Florida’s Elder-Care Facilities Buckle as COVID-19 Deaths Climb*, WALL STREET J. (Aug. 5, 2020), <https://www.wsj.com/articles/floridas-elder-care-facilities-buckle-as-virus-deaths-climb-11596628812>.

143. Matina Stevis-Gridneff et al., *When COVID-19 Hit, Many Elderly Were Left to Die*, N.Y. TIMES (Aug. 8, 2020), <https://www.nytimes.com/2020/08/08/world/europe/coronavirus-nursing-homes-elderly.html>.

we have already seen in Washington State.”¹⁴⁴ Also during March 2020 we learn, COVID-19, “is spreading quickly in America’s jails and prisons, where social distancing is impossible and sanitizer is widely banned, prompting authorities across the country to release thousands of inmates in recent weeks to try to slow the infection, save lives and preserve medical resources.”¹⁴⁵ *The New York Times* reports, “America has more people behind bars than any other nation. Its correctional facilities are frequently crowded and unsanitary, filled with an aging population of often impoverished people with a history of poor health care, many of whom suffer from respiratory and heart conditions.”¹⁴⁶ The Federal Bureau of Prisons announced by April 1, 2020, “that it would keep thousands of inmates at facilities nationwide locked in their cells with limited exceptions for the next 14 days as officials try to stem the spread of the coronavirus after one prisoner died and more prisoners and staff tested positive for the disease.”¹⁴⁷

By mid-June 2020, “[c]ases of the coronavirus in prisons and jails across the United States have soared . . . even as the overall daily infection rate in the nation has remained relatively flat.”¹⁴⁸ Data collected by *The New York Times* indicated infections “doubled during the past month to more than 68,000. Prison deaths tied to the coronavirus have also risen, by 73 percent since mid-May. By now, the five largest known clusters of the virus in the United States are not at nursing homes or meatpacking plants, but inside correctional institutions.”¹⁴⁹ In an Op-Ed, *The New York Times* writes:

[t]he situation inside the nation’s jails and prisons . . . has become the stuff of nightmares. Overcrowding, unsanitary conditions, shortage of personal protective equipment (not to mention soap) and restrictions on hygiene products such as hand sanitizer have turned detention facilities into a playground for the virus and a deathtrap for inmates.¹⁵⁰

144. Besser, *supra* note 38.

145. Timothy Williams et al., *Jails Are Petri Dishes: Inmates Freed as the Virus Spreads Behind Bars*, N.Y. TIMES (Mar. 31, 2020), <https://www.nytimes.com/2020/03/30/us/coronavirus-prisons-jails.html>

146. *Id.*

147. Sadie Gurman & Deanna Paul, *Federal Prisons Heighten Restrictions to Stem Spread of Coronavirus*, WALL STREET J. (Mar. 31, 2020), <https://www.wsj.com/articles/federal-prisons-heighten-restrictions-to-stem-spread-of-coronavirus-11585694107#:~:text=The%20federal%20Bureau%20of%20Prisons,tested%20positive%20for%20the%20disease>.

148. Timothy Williams et al., *Coronavirus Cases Rise Sharply in Prisons Even as They Plateau Nationwide*, N.Y. TIMES (June 16, 2020), <https://www.nytimes.com/2020/06/16/us/coronavirus-inmates-prisons-jails.html>.

149. Williams et al., *supra* note 145.

150. The Editorial Board, *The Coronavirus Crisis Inside Prisons Won’t Stay Behind Bars*, N.Y. TIMES (June 25, 2020), <https://www.nytimes.com/2020/06/25/opinion/coronavirus-prisons-compassionate-release.html>.

As 2021 begins, “[e]ight months into the coronavirus pandemic, prisons across the country are still grappling with how best to control a virus that is intensifying nationwide.”¹⁵¹

F. Native Americans

It appears that many Native American communities have shouldered a disproportionate COVID-19 burden, including infection and mortality rates that exceed those of the general population. These typically small population Native American communities often suffer from water quality and other infrastructure hygiene issues, so it has proven challenging to measure the pandemic’s impact.¹⁵² The *PBS News Hour* states, “[t]here is a wide range of COVID-19 rates among different American Indian reservations, but a handful of reservations have many-fold greater infection rates compared to the general U.S. population.”¹⁵³ For example, at May 12, 2020, the COVID-19 infection rate for the general U.S. population was about 400 per 100,000 individuals. But for some reservations, the rate is much higher: “the Mississippi Band of Choctaw Indians, the Ho-Chunk Nation, the Navajo Nation, the Pueblo of San Felipe, and the Pueblo of Zia have astonishingly high reservation-based COVID-19 rates per 100,000 at 500, 800, 1100, 1400 and 3300, respectively”¹⁵⁴ Research suggests COVID-19 is more likely found “in tribal communities with a higher proportion of homes lacking indoor plumbing”¹⁵⁵ As a result, “American Indian households on tribal reservations are 3.7 more likely to lack complete indoor plumbing relative to all other households in the United States . . . such as the Navajo reservation (18%).”¹⁵⁶

Joseph Kalt, the Ford Foundation Professor of International Political Economy Emeritus at the Harvard Kennedy School says, “With tribal businesses halted and their services in peril, the economic impact of COVID-19 on Native American communities could be devastating . . . [t]here is not a single Indian casino in the United States open today, and all tribal businesses are closed.”¹⁵⁷ The AMA observes, “that American Indians are the only

151. Talal Ansari, *Trying to Keep COVID-19 at Bay in Nation’s Prisons Presents a Challenge*, WALL STREET J. (Nov. 27, 2020), <https://www.wsj.com/articles/trying-to-keep-COVID-19-at-bay-in-nations-prisons-presents-a-challenge-11606491091>.

152. Randall Akee, *How COVID-19 is Impacting Indigenous Peoples in the U.S.*, PBS NEWS HOUR (May 13, 2020 6:14 PM), <https://www.pbs.org/newshour/nation/how-COVID-19-is-impacting-indigenous-peoples-in-the-u-s>.

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.*

157. Liz Mineo, *For Native Americans, COVID-19 is ‘the Worst of Both worlds at the Same Time’*, HARV. GAZETTE (May 8, 2020), <https://news.harvard.edu/gazette/story/2020/05/the-impact-of-COVID-19-on-native-american-communities/>.

[U.S.] population that's actually born with a legal right to health services . . . based on treaties in which . . . tribes exchanged land and natural resources for various social services, including housing, education and health care."¹⁵⁸ However, it is unfortunate that "what little money flows into the Indian Health Service (HIS) is spent on medical care, not public health programs, putting Native American populations at particular risk in a pandemic"¹⁵⁹

By July 31, 2020, we learn, "[t]he rate of known cases in the eight counties with the largest populations of Native Americans is nearly double the national average, a *New York Times* analysis has found."¹⁶⁰ The report shows:

Native Americans, who make up about 7 percent of the country's population, seemed to account for many of the [Yakima County, Washington] hospital's virus patients. Because the hospital does not routinely record race and ethnicity data . . . it was hard . . . to know for certain . . . [w]ithout firm figures . . . health care providers for Native communities said they struggled to know where or how to intervene to stop the spread . . . By mid-July, more than 650 members of the Yakama Nation, in central Washington State had contracted the virus—about 6 percent of the total membership. Twenty-eight people have died . . .¹⁶¹

G. Asian Americans

As the pandemic death toll continues to mount, it disproportionately hurts Black and Latino communities. However, "public health departments and healthcare systems . . . do not collect accurate race and ethnicity data."¹⁶² Much is still not known about the particular sensitivities, if any, of racial groups to the coronavirus. As we will discuss more fully later, infection experience by race is not captured accurately in many parts of the country. However, *NBC News* reports a disturbing statistic for Asian Americans was reported on May 20, 2020 in San Francisco. According to the report, which is based on research collected by the Asian American Research Center, "the

158. Timothy M. Smith, *Why COVID-19 is Decimating Some Native American Communities*, AM. MED. ASS'N (May 13, 2020), <https://www.ama-assn.org/delivering-care/population-care/why-covid-19-decimating-some-native-american-communities>.

159. *Id.*

160. Conger, *supra* note 18.

161. *Id.*

162. Namratha Kandula & Nilay Shah, *Asian Americans Invisible in COVID-19 Data and in Public Health Response*, CHICAGO REP. (June 16, 2020), <https://www.chicagoreporter.com/asian-americans-invisible-in-covid-19-data-and-in-public-health-response/>.

City and County of San Francisco's COVID-19 demographic report . . . at [May 5] had recorded a total of 1,754 cases and 31 deaths. Of those deaths, 16 were Asian American."¹⁶³ To put these numbers in perspective, Asian Americans are reported by researchers to comprise:

13.7 percent of all cases of infections in San Francisco but had the highest proportion of deaths to cases across all racial groups . . . exceed[ing] that of California as a whole . . . [I]n a county where Asian Americans account for about 35 percent . . . the group's mortality rates . . . are concerning.¹⁶⁴

Nationwide, reports of "racial hostility has left Asian Americans, who represent 6 percent of the U.S. population but 18 percent of the country's physicians and 10 percent of its nurse practitioners, in a painful position on the front lines of the response to the coronavirus pandemic."¹⁶⁵ Additional reports indicate that "some [C]ovid-19 patients refuse to be treated by [Asian Americans]. And when doctors and nurses leave the hospital, they face increasing harassment in their daily lives, too."¹⁶⁶ In sum, *The Washington Post* reports, "Asian Americans have experienced a sharp increase in racist verbal abuse and physical attacks during the pandemic, with the FBI warning of a potential surge in hate crimes against Asians as the coronavirus death toll mounts and stay-at-home orders are lifted."¹⁶⁷

163. Agnes Constante, *Asian American COVID-19 Death Rate in San Francisco Concerning, Researchers Say*, NBC NEWS (May 20, 2020), <https://www.nbcnews.com/news/asian-america/asian-american-COVID-19-death-rate-san-francisco-concerning-researchers-n1211491>.

164. *Id.*

165. Tracy Jan, *Asian American Doctors and Nurses are Fighting Racism and the Coronavirus*, WASH. POST (May 19, 2020), <https://www.washingtonpost.com/business/2020/05/19/asian-american-discrimination/>.

166. *Id.*

167. *Id.*

VI. Diseases of Despair

Despair has an incredible power to initiate destruction. It is exceedingly dangerous to assume that oppression and pain can be inflicted without consequence, to believe that the victim will silently absorb the injury and the wound will fade. No, the injuries compound, particularly when there is no effort to alter the system doing the wounding, no avenue by which the aggrieved can seek justice. This all breeds despair, simmering below the surface, a building up in need of release, to be let out, to lash out, to explode.

- Charles M. Blow
Opinion Columnist
The New York Times
June 1, 2020¹⁶⁸

It should come as no surprise that America, “has a track record of historically and systematically disadvantaging certain racial groups—in addition to ethnic, religious and other minoritized groups—across the country.”¹⁶⁹ The AMA observes:

[t]hese structural and political forces have created deep-seated problems that persist today, more than 150 years after slavery ended and 50 years after the Civil Rights Movement. It’s widely understood . . . that structural racism manifests in differential access by race to opportunities, resources, conditions, and power within their respective systems.¹⁷⁰

Consider:

The push to address the impact of racism on mental health has gained more urgency in recent months. “In the current moment, given what happened to George Floyd, it has induced a collective trauma, particularly among Black Americans” . . . Symptoms of anxiety and depression in non-Hispanic Black adults rose to 40.5% May 28 to June 2 from

168. Charles M. Blow, Opinion, *Despair’s Destructive Power*, N.Y. TIMES, June 1, 2020, at A21.

169. Jesse M. Ehrenfeld & Patrice A. Harris, *Police Brutality Must Stop*, AM. MED. ASS’N (May 29, 2020), <https://www.ama-assn.org/about/leadership/police-brutality-must-stop>.

170. *Id.*

35.6% May 21 to 26 and remain elevated, according to data from the [CDC].¹⁷¹

By late June 2020, “[t]o a startling degree, many coronavirus patients are reporting . . . hospital delirium . . . seen mostly in . . . older patients, some of whom already had dementia . . . Now, the condition is bedeviling coronavirus patients of all ages with no previous cognitive impairment.”¹⁷² For example:

The ingredients for delirium are pervasive during the pandemic. They include long stints on ventilators, heavy sedatives and poor sleep. Other factors: patients are mostly immobile, occasionally restrained to keep them from accidentally disconnecting tubes, and receive minimal social interaction because families can’t visit and medical providers wear face-obscuring protective gear and spend limited time in patient’s rooms . . .

Two months after returning home from her three-week hospitalization, [name redacted] said she’s been experiencing troubling emotional and psychological symptoms, including depression and insomnia. She has been noticing the smell of cigarettes or wood burning, a figment of her imagination.¹⁷³

By August 2020, *The Wall Street Journal* observes, “The pandemic and its economic fallout are taking a toll on the mental health of many Americans. But the burden is perhaps greatest for those on the brink of adulthood, young people who are often seeing their dreams of careers, romances and adventures dashed.”¹⁷⁴

A. Police Violence, Chronic Stress, and Health Impact

The AMA warns about the harmful health impact caused by:

the connection between excessive police activity and health. Research demonstrates that racially marginalized communities are disproportionately subject to police force, and there

171. Cordilia James & Andrea Petersen, *Racism’s Mental Health Impact*, WALL STREET J., July 21, 2020, at A9.

172. Pam Belluck, *As Body Fights, Virus Splinters Patient’s Minds*, N.Y. TIMES, June 29, 2020, at A1, A7.

173. *Id.*

174. Andrea Petersen, *Coronavirus Turmoil Raises Depression Risks in Young Adults*, WALL STREET J., Aug. 11, 2020, at A11.

is a correlation between policing and adverse health outcomes. For example . . . Black males are three times more likely to be killed during a police encounter than . . . White[s].¹⁷⁵

National data from 2012 illustrates:

That while Latinx made up roughly 18 percent of the population, they accounted for 30 percent of arrests and 23 percent of all searches. An increased prevalence of police encounters is linked to elevated stress and anxiety levels, along with increased rates of high blood pressure, diabetes and asthma—and fatal complications of those comorbid conditions. Racism as a driver of health inequity is also particularly evident in findings from a 2018 study showing that law enforcement-involved deaths of unarmed black individuals were associated with adverse mental health among Black American adults—a spillover effect on the population, regardless of whether the individual affected had a personal relationship with the victim or the incident was experienced vicariously. The trauma of violence in a person’s life course is associated with chronic stress, higher rates of comorbidities and lower life expectancy, all of which bear extensive care and economic burden on our healthcare system while sapping the strength of affected families and communities.¹⁷⁶

Professor Melanye Price writes, “Black death has long been treated as a spectacle. White crowds saw lynchings as cause for celebration and would set up picnic lunches and take body parts with them as souvenirs.”¹⁷⁷ She reflects:

Long before we put hashtags in front of the names of Trayvon Martin, Michael Brown, Sandra Bland and Ahmaud Arbery, there were the Scottsboro Boys and Emmett Till, and for my generation, Rodney King. This is not a straight historical line for white Americans. Yet, it is a

175. Ehrenfeld & Harris, *supra* note 169.

176. *Id.*

177. Melanye Price, Opinion, *Put Limits on the Violent Videos*, N.Y. TIMES, June 4, 2020, at A27.

litany of black deaths that African-Americans learn to cite early on.¹⁷⁸

The Wall Street Journal documents on July 21, 2020, “a growing recognition that the impact of racism on the mental health of Black people has often been ignored. This has led many patients to be undiagnosed, misdiagnosed or not adequately treated for their distress, doctors and therapists say.”¹⁷⁹

B. Depression

By May 27, 2020, *The Washington Post* reports that “[a] third of Americans are showing signs of clinical anxiety or depression . . . the most definitive and alarming sign yet of the psychological toll exacted by the coronavirus pandemic.”¹⁸⁰ A Census Bureau survey “included four questions taken nearly word for word from a form used by doctors to screen patients for depression and anxiety. Those answers are providing a real-time window into the country’s collective mental health after three months of fear, isolation, soaring unemployment and continuing uncertainty.”¹⁸¹ Results in twenty-four percent of those tested indicated “clinically significant symptoms of major depressive disorder and 30 percent showed symptoms of generalized anxiety disorder.”¹⁸² *The Wall Street Journal* reports on July 21, 2020, “[r]esearch has found a link between racism and psychological distress, anxiety, post-traumatic stress disorder and depression among Black people.”¹⁸³ A survey conducted by the American College Health Association, in conjunction with Boston University, University of Michigan, and UCLA’s Healthy Minds Network found, “[n]early 41% of college students reported symptoms of depression in a survey of 18,764 students from the end of March through May . . . [,] up from 35.7% in a . . . survey from fall 2019.”¹⁸⁴

178. Price, *supra* note 177.

179. James & Petersen, *supra* note 171.

180. Alyssa Fowers & William Wan, *A Third of Americans Show Signs of Clinical Anxiety or Depression Amid Pandemic, Census Bureau Finds*, WASH. POST (May 27, 2020), <https://www.washingtonpost.com/health/2020/05/26/americans-with-depression-anxiety-pandemic/?arc404=true>.

181. *Id.*

182. *Id.*

183. James & Petersen, *supra* note 171.

184. *Id.*

C. Suicide

Even before the pandemic gained considerable traction in the United States, in her testimony before the House Subcommittee on Communications and Technology, Sue Ann Atkerson stated:

Suicide is the 10th leading cause of death for Americans overall and the 2nd leading cause of death for people ages 10-34. We lost 48,344 Americans to suicide in 2018. When age-adjusted, that is 14.2 per 100,000 individuals. It is essential to note that suicide has an echoing effect, with people close to those who die becoming more susceptible to depression and having a heightened risk of suicide.

Populations particularly vulnerable to suicide are veterans and LGBTQ youth. Non-Hispanic American Indian or Alaska Native (“AIAN”) suicide rates have increased by 139% among females and 71% among males. There are also significant increases in suicide attempts. For instance, the number of African American adolescents who self-reported suicide attempts rose by 73% between 1991 and 2017. According to the . . . (CDC), in 2017, 10.6 million American adults seriously thought about suicide, 3.2 million made a plan, and 1.4 million attempted suicide.¹⁸⁵

The CDC observes that “fear and anxiety about a new disease and what could happen can be overwhelming and cause strong emotions in adults and children.”¹⁸⁶ Necessary COVID-19 “public health actions such as social distancing, can make people feel isolated and lonely and can increase stress and anxiety.”¹⁸⁷ Even before the pandemic, “suicide rates have been rising in the U.S. over the last 2 decades. The latest data available (from 2018) shows the highest age-adjusted suicide rate in the U.S. since 1941.”¹⁸⁸ With understandable increased levels of anxiety brought about by highly publicized pandemic deaths, widespread job loss and shelter-in-place orders, “just as

185. *National Suicide Hotline Designation Act: Hearing on H.R. 4194 Before the S. Comm. On Communications & Tech.*, 116th Cong. (2020) (statement of Sue Ann Atkerson, CEO Behavioral Health Link).

186. *Coronavirus Disease 2019 (COVID-19): Coping With Stress: Pandemics Can Be Stressful*, CTRS. FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/coronavirus/2019-ncov/daily-life-coping/managing-stress-anxiety.html>.

187. *Id.* See also Anahad O’Connor, *Pandemic Begets Weight Gain and Stress*, N.Y. TIMES, Dec. 8, 2020, at D6.

188. Mark A. Reger et al., *Suicide Mortality and Coronavirus Disease 2019—A Perfect Storm?*, 77 JAMA PSYCHIATRY 1093-94 (April 10, 2020), <https://jamanetwork.com/journals/jamapsychiatry/fullarticle/2764584>.

individuals with pre-existing physical illnesses are more likely to get physically ill from the coronavirus, people whose mental health is compromised are at greater risk of experiencing worsening mental illness as a result of the coronavirus—no matter what their mental illness may be.”¹⁸⁹ Chaomin Wu and Xianglin Hu write, “An epidemic disease, such as SARS in 2003, generally accompanies with multiple psychiatric morbidities, including anxiety, depression and even suicide.”¹⁹⁰ In their study of 370 COVID-19 survivors discharged between early January and mid-February 2020 from infections at the initial Wuhan China hospital, researchers “found anxiety and depression existed in approximately 10 percent of COVID-19 survivors . . . and found a high proportion of 29.5% survivors were bothered by sleeping disorders . . . Home quarantine lifestyle may cause a high proportion of depression.”¹⁹¹

D. Increased Alcohol Use and Addiction

The New York Times reports, “[h]istorically, drinking and drug use rise when people experience wars, terrorist attacks or natural disasters, but those are typically localized events”¹⁹² Consider:

The pandemic has reduced access to social support networks, while alcohol remains fairly easy to get. That combination means “there remains a threat to develop new substance-abuse disorders.” . . . A study published . . . in the *Asian Journal of Psychiatry* showed a sharp increase among people in China, where the pandemic originated, who reported “harmful drinking” during isolation. People between the ages of 21 and 40 were particularly susceptible, the study found.¹⁹³

189. *Living With Mental Illness During COVID-19 Outbreak—Preparing for Your Wellness*, MENTAL HEALTH AM., <https://mhanational.org/living-mental-illness-during-COVID-19-outbreak-preparing-your-wellness>.

190. Chaomin Wu & Xianglin Hu, *Mental Health Status of Survivors Following COVID-19 in Wuhan, China: A Descriptive Study*, (THE LANCET, Working Paper No. D-20-00431, Apr. 14, 2020) <http://ssrn.com/abstract=3559616>.

191. *Id.*

192. Maria Cramer, *Sobering Reality: Many Are Drinking to Excess*, N.Y. TIMES, May 27, 2020, at A4.

193. *Id.*

E. Spouse Abuse and Family Violence

Rebecca A. Clay writes:

[m]illions of people have lost their jobs; some have lost their homes or businesses. Families cooped up together because of stay-at-home orders are chafing under the stress, which may increase the risk of intimate partner violence and child abuse. Disrupted routines and the potential for contracting a life-threatening disease may be exacerbating preexisting problems such as mental illness or substance abuse.”¹⁹⁴

VII. Employment and Race

While many standard economic statistics have yet to catch up with the reality we’re experiencing, it’s clear that the effects on the economy are severe. Millions of workers are losing their jobs . . . Household spending has plummeted as people stay home, and measures of consumer sentiment have fallen precipitously. Hotels, airlines, restaurants, department stores, and other retailers have been particularly hard hit. Manufacturing output fell . . . and is likely to drop even more . . . as many factories have temporarily closed.

- Jerome Powell

Chairman, Board of Governors
Federal Reserve System
April 29, 2020¹⁹⁵

By March 2020, *The Wall Street Journal* reports, “[As] coronavirus shutdowns halt commerce across the U.S., low-wage workers, many of whom live paycheck to paycheck, are being quickly stung. The affected jobs, by their nature, often require personal contact, such as running a cash register or cleaning hotel rooms. That substantially raises the risk of infection.”¹⁹⁶ Unfortunately, many of these workers also hold positions most vulnerable to quick job cuts and pay cuts, especially in service industries . . . include restaurant workers, hotel maids, dog walkers and child-care

194. Cramer, *supra* note 192.

195. Jerome Powell, Chair, Board of Governors of the Fed. Res. System, Press Conf. (Apr. 29, 2020).

196. Eric Morath & Rachel Feintzeig, *Low-Wage Workers Face Brunt of Coronavirus Crisis*, WALL STREET J., Mar. 21–22, 2020, at A1.

providers. In many cases, the cuts are tied to shutdowns and cancellations at sports stadiums, conventions, casinos, music festivals and other gatherings.¹⁹⁷

As some attempt to return to work during May 2020, U.S. Senator Patty Murray states, “Currently, many people cannot follow the CDC’s advice to stay home from work if they are sick without losing a paycheck.”¹⁹⁸ By March 2020, *The Wall Street Journal* reported:

More than 90% of the announced U.S. job cuts tied to the coronavirus were at restaurants and other entertainment and leisure businesses according to outplacement firm Challenger, Gray & Christmas. For many who retain their jobs, tips and commissions have evaporated. Working at home isn’t an option, nor is sick pay . . . There are more than 34 million people in the pool of most vulnerable workers, or about a quarter of the private workforce. About half this group were employed in service jobs in the hospitality industry, where occupations earn less than the overall median pay for all U.S. workers of \$18.58. The median wage for a restaurant job is \$11.09 an hour. The other half come from retail, personal and maintenance service jobs—many of which start at the minimum wage, as low as \$7.25 an hour, depending on the state.¹⁹⁹

As the coronavirus continues to gain strength during spring 2020, a negative multiplier effect permeates through the economy. For perspective, consider, “[w]hen Table 20 closed its dining room in Cartersville, [Georgia], this week, the pain radiated out to a hydroponic farmer, a tablecloth supplier, a liquor distributor, a credit-card processor, a banker and countless others.”²⁰⁰ Understandably, “Americans with less money have fewer options amid the new normal of school closings, shuttered businesses and shelter-in-place orders.”²⁰¹ University of Michigan Professor of Social Work H. Luke Shaefer says the poor “tend to be the first hit when things go wrong and then also to take the longest time to recover.”²⁰²

197. Morath & Feintzeig, *supra* note 196.

198. Press Release, U.S. Senator Patty Murray, Senator Murray Presses Federal Public Health Officials on Administration Response to Coronavirus (Mar. 3, 2020), <https://www.murray.senate.gov/public/index.cfm/mobile/newsreleases?ID=1FD28F48-E563-4145-9A44-B979596D4723>.

199. Morath & Feintzeig, *supra* note 196, at A10.

200. Ruth Simon, *Chain Reaction*, WALL STREET J., Mar. 21–22, 2020, at B1.

201. Manny Fernandez, *Skipping Meals So Her Children Can Have Theirs*, N.Y. TIMES, Mar. 21, 2020, at A1.

202. *Luke Shaefer Discusses How Low-Income Families Have Fewer Options During COVID-19*, U. MICH. SCH. OF SOCIAL WORK, (Mar. 20, 2020),

A. Is This Time Really Different?

The COVID-19 newly unemployed “encompasses many workers who were late beneficiaries of the surge in hiring as the labor market tightened in recent years—including members of minority groups or people with less education and skills—during one of the longest and most lucrative growth phases in U.S. history.”²⁰³

By late March 2020, the die was cast. Consider that, “[f]or the millions of Americans who found themselves without a job in recent weeks, the sharp and painful change brought a profound sense of disorientation. They were going about their lives, bartending, cleaning, managing events, waiting tables, loading luggage and teaching yoga.”²⁰⁴ After just a few weeks, “suddenly they were in free fall, grabbing at any financial help they could find, which in many states this week remained locked away behind crashing websites and overloaded phone lines.”²⁰⁵ On May 5, 2020, the Pew Research Center reported that Hispanic adults have been impacted the most by lost jobs and wages: “61% of Hispanic Americans and 44% of black Americans said . . . that they or someone in their household had experienced a job or wage loss due to the coronavirus outbreak, compared with 38% of white adults.”²⁰⁶ A common experience shared by both Hispanic and Black Americans is having entered the COVID-19 pandemic without financial resource reserves to provide for an emergency. Survey results indicate, “black (73%) and Hispanic adults (70%) [lack] emergency funds to cover three months of expenses; around half of white adults said the same . . . [most] black and Hispanic adults without financial reserves . . . [lack funds] to cover their expenses for three months by borrowing money, using savings or selling assets.”²⁰⁷ By June 2020, “The coronavirus pandemic and shutdown brought . . . one of the most promising economies in recent memory for African-Americans to a crushing end.”²⁰⁸ Professor Robert W. Fairlie looks at the data for April 2020 alone, and finds, “African-American businesses were hit especially hard experiencing a 41 percent drop in business activity. Latinx business owners’ activity fell by 32 percent, and Asian business owner activity

<https://ssw.umich.edu/news/articles/2020/03/20/61263-luke-shaefer-discusses-how-low-income-families-have-fewer-options-during-COVID-19>. See also Kenneth A. Couch, et al., *The Impacts of COVID-19 on Minority Unemployment: First Evidence from April 2020 CPS Microdata*, (Working Paper, May 18, 2020), <https://ssrn.com/abstract=3604814>.

203. Morath & Feintzeig, *supra* note 196, at A1.

204. Sabrina Tavernise et al., *‘We Have Lost It All’: Millions Reel from Sudden Unemployment*, N.Y. TIMES, Mar. 28, 2020, at A1.

205. *Id.*

206. Lopez et al., *supra* note 81.

207. *Id.*

208. Eric Morath & Amara Omeokwe, *Virus Obliterates Black Job Market: Fragile Economic Situation Hinders Recovery for Many African-Americans*, WALL STREET J., June 10, 2020, at A1.

dropped by 26 percent . . . Female business owners were also disproportionately affected (25 percent drop in business activity).”²⁰⁹

We know that before COVID-19, small business is estimated to account for between 60 to 80 percent of new job creation.²¹⁰ By July 20, 2020, *The Wall Street Journal* reports, “[t]he fierce resurgence of COVID-19 cases and related shutdowns are dashing hopes of a quick economic recovery, prompting businesses from airlines to restaurant chains to shift their strategies—this time with a long-term focus.”²¹¹ By July 24, 2020, “[n]ew state unemployment claims increased last week for the first time in nearly four months, disturbing evidence that the struggling economy is backsliding at a time when coronavirus cases are on the rise.”²¹² Consider:

After a flood of claims as the pandemic shut businesses early in the spring, weekly unemployment filings fell sharply before flattening in June. But . . . [on July 23, 2020] the Labor Department reported more than 1.4 million new applications for state benefits last week, up from about 1.3 million in the preceding two weeks.

Another 975,000 jobless workers filed for benefits through an emergency federal program, also an increase . . . Claims are rising just as a \$600-a-week federal supplement to jobless benefits is set to expire and Republican infighting has kept the party from pushing forward a proposal for further aid . . .²¹³

Law professor Lily Batchelder writes:

Among high-income countries, the United States has one of the lowest levels of intergenerational economic mobility, meaning that a child’s economic future is heavily influenced by his or her parents’ income. We have the second-highest level of income inequality after taxes and government

209. Robert W. Fairlie, *The Impact of COVID-19 on Small Business Owners: The First Three Months after Social-Distancing Restrictions*, (CESifo, Working Paper No. 8581, 2020), <https://ssrn.com/abstract=3703459>.

210. Lawrence J. Trautman, Anthony “Tony” Luppino & Malika S. Simmons, *Some Key Things U.S. Entrepreneurs Need to Know About the Law and Lawyer*, 46 TEXAS J. BUS. L. 155, 156 (2016).

211. Chip Cutter & Doug Cameron, *Businesses Are Gearing Up For Longer Road to a Rebound*, WALL STREET J., July 20, 2020 at A1.

212. Patricia Cohen, *Uptick in Claims Hints at Retreat in Jobs Recovery: A Painful Backslide as a \$600-a-Week Bonus Is Set to Run Out*, N.Y. TIMES, July 24, 2020, at A1.

213. Cohen, *supra* note 212. See also Eric Morath, *Unemployment Claims Rise as Virus Surge Hits Recovery*, WALL STREET J., July 24, 2020, at A1.

transfers, and the highest level of wealth inequality. These disparities are sharply skewed by race. Median black household wealth is only 9 percent that of white households, a racial wealth gap that is even larger than in 1968. New research suggests the pandemic will further increase wealth inequality, as the affluent save more and the poor earn less.²¹⁴

It was opined for New York City that “[w]hen the pandemic eventually subsides, roughly one-third of the city’s 240,000 small businesses may never reopen, according to a report by the Partnership for New York City, an influential business group. So far, those businesses have shed 520,000 jobs.”²¹⁵ As 2021 begins, the global economy is facing one of the worse outlooks since the Great Depression.”²¹⁶

B. Who Are the Essential Workers and First Responders?

Even in the face of growing and staggering unemployment, “[m]illions of workers are still on the job providing essential services. Nearly every state governor has issued executive orders that outline industries deemed ‘essential’ during the pandemic, which typically include health care, food service, and public transportation, among others.”²¹⁷ Unfortunately, even the most basic safety and health precautions to ensure against the contagion of the coronavirus have not been provided for many of these essential workers. As a direct result, essential workers are dying.²¹⁸

Exactly who are these essential workers? They include, “Health care and construction workers . . . delivery drivers, grocery store clerks, security guards, building porters and countless others. In New York City, many essential workers who have shouldered the burden of the pandemic put in long, hard hours for not much money.”²¹⁹ We now know:

There are more than 1 million of these front-line workers who provide health care and social services, keep the

214. Lily Batchelder, *The Silver Spoon Tax*, N.Y. TIMES, July 5, 2020, at SR15.

215. Matthew Haag, *Pandemic Decimates Small Businesses, New York City’s Beating Heart*, N.Y. TIMES Aug. 4, 2020, at A9.

216. Orla McCaffrey, *Progress Slows on Mortgage Payments*, WALL STREET J., Jan. 25, 2021 at A1.

217. Celine McNicholas & Margaret Poydock, *Who Are Essential Workers?*, WORKING ECONOMICS BLOG (May 19, 2020), <https://www.epi.org/blog/who-are-essential-workers-a-comprehensive-look-at-their-wages-demographics-and-unionization-rates/>.

218. *Id.*

219. Winnie Hu & Nate Schweber, *Propping Up a City They Couldn’t Afford to Flee*, N.Y. TIMES, June 16, 2020, at A1.

subway and busses running, make deliveries, clean buildings, and stock shelves at groceries and pharmacies . . .

In the Bronx, the borough with the highest COVID-19 death rate, many essential workers say they lacked adequate defenses against the virus. They were not provided with enough masks and protective gear and had limited access to testing and medical care until well after the outbreak had taken hold.

Health officials are increasingly looking at how and why people are getting sick, including what jobs they have. Many doctors and public health experts believe that front-line workers are at higher risk because they often spend hours around other people and cannot always maintain social distancing.²²⁰

America's struggle with COVID-19 "[h]as revealed much about the nature of work in the U.S."²²¹ As Exhibit 10 depicts, health care—at 30%—comprises the largest category of essential workers; with "food and agriculture" next largest employer group—at 20%; and the category "industrial, commercial, residential facilities and service industries"—at 12%.²²² First responders also include ambulance, police, and fire protection professionals. Unfortunately, robust studies and data regarding the impact of COVID-19 on these professions and occupations is not yet available.

220. Hu & Schweber, *supra* note 219.

221. McNicholas & Poydock, *supra* note 217.

222. *Id.*

Exhibit 10
Essential Workers by Industry

	Total	Percent of industry
<i>All essential workers</i>	55,217,845	100%
<i>Food and agriculture</i>	11,398,233	20.6%
<i>Emergency services</i>	1,849,630	3.3%
<i>Transportation, warehouse, and delivery</i>	3,972,089	7.2%
<i>Industrial, commercial, residential facilities and services</i>	6,806,407	12.3%
<i>Health care</i>	16,679,875	30.2%
<i>Government and community-based services</i>	4,590,070	8.3%
<i>Communications and IT</i>	3,189,140	5.8%
<i>Financial sector</i>	3,070,404	5.6%
<i>Energy sector</i>	1,327,760	2.4%
<i>Water and wastewater management</i>	107,846	0.2%
<i>Chemical sector</i>	271,160	0.5%
<i>Critical manufacturing</i>	1,955,233	3.5%

C. Inherently Vulnerable Occupations

As just one example, on July 27, 2020, *The New York Times* reports, “When the coronavirus engulfed New York, it pummeled the transit work force: So far, 131 transit workers have died from the virus and over 4,000 have tested positive, making the Metropolitan Transportation Authority one of the hardest-hit government agencies in New York.”²²³ We will now provide a brief discussion about the disproportionate impact the coronavirus has had on medical professionals, nursing and retirement home workers, and those employed by meat packing plants.

D. Medical Professionals

By mid-May 2020, the toll on front-line medical workers is apparent. *The New York Times* reports, “The heroes are hurting, badly. Even as

223. Jonah Markowitz & Christina Goldbaum, *The Lives of Transit Workers: Trauma and Constant Dread*, N.Y. TIMES, July 27, 2020, at A8.

applause to honor them swells nightly from city windows, as cookies and thank-you notes arrive at hospitals, the doctors, nurses and emergency responders on the front lines of a pandemic they cannot control are battling a crushing sense of inadequacy and anxiety.”²²⁴ This is of great concern to all who rely on the American healthcare system:

Every day they become more susceptible to post-traumatic stress, mental health experts say. And their psychological struggles could impede their ability to keep working with the intensity and focus their jobs require . . . suicides . . . served as a devastating wake-up call about the mental health of medical workers. Even before the coronavirus pandemic, their professions were pockmarked with burnout and even suicide . . . The World Health Organization issued a report about the pandemic’s impact on mental health, highlighting health care workers as vulnerable. Recent studies of medical workers in China, Canada and Italy who treated COVID-19 patients found soaring rates of anxiety, depression and insomnia . . . Even when new COVID-19 cases and deaths begin to ebb, as they have in some places, mental health experts say the psychological pain of medical workers is likely to continue and even worsen. “As the pandemic intensity seems to fade, so does the adrenaline. What’s left are the emotions of dealing with the trauma and stress of the many patients we cared for,” said Dr. Mark Rosenberg, the chairman of the emergency department at St. Josephs’ Health in Patterson, [New Jersey]. “There is a wave of depression, letdown, true PTSD and a feeling of not caring anymore that is coming.”²²⁵

The AMA publication JAMA Psychiatry observes, “Many studies document elevated suicide rates among medical professionals. This at-risk group is now serving in the front lines of the battle against COVID-19 . . . health care workers . . . [have] concerns about infection, exposure of family members, sick colleagues, shortages of necessary personal protective equipment, overwhelmed facilities, and work stress.”²²⁶ By mid-July 2020, *The Wall Street Journal* reported, “As the pandemic pushes hospitals in the South and West near capacity, the urgent need for available beds has stranded patients in emergency rooms, scrambled ambulances and forced patients to

224. Jan Hoffman, ‘*I Can’t Turn My Brain Off*,’ N.Y. TIMES, May 17, 2020, at A1.

225. *Id.* at A1-8.

226. Reger, *supra* note 188.

relocate hundreds of miles to relieve overcrowded wards.”²²⁷ For example, “[a] dozen Houston-area hospitals had a combined 273 patients holding in emergency rooms for an empty bed . . . including about 40 in need of intensive care, said Darrell Pile, chief executive of the Southeast Texas Regional Advisory Council, which tracks bed availability and helps hospitals coordinate transfers.”²²⁸

E. Nursing and Retirement Home Workers

Early-on, nursing homes and their workers were hard hit by the coronavirus, “[a]s workers are forced to stay home because of potential infection.”²²⁹ As just one example, “St. Joseph’s Senior Home in Woodbridge Township, [New Jersey], called the state for help because about a dozen staffers were sick and the facility couldn’t adequately care for residents . . . the center was forced to bus 78 residents, escorted by state troopers, to a different facility more than 30 miles away.”²³⁰ Spokesperson Tim Killian of Life Care Center of Kirkland, Washington, said, “We lost a third of our staff within the first few days.”²³¹ For perspective, U.S. government data reveal that about “1.4 million elderly and disabled adults live in more than 15,000 nursing homes.”²³²

By May 28, 2020, *The Wall Street Journal* reports, “Nursing homes and assisted-living facilities have emerged as major hot spots for COVID-19. The Kaiser Family Foundation tallied more than 35,000 U.S. deaths in long-term care facilities linked to COVID-19, based on state data.”²³³ We have previously discussed how nursing home outbreaks have taken a disproportionate and heavy toll on residents of color.²³⁴ It can safely be assumed that workers in these working environments are disproportionately comprised by blacks, Latinos, and other persons of color.

227. Melanie Evans, Joseph Walker & Stephanie Armour, *Bursting Hospitals Compound Risks of Virus*, WALL STREET J., July 16, 2020, at A6.

228. *Id.*

229. Anna Wilde Mathews & Jon Kamp, *Nursing Home Staffs Are Stretched Thin*, WALL STREET J., Mar. 27, 2020, at A8.

230. *Id.*

231. *Id.*

232. Yuka Hayashi, *Nursing Home Visitor Ban Raises Difficult Questions*, WALL STREET J., Mar. 28, 2020, at A8.

233. Anna Wilde Mathews & Jon Kamp, *COVID-19 Pandemic Hits Nursing Home Finances*, WALL STREET J. (May 27, 2020), <https://www.wsj.com/articles/COVID-19-pandemic-hits-nursing-home-finances-11590604049>. *COVID-19*

234. See *The Striking Racial Divide in How COVID-19 Has Hit Nursing Homes*, *supra* note 123 (discussing the racial divide of nursing home outbreaks).

F. Meat Packing Plant Workers

By mid-May 2020, meat packing operations are shown to be a particularly prolific environment for coronavirus transmission, “In Cass County, Ind., where a meatpacking outbreak sickened at least 900 people... in Sioux Falls, S.D. where the virus sickened more than 1,000 people at a Smithfield pork processing plant, the outbreak appears to be slowing ... Yet the mayor fears that his city’s progress could be temporary.”²³⁵ This observation comes on the same day that meat processing operations near Amarillo, Texas resulted in “A spike in coronavirus cases two weeks after the state began to open.”²³⁶ A May 26, 2020 front-page story in *The New York Times* warns:

Crowded working conditions and pressure to stay open made meatpacking plants some of the country’s best breeding grounds for coronavirus infections. But as dozens of them begin reopening, meat companies’ reluctance to disclose detailed case counts make it difficult to tell whether the contagion is contained or new cases are emerging even with stronger safety measures in place. The [CDC] said there were nearly 5,000 meatpacking workers infected with the virus as of the end of [April 2020]. But the nonprofit group Food and Environment Reporting Network estimated last week that the number had climbed to more than 17,000 . . . And the outbreaks may be even more extensive. For weeks, local officials received conflicting signals from state leaders and meatpacking companies about how much information to release, according to internal emails from government health agencies obtained through public records requests by Columbia University’s Brown Institute for Media Innovation and provided to *The New York Times*. The mixed messages left many workers and their communities in the dark about the extent of the spread in parts of Iowa, Nebraska and Colorado.²³⁷

By May 15, 2020, *The New York Times* reports, “Coronavirus outbreaks at many meat packing plants across the Midwest have created a backlog of pigs that are ready for slaughter . . . Hundreds of thousands of pigs have grown too large to be slaughtered commercially, forcing farmers to kill them

235. Julie Bosman, Amy Harmon & Mitch Smith, *New Cases in U.S. Slow, Posing Risk of Complacency*, N.Y. TIMES, May 17, 2020, at A1–6.

236. *Id.* at A6.

237. Michael Corkery, David Yaffe-Bellany & Derek Kravitz, *Meat Workers Left in the Dark Under Pressure*, N.Y. TIMES, May 26, 2020, at A1.

and dispose of their carcasses without processing them into food.”²³⁸ Protection of the American food supply becomes a concern as, “[A]round the United States, scores of people are struggling to find enough to eat, lining up at food banks after losing their jobs in the economic fallout of the pandemic. Distribution issues have caused grocery stores and fast-food restaurants to run low on meat.”²³⁹ As data for April and May 2020 become available, it is apparent that “[m]ore than 17,300 meat and poultry processing workers in 29 states were infected and 91 died, according to the [CDC] . . . Plant shut-downs reduced U.S. beef and pork production by more than one-third in late April.”²⁴⁰ By July 2020 it is apparent that “[t]he COVID-19 pandemic has been a debacle for the \$213 billion U.S. meat industry . . . Fast-food chain Wendy’s had to tell customers that some restaurants couldn’t serve hamburgers.”²⁴¹ By July 2020, *The Wall Street Journal* reports:

The U.S. meatpacking industry, which employs about 585,000 workers, became an early epicenter for infections as the coronavirus spread across the country. The United Food and Commercial Workers International Union, which estimates its members represent about 80% of beef-and-pork processing, said last week that 65 meatpacking workers had died due to the coronavirus and more than 4,000 have been infected.²⁴²

By early December 2020 JBS, “the largest U.S. beef processor, faces fresh Covid-19 outbreak in Greeley, Colo., where the company maintains a beef plant that employs about 3,500 people . . . U.S. meatpackers are shoring up defenses to keep Covid-19 out of plants that collectively employ hundreds of thousands of workers, supplying meat”²⁴³

238. Corkery et al., *supra* note 237.

239. Michael Corkery & David Yaffe-Bellany, *With Closure of Meat Plants, Pig Farmers Face a Wrenching Task*, N.Y. TIMES, May 15, 2020, at A1.

240. Jacob Bunge & Jesse Newman, *Meatpackers Slammed by Virus Turn to Robot Butchers—Pandemic Speeds Shift, but Machines Can’t Yet Match Humans*, N.Y. TIMES, July 10, 2020, at A1.

241. *Id.* at A1–A9.

242. Jacob Bunge, *Business News: Meat Plants Tested by Virus Surge*, WALL STREET J., July 3, 2020, at B3.

243. Jacob Bunge, *Virus Risk Sends Beef Workers Home*, WALL STREET J., Dec. 5, 2020, at B3.

VIII. The Trump Administration and COVID-19

President Trump “ha[d] demonstrated utter lack of leadership, utter incompetence. And he’s been profoundly dishonest about the nature of the threat to the American people by downplaying it, by dismissing it, by comparing it to the flu . . . He ha[d] misled the American people to such an extent that lives have been lost in the process . . . Whether that’s because he didn’t care or he was trying to downplay the problem and buoy his electoral prospects mistakenly, or whether it was to buck up the markets, or because he doesn’t care, I don’t know what it was. I just know that he has cost tens of thousands of American lives.

- Ambassador Susan E. Rice
Former National Security Advisor to
President Barack Obama²⁴⁴

The Trump presidency has been distinguished by: impeachment;²⁴⁵ an assortment of legal actions sounding in multiple violations of the U.S. Constitution’s emoluments clause;²⁴⁶ and numerous warnings about his questionable mental health and lack of fitness to serve.²⁴⁷ *The New York Times* observes that President Trump

has spent a lifetime grappling with bankruptcy, fending off creditors, evading tax collectors, defending lawsuits, deflecting regulators, spinning reporters and dueling with estranged wives, usually coming out ahead, at least as he defines it . . . these were crises of his own creation involving human adversaries he knew how to confront.²⁴⁸

Journalists Peter Baker and Maggie Haberman write:

244. Jonathan Capehart, *Susan Rice on Trump’s Coronavirus Response: ‘He has Cost Tens of Thousands of American Lives’*, WASH. POST (Apr. 6, 2020), <https://www.washingtonpost.com/opinions/2020/04/06/susan-rice-trumps-coronavirus-response-he-has-cost-tens-thousands-american-lives/>.

245. Lawrence J. Trautman, *Impeachment, Donald Trump and the Attempted Extortion of Ukraine*, 40 PACE L. REV. 141 (2020); Lawrence J. Trautman, *Presidential Impeachment: A Contemporary Analysis*, 44 U. DAYTON L. REV. 529 (2019).

246. Lawrence J. Trautman, *Grab ‘Em By the Emoluments: The Crumbling Ethical Foundation of Donald Trump’s Presidency*, 17 CONN. PUB. INT. L.J. 169 (2018).

247. Lawrence J. Trautman, *The Twenty-Fifth Amendment: Incapacity and Ability to Discharge the Powers and Duties of Office?*, 67 CLEVE. ST. L. REV. 373 (2019).

248. Peter Baker & Maggie Haberman, *Trump Is Faced With Crisis Too Big for Big Talk*, N.Y. TIMES, Mar. 22, 2020, at A1.

Nothing in his background in business, entertainment or multiple marriages prepared him for the coronavirus pandemic now threatening America's health and wealth. Mr. Trump's performance on the national stage in recent weeks has put on display the traits that Democrats and some Republicans consider so jarring—the profound need for personal praise, the propensity to blame others, the lack of human empathy, the penchant for rewriting history, the disregard for expertise, the distortion of facts, the impatience with scrutiny or criticism. For years, skeptics expressed concern about how he would handle a genuine crisis, and now they know.²⁴⁹

A. Warning Signals Ignored

On May 21, 2020, *The New York Times* reports, “If the United States had begun imposing social distancing measures one week earlier than it did in March, about 36,000 fewer people would have died in the coronavirus outbreak, according to new estimates from Columbia University disease modelers.”²⁵⁰ Columbia researchers further conclude, “If the country had begun locking down cities and limiting social contact on March 1, two weeks earlier than most people started staying home, the vast majority of the nation's deaths—about 83%—would have been avoided”²⁵¹ Under the March 1st scenario for closing down, “about 54,000 fewer people would have died by early May. The enormous cost of waiting to take action reflects the unforgiving dynamics of the outbreak that swept through American cities in early March. Even small differences in timing would have prevented the worst exponential growth.”²⁵² Compelling science has predicted this pandemic for years: “Two recent epidemics—SARS in 2002-03 and its viral cousin, Middle-East respiratory syndrome, which emerged in 2012—made clear that coronaviruses were dangerous.”²⁵³ Consider, “last year [2019], a Chinese scientist . . . published a specific forecast: ‘It is highly likely that future SARS-or-MERS-like coronavirus outbreaks will originate from bats, and there is an increased probability that this will occur in China.’”²⁵⁴ Despite this, “Federal money to help U.S. states and cities prepare for pandemics and

249. Baker & Haberman, *supra* note 248.

250. James Glanz & Campbell Robertson, *Lockdown Delays Cost at Least 36,000 Lives, Data Suggests*, N.Y. TIMES, May 21, 2020, at A1.

251. *Id.*

252. *Id.*

253. Betsy McKay & Phred Dvorak, *The Covid Storm: A Pandemic Was Inevitable. Why Was No One Ready?*, COVID-19, WALL STREET J., Aug. 14, 2020, at A1.

254. *Id.* at A8.

other emergencies fell 35% between fiscal 2003 and fiscal 2020.”²⁵⁵ However, “[i]n Washington in 2005, a powerful player started driving U.S. efforts to become more prepared. President George W. Bush had read author John M. Barry’s ‘The Great Influenza,’ a history of the 1918 flu pandemic, over a long August vacation at his Texas ranch.”²⁵⁶

So what happened that set the stage for this horrific loss of American lives? Susan Rice served as Security Advisor to President Barack Obama and as Obama’s first ambassador to the United Nations. During April 2020, Ambassador Rice says:

As an American, I have been horrified by the president’s [Trump’s] response to the pandemic . . . I had met, myself, with my successor, General Michael Flynn, on four occasions over 12 hours. I handed off over 100 briefing papers to him and shared with him the issues I thought were most salient and most important for him to grasp. Among them, the risk that we would face another pandemic . . . The reality is . . . anybody who knows national security, anybody who knows global health, knows development issues, understood that we were not only inevitably going to face another global pandemic, but in fact, that the world was overdue. [Starting with the swine flu in 2009, followed by Ebola in 2014 and Zika in 2016], pandemic preparedness needed to be a top national security priority. We left behind a 69-page playbook, which was sort of “Pandemic for Dummies.” If you don’t know where to start, start here, and ask these questions and do these things . . . Judging by our lived reality, the dummies have prevailed in imposing their willful ignorance on the rest of us. This administration was not interested in pandemics. It was not prepared for pandemics.²⁵⁷

By late May 2020, President Trump announced his withdrawal of financial support from the WHO and that he was taking, “no responsibility for the deaths of 100,000 Americans from the virus, instead saying China had ‘instigated a global pandemic.’”²⁵⁸ *The New York Times* reports, “[There is] no evidence that the WHO or the government in Beijing hid the extent of the

255. McKay & Dvorak, *supra* note 253, at A8.

256. *Id.* at A9.

257. Capehart, *supra* note 244. See also Troy A. Rule, *Toward a More Strategic National Stockpile*, 9 TEX. A&M L. REV. (forthcoming, 2021) (finding the COVID-19 pandemic has uncovered major deficiencies in the U.S. approach to emergency preparedness).

258. Donald G. McNeil, Jr. & Andrew Jacobs, *Attacking China, Trump Says U.S. Will Cut Ties with W.H.O.*, N.Y. TIMES, May 30, 2020, at A6.

epidemic in China, and public health experts generally view Mr. Trump's charges as a way to deflect attention from his administration's own bungled attempts to respond to the virus's spread in the United States.²⁵⁹ For example:

Mr. Trump supported and generously funded the [WHO] as it fought an Ebola outbreak in Africa for three years, but abruptly turned on the WHO a few weeks ago, when he began accusing the organization of doing too little to warn the world of the spread of the coronavirus. In fact, the agency issued its first alarm on [January] 4, just 5 days after the local health department of Wuhan—at the time a city few non-Chinese had ever heard of—announced a cluster of 27 cases of an unusual pneumonia at a local seafood market. The W.H.O. followed up with a detailed report the next day. On Jan 20 and 21, a WHO field team visited China and reported that there could be human—to—human transmission of the new pneumonia-causing virus. Almost simultaneously, China's leading epidemiologist, who had just completed his own investigation on behalf of the Beijing government, confirmed during a [January] 20 interview on state television that transmission to doctors was occurring in Wuhan, although he said on a recent interview with CNN that local officials had lied about it and even tried to mislead him. Within three days, Beijing had shut off all travel out of Wuhan. Mr. Trump did not order any restrictions on travel from China until [January] 31.²⁶⁰

Over 160,000 deaths later, on November 2, 2020, *The Washington Post* reported that since the COVID-19 outbreak began, President Trump has said forty times that the coronavirus would simply go away.²⁶¹ On December 20, 2020, *The New York Times* documents China's efforts at damage control of the rapidly spreading virus story when, on February 7, 2020, news spread that “Li Wenliang, a doctor who had warned about a strange new viral outbreak only to be threatened by the police and accused of peddling rumors, had died of COVID-19. Grief and fury coursed through social media.”²⁶²

259. McNeil, Jr. & Jacobs, *supra* note 258.

260. *Id.*

261. J.M. Rieger *40 times Trump Said the Coronavirus Would Go Away*, WASH. POST, Nov. 2, 2020, https://www.washingtonpost.com/video/politics/24-times-trump-said-the-coronavirus-would-go-away/2020/04/30/d2593312-9593-4ec2-af7-72c1438fca0e_video.html.

262. Raymond Zhong, Paul Mozur, Jeff Kao & Aaron Krolik, ‘Be Sleek and Silent’: How China Censored Bad News About Covid, N.Y. TIMES, Dec. 20, 2020, at A1.

China's censors "ordered news websites not to issue push notifications alerting readers to his death. They told social platforms to gradually remove his name from trending topic pages. And they activated legions of fake online commentators to flood social sites with distracting chatter"²⁶³

B. The Virus Testing Debacle

On March 19, 2020, *The Wall Street Journal* warns, "When cases of the new coronavirus began emerging several weeks ago in California, Washington State and other pockets of the country, U.S. public-health officials worried this might be The Big One, emails and interviews show. The testing program they rolled out to combat it, though, was a small one."²⁶⁴ Consider:

Limited testing has blinded Americans to the scale of the outbreak so far; impeding the nation's ability to fight the virus through isolating the sick and their contacts, public-health officials say. As of [March 18, 2020], about 6,500 people in the U.S. had tested positive, data compiled by the Johns Hopkins University show, but the [CDC] had reported only 32,000 tests conducted at its facilities and other public-health labs. The CDC last updated its data on Tuesday, its website shows, leaving out an unexpected uptick in testing in recent days While the virus was quietly spreading in the U.S., the CDC had told state and local officials its "testing capacity is more than adequate to meet current testing demands," according to a Feb. 26 agency email viewed by *The Wall Street Journal*, part of a cache of agency communications reviewed by the Journal that sheds light on the early response. The agency's data show it tested fewer than 100 patients that day. When the CDC first dispersed test kits in early February, it shipped them to a network of state and local government labs and restricted testing to people with virus symptoms who had recently traveled to China, where the virus first emerged, or had been exposed to a known case. Federal officials hoped the virus could be contained—even as they disputed alarms from those on the front lines that the CDC's guidelines weren't keeping up with the outbreak's spread.²⁶⁵

263. Zhong et al., *supra* note 262.

264. Weaver et al., *supra* note 6.

265. *Id.*

The CDC announced plans in mid-February 2020 “for a national surveillance effort—by testing samples from people with flulike symptoms—to determine whether the virus was spreading undetected. The effort was to begin in Seattle, New York, and three other cities, but after disagreements about how to proceed, it did not start.”²⁶⁶ Early on, journalists Aaron Williams and Adrian Blanco reported that:

Few states published detailed demographic data on who was being affected by the virus . . . because of the [virus] scale . . . and the unexpected nature of its transmissions. Another hurdle was a standardized CDC form that takes an estimated 30 minutes to fill out . . . [which likely] strain . . . local agencies.²⁶⁷

This early failure proved critical because “without key demographic data, it could be difficult for local and state governments to marshal necessary resources for the hardest-hit communities.”²⁶⁸ As *The New York Times* reported that “deaths are a lagging sign of the virus’s progression because people who die of COVID-19 were typically infected three weeks earlier. But because death counts are not distorted by uneven testing practices, they are ‘a very clearly observed indicator.’”²⁶⁹ The CDC, early in the progression of the virus, “botched an initial test kit developed in an agency lab, retracting many tests. They resisted calls from state officials and medical providers to broaden testing, and health officials failed to coordinate with outside companies to ensure needed test-kit supplies, such as nasal swabs and chemical reagents, would be available . . .”²⁷⁰ A pervasive failure of leadership and planning by the Trump Administration is documented:

Health-care officials say the current state of testing reflects both technical and planning failures, as well as broader failure of imagination. Leaders including President Trump and Health and Human Services Secretary Alex Azar early in the outbreak appeared unable or unwilling to envision a crisis of the scale that has now emerged, and no one stepped up to effectively coordinate among federal agencies or the

266. Eric Lipton et al., *Built for This, C.D.C. Shows Flaws in Crisis*, N.Y. TIMES, June 3, 2020, at A1.

267. Williams & Blanco, *supra* note 101 (quoting spokesperson for the Centers for Disease Control and Prevention Scott Pauley).

268. *Id.*

269. Bosman et al., *supra* note 235, at A6 (quoting Nicholas Reich, biostatistician at the University of Massachusetts, Amherst).

270. Weaver et al., *supra* note 6, at A1, A8.

private-sector labs, medical providers and manufacturers needed for a large-scale testing push, they say.²⁷¹

Unfortunately, *The New York Times* reports during late May 2020, “[W]hile public health experts and government officials have emphasized that widespread testing will be critical to reopening, there is little clear guidance from state and federal agencies on the role employers should play in detecting and tracking the coronavirus.”²⁷² Given this lack of public policy leadership, “businesses are largely on their own in sorting out whether to test—and how to do it—to reassure employees and customers. For now, many companies are just waiting.”²⁷³

By June 2020, reports indicated that it was “early testing mistakes that contributed to a cascade of problems that persist today as the country tries to reopen. [The CDC] [f]ailed to provide timely counts of infections and death, hindered by aging technology and a fractured public health reporting system.”²⁷⁴ Other criticisms of early CDC testing failures include that “it hesitated in absorbing the lessons of other countries, including the perils of silent carriers spreading the infection.”²⁷⁵ Over the months to come, we saw many indications of a preference from the Trump Administration to understate the COVID-19 virus infection data, evidently founded in the belief that fewer reported cases are better for political reelection purposes.²⁷⁶ On July 20, 2020, *The New York Times* reports, “As demand for coronavirus testing surges around the nation, laboratories that process samples are again experiencing backlogs that have left anxious patients and their doctors waiting days—sometimes a week or more—for results.”²⁷⁷

C. Trump in Denial

NBC News reports raw intelligence existed as early as November 2019 describing a new “public health crisis in Wuhan, China.”²⁷⁸ In early January

271. Weaver et al., *supra* note 6, at A1, A8.

272. Steve Eder, Ellen Gabler, Sarah Kliff & Heather Murphy, *Employers Get Little Direction Over Staff Tests*, N.Y. TIMES, May 23, 2020, at A1.

273. *Id.*

274. Weaver et al., *supra* note 6, at A8.

275. *Id.*

276. See *infra* Chapter IX; see also Noah Higgins-Dunn, *Trump Says U.S. Would Have Half the Number of Coronavirus Cases if it Did Half the Testing*, CNBC (Jul. 14 2020), <https://www.cnbc.com/2020/07/14/trump-says-us-would-have-half-the-number-of-coronavirus-cases-if-it-did-half-the-testing.html>.

277. Katherine J. Wu, *Delays from Testing Backlogs May Cloud True Spread of Coronavirus*, N.Y. TIMES, July 20, 2020, at A5.

278. Ken Dilanian, Robert Windrem & Courtney Kube, *U.S. Spy Agencies Collected Raw Intelligence Hinting at Public Health Crisis in Wuhan, China, in November*, NBC NEWS (Apr. 9,

2020, the U.S. Government Accountability Office issues a warning to “federal officials . . . that its readiness for something like a pandemic fell short. . . . GAO investigators found crisis plans didn’t fully account for the huge role the private sector would have to play”²⁷⁹ In late January 2020, trade adviser Peter Navarro sends a memo to President Trump, warning “the coronavirus crisis could cost the United States trillions of dollars and put millions of Americans at risk of illness or death. [This warning] is the highest-level alert known to have circulated inside the West Wing . . . ” at that time.²⁸⁰ Michiko Kakutani writes, “The coronavirus crisis has italicized the horrifying costs (measured in actual deaths) of the president’s contempt for science and expertise and the government agencies meant to handle such emergencies.”²⁸¹ COVID-19 “has also underscored the consequences of Trump’s eagerness to spread misinformation about everything from the magnitude of the threat posed by the virus, to untested and potentially dangerous treatments.”²⁸² By June 2020, an assessment of several months of pandemic policy revealed the CDC and its leadership “faced unprecedented challenges from President Trump, who repeatedly wished away the pandemic. His efforts to seize the spotlight from the public health agency reflected the broader patterns of his erratic presidency: public condemnations on Twitter, a tendency to dismiss findings from scientists, [and] inconsistent policy or decision-making”²⁸³ As reported by *The Wall Street Journal*:

Mr. Trump repeatedly dismissed the threat of a broad U.S. outbreak, saying in late February, “One day it’s like a miracle, it will disappear.” The next day, the first reported American death tied to COVID-19, the disease caused by the coronavirus, occurred in Washington State. Some White House aides learned of complaints about the availability of testing from the media, not the public-health officials in their own government, an administration official familiar with the matter said. Only in the first week of March did discussions in a White House coronavirus task force about the testing shortfall take on a sense of urgency, the person

2020, 3:43 PM), <https://www.nbcnews.com/politics/national-security/u-s-spy-agencies-collected-raw-intel-hinting-public-health-n1180646>.

279. Weaver et al., *supra* note 6, A8.

280. Maggie Haberman, *Trade Adviser Warned White House in January of Risks of a Pandemic*, N.Y. TIMES (Apr. 6, 2020), <https://www.nytimes.com/2020/04/06/us/politics/navarro-warning-trump-coronavirus.html>.

281. Michiko Kakutani, Book Review, *Pandemic Notebook: Finding Solace and Connection in Classic Books*, N.Y. TIMES, (2020) <https://www.nytimes.com/2020/05/05/books/review/coronavirus-new-york-life-michiko-kakutani.html>.

282. *Id.*

283. Weaver et al., *supra* note 6, at A1, A8.

said. Even then, Mr. Azar defended the testing program in television interviews including twice on ABC News that week, citing the low number of confirmed cases—at a time when almost no tests were available to detect them.²⁸⁴

Just days after the tragic death of Mr. George Floyd at the hands of several Minneapolis police officers, “with a nation on edge, ravaged by disease, hammered by economic collapse, divided over lockdowns and even face masks and now convulsed again by race, President Trump’s first instinct has been to look for someone to fight.”²⁸⁵ The front page of *The New York Times* states, “Over the past week, America reeled from 100,000 pandemic deaths, 40 million people out of work and cities in flames over a brutal police killing of a subdued black man.”²⁸⁶ In response, “Mr. Trump was on the attack against China, the World Health Organization, Big Tech, former president Barack Obama, a cable television host and the mayor of a riot-torn city.”²⁸⁷ In response to the Trump Administration’s demonstrated pattern of failing to confront the pandemic over many months, Congressman Raskin states:

A large and unwieldy stack of paper is not a plan. A plan is a comprehensive and coordinated strategy for victory and we haven’t seen anything like a plan, no one has shown us anything.

Blaming other countries is not a plan. Blaming China is not a plan. Blaming China is not even a good excuse for the lethal incompetence and disinformation of President Trump. China’s early cover-up of the disease only deepens the responsibility and complicity of President Trump who, on 37 different occasions as I’ve demonstrated by submissions to this committee, defended and excused and praised the Chinese government and President Xi.

A plan is a plan, and we haven’t heard what the plan is. And this is what has bedeviled us from the beginning. Mr. Chairman, we’ve got 4.4 million cases [as of July 31, 2020]. We lead the world in case count. We lead the world in death count. More than 153,000 Americans are dead right now.

Fifty-four million people filed for unemployment benefits. We’ve seen a one-third drop in GDP; a one-third drop,

284. Weaver et al., *supra* note 6, at A1, A8.

285. John Eligon, Matt Furber & Campbell Robertson, *Spreading Unrest Leaves A Nation on Edge: President Needles as America Burns*, N.Y. TIMES, May 31, 2020, at A1.

286. *Id.*

287. *Id.*

unprecedented in economic activity. The chart behind me demonstrates the astonishing and terrifying growth of this disease. It took us 98 days to reach 1 million cases. It took us 44 days to reach 2 million cases. It took 26 days to reach 3 million cases. And it took us only 15 days to reach 4 million cases.²⁸⁸

Rather than consider the pandemic as an opportunity to provide strong federal executive leadership, the goal of the Trump Administration appeared to be:

to shift responsibility for leading the fight against the pandemic from the White House to the states. [It] would become at once a catastrophic policy blunder and an attempt to escape blame for a crisis that has engulfed the country . . . [maybe] one of the greatest failures of presidential leadership in generations.²⁸⁹

The New York Times observes, “Over a critical period beginning in mid-April, President Trump and his team convinced themselves that the outbreak was fading, that they had given state governments all the resources they needed to contain its remaining ‘embers’ and that it was time to ease up on the lockdown.”²⁹⁰

D. Infections Increase at an Alarming Rate

In April 2020, as states made plans to reopen their economies, CDC Director Robert Redfield warns that a second wave of coronavirus in the United States “will be far more dire because it is likely to coincide with the start of the [2020] flu season.”²⁹¹ By May 20, 2020, additional concern appeared that “the prospect of a second wave of coronavirus infection across Europe is no longer a distant theory, according to the director of the EU

288. *The Urgent Need for a Nat’l Plan to Contain the Coronavirus: Hearing on the Coronavirus Crisis Before the Coronavirus Crisis Select Subcomm. Of the Comm. On Oversight and Reform*, 116th Cong. (2020) (statement by Rep. Jamie Raskin).

289. Michael D. Shear et. al., *Passing Off Virus Burden, White House Fueled Crisis*, N.Y. TIMES, July 19, 2020, at A1.

290. *Id.*; see also Robert Faris et. al., *Polarization and the Pandemic: American Political Discourse*, BERKMAN KLEIN CTR. FOR INTERNET & SOC’Y AT HARV. U. (Oct. 2020) (describing how American media ecosystems are able to sustain different worldviews and contribute to the mishandling and miscommunication of the pandemic).

291. Lena H. Sun, *CDC Director Warns Second Wave of Coronavirus is Likely to be Even More Devastating*, WASH. POST (Apr. 21, 2020, 3:41 PM), <https://www.washingtonpost.com/health/2020/04/21/coronavirus-secondwave-cdcdirector/>.

agency responsible for advising governments—including the UK—on disease control.”²⁹² Dr. Andrea Ammon, Director of the European Centre for Disease Prevention and Control (“ECDC”), says, “[T]he question is when and how big [a second wave will be], that is the question in my view.”²⁹³ But Dr. Ammon warns:

Looking at the characteristics of the virus, looking at what now emerges from the different countries in terms of population immunity—which isn’t all that exciting, between 2% and 14%, that leaves still 85% to 90% of the population susceptible—the virus is around us, circulating much more than January and February . . . I don’t want to draw a doomsday picture but I think we have to be realistic. That it’s not the time now to completely relax.”²⁹⁴

On May 27, 2020, journalists William Wan and Carolyn Johnson contend, “There’s a good chance the coronavirus will never go away. Even after a vaccine is discovered and deployed, the coronavirus will likely remain for decades to come, circulating among the world’s population. Experts call such diseases endemic—stubbornly resisting efforts to stamp them out. Think measles, HIV, chickenpox.”²⁹⁵ By Memorial Day 2020, large crowds gathered and party-like atmospheres are observed at: Daytona Beach, Florida; Houston, Texas; and Lake of the Ozarks, Missouri.²⁹⁶ Less than a week later, “[h]ealth officials in Missouri [scrambled] to contact ‘mass numbers of unknown people’ after an attendee at crowded pool parties at Lake of the Ozarks over Memorial Day weekend tested positive for COVID-19.”²⁹⁷ By June 1, 2020, “[a]lready, daily death tolls are surging across the developing world, and in some cases now rival the worst days of the pandemic in Europe. Brazil has joined the U.S. as the only countries where more than 1,000 people

292. Daniel Boffey, *Europe Should Brace for Second Wave, Says EU Coronavirus Chief*, THE GUARDIAN (May 20, 2020), <https://www.theguardian.com/world/2020/may/20/top-eu-doctor-europe-should-brace-itself-for-second-wave-of-coronavirus>.

293. *Id.*

294. *Id.*

295. William Wan & Carolyn Y. Johnson, *Coronavirus May Never Go Away, Even With a Vaccine*, WASH. POST (May 27, 2020, 8:38 PM), <https://www.washingtonpost.com/health/2020/05/27/coronavirus-endemic/>.

296. Meagan Flynn, *‘An International Example of Bad Judgment’: Local Officials Stunned by Raucous Memorial Day Festivities*, WASH. POST (May 26, 2020), <https://www.washingtonpost.com/nation/2020/05/26/memorial-day-weekend-crowds-coronavirus/>. See also Jacey Fortin & Johnny Diaz, *Throngs Urged to Quarantine After ‘Record Weekend’ at Lake of the Ozarks*, N.Y. TIMES, May 27, 2020, at A7.

297. *Tracking an Outbreak, Around the U.S. and the World, Missouri: Attendee at Ozarks Party Tests Positive for COVID-19*, N.Y. TIMES, May 31, 2020, at 4.

are regularly dying each day from the pandemic.”²⁹⁸ Mexico, America’s major trading partner, “now ranks third in the tally of daily deaths behind the U.S. and Brazil and ahead of the U.K.”²⁹⁹ Around the same time, “[t]he emergence of a string of fresh coronavirus outbreaks in Europe has prompted a debate about the speed of lifting lockdowns, with some politicians calling for selected restrictions to remain in place as governments reopen their economies.”³⁰⁰

As U.S. coronavirus deaths reached 100,000 on May 27, 2020, “[s]ome experts are saying there is a good chance the virus will never go away, even after a vaccine is discovered and deployed. Experts in epidemiology, disaster planning and vaccine development say embracing that reality is crucial to the next phase of America’s response.”³⁰¹ On the same day, California Governor Gavin Newsom says, “I’ve been overwhelmed by 40 million Americans who live in the state of California, the vast majority doing the right thing, recognizing that this pandemic is not behind us . . . We’re not into a second wave. We still haven’t gotten through the first wave.”³⁰² Of global concern, India reopened at the end of May 2020, while it’s coronavirus cases are skyrocketing, putting it among the world’s most worrisome pandemic zones in recent weeks, “lifting its lockdown at what experts fear may be the worst time.”³⁰³ Just a few weeks later, by the end of June 2020, *The New York Times* reported, “governors, mayors, investors and others across the United States woke up to news that was impossible to ignore. More than 35,000 new coronavirus cases had been identified the day before. It was the highest number of cases reported in a single day since late April.”³⁰⁴ By the end of June, “[t]he news [kept] getting worse. Florida, Texas and Oklahoma reported their highest single-day totals. New York instituted a quarantine for some [out-of-state travelers] . . . It was as if the country had found itself back in March—at the start of the pandemic”³⁰⁵ Several weeks later, during mid-August 2020, *The Wall Street Journal* reports, “Total cases in the U.S. topped 5.2 million, about a quarter of the

298. David Luhnow & Joe Parkinson, *Developing Countries Walk a Tightrope*, WALL STREET J., May 26, 2020, at A9.

299. *Id.*

300. Bojan Pancevski, *Clusters of New Cases Emerge in Europe*, WALL STREET J., May 26, 2020, at A10.

301. Marisa Lati, et. al., *Experts Say Coronavirus Might Never Go Away As U.S. Death Toll Reaches 100,000*, WASH. POST (May 27, 2020), <https://www.washingtonpost.com/nation/2020/05/27/coronavirus-update-us/>.

302. Lateshia Beachum, *California Governor Says the Virus’s First Wave There is Not Over*, WASH. POST, May 27, 2020, at [XX].

303. Kai Schultz & Sameer Yasir, *Even as Caseload Spirals, Nation Marches Toward Reopening*, N.Y. TIMES, May 30, 2020, at A9.

304. Matt Phillips & Anupreeta Das, *U.S. Staggers Back on Ropes as Virus Soars*, N.Y. TIMES, June 25, 2020, at A1.

305. *Id.*

world-wide total . . . [with] confirmed death[s] . . . surpass[ing] 167,000 . . . [as of Aug. 11, 2020] . . . report[ing] 1,499 deaths, its highest daily count since May 27, with 1,518 deaths.”³⁰⁶

E. Face Masks and Social Distancing

For some unknown, and illogical reason, President Trump downplayed the wearing of face masks and importance of social distancing for months, refusing to be seen wearing a face mask himself. For months, conservative media outlets equated the wearing of face masks as nothing more than a fake news political ploy of the Democratic Party. By mid-July 2020, the AMA published scientific study results and disclosed that the “CDC reviewed the latest science and affirms that cloth face coverings are a critical tool in the fight against COVID-19 that could reduce the spread of the disease, particularly when used universally within communities.”³⁰⁷ Experience with the virus has shown that “there is increasing evidence that cloth face coverings help prevent people who have COVID-19 from spreading the virus to others.”³⁰⁸ Experts counsel:

‘Cloth face coverings are one of the most powerful weapons we have to slow and stop the spread of the virus—particularly when used universally within a community setting. All Americans have a responsibility to protect themselves, their families, and their communities.’ This review included two case studies out today, one from JAMA, showing that adherence to universal masking policies reduced SARS-CoV-2 transmission within a Boston hospital system, and one from CDC’s Morbidity and Mortality Weekly Report (MMWR), showing that wearing a mask prevented the spread of infection from two hair stylists to their customers in Missouri.³⁰⁹

During mid-August 2020, Princeton economics professor, and former Vice Chairman of the U.S. Federal Reserve System, Alan S. Blinder writes:

306. Jennifer Calfas & Allison Prang, *New Cases Tick Up Again in the U.S.*, WALL STREET J., Aug. 14, 2020, at A6.

307. Press Release, Centers of Disease Control, CDC Calls on Americans to Wear Masks to Prevent COVID-19 Spread (July 14, 2020), <https://www.cdc.gov/media/releases/2020/p0714-americans-to-wear-masks.html>.

308. *Id.*

309. *Id.*

The U.S. government's disastrous failure in dealing with the coronavirus pandemic is a tragedy in many acts—from the [CDC]'s initial errors with test kits and masking, to a knowing president who confuses magical thinking with thinking, even to craven political considerations when the pandemic was seen as a blue-state problem, and much more³¹⁰

IX. A Critique of the Data

It may be the case that people who were suffering from the virus died before being able to get to the hospital or before being tested. It may also be that the number of deaths increased as a function of other causes, as well, such as people deciding against seeking medical attention for urgent conditions, perhaps out of concern about contracting the virus . . . Studies indicate that those who have died of the virus might have been expected to have lived another 10 years on average.

- Anthony S. Fauci,

Immunologist, Physician and Director of the National Institute of Allergy and Infectious Diseases³¹¹

An editorial appearing mid-May 2020 in *The Lancet* states, “The [CDC] the flagship agency for the nation’s public health has seen its role [minimized] and bec[ame] an ineffective and nominal adviser in the response to contain the spread of the virus.”³¹² After several months of reflection and confirmation of the facts and chronology, *The New York Times* reports, “Americans returning from China landed at U.S. airports by the thousands in early February, potential carriers of a deadly virus who had been diverted to a handful of cities for screening by the [CDC].”³¹³ It is now clear that U.S. public health efforts were “frustrated as the CDC’s decades-old notification system delivered information collected at the airports that was riddled with duplicative records, bad phone numbers and incomplete addresses. For weeks, officials tried to track passengers using lists sent by the CDC, scouring information about each flight in separate spreadsheets.”³¹⁴ Of particular

310. Alan S. Blinder, *Individual Choice is a Bad Fit for COVID Safety*, WALL STREET J., Aug. 13, 2020, at A15.

311. Philip Bump, *Fauci Puts it Bluntly: Coronavirus Deaths are Undercounted*, WASH. POST (May 12, 2020), <https://www.washingtonpost.com/politics/2020/05/12/fauci-puts-it-bluntly-coronavirus-deaths-are-undercounted/>.

312. *Reviving the U.S. CDC*, 395 THE LANCET 1521 (May 16, 2020), [https://www.thelancet.com/journals/lancet/article/PIIS0140-6736\(20\)31140-5/fulltext](https://www.thelancet.com/journals/lancet/article/PIIS0140-6736(20)31140-5/fulltext).

313. Lipton et al., *supra* note 266, at A1.

314. *Id.*

concern, “when the system went offline in mid-February, briefly halting the flow of passenger data, local officials listened in disbelief on a conference call as the CDC responded to a possibility that infected travelers might slip away. ‘Just let them go,’ two of the health officials remember being told.”³¹⁵ Former emergency physician Elisabeth Rosenthal writes in *The New York Times*:

The White House, the [CDC] and the states are debating the proper theoretical (and politically beneficial) way to tally COVID-19 deaths. One group, led by President Trump, feels the current tally is too high. The other, including Dr. Anthony Fauci, the nation’s top infectious disease expert, thinks it may be an underestimate. Though my mother almost certainly died of Covid (she met the clinical case definition), her death was, as far as I can tell, not counted—and certainly will not be if the White House gets its way. Unfortunately, counting Covid deaths and cases has been turned into a battle of semantics, chance, bureaucracy, politics and immediate circumstance, rather than science. And we are fooling ourselves: Not having an accurate, standard, honest, nationwide way to tally Covid cases will only add to the current tragedy . . . Not testing or transparently reporting Covid cases is a great way to keep numbers low. As President Trump said when he balked at having American passengers come ashore from an infected cruise ship on March 7, ‘I like numbers being where they are.’ For states, avoiding robust testing and reporting is a good way to make sure new cases decrease for 14 days (a C.D.C. recommendation for reopening). But it deprives those same states of crucial information for rational decisions. For assisted-living facilities, nursing homes and other businesses, there is pressure not to know . . . By not testing residents like my mom, her facility could report for weeks that it had only four positive cases—and technically be telling the truth. What we need instead is a single national testing strategy clearly stating who must be tested, when and with which test. On the morning of March 9, the last day I saw my mother, the facility had gone into lockdown, unknown to me. The director,

315. *Id.*

kindly, brought my mom out to the garden so we could have
a socially distant visit³¹⁶

A. CDC and the Data Challenge

In waging the war against the COVID-19 pandemic, “nothing has been more critical than getting fast, accurate information on how the virus is spreading, who is getting sick, and how best to treat them and how quickly the country can reopen.”³¹⁷ Unfortunately, the necessary managerial information has proven “difficult for the agency’s antiquated data systems, many of which rely on information assembled by or shared with local health officials through phone calls, faxes and thousands of spreadsheets attached to emails . . . is not integrated, comprehensive or robust enough, with some exceptions, to depend on in real time.”³¹⁸ For example:

The CDC could not produce accurate counts of how many people were being tested, compile complete demographic information on confirmed cases or even keep timely tallies of deaths. Backups on at least some of these systems are made on recordable DVDs, a technology that was state-of-the-art in the late 1990s. The result is an agency that had blind spots at just the wrong moment, limited in its ability to gather and process information about the pathogen or share it with those who need it most: front-line medical workers, government health officials and policymakers. “That specific, granular data has huge implications,” said Julie Fisher, a professor of microbiology at Georgetown University preparedness for emerging diseases. “We lost precious time in decision-making and putting public health resources to use.”³¹⁹

As months passed, it became very clear President Trump viewed the accurate reporting of coronavirus data as a threat to his 2020 reelection prospects. By May 2020, the *Wall Street Journal* reported, “[A] recently launched federal effort to collect data on the impact of the coronavirus in nursing homes will leave the full toll unclear, because a new rule doesn’t require facilities to report deaths and infections that occurred before early

316. Elisabeth Rosenthal, Opinion, *It’s Time to Count All the Covid Cases*, N.Y. TIMES, May 26, 2020, at A22.

317. Lipton et al., *supra* note 266, at A1.

318. *Id.*

319. *Id.*

May.”³²⁰ Issued on May 8, 2020, these new rules require “nursing homes to submit data on coronavirus cases to the . . . [CDC] . . . the information has to go back only to the week leading up to their first filing, which was supposed to occur by May 17, while older data are optional.”³²¹ By mid-July 2020, *The New York Times* reports, “As hard as the United States works to control coronavirus, it keeps running into problems caused by its fragmented health system, a jumble of old and new technology, and data standards that don’t meet epidemiologists’ needs.”³²² As of mid-July 2020, *The New York Times* notes:

Health departments track the virus’s spread with a distinctly American patchwork: a reporting system in which some test results arrive via smooth data feeds but others come by phone, email, physical mail or fax, a technology retained because it complies with digital privacy standards for health information. These reports often come in duplicate, go to the wrong health department, or are missing critical information such as a patient’s phone number or address. The absence of a standard digital process is hampering case reporting and contact tracing, crucial to slowing the spread. Many labs joined the effort but had limited public health experience, increasing the confusion.³²³

With criticism of the Trump Administration’s handling of the pandemic growing daily, by July 22, 2020, *The New York Times* reports former CDC Director, Dr. Thomas R. Frieden as pleading with “state health officials to start reporting coronavirus data in a detailed and uniform fashion, rather than the disorganized hodgepodge most states now produce. Other . . . experts said that such guidelines were long overdue and that the agency’s current director . . . should have mandated them months ago.”³²⁴ Additionally, “the lack of clear C.D.C. guidance—even on simple issues like data collection—was an example of the administration’s ineptitude and ineffective leadership in the face of a growing crisis, experts said.”³²⁵ In July 2020, the CDC reports, “[T]he number of people infected with the coronavirus in different

320. Anna Wilde Mathews, *New Rules Leave Full Toll at Nursing Homes Unclear*, WALL STREET J., May 22, 2020, at A7.

321. Anna Wilde Mathews & Jon Kamp, *U.S. to Pause Routine Nursing-Home Checks*, WALL STREET J., Mar. 24, 2020, at A9.

322. Sarah Kliff & Margot Sanger-Katz, *Reams of Paper Cripple Efforts to Trace Cases*, N.Y. TIMES, July 14, 2020, at A1.

323. *Id.*

324. Donald G. McNeil Jr., *Former Head of Health Agency Urges States to Standardize Data*, N.Y. TIMES, July 22, 2020, at A9.

325. *Id.*

parts of the United States was anywhere from two to thirteen times higher than the reported rates for those regions . . . [t]he finding . . . people . . . [without] symptoms or did not seek medical care may have kept the virus circulating.”³²⁶

B. Trump Administration Complicit in Data Cover-Up?

Profoundly alarming to those of us who believe in science, “the Trump administration has ordered hospitals to bypass the [CDC] and sell all Covid-19 patient information to a central database in Washington beginning on Wednesday [July 15, 2020]. The move has alarmed health experts who fear the data will be politicized or withheld from the public.”³²⁷ *The New York Times* reports:

The new instructions were posted in a little-noticed document on the Department of Health and Human Services website. From now on, the Department—not the CDC—will collect daily reports about the patients that each hospital is treating, the number of available beds and ventilators, and other information vital to tracking the pandemic.

Officials say the change will streamline the data gathering and assist the White House coronavirus task force in allocating scarce supplies like personal protective gear and remdesivir, the first drug shown to be effective against the virus. But the Health and Human Services database that will receive new information is not open to the public, which could affect the work of scores of researchers, modelers and health officials who rely on CDC data to make projections and crucial decisions.

“Historically, CDC. has been the place where public health data has been sent, and this raises questions about not just access for researchers but access for reporters, access for the public, to try to better understand what is happening with the outbreak,” said Jen Kates, the director of global health and HIV policy with the nonpartisan Kaiser Family Foundation.”³²⁸

326. Sheryl Gay Stolberg, *Trump Administration to Collect Hospitals' Virus Data from Now On*, N.Y. TIMES, July 15, 2020, at A5.

327. *Id.*

328. Dunn, *supra* note 276.

On July 14, 2020, [P]resident Trump says, “If we did half the testing we would have half the cases.”³²⁹ Just a few days later *The New York Times* reports, “[T]he Trump Administration has balked at providing billions of dollars to fund coronavirus testing and shore up federal health agencies as the virus surges across the country, complicating efforts to reach agreement on the next round of pandemic aid.”³³⁰ Pressuring Senate Republicans to eliminate funds:

administration officials . . . pushed to zero out the funding for testing and for the nation’s top health agencies, and to cut the Pentagon funding to \$5 billion, according to another person familiar with the discussions . . .

Though few, if any, of the administration’s proposals are likely to be accepted by Senate Republicans, the disconnect reflects a deep rift between lawmakers who have come to see approving another robust coronavirus relief package as a public health and political imperative and a White House that has been reluctant to follow the lead of the CDC or to assume responsibility for implementing a rigorous testing program across the country.³³¹

By mid-August 2020, *The Wall Street Journal* observes, “Public release of hospital data about the coronavirus pandemic has slowed to a crawl, one month after the federal government ordered states to report it directly to the Department of Health and Human Services and bypass the [CDC].”³³² Details include:

Key indicators, such as estimates of the portion of inpatient beds occupied by COVID-19 patients, are lagging by a week or more, making it harder for citizens and local officials to get a handle on how the pandemic is progressing and to allocate supplies of antiviral drugs and personal protective equipment, public-health experts say. The decision to switch data reporting in the middle of a public-health crisis was reckless, researchers and former public-health officials say . . .

329. Dunn, *supra* note 276.

330. Emily Cochrane, *Trump Proposes Draining Billions From Next Relief Bill*, N.Y. TIMES, July 19, 2020, at A10.

331. *Id.*

332. Robbie Whelan, *Covid Reporting Beset by Delays*, WALL STREET J., Aug. 12, 2020, at A7.

The data hospitals report to the federal government is important in part because it helps determine how officials allocate supplies of remdesivir, an antiviral drug manufactured by Gilead Sciences, Inc. that has been distributed by the U.S. since it was authorized for emergency use in May .

..

In early July, the White House coronavirus task force asked the CDC to add dozens of new elements to its National Health Safety Network system, which has been in place for about fifteen years. The White House gave the CDC a deadline of two to three days, the HHS official said, but the CDC said it needed two to three weeks to implement changes.³³³

The next day, *The New York Times* reports, “[N]early three dozen current and former members of a federal health advisory committee, including nine appointed or reappointed by Health Secretary Alex M. Azar, are warning that the Trump administration’s new coronavirus database is placing an undue burden on hospitals and will have ‘serious consequences on data integrity.’”³³⁴ Furthermore, “[t]he health care technology firm that is helping to manage the Trump Administration’s new coronavirus database has refused to answer questions from Senate Democrats about its \$10.2 million contract, citing a nondisclosure agreement it signed with the Department of Health and Human Services.”³³⁵ *The New York Times* reports, “[t]he specter of possible censorship by the administration of [Governor] Ron DeSantis, a Republican allied with President Trump, exploded into the frantic pandemic news cycle, and Ms. Jones’s defiance came to symbolize the growing questions over Florida’s handling of the pandemic.”³³⁶ As 2021 begins and congressional passage of economic stimulus and relief takes place just days before, House Speaker Nancy Pelosi observes,

Communities of color [were] so hard hit . . . [a]nd now we see why. They didn’t believe in the science, we knew that. But they did believe in herd immunity. And that’s why they

333. Whelan, *supra* note 332.

334. Sheryl Gay Stolberg, *Health Experts Raise Alarm Over Federal Rules on Hospital Data*, N.Y. TIMES, Aug. 13, 2020, at A8.

335. Sheryl Gay Stolberg, *Firm Running Database Refuses to Answer the Senate*, N.Y. TIMES, Aug. 15, 2020, at A5; *see also* Patricia Mazzei, *Whistle Blown, Job Lost, and Now a Raid on a Data Scientist*, N.Y. TIMES, Dec. 13, 2020, at A4.

336. *Id.*

never, they never could come up to that first bill pillar, to crush the virus.³³⁷

C. Big Data Fails the Poor

Professors Robertson and Ramos discussed the importance and use of big data to provide critical analysis of medical and public health data and warn:

[T]he potential to ignore a large portion of the population, because the sources of much of the data—social media, wearables, electronic health records and insurance claims – are not utilized by . . . [the poor]. These omitted populations, such as minorities and low-income individuals, are at a greater risk for health disparities and are the very populations that could most benefit from research and intervention.³³⁸

D. FDA Halts Seattle Program?

In May 2020, Bill Gates and public health officials in Seattle promoted a new, innovative coronavirus testing program as a way to conduct wider surveillance on the spread of the virus.³³⁹ *The New York Times* reports:

The program involved sending home test kits to both healthy and sick people in the hope of conducting the kind of widespread monitoring that could help communities safely reopen from lock-downs. Researchers and public health authorities already had tested thousands of samples, finding dozens of previously undetected cases. But the program, a partnership between research groups and the Seattle

337. Press Release, Pelosi Remarks at Media Availability on Coronavirus Relief & Omnibus Agreement with Leader Schumer, (Dec. 21, 2020), <https://pelosi.house.gov/news/press-releases/pelosi-remarks-at-media-availability-on-coronavirus-relief-omnibus-agreement>; see also Klaus Desmet & Romain T. Wacziarg, *Understanding Spatial Variation in COVID-19 Across the United States*, (NBER, Working Paper No. w27329 June 2020) (finding fewer deaths and cases in counties where Donald Trump received a high share of the vote in 2016, partly explaining the emerging political divide over lockdown and reopening policies, but that this correlation is reversed when controlling for shares of minority groups).

338. Sarah E. Malanga, Jonathan D. Loe, Christopher Robertson & Kenneth S. Ramos, *Who's Left out of Big Data? How Big Data Collection, Analysis, and Use Neglect Populations Most in Need of Medical and Public Health Research and Interventions*, BIG DATA, HEALTH LAW, AND BIOETHICS 98 (I. Glenn Cohen et al. eds., 2018).

339. Mike Baker, *F.D.A. Halts Seattle Program Backed by County and Gates*, N.Y. TIMES, May 16, 2020, at A17.

and King County public health department that had been operating under authorization from the state, was notified this week that it now needs approval directly from the federal government. Officials from the food and drug administration told the partnership to cease its testing and reporting until the agency grants further approval. “Please discontinue patient testing and return of diagnostic results to Patients until proper authorization is obtained,” the FDA said in a memo. The delay is the latest evidence of how a splintered national effort to develop, distribute and ramp up testing has left federal regulators struggling to keep up. Amid concerns about the reliability of a burgeoning number of coronavirus antibody tests—which check whether someone may have previously had the virus—the FDA responded last week by ordering companies to submit data proving the tests’ accuracy.³⁴⁰

X. Technological Challenges, Opportunity, and Impact

Through our scientific and technological developments we have lifted our heads to the skys and yet our feet are still firmly planted in the muck of barbarism and racial hatred. Indeed this is America’s chief moral dilemma. And unless the Nation grapples with this dilemma forthrightly and firmly, she will be relegated to a second rate power in the world. The price that America must pay for the continued oppression of the Negro is the price of its own destruction.

- Dr. Martin Luther King, Jr.

Rally to Support Freedom Riders First Baptist Church,
Montgomery, Alabama
May 21, 1961³⁴¹

A. Big Tech, COVID-19 Contact Tracing Versus Privacy Rights

By May 18, 2020, *The Wall Street Journal* reports, “[t]he continent that helped lead a backlash against Silicon Valley’s appetite for personal data is increasingly aligning itself with technology built by Apple Inc. and Alphabet

340. Baker, *supra* note 339.

341. Martin Luther King, Jr., President of the Southern Christian Leadership Conference, Remarks at a Rally to Support the Freedom Riders, First Baptist Church, Montgomery, Al. (May 21, 1961) (on file with Stanford U., The Martin Luther King, Jr. Res. & Edu. Inst., <https://kinginstitute.stanford.edu/king-papers/documents/address-freedom-riders-rally-first-baptist-church>).

Inc.'s Google to blaze a path out of the coronavirus pandemic."³⁴² In addition, "[c]ountries across Europe like others in the developed world, are building their own smartphone apps to help conduct contact tracing. The aim of the apps is to help public-health officials identify and test everyone who has spent time near an infected person, to better understand and contain the virus."³⁴³ Apple is constantly defending against personal privacy issues during recent years. Now, with the coronavirus crisis:

The movement toward Apple and Google in Europe is being driven in part by the same officials who previously have gone after U.S. tech giants over privacy concerns and other issues. European privacy regulators say they have a preference for systems like the one being developed by Apple and Google because they use a decentralized approach to data gathering—collecting little of it centrally and keeping most of it on users' phones. Margrethe Vestager, the European Commission's competition czar, has long tangled with Apple and Google on anticompetitive concerns. She is now backing the type of technology the pair is using for contact tracing, in part to promote an interoperable framework across the continent. "It's important to have a common European approach, and right now the tendency is toward a decentralized system," Ms. Vestager told the European Union's parliament last week, adding that she hopes such apps will "enable at least some traveling during the summer period." A rival approach for building contact-tracing apps involves collecting and storing data at centralized depositories, which governments or health-care systems can hold onto and use. France, Norway and the U.K. have said they want public-health authorities to control and learn from the data generated from tracing the contacts of tens, if not hundreds, of thousands of infected citizens over the coming months.³⁴⁴

On July 22, 2020, *The New York Times* revealed that, "South Korea has been praised for making effective use of digital tools to contain the coronavirus, from emergency phone alerts to aggressive contact tracing based on a

342. Sam Schechner & Jenny Strasburg, *Europe Embraces Big Tech For Tracing*, WALL STREET J., May 18, 2020, at A7.

343. *Id.* at B3.

344. *Id.* at A7.

variety of data.”³⁴⁵ However, it is now known that “one pillar of that strategy, a mobile app that helps enforce quarantines, had serious security flaws that made private information vulnerable to hackers, a software engineer has found.”³⁴⁶

B. China, Iran, Russia and Hacks of COVID-19 Research

Data breaches and cybertheft continue to be a costly problem, attracting criminals to individuals and institutional sources having anything of value.³⁴⁷

New technologies result in increased cyber vulnerabilities.³⁴⁸ It should come as no surprise that “Chinese hackers are targeting American universities, pharmaceutical and other health-care firms in a bid to steal intellectual property related to coronavirus treatments and vaccines and the intrusions may be jeopardizing progress on medical research, U.S. officials said in an alert.”³⁴⁹ Consider that U.S.:

[a]dministration officials said one technique Iran has favored is so-called password spraying, a relatively unsophisticated hacking technique that attempts to compromise an organization by rapidly guessing common account-login passwords.

Among Iran’s recent targets, cybersecurity researchers say, was the pharmaceutical company Gilead Sciences Inc., which has produced the antiviral drug remdesivir that was

345. Choe Sang-Hun, Aaron Krolak, Raymond Zhong & Natasha Singer, *Quarantine App Left Data Exposed*, N.Y. TIMES, July 22, 2020, at B1.

346. *Id.*

347. David D. Schein & Lawrence J. Trautman, *The Dark Web and Employer Liability*, 18 COLO. TECH. L.J. 49 (2020); Lawrence J. Trautman, *Managing Cyberthreat*, 33 SANTA CLARA HIGH TECH. L.J. 230 (2016); Lawrence J. Trautman & Janet Ford, *Nonprofit Governance: The Basics*, 52 AKRON L. REV. 971 (2018); Robert W. Emerson & Lawrence J. Trautman, *Lessons About Franchise Risk From YUM! Brands and Schlotsky’s*, 24 LEWIS & CLARK L. REV. 997 (2020); Lawrence J. Trautman, Mohammed T. Hussein, Emmanuel U. Opara & Shahedur Rahman, *Posted: No Phishing*, 8 EMORY CORP. GOV. & ACCT. REV. (forthcoming 2021); Lawrence J. Trautman & Peter C. Ormerod, *Industrial Cyber Vulnerabilities: Lessons from Stuxnet and the Internet of Things*, 72 U. MIAMI L. REV. 761 (2018); Lawrence J. Trautman & Peter C. Ormerod, *WannaCry, Ransomware, and the Emerging Threat to Corporations*, 86 TENN. L. REV. 503 (2019).

348. Lawrence J. Trautman, Mohammed T. Hussein, Louis Ngamassi & Mason Molesky, *Governance of The Internet of Things (IoT)*, 60 JURIMETRICS (2020); Lawrence J. Trautman & Mason J. Molesky, *A Primer for Blockchain*, 88 UMKC L. REV. 239 (2019). Lawrence J. Trautman, *Rapid Technological Change and U.S. Entrepreneurial Risk in International Markets: Focus on Data Security, Information Privacy, Bribery and Corruption*, 49 CAPITAL U. L. REV. (forthcoming 2021); Lawrence J. Trautman, *Bitcoin, Virtual Currencies and the Struggle of Law and Regulation to Keep Pace*, 102 MARQ. L. REV. 447 (2018); Lawrence J. Trautman & Alvin C. Harrell, *Bitcoin Versus Regulated Payment Systems: What Gives?*, 38 CARDOZO L. REV. 1041 (2017).

349. Gordon Lubold & Dustin Volz, *U.S. Says Hackers Hinder Hunt for Vaccine*, WALL STREET J., May 14, 2020, at A7.

recently given emergency-use authorization by the Food and Drug Administration as a potential COVID-19 treatment.³⁵⁰

On July 16, 2020, *The Washington Post* reports, “[S]ecurity officials announced . . . that hackers linked to Russia’s intelligence services were actively trying to steal information from researchers working to produce coronavirus vaccines in the United States, Britain and Canada.”³⁵¹ Both the U.S. National Security Agency and Britain’s cybersecurity agency, “said that a group named APT29, also known as ‘the Dukes’ or ‘Cozy Bear,’ has targeted British, American and Canadian vaccine research and development organizations.”³⁵² Consider that, “Paul Chichester, director of operations at Britain’s National Cyber Security Centre (NCSC), said the government-backed hackers launched ‘despicable attacks against those doing vital work to combat the coronavirus pandemic.’”³⁵³ Then, during December 2020, it became known that Russia has successfully penetrated the data systems of major U.S. government agencies and business enterprises for at least the prior ten months.³⁵⁴

350. Lubold & Volz, *supra* note 349.

351. William Booth, Adam Taylor & Ellen Nakashima, *U.S., Britain and Canada say Russian Cyberspies are Trying to Steal Coronavirus Vaccine Research*, WASH. POST, July 12, 2020, https://www.washingtonpost.com/world/uk-us-and-canada-report-russian-cyberspies-may-be-trying-to-steal-vaccine-research/2020/07/16/d7c0dbd6-c765-11ea-a825-8722004e4150_story.html.

352. *Id.*

353. *Id.* See also, Jenny Strasburg & Dustin Volz, *Russia Blamed for Hacks Tied to Virus Work*, WALL ST. J., July 17, 2020, at A1; Julian E. Barnes, *Russians Accused of A Plot To Steal Vaccine Research*, N.Y. TIMES, July 17, 2020, at A1.

354. David E. Sanger & Nicole Perlroth, *Range of Tools in a Vast Hack Elevates Fears*, N.Y. TIMES, Dec. 18, 2020, at A1.

XI. Police Violence and Unrest

We have to recognize the inequity of authoritarianism and its violent remnants that remain today. People always question whether racism is involved when unarmed African Americans are shot by police. But do we really need researchers, such as those from Boston University in the Journal of the National Medical Association in 2018, to tell us that structural racism is definitely related to police shootings? The university's public health researchers said people are wrongfully assuming that individual cops are out to get black people; rather, the problem lies within 'all of society' and how it has treated black people for centuries.

- Bakari Sellers
Former State Representative
South Carolina State Legislature³⁵⁵

The late May 2020 death of Mr. George Floyd, a black man choked to death by four Minneapolis police officers, further complicates the pandemic problem in the United States. *The New York Times* writes, “They are parallel plagues ravaging America: [t]he coronavirus, and police killings of black men and women . . . [t]he upheaval sparked by a video capturing Mr. Floyd’s agonizing last minutes as a white police officer kneels on his neck is pulsing through an America already raged with anger and anxiety.”³⁵⁶ Professor Maybell Romero documents how “police violence has posed mental health threats and risks to poor and minority communities.”³⁵⁷

A. Protests and the Pandemic

Unfortunately, “[m]ass protests against police brutality that have brought thousands of people out of their homes and onto the streets in cities across America are raising the specter of new coronavirus outbreaks,

355. BAKARI SELLERS, MY VANISHING COUNTRY: A MEMOIR 24 (2020).

356. Jack Healy & Dionne Searcey, *Twin Crises and Surging Anger Convulse U.S.: Pandemic Leaves Nation’s Nerves on the Edge*, N.Y. TIMES, June 1, 2020, at A1; see also Gillian Bolsover, *Black Lives Matter Discourse on U.S. Social Media During COVID: Polarised Positions Enacted in a New Event* (University of Leeds, School of Politics and International Studies, Working Paper, Sept. 8, 2020), <https://ssrn.com/abstract=3688909> (suggesting that George Floyd’s death, as yet another example of an Black American man killed by U.S. police, was largely seen through established, polarized identity positions that made reactions to the incident and resulting protest largely a foregone conclusion, established and articulated without reference to the ongoing pandemic).

357. Maybell Romero, *Law Enforcement as Disease Vector*, CHICAGO L. REV. ONLINE (Nov. 16, 2020).

prompting political leaders, physicians and public health experts to warn that the crowds could cause a surge in cases.³⁵⁸ *The New York Times* observes:

The protests in dozens of cities have been spurred most recently by the death late last month of George Floyd at the hands of the police in Minneapolis. But the unrest and outrage spilling out into the streets from one city to the next also reflects the dual, cumulative tensions arising from decades of killings by police and the sudden losses of family and friends from the virus. The spontaneous outpouring of protests are occurring as many states have warily begun reopening after weeks of stay-at-home orders with millions of Americans unemployed. Restaurants, schools, beaches and parks are under scrutiny as the public tentatively practices new forms of social distancing. In Los Angeles, where demonstrations led to the closing of virus testing sites on Saturday, Mayor Eric Garcetti warned that the protests could become “super-spreader events,” referring to the types of gatherings, usually held in indoor settings, that can lead to an explosion of secondary infections.³⁵⁹

XII. Policy Prescriptions

Sooner or later, all the peoples of the world will have to discover a way to live together in peace, and thereby transform this pending cosmic elegy into a creative psalm of brotherhood. If this is to be achieved, man must evolve for all human conflict a method which rejects revenge, aggression, and retaliation. The foundation of such a method is love.

- Dr. Martin Luther King, Jr.
Acceptance Address
For the Nobel Peace Prize
Oslo, Norway December 10, 1964³⁶⁰

A. Learning from What Works

358. Roni Caryn Rabin, *Mass Protests Bring Fear of Hot Spots*, N.Y. TIMES, June 1, 2020, at A7.

359. *Id.*

360. Dr. Martin Luther King, Jr., Acceptance Address for the Nobel Peace Prize, Oslo, Norway, Dec. 10, 1964, in *A CALL TO CONSCIENCE: THE LANDMARK SPEECHES OF DR. MARTIN LUTHER KING, JR.* 106 (Clayborne Carson & Kris Shepard, eds., Hatchette, 2002).

Thoughtful policy makers will pause to reflect upon best practice outcomes thus far in fighting the coronavirus pandemic. As reported deaths due to COVID-19 approach the 400,000 mark in the United States, thoughtful policy makers will pause to reflect upon best practice outcomes thus far in fighting the coronavirus pandemic. *The Wall Street Journal* reports on May 27, 2020, “Hong Kong and Singapore reported their first cases of the novel coronavirus in January. Four months later, the densely packed Asian metropolises, with a combined population of about 13 million, have seen 27 fatalities between them.”³⁶¹ Because of their low global fatality rates despite high population density, Hong Kong and Singapore appear to be attractive role models and “show that coronavirus outbreaks don’t have to result in large-scale loss of life. Their playbook: test widely, quarantine aggressively and treat patients early to avoid fatal complications and overburdened health systems.”³⁶² Accordingly:

Both Hong Kong and Singapore acted quickly to keep the outbreak in check, giving them enough lead time to prepare the space, manpower and equipment they needed. With controllable caseloads, hospitals were able to properly manage workflows, monitor infected individuals and provide supportive care that kept many cases from becoming critical . . . The picture is different in New York City, which has recorded more than 16,000 deaths and where about 8% of those with confirmed infections have died, according to official data. The case-fatality rate in the U.S. overall is 5.9%, according to Johns Hopkins data. It is 14% in the U.K. and Italy . . . Extensive testing allows authorities to quickly determine who is infected and isolate. This strategy has helped Hong Kong and Singapore keep the virus away from tightly packed groups of older people, who are more susceptible to dying from the disease. More than 90% of cases in Singapore were detected among its migrant-worker community, who are mostly young, healthy men. Health officials said 95% of patients who died in Singapore from the disease were more than 60 years old, while the vast majority of those infected were between the ages of 20 and 59. In Hong Kong, the median age of those infected is 35, with only about 5% of cases occurring in people age 70 and up . . .³⁶³

361. Newley Purnell & Feliz Solomon, *How Two Cities Kept the Pandemic at Bay*, WALL STREET J., May 27, 2020, at A6.

362. *Id.*

363. *Id.*

The success of testing in Singapore provides valuable lessons. Because migrant workers quickly proved to be a highly vulnerable population and “outbreaks emerged in densely packed dormitories where migrant workers live, authorities isolated the areas and have set out to test all of the more than 300,000 people who live in them. Case numbers have soared, but nearly all of them are mild or asymptomatic.”³⁶⁴ Unlike the United States:

Both Hong Kong and Singapore have benefited from experience . . . the SARS outbreak in the early 2000s prompted a rethinking of disease preparedness across Asia. Singapore also had a blue print ready to be deployed at the first sign of an outbreak. Doctors in Singapore said hospitals began stockpiling personal protective equipment in January, and a test kit was developed within weeks. “The difference is they never really let it get out of control,” said Dr. [Daniel] Lucey, adding that the U.S. could apply elements of their approach as cases level off and commerce restarts. “It’s not too late. [U.S.] states can still learn from this model.”³⁶⁵

Veteran virus fighter, and former CDC Director Richard Besser, offers the following reflections during March 2020:

Our nation’s predicament today is both tragic, because so many people will likely suffer, and maddening, because it didn’t have to be this way. In the short term, the United States must play the hand that we’ve dealt ourselves. Indeed, there are no short-term solutions to our long-term neglects. The underlying work our nation must do to ensure all people in the United States have a fair and just opportunity for health and well-being—sick leave, universal health care, quality child care and early education, as well as fair immigration policies—must be done in moments of calm.³⁶⁶

By late July 2020, it became abundantly clear the United States is uniquely incompetent with their public health effort to fight the COVID-19 pandemic.³⁶⁷ In Congressional testimony, Dr. Anthony Fauci observes,

364. Purnell & Solomon, *supra* note 361.

365. *Id.*

366. Besser, *supra* note 38.

367. Jeneen Interlandi, *Why We’re Losing The Battle With COVID-19: The Escalating Crisis in Texas Shows How the Chronic Underfunding of Public Health Has Put America on Track for*

“European governments . . . [have] the disease on the run. In fact, the Asian countries have the disease on the run. I saw some remarkable figures, almost every other country on earth is doing far, far better than the United States, except for Brazil, whose president has followed President Trump’s policies.”³⁶⁸ As 2021 begins, over eighteen million Americans have tested positive, with deaths in excess of 320,000.³⁶⁹

B. Global Nation State Interdependence

The global pandemic threatens the very survival of much of the world’s population. Like climate change, the coronavirus has the potential to change our world forever. “We are all in this together” is not just a mere platitude, it is a new reality. By March 2020, *The Wall Street Journal* reports, “The new coronavirus is now taking off in the world’s poorest countries, which join the battle with even fewer weapons than developed nations, some of which have fumbled the pandemic’s early stages.”³⁷⁰ Among those nations having little resources to defend themselves, “from Venezuela to Pakistan to the Democratic republic of Congo—and nearly every developing country between—confirmed cases have started to spike in recent days, a sign the contagion is advancing exponentially, disease-control experts say.”³⁷¹ Consider that, “The tensions spilled over into the United Nations on Friday [May 15, 2020] when China said that the urgency of the pandemic demanded that the United States pay its delinquent U.N. assessment, which by some calculations exceeds \$2 billion.”³⁷² On May 20, 2020, *The Wall Street Journal* observes:

The Coronavirus pandemic is causing a humanitarian emergency in the world’s poorest countries, and it won’t likely end until rich nations are able to safely reopen their economies, the head of the World Bank said. “The human toll in the developing world—in the poorest countries, in particular—from the shutdown is devastating,” World Bank President David Malpass said. “The question is: How long will

the Worst Coronavirus Response in the Developed World, N.Y. TIMES (July 18, 2020), <https://www.nytimes.com/2020/07/14/magazine/covid-19-public-health-texas.html>.

368. *Hearings on the Urgent Need for a National Plan to Contain the Coronavirus*, 116th Cong. (2020) (statement of Dr. Anthony Fauci).

369. James Barron, *Tracking an Outbreak*, N.Y. TIMES, Dec. 22, 2020, at A4.

370. Saeed Shah & Joe Parkinson, *Next in Line Are Poor, Unprepared Nations*, WALL STREET J., Mar. 26, 2020, at A1; see also Matthew J. Brown & Joyce C. Havstad, *The Disconnect Problem, Scientific Authority, and Climate Policy*, 25 PERSPECTIVES ON SCI. (2017).

371. Shah & Parkinson, *supra* note 370.

372. Chris Buckley & Steven Lee Myers, *Rift Threatens U.S. Cold War Against China*, N.Y. TIMES, May 16, 2020, at A6.

it last? And for the developing world, that depends heavily on the reopening of the advanced economies.” The World Bank estimates that 60 million people worldwide are likely to fall into extreme poverty—subsisting on less than \$1.90 a day—this year, while hundreds of millions more could lose their jobs. Such a backslide could have health implications beyond the coronavirus, such as stunting growth in children who can’t get enough nutrition, Mr. Malpass said. For poor nations that rely heavily on tourism, crude oil or other commodities, the pandemic’s impact on domestic economies is compounded by declining exports and foreign investment.³⁷³

Immunologist, physician, and Director of the National Institute of Allergy and Infectious Diseases, Dr. Anthony Fauci says that “although developed countries are struggling with their own responses to this outbreak, we also have a moral responsibility for people throughout the world . . . So we need to pour resources into developing countries and start to get some infrastructure in place.”³⁷⁴ Dr. Fauci warns:

Another consideration here is vaccines. We need to make a commitment right now that when we do the vaccine trials, we include the developing world. We can’t make a vaccine for ourselves and only know how well it works for us. That’s something we really need a commitment on internationally. I’m usually very reserved and conservative about promising anything medically or scientifically. But I think that within a reasonable period of time, we will get a vaccine. We’ve got to make sure that the developing world is right there in all the considerations. As well as the moral commitment to do this, there’s also an enlightened self-interest. That is, if you don’t control an outbreak in the developing world, it’s going to come right around and bite you the next season . . . Because I’m a scientist and I’m a physician and I have a great deal of faith in what one can accomplish scientifically. That is something that keeps me optimistic, the power of science and the ability to develop interventions, diagnostics, therapeutics, and vaccines. It’s

373. Paul Kiernan, *Global Economy: Shutdown Batters Poorest Nations*, WALL STREET J., May 20, 2020, at A9.

374. See Dr. Anthony Fauci, Opinion, *What Keeps Me Optimistic is the Power of Science: Demand a Global Response*, ONE (May 21, 2020), <https://www.one.org/international/blog/anthony-fauci-pass-the-mic-covid19/>.

not guesswork. It's a combination of real hard data and our experience and knowing how outbreaks work. For example, when I said I was concerned that if we leap-frogged over some of the check points of decreasing mitigation, that you are going to get infections that occur, I'm 100% certain because I've seen that in multiple outbreaks.³⁷⁵

The *Washington Post* reports on May 27, 2020, as Mexico's health-care system has strained under the coronavirus, small community hospitals in Southern California, some of the poorest in the state, have been flooded with Americans who have fallen ill and crossed the border. They are retirees and dual citizens, Americans working in Mexico or visiting family there.³⁷⁶ The complex situation in Mexico's attempt to battle the coronavirus is compounded by the "country's broken health system [which is] killing people as well."³⁷⁷ *The New York Times* reports:

The senseless deaths torment doctors and nurses the most: The man who died because an inexperienced nurse unplugged his ventilator. The patient who died from septic shock because no one monitored his vital signs. The people whose breathing tubes clogged after being abandoned in their hospital beds for hours on end . . . Years of neglect had already hobbled Mexico's health care system, leaving it dangerously short of doctors, nurses and equipment to fight a virus that has overwhelmed far richer nations. Now, the pandemic is making matters much worse, sickening more than 11,000 Mexican health workers—one of the highest rates in the world—and depleting the already thin ranks in hospitals. Some hospitals have lost half their staff to illness and absenteeism. Others are running low on basic equipment, like heart monitors. The shortages have had devastating consequences for patients, according to interviews with health workers across the country. Several doctors and nurses recounted dozens of preventable deaths in hospitals—the result of neglect or mistakes that never should have happened . . . Patients die because they're given the wrong medications, or the wrong dose, health workers say.³⁷⁸

375. Fauci, *supra* note 374.

376. Kevin Sieff, *California Hospitals Overwhelmed by Virus Patients from Mexico*, WASH. POST, May 27, 2020.

377. Natalie Kitroeff & Paulina Villegas, *Mexico's Broken Hospitals are Deadlier Than a Virus*, N.Y. TIMES, May 29, 2020, at A8.

378. *Id.*

At about the same time we learn:

A leading model predicts the death toll from the disease could surpass 125,000 in Brazil by early August, as Latin America quickly becomes the new hotbed of the pandemic . . . In Brazil, the country with the region's highest death toll, authorities have so far confirmed more than 24,000 fatalities, even though skepticism over the accuracy of those figures has mounted. Researchers argue the real death toll is probably far higher and could surge further in coming weeks. According to the latest estimates by the University of Washington's Institute for Health Metrics and Evaluation, deaths could increase by more than 400 percent within the next two months. Previously, the institute had estimated around 88,000 deaths in Brazil, but that analysis was based on a smaller pool of states examined by the researchers.³⁷⁹

On May 28, 2020, we learn that "Brazil has reached a grim milestone, reporting more COVID-19 deaths in one day than the U.S., which until recently had logged the most daily fatalities from the disease."³⁸⁰ Just several days later we read, "As the coronavirus stalks the globe, some nations, particularly in the developing world, find themselves under extraordinary strain as they simultaneously contend with other outbreaks, chronic public health problems and challenges posed by government mismanagement, poverty and armed conflict."³⁸¹ On May 31, 2020, *The New York Times* warns, "In Latin America, where the number of coronavirus cases has been rising sharply, governments are trying to contend with new dengue outbreaks while holding onto gains in the fight against other infectious diseases."³⁸² The regional challenge is complicated with "at least nine countries in Latin America and the Caribbean have paused some of their immunization activities . . . threatening efforts to control diseases such as polio, tuberculosis and measles."³⁸³ On June 1, 2020, we read, "Across Nicaragua, families are being forced to

379. Jenna Portnoy & Seung Min Kim, *Lawmakers Urge Government to Suspend Plans for Trump's July 4 Military Parade Amid Pandemic*, WASH. POST, May 27, 2020.

380. Jeffrey T. Lewis & Luciana Magalhaes, *Brazil's Daily Coronavirus Death Toll Surpasses that of U.S.*, WALL STREET J., May 27, 2020, at A18.

381. Kirk Semple, *In Some Nations, Coronavirus is Only One of Many Outbreaks*, N.Y. TIMES, May 30, 2020, at 6.

382. *Id.*

383. *Id.*

hold these ‘express burials,’ rushed funerals at all hours of the night, without time to call a priest or to buy flowers.”³⁸⁴ Consider:

Long lines have formed at the country’s hospitals, and pharmacies have run out of basic medicines . . . The signs are everywhere that the coronavirus is raging across Nicaragua . . . a nation of 6.4 million people, is one of the last countries to resist adopting the strict measures that have been put in place around much of the world to curb the spread of the disease. It never closed its schools. It did not shutter businesses. Throughout the pandemic, the government not only allowed mass events—it organized them. Families say the consequences of these decisions are being buried, literally, under cover of darkness. Without any testing for COVID-19, they are told that their loved ones died of pneumonia and—because of fear of contagion—are urged to bury them as soon as possible. Health organizations are struggling to get accurate case numbers. Testing is limited and controlled by the government. Doctors and activists watching respiratory illnesses spread around the nation are bracing for disaster, just two years after antigovernment uprisings against President Daniel Ortega turned violent.³⁸⁵

As yet another indication of how the futures of all nations are tied together, by late May 2020, *The Wall Street Journal* warns, “Poorer countries are starting to reopen while new infections and deaths are growing. Health experts say the timing risks an explosive rise in cases and deaths in crowded slums across the developing world.”³⁸⁶ Using data collected in the United Kingdom during April and May 2020, Professors Thomas F. Crossley, Paul Fisher, and Hamish Low find, “those with precarious employment, under 30 and from minority ethnic groups face the biggest labour market shocks. Almost 50% of individuals have experienced declines in household earnings of at least 10%, but declines are most severe in the bottom income quintiles.”³⁸⁷ By August 2020, “The pandemic has devastated hundreds of thousands of businesses across Latin America, setting back the clock on the social and economic gains made over the past two decades when a global commodities

384. Alfonso Flores Bermúdez & Frances Robles, *Resisting Lockdown, Nicaragua Becomes a Place of Midnight Burials*, N.Y. TIMES, June 1, 2020, at A5.

385. *Id.*

386. David Luhnnow & Joe Parkinson, *Poor Countries Weigh Easing Lockdowns as Coronavirus Cases Continue to Rise*, WALL STREET J., May 26, 2020, at A9.

387. Thomas F. Crossley, Paul Fisher & Hamish Low, *The Heterogeneous and Regressive Consequences of COVID-19: Evidence from High Quality Panel Data*, 193 J. OF PUB. ECON. 104, 334 (Aug. 10, 2020).

boom powered breakneck growth.”³⁸⁸ As 2021 begins, a mutation emerged that caused Europe to isolate the United Kingdom.³⁸⁹

The interconnectedness of global trading partners, and availability of travel, requires that nation states view highly contagious viruses as an immediate threat to us all. Such a policy viewpoint seems to be based in common sense and appears to be a pragmatic self-preservation tool.³⁹⁰

C. China / U.S. Relations

Our discussion of global public health policy would be remiss without mention of diplomatic relations between the United States and China. The time has come for policy makers to internalize just how small our planet is and how dependent the peoples of the Earth are upon each other. Global warming, transnational organized crime, and transnational public health issues all require a high degree of cooperation. Politicians must change the dialogue of nationalism and divisive rhetoric. By mid-May 2020, *The New York Times* reports, “The bitter recriminations have plunged relations between China and the United States to a nadir, with warnings in both countries that the bad blood threatens to draw them into a new kind of Cold War.”³⁹¹ The warning continues:

“Evil.” “Lunacy.” “Shameless.” “Sick and twisted.” China has hit back at American criticism over its handling of the coronavirus pandemic with an outpouring of vitriol as acrid as anything seen in decades . . . A cycle of statements and actions is solidifying longstanding suspicions in Beijing that the United States and its allies are bent on stifling China’s rise as an economic, diplomatic and military power. Hardliners are calling on Beijing to be more defiant, emboldened by the Trump administration’s efforts to blame China for the mounting death toll in the United States. Moderates are warning that Beijing’s strident responses could backfire, isolating the country when it most needs export markets and diplomatic partners to revive its economy and regain

388. Ryan Dube & Juan Forero, *COVID-19 Derails Latin America’s Bid for Middle-Class Prosperity*, WALL STREET J., Aug. 6, 2020, at A1.

389. Mark Landler & Stephen Castle, *Concerns About Coronavirus Cut Off U.K from Europe*, N.Y. TIMES, Dec. 21, 2020, at A1; Marc Santora, *Can Travel Bans Really Stop the Spread of Coronavirus Variants? Experts are Skeptical*, N.Y. TIMES, Dec. 22, 2020, at A1.

390. See Auffray et al., *COVID-19 and Beyond: A Call for Action and Audacious Solidarity to All the Citizens and Nations, It Is Humanity’s Fight* (Working Paper, June 18, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3630412.

391. Chris Buckley & Steven Lee Myers, *Rift Threatens U.S. Cold War Against China*, N.Y. TIMES, May 16, 2020, at A1.

international credibility. The clash with the United States over the pandemic is fanning broader tensions on trade, technology, espionage and other fronts—disputes that could intensify as President Trump makes his contest with Beijing a theme of his [2020] re-election campaign . . . While the hostility has so far been mostly confined to words, there are warning signs the relationship could worsen. The trade truce that Trump and his Chinese counterpart, Xi Jinping, reached in January could fall apart, despite recent pledges to keep to its terms. Other tensions, including those over Taiwan and the South China Sea, are also flaring.³⁹²

Additional indication of the deteriorating relationship between the United States and China is shown by the United States' demand on July 22, 2020, that China closes its Houston Consulate.³⁹³ Just two days later, China reciprocated by ordering the U.S. to close its consulate in Chengdu.³⁹⁴

D. Improving Vaccination Rates

By May 21, 2020, *The New York Times* warns, “During the height of the pandemic, from March 23 to May 9, the number of [non-COVID-19] vaccine doses administered to children dropped 63 percent compared with the same time last year, and by 91 percent for children older than 2, according to the [New York] city health department.”³⁹⁵ Across the United States, “[v]accination rates have fallen significantly across the country because of the closures of many practices, as well as fears of taking healthy children to doctors’ offices during the pandemic, though the American Academy of Pediatrics has recommended that parents continue so-called well visits, which include vaccinations.”³⁹⁶ An April 2020 survey reveals:

PCC, a pediatric electronic health records company, found that vaccine doses had fallen between 40 and 73 percent for

392. Buckley & Myers, *supra* note 391.

393. Edward Wong, Lara Jakes & Steven Lee Myers, *U.S. Orders China to Close Houston Consulate, Citing Efforts to Steal Trade Secrets*, N.Y. TIMES, July 22, 2020, at A1.

394. Chun Han Wong, Liza Lin & William Mauldin, *China Orders U.S. to Close Chengdu Consulate as Payback for Houston Move*, WALL STREET J., July 24, 2020, at A1; Keith Bradsher & Steven Lee Myers, *China Orders U.S. to Shut Chengdu Consulate, Retaliating for Houston*, N.Y. TIMES, July 24, 2020, at A13. *But see* Lawrence J. Trautman, *American Entrepreneur in China: Potholes on the Silk Road to Prosperity*, 12 WAKE FOREST J. BUS. & INTELL. PROP. L. 427 (2012) (discussing the importance of the relationship to each country).

395. Eliza Shapiro, *Child Vaccinations Plummet 63 Percent, a New Hurdle for N.Y.C. Schools*, N.Y. TIMES, May 20, 2020, at A16.

396. *Id.*

a range of preventable illnesses . . . Pediatricians agreed that delays are most dangerous for infants and young children who are supposed to be getting their first series of vaccinations. Delays could be less worrying as long as they are rescheduled and not put off indefinitely. Michael Rothschild, a pediatric ear, nose and throat doctor in Manhattan, said visits to his practice had dropped by 90 percent . . . “You’d think with this pandemic showing you exactly how awful it is not to have a vaccine, people would get vaccines,” he said.³⁹⁷

As of May 21, 2020, New York City was:

planning to reopen its 1,800 public schools in September, along with hundreds of day care sites. But children will not be able to start school without shots to protect them against illnesses like measles and chickenpox. In a typical year, about 98 percent of . . . students are fully vaccinated.³⁹⁸

Survey results conducted by the Associated Press-NORC Center for Public Affairs Research reveal disturbing results indicating “only about half of Americans say they definitely would get vaccinated against the novel coronavirus once a vaccine becomes available . . . 49 percent plan to get vaccinated while 31 percent say they are not sure. Twenty percent say they will not get vaccinated.”³⁹⁹ By mid-July 2020, *The New York Times* warns, “A growing number of polls find so many people saying they would not get a coronavirus vaccine that its potential to shut down the pandemic could be in jeopardy. Distrust . . . is particularly pronounced in African-American communities, which have been disproportionately devastated by the virus.”⁴⁰⁰ As 2021 begins, the United States finds itself in the early stages of administering COVID-19 vaccines from Pfizer and Moderna.⁴⁰¹

397. Shapiro, *supra* note 395.

398. *Id.*

399. John Wagner, *Only About Half of Americans Say They Will Definitely Get Vaccinated, Poll Finds*, WASH. POST, May 27, 2020.

400. Jan Hoffman, *Mistrust of a Coronavirus Vaccine Could Imperil Widespread Immunity*, N.Y. TIMES, July 18, 2020, at A1.

401. Peter Loftus & Charles Passy, *U.S. Starts Delivery of Moderna’s COVID-19 Vaccine*, WALL STREET J., Dec. 20, 2020, at A6; see also Harald Schmidt et. al., *What Prioritizing Worse-Off Minority Groups for COVID-19 Vaccines Means Quantitatively: Practical, Legal and Ethical Implications* (Working Paper, October 27, 2020), <https://ssrn.com/abstract=3716686> (discussing how CDC’s Social Vulnerability Index [SVI] includes a race variable and could face legal challenges, and it is desirable to quantify using an alternative such as the Area Deprivation Index [ADI] that does not include race and can offer more targeted prioritization as it is centered on the block-group, not census-tract level).

E. Importance of Effective Communications During Crisis

Michiko Kakutani writes about President Trump, “His cavalier subversion of trust in the government and sowing of divisiveness, partisanship and confusion are particularly dangerous in the midst of a crisis”⁴⁰² Historian John M. Barry contends that the great lesson to be learned from the 1918 flu pandemic is that “‘those in authority must retain the public’s trust’ and ‘the way to do that is to distort nothing, to put the best face on nothing, to try to manipulate no one.’”⁴⁰³ Consider:

“The bottom line is I have absolutely no faith in the F.D.A. and in the Trump Administration,” said Joanne Barnes, a retired fourth-grade teacher from Fairbanks, Alaska, who said she was otherwise always scrupulously up-to-date on getting her shots, including those for shingles, flu and pneumonia. “I just feel like there’s a rush to get a vaccine out, so I’m very hesitant.”

Mistrust of vaccines has been on the rise in the U.S. in recent years, a sentiment that resists categorization by political party, educational background or socio-economic demographics.⁴⁰⁴

Another communications issue unearthed by the pandemic is the woeful lack of access by the poor to broadband and the Internet, a necessary requirement for schools that will reopen online only. By mid-July 2020, *The Wall Street Journal* warns, “With the next academic year quickly approaching, school districts and parents everywhere are racing to figure out how to resume learning during the coronavirus pandemic—with the interruption that upended the last school year beginning to look like a longer-term disruption.”⁴⁰⁵ Consider:

Preliminary research suggests students nationwide will return to school in the fall with roughly 70% of learning gains in reading relative to a typical school year, and less than 50% in math, according to projections by NWEA, an Oregon-based nonprofit education-services firm. It expects

402. Michiko Kakutani, *Pandemic Notebook*, N.Y. TIMES BOOK REV., May 17, 2020 at 1, 21.

403. *Id.* (citing JOHN M. BARRY, *THE GREAT INFLUENZA* (2004)); see also Louis M. T. Ngamassi, Thiagarajan Ramakrishnan & Shahedur Rahman, *Use of Social Media for Disaster Management: A Prescriptive Framework*, 28 J. ORGAN. & END USER COMP. 122 (2016).

404. Hoffman, *supra* note 400.

405. Tawnell D. Hobbs, *The Results Are in for Remote Learning: It Didn't Work*, WALL STREET J., June 5, 2020, at A1.

a greater learning loss for minority and low-income children, who have less access to technology and whose families are more likely to be affected by the economic downturn.

About 26 million public-school students, just over half in the U.S., are considered low-income and rely on free or reduced-price meals at school . . .

Missing those months will leave some children across the country, especially those already behind, struggling to catch up, educators said.⁴⁰⁶

Professors Nielsen, Fletcher, Kalogeropoulos, and Simon observe:

The coronavirus pandemic is a communications crisis in addition to being a public health emergency . . . based on the results of ten online panel surveys of UK respondents fielded from mid-April to mid-August 2020 . . . find that: (i) most people are relatively informed but large minority do not feel news media or the government have explained what they can do in response to the pandemic (ii) information inequality is growing as the crisis continues, and (iii) the “infodemically vulnerable” are a small but significant and growing part of the UK public.⁴⁰⁷

We believe it is likely these results can be extrapolated to minority populations worldwide. By July 10, 2020, it becomes evident that “[t]he rising tide of coronavirus cases in the U.S. South and West, coming four months into the outbreak, emerged amid a patchwork of often confusing or conflicting rules across government that have proved inconsistent and often difficult to enforce, making the pandemic harder to halt.”⁴⁰⁸ We believe that the lesson from this failed experiment in American federalism is that, just as in cases of war, a global pandemic requires strong leadership at the top and by the executive branch of the government to marshal resources and wage war in infectious disease.

406. Hobbs, *supra* note 405.

407. Rasmus Kleis Nielsen, Richard Fletcher, Antonis Kalogeropoulos & Felix Simon, *Communications in the Coronavirus Crisis: Lessons for the Second Wave*, REUTERS INST. FOR THE STUDY OF JOURNALISM (2020), <https://reutersinstitute.politics.ox.ac.uk/communications-coronavirus-crisis-lessons-second-wave>.

408. Arian Campo-Flores, Rebecca Ballhaus & Valerie Bauerlein, *Behind New COVID-19 Outbreaks: America's Patchwork of Policies*, WALL STREET J., July 9, 2020, at A1.

F. National Child Care Required

Richard E. Besser was Acting Director of the CDC during spring 2009, when the outbreak of H1N1 influenza virus took place in Mexico and quickly grew into a pandemic. Director Besser warns us to heed the following lessons learned from the 2009 experience:

Parents without sick leave or affordable child care options were forced to drop their kids at malls, libraries or community centers rather than leave them unsupervised at home. In essence, the CDC had failed to consider that millions of Americans couldn't comply even if they wanted to. What happens, for example, to the millions of children who get breakfast and lunch through programs at school if we close them? Crises such as H1N1 and covid-19 provide a mirror for our society and the actions we take—or fail to take. Today, the United States in that mirror is one in which the risk of exposure and the ability to protect oneself and one's family depends on income, access to health care, and immigration status, among other factors.⁴⁰⁹

Deb Perelman writes, “[O]ur national response feels more like a dystopian novel where only the wealthy get to limit their exposure and survive the pandemic unscathed.”⁴¹⁰ Consider, “Allowing workplaces to reopen while schools, camps and day cares remain closed tells a generation of working parents that it’s fine if they lose their jobs, insurance and livelihoods in the process. It’s outrageous, and I fear if we don’t make the loudest amount of noise possible over this, we will be erased from the economy.”⁴¹¹ *The New York Times* reports on December 3, 2020, “Detailed loan information released by the Small Business Administration . . . showed that a mere 1 percent of the program’s 5.2 million borrowers—those seeking \$1.4 million and above—received more than a quarter of the \$523 billion disbursed.”⁴¹²

G. Increased Funding for U.S. and International Public Health

It is long past time for America to embrace the lessons from science and provide robust public health services to all of our citizens. The pervasive

409. Besser, *supra* note 38.

410. Deb Perelman, *The COVID-19 Parent Trap*, WALL STREET J., July 15, 2020, at Bus. 2.

411. *Id.*

412. Stacy Cowley & Ella Koeza, *One Percent of P.P.P Borrowers Got One Quarter of the Loan Money*, N.Y. TIMES, Dec. 2, 2020, at A1.

short-sighted greed, and cruel indifference, towards those less fortunate must be replaced with a pragmatic understanding that to systematically deprive our citizens of the basic human rights of freedom from hunger, poverty and disease must stop. In his April 16, 1963 *Letter from a Birmingham Jail*, Martin Luther King, Jr. writes:

We know through painful experience that freedom is never voluntarily given by the oppressor; it must be demanded by the oppressed. Frankly, I have yet to engage in a direct action campaign that was “well timed” in the view of those who have not suffered unduly from the disease of segregation. For years now I have heard the word “Wait!” It rings in the ear of every Negro with piercing familiarity. This “Wait” has almost always meant “Never.” We must come to see, with one of our distinguished jurists, that ‘justice too long delayed is justice denied.’⁴¹³

We believe the U.S. 2020-21 pandemic experience highlights the growing income inequality and current predatory policies toward minority groups and the less fortunate. Cornell University economist Robert H. Frank writes, “Growing recognition that pre-pandemic spending patterns have served the country poorly portends increased support for public investment in the future.”⁴¹⁴ Professor Frank observes:

As the pandemic recedes . . . legislators will face a choice between two starkly different futures.

In one—call it Society A—\$50,000 cars, 4,000-square-foot houses and \$40,000 weddings would soon be the norm. This society would invest little in hospital surge capacity, medical research, green energy and infrastructure.

In the other—Society B—private consumption would be lower, with \$25,000 cars, 2,500-square-foot houses and \$15,000 weddings the norm; but public investment in this society would be substantially higher than current U.S. levels.

The spending pattern in Society A describes where the United States will soon be if pre-pandemic trends continue. Society B describes where the country could be if public policy steered spending in significantly different directions.

413. Martin Luther King, Jr., *Letter from a Birmingham Jail*, AFRICAN STUD. CTR. U. PA., https://www.africa.upenn.edu/Articles_Gen/Letter_Birmingham.html.

414. Robert H. Frank, *Spend More on Society and Get More for Yourself*, N.Y. TIMES, July 16, 2020, at BU7.

Findings from decades of careful research in behavioral sciences are helpful in thinking about the choice between these two societies. These findings, which are consistent with recent experience under the pandemic, support two robust conclusions: People would be both happier and healthier in Society B. And the additional tax revenue to finance the investments necessary to sustain Society B would require fewer painful sacrifices than most people think.⁴¹⁵

Enlightened self-interest dictates that we take care of the least fortunate among us, including those who have been failed by a substandard education system and left incapable of recognizing public policy in their own best interest. A global pandemic dramatically demonstrates how all citizens of the Earth are interconnected. The broad concept of supporting international cooperation among “academic and industry ecosystems taking a systems approach to understanding COVID-19 by thoroughly characterizing viruses, patients and populations during the pandemic, using openly shared tools” should be encouraged.⁴¹⁶ Such a global alliance “will catalyze the creation of medical and health products such as diagnostic tests, drugs and vaccines that become common goods for all, while seeking further alliances with civil society to bridge with socio-ecological and technological approaches that characterize urban systems, for a collective response to future health emergencies.”⁴¹⁷

Divisive government policies based in racism and hatred for the “other” will not enable our children to thrive during the future. Societal priorities and public policy must be reflected in more than just empty words. Who, and what, we want our society to be in the future, must be reflected by budget priorities.⁴¹⁸

XIII. Conclusion

We must understand that we are one people—the American people; we are one family—the American family; and we live in the same house—the American house.

415. Frank, *supra* note 414.

418. Auffray et al., *supra* note 390.

419. *Id.*

420. Govind Persad, *Allocating Medicine Fairly in an Unfair Pandemic*, U. ILL. L. REV. (forthcoming 2021) (observing: America’s COVID-19 pandemic has both devastated and disparately harmed minority communities; and discussing why using individual-level racial classifications in allocation of medicines is precluded by current Supreme Court precedent. Therefore, recommending priority of individuals who live in disadvantages geographic areas or work in occupations hard-hit by COVID-19, potentially alongside aggregate metrics like neighborhood segregation).

Mr. Speaker, we must teach all of our people to respect the dignity and the worth of every human being. We must be the headlights, not the taillights, in loving and cherishing our brothers and sisters. We are brothers and sisters.

We must understand that our foremothers and our forefathers came to this great Nation in different ships, but we are all in the same boat now.

- John Lewis
Representative
U.S. House of Representatives
June 15, 2017⁴¹⁹

Any conclusion that we might offer here to the disastrous American experience and failure of leadership during the past six months fails in comparison to the words of Dr. Martin Luther King spoken over fifty years ago:

A true revolution of values will soon look uneasily on the glaring contrast of poverty and wealth. With righteous indignation, it will look across the seas and see individual capitalists of the West investing huge sums of money in Asia, Africa, and South America, only to take the profits out with no concern for the social betterment of the countries, and say, "This is not just." The Western arrogance of feeling that it has everything to teach others and nothing to learn from them is not just . . . A nation that continues year after year to spend more money on military defense than on programs of social uplift is approaching spiritual death . . .

America, the richest and most powerful nation in the world, can well lead the way in this revolution of values . . . There is nothing to keep us from molding a recalcitrant status quo with bruised hands until we have fashioned it into a brotherhood . . .

This call for worldwide fellowship that lifts neighborly concern beyond one's tribe, race, class, and nation is in reality a call for an all-embracing and unconditional love for all mankind . . . When I speak of love I am not speaking of some sentimental and weak response. I'm not speaking of that force which is just emotional bosh. I am speaking of that force which all of the great religions have seen as the supreme unifying principle of life. Love is somehow the

421. 115 Cong. Rec. H.4921-H4922 (daily ed. June 15, 2017) (statement of Rep. John Lewis), <https://www.congress.gov/crc/2017/06/15/CREC-2017-06-15.pdf>.

key that unlocks the door which leads to ultimate reality. This Hindu-Muslim-Christian-Jewish-Buddhist belief about ultimate reality is beautifully summed up in the first epistle of Saint John: "Let us love one another for love is God. And every one that loveth is born of God and knoweth God. He that loveth not knoweth not God, for God is love . . . If we love one another, God dwelleth in us and his love is perfected in us." Let us hope that this spirit will become the order of the day.

We can no longer afford to worship the god of hate or bow before the altar of retaliation. The oceans of history are made turbulent by the ever-rising tides of hate. History is cluttered with the wreckage of nations and individuals that pursued this self-defeating path of hate.⁴²⁰

422. Dr. Martin Luther King Jr., *Beyond Vietnam*, speech delivered at Riverside Church, New York, NY, Apr. 4, 1967, in *A CALL TO CONSCIENCE: THE LANDMARK SPEECHES OF DR. MARTIN LUTHER KING, JR.* 158 (Clayborne Carson & Kris Shepard, eds., Hachette, 2002).