

Spring 2021

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### Recommended Citation

John Taschner, *Recapturing Democracy: COVID-19 and the 2020 Presidential Election*, 48 HASTINGS CONST. L.Q. 461 (2021).

Available at: [https://repository.uchastings.edu/hastings\\_constitutional\\_law\\_quarterly/vol48/iss3/4](https://repository.uchastings.edu/hastings_constitutional_law_quarterly/vol48/iss3/4)

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# Recapturing Democracy: COVID-19 and the 2020 Presidential Election

by JOHN TASCHNER\*

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*“There is a way to reach out [across partisan divide] and not be a sap. There is a way of consistently offering the possibility of cooperation.”*  
– Barack Obama<sup>1</sup>

## Abstract

America is in the business of selling and maintaining democracy around the world. Through aid, provision, humanitarian relief, guidance, and forcible action if need be, the United States stands for democracy. At the birth of the country, the biggest threat to the founding fathers was someone assuming the highest position of leadership in the country and, thereafter, becoming unwilling to transition power. In the aftermath of the 2020 Presidential Election, this exact worst-case-scenario from more than two hundred years had played out amidst numerous lawsuits and demands for recounted votes in order to have only the “legal” votes counted towards the final result. COVID-19’s presence as the driver of this historic election only elevated the stakes, as over the death toll approached half a million and continued to set new records.<sup>2</sup> Biden’s promise to have 100 million coronavirus vaccines given in the first 100 days was also criticized for being too low.<sup>3</sup> Later, he

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1. See Joseph Choi, *Obama on Bipartisanship: ‘There Is a Way to Reach out and Not Be a Sap,’* THE HILL (Nov. 16, 2020), <https://thehill.com/homenews/news/526150-obama-on-bipartisanship-there-is-a-way-to-reach-out-and-not-be-a-sap>.

2. See Cecilia Smith-Schoenwalder, *January Marks Deadliest Month Yet for Coronavirus Pandemic in the U.S.*, U.S. NEWS & WORLD REPORT (Jan. 27, 2021), <https://www.msn.com/en-us/health/medical/january-marks-deadliest-month-yet-for-coronavirus-pandemic-in-the-u-s/ar-BB1d91b8?ocid=msedgntp>.

3. See Eileen Sullivan & Sheryl Gay Stolberg, *Live Updates: Biden Confronts a Confluence of Crises*, N.Y. TIMES (January 22, 2021), <https://www.nytimes.com/live/2021/01/21/us/joe-biden>.

announced aims to acquire an additional 200 million doses of vaccines, increasing the overall total doses to 600 million and pushing towards the goal of inoculating most Americans by summer 2021.<sup>4</sup> Rather than giving hyper focus to the COVID-19 pandemic, the United States is divided across political, public health, and social lines that challenge the sanctity of American democracy; this in turn has led to serious questions on the ability of the country to maintain its position as a global leader who defends authoritarianism and champions authentic democracy by the people, for the people.

### Introduction

The architecture of American life and American politics has changed forever as a result of COVID-19 and the contested Presidential Election that occurred during its ravaging period. This has resulted in rapidly changing views about the stability of American democracy, both on the home front and abroad.<sup>5</sup> After one of the most hotly contested elections in United States history, the national leadership is in a gridlock. With an incumbent Trump refusing to concede to the Biden/Harris ticket until the January 6, 2021 Capitol riots, the American public began questioning the impact of the lack of transition. With COVID-19 infections continuously roaring and expiration dates looming for key COVID relief programs, the United States experienced

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4. See *Biden Aims to Have Enough Coronavirus Vaccines for Most Americans by the End of Summer*, NEWS.LAW (Jan. 27, 2021), <https://news.law/biden-aims-to-have-enough-coronavirus-vaccines-for-most-americans-by-the-end-of-summer/>.

5. The United States plays a pivotal role in advancing democratic ideals across the globe. However, with the chaos surrounding the election, the rapidly disintegrating view of the government's roles and abilities are being questioned outside of the United States, as well. Although parallels have been drawn to the 2000 *Bush vs. Gore* election challenges over the winner of the state of Florida, the 2020 election was completely unique and historic for its widespread lack of acceptance of the declared victor and various tactics used by the seated President Trump to overturn declared results. Kari Henriksen was a member of Norway's parliament who headed the Organization for Security and Cooperation in Europe (OSCE) Parliamentary Assembly's group of election observers. She stated, "People have big expectations of the U.S. as a good, functional democracy. Therefore, it is astonishing that we experience this kind of mistrust from a president when the U.S. is the leading country in the world regarding democracy. That is one of the issues that makes this very, very special." Others watching the government's response after the election echoed her surprise. Michal Baranowski, the German Marshall Fund director of the office in Warsaw discussed the post-election uncertainty and Trump's refusal to concede by saying, "People who know the U.S. are shocked it's going on so long. We still say it will work out, because of the strength of U.S. institutions. But, man, it's taking a long time, and I'm beginning to worry." See Carol Morello, *Foreign Observers Shocked by Chaos over U.S. Election*, WASH. POST (Nov. 2020), <https://www.msn.com/en-us/news/politics/foreign-observers-shocked-by-chaos-over-u-s-election/ar-BB1bjz1Y?ocid=msedgntp>.

great internal tumult and division.<sup>67</sup> Questions of national security and shaken trust in the democratic process grew daily, as soaring COVID-19 statistics continued to break their own months-old records.

“A dangerous time;” “humanitarian disaster;” “covid-hell.”<sup>8</sup> Experts are in virtually unanimous consensus: COVID-19 is unbelievably destructive. Since coronavirus first arrived in the United States in early 2020, the nation has consistently beaten its own records in terms of death count and infection rate. There are days on end where well over 100,000 cases are confirmed. Within this environment, there has been a vacuum of leadership for a variety of reasons: lack of vaccines, conflicting arguments over the 2020 Presidential Election, and more. This has led to more infections, as the citizens are becoming increasingly jaded by the continuation of the pandemic with seemingly no improvement over the course of the first year. The same issues at the beginning of COVID-19 with lack of personal protective equipment (PPE) for front-line workers, overcrowded hospitals, and an overwhelmed healthcare system are re-emerging as casual American life continues to fuel virus surges.<sup>9</sup>

Furthermore, the longer it takes for vaccines to be released is often related to increased hesitancy or resistance from patients. They will say that they do not want it, they do not trust it, they believe they will get better on their own, or they do not trust medicine in general. Studies have shown that religious beliefs are often a causal factor in vaccine hesitancy.<sup>10</sup> Other groups that reported vaccine hesitant beliefs included ethnic or indigenous groups, people of higher socioeconomic status, well-educated people, and people living in urban areas.<sup>11</sup> Still, concern about vaccine hesitancy is growing worldwide and the World Health Organization (WHO) has identified it as one of the top ten global health threats in 2019.<sup>12</sup> The WHO defines

6. See Grace Segers, *Key COVID Relief Programs Set to Expire without Deal on New Bill*, CBS NEWS (Nov. 18, 2020), <https://www.msn.com/en-us/news/politics/key-covid-relief-programs-set-to-expire-without-deal-on-new-bill/ar-BB1b8v48?ocid=msedgdp>.

7. See Holly Yan et al., *U.S. Coronavirus: 1,707 Covid-19 Deaths Were Reported in 1 Day. That's the Highest Daily Death Toll in 6 Months*, CNN (Nov. 18, 2020), <https://www.msn.com/en-us/health/medical/us-coronavirus-1-707-covid-19-deaths-were-reported-in-1-day-that-s-the-highest-daily-death-toll-in-6-months/ar-BB1b7mEQ?ocid=msedgntp>.

8. See Marisa Iati, ‘Covid-Hell.’ ‘Humanitarian Disaster.’ Experts Sound the Alarm about U.S. Coronavirus Outbreak, WASH. POST (Nov. 12, 2020), <https://www.msn.com/en-us/news/us/covid-hell-humanitarian-disaster-experts-sound-the-alarm-about-u-s-coronavirus-outbreak/ar-BB1aXM0C?ocid=msedgntp>.

9. *Id.*

10. See Eve Dubé et al., *Mapping Vaccine Hesitancy—Country-Specific Characteristics of a Global Phenomenon*, 32 VACCINE 6649 (2014).

11. *Id.*

12. See Resolution 2017/2951(RSP) of the European Parliament of 19 April 2018 on Vaccine Hesitancy and the Drop in Vaccination Rates in Europe. See also Rada Akbar, *Ten Health Issues WHO Will Tackle This Year*, WORLD HEALTH ORGANIZATION, <https://www.who.int/news-room/spotlight/ten-threats-to-global-health-in-2019> (last visited Nov. 16, 2020).

vaccine hesitancy as a “delay in acceptance or refusal of vaccination despite availability of vaccination services.”<sup>13</sup> As the attitudes towards vaccines shifts negatively, the likelihood that COVID-19 vaccines will be met with open arms diminishes and extends the reach of the virus.

However, a look at some of the major diseases in history reveals the efficacy of vaccination—smallpox, polio, tetanus, measles, the list of eradicated infections goes on.<sup>14</sup> After the release of COVID-19 vaccines, there is still a strong chance of liability issues emerging between institutions, healthcare workers, and patients. For example, if a physician chooses not to get vaccinated and then transmits the virus to a patient, there could be liabilities due to their deliberate actions that negatively impacted the patient in their care. Nurses, doctors, firemen, and various other first responders are all primary points of contact for infected patients. If they work for hospitals or other government-funded programs, they must receive vaccinations for the safety of those that they come into contact with before entering the workplace. Coronavirus is far bigger than any one individual and requires careful and compassionate consideration of how each person’s decision to be vaccinated or not impacts other people’s health and wellbeing. Still, how can this truly be enforced? Questions regarding ownership over one’s body, making independent choices, honoring religious freedoms, and more are certain to create numerous lawsuits.

Before the measles vaccine program began in the United States in 1962, as many as four million people became infected every year.<sup>15</sup> However, with large thanks to a comprehensive vaccine program that reduced the number of cases by ninety-nine percent, the disease was essentially eradicated in the United States by 2000.<sup>16</sup> Unfortunately, as the anti-vaccine movement gains traction, measles has crept back.<sup>17</sup> The threshold considered necessary to maintain immunity is ninety-five percent.<sup>18</sup> In 2019, New York was hit with a wave of measles infections that was concentrated among children from Orthodox Jewish families, many of whom attended religious schools that may have fallen below that mark.<sup>19</sup> Later that year, New York State revoked its

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13. See Noni E. Macdonald, *Vaccine Hesitancy: Definition, Scope and Determinants*, 33 *VACCINE* 1461, 1464 (2015).

14. See *14 Diseases You Almost Forgot About (Thanks to Vaccines)*, CTRS. FOR DISEASE CONTROL AND PREVENTION (May 8, 2020), <https://www.cdc.gov/vaccines/parents/diseases/forgot-14-diseases.html>.

15. See *Measles*, CTRS. FOR DISEASE CONTROL AND PREVENTION (Nov. 5, 2020), <https://www.cdc.gov/measles/about/history.html>.

16. See Michelle Andrews, *Why Measles Hits So Hard Within N.Y. Orthodox Jewish Community*, KAISER HEALTH NEWS (Mar. 11, 2019), <https://khn.org/news/why-measles-hits-so-hard-within-n-y-orthodox-jewish-community/>.

17. *Id.*

18. *Id.*

19. *Id.*

former allowance of religious exemptions from mandated vaccines.<sup>20</sup> As schools increasingly require their students to receive mandatory vaccinations in order to attend classes, it is likely that the COVID-19 vaccine will soon be added to the list.

Researchers during the Bush administration in the early 2000s recognized that schools were an ideal environment for spreading diseases, and studies on combatting a large-scale contagion found that if public schools were closed, then the spread of a disease would be significantly slowed.<sup>21</sup> During the early stages of COVID-19, schools were closed in order to limit the spread of the virus. However, as schools across the country reopened, cases amongst American children and teenagers began rising.<sup>22</sup> This reflects the necessity for vaccinations amongst schoolchildren, but once again the questions of how to enforce the imminent COVID-19 vaccination policies arise. Liabilities for schools and districts are certain to emerge: can children be kept away from the classroom because they aren't vaccinated? Can physicians refuse the vaccine, prohibiting them from working, and be fired? If individuals in the military do not want to get vaccinated, will they be able to stay? Large questions over the value of the individual versus collective safety will lead to lawsuits, new legislation, and hopefully strong and consistent leadership to carry the nation through this uncharted process. Dr. Howard Markel, a professor of the history of medicine who helped shape federal social distancing policy during the George W. Bush administration, explained: "[L]eadership does matter. What your leaders do, like flaunting the mask or having parties without masks, almost encourages people to do the same."<sup>23</sup>

The world has struggled to develop safe vaccines, to create an apparatus to distribute them, and to have widespread adoption of the vaccine. The Trump administration's response to the COVID-19 pandemic and development of vaccines to combat the spread of the virus were driving issues of the 2020 U.S. Presidential Election.<sup>24</sup> Studies conducted prior to the election discovered swing state voters said by a slim margin that Democratic candidate Joe Biden and his party would do a better job of handling COVID-19

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20. See *Immunizations*, THE N.Y. CITY DEP'T. OF EDU., <https://www.schools.nyc.gov/school-life/health-and-wellness/immunizations> (last visited Nov. 16, 2020).

21. See Eric Lipton & Jennifer Steinhauer, *The Untold Story of the Birth of Social Distancing*, N.Y. TIMES (Apr. 22, 2020), <https://www.nytimes.com/2020/04/22/us/politics/social-distancing-coronavirus.html>.

22. See Lindsey Tanner, *COVID-19 Cases Rising Among U.S. Children as Schools Reopen*, AP NEWS (Sep. 29, 2020), <https://apnews.com/article/virus-outbreak-archive-901fb467cbaf5cd519be2247f0e3983c>.

23. See *The Surging Coronavirus Finds a Federal Leadership Vacuum*, NEWS CHANT USA (Nov. 11, 2020), <https://us.newschant.com/politics/the-surging-coronavirus-finds-a-federal-leadership-vacuum/>.

24. See *Presidential Debate: Trump and Biden Row Over Covid, Climate and Racism*, BBC (Oct. 23, 2020), <https://www.bbc.com/news/world-us-canada-54654937>.

than Trump and the GOP, supporting the belief that Trump's inability to control the outbreak hampered his chances at a second term.<sup>25</sup> The frequency of cases has undeniable effects on politicians, but even more so for the first responders that have direct exposure to the virus by personal contact with ill patients.

After the 2020 election was called by the media in favor of Democratic candidate Joe Biden, the pandemic narrative that dominated headlines often appeared to be replaced by the stories about election-based conflict. As daily deaths and infections continued to plague the American public, the only public statements made by President Trump regarding coronavirus were to display his disdain that positive updates about coronavirus vaccines had not come until after November 3rd.<sup>26</sup> Once again, this demonstrates the significant impact that coronavirus had on the election results, as the incumbent Trump implied that, had the vaccine been released earlier, his chance of victory would have been substantially higher. However, his withdrawal from coronavirus resolution efforts in favor of election-based accusations has contributed to a widespread "vacuum" of federal leadership.<sup>27</sup> Around the country, state hospitals are filling, PPE shortages are re-emerging, and health officials have begun mulling over plans to train family members of nursing home residents to fill in at facilities that lack adequate numbers of workers.<sup>28</sup> Frontline workers have made one fact resoundingly clear: they cannot fight the pandemic on their own.

In the unfortunate case of a rescue gone wrong, there are certain circumstances and laws that put the responsibility on the first responders rather than the municipality; thus, forcing them to potentially be responsible for accidents that they may have had no fault in. There is a significant exception to these personal liabilities that can be incurred by government officials that is known as qualified immunity. This is a legal notion which protects government employees from lawsuits that allege the official violated a plaintiff's rights, and only allows suits where officials violated a "clearly established" statutory or constitutional right at the time of the incident which a reasonable person would have known.<sup>29</sup> This does not prevent police officers from being sued, but in the case that a suit is filed, the officers are then legally permitted to claim qualified immunity as a defense in order to prevent money judgments from entering against them and, hopefully, avoid being forced to

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25. See Jacob Pramuk, *Coronavirus Concerns Fall and Trump Approval Ticks Higher in Swing States*, CNBC/Change Research Poll Finds, CNBC (Aug. 26, 2020), <https://www.cnbc.com/2020/08/26/coronavirus-concerns-fall-and-trump-approval-rises-in-2020-swing-states.html>.

26. Sullivan & Stolberg, *supra* note 3.

27. *Id.*

28. *Id.*

29. See *Qualified Immunity*, LEGAL INFO. INST., CORNELL L. SCHOOL, [https://www.law.cornell.edu/wex/qualified\\_immunity](https://www.law.cornell.edu/wex/qualified_immunity) (last visited Oct. 27, 2020).

stand trial.<sup>30</sup> Government employees who meet the standards for qualified immunity include mayors, governors, prison guards, school administrators, IRS agents, and, perhaps most infamously, police officers.<sup>31</sup>

I will begin this article with a detailed explanation of how leadership has pulled apart in the United States on both partisan, federal, and national levels, glaringly so during the COVID-19 pandemic. This “vacuum” of leadership has contributed to the deaths of thousands of Americans and posed security risks for the country. I will then discuss the legislative and liability potentials that will emerge as a result of imminent COVID-19 vaccinations. The U.S. Constitution protects certain rights and privileges, and some have argued that the mandates instigated through coronavirus have been unconstitutional. Supreme Court Justice Samuel Alito described the policies seen during the pandemic as inspiring “previously unimaginable restrictions on individual liberty.”<sup>32</sup> Still, during a grave public health crisis, the value of the individual’s rights and freedoms must be compared to the lives of the larger collective population. The rights to freedoms such as religious liberty, however, will undoubtedly become questioned in light of imminent mandatory vaccinations for school attendance, travel, and work. Millions of government officials will presumably be asked to take the vaccines, as well, which in the case of refusal and subsequent illness could also produce further lawsuit claims and qualified immunity defenses.

I will define qualified immunity and the legislative precedent that has established it. I will also briefly discuss the legal complexities to qualified immunity, with regard to tort, civil, and criminal law. The United States arrived at the point of polarized, yet widespread, demands to end qualified immunity, largely through citizen-driven protests and the Black Lives Matter movements. Understandably so, citizens want to minimize deaths at the hands of police officers, and qualified immunity is facing new challenges to its existence. Nonetheless, this is a complex issue that demands attention to the economic and social repercussions of ridding qualified immunity. Some states have opted in the past to limit the immunities of their first responders. I will address these circumstances to provide context to the nationwide issue and display the necessity for some form of qualified immunity in specific

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30. See Carl J. Schuman, *Qualified Immunity for Police Officers: Is There a Middle Ground?*, DIVIDED WE FALL (Sep. 14, 2020), <https://dividedwefall.com/2020/09/14/qualified-immunity-for-police-officers-is-there-a-middle-ground/>.

31. See *Frequently Asked Questions About Ending Qualified Immunity*, INST. FOR JUST., <https://ij.org/frequently-asked-questions-about-ending-qualified-immunity/> (last visited Jan. 27, 2021).

32. See Meghan Roos, *Supreme Court Justice Alito Calls COVID Lockdowns ‘Previously Unimaginable Restrictions on Individual Liberty,’* NEWSWEEK (Nov. 13, 2020), <https://www.msn.com/en-us/news/politics/supreme-court-justice-alito-calls-covid-lockdowns-previously-unimaginable-restrictions-on-individual-liberty/ar-BB1aZGYA?ocid=msedgdp>.

cases to allow responders to carry out their job duties to the best of their abilities.

I argue that qualified immunity must be altered and amended in such a way that the previously established “one size fits all” immunity package becomes a fact-specific individualized matter. There will be unfortunate circumstances in which intentional conduct is outrageous and officer actions result in death or injury. In these cases, qualified immunity must not cover clearly depraved acts. However, there must still be a form of protection for first responders that acknowledges their vital need to perform their job in good faith for the protection of citizens. Liabilities must be placed on municipalities above individuals in order to do so, particularly if there was an established pattern and practice of misconduct and the municipality allowed it to continue. With the added public health crisis, the stakes are elevated even higher. These first responders must have adequate protections and policies in place to aid them in doing their jobs, particularly when it comes to physical immunities through a vaccine. These are needs acknowledged by early plans for vaccination distributions, as first responders will be prioritized.<sup>33</sup> The physical immunities must also translate into legal immunities. The legal notion of qualified immunity is one that is fundamental to protecting those in positions to protect others. If adjustments are made to limit qualified immunity and reform the legal basis of application in such a way that both protects officials and citizens, lives will be saved.

Qualified immunity has historically been considered a critical defense for government officials, as they must be able to perform their jobs without fear of lawsuits and liability concerns. However, the death of George Floyd at the knee of a Minneapolis police officer on May 25, 2020 rapidly and loudly altered the course of conversation in regard to qualified immunity.<sup>34</sup> Police officers arrested Floyd after a convenience store employee called 911 and informed police that Floyd had bought cigarettes with a counterfeit twenty dollar bill.<sup>35</sup> Video footage of the arrest revealed that officer Derek Chauvin did not remove his knee from the neck of George Floyd, even after Floyd lost consciousness, and for a full minute and twenty seconds after paramedics arrived at the scene.<sup>36</sup> In the aftermath of George Floyd’s death, District Attorneys filed charges against all officers involved: Derek Chauvin, Thomas Lane, J. Alexander Kueng, and Tou Thao.<sup>37</sup> This incident led to nationwide demands for reform from patterns of police brutality (particularly

33. THE NATIONAL ACADEMIES PRESS, FRAMEWORK FOR EQUITABLE ALLOCATION OF COVID-19 VACCINE (2020).

34. See Evan Hill et al., *How George Floyd Was Killed in Police Custody*, N.Y. TIMES (May 31, 2020), <https://www.nytimes.com/2020/05/31/us/george-floyd-investigation.html> [<https://perma.cc/S6A3-Q52D>].

35. *Id.*

36. *Id.*

37. *Id.*

against black men) and widespread change throughout all police departments. Vocal demands to “Defund the Police” are opposed by calls to “Back the Blue,” both rapidly increasing in volume and posing a dangerous threat to the unity of our nation.

The qualified immunity defense has protected officers for years, but was heavily criticized by the public after the death of George Floyd. In June 2020, the George Floyd Justice in Policing Act of 2020 was introduced to the Senate.<sup>38</sup> This Act addressed a wide range of policies and issues regarding policing practices and law enforcement accountability in order to enhance transparency and data collection, to eliminate discriminatory policing practices, facilitate federal enforcement of constitutional violations by state and local law enforcement, and establish a framework to prohibit racial profiling, among other measures.<sup>39</sup> This bill specifically addressed qualified immunity by “limit[ing] qualified immunity as a defense to liability in a private civil action against a law enforcement officer or state correctional officer.”<sup>40</sup> The specific wording—“limits”—is critical, as it accounts for the overwhelming wave of demands for change to police protections within the legal arena in 2020, without removing all immunity protections and thus leaving officers vulnerable. To rid the country and our nation’s first responders of qualified immunity entirely is an extremely nuanced and complex issue with real economic ramifications.

### **I. Qualified Immunity’s Historical Placement in Law to Protect Government Officials**

Qualified immunity as it is understood in 2020 has a lengthy and non-linear history that taking place over the last century. The text of the Civil Rights Act of 1871, Section 1983, which authorizes civil suits for both constitutional and statutory violations, reads:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.<sup>41</sup>

38. George Floyd Justice in Policing Act of 2020, H.R. 7120, 116th Cong. (2020).

39. George Floyd Justice in Policing Act of 2020, *supra* not 38.

40. *Id.*

41. *See* 42 U.S.C. § 1983 (2012).

This adheres the fundamental principle established in *Marbury v. Madison* that where there is a right, there is also a remedy.<sup>42</sup> Section 1983 honored citizens' right to take action against those who wrong them. This is an important right, as it in theory ensures that officers are subject to consequences if they behave in an inappropriate or unjust manner.

Initially, this right to hold officials liable for their actions was relatively straightforward, as in the case of *Monroe v. Pape*. In the early morning of October 29, 1958, thirteen Chicago police officers broke down the door of James Monroe and his wife.<sup>43</sup> They forced both individuals to stand naked in the living room and ransacked the apartment.<sup>44</sup> After this, Mr. Monroe was taken and held for ten hours on "open charges" while police officers interrogated him about a murder.<sup>45</sup> The police had no warrant for search or arrest, and refused him permission to call his attorney; both of these violating fundamental constitutional rights.<sup>46</sup> The Supreme Court concluded that the Fourth Amendment right prohibiting illegal search and seizure had been violated and officers had committed an action under the color of law; thus, police could be held individually liable as established through Section 1983.<sup>47</sup> However, the municipality could not be liable.<sup>48</sup> This was an important recognition by the nation's highest court that officials could and would be punished under the law for constitutional violations against other citizens.

42. See *Marbury v. Madison*, 5 U.S. 137, 163 (1803).

43. See *Monroe v. Pape*, 365 U.S. 167 (1961).

44. *Id.*

45. See *Monroe v. Pape*, OYEZ, [www.oyez.org/cases/1960/39](http://www.oyez.org/cases/1960/39) (last visited Jan. 27, 2021).

46. The Fourth Amendment to the United States Constitution provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV. The Sixth Amendment to the United States Constitution provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

U.S. CONST. amend. VI.

47. *Id.*

48. *Id.*

*Katz v. United States* was a 1967 case that also dealt with “search and seizure” protocol, in a suit brought about after Katz’s conviction for illegally transmitting wagering information from Los Angeles to Boston and Miami. The evidence against Katz included recordings from an eavesdropping device placed on the outside of a public phone booth.<sup>49</sup> The Court ruled that Katz was entitled to protection and privacy under the Fourth Amendment, as “The Fourth Amendment protects people, not places;” and a concurring opinion by Justice John Harlan led to the idea of a “reasonable expectation of privacy” under the amendment.<sup>50</sup>

However, the case *Pierson v. Ray* also decided in 1967 that government officials who had committed statutory or constitutional violations while acting in “good faith” would be able to raise qualified immunity as a defense to civil claims.<sup>51</sup> This case claimed that qualified immunity was necessary because “[a] policeman’s lot is not so unhappy that he must choose between being charged with dereliction of duty if he does not arrest when he had probable cause, and being mulcted in damages if he does.”<sup>52</sup> However, little specification was given to what precisely “acting in good faith” looked like on a case-by-case basis. Rather, the Court suggested “good faith” was based upon the police officer’s judgment and their personal subjectivity. This chipped away some of the previously established precedent allowing citizens to take action against officials, but qualified immunity would be extended even further in *Harlow v. Fitzgerald*.<sup>53</sup>

#### A. Qualified and Absolute Immunities: Different in Definition but Similar in Application

Legally there is a difference between qualified and absolute immunities in terms of who qualifies for such protections. Under absolute immunity, rather than officials being judged by a subjective “good faith” standard, those accused of misconduct or inappropriate action would be immune unless it was proven that the rights in question were “clearly established.”<sup>54</sup> The *Harlow v. Fitzgerald* ruling declared that qualified immunity was necessary for government officials to carry out their jobs and that courts could adequately determine whether actions fell in the scope of qualified immunity based upon whether the officials in question knew or should have known that their

49. See *Katz v. United States*, 389 U.S. 347 (1967).

50. See *Katz*, 389 U.S. 347.

51. See *Pierson v. Ray*, 386 U.S. 547 (1967).

52. *Id.*

53. See Amir H. Ali & Emily Clark, *Qualified Immunity: Explained, The Lab*, THE APPEAL (June 20, 2019), <https://theappeal.org/qualified-immunity-explained/>. See also *Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

54. *Id.*

actions would lead to a violation of another individual's constitutional rights.<sup>55</sup> The case itself dealt with a presidential aide and immunity from civil suits; but once applied in practicality, qualified immunity soon became similar to a blanket or absolute immunity.

First responders, such as lifeguards and paramedics, will by definition fall into the qualified immunity defense rather than absolute immunity. *Harlow v. Fitzgerald* differentiated between absolute immunity and qualified immunity. Both immunities are legal terms used to protect public officials, but for different roles and purposes. The Supreme Court reinforced "the need to protect officials who are required to exercise discretion and the related public interest in encouraging the vigorous exercise of official authority" by continuing to uphold immunities.<sup>56</sup> However, certain government officials (President, prosecutors, similar officials) were granted absolute immunity, which shielded these individuals from criminal prosecution and lawsuits, contingent on their actions being within the scope of their job responsibilities.<sup>57</sup> Although the Supreme Court differentiated between absolute immunity and qualified immunity, attorneys have since successfully invoked the latter as a defense in numerous cases involving police officers.<sup>58</sup> For a police officer accused of misconduct or violation, they may claim qualified immunity that will allow them to be "excused" of liability for their actions. In application, there can and has been little differentiation from absolute and qualified immunity as both permit a release of liability for government officials.

#### B. Responsibilities of Officers and Municipalities in Questionable Acts

Regardless of the Court's original intent in creating and amending law regarding qualified immunity, an officer who violates someone's constitutional rights will be generally protected from a lawsuit unless prior judicial opinions that address specific context and conduct can be identified.<sup>59</sup> Unfortunately, this is becoming fact in numerous cases of serious constitutional violations by police officers. In 2018, two police officers in Sacramento, California fatally shot Stephon Clark in his grandparents' backyard and did not face charges.<sup>60</sup> Police responded to a call about a man wearing a black hoodie and dark pants breaking car windows, and a sheriff's department

55. *Id.* See also *Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

56. Ali & Clark, *supra* note 53.

57. *Id.*

58. *Qualified Immunity*, LEGAL INFO. INST., CORNELL L. SCHOOL, [https://www.law.cornell.edu/wex/qualified\\_immunity](https://www.law.cornell.edu/wex/qualified_immunity).

59. Ali & Clark, *supra* note 53.

60. See Nick Cahill, *Feds Decline to Charge Officers in Shooting Death of Stephon Clark*, COURTHOUSE NEWS SERVICE (Sept. 26, 2019), <https://www.courthousenews.com/feds-decline-to-charge-officers-in-shooting-death-of-stephon-clark/>.

helicopter spotted Clark in a backyard.<sup>61</sup> The officers pursued and shot him mere moments after commanding him to show his hands, fatally unloading twenty shots after seeing what was later discovered to be an iPhone in his hand.<sup>62</sup> The police officers who shot him avoided charges and were also declared fit to return to active duty.<sup>63</sup> The city of Sacramento faced a wrongful death lawsuit that concluded in a settlement worth millions which was paid out to Clark's two sons and remaining family.<sup>64</sup> Still, the officers were released from liability.<sup>65</sup> While there are undeniable life and death situations facing police officers, the question of liability, good faith, and bad circumstances intermingle in a complex web of legal and social factors.

There is also a critical difference between municipal and individual liabilities in determining where qualified immunity applies in the context of police shootings. Through the *Monell v. Department of Social Services* ruling, a plaintiff can sue an officer's municipal employer for promulgating unconstitutional policies or practices that precipitate officer misconduct. This is because municipalities are not entitled to absolute or qualified immunities through the Civil Rights Act of 1871 Section 1983 or relevant law used by plaintiffs seeking recovery for alleged violations of constitutional rights.<sup>66</sup> Constitutional violations must still be tied to a policy or custom, and the Court concluded that a municipality could not be held vicariously liable for its employees' conduct.<sup>67</sup> Nonetheless, this left wide vulnerabilities for municipalities, who are not protected in the same way government officials are. The Supreme Court also added that constitutional violations must be tied to a particular policy or custom and that liability does not attach through respondeat superior.<sup>68</sup> In particular, plaintiffs in a case must establish that a municipality's "*deliberate* conduct . . . [is] the 'moving force'" that causes the deprivation of federal rights.<sup>69</sup> Today, it must also be demonstrated that a municipal decision:

reflects deliberate indifference to the risk that a violation of a particular constitutional or statutory right will follow the decision. Only where adequate scrutiny of an applicant's

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61. See Anita Chabria, *Before George Floyd, There Was Stephon Clark. Here's What His Brother Has Learned About Pain, Protests*, LOS ANGELES TIMES (June 4, 2020), <https://www.latimes.com/california/story/2020-06-04/stephon-clark-death-brother-stevante-leads-george-floyd>.

62. *Id.*

63. See Cahill, *supra* note 60.

64. *Id.*

65. *Id.*

66. See *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 701 (1978).

67. *Id.*

68. *Id.*

69. *Id.*

background would lead a reasonable policymaker to conclude that the plainly obvious consequence of the decision to hire the applicant would be the deprivation of a third party's federally protected right can the official's failure to adequately scrutinize the applicant's background constitute "deliberate indifference."<sup>70</sup>

The ruling in *Monell* was also a reversal of the previous decision in *Monroe v. Pape* in that the court decided that "Congress *did* intend municipalities and other local government units to be included among those persons to whom [Section] 1983 applies."<sup>71</sup> George Floyd's family reaffirmed this by filing a wrongful death lawsuit in the U.S. District Court for the District of Minnesota not only against the four officers involved in Floyd's death in their individual capacities, but also against the city of Minneapolis for promulgating unconstitutional policies and practices that precipitated Floyd's death.<sup>72</sup> Still, municipal liabilities doctrine demands plaintiffs meet nearly impossible standards of proof as they relate to policies and causation, meaning that victims of police brutality find their remedies severely limited.<sup>73</sup>

## II. Rapidly Heightening Social Pressure to Reform Liability Systems Nationwide

Before May 25, 2020, the majority of the American public likely did not understand qualified immunity and its implications. In the past few decades, there has been a revival of social attention and indignation towards the perceived lack of policing exhibited towards police officers themselves.<sup>74</sup> It is a rare event for a police officer to be charged with a crime resulting from a fatal on-duty shooting, and even rarer for an officer to be convicted in one of those cases.<sup>75</sup> From 2005–2018, ninety-seven nonfederal sworn law enforcement officers with the general powers of arrest were arrested for murder or manslaughter resulting from an on-duty shooting where the officer shot

70. See *Bd. of Cnty. Comm'rs v. Brown*, 520 U.S. 397, 410 (1997). See also Gregory A. Hall, *Section 1983 Claims Difficult to Prove*, GREGORY A. HALL (Dec. 6, 2013), <https://adenverlawyer.com/2013/12/06/section-1983-claims/>.

71. See *Bd. of Cnty. Comm'rs v. Brown*, *supra* note 70.

72. See Brett Raffish, *Municipal Liability in Police Misconduct Lawsuits*, LAWFARE (Oct. 19, 2020), <https://www.lawfareblog.com/municipal-liability-police-misconduct-lawsuits>.

73. See Avidan Y. Cover, *Revisionist Municipal Liability*, 52 GA. L. REV. 375, 436 (Winter 2018).

74. See Samuel Walker, *Police Accountability: Current Issues and Research Needs*, NAT'L INST. OF JUST.: POLICE PLANNING RES. WORKSHOP (Nov. 2006), <https://www.ncjrs.gov/pdffiles1/nij/grants/218583.pdf>.

75. See Philip M. Stinson, *Charging a Police Officer in Fatal Shooting Case is Rare, and a Conviction is Even Rarer*, CRIM. JUST. FAC. PUBLICATIONS (May 31, 2017), [https://scholarworks.bgsu.edu/crim\\_just\\_pub80](https://scholarworks.bgsu.edu/crim_just_pub80).

and killed someone, of which only thirty-five were convicted of a crime resulting from said on-duty shooting.<sup>76</sup> However, in the aftermath of George Floyd's death at the knee of Minneapolis police officers, nationwide demands for police reform are sweeping rapidly throughout the nation.

The issue of police brutality has been a focal point of the 2020 Presidential Election, with moderators asking President Donald Trump, Vice President Mike Pence, Democratic Presidential nominee Joe Biden and Democratic Vice-Presidential nominee Kamala Harris about it during the presidential and vice-presidential debates. The cases against the officers present at the time of George Floyd's death angered many, as it spoke to a wide pattern and practice of law enforcement officers being permitted to use violent tactics against citizens, particularly against Black men. However, the charges brought against the officers are perhaps a moderate indication of reform and change to the justice system already. A judge dropped the third-degree murder charge that was filed against Officer Derek Chauvin but kept the higher second-degree murder charge.<sup>77</sup> The Minnesota Attorney General Keith Ellison stated:

The court has sustained eight out of nine charges against the defendants in the murder of George Floyd, including the most serious charges against all four defendants. This means that all four defendants will stand trial for murder and manslaughter, both in the second degree. This is an important, positive step forward in the path toward justice for George Floyd, his family, our community, and Minnesota.<sup>78</sup>

The linguistics of his statement are critical: Floyd's death is being called "murder." This is a significant difference when compared to other cases when officers were not convicted because there was no clear indication that they had violated the subjective precedent established in *Anderson v.*

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76. See Stinson, *supra* note 75. See also Tyrionna Clardy, *Vice Presidential Nominees Debate Coronavirus, Police Brutality in Return to Normalcy*, U. NEWS (Oct. 19, 2020), <https://info.umkc.edu/unews/vice-presidential-nominees-debate-coronavirus-police-brutality-in-return-to-normalcy/>. See also Morgan Watkins, *Joe Biden in Debate: 'Cops Aren't Happy to See What Happened to Breonna Taylor'*, LOUISVILLE COURIER J. (Sept. 30, 2020), <https://www.courierjournal.com/story/news/politics/2020/09/29/breonna-taylor-receives-mention-during-first-presidential-debate/3583328001/>.

77. See *Trial to Proceed for Four Former Officers in Death of George Floyd, Judge Drops 3rd-Degree Murder Charge Against Chauvin*, KSTP (Oct. 22, 2020), <https://kstp.com/news/judge-drops-one-of-the-murder-charges-against-former-mpls-officer-derek-chauvin-in-the-death-of-george-floyd-2nd-degree-murder-charge-remains/5902394/>.

78. *Id.*

*Creighton*.<sup>79</sup> This precedent is risky because the perspective of a “reasonable officer” may contain subconscious racial biases and Floyd’s death is not a case that should offer wiggle room for “reasonable perspective.”<sup>80</sup> There should be no doubt that the knee of an officer pressed into a man’s neck for eight minutes when he is on the ground, pleading with officers, and telling them that he cannot breathe, violates constitutional rights.

After Floyd’s death, outcry across the nation took place in the form of protests and graffiti, as people came together to collectively state: “enough is enough.” While the legal implications of the officers who killed and observed the killing of George Floyd are beyond weighty enough to warrant their own conversation, it is critical to acknowledge the intense emotional and racial dynamics of the incident and its ensuing backlash. The horrific image of Floyd on the ground with a knee on his neck was seared into the minds of Americans across the country: Floyd could have been their father, brother, cousin, friend, or loved one. While the graffiti etched across the country was criticized by some, others claimed that it was a form of visual activism in order to historically document the tragic sentiment and testify to political and racial struggles in America.<sup>81</sup> This was not a unique incident, as the protests and graffiti bearing Floyd’s infamous words “I can’t breathe” were replaced only a few weeks later by “Say Her Name” in reference to Breonna Taylor.

#### A. Case Study: Breonna Taylor

The demands for change within the legal system in prosecuting police officers has been spurred not only by George Floyd but also by the death of Breonna Taylor. Breonna Taylor was a twenty-six year-old emergency room technician from Louisville, Kentucky. On March 13, 2020, she was in bed with her boyfriend Kenneth Walker when they heard loud banging at the door.<sup>82</sup> Both Taylor and Walker allegedly called out, asking who was at the door.<sup>83</sup> Unbeknownst to them at the time, police were executing a search

79. See *Anderson v. Creighton*, 483 U.S. 635 (1987). This case established that qualified immunity is allowed if proof is presented that a “reasonable officer” could have believed the search was constitutionally compliant.

80. See Cynthia Lee, *Reforming the Law on Police Use of Deadly Force: De-Escalation, Pre-Seizure Conduct, and Imperfect Self-Defense*, U. ILL. L. REV. 629 (2018).

81. See Mary Louisa Cappelli, *Black Lives Matter: The Emotional and Racial Dynamics of the George Floyd Protest Graffiti*, SCIENTIFIC RES.: ADVANCES IN APPLIED SOC. (Sept. 2020), <https://doi.org/10.4236/aasoci.2020.109020>.

82. See Richard A. Oppel et al., *What We Know About Breonna Taylor’s Case and Death*, N.Y. TIMES (May 30, 2020), <https://www.nytimes.com/article/breonna-taylor-police.html>.

83. *Id.*

warrant with a battering ram to enter their apartment.<sup>84</sup> After the police officers broke the door off its hinges, police began firing, and fatally shot Taylor.<sup>85</sup>

Initially, no officers were charged with killing Taylor, and the first charge made was an indictment against former detective Brett Hankison for three counts of “wanton endangerment” after saying he had threatened the lives of three people living next to Taylor’s apartment by firing bullets that landed in theirs.<sup>86</sup> This turn of events set the public into an uproar, particularly amongst the younger generations.

#### B. Social Media Driven Movements Forcing National Change

George Floyd. Breonna Taylor. Elijah McClain. Ahmaud Arbery. Tamir Rice. Trayvon Martin. Eric Garner. Laquan McDonald. #SayTheirNames.

Social media has become an increasingly popular platform for social movements, as it has become a vehicle for widespread distribution of information practically instantaneously. Modern technology enables inexpensive video capture, which links to global networks such as YouTube, Instagram, and Snapchat. Activists founded The Black Lives Matter movement after Trayvon Martin’s murderer was acquitted, and it is now a global organization that serves to “eradicate white supremacy and build local power to intervene in violence inflicted on Black communities by the state and vigilantes.”<sup>87</sup> Since then, it has maintained a strong online influence that exploded in breadth and width in the aftermath of recent police brutality cases.

The younger generations comprised of Generation Z (Gen Z) and Millennials have been particularly vocal on social media in terms of spreading awareness. Phrases like “Defund the Police” and “ACAB,” an acronym standing for “All Cops Are Bastards,” quickly began trending online. Videos emerged on TikTok, the Chinese video sharing app, featuring the song “I NEED YOU TO” by Tobe Nwigwe. In these videos, people would post phrases that were seemingly innocent, only to be quickly transformed into an overlapping audio of Nwigwe’s song featuring the lyric “Arrest the killers of Breonna Taylor. All of y’all who think we need more evidence, you goofy. I said, arrest the killers of Breonna Taylor.”<sup>88</sup> These phrases were typically clickbait in some form: “You’ll never guess who slid into my

84. Oppel et al., *supra* note 82.

85. *Id.*

86. See Whitney Curtis, *Two Officers Shot in Louisville Protests Over Breonna Taylor Charging Decision*, N.Y. TIMES (Sept. 23, 2020), <https://www.nytimes.com/2020/09/23/us/breonna-taylor-decision-verdict.html>.

87. See *about*, BLACK LIVES MATTER, <https://blacklivesmatter.com/about/> (last visited Jan. 27, 2021).

88. TOBY Nwigwe, I NEED YOU TO (LaNell Grant 2020). See also Out West, *Arrest The Killers Of Breonna Taylor (Tik Tok Compilation) | Tobe Nwigwe | I NEED YOU TO*, YOUTUBE (July 27, 2020), <https://www.youtube.com/watch?v=OHUY8M4D7yU>.

TikTok DMs,” “How to lose 45 pounds in 4 months,” and “Amazon Must Haves.” Only to quickly shift into a new video clip demanding the arrests of the officers who had killed Ms. Taylor.<sup>89</sup> These types of social justice-based trends have long circulated on the Internet, but 2020 has shown how powerful online voices are. In response to numerous videos on Breonna Taylor, BLM, Defund the Police, and overwhelming public backlash, cities across the United States are cutting funding to police department budgets.<sup>90</sup>

The two largest cities in the country, New York and Los Angeles, both approved budget cuts mere weeks after protests began—New York slashed one billion dollars from its 2021 budget and Los Angeles approved a \$150 million cut.<sup>91</sup> After outcry over the alleged problems with over-policing and racial biases among officers, \$354 million of the police budget was reallocated to mental health, homelessness and education services in New York.<sup>92</sup> There ought to be relatively universal consensus that police officers are not put into their positions in order to cause harm against others. However, when the number of punitive measures taken against police officers who shoot others is significantly lower than the number of actions taken, change must be created. Qualified immunity can and should remain in effect in order to protect and encourage first responders to perform their job duties to the best of their abilities, without fear of repercussion. Still, it cannot and should not remain a blanket protection that permits unlawful and unconstitutional behavior against citizens.

### III. COVID-Fueled Leadership “Vacuum” Limiting National Response and Recovery

The pandemic adds further layers of complexities to the issues surrounding liability on both municipal and individual levels. Similar to Spanish flu in the early twentieth century, COVID-19 may be here to stay for a number of years because of the high incidence of death. The higher the incidence of death, the more rapidly it will disperse throughout a population. Since it has been confirmed that individuals can contract the virus multiple times, the future is almost certain to contain extensive numbers of cases.<sup>93</sup> Unfortunately, the rapid spread of the disease has been met across the

89. Nwigwe, *supra* note 88.

90. See Jemima McEvoy, *At Least Thirteen Cities Are Defunding Their Police Departments*, FORBES (Sept. 29, 2020), <https://www.forbes.com/sites/jemimamcevoy/2020/08/13/at-least-13-cities-are-defunding-their-police-departments/?sh=43eb8f4a29e3>.

91. McEvoy, *supra* note 90.

92. *Id.*

93. See Suzi Ring & Jason Gale, Analysis, *Can You Get Covid Twice? What Reinfection Cases Really Mean*, WASH. POST (Oct. 29, 2020), [https://www.washingtonpost.com/business/can-you-get-covid-twice-what-reinfection-cases-really-mean/2020/10/28/1cd3b53a-18d9-11eb-8bda-814ca56e138b\\_story.html](https://www.washingtonpost.com/business/can-you-get-covid-twice-what-reinfection-cases-really-mean/2020/10/28/1cd3b53a-18d9-11eb-8bda-814ca56e138b_story.html).

country with a “decentralized and piecemeal response led primarily by governors, mayors, and local health departments.”<sup>94</sup> Although the Trump administration’s coronavirus response was criticized for offering uneven assistance to states, funding and supply delays, lack of consistent messaging, and insufficient testing, the federal government by nature of the democratic system was limited in its ability to mandate centralized courses of action.<sup>95</sup>

Many believe that the response to COVID-19 should have been stronger from the federal government, as evidenced by dropping numbers in the polls taken of President Trump’s approval rating for his handling of the coronavirus pandemic.<sup>96</sup> However, the national COVID-19 response is divided among more than 2,000 state, local, and tribal public health departments. The Tenth Amendment of the U.S. Constitution states: “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”<sup>97</sup>

President Trump incorrectly stated that the authority of the president is “total . . . [States] can’t do anything without the approval of the president of the United States.”<sup>98</sup> The power of quarantine rests primarily with state and local authorities, not the federal government.<sup>99</sup> However, there are still measures that the federal government can take. On several occasions President Trump had publicly downplayed the severity of the pandemic, sent mixed signals on masks, suggested that the U.S. case numbers were rising because more tests were being conducted, pushed to reopen schools for in-person learning, and pulled out of the WHO.<sup>100</sup> In the election debates on healthcare, his Democratic opponent Joe Biden, supported expanded testing, eliminating out-of-pocket costs for COVID-19 treatment, additional pay and PPE for essential workers, reopening schools in-person only after sufficient reductions in community transmission, and re-joining the WHO.<sup>101</sup> The leadership styles are drastically different, but the strong points of their plans

94. See Sarah H. Gordon et al., *What Federalism Means for the U.S. Response to Coronavirus Disease 2019*, JAMA HEALTH FORUM (May 8, 2020), <https://doi.org/10.1001/jamahealthforum.2020.0510>.

95. *Id.*

96. See Chelsea Stahl, *Meet the Press Blog: Latest News, Analysis and Data Driving the Political Discussion*, NBC NEWS (Apr. 15, 2020), <https://www.nbcnews.com/politics/meet-the-press/blog/meet-press-blog-latest-news-analysis-data-driving-political-discussion-n988541/ncrd1190981>.

97. U.S. CONST. amend. X.

98. Gordon et al., *supra* note 94.

99. See Lawrence O. Gostin & Lindsay F. Wiley, *Governmental Public Health Powers During the COVID-19 Pandemic*, 323 JAMA HEALTH FORUM 21 (2020).

100. See Larry Levitt, *Trump vs. Biden on Health Care*, JAMA (Sep. 3, 2020), <https://doi.org/10.1001/jamahealthforum.2020.1110>.

101. See Levitt, *supra* note 100. See also Erica L. Green, *Biden’s Education Department Will Move Fast to Reverse Betsy DeVos’s Policies*, N.Y. TIMES (Nov. 13, 2020), <https://www.msn.com/en-us/news/politics/biden-s-education-department-will-move-fast-to-reverse-betsy-devos-s-policies/ar-BB1aYDal?ocid=msedgntp>.

appealed to different populations within the American public and had a divisive effect on the country in an intense and historic election.

After the media announced Democratic candidate Joe Biden and his Vice President Kamala Harris victors of the 2020 election, Biden's first move was to create a coronavirus task force.<sup>102</sup> The co-chairs of this task force were David Kessler, former Food and Drug Administration (FDA) commissioner; Marcella Nunez-Smith, Yale Associate Dean for Health Equity Research; and Vivek Murthy, former Surgeon General.<sup>103</sup> These experts will "help shape [Biden's] approach to managing the surge in reported infections; ensuring vaccines are safe, effective, and distributed efficiently, equitably, and free; and protecting at-risk populations."<sup>104</sup> These could perhaps be the "robust national guidelines for state-level pandemic response" that will provide "a uniform baseline level of health care access [that] will not only improve equity but also help to ensure that the nation's health is protected."<sup>105</sup> However, the American system limits the power of a president-elect until after inauguration on January 20, 2021, which imposed limitations on any federal movements Biden could have taken before his inauguration.

In a typical election year with a transfer of power, from the months of November through January, the president and president-elect both work peaceably to make the transition period proceed as smoothly as possible. However, this was not the case with the 2020 election. Although several states have relied solely on mail-in ballots in the past, the coronavirus pandemic caused mail-in ballots to be far more popular in 2020 than any other election year. In the months leading up to the election, President Trump gave many warnings that there would be widespread voter fraud as a result of the mail-in ballots. Once the ballots were initially counted and called in favor of the Biden/Harris ticket, Trump demanded recounts in several swing states. In the weeks following, polls of Republicans found that seventy-one percent "strongly agreed that voter fraud helped Biden in the election," and eighteen percent "somewhat agreed that fraud helped Biden," meaning seventy-five percent of polled Republicans agreed to some degree that the Biden/Harris victory was aided by election manipulation.<sup>106</sup> President Trump also remained largely out of view for the two weeks after the election, making only

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102. See Lev Facher, *Biden Transition Team Unveils Members of Covid-19 Task Force*, STAT (Nov. 9, 2020), <https://www.statnews.com/2020/11/09/biden-transition-team-unveils-members-of-covid-19-task-force/>.

103. Facher, *supra* note 45.

104. Facher, *supra* note 45.

105. Gordon et al., *supra* note 94.

106. See Jeffrey Martin, *75% Of Republicans Believe Voter Fraud Benefited Biden Amid Trump's Refusal to Concede: Poll*, NEWSWEEK (Nov. 18, 2020), <https://www.msn.com/en-us/news/politics/75-of-republicans-believe-voter-fraud-benefited-biden-amid-trump-s-refusal-to-concede-poll/ar-BB1b99uM?ocid=msedgdp>.

three public appearances and not taking questions from reporters.<sup>107</sup> However, as the recounts took place within the traditional turnover period, there was little coherent federal leadership to guide the country. The country was faced with the sad reality that the nation was becoming a ship without a rudder—the original captain was unwilling to get off out of concern that the new captain was illegitimate, the new captain was unable to get on, and no one was left to steer the ship.

During Biden's victory speech, he vowed to bring "a time to heal" in America, an idea reinforced in the ensuing weeks after he stated he would not order his administration to investigate Donald Trump if elected President.<sup>108</sup> Despite demands for punitive measures against President Trump, Biden refused to cave, opting to leave it to the Justice Department: "I would not dictate who should be prosecuted or who should be exonerated. That's not the role of the president of the United States."<sup>109</sup> Laurence Tribe, a constitutional law professor at Harvard Law School, in response to the numerous lawsuits Trump's legal team filed across the nation to question the election's results that saw seventy-three million voting for the Biden/Harris ticket, has said, "It's quite clear that Republican, as well as Democratic judges, are going to follow the law when there is no ambiguity."<sup>110</sup> Fortunately, despite coronavirus-facilitated court closures, the pursuit of legal claims after the election, still proceeded in a timely manner, ensuring the sanctity of the American democratic system.

After the mail-in ballots and in-person votes were counted, several swing states faced pressure to recount their ballots out of concern that widespread voter fraud would elect a President that had not legitimately won. The state of Georgia recounted their votes, after having initially declared Joe Biden the winner, only to reaffirm their initial claim and declare that they had found no widespread fraud after a statewide audit.<sup>111</sup> Michigan, another swing state which Trump won in 2016 but Biden claimed in 2020, recounted

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107. See *Trump Digs in at White House, Denying Biden Access on Pandemic, National Security*, ABC NEWS (Nov. 18, 2020), <https://www.msn.com/en-us/news/politics/trump-digs-in-at-white-house-denying-biden-access-on-pandemic-national-security/ar-BB1b8M5a?ocid=msedgdp>.

108. See Charlotte Alte, *President-Elect Joe Biden Vows to Usher In 'A Time to Heal,'* TIME (Nov. 7, 2020), <https://time.com/5908983/president-elect-joe-biden-vows-to-usher-in-a-time-to-heal-in-america/>. See also Tucker Higgins, *Joe Biden Says He Would Let Justice Department Decide Whether to Prosecute Trump If He Is Elected*, CNBC (Nov. 20, 2019), <https://www.cnbc.com/2019/11/20/joe-biden-says-he-wouldnt-order-investigation-into-trump-as-president.html>.

109. *Id.*

110. See Stephen Collinson & Maeve Reston, Analysis, *Trump Undercuts American Democracy as He Clings to Power*, CNN (Nov. 20, 2020), <https://www.cnn.com/2020/11/20/politics/trump-american-democracy/index.html>.

111. See Maeve Reston & Marshall Cohen, *Georgia Confirms Biden Victory and Finds No Widespread Fraud after Statewide Audit*, CNN (Nov. 20, 2020), <https://www.cnn.com/2020/11/19/politics/georgia-recount-election-results/index.html>.

its votes.<sup>112</sup> Nearly a month after the initial November 3rd Election Night, Michigan's Board of State Canvassers voted to certify the state's election results and officially validate the call for Biden.<sup>113</sup> Yet the official transition to a new administration can only begin by the head of the General Services Administration, who informed agencies that the first step in transfer of power—releasing millions of dollars and giving a president-elect access to the government—could be delayed.<sup>114</sup>

Historical precedent emphasizes peace and the fostering of democracy during transition, but the 2020 Presidential Election and ensuing aftermath were filled with lawsuits, chaos, accusations, and heavy criticism of both parties. The combination of both COVID-19 and the election has drawn lines in the American public that some believe are too deep to be crossed.<sup>115</sup>

112. See *Michigan Presidential Race Results: Donald J. Trump Wins*, N.Y. TIMES (Aug. 1, 2017), <https://www.nytimes.com/elections/2016/results/michigan-president-clinton-trump>.

113. See Alana Wise, *Michigan Certifies Joe Biden's Election Victory*, NPR (Nov. 23, 2020), <https://www.npr.org/sections/biden-transition-updates/2020/11/23/938015808/michigan-a-state-where-biden-leads-to-certify-election-results>.

114. See Lisa Rein et al., *As Democrats Fume, the Trump Appointee Who Can Start the Biden Transition Is in No Hurry*, WASH. POST (Nov. 21, 2020) <https://www.msn.com/en-us/news/politics/as-democrats-fume-the-trump-appointee-who-can-start-the-biden-transition-is-in-no-hurry/ar-BB1bdp8n?ocid=msedgdhp>.

115. Throughout the pandemic, the American response has been divided largely across partisan lines. In February 2020, Trump alleged that Democratic leaders were exploiting the situation for “political advantage” and accused Speaker of the House Nancy Pelosi of “trying to create a panic.” See Oliver Darcy, *Fox News Hosts Accuse Democrats and Journalists of ‘Weaponizing’ Coronavirus to Attack Trump*, CNN (Feb. 27, 2020), <https://www.cnn.com/2020/02/27/media/coronavirus-hannity-ingraham-limbaugh/index.html>. His followers latched onto this belief even after the President fell ill with the virus, claiming,

It's a hoax. There's no pandemic. As Trump said, how many millions die of the flu? If [Trump's] sick [with COVID-19], then they planted it when they tested him. It's what they did to me when I went to hospital for my heart beating too fast. Two weeks later I got a cold. It's political. I don't trust the U.S. government at all. Who are they to mandate personal safety? I listen to Trump.

See Chris McGreal, *'It's a Hoax. There's No Pandemic': Trump's Base Stays Loyal as President Fights Covid*, THE GUARDIAN (Oct. 3, 2020), <https://www.theguardian.com/us-news/2020/oct/03/donald-trump-base-stays-loyal-president-fights-covid-19>.

On the other hand, numerous health experts across the globe have stated the seriousness and severity of the virus. In a congressional hearing on the coronavirus response and misinformation, Dr. Anthony Fauci answered very clearly that children are not immune from COVID-19, wearing a mask does not cause coronavirus, being in a crowd is a risk for acquisition and transmission of the virus, and coronavirus is not a hoax. See *Fauci on Coronavirus Misinformation: Virus Is Not a Hoax and Children Are Not Immune*, NBC 6 SOUTH FLORIDA (Jul 31, 2020), <https://www.nbcmiami.com/news/national-international/fauci-on-coronavirus-misinformation-virus-is-not-a-hoax-and-children-are-not-immune/2270974/>. The two sides are further pulled apart and coronavirus continues to hold its grasp on the country as public health officials are no longer trusted or believed to be reliable by significant percentages of the U.S. population.

### A. Partisan Lines Carved More Deeply Than Ever Amidst Coronavirus Mandates

The U.S. remained at or near the top of the lists of confirmed coronavirus cases for much of the pandemic. At the time of the election, the confirmed deaths were rapidly approaching 250,000.<sup>116</sup> Globally, some of the most successful ways of cutting down on infections have been from contact tracing.<sup>117</sup> Amidst record hospitalizations and overcrowding, policy makers face particular challenges as people are becoming complacent in travel and social settings.<sup>118</sup> Officials have ordered mask mandates at various points in the pandemic nationwide and faced tremendous backlash—particularly across party lines.

Dannagal Young, a political psychologist and associate professor at the University of Delaware, has argued that the political parties in the United States have become increasingly correlated with two distinct cultures defined by religious identity, racial identity and geographic location.<sup>119</sup> This theory is reinforced by data: The Pew Research Center found during the summer of 2020 that Republicans were significantly less worried than Democrats that they might spread the coronavirus—forty-five percent of Republican reported being “very” or “somewhat” concerned about unknowingly spreading the coronavirus, in contrast to seventy-seven percent of Democrats.<sup>120</sup> The continuing polarization of political parties has transformed the coronavirus from a devastating public health crisis universally combated to a highly politicized and controversial illness. Still, it would be naïve and blatantly incorrect to say that coronavirus’ perceived severity is contingent solely on political views. Utah’s Republican governor Gary Herbert announced a statewide mask mandate in November 2020, saying “Laws are put in places to protect all of us. That’s why we have traffic lights, speed limits and seatbelts, and that’s why we now have a mask mandate . . . individual freedom

116. See Sara G. Miller & Jiachuan Wu, *Coronavirus in the U.S.: Map of How Many Cases Have Been Confirmed Across the Country, by State*, NBC NEWS (Nov. 17, 2020), <https://www.nbcnews.com/health/health-news/coronavirus-u-s-map-where-virus-has-been-confirmed-across-n1124546>.

117. See Beth Duff-Brown, *Model Shows Potential Contact Tracing Impact Against COVID-19*, STANFORD MED. (Aug. 24, 2020), <http://med.stanford.edu/news/all-news/2020/08/model-shows-potential-contact-tracing-impact-against-covid-19.html>.

118. See Jennifer Levitz & Talal Ansari, *States Impose Flurry of Measures as Covid-19 Cases Surge*, THE WALL STREET J. (Nov. 13, 2020), <https://www.msn.com/en-us/money/markets/states-impose-flurry-of-measures-as-covid-cases-surge/ar-BB1aXIYC?ocid=msedgntp>.

119. See *Why Millions Don’t Trust the Election Results, Despite No Evidence of Fraud: Experts*, ABC NEWS (Nov. 22, 2020), <https://www.msn.com/en-us/news/politics/why-millions-dont-trust-the-election-results-despite-no-evidence-of-fraud-experts/ar-BB1bfSI?ocid=msedgntp>.

120. See *Republicans, Democrats Move Even Further Apart in Coronavirus Concerns*, PEW RES. CTR. (August 28, 2020), <https://www.pewresearch.org/politics/2020/06/25/republicans-democrats-move-even-further-apart-in-coronavirus-concerns/>.

is certainly important, and it is our rule of law that protects that freedom.”<sup>121</sup> This type of interpretation of freedom takes on its own variations, as seen by numerous government events held with masks versus without.

### B. Lack of Leadership Leading to Potential National Security Risks

While these demands to live without masks are often made in the name of protecting individual freedoms, there are still dangerous collective risks during the pandemic that can have major repercussions on individual citizens as a result of the lack of cohesive leadership. After the election was called in favor of Joe Biden, there was no swift and immediate transfer of power. The demands for votes being recounted was similar to the 2000 election between George W. Bush and Al Gore, in which the results of the state of Florida were so close that it became a Supreme Court case. The *9/11 Commission Report* later found that the delay in transition because of the lack of clear winner may have hampered the nation’s preparedness for a terrorist attack.<sup>122</sup> September 11, 2001 was one of the greatest tragedies in U.S. history that saw 3,000 Americans dead after terrorists hijacked airplanes and crashed them into the World Trade Center in New York.<sup>123</sup> During the age of COVID-19, it is possible to see 3,000 deaths in a matter of mere days. The stakes are dauntingly high. This new delay “impedes [Biden’s] ability to manage the ongoing COVID-19 pandemic’s presence and undermines [his] legitimacy among the 71 million Americans who voted to keep Trump in office.”<sup>124</sup>

In the aftermath of the 2020 election, President Donald Trump repeatedly claimed that there had been widespread voter fraud.<sup>125</sup> This attempt to undermine the Biden victory was met with dubious responses even from within his own party—Maryland’s Republican governor Larry Hogan said, “[Trump’s rhetoric] makes people question the integrity of the system, which is such a fundamental thing to our democratic process here in America. It’s embarrassing around the world.”<sup>126</sup> In a time when parties are pulling apart,

121. See Laurel Wamsley, *Utah Gov. Announces Statewide Mask Mandate, Citing Steep Spike in COVID-19 Cases*, NPR (Nov. 9, 2020), <https://www.npr.org/sections/coronavirus-live-updates/2020/11/09/933055781/utah-gov-announces-statewide-mask-mandate-citing-steep-spike-in-covid-19-cases>.

122. See Molly Ball, *As Donald Trump Refuses to Concede, America Is Caught Between Crisis and Confusion*, TIMES (Nov. 12, 2020), <https://www.msn.com/en-us/news/politics/as-donald-trump-refuses-to-concede-america-is-caught-between-crisis-and-confusion/ar-BB1aWB41?ocid=msedgntp>.

123. See *September 11 Terror Attacks Fast Facts*, CNN (Sept. 18, 2020), <https://www.cnn.com/2013/07/27/us/september-11-anniversary-fast-facts/index.html>.

124. See Ball, *supra* note 122.

125. See Byron Tau & Sara Randazzo, *Trump Cries Voter Fraud. In Court, His Lawyers Don’t*, THE WALL STREET J. (Nov. 13, 2020), <https://www.wsj.com/articles/trump-cries-election-fraud-in-court-his-lawyers-dont-11605271267>.

126. See Ball, *supra* note 122.

households are divided, and tensions are flaming, the potential security risks involved with the lack of clear national leadership are deeply troubling. Meanwhile, as people counted votes, thousands of citizens were dying.

It was not until after the January 6, 2021 attack on the Capitol that Trump did concede the election.<sup>127</sup> After what was described as a “violent attempt at insurrection at the U.S. Capitol” which saw five people dead, Trump released a taped video announcing that “[a] new administration will be inaugurated on January 20th. My focus now turns to ensuring a smooth, orderly and seamless transition of power.”<sup>128</sup> A White House adviser said that the video came amidst concerns of a historic second impeachment and several members of his cabinet resigning.<sup>129</sup> In comments after the storming of the Capitol, Biden called it:

one of the darkest days in the history of our nation. An unprecedented assault on our democracy, an assault literally on the citadel of liberty, in the United States Capitol itself. An assault on the rule of law. An assault on the most sacred of American undertakings: ratifying the will of the people and choosing the leadership of their government . . . And I wish we could say we couldn't see it coming. But that isn't true. We could see it coming.<sup>130</sup>

Upon Biden's inauguration and transition into President of the United States, his team was quick in putting blame on the previous president's efforts. Jeff Zients, White House COVID-19 Coordinator under the Biden administration said, “[w]hat we're inheriting is so much worse than we could have imagined. The cooperation or lack of cooperation from the Trump administration has been an impediment. We don't have the visibility that we would hope to have into supply and allocations.”<sup>131</sup> Many of Biden's first executive orders upon assuming office were directed towards leadership over

127. See Kevin Liptak et. al., *Trump Publicly Acknowledges He Won't Serve a Second Term a Day after Inciting Mob*, CNN (Jan. 8, 2021), <https://www.cnn.com/2021/01/07/politics/trump-biden-us-capitol-electoral-college-insurrection/index.html>.

128. See Liptak, *supra* note 127. See also Jack Healy, *These Are the 5 People Who Died in the Capitol Riot*, N.Y. TIMES (Jan. 11, 2021), <https://www.nytimes.com/2021/01/11/us/who-died-in-capitol-building-attack.html>.

129. *Id.*

130. See Phillip Ewing and Brian Naylor, *Biden Says Capitol Attack Was 'Culmination' Of Trump's Assaults On Democracy*, NPR (Jan. 7, 2021), <https://www.npr.org/sections/biden-transition-updates/2021/01/07/954404473/biden-is-set-to-introduce-merrick-garland-as-his-attorney-general-pick#remarks>.

131. See Sheryl Gay Stolberg, *Biden Rolls out 'Full-Scale, Wartime' Coronavirus Strategy, Including Requiring Masks on Some Planes, Trains and Buses*, N.Y. TIMES (Jan. 21, 2021), <https://www.nytimes.com/2021/01/21/us/politics/biden-rolls-out-full-scale-wartime-coronavirus-strategy-including-requiring-masks-on-some-planes-trains-and-buses.html>.

the pandemic. These orders, which he called a “full-scale wartime effort” included mask requirements on interstate planes, trains, and buses, the creation of a national testing board, and mandatory quarantines for international travelers arriving in the United States.<sup>132</sup>

Biden’s wholesale changes from the Trump administration also include the national approach to climate change and foreign policy. Executive orders signed in the first days of his campaign called for the secretary of the Interior Department “to pause on entering into new oil and natural gas leases on public lands and offshore waters to the extent possible”, and also begin a “rigorous review” of all the existing fossil fuel leases and permitting practices.<sup>133</sup> Paying for this \$2 trillion climate change plan will come from overhauling the tax breaks to the oil, coal and gas industries.<sup>134</sup> This also includes foreign policy, as the executive orders will specify that climate change, for the first time, will be a core aspect of all United States foreign policy and national security decisions.<sup>135</sup> The Paris Agreement is a formal agreement between nations to fight climate change under the terms the nation had pledged to slash emissions by up to 28 percent from the 2005 levels by 2020.<sup>136</sup> The Trump administration had pulled the U.S. out of the agreement, but the country rejoined within days of the Biden administration.<sup>137</sup>

COVID-19 news briefings were an important aspect of the Trump administration’s approach to managing coronavirus and communicating to the public, but they changed under the Biden team. Instead, there were no cameos from the president, speakers behind a podium squaring off with reporters, data coming from outside the federal agencies that were involved in the pandemic response, or in-person hosting.<sup>138</sup> These changes in briefings were called “one of the clearest signs yet of how President Joe Biden is taking a vastly different approach when it comes to talking to the American people.”<sup>139</sup> Throughout 2020, President Trump put travel restrictions in place

132. See Sheryl Gay Stolberg, *Biden Unveils a National Pandemic Response That Trump Resisted*, N.Y. TIMES (Jan. 21, 2021), <https://www.nytimes.com/2021/01/21/us/politics/biden-coronavirus-response.html>.

133. See Lisa Friedman & Christopher Flavelle, *President Biden to Sign Executive Order, Pausing Oil and Gas Leasing*, N.Y. TIMES (Jan. 27, 2021), <https://www.msn.com/en-us/news/politics/in-sweeping-actions-on-climate-biden-to-pause-oil-and-gas-leasing/ar-BB1d8OqF?ocid=msedgntp>.

134. *Id.*

135. *Id.*

136. *Id.*

137. See Julia Jacob, *How Biden Is Reversing Trump’s Environmental Actions*, ABC NEWS (Jan. 27, 2021), <https://abcnews.go.com/US/biden-reversing-trumps-environmental-actions/story?id=75417026>.

138. See Shannon Pettypiece, *Biden to Sit out Covid Briefing as Part of a New Plan to Talk to Americans*, NBC, (Jan.27, 2021), <https://www.nbcnews.com/politics/white-house/biden-sit-out-covid-briefing-part-new-plan-talk-americans-n1255815>.

139. *Id.*

from various countries; although over time, many of these were rescinded.<sup>140</sup> However, once Biden entered the office, many of the former bans were reinstated as well as new ones placed on countries like South Africa where new strains of COVID-19 were identified.<sup>141</sup> Once again, this demonstrates a marked shift in leadership with new impacts and regulations that stretch far beyond the relaxed approach that Americans had become accustomed to under the Trump administration.

### C. The State of the Economy During COVID-19

When coronavirus cases first began emerging in the United States, the stock market saw one of the most dramatic crashes in history.<sup>142</sup> Since then, the country has seen record unemployment and business closures. Major companies like J. Crew, Neiman Marcus, JCPenney, Hertz, 24 Hour Fitness, Sur La Table, and California Pizza Kitchen all filed for bankruptcy during the pandemic.<sup>143</sup> There will always be economic highs and lows, but not usually for this extended period of time. Companies are able to survive three months with limited customers, but the narrative shifts if it is three years.

There have already been hundreds of thousands of deaths in the United States, but there are also serious complications that can occur in those that contract COVID-19 but survive. These complications include respiratory, cardiac, and mental health disorders, and can even cause an increased risk of premature death.<sup>144</sup> This is the new reality of the American workforce—they may have survived coronavirus, but they will be handling a wide variety of new health conditions that could eventually impact their work performances.

If all the companies that are employing the American workforce close, and the workers are unemployed, the American way of life will change. The longer that leadership continues to fail, the more likely it is that there will be permanent economic consequences for the world. The longer the coronavirus exists, the more likely it is that businesses will continue to fail. The

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140. See Kelly O'Donnell, *Biden to Reinstate Covid Travel Restrictions Trump Rescinded, Impose New Ban on South Africa*, NBC News, (Jan. 24, 2021), <https://www.nbcnews.com/politics/politics-news/biden-sign-sweeping-coronavirus-related-travel-restrictions-n1255484>.

141. *Id.*

142. See Mieszko Mazur et al., *COVID-19 and the March 2020 Stock Market Crash. Evidence from S&P1500*, FIN. RES. LETTERS (Jul 9, 2020), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7343658/pdf/main.pdf>.

143. See Emily Pandise, *From Friendly's to J. Crew, Main Street Bankruptcies Continue*, NBC NEWS (Nov 2, 2020), <https://www.nbcnews.com/business/consumer/which-major-retail-companies-have-filed-bankruptcy-coronavirus-pandemic-hit-n1207866>.

144. See David M. Cutler & Lawrence H. Summers, *The COVID-19 Pandemic and the \$16 Trillion Virus*, 324 JAMA HEALTH FORUM 1495-1496 (Oct. 12, 2020). See also Hassaan Ahmed et al., *Long-term Clinical Outcomes in Survivors of Coronavirus Outbreaks After Hospitalisation or ICU Admission: A Systematic Review and Meta-Data Analysis of Follow-Up Studies*, MEDRXIV (Apr. 22, 2020), <https://doi.org/10.1101/2020.04.16.20067975>.

money that was allocated through the CARES Act passed in the early months of the pandemic quickly dried up, and studies have found that poverty escalated to rates higher than even those before COVID-19 hit.<sup>145</sup> Once businesses fail, the government will no longer have access to their tax dollars to pay for roads, police officers, and schools. As parents lose jobs, unemployment funds and stimulus checks will be even more needed. But, who will fund it? The government has no official income to fund their programs and expenses, so the incoming money instead comes from taxing the taxpayers. Thus, taxes will have to rise, and money will need to be reallocated within the annual federal budget for the coming years. The money and economic fallout from COVID-19 will saddle a few generations and change the trajectory of the United States forever.

This reallocation of federal funding will also take money from areas that are already struggling during the COVID-19 pandemic. Higher education has been hit hard from the coronavirus fallout, as it has been expected that many smaller educational institutions will not survive.<sup>146</sup> These issues are being felt across the United States: Wesleyan University in the Midwest is eliminating eighteen majors, the University of California, Berkeley in the West is holding admissions to its anthropology, sociology, and art history Ph.D. programs, and Harvard University in the Northeast reports a ten million dollar deficit.<sup>147</sup> Robert Kelchen, an associate professor at Seton Hall University in New Jersey who has tracked the higher learning funding crunch has said, “We haven’t seen a budget crisis like this in a generation. There’s nothing off-limits.”<sup>148</sup> One estimate states that the pandemic has cost colleges at least \$120 billion, a crushing figure when one accounts for the financial crisis growing well before COVID-19 because of shrinking state support and student concerns with skyrocketing tuition and loan debt.<sup>149</sup> As professors are being laid off, classes cut, and degrees eliminated, the ripple effect is unimaginable.

The cumulative financial costs of COVID-19 have yet to be fully determined. Early estimates project the losses at more than sixteen trillion dollars, or approximately ninety percent of the annual gross domestic product (GDP) of the United States.<sup>150</sup> For a family of four, the estimated loss would be

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145. See Jason DeParle, *8 Million Have Slipped Into Poverty Since May as Federal Aid Has Dried Up*, MSN NEWS (Oct. 16, 2020), <https://www.msn.com/en-us/news/us/8-million-have-slipped-into-poverty-since-may-as-federal-aid-has-dried-up/ar-BB1a337Z?ocid=msedgdhp>.

146. See *Fear and Loathing as Colleges Face Another Season of Red Ink*, U.S. NEWS (Dec. 4, 2020), <https://www.usnews.com/news/health-news/articles/2020-12-04/fear-and-loathing-as-colleges-face-another-season-of-covid-and-red-ink>.

147. See Amelia Nierenberg & Adam Pasick, *Colleges Are Slashing Budgets*, N.Y. TIMES (Oct. 26, 2020), <https://www.nytimes.com/2020/10/26/us/colleges-budget-cuts-finance.html>.

148. *Id.*

149. *Id.*

150. See Cutler & Summers, *supra* note 144.

nearly \$200,000—half of which is lost income from the COVID-19 induced recession; the remainder coming from the economic effects of a shorter and less healthy life.<sup>151</sup> With initial lockdowns in place in hopes of limiting the spread of the virus, unemployment rates soared higher in three months of the first year of COVID-19 than it did in two full years of the Great Recession from 2007–2009.<sup>152</sup> Despite government aid through the Paycheck Protection Program (PPP) and unemployment, much of the United States workforce suddenly found itself out of work. If these estimations are even remotely true, the United States will continue to face painful physical and economic struggles in the coming years.<sup>153</sup>

#### D. Strong Leadership Showings Are Necessary for the American COVID-19 Recovery

Amidst national turmoil, Dr. Fauci reassured the American public in November 2020 by promising, “Certainly it’s not going to be pandemic for a lot longer because I believe the vaccines are going to turn that around.”<sup>154</sup> Upon release of vaccines to the American public, there is hope for life to return to some semblance of pre-2020 reality. However, Fauci adds, “Putting it to rest doesn’t mean eradicating it. I doubt we’re going to eradicate this, I think we need to plan that this is something we may need to maintain control over chronically, it may be something that becomes endemic that we have to just be careful about.”<sup>155</sup> Although vaccines are now available, it is critical that we do not think of them as spelling the end of the pandemic. It may well take months to fully and equitably distribute vaccines throughout the American population, and perhaps even longer for the rest of the world.

The pandemic is not just a state issue. The scale of COVID-19 requires federal leadership and cooperation across the board. In March of 2020, New York Governor Andrew Cuomo was vocal with his criticism about the Trump administration’s handling of the pandemic, after the President told reporters that the federal government is “not a shipping clerk” for potentially

151. *Id.*

152. See Rakesh Kochhar, *Unemployment Rose Higher in Three Months of COVID-19 Than It Did in Two Years of the Great Recession*, PEW RES. CTR. (Aug. 26, 2020), <https://www.pewresearch.org/fact-tank/2020/06/11/unemployment-rose-higher-in-three-months-of-covid-19-than-it-did-in-two-years-of-the-great-recession/>.

153. Figures on value of life is an impossible measure, but economists have used the technique of valuing “statistical lives,” measuring how much it is worth to people to reduce their risk of mortality or morbidity. A statistical life is assumed to be worth ten million dollars. If a more conservative seven million dollar estimate is taken, the economic costs of premature deaths is still well into the trillion-dollar range. See Cutler & Summers, *supra* note 144.

154. See Peter Sullivan, *Fauci: Coronavirus Won’t Be a Pandemic for ‘a Lot Longer’ Thanks to Vaccines*, THE HILL (Nov. 12, 2020), <https://www.msn.com/en-us/news/politics/fauci-coronavirus-won-t-be-a-pandemic-for-a-lot-longer-thanks-to-vaccines/ar-BB1aXbfZ?ocid=msedgntp>.

155. *Id.*

life-saving supplies like respirators and put the pressure on governors instead to obtain the critical equipment.<sup>156</sup> Once promising vaccines emerged and distribution plans were released, the tension between Cuomo and Trump flared again. President Trump singled out the state of New York, saying:

As soon as April [2021], the vaccine will be available to the entire general population, with the exceptions of places like New York state where, for political reasons, the governor decided to say, and I don't think it's good politically, I think it's very bad from a health point, but he wants to take his time on the vaccine, he doesn't trust where the vaccine's coming from. We won't be delivering it to New York until we have authorization to do so, and that pains me to say that.<sup>157</sup>

Cuomo fired back with threats to sue the Trump administration, saying "If the Trump administration does not change this plan [to use private companies] and does not provide an equitable vaccine process, we will enforce our legal rights, we will bring legal action to protect New Yorkers."<sup>158</sup>

As a whole, South Dakota has some of the fewest restrictions of any state, with no mask mandates or significant limits on businesses, and their Republican Governor Kristi Noem has called that distinction a badge of freedom and criticized restrictions as ineffective and economically destructive.<sup>159</sup> Meanwhile, Democratic Governor Michelle Lujan Grisham of New Mexico put her state's two million residents under some of the most stringent restrictions in the country by issuing a two-week stay-at-home order, banning restaurant dining, setting capacity limits on grocery stores, and closing indoor malls, movie theaters, and gyms.<sup>160</sup> Inflammatory and contradictory rhetoric comes from both sides in terms of what freedom is, what it looks like, and how to best live life in a coronavirus-dominated world. Across the country, the disjointed response from the federal, state, and local levels has led to various infection spikes and a rapidly widening gap between pictures of life in different states. Whereas some fiercely advocate for a "new

156. See Quint Forgey, *'We're Not a Shipping Clerk': Trump Tells Governors to Step up Efforts to Get Medical Supplies*, POLITICO (Mar 20, 2020), <https://www.politico.com/news/2020/03/19/trump-governors-coronavirus-medical-supplies-13765>.

157. See Caroline Linton, *Cuomo Says He May Sue Trump Administration over Vaccine Distribution*, CBS NEWS (Nov. 15, 2020), <https://www.cbsnews.com/news/cuomo-may-sue-trump-administration-coronavirus-vaccine-distribution/>.

158. Linton, *supra* note 86.

159. See Manny Fernandez & Jack Healy, *1 America, 1 Pandemic, 2 Realities*, N.Y. TIMES (Nov. 22, 2020), <https://www.msn.com/en-us/news/us/1-america-1-pandemic-2-realities/ar-BB1be5qc?ocid=msedgntp>.

160. *Id.*

normal” of mask wearing and social distancing, others equally passionately demand a return to the old “normal.”

This lack of cohesion between the state and federal governments highlights the hugely important need for strong unity from authoritative figures. Regardless of political viewpoints, the pandemic will only be overcome through cooperation. This cooperation may look different in each relationship but is vital to the distribution of vaccines and eventual COVID-19 recovery.

#### E. Travel: Not Only a State Issue

The CDC states, “Travel can increase your chance of getting and spreading COVID-19”.<sup>161</sup> Travelers are a significant part of the COVID-19 distribution system as both asymptomatic and symptomatic carriers. Airports are filled with common surfaces from the moment you enter the doors on a departing flight to the moment you walk out the doors from an arriving flight. Thousands of people go in and out of airports every day, creating a breeding ground for various illnesses. United Flight 591 made headlines at the end of 2020 after a passenger died while in the air.<sup>162</sup> The man who passed away had submitted a “ready-to-fly” checklist that verified he had not been diagnosed with COVID-19 and was not experiencing symptoms; yet his family later confirmed that he had been feeling sick and his wife told medical workers that he had lost his sense of taste and smell.<sup>163</sup> This case is unfortunately not unique, as a couple in Hawaii who tested positive for COVID-19 was told to isolate in California and instead flew to Kauai, and a mother and son in Maryland tried to get on a plane to Puerto Rico after testing positive.<sup>164</sup> Various states and countries have different policies on travel during the pandemic, ranging from no constraints, to completely closed borders.

In the state of Hawaii, policies evolved over time, varying from enforcing a fourteen day quarantine period for visitors to showing proof of a negative COVID-19 test from within seventy-two hours of the flight.<sup>165</sup> However, with the creation of vaccines, proof of appropriate COVID-19 vaccinations may be required. Dr. Fauci has said that immunity passports “would be an appropriate thing, possibly, if we knew how long the duration

161. See *Travel: Frequently Asked Questions and Answers*, CDC (Jan. 13, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/travelers/faqs.html#:~:text=Travel%20can%20increase%20your%20chance,from%20COVID%2D19>.

162. See Hannah Sampson & Shannon McMahon, *People with Coronavirus Are Still Getting on Planes. No One Knows How Many*, WASH. POST (Dec. 28, 2020), <https://www.washingtonpost.com/travel/2020/12/28/passenger-covid-flight-airlines-positive/>.

163. *Id.*

164. *Id.*

165. See *Traveling to Hawaii*, HAWAII TOURISM AUTHORITY (Nov. 17, 2020), <https://www.hawaiiitourismauthority.org/covid-19-updates/traveling-to-hawaii/>.

of antibody protection was, and whether or not a certain titer does or does not protect . . . but it's not a perfect solution."<sup>166</sup>

The tremendous promise of modern medicine is evident in the very existence of potential vaccines within a year of the virus' emergence. Vaccines are showing optimistic effectiveness rates of over ninety percent, better than most could have predicted.<sup>167</sup> Still, even with a vaccine, the possibility of returning to normalcy may remain elusive. Regardless of partisan alignment, leadership must band together, work alongside one another, and foster unity within the country from the inside out.

#### IV. Liabilities and Lawsuits in the United States as a Result of Vaccine Policies

While the creation and development of vaccines is critical to recovery from the coronavirus pandemic, of almost equal importance is a distribution plan for said vaccinations. During the early days of the pandemic, the United States suffered tremendously from lack of personal protective equipment for healthcare workers, not enough testing, and what available tests existed being inequitably distributed. In order to avoid the pandemonium and chaos that surrounded the first months of the pandemic from repeating, careful planning, and framework for distribution plans must take priority.

##### A. Vaccine Distribution Plans Must Rely on Equitable and Impartial Judgements

Operation Warp Speed was launched by the U.S. government in May of 2020 to "compress what can sometimes be a decade long [vaccine] development process into a matter of months".<sup>168</sup> While some would say that this bodes well for the COVID-19 recovery process, others remain highly skeptical about the safety and effectiveness of vaccines developed on expedited timelines and under political pressure. The plans for vaccine distribution prioritize certain populations above others.<sup>169</sup> Scheduled amongst the first

166. See Jennifer Abbasi, *Anthony Fauci, MD, on COVID-19 Vaccines, Schools, and Larry Kramer*, 324 JAMA HEALTH FORUM 220–22 (Jun 8, 2020).

167. See Sullivan, *supra* note 83.

168. See *Fact Sheet: Explaining Operation Warp Speed*, U.S. DEP'T OF HEALTH AND HUM. SERV. (Nov. 13, 2020), <https://www.hhs.gov/about/news/2020/06/16/fact-sheet-explaining-operation-warp-speed.html>. See also Anand Shah et al., *Unwavering Regulatory Safeguards for COVID-19 Vaccines*, 324 JAMA 931–932 (Aug. 7, 2020).

169. See *COVID-19, CNTY. OF L.A. PUB. HEALTH* <http://publichealth.lacounty.gov/acd/ncorona2019/covidvaccinedistribution/> (last visited Jan. 27, 2021). See also *COVID-19 Vaccination Distribution*, ORANGE CNTY HEALTH CARE AGENCY <https://oc-covid19.ocalthinfo.com/covid-19-vaccination-distribution> (last visited Jan. 27, 2021). See also *COVID-19 Vaccine Phases*, SAN DIEGO COUNTY (last visited Jan. 23, 2021),

to receive it are frontline healthcare workers—doctors, nurses, technicians, etc.—elderly with pre-existing conditions, and essential workers. Before vaccines were released to the general public and despite rapidly escalating coronavirus statistics, predictions were made that there were still people that are unwilling to take them due to lack of trust in government, or lack of trust in the vaccines themselves.<sup>170</sup>

Still, the FDA is committed to ensuring the safety and quality of the vaccines.<sup>171</sup> In addition to the need for broad use, the FDA also recognizes that COVID-19 disproportionately impacts certain populations. In one survey conducted on how the reported incidences, knowledge, and behaviors regarding coronavirus vary across sociodemographic characteristics in the United States, researchers found that the largest differences in COVID-19-related knowledge and behaviors were associated with race/ethnicity, sex, and age.<sup>172</sup> African-American participants, men, and people younger than fifty-five years were less likely to know how the virus spreads, were less likely to know the symptoms of COVID-19, and left the home more frequently.<sup>173</sup> To fully realize the acute needs of certain populations, advocates recommend that a sufficient representation of both racial and ethnic minorities, older adults, and individuals with medical comorbidities are included in clinical trial.<sup>174</sup> Notably missing from the populations participating in vaccine trials are children and incarcerated individuals.<sup>175</sup> Once vaccines are made widely public, however, they too must be able to receive dosages.

In order to fairly and equitably prioritize groups for access to vaccines, there are various ethical values that must come into play. The United States National Academy of Medicine (NAM) has proposed a framework for COVID-19 vaccine allocation that relies on three ethical values: benefiting people and limiting harm, prioritizing disadvantaged populations, and disregarding differences such as gender, race, or religion, when doing so would

[https://www.sandiegocounty.gov/content/sdc/hhsa/programs/phs/community\\_epidemiology/dc/2019-nCoV/vaccines/phases.html](https://www.sandiegocounty.gov/content/sdc/hhsa/programs/phs/community_epidemiology/dc/2019-nCoV/vaccines/phases.html).

170. See Zakiya Whatley & Titilayo Shodiya, *Why So Many Americans Are Skeptical of a Coronavirus Vaccine*, SCIENTIFIC AM. (Oct. 12, 2020), <https://www.scientificamerican.com/article/why-so-many-americans-are-skeptical-of-a-coronavirus-vaccine/>.

171. See CTR. FOR BIOLOGICS EVALUATION AND RESEARCH, *Development and Licensure of Vaccines to Prevent COVID-19*, U.S. FOOD AND DRUG ADMIN. (June 2020), <https://www.fda.gov/regulatory-information/search-fda-guidance-documents/development-and-licensure-vaccines-prevent-covid-19>.

172. See Marcella Alsan et al., *Disparities in Coronavirus 2019 Reported Incidence, Knowledge, and Behavior Among US Adults*, JAMA HEALTH FORUM (June 18, 2020), <https://jamanetwork.com/journals/jamanetworkopen/fullarticle/2767261>.

173. *Id.*

174. See Shah et al., *supra* note 168.

175. See Evan J. Anderson et al., *Warp Speed for COVID-19 Vaccines: Why Are Children Stuck in Neutral? Clinical Infectious Disease*, OXFORD ACADEM. (September 18, 2020), <https://doi.org/10.1093/cid/ciaa1425>. See also Emily A. Wang et al., *Ethical Considerations for COVID-19 Vaccine Trials in Correctional Facilities*, 324 JAMA 1019, 1031–32 (August 17, 2020).

not help prevent harm or prioritize disadvantaged groups.<sup>176</sup> They also focus on prioritizing health care workers and staff first, then people engaged in essential high-risk activities (in-person education, childcare, food supply work, etc.), then individuals whose medical conditions increase their risk of serious COVID-19 outcomes if they contract the virus. Coronavirus puts many populations at risk of serious illness, including elderly, diabetic, immunocompromised, obese, etc.<sup>177</sup> Once vaccines were first available there were not enough to immediately distribute them to everyone; and as such the difficult decision on prioritizing select groups amongst those previously identified as “priority populations” took place.<sup>178</sup>

Research has verified the risk to healthcare workers and shown that the reliable and rapid access to COVID-19 testing for employees is essential to preserve the health, safety, and availability of the healthcare workforce during this pandemic.<sup>179</sup> Likewise, they must have access to vaccines on an accelerated and prioritized pacing. However, what will happen if they do not wish to take these vaccinations?

#### B. Vaccine Hesitancy Poses Problem for Coronavirus Recovery Plan

Although medical staff are on the front lines and see the brutality of the COVID-19 pandemic on a daily basis, research has found that there was a surprisingly high rate of vaccine skepticism among medical staff.<sup>180</sup> Many frontline workers have been notified that they will have first access to the vaccines, and soon it may be required for them to come to work. However, if they do not take it, thus refusing to work—will they be fired? What if they cite wrongful termination? Will hospitals, already overcrowded and struggling, be forced into lawsuits?

To attend colleges, there are often required vaccines that students must have. Public schools at all levels have ordered vaccinations like measles be mandatory before attending. Private schools have less involvement from the government and would likely not be subject to the same enforced limitations as those within the public education system. However, there is still a chance

176. See *A Framework for Equitable Allocation of Vaccine for the Novel Coronavirus*, National Academy of Sciences, THE NAT'L ACADEM., (August 2020), <https://www.nationalacademies.org/our-work/a-framework-for-equitable-allocation-of-vaccine-for-the-novel-coronavirus>.

177. See Beaver, H. Dennis, *Can Your Boss Force You to Get a COVID-19 Vaccine?* KIPLINGER (Dec. 29, 2020), <https://www.kiplinger.com/personal-finance/careers/602003/can-your-boss-force-you-to-get-a-covid-19-vaccine>.

178. See Govind Persad et al., *Fairly Prioritizing Groups for Access to COVID-19 Vaccines*, 324 JAMA 1601 (Sept. 10, 2020).

179. See Nandita S. Mani et al., *Prevalence of Coronavirus Disease 2019 Infection and Outcomes Among Symptomatic Healthcare Workers in Seattle, Washington*, *Clinical Infectious Diseases*, OXFORD ACADEM. (June 16, 2020), <https://doi.org/10.1093/cid/ciaa761>.

180. See Amiel A. Dror et al., *Vaccine Hesitancy: The Next Challenge in the Fight Against COVID-19*, 35 EUR. J. OF EPIDEMIOLOGY 775, 779 (Aug. 8, 2020).

that legal complications will emerge as a result of COVID-19 vaccinations by individuals who claim they are being discriminated against because of their refusal to be vaccinated. This is an identified, significant issue of national importance that requires judicial determination.

In 2019, there were over two million workers employed by the government.<sup>181</sup> Hospitals are recipients of government funding, thus many of their workers can claim they are government officials. If they do so, they could potentially be able to claim qualified immunity and be exempt from various charges. If a government official refuses to take COVID-19 vaccines, then infects someone else who later dies, will they be charged? Perhaps not if they claim qualified immunity. With two million in the United States able to claim this defense, it is deeply troubling.

### V. Liabilities for Individuals and Municipalities

Besides in the instance of police officer wrongdoing, municipalities cannot be sued freely for any general alleged constitutional violation—there must be a pattern. There are different types of suits that can be filed, ranging from negligence to wrongful death cases. Common law defines negligence as “conduct which falls below the standard established by law for the protection of others against unreasonable risk of harm.”<sup>182</sup> The first question in a negligence analysis is whether or not the defendant owed a particular duty to the plaintiff.<sup>183</sup> For example, those who own property have a duty to carry on activities on that property with reasonable attention to invitee’s safety.<sup>184</sup>

In the case of an accident where fault is not immediately clear, numerous rulings on liability and immunities further complicate the issue. Typically, neither party desires to claim responsibility, as there are real financial ramifications through settlements and payouts to victims and/or their families. Unlike in the cases of George Floyd, Stephon Clark, and others where municipalities were charged because they promulgated unconstitutional policies and practices, negligent suits filed following an accident differ significantly.

#### A. Hawaiian Lifeguards Facing Individual Liabilities After Municipalities Shift Weight

Liabilities due to the nature of job duties are not limited solely to police, and also include other government employees such as first responders. In

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181. See *Federal Employees by State*, GOVERNING (January 25, 2019), <https://www.governing.com/gov-data/federal-employees-workforce-numbers-by-state.html>.

182. See Restatement (Second) of Torts § 282 (2006).

183. See Terra Bowling, *From Ripcurrents to Flying Umbrellas: Beach Liability Basics and Recent Cases*, 38 ENV'T L. REP. 10,452 (July 2008).

184. See Restatement (Second) of Torts § 332 (1965).

society, lifeguards rarely receive the recognition they deserve for performing frontline work and putting their own lives on the line. In 2017, the state of Hawaii reversed Senate Bill 562 granting liability protections afforded to lifeguards, thus putting lifeguards at risk for personal lawsuits.<sup>185</sup> If a lifeguard is in a situation where a dangerous rescue needs to be made in rough waters, they are left with a potentially lose-lose situation without liability protections. They can opt to make the rescue, but something could go wrong that is fully out of the control of the lifeguard. The guard can then be sued for failing to perform the job adequately and putting others at risk. If they do not want to be sued, will lifeguards begin avoiding making rescues in order to avoid being liable for any accident that may or may not take place? This lack of liability fails to protect either the lifeguard in question or the ordinary citizens depending on the guard.

Liability protections for lifeguards have existed since 2002. They offer protection for lifeguards from personal injury suits, as seen in one case when an individual chose to perform an acrobatic trick before leaping off a rock towards the water.<sup>186</sup> Lifeguards immediately rescued and revived him, saving his life, but the family sued the City and County of Honolulu for the guards' breach of the "duty to warn."<sup>187</sup> Though the City and County won the suit and protected themselves and the lifeguards, they had to spend extra money defending themselves in lawsuits. This illuminates one risk of not offering liability protection for municipalities in such situations because if cities had to pay, budgets would be slashed, or if individual guards faced liability, it would become extremely difficult to attract and hire applicants for first responder jobs. People will not want to work at a job where their life and body are at risk of physical harm if there is also the chance that they could face individual liability should circumstances fall in an inopportune manner. If no one applies to work for these jobs, the perpetual cycle of risk continues as citizens will then be more liable to have a dangerous or life-altering accident without the watchful gaze of a guard and seek to place blame on an individual or municipality.

Global COVID-19 cases have also put extreme strain on the state's economy. As an island that relies heavily on the tourism industry, the lack of flying and vacationers led to unemployment rising to Great Depression-levels following shutdown orders in March 2020.<sup>188</sup> Business closures,

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185. See S.B. 562, 29th Leg., (Haw. 2017), [https://www.capitol.hawaii.gov/session2017/bills/SB562\\_.PDF](https://www.capitol.hawaii.gov/session2017/bills/SB562_.PDF).

186. See Kyveli Diener, *Hawaii Legislation Seriously Threatens Lifeguards' Ability to Save Lives*, THE INERTIA (April 19, 2017), <https://www.theinertia.com/surf/hi-legislation-could-seriously-undercut-lifeguards-ability-to-do-their-jobs/>.

187. *Id.*

188. See Ryan Finnerty, *Facing Economic Devastation, Hawaii Attempts To Revive Tourism*, NPR (October 20, 2020), <https://www.npr.org/2020/10/20/925795410/facing-economic-devastation-hawaii-attempts-to-revive-tourism>.

restrictions on large gatherings, requiring out-of-state travelers to quarantine upon arrival, and public concerns over the safety of flying all led to the tanking of the Hawaiian economy.<sup>189</sup> This puts heightened financial pressure on all Hawaiian citizens, including first responders. If a lifeguard were to be sued during COVID-19 for a rescue gone wrong or tragic accident, the lack of municipal liability and subsequent individual responsibility could be utterly devastating. Thus demonstrates the interconnected nature between municipal and individual liabilities and responsibilities.

### B. Municipalities Must Support Their Employed Individuals Through Liability Claims

Laws on liability protections for lifeguards and other first responders must take into account the precedent established in *Pierson v. Ray*: “[an officer must not] choose between being charged with dereliction of duty if he does not arrest when he had probable cause, and being mulcted in damages if he does.”<sup>190</sup> In other words: damned if you do, damned if you don’t. The *Harlow v. Fitzgerald* ruling declared qualified immunity necessary for government officials to be able to perform their job duties.<sup>191</sup> Lifeguards and first responders will be unable to efficiently and effectively carry out their job duties if they are perpetually preoccupied with the notion that they may be liable for rescues that they make or participate in. As such, qualified immunity must persist for lifeguards in particular in order to ensure the safety of the wider population by enabling them to do the jobs that they have been hired and expected to do.

This issue of liabilities—both municipal and individual—is also one that has correlation to economic concerns. In the aforementioned personal injury case in Hawaii, the City and County of Honolulu spent \$500,000 on their defense of the lifeguards. When used as a defense, qualified immunity is invoked prior to trial in order to minimize the amount of wasted time and money spent going to trial, which can be a hugely expensive endeavor. If individuals are protected while municipalities remain liable, they may have to pay these exorbitant fees. Research has demonstrated that even with regard to ordinary torts, it is not clear just how much the prospect of liability will modify behavior.<sup>192</sup> With liabilities, the optimistic hope would be that lifeguards and other first responders would be more attentive, in order to avoid cases of negligence, wrongful death, etc. However, the weakness of mere “hope” leaves concerning ambiguity as to whether or not liability

189. Finnerty, *supra* note 188.

190. *See Pierson v. Ray*, 386 U.S. 547 (1967).

191. *See Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

192. *See Gary T. Schwartz, Reality in the Economic Analysis of Tort Law: Does Tort Law Really Deter?*, 42 UCLA L. REV. 377, 422 (1944).

prospects will result in behavioral changes as well as creating an employment environment where the risk of loss may transcend potential benefits.

Municipalities do have certain rights and protections afforded to them against arbitrary claims, which they must continue to have. Hawaiian law expressly limits the duty of the state and several counties to warn of dangerous shore break or strong current in the ocean at public beach parks if the conditions are extremely dangerous, typical for that particular beach park, and pose a risk of serious injury.<sup>193</sup> This law protects the city from wasting critical time and monetary resources on exploitative claims, or claims that were clearly outside the boundaries of municipal liability. Nonetheless, stipulations to these protections still exist. In the case of Hawaiian lifeguards, this allows municipalities to be liable if they exhibited intentional indifference or apathy towards a “plainly obvious risk,” such as could be considered abnormal for that particular environment. However, for cases in which individuals ought to be exercising appropriate judgment, as in the personal injury case mentioned above that saw an accident after jumping off a rock, action may not be taken against the municipalities. The Hawaiian lifeguard that rescued and revived the individual after jumping off the rock should not have ever had to be concerned about whether they would be liable for their actions. The municipalities and governments in question must take hold of their legal responsibilities and ethical obligations to provide protections for the first responders who lay their lives on the line to protect the ordinary citizen.

### C. COVID-19 Specific Protections for First Responders, Including Vaccine Protocol

During COVID-19, protections for public health must also include vaccinations at a low or extremely minimal cost. Early talks on vaccine distribution plans have stated that the doses must be free and must have strict protocol to get the vaccine into the hands of those that need it most—namely first responders.<sup>194</sup> These are workers whose jobs are essential to the overall wellbeing of the public, and thus must be shielded from the virus imminently in order to maintain safe employment.

The first coronavirus vaccines were administered in the United States in December of 2020.<sup>195</sup> Distribution is now being staggered throughout the population, in order to account for those who are at highest risk of death or

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193. See 1996 Haw. Sess. Laws § 2(a).

194. See *COVID-19 Vaccination Program Interim Playbook for Jurisdiction Operations*, CTRS. FOR DISEASE CONTROL AND PREVENTION (2020), [https://www.cdc.gov/vaccines/imz-managers/downloads/COVID-19-Vaccination-Program-Interim\\_Playbook.pdf](https://www.cdc.gov/vaccines/imz-managers/downloads/COVID-19-Vaccination-Program-Interim_Playbook.pdf).

195. See *Covid-19: First Vaccine given in US as Roll-out Begins*, BBC NEWS (Dec. 14, 2020), <https://www.bbc.com/news/world-us-canada-55305720>.

continued exposure and transmission.<sup>196</sup> First responders fit into the latter category, as they are the primary points of contact for those who are ill. Since the coronavirus can live in an asymptomatic person, who can then unknowingly transmit it to others, it is critical that these workers have immediate and financially feasible access to vaccines.

Guidelines must also be established to ensure that those who are receiving vaccines are actually members of these vulnerable populations. For example, people who are simply trying to jump ahead of others without having a legitimate claim could attempt to convince doctors they are suffering from underlying conditions to have access to a vaccine. While there are opportunities for inequitable distribution, the overall guiding principal must be the prioritization of those in apparent higher-risk situations. The high incidence of transmission means that vaccine administration should be viewed with urgency, and municipalities and healthcare settings must work to secure vaccinations for their workers in need.

Inevitable liability questions will emerge for the doctors and first responders during the age of COVID-19. If they inadvertently transmit the virus to a patient or rescue, are they as individuals liable for it? Could they be charged with wrongful death? Once vaccines are available to the public, do doctors have the right to refuse to administer? If something were to go wrong with the administering of a vaccine, is the doctor liable? If a first responder is vaccinated but by some fluke it does not work and they transmit it, are they liable? If there is a death, there are even further questions of liability. When a first responder—for example, a police officer—passes away on the job, the surviving family is entitled to payouts. If this continues throughout COVID-19, deaths due to coronavirus that were a direct result of job duties would presumably require financial provisions to the families. This implicates the city, providing economic reasoning for why municipalities must take charge in vaccinating their workers. Without the vaccine, the first responders are susceptible themselves, but also putting others at risk as well.

Overall, support of first responders must take priority for municipalities. These responders are necessary for the security, health, and wellness of citizens, but they will not be able to carry out their job duties if they are overly preoccupied with whether or not they shall be liable for complete or partial failure of their efforts. Being a first responder is a physically and mentally challenging job that requires full, undivided, and undistracted attention in the midst of emergencies.

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196. See *COVID-19, COVID-19 Vaccination Distribution, and COVID-19 Vaccine Phases supra* note 169.

## VI. A Guiding Framework to Guide Police Reform Whilst Protecting First Responders

Qualified immunity, in its principle idea of shielding those who protect us in order to not inhibit them from doing their jobs, is not innately wrong. However, the application of this notion has a longstanding and well-documented history of in fact inhibiting justice; and on a more modern note—encouraging the continuation of police brutality against marginalized populations. There must still be liability for blatant disregard for an individual's constitutional rights, for the safety and security of all citizens. Qualified immunity must be implemented on a more individualized, case-by-case basis, rather than as a widespread legal doctrine that allows impunity for police who act unlawfully.

Social media, the Internet, and modern technology allow for more highly publicized deaths than ever before. However, these deaths also coincide with a growing distrust of the police amongst Black Americans.<sup>197</sup> In order to strengthen and repair the relationship between minorities and police in such a way that keeps both police and citizens safe, the officers who break laws and violate people's constitutional rights must not be able to claim immunity.

A law review note by Kelly M. Hogue for the *Texas Law Review* suggested an added supplement to states' current statutes on police use of force with a model statute stating:

- (a) Regardless of whether an on-duty police officer knows if the civilian is or is not carrying a firearm, the officer commits an offense if he intentionally or knowingly uses deadly force that causes the death of a civilian who is not carrying a firearm when the force is used.
- (b) Any use-of-force defense is not a defense to prosecution under this section.<sup>198</sup>

She then clarifies that the statute not only criminalizes killings by the police of unarmed citizens, but also criminalizes killings by the police of civilians armed with a weapon that is less lethal than a firearm.<sup>199</sup> If enacted, this would charge officers like those that shot Edward Garner, an eighth-grade boy that was five-foot-four and around 100 to 110 pounds, whose body

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197. See Jack T. Vanderford, *Wardlow Revisited: How Media Coverage of Police Brutality Makes Empirical Data More Relevant Than Ever*, 22 UNIV. PA. J. CONST. LAW 1523, 1523–49 (2020).

198. See Kelly M. Hogue, *When an Officer Kills: Turning Legal Police Conduct into Illegal Police Misconduct*, 98 TEX. L. REV. (2020).

199. *Id.*

was found only with ten dollars and a purse.<sup>200</sup> While police officers should have weapons at hand to prevent harm, these weapons should by no means be discharged with an immediate sense of urgency in situations that could be defused by other non-violent means. If weapons are discharged in unnecessary situations to an excessive amount, the officers in question should not fall under qualified immunity.

Much of the legislation surrounding qualified immunity relies heavily on the perspective of a reasonable police officer. Since *Graham v. Connor*, the Supreme Court has consistently reaffirmed that the “reasonable police officers on the scene” standard of care governs the adjudication of excessive force claims under Section 1983.<sup>201</sup> While legal precedent can and should be adhered to in the development of new legislation, it must not be held in an esteem that renders it untouchable if it permits or allows for unconstitutional acts against other citizens. In the immediate aftermath of the death of George Floyd, current legislation still relies on police officers’ perspectives. In order to comply with this present ruling, courts ought to expand on their decision-making processes to determine whether qualified immunity is justifiable by considering officer training and the extent they adhered or deviated from the training during the incident in question, the officer’s experience in law enforcement, and the extent the officer complied or violated department rules that were applicable to the use of force under the circumstances in question.<sup>202</sup> By taking more of an individualized and evidentiary-based perspective towards the policing of police officers, there will be a fair and thorough examination of the events that transpired with the intent of keeping well-trained and beneficial officers in the positions they are in while instigating punitive measures for officers that are in flagrant violation of constitutional law.

Part of the budget slashing approved by New York included the reallocation of funds to mental health resources. Trainings focused on preparing officers to defuse mental health situations that may not warrant violence must become more implemented as typical protocol. Individuals that have mental illnesses can present unique challenges for law enforcement officers as they can react differently to confrontations with the police and can also react adversely to traditional police training.<sup>203</sup> Unfortunately, many officers are not sufficiently trained when it comes to interacting with those with mental illness.<sup>204</sup> This lack of understanding and exposure to alternative

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200. See *Tennessee v. Garner*, 471 U.S. 1 (1985).

201. See Mitch Zamoff, *Determining The Perspective Of A Reasonable Police Officer: An Evidence-Based Proposal*, 65 VILL. L. REV. 585, 585–645 (2020).

202. See Zamoff, *supra* note 201, at 585-645.

203. See Andrew C. Hanna, *Municipal Liability and Police Training for Mental Illness: Causes of Action and Feasible Solutions*, 14 INDIANA HEALTH L. REV. 221, 221–66 (2017).

204. See Ind. Code § 5-2-1-9(a)(9)(A)-(C) (2018).

problem-solving techniques can increase the likelihood that police officers' resort to deadly force in order to eliminate perceived threats.<sup>205</sup> This use of deadly force, of course, relates back to the lack of a positive relationship with and perception of police by American citizens.

When it comes to qualified immunity, determining those who are entitled and those who are not is of paramount importance. The Court has ruled before that municipalities and private prison guards are not entitled to qualified immunity because neither is threatened by personal financial liability.<sup>206</sup> Public prison guards, however, typically would be eligible to use qualified immunity as a defense for actions on the job. The movement against law enforcement officials invoking qualified immunity as a defense has been heightened by a November 2020 Supreme Court decision that refused to grant long-standing protections to corrections officers who allegedly kept an inmate housed in "shockingly unsanitary cells" for six days and held that "any reasonable correctional officer should have realized that Trent Taylor's conditions of confinement offended the Eighth Amendment."<sup>207</sup>

Since municipalities are not entitled to qualified immunity, they can face liability for allowing dangerous patterns and practices. Floyd's family has sued the city of Minneapolis and the four officers involved in George Floyd's, with the suit alleging that "the city of Minneapolis has a history of policies, procedures and deliberate indifference that violates the rights of arrestees, particularly Black men, and highlights the need for officer training and discipline."<sup>208</sup> These progressions towards change and amending qualified immunity has been supported by experts, claiming "available evidence indicates that qualified immunity often is not functioning as assumed, and is not achieving its intended goals . . . The Supreme Court, as well as lower

205. See Amy Watson et al., *Improving Police Response to Persons with Mental Illness: A Multi-Level Conceptualization of CIT*, 31 INT. J. LAW PSYCHIATRY 359, 359–68 (2008).

206. See *Richardson v. McKnight*, 521 U.S. 399, 411 (1997); *Own v. City of Indep.*, 445 U.S. 622, 653 (1980).

207. The Court's decision was made in reversal of a lower court, after the Fifth Circuit Court of Appeals agreed that the prison guards' conduct violated the prisoner's Eighth Amendment prohibition on "cruel and unusual" punishment, but that the officials were entitled to qualified immunity because no court had established that the conditions imposed were unconstitutional. The prisoner had allegedly been stripped naked and housed in a cell with human feces covering virtually every surface. This is a critical ruling that could be used to begin chipping away at the previous requirements that courts clearly establish conditions as unconstitutional. At minimum, it suggests the beginning of the erosion of long-entrenched immunity towards officers that may be a forerunner of cases to follow. See Harper Neidig, *Supreme Court Issues Rare Ruling Against Protections for Law Enforcement Officials*, THE HILL (Nov. 2, 2020), <https://thehill.com/regulation/court-battles/523985-supreme-court-issues-rare-ruling-against-protections-for-law?amp>. See also *Taylor v. Riojas*, SCOTUSBLOG, <https://www.scotusblog.com/case-files/cases/taylor-v-riojas/> (last visited Jan. 27, 2021).

208. See Randy Furst & Paul Walsh, *George Floyd Family Sues City of Minneapolis, Officers Involved Citing 'Reckless Disregard' of Civil Rights*, STAR TRIBUNE (July 15, 2020), <https://www.startribune.com/floyd-family-seeks-financially-prohibitive-precedent-in-suit-vs-minneapolis-officers/571778032/?refresh=true>.

courts, should adjust their qualified immunity decisions to comport with this evidence.”<sup>209</sup> The year 2020 was defined by chaos, internal divide, and vocal criticism of authority. The end of this historic year must not be where the demands for reform end: qualified immunity must evolve for the safety and protection of both officers and American citizens alike.

## VII. Conclusion

The only situations comparable to the COVID-19 era are those of war and postwar. The body count stretching into the hundreds of thousands is not at all unlike those of historic wars. Unfortunately, when war happens, it can take generations to rebuild and recover. The economic aspect of COVID-19 is critical: unemployment, homelessness, and failed business numbers are steadily ticking upwards. Gyms, schools, businesses, malls, churches, all stand barely filled or completely empty. They may not be bombed as in official wartime, but they remain empty shells in comparison to how they existed pre-2020. The leadership vacuum that is pulling at the infrastructure of the United States spells out a bleak future filled with economic and public health strains if there are no immediate cooperative changes made.

The coronavirus is the most significant public health crisis in our lifetimes, with scarcely imaginable death tolls. Nearly a year after the first confirmed cases, Dr. Anthony Fauci stated, “Two to three thousand deaths a day times a couple of months, and you’re approaching a really stunning number of deaths.”<sup>210</sup> This period will go down in human history for not only the death tolls, but also the intense economic fallout and social demands. The 2020 election was driven primarily by COVID-19 leadership in the past and future, as well as the perceptions of said leadership. President Trump’s demands for recounts and consistent allegations of fraud on social media sites were met with attempts from the sites themselves to label certain statements as misleading.<sup>211</sup> This is a major issue and wholly unprecedented, as hundreds of millions of individuals have profiles on social media sites or rely on it for news. To filter through individual statements and add labels rather than

209. See Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 *YALE L. J.* 1, 2–76 (2017).

210. See John Bacon, *Coronavirus Updates: CDC May Reduce Quarantines; Fauci Says ‘Stunning Number of Deaths’ Looms; Masks Will Be Key for Months*, USA TODAY (Nov. 24, 2020), <https://www.msn.com/en-us/news/us/coronavirus-updates-fauci-warns-of-stunning-number-of-deaths-family-overwhelmed-by-covid-after-ignoring-rules-makes-psa/ar-BB1biOMD?ocid=msedgntp>.

211. See Taylor Hatmaker, *Close U.S. Election Results Plunge Social Media into Nightmare Misinformation Scenario*, TECHCRUNCH (Nov. 4, 2020), <https://techcrunch.com/2020/11/04/trump-election-2020-premature-victory-facebook-twitter/?guccounter=1>.

focusing on the hundreds of thousands of deaths is indicative of the leadership priorities in the United States.

The nation has a rich and longstanding history of resilience that emphasizes the rule of law. It has been said that the rule of law “does not take sides in policy debates or elections, so as long as the process and the outcomes are governed by duly enacted laws that are clear and accessible, are applied equally to all, protect fundamental rights and are reviewed by an independent judiciary.”<sup>212</sup> American democracy is one of the first of its kind, as former President Barack Obama stated: “America is the first real experiment in building a large, multiethnic, multicultural democracy. And we don’t know yet if that can hold. There haven’t been enough of them around for long enough to say for certain that it’s going to work.”<sup>213</sup> However, the country has pushed through and reconciled numerous issues that have previously divided the nation. The 2020 Presidential Election combined with the global COVID-19 pandemic has certainly created radically unprecedented issues, but the American focus on democracy and cooperation can conquer the divide. There is no other option. In the past, periods of transition have seen candidates with opposing political beliefs work together to move beyond their differences and foster democracy. This was not the case for the 2020 election, and this failure had major repercussions for both the perception of the United States, as well as the sanctity of the democratic process as championed by the nation.

Observers from around the world are watching closely to see the aftermath of the election and the future of American democracy. Krzysztof J. Pelc, a political science professor at McGill University in Canada, stated:

The great lesson that U.S. allies have drawn from the past four years is that the American ideals of democratic freedom and openness rest on a fragile basis. American political institutions have proven more delicate than most international observers thought. As a result, we are always one election away from U.S. commitments coming undone.<sup>214</sup>

This sentiment shows the precarity of other countries’ perception of the United States. This collision of COVID-19 and the leadership vacuum has created a colossal danger with an open threat to elections, democracy, and

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212. See Elizabeth Anderson, *To Defend Rule of Law, We Must Agree on Its Meaning*, The Hill, (Jan. 23, 2021), <https://www.msn.com/en-us/news/politics/to-defend-rule-of-law-we-must-agree-on-its-meaning/ar-BB1d0HiU>.

213. Lisa Lerer, *How Obama Sees This Moment*, N.Y. TIMES (Nov. 16 2020), <https://www.nytimes.com/2020/11/16/us/politics/obama-interviews.html>.

214. See Carol Morello, *Foreign Observers Shocked by Chaos Over U.S. Election*, WASH. POST (Nov. 24 2020), [https://www.washingtonpost.com/national-security/us-election-observers-trump/2020/11/23/caf358d0-2d03-11eb-9c71-ccf2c0b8d571\\_story.html](https://www.washingtonpost.com/national-security/us-election-observers-trump/2020/11/23/caf358d0-2d03-11eb-9c71-ccf2c0b8d571_story.html)

the American system of values. These are all unprecedented firsts for America. While there have been undeniably harsh periods of conflict in history, this is the first of its kind.

President Abraham Lincoln delivered The Gettysburg Address in the midst of the Civil War, when the United States was quite literally divided into two sides. The battle at Gettysburg was one of the bloodiest of the war and counted the tragic losses of more than 7,000 soldiers.<sup>215</sup> Afterwards, Lincoln said, “We here highly resolve that these death shall not have died in vain—that this nation, under God, shall have a new birth of freedom—and that government of the people, by the people, for the people, shall not perish from the earth.”<sup>216</sup> During the modern division in the United States, the same values that both Lincoln and Obama describe still ring true. America is a nation of spreading and enforcing democracy around the world, a process that begins from the most inner workings of government. Without the capacity to model democracy in our own government, we cannot advocate for it to other systems. When our own system shows signs of woeful lack in terms of operations, functionality, and believability, it will be a far tougher sell to go around the world and argue for the benefits of a free market and democracy.

Change is coming to the way that police officers and other first responders are treated in the United States. In 2020, the country is powerfully divided between “Back the Blue” and “ACAB,” but legislative measures to police the police and slash police budgets in several major American cities are indicative that the social demands and outcry are being heard. Qualified immunity protections for officers will not end overnight, but the legislative decisions being made in America’s government and highest courts reflect that this process of chipping away at centuries of protection have already begun. In order to help first responders perform their job duties to the best of their abilities without fear of retribution in the form of legal or fiscal liabilities, qualified immunity must remain. However, the way that it is applied must not be taken as a “one size fits all” notion. The color of the law and manner in which officer actions are critiqued must not apply anytime a responder puts on their uniform, but rather be increasingly fact specific. Amending qualified immunity must not be as extensive as in Hawaii, so as to put responders at unnecessary risk, but neither so vague that outrageous conduct goes unpunished.

There are circumstances where intentional conduct is depraved and results in death or serious injury. George Floyd’s death was not unintentional. A long-concerted knee on the neck should be in no way held to the same

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215. See *Gettysburg Casualties (Battle Deaths at Gettysburg)*, HISTORYNET, <https://www.historynet.com/gettysburg-casualties> (last visited Jan. 27, 2021).

216. See Abraham Lincoln, President, U.S., *Gettysburg Address* (November 19, 1863).

standards as an accidental bullet. Officer Derek Chauvin heard the “I can’t breathe” pleas and still kept his knee on Floyd’s neck. There cannot be any form of qualified immunity for his role in the killing of George Floyd and still have justice be served. When it comes to municipal liability, if the city in question knew and noticed that their public servants had a pattern and practice of depraved or excessive force and overlooked it, they also should be liable. The notion of qualified immunity is one that has the potential to create safety and encourage officers to perform their jobs without fear of retribution, but not one that permits officers to perform their jobs without fear of punishment.

Rather than making quick strides on the myriad of issues facing the United States, Biden has chosen to focus on COVID-19. Biden’s immediate recognition of the danger of the coronavirus pandemic speaks towards the immense risk faced by first responders in the age of COVID-19 and beyond. Questions emerge, like “What happens to the first responders serving on the front lines that face heavy exposure rates in an already dangerous job?,” “What if they too spread it to someone in a rescue unknowingly?,” “Will they be liable?,” and “Will the municipality they work for be liable?” Qualified immunity as it stands under historical legislation simply does not account for the radical public health and social developments of 2020.

President Joe Biden is attempting to step into the leadership vacuum through the new task force and numerous pleas for Americans to wear masks, but did not have tangible authority to mobilize a federal response until after inauguration in January 2021.<sup>217</sup> However, his efforts along with other federal officials’ in working to cease the deadly grip the coronavirus has on the United States are desperately needed to protect the public. This is a global humanitarian crisis that is being felt painfully across the nation, and there are serious consequences and unanswered questions emerging on vaccine distribution protocol, priority populations, federal leadership response, economic status, and doctor and first responder liabilities. The real problems associated with a leadership vacuum make coronavirus recovery efforts more challenging, and thus widespread cooperation and efforts are a necessity.

The questions of both physical and legal immunities for healthcare workers and first responders are not disappearing anytime soon and cannot be ignored. Clearly, blanket coverage under historic qualified immunity orders is not working efficiently as nationwide demands for reform surface daily. Derogatory names being hurled at police officers on such a widespread level, regardless of their own individual actions, speaks volumes to the lack of regard or trust for American police during this time of tension. As such, action must be taken in order to enhance transparency and boost national morale. With change being made to the longstanding legal notion

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217. See Stolberg et al., *supra* note 131.

of qualified immunity, the lives and well-being of officers and citizens alike can be saved.

These changes must come from the top down. COVID-19, leadership, and qualified immunity are all hotly debated issues, but they must be reconciled for the continued safety and future of our nation and the free world as we know it. If our leaders from all branches of government can come together, move across the aisle and partisan lines, to collectively push for the betterment of all Americans, the collective benefit will propel us into a stronger, more unified, and more cohesive future led by trustworthy and reliable figures. Congress has failed to make progress on much-needed economic relief plans, as both sides of the aisle blame the other for the lack of progress.<sup>218</sup> Meanwhile, unemployment numbers are painfully high, and the people continue to suffer. As former President Barack Obama suggested, “There is a way of consistently offering the possibility of cooperation.”<sup>219</sup> If the leadership vacuum can be filled with individuals willing to step up and bridge the gap between the separating parties to push for cohesive unity, greater law and management, and stronger leadership, COVID-19 can be managed more effectively, and lives will be saved. We must protect the rule of law. The world is watching the American response to evaluate how well a free system and democratic ideals can hold up. The country is strong, resilient, and capable, but we must focus on filling the holes in our own system first in order to be an effective advocate for democracy in the rest of the world.

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218. See Susan Cornwell & Jason Lange, *Biden Hopes for Post-Trump Progress on COVID-19 Stimulus*, REUTERS (Nov. 18, 2020), <https://www.msn.com/en-us/news/politics/pressure-for-covid-19-deal-builds-on-congress/ar-BB1b8r1L?ocid=msedgntp>.

219. See Choi, *supra* note 1.