Sickening Representation: The Impact and Ethical Considerations of Litigating Against Contagion Control

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INTRODUCTION

Strategic litigation to advance a cause or ideology can play an important role in shaping public discourse relevant to health. It was first utilized as a legal project to help expand rights for marginalized groups, especially by the National Association for the Advancement of Colored People ("NAACP").[1] Such

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1. *See* Scott L. Cummings, *Movement Lawyering*, 2017 U. ILL L. REV. 1645, 1654 (2017) (noting that strategic impact litigation by the NAACP was used "to advance progressive policy reform that [was] validated by activist courts.").

litigation is an important tool for developing legal protections and impacting the public's and court's understanding of an issue, as was the case with the HIV movement.[2] Recently, conservative political projects have adopted these same tools with considerable success, but to limit structural mechanisms favoring marginalized groups or the public's good.[3] Unlike the obesity epidemic that accumulated lawsuits against fast food companies to impose liability for the adverse effects their products caused consumers,[4] the COVID-19 pandemic spurred many lawsuits in the opposite direction. Galvanized by what they characterized as an overreach of governmental authority, lawyers and judges aggressively took on public health mandates at the local, state, and federal levels, ultimately recasting America's future battles against contagion.[5]

It is important to recognize that strategic litigation is both risky and resource intensive.[6] As such, legal challenges to pandemic restrictions were more likely to be brought by individuals with greater resources or who were more likely to be white,[7] leading to situations where loosened restrictions disproportionately impacted communities with pre-existing health inequities. While lawyers and judges themselves may not directly spread communicable diseases, their zealous representation or advocacy can inadvertently contribute to the spread of these diseases. By influencing policies, behaviors, and access to healthcare, particularly in cases related to public health emergency orders and vaccination laws, lawyers and judges cause harm to racially marginalized communities under the guise of

2. Tamar Ezer & Priti Patel, *Strategic Litigation to Advance Public Health*, 20 HEALTH HUM. RTS. 149, 149 (2018).

3. *See* Noah A. Rosenblum, *Power-Conscious Professional Responsibility: Justice Black's Unpublished Dissent and a Lost Alternative Approach to the Ethics of Cause Lawyering*, 34 GEO. J. LEGAL ETHICS 125, 132 (2021).

4. *See* Alyse Meislik, *Weighing in on the Scales of Justice: The Obesity Epidemic and Litigation Against the Food Industry*, 46 ARIZ. L. REV. 781, 796 (2005); *see also Obese Man Sues Fast-Food Chains for Health Woes*, WASH. TIMES (Jul. 27, 2002), https://www.washingtontimes.com/news/2002/jul/27/20020727-035012-8644r/ [https://perma.cc/J625-Y785].

5. Lauren Weber & Anna Maria Barry-Jester, *Conservative Blocs Unleash Wave of Litigation to Curb Public Health Powers*, KFF HEALTH NEWS (Jul. 18, 2022, 5:00 AM), https://www.npr.org/sections/health-shots/2022/07/18/1111766924/conservative-bloc-litigation [https://perma.cc/M77F-M987].

6. Ezer & Patel, *supra* note 2, at 150.

7. *See* Abadi v. Am. Airlines, Inc., No. 23-cv-4033 (LJL), 2024 U.S. Dist. LEXIS 59889 (S.D.N.Y. Mar. 29, 2024) (demonstrating that the plaintiff was CEO of the National Environmental Group and routinely traveled for business); Doe v. Salina, No. 23-CV-3529 (JMW), 2024 U.S. Dist. LEXIS 224362 (E.D.N.Y. Dec. 11, 2024) (demonstrating that plaintiffs Jane Doe and her husband are residents of Massapequa, New York and that their two children were enrolled in the Plainedge Union Free School District). Massapequa is located in Nassau County, the wealthiest county in New York, and Plainedge Union Free School District is a district with a primarily white student body. *See also* Jacobson v. Bassett, No. 3:22-CV-00033 (MAD/ML), 2022 U.S. Dist. LEXIS 65989 (N.D.N.Y. Mar. 25, 2022) (involving a challenge against the U.S. Food & Drug Administration's ("FDA") guidance that prioritized certain racial groups for SARS-CoV-2 treatments in New York by a white, non-Hispanic law professor at Cornell University); Roberts v. Bassett, Nos. 22-622-cv, 22-692-cv, 2022 U.S. App. LEXIS 31486 (2d Cir. Nov. 15, 2022) (involving a challenge against the FDA's guidance that prioritized certain racial groups for SARS-CoV-2 treatments in New York by two white, non-Hispanic residents of New York City).

neutrally advancing constitutional claims. For example, refusing to wear a mask or helping overturn mask mandates during a pandemic known to disproportionately kill Black and Latinx populations, makes masks not only politicized,[8] but also racialized to further dangerous division.[9] Hence, understanding the role of lawyers and judges in advancing ideological interests to the detriment of the public's health is critical, as legal precedents that weaken disease prevention efforts were ultimately created during the COVID-19 pandemic.

Part I will provide a high-level overview of the COVID-19 pandemic landscape, highlighting the initial pandemic response, the government's power to fight infectious diseases, and the racial lens from which to view the attitude towards minimal COVID-19 protections in certain states. Part II will cover standing law and lawyering to advance a cause, focusing specifically on pandemic-related lawsuits and the reasons implored by courts to advance or dismiss a case. Part III will explore the ethical implications for lawyers and judges who helped facilitate litigation aimed at diminishing public health efforts, looking at the Model Rules of Professional Conduct and Model Code of Judicial Conduct. Finally, Part IV will address how weaponizing litigation to assert ideologies that diminish the U.S. public health system and trust in the legal profession on the pretext of strategy to hold governments accountable is an ethical issue requiring a remedy. In particular, it will propose how lawyers and judges who engage in such practices should be treated and whether the common law tort of negligence may provide a cause of action against these professionals who threatened to sue or who facilitated the actual removal of public health protections.

I. COVID-19, PANDEMIC POLITICS, AND RACE

A. THE VIRUS AND GOVERNMENT ACTION

As of March 13, 2025, COVID-19, a virus caused by SARS-CoV-2 and spread via respiratory droplets, has been responsible for 1.22 million deaths in the United States.[10] Its infectious capability has brought the tension between public welfare and individual freedom to the forefront of national discourse, creating political terrains on which efforts to assert rights are fought.[11] The 10th Amendment confers upon states all powers not specifically given to the federal government, which allows them to take public health emergency actions such as setting

8. *See* Health Freedom Def. Fund, Inc. v. Biden, 599 F. Supp. 3d 1144 (M.D. Fla. 2022).

9. Rhea Boyd, *What It Means When You Wear a Mask—and When You Refuse To*, THE NATION (July 9, 2020), https://www.thenation.com/article/society/mask-racism-refusal-coronavirus/[https://perma.cc/RW9T-8JUV].

10. *Provisional COVID-19 Mortality Surveillance*, CTRS. DISEASE CONTROL & PREVENTION, https://www.cdc.gov/nchs/nvss/vsrr/covid19/index.htm [https://perma.cc/HG58-DGDE] (last visited Mar. 13, 2025).

11. Nolan Kline, *Governing with Contagion: Pandemic Politics, COVID-19, and Undermining Public Health in Florida*, 37 MED. ANTHROPOLOGY Q. 367, 378 (2023).

quarantines.[12] Given such, the U.S. Supreme Court has recognized that states have "police powers" to act within the strictures of due process if said actions constrain individual liberty.[13] On the federal level, the government has broad authority to quarantine and impose other health measures to prevent the spread of diseases between states as granted through the Commerce Clause, although this has never been affirmed.[14] In addition, the federal Public Health Service Act ("PHSA") grants the Secretary of Health and Human Services authority to respond to public health emergencies.[15] For example, the Centers for Disease Control and Prevention's ("CDC") issuance of an order halting residential evictions during the COVID-19 pandemic, under Section 361 of PHSA to prevent the interstate spread of the disease, was an exercise of this authority.[16] Congress or the President can also exercise considerable powers at ports of entry, which allowed the Transportation Security Administration to require masks on public transportation, with limited exceptions.[17] Consequently, the COVID-19 pandemic increasingly shed light on the flaws of American federalism, especially on how constitutional boundaries between federal and state authorities raise issues about who is in control.[18] Furthermore, the pandemic highlighted how a President's failure to accept responsibility and exercise existing authority decisively and competently disadvantaged states and their local governments, leading to increased economic hardship and excess deaths.[19]

The COVID-19 pandemic also revealed significant gaps in the legal infrastructure for responding to health emergencies in the U.S. and increased distrust in public health law. Trust in the safety and efficacy of vaccines, in the individuals who administer vaccines or provide information on vaccination, and in the broader healthcare system are all important factors that influence the vaccine decision-making process.[20] During the COVID-19 pandemic, higher levels of trust in the government were highly correlated with the adoption of positive health behaviors like social isolation and frequent handwashing, and significantly

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12. *Two Centuries of Law Guide Legal Approach to Modern Pandemic*, AM. BAR ASS'N (Apr. 2020), https://www.americanbar.org/news/abanews/publications/youraba/2020/youraba-april-2020/law-guides-legal-approach-to-pandemic/ [https://perma.cc/GJ7W-VVJ5].

13. *See* Best v. St. Vincents Hosp., 2003 U.S. Dist. LEXIS 11354 (S.D.N.Y. July 2, 2003).

14. AM. BAR ASS'N, *supra* note 12.

15. *Id.*

16. WEN W. SHEN, CONG. RSCH. SERV., R46758, SCOPE OF CDC AUTHORITY UNDER SECTION 361 OF THE PUBLIC HEALTH SERVICE ACT (PHSA) 2 (2021).

17. Scott Bomboy, *The Constitutional Issues Related to COVID-19 Mask Mandates*, NAT'L CONST. CTR. (Aug. 13, 2021), https://constitutioncenter.org/blog/the-constitutional-issues-related-to-covid-19-mask-mandates [https://perma.cc/7QXM-VRTA].

18. Jennifer Selin, *How the Constitution's Federalist Framework is Being Tested by COVID-19*, BROOKINGS (June 8, 2020), https://www.brookings.edu/articles/how-the-constitutions-federalist-framework-is-being-tested-by-covid-19/[https://perma.cc/YHT2-FUTM].

19. Beverly A. Cigler, *Fighting COVID-19 in the United States with Federalism and Other Constitutional and Statutory Authority*, 51 PUBLIUS 673, 674 (2021).

20. Pauline Paterson et al., *Vaccine hesitancy and healthcare providers,* 34 VACCINE 6700, 6701 (2016).

associated with less decline in health behaviors over time.[21] This is not limited to COVID-19, as higher trust in the government typically equates to the uptake of annual vaccines.[22] The same can be said for the inverse: less trust leads to less vaccine acceptance. Institutions such as CDC were complicit in misinforming and confusing the public about the severity of COVID-19.[23] Guiding information regularly fluctuated during the pandemic, with some safety-related updates operating in direct contradiction to the advice provided earlier.[24] CDC is not solely to blame for the confusion, as pressure to make abrupt changes came from the White House Coronavirus Task Force under an administration that believed the United States was conducting too many tests for the virus.[25]

Due to the government's decision to take a laissez-faire approach to social distancing, masks, and testing, racial inequities in COVID-19 infections and deaths resulted.[26] With this in mind, many state legislatures passed laws limiting the scope of public health powers held by health officials and governors. From January 2021 through April 2023, seven states limited officials' ability to close businesses, four adopted new prohibitions on requiring vaccines or proof of vaccination, eleven restricted the ability to restrict religious gatherings and five prohibited mask mandates.[27] State laws facilitating autonomous adults in their quest to avoid vaccines is one thing, yet inhibiting schools from instituting efficacious mask requirements to protect children who must attend but cannot lawfully be vaccinated is another. These state laws that were enacted in the absence of expertise and forethought delayed lifesaving information and interventions while "advancing health-harming political calculations that overrode protective decisions and

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21. Qing Han et al., *Trust in Government Regarding COVID-19 and its Associations with Preventive Health Behaviour and Prosocial Behaviour During the Pandemic: A Cross-Sectional and Longitudinal Study*, 53 PSYCH. MED. 149, 153–55 (2023).

22. Heidi J. Larson et al., *Measuring Trust in Vaccination: A Systematic Review*, 14 HUM. VACCINES & IMMUNOTHERAPEUTICS 1599, 1602 (2018).

23. José M. Flores Sanchez & Jade Kai, *Coloniality and Contagion: COVID-19 and the Disposability of Women of Color in Feminized Labor Sectors*, 30 GENDER WORK & ORG. 373, 375 (2022).

24. *Id.*

25. *See* Nick Valencia, Sara Murray & Kristen Holmes, *CDC Was Pressured 'from the Top Down' to Change Coronavirus Testing Guidance, Official Says*, CNN NEWS (Aug. 27, 2020, 12:30 AM), https://www.cnn.com/2020/08/26/politics/cdc-coronavirus-testing-guidance/index.html?sr=twCNN082620cdc-coronavirus-testing-guidance1204PMStory [https://perma.cc/QF77-8JU6]; Stephanie Soucheray, *Experts Question CDC Changes to COVID-19 Testing Guidance*, CIDRAP NEWS (Aug. 26, 2020), https://www.cidrap.umn.edu/covid-19/experts-question-cdc-changes-covid-19-testing-guidance [https://perma.cc/CLR2-8CYL].

26. Ruqaiijah Yearby & Seema Mohapatra, *Systemic Racism, the Government's Pandemic Response, and Racial Inequities in COVID-19*, 70 EMORY L.J. 1419, 1430 (2021).

27. Michelle M. Mello et al., *Judicial Decisions Constraining Public Health Powers During COVID-19: Implications for Public Health Policy Making*, 43 HEALTH AFFS. 759, 760 (2024); *see also* Wendy E. Parmet, *The COVID Cases: A Preliminary Assessment of Judicial Review of Public Health Powers During a Partisan and Polarized Pandemic*, 57 SAN DIEGO L. REV. 999, 1000 (2020) (emphasizing how until COVID-19, "no court in the past century had to determine the full reach of state public health emergency powers during a widespread and highly lethal pandemic. Nor had any court been asked to reconcile contemporary understandings of constitutional rights with the states' need to protect its residents from such a pandemic.").

measures for the public's health."[28] As a result, such legal reforms advanced an ideology privileging health freedom over health protection.

These lawsuits and reforms did not come about on their own. Some lawyers actively worked against public health measures under the guise of promoting liberty, disregarding the importance of research on the health effects of laws and encouraging COVID-19 backlash that placed many individuals at direct risk of exposure. An example arises in *Faris v. CDC & Prevention*,[29] where a helicopter maintenance supervisor with a generalized anxiety disorder and who frequently traveled by air filed a pro se lawsuit seeking to permanently enjoin COVID-related mask mandates and recover money from airlines for conspiring to violate his civil rights. The court dismissed the claims against the federal agencies as moot since enforcement had already stopped for the CDC's Travel Mask Mandate as well as the claims for deceptive and misleading trade practices, fraudulent misrepresentation, and invasion of privacy against the airlines.[30] The claim that airlines illegally practiced medicine without a license was also dismissed since requiring passengers to wear masks does not constitute the practice of medicine.[31] Another example is Ohio Senate Bill 22, which established that the General Assembly of the State of Ohio may "rescind [a] special or standing order or rule [for preventing the spread of contagious or infectious disease] or [an action to control and suppress the cause of disease or illness, including contagious, infectious, epidemic, pandemic, or endemic conditions], in whole or in part, by adopting a concurrent resolution."[32] The bill also allows any person to challenge an emergency rule "in a civil action for damages, declaratory judgment, injunctive relief, or other appropriate relief" and recover attorney's fees and court costs if successful.[33] Despite Governor DeWine's veto that was later overridden, Senate President Matt Huffman, a local attorney, and other Republicans demonstrably used S.B. 22 to question how much power a governor should have and for how long during pandemics.[34] Consequently, this approach failed to consider how changes to executive powers surrounding state health orders could cost lives in the next outbreak or pandemic. Similarly in Montana, House Bill 230 established that "[a]n agency or political subdivision of the state may not take

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28. NETWORK PUB. HEALTH L., *State Laws Limiting Public Health Protections: Hazardous for Our Health* 1, 16 (2022).

29. No. 3:22-cv-23-BJB, 2024 U.S. Dist. LEXIS 177128 (W.D. Ky. Sep. 30, 2024) ("[Faris'] [c]omplaint grounds the alleged conspiracy in discrimination against disabled travelers: "the Airline Defendants are motivated by a class-based, invidiously discriminatory animus resulting in an unfounded, ridiculous fear that healthy, uninfected disabled travelers who can't wear a face mask are somehow a grave danger . . .").

30. *Id.*

31. *See id.*

32. S.B. 22, 134th Gen. Assemb., Reg. Sess. (Ohio 2021).

33. *Id.*; NETWORK PUB. HEALTH L., *supra* note 27, at 12.

34. Anna Staver, *Ohio Lawmakers Override Gov. Mike DeWine's Veto of Health Order Bill*, COLUMBUS DISPATCH (Mar. 24, 2021, 5:36 AM), https://www.dispatch.com/story/news/2021/03/24/ohio-senate-set-override-health-order-bill-veto-governor-mike-dewine/6964465002/ [https://perma.cc/46EY-RGK9].

discriminatory action against a religious organization wholly or partially on the basis that the organization is religious [and] operates or seeks to operate during an emergency or disaster,"[35] which makes it difficult for the government to limit physical attendance at religious services during pandemics, for example.

Additional laws passed in Florida, Indiana, and West Virginia shifted authority from local jurisdictions to the state, allowing the state to mandate what local governments and their public health agencies could and could not do to respond to conditions that may be specific to their communities.[36] As a result, these laws impacted the use of protective public health measures, the length of local emergency orders, and the ability to hire and remove public health officials from public health agencies to legislative bodies.[37] Specifically in Florida, Republican Governor Ron DeSantis, an attorney as well, resisted COVID-19 mitigation efforts and enacted executive orders banning local governments from passing their own COVID-19 protections.[38] Florida's response to COVID-19 was characterized by an initial effort to contain the spread of the virus in March 2020 followed by swift rejection of any effort deemed unfriendly to businesses by the end of April 2020, when the statewide stay-at-home order expired.[39] By September 2020, DeSantis had issued an order that overturned county and municipal measures to control COVID-19.[40] By November 2020, DeSantis championed and signed into law legislation that fined businesses for requiring vaccinations.[41] Consequently, Florida experienced an estimated 19,241 excess deaths from March to September 2020, meaning the mortality burden of COVID-19 was significantly higher in the state during this period than what was officially reported.[42] The COVID-19 pandemic is not the first time religious liberty has come into conflict with public health laws nor is it the first time that governmental health authorities have been questioned. Still, for lawyers and judges who choose to push infectious disease or pandemic-related reform that could have negative long-term effects on public health and the government's ability to respond to future emergencies, should they be morally reprimanded?

B. RACISM IN THE WAKE OF CONTAGION

Pandemics and epidemics "highlight moments of competing interests and can be opportunities for co-opting public health actions for other goals."[43] The federal government under the Trump administration largely left coordination and planning of COVID-19 testing to states. As a result, the United States was left to deal

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35. H.B. 230, 2021 Leg., 67th Sess. (Mont. 2021).
36. NETWORK PUB. HEALTH L., *supra* note 27, at 10.
37. *Id.* at 10–11.
38. Kline, *supra* note 11, at 369.
39. *Id.*
40. *Id.*
41. *Id.*
42. Moosa Tatar et al., *Analysis of Excess Deaths During the COVID-19 Pandemic in the State of Florida*, 111 AM. J. PUB. HEALTH 704, 705–6 (2021).
43. Kline, *supra* note 11, at 368.

with a pandemic made worse by an administration that for years characterized science and fact-checking as "fake news."[44] It was during this same administration that protests declaring "Bar Lives Matter" in states like Texas, where COVID-19 case counts were high, juxtaposed protests to confront the intersecting forms of violence that threaten Black lives.[45] Generally, many Americans do not perceive themselves to be at risk when racialized minorities are dying because U.S. communities are highly segregated by race, which may lead them to endorse racial apathy as a result.[46] In particular, mask usage among white Americans depended on who was dying from COVID-19 in the surrounding community, meaning white individuals wore masks less frequently when Black and Hispanic death rates were higher relative to white death rates.[47] These sentiments created an avenue for systemic racism to become heavily embedded in the government's COVID-19 pandemic response, often limiting racial and ethnic minorities' equal access to key resources such as employment benefits and protections, COVID-19 testing, medical treatments, and vaccines.[48]

Accordingly, the COVID-19 pandemic provided an opportunity for lawyers, judges, and legislators to advance a politics of social division while simultaneously using the pandemic as a politically expedient backdrop to conceal power and harm health.[49] New forms of governmentality were created that hinged on policy as a technique of behavioral control.[50] While pandemics and epidemics do not discriminate in terms of who gets infected and the threats posed by mass contagion are often publicized, "the structures and processes that render people more susceptible to infection and death are always highly racialized, classed, and gendered."[51] Due to lengthy histories of medical institutions both causing and denying ailments,[52] marginalized groups have inherited higher risks of illness and

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44. Chris Cillizza, *Here's Donald Trump's Most Lasting, Damaging Legacy*, CNN NEWS (Aug. 30, 2021, 7:06 PM), https://www.cnn.com/2021/08/30/politics/trump-legacy-fake-news/index.html [https://perma.cc/GQ4N-RPWH].

45. *See* Boyd, *supra* note 9; *see also* Zack Budryk, *Texas Bar Owner Organizes 'Bar Lives Matter' Concert in Protest of Governor's Orders*, THE HILL (June 30, 2020, 1:00 PM), https://thehill.com/homenews/state-watch/505227-texas-bar-owner-bans-masks-organizes-bar-lives-matter-concert-in-protest/ [https://perma.cc/D8BW-QXPF]; Daniel Villarreal, *'Bar Lives Matter' Protesters Descend on Texas Capitol to Oppose Closures*, NEWSWEEK (June, 30, 2020, 5:39 PM), https://www.newsweek.com/bar-lives-matter-protesters-descend-texas-capitol-oppose-closures-1514538 [https://perma.cc/4UE4-DGER] (illustrating how bar owners in Texas appropriated language from Black Lives Matter protests in response to Republican Governor Greg Abbott's June 26 order to close all drinking establishments).

46. Berkeley Franz et al., *Do Black Lives Matter in the American Public's Mitigation Responses to the COVID-19 Pandemic? An Analysis of Mask Wearing and Racial/Ethnic Disparities in Deaths from COVID-19*, 9 J. RACIAL & ETHNIC HEALTH DISPARITIES 1577, 1581 (2021).

47. Franz et al., *supra* note 43, at 1578.

48. Yearby & Mohapatra, *supra* note 25, at 1423.

49. Kline, *supra* note 11, at 367.

50. Lynette J. Chua & Jack Jin Gary Lee, *Governing through Contagion*, *in* COVID-19 IN ASIA: LAW AND POLICY CONTEXTS 115 (Victor V. Ramraj ed., 2021).

51. Flores Sanchez & Kai, *supra* note 22, at 379.

52. *See generally* HARRIET A. WASHINGTON, MEDICAL APARTHEID: THE DARK HISTORY OF MEDICAL EXPERIMENTATION ON BLACK AMERICANS FROM COLONIAL TIMES TO THE PRESENT 7 (1st ed. 2006).

death. Compared to whites, racial and ethnic minorities were disproportionately affected by COVID-19, experiencing an increased risk for infection, hospitalization, and death.[53] These disparities were not coincidental, as they are a product of racial subordination that has long underwritten healthcare access and quality in the United States.[54] There are clear links between racial susceptibility to pandemics, which include the fact that low-income, Black and Latinx families often must continue to work during the outbreak of highly infectious and deadly diseases.[55] Thus, this Note applies a "racial lens" to public health litigation, scrutinizing the actors behind legal challenges that disproportionately restrict access to vital public health services for people of color.

II. STRATEGIC PUBLIC HEALTH LITIGATION

Regardless of their political inclinations, lawyers may bring cases to advance governments' accountability, viewing litigation as often necessary to prompt change when legislation and regulation move slowly to address an issue. The harm an individual suffered may be quite real, but redressing harm is usually not the lawyer's only or main goal.[56] Typically, the impetus is to get into court and use plaintiffs to push policy agendas or commercial interests.[57] In other words, lawyers can participate in strategic litigation, which has been defined as "litigation with an intended impact beyond a particular case to influence broader change at the level of law, policy, practice, or social discourse."[58] Successful litigation, in the narrow sense of winning in court, is no guarantee of success in the material sense of improving a litigant's liberty, health, or exercise of their rights.[59] Successful litigation may not even be conducive to success in the social sense, improving the health status or rights of the general population.[60] HIV litigation cases have demonstrated the importance of considering and planning for such direct and indirect impacts.[61] These impacts are notoriously difficult to assess, as possible confounding social factors make it very difficult to establish credible links.[62] This raises a separate ethical concern about lawyering to advance a cause

53. Sebastian D. Romano et al., *Trends in Racial and Ethnic Disparities in COVID-19 Hospitalizations, by Region—United States, March–December 2020*, 70 MORBIDITY MORTALITY WEEKLY. REP. 560, 560–61 (Apr. 12, 2021).

54. Andrew J. Twinamatsiko et al., *How Recent Litigation Undermines Efforts to Advance Health Equity in the U.S.*, O'NEILL INST. FOR NAT'L & GLOB. HEALTH L. (May 16, 2023), https://oneill.law.georgetown.edu/how-recent-litigation-undermines-efforts-to-advance-health-equity-in-the-u-s/ [https://perma.cc/G2P5-SAR7].

55. Flores Sanchez & Kai, *supra* note 22, at 379.

56. Rosenblum, *supra* note 3, at 145.

57. *Id.*; Siri Gloppen, *Litigation as a Strategy to Hold Governments Accountable for Implementing the Right to Health*, 10 HEALTH HUM. RTS. 21, 27 (2008).

58. Ezer & Patel, *supra* note 2, at 150.

59. Gloppen, *supra* note 54, at 25.

60. *Id.*

61. Ezer & Patel, *supra* note 2, at 151.

62. Gloppen, *supra* note 54, at 31.

that this paper will not address, which includes whether such cases should be allowed into court at all.[63]

To abate the spread of the novel coronavirus, various U.S. government officials used their legal powers to implement community mitigation measures designed to slow disease spread such as restricting mass gatherings, halting evictions, limiting travel, and much more.[64] Concurrently, public health legal powers came increasingly under pressure from the courts, as individuals and organizations successfully challenged many of these community mitigation measures. Courts adopted narrow interpretations of the powers that Congress gave agencies in the statutes undergirding most of these mitigation measures, including the CDC's eviction moratorium, rules for cruise ships, and mask requirements for public transit.[65] In particular, courts were unwilling to consider these public health orders as similar to the enumerated measures that the federal government was explicitly allowed to take under relevant statutes, reading broad grants of statutory authority as implicitly narrowed.[66] For example, some courts interpreted the PHSA of 1944 as restricting the CDC to enact measures that correspond only with the description of "inspection, fumigation, disinfection, sanitation, pest extermination, [and] destruction of [infectious] animals or articles,"[67] declining to give any discretion to CDC to enact other measures to prevent disease spread despite the statute specifically mentioning this. In reading statutes narrowly, courts have also relied on the major questions doctrine, taking the view that it applied to even mask-wearing on public transit.[68] In holding that mask-wearing on public transit constitutes decisions of "vast social and political significance," the courts hamstrung agencies' ability to act, especially when Congress did not anticipate the exact situation confronting them.[69] These decisions easily exposed the legal vulnerability of U.S. disease control despite the perceived empowerment of local governments to make their own orders.[70]

Manipulating law to forward illiberal aims is not surprising, as there is a consistent relationship between the prevalence of infectious diseases and people's authoritarian attitudes and psychological preference for conformity.[71] Strategic

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63. Rosenblum, *supra* note 3, at 145.

64. Mello et al., *supra* note 26, at 759.

65. *Id.* at 763.

66. Mello et al., *supra* note 26, at 763.

67. *Id.* (citing Ass'n of Realtors v. HHS, 141 S. Ct. 2320, 2487 (2021)) (recognizing that since Congress enacted the PHSA in 1944, it has "generally been limited to quarantining infected individuals and prohibiting the import or sale of animals known to transmit disease.").

68. Mello et al., *supra* note 26, at 763 (citing Health Freedom Defense Fund, Inc. v. Biden, 599 F. Supp. 3d 1144 (M.D. Fla. 2022)).

69. *Id.* at 765.

70. *See id.* at 759; Michael R. Ford, *How Weaponizing Federalism Prevented a Cohesive Coronavirus Response*, PA TIMES (Aug. 14, 2020), https://patimes.org/how-weaponizing-federalism-prevented-a-cohesive-coronavirus-response/[https://perma.cc/QBQ9-KVRV].

71. *See* Leor Zmigrod et al., *The Psychological and Socio-Political Consequences of Infectious Diseases: Authoritarianism, Governance, and Nonzoonotic (Human-to-Human) Infection Transmission*, 9 J. SOC. & POL. PSYCH. 456, 457 (2021).

litigation during the pandemic was explicitly used to harness the law's potential to construct reality and historical truth, a reality now marred by misinformation, vaccine hesitancy, and exclusion.[72] Laws passed in 2021 and 2022 in places such as Florida, Idaho, Kansas, Kentucky, Montana, and New Hampshire elevated specific individual rights over that of the common good, including the right to free exercise of religion, to attend worship services in person, and to peaceful assembly.[73] This is a departure from long-standing legal norms recognizing that to protect public safety and health, the government may need to take actions that limit individual rights during emergencies.[74] Of course, as a public health emergency persists and information about a pathogen continues to evolve, it is reasonable to require that health orders that burden people's liberty have a clear, sound evidentiary basis.[75] Furthermore, emergency measures during a pandemic must be legitimately based in law, align with medical knowledge, and actually counter the spread of infectious agents.[76] Still, more understanding is needed to assess how existing U.S. government structures contribute to the nation's inability to mount a coordinated response to a global health crisis.[77] Part of this will be coming to terms with how federalism is understood and pushing back against efforts to weaponize the First Amendment to deregulate the American state.[78]

A. STANDING

Against the background of rising ethnonationalism and authoritarianism in America, the spread of the COVID-19 virus provided a perfect pretext to adopt repressive legal measures for purposes unrelated to the pandemic. Just as challenges to "equity policies . . . often repackage and weaponize the language and strategies historically used by civil rights advocates to attack the laws that [these] advocates worked hard to establish,"[79] lawyers and judges alike have used the doctrine of standing to roll back public health policies in the courts. Standing law is all about who can obtain access to the courts. It is not surprising that judges provide access to those who seek to further the political and ideological agendas of judges.[80] In other words, to further their own political preferences, judges may

72. Ezer & Patel, *supra* note 2, at 149.

73. *See* NETWORK PUB. HEALTH L., *supra* note 27, at 16.

74. *Id.* at 14.

75. Mello et al., *supra* note 26, at 766.

76. Anna Garus-Pakowska & Maciej Pakowski, *The Obligation to Use Face Masks in Public Spaces as a Public Health Measure and Permissible Limits on Civil Liberties*, 44 J. PUB. HEALTH POL'Y 110, 110 (2023).

77. Ford, *supra* note 67.

78. *Id.*

79. Emily Schneider, S*tanding Requirements in Health Equity Litigation*, O'NEILL INST. FOR NAT'L & GLOB. HEALTH L. (Sept. 6, 2024), https://oneill.law.georgetown.edu/standing-requirements-in-health-equity-litigation/ [https://perma.cc/4GBH-EKXP].

80. Richard J. Pierce Jr., *Is Standing Law or Politics*, 77 N.C. L. REV. 1741, 1742–43 (1999); *see, e.g.*, 303 Creative v. Elenis, 143 S. Ct. 2298 (2023) (enjoining Colorado from enforcing its anti-discrimination law because it would violate the plaintiff's First Amendment rights by compelling her to create expressive designs celebrating same-sex marriage despite her injury being hypothetical and her asserted plans to design wedding

manipulate standing doctrine and rely on the selective citation of precedents.[81] For example, standing has been used to limit environmentalists from bringing enforcement actions, which has significantly reduced their ability to influence decision-making by federal agencies.[82] Standing law is further complicated by associational standing. Associational standing, the doctrine allowing an organization to sue a challenged activity based solely on an injury suffered by one or more of its members even in the absence of any legally cognizable harm to itself,[83] could be to blame for courts hearing pandemic mandate cases in the first place. A core premise of the U.S. legal system is that the plaintiff in a case should be either the real party in interest—the person who suffered the harm that gave rise to the lawsuit—or a representative standing in the shoes of that real party in interest.[84] Thus, to sue in federal court, a plaintiff must establish both constitutional standing under Article III[85] and prudential standing.[86] Article III standing requires a plaintiff to demonstrate that they have suffered a concrete, particularized injury in fact.[87] A general complaint or harm that may happen does not count as an injury in fact.

As a prudential matter, the Supreme Court has further held that a plaintiff may usually sue only for violations of their own rights.[88] Traditional third-party standing principles sometimes allow a plaintiff to sue for a concrete, particularized injury it has suffered through a violation of someone else's rights.[89] Such third-party standing is particularly appropriate where the plaintiff has a relationship with that third party and the plaintiff is better positioned than the third party to pursue litigation.[90] For example, third-party standing doctrine allows a private school to challenge a law requiring parents to send their children to public school by asserting "the liberty of parents and guardians to direct the upbringing and education of children under their control."[91] If a person does not have standing to bring a case, the court cannot rule on the underlying merits of the case and must

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websites in the future); *see also* Biden v. Nebraska, 143 S. Ct. 2355 (2023) (highlighting how the majority, led by Chief Justice Roberts, disregarded established standing principles to invalidate the Department of Education's plan to forgive $430 billion in student-loan debt at the end of the COVID-19 pandemic).

81. Pierce Jr., *supra* note 80, at 1786.

82. *Id.* at 1749 nn. 46–47.

83. *See* Hunt v. Wash. State Apple Advert. Comm'n, 432 U.S. 333, 342 (1977); Warth v. Seldin, 422 U.S. 490, 511 (1975).

84. Michael T. Morley & F. Andrew Hessick, *Against Associational Standing*, 91 U. CHI. L. REV. 1539, 1540 (2023).

85. *See* U.S. CONST. art. III, § 2, cl. 1 (limiting federal jurisdiction to "cases" and "controversies").

86. Warth v. Seldin, 422 U.S. 490, 498 (1975) (delineating that standing "involves both constitutional limitations on federal-court jurisdiction and prudential limitations on its exercise.").

87. *See* Spokeo, Inc. v. Robins, 578 U.S. 330, 339 (2016); Lujan v. Defs. of Wildlife, 504 U.S. 555, 560 (1992).

88. *See* Barrows v. Jackson, 346 U.S. 249, 255 (1953) ("Ordinarily, one may not claim standing in this Court to vindicate the constitutional rights of some third party.").

89. Powers v. Ohio, 499 U.S. 400, 410–11 (1991) (citing Singleton v. Wulff, 428 U.S. 106, 112–16 (1976)).

90. *Id.*

91. Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925).

dismiss it.[92] Even when the court may throw out a case on standing, the threat of litigation or an expensive legal battle or negative publicity can chill efforts focused on equity.[93]

The casuistic nature of litigation is concerning, namely that litigation may undermine rational priority setting in health policy, and weaken collective public health.[94] Over the course of the pandemic and in decisions relating to community mitigation measures, courts often disrupted the traditional scope of public health powers.[95] Despite the courts' traditional deference to public health orders, the COVID-19 pandemic contained a high "number of interventions by the U.S. Supreme Court using its 'shadow docket'—a track in which the Court issues decisions without oral argument or extensive briefing."[96] The willingness to overturn health orders by these justices bolsters the attractiveness of litigation as a strategy to object to public health policies.[97] Determining causation depends on how far back in a chain of events one is willing to go, making it a discretionary, policy-laden judgment by judges who "personif[y themselves] in giving content to the doctrine of standing."[98] In spite of the Supreme Court portraying standing as a threshold issue of jurisdiction, it often applies the doctrine loosely or strictly in light of substantive legal views.[99]

Nonetheless, rulings in some pandemic-related cases provided insight into how standing requirements may limit the use of litigation as a strategy to prevent health equity.[100] During the COVID-19 pandemic, America First Legal challenged New York's guidance on the distribution of antiviral treatments to at-risk non-white and Latinx individuals in *Jacobson v. Bassett*.[101] Under the guidance, race and ethnicity were considered risk factors based on evidence that systemic inequities "increased risk of severe illness and death from COVID-19" among communities of color.[102] The plaintiffs argued that the use of race or ethnicity in determining treatment prioritization was discriminatory. The courts rejected these claims on standing grounds, reasoning that the causal chain of events needed for the plaintiffs to suffer harm was too attenuated.[103] Accordingly, the court declined

92. Schneider, *supra* note 76.

93. *See id.*

94. Gloppen, *supra* note 54, at 24.

95. Mello et al., *supra* note 26, at 766.

96. *Id.*

97. *Id.*

98. Robert J. Pushaw, Jr., *The Court Continues to Confuse Standing: The Pitfalls of Faux Article III "Originalism"*, 31 GEO. MASON L. REV. 893, 907 (2024) (citing JOSEPH VINING, LEGAL IDENTITY: THE COMING OF AGE PUBLIC LAW (YALE UNIV. PRESS 1978)).

99. *Id.* at 894 (citing Warth v. Seldin, 422 U.S. 490, 526 (1975) (Brennan, J., dissenting) (charging the majority with contorting standing doctrine to disguise their hostility to plaintiffs' civil rights claims that "because of the exclusionary practices of a zoning ordinance, they cannot live in Penfield and have suffered harm.").

100. Schneider, *supra* note 76.

101. No. 3:22-CV-00033 (MAD/ML), 2022 U.S. Dist. LEXIS 65989 (N.D.N.Y. Mar. 25, 2022).

102. Schneider, *supra* note 76 (citing No. 3:22-CV-00033 (MAD/ML), at 4).

103. *Id.*

to hear the case.[104] This is important considering that opposition to public health interventions, like masking, are increasingly becoming material manifestations of America's racism.[105]

III. ETHICS OF LITIGATING AGAINST PUBLIC HEALTH MEASURES

To practice as an American attorney in good standing, compliance with a range of ethical rules of professional conduct established by the American Bar Association is required. Discipline under these rules can be imposed by a state bar association or courts of that jurisdiction following the review of complaints and a preliminary investigation.[106] American law and American legal ethics take "as the prototypical legal situation a lawyer representing a concrete client with tangible interests in a discrete legal dispute."[107] The foundation of that relationship is the "master norm of zealous representation."[108] According to the ethics rules, lawyers should use their "special knowledge and skill" to advance their client's interest and objectives.[109] But the client should maintain "ultimate authority to determine the purposes to be served by legal representation,"[110] along with specific authority over particular actions.[111] The Model Rules of Professional Conduct treat all litigators the same, providing lawyers with inadequate guidance and encouraging lawyers with more political will or power in the interests involved in a case to game the system.[112] Polarized political rhetoric operated under the guise of legal language during the pandemic. The actions it inspired present a significant barrier to the success of evidence-based public health measures that implicate individual rights more than law or ethics.[113]

A. ISSUES WITH SCOPE OF REPRESENTATION

Reconciling contemporary understandings of constitutional rights propagated by lawyers and judges against the exigencies of public health is something worth exploring on ethical grounds. According to the Model Rules of Professional

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104. Schneider, *supra* note 76 (citing No. 3:22-CV-00033 (MAD/ML), at 12–13).

105. Boyd, *supra* note 9.

106. MODEL RULES OF PRO. CONDUCT R. 8.5(a) (AM. BAR ASS'N 2025) [hereinafter MODEL RULES]; MODEL RULES OF LAW. DISCIPLINARY ENF'T R. 9 cmt.

107. Rosenblum, *supra* note 3, at 142.

108. Robert W. Gordon, *The Ethical Worlds of Large-Firm Litigators: Preliminary Observations*, 67 FORDHAM L. REV. 709, 727 (1998).

109. MODEL RULES r. 1.2 cmt. 2.

110. MODEL RULES r. 1.2 cmt. 1.

111. MODEL RULES r. 1.2.

112. Rosenblum, *supra* note 3, 187 n.375 (2021).

113. Abigail Lynch, *Individual Rights and the Public's Health: Constitutional, Ethical, and Political Aspects of COVID-19 Measures and Their Enforcement*, NETWORK PUB. HEALTH L. (Feb. 24, 2021), https://www.networkforphl.org/news-insights/individual-rights-and-the-publics-health-constitutional-ethical-and-political-aspects-of-covid-19-measures-and-their-enforcement/ [https://perma.cc/AYY7-Y55Q].

Conduct,[114] in representing a client, a lawyer does not endorse the client's political, economic, social, or moral views or activities.[115] Furthermore, "a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law," while making sure to not counsel a client "to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent."[116] What does this mean then for lawyers who willingly represent clients who aim to counteract public health mandates during a time when a highly infectious disease affecting everyone, including other lawyers, is rampant? If the issues that lawyers take up are fundamentally political and the remedies they seek are hazardous to health and public safety, it is not obvious why they should be allowed into court in the first place. The appropriate remedy would seem to rest in the electoral process rather than the courts, if adopting the view that "litigation as a means of systemic reform is seen as an illegitimate foray into the political system."[117] If not, it seems like a misuse of legal power, which necessitates conflict resolution, not policymaking.[118]As a result, it can be argued that a "lawyer . . . who takes advantage of a loophole to bring a case that should not ordinarily be brought, [such as those that challenge the government's authority to require occupational vaccine requirements or mask mandates on planes]—acts unethically."[119] Throughout the COVID-19 pandemic, disproportionately Republican judges, similar to their attorney counterparts, turned a hostile, skeptical eye to public health measures, making rulings that both were out-of-sync and unaligned with historical precedent approaches.[120]

B. DECEIT OF PLAINTIFFS AND ABUSE OF JUDICIAL OFFICE TO PUSH IDEOLOGICAL CLAIMS

Litigation seeking to bar access to preventative healthcare for the general public that will primarily be useful for safeguarding Black and Latinx communities during a highly infectious pandemic should qualify as an ethical violation. Under Model Rule 8.4 of Professional Conduct,[121] "[i]t is professional misconduct for a

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114. *Model Rules of Professional Conduct - Table of Contents*, AM. BAR ASS'N (2025), https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents/ [https://perma.cc/M56T-UTQP].

115. MODEL RULES r. 1.2(b).

116. MODEL RULES r. 1.2(d).

117. Catherine Albiston, *Democracy, Civil Society, and Public Interest Law*, WISC. L. REV. 187, 190-91 (2018).

118. *Rosenblum, supra* note 3, at 147.

119. *Id.* at 146.

120. *See* John Fabian Witt, *Republican Judges Are Quietly Upending Public Health Laws*, N.Y. TIMES (Oct. 15, 2020), https://www.nytimes.com/2020/10/15/opinion/coronavirus-health-courts.html [https://perma.cc/4HVN-WP8N].

121. MODEL RULES r. 8.4(g); r. 8.4 cmt. 1 (stating "[l]lawyers are subject to discipline when they violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so or do so through the acts of another . . . Offenses involving violence, dishonesty, breach of trust, or serious interference

lawyer to . . . engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, . . . ethnicity, . . . or socioeconomic status in conduct related to the practice of law." Since its adoption by the ABA in 2016, lawyers have argued for and against state adoption of Rule 8.4(g), in part based on competing understandings of the "core values" at stake.[122] Specifically, lawyers disagree on how to fulfill one's duties to clients, courts, third parties, and the community and how to organize core values in tension with one another.[123] This split among American lawyers has made this Rule ineffective, with one side arguing that it is an infringement on lawyers' First Amendment rights, while the Rule's comments and advocates encourage a definition that prohibits speech that "manifests bias or prejudice" or is "derogatory or demeaning" on the aforementioned bases for lawyers.[124]

Concerning the judicial branch, judges acting under authoritarian values that attack American democracy and harm public health should be considered unethical under Canon 1, Rules 1.2 and 1.3 of the Model Code of Judicial Conduct.[125] Being an ethical judge means acting in "a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and avoid [ing] impropriety and the appearance of [it]."[126] Because "[a] judge shall not abuse the prestige of judicial office to advance the personal or economic interests of the judge or others, or allow others to do so,"[127] judges acting to further political agendas, do favors for legislators, and otherwise have a stake in policy litigation in furtherance of harm to Black and Latinx communities should be considered in violation. For example, U.S. District Judge Kathryn Kimball Mizelle, the judge who struck down Biden's transportation mask mandate in Florida, was found by a substantial majority of the ABA Standing Committee to not even be qualified. The ABA cited her lack of meaningful trial experience in the practice of law as making her unable to "meet the requisite minimum standard of experience necessary to perform the responsibilities required by the high office

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with the administration of justice are in that category."). The comments further state that "[a] pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation." *See* MODEL RULES r. 8.4 cmt. 2.

122. Michael Ariens, *Model Rule 8.4(g) and the Profession's Core Values Problem,* 11 ST. MARY'S J. ON LEGAL MALPRACTICE & ETHICS 180 (2021).

123. *Id.*

124. Margaret Tarkington, *Reckless Abandon: The Shadow of Model Rule 8.4(g) and a Path Forward*, 95 ST. JOHN'S L. REV. 121, 121 (2022).

125. MODEL CODE OF JUD. CONDUCT Canon 1, r. 1.2 & 1.3 (AM. BAR ASS'N 2020) [hereinafter MODEL CODE].

126. MODEL CODE Canon 1, r. 1.2 cmt. 5 (stating "[the] test for appearance of impropriety is whether the conduct would create in reasonable minds a perception that the judge violated this Code or engaged in other conduct that reflects adversely on the judge's honesty, impartiality, temperament, or fitness to serve as a judge.").

127. MODEL CODE Canon 1, r. 1.3 cmt. 1 (stating "[i]t is improper for a judge to use or attempt to use his or her position to gain personal advantage or deferential treatment of any kind").

of a federal trial judge."[128] Additional training may not have made Judge Mizelle change her decision, but perhaps a stronger vetting process coupled with term limits for judges could prevent such anti-health rulings from existing or having long-standing influences.

IV. POSSIBLE REMEDIES FOR EXPOSURE OR INDIRECT HARM

In addition to dealing with the lasting effects of the COVID-19 pandemic and the remnants of agency authority, America must address a pre-existing condition: its ideological infection. Today's partisanship has taken on a negative light, as both parties are more motivated by their opposition to the other than by advocacy for the general welfare of Americans. This leaves us with an important question of public policy as to whether lawyers and judges who actively choose to dismantle governmental efforts to vaccinate or protect the public under ideological principles should be held liable for that decision. Outbreaks and infectious diseases are not new phenomena in the United States. Nor are the complex and misguided public health policy responses to them. Therefore, the U.S. government should make it clear that it has a compelling state interest in preventing the spread of unknown infectious diseases through official health policy, either through the implementation of a statute, "perhaps commemorating the victims of COVID-19, or through executive action."[129]

While it is important to protect people's ability to practice religion freely and assert individual liberties against government actions, these claims should not burden an entire class of people's ability to maintain basic health and well-being. A question then arises: is there any legal recourse for those who have been harmed by the inability, as perpetuated by lawyers and judges, of the government to defeat infectious diseases through vaccines, social distancing, and surveillance? The Supreme Court departed from past practice to stymie efforts to mitigate the COVID-19 pandemic, demonstrating how pre-pandemic court decisions helped to shatter social contracts, weaken democracy, and perpetuate the inequalities that made the United States especially vulnerable when COVID-19 struck.[130] Yes, individuals should be free to make their own decisions; however, they should not be exempt from the consequences of their actions. The potential was raised to classify those who threatened or attempted to spread COVID-19 as

128. Email from Randall D. Noel, Chair, Standing Comm. on the Fed. Judiciary, to Lindsey Graham, Chairman, S. Comm. on the Judiciary, and Dianne Feinstein, Ranking Member, S. Comm. on the Judiciary (Sept. 8, 2020), https://www.americanbar.org/content/dam/aba/administrative/government_affairs_office/2020-09-08chair-rating-letter-to-graham-and-feinstein-re-nomination-of-kathryn-kimball-mizelle.pdf?logActivity=true [https://perma.cc/L64Q-X4BK] (discussing the evaluation of Kathryn Kimball Mizelle's professional qualifications as nominee to United States District Court for the Middle District of Florida).

129. Ezra Clark, *The Intersection of Civil Rights, Religious Liberty, and Infectious Disease*, 36 GEO. J. LEGAL ETHICS 619, 632 (2023).

130. WENDY E. PARMET, CONSTITUTIONAL CONTAGION, THE COURTS, COVID, AND PUBLIC HEALTH 1 (Cambridge Univ. Press 2023).

having engaged in federal terrorism offenses because of their use of a biological agent.[131] Therefore, could a conscious and intentional decision guided by anti-establishment rhetoric to not impose mask mandates, stay-at-home orders, and vaccine requirements during a pandemic be considered a crime?

Hindering efforts at herd immunity and ensuring an appropriate response to future outbreak control could be seen as indirectly causing harm, especially since disparities in morbidity and mortality in the context of COVID-19 have brought to the forefront a much older and more enduring public health crisis: racial discrimination.[132] Thus, it is judicially relevant that a particular group or cause has been kept out of the ordinary means of making policy.[133] Many of the cases pushed during the pandemic to undermine governmental authority over public health were brought on behalf of a dominant racial group that had a history of exercising its power at the expense of others and rarely lacked the ability to make itself heard through traditional, non-judicial democratic channels. Particularly, the Supreme Court has increasingly put conservative Christians' First Amendment rights ahead of others' dignity and rights to equal protection.[134] This contrasts with the belief that "[o]nly where a group is marginalized, and so unable to effectively pursue its interest through ordinary politics, should—and would—it be able to prosecute ideological litigation instead."[135] This race- and power-conscious approach to pandemic litigation would have pushed courts to analyze whether the causes championed and groups represented were so excluded from the democratic process that they needed to work through the judiciary to pursue their aims.[136] This approach would have also analyzed whether judges were unethical for allowing policy litigation to move forward despite the presence of a highly infectious disease.

Although there may be a legal basis for bringing a negligence claim for eliminating policies that promote vaccination—like whether a plaintiff can show that a particular judge's decision to, say, eliminate vaccine work requirements caused the transmission of the disease—such a claim would be treading in uncharted legal waters. Looking to environmental litigation for guidance, it has been noted that marginalized communities overburdened by toxic waste facilities find it difficult to obtain a judicial remedy for racial discrimination through either

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131. Ian Freckelton, *COVID-19: Fear, Quackery, False Representations and the Law*, 72 INT'L J.L. & PSYCHIATRY 1, 7 (2020); Megan Christie & Cho Park, *Americans Report $12 Million in COVID-19-Related Fraud Losses: Officials*, ABC NEWS (Apr. 10, 2021, 5:20 PM), https://abcnews.go.com/US/americans-report-12-million-covid-19-related-fraud/story?id=70096611 [https://perma.cc/B8TX-S5ZG] (stating that some coronavirus phishing emails threatened to infect a recipient with COVID-19 if an action was not taken).

132. Franz et al., *supra* note 43, at 1582.

133. Rosenblum, *supra* note 3, at 186 ("Where its grievances are legitimate, and no other outlet is available for it but unrest, the Court should note this fact and make sure that the country's tribunals are open.").

134. *See generally* 303 Creative LLC v. Elenis, 600 U.S. 570 (2023). On issues where conservative Christian First Amendment claims directly threaten the equal citizenship of sexual minorities, for example, the Court left no question about which side it was on.

135. *Id.*

136. *Id.* at 189.

section 1983 of the Civil Rights Act of 1866 or the Equal Protection Clause of the Fourteenth Amendment.[137] Thus, it would be equally difficult to find a remedy for marginalized communities overburdened by the effects of long-COVID and the existing political structures that lawyers and judges helped formulate. It is also equally difficult to link litigation to the spread of disease or prove that a lawyer or judge harbored a discriminatory purpose when acting to limit public health orders, given who was most at risk of acquiring and dying from COVID-19. Of course, judges are immune from lawsuits while acting in their judicial capacity. Still, where flagrant disparities exist between a burden imposed on minority communities relative to white communities, a constitutional remedy may be successful considering that discriminatory purpose may be proved through circumstantial evidence.[138]

In the public health context, courts have held individuals liable for the harm caused by negligently spread diseases.[139] Application of the law of negligence to contagion has been an enduring one, with many cases commenting on the issue.[140] These contagion cases indicate that contagion is cognizable under the tort of negligence. However, common law standards mitigate a defendant's tort liability exposure in the COVID-19 context. Because COVID-19 is highly contagious and imperceptible, a plaintiff who contracted COVID-19 may have difficulty determining the source of their infection and proving that they got sick because of a defendant's actions or omissions.[141] Notice may be complicated too, as liability for spreading disease is only imposed when the infected person has constructive or actual notice of their contagious condition.[142] This is specific to sexually transmitted diseases. Another remedy can be trying to recover damages from a lawyer, legal organization, or judge resulting from COVID-19 if they are in fact traceable to a specific state reform. But again, this does not seem feasible.

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137. Rachel D. Godil, *Remedying Environmental Racism*, 90 MICH. L. REV. 393, 408 (1991).

138. *Id.* at 409 (finding that "[i]n lawsuits over the disparate provision of services [and the sightings of hazardous waste], the courts have found that local governments violated the equal protection rights of their [B]lack citizens by failing to offer them the same municipal services provided to white residents.").

139. *See* Billo v. Allegheny Steel Co. 195 A. 110, 114 (Pa. 1937) (claiming "to be stricken with disease through another's negligence is in legal contemplation as it often is in the seriousness of consequences, no different from being struck with an automobile through another's negligence.").

140. *See* Berner v. Caldwell 543 So.2d 686, 688 (Ala. 1989) (highlighting that "For over a century, liability has been imposed on individuals who have transmitted communicable diseases that have harmed others."); *see also* Crowell v. Crowell 180 N.C. 516, 519 (1920) (holding "it is a well-settled proposition of law that a person is liable if he negligently exposes another to a contagious or infectious disease"); *see* generally 39 Am. Juris. 2d. Health § 99 (stating that a person who negligently exposes another to a nuisance that endangers public health or an infectious disease, which such other thereby contracts, is liable in damages); *see* also John B. v. Superior Ct. 38 Cal.4th 1177, 1188 (2006).

141. KEVIN M. LEWIS ET AL., CONG. RSCH. SERV., R46540, COVID-19 LIABILITY: TORT, WORKPLACE SAFETY, AND SECURITIES LAW 1, 11 (2020).

142. *See e.g.* Endres v. Endres, 2008 VT 124, ¶ 15 [185 Vt. 63, 69, 968 A.2d 336, 341] (noting that "using a constructive knowledge requirement holds responsible those who consciously avoid knowledge of infection even when suffering visible symptoms of a disease.").

CONCLUSION

In the politically charged wave of litigation attacking affirmative action, abortion, and the like, this Note aimed to expose how lawyers and judges advanced the spread of COVID-19 by choosing to represent issues and ideologies that make it difficult for leaders to protect the country from infectious diseases crossing both red and blue state lines. Those who push to strip away public health powers and duties to protect the community frame this effort as a defense of individual liberties, without acknowledging that dismantling governmental public health laws often favors the liberties of certain individuals over those of others. Recent scholarship has highlighted that as a society, we routinely make moral judgments about people based on their actions. People protesting during the HIV/AIDS crisis believed the government was not doing enough, whereas people protesting during the COVID-19 pandemic believed the government was too active.[143] As a result, all lawyers should at least recognize the health effects of laws in their specialties.

Although lawyers and judges are free to exercise their judgment as to whether to represent a particular client or cause,[144] others are also entitled to judge and criticize, on moral grounds, their decision to do so. If such representation or judgment limits the government from protecting the public's health, then there should be consequences. Being able to turn aside ostensibly difficult moral dilemmas with the notion that one's role is to only represent an interest fairly without explicitly endorsing it comes across as disingenuous given the highly politicized space that public health law has become in the U.S. Public health is not a standard component of legal education, but perhaps it should be to bridge the gap that exists between some lawyers, judges, and the public health issues underpinning the cases they represent or hear. Incorporating public health into legal education would ensure lawyers are more competent when dealing with infectious disease litigation and the social determinants of health, more broadly, that underpin legal decisions. Just as academic institutions need to take from the pandemic a commitment to fact-based speech and "truth-seeking," unnecessary suffering is something the legal profession should work hard to reduce. When would-be authoritarians in the legal profession attack minority rights and other core tenets of the American constitutional order, it "cannot and must not sit idly by on the sidelines as witnesses to the erosion of the public's confidence in the fundamental institutions of democracy and freedom."[145] Of course, this can be difficult in a profession ridden with weak diversity, poor well-being, and non-neutral actors.

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143. Clark, *supra* note 126, at 623.

144. *See* MODEL RULES r. 2.1.

145. Alex Goldstein, *The Attorney's Dty to Democracy: Legal Ethics, Attorney Discipline, and the 2020 Election*, 35 GEO. J. LEGAL ETHICS 737, 744 (2022) (citing Michael Miller, *Lawyers Have a Special Obligation to Our Democracy*, LAW.COM (Aug. 27, 2018), https://www.law.com/newyorklawjournal/2018/08/27/lawyers-have-a-special-obligation-to-our-democracy/) [https://perma.cc/A7TU-X2KX].