

COVID-19 and Racial Justice in America

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I INTRODUCTION

In the United States, the impact of COVID-19 is influenced and exacerbated by an embedded social issue: structural racism and its attendant systemic inequities.¹ In this chapter, we address how structural racism – broadly construed as the deeply rooted discriminatory policies and systems that produce the chronic systemic inequities faced by Black, Indigenous, and People of Color (BIPOC) people in American society – have influenced, with notable detriment,² COVID-19’s impact in the United States. We argue that the pandemic’s legal and policy legacy will be one of greater realized health equity and racial justice. The United States is at a pivotal political point. The confluence of an ever-looming pandemic intertwined with racial equity protests and a newly elected president provide the political impetus for monumental legal and social change. Notably, because of the pervasive nature of systemic inequities and structural racism, legal and social changes flowing from this pivot point will influence both health and non-health law realms. Probable changes to American law and policy are likely to be immense – historic in both scope and impact. We broadly examine these possibilities, providing an ultimate assessment of the probable far-reaching legal and policy legacy of COVID-19: naming and challenging the foundation of structural racism in the United States.

II RACISM IN THE EPIDEMIOLOGY OF COVID-19

Understanding the epidemiology of COVID-19 requires one to name racism as a fundamental cause of health inequity, and to acknowledge that racism and white

* The views expressed are those of the authors and do not necessarily represent American Medical Association policy.

¹ William M. Wiecek, *Structural Racism and the Law in America Today: An Introduction*, 100 *Ky. L.J.* 1, 5 (2011).

² See Ruqaiyah Yearby & Seema Mohapatra, *Law, Structural Racism, and the COVID-19 Pandemic*, 7 *J. L. Biosciences*. 1 (2020).

supremacy have shaped data systems across the country. This has operated in several ways, including failing to collect critically important data, either through colorblind ideology or through the systemic failure to fund critical public health infrastructure, and manifests in the research questions that are asked and the models that are created to explain population health patterns.

On an empirical level, the inequitable epidemiologic burden of COVID-19 has been well established. The earliest studies, emerging in April 2020, warned of a disproportionate cost for marginalized and minoritized groups.³ Health equity researchers warned that COVID-19 would amplify existing inequities as it spread throughout the country. As the United States crossed the threshold of 600,000 total deaths from COVID-19, it continued to see the significant inequities that were revealed in the early weeks of the pandemic. The latest data (as of July 2021) show that age-adjusted mortality rates for Latinx and Black people are more than double that of White people (2.3 times and 2.0 times, respectively).⁴ Indigenous people have experienced age-adjusted mortality rates 2.2 times higher than for White people; Pacific Islanders have a rate that is 2.7 times higher.⁵ This translates into an unprecedented level of excess deaths across the country.⁶ If the COVID-19 mortality rate experienced in the White population applied universally to BIPOC communities, more than 21,000 Black, 10,000 Latinx, and 1,000 Indigenous people would still be alive today – estimates that continue to rise every month.⁷ This burden is clear in epidemiologic models, and it is clear in empirical data; the latest analysis of national vital statistics data reveal that US life expectancy dropped by a full year in the first half of 2020, from 78.8 years in 2019 to 77.8 years in the first half of 2020.⁸ This life expectancy decline was largest among non-Hispanic Black males, whose life expectancy dropped by three years in just one year. Hispanic males also saw a large decrease in life expectancy, with a decline of 2.4 years. Non-Hispanic Black females saw a life expectancy decline of 2.3 years, and Hispanic females faced a decline of 1.1 years.⁹

³ Javis T. Chen & Nancy Krieger, Revealing the Unequal Burden of COVID-19 by Income, Race/Ethnicity, and Household Crowding: US County Versus ZIP Codes Analyses, 27 *J. Pub. Health Mgmt. Prac.* S43, S43, (2021); Samrachana Adhikari et al., Assessment of Community-Level Disparities in Coronavirus Disease 2019 (COVID-19) Infections and Deaths in Large US Metropolitan Areas, 3 *JAMA Network Open* e2016938 (2020).

⁴ Risk for COVID-19 Infection, Hospitalization, and Death by Race/Ethnicity, Ctrs. for Disease Control & Prevention, (July 16, 2021), www.cdc.gov/coronavirus/2019-ncov/covid-data/investigations-discovery/hospitalization-death-by-race-ethnicity.html.

⁵ APM Rsch. Lab Staff, The Color of the Coronavirus: COVID-19 Deaths by Race and Ethnicity in the US, APM Rsch. Lab (Feb. 23, 2021), www.apmresearchlab.org/covid/deaths-by-race.

⁶ Steven H. Woolf, Derek A. Chapman & Roy T. Sabo, Excess Deaths from COVID-19 and Other Causes, March–July 2020, 324 *JAMA* 1562, 1562 (2020); Lauren M. Rossen et al., Excess Deaths Associated with COVID-19, by Age and Race and Ethnicity – United States, January 26–October 3, 2020, 69 *Morbidity & Mortality Weekly Rep.* 1522, 1522 (2020).

⁷ APM Rsch. Lab Staff, *supra* note 5.

⁸ Elizabeth Arias, Betzaida Tejada-Vera & Farida Ahmad, Provisional Life Expectancy Estimates for January through June, 2020, at 1 (2021), www.cdc.gov/nchs/data/vsrr/VSRR10-508.pdf.

⁹ *Id.* at 2.

This hit – driven primarily, but not exclusively, by COVID-19 mortality – adds to an already inequitable picture with excess deaths associated with all-cause mortality.¹⁰

The disparate impact is also evident regarding problems ancillary to the pandemic, such as the economic recession, which has inflicted a greater toll on BIPOC communities as well. Job and wage losses due to COVID-19 have hit marginalized and minoritized communities hardest; more than half of Hispanic (58 percent) and Black (53 percent) households in the US Census Bureau’s Household Pulse Survey reported a decline in employment income since mid-March 2020.¹¹ Black workers have experienced the highest rates of unemployment and the weakest recoveries since the March–April 2020 unemployment peak.¹²

Early in the pandemic, it became evident that the country’s public health infrastructure would strain to meet the demand for timely, granular, and actionable data. In particular, it was clear in the first weeks of the pandemic that despite promises to do so, race/ethnicity data were not being collected in systematic and comprehensive ways. These data are critical for understanding injustice and ensuring the optimal health of all communities – but it was gravely missing from COVID-19 test data throughout the country.¹³ These data are also missing from many vaccination records, again hampering efforts to challenge racial injustice and center equity. Despite continued problems with missing race/ethnicity data, the inequitable burden of COVID-19 is well established.¹⁴

Some have interpreted racial/ethnic inequities in COVID-19 incidence and mortality through behavioral explanations, arguing that patterns are explained by preexisting conditions, including higher levels of obesity, asthma, and heart disease. Yet such logic fails to acknowledge root causes, what epidemiologists call “the causes of the causes.”¹⁵ On this point, Data 4 Black Lives is clear: “[W]hy are Black people particularly vulnerable and over-represented among COVID-19 cases and deaths? The conditions that make Black communities vulnerable to the virus are the same conditions that make Black communities vulnerable to the daily harms of structural racism.”¹⁶

¹⁰ Maureen R. Benjamins et al., Comparison of All-Cause Mortality Rates and Inequities Between Black and White Populations Across the 30 Most Populous US Cities, 4 *JAMA Network Open* e2032086 (2021).

¹¹ Sharon Cornelissen & Alexander Hermann, A Triple Pandemic? The Economic Impacts of COVID-19 Disproportionately Affect Black and Hispanic Households, Joint Ctr. for Hous. Stud. Harv. Univ. (July 7, 2020), www.jchs.harvard.edu/blog/a-triple-pandemic-the-economic-impacts-of-covid-19-disproportionately-affect-black-and-hispanic-households.

¹² Jhacova Williams, Laid Off More, Hired Less: Black Workers in the COVID-19 Recession, RAND Blog (Sept. 29, 2020), www.rand.org/blog/2020/09/laid-off-more-hired-less-black-workers-in-the-covid.html.

¹³ Aletha Maybank, The Pandemic’s Missing Data: We Desperately Need to Release the Statistics on Race and Ethnicity, NY Times (Apr. 7, 2020), www.nytimes.com/2020/04/07/opinion/coronavirus-blacks.html.

¹⁴ Tim F. Liao & Fernando De Maio, Association of Social and Economic Inequality with Coronavirus Disease 2019 Incidence and Mortality Across US Counties, 4 *JAMA Network Open* e2034578 (2021).

¹⁵ Michael Marmot, *The Health Gap: The Challenge of an Unequal World* 52 (2d ed. 2015).

¹⁶ D4BL (Data for Black Lives), The Impact of COVID-19 on Black Communities, D4BL (Data for Black Lives) (Feb. 22, 2021), <https://d4bl.org/covid19-data.html>.

And as Rachel Hardeman points out, “[O]ur traditional notions of white supremacy keep us focused on hate groups and vulgar language rather than a culture and ideology born from the premise of Black inferiority and false notions of race as biological that have permeated the ways in which we conduct our research.”¹⁷

One of the lessons from the COVID-19 pandemic has been the need to reexamine the political underpinnings of public health data systems, particularly the ways that racism and white supremacy have inhibited our collective actions. There are new national efforts in this area, with a Robert Wood Johnson Foundation-funded Commission to Transform Public Health Data Systems noting that it “is the time to fundamentally reprioritize our public health data and related health data systems so they work better to ensure equitable outcomes for all.”¹⁸

III POLITICAL PIVOT POINT

A political and social-cultural pivot point has been several years in the making, starting with the Black Lives Matter (BLM) movement,¹⁹ and arguably reaching a crescendo in 2020 with the murder of George Floyd, concurrent with the inequitable hardships inflicted by the COVID-19 pandemic. Some data have indicated that the BLM movement reached new heights in 2020, possibly becoming the largest mass movement in American history.²⁰ Douglas McAdam, a scholar of social movements, noted that BLM is “setting in motion a period of significant, sustained and widespread social, political change” and that such an achievement by a mass movement is allowing society to experience “a social change tipping point” that is both “rare” and “potentially consequential.”²¹

Indeed, public health experts have also noted a “sea change” in America’s growing “recognition of racism as a durable feature of US society and of its high cost in Black lives.”²² Moreover, it is important to recognize that the confluence of the BLM protests of 2020 and the COVID-19 pandemic is not accidental; there is a

¹⁷ Rachel R. Hardeman & J’Mag Karbeah, Examining Racism in Health Services Research: A Disciplinary Self-Critique, 55 *Health Serv. Resch.* 777, 777 (2020).

¹⁸ Alonzo Plough & Gail C. Christopher, New Commission to Tackle How National Health Data Are Collected, Shared, and Used, *Health Affs. Blog* (May 18, 2021), www.healthaffairs.org/doi/10.1377/forefront.20210518.409206/full/.

¹⁹ The BLM movement began in 2013 after the acquittal of George Zimmerman in the Trayvon Martin case and gained further national recognition in 2014 after the police killing of Eric Garner. See Howard University Law Library, Black Lives Matter Movement, *Howard Univ. Sch. L.* (2018), <https://library.law.howard.edu/civilrightshistory/BLM/>; see also Kay Lim, Alicia Garza on the Origin of Black Lives Matter, *CBS News* (Oct. 18, 2020), www.cbsnews.com/news/alicia-garza-on-the-origin-of-black-lives-matter/.

²⁰ Larry Buchanan, Quoc Trung Bui & Jugal K. Patel, Black Lives Matter May Be the Largest Movement in US History, *NY Times* (July 3, 2020), www.nytimes.com/interactive/2020/07/03/us/george-floyd-protests-crowd-size.html.

²¹ *Id.*

²² Zinzi D. Bailey, Justin M. Feldman & Mary T. Bassett, How Structural Racism Works – Racist Policies as a Root Cause of U.S. Racial Health Inequities, 384 *New Eng. J. Med.* 768, 768 (2020).

linkage between the two. If not for the COVID-19 pandemic, the strong momentum, size, and influence of the BLM protests in 2020 following Floyd's death would likely not have materialized to the same extent.²³ Hence, viewed broadly, any outcomes toward equity made by the BLM protests of 2020 could also be viewed as part of the broader legacy of the pandemic.

Also significant is the coupling of the BLM political movement – and its power – with the election of President Biden,²⁴ and the seismic change transitioning from the Trump Administration to one that is, on the surface, not as hostile to racial and health equity.²⁵ For example, President Biden has signaled a willingness to protect the Affordable Care Act (ACA),²⁶ and to implement some reforms called for by BLM activists.²⁷ Additionally, the Democrats gained control of the Senate,²⁸ giving the party complete control of both houses of Congress, along with control of the Presidency, at the beginning of 2021. While there is debate about how much progress the Democrats can accomplish toward racial and health equity, the Democrats' goals are more closely aligned with racial and health equity goals, and they provide the BLM movement with actualized political power at the federal level. However, it is important to note that much of the law that impacts health equity also exists at the state and local levels. And while there have been gains made at such levels,²⁹ local gains vary across the country, as some states are not embracing legal changes advancing health equity. Indeed, there has been significant political pushback. A year after the 2020 election, the scope of gained political power has reached greater uncertainty. Many progressive goals have gone unfulfilled,³⁰ and the

²³ See Maneesh Arora, *How the Coronavirus Pandemic Helped the Floyd Protests Become the Biggest in U.S. History*, Wash. Post (Aug. 5, 2020), www.washingtonpost.com/politics/2020/08/05/how-coronavirus-pandemic-helped-floyd-protests-become-biggest-us-history/; see also Alan Greenblatt, *A Crisis Within a Crisis: How COVID Fueled the Protests*, *Governing: The Future of States and Localities* (June 5, 2020), www.governing.com/now/a-crisis-within-a-crisis-how-pandemic-fueled-the-protests.html.

²⁴ Mark Sherman, *Electoral College Makes It Official: Biden Won, Trump Lost*, AP (Dec. 14, 2020), <https://apnews.com/article/joe-biden-270-electoral-college-vote-d429ef97af2bf574d16463384dc7cc1e>.

²⁵ Tim Craig & Robert Klemko, *Black Lives Matter Movement at a Crossroads as Biden Prepares to Take Office*, Wash. Post (Dec. 1, 2020), www.washingtonpost.com/national/black-lives-matter-movement-at-a-crossroads-as-biden-prepares-to-take-office/2020/12/01/8ebb95ce-2f26-11eb-860d-f7999599cbe2_story.html.

²⁶ Biden Defends Obamacare as Top Court Hears Case, BBC News (Nov. 10, 2020), www.bbc.com/news/world-us-canada-54896663.

²⁷ Candice Norwood & Daniel Bush, *What a Biden Administration Could Mean for Criminal Justice Reform*, PBS News Hour (Dec. 14, 2020), www.pbs.org/newshour/politics/what-a-biden-administration-could-mean-for-criminal-justice-reform.

²⁸ Patricia Zengerle & Susan Cornwell, *Democrats Take Narrow Control of the U.S. Senate*, Reuters (Jan. 20, 2021), www.reuters.com/article/us-usa-congress/democrats-take-narrow-control-of-u-s-senate-idUSKBN29P2SD.

²⁹ See, for example, Emanuella Evans & Rita Ocegüera, *Illinois Criminal Justice Reform Ends Cash Bail, Changes Felony Murder Rule*, Injustice Watch (Feb. 23, 2021), www.injusticewatch.org/news/2021/illinois-criminal-justice-reform-cash-bail-felony-murder/.

³⁰ Olive Knox, *Biden Enters 2022 With Many Progressive Goals Unmet*, Wash. Post (Dec. 17, 2021), www.washingtonpost.com/politics/2021/12/17/biden-enters-2022-with-many-progressive-goals-unmet/.

Republican Party is likely to retake the House in 2022,³¹ making the legacy of the political pivot of 2020 somewhat murkier and more nuanced than might have been initially surmised at the height of 2020's political momentum. Still, the political gains and momentum observed in 2020 further solidify the pivot point in which America currently finds itself – a pivot created by an increasingly influential political and social movement coupled with political power gained in Washington, DC.

IV LEGAL AND POLICY IMPACT

Considering the political moment in which the United States currently finds itself – combined with the historic public health crisis – it is both logical and important to question what the legal and policy impact of this pivotal instance in American history will be. While, in a traditional sense, COVID-19's societal impact is most likely to be acutely observed within the lens of health care and medicine (as the crisis is, at its core, a public health and medical problem), the impact of COVID-19 in American society will likely be quite broad, especially with regards to the pandemic's impact on health equity and structural racism. Structural racism – regardless of whether it is directly or tangentially related to health or medicine – has an impact on health, and hence is also key to moving the needle on health equity. For example, police brutality affects health.³² When evaluating the pandemic's legal impact (especially in the context of health equity and structural racism), it is important to use a broad lens to take account of the multi-faceted way in which health and law interact beyond narrow notions of “health law.” This holistic vantage point helps reveal what COVID-19 dramatically exposed – that inequities are structural, engrained, systemic, and inescapable, continually reinforcing flawed systems in all domains of daily life.

A Law and Health

The relationship between law and health is complex. One might imagine that the nexus of law and health that produces “health law” would be confined to the directly related jurisprudence, for instance, medical malpractice torts, health insurance contracts, medical privacy, patient autonomy, and informed consent. Abbe R. Gluck notes that these traditional modes of health law are typically “private law,” which is focused “on regulating relationships among private parties”

³¹ Ally Mutnick, Republican Wave Builds to Take Back the House, Politico (Nov. 8, 2021), www.politico.com/news/2021/11/08/republican-wave-house-congress-520238.

³² See Jacob Bor et al, Police Killings and Their Spillover Effects on the Mental Health of Black Americans: A Population-Based, Quasi-Experimental Study, 392 *Lancet* 302 (2018); see also, Press Release, Amer. Med. Ass'n, AMA Policy Recognizes Police Brutality as a Product of Structural Racism (Nov. 17, 2020), www.ama-assn.org/press-center/press-releases/ama-policy-recognizes-police-brutality-product-structural-racism.

and has been historically sourced from “states, local governments, and the medical profession itself.”³³ However, in our modern society, there is a need to look beyond these traditional relationships between private parties. Gluck notes that health law should encompass a focus on “public law” – in other words, on “a field that is defined by the role of the government” – particularly pointing out the ACA and its outsized role influencing health beyond the traditional “private law” domain.³⁴

Additionally, it is important to consider areas of law that may be – on their face – tangential and not directly related to health. However, these “tangential” areas are more than ones merely touching on health care concerns; they are instead truly core areas of law related to the social and structural determinants of health, and have documented impacts on health disparities affecting BIPOC people, including the disparities observed with COVID-19.³⁵ Social determinants include discrimination, poverty, legal and political systems, housing, and health care.³⁶ Hence, areas of jurisprudence, such as immigration,³⁷ employment law,³⁸ criminal law, education, tax law,³⁹ and housing/zoning,⁴⁰ are relevant to health equity. As previously addressed, criminal justice is a good example, given that the linkage between health and police brutality is now documented.⁴¹ “Mass incarceration” is also a structural determinant of health that has “disproportionality harmed low-income

³³ Abbe R. Gluck, Why Health Lawyers Must Be Public-Law Lawyers: Health Law in the Age of the Modern Regulatory State, 18 *J. Health Care L. & Pol’y* 323, 324 (2015).

³⁴ Id.

³⁵ Emily A. Benfer et al., Health Justice Strategies to Combat the Pandemic: Eliminating Discrimination, Poverty, and Health Disparities During and After COVID-19, 19 *Yale J. Health Pol’y, L. Ethics* 122, 126 (2020).

³⁶ Id. at 135. The authors note the wide array of social determinants of health, both structural and intermediary.

³⁷ See Wendy E. Parmet, The Worst of Health: Law and Policy at the Intersection of Health & Immigration, 16 *Ind. Health L. Rev.* 211 (2019); see also Wendy E. Parmet, Immigration Law as a Social Determinant of Health, 92 *Temp. L. Rev.* 931 (2020).

³⁸ See Ruqaiijah Yearby, The Impact of Structural Racism in Employment and Wages on Minority Women’s Health, 43 *Hum. Rts.* 75 (2018); see also Ruqaiijah Yearby & Seema Mohapatra, Structural Discrimination in COVID-19 Workplace Protections, Health Affs. Blog (May 29, 2020), www.healthaffairs.org/doi/10.1377/forefront.20200522.280105/full/.

³⁹ See Victoria J. Haneman, Contemplating Homeownership Tax Subsidies and Structural Racism, 54 *Wake Forest L. Rev.* 363 (2019).

⁴⁰ See Juliana Maantay, Zoning Law, Health, and Environmental Justice: What’s the Connection?, 30 *J. L. Med. Ethics* 572 (2002); see also Abraham Gutman, Katie Moran-McCabe & Scott Burris, Health, Housing, and the Law, 11 *Ne. Univ. L. Rev.* 251 (2019); David Oshinsky, A Powerful, Disturbing History of Residential Segregation in America, NY Times (June 20, 2017) (reviewing Richard Rothstein, *The Color of Law: A Forgotten History of How Our Government Segregated America* (2017)), www.nytimes.com/2017/06/20/books/review/richard-rothstein-color-of-law-forgotten-history.html.

⁴¹ See Bor et al., supra note 32; see also Abigail A. Sewell & Kevin A. Jefferson, Collateral Damage: The Health Effects of Invasive Police Encounters in New York City, 93 *J. Urb. Health* S42 (2016); Alyasah Ali Sewell et al., Illness Spillovers of Lethal Police Violence: The Significance of Gendered Marginalization, 44 *Ethnic Racial Stud.* 1089 (2020).

and racial and ethnic minorities.”⁴² Nearly every aspect of daily life plays a role in constructing one’s health. These aspects of daily life – in other words, the conditions where people live, learn, work, and play – are part of the social determinants of health.⁴³ The law also touches on every aspect of daily life and thus also touches on the social determinants of health. In this way, nearly every area of law could be deemed “health law” and have some influence on societal health equity.

B Legal Legacy

COVID-19’s imperfect legal legacy on health justice is unfolding before us. A legacy that bends the United States toward greater health equity is possible and can be rooted in several areas of policy and law, such as state and local law, and federal administrative law. In this section, we broadly examine four possible examples of legal legacy: (1) expanded health care access; (2) criminal justice reform; (3) the correction of historical red-lining; and (4) the reformation of administrative enforcement of Title VI of the Civil Rights Act.

First, expanded health care access is a key component of combating health inequities and tackling the pandemic,⁴⁴ and expansion is likely to be one of COVID-19’s legal legacies.

Expansion will most likely be demonstrated through protecting and expanding the ACA and Medicaid coverage. In 2021, President Biden issued an executive order reopening enrollment to ACA health plans, explicitly noting that doing so would “protect and build on the Affordable Care Act, meet the health care needs created by the pandemic, reduce health care needs created by the pandemic, reduce health care costs, protect access to reproductive health care, and make our health care system easier to navigate and more equitable.”⁴⁵ President Biden is also signaling an end to the Trump Administration’s “health policy goal” of approving state Medicaid waivers to allow work requirements for Medicaid enrollees.⁴⁶ Work requirements are state mandates that require Medicaid recipients to work a set number of hours per month

⁴² Benfer et. al., *supra* note 35, at 133–34.

⁴³ Social Determinants of Health: Know What Affects Health, Ctrs. for Disease Control & Prevention (Sept. 30, 2021), www.cdc.gov/socialdeterminants/index.htm.

⁴⁴ See Marsha Lillie-Blanton & Catherine Hoffman, The Role of Health Insurance Coverage in Reducing Racial/Ethnic Disparities in Health Care, 24 *Health Affs.* 398, 407 (2005); see also Rene Bowser, The Affordable Care Act and Beyond: Opportunities for Advancing Health Equity and Social Justice, 10 *Hastings Race Poverty L.J.* 69, 79 (2013); Jesse Cross-Call & Matt Broaddus, States That Have Expanded Medicaid Are Better Positioned to Address COVID-19 and Recession (2020), www.cbpp.org/research/health/states-that-have-expanded-medicaid-are-better-positioned-to-address-covid-19-and-recession.

⁴⁵ White House Press Office, Fact Sheet: President Biden to Sign Executive Orders Strengthening Americans’ Access to Quality, Affordable Health Care (Jan. 28, 2021), www.whitehouse.gov/briefing-room/statements-releases/2021/01/28/fact-sheet-president-biden-to-sign-executive-orders-strengthening-americans-access-to-quality-affordable-health-care/.

⁴⁶ Sara Kliff & Margot Sanger-Kate, Biden Administration Moves to End Work Requirements in Medicaid, *NY Times* (Feb. 12, 2021), www.nytimes.com/2021/02/12/upshot/biden-medicaid-reversing-trump.html.

in order to receive Medicaid benefits.⁴⁷ Data have shown that work requirements are harmful and lead to coverage loss.⁴⁸ Rolling back work requirements removes a barrier to accessing care. However, a possible pitfall in the expansion of health care is the continuing deadlock in Congress. For example, the Democrat's "Build Back Better" bill contains measures that would help address the expansion of health care, such as closing the Medicaid coverage gap,⁴⁹ and reducing high drug prices,⁵⁰ among other ambitious priorities. But with the bill stalled and the increasing possibility of the Democrats losing control of Congress in the midterms, the chances of such legislative initiatives succeeding in reducing health inequities are limited.

A second legal legacy is criminal justice reform. Flowing from the political pivot earlier discussed, issues of criminal justice reform have taken on recent impetus. Additionally, criminal justice is a key factor in racial inequity in the United States, and reform is important to reduce health inequities. A recent example of reform comes from Illinois, where the state passed a sweeping reform of criminal law.⁵¹ The law notably makes Illinois the first state to eliminate cash bail and narrows the definition of felony murder, something criminal justice reform advocates have been calling for nationwide for years. Such reforms are critical from a health equity standpoint. Like police brutality, criminal justice and incarceration have notable and recognized links to health and health equity in American society.⁵²

A third possible legacy is addressing housing equity. In 2015, the Obama Administration instituted an administrative rule enforcing the Affirmatively Further Fair Housing (AFFH) provision of the Fair Housing Act. The Obama rule conditioned "receipt of HUD [US Department of Housing and Urban Development] funds by local recipients on their [local governmental authorities] looking searchingly at unequal access by community members to housing located in neighborhoods of opportunity."⁵³ AFFH serves as a federal governmental incentive to influence local government zoning law, where "HUD beneficiaries are required to initiate discussion about how to move toward fair housing for all and then to take action."⁵⁴ The Obama-era proposal

⁴⁷ Jennifer Wagner & Jessica Schubel, States' Experiences Confirm Harmful Effect of Medicaid Work Requirements 1 (2020), www.jstor.org/stable/pdf/resrep27502.pdf.

⁴⁸ Id.

⁴⁹ Judith Solomon, Build Back Better Legislation Would Close the Medicaid Coverage Gap 1 (2021), www.cbpp.org/research/health/build-back-better-legislation-would-close-the-medicaid-coverage-gap.

⁵⁰ Ricardo Alonso-Zaldivar & Lisa Mascaro, Democrats Push to Retool Health Care Programs for Millions, AP (Sept. 19, 2021), <https://apnews.com/article/congress-health-care-69c7bb592f8d73232becid8e15be82e3>.

⁵¹ Ill. Public Act No. 101-0652 (2021); see also Maria Cramer, Illinois Becomes First State to Eliminate Cash Bail, NY Times (Feb. 23, 2021), www.nytimes.com/2021/02/23/us/illinois-cash-bail-pritzker.html; Evans & Ocegüera, *supra* note 29.

⁵² George Hobor & Alonzo Plough, Addressing Mass Incarceration to Achieve Health Equity, 110 *Am. J. Pub. Health* S13 (2020).

⁵³ Palma Joy Strand, The Invisible Hands of Structural Racism in Housing: Our Hands, Our Responsibility, 96 *U. Det. Mercy L. Rev.* 155, 157 (2019).

⁵⁴ Id. at 158.

was lauded as finally allowing administrative enforcement of the AFFH. However, the Trump Administration terminated the rule, citing it as “unworkable” and a “waste of time.”⁵⁵ As was widely expected, the Biden Administration reinstated the Obama-era rule, effective July 31, 2021.⁵⁶ A return to the Obama-era rule is an important push toward health equity, with HUD Secretary Marcia Fudge noting that the return reflects the fact that “HUD is taking a critical step to affirm that a child’s future should never be limited by the ZIP code where they are born.”⁵⁷ Another key aspect of housing in the realm of health equity is that of the COVID-19 eviction moratorium. In 2020, the Centers for Disease Control and Prevention took the unprecedented step of halting evictions to stop the spread of COVID-19.⁵⁸ The moratorium was a positive step toward health equity, while also underscoring broader housing concerns.⁵⁹ However, the Supreme Court struck down the moratorium in August 2021.⁶⁰ The order doing so was 6-3, along ideological lines, a reminder of another barrier toward effectuating health equity. Considering the substantial change in the federal judiciary over the last few years via the Trump Administration’s conservative judicial appointments, ones which lack any meaningful reflection of the nation’s diversity,⁶¹ it is important to recognize that this unrepresentative judiciary could imperil equitable progress.

A final example is reformation of administrative enforcement to Title VI of the Civil Rights Act to better effectuate health equity. With the increased recognition and understanding of structural racism and how it is a root cause of health inequities,⁶² it makes sense that structural pillars such as federal governmental agencies are part of the structural problem producing inequities that continue into the COVID-19 era. However, reformation of a structural pillar such as administrative enforcement is also a key opportunity to reduce inequities. In the context of health care, “Title VI prohibits health care facilities in receipt of government funding from using racial bias to determine who receives quality health care.”⁶³

⁵⁵ Press Release, US Dep’t Hous. & Urb. Dev., Secretary Carson Terminates 2015 AFFH Rule: Removal of Rule Returns Power to Localities in Effort to Advance Fair Housing Nationwide (July 23, 2020), <https://archives.hud.gov/news/2020/pr20-109.cfm>.

⁵⁶ 24 C.F.R. 5.151-52, 91.325.

⁵⁷ Press Release, US Dep’t Hous. & Urb. Dev., HUD Restores Affirmatively Furthering Fair Housing Requirement (June 10, 2021), www.hud.gov/press/press_releases_media_advisories/HUD_No_21_098.

⁵⁸ Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19, 85 Fed. Reg. 55292, (Sept. 4, 2020).

⁵⁹ Emily Benfer et al., Opinion: The Eviction Moratorium Limbo Laid Bare the System’s Extreme Dysfunction, Wash. Post (Aug. 12, 2021), www.washingtonpost.com/opinions/2021/08/12/eviction-moratorium-court-cdc-congress/.

⁶⁰ Krishnadev Calamur & Chris Arnold, The Supreme Court Will Allow Evictions to Resume. It Could Affect Millions of Tenants, NPR (Aug. 26, 2021), www.npr.org/2021/08/26/1024668578/court-blocks-biden-cdc-evictions-moratorium.

⁶¹ Stacy Hawkins, Trump’s Dangerous Judicial Legacy, 67 *UCLA L. Rev. Discourse* 20, 20 (2019).

⁶² Zinzi D. Bailey, Justin M. Feldman & Mary T. Bassett, How Structural Racism Works – Racist Policies as a Root Cause of US Racial Health Inequities, 384 *New Eng. J. Med.* 768 (2021).

⁶³ Ruqaiyah Yearby, When Is a Change Going to Come?: Separate and Unequal Treatment in Healthcare Fifty Years after Title VI of the Civil Rights Act, 67 *SMU L. Rev.* 287, 288 (2014).

The promise of Title VI to eliminate health inequities has not been fulfilled. A key reason is that the “Supreme Court ruled that private parties do not have a right to sue for disparate impact bias under Title VI,”⁶⁴ leaving enforcement to the Department of Health and Human Services, whose track record has been “woefully inadequate” in enforcing Title VI to stop segregation and inequities in federally funded health care facilities.⁶⁵ Hence, there is an opening for the Biden Administration to prioritize effective Title VI enforcement. With the right leadership and guidance, administrative enforcement can potentially be more effective than private enforcement in the courts, as federal agencies have the “institutional advantages” of “resources” and “expertise” that courts may not have.⁶⁶

V CONCLUSION

The legacy of the pandemic in the context of structural racism is unfolding; its path, while uncertain, contains promise to better effectuate health equity in the United States. How far the pandemic will move the country toward health equity is difficult to predict with precision; however, the unique moment presents the possibility of significant, if not monumental, progress. We believe that the legacy of COVID-19 in the context of American structural racism will be one that yields greater health equity; however, this outcome is not certain because while there are clear forces that can help propel America to greater health equity, opposing forces remain and will mitigate gains. While we offer our analysis as a predictive legacy informed by what has unraveled thus far, we also hope that it inspires and informs key stakeholders of the critical policy and legal areas on which to focus energy in the wake of the “twin crises” of the pandemic and structural racism.⁶⁷ Indeed, it is no guarantee that the arc of history will “bend” toward justice; it must be actively steered and pulled toward an equitable destination.⁶⁸ The future is in our hands.

⁶⁴ *Id.* at 313; see also *Alexander v. Sandoval*, 532 US 275 (2001).

⁶⁵ Yearby, *supra* note 63, at 312.

⁶⁶ Olatunde C.A. Johnson, *Lawyering That Has No Name: Title VI and the Meaning of Private Enforcement*, 66 *Stan. L. Rev.* 1293, 1328 (2014).

⁶⁷ Sheryl Gay Stolberg, ‘Pandemic within a Pandemic’: Coronavirus and Policy Brutality Roil Black Communities, *NY Times* (June 7, 2020), www.nytimes.com/2020/06/07/us/politics/blacks-coronavirus-police-brutality.html.

⁶⁸ Mychal Denzel Smith, *The Truth About ‘The Arc of the Moral Universe,’* *Huffington Post* (Jan. 18, 2018), www.huffpost.com/entry/opinion-smith-obama-king_n_5a5903e0e4b04f3c55a252a4.