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Scrambling the New Sanitationist Synthesis: Civil Liberties and Public Health in the Age of COVID-19

John Fabian Witt[†]

I. INTRODUCTION

For much of the nineteenth and twentieth centuries, the model of public health law was what Professor Wendy Parmet has called the “tragic view” of the law of public health.¹ On this account, public health and civil liberties inevitably conflict. Legislators and judges need to make hard choices balancing one against the other. Sacrifices of important values are inevitable.

The leading case of *Jacobson v. Massachusetts*,² decided in 1905, serves as the paradigmatic expression of the tragic view. In *Jacobson*, the Supreme Court upheld by a vote of seven-to-two a Massachusetts mandatory vaccination program for smallpox.³ Individual rights gave way to collective imperatives under the heading of the police power. *Salus populi suprema lex*, as the old Ciceronian dictum had it. The health of the people was supreme.⁴

At the end of the twentieth century, public health law made a new turn. In a novel departure, a generation of lawyers and public health advocates began to argue that public health and civil liberties were not in conflict but aligned. Beginning in the 1980s, and inspired by the imperatives of the fight against HIV/AIDS, the new model asserted that

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¹ Wendy Parmet, *Health Law: Power, Duty, Restraint*, by Lawrence O. Gostin, 24 J. PUB. HEALTH POL'Y 460, 465 (2003) (book review); see also Lawrence O. Gostin et al., *Law and the Public's Health: A Study of Infectious Disease Law in the United States*, 99 COLUM. L. REV. 59, 77–79 (1999).

² 197 U.S. 11 (1905).

³ *Id.* at 36.

⁴ WILLIAM J. NOVAK, *THE PEOPLE'S WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA* 9 (1996).

nurturing the trust and eliciting the cooperation of vulnerable populations was crucial to the protection of public health and far more effective than harsh mandates and quarantines.⁵ Progressive public health leaders asserted that a synthesis of civil liberties and public health would not only protect rights, but that it was also crucial to the successful management of epidemics.⁶ Protecting people's rights would enable the protection of public health; restricting those rights would only drive the sick and the vulnerable underground and make epidemic management more difficult. Public health and individual rights, it seemed, might run together because protecting rights would prompt widespread confidence in and cooperation with public health measures.

In my recent book, *American Contagions: The Law of Epidemics from Smallpox to COVID-19*, I call the synthesis of rights and public health “the New Sanitationism.”⁷ New Sanitarians aimed to vanquish the tragic relationship between these two historically opposing values. In doing so, they extended the arguments of an earlier generation of Sanitarians from the nineteenth century, when social programs like tenement reform and urban sanitation aimed simultaneously to combat infectious disease and uplift vulnerable populations.⁸ The New Sanitarians carried their predecessors' arguments in a new direction by advancing claims about individual rights and molding them onto public health imperatives. Looking back on his work in the 1980s and 1990s, for example, leading public health law authority Lawrence O. Gostin recalled that though “[t]he focus on civil liberties of persons living with HIV/AIDS” might have seemed “counterintuitive,” there had been “sound reasons for avoiding coercion whenever possible.”⁹

In this Article, I argue that the pandemic of 2020–21 is scrambling the New Sanitationist synthesis that I identified in my book. Indeed, COVID-19 is doing so in multiple ways, raising the real prospect that we stand on the verge of a new paradigm—or at least the destruction of an existing one—in the relationship between civil liberties and public health. The contours of the paradigm are not yet entirely clear. But it promises to depart substantially from both its *Jacobson*-era forerunner and its New Sanitarian predecessor.

⁵ LAWRENCE O. GOSTIN, *THE AIDS PANDEMIC: COMPLACENCY, INJUSTICE, AND UNFULFILLED EXPECTATIONS* (2004).

⁶ Lawrence O. Gostin, *A Tribute to Jonathan Mann: Health and Human Rights in the AIDS Pandemic*, 26 J.L., MED. & ETHICS 256 (1998).

⁷ JOHN FABIAN WITT, *AMERICAN CONTAGIONS: EPIDEMICS AND THE LAW FROM SMALLPOX TO COVID-19* (2020).

⁸ *Id.* at 19–21, 29–30.

⁹ *Id.* at 92.

In Part II, I outline three ways in which the rights-health synthesis of the late twentieth century is being remixed. First, I trace the emergence of powerful new technologies of surveillance and population management that have allowed states like South Korea to adopt new and remarkably effective mechanisms for controlling people's bodies, with or without their willing cooperation. COVID-19 has not exactly created the brave new world of science fiction dystopias. But the beginnings of new controls are visible. In the law of public health, such controls may substantially reduce the imperatives of cooperation and trust that have characterized management of the HIV/AIDS epidemic and supported the New Sanitarian synthesis. The state of the future may not require the cooperation of at-risk individuals, at least not in the same ways or to the same degree.

In Part III, I turn to the other side of the rights-public health dynamic to examine the emergence of a new set of unruly and fractious rights-claims in the COVID-19 era. In our hyper-partisan times, individual rights during the pandemic have become a hotly political topic. Bold individual rights claims to liberties like freedom of religion have emerged in ways that are historically unprecedented. Such claims, and a startling new line of the U.S. Supreme Court's decisions striking down pandemic regulations as violations of religious exercise rights,¹⁰ threaten to undo carefully balanced public health orders. Crucially for us here, the new claims and the new decisions by the conservative majority on the Court do not aim to further public health. They do not contemplate that the novel rights claims they recognize are aligned with public health imperatives. Instead, they push back against and resist public health expertise. The New Sanitationist synthesis is thus under assault from two sides. Even as collective public health technologies grow more robust, rights claims are becoming more forceful and aggressive. The SARS-CoV-2 virus has called forth a new and combustible mix of competing technologies, public imperatives, and individual rights. We are watching the chemical reaction in real time.

Part IV pivots to observe another new phenomenon in the age of our novel COVID-19 pandemic. For even as old-fashioned individual rights have been pitted against the regulatory demands of the public health experts, novel social mobilizations are asserting a new set of rights in ways almost unimaginable in recent decades of U.S. politics. New claims to social rights like health care, employment, housing, and other forms of public provisions are now surging forward in our politics and our law. They may stick around for some time to come.

¹⁰ See *infra* text accompanying notes 44–53.

II. TRAGEDY REVISITED?

Beginning in the 1980s, leading figures in the law of public health began to argue that protecting individual and human rights would promote public health, not interfere with it.¹¹ This synthesis of rights and health rested in part on the idea that effectively managing public health required the willing participation of vulnerable populations. Public health thinkers believed that protecting individuals' rights, for example by resisting quarantines and other draconian measures, would induce the cooperation so crucial to managing disease risks.¹² The synthesis of rights and health thus held out the promise of finally vanquishing the age-old idea that public health measures were at odds with individual rights.¹³

Today, however, threats to this new synthesis view abound, and for good reason. New technologies have offered public health authorities unprecedented novel tools to manage populations. Automated methods of contact tracing, quarantine enforcement, and location monitoring, for example, are new collective mechanisms for preventing the spread of disease.¹⁴ But these new technologies in the age of COVID-19 seem to offer tools of population management that do not rely on public cooperation, at least not to the same extent. Consider that public health experts have come out in favor of suspending data-privacy protection laws to achieve better surveillance.¹⁵ The old paradigm is back; civil liberties and public health once again seem to be in tension with each other.¹⁶

¹¹ See, e.g., HEALTH AND HUMAN RIGHTS: A READER (Jonathan M. Mann et al. eds., 1999); LAWRENCE O. GOSTIN, THE AIDS PANDEMIC: COMPLACENCY, INJUSTICE, AND UNFULFILLED EXPECTATIONS (2003); LAWRENCE O. GOSTIN, PUBLIC HEALTH LAW: POWER, DUTY, RESTRAINT (2000); Wendy Parmet, *AIDS and Quarantine: The Revival of an Archaic Doctrine*, 14 HOFSTRA L. REV. 53 (1985).

¹² AMERICAN CIVIL LIBERTIES UNION & YALE GLOBAL HEALTH JUSTICE PARTNERSHIP, FEAR, POLITICS, AND EBOLA: HOW QUARANTINES HURT THE FIGHT AGAINST EBOLA AND VIOLATE THE CONSTITUTION 32 (2015), https://www.aclu.org/sites/default/files/field_document/aclu-ebolareport.pdf [<https://perma.cc/Z5DW-FNRD>].

¹³ Parmet, *supra* note 1.

¹⁴ See, e.g., Myungji Yang, *Behind South Korea's Success in Containing COVID-19: Surveillance Technology Infrastructures*, SOC. SCI. RSCH. COUNCIL: ITEMS (Jan. 21, 2021), <https://items.ssrc.org/covid-19-and-the-social-sciences/covid-19-in-east-asia/behind-south-koreas-success-in-containing-covid-19-surveillance-technology-infrastructures/> [<https://perma.cc/GTQ8-7N58>].

¹⁵ Laura Bradford et al., *COVID-19 Contact Tracing Apps: A Stress Test for Privacy, the GDPR, and Data Protection Regimes*, 7 J.L. & BIOSCIENCES, Jan.–Dec. 2020, at 1 n.3, <https://doi.org/10.1093/jlb/ljaa034> [<https://perma.cc/2HDS-FYNQ>].

¹⁶ Christina Farr, *The COVID-19 Response Must Balance Civil Liberties And Public Health—Experts Explain How*, CNBC (Apr. 18, 2020), <https://www.cnbc.com/2020/04/18/covid-19-response-vs-civil-liberties-striking-the-right-balance.html> [<https://perma.cc/G25T-22KQ>] (quoting Professor Gostin); see also *NIPH Stops Collection of Personal Data in Smittestopp*, NOR. INST. PUB. HEALTH (June 15, 2020), <https://www.fhi.no/en/news/2020/niph-stops-collection-of-personal-data-in-smittestopp/> [<https://perma.cc/7WTJ-PLUF>].

South Korea's extraordinary success in managing COVID-19 has helped make it a leading illustration of the emerging dynamic. The pattern comes into view if we turn back the clock to 2015, when the MERS outbreak put South Korean officials in a prolonged debate about public disclosure and the privacy of patient information.¹⁷ Many came to think that Korea's respect for privacy interests in 2015 hampered containment efforts and increased infections.¹⁸ Not so today, after such concerns prompted legislation allowing for private data collection without a warrant and strengthening the public's "right to know."¹⁹ South Korea's COVID-19 response has been characterized by extraordinary new surveillance and tracking powers. To improve contact tracing, the Korea Center for Disease Control and Prevention used medical records, surveillance camera footage, mobile GPS data, credit card history, and travel records.²⁰ Under the "right to know" policy, alerts were sent to people living nearby, informing them of the patient's age, gender, and a detailed log of their movements. Depending on the data available, this log would include highly specific information including the rooms of a building that the patient entered, whether they visited a toilet, and if they wore a mask.²¹

Initially patients' full addresses and workplaces were also disclosed, which led to patients being identified and harassed.²² Public backlash and concerns over reduced voluntary testing led to better anonymization of the increased data, but the South Korean public still overwhelmingly supported such releases of data.²³ Having learned and

¹⁷ See, e.g., Hyunjung Kim, *South Korea Learned Its Successful COVID-19 Strategy from a Previous Coronavirus Outbreak: MERS*, BULL. ATOMIC SCIENTISTS (Mar. 20, 2020) <https://thebulletin.org/2020/03/south-korea-learned-its-successful-COVID-19-strategy-from-a-previous-coronavirus-outbreak-mers/> [<https://perma.cc/7X5M-YVWS>]; Bae Jong-Myon, *Establishing Public Health Ethics Related to Disclose Information for Controlling Epidemics on 2015 MERS Epidemics in Korea*, 41 KOR. PUB. HEALTH RSCH., no. 4, 2015, at 15.

¹⁸ Brian J. Kim, *South Korea Has the Legal Infrastructure to Fight Pandemics; The US Doesn't*, 15 GLOBAL ASIA 106, 107 (2020).

¹⁹ Brian J. Kim, *Lessons for America: How South Korean Authorities Used Law to Fight the Coronavirus*, LAWFARE (Mar. 16, 2020), <https://www.lawfareblog.com/lessons-america-how-south-korean-authorities-used-law-fight-coronavirus> [<https://perma.cc/2VZK-D5KY>].

²⁰ Jongeun You, *Lessons from South Korea's COVID-19 Policy Response*, 50 AM. REV. PUB. ADMIN. 801, 803 (2020).

²¹ Mark Zastrow, *South Korea Is Reporting Intimate Details of COVID-19 Cases: Has it Helped?*, NATURE (Mar. 18, 2020), <https://www.nature.com/articles/d41586-020-00740-y> [<https://perma.cc/Z6FX-RGWC>]; Hyung Eun Kim, *Coronavirus Privacy: Are South Korea's Alerts Too Revealing?*, BBC NEWS KOR. (Mar. 5, 2020), <https://www.bbc.com/news/world-asia-51733145> [<https://perma.cc/BY4R-JHS2>].

²² Zastrow, *supra* note 21.

²³ June Park, *Striking a Balance Between Data Privacy and Public Health Safety: A South Korean Perspective*, NAT'L BUREAU OF ASIAN RSCH. (Apr. 29, 2021), <https://www.nbr.org/publication/striking-a-balance-between-data-privacy-and-public-health-safety-a-south-korean-perspective/> [<https://perma.cc/4CX7-NRBL>] ("[T]he majority of South Koreans remain willing to consent

suffered from its MERS response, the South Korean government and people have embraced a brave new world of state controls at the expense of individual rights such as privacy.

South Korea is hardly alone. China has adopted expansive new restrictions in its quarantining and contact-tracing efforts. In Hong Kong, electronic wristbands are used to enforce a mandatory quarantine for all arrivals except essential workers.²⁴ Facial-recognition cameras and thermal sensors are used to identify people with fevers and those not wearing masks.²⁵ Alipay, a ubiquitous payment app in China, assigns a COVID-19 risk level to each user based on travel history, medical records, past proximity to known carriers, and other undisclosed information.²⁶ Users with certain risk levels are barred from public spaces and those at the highest risk are required to quarantine.²⁷

In many cases, technological issues have hampered such surveillance efforts. The electronic wristbands used for quarantining in Hong Kong initially suffered glitches rendering the system ineffective.²⁸ However, across the board, it is clear that where technological limitations have prevented more expansive surveillance policies, the technology has rapidly progressed to overcome those limitations. Fixing the wristbands in Hong Kong is one example.²⁹ Similarly, when the Singaporean contact-tracing app encountered difficulty because of its incompatibility

to conditional surrender of personal data for public health efforts so long as it remains anonymous.”); see also Hocheol Lee et al., *Determining Public Opinion of the COVID-19 Pandemic in South Korea and Japan: Social Network Mining on Twitter*, 26 HEALTHCARE INFO. RSCH. 335 (2020).

²⁴ Xiaofeng Liu & Mia M. Bennett, *Viral Borders: COVID-19’s Effects on Securitization, Surveillance, and Identity in Mainland China and Hong Kong*, 10 DIALOGUES IN HUM. GEOGRAPHY 158, 159–60 (2020).

²⁵ See generally Meredith Van Natta et al., *The Rise and Regulation of Thermal Facial Recognition Technology During the COVID-19 Pandemic*, 7 J.L. & BIOSCIENCES, Jan.–Dec. 2020, <https://doi.org/10.1093/jlb/ljaa038> [<https://perma.cc/KHH2-LB6M>].

²⁶ Helen Davidson, *China’s Coronavirus Health Code Apps Raise Concerns Over Privacy*, GUARDIAN (Apr. 1, 2020), <https://www.theguardian.com/world/2020/apr/01/chinas-coronavirus-health-code-apps-raise-concerns-over-privacy> [<https://perma.cc/MD2Y-8LWP>].

²⁷ Fan Liang, *COVID-19 and Health Code: How Digital Platforms Tackle the Pandemic in China*, 6 SOC. MEDIA + SOC’Y, Aug. 11, 2020, at 1–2, <https://doi.org/10.1177/2056305120947657> [<https://perma.cc/PLW6-VP8A>].

²⁸ Shawna Kwan, *Hong Kong’s Faulty Wristbands Allow Quarantined to Wander Free*, BLOOMBERG (Mar. 23, 2020), <https://www.bloomberg.com/news/articles/2020-03-24/hong-kong-s-faulty-wristbands-allow-quarantined-to-wander-free> [<https://perma.cc/HC94-ZQX6>].

²⁹ *Bluetooth Bracelet to Overcome Earlier Glitches*, STANDARD (Mar. 25, 2020), <https://www.thestandard.com.hk/breaking-news/section/4/144408/Bluetooth-bracelet-to-overcome-earlier-glitches> [<https://perma.cc/ZL4V-UMEC>]; see also Kanis Leung, *Coronavirus: Hong Kong Government Scrambles to Fix Glitch in Quarantine Wristbands After Only a Third of Tracking Devices Work*, S. CHINA MORNING POST (Mar. 20, 2020), <https://www.scmp.com/news/hong-kong/health-environment/article/3076085/coronavirus-only-third-hong-kongs-quarantine> [<https://perma.cc/R6AD-R5FG>]; Zen Soo, *Hong Kong Enforcing Coronavirus Quarantine with Wristband Trackers*, N.Y. POST (May 21, 2020), <https://nypost.com/2020/05/21/virus-diary-in-hong-kong-lockdown-watched-by-a-wristband> [<https://perma.cc/L6P5-NXNS>].

with certain operating systems,³⁰ Singapore was able to quickly release a new phone-independent contact-tracing token that could be distributed to citizens with incompatible phones and without phones. With the token's release, Singapore made either the app or token required for access to public venues.³¹

South Korea's COVID-19 response has garnered strong public support.³² Experts similarly note the effectiveness of the surveillance policies in China and Singapore.³³ Some have attributed such successes in containing the pandemic to traditions of state authority or cultures of collectivism.³⁴ Experts have noted very different traditions and cultures in places like the United States,³⁵ and observers around the world have praised the approaches in China, South Korea, Taiwan, and Vietnam as superior to those in most European or North American countries.³⁶ Given the policy and attitude shifts following SARS and MERS, the privacy concerns in America and Europe now appear to many as naivete rather than ideological difference. In this view, the rest of the world may soon learn the lessons that many in East Asia have drawn from earlier infectious diseases.

Certain European countries have already seen the synthesis of individual rights and public health begin to come apart in controversies about the implementation of new technologies of tracking and surveillance. In Norway, the Norwegian Data Protection Authority (NDPA) stepped in to stop the country's Institute of Public Health (NIPH) from all data collection in its "Smittestopp" contact-tracing app.³⁷ The NDPA

³⁰ Vivian Balakrishnan, Minister-in-Charge of the Smart Nation Initiative and Minister for Foreign Aff., Oral Reply at Second Session of the Parliamentary Sitting on June 5, 13th Parl. of Singapore (2020), <https://www.smartnation.gov.sg/whats-new/speeches/parliamentary-sitting-on-5-june-2020> [<https://perma.cc/LRZ4-6PZK>].

³¹ Dewi Nurjuwita, *TraceTogether App or Token to Be Made Compulsory at Public Venues by End December*, TIMEOUT SING. (Oct. 21, 2020), <https://www.timeout.com/singapore/news/tracetogogether-app-or-token-to-be-made-compulsory-at-public-venues-by-end-december-102120> [<https://perma.cc/BUL8-TKKV>].

³² Park, *supra* note 23; *see also* Lee et al., *supra* note 23.

³³ Hafiz Syed Mohsin Abbas et al., *China Health Technology and Stringency Containment Measures During COVID-19 Pandemic: A Discussion of First and Second Wave of COVID-19*, 11 HEALTH & TECH. 405, 409 (2021); Yue Yan et al., *COVID-19 in Singapore: Another Story of Success*, 12 INT'L J. MATHEMATICS FOR INDUS. 9 (2020).

³⁴ *See, e.g.*, Peter Dizikes, *When Culture Clashes with COVID-19*, MIT NEWS (June 25, 2020), <https://news.mit.edu/2020/when-culture-clashes-covid-19-0625> [<https://perma.cc/2FDZ-FZNS>].

³⁵ Brian Y. An & Shui-Yan Tang, *Lessons from COVID-19 Responses in East Asia*, 50 AM. REV. PUB. ADMIN. 790, 791 (2020); You, *supra* note 20; Katharine N. Destler, *Creating a Performance Culture: Incentives, Climate, and Organizational Change*, 46 AM. REV. PUB. ADMIN. 201 (2016).

³⁶ Swee Kheng Khor & David Heymann, *An Asian Pandemic Success Story*, FOREIGN AFFS. (Sept. 21, 2020), <https://www.foreignaffairs.com/articles/united-states/2020-09-21/283rego-pandemic-success-story> [<https://perma.cc/2XF9-TNQA>].

³⁷ NIPH *Stops Collection of Personal Data in Smittestopp*, *supra* note 16.

deemed data such as GPS logs to be too invasive. Evoking the old tragedy view, NIPH Director-General Camilla Stoltenberg responded that this action would cause “a reduced ability to combat ongoing transmission.”³⁸ The pandemic, she observed, was still in progress, and, as she saw it, Norway would be worse off in a world “without the Smittestopp app.”³⁹ Nonetheless, the data protection officials insisted that individual rights took priority and that Smittestopp was on the wrong side of the balance in an inevitable conflict between public health surveillance and privacy rights.⁴⁰

To be sure, in many ways the synthesis of public health and civil liberties has held strong during the COVID-19 moment. In the U.K., researchers have emphasized anew the importance of public trust in the adoption of new technologies.⁴¹ Even in South Korea, limits on the new surveillance and tracking programs have emerged; the aforementioned policy of releasing information on infected individuals, for example, was refined after patient harassment seemed to disincentivize testing.⁴² In some ways, the lessons taken from the HIV/AIDS epidemic persist into the digital age. Widespread adoption is key to the effectiveness of contact-tracing apps. Automated technology has not completely eliminated the need for the public to report their symptoms, get tested, or list their close contacts—at least not yet. The development of thermal sensors, facial recognition, and position tracking may still undo even these residual obstacles to collective control.

Whether the late twentieth-century synthesis can survive these new technologies is now in serious doubt, in a way that was simply unimaginable in the 1980s. Quarantines around the world and widespread testing requirements to enter public spaces stand for the possibility of tremendous new levels of state control. Tech-enabled restrictions on entering public spaces absent testing in places like China and Singapore, for example, make effective testing mandates easier than ever to adopt. Similarly, while symptoms such as headaches or fatigue must be willingly reported, the capability of thermal sensors to detect fevers reduces the need for voluntary participation in public health programs. As the effectiveness and pervasiveness of these technologies grow, we may see

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ Ida Irene Bergström, *Norway's Coronavirus Tracing App Halted by Data Protection Authority—Too Invasive and Not Useful*, SCI. NOR. (June 16, 2020), <https://sciencenorway.no/covid19-epidemic-society-and-culture/norways-coronavirus-tracing-app-halted-by-data-protection-authority-too-invasive-and-not-useful/1699843> [<https://perma.cc/PR2K-BN7Q>].

⁴¹ Carly Kind, *Exit Through the App Store?*, 1 PATTERNS, June 12, 2020, at 3 (previewing *COVID-19 Rapid Evidence Review*, ADA LOVELACE INST. (2020)).

⁴² Natasha Singer & Choe Sang-Hun, *As Coronavirus Surveillance Escalates, Personal Privacy Plumets*, N.Y. TIMES (Apr. 17, 2020), <https://www.nytimes.com/2020/03/23/technology/coronavirus-surveillance-tracking-privacy.html> [<https://perma.cc/P5E2-WNMH>].

the old tragic relationship between public health and individual rights surge back into view.

III. TRAGEDY REMIXED

If novel technologies threaten to reestablish the tragic model along one dimension, we are also witnessing an unprecedented effort to assert a new set of individual rights in opposition to public health limits in the era of COVID-19. In particular, bitter partisan polarization has produced a surge of individual rights claims—claims that are resurrecting the tragic conception from the other direction.

A new libertarian formulation of pandemic-era rights has led to new and stunningly aggressive assertions of rights against public health measures. If the old tragic view held that public health and civil liberties were valuable public commitments at loggerheads with one another, the new libertarian rights claims during the COVID-19 pandemic imagine individual rights as having priority in a righteous struggle with technocratic tyrants. Such new controversies are not so much about tragedy as they are about culture war.

Consider the high-profile cases that have gone all the way to the U.S. Supreme Court. In November 2020, the Court enjoined enforcement of New York State's restrictions on attendance at religious services. The decision, which came in the case of *Roman Catholic Diocese of Brooklyn v. Cuomo*,⁴³ ruled that attendance limits in zones classified as high-risk for infection unconstitutionally violated New Yorkers' right to the free exercise of their religions.⁴⁴ Concurring in the judgment of the Court, Justice Neil Gorsuch denounced the attendance limits as a "radical" break "from the First Amendment's terms and long-settled rules."⁴⁵ The truth is quite the opposite: religious rights claims have surged forward in this pandemic like never before, despite a long history of pandemic-era limits on religious gatherings.⁴⁶ Even more startling was Justice Gorsuch's extended effort to minimize the significance of the century-old decision in *Jacobson*, not for the purpose of synthesizing rights and public health as mutually reinforcing, but for the purpose of asserting individual rights over the authority of public health

⁴³ 141 S. Ct. 63 (2020) (per curiam).

⁴⁴ *Id.* at 66.

⁴⁵ *Id.* at 70 (Gorsuch, J., concurring).

⁴⁶ See WITT, *supra* note 7, at 118; see also JOHN M. BARRY, *THE GREAT INFLUENZA: THE STORY OF THE DEADLIEST PANDEMIC IN HISTORY* 328–47 (2004); Dorothy Ann Pettit, *A Cruel Wind: America Experiences Pandemic Influenza, 1918–1920*, *A Social History* 119 (1976) (Ph.D. dissertation, University of New Hampshire).

rules.⁴⁷ The Court's decision in *Roman Catholic Diocese* and Justice Gorsuch's concurrence did not even entertain the rationales offered by state officials for the distinctive and more restrictive regulations imposed on religious services. Religious gatherings, public health experts reasonably believe, pose special public health challenges.⁴⁸ Traditions of interpersonal contact, singing, and prolonged presence make religious gatherings very different for infection-risk purposes than activities like shopping. States, moreover, have grave difficulty regulating religious practices within services, for both practical and constitutional reasons.

In February 2021, in the case of *South Bay United Pentecostal Church v. Newsom*,⁴⁹ the Court enjoined enforcement of California's ban on indoor religious services in areas characterized by widespread infection. Once again, Justice Gorsuch wrote separately (this time for Justices Clarence Thomas and Samuel Alito), asserting that states may not "demand that individual rights give way to collective interests."⁵⁰ The observation is a truism, of course. Once one defines the activity in question as an individual right, the collective interests give way. The entire problem is to decide on the scope of the right in the first place. But in the Court's bold new individual rights jurisprudence, the tragedy is no longer that rights must give way to public health. Today, the tragedy is that public health must give way to rights. The *Jacobson* model is in retreat.

Indeed, as I write this, the retreat has devolved into a rout. In April 2021, the Court extended the new line of cases to grant an injunction blocking enforcement of California's pandemic limits on indoor at-home religious gatherings. In *Tandon v. Newsom*,⁵¹ the Court held in an unsigned *per curiam* opinion that the Constitution requires application of strict scrutiny whenever government regulations "treat *any* comparable secular activity more favorably than religious exercise."⁵² The state, however, had not met its burden to show that comparable activities treated more favorably posed a lesser risk. In dissent, Justice Kagan protested that the state and the lower courts had amply documented the greater risks associated with at-home gatherings than at commercial establishments.⁵³ But to no avail.

⁴⁷ *Roman Catholic Diocese*, 141 S. Ct. at 71 ("[W]e may not shelter in place when the Constitution is under attack.").

⁴⁸ Brief for Respondent at 30, *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020) (*per curiam*) (No. 20A87).

⁴⁹ 141 S. Ct. 716 (2021).

⁵⁰ *Id.* at 718 (statement of Gorsuch, J.).

⁵¹ 141 S. Ct. 1294 (2021) (*per curiam*).

⁵² *Id.* at 1296 (citing *Roman Catholic Diocese*, 141 S. Ct. at 67–68).

⁵³ *Id.* at 1298 (Kagan, J., dissenting).

The new religious freedom cases do not come out of thin air; nor have they been limited to the U.S. Supreme Court. The cases come out of a new and concerted program of legal action in which Christian advocacy groups have made coordinated efforts to challenge public health doctrines in the name of civil liberties.⁵⁴ Advocacy groups such as Alliance Defending Freedom, Liberty Counsel, and First Liberty Institute have challenged such doctrines across the country. In Kentucky, the First Liberty Institute won a religious freedom suit against state COVID-19 regulations.⁵⁵ In Oregon, Alliance Defending Freedom sued the governor on behalf of churches seeking to challenge the state's COVID-19 rules⁵⁶ and gained a favorable ruling in the lower state courts before losing at the Oregon Supreme Court.⁵⁷ Similar litigations have taken place in states around the country, many of them gaining momentum from the U.S. Supreme Court's decisions in *Roman Catholic Diocese* and *South Bay United Pentecostal*.⁵⁸

Meanwhile, related claims against COVID-19 regulations have gone forward alongside the religious liberty suits. By one count, more than 400 suits had been filed against pandemic controls by the end of 2020.⁵⁹ In Wisconsin, the state supreme court enjoined the state's business-closure and stay-at-home orders on the ground that the executive branch had exceeded its authority under the relevant state laws.⁶⁰ The majority opinion in the case avoided a holding on any individual right under the state or federal constitutions, but a concurring opinion by Justice Daniel Kelly made clear that concerns about individual rights were close to the Wisconsin justices' minds: "This comprehensive claim

⁵⁴ Andrew Lewis & Daniel Bennett, *Church Closures, Religious Freedom, and the Coronavirus Pandemic: Assessing the Christian Legal Movement's Response*, CANOPY F. (Oct. 2, 2020), <https://canopyforum.org/2020/10/02/church-closures-religious-freedom-and-the-coronavirus-pandemic/> [https://perma.cc/48U9-L6XA].

⁵⁵ *On Fire Christian Ctr. v. Fischer*, 453 F. Supp. 3d 901 (W.D. Ky. 2020).

⁵⁶ *Oregon Governor Sued over COVID-19 Order that Allows Numerous Gatherings, Restricts Churches*, ALL. DEFENDING FREEDOM (May 26, 2020), <https://adfmedia.org/press-release/oregon-governor-sued-over-COVID-19-order-allows-numerous-gatherings-restricts> [https://perma.cc/8A63-PPS7].

⁵⁷ Karina Brown, *Oregon Judges Take Fight Over Reopening Churches to Mat*, COURTHOUSE NEWS SERV. (May 26, 2020), <https://www.courthousenews.com/oregon-judges-take-fight-over-reopening-church-to-mat/> [https://perma.cc/M522-3LFE]; Conrad Wilson & Dirk VanderHart, *Oregon Supreme Court Rules Against Churches Challenging COVID-19 Restrictions*, OR. PUB. BROAD. (June 12, 2020), <https://www.opb.org/news/article/oregon-supreme-court-coronavirus-COVID-19-restrictions-ruling/> [https://perma.cc/YAA7-QQHR].

⁵⁸ See, e.g., *Capitol Hill Baptist Church v. Bowser*, 496 F. Supp. 3d 284 (D.D.C. 2020); *Elkhorn Baptist Church v. Brown*, 466 P.3d 30 (Or. 2020); *Tandon v. Newsom*, 141 S. Ct. 1294 (2021) (per curiam).

⁵⁹ John Fabian Witt & Kiki Manzur, *How U.S. Pandemic Restrictions Became a Constitutional Battlefield*, FOREIGN AFFS. (Dec. 31, 2020), <https://www.foreignaffairs.com/articles/united-states/2020-12-31/how-us-pandemic-restrictions-became-constitutional-battlefield> [https://perma.cc/CG8G-4RHG].

⁶⁰ *Wis. Leg. v. Palm*, 942 N.W.2d 900 (Wis. 2020).

to control virtually every aspect of a person's life," he wrote, "is something we normally associate with a prison, not a free society governed by the rule of law."⁶¹ In Michigan, a similar decision by the state's supreme court went a step further and turned concerns by the court majority about individual rights into a constitutional ruling striking down the state legislature's delegation of broad emergency powers to the governor.⁶² The delegation had been in place for three-quarters of a century without challenge.⁶³ But in the newly assertive legal atmosphere of the COVID-19 pandemic, the Michigan law fell.

Crucially, the new legal arguments against public health measures gain traction by their connection to one of the nation's two major political parties. Time and again, such cases have had a strongly partisan structure. Former President Donald Trump, a Republican, promised to override Democratic state governors and to reopen churches.⁶⁴ In the end he did no such thing, at least not directly. But courts animated by similar suspicions of expert public health regulation finished what the former president had not. Regulations issued by Democratic Party-affiliated governors came under fire from judges and justices affiliated with or nominated by the Republican Party.⁶⁵

The partisan structure of such disputes is ominous and important in its own right. For purposes of this Article, the point is to illustrate the power of the challenge to the late twentieth-century sanitarian synthesis. The hopeful dream of late twentieth- and early twenty-first-century public health lawyers is now under fierce pressure on all sides. New technologies allow states previously unthinkably broad capacities in the control of populations. A partisan-fueled social movement asserts and wins on rights claims of unprecedented scope. Individual rights and public health seem to be at war once again.

But a new tragedy is not inevitable. The social response to the pandemic has also made visible new ways of conceptualizing the individual and the social and new ways of organizing social life around questions

⁶¹ *Id.* at 939 (Daniel, J., concurring).

⁶² *In re Certified Questions from U.S. Dist. Ct., W.D. Mich., S. Div.*, 958 N.W.2d 1, 31 (Mich. 2020).

⁶³ The Emergency Powers of the Governor Act, MICH. COMP. LAWS § 10.31 *et seq.*

⁶⁴ Jeffrey Haynes, *Donald Trump, the Christian Right and COVID-19: The Politics of Religious Freedom*, 10 LAWS, Jan. 30, 2021, at 11, <https://doi.org/10.3390/laws10010006> [<https://perma.cc/864J-QXKH>].

⁶⁵ 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/8KT6-EHNU>]; *see also* Witt & Manzur, *supra* note 59. Of course, plenty of Republican-affiliated jurists, led by Chief Justice John Roberts, have voted to uphold pandemic regulations. The point is not that GOP-affiliation has required opposition to Democratic gubernatorial policy, but rather that the startling new trend of judicial opposition has been polarized along partisan lines.

of public health. In particular, the COVID-19 pandemic has reasserted the priority of a set of social rights that have been out of favor for decades.

IV. A MERGER OF CIVIL LIBERTIES AND SOCIAL RIGHTS?

Even as new individual rights claims circulated, the COVID-19 pandemic also produced a new model of social rights in interesting and sometimes surprising ways.

Since at least the time of *Jacobson*, and in fact since long before, thinking about the conflict between public health and civil liberties has imagined that the rights in question are traditional negative individual rights: the right *not* to be vaccinated, the right *not* to wear masks, or the right *not* to have one's freedom of movement inhibited, for example. But COVID-19 raises a new prospect. More than other emergent diseases over the past half-century, the new pandemic has emphasized the value of social rights.

The social conception of liberty was a submerged thread already in Justice Harlan's *Jacobson* opinion: "Real liberty for all," he explained, "could not exist under the operation of a principle which recognizes the right of each individual person . . . regardless of the injury that may be done to others."⁶⁶ If Harlan was right, then many traditional conceptions of civil liberties will be inapt in public health settings.⁶⁷ Harlan's "real liberty" is an alternative mode of flourishing. It conceives individual autonomy as dangerous to human flourishing, and it requires social provision of public health goods. British sociologist Graham Scambler suggests that COVID-19 is functioning as what the sociologist Harold Garfinkel labeled a "breaching experiment"—a disruption of the normal social order that illuminates a society's underlying rules and their shortcomings.⁶⁸ In the United States in 2020 and early 2021, this meant revelations about the stark costs of the private provision of basic social goods.

Consider the ways in which COVID-19 has scrambled the delivery of health care in the United States. At the outset of the pandemic, it

⁶⁶ *Id.* at 26.

⁶⁷ Even saying it this way risks anachronism—the phrase civil liberties was essentially unknown in the United States until 1917. On the origins of the phrase "civil liberties," see JOHN FABIAN WITT, PATRIOTS AND COSMOPOLITANS: HIDDEN HISTORIES OF AMERICAN LAW ch. 3 (2009); see also Christopher W. Schmidt, *The Civil Rights-Civil Liberties Divide*, 12 STAN. J. C.R. & C.L. 1 (2016).

⁶⁸ Graham Scambler, *Pandemic as a 'Breaching Experiment' in Social Order*, DISCOVER SOCIETY (Mar. 17, 2020), <https://discoversociety.org/2020/03/17/pandemic-as-a-breaching-experiment-in-social-order/> [<https://perma.cc/X4VZ-DCEU>]; see also Harold Garfinkel, *A Conception of and Experiments with 'Trust' As a Condition of Stable Concerted Actions*, in MOTIVATION & SOC. INTERACTION: COGNITIVE DETERMINANTS 187 (O.J. Harvey ed., 1963).

quickly became clear that the traditional private provision of care through insurance and employers would poorly suit a health crisis of global scale.⁶⁹ Researchers warned early on that, in a COVID-19 recession, the ranks of the uninsured would increase with unemployment.⁷⁰ Amid warnings of extreme job loss, the privatized system of health care through employment seemed to invite disaster.⁷¹

Health care policy soon responded. Public pressure from members of Congress led the Centers for Disease Control and Prevention (CDC) to provide free COVID-19 testing early in the pandemic.⁷² In the Families First Coronavirus Response Act (FFCRA), enacted in March 2020, Congress expanded Medicaid eligibility, increased the federal share of Medicaid payments, and eliminated cost sharing for COVID-19 testing.⁷³ Later regulations required insurers to pay for COVID-19-related care even when delivered by out-of-network providers.⁷⁴

To be sure, the basic private structure of American social provision remained in place. Those who argued that COVID-19 required universal public healthcare⁷⁵ found themselves disappointed. The United States did not follow Spain's example and nationalize hospitals.⁷⁶ But in early 2021, the new presidential administration of President Joe

⁶⁹ Linda J. Blumberg & Cindy Mann, *Quickly Expanding Medicaid Eligibility As an Urgent Response to the Coronavirus Pandemic*, URBAN INST. 1 (Mar. 2020), https://www.urban.org/sites/default/files/publication/101910/quickly-expanding-medicaid-eligibility-as-an-urgent-response-to-the-coronavirus-pandemic_3.pdf [<https://perma.cc/8WJ8-M2ZR>].

⁷⁰ *Id.* at 5.

⁷¹ Nelson D. Schwartz, *Coronavirus Recession Looms, Its Course 'Unrecognizable'*, N.Y. TIMES (Mar. 21, 2020), <https://www.nytimes.com/2020/03/21/business/economy/coronavirus-recession.html> [<https://perma.cc/D7HA-2FA4>]; Steve Matthews, *US Jobless Rate May Soar to 30%, Fed's Bullard Says*, BLOOMBERG (Mar. 22, 2020), <https://www.bloomberg.com/news/articles/2020-03-22/fed-s-bullard-says-u-s-jobless-rate-may-soar-to-30-in-2q> [<https://perma.cc/9YGD-KQKT>]; Mohamed A. El-Erian, *The Coming Coronavirus Recession and the Uncharted Territory Beyond*, FOREIGN AFFS. (Mar. 17, 2020), <https://www.foreignaffairs.com/articles/2020-03-17/coming-coronavirus-recession> [<https://perma.cc/6HX3-C7NC>].

⁷² Meagan Flynn, *'Not Good Enough': How Rep. Katie Porter's Relentless Questioning Led the CDC Chief to Commit to Free Coronavirus Testing*, WASH. POST (Mar. 13, 2020), <https://www.washingtonpost.com/nation/2020/03/13/coronavirus-testing-katie-porter/> [<https://perma.cc/73PN-749C>].

⁷³ Tricia Brooks & Andy Schneider, *The Families First Coronavirus Response Act: Medicaid and CHIP Provisions Explained*, GEO. U. HEALTH POL'Y INST., CTR. FOR CHILDREN & FAMILIES (2020).

⁷⁴ Additional Policy and Regulatory Revisions in Response to the COVID-19 Public Health Emergency, 85 Fed. Reg. 71,142 (Nov. 6, 2020) (to be codified in scattered sections of 42 C.F.R.).

⁷⁵ See, e.g., Alison P. Galvani et al., *The Imperative for Universal Healthcare to Curtail the COVID-19 Outbreak in the USA*, 23 LANCET: ECLINICAL MED. (May 17, 2020).

⁷⁶ Rob Wallace et al., *COVID-19 and Circuits of Capital*, 72 MONTHLY REV. 1 (May 1, 2020), <https://monthlyreview.org/2020/05/01/covid-19-and-circuits-of-capital/> [<https://perma.cc/URK3-SRWP>].

Biden did invoke the Defense Production Act to convert factories to vaccine manufacturing.⁷⁷ Polls show, too, that during the COVID-19 pandemic U.S. adults have become increasingly in favor of universal health care.⁷⁸

Health care was not the only domain scrambled by COVID-19. The United States' notoriously narrow employment law⁷⁹ posed real risks of community spread by leaving sick employees vulnerable to firing for time missed at work and by denying possibly infected workers basic rights to paid sick leave. Pre-pandemic research found that each week three million American employees went to work sick.⁸⁰ Once the pandemic arrived, such behavior posed grave risks to everyone. The problem was highlighted in March 2020, when a Metropolitan Transit Authority worker in New York showed up to work sick, resulting in the diverting of trains and closure of multiple stations.⁸¹

Such workplace dilemmas led to faster socialization of the risks in the employment relation than in virtually any time in modern American history. As the scale of the COVID-19 pandemic became clear, big employers like Walmart and Olive Garden were quick to implement extended sick leave policies.⁸² In the domain of legislation, the Healthy Families Act mandating paid sick leave had been stuck in Congress for well over a decade.⁸³ Suddenly in late March 2020, the FFCRA established such sick leave for COVID-19-related absences.⁸⁴ More recently, states like New York and California have stepped in and guaranteed

⁷⁷ Ari Holtzblatt et al., *COVID-19: The Biden Administration's First Deployment of the Defense Production Act*, JD SUPRA (Feb. 17, 2021), <https://www.jdsupra.com/legalnews/COVID-19-the-biden-administration-s-9963366/> [<https://perma.cc/U4FV-4FKT>].

⁷⁸ During COVID-19, U.S. adults have become increasingly in favor of universal health insurance, an increased minimum wage, guaranteed two-week paid sick leave, and an active government. Colleen L. Barry et al., *Public Support for Social Safety-Net Policies for COVID-19 in the United States*, 110 AM. J. PUB. HEALTH 1811, 1812 (Dec. 1, 2020).

⁷⁹ See, e.g., Jay M. Feinman, *The Development of the Employment at Will Rule*, 20 AM. J. LEGAL HIST. 118 (1976).

⁸⁰ Philip Susser & Nicolas R. Ziebarth, *Profiling the U.S. Sick Leave Landscape: Presenteeism Among Females*, 51 HEALTH SERVS. RSCH. 2305, 2306 (2016).

⁸¹ David Meyer, *Queens Subway Left in Chaos after MTA Worker Shows Up Sick, Prompting Deep Clean*, N.Y. POST (Mar. 20, 2020), <https://nypost.com/2020/03/20/queens-subway-left-in-chaos-after-mta-worker-shows-up-sick-prompting-deep-clean> [<https://perma.cc/SN4J-Z969>].

⁸² Alexander Cheema-Fox et al., *Corporate Resilience and Response During COVID-19* (Harv. Bus. Sch. Acct. & Mgmt. Unit, Working Paper No. 20-108, 2020), <https://ssrn.com/abstract=3578167> [<https://perma.cc/JA7B-K887>]; Stefanie Benjamin et al., "We Can't Return to Normal": *Committing to Tourism Equity in the Post-Pandemic Age*, 22 TOURISM GEOGRAPHIES 476, 478 (May 2020).

⁸³ Healthy Families Act, S. 932, 109th Cong. (2005).

⁸⁴ DEPT OF LAB., *FAMILIES FIRST CORONAVIRUS RESPONSE ACT: EMP. PAID LEAVE RIGHTS* (2020), <https://www.dol.gov/agencies/whd/pandemic/ffcra-employee-paid-leave> [<https://perma.cc/U68B-TDUP>].

many workers paid sick leave days.⁸⁵ Pressure for even more expansive sick leave policies continues.⁸⁶ Indeed, pressure for sick leave is one of the factors that produced ultimately failed efforts to unionize Amazon facilities in Alabama and elsewhere.⁸⁷

Housing has also come under scrutiny as unemployment puts many Americans at risk of eviction. From Congress, the CARES Act⁸⁸ (officially the “Coronavirus Aid, Relief, and Economic Security Act”) provided new funding for the Public Housing Operating Fund and for tenant-based rental assistance.⁸⁹ The CDC announced unprecedented federal eviction moratoriums,⁹⁰ though the effort has recently run into difficulty in the courts.⁹¹ Researchers and advocates assert the benefits of eviction moratoriums and progressive housing policies on public health outcomes.⁹² Some contend that the COVID-19-era policies have not gone far enough and call for the creation of more temporary public shelters and a federal right to housing.⁹³

In the law of pharmaceuticals, another push to socialize rights has arisen. The prominent public role in the design of vaccines like the one designed by Moderna has led many to call for a greater public role in

⁸⁵ Howard Lavin et al., *Recent COVID-19-Related Employment Law Developments*, N.Y.L.J. (Apr. 19, 2021), <https://www.law.com/newyorklawjournal/2021/04/19/recent-covid-19-related-employment-law-developments/> [<https://perma.cc/ZE5F-9RYE>].

⁸⁶ See, e.g., Juan Vazquez et al., *Expanding Paid Sick Leave As a Public Health Tool in the COVID-19 Pandemic*, 62 J. OCCUPATIONAL & ENV'T MED. 598, 598 (Oct. 2020); Stefan Pichler et al., *COVID-19 Emergency Sick Leave Has Helped Flatten the Curve in the United States*, 39 HEALTH AFFS. 2197, 2203 (Dec. 2020); Zackary D. Berger et al., *COVID-19: Control Measures Must Be Equitable and Inclusive*, 368 BRIT. MED. J. 1 (Mar. 20, 2020); Barry et al., *supra* note 78.

⁸⁷ Joseph Pisani, *Amazon Faces Biggest Union Push in Its History*, ABC NEWS (Mar. 29, 2021), <https://abcnews.go.com/Business/wireStory/amazon-faces-biggest-union-push-history-76757854> [<https://perma.cc/2N3Z-KMHG>].

⁸⁸ Pub. L. No. 116-136, 134 Stat. 281 (2020).

⁸⁹ *Id.*

⁹⁰ Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19, 85 Fed. Reg. 55,292 (Sept. 4, 2020).

⁹¹ See, e.g., *Terkel v. Ctrs. for Disease Control & Prevention*, No. 6:20-cv-00564, 2021 WL 742877 (E.D. Tex. Feb. 25, 2021), *appeal filed*, No. 21-40137 (5th Cir. 2021); *Skyworks, Ltd. v. Ctrs. for Disease Control & Prevention*, No. 5:20-cv-2407, 2021 WL 911720 (N.D. Ohio Mar. 10, 2021).

⁹² See, e.g., Priya Pattath & Michael Landen, *Eviction Moratoriums and COVID-19*, VA. DEP'T OF HEALTH (Jan. 20, 2021), <https://www.vdh.virginia.gov/coronavirus/2021/01/20/eviction-moratoriums-and-covid-19/> [<https://perma.cc/85CR-YAW6>]; Anjalika Nande et al., *The Effect of Eviction Moratoria on the Transmission of SARS-CoV-2*, 12 NATURE COMM'NS 1, 8 (Apr. 15, 2021); Kathryn M. Leifheit et al., *Expiring Eviction Moratoriums and COVID-19 Incidence and Mortality* 5 (Dec. 3, 2020) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3739576 [<https://perma.cc/596E-CHXP?type=image>]; Emily A. Benfer et al., *Eviction, Health Inequity, and the Spread of COVID-19: Housing Policy as a Primary Pandemic Mitigation Strategy*, 98 J. URBAN HEALTH 1, 7 (2021).

⁹³ HILARY MALSON & GARY BLASI, UCLA LUSKIN INST. ON INEQUALITY & DEMOCRACY, FOR THE CRISIS YET TO COME: TEMPORARY SETTLEMENTS IN THE ERA OF EVICTIONS 46 (2020); Bohdan Fasii et al., *The Right to Housing: During and After the COVID-19 Pandemic*, 10 IUS HUMANI L.J. 27, 41 (2021).

their production and distribution.⁹⁴ Issues like skyrocketing prices for the COVID-19 therapeutic known as Remdesivir have made the problem of pharmaceutical access salient in the public consciousness for perhaps the first time since the height of the HIV/AIDS crisis.⁹⁵ Moderna has pledged to not enforce its COVID-19-related patents during the pandemic,⁹⁶ though many have expressed skepticism that such a pledge will accomplish much.⁹⁷ Some scholars argue that since federal taxes paid for such patent production, they should already belong to the public.⁹⁸

On the international stage, COVID-19 has similarly revitalized the global debate surrounding drug patents.⁹⁹ India and South Africa have requested the World Trade Organization to waive the enforcement of COVID-19 related patents.¹⁰⁰ Though the United States and European Union have expressed opposition,¹⁰¹ the scope of the COVID-19 pandemic seems to have strengthened the argument for weakening certain patent enforcement measures. What precedent will be set, and whether this global debate will be permanently shifted, remains to be seen.¹⁰²

⁹⁴ Valerie Bauman, *Government May Have Ownership or Rights to Coronavirus Vaccines*, BLOOMBERG L. (Mar. 20, 2020), <https://news.bloomberglaw.com/health-law-and-business/government-may-have-ownership-or-rights-to-coronavirus-vaccines> [https://perma.cc/3BGM-SDRU]; see also Amy Kapczynski & Aaron S. Kesselheim, 'Government Patent Use': A Legal Approach To Reducing Drug Spending, 35 HEALTH AFFS. 791 (2016).

⁹⁵ Amy Kapczynski et al., *Remdesivir Could Be in Short Supply. Here's a Fix.*, N.Y. TIMES (July 28, 2020), <https://www.nytimes.com/2020/07/28/opinion/remdesivir-shortage-coronavirus.html> [https://perma.cc/RC59-DFXQ].

⁹⁶ Statement by Moderna on Intellectual Property Matters During the COVID-19 Pandemic (Oct. 8, 2020), <https://investors.modernatx.com/node/10066/pdf> [https://perma.cc/R6HP-2NZ2].

⁹⁷ *MSF: Moderna's Decision to Not Enforce COVID-19 Vaccine Patents During the Pandemic Isn't Enough*, DRS. WITHOUT BORDERS (Oct. 8, 2020), <https://www.doctorswithoutborders.org/what-we-do/news-stories/news/msf-modernas-decision-not-enforce-COVID-19-vaccine-patents-during> [https://perma.cc/EZ2D-WSRP].

⁹⁸ James Krellenstein & Christopher J. Morten, *The U.S. Government's Apparent Co-Ownership of Patents Protecting Remdesivir*, PREP4ALL COLLABORATION & N.Y.U. TECH. L. & POL'Y CLINIC (May 20, 2020), <https://static1.squarespace.com/static/5e937afb7a75746167b39c/t/5ecd886c5699191ae9bad9ea/1590528109403/The+U.S.+Government%27s+Apparent+Co-Ownership+of+Patents+Protecting+Remdesivir+-+P4A+%26+NYU.pdf> [https://perma.cc/F3WB-7JD8].

⁹⁹ See, e.g., Roger Collier, *Drug Patents: Innovation v. Accessibility*, 185 CAN. MED. ASS'N. J. E379 (2013).

¹⁰⁰ Request for Waiver from Certain Provisions of the TRIPS Agreement for the Prevention, Containment and Treatment of COVID-19 by India & South Africa, *Council for Trade-Related Aspects of Intellectual Property Rights*, WTO Doc. IP/C/W/669 (Oct. 2, 2020).

¹⁰¹ Hannah Monicken, *U.S., EU Oppose WTO Effort to Waive IP Protections amid Pandemic*, INSIDE U.S. TRADE'S WORLD TRADE ONLINE (Oct. 20, 2020), <https://insidetrade.com/daily-news/us-eu-oppose-wto-effort-waive-ip-protections-amid-pandemic> [https://perma.cc/96QN-QDHN]; Thiru Balasubramaniam, *WTO TRIPS Council (October 2020): European Union Dismisses Concerns That IPRs Are a Barrier to COVID-19 Medicines and Technologies*, KNOWLEDGE ECOLOGY INT'L (Oct. 20, 2020), <https://www.keionline.org/34275> [https://perma.cc/SQL7-DSLY].

¹⁰² Selam Gebrekidan & Matt Apuzzo, *Rich Countries Signed Away a Chance to Vaccinate the World*, N.Y. TIMES (Mar. 21, 2021), <https://www.nytimes.com/2021/03/21/world/vaccine-patents->

To be sure, many obstacles to new social rights persist. But one thing is increasingly clear. Those with access to private resources have responded to the pandemic by establishing privatized systems of collective care and solidarity. Groups of parents have formed “learning pods,” to provide their children with private tutoring and peer-to-peer social interaction in a safe environment.¹⁰³ At the university level, early research suggested that bringing students to campus could be done safely with aggressive testing, quarantining, and contact tracing far more thorough than anything available to the general population in the United States.¹⁰⁴ Using deep resources and unilateral authority over on-campus residents, some wealthy colleges have implemented these policies with significant success.¹⁰⁵ Those that were successful now enjoy levels of safety and social interaction reminiscent of states like South Korea and generally unavailable elsewhere in the United States. Certain employers acted similarly to socialize and protect their communities. Across the country they created their own COVID-19 testing and tracing procedures to supplement lackluster federal policy.¹⁰⁶ And, as we have seen, some also expanded their sick leave policies before it was federally mandated.¹⁰⁷

To be sure, the prospects still seem poor that a new set of social rights will gain court enforcement, at least in the federal courts. Lawsuits by prisoners and others seeking affirmative rights in the COVID-19 era have fared poorly at the Supreme Court.¹⁰⁸

us-eu.html [https://perma.cc/689W-3PU8].

¹⁰³ Michael B. Horn, *The Rapid Rise of Pandemic Pods: Will the Parent Response to COVID-19 Lead to Lasting Change?*, 21 EDUC. NEXT 21 (Sept. 2, 2020), <https://www.educationnext.org/rapid-rise-pandemic-pods-will-parent-response-covid-19-lead-to-lasting-changes/> [https://perma.cc/QZX6-FBK6].

¹⁰⁴ A. David Paltiel et al., COVID-19 Screening Strategies that Permit the Safe Re-Opening of College Campuses 13 (July 7, 2020) (unpublished manuscript), <https://www.medrxiv.org/content/10.1101/2020.07.06.20147702v1.full.pdf> [https://perma.cc/39WL-ZVDU]; A. David Paltiel et al., *Assessment of SARS-CoV-2 Screening Strategies to Permit the Safe Reopening of College Campuses in the United States*, 3 JAMA NETWORK OPEN 3 (July 31, 2020).

¹⁰⁵ See, e.g., Scott A. Travis et al., Providing a Safe, In-Person, Residential College Experience During the COVID-19 Pandemic (Mar. 5, 2021) (unpublished manuscript), <https://www.medrxiv.org/content/10.1101/2021.03.02.21252746v1> [https://perma.cc/2TWT-P6PT]; Davidson H. Hamer et al., Control of COVID-19 Transmission on an Urban University Campus During a Second Wave of the Pandemic (Mar. 2, 2021) (unpublished manuscript), <https://www.medrxiv.org/content/10.1101/2021.02.23.21252319v2> [https://perma.cc/DK5D-GG39].

¹⁰⁶ See generally Matthew T. Bodie & Michael McMahon, *Employee Testing, Tracing, and Disclosure As a Response to the Coronavirus Pandemic*, 64 WASH. U. J.L. & POLY 31 (2021).

¹⁰⁷ See *supra* note 82.

¹⁰⁸ See, e.g., *Barnes v. Ahlman*, 140 S. Ct. 2620 (2020) (staying a preliminary injunction that would have required local California sheriff to implement certain safety measures to protect inmates during the pandemic); *Valentine v. Collier*, 140 S. Ct. 1598 (2020) (denying application to vacate appellate court’s stay of trial judge’s injunction that would have required certain safety measures in Texas prisons); *FDA v. Am. Coll. of Obstetricians & Gynecologists*, 141 S. Ct. 578 (2021) (granting application for stay of trial judge’s order that prison officials continue distributing

But in the light of successful private efforts, on the one hand, and the legislative establishment of new rights, on the other, including rights that had seemed unthinkable before March 2020, two paths into the future come into view. In the first path, private success in regulating communities like universities and workplaces may become a model for the public sphere, where it could be hard to resist further calls for public options. In the second path, private efforts may defuse demands for government action.

The results will unfold in the fullness of time. But the path of privatization already faces substantial resistance.¹⁰⁹ And by most accounts, the increased socialization thus far has significantly mitigated the harms of the pandemic. COVID-19 has illustrated the interdependence of communities. In turn, mass COVID-19 testing and vaccinations have offered Americans an experience of social rights, including the right to basic care, employment security, and housing. Our “breaching experiment” and the consequent reevaluation of our inevitable interdependence may place new emphasis on the value of public provision for years to come.

V. CONCLUSION

All we can really know for now is that COVID-19 has fundamentally shaken the confident alignments of civil liberties and public health that marked late twentieth- and early twenty-first-century public health law. Very recently, leading authorities in the field—the New Sanitarians—exuded an optimistic confidence that these two social values ran together, that we could have our rights and our public health, too. Indeed, the strongest form of the view was that we could only protect public health by protecting rights.

Battling COVID-19 has deeply compromised this confident and even exuberant view. The happy synthesis is in retreat, and the older tragic conception of individual rights has returned front and center. New technologies may allow states to override rights claims with fewer public health costs. Novel rights claims meanwhile are disrupting public health efforts. And waiting in the wings is still another emerging synthesis of rights and public health, one that emphasizes social rights over individual ones. It is too soon to predict the path forward. But it seems sure to be a new one.

RU486, the so-called “abortion pill,” during the pandemic).

¹⁰⁹ Debbie Kaminer, *Discrimination Against Employees Without COVID-19 Antibodies*, N.Y.L.J. (May 4, 2020), <https://www.law.com/newyorklawjournal/2020/05/04/discrimination-against-employees-without-covid-19-antibodies/?slreturn=20210825151005> [<https://perma.cc/GD9Y-DRWM>].