

BLACK LIBERTY IN EMERGENCY

Norrinda Brown

ABSTRACT—COVID-19 pandemic orders were weaponized by state and local governments in Black neighborhoods, often through violent acts of the police. This revealed an intersection of three centuries-old patterns—criminalizing Black movement, quarantining racial minorities in public health crises, and segregation. The geographic borders of the most restrictive pandemic order enforcement were nearly identical to the borders of highly segregated, historically Black neighborhoods.

The right to free movement is fundamental and, as a rule, cannot be impeded by the state. But the jurisprudence around state power in public health emergencies, deriving from the 1905 case *Jacobson v. Massachusetts*, has practically resulted in a public health exception to this general rule. Over the past twenty years, scholars have asserted that deference in this context, including denying due process and suspending judicial review, can lead courts to sustain gross violations of civil rights in emergencies. These scholars' arguments gained traction amongst libertarians and the courts during the COVID-19 pandemic. But scholars and courts alike have failed to sufficiently center race as they update the law of quarantine, despite a four-hundred-year history of racialized quarantines.

This Article seeks to render race visible in our understanding of the nature and scope of quarantines during public health emergencies. The Article makes the claim that COVID-19 pandemic orders and their enforcement schemes are genealogically related to a larger American project of racializing neighborhood borders and constricting Black movement. And it proposes the abolition of carceral responses to public health crises in Black communities, including quarantines, and the reconstruction of liberty to bring Black communities within the sphere of the state's protection in future emergencies.

AUTHOR—Norrinda Brown is an Associate Professor of Law, Fordham University School of Law; J.D., University of Virginia School of Law; B.A., Dartmouth College. I am thankful to the faculties of Fordham University School of Law and Rutgers Law School for their helpful comments. This Article benefited from feedback received at the Decarceration Workshop, Lutie Lytle Writer's Workshops in 2022 and 2023, the 7th Gathering on

Abolition and Slavery in Accra, Ghana, the Richmond Junior Faculty Workshop, and a faculty workshop at Brooklyn Law School. I am also grateful to Bernard Bell, Bennett Capers, Carliss Chatman, Nestor Davidson, Taja-Nia Henderson, Tanya Hernandez, Clare Huntington, Marissa Sow Jackson, Jamelia Morgan, and India Thusi for their invaluable feedback. Dani D’Annunzio, Lea Dyce, Nicholas Gervasi, Sydney Harris, and Liviya James all provided excellent research assistance. And I am grateful to the editors at the *Northwestern University Law Review* for their insightful and thoughtful editing.

INTRODUCTION	692
I. BLACK LOCKDOWN.....	699
A. COVID-19 Emergency Order Proliferation.....	700
B. COVID-19 Emergency Order Enforcement.....	702
II. CRIMINALIZING BLACK MOVEMENT.....	709
A. The Right to Free Movement.....	711
B. The Law’s Imposition on Black Free Movement.....	712
III. RACIALIZING QUARANTINE.....	720
A. Quarantine Jurisprudence and Jacobson.....	721
B. Quarantining Racial Minorities.....	723
IV. CHALLENGING JACOBSON AND DEFERENCE TO STATE ACTION.....	725
A. Critique of Judicial Deference in Emergency.....	725
B. Libertarian Resistance to Jacobson in the COVID-19 Pandemic	730
V. BLACK LIBERTY.....	739
A. Applying Judicial Review.....	740
B. Abolishing Mandatory Quarantine.....	742
CONCLUSION	753

INTRODUCTION

The COVID-19 pandemic saw an intersection of three historical phenomena—criminalizing Black movement, quarantining racial minorities and segregation.¹ Across the country, state and local governments weaponized pandemic stay-at-home orders against Black communities to stifle free movement, often through police violence. In city after city, Blacks

¹ See MICHELLE ALEXANDER, *THE NEW JIM CROW* 4 (2012); see also Linda Poon, *The Racist History of Curfews in America*, BLOOMBERG (June 18, 2020, 3:00 AM), <https://www.bloomberg.com/news/articles/2020-06-18/the-racist-history-of-curfews-in-america> [<https://perma.cc/2WH5-AR8C>] (discussing the use of curfews to restrict Black movement).

were isolated and segregated, stopped and arrested, subjected to fines and fees, and received enhanced sentences for violations of pandemic orders.²

New York City, utilizing the New York Police Department (NYPD), for example, first restricted and then criminalized the movement of thousands of Black New Yorkers for allegedly violating the city's pandemic social distancing orders. A May 2020 report prepared by the Legal Aid Society in New York revealed that Black and Latinx NYPD precincts constituted eighteen of the twenty precincts with the highest rates of social distancing arrests and summonses per 10,000 people, even though slightly less than half (46.2%) of complaints were in those areas.³ Indeed, four out of five precincts receiving the most complaints were white precincts, while four out of five precincts with the most arrests were Black and Latinx precincts.⁴ The evidence continues. The Brooklyn District Attorney's Office found that forty people were arrested in Brooklyn for pandemic order violations between March 17 and May 4, 2020.⁵ Of those, thirty-five were Black, four Hispanic, and one white.⁶ The districts where the most pandemic-order arrests were made were also the districts where New York's notorious stop-and-frisk policies were enforced with the most rigor.⁷

Quarantines in Black neighborhoods stood in contrast to those in majority-white neighborhoods.⁸ For instance, in Park Slope, an affluent neighborhood in Brooklyn, viral videos showed crowds of white citizens picnicking in public parks, in large groups and unmasked.⁹ NYPD officers

² See, e.g., Emilie Bruzelius & Jessica Ho, *NYPD Enforcement of COVID Mandates Reproduced Familiar Pattern of Racial Disparities*, COLUM. MAILMAN SCH. OF PUB. HEALTH (Nov. 12, 2021), <https://www.publichealth.columbia.edu/public-health-now/news/nypd-enforcement-covid-mandates-reproduced-familiar-pattern-racial-disparities> [<https://perma.cc/Y3P3-KQG4>] (showing that New York City neighborhoods with a higher percentage of Black residents saw higher rates of COVID-19-related arrests in the early days of the pandemic).

³ LEGAL AID SOC'Y, *RACIAL DISPARITIES IN NYPD'S COVID-19 POLICING: UNEQUAL ENFORCEMENT OF 311 SOCIAL DISTANCING CALLS 2* (2020), https://legalaidnyc.org/wp-content/uploads/2020/05/LAS_Racial-Disparities-in-NYPDs-COVID-19-Policing_5.20.20_5PM_FINAL.pdf [<https://perma.cc/PS6E-7QLB>].

⁴ *Id.*

⁵ Adam Gabbatt, *Social Distancing: New York Police Arresting Black People at Far Higher Rate*, GUARDIAN (May 8, 2020, 12:43 PM), <https://www.theguardian.com/us-news/2020/may/08/social-distancing-arrests-black-people-new-york-police> [<https://perma.cc/P2RC-Y4ZZ>]; Ashley Southall, *Scrutiny of Social-Distance Policing as 35 of 40 Arrested Are Black*, N.Y. TIMES (Nov. 30, 2020), <https://www.nytimes.com/2020/05/07/nyregion/nypd-social-distancing-race-coronavirus.html> [<https://perma.cc/23GL-ETXF>].

⁶ Gabbatt, *supra* note 5; Southall, *supra* note 5.

⁷ See LEGAL AID SOC'Y, *supra* note 3, at 3–4.

⁸ *Id.* at 1.

⁹ Matt Troutman, *Prospect Park Crowds Draw Ire over Coronavirus Closure Chatter*, PATCH (Mar. 26, 2020, 3:43 PM), <https://patch.com/new-york/prospectheights/prospect-park-crowds-draw-ire-over->

responded by politely requesting that they maintain distance and offering masks to the unmasked.¹⁰

COVID-19 pandemic order enforcement schemes are genealogically related to a larger American project of racializing neighborhoods and constricting Black movement. Indeed, the free movement of Black people outside of designated spaces has been criminalized since prior to the founding of America. Over the course of four centuries, fugitive slave laws, Black codes, sundown laws, vagrancy statutes, curfews, and stop-and-frisk regimes have successively criminalized Black movement as a form of racial and social control.¹¹ Segregation is central to this exercise. Establishing where Black people are not allowed has always required setting out where they *are* allowed and then prohibiting them from traversing these boundaries without a permissible excuse.

During public health emergencies, the movement of Black people and other people of color has been further constrained. On the eve of Emancipation in 1862, when smallpox broke out in Washington, the Freedmen's Bureau blamed freed people for the spread of diseases.¹²

Other racial groups have also been targeted in public health emergencies. As early as 1662, for example, in the town of East Hampton, New York, authorities ordered that “no Indian shall come to towne . . . or be

coronavirus-closure-chatter [https://perma.cc/AK63-G3FU]; Matt Troutman, *Not One Social Distancing Ticket for All of Park Slope: Data*, PATCH (May 12, 2020, 3:27 PM), <https://patch.com/new-york/parkslope/not-one-social-distancing-ticket-all-park-slope-data> [https://perma.cc/MU8D-A4KM] (showing that Park Slope did not see a single arrest for flouting social distancing requirements, unlike communities of color).

¹⁰ Poppy Noor, *A Tale of Two Cities: How New York Police Enforce Social Distancing by the Color of Your Skin*, GUARDIAN (May 4, 2020, 1:55 PM), <https://www.theguardian.com/world/2020/may/04/coronavirus-new-york-police-enforce-social-distancing> [https://perma.cc/6PZX-YGJC] (“[NYPD] officers hand[ed] out masks to white sunbathers, while another video shows an officer punching a person of color and sitting on him following a dispute about social distancing.”).

¹¹ See ALEXANDER, *supra* note 1, at 16; see also Poon, *supra* note 1 (discussing how curfews have been used “largely to control African Americans and restrict their movements”).

¹² JOHN FABIAN WITT, AMERICAN CONTAGIONS: EPIDEMICS AND THE LAW FROM SMALLPOX TO COVID-19, at 44 (2020). (“At least one-quarter of the four million former slaves got sick and died between 1862 and 1870.”) Of those, at least 60,000, but likely more, died of smallpox. Historians of the Civil War attribute the outbreak to freed former slaves traveling for work. Tallies of a smaller white population of smallpox victims were kept lackadaisically and eventually not at all, which one historian, Jim Downs, argues is evidence that the outbreak was seen as the “Black epidemic.” Jennifer Schuessler, *Smallpox Took Huge Toll on Emancipated Slaves, Historian Writes*, SEATTLE TIMES (June 16, 2021, 8:01 AM), <https://www.seattletimes.com/nation-world/smallpox-took-huge-toll-on-emancipated-slaves-historian-writes/> [https://perma.cc/H67R-F2U5] (referencing JIM DOWNS, SICK FROM FREEDOM 15 (2012)).

whipped until they be free of the smallpoxe.”¹³ In March 1900, a suspected death from bubonic plague in San Francisco led to the immediate lockdown of the city’s Chinatown.¹⁴ In 1924, again during an outbreak of the bubonic plague, this time in Los Angeles, city officials roped off Mexican neighborhoods and forbade entrance or exit.¹⁵

Before the coronavirus pandemic, courts were largely deferential to state actions in quarantine cases, often citing the U.S. Supreme Court’s 1905 decision *Jacobson v. Massachusetts*.¹⁶ Courts almost universally upheld quarantines under police powers, failing to require states to provide due process and suspending normal standards of judicial review.¹⁷ COVID-19 was different. Over 2,000 lawsuits were filed nationwide alleging civil rights abuses under emergency orders, including for violations of the Fourteenth Amendment.¹⁸ When faced with legal challenges to emergency orders, some

¹³ Justin Fox, *The Founding Fathers Would’ve Been Pro-Face Mask*, BLOOMBERG (July 18, 2020), <https://www.bnnbloomberg.ca/the-founding-fathers-would-ve-been-pro-face-mask-1.1467314> [<https://perma.cc/ULZA-Q3JZ>].

¹⁴ *Plague Scare in 'Frisco: Chinatown Quarantined Because of a Suspicious Case*, WASH. POST, Mar. 8, 1900, at 9.

¹⁵ *Three Plague Deaths and Four New Cases in Los Angeles as Epidemic Revives Again*, N.Y. TIMES, Nov. 7, 1924, at 21.

¹⁶ *E.g.*, *Whitlow v. California*, 203 F. Supp. 3d 1079, 1083 (S.D. Cal. 2016) (“For more than 100 years, the United States Supreme Court has upheld the right of the States to enact and enforce [public health] laws . . .” (citing *Jacobson v. Massachusetts*, 197 U.S. 11, 27 (1905))); *Phillips v. City of New York*, 775 F.3d 538, 542 (2d Cir. 2015) (finding that *Jacobson* foreclosed the argument that a New York statute requiring vaccination of schoolchildren violated the Fourteenth Amendment’s Due Process Clause); *Caviezel v. Great Neck Pub. Sch.*, 500 F. App’x 16, 19 (2d Cir. 2012) (rejecting plaintiff’s due process claims and noting that the Supreme Court continues to cite *Jacobson* approvingly).

¹⁷ Mark A. Rothstein, *From SARS to Ebola: Legal and Ethical Considerations for Modern Quarantine*, 12 IND. HEALTH L. REV. 227, 246 (2015).

¹⁸ Rita Zeidner, *Avoid Pandemic-Related Litigation Risks*, SHRM (Apr. 24, 2021), <https://www.shrm.org/hr-today/news/all-things-work/pages/avoid-pandemic-related-litigation-risks.aspx> [<https://perma.cc/823B-9TDJ>]; *see, e.g.*, *State v. El Paso County*, 618 S.W.3d 812, 826 (Tex. App. 2020) (concluding that El Paso County could not impose more burdensome COVID-19 restrictions beyond those imposed statewide); *Wis. Legislature v. Palm*, 942 N.W.2d 900, 918 (Wis. 2020) (holding unlawful an executive order confining people to their homes, restricting travel, and closing businesses); *Free Minn. Small Bus. Coal. v. Walz*, No. A20-0641, 2020 WL 2745414, at *1 (Minn. Ct. App. May 26, 2020) (dismissing, without addressing the merits, a petition alleging that a COVID-19-related executive order violated equal protection rights); *State ex rel. Schmitt v. Page*, No. 4:21-CV-00948-SRC, 2021 WL 3286787, at *5 (E.D. Mo. Aug. 1, 2021) (declining to exercise jurisdiction over state law issues regarding Missouri’s mask mandate); First Amended Complaint at 3, *Rock House Fitness Inc. v. Acton*, No. 20-CV-000631, 2020 WL 3628855 (Ohio Com. Pl. May 11, 2020) (seeking a declaration of unconstitutionality as to mandated closure of gyms); Complaint at 2, *Linthicum v. Brown*, No. 20-CV-37213, 2020 WL 6202425 (Or. Cir. Oct. 16, 2020) (alleging that the emergency COVID-19 powers given to the Oregon governor violated the state constitution); *County of Butler v. Wolf*, 486 F. Supp. 3d 883, 891 (W.D. Pa. 2020) (holding that the business closure and stay-at-home orders issued in Pennsylvania violated the Fourteenth Amendment Due Process Clause); *Martinko v. Whitmer*, 465 F. Supp. 3d 774, 777 (E.D. Mich. 2020) (dismissing a suit related to Michigan’s stay-at-home order because the order had

states repealed the laws in question.¹⁹ Of those cases that were heard in court, several found a sympathetic judiciary, declining to defer to the states and holding that pandemic emergency orders violated citizens' fundamental rights, including the right to move freely.²⁰

Despite a shift in the judiciary's response to pandemic emergency orders, racial disparities related to COVID-19 enforcement persisted in courts. In the one lawsuit explicitly challenging disparate enforcement of pandemic orders in Black neighborhoods, the federal district court deferred to New York City and upheld the limits on the free movement of thousands of people of color.²¹ In the early months of the COVID-19 pandemic, Black and Latinx plaintiffs in *Floyd v. City of New York* filed an injunction to stop the NYPD from violently enforcing emergency orders, including orders to mask, social distance, and stay at home.²² Citing *Jacobson*, New York City argued that it was owed deference in the public health emergency, which the court granted.²³ The *Floyd* court's decision permitted the state to deny—even using violence—the right to free movement for entire Black communities in the largest city in the country in the longest public health emergency in our nation's history.²⁴ In some Black neighborhoods during the pandemic, public

been lifted). Additionally, large protests were held against mandates in areas of the country. See Lilly Nguyen, *Orange County Breaks 100,000 COVID-19 Cases as Demonstrators Protest to Reopen Businesses*, DAILY PILOT (Dec. 16, 2020, 9:47 AM), <https://www.latimes.com/socal/daily-pilot/news/story/2020-12-14/orange-county-breaks-100-000-covid-19-cases-as-demonstrators-protest-to-reopen-businesses> [<https://perma.cc/ED5H-PGFZ>].

¹⁹ In Michigan, for example, Governor Gretchen Whitmer was sued by the Michigan House of Representatives and the Michigan Senate on May 6, 2020, for exceeding her authority with respect to her stay-at-home order. The Court of Claims judge ruled against the legislators on May 21, 2020. In October 2020, the Michigan Supreme Court ruled that Governor Whitmer had no authority to extend the stay-at-home order beyond April 30, 2020. The order had already been lifted by the Governor on June 1, 2020. Dave Alsup & Susannah Cullinane, *Michigan Supreme Court Strikes Down Governor's Emergency COVID Powers*, CNN (Oct. 2, 2020, 9:37 PM), <https://www.cnn.com/2020/10/02/politics/michigan-supreme-court-whitmer-covid-emergency/index.html> [<https://perma.cc/5LZ6-Q8C5>].

²⁰ See, e.g., *id.* See generally *Lawsuits About State Actions and Policies in Response to the Coronavirus (COVID-19) Pandemic*, BALLOTPEDIA, [https://ballotpedia.org/Lawsuits_about_state_actions_and_policies_in_response_to_the_coronavirus_\(COVID-19\)_pandemic](https://ballotpedia.org/Lawsuits_about_state_actions_and_policies_in_response_to_the_coronavirus_(COVID-19)_pandemic) [<https://perma.cc/8CK3-VLCY>].

²¹ See *Floyd v. City of New York*, No. 08 Civ. 1034 (AT), 2020 WL 3819566, at *1 (S.D.N.Y. July 8, 2020). The court in the case had previously ruled that New York's stop-and-frisk policies were racially disparate and unconstitutional. See *Floyd v. City of New York*, 959 F. Supp. 2d 540, 562 (S.D.N.Y. 2013).

²² 2020 WL 3819566, at *1.

²³ Defendant's Memorandum of Law Opposing Plaintiffs' Motion for Emergency Relief at 42, *Floyd v. City of New York*, No. 08 Civ. 1034 (AT) (S.D.N.Y. June 9, 2020), ECF No. 771 (“[C]ourts have long recognized that states have broad authority to utilize police powers in the event of a public health emergency.” (citing *Jacobson v. Massachusetts*, 197 U.S. 11, 26 (1905))).

²⁴ Viral videos circulated in spring 2020 revealed the extreme levels of violence that NYPD officers were utilizing against Black people to enforce pandemic orders. These videos showed officers engaged

safety policies from earlier eras—namely stop and frisk—shapeshifted into public health policies to the same effect.²⁵ The criminalization of Black people’s free movement by a heavy-handed police state during the COVID-19 pandemic revealed holes in the fabric of Black citizenship.²⁶

in takedowns, slapping and punching, threatening with batons, and sitting on top of citizens alleged to have violated pandemic orders by not wearing a mask, failing to cover their nose with their mask, or failing to stand six feet apart from others while outdoors. *See, e.g., Coronavirus News: Video of NYPD Arrest During Social Distancing Enforcement Sparks Outcry*, ABC 7 EYEWITNESS NEWS (May 4, 2020), <https://abc7ny.com/nypd-violent-arrest-east-village-caught-on-camera-legal-aid/6147631/> [<https://perma.cc/Z3AQ-DSNA>]; Josiah Bates, ‘We Cannot Police Our Way Out of a Pandemic.’ *Experts, Police Union Say NYPD Should Not Be Enforcing Social Distance Rules Amid COVID-19*, TIME (May 7, 2020, 5:03 PM), <https://time.com/5832403/nypd-pandemic-police-social-distancing-arrests/> [<https://perma.cc/9AZ5-AB53>]. One of these viral videos was of Kaleemah Rozier being taken down by multiple NYPD officers in the Atlantic Avenue subway station while she was wearing a mask. *See Nicole Johnson, NYPD Investigates Viral Subway Station Social Distancing Arrest*, PIX 11 (May 14, 2020, 7:16 PM), <https://pix11.com/news/coronavirus/nypd-investigates-viral-subway-station-social-distancing-arrest/> [<https://perma.cc/PY2W-BMKH>]. Kaleemah’s arrest was referenced by the plaintiffs in a motion supporting their position for the *Floyd* case. Plaintiffs’ Memorandum of Law in Support of Their Motion for Emergency Relief at 20, *Floyd v. City of New York*, No. 08 Civ. 1034 (S.D.N.Y. May 26, 2020), ECF No. 760 (citing LEGAL AID SOC’Y, *supra* note 3, at 2).

²⁵ The concern about shapeshifting extends beyond the spread of infectious diseases to other types of emergencies. One cannot help but also think about natural disasters and climate change here. While natural disasters do not present the same durational challenges now, climate change continues to impact the frequency and duration of these events. For example, Derecka Purnell writes with respect to the warming of the planet in *Becoming Abolitionists: Police, Protests, and the Pursuit of Freedom*, where she recounts her increasingly hot St. Louis summers during childhood. DERECKA PURNELL, *BECOMING ABOLITIONISTS: POLICE, PROTESTS, AND THE PURSUIT OF FREEDOM* 239 (2021) (“Racial capitalism relegated Black people to poor, overcrowded housing. We would go outside for space, air, and ironically, privacy. Police patrolled our relief using laws against loitering, trespass, and idleness. So back in the house we’d go until we needed temporary relief again.”).

²⁶ *See* Ryan C. Williams, *Originalism and the Other Desegregation Decision*, 99 VA. L. REV. 493, 600 (2013) (noting that the Fourteenth Amendment granted Blacks citizenship, the lines of which are still being drawn). The evolution and contours of Black citizenship have been extensively written on by other scholars. For example, the chapter on citizenship in *The 1619 Project* adds to this conversation by describing the role Black activists played in pursuing Black citizenship for six decades of national colored conventions. Beginning in Philadelphia in 1830 until the last convention in Cincinnati, Ohio in 1893, Black activists (having been excluded from political parties, statehouses, and Congress) ideated, developed strategies, and exhibited capacity for full citizenship. Martha S. Jones, *Citizenship*, in *THE 1619 PROJECT: A NEW ORIGIN STORY* 219–48 (Nikole Hannah-Jones, Caitlin Roper, Ilena Silverman & Jake Silverstein eds., 2021). At that first convention, the delegates, already busy with advancing the cause of abolition, defined an agenda “with a focus on establishing their citizenship,” a question none of the country’s white political elite, including the prewar Congress itself, was willing to be clear on. *Id.* at 220. Chief Justice Roger B. Taney’s decision in *Dred Scott v. Sandford* “dealt a blow to the Black American claim to citizenship: Taney ruled that Scott had no right to sue because as an enslaved person, he was not a citizen.” *Id.* at 229. Of course, Taney went further to say that “[n]o Black American was intended to be a citizen of the United States by the framers.” *Id.* The decision was not unanimous, and Justices Benjamin Robbins Curtis and John McLean’s dissents became a guidepost in subsequent months for lower federal courts and state courts to craft exceptions to this general rule. *Id.* at 229–30. Black activists, including Frederick Douglass, were undeterred and took every opportunity to condemn Chief Justice Taney’s decision. Douglass deemed Chief Justice Taney’s ruling “an open, glaring, and scandalous tissue of lies.”

By interrogating state action taken to limit Black mobility in the pandemic, this Article seeks to render race visible in our understanding of the nature and scope of quarantine enforcement. It also seeks to interject the subject of race into scholarly discussions, calling for heightened scrutiny of state actions in public health emergencies. For two decades, an increasing number of scholars have asserted that courts' extreme deference to state action in emergencies, including by denying due process and suspending judicial review, can lead them to "sustain gross violations of civil rights because they are either unwilling or unable to meaningfully look behind the government's purported claims of exigency."²⁷ Some courts that struck down COVID-19 emergency orders as invalid for violating fundamental rights explicitly relied on this literature.²⁸ That scholars have not sufficiently centered race or considered the impact that racially disparate quarantine enforcement should have in their analyses—either of due process or judicial review—leaves their critique of quarantine law undertheorized to the detriment of Black communities.²⁹

This Article contends that the use of police force to enclose Black people in geographically isolated and segregated neighborhoods violates their fundamental rights, including the right to move freely, even in a public health emergency. The Article maintains that the normalization of forceful and disparate enclosure of Black citizens in the COVID-19 pandemic is a canary in the coal mine—it portends an even more expansive use of violence to impose racial borders.³⁰ This normalization allows such violence to

arguing that "Man's right to liberty is self-evident." *Id.* at 231. Black activists never abandoned their claim to be U.S. citizens. Even after the Fourteenth Amendment was passed, Black activists pursued clarity to the meaning of the particular brand of citizenship that they believed was their birthright. In the short time since Emancipation, convention-goers had already become veterans of struggles over the contours of Black citizenship, including with regard to land ownership, labor conditions, family autonomy, mobility, public education, and armed self-defense.

²⁷ See Lindsay F. Wiley & Stephen I. Vladeck, *Coronavirus, Civil Liberties, and the Courts: The Case Against "Suspending" Judicial Review*, 133 HARV. L. REV. F. 179, 183 (2020).

²⁸ See, e.g., *Bayley's Campground Inc. v. Mills*, 463 F. Supp. 3d 22, 31–32 (D. Me. 2020) (citing Wiley & Vladeck, *supra* note 27) (propositioning that *Jacobson* should not be interpreted as permitting the "suspension" of traditional levels of constitutional scrutiny in reviewing challenges to COVID-19 mitigation measures).

²⁹ See, e.g., Wiley & Vladeck, *supra* note 27 (using failure to mention race while accessing abortions during the coronavirus pandemic, individual detentions during the Ebola epidemic, and imprisonment at Guantanamo as case studies to argue that the exceptional temporary loss of some constitutional rights during a transitory crisis—as articulated in *Jacobson*—has been allowed by the courts to swallow the rule that certain rights simply cannot be abridged).

³⁰ E. Tendayi Achiume, *Racial Borders*, 110 GEO. L.J. 445, 449 (2022) (using the term "racial borders" in the immigration context to refer to "territorial and political border regimes that disparately curtail movement (mobility) and political incorporation (membership) based on race and sustain international migration and mobility as racial privileges" (citing Devon W. Carbado, *Racial Naturalization*, 57 AM. Q. 633, 634, 636 (2005))).

proliferate, with the increased frequency of public health emergencies, including other pandemics, and weather-related catastrophes such as tropical storms and extreme heat, to the detriment of Black communities.

This Article considers the application of a heightened standard by courts when reviewing state action in emergency, including the enforcement of mandatory quarantines that disparately target Black communities, and queries whether mandatory quarantines should be abolished altogether instead. Beyond exploring the abolishment of quarantine, the Article advances the claim that protection for Black communities during future public health emergencies requires the equitable distribution of resources, such as housing, in order to interrupt the spread of communicable diseases.

This Article proceeds in five Parts. In Part I, the Article sets out the components of pandemic order enforcement: isolation; stops and arrests; fines and fees; and charge enhancement. Part II briefly summarizes the history of criminalizing Black free movement in the United States, beginning as soon as enslaved Africans were brought to this country, to establish the genealogical connection between this centuries-old project and pandemic orders. Part III describes the equally long history of constricting the movement of Black people and other people of color during public health emergencies, dating from before Emancipation, to add further evidence of how state actors have sought to use public health crises to facilitate the racial and social control of minoritized groups. Part IV reviews the scholarly literature critiquing judicial deference to state action in public health crises and notes the absence of an analysis of race despite a four-century-long history of racialized quarantines. Part IV also identifies courts' revised thinking regarding judicial deference to state actions in public health emergencies during the COVID-19 pandemic. And, finally, Part V calls for the abolishment of mandatory quarantines given their unequal impact on Black communities. Instead, the Article urges the substitution of carceral measures with distributive and environmental justice to protect Black people in future public health crises.

I. BLACK LOCKDOWN

COVID-19 pandemic orders had a symbiotic relationship with systemic segregation.³¹ The edicts to stay at home that targeted Black communities reified long-established housing patterns, including the geographic isolation

³¹ See generally Alexandre White, Lingxin Haob, Xiao Yub & Roland J. Thorpe Jr., *Residential Racial Segregation and Social Distancing in the United States During COVID-19*, 35 *ECLINICAL MED.* 1, 2, 7 (2021) (finding that higher countywide levels of segregation were associated with decreased mobility under pandemic orders and that the relationship between segregation and mobility dissipated under reopening orders).

of Blacks in highly segregated, heavily policed neighborhoods. Twin secondary effects of these stay-at-home orders were to *reinforce* and *prevent* breaches of these established boundaries.³² This Part reviews the proliferation of pandemic laws and the schemes that enforced them.

A. COVID-19 Emergency Order Proliferation

Quarantine was a widely touted mitigation strategy in the early days of the COVID-19 pandemic. Between March 1 and May 31, 2020, forty-two states and territories issued mandatory stay-at-home orders, which affected 2,355 (73%) of 3,233 counties in the United States for some period of time.³³ Put differently, the early days of the COVID-19 pandemic forced the vast majority of citizens to cede their right to free movement in the name of public health.

But pandemic orders were not uniform. Under their police powers, each state had authority to issue pandemic orders with unique parameters.³⁴ Some states issued nonmandatory orders for short periods.³⁵ Others issued mandatory orders for longer periods.³⁶ Enforcement was discretionary and varied wildly.

Puerto Rico offers one example of how pandemic orders rapidly evolved in the early days of the pandemic. On March 15, 2020, Puerto Rico was the first territory to issue a stay-at-home order.³⁷ Puerto Rico's Governor Wanda Vazquez-Garced's initial Executive Order 2020-023 forbade residents from traveling or walking on roads except for specific limited purposes such as medical appointments and to acquire food and medication.³⁸ Fifteen days later, on March 30, 2020, Governor Vazquez-Garced issued a second, more stringent stay-at-home order, which called for total lockdown until April 12, 2020.³⁹ Section 1 of Executive Order 2020-029 established a

³² See DAVID CORREIA & TYLER WALL, POLICE: A FIELD GUIDE (2022) (noting that curfews are at once a police ordinance and a carceral formation); see also David Correia & Tyler Wall, *The Real Definition of the Word "Curfew,"* VERSO (June 2, 2020), https://www.versobooks.com/blogs/news/4733-the-real-definition-of-the-word-curfew?_pos=1&_sid=210041a81&_ss=r [https://perma.cc/H85T-67WB].

³³ See Amanda Moreland et al., *Timing of State and Territorial COVID-19 Stay-at-Home Orders and Changes in Population Movement — United States, March 1–May 31, 2020*, 69 MORBIDITY & MORTALITY WKLY. REP. 1198, 1198–99 (2020).

³⁴ *Id.* at 1198.

³⁵ See *id.* at 1199.

³⁶ See *id.*

³⁷ *Id.*

³⁸ P.R. Exec. Order No. 2020-023 (Mar. 15, 2020), <https://www.fmcsa.dot.gov/sites/fmcsa.dot.gov/files/2020-03/PR%20DeclarationofEmergency.pdf> [https://perma.cc/7Q3J-C2D3].

³⁹ P.R. Exec. Order No. 2020-029 (Mar. 30, 2020), <https://www.littler.com/files/oe-2020-029.pdf> [https://perma.cc/Z2LP-G88B].

“*lockdown*” in Puerto Rico and instructed “[e]very citizen on the island of Puerto Rico . . . to remain at their place of residence or shelter 24 hours a day, 7 days a week.”⁴⁰ The only exemptions were for medical treatment, to acquire food or essential supplies, and for emergency financial business.⁴¹ The use of motor vehicles was also strictly prohibited in most cases, as well as walking and traveling on the roads.⁴² Violators of Puerto Rico’s lockdown could be subject to up to six months in prison and a fine of up to \$5,000.⁴³

Pandemic orders amongst the states followed a somewhat similar trajectory. On March 19, 2020, California was the first state to issue a stay-at-home order.⁴⁴ California’s order called for “all individuals living in the State of California to stay home or at their place of residence except as needed to maintain continuity of operations of the federal critical infrastructure sectors.”⁴⁵ California’s order notably called for the supply chain to continue so that Californians would have access to necessities such as “food, prescriptions, and healthcare,” effectively creating an exception for workers in those industries.⁴⁶ The other states with mandatory orders were Hawaii, Michigan, New Jersey, and New York.⁴⁷

Facial challenges to stay-at-home orders came swiftly from some parts of the country. Protests opposing statewide stay-at-home orders were held in thirteen states during the first wave of the pandemic—Colorado, California, Illinois, Florida, Kentucky, Michigan, Minnesota, North Carolina, Ohio, Tennessee, Utah, Virginia, and Washington—even though the stay-at-home orders in most of those states were only advisory, not mandatory.⁴⁸ By May

⁴⁰ *Id.* (emphasis added).

⁴¹ *Id.*

⁴² *Id.*

⁴³ Edmy Ayla & Patricia Mazzei, *Puerto Rico Orders Coronavirus Lockdown. Violators Could Be Fined.*, N.Y. TIMES (Mar. 15, 2020), <https://www.nytimes.com/2020/03/15/us/coronavirus-puerto-rico.html> [https://perma.cc/AE26-9N5R].

⁴⁴ See Moreland et al., *supra* note 35, at 1199.

⁴⁵ Cal. Exec. Order No. N-33-20 (Mar. 19, 2020), <https://covid19.ca.gov/img/Executive-Order-N-33-20.pdf> [https://perma.cc/NZE9-WA5V].

⁴⁶ *Id.*

⁴⁷ Haw. Exec. Order No. 20-06 (Sixth Supplementary Proclamation) (Apr. 27, 2020), <https://dod.hawaii.gov/hiema/sixth-supplementary-proclamation/> [https://perma.cc/HEE3-UMGRN]; Mich. Exec. Order No. 2020-21 (Mar. 23, 2020), <https://www.michigan.gov/whitmer/news/state-orders-and-directives/2020/03/23/executive-order-2020-21> [https://perma.cc/F3XX-GWC9]; N.J. Exec. Order No. 107 (Mar. 21, 2020), <https://nj.gov/infobank/eo/056murphy/pdf/EO-107.pdf> [https://perma.cc/9JG7-MG55]; N.Y. Exec. Order No. 202.6 (Mar. 18, 2020), <https://www.governor.ny.gov/sites/default/files/atoms/files/EO202.6.pdf> [https://perma.cc/J39H-VUMD].

⁴⁸ Dakin Andone, *Protests Are Popping Up Across the US Over Stay-at-Home Restrictions*, CNN (Apr. 17, 2020, 12:44 PM), <https://www.cnn.com/2020/04/16/us/protests-coronavirus-stay-home-orders/>

29, 2020, lawsuits challenging the constitutionality of state stay-at-home orders and other social distancing measures had been filed in California, Illinois, Kansas, Kentucky, Maryland, Mississippi, New Mexico, North Carolina, Oregon, Pennsylvania, and Wisconsin.⁴⁹

For example, in the California case *Armstrong v. Newsom*, the plaintiff filed a class action complaint alleging that the state's stay-at-home order "confined" him and others similarly situated to their homes, which constituted a detention in violation of the Fourteenth Amendment.⁵⁰ Three Michigan residents filed a lawsuit against their governor in *Martinko v. Whitmer*, alleging that Governor Gretchen Whitmer's pandemic-related executive orders, including the one governing mandatory quarantine, infringed upon their constitutional rights, including their right to move.⁵¹ Michigan rescinded its order, rendering the case moot, before the court could decide the merits.⁵² By May 31, 2020, five of the states where there were public protests ended their stay-at-home orders altogether.⁵³

B. COVID-19 Emergency Order Enforcement

Enforcement of stay-at-home orders generally included: (1) isolation, (2) stops and arrests, (3) fines, and (4) charge enhancements.⁵⁴ Once one appreciates which communities are more likely to be subject to pandemic order enforcement, this enforcement scheme appears consistent with the disparate treatment of Blacks at every stage of the criminal justice system, both generally and over time.

index.html [https://perma.cc/LDK4-NE9B]; Bill Hutchinson, *Protests Against Coronavirus 'Stay-at-Home' Orders Spread Across the Country*, ABC NEWS (Apr. 20, 2020, 3:40 PM), <https://abcnews.go.com/US/protests-coronavirus-stay-home-orders-spread-country/story?id=70242988> [https://perma.cc/R47R-LURY]; Meredith Deliso, *Residents Protest Coronavirus Stay-at-Home Orders in 5 States*, ABC NEWS (Apr. 19, 2020, 6:12 PM), <https://abcnews.go.com/US/residents-protest-coronavirus-stay-home-orders-states/story?id=70233220> [https://perma.cc/7J69-7BGC].

⁴⁹ See Laurie Sobel & MaryBeth Musumeci, *Litigation Challenging Mandatory Stay at Home and Other Social Distancing Measures*, KAISER FAM. FOUND. (June 5, 2020), <https://www.kff.org/report-section/litigation-challenging-mandatory-stay-at-home-and-other-social-distancing-measures-table/> [https://perma.cc/ER9G-TTJS].

⁵⁰ No. CV 20-3745, 2020 WL 5585053, at *3 (C.D. Cal. Aug. 8, 2020), *aff'd*, No. 21-55060, 2021 WL 6101260 (9th Cir. Dec. 21, 2021), *cert. denied*, 143 S. Ct. 95 (2022).

⁵¹ 465 F. Supp. 3d 774, 775–76 (E.D. Mich. June 5, 2020).

⁵² *Id.* at 777.

⁵³ See Deliso, *supra* note 48; Moreland et al., *supra* note 35, at 1200.

⁵⁴ See PASCAL EMMER, WOODS ERVIN, DERECKA PURNELL, ANDREA J. RITCHIE & TIFFANY WANG, UNMASKED: IMPACTS OF PANDEMIC POLICING 29–30, 40 (2020), <https://crhub.wpenginepowered.com/wp-content/uploads/2020/12/Unmasked.pdf> [https://perma.cc/RK6K-RBPR].

1. Isolation

Confinement is the defining characteristic of quarantine. Over the course of the pandemic, state and local governments across the country relied on some degree of confinement to address the pandemic. Enforcement of confinement was particularly harsh in Black communities.

In Newark, New Jersey, for example, when there were just nine known coronavirus cases, Mayor Ras Baraka “locked down” three discrete areas of the city that contained several public housing developments.⁵⁵ Videos surfaced on social media showing Newark police car caravans patrolling the locked-down areas, blaring sirens and blasting bullhorn statements warning residents to stay inside.⁵⁶ Three weeks later, the entire city of Newark went into lockdown. And three adjacent Black cities—Orange, East Orange, and Irvington—joined in what they dubbed “Operation Lockdown.”⁵⁷ Each of these four cities later instituted “Silent Mondays,” during which it was “strongly recommend[ed]” that all residents stay at home completely and not leave the house even for essential items.⁵⁸ All four cities involved in Operation Lockdown and Silent Mondays are cities in which minority groups make up the majority of the population—so-called majority–minority cities.⁵⁹ And all the towns surrounding them are white. This created an inner

⁵⁵ Deborah Barfield Berry & Kameel Stanley, *In New Jersey's Most Segregated County, Racism and Coronavirus Made a 'Vicious Circle,'* USA TODAY (Oct. 12, 2020, 7:46 PM), <https://www.usatoday.com/in-depth/news/nation/2020/10/12/covid-segregation-killing-black-americans-new-jersey/5798587002/> [https://perma.cc/XLX4-LZQM].

⁵⁶ See, e.g., Rodrigo Torrejon & Rebecca Panico, *Newark Police Officer Under Investigation over Video Showing Him Repeatedly Punching Man*, NJ.COM (May 14, 2020, 10:33 AM), <https://www.nj.com/essex/2020/05/newark-police-officer-under-investigation-over-video-showing-him-repeatedly-punching-man.html> [https://perma.cc/KG7U-S4JA].

⁵⁷ Eric Kiefer, *Coronavirus 'Lockdown' in Newark, Irvington, Orange, East Orange*, PATCH (Apr. 1, 2020, 9:59 AM), <https://patch.com/new-jersey/newarknj/massive-coronavirus-lockdown-4-essex-county-cities> [https://perma.cc/944W-Y6UP].

⁵⁸ *Works in Progress Group #10 Racial Justice: Policing & Political Community*, ASS'N OF AM. L. SCHS. (Apr. 30, 2021), https://memberaccess.aals.org/eweb/DynamicPage.aspx?webcode=SesDetails&ses_key=8656faa4-8dbb-43b3-a527-9549db241160 [https://perma.cc/7UAU-7V8C].

⁵⁹ See Katharine Nelson, *Housing Gaps in Cities of Color: Affordability Trends in Newark's Inner-Ring Suburbs of Irvington, Orange and East Orange*, RUTGERS CTR. ON L., INEQ. & METRO. EQUITY (Nov. 12, 2021), <https://www.clime.rutgers.edu/publications-filtered/housing-gaps-in-cities-of-color-affordability-trends-in-newarks-inner-ring-suburbs-of-irvington-orange-and-east-orange> [https://perma.cc/PW4P-HMYJ] (“Orange, East Orange, and Irvington are Black working-class suburban communities.”). The mayors of all of these cities are also Black, highlighting the role Black leadership plays in the maintenance of boundaries delineating highly segregated Black neighborhoods in and out of public health emergencies.

core that was inhabited by Blacks who were locked down, with freely moving whites in a ring around them.⁶⁰

Many white hotspots in New Jersey did not implement mandatory quarantine orders, and thus were unable to lessen the impact of COVID-19 to the same degree. At the start of the coronavirus pandemic in New Jersey, Bergen County—not Essex, where Newark is located—was the epicenter of the virus.⁶¹ On March 26, Teaneck had 213 cases when Newark, with over seven times the population, had 155 cases.⁶² Teaneck never went into a full lockdown, while Newark, Orange, East Orange, and Irvington were gradually locked down and ultimately cut off from essential services altogether.⁶³ At the start of the second wave of the pandemic in fall 2020, Lakewood in Ocean County was the site of one of worst outbreaks of the pandemic.⁶⁴ The population of Lakewood is heavily white and Jewish.⁶⁵ When faced with a spike in COVID-19 cases linked to the attendance of religious services, funerals, and weddings, state and local government officials worked with religious and community partners to engage in a public education campaign to reduce infection rates and ensure that the protected class—a religious group—was not disparately and negatively impacted.⁶⁶ New Jersey state officials employed a community-centered model in Lakewood while simultaneously allowing Black residents in Newark (where

⁶⁰ This was arguably the result of “[t]he classic pattern of a black core surround[ed] by a white ring [that] persisted throughout the 1970s.” See generally DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID* 67 (1993).

⁶¹ Daniel Israel, *Bergen County Surpasses Hudson County for Most COVID-19 Cases*, HUDSON REP. (June 11, 2020), <https://hudsonreporter.com/2020/06/11/bergen-county-surpasses-hudson-county-for-most-covid-19-cases/> [https://perma.cc/DM87-X2ZA].

⁶² *COVID-19 Update: Bergen County as of 6:00 PM Thursday, March 26, 2020*, BERGEN CNTY., N.J. (Mar. 26, 2020, 6:00 PM), <https://www.co.bergen.nj.us/component/content/article?id=174:covid-19-case-total-march-26-2020&Itemid=783> [https://perma.cc/W3GF-4J7P]; *March 26, 2020 Coronavirus (COVID-19) Daily Update Key Points*, CITY OF NEWARK, <https://www.newarknj.gov/news/march-26-2020-coronavirus-covid-19-daily-update-key-points> [https://perma.cc/8JXR-Y5RV].

⁶³ *3 Municipalities Join Newark Lockdown; Cops Issuing Summonses*, FOX 5 N.Y. (Mar. 31, 2020, 7:01 PM), <https://www.fox5ny.com/news/3-municipalities-join-newark-lockdown-cops-issuing-summonses> [https://perma.cc/NET7-T7GF].

⁶⁴ Alex Napoliello & Brent Johnson, *'We Are Anticipating a Second Wave' as New Coronavirus Cases Spike to 4-Month High, N.J. Health Officials Says*, NJ.COM (Oct. 9, 2020, 7:38 PM), <https://www.nj.com/coronavirus/2020/10/we-are-anticipating-a-second-wave-as-new-coronavirus-cases-spike-to-4-month-high-nj-health-officials-says.html> [https://perma.cc/NF2L-FMLM].

⁶⁵ Andrew S. Lewis, *In NJ, Lakewood Tops State for Rate of COVID-19 Infections*, NJ SPOTLIGHT NEWS (Oct. 19, 2020), <https://www.njspotlightnews.org/2020/10/whats-driving-covid-19-spike-lakewood-ocean-county-orthodox-jewish-community-fears/> [https://perma.cc/3CS2-6XTP].

⁶⁶ *Id.*; Daniel Nee, *Murphy Meets with Ocean County, Orthodox Jewish Leaders over Lakewood COVID-19 Outbreak*, SHOREBEAT (Oct. 2, 2020), <https://brick.shorebeat.com/2020/10/murphy-meets-with-ocean-county-orthodox-jewish-leaders-over-lakewood-covid-19-outbreak/> [https://perma.cc/T6ZF-LT65].

the rate of COVID-19 was lower) to be prohibited from leaving the house altogether or risk arrest.⁶⁷

In Chicago, police officers were stationed on street corners on the majority-Black West Side and required residents to show identification before entering their own neighborhoods.⁶⁸ A spokesperson for the Chicago Police Department (CPD) said that the move was designed to reduce criminal loitering and enforce the stay-at-home order.⁶⁹ But CPD did not implement similar requirements in other areas of the city.⁷⁰

During New York City's second wave of COVID-19, Mayor Bill de Blasio adopted more stringent restrictions in twenty "hard-hit areas" throughout Brooklyn and Queens.⁷¹ In nine of the areas, de Blasio closed all schools and nonessential businesses in an effort to keep citizens home.⁷² Several of the targeted areas covered Black and brown neighborhoods.⁷³

2. Stops and Arrests

Law enforcement officers stopped and arrested Blacks in connection with pandemic-order enforcement. And in some cities, these stops and arrests were employed in the kind of disparate manner that had been held to be unconstitutional in contexts outside of a public health emergency. In San Diego, for example, 24% of people arrested for violating COVID-19

⁶⁷ See Jeremy Schneider, *A City on Lockdown: Scenes from Newark's New COVID-19 Curfew (PHOTOS)*, NJ.COM (Oct. 29, 2020, 12:00 PM), <https://www.nj.com/coronavirus/2020/10/a-city-on-lockdown-scenes-from-newarks-new-covid-19-curfew-photos.html> [<https://perma.cc/RNT4-QFLZ>].

⁶⁸ Pascal Sabino, *Chicago Police Required ID to Access West Side Blocks to Curb Coronavirus, but ACLU Says Move Might Violate Rights*, BLOCK CLUB CHI. (Apr. 5, 2020, 10:42 AM), <https://blockclubchicago.org/2020/04/05/chicago-police-required-id-to-access-west-side-blocks-to-curb-coronavirus-but-aclu-says-move-might-violate-rights/> [<https://perma.cc/5AHP-GDWP>].

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Mayor: City to Bolster Neighborhood Clinics in Hard-Hit Areas*, SPECTRUM NEWS NY 1 (May 11, 2020, 11:34 AM), <https://www.ny1.com/nyc/all-boroughs/news/2020/05/11/mayor-de-blasio-daily-coronavirus-update-> [<https://perma.cc/G8R8-CP9H>]; Reema Amin & Alex Zimmerman, *De Blasio Plans to Close 100 NYC Public Schools in Coronavirus Hot Spots*, CHALKBEAT N.Y. (Oct. 4, 2020, 12:44 PM), <https://ny.chalkbeat.org/2020/10/4/21501152/school-closure-nyc-coronavirus-hotspot> [<https://perma.cc/82VP-W33B>].

⁷² Amin & Zimmerman, *supra* note 71.

⁷³ Many of the "target areas" were home to Orthodox Jews. *Id.*; Julia Marsh, *De Blasio Apologizes to Ultra-Orthodox Leaders over Lack of COVID-19 Communication*, N.Y. POST (Oct 20, 2020), <https://nypost.com/2020/10/20/de-blasio-apologizes-to-ultra-orthodox-leaders-over-covid-19/> [<https://perma.cc/Z78A-X6HK>].

lockdown orders were Black.⁷⁴ Black residents only account for 6.5% of San Diego's population.⁷⁵

Nowhere were stops and arrests more disparate than in New York City. There, the Legal Aid Society analyzed 32,293 social distancing 311 complaints. Of those, slightly less than half (46.2%) of the complaints concerned violations in majority Black and Latinx precincts.⁷⁶ The report found that “[f]our of the five precincts that received the most social distancing complaints through 311 were in neighborhoods that are not majority Black or Latino.”⁷⁷ Conversely, four of the five precincts with the most COVID-19-related arrests (74.1%) and summonses (78.9%) for which the Legal Aid Society was able to identify a precinct were in neighborhoods that are majority Black or Latinx.⁷⁸ Of the precincts with the twenty highest rates of known COVID-19-related arrests or summonses per 10,000 people, eighteen were majority Black or Latinx precincts:⁷⁹ “Over the time period reviewed, NYPD responses to 311 complaints for social distancing violations were considerably more likely to result in a summons or an arrest in majority Black or Latino precincts.”⁸⁰

In Hamilton County, where Cincinnati is located, 61% of the 107 people charged with violating stay-at-home orders were Black.⁸¹ In Toledo, 78% of the 23 people charged were Black, and in Franklin County, 57% of the 129 charged were Black.⁸² Hamilton County is 27% Black.⁸³ Toledo is 27% Black, and Franklin County is 23.5% Black.⁸⁴ In Springfield Township, a mostly white suburb of Cincinnati, 9 people were arrested for violating the stay-at-home order.⁸⁵ All 9 of them were Black.⁸⁶ Additionally, researchers

⁷⁴ Anagha Srikanth, *Data Shows Black Americans Are Punished More Harshly for COVID-19 Violations*, HILL (Jan. 6, 2021), <https://thehill.com/changing-america/respect/equality/532894-data-shows-black-americans-are-punished-more-harshly-for/> [https://perma.cc/6U7U-XZ2Y].

⁷⁵ *Id.*

⁷⁶ LEGAL AID SOC'Y, *supra* note 3, at 2.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ Joshua Kaplan & Benjamin Hardy, *Early Data Shows Black People Are Being Disproportionally Arrested for Social Distancing Violations*, PROPUBLICA (May 8, 2020, 6:22 PM), <https://www.propublica.org/article/in-some-of-ohios-most-populous-areas-black-people-were-at-least-4-times-as-likely-to-be-charged-with-stay-at-home-violations-as-whites> [https://perma.cc/ZAC6-3Z5A].

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

in Ohio found that less than 50% of Black defendants were released without bond compared to 95% of white defendants.⁸⁷

The majority of those arrested for violating Milwaukee's stay-at-home order were Black. Between March 27 and May 12, 2020, 177 people were arrested for violating the stay-at-home order.⁸⁸ Of those, 138 were Black (78%) and 21 were Hispanic (12%), while only 6% of those arrested were white.⁸⁹ These numbers suggest that arrests connected to pandemic enforcement had a disparate impact on Black people. According to the U.S. Census Bureau's 2021 population estimates, 39.9% of Milwaukee residents are white, 39.4% are Black, and 19.9% are Hispanic.⁹⁰ There was also a geographic aspect to the enforcement of Milwaukee's stay-at-home order. The majority of these arrests—more than one quarter (26%) of the total number—occurred on Milwaukee's North Side, in the 53206 zip code.⁹¹ Approximately 91% of the zip code residents are single-race Black.⁹² Not only is the zip code Black; according to a 2013 study, it was known as the most incarcerated zip code in the entire state of Wisconsin.⁹³

3. Fines

As part of their pandemic-order enforcement, some states attached exorbitant fines to violations. Fines and fees, when applied in a disparate manner, can violate the law, including the Fourteenth Amendment's Due Process Clause.⁹⁴ One of the most egregious fines was found in Wisconsin's

⁸⁷ Justin Jouvenal & Michael Brice-Saddler, *Social Distancing Enforcement Is Ramping Up. So Is Concern That Black and Latino Residents May Face Harsher Treatment*, WASH. POST (May 10, 2020, 11:00 AM), https://www.washingtonpost.com/local/public-safety/social-distancing-enforcement-is-ramping-up-so-is-concern-that-black-and-latino-residents-may-face-harsher-treatment/2020/05/10/b1bcf490-8fbd-11ea-9e23-6914ee410a5f_story.html [<https://perma.cc/25TS-4Q3Y>].

⁸⁸ Edgar Mendez, *Milwaukee Police Department's Stay-at-Home Arrests Reveal Deep Racial Disparities*, WTMJ-TV MILWAUKEE (July 2, 2020, 9:36 AM), <https://www.tmj4.com/news/coronavirus/milwaukee-police-departments-stay-at-home-arrests-reveal-deep-racial-disparities> [<https://perma.cc/4LV7-6JUU>].

⁸⁹ *Id.*

⁹⁰ *QuickFacts: Milwaukee City, Wisconsin*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/milwaukeecitywisconsin> [<https://perma.cc/MJ5B-CTC3>].

⁹¹ Mendez, *supra* note 88.

⁹² U.S. CENSUS BUREAU, *supra* note 31.

⁹³ Gayle, *supra* note 30.

⁹⁴ In 2016, following the murder of Michael Brown, the Department of Justice filed a complaint against the City of Ferguson, Missouri. The complaint alleged, among other things, that city officials engaged in a pattern or practice of resolving municipal charges in a manner that violates the due process and equal protection rights of accused persons by imposing significant fines without regard to ability to pay. The DOJ found that this pattern of conduct disproportionately harmed Ferguson's African-American residents and was driven by racial bias. Press Release, DOJ, Justice Department Files Lawsuit to Bring Constitutional Policing to Ferguson, Missouri (Feb. 10, 2016), <https://www.justice.gov/opa/pr/justice-department-files-lawsuit-bring-constitutional-policing-ferguson-missouri> [<https://perma.cc/P6H3-KX4A>].

law, where those who “violate a medical isolation or quarantine order . . . could be put in jail for up to nine months and fined up to \$10,000.”⁹⁵ Honolulu was another locale with a high fine attached to violations of its stay-at-home order. There, violating the stay-at-home order was a misdemeanor, punishable by a fine of up to \$5,000 and up to a year in jail.⁹⁶

In other places, such as Milwaukee, the fine for violating the city’s stay-at-home order was lower; but at \$500, this fine was still quite high, especially given how many people were unemployed due to the pandemic.⁹⁷ Similarly, in Ohio, violating the stay-at-home order was a misdemeanor, punishable by up to ninety days in jail and a \$750 fine.⁹⁸ Finally, in San Diego County, violating the stay-at-home order was a misdemeanor, punishable by a \$1,000 fine, up to six months in jail, or both.⁹⁹

When Black people are arrested at such a greater rate than whites, then the imposition of fines and fees associated with those arrests also becomes disparate.

4. *Enhanced Sentencing*

In some jurisdictions, sentencing can be enhanced or increased during an emergency such as the COVID-19 pandemic.¹⁰⁰ In Florida, charges for

⁹⁵ Laurel White, *Wisconsin Quarantine Laws Include Potential for Steep Penalties, Jail Time*, WPR (Mar. 11, 2020, 6:30 AM), <https://www.wpr.org/wisconsin-quarantine-laws-include-potential-steep-penalties-jail-time> [https://perma.cc/MCB8-DWYM] (“[The Wisconsin law] also allows government officials to ‘employ as many persons as are necessary to execute his or her orders and properly guard any place if quarantine or other restrictions on communicable disease are violated or intent to violate is manifested.’ Those guards, referred to as ‘quarantine guards’ in the statute, would have ‘police powers, and may use all necessary means to enforce the state laws for the prevention and control of communicable diseases.’”).

⁹⁶ *What Is the Penalty for Violating the Traveler Quarantine Order?*, STATE OF HAW. DEP’T OF TRANSP. (May 27, 2020), <https://hidot.hawaii.gov/blog/faq/what-is-the-penalty-for-violating-the-traveler-quarantine-order/> [https://perma.cc/3BFF-GPJV].

⁹⁷ Mendez, *supra* note 88.

⁹⁸ Cameron Knight & Quinian Bentley, *Ohio Curfew: Here’s What Happens If You Get Caught Breaking Curfew*, ENQUIRER (Nov. 20, 2020, 12:36 PM), <https://www.cincinnati.com/story/news/2020/11/20/ohio-curfew-mandate-order-governor-mike-dewine/6355144002/> [https://perma.cc/PJT9-QJHF].

⁹⁹ Allison Ash, *North County Sheriff’s Deputies Ticket People Violating Stay-at-Home Order*, NBC 7 (Apr. 14, 2020), <https://www.nbcsandiego.com/news/local/north-county-sheriffs-deputies-ticket-people-violating-stay-at-home-order/2305834/> [https://perma.cc/KAN9-85P9].

¹⁰⁰ Criminal sentencing in the United States has been found to be subject to racial disparities. For instance, sentences imposed on Black males in federal crimes are nearly 20% longer than those imposed on white males for the same crimes. See Christopher Ingraham, *Black Men Sentenced to More Time for Committing the Exact Same Crime as a White Person, Study Finds*, WASH. POST (Nov. 16, 2017, 1:33 PM), <https://www.washingtonpost.com/news/wonk/wp/2017/11/16/black-men-sentenced-to-more-time-for-committing-the-exact-same-crime-as-a-white-person-study-finds/> [https://perma.cc/Z6SD-6E3U]. In state and federal courts, Black and Latino men are found to have greater odds of being incarcerated and receive longer sentences than similarly situated white offenders. See *Report to the United Nations on*

certain offenses can be upgraded during a state of emergency.¹⁰¹ For example, a person who commits a third-degree felony during a state of emergency could be charged with a second-degree felony, increasing their maximum sentence from five years to fifteen years of imprisonment.¹⁰² In Hawaii, a man was arrested for allegedly trying to steal a car battery valued at \$250.¹⁰³ Such an offense is ordinarily a petty misdemeanor, punishable by up to thirty days in jail and a fine of up to \$1,000.¹⁰⁴ But, because the theft occurred during a state of emergency, prosecutors were able to enhance the charges to a Class B felony, punishable by up to ten years in prison and a fine of up to \$25,000.¹⁰⁵ Sentencing enhancements are known to have racially disparate impacts that are reflective of the racial disparities at every other stage of the criminal legal process.¹⁰⁶

II. CRIMINALIZING BLACK MOVEMENT

The Constitution guarantees a fundamental right to free movement.¹⁰⁷ Enslaved as chattel, the first Africans in America possessed no right to freedom of movement. As increasing numbers of Black people achieved freedom antebellum, their right to move freely remained tenuous under the

Racial Disparities in the U.S. Criminal Justice System, SENT'G PROJECT (Apr. 19, 2018), <https://www.sentencingproject.org/reports/report-to-the-united-nations-on-racial-disparities-in-the-u-s-criminal-justice-system/> [<https://perma.cc/N5DW-DK4G>]. The racial disparities are consistent with the disparate treatment of Blacks at every stage of the criminal justice system. *Id.* Scholars have also noted that federal sentencing enhancements are applied by federal prosecutors in an arbitrary and racially discriminatory manner and themselves exacerbate racial disparities in the criminal justice system. Surprisingly, these disparities grow exponentially in the context of nonviolent crimes in both state and federal systems. And, unsurprisingly, some states have worse racial disparities in sentencing than others. ACLU, WRITTEN SUBMISSION OF THE AMERICAN CIVIL LIBERTIES UNION ON RACIAL DISPARITIES IN SENTENCING (2014), https://www.aclu.org/sites/default/files/assets/141027_iachr_racial_disparities_aclu_submission_0.pdf [<https://perma.cc/4XH2-Z5SQ>].

¹⁰¹ “*State of Emergency*” Crimes, SAMMIS L. FIRM (July 30, 2020), <https://criminaldefenseattorneytampa.com/practice-areas/state-of-emergency/> [<https://perma.cc/4G98-78DV>].

¹⁰² *Id.*

¹⁰³ *Hawaii Prosecutors up Petty Misdemeanor to Felony Charge Under Governor’s Emergency Proclamation*, STAR-ADVERTISER (Mar. 30, 2020), <https://www.staradvertiser.com/2020/03/30/breaking-news/hawaii-prosecutors-up-petty-misdemeanor-to-felony-charge-under-governors-emergency-proclamation/> [<https://perma.cc/S3RF-MMK6>].

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ ACLU, *supra* note 100, at 1–8.

¹⁰⁷ See *United States v. Wheeler*, 254 U.S. 281, 293 (1920) (“In all the States from the beginning down to the adoption of the Articles of Confederation the citizens thereof possessed the fundamental right, inherent in citizens of all free governments, peacefully to dwell within the limits of their respective States, to move at will from place to place therein, and to have free ingress thereto and egress therefrom . . .”).

law.¹⁰⁸ Postbellum, despite achieving citizenship, formerly enslaved persons found their movement ensconced in a legal morass that has persisted in several iterations. Segregation has been fundamental to the limitations on Black movement post-Emancipation.¹⁰⁹ In order to establish where Blacks are not allowed, the laws set out where they are allowed and then makes it criminally punishable for Blacks to traverse the boundaries without permission.¹¹⁰ This Part briefly summarizes the lineage of laws criminalizing Black free movement over four centuries leading up to pandemic orders.

¹⁰⁸ *The African American Odyssey: A Quest for Full Citizenship: Free Blacks in the Antebellum Period*, LIBR. OF CONG., <https://www.loc.gov/exhibits/african-american-odyssey/free-blacks-in-the-antebellum-period.html> [<https://perma.cc/G5DD-FBV3>] (detailing items showcased by the Library of Congress's exhibition *The African American Odyssey: A Quest for Full Citizenship*).

¹⁰⁹ Segregation is far from antiquated. Professor Reva Siegel reminds us:

Today, the Court is confident that it has abolished segregation and granted African-Americans equal protection of the laws. Now, doctrines concerning discriminatory purpose authorize certain forms of state action that perpetuate racial stratification as consistent with constitutional guarantees of equal protection. If we assume that status-enforcing state action has no transhistorical form, but instead evolves in rule structure and rhetoric as it is contested, we might conclude that the reigning interpretation of equal protection has once again caused a shift in the forms of state action that perpetuate the racial stratification of American society.

Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1130 (1997).

¹¹⁰ It is largely through this process—outlining where it is safe and legal versus illegal and unsafe for Blacks to move freely—that the “Black map” has been drawn. MARCUS ANTHONY HUNTER & ZANDRIA F. ROBINSON, *CHOCOLATE CITIES: THE BLACK MAP OF AMERICAN LIFE* 5 (2018). According to Professors Marcus Anthony Hunter and Zandria Robinson, the Black map of the United States is composed of six regions: Up South, Down South, Deep South, Mid South, Out South, and West South. “South” here “is not just shorthand for systemic inequality and racism but also a frame for understanding and analyzing the striking similarities across Black communities and neighborhoods.” *Id.* Hunter and Robinson call this new geography “chocolate maps.” *Id.* at 4–5.

A. *The Right to Free Movement*

The right to *intrastate* free movement represents a rare unenumerated fundamental right¹¹¹ that is central to every American citizen's liberty.¹¹² Freedom of movement is constituted of three separate rights—to leave your present location, to travel undeterred across various boundaries, and to settle in the place that you choose and remain.¹¹³ Though not explicitly appearing in the Constitution or the Bill of Rights, the courts have continuously acknowledged the right to free movement in fairly broad terms.¹¹⁴

Given that the right to free movement is nowhere granted specific protection, it is perhaps less absolute than the rights to free speech or free practice of religion.¹¹⁵ And yet, even the modern Court has continued to endorse the right to move within a single state. In a 1972 case, *Papachristou v. City of Jacksonville*, when faced with the question of the legality of a vagrancy ordinance, the Supreme Court held that the law was unconstitutional and affirmed the right to travel locally.¹¹⁶ The Court opined that the constitutional right to free movement, including wandering and strolling, was “historically part of the amenities of life.”¹¹⁷ Still more recently, in *Michael H. v. Gerald D.*, the Court endorsed this view that there

¹¹¹ In *Crandall v. State of Nevada*, the Supreme Court considered the constitutionality of a \$1 per passenger tax the state of Nevada sought to impose on transportation companies. 73 U.S. 35, 36 (1867). The *Crandall* Court, invoking language that confirmed the right to intrastate travel, held that Nevada's proposed tax was unconstitutional because it would burden citizens' ability to take advantage of this fundamental right. *Id.* at 46. Relatively more recently, in *Kent v. Dulles*, 357 U.S. 116 (1958), the Court was presented with the right to travel issue again in deciding whether a practice and a statute calling for the denial of passports to suspected Communists should be upheld. Even though the denial would not have affected the citizens' day-to-day mobility, the *Kent* Court held that the practice and statute, respectively, were unconstitutional on right-to-movement grounds, finding that “[f]reedom of movement is basic in our scheme of values” and travel “may be necessary for a livelihood.” *Id.* at 126 (citing *Crandall*, 73 U.S. at 46); see also *Aptheker v. Sec. of State*, 378 U.S. 500, 514 (1964) (identifying a person's commitment and purposes in travel, among other “plainly relevant” considerations, to fall within the constitutional protection of the right to travel).

¹¹² See Richard Sobel, *The Right to Travel and Privacy: Intersecting Fundamental Freedoms*, 30 J. MARSHALL J. INFO. TECH. & PRIVACY L. 639, 640 (2014).

¹¹³ *Id.* at 641.

¹¹⁴ See JÉRÉMIE GILBERT, *NOMADIC PEOPLES AND HUMAN RIGHTS* 73 (2014) (discussing the widespread recognition of the right to travel amongst international courts). Of course, not every state action that abridges mobility offends the right to movement or triggers its protections. For example, the Court has held that gasoline taxes, toll roads, speed limits, and all manner of other minor infringements on travel are not violative of the right.

¹¹⁵ See Kathryn E. Wilhelm, *Freedom of Movement at a Standstill? Toward the Establishment of a Fundamental Right to Intrastate Travel*, 90 B.U. L. REV. 2461, 2466–69 (2010) (discussing the origins of the right to intrastate travel).

¹¹⁶ 405 U.S. 156, 157–58 (1972).

¹¹⁷ *Id.* at 164.

is a right to move freely intrastate.¹¹⁸ In *Michael H.*, Justice Antonin Scalia wrote that the Due Process Clause substantively protects unenumerated rights so rooted in the “traditions and conscience of our people as to be ranked as fundamental.”¹¹⁹ The Third Circuit, applying Justice Scalia’s reasoning in *Lutz v. City of York*, found that the right to move freely about one’s neighborhood or town, certainly by foot, but even by automobile, is one such right “implicit in the concept of ordered liberty” while holding that a cruising ordinance burdened the right to travel.¹²⁰

B. *The Law’s Imposition on Black Free Movement*

The movement of Black people has been criminalized since the first Africans were captured and enslaved in America. Indeed, one could view the right to move freely as the antithesis of enslavement.¹²¹ During the antebellum period, legislators in the South passed slave codes to curtail the movement of free and enslaved Blacks during nighttime hours.¹²² And in the postbellum period, Black codes restricted the rights of freed persons by criminalizing acts such as loitering and vagrancy.¹²³ Post-Reconstruction Era, sundown towns passed ordinances and posted signs warning Blacks not to travel within their borders after the sun went down or risk injury or even death.¹²⁴ During the racial uprisings of the 1960s and 1970s, curfew laws targeted towards Blacks were used to quell protests of police brutality and economic inequality.¹²⁵ And, of course, stop-and-frisk regimes have been used as a form of racial and social control. It is important to identify the transhistorical criminalization of Black movement as context for considering how quarantine orders during the COVID-19 pandemic neatly fit into this persistently oppressive timeline.

The first laws controlling the return of refugee enslaved persons, including escapees, date back to as early as 1643 and the New England

¹¹⁸ 491 U.S. 110, 122 (1989).

¹¹⁹ *Id.* (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934)).

¹²⁰ 899 F.2d 255, 268 (3d Cir. 1990).

¹²¹ Chattel slavery, of course, established the paradigm. LIBR. OF CONG., *supra* note 108.

¹²² *Id.*

¹²³ Nadra Kareem Nittle, *How the Black Codes Limited African American Progress After the Civil War*, HISTORY (Aug. 4, 2023), <https://www.history.com/news/black-codes-reconstruction-slavery> [https://perma.cc/66C4-BLU7].

¹²⁴ Sundown town signs displayed slogans such as “Nigger Don’t Let the Sun Set on Your Back.” Correia & Wall, *supra* note 34. Japanese Americans were subject to curfew laws in the 1940s as part of a racist “national security” campaign. *Japanese-American Incarceration During World War II*, NAT’L ARCHIVES (Jan. 24, 2022), <https://www.archives.gov/education/lessons/japanese-relocation#background> [https://perma.cc/3582-DLBQ].

¹²⁵ Poon, *supra* note 1.

Confederation.¹²⁶ All thirteen of the original colonies eventually enacted laws governing the movement of enslaved persons.¹²⁷ By the time of the Constitutional Convention, however, several Northern states had already abolished slavery.¹²⁸ Concerned that these states would become safe havens for refugee enslaved persons, Southern states lobbied for the inclusion of Article IV of the Constitution, which stated that “[n]o person held to Service or Labor in one State . . . escaping into another shall . . . be discharged from such Service or Labour.”¹²⁹ As antislavery sentiment continued to grow, the slaveholding states pressed further for additional protections against potential losses of their enslaved people, leading Congress to pass the first Fugitive Slave Act in 1793 (1793 Act).¹³⁰ The 1793 Act essentially codified Article IV. The 1793 Act was more specific, of course, including by setting out how the law was to be enforced—namely, the owners and their “agents” could search for escapees within the borders of the free states.¹³¹ It also imposed a civil penalty of \$500 on those aiding escapees.¹³² These enforcement provisions led the way for the expansion of slave patrols, whose only responsibility was to control the movement and behaviors of enslaved persons.¹³³ Northern states opposed the right of Southern states to send patrols into their borders and mostly declined to enforce the 1793 Act.¹³⁴

¹²⁶ *Slavery and the Making of America: 1641*, THIRTEEN, <https://www.thirteen.org/wnet/slavery/timeline/1641.html> [https://perma.cc/8AWX-YKLL].

¹²⁷ J. Gordon Hylton, *Before There Were “Red” and “Blue” States, There Were “Free” States and “Slave” States*, MARQ. UNIV. L. SCH. FACULTY BLOG (Dec. 20, 2012), <https://law.marquette.edu/facultyblog/2012/12/before-there-were-red-and-blue-states-there-were-free-states-and-slave-states/> [https://perma.cc/D766-EQ6M].

¹²⁸ Connecticut, Massachusetts, New Hampshire, Pennsylvania, and Rhode Island had all abolished slavery in advance of the Constitutional Convention. *Id.*

¹²⁹ U.S. CONST. art. IV, § 2, cl. 3; *see also* Andrew Delbanco, *America’s Struggle for Moral Coherence*, ATLANTIC (Nov. 12, 2018), <https://www.theatlantic.com/ideas/archive/2018/11/the-nation-has-been-this-divided-in-the-civil-war/575587/> [https://perma.cc/KGH9-BHN5] (commenting on the division between Northern and Southern states on slavery at the time of founding).

¹³⁰ Andrew Glass, *Congress Enacts First Fugitive Slave Law, Feb. 12, 1793*, POLITICO (Feb. 12, 2014), <https://www.politico.com/story/2014/02/this-day-in-politics-congress-enacts-first-fugitive-slave-law-feb-12-1793-103375> [https://perma.cc/Z7US-AFEG].

¹³¹ Earl Maltz, *Fugitive Slave Laws*, ENCYCLOPEDIA VA., <https://encyclopediavirginia.org/entries/fugitive-slave-laws/> [https://perma.cc/8TKP-HPD4].

¹³² *Id.*

¹³³ *See* Philip L. Reichel, *Southern Slave Patrols as a Transitional Police Type*, 7 AM. J. POLICE 51, 57–62 (1988).

¹³⁴ Glass, *supra* note 130. Some Northern states went further, passing “Personal Liberty Laws” that offered accused escapees a right to a jury trial and attempted to protect free Blacks from being abducted and sold into slavery. *Id.* The legality of Personal Liberty Laws was challenged in the 1842 case *Prigg v. Pennsylvania*, 41 U.S. 539 (1842). The Supreme Court decided the case for Prigg, establishing precedent that no state law could interfere with the federal Fugitive Slave Act. *Id.* But the Court did concede that Congress could only compel federal officers, not state officers, to recapture enslaved persons, opening

The first slave patrols were created in South Carolina in 1704.¹³⁵ The colony expressed a need for two forms of military force—a militia to deter foreign enemies and a patrol to serve as a deterrent against slave insurrection.¹³⁶ The slave patrol rode between plantations, capturing enslaved persons that “had no ticket from their master.”¹³⁷ By 1740, South Carolina’s patrolling experiment became concretized with increased duties and the establishment of patrolling maps and districts.¹³⁸

South Carolina became a model of the patrol for some states, such as Georgia.¹³⁹ Other states, such as Virginia and North Carolina, enacted distinct systems.¹⁴⁰ Despite regional nuances, as a general matter, slave patrols served three main functions: “(1) to chase down, apprehend, and return to their owners, runaway slaves; (2) to provide a form of organized terror to deter slave revolts; and, (3) to maintain a form of discipline for slave-workers.”¹⁴¹ At a more granular level, slave patrols routinely enforced *curfews*, checked travelers for a permission pass, dispersed independent slave gatherings of any kind, including religious, and prevented organized resistance.¹⁴² In carrying out their duties, patrolmen were permitted to beat and whip enslaved men, women, and children and confiscate and destroy the property of enslaved persons.¹⁴³

In Northern cities such as New York and Boston, enslaved persons could also not travel freely at night.¹⁴⁴ Municipal codes mandated that Black, mixed-race, and Indigenous people carry candle lanterns while walking in the streets after dark and when not in the company of a white person, so that

the door for Northern states to pass more personal liberty laws in the years after *Prigg* was decided. Nicholas Mosvick, *On This Day, the Supreme Court Decides Prigg v. Pennsylvania*, NAT’L CONST. CTR. (Mar. 1, 2020), <https://constitutioncenter.org/blog/on-this-day-the-supreme-court-decides-prigg-v-pennsylvania> [https://perma.cc/JZ99-JXY3].

¹³⁵ SALLY E. HADDEN, *SLAVE PATROLS: LAW AND VIOLENCE IN VIRGINIA AND THE CAROLINAS* 19 (2001).

¹³⁶ *Id.* at 19–20.

¹³⁷ *Id.*

¹³⁸ *Id.* at 23–24.

¹³⁹ *Id.* at 24.

¹⁴⁰ *Id.*

¹⁴¹ Gary Potter, *The History of Policing in the United States, Part 1*, ECU ONLINE (June 25, 2013), <https://ekuonline.eku.edu/blog/police-studies/the-history-of-policing-in-the-united-states-part-1/> [https://perma.cc/R9YL-W2SR].

¹⁴² HADDEN, *supra* note 135, at 40.

¹⁴³ *Id.* at 59. It is worth noting that Northern “watchmen” were similar in many respects to Southern “slave patrols.” *Id.* at 58.

¹⁴⁴ Northern states opposed the right of Southern states to send patrols into their borders and mostly declined to enforce the 1793 Act.

slaves could easily be identified.¹⁴⁵ Violation of the lantern law carried many possible punishments, including up to forty lashes.¹⁴⁶

As calls for abolition in the North and secession in the South reached a higher pitch, Congress moved to stave off a civil war by passing a package of bills in 1850, including a second fugitive slave law.¹⁴⁷ The 1850 Fugitive Slave Act increased the penalty for abetting to \$1,000, maintained a potential sentence of six months in jail, and established new federal commissioners to preside over hearings to establish whether a person was legally free or enslaved.¹⁴⁸ The fugitive slave laws were repealed in 1864.¹⁴⁹ Though slave patrols were legally abolished along with slavery, in some states Southern police forces often carried out the former tasks of the patrols, including systemic surveillance and the enforcement of curfews.¹⁵⁰

Reconstruction briefly brought free movement to Blacks.¹⁵¹ Chattel slavery having been abolished, Blacks were theoretically free to move about as they pleased. And they largely did from 1865 until 1899. But this relative freedom would not last. Freedpersons' rights were soon retrenched through new "Black codes" passed in many states. Black codes were laws that forced Black people to work white people's land as indentured servants, separated families, prohibited landownership, and restricted travel.¹⁵² Black codes

¹⁴⁵ *The Great New York Conspiracy of 1741: Slave Rebellion*, INSIDE OUT TOURS (Feb. 18, 2019), <https://insideouttours.com/2019/02/18/the-great-new-york-conspiracy-of-1741-slave-rebellion/> [https://perma.cc/6CQM-83WT].

¹⁴⁶ SIMONE BROWNE, DARK MATTERS: ON THE SURVEILLANCE OF BLACKNESS 76–83 (2015) (detailing lantern laws and proposing that such laws set a precedent for the legal framework for more modern surveillance and policing practices).

¹⁴⁷ *The Fugitive Slave Law of 1850*, BILL RTS. ACTION, Winter 2019, at 5.

¹⁴⁸ Laura F. Edwards & Kurt Lash, *The Fugitive Slave Act (1850)*, NAT'L CONST. CTR., <https://constitutioncenter.org/the-constitution/historic-document-library/detail/the-fugitive-slave-act-1850> [https://perma.cc/3KB5-CRZX].

¹⁴⁹ *Fugitive Slave Acts*, BRITANNICA (Oct. 21, 2022), <https://www.britannica.com/event/Fugitive-Slave-Acts> [https://perma.cc/M8T2-EZNN].

¹⁵⁰ *Slave Patrols: An Early Form of American Policing*, NAT'L L. ENF'T MEM'L FUND, <https://nleomf.org/slave-patrols-an-early-form-of-american-policing/> [https://perma.cc/6VQ4-VG4H]. The post-Emancipation connection between slave patrols, militias, police, and extra-legal groups such as the Ku Klux Klan is now well-established. Slave patrols are the predecessors of police forces. Historian Sally Hadden writes in her book on slave patrols in Virginia and the Carolinas that "[t]he history of police work in the South grows out of this early fascination, by white patrollers, with what African American slaves were doing. Most law enforcement was, by definition, white patrolmen watching, catching, or beating black slaves." HADDEN, *supra* note 135, at 4.

¹⁵¹ William G. Thomas III, Richard G. Healey & Ian Cottingham, *Reconstructing African American Mobility After Emancipation, 1865–67*, 41 SOC. SCI. HIST. 673, 673–74 (2017).

¹⁵² RICHARD WORMSER, *THE RISE & FALL OF JIM CROW: THE AFRICAN-AMERICAN STRUGGLE AGAINST DISCRIMINATION, 1865–1954*, at 15–16 (Franklin Watts ed. 1999).

existed prior to Emancipation,¹⁵³ but the labor supply shortage that followed the end of the Civil War—resulting from the sudden absence of slave labor—caused a reinvigoration of these laws.¹⁵⁴ Between 1865 and 1866, nine states updated their Black codes, making them more stringent.¹⁵⁵

Beginning around 1890, white Americans began establishing thousands of towns for whites only.¹⁵⁶ While there was some precedent for these laws prior to 1890, this was largely a departure from the mixed racial demographics of antebellum towns.¹⁵⁷ Professor James Loewen explains that except in the traditional South,¹⁵⁸ driving African Americans out and keeping them out became “the proper civic-minded thing to do, in the thinking of many whites of all social strata between about 1890 and 1940, lasting until at least 1968.”¹⁵⁹ Towns with no Black residents passed ordinances that

¹⁵³ The U.S. Army had instituted Black codes to regulate the general behavior of Black people. Though the Army had a mandate to protect Blacks from discrimination, it also was concerned with maintaining the labor force so that the Southern economy could be revived. THEODORE BRANTNER WILSON, *THE BLACK CODES OF THE SOUTH* 53–56, 61–80 (1965). The Bureau cooperated with Southern authorities in rounding up Black “vagrants” and condemning them to “contract work.” *Id.* at 58.

¹⁵⁴ Ellen Terrell, *The Convict Leasing System: Slavery in Its Worst Aspects*, LIBR. OF CONG. BLOGS: INSIDE ADAMS (June 17, 2021), https://blogs.loc.gov/inside_adams/2021/06/convict-leasing-system/ [<https://perma.cc/7RPR-BZQT>]. Black codes were used to criminalize relatively minor transgressions such as walking on grass, stealing food, and vagrancy. *Id.* The accused were then fed into the convict leasing system that had been made possible by an exemption in the Thirteenth Amendment for “convicts.” *Id.* All of this was done with the intention of reinstating slavery and addressing the labor shortage that had arisen as a result of Emancipation. *Id.*

¹⁵⁵ WILSON, *supra* note 153, at 61–80.

¹⁵⁶ James Loewen, *Sundown Towns*, ENCYCLOPEDIA OF ARK. (July 7, 2023), <https://encyclopediaofarkansas.net/entries/sundown-towns-3658/> [<https://perma.cc/9LEC-RZQL>].

¹⁵⁷ *Id.*

¹⁵⁸ Where Blacks continued to live amongst whites, anti-Blackness was still present. During the Jim Crow Era, for example, in Mobile, Alabama, where Blacks still lived in close proximity to whites, Blacks were prevented from leaving their homes after 10:00 PM. Brittany Levine Beckman, *Curfews Have a Disturbing Racist History*, MASHABLE (June 4, 2020), <https://mashable.com/article/protest-curfews> [<https://perma.cc/2W9N-JHCN>].

¹⁵⁹ JAMES W. LOEWEN, *SUNDOWN TOWNS: A HIDDEN DIMENSION OF AMERICAN RACISM* 49 (2006). Towns competed to advertise how white they were. In 1907, Rogers, Arkansas, bragged that it had “no Negroes or saloons.” *Id.* at 48. Cumberland County, Tennessee, reported: “No Malaria, and No Niggers” in the 1920s. *Id.* Much of Oklahoma and the non-southern parts of Texas also adopted this anti-Black rhetoric. *Id.* Terry County, Texas, advertised itself as having a population of 2,000, “ALL WHITE” in 1908. *Id.* at 48–49. Comanche County, Texas, drove out its Black population in 1886 and bragged after the 1940 Census that it was “the home of the purest Anglo-Saxon population of any county in the United States.” *Id.* at 49. Midwest and far west towns were also quick to boast their all-whiteness. *Id.* In 1936, Owosso, Michigan, declared: “There is not a Negro living in the limits of Owosso’s incorporated territory.” *Id.* A Detroit suburb, Royal Oak, proclaimed in a 1954 pamphlet: “The population is virtually 100% white.” *Id.* And in flyers for a new housing development surrounding Corning, California: “In most communities in California you’ll find Chinese, Japs, Dagoes, Mexicans, and Negroes mixing up and working in competition with the white folks. Not so at Maywood Colony.” *Id.*

African Americans were not allowed in the towns after sundown.¹⁶⁰ Mixed-race towns desperate to go all-white drove their Black residents out, often by engaging in violent acts, such as mob attacks, arson, and lynching.¹⁶¹ Ranging in size “from hamlets like Alix, Arkansas, population 185, to large cities like Appleton, Wisconsin, with 57,000 residents in 1970,” whites-only towns developed into a map of anti-Blackness.¹⁶² These towns demarcated a concrete area where Blacks could not travel without limited exceptions.¹⁶³

¹⁶⁰ *Id.* In the West, Chinese Americans had experienced a similar “retreat.” *Id.* at 50. Loewen tells one particularly vivid story:

Between 1885 and about 1920, dozens of communities in the West, including towns and counties as far inland as Wyoming and Colorado and cities as large as Seattle and Tacoma, drove out their entire Chinese American populations—some briefly, some for decades.

Rock Springs, Wyoming, built at a coal mine owned by the Union Pacific . . . , was the site of one of the earliest expulsions. The railroad had hired hundreds of Chinese American miners, most of whom lived in a separate neighborhood, “Chinatown.” On September 2, 1885 . . . at least 150 white miners and railroad workers, most of them armed, gave the Chinese “one hour to pack their belongings and leave town[.]” . . . “Most carried nothing at all, not even their money.” Many hid in their homes, but the rioters then burned Chinatown, incinerating those who were hiding there. [An eyewitness reported:]

The stench of burning human flesh was sickening and almost unendurable, and was plainly discernible for more than a mile along the railroad . . . [and] where 700 to 900 had lived the day before . . . not a single house, shanty, or structure of any kind that had ever been inhabited by a Chinaman was left unburned.

Id. at 50–51.

¹⁶¹ *Id. passim.* Loewen writes:

When all else fails, after ordinances and covenants were decreed illegal, when steering, discriminatory lending, and the like have not sufficed, when an African American family is not deterred by a community’s reputation—when they actually buy and move in—then residents of sundown towns and suburbs have repeatedly fallen back on violence and threat of violence to keep their communities white.

Id. at 270. The house has often been the target of the attack, but the person could also be the target. In LaSalle-Peru, Illinois, a Black family “moved into town, and shortly after the father was found drowned in the Illinois [River].” *Id.* at 271 (alteration in original).

¹⁶² James Loewen, *Was Your Town a Sundown Town?*, UUWORLD (Feb. 18, 2008), <https://www.uuworld.org/articles/sundown-town> [https://perma.cc/7AZP-FVBX]. A guidebook was published yearly from 1938 until 1967 (when the Civil Rights Acts were passed outlawing discrimination in travel) to arm Blacks with knowledge on the lodging, eateries, and gas stations they could travel to relatively safely without fear of bodily harm. *The Architecture of the Negro Travelers’ Green Book*, UNIV. OF VA. (Apr. 20, 2021), <https://community.village.virginia.edu/greenbooks/> [https://perma.cc/DX9X-385C].

¹⁶³ City limits and county lines were important in the maintenance of sundown towns. It was here that the sundown signs were erected. But even in the absence of markers, white residents made sure borders were respected. Eight Mile Road, for example, was the boundary between overwhelmingly Black Detroit and whiter suburbs to the north. *Encyclopedia of Detroit: Eight Mile Road*, DET. HIST. SOC’Y, <https://detroithistorical.org/learn/encyclopedia-of-detroit/eight-mile-road> [https://perma.cc/H6CW-T2EH].

“Sundown suburbs” formed a little later, between 1890 and 1968.¹⁶⁴ These suburbs were a distinct phenomenon on a vast geographic scale. Their residents drove out Black people who had lived there prior to the suburbs’ incorporation and placed restrictions on their residency and travel. Sundown suburbs could be quite large, “such as Glendale, a suburb of Los Angeles; Levittown, on Long Island; and Warren, a Detroit suburb.”¹⁶⁵ In some states, entire counties became sundown suburbs.¹⁶⁶ The number of square miles the suburbs occupied meant that the geographic reach of whiteness was much more vast than even in the cities. Beyond their sheer size, the manner in which the suburbs had been formed almost guaranteed that they abutted, or were encircled by, deeply segregated Black space. As a result, for a century after chattel slavery ended, there were many places where Blacks either could not travel at all or where their movement was heavily regulated. Those places were clearly demarcated in lore and law such that both Black and white citizens knew where the boundaries began and ended. Violators of those boundaries risked being penalized, including by jail or even death.

In more modern times, curfews have allowed police to regulate and control the movement of members of a population, usually the poor, through the restriction of time and space.¹⁶⁷ During the Civil Rights Movement, local governments used curfews to limit the mobility of Black adults.¹⁶⁸ Curfews continue to be used to control Black resistance in modern times. For example, during the 1992 Los Angeles riots, police initially focused on looters, but most of their arrests ended up being for curfew violations and civil disturbances.¹⁶⁹ Black people comprised 36% of those arrested during the course of the riots.¹⁷⁰ Curfews were instituted to quell Baltimore’s uprising after the murder of Freddie Gray in 2015, Ferguson’s uprising after the murder of Michael Brown in 2014, as well as unrest in New Orleans after

¹⁶⁴ James W. Loewen, Fran Kaplan & Robert Smith, *Sundown Towns: Racial Segregation Past and Present*, AM.’S BLACK HOLOCAUST MUSEUM, <https://www.abhmuseum.org/sundown-towns-the-past-and-present-of-racial-segregation/> [<https://perma.cc/WD6E-RQHN>].

¹⁶⁵ *Sundown Town History and Resolution*, COAL. FOR AN ANTI-RACIST GLENDALE, <https://www.antiracistglendale.org/sundown-town-glendale> [<https://perma.cc/WEB6-HGKA>] (quoting Loewen, *supra* note 163).

¹⁶⁶ *Id.*

¹⁶⁷ CORREIA & WALL, *supra* note 32.

¹⁶⁸ David L. Hudson Jr., *Curfews*, MIDDLE TENN. STATE UNIV., <https://www.mtsu.edu/first-amendment/article/1206/curfews> [<https://perma.cc/62E4-UJC6>].

¹⁶⁹ Paul Lieberman, *51% of Riot Arrests Were Latino, Study Says: Unrest: RAND Analysis of Court Cases Finds They Were Mostly Young Men*, L.A. TIMES (June 18, 1992, 12:00 AM), <https://www.latimes.com/archives/la-xpm-1992-06-18-me-734-story.html> [<https://perma.cc/S2MX-Y74E>].

¹⁷⁰ *Id.*

Hurricane Katrina and in major cities nationwide following the murder of George Floyd in 2020.¹⁷¹

Outside of the context of political unrest, curfews have been most frequently used in recent times to curb the free movement of youth, particularly those that are poor and Black.¹⁷² Juvenile curfew provisions vary in detail, but they generally include: (1) age group of minors; (2) hours of the curfew; (3) juvenile conduct prohibited; (4) prohibited places; (5) conduct excepted from the curfew; and (6) parental responsibility.¹⁷³ There is evidence to suggest nocturnal juvenile curfew laws not only fail to reduce juvenile crime or victimization, but they also disproportionately impact communities of color.¹⁷⁴ Federal courts have, however, generally

¹⁷¹ See CORREIA & WALL, *supra* note 32, at 44; Derrick Bryson Taylor, *George Floyd Protests: A Timeline*, N.Y. TIMES (Nov. 5, 2021), <https://www.nytimes.com/article/george-floyd-protests-timeline.html> [<https://perma.cc/BQT6-9MF6>]. Pandemic curfews limited protestors' and journalists' First Amendment rights to peaceful assembly. In Los Angeles in 2020, for example, the ACLU on behalf of Black Lives Matter—Los Angeles sued the city to oppose the curfews that were being used to prevent protests in the wake of George Floyd's murder. Hannah Fry, Matt Hamilton & Brittny Mejia, *ACLU Sues to End L.A. Curfew, Calling It a Suppression of Political Protest*, L.A. TIMES (June 3, 2020, 11:14 PM), <https://www.latimes.com/california/story/2020-06-03/l-a-s-nighttime-curfew-faces-growing-criticism-as-arrests-mount> [<https://perma.cc/F88Z-59D7>].

¹⁷² Curfew legislation aimed directly at juveniles gained momentum in the latter half of the nineteenth century. The arguments in favor of juvenile curfews were that parenting and traditional family values were on the decline particularly in the cities. President Benjamin Harrison described juvenile curfew laws as “the most important municipal regulation for the protection of the children of American homes, from the vices of the street.” Craig Hemmens & Katherine Bennett, *Out in the Street: Juvenile Crime, Juvenile Curfews, and the Constitution*, 34 GONZ. L. REV. 267, 280 (1998). In 1894, the adoption of curfew ordinances was urged at the National Convention of the Boys' and Girls' Home Employment Association and in numerous periodicals of the day. 8 ENCYCLOPEDIA AMERICANA 306 (1918). By the end of the nineteenth century, at least 3,000 communities had juvenile curfew ordinances. Juvenile curfews would expand and wane again for the next century. *Id.* By 1997, they were on the rise once more, with 79% of communities with populations over 30,000 having nighttime juvenile curfews. Hemmens & Bennett, *supra*, at 269 n.12; *see also id.* at 293–323 (discussing several federal cases on juvenile curfew laws that provided discordant opinions on which freedoms were at issue, how fundamental those freedoms were, and what level of scrutiny should be applied to laws burdening the freedoms).

¹⁷³ *Juvenile Curfew Laws: The Basics*, FINDLAW (Oct. 9, 2023), <https://www.findlaw.com/criminal/criminal-charges/juvenile-curfew-laws-the-basics.html> [<https://perma.cc/G2VC-8TC2>].

¹⁷⁴ See, e.g., Ivonne Roman, *The Curfew Myth*, MARSHALL PROJECT (July 31, 2018), <https://www.themarshallproject.org/2018/07/31/the-curfew-myth> [<https://perma.cc/PN89-MBA5>]. Opponents of curfew laws consistently raise categorical challenges to them. In addition to arguing that curfew laws violate young people's rights, opponents raise that these laws: (1) are ineffective at reducing crime; (2) punish noncriminal behavior; (3) do not target the populations committing the most crime, and (4) importantly, are applied in a discriminatory manner that disproportionately affects people of color. The New Orleans curfew law, one of the strictest in the country, was found to be racially biased and ineffective—targeting poor, Black children. In 2011, 93% (704 of 753 detentions) of the children detained in New Orleans's curfew center were Black and from two districts, the seventh and eighth. Ramon Antonio Vargas, *New Orleans' Curfew Enforcement Is Racially Biased, Ineffective, Critics Say; but NOPD Chief Disagrees*, NOLA.COM (Mar. 15, 2013), https://www.nola.com/news/crime_police/new-orleans-curfew-enforcement-is-racially-biased-ineffective-critics-say-but-nopd-chief-disagrees/article_1119e41a-9d16-5b59-bdd0-a4c8a9039426.html [<https://perma.cc/K7S9-5YXJ>].

been inclined to uphold curfew laws in “emergencies” on police power grounds if they are limited in scope, duration, and application.¹⁷⁵

And there has been stop-and-frisk. New York City’s notorious stop-and-frisk program targeted, stopped, and frisked people of color, especially young Black and Latino men and boys, the vast majority of who were innocent.¹⁷⁶ In 1999, Black and Latinx people made up 50% of New York’s population but 84% of its stops.¹⁷⁷ Between 2004–2012, New York stopped 4.4 million people, 80% of whom were Black and Latinx.¹⁷⁸ Black and Latinx people were targeted by the police even though there was no indication that they were more likely to have been engaged in criminal conduct. In fact, Black and Latinx people were half as likely to have a weapon in their possession than white people.¹⁷⁹ At the program’s peak, in 2011, the NYPD made nearly 700,000 stops.¹⁸⁰ Litigation filed by the Center for Constitutional Rights, the New York Civil Liberties Union, and others has reduced significantly the number of stops, though the disparities remain.¹⁸¹ Nine out of ten New Yorkers that are stopped and frisked are completely innocent.¹⁸² In August 2013, federal district court Judge Shira Scheindlin held that New York’s stop-and-frisk program violated the Fourth Amendment’s right to be free from unreasonable searches and seizures.¹⁸³ Since the litigation concluded, NYPD has significantly reduced the number of stops it makes, but there are still disparities.¹⁸⁴

III. RACIALIZING QUARANTINE

There is a long history of the state abridging the right of people of color to move during public health emergencies. This Part summarizes the

¹⁷⁵ See, e.g., *United States v. Chalk*, 441 F.2d 1277, 1280 (4th Cir. 1971); see also *State v. Dobbins*, 178 S.E.2d 449, 456–57 (N.C. 1971) (stemming from the same incident).

¹⁷⁶ Taahira Thompson, *NYPD’s Infamous Stop-and-Frisk Policy Found Unconstitutional*, LEADERSHIP CONF. EDUC. FUND (Aug. 21, 2013), <https://civilrights.org/edfund/resource/nypds-infamous-stop-and-frisk-policy-found-unconstitutional/#> [<https://perma.cc/FMJ5-MSTY>].

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Stop-and-Frisk Data*, NYCLU, <https://www.nyclu.org/en/stop-and-frisk-data> [<https://perma.cc/GT3M-KHS5>].

¹⁸¹ *Id.*

¹⁸² Louis Casanave, *EDA with Tableau: 2021 NYPD Stop-and-Frisky by Demographics*, MEDIUM (Sept. 7, 2022), <https://towardsdatascience.com/eda-with-tableau-2021-nypd-stop-and-frisks-by-demographics-e5e88eb43939> [<https://perma.cc/7GEK-3KXD>].

¹⁸³ Press Release, Ctr. for Const. Rts., *Landmark Decision: Judge Rules NYPD Stop and Frisk Practices Unconstitutional, Racially Discriminatory* (Aug. 12, 2013), <https://ccrjustice.org/home/press-center/press-releases/landmark-decision-judge-rules-nypd-stop-and-frisk-practices> [<https://perma.cc/75T4-E6TE>].

¹⁸⁴ NYCLU, *supra* note 180.

racialization of quarantine over centuries and courts' implicit sanction of such disparate treatment through application of the deference standard *Jacobson* has come to stand for.

A. *Quarantine Jurisprudence and Jacobson*

The modern jurisprudence around quarantine law establishes that, in some cases, a threat to the public's health justifies states' imposition of limitations on their citizens' liberty, including through the use of mandatory quarantines.¹⁸⁵ In 1824, the Supreme Court, in *Gibbons v. Ogden*, first held that the power to quarantine was a police power held by the states.¹⁸⁶ The Court maintained this position in decades following.¹⁸⁷ The Court expounded upon its views on quarantine in a 1902 case, *Compagnie Francaise de Navigation a Vapeur v. Louisiana State Board of Health*, in which the Court ultimately rejected both Commerce Clause and Due Process challenges to a state law that prohibited healthy, noncontagious immigrants from entering areas of the state in which there was disease.¹⁸⁸ A few years later, in the course of upholding a vaccine mandate in *Jacobson v. Massachusetts*, the Court first opined that an individual could “be held in quarantine against his will . . . until it be ascertained . . . that the danger of the spread of the disease among the community at large has disappeared.”¹⁸⁹

In *Jacobson*, local boards of health were empowered to require adults to be vaccinated for smallpox.¹⁹⁰ Following a smallpox outbreak, the Cambridge Board of Health instituted compulsory vaccines.¹⁹¹ Violators faced fines or imprisonment. The *Jacobson* Court opined:

¹⁸⁵ Quarantines can be voluntary or mandatory. See Wendy E. Parmet, *Quarantining the Law of Quarantine: Why Quarantine Law Does Not Reflect Contemporary Constitutional Law*, 9 WAKE FOREST J.L. & POL'Y 1, 8 (2018). Voluntary quarantines are when a person agrees to separate upon the advice of a government actor or health professional, while involuntary quarantines are when well people are forced to segregate. *Id.* Quarantine differs from isolation, which refers to the separation of someone who is already ill. *Id.* at 7–8. Isolation is the segregation of ill persons as part of a treatment and is thought to benefit the person who is isolated. *Id.* On the other hand, quarantine separates well people from society, not as a part of a treatment plan or necessarily for the benefit of the person who is quarantined. *Id.* Prior to World War II, the nation was repeatedly threatened by horrible epidemics and mandatory quarantine was common. *Id.* at 9. Quarantine was frequently imposed disparately on vulnerable populations. *Id.* To the extent that that practice of imposing mandatory quarantine on vulnerable populations subsided, it may be due to epidemics themselves having subsided. *Id.* at 11. Even prior to the COVID-19 response, scholars had long “disagreed about quarantine’s role in the public health armamentarium.” *Id.* at 30.

¹⁸⁶ 22 U.S. 1, 67 (1824).

¹⁸⁷ See, e.g., *Morgan’s Steamship, Co. v. La. Bd. of Health*, 118 U.S. 455, 464 (1886).

¹⁸⁸ 186 U.S. 380, 391, 393 (1902).

¹⁸⁹ 197 U.S. 11, 29 (1905).

¹⁹⁰ *Id.*

¹⁹¹ *Id.* at 12.

[I]n every well-ordered society charged with the duty of conserving the safety of its members the rights of the individual in respect of his liberty may at times, under the pressure of great dangers, be subjected to such restraint, to be enforced by reasonable regulations, as the safety of the general public may demand.¹⁹²

In finding for the State of Massachusetts, the *Jacobson* Court clearly recognized the power of the state to take actions in a public health emergency that it could not take at other times.

Nonetheless, the *Jacobson* Court also recognized that there must be limits on the state's reach in a public health emergency. The Court contemplated a situation where the state, utilizing the power to protect the public against an epidemic, could exercise power over a particular group of people beyond what was reasonably necessary to keep the public safe, thus compelling the courts to intervene on behalf of that group.¹⁹³ The Court therefore opined that quarantine could not be "arbitrary," "oppressive," "cruel," or "inhumane."¹⁹⁴ The *Jacobson* Court emphasized that any state action in an emergency had to be reasonable both as to who was quarantined and the conditions of the quarantine.¹⁹⁵

The Supreme Court has not directly ruled on the legality of quarantines since *Compagnie Francaise*, even as constitutional law has evolved.¹⁹⁶ Indeed, between World War II and the COVID-19 pandemic, there had been very few cases dealing with quarantine, and only a few of those cases were in federal court.¹⁹⁷ Since 1973, "only two federal district courts have published opinions relating to the detention of individuals (who were not already prisoners) to prevent the spread of communicable disease."¹⁹⁸ In *Haitian Centers Council, Inc. v. Sale*, a federal district court ruled that the detention of HIV-positive Haitian refugees at Guantanamo Bay was unconstitutional.¹⁹⁹ And in *Best v. St. Vincent's Hospital*, a court dismissed a complaint that challenged a statute permitting the treatment and confinement of a noncompliant tuberculosis patient.²⁰⁰

¹⁹² *Id.* at 29.

¹⁹³ *Id.* at 38–39.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.* at 29.

¹⁹⁶ The Court heard a case on quarantining live goods in *Mintz v. Baldwin*, 289 U.S. 346, 348 (1933) (considering diseased cattle).

¹⁹⁷ See, e.g., U.S. *ex. rel.* Siegel v. Shinnick, 219 F. Supp. 789 (E.D.N.Y. 1963) (dismissing plaintiff's habeas petition to release a potential smallpox patient from isolation); Reynolds v. McNichols, 488 F.2d 1378 (10th Cir. 1973) (affirming ruling against plaintiff subject to a "hold and treat" ordinance for venereal disease).

¹⁹⁸ Parmet, *supra* note 185.

¹⁹⁹ 82 F. Supp. 1028, 1049 (E.D.N.Y. 1993).

²⁰⁰ No. 03 CV.0365, 2003 WL 21518829, at *1 (S.D.N.Y. July 2, 2003).

Though it only indirectly concerns quarantine, *Jacobson* remains the most frequently cited case justifying the power of the state to quarantine its citizens in emergencies.²⁰¹

B. Quarantining Racial Minorities

Historically, quarantine in the United States has been racialized. As early as 1662, during a smallpox outbreak in the town of East Hampton, New York, authorities ordered that “no Indian shall come to towne into the street . . . or be whipped until they be free of the smallpoxe.”²⁰² On the eve of Emancipation, an epidemic of smallpox that broke out in Washington and then spread through the South was blamed on former slaves.²⁰³ During typhus and cholera outbreaks in New York City in 1892, poor Russian Jewish and Italian immigrants who had arrived on steerage ships were rounded up and quarantined by the state of New York without regard for their humanity or legal rights.²⁰⁴ One of the most tragic examples of racially discriminatory quarantines occurred in Honolulu’s Chinatown between 1899 and 1900, after a small number of bubonic plague cases appeared there.²⁰⁵ The Hawaiian government imposed a “*cordon sanitaire*” of the area, prohibiting Chinese and Japanese residents from leaving the Chinatown neighborhood.²⁰⁶ When the outbreak worsened, the government began incinerating buildings surrounding the location of plague victims.²⁰⁷ Ultimately, much of Chinatown was burnt down and approximately 5,000 residents of the area, largely Chinese immigrants, were left homeless.²⁰⁸

Almost contemporaneously to the atrocity of Honolulu’s quarantine, in March 1900, in one of the most-cited quarantine cases, *Jew Ho v. Williamson*, San Francisco hastily imposed quarantine in its Chinatown

²⁰¹ See James R. Steiner-Dillon & Elisabeth J. Ryan, *Jacobson 2.0: Police Power in the Time of COVID-19*, 84 ALB. L. REV. 383, 387 (2021).

²⁰² Fox, *supra* note 13.

²⁰³ See WITT, *supra* note 12, at 15.

²⁰⁴ See generally Howard Markel, “Knocking out the Cholera”: Cholera, Class, and Quarantines in New York City, 1892, 69 BULL. HIST. MED. 420, 423, 429 (1995).

²⁰⁵ See Michael Lee, *When Chinese Americans Were Scapegoated for Bubonic Plague*, HISTORY (Oct. 11, 2022), <https://www.history.com/news/bubonic-plague-honolulu-fire-san-francisco> [<https://perma.cc/PY5H-QWHB>].

²⁰⁶ *Id.*; Charles Richter & John S. Emrich, *How Honolulu’s Chinatown “Went Up in Smoke,”* AM. ASS’N OF IMMUNOLOGISTS (July 2020), <https://www.aai.org/About/History/History-Articles-Keep-for-Hierarchy/How-Honolulu%E2%80%99s-Chinatown-Went-Up-in-Smoke-The-Fi> [<https://perma.cc/R2UX-N7ZC>]; Rebecca Onion, *The Disastrous Cordon Sanitaire Used on Honolulu’s Chinatown in 1900*, SLATE (Aug. 15, 2014, 10:22 AM), <https://slate.com/human-interest/2014/08/history-of-the-cordon-sanitaire-honolulu-hawaii-bubonic-plague-in-1899.html> [<https://perma.cc/Q9R7-GKX6>].

²⁰⁷ See Lee, *supra* note 205.

²⁰⁸ *Id.*

when deaths of neighborhood residents were diagnosed as caused by bubonic plague.²⁰⁹ Only Chinese residents were subjected to the quarantine's restrictions.²¹⁰ Eventually, barbed wire fence was erected.²¹¹ Officials of all three levels of government focused time and attention on devising and evaluating plans to quarantine Chinatown residents.²¹² Lawyers quickly filed a habeas petition on behalf of a quarantined Chinese man who did not live in Chinatown but who had become trapped while visiting friends.²¹³ The habeas petition was granted.²¹⁴ Shortly thereafter, lawyers representing several Chinese organizations filed suit with *Jew Ho* as the plaintiff.²¹⁵

The *Jew Ho* court held that while it might be reasonable for the state to quarantine a particular house when an inhabitant was ill, it was indefensible to quarantine an entire community.²¹⁶ The quarantine before it was not a reasonable regulation, the court explained, because the quarantine was in "practical operation" discriminatory, and the city's purpose was only "to enforce it 'with an evil eye and unequal hand,'" in violation of the Fourteenth Amendment.²¹⁷

Jew Ho is an outlier. Post-*Jew Ho*, more often courts have abjured their authority to review the issuance of quarantines by state actors even when quarantines were enforced in a discriminatory manner against vulnerable populations. For example, during a polio epidemic in New York City in 1916, immigrant children were forcibly removed from their parents and placed in quarantine.²¹⁸ Federal authorities directed that no child could travel to towns with more forgiving approaches to the epidemic without a certificate, while nearby suburbs also took actions to keep the virus out.²¹⁹

²⁰⁹ 103 F. 10, 11 (N.D. Cal. 1900).

²¹⁰ *Id.* at 12–13.

²¹¹ Cyriaque Lamar, *In 1900, San Francisco's Chinatown Was Quarantined with Barbed Wire Fences*, GIZMODO (Jan. 24, 2012), <https://gizmodo.com/in-1900-san-franciscos-chinatown-was-quarantined-with-5878877> [<https://perma.cc/4NF8-43MH>].

²¹² Andrew Lawler, *When Bubonic Plague First Struck America, Officials Tried to Cover It Up*, NAT'L GEOGRAPHIC (Apr. 24, 2020), <https://www.nationalgeographic.com/history/article/bubonic-plague-first-struck-america-officials-tried-cover-up>. [<https://perma.cc/X2VX-RXFJ>].

²¹³ *Jew Ho*, 103 F. 10 at 12; *see also* WITT, *supra* note 12, at 28 (describing the progressive "sanitizationist state" that emerged in the nineteenth century, which supported the view that improving the living conditions of the poorest classes could, in fact, reduce transmission of communicable disease). This is the same argument that housing and environmental justice advocates made in the current COVID-19 pandemic.

²¹⁴ *Jew Ho*, 103 F. 10 at 26.

²¹⁵ *Id.* at 14.

²¹⁶ *Id.* at 26.

²¹⁷ *Id.* at 24.

²¹⁸ PAUL A. OFFIT, *THE CUTTER INCIDENT: HOW AMERICA'S FIRST POLIO VACCINE LED TO THE GROWING VACCINE CRISIS* 4 (2005).

²¹⁹ *Id.* at 8.

There was significant protest, including violent threats, surrounding both the manner and imposition of the quarantine and the travel restrictions.²²⁰ Still, there appear to be no published legal cases challenging the state's actions. In a 1918 case involving the quarantine of a man with syphilis, *State ex rel. McBride v. Superior Court*, the court held that it had no power to interfere with the determination that quarantine was necessary.²²¹ So difficult was it to prevail in legal cases challenging quarantine during the late nineteenth and early twentieth century that few cases were even brought.

IV. CHALLENGING *JACOBSON* AND DEFERENCE TO STATE ACTION

Scholars have criticized judicial reliance on *Jacobson*'s "deference standard," noting that adhering to it leaves the public both less free and less safe from disease in public health crises. In the COVID-19 pandemic, scholarly literature dovetailed with libertarian opposition to pandemic emergency orders, including orders to stay at home. This Part explores how the law of quarantine shifted during the COVID-19 pandemic and what those shifts may mean (or not) for Black liberty in future public health emergencies. And it recounts examples of legal challenges by the libertarian movement to state action during the pandemic.

A. *Critique of Judicial Deference in Emergency*

Courts' failure to review state actions in emergencies, especially those that infringe on liberty, has been the subject of criticism in the scholarly literature for at least two decades. The critiques have coalesced around two separate but related ideas: (1) quarantined persons are owed procedural and perhaps substantive due process and (2) judicial review should apply to state action in emergencies. Neither discussion explicitly addresses race, which makes deficient both the analysis and the proposals they offer to replace *Jacobson*'s deference standard.

1. *Due Process*

Once individual citizens have been quarantined, they will almost certainly assert that their due process rights have been violated. Under the current quarantine jurisprudence, due process has not been required by the courts. Legal scholars began critiquing courts' inattention to individual rights in quarantine through the lens of due process over twenty years prior to the onset of COVID-19. In 1999, Professor Lawrence Gostin argued that "[l]aw plays crucial roles in the field of public health, from defining the power and jurisdiction of health agencies, to influencing the social norms

²²⁰ *Id.* at 6.

²²¹ 174 P. 973, 978–79 (Wash. 1918).

that shape individual behavior,” but that the role had been neglected.²²² According to Gostin, seven reforms of public health law were necessary to protect individuals from the harms of quarantine, including providing procedural due process and “the use of the least restrictive alternative.”²²³ Gostin analogized quarantine detention to civil commitment in cases such as *O’Connor v. Donaldson*, where Chief Justice Warren Burger opined in his concurrence: “There can be no doubt that involuntary commitment to a mental hospital, like involuntary confinement of an individual for any reason, is a deprivation of liberty which the State cannot accomplish without due process of law.”²²⁴ Public health statutes should provide for fair procedures in the exercise of coercive health powers, Gostin continues, “including written notice of the behavior or conditions said to pose a risk, assistance of counsel, a full and impartial hearing, and an appeal.”²²⁵ Gostin also proposed that the level of rigor in procedures should be adjusted “by the potential restriction on an individual’s liberty for an extended period of time and the potential for erroneous fact-finding.”²²⁶ And on the subject of requiring health officials to choose the least restrictive alternative, Gostin asserted that doing so would “help align communicable disease statutes with the evolving standards of both antidiscrimination law and constitutional law, by allowing only those measures that are reasonably necessary to contain a significant risk to others.”²²⁷

In a 2018 article, Professor Wendy Parmet likewise argues courts should analogize quarantine to civil commitment.²²⁸ In the case of the latter, an extensive body of law has been articulated over the last fifty years calling for due process.²²⁹ Parmet challenged courts to engage in a process “by which broad constitutional commands—such as due process—which are applicable to quarantine” are fleshed out in opinions and “developed into ‘regulatory codes of conduct’ that can guide officials in actual cases.”²³⁰ Parmet argued that forestalling the refinement of the constitutional law of quarantine has

²²² Lawrence O. Gostin, Scott Burris & Zita Lazzarini, *The Law and the Public’s Health: A Study of Infectious Disease Law in the United States*, 99 COLUM. L. REV. 59, 59 (1999).

²²³ *Id.*

²²⁴ 422 U.S. 563, 580 (1975). In cases involving civil commitment of persons with mental illness, the Supreme Court has required “clear and convincing” proof of dangerousness. Many lower federal courts have required an array of procedural protections in order to go through with commitment. These courts have reasoned that little difference exists between loss of liberty for mental health purposes and loss of liberty for public health purposes.

²²⁵ Gostin et al., *supra* note 222, at 122.

²²⁶ *Id.* at 122–23.

²²⁷ *Id.* at 124.

²²⁸ Parmet, *supra* note 185, at 13.

²²⁹ *Id.* at 4.

²³⁰ *Id.* at 6.

effectively separated the law of quarantine from contemporary constitutional constraints on the deprivation of liberty, both to the detriment of those who are quarantined but also the public's health.²³¹

Michelle Daubert argued that not only procedural but also substantive due process should apply in quarantine cases. Daubert posits that given the impact of quarantines on individual liberty interests, sufficient due process of quarantine regulations is imperative.²³² She articulated the basic elements of substantive due process which should be met in order to permit quarantine:

- (1) a demonstrated public health necessity; (2) an effective intervention with a demonstrable means-end connection; (3) proportionality—the intervention is neither too narrowly or broadly tailored; and (4) it is the least restrictive in terms of infringing on individual rights while accomplishing its purpose, and does not inflict unnecessary harm.²³³

Importantly, Daubert also offers that where a fundamental right or a suspect class is implicated by a government action, strict scrutiny should be applied, and that the first step in protecting the quarantined individuals' due process rights in the event of a large quarantine is to require statutes and regulations to mandate legal safeguards.²³⁴ Daubert ultimately suggested public health officials and courts should consider applying a “continuum framework”—the greater the restraint and less definite the diagnosis, the greater the due process protections.²³⁵

Some scholars have expressed doubts about whether the procedural rights approach would be effective in a large-scale quarantine such as the type imposed in Black communities during the COVID-19 pandemic. For example, Professor Noah Smith-Drelich argued that while the procedural rights approach provides a robust set of protections, those protections may be ill-suited for “plaintiffs seeking to challenge ‘general statutes’ establishing ‘a rule of conduct [that] applies to more than a few people.’”²³⁶ Put another way, Smith-Drelich fears the procedural rights approach will not act as a check against even the most egregious of general public health statutes.²³⁷ Professor Pamela Karlan's work is also instructive here when she

²³¹ *Id.* at 6–7.

²³² See Michelle A. Daubert, Comment, *Pandemic Fears and Contemporary Quarantine: Protecting Liberty Through a Continuum of Due Process Rights*, 54 *BUFF. L. REV.* 1299, 1299–1300 (2007).

²³³ *Id.* at 1310.

²³⁴ *Id.* at 1314.

²³⁵ *Id.* at 1318–19.

²³⁶ Noah Smith-Drelich, *The Constitutional Right to Travel Under Quarantine*, 94 *S. CAL. L. REV.* 1367, 1404 (2021) (alteration in original) (quoting *Bi-Metallic Inc. v. State Bd. of Equalization*, 239 U.S. 441, 445–46 (1915)).

²³⁷ *Id.*

argues that “the overarching purpose of constitutional law is to deter or prevent deprivations of individuals’ rights, and not simply to induce the government to internalize their costs or to compensate individuals who suffer them after the fact.”²³⁸ Karlan and Smith-Drelich’s sharp critiques of procedural due process’ usefulness in the context of community-wide quarantine suggests more may be needed to cabin the reach of *Jacobson*.

2. *Judicial Review*

Courts have tended to be deferential to states and suspend judicial review in public health emergencies citing *Jacobson*’s two-prong test. And scholars have criticized this suspension-or-deference approach.

Following the SARS pandemic, Professor Mark Rothstein noted that poorly devised quarantine orders can cause great harm, which leads to challenges to those orders in court. The challenges tend to be unsuccessful, however, because quarantine orders are consistently upheld under broad police powers, making citizens even more vulnerable.²³⁹ Rothstein suggests that utilitarian concerns over public health “are not a blank check for public health interventions” and that “the exercise of public health authority always must be preceded by a showing of necessity.”²⁴⁰ While Rothstein’s piece did not take on *Jacobson* and deference directly, he argued that quarantine orders needed their own analytical ethical approach, which was composed of four factors: “(1) necessity, effectiveness and scientific rationale; (2) proportionality and least infringement; (3) humane supportive services; and (4) public justification.”²⁴¹

In 2018, Professor Robert Gatter argued that courts had a responsibility “inherent in even the most deferential standard of review” to require states to support their decisions to mandate quarantine with the facts used in making such decisions and that such an inquiry was the only way for a court to determine whether the quarantine order was indeed reasonable.²⁴² In the case of Ebola virus, however, Gatter found that courts had reneged on that duty.²⁴³ As a result, in his opinion, hundreds of people were unnecessarily quarantined because of the failure of government officials and courts to deploy the law properly.²⁴⁴ Gatter argued there had been an erosion of what

²³⁸ Pamela S. Karlan, *The Paradoxical Structure of Constitutional Litigation*, 75 *FORDHAM L. REV.* 1913, 1914 (2007).

²³⁹ See Rothstein, *supra* note 17, at 239.

²⁴⁰ *Id.* at 249.

²⁴¹ *Id.* at 280.

²⁴² Robert Gatter, *Three Lost Ebola Facts and Public Health Legal Preparedness*, 12 *ST. LOUIS U. J. HEALTH L. & POL’Y* 191, 211 (2018).

²⁴³ *Id.* at 192.

²⁴⁴ *Id.*

constitutes a reasonable quarantine order, making the standard itself “less likely to be treated as a meaningful check on public health action in the face of an infectious disease.”²⁴⁵ Gatter proposed several possible alternatives, including the “hard look standard” applicable to agency decisions.²⁴⁶ Under the “hard look standard,” courts are supposed to take a “thorough, probing, [and] in-depth review” of the agency action.²⁴⁷

Also in 2018, Professors Wendy Mariner and Michael Ulrich responded to *Hickox v. Christie* and *Liberian Community Association v. Malloy*.²⁴⁸ Both cases involved well people who were quarantined by police force due to possible exposure to Ebola; both argued that as a result, their rights, including due process, had been violated.²⁴⁹ None of the plaintiffs ever developed Ebola. Mariner and Ulrich argued that quarantine orders that operate in this way—limiting the rights of well people—undermine the rule of law.²⁵⁰ They argued for a “rights-based approach” to managing public health emergencies, built on transparency and science.²⁵¹ Flexibility in the enforcement of quarantine orders can lead to abuse.²⁵² Mariner and Ulrich argued constitutional safeguards are mandated for this reason.²⁵³

The COVID-19 pandemic crystallized the scholarly critique on the topic of judicial review of state-ordered quarantine. Professors Lindsay Wiley and Stephen Vladeck pointed out contemporaneously with the pandemic that the suspension of judicial review of state action in emergency relies heavily on the idea that the crisis to be addressed will be fleeting.²⁵⁴ Under the suspension argument, *Jacobson* applies to all constitutional rights unless explicitly exempted by the Court. But the problem with this analysis is plainly clear: “[T]he Supreme Court has *never* said that *Jacobson* applies—to the exclusion of subsequently articulated doctrinal standards—to all constitutional rights.”²⁵⁵ In fact, as Wiley and Vladeck note, *Jacobson*’s deference standard predates “the entire modern canonization of constitutional scrutiny.”²⁵⁶ Naturally, this poses a quandary for the modern

²⁴⁵ *Id.* at 205.

²⁴⁶ *Id.* at 209.

²⁴⁷ *Id.* (citing *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415–16 (1971)).

²⁴⁸ See Michael R. Ulrich & Wendy K. Mariner, *Quarantine and the Federal Role in Epidemics*, 71 SMU L. REV. 391, 422 (2018).

²⁴⁹ *Id.* at 421–22.

²⁵⁰ See *id.* at 444.

²⁵¹ *Id.* at 398.

²⁵² *Id.* at 399.

²⁵³ *Id.*

²⁵⁴ See Wiley & Vladeck, *supra* note 27.

²⁵⁵ *Id.* at 194.

²⁵⁶ *Id.* at 193.

court considering state action in emergency. This is because “the idea that [levels of scrutiny] all have baked-in ‘*Jacobson* exceptions’ falls apart under even modest . . . scrutiny.”²⁵⁷ To address this incongruence, courts relying on *Jacobson* tend to “cover their bases by assuming, without deciding, that strict scrutiny applies” to a given public health order, finding that the order would pass the strict scrutiny test, and thus upholding the order.²⁵⁸ But this truncated show of judicial review is insufficient to protect citizens from state overreach.

In a 2021 article, Smith-Drelich argued that the “deferential approach demands that courts uphold against constitutional challenge most, if not all, public health measures—including, almost certainly, . . . stay-at-home orders.”²⁵⁹ No matter how heavy-handed a regulation is, essentially any version of such regulation that a state drafts will have “real or substantial relation” to that state’s public health goals.²⁶⁰ Meeting the low *Jacobson* standard is particularly likely, Smith-Drelich argues, if, as numerous lower courts have held, the deferential *Jacobson* approach is effectively indifferent to issues of overbreadth.²⁶¹

These scholars collectively and over time have made a case for revising the judiciary’s view of *Jacobson* and modernizing the quarantine law canon to be consistent with developments in constitutional law in the last century, including the application of judicial review.

B. *Libertarian Resistance to Jacobson in the COVID-19 Pandemic*

Libertarians publicly protested stay-at-home and other pandemic orders. And when protestation was unsuccessful, they filed a significant number of lawsuits to protect their rights. Over 17,000 lawsuits were filed raising legal claims concerning various aspects of the COVID-19 pandemic orders between March 2020 and October 2022.²⁶² Approximately 2,000 of these lawsuits alleged violations of civil rights.²⁶³ And 654 cases involved challenges to business closures, stay-at-home orders, or gathering bans challenges, which collectively made up the largest category of civil rights

²⁵⁷ *Id.*

²⁵⁸ *Id.*

²⁵⁹ See Smith-Drelich, *supra* note 236.

²⁶⁰ *Id.* at 1403. Smith-Drelich uses the example of South Dakota closing its border, protected by *Jacobson* and under the pretext of quelling COVID-19 but with a purpose of chilling protestors of the Keystone XL pipeline from moving about. *Id.* This political move likely passes muster under the deferential standard so long as it is not “arbitrary or oppressive.” *Id.*

²⁶¹ *Id.* at 1402–03.

²⁶² HUNTON ANDREWS KURTH LLP, COVID-19 COMPLAINTS TRACKER (2022) (on file with author).

²⁶³ *Id.*; Zeidner, *supra* note 18.

lawsuits.²⁶⁴ Consistent with *Jacobson*, many of these cases were unsuccessful.²⁶⁵

Surprisingly, however, some courts did invalidate some pandemic orders.²⁶⁶ State and federal courts in Kentucky, Michigan, Oregon, Pennsylvania, and Wisconsin all held that the states' stay-at-home orders were either unconstitutional, infringed on citizens' fundamental civil rights, or impeded liberty on their face.²⁶⁷ In one notable instance, in the midst of the trend away from *Jacobson*, Black and Latinx plaintiffs argued that the enforcement of pandemic orders was disparate and violent, but were unsuccessful in persuading the court that their liberty should not be abridged in an emergency. The Section below is preoccupied with this dichotomy between white and Black liberty.

1. County of Butler v. Wolf

In *County of Butler v. Wolf*, involving orders addressing the COVID-19 pandemic issued by the Governor and Secretary of Health of Pennsylvania, the federal district court struck down some of these orders, including the stay-at-home order, as unconstitutional.²⁶⁸ The plaintiffs were Pennsylvania

²⁶⁴ HUNTON ANDREWS KURTH LLP, *supra* note 262.

²⁶⁵ See, e.g., *Colorado Supreme Court Declines to Hear Neville vs Polis Mask Lawsuit*, FOX 21 NEWS (Aug. 28, 2020), <https://www.fox21news.com/top-stories/colorado-supreme-court-declines-to-hear-neville-vs-polis-mask-lawsuit/> [<https://perma.cc/Q4UM-EG89>] (discussing a state supreme court's refusal to hear a case alleging the Colorado Governor overstepped his constitutional powers when he issued more than three dozen executive orders, including a stay-at-home order); *Beshear v. Acree*, 615 S.W.3d 780, 830 (Ky. 2020) (upholding governor's emergency orders in the face of allegations of their unconstitutionality). It is worth noting that there is a political thread that ties together some cases where *Jacobson* was used to shield state action.

²⁶⁶ See, e.g., *Order Granting Preliminary Injunction, Rock House Fitness, Inc. v. Acton*, No. 20CV000631, at 8 (Ohio Com. Pl. May 20, 2020) (granting preliminary injunction barring enforcement of a stay-at-home order which quarantined the entire state for more than fourteen days); *Roberts v. Neace*, 958 F.3d 409, 416 (6th Cir. 2020) (enjoining the state from enforcing its ban on interstate travel because the law was unconstitutional); *First Pentecostal Church of Holly Springs v. City of Holly Springs*, 959 F.3d 669, 670 (5th Cir. 2020) (issuing a temporary restraining order to permit the church to resume conducting in-person worship services); *Berean Baptist Church v. Cooper*, 460 F. Supp. 3d 651, 663–64 (E.D.N.C. 2020) (recognizing *Jacobson* but granting plaintiff's motion for a temporary restraining order due to the executive order's failure to address the compelling government interest in public health protection); *Wis. Legislature v. Palm*, 942 N.W.2d 900, 918 (2020) (finding that the COVID-19 emergency order issued by Wisconsin's Department of Health Services was not a statutorily permissible exercise of authority under two relevant statutes).

²⁶⁷ Sobel & Musumeci, *supra* note 49.

²⁶⁸ 486 F. Supp. 3d 883, 918 (W.D. Penn. 2020), *opinion vacated, appeal dismissed sub nom.*, *County of Butler v. Governor of Pa.*, 8 F.4th 226 (3d Cir. 2021). The federal government has largely stayed out of quarantine matters. Polly J. Price, *A Coronavirus Quarantine in America Could Be a Giant Legal Mess*, ATLANTIC (Feb. 16, 2020), <https://www.theatlantic.com/ideas/archive/2020/02/coronavirus-quarantine-america-could-be-giant-legal-mess/606595/> [<https://perma.cc/FN33-D2CC>] (“Except at the nation's borders, the federal government, with the expertise of the Centers for Disease Control and

citizens, elected officials, and businesses challenging various orders that had been issued between March and July 2020.²⁶⁹ These plaintiffs argued that the order requiring Pennsylvanians to stay at home violated both the Due Process and Equal Protection Clauses of the Fourteenth Amendment.²⁷⁰ In response to this argument, Judge William S. Stickman IV opined:

Indeed, the greatest threats to our system of constitutional liberties may arise when the ends *are* laudable, and the intent *is* good—especially in a time of emergency. In an emergency, even a vigilant public may let down its guard over its constitutional liberties only to find that liberties, once relinquished, are hard to recoup and that restrictions—while expedient in the face of an emergency situation—may persist long after immediate danger has passed. Thus, in reviewing emergency measures, the job of courts is made more difficult by the delicate balancing that they must undertake. The Court is guided in this balancing by principles of established constitutional jurisprudence.²⁷¹

The defendants argued that the *Jacobson* standard

grants almost extraordinary deference to their actions in responding to a health crisis and that, based on that deference, Plaintiffs’ claims are doomed to fail. In other words, Defendants argue that no matter which traditional level of scrutiny that the underlying constitutional violation would normally require, a more deferential standard is appropriate.²⁷²

But the court disagreed, noting that “*Jacobson* was decided over a century ago. Since that time, there has been substantial development of federal constitutional law in the area of civil liberties.”²⁷³ Those developments, according to the court, have ushered in “a jurisprudential shift whereby federal courts have given greater deference to considerations of individual liberties, as weighed against the exercise of state police powers.”²⁷⁴ The *County of Butler* court went on to question whether *Jacobson* “remains instructive in light of the intervening jurisprudential developments,” including principally “the creation of tiered levels of scrutiny for constitutional claims” that did not exist when that case was decided.²⁷⁵

Prevention, is *not* in charge. America’s defense against epidemics is divided among 2,684 state, local, and tribal public-health departments. Each one is responsible for monitoring people within its jurisdiction, imposing isolation or quarantine as needed.”).

²⁶⁹ *Id.* at 890, 892–93.

²⁷⁰ *Id.* at 890.

²⁷¹ *Id.*

²⁷² *Id.* at 896.

²⁷³ *Id.* at 897.

²⁷⁴ *Id.*

²⁷⁵ *Id.*

In making its decision, the *County of Butler* court looked to the District of Maine’s earlier decision in *Bayley’s Campground, Inc. v. Mills*, “examin[ing] whether the governor of Maine’s emergency order requiring, *inter alia*, visitors from out of state to self-quarantine was constitutional.”²⁷⁶ The *Bayley’s* court was called on to decide between the deferential analysis consistent with *Jacobson* and advocated for by the governor, or a new standard that applied traditional levels of scrutiny and was advocated for by the plaintiffs.²⁷⁷ The *Bayley’s* court observed that “[i]n the eleven decades since *Jacobson*, the Supreme Court refined its approach for the review of state action that burdens constitutional rights” and found compelling evidence to suggest that the quarantines were unconstitutional.²⁷⁸ The *Bayley’s* court ultimately declined to apply a standard below those of the established tiered levels of scrutiny and stated: “[T]he permissive *Jacobson* rule floats about in the air as a rubber stamp for all but the most absurd and egregious restrictions on constitutional liberties, free from the inconvenience of meaningful judicial review.”²⁷⁹

The *County of Butler* court found that Justice Samuel Alito’s dissent in a case the Court declined to take, *Calvary Chapel Dayton Valley v. Sisolak*, “cast doubt on whether *Jacobson* can, consistent with modern jurisprudence, be applied to establish a diminished, overly deferential level of constitutional review of emergency health measures.”²⁸⁰ Justice Alito was joined in dissenting by Justices Clarence Thomas and Brett Kavanaugh. In arguing that the Court should have granted the requested injunction, Justice Alito stated: “We have a duty to defend the Constitution, and even a public health emergency does not absolve us of that responsibility.”²⁸¹ Justice Alito opined further:

For months now, States and their subdivisions have responded to the pandemic by imposing unprecedented restrictions on personal liberty, including the free exercise of religion. This initial response was understandable. In times of crisis, public officials must respond quickly and decisively to evolving and uncertain situations. At the dawn of an emergency—and the opening days of the COVID-19 outbreak plainly qualify—public officials may not be able to craft precisely

²⁷⁶ *Id.*

²⁷⁷ 463 F. Supp. 3d 22 (D. Me. 2020).

²⁷⁸ *Id.* at 31 (citing *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 857 (1992)); *see also Casey*, 505 U.S. at 857 (citing *Jacobson v. Massachusetts*, 197 U.S. 11, 24–30 (1905)) (affirming that “a State’s interest in the protection of life falls short of justifying any plenary override of individual liberty claims”).

²⁷⁹ *Bayley’s Campground*, 463 F. Supp. 3d at 32.

²⁸⁰ *County of Butler*, 486 F. Supp. 3d at 897–98 (quoting *Calvary Chapel Dayton Valley v. Sisolak*, 140 S. Ct. 2603, 2604 (2020) (Alito, J., dissenting)).

²⁸¹ *Id.* at 898.

tailored rules. Time, information, and expertise may be in short supply, and those responsible for enforcement may lack the resources needed to administer rules that draw fine distinctions. Thus, at the outset of an emergency, it may be appropriate for courts to tolerate very blunt rules. In general, that is what has happened thus far during the COVID-19 pandemic.

But a public health emergency does not give Governors and other public officials *carte blanche* to disregard the Constitution for as long as the medical problem persists. As more medical and scientific evidence becomes available, and as States have time to craft policies in light of that evidence, courts should expect policies that more carefully account for constitutional rights.²⁸²

Justice Alito found the argument unreasonable, disagreeing that *Jacobson* could be used to create a deferential standard whereby public health measures will pass scrutiny unless they are “beyond all question a plain, palpable invasion of rights secured by the fundamental law.”²⁸³ It strained credulity, according to Justice Alito, “to read the [*Jacobson*] decision as establishing the test to be applied when statewide measures of indefinite duration are challenged under the First Amendment or other provisions not at issue in that case.”²⁸⁴

Finally, the *County of Butler* court cited Wiley and Vladeck’s article for further support for abandoning *Jacobson*.²⁸⁵ Wiley and Vladeck argue “that the suspension approach to judicial review is wrong—not just as applied to governmental actions taken in response to novel coronavirus, but in general.”²⁸⁶ They highlight three objections to an overly deferential suspension model standard of review: (1) the suspension principle is inextricably linked with the idea that a crisis is of finite—and brief—duration and that the principle is not designed for long-term and open-ended emergencies like the COVID-19 pandemic; (2) the suspension model is based upon the notion that ordinary judicial review will be too harsh on government actions in a crisis, though in the case of COVID-19 the court believed most of these measures would have met with the same fate under ordinary scrutiny; and (3) that the suspension model does not account for the importance of an independent judiciary in a crisis, “as perhaps the only institution that is in any structural position to push back against potential overreaching by the local, state, or federal political branches.”²⁸⁷

²⁸² *Id.*

²⁸³ *Id.*

²⁸⁴ *Id.*

²⁸⁵ *Id.* at 899.

²⁸⁶ Wiley & Vladeck, *supra* note 27, at 182–83.

²⁸⁷ *Id.*

With that, the *County of Butler* court held that *Jacobson* was not applicable to the case before it and, instead, applied regular constitutional scrutiny to the issues in that case. To find otherwise, the court opined, would risk repeating decisions like *Korematsu v. United States*, “in which courts sustain gross violations of civil rights because they are either unwilling or unable to meaningfully look behind the government’s purported claims of exigency.”²⁸⁸

County of Butler was appealed to the Third Circuit. The case was not heard on the merits—the issue was moot since the state let the orders expire. Nevertheless, in declining to take the case, the appellate court expressed equal support for the libertarian arguments as it did for the state’s position. Justice Kent Jordan wrote in the concurrence of the “full sympathy” he felt for both sides.²⁸⁹

What is interesting regarding the liberty cases is how many were initiated by state officials—even legislatures. The Michigan and Wisconsin legislatures each brought lawsuits or other actions on behalf of citizens against their own governors to cease enforcement of pandemic orders.²⁹⁰ In *Michigan House of Representatives and Michigan Senate v. Whitmer*, both chambers of the Michigan state legislature asserted in a lawsuit that the Governor had exceeded her authority under two state laws providing for the issuance of emergency orders when she extended her stay-at-home order beyond April 30, 2020.²⁹¹ The Supreme Court of Michigan sided with

²⁸⁸ *County of Butler*, 486 F. Supp. 3d at 897 (citing *Korematsu v. United States*, 323 U.S. 214 (1944)). The *County of Butler* court was especially troubled by the ongoing and indefinite nature of the quarantine. The court opined that the quarantine’s duration weighed strongly against application of a more deferential level of review. According to the Judge William S. Stickman IV:

The extraordinary emergency measures taken by Defendants in this case were promulgated beginning in March—six months ago. What were initially billed as temporary measures necessary to “flatten the curve” and protect hospital capacity have become open-ended and ongoing restrictions aimed at a very different end—stopping the spread of an infectious disease and preventing new cases from arising—which requires ongoing and open-ended efforts. Further, while the harshest measures have been “suspended,” Defendants admit that they remain in-place and can be reinstated *sua sponte* as and when Defendants see fit. In other words, while not currently being enforced, Pennsylvania citizens remain subject to the re-imposition of the most severe provisions at any time. Further, testimony and evidence presented by Defendants does not establish any specified exit gate or end date to the emergency interventions. Rather, the record shows that Defendants view the presence of disease mitigation restrictions upon the citizens of Pennsylvania as a “new normal” and they have no actual plan to return to a state where all restrictions are lifted.

²⁸⁹ *County of Butler v. Governor of Pa.*, 8 F.4th 226, 233 (3d Cir. 2021) (Jordan, J., concurring).

²⁹⁰ Sophie Quinton, *GOP Lawsuits Restrain Governors’ COVID-19 Actions*, STATELINE (Nov. 17, 2020, 12:00 AM), <https://stateline.org/2020/11/17/gop-lawsuits-restrain-governors-covid-19-actions/> [<https://perma.cc/TU9P-DYPG>].

²⁹¹ No. 353655, 2020 WL 6826619, at *2 (Mich. Ct. App. June 19, 2020).

plaintiffs, affirming that the Governor had no authority to extend her stay-at-home order. The Kentucky, Missouri, and Texas attorneys general filed lawsuits hoping to upend aspects of pandemic order enforcement.²⁹² And smaller groups of individual lawmakers in Minnesota and Oregon filed or joined lawsuits challenging their governor's pandemic orders, arguing those orders exceeded authority and were unconstitutional.²⁹³ In slightly different procedural posture, but to similar effect, Louisiana's House Republicans also moved to revoke and nullify all of their Governor's coronavirus restrictions.²⁹⁴

2. *Floyd v. City of New York*

Though they made very similar arguments to the plaintiffs in the liberty cases, Black and Latinx plaintiffs were unsuccessful in enjoining the violent and selective enforcement of pandemic orders in the one lawsuit that attempted to do so. Plaintiffs from two landmark class action lawsuits challenging NYPD's stop-and-frisk practices as racially discriminatory and unconstitutional, *Floyd v. City of New York* and *Davis v. City of New York*, sought to enjoin NYPD's violent, discriminatory pandemic order enforcement.²⁹⁵ Armed with Legal Aid Society's data on the disparate nature of NYPD's pandemic order enforcement, the injunction plaintiffs argued that

²⁹² *Missouri v. Biden*, No. 3:22-CV-01213, 2022 WL 4086539, at *1 (W.D. La. 2022); Bruce Schreiner, *Kentucky AG Criticizes Governor's Handling of COVID Crisis*, AP (Aug. 6, 2021, 3:09 PM), <https://apnews.com/article/health-coronavirus-pandemic-kentucky-da03f83002e46a8bcc84efa148b2d773> [<https://perma.cc/4EME-LFFV>] (discussing how Kentucky Attorney General Daniel Cameron has both "waged legal fights against [Governor] Beshear's use of his executive authority to impose pandemic restrictions" and received criticism "for the lack of charges against the officers who fatally shot [Breonna] Taylor," a Black woman killed in her sleep by Louisville police officers during a wrongly executed warrant); Christina Maxouris, Jason Hanna & Amir Vera, *Texas Attorney General Files Lawsuit Against Austin Leaders over Mask Requirement*, CNN (Mar. 11, 2021, 5:58 PM), <https://www.cnn.com/2021/03/11/us/texas-mask-mandate-attorney-general-austin-travis-county/> [<https://perma.cc/G8VX-76T6>].

²⁹³ BALLOTPEdia, *supra* note 20; Press Release, Minn. House of Reps., More Legislators Join Lawsuit Against Governor Walz (June 16, 2020), <https://www.house.mn.gov/Caucus/View/NR/43325> [<https://perma.cc/UWX2-ZZFR>]; Nigel Jaquiss, *Republican Lawmakers Sue Gov. Kate Brown, Claiming She's Abusing Emergency Authority*, WILLAMETTE WEEK (Oct. 17, 2020, 2:06 PM), <https://www.wweek.com/news/state/2020/10/17/republican-lawmakers-sue-gov-kate-brown-claiming-shes-abusing-emergency-authority/> [<https://perma.cc/VH3B-2UR5>].

²⁹⁴ Melinda Deslatte, *Louisiana House GOP Trying to Yank Governor's Virus Rules*, AP (Oct. 23, 2020, 11:23 AM), <https://apnews.com/article/virus-outbreak-public-health-louisiana-john-bel-edwards-495c3f2f710d131f787801947a90eae6> [<https://perma.cc/WFR7-9755>] ("Republicans are invoking a never-before-used process outlined in state law that allows a majority of House lawmakers to nullify the governor's public health emergency declaration—and all restrictions tied to it—with a petition.").

²⁹⁵ *Floyd v. City of New York*, No. 08 Civ. 1034 (AT), 2020 WL 3819566, at *1 (S.D.N.Y. July 8, 2020). In the original case, *Floyd v. City of New York*, 959 F. Supp. 2d 540, 562 (S.D.N.Y. 2013), the court held that "Level 3 Terry stops" and racial disparities were both unconstitutional. During the pandemic, however, the same judge acquiesced to the city's arguments that *Terry* stops conducted in connection with enforcing pandemic orders were outside the purview of her previous *Floyd* decisions.

the NYPD's discriminatory enforcement of social distancing protocols and New York City's curfew violated the court's previous orders in *Floyd* and *Davis*.²⁹⁶ It is easy to see the similarities between the cases. NYPD's COVID-19 conduct, including the violence, selective enforcement, and racially disparate stops, was virtually identical to its previous stop-and-frisk regime.²⁹⁷

The plaintiffs' attorneys presented a number of accounts of disparate and violent pandemic order enforcement to the court. They asserted that the victims of the enforcement were among hundreds of Black and Latinx New Yorkers whose movement was first restricted, and then criminalized, by NYPD for allegedly violating the City's nonmandatory pandemic orders.²⁹⁸

One of the stories was about Malik Harris. Malik "was standing in the courtyard of his public housing complex with a mask in his hand" on May 20, 2020, when NYPD officers apprehended and then arrested him for failing to social distance.²⁹⁹ Malik, a Black man, was then housed in central booking with twenty other men without access to masks, soap, or hand sanitizer.³⁰⁰ He later spent three weeks on Rikers Island in a cell block with fifty other men, each provided with only one mask during that entire time.³⁰¹ There is a perverse irony that Malik was arrested for failing to social distance under a nonmandatory order but was subsequently held in a facility where social distancing was impossible.³⁰²

Malik's story is not unique. On April 4, 2020, Crystal Pope, a Black woman, observed a group of adolescent boys being harassed by NYPD

²⁹⁶ Plaintiffs' Memorandum of Law in Support of Their Motion for Emergency Relief, *supra* note 24, at 4–5 (citing LEGAL AID SOC'Y, *supra* note 3, at 2).

²⁹⁷ See Sandhya Kajeepeta, Emilie Bruzelius, Jessica Z. Ho & Seth J. Prins, *Policing the Pandemic: Estimating Spatial and Racialized Inequities in New York City Police Enforcement of COVID-19 Mandates*, 32 CRITICAL PUB. HEALTH 56 (2021) ("[T]he 2011 ZIP-code-level stop-and-frisk rates had stronger associations with the public health policing measures than indicators of poor social distancing compliance, suggesting pandemic policing mirrored the imprecise and discretionary nature of the stop-and-frisk program, which was deemed unconstitutional due to racially discriminatory practices.").

²⁹⁸ The unhoused were also targeted during the pandemic by the NYPD. The Transit Authority decided to close the subway for "cleaning" between the hours of 1:00 AM and 5:00 AM every morning, and the city authorized the "removal" of "scores" of unhoused persons to help effectuate the cleaning. A thousand NYPD officers were assigned the task of securing the 500 stations each night and facilitating the admission of unhoused persons into congregate shelters, which of course were not able to safely facilitate social distancing. Ella Torres & Aaron Katersky, *As NYC Subways Prepare for Disinfecting, Homeless Will Have to Find Alternate Refuge*, ABC NEWS (May 5, 2020, 5:40 PM), <https://abcnews.go.com/US/subway-closure-outright-disaster-homeless-safe-shelter-options/story?id=70429030> [<https://perma.cc/6JDX-RA36>].

²⁹⁹ Plaintiffs' Memorandum of Law in Support of Their Motion for Emergency Relief, *supra* note 24, at 4.

³⁰⁰ *Id.*

³⁰¹ *Id.*

³⁰² *Id.*; see also Moreland et al., *supra* note 35, at 1200.

officers for violating social distancing directives.³⁰³ She followed behind the officers and observed one of the officers lifting one of the boys up by the neck and choking him. Crystal was then maced by one of the officers.³⁰⁴

In another instance, on April 28, 2020, Steven Merete, a fifty-one-year-old Latino man, was arrested while NYPD officers were conducting social distancing enforcement.³⁰⁵ At the time, Steven was socially distanced and standing outside of his own home.³⁰⁶ Nevertheless, NYPD officers pushed him, slammed him to the ground, and arrested him.³⁰⁷ Steven spent almost twenty-four hours in custody and was ultimately charged with disorderly conduct and resisting arrest before being released.³⁰⁸

Despite finding that some of the alleged police misconduct described by plaintiffs fell squarely within the scope of the court's previous orders condemning the NYPD's suspicionless and racially motivated stops and frisks, Judge Analisa Torres held that a "blanket injunction barring the NYPD from COVID-19 enforcement . . . would interfere with a wide range of police conduct that is outside the bounds of this case, and would halt even lawful enforcement."³⁰⁹ Judge Torres recommended the plaintiffs pursue a separate plenary action to stop the violence.³¹⁰ *Floyd* is the sole case found that directly concerns the disparate and violent treatment of Black people under pandemic emergency orders. And plaintiffs were unsuccessful in making their libertarian claims—the same claims that had been asserted in cases like *County of Butler*.

Multiple questions emerge post-*Floyd*. First, what explains the lack of objection on the part of Blacks to the criminalization of their right to move freely? Second, what does the court's reticence to enjoin a violent and disparately enforced geographic quarantine on Blacks in a city with a voluntary stay-at-home order mean for Black personhood? Professor Monica Bell's legal estrangement theory helps explain both phenomena.³¹¹ Legal

³⁰³ Plaintiffs' Memorandum of Law in Support of Their Motion for Emergency Relief, *supra* note 24, at 4.

³⁰⁴ *Id.*; see also *supra* note 24 and accompanying text.

³⁰⁵ Plaintiffs' Memorandum of Law in Support of Their Motion for Emergency Relief, *supra* note 24, at 3, 21.

³⁰⁶ *Id.*

³⁰⁷ *Id.*

³⁰⁸ *Id.*

³⁰⁹ *Floyd v. City of New York*, No. 08 Civ. 1034 (AT), 2020 WL 3819566, at *4–5 (S.D.N.Y. July 8, 2020).

³¹⁰ *Id.*

³¹¹ Monica C. Bell, *Police Reform and the Dismantling of Legal Estrangement*, 126 *YALE L.J.* 2054, 2085–86 (2017). Professor Bell asserts that "legal estrangement is a product of three socio-legal processes: procedural injustice, vicarious marginalization, and structural exclusion." *Id.* at 2100. The third

estrangement is defined as “a cultural orientation about the law that emanates from collective symbolic and structural exclusion—that is, both subjective and objective factors.”³¹² Legal estrangement theory can assist in understanding situations where “even *despite* the embrace of legality by African Americans and residents in high-poverty neighborhoods and regardless of the degree to which they embrace law enforcement officials as legitimate authorities they are nonetheless structurally ostracized through laws ideas and priorities.”³¹³ Blacks found themselves estranged from the law. Blacks were complying with pandemic orders as much, if not more than, other groups, but were policed more heavily (and then denied relief in courts).³¹⁴ From a legal estrangement perspective, the law’s purpose is the creation and maintenance of social bonds.³¹⁵ “An emphasis on inclusion implies concerns not only about how individuals perceive the police and the law (and thus whether those individuals cooperate with the state’s demands), but about the signaling function of the police and the law to groups about their place in society.”³¹⁶

V. BLACK LIBERTY

The violent enclosure of Black people by the state during the COVID-19 pandemic violated their fundamental rights, including the right to move freely. These were the same rights that whites were able to protect on libertarian grounds. Speaking in the context of racially disparate reproductive rights, Professor Dorothy Roberts has said that “we need a way

leg of legal estrangement—structural exclusion—is particularly relevant when thinking about the inequities of COVID-19 enforcement. Structural exclusion describes the ways in which “policies that may appear facially race- and class-neutral distribute policing resources so that African Americans and residents of disadvantaged neighborhoods tend to receive lower-quality policing than whites and residents of other neighborhoods.” *Id.* at 2114. Structural exclusion also refers to the ways in which “[l]aws and policies produce and normalize vastly different experiences by race and class.” *Id.* According to Bell, these policies serve as a form of “*legal closure*, a means of hoarding legal resources for the socially and socioeconomically advantaged while locking marginalized groups out of the benefits of law enforcement.” *Id.* at 2114–15. “The process of legal closure leaves some areas essentially lawless—harshly policed yet underprotected—while others may be rigorously defended over and above the degree to which they are at risk.” *Id.* at 2115. In the case of COVID-19 enforcement, some areas are left with the resources and policies to truly fight the pandemic, while others (e.g., Black neighborhoods) are left without those resources.

³¹² *Id.* at 2085.

³¹³ *Id.* at 2085. On the other hand, legitimacy theory suggests that Blacks do not comply because of a troubled relationship with the police. Professor Bell’s *Hearing Their Voices: Understanding the Freddie Gray Uprising* study conducted in the months directly following Freddie Gray’s murder tells the story of Black life in Baltimore, including limitations on movement enforced by police in ways that are similar to that experienced by Blacks nationwide during pandemic. *Id.* at 2090 n.137.

³¹⁴ *Id.* at 2118.

³¹⁵ *Id.* at 2087.

³¹⁶ *Id.* at 2087–88.

of rethinking the meaning of liberty so that it protects all citizens equally.”³¹⁷ The same is true of pandemic-order enforcement. The contours of equitable liberty during a public health emergency should protect Blacks from violence, degradation, and intrusion, not subject them to more of it as was experienced during the COVID-19 pandemic. Equitable liberty would also make room for social justice remedies to public health emergencies—beginning before the emergency starts. That is, Black liberty in an emergency requires the dismantling of social arrangements that make it impossible for Black people to make choices that will keep them safe before, during, and after emergencies.

This Part of the Article seeks to bring community-wide quarantine enforcement of the type experienced in Black neighborhoods during the COVID-19 pandemic into larger conversations surrounding carceral abolition. Abolishing quarantine laws will cease individual and community physical harm and also expose the state’s deployment of punishment regimes even when it is ostensibly engaged in efforts to protect Black communities. Beyond abolishment of community-wide quarantines, this Part considers social-justice-oriented state interventions that would bring Blacks within the sphere of protection during future public health emergencies.

A. *Applying Judicial Review*

Libertarian arguments asserted in cases such as *County of Butler, Martinko v. Whitmer*, and *Armstrong v. Newsom* were successful in focusing courts’ attention on the ways in which emergency orders, including quarantine laws, abridge fundamental rights such as the right to free movement. In *County of Butler*, the court held that “[b]road population-wide lockdowns [were] such a dramatic inversion of the concept of liberty in a free society as to be nearly presumptively unconstitutional.”³¹⁸ In Black communities, we saw just that—violent state action eclipsed liberty in the name of public health. The question of whether *Jacobson* remains good law is likely to present itself in future public health emergencies. Justice Alito’s dissent in *Sisolak* may portend where the law is headed—there is an indication that states may not be able to use *Jacobson* to shield state action taken in emergencies from review in the future.³¹⁹ As discussed previously, other scholars have pointed out that this shift in public health law jurisprudence—allowing for the application of judicial review—should be

³¹⁷ DOROTHY E. ROBERTS, *KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY* 294 (1997).

³¹⁸ *County of Butler v. Wolf*, 486 F. Supp. 3d 883, 918 (W.D. Pa. 2020).

³¹⁹ See *supra* pp. 733–734 and note 280.

welcomed by anyone concerned with the erosion of liberty and civil rights in emergency.³²⁰

Among those calling for the application of judicial review, however, there is variance as to what level of scrutiny should be applied.³²¹ Some suggest that rational basis will suffice. In *County of Butler*, however, the court replaced *Jacobson*'s deference standard with intermediate scrutiny.³²² At the very, least intermediate scrutiny should be applied to quarantine laws that target entire Black communities, as during the COVID-19 lockdowns in San Juan, Chicago, New York, and Newark. Moreover, the use of state violence to disparately enforce community-wide quarantines suggests strict scrutiny, as was applied in the original *Floyd* litigation, might be more appropriate to prevent states from causing individual harm and eroding entire Black communities' constitutional rights.³²³ The level of scrutiny should increase in such circumstances as in *Floyd TRO*, where, despite arising from a facially neutral law or policy, the enforcement is selective and disparate. The imposition of geographic quarantines during the pandemic in segregated neighborhoods through police presence, and often force, violates the Constitution and civil rights laws just as it would in a nonemergency. Far from deferring to the city under a *Jacobson* analysis, Judge Torres should

³²⁰ *Id.*

³²¹ See Margaret Reiney & John C. O'Quinn, *Is Rational Basis the Appropriate Test to Apply in Reviewing Emergency COVID-19 Orders?*, FEDERALIST SOC'Y (Feb. 3, 2021), <https://fedsoc.org/commentary/fedsoc-blog/is-rational-basis-the-appropriate-test-to-apply-in-reviewing-emergency-covid-19-orders> [https://perma.cc/BB23-7FGW].

³²² *County of Butler*, 486 F. Supp. 3d at 907.

³²³ Newark Mayor Ras Baraka, when referring to challenges to his mandatory stay-at-home policies that exceeded the governor's orders, stated that "[Newark] is not other towns, we have to run faster than the state." Karen Yi, *Newark, NJ's Largest City, Defies Governor and Issues Strict Lockdown as Positivity Rate Soars*, GOTHAMIST (Nov. 12, 2020), <https://gothamist.com/news/newark-njs-largest-city-defies-governor-and-issues-strict-lockdown-as-positivity-rate-soars> [https://perma.cc/FPK7-RMK3]. Among other things that make Newark not like "other towns" are its demographics. Colleen O'Dea, *Interactive Map: Segregation Continues to Be NJ's State of the State*, NJ SPOTLIGHT NEWS (Dec. 2, 2016), <https://www.njspotlightnews.org/2016/12/16-12-01-interactive-map-segregation-continues-to-be-nj-state-of-the-state/> [https://perma.cc/6X56-JS3K] ("All of New Jersey's five wealthiest municipalities were at least three quarters non-Hispanic white and more than nine in 10 residents were white in two of those—Essex Fells and North Caldwell, both in Essex County. Less than 15 miles away from both is Newark. With the 12th-lowest median household income as measured by the 2014 American Community Survey, Newark's minority population is the 10th largest in the state—51 percent black and 35 percent Hispanic. Little more than one in 10 residents of the state's largest city are white."). Newark's former Public Safety Director Anthony Ambrose urged "residents to call the police if they [saw] groups of people hanging out and violating this mandate." See *Mayor Baraka Puts Entire City on Strict Shelter-in-Place Restrictions and Promises Aggressive Enforcement to Stop Spread of COVID-19*, CITY OF NEWARK (Mar. 25, 2020), <https://www.newarknj.gov/news/mayor-baraka-puts-entire-city-on-strict-shelter-in-place-restrictions-and-promises-aggressive-enforcement-to-stop-spread-of-covid-19> [https://perma.cc/27TY-6UBT].

have applied strict scrutiny when reviewing the NYPD's violent and disparate enforcement of pandemic orders in Black communities.³²⁴

B. Abolishing Mandatory Quarantine

“The abolition of police means more than simply the absence of policing or the end of police-perpetuated harm Rather than a quixotic demand to disband police departments overnight, abolition is a careful and collective endeavor to build a world where police—and the reasons we believe we need policing—become obsolete.”

—Matthew Clair³²⁵

The implication that Blacks could social distance their way to lower rates of COVID-19 transmission, and the act of subjecting them to police violence for failing to do so, were not only perverse. They also obscured actual solutions that could have kept Black communities safer.

1. Decriminalization

Policing is not a public health response.³²⁶ Quite the opposite. An emerging body of empirical scholarship suggests that aggressive policing of the kind utilized in connection with COVID-19 pandemic enforcement is a public health crisis on its own, associated with a number of negative population health outcomes and health inequity.³²⁷ Aggressive policing includes a broad and expansive set of strategies used by law enforcement officers “to proactively control disorder and strictly punish all levels of

³²⁴ The Second Circuit has said that there are at least three ways a plaintiff can plead intentional discrimination that violates the Equal Protection Clause:

First, “[a] plaintiff could point to a law or policy that ‘expressly classifies persons on the basis of race.’” *Second*, “a plaintiff could identify a facially neutral law or policy that has been applied in an intentionally discriminatory manner.” *Third*, “[a] plaintiff could also allege that a facially neutral statute or policy has an adverse effect and that it was motivated by discriminatory animus.” In none of these three cases is a plaintiff “obligated to show a better treated, similarly situated group of individuals of a different race in order to establish a claim of denial of equal protection.”

Floyd v. City of New York, 959 F. Supp. 2d 540, 562 (S.D.N.Y. 2013) (internal citations omitted). But in the case of COVID-19 enforcement in New York City, there was such evidence, and it was presented to the court. The *Floyd* court hearing the plaintiffs’ COVID-19 enforcement temporary restraining order was, of course, familiar with the Second Circuit’s Equal Protection jurisprudence. It had been cited in the original court’s opinion.

³²⁵ Matthew Clair, *Study and Struggle: The Pragmatism of Police Abolition*, NATION (Mar. 9, 2022), <https://www.thenation.com/article/society/derecka-purnell-becoming-abolitionists/> [<https://perma.cc/KN2P-6KCM>].

³²⁶ Some scholars have argued that a policy of aggressive policing is itself a public health crisis and threatens the health of those exposed to it. *See, e.g.*, Michael Esposito, Savannah Larimore & Hedwig Lee, *Aggressive Policing, Health, and Health Equity*, HEALTH AFFS. (Apr. 30, 2021), <https://www.healthaffairs.org/doi/10.1377/hpb20210412.997570/> [<https://perma.cc/6DWD-RDM7>].

³²⁷ Researchers have observed three types of health-related harm: (1) immediate physical danger to the individual, (2) long-term mental and physical harm, and (3) community-wide health deterioration. *Id.*

deviant behavior.”³²⁸ At a more granular level, aggressive policing can include persistent patrolling and surveillance of neighborhoods, frequent engagement of civilians who are considered suspicious, the systematic arrest of people for even low-level infractions, and relentless surveillance. Stop-and-frisk is the canonical aggressive policing tactic.³²⁹ Communities of color, particularly Black communities, are overexposed to aggressive policing strategies and, by extension, the harms that those policies engender, including health disparities.³³⁰

Recent studies suggest that prisons neither rehabilitate prisoners nor make the public safer.³³¹ Prison is itself an unhealthy place. Incarcerated persons, abolitionists, criminal law reform advocates, and even some prosecutors argued for release and cessation of arrests to minimize the threat of disastrous outbreaks.³³² Thousands were indeed released.³³³ Whether using police officers to impose social distancing measures, such as quarantine, on healthy people is effective to combat communicable diseases can be defended on public health grounds is unclear.³³⁴ Instead of a public good,

³²⁸ *Id.* Ironically, while enforcing pandemic mandates many officers often did not wear masks themselves. See Dionne Searcey, Lucy Tompkins & Robert Chiarito, *Virus Cases Grow, but Some Police Officers Shed Masks*, N.Y. TIMES (Aug. 12, 2020), <https://www.nytimes.com/2020/06/23/us/coronavirus-police-masks.html> [<https://perma.cc/3X6M-UHGN>].

³²⁹ Esposito et al., *supra* note 326.

³³⁰ Aggressive policing practices have historically been and continue to be focused on neighborhoods with larger populations of racial minorities, particularly areas with greater densities of Black residents. A review of Philadelphia law enforcement’s stop-and-frisk practices found that Black residents, who make up approximately 40% of the city’s population, accounted for approximately 70% of stops, and that this disproportionate exposure to aggressive policing was not explained by “non-racial factors” such as age or crime rates. See Plaintiffs’ Tenth Report to Court on Stop and Frisk Practices: Fourteenth Amendment Issues at 2–3, *Bailey v. City of Philadelphia*, No. 2:10-CV-5952 (E.D. Pa. Apr. 24, 2020), ECF No. 106. An analysis of New York City’s stop-and-frisk data also demonstrated that Black and Latinx people were disproportionately subjected to searches that yielded no evidence of criminal activity. See Sharad Goel, Justin M. Rao & Ravi Shroff, *Precinct or Prejudice? Understanding Racial Disparities in New York City’s Stop-and-Frisk Policy*, 10 ANNALS APPLIED STAT. 365, 367 (2016).

³³¹ See, e.g., Francis T. Cullen, Cheryl Lero Jonson & Daniel S. Nagin, *Prisons Do Not Reduce Recidivism: The High Cost of Ignoring Science*, 91 PRISON J. 48S, 57S (2011) (concluding that “there was . . . no evidence that sentencing offenders to prison reduced recidivism”).

³³² See Norrinda Brown Hayat, *Housing the Decarcerated: COVID-19, Abolition & the Right to Housing*, 110 CALIF. L. REV. 639, 647 (2022) (citing *Reducing Jail and Prison Populations During the COVID-19 Pandemic*, BRENNAN CTR. FOR JUST. (Jan. 7, 2022), <https://www.brennancenter.org/our-work/research-reports/reducing-jail-and-prison-populations-during-covid-19-pandemic> [<https://perma.cc/KB4V-LUV5>]).

³³³ Patrice Gaines, *Thousands Were Released from Prison Because of Covid. Will They Have to Return?*, NBC NEWS (Sept. 13, 2021, 11:02 AM), <https://nbcnews.com/news/nbcblk/thousands-released-prison-covid-will-return-rcna1977> [<https://perma.cc/R2GD-XAAZ>].

³³⁴ JOE NOCERA & BETHANY MCLEAN, THE BIG FAIL: WHAT THE PANDEMIC REVEALED ABOUT WHO AMERICA PROTECTS AND WHO IT LEAVES BEHIND 33 (2023) (“[T]here was never any actual scientific studies supporting the strategy [of lockdown]. It was a giant experiment, one that would bring

quarantines, especially in Black communities, served more pernicious functions similar to predecessor laws that criminalized Black movement, such as stop-and-frisk policies. That many Black and brown people, such as Malik Harris, were arrested and sent to Rikers for allegedly violating pandemic orders shows that quarantine laws are carceral.

When we acknowledge that quarantine laws are carceral and recognize them as genealogically related to other laws that criminalize low-level deviant conduct (both past and present), calling to abolish quarantine seems naturally aligned with the calls for prison and police abolition. Decriminalization movements seek to eliminate unnecessary laws that criminalize minor offenses in order to reduce the number of street-level harassments and interactions between the police and various communities. This is done by repealing outdated laws and is a central tenet of the prison and police abolition movement.³³⁵ This Article is concerned with the repeal of outdated quarantine policies that were revised during the COVID-19 pandemic to activate police violence as a means of limiting Black free movement in emergencies.

Grassroots abolition campaigns are already working not just to end the construction and expansion of prisons and jails but also to eliminate the use of racially discriminatory policing practices, from gang injunctions to stop and search, with the aim of depriving the prison industrial complex of the people, policies, and practices that sustain and give it legitimacy.³³⁶

devastating social and economic consequences.”). Studies typically show that quarantine is effective in limiting the spread of the virus. Barbara Nussbaumer-Streit, *Quarantine Alone or in Combination with Other Public Health Measures to Control COVID-19: A Rapid Review*, COCHRANE DATABASE SYSTEMATIC REVIEWS, Sept. 14, 2020, at 19 (analyzing fifty-one studies on quarantine in the context of COVID-19, SARS, and MERS, and reporting that the “modelling studies on COVID-19 consistently reported a benefit of the simulated quarantine measures”). See generally Lawrence O. Gostin & Lindsay F. Wiley, *Governmental Public Health Powers During the COVID-19 Pandemic*, JAMA (Apr. 2, 2020), <https://jamanetwork.com/journals/jama/fullarticle/2764283> [<https://perma.cc/5EJJ-DNWD>] (“Some models suggest physical distancing would have to persist for 3 months to mitigate the peak effects on health systems and could be required on an intermittent basis for 12 to 18 months.”). Still, studies have not measured the trade-off of civil liberties in the context of quarantines, despite calls to do so. See NAT’L ACADS. SCI., ENG’G & MED., EVIDENCE-BASED PRACTICE FOR PUBLIC HEALTH EMERGENCY PREPAREDNESS AND RESPONSE 193–94, 423–24 (2020) (“The results of [fourteen qualitative studies highlighting the potential need for a broader definition of effectiveness for quarantine] suggest that agencies may want to judge the effectiveness of quarantine not only using the metric of medical outcomes but also in terms of the degree of protection of the civil rights of the public on whom quarantine is imposed.”). Still, as one study pointed out, it can be difficult to determine “the effectiveness and equitable application of quarantine policies, particularly given the issues of personal liberties,” and thus it may be easier to just focus on efficacy. *Id.* at 423.

³³⁵ *Decriminalization*, BLACK LIVES MATTER, <https://defundthepolice.org/decriminalization/> [<https://perma.cc/S7MS-ZCC9>].

³³⁶ Rachel Herzing, *Abolition Is Practical*, INQUEST (July 11, 2023), <https://inquest.org/abolition-is-practical> [<https://perma.cc/6CM6-RJ24>].

Quarantine laws could be a part of existing campaigns aimed at the individual and community harms that befall Black communities as a result of the carceral state's unnecessary intrusion into Black lives.

2. Liberty Redefined

Repealing mandatory quarantine laws alone will not adequately safeguard Black liberty and Black lives in future emergencies. Interventions in the welfare state are also needed to protect the health of Black individuals and communities during public health emergencies. “Blacks’ exclusion from citizenship persistently blocks efforts to establish an inclusive welfare system,” Dorothy Roberts reminds us in *Welfare and the Problem of Black Citizenship*.³³⁷ Roberts argues that racial injustice “has had a profound impact on our conception of welfare: It not only denied Blacks benefits to which whites were entitled; it also constrained the meaning of citizenship for all Americans.”³³⁸ An example of this constrained view of liberty was evident in the enforcement of COVID-19 quarantine orders, which curtailed the free movement of those who were not privileged, including Blacks. What is needed then is a revision away from the dominant conception of liberty that only benefits the privileged and which was on full display in the COVID-19 libertarian cases and towards a social justice approach. A social justice approach to liberty would include a proscription against government intrusion and violence, but also a mandate to protect individuals from the degradation that relegates them to discriminatory healthcare, toxic air, and unstable housing in deeply segregated communities, making them more susceptible to communicable diseases in the first place.³³⁹ For example, Blacks living in the Ironbound neighborhood of Newark breathe air that is so toxic that it makes them more susceptible to communicable diseases like COVID-19.³⁴⁰

Targeting the racism and classism historically inherent in the public health state—a system that reduces Black liberty instead of providing Blacks with the resources necessary to fight a pandemic—may also be an appropriate target of abolitionist movements. Abolition is best understood, Derrecka Purnell instructs us, as demanding strategies, resources, and mutual efforts that work together to reduce harm in society more broadly through investments in education, housing, employment, health care, and

³³⁷ Dorothy E. Roberts, *Welfare and the Problem of Black Citizenship*, 105 YALE L.J. 1563, 1565 (1996).

³³⁸ *Id.* at 1574.

³³⁹ ROBERTS, *supra* note 317, at 184.

³⁴⁰ Sharon Lerner, *What Racism Smells Like*, INTERCEPT (Aug. 8, 2020, 8:09 AM), <https://theintercept.com/2020/08/08/coronavirus-pollution-environmental-justice-racism/> [<https://perma.cc/C43R-963A>].

environmental preservation.³⁴¹ Abolition politics then seeks not simply to uproot just a system of violent policing but also other forms of oppression that intersect with the carceral state.³⁴²

Unsurprisingly, organizing in the prison and police abolition contexts has modeled new ways of responding to other crises, such as racial capitalism and colonialism, which were then exercised in Black communities during the COVID-19 pandemic.³⁴³ “Abolitionist demands have become a terrain for reimagining social, political, and economic life.”³⁴⁴ Radical³⁴⁵ demands, such as the #CancelRent and OccupyPHA movements, are consistent with this paradigm.³⁴⁶

a. Equitable Distribution

Recognizing the link between unemployment, eviction, and transmission rates, federal and state government officials initiated broad-scale social programs to keep communities safe during the pandemic. These programs included the eviction moratorium, rental assistance, student loan repayment pause, child tax credit, and provisions of free personal protective equipment, vaccines, testing, and internet access.³⁴⁷ The origins of several of these programs, specifically the ones calling for eviction moratorium and rental assistance, can be traced back to demands asserted in cities where “black and brown families have become especially vulnerable to the changing rental market.”³⁴⁸ Organizers in New York, Philadelphia, and the Bay Area, for instance, coordinated what is considered by some to be the largest rent strike in American history as an act of mass noncompliance.³⁴⁹ In

³⁴¹ Clair, *supra* note 325.

³⁴² *Id.*

³⁴³ Marbre Stahly-Butts & Amna A. Akbar, *Reforms for Radicals? An Abolitionist Framework*, 68 UCLA L. REV. 1544, 1546 (2022).

³⁴⁴ *Id.*

³⁴⁵ *Id.* at 1546 n.3 (“When we use the term radical, we are inspired by Ella Baker’s use of the phrase: “[G]etting down to and understanding the root cause.”” (alteration in original) (citing BARBARA RANSBY, ELLA BAKER AND THE BLACK FREEDOM MOVEMENT: A RADICAL DEMOCRATIC VISION 1 (2013))).

³⁴⁶ Matthew Haag & Conor Dougherty, *#CancelRent Is New Rallying Cry for Tenants. Landlords Are Alarmed.*, N.Y. TIMES (Oct. 6, 2021), <https://www.nytimes.com/2020/05/01/nyregion/rent-strike-coronavirus.html> [<https://perma.cc/M66P-2BH7>]; Stahly-Butts & Akbar, *supra* note 343.

³⁴⁷ *Policy Responses to COVID-19*, IMF, <https://www.imf.org/en/Topics/imf-and-covid19/Policy-Responses-to-COVID-19> [<https://perma.cc/EMA8-6A2M>]; *Assistance for American Families and Workers*, U.S. DEP’T OF THE TREASURY, <https://home.treasury.gov/policy-issues/coronavirus/assistance-for-american-families-and-workers> [<https://perma.cc/5X92-4JVY>].

³⁴⁸ Keeanga-Yamahtta Taylor, *Cancel the Rent*, NEW YORKER (May 12, 2020), <https://www.newyorker.com/news/our-columnists/cancel-the-rent> [<https://perma.cc/5Q3N-6X4E>].

³⁴⁹ Rent assistance is an example of the kind of affirmative state action that is needed in pandemics. Pre-pandemic rent in New York City was astronomical. Just prior to the onset of the pandemic in January 2020, the average rent in New York City was \$2,900. See Mihir Zaveri, *Rents Are Roaring Back in New*

April 2020, nearly 200,000 tenants stopped paying rent and called for rent forgiveness from their landlords.³⁵⁰ New York was considered the epicenter of the #CancelRent movement and organizers there articulated three points to the agenda: (1) cancel rent for four months or the duration of the pandemic, whichever was longer; (2) freeze rents and offer every tenant the right to renew their lease; and (3) rehouse all New Yorkers experiencing homelessness.³⁵¹

Mass evictions would have accelerated the spread of COVID-19, especially in cities in which both evictions and contacts occur more frequently in poorer neighborhoods. One study found that the process of being evicted can have a measurable impact on the spread of the pandemic in cities and that policies to stem evictions are an important and warranted component of epidemic response.³⁵² The harm of an eviction is never limited to those who were evicted or those who received evicted families into their homes. This would have been no different in the pandemic, and likely worse. Non-evicted households would have also experienced an increase in infections as well because of spillovers from the transmission amplified by evictions.

The same study found that the CDC-mandated national order prohibiting evictions likely prevented thousands of COVID-19 infections for every million metropolitan residents, and that allowing evictions would have increased the relative risk of infection for all households—not just the narrow class of those experiencing eviction.³⁵³ This is because evictions change with whom we have the closest contacts. This uptick in contacts, even when affecting only a small portion of the population, can significantly increase the transmission of communicable diseases across an interconnected city.

#CancelRent was prefigurative. Subsequently, forty-five states and the federal government enacted some form of relief for tenants, ranging from rent moratoria and halting residential evictions for nonpayment of rent to

York City, N.Y. TIMES (Mar. 7, 2022), <https://www.nytimes.com/2022/03/07/nyregion/nyc-rent-surge.html> [<https://perma.cc/6PU4-XX95>]. And it was difficult for the average New Yorker to pay. At the onset of the pandemic, affordability became an appreciably larger issue as many businesses were required to shutter, causing them to let employees go and making it even hard for the average New Yorker to pay rent. This spurred the #CancelRent movement. See Annie Lowrey, *Cancel Rent*, ATLANTIC (May 2, 2020), <https://www.theatlantic.com/ideas/archive/2020/05/cancel-rent/611059/> [<https://perma.cc/LTN9-UK7K>].

³⁵⁰ Lowrey, *supra* note 349.

³⁵¹ *Can't Pay Rent!*, ACTION NETWORK, <https://actionnetwork.org/forms/mayday-cantpay> [<https://perma.cc/4CAH-YXWQ>].

³⁵² Anjalika Nande et al., *The Effect of Eviction Moratoria on the Transmission of SARS-CoV-2*, 12 NAT. COMMUN. 2274, 2280 (2021).

³⁵³ *Id.*

utilities subsidies.³⁵⁴ Later, the federal government passed a federally funded rental aid program—Emergency Rental Assistance Program (ERAP)—essentially transforming the call to “cancel rent” into a universal housing program.³⁵⁵

The Occupy movement in Philadelphia is another example of an intervention that helped flatten the pandemic curve and existed outside of policing. There, at least three different encampments were erected by unhoused persons as an alternative to traditional housing.³⁵⁶ Activists from the Workers Revolutionary Collective, the Black and Brown Workers Co-op, and OccupyPHA set up encampments, including one outside the Philadelphia Housing Authority (PHA) headquarters.³⁵⁷ The Occupy organizers were following a long tradition of “squatting”³⁵⁸ and asserted that their action sat at the intersection of “racism, gun violence, and housing.”³⁵⁹ The encampments were declared police-free since, as organizers put it,

³⁵⁴ Ann O’Connell, *Emergency Bans on Evictions and Other Tenant Protections Related to Coronavirus*, NOLO (Dec. 19, 2022), <https://www.nolo.com/evictions-ban> [<https://perma.cc/K37S-F6FX>]; *COVID-19 Housing Policy Scorecard*, EVICTION LAB (June 30, 2021), <https://evictionlab.org/covid-policy-scorecard/> [<https://perma.cc/M54R-XPV7>].

³⁵⁵ See *Emergency Rental Assistance Program*, U.S. DEP’T OF THE TREASURY, <https://home.treasury.gov/policy-issues/coronavirus/assistance-for-state-local-and-tribal-governments/emergency-rental-assistance-program> [<https://perma.cc/L6JM-ZBSE>].

³⁵⁶ On any given night in Philadelphia, approximately 4,400 people are unhoused. Mike D’Onofrio, *Philly’s First Tiny House Village for Homeless Slated for 2023*, AXIOS PHILA. (Nov. 16, 2022), <https://www.axios.com/local/philadelphia/2022/11/16/philadelphia-tiny-house-village-homeless> [<https://perma.cc/S3VU-GM3B>]. Lockdown made homeless shelters untenable for many unhoused persons due to increased COVID-19 risk.

³⁵⁷ Michael Tanenbaum, *Philly Officials Address Encampment Protest on Benjamin Franklin Parkway*, PHILLY VOICE (June 16, 2020), <https://www.phillyvoice.com/philly-encampment-protest-homeless-benjamin-franklin-parkway-housing-pha/> [<https://perma.cc/M9Q8-TKBX>]. In late June, the residents of the Parkway Encampment (known as Camp JTD) moved to parcels of land located across from PHA’s Headquarters on Ridge Avenue “with the goal of pressuring PHA to come to the table regarding the housing crisis in Philadelphia and to discuss uses for long term vacant PHA properties.” The Ridge Avenue encampment was known as Camp Teddy. Pat Ralph, *City Officials, Homeless Encampment Leaders Reach Deal to End Protest Camp at Ridge Ave.*, PHILLY VOICE (Oct. 6, 2020), <https://www.phillyvoice.com/philadelphia-housing-authority-occupy-pha-homeless-encampment-ridge-avenue/> [<https://perma.cc/HAV3-FG9L>].

³⁵⁸ To “squat” is to occupy an uninhabited building or piece of land without legal title and without the payment of rent. *Squatter*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/squatters> [<https://perma.cc/4649-HAXQ>].

³⁵⁹ Apoorva Tadepalli, *A Radical Movement to Take Back Our Cities*, NEW REPUBLIC (Aug. 11, 2020), <https://newrepublic.com/article/158842/abolition-park-protest-defund-the-police-homelessness-housing-crisis> [<https://perma.cc/26TR-9BY Y>]. The encampments were organized before George Floyd’s murder and the protests that erupted internationally in late May and early June. Yet, “BLM” and “HOUSING NOW” signs could be seen hanging side-by-side over the tents. One OccupyPHA organizer, Jennifer Bennetech, described the action as “a civil war between the poor and Black citizens of Philadelphia, and the city.” *Id.*

“[p]olice are the primary brutalizers of those experiencing homelessness.”³⁶⁰ Also, as part of the action, organizers moved over fifty unhoused families into empty publicly owned properties.

In lieu of a central policy goal, organizers described the encampments as representing “something more like ‘collective world-making.’”³⁶¹ The group had eight demands, including requests to halt the sale of properties to private parties until all those on PHA waiting lists have been housed, repeal camping ordinances within the city limits, sanction some encampments as permanent, legal, and valid, and stop all sweeps of unhoused people.³⁶² Residents of the encampments came to an agreement with the City of Philadelphia on October 5, 2020.³⁶³ The agreement called for the residents to vacate the encampment in exchange for multiple pathways to permanent affordable housing.³⁶⁴ Among the pathways was PHA’s establishment of the COVID-19 Homeless Relief Program, which allocated twenty-five permanent housing opportunities for homeless families referred to PHA by qualified service providers.³⁶⁵

In Los Angeles, Project Roomkey housed homeless persons in empty hotel rooms during the height of the COVID-19 pandemic.³⁶⁶ Project Roomkey was a collaboration between the City and County of Los Angeles, the State of California, and the federal government.³⁶⁷ Under the program, more than 10,000 people vulnerable to COVID-19 had the ability to occupy a hotel room instead of being on the street.³⁶⁸ “At its peak, Project Roomkey included more than 4,000 rooms” set aside for unhoused people in thirty-seven hotels.³⁶⁹

³⁶⁰ *Id.*

³⁶¹ *Id.*

³⁶² See *Our Demands*, PHILA. HOUS. ACTION, <https://philadelphiahousingaction.info/our-demands/> [<https://perma.cc/2WFB-VJ2V>].

³⁶³ Ralph, *supra* note 357.

³⁶⁴ *Id.*

³⁶⁵ *Id.*

³⁶⁶ Nick Watt, *Should Vacant Hotels in Los Angeles House the Homeless? Voters Will Decide.*, CNN (Aug. 27, 2022, 2:56 PM), <https://www.cnn.com/2022/08/24/us/los-angeles-homeless-hotel-rooms-ordinance/index.html> [<https://perma.cc/FJ87-YEXY>]. On an average night in Los Angeles County, more than 60,000 people are unhoused. *Id.*

³⁶⁷ *Project Roomkey Ends Homelessness for 4,824 People*, L.A. HOMELESS SERV. AUTH. (Nov. 18, 2022), <https://lahsa.org/news?article=901-project-roomkey-ends-homelessness-for-4-824-people> [<https://perma.cc/ZM2D-XJX3>].

³⁶⁸ *Id.*

³⁶⁹ *Id.* In 2024, Los Angeles residents will be asked to vote on whether hotel rooms should be permanently offered to the unhoused in the form of an ordinance that was proposed by Unite Here Local 11—the union that represents most of the city’s hospitality workers. If the ordinance were to pass, “every hotel—from a suburban Super 8 Motel to glitzy hostelrys like the storied Biltmore—will be required to

Radical responses to the COVID-19 pandemic, such as #Cancelrent, #OccupyPHA, and Project Roomkey, recognized the need to redistribute housing resources to the most vulnerable members of the community. All three movements were the result of abolitionist-style organizing efforts that sought to bring Black and other minoritized people into the sphere of the welfare state's protection.

Despite their success, even these campaigns had a racially disparate impact. In some cases, Blacks were unable to access these and other social welfare programs, such as the eviction moratoria and rental assistance, that should have dampened the impacts of the virus on their lives.³⁷⁰ In New York City, for example, despite the \$3.2 billion dollars paid to landlords to cover 245,000 tenants funded through the federal Emergency Rental Assistance Program (ERAP), as of January 20, 2023, tenants living in public housing and participants in other subsidized housing programs were first “deprioritized” and later disqualified outright from receiving emergency rental assistance.³⁷¹ As a result, by summer 2023, New York City Housing Authority (NYCHA) reported rent arrears of \$338 million, which was imperiling its financial viability.³⁷² These were the most deeply impoverished

report vacancies and welcome homeless guests who have a voucher from the city. The hotels would be paid market-rate for the rooms.” Watt, *supra* note 366.

³⁷⁰ Professor Dorothy Roberts sharpens our focus on why programs such as ERAP, the Philadelphia tiny homes, and Project Roomkey—all of which could be described as social welfare programs—were not the first state response to a pandemic for the Black community. The answer leads us back to Black citizenship. In *Welfare and the Problem of Black Citizenship*, Roberts argues:

Blacks' exclusion from citizenship persistently blocks efforts to establish an inclusive welfare system. On the one hand, racial justice demands aggressive government programs to relieve poverty and redress longstanding barriers to housing, jobs, and political participation. Yet . . . white Americans have resisted the expansion of welfare precisely because of its benefits to Blacks.

Citing to Harold Curse, she argues: “[W]hite America has inherited a racial crisis that it cannot handle and is unable to create a solution for it that does not do violence to the collective white American racial ego.” Black citizenship is, Roberts asserts, America's chief reason for and impediment to a strong welfare state. Roberts, *supra* note 337, at 1565–66.

³⁷¹ Iziah Thompson & Marquis Jenkins, *Opinion: Thousands of NYCHA Tenants Forgotten Under Emergency Rental Assistance Program*, CITY & STATE N.Y. (Jan. 19, 2023), <https://www.cityandstateny.com/opinion/2023/01/opinion-thousands-nycha-tenants-forgotten-under-emergency-rental-assistance-program/381976/> [<https://perma.cc/6Z6A-R4WN>]; David Brand, *Public Housing Tenants Demand Funding After Exclusion From NY's \$3 Billion Rent Relief Program*, GOTHAMIST (Mar. 26, 2023), <https://gothamist.com/news/public-housing-tenants-demand-funding-after-exclusion-from-nys-3-billion-rent-relief-program> [<https://perma.cc/C93V-7FFK>].

³⁷² Ari Ephraim Feldman, *NYCHA's Unpaid Rent at \$338M and Growing Despite State Funding*, SPECTRUM NEWS NY 1 (May 18, 2023, 6:10 PM), <https://www.ny1.com/nyc/all-boroughs/politics/2023/05/18/nycha-s-rental-arrears-at--338m-and-growing-despite-state-funding> [<https://perma.cc/R2AL-BAAV>].

families in the city,³⁷³ and yet they were denied access to a federal program designed to keep them housed and out of massive debt.

These types of inequities cannot stand in future health pandemics if Black communities are to be kept safe through them. This is the kind of neoliberal liberty that Roberts pushes us to abolish and replace. Blacks' exclusion from citizenship persistently blocks efforts to establish an inclusive welfare system. But racial justice demands aggressive government programs to relieve poverty and redress long-standing barriers to housing, jobs, and political participation.

b. Environmental Justice

Black people proved to be more vulnerable to COVID-19, but not because they were too irresponsible to social distance.³⁷⁴ Comorbid conditions, such as heart disease, diabetes, and asthma, and social conditions, such as lack of housing and healthcare, made Black communities more vulnerable to a communicable disease like COVID-19. An open letter authored by dozens of environmental groups in July 2020 stated: "Disinvestment in environmental justice communities has contributed to polluted air and water, fewer hospitals and healthy food options, jobs without paid sick leave, and crowded living conditions that make social distancing difficult."³⁷⁵ The groups asserted that these factors were a cause of the disproportionate impacts of coronavirus on communities of color.³⁷⁶

While the racial disparities around COVID-19 were first regarded as a mystery, it became clear not long into the pandemic that they could be explained, at least in part, by exposure to pollution. Those exposed to pollution often have conditions which make them particularly susceptible to severe effects of the disease. Take Newark, New Jersey, for example, which has 930 facilities permitted to release pollution, eighty-seven of which had current violations as of August 2020.³⁷⁷ Just one of the incinerators burns one million tons of trash from other areas of Essex County, New Jersey, and New

³⁷³ As of March 2022, 43.61% of NYCHA's 157,334 tenants were Black and 44.61% were Hispanic. There were 122,363 female headed households and 25.16% of the NYCHA population was families with children. The average income was \$24,454. N.Y.C. HOUS. AUTH., RESIDENT DATA BOOK 2 (2022), <https://www.nyc.gov/assets/nycha/downloads/pdf/Resident-Data-Book-Summary-2022.pdf> [<https://perma.cc/X47N-ERVD>].

³⁷⁴ During the smallpox epidemic, the emancipated enslaved people were susceptible to the disease because they were resourceless. WITT, *supra* note 12. The same is true today. Early in the pandemic, "Newark's death rate from COVID-19 [was] 223 per 100,000 people, compared to 177 statewide and just under 44 in the U.S. as a whole. Nationwide, the Black and Latino death rates from COVID-19 [were] almost three times that of white people." Lerner, *supra* note 304.

³⁷⁵ Lerner, *supra* note 304.

³⁷⁶ *Id.*

³⁷⁷ *Id.*

York City.³⁷⁸ The incinerators in Newark and Camden emit the largest amount of lead in the country and they are sickening the people who live near them.³⁷⁹ Those people are primarily Black.³⁸⁰

As a result of breathing all of this toxic air, the health of the city's residents is imperiled. In Newark, 25% of children suffer from asthma—three times the national rate—and are hospitalized at thirty times the rate of children in other parts of the country.³⁸¹ And chronic asthma contributes to chronic absenteeism. During the 2013–2014 school year, “one in four children in grades K-3 . . . was chronically absent, missing [ten] or more school days, with asthma given as the primary health reason.”³⁸² So, as Newark's mayor made repeated statements about keeping Black and brown communities such as the Ironbound safe from coronavirus, those communities continued to be overburdened by the state's polluting infrastructure.³⁸³ In April 2020, at the height of the first wave of the pandemic, the New Jersey Department of Environmental Protection expanded the permits of crematoriums so that they could operate around the clock to keep up with the mounting number of COVID-19 fatalities.³⁸⁴ Residents reported smelling the burning of harmful air pollutants from the crematoriums around the clock.³⁸⁵ New Jersey is not idiosyncratic in this way—overburdening poor communities of color with the expense of burning the entire state's trash.³⁸⁶

Living in the Ironbound next to New Jersey's largest trash incinerator is not a choice for many of the neighborhood's residents. Many of them likely cannot afford to live anywhere else. New Jersey enacted environmental justice legislation in 2020, but at the time critics contended

³⁷⁸ *Id.*

³⁷⁹ Press Release, Insider NJ, *supra* note 307.

³⁸⁰ *Id.* (“New Jersey's facilities are in the Ironbound area of Newark, not in Short Hills, Union County's incinerator is in the only black community of Rahway and South Jersey's facility is in Westville, not Haddonfield.”).

³⁸¹ Bob Hennesly, *Ironbound Pushes Back on PVSC Plan B*, INSIDER NJ (Apr. 26, 2022, 8:26 AM), <https://www.insidernj.com/ironbound-pushes-back-on-pvsc-plan-b/> [https://perma.cc/W8M7-8BE8].

³⁸² *Id.*

³⁸³ See Cecilia Levine, *Coronavirus Is Ravaging America's Black Communities, Newark Mayor Takes Stringent Approach*, DAILY VOICE (Apr. 16, 2020, 11:55 AM), <https://dailyvoice.com/new-jersey/essex/news/coronavirus-is-ravaging-americas-black-communities-newark-mayor-takes-stringent-approach/786677/> [https://perma.cc/KUX8-QKC5]. Ironbound qualifies as an overburdened community. An overburdened community is one where, according to the U.S. Census, 40% of the households are minority and 35% qualify as low-income. Hennesly, *supra* note 381.

³⁸⁴ Letter from Elizabeth Dragon, Assistant Comm'r, Compliance & Enf't, N.J. Dep't of Env't Prot., to All Human Crematory Operators (Apr. 13, 2020), <https://nj.gov/dep/covid19regulatorycompliance/docs/eq-crematory-operator20200413.pdf> [https://perma.cc/CQ2W-E6HW].

³⁸⁵ Lerner, *supra* note 304.

³⁸⁶ Press Release, Insider NJ, *supra* note 307; Hennesly, *supra* note 381.

the bill did not do enough.³⁸⁷ Sixteen of the largest twenty incinerators in the country are in communities where people of color are a higher percentage than the national average, and fourteen of those twenty are in communities where the majority of the residents are people of color.³⁸⁸ Community-led organizations such as New Jersey Sierra Club argue that Black communities need protection from toxins that make them more susceptible to communicable diseases to protect them from future pandemics, not more policing.³⁸⁹

What is interesting about the Newark example and others like it is that, even as local governments were publicly articulating a narrative of benevolence and safety to justify violence against Black communities in the name of public health through pandemic order enforcement, they were denying access to necessary resources and giving the green light to projects that perpetually endanger the most vulnerable members of those same communities. Narratives of state benevolence and personal accountability obscured the question of resources and social justice.

CONCLUSION

After a little over three years, on May 5, 2023, the director-general of the World Health Organization announced that the COVID-19 pandemic is no longer a public health emergency of international concern.³⁹⁰ The director-general argued that we need to move from responding to preparing.³⁹¹ This Article is concerned with what that preparation looks like and the implications it has not only for Black free movement but also for the valuation of Black life in future public health emergencies. Airborne diseases are not the only possible public health crises that Americans may face in the

³⁸⁷ *Id.* (“The bill isn’t likely to dramatically alter the Newark factoriescape any time soon because it doesn’t require the state to deny applications for permit renewals if they add additional environmental stressors to overburdened communities.”); Tennyson Donyéa, *N.J. Advocates Are Mobilizing to Prevent Fossil Fuel Companies from Expanding in Low-Income Neighborhoods*, WHY (Aug. 23, 2022), <https://why.org/articles/new-jersey-advocates-fossil-fuel-companies-low-income-neighborhoods/> [<https://perma.cc/2PMV-ZR6S>] (“After New Jersey enacted an environmental justice law in 2020, predominantly Black and Hispanic cities like Camden, Newark, Trenton, and Atlantic City were designated as environmentally overburdened communities or OBCs.”).

³⁸⁸ *Incineration and Environmental Racism*, ENERGY JUST. NETWORK (Sept. 2022), <https://www.energyjustice.net/incineration/ej> [<https://perma.cc/ULF4-7T36>].

³⁸⁹ Press Release, Insider NJ, Study Shows Incinerators Are in 80% of EJ Communities Nationally & NJ (May 22, 2019, 2:53 PM), <https://www.insidernj.com/press-release/study-shows-incinerators-80-ej-communities-nationally-nj/> [<https://perma.cc/FM6J-SRPD>].

³⁹⁰ Spencer Kimball, *WHO Declares End to COVID-19 Global Public Health Emergency*, CNBC (May 6, 2023, 2:56 PM), <https://www.cnbc.com/2023/05/05/who-declares-end-to-covid-global-public-health-emergency.html> [<https://perma.cc/S9ED-6T2Y>].

³⁹¹ *Id.*

very near future. The warming of the planet, for example, has created all manner of emergencies in cities and states across the country.³⁹² As states respond to the increasing number of emergencies and courts review state responses, the public should be concerned about what regimes will be permissible to protect citizens in the future.

Black free movement has been criminalized during public health emergencies since before Reconstruction. Scholars have rightly critiqued state action in emergencies for two decades. While people of color have been inequitably denied liberty by quarantine laws for centuries, courts have only infrequently intervened to protect them, and the scholarly literature has been largely silent on the nuances posed by Black liberty in emergency.

Libertarian cases filed during the COVID-19 pandemic demonstrate that quarantine jurisprudence may be aligning with modern constitutional law. But *Floyd* is a canary in the coal mine with respect to the contours of Black citizenship in emergencies going forward. If states take the same disparate path regarding public health emergency order enforcement that they took over the last three years and courts endorse it, what became a seemingly never-ending pandemic will normalize a continued state of Black enclosure, even as whites move freely.

Our quarantine jurisprudence needs to be revised to reflect current constitutional norms. That process has begun. During the COVID-19 pandemic, there began to emerge one rule for free movement in an emergency for whites and a seemingly different rule for Blacks. One group moves freely, initiating litigation to repeal any orders that might limit its comings and goings, even theoretically. Legislatures and the courts were increasingly inclined to agree. The other group was criminalized for lesser acts of noncompliance, violently made to adhere to the laws, and then, when they complained in court, were met with *Jacobson*'s outdated deference standard. It is imperative to ask—how does this make sense?

COVID-19 emergency order enforcement in Black neighborhoods compared to that in white neighborhoods reminds us of the work that segregation does to reinforce ingroups and outgroups—favoring certain populations over others.³⁹³ Professor Achille Mbembe explores the results for

³⁹² Sameed Khatana, *The Increasing Death Toll in the U.S. from Extreme Heat*, TIME (July 20, 2022, 6:20 AM), <https://time.com/6198720/heatwave-health-death-toll/> [<https://perma.cc/3HVC-ZE2R>].

³⁹³ See generally Bernd Simon, *On the Asymmetry in the Cognitive Construal of Ingroup and Outgroup: A Model of Egocentric Social Categorization*, 23 EUR. J. SOC. PSYCH. 131, 132 (1993) (“[S]ocial categorization refers to the establishment of categories of human beings (e.g., females, gays, etc.). Consequently, [social categorization of human beings] always implies a categorization into ingroup and outgroup.”).

the outgroup through his theory of necropolitics.³⁹⁴ Mbembe explains that the confinement of certain populations in particular, precarious, and militarized spaces—campsites, refugee camps, prisons, banlieues, suburbs, favelas—has become a prevailing way to govern unwanted populations.³⁹⁵ Daily interactions with the state that limit movement in Black communities within businesses, homes, and public spaces such as parks and playgrounds have a significant impact on those communities' access to opportunity.³⁹⁶ Policing Blacks in this way ultimately transforms micro-scale movement (e.g., seeking access to goods, services, employment, and education), even within a defined geographic area, from commonsensical to risky, aberrational behavior. And as a result, deep isolation and scarcity within the community becomes normative over the long term, making Black people not only less safe both during pandemics and outside of them, but also creating a picture of them as less human. Mbembe calls this “small doses of death” or “small massacres” inflicted one day at a time.³⁹⁷

A certain type of state action in Black communities during public health emergencies—the kind we saw in the COVID-19 pandemic—is perhaps less about the public's health than it is about racial and social control. Such state actions, including orders calling for mandatory, community-wide quarantines, serve to further estrange Black communities from a social welfare system that should protect them but does not. To prevent this harm in the future, a campaign to end mandatory quarantine in emergency aligns with the prison and police abolition movements and can perhaps be folded into those movements.

Instead of enclosure, isolation, and policing, social justice interventions that prioritize the equitable distribution of resources such housing and accelerate the pace of environmental justice will keep Black communities and society as a whole safer in future pandemics. Given the widespread unemployment caused by the pandemic, every level of government recognized the correlation between resources, including keeping people housed, and the likelihood of surviving the virus. The federal government spent roughly \$5 trillion on pandemic-related economic stimulus

³⁹⁴ See ACHILLE MBEMBE, *NECROPOLITICS* 92 (Nancy Rose Hunt & Achille Mbembe eds., Steven Corcoran trans., 2019) (defining necropolitics as “contemporary forms of subjugating life to the power of death”).

³⁹⁵ See *id.* at 97 (discussing the restriction of movement as an effective means of control in the context of military occupations).

³⁹⁶ See Lindsay M. Monte & Daniel J. Perez-Lopez, *COVID-19 Pandemic Hit Black Households Harder Than White Households, Even When Pre-Pandemic Socio-Economic Disparities Are Taken into Account*, U.S. CENSUS BUREAU (July 21, 2021), <https://www.census.gov/library/stories/2021/07/how-pandemic-affected-black-and-white-households.html> [<https://perma.cc/RE74-4C3P>].

³⁹⁷ See MBEMBE, *supra* note 394, at 36–39.

programs.³⁹⁸ The origins of many COVID-19 social welfare programs can be traced to demands such as #CancelRent, made by Black communities even as their neighborhoods were the most heavily quarantined and policed. Ironically, though perhaps not unexpectedly, they were denied access to the social welfare programs designed to keep all American citizens safe from the pandemic.

To protect Black rights during future public health emergencies, the meaning of liberty will need to be reconstructed. The disparateness of quarantine during COVID-19 demonstrated that Black people's free movement falls outside of the sphere of the state's protection. A reconstruction of liberty to center Black people's experiences in public health crises will need to include a proscription against government violence but also an affirmative duty of government to facilitate economic and environmental justice in Black communities.

³⁹⁸ Alicia Parlapiano, Deborah B. Solomon, Madeleine Ngo & Stacy Cowley, *Where \$5 Trillion in Pandemic Stimulus Money Went*, N.Y. TIMES (Mar. 11, 2022), <https://www.nytimes.com/interactive/2022/03/11/us/how-covid-stimulus-money-was-spent.html> [<https://perma.cc/9NYH-KHNA>].