

Summary of Findings and Recommendations

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Introduction

COVID-19 is the new virus this country has been preparing to take on for decades – and has, so far, failed miserably to stop. While peer countries have managed to get it under control, the United States faces rising cases and deaths. This is not a failure of resources: although decades of cutting health agency budgets is a big part of our problem, we remain a country rich in money and expertise. This is not a failure of individual courage; from health care workers through transport workers to people who produce and deliver food supplies, essential workers have shown up and done their jobs at significant personal risk. This has been, first and foremost, a failure of leadership and the implementation of an effective response.

This collection of 36 expert assessments shows that the COVID-19 failure is, in important ways, also a legal failure:

- Decades of pandemic preparation focused too much on plans and laws on paper, and ignored the devastating effects of budget cuts and political interference on the operational readiness of our local, state and national health agencies
- Legal responses have failed to prevent racial and economic disparities in the pandemic's toll, and in some cases has aggravated them – COVID-19 has highlighted too many empty promises of equal justice under law
- Ample legal authority has not been properly used in practice – we've had a massive failure of executive leadership and implementation at the top and in many states and cities.

The more important finding of this Report is that better use of legal tools can help turn things around right now. This Report offers more than 100 specific legal recommendations for the president and Congress, governors and state legislatures, and mayors and city councilors across the country. These recommendations encompass nearly all aspects of the response, and are organized into six priority areas: *Using Government Powers to Control the Pandemic*; *Fulfilling Governmental Responsibilities in a Federal System*; *Financing and Delivering Health Care*; *Assuring Access to Medicines and Medical Supplies*; *Protecting Workers and Families*; and *Taking on Disparities and Protecting Equal Rights*.

The findings and recommendations are those of each individual author, and they are sweeping. Experts in this Report call for fundamental structure changes to reduce the pernicious influence of politics on scientific decision making – like establishing the

U.S. Centers for Disease Control and Prevention (CDC) as an independent agency along the lines of the Federal Reserve. They suggest increasing the resilience of state economies by getting rid of rules that require states to balance their budgets even in crisis years. They recommend aggressive expansion of health care access through Medicaid and the Affordable Care Act, along with the removal of crucial barriers to care, like current immigration law and enforcement. They criticize multiple government failures in securing basic medical supplies and tests, and recommend a comprehensive reboot of federal coordination and procurement led by career government staff and free of petty political interference. They recognize the health risks and economic stress experienced by workers and families, and call for both continued economic-support legislation and better enforcement of occupational safety and health rules. Every author has found ways in which COVID-19 law has failed to address racial and economic disparities or made them worse. Authors find that states and cities have moved schooling online without removing legal barriers to – let alone ensuring – universal access to broadband internet; they have depended on low-wage workers in many sectors to keep the economy and vital services working, but have taken too little action to assure safe workplaces, provide paid sick leave, or recognize higher risk with higher pay; they have issued plans for allocating scarce medical services that violate laws protecting people with disabilities.

Each thematic section of the Report begins with a detailed list of recommendations, followed by the chapters laying out the underlying assessment and rationale. These chapters ask:

- Was the law (including both the law that existed prior to the pandemic and laws that took effect during the pandemic) a barrier or facilitator of the response in this topic area?
- What appear to be the major legal, structural, and implementation factors in effectiveness or ineffectiveness of legal and policy developments?
- Did the law or policy exacerbate racial, or socioeconomic or other pre-existing disparities?
- Was the law applied in a manner consistent with ethical values and constitutional norms?

This Summary, written by the editors, pulls out key high-level themes and aims to capture the broad thrust of the recommendations.

EQUITY AS A PRIMARY CONCERN OF THIS ASSESSMENT

Law and policy play an important role in limiting or exacerbating health disparities and health inequities. Health disparities are differences in health outcomes that people of different demographic backgrounds experience. Health disparities were all too common in the United States before COVID-19, and have been striking during the pandemic. As Patricia Williams points out in her powerful closing reflections on this Report, these disparities do not arise from bad individual choices or biological differences between races but the social factors that shape people's lives every day "in the ghettoized geographies that have become such petri dishes of contagion." These disparities are not inevitable. We as a society have created them. Centuries of oppression through policies, norms, and institutional practices shape individual experience and over time have created the inequitable society we inhabit.

Laws and policies too often reinforce health inequities by making resources scarce for many or creating unhealthy environments, especially in poor communities and communities of color. But the tools of law and policy can also be the deliberate intervention to change the fundamental drivers of inequity and increase health equity. We and our authors saw inequities all over the pandemic legal response, but also the moral and practical demand – we might even say craving – for cooperation, mutual aid, and solidarity. As Professor Williams concludes, "We can divide ourselves up into races and castes and neighborhoods and nations all we like, but to the virus—if not, alas, to us—we are one glorious, shimmering, and singular species."

Using Government Powers to Control the Pandemic

The COVID-19 pandemic in the United States is an unprecedented public health event that has demanded a multi-level response touching all levels of our society. Federal, state, local, and Tribal governments possess significant legal authority to intervene and respond to COVID-19, but, far too often, they have been slow and ineffective in their use of authority in the crisis.

Federal government leadership, coordination and even unprecedented levels of Congressional spending have been insufficient to meet the national need. Most of the recommendations aimed at the executive branch boil down to pleas for less political interference and more competent coordination and regulatory enforcement. It is not too late for the Trump administration to change course. At the very least, the CDC should be instructed (and allowed) to take the lead, and work with other relevant federal agencies, in developing rigorous, scientifically-grounded, and apolitical guidance for safe interactions between individuals and safe operation of schools, businesses, indoor spaces, and other settings to assist both government and private actors in assessing risk from COVID-19.

Congress needs to do more to fund state and local control efforts and to keep families and businesses above water through the worst economic downturn since the Great Depression. This legislative support should include legal protections against eviction, mortgage foreclosure, utility shutoff, discrimination, and employment loss, as well as funding for income support and unemployment benefits. Congress should also fund state, local, and Tribal efforts to implement supports, accommodations, and legal protections that enable individuals, families, employers, landlords, and communities to comply with social and physical distancing. Additionally, it is vital that Congress provide funding support for operations of state, local, and Tribal governments, many of which are constrained by balanced budget rules.

With the executive failure in mind, Congress should get started with a number of longer term structural reforms. Congress

should urgently consider reorganizing CDC and the Food and Drug Administration (FDA) as independent agencies along the lines of the Federal Reserve, enhancing their capacity and rendering them less susceptible to political influence. Congress should also amend the Public Health Services Act to add transparency and accountability mechanisms that require the U.S. Health and Human Services Secretary and CDC Director to provide scientific support for guidance and orders responding to the pandemic. In the face of executive failure or deliberate suppression of information, it is urgent for Congress to mandate and fund efforts to assure the collection and dissemination of accurate data. Disease surveillance reports should require enhanced demographic data collection that includes sexual orientation, gender identity, and disability status. To clear the way for better use of modern information technology in disease control, Congress should enact legislation that safeguards individuals from privacy and discrimination risks that arise from digital contact tracing and surveillance.

The state response has been hampered in some places by inter-branch and state-local fights over authority. State legislators, where necessary, should clarify the scope and authority of state executive officials to implement disease surveillance and data collection, testing and contact tracing, and physical distancing measures. State health departments should deploy these measures to protect the public's health and include transparent supporting scientific information with emergency orders implementing these measures. State legislatures should fund expansion of testing and tracing capacity and engage community-based organizations to facilitate connections with diverse local communities through multilingual and culturally-sensitive outreach efforts that will boost public trust. State legislation or executive orders also should provide incentives, funding, programmatic support, and legal protections to assist people with employment, housing, food access, physical and mental health care, social services, and income support, which will allow people to comply with public health guidance as well as mitigating economic and social harm. State health departments should collect detailed demographic

data to enhance targeted COVID-19 response efforts and should provide privacy and antidiscrimination protection for data collected through surveillance or digital contact tracing.

Fulfilling Governmental Responsibilities in a Federal System

Dividing authority among federal, state, local and Tribal governments – and between executives, legislatures and courts – is a strength of American governance – and a weakness. There is great potential in the system for creativity and responsiveness to local needs and values – but also high risk of confusion, infighting, and the breakdown of essential coordination. Leadership and the explicit delineation of roles and responsibility makes the difference in a crisis. For the last century at least, the federal government has provided broad expertise, clear guidelines and essential resources to state, Tribal and local governments, which have served as the front-line responders. The president has accepted responsibility for assuring that federal agencies respond effectively, and of amplifying and modeling compliance with federal advice.

Given the manifest failure of the Trump administration, many of the recommendations call for changes in the organization and operation of the federal government. In particular, because most states have constitutional limitations on deficit spending, only the federal government can supply the resources needed to ensure adequate testing and personal protective equipment (PPE), and research in and distribution of countermeasures. Likewise, only the federal government can soften the pandemic's economic impact and prevent it from exacerbating pre-existing inequities. The federal government needs to take more steps in each of these areas.

It is also critical that federal guidance and legal interventions be grounded, to the extent possible, on the best available scientific information. These add to the reasons for Congress to consider reorganizing the FDA and CDC as independent agencies, insulated from political interference, and for CDC to abstain from using its quarantine powers to achieve non-health related goals like immigration control. The federal government should also support essential policy experimentation by minimizing preemption of reasonable state and local control measures.

To help ensure that we are better prepared for the next pandemic, Congress and the president should jointly convene an independent commission of inquiry to investigate pandemic preparedness and the nation's response to COVID-19. Congress should also pass a joint resolution to reverse the president's decision to withdraw the U.S. from the World Health Organization, and Congress should continue funding that organization. Congress must also honor the federal government's trust responsibility and provide funding directly to American Indian and Native Alaskan Tribes, while sufficiently funding the Indian Health Service and Urban Indian Health Centers, as well as other Indian health programs.

There are also recommendations for state and local governments. States' response must also be guided, to the extent possible, by science. State orders should provide clarity as to the scientific basis that underlies them. State orders should also incorporate

RAPID ASSESSMENT EDITIONS

This is the first of two Reports we plan to release this year. This one has been assembled in just two months, with limited external review and a focus on immediate needs and recommendations. Over the next several months, we will be seeking broader input from a range of stakeholders, with the aim of producing a final report to inform the long-term policy agenda in 2021 and beyond. Readers with suggestions about any of the topics covered in this Report are invited to contact the authors or editors directly.

equity considerations. In addition, states should not preempt local laws that provide greater protection against the pandemic, or that enhance economic security or civil rights. States should also strengthen home rule; and local governments should advocate for state legislation or ballot initiatives that do so. States should also enact laws that require them to consult with Tribes within their boundaries, and work with Tribal governments to enter into data sharing and mutual aid agreements, while respecting Tribal authority and jurisdiction to promote the health welfare of their communities.

Financing and Delivering Health Care

The U.S. healthcare continues to critically underperform across multiple primary dimensions including access, financing, delivery, and the integration of technology. COVID-19 both emphasized these existing failings and highlighted some second level problems. The pandemic and its impact on employment demonstrated the over-reliance of health care access and financing on the employer-provided model; as millions of jobs were lost the ranks of the uninsured swelled. However, alternate public or private financing systems were unable to cope. Those without health insurance before COVID-19 suffered even more. The health of the disadvantaged, whether because of poverty, race, substance use, or congregate living declined still further as the virus further exposed the inadequacy of the country's safety-net. Many with health insurance suffered as much as the uninsured. Not all policies covered the tests and treatments necessary to combat COVID-19, often they were out-of-network and precipitated excessive "surprise bills." Additionally, the need for additional tests and treatments once again illustrated the out-of-pocket costs borne by an increasingly underinsured population.

This Report emphasizes some essential recommendations for the federal government. Medicaid is the key to many of the COVID-19 healthcare problems. As a result, Congress and the administration should step up with an enhanced Medicaid match during COVID-19 and its economic turmoil and also provide additional incentives to hold-out states to finally expand Medicaid. For those who remain or wish to remain in private health insurance markets, we recommend that Congress should authorize COBRA subsidies to help workers and their families to maintain comprehensive coverage. Similarly, both the federal and state governments should ease access to their individual markets with Special Enrollment Periods and extended end-dates. Federal legislation is urgently

required to address deficiencies in health care coverages or their costs relating to COVID-19 testing and treatment, including cost-sharing, balance-billing, and other impediments to care delivery. The federal government should increase its support for health care safety net providers by better targeting federal emergency provider grants, giving states greater Medicaid flexibility to help safety net providers, and helping uninsured patients gain access to the Provider Uninsured Claims Fund. The federal government should recognize that increased regulation and improved enforcement is necessary to protect nursing home residents and staff, yet there is no justification for exceptional rules that, for example, deny women their reproductive health during the pandemic or those in the LGBT communities access to HIV medication and gender confirmation services.

State governments should be aggressive in pursuing Medicaid waivers and other avenues to streamline application and enrollment processes and to increase eligibility and services. States should prioritize assistance to State safety net providers, expand their funding of telehealth programs, and use their own budgets to extend coverage to non-citizens. With regard to their regulation of private insurance, the states should be conscious of the existential attack on the Affordable Care Act currently before the Supreme Court, and make overdue changes to the affordability of their insurance markets by introducing a “public option” and stabilizing their insurance risk pools.

Local governments are, for the most part, observers in the health care funding debate, but they can do important things to make healthcare more accessible. For example, they can remove barriers to effective care for Substance Use Disorder by modifying zoning and licensing laws that create barriers to the establishment of and access to methadone treatment facilities.

Assuring Access to Medicines and Medical Supplies

The United States was unprepared for the surge in demand for basic medical equipment for testing, infection control and care. From the outset, there was a shortage of personal protective equipment like masks and gowns, and fears that ventilators would be next. Soon after there were shortages in swabs, reagents, pipettes and other supplies for testing. Between long-term cuts in federal staffing, poor leadership and political posturing, the federal government proved to be unready for shortages it had itself long predicted, and slow and ineffective in using its ample power to ramp up supplies. States, cities and health care providers, all of whom had trusted too much in federal preparation and taken too little responsibility for their own predictable needs, were left to scramble in an increasingly pricey competition with each other and the federal government.

In the short term, we can only demand that the president reverse course and put qualified, experienced professionals in the federal government squarely in charge of managing essential medical supplies. The president, if he is willing to put politics aside, has all the powers he needs to direct and equip competent career government staff with the necessary resources to fully use federal emergency and Defense Production Act authority to assess need and capacity, use investment and purchasing to incentivize

manufacturers to increase production, and develop and implement a strategy for federal procurement and need-based distribution to states. If the federal government fails to step up, states should continue to expand their use of cooperative mechanisms like interstate compacts to reduce cannibalistic competition in the medical supply market and to share resources as their relative needs rise and fall.

The best long-term solution for future emergencies is to be better prepared for the short-term need. As the COVID-19 emergency eases, Congress should fund and require HHS to hire and manage the long-term staff and infrastructure to monitor, track, and proactively address deficiencies in the supply chain for essential medical supplies. When the next virus hits, we should have complete, up-to-date information on the supply chain, an ample Strategic National Stockpile, and a real plan to meet the surge in demand.

Governments and the law also have a role in supporting the development of new devices, treatments and vaccines. FDA should immediately beef up its guidance on alternative sources and reuse of scarce medical supplies. Even more important is for Congress to look closely at the substantial risk that social or political pressure – or just the overwhelming desire to do good – will influence the FDA to approve a vaccine too soon. While expediting the process is obviously vital, it is equally important to ensure that the final decision is made by scientists, not politicians facing an election. In particular, FDA should resist pressure to issue an Expanded Use Authorization for any new vaccine, and the time is now for Congress to consider banning EUAs for COVID-19 vaccines altogether. States can use their authority over the practice of medicine to prevent practitioners from prescribing untested and potentially dangerous drugs even if the FDA has given them its green light.

Protecting Workers and Families

Before COVID-19, the U.S. lacked adequate protections to provide many low-income individuals and families safe and affordable housing and food security, and to ensure job and income security and worker safety. Additionally, changes in law and policy in the past few years have further limited health and safety protections and their enforcement. While the pandemic has affected all families and workers, the most severe impact has been on those the system was already failing – people of color and low-income individuals, whose ranks include the majority of workers providing essential services and unable to shelter at home. Stable housing, safe working conditions, food and income insecurity are all essential to health, and COVID-19 has made matters worse. Employers – and our society through our government – have done too little to protect essential workers and our vulnerable neighbors.

The many recommendations that flow from the assessment aim to address these socioeconomic determinants of health. Federal, state and local governments can all act to join our peer nations in providing universal, job-protected paid leave so that workers can afford to comply with quarantine and stay-at-home orders. The federal government can increase SNAP (food stamp) allotments, and widen eligibility for help. All levels of government can increase funding and widen eligibility for housing assistance of all kinds, and

can maintain moratoria on evictions during and for a significant period of time after the COVID-19 crisis. OSHA can take more vigorous action, with Congressional prodding if necessary, to make sure every workplace is safe from COVID and future pandemics.

Taking on Disparities and Protecting Equal Rights

The COVID-19 pandemic has laid bare the life-and-death consequences of inadequate and discriminatory laws and policies such as unequal worker protections, divisive immigration policies, and uneven access to health care, to name a few. Health and racial disparities are being compounded by the COVID-19 pandemic, the government's response (or lack thereof), and discrimination in the private sector. Existing gaps in legal protections, the lack of knowledge, and widespread noncompliance with current laws including Title VI of the 1964 Civil Rights Act, Americans with Disabilities Act, Section 504 of the Rehabilitation Act, and Section 1557 of the Affordable Care Act (ACA), and others, are also contributing to COVID-19's impact. Additionally, the rollback of protections and access to services for immigrants and LGBT communities is contributing to the deepening of poverty, health disparities and lack of opportunity among these groups and their families. It is no surprise then that Black, Latinx, LGBT, persons with disabilities, incarcerated persons, and immigrants are disproportionately impacted by both the economic and health toll of the pandemic.

This assessment makes critical recommendations for the federal government to ensure that persistent health and racial disparities and inequities are not further exacerbated in the response to COVID-19 and beyond. At the federal level these recommendations include shoring up civil rights protections and offering clear guidance on various legal requirements, addressing immigrant and criminal justice detention and enforcement issues to minimize the spread of COVID-19, and solidifying or expanding resources and partnerships for organizations serving communities that are most at risk. Specifically, federal agencies such as the U.S. Department of Health and Human Services Office of Civil Rights should start by issuing clear, ongoing legal guidance on protections under the requirements of Title VI of the 1964 Civil Rights Act, Americans with Disabilities Act, Section 504 of the Rehabilitation Act, and Section 1557 of the ACA, and other federal legislation protecting civil rights. Congress should ensure sufficient resources for federal agencies to assist with the outreach and enforcement of these protections as well as encourage coordination with civil rights organizations to monitor compliance. Congress should also convene a commission or task force to study the causes of the racial and health disparities resulting from the COVID-19 pandemic to help assess future response policies. To minimize additional risks of exposure to COVID-19, Congress and the federal administration should order a halt to immigration detentions for nonviolent offenders, and specifically reduce or suspend enforcement around schools or health care facilities. To ensure these families are not further pushed to the brink of poverty, Congress or the federal administration should reverse the public charge rule to allow for access to critical food and health care services during this economic downturn. The federal administration or Congress should affirm and reinstate prohibitions

IMPROVING PUBLIC HEALTH LAW CAPACITY

The many legal issues presented by COVID-19 — from lack of sufficient preparedness and attention to foreseeable challenges to the exercise of authority in response by public health officials across the nation and the disparate impact on certain populations — has underscored the need for increased capacity to use law and policy to protect the public's health and achieve health equity. Public health agencies should have funding for, and access to, public health law expertise, whether embedded in the agency or dedicated to the agency at municipal, county or state attorney general offices.

on discrimination based on sexual orientation and gender identity in health care, housing and other private settings. Finally, Congress should ensure funding under the CARES Act or other federal emergency funding is available to community-based organizations serving racial/ethnic communities, immigrants, LGBT, incarcerated populations, persons with disabilities, and other under-resourced and underserved communities.

State governments have an important role in advancing equitable policies that can work towards eliminating or limiting health disparities at the local and state levels. State policymakers should incorporate equity considerations and address the needs of disenfranchised and underserved communities in COVID-19 response through state guidance to local and state agencies and departments. State agencies and attorneys general should clarify the rights and legal protections of people who experience discrimination under appropriate federal and state laws. As states roll out contact tracing applications and processes, they must ensure privacy protections, utilize best practices in reaching underserved communities, and include multilingual information and services. Additionally, state governments must ensure adequate resources for state and local level community-based organizations serving racial/ethnic communities, immigrants, LGBT, incarcerated populations, persons with disabilities, and other under-resourced and underserved communities. Further, states should allocate additional funding or realign budget priorities to include resources toward preventive health services.

Next Steps

COVID-19 is here now and there is no time to waste in getting it under control. Everyone in America can help by maintaining physical distance, wearing a mask, and vocally supporting an effective response rooted in apolitical good judgment, scientific evidence and public health expertise. Everyone in America can stand up for a response that is not just effective but fair and generous to essential workers and the vulnerable among us. This country is still capable of great things, and the legal recommendations in the Report offer a detailed roadmap to successful control of the pandemic and amelioration of its worst economic and social effects.

We cannot settle for less. 🌟