Summary of Findings and Recommendations for Action

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This report, including 39 chapters by more than 50 experts, updates and expands the initial rapid COVID-19 legal assessment published in August 2020. The failures we noted in the first Report have only worsened, culminating in the sad moment in February when the country reached 500,000 deaths. For Volume II of the Report, our team has revisited the legal issues we first surveyed early in the pandemic, and have added new topics, including education, data systems, and the lessons of the 2020 pandemic election. Even for the subjects covered previously, this Report consists of largely new material, including new, post-election recommendations, which we highlight in this summary. Volume I confronted a historic failure of law and policy. Volume II points to a historic opportunity to remake our institutions, public and clinical health law and policy, and the social contract.

Once again, we have asked our authors to focus on how law has served the nation’s response to COVID-19, and to offer concrete suggestions for immediate and long-term changes to better serve the health of the nation. Each of the six sections of the Report addresses a big question:

1. How can government power best be used to prevent and control pandemics like COVID-19?
2. How can law help best harness the power and overcome the limitations of a divided system of federal, state, and local governments?
3. What reforms are needed to get high quality, affordable health care to everyone during the pandemic and beyond?
4. What can law do to help ensure access to essential medicines and medical supplies?
5. What legal steps are needed to protect American workers and their families from COVID-19 and its economic side effects?
6. Finally, and most importantly, what must be done through law to knock down the structures of racism and inequality that produce health inequity now, and prevent the American people from working together for health and prosperity in the future?

In this summary, we synthesize the answers our authors have provided, including the most important next steps for getting control of COVID-19, and offer a blueprint for longer-term legal action to strengthen health and health equity in the years to come.

Part I: How can government power best be used to prevent and control pandemics like COVID-19?
COVID-19 has proven beyond reasonable doubt that public health is truly public. It not only touches all of us, but it requires collective action through government to maintain and defend. In this pandemic, government in the United States struggled to do its public health duty, and law can and must play an essential role to get the enterprise back on track.

Controlling COVID-19
Government interventions in response to the COVID-19 pandemic have taken the form of an array of overlapping strategies to test for and track the spread of the disease; limit contact between people; mitigate infection risk when contact occurs through density and duration restrictions and the interposition of physical distance and...
SUMMARY OF FINDINGS AND RECOMMENDATIONS FOR ACTION

Most governments currently possess sufficient public health powers and emergency powers to respond to a variety of public health threats, but the use of these powers to address COVID-19 faltered in practice due to leadership and implementation failures. Future pandemic planning should study and account for these insights. Additionally, the ability of state and local officials to respond rapidly to emerging threats must be maintained in the face of misguided efforts by state legislatures to strip executive branch officials of public health powers and to further limit democratic participation in the electoral process. While states’ experience with the pandemic should provide states with the impetus to review and reform their laws to ensure in the future a more effective, equitable and transparent response that adheres to constitutional limitations, legislatures should not crudely strip executive branch officials of the vital powers they may need to use in the next health emergency. Nor should they further limit democratic participation in the electoral process. Legislatures may need to more proactively define when public health interventions are required, and, ultimately, voters must impose accountability for leadership failure.

Public health infrastructure should also be bolstered. The COVID-19 pandemic has demonstrated the importance of public health capacity, and Congress should fund efforts to expand the public health workforce and modernize and expand public health institutions. The federal government should substantially strengthen its long-term support for legal epidemiology — scientific research on the health effects of law and legal practices — beginning with the impact of law on the COVID-19 response. If we better understand the role of law as a determinant of health, it will allow us to craft better interventions.

Planning and implementing effective and equitable interventions requires adequate information. The federal government should centralize, coordinate, standardize, and regulate data collection and distribution related to public health responses, including the use of a consistent approach for contact tracing. The data systems required need drastic upgrading and harmonizing at the local, state, and federal levels. Work to improve our national health data infrastructure depends on creating new rules that create safe but usable health information systems: the law must protect privacy and data security, prevent discrimination and disparate impacts, and promote transparency, accuracy, and accountability — but it must also ensure that data can be readily used for important public purposes.

Federal, state, and local governments should enact policies that support individuals, businesses, and institutions during pandemics. Measures such as economic supports (i.e., direct payments, child care support, unemployment extensions, rental and food assistance) and legal protections (i.e., foreclosure, eviction, and utility shutoff moratoria, employment and anti-discrimination protections, and workplace safety and leave policies) allow for better adherence with public health interventions and community mitigation strategies and can help to mitigate disparate health outcomes. These policies foster the more resilient and equitable society that we should be striving for.

The COVID-19 pandemic revealed starkly how pernicious structural and societal factors like racial and ethnic health disparities and barriers; provide limited legal and economic supports for people, businesses, and institutions; and support the development and distribution of COVID-19 vaccines as they have become available. These efforts were inadequate to stop the United States from enduring the worst COVID-19 outbreak in the world. This is in large part because these layered strategies were pursued ad hoc at the state and local levels without consistency or coordination, adequate guidance or evaluation, or necessary information, in a contentious political atmosphere where the federal government consistently undermined public health efforts and messaging.

The Biden administration has already taken promising early steps to implement a coordinated national strategy. The administration has said it will use existing federal powers to advance COVID-19 responses, harmonize guidance to encourage good public health practices, promote vaccination, and collect necessary data—including data on racial, ethnic, and economic disparities—to clearly assess the areas where targeted interventions are needed. In all, it will prioritize equity in COVID-19 policies, including in vaccine distribution and the imposition of evidence-based community mitigation strategies and supports. Nevertheless, our federal system, which places primary reliance for public health on the states, means that inconsistencies and inattention to equity may remain as states go their own way.

Several additional legal steps should be taken right away. State and local governments should continue to use targeted orders to implement social distancing and other community mitigation strategies when appropriate to reduce transmission of COVID-19 under guidance from the Centers for Disease Control and Prevention (CDC) about how to best target and layer these community mitigation strategies and standardize surveillance, contact tracing, and data management approaches. Congress should pass pending legislation containing economic and social supports and legal protections that allow people, businesses, and institutions to comply with community mitigation strategies and participate in COVID-19 surveillance, testing, and contact tracing initiatives, as well as support for equitable vaccine distribution and the safe reopening of schools. Additional resources and attention must be given to reduce racial and economic disparities in all of these initiatives.

Recommendations for a Safer, More Equitable Future

Successful use of government powers to respond to future pandemics and public health threats requires

1. a clear understanding of the scope of available public health powers;
2. a well-developed public health infrastructure;
3. a knowledge base that allows informed and equitable decisions to be made about public health;
4. policies that provide economic, social, and legal support to allow compliance with public health interventions and community mitigation strategies, and to mitigate disparate health outcomes; and
5. a centering of equity as a key priority across all of these efforts.

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economic precarity place racial and ethnic minorities, people who are low income, and people with disabilities at greater health risk. It is essential that public health policies — in conjunction with broader social policies that affect health outcomes — prioritize equity.

Part II: How can law help best harness the power and overcome the limitations of a divided system of federal, state, and local governments?

In the United States, power is divided among the federal government and the states and Tribal authorities, among branches of government within each jurisdiction, and among states and their local governments and Tribal authorities. This can be a strength. During the COVID-19 pandemic, this dispersion of power has made it possible for some levels of government to respond to the pandemic even when others failed to do so — but it also enabled political leaders to try to evade responsibility, and facilitated an inconsistent and often incoherent response.

Controlling COVID-19

The good news is that the Biden administration has taken a more proactive stance. It has made COVID-19 a priority. It has been holding regular pandemic briefings by scientists, coordinating action with states and cities, emphasizing equity, and focusing on vaccine distribution and Congressional passage of a significant relief package to support vaccine distribution and mitigate the economic fallout of the pandemic. The Biden administration has also installed new leadership at CDC, and has vowed to let science guide that agency. That promise must be kept, as CDC guidance on a range of issues that will arise in the coming months will be critical to ending the pandemic. State leaders must attend to CDC advice, and be transparent about the criteria they apply as they maintain or ease emergency measures during the remaining months of the pandemic. Equity must be a central feature of all decision-making. States should also avoid preempting local public health measures, and respect Tribal authority.

Recommendations for a Safer, More Equitable Future

As we move past COVID-19, it is essential that Congress does not repeat the mistake of neglecting pandemic preparedness in the years between pandemics. In Volume I, we concluded that the national lack of readiness for COVID-19 was not a matter of bad laws or plans on paper, but rather neglect of the human and administrative infrastructure that is needed to put those plans into practice when the emergency comes. Congress should appropriate the necessary funds to replenish the Strategic National Stockpile (SNS) and revise the Public Health Services Act, as necessary, to mandate that the SNS be replenished after any use. CDC should also revise its quarantine regulations to provide transparency in the criteria it will use when using its authority in the years to come. The federal government must also fulfill its support obligations to Tribal authorities, and appropriate sufficient funds to ensure safe drinking water and broadband for all who live under Tribal authority. Equity needs to be a lodestar for all executive branch actions.

Congress should also act to ensure that in the next health crisis, federal scientific guidance for states, cities, and the public is not subject to undue political interference. This includes re-examining the legal status and organization of our key health agencies, CDC and Food and Drug Administration (FDA), to ensure independence from political pressure. It could include creating an independent federal expert agency whose function is to produce clear and reliable public health guidance for both the public and policy makers. Congress should consider whether the leadership of key health agencies should be required to have specific expertise, and should be removable only for cause.

States cannot play their vital roles in public health without their own strong public health infrastructure. Like Congress, state legislatures need to appropriate sufficient funds going forward to ensure that health departments can effectively perform their disease detection and control work. States should consider amending their constitutions to permit deficit-spending during public health emergencies so that their capacity to respond and mitigate the impact on vulnerable populations is not totally reliant on the federal government.

During COVID-19, we have seen cities where leadership and the public wanted measures that were different from those imposed by the state. Such policy diversity within states has many benefits. Local governments can use health authority to develop health measures tailored to the needs and preferences of the community. States should reject new efforts to restrict the authority of local governments to take steps to enhance equity, and empower governors during a health emergency to suspend laws that preempt effective and equitable local responses. States should also repeal laws that penalize local officials who enact or enforce potentially preempted laws, and work with and respect Tribal jurisdictions.

Part III: What reforms are needed to get high quality, affordable health care to everyone during the pandemic and beyond?

COVID-19 descended on a health care system that was critically unprepared for such a widespread and deadly virus. It was a system that was already underperforming across multiple dimensions: access, financing, delivery, and the integration of technology. It was also a system under sustained political and regulatory attack by the Trump administration, which continued to push policies intended to weaken and even destroy the Affordable Care Act (ACA). Fragmented models of care and data flow are problematic at the best of times. In a pandemic they are a recipe for the disaster we observed. However, COVID-19 found one more way to twist the knife. The pandemic’s negative impacts on the economy, some temporary, many more likely permanent, led to widespread unemployment. Suddenly, the core organizing principle of U.S. health care financing — employment-based health insurance — was swept away, jeopardizing access to health care for millions as the safety net predictably also underperformed.

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Some urgent issues have already been addressed by executive orders issued by President Biden. These include opening a special enrollment period on the federal marketplace and critically reviewing regulations and policies of the prior administration that had the effect of weakening provisions in the ACA. Other
recommendations, such as increasing eligibility for marketplace policies, increasing subsidies, and capping premiums, should be legislative priorities. Other urgent tasks should include increasing the Medicaid Federal Medical Assistance Percentages (FMAP) formula for states to 90% for all program costs for the duration of the emergency and recovery period. The Department of Health and Human Services (HHS) should stop defending waiver approvals involving work requirements in the lawsuits before the Supreme Court and elsewhere, and revise its Section 1115 waiver policy to encourage the expansion of coverage. The increase in telehealth services during the pandemic should continue and be improved; first by reimbursing community health workers who train and educate those with health disparities; second by providing technology and broadband subsidies for high utilizers of Medicare and Medicaid programs. While the Biden administration completes its review of the punitive changes made by the previous administration to the Title X family planning program, it should move swiftly to allow medication abortion drugs (mifepristone) to be ordered through mail-order prescription services and retrieved at retail pharmacies. Meanwhile states should cease abortion exceptionalism whereby reproductive health services are not categorized as essential services.

**Recommendations for a Safer, More Equitable Future**

The Patient Protection and Affordable Care Enhancement Act (H.R.1425), passed by the House of Representatives in 2020, provides a roadmap for reversing the last administration’s attacks on the ACA. However, the Biden administration will need to go further than reversing prior policies, incentivizing the 12 hold-out states to expand Medicaid, making marketplace plans affordable for more people, and continuing the telehealth revolution. Health care costs incurred by individuals and states create structural barriers to care requiring major legislative reform, such as the introduction of a “public option.” Priority should also be given to designing a universal insurance coverage mechanism to ensure access to coverage during a declared public health emergency.

COVID-19 has framed and highlighted many legal and policy flaws that had been ignored for decades. Notwithstanding mental health parity legislation, federal and state governments have failed to adequately promote mental health education or strengthen the safety net to provide care and treatment. Equally, treatment of opioid use disorders must be normalized by removing the extraordinary and unnecessary limits on prescribing buprenorphine and agonists, and restrictive telemedicine rules. Residents of long-term care facilities were suffering before the pandemic, and the defects of that care system have been magnified by COVID-19: stronger regulation of staffing and infection control and enforcement are overdue.

Finally, building resilience against future public health emergencies such as substance use epidemics and viral pandemics, requires a commitment to health equity. Equity depends not merely on universal access to care or fighting implicit bias in its delivery but removing disparities in health caused by social determinants such as education, income, and social inclusion.

**Part IV: What can law do to help ensure access to essential medicines and medical supplies?**

COVID-19 revealed a federal government unprepared to manage the fundamentally practical task of ensuring access to essential medical supplies and personal protection. An essential bureaucratic infrastructure of data and expertise on supply chains and coordinated purchasing was simply missing. In the last six months, the federal government has taken some important steps — like acting to increase production of glass vials for vaccines — but shortages persist, and coordinated national production and distribution remains, at best, an aspiration. In the domain of medicines and vaccines, poor vetting of COVID-19 tests, and ill-advised emergency approvals for hydroxychloroquine and chloroquine raised fears about FDA independence and reliability. The agency redeemed itself with its management of emergency vaccine approvals, but the experience has raised important questions of legal reform in the agency’s structure and rules. In the long run, only good government management, supported by sustained funding, can maintain a supply system that can withstand pandemic shocks.

**Controlling COVID-19**

Intelligent, data-driven management of supply chains is crucial to prevent and alleviate shortfalls. The federal government should rebuild staff and use its manifold legal authority to require transparency from manufacturers all along the supply chain, and should use new and existing data sources to make sure that personal protective equipment (PPE), medicines and vaccines are being distributed fairly and in line with law and public priorities. This includes the federal government immediately and substantially increasing the SNS of traditional and alternative PPE — as it has done for COVID-19 treatments and vaccines — while developing an equitable national strategy for distribution to states.

Rapid and transparent regulatory action is essential to support innovation and keep junk out of the market, but it must be carried out in a way that respects scientific requirements and maintains public trust. The pandemic has challenged FDA in all sorts of ways: with tests, masks and other PPE, it had to uphold quality standards and fight counterfeiting, in the face of great demand and a proliferation of new providers. FDA, the National Institute for Occupational Safety and Health (NIOSH), and the Occupational Safety and Health Administration (OSHA) should finalize all draft COVID-19 guidance documents and standards for respirators, imported masks, and testing newly fabricated PPE. Federal agency civil rights offices should develop, expand, or update best practices and guidance for the allocation of scarce resources and crisis standards of care consistent with federal antidiscrimination laws. With drugs and vaccines, FDA has had to manage the tension between getting a vaccine on the market, determining with reasonable confidence that the candidates were both effective and safe, and doing so with a transparency and scientific rigor that would reassure the public that vaccination was in their best interest. There are continued challenges ahead: Expanded Use Authorizations (EUA) before the full required sequence of clinical trials is complete makes it difficult if not impossible to enroll
participants to complete the trials leading, for example, to a lack of trial evidence of the effect of the vaccines on transmission.

Immediate and substantial federal funding and technical support is vital for states, cities and businesses struggling to ensure equitable access to PPE, medicines and vaccines. Congress should increase and maintain funding for public health emergency preparedness through a dedicated public health emergency fund; should expand support for the National Hospital Preparedness Program, the SNS, and vaccine manufacturing capacity; and should fund state, local, and private sector efforts to expand COVID-19 vaccination capacity.

Recommendations for a Safer, More Equitable Future

In the domain of essential supplies, medicines, and vaccines, preparedness requires ongoing robust support of human and material infrastructure in the years and decades to come. In a better future, the nation will not be shocked to learn that pandemics can stress supply chains while prompting dramatic spikes in demand. To get there, the federal government must permanently strengthen the SNS and its supply chain management capacity. Congress should reaffirm the role of the SNS as the primary resource for the nation during emergency surges in demand, and institute a long-term funding plan for assuring supplies commensurate with predicted need. It should fund, and the Department of Health and Human Services (HHS) should properly implement and manage, the long-term staff and infrastructure to monitor, track, and use the resources of the Biomedical Advanced Research and Development Agency (BARDA) to proactively address deficiencies in the supply chain for essential medical equipment. HHS should develop, with real attention, new regulations on emergency supply chain management including developing and implementing "stress tests" for supply chains for key products.

2021 will also be the year to start building on COVID-era innovations to develop and institutionalize methods of rapid response production. In years past, BARDA supported new technologies and manufacturing ideas, but failed to get innovation into infrastructure and practice. That is a correctable mistake. The end of the acute COVID-19 pandemic should also mark the start of serious legal reconsideration of FDA's independence, its regulatory approach to PPE, and the nature and role of EUAs for vaccines and medicines during a pandemic emergency.

The problems of equitable access to medical supplies, medicines, and vaccines is yet another reason for states and local governments to reinvest in their public health infrastructure. As with the federal government, the time to build human and institutional capacity to manage PPE and vaccine distribution during an emergency is before the emergency. State legislatures or executive agencies should also develop and approve protocols for crisis standards of care and allocation of scarce medical resources and services during declared emergencies, disasters, or public health emergencies. They should also set clear indicators and triggers for when crisis standards of care apply, including guidance for the distribution of new treatments and vaccines for COVID-19 that center both efficacy and equity.

Part V: What legal steps are needed to protect American workers and their families from COVID-19 and its economic side effects?

A pandemic meets its hosts as it finds them. In a nation where inadequate protection for workers and families is the status quo, COVID-19 has put them, and disproportionately those who are people of color, at greater risk from the loss of income, housing and food security; workplace injury and infection; and the ramifications of school shutdowns. This reality, in addition to the lack of adequate contingency planning and safeguards for an extended public health emergency have left the nation's residents more vulnerable to the virus.

Controlling COVID-19

To protect the health of families and workers, federal and state governments must increase and extend supports for education, housing, and food security. Expanding vaccine access to teachers as rapidly as possible – as the Biden administration is trying to do – will clear some of the roadblocks, but clear guidance and additional funding is required to open schools safely. It remains vital to address the needs of children normally met when they are in school – access to healthy meals, broadband, special education and safe supervision. Families must receive the necessary protections to stay in their homes — eviction and foreclosure moratoriums should be extended, and additional federal loans and rental assistance provided for property owners and tenants. Housing must be created and maintained for people living in poverty, and supportive housing should be established for people experiencing homelessness. The emergency 15% increase to the maximum Supplemental Nutrition Assistance Program (SNAP) benefits and the able-bodied adults without dependents (ABAWDs) waiver should be extended and linked to economic recovery.

COVID-19 has exposed and heightened the need for policies that enable workers to survive financially and care for themselves and their families during a crisis. Paid sick leave and unemployment insurance provide lifesaving support for impacted workers. However, millions of workers were left out from paid leave requirements with low-wage workers and workers of color more likely to be excluded. Congress should pass President Biden's proposal to reinstate and expand the right to emergency job-protected leave, and the Department of Labor should enforce paid leave protections. Although the omnibus and relief package passed by Congress in December 2020 provided relief for workers by extending regular unemployment benefits through periods of high unemployment, implementation barriers have continued and have aggravated inequities suffered by women and people of color.

Workers who have provided essential services have been hailed as heroes, but many have not been afforded the basic protections to safeguard them from workplace infections and death. Access to vaccines is imperative, but just one need. Recommendations for needed protection include enactment and enforcement of workplace safety laws, including airborne infectious diseases requirements at the state and national level; a national worker COVID-19 protection plan; enforcement of existing OSHA protections, including mandated testing and disclosure of de-identified testing information and aggressive use of the
Defense Production Act to obtain PPE. Calls for broader immunity shields for employers who put workers in harm's way should be resisted, especially where the conduct to be shielded actually increased transmission.

Recommendations for a Safer, More Equitable Future

This nation must acknowledge that before the pandemic, existing programs did not sufficiently protect workers and families from challenges to their jobs, income, housing, and food security, and that gaps in protections disproportionately impact people on low incomes and people of color. These failings left us more vulnerable to the virus. To meet future challenges to the public's health as a stronger, more resilient nation, workers and families need stronger social supports built into the law.

Legal support for workers starts with safety on the job. COVID-19 has demonstrated a compelling need to enact a national workplace safety law, as well as permanent structural paid leave reform to ensure universal, equitable, inclusive, comprehensive paid sick days, paid family and medical leave for all workers, and an updated, well-implemented unemployment insurance system.

Law must also do a better job ensuring housing quality and security. The inequities of COVID-19 call out for measures to redress the inadequate housing supply and health-harming housing conditions, and to provide rental subsidies and eviction protections. Issues that lead to unstable housing and homelessness, including access to mental health and substance use disorder services must be addressed in an effort to end the cycle of poverty and unstable housing. SNAP benefits should provide families with basic food security, calibrated to economic indicators; the ban on SNAP participation by individuals with felony drug convictions should be repealed.

Equitable access to broadband for all families is needed, but particularly to ensure that children of color as well those who are geographically isolated or live in lower resourced households are able to attend school remotely. Contingency planning needs to be in place for children who rely on essential economic and safety supports provided by their schools.

Finally, future emergency preparedness planning must include a focus on responses necessary to mitigate the economic fallout and instability from an extended civic or public health emergency accompanied by business and school shutdowns. Enhanced protections for workers and families will yield a more equitable and stronger society, and a nation better prepared for future challenges to the nation's health and safety.

Part VI: What must be done through law to knock down the structures of racism and inequality that produce health inequity now, and prevent the American people from working together for health and prosperity in the future?

COVID-19 exposed the ways in which U.S. systemic inequalities have created disparate and inequitable health outcomes. It showed how deeply racism and discrimination are entrenched in our laws and policies. Many, including people with disabilities, immigrants, Black, Indigenous, and other people of color, people who are incarcerated, and LGBTQ communities, are among those who have faced the greatest challenges as a result of COVID-19. This section of the report identifies short- and long-term legal and policy solutions to ensure that those who have already suffered the most will not continue to pay the heaviest price of the COVID-19 pandemic.

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Accurate data documenting disparities is a starting point for change. The inability to identify hot spots, track community infection and death rates, and disaggregate data based on socio-economic factors has left us with gaping holes in our ability to respond. Across every level of government, investments to standardize data collection and analysis must be prioritized to accurately address community needs and pinpoint those experiencing the greatest health risks.

Federal agencies must take proactive steps to clarify legal protections for the communities experiencing health and social inequities. The guidance should be targeted to local and state governments and private entities, and cover topics such as the Religious Freedom Restoration Act; Section 1557 of the Affordable Care Act; sex discrimination prohibitions in public accommodations; requirements under the Americans with Disabilities Act; and the Rehabilitation Act. Government agencies should reverse or withdraw steps taken by the previous federal administration that promoted exclusion and discrimination.

Federal agencies must take steps to remove funding exclusions and unnecessary limits on programs to ensure all communities are able to access critical life supports and basic services. For example, prohibitions on the use of Medicare and Medicaid funds in correctional facilities should be removed. The exclusion of undocumented individuals from pandemic economic relief and other critical services must be eliminated, and the last administration’s more onerous definition of public charge should be reversed. State governments should leverage their authority and discretion over the use of federal, state, and local funding to provide safe spaces for at-risk communities, funding to community-based organizations, and to expand health and social services.

Finally, state and federal governments should develop and implement policies to address the coronavirus’s spread in all detention facilities, including immigration facilities. ICE should cease all immigration raids and deportations that are not public safety concerns. The Biden administration must also ensure that all the communities addressed in this section are able to access vaccines quickly and equitably, including people who are detained or who are unable to leave their home due to a disability.

Recommendations for a Safer, More Equitable Future

The new federal administration has already taken action through executive orders on immigration policy, racial equity, the justice system, and LGBTQ data and discrimination protections, which are all important first steps. As governments at all levels build
upon these efforts, they must aggressively address structural discrimination and racism. The legal experts writing in this report identified ongoing exclusionary and discriminatory practices and policies that have left communities more vulnerable to the pandemic, and likely to be without critical services to recover.

We must consider more comprehensive policy making approaches to civil rights, immigration, and incarceration. Policy approaches must eliminate structural barriers to good health by, for example, eliminating the exclusion of immigrants from public benefits and offering a way to citizenship, stopping practices that result in the excessive incarceration in Black, Indigenous and other communities of color, and successfully secure reentry for those leaving facilities.

COVID-19 demonstrated how communities experience the effects of a public health emergency in different ways, suggesting that ameliorative policies may not work across the board. All levels of government should consider “targeted universalism,” and develop guidance on this approach to ensure that policies, responses, and resources benefit all populations while addressing the unevenness of social, racial, and health inequities.

While our country is grappling with a pandemic, large swaths of our country are also in a war against facts, still believing that the pandemic is a hoax and that our government is untrustworthy. These beliefs are part of a broader misunderstanding of our nation’s history of structural discrimination and racism. As Harris and Pamukcu state in their Chapter: “The absence of a shared infrastructure of facts including a recognition of structural racism threatens our health, our social fabric, and the very mechanisms of our democracy.” Our country will not achieve a successful collective approach to address this and future pandemics if we do not face the facts together. Local and state governments should support truth and reconciliation committees to help confront structural racism and discrimination in laws and policies, and identify new resource distribution efforts using the targeted universalism approach.

Another way to address the mistrust and lack of connection between government and communities is through innovative partnerships. The pandemic has shown us that no agency, or even the government as a whole, can address the severity of its impact on its own. Throughout the past year, community organizations have stepped in to fill the gaps, including creating safe spaces for mental health, distributing resources including food and PPE, and helping to dispel myths. By leveraging existing infrastructure and partnerships with public health officials, social justice movements, and community leaders, government efforts will be more successful. These efforts can also help to spur economic growth and stability, bring community expertise to policy planning, and inform recovery efforts.

We have the opportunity to dismantle unjust and inhumane laws and policies and to help heal a nation from this pandemic as well as our legacies of racism, segregation, and discrimination. It is imperative that policy makers not only look at short-term solutions to address the impacts of COVID-19 but to seize this opportunity to enact greater, more comprehensive reforms that will address unjust and unnecessary discrimination and exclusion resulting in health inequities.

**A Social Contract for Solidarity and Equity**

We finish with a return to the most basic “legal” questions: What are the terms of the social contract in this country? What can each of us expect from the other, and from our government?

The national and state constitutions define the powers of government and their separation, and provide protection for individual rights. On a deeper level, though, they — and the landmark court decisions that interpret them — define the fundamental nature of our civil society, articulating core values and providing the ultimate blueprint for how we cooperate and coexist. COVID-19 is just one in a series of events that has tested the social union. Public health as a practice, and as a branch of law, has a lot to say about our society’s values and aspirations.

*Jacobson v. Massachusetts*, the defining case that has endured for more than a century of public health, built its analysis on the nature of the American social contract. In 1902 in Massachusetts, the Board of Health of Cambridge ordered all residents to be vaccinated. Henning Jacobson, a local minister, refused and was fined $5. Backed by anti-vax advocates, he took his case all the way to the Supreme Court. The Court explained why Mr. Jacobson could not claim a right to opt out. He did indeed have a constitutional right to liberty, but if it came down to a conflict between his individual liberty and the welfare of the community, well — as the old maxim put it in other cases — *salus populi suprema lex*: the health of the people is the supreme law. To the Supreme Court, it was “a fundamental principle of the social compact that the whole
people covenants with each citizen, and each citizen with the whole people, that all shall be governed by certain laws for ‘the common good,’ and that government is instituted for the common good, for the protection, safety, prosperity, and happiness of the people, and not for the profit, honor, or private interests of any one man, family, or class of men.” We Americans get all the benefit of civil society — cooperation, good government, potable water, education, public health protection, democracy, and even liberty itself. In return we agree that there may be times when our individual interests must give way to the needs of society. That is a principle of social solidarity, the idea—indispensable for a functioning democracy—that we are all in this together, sharing the sacrifices as well as the benefits of community.

Solidarity has a twin, the equally indispensable principle of social equity. We are not only all in this thing together, but we are all entitled to the same inalienable rights that make us equal in status, equal in opportunity, and entitled to fairness in outcomes. For far too long, all Americans have not been truly equal in their social or legal status, opportunities have been created much more for some than others, and the outcome has been historically high levels of economic and social inequality. Law and policy play an important role in limiting and in exacerbating these inequities and the health disparities that result. The analyses and recommendations in this Report have been guided by an equity framework and have endeavored to name specific legal and policy steps that can improve equity in the COVID-19 response and beyond.

A positive vision of the possibilities of public health (law) is indispensable if we are to rise from the ashes of failure. Equity and solidarity are the necessary values to guide a collective effort to make sure that health — including safety from the next pandemic—does not depend for Americans on their race, ethnicity, income, or ZIP code. This country can heal itself from COVID—19, move on from 2020’s historic failure, grasp the historic opportunity for reform and renewal, and thereby ready itself for a better response to the next pandemic. And, as we concluded in our first Report, we should settle for nothing less.

**RECOMMENDATIONS ADDRESSED BY CONGRESS AND THE BIDEN-HARRIS ADMINISTRATION**

Prior to the August 2020 publication of Volume I of this assessment, Congress had passed two major pieces of COVID-19 relief legislation. Legal issues raised or answered by those laws, the Coronavirus Aid, Relief, and Economic Security (CARES) Act (on March 17, 2020) and the Families First Coronavirus Response Act (FFCRA) (on March 18, 2020), featured in many of our recommendations. Thereafter, much anticipated further legislation failed to materialize until after the November 2020 election. On December 27, 2020, President Trump signed new relief legislation as part of the Bipartisan-Bicameral Omnibus COVID Relief Deal (Dec. 27, 2020). That relief package was primarily financial, consisting of payments to individuals, supplemental jobless benefits, help for small businesses, and a moratorium on evictions.

The inauguration of President Biden presaged a rapid ramp-up in ameliorative provisions, many of which mirror or at least anticipate recommendations made by our authors in both volumes of the assessment.

By early March 2021, President Biden had signed 35 Executive Orders (EOs). Some, such as EOs directed at securing the public health supply chain or opening a special enrollment period for federally facilitated individual health insurance plans, were immediate reflections of experts’ assessments. Other EOs suggest that additional important reforms will be coming after study or administrative process. These include public health data management, health equity, and combating discrimination on the basis of gender identity or sexual orientation. Separately, by letter, the Biden Department of Justice (DOJ) notified the Supreme Court that the new administration disagreed with the arguments previously made that the Affordable Care Act (ACA) was unconstitutional. Similarly, the DOJ notified courts that it would no longer defend the Trump administration’s “public charge” regulation and the new Homeland Security Secretary Alejandro Mayorkas announced the end of its implementation.

President Biden’s first signature legislation was The American Rescue Plan Act (ARPA) (on March 11, 2021). Legislative provisions that touched the recommendations made in the two volumes of our assessment include:

- Major additional funding of the safety-net with additional funds aimed at reducing child poverty through a fully refundable tax credit in addition to extending FFCRA and CARES stimulus checks, unemployment support, SNAP supplementation, rental assistance, and food support together with additional rental and utilities assistance.
- Supporting the workforce with emergency federal aid for federal workers, increased funding for OSHA activities involving high-risk workplaces, and funds to help reopen schools and support childcare.
- Employees who lose jobs or benefits qualify for 100% COBRA health-insurance subsidies.
- Major changes to the eligibility for and amount of subsidies (tax credits) available to purchasers of individual health insurance (through the ACA marketplace), including eliminating the annual income cap and limiting the amount households pay to 8.5% of annual income.
- COVID-19 vaccines and treatment are covered without cost sharing by Medicaid and CHIP at 100% of the Federal Medical Assistance Percentage (FMAP) until one year after the end of the Public Health Emergency. States have the option of extending this to uninsured persons.
- Temporary increases to the state base FMAP to encourage non-expansion states, such as Florida and Texas, to expand Medicaid.
- Increases in funding for mental health and substance use disorders.
- Funding for Defense Production Act (DPA) activities such as manufacturing and procuring PPE and vaccines.
- Decreasing inequities with funds for rural health care, indigenous persons, and disadvantaged (particularly Black) farmers.

Most of these provisions are time-limited and, as a result, several of our recommendations in Volume II are that they be made permanent.
Top Recommendations for Action

The recommendations here have been distilled by the Editorial Committee from hundreds of specific legal ideas offered by Chapter authors. For more details and explanations, see the individual chapters noted with each recommendation.

Strengthening the Public Health System

- Congress and the White House should jointly convene an independent commission or task force to investigate the preparation for, the response to, and the inequities exacerbated by COVID-19 (see Anderson & Burris, Medical Supplies; Jacobson et al., Executive Decision Making; Harris & Pamukcu, Civil Rights).
- Policymakers should consider providing greater structural independence to the Centers for Disease Control and Prevention (CDC) and the Food and Drug Administration (FDA), or creating a new health information agency, to insulate public health guidance and regulatory actions from political interference (see Wiley, Federalism, Volume 1; Robertson & Salwa, Independent Agency).
- Congress should designate a single federal agency or data trust to standardize collection and publication of rich data illuminating health and health equity, create a modern national data information infrastructure, and ensure privacy and publicly beneficial use (see Fowler et al., Data Collection).
- State legislatures should enact laws that provide substantive standards to guide executive officials during public health emergencies, without reducing the scope of public health powers (see Gable, Movement Restrictions).
- Congress should reaffirm and make mandatory the role of the Strategic National Stockpile (SNS) as the primary resource for supplies required during emergency surges in demand, and institute a long-term funding plan for assuring supplies commensurate with predicted need (see Anderson & Burris, Medical Supplies; Wiley, Federalism).
- The federal government should fulfill its treaty and trust obligations to Tribes, and both the federal government and the states should support Tribal public health, including through ensuring the provision of clean water, safe housing, broadband, access to health care, and data access (see Tanana & Hoss, Tribal).
- Local governments should recognize and address racism as an institutional and systemic issue, such as by declaring racism as a public health crisis (see Harris & Pamukcu, Civil Rights).
- The Health and Human Services Office for Civil Rights should develop, expand, and update best practices and guidance for the allocation of scarce resources and crisis standards of care consistent with federal antidiscrimination laws (see Gable, Allocating Medical Resources).
- Public health officials at all levels of government should make equity a central focus of pandemic response, and work to reduce the inequitable impact of public health emergencies (Jacobson, et al., Executive Decision Making).
- The Food and Drug Administration should comprehensively assess its procedures, standards, and practices for Emergency Use Authorizations (EUAs) (see Zettler et al., Vaccines).

Protecting Communities, Workers, and Families

- Congress and states should enact strong workplace safety laws requiring airborne infectious disease protections; Occupational Safety and Health Administration (OSHA) and state OSHA plans should mandate necessary disease testing and public disease data reporting (see Yearby, Worker Protection).
- Congress should move to eliminate food insecurity in the US through significant long-term enhancements to the SNAP program (see Swinburne, Food Insecurity).
- Congress, state legislatures, and local governments should adopt and enforce paid leave to ensure universal, equitable, inclusive, and comprehensive paid sick days and paid family and medical leave for workers (see Terman & Evermore, Paid Sick Leave).
- Congress and the states should comprehensively rebuild the benefit and technology structure of the unemployment compensation system to assure all workers have access to sufficient and timely benefits, and should eliminate taxation of unemployment benefits (see Terman & Evermore, Paid Sick Leave).
- Congress should enact comprehensive immigration reform that provides undocumented immigrants with a pathway to citizenship and reduces immigration insecurity (see Parmet, Immigration).
- Congress should amend the Affordable Housing Credit Improvement Act of 2019 to increase the tax credit allocations by 50% to increase the supply of affordable housing (see Anderson, Housing).
- States should repeal and reject efforts to restrict local authority to adopt health and equity promoting local laws (see Haddow et al, Preemption).
- Congress and state legislatures should comprehensively reform current laws governing evictions, mortgage foreclosures, and utility shut-offs to end inhumane and socially costly housing insecurity (see Anderson, Housing).
• Public housing authorities should take all measures to protect tenants from loss of housing, and local governments should provide supportive housing for people experiencing homelessness (see Anderson, Housing).

• Legislators should require prisons and jails to implement policies to address COVID–19 behind bars, and to frequently report data on infections, deaths, and releases that include demographics (see Beletsky & Bresler, Criminal Justice).

• Congress should act to promote greater competition in broadband, expand subsidies to ensure equitable access, and bar states from prohibiting local broadband initiatives (see Lawton, Broadband).

• States should develop plans to maintain and prioritize in-person education safely during public health emergencies (see Kershner & Silverthorn, Children).

• States should stop practices like pre-trial detention and cash bail, and decriminalize “quality of life” offenses (see Beletsky & Bresler, Criminal Justice).

Enhance Quality and Accessibility of Health Care

• Congress should make permanent provisions in the American Rescue Plan Act relating to subsidies to the ACA marketplace, Medicaid coverage reforms, and expansion of Medicaid and CHIP eligibility (see Huberfeld & Watson, Medicaid; Weeks, Private Insurance; Rosenbaum & Handley, Uninsured).

• States should follow the lead of the federal government and open special enrollment periods and extend their end-dates for all state-operated marketplaces (see Weeks, Private Insurance).

• States should enact individual health insurance mandates and provide for a “public option,” publicly funded health insurance to stabilize markets and reduce costs (see Weeks, Private Insurance).

• CMS should withdraw its guidelines favoring using Section 1115 waivers to impose work requirements and block grants and deny renewals of same and publish new policies encouraging the expansion of Medicaid coverage (see Huberfeld & Watson, Medicaid).

• Congress should enhance funding for nursing homes, and the federal government and states should strengthen nursing home regulation and enforcement (see Sklar, Long-Term Care).

• Congress and state legislatures should decrease barriers to accessing OUD treatments, including buprenorphine and methadone (see Davis & Lieberman, Opioid Use Disorder).

• Congress and state legislatures should comprehensively remove regulatory, financial, and technological barriers to the use of telehealth to deliver health, mental health, abortion and substance use disorder treatment services (see Schmit, Telehealth; Rebouche, Abortion; Davis & Lieberman, Opioid Use Disorder; Krueger, Mental Health).

Preserving Democracy in Pandemics and Beyond

• Congress should set national minimum standards and provide adequate funding to protect election administration in voting during health and other emergencies (see Hunter, Elections).

• States should maintain and expand voting options that protect the right to vote during health and other emergencies (see Hunter, Elections).