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TORT LAW'S NEW QUARANTINISM: RACE AND COERCION IN THE AGE OF A NOVEL CORONAVIRUS

Sierra Stubbs & John Fabian Witt***

INTRODUCTION

In the history of the law of epidemics, there have been two traditions in European and North American legal systems. The first, and in some respects the oldest, has been quarantine. The second has been sanitation.

Quarantinist policies first took their modern form in eastern Europe when cholera made its way from east to west in the eighteenth-century. Autocratic states like Russia, Austria-Hungary, and Prussia responded to the cholera threat by implementing controls that limited freedom of movement in the service of public health.¹ By enacting these restrictive controls, as historian Peter Baldwin has analyzed, these states recalibrated the balance between individual autonomy and state preventive measures and, in so doing, further developed modern iterations of absolutist government and politics.² Prussia, for example, authorized its soldiers to shoot violators of the militarized *cordon sanitaires* along their borders.³ Throughout the region, travelers faced quarantines,⁴ enforced reporting requirements, isolation obligations, and stiff criminal penalties, including imprisonment.⁵

The second strategy in the law of epidemics arose in the so-called liberal states of western Europe.⁶ In the United Kingdom and in France, for example, reform-minded public health policymakers sought to regulate not individuals, but rather, more broadly, the environments in which people lived.⁷ Consider, for example, John Snow's

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1. PETER BALDWIN, *CONTAGION AND THE STATE IN EUROPE, 1830–1930*, at 41, 44, 51 (1999).

2. *See id.* at 12.

3. *Id.* at 43–44, 52.

4. *Id.* at 44.

5. *See, e.g., id.* at 57–58.

6. *See id.* at 10–12.

7. *Id.* at 238–40.

famous study of cholera and the pollution of the Thames River, which, to this day, stands for the proposition that state attention to environmental regulations can mitigate the spread of disease.⁸ A whole world of legal provisions followed, ranging from street cleaning and municipal uplift to tenement reform.⁹ Some extended the sanitationist thesis to encompass not only living conditions, but also *moral* conditions.¹⁰ Nineteenth-century theories of sanitationism thus encompassed a spectrum of liberals, progressives, and conservatives, whose policies included work requirements, enforced temperance, and mandatory thrift.¹¹

My recent book contends that the American law of epidemics has historically been a mix of the two major European traditions and their variants.¹² The American experience has included powerful examples of sanitationisms, progressive and conservative alike. But the United States has had a robust tradition of autocratic quarantinism, too. While the United States has historically pursued sanitationist policies for white and middle- and upper-class Americans, it has also, in parallel, imposed quarantinist or authoritarian policies on low-income and non-white populations.¹³

This Article proposes that in the COVID-19 pandemic, American tort law has become the site for a new and distinctive variation of the quarantinist tradition.¹⁴ For the first time in the history of the law of epidemics, immunity for private parties from legal claims became a central element of the legal response to infectious disease. Almost immediately with the arrival of SARS-CoV-2 in the United States in February and March of 2020, business interests called for immunity legislation on behalf of businesses and organizations.¹⁵ At the same

8. See generally JOHN SNOW, ON THE MODE OF COMMUNICATION OF CHOLERA 133–34 (1849).

9. See JOHN DUFFY, THE SANITARIANS: A HISTORY OF PUBLIC HEALTH 126–92 (1990); NANCY TOMES, THE GOSPEL OF GERMS 157–235 (1998).

10. E.g., EDWIN CHADWICK, REPORT ON THE SANITARY CONDITION OF THE LABOURING POPULATION OF GREAT BRITAIN 167–219 (M.W. Flinn ed., 1965) (1842).

11. See generally DUFFY, *supra* note 9.

12. JOHN FABIAN WITT, AMERICAN CONTAGIONS: EPIDEMICS AND THE LAW FROM SMALLPOX TO COVID-19, at 9 (2020) [hereinafter WITT, AMERICAN CONTAGIONS].

13. *Id.*

14. For more on the topsy-turvy reorganization of the American law of epidemics in the COVID-19 episode, see generally John Fabian Witt, *Scrambling the New Sanitationist Synthesis: Civil Liberties and Public Health in the Age of COVID-19*, U. CHI. LEGAL FORUM (forthcoming 2022) (on file with author).

15. See, e.g., Elaine S. Povich, *Businesses Want a Shield Against COVID-19 Lawsuits. But What About Customer Safety?*, PEW (Aug. 11, 2020), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2020/08/11/businesses-want-a-shield-against-covid-19-lawsuits-but-what-about-customer-safety> [<https://perma.cc/6ZKW-UXBC>].

time, private industry began to produce private forms of immunity through waivers by which individuals agreed to relinquish the right to sue for COVID-19 risks.¹⁶ Together, the immunity legislation and the virus liability waivers constitute a significant variation on American governance of epidemics. They reflect a new quarantinism in American tort law, one that controls bodies and exercises coercive authority through the delegation of unaccountable power to private parties.

The features of this new tort quarantinism illuminate a novel and significant way in which American law now shapes the exercise of power during moments of infection. Historically, quarantinisms have entailed the direct exercise of coercive state power. Statist policies were the centerpiece of quarantinist strategies. In the COVID-19 pandemic, efforts to reduce the private legal obligations of businesses and organizations through tort immunities and waivers constitute one example of a new and potentially equally coercive legal response. Tort reform in the age of the novel coronavirus has meant the reallocation and magnification of private coercive resources through background rules of private law. The new quarantinism has been, in some ways, a privatization of what was once the public exercise of state control. As this Article examines, the consequences of this form of privatization have been deadly for the most vulnerable populations in the United States. Tort reform is only one dimension of a broader move in the law of epidemics that focuses on private rather than public power.¹⁷ The new quarantinism in tort is emblematic of the ways in which law in the era of COVID-19 has revealed the coercive force immanent in private power.

In what follows, this Article offers a preliminary sketch of the new landscape of immunity and waivers. Part I takes up immunity legislation. Part II turns to the proliferation of liability waivers. Part III describes the impact of such forms of private power for the most vulnerable communities in the country, focusing on the very real effects of tort immunities in the context of meatpacking plants and prisons. Older American quarantinisms targeted poor communities and non-white communities. The new quarantinism does the same. The emerging tort law exacerbates private inequalities and increases the risks of infection, injury, and death for the most vulnerable among us.

16. See *infra* Part II.

17. See *infra* Part III.B.

I. IMMUNITY LEGISLATION

New rules limiting the domain of tort liability have proliferated at both the state and federal levels during the pandemic. The discussion below describes the new immunity provisions and offers an account of their significance. But it is worth reviewing the history of tort immunity to put the new developments into context.

A. *Reciprocal Immunities and Nonreciprocal Immunities*

Legislative immunities have long been a part of the landscape of tort principles. The very first workers' compensation laws in the United States offered injured workers a choice between compensation claims and tort suits.¹⁸ The former offered secure but limited damages.¹⁹ The latter offered the potential for full compensation²⁰ but placed the burden on plaintiffs to succeed at making out all of the elements of a common law tort claim.²¹ But when such laws ran into constitutional obstacles in the state courts,²² compensation statutes turned decisively to the quid pro compensation model.²³ Legislatures gave employees the security of sure and steady workers' compensation benefits – but also gave employers immunity from tort suits by their employees.²⁴ The guarantee of damages for injured employees came along with immunity from tort suits for employers.²⁵ The arrangement thus left in place an approximation of the existing baseline of distributions between the relevant classes.²⁶ Employees gained and lost. Employers gained and lost.

A whole host of quid pro quo immunity statutes followed over the course of the twentieth century. Congress gave the victims of future nuclear disasters a limited compensation for their injuries in return for

18. JOHN FABIAN WITT, *THE ACCIDENTAL REPUBLIC: CRIPPLED WORKINGMEN, DESTITUTE WIDOWS, AND THE REMAKING OF AMERICAN LAW* 125–52 (2004) [hereinafter WITT, *THE ACCIDENTAL REPUBLIC*]. See also PRICE V. FISHBACK & SHAWN EVERETT KANTOR, *PRELUDE TO THE WELFARE STATE* 197–204 (2000) (arguing workers' compensation schemes succeeded because all parties – labor, management, insurance companies – benefited from their creation).

19. See generally LEX LARSON, *LARSON'S WORKERS COMPENSATION LAW* ch. 1 (2010); Martha T. McCluskey, *The Illusion of Efficiency in Workers' Compensation "Reform"*, 50 *RUTGERS L. REV.* 657 (1998).

20. JOHN FABIAN WITT & KAREN M. TANI, *TORTS: CASES, PRINCIPLES, AND INSTITUTIONS* 609–10 (5th ed. 2020).

21. See CRYSTAL EASTMAN, *WORK-ACCIDENTS AND THE LAW* 169–89 (Paul Underwood Kellogg ed., 1910).

22. *Ives v. S. Buff. Ry. Co.*, 94 N.E. 431, 433 (N.Y. 1911). See also WITT, *THE ACCIDENTAL REPUBLIC*, *supra* note 18, at 152–55.

23. WITT, *THE ACCIDENTAL REPUBLIC*, *supra* note 18, at 181–82.

24. See *Jensen v. S. Pac. Co.*, 109 N.E. 600 (N.Y. 1915).

25. WITT, *THE ACCIDENTAL REPUBLIC*, *supra* note 18, at 181–82.

26. *Id.*

their traditional tort remedies.²⁷ No-fault auto insurance laws in many states removed minor auto injuries from the tort system, substituting mandatory first-party insurance arrangements for tort suits.²⁸ The National Childhood Vaccine Injury Act established a no-fault system of vaccine injury compensation, displacing most tort liability for childhood vaccines.²⁹ Proposals circulated for decades to enact further quid pro quo reforms, including the replacement of all automobile tort litigation with no-fault systems or the establishment of similar changes in medical malpractice.³⁰ The 9/11 Victim Compensation Fund took something of this structure, too, by offering inducements to victims' families to enter the compensation system rather than take their chances in tort.³¹

In the past forty-five years, however, a different kind of legislation limiting tort liability has surged to the fore. The 1975 enactment of California's Medical Injury Compensation Reform Act (MICRA) led the way.³² MICRA did not offer immunity from liability, at least not in principle. Instead, it offered defendants immunity from non-pecuniary damages in medical malpractice cases over a \$250,000 maximum.³³ MICRA's story, and that of the tort reform movement that followed, in medical malpractice and in other areas of personal injury, has been told often and well.³⁴ But the analytic structure of the tort reform laws is worth drawing out. MICRA and the laws that followed enacted a nonconsensual redistribution between the class of tort plaintiffs and tort defendants. The laws redistributed resources away from people identified by juries or trial judges as the most injured, namely with injuries so grave that the non-pecuniary damages exceeded the new

27. 42 U.S.C. § 2210 (2006); *see also* Daniel Kolomitz, *A Nuclear Threat: Why the Price Anderson Act Must Be Amended*, 48 ARIZ. ST. L.J. 853, 859–60 (2016) (arguing that the Price Anderson Act should be amended to preempt state statutes that address nuclear incidents, including those that do not rise to the level of a nuclear incident under the meaning of the federal statute).

28. Nora Freeman Engstrom, *An Alternative Explanation for No-Fault's Demise*, 61 DEPAUL L. REV. 303, 319 (2012).

29. National Childhood Vaccine Injury Act of 1986, 42 U.S.C. § 300aa-11 (2016).

30. KENNETH ABRAHAM, *THE LIABILITY CENTURY: INSURANCE AND TORT LAW FROM THE PROGRESSIVE ERA TO 9/11*, at 69–138 (2010); Robert L. Rabin, *The Renaissance of Accident Law Plans Revisited*, 64 MD. L. REV. 699, 701 (2005).

31. Air Transportation Safety and System Stabilization Act, 49 U.S.C. § 40101 (2001).

32. *See* CAL. CIV. CODE § 3333 (West 2021).

33. *Id.* at § 3333.2.

34. *E.g.*, John Nockleby & Shannon Curreri, *100 Years of Conflict: The Past and Future of Tort Retrenchment*, 38 LOYOLA L.A. L. REV. 1021, 1028, 1054 (2005); Robert L. Rabin, *Federalism and the Tort System*, 50 RUTGERS L. REV. 1, 3 (1997); Robert L. Rabin, *Some Reflections on the Process of Tort Reform*, 25 SAN DIEGO L. REV. 13, 13–15 (1988); “Common Sense” Legislation: *The Birth of Neoclassical Tort Reform*, 109 HARV. L. REV. 1765, 1766–68 (1996).

cap of a quarter million dollars.³⁵ Anyone with non-pecuniary damages at or below the caps, after all, would never feel the damages cap. The effect of the MICRA cap – and of the dozens of caps that followed in states around the country – was to coercively rearrange the private relations of tort plaintiffs and defendants in such a way as to systematically disadvantage the most those parties who were the least well-off, namely the parties whose injuries were the worst.³⁶

Dozens of similar tort damages caps have been enacted in state legislatures around the country, many of them expanding beyond the original medical malpractice context to establish non-pecuniary damages caps for virtually the entire domain of accidental injuries. Many of them followed the MICRA pattern of capping non-pecuniary damages.³⁷ As time went by, the caps often increased the original MICRA limit of \$250,000.³⁸ But legislators rarely indexed the caps for inflation, which means that the real value of damages caps systematically drops over time.

Crucially, the MICRA introduced a distinctive form of defendant immunity without the reciprocal *quid pro quo* compensation of the workers' compensation tradition. To be sure, such immunity did not insulate defendants from pecuniary damages or from the first quarter-million dollars in non-pecuniary damages.³⁹ But the post-MICRA tort reform movement took a turn in 2005 when Congress enacted the Protection of Lawful Commerce in Arms Act (PLCAA).⁴⁰ The PLCAA went further than the damages caps of the MICRA model. It immunized firms in the firearm industry from a wide swath of personal injury liability.⁴¹ But the PLCAA established immunity with no accompanying benefit for the immunity provision's losers.⁴² The PLCAA was a one-way redistribution like the MICRA enactment, one that reallocated from tort plaintiffs to tort defendants, with no substi-

35. Lucinda M. Finley, *The Hidden Victims of Tort Reform: Women, Children, and the Elderly*, 53 EMORY L.J. 1263, 1279 (2004).

36. *See id.*

37. *See generally* Rabin, *Some Reflections on the Process of Tort Reform*, *supra* note 34.

38. *Id.*

39. CAL. CIV. CODE § 3333 (West 2021).

40. 15 U.S.C. § 7901–03 (2012).

41. *Id.*

42. *See* Joseph Blocher & Darrell A.H. Miller, *What is Gun Control: Direct Burdens, Incidental Burdens, and the Boundaries of the Second Amendment*, 83 U. CHI. L. REV. 295, 310–13 (2016); Andrew Jay McClurg, *The Second Amendment Right to Be Negligent*, 68 FLA. L. REV. 1, 8–9 n.26 (2016); Comment, *Tort Law – Civil Immunity*, 119 HARV. L. REV. 1939, 1941 (2006).

tute compensation mechanism.⁴³ The result was another nakedly coercive redistribution by the state among private parties.

Let us pause here with this idea. What does it mean to call tort reform enactments coercive redistributions? Observers of tort reform arrangements do not often think of legal reforms in tort in these terms.⁴⁴ But it is useful to do so, at least from time to time, to regain one's analytic bearings in the sea of catch-all umbrella labels like "public" and "private." To say that the PLCAA was coercive is not, to be clear, the same as saying that it was bad. The term "coercive" here functions in the sense in which the progressive lawyer-economist Robert Hale used it a century ago.⁴⁵ The PLCAA undoubtedly had myriad effects and meanings, some perhaps good, others decidedly less so. To say that a legal change like the PLCAA coercively redistributes is simply to observe that the effects of the PLCAA on the class of future plaintiffs and defendants are nonconsensual and alter the power and resources available to individuals and firms in the private sphere.

B. Nonreciprocal Immunities in the Era of COVID-19

The arrival of the SARS-CoV-2 virus in the United States sparked a new wave of coercively redistributive enactments in the form of tort immunity legislation. Immunity legislation in the era of COVID-19 does not aim, as workers' compensation did or as the National Childhood Vaccine Injury Act did, to replace tort with a compensation system on the model of work injury compensation. Instead, the new legislation carries forward decades of tort reform efforts, replete with the hidden coercive effects. The new legislation also produced a new development in the law of epidemics. Never in the history of the law of epidemics had the spread of infection been accompanied by the immunization of broad swaths of society against the threat of litigation.

Let us review some of what has happened, mostly in the state legislatures. Since March 2020, nearly half the states in the United States have enacted broad coronavirus business liability shields limiting harmed individuals' ability to win personal injury lawsuits.⁴⁶ As of

43. Alexandra B. Klass, *Tort Experiments in the Laboratory of Democracy*, 50 WM. & M. L. REV. 1501, 1540 (2009).

44. See, e.g., sources cited, *supra* note 34.

45. Robert L. Hale, *Coercion and Redistribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470, 470–71 (1923).

46. There are twenty-four states with broad coronavirus liability shields. See, e.g., Chris Marr, *States Prolong Covid-19 Liability Shields as Pandemic Persists*, BUSINESS INSIDER (Apr. 20, 2021, 12:38 PM), <https://news.bloomberglaw.com/daily-labor-report/states-prolong-covid-19-liability-shields-as-pandemic-persists>.

mid-April 2021, eight more states have such liability shields pending somewhere in the legislative process.⁴⁷ Seventeen states either have narrow coronavirus liability shields or no liability shield at all.⁴⁸ Examples of the former include New York's now-repealed statute immunizing healthcare providers and the manufacturers and distributors of personal protective equipment.⁴⁹

Some states have enacted immunity legislation that is so broad it could effectively prohibit plaintiffs from bringing successful claims. For example, South Dakota's liability shield states that "[a] person may not bring or maintain any action or claim for damages or relief alleging exposure or potential exposure to COVID-19 unless the exposure results in a COVID-19 diagnosis *and the exposure is the result of intentional exposure with the intent to transmit COVID-19.*"⁵⁰ At certain periods in time, South Dakota was among the states with the least coronavirus-related regulatory restrictions.⁵¹ At one point early in November 2020, the state's per-capita rate of new cases was twice the highest per-capita rate in the United States during the entire epidemic.⁵² Around that same time, South Dakota's hot spot had the third-highest per-capita COVID-19 death rate in the world.⁵³

South Dakota's high death rates can be considered in light of the effects of its tort immunity act. It is worth considering just how high of a pleading threshold *intentional* transmission is. It is not enough for a plaintiff in a South Dakota case to show that a defendant spread infection by negligence. A defendant is only susceptible to liability if the plaintiff can show that the defendant knew with a *substantial certainty* that infection would follow from their conduct, or if the plaintiff can show that the defendant's conduct was motivated by a *purpose* to in-

47. *Id.*

48. *Id.*

49. N.Y. Pub. Health §§ 3080–82 (McKinney 2020), *repealed* by N.Y. Laws 2021 ch. 56, § 1; Roy Breitenbach, *COVID-19 Immunity from Liability Provisions, Adopted in Emergency, Now Repealed in New York State*, JD SUPRA (Apr. 26, 2021), <https://www.jdsupra.com/legalnews/covid-19-immunity-from-liability-5792048/>.

50. H.B. 1046, 2021 Leg., 96th Sess. (S.D. 2021) (emphasis added).

51. Adam McCann, *States with the Fewest Coronavirus Restrictions*, WALLETHUB (Apr. 6, 2021), <https://wallethub.com/edu/states-coronavirus-restrictions/73818>.

52. See *New York Times Covid-19 Tracker*, NY TIMES, <https://www.nytimes.com/interactive/2021/us/covid-cases.html> (last visited Jan. 13, 2022).

53. Zack Budryk, *North Dakota Records World's Highest COVID-19 Mortality Rate*, THE HILL (Nov. 17, 2020, 12:29 PM), <https://thehill.com/policy/healthcare/526324-north-dakota-records-worlds-highest-covid-19-mortality-rate>; Aaron Blake, *Kristi Noem Hails South Dakota as a Coronavirus Success Story — Using Badly Cherry-Picked Numbers*, WASH. POST (Dec. 8, 2020), <https://www.washingtonpost.com/politics/2020/12/08/kristi-noem-hails-south-dakota-coronavirus-success-story-using-badly-cherry-picked-numbers>.

fect the plaintiff.⁵⁴ During most of the pandemic, few people had substantial certainty as to what would lead to transmission.

Oklahoma is an example of a state with broad immunity legislation.⁵⁵ The legislation states that no person shall be liable in a civil action for injury arising out of exposure to the SARS-CoV-2 virus if their conduct was “in compliance or consistent with federal or state regulations, a Presidential or Gubernatorial Executive Order, or guidance applicable at the time of the alleged exposure.”⁵⁶ The Oklahoma legislation provided further that where “two or more sources of guidance” were “applicable to the conduct or risk at the time of the alleged exposure,” no person will be liable if the conduct was “consistent with *any* applicable guidance.”⁵⁷ The lowest regulatory denominator sets the tort standard. For a period of time, Oklahoma had the least substantial coronavirus-related regulatory restrictions of any state – even fewer than South Dakota.⁵⁸

As of this writing, thirty-four states and the District of Columbia have enacted legislation limiting liability. Across these bills, two types of immunity from liability are granted: 1) blanket immunity to different kinds of facilities, namely, any business, governmental entity, and religious and/or cultural institutions; and 2) immunity from liability for public health agents and healthcare providers.⁵⁹ Some states have

54. See RESTATEMENT (THIRD) OF TORTS: PHYSICAL & EMOTIONAL HARM § 1 (AM. LAW. INST. 2010).

55. S.B. 1946, 57th Leg., 2d Sess. (Okla. 2020). The Bill reads in full:

A person or agent of the person who conducts business in this state shall not be liable in a civil action claiming an injury from exposure or potential exposure to COVID-19 if the act or omission alleged to violate a duty of care of the person or agent was in compliance or consistent with federal or state regulations, a Presidential or Gubernatorial Executive Order, or guidance applicable at the time of the alleged exposure. If two or more sources of guidance are applicable to the conduct or risk at the time of the alleged exposure, the person or agent shall not be liable if the conduct is consistent with any applicable guidance.

Id.

56. *Id.*

57. *Id.* (emphasis added).

58. KLFY Staff, *Wallet Hub: Oklahoma has Least Coronavirus Restrictions in the Nation*, OKLA. NEWS 4 (Jan. 26, 2021, 5:09 PM), <https://kfor.com/news/local/wallet-hub-oklahoma-has-least-coronavirus-restrictions-in-the-nation>.

59. States that have passed legislation guaranteeing the first kind of immunity are: S.B. 30, 2021 Leg., Reg. Sess. (Ala. 2021); H.B. 6, 65th Leg., 1st Spec. Sess. (Idaho 2020); S.B. 2388, 88th Gen. Assemb. (Iowa 2020); S.B. 1, 122nd Gen. Assemb., 1st Reg. Sess. (Ind. 2021); S.B. 3049, 2020 Leg., 145th Sess. (Miss. 2020); S.B. 65, 2021 Leg., 67th Sess. (Mont. 2021); S.B. 4, 2020 Leg., 32d Spec. Sess. (Nev. 2020); H.B. 118, 2019 Gen. Assemb., Reg. Sess. (N.C. 2020); S.B. 1946, 57th Leg., 2d Sess. (Okla. 2020); S.B. 5003, 2020 Leg., 5th Spec. Sess. (Utah 2020); H.B. 4402, 80th Leg. Assemb., 3rd Spec. Sess. (Or. 2020) (protection for public and private schools); S.B. 8002, 2020 Gen. Assemb., 2d Spec. Sess. (Tenn. 2020); VT. STAT. ANN. tit. 20, § 20 (2021) (state agencies and political subdivisions). States providing for the second kind of immunity are: S.B.

also already extended their respective immunity legislation, with Georgia extending its immunity through July 2022 and Kansas until March 2022.⁶⁰

What does the new immunity legislation mean? Following the analysis offered regarding immunity legislation in the twentieth and twenty-first-century tort reform movement, such legislation represents an unconsented to coercive redistribution of resources from the class of people infected and injured by SARS-CoV-2 to the businesses and organizations benefiting from COVID-19 immunity. To be clear, businesses and organizations are a nexus of contracts⁶¹ – a node in a network of relationships among stakeholders, including shareholders, customers, creditors, executives, and employees, among others.⁶² When the law distributes resources to them, there is nothing *a priori* that determines the final resting place of those resources in the network that is the firm.⁶³ Some or all of the parties may benefit or lose out from a legal change in their favor, but which stakeholders change and how much is a complex question turning on relative elasticities of supply and demand in the market and also on myriad institutional factors shaping the structure of the networks and firms in question.⁶⁴

The stakeholders of a firm benefitting from immunity legislation will even, on occasion, include some people in the class of people harmed by the very same legislation. Such people will find themselves on both sides of the law's redistributive effect. For such individuals, it will be as if the law picks from their left pocket and quietly lines their right. There is even reason to think, as the network sociologists remind us, that the class of people most likely to be infected will consist disproportionately of the most socially connected people, including

241, 31st Leg., 2d Sess. (Alaska 2020); D.C. CODE § 7-311 (2021); Haw. Exec. Order No. 20-05 (Apr. 16, 2020); Ill. Exec. Order No. 27 (Apr. 1, 2020); H.B. 2016, 88th Leg., 1st Spec. Sess. (Kan. 2020); S.B. 150, 2020 Gen. Assemb., Reg. Sess. (Ky. 2020); H.B. 826, 2020 Leg., Reg. Sess. (La. 2020); MD. CODE ANN., Pub. Safety § 14-3A-06 (West 2021); S.B. 2640, 2020 Leg., 191st Gen. Ct. (Mass. 2020); H.B. 6031, 100th Leg., Reg. Sess. (Mich. 2020); MISS. CODE ANN. § 11-71-7 (West 2020); S.B. 2333, 219th Leg., Reg. Sess. (N.J. 2020); N.M. Exec. Order 2020-083 (Mar. 11, 2020); Executive Order to Enhance Protections for Health Care Professionals (Pa. May 6, 2020); R.I. Exec. Order 20-21 (Apr. 10, 2020); 2019 Wis. Act 185 (Apr. 15, 2020); S.B. 2, 65th Leg., Spec. Sess. (Wyo. 2020).

60. H.B. 112, 2021-2022 Leg., Gen. Assemb. (Ga. 2020); S.B. 283, 2021-2022 Leg., Reg. Sess. (Kan. 2020); Marr, *supra* note 46.

61. See generally Michael C. Jensen & William H. Meckling, *The Theory of the Firm: Managerial Behavior, Agency Costs, and Ownership Structure*, 3 J. FIN. ECON. 305 (1976).

62. Mariana Pargendler, *Veil Peeking: The Corporation as a Nexus for Regulation*, 169 U. PA. L. REV. 717, 720 nn.5-6 (2021).

63. N. GREGORY MANKIW, PRINCIPLES OF ECONOMICS 125-27 (6th ed. 2012) (explaining basic economics of tax incidence).

64. *Id.*

the most wealthy and best resourced,⁶⁵ though they of course will have access to the best care and are least likely to be gravely injured by an infection.⁶⁶ But setting these puzzles aside, one thing should be clear: SARS-CoV-2 immunity legislation, all things being equal, redistributes exclusively to firms that would have been subject to damages payments under the standard common law of negligence and distributes to them exclusively from those with colorable claims of infection and injury therefrom.

II. LIABILITY WAIVERS

Public law efforts to secure immunity have been combined with private mechanisms to do so as well. Businesses and organizations across the United States have also pursued a different, but related, path to avoiding liability arising out of the pandemic. Contractual waivers of liability proliferated at the start of the COVID-19 emergency.

Like the tort reform movement, the practice of using contractual waivers has been on the rise for decades.⁶⁷ Despite the widespread state law protections for businesses and organizations, COVID-19 liability waivers have cropped up everywhere, like a belt-and-suspenders approach to securing immunity. Like the cicadas of the spring of 2021, COVID-19 waivers are almost everywhere (at least the cicadas of the spring of 2021 were limited to a particular swath of the country). COVID-19 liability waivers appear in all the commercial spaces in which liability waivers have been familiar: gyms and health clubs, sporting events, children's activities, and more.⁶⁸ But in the year after the arrival of SARS-CoV-2 in the United States, liability waivers popped up in a wide array of less familiar places. Nonprofit and charitable organizations like the Girl Scouts,⁶⁹ the United Way,⁷⁰ and the Na-

65. NICHOLAS A. CHRISTAKIS, *APOLLO'S ARROW: THE PROFOUND AND ENDURING IMPACT OF CORONAVIRUS ON THE WAY WE LIVE* 55–57 (2020).

66. See Jack Kelly, *The Rich Are Riding Out the Coronavirus Pandemic Very Differently Than the Rest of Us*, FORBES (Apr. 1, 2020, 4:23 PM), <https://www.forbes.com/sites/jackkelly/2020/04/01/the-rich-are-riding-out-the-coronavirus-pandemic-very-differently-than-the-rest-of-us>.

67. Ryan Martins, Shannon Price & John Fabian Witt, *Contract's Revenge: The Waiver Society and the Death of Tort*, 41 CARDOZO L. REV. 1265, 1268–69 (2020).

68. Sunnie Ning, *Are Covid Waivers Enforceable? Look to Gym Waivers for Insights*, HARV. L. BILL OF HEALTH (Sept. 18, 2020), <https://blog.petrieflom.law.harvard.edu/2020/09/18/are-covid19-liability-waivers-enforceable>.

69. Girl Scouts of Eastern Pennsylvania, *COVID-19 Waiver of Liability and Indemnification*, <https://webcache.googleusercontent.com/search?q=cache:y9qd-fQWIM8J:https://www.gsep.org/content/dam/girlscouts-gsep/documents/covid-19-documents/GSEP%2520covid-19-waiver-of-liability-and-indemnification.pdf+&cd=100&hl=en&ct=cln&gl=US&client=firefox-b-1-e> (last updated Sept. 2020).

70. United Way of Santa Barbara, *Assumption of the Risk and Waiver of Liability Relating to Coronavirus/COVID-19* (Oct. 2021), <https://webcache.googleusercontent.com/search?>

tional Multiple Sclerosis Society,⁷¹ among uncountable thousands of others, adopted waivers of liability to limit their exposure. After-school sports programs in school districts required participants to execute waivers.⁷² Hair salons did, too.⁷³ At least one prison required waivers from prisoners.⁷⁴ Spectators at WrestleMania 37 entered on the condition that they sign a waiver.⁷⁵ Participants who attended political rallies for the former President of the United States were also required to sign waivers.⁷⁶ Wedding planners advised their clients to include COVID-19 waivers in their wedding invitations⁷⁷ (better than asking for signatures at the wedding itself, they advised, since the latter approach might lead to mixed feelings on the big day). Film production companies employed COVID-19 waivers.⁷⁸ The American Bar Association reported early in the pandemic that “[d]entist and doctor’s offices, salons, restaurants, gyms, day care centers, movie theaters and bowling alleys are just some of the businesses now asking people to sign COVID-19 waivers.”⁷⁹

q=cache:y0XDQASGjGYJ:https://www.unitedwaysb.org/sites/unitedwaysb.org/files/PDF%27s/Waivers/Covid-19%2520Volunteer%2520Liability%2520Waiver.pdf+&cd=5&hl=EN&ct=clnk&gl=US&client=firefox-b-1-e.

71. National Multiple Sclerosis Society, *Event Release and Waiver of Liability* (Oct.2021), http://webcache.googleusercontent.com/search?q=cache:rwMjk8-hiukJ:main.nationalmssociety.org/site/DocServer/Special_Events_Release_and_Waiver_of_Liability.pdf%3FdocID%3D80380+%&cd=23&hl=en&ct=clnk&gl=us&client=firefox-b-1-e.

72. See School District Waiver of Liability Template, available at <https://www.osaa.org/docs/osaainfo/Waiver-of-Liability-for-COVID-19-Student-Sport-or-Activity.pdf> (last visited Jan. 13, 2022).

73. Tom Krisher & Mark Sherman, *Coronavirus Liability Waivers: Businesses Want Customers and Workers to Give Up Their Right to Sue over COVID-19. Can They Do That?*, ORLANDO SENTINEL (June 17, 2020, 8:51 AM), <https://www.orlandosentinel.com/business/ct-biz-coronavirus-liability-waivers-20200616-pk2mcrbxyjgzxctqy63toz54hu-story.html>.

74. *Prison Under Fire for Asking Inmates for Covid Liability Waivers*, KHN MORNING BRIEFING (May 19, 2021), <https://khn.org/morning-breakout/prison-under-fire-for-asking-inmates-for-covid-liability-waivers/>.

75. Marc Middleton, *WWE Releases WrestleMania 37 COVID-19 Protocols, Liability Waiver, and Risk Agreements*, WRESTLING INC. (Mar. 18, 2021), <https://www.wrestlinginc.com/news/2021/03/wwe-releases-wrestlemania-37-covid-19-protocols-liability-waiver-and-risk-agreements/>; Louis Dangoor, *Report: Fans Attending WWE WrestleMania 37 Must Sign Liability Waivers*, WRESTLETALK.COM (Mar. 2021), <https://wrestletalk.com/news/report-fans-attending-wwe-wrestlemania-37-must-sign-liability-waivers/>.

76. Laura Lorek, *How Effective are Liability Waivers in the Age of the Novel Coronavirus?*, ABA JOURNAL (July 2, 2020, 9:33 AM), <https://www.abajournal.com/web/article/understanding-liability-waivers-in-the-age-of-covid-19>.

77. Caroline Fox, *FREE SAMPLE COVID-19 WAIVER - Do I Need a COVID Waiver for Weddings and Events?*, ENGAGED LEGAL, <https://blog.engagedlegal.com/blog/covid-19-waiver-wedding> (last visited Jan. 13, 2022).

78. Teresa Beardsley, *Producer’s Guide: Covid-19 Waivers & Forms*, WRAPBOOK.COM (Apr. 16, 2021), <https://www.wrapbook.com/blog/covid-19-waivers-forms>.

79. Lorek, *supra* note 76.

Colleges and universities got into the waiver business, too, requiring students to sign liability waivers for coronavirus injuries before returning to school.⁸⁰ The University of Alabama attempted to require students to sign documentation stating that they “voluntarily assume such risk” of returning to campus in person,⁸¹ though the university changed the language when some students refused to sign the waiver.⁸² The University of New Hampshire’s liability waiver captured the general language typical of many such university waivers:

By signing below, I understand the University of New Hampshire’s approach to on-campus learning during the COVID-19 pandemic. I understand that my decision to return to on-campus programming is voluntary. I understand that UNH cannot guarantee my health or immunity from infection. I understand there are risks of exposure to the virus from symptomatic and asymptomatic carriers. I recognize that the risks of exposure to COVID-19 include sharing space with others and engaging in interpersonal communications. *I assume the risks associated with being at the University of New Hampshire including the risk of exposure to COVID-19.*⁸³

Some public-school districts required parents to sign liability waivers in order for their children to return to in-person learning. For example, a South Carolina school district’s waiver required parents to “assume[] the risk and responsibility if their child gets sick or even dies from COVID-19.”⁸⁴ When parents criticized the school district’s decision to implement a liability waiver, the school district replied that “[t]he waiver is necessary to have a voluntary re-opening of schools during a pandemic when risk – both known and unknown – cannot be quantified.”⁸⁵ No one explained how shifting the risk to families would help with the quantifying, though to be sure, it might relieve the district and its insurers of doing the calculation.

The mechanism for the spread of COVID-19 waivers seems at least in part to have been a new array of health status check forms used by

80. See Greta Anderson, *Colleges Seek Waivers from Risk-Taking Students*, INSIDE HIGHER ED. (Aug. 3, 2020), <https://www.insidehighered.com/news/2020/08/03/students-asked-sign-liability-waivers-return-campus>.

81. Erika Beras, *Students Face COVID-19 Liability Waivers Upon Return to Campus*, MARKETPLACE (Sept. 2, 2020), <https://www.marketplace.org/2020/09/02/students-face-covid-19-liability-waivers-upon-return-to-campus/>.

82. *Id.*

83. University of New Hampshire, *Informed Consent Agreement for Students Participating in On-Campus Programming for the Fall Semester* (July 16, 2020), https://www.unh.edu/sites/default/files/departments/student_life/informed_consent_agreement_for_unh_students_july.16.2020.pdf (emphasis added).

84. Kaitlin Stansell, *Berkeley Co. School District Requires Parents to Sign COVID Waiver for In-Person Instruction*, LIVE 5 NEWS (July 20, 2020), <https://www.live5news.com/2020/07/20/berkeley-co-school-district-requires-parents-sign-covid-waiver-in-person-instruction>.

85. *Id.*

service providers and organizations, on the one hand, and individual customers or participants, on the other. For example, hair salons in Florida introduced forms asking whether the customer or any of their family members had symptoms of the virus; it was of little cost to add additional language asking customers to waive their liability.⁸⁶ From my personal experience, the barbershop in New Haven, Connecticut, where my hair is typically cut, used a widely available iPad app for barber shops, which ran the patron through a battery of COVID-19 questions and bundled the COVID-19 questions together with a waiver clause.⁸⁷ In Los Angeles, lawyers at the actors' union Screen Actors Guild - American Federation of Television and Radio Artists (SAG-AFTRA) reported that film productions had started with coronavirus healthcare questionnaires and then added new features including waivers.⁸⁸ "Oh, well, if they're already filling out this form," the logic seems to have gone, "why don't we have them sign something that basically in some form tries to limit the liability of the employer for potential risk" said SAG-AFTRA's chief operating officer and general counsel.⁸⁹ A similar pattern appeared in healthcare. The American Academy of Periodontology's standard COVID-19 form for the informed consent of the patient is actually a COVID-19 waiver in disguise, not a patient-protective form at all.⁹⁰

The spread of COVID-19 waivers has produced considerable resistance. Unions objected.⁹¹ Sophisticated employment-side lawyers warned their clients that waivers would often be more trouble than they were worth, at least with respect to employee infection injuries.⁹² Critics observed, too, that waivers in the infectious disease context

86. Krisher & Sherman, *supra* note 73 ("The form, which also asks patrons if they or any family members have virus symptoms, gives the salon extra legal protection . . .").

87. Author's personal experience, Fall 2020, New Haven, Connecticut.

88. Anousha Sakoui, *As Hollywood Reopens, COVID-19 Liability Waivers Abound: What are They and Should You Sign?*, LA TIMES (Sept. 11, 2020, 6:00 AM), <https://www.latimes.com/entertainment-arts/business/story/2020-09-11/covid-19-liability-waivers-hollywood-production-unions>.

89. *Id.*

90. See *COVID-19 Resources*, AM. ACAD. OF PERIODONTOLOGY, <https://www.perio.org/members/COVID-19> (last visited Jan. 13, 2022).

91. See Ana Swanson & Alan Rappeport, *Businesses Want Virus Legal Protection. Workers Are Worried.*, N.Y. TIMES (June 12, 2020), <https://www.nytimes.com/2020/06/12/business/economy/coronavirus-liability-shield.html> ("Unions including the United Steelworkers, the United Farm Workers, the Teamsters and the American Federation of Teachers have also protested expanded liability protections, fearing that they would lead to laxer safety standards for workers.").

92. Allen Smith, *When Should COVID-19 Waivers, Acknowledgements and Notices Be Used?*, SHRM (July 17, 2020), <https://www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/coronavirus-waivers-acknowledgments.aspx>.

presented an unusual and distinctive problem.⁹³ In a typical gym or amusement park waiver, the customer or participant is asked to sign away isolated risks that are plausibly described as their own to sign away.⁹⁴ But because a person is also a disease vector, the customer who signs away protections against infection poses a new and uncontained risk to the community around them. Waivers between private parties are especially inapt for such collective risks.⁹⁵ On the one hand, third parties are put at risk by the waivers if the waivers induce people or organizations to exercise less care than they otherwise would.⁹⁶ However, waivers do nothing to immunize the organizations that use them from suit by such third parties, since the latter never agreed to waive the right to sue.⁹⁷ Waivers in such settings often fail both their victims and their apparent beneficiaries. Waivers and infectious disease indeed seem poorly suited to one another. Infection raises social questions of public health that evade the bilateral, party-specific features of the private waiver contract.

Perhaps it is no wonder, then, that certain highly publicized waivers generated considerable resistance in the political process. For example, when Ohio State University's athletics program began asking that student athletes sign something that resembled a cross between an informed consent and community compact, on the one hand, and a lawsuit waiver, on the other, the ensuing controversy led members of the U.S. Senate to get involved.⁹⁸ The National Collegiate Athletic Association soon ordered its member schools, including Ohio State, not to require such waivers from their student athletes.⁹⁹

For these reasons and more, the enforceability of COVID-19 waiver agreements is not yet clear. The enforceability of tort waivers generally varies substantially from state to state.¹⁰⁰ As of this writing, no reported judicial decision rules on the question one way or another,

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. *See id.*

98. Rick Maese, *Senators Press NCAA for Coronavirus Rules, Criticize Schools' Liability Waivers*, WASH. POST (July 1, 2020), <https://www.washingtonpost.com/sports/2020/07/01/senators-press-ncaa-coronavirus-rules-criticize-schools-liability-waivers>.

99. Joey Kaufman, *NCAA Says Schools Cannot Require COVID Liability Waivers*, COLUMBUS DISPATCH (Aug. 5, 2020, 4:21 PM), <https://www.dispatch.com/story/special/2020/08/05/ncaa-says-schools-cannot-require-covid-liability-waivers/42172353>.

100. *See generally* Martins, Price & Witt, *supra* note 67.

though the law review literature is beginning to produce arguments on enforceability.¹⁰¹

The enforceability of such waivers is likely to be as widely varying as the enforcement of other waivers have been. Courts asked to decide on enforceability in waiver cases typically consider factors such as whether the business or organization in question is “of a type generally thought suitable for public regulation”; whether the service is “of great importance to,” or “a matter of practical necessity” for, the public; whether the service is available “for any member of the public”; whether the party seeking to enforce the agreement possessed an “advantage of bargaining strength”; whether the agreement was “a standardized adhesion contract” with no possibility of an alternative arrangement; and whether a person is placed by the agreement “under the control” of another party and thereby made unduly vulnerable to “the risk of carelessness.”¹⁰²

Crucially, such factors relate to the nature of the business in question, not the character of the risk at issue. But of course, infectious disease presents a different kind of risk than those around which most tort liability contracts are organized. Despite its differences, infectious disease, in other words, is not singled out for special treatment in the law of waiver enforcement. It is instead enfolded into a private and public law scheme that is concerned generally with the businesses and accommodations in question and their economic functions.

Some might predict that waiver contracts will be less likely in the pandemic context given the universal need to take precautions to limit the spread of the disease. Consequently, these imagined limitations on waiver enforceability in the pandemic context might in turn force a reckoning with the general mass use of liability waivers. But in the law of SARS-CoV-2, this private enforcement mechanism has been buttressed by state statutes granting immunity; it is therefore unlikely that the COVID-19 pandemic will somehow shift us toward waiver non-enforcement.

Here, then, is the resulting situation in the American consumer economy: Citizens and consumers are asked pervasively to participate in economic life on the condition that they waive protections that they would otherwise have against the negligent conduct of others. Courts may or may not enforce such agreements. But it is difficult, even for experts, to do more than guess at the enforceability of the arrangements – and that is surely part of the point. Waivers are the exercise of

101. Leah A. Plunkett & Michael S. Lewis, *Education Contracts of Adhesion in the Covid-19 Pandemic*, 2021 U. ILL. L. REV. 1, 10–11 (2021).

102. *Tunkl v. Regents of the Univ. of Cal.*, 383 P.2d 441, 445–46 (Cal. 1963).

private power among private individuals and institutions whose positions in the market lead them for one reason or another to alter background tort rights and obligations.

III. THE NEW PRIVATE QUARANTINISM

At the end of September 2021, the litigation trackers at Hunton Andrews Kurth reported more than 13,000 total cases filed in state and federal courts related to the COVID-19 pandemic.¹⁰³ But of those 13,000, no more than 832 cases, and perhaps far fewer, arose out of personal injury claims.¹⁰⁴

If merely 6.5% of COVID-19 claims are for personal injury or wrongful death, then surely, one might think, neither the personal injury and wrongful death cases, nor the immunity legislation, nor the injury waivers can be all that socially significant. How much coercive authority has the law been deploying in the domain of tort and tort reform if the cases are so few?

First, the number of COVID-19 cases in the courts is a function, in part, of the widespread enactment of immunity legislation and the widespread use of injury waivers. Selection effects, reporting effects, and endogeneity distort tort statistics generally, and COVID-19 cases are no different.¹⁰⁵ Second, the tort immunity and waiver phenomena offer vivid illustrations of a new pattern emerging across the law, and not only in tort.¹⁰⁶ Immunity legislation and waiver agreements capture the spirit of a new departure in the American law of epidemics, one that has highlighted the role of private power in coercing individuals during the novel coronavirus.¹⁰⁷ In particular, tort developments highlight the ways in which the laws of the United States have magni-

103. *COVID-19 Complaint Tracker*, HUNTON, <https://www.huntonak.com/en/covid-19-tracker.html> (last visited Dec. 17, 2021).

104. *Id.* At the time of this writing, the Hunton tracker had recorded only 62 “Wrongful Death or Personal Injury” claims arising not in the employment, consumer, or healthcare settings. But it had also recorded 149 products liability claims, 67 consumer personal injury claims, 39 medical malpractice claims, 310 healthcare wrongful death claims, and 215 employment cases including wrongful death and personal injury cases. *See also* Tom Baker, *Covid Coverage Litigation Tracker*, U. PA. L., <https://cclt.law.upenn.edu/> (last visited Dec. 17, 2021) (documenting a similarly small number of liability injury cases amidst a much larger number of business interruption insurance cases).

105. Two classic articles here are George Priest & Benjamin Klein, *The Selection of Cases for Litigation*, 13 J. LEGAL STUDIES 1, 51 (1984); Michael Saks, *Do We Really Know Anything About the Behavior of the Tort Litigation System—And Why Not?*, 140 U. PA. L. REV. 1147, 1155 (1992).

106. WITT, *AMERICAN CONTAGIONS*, *supra* note 12, at 98–104, 129–30.

107. *Id.*

fied private and hard-to-spot background forms of legal power to exercise new forms of coercive authority.

This use of background legal rules and this allocation of state power to private parties are the hallmark of the new quarantinism in tort and elsewhere.¹⁰⁸ Where the old quarantinism relied on statist control over bodies in *cordon sanitaires*, forced isolation, border maintenance, and the like, the new quarantinism operates through private power and legal background rules.¹⁰⁹ One central feature of the new private quarantinism, however, is continuous with its older statist predecessors and with the long history of quarantinist policies in the American law of epidemics.¹¹⁰ The new quarantinism, like the old, disproportionately disadvantages the vulnerable.¹¹¹

A. *Disparate Impacts*

COVID-19 has disproportionately impacted racial and ethnic minorities and lower-income communities.¹¹² The Centers for Disease Control and Prevention (CDC) has reported on the disparate impact of the pandemic on racial minorities, noting that the disparities may be caused, in part, by the fact that “[r]acial and ethnic minority populations are disproportionately represented among essential workers and industries.”¹¹³

After adjusting for different age profiles, the share of deaths among Hispanics and non-Hispanic Blacks is double or even three times those populations’ age-adjusted shares of the population – and approximately half the age-adjusted share of the whites and Asian popu-

108. *Id.*

109. *Id.* at 129–33.

110. *Id.* at 35–60.

111. *Id.* at 127–28.

112. Christine Little et al., *The Impact of Socioeconomic Status on the Clinical Outcomes of COVID-19; a Retrospective Cohort Study*, J. CMTY. HEALTH (Jan. 2, 2021), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7775835> (“Emerging evidence has raised concerns regarding the disproportionate burden of COVID-19 morbidity and mortality among racial and ethnic minorities within the US, which has been suggested to stem from socioeconomic disadvantages that place low-income individuals at a higher risk of infection.”); Graeme Wood, *What’s Behind the COVID-19 Racial Disparity*, THE ATLANTIC (May 27, 2020), <https://www.theatlantic.com/ideas/archive/2020/05/we-dont-know-whats-behind-covid-19-racial-disparity/612106>. See also Merlin Chowkwanyun & Adolph L. Reed, Jr., *Racial Health Disparities and Covid-19 – Caution and Context*, NEJM (July 16, 2020), <https://www.nejm.org/doi/pdf/10.1056/NEJMp2012910?articleTools=true>.

113. *Health Equity Considerations and Racial and Ethnic Minority Groups*, CDC, <https://www.cdc.gov/coronavirus/2019-ncov/community/health-equity/race-ethnicity.html> (last updated Apr. 19, 2021).

lation.¹¹⁴ Scholars have found powerful correlations between socioeconomic status and coronavirus outcomes, too.¹¹⁵ Class and socioeconomic status produce COVID-19 risk, though when studies control for socioeconomic status, correlations between racial-minority status and health outcomes still appear to be strong.¹¹⁶

Two case studies illuminate the disparate impacts of the novel coronavirus: meatpacking plant workers and incarcerated people. Both communities are majority non-white¹¹⁷ and low-income,¹¹⁸ and both have suffered disproportionately from the pandemic.

Consider meatpacking plants, which from early on in the pandemic experienced serious outbreaks.¹¹⁹ In July 2020, meatpacking plants were estimated to be in association with between 6% and 8% of coronavirus cases.¹²⁰ A year later, meatpacking plants would be associated with at least 59,148 cases and 298 deaths.¹²¹ Scientists have speculated that these outbreaks may have occurred because the factories are “cold and damp, are perfect environments for coronavirus to linger and spread,” and that the workers are likely “standing right next to each other working heavily - because of course this is a difficult job - and [thus] breathing heavily.”¹²² No matter the cause of the

114. CDC, *Health Disparities*, https://www.cdc.gov/nchs/nvss/vsrr/covid19/health_disparities.htm (last updated Sept. 22, 2021); see also Cary P. Gross et al., *Racial and Ethnic Disparities in Population Level Covid-19 Mortality*, 35 J. GEN. INTERNAL MED. 3097 (2020).

115. E.g., Richard V. Reeves & Jonathan Rothwell, *Class and COVID: How the Less Affluent Face Double Risks*, BROOKINGS (Mar. 27, 2020), <https://www.brookings.edu/blog/up-front/2020/03/27/class-and-covid-how-the-less-affluent-face-double-risks>.

116. Little et al., *supra* note 112 (“However, our analysis revealed a higher risk of hospitalization for non-Hispanic Black and non-white patients of other race, even after adjusting for socioeconomic status, indicating that the higher risk of hospitalization among minority populations cannot be explained by SES status alone.”).

117. *Update: COVID-19 Among Workers in Meat and Poultry Processing Facilities—United States, April–May 2020*, CDC (July 10, 2020), <https://www.cdc.gov/mmwr/volumes/69/wr/mm6927e2.htm> (“Among cases with race/ethnicity reported, 87% occurred among racial or ethnic minorities.”) [hereinafter *Update: COVID-19 Among Workers*].

118. Megan Wallace et al., *COVID-19 in Correctional and Detention Facilities — United States, February–April 2020*, CDC (May 15, 2020), <https://www.cdc.gov/mmwr/volumes/69/wr/mm6919e1.htm>.

119. Charles A. Taylor et al., *Livestock Plants and COVID-19 Transmission*, PNAS (May 19, 2020), <https://www.pnas.org/content/117/50/31706>; Michael Grabell et al., *Emails Reveal Chaos as Meatpacking Companies Fought Health Agencies Over COVID-19 Outbreaks in Their Plants*, PROPUBLICA (June 12, 2020, 2:04 PM), https://www.propublica.org/article/emails-reveal-chaos-as-meatpacking-companies-fought-health-agencies-over-covid-19-outbreaks-in-their-plants?utm_medium=social&utm_source=twitter.

120. Taylor et al., *supra* note 119.

121. Leah Douglas, *Mapping Covid-19 Outbreaks in the Food System*, FOOD & ENVIR. REPORTING NETWORK (Apr. 22, 2020), <https://thefern.org/2020/04/mapping-covid-19-in-meat-and-food-processing-plants>.

122. Anthony Reuben, *Coronavirus: Why Have There Been So Many Outbreaks in Meat Processing Plants?*, BBC (June 23, 2020), <https://www.bbc.com/news/53137613>.

widespread transmission, meatpacking workers appear to be especially vulnerable to catching the coronavirus, and meatpacking factory outbreaks seem to disproportionately affect people of color.¹²³ For example, a CDC multi-state study found that of 9,919 workers infected with COVID-19 who reported their race, approximately 56% were Hispanic and 12% were Asian, despite the fact that Hispanics and Asians made up only 30% and 6% of the meatpacking worker populations respectively.¹²⁴ The incidence of infections was roughly double their share of the population.¹²⁵ Black meatpacking workers suffered infections at roughly the same rate as their share of the population; whites, by contrast, made up 40% of the meatpacking worker population and suffered only 13% of the infections.¹²⁶

Despite large outbreaks and reports of unsafe working conditions, the Occupational Safety and Health Administration (OSHA) did not act to protect meatpacking workers. In fact, in February 2021, the House Select Subcommittee on the Coronavirus Crisis announced that it began investigating the outbreaks at major national meatpacking companies and OSHA for its handling of these outbreaks.¹²⁷ The Subcommittee's Chairman, Representative James E. Clyburn, charged that the agency "failed to adequately carry out its responsibility for enforcing worker safety laws at meatpacking plants across the country, resulting in preventable infections and deaths."¹²⁸ As a response to hundreds of outbreaks, the agency "issued only eight citations and less than \$80,000 in total penalties" for meatpacking plant safety violations.¹²⁹ In light of the combination of liability waivers and immunity legislation, OSHA's failure to enforce safety laws may leave some harmed individuals with no recourse for their suffering.

Prison populations in the United States are also disproportionately composed of racial minorities.¹³⁰ As in the meatpacking industry, the

123. *Update: COVID-19 Among Workers*, *supra* note 117.

124. *Id.*

125. *Id.*

126. *Id.*

127. Press Release, Select Subcommittee Launches Investigation Into Widespread Coronavirus Infections And Deaths In Meatpacking Plants, Select Subcomm. on the Coronavirus Crisis, <https://coronavirus.house.gov/news/press-releases/select-subcommittee-launches-investigation-widespread-coronavirus-infections-and>.

128. *Id.*

129. *Id.*

130. *Inmate Race*, FED. BUR. OF PRISONS, https://www.bop.gov/about/statistics/statistics_inmate_race.jsp (last updated Sept. 25, 2021); Ashley Nellis, *The Color of Justice: Racial and Ethnic Disparity in State Prisons*, SENTENCING PROJECT (June 14, 2016), <https://www.sentencingproject.org/publications/color-of-justice-racial-and-ethnic-disparity-in-state-prisons/#II.%20Overall%20Findings>.

pandemic caused numerous and severe coronavirus outbreaks in prisons and jails.¹³¹ In one state prison in Wisconsin, a little less than 80% of the incarcerated population and 22.6% of staff members contracted the coronavirus over the course of just eight weeks.¹³² Through November 2020, the incarcerated coronavirus death rate for the entire country was 2.1 times the national rate, although the death rate numbers vary by state.¹³³ The coronavirus infection rate in prisons was nearly four times the national rate.¹³⁴ As of November 2020, South Dakota, Kansas, and Arkansas reported that over 40% of their state prison populations had contracted coronavirus.¹³⁵

B. Private Coercions in the Age of the Novel Coronavirus

It is tempting to attribute such disparate impacts to background features like “socio-economic circumstance” or “environment” or “inequality.” Such explanations seem to be tempting because that is how most people tell the story.¹³⁶

Robert Hale and the realist analysis of the law suggests a different account.¹³⁷ The basic law of property, contract, and tort, plus the law of housing, employment, and healthcare, are crucial political institutions that produce disparate outcomes in the COVID-19 pandemic as in so much else. The private delivery of healthcare, social provision, and education means fundamentally that the law of private property invites certain people to exploit the resource in question and excludes others.

These represent the forms of coercive exclusion for our time. Today, they barely require the active involvement of the state – at least not visibly. But the exclusion of the poor from the best hospitals with the best services is the parallel to the Russian *cordon sanitaire*, which once upon a time served as the paradigmatic mechanism for the quaran-

131. Mary Van Beusekom, *Studies Detail Large COVID Outbreaks at US Prisons, Jails*, CIDRAP (Apr. 5, 2021), <https://www.cidrap.umn.edu/news-perspective/2021/04/studies-detail-large-covid-outbreaks-us-prisons-jails>.

132. *Rapid Spread of SARS-CoV-2 in a State Prison After Introduction by Newly Transferred Incarcerated Persons — Wisconsin, August 14–October 22, 2020*, CDC (Apr. 2, 2021), <https://www.cdc.gov/mmwr/volumes/70/wr/mm7013a4.htm#contribAff>.

133. NAT'L COMM'N ON COVID-19 AND CRIM. JUST., *Impact Report: COVID-19 and Prisons — December 2020 Update* (2020), <https://covid19.counciloncj.org/2020/12/06/impact-report-covid-19-and-prisons>.

134. *Id.*

135. *Id.*

136. E.g., Max Fisher & Emma Bubola, *As Coronavirus Deepens Inequality, Inequality Worsens Its Spread*, N.Y. TIMES (Mar. 16, 2020), <https://www.nytimes.com/2020/03/15/world/europe/coronavirus-inequality.html>.

137. Hale, *supra* note 45, at 470.

tinist regimes of eighteenth- and nineteenth-century Europe. The compulsory closing of the best housing to the poor is our version of the Prussian soldiers' order to shoot anyone violating quarantine orders. The way in which access to social provision turns on participating in the employment market illustrates the point once more. People with money or other resources found it much easier to navigate virus risks during the pandemic. People without such resources often had no choice but to risk infection in order to keep food on the table and a roof over their heads.

CONCLUSION

In myriad ways, the twenty-first-century legal order has taken basic features of the liberal order – private property, rights to contract, background rules of tort – and deployed them to do the coercive work of allocating and reallocating risk. These core features of the older progressive-sanitarian regimes have been converted into systems of coercion and power. The tort law of immunity and waivers are modest but novel examples of this broader pattern.