

# Tailoring Public Health Policies

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*In an effort to contain the spread of COVID-19, many states and countries have adopted public health restrictions on activities previously considered commonplace: crossing state borders, eating indoors, gathering together, and even leaving one's home. These policies often focus on specific activities or groups, rather than imposing the same limits across the board. In this Article, I consider the law and ethics of these policies, which I call tailored policies.*

*In Part II, I identify two types of tailored policies: activity-based and group-based. Activity-based restrictions respond to differences in the risks and benefits of specific activities, such as walking outdoors and dining indoors. Group-based restrictions consider differences between groups with respect to risk and benefit. Examples are policies that treat children or senior citizens differently, policies that require travelers to quarantine when traveling to a new destination, and policies that treat individuals differently based on whether they have COVID-19 symptoms, have tested positive for COVID-19, have previous COVID-19 infection, or have been vaccinated against COVID-19.*

*In Part III, I consider the public health law grounding of tailored policies in the principles of "least restrictive means" and "well-targeting." I also examine how courts have analyzed tailored policies that have been challenged on fundamental rights or equal protection grounds. I argue that fundamental rights analyses typically favor tailored policies and that equal protection does not preclude the use of tailored policies even when imperfectly crafted.*

*In Part IV, I consider three critiques of tailored policies, centering on the claims that they produce inequity, cause harm, or unacceptably limit liberty. I argue that we must evaluate restrictions comparatively: the question is not whether tailored policies are perfectly equitable, wholly prevent harm, or completely protect liberty, but whether they are better than untailored ones at realizing these goals in a pandemic. I also argue that evaluation must consider indirect harms and benefits as well as direct and apparent ones.*

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## I. INTRODUCTION

Public health policies, including those adopted in response to COVID-19, often explicitly treat people differently. They do so based on where people live or travel, what activities they engage in, and how likely they are to get very sick or get others sick. Treating people differently can help control disease while reducing collateral damage to freedom and flourishing. Yet some complain that policies that treat people differently unfairly pick winners and losers or unacceptably divide society into haves and have-nots. These objections come from across the political spectrum. Legally and ethically, what should we make of their objections?

In this Article, I argue that policies that treat people differently—which I call “tailored” policies—are typically legally and ethically preferable to untailored, one-size-fits-all policies. They are preferable not merely because they better control disease, but because, compared to alternative options, they also better protect liberty and promote economic and social wellbeing, including the wellbeing of the least advantaged in society.

I begin in Part II by discussing two types of tailored policies: activity-based and group-based. Activity-based policies respond to differences in the risks and benefits of specific activities. Group-based restrictions consider differences between groups with respect to risk and benefit. Last, individualized policies include policies that treat individuals differently based on their individualized risk of contracting COVID-19, getting very sick, or spreading COVID-19 to others.

In Part III, I consider the legal case for tailored policies. I argue that the law sometimes requires tailored policies, and rarely prohibits them.

In Part IV, I consider the ethics of tailored policies. I argue that policies must be assessed comparatively: the question is not whether tailored policies are perfectly equitable, wholly prevent harm, or perfectly protect liberty, but whether they are better than one-size-fits-all policies at improving liberty, preventing harm, and assisting the least advantaged, once all benefits and harms are considered. Usually, they are.

## II. TAILORED POLICIES IN ACTION

In this Part, I review and categorize several types of policies that states and localities have adopted, or that have been proposed by commentators or policymakers. I begin in [Section II.A](#) by examining activity-based policies, which limit certain activities while permitting others. [Section II.B](#) then turns to group-based policies, which differentiate groups of people based on risk. Many policies could be understood as either activity or group based; mask requirements, for instance, can be understood as activity based (prohibiting unmasked activity by any person) or group based (differentiating masked from unmasked people). Group- and activity-based policies are often combined; for instance, a policy may require masks only in indoor venues.

### A. ACTIVITY-BASED RESTRICTIONS

In this Section, I begin with the most common way of tailoring policies, “activity-based” tailoring. Activity-based tailoring restricts riskier or less beneficial activities while permitting less risky or more beneficial activities.<sup>1</sup> It typically considers three different

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<sup>1</sup>See, e.g., *Six v. Newsom*, 462 F. Supp. 3d 1060, 1072 (C.D. Cal. 2020) (examining state treatment of “essential” versus “non-essential” businesses and activities).

**Table 1. Risk and benefit levels for certain activities during the COVID-19 pandemic**

	<b>Low Risk</b>	<b>Medium Risk</b>	<b>High Risk</b>
<b>Low Benefit</b>	Watching TV alone	Watching TV outdoors in a large group	Watching TV in a bar
<b>Medium Benefit</b>	Listening to music while running outdoors	Outdoor concerts	Indoor concerts
<b>High Benefit</b>	Telemedicine	Medical office visits	Treating COVID-19 patients

factors that affect risk and benefit: *what* activity is happening, *where* it is happening, and *how many* participants there are.

Table 1 represents activity-based tailoring on a two-dimensional matrix. One dimension is benefit, the other risk.

States and localities adopted numerous activity-based policies during the pandemic.<sup>2</sup> No state closed “essential” businesses, such as grocery stores, gas stations, and banks.<sup>3</sup> Most only closed certain high-risk businesses, closed businesses in specific areas of high COVID-19 prevalence, or limited certain types of activities, such as indoor food service or gatherings.

## B. GROUP-BASED POLICIES

In this Section, I discuss “group-based” policies, which apply to specific groups who are at higher risk of transmitting COVID-19 or suffering poor outcomes.

### 1. Risk of Spreading Infection

#### a. Current Infection

Active COVID-19 infection is broadly regarded as a legitimate reason to impose restrictions. Businesses may legally require testing and exclude individuals who are currently infected.<sup>4</sup>

Some have proposed scaling up testing via rapid tests to break chains of transmission.<sup>5</sup> Under this approach, advocates argue that employers could require “workers to take time-dated pictures of their negative test results before coming to work,” colleges “would require students to do the same before coming to class,” and restaurants “could accept reservations only if accompanied by negative-test pictures.”<sup>6</sup> Many universities

<sup>2</sup>State COVID-19 Data and Policy Actions, KAISER FAM. FOUND. (Apr. 12, 2021), <https://www.kff.org/coronavirus-covid-19/issue-brief/state-data-and-policy-actions-to-address-coronavirus/> [<https://perma.cc/69ZJ-5H5E>]; Summary of Public Health Criteria in Reopening Plans, NAT’L GOVERNORS ASS’N, <https://www.nga.org/coronavirus-reopening-plans/> [<https://perma.cc/J5V3-RWWJ>] (last updated Apr. 17, 2021).

<sup>3</sup>Cf. COVID-19: Essential Workers in the States, NAT’L CONF. ST. LEGISLATURES (Jan. 11, 2021), <https://www.ncsl.org/research/labor-and-employment/covid-19-essential-workers-in-the-states.aspx> [<https://perma.cc/572H-FEAJ>].

<sup>4</sup>What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws, U.S. EQUAL EMP. OPPORTUNITY COMM’N, <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws> [<https://perma.cc/6U8D-ULSW>] (last updated Dec. 16, 2020) (explaining that “employers may take screening steps to determine if employees entering the workplace have COVID-19 because an individual with the virus will pose a direct threat to the health of others”).

<sup>5</sup>See Laurence J. Kotlikoff & Michael Mina, *A Cheap, Simple Way to Control the Coronavirus*, N.Y. TIMES (July 3, 2020), <https://www.nytimes.com/2020/07/03/opinion/coronavirus-tests.html> [<https://perma.cc/N5H5-NNXX>] (describing innovative “cost effective,” daily-use paper-strip tests that provide COVID-positive results in fifteen minutes).

<sup>6</sup>*Id.*

require their on-campus students to test regularly and to quarantine if they receive a positive test.<sup>7</sup> Some settings have also adopted symptom rather than infection testing, but symptom testing is not very reliable.<sup>8</sup>

*b. Travel History*

Some U.S. states and localities have required people who have traveled to areas with high COVID-19 prevalence to quarantine or have excluded them from certain activities.<sup>9</sup> In some cases, these quarantine requirements are waived for people who show a negative COVID-19 test.<sup>10</sup> Some workplaces and other venues have also elected to exclude travelers from certain activities.<sup>11</sup>

*c. Mask Requirements*

Mask requirements have been adopted in most states and localities.<sup>12</sup>

2. Risk of Becoming Ill

*a. Immunity*

The group of people who are immune from COVID-19 might be excused from some restrictions to which others are subject. There is evidence that prior infection confers immunity, and some tests seem predictive of prior infection, but states and localities have been hesitant to base policies on these tests.<sup>13</sup> Uncertainty initially existed regarding how well current antibody tests identify past exposure, about the extent to which antibodies are predictive of immunity, and about how long immunity lasts, though some of the

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<sup>7</sup>E.g., Meredith Deliso & Jay Bhatt, *Inside University of Illinois' Massive COVID-19 Testing Operation*, ABC NEWS (Sept. 10, 2020, 5:01 AM), <https://abcnews.go.com/US/inside-university-illinois-massive-covid-19-testing-operation/story?id=72686799> [<https://perma.cc/B62H-MCPH>].

<sup>8</sup>*Screening K-12 Students for Symptoms of COVID-19: Limitations and Considerations*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://stacks.cdc.gov/view/cdc/97251> [<https://perma.cc/R5P7-NGZT>] (last updated Nov. 16, 2020) (noting that universal symptom screenings in school reopening plans will “fail to identify some students who have SARS-CoV-2” or “will identify only that a person may have an illness, not that the illness is COVID-19”).

<sup>9</sup>Christina Ianzito, *Guide to State Quarantine Rules for Travelers*, AARP, <https://www.aarp.org/travel/travel-tips/safety/info-2020/state-quarantine-guide.html> [<https://perma.cc/8EFQ-BDKQ>] (last updated Apr. 20, 2021).

<sup>10</sup>*Id.*

<sup>11</sup>E.g., *Travel Guidance*, UNIV. CAL. S.F., <https://coronavirus.ucsf.edu/travel> [<https://perma.cc/V3VN-32CS>] (last updated Apr. 13, 2021) (“UCSF is restricting all non-essential university-sponsored travel – both international and interstate – and strongly recommends against all non-essential personal travel.”).

<sup>12</sup>*Guidance for Wearing Masks*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/cloth-face-cover-guidance.html> [<https://perma.cc/9YSA-L2CX>] (last updated Apr. 19, 2021).

<sup>13</sup>Paola Luelmo & Nathan Allen, *Madrid's COVID Immunity Cards Plan Faces Backlash*, REUTERS (July 29, 2020 7:55 AM), <https://www.reuters.com/article/health-coronavirus-spain/madrids-covid-immunity-cards-plan-faces-backlash-idUSL5N2F0419> [<https://perma.cc/L878-WMPR>]; *Interim Guidelines for COVID-19 Antibody Testing*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/coronavirus/2019-ncov/lab/resources/antibody-tests-guidelines.html> [<https://perma.cc/2DCY-E5LS>] (last updated Mar. 17, 2021). Evidence in this area has evolved. *Compare "Immunity Passports" in the Context of COVID-19*, WORLD HEALTH ORG. (Apr. 24, 2020), <https://www.who.int/news-room/commentaries/detail/immunity-passports-in-the-context-of-covid-19> [<https://perma.cc/J75K-RCX3>] (“There is currently no evidence that people who have recovered from COVID-19 and have antibodies are protected from a second infection.”), with Victoria Jane Hall et al., *SARS-Cov-2 Infection Rates of Antibody-Positive Compared with Antibody-Negative Health-Care Workers in England: A Large, Multicentre, Prospective Cohort Study (SIREN)*, 397 LANCET 1459, 1459 (2021) [https://www.thelancet.com/journals/lancet/article/PIIS0140-6736\(21\)00675-9/fulltext](https://www.thelancet.com/journals/lancet/article/PIIS0140-6736(21)00675-9/fulltext) [<https://perma.cc/9JBV-4URH>] (explaining that “previous infection with SARS-CoV-2 induces effective immunity to future infections in most individuals”).

uncertainty has resolved.<sup>14</sup> The Equal Employment Opportunity Commission prohibited serological tests that assess whether someone previously contracted COVID-19 from being used in workplace decisions.<sup>15</sup>

Now that COVID-19 vaccines are becoming widely available in the United States, vaccination status is a more likely basis for immunity-based policies. Some settings, such as nursing homes, emergency services,<sup>16</sup> and universities,<sup>17</sup> have begun to require vaccination for employment or attendance, and many countries are creating infrastructure to allow businesses and venues to determine whether someone has been vaccinated.<sup>18</sup> Unlike policies based on infection-derived immunity, immunity due to vaccination does not raise the concern that people might self-infect to become immune.<sup>19</sup> There is increasing evidence that COVID-19 vaccines prevent transmission as well as infection, meaning that immunity-based policies address the risk of spreading infection as well as the risk of becoming ill.<sup>20</sup>

b. *Medical Vulnerability*

During the pandemic, people over a certain age have sometimes been discouraged from participating in certain high-risk activities, or even excluded from those activities.<sup>21</sup> Some commentators have suggested the broader use of age-targeted

<sup>14</sup>"Immunity Passports" in the Context of COVID-19, *supra* note 13.

<sup>15</sup>U.S. EQUAL EMP. OPPORTUNITY COMM'N, *supra* note 4, at A-7.

<sup>16</sup>Laura Romero, *Employers Grapple with Tough New Question: Can They Demand Workers Get a COVID-19 Vaccine?*, ABC NEWS (Mar. 8, 2021, 5:02 AM), <https://abcnews.go.com/US/employers-grapple-tough-question-demand-workers-covid-19/story?id=76282417> [<https://perma.cc/L287-CFJD>].

<sup>17</sup>Bill Chappell, *Rutgers To Require Vaccine Proof for 'All Students Planning To Attend this Fall'*, NPR (Mar. 25, 2021, 1:14 PM), <https://www.npr.org/sections/coronavirus-live-updates/2021/03/25/981215860/rutgers-to-require-vaccine-proof-for-all-students-planning-to-attend-this-fall> [<https://perma.cc/684S-X4JX>].

<sup>18</sup>*Covid Passports: What Are Different Countries Planning?*, BBC NEWS (Mar. 26, 2021), <https://www.bbc.com/news/world-europe-56522408> [<https://perma.cc/2JFL-NWN7>].

<sup>19</sup>*See, e.g.,* Alexandra L. Phelan, *COVID-19 Immunity Passports and Vaccination Certificates: Scientific, Equitable, and Legal Challenges*, 395 LANCET 1595, 1596 (2020) (arguing that immunity passport programs incentivize individuals to seek out infection to participate in restricted activities).

<sup>20</sup>*See* Tara Haelle, *Yes, Vaccines Block Most Transmission of COVID-19*, NAT'L GEOG. <https://www.nationalgeographic.com/science/article/yes-vaccines-block-most-transmission-of-covid-19> [<https://perma.cc/9XVQ-AAS3>] ("The latest data show that getting a shot not only protects vaccinated individuals, it reduces the chance they can spread the virus to others.").

<sup>21</sup>*E.g.,* *COVID-19 Guidance for Places of Worship and Providers of Religious Services*, ILL. DEP'T OF PUB. HEALTH, <http://dph.illinois.gov/covid19/community-guidance/places-worship-guidance> [<https://perma.cc/J8WV-3TJ4>] (last updated Apr. 8, 2021) ("Consider conducting multiple small services and, separate services for certain groups – such as those over 65 years of age, those who have serious underlying medical conditions, or those with small children who will have difficulty social distancing."); Thomas Fuller, *California Calls for Residents 65 and Older to Stay at Home*, N.Y. TIMES (Mar. 15, 2020), <https://www.nytimes.com/2020/03/15/us/coronavirus-newsom-california-seniors-restaurants-bars.html> [<https://perma.cc/S638-KPRV>]; Lisa Kaczke, *Gov. Kristi Noem Lifts Stay-at-Home Order for Those 65+ in Sioux Falls Area*, ARGUS LEADER (May 11, 2020, 3:58 PM), <https://www.argusleader.com/story/news/politics/2020/05/11/gov-kristi-noem-lifts-stay-home-order-those-65-sioux-falls-area/3111654001/> [<https://perma.cc/VFT2-4KZP>]; Nancy Lofholm, *Gunnison County Bans Restaurants, Bars From Serving People 60 and Older To Slow Coronavirus Spread*, COLO. SUN (Mar. 16, 2020 3:05 AM), <https://coloradosun.com/2020/03/16/gunnison-county-coronavirus-restaurant-bar-ban/> [<https://perma.cc/QCN4-X23W>]; Timothy McQuiston, *Governor Condemns Shaming Incident on Monday*, VT. BUS. MAG. (May 13, 2020, 6:13 PM), <https://vermontbiz.com/news/2020/may/13/governor-condemns-shaming-incident-monday> [<https://perma.cc/8Z4U-EHJD>] ("Childcare guidance was issued today provides [sic] strict guidance and maximum class size. For instance, no one over 65 or with underlying health conditions and those pregnant cannot be providers."); Brendan Rivers, *Florida Executive Order Says Seniors 'Shall Stay At Home,' but Does That Mean They Have To?*, WUSF PUB. MEDIA (Apr. 17, 2020, 5:51 PM), <https://wusfnews.wusf.usf.edu/post/florida-executive-order-says-seniors-shall-stay-home-does-mean-they-have> [<https://perma.cc/3GJ8-3CVZ>].

policies.<sup>22</sup> Age is often used because it is a less controversial legal and social category than other categories that might be correlated with risk, such as sex or race.<sup>23</sup>

A variety of medical conditions have been identified as risk factors for poor outcomes from COVID-19.<sup>24</sup> Reputable studies have also suggested other factors, such as blood group, are predictive of risk.<sup>25</sup> If individual risk could be estimated, restrictions could be calibrated to risk. Individualized judgments about risk to an employee can be a legally acceptable basis for employers' decisions,<sup>26</sup> and judgments based on risks associated with medical conditions have been used to prioritize people with high-risk conditions for access to vaccines.<sup>27</sup>

### III. THE LEGALITY OF TAILORED POLICIES

In this Part, I consider the legal dimensions of tailored policies. I explain that tailored policies are often legally preferable to untailored ones, particularly where fundamental rights are concerned. I also explain why equal protection concerns should not typically obstruct the implementation of even imperfect tailored policies. Freedom and equality are not the only relevant values—wellbeing matters too—but this Part focuses on freedom and equality because of their primacy in American law.

#### A. “WELL-TARGETED” POLICIES AND THE LEAST RESTRICTIVE ALTERNATIVE

Public health law scholars have embraced the idea that restrictions should be the “least restrictive alternative”: they should restrict individual freedom no more than is necessary to protect the public's health.<sup>28</sup> The need to limit infringements on individual freedom is embodied in the Model State Public Health Act (“Model Act”):

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<sup>22</sup>E.g., Acemoglu et al., *Optimal Targeted Lockdowns in a Multi-Group SIR Model* 44 (Nat'l Bureau of Econ. Research., Working Paper No. 27102, 2020), [https://www.nber.org/system/files/working\\_papers/w27102/w27102.pdf](https://www.nber.org/system/files/working_papers/w27102/w27102.pdf) [<https://perma.cc/QT6S-7ZEX>] (finding that targeted policies the aggressively isolated older groups corresponded with economic gains and decreased fatality and hospitalizations).

<sup>23</sup>E.g., DIVISION ON C.R., ATT'Y GEN. STATE N.J., CIVIL RIGHTS AND COVID-19: FREQUENTLY ASKED QUESTIONS 3 (2020), <https://www.hcdnj.org/assets/documents/covid%20virus%20crisis%20-%20div.%20on%20civ%20rts%20faqs.pdf> [<https://perma.cc/Q4XL-V93C>] (“For example, a store might limit the first hour of its daily operations to customers over 65 years of age, while serving customers of all ages for the rest of the store's hours. Such policies would not violate the LAD because age is not a protected characteristic in places of public accommodation.”).

<sup>24</sup>Elizabeth J. Williamson et al., *Factors Associated With COVID-19-Related Death Using OpenSAFELY*, 584 NATURE 430, 433 (2020) (“Most comorbidities were associated with increased risk, including cardiovascular disease, diabetes, respiratory disease (including severe asthma), obesity, a history of haematological malignancy or recent other cancer, kidney, liver and neurological diseases, and autoimmune conditions.”).

<sup>25</sup>David Ellinghaus et al., *Genomewide Association Study of Severe Covid-19 with Respiratory Failure*, 383 NEW ENG. J. MED. 1522, 1531 (2020); see also Yuan Hou et al., *New Insights into Genetic Susceptibility of COVID-19: An ACE2 and TMPRSS2 Polymorphism Analysis*, BMC MED., July 15, 2020, at 1, 4 (identifying enzyme polymorphisms as important binding factors that affect COVID-19 susceptibility).

<sup>26</sup>See *Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73, 85-86 (2002) (finding that an individualized assessment of an employee's “ability to safety perform the essential functions of the job” is reasonable under the Americans with Disabilities Act).

<sup>27</sup>NAT'L ACADS. SCIS., ENG'G, & MED. & NAT'L ACAD. MED., *FRAMEWORK FOR EQUITABLE ALLOCATION OF COVID-19 VACCINE 9-11* (Helene Gayle et al. eds., 2020); Jennifer Tolbert et al., *The COVID-19 Vaccine Priority Line Continues to Change as States Make Further Updates*, KAISER FAM. FOUND. (Jan. 21, 2021), <https://www.kff.org/policy-watch/the-covid-19-vaccine-priority-line-continues-to-change-as-states-make-further-updates/> [<https://perma.cc/3D9Z-73A9>].

<sup>28</sup>Lawrence O. Gostin & Katharina E. Ó Cathaoir, *Lurching from Complacency to Panic in the Fight Against Dangerous Microbes: A Blueprint for a Common Secure Future*, 67 EMORY L.J. 337, 394 (2018) (“Any infringement of liberty must be the least restrictive alternative.”); Wendy F. Hensel & Leslie E. Wolf, *Playing God: The Legality of Plans Denying Scarce Resources to People with Disabilities in Public Health Emergencies*,

*Well-targeted intervention.* A state or local public health agency shall strive to design and implement interventions that are well-targeted to accomplishing essential public health services and functions. An agency should avoid using compulsory power in a manner that is over-broad (applying to more individuals than is necessary for the public's health)... .

*Least restrictive alternative.* A state or local public health agency shall employ the least restrictive alternative in the exercise of its authorities or powers, especially compulsory powers. This means that where the agency may exercise one or more of its authorities or powers to accomplish essential public health services and functions, it shall, to the extent possible, employ the policy or practice that least infringes on the rights or interests of individuals. Employing the least restrictive alternative does not require the agency to adopt policies or programs that are less effective in protecting the public's health or safety.<sup>29</sup>

While few jurisdictions have adopted the Model Act's language wholesale,<sup>30</sup> the concepts of targeting and the least restrictive alternative have found their ways into state public health statutes and regulations,<sup>31</sup> as well as agency guidance.<sup>32</sup>

Legally, however, application of the least restrictive alternative principle or analogous approaches has primarily been confined to public health restrictions that limit fundamental constitutional rights, such as religious exercise, speech and assembly, and travel, whether those rights are specifically enumerated or instead considered fundamental by courts. Restrictions on religious exercise that are not neutral and generally applicable must satisfy strict scrutiny.<sup>33</sup> Strict scrutiny also applies to restrictions on the right to

63 FLA. L. REV. 719, 725 (2011) (“[P]ublic health authorities are obligated to use the least restrictive alternative intervention available.”); Wendy E. Parmet, *Beyond Paternalism: Rethinking the Limits of Public Health Law*, 46 CONN. L. REV. 1771, 1785–86 (2014) (“[L]awyers and ethicists have long employed concepts such as the least-restrictive alternative ... to argue against the application of any more coercion than is necessary to support public health.”) (footnotes omitted); Jonathan Todres, *Moving Upstream: The Merits of a Public Health Law Approach to Human Trafficking*, 89 N.C. L. REV. 447, 500 (2011) (“Public health aims to adopt the least restrictive means of achieving the community's or population's health goals.”).

<sup>29</sup>THE TURNING POINT PUB. HEALTH STATUTE MODERNIZATION COLLABORATIVE, THE MODEL STATE PUBLIC HEALTH ACT 43 (2003), <https://law.asu.edu/sites/default/files/multimedia/faculty-research/centers/phlp/turning-point-model-act.pdf> [<https://perma.cc/K34N-NKQP>] (emphasis omitted).

<sup>30</sup>But see AM. SAMOA CODE ANN. §§ 13.0201-13.0241 (2007) (adopting the Model Act's language).

<sup>31</sup>*E.g.*, OR. REV. STAT. ANN. § 433.035(5) (West 2010) (“Any action taken by the Public Health Directors ... must be the least restrictive alternative available to accomplish the results necessary to minimize the transmission of the disease to others.”); IND. CODE ANN. § 16-41-9-15 (LexisNexis 2020) (“[A] public health authority shall attempt to seek the cooperation of cases, individuals with a communicable disease, contacts, or suspect cases to implement the least restrictive but medically necessary procedures to protect the public health.”); WASH. REV. CODE ANN. § 70.24.024(4)(b) (West 2020) (requiring that restrictions focused on specific individuals “be imposed in the least-restrictive manner necessary to protect the public health”); see Polly J. Price, *Do State Lines Make Public Health Emergencies Worse? Federal Versus State Control of Quarantine*, 67 EMORY L.J. 491, 498 (2018) (“[G]enerally, isolation or quarantine must be carried out in the least restrictive setting necessary to maintain public health.”).

<sup>32</sup>BRUCE JENNINGS & JOHN ARRAS, ETHICAL GUIDANCE FOR PUBLIC HEALTH EMERGENCY PREPAREDNESS AND RESPONSE: HIGHLIGHTING ETHICS AND VALUES IN A VITAL PUBLIC HEALTH SERVICE 49 (2008), <https://stacks.cdc.gov/view/cdc/44130> [<https://perma.cc/CGJ6-HYP4>]; N.C. INST. OF MED., STOCKPILING SOLUTIONS: NORTH CAROLINA'S ETHICAL GUIDELINES FOR AN INFLUENZA PANDEMIC 15 (2007), [https://epi.dph.ncdhhs.gov/cd/flu/plan/AppendixO1\\_2008.pdf](https://epi.dph.ncdhhs.gov/cd/flu/plan/AppendixO1_2008.pdf) [<https://perma.cc/D8VL-BHDW>].

<sup>33</sup>See Roman Cath. Diocese of Brooklyn, N.Y. v. Cuomo, 592 U.S. \_\_\_, No. 20A87, slip op. at 4-5 (2020) (Gorsuch, J., concurring) (per curiam) (granting injunction against state restrictions on church gatherings based on location COVID-19 rate); see also *Desrosiers v. Governor*, 158 N.E.3d 827, 844 (Mass. 2020)

interstate travel,<sup>34</sup> but not necessarily to restrictions on intrastate travel. For speech and assembly, content-neutral restrictions must satisfy intermediate scrutiny—that is, they must be “narrowly tailored to serve a significant governmental interest.”<sup>35</sup> At least one court, however, has signaled that non-religious and religious speech may need to be treated similarly, presenting the prospect of functionally “leveling up” restrictions on nonreligious speech to a strict scrutiny standard.<sup>36</sup> Another court attempted to revive *Lochner*-era jurisprudence, recognizing economic liberties as fundamental, but that decision was quickly stayed.<sup>37</sup>

Plausibly, fundamental rights analyses, or other forms of heightened scrutiny, will favor certain group-based exemptions from public health restrictions. For instance, it is difficult to justify preventing vaccinated people from attending in-person worship services or theater performances. Analogously, one court referenced the existence of exceptions for people with a recent negative test in support of its conclusion that a quarantine requirement for travelers satisfies strict scrutiny.<sup>38</sup> More generally, heightened scrutiny requires that restrictions be grounded in factual evidence, which will tend to promote better-tailored policies over time.<sup>39</sup> But heightened scrutiny applies only to state action—not to state inaction. The law does not require factual evidence supporting the

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(explaining that “limitations on religious gatherings to mitigate COVID-19 risks are valid as long as the limitations are no more stringent than those imposed on similarly situated secular institutions”).

<sup>34</sup>*Carmichael v. Ige*, 470 F. Supp. 3d 1133, 1146 (D. Haw. 2020); *see also* *Bayley’s Campground Inc. v. Mills*, 463 F. Supp. 3d 22, 32 (D. Me. 2020), *reconsideration denied*, No. 2:20-CV-00176-LEW, 2020 WL 3037252 (D. Me. June 5, 2020), *aff’d*, 985 F.3d 153 (1st Cir. 2021) (“Curtailed of a United States citizen’s right to travel and to enter and abide in the state of his or her choosing requires a compelling justification (i.e., not merely a rational justification).”).

<sup>35</sup>*McCarthy v. Cuomo*, No. 20-CV-2124 (ARR), 2020 WL 3286530, at \*4 (E.D.N.Y. June 18, 2020); *Nat’l Ass’n of Theatre Owners v. Murphy*, No. 3:20-CV-8298 (BRM) (TJB), 2020 WL 5627145, at \*10 (D.N.J. Aug. 18, 2020) (quoting *Startzell v. City of Phila.*, 533 F.3d 183, 201 (3d Cir. 2008)); *Bimbe’s Delwood, Inc. v. James*, No. 20-CV-1043S, 2020 WL 6158612, at \*13 (W.D.N.Y. Oct. 21, 2020). Intermediate scrutiny applies to content-neutral restrictions on any speech, not only commercial speech. *See Holder v. Humanitarian L. Project*, 561 U.S. 1, 26–27 (2010) (quoting *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 189 (1997)) (describing the application of “intermediate scrutiny,” under which a “content-neutral regulation will be sustained under the First Amendment if it advances more important governmental interests unrelated to the suppression of free speech and does not burden substantially more speech than necessary to further those interests”).

<sup>36</sup>*See Clementine Co. v. Cuomo*, No. 20 Civ. 8899 (CM), 2020 WL 7321504, at \*2 (S.D.N.Y. Dec. 11, 2020) (comparing the Governor of New York’s treatment of assembly for the arts to assembly for worship).

<sup>37</sup>*Cty. of Butler v. Wolf*, 486 F. Supp. 3d 883, 920, 927 (W.D. Pa. 2020); *Cty. of Butler v. Governor of Pa.*, No. 20-2936, 2020 WL 5868393 (3d Cir. Oct. 1, 2020) (granting stay); *but see, e.g., Desrosiers*, 158 N.E.3d at 844 (“The right to work is not a fundamental right that receives strict scrutiny.”); *SH3 Health Consulting, LLC v. Page*, 459 F. Supp. 3d 1212, 1226–27 (E.D. Mo. 2020) (explaining that the “Eighth Circuit has consistently rejected right-to-conduct-business/right-to-earn-a-living due-process claim”).

<sup>38</sup>*Carmichael*, 470 F. Supp. 3d at 1147 (“[T]he trans-Pacific pre-testing program will allow travelers to waive the quarantine requirement if they obtain a negative COVID-19 test within 72 hours of arrival and provide proof upon landing. Any traveler exhibiting signs of infection will undergo secondary screening and be offered a COVID-19 test at the airport. Accordingly ... the Court finds that the quarantine survives strict scrutiny.”) (citations omitted); *see also Bayley’s Campground Inc.*, 463 F. Supp. 3d at 28 (upholding public health restrictions on travel while noting that: “[a]s the supply of test kits increases, and as the State obtains better information about the interpretation of alternative antibody tests, the State assured it will continue to evaluate the use of the tests as a substitute for, or in addition to, the existing quarantine requirement [and that] [t]here also continues to be significant scientific uncertainty surrounding the notion of ‘immunity passports’—the idea that individuals who have previously been infected with COVID-19 develop sufficient immunity to prevent them from transmitting the virus”).

<sup>39</sup>*See Page v. Cuomo*, 478 F. Supp. 3d 355, 368 (N.D.N.Y. 2020) (observing that “the law of strict scrutiny” does not require “policymakers to enact inflexible, unchanging measures that fail to account for the facts on the ground,” and that “[i]f anything, just the opposite is true[,] [u]nder any standard of review, public health officials can and should continue calibrating their responsive measures to the situation as it unfolds.”).

*absence* of restrictions, which is likely to lead some decisionmakers to choose unsafe options that permit greater viral spread.<sup>40</sup>

## B. EQUAL PROTECTION

Public health law scholars have argued that law and policy should be equitable as well as effective. As Bruce Jennings notes:

An intervention could be well-targeted because it was efficient and effective at neutralizing or controlling the risk. Such an intervention would limit the liberty only of those it was necessary to affect in order for the public health or security operation to be successful. The coercion would be a surgical strike; collateral damage to liberty would be held to a minimum. On the other hand, well-targeted could mean justly, fairly, or equitably targeted. A requirement for the moral justification of the public health intervention would be that the intervention's burdens (loss of liberty) and benefits (increased protection) be fairly distributed. If we follow the now widely accepted Rawlsian notion of fairness, that would mean that the benefits and burdens would have to be distributed equally across the population unless a deviation from that equal distribution could be shown to redound to the benefit of the least well off. While there may be no inherent conflict between considerations of efficiency and equity, in a given case a scarcity of manpower or resources might likely mean that an operation that was more widely administered in the name of fairness would be less effective in terms of public health outcomes.<sup>41</sup>

While Jennings' view—that public health restrictions should impose equal burdens as a default and show special concern for the disadvantaged—is worthy of consideration, equal protection doctrine departs sharply from Jennings' "equal burden" approach. There is no legal requirement that public health restrictions distribute burdens evenly across the population, show special solicitude for the worst off, compensate affected individuals for the burdens imposed by restrictions, or restore such individuals to their pre-pandemic position. And this makes sense not only legally, but ethically. Even when tailored policies produce unequal burdens, the demand cannot reasonably be for a tailored COVID-19 response to be Pareto-superior—that is, worse for no one—compared to the status quo or to an untailored lockdown.<sup>42</sup> Any policy is likely to benefit some people relative to the status quo or alternatives, and to burden others. This is in no way

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<sup>40</sup>*Cf.* John Dorsett Niles et al., *Making Sense of State Action*, 51 SANTA CLARA L. REV. 885, 885 (explaining that the Constitution generally "constrains state action only").

<sup>41</sup>Bruce Jennings, *On Authority and Justification in Public Health*, 55 FLA. L. REV. 1241, 1248-49 (2003). As an interpretive matter, Jennings misapplies Rawlsian fairness. See Kirsten Engel, *Reconsidering the National Market in Solid Waste: Trade-Offs in Equity, Efficiency, Environmental Protection, and State Autonomy*, 73 N.C. L. REV. 1481, 1541 (1995) ("Rawls intended for his theory of justice, including the two principles, to apply only to the basic structure of society and not to distributions of particular goods or services."); see also S.A. Lloyd, *Situating A Feminist Criticism of John Rawls's Political Liberalism*, 28 LOY. L.A. L. REV. 1319, 1327 (1995) ("[The] supreme court is an institution of the basic structure . . . it is not supposed to decide individual cases affecting the wealth of the litigants according to the difference principle.").

<sup>42</sup>*Cf.* Matthew D. Adler & Eric A. Posner, *Rethinking Cost-Benefit Analysis*, 109 YALE L.J. 165, 170 (1999) ("The difficulty posed by the Pareto criterion is that it is too strong. Few projects satisfy the criterion, because just about every worthwhile government project will hurt people, and compensating those people is usually infeasible.").

unique to COVID-19 policy. Other major policy changes, such as investments in technologies like the internet, efforts to mitigate harms like pollution, and protection for new forms of rights, also benefit some people while worsening the situation of others.<sup>43</sup>

Challenges to activity-based restrictions as violations of equal protection have therefore typically been unsuccessful.<sup>44</sup> Most of these challenges follow a similar form. First, the challenger argues that they are being treated differently from some other businesses or sets of businesses.<sup>45</sup> The court explains that, because the challenger is not part of a protected category, the challenge must be analyzed within a rational basis framework, which is deferential to the state's asserted justifications for the policy.<sup>46</sup> Then, the state responds that there is a rational basis for differential treatment.<sup>47</sup> Often, the state offers medical evidence in support of the public health regulation,<sup>48</sup> though courts have indicated this is not required.<sup>49</sup> Sometimes, the state's evidence is supplemented or alternatively

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<sup>43</sup>*Id.*

<sup>44</sup>*E.g.*, *Six v. Newsom*, 462 F. Supp. 3d 1060, 1072 (C.D. Cal. 2020); *Lawrence v. Colorado*, 455 F. Supp. 3d 1063, 1076 (D. Colo. 2020); *Henry v. DeSantis*, 461 F. Supp. 3d 1244, 1255 (S.D. Fla. 2020); *CommCan, Inc. v. Baker*, No. 2084CV00808-BLS2, 2020 WL 1903822, at \*12 (Mass. Super. Ct. Apr. 16, 2020); *McCarthy v. Cuomo*, No. 20-CV-2124 (ARR), 2020 WL 3286530, at \*6 (E.D.N.Y. June 18, 2020); *Hartman v. Acton*, No. 2:20-CV-1952, 2020 WL 1932896, at \*11 (S.D. Ohio Apr. 21, 2020).

<sup>45</sup>*E.g.*, *Alsop v. DeSantis*, No. 8:20-CV-1052-T-23SPF, 2020 WL 4927592, at \*2–3 (M.D. Fla. Aug. 21, 2020) (discussing “claim that the order impermissibly treats vacation rentals differently than hotels, motels, inns, and resorts”); *910 E Main LLC v. Edwards*, 481 F. Supp. 3d 607, 622–23 (W.D. La. 2020) (analyzing claim that a distinction between bars and “restaurants with full-service bars” is arbitrary); *4 Aces Enters., LLC v. Edwards*, 479 F. Supp. 3d 311, 326–27 (E.D. La. 2020) (similar); *World Gym, Inc. v. Baker*, 474 F. Supp. 3d 426, 432–34 (D. Mass. 2020) (rejecting complaint “that the choice to designate fitness facilities non-essential was arbitrary”); *Talleywhacker, Inc. v. Cooper*, 465 F. Supp. 3d 523, 536–37 (E.D.N.C. 2020) (analyzing claim that public health orders violate plaintiffs’ “right to equal protection by requiring plaintiffs’ businesses to remain closed while allowing certain restaurants, breweries, wineries, and distilleries to reopen.”); *Luke’s Catering Serv., LLC v. Cuomo*, 485 F. Supp. 3d 369, 382 (W.D.N.Y. 2020) (discussing claim by caterers who see no “distinction between their businesses, which serve food and beverages to diners, and restaurants, which likewise serve food and beverages to diners.”); *TJM 64, Inc. v. Harris*, 475 F. Supp. 3d 828, 835 (W.D. Tenn. 2020) (analyzing plaintiffs’ complaint that it is unfair to treat restaurants “which only gross less than 50% of their sales from food sales” differently from “those which receive over 50% of their gross revenue from food sales ...”).

<sup>46</sup>*E.g.*, *Alsop v. DeSantis*, 2020 WL 4927592, at \*2–3 (“The plaintiffs, each an owner of a commercial business, belong to no suspect class”); *Hund v. Cuomo*, No. 20-CV-1176 (JLS), 2020 WL 6699524, at \*12 (W.D. N.Y. Nov. 13, 2020) (rejecting equal protection claim because live “musicians do not comprise a protected class for equal protection purposes”); *AJE Enter. LLC v. Justice*, No. 1:20-CV-229, 2020 WL 6940381, at \*5 (N.D.W. Va. Oct. 27, 2020) (“The interests which the plaintiffs seek to protect are strictly economic interests. If the rules or enactments neither infringe a fundamental right nor disadvantage a suspect class, courts apply the rational basis test.”). *See generally* *Armour v. City of Indianapolis*, 566 U.S. 673, 680 (2012) (explaining that a “classification neither involving fundamental rights nor proceeding along suspect lines ... cannot run afoul of the Equal Protection Clause if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose.” (quoting *Heller v. Doe*, 509 U.S. 312, 319–20 (1993))).

<sup>47</sup>*E.g.* *Desrosiers v. Governor*, 158 N.E.3d 827, 844 (Mass. 2020); *Luke’s Catering Serv., LLC*, 485 F. Supp. 3d at 381 (“Plaintiffs’ venues are not similarly situated in all material respects to restaurants: they do not have similarly sized groups arriving and departing at the same time; they do not attract and foster the same types of patron interaction; and they do not serve their clientele for similar lengths of time.”).

<sup>48</sup>*Henry*, 461 F. Supp. 3d at 1255 (explaining that “the Governor used scientifically-based-research policies from the U.S. Centers for Disease Control.”); *World Gym*, 474 F. Supp. 3d at 432–33 (discussing affidavit from state public health expert supporting claims that fitness facilities are high-risk); *Talleywhacker, Inc.*, 465 F. Supp. 3d at 538 (noting that state decisionmakers’ “medical advisors ... concluded that entertainment and fitness facilities “bring together large groups of people in an indoor setting where they will be largely stationary or sitting for long periods of time.”); *TJM 64, Inc.*, 475 F. Supp. 3d at 835 (“[T]he decision to close bars and limited service restaurants was based on significant input from the Center for Disease Control”).

<sup>49</sup>*TJM 64 Inc.*, 475 F. Supp. 3d at 836 (“[T]he Fourteenth Amendment’s arbitrary and capricious standard does not require ... data-driven, scientifically rigorous decision-making from local officials.”); *Brach v. Newsom*, No. 2:20-CV-06472-SVW-AFM, 2020 WL 6036764, at \*6–7 (C.D. Cal. Aug. 21, 2020) (“The

supported by economic evidence about the necessary status of certain businesses.<sup>50</sup> Following this showing, the court concludes that the tailored restriction passes muster under a rational basis test,<sup>51</sup> though often expressing sympathy for the business.<sup>52</sup>

In occasional cases, courts have been willing to endorse equal protection challenges and reject policies as irrational.<sup>53</sup> Their reasons for doing so, however, often venture implausibly into epidemiological speculation.<sup>54</sup>

Equal Protection Clause simply does not require that government classifications be supported by scientific consensus – or even the most reliable scientific evidence.”)

<sup>50</sup>*Desrosiers*, 158 N.E.3d at 845 (explaining that the state’s governor is “making difficult decisions about which types of businesses are ‘essential’ to provide people with the services needed to live and which types of businesses are more conducive to spreading COVID-19”); *Talleywhacker, Inc.*, 465 F. Supp. 3d at 539 (discussing the “reasons... for allowing restaurants to open with restrictions, based upon their importance to the community as a whole, while not with the same urgency allowing adult entertainment establishments, or components of businesses that provide adult entertainment, to open”); *Luke’s Catering Serv., LLC*, 485 F. Supp. 3d at 383 (“As private venues serving private parties, banquet and catering facilities do not provide the same essential food service as restaurants.”).

<sup>51</sup>*TJM 64 Inc.*, 475 F. Supp. 3d at 835 (holding that the restrictions are “reasonably related to the legitimate government goal of fighting the COVID-19 virus in Shelby County”); *Talleywhacker, Inc.*, 465 F. Supp. 3d at 538 (“While plaintiffs effectively point out similarities between their businesses and those allowed to reopen, ‘a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect.’”); *Antietam Battlefield KOA v. Hogan*, 461 F. Supp. 3d 214, 230 (D. Md. 2020), *appeal dismissed*, No. 20-1579, 2020 WL 6787532 (4th Cir. July 6, 2020) (“It might be, as the plaintiffs contend, that the prohibitions in place are not necessary to ensure public health and safety, or it might be that even stricter prohibitions are warranted. But although there may be more than one reasonable way to respond to the COVID-19 outbreak, it is clear that the Governor’s orders have at least a real and substantial relation to protecting public health.”); *Pro. Beauty Fed’n of Cal. v. Newsom*, No. 2:20-CV-04275-RGK-AS, 2020 WL 3056126, at \*8 (C.D. Cal. June 8, 2020) (“[T]he Stay at Home Order has a legitimate purpose and there are plausible, arguable, or conceivable reasons for the State’s designations of essential and non-essential businesses.”); *McCarthy v. Cuomo*, No. 20-CV-2124 (ARR), 2020 WL 3286530, at \*6 (E.D.N.Y. June 18, 2020) (finding no violation of plaintiffs’ fundamental right nor suspect classification); *World Gym*, 474 F. Supp. 3d at 433 (“[T]he Governor’s actions were rationally related to a legitimate interest and do not violate the equal protection clause.”).

<sup>52</sup>*Desrosiers*, 158 N.E.3d at 845 (“Although some businesses and organizations bear a larger burden than others under the emergency orders, this alone does not render arbitrary the restrictions imposed by the emergency orders.”); *Luke’s Catering Serv., LLC*, 485 F. Supp. 3d at 388 (“This Court is sympathetic to Plaintiffs’ plight. They see others in the food-service industry with an opportunity to survive this epidemic by operating at 50% capacity, yet they cannot. They are willing to engage in the same protective protocols that allow others in the industry to operate as safely as possible, yet they cannot. They have worked hard to build their businesses, for some their life’s work, and have prepared their facilities to reopen safely, yet they cannot. Even in the face of a foe as fierce as COVID-19, one can understand why Plaintiffs implore this Court to engage in a more searching scrutiny of the wisdom, effectiveness, and need for the State’s emergency measures, yet it cannot.”); *4 Aces Enters., LLC v. Edwards*, 479 F. Supp. 3d 311, 329 (E.D. La. 2020) (“The Governor’s victory does not mean his proclamations are sound policy; nor does it mean the proclamations are sufficiently solicitous of the interests of Louisiana small-business owners, like the plaintiffs here; it means quite simply that the proclamations are constitutional.”).

<sup>53</sup>*Dimartile v. Cuomo*, No. 1:20-CV-0859 (GTS/CFH), 2020 WL 4877239, at \*8 (N.D.N.Y. Aug. 19, 2020); *Hotze v. Abbott*, 473 F. Supp. 3d 736, 739 (S.D. Tex. 2020) (holding that the state’s shutdown of a political convention as “arbitrary”); *see also Friends of Danny DeVito v. Wolf*, 227 A.3d 872, 904 n.1 (Pa. 2020) (Saylor, J., concurring and dissenting), *cert. denied*, 141 S.Ct. 239 (2020) (arguing that it “is not clear why some businesses are on the life-sustaining list[.] For example, why are ‘beer, wine, and liquor stores,’ determined to be non-life-sustaining, but ‘beer distributors’ are determined to be ‘life-sustaining?’ Why are ‘department stores’ non-life-sustaining, but ‘other general merchandise stores’ life-sustaining?”).

<sup>54</sup>*See Hotze*, 473 F. Supp. 3d at 739 (concluding that statewide Republican Party convention’s “contribution to viral risk is no more than another large grocery store”); *see also Dimartile*, 2020 WL 4877239, at \*4-5 (claiming that “logic suggests that putting a rotating group hundreds of different people in a space over the course of a night would be more likely to result in COVID-19 exposure than having a group of 125 to 175 people in the room for the whole night,” and that “the fact that guests will be present at a wedding for longer periods of time than regular diners does not mean that those guests will be physically interacting with individuals beyond their assigned table.”) Additionally, “the fact that patrons arrive and leave at the same time for a wedding does not constitute a significant difference from ordinary dining” and that “the Court will not linger on

A few plaintiffs have taken a different tack, by trying to argue that the restrictions discriminate against a defined group. These arguments, however, have proven unsuccessful, either because the class in question is not subject to strict scrutiny, or because courts conclude the restrictions do not discriminate in the way described. The Sixth Circuit, for instance, recently disposed of a claim that tailored restrictions on farmworkers unfairly discriminated on the basis of race, observing that the restrictions did not target workers by race, and that consciousness that a policy will narrow health disparities does not subject a policy to strict scrutiny.<sup>55</sup>

States could in principle ameliorate the effects of legal policies that have unequal impact by compensating businesses who lose out under the new policy, potentially coming closer to creating a Pareto-improving policy by finding a policy that is better for some and worse for none.<sup>56</sup> But assisting those who lose out relative to the status quo must be weighed against other ways that public funds or regulatory power might be used. Movie theater or bar owners may lose out under policies that aim to reduce the spread of COVID-19, but losing out is different from being disadvantaged in absolute terms. And courts have emphasized that there is no constitutional right to continue in one's current occupation, whether under pandemic circumstances or otherwise.<sup>57</sup> As I discuss in Part IV, there are ethical reasons to be concerned about burdens on those who are absolutely disadvantaged, as opposed to those whose lives are most disrupted by COVID-19 restrictions, but it is important to consider overall burdens and to compare them to the burdens that would result under alternative policies—including the inequitable burdens of a spreading pandemic.

#### IV. THE ETHICS OF TAILORED POLICIES

In this Part, I explain why tailored policies, even though they treat people and activities differently, often better serve equity, prevent harm, and respect individual freedom than one-size-fits-all alternatives. Treating activities and groups who pose or face different risks identically is often neither fair nor equitable. My core point is that evaluation of tailored policies must be *comparative*: any problems tailored public health restrictions present must be weighed against the problems presented by one-size-fits-all “lockdown” restrictions or by uncontrolled COVID-19 spread in the absence of any restrictions.<sup>58</sup> Evaluation must consider burdens and benefits broadly, rather than

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whether members of a local community who have encountered each other for the first time after a long quarantine have less of an incentive to mingle than do family members weary [sic] of infecting their loved ones.” *Dimartile*, 2020 WL 4877239, at \*4-5. See also *Cty. of Butler v. Wolf*, 486 F. Supp. 3d 883, 928 (W.D. Pa. 2020) (rejecting public health orders on the basis that “the largest retailers remained open to attract large crowds, while smaller specialty retailers ... were required to close”).

<sup>55</sup> *Castillo v. Whitmer*, 823 F. App'x 413, 416-17 (6th Cir. 2020).

<sup>56</sup> See sources cited *infra* note 129 and related text.

<sup>57</sup> See *Doe v. Rogers*, 139 F. Supp. 3d 120, 152 (D.D.C. 2015) (rejecting the argument that “the right to practice one's chosen profession is a fundamental right” subject to strict scrutiny); see also Louis Kaplow, *An Economic Analysis of Legal Transitions*, 99 HARV. L. REV. 509, 522 (1986) (discussing the “[f]ailure of [r]eliance and [e]xpectations [a]rguments” against “allowing private actors to bear losses resulting from changes in government policy”). But see Craig Konnoth, *Narrowly Tailoring the COVID-19 Response*, 11 CALIF. L. REV. ONLINE 193, 205 (2020) (arguing that “the right to come together to engage in economic production and earn a livelihood” should be recognized as fundamental, though acknowledging that its legal status is “unclear”).

<sup>58</sup> Cf. Michelle M. Mello & C. Jason Wang, *Ethics and Governance for Digital Disease Surveillance*, 368 SCIENCE 951, 953 (2020) (“First, the wisdom of adopting a digital surveillance measure should be evaluated not in the abstract but by reference to the counterfactual. What would be used instead of the technology, and is that more or less desirable? The counterfactual for COVID-19 involves mass shelter-at-home and business closure

considering only the immediate or facially obvious burdens associated with tailored policies.<sup>59</sup> Critics of tailored policies are often unclear about what alternative policy they believe is preferable. While defenders of untailored reopenings may prefer them over tailored policies, their arguments will typically regard tailored policies as preferable to one-size-fits-all lockdowns. Similarly, while defenders of untailored lockdowns may prefer them to tailored policies, tailored policies will be preferable from their perspective to a universal reopening. Despite facing criticism from both sides,<sup>60</sup> when evaluated comparatively, tailored policies are typically superior to one-size-fits-all alternatives.

In this Part, I will examine debates concerning immunity-based policies, an area legal and other commentators have discussed extensively.<sup>61</sup> I will also discuss recent legal scholarship criticizing mask requirements.<sup>62</sup> Many of the issues discussed, however, also pertain to other group-based restrictions and to activity-based restrictions.

## A. EQUITY

### 1. Differential Treatment

Tailored policies explicitly treat individuals, businesses, and groups differently. This differential treatment has prompted criticism of activity-based restrictions, with some policymakers rejecting them on the basis that “[e]very single business and institution is

orders, which impose serious liberty and economic deprivations and are, in most areas, completely nonconsensual.”)

<sup>59</sup>*Cf.* Thomas B. Colby, *In Defense of Judicial Empathy*, 96 MINN. L. REV. 1944, 2012, 2012 n.317 (2012) (discussing concern that “policymakers overemphasize the immediate and obvious costs and benefits of their decisions—the ‘seen’ effects—and underemphasize the remote and less obvious costs and benefits—the ‘unseen’ effects” and concluding that “it is important for empathic judges to avoid empathizing only with those whose plight is most obvious or apparent”).

<sup>60</sup>*Cf.* Paul Schiff Berman, *Federalism and International Law Through the Lens of Legal Pluralism*, 73 MO. L. REV. 1149, 1164 (2008) (observing that the International Criminal Court’s jurisdiction rules have been criticized by “sovereignist voices” for infringing on states’ rights, and by “international human rights advocates” for allowing “too many potential suspects to skirt international justice”).

<sup>61</sup>For criticisms of immunity-based policies such as immunity passports and certificates, see Henry T. Greely, *COVID-19 Immunity Certificates: Science, Ethics, Policy, and Law*, 7 J.L. & BIOSCIENCES 1, 23-24 (2020); Natalie Kofler & Françoise Baylis, *Ten Reasons Why Immunity Passports are a Bad Idea*, 581 NATURE 379, 379-81 (2020); Vardit Ravitsky & Daniel Weinstock, *Commentary, Are Immunity Licenses Just?*, 20 AM. J. BIOETHICS 172, 173-74 (2020); Nita Farahany, *Editorial, Proof of Vaccination Will be Very Valuable — and Easy to Abuse*, WASH. POST. (Dec. 15, 2020), <https://www.washingtonpost.com/outlook/2020/12/15/vaccine-cards-discrimination-immunity-passports/> [<https://perma.cc/8BQE-83QL>]. For more positive perspectives, see Govind Persad & Ezekiel J. Emanuel, *Opinion, The Ethics of COVID-19 Immunity-Based Licenses (“Immunity Passports”)*, 323 J. AM. MED. ASS’N 2241, 2241-42 (2020); Mark A. Hall & David M. Studdert, *Opinion, Privileges and Immunity Certification During the COVID-19 Pandemic*, 323 J. AM. MED. ASS’N 2243, 2243-44 (2020); Ole F. Norheim, *Protecting the Population with Immune Individuals*, 26 NATURE MED. 823, 824 (2020); Teck Chuan Voo et al., *Ethical Implementation of Immunity Passports During the COVID-19 Pandemic*, 222 J. INFECTIOUS DISEASES 715, 717 (2020). Two other recent articles take a unique perspective, with one criticizing the use of infection-derived immunity but supporting the relevance of vaccine-derived immunity, one by Alexandra L. Phelan, *supra note 19*, at 1596-97, and another focusing on incentive concerns, Daniel Hemel & Anup Malani, *Immunity Passports and Moral Hazard*, 3, 5 (Univ. Chi. Pub. L., Working Paper No. 743, May 8, 2020; Univ. Chi. Coase-Sandor Inst. for L. & Econ., Research Paper No. 905, June 3, 2020), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3596569](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3596569) [<https://perma.cc/2B6H-FNZD>].

<sup>62</sup>Robert Gatter & Seema Mohapatra, *COVID-19 and the Conundrum of Mask Requirements*, 77 WASH. & LEE L. REV. ONLINE 17, 27–28 (2020) (arguing that unintended punitive measures and racial discrimination may result from mask requirements); Elizabeth Pendo, et al., *Resolving Tensions Between Disability Rights Law and COVID-19 Mask Policies*, 80 MD. L. REV. ONLINE 1, 12 (2020) (recommending voluntary, rather than compulsory, mask policies).

a priority to someone,” and that it is not “the role of government to pick winners and losers.”<sup>63</sup> While those leveling this criticism at activity-based restrictions have primarily been conservatives and libertarians, other commentators have directed similar concerns against group-based policies that consider risk or immunity. Professors Daniel Weinstock and Vardit Ravitsky claim, for instance, that immunity “licenses clearly create a social reality of inequality, as they discriminate between those with and without immunity.”<sup>64</sup>

Differential treatment, however, need not be inequitable, including in the COVID-19 response. Untailored policies cause or permit differential, and typically far more inequitable, impacts than tailored policies. Untailored policies will have very different effects on healthy, wealthy homebodies than on those who need to attend school, work, or obtain medical care.<sup>65</sup> Closure of facilities like day care centers and schools in an effort to quell COVID-19 spread imposes disproportionate harm on working parents and especially, in practice, on working women, as well as harming children who do not have access to high-quality child care alternatives.<sup>66</sup> Similarly, uncontrolled spread disparately harms those most medically vulnerable to poor COVID-19 outcomes if infected, those in need of medical care if health systems become overwhelmed, and people who are exposed to COVID-19 because they are in essential, often underpaid, jobs.<sup>67</sup> Tailored policies do not create inequality *ex nihilo*, but try to recognize and remediate the harm and inequality produced or threatened by the pandemic, which will often require treating people, places, and activities differently according to differences in risk. That tailored policies aim to address harms by responding to relevant, actual differences in risk undermines, for instance, the claim that vaccine certificates are analogous to literacy tests for voting,

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<sup>63</sup>Ryan Patterson, *Link, Stafsholt Square off in 10th Senate District Republican Primary*, LEADER-TELEGRAM (Aug. 4, 2020), [https://www.leadertelegram.com/covid-19/link-stafsholt-square-off-in-10th-senate-district-republican-primary/article\\_d16ec589-8606-5ad6-a912-722af24fa697.html](https://www.leadertelegram.com/covid-19/link-stafsholt-square-off-in-10th-senate-district-republican-primary/article_d16ec589-8606-5ad6-a912-722af24fa697.html) [https://perma.cc/T5BU-QZ7N] (statement of state Rep. Rob Stafsholt); see also *Cty. of Butler v. Wolf*, 486 F. Supp. 3d 883, 927 (W.D. Pa. 2020) (criticizing the picking of “winners and losers”); Andrew J. Lanza, *Staten Island: Re-Opening for Business*, N.Y. STATE SENATE (June 19, 2020), <https://www.nysenate.gov/newsroom/articles/2020/andrew-j-lanza-staten-island-re-opening-business> [https://perma.cc/CG5G-RW5Z] (“Over these several months, we have seen some in government pick winners and losers – who can be open for business and who cannot. Many of you have helped to highlight the confusion that has emanated from some of these disjointed determinations.”); *N.C. Lawmakers Push Reopen Bills, Virus Liability Protection*, NEWS CHANNEL 12 (June 16, 2020), <https://wcti12.com/news/state-news/nc-lawmakers-push-reopen-bills-virus-liability-protection> [https://perma.cc/3RCK-LVAA] (statement of Rep. John Szoka) (arguing for reopening bowling alleys and skating rinks: “[w]e should treat all businesses the same and we shouldn’t pick winners and losers.”).

<sup>64</sup>Ravitsky & Weinstock, *supra* note 61, at 173. Similar concerns are raised by others; see, e.g., Kofler & Baylis, *supra* note 61, at 381 (“Labelling people on the basis of their COVID-19 status would create a new measure by which to divide the ‘haves’ and the ‘have-nots’ — the immunoprivileged and the immunodeprived.”); Phelan, *supra* note 19 (“Immunity passports would impose an artificial restriction on who can and cannot participate in social, civic, and economic activities”); Farahany, *supra* note 61 (“Imagine a two-tiered society: One group has access to jobs and public places, one doesn’t.”).

<sup>65</sup>Stefanie DeLuca, et al., *The Unequal Cost of Social Distancing*, JOHNS HOPKINS UNIV. & MED., <https://coronavirus.jhu.edu/from-our-experts/the-unequal-cost-of-social-distancing> [https://perma.cc/4AXF-7FAN].

<sup>66</sup>Meira Levinson et al., *Reopening Primary Schools During the Pandemic*, 383 NEW ENG. J. MED., 981, 981, 984 (2020).

<sup>67</sup>Emily A. Benfer & Lindsay F. Wiley, *Health Justice Strategies to Combat COVID-19: Protecting Vulnerable Communities During A Pandemic*, HEALTH AFFAIRS BLOG (Mar. 19, 2020), <https://www.healthaffairs.org/doi/10.1377/hblog20200319.757883/full/> [https://perma.cc/ZB22-83JD]; Caitlin Brown & Martin Ravallion, *Poverty, Inequality, and COVID-19 in the US*, VOX EU (Aug. 10, 2020), <https://voxeu.org/article/poverty-inequality-and-covid-19-us> [https://perma.cc/YJ25-Y9CD]; Nadia J. Siddiqui et al., *The COVID-19 Crisis: An Opportunity to Build Fairer, Healthier Nation*, HEALTH AFFAIRS BLOG (June 24, 2020), <https://www.healthaffairs.org/doi/10.1377/hblog20200624.928351/full/> [https://perma.cc/RR2G-Q3MM].

which excluded some from the exercise of a fundamental right, based on irrelevant differences, for the purpose of enacting racial exclusion.<sup>68</sup>

Critics of immunity-based and other forms of tailored policies often overlook the reality that policies mandating facially identical treatment—such as the use of governmental power to prohibit employers and venues from considering whether someone has been vaccinated or is otherwise immune<sup>69</sup>—would leave different people exposed to very different levels of risk from the pandemic. For instance, Ravitsky and Weinstock’s call for “alternative ways of limiting the spread of the virus that, rather than discriminating between individuals, allow all of us to emerge safely from the stage of severe restriction through collective action”<sup>70</sup> does not consider whether equity may necessitate a response that discriminates—in a non-invidious sense—between individuals who face different risks. Similarly, while they argue that “policies can reduce the spread of the virus through collective approaches that redesign and expand public spaces in ways that make them safe and accessible to all by allowing physical distancing,”<sup>71</sup> redesigning spaces to permit distancing—while desirable—does not create equal, substantive accessibility for all. The same is true for the suggestion that “[m]easures such as the use of protective equipment, such as masks and gloves, by all would also allow everyone to emerge from confinement together.”<sup>72</sup> Masking and distancing are good policies because they make everyone safer, but they do not flatten preexisting inequalities in risk of infection or of poor outcomes if infected. Nor do masking and distancing alone better achieve equity than a policy response that combines them with more tailored measures.<sup>73</sup> And, as other critics point out, masking and distancing are themselves subject to criticism on equity grounds.<sup>74</sup>

Ultimately, while physical distancing, expanded access to outdoor spaces, and the use of protective equipment are undoubtedly desirable, they are not alternatives to tailored policies, and are insufficient on their own to address the inequitable burden of the pandemic. Just as speed limits and safer street designs can and should be coupled with tailored policies like driver’s licenses and efforts to prevent intoxicated driving, distancing and protective equipment can and must be combined with tailored policies. Masks alone will not “allow everyone to emerge from confinement together;”<sup>75</sup> people at higher risk of infection or of poor outcomes will still have good reason to stay at home. The same critique applies to commentators who complain about government “picking winners and losers.”<sup>76</sup> The risk of transmitting COVID-19 is higher at a bar than an outdoor playground, and if policies do not respond to these facts, they will allow COVID-19 to pick far more losers

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<sup>68</sup>See Mía Sato, *Vaccine Passports Could Further Erode Trust*, MIT TECH. REV. (Dec. 22, 2020), <https://www.technologyreview.com/2020/12/22/1015451/vaccine-passports-nita-farahany-trust> [<https://perma.cc/5D6P-QJ6E>] (reporting comparison by Prof. Nita Farahany between vaccine certification and the use of literacy tests).

<sup>69</sup>Farahany, *supra* note 61 (proposing that federal power be used to “specify that schools, employers and businesses cannot refuse entry to individuals who have not obtained a coronavirus vaccine”).

<sup>70</sup>Ravitsky & Weinstock, *supra* note 61, at 173.

<sup>71</sup>*Id.* at 174.

<sup>72</sup>*Id.*

<sup>73</sup>See e.g., Gemma Mitchell, *Tailored Covid-19 Guidance Finally Published for Learning Disabilities*, NURSING TIMES (June 17, 2020), <https://www.nursingtimes.net/news/learning-disability/tailored-covid-19-guidance-finally-published-for-learning-disabilities-17-06-2020/> [<https://perma.cc/B8TL-EFUK>] (discussing the need for tailored policies and risk assessment for those facing unique challenges dealing with Covid-19, particularly around the use of personal protective equipment).

<sup>74</sup>See sources cited *supra* note 62.

<sup>75</sup>Ravitsky & Weinstock, *supra* note 61, at 174.

<sup>76</sup>See sources cited *supra* note 63.

than a tailored policy would have, and to pick those losers disproportionately from those who are most vulnerable to infection and to poor outcomes.<sup>77</sup>

Related to the complaint of differential treatment is the protest that certain tailored policies take an unacceptably individual lens. One critique, for instance, argues that “[s]trategies that focus on the individual—using conceptions of ethics rooted in libertarianism—contradict the mission of public health,” and “distract attention from actions that benefit all, such as funding international collaborations, practising effective public-health measures and redressing income inequity.”<sup>78</sup> This critique is aimed at immunity licensing policies, but would seemingly sweep more broadly to include any policy that attempts to address spread at an individual level. But it is unclear why tailored policies distract from, rather than complement, other policies such as international collaboration or income support for individuals facing pandemic poverty. Regulations requiring evidence of immunity to engage in certain risky activities hardly seem libertarian, and benefit others by slowing the spread of infection while permitting economic activity. Furthermore, a natural complement for immunity-based policies would be income support for those economically disadvantaged because they are excluded from risky activities.<sup>79</sup>

Another critique similarly rejects “strategies focusing on the individual,” but praises the “established public health practices of testing, contact tracing, quarantine of contacts, and isolation of cases.”<sup>80</sup> Yet, all the interventions praised are individual: individuals are the ones who are tested, whose contacts are traced (or who are themselves the traced contacts), and who are quarantined or placed in isolation. The same is true of vaccination and masks, which, even if mandated, must ultimately be adopted by individuals.<sup>81</sup> Ultimately, the individual/societal distinction is a false dichotomy—given the impossibility of somehow destroying COVID-19 outside of individuals’ bodies, interventions to slow or stop viral spread will ultimately have to proceed via individuals.<sup>82</sup> Equity does not require identical treatment; it requires that individuals receive societal and institutional support that responds to their situation.

## 2. Exacerbation of Preexisting Inequities

Rather than merely criticizing tailored policies for treating individuals differently, some charge that they will harm those who are already disadvantaged.<sup>83</sup> These criticisms, however, also require a comparative analysis. Consider, for instance, the claim that mask or vaccination mandates should not be enforced using fines, because fines

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<sup>77</sup>See DeLuca et al., *supra* note 65 (noting that COVID-19 policies must eventually be tailored to lower economic costs).

<sup>78</sup>Kofler & Baylis, *supra* note 61, at 381.

<sup>79</sup>See Hemel & Malani, *supra* note 61, at 17-18.

<sup>80</sup>Phelan, *supra* note 19, at 1597.

<sup>81</sup>This makes somewhat puzzling the suggestion in Daniel Goldberg, *The Problem with Individual-Level Interventions to Curb the COVID-19 Pandemic*, HARVARD L.: BILL OF HEALTH (Dec. 9, 2020), <https://blog.petrieflom.law.harvard.edu/2020/12/09/individualism-covid-pandemic-public-health/> [<https://perma.cc/7Q8U-CJRM>], that “if an intervention depends for its efficacy on thousands of individual, micro-level decisions, the intervention is extremely unlikely to be effective.” Vaccination is precisely such an intervention, but has been successful in combating the pandemic, even without population-wide mandates. Masks, even when mandated, are likewise an individual-level intervention.

<sup>82</sup>See generally Dyani Lewis, *COVID-19 Rarely Infects Through Surfaces. So Why Are We Still Deep Cleaning?*, 590 NATURE 26 (2021).

<sup>83</sup>Ifeoma Ajunwa, *COVID-19 Immunity as Passport to Work Will Increase Economic Inequality*, HARVARD L.: BILL OF HEALTH (Dec. 2, 2020), <https://blog.petrieflom.law.harvard.edu/2020/12/02/covid-immunity-passport-economic-inequality/> [<https://perma.cc/PZ8F-TYWF>].

disproportionately burden the poor.<sup>84</sup> Even if fines can create disparate financial burdens, they may nevertheless promote equity overall if they reduce the spread of COVID-19, given the disparate burden of COVID-19 in poor communities.<sup>85</sup> Fines may also be less burdensome than alternative penalties, such as “employment suspension or stay-at-home orders for persons in designated high-priority groups who refuse vaccination.”<sup>86</sup> Rather than jumping to the claim that fines should never be used, it would be preferable to first consider whether fines could be designed to equitably consider differences in individuals’ financial circumstances.<sup>87</sup>

Others have complained that certain tailored policies, such as immunity certification, will unfairly disadvantage individuals who are already economically or socially disadvantaged.<sup>88</sup> For instance, if unvaccinated individuals are required to attend virtual church services or fitness classes, or to pick up restaurant orders curbside, they may feel excluded from valuable social interactions and opportunities to see friends and family. And if they are not allowed to preach, teach fitness classes, or work in restaurants, they may be harmed economically. Yet, under a one-size-fits-all closure, unvaccinated individuals would be no freer to pursue these activities. The only advantage for them would be relative—nobody else would be able to do these things.<sup>89</sup> And it’s unclear that this relative advantage would leave unvaccinated people better off overall. Individuals at high risk might gain personally and economically in absolute terms from others being able to do what they cannot. For instance, high-risk individuals could have loved ones pick items up for them, run errands, or provide other forms of support.<sup>90</sup> Meanwhile, absent closures, high-risk individuals would be subject to greater risk of bad medical outcomes<sup>91</sup>—safe participation in many activities will be *de facto* contingent on one’s personal risk, whether or not that risk is *de jure* codified by immunity certification or other tailored policies.

It is also worth noting that basing immunity certification on prior infection rather than only on vaccination may ameliorate rather than exacerbate inequities, because individuals in disadvantaged communities are more likely to have already been infected.<sup>92</sup> This point is relevant to recently raised concerns that immunity-based policies may increase economic inequality by rewarding “those who could afford the care needed to

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<sup>84</sup>Michelle M. Mello et al., *Ensuring the Uptake of Vaccines Against SARS-CoV-2*, 383 NEW ENG. J. MED. 1296, 1298 (2020) (arguing that for violations of vaccination mandates, “relatively substantive penalties could be justified, including employment suspension or stay-at-home orders for persons in designated high-priority groups who refuse vaccination,” but “neither fines nor criminal penalties should be used” because “fines disadvantage the poor”); see also Gatter & Mohapatra, *supra* note 62, at 29-30 (suggesting alternatives to fines).

<sup>85</sup>See Samrachana Adhikari et al., *Assessment of Community-Level Disparities in Coronavirus Disease 2019 (COVID-19) Infections and Deaths in Large US Metropolitan Areas*, JAMA NETWORK OPEN, July 28, 2020, at 1, 2 (counties with higher poverty rates experience a disproportionately high rate of COVID-19 infections).

<sup>86</sup>Mello et al., *supra* note 84, at 1298 (advocating these policies).

<sup>87</sup>See, e.g., Beth A. Colgan, *Graduating Economic Sanctions According to Ability to Pay*, 103 IOWA L. REV. 53, 60–61 (2017) (describing growing support for gradation in economic sanctions generally).

<sup>88</sup>Ravitsky & Weinstock, *supra* note 61, at 173 (“When cast against the backdrop of structural inequality, immunity licenses risk locking structural inequalities into place.”); Farahany, *supra* note 64 (“Making participation in schools, work or leisure contingent on vaccination status will further entrench the economic inequities of the global pandemic.”).

<sup>89</sup>Persad & Emanuel, *supra* note 61 (arguing that “bringing every person down to the least advantaged position does not solve the problem of disadvantage”).

<sup>90</sup>*Precautions for People at Higher Risk*, AM. RED CROSS, <https://www.redcross.org/get-help/how-to-prepare-for-emergencies/types-of-emergencies/coronavirus-safety/for-people-at-higher-risk.html> [<https://perma.cc/8ZWJ-UZW6>] (recommending that older adults “[c]reate a personal support network of trusted individuals” to help them while they distance from others).

<sup>91</sup>Williamson et al., *supra* note 24.

<sup>92</sup>Hall & Studdert, *supra* note 61, at 2244.

survive.”<sup>93</sup> While it is crucial to address background injustices that generate inequitable access to care, declining to enact immunity-based policies will not help address inequities between people who survive and those who do not: people who do not survive COVID-19 cannot work or participate in social activities, whether or not immunity-based policies are enacted. In contrast, while immunity-based policies also cannot redress inequities in survival, they could avoid leaving survivors of COVID-19 infection subject to restrictions that may be disproportionate to their present risk of contracting or spreading infection.<sup>94</sup>

A different concern about the exacerbation of disadvantage relates to costs—in particular, the cost of testing for policies that require negative infection tests, or of vaccinations and antibody tests for policies based on immunity. Vaccines—and increasingly testing—are available at zero cost in the United States and many other countries because the social benefits of access to these interventions are large.<sup>95</sup> But even a tailored policy that depends on tests or vaccines to which access is unequal might still improve equity, relative to feasible untailored alternatives, by slowing the spread and disparate harm of COVID-19 relative to a policy without restrictions and by permitting more economic activity than a policy with untailored restrictions.

As discussed above, it is also doubtful whether strict, untailored restrictions on low-risk people—for instance, on people who have been vaccinated—even if inequality in access remains, would pass muster legally or be consistent with core principles of public health law and policy. For instance, it seems difficult to legally or ethically defend restrictions on at-home or religious worship gatherings comprising only vaccinated people, or the subjection of vaccinated people to interstate or international travel quarantines.<sup>96</sup> Such restrictions are justified when they substantially reduce the risk of death or harm to others. They are not obviously justified as a way of enforcing *de jure* identical treatment of people whose risk profiles are *de facto* very different, even in service of equity goals. I therefore disagree with the claim that “we shouldn’t even be talking about vaccine passes until we get to the point where everyone in all communities who want the vaccine have an equal chance of being able to get it.”<sup>97</sup> Access to many goods and capabilities—ranging from driving to housing to education—is not as equal as it should be, but depriving everyone of the benefits of unequally distributed goods or ignoring factual differences in risk may neither respect individuals’ liberty interests nor ultimately serve equity.

Some raise a different worry, about exploitation of the disadvantaged rather than their exclusion.<sup>98</sup> Ravitsky and Weinstock, for instance, claim that “when a regime of immunity licenses is introduced into a context of structures of disadvantage, those holding them would find themselves subject to pressures to continue to occupy poorly remunerated and insecure jobs now deemed necessary, as those more advantaged now work

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<sup>93</sup>E.g. Ajunwa, *supra* note 83.

<sup>94</sup>Hall & Studdert, *supra* note 61, at 2244.

<sup>95</sup>Govind Persad, *Choosing Affordable Health Insurance*, 88 GEO. WASH. L. REV. 819, 882-83 (2020) (discussing the positive externalities of covering vaccinations and prenatal care in insurance plans).

<sup>96</sup>Carmichael v. Ige, 470 F. Supp. 3d 1133, 1146 (D. Haw. 2020); *see also* Bayley’s Campground Inc. v. Mills, 463 F. Supp. 3d 22, 32 (D. Me. 2020), *reconsideration denied*, No. 2:20-CV-00176-LEW, 2020 WL 3037252 (D. Me. June 5, 2020), *aff’d*, 985 F.3d 153 (1st Cir. 2021).

<sup>97</sup>Grace Tatter & Meghna Chakrabarti, *Vaccine Passports: Public Health Tool, or Invasion of Civil Liberties?*, WBUR: ON POINT’s (Mar. 9, 2021), <https://www.wbur.org/onpoint/2021/03/09/vaccine-passports-public-health-tool-or-invasion-of-civil-liberties> [<https://perma.cc/J4FN-3U4X>] (reporting statement by ethicist Ruth Faden).

<sup>98</sup>*See* Phelan, *supra* note 19 (raising concerns about “corporate entities being the beneficiaries of the immunocapital of workers”); *see also* Kofler & Baylis, *supra* note 61, at 381 (discussing implications of potential “biological passports” that enable employers and insurers to discriminate).

comfortably from home.”<sup>99</sup> While this argument is directed at infection-based immunity licenses, it would also seemingly apply to vaccine-derived immunity licenses.<sup>100</sup> Yet, this argument faces two major problems. First, tailored policies do not force people to engage in activities, but only permit them to do so. Analogously, many people are permitted to obtain driver’s licenses, but elect not to obtain them. Second, even though background inequities may create disparate pressures to take risks, prohibiting tailored policies does not effectively address those pressures. Consider the problem Ravitsky and Weinstock associate with tailored policies, that of “poorly remunerated and insecure jobs.”<sup>101</sup> One-size-fits-all closures simply replace that problem with the problem of unemployment, while untailored reopening means that people at high risk of infection end up working in these jobs.<sup>102</sup> Refusing to issue immunity licenses would not achieve equity or persuade well-off people to work as grocery cashiers; rather, poorer people who are not immune will be likely to work in these jobs and expose themselves to infection.<sup>103</sup> A better approach would be to work for improved labor policies and protections in tandem with tailored policies that calibrate permitted activities to risk.

When assessing concerns about the exacerbation of existing inequities, conjectural inequities resulting from tailored policies must be weighed against the real and present inequities flowing from untailored policies. One recent commentary argues that “[r]equiring or encouraging immunity verification for employment, housing, education, or even for entering a movie theater or shopping center could lead to an increase in testing, and thus a compounding of the privacy harms related to testing.”<sup>104</sup> While increased testing can have privacy risks, testing also produces health and equity benefits by helping individuals learn whether they are infected and by stemming the spread of a pandemic with inequitable effects. The same weighing applies to the concern that “[i]mmunity passport or verification programs could create a lasting shift in social norms, laying the groundwork for future programs that use genetics or health status as conditions for accessing certain rights and privileges.”<sup>105</sup> Concerns about shifting social norms would seemingly apply to any COVID-19 policy: one could equally argue that business closures, mask mandates, or travel restrictions in response to COVID-19 could lay the groundwork for future restrictions for other reasons. The specific suggestion that tailored COVID-19 policies might encourage future programs to condition rights on genetics or health status is also questionable.<sup>106</sup> Programs—such as driver’s

<sup>99</sup>Ravitsky & Weinstock, *supra* note 61, at 173.

<sup>100</sup>See Kofler & Baylis, *supra* note 61, at 381 (noting that vaccine certification offers people a choice to “opt in” to higher societal stratification with fewer restrictions due to COVID-19).

<sup>101</sup>Ravitsky & Weinstock, *supra* note 61, at 173.

<sup>102</sup>See Thomas M. Selden & Terceira A. Berdahl, *Risk of Severe COVID-19 Among Workers and Their Household Members*, 181 J. AM. MED. ASS’N INTERNAL MED. 120, 121 (2021) (discussing that somewhere between 56.7 and 74.3 million essential workers who could not work from home were themselves at increased risk of contracting COVID-19, or lived with someone at increased risk); Patricia Cohen & Tiffany Hsu, ‘Sudden Black Hole’ for the Economy With Millions More Unemployed, N.Y. TIMES, <https://www.nytimes.com/2020/04/09/business/economy/unemployment-claim-numbers-coronavirus.html> [<https://perma.cc/D4EZ-PF9T>] (last updated May 28, 2020) (stating that mass business closures in every state caused 6.6 million workers to lose their jobs at the start of the COVID-19 pandemic).

<sup>103</sup>See Lazaro Gamio, *The Workers Who Face the Greatest Coronavirus Risk*, N.Y. TIMES (Mar. 15, 2020), <https://www.nytimes.com/interactive/2020/03/15/business/economy/coronavirus-worker-risk.html> [<https://perma.cc/S447-L2WC>] (explaining that many essential workers who work low-paying jobs face elevated risks of contracting COVID-19).

<sup>104</sup>Tiffany C. Li, *Privacy in Pandemic: Law, Technology, and Public Health in the COVID-19 Crisis*, 52 LOY. U. CHI. L.J. (forthcoming 2021) (manuscript at 55), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3690004#](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3690004#) [<https://perma.cc/X9AC-DBKS>].

<sup>105</sup>*Id.* (manuscript at 56).

<sup>106</sup>See *id.* (manuscript at 55) (speculating on the potential “normalization” of sharing private health data).

licensing and employee vaccination requirements—already condition participation in certain activities on health status.<sup>107</sup> But they also require that the conditions be relevant to the activities at issue and that reasonable accommodations be made for those unable to participate.<sup>108</sup> Tailored COVID-19 policies should be similar.

### 3. Inconsistency with Deservingness

Others understand equity as responding to individual choice or deservingness, and argue that tailored policies treat individuals differently based on unchosen differences.<sup>109</sup> Hank Greely, for instance, argues that immunity-based policies are not grounded in “any kind of merit or positive actions, but . . . something that most people will have had little or no control over—who has, and who has not, contracted COVID-19.”<sup>110</sup> Greely further opines that critics of such policies “will be right” and that while immunity-based policymaking “may make sense in terms of protecting people and their societies from the worst ravages of SARS-CoV-2 . . . it will not be fair.”<sup>111</sup> This critique of immunity-based policies echoes complaints made about activity-based restrictions.<sup>112</sup>

Though Greely does not explain in depth why immunity-based policies are unfair, his references to “merit or positive actions”<sup>113</sup> and individual control suggests he believes fairness requires looking backward to ensure that differential treatment or outcomes reflect individuals’ past meritorious, or at least voluntary, choices. Many others have similarly endorsed “responsibility-catering,” “desert-catering,” luck-neutralizing, or “meritocratic” accounts of fairness.<sup>114</sup>

Do tailored policies violate these backward-looking conceptions of fairness? I argue that they need not do so, and that the backward-looking conceptions are, in any event, normatively questionable. First, just as tailored policies are not the fundamental

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<sup>107</sup> See generally U.S. DEP’T OF TRANSP., NAT’L HIGHWAY TRAFFIC SAFETY ADMIN., MEDICAL REVIEW PRACTICES FOR DRIVER LICENSING, REPORT NO. DOT HS 812 402 (Apr. 2017), [https://www.nhtsa.gov/sites/nhtsa.dot.gov/files/documents/812402\\_medicalreviewdriverlicense.pdf](https://www.nhtsa.gov/sites/nhtsa.dot.gov/files/documents/812402_medicalreviewdriverlicense.pdf) [<https://perma.cc/N4HC-5J8G>] (examining the medical requirements for driver’s licenses across the United States); Jennifer M. Schwartzott & Theresa E. Rusnak, *Can Private Sector Employers Require Employees To Be Vaccinated for COVID-19?*, N.Y. BAR ASS’N (Feb. 4, 2021), <https://nysba.org/covid-19-vaccinations-can-private-sector-employers-require-employees-to-be-vaccinated/> [<https://perma.cc/MR4N-K9PV>] (discussing instances where courts have upheld employers’ vaccination requirements).

<sup>108</sup> See Debbie Kaminer, *Vaccines in the Time of COVID-19: How Government and Businesses Can Help Us Reach Herd Immunity*, WIS. L. REV. FORWARD, Nov. 15, 2020, at 120-21 (“Under the ADA, a reasonable accommodation is one that can be done without ‘significant difficulty or expense’ . . . However, it should be noted that the EEOC has understandably discouraged mandatory vaccination policies that do not include medical exemptions.”).

<sup>109</sup> Ravitsky & Weinstock, *supra* note 61, at 173.

<sup>110</sup> Greely, *supra* note 61, at 18.

<sup>111</sup> *Id.*

<sup>112</sup> See, e.g., Sarah Isgur, *Would It Be Better to Let Airlines File for Chapter 11 Bankruptcy?*, THE DISPATCH (Mar. 30, 2020), <https://thedispatch.com/p/would-it-be-better-to-let-airlines> [<https://perma.cc/ZYC7-D4QG>] (“[T]he vast majority of the businesses facing an existential crisis did nothing wrong . . . These businesses are in danger of failing because a governor or county commissioner government asked (or in the majority of states now, ordered) them to shut down for the public good.”).

<sup>113</sup> Greely, *supra* note 61, at 18.

<sup>114</sup> For responsibility-catering views, see ERIC RAKOWSKI, EQUAL JUSTICE (1991); Ronald Dworkin, *What is Equality? Part 2: Equality of Resources*, 10 PHIL. & PUB. AFFS. 283 (1981); Daniel Markovits, *Luck Egalitarianism and Political Solidarity*, 9 THEORETICAL INQUIRIES L. 271, 272-73 (2008). For desert-catering views, see Richard J. Arneson, *Luck Egalitarianism and Prioritarianism*, 110 ETHICS 339 (2000); John E. Roemer, *A Pragmatic Theory of Responsibility for the Egalitarian Planner*, 22 PHIL. & PUB. AFFS. 146 (1993). For meritocratic views, see THOMAS MULLIGAN, JUSTICE AND THE MERITOCRATIC STATE (2018). See generally Elizabeth Anderson, *How Should Egalitarians Cope with Market Risks?*, 9 THEORETICAL INQUIRIES L. 239 (2007) (summarizing these views).

source of inequality, they are not the fundamental source of outcomes that fail to track desert. The blame lies with the virus, which does not apportion its harmful effects in proportion to desert. Even without tailored policies, people who are immune would factually be freer to take risks without becoming infected, while those not immune would be in danger through no fault of their own.<sup>115</sup> Meanwhile, unlucky high-risk businesses would face similar problems without tailored policies. Many people are not interested in dining indoors, sitting in movie theaters, or flying on airplanes, restrictions or no restrictions.<sup>116</sup>

Second, the idea that fairness must look backward is dubious. Many policies outside the COVID-19 context treat individuals differently based on unchosen differences, to achieve forward-looking goals: for instance, requiring a license to drive treats individuals who are unable to drive differently from others.<sup>117</sup> More generally, economic goods are not generally distributed on the basis of past merit.<sup>118</sup> Many people labor skillfully to develop products and services that ultimately fail because of bad luck.<sup>119</sup> Similarly, if a firm's bad luck leads it to provide a service or product that proves unsafe, it has no legal entitlement to compensation when that product is removed from the market.<sup>120</sup>

That fairness need not look backwards is fully consistent with assisting people who find themselves in genuine need, irrespective of judgments about their control over their circumstances. One compelling way of meeting these genuine needs draws on the political theorist Professor Elizabeth Anderson's idea of "democratic equality."<sup>121</sup> Anderson's goal is to ensure that all people are able to participate equally as citizens, for instance by voting and participating in civil society.<sup>122</sup> Under Anderson's democratic equality

<sup>115</sup>See Greely, *supra* note 61, at 18.

<sup>116</sup>See, e.g., Henry Blodget, *Yes, We Should Bail Out Companies – But Not Shareholders*, BUS. INSIDER: INSIDER TODAY (Apr. 16, 2020, 10:30 AM), <https://www.businessinsider.com/government-bail-out-companies-not-shareholders-2020-4> [<https://perma.cc/7APC-PDTW>] (“Even without a shutdown, the usage of airlines, hotels, restaurants, and other companies would still be radically lower than before the crisis.”); Stacey Haas et al., *Eating Out(side): Restaurant Dining in the Next Normal*, MCKINSEY & CO. (Aug. 28, 2020), <https://www.mckinsey.com/industries/retail/our-insights/eating-out-side-restaurant-dining-in-the-next-normal#> [<https://perma.cc/263K-A2SA>] (“More than 80 percent of survey respondents reported medium to high anxiety levels about the idea of returning to dine-in restaurants.”); see also Adam Brzezinski et al., *The Cost of Staying Open: Voluntary Social Distancing and Lockdowns in the US*, VOXEU (June 12, 2020), <https://voxeu.org/article/voluntary-social-distancing-and-lockdowns-us> [<https://perma.cc/V57A-UKXA>] (“[T]he economic costs of the pandemic will be substantial even in the absence of lockdowns, since the spread of the virus causes a significant increase in voluntary social distancing.”) (citation omitted); Steve Goldstein, *Sweden Didn't Impose a Lockdown, but Its Economy Is Just As Bad As Its Neighbors*, MARKET WATCH (June 27, 2020, 8:51 AM), <https://www.marketwatch.com/story/sweden-didnt-impose-a-lockdown-its-economy-is-just-as-bad-as-its-neighbors-who-did-2020-06-25>. [<http://web.archive.org/web/20210425162305/https://www.marketwatch.com/story/sweden-didnt-impose-a-lockdown-its-economy-is-just-as-bad-as-its-neighbors-who-did-2020-06-25>] (“The simple answer is that in a pandemic, most people will change their behavior to avoid catching the virus... . People will shun public transport, shopping, and other crowded places, and even think twice about letting their children go to school.”).

<sup>117</sup>See William E. Crozier & Brandon L. Garrett, *Driven to Failure: An Empirical Analysis of Driver's License Suspension in North Carolina*, 69 DUKE L.J. 1585, 1591 (2020) (explaining that driver licenses provide liberty and property interests by “affecting [the holder's] livelihood and ability to travel”).

<sup>118</sup>Anderson, *supra* note 114, at 261 (arguing that “desert-catering individually allocating rules are incompatible with justice and with the virtues of the market system,” and that “[w]e must allow market signals to do their work, which requires that luck influence distributive outcomes”).

<sup>119</sup>See *id.* at 248 (“Outcomes are the joint product of inner merit and external factors... . The choices that any individual makes in such market games are at best educated guesses.”).

<sup>120</sup>Taking “Takings Rights” Seriously: A Debate on Property Rights Legislation Before the 104th Congress, 9 ADMIN. L.J. AM. U. 253, 287 (1995) (debate).

<sup>121</sup>Elizabeth Anderson, *Fair Opportunity in Education: A Democratic Equality Perspective*, 117 ETHICS 595 (2007).

<sup>122</sup>See *id.* at 615-20.

approach, the goal should be to prevent the social and economic exclusion of people who are at risk of spreading or contracting COVID-19, not to restore those people to the position they would have been in had the pandemic never happened or to treat everyone identically. This approach has implications for tailored policies: in some cases, equal citizenship may require permitting everyone to participate in a risky activity, like in-person voting. But in most cases, equal citizenship is compatible with alternative modes of participation, such as remote access or takeout dining.<sup>123</sup>

An equal citizenship approach also implies that, while society should ensure the provision of a decent minimum, it need not cover the losses professional athletes or musicians incur when large venues are closed due to COVID-19,<sup>124</sup> or to equalize economic outcomes between those who are and are not subject to tailored restrictions. It also undercuts the idea that fairness requires compensating businesses that are required to close.<sup>125</sup> Businesses may have legal personhood, but they are not entitled to equal citizenship, nor are their investors entitled to protection against economic change.<sup>126</sup> Accordingly, society should neither accept pandemic harms to protect existing businesses, nor financially bail out businesses beyond what is necessary to prevent unemployment or destitution for individuals.<sup>127</sup>

Criticisms of backward-looking frameworks also apply to the argument that “corporate entities” may become “the beneficiaries of the immunocapital of workers” if tailored policies based on immunity are adopted.<sup>128</sup> There is no obvious reason why a firm’s profiting from a worker’s “immunocapital” is different from its profiting from a basketball player’s height, a trucker’s skill in driving, or a deep-sea diver’s willingness to take risks.<sup>129</sup> The emphasis should be on fair compensation for all jobs, not an

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<sup>123</sup>*Cf. id.* at 618 (explaining that equal citizenship sometimes involves “more intensive investment in the disadvantaged than an equality of resources standard would allow,” and that even “where the egalitarian standard cannot be met,” policies should still enable all to “meaningfully participate in community life”).

<sup>124</sup>*Cf. Anderson, supra note 114*, at 267-68 (“While the most advantaged may find it distressing to be subject to market risks that threaten to reduce them to merely middling status, there is no public interest in securing them against such risks.”).

<sup>125</sup>See Oren Cass, *How to Solve the Fixed-Cost Crisis*, ATLANTIC (Mar. 19, 2020), <https://www.theatlantic.com/ideas/archive/2020/03/create-taking-fund-compensate-businesses/608311/> [<https://perma.cc/6JFE-JLU7>] (describing proposed legislation for a Public-Health Takings Fund to compensate businesses for fixed costs incurred during COVID-19 pandemic); see also Konnoth, *supra note 59* at 204 (“[L]egislatures may offer offsets that minimize burdens to further insulate their regulation from judicial invalidation.”).

<sup>126</sup>See, e.g., U.S. Sec. & Exch. Comm’n, *What is Risk?*, INVESTOR.GOV, <https://www.investor.gov/introduction-investing/investing-basics/what-risk> [<https://perma.cc/8AWG-EFKF>] (noting that investors are not insured for securities or mutual fund investments).

<sup>127</sup>See Blodget, *supra note 116* (“Airlines, hotel, and other companies provide real value to our country. They also provide employment to millions of dedicated employees. It’s in our collective interest to preserve these services and jobs. But that doesn’t mean we have to insure the losses of those who invested in them.”); cf. Kathryn Judge, *The Truths About the COVID-19 Bailouts*, FORBES (Apr. 15, 2020, 9:33 AM), <https://www.forbes.com/sites/kathrynjudge/2020/04/15/the-covid-19-bailouts/#19fc44403b77> [<https://perma.cc/HSN9-HZ5P>] (“Given the massive economic contraction underway, the government should do as much as it can to protect productive enterprises and their employees, but that doesn’t have to entail protecting investors in those enterprises. The optimal policy would help businesses in duress get the financing they need to continue operating, while still forcing shareholders and creditors to take losses when appropriate.”).

<sup>128</sup>Phelan, *supra note 19*. While this criticism is directed at licenses based on infection-derived immunity, it would seemingly also apply to licenses based on vaccine-derived immunity—another form of “immunocapital.”

<sup>129</sup>This point challenges the suggestion in Farahany, *supra note 61*, that people who decline a COVID-19 vaccine “should face no penalty for declining to do so.” Even if they should face no governmental sanctions, it does not follow that any economic consequences they face should be neutralized. People frequently obtain economic benefits from taking far more substantial risks than receipt of an authorized and tested vaccine, and, as Farahany notes, many employers require other vaccinations such as flu vaccines.

exceptionalist concern about undeserving actors profiting from their own, or others', immunity or health status.

#### 4. Inequitable Enforcement

Rather than—or in addition to—arguing that tailored policies, such as mask requirements and immunity certification, are inequitable in principle, many argue that they will be inequitably enforced in practice.<sup>130</sup> This concern, while important, applies even more seriously to the enforcement of untailored policies. Meanwhile, non-enforced policies trade inequitable enforcement for the much worse problem of an uncontrolled pandemic with starkly inequitable effects.

First, untailored restrictions are likely to require a larger scale of enforcement than tailored ones. Dr. Natalie Kofler and Professor Francoise Baylis observe that that Black New Yorkers were disproportionately subject to arrest by officers enforcing physical distancing.<sup>131</sup> This observation makes it striking that Kofler and Baylis avoid any criticism of physical distancing and instead direct their criticism at tailored policies that might reduce the need for physical distancing.<sup>132</sup> The same is true for concerns about inequity in tailored policies. For instance, if businesses are entirely closed, unauthorized economic interactions and gatherings will still take place, presenting the choice of whether to enforce limitations—potentially inequitably—or accept unchecked spread.

Meanwhile, though abandoning public health restrictions avoids the risk of inequitable enforcement, it inflicts hugely disparate death, illness, and economic harm on the least advantaged. The disparate harms of the COVID-19 pandemic should be remembered when evaluating the equity effects of tailored policies that aim to quell the pandemic, including not only immunity-based policies but also mask requirements. An initial critique of mask requirements frames these requirements as presenting a choice between “efficacy”—reducing the spread of COVID-19—and avoiding unjust discrimination against Black Americans who wear masks.<sup>133</sup> It ultimately concludes that “a mask requirement, while potentially effective, very likely will lead to unchecked racial discrimination and add to the unfair burden of this pandemic on racial minorities, especially Black Americans,” and so argues that “a mask recommendation is the better solution for now” and that “the likelihood of increased racial discrimination undercuts the public health justification for a mask requirement.”<sup>134</sup> This analysis is inadequate. In light of the disparate burden of COVID-19 in Black and other minority communities,<sup>135</sup> a mask mandate is likely to advance not only efficacy, but also equity, and to decrease rather than increase the unfair burden of the pandemic. Significantly, a majority of Black poll respondents during the introduction of mask mandates supported or strongly supported them and did so at a greater rate than white respondents.<sup>136</sup>

<sup>130</sup>Kofler & Baylis, *supra* note 61, at 380 (“With increased monitoring comes increased policing, and with it higher risks of profiling and potential harms to racial, sexual, religious or other minority groups.”); Phelan, *supra* note 19 (arguing that certification of immunity “would be ripe for both corruption and implicit bias,” and that “[e]xisting socioeconomic, racial, and ethnic inequities might be reflected in the administration of such certification”).

<sup>131</sup>Kofler & Baylis, *supra* note 61, at 380.

<sup>132</sup>*Id.* at 380–81 (criticizing monitoring and mask mandates for producing societal stratification).

<sup>133</sup>*Id.*

<sup>134</sup>Gatter & Mohapatra, *supra* note 62, at 27–29.

<sup>135</sup>*See, e.g.*, Jonathan M. Wortham et al., *Characteristics of Persons Who Died with COVID-19—United States, February 12–May 18, 2020*, 69 MORBIDITY & MORTALITY WKLY. REP. 923–24 (2020).

<sup>136</sup>MORNING CONSULT & POLITICO, NATIONAL TRACKING POLL NO. 200766 172–73 (2020), <https://www.politico.com/f/?id=00000173-7329-d26c-at77-7b7f646a0000> [<https://perma.cc/Z9HL-3GTW>] (56% of

Concerns about disparate enforcement of mask mandates against people with disabilities similarly appear inadequate to justify abandoning mandates rather than equitably enforcing them. A group of scholars argued that, even though “mask recommendations are unlikely to result in the same degree of mask-wearing as would mask requirements and, therefore ... are not as likely to slow the spread of the virus as would mask requirements ... the risk of uninformed and discriminatory enforcement of mask requirements against people with disabilities undercuts the justification for mask requirements.”<sup>137</sup> This argument overlooks the likelihood that disparate risk from COVID-19 spread justifies mask requirements on equity grounds, even though its supporters recognize the disparate risk that COVID-19 spread presents to people with disabilities.<sup>138</sup> While “[m]ask recommendations, unlike requirements ... eliminate the need for an enforcement mechanism and thereby substantially reduce the risk that a person with a non-obvious disability is faced with inappropriate or intrusive questioning,”<sup>139</sup> replacing enforceable requirements with recommendations may substantially increase the risk that people with disabilities contract, are hospitalized for, and die of COVID-19.<sup>140</sup> This striking downside of mask recommendations presents a compelling comparative equity case for imposing mask requirements, while coupling those requirements with education on appropriate enforcement and with accommodations for those medically unable to wear masks. It is therefore unsurprising that disability advocates and people with disabilities have spoken in support of mask requirements.<sup>141</sup>

Inequitable enforcement and over policing are dangers for a plethora of governmental policies, including business closures and public health requirements outside the COVID-19 context such as driver licensing and food safety. Yet the proper response to inequitable enforcement is to improve equity in enforcement, not to abandon public health efforts for fear of inequitable enforcement. While it may pose a danger of inequitable enforcement, a mask mandate—even if imperfectly enforced—is better able than a mere recommendation to prevent the much more inequitable and harmful outcome of disproportionate deaths from COVID-19 in Black and other minority communities and among people with disabilities.<sup>142</sup>

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black registered voters strongly support a mask requirement, versus 52% of white registered voters, and only 14% somewhat or strongly oppose such a requirement, versus 24% of white voters); THE MARQUETTE LAW SCHOOL POLL AUGUST 4-9, 2020 MARQ. L. SCH. 1, 85 (2020), <https://law.marquette.edu/poll/wp-content/uploads/2020/08/MLSP62CrosstabsRV.pdf> [<https://perma.cc/5QXC-Y2PL>] (83% of black registered voters, vs. 68% of white registered voters); see generally *Poll: 82 Percent of Voters Support a National Face Mask Mandate*, THE HILL (Aug. 3, 2020), <https://thehill.com/hilltv/what-americas-thinking/510317-poll-82-percent-of-voters-support-a-national-mask-mandate> [<https://perma.cc/5AVC-DWLA>].

<sup>137</sup> Pendo et al., *supra* note 62, at 12.

<sup>138</sup> *Id.* at 11.

<sup>139</sup> *Id.*

<sup>140</sup> On the inadequacy of mere recommendations, see Goldberg, *supra* note 81.

<sup>141</sup> E.g., Meg Shaw, *Disabilities Rights Ohio: Cleveland Mask Mandate Protects Individuals with Disabilities*, *Per ADA*, NEWS 5 CLEVELAND, <https://www.news5cleveland.com/news/continuing-coverage/coronavirus/local-coronavirus-news/disabilities-rights-ohio-cleveland-mask-mandate-protects-individuals-with-disabilities-per-ada> [<http://web.archive.org/web/20210425162816/https://www.news5cleveland.com/news/continuing-coverage/coronavirus/local-coronavirus-news/disabilities-rights-ohio-cleveland-mask-mandate-protects-individuals-with-disabilities-per-ada>] (last updated July 9, 2020) (reporting statement of executive director for Disabilities Rights Ohio, Kerstin Sjoberg, that “mask requirements, overall, are positive for individuals with disabilities,” because they “better protect[] the population of people from contracting the virus,” and statement of Jess Wallace, a Cleveland resident with a lung disorder, in favor of mask requirements).

<sup>142</sup> See *id.*; Goldberg, *supra* note 81 (noting that mask mandates are more effective than mask recommendations); Wortham et al., *supra* note 135, at 923-924 (presenting evidence of the disproportionate effect of the COVID-19 pandemic on Black Americans).

While—given the immensely inequitable harms of untailed policies—concerns about inequitable enforcement are an insufficient reason to abandon tailored policies, equitable enforcement remains important. Equity might be better realized by training officials on various types of bias and having enforcement conducted by specialized officials, rather than purely or primarily by police.<sup>143</sup> Public health inspections are used routinely in other settings, like restaurants, and can be consistent with equity.<sup>144</sup> Imposing substantial penalties for a failed inspection, and making the inspections unpredictable, could help deter violations without requiring as many enforcement actions.<sup>145</sup> Businesses could also be incentivized to self-enforce tailored policies, just as the law incentivizes bars to prevent underage drinking.<sup>146</sup> The requirement to show an ID to enter a bar is not regarded as unacceptably inequitable or divisive.

## B. HARM PREVENTION

Tailored policies have been criticized for imperfectly preventing harm because they rely on uncertain and changing information about risk, and for incentivizing counterproductive behavior or fraudulent claims. This Part considers those arguments.

### 1. Uncertainty

A common criticism of tailored policies is that because policymakers cannot be certain that some activities or groups are lower-risk, drawing distinctions based on uncertain information presents an unacceptable risk of harm.<sup>147</sup> This argument has been used to justify untailed closures and safety measures, such as the closure of playgrounds or continued emphasis on strict surface hygiene.<sup>148</sup> It has also been used to criticize the use of imperfect antibody tests in immunity-based policies,<sup>149</sup> and to criticize group-based policies based on imperfect proxies for risk, such as age.<sup>150</sup> More recently, it has been used to criticize the use of vaccine certification as a prerequisite for travel.<sup>151</sup>

<sup>143</sup>*Cf.* Roge Karma, *4 Ideas to Replace Traditional Police Officers*, VOX (June 24, 2020, 7:30 AM), <https://www.vox.com/2020/6/24/21296881/unbundle-defund-the-police-george-floyd-rayshard-brooks-violence-european-policing> [<http://web.archive.org/web/20210425163834/https://www.vox.com/2020/6/24/21296881/unbundle-defund-the-police-george-floyd-rayshard-brooks-violence-european-policing>]; Derek Thompson, *Unbundle the Police*, ATLANTIC (June 11, 2020), <https://www.theatlantic.com/ideas/archive/2020/06/unbundle-police/612913/> [<https://perma.cc/9G7R-J5B7>].

<sup>144</sup>*See* Daniel E. Ho, *Equity in the Bureaucracy*, 7 U.C. IRVINE L. REV. 401, 409-10 (2017) (explaining restaurant inspection process in Washington State).

<sup>145</sup>*New York State Rest. Ass'n v. New York City Dep't of Health & Mental Hygiene*, 303 F. Supp. 2d 265, 273 (E.D.N.Y. 2004) (discussing “the deterrent value of . . . penalties and fines”).

<sup>146</sup>*See, e.g.,* Motif, Ltd. v. Iowa Dep't of Commerce-Alcoholic Beverages Div., No. 11-0793, 2012 WL 170211, at \*1 (Iowa Ct. App. Jan. 19, 2012) (explaining system for identification checks to enter bars).

<sup>147</sup>Lewis, *supra* note 82, at 28 (explaining that “definitively ruling out surface transmission is hard” and that “authorities can be reluctant to tell people not to be cautious”).

<sup>148</sup>*Id.*

<sup>149</sup>*E.g.,* Shannon Palus, *I Kind of Regret Getting an Antibody Test*, SLATE (May 7, 2020, 4:01 PM), <https://slate.com/technology/2020/05/coronavirus-antibody-test-pointless.html> [<https://perma.cc/86TZ-BCMC>] (claiming that “even if the test returned positive, I shouldn’t change anything about my daily behavior”).

<sup>150</sup>*E.g.* Chris Farrell, *A Pandemic Lockdown Just for Older People? No!*, FORBES (July 3, 2020, 8:00 AM), <https://www.forbes.com/sites/nextavenue/2020/07/03/a-pandemic-lockdown-just-for-older-people-no/#f8cf9ad457b3> [<https://perma.cc/2HMF-JG95>] (“[M]any young Americans live with the same underlying health conditions that put them at risk to the coronavirus as older ones, including diabetes, asthma and obesity.”).

<sup>151</sup>Natalie Kofler & Françoise Baylis, *Covid-19 Vaccination Certificates: Prospects and Problems*, HASTINGS CTR. (Mar. 10, 2021) [hereinafter Kofler & Baylis, *Covid-19*], <https://www.thehastingscenter.org/covid-19-vaccination-certificates-prospects-and-problems> [<https://perma.cc/XKC5-DK77>] (“[V]accination certificates cannot be used to guarantee safe international travel until transmission data, specific to each vaccine and for each variant, is in hand.”).

Uncertainty, however, is an insufficient justification for untailed policies. Overly strict untailed policies are likely to produce harm by leading people to make all-or-nothing rather than harm-reducing choices about risk. If policies close playgrounds or outdoor dining, they may lead people to congregate indoors at home with fewer precautions.<sup>152</sup> If people are told that antibody tests or age tell them nothing about their own risk, they may send their 75-year-old grandmother to do necessary grocery shopping rather than sending the 25-year-old grandson who tested positive for antibodies. If policies prevent vaccinated people from flying, those people are deprived of valuable experiences, like seeing family members, for little benefit. Meanwhile, lenient untailed policies—such as letting anyone fly to countries where COVID-19 spread has been stopped—would clearly produce harm by permitting COVID-19 spread.<sup>153</sup>

Although tailored policies will inevitably fail to perfectly track the risks presented by activities or groups, imperfection is pervasive and is recognized as acceptable in other areas of policy. Some restaurants that fail sanitation spot-checks may be safer than some that pass; some drivers who fail driver's tests may be better drivers than others who pass; some medical graduates who fail board exams may be better than some who pass. Yet, restaurant inspections, driver's licenses, and professional licenses are acceptable despite their imperfections. Likewise, tailored policies need not be perfectly accurate, so long as there is reason to believe they are predictive of the outcomes they are attempting to assess and take steps to avoid replicating preexisting disadvantage.<sup>154</sup> Demanding greater accuracy may also present tradeoffs with other benefits, such as speedily returning results.<sup>155</sup>

## 2. Incentives

Some worry that COVID-19 policies will create an incentive for risk compensation: as tailored policies make risky activities safer, people will pursue those risky activities more often.<sup>156</sup>

The concern about incentives is most plausible for infection-based immunity policies, which could create incentives to infect oneself to become immune.<sup>157</sup> A variety of strategies have been proposed to counter or dampen these incentives, including subsidies for people who must stay at home, penalties for self-infection, and encouragement not to self-infect.<sup>158</sup> The advent of vaccines, however, makes this concern less salient.<sup>159</sup>

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<sup>152</sup>See, e.g., Julia Marcus, *Quarantine Fatigue Is Real*, ATLANTIC (May 11, 2020), <https://www.theatlantic.com/ideas/archive/2020/05/quarantine-fatigue-real-and-shaming-people-wont-help/611482/> [<https://perma.cc/MD5B-UQWM>]; Julia Marcus, *The Danger of Assuming That Family Time Is Dispensable*, ATLANTIC (Dec. 9, 2020), <https://www.theatlantic.com/ideas/archive/2020/12/tis-the-season-for-shame-and-judgment/617335/> [<https://perma.cc/U99A-YM7L>].

<sup>153</sup>Jake Horton, *Covid: Thanksgiving the Cause of a Spike in US Infections?*, BBC (Dec. 22, 2020), <https://www.bbc.com/news/55363256> [<https://perma.cc/EQH9-FU83>] (noting increased COVID-19 incidence in the U.S. and Canada after Thanksgiving).

<sup>154</sup>Cf. sources cited *supra* notes 49-50 and related text.

<sup>155</sup>See Kotlikoff & Mina, *supra* note 5.

<sup>156</sup>Kristen Underhill, *Risk-Taking and Rulemaking: Addressing Risk Compensation Behavior Through FDA Regulation of Prescription Drugs*, 30 YALE J. ON REGUL. 377, 390 (2013) (“For instance, someone who drinks diet soda may choose to eat more sweets because she perceives a lower risk of weight gain.”).

<sup>157</sup>See Persad & Emanuel, *supra* note 61; Phelan, *supra* note 19.

<sup>158</sup>Hemel & Malani, *supra* note 61, at 17-18, 20; Persad & Emanuel, *supra* note 61.

<sup>159</sup>Phelan, *supra* note 19, at 1597 (“The main distinction between the two is the nature of the incentive. Vaccination certificates incentivise individuals to obtain vaccination against the virus, which is a social good. By contrast, immunity passports incentivise infection.”).

Other people raise the risk compensation concern at the institutional level: they complain that exempting lower-risk individuals from some or all restrictions will discourage governments from taking other steps to limit the spread of COVID-19.<sup>160</sup> Professor Alexandra Phelan, for instance, suggests that tailored policies that treat immune individuals differently from non-immune ones “risk alleviating the duty on governments to adopt policies that protect economic, housing, and health rights across society by providing an apparent quick fix.”<sup>161</sup> This is a false dichotomy. Immunity-based policies no more prevent the policies Phelan advocates for than driver licensing prevents efforts to improve road safety or improve the quality of medical care for accident victims.<sup>162</sup> Society can work to protect people from COVID-19 in the short term by preventing the worst outcomes, even while pursuing other steps like economic support for the least advantaged or research into improved therapeutics or vaccines.

Last, some worry about incentives for fraud. These concerns have most often been raised about immunity-based policies,<sup>163</sup> but could also apply to policies based on current infection or lying about past travel or business activities.<sup>164</sup> This problem is not unique to COVID-19 policy: it applies to every social policy, from vaccination to passports to driver licensing to diplomas. Fraud exists in all of these systems, as do strategies for combating fraud, but in none of these cases are fraud concerns regarded as sufficient to justify abandoning the policy.

### C. LIBERTY

Some criticisms of tailored restrictions allege that they will cause lurid deprivations of basic freedoms. Kofler and Baylis, for instance, ask us to “[i]magine a world where your ability to get a job, housing or a loan depends on passing a blood test. You are confined to your home and locked out of society if you lack certain antibodies.”<sup>165</sup> Other critics of immunity-based restrictions frame them as generating a “two-tiered society” where “[o]ne group has access to jobs and public places, one doesn’t,” and frame the policy question as whether we should “make participation in society depend upon immunity status” or condition “societal participation on taking a vaccine that’s not fully vetted.”<sup>166</sup> This is an implausible picture of immunity-based restrictions, whether immunity is derived from past infection or from a vaccine. It is similarly an implausible picture of other group-based restrictions and of activity-based restrictions.<sup>167</sup>

<sup>160</sup>*Id.* at 1596.

<sup>161</sup>*Id.*

<sup>162</sup>*Id.* at 1597; see Rebecca Brown et al., *Passport to Freedom? Immunity Passports for COVID-19*, 46 J. MED. ETHICS 652, 657 (2020) (“Immunity passports are unlikely to be used in isolation, and it is more probable that they will form part of a collective set of practices aimed at a phased reduction in lockdown restrictions.”); Jane Wakefield, *Coronavirus: NHS app paves the way for ‘immunity passports’*, BBC (May 27, 2020), <https://www.bbc.com/news/technology-52807414> [<https://perma.cc/B6YU-NQ78>] (discussing the integration of “immunity passports” into mobile applications that exist in addition to, not in replacement of, other apps for contact tracing).

<sup>163</sup>Greely, *supra* note 61, at 16; Farahany, *supra* note 61.

<sup>164</sup>Greely, *supra* note 61, at 15 (“Perhaps [immunity certificates] should be like driver’s licenses, but, as many underage kids seeking alcohol and others figured out, fraudulent drivers licenses are not that hard to buy or to make.”).

<sup>165</sup>Kofler & Baylis, *supra* note 61, at 379.

<sup>166</sup>Farahany, *supra* note 61.

<sup>167</sup>See NAT’L CONF. OF STATE LEGISLATURES, *supra* note 3 (describing the ability, and necessity, to keep “essential” employment operational regardless of COVID-19); U.S. EQUAL EMP. OPPORTUNITY COMM’N, *supra* note 4, at A-7 (stating it is unlawful under the ADA for an employer to condition a worker’s reentry into the workplace upon a COVID-19 antibody test).

A more realistic understanding of tailored policies is that certain groups of people—those not yet infected or unable or unwilling to be vaccinated, those unable or unwilling to wear masks—would be accommodated differently in some high-risk settings. They would not be barred from employment or social activity, but they might be unable to work as a nanny or a dental hygienist;<sup>168</sup> they would not be confined to their homes, but they might have to get take-out from restaurants rather than eating inside or attend large gatherings remotely rather than in person. These policies do limit liberty for the vulnerable directly, by limiting the ability to engage in certain activities. But they enhance liberty indirectly, by reducing the spread of COVID-19 and by reducing the risk of death, the most serious deprivation of liberty. Returning to a point made above,<sup>169</sup> everyone, and especially those at high risk, will have their liberty seriously limited by government inaction—rather than government action—if COVID-19 spreads uncontrollably. And their liberty will be even more limited by untailored closures and restrictions than by tailored ones.

As vaccines become more widely available, and evidence that they reduce transmission improves, relaxing restrictions for vaccinated people becomes increasingly compelling both legally and ethically.<sup>170</sup> Kofler and Baylis nevertheless argue that seeking to “jump-start flailing economies” or provide “some semblance of a ‘normal’ pre-Covid life which includes international travel” are inadequate bases for policies that differentiate vaccinated from unvaccinated people, and that motivations for vaccination certificates “rooted in neocapitalism and individual liberalism are at odds with public health ethics.”<sup>171</sup> Permitting other policies, such as tax policy or macroeconomic policy, to be grounded in capitalist motivations while rejecting the use of vaccination certificates would be an odd exceptionalism. Furthermore, economic recovery benefits ordinary people whether or not they hold capital.<sup>172</sup> And rejecting individual liberalism—a core value in most democracies—as a basis for permitting vaccinated people to engage in activities is even less plausible. Kofler and Baylis appear to suggest that the only legitimate basis for vaccination certificates is “to assist public health with the overarching goal of reducing viral transmission.”<sup>173</sup> But even if allowing a vaccinated person to visit her children, attend a Broadway musical, or go on a religious pilgrimage would not reduce viral transmission, blocking her from doing so is difficult to justify when her travel would be unlikely to increase viral transmission and would serve important aims she reasonably wishes to

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<sup>168</sup>Notably, Farahany, concedes that “[s]ome discrimination based on vaccination or existing immunity could be justified in special cases. Nursing homes may reasonably want to hire immunized staff before other applicants, for instance.” *Supra* note 61.

<sup>169</sup>See discussion *supra* Section IV.A.2; see also *supra* notes 58, 67 and accompanying text.

<sup>170</sup>See Mark G. Thompson et al., *Interim Estimates of Vaccine Effectiveness of BNT162b2 and mRNA-1273 COVID-19 Vaccines in Preventing SARS-CoV-2 Infection Among Health Care Personnel, First Responders, and Other Essential and Frontline Workers — Eight U.S. Locations, December 2020–March 2021*, 70 *MORBIDITY & MORTALITY WKLY. REP.* 495, 496-97 (2021) (study finding two-dose mRNA vaccination is approximately 90% effective against SARS-CoV-2 infections); *Background Rationale and Evidence for Public Health Recommendations for Fully Vaccinated People*, CTR. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/coronavirus/2019-ncov/science/science-briefs/fully-vaccinated-people.html> [https://perma.cc/4PQE-PZRY] (last updated Apr. 2, 2021) (“[R]elaxing certain prevention measures for fully vaccinated people may be a powerful motivator for vaccination, and thus should be an important goal of the U.S. vaccination program.”).

<sup>171</sup>See Kofler & Baylis, *Covid-19*, *supra* note 151.

<sup>172</sup>See Francesco Bianchi et al., *The Long-Term Impact of the COVID-19 Unemployment Shock on Life Expectancy and Mortality Rates 2-4*, 26-27 (Nat’l Bureau of Econ. Research, Working Paper No. 28304, 2021), [https://www.nber.org/system/files/working\\_papers/w28304/w28304.pdf](https://www.nber.org/system/files/working_papers/w28304/w28304.pdf) [https://perma.cc/7V52-T3H4] (noting that unemployment due to COVID-19 will increase mortality and decrease life expectancy, particularly for women and African-Americans).

<sup>173</sup>Kofler & Baylis, *Covid-19*, *supra* note 151.

pursue.<sup>174</sup> Public health ethics and law recognize that better public health is not the only outcome that matters.<sup>175</sup>

Alternatively, activity- and group-based policies might be criticized as a paternalistic intrusion on people's right to choose their own level of acceptable risk.<sup>176</sup> People at high risk are typically permitted to engage in risky activities, such as contact sports, though the law permits employers to exclude them based on an individualized risk assessment.<sup>177</sup> Those who become infected with COVID-19, however, place not just themselves, but others at risk, undermining the suggestion that "everyone gets to weigh the risks for themselves."<sup>178</sup> First, COVID-19—unlike sports injuries—is contagious. Second, COVID-19 outbreaks overwhelm health systems, while sports injuries typically do not. Both of these factors mean that people who take COVID-19 risks also pose risks to others.

## V. CONCLUSION

Tailored policies try to identify the activities and people at greatest risk of suffering and causing harm due to COVID-19 infection. They have been widely adopted and even more widely proposed. But they have also been widely criticized, and those criticisms have often stymied their adoption or persistence. I have argued that the law rarely proscribes tailored policies, and increasingly often requires them. I have also argued that ethical critiques of tailored policies need to compare their potential deleterious consequences to the deleterious consequences of feasible, and often actual, alternatives. Those who enact tailored policies often open themselves up to blame for causing inequality and harm or depriving people of liberty, particularly when those policies invariably prove imperfect—as all policies are. But that blame is often misdirected. Even when these policies directly cause inequity or harm, or limit liberty, they often directly and indirectly serve to prevent far greater inequities, harms, and losses of liberty. Analysis of tailored policies must make these comparisons, rather than blaming the messenger.

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<sup>174</sup>*Cf.* James F. Childress et al., *Public Health Ethics: Mapping the Terrain*, 30 J.L. MED. & ETHICS, Summer 2002, at 170, 176 (raising concerns about cases where "public health agents seek to evade the stringent demands of the general moral consideration of respect for autonomy").

<sup>175</sup>*Id.* at 171-72 (noting that, in addition to producing benefits and reducing harms, the general moral considerations of public health include "respecting autonomous choices and actions, ... protecting privacy and confidentiality[,] ... [and] building and maintaining trust," *inter alia*).

<sup>176</sup>*Cf.* Franklin G. Miller, *Lockdown of the Elderly Is Misguided Policy*, J. MED. ETHICS: BMJ BLOGS (June 23, 2020), <https://blogs.bmj.com/medical-ethics/2020/06/23/lockdown-of-the-elderly-is-misguided-policy> [<https://perma.cc/8XKJ-H369>].

<sup>177</sup>*Chevron U.S.A. v. Echazabal*, 536 U.S. 73, 86 (2002).

<sup>178</sup>Erin Kokemiller, Opinion, *Yielding Our Freedom to the Government Is Risky*, DES MOINES REG. (Apr. 24, 2020), <https://www.desmoinesregister.com/story/opinion/columnists/iowa-view/2020/04/24/covid-19-iowa-yielding-our-freedom-government-risky/3004530001> [<https://perma.cc/B7NM-AYDL>].