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# INEQUALITY, COVID-19, AND HUMAN RIGHTS: WHOSE LIVES MATTER?

Barbara Stark\*

*“You don’t have to be an epidemiologist to realize that infectious diseases make their own preferential option for the poor—they afflict them more, and worse.”*

—Paul Farmer<sup>1</sup>

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\* Barbara Stark 2020. Professor of Law and Hofstra Research Fellow, Maurice A. Deane School of Law, Hofstra University. An early version of this Article was presented at the panel on *Novel Human Rights Crises During a Global Pandemic*, at the International Law Weekend sponsored by the International Law Association, American Branch. I am grateful to Aaron Fellmeth for organizing the panel and to Christina Cerna and Paul Dubinsky for their thoughtful presentations. Thanks also to Alexandra Moore, Lead Articles Editor, and her hard-working Executive Board, for their rigorous edit.

1. Ariel Levy, *Ophelia Dahl’s National Health Service*, THE NEW YORKER, Dec. 11, 2017. [Farmer and his partners] were particularly taken with the Peruvian philosopher and priest Gustavo Gutiérrez’s conception of a ‘preferential option for the poor.’ Because God favors the poor and the powerless, Gutiérrez argued, Christianity should focus on the injustices visited upon the destitute. To [Farmer and his partners], it seemed clear that this doctrine applied to health care, too.

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## I. INTRODUCTION

The coronavirus was called a “rich man’s disease” when it first appeared in some countries, brought by travelers returning from business trips in China, ski vacations in the Rockies, and studies in Europe.<sup>2</sup> It did not remain confined to the better neighborhoods for long. As Part I of this Article shows, the poor, everywhere, are more likely to get sick and more likely to die when they do.<sup>3</sup> In many countries, they are also more likely to starve.<sup>4</sup> As researchers noted in March, “[a]s the coronavirus spreads across the globe, it appears to be setting off a devastating feedback loop with another of the gravest forces of our time: economic inequality.”<sup>5</sup>

Part II explains why this is a matter of human rights.<sup>6</sup> The ongoing deprivation of basic rights to healthcare and an adequate standard of living

2. Shashank Bengali et al., *How Coronavirus—a “Rich Man’s Disease” Infected the Poor*, L.A. TIMES (May 8, 2020), <https://www.latimes.com/world-nation/story/2020-05-08/how-the-coronavirus-began-as-a-disease-of-the-rich>.

3. Max Fisher & Emma Bubola, *As Coronavirus Deepens Inequality, Inequality Worsens Its Spread*, N.Y. TIMES (Mar. 16, 2020), <https://www.nytimes.com/2020/03/15/world/europe/coronavirus-inequality.html>; see David Segal, *What Happened to the Great American Logistics Machine?*, N.Y. TIMES, May 24, 2020, at B1 (noting that “the coronavirus is offering a real-time demonstration of how to hopscotch the globe, with ease and speed.”).

4. Abdi Latif Dahir, *‘Instead of Coronavirus, the Hunger Will Kill Us.’ A Global Food Crisis Looms.*, N.Y. TIMES (Apr. 23, 2020), <https://www.nytimes.com/2020/04/22/world/africa/coronavirus-hunger-crisis.html>.

5. Fisher & Bubola, *supra* note 3.

6. For purposes of this Article, human rights include: G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948); G.A. Res. 2200 (XXI) A, International Covenant on Economic, Social and Cultural Rights (Dec. 16, 1966) [hereinafter ICESCR]; G.A. Res. 2200 (XXI) A, International Covenant on Civil and Political Rights (Dec. 16, 1966) [hereinafter ICCPR]; G.A. Res. 2106 (XX), Convention on the Elimination of All Forms of Racial Discrimination (Dec. 21, 1965) [hereinafter CERD]; G.A. Res. 34/180, Convention on the Elimination of All Form of Discrimination Against Women (Dec. 18, 1979) [hereinafter CEDAW]; G.A. Res. 44/25, Convention on the Rights of the Child (Nov. 20, 1989) [hereinafter CRC].

are major factors.<sup>7</sup> As this Part demonstrates, however, the extreme vulnerability of the poor is grounded in earlier violations of human rights, including state-sanctioned segregation in the American south in the 1950s and what one author has called “the darker side of American hegemony,” referring to the United States’ role in the violent overthrow of leftist regimes during the Cold War.<sup>8</sup>

Part III argues that the current crises demand a broader, deeper, and more authentic commitment to human rights. This Part draws on vulnerability theory,<sup>9</sup> abolition theory,<sup>10</sup> and a new theory of ‘intercountry’ human rights<sup>11</sup> to support this expanded commitment and proposes two concrete legal reforms to realize it. First, it proposes that the United States fulfil its early promise to promote human rights. Second, it proposes that the United States assure certain human rights for specific groups which otherwise would have no claim against it.<sup>12</sup>

In short, we are living in a world of “obscene” economic inequality,<sup>13</sup> in which some lives matter, and others do not. The United States has played a major role in creating this world, in part by violating the human rights of

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7. Bengali et al., *supra* note 2; U.N. Secretary-General, *Policy Brief: COVID-19 and People on the Move* (June 2020), <https://unsdg.un.org/sites/default/files/2020-06/SG-Policy-Brief-on-People-on-the-Move.pdf> [hereinafter *Policy Brief*].

8. Vincent Bevins, *The ‘Liberal World Order’ Was Built With Blood*, N.Y. TIMES (May 29, 2020) <https://www.nytimes.com/2020/05/29/opinion/sunday/united-states-cold-war.html>.

9. See, e.g., VULNERABILITY: REFLECTIONS ON A NEW ETHICAL FOUNDATION FOR LAW AND POLITICS (Martha Albertson Fineman & Anna Grear eds. 2013). Professor Fineman established the Vulnerability and the Law Initiative at Emory University in 2008. It is based on the idea that vulnerability is “universal and constant, inherent in the human condition” and that focusing on vulnerability “suggests a critique of dominant modes of thinking about inequality.” Martha Albertson Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, 20 YALE J. L. & FEMINISM 1, 1, 11 (2008) [hereinafter *Equality in the Human Condition*].

10. Patisse Cullors, *Abolition, and Reparations: Histories of Resistance, Transformative Justice, and Accountability*, 132 HARV. L. REV. 1684, 1686 (2019).

11. See Barbara Stark, *Toward a Theory of Intercountry Human Rights: Global Capitalism and the Rise and Fall of Intercountry Adoption*, 95 IND. L. J. 1365, 1391–95 (2020) (setting out a theory of intercountry human rights in the context of intercountry adoption).

12. This is hardly a radical idea. A strong form is seen in the early requirement that Member States ratify the European Convention on Human Rights before admission to the Council of Europe, and the more recent Treaty of Lisbon (2009), under which the Charter of Fundamental Rights of the EU became binding on EU Member States. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 2889 U.N.T.S. 222. A weaker, or more limited, version can be seen in the Banjul Charter. African (Banjul) Charter on Human and Peoples’ Rights, 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (which requires that children can be adopted from Member States only by individuals in other Member States, or in states that are a party to the Convention on the Rights of the Child).

13. The characterization is in Philip Alston, *Extreme Inequality as the Antithesis of Human Rights*, OPENGLOBALRIGHTS (Aug. 27, 2015), <https://www.openglobalrights.org/extreme-inequality-as-the-antithesis-of-human-rights/> [hereinafter *Extreme Inequality*].

Black Americans, immigrants, and asylum-seekers. This Article argues that the United States should take responsibility for these violations and suggests how it may begin.

## II. COVID-19 TARGETS THE POOR

### A. *Inequality Going into the Pandemic*

The world's richest 1%, those with over \$1 million in assets minus debts, own 44% of the world's wealth; 56.6 % of the world's population have less than \$10,000 in assets and own less than 2% of the world's wealth.<sup>14</sup> According to Oxfam, the concentration of wealth is getting more extreme.<sup>15</sup> In 2009, 380 billionaires owned what the bottom 50% of the global population owned; in 2018, only twenty-six billionaires owned what the bottom 50% owned.<sup>16</sup> As Thomas Piketty has shown, birth predicts wealth as certainly as it did during the Gilded Age.<sup>17</sup>

Income is also deeply skewed.<sup>18</sup> The top 1% earned more than 20% of global income in 2018, up from 16% in 1980.<sup>19</sup> The post-World War II trend toward greater equality of incomes was reversed during the roughly thirty years from 1980–2013.<sup>20</sup> During this period the richest 1% in the United States saw their average real income increase from \$469,403 adjusted for inflation, to \$1,260,508 and their share of national income double, from 10% to 21%.<sup>21</sup> The top .1% saw their average real income increase from \$1,597,080, adjusted for inflation, to \$6,087,113 and their share of national income almost tripled, from 3.4 to 10.3%.<sup>22</sup> In the United States, those in the bottom quintile, in contrast, saw an increase of only 9% during roughly the same period, during which they increased their average work hours by 72%.<sup>23</sup>

14. *Global Inequality Facts*, INEQUALITY, <https://inequality.org/facts/global-inequality/> (last visited Jan. 11, 2021) (citing Credit Suisse Research Institute, GLOBAL WEALTH REPORT 2020, Oct. 2020).

15. *Id.*

16. *Id.*; see *World's Billionaires List: The Richest in 2020*, FORBES, <https://www.forbes.com/billionaires/#a97200b251c7> (last updated Mar. 18, 2020) (noting that 51% of the billionaires are poorer than they were in 2019, because of the virus).

17. THOMAS PIKETTY, CAPITAL IN THE TWENTY-FIRST CENTURY 408–09, 421 (Arthur Goldhammer trans., 2014).

18. *Global Inequality Facts*, *supra* note 14.

19. *Id.*

20. Joseph Stiglitz, *Inequality and Economic Growth*, 86 POL. Q. 134, 134 (2015); see also DAVID M. KOTZ, THE RISE AND FALL OF NEOLIBERAL CAPITALISM 95–99 (2015) (describing the same trend).

21. Stiglitz, *supra* note 20, at 135.

22. *Id.* at 134–35.

23. *Id.*

In the first three years after the Great Recession, 91% of the gains in income went to the top 1%.<sup>24</sup>

This inequality is a product of the neoliberalism that emerged in the late 1970s and became hegemonic after the end of the Cold War in 1989. As Robert Howse put it, “the old struggle between [the] right and [t]he left over the governance of the economy and the redistribution of wealth within the advanced liberal democracies had yielded to a new pro-market consensus.”<sup>25</sup> Neoliberalism was grounded in the conviction that free markets, unrestrained by irrational humans and free of onerous regulations, were our best collective hope.<sup>26</sup> It promised that global capitalism would improve human well-being where badly managed, often corrupt, social welfare schemes had failed.<sup>27</sup>

But the extreme wealth at the top never “trickled down.”<sup>28</sup> Instead, the American housing bubble burst in 2007 and markets panicked, triggering the Great Recession.<sup>29</sup> The United States economy constituted such a large proportion of the global economy that when it sank, it took the rest of the world with it.<sup>30</sup> In addition, the United States had already exported its neoliberal philosophy.<sup>31</sup> The Great Recession spread like wildfire because neoliberal globalization had already eliminated the protections that might have slowed it.<sup>32</sup> Those in low-income states were especially vulnerable.<sup>33</sup> They were immediately hit by the collapse in global demand.<sup>34</sup> Remittances—which have always dwarfed foreign aid—from the United States and Europe fell.<sup>35</sup>

This matters here for three reasons. First, neoliberalism required that states slash social safety nets, privatize once-public functions (like maintaining clinics and prisons), and reduce or eliminate environmental,

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24. *Id.* at 136.

25. Robert Howse, *The End of the Globalization Debate*, 121 HARV. L. REV. 1528, 1529 (2008) (book review).

26. DANIEL STEDMAN JONES, *MASTERS OF THE UNIVERSE: HAYAK, FRIEDMAN AND THE BIRTH OF NEOLIBERAL POLITICS* 2 (2012); DAVID HARVEY, *A BRIEF HISTORY OF NEOLIBERALISM* 37 (2005).

27. *See generally* Stiglitz, *supra* note 20, at 134.

28. KOTZ, *supra* note 20, at 98. Harvey argues that the real goal of neoliberalism was to restore wealth to the top 1% of the population. HARVEY, *supra* note 26, at 15–18 (drawing on the analyses of data by Gérard Duménil and Dominique Lévy, charting the “extraordinary concentrations of wealth and power emerging all over the place.”).

29. *See* JOSEPH E. STIGLITZ, *FREEFALL: AMERICA, FREE MARKETS, AND THE SINKING OF THE WORLD ECONOMY* 21–24 (2010) [hereinafter *FREEFALL*].

30. *Id.*

31. *Id.*

32. *Id.*

33. *See generally id.*

34. *FREEFALL*, *supra* note 29.

35. *Id.* at 24. *See* note 68, *infra*.

financial, and health and safety regulations.<sup>36</sup> These policies were referred to as “structural adjustment” when imposed by the International Monetary Fund in the global south,<sup>37</sup> or “austerity” when imposed by richer lenders on poorer borrowers in the global north.<sup>38</sup> This meant that the world’s poor had already lost the protections—including government health and welfare services, decent-paying government jobs (with benefits), and health and safety regulations—that might have helped them avoid or survive COVID-19 by the time it hit. Second, thirty years of neoliberalism had eliminated state agencies, the government workers who ran them, and the infrastructure that supported them. Third, but equally important, the *idea* that it was the state’s responsibility to assure the well-being of its people, or that it even had that capacity, was a dim memory for many, and unimaginable for some.<sup>39</sup>

### B. How the Poor Are Affected

Low socioeconomic status has joined old age and pre-existing health conditions as major risk factors resulting in death for those who become infected.<sup>40</sup> This section focuses on two groups, Black Americans and those who the United Nations (UN) refers to as “people on the move”—migrants, refugees, and internally displaced persons (IDP).<sup>41</sup> Members of both groups are disproportionately likely to get sick, and more likely to die if they do. According to the Chinese Centers for Disease Control and Prevention, because health disparities have grown along with the gap between the rich and the poor, those at the bottom are also more likely to have chronic conditions.<sup>42</sup> COVID-19 is roughly twice as deadly for them.<sup>43</sup>

#### 1. Black Americans

In 2019, the median family wealth for a white family was \$188,200, eight times that of a Black family, \$24,100.<sup>44</sup> This meant that a typical white

36. JONES, *supra* note 26, at 16, 242–49.

37. HARVEY, *supra* note 26, at 37–38 (describing the Washington Consensus).

38. *Id.* at 100.

39. See WENDY BROWN, UNDOING THE DEMOS: NEOLIBERALISM’S STEALTH REVOLUTION 221(2015) (noting that neoliberalism rejects the idea that humanity can “craft and steer its existence or even to secure its future.”).

40. Fisher & Bubola, *supra* note 3.

41. *Policy Brief*, *supra* note 7 (aggregating migrant, refugees, and internally displaced persons (IDP)).

42. Fisher & Bubola, *supra* note 3.

43. *Id.*

44. Rachel Siegel, *Wealth Gaps Between Black and White Families Persisted Even at the Height of the Economic Expansion*, WASH. POST (Sept. 28, 2020), <https://www.washingtonpost.com/business/2020/09/28/wealth-gap-fed/>.

family had \$50,600 to draw on in an emergency, while a typical Black family had \$14,400.<sup>45</sup> As noted by a Federal Reserve staff researcher, “[t]hese gaps in savings are particularly relevant in light of the COVID-19 pandemic and associated job losses . . . [suggesting] large disparities in families’ ability to weather the pandemic.”<sup>46</sup> Black Americans are also more likely to be unemployed and less likely to receive unemployment insurance.<sup>47</sup>

Black Americans account for more than half of those who have tested positive and 72% of virus-related deaths in Chicago, even though they comprise slightly less than a third of the population.<sup>48</sup> Similar disparities have been reported in Michigan, Louisiana, North Carolina, and South Carolina.<sup>49</sup> As of April 2020, officials in many states hit hard by the virus—including California and New York—had not made statewide information about race available<sup>50</sup> and “fewer than a dozen states” had published such information.<sup>51</sup> In May, the nonpartisan APM Research Lab released an analysis of data from forty states and the District of Columbia, which found that Black Americans were more than twice as likely as whites, Latinos, or Asian Americans to die from the virus.<sup>52</sup> Under pressure from Congress, the Trump administration finally required the states to include race and ethnicity data in June.<sup>53</sup> But as of December 16, 2020, the Center for Disease Control and Prevention (CDC) reported that such data was only available for 50% of the cases.<sup>54</sup>

Experts attribute these disparities to long-standing inequalities that have left Black Americans less likely to have health insurance, less likely to be referred for virus testing when they do seek medical care, and more likely to

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45. *Id.*

46. *Id.*

47. *Id.*; see Eli Rosenberg & Andrew Van Dam, *Economic Gap Between Black, White Americans May Help Explain Protests*, WASH. POST, June 2, 2020, at A21.

48. John Eligon et al., *Black Americans Face Alarming Rates of Coronavirus Infection in Some States*, N.Y. TIMES (Apr. 7, 2020), <https://www.nytimes.com/2020/04/07/us/coronavirus-race.html>.

49. *Id.* (Minnesota is the only state mentioned in the Article in which the percentage of Blacks infected roughly corresponds to their percentage of the state’s population).

50. *Id.*

51. Aletha Maybank, Opinion, *The Pandemic’s Missing Data*, N.Y. TIMES (Apr. 7, 2020), <https://www.nytimes.com/2020/04/07/opinion/coronavirus-blacks.html>.

52. APM Research Lab Staff, *The Color of Coronavirus: COVID-19 Deaths by Race and Ethnicity in the U.S.*, APM RSCH. LAB (Jan. 7, 2021), <https://www.apmresearchlab.org/covid/deaths-by-race>; see Editors, *Too Many Black American are Dying from COVID-19*, SCI. AM. (Aug. 1, 2020), <https://www.scientificamerican.com/article/too-many-black-americans-are-dying-from-covid-19/> (noting that the “pandemic exposed a glaring health gap caused by systemic racism.”).

53. Sheryl Gay Stolberg, *‘Pandemic Within a Pandemic’: Coronavirus and Police Brutality Roil Black Communities*, N.Y. TIMES (June 7, 2020), <https://www.nytimes.com/2020/06/07/us/politics/blacks-coronavirus-police-brutality.html>.

54. *COVID Data Tracker*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://covid.cdc.gov/covid-data-tracker/#demographics> (last visited Jan. 15, 2021).



live in segregated neighborhoods that lack job opportunities (requiring long commutes on public transportation), affordable housing, and grocery stores with healthy food.<sup>55</sup> Low-income Black Americans do not have enough private space to maintain the recommended six feet apart required by “social distancing.”<sup>56</sup> Such rules do not take their circumstances into account, or give them any possibility of complying. Black Americans also suffer disproportionately because they experience high levels of stress from multiple sources, such as exposure to toxins, lack of sleep, and racial discrimination, which can accelerate aging.<sup>57</sup>

The decline of unions and the rise of part-time work has left people with fewer workplace protections. Unlike white collar workers, many of whom can telecommute, Black Americans disproportionately work in sectors in which it is not an option.<sup>58</sup> Nor, in general, do they have paid leave. In the United States, 90% of those with incomes in the top quarter have paid sick leave, in contrast to only 47% in the bottom quarter.<sup>59</sup>

Black Americans are also more likely to work in the meat packing plants and nursing homes and to be incarcerated in the prisons,<sup>60</sup> that have become hot spots throughout the United States.<sup>61</sup> They are the bulk of the workers deemed “essential,” i.e., excluded from lock down orders. This includes

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55. Eligon et al., *supra* note 48.

56. Jason DeParle, *The Coronavirus Class Divide: Space and Privacy*, N.Y. TIMES (Apr. 13, 2020), <https://www.nytimes.com/2020/04/12/us/politics/coronavirus-poverty-privacy.html>.

57. Eligon et al., *supra* note 48.

58. Heather Long et al., *The COVID-19 Recession is the Most Unequal in Modern U.S. History*, WASH. POST (Sept. 30, 2020), <https://www.washingtonpost.com/graphics/2020/business/coronavirus-recession-equality/>; Michael Gee, *Why Aren't Black Employees Getting More White-Collar Jobs?*, HARV. BUS. REV. (Feb. 28, 2018), <https://hbr.org/2018/02/why-arent-black-employees-getting-more-white-collar-jobs>.

59. Elise Gould, *Lack of Paid Sick Days and Large Numbers of Uninsured Increase Risks of Spreading the Coronavirus*, ECON. POL'Y INST. (Feb. 28, 2020, 5:20 PM), <https://www.epi.org/blog/lack-of-paid-sick-days-and-large-numbers-of-uninsured-increase-risks-of-spreading-the-coronavirus/>.

60. Dorothy E. Roberts, *Foreword: Abolition Constitutionalism*, 133 HARV. L. REV. 1, 5 (2018) (documenting mass incarceration of Black men); see Ta-Nehisi Coates, *The Black Family in the Age of Mass Incarceration*, ATLANTIC (Oct. 2015), <https://www.theatlantic.com/magazine/archive/2015/10/the-black-family-in-the-age-of-mass-incarceration/403246/>; Adam Liptak, *Supreme Court Refuses to Stop Order to Move Inmates from Virus-Ravaged Prison*, N.Y. TIMES (May 26, 2020), <https://www.nytimes.com/2020/05/26/us/politics/supreme-court-virus-inmates.html> (noting that the U.S. Supreme Court denied a request by the Trump administration to block a trial court ruling that ordered federal prison officials to protect 800 older or medically vulnerable inmates).

61. See Rosenberg & Van Dam, *supra* note 47 (noting that Black Americans are overrepresented in these jobs); Stephen Speranza et al., Opinion, *'You're on Your Own,' Essential Workers are Being Told*, N.Y. TIMES (Apr. 20, 2020), <https://www.nytimes.com/2020/04/20/opinion/osha-coronavirus.html> (quoting a former official of the Department of Labor's enforcement arm, the Occupational Safety and Health Administration (OSHA), who says that OSHA has basically told employers and their workers, “[y]ou're on your own.”).

healthcare workers, grocery and pharmacy workers, delivery people, farmworkers, and sanitation workers.<sup>62</sup> As a critical care doctor in Boston observed, “C[OVID]-19 has become a disease of the vulnerable.”<sup>63</sup> Black Americans have been “bearing the brunt of three crises—police violence, crushing unemployment and the deadliest infectious disease threat in a century—that has laid bare longstanding injustice.”<sup>64</sup>

## 2. People on the Move

Migrants, who typically perform the low-wage work that citizens do not want, are at tremendous risk and often beyond the ambit of workplace regulation or health care coverage.<sup>65</sup> Along with the tourists and business travelers who carried the virus across borders, the International Labor Organization estimates that almost 200 million migrant workers travel from state to state for farm work, and other seasonal and low wage work.<sup>66</sup>

An additional 760 million workers travel internally, from one region of their home countries to another, including forty million internal migrants within India.<sup>67</sup> Before the virus, these workers were respected for the remittances they sent back to their communities.<sup>68</sup> Now they are often viewed as pariahs, suspected of carrying the virus.

Migrants are, in fact, disproportionately affected. In New York, for example, as rates were declining elsewhere in the state during the last two weeks of May, rural Sullivan County had the highest positive test rate and the most new cases per capita. This was mostly attributed to migrant farm workers, who often live in dormitories with shared bathrooms and dining areas.<sup>69</sup> Governments often exacerbate the vulnerability of people on the move. In Singapore, migrant workers were not included in the plan to contain

62. Gene B. Sperling, Opinion, *Martin Luther King Jr. Predicted this Moment*, N.Y. TIMES (Apr. 24, 2020), <https://www.nytimes.com/2020/04/24/opinion/sunday/essential-workers-wages-covid.html>.

63. Daniela J. Lamas, Opinion, *The Country is Reopening. My Patients are Still Suffering.*, N.Y. TIMES (May 29, 2020), <https://www.nytimes.com/2020/05/29/opinion/sunday/coronavirus-nursing-homes.html>.

64. Stolberg, *supra* note 53.

65. Hannah Beech, *Coronavirus Finds Fuel in a World of Migrants*, N.Y. TIMES (Apr. 11, 2020), <https://www.nytimes.com/2020/04/10/world/asia/coronavirus-migrants.html>.

66. *Id.*

67. *Id.*

68. *Id.* FREEFALL, *supra* note 29. As the UN Secretary-General noted in June, “[T]he loss of income from COVID-19 is likely to lead to a colossal \$109 billion drop in remittances. That’s the equivalent of nearly three-quarters of all official development assistance that is no longer being sent back home to the 800 million people who depend on it.” *UN chief underlines need to protect refugees and migrants in COVID-19 pandemic*, UN NEWS (June 3, 2020), <https://news.un.org/en/story/2020/06/1065322>. See note 35, *supra*.

69. *Id.*

the virus, which included free testing and treatment of residents.<sup>70</sup> Singapore initially seemed to have the virus under control. But the number of cases doubled to 8000 by April 20, 2020 because of new infections in the government-built dormitories, in which up to twenty migrants shared a “stifling” room.<sup>71</sup> By December, data showed that 152,000 foreign workers, or 47%, had been infected.<sup>72</sup> Infections have dropped to near zero, but the workers are still basically quarantined. They have been told that restrictions will gradually be eased in 2021.<sup>73</sup>

In the United States, the CDC issued an Order Suspending the Introduction of Certain Persons from Countries Where a Communicable Disease Exists on March 20, 2020.<sup>74</sup> The United States Department of Homeland Security (DHS) deported 10,000 people, denying them entry at the border, within roughly two months.<sup>75</sup> These migrants, many infected by the coronavirus, were sent to countries already overwhelmed—not only by the virus, but by poverty and corruption as well.<sup>76</sup>

As Chris Boian, a spokesperson for the UN Refugee Agency noted, “[the pandemic] may warrant extraordinary measures at borders, [but] expulsion of asylum seekers resulting in refoulement should not be among them.”<sup>77</sup> According to the UN Network on Migration, states in many regions have similarly closed their borders and suspended procedures for asylum-seekers.<sup>78</sup> The Network reiterated the UN Secretary-General’s call to grant

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70. Hannah Beech, *Singapore Seemed to Have Coronavirus Under Control, Until Cases Doubled*, N.Y. TIMES (Apr. 21, 2020), <https://www.nytimes.com/2020/04/20/world/asia/coronavirus-singapore.html>.

71. *Id.*

72. Andreas Illmer, *COVID-19: Singapore migrant worker infections were three times higher*, BBC NEWS (Dec. 16, 2020), <https://www.bbc.com/news/world-asia-55314862>.

73. *Id.*

74. Junteng Zheng, *Pandemic, Emergency Power, and Implications on the Right to Seek Asylum*, 24 AM. SOC’Y INT’L L. (May 28, 2020) <https://www.asil.org/insights/volume/24/issue/13/pandemic-emergency-power-and-implications-right-see-asylum>; see Nina Lakhani, *US using coronavirus pandemic to unlawfully expel asylum seekers, says UN*, GUARDIAN (Apr. 17, 2020) (noting that the “unprecedented U.S. policy authorizing the summary expulsion of migrants and asylum seekers violates international law.”).

75. Zheng, *supra* note 74.

76. The Editorial Board, Opinion, *Why Is the United States Exporting Coronavirus?*, N.Y. TIMES, (June 18, 2020) <https://www.nytimes.com/2020/06/18/opinion/trump-immigration-covid19-deportations.html>.

77. Lakhani, *supra* note 74.

78. UN Network on Migration Official Statement on the SG’s Policy Guidance: *The COVID-19 Pandemic is an Opportunity to Reimagine Human Mobility*, UN NETWORK ON MIGRATION (June 3, 2020), <https://migrationnetwork.un.org/un-network-migration-official-statement-sgs-policy-guidance-covid-19-pandemic-opportunity-reimagine>.

temporary residence to migrants and impose a moratorium on deportations.<sup>79</sup> But global migration from poor countries to wealthier ones has been blocked by border closings, lockdowns, the reduction of global transportation, and suspended asylum programs.<sup>80</sup> According to Gillian Triggs, assistant high commissioner for protection at the UN Refugee Agency, most governments have temporarily shut down their asylum programs.<sup>81</sup>

### III. HUMAN RIGHTS AND THE PANDEMIC

Human rights protect people from COVID-19 and other infectious diseases by requiring their states to assure that they enjoy the “highest attainable standard of physical and mental health,”<sup>82</sup> and an “adequate standard of living”<sup>83</sup> so they can resist infection; by assuring the provision of appropriate personal protective equipment (PPE), especially for essential workers;<sup>84</sup> by assuring enough living space and workspace to maintain social distancing; by providing adequate testing and contact tracing; and by assuring effective care for those infected.

We know that these human rights save lives and enable countries to cope with the virus because they have done so in the other wealthy democracies.<sup>85</sup> The universal health care available for decades in other developed states meant that the infrastructure for testing, isolation, and treatment was already in place. Their governments quickly assumed responsibility. South Korea, recalling the lessons of Middle East Respiratory Syndrome (MERS), immediately began coordinating the production of PPE. But Black Americans and people on the move, described in Part I, cannot claim their human rights. The following two sections explain why.

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79. Press Release, Network on Migration, Forced Returns of Migrants Must be Suspended in Times of COVID-19, U.N. Press Release SC/6997 (May 13, 2020).

80. Kirk Semple, *As World Comes to Halt Amid Pandemic, So Do Migrants*, N.Y. TIMES (May 5, 2020), <https://www.nytimes.com/2020/05/04/world/americas/coronavirus-migrants.html>.

81. *Id.* (noting that only about thirty states of the 120 that have closed their borders allow asylum seekers to file claims).

82. ICESCR, *supra* note 6, arts. 6, 12.

83. *Id.* art. 11.

84. *Id.* art. 7(b) (“safe and healthy work conditions”).

85. See Michelle Goldberg, Opinion, *America is Too Broken To Fight the Coronavirus*, N.Y. TIMES (June 22, 2020), <https://www.nytimes.com/2020/06/22/opinion/us-coronavirus-trump.html> (noting that “[n]o other developed country is doing as badly as the United States.”).

A. *Racism and America's Rejection of Human Rights*

Although the United States had been among the earliest proponents of international human rights,<sup>86</sup> it soon abandoned the project. Its rejection of international human rights was led in the 1950s by southern conservatives in Congress.<sup>87</sup> They insisted that international human rights violated states' rights.<sup>88</sup> What they meant was that the law's prohibitions against racial discrimination would bar still-legal segregation in the South. They were right.

An excerpt from the debate in the United States Senate Foreign Relations Subcommittee on the Genocide Convention sets out their concerns:

. . . If there is to be a succession of treaties from the United Nations dealing with domestic questions, *are we ready to surrender the power of the States over such matters to the Federal Government?* . . . The report of the Civil Rights Committee appointed by the President . . . in two places refers to the added power which may be given to Congress in the field of civil rights if the human-rights treaty is ratified and approved.<sup>89</sup>

Congress was not “ready to surrender the power of the states over [civil rights] to the Federal Government”—and certainly not to the United Nations. Senator Bricker of Ohio proposed an amendment to the Constitution, which would require Congressional legislation before any treaty could become law in the United States.<sup>90</sup> As Louis Henkin noted, this would have made all treaties non-self-executing.<sup>91</sup> The Bricker Amendment was narrowly defeated by “vigorous lobbying by the Eisenhower Administration and its concomitant undertaking . . . not to adhere to human rights treaties.”<sup>92</sup>

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86. MARY ANN GLENDON, *A WORLD MADE NEW: ELEANOR ROOSEVELT AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS* 9 (2001).

87. Natalie H. Kaufman & David Whiteman, *Opposition to Human Rights Treaties in the United States Senate: The Legacy of the Bricker Amendment*, 10 HUM. RTS. Q. 309, 311 (1988).

88. *Id.* at 313, 315, 323.

89. *The Genocide Convention, Hearings Before A Subcomm. of the S. Comm. Sess.* 208 (1950) (statement of Carl B. Rix, Vice Chairman of Special Comm. on Peace and Law Through United Nations of the American Bar Association).

90. Kaufman & Whiteman, *supra* note 87, at 309, 310, 313–316, 324.

91. Louis Henkin, *U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker* (editorial comments), 89 AM. J. INT'L L. 341, 348 (1995).

92. LOUIS B. SOHN & THOMAS BUERGENTHAL, *INTERNATIONAL PROTECTION OF HUMAN RIGHTS* 964–65 (1973).

The executive branch was more worried about the international reaction to domestic racism.<sup>93</sup> The Soviets distributed photographs of the police attacking civil rights marchers, with fire hoses and German shepherds, throughout the Third World.<sup>94</sup> People in the newly independent states were appalled. Desegregation became a Cold War imperative, as the United States noted in its amicus brief in *Brown v. Board of Education*.<sup>95</sup>

Nor was America receptive to economic rights in the 1950s. Economic rights were viewed as both dangerous—a deceptively benign form of communism that would subvert and destroy American initiative—and demeaning, “handouts” inimical to self-respect. The rhetoric of opportunity, the get-rich-quick promise of the American Dream, made economic rights seem superfluous. America was the richest country in the world.

White Americans did not need economic rights because they were *already* the beneficiaries of massive, generous government spending programs. The G.I. Bill assured white American men who had served in World War II re-entry into civilian life. “No other New Deal initiative had as great an impact on changing the country. Aimed at reintegrating sixteen million veterans, it reached eight of ten men born during the 1920s.”<sup>96</sup> Between 1944 and 1971, \$95 billion was invested in the “model welfare system” it created.<sup>97</sup> More than 200,000 used the G.I. Bill’s access to capital to buy farms and start businesses.<sup>98</sup> Five million veterans were able to get mortgages for new houses in the suburbs. It was a phenomenal success for white Americans.

While the G.I. Bill was technically available to Black veterans, it was administered locally. In the south, “95 percent of Black veterans used their higher education benefits” in segregated colleges.<sup>99</sup> None of these schools were research universities and fewer than 5% were accredited by the American Association of University Professors (AAUP).<sup>100</sup> Although Blacks comprised 25% of the population in the south, white schools outnumbered

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93. Vicki Goldberg, *Remembering the Faces in the Civil Rights Struggle*, N.Y. TIMES (July 17, 1994), <https://www.nytimes.com/1994/07/17/arts/photography-view-remembering-the-faces-in-the-civil-rights-struggle.html>.

94. *Id.*

95. Mary L. Dudziak, *Desegregation as a Cold War Imperative*, 41 STAN. L. REV. 61, 62–63 (1988); see Brief for American Civil Liberties Union et al., *Brown v. Board of Education* (Brown I) 347 U.S. 483 (1954) (No. 08) (explaining that, “Soviet spokesmen [are using the] undeniable existence of racial discrimination [as] propaganda warfare.”).

96. Ira Katznelson, *When Is Affirmative Action Fair? On Grievous Harms and Public Remedies*, 73 SOC. RSCH. 541, 566 (2006).

97. *Id.*

98. *Id.*

99. *Id.* at 553.

100. *Id.* at 554.

Black schools by more than five to one.<sup>101</sup> Many of the Black schools were small with fewer than 250 students.<sup>102</sup> Twenty-thousand Black applicants were denied admission because there was no room for them.<sup>103</sup> Fannie Mae mortgage loans, similarly, made it possible for white families to buy a house in the suburbs. Black families were explicitly excluded from the new suburbs by residential red-lining. As Ira Katznelson has shown, “there was . . . no greater instrument for widening an already huge racial gap in postwar America than the G.I. Bill.”<sup>104</sup>

Many in the Civil Rights Movement understood that economic rights were necessary for racial equality. Martin Luther King, Jr., drafted an “economic and social Bill of Rights,” which included “the right . . . to a decent job . . . the right to a minimum income . . . [and] the right to an adequate education.”<sup>105</sup> Internationalists and progressives urged the United States to recognize the full range of human rights set out in the Universal Declaration. They were persecuted by Senator Joseph McCarthy and his followers.<sup>106</sup> The United States did not ratify the Civil Covenant and the Race Convention until the early 1990s, when the Cold War was over. Even then, the ratifications had caveats that assured the treaties would have no effect. The southern segregationists had prevailed. The United States is the only industrialized democracy that is still not a party to the International Covenant on Economic, Social and Cultural Rights, the Convention on the Elimination of All Forms of Discrimination Against Women, and the Convention on the Rights of the Child.<sup>107</sup>

### B. *The United States Campaign Against Communism in Latin America*

The people on the move described in Part I, at least those seeking to stay in the United States or to seek asylum here, cannot claim their human rights because the United States will not allow them to do so. These deportations are especially egregious because of the United States’ historical support of

101. Katznelson, *supra* note 96, at 553.

102. *Id.* at 554.

103. *Id.*

104. *Id.* at 553.

105. Martin Luther King, Jr., *Economic & Social Bill of Rights*, (Feb. 6, 1968), <https://www.crmvet.org/docs/68ebr.htm>.

106. See, e.g., Beverly Gage, *What an Uncensored Letter to M.L.K. Reveals*, N.Y. TIMES MAG. (Nov. 11, 2014), <https://www.nytimes.com/2014/11/16/magazine/what-an-uncensored-letter-to-mlk-reveals.html> (describing the F.B.I.’s smear campaign against Martin Luther King Jr.); see generally RICHARD M. FREELAND, *THE TRUMAN DOCTRINE AND THE ORIGINS OF MCCARTHYISM* (1972).

107. See G.A. Res. 217 (III) A, *supra* note 6; see also ICESCR, *supra* note 6; ICCPR, *supra* note 6; CERD, *supra* note 6; CEDAW, *supra* note 6; CRC, *supra* note 6; UN Human Rights Office of the High Commissioner, *Status of Ratifications Interactive Dashboard*, OHCHR, <https://indicators.ohchr.org> (last visited Sept. 29, 2020).

right-wing authoritarian regimes in Latin America, which forced immigrants to flee to the United States from a violent, corrupt, and impoverished region. In a new book, *The Jakarta Method: Washington's Anticommunism Crusade and the Mass Murder Program That Shaped Our World*,<sup>108</sup> Vincent Bevins draws on recently declassified government documents to describe the role of the United States in the Indonesian Army's "annihilation" of the Communist Party.<sup>109</sup> "Jakarta," he shows, became a code word in Brazil and Chile.

Testimony before Brazil's Truth Commission after the fall of its right-wing dictatorship established that the "Jakarta Operation" there referred to the mass murder of communists.<sup>110</sup> Graffiti with the message "Jakarta is coming," or simply "Yakarta," appeared throughout the region. It meant "anti-communist mass murder and the state-organized extermination of civilians who opposed . . . capitalist authoritarian regimes loyal to the United States. . . . [Jakarta] would be employed far and wide in Latin America over the two decades that followed."<sup>111</sup> The United States' efforts to undermine communist regimes in Latin America also included what the International Court of Justice (ICJ) held was America's illegal use of force against Nicaragua in *Nicaragua v. United States*,<sup>112</sup> as well as its role in the overthrow of the democratically elected President of Chile, Salvador Allende, and its support for General Augusto Pinochet, the dictator who replaced him.<sup>113</sup>

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108. See generally VINCENT BEVINS, *THE JAKARTA METHOD: WASHINGTON'S ANTI-COMMUNISM CRUSADE AND THE MASS MURDER PROGRAM THAT SHAPED OUR WORLD* (Hatchett Book Group) (2020) [hereinafter *JAKARTA METHOD*].

109. *Id.* at 139–40, 156–57; Vincent Bevins, *How 'Jakarta' Became the Codeword for U.S. Backed Mass Killing*, N.Y. REV. BOOKS (May 18, 2020), [https://www.nybooks.com/daily/2020/05/18/how-jakarta-became-the-codeword-for-us-backed-mass-killing/?lp\\_txn\\_id=1039785](https://www.nybooks.com/daily/2020/05/18/how-jakarta-became-the-codeword-for-us-backed-mass-killing/?lp_txn_id=1039785) (stating that, "Operation Annihilation" was the Indonesian Army's name for the campaign in which "between five hundred thousand and one million people were slaughtered, and one million more were herded into concentration camps." While conceding that, "The prime responsibility for the massacres and the concentration camps lies with the Indonesian military," Bevins insists that, "The United States was part and parcel of the operation at every stage.").

110. *Id.* at 193–94.

111. *Id.* at 199–200.

112. *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, Judgment, 1986 I.C.J. 14, ¶¶ 9, 15, 25, 26(g) (June 27).

113. *JAKARTA METHOD*, *supra* note 108, at 200–01, 203; see generally Frederic L. Kirgis, *Possible Indictment of Pinochet in the United States*, 51 AM. SOC'Y INT'L L. (Mar. 13, 2000) <https://www.asil.org/insights/volume/5/issue/3/possible-indictment-pinochet-united-states>; *Support SOA Watch*, SOAW (Jan. 1, 2021) <https://soaw.org/support-soa-watch-today> ("The SOA Watch staff collective is spread across continents, working with allies and compass throughout the Americas on everything from reports documenting the impacts of US trained, funded and supported state officials; to organizing virtual spaces for popular education.").



#### IV. TOWARD A MORE AUTHENTIC COMMITMENT TO HUMAN RIGHTS

This Part begins with two theories that support the more vigorous approach to human rights that the current crises demand. It then proposes a new theory, intercountry human rights, intended to globalize human rights through *ad hoc* arrangements between states. It concludes by proposing two concrete legal reforms for the United States.

##### A. Theories to Support More Robust Human Rights

Vulnerability theory and reparations theory are both familiar to international lawyers. These recent iterations differ from the traditional international lawyers' understanding in ways that support the deeper commitment to human rights needed now.

##### 1. Vulnerability Theory

The core insight of vulnerability theory is that “vulnerability is . . . inherent in the human condition”; we are all vulnerable in different ways and at different times in our lives.<sup>114</sup> As a corollary, the notion that only some groups are “vulnerable” is “not only misleading and inaccurate, it is also pernicious” because it suggests that other groups are not.<sup>115</sup> Under vulnerability theory, in contrast, the state has an affirmative obligation to recognize and address the multiple vulnerabilities of its people.<sup>116</sup>

Although the term “vulnerability theory” was coined in the twenty-first century, human vulnerability has been addressed in human rights law since the Universal Declaration of Human Rights in 1948.<sup>117</sup> Article 6, for example, recognizes everyone’s “right to recognition everywhere as a person before the law.”<sup>118</sup> Article 22 recognizes the right to social security and the right to the “realization . . . of economic, social and cultural rights indispensable for his dignity.”<sup>119</sup> Article 23.3 recognizes that “everyone who works has the right to . . . [remuneration] . . . ensuring for himself and his

114. *Equality in the Human Condition*, *supra* note 9, at 1.

115. *Id.* at 3; Martha Albertson Fineman, *Equality, Autonomy, and the Vulnerable Subject in Law and Politics*, in VULNERABILITY: REFLECTIONS ON A NEW ETHICAL FOUNDATION FOR LAW AND POLITICS 13, 16 (Martha Albertson Fineman & Anna Grear eds. 2013).

116. *Equality in the Human Condition*, *supra* note 9, at 20–21.

117. *See generally* G.A. Res. 217 (III) A, *supra* note 6; Robert Andorno, *Is Vulnerability the Foundation of Human Rights*, in HUMAN DIGNITY OF THE VULNERABLE IN THE AGE OF RIGHTS: INTERDISCIPLINARY PERSPECTIVES 257, 258 (Aniceto Masferrer & Emilio Garcia-Sanchez eds., 2016) [hereinafter *Vulnerability the Foundation of Human Rights*].

118. G.A. Res. 217 (III) A, *supra* note 6, art. 6.

119. *Id.* art. 22.

family existence worthy of human dignity,”<sup>120</sup> and Article 25 recognizes that if a person *cannot* work; because of unemployment, sickness, disability, old age or other reason; he still has a right to security.<sup>121</sup> These rights and others, including the rights to an adequate standard of living,<sup>122</sup> to be free from hunger,<sup>123</sup> and the right to the “highest attainable standard of physical and mental health”<sup>124</sup> are spelled out in detail in the legally binding Economic Covenant.<sup>125</sup> Additional rights, recognizing the specific vulnerabilities of women and children, are set out in the Women’s Convention and the CRC.<sup>126</sup>

Vulnerability theory extends the scope of those for whom the state is responsible. Under the human rights treaties, the state is responsible only for the specific parties, and in the specific contexts, set out in the treaties. The treaties, moreover, are binding only on ratifying parties, and even then, only to the extent accepted by the state. Under vulnerability theory, in contrast, vulnerability is universal.

## 2. Abolition Theory

Reparations have a long history in international law. They are due whenever a state is in breach of a legal obligation. They may take the form of compensation, restitution, apology, or other form of satisfaction. In *The Alabama Arbitration*, for example, Great Britain paid the United States \$15,500,000 for its breach of neutrality during the American Civil War.<sup>127</sup>

Under recent iterations of reparations theory propounded by the Black Lives Matter movement, however, reparations have been explicitly linked to the abolition of the original harm upon which the reparations are based.<sup>128</sup> As Patrisse Cullors describes it, this enables those seeking to eliminate destructive institutions to situate the harm in a social and political context.<sup>129</sup>

120. *Id.* art. 23, ¶ 3.

121. *Id.* art. 25.

122. ICESCR, *supra* note 6, art. 11, ¶ 1.

123. *Id.*

124. *Id.* art. 12.

125. *See generally* ICESCR, *supra* note 6.

126. *See, e.g.*, CEDAW, *supra* note 6, arts. 5–6 (requiring state to “ensure that family education includes a proper understanding of maternity as a social function and the recognition of the common responsibility of men and women in the upbringing and development of their children” and “to suppress all forms of traffic in women and exploitation of prostitution of women” *Id.*); CRC, *supra* note 6, arts. 7, ¶ 1, 24, ¶ 2 (“The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents.” *Id.* art. 7, ¶ 1. As well as “To diminish infant and child mortality[.]” *Id.* art. 24, ¶ 2(a)).

127. MARK WESTON JANIS, *AMERICA AND THE LAW OF NATIONS 1776–1939* 131–33 (2010).

128. *See, e.g.*, Cullors, *supra* note 10, at 1686; Roberts, *supra* note 60, at 30.

129. Cullors, *supra* note 10, at 1687.

She offers a graphic example.<sup>130</sup> Her brother, a 6'2" Black man weighing almost three hundred pounds, was discharged from prison with a diagnosis of mental illness, but his family was not informed.<sup>131</sup> They were terrified when he started to hallucinate and did not know where he was.<sup>132</sup> They called for the Psychiatric Emergency Team, which arrived and promptly called the police.<sup>133</sup> Her brother dropped to his knees, hands in the air, "plead[ing] with the officers for his life."<sup>134</sup> Cullors was able to persuade the officers to leave, and her brother eventually agreed to go to the hospital. As Cullors concludes, "[a]bolition means not having the police as first responders to mental and emotional health crises."<sup>135</sup> Rather, she suggests, "[a]bolition fights to ensure that all families have access to adequate and quality health services."<sup>136</sup>

Those seeking to abolish prisons, for example, may seek reparations for mass incarceration even as they work toward its abolition. The key is to avoid measures that perpetuate that which is to be eradicated, rather than dismantle or diminish it. As Angel Sanchez explains, "I understand this [Essay] may not be abolitionist enough for some . . . [but] after serving over a decade in prison . . . I yearn to . . . alleviate the inhumane treatment of the imprisoned . . . I believe that the prison system is like a social cancer: we should fight to eradicate it but never stop treating those affected by it."<sup>137</sup>

Framing reparations for human rights violations as a measure taken toward the abolition of such violations, similarly, is important for symbolic and educational reasons. But it is also important to apply those reparations to the remediation of the actual harm caused by the violations and to the prevention of future violations. The ICJ found that the United States had an obligation to pay reparations in *The Nicaragua Case*, for example.<sup>138</sup> But Nicaragua later abandoned its claim, presumably in response to United States pressure to do so in exchange for foreign aid.<sup>139</sup> If the United States wanted to repair its relationship with Nicaragua, and the region, it might have instead accepted responsibility for its earlier violations, and framed the same exchange not only as reparations but as a commitment to the abolition of the illegal use of force.

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130. *Id.* at 1689.

131. *Id.*

132. *Id.*

133. *Id.*

134. Cullors, *supra* note 10, at 1689.

135. *Id.*

136. *Id.*

137. Angel E. Sanchez, *In Spite of Prison*, 132 HARV. L. REV. 1650, 1652 (2019).

138. MARK WESTON JANIS ET AL., INTERNATIONAL LAW 804 (6th ed. 2020).

139. *Id.* at 805.

### 3. A Theory of Intercountry Human Rights

Intercountry human rights would effectively merge the participating states into a single functioning unit for purposes of assuring specific, agreed-upon human rights. The legal mechanism for accomplishing this could be a simple protocol to a pre-existing treaty to which they were both parties, such as a friendship, commerce, and navigation treaty (FCN) treaty or, if there were more than two states, the relevant human rights treaty.

The terms of the agreements would vary according to the interests, needs, histories, and geographies of their state parties. There are several reasons states might accede to such treaties, and more broadly, embrace the notion of intercountry human rights, as set out below. These treaties would find support in vulnerability theory, abolition theory, and the growing recognition that human rights violations, like viruses, ignore political borders in a globalized world.

A strong version of intercountry human rights would be a multilateral treaty or protocol in which states recognize that all activities involving international law would be subject to international human rights law.<sup>140</sup> Disputes would be resolved by the ICJ. In other words, if an activity involved goods, services, or persons of more than one state, or any form of international commerce or investment, human rights would have to be assured at every step of the process, for everyone involved. Rich countries, for example, could not corner the market on a COVID-19 vaccine because it would violate the right to health of those unable to afford it.<sup>141</sup> A person ordering shoes from China would know that workers' rights were protected in the factories in which they were made, and that toxic by-products of industrialization were not lowering the life expectancy of the people who lived in the region. A strong version of intercountry human rights, in short, would eliminate the "siloning" of human rights documented and deplored by Alston.<sup>142</sup>

Intercountry human rights are not an alternative to *international* human rights, understood as the UN-centered system, but an addition. It would draw

140. See ICESCR, *supra* note 6; ICCPR, *supra* note 6; CERD, *supra* note 6; CEDAW, *supra* note 6; CRC, *supra* note 6.

141. See, e.g., Megan Twohey et al., *With First Dibs on Vaccines, Rich Countries Have 'Cleared the Shelves'*, N.Y. TIMES (Dec. 16, 2020), <https://www.nytimes.com/2020/12/15/us/coronavirus-vaccine-doses-reserved.html?searchResultPosition=2>; Matt Apuzzo & Selam Gebrekidan, *For COVID-19 Vaccines, Some are Rich and too Poor*, N.Y. TIMES, <https://www.nytimes.com/2020/12/28/world/africa/covid-19-vaccines-south-africa.html?searchResultPosition=1> (last updated Dec. 30, 2020).

142. *Extreme Inequality*, *supra* note 13; Philip Alston, *Universal Basic Income*, in THE FUTURE OF ECONOMIC AND SOCIAL RIGHTS 377, 379 (Katherine Young ed. 2019).

on developments in that system, such as recent research showing that state reporting to human rights treaty bodies is linked to better rights practices.<sup>143</sup>

There is no need for any theoretical justification for the mechanism proposed here; it is simply an agreement between, or among, consenting states. There is no encroachment on state sovereignty. Rather, like any other international agreement, it is a voluntary surrender of *some* sovereignty, in recognition of a greater common good.

### B. *Legal Reforms for the United States*

This section suggests how the United States could apply the theories set out above. These are merely sketches, set out for purposes of illustration, but they are intended to serve as sketches for actual, concrete proposals. While vulnerability theory and abolition theory apply to both Black Americans and people on the move, the focus in the first subsection, below, is on Black Americans. Intercountry human rights could apply, in theory, to *all* people on the move. Here, more specifically, the theory is considered in the context of those harmed by the United States' anti-communism campaigns in Latin America and to those deported there during the pandemic.

#### 1. Fulfil America's Early Promise

The United States can begin by revoking its prior declarations that the ICCPR and the Race Convention were “non-self-executing.”<sup>144</sup> It can then join the other industrialized democracies by ratifying the remaining major human rights treaties without stipulating that they will have no legal effect.<sup>145</sup>

This may seem overly ambitious, especially in view of our historical antipathy to human rights. But there are three reasons why these measures, which the other industrialized democracies adopted decades ago, may finally be within reach. First, our historical antipathy to human rights was deeply grounded in a virulent form of racism that growing numbers of Americans, especially young Americans, now find repugnant.<sup>146</sup> Americans in every

143. Cosette D. Creamer & Beth A. Simmons, *The Proof is in the Process: Self-Reporting Under International Human Rights Treaties*, 114 AM. J. INT'L L. 1, 1 (2020).

144. See, e.g., Penny M. Venetis, *Making Human Rights Treaty Law Actionable in the United States: The Case for Universal Implementing Legislation*, 63 ALA. L. REV. 98, 98–99 (2011).

145. *Id.*

146. See, e.g., Nate Cohn & Kevin Quealy, *How Public Opinion Has Moved on Black Lives Matter*, N.Y. TIMES (June 10, 2020), <https://www.nytimes.com/interactive/2020/06/10/upshot/black-lives-matter-attitudes.html> (noting that “in recent weeks, American voters’ support for Black Lives Matter increased almost as much as it had in the preceding two years”); *Id.*; Astead W. Herndon & Dionne Searcey, *How Trump and the Black Lives Matter Movement Changed White Voters’ Minds*, N.Y. TIMES, <https://www.nytimes.com/2020/06/27/us/politics/trump-biden-protests-polling.html> (last updated July 3, 2020).

state demonstrated against the murder of George Floyd and other Black Americans by the police this year.<sup>147</sup> These murders, and the Black Lives Matter movement, have produced a “seismic shift” in American views on racism.<sup>148</sup> Along with the pandemic, and its economic costs, “[i]deas that would have been considered too liberal for most Democrats a few months ago are now being proposed by Republicans.”<sup>149</sup>

Second, “human rights” have become part of mainstream discourse, in part thanks to Bernie Sanders.<sup>150</sup> As then President-elect Joe Biden noted in a speech on December 10, 2020, Human Rights Day, he is receptive:

This year, amid a pandemic and global protests, we are reminded of how much work remains to be done to root out the systemic inequities that continue to cut short lives and imperil livelihoods. And as we work . . . to advance human rights globally, we must also recognize that our task begins at home. Every American — regardless of race, ethnicity, zip code, religion, sex, sexual orientation, gender identity, or disability — should be free to flourish in a society that values and defends equal justice for all. We must lead by the power of our example.<sup>151</sup>

Third, the idea that it is the state’s responsibility to assure the well-being of its people, and that the state is in fact capable of doing so, has been rehabilitated.<sup>152</sup> Nobel-prize winning economist Paul Krugman recently cited Ronald Reagan: “the most terrifying words in English are ‘I’m from

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147. See, e.g., Damien Cave, Livia Albeck-Ripka, & Iliana Magra, *Huge Crowds Around the Globe March in Solidarity Against Police Brutality*, N.Y. TIMES (June 9, 2020), <https://www.nytimes.com/2020/06/06/world/george-floyd-global-protests.html> (Protesters throughout the world took to the streets in solidarity).

148. Giovanni Russonello, *Why Most Americans Support the Protests*, N.Y. TIMES (June 5, 2020), <https://www.nytimes.com/2020/06/05/us/politics/polling-george-floyd-protests-racism.html>.

149. Perry Bacon Jr., *The Pandemic Has Pushed Biden To The Left. How Far Will He Go?*, FIVETHIRTYEIGHT (May 21, 2010), <https://fivethirtyeight.com/features/the-pandemic-has-pushed-biden-to-the-left-how-far-will-he-go/>.

150. Sydney Ember, *Bernie Sanders Went to Canada, and a Dream of ‘Medicare for All’ Flourished*, N.Y. TIMES (Sept. 9, 2019), <https://www.nytimes.com/2019/09/09/us/politics/bernie-sanders-health-care.html>.

151. Press Release, Joe Biden, Biden-Harris Transition, Statement by President-elect Joe Biden on Human Rights Day (Dec. 10, 2020) (on file at <https://buildbackbetter.gov/press-releases/statement-by-president-elect-joe-biden-on-human-rights-day>).

152. See BROWN, *supra* note 39, at 131; *Government’s Responsibility for Public Health*, MINNESOTA DEPT. HEALTH, <https://www.health.state.mn.us/communities/practice/resources/chsadmin/mnsystem-responsibility.html> (last visited Jan. 28, 2021).

the government, and I'm here to help.”<sup>153</sup> But *this* year, Krugman continues, “the government was there to help – and help it did.”<sup>154</sup>

This is not to suggest that racism is not an ongoing—and deadly—nightmare in this country.<sup>155</sup> Or that even Americans who believe that health care is a human right are ready to recognize federally-funded, equal education as a human right.<sup>156</sup> Or that seventy-one million people did not vote for Donald Trump.<sup>157</sup> But COVID-19, and its ongoing economic fallout, seems to have taught us something about our own vulnerability.<sup>158</sup>

## 2. Intercountry Human Rights

Intercountry human rights, applied in this context, could require the United States to take responsibility for its historical support of repressive regimes in Latin America, as well as its more recent illegal deportations of 10,000 immigrants to the region, many already infected with the virus. One approach might be to establish a joint commission with the affected states to determine reparations.

President Biden might be particularly well-prepared for such a project. As his longtime friend, Senator Tom Carper of Delaware, recently observed, “[Biden] believes that we—the U.S.— are the root cause of much of the violence and crime and lack of opportunity in . . . Central America.”<sup>159</sup>

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153. Paul Krugman, Opinion, *2020 Was the Year Reaganism Died*, N.Y. TIMES (Dec. 28, 2020), <https://www.nytimes.com/2020/12/28/opinion/reagan-economy-covid.html>; *Paul Krugman – Facts*, NOBEL PRIZE, <https://www.nobelprize.org/prizes/economic-sciences/2008/krugman/facts/> (last visited Jan. 28, 2021); see Jason DeParle, *Vast Federal Aid Has Capped Rise in Poverty, Studies Find*, N.Y. TIMES (June 22, 2020), <https://www.nytimes.com/2020/06/21/us/politics/coronavirus-poverty.html>.

154. Krugman, *supra* note 153.

155. See, e.g., *Police Violence Map*, MAPPING POLICE VIOLENCE, <https://mappingpoliceviolence.org/> (last updated Feb. 16, 2021).

156. See, e.g., *Equality of Educational Opportunity*, STAN. ENCYC. PHIL. (May 31, 21017), <https://plato.stanford.edu/entries/equal-ed-opportunity/>; see generally Mary Gerisch, *Health Care as a Human Right*, A.B.A., [https://www.americanbar.org/groups/crsj/publications/human\\_rights\\_magazine\\_home/the-state-of-healthcare-in-the-united-states/health-care-as-a-human-right/](https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/the-state-of-healthcare-in-the-united-states/health-care-as-a-human-right/) (last visited Jan. 28, 2021).

157. Margaret Renkl, Opinion, *71 Million People Voted for Trump. They're Not Going Anywhere*, N.Y. TIMES (Nov. 9, 2020), <https://www.nytimes.com/2020/11/09/opinion/trump-biden-nation-divided.html>.

158. Roberts, *supra* note 60 (As Dorothy Roberts reminds us, quoting Angela Y. Davis, “You have to act as if it were possible to radically transform the world. And you have to do it all the time.”).

159. Christian Paz, *The Biden Doctrine Begins with Latin America*, ATLANTIC (Oct. 26, 2020), <https://www.theatlantic.com/international/archive/2020/10/joe-biden-foreign-policy-latin-america/616841/>.

Carper is certain that Biden would “make sure we do a better job.”<sup>160</sup> Biden believes that “we have a moral responsibility, having created havoc in [Central and South America].”<sup>161</sup> Foreign aid, of course, is not the same as recognizing a legal obligation to support human rights in a foreign country. But it could be a beginning.

## V. CONCLUSION

This Article has explained why COVID-19 targets the poor and why this is a matter of human rights. It has argued that the current crises demand a deeper, more authentic commitment to human rights and drawn on vulnerability theory, abolition theory, and a new theory of ‘intercountry’ human rights to support this commitment. Finally, it has proposed two legal reforms to realize it.

We are living in a world of staggering economic inequality, in which some lives matter and others do not. America has played a significant role in creating this world, in part by violating the human rights of Black Americans and “people on the move.” This Article has argued that America should take responsibility for these violations and suggested how we might begin.

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160. *Id.* (On March 15, 2020, Biden said he would impose a moratorium of deportation of immigrants for the first hundred days of his administration, after which deportations would be limited to people convicted of felonies); Melissa Gomez, *Biden Commits to Moratorium on Deportations of Immigrants*, L.A. TIMES (Mar. 15, 2020), <https://www.latimes.com/politics/story/2020-03-15/joe-biden-bernie-sanders-deportations-coronavirus-healthcare>.

161. Paz, *supra* note 159.