

# **CORONAVIRUS AND RELIGIOUS FREEDOM: A PRELIMINARY VIEW FROM THE UNITED STATES**

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**SUMMARY:** Introduction. I. The Coronavirus pandemic in the United States. A. The basic story. B. Milestones. C. Churches as superspreaders and scapegoats. D. Ancillary crises - economic, racial justice, social trust. II. The impact of government actions on freedom of religion and belief. A. Legal principles - non-discrimination, reasonable accommodation, compelling state interests. B. Gathering. C. Religious holidays. D. Hospital patients. E. Weddings and funerals. F. Nursing homes. G. Prisons. H. Religious education. III. Responses of religious communities and their adherents to government rules. A. Cooperation and caution. B. Challenges to government restrictions. C. Government funding of religion and religiously-affiliated institutions. D. Vaccinations and anti-vaccine ideology. IV. Responses of religious communities to the coronavirus crisis. A. Spiritual and mental health support. B. Humanitarian responses. V. The coronavirus pandemic as a stress test. VI. The problem of the politicization of the coronavirus pandemic. VII. The Crisis of trust. Conclusion: Human dignity of and for all.

## **INTRODUCTION**

The coronavirus crisis has been a global phenomenon, but it has had very different manifestations in various countries and regions of the world. In the United States, the pandemic has acted as a kind of “stress test” upon our most important institutions and

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their leaders, a test that we as a society have not met with great success.<sup>2</sup> The most prominent feature of the pandemic in the United States has been the deep politicization of the crisis.<sup>3</sup> It has also exacerbated a crisis of trust that predated the pandemic, but which has now reached proportions that should alarm even optimistic observers.<sup>4</sup> As David Brooks, an astute U.S. commentator put it in October 2020, “America is having a moral convulsion.” According to Brooks, “Levels of trust in this country - in our institutions, in our politics, and in one another - are in precipitous decline.” He then notes ominously, “and when social trust collapses, nations fail.”<sup>5</sup> The pandemic, while not the cause of this decline in social trust, has acted as an accelerant and amplifier of it.<sup>6</sup>

The impact of the coronavirus on religion and religious believers in the U.S. has been significant, and its implications for religious freedom have been significant and may be long lasting.<sup>7</sup> We have well-established legal resources for dealing with the challenges of balancing concerns for public health with concerns for freedom of religion and belief, but these resources have been deployed with varying degrees of sensitivity and skill.<sup>8</sup> For the most part - and with some notable exceptions -- religious organizations and communities

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<sup>2</sup> See Brett G. Scharffs, “Covid-19, Religion and FoRB: 2020 Vision - Looking Backwards and Seeing the Way Forward. Reflections upon the Completion of the Covid-19 & FoRB Webinar Series, Talkabout Law and Religion, [talkabout.iclrs.org/2020/07.11](http://talkabout.iclrs.org/2020/07.11).

<sup>3</sup> For example, in May, New York Magazine reported the results from a Civiqs poll, which showed “that on the question of whether a given respondent is ‘extremely concerned’ about the coronavirus, the divide between Democrats and Republicans, respectively, is 60 percent to 12 percent. By that same token, just 2 percent of Democrats are ‘not concerned at all,’ while 33 percent of Republicans fit in that bucket.” Jesse Singal, *The Theory That Explains the Politicization of Coronavirus*, *Intelligencer*, *New York Magazine*, May 8, 2020.

<sup>4</sup> I have written about this theme in Brett G. Scharffs, “The COVID Crisis as a Crisis of Trust,” as part of a blog webinar reflecting on Covid, law and religion at six months. See [talkabout.iclrs.org/2020/10/02/the-covid-crisis-as-a-crisis-of-trust/](http://talkabout.iclrs.org/2020/10/02/the-covid-crisis-as-a-crisis-of-trust/).

<sup>5</sup> David Brooks, “Collapsing Levels of Trust are Devastating America,” *The Atlantic*, October 5, 2020. Brooks predicts that “The Culture that is emerging, and which will dominate American life over the next decades, is a response to a prevailing sense of threat. This new culture values security over liberation, equality over freedom, the collective over the individual.” *Id.*

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

<sup>7</sup> For several early journalistic accounts, see for example, “Public Health Crisis Such as COVID-19 — May Lead to Flare-ups of Dangerous Religious Sentiments, including ‘Scapegoating,’” *Baylor University*, March 24, 2020, <https://www.baylor.edu/mediacommunications/news.php?action=story&story=218155>; Sarah Mervosh and Elizabeth Dias, “From Seattle to Kentucky, Churches Cancel Religious Services,” *The New York Times*, March 11, 2020, <https://www.nytimes.com/2020/03/11/us/coronavirus-kentucky-churches-cancel.html>.

<sup>8</sup> See Brett G. Scharffs, “Religious Freedom in the Age of Coronavirus: Legal and Non-Legal Strategies for Finding Community and Hope,” [talkabout.iclrs.org/2020/06/19](http://talkabout.iclrs.org/2020/06/19).

have been quite responsive and responsible in dealing with the coronavirus crisis.<sup>9</sup> For religious institutions and leaders, too, the pandemic has posed a stress test for the trustworthiness of those institutions and leaders.

## **CONTENTS**

This chapter is a brief overview of the first six months (March through October 2020) of the coronavirus pandemic in the United States and focuses on the implications of the pandemic for religion and religious freedom. With no end in sight, and with a presidential election looming in early November, this overview is tentative.

Part I will provide a brief summary of the coronavirus pandemic in the United States, including several important milestones along the way. There have been several distinct phases of the crisis. Part II addresses government rules relating to the coronavirus epidemic and the impact of these rules upon the free exercise of religion. Here I will discuss three basic legal principles and their application - nondiscrimination, reasonable accommodation, and the compelling state interest test. Part III summarizes the response of religious communities and their adherents to the government rules. Part IV addresses other dimensions of the responses of religious communities to the coronavirus crisis, including humanitarian activities. Part V develops the theme of the coronavirus pandemic as a stress test and assesses how well various institutions and leaders have responded to this test. Part VI addresses the problem of the politicization of the coronavirus crisis in the United States. Part VII addresses the ancillary crises that have been created or amplified during the time of the coronavirus pandemic, focusing on the crisis of trust that now poses a significant threat to the United States and its most fundamental institutions. I will then conclude on a note of strained optimism, with several ideas for navigating our way out of these overlapping crises.

## **I. THE CORONAVIRUS PANDEMIC IN THE UNITED STATES**

### **A. The basic story**

As of mid-October 2020, the total number of cases of coronavirus in the U.S. stood at approximately 8.5 million, with approximately 210,000 reported deaths.<sup>10</sup> Political

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<sup>9</sup>“Doing Church During Disruption: Coronavirus (COVID-19) resources for church leaders,” Church Executive, March 2020, <https://churchexecutive.com/archives/coronavirus-covid-19-resources-for-church-leaders>.

commentators such as David Leonhardt noted that with 4 percent of the world's population, the U.S. accounted for 22 percent of confirmed Covid-19 deaths.<sup>11</sup> Total deaths per million of population stood at 676, which placed the U.S. alongside countries such as Brazil (722) and Spain (722), while reported deaths per million were lower in countries such as the United Kingdom (641), Italy (604), Sweden (585), France (511), the Netherlands (394), and Germany (118). Meanwhile, deaths per million in Australia (35), Japan (13), South Korea (9), and New Zealand (5) were much lower. The U.S. rate of deaths per million was higher than that of our nearest neighbors, more than double Canada (258) and a little higher than Mexico (665). In addition to Brazil and Spain, the only countries with higher reported deaths per million were Chile (709), Ecuador (698), and Bolivia (722). Reported deaths per million in China, where the virus originated, were 3 per million.<sup>12</sup>

## B. Milestones

According to a timeline assembled by NBC News, It was late December 2019 when Chinese officials in Wuhan, China confirmed dozens of cases of pneumonia from an unknown cause.<sup>13</sup> The outbreak was identified as a new coronavirus on January 7<sup>th</sup> 2020.<sup>14</sup> The first death was reported in Wuhan on January 11<sup>th</sup>,<sup>15</sup> and on January 20<sup>th</sup> the World Health Organization confirmed the first cases outside China in Thailand, Japan,

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<sup>10</sup> National Center for Health Statistics, "Daily Updates of Totals by Week and State: Provisional Death Counts for Coronavirus Disease 2019 (COVID-19)," Accessed October 20, 2020, <https://www.cdc.gov/nchs/nvss/vsrr/covid19/index.htm>.

<sup>11</sup> See David Leonhardt, "America's Death Gap and what else you need to know today," September 1, 2020, New York Times.

<sup>12</sup> Comparisons of testing data across countries are affected by differences in the way the data are reported. For instance, where the number of confirmed cases is high relative to the extent of testing, this suggests that there may not be enough tests being carried out to properly monitor the outbreak. Limited testing and challenges in the attribution of the cause of death means that the number of confirmed deaths may not be an accurate count of the true number of deaths from COVID-19. Hasell, J., Mathieu, E., Beltekian, D. et al. A cross-country database of COVID-19 testing. *Sci Data* 7, 345 (2020) The data in this paragraph is from [worldometers.info/coronavirus](http://worldometers.info/coronavirus), accessed on October 18, 2020.

<sup>13</sup> The virus was originally reported as an atypical pneumonia. Center for Infectious Disease Research and Policy, "Unexplained pneumonia in China..." University of Minnesota, December 31, 2019, <https://www.cidrap.umn.edu/news-perspective/2019/12/news-scan-dec-31-2019>.

<sup>14</sup> World Health Organization, "Pneumonia of Unknown Cause—China," *Disease Outbreak News*, January 5, 2020,

<https://www.who.int/csr/don/05-january-2020-pneumonia-of-unknown-cause-china/en/>.

<sup>15</sup> "武汉市卫生健康委关于不明原因的病毒性肺炎情况通报" ("Wuhan Municipal Health Commission Bulletin Regarding Viral Pneumonia of Unknown Cause"), January 11, 2020, <http://wjw.wuhan.gov.cn/front/web/showDetail/2020011109035>.

and South Korea.<sup>16</sup> The first confirmed coronavirus case in the United States was on January 21<sup>st</sup>,<sup>17</sup> and China placed Wuhan and its 11 million inhabitants under quarantine on January 23<sup>rd</sup>.<sup>18</sup> The WHO declared the outbreak a global public health emergency on January 30<sup>th</sup> and on January 31<sup>st</sup> the U.S. imposed a travel ban on foreign nations who had traveled to China.

In February, early outbreaks were detected on cruise ships, and on February 7<sup>th</sup>, Dr. Li Wenliang, a Chinese doctor who had issued an early warning about the outbreak died.<sup>19</sup> The first U.S. citizen to die from coronavirus passed away in Wuhan on February 8<sup>th</sup>.<sup>20</sup> On February 9<sup>th</sup>, the death toll in mainland China reached 811, surpassing the number of people who died from the SARS outbreak in 2003.<sup>21</sup> By mid-February, deaths from the coronavirus were being reported in France, Iran, and Korea, and by late February Italy was the worst-hit country in Europe.<sup>22</sup> The U.S. stock market began to fall sharply on February 24<sup>th</sup>, and on February 26<sup>th</sup> the first case in the U.S. with no clear source of exposure was reported in California.<sup>23</sup> At the end of February, the U.S. announced

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<sup>16</sup> World Health Organization, “Novel Coronavirus (2019-nCoV) Situation Report—1,” January 21, 2020,

<https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200121-sitrep-1-2019-ncov.pdf>.

<sup>17</sup> U.S. CDC, “First Travel-Related Case of 2019 Novel Coronavirus Detected in United States,” January 21, 2020,

<https://www.cdc.gov/media/releases/2020/p0121-novel-coronavirus-travel-case.html>.

<sup>18</sup> Wuhan Municipality Novel Coronavirus Infection Pneumonia Epidemic Prevention and Control Command Center,

“市新型冠状病毒感染的肺炎疫情防控指挥部通告（第 1 号）” (“Notice from the Municipal Novel Coronavirus

Infection Pneumonia Epidemic Prevention and Control Command Center (No. 1”), January 23, 2020,

[http://www.gov.cn/xinwen/2020-01/23/content\\_5471751.htm](http://www.gov.cn/xinwen/2020-01/23/content_5471751.htm).

<sup>19</sup> Stephanie Hegarty, “The Chinese doctor who tried to warn others about coronavirus,” BBC News, February 6, 2020, <https://www.bbc.com/news/world-asia-china-51364382>.

<sup>20</sup> Raymond Zhong and Edward Wong, “First American Dies of Coronavirus, Raising Questions About U.S. Response,” *The New York Times*, February 8, 2020, <https://www.nytimes.com/2020/02/08/world/asia/china-coronavirus-american-dead.html>.

<sup>21</sup> Raymond Zhong, et al., “Deaths in China From Coronavirus Reach 811, Surpassing SARS Toll,” *The New York Times*, February 8, 2020, <https://www.nytimes.com/2020/02/08/world/asia/coronavirus-china.html>.

<sup>22</sup> Derrick Taylor, “A Timeline of the Coronavirus Pandemic,” *The New York Times*, Aug 6, 2020, <https://www.nytimes.com/article/coronavirus-timeline.html>.

<sup>23</sup> Aaron Steckelberg and Jennifer Liberto, “How the coronavirus tanked the market,” *Washington Post*, February 28, 2020, <https://www.washingtonpost.com/business/2020/02/28/12-days-that-tanked-markets>.

additional travel restrictions involving Iran, Italy, and South Korea, and on February 29<sup>th</sup> the U.S. recorded its first death in Washington state.<sup>24</sup>

The effects of the coronavirus crisis were beginning to be felt in the U.S. by early March, and on March 8<sup>th</sup>, the number of confirmed cases in the U.S. reached 500. Italy's Lombardi region went into lockdown on March 10<sup>th</sup>, and on March 11<sup>th</sup> the WHO characterized the coronavirus outbreak as a pandemic.<sup>25</sup> A major turning point occurred in the U.S. on March 11<sup>th</sup>, when the National Basketball Association suspended all basketball games after a player tested positive.<sup>26</sup> Also on March 11<sup>th</sup>, the Trump administration announced new restrictions on foreign travelers from 26 countries in Europe.<sup>27</sup> On March 12<sup>th</sup>, Major League Baseball suspended spring training and announced that the start of the baseball season would be delayed by at least two weeks. Other sports leagues followed suit, and Italy's death toll surpassed 1,000 on March 13<sup>th</sup>.<sup>28</sup> Also on March 13<sup>th</sup>, the WHO said Europe had become the epicenter of the pandemic, President Trump declared a national state of emergency, and states began closing schools over concerns about coronavirus.<sup>29</sup> Also in mid-March, spikes were reported in Spain and Iran, and the U.S. extended its travel ban to include the U.K. and Ireland. On March 16<sup>th</sup>, the Trump administration advised Americans to avoid gatherings of more than ten people, to avoid going to bars and restaurants, and to avoid discretionary travel.<sup>30</sup>

During the second half of March, many Americans began quarantining at home. The U.S. stock market continued to fall, refugee admissions were suspended, and Congress

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<sup>24</sup>Mike Baker, Nicholas Bogel-Burroughs and Karen Weise, "Washington State Declares Emergency Amid Coronavirus Death and Illnesses at Nursing Home," *The New York Times*, February 29, 2020, <https://www.nytimes.com/2020/02/29/us/coronavirus-washington-death.html>.

<sup>25</sup> World Health Organization, "Virtual press conference on COVID-19," March 11, 2020, <https://www.who.int/docs/default-source/coronaviruse/transcripts/who-audio-emergencies-coronavirus-press-conference-full-and-final-11mar2020.pdf>.

<sup>26</sup> "Jazz stars Donovan Mitchell, Rudy Gobert test positive for coronavirus," *NBA online*, March 12, 2020, <https://www.nba.com/article/2020/03/11/nba-suspends-season-virus-outbreak-ap>

<sup>27</sup> Donald Trump, "Proclamation—Suspension of Entry as Immigrants and Nonimmigrants of Certain Additional Persons Who Pose a Risk of Transmitting 2019 Novel Coronavirus," *The White House*, <https://www.whitehouse.gov/presidential-actions/proclamation-suspension-entry-immigrants-nonimmigrants-certain-additional-persons-pose-risk-transmitting-2019-novel-coronavirus/>

<sup>28</sup> Robin Muccari, Denise Chow and Joe Murphy, "Coronavirus timeline: Tracking the critical moments of COVID-19," *NBC*, Updated July 8, 2020, <https://www.nbcnews.com/health/health-news/coronavirus-timeline-tracking-critical-moments-covid-19-n1154341>.

<sup>29</sup> *Ibid.*

<sup>30</sup> "Remarks by President Trump, Vice President Pence, and Members of the Coronavirus Task Force in Press Briefing," *The White House*, March 16, 2020, <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-vice-president-pence-members-coronavirus-task-force-press-briefing-3/>.

enacted and President Trump signed a coronavirus aid bill.<sup>31</sup> Meanwhile, on March 19<sup>th</sup>, China reported no new domestic cases for the first time since the beginning of the epidemic, and Italy (with 3,405 fatalities) overtook China (with 3,242 fatalities) as the country with the largest number of coronavirus-related deaths.<sup>32</sup> Also on March 19<sup>th</sup>, the U.S. State Department issued a warning against all international travel and encouraged those abroad to return home immediately.<sup>33</sup> By late March, the hardest hit area in the U.S. was New York, which surpassed 10,000 cases on March 21<sup>st</sup>. A number of U.S. state governors issued stay at home orders.<sup>34</sup> By the end of March, the Tokyo 2020 Olympics had been postponed until 2021.<sup>35</sup> On March 26<sup>th</sup>, the death count in the U.S. surpassed 1,000, and confirmed cases surpassed 68,000, eclipsing the number of cases reported in China. Globally, cases reached 500,000 on March 27<sup>th</sup>, with the worldwide death toll reaching 24,000. By the end of March, President Trump had signed a \$2 trillion coronavirus economic stimulus bill, cases in the U.S. had surpassed 100,000, and nationwide deaths surpassed 2,000.<sup>36</sup> At the end of March, the Trump administration extended its guidelines on social distancing to April 30<sup>th</sup>, and the mantra heard constantly in the press was that shutdown measures would help “flatten the curve” of the rate of infections so hospital and other health care systems would not be overwhelmed.<sup>37</sup>

The month of April opened with much of the country under stay-at-home orders or advisories. The economic impact of the epidemic was being felt, and more than 6.6 million Americans filed for unemployment benefits in one week.<sup>38</sup> On April 2<sup>nd</sup>, deaths in New York surpassed 2,000, while confirmed cases rose to more than 92,000; nationwide deaths topped 5,000 and confirmed cases neared a quarter million; globally deaths

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<sup>31</sup> Muccari, Chow, and Murphy, “Coronavirus timeline”; U.S. Department of the Treasury, “The CARES Act Works for All Americans,” accessed Oct 20, 2020, <https://home.treasury.gov/policy-issues/cares>.

<sup>32</sup> Muccari, Chow, and Murphy, “Coronavirus timeline”.

<sup>33</sup> Dan Diamond, Nahal Toosi, and Sam Mintz, “State Department warns Americans: Don’t travel abroad, come home if overseas,” Politico, March 19, 2020, <https://www.politico.com/news/2020/03/19/coronavirus-travel-advisory-level-four-137227>.

<sup>34</sup> Muccari, Chow, and Murphy, “Coronavirus timeline”.

<sup>35</sup> The Tokyo Organising Committee of the Olympic and Paralympic Games, “Olympic Games postponed to 2021,” Tokyo 2020, March 24, 2020, <https://tokyo2020.org/en/news/joint-statement-from-international-olympic-committee-and-tokyo2020>.

<sup>36</sup> Muccari, Chow, and Murphy, “Coronavirus timeline”.

<sup>37</sup> Michael Shear, “Trump Extends Social Distancing Guidelines Through End of April,” The New York Times, March 29, 2020, <https://www.nytimes.com/2020/03/29/us/politics/trump-coronavirus-guidelines.html>

<sup>38</sup> Anneken Tappe and Annalyn Kurtz, “Another 6.6 million Americans filed for unemployment benefits last week,” CNN, April 9, 2020, <https://www.cnn.com/2020/04/09/economy/unemployment-benefits-coronavirus/index.html>.

surpassed 51,000 and total cases surpassed 1 million.<sup>39</sup> On April 3<sup>rd</sup>, the White House issued a recommendation that Americans wear face coverings. On April 6<sup>th</sup>, the U.S. death toll surged past 10,000, more than doubling the total number of deaths over four days.<sup>40</sup> Meanwhile, on April 6<sup>th</sup>, China reported its first day with no coronavirus deaths since the beginning of the outbreak.<sup>41</sup> On April 9<sup>th</sup>, the number of cases in New York surpassed 150,000, which was larger than any country in the world except the U.S. On April 11<sup>th</sup>, the U.S. surpassed Italy as the country with the largest number of coronavirus deaths, 18,860. In mid-April, the governors of New York, New Jersey, Connecticut, and Pennsylvania began steps to ease lockdown restrictions.<sup>42</sup>

In mid-April, the global number of cases surpassed 2 million.<sup>43</sup> On April 20<sup>th</sup>, the Navajo Nation reported a per-capita infection rate that was 10 times higher than in Arizona, which was comparable to rates in New York and New Jersey.<sup>44</sup> In late April, protests were held in a variety of states including Wisconsin and Michigan in opposition to the stay-at-home orders issued by governors. Health officials were vocal in their criticism of such protests.<sup>45</sup> By the end of April the number of deaths in the United States had surpassed 60,000. By the end of April, more than 30 million Americans had filed for unemployment benefits, with the unemployment rate reaching 18%.<sup>46</sup>

During the month of May, most schools remained closed and most workers who could work from home were doing so. The economic toll of the pandemic was being felt in many areas of the economy, particularly retail sales, with a number of prominent department stores filing for bankruptcy.<sup>47</sup> By mid-May a number of governors were announcing plans to reopen their economies, including plans for people to return to work and school. On

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<sup>39</sup> Muccari, Chow, and Murphy, "Coronavirus timeline".

<sup>40</sup> Ibid.

<sup>41</sup> John Ruwitch, "China Reports Its First Day With No New COVID-19 Deaths," NPR News, April 7, 2020, <https://www.npr.org/sections/coronavirus-live-updates/2020/04/07/828827326/china-reports-its-first-day-with-no-new-covid-19-deaths>.

<sup>42</sup> Muccari, Chow, and Murphy, "Coronavirus timeline".

<sup>43</sup> Ibid.

<sup>44</sup> Laurel Morales, "Navajo Nation Sees High Rate Of COVID-19 And Contact Tracing Is A Challenge," NPR News, April 24, 2020, <https://www.npr.org/2020/04/24/842945050/navajo-nation-sees-high-rate-of-covid-19-and-contact-tracing-is-a-challenge>.

<sup>45</sup> Allan Smith, "'Lock her up!': Anti-Whitmer coronavirus lockdown protestors swarm Michigan Capitol," NBC, April 15, 2020, <https://www.nbcnews.com/politics/politics-news/lock-her-anti-whitmer-coronavirus-lockdown-protestors-swarm-michigan-capitol-n1184426>.

<sup>46</sup> Muccari, Chow, and Murphy, "Coronavirus timeline".

<sup>47</sup> Áine Cain and Madeline Stone, "These 35 retailers and restaurant companies have filed for bankruptcy or liquidation in 2020," Business Insider, October 7, 2020, <https://www.businessinsider.com/retailers-filed-bankruptcy-liquidation-closing-stores-2020-2>.

May 13<sup>th</sup>, the Wisconsin Supreme Court struck down the states stay-at-home order as “unlawful, invalid and unenforceable.”<sup>48</sup> By the end of May, all states had begun easing their lockdown measures. On May 20<sup>th</sup> protestors in Michigan protested the State’s stay-at-home order by getting haircuts outside the State Capitol in Lansing. State police and health officials indicated that protestors would be cited for disorderly conduct.<sup>49</sup> On May 20<sup>th</sup>, the global coronavirus count surpassed 5 million. On May 21<sup>st</sup>, the number of Americans who had lost their jobs due to the pandemic reached 40 million.

On May 22<sup>nd</sup>, President Trump announced that places of worship are “essential,” and should be re-opened, which conflicted with orders of various states who had not permitted churches, synagogues and mosques to reopen.<sup>50</sup> On the same day, the Department of Justice sided with parties challenging pandemic-related restrictions in Illinois.<sup>51</sup> Also on May 22<sup>nd</sup>, New York Governor Andrew Cuomo signed an order allowing groups of 10 or fewer people to gather, provided that social distancing, cleaning and disinfection protocols were followed.<sup>52</sup> On May 23<sup>rd</sup>, the Ninth Circuit Court of Appeals upheld California Governor Gavin Newsom’s ban on gatherings at houses of worship, deferring to the Governor’s broad powers to address public health emergencies.<sup>53</sup> On May 25<sup>th</sup>, Democratic Presidential Candidate Joe Biden appeared in public for the first time in more than two months. On May 25<sup>th</sup>, the U.S. Department of Justice sent a letter to Nevada’s governor, Steve Sisolak, stating that the Department was concerned the state’s ban on gatherings of 10 or more people for religious worship violated civil rights laws.<sup>54</sup> On May 26<sup>th</sup> California began permitting hair salons and barber shops to reopen for business, and Los Angeles Mayor Eric Garcetti said customers could return to retail businesses and

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<sup>48</sup> Wisconsin Legislature v. Secretary-Designee Andrea Palm, 2020 WI 42U, [https://www.wpr.org/sites/default/files/wi\\_legislature\\_v\\_andrea\\_palm\\_-\\_decision.pdf](https://www.wpr.org/sites/default/files/wi_legislature_v_andrea_palm_-_decision.pdf).

<sup>49</sup> Abigail Censky, “Protesters Offer Free Haircuts At Michigan Capitol To Defy Stay-At-Home Order,” NPR, May 20, 2020, <https://www.npr.org/2020/05/20/859713804/protesters-offer-free-haircuts-at-michigan-capitol-to-defy-stay-at-home-order>.

<sup>50</sup> “Press Briefing by Press Secretary Kayleigh McEnany,” The White House, May 23, 2020, <https://www.whitehouse.gov/briefings-statements/press-briefing-press-secretary-kayleigh-mcenany-052220/>.

<sup>51</sup> Office of Public Affairs, “The Department of Justice Files Statement of Interest in Support of Church That Ministers to Underserved Communities,” The Department of Justice, May 3, 2020, <https://www.justice.gov/opa/pr/department-justice-files-statement-interest-support-church-ministers-underserved-communities>.

<sup>52</sup> Muccari, Chow, and Murphy, “Coronavirus timeline”.

<sup>53</sup> Sonali Kohli and Matthew Ormseth, “Court upholds Newsom’s coronavirus ban on in-person church services in California,” Los Angeles Times, May 23, 2020, <https://www.latimes.com/california/story/2020-05-23/church-services-ban-upheld>.

<sup>54</sup> “US Warns Nevada Governor About In-Person Worship Limits,” US News, May 26, 2020, <https://www.usnews.com/news/us/articles/2020-05-26/us-warns-nevada-governor-about-in-person-worship-limits>.

houses of worship could resume in-person services.<sup>55</sup> By the end of May, the U.S. had surpassed 100,000 coronavirus deaths. Globally, the number of coronavirus cases had surpassed 6 million, and the death toll worldwide was at approximately 375,000.<sup>56</sup>

A major turning point in the crisis occurred when George Floyd was killed while in police custody in Minneapolis on May 25, 2000, over the Memorial Day Weekend.<sup>57</sup> The first phase of the crisis from the beginning of March to the middle of April had focused on the coronavirus itself, and social distancing and quarantining to “flatten the curve.” The second phase of the crisis from approximately the middle of April to the end of May was focused on the economic effects of the crisis, as tens of millions of Americans lost their jobs.<sup>58</sup> With the death of George Floyd, a third dimension to the crisis moved to the forefront, which focused on social justice in general and police misconduct as it relates to African Americans and other minorities in particular. Meanwhile, on May 24<sup>th</sup>, Muslims began celebrating Eid al-Fitr, marking the end of the fasting month of Ramadan, with a high expectation that they would observe strict social distancing guidelines in many places around the world, including the United States.<sup>59</sup>

As the calendar turned from May to June, thousands of Americans gathered in cities across the country to protest the death of George Floyd. While some politicians and public health officials warned that the lack of social distancing could result in a spike in the spread of the coronavirus, the prevailing message from political leaders and public health officials was that the social justice protests were so important that they should not be banned on the basis of public health. While just a few weeks earlier, people protesting government shutdowns were demonized for violating social distancing rules, this new wave of protests was met with a very different attitude of support by many political leaders and public health officials.<sup>60</sup> With this inconsistency, the public’s patience with lockdowns and quarantines entered into a very new phase, with much less deference to political and public health expertise. Thus, while the number of infections continued to increase throughout the summer, the political and cultural will to be vigilant was severely

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<sup>55</sup> Muccari, Chow, and Murphy, “Coronavirus timeline”.

<sup>56</sup> Ibid.

<sup>57</sup> Evan Hill, et al., “How George Floyd Was Killed in Police Custody,” The New York Times, May 31, 2020, <https://www.nytimes.com/2020/05/31/us/george-floyd-investigation.html>.

<sup>58</sup> Muccari, Chow, and Murphy, “Coronavirus timeline”.

<sup>59</sup> Kovie Biakolo, “What it means to “gather” for Easter, Passover, and Ramadan this year,” VOX, April 8, 2020, <https://www.vox.com/identities/2020/4/8/21210114/easter-passover-ramandan-coronavirus>.

<sup>60</sup> Michael Powell, “Are Protests Dangerous? What Experts Say May Depend on Who’s Protesting What,” The New York Times, July 6, 2020, <https://www.nytimes.com/2020/07/06/us/Epidemiologists-coronavirus-protests-quarantine.html>.

diminished. As mass protests grew in size and at times became violent, scientists reported that social distancing is the most effective way to mitigate the spread of the coronavirus.<sup>61</sup> While large scale protests did not meet with government disapproval, religious gatherings remained subject to strict limits in many places. This resulted in inevitable complaints about discrimination against gatherings that government officials did not favor while tolerating or encouraging gatherings that were politically favored.<sup>62</sup>

The political protests often included calls to “defund the police,” and crime rates soared in many cities as the protests for racial justice became violent. The riots and violence often turned to property damage,<sup>63</sup> destroyed monuments,<sup>64</sup> and a spike in murder rates in many places.<sup>65</sup>

During June, the rates of infection continued to increase, while the rates of deaths fell significantly. This was in part due to better understanding of the disease and improved treatments, but also in a larger number of cases that had only moderate or mild symptoms. Also in June professional sports leagues began tentative efforts to re-start their seasons, usually with strict “quarantine bubbles” (which characterized the NBA, WNBA, and NHL), or modified schedules and protocols that kept infections to a minimum (MLS, MLB, PGA).<sup>66</sup>

Even with rates of infection remaining high, and in some places rising, the summer months saw a gradual de-escalation of restrictions on businesses and other gatherings. Restaurants began to re-open, often limited to take-out orders and outside socially-distanced seating. The details of state restrictions varied, but the general trend was towards a loosening of restrictions, even as infection rates were much higher than they had been earlier in the Spring when much stricter regulations were in place. For example,

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<sup>61</sup> Centers for Disease Control and Prevention, “Social Distancing,” U.S. Department of Health & Human Services, updated July 15, 2020, <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/social-distancing.html>.

<sup>62</sup> Powell, “Are Protests Dangerous?”

<sup>63</sup> Brad Polumbo, “George Floyd Riots Caused Record-Setting \$2 Billion in damages, New Report Says. Here’s Why the True Cost is Even Higher,” *Fee*, September 16, 2020, <https://fee.org/articles/george-floyd-riots-caused-record-setting-2-billion-in-damage-new-report-says-here-s-why-the-true-cost-is-even-higher/>.

<sup>64</sup> Rachel Scully & James Bikalies, “A List of the Statues Across the US Toppled, Vandalized or Officially Removed Amid Protests,” *The Hill*, June 12, 2020, <https://thehill.com/homenews/state-watch/502492-list-statues-toppled-vandalized-removed-protests>.

<sup>65</sup> Jon Hilsenrath, “Homicide Spike Hits Most Large U.S. Cities,” *The Wall Street Journal*, August 2, 2020, <https://www.wsj.com/articles/homicide-spike-cities-chicago-newyork-detroit-us-crime-police-lockdown-coronavirus-protests-11596395181>.

<sup>66</sup> Scott Miller, “When Will MLB, Champions League, NHL, Tennis & More Come Back? Updated Return Dates for Every Sport,” Action Network, June 23, 2020, <https://www.actionnetwork.com/news/updating-2020-sports-calendar-return-dates-major-events-coronavirus>.

New York City began the first phase of reopening on June 8<sup>th</sup> after nearly three months of strict limitations.<sup>67</sup> New Jersey lifted its stay-at-home order on June 9<sup>th</sup>.<sup>68</sup> On June 10<sup>th</sup> the number of confirmed coronavirus cases in the United States surpassed 2 million, and by the end of June the global death toll had surpassed 500,000 and the number of confirmed cases had reached 10 million.<sup>69</sup>

July followed a similar pattern of gradual re-opening of the economy, with periodic limitations imposed in places where infections were spiking. On July 7<sup>th</sup>, less than a month after surpassing 2 million cases, the U.S. total surpassed 3 million. Also in July, the daily rates of infection continued to climb, reaching a high of 68,000 cases in one day on July 10<sup>th</sup>.<sup>70</sup> On July 11<sup>th</sup>, President Trump publicly wore a mask for the first time.<sup>71</sup> By mid-summer a variety of vaccines were in development, but a new sense was settling in that the pandemic's effects would not be felt only through the end of 2020, but well into 2021 as well.

August brought more of the same as infection rates remained high, schools began to re-open with a wide variety of formats, including entirely online, hybrid, and in person.<sup>72</sup> September and October were much the same, with attention shifting to the Presidential election to be held on November 3<sup>rd</sup>. On October 2<sup>nd</sup>, President Trump announced that he and the first lady Melania Trump had tested positive, and after several days of hospitalization, President Trump returned to the White House and was soon back on the campaign trail.<sup>73</sup>

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<sup>67</sup> J. David Goodman, "After 3 Months of Outbreak and Hardship, N.Y.C. Is Set to Reopen," The New York Times, June 7, 2020, <https://www.nytimes.com/2020/06/07/nyregion/new-york-reopening-coronavirus.html>.

<sup>68</sup> State of New Jersey, "TRANSCRIPT: June 9th, 2020 Coronavirus Briefing Media," June 9, 2020, <https://nj.gov/governor/news/news/562020/approved/20200609b.shtml>.

<sup>69</sup> Muccari, Chow, and Murphy, "Timeline".

<sup>70</sup> Ibid.

<sup>71</sup> Alana Wise, "Trump Wears Mask In Public For First Time During Walter Reed Visit," NPR, July 11, 2020, <https://www.npr.org/sections/coronavirus-live-updates/2020/07/11/889810926/trump-wears-mask-in-public-for-first-time-during-walter-reed-visit>.

<sup>72</sup> Tawnell D. Hobbs, "Schools Are Reopening, Then Quickly Closing Due to Coronavirus Outbreaks," The Wall Street Journal, 17 August 2020, <https://www.wsj.com/articles/schools-are-reopening-then-quickly-closing-due-to-coronavirus-outbreaks-11597700886>; Sarah Mervosh and Shawn Hubler, "As the Coronavirus Comes to School, a Tough Choice: When to Close," The New York Times, 13 August 2020, <https://www.nytimes.com/2020/08/03/us/school-closing-coronavirus.html>

<sup>73</sup> CNN, "READ: Trump's doctor releases statement after the President and first lady test positive for Covid-19," CNN, October 2, 2020, <https://www.cnn.com/2020/10/02/politics/trump-doctor-covid-statement/index.html>.

By the middle of October, the total number of cases in the U.S. had surpassed 8 million, and the total number of deaths had passed 200 thousand. Globally, total cases were nearly 40 million, and total deaths had surpassed 1.11 million.<sup>74</sup>

### C. Churches as superspreaders and scapegoats

One feature of the pandemic that was troubling was how often religious gatherings or religious communities were harshly characterized in the press and by politicians as particularly dangerous. While breakouts linked to health clubs, bars and restaurants, and hair salons were treated as ordinary events, breakouts linked to church choirs or religious communities such as Orthodox Jews in New York City were treated as pathological problems.<sup>75</sup> Understandably, religious groups—particularly minority groups—were quick to perceive discriminatory treatment.<sup>76</sup>

The treatment of Orthodox Jews in New York City was a particularly egregious example. While Mayor Bill DeBlasio had been very supportive of mass gatherings to protest on behalf of social justice, he targeted tight knit religious communities for limitations that were much more severe.<sup>77</sup> He tried to utilize rationales that seemed general and neutral, but his differential treatment of other groups was evident, especially social justice demonstrators with whom he had political sympathy.<sup>78</sup>

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<sup>74</sup> Muccari, Chow, and Murphy, “Timeline”.

<sup>75</sup> Philissa Cramer, “Reacting to packed Orthodox funeral, New York City mayor warns ‘the Jewish community’ and faces swift backlash,” Jewish Telegraphic Agency, 29 April 2020, <https://www.jta.org/2020/04/29/united-states/reacting-to-a-packed-funeral-new-york-city-mayor-warns-the-jewish-community-and-faces-a-swift-firestorm>.

<sup>76</sup> Ed Stetzer, “Churches, Coronavirus, and The New York Times,” Christianity Today, July 8, 2020, <https://www.christianitytoday.com/edstetzer/2020/july/churches-coronavirus-new-york-times-churches-are-taking.html>. Mansee Khurana, “The Right to Worship: Church and State Clash Over Religious Services in the Coronavirus Era,” *NBC News*, May 9, 2020, <https://www.nbcnews.com/politics/politics-news/right-worship-church-state-clash-over-religious-services-coronavirus-era-n1201626>. It is important to note that the Justice Department has sought to advocate for the churches and eliminate the discrimination. Pete Williams, “Justice Department Defends Mississippi Drive-In Church Service,” *NBC News*, April 14, 2020, <https://www.nbcnews.com/politics/justice-department/justice-department-defends-mississippi-drive-church-service-n1183761>.

<sup>77</sup> Cramer, “Reacting to packed Orthodox funeral.”

<sup>78</sup> Valerie Richardson, “NYC mayor nixes large events -- except Black Lives Matter protests,” *Washington Times*, July 10, 2020, <https://www.washingtontimes.com/news/2020/jul/10/bill-de-blasio-cancels-all-large-gatherings-except/>. Mansee Khurana, “The Right to Worship: Church and State Clash Over Religious Services in the Coronavirus Era,” *NBC News*, May 9, 2020, <https://www.nbcnews.com/politics/politics-news/right-worship-church-state-clash-over-religious-services-coronavirus-era-n1201626>. It is important to note that the Justice Department has sought to advocate for the churches and eliminate the discrimination. Pete Williams, “Justice Department Defends Mississippi Drive-In Church Service,” *NBC News*, April 14, 2020, <https://www.nbcnews.com/politics/justice-department/justice-department-defends-mississippi-drive-church-service-n1183761>.

#### D. Ancillary crises - economic, racial justice, social trust

As indicated in the timeline described above, the coronavirus crisis in the United States went through distinct phases. It is noteworthy that the pandemic was much more than a public health crisis. It seemed to serve as an amplifier and accelerant of a number of other significant economic and social problems.

- *Coronavirus as a public health crisis.* From approximately the beginning of March to the middle of April, the crisis was predominantly treated as a public health problem, media coverage focused on places such as New York and Seattle with high rates of infection, and there was a high degree of social cooperation as intensive limitations on travel, gathering, and work took place. The pre-eminent message was “flatten the curve” quickly, so we could save lives, not overwhelm the hospitals, and return to normal more quickly.<sup>79</sup>

- *Coronavirus as an economic crisis.* From the middle of April to the end of May a second phase emerged where there was a much greater emphasis on the economic fallout of the coronavirus crisis, with daily attention to unemployment numbers and the stock market’s performance dominating public discourse.<sup>80</sup> Great attention was paid to a series of large multi-trillion dollar government aid packages to employers and workers.<sup>81</sup>

- *Coronavirus as a racial justice crisis.* Then in late May, with the killing of George Floyd, a third phase began with police misconduct and social justice moving to the foreground. Public discourse was dominated by Black Lives Matter messaging, and backlashes against its underlying political ideology which was viewed by some as Marxist and anti-family.<sup>82</sup> This phase, with large protests that sometimes turned violent and included large scale looting and destruction of public monuments, also lasted approximately six weeks.<sup>83</sup> Large protests, often accompanied with significant vandalism

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<sup>79</sup> Brandon Specktor, “Coronavirus: What is ‘flattening the curve,’ and will it work?,” Live Science, Future US Inc., March 16, 2020, <https://www.livescience.com/coronavirus-flatten-the-curve.html>; Siobhan Roberts, “Flattening the Coronavirus Curve,” The New York Times, March 27, 2020, <https://www.nytimes.com/article/flatten-curve-coronavirus.html>.

<sup>80</sup> See, for example, The New York Times’ chronicle of coronavirus-economy impact. “Powell Says Rates Are Likely to Stay Low for Years,” The New York Times, last updated September 18, 2020, <https://www.nytimes.com/live/2020/09/04/business/stock-market-today-coronavirus>.”

<sup>81</sup> Kelsey Snell, “Here’s How Much Congress Has Approved For Coronavirus Relief So Far And What It’s For,” NPR, May 15, 2020, <https://www.npr.org/2020/05/15/854774681/congress-has-approved-3-trillion-for-coronavirus-relief-so-far-heres-a-breakdown>.

<sup>82</sup> These views are fueled by the statements of some BLM members. Yaron Steinbuch, “Black Lives Matter co-founder describes herself as ‘trained Marxist,’” New York Post, June 25, 2020, <https://nypost.com/2020/06/25/blm-co-founder-describes-herself-as-trained-marxist/>.

<sup>83</sup> For more data and information on the protests and violence that occurred during this time see “Demonstrations & Political Violence in America: New Data for Summer 2020,” *The Armed Conflict*

and spikes in violent crime, also crested, as left-leaning media and politicians became concerned that domestic unrest could swing support in the election to a “law and order” message from President Trump.

- *Coronavirus as a long-term reality.* By the middle of July a new phase of a return to a “new normal” was evident, symbolized by the return of professional sports, packaged for a television audience and without spectators present. Interestingly, by mid-July, unemployment had decreased significantly [data], although not to pre-pandemic levels. And the stock market, fueled by immense government spending, had also rebounded. [data]

- *The fall wave.* By Labor Day in early September, most schools had reopened, albeit with modified schedules and often hybrid formats. Rates of infection were much higher than during the early months of the crisis when a much more severe lockdown had been implemented in most parts of the country. As I will describe in greater detail below, the crisis had again taken on a new face, as concerns about social trust and the future of the country began to be prominent in public discourse.

The fall months of September and October were dominated with concern about the pending Presidential election, and great worry that the disappointed side may be unwilling to accept the legitimacy of the outcome.<sup>84</sup> The Democratic candidacy of Joe Biden was framed around a return to normalcy, at least with respect to politics.<sup>85</sup> The Republican candidacy of Donald Trump for re-election was framed around provoking fear of a left-wing takeover of a Biden administration with a President who would be weak and appeared to be experiencing significant cognitive decline.<sup>86</sup> There was a high-stakes battle over seating Amy Coney Barrett, a conservative judge, to replace Justice Ruth

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*Location & Event Data Project*, <https://acleddata.com/2020/09/03/demonstrations-political-violence-in-america-new-data-for-summer-2020/>.

<sup>84</sup> Both Democratic and Republican parties have been vocal on this issue. Hillary Clinton has said that Biden should not concede under any circumstance, while Trump has said that he will not pre-commit, since the election might not be fair. Rebecca Shabad, “Hillary Clinton says Biden should not concede the election ‘under any circumstances,’” NBC, August 26, 2020, <https://www.nbcnews.com/politics/2020-election/hillary-clinton-says-biden-should-not-concede-2020-election-under-n1238156>; Michael Crowley, “Trump Won’t Commit to ‘Peaceful’ Post-Election Transfer of Power,” The New York Times, Sept 23, 2020, <https://www.nytimes.com/2020/09/23/us/politics/trump-power-transfer-2020-election.html>.

<sup>85</sup> Unlike other Democratic candidates who promised new policies, Biden promised stability. Eric Lach, “Joe Biden, the Normalcy Candidate, Keeps Winning in Abnormal Times,” The New Yorker, March 18, 2020, <https://www.newyorker.com/news/campaign-chronicles/joe-biden-the-normalcy-candidate-keeps-winning-in-abnormal-times>.

<sup>86</sup> “Trump Campaign Announces President Trump’s 2<sup>nd</sup> Term Agenda: Fighting for You!” Donald J. Trump for President, August 23, 2020, <https://www.donaldjtrump.com/media/trump-campaign-announces-president-trumps-2nd-term-agenda-fighting-for-you/>.

Bader Ginsburg, the Supreme Court's most liberal voice, who died on September 18th.<sup>87</sup> On the right, conspiracy theories such as QAnon were surging, and small groups such as the Proud Boys were garnering press attention for their confrontations with groups on the left such as Antifa agitators, Black Lives Matter protestors, and a variety of anarchist groups.<sup>88</sup> Large cities such as San Francisco and Seattle experienced ongoing clashes between leftist (Antifa) activists and rightist (Proud Boy) activists.<sup>89</sup>

## II. THE IMPACT OF GOVERNMENT ACTIONS ON FREEDOM OF RELIGION AND BELIEF

The government has done many things that have had a significant impact on the free exercise of religion, some of which might have long-term consequences. It is important to begin with a preliminary point. Contrary to the hopes and fears of some, religion and religious exercise are not beyond or outside the law.<sup>90</sup> There is no blanket exemption from legal oversight for religious exercise, no immunity from state authority. When we speak of freedom of thought, conscience, and religion, we are not talking about absolute rights. Fundamental, yes; absolute, no.

More than a century ago, in a 1905 case, the US Supreme Court rejected the argument of a pastor from Massachusetts who objected on religious grounds from compulsory vaccination against smallpox.<sup>91</sup> Today, too, religious organizations and

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<sup>87</sup> Many Democrats felt it was an injustice that there was a prompt hearing to fill the seat, whereas Merrick Garland was not given a hearing on the grounds that it was an election year. This thinking may be short-sighted; Senator Ted Cruz cited data that it is standard procedure for presidents to nominate Supreme Court replacements during election years, and the notable pattern has been to confirm them when the President and Senate majority are the same party (as now), and to not confirm them when the President and Senate majority are different parties (as in the case of Garland in 2016). "Sen. Cruz Sets Record Straight on SCOTUS Precedent." U.S. Senator for Texas Ted Cruz, press release, September 25, 2020, [https://www.cruz.senate.gov/?p=press\\_release&id=5392](https://www.cruz.senate.gov/?p=press_release&id=5392).

<sup>88</sup> Lois Beckett, "QAnon: a timeline of violence linked to the conspiracy theory," The Guardian, October 16, 2020, <https://www.theguardian.com/us-news/2020/oct/15/qanon-violence-crimes-timeline>.

<sup>89</sup> Mallory Moench and Michael Williams, "Six injured, including three police officers, during clashes in S.F. between pro- and anti-Trump groups," San Francisco Chronicle, October 17, 2020, <https://www.sfchronicle.com/bayarea/article/Punches-thrown-as-left-wing-protesters-show-up-at-15655621.php>; Hal Bernten, "Proud Boys rally on Saturday raises concerns of more violence in Portland," Seattle Times, Sept 25, 2020, <https://www.seattletimes.com/seattle-news/proud-boys-rally-on-saturday-raises-concerns-of-more-violence-in-portland/>.

<sup>90</sup> Douglas Laycock, "Do Cuomo's New Covid Rules Discriminate Against Religion?" The New York Times, October 9, 2020, <https://www.nytimes.com/2020/10/09/opinion/cuomo-synagogue-lockdown.html>.

<sup>91</sup> "Jacobson v. Massachusetts." Oyez. Accessed October 19, 2020. <https://www.oyez.org/cases/1900-1940/197us11>.

religious individuals are subject to a variety of emergency measures that place significant limits on religious exercise.<sup>92</sup>

### **A. Three legal strategies**

At times of crisis it is perhaps natural to look for new and innovative ways of responding. And in responding to Covid-19, we have needed innovation both for treatments and ultimately a vaccination to prevent infections. But in the case of freedom of religion in the COVID-19 era, what is remarkable is how ready, responsive and resilient are the legal tools in our existing toolkit.

These are very old tools, found in the First Amendment and in more than two hundred years of legislative experience and court cases. As a nation, we have dealt with crises before (including pandemics and infectious diseases), and we have the legal tools needed to address the challenges presented by the coronavirus pandemic. The primary challenge is remembering what these tools are and how to use them.

In the U.S., there are three baseline principles that are of particular importance. Similar legal principles are employed in many countries around the world. These principles are, first, the rule of law and non-discrimination; second, the concept of reasonable accommodation; and third, the compelling state interest test, which is used to justify limitations upon religious exercise as long as there is no less restrictive means of vindicating the important state interest.

#### *1. Rule of law and non-discrimination*

The basic baseline principles are the rule of law and non-discrimination. As should be obvious, religious activity cannot simply be completely banned. Governors who have taken the view that religious activity is not an “essential activity” and can simply be prohibited are mistaken. Courts, perhaps after a time of deference in the name of protecting public health, have and will strike down comprehensive measures that prohibit all religious activity.<sup>93</sup> Religious freedom, including religious worship and the right to gather, are among our most precious, and protected, constitutional rights.

Particularly offensive are overbroad prohibitions that create exceptions for other activities such as liquor stores and marijuana dispensaries, or for health clubs and

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<sup>92</sup> Sarah Mervosh and Elizabeth Dias, “From Seattle to Kentucky, Churches Cancel Religious Services,” *New York Times*, March 11, 2020, <https://www.nytimes.com/2020/03/11/us/coronavirus-kentucky-churches-cancel.html>.

<sup>93</sup> David Crary, “More US churches sue to challenge COVID-19 restrictions,” *AP News*, August 13, 2020, <https://apnews.com/article/religion-lawsuits-minnesota-u-s-supreme-court-california-7d2933ca919f33aa8c4c845e1d3febdc>.

cinemas, but which do not provide exceptions for religious services and similar types of gatherings.<sup>94</sup> If these are “essential activities,” it is hard to see why similar access to religious bookstores or to religious leaders in churches, temples, mosques and synagogues (employing similar social distancing and infection control measures) should not also be allowed.

The rule of law includes the requirement that the coercive legal power of the state be enacted and exercised in accordance with the rules stipulated for lawmaking and the exercise of executive and police authority. In an emergency, it is easy for government officials to overstep the bounds of their authority, and to issue sweeping proclamations that may not satisfy minimal rule of law requirements.<sup>95</sup> More problematic, measures that are implemented at times of emergency too easily become permanent limitations on freedom that outlast the emergency.<sup>96</sup>

The principle of non-discrimination is a basic baseline requirement that the free exercise of religion, including activities and manifestations of religion, not be treated less favorably than similarly situated activities. A close comparison is how states regulate health clubs and fitness centers. Like churches, these are places where people gather in close proximity, touch shared equipment and devices, and where the prospect of particles of saliva in the air is not only possible but probable.<sup>97</sup> Given the Free Exercise Clause, there may be good constitutional reasons for allowing religious gatherings to happen before health clubs are permitted to reopen, but it is difficult to imagine legitimate reasons for allowing health clubs while prohibiting religious gatherings of a similar size.

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<sup>94</sup> In the May 2020 ruling of *Maryville Baptist Church, Inc. v. Beshear*, the 6th U.S. Circuit Court of Appeals expressed support for the church's argument that it wasn't being treated fairly, noting "hundreds" of cars were parked in the lot of a nearby grocery store on the same day the police informed the churchgoers they were violating the law. See also Mansee Khurana, "The right to worship: Church and state clash over religious services in the coronavirus era," NBC, May 9, 2020, <https://www.nbcnews.com/politics/politics-news/right-worship-church-state-clash-over-religious-services-coronavirus-era-n1201626>.

<sup>95</sup> VOX, What it means to “gather” for Easter, Passover, and Ramadan this year, 8 April 2020, <https://www.vox.com/identities/2020/4/8/21210114/easter-passover-ramandan-coronavirus>;

<sup>96</sup> “The spread of a threat to public health such as the coronavirus may seem to warrant dispensing with human rights protections. . . . History has shown us that this is a mistake, and governments must move expeditiously while also protecting human rights.” Doug Rutzen & Nikhil Dutta, “Pandemics and Human Rights” *Just Security*, March 12, 2020, <https://www.justsecurity.org/69141/pandemics-and-human-rights/>.

<sup>97</sup> “According to [a Nevada public health] order, churches may not admit more than 50 people at the same time. Yet other institutions, such as casinos, breweries, bowling allies, and gyms, may operate at 50 percent capacity.” Ian Millhiser, “The Supreme Court’s surprising decision on churches and the pandemic, explained,” Vox, July 25, 2020, <https://www.vox.com/2020/7/25/21338216/supreme-court-churches-pandemic-covid-samuel-alito-brett-kavanaugh-calvary-chapel>.

## 2. Reasonable accommodation

A second important legal principle, which we might think of as an intermediate strategy, is the concept of “reasonable accommodation.” In many areas of the law, including the free exercise of religion, legislation often mandates that reasonable accommodations be made for special needs of groups or individuals.<sup>98</sup> Examples here might include special needs relating to diet, religious attire, or religious holidays or rituals.<sup>99</sup> As we emerge from the crisis, there will be a number of situations that call out for reasonable accommodation, such as access of patients in hospitals to religious leaders including chaplains, or the performance of rituals that require proximity and touching (think here of “last rites” for a Catholic who is dying, or a baptism, or an ordinance that requires the laying on of hands).<sup>100</sup>

It will be reasonable to require those participating in such activities to observe certain restraints, and a measure of trust between religious and government officials will be necessary, much as it is in the case of other essential activities that are permitted.

I have written before about three different attitudes that we sometimes take to the concept of reasonable accommodation.<sup>101</sup> The first is to treat special needs as unfortunate exceptions to general and neutral rules that should be granted, at best, reluctantly, on the grounds that they violate the principle of equal treatment. The second is to view reasonable accommodations as modifications or adjustments that must be made by those who would prefer to observe religious precepts or follow the dictates of their conscience. Here the party that must make the accommodation is the person who is required to depart from their convictions. But there is a third, and to my mind, much more attractive way of thinking about making an accommodation, and it is based on the idea of a hotel or guest house that is provided as a place of sanctuary and abode for the weary traveler. When a stranger arrives, it is possible to turn them away on the grounds that there is no room for them at the inn, but it is also possible to give them a place where they can safely rest their head. We can provide them accommodation. This attitude

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<sup>98</sup> “[A]n accommodation causes ‘undue hardship’ whenever that accommodations results in ‘more than a *de minimus cost*’ to the employer.” *Ansonia Bd. Of Educ. V. Philbrook*, 479 U.S. 60, 67, (1986) (quoting *Trans World Airlines, Inc. v. Hardison*, 432, U.S. 63, 84 (1977)).

<sup>99</sup> See *E.E.O.C. v. Abercrombie & Fitch Stores, Inc.*, 575 U.S. 768 (2015); *Ansonia Bd. Of Educ. V. Philbrook*, 479 U.S. 60 (1986); *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977).

<sup>100</sup> Harriet Ryan, Sarah Parvini, “Holy oil, masks and FaceTime: The coronavirus forces Catholics to adapt last rites,” *Los Angeles Times*, April 11, 2020, <https://www.latimes.com/california/story/2020-04-11/last-rites-coronavirus-pandemic-catholics>.

<sup>101</sup> Brett Scharffs, “Freedom of Religion or Belief,” in *Law and Religion: National, International, and Comparative Perspectives*, eds. Paul Babie, Neville Rochow and Brett Scharffs (New York: Wolters Kluwer, 2019), 177—229.

towards accommodation reflects what we might call an ethic of hospitality, rather than an ethic of right.

As we emerge from the Covid crisis, it will be interesting to see which of these three attitudes prevails: will we look at religious needs as “unfortunate exceptions” as “sacrifices that must be made by the observant,” or as opportunities to accommodate, to provide an accommodation for, others, including those who may be different or even seem alien?

### 3. *Compelling state interest and least restrictive means*

A third legal principle that is an important part of our legal toolkit for responding to the Covid crisis is the compelling state interest test, which requires that governments use the least restrictive means when restricting religious freedom. The basic idea is that restrictions or limitations on religious activities or manifestations should be no greater than what is really necessary. This will require careful balancing that takes account of actual circumstances, which may change quickly.

In compelling state interest analysis, most of the action takes part in the second phase of the analysis. There are two things worth emphasizing. First, it is the government that bears the burden both of establishing that there is a compelling state interest that justifies the limitation, and more importantly, it is the government that bears the burden of proving that there is no less restrictive way of protecting that interest. What we find is that governments are good at finding compelling reasons to limit freedom, but they are less adept at ensuring that their methods are narrowly tailored to the vindication of those compelling interests.<sup>102</sup>

## **B. Gathering**

The most obvious restrictions on religious exercise have limited physical gathering. Rules of this type are complex and have varied significantly over time and from state to state, and they have often involved staged limitations and recommendations. When restrictions on religious gatherings have been similar to restrictions on gatherings in venues such as theaters and cinemas, they have not raised much objection, and have

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<sup>102</sup> For instance, the Supreme Court in *South Bay United Pentecostal Church v. Newsom* suggested that church congregations were not essential tasks because people are often in “close proximity [of one another] for extended periods” like other prohibited secular activities, and the California governor’s restrictions did not violate the First Amendment. The dissent noted that other businesses similar to churches were not required to operate at the 25% occupancy capacity like churches were, which indicated that the order was not equally applying a “narrowly tailored” limitation in light of a compelling state interest.

survived legal challenges.<sup>103</sup> More problematic have been instances where religious gatherings are subject to limitations that are not imposed on other gatherings that seem to be of a similar character.<sup>104</sup> What is similar and dissimilar has also been a topic of heated disagreement.<sup>105</sup>

A related issue has been what counts as an “essential service.” In some states, churches have been viewed as providing “essential services,” and are thus subject to less regulation, whereas in other states they have not been.<sup>106</sup>

### **C. Religious holidays**

Restrictions on gathering for religious holidays has been particularly sensitive. In early April, about a month into the lockdown, there was a convergence of important religious holidays for Jews (Passover), Christians (Easter), and Muslims (Ramadan). For the most part religious leaders encouraged congregants to observe social distancing rules, and significant modifications were made to religious celebrations.<sup>107</sup> But there were pockets of resistance where some religious leaders bristled at the governments’ restrictions on gathering.

### **D. Hospital patients**

Early in the crisis, severe limitations were placed on the ability of family and friends to be physically present with family members who were infected with, and often dying from, the coronavirus.<sup>108</sup> Questions arose about limitations placed upon clergy or other religious

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<sup>103</sup> Adam Liptak, “Split 5 to 4, Supreme Court Rejects Nevada Church’s Challenge to Shutdown Restrictions,” *The New York Times*, July 24, 2020, <https://www.nytimes.com/2020/07/24/us/supreme-court-nevada-church-coronavirus.html>.

<sup>104</sup> Matt Hadro, “Senators support DC church’s suit against discriminatory coronavirus restrictions,” *Catholic News Agency*, October 8, 2020, <https://www.catholicnewsagency.com/news/senators-support-dc-churchs-suit-against-discriminatory-coronavirus-restrictions-28819>.

<sup>105</sup> State and federal voices have clashed on this matter. Katie Benner, “Justice Dept. Voices Support for Church’s Drive-in Services Despite Virus Orders,” *The New York Times*, 14 April 2020, <https://www.nytimes.com/2020/04/14/us/politics/virus-justice-department-religious-freedom.html>.

<sup>106</sup> The Trump administration’s Justice Department released a statement in July stating religious worship is an essential service. “Press Briefing by Press Secretary Kayleigh McEnany,” *The White House*.

<sup>107</sup> Grace Hauck, “States are restricting Easter gatherings amid COVID-19. Churches and lawmakers are pushing back.” *USA Today*, April 11, 2020, <https://www.usatoday.com/story/news/nation/2020/04/11/coronavirus-easter-kansas-kentucky-restrict-religious-gatherings-church/2975593001/>,

<sup>108</sup> In one of many accounts, the reporter had to say goodbye over telephone with awful jazz on-hold music, the body could not be identified according to Jewish law because of the health risk of

advisors.<sup>109</sup> Over time, as the virus and the mechanisms of its transmission were better understood, these restrictions began to ease and the problem of restrictions on chaplains that seemed discriminatory or overbroad were moderated.<sup>110</sup>

### E. Weddings and funerals

The pandemic also triggered severe limitations on gatherings that commemorate important life milestone events, including weddings and especially funerals.<sup>111</sup> For families who had loved ones die early in the coronavirus crisis, limitations on gathering had a significant impact on the types of funerals that were permitted.<sup>112</sup>

### F. Nursing homes

Nursing homes in the United States were often at the epicenter not only of infections, but of infections that were severe and resulted in death.<sup>113</sup> Limitations on access to patients, often at the end of their lives, were imposed not only on family members but on religious leaders as well.<sup>114</sup> These limitations, often severe in the early months of the crisis, were often eased as rates and manner of transmission were brought under control.<sup>115</sup>

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open coffin, the funeral attendees waited in their cars as hazmat suit wearers carried the coffin to the plot, and they had to rent a rabbi to cover the service. Eitan Levine, "Burying My Bubby During the Pandemic," *The New York Times*, 16 May 2020, <https://www.nytimes.com/2020/05/16/opinion/coronavirus-jewish-funeral.html>.

<sup>109</sup> Lindsay Schnell, "Religions alter death and burial rituals in wake of coronavirus, causing mourners more heartbreak," *USA Today*, April 23, 2020, <https://eu.usatoday.com/story/news/nation/2020/04/23/coronavirus-forces-religions-modify-death-burial-rituals/3009538001/>

<sup>110</sup> Zoë Read, "Hospital visits to those who are ill but not dying are vital too, clergy argue," PBS, NPR, WHYY, <https://why.org/articles/hospital-visits-to-those-who-are-ill-but-not-dying-are-vital-too-clergy-argue/>.

<sup>111</sup> Schnall, "Religions alter death and burial rituals."

<sup>112</sup> Levine, "Burying My Bubby During the Pandemic.]"

<sup>113</sup> "Americans Most Likely to Be Infected: the Faithful, Jailed or Old," *Bloomberg*, 11 April 2020, <https://www.bloomberg.com/news/articles/2020-04-11/americans-most-likely-to-be-infected-the-faithful-jailed-or-old>.

<sup>114</sup> Lindsay Schnell, "Religions alter death and burial rituals in wake of coronavirus, causing mourners more heartbreak," *USA Today*, 23 April 2020, <https://eu.usatoday.com/story/news/nation/2020/04/23/coronavirus-forces-religions-modify-death-burial-rituals/3009538001/>.

<sup>115</sup> Doug Brunk, "Undeterred during COVID-19, hospital chaplains transform delivery of spiritual care," *The Hospitalist*, April 27, 2020, <https://www.the-hospitalist.org/hospitalist/article/221320/coronavirus-updates/undeterred-during-covid-19-hospital-chaplains>.

## **G. Prisons**

Another typical hot spot for infections were prisons.<sup>116</sup> There was significant pressure on the government to release non-violent offenders, and prisons often became “hot spots” for infection.<sup>117</sup> The ability of prisoners to gather for religious services were often severely constrained.<sup>118</sup>

## **H. Religious education**

Another type of institution that has been particularly hard hit by the coronavirus pandemic are religiously-affiliated private schools, notably Catholic schools in large cities. Many of these schools that operate on very tight margins were forced to close in the face of the pandemic.<sup>119</sup>

## **III. RESPONSES OF RELIGIOUS COMMUNITIES AND THEIR ADHERENTS TO GOVERNMENT RULES**

### **A. Cooperation and Caution**

Most religious organizations and religious leaders were extremely cooperative and cautious in their response to the coronavirus, especially during the early months of March and April.<sup>120</sup> Most churches ceased in-person meetings, and a wide variety of innovative responses to the pandemic were evident, including online services, outdoor gatherings in

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<sup>116</sup> Gabrielle Coppola and Edvard Pettersson, “Americans Most Likely to Be Infected: the Faithful, Jailed or Old,” Bloomberg, 11 April 2020, <https://www.bloomberg.com/news/articles/2020-04-11/americans-most-likely-to-be-infected-the-faithful-jailed-or-old>.

<sup>117</sup> Ibid.

<sup>118</sup> “As it pertains to the incarcerated,...religious gatherings, and education have been either suspended or modified to minimize potential exposure and encourage social distancing. For example, individuals are provided access to religious materials and are encouraged to practice their faith in their living quarters.” Department of Corrections, “COVID-19 Frequently Asked Questions, #6,” New Jersey Department of Corrections, accessed October 20, 2020, <https://www.state.nj.us/corrections/pages/COVID19Updates.shtml>.

<sup>119</sup> Catholic News Service, “New York Archdiocese closes 20 schools; six more close in Brooklyn Diocese,” National Catholic Reporter, 9 July 2020, <https://www.ncronline.org/news/people/new-york-archdiocese-closes-20-schools-six-more-close-brooklyn-diocese>.

<sup>120</sup> Tom Gjelten, “Churches Grapple with Whether to Suspend Worship Services,” *NPR*, March 13, 2020, <https://www.npr.org/2020/03/13/815502396/churches-grapple-with-whether-to-suspend-worship-services>.]

cars, and drive-by confession and even communion.<sup>121</sup> If anything, many churches were more cautious than the government mandates concerning gathering size and protocol.<sup>122</sup>

## B. Challenges to government restrictions

Some religious groups bristled at government restrictions on gathering, and there were several legal challenges to government restrictions that seemed overbroad or discriminatory. In the early days of the pandemic, especially, courts were quite deferential to public officials and their judgments concerning the best measures to protect public health.<sup>123</sup>

Controversies became more acute as different government attitudes towards what counted as “essential services” arose, and as discriminatory treatment of religious gatherings became more acutely felt.<sup>124</sup> Multiple lawsuits seeking injunctions on the discriminatory guidelines made it to the Supreme Court but were denied.<sup>125</sup> These decisions were not clear cut, however, with multiple judges writing dissents against the decisions.<sup>126</sup>

## C. Government funding of religion and religiously affiliated institutions

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<sup>121</sup> For examples of the creative ways that churches are adapting see: Dalvin Brown, “Churches are Closing Doors, Live Streaming Services for Congregants Avoiding Coronavirus,” *USA Today*, March 10, 2020, <https://www.usatoday.com/story/tech/2020/03/10/coronavirus-churches-live-streaming-sunday-services/5000822002/>; Andrew R. Chow, “‘Come Ar You Are in the Family Car.’ Drive-In Church Services are Taking Off During the Coronavirus Pandemic,” *Time*, March 28, 2020, <https://www.usatoday.com/story/tech/2020/03/10/coronavirus-churches-live-streaming-sunday-services/5000822002/>; Ella Torres, “Priest Offers Drive-thru Confession During Coronavirus Pandemic,” *ABC News*, March 21, 2020, <https://abcnews.go.com/US/priest-offers-drive-confession-coronavirus-pandemic/story?id=69726217>.

<sup>122</sup> Peggy Fletcher Stack, “Latter-day Saints Suspend All Worship Services Worldwide Due to Coronavirus; Other Utah Churches Cancel Services, Too,” *Salt Lake Tribune*, March 13, 2020, <https://www.sltrib.com/religion/2020/03/12/lds-church-suspends-all/>.

<sup>123</sup> See *South Bay United Pentecostal Church v. Newsom*, 959 F.3d 938 (9<sup>th</sup> Cir. 2020) (holding that the “state action ‘does not infringe upon or restrict practices because of their religious motivation’ and does not ‘in a selective manner impose burdens only on conduct motivated by religious belief,’ it does not violate the First Amendment.” Quoting *Church of Lukumi Babalu Aye Inc. v. City of Hialeah*, 508 U.S. 520, 522, 643 (1993)).]

<sup>124</sup> *South Bay United Pentecostal Church v. Newsom*, 590 U.S. \_\_\_\_ (2020); *Calvary Chapel Dayton Valley v. Sisolak*, 140 S.Ct. 2603 (2020).

<sup>125</sup> *Id.*

<sup>126</sup> *South Bay United Pentecostal Church*, 590 U.S. at \_\_\_\_ (J. Kavanaugh, dissenting) (Seeking to grant the injunction because “California’s latest safety guidelines discriminate against places of worship and in favor of comparable secular businesses. Such discrimination violates the First Amendment.”); *Calvary Chapel Dayton Valley*, 140 S.Ct. at 2609 (J. Gorsuch, dissenting) (“[C]hurches, synagogues, and mosques are banned from admitting more than 50 worshippers—no matter how large the building, how distant the individuals, how many wear face masks, no matter the precautions at all. . . . [T]here is no world in which the Constitution permits Nevada to favor Caesars Palace over Calvary Chapel.”).

Another significant issue involved government programs to compensate businesses for losses incurred as a result of the coronavirus. For more than 200 years there has been a rather strict limitation on public funding of churches and religiously affiliated organizations, such as schools. Large government programs such as the PPP program provided loans to small businesses, which would later be forgiven if employees were not laid off. Over time, this amounted to direct government funding, including for churches and religiously affiliated employers who applied for and received government funds.<sup>127</sup>

This has raised a question whether there will be a significant reassessment in the United States of the eligibility for government funding of religious organizations.

#### **D. Vaccinations and anti-vaccine ideology**

The coronavirus crisis has seen a major effort to produce a vaccine. As the availability of a vaccine nears, there are concerns about how many people will resist getting vaccinated.<sup>128</sup> Some anti-vaccination energy exists within some religious communities, so the role that religious groups play in either encouraging or discouraging their adherents to get vaccinated is of significant interest.<sup>129</sup> There is also significant concern that even if religious leaders encourage members of their communities to get an immunization, pockets of resistance within these communities may be strong.<sup>130</sup>

### **IV. RESPONSES OF RELIGIOUS COMMUNITIES TO THE CORONAVIRUS CRISIS**

#### **A. Spiritual and mental health support**

The mental and spiritual health impact of coronavirus have been significant. Some polls and other studies have found that large percentages of Americans are experiencing

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<sup>127</sup> Christina Capatides, "More Than 12,000 Catholic Churches in the U.S. applied for PPP Loans and 9,000 Got Them," *CBS News*, May 8, 2020 <https://www.cbsnews.com/news/catholic-churches-paycheck-protection-program-12000-applied-9000-got/>; Ryan P. Burge, "665K Ministry Jobs Covered by Paycheck Protection Program Funds," *Christianity Today*, July 8, 2020, <https://www.christianitytoday.com/news/2020/july/paycheck-protection-program-loans-christian-churches-minist.html>.

<sup>128</sup> See David Crow & Kiran Stacey, "Why is the 'Anit-Vaxxer' Movement Growing During a Pandemic?" *Los Angeles Times*, Aug. 20, 2020 <https://www.latimes.com/world-nation/story/2020-08-20/why-anti-vaxxer-movement-growing-during-coronavirus-pandemic> (stating that the number of "U.S. adult [who] said they would get a COVID-19 vaccine . . . had dropped to 41%.).

<sup>129</sup> John D. Grabenstein, "What the World's Religions Teach, Applied to Vaccines and Immune Globulins," 31 *Vaccine*, 16, April 12, 2013, <https://www.sciencedirect.com/science/article/pii/S0264410X13001898>.

<sup>130</sup> Philip Ball, "Anti-Vaccine Movement Could Undermine Efforts to End Coronavirus Pandemic, Researchers Warn," *Nature*, May 13, 2020, <https://www.nature.com/articles/d41586-020-01423-4>.

significant mental health problems in the wake of the coronavirus crisis.<sup>131</sup> Many religious communities have been proactive in trying to address mental and spiritual health issues of their congregants.<sup>132</sup>

## B. Humanitarian responses

Many religious groups have been extremely active in responding to the coronavirus. The present crisis is unprecedented in many ways, especially in its link to religion. The vast reach of religious institutions and their social importance is unmistakable, highlighting their significance in ways that, for many, are quite new. This underscores that understanding how religious institutions are involved in society, and in health care and providing for the neediest is a must for policy makers. This religious engagement draws attention to places where the right to religious freedom is not honored, and to the need for a sophisticated religious literacy in policy to enhance understanding of how various religious institutions function.<sup>133</sup>

The challenge of meeting urgent needs for personal protective equipment (PPE) in the mountains of the American west was offered as a vivid example of community mobilization and the intermediary roles of an experienced faith organization. LDS Charities crowdsourced mask and gown production to 1 million volunteers, from different faith traditions and organizations, overshooting goals.<sup>134</sup> The example highlights the communication and education elements of humanitarian organizations, which appeal to people's desire to help but also nudge people towards desirable behaviors. It also highlights the real benefits of common efforts and cooperation. The work of one

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<sup>131</sup> Responses to a survey done by the CDC report triple the amount of people experiencing anxiety symptoms and four times the amount of people experiencing depressive symptoms as compared to 2019. See Centers for Disease Control and Prevention Morbidity and Mortality Weekly Report, "Mental Health, Substance Use, and Suicidal Ideation During the Covid-10 Pandemic—United States, June 24-30, 2020, 1053 <https://www.cdc.gov/mmwr/volumes/69/wr/pdfs/mm6932a1-H.pdf>.

<sup>132</sup> Emily McFarlan Miller, "Churches Offer Mental Health Aid Amid Pandemic, Protests," *Kirksville Daily Express*, July 18, 2020, <https://www.kirksvilledailyexpress.com/story/lifestyle/faith/2020/07/18/churches-offer-mental-health-aid-amid-pandemic-protests/42079365/> (A church worked to give people a "sign of hope" during the uncertainty of the Pandemic); Minnah Arshed, "How Muslim Organizations are Keeping Communities in High Spirits, Despite Pandemic," *Detroit Free Press*, June 21, 2020 <https://www.freep.com/story/news/local/michigan/wayne/2020/06/21/muslims-mental-health-coronavirus-covid-19/3197309001/>.

<sup>133</sup> This need for religious literacy within society has led to many programs and organizations to help that. One of those is through the Harvard Divinity School, which seeks to educate religion professionals, students, and educators, including offering a Master of Religion and Public Life. See Religion and Public Life, *Harvard Divinity School*, <https://rpl.hds.harvard.edu>.

<sup>134</sup> Morgan Wolfe, "Project Protect Makes Six Million Masks for Frontline Workers," *KSLTV*, June 26, 2020, <https://ksltv.com/440306/project-protect-makes-six-million-masks-for-frontline-workers/?>.

Washington D.C. Catholic organization sought to help those who were at high risk for getting and spreading the Coronavirus—the homeless. They do this by feeding and training them on ways to slow the spread of the virus.<sup>135</sup> Alongside direct help comes passionate advocacy with government, spiritual care for all, and creative use of technology to overcome the barriers of physical distancing.

The economic downturn that quickly followed the pandemic calls for resources and emergency situations that are unprecedented and that are almost certain to last a long time. Pope Francis' disgust for what he calls the culture of waste and indifference was cited as a symptom of dangerous models of selective care that devalue life.<sup>136</sup> With the effort to rebuild better and to reimagine, this can change.

Religious institutions have a capacity and a responsibility to play significant roles in addressing the rise in fear and discrimination that accompanies a pandemic, perhaps inevitably. Religious mobilization is equally critical in addressing tensions and violence, from civil war to domestic violence. Grief is a facet of the current crisis that should be recognized, honored, and addressed. It begins, Sharon Eubank observed, with anger, competition, and stress, and it ends, hopefully, with acceptance and shared humanity.<sup>137</sup> Thus in this crisis we cannot thrive without each other. Religious organizations need to play central roles in identifying and strengthening entities that push back against the rise in fearmongering and scapegoating, promote positive mechanisms to reach out to people who are scared and acting out, and challenge us all to do better, step up, and learn more.

But in order to survive and thrive during the crisis, barriers that can separate different entities need to break down. Faith organizations need to be invited to the policy tables so that the experience, wisdom, and community engagement can contribute in meaningful ways. Cooperation among religious communities and entities is vital and it is possible. A special asset these communities share is starting from the bottom, including the most vulnerable, and working up, a critical element of what we term now inclusion and successful rebuilding.

Hope is a vital element and the discussion was replete with positive themes to inspire that hope. Among them are the enormous mobilization and creative pivoting of so many faith communities and organizations. Also encouraging are good faith efforts to learn

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<sup>135</sup> Matt Hadro, "Washington D.C. Homeless Shelter Serves the Poor Despite Coronavirus Fears," *Catholic News Agency*, March 10, 2020, <https://www.catholicnewsagency.com/news/washington-dc-homeless-shelter-serves-the-poor-despite-coronavirus-fears-15629.des>

<sup>136</sup> Vatican News, "Pope: Society is 'Civil' if it Fights Against a 'Culture of Waste,'" January 30, 2020, <https://www.vaticannews.va/en/pope/news/2020-01/pope-society-is-civil-if-it-fights-against-a-culture-of-waste.html>.

<sup>137</sup> [Cite Sharon Eubank on the link between grief and gratitude. I think there is a Deseret News article that covers this.]

lessons from past pandemics like Ebola and HIV/AIDS, and outreach to religious entities by many bodies including the World Health Organization and other multilateral and national organizations. Sober attention to the potential for public health measures to go too far in restricting religious communities and, vice versa, for religious communities to undermine and even thwart public health advice is a good sign that the human right to freedom of religion and belief is more widely understood.

Many challenges lie ahead. Religious entities fiercely resent being used for pre-set purposes, something they term instrumentalization. Too often the funder feels a right to set the agenda without much attention to other views. And there are dangers in a shallow understanding of what “religion at the table” can mean, an attitude akin to “add religion and stir”. And there are real, urgent needs, with the 80 million forced migrants in today’s world perhaps the most dramatic example of a place where immediate large-scale action is needed.

Looking to the future, the example of disrupted supply chains offers a metaphor for what it will take to rebuild in ways that are truly better. We can and must disrupt old, broken patterns, and develop new ones. We have proved, through the crisis, that this need not take a long time. It is possible to pinpoint where suffering is taking place and address the needs swiftly and creatively. Each one of us, individually and as institutions, need to confront our own biases in the search for new solutions.

## **V. THE CORONAVIRUS PANDEMIC AS A STRESS TEST**

The pandemic has presented a kind of stress test upon us and upon the institutions to which we belong.<sup>138</sup> The question to ask is how well are we, as individuals and as members of institutions, standing up to the challenges presented by the current Coronavirus crisis? For some institutions—such as hospitals, ambulances, and EMTs, fire and police—there is a lot of discussion in the popular media. But what must also be measure is the strength and resiliency of two particular institutions, specifically as it relates to our topic of freedom of religion and belief.

The first is the state, including government agencies and particular political leaders. The second are religious communities, particular faith communities and the leaders of

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<sup>138</sup> Think back to your high school days. Imagine being given balsa wood and glue to make a bridge. The bridges were then subject to a stress test to measure how much weight the bridge could bear before it broke under the strain. In other words, how many pounds of downward pressure could the bridge withstand. Or think in another context of heart health. When we take a stress test, with respect to heart health, physicians measure how our heart works during physical exercise that becomes increasingly strenuous.

those communities. In particular, three benchmarks seem relevant - are institutions and individuals responding in ways that are responsible, responsive, and exhibit resilience?

First, with respect to the government, the baseline test is equal treatment. Are governments engaging in discrimination, scapegoating blaming, or harassing particular groups or minorities? A related question here is what counts as an essential service? Oftentimes differentiations exist about what types of activities are permitted and not permitted.

A helpful question in this context is thinking about how the government treats religious groups in comparison to health clubs or gyms, which have sometimes been compared, or analogize, to places of worship for the millennial generation. Places where they gather and build community and seek to improve themselves. But they are also places where people are in close proximity where the transmission of disease is very possible. It is interesting to compare the attitudes that governments have towards the regulation of a clearly secular activity, where we are in close proximity with each other with a religious activity where we are often in close proximity with each other.

A second question is about the ability that our leaders have to set aside clearly partisan priorities at this time. Is this being treated as a national emergency and international emergency or as a political opportunity? It seems to me that this is a good time to set aside ordinary partisan political objectives. This is not a good time to use the crisis as a way of building union membership or engaging in abortion politics.

The coronavirus does not discriminate, although it impacts different people and different groups in very different ways. It operates on laws that are not socially constructed. But it's very clear the vulnerabilities vary significantly from group to group and the consequences are quite different for different groups. We are aware in the United States that blue collar workers are more susceptible than our white-collar workers. The nature of their work keeps them out providing services. It is a luxury for those who can self-isolate and work from home. We see differences based upon economics, race, age, gender.

This has been one of the remarkable features of the coronavirus crisis. On the one hand, it treats us all the same. But on the other hand, the effects that it has on us are very different. We know elderly people are much more likely to die than are the young and healthy. From the perspective of religious communities, we know people who are less familiar less comfortable with technology might find it more difficult to feel connected at a

time of physical distancing. I appreciated World Vision's comment that we prefer the nomenclature "physical distancing" rather than "social distancing."<sup>139</sup>

Physical distance and social proximities, social outreach, social support are needed as much as possible, while still being aware of the most vulnerable in the communities, including religious communities. It is important to remember how this pandemic might really have different magnitudes of effect on different groups of people. The homeless, for example, are going to be affected in ways that are very different than those who have homes.

The baseline test is whether religious groups are avoiding the twin hazards of meek compliance or truculent defiance.<sup>140</sup> First, are religious groups being responsible? Here the baseline is: are you at least not being a part of the problem? Second, responsive. Are you a part of the solution? And third, resilient? How are you exhibiting strengths under pressure?

Now, there are many different dimensions of gathering worship, pastoral care counseling, attending to the physical, spiritual and emotional needs of congregants and conducting important life events such as weddings and funerals. But the baseline tests, the stress tests are very similar. Are we behaving in ways that are responsible, responsive, and resilient? As religious individuals, does our faith help us constructively and appropriately respond during this crisis. Are we doing a better or worse job in living the great two great commandments?

We need to adopt sort of a three-part perspective when we are thinking about situations like this. Before the crisis, during the crisis, and after the crisis.<sup>141</sup> The basic idea is before the crisis occurs, there is various types of planning and preparation, relationship building, institution building, that is very helpful. And so in the case of responding to hate speech, for example, having religious leaders get to know each other and have relationships of trust, so that when the dark night comes of the crisis, say and a terrible act of hate speech, or even violence in the name of religion, there is the ability to respond in ways that are productive and helpful. There is not a lot of time for thinking and contemplation in the midst of the crisis and then in the moment of response, and one predictable tendency is overreaction. We might overreact to hate speech by enacting very sweeping legal limitations. The aftermath is a time for reflection and assessment, a time

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<sup>139</sup> Kathryn Reid, "What is the Coronavirus? Facts, Symptoms, and How to Help," *World Vision*, Sept. 24, 2020, <https://www.worldvision.org/disaster-relief-news-stories/what-is-coronavirus-facts>.

<sup>140</sup> "The Coronavirus Pandemic has Exposed Fissures Within Religions," *The Economist*, April 11, 2020, <https://www.economist.com/international/2020/04/11/the-coronavirus-pandemic-has-exposed-fissures-within-religions>

<sup>141</sup> Citation to Prof. Scharff's speech on how this relates to hate speech as a comparison.

where it is really important to revisit the questions of necessity, of whether there is a less restrictive means of accomplishing the state's interest in protecting health and safety. This is something we should be mindful of, as we emerge from this crisis, that where measures have been necessary, but they may not be necessary indefinitely, that we find appropriate ways to lessen and eliminate those limitations to the extent possible.

This will be a very important question in the months and years ahead. It is quite easy for us to get comfortable with levels of intrusion and oversight at times of emergency and if that gets reset as a so-called "New Normal", that might be very detrimental to our civil liberties in the long run. What we ought to be willing to put up with and do or cooperate with, during times of genuine emergency, is very different than what we ought to be expected to endure and cooperate with during more ordinary times. In situations like it, it is important to use the legal frameworks already in place. Is there a compelling state interest? Is there a less restrictive means? Is this limitation genuinely necessary? Does it remain necessary? Is it proportionate?

By focusing on these existing tools, a toolbox is in place which can really help navigate the difficult situation we are in. For example, by focusing on the question of necessity and proportionality, the answers to the questions with respect to particular limitations is going to change over time. As we emerge from the crisis, as therapeutic responses are found, as eventually an inoculation of some sort is found, we want to be able to return to the baseline of freedom as quickly and as completely as possible.

In thinking about the coronavirus pandemic as a stress test, with the perspective of six months time, it is apparent that many of our institutions have not performed particularly well. As for Congress and the President, they deserve low marks. Congress has managed to pass several sizeable appropriations, but otherwise seem missing in action. The President has mostly wanted to move beyond the crisis.

The media has also performed poorly, bifurcating into the predictable anti- and pro-Trump camps that distorts everything. I doubt there is any American institution that will have more difficulty regaining trust and credibility than the media. Even legacy providers such as *The New York Times* and CNN have been deeply tarnished.

The courts have been doing somewhat better, largely by deferring to the political branches of government. As time passes, and problems of discriminatory treatment by government officials become more acute and apparent, the role of courts is likely to increase. Churches and religious organizations have been mixed, but they have performed well in regard to being good citizens, exercising restraint, and offering humanitarian support.

As seen with the killing of George Floyd and its aftermath, the police have performed poorly. It is noteworthy that nearly everyone immediately saw racism and systemic

patterns of police misconduct in the George Floyd video, rather than something more isolated.

Public health officials, unfortunately, have also earned poor marks. As a group, they seem to go from treating gatherings as completely unacceptable to acceptable overnight (that night was May 25th, Memorial Day, the day George Floyd was killed). As enormous public protests arose, a thousand public health officials wrote an open letter<sup>142</sup> declaring that police misconduct and systemic racism was also a public health crisis that justified ignoring social distancing and other health guidelines. After that, the public's willingness to heed and take seriously public health officials (as well as other politicians and the media) evaporated like morning dew with the rising of a summer sun.

Throughout everything, one word keeps coming back: Trust. Most of our institutions have taken a beating during the pandemic and trust, both individual and institutional, once lost, is difficult to reclaim. This is deeply worrisome.

## **VI. THE PROBLEM OF THE POLITICIZATION OF THE CORONAVIRUS PANDEMIC**

Perhaps the most disheartening aspect of the COVID crisis in the United States has been its politicization. Rather than joining together and focusing on a way out of the pandemic, politicians, healthcare officials, and other global leaders, are using the pandemic to further their agenda and point fingers of blame at others. The issue of the pandemic has even seeped into the important discussions on racial injustice and the nomination of a new Supreme Court Justice, among other things.

Even more tragically, the politicization has reached the American public. Attitudes towards basic preventative measures such as social distancing and wearing masks vary dramatically depending upon whether people identify as Republican or Democrat. These fights have reached discussions on whether or not to open schools; what restaurants, parks, and other public places should do to slow the spread; and whether churches should be able to reopen.

Also, there is great variance in who each person is willing to trust. Large percentages of Republicans believe the crisis is being manipulated by Democrats and the mainstream press to harm the re-election prospects of President Trump. Democrats are much more likely to view coronavirus as a threat of such a magnitude that it warrants shutting down

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<sup>142</sup> Mallory Simon, *Over 1,000 health professionals sign a letter saying, Don't shut down protests using coronavirus concerns as an excuse*, CNN (June 5, 2020) <https://www.cnn.com/2020/06/05/health/health-care-open-letter-protests-coronavirus-trnd/index.html>.

the economy, schools, and churches. They are more likely to blame President Trump personally for the effects of the coronavirus.

## **VII. ANCILLARY CRISES - ECONOMIC, RACIAL JUSTICE, AND TRUST**

As noted above, the pandemic has not just been a public health crisis. It has involved important secondary crises, including economic and racial justice. Perhaps the most important ancillary crisis is the amplification and acceleration of a crisis of trust that appears to be significantly worsening in the United States.

### **A. The crisis of trust**

Ask a family therapist what is most likely to destroy a marriage, or a business consultant what is most likely to damage a successful enterprise, or a political scientist what will sabotage a nation - and you are likely to get the same answer: Trust, or to put it negatively, the end of trust.<sup>143</sup>

When we stop trusting each other, or the institutions we inhabit, it is difficult to imagine what else we might do right that will compensate for the harm done by the eradication of trust. Thus, it is through the “prism of trust” that I have been thinking about the coronavirus crisis and its effects on us as individuals, and upon our most important institutions, including for religious leaders and the institutions they steward.

The coronavirus pandemic has perhaps not been so much transformational as it has been an accelerant and amplifier of tendencies that were well underway before the crisis. For example, concerning retail sales, the COVID crisis has compressed into six months what might have otherwise taken six or twelve years - a trend towards online purchases and the bankruptcy of legacy department stores, the rise of Amazon, and the fall of J.C. Penney.

Similar accelerations and amplifications can be seen in ourselves, in our most important relationships, and the institutions we inhabit. Those people and institutions that are generally trustworthy are being proven more so, and those that warrant mistrust are experiencing an amplification and acceleration of our mistrust.

In the U.S., trust in government was already at historic lows when the COVID crisis struck. The same was true for public trust of the media and of science. Even with alarmingly low baselines, over the past six months, public trust in these institutions has managed to fall further. The federal government, the national media, and our public

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<sup>143</sup> See Dennis Jaffe, “The Essential Importance of Trust: How to Build It or Restore It,” *Forbes*, December 5, 2018, <https://www.forbes.com/sites/dennisjaffe/2018/12/05/the-essential-importance-of-trust-how-to-build-it-or-restore-it/#39f697c64fe5>.

health institutions, such as the Center for Disease Control, have all suffered precipitous declines in trust since April.<sup>144</sup>

According to a Pew report on September 14, 2020, only 20% of U.S. adults say they trust the government in Washington to “do the right thing” just about always or most of the time.<sup>145</sup> In August of this year, Gallup reported that 86% of Americans believe media outlets are politically biased, with 56% acknowledging that their preferred source of media has some form of bias.<sup>146</sup> About six in ten adults in a recent Kaiser Family Foundation poll worried that the approval process for a vaccine was being subject to political pressure, and about 40% said they would not get a vaccine if one were approved before the election.<sup>147</sup> When public health officials shifted their messaging on the importance of social distancing in early June in defense of large public protests following the death of George Floyd, the floodgates were opened for increased mistrust of public health officials.

Interestingly, people’s assessments of the responses of state and local governments, local school systems, and their own households are much more favorable. For churches and church leaders trust has never been more important than it is right now. For religious leaders, one of the most important benchmarks for decision-making during this crisis is how to engender rather than undermine trust. This means, more than anything, thinking and behaving in ways that generate trust. Here the basic principles are quite clear:

- act with integrity,
- seek and make decisions based upon the best available data,
- follow public health guidance including on the size of gatherings,
- understand and adopt best practices for cleanliness and hygiene, including wearing masks, physical distancing, and singing,
- provide opportunities for online participation for those who need to isolate

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<sup>144</sup> David Brooks, “America Is Having a Moral Convulsion,” *The Atlantic*, October 5, 2020, <https://www.theatlantic.com/ideas/archive/2020/10/collapsing-levels-trust-are-devastating-america/616581/>. “Americans haven’t just lost faith in institutions; they’ve come to loathe them, even to think that they are evil.”

<sup>145</sup> Pewresearch.org. “Just 20% trust the federal government. During the last three presidencies - through the final years of the George W. Bush administration and the presidencies of Barack Obama and Donald Trump, the share of Americans who say they trust the government just about always or most of the time has been below 30%.”

<sup>146</sup> News.gallup.com. “A majority of Americans currently see ‘a great deal’ (49%) or ‘a fair amount’ (37%) of political bias in news coverage - more so than in 2017.” In addition, “More than eight in 10 Americans say the media bears ‘a great deal’ (48%) or ‘a moderate amount’ (36%) of blame for political division in this country.”

<sup>147</sup> Kff.org. “Public skepticism about the FDA and the process of approving a vaccine is eroding public confidence even before a vaccine gets to the starting gate.”

themselves,

- be mindful of the needs of those most susceptible to serious effects of a COVID inflection, and care for those who are suffering,
- err on the side of caution,
- be responsive to new information,
- communicate clearly and often,
- listen and empathize.

Religious leaders and communities have had to be innovative, creative, responsive, and responsible. Many, though not all, have worked to generate trust at a time when the need for trust is at a premium.

Trust, also, must be gained on a more personal and granular level. Are we showing respect and concern for others? Are we communicating in a clear and straightforward way? Are we building and sustaining the relationships and institutions that we value? Are we innovative and creative in the face of current realities and the limitations they place upon us? Are we confronting reality and responding to it? Are we seeking information from a wide variety of credible sources?

As the Presidential election on November 3<sup>rd</sup> drew near, there was a palpable fear that our most important institutions will fail us. Partisans on both sides behaved in ways that made it difficult to trust even the integrity of our voting system.<sup>148</sup> A contentious Supreme Court nomination reminded us of the history of bad behavior by both parties dating back to the Robert Bork hearings and as recently as the circus surrounding the Brett Kavanaugh confirmation.<sup>149</sup> The trajectory of infections in the US was extremely worrisome.<sup>150</sup> The economic fallout was being felt by most individuals and families, for many acutely.<sup>151</sup> More than 225,000 families and counting have lost a loved one.<sup>152</sup>

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<sup>148</sup> Edward-Isaac Dovere, "Why Americans Might Not Trust the Election Results," *The Atlantic*, May 28, 2020, <https://www.theatlantic.com/politics/archive/2020/05/election-2020-trust-voters-doubt/612100/>.

<sup>149</sup> Jane Chong, "The Amy Coney Barrett Hearings were a Failure," *The Atlantic*, October 16, 2020, <https://www.theatlantic.com/ideas/archive/2020/10/amy-coney-barrett-hearings-were-failure/616738/>.

<sup>150</sup> Will Stone, "Coronavirus Cases Rise to Highest Level Since Late July," *NPR*, <https://www.npr.org/sections/health-shots/2020/10/19/924972322/coronavirus-cases-rise-to-highest-level-since-late-july>.

<sup>151</sup> Charisse Jones, "Another 790,021 Americans File for Unemployment as the Fallout From Covid-19 Lingers," *USA Today*, Sept. 17, 2020, <https://www.usatoday.com/story/money/2020/09/17/jobless-claims-unemployment-benefits-another-790-000-workers-file/5817050002/>.

Concerns about police misconduct, racial injustice, and the politicization of specific incidents have created what feels like a tinderbox.<sup>153</sup>

There was real and widespread fear that the outcome of the Presidential election, in either direction, would result in the disappointed side reacting with protests that become violent. The number of people on the left as well as the right who seem willing or inclined to “burn it all down” seemed distressingly high. There is real concern that the “middle will not hold,” that W.B. Yeats’ vision of a time when “the best lack all conviction, while the worst are full of passionate intensity” is upon us.<sup>154</sup> Interestingly, Yeats wrote these words in the aftermath of the 1918-19 flu epidemic, shortly after his wife who was pregnant came close to dying from influenza.

Religious people, religious leaders, and religious institutions have an important role to play. Each should each look to the belief systems they hold dear, to their most profound doctrines and convictions, and seek guidance on how to react in times of tremendous stress and adversity. Most religious traditions have resources, in doctrine and practice, that can help navigate this crisis. All should behave in ways that reflect the best of their faith traditions and will generate and be deserving of trust - in themselves, in each other, and in our most cherished institutions.

## **CONCLUSION: HUMAN DIGNITY OF AND FOR ALL**

There are no magic wands in figuring out how to respond to the global medical and economic pandemic that is coronavirus. We are learning as we are going. There is much to be said. There is more to be done.

But it is useful to look to our existing resources - especially when we are in the midst of a crisis (as opposed to before and after a crisis, when we have more time and capacity for institutional design and re-design).

For example, when the Apostle Paul teaches of charity, or pure love, as embodied by Jesus Christ in Corinthians 13. He speaks of long suffering, envying not, humility, being not easily provoked, endurance, seeking truth, and above all, faith, hope and charity, with

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<sup>152</sup> The New York Times, “Covid in the U.S.: Latest Map and Case Count,” *The New York Times*, Last Updated October 20, 2020, <https://www.nytimes.com/interactive/2020/us/coronavirus-us-cases.html>.

<sup>153</sup> Suyin Haynes, “As Protesters Shine a Spotlight on Racial Injustice in America, the Reckoning is Going Global,” *Time*, June 11, 2020, <https://time.com/5851879/racial-injustice-protests-europe/>.

<sup>154</sup> W.B. Yeats, *The Second Coming*, written in 1919, in the aftermath of WWI and the 1918-19 flu pandemic. “Things fall apart; the centre cannot hold; / Mere anarchy is loosed upon the world, / The blood-dimmed tide is loosed, and everywhere / The ceremony of innocence is drowned; / The best lack all conviction, while the worst / Are full of passionate intensity.”

the greatest of these being Godlike love or what the King James Bible translates as charity.<sup>155</sup>

Another existing resource is human dignity - of all people, at all times, in all places. Consider the concepts, fundamental values and norms that were articulated at the end of World War II, at the beginning of the human rights era.

The men and women who drafted the Universal Declaration of Human Rights identified human dignity as the central concept that serves as the foundation for human rights, the end goal or telos of human rights, and the metric for measuring success in the implementation or realization of human rights.<sup>156</sup>

Many of the drafters of the UDHR had personal memories of the global influenza pandemic of 1918-19 that killed as many as 60 million people worldwide, not to mention personal memories of World War I, and the much more recently immediate memories of the harrowing experiences of World War II. If there was one attitude that prevailed over all others it was the simple declaration, prayer and plea, "Never Again."

These were not starry-eyed idealists, but they were idealists nonetheless - with sober and hard-earned understanding that it would take an articulation of ideals that were genuinely universal and deeply normatively attractive (even true) to be the foundational principles of human rights. Thus, it is not accidental, nor is it unimportant, that the preamble of the UDHR begins with a recognition that "the *inherent dignity* and of the *equal and inalienable* rights of all members of the human family is the foundation of freedom, justice, and peace in the world."<sup>157</sup>

And it is not accidental, nor is it unimportant, that Article One of the UDHR begins by proclaiming that "All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood."<sup>158</sup>

Is human dignity for everyone a true and useful principle at this time of crisis? Consider two truisms - truisms that are both true and not, and thus can be a source of consternation as well as consolation.

## **1. We are all in this together**

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<sup>155</sup> 1 Corinthians 13: 4-8.

<sup>156</sup> Eleanor Roosevelt said at the adoption of the UDHR, "This Declaration is based upon the spiritual fact that man must have freedom in which to develop his full stature and through common effort to raise the level of human dignity." Eleanor Roosevelt, Adoption of the Declaration of Human Rights, Dec. 9, 1948, Paris, France.

<sup>157</sup> G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948).

<sup>158</sup> *Id.*

First, we are all in this together. This is quite literally true. By its nature, a global pandemic is something that affects all of us, and the coronavirus is an invisible foe that is ruthless and relentless. But we also see that the coronavirus does not hit all countries, communities, or people equally. Through good political leadership and management, and sometimes due to luck, some countries have been hit much less hard than others. In an era of globalization (and skepticism about globalism and multilateralism), it has been interesting to see the reassertion of nation-states as the pre-eminent global institutions. The impacts on communities and individuals have also varied dramatically.

Consider basic guidelines concerning physical distancing (also sometimes called social distancing).<sup>159</sup> Sheltering in place, staying indoors, and keeping a physical distance of at least two meters is sound medical advice. But doing this is much more difficult for some than for others, including:

- People who live in crowded conditions, often with multiple generations in confined quarters (exposing those with high-risk outcomes to infection by those with lower-risk outcomes).
- People who don't have homes at all.
- People who depend upon public transportation rather than private automobiles.
- People who work in high-risk jobs (including both doctors and janitors who work at hospitals), or those who live with people who come home from such high-risk jobs.

Human dignity for everyone everywhere reminds us that while we are in this together, the coronavirus affects some of us differently. There is something remarkable about the sacrifices being made to help prevent the infection from spreading so quickly and broadly that it overwhelms our health care systems. For the young and healthy, being vigilant is a way of not only serving one's own self-interest, but also of taking into account the interests of those who are not young and not healthy.

It is not difficult to identify places (physical locations) of significant concern:

- Refugee camps and detention centers (consider refugee camps in Jordan; or the camps interring Uighur Muslims in China; or the Rohingya people in Bangladesh).

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<sup>159</sup> Centers for Disease Control and Prevention, "Social Distancing," July 15, 2020, <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/social-distancing.html>.

- Prisons
- Densely packed urban centers in large cities such as Mumbai, Rio, Lagos

Human dignity is not a magic wand that will solve the problems in all of these places, but I believe it is the set of lenses through which we should be viewing the problems.

## **2. The coronavirus does not discriminate**

This is also true in very important ways. The coronavirus is not a social construct; it is a biological reality. It follows natural laws, showing no favoritism. But we also are seeing clearly that the coronavirus does not affect everyone equally.

- Many who are infected are asymptomatic, not even realizing they are carrying the virus, or suffering relatively ordinary flu-like symptoms (currently scientists find that about 80% of people infected with coronavirus do not show symptoms or have mild symptoms); but, they can transmit it to others, who might get very sick or even die.<sup>160</sup>

- Those with certain pre-existing conditions are also especially vulnerable - those who are immunocompromised, those with asthma or other lung disease (such as chronic emphysema or bronchitis), and those with conditions such as hypertension (or high blood pressure), heart disease, atrial fibrillation (irregular heartbeat), diabetes, active cancer, kidney disease, those who have suffered a stroke, or dementia, or chronic liver disease, or are obese or HIV-positive.<sup>161</sup>

- Those who are older are much more likely to require hospitalization and to die than those who are younger. One of the brutal aspects of coronavirus is how the likelihood of death seems to increase dramatically for each decade older a person is.<sup>162</sup>

- Men seem more likely to get extremely sick and die than women.<sup>163</sup>

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<sup>160</sup> World Health Organization, "Coronavirus Disease 2019 Situation Report-46," March 6, 2020, [https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200306-sitrep-46-covid-19.pdf?sfvrsn=96b04adf\\_4](https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200306-sitrep-46-covid-19.pdf?sfvrsn=96b04adf_4).

<sup>161</sup> Centers for Disease Control and Prevention, "People with Certain Medical Conditions," Oct. 16, 2020, [https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html#:~:text=%2D%20Cancer.%20%2D%20Chronic,of%2030%20or%20higher\)](https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html#:~:text=%2D%20Cancer.%20%2D%20Chronic,of%2030%20or%20higher)).

<sup>162</sup> Centers for Disease Control and Prevention, "Older Adults," Sept. 11, 2020, <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/older-adults.html>.

<sup>163</sup> Nell Greenfieldboyce, "The New Coronavirus Appears to Take a Greater Toll on Men Than on Women," *NPR*, April 10, 2020,

- Health care workers are especially vulnerable, working on the front lines of exposure to the virus. This includes nurses as well as doctors as well as orderlies and housekeeping staff.
- Others providing essential services are also at heightened risk - police, fire, EMTs.
- So are those who help provide the infrastructure for daily life (often in low-status and low-paying occupations) - garbage collectors, warehouse workers, delivery people, cashiers, people working in the food supply chain.
- In many places, those who belong to racial or ethnic minorities are often much more likely to be harmed or killed by coronavirus, often reflecting deep social and economic inequities that pre-date the current crisis.<sup>164</sup>
- The list goes on.

Sheltering in place is a hardship, but it is also a luxury. Those who can stay home, teach online from home, join a zoom conference or webinar as a replacement for in-person meetings, are relatively well off during a time of immense difficulty.

The language of discrimination may not be very helpful in the face of a health pandemic such as coronavirus, but the idea of disparate impact is helpful. The virus may not discriminate, but our social and economic realities may result in effects that are very different.

#### *The Punta del Este Declaration*

At approximately the midway point of the preamble of the Punta del Este Declaration on Human Dignity for Everyone Everywhere, it says:

“Recognizing that the concept of human dignity emphasizes the uniqueness and irreplaceability of every human being; that it implies a right of each individual to find and define the meanings of his or her own life; that it presupposes respect for pluralism and difference; and that it carries with it the responsibility to honor the

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<https://www.npr.org/sections/goatsandsoda/2020/04/10/831883664/the-new-coronavirus-appears-to-take-a-greater-toll-on-men-than-on-women>.

<sup>164</sup> Don Bambino Geno Tai, Aditya Shah, Chyke A. Coubeni, Irene G. Sia, & Mark L. Wieland, “The Disproportionate Impact of COVID-19 on Racial and Ethnic Minorities in the United States,” *Clinical Infectious Diseases*, ciaa815, <https://academic.oup.com/cid/advance-article/doi/10.1093/cid/ciaa815/5860249>.

dignity of everyone.”<sup>165</sup>

Nearly every aspect of this sentence is meaningful in our current situation.

- The uniqueness and irreplaceability of every human being - it is important to remember that there are individual human beings that lay behind the statistics that fill our television screens, and the charts that we (including me) obsess over.

- Human dignity implies a right of each individual to find and define the meanings of his or her own life - we must be careful to try to respect individuals, including those at the portals of death; we must try to find humane ways to afford connections even when physical separation is required.

- Human dignity presupposes respect for pluralism and difference - we are seeing this in the ways individuals, communities, and even nations respond to the challenges of the coronavirus.

We have a responsibility to honor the dignity of everyone - not just the old (or the young); not just the rich (or the poor); not just the healthy (or those with pre-existing conditions).

The most important part of the Punta del Este declaration are the words “human dignity.” But equally important is the idea “of” and “for” Everyone Everywhere. The most important thing that a human rights perspective can afford us at a time like this is a passionate insistence that every person matters— all people in all places.

This is a time of high political divisiveness. This crisis is unfolding in the US just as the presidential primaries are finishing and focus is turning to the general election. The impulses to politicize this crisis are difficult to resist. Whether, or more pointedly, the extent to which we rise to this challenge will define this moment and will define us in it.

Focusing on human dignity for everyone everywhere is a way to try to avoid the (over)politicization of this moment. From this human dignity project, two things stand out. The first is the generative character of human dignity: almost everyone has something interesting and insightful to add to our understanding of this concept, which is at once simple and clear, but which is also rich and thick. Second, human dignity tends to elevate rather than degrade conversations. Most political concepts become divisive quickly. It is possible that human dignity becomes divisive as well, but this idea - human dignity for

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<sup>165</sup> “Punte del Este Declaration on Human Dignity for Everyone Everywhere,” December 2018, <https://www.dignityforeveryone.org/wp-content/uploads/sites/5/2019/02/Punta-del-Este-Declaration.pdf>.

everyone everywhere -has a greater prospect for elevating our discourse than any other comparable concept.

It is easy to make the mistake of focusing exclusively on legal responses to social problems, including the Covid crisis. There are powerful and useful tools in the legal toolkit for addressing the challenges at hand. But, as important as juriscentric approaches are, usually more important are non-juriscentric approaches.

There are two non-legal strategies that may be especially apropos at this time.

### **3. Patience, Forbearance, and Restraint**

The first is remembering to exercise patience, forbearance, and restraint, both with ourselves, and with each other. One might have found their nerves frayed and emotions heightened over the past several months. But, it is harder to be tolerant of the behavior of others when one is full of regard for self and deficient in regard for others.

### **4. Be a Light, Reflect Light, Seek Light**

Second is striving to be a light at times of darkness. Scriptures often admonish one to be a light. For example, in the Sermon on the Mount, Jesus declares, “Ye are the light of the world.” He urges us to not hide our light under a bushel, and to let our light shine.<sup>166</sup>

The scriptures also teach to recognize Jesus Christ as the light of the world, and when a person is incapable of being a light, perhaps that person can strive to reflect His light. Jesus says, “I am the light of the world; he that followeth me shall not walk in darkness, but shall have the light of life.”<sup>167</sup>

Finally, if a person is too tired or worn down that he cannot be a light, or even effectively reflect light, when he finds himself in darkness, let him be a seeker after and believers in the reality of light. As the great Bono of U2 has reminded us, “darkness always gathers around the light.”<sup>168</sup> But the New Testament prophet John reminds us, “The light shines in the darkness, and the darkness has not overcome it.”<sup>169</sup> In that song, called 13 (There is a Light), Bono reminds us that just as we know the world exists even if we are no longer living, we should not doubt that light exists just because it is dark.

“If there is a light, we can’t always see,  
If there is a world, we can’t always be.

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<sup>166</sup> See Matthew 5:14-16.

<sup>167</sup> John 8:12.

<sup>168</sup> “13 (There Is A Light),” on U2, *Songs of Experience*, Interscope, 2017.

<sup>169</sup> John 1:5

If there is a dark, now we shouldn't doubt,  
There is a light, don't let it go out."<sup>170</sup>

### *Human Dignity in a Time of Covid*

Human dignity is an important legal principle, and it is the foundational idea upon which human rights are based. But recognizing, regarding, and respecting the dignity of all people in all places is also an important strategy for how we respond, collectively and individually, to the Covid crisis.

Elder Jeffrey R. Holland spoke of the “all hands on deck” war with COVID-19, “a solemn reminder that a virus 1,000 times smaller than a grain of sand can bring entire populations and global economies to their knees.”<sup>171</sup>

While it may be easy to make the Covid pandemic a legal or political battle to bring an end to the suffering and death, it is more important to use the notions of human dignity to help ease the pain of the pandemic.

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<sup>170</sup> “13 (There Is A Light),” on U2, *Songs of Experience*, Interscope, 2017.

<sup>171</sup> Jeffrey R. Holland, “A Perfect Brightness of Hope,” April 2020.