

# UNIVERSITY *of* PENNSYLVANIA

## JOURNAL *of* LAW & PUBLIC AFFAIRS

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Vol. 6

December 2020

No. 2

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### INJUSTICE IS AN UNDERLYING CONDITION

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*Race, poverty, and zip code serve as critical determinants of a person's health. Research showed the links between these factors and poor health and mortality before COVID-19, and they have only been amplified during this pandemic.*

*People of color experience higher rates of asthma, heart disease, diabetes, and other chronic conditions. People of color who live in poverty are even more likely to suffer from poor health; they face a "double burden" of health disparities associated with both racial and socioeconomic marginalization. Neighborhoods with concentrated poverty and with residents who are primarily people of color have even faced a life expectancy decades shorter than higher income, predominantly white neighborhoods. Now, a virus that does not itself discriminate is disproportionately infecting and killing people of color across the nation. Biology cannot explain either the longstanding disparities that COVID has spotlighted or the new disparities that have been framed as the "color of COVID." The common underlying condition? Injustice.*

*The U.S. Centers for Disease Control and Prevention ("CDC") and other health experts across the world recognize the powerful role that social determinants play in health. Social and economic conditions such as unemployment, housing instability, food insecurity, and unequal access to*

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quality education, drive as much as 80% of a person’s health. These social determinants, and the racist legal structures that have furthered them, are at the root of the health disparities illuminated by COVID.

A growing body of “health justice” scholarship explores the role of law and policy in eliminating unjust disparities. A health justice approach requires as a fundamental first step a structural understanding of health disparities and the ways that social determinants of health drive those inequities. This article examines two major social determinants of health that drove disparities pre-COVID and are exacerbating them now: food insecurity and housing instability. With the pandemic and resulting recession, hunger is growing rapidly in the U.S., with dangerous impacts on health, especially for children. As unemployment escalates, millions of Americans find themselves unable to pay rent and on the brink of eviction and homelessness, both of which are associated with poor health outcomes. Low-income Americans are confined to homes with substandard conditions like mold and rodents that drive asthma and other respiratory diseases, at a time when those illnesses can make people more susceptible to complications from COVID.

Health justice scholars have called for major law and policy reforms to address disparities in these areas. However, existing legal rights in the areas of public benefits and housing law are under-enforced, with deleterious health effects. While we work towards a health justice revolution, this article argues for the full enforcement of laws already on the books to attack injustice and advance health. During the COVID recovery and beyond, justice is a requisite for a healthier nation.

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## INTRODUCTION

The Petersons<sup>1</sup> live in an apartment with walls blackened by mold. Eight-year-old Kenny's frequent asthma attacks often send him to the emergency room. Knowing that mold can exacerbate asthma, Ms. Peterson asked her landlord to fix the issue, but she received no response. When the COVID-19 ("COVID") pandemic hit and Kenny's school closed, he became even sicker because he was stuck at home most of each day in the moldy apartment. Ms. Peterson is worried about Kenny's health and afraid that their frequent emergency room visits are putting the family at higher risk of contracting COVID. There are also many people in their apartment building with COVID, and Ms. Peterson knows several neighbors who have needed intensive care treatment.

Mr. Peterson lost his job at a temp agency at the start of the pandemic and is having difficulty obtaining the paperwork he needs from his employer to qualify for unemployment benefits. Without his income, the parents have skipped meals to make sure the kids have enough to eat, a strategy which has been making Ms. Peterson feel very weak, especially in light of her diabetes. The Petersons applied for food stamps but were denied without any explanation. The family has had to make the difficult decision to use their rent money for food so that they won't continue to go hungry. Although there is a moratorium on evictions in their city during this public health emergency, the Petersons have been unable to make their full rent payments and are terrified of being evicted and becoming homeless once evictions resume.

Kenny's asthma and Ms. Peterson's diabetes put them at higher risk for complications from COVID, but these aren't the only underlying conditions affecting their health. The Petersons are affected by the *social* determinants of health, which are social and economic conditions in which people are born, grow, live, work and age.<sup>2</sup> These non-biological social determinants, such as housing instability, food insecurity, and unequal access to healthcare and education, can contribute to more than 80% of a person's health.<sup>3</sup> Social determinants have played a role in high rates of chronic diseases, high blood pressure, asthma, diabetes, and obesity among

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<sup>1</sup> This story is based on a composite of several families being served by the author, her colleagues, and students with the Health Justice Alliance Law Clinic, and all names have been changed to protect the identity of the clients.

<sup>2</sup> *Social Determinants of Health*, HEALTHY PEOPLE 2030, <https://health.gov/healthy-people/objectives-and-data/social-determinants-health> [<https://perma.cc/TE5M-KJSU>] (last visited Dec. 8, 2020).

<sup>3</sup> Sally Magnan, *Social Determinants of Health 101 for Health Care: Five Plus Five*, NAT'L ACAD. MED. PERSP. 1, 1 (Oct. 9, 2017), <https://nam.edu/wp-content/uploads/2017/10/Social-Determinants-of-Health-101.pdf> [<https://perma.cc/V8JT-7KFT>].

communities of color.<sup>4</sup> These underlying health challenges are now putting those communities at increased risk for complications and death related to COVID.<sup>5</sup> Social determinants of health are, in fact, deeply connected to the stark racial and economic health disparities<sup>6</sup> that COVID has both highlighted and exacerbated.

The virus itself may not discriminate, but long-standing inequality and structural racism in the United States have created the conditions that have allowed COVID to disproportionately ravage communities of color,<sup>7</sup> like the Washington, D.C. community in which the Petersons live. The data have made clear that people of color are disproportionately affected by the COVID pandemic across a variety of metrics and across socioeconomic status.<sup>8</sup> From the Navajo Nation to African American<sup>9</sup> and Latino communities across the country, rates of infection, intensive care treatment, and death are all higher among communities of color.<sup>10</sup> The pandemic is simply magnifying how “[r]acism has led to a lack of investment in African

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<sup>4</sup> Emily A. Benfer, *Health Justice: A Framework (and Call to Action) for the Elimination of Health Inequity and Social Injustice*, 65 AM. U. L. REV. 275, 280–82 (2015).

<sup>5</sup> Max Fisher & Emma Bubola, *As Coronavirus Deepens Inequality, Inequality Worsens Its Spread*, N.Y. TIMES: THE INTERPRETER (Mar. 16, 2020), <https://www.nytimes.com/2020/03/15/world/europe/coronavirus-inequality.html> [<https://perma.cc/4S4P-L8UQ>]; see, e.g., Ibram X. Kendi, *What the Racial Data Show*, ATLANTIC (Apr. 6, 2020), <https://www.theatlantic.com/ideas/archive/2020/04/coronavirus-exposing-our-racial-divides/609526/> [<https://perma.cc/5F8R-M3LR>] (connecting incarceration and homelessness and their racially disparate impacts, to increased COVID vulnerability).

<sup>6</sup> Benfer, *supra* note 4, at 278.

<sup>7</sup> Sheila Foster, Yael Cannon & Gregg Bloche, *Health Justice is Racial Justice: A Legal Action Agenda for Health Disparities*, HEALTH AFF. BLOG (July 2, 2020), <https://www.healthaffairs.org/doi/10.1377/hblog20200701.242395/full/> [<https://perma.cc/M36L-S4QW>].

<sup>8</sup> See Emily A. Benfer & Lindsay F. Wiley, *Health Justice Strategies to Combat COVID-19: Protecting Vulnerable Communities During A Pandemic*, HEALTH AFF. BLOG (Mar. 19, 2020), <https://www.healthaffairs.org/doi/10.1377/hblog20200319.757883/full/> [<https://perma.cc/M36L-S4QW>] (predicting the disparate impact of COVID on “low-income and marginalized communities”); *COVID-19 May Not Discriminate Based on Race—but U.S. Health Care Does*, PBS NEWS HOUR (Apr. 2, 2020, 6:30 PM), <https://www.pbs.org/newshour/show/covid-19-may-not-discriminate-based-on-race-but-u-s-health-care-does?> [<https://perma.cc/SYQ8-DXGC>] (detailing an emergency medicine doctor’s experience with and concern regarding COVID and vulnerable populations).

<sup>9</sup> This Article uses the term “Black” and “African American” interchangeably and capitalizes “Black.” See Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1332 n.2 (1988) (“I shall use ‘African-American’ and ‘Black’ interchangeably. When using ‘Black,’ I shall use an upper-case ‘B’ to reflect my view that Blacks, like Asians, Latinos, and other ‘minorities,’ constitute a specific cultural group and, as such, require denotation as a proper noun.”).

<sup>10</sup> *Health Equity Considerations and Racial and Ethnic Minority Groups*, CTRS. FOR DISEASE CONTROL & PREV.: CORONAVIRUS DISEASE 2019 (COVID-19) (July 24, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/racial-ethnic-minorities.html> [<https://perma.cc/P4J3-HSKX>] [hereinafter *Health Equity Considerations*].

American communities and worse health care for the population in general.”<sup>11</sup> And for those African Americans and other people of color who are also low-income, the health impacts and disparities are further amplified.<sup>12</sup>

There is growing recognition of the role of law as a social determinant of health and as a driver of connected disparities—a concept embraced by legal scholars writing within the burgeoning health justice paradigm.<sup>13</sup> Health justice is “an emerging framework for using law and policy to eliminate unjust health disparities.”<sup>14</sup> Health justice scholars seek to advance a vision of health equity<sup>15</sup> in which “everyone has a fair and just opportunity to be healthy”<sup>16</sup> and “all persons have the same chance to be free from hazards that jeopardize health, fully participate in society, and access opportunity.”<sup>17</sup> The health justice framework requires as a fundamental first step a structural understanding of health disparities and the ways that social determinants of health drive those inequities.<sup>18</sup>

Once disparities are recognized and understood, the health justice framework requires an exploration of the use of law to address those determinants and facilitate health equity.<sup>19</sup> Health justice legal scholarship has focused on the critical need for significant changes to law and policy in furtherance of equity.<sup>20</sup> Health justice scholars such as Emily Benfer, Ruqaiyah Yearby, Lindsay Wiley, Seema Mohapatra, Dayna Bowen

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<sup>11</sup> Jan Wolfe, *African Americans More Likely to Die from Coronavirus Illness, Early Data Shows*, REUTERS (Apr. 6, 2020, 1:00 PM), <https://www.reuters.com/article/us-health-coronavirus-usa-race/african-americans-more-likely-to-die-from-coronavirus-illness-early-data-shows-idUSKBN21O2B6> [<https://perma.cc/6SF3-6RUL>]; see also Kendi, *supra* note 5 (discussing the continuing racial disparities within America and how COVID exacerbates those disparities).

<sup>12</sup> Wyatt Koma, Samantha Artiga, Tricia Neuman, Gary Claxton, Matthew Rae, Jennifer Kates & Josh Michaud, *Low-Income and Communities of Color at Higher Risk of Serious Illness if Infected with Coronavirus*, KAISER FAM. FOUND. (May 7, 2020), <https://www.kff.org/coronavirus-covid-19/issue-brief/low-income-and-communities-of-color-at-higher-risk-of-serious-illness-if-infected-with-coronavirus/> [<https://perma.cc/G9UC-EUN6>]; Matthew A. Raifman & Julia R. Raifman, Research Letter, *Disparities in the Population at Risk of Severe Illness from COVID-19 by Race/Ethnicity and Income*, AM. J. PREV. MED. 137, 138 (2020).

<sup>13</sup> See e.g., Benfer, *supra* note 4, at 278 (introducing the legal system as a social determinant of health).

<sup>14</sup> Benfer & Wiley, *supra* note 8.

<sup>15</sup> See ELIZABETH TOBIN-TYLER & JOEL B. TEITELBAUM, ESSENTIALS OF HEALTH JUSTICE: A PRIMER ix (2019) (defining health equity as “everyone ha[ving] a fair and just opportunity to be healthy . . . [by] removing obstacles to health, such as poverty, discrimination, and their consequences, including powerlessness and lack of access to good jobs with fair pay, quality education and housing, safe environments, and health care”).

<sup>16</sup> *Id.*

<sup>17</sup> Benfer, *supra* note 4, at 278; see also TOBIN-TYLER & TEITELBAUM, *supra* note 15 at x–xi (discussing barriers to health equity).

<sup>18</sup> Benfer & Wiley, *supra* note 8.

<sup>19</sup> *Id.*

<sup>20</sup> Benfer, *supra* note 4, at 278.

Matthew, and Angela Harris, have explored the role that law has played in facilitating disparities and racial injustice, and have advocated for systemic reforms to law and policy.<sup>21</sup>

While broken systems and laws must be overhauled, existing laws also need to be leveraged now to promote the health of those most deeply affected by racial and economic inequity.<sup>22</sup> This article builds on health justice scholarship by arguing that, in addition to forms of systemic change that are needed to allow law to play a role in advancing health justice, *existing laws* should be wielded and enforced to their fullest extent to address social determinants of health in furtherance of health justice.

In Part I, I explore the health justice framework and its two key principles: (1) the importance of understanding health disparities and inequities and their interconnectedness with social determinants of health, and (2) the critical role of law in addressing those challenges in furtherance of health equity and justice. In doing so, I demonstrate that a health justice approach to addressing social determinants of health necessitates an analysis pursuant to both principles, including an examination of the potential for enforcement of existing laws to improve health and mitigate disparities.

I then apply these two principles of health justice to analyze two critical social determinants that have long driven health disparities and that have become at once more visible and more problematic during this pandemic. In Part II, I explore food insecurity as a powerful social determinant of health and its connections to racial and economic disparities before and during COVID. Next, I apply the second principle of health justice and argue for the potential of existing laws, if properly enforced, to address food insecurity to advance health and reduce disparities.

In Part III, I apply this analysis to another core social determinant: access to safe and healthy housing. I examine racial and economic disparities connected to housing and health both before and during the pandemic. I then apply the second principle of health justice to explore the critical role of law in this determinant of health. I contend that existing housing laws should be enforced to advance health and attack health disparities for low-income individuals of color.

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<sup>21</sup> See, e.g., Benfer & Wiley, *supra* note 8; Dayna Bowen Matthew, *On Charlottesville*, 105 VA. L. REV. 269, 307–23 (2019); Angela P. Harris & Aysha Pamukcu, *The Civil Rights of Health: A New Approach to Challenging Structural Inequality*, 67 UCLA L. REV. (forthcoming 2020) (manuscript at 20–21) (on file with author).

<sup>22</sup> For example, laws already require landlords to make homes habitable and allow low-income families to access money for food. Kathryn A. Sabeth, *(Under)Enforcement of Poor Tenants' Rights*, 27 GEO. J. POVERTY L. & POL'Y 97, 111–16 (2019); *Supplemental Nutrition Assistance Program (SNAP)*, U.S. DEP'T AGRIC., <https://www.fns.usda.gov/snap/supplemental-nutrition-assistance-program> [<https://perma.cc/2MGC-TX4A>] (last visited May 28, 2020). Attorneys should step up to ensure that laws like these are utilized during the pandemic and beyond.

I conclude by arguing that the laws we have on the books must be enforced to their fullest extent to address the underlying condition that is injustice in this country. This article applies the core principles of health justice to conceptualize the role of law in furthering health and reducing the disparities that COVID has laid bare. By investigating the potential for law to address social determinants of health in two core areas of basic human need, food insecurity and housing, the article aims to demonstrate that law can be a tool for preventing and mitigating poor health among those most affected by disparities when the laws we have are enforced properly.<sup>23</sup>

## I. HEALTH JUSTICE

The health justice paradigm calls for “law and policy to eliminate unjust health disparities.”<sup>24</sup> While advancing a vision of health equity in which everyone has a “fair and just opportunity to be as healthy as possible,”<sup>25</sup> a focus on the concept of “justice” centers the important role of law and policy in facilitating both existing health disparities and the potential for their eradication.<sup>26</sup> Health justice recognizes that “law and polic[y] are essential tools to close health gaps by dismantling [systemic] barriers” to health and promoting equity by “creating opportunities for all to be healthy.”<sup>27</sup> This framework is centered on two core principles: (1) a structural understanding of health disparities and the force of social determinants of

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<sup>23</sup> See Benfer, *supra* note 4, at 330, 339 (discussing city-wide ordinances around housing to prevent the detrimental effects of lead poisoning and arguing, within a public health framework, that primary prevention strategies are the most useful in preventing poor health outcomes by attacking the root of the problem while secondary and tertiary prevention strategies are band-aid fixes); see also INST. OF MED. OF THE NAT'L ACAD., FOR THE PUBLIC'S HEALTH: REVITALIZING LAW AND POLICY TO MEET NEW CHALLENGES, 13 (2011) <https://www.nap.edu/read/13093/chapter/1#ix> [<https://perma.cc/45ME-QV4L>] (discussing how law is a driver of health improvements by addressing infrastructure, intervention, and the cooperation of different sectors of government). For examples of laws enacted to prevent and mitigate disparities by requiring routine evaluations of special education programs, home health services, and workplace safety, see Individuals with Disabilities Education Act, Pub. L. No. 108-446, § 614, 118 Stat. 2647, 2702 (2004) (codified as amended at 20 U.S.C. § 1414); Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 2703, 124 Stat. 199, 319 (2010) (codified as amended at 42 U.S.C. § 1396w-4); Occupational Safety and Health Act of 1970, Pub. L. No. 91-596, § 26, 84 Stat. 1590, 1615 (codified at 29 U.S.C. § 675).

<sup>24</sup> Benfer & Wiley, *supra* note 8.

<sup>25</sup> TOBIN-TYLER & TEITELBAUM, *supra* note 15, at ix (emphasizing that pursuing health equity requires “removing obstacles to health, such as poverty, discrimination, and their consequences, including powerlessness and lack of access to good jobs with fair pay, quality education and housing, safe environments, and health care”).

<sup>26</sup> See *id.*; PAULA BRAVEMAN, ELAINE ARKIN, TRACY ORLEANS, DWAYNE PROCTOR & ALONZO PLOUGH, ROBERT WOOD JOHNSON FOUND., WHAT IS HEALTH EQUITY? AND WHAT DIFFERENCE DOES A DEFINITION MAKE? 2 (2017), <https://www.rwjf.org/en/library/research/2017/05/what-is-health-equity-.html> [<https://perma.cc/63LW-8Z5D>].

<sup>27</sup> CHANGELAB SOLUTIONS, EXECUTIVE SUMMARY, A BLUEPRINT FOR CHANGEMAKERS: ACHIEVING HEALTH EQUITY THROUGH LAW & POLICY 2 (2019), <https://www.changeabsolutions.org/product/blueprint-changemakers> [<https://perma.cc/5N43-8BMS>].

health in driving them,<sup>28</sup> and (2) the role of law and policy in addressing those disparities and their underlying determinants in order to advance health equity and justice.<sup>29</sup>

### A. Disparities and the Social Determinants at Their Root

Health justice requires a structural understanding of health disparities and their roots in the social determinants of health. The health justice framework recognizes that eliminating disparities in health is different from improving public health overall. While the study of public health focuses more broadly on preventing negative health for entire populations, health justice advocates attempt to understand and attack the roots of health disparities that impact particular populations, roots which include social determinants of health that are closely connected to law.<sup>30</sup> To promote health equity through law and policy, health justice necessitates an “understanding of what health inequities are, why they exist, and how they affect people’s lives.”<sup>31</sup> The health justice framework begins with an understanding of disparities on local and national levels to identify patterns of inequity, along with an exploration of the roots of these problems in the social determinants of health.<sup>32</sup>

An examination of the Petersons’ neighborhood in southeast Washington, D.C., in the city’s Ward 8, reveals the longstanding health disparities that predated COVID and that the pandemic has exacerbated. Ward 8 is a high poverty area where more than 90% of residents are African American.<sup>33</sup> Before COVID, average life expectancy there was *fifteen years shorter* than across town in Ward 3, the city’s highest-income area, which is predominantly white.<sup>34</sup> The infant mortality rate is ten times higher in Ward 8 than Ward 3.<sup>35</sup> Further, African American residents are three times more

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<sup>28</sup> See Harris & Pamukcu, *supra* note 21, at 5–6 (arguing for a new contextualization of the health justice framework as the “civil rights of health,” pushing for a structural understanding of social determinants of health that connects health disparities to the subordination of disadvantaged groups and the need for civil rights protections).

<sup>29</sup> CHANGELAB SOLUTIONS, *supra* note 27, at 2.

<sup>30</sup> Harris & Pamukcu, *supra* note 21, at 43; see *What Is Public Health?*, CDC FOUND., <https://www.cdcfoundation.org/what-public-health> [<https://perma.cc/7HAH-M4PY>] (last accessed September 30, 2020) (describing the purpose of public health and the role of public health officials when working to address health disparities).

<sup>31</sup> CHANGELAB SOLUTIONS, *supra* note 27, at 2.

<sup>32</sup> *Id.* at 7.

<sup>33</sup> DC HEALTH MATTERS, 2020 DEMOGRAPHICS, SUMMARY DATA FOR WARD: WARD 8, <http://www.dchealthmatters.org/?module=demographicdata&controller=index&action=index&id=131495&sectionId=> [<https://perma.cc/Q93L-Z6UG>] (last visited July 30, 2020).

<sup>34</sup> CHRISTOPHER J. KING & PATRICIA CLOONAN, GEO. UNIV. SCH. OF NURSING & HEALTH STUD., HEALTH DISPARITIES IN THE BLACK COMMUNITY: AN IMPERATIVE FOR RACIAL EQUITY IN THE DISTRICT OF COLUMBIA 4 (2020).

<sup>35</sup> Domenica Ghanem, *For Women of Color, the ‘Healthcare Gap’ Is Real and Deadly*, HILL

likely to be obese, seven times more likely to have diabetes, and twice as likely to die of heart disease as white D.C. residents.<sup>36</sup> While many of these health disparities cross socioeconomic status, they are also connected to and compounded by income disparities in Washington, D.C.; the median income of African American families in D.C. is \$43,000, while the median income for white families is more than three times that, at \$130,000.<sup>37</sup>

COVID has exacerbated these inequities in Washington, D.C. in frightening ways. While only 11% of the city's residents live in the Petersons' Ward 8,<sup>38</sup> more than 20% of Washington, D.C.'s reported COVID deaths have occurred there.<sup>39</sup> Across the city, African Americans account for 48% of the population, but 51% of infections and 74.5% of the deaths.<sup>40</sup> While white Washingtonians also make up 46% of the population, they represent only 23.5% of infections and only 13% of the deaths.<sup>41</sup> D.C. Mayor Muriel Bowser has recognized the connection between COVID's disparities and longstanding health disparities in the city,<sup>42</sup> acknowledging that Black and brown individuals are "right in the crosshairs of COVID-19,"<sup>43</sup> bringing attention to what D.C. Fiscal Policy Institute analyst Oubilah Huddleston refers to as the "disregard for black life and black bodies."<sup>44</sup>

Neither longstanding health disparities nor the disproportionate impact of COVID on people of color are limited to the nation's capital.<sup>45</sup> Mayors and governors across the country are calling attention to the "spotlight" that COVID has put on racial health disparities in the United

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(Mar. 8, 2017, 7:40 AM), <https://thehill.com/blogs/pundits-blog/healthcare/322874-for-women-of-color-the-healthcare-gap-is-real-and-deadly> [<https://perma.cc/H6KX-VXM7>].

<sup>36</sup> Justin Wm. Moyer, 'Legacy of Inequality' to Blame for COVID-19 Deaths Among Black D.C. Residents, *Report Says*, WASH. POST (June 2, 2020, 7:29 PM), <https://www.washingtonpost.com/local/legacy-of-inequality-to-blame-for-covid-19-deaths-among-black-dc-residents-report-says/2020/06/02/80275a90-a4eb-11ea-8681-7d471bf20207story.html> [<https://perma.cc/EPC8-GKTQ>].

<sup>37</sup> *Id.*

<sup>38</sup> DC HEALTH MATTERS, *supra* note 33.

<sup>39</sup> COVID-19 Surveillance, GOV'T D.C., <https://coronavirus.dc.gov/data> [<https://perma.cc/LDE8-8N7M>] (last visited July 30, 2020).

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> Kimberly Dozier, *As Washington D.C. Weighs Reopening, African Americans in the Nation's Capital Brace for the Worst*, TIME (May 26, 2020), <https://time.com/5842744/reopening-washington-dc-african-americans-coronavirus/> [<https://perma.cc/CP4S-BPEG>].

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

<sup>44</sup> *Id.*

<sup>45</sup> See *The Color of Coronavirus: COVID-19 Deaths By Race and Ethnicity in the U.S.*, AM. PUB. MEDIA RES. LAB, <https://www.apmresearchlab.org/covid/deaths-by-race> [<https://perma.cc/H2AY-EN9B>] (last visited Nov. 12, 2020) (examining the disparate racial impacts of COVID across the country).

States.<sup>46</sup> Generally, it has been well-documented that low-income and minority groups are more likely than white people to have and die from chronic diseases.<sup>47</sup> For example, people of color, and particularly African Americans, have long been disproportionately vulnerable to many health conditions, such as respiratory illnesses, heart disease, diabetes, kidney disease, and strokes.<sup>48</sup> Black people, when compared with white people, have higher rates of chronic conditions and stress, lower life expectancy, and now, in this pandemic, also higher COVID mortality rates.<sup>49</sup> People of color more broadly have a greater risk of COVID contraction, serious and life-threatening complications, and death.<sup>50</sup> For example, while only 6% of New Mexico residents are Native American, 25% of the positive COVID cases in New Mexico are among Native Americans.<sup>51</sup>

The mortality rate from COVID among people of color is staggering.<sup>52</sup> In Louisiana, African Americans account for 70% of COVID deaths but only 33% of the population.<sup>53</sup> In New York City, Black and Latinx

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<sup>46</sup> David Beavers, *Mayors, Governor Call Out Racial Health Disparities Highlighted by Coronavirus*, POLITICO (Apr. 12, 2020, 2:23 PM), <https://www.politico.com/news/2020/04/12/dc-mayor-coronavirus-african-american-health-disparities-180890> [<https://perma.cc/VH3N-3RQ8>].

<sup>47</sup> See e.g., Elizabeth Tobin-Tyler, *In Allocating Scarce Health Care Resources During COVID-19, Don't Forget Health Justice*, HEALTH AFF. BLOG (Apr. 25, 2020), <https://www.healthaffairs.org/doi/10.1377/hblog20200422.50144/full/> [<https://perma.cc/EJ2W-L3SR>] (discussing racial disparities with respect to chronic illness and the connection between chronic illness and an increased risk of death from COVID).

<sup>48</sup> Cato T. Laurencin & Aneesah McClinton, *The COVID-19 Pandemic: A Call to Action to Identify and Address Racial and Ethnic Disparities*, 7 J. RACIAL & ETHNIC HEALTH DISPARITIES 398, 398 (2020).

<sup>49</sup> *Health Equity Considerations*, *supra* note 10; M. Jermaine Bond & Allen A. Herman, *Lagging Life Expectancy for Black Men: A Public Health Imperative*, 106 AM. J. PUB. H. 1167, 1167–69 (2016).

<sup>50</sup> See Tobin-Tyler, *supra* note 47 (describing the correlation between race, poverty and chronic illness, which in turn leads to a higher risk for COVID and complications); *cf.* Benfer & Wiley, *supra* note 8 (mentioning further risks COVID poses for people of color including increased risk of evictions and other harms).

<sup>51</sup> Beavers, *supra* note 46.

<sup>52</sup> Jamelle Bouie, Opinion, *Why Coronavirus Is Killing African-Americans More Than Others*, N.Y. TIMES (Apr. 14, 2020), <https://www.nytimes.com/2020/04/14/opinion/sunday/coronavirus-racism-african-americans.html?referringSource=articleShare> [<https://perma.cc/D5WU-W5Z6>]; see also Jack P. Shonkoff & David R. Williams, *Thinking About Racial Disparities in COVID-19 Impacts Through a Science-Informed, Early Childhood Lens*, HARV. U. CTR. ON THE DEVELOPING CHILD (Apr. 27, 2020), <https://developingchild.harvard.edu/thinking-about-racial-disparities-in-covid-19-impacts-through-a-science-informed-early-childhood-lens/> [<https://perma.cc/6V86-U5C9>] (“[C]ommunities of color in the United States are experiencing dramatically higher rates of hospitalization and death.”).

<sup>53</sup> Bouie, *supra* note 52.

people are dying at twice the rate of whites from COVID.<sup>54</sup> In the United States as a whole, Latinx and African American residents are “three times as likely to become infected as their white neighbors” and “nearly twice as likely to die from the virus as white people.”<sup>55</sup>

Racial health disparities cross socioeconomic status and persist regardless of educational attainment, wealth, or occupation.<sup>56</sup> Racism “operates independently of class, helping explain why racial health inequities persist even after controlling for socio-economic status.”<sup>57</sup> For example, one study showed that health disparities between Black and white Americans are stark, even among African Americans who earn more than \$175,000 a year.<sup>58</sup>

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<sup>54</sup> Jeffery C. Mays & Andy Newman, *Virus is Twice as Deadly for Black and Latino People Than Whites in N.Y.C.*, N.Y. TIMES (Apr. 8, 2020), <https://www.nytimes.com/2020/04/08/nyregion/coronavirus-race-deaths.html> [<https://perma.cc/5PAA-85JX>] (citing *Age Adjusted Rate of Fatal Lab Confirmed COVID-19 Cases per 100,000 by Race/Ethnicity Group*, NYC HEALTH (Apr. 6, 2020), <https://www1.nyc.gov/assets/doh/downloads/pdf/imm/covid-19-deaths-race-ethnicity-04082020-1.pdf> [<https://perma.cc/C4LD-VSS4>]).

<sup>55</sup> Richard A. Oppel Jr., Robert Gebeloff, K.K. Rebecca Lai, Will Wright & Mitch Smith, *The Fullest Look Yet at the Racial Inequity of the Coronavirus*, N.Y. TIMES (July 5, 2020), <https://www.nytimes.com/interactive/2020/07/05/us/coronavirus-latinos-african-americans-cdc-data.html?action=click&module=Top%20Stories&pgtype=Homepage> [<https://perma.cc/9NDC-EESP>].

<sup>56</sup> See Shervin Assari, *The Benefits of Higher Income in Protecting Against Chronic Medical Conditions Are Smaller for African Americans Than Whites*, 6 HEALTHCARE 1, 6 (Jan. 2018) [hereinafter Assari, *Benefits of Higher Income*] (finding that having high income is less protective against chronic medical conditions for African Americans than whites); cf. Edith Chen, Andrew D. Martin & Karen A. Matthews, *Understanding Health Disparities: The Role of Race and Socioeconomic Status in Children’s Health*, 96 AM. J. PUB. HEALTH 702, 702 (2006) (seeking to determine “whether childhood health disparities are best understood as effects of race, socioeconomic status (SES), or synergistic effects of the two”). See generally Shervin Assari, *Combined Racial and Gender Differences in the Long-Term Predictive Role of Education on Depressive Symptoms and Chronic Medical Conditions*, 4 J. RACIAL & ETHNIC HEALTH DISPARITIES 385 (2016) [hereinafter Assari, *Combined Racial and Gender Differences*] (examining the protective effect of education on health outcomes across racial and gender differences).

<sup>57</sup> Brian Smedley, Michael Jeffries, Larry Adelman & Jean Cheng, *Race, Racial Inequality and Health Inequities: Separating Myth from Fact* 6 (Opportunity Agenda, Briefing Paper, 2008) [http://www.unnaturalcauses.org/assets/uploads/file/Race\\_Racial\\_Inequality\\_Health.pdf](http://www.unnaturalcauses.org/assets/uploads/file/Race_Racial_Inequality_Health.pdf) [<https://perma.cc/8YGW-ATCS>]; see also Assari, *Benefits of Higher Income*, *supra* note 56, at 6 (“[T]he U.S. social structure fails African Americans, even those able to climb the social ladder and become wealthy. Regardless of education attainment, wealth, or occupation, Blacks have higher physical health costs for social gains.”); cf. Assari, *Combined Racial and Gender Differences*, *supra* note 56, at 386 (“Race, gender, age, cohort, and other demographic factors shape . . . health gains associated with education.”); Chen et al., *supra* note 56, at 702 (“Health disparities reflect differences in health because of sociodemographic variables, such as race, socioeconomic status (SES), and gender.”).

<sup>58</sup> Kanetha B. Wilson, Roland J. Thorpe Jr. & Thomas A. LaVeist, *Dollar for Dollar: Racial and Ethnic Inequalities in Health and Health-Related Outcomes Among Persons with Very High Income*, 96 PREVENTATIVE MED. 149, 151 (2017).

The allostatic load, or “cumulative wear and tear on the body’s system brought on by the repeated adaptation to stressors,” affects African American health due to the persistent burden of coping with racism across the lifespan.<sup>59</sup>

For those Americans who are both low-income and people of color, these challenges can be compounded.<sup>60</sup> Many low-income Americans face significant challenges during the pandemic without disposable income, health insurance, guaranteed paid leave, flexible work schedules, or the ability to stay home from work and socially distance effectively.<sup>61</sup> These challenges disproportionately affect people of color, as racial and ethnic minorities are more likely to experience poverty at some point in their lives and poverty rates are higher among African Americans than white Americans.<sup>62</sup> Racism operates upstream of class, as “educational, housing and wealth-accumulating opportunities have been shaped by a long history of racism that confers economic advantage to some groups while disadvantaging others . . . [a]nd lower socioeconomic status translates into poorer health.”<sup>63</sup> For those experiencing the stress of racism and discrimination as well as the stressors of lower socioeconomic status, the health impacts are compounded through a double burden, or “double jeopardy.”<sup>64</sup>

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<sup>59</sup> JAMILA TAYLOR, THE CENTURY FOUND., RACISM, INEQUALITY, AND HEALTH CARE FOR AFRICAN AMERICANS 6 (2019), <https://tcf.org/content/report/racism-inequality-health-care-african-americans/?agreed=1> [<https://perma.cc/WR9K-AMG8>]; see Bruce S. McEwen, *Protective and Damaging Effects of Stress Mediators: Central Role of the Brain*, 8 DIALOGUES IN CLINICAL NEUROSCIENCE 367–81 (2006) (detailing the impact of stress on the brain); Arline T. Geronimus, Margaret Hicken, Danya Keene & John Bound, “*Weathering*” and Age Patterns of Allostatic Load Scores Among Blacks and Whites in the United States, 96 AM. J. PUB. HEALTH 826, 830 (2006) (“[P]ersistent racial differences in health may be influenced by the stress of living in a race-conscious society.”).

<sup>60</sup> Smedley et al., *supra* note 57, at 6.

<sup>61</sup> Benfer & Wiley, *supra* note 8; Fisher & Bubola, *supra* note 5; Liz Essley Whyte & Chris Zubak-Skees, *Underlying Health Disparities Could Mean Coronavirus Hits Some Communities Harder*, NPR (Apr. 1, 2020 5:00 AM), <https://www.npr.org/sections/health-shots/2020/04/01/824874977/underlying-health-disparities-could-mean-coronavirus-hits-some-communities-harder> [<https://perma.cc/4GYL-BZN9>].

<sup>62</sup> David R. Williams, Selina A. Mohammed, Jacinta Leavell & Chiquita Collins, *Race, Socioeconomic Status, and Health: Complexities, Ongoing Challenges, and Research Opportunities*, 1186 ANNALS N.Y. ACAD. SCI. 69, 75 (2010); Paula A. Braveman, Catherine Cubbin, Susan Egerter, David R. Williams & Elsie Pamuk, *Socioeconomic Disparities in Health in the United States: What the Patterns Tell Us*, 100 AM. J. PUB. HEALTH S186, S192 (2010).

<sup>63</sup> Smedley et al., *supra* note 57, at 6.

<sup>64</sup> Chen et al., *supra* note 56, at 702 (emphasis omitted). This article examines disparities and injustices affecting people of color and people who are low-income (acknowledging that people of color have disproportionate rates of lower income and poverty as a result of structural racism), as well as the disparities and injustices affecting people who are both of color and also low-income, which results in this double jeopardy of health disparity. For further discussion of the intersection between race and health, see Smedley et al., *supra* note 57, at 6.

In contemplating the roots of longstanding health disparities, Dorothy Roberts explains that “[i]t is implausible that one race of people evolved to have a genetic predisposition to heart failure, hypertension, infant mortality, diabetes and asthma. There is no evolutionary theory that can explain why African ancestry would be genetically prone to practically every major common illness.”<sup>65</sup> In other words, genes do not cause these disparities; rather, they are driven by social conditions closely connected to injustice.<sup>66</sup>

Social determinants of health (or “social determinants”) are “conditions in the environments in which people are born, live, learn, work, play, worship, and age that affect a wide range of health, functioning, and quality-of-life outcomes and risks.”<sup>67</sup> Health is not just determined by what happens when we go to the doctor, but by all the moments before and after.<sup>68</sup> Scholars have noted that, “[w]hile access to high quality medical care is essential, the health of a population is mostly shaped by the social and environmental conditions of the communities in which we live.”<sup>69</sup> Social determinants drive population health and affect individual health outcomes including mortality, morbidity, life expectancy, health care expenditures, health status, and functional limitations.<sup>70</sup> The best predictor of health is a person’s standing within the social hierarchy, and racism adds to the harmful

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<sup>65</sup> Khiara M. Bridges, *The Many Ways Institutional Racism Kills Black People*, TIME (June 11, 2020, 6:31 AM), <https://time.com/5851864/institutional-racism-america/> [<https://perma.cc/5ZWJ-TEMC>].

<sup>66</sup> *Id.*

<sup>67</sup> *Social Determinants of Health*, *supra* note 2; see also Scott Burris, *From Health Care Law to the Social Determinants of Health: A Public Health Law Research Perspective*, 159 U. PA. L. REV. 1649, 1649 (2011) (quoting Paula A. Braveman, Susan A. Egerter & Robin E. Mockenhaupt, *Broadening the Focus: The Need to Address the Social Determinants of Health*, 40 AM. J. PREVENTATIVE MED. S1, S5 (2011)) (“Research over the past three decades has demonstrated that population health is shaped powerfully by ‘[t]he contexts in which people live, learn, work, and play’—also called ‘social determinants of health’ or ‘fundamental social causes of disease.’”).

<sup>68</sup> Jack Karp, *Virus Turns Up Pressure on Medical-Legal Partnerships*, LAW360 (July 19, 2020, 8:02 PM), <https://www.law360.com/access-to-justice/articles/1293163/virus-turns-up-pressure-on-medical-legal-partnerships> [<https://perma.cc/V2GZ-9C7W>] (quoting Ellen Lawton, co-director of the National Center for Medical-Legal Partnership: “The things that are important to promoting health are not just access to a doctor and things that happen in a doctor’s office” but “also access to healthy, safe housing, having enough income to provide food for your family, maybe services that you might need if you’re, for example, a disabled veteran or a child with chronic asthma.”).

<sup>69</sup> KING & CLOONAN, *supra* note 34, at 2.

<sup>70</sup> SAMANTHA ARTIGA, KENDAL ORGERA & OLIVIA PHAM, KAISER FAM. FOUND., *DISPARITIES IN HEALTH AND HEALTH CARE: FIVE KEY QUESTIONS AND ANSWERS 2–4* (2020) <https://www.kff.org/disparities-policy/issue-brief/disparities-in-health-and-health-care-five-key-questions-and-answers/> [<https://perma.cc/LP6F-CMFS>].

effects of lower socioeconomic status.<sup>71</sup> In fact, research shows that as much as 80% of health is impacted by social determinants like the poor housing conditions that exacerbate Kenny's asthma and the food insecurity that jeopardizes Ms. Peterson's health, given her diabetes.<sup>72</sup>

The impact of social determinants is being amplified by the pandemic and felt strongly by low-income families of color like the Petersons, who are experiencing the double jeopardy discussed above by virtue of race and class—a concept that has been explored in public health literature.<sup>73</sup> During this pandemic and the resulting recession, a lack of financial security facing people who were already low-income, along with the cumulative impacts of racism and health disparities, make low-income families of color particularly vulnerable to social determinants of health, such as housing insecurity and food insecurity.<sup>74</sup>

A number of new social determinants of health that have arisen during the pandemic profoundly affect low-income families. “Social distancing,”<sup>75</sup> which requires people to remain at home most of the time, can pose its own additional risks. Families who have low income like the Petersons are more likely to be sheltering in place in substandard housing “with poor air quality, mold, asbestos, lead, pest infestations, and inadequate space to separate the sick from the well.”<sup>76</sup> These conditions put low-income families at risk of negative health effects such as “asthma, respiratory distress, carbon monoxide poisoning, high blood pressure, heart disease, lead poisoning, mental health impairment, and cancer, among others.”<sup>77</sup>

Social determinants of health have also made it more difficult for low-income people of color to practice effective social distancing due to crowded housing, reliance on public transportation, and low-wage essential worker

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<sup>71</sup> Dorothy Roberts, *Debating the Cause of Health Disparities: Implications for Bioethics and Racial Equality*, 21 CAMBRIDGE Q. HEALTHCARE ETHICS 332, 333–34 (2012).

<sup>72</sup> Magnan, *supra* note 3, at 1.

<sup>73</sup> See e.g., Chen et al., *supra* note 56, at 702 (investigating the double jeopardy hypothesis in children's health).

<sup>74</sup> See Abby Vesoulis, *Coronavirus May Disproportionately Hurt the Poor—and That's Bad for Everyone*, TIME (Mar. 11, 2020, 3:16 PM), <https://time.com/5800930/how-coronavirus-will-hurt-the-poor/> [<https://perma.cc/M9SB-7G3P>] (finding that low-income status negatively impacts housing and food security).

<sup>75</sup> “Social distancing” is the practice of maintaining physical distance between yourself and others to prevent the spread of airborne pathogens. Public health authorities report that individuals can reduce the spread of COVID-19 by maintaining a six-foot distance at all times between themselves and anyone not from their household. See *Social Distancing*, CTRS. FOR DISEASE CONTROL & PREVENTION: COVID-19 (CORONAVIRUS DISEASE) (Nov. 17, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/social-distancing.html> [<https://perma.cc/3FHS-V6NZ>] (defining and describing how to socially distance).

<sup>76</sup> Benfer & Wiley, *supra* note 8.

<sup>77</sup> *Id.*

duties, putting them at higher risk of contracting COVID.<sup>78</sup> Social determinants such as access to safe and healthy housing, food and income insecurity, employment, and immigration status, among other things, play a vital role in determining who has the privilege of social distancing.<sup>79</sup> The coronavirus pandemic has made obvious what public health officials and researchers already knew: across the United States—in rural communities, suburban counties, and urban centers alike—poor people of color are more likely to be affected by social determinants of health that make them more susceptible to poor health and disease.<sup>80</sup>

The health justice framework necessitates an understanding of these health disparities and that social determinants of health are at their root. Even at its highest functioning capacity, the U.S. health system cannot improve the health of the overall population “without addressing the root causes of poor health.”<sup>81</sup> Health justice achieves a standard of healthy living for all by addressing the social determinants that result in poor health for individuals, as well as communities at large.<sup>82</sup>

### *B. The Role of Law in Eliminating Determinants and Disparities*

Health justice requires the deployment of “legal and policy strategies” to “dismantle systemic barriers to health and promote health equity.”<sup>83</sup> The terminology of “health justice” instead of “health equity” is intentional; while

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<sup>78</sup> Oppel Jr. et al., *supra* note 55 (quoting Dr. Mary Bassett, Director of the FXB Center for Health and Human Rights at Harvard University: “[T]his really is about who still has to leave their home to work, who has to leave a crowded apartment, get on crowded transport, and go to a crowded workplace . . .”).

<sup>79</sup> See Fisher & Bubola, *supra* note 5 (arguing that, like the H1N1 outbreak in America, where “spotty access to health care and the economics of part-time employment led three in 10 workers with H1N1 symptoms to continue going to work,” the same social determinants will exacerbate health disparities during the COVID-19 pandemic).

<sup>80</sup> See generally Paul James, *Didn't Make It to Georgetown's Racial Justice Panels? Here's What You Missed*, GEO. VOICE (July 16, 2020) <https://georgetownvoice.com/2020/07/16/georgetown-racial-justice-panels/> [<https://perma.cc/X5EL-7FAH>] (quoting Edilma Yearwood, Associate Professor and Chair of the Department of Professional Nursing at Georgetown's School of Nursing and Health Studies, describing COVID-19 as “an accelerant to an underlying problem that has always existed”); Oppel Jr. et al., *supra* note 55 (reporting the racially disparate impact of COVID-19 across hundreds of counties).

<sup>81</sup> Benfer, *supra* note 4, at 275.

<sup>82</sup> *Id.*; TOBIN-TYLER & TEITELBAUM, *supra* note 15, at x (using health justice as a theoretical concept to discuss: (1) the lack of right to health, health care services, or health insurance in the U.S., (2) how social factors impact individual and population health, (3) how wealth equals health, (4) how society often medicalizes social needs and criminalizes social deficiencies); Seema Mohapatra, *Black Pain Matters: The Need for a Health Justice Approach to Chronic Pain Management* (abstract) (May 28, 2020), <https://ssrn.com/abstract=2617895> [<https://perma.cc/4G3S-EQAS>].

<sup>83</sup> CHANGELAB SOLUTIONS, *supra* note 27, at 2.

health inequities need to be understood as a foundation for health justice, and health equity is the ultimate goal of this framework, the use of the word “justice” amplifies the necessary impact of the law in addressing health disparities.<sup>84</sup> The framework recognizes that laws and policies have created systems that have enabled, perpetuated, and exacerbated disparities—and that laws and policies “must be used to undo them.”<sup>85</sup>

The health justice paradigm identifies the role of law in facilitating the social determinants of health and in fact sees law as a determinant of health, as law can cause and exacerbate poor health and drive disparities.<sup>86</sup> To achieve “health justice,” law should be conceptualized as a social determinant because it allows us to attack health disparities at their roots.<sup>87</sup>

Therefore, in addition to advocating a structural understanding of social determinants of health and the health disparities that they drive, the health justice framework explores the role of law and policy in addressing those determinants and facilitating health equity.<sup>88</sup> For example, laws and policies created redlining and restrictive covenants, which led to racial segregation and the overcrowding of communities of color in dilapidated housing stock, and which contribute to poor health.<sup>89</sup> Law and policy can be used to reform these challenges through revamping of zoning and housing code enforcement systems.<sup>90</sup>

Health justice scholars have focused on the need to reform broken systems through laws and policies that deliberately lead to equity and prioritize those with the greatest need.<sup>91</sup> Advocates for health justice argue for health in all policies,<sup>92</sup> which is an approach that incorporates health,

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<sup>84</sup> Harris & Pamukcu, *supra* note 21, at 5–6; *see also* TOBIN-TYLER & TEITELBAUM, *supra* note 15, at x (explaining that the word “justice” is “relatively more recognized and understood by a greater number of people,” and that “justice” allows the discussion of the role of law in both “creating and remediating health injustices”).

<sup>85</sup> CHANGELAB SOLUTIONS, *supra* note 27, at 3.

<sup>86</sup> Benfer, *supra* note 4, at 306–07.

<sup>87</sup> TOBIN-TYLER & TEITELBAUM, *supra* note 15, at 136; *see* INST. OF MED. OF THE NAT’L ACAD., *supra* note 23, at 76 (describing the role of policy as a social determinant of health).

<sup>88</sup> Benfer & Wiley, *supra* note 8.

<sup>89</sup> Foster et al., *supra* note 7, at 3.

<sup>90</sup> *Id.* at 3–4.

<sup>91</sup> CHANGELAB SOLUTIONS, *supra* note 27, at 3.

<sup>92</sup> *See Social Determinants of Health*, HEALTHYPEOPLE.GOV, <https://www.healthypeople.gov/2020/topics-objectives/topic/social-determinants-of-health> [<https://perma.cc/77MV-E3FJ>] (last visited Dec. 14, 2020). (“[P]olicies that positively influence social and economic conditions and those that support changes in individual behavior [can] improve health for large numbers of people in ways that can be sustained over time.”); MINISTRY OF SOC. AFF. & HEALTH & EUR. OBSERVATORY ON HEALTH SYS. & POL’Y, HEALTH IN ALL POLICIES: PROSPECTS AND POTENTIALS xviii (2006) (“[Policies] seek[] to improve health and at the same time contribute to the well-being and the wealth of the nations through structures, mechanisms and actions planned and managed mainly by sectors other than health.”).

equity, and sustainability into policymaking across sectors.<sup>93</sup> The U.S. Department of Health and Human Services (“HHS”) has embraced this notion in its Healthy People 2020 campaign, emphasizing that social and physical environments should promote good health for everyone *equally*, and that the U.S. should strive for a “health in all policies” strategy as a means to close health gaps across government.<sup>94</sup> Health justice principles connect closely with those of other justice movements, such as environmental justice, housing justice, and reproductive justice movements, which also recognize the role of law and policy in driving health and inequity.<sup>95</sup>

With more Americans and their elected officials acknowledging racial inequities—including health inequities and broader inequities connected to the social determinants of health<sup>96</sup>—now is the time to push for major systemic reforms. As America recovers from the COVID crisis, we must not attempt to “quarantin[e] away social problems,” but must instead prioritize “long-term investments that support inclusive communities and combat the structures that engender such crises in the first place.”<sup>97</sup> The need for such

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<sup>93</sup> CHANGELAB SOLUTIONS, *supra* note 27, at 3; Benfer & Wiley, *supra* note 8, at 3–4; *see Social Determinants of Health*, *supra* note 2 (predicating good health on needed advances across multiple fields); MINISTRY OF SOC. AFF. & HEALTH & EUR. OBSERVATORY ON HEALTH SYS. & POL’Y, *supra* note 92, at 3 (explaining the approach to integration with European policy-making).

<sup>94</sup> *See Social Determinants of Health*, *supra* note 2 (“[An] application of a ‘health in all policies’ strategy, which introduces improved health for all and the closing of health gaps as goals to be shared across all areas of government.”); *see also* MINISTRY OF SOC. AFF. & HEALTH & EUR. OBSERVATORY ON HEALTH SYS. & POL’Y, *supra* note 92 at 1; D.C. HEALTH EQUITY OFF., HEALTH DEP’T, HEALTH EQUITY REPORT: DISTRICT OF COLUMBIA 43 (2018) (“Proactive multi-sector solutions are essential to meaningful transformational change.”).

<sup>95</sup> *See* Benfer, *supra* note 4, at 306–307 (listing ways in which the legal system can cause or exacerbate poor health); Lindsay F. Wiley, *Health Law as Social Justice*, 24 CORNELL J. L. & PUB. POL’Y 47 (2014) (advocating for a view of health law as an instrument of social justice); Harris & Pamukcu, *supra* note 21, at 5–6 (situating a “civil rights of health” initiative within the “health justice” movement and recognizing parallels with other “[x] justice” movements).

<sup>96</sup> *See* Christine Vestal, *Racism is a Public Health Crisis, Say Cities and Counties*, PEW (June 15, 2020), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2020/06/15/racism-is-a-public-health-crisis-say-cities-and-counties> [<http://perma.cc/VP2R-T27G>] (reporting the results of multiple public health studies and concluding that pervasive racism is the cause of “the health gap between African Americans and white Americans.”).

<sup>97</sup> Hanna Love & Jennifer S. Vey, *After COVID-19, We Must Invest In—Not Isolate—Our Most Vulnerable Communities*, BROOKINGS (Apr. 3, 2020), <https://www.brookings.edu/blog/the-avenue/2020/04/03/after-covid-19-we-must-invest-in-not-isolate-our-most-vulnerable-communities/> [<http://perma.cc/HP5J-QR3Y>]; *see also* Fisher & Bubola, *supra* note 5 (describing the importance of focusing on systemic disparities when thinking about solutions because “[w]hen a health crisis hits entire segments of society, it can set off a cycle in which declining economic status leads to rising rates of chronic illness. That, in turn, further depresses productivity and raises health care costs, leading to more poverty, which leads to more disease.”).

large scale structural reform has been highlighted by the health inequities exacerbated by the pandemic, as well as by the national discussion about racial injustice. That discussion—sparked by numerous instances of police violence, including the murder of George Floyd by Minneapolis police officers—has broadened to include issues of racial and economic justice in many areas of American society. Racial injustice in health is and should be a critical aspect of that broader national reckoning.<sup>98</sup>

Significant legislative and policy changes are needed to address social determinants of health, such as environmental injustice, a nationwide shortage of affordable housing, and rampant food insecurity.<sup>99</sup> The Improving Social Determinants of Health Act of 2020, recently introduced in the House, would authorize the U.S. Centers for Disease Control and Prevention to fund programs to address social determinants of health in furtherance of health equity and improved health outcomes.<sup>100</sup> This legislation is a start, but there is no question that we need a major overhaul of laws, policies, and systems that have allowed for grave inequities in this country.

While we work towards this revolution, existing laws have an important role to play in helping those most affected by health disparities and the social determinants that drive them. Where existing laws implicate social determinants of health, they can be characterized as “health-harming legal needs.”<sup>101</sup> Adopting a health justice approach requires the pursuit of broad legislative and policy reforms to address disparities, as well as enforcement of existing laws that could be leveraged to improve health and mitigate disparities. The under-enforcement of existing laws can result in health-harming legal needs, a phenomenon directly connected to injustice, as is evident in the contexts of housing and public benefits. In housing law and policy, health-harming legal needs can relate to eviction, housing conditions, and housing discrimination. With public benefits, health-harming legal needs can implicate food and income insecurity through benefit denials, terminations, and reductions.<sup>102</sup> When laws that can protect individuals in these areas go unenforced, low-income Americans of color like the Petersons, who are already faced with a double jeopardy by virtue of their race and socioeconomic status,<sup>103</sup> are left without justice and—because these laws represent social determinants—without health and true well-being.

Effective enforcement of public benefits and housing laws should play a role in addressing the social determinants affecting the Petersons and

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<sup>98</sup> Foster et al., *supra* note 7, at 5.

<sup>99</sup> *Id.*

<sup>100</sup> H.R. 6561, 116th Cong. (2020).

<sup>101</sup> JENNIFER TROTT & MARSHA REGENSTEIN, NATIONAL CENTER FOR MEDICAL-LEGAL PARTNERSHIP, SCREENING FOR HEALTH-HARMING LEGAL NEEDS 1 (2016).

<sup>102</sup> *Id.*

<sup>103</sup> Chen et al., *supra* note 56, at 702.

millions of other families. Those laws need to be enforced in order to mitigate the underlying condition of injustice.

## II. A HEALTH JUSTICE APPROACH TO FOOD INSECURITY

After Mr. Peterson lost his job in the midst of the pandemic, the Peterson family suffered from food insecurity. The parents skipped meals to ensure their children could eat. Less income meant hard choices: pay the rent or eat. Ultimately, the Petersons struggled to do either. Food insecurity is a critical social determinant of health, and laws and policies that govern public benefits programs implicate the health of their intended recipients. A health justice approach to food insecurity first requires a structural understanding of how this phenomenon functions as a social determinant of health and a driver of associated racial and socioeconomic disparities.<sup>104</sup> Health justice also demands an examination of the particular role of law and policy in driving food insecurity as a determinant and the disparities that harm marginalized individuals.<sup>105</sup> This section engages in this analysis and identifies opportunities to leverage enforcement of existing public benefits laws to remediate the food insecurity that so powerfully affects health and reduce long-standing disparities and those that have emerged and been exacerbated by the COVID pandemic.

### A. *Food Insecurity as a Determinant of Health*

A health justice approach to food insecurity must begin with a structural understanding of the ways in which it functions as a determinant of health. The United States is one of the wealthiest countries on the globe, but about 17% of Americans experience food insecurity, which is defined as a combination of “inadequate quantity and quality of food,”<sup>106</sup> including an inability to obtain food that is adequately nutritious.<sup>107</sup> Food insecurity has cascading effects for low-income Americans; it can force a choice between buying food or paying rent and other important bills, such as utilities

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<sup>104</sup> Harris & Pamukcu, *supra* note 21, at 5–6 (arguing for a new contextualization of the health justice framework as the “civil rights of health,” and pushing for a structural understanding of social determinants of health that connects health disparities to the subordination of disadvantaged groups and the need for civil rights protections).

<sup>105</sup> CHANGLAB SOLUTIONS, *supra* note 27, at 2–3.

<sup>106</sup> TOBIN-TYLER & TEITELBAUM, *supra* note 15, at 70.

<sup>107</sup> Eve E. Garrow & Jack Day, *Strengthening the Human Right to Food*, 7 U.C. IRVINE L. REV. 275, 276–77 (2017) (defining food insecurity as experiencing “difficulties at some points during the year affording a diet of adequate quality”) (citing ALISHA COLEMAN-JENSEN ET AL., ECON. RES. SERV., U.S. DEP’T OF AGRIC., NO. 194, HOUSEHOLD FOOD SECURITY IN THE U.S. IN 2014, at 8 (2015)).

payments.<sup>108</sup> This choice, sometimes called “heat or eat,” is impossible because people need all of these necessities to thrive.<sup>109</sup>

When an emergency happens, like the current pandemic that has left millions unemployed,<sup>110</sup> low-income Americans often find themselves without a meaningful safety net that would allow them to avoid such a dangerous choice as “heat or eat.” Over 40% of Americans do not have the means to deal with an emergency costing more than \$400.<sup>111</sup> Many low-income Americans who lacked savings before COVID have struggled immensely to pay their bills and put food on the table.<sup>112</sup> Many families live on the brink of financial ruin, with their income insecurity exacerbated by higher living expenses and the erratic work schedules of low-paying jobs.<sup>113</sup>

Food insecurity is closely connected to poor health,<sup>114</sup> including an array of concerning conditions, such as obesity, low birthrate, iron deficiency, and developmental problems including aggression, anxiety, depression, and attention deficit disorder.<sup>115</sup> Hunger can make it hard to focus in school and at work.<sup>116</sup>

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<sup>108</sup> See Ericka Petersen, *Building a House for Gideon: The Right to Counsel in Evictions*, 16 STAN. J. CIV. RTS. & CIV. LIBERTIES 63, 70 (2020) (“Soaring rents lead most low-income tenants to spend over half of their income on rent, leading to excruciating budget choices and the inability to afford other basic necessities, such as electricity, water, food, and medicine. As a result, these low-income tenants frequently sacrifice food, medical care, and medications to pay rent.”).

<sup>109</sup> Jayanta Bhattacharya, Thomas DeLeire, Steven Haider & Janet Currie, *Heat or Eat? Cold-Weather Shocks and Nutrition in Poor American Families*, 93 AM. J. PUB. HEALTH 1149, 1153 (2003).

<sup>110</sup> Sarah Hansen, *30 Million Are Unemployed and More Pain Is on the Way: Here Are 8 Numbers that Sum Up the Destruction in the U.S. Labor Market*, FORBES (July 24, 2020), <https://www.forbes.com/sites/sarahhansen/2020/07/24/30-million-are-unemployed-and-more-pain-is-on-the-way-here-are-8-numbers-that-sum-up-the-destruction-in-the-us-labor-market/#78564986161b> [<https://perma.cc/9E5L-X323>].

<sup>111</sup> William J. Barber & Mitch Landrieu, *Poverty Is the Virus that Put Us at COVID-19 Risk*, USA TODAY (Mar. 23, 2020), <https://www.usatoday.com/story/opinion/2020/03/23/corona-virus-spread-poverty-covid-19-stimulus-column/2899411001/> [<https://perma.cc/99ZX-KH42>].

<sup>112</sup> Quentin Fottrel, *Nearly 25% of Americans Have No Emergency Savings*, MARKET WATCH (June 9, 2020 1:49 PM), <https://www.marketwatch.com/story/nearly-25-of-americans-have-no-emergency-savings-and-lost-income-due-to-coronavirus-is-piling-on-even-more-debt-2020-06-03> [<https://perma.cc/XB2V-Y327>].

<sup>113</sup> *Id.*

<sup>114</sup> Maureen Black, *Household Food Insecurities: Threats to Children’s Well-Being*, AM. PSYCH. ASS’N (June 2012), <https://www.apa.org/pi/ses/resources/indicator/2012/06/household-food-insecurities> [<https://perma.cc/ZN9F-57H9>].

<sup>115</sup> *Food Insecurity*, HEALTHYPEOPLE.GOV, <https://www.healthypeople.gov/2020/topics-objectives/topic/social-determinants-health/interventions-resources/food-insecurity> [<https://perma.cc/QNA2-GHEC>] (last visited Oct. 15, 2020); Black, *supra* note 114.

<sup>116</sup> See PUB. INT. GOV’T REL. OFF., AM. PSYCH. ASS’N, WHAT ARE THE PSYCHOLOGICAL EFFECTS OF HUNGER ON CHILDREN? (2020) (explaining how limited cognitive bandwidth and other psychological processes prevent hungry children from focusing on school).

Adults living in food insecure homes are more likely to visit the hospital towards the end of the month.<sup>117</sup> Research has attributed this increase in admission to “food insecurity and the exhaustion by low-income households of food budgets by the end of the month.”<sup>118</sup>

Even if hunger only lasts for a short time, it can have long-term impacts on health,<sup>119</sup> as is evident by the particularly “insidious effects on the health and development of young children.”<sup>120</sup> Children living in poverty are more likely to be food insecure and are more likely to suffer from “severe chronic conditions and their complications such as asthma, obesity, diabetes, ADHD, behavior disorders, cavities, and anxiety.”<sup>121</sup> Children facing food insecurity fare worse developmentally than children at similar income levels who live in food-secure homes.<sup>122</sup> The harmful effects of unaddressed food insecurity in children can snowball into “poor school readiness, poor school performance and subsequent health disparities and poverty.”<sup>123</sup>

The inability to consistently provide food for children can have negative impacts not only on child health, but also on parents and other caregivers.<sup>124</sup> Families may be “forced to make difficult choices among basic needs, such as food, housing, energy, and health care, often resulting in frustration and emotional distress.”<sup>125</sup> This stress can manifest in the caregivers experiencing depression and anxiety, and ultimately affect their

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<sup>117</sup> TOBIN-TYLER & TEITELBAUM, *supra* note 15, at 71.

<sup>118</sup> *Id.*

<sup>119</sup> Diane Whitmore Schanzenbach, *Early Life Impacts on Later Life Health and Economic Outcomes*, 57 WASH. U. J. L. & POL’Y 103, 103 (“[C]hildhood exposure to famine or food deprivation permanently scars those who survive, resulting in increased obesity, schizophrenia and disability rates in adulthood . . . . Experiencing extreme malnutrition in early life has been shown to impact brain development, with brain growth diminished among children who were malnourished in infancy.”) (citing Elizabeth L. Prado & Kathryn G. Dewey, *Nutrition and Brain Development in Early Life*, 72 NUTRITION REV. 267, 273 (2014)).

<sup>120</sup> Black, *supra* note 114.

<sup>121</sup> *Children in Poverty*, COUNTY HEALTH RANKINGS, <https://www.countyhealthrankings.org/explore-health-rankings/measures-data-sources/county-health-rankings-model/health-factors/social-and-economic-factors/income/children-in-poverty> [<https://perma.cc/V77N-3AWL>] (last visited Aug. 3, 2020).

<sup>122</sup> Ruth Rose-Jacobs, Maureen M. Black, Patrick H. Casey, John T. Cook, Diana B. Cutts, Mariana Chilton, Timothy Heeren, Suzette M. Levenson, Alan F. Meyers & Deborah A. Frank, *Household Food Insecurity: Associations with At-Risk Infant and Toddler Development*, 121 PEDIATRICS 65, 70 (2008).

<sup>123</sup> Black, *supra* note 114; *see also* Craig Gundersen & James Ziliak, *Food Insecurity and Health Outcomes*, 11 HEALTH AFF. 1830, 1833 ex.2, 1834 ex. 3, 1835 ex. 4 (2015) (describing the impacts of food insecurity on the health of children, adults, and seniors).

<sup>124</sup> Black, *supra* note 114.

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

ability to care for their children.<sup>126</sup> It can also lead to a panoply of poor health conditions, such as high blood pressure and diabetes.<sup>127</sup>

With so many people out of work as a result of the pandemic,<sup>128</sup> a growing number of Americans face uncertainty over where their next meal will come from.<sup>129</sup> Food insecurity has exploded. Only 10.5% of American households experienced food insecurity at some point during 2019.<sup>130</sup> The Urban Institute now reports that 17.7% of all households—and 21.8% of households with children—experienced food insecurity during May 2020 alone.<sup>131</sup> Food insecurity also plagued nearly one-third of low income households during that time.<sup>132</sup> As early as May 2020, approximately one-fifth of mothers of young children reported that their children were not getting enough to eat.<sup>133</sup> Millions of children in the United States rely on school programs—such as the National School Lunch Program, the School Breakfast Program, and the Child and Adult Care Food Program—for food.<sup>134</sup> With many schools closed, child hunger rates are extremely high, with 31% of households with children reporting that they cannot afford the quantity or quality of food they need.<sup>135</sup> While food banks, school systems, and cities have instituted

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<sup>126</sup> *Id.*

<sup>127</sup> Steven Carlson & Brynne Keith-Jennings, *SNAP is Linked with Improved Nutritional Outcomes and Lower Health Costs*, CTR. ON BUDGET & POL'Y PRIORITIES, (Jan. 17, 2018), <https://www.cbpp.org/sites/default/files/atoms/files/1-17-18fa.pdf> [<https://perma.cc/N2ME-9HMP>].

<sup>128</sup> Rachel Sugar, *The Scramble to Feed the Kids Left Hungry by the Coronavirus Crisis*, VOX (Apr. 17, 2020), <https://www.vox.com/the-goods/2020/4/17/21220016/school-lunch-coronavirus-meal-programs> [<https://perma.cc/EP79-47WN>].

<sup>129</sup> LIZ HAMEL, AUDREY KEARNEY, ASHLEY KIRZINGER, LUNNA LOPES, CAILEY MUÑANA & MOLLYANN BRODIE, *Impact of Coronavirus on Personal Health, Economic and Food Security, and Medicaid*, KFF (2020), <https://www.kff.org/report-section/kff-health-tracking-poll-may-2020-health-and-economic-impacts/> [<https://perma.cc/E2Y8-MJEG>] (“[O]ne in four Americans (26%) say they or someone in their household have skipped meals or relied on charity or government food programs since February, including 16% who say this was due to the impact of coronavirus on their finances.”).

<sup>130</sup> *Food Security Status of U.S. Households in 2019*, ECON. RES. SERV. (Sept. 9, 2020), <https://www.ers.usda.gov/topics/food-nutrition-assistance/food-security-in-the-us/key-statistics-graphics.aspx#foodsecure> [<https://perma.cc/BJ57-P9ZE>].

<sup>131</sup> ELAINE WAXMAN, POONAM GUPTA & MICHAEL KARPMAN, URBAN INST., *MORE THAN ONE IN SIX ADULTS WERE FOOD INSECURE TWO MONTHS INTO THE COVID-19 RECESSION 1* (2020).

<sup>132</sup> *Id.* at 2.

<sup>133</sup> Lauren Bauer, *The COVID-19 Crisis Has Already Left Too Many Children Hungry In America*, BROOKINGS (May 6, 2020), <https://www.brookings.edu/blog/up-front/2020/05/06/the-covid-19-crisis-has-already-left-too-many-children-hungry-in-america/> [<https://perma.cc/833R-NLEM>].

<sup>134</sup> Abigail Hess, *Widespread School Closures Mean 30 Million Kids Might Go Without Meals*, CNBC (Mar. 14, 2020), <https://www.cnn.com/2020/03/14/widespread-school-closures-mean-30-million-kids-might-go-without-meals.html> [<https://perma.cc/N7HC-T5QG>].

<sup>135</sup> Jason DeParle, *Hunger Program's Slow Start Leaves Millions of Children Waiting*, N.Y. TIMES (May 26, 2020), <https://www.nytimes.com/2020/05/26/us/politics/child-hunger-coronavirus.html> [<https://perma.cc/U4LD-7H5B>].

meal and grocery giveaways,<sup>136</sup> these emergency food provision programs only provide a short-term fix for families who are food insecure.

Food insecurity is driven by income insecurity, both of which are associated with major disparities. Research demonstrates that “income equality is linked with health” and that “[t]he greater the gap between the richest and the poorest residents, the greater the differences in health.”<sup>137</sup>

### *B. Racial Disparities in Food Insecurity*

While 21.5% of people of color experienced food insecurity pre-COVID, only 10% of white households were considered food insecure.<sup>138</sup> This disparity can be explained, in part, by inequities in income insecurity, as people of color are more likely to have jobs without livable wages, and African Americans are twice as likely to be unemployed than white individuals.<sup>139</sup>

Many low-income families and people of color live in neighborhoods known as “food deserts,” or “areas with limited access to affordable nutritious foods.”<sup>140</sup> Food deserts can contribute to food insecurity and force families to “resort to low-cost, low nutrient-dense food”<sup>141</sup> that is more accessible and more affordable.<sup>142</sup> Only 8% of African Americans have a grocery store within their census tract, and 24% of African Americans and 17% of Latinos

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<sup>136</sup> See D.C. GOV’T., COMPREHENSIVE MEAL SITES (2020) (listing sites where, as of late March 2020, D.C. area children up to the age of 18 were able to receive meals); see also *Coronavirus (COVID-19) Updates*, D.C. PUB. SCHOOLS, <https://dcps.dc.gov/coronavirus> [<https://perma.cc/G7TJ-RPBC>] (last visited Apr. 1, 2020) (listing efforts by the D.C. public school system to address the needs of students and families during the coronavirus pandemic).

<sup>137</sup> D.C. HEALTH EQUITY OFF., *supra* note 94, at 148; see also FOOD RSCH. & ACTION CTR., THE IMPACT OF POVERTY, FOOD INSECURITY, AND POOR NUTRITION ON HEALTH AND WELLBEING 6 (2020) (“A considerable amount of research demonstrates that people living in or near poverty have disproportionately worse health outcomes and less access to health care than those who do not.”).

<sup>138</sup> ALL. TO END HUNGER, HUNGER IS A RACIAL EQUITY ISSUE (2017).

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

<sup>140</sup> TOBIN-TYLER & TEITELBAUM, *supra* note 15, at 70; ALL. TO END HUNGER, *supra* note 138.

<sup>141</sup> Black, *supra* note 114.

<sup>142</sup> Food deserts are “areas where people have limited access to a variety of healthy and affordable food.” PAULA DUTKO, MICHELE VER PLOEG & TRACEY FARRIGAN, ECON. RES. SERV., U.S. DEP’T OF AGRIC., NO. 140, CHARACTERISTICS AND INFLUENTIAL FACTORS OF FOOD DESERTS iii (2012). Food deserts are frequently found in low-income areas and are less likely to have “full-service supermarkets;” instead they offer small convenience and corner stores that are likely to sell food with higher prices and less nutritional value. *Food Insecurity*, *supra* note 115; see also Nareissa Smith, *Eatin’ Good? Not in this Neighborhood: A Legal Analysis of Disparities in Food Availability and Quality at Chain Supermarkets in Poverty-Stricken Areas*, 14 MICH. J. RACE & L. 197, 201 (2009) (“Some Americans are fortunate enough to live near a grocery store that stocks a wide variety of health foods . . . [but] many Americans have more limited access to food.”).

do not own a car, making grocery shopping more difficult.<sup>143</sup> Without access to healthy and fresh foods, people are more likely to experience obesity, diabetes, high blood pressure, cancer, and other diseases related to diet.<sup>144</sup>

Food insecurity has profoundly impacted people of color during the pandemic, especially given the long-standing problem of food deserts and the challenge that many families of color continue to experience in accessing nutritious food.<sup>145</sup> In the midst of this COVID recession, the rate of food insecurity for African Americans and Latinos is approximately double that of white Americans.<sup>146</sup>

The situation of the Peterson family and the challenges facing their neighborhood in Washington, D.C. illustrate these disparities. The family was already extremely low-income before COVID hit, like most of their neighbors. Income inequality in the city is above the national average.<sup>147</sup> Pre-COVID data from 2020 shows that “compared with all racial and ethnic groups, the median household income for Blacks is the lowest (\$43,546)—three times less than Whites (\$135,263).”<sup>148</sup> Unemployment, which is closely connected to stress-related conditions and other diseases, is higher in the Petersons’ predominantly African American Ward 8, which had an unemployment rate of 12.5% even before the pandemic, compared to only 3.6% and 3.8% unemployment in the two highest income, predominantly white wards of the city.<sup>149</sup>

Accessing quality food was already a major challenge for the Petersons before COVID. More than three-quarters of the food deserts in D.C.

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<sup>143</sup> ALL. TO END HUNGER, *supra* note 138.

<sup>144</sup> *Access to Foods that Support Healthy Eating Patterns*, HEALTHYPEOPLE.GOV, <https://www.healthypeople.gov/2020/topics-objectives/topic/social-determinants-health/interventions-resources/access-to-foods-that> [<https://perma.cc/J7HT-ACVD>] (last visited Oct. 16, 2020); *see also* ALL. TO END HUNGER, *supra* note 138 (“Lacking access to nutritious foods can cause disease and poor health outcomes that shorten life expectancy . . . .”); Patricia M. Anderson & Kristin F. Butcher, *The Relationships Among SNAP Benefits, Grocery Spending, Diet Quality, and the Adequacy of Low-Income Families’ Resources*, CTR. ON BUDGET & POL’Y PRIORITIES 2 (June 14, 2016), <https://cpb-us-e1.wpmucdn.com/sites.dartmouth.edu/dist/0/1994/files/2019/05/CBPP2016.pdf> [<https://perma.cc/9597-Q2YW>] (“[I]ncreasing spending on groceries by \$19.48 would increase consumption of healthier foods.”).

<sup>145</sup> *The Disproportionate Impact of COVID-19 on Communities of Color: Hearing Before the H. Ways & Means Comm.*, 116th Cong. (2020) (statement of Douglas Holtz-Eakin, Pres. American Action Forum).

<sup>146</sup> WAXMAN ET AL., *supra* note 131, at 2.

<sup>147</sup> D.C. HEALTH EQUITY OFF., *supra* note 94, at 20.

<sup>148</sup> KING & CLOONAN, *supra* note 34, at 10.

<sup>149</sup> OFF. OF LAB. MKT. RSCH. & INFO., DISTRICT OF COLUMBIA, LABOR FORCE, EMPLOYMENT, UNEMPLOYMENT AND UNEMPLOYMENT RATE BY WARD (2020), [https://does.dc.gov/sites/default/files/dc/sites/does/page\\_content/attachments/DC%20Ward%20DataAug20-Jul20-Aug19.pdf](https://does.dc.gov/sites/default/files/dc/sites/does/page_content/attachments/DC%20Ward%20DataAug20-Jul20-Aug19.pdf) [<https://perma.cc/5JPM-FPJS>].

are located in the family's Ward 8 and adjacent Ward 7.<sup>150</sup> In areas that already provided little access to healthy foods, the coronavirus has made the fight against hunger even more difficult.<sup>151</sup> For example, in Ward 7, there are just two small grocery stores for the ~75,000 residents in the low-income area.<sup>152</sup> With the advent of COVID, the shelves in these stores were wiped out for extended periods of time, making food staples even harder to acquire than usual.<sup>153</sup> Additionally, it can be difficult for low-income residents to travel beyond their immediate neighborhoods to acquire nutritional food due to lack of access to a car, access gaps in public transportation,<sup>154</sup> and/or the inability to afford public transportation.<sup>155</sup> In several D.C. neighborhoods, particularly those in Wards 7 and 8, up to half of all households have no access to a vehicle.<sup>156</sup> The Petersons are one of those families, for whom, under normal circumstances, accessing a grocery store without a car, with three children in tow, and via multiple bus lines, is a major challenge. The family's food insecurity became emergent during the COVID pandemic, following Mr. Peterson's loss of employment and cuts to bus service designed to maximize social distancing.<sup>157</sup> The family's situation is tragically common in their neighborhood, as COVID is driving further inequality in D.C.<sup>158</sup>

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<sup>150</sup> RANDY SMITH, D.C. POL'Y CTR, FOOD ACCESS IN D.C. IS DEEPLY CONNECTED TO POVERTY AND TRANSPORTATION 7 (2017).

<sup>151</sup> Devin Dwyer, *An Urban Food Desert Faces Novel Coronavirus and Hunger: Reporter's Notebook*, ABC NEWS (Mar. 20, 2020, 12:43 PM), <https://abcnews.go.com/Health/urban-food-desert-faces-coronavirus-hunger-reporters-notebook/story?id=69679011> [<https://perma.cc/G837-KXHP>].

<sup>152</sup> D.C. HEALTH EQUITY OFF., *supra* note 94, at 110, 186.

<sup>153</sup> Colleen Grablick, *No Toilet Paper, Massive Lines at D.C. Grocery Stores As Residents Stock Up*, DCIST (Mar. 13, 2020, 4:31 PM), <https://dcist.com/story/20/03/13/no-toilet-paper-massive-lines-at-d-c-grocery-stores-as-residents-stock-up/> [<https://perma.cc/JT5F-5ZKV>].

<sup>154</sup> "Gaps" in public transit are identified based not only on the availability of transit in a given area, but also on the demand for it. Accordingly, areas with limited transit availability—including many rural areas—are not deemed to be facing "transit gaps" if the demand for transit is low in those areas. This sets "transit gaps" apart from "food deserts," which are identified based solely on availability. See *Transit Gap Methods*, ALLTRANSIT™ GAP FINDER, <https://alltransit.cnt.org/methods/gap-methods-v1.pdf> [<https://perma.cc/JR88-AGN4>] (last accessed Sept. 30, 2020) (defining "transit gaps" and explaining why the term is used rather than "transit deserts").

<sup>155</sup> D.C. HEALTH EQUITY OFF., *supra* note 94, at 24; see also SARAH TREUHAFT & ALLISON KARPYN, POLICYLINK & THE FOOD TRUST, THE GROCERY GAP: WHO HAS ACCESS TO HEALTHY FOOD AND WHY IT MATTERS 16 (2010) (explaining that lack of transportation to supermarkets is a major barrier to healthy food access).

<sup>156</sup> D.C. HEALTH EQUITY OFF., *supra* note 94, at 24.

<sup>157</sup> See *Metro and Covid-19: Steps We've Taken*, WASH. METRO. AREA TRANSIT AUTH. (Aug. 17, 2020) <https://www.wmata.com/service/covid19/COVID-19.cfm> [<https://perma.cc/8D7D-DCLT>] (describing metro closures and re-openings in D.C. during the COVID-19 pandemic).

<sup>158</sup> Eliza Berkon, *For Thousands of Eligible D.C. Residents, A COVID-19 Stimulus Check May Never Arrive*, WAMU (June 25, 2020), <https://wamu.org/story/20/06/25/eligible-dc-residents-no-coronavirus-stimulus-act-irs-money/> [<https://perma.cc/R7GA-E2YL>].

### C. Leveraging Law and Policy to Fight Food Insecurity and Advance Justice

Law and policy can be leveraged, pursuant to a health justice approach, to eliminate disparities in food insecurity and bring low-income Americans more income. Health justice scholars Ruqaiijah Yearby and Seema Mohapatra have advocated for essential workers to receive a guaranteed basic universal income and paid sick leave for the duration of the pandemic.<sup>159</sup> They have called for workers of color to be provided with savings accounts that will make their pay equal to that of white workers, and for all essential workers to receive survivorship benefits.<sup>160</sup> They argue that all domestic, agricultural and service workers should have paid sick leave and guaranteed basic income to ensure they are living above the poverty line.<sup>161</sup>

Health justice advocates have also called for an extension of the higher unemployment benefits established by one of the original COVID relief packages, the CARES Act,<sup>162</sup> which are estimated to have kept almost 16 million Americans out of poverty.<sup>163</sup> Additional stimulus checks or other forms of financial relief will be critical,<sup>164</sup> particularly for the 40 million Americans who could lose their homes in the next few months.<sup>165</sup> Systems must be in place to ensure that low-income Americans actually receive these benefits; earlier this year, onerous and unnecessary registration requirements prevented 12 million eligible low-income individuals from receiving the relief checks due to them under the CARES Act.<sup>166</sup> Other measures that are important to a health justice approach include prohibitions against employer

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<sup>159</sup> Ruqaiijah Yearby & Seema Mohapatra, *Law, Structural Racism, and the COVID-19 Pandemic*, J. L. & BIOSCIENCES 1, 17 (forthcoming 2020). As COVID-19 exacerbates inequality and poverty across the nation and the globe, a temporary universal basic income that would allow individuals to buy food, and afford health and education expenses, would be not only helpful, but important to protect the poorest people according the U.N. Development Programme. *Temporary Basic Income to Protect the World's Poorest People Could Slow the Surge in COVID-19 Cases, Says UNDP*, U.N. DEV. PROGRAMME (July 23, 2020), [https://www.undp.org/content/undp/en/home/news-centre/news/2020/Temporary\\_Basic\\_Income\\_to\\_protect\\_the\\_worlds\\_poorest\\_people\\_slow\\_COVID19.html](https://www.undp.org/content/undp/en/home/news-centre/news/2020/Temporary_Basic_Income_to_protect_the_worlds_poorest_people_slow_COVID19.html) [https://perma.cc/SE65-MD3F].

<sup>160</sup> Yearby & Mohapatra, *supra* note 159, at 17.

<sup>161</sup> *Id.* at 18.

<sup>162</sup> Annie Nova, *\$600 Unemployment Boost. Stimulus Checks. Government Relief is Coming to an Abrupt End*, CNBC (July 20, 2020, 1:10 PM), <https://www.cnbc.com/2020/07/20/unemployment-stimulus-checks-what-to-expect-as-relief-measures-end.html> [https://perma.cc/SE65-MD3F].

<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> David Super, *Brinkmanship in Free-Fall*, BALKINIZATION (July 15, 2020), <https://balkin.blogspot.com/2020/07/brinkmanship-in-free-fall.html?m=1> [https://perma.cc/AY7R-T97X].

retaliation directed at employees who request leave or reasonable accommodations due to the COVID pandemic.<sup>167</sup>

In addition to shorter-term measures, health justice scholars Emily Benfer and Lindsay Wiley have called for longer-term and increased financial supports to help alleviate the long-lasting impacts of layoffs and other financial hardship on low-income communities, as well as the harmful effects of poverty that predated COVID.<sup>168</sup> To address the ongoing and unmet need,<sup>169</sup> federal, state, and local policymakers should expand eligibility for SNAP,<sup>170</sup> increase the amount of SNAP benefits provided to beneficiaries,<sup>171</sup> extend Pandemic-EBT benefits afforded to parents with students who normally rely on school lunches, and provide flexibility to stringent SNAP rules regulating what types of food recipients can purchase with their benefits to create access to more food for low income individuals.<sup>172</sup> The Families First Coronavirus Response Act suspended work requirements for “able-bodied adults without dependents” and allowed for the relaxation and extension of onerous recertification requirements typically imposed on recipients, changes that should continue beyond the pandemic to make SNAP more accessible to low-income individuals facing food insecurity in the long-

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<sup>167</sup> Benfer & Wiley, *supra* note 8; Yearby & Mohapatra, *supra* note 159, at 17–18.

<sup>168</sup> Benfer & Wiley, *supra* note 8.

<sup>169</sup> Not all food insecure households qualify for SNAP, leaving their needs unaddressed. Carlson & Keith-Jennings, *supra* note 127, at 3. Government spending on SNAP has been decreasing in recent years. In fiscal year 2013, spending reached \$109.2 billion for the year, whereas for fiscal year 2018, spending was at \$96.1 billion. VICTOR OLIVEIRA, ECON. RES. SERV., U.S. DEP’T OF AGRIC., *THE FOOD ASSISTANCE LANDSCAPE: FY 2018 ANNUAL REPORT 1* (2019).

<sup>170</sup> Eligibility for means-tested benefits programs is often determined by comparing a household’s income to the federal poverty threshold, known as the “federal poverty line” or “FPL.” Some have criticized the use of the federal poverty threshold “as underestimating the number of people who live in poverty because its calculation of the cost of meeting basic needs is too low.” TOBIN-TYLER & TEITELBAUM, *supra* note 15, at 94.

<sup>171</sup> Not all SNAP recipients receive enough benefits to remedy their food insecurity. Many families spend all or most of their SNAP benefits in the first half of the month and go hungry in the second. This means that many families receiving SNAP still experience increased food insecurity after their benefits run out each month. *See, e.g.*, EXEC. OFF. OF THE PRES., *LONG-TERM BENEFITS OF THE SUPPLEMENTAL NUTRITION ASSISTANCE PROGRAM 3* (2015) (“[T]he benefits are . . . too low to allow a family to purchase an adequate, healthy diet . . . [T]he current level of benefits often cannot sustain families through the end of the month.”); Carlson & Keith-Jennings, *supra* note 127, at 11; FEEDING AMERICA, *CHILD FOOD INSECURITY* (2018) (“Some families in need of public support, however, face challenges maintaining consistent enrollment while others may not even qualify for federal assistance. One in five food-insecure children lives in a home that is likely ineligible for these important programs, underscoring the critical role of both the public and private sector in addressing child food insecurity.”).

<sup>172</sup> Benfer & Wiley, *supra* note 8.

term.<sup>173</sup> Allowance of the online purchase of groceries using SNAP benefits in most states has allowed for more access to essential items for families who are sheltering in place,<sup>174</sup> and should be expanded to all states and continue long-term.

While advocates for health justice pursue these critical changes in law and policy, existing laws providing for public benefits to address income and food insecurity must be enforced so that low-income Americans receive the full extent of income and food assistance to which they are entitled. Without effective enforcement, the denial or loss of public benefits for a family living in poverty “immediately robs the family of its means of survival and threatens its fundamental ‘right to exist in society.’”<sup>175</sup>

Existing public benefits laws provide low-income families with an opportunity to access financial assistance that can help remediate food insecurity. There are several federal benefits programs designed to help low-income individuals “cover basic [living] expenses such as food, housing, and healthcare,”<sup>176</sup> including the Supplemental Nutrition Assistance Program (SNAP; also known as “food stamps”),<sup>177</sup> the Special Supplemental Nutrition Program for Women, Infants and Children (WIC),<sup>178</sup> Temporary Assistance for Needy Families (TANF), Supplemental Security Income (SSI), and Social Security Disability Income (SSDI).<sup>179</sup> These programs, which are designed to remediate or prevent poverty, can help people become healthier because “[h]igher income, particularly when it raises a person or family out of poverty, is a strong predictor of improved health outcomes.”<sup>180</sup>

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<sup>173</sup> Families First Coronavirus Response Act, Pub. L. No. 116-127, § 2301, 134 Stat. 178, 187–88 (2020); see also Dottie Rosenbaum, Ed Bolen, Zoe Neuberger & Stacy Dean, *USDA, States Must Act Swiftly to Deliver Food Assistance Allowed by Families First Act*, CTR. ON BUDGET & POL’Y PRIORITIES 2, 8 (April 7, 2020), <https://www.cbpp.org/sites/default/files/atoms/files/3-20-20fa.pdf> [<https://perma.cc/U7NA-EVJ4>] (advocating for the expansion of SNAP during the pandemic); *SNAP – Families First Coronavirus Response Act and Impact on Time Limit for Able-Bodied Adults Without Dependents (ABAWDs)*, U.S. DEP’T OF AGRIC. (March 20, 2020), <https://www.fns.usda.gov/snap/ffcra-impact-time-limit-abawds> [<https://perma.cc/3D2T-4VGC>] (discussing work requirements for able-bodied adults without dependents).

<sup>174</sup> Benfer & Wiley, *supra* note 8; see *SNAP Online Purchasing Pilot*, U.S. DEP’T OF AGRIC., FOOD & NUTRITION SERV., <https://www.fns.usda.gov/snap/online-purchasing-pilot> [<https://perma.cc/CVA3-YAQ5>] (last visited Sept. 30, 2020) (providing answers to frequently asked questions about how to use SNAP payments for online grocery purchases).

<sup>175</sup> Stephen Loffredo & Don Friedman, Gideon Meets Goldberg: *The Case for a Qualified Right to Counsel in Welfare Hearings*, 25 *TOURO L. REV.* 273, 327 (2009) (quoting N.Y. Soc. Serv. Law §§ 157–159; N.Y. Soc. Serv. Law § 350).

<sup>176</sup> *Government Benefits*, USA.GOV, <https://www.usa.gov/benefits> [<https://perma.cc/QR52-YBDK>] (last visited Aug. 3, 2020).

<sup>177</sup> *Supplemental Nutrition Assistance Program (SNAP)*, *supra* note 22.

<sup>178</sup> *Special Supplemental Nutrition Program For Women, Infants, and Children (WIC)*, U.S. DEP’T OF AGRIC., FOOD & NUTRITION SERV. <https://www.fns.usda.gov/wic> [<https://perma.cc/R7NA-7Y9U>] (last visited Oct. 12, 2020).

<sup>179</sup> *Government Benefits*, *supra* note 176.

<sup>180</sup> TOBIN-TYLER & TEITELBAUM, *supra* note 15, at 96.

While many benefits programs play a critical role in bringing additional income to families living in poverty, this section focuses on SNAP because it is explicitly targeted at food-insecure families.<sup>181</sup> Congress enacted the SNAP program in 1964 to “promote the general welfare, to safeguard the health and well-being of the Nation’s population by raising levels of nutrition among low-income households,” and to increase food purchasing power because a lack of such power “contributes to hunger and malnutrition among members of such households.”<sup>182</sup> SNAP also exemplifies an existing public benefits scheme that can facilitate better health for those negatively impacted by racial and economic disparities if effectively enforced.

SNAP provides “nutrition benefits to supplement the food budget of needy families so they can purchase healthy food and move toward self-sufficiency.”<sup>183</sup> Beneficiaries receive a debit card that can be used to purchase food at participating retailers.<sup>184</sup> The program is wide-reaching and served more than forty-six million people in 2014.<sup>185</sup> The U.S. Department of Agriculture’s (USDA) Food and Nutrition Service administers SNAP,<sup>186</sup> but states effectuate the program for individual applicants.<sup>187</sup>

Generally, eligibility for SNAP is determined based on a person’s income and available resources.<sup>188</sup> In addition to SNAP’s income requirements, unless a state has obtained a waiver from such requirements, an adult who does not have children or disabilities who is receiving SNAP benefits must typically meet several different work requirements to maintain his or her eligibility, although these work requirements have been temporarily suspended via statute during the COVID public health emergency.<sup>189</sup> SNAP

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<sup>181</sup> See *Supplemental Nutrition Assistance Program (SNAP)*, *supra* note 22 (“SNAP provides nutrition benefits to supplement the food budget of needy families so they can purchase healthy food . . .”).

<sup>182</sup> 7 U.S.C. § 2011.

<sup>183</sup> *Supplemental Nutrition Assistance Program (SNAP)*, *supra* note 22.

<sup>184</sup> *Government Benefits*, *supra* note 176.

<sup>185</sup> Gundersen & Ziliak, *supra* note 123, at 1836.

<sup>186</sup> *SNAP Eligibility*, U.S. DEP’T OF AGRIC., FOOD & NUTRITION SERV., <https://www.fns.usda.gov/snap/recipient/eligibility> [<https://perma.cc/V5QK-AW74>] (last visited Dec. 14, 2020).

<sup>187</sup> *Id.*

<sup>188</sup> *Id.*

<sup>189</sup> *Id.*; see Families First Coronavirus Response Act, Pub. L. No. 116-127, § 2301, 134 Stat. 178, 188 (2020) (explaining the suspension of several work requirements to maintain SNAP eligibility during the pandemic); see also Rosenbaum et al., *supra* note 173 (describing the ramifications of the Families First Coronavirus Response Act). Prior to the COVID pandemic, the USDA waived SNAP work requirements statewide in only a few states: Louisiana, New Mexico, the District of Columbia, and the Virgin Islands. Thirty states had been approved for partial work requirement waivers pre-pandemic, while nineteen states and territories had no work requirement waivers at all. U.S. DEP’T OF AGRIC., SUPPLEMENTAL NUTRITION ASSISTANCE PROGRAM (SNAP): STATUS OF STATE ABLE-BODIED ADULT WITHOUT DEPENDENTS (ABAWD) TIME LIMIT WAIVERS – FISCAL YEAR 2020 – 2<sup>ND</sup> QUARTER.

operates under the assumption that a family will spend approximately “30 percent of their own resources on food.”<sup>190</sup> SNAP benefits are calculated based on the number of family members; for example, after a recent increase in SNAP benefits, a family of four can receive up to \$680 in SNAP benefits.<sup>191</sup>

In response to growing food insecurity as a result of the COVID pandemic, Congress created a program called Pandemic-EBT (Electronic Benefits Transfer) to provide additional funds to families on electronic cards for food to compensate for lost school lunches as a result of school closures.<sup>192</sup> This program gives families additional benefits beyond their typical SNAP allotment.

Studies indicate that women receiving food assistance such as SNAP and Pandemic-EBT see improved birth outcomes.<sup>193</sup> Public benefits like SNAP also have positive impacts on the health of children from the time they are born.<sup>194</sup> A food-insecure child who receives public benefits can see improvements in long-term health that continue into adult life.<sup>195</sup> SNAP has been suggested as a tool to “reduce . . . health and educational disparities.”<sup>196</sup> Children receiving food assistance benefits see a “reduction in the incidence of metabolic syndrome,”<sup>197</sup> and these benefits may even reduce the need for hospitalization.<sup>198</sup> Additionally, there are a myriad of physical and mental health conditions associated with food insecurity in adulthood, including

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<sup>190</sup> *SNAP Eligibility*, *supra* note 186.

<sup>191</sup> *Id.*; Press Release, U.S. Dep’t of Agric., Food & Nutrition Serv., SNAP Benefit Increase Takes Effect (Oct. 1, 2020), <https://www.fns.usda.gov/news-item/fns-001420> [<https://perma.cc/GH8Z-567B>].

<sup>192</sup> DeParle, *supra* note 135.

<sup>193</sup> See, e.g., Douglas Almond, Hilary W. Hoynes & Diane Whitmore Schanzenbach, *Inside the War on Poverty: The Impact of Food Stamps on Birth Outcomes*, 93 REV. ECON. & STAT. 387, 402 (2011) (finding that women’s participation in the modern Food Stamp program during pregnancy resulted in improved infant health, as indicated by birthweight).

<sup>194</sup> DIANE WHITMORE SCHANZENBACH & BETSY THORN, HEALTH AFF., FOOD SUPPORT PROGRAMS AND THEIR IMPACTS ON VERY YOUNG CHILDREN 4 (2019).

<sup>195</sup> *Id.*

<sup>196</sup> TOBIN-TYLER & TEITELBAUM, *supra* note 15, at 72.

<sup>197</sup> Hilary Hoynes, Diane Whitmore Schanzenbach & Douglas Almond, *Long-Run Impacts of Childhood Access to the Safety Net*, 106 AM. ECON. REV. 903, 903 (2016); see also *Metabolic Syndrome*, MAYO CLINIC (March 14, 2019), <https://www.mayoclinic.org/diseases-conditions/metabolic-syndrome/symptoms-causes/syc-20351916> [<https://perma.cc/V9D7-3B27>] (“Metabolic syndrome is a cluster of conditions that occur together, increasing your risk of heart disease, stroke and type 2 diabetes. These conditions include increased blood pressure, high blood sugar, excess body fat around the waist, and abnormal cholesterol or triglyceride levels.”).

<sup>198</sup> John T. Cook, Deborah A. Frank, Carol Berkowitz, Maureen M. Black, Patrick H. Casey, Diana B. Cutts, Alan F. Meyers, Nieves Zaldivar, Anne Skalicky, Suzette Levenson, Tim Heeren & Mark Nord, *Food Insecurity is Associated with Adverse Health Outcomes Among Human Infants and Toddlers*, 134 J. NUTRITION 1432, 1437 (2004).

diabetes and hypertension,<sup>199</sup> which can be remedied in part by public benefits like SNAP.<sup>200</sup> SNAP not only remedies food insecurity, but it has also been shown to lower health care costs.<sup>201</sup> This reduction in health care costs occurs because people can afford more nutritious food, and because they can use money they would have otherwise had to use to put food on the table to tend to other health care needs, such as visiting the doctor or paying for a prescription.<sup>202</sup>

SNAP has been successful in reducing both food insecurity and poverty.<sup>203</sup> Participation in SNAP “significantly alleviates financial stress on families,” and allows families to provide for essentials like housing and medical care.<sup>204</sup> For example, research has found “that SNAP participation reduces the risk of falling behind on rent by 7%.”<sup>205</sup> Along with reducing food insecurity and poverty, SNAP “can encourage shifts in dietary intake toward healthy food,” in some instances resulting in prevention of certain “diet-sensitive chronic disease[s].”<sup>206</sup>

SNAP is an “entitlement” program, meaning that anyone who meets the eligibility requirements should receive benefits, regardless of how many other individuals already qualify.<sup>207</sup> Despite this broad entitlement, SNAP laws are under-enforced. Like other public benefits, the program has been marred by an “entitlement failure,” a breakdown of government systems resulting in many eligible low-income Americans failing to receive SNAP benefits.<sup>208</sup> These failures have also been evident during COVID. For example, the Pandemic-EBT program was meant to provide additional food assistance beyond regular SNAP benefits to thirty million children, but as of May

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<sup>199</sup> TOBIN-TYLER & TEITELBAUM, *supra* note 15, at 70.

<sup>200</sup> See FOOD RSCH. & ACTION CTR., HUNGER AND HEALTH—THE IMPACT OF POVERTY, FOOD INSECURITY, AND POOR NUTRITION ON HEALTH AND WELL-BEING 6 (2017) (“SNAP and the Child Nutrition Programs are important, effective, and widely available interventions to improve the health and well-being of vulnerable Americans.”).

<sup>201</sup> See Carlson & Keith-Jennings, *supra* note 127, at 2 (“[L]ow-income adults participating in SNAP incur about \$1,400, or nearly 25 percent, less in medical care costs in a year than low-income non-participants. The difference is even greater for those with hypertension (nearly \$2,700 less) and coronary heart disease (over \$4,100 less).”).

<sup>202</sup> *Id.* at 14.

<sup>203</sup> *Id.* at 1.

<sup>204</sup> TOBIN-TYLER & TEITELBAUM, *supra* note 15, at 103–04.

<sup>205</sup> *Id.* at 104.

<sup>206</sup> Hilary K. Seligman, Barbara A. Laraia & Margot B. Kushel, *Food Insecurity Is Associated with Chronic Disease Among Low-Income NHANES Participants*, 140 J. NUTRITION 304, 308 (2010).

<sup>207</sup> Garrow & Day, *supra* note 107, at 277.

<sup>208</sup> See *id.* at 278 (citing JEAN DRÈZE & AMARTYA SEN, HUNGER AND PUBLIC ACTION 22–23 (1989)) (describing food insecurity as resulting from entitlement failure—a breakdown of political and legal systems).

15, 2020, only 4.4 million children had received the funds.<sup>209</sup> This phenomenon of entitlement failure prevents SNAP and Pandemic-EBT from ensuring “food security for all,” as intended.<sup>210</sup> The law on the books remains elusive for the households that desperately need its implementation and enforcement.

The rights of SNAP recipients can be violated by a local benefits agency in a variety of ways. Beneficiaries frequently encounter barriers when trying to apply for benefits, receive benefits, and maintain their eligibility for benefits.<sup>211</sup> They can experience wrongful denials of their benefits applications, terminations, or reductions of benefits, or receive notice of overpayments.<sup>212</sup> Often these actions are erroneous and can negatively affect the receipt, termination, amount, or conditions of assistance afforded to low-income people,<sup>213</sup> leaving them without the income they need to feed their families. A wrongful action by a benefits agency might be a result of an “administrative error, communication problems between a government agency and the recipient, or confusion about changing eligibility standards.”<sup>214</sup>

SNAP is a federal program administered by local offices<sup>215</sup> that make bureaucratic mistakes, such as miscalculating a family’s income, resulting in a lower benefits amount.<sup>216</sup> Benefits are calculated based on household size and income contributions from various family members, and benefits agencies sometimes err in the determination of household size or in the related calculations.<sup>217</sup> For example, in *Howard v. Department of Public Welfare*, the city benefits agency reduced a family’s aid after support payments made by a child’s father to his mother were improperly counted as income for the entire household; the payments were not available to the whole family and should not have been counted as family income, meaning that the family’s benefits should not have been reduced.<sup>218</sup> The benefits calculation

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<sup>209</sup> DeParle, *supra* note 135.

<sup>210</sup> Garrow & Day, *supra* note 107, at 278 (citing Drèze & Sen, *supra* note 208, at 22-23).

<sup>211</sup> Susan J. Algert, Michael Reibel & Marian J. Renvall, *Barriers to Participation in the Food Stamp Program Among Food Pantry Clients in Los Angeles*, 96 AM. J. PUB. HEALTH 807, 807.

<sup>212</sup> TOBIN-TYLER & TEITELBAUM, *supra* note 15, at 107–08; *see, e.g.*, D.C. OFFICE OF ADMIN. HEARINGS, REQUEST FOR A HEARING IN A DEPARTMENT OF HUMAN SERVICES CASE (2015) (listing denial of benefits and notice of overpayment as bases for requesting a hearing).

<sup>213</sup> *See* D.C. CODE § 4-210.02 (listing “safeguard[ing] applicants and recipients from mistaken, negligent, unreasonable, or arbitrary action by agency staff” as an objective of the hearing process in public assistance)

<sup>214</sup> TOBIN-TYLER & TEITELBAUM, *supra* note 15, at 107.

<sup>215</sup> *See* INST. OF MED. & NAT’L RES. COUNCIL, SUPPLEMENTAL NUTRITION ASSISTANCE PROGRAM: EXAMINING THE EVIDENCE TO DEFINE BENEFIT ADEQUACY 27 (2013) (“SNAP is administered by USDA in cooperation with state social service agencies.”).

<sup>216</sup> RANDY ALISON AUSSENBERG, CONG. RSCH. SERV., ERRORS AND FRAUD IN THE SUPPLEMENTAL NUTRITION ASSISTANCE PROGRAM (SNAP) 5 (2018).

<sup>217</sup> HELEN HERSHKOFF & STEPHEN LOFFREDO, GETTING BY: ECONOMIC RIGHTS AND LEGAL PROTECTIONS FOR PEOPLE WITH LOW INCOME 248 (2019).

<sup>218</sup> 272 A.2d 676, 679 (D.C. 1971).

was ultimately fixed after an attorney advocated for the appropriate enforcement of SNAP laws and regulations to demonstrate that the father's income was not in fact available to the whole family.<sup>219</sup> In another case handled by the Georgetown University Health Justice Alliance Law Clinic, a family received a lower benefits amount than the amount to which they were entitled because the local benefits agency refused to include two of the family's six children in the household when calculating benefits. Without the full amount of benefits, the parents struggled to feed the whole family. When the Law Clinic's legal team litigated the case and an administrative law judge determined that the children should have been counted within the household, the family was awarded thousands of dollars in back benefits.<sup>220</sup>

Benefits miscalculations can have a significant impact on beneficiary health. This is evident in the story of Eric Campbell, a low-income African American man with diabetes.<sup>221</sup> Mr. Campbell's physician noticed that his blood sugar levels had spiked out of control. The doctor learned that his SNAP benefits had been reduced and he was unable to afford the healthy food necessary to control his blood sugar.<sup>222</sup> The failure to effectively implement SNAP laws severely affected his health. The physician referred Mr. Campbell to an attorney, who determined he was not receiving the correct amount of benefits as required under law.<sup>223</sup> The lawyer was able to enforce the applicable laws and regulations and correct this error, and Mr. Campbell began receiving the full amount of SNAP benefits to which he was entitled.<sup>224</sup> Mr. Campbell's physician noted that after his benefits were adjusted to the appropriate level, his health improved and he was even able to stop taking some of his prescribed medications.<sup>225</sup> Because this issue with food benefits was detected, Mr. Campbell's county was able to correct a similar error for at least 200 other people.<sup>226</sup> In this way, enforcement of existing public benefits laws for one individual can benefit others.

In addition, local offices sometimes enforce "onerous application, verification and recertification requirements" that can "suppress access" to SNAP.<sup>227</sup> Restricted hours, negative attitudes, fingerprinting, and confusion

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<sup>219</sup> *Id.*

<sup>220</sup> Information on this case is on file with the author, who directs the Health Justice Alliance Law Clinic. Names have not been included to protect the confidentiality of the family.

<sup>221</sup> *Improving Blood Sugar with Food Benefits*, NAT'L CTR. FOR MED. LEGAL P'SHIP (Oct. 5, 2017), <https://medical-legalpartnership.org/diabetes-story/> [<https://perma.cc/YE2C-QXBF>].

<sup>222</sup> *Id.*

<sup>223</sup> *Id.*

<sup>224</sup> *Id.*

<sup>225</sup> *Id.*

<sup>226</sup> *Id.*

<sup>227</sup> Garrow & Day, *supra* note 107, at 281. See also PAMELA HERD & DONALD MOYNIHAN, HEALTH AFF.: HEALTH POL'Y BRIEF, HOW ADMINISTRATIVE BURDENS CAN HARM HEALTH,

about exemptions from work requirements are unduly restrictive practices employed by some local offices that preclude some qualified individuals from accessing SNAP.<sup>228</sup>

Immigrants face unique challenges in this area; the rules about immigrant eligibility for government benefits are complex, and immigrant communities deal with fear and misinformation in trying to navigate them.<sup>229</sup> Some immigrants erroneously fear that they are ineligible for SNAP benefits if they have limited English proficiency, or that applying for SNAP benefits will negatively affect their immigration status or expose their sponsor to liability.<sup>230</sup> These misconceptions deter some immigrants who are eligible from applying for SNAP benefits.<sup>231</sup>

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HEALTH AFF.: HEALTH POLICY BRIEF (2020) (“The COVID-19 pandemic and ensuing recession are exposing profound gaps in our social welfare system, including the byzantine bureaucracies that those seeking help must negotiate. As nearly fifty million Americans sought unemployment benefits, they encountered crashing websites, overloaded telephone lines, and confusing forms. As one Floridian commented, ‘It’s very obvious that this is a weaponized system to keep you from using your benefits.’ . . . social welfare programs that soften the economic blow from recessions, including food stamps, the Earned Income Tax Credit, and Medicaid, are also laden with administrative burdens such as complicated eligibility rules, confusing forms, multiple requests for the same information, and demands for in-person visits that ignore the transportation and work schedules of low-income beneficiaries. Social welfare program design often seems more focused on excluding the ineligible than on including the eligible.”)

<sup>228</sup> See Dorothy Rosenbaum & Brynne Keith-Jennings, *SNAP Caseload and Spending Declines Have Accelerated in Recent Years*, CTR. ON BUDGET & POL’Y PRIORITIES 13 (June 6, 2019), <https://www.cbpp.org/sites/default/files/atoms/files/6-6-19fa.pdf> [<https://perma.cc/NMY5-ZJEL>] (finding that administrative policies can make SNAP participation cumbersome and can increase stigma); Loffredo & Friedman, *supra* note 175, at 307 (arguing that legal representation should be guaranteed in welfare administrative hearings). Confusion about exemptions from work requirements can cause beneficiaries to lose benefits if they make a mistake in their registration paperwork. Beneficiaries with disabilities face unique difficulties navigating the world of work requirements and exemptions. See Erin Brantley & Leighton Ku, *Work Requirements: SNAP Data Show Medicaid Losses Could be Much Faster and Deeper Than Expected*, HEALTH AFF. BLOG (April 12, 2018), <https://www.healthaffairs.org/doi/10.1377/hblog20180412.310199/full/> [<https://perma.cc/EA3S-VSG4>] (noting that workers with disabilities are sometimes erroneously deemed able-bodied and subject to work requirements which has been shown to result in a loss of benefits); *Thousands Dropped from Food Stamps due to Work Requirements*, ATLANTA J. CONST. (Nov. 13, 2017), <https://www.ajc.com/news/breaking-news/thousands-dropped-from-food-stamps-due-work-requirements/nAcoTvoPq4LBO0u42Z8CTP/> [<https://perma.cc/FV2W-JQ58>] (describing a case in which hundreds of Georgia SNAP recipients with disabilities were erroneously labeled “able-bodied” and dropped from the program for failing to comply with work requirements).

<sup>229</sup> See U.S. DEP’T AGRIC., SUPPLEMENTAL NUTRITION ASSISTANCE PROGRAM: GUIDANCE ON NON-CITIZEN ELIGIBILITY (2011) (acknowledging that eligibility requirements for non-citizens have “changed substantially over the years and become more complicated in certain areas”).

<sup>230</sup> *Id.*

<sup>231</sup> See *id.* (explaining that, as a result of misinformation about SNAP eligibility requirements for non-citizens, the SNAP participation of eligible non-citizen households has historically been low).

Those who have experienced an adverse action by a local benefits agency—including a denial, a reduction, or a termination of benefits—are “uniquely vulnerable,” as they may experience “the severest sorts of injury and privation: eviction, homelessness, hunger, family dissolution, dangers of shelter or street life, illness, and lack of medical care.”<sup>232</sup> Recognizing the deep impact of a lack of access to needed public benefits, courts have held that “even reductions of a relatively small magnitude, impose irreparable harm on recipient families.”<sup>233</sup> When public benefits are erroneously denied, reduced, or terminated, the government and society at large are harmed too, as a result of high costs related to “emergency shelter . . . increased Medicaid and municipal hospital expenditures . . . increased social services costs, and child protective costs . . . .”<sup>234</sup> In recognition of this harm and its effects on health, courts have held that welfare recipients who appeal adverse actions are eligible for preliminary injunctive relief in the form of continued benefits pending resolution of the dispute.<sup>235</sup>

Violations of benefits laws and regulations can be both substantive and procedural, such as the untimely provision by a benefits agency of a termination notice.<sup>236</sup> In *Goldberg v. Kelly*, the Supreme Court held that recipients of public benefits must “have timely and adequate notice detailing the reasons for a proposed termination, and an effective opportunity to defend by confronting any adverse witnesses and by presenting [their] own arguments and evidence orally.”<sup>237</sup>

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<sup>232</sup> Loffredo & Friedman, *supra* note 175, at 313–14.

<sup>233</sup> *Roe v. Anderson*, 134 F.3d 1400, 1404 (9th Cir. 1998).

<sup>234</sup> Loffredo & Friedman, *supra* note 175, at 326 (citing Steven Banks, *ADR and Litigation Involving Social Problems*, 35 *FORDHAM URB. L.J.* 109, 115–16 (2008)).

<sup>235</sup> See *Goldberg v. Kelly*, 397 U.S. 254, 264 (1970) (“[T]ermination of aid pending resolution of a controversy over eligibility may deprive an eligible recipient of the very means by which to live while he waits. Since he lacks independent resources, his situation becomes immediately desperate. His need to concentrate upon finding the means for daily subsistence, in turn, adversely affects his ability to seek redress from the welfare bureaucracy.”); see also *Roe*, 134 F.3d at 1404 (noting that plaintiffs could face irreparable harm if an injunction preventing their benefits from being reduced was not granted); Loffredo & Friedman, *supra* note 175, at 314–15 (explaining that the Supreme Court has determined that an eligible recipient cannot be deprived of benefits without a pre-termination hearing).

<sup>236</sup> See, e.g., D.C. OFFICE OF ADMIN. HEARINGS, *supra* note 212 (listing termination of benefits, reduction of benefits, and denial of an application for benefits as bases for requesting a hearing); see also N.Y. OFFICE OF ADMIN. HEARINGS, *FAIR HEARING REQUEST FORM* (2012) (listing discontinuance, denial, reduction, or inadequacy of benefits as bases for requesting a hearing); *Goldberg*, 397 U.S. at 267–68 (holding that a pre-termination hearing must give a recipient “timely and adequate notice detailing the reasons for a proposed termination, and an effective opportunity to defend by confronting any adverse witnesses and by presenting his own arguments and evidence orally”).

<sup>237</sup> *Goldberg*, 397 U.S. at 267–68; see also Loffredo & Friedman, *supra* note 175, at 276 (“[I]n the landmark case of *Goldberg v. Kelly*, the Supreme Court held that the Fourteenth

The notices that an applicant or beneficiary receive indicating an agency's adverse action, such as a denial, reduction, or termination of benefits, play an extremely important role in the ability of a recipient or applicant to receive or maintain their much needed benefits.<sup>238</sup> The Court in *Goldberg* did not set out clear rules for what an adequate notice entails, but it did require that written notices be timely and detail the reasons for the agency's proposed action.<sup>239</sup> Lower courts have held that the "state cannot place the burden on the participant to find out all information needed to determine why a decision was made."<sup>240</sup> Federal and state laws and regulations create specific notice requirements for several public benefits programs—including adequacy and timeliness mandates.<sup>241</sup> However, benefits administrators often fail to comply. These issues have only become more pronounced as technology has been increasingly employed ineffectively in an attempt to modernize benefits systems, resulting in needless gaps in coverage.<sup>242</sup>

When an applicant or beneficiary first receives a notice about a change or denial of benefits, the notice may be many pages long and filled with "technical detail that challenges even experienced advocates."<sup>243</sup> Sometimes, the notices provide sparse detail, leaving the claimant without an understanding of the reasons behind the agency's actions, as required by

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Amendment's Due Process Clause entitled welfare recipients to notice and a meaningful opportunity to be heard prior to any termination of subsistence benefits.").

<sup>238</sup> Sovereign Hager & Ty Jones, *What Does Due Process Mean for State Notices on Receiving Public Benefits?*, CLEARINGHOUSE REV., Feb. 2016, at 1.

<sup>239</sup> *Goldberg*, 397 U.S. at 267–68; see also Hager & Jones, *supra* note 238, at 2 ("Beyond establishing that adequate notice must include detailed reasons for a proposed termination of benefits, *Goldberg* does not specify how much information the notice must give to satisfy due process.").

<sup>240</sup> Hager & Jones, *supra* note 238, at 2; see *Ortiz v. Eichler*, 616 F. Supp. 1046, 1062 (D. Del. 1985) ("[T]he burden of providing adequate notice rests with the state, and it cannot shift that burden to the individual by providing inadequate notice and inviting the claimant to call to receive complete notice."); *Schroeder v. Hegstrom*, 590 F. Supp. 121, 128 (D. Or. 1984) (quoting *Phila. Welfare Rts. Org. v. O'Bannon*, 525 F. Supp. 1055, 1061 (E.D. Pa. 1981)) ("It is true that defendant's notice invites the recipient to inquire further or to request a hearing, but this improperly places on the recipient the burden of acquiring notice whereas due process directs defendants to supply it . . .").

<sup>241</sup> Hager & Jones, *supra* note 238, at 3–4.

<sup>242</sup> Gina Mannix, Marc Cohan & Greg Bass, *How to Protect Clients Receiving Public Benefits When Modernized Systems Fail*, CLEARINGHOUSE REV., Jan. 2016, at 2 ("Workers' failure to act timely on applications and submitted documents means that cases are inappropriately and routinely closed without an individualized review . . . . Overloaded and inadequately staffed call centers—with lengthy waits and large numbers of abandoned or interrupted calls—prevent people from completing mandatory SNAP eligibility interviews or dealing with eligibility issues.").

<sup>243</sup> Loffredo & Friedman, *supra* note 175, at 288.

*Goldberg*.<sup>244</sup> Consider a hypothetical beneficiary, who received a notice stating only “that her SNAP benefits will be terminated because her ‘gross income exceeds limit,’” leaving her to wonder why this action was being taken and forcing her to spend unnecessary time contacting the agency to get more information on her case.<sup>245</sup> Legal services attorneys have used this example to illustrate the types of notice that many recipients are sent, which fail to provide enough information for recipients to understand the decision the agency is taking so that they can address the problem and secure their benefits.<sup>246</sup>

In some states, appellants also have the right to see all relevant agency records before or during the hearing. For example, in New York, appellants may request “a copy of all the evidence the local agency intends to submit, as well as any other document in the agency’s possession . . . necessary to prepare [appellant’s] case.”<sup>247</sup> Most appellants are unaware of their substantive and procedural rights, such as the right to request such documentation, and face barriers that impede effective participation in the hearing process, such as “confusing notices, language barriers, education level, physical and mental disability, and the intense stress brought on by threats to subsistence benefits.”<sup>248</sup> Without a true understanding of their rights, many individuals with valid grievances do not request hearings.<sup>249</sup>

When appellants do appeal, their experience is typically not reflective of the laws, regulations, and rules on the books,<sup>250</sup> and their rights frequently go without effective enforcement. Benefits hearings are adversarial “in form and in nature.”<sup>251</sup> Accordingly, beneficiaries’ ability to obtain representation—to have a trained advocate on their side—is directly tied to

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<sup>244</sup> Mannix et al., *supra* note 242, at 2 (“Design and implementation failures, inadequate staffing, ineffective leadership, inability to oversee technology vendors, and reduced in-person service for vulnerable persons mean systemic failures that prevent eligible people from establishing and maintaining eligibility for desperately needed benefits.”).

<sup>245</sup> Hager & Jones, *supra* note 238, at 1.

<sup>246</sup> *Id.*; see also *Goldberg v. Kelly*, 397 U.S. 254, 268 (1970) (noting that inadequate notice disadvantages benefits recipients who are challenging proposed terminations that may rest on incorrect or misleading facts or an incorrect application of rules or policies to facts).

<sup>247</sup> Loffredo & Friedman, *supra* note 175, at 285.

<sup>248</sup> *Id.* at 287; see also N.Y.C. DEP’T OF SOC. SERVS., HUM. RES. ADMIN., HRA FACTS QUARTERLY SUPPLEMENT (2020) (stating that only 62% of Family Assistance Program (FAP) and 58% of Safety Net Assistance (SNA) recipients have a high school or greater education; 4% of FAP and 10% of SNA recipients lack a ninth-grade education).

<sup>249</sup> David A. Super, *Are Rights Efficient? Challenging the Managerial Critique of Individual Rights*, 93 CAL. L. REV. 1051, 1087–88 (2005).

<sup>250</sup> See Loffredo & Friedman, *supra* note 175, at 289–91 (describing how hearing officers directing proceedings involving pro se appellants often fail to provide these appellants opportunities to examine and object to the agency’s evidence or to present their side of the narrative despite a due process requirement to do so).

<sup>251</sup> *Id.* at 318.

their likelihood of success in a benefits hearing.<sup>252</sup> Imbalances in legal representation create inequities in this adversarial system that make it more difficult for beneficiaries to enforce their legal rights. In 98 to 99% of welfare proceedings, the local benefits department has trained legal representation, but appellants are typically unrepresented,<sup>253</sup> unprepared, and ill-equipped to enforce their rights against adversaries from the benefits agency who are well-versed in such proceedings.<sup>254</sup> The hearing officer is supposed to be impartial, “with very limited obligations to see to the fair development of the record.”<sup>255</sup> The resulting imbalance threatens the fairness and accuracy required to make such proceedings true opportunities for low-income individuals to enforce rights that would help them address income and food insecurity.<sup>256</sup>

The appellant must be able to “examine and object to the agency’s evidence,” but hearing officers “frequently do not honor this right, especially in the case of pro se litigants.”<sup>257</sup> The average length of these hearings is typically seven minutes,<sup>258</sup> and hearing officers will often rush an appellant through his or her side of the story, failing to ask thorough questions.<sup>259</sup> Although *Goldberg* guarantees beneficiaries a pre-termination evidentiary hearing and an opportunity to cross examine witnesses,<sup>260</sup> the complexity of the documents involved and the hearings reduce these guarantees “to a nullity” for the majority of litigants who appear without appointed counsel.<sup>261</sup>

These substantive and procedural deficiencies in the enforcement of SNAP laws harm the health of families. When the Petersons were denied an increase in their SNAP benefits, despite Mr. Peterson’s loss of income, the family went hungry and Ms. Peterson, especially, suffered as a result of her diabetes. In examining the failures of the public benefits agency in the Petersons’ city of Washington, D.C. to effectively implement SNAP

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<sup>252</sup> See, e.g., Emily S. Taylor Poppe & Jeffrey J. Rachlinski, *Do Lawyers Matter? The Effect of Legal Representation in Civil Disputes*, 43 PEPP. L. REV. 881, 910–18 (2016) (surveying quantitative literature on the impact of legal representation in public benefits hearings and finding overwhelming evidence that legal representation improves outcomes for claimants).

<sup>253</sup> See Loffredo & Friedman, *supra* note 175, at 277–78 (“[I]n all but one or two percent of [termination or denial of benefits] adjudications, only one party—the local welfare department—is represented by a trained advocate. In nearly ninety-nine percent of the cases . . . the individual claimant must fend for herself without the assistance of an expert adviser.”)

<sup>254</sup> Loffredo & Friedman, *supra* note 175, at 317–18.

<sup>255</sup> *Id.* at 318.

<sup>256</sup> *Id.* at 317.

<sup>257</sup> *Id.* at 290.

<sup>258</sup> *Id.* at 285.

<sup>259</sup> See *id.* at 291 (“Once the agency completes its case, the hearing officer should invite the appellant to present her side, but too often the invitation is not forthcoming. Instead, the hearing officer may attempt to expedite the process by asking the appellant one or two questions that the officer believes most pertinent.”).

<sup>260</sup> *Goldberg v. Kelly*, 397 U.S. 254, 367–68 (1970).

<sup>261</sup> Loffredo & Friedman, *supra* note 175, at 319.

recertification laws, the U.S. District Court there indicated that without SNAP benefits, low-income families in D.C. are forced to “skip meals and go hungry.”<sup>262</sup> The Court noted that families lacking SNAP benefits may obtain food at the expense of “other necessary survival expenses, such as rent, electric bills or phone bills.”<sup>263</sup> Without proper enforcement of their rights related to their benefits, the Petersons went hungry and were left with similarly impossible choices in the middle of a pandemic. There is no question that the harm associated with under-enforcement of public benefits laws results in the deprivation of food, which is “extremely serious and is quite likely to impose lingering, if not irreversible, hardship upon recipients.”<sup>264</sup>

### III. A HEALTH JUSTICE APPROACH TO HOUSING

Housing is one of the most well-researched social determinants of health.<sup>265</sup> Homelessness, housing instability, substandard housing conditions, the financial burdens resulting from high-cost housing, and neighborhood-level factors, such as pollution, can all impact health.<sup>266</sup>

The Petersons experience the intersection between health and housing, and associated disparities, in a number of ways. Kenny suffers from asthma in a city with significant rates of childhood asthma—an “epidemic, in a way”—that disproportionately impacts low-income children of color in D.C., particularly in the Petersons’ Ward 8 neighborhood.<sup>267</sup> Children who live in Ward 8 have twenty to twenty-fives times the number of visits to the emergency room and ten times the number of hospitalization rates for asthma as their counterparts who live in more affluent neighborhoods with predominantly white populations.<sup>268</sup> Physicians in the city attribute these poor health outcomes and alarming disparities to poor housing conditions, like the mold that the Peterson family’s landlord has failed to remediate.<sup>269</sup>

The Petersons also fear eviction because they are unable to pay rent. If they are evicted and become homeless, their health risks will skyrocket, particularly during a pandemic. A health justice approach to housing insecurity first requires a structural understanding of the ways in which

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<sup>262</sup> Garnett v. Zeilinger, 313 F. Supp. 3d 147, 157 (D.D.C. 2018).

<sup>263</sup> *Id.*

<sup>264</sup> *Id.* (citing Haskins v. Stanton, 794 F.2d 1273, 1276–77 (7th Cir. 1986)).

<sup>265</sup> LAUREN A. TAYLOR, HEALTH AFF.: HEALTH POL’Y BRIEF, HOUSING AND HEALTH: AN OVERVIEW OF THE LITERATURE 1 (2018).

<sup>266</sup> *Id.*

<sup>267</sup> Morgan Baskin, *Doctors Blame D.C.’s High Asthma Rates in Poor Housing*, WASH. CITY PAPER (May 22, 2019), <https://www.washingtoncitypaper.com/news/housing-complex/article/21069963/doctors-blame-dcs-high-asthma-rates-in-part-on-poor-housing> [<https://perma.cc/7Z5A-KCKA>].

<sup>268</sup> *Id.*

<sup>269</sup> *Id.*

housing functions as a social determinant of health and of the associated racial and economic disparities.<sup>270</sup> Health justice then demands an examination of the role of law and policy in driving housing instability as a determinant, and of the disparities that harm marginalized individuals.<sup>271</sup> This section engages in this analysis and identifies opportunities to leverage enforcement of existing housing laws to ensure justice and address longstanding housing inequities that have only been exacerbated by the COVID pandemic.

### A. Housing as a Determinant of Health

A health justice approach requires a structural understanding of housing as a determinant of health and the associated disparities. Homelessness and other forms of housing instability, including the threat of eviction or eviction itself, are connected to poor health outcomes, including risk of chronic illness, infectious disease, sexual assault, and death.<sup>272</sup> When people experience homelessness, they may live outdoors where they are exposed to the elements, lack resources for sanitation and healthy eating, or be forced to live in shelters or with family or friends in unhealthy conditions.<sup>273</sup>

All of these health risks are compounded during a pandemic. Many homeless adults have pre-existing conditions, such as chronic lung diseases, heart conditions, diabetes, and kidney and liver diseases, which not only contribute to poor health in the first instance, but which also put them at higher risk for developing more severe complications from COVID.<sup>274</sup>

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<sup>270</sup> See Harris & Pamukcu, *supra* note 21, at 5–6 (arguing for a new contextualization of the health justice framework as the “civil rights of health,” and pushing for a structural understanding of social determinants of health that connects health disparities to the subordination of disadvantaged groups and the need for civil rights protections).

<sup>271</sup> CHANGELAB SOLUTIONS, *supra* note 27, at 2–3.

<sup>272</sup> Petersen, *supra* note 108, at 68–69.

<sup>273</sup> See Jonathan J. Sheffield, *Homeless Bill of Rights: Moving United States Policy Toward a Human Right to Housing*, 22 GEO. J. ON POVERTY L. & POL’Y 321, 330 (2015) (describing how living “doubled up” with friends or family members indefinitely is a “common practice to avoid living on the street”); NAT’L HEALTH CARE FOR THE HOMELESS COUNCIL, HOMELESSNESS & HEALTH: WHAT’S THE CONNECTION? FACT SHEET (Feb. 2019) (“[S]table housing is a key ‘social determinant of health.’”).

<sup>274</sup> See *People Experiencing Homelessness*, CTR. FOR DISEASE CONTROL AND PREVENTION, (Aug. 10, 2020) <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/homelessness.html> [<https://perma.cc/U8HX-RLF3>] (“[M]any people who are homeless . . . have underlying medical conditions.”); *People with Certain Medical Conditions*, CTR. FOR DISEASE CONTROL AND PREVENTION, (Nov. 2, 2020) <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html> [<https://perma.cc/GG9L-8ZRV>] (stating that adults with certain underlying medical conditions, including heart conditions, asthma, kidney and liver disease, and type 1 diabetes may be at increased risk of severe illness from COVID-19).

Moreover, homelessness correlates with an increased risk of contracting a life-threatening case of COVID due to the likelihood of living in large groups<sup>275</sup> and concentrated areas that make it difficult or impossible to effectively practice social distancing,<sup>276</sup> as well as a lack of resources that allow for the practice of good hygiene that is critical to health during the pandemic.<sup>277</sup>

Housing insecure individuals, such as those living doubled up with friends or family in overcrowded units, may also find it difficult to appropriately social distance.<sup>278</sup> Regardless of COVID, overcrowding in a home correlates with poor mental health and development delays for children.<sup>279</sup>

Housing insecurity also affects health, even if it occurs short of or prior to homelessness. For example, the stress of being behind on rent is correlated with poor health outcomes<sup>280</sup> and those who are struggling to afford rent often make extremely difficult choices to forego electricity, water, food, medicine or other medical care to pay rent, all of which can contribute to bad health.<sup>281</sup> The threat of eviction proceedings can prevent tenants from asking for repairs to which they are entitled, leaving them in substandard housing that can negatively affect their health.<sup>282</sup>

Evictions themselves, like other legal processes, can be taxing on mental and emotional health.<sup>283</sup> The mere initiation of an eviction proceeding

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<sup>275</sup> See *People Experiencing Homelessness*, *supra* note 274 (explaining that homeless individuals may live in congregate shelter settings that prevent effective social distancing and facilitate the spread of infection).

<sup>276</sup> Benfer & Wiley, *supra* note 8.

<sup>277</sup> Vesoulis, *supra* note 74.

<sup>278</sup> Sara Heath, *How the Coronavirus Affects Social Determinants of Health*, PATIENT CARE ACCESS NEWS (Mar. 24, 2020), <https://patientengagementhit.com/news/how-the-coronavirus-affects-social-determinants-of-health> [<https://perma.cc/U8TR-ZW5P>]; see U.S. DEP'T OF HEALTH & HUM. SERVS., THE SURGEON GENERAL'S CALL TO ACTION TO PROMOTE HEALTHY HOMES 1 (2009) (“[B]asic sanitation, ventilation, reduced household crowding, and other improvement in housing made a powerful contribution to conquering” past epidemics such as typhoid and tuberculosis).

<sup>279</sup> Allyson E. Gold, *No Home for Justice: How Eviction Perpetuates Health Inequity among Low-Income and Minority Tenants*, 24 GEO. J. ON POVERTY & POL'Y 59, 61 (2016).

<sup>280</sup> Petersen, *supra* note 108, at 69.

<sup>281</sup> *Id.* at 70.

<sup>282</sup> See Gold, *supra* note 279, at 68 (describing one tenant's hesitation to take action against her landlord, even when his refusal to mitigate the mold in her apartment gave her headaches and respiratory issues); Petersen, *supra* note 108, at 74 (describing how many low-income tenants “accept hazardous conditions fearing that their landlord will retaliate and evict them if they complain”).

<sup>283</sup> Petersen, *supra* note 108, at 69 (describing how inadequate housing “has a profound effect on mental health” because “housing impacts a person's dignity and self-perception, and inadequate housing can create or exacerbate psychological distress, anxiety, and depression”); see also ROBERT COLLINSON & DAVID REED, THE EFFECTS OF EVICTIONS ON LOW-INCOME HOUSEHOLDS 3 (2018) (“[Evictions] worsen health, particularly mental health,

can cause tremendous stress. Importantly, even an unsuccessful eviction action may put a mark on a tenant's record that can make it difficult, if not impossible, for that person to find future housing.<sup>284</sup> Children without stable housing are at higher risk for a number of poor outcomes, including developmental delays, anxiety, depression, and even death.<sup>285</sup> Research suggests that mothers are more likely to be depressed even years after enduring an eviction.<sup>286</sup> When evicted tenants do successfully find a new place to move, the new home nearly always represents a "downward move," defined as "a relocation to a disadvantaged neighborhood and/or substandard housing."<sup>287</sup>

A person's home is her sanctuary, her safe space, her "retreat from the world."<sup>288</sup> Stable housing is more important than ever during this pandemic, as unemployment rates are soaring and many people are without income, just as they have been told "to stay inside their homes" and quarantine.<sup>289</sup> In mid-March, the U.S. Department of Housing and Urban Development placed an immediate moratorium on foreclosures and evictions for homeowners of single family homes with FHA-backed mortgages who could not make their mortgage payments.<sup>290</sup> This effort fell short of broader protections for low-income renters at the national level;<sup>291</sup> instead, states and cities implemented short-term eviction moratoriums through a patchwork of different laws, policies and court rules, many of which are beginning to expire.<sup>292</sup>

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and increase emergency room utilization."); Matthew Desmond & Rachel Tolbert Kimbro, *Eviction's Fallout: Housing, Hardship, and Health*, 94 SOC. FORCES 295, 296 (2015) (finding that evicted mothers "were more likely to suffer from depression, reported worse health for themselves and their children, and reported more parenting stress"); Larry H. Strasburger, *The Litigant-Patient: Mental Health Consequences of Civil Litigation*, 27 J. AM. ACAD. PSYCHIATRY L., 203, 203 (1999) ("[C]ivil litigation often has profound psychological consequences for plaintiffs and defendants.").

<sup>284</sup> Gold, *supra* note 279, at 59 (explaining how most tenants sued in eviction proceedings in Chicago wind up with a "publicly available record linking them to an eviction, regardless of fault and regardless of whether a judgment was entered").

<sup>285</sup> Petersen, *supra* note 108, at 69.

<sup>286</sup> *Id.*

<sup>287</sup> Gold, *supra* note 279, at 61 (citing Matthew Desmond, *Eviction and the Reproduction of Urban Poverty*, 118 AM. J. SOC. 88, 119 (2012)).

<sup>288</sup> Petersen, *supra* note 108, at 68.

<sup>289</sup> Jessica Contera & Tracy Jan, *Facing Evictions as Millions Shelter in Place*, WASH. POST (Mar. 22, 2020), <https://www.washingtonpost.com/dc-md-va/2020/03/22/evictions-corona-virus-renters-shelter-in-place/> [<https://perma.cc/5BN2-ECVQ>].

<sup>290</sup> Renae Merle & Tracy Jan, *HUD Orders 60-day Foreclosure Moratorium For Homeowners Affected By Coronavirus*, WASH. POST (Mar. 18, 2020), <https://www.washingtonpost.com/business/2020/03/18/hud-orders-60-day-foreclosure-moratorium-homeowners-affected-by-coronavirus/> [<https://perma.cc/46LP-RF6H>].

<sup>291</sup> Contera & Jan, *supra* note 289.

<sup>292</sup> Sarah Mervosh, *An 'Avalanche of Evictions' Could Be Bearing Down on America's Renters*, N.Y. TIMES (May 27, 2020), <https://www.nytimes.com/2020/05/27/us/coronavirus-evictions-renters.html?referringSource=articleShare> [<https://perma.cc/NBZ9-LVS3>].

In September, the CDC issued a nationwide moratorium on residential evictions due to nonpayment of rent from September 4, 2020 through December 31, 2020.<sup>293</sup> The ban protects tenants who are unable to make rent due to a loss of income or unexpected medical expenses, and whose expected income for 2020 falls below a certain level: \$99,000 for individuals and \$198,000 for couples.<sup>294</sup> To secure the protection of the policy, eligible tenants must swear to all facets of their eligibility in a written declaration, and they must send that declaration to their landlord.<sup>295</sup> Many renters are not aware of the ban or do not understand the rules or their rights which is a major barrier to the effective enforcement of the moratorium, given that it puts the onus on tenants to prepare and submit an adequate declaration.<sup>296</sup> There is further evidence that landlords are evicting despite the moratorium and courts are failing to fully enforce it.<sup>297</sup>

Experts are predicting an avalanche of evictions,<sup>298</sup> with dire consequences for public health. In late May, the Texas Supreme Court lifted the state's moratorium on evictions, creating a major public health risk by driving people out of their homes into homelessness and in pursuit of alternate housing at a time when public health experts urged people to stay at home.<sup>299</sup> A recent Census Bureau survey found that one quarter of respondents had either missed their last mortgage or rent payment, or were unsure if they would

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<sup>293</sup> Temporary Halt to Evictions to Prevent the Spread of COVID-19, 85 Fed. Reg. 55,292 (Sept. 4, 2020); see, e.g., Annie Nova, *Most Evictions in the U.S. Are Now Banned. What You Need To Know*, CNBC (September 8, 2020, 5:03 PM), <https://www.cnbc.com/2020/09/08/most-evictions-in-the-us-are-now-banned-what-you-need-to-know-.html> [<https://perma.cc/LR44-55MN>] (summarizing the effect and applicability of the CDC's evictions ban of September 2020).

<sup>294</sup> Temporary Halt to Evictions to Prevent the Spread of COVID-19, 85 Fed. Reg. 55,292 (Sept. 4, 2020); see Nova, *supra* note 293 (“You’ll need to attest on a declaration form that you expect to earn less than \$99,000 a year in 2020 (for couples, less than \$198,000).”).

<sup>295</sup> Temporary Halt to Evictions to Prevent the Spread of COVID-19, 85 Fed. Reg. 55,292 (Sept. 4, 2020); see Nova, *supra* note 293 (describing the declaration form that renters will need to produce and provide to their landlords in order to obtain protection from evictions).

<sup>296</sup> See, e.g., Chris Arnold, *Despite a New Federal Ban, Many Renters are Still Getting Evicted*, NPR (September 14, 2020, 5:00 AM), <https://www.npr.org/2020/09/14/911939055/despite-a-new-federal-ban-many-renters-are-still-getting-evicted> [<https://perma.cc/BX4K-49UM>] (“The ban is nationwide—but it’s not automatic. And many renters facing eviction still don’t know about the ban or understand the rules or their rights.”).

<sup>297</sup> See, e.g., *id.* (noting that in Houston over 9,000 eviction suits have been filed during the coronavirus pandemic, and that out of 100 eviction cases “only one renter was able to use the CDC order to block eviction”).

<sup>298</sup> Mervosh, *supra* note 292.

<sup>299</sup> Elizabeth Trovall, *Texas Lifts Moratorium on Evictions, Leaving Houston Renters Vulnerable*, HOUS. PUB. MEDIA (May 22, 2020, 2:40 PM), <https://www.houstonpublicmedia.org/articles/news/in-depth/2020/05/22/370378/texas-lifts-its-moratorium-on-evictions-leaving-houston-renters-vulnerable/> [<https://perma.cc/S2V3-VB42>]; Mervosh, *supra* note 292.

be able to pay their next one.<sup>300</sup> It is estimated that between 20 and 28 million American tenants are on the brink of eviction.<sup>301</sup> As eviction moratoriums throughout the country are lifted, and as tenants slip through the cracks of the under-enforced CDC moratorium,<sup>302</sup> families will be forcibly removed from their homes, which will lower credit scores and lead to unemployment, homelessness, academic decline, and poor health consequences.<sup>303</sup>

Many low-income tenants live in substandard housing conditions, which are associated with poor health in a myriad of ways.<sup>304</sup> Rat infestations and the presence of cockroaches and other pests cause respiratory diseases like asthma, especially in children.<sup>305</sup> A study in Illinois found that 50% of low-income residents had cockroaches, 33% had mold or mildew, 33% had plumbing problems, and 20% had rodent infestation in their homes.<sup>306</sup>

Damp, cold, and moldy housing conditions also negatively impact health. Such conditions are associated with respiratory illnesses,<sup>307</sup> and residents may particularly experience heat and cold-related illnesses from inadequate temperature controls that result in mold and contribute to chest and rheumatic diseases.<sup>308</sup>

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<sup>300</sup> Mervosh, *supra* note 292.

<sup>301</sup> Emily A. Benfer, *Coronavirus Rent Freezes Are Ending—And a Wave of Evictions Will Sweep America*, NBC NEWS (June 22, 2020, 4:30 AM), <https://www.nbcnews.com/think/opinion/coronavirus-rent-freezes-are-ending-wave-evictions-will-sweep-america-ncna1230916> [<https://perma.cc/8ESH-4R8H>].

<sup>302</sup> *See, e.g.*, Arnold, *supra* note 296 (explaining that many renters are unaware of their rights with respect to the order, and that the order has caused confusion in courts).

<sup>303</sup> Benfer, *supra* note 301.

<sup>304</sup> *Evidence-Based Resource Summary*, HEALTHYPEOPLE.GOV, <https://www.healthypeople.gov/2020/tools-resources/evidence-based-resource/housing-improvements-for-health-and-associated-socio-economic-outcomes> [<https://perma.cc/C3LX-5M7T>] (last visited May 22, 2020); *see also* U.S. DEP'T OF HEALTH & HUM. SERVS., *supra* note 278, at 15 (stating that low-income renters experience water leaks causing mold, allergic reactions, and asthma attacks); James Krieger & Donna L. Higgins, *Housing and Health: Time Again for Public Health Action*, 92 AM. J. PUB. HEALTH, 758, 758 (2002) (indicating a correlation between poor living conditions and health conditions such as asthma and respiratory infections); David E. Jacobs, *Environmental Health Disparities in Housing*, 101 AM. J. PUB. HEALTH, S115, S115 (2011) (stating that individuals living in inadequate housing and infrastructure have a “host of unmet needs and environmental diseases and injuries”).

<sup>305</sup> *See* Jacobs, *supra* note 304, at S118–19 (suggesting that housing-related allergens are associated with asthma, and that inner-city children exposed to these allergens may experience more frequent symptoms and more severe asthma).

<sup>306</sup> Benfer, *supra* note 4, at 296–97.

<sup>307</sup> Krieger & Higgins, *supra* note 304, at 758.

<sup>308</sup> CHRISTINA PLERHOPLES STACY, JOSEPH SCHILLING, STEVE BARLOW, RUTH GOUREVITCH, BRADY MEIXELL, STEPHANIE MODERT, CHRISTINA CRUTCHFIELD, ESTHER SYKES-WOOD & RICHARD URBAN, URB. INST., STRATEGIC HOUSING CODE ENFORCEMENT AND PUBLIC HEALTH 1, 7 (2018).

Housing deterioration, including leaks, cracks, holes, and the breakdown of toilets and heating also significantly increase the odds of tenants developing respiratory problems like asthma.<sup>309</sup> Insufficient ventilation can also affect respiratory health, particularly if the home is located near factories, refineries, or interstates, where harmful chemicals could get into the home.<sup>310</sup> Residents of substandard housing may also face high risks of physical injury caused by poorly structured buildings or a lack of safety features.<sup>311</sup> Infectious diseases are common in substandard housing due to overcrowded living spaces and poor ventilation.<sup>312</sup> Residents of substandard housing can also experience poor mental health connected to the stress of their living situations.<sup>313</sup>

People spend more time at home than anywhere else and therefore poor housing conditions have a particularly strong impact on their health.<sup>314</sup> Before COVID, most Americans spent almost 90% of their time indoors.<sup>315</sup> Many of the health problems caused by substandard housing may be even more pronounced during the coronavirus, when many who would leave home to spend hours at work or school are now confined to their homes.<sup>316</sup>

For young children, whose immune systems are still developing, health conditions in the home can have an even greater health impact.<sup>317</sup> One of the most dangerous effects of substandard housing is lead poisoning.<sup>318</sup> The majority of homes in the U.S. built before 1980 have surfaces covered in lead paint, and lead poisoning is especially dangerous to children,<sup>319</sup> as it can lead to significant cognitive and developmental delays.<sup>320</sup>

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<sup>309</sup> Jacobs, *supra* note 304, at S118; *see also id.* at 5.

<sup>310</sup> STACY ET AL., *supra* note 308, at 5.

<sup>311</sup> *Id.* at 6.

<sup>312</sup> *Id.* at 7.

<sup>313</sup> *Id.* at 8–9; Krieger & Higgins, *supra* note 304, at 758.

<sup>314</sup> For instance, most allergen, irritant, and toxic substance exposure occurs at home. *See* Samiya A. Bashir, *Home Is Where the Harm Is: Inadequate Housing as a Public Health Crisis*, 92 AM. J. PUB. HEALTH 733, 738 (2002) (describing the “dangers” of homes themselves, and the “home-based environmental health hazards” that affect many low-income families).

<sup>315</sup> Gold, *supra* note 279, at 70.

<sup>316</sup> Benfer & Wiley, *supra* note 8, at 3; *see* U.S. DEP’T OF HEALTH & HUM. SERVS., *supra* note 278, at 1 (noting that “basic sanitation, ventilation, reduced household crowding, and other improvements in housing made a powerful contribution to conquering” past epidemics such as typhoid and tuberculosis).

<sup>317</sup> Gold, *supra* note 279, at 70.

<sup>318</sup> Benfer, *supra* note 4, at 294–95.

<sup>319</sup> *Id.* at 294.

<sup>320</sup> *Id.* at 294–95.

Utilities such as water, heat, air conditioning, gas, and electricity, are also determinants of health.<sup>321</sup> Healthy housing necessitates reliable access to all of these utilities.<sup>322</sup> Water is critical to the good hygiene that is key to curbing the spread of COVID.<sup>323</sup> During the pandemic, especially, utilities are essential to avoiding life-threatening health emergencies, as people are confined to their homes at greater rates, often with less income to contribute towards utilities, and in need of clean water and heat and other utilities to maintain basic health.<sup>324</sup>

### *B. Racial Disparities in Housing*

Housing inequities and associated health disparities have long been, and continue to be, driven by structural racism.<sup>325</sup> Racial and ethnic minorities are over-represented among the American homeless population, with African Americans comprising about 13% of the total U.S. population, but 40% of the homeless population.<sup>326</sup> Homeless individuals are particularly susceptible to COVID, and homeless people of color are particularly at risk.<sup>327</sup> The Peterson family is on the brink of joining many African American Washingtonians in becoming homeless. While homelessness has declined nationally, it has risen in the District, which saw a 34.1% increase in homelessness between 2009 and 2016.<sup>328</sup> Despite comprising only 47% of the D.C. population, African Americans make up 88% of the adults experiencing homelessness.<sup>329</sup>

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<sup>321</sup> See Boston Medical Center, *Social Determinant Screening Not Enough to Capture Patients at Risk of Utility Shut-Off*, SCIENCE DAILY (Feb. 24, 2020), <https://www.sciencedaily.com/releases/2020/02/200224152658.htm> [<https://perma.cc/A2CG-6FWT>] (“[P]reventing utility shut-off is vital to maintaining patients’ health.”); Benfer & Wiley, *supra* note 8, at 9 (noting how utilities are intrinsically linked to securing health justice “throughout and beyond” the COVID-19 crisis).

<sup>322</sup> See Boston Medical Center, *supra* note 321 (“Preventing utility shut-off is vital to maintaining patients’ health . . .”).

<sup>323</sup> Benfer & Wiley, *supra* note 8, at 8.

<sup>324</sup> *Id.* at 3, 8.

<sup>325</sup> Foster et al., *supra* note 7, at 3.

<sup>326</sup> *Profile: Black/African Americans*, HHS.GOV (Aug. 22, 2019 2:44 PM), [https://minorityhealth.hhs.gov/omh/browse.aspx?lvl=3&lvlid=61#:~:text=Overview%20\(Demographics\)%3A%20In%20July,following%20the%20Hispanic%2Flatino%20population](https://minorityhealth.hhs.gov/omh/browse.aspx?lvl=3&lvlid=61#:~:text=Overview%20(Demographics)%3A%20In%20July,following%20the%20Hispanic%2Flatino%20population) [<https://perma.cc/3V32-J7X4>]; *State of Homelessness: 2020 Edition*, NAT’L ALL. TO END HOMELESSNESS, <https://endhomelessness.org/homelessness-in-america/homelessness-statistics/state-of-homelessness-report/> [<https://perma.cc/285J-TAYU>] (last visited Aug. 6, 2020).

<sup>327</sup> *State of Homelessness: 2020 Edition*, *supra* note 326.

<sup>328</sup> D.C. HEALTH EQUITY OFF., *supra* note 94, at 22.

<sup>329</sup> WASH. LEGAL CLINIC FOR THE HOMELESS, FACT SHEET ON HOMELESSNESS AND HOUSING INSTABILITY IN DC (2019).

People of color are also more likely to face housing insecurity and its harmful health effects. Before COVID, 47% of renters in the U.S. were “cost-burdened,” or paying rent that was at least 30% of their income, resulting in difficult tradeoffs in paying for other essentials such as food, utilities, medical care, transportation, and child care.<sup>330</sup> Among Black and Latino tenants nationally, and in D.C. where the Petersons live, more than 50% are cost-burdened.<sup>331</sup> COVID is widening the gap and making access to safe and affordable housing even more racially divided.<sup>332</sup> Black, Latinx, and low-income renters were more likely than white and high-income renters to miss paying rent in May, a problem that can lead to evictions.<sup>333</sup>

Substandard housing conditions and overcrowding—and the associated health impacts—are more common among people of color.<sup>334</sup> Adverse health problems connected to overcrowding and other substandard housing conditions are closely connected to the segregation that has kept neighborhoods separated by race.<sup>335</sup> Children repeatedly hospitalized for asthma are more likely to live in census tracts that are crowded, non-white, and have high poverty rates.<sup>336</sup> Further, children with asthma who are exposed to cockroaches have more frequent symptoms, which is most common among low-income minority households.<sup>337</sup> Race is the strongest predictor of clean water access, and Black and Latinx individuals are two times more likely than white individuals to lack access to clean water.<sup>338</sup> People of color living in such substandard conditions are more likely to have building owners who are reluctant to make housing improvements and they are more likely to be evicted.<sup>339</sup>

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<sup>330</sup> Keeanga-Yamahtta Taylor, *Cancel the Rent*, NEW YORKER (May 12, 2020), <https://www.newyorker.com/news/our-columnists/cancel-the-rent> [<https://perma.cc/6522-TFKB>].

<sup>331</sup> *Id.*

<sup>332</sup> Solomon Greene & Alanna McCargo, *New Data Suggest COVID-19 is Widening Housing Disparities by Race and Income*, URB. INST.: URB. WIRE (May 29, 2020), <https://www.urban.org/urban-wire/new-data-suggest-covid-19-widening-housing-disparities-race-and-income> [<https://perma.cc/4Z33-SN4R>].

<sup>333</sup> *Id.*

<sup>334</sup> See Tobin-Tyler, *supra* note 47 (explaining correlations between disparities related to race, poverty, and social environment, and rates of asthma and other diseases).

<sup>335</sup> See Jacobs, *supra* note 304, at S118 (documenting studies of adverse health outcomes that are associated with living in racially segregated neighborhoods).

<sup>336</sup> *Id.*

<sup>337</sup> *Id.* at S119.

<sup>338</sup> H. COMM. ON ENERGY AND COM., 116<sup>TH</sup> CONG, THE INJUSTICE OF INEQUITABLE DISEASE: ADDRESSING RACIAL HEALTH INEQUITIES AMID THE COVID-19 PANDEMIC 9 (Comm. Print 2020 by Rhea W. Boyd).

<sup>339</sup> Foster et al., *supra* note 7.

Racial residential segregation was and continues to be a key driver of many of these problems.<sup>340</sup> Segregation has created Black communities that are areas of concentrated poverty and suffer from negative social and physical environments,<sup>341</sup> ultimately resulting in health disparities.<sup>342</sup> For example, many communities of color are segregated in neighborhoods with polluting facilities very close to housing, because zoning and land use laws and policies have allowed for an unhealthy mix of residential and industrial buildings.<sup>343</sup> African Americans are 75% more likely than their white counterparts to live near a polluting facility.<sup>344</sup>

Substandard housing and neighborhood conditions have been perpetuated by housing discrimination—including “redlining” and racially restrictive covenants—that ensures the separation of Black and white residents.<sup>345</sup> Civil rights laws aimed at curbing housing discrimination, such as the Fair Housing Act of 1968, have gone under-enforced.<sup>346</sup> Without broad access to quality housing, wealth accumulation was stymied in minority neighborhoods, the effects of which remain today.<sup>347</sup> A majority of neighborhoods in the United States are still segregated, driving health disparities.<sup>348</sup>

According to the CDC, structural racism and its resulting segregation have confined people of color to densely populated areas where poverty is

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<sup>340</sup> See Mercedes A. Bravo, Rebecca Anthopolos, Rachel T. Kimbro & Marie Lynn Miranda, *Residential Racial Isolation and Spatial Patterning of Type 2 Diabetes Mellitus in Durham, North Carolina*, 7 AM. J. EPIDEMIOLOGY 1467, 1467 (2018) (defining racial residential segregation of Black residents as the physical and geographic separation between those residents and people of other races).

<sup>341</sup> Mary O. Hearst, J. Michael Oakes & Pamela Jo Johnson, *The Effect of Racial Residential Segregation on Black Infant Mortality*, 11 AM. J. EPIDEMIOLOGY 1247, 1247 (2008).

<sup>342</sup> *Id.*; Bravo et al., *supra* note 340, at 1467.

<sup>343</sup> Foster et al., *supra* note 7; see Janell Ross, *A Rundown of Just How Badly the Fair Housing Act Has Failed*, WASH. POST (July 10, 2015), <https://www.washingtonpost.com/news/the-fix/wp/2015/07/10/a-look-at-just-how-badly-the-fair-housing-act-has-failed/?arc404=true> [<https://perma.cc/8R5S-2V53>] (describing how neighborhoods with a majority of Black and Latino residents are typically closer to harmful pollution, have schools with teachers who have minimal experience, and experience high rates of unemployment, all of which can have an impact on health).

<sup>344</sup> Michelle A. Williams & Jeffrey Sánchez, *Racism Is Killing Black People. It's Sickening Them Too*, WASH. POST (June 4, 2020), [https://www.washingtonpost.com/opinions/racism-is-killing-black-people-its-sickening-them-too/2020/06/04/fe004cc8-a681-11ea-b619-3f9133bbb482\\_story.html](https://www.washingtonpost.com/opinions/racism-is-killing-black-people-its-sickening-them-too/2020/06/04/fe004cc8-a681-11ea-b619-3f9133bbb482_story.html) [<https://perma.cc/VD8N-WT4A>].

<sup>345</sup> See Benfer, *supra* note 4, at 284–87 (demonstrating that current poverty and demographic maps of Chicago “track almost identically” with 1930s redlining and describing modern efforts to enforce redlining and racially restrictive covenants).

<sup>346</sup> See Ross, *supra* note 343 (discussing the deep segregation of neighborhoods due to the government’s failure in enforcing the Fair Housing Act of 1968, and its impacts on the health of minority populations).

<sup>347</sup> Benfer, *supra* note 4, at 284–86.

<sup>348</sup> See generally Ross, *supra* note 343.

more concentrated.<sup>349</sup> The differences in social and economic status between white communities and communities of color lead to large disparities in health and health outcomes.<sup>350</sup> For example, many areas that primarily house people of color are, on average, further from stores and health care facilities, making it more difficult to purchase food and access health care, with serious health implications.<sup>351</sup> Segregation leads to worse health outcomes for people of color regardless of income. Racial segregation has long been linked to a variety of underlying health conditions including, but not limited to, type II diabetes,<sup>352</sup> infant mortality,<sup>353</sup> and all-cause mortality in adults.<sup>354</sup> Instances of hypertension, diabetes, and obesity are far lower when Black and white Americans live in integrated communities.<sup>355</sup> These disparities can be seen, for example, in the higher rates of asthma experienced by African American children than their white peers, even when their families fall in the same income bracket.<sup>356</sup>

Overcrowding and substandard housing conditions have contributed to significant disparities during the COVID pandemic.<sup>357</sup> In particular, a lack of space during the COVID pandemic has made social distancing particularly difficult for many low-income people of color,<sup>358</sup> further increasing their susceptibility to COVID.<sup>359</sup> The intersection of housing and health in Chelsea, Massachusetts, outside of Boston, demonstrates how densely populated and segregated areas are disproportionately impacted during the

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<sup>349</sup> *Health Equity Considerations*, *supra* note 10.

<sup>350</sup> See Darrell J. Gaskin, Gneisha Y. Dinwiddie, Kitty S. Chan & Rachael R. McCleary, *Residential Segregation and the Availability of Primary Care Physicians*, 47 HEALTH SERV. RSCH. 2353, 2368 (2012) (finding associations between zip codes with primarily Black and Hispanic residents and areas with shortages of primary care physicians); Angela Hilmers, David C. Hilmers & Jayna Dave, *Neighborhood Disparities in Access to Healthy Foods and Their Effects on Environmental Justice*, 102 AM. J. PUB. HEALTH 1644, 1651 (2012) (discussing the relative accessibility of fast-food restaurants and convenience stores as compared to grocery stores and supermarkets in low-income neighborhoods); CHARACTERISTICS AND INFLUENTIAL FACTORS OF FOOD DESERTS, *supra* note 142, at 9–13 (showing a statistical correlation between census tracts with large populations of racial minorities and areas labeled food deserts).

<sup>351</sup> *Health Equity Considerations*, *supra* note 10.

<sup>352</sup> Bravo et al., *supra* note 340, at 1467.

<sup>353</sup> Hearst et al., *supra* note 341, at 1247.

<sup>354</sup> Sharon A. Jackson, Roger T. Anderson, Norman J. Johnson & Paul D. Sorlie, *The Relation of Residential Segregation to All-Cause Mortality: A Study in Black and White*, 4 AM. J. PUB. HEALTH, 615, 615–16 (2000).

<sup>355</sup> Roberts, *supra* note 71, at 334.

<sup>356</sup> Johnna S. Murphy & Megan T. Sandel, *Asthma and Social Justice: How to Get Remediation Done*, 41 AM. J. PREVENTATIVE MED. S57, S57 (2011).

<sup>357</sup> *Health Equity Considerations*, *supra* note 10.

<sup>358</sup> *Id.*

<sup>359</sup> *Id.*

pandemic.<sup>360</sup> Chelsea, a city made up of predominantly immigrant communities, is considered an epicenter of the Coronavirus outbreak in Massachusetts.<sup>361</sup> In April, the small and very crowded city was reported to have more than six times the state average of coronavirus cases, and the highest COVID infection rate in Massachusetts—2,200 infections among 40,000 people and 124 deaths.<sup>362</sup> Chelsea’s population density is almost 17,000 people per square mile, with families living in single rooms, or even porches, closets, or unfinished basements, often without proper sanitation measures or running water in some places.<sup>363</sup>

Higher rates of infection in Chelsea and other low-income, minority communities are not the result of race or ethnicity bringing a higher risk for disease. Those rates of infection are driven by structural racism that has resulted in substandard living conditions that sabotage the health of residents.<sup>364</sup> Without running water or other utilities, it is difficult to practice good hygiene that is required to stave off or recover from COVID.<sup>365</sup> Being forced to stay inside in a home with substandard housing conditions like mold or rodents can exacerbate respiratory and other illnesses that function as underlying conditions that make people more at risk for serious COVID complications.<sup>366</sup>

Social distancing is also extremely difficult, if not impossible, for those living in crowded and impoverished conditions.<sup>367</sup> Latinos are twice as likely, compared to whites, to live in crowded dwelling conditions of less than 500 square feet per person.<sup>368</sup> Within the homes of racial minorities, many families practice multi-generational living, and thus house older members of the family who are not only more susceptible to diseases, but are

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<sup>360</sup> Jose A. Del Real, *In an Immigrant Community Battling Coronavirus, ‘Essential’ Means ‘Vulnerable’*, WASH. POST (May 9, 2020), [https://www.washingtonpost.com/national/in-an-immigrant-community-battling-coronavirus-essential-means-vulnerable/2020/05/08/c25cdb4e-8e1e-11ea-a9c0-73b93422d691\\_story.html](https://www.washingtonpost.com/national/in-an-immigrant-community-battling-coronavirus-essential-means-vulnerable/2020/05/08/c25cdb4e-8e1e-11ea-a9c0-73b93422d691_story.html) [https://perma.cc/ECX6-44PT].

<sup>361</sup> Ellen Barry, *In a Crowded City, Leaders Struggle to Separate the Sick From the Well*, N.Y. TIMES (Apr. 25, 2020), <https://www.nytimes.com/2020/04/25/us/coronavirus-chelsea-massachusetts.html> [https://perma.cc/ACY4-Z7FD].

<sup>362</sup> *Id.*; Del Real, *supra* note 360.

<sup>363</sup> Barry, *supra* note 361.

<sup>364</sup> *The Disproportionate Impact of COVID-19 on Communities of Color: Hearing Before the H. Comm. On Ways and Means*, 116th Cong. (2020) [hereinafter *Hearing*] (statement of Thomas D. Sequist, Chief Patient Experience and Equity Officer at Mass. General Brigham, Professor of Medicine and Health Care Policy at Harvard Medical School).

<sup>365</sup> See Benfer & Wiley, *supra* note 8, at 8 (“Low-income people are more likely to live in homes with poor air quality, mold, asbestos, lead, pest-infections, and inadequate space to separate the sick from the well. . . . which have all been linked to poorer health outcomes.”).

<sup>366</sup> See *id.* (describing how “low-income people are more likely to live in homes with poor air quality, mold, asbestos, [and] pest infestations” and, as a result, “disproportionately suffer” negative health effects such as asthma, respiratory distress, high blood pressure, and heart disease).

<sup>367</sup> *Hearing*, *supra* note 364.

<sup>368</sup> Oppel Jr. et al., *supra* note 55.

also unable to isolate from younger family members.<sup>369</sup> Sharing bedrooms and bathrooms with family members makes it impossible to avoid contact with them during any type of illness.<sup>370</sup> As individuals contract the illness and choose to “ride out the illness at home,” they further spread COVID among the close-quartered living conditions.<sup>371</sup> As Chelsea residents of color already endure lower health outcomes connected to poor air quality, Chelsea’s crowded conditions have led some to believe that in this pandemic even the air outside is contaminated with Coronavirus.<sup>372</sup> Neighborhood pollution, in conjunction with employment and health care access, can lead to higher death rates from COVID.<sup>373</sup>

### *C. Leveraging Law and Policy to Fight Housing Instability and Advance Justice*

Advocates of health justice have called for a range of systemic reforms to address the deleterious effects of unstable and unsafe housing during this pandemic and beyond. Between 19 and 23 million renters in America were at risk of being evicted by September 30, 2020,<sup>374</sup> and more than 29 million Americans, in 13 million households are at risk of eviction by the end of the year.<sup>375</sup> Current law has failed to protect these Americans. The March 2020 CARES Act included a 120-day federal moratorium on evictions<sup>376</sup> for those living in properties with a federally backed mortgage or multifamily mortgage loan, and those participating in a few other covered housing programs, such as the rural housing voucher program and Violence Against Women Act housing assistance programs.<sup>377</sup> The moratorium,

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<sup>369</sup> *Health Equity Considerations*, *supra* note 10.

<sup>370</sup> Bridges, *supra* note 65.

<sup>371</sup> Barry, *supra* note 361.

<sup>372</sup> Del Real, *supra* note 360; Barry, *supra* note 361.

<sup>373</sup> *The Disproportionate Impact of COVID-19 on Communities of Color: Hearing Before the H. Comm. On Ways and Means*, 116th Cong. (2020) (statement of Ibram X. Kendi, Founding Director, the Antiracist Research & Policy Center at American University).

<sup>374</sup> Katherine Lucas McKay, Zach Neumann & Sam Gilman, *20 Million Renters Are at Risk of Eviction; Policymakers Must Act Now to Mitigate Widespread Hardship*, ASPEN INST. (June 19, 2020), <https://www.aspeninstitute.org/blog-posts/20-million-renters-are-at-risk-of-eviction/> [<https://perma.cc/23FR-LFW9>]; *see also* Regina Garcia Cano & Michael Casey, *Wave of Evictions Expected as Moratoriums End in Many States*, AP NEWS (Aug. 4, 2020), <https://apnews.com/833d91877e2f0fa913c5258978a9e83c> [<https://perma.cc/3CDB-A85C>] (suggesting the number of eviction filings in Ohio and elsewhere are rising, with higher numbers expected in August and September).

<sup>375</sup> *The Covid-19 Eviction Defense Project’s Analysis Demonstrates Unprecedented Eviction Risk in the U.S.*, COVID-19 EVICTION DEFENSE PROJECT, <https://cedproject.org/research/> [<https://perma.cc/4FEC-B9D2>] (last visited Aug. 5, 2020).

<sup>376</sup> CARES Act, H.R. 748, 116th Cong. § 4024 (2020).

<sup>377</sup> *Id.* §§ 4024(a)(1)(A)(i)–(ii)(B), 4024(a)(2)(B)(i)–(ii).

which protected less than half of the 43.7 million total renter households,<sup>378</sup> expired on July 24, 2020, and landlords can resume evictions if the moratorium is not extended.<sup>379</sup>

State and local governments also enacted a patchwork of moratoriums on evictions in response to COVID,<sup>380</sup> but at least thirty state moratoriums have expired since May.<sup>381</sup> Data from the summer of 2020 shows that 26.5% of adults eighteen years or older were unable to pay their last month's rent or mortgage and were concerned about being able to make payments the following month,<sup>382</sup> with a number of states reporting rates closer to 30% or higher.<sup>383</sup>

Further, the CDC's federal moratorium has gone underenforced, and many tenants have slipped through the cracks. In order to be protected by the CDC's policy, tenants must send a written declaration to their landlord stating that they meet certain criteria.<sup>384</sup> Tenants who are unaware of this procedural requirement—many of whom lack legal representation—are still subject to eviction.<sup>385</sup> Housing court judges have also been slow to adjust to this policy; they often fail to ask landlords if tenants provided them with the necessary declarations, and therefore never find out if tenants were legally protected from eviction.<sup>386</sup> Further, some housing courts have been slow to incorporate

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<sup>378</sup> Sonya Acosta, Anna Bailey & Peggy Bailey, *Extend CARES Act Eviction Moratorium, Combine With Rental Assistance to Promote Housing Stability*, CTR. ON BUDGET & POL'Y PRIORITIES 2 (July 27, 2020), <https://www.cbpp.org/sites/default/files/atoms/files/7-24-20hou.pdf> [<https://perma.cc/3M38-XN8K>] (“Less than half of all 43.7 million renter households are estimated to have been covered by the CARES Act moratorium. According to the Federal Reserve Bank of Atlanta, the federal ban covered between 12.3 million and 19.9 million households (28.1 to 45.6 percent of all renter households), meaning that the federal moratorium didn't cover as many as 31.4 million renter households.”).

<sup>379</sup> Cano & Casey, *supra* note 374.

<sup>380</sup> Acosta et al., *supra* note 378, at 2; NAT'L HOUSING L. PROJECT, CORONAVIRUS EVICTION MORATORIA: CONSIDERATIONS AND BEST PRACTICES 1 (2020), <https://docs.google.com/document/d/14rz4hhMbIRbShHWccsFtIWV2FXn6NcgW0IBh9UTdM54/edit> [<https://perma.cc/5QTA-QCRZ>].

<sup>381</sup> Cano & Casey, *supra* note 374; *COVID-19 Housing Policy Scorecard*, EVICTION LAB, <https://evictionlab.org/covid-policy-scorecard/> [<https://perma.cc/CFS3-BN6Z>] (last visited Aug. 5, 2020).

<sup>382</sup> Cano & Casey, *supra* note 374 (“Nationally, the figure was 26.5% among adults 18 years or older, with numbers in Louisiana, Oklahoma, Nevada, Alabama, Florida, Mississippi, New York, Tennessee and Texas reaching 30% or higher.”); *see also Household Pulse Survey, Housing Insecurity*, U.S. CENSUS BUREAU, <https://www.census.gov/data-tools/demo/hhp/#/?measures=HIR> [<https://perma.cc/T562-JPNP>] (last visited Aug. 5, 2020) (providing an interactive tool for exploring housing insecurity across the United States).

<sup>383</sup> *See* Cano & Casey, *supra* note 374 (noting states with rates of concerned renters above 30%).

<sup>384</sup> *See, e.g.,* Arnold, *supra* note 296 (detailing the procedures tenants must take to qualify for the CDC moratorium).

<sup>385</sup> *Id.*; Nova, *supra* note 293.

<sup>386</sup> *See* Arnold, *supra* note 296 (documenting the failures of Houston courts to inquire about the CDC moratorium in eviction hearings).

CDC declarations as “critical evidence” during eviction proceedings, allowing some tenants to be evicted despite their compliance with the CDC’s requirements.<sup>387</sup> Houston Public Media observed 100 eviction proceedings and found that only one tenant was able to use the CDC order to block eviction.<sup>388</sup> Legal aid attorneys in Houston noted that “[T]he judges aren’t asking landlords if tenants sent them CDC declarations. Many tenants don’t show up. And among those that do, most don’t appear to even know about their rights under the CDC order. The judges don’t ask them about that. And in the vast majority of cases, the landlord is given the right to evict them. That’s despite the CDC order, in the middle of a pandemic.”<sup>389</sup>

With so many Americans behind on rent and the beginning of what is likely to be a “tsunami” of evictions,<sup>390</sup> some activists have called for a “cancel the rent” initiative for the duration of the COVID pandemic.<sup>391</sup> They argue that rent and late fees for all tenants nationwide should be brought down to zero, and that after the rent cancellation is lifted, rents should be frozen at current rates.<sup>392</sup> This response matches the scope of the current economic and health catastrophe.<sup>393</sup>

Health justice scholars and advocates have also called for a more robust nationwide federal moratorium on evictions, as well as rent subsidies for families in need.<sup>394</sup> The CDC moratorium, while nationwide in scope, has been criticized as falling short for multiple reasons, including its temporary nature, the fact that its protections are not automatic and require a form to be prepared by tenants, and the confusion around the process, factors which have resulted in the eviction of tenants who should be protected.<sup>395</sup> It has also been

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<sup>387</sup> See, e.g., *id.* (illustrating how judicial systems need to provide additional guidance to lower courts as to moratorium implementation).

<sup>388</sup> *Id.*

<sup>389</sup> *Id.*

<sup>390</sup> Zoe Tillman, *Landlords Are Illegally Evicting Tenants During The Coronavirus Pandemic. Lawyers Fear A “Tsunami” Of Evictions When State Moratoriums End*, BUZZFEED NEWS (Apr. 22, 2020, 5:26PM), <https://www.buzzfeednews.com/article/zoe-tillman/coronavirus-illegal-evictions-moratorium-rent-lawyer-aid> [<https://perma.cc/5DZM-6SP3>].

<sup>391</sup> *Cancel Rent*, OUR HOMES, OUR HEALTH, <https://ourhomesourhealth.org/cancel-rent-reclaim-homes> [<https://perma.cc/7ENZ-32FK>] (last visited Aug. 6, 2020).

<sup>392</sup> *Id.*

<sup>393</sup> *Id.*

<sup>394</sup> Benfer, *supra* note 301.

<sup>395</sup> Bram Sable-Smith, Martha Bebinger & Darian Benson, *Evictions Damage Public Health. The CDC Aims to Curb Them – For Now*, NPR (September 29, 2020, 1:01 AM), <https://www.npr.org/sections/health-shots/2020/09/29/916972891/evictions-damage-public-health-which-is-why-the-cdc-has-banned-them-for-now> [<https://perma.cc/7D36-P9UC>]; Chris Arnold, *CDC Issues Sweeping Temporary Halt on Evictions Nationwide Amid Pandemic*, NPR (September 1, 2020, 8:48 PM), <https://www.npr.org/sections/coronavirus-live-updates/2020/09/01/908581048/sweeping-new-eviction-ban-from-trump-administration> [<https://perma.cc/7QFU-3N9P>].

criticized by both landlords and tenants as falling short of truly remedying the problem of tenants' inability to pay rent. Tenants argue that the ban merely postpones, but does not minimize, the financial cliff that renters will inevitably face, while landlords argue that the policy's failure to subsidize missed rent will drive landlords out of business and decrease housing stock.<sup>396</sup>

Professor Emily Benfer has argued that the HEROES Act, which passed through the U.S. House of Representatives but is pending in the Senate, should be passed in order to provide over \$100 billion in rental assistance, extend unemployment insurance, and create a 12-month moratorium on evictions across the country.<sup>397</sup> Then-Senator Kamala Harris also proposed a ban on evictions and foreclosures for one year and a process for allowing tenants up to 18 months to pay back any missed payments.<sup>398</sup> However, Senate Republicans have not yet supported either proposal.<sup>399</sup> Ultimately, an eviction moratorium and short-term rental assistance are merely "tertiary stopgap measures,"<sup>400</sup> and the creation of more affordable housing will be critical to keeping people housed.<sup>401</sup>

Health justice scholars Ruqaiyah Yearby and Seema Mohapatra have called for the federal government to enact some form of legislation that will address health-related housing violations, and the underlying structural racism that contributes to substandard housing conditions.<sup>402</sup> They argue that any further COVID relief legislation should require that all residents in areas highly affected by the pandemic have access to clean water, either through their tap water or through bottles.<sup>403</sup> In the long-term, the federal government should ensure that every house in the country has access to clean, running hot and cold water, a toilet that flushes, either a bathtub or a sink, and kitchen facilities.<sup>404</sup> This task is even more difficult during hurricane season. The

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<sup>396</sup> Arnold, *supra*, note 395.

<sup>397</sup> Emergency Housing Protections and Relief Act of 2020, H.R. 7301, 116th Cong. (2020); RJ Vogt, *Emily Benfer on the Incoming Wave of COVID-19 Evictions*, LAW360 (June 21, 2020, 8:02 PM), [https://www.law360.com/access-to-justice/articles/1284556/emily-benfer-on-the-incoming-wave-of-covid-19-evictions?nl\\_pk=edb76ee5-0615-4b76-b8c5-799d585646c4&utm\\_source=newsletter&utm\\_medium=email&utm\\_campaign=access-to-justice](https://www.law360.com/access-to-justice/articles/1284556/emily-benfer-on-the-incoming-wave-of-covid-19-evictions?nl_pk=edb76ee5-0615-4b76-b8c5-799d585646c4&utm_source=newsletter&utm_medium=email&utm_campaign=access-to-justice) [https://perma.cc/UM3Z-TAQQ].

<sup>398</sup> Renae Merle, *A Federal Eviction Moratorium Has Ended. Here's What Renters Should Know.*, WASH. POST (Aug. 4, 2020 2:41 PM), <https://www.washingtonpost.com/business/2020/07/24/faq-federal-eviction-moratorium/> [https://perma.cc/LJ3P-7AC2].

<sup>399</sup> *Id.*

<sup>400</sup> Sacha Pfeiffer, *Health Justice Lawyer Argues for Nationwide Eviction Moratorium*, NPR: ALL THINGS CONSIDERED (July 5, 2020, 5:20 PM), <https://www.npr.org/2020/07/05/887465412/health-justice-lawyer-argues-for-nationwide-eviction-moratorium> [https://perma.cc/6YH9-7RWL].

<sup>401</sup> Benfer, *supra* note 301.

<sup>402</sup> Yearby & Mohapatra, *supra* note 159, at 18.

<sup>403</sup> *Id.*

<sup>404</sup> *Id.*

power outages caused by Tropical Storm Isaias forced those working remotely to choose between leaving their homes for internet connection and risking their jobs, and it caused many households to lose critical stocks of refrigerated food.<sup>405</sup> Lawmakers can work with utility companies to prevent water and other utility shutoffs, and in other cases where utilities are owned by municipalities, cities can be proactive in suspending all shutoffs<sup>406</sup> and reconnecting utilities that have already been shutoff.<sup>407</sup> Benfer and Lindsay Wiley have argued that cities, states, and the federal government should completely forgive all utility debt, rather than try to collect it later, so that low-income individuals are able to recover from the effects of the pandemic.<sup>408</sup>

While we work towards these critical legislative and policy reforms, existing housing laws and regulations, which are under-enforced, should be used to their fullest extent to protect low-income Americans and people of color.<sup>409</sup>

Although housing laws require that landlords formally file to evict tenants, these laws are under-enforced and many people are forced to move out without any eviction filing.<sup>410</sup> Such illegal forced moves can take the form of a landlord telling a tenant she is evicted without any documentation, paying a tenant to leave, turning off the water or electricity, or even removing the front door.<sup>411</sup> Because many tenants are unaware of their right to legally sufficient notice and other forms of due process prior to an eviction, they may leave their homes in response to these informal actions without ever having an opportunity to plead their cases.<sup>412</sup> Laws prohibiting forcible entry and detainer exist to protect tenants from self-help evictions, but these rights are largely ignored.<sup>413</sup>

The under-enforcement of these laws has been compounded during COVID, as landlords have taken informal self-help actions to evict tenants who are behind on their rent payments, even when COVID eviction moratoriums and/or longstanding due process protections in eviction law make such actions illegal.<sup>414</sup> The confusing patchwork of moratoriums and the lack of understanding of tenants' rights has further led to moratoriums on

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<sup>405</sup> Mihir Zaveri & Tracey Tully, *Outages Pile On Misery for 1.4 Million Coping with Pandemic*, N.Y. TIMES (Aug. 6, 2020), <https://www.nytimes.com/2020/08/06/nyregion/isaias-storm-power-outages.html> [<https://perma.cc/L7HZ-8STU>].

<sup>406</sup> Benfer & Wiley, *supra* note 8, at 8.

<sup>407</sup> *Id.*

<sup>408</sup> *Id.*

<sup>409</sup> Petersen, *supra* note 108, at 68.

<sup>410</sup> *Id.* at 75.

<sup>411</sup> *Id.*; Sabbeth, *supra* note 22, at 99.

<sup>412</sup> Petersen, *supra* note 108, at 76.

<sup>413</sup> Benfer, *supra* note 4, at 308.

<sup>414</sup> NAT'L HOUSING L. PROJECT, *supra* note 380.

evictions being under-enforced.<sup>415</sup> For example, a majority of states did not require that landlords disclose whether their buildings were covered under the prior federal moratorium on evictions, leaving tenants to determine this information in order to enforce their rights.<sup>416</sup> Many tenants do not know whether they are living in a property covered by a moratorium on evictions, and landlords will not necessarily be forthcoming about this issue.<sup>417</sup> While some landlords may be helping tenants during this time, others are using violence, intimidation, or asking women to exchange sex for rent.<sup>418</sup>

When landlords file for eviction and tenants are involved in formal eviction proceedings, their rights also remain under-enforced. Evictions are often heard in high-volume courtrooms termed “eviction machines;”<sup>419</sup> for example, a 2005 study found that most eviction hearings in Maricopa County, Arizona took less than a minute.<sup>420</sup> Tenants are rarely represented by counsel, while most landlords have attorneys.<sup>421</sup> Landlords and their counsel often have the advantage of being repeat players in the courtroom, while tenants are frequently interrupted and silenced by judges.<sup>422</sup> Sometimes, judges are simply unfamiliar with the rights afforded to tenants, leading to further under-enforcement.<sup>423</sup>

One study in Chicago showed that many landlords were not required to establish the requisite prima facie case to “support an order of possession.”<sup>424</sup> While judges are required to ensure that eviction notices follow due process notice requirements, the study indicated that judges did so in only 65% of cases.<sup>425</sup> Tenants’ rights of dismissal when landlords fail to appear in court were also shown to be under-enforced, with cases

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<sup>415</sup> Renae Merle, *Evictions are Likely to Skyrocket This Summer as Jobs Remain Scarce. Black Renters Will Be Hit Hard*, WASH. POST (July 6, 2020), <https://www.washingtonpost.com/business/2020/07/06/eviction-moratoriums-starwood/> [<https://perma.cc/TA68-2EQU>].

<sup>416</sup> *Id.*

<sup>417</sup> Kriston Capps, *What Happens When the Eviction Bans End?*, CITY LAB (May 29, 2020), <https://www.citylab.com/equity/2020/05/pay-rent-eviction-ban-coronavirus-housing-crisis-landlord/612277/> [<https://perma.cc/KR84-9VNK>].

<sup>418</sup> Taylor, *supra* note 330.

<sup>419</sup> John Whitlow, *Lawyer Calls Court an Eviction Machine*, ALBUQUERQUE J. (July 19, 2019, 12:02 AM), <https://www.abqjournal.com/1342272/lawyer-calls-court-an-eviction-machine.html> [<https://perma.cc/MRP2-5B4F>].

<sup>420</sup> WILLIAM E. MORRIS INST. FOR JUST., INJUSTICE IN NO TIME: THE EXPERIENCE OF TENANTS IN MARICOPA COUNTY JUSTICE COURTS 2 (2005).

<sup>421</sup> Sabbeth, *supra* note 22, at 120; Petersen, *supra* note 108, at 76.

<sup>422</sup> Petersen, *supra* note 108, at 76.

<sup>423</sup> *Id.*

<sup>424</sup> LAWYERS’ COMM. FOR BETTER HOUS., NO TIME FOR JUSTICE: A STUDY OF CHICAGO’S EVICTION COURT 6 (2003); *see also* Benfer, *supra* note 4, at 309 (“In Eviction Court, landlords were rarely required to meet the burden of proof necessary to support an order of possession.”).

<sup>425</sup> LAWYERS’ COMM. FOR BETTER HOUS., *supra* note 424, at 4; Benfer, *supra* note 4, at 309.

proceeding despite a landlord's absence 60% of the time.<sup>426</sup> Tenants also have the right to present defenses in forcible entry and detainer cases, but were only asked to do so in 27% of cases.<sup>427</sup> Although 55% of tenants offered defenses, all were evicted.<sup>428</sup> The average hearing spanned one minute and forty-four seconds, which decreased if the landlord had legal representation.<sup>429</sup> This data reveals the under-enforcement of tenants' rights in eviction proceedings, as "the procedures designed to guarantee fairness and justice are not being followed" and the "equality, impartiality, and transparency" of the legal system "are undermined by an apparent bias in the landlord's favor."<sup>430</sup>

Tenants often do have claims and defenses that can be raised in furtherance of their rights and to reduce their rent obligations or defeat an eviction.<sup>431</sup> For example, tenants may actually have paid rent despite receiving notice to the contrary or have other technical procedural defenses related to notice.<sup>432</sup> They may be able to argue for reductions in the amount of rent owed<sup>433</sup> if they understand and are empowered to assert their rights. Some landlords regularly initiate non-meritorious eviction cases as a form of harassment, which could be defeated if tenants understood and could enforce their rights.<sup>434</sup>

Most states allow counterclaims or defenses to non-payment of rent for the landlord's failure to maintain the habitability of the unit.<sup>435</sup> For example:

The tenant can argue that the landlord's breach of the warranty of habitability negates the tenant's duty to pay rent because the two obligations are mutually dependent. Alternatively, the tenant can argue that even if the landlord is entitled to collect some rent, the amount should be reduced to reflect the substandard conditions.<sup>436</sup>

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<sup>426</sup> LAWYERS' COMM. FOR BETTER HOUS., *supra* note 424, at 5; Benfer, *supra* note 4, at 309.

<sup>427</sup> LAWYERS' COMM. FOR BETTER HOUS., *supra* note 424, at 7; Benfer, *supra* note 4, at 309.

<sup>428</sup> LAWYERS' COMM. FOR BETTER HOUS., *supra* note 424, at 4; Benfer, *supra* note 4, at 309.

<sup>429</sup> LAWYERS' COMM. FOR BETTER HOUS., *supra* note 424, at 4; Benfer, *supra* note 4, at 309.

<sup>430</sup> Benfer, *supra* note 4, at 310 (citing Lloyd T. Wilson, Jr., *The Beloved Community: The Influence and Legacy of Personalism in the Quest for Housing and Tenants' Rights*, 40 J. MARSHALL L. REV. 513, 530 (2007)).

<sup>431</sup> Sabbeth, *supra* note 22, at 111, 113.

<sup>432</sup> Petersen, *supra* note 108, at 101–02.

<sup>433</sup> Sabbeth, *supra* note 22, at 113, 121.

<sup>434</sup> Kathryn A. Sabbeth, *Housing Defense as the New Gideon*, 41 HARV. WOMEN'S L.J. 56, 113 (2019).

<sup>435</sup> Petersen, *supra* note 108, at 100 (citing Mary Ann Glendon, *The Transformation of American Landlord-Tenant Law*, 23 B.C. L. REV. 503, 529, 537 (1982) (explaining that most states require landlords to maintain habitability, and most implied warranty states allow tenants to raise habitability issues as a defense)). See, e.g., Uniform Residential Landlord Tenant Act §§ 2.104, 4.105 (allowing for counterclaim when landlord fails to maintain fit premises).

<sup>436</sup> Sabbeth, *supra* note 434, at 112.

A tenant who disputes the termination of a lease could also raise counterclaims around substandard conditions and pursue monetary relief and an injunction requiring the landlord to repair the property.<sup>437</sup> Tenants rarely assert such defenses and counterclaims, especially as they are seldom represented by attorneys who could advance such arguments effectively.<sup>438</sup> Tenants may also fail to make these arguments out of fear, as some tenants find themselves in eviction proceedings as a result of complaints about housing code violations, even though such evictions represent a form of retaliation by landlords that is illegal in many jurisdictions.<sup>439</sup>

Studies of legal representation of low-income tenants reveal the potential for tenants to remain housed if their rights are effectively enforced. Represented tenants who are able to enforce their rights through counsel are “less likely to be evicted, but also less likely to default, more likely to receive rent abatement and repairs, and more likely to obtain favorable settlements.”<sup>440</sup> Many tenants are not emboldened to enforce their rights as lawyers would through strategies such as “repeated discovery requests, counterclaims for significant amounts, and tenacious advocacy to enforce orders to repair, provid[ing] sufficient incentives to obtain settlements that address tenants’ interests.”<sup>441</sup> Attorneys can also help enforce laws that allow priority access afforded to certain low-income individuals like those who are homeless to housing assistance programs, such as public housing and the Housing Choice Voucher Program.<sup>442</sup> Tenants also have rights to appeal wrongful denials or terminations from those programs that go under-enforced.<sup>443</sup>

Tenants’ rights to live in healthy and safe housing can be enforced not only as defenses and counterclaims in eviction proceedings, but also through the affirmative enforcement of housing codes, which provide the standards for safe and habitable housing.<sup>444</sup> Most jurisdictions have housing inspectors that tenants can contact to report violations, which can result in a fine if the landlord fails to make the necessary repairs.<sup>445</sup> In addition to habitability defenses that can be raised in eviction proceedings, as described above, tenants can use these inspections and other evidence to bring affirmative actions against their landlords.<sup>446</sup> Special courts have been created in some jurisdictions to handle housing code violation claims.<sup>447</sup> However, housing

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<sup>437</sup> Sabbeth, *supra* note 22, at 112–13.

<sup>438</sup> Petersen, *supra* note 108, at 101.

<sup>439</sup> *Id.* at 75.

<sup>440</sup> *Id.* at 77.

<sup>441</sup> Sabbeth, *supra* note 434, at 115.

<sup>442</sup> Petersen, *supra* note 108, at 78.

<sup>443</sup> *Id.*

<sup>444</sup> *Id.* at 108–09.

<sup>445</sup> *Id.* at 109.

<sup>446</sup> *Id.*

<sup>447</sup> *Id.*

codes are under-enforced, and when they are deployed, are often used to address immediate safety concerns or “visible” problems instead of long-term improvements, leaving tenants in unhealthy and unsafe situations.<sup>448</sup> Without enforcement of these rights, many low-income tenants across the country are living in unhealthy conditions,<sup>449</sup> as “23 million housing units have lead-based paint hazards, 17 million have high exposure to indoor allergens, and 6 million have moderate to severe infrastructure problems.”<sup>450</sup>

While state and local governments may deprioritize health and safety inspections for other emergency functions during the pandemic, it is important that health standards in homes are enforced during the pandemic, especially as people are forced to be at home for long periods of time.<sup>451</sup> Inspections of leaks, mold, infestation, and emergency remediation must be a priority during the COVID pandemic, when people’s exposure to harmful conditions in their home is compounded as a result of stay-at-home orders and school closures.<sup>452</sup>

The enforcement of housing discrimination laws is also key to ensuring that people of color and low-income individuals are not excluded from safe and affordable housing and therefore forced to live in segregated neighborhoods and substandard housing conditions connected to poor health outcomes.<sup>453</sup> The Fair Housing Act prevents discrimination based on race and other protected factors in the sale and rental of homes, but it has been referred to as having a “limited-if-not-failed legacy” due to lack of enforcement.<sup>454</sup> For example, there continues to be dishonesty regarding the availability of rental properties, mortgages, and homes.<sup>455</sup> Moreover, despite the Fair Housing Act’s prohibition of discrimination based on familial status, some landlords refuse to rent to larger families with multiple children.<sup>456</sup>

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<sup>448</sup> STACY ET AL., *supra* note 308, at 1.

<sup>449</sup> Petersen, *supra* note 108, at 109.

<sup>450</sup> TOBIN-TYLER & TEITELBAUM, *supra* note 15, at 74.

<sup>451</sup> Benfer & Wiley, *supra* note 8.

<sup>452</sup> *Id.*

<sup>453</sup> See Benfer, *supra* note 4, at 285–87 (tracing ongoing segregation to historic patterns of redlining).

<sup>454</sup> Ross, *supra* note 343; see also Benfer, *supra* note 4, at 285 n.46 (arguing that the impact of underenforced policies such as the Fair Housing Act is continued segregation); U.S. DEP’T OF HOUS. & URB. DEV., ANNUAL REPORT ON FAIR HOUSING, FY 2012-2013, at 17 (2014) (“The Fair Housing Act prohibits discrimination based on race, color, national origin, religion, sex, disability, or familial status in most housing-related transactions.”).

<sup>455</sup> See generally OFF. OF POL’Y DEV. & RSCH., U.S. DEP’T OF HOUS. & URB. DEV., HOUSING DISCRIMINATION AGAINST RACIAL AND ETHNIC MINORITIES: EXECUTIVE SUMMARY (2012).

<sup>456</sup> See 42 U.S.C. § 3604 (prohibiting housing discrimination based on familial status); 42 U.S.C. § 3602(k) (defining familial status to include a parent living with one or more children under age 18); Sabbath, *supra* note 22, at 110 (“Landlords also continue to engage in old-fashioned discrimination, refusing to rent to tenants on the basis of race, gender, or familial status.”).

The Housing Choice Voucher Program is a federal tenant rental assistance initiative, which pays a subsidy to private landlords of the tenants,<sup>457</sup> and some jurisdictions offer other rental subsidies that can be used on the private rental market in the form of different types of vouchers.<sup>458</sup> Tenants must find a private landlord willing to accept a voucher and rent to them.<sup>459</sup> Many landlords refuse to take housing assistance vouchers, “citing the difficulties of inspections and paperwork, though income and racial discrimination play a large role in the refusal to accept them as well.”<sup>460</sup> This discrimination makes the actual use of housing vouchers difficult for many low-income tenants, who then often have no choice but to rent in low-income neighborhoods with poor housing conditions.<sup>461</sup>

Some jurisdictions have enacted laws to prevent such “source of income discrimination,” requiring landlords to accept housing vouchers.<sup>462</sup> Holding landlords accountable under law for various forms of discrimination is critical to ensuring that people of color and low-income tenants can locate affordable housing with safe conditions.<sup>463</sup> The enforcement of anti-discrimination housing laws is all the more critical during COVID, when many people are struggling financially and may be facing evictions and urgently searching for new housing.<sup>464</sup>

Enforcement of laws and policies that provide utility shut-off protection and utility assistance are also critical to health, especially during the pandemic. While people are sheltering in place at home for extended periods of time, utility shut-offs could result in life-threatening emergencies.<sup>465</sup> Electricity and gas are essential for heat and cooking, to preserve foods and medication that are perishable, and for the use of medical

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<sup>457</sup> HERSHKOFF & LOFFREDO, *supra* note 217, at 636.

<sup>458</sup> *See, e.g.*, D.C. CODE § 4-751.01(27C), (31A) (2020) (defining “permanent supportive housing” and “rapid re-housing” rental assistance programs in the District of Columbia).

<sup>459</sup> HERSHKOFF & LOFFREDO, *supra* note 217, at 640.

<sup>460</sup> Petersen, *supra* note 108, at 73.

<sup>461</sup> *Id.*

<sup>462</sup> *See, e.g.*, D.C. CODE §§ 2-1402.21(a), 2-1403.13(a), 42-2851.06 (2020) (providing that source of income discrimination is unlawful and an owner cannot refuse to rent to a person when he provides his rental payment through a section 8 voucher); *see also* HERSHKOFF & LOFFREDO, *supra* note 217, at 641 (explaining that a landlord’s refusal to rent because a tenant’s rent is assisted through a voucher could violate certain state and local laws that bar housing discrimination based on source of income); Petersen, *supra* note 108, at 73 (stating that landlords are not required to accept vouchers in many jurisdictions across the country).

<sup>463</sup> Petersen, *supra* note 108, at 78.

<sup>464</sup> *See* Benfer & Wiley, *supra* note 8 (discussing the need to protect against discrimination that commonly occurs in the implementation of disaster recovery programs).

<sup>465</sup> *Id.*

equipment.<sup>466</sup> Without air conditioning in hot summer conditions or heat during the upcoming winter in cold places, the elderly and those with underlying conditions are particularly at risk of infections.<sup>467</sup> Clean water for cooking, hydration and hygiene are required to prevent the spread of COVID.<sup>468</sup> Electricity and internet access are also critical for those telecommuting and participating in school from home.<sup>469</sup>

As of October 2020, seventeen states and the District of Columbia had active suspensions on utility shut-offs for nonpayment as part of their pandemic response; eighteen others originally instituted suspensions but had allowed them to expire.<sup>470</sup> Enforcement of these shut-off protections is critical to health.<sup>471</sup> The fifteen other states either never instituted official shut-off moratoriums.<sup>472</sup> However, most states have laws that "prohibit[] or delay[] utility companies from terminating service to low-income households when occupants present a medical letter confirming a household member has a chronic serious illness."<sup>473</sup> Enforcement of these laws are critical to health even in non-pandemic times.<sup>474</sup> At Boston Medical Center, physicians and nurses teamed up with attorneys to ensure that their recommendations for utility shutoff protection for the medically vulnerable were actually enforced, recognizing how critical such enforcement was to health.<sup>475</sup>

The Low Income Home Energy Assistance Program (LIHEAP) is a decades-old program that provides financial assistance to low-income people

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<sup>466</sup> See Boston Medical Center, *supra* note 321 (indicating that utility shutoff protection laws "ensure electricity-powered medical devices continue running, and that patients have electricity to refrigerate medications. Preventing utility shutoffs may help patients pay for other necessities like food, medicine, and shelter."); Benfer & Wiley, *supra* note 8 (explaining that electric, gas, and steam utilities are critical to heating a home, cooking, and preserving perishable items).

<sup>467</sup> Mark Wolfe & Cassandra Lovejoy, *Unless Congress Acts, Americans Will Be 'Sweltering in Place,'* THE HILL (July 20, 2020, 7:30 PM), <https://thehill.com/opinion/energy-environment/508157-unless-congress-acts-americans-will-be-sweltering-in-place> [<https://perma.cc/A47S-6WHA>].

<sup>468</sup> WORLD HEALTH ORG., WATER, SANITATION, HYGIENE, AND WASTE MANAGEMENT FOR SARS-CoV-2, THE VIRUS THAT CAUSES COVID-19: INTERIM GUIDANCE 1 (2020).

<sup>469</sup> Benfer & Wiley, *supra* note 8.

<sup>470</sup> *Summary of State Utility Shut-Off Moratoriums Due to COVID-19*, NEADA (Oct. 19, 2020), <https://neada.org/utilityshutoffsuspensions/> [<https://perma.cc/RMT6-A2SA>].

<sup>471</sup> See Boston Medical Center, *supra* note 321 ("Preventing utility shut-off is vital to maintaining patients' health . . .").

<sup>472</sup> *Summary of State Utility Shut-Off Moratoriums Due to COVID-19*, *supra* note 470.

<sup>473</sup> Boston Medical Center, *supra* note 321.

<sup>474</sup> *Id.*

<sup>475</sup> *MLP In Action: A Utilities Case Study*, NAT'L CTR. FOR MED. LEGAL P'SHIP, <https://medical-legalpartnership.org/response/utilities-case-study/> [<https://perma.cc/CZ7H-CCHX>] (last visited Aug. 7, 2020).

who are struggling to make their electric and gas payments.<sup>476</sup> Although the program is under-funded for the need, it provides an important safety net that must be utilized to its fullest extent to help people cope with the pandemic.<sup>477</sup>

The under-enforcement of housing laws harms the health of low-income people of color and drives disparities. When the Petersons' landlord ignored their requests to remediate the mold in their home, Kenny's health suffered. Dr. Ankoor Shah, medical director of the asthma clinic at Children's National Health System in Washington, D.C., explained the impact of substandard housing conditions on children like Kenny, noting "[t]here are so many children in which poor housing is the leading cause of their poor asthma . . . . The way I know this is: A child is living in a house with mold, mice, pests, cockroaches, and when the child is at home, the symptoms flare up. When they're not at home, they're fine. But the family has an inability to get out of the home . . . . This is a social justice issue in the city."<sup>478</sup>

With Kenny's asthma getting worse as the family sheltered in place as a result of the pandemic, the Petersons also added eviction and homelessness to their list of worries. To protect their health, the city's moratorium on evictions and other tenants' rights laws need to be enforced to their fullest extent for this family.

## CONCLUSION

A health justice approach to the problems of food insecurity and housing instability necessitate a structural understanding of the connections between determinants and health for marginalized individuals and the associated racial disparities.<sup>479</sup> The above examination of the role of food insecurity and housing as powerful drivers of health reveals that individuals from marginalized communities have long suffered health disparities and are now bearing the brunt of the COVID pandemic.<sup>480</sup> These social determinants have unduly burdened communities of color with high rates of chronic diseases and conditions that make healthy practices during a pandemic much

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<sup>476</sup> *About LIHEAP*, OFF. OF CMTY. SERVS., <https://www.acf.hhs.gov/ocs/programs/liheap/about> [<https://perma.cc/65PK-2QBE>] (last visited June 17, 2020); Wolfe & Lovejoy, *supra* note 467.

<sup>477</sup> Wolfe & Lovejoy, *supra* note 467.

<sup>478</sup> Baskin, *supra* note 267.

<sup>479</sup> See Harris & Pamukcu, *supra* note 21, at 5–6 (arguing for a new contextualization of the health justice framework as the “civil rights of health” and pushing for a structural understanding of social determinants of health that connects health disparities to the subordination of disadvantaged groups and the need for civil rights protections).

<sup>480</sup> See Benfer & Wiley, *supra* note 8 (explaining that the lower a person's socioeconomic status, the greater their chance of suffering from conditions that increase the mortality risk of COVID); Kendi, *supra* note 5 (noting that black Americans are overrepresented among people infected with and killed by COVID); Fisher & Bubola, *supra* note 5 (“Research suggests that those in lower economic strata are likelier to catch the disease.”).

more challenging—factors that are now putting individuals in these communities at an increased risk for contracting COVID and developing serious complications.<sup>481</sup>

These two social determinants of health, like many others, are closely connected, as the systems that entangle low-income people of color are often intertwined. Housing and food insecurity often drive each other, as they present impossible choices, to the detriment of health. “Being forced to choose between paying for food, health care, utilities, or other necessities and keeping up with rent will almost always result in eviction, and eviction always results in a downward move to worse conditions, including homelessness and corollary poor health outcomes.”<sup>482</sup>

While we work towards a health justice revolution aimed at eradicating racial and economic health disparities, the laws we currently have on the books must be deployed and enforced to their fullest extent. Especially in a time of legislative inertia, the enforcement of current laws is necessary to effectively remediate the negative health consequences of food insecurity and unstable and unsafe housing, along with their associated disparities.<sup>483</sup>

What pathways exist to such enforcement? Low-income individuals need to understand their rights and have the tools and the power to enforce them. Research shows that representation by an attorney may be the best opportunity for families like the Petersons to achieve justice.<sup>484</sup> The Petersons eventually secured a legal services attorney to represent them in their public benefits and housing matters. The lawyer was able to successfully challenge the denial of unemployment benefits to Mr. Peterson and the denial of the

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<sup>481</sup> Kendi, *supra* note 5; Fisher & Bubola, *supra* note 5. The COVID-19 crisis poses a unique threat to the LGBTQ+ community, who bear the burden of high rates of HIV and cancer. See Elliott Kozuch, *HRC Releases Research Brief on the Vulnerabilities of the LGBTQ Community During the COVID-19 Crisis*, HUMAN RIGHTS CAMPAIGN (Mar. 20, 2020), <https://www.hrc.org/blog/hrc-releases-research-brief-on-lgbtq-community-during-covid-19-crisis> [<https://perma.cc/67WU-RCFW>] (discussing how LGBTQ people are more vulnerable to the health risks of COVID); Savannah Eadens, *LGBTQ Community May Be ‘Particularly Vulnerable’ to Coronavirus Pandemic. Here’s Why.*, USA TODAY (Mar. 18, 2020), <https://www.usatoday.com/story/news/nation/2020/03/18/lgbtq-coronavirus-community-vulnerable-covid-19-pandemic/2863813001/> [<https://perma.cc/9VRT-KCK7>] (describing the reasons why members of the LGBTQ community may be especially vulnerable to the effects of COVID).

<sup>482</sup> Benfer & Wiley, *supra* note 8; see also WHY EVICTION MATTERS, EVICTION LAB, <https://evictionlab.org/why-eviction-matters/#eviction-impact> [<https://perma.cc/56WP-A2NL>] (last visited April 7, 2020) (discussing the interconnectedness between eviction, employment, and health).

<sup>483</sup> CHANGLAB SOLUTIONS, *supra* note 27, at 2–3.

<sup>484</sup> See Kathryn Joyce, *No Money, No Lawyer, No Justice: The Vast, Hidden Inequities of the Civil Legal System*, NEW REPUBLIC (June 22, 2020) <https://newrepublic.com/article/158095/civil-legal-system-no-money-no-lawyer-no-justice> [<https://perma.cc/S4AL-DVFP>] (discussing studies that suggest that having a lawyer results in better legal outcomes for litigants).

family's SNAP benefits. The income the family received from unemployment benefits and SNAP benefits provided them with the funds needed to put food on the table and begin to achieve better health.

The attorney also enforced the family's rights under D.C.'s housing conditions laws by advocating with the family's landlord to remediate the mold in their home,<sup>485</sup> thereby reducing Kenny's asthma attacks. The lawyer advocated for reduced rent connected to these conditions and ensured that the landlord was abiding by D.C.'s COVID-related moratorium on evictions.<sup>486</sup> The reduced medical bills and rent, along with the increased income from the public benefits advocacy, allowed the Petersons to catch up on their rent and stave off an eviction. With these legal needs addressed, the Petersons can feed the family, stay housed, live in safe conditions, and achieve better health. Such enforcement of health-harming legal needs can be critical to health.

Millions of Americans remain without legal representation in these types of civil cases that affect their most basic human needs.<sup>487</sup> The phenomenon of low-income Americans having to navigate civil legal issues without attorney representation is known as the "justice gap."<sup>488</sup> In 2019, members of low-income communities only had adequate civil legal representation 14% of the time, and 80% of legal needs in low-income communities were unrealized.<sup>489</sup> One way for the U.S. to ensure enforcement of existing laws to further health and reduce disparities is through a civil right to counsel, similar to the right to an attorney afforded to indigent criminal defendants, in cases that affect basic human needs, such as shelter, sustenance, and access to healthcare.<sup>490</sup> The civil right to counsel movement has gained traction recently with the introduction of a resolution in the U.S. House of Representatives raising concerns about the lack of access to justice for low-income Americans, especially in light of COVID, and calling for guaranteed legal representation in cases that affect basic human needs.<sup>491</sup>

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<sup>485</sup> D.C. CODE § 8-241.04; D.C. Mun. Regs. tit. 14, § 400 (2020).

<sup>486</sup> Coronavirus Support Emergency Act of 2020, D.C. Act 23-326 (effective May 27, 2020); Martin Austerhuhle & Ally Schwitzer, *D.C. Council Approves New Protections for Tenants and Homeowners*, DCIST (May 5, 2020, 4:18 PM), <https://dcist.com/story/20/05/05/d-c-tenants-will-now-be-able-to-get-payment-plans-for-rent-and-evictions-and-foreclosures-will-be-delayed-2/> [<https://perma.cc/PC2L-G9YW>].

<sup>487</sup> LEGAL SERVS. CORP., *THE JUSTICE GAP: MEASURING THE UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS* 6 (2017).

<sup>488</sup> *Id.*

<sup>489</sup> Press Release, Joe Kennedy III, U.S. Congressman for the 4<sup>th</sup> Dist. of Mass., Kennedy Introduces Civil Gideon (May 8, 2020) (on file with author).

<sup>490</sup> See Tonya L. Brito, David Pate Jr., Daanika Gordon & Amanda Ward, *What We Know and Need to Know About Civil Gideon*, 67 S. C. L. REV. 223, 224 (2016) ("The 'Civil Gideon' movement aims to address the justice gap by advocating for an expanded right to counsel for pro se low-income civil litigants in cases implicating basic human needs.").

<sup>491</sup> Recognizing the Right to Counsel in Civil Proceedings, H.R. Res. 960, 116<sup>th</sup> Cong. (as referred to the H. Comm. on the Judiciary, May 8, 2020).

Local municipalities have also recently advanced the right to counsel in certain civil legal areas, such as evictions.<sup>492</sup>

Lawyers may be especially critical to enforcing existing legal rights during COVID. With frequent changes to benefits systems and housing laws during COVID and the collapse of some benefits systems under the pressure of so many new applicants, lawyers are needed to help people understand their rights.<sup>493</sup> Moreover, many court proceedings are being conducted remotely by telephone or online.<sup>494</sup> Because low-income litigants are less likely to have stable internet access, high computer literacy, and a quiet place at home to participate in these proceedings,<sup>495</sup> access to counsel might be particularly important to the enforcement of existing laws connected to health justice in the context of this pandemic.

The medical-legal partnership movement also presents a pathway to advance health justice through enforcement of existing laws. This model of healthcare delivery trains providers to identify unmet legal needs among vulnerable patients.<sup>496</sup> They refer cases to attorneys, who are integrated into healthcare settings, and use legal advocacy to address social determinants of health and reduce disparities.<sup>497</sup> The medical-legal partnership model can bring lawyers and doctors together to identify social, economic, and environmental factors that result in health-harming legal needs for low-

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<sup>492</sup> Petersen, *supra* note 108, at 80–81.

<sup>493</sup> See Patricia Cohen, Ben Casselman & Gillian Friedman, *An Extra \$600 a Week Kept Many Jobless Workers Afloat. Now What Will They Do?*, N.Y. TIMES (July 29, 2020), <https://www.nytimes.com/2020/07/29/business/economy/unemployment-benefits-corona-virus.html> [<https://perma.cc/9BDN-UNEU>] (describing the grave impact that the expiration of emergency relief will have on families); Eli Rosenberg, *Workers Are Pushed to the Brink as They Continue to Wait for Delayed Unemployment Payments*, WASH. POST (July 13, 2020), <https://www.washingtonpost.com/business/2020/07/13/unemployment-payment-delays/> [<https://perma.cc/KZS3-US2X>] (recounting time-consuming attempts to navigate states' unemployment systems and delays in getting jobless benefits to the unemployed).

<sup>494</sup> See *Stopping COVID-19 Evictions Survey Results*, NAT'L HOUS. L. PROJECT (July 2020), <https://www.nhlp.org/wp-content/uploads/Evictions-Survey-Results-2020.pdf?fbclid=IwAR3FnGdTXqkTtCSORCzqJotKj7CWg3voKY6vOBbludj1khBQeHwyvV-9mI> [<https://perma.cc/SP54-7G2N>] (listing remote hearings conducted via Zoom as a serious concern because they are rife with due process problems).

<sup>495</sup> See David Freeman Engstrom & Chief Justice Bridget Mary McCormack, *Post-COVID Courts*, STAN. L. SCH. BLOG (July 15, 2020), <https://law.stanford.edu/2020/07/15/post-covid-courts/> [<https://perma.cc/A325-N9U5>] (suggesting that an increasing reliance on “legal tech” could widen the gap between the “haves” and the “have nots,” making it “easier for employers, creditors, and landlords to bring cases against employees, debtors, and tenants”).

<sup>496</sup> Barry Zuckerman, Megan Sandel, Lauren Smith & Ellen Lawton, *Why Pediatricians Need Lawyers to Keep Children Healthy*, 114 PEDIATRICS 224, 224 (2004).

<sup>497</sup> *The Response*, NAT'L CTR. FOR MED. LEGAL P'SHIP, <https://medical-legalpartnership.org/response/> [<https://perma.cc/F3P5-ZB5S>] (last visited July 30, 2020).

income people and ideally address them before people are in crisis.<sup>498</sup> This integration of law and medicine allows for the holistic deployment of services to enforce existing laws in furtherance of both advance justice and health.

Through state attorneys general and other civil rights enforcement offices, jurisdictions can also ensure that the rights of low-income people of color that implicate health are vigorously enforced. In Washington, D.C., the Office of the Attorney General has instituted a campaign to fight housing discrimination.<sup>499</sup> Such efforts can also provide a pathway to a health justice and are increasingly critical during the COVID recovery when so many Americans of color and low-income Americans are vulnerable to discrimination and other violations of their rights.

The pandemic has highlighted a range of racial inequities, a phenomenon that scholar Catherine Powell calls “the color of COVID.”<sup>500</sup> In the midst of this pandemic and invigorated racial justice movements, America is awakening to the urgency of fighting inequities that are closely connected across measures of health and justice.<sup>501</sup> The country is beginning to understand that injustice is an underlying condition, and that justice is a requisite for a healthier nation.

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<sup>498</sup> Lindsay F. Wiley, *From Patient Rights to Health Justice: Securing the Public’s Interest in Affordable, High-Quality Health Care*, 37 CARDOZO L. REV. 833, 837–39 (2016).

<sup>499</sup> *Newsletter: Housing Discrimination is Illegal*, OFF. OF ATT’Y GEN., FOR THE D.C. (Mar. 2, 2020), <https://oag.dc.gov/blog/newsletter-housing-discrimination-illegal> [<https://perma.cc/QWP2-GBAC>].

<sup>500</sup> Catherine Powell, *Color of Covid: The Racial Justice Paradox of Our New Stay-At-Home Economy*, CNN (Apr. 18, 2020, 9:13 AM), <https://www.cnn.com/2020/04/10/opinions/covid-19-people-of-color-labor-market-disparities-powell/index.html> [<https://perma.cc/F3HF-P7X7>].

<sup>501</sup> Foster et al., *supra* note 7.