REVISED TESTIMONY OF PROFESSOR BENJAMIN G. DAVIS UNIVERSITY OF TOLEDO COLLEGE OF LAW BEFORE THE HOUSE WAYS AND MEANS COMMITTEE HEARING ON THE DISPROPORTIONATE IMPACT OF COVID-19 ON COMMUNITIES OF COLOR

INTRODUCTION

As we watch the revival of the first wave and anticipate an inevitable second wave of the COVID-19 pandemic, the intentionally inept federal, uneven and dangerous state and local, and self-interested business response to the COVID-19 pandemic is a horrifying experience.

As the reality of the situation unfolds, the breach of public trust is breathtaking. The clear indifference of large swathes of the governing class to the welfare of the citizens whom they are sworn to protect is monstrous.

This testimony asks your committee to consider carefully when that monstrosity starts to look like a crime or even a crime against humanity.

This testimony presents a French precedent for domestic criminal liability of state actors, compares the American approach (Part I), and then examines the American response as a matter of international criminal law as a crime against humanity (Part II).

I. DOMESTIC CRIMINAL LIABILITY

A. French Precedent of a criminal case against high officials for acts and omissions in an epidemic

From the start of the AIDS epidemic around 1983, one of the most dramatic events in the course of that epidemic was the case of the French government response with respect to blood transfusion testing for HIV/AIDS. Families of hemophiliacs accused the former Prime Minister, the former Minister of Social Affairs and National Solidarity, and the former Secretary of State for Health of the crimes of involuntarily causing the death or involuntarily causing the poisoning of certain hemophiliac persons who received transfusions of non-heated blood infected with HIV during a period in which a heated blood method was available from an American laboratory.

As detailed in the commission for instruction report of the French Court of Justice of the Republic when the decision was made to send some of the cases to the criminal courts, the argumentation might be of interest as we look at the government response to the current COVID-19 pandemic in the United States.

With respect to then Prime Minister, the commission of instruction noted that:

> A head of government who says he is determined to act against what he considers an epidemic, who announces that the testing of blood donors would permit the avoidance of several hundred people each year developing AIDS, cannot argue he was diligent while tolerating that the contamination of the receivers of the blood be prolonged for several weeks, with the sole reason being the French manufacturer of the test was not yet operational.[“] We are forced to note, contrary to appearances, that the approach taken by [the then Prime Minister] with respect to the testing

> matter does not correspond to what we have the right to expect in terms of public health."[1]

While rejecting responsibility for the Prime Minister on this second point of the delay with the diffusion of the heated blood, the commission of instruction was also very tough on the Minister of Social Affairs and National Solidarity and Secretary of State for Health, to wit:

> [T]heir negligence, inattention, and lack of prudence and security, their lack of response to an order on the selection of blood donors, the lack of prohibition of collection of blood from risky populations, created conditions that made the injury of the hemophiliacs in question possible. With respect to the lack of follow-up with those who had received transfusions (to see whether they had or had not been contaminated in the months of high risk), the magistrates noted that the Minister of Health having abstained from taking any initiative to make these follow-up interviews mandatory must bear the liability in part for these indirect contaminations which could have been easily avoided."[2]

Due to the statute of limitations, only a subset of the cases presented were allowed to go forward. Ultimately, the highest court in France, the Cour de Cassation, weighed in on the matter in deciding to acquit the former Prime Minister and the former Minister of Social Affairs and National Solidarity and condemn the Secretary of State for Health on one count. However, due to the 15 year passage of time since the events, they ordered him not to have any punishment.

B. The analysis of the highest court in France

The highest court in France, the Cour de Cassation noted that the French Constitution at Article 68-1[3] confirmed the autonomy of the criminal liablity of members of a government in cases of serious crimes or

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[1] Eric Favereau and Dominique SIMONNOT — 21 juillet 1998, Procès du sang contaminé. Trois ministres responsables. L'arrêt de renvoi précise les faits imputés aux ministres. Fabius est directement mis en cause (Contaminated blood case: Three ministers liable: The order of referral ruling specifies facts implicating government ministers, former Prime Minister Fabius accused), Libération, July 21, 1998 https://urldefense.com/v3/__https://www.liberation.fr/societe/1998/07/21/proces-du-sang-contamine-trois-ministres-responsables-l-arret-de-renvoi-precise-les-faits-imputes-au_242079__;!!LoBwcKfm!1WAN9WIhWiSbhIdVmdyfSK3fQknSGdRsk03qL2F8qnzF4IaLHt_l2ypdaHjNV31AGak$

[2] Eric Favereau and Dominique SIMONNOT — 21 juillet 1998, Procès du sang contaminé. Trois ministres responsables. L'arrêt de renvoi précise les faits imputés aux ministres. Fabius est directement mis en cause, Libération, July 21, 1998 https://urldefense.com/v3/__https://www.liberation.fr/societe/1998/07/21/proces-du-sang-contamine-trois-ministres-responsables-l-arret-de-renvoi-precise-les-faits-imputes-au_242079__;!!LoBwcKfm!1WAN9WIhWiSbhIdVmdyfSK3fQknSGdRsk03qL2F8qnzF4IaLHt_l2ypdaHjNV31AGak$

[3] **Article 68-1**
Members of the Government shall be criminally liable for acts performed in the holding of their office and classified as serious crimes or other major offences at the time they were committed.
They shall be tried by the Court of Justice of the Republic.
The Court of Justice of the Republic shall be bound by such definition of serious crimes and other major offences and such determination of penalties as are laid down by statute. Constitution of 4 October 1958 available at https://www.conseil-constitutionnel.fr/en/constitution-of-4-october-1958

other major offences committed by them during their office without making a distinction between voluntary and involuntary infractions.

It noted also that it was not for a Court - whose role is to apply the positive law - to evaluate whether it is appropriate to apply such law.

It further noted that political choices are for the legislature, and the Court in exercising its judicial functions was not to arrogate to itself a role of arbitrator of the French political life without compromising the normal functioning of the institutions of the French Republic.[4]

In particular, the Cour de Cassation made short work of the prosecutor's argument highlighting the risk that ministers in the future would be required to explain their political choices before the Court of Justice of the Republic, with a result of substituting judicial oversight for what should be a subject of democratic oversight. This would create a "regrettable confusion of powers" in subjecting the actions of the executive power to the appreciation of judges.[5]

The Court stated that political liability - even if the idea, its criteria and its implementation were defined specifically, which is not the jurisdiction of the Court – is not exclusive either of civil or administrative liability of the State nor or criminal liability.[6]

C. Return to America: What we can learn from the French

What is instructive in the above French case was that criminal liability was sought and imposed against high government officials for acts and omissions in dealing with the health crisis in that country. The fact that they were high governmental officials at the time they did these acts did not protect them from criminal liability – the French Constitution made that explicit. The fact that they had made policy choices within the scope of their work and would suffer some ill-defined political liability did not make the state immune from civil or administrative liability, nor these ministers immune from criminal liability when those acts and omissions were so devastating for injured and dead citizens.

In the United States no such explicit rule is found in our U.S. Constitution with respect to the criminal liability of high governmental officials. The only specified process in that Constitution is the political process of impeachment which we saw this year which if convicted has the person removed from office and no longer able to hold office in government, but no civil, administrative, or criminal liability.

The Supreme Court in a series of cases going forward from *In Re Neagle*, (131 US 1 (1890)) has provided a form of qualified immunity for federal officers operating in the scope of their authority.[7] And no doubt

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[4] Arrêt du 9 mars 1999 - Cour de justice de la République - | Cour de cassation https://urldefense.com/v3/__https://www.courdecassation.fr/autres_juridictions_commissions_juridictionnelles_3/cour_justice_republique_616/decisions_7973/mars_1999_36751.html__;!!LoBwcKfm!2hhH6aX-ffgBx1txuPUnkNVnbuEj0pGiV06-jsEYvMiM8Qh1toPLti_D5hfE2MBTPb0$

[5] Arrêt du 9 mars 1999 - Cour de justice de la République - | Cour de cassation

[6] Arrêt du 9 mars 1999 - Cour de justice de la République - | Cour de cassation

[7] . Apparently, there is some debate currently in the Supreme Court about addressing aspects of this qualified immunity doctrine. Jay Sweikert, Supreme Court may be preparing to consider several major cases on qualified immunity, Unlawful Shield, A Cato Institute Website Dedicated to Abolishing Qualified Immunity, October 11, 2019 available at https://www.unlawfulshield.com/2019/10/supreme-court-may-be-preparing-to-consider-several-

the same issues of qualified immunity are addressed in various manners by state law and judicial decisions. And such qualified immunity might be extended to government contractors who do work for the government in the current COVID-19 crisis pursuant to an order under the Defense Production Act. In the presence of a federal or state order on how private citizens are to act, it is possible that private businesses might be able to assert compliance with governmental orders in a form of quasi-immunity for the civil and possibly de facto criminal liability.

Having looked at this area of law over the years with respect to criminal prosecutions of high-level governmental officials and a former President for torture and other crimes, without going into too much detail, the path is murky. However, unlike what we see enshrined in French law, through case law or prosecutorial discretion it does appear that there is a path through for such governmental officials or private businesses to escape any criminal liability for their acts or omissions in addressing the COVID-19 pandemic.

D. Enter COVID-19 Immunity Bills

But that murky way through is clearly a concern for business.

At least in Ohio and in Congress[8], there are efforts to pass COVID-19 Immunity Bills. The Ohio version of such a bill (Ohio Senate Bill 308) ostensibly seeks to revise the law governing immunity from civil liability and professional discipline for health care providers during disasters or emergencies, to provide qualified civil immunity to service providers providing services during and after a government-declared disaster, and to declare an emergency. The act is to apply retroactively to the date a disaster is declared by the federal government, state government, or political subdivision of the state.

One can question whether it is appropriate to provide such immunity to health providers extracting them from the ordinary duties of care required of them in their addressing those who come to them.[9]

But, this bill goes farther.

Tucked in the end of the bill is a definition of services and service providers that encompasses pretty much all of the private or non-profit activity in Ohio. Article A(4) defines "Services" as meaning “providing lodging, sheltering, groceries, pharmaceutical products, fuel products, other products, retail merchandise, manufacturing, care, religious or nonprofit services, or other acts that are part of or outside the normal scope of a person's business or nonprofit activities during the period of a declared disaster and not more than one hundred eighty days after the end of the period of the declared disaster.” The bill goes on to define “service provider” in Article A (5) "Service provider" means any person providing the services described in division (A)(4) of this section, including that person's owner, officer, director, employee, or agent.[10]

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major-cases-on-qualified-immunity/; Andrew Chung, Lawrence Hurley, Jackie Botts, Andrea Januta, Guillermo Gomez, Special Report: For cops who kill, special Supreme Court protection, Reuters, May 8, 2020 available at https://www.reuters.com/article/us-usa-police-immunity-scotus-specialrep-idUSKBN22K18C?taid=5eb548a563ff0700018722c5.

[8] See TESTIMONY OF PROFESSOR DAVID C. VLADECK GEORGETOWN UNIVERSITY LAW CENTER BEFORE THE SENATE JUDICIARY COMMITTEE EXAMINING LIABILITY DURING THE COVID-19 PANDEMIC available at https://www.judiciary.senate.gov/imo/media/doc/Vladeck%20Testimony.pdf

[9] The only true beneficiaries would be the bad actors. See Vladeck Testimony, Id.

[10] Ohio Senate Bill 308 available at https://urldefense.com/v3/__http://search-prod.lis.state.oh.us/solarapi/v1/general_assembly_133/bills/sb308/IN/00?format=pdf__;!!LoBwcKfm!2sTo-

And all these persons are granted immunity except if it is established by clear and convincing evidence that the service provider's act or omission is intentional, willful, or wanton misconduct. Thus, the preponderance of the evidence standard of proof in civil matters is thrown out for a higher standard. And this higher standard in these civil cases of clear and convincing evidence coupled with the kinds of intentionality, willfulness, or wanton disregard seems to exclude civil liability for recklessness.

As to a criminal case, given this proposed law and prosecutorial discretion if a relevant statute were present, the kind of criminal case that was brought in France would appear highly unlikely to prosper in any but the most extreme case against a person in a public or private entity in Ohio. And if a version of this Ohio draft were passed at the federal level, such cases would be unlikely to prosper for the same reasons across the United States.

In sum, on the domestic front, through a combination of executive, legislative and judicial approaches at both the federal and state level the ordinary citizen that is sickened or dies due to the act or omissions of public or private entities risk being at an impasse in seeking civil or criminal accountability of either public or private actors for how they treat ordinary people in the COVID-19 pandemic.

II. ENTER CUSTOMARY INTERNATIONAL CRIMINAL LAW APPLICABLE TO THE UNITED STATES

All of the analysis above of the French and American experience has been done in the domestic law contexts of each country.

What about international law?

First we start with one of the cardinal rules of international law that no state can invoke the provisions of its internal law as justification for its failure to perform a treaty[11] which is also a customary international law rule.

In such a view, the combination of acts and omissions of the executive, the legislator in such immunity legislation or otherwise, and the judiciary in the application of the various doctrines of qualified immunity at the state or local level or otherwise all form together the domestic state response to the COVID-19 pandemic.

One way of thinking about this situation is to consider customary international criminal law rules on crimes against humanity that are applicable to the United States.

I recognize that the United States is not a party signator of the Statute of the International Criminal Court. And there is a debate as to what extent the Statute of the International Criminal Court states customary international criminal law rules (crystallizes rules applicable to all states) or creates new rules (progressive

aQngYSi0eju8vAh4-2PB78orw4ZT3un4L9MI5wzWZkcRoMbdr47489cmk75XGg$; This bill appears to be part of a wider effort, See Kery Murakami, Colleges Worry They'll Be Sued if They Reopen Campuses, Inside Higher Ed, May 15, 2020 available at https://www.insidehighered.com/news/2020/05/15/colleges-seek-protection-lawsuits-if-they-reopen ; INSIGHT: Business Immunity Will Prevent Covid-19 Litigation Crisis, Bloomberg Law, April 30, 2020 available at https://news.bloomberglaw.com/corporate-governance/insight-business-immunity-will-prevent-covid-19-litigation-crisis-7

[11] Article 27, Vienna Convention on the Law of Treaties, available at https://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf;

development) that bind only signatories.[12] Prudence is encouraged in approaches to identify customary international criminal law rules and prosecute actors.

> "For International practitioners should be cautious in the identification of customary rules in international criminal law, so as to prosecute and punish suspects of international crimes without endangering the principle of legality."[13]

That being said, the Statute of the International Criminal Court defines a crime against humanity as any of a series of acts when committed as part of a **widespread or systematic attack** directed against **any civilian population**, with knowledge of the attack. Those acts include persecution against any **identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender, or other grounds that are universally recognized as impermissible under international law** as well as other inhumane acts of a similar character **intentionally causing great suffering, or serious injury to body or to mental or physical health**. An attack directed against any civilian population is further defined as a course of conduct involving the **multiple commission of acts referred to in that section against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack** [emphasis added].

Let us think out loud about some of the civilian populations toward which a widespread or systematic attack might be found in the COVID-19 pandemic response of the federal and state level so far. There may be more.

Racial Minorities: While in US domestic law we tend to shy away from the effect of policy and focus on the intent of policy, international law recognizes both purpose and effect. The disproportionate sickness and death toll among racial minorities that appears widespread forms another civilian population under attack by the sum of the responses at all levels.

Workers: if workers are made to "volunteer" to go back to work or face the loss of unemployment and/or CARES Act benefits where their workplace is a death trap such as in the meat industry, then federal, state, local, and business interests are committing such a widespread or systematic attack on those workers. If the local or national worker protection laws as applied do not, in fact, protect workers but endanger them and if the courts turn a deaf ear to the pleas of these workers in harm's way they are thrown to the wolves. For those workers at grocery stores, gas stations, medical personnel, and any other type of work where COVID-19 can easily spread, the same is true. A significant number of those low-wage workers come from communities of color.

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[12] Marko Milanovic, Is the Rome Statute Binding on Individuals? (And Why We Should Care) Journal of International Criminal Justice, Volume 9, Issue 1, March 2011, Pages 25–52,available at https://doi.org/10.1093/jicj/mqq070; Gennady M. Danilenko Wayne State Universtiy School of Law, The Statute of the International Criminal Court and Third States, Michigan Journal of International Law Michigan Journal of International Law Volume 21Issue 3 2000, available at https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1390&context=mjil; Yudan Tan, The Identification of Customary Rules in International Criminal Law, available at https://www.researchgate.net/publication/317996151_The_Identification_of_Customary_Rules_in_International_Criminal_Law

[13] Yudan Tan, The Identification of Customary Rules in International Criminal Law, available at https://www.researchgate.net/publication/317996151_The_Identification_of_Customary_Rules_in_International_Criminal_Law

Elderly: given that the specific needs of the elderly in assisted care-living and the workers there have not been met so that we find significant clusters of death at these places, this group of vulnerable population form another type of victim. Even in assisted care living facilities where the elderly residents are not from communities of color, in my experience the staff is predominantly made up of persons from communities of colors who are endangered by the lackadaisical response so far.

Prisoners and persons in detention centers: Clusters of COVID-19 cases for workers and detainees in these places are being found each day. The significant percentage of persons incarcerated and staff from communities of color are clearly endangered under the current lackadaisical response so far.

Customers and students: With the possibility of the suspension of the normal rules of civil and likely criminal liability, any customer or student who gets sick or dies becomes a potential victim of the acts or omissions by the executive, legislative or judicial powers at the state or federal level and the public or private entity immunity. It should be noted that this appears to be a more amorphous group then the other four here to be a true civilian population, but the point is that members of communities of color form parts of both these groups.

As if to emphasize its culpability, the federal government has provided denialism, weak help in addressing the pandemic, and inconsistent and contradictory guidance. The reopening states have ignored even the correct guidance of the federal government and some are hiding statistics of infections as they play with fire. Local communities have acted like the Amity mayor in Jaws trying to keep the beaches open in the face of a clear and present danger. And the business community, maximizing shareholder value, has engaged in price arbitrage on PPE, taken the CARES Act money and run, and now seek that Congress and states shield them from any liability to customers or workers for reopening,

The picture is of course not all one sided for there are many laudable persons and entities at all these level who are doing what they can to attempt to protect these vulnerable populations from the monstrous response.

If local law possibilities do not provide relief or only piecemeal relief in the context of a worldwide pandemic, if we care about workers, the elderly, racial minorities, prisoners and detainees, and potential other civilian populations such as customers and students in more than a lip-service sense, we might consider taking a more international or transnational view of the human rights violations that may rise to be crimes against humanity that are leading to their sickness and death for profit. That, international view, even without criminal prosecution can then help us crystallize our understanding of what is going on.

In fact, independent of such criminal liability through prosecutions or applicability of customary international criminal law, it might be possible to turn on its head the analysis of the French Cour de Cassation and think of these customary international criminal law rules as defining a form of political liability. That redefinition then might help galvanize efforts within the United States to understand the multilevel process that intentional or not risks leaving so many members of communities of color and beyond to sicken and die at the hands of COVID-19.

The advantage of this international criminal law approach is that one can begin to think through systematically the effect on human endangerment of a number of what might appear to be at first blush isolated events. Here are some examples.

Voting: The Wisconsin primary end result of the Executive, Legislative and Judicial process at the state level and the US Supreme Court at the federal level was to place voters before a Hobbesian choice between exercising their right to vote and risking their health. In the Ohio primary on March 17, the same kind of

Hobbesian choice was presented to voters who had to decide whether to risk their health to early vote at polling locations. For those who (as was their right) decided to take the risk to their health of voting on the primary day, they were confronted with the fact that the primary election went on but the polling places were closed.

Accurate COVID-19 data: The strange situations in some states with respect to the manner in which data on COVID-19 infections or deaths have been manipulated (alleged in Georgia and Florida), or made confidential (Florida) is a concern. The end result is that the ordinary citizen from a community of color or otherwise is unable to have accurate information about what is the health risk they face, even while those states seek to reopen and get them back to work. The same concern arises with respect to the continued accuracy of the data being provided by the CDC. Persons on unemployment are pushed to choose between protecting their health and "volunteering" to go back to work or lose their benefits. Such decisions may decrease burdens on state coffers while placing squarely the risk of endangerment on those workers. The apparent lies and deceit about the numbers bring the situation from a mere failure to act to a willful and deliberate series of actions – from negligent homicide, to manslaughter or reckless endangerment.

Immunity legislation: As described above, someone who risks falling sick and/or dying is placed before another type of untenable Hobbesian choice of risk their health by going to work or starve. And the bad actors are the one's rewarded as they get immunity rather than accountability.

Inconsistent guidance on Masks: Over the past few months the guidance with regard to the wearing of masks has been confusing. At one point, the guidance of the federal government was that masks were not necessary. Later on in the pandemic the guidance was that masks are useful, but again done in a voluntary manner. Underneath this shifting guidance appears to be a basic problem of rationing the appropriate masks and PPE to prefer health care workers to the detriment of the rest of the population and especially the most vulnerable groups described above. And the principal reason for such rationing was the lack of ramping up of production by the federal government back in January or February 2020. The fact that White House staff are being tested and now wearing masks shows that the administration knows full well the consequence.

Weak guidance on specific industries: As an example in the meat industry where numbers of workers are from communities of color, **a seven-level set of word games** leads to worker endangerment NOT worker protection. And so the rules and structures to protect worker health and safety end up actually countenancing worker sickness and death.

Level one is the April 28, 2020 Executive Order on Delegating Authority under the DPA(Defense Production Act) with Respect to Food Supply Chain Resources During the National Emergency Caused by the Outbreak of COVID-19. Among the reasons given in the Executive Order for the action were (1) the outbreaks of COVID-19 among workers at some processing facilities that have led to the reduction of some facilities' production capacity and (2) recent actions in some states that have led to the complete closure of some large processing facilities. In response to these developments, the executive order states that: such actions may differ from or be inconsistent with interim guidance recently issued by the Centers for Disease Control and Prevention (CDC) of the Department of Health and Human Services and the Occupational Safety and Health Administration (OSHA) of the Department of Labor entitled "Meat and Poultry Processing Workers and Employers" providing for the safe operation of such facilities.

Level Two is if one turns to the CDC and OSHA guidance that has been provided to meat-packing plants, one sees a series of what can only be termed mealy-mouthed phrases on worker safety. Reading the executive order and the CDC/OSHA guidance together, one sees that the order is concerned with differences or inconsistencies between what is happening at the meat-packing plants and the guidance. This

would seem to be a valid point. However, the guidance has so much precautionary language that it leaves a significant amount of discretion to the management of the meat-packing facility as to how it will protect the workers. This problem was discussed at length on the Rachel Maddow Show on April 28, 2020. And, so workers get sick and workers die if they go back to work.

Level Three is that a company that reopens or increases production may say to laid-off workers that it is seeking volunteers to come back. That way, the worker who "volunteers" is in some sense assuming a risk in going back to the workplace, thus providing a defense for the company if anything happens to them on the worksite. With respect to volunteering, the unemployed worker is faced with the Hobbesian choice between protecting their health or going back to an unhealthy workplace where a COVID-19 pandemic is rampant.

Level Four is if there is a job available and a worker does not take it, there are reports that some governors are saying that the unemployed worker will no longer be entitled to unemployment compensation and maybe even more. Under the CARES act, these workers are almost certainly getting more in unemployment benefits than they would have in wages. The CARES act created the Federal Pandemic Unemployment Compensation (FPUC) program, which provides a fixed or flat amount of $600 to state-level unemployment benefits. Because the FPUC payment is a defined amount, the result is that workers with wages of about $55,000 a year or less will actually receive more in unemployment benefits than they would have in wages. Each state's unemployment benefit level is different, some states have extremely low unemployment benefits. While the numbers change by state, the same issue applies everywhere.

The FPUC benefit expires on July 31, 2020, so the impact of the program is relatively short-lived. The Department of Labor issued guidance to the states earlier this week indicating that a laid off or furloughed employee who refuses to come back to work in order to keep drawing the higher unemployment benefits would be disqualified from receiving benefits at all (hat tip to Robert C. Rice for this line of analysis). So not only is the Hobbesian choice one about whether to protect one's health (and under community spread those in your family and those with whom one has contact) or go to an unhealthy workplace but also, if one chooses to protect one's health one loses money thus endangering one's ability to feed oneself and one's family.

Level Five is that if by some happenstance the worker gets sick and/or dies, there may be arguments about whether the worker actually contracted COVID-19 at the workplace or out in the community as a way to deny liability for the worker's sickness and/or death**.** And because people with COVID-19 may die of underlying problems that are made more severe by COVID-19, even if COVID-19 can be proved to have been contracted at the plant, the question will be raised as to whether a given sickness or death is a "true" COVID-19 sickness or death.

Level Six is that with reopening being subject to the Defense Production Act, the plant could assert a form of governmental contractor qualified immunity (similar to the Agent Orange cases from the Vietnam era) or in the torture cases.

Level Seven is as noted above, if the first six levels are not good enough, there is an effort by business groups to get Congress and states to pass legislation to limit liability for COVID-19 for reopening.

Pernicious COVID-19 Contractual waivers: As recently reported, with the reopening of the New York Stock Exchanges, persons on the floor are required to sign what is called a COVID-19 waiver (https://www.nbcnews.com/business/markets/new-york-s-famed-stock-exchange-prepares-reopen-masks-waiver-n1214561). The text of such a waiver is unclear but its effect pernicious. In the absence of clear state or federal public policy delineating that such waivers are void as against public policy, it is not clear

they will be unenforceable. They are problem throughout the economy, I have been made aware of such waivers being required of parents of children with disabilities in order to continue the accommodations to which they are entitled under the Americans with Disabilities Act (ADA). Parents desperate to have their children learn are put in a spot where to get what their child needs they have to put their child in front of a COVID-19 risk. In situations of unequal bargaining power as experience by employees from communities of color, the end result is to put them at further risk for contracts and torts, and potentially sideline other statutory claims. Moreover, with the ubiquity of arbitration clauses, the likelihood is that private arbitral tribunals and not courts will be making determinations about such clauses which should be a concern as the private arbitral tribunals are faced with a presumption in favor of contracts being enforced that can be rebutted only by a clear public policy. Such a clear public policy may be very hard to discern in the current confusion.

Assisted care living facility patient takeback immunity: The limitation of liability for assisted care facilities in New York State in order to make them take back their residents who were found to be positive for COVID-19 might on the one hand be seen as a positive development. On the other hand, the reasons that these elderly persons became sick possibly due to the manner of management or mismanagement of such assisted care living facilities is swept under the rug except, if at all, for the most egregious cases.

III. CONCLUSION

It is the combination of these hundreds or thousands of local, state and federal, public and private responses that create the monstrous mosaic of the human endangerment in the COVID-19 pandemic here in the United States.

One can go on and on with thinking about what we learn in the news each day and see the intentionality of the acts and omissions done at each step of the way. On each occasion, the ordinary citizen particularly from communities of color is placed before a difficult Hobbesian choice of protecting their health or venturing out in some manner.

And, beyond the United States, if we look to what is happening in Sweden and Brazil, we can see further examples of the devastating impact of reckless governmental action anywhere on vulnerable populations like the communities of color here in the United States.

There is no doubt, that if the case is bad enough, government neglect, combined with an affirmative government action that endangers a civilian population, could slip out of the realm of bad policy, into human rights abuses, and thereafter into international crimes.

Please make sure that the double security of the rights of the people touted by James Madison, is not flouted in the COVID-19 pandemic, particularly for the members of communities of color as well as all Americans.

Toledo, May 26, 2020