Color of COVID and Gender of COVID: Essential Workers, Not Disposable People

Catherine Powell

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Catherine Powell†

**Abstract:** We live in a viral moment—a moment of interconnected pandemics. The COVID-19 crisis provides a window into the underlying pandemics of inequality, economic insecurity, and injustice. In fact, the viruses of sexism, racism, and economic instability are pre-existing conditions of an unjust legal system—baked into our nation at the Founding in the shadow of chattel slavery, female disenfranchisement, property-based voting rights, and Native American dispossession. COVID-19 has not created these conditions, but instead has amplified the persisting inequalities upon which the nation was built.

At the same time, the current viral moment reveals that vulnerability is universal—inherent in being human—making Martha Fineman’s vulnerability analysis particularly timely for theorizing a framework that manages our common vulnerabilities, even against a backdrop of differential vulnerability. Commentators have observed, “coronavirus doesn’t discriminate . . . But America does.” Even as COVID-19 has unmasked deeply embedded structural inequalities, this moment of interlinked pandemics of coronavirus, inequality, and economic precarity affects us all, albeit disparately, and has torn at the very fabric of the social contract we owe one other and, in fact, depend on.

Drawing on insights from Derrick Bell’s notion of “interest-convergence” and Ruha Benjamin’s idea of “viral justice,” I propose a new concept, “viral convergence.” Both descriptive and prescriptive, I offer the idea of viral convergence as a way not only to analyze this moment of interlinked

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crises, but also to utilize it productively. The road ahead calls for new legal paradigms and political coalitions that offer both universal solutions (for our shared vulnerabilities) and more targeted solutions (for disparate impacts). As Arundhati Roy suggests, we must both acknowledge the tragedy while also utilizing this crisis for transformational change by viewing the COVID-19 pandemic as a “portal” to a more just and equal world.

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INTRODUCTION

“Women are living in a world that’s made for men... and it’s far worse for women of color.”1

“Other countries have social safety nets; the U.S. has women.”2

We live in a viral moment—a moment of interconnected pandemics. The COVID-19 crisis provides a window into the underlying pandemics of inequality, economic insecurity, and injustice.3 In fact, the viruses of sexism, racism, and economic instability are preexisting conditions of an unjust legal system4—baked into our nation at the Founding in the shadow of chattel slavery, female disenfranchisement, property-based voting rights, and Native American dispossession. COVID-19 has not created these conditions, but instead has amplified the persisting inequalities upon which the nation was built.

As the novel coronavirus (SARS-CoV-2)—the underlying virus that causes the coronavirus disease 2019 (COVID-19)—has become a global pandemic, like other viruses, the novel coronavirus knows no boundaries. It is a universal problem across geography, race, gender, class, etc.


3. For preliminary analysis of these interlinked pandemics, see Catherine Powell, “Viral Convergence: Interconnected Pandemics as Portal to Racial Justice, JUST SECURITY (Aug. 5, 2020), https://www.justsecurity.org/17142/viral-justice-interconnected-pandemics-as-portal-to-racial-justice [https://perma.cc/RR8V-893U] (discussing the connections between the pandemics of poverty and policing, for example, as demonstrated by the fact that George Floyd—and earlier, Eric Garner—was arrested for a crime of poverty, highlighting the misguided ways that the United States wrongly addresses economic insecurity through the criminal justice system). See also Sandro Galea, Opinion, The Coronavirus Pandemic Will Turn Into a Pandemic of Poverty Unless We Act Now, WASH. POST (May 26, 2020), https://www.washingtonpost.com/opinions/2020/05/26/coronavirus-pandemic-will-turn-into-poverty-pandemic-unless-we-act-now [https://perma.cc/Q8V8-F6L8] (discussing how the coronavirus pandemic would pave the way for a pandemic of poverty in the absence of government policy to address rising unemployment and economic insecurity); Peter Edelman, NOT A CRIME TO BE POOR: THE CRIMINALIZATION OF POVERTY IN AMERICA (2017).

However, COVID-19 does not affect us all equally. This Article explores how the coronavirus interacts with other viruses—the viruses of sexism and racism in particular. As British Professor Iyiola Solanke notes, “There are currently two viruses causing death and destroying lives around the world: one is coronavirus, the other is discrimination.”5 Building on Solanke’s work, I am interrogating how these two viruses interact with (and amplify) each other, and what lawmakers should do to respond. Indeed, like the coronavirus, the virus of discrimination can lead to death, directly or indirectly. The deaths of Breonna Taylor, George Floyd,6 and others demonstrate the fatal outcomes of Sleeping While Black, Breathing While Black, Living While Black. While Solanke’s predominant focus is on race, her analysis can be applied to gender and other forms of discrimination as well.

At the same time, the current viral moment reveals that vulnerability is universal and “inherent in the human condition,” making vulnerability analysis particularly timely for analyzing potential solutions to our interconnected pandemics.7 In theorizing a “vulnerability thesis” in the pages of this Journal, Professor Martha Fineman offers a compelling framework “to manage our common vulnerabilities,” even against a backdrop of differential vulnerability.8 As we emerge from the Trump presidency, commentators have observed, “coronavirus doesn’t discriminate . . . But America does.”9 Even as COVID-19 has unmasked deeply embedded structural inequalities, this moment of interlinked pandemics of coronavirus, inequality, and economic precarity affects us all, albeit disparately, and has torn at the very fabric of the social contract we owe one another and, in fact, depend on.10


8. Fineman, The Vulnerable Subject, supra note 7.


10. From controversies over face masks and vaccine requirements to disagreement over stimulus relief and infrastructure investment, the United States is involved in multiple debates concerning what we owe each other. As an example of one such controversy, during the summer before his re-election defeat, President Trump issued a set of executive orders, ostensibly pandemic-related stimulus relief, but which
To theorize a way forward—taking a page from Derrick Bell’s notion of “interest-convergence”\textsuperscript{11}—I propose a new concept, “viral convergence.”\textsuperscript{12} Both descriptive and prescriptive, I offer the idea of viral convergence as a way to not only analyze this moment of interlinked crises, but also to advance a theory of justice based in our interconnected interests in this viral moment. The road ahead calls for new legal paradigms and political coalitions that offer both universal solutions (for our shared vulnerabilities) and more targeted solutions (for disparate impacts).

This pairing of universal and targeted ways of addressing our interlocking pandemics maps onto existing challenges and initial responses, which have combined laudable universal solutions with, at times, unfortunate, misguided (as opposed to beneficial), targeted responses. For example, once COVID-19 restrictions, such as wearing face masks, were adopted ostensibly with universal application in mind to mitigate the coronavirus, such restrictions unfortunately suffered from targeted, unequal enforcement in New York: the New York Police Department violently arrested individuals in communities of color, while politely handing out face masks to white sunbathers in Central Park.\textsuperscript{13} Additionally, as discussed further in Part I, social distancing measures were recommended for us


12. For a brief introduction of the idea of “viral convergence,” \textit{see} Powell, \textit{supra} note 3 (combining the insights of Benjamin and Bell and noting, “Hopefully, this return to the idea of human rights— including the indivisibility of rights and addressing harm at the intersection of identities—can provide a platform for . . . a ‘viral convergence’ of demands for the racial and economic justice the United States so desperately needs.’


Note also the disparate response to BLM protesters (and curfew violators) and the armed protesters who demonstrated against face masks, quarantine measures, and other COVID-19 restrictions from which we ostensibly needed to be “liberate[d],” according to Trump tweets. Mary McCord, \textit{Trump’s ‘LIBERATE MICHIGAN!’ Tweets Incite Insurrection. That’s Illegal}, WASH. POST (Apr. 17, 2020), https://www.washingtonpost.com/outlook/2020/04/17/liberate-michigan-trump-constitution [https://perma.cc/HH3U-4ZYU].
all to mitigate the health crisis, yet have created a corresponding economic crisis with a particularly dire impact on women and people of color—and especially women of color—further entrenching inequality. This comes as no surprise. Since the Founding, identity, space, and place\textsuperscript{14} have cemented social status—whether, for example, through Jim and Jane Crow\textsuperscript{15} or the public/private dichotomy in law.\textsuperscript{16}

More specifically, in the midst of COVID-19, this Article focuses in particular on the labor dimensions of these twin crises—health and economic—for women of color, building on what I call the “Color of Covid” and “Gender of Covid.”\textsuperscript{17} I coined these terms in earlier, shorter interventions to document and investigate in real time what I view as race and gender justice paradoxes of the pandemic. Since women of color sit at the intersection of the raced and gendered dimensions of COVID-19’s health and economic challenges, these women are central to the solution. Thus, I utilize both race and gender as lenses once again, but here I challenge feminists to reconceive the struggle for women’s rights in ways that better center race and economic insecurity. Such a reconceptualization would benefit from the broader racial reckoning that is underway, as demonstrated by the largescale protests in support of Black Lives that emerged in the summer of 2020.

Taking the virus and discrimination analogy to its logical conclusion, Solanke offers a public health strategy for fighting the virus of discrimination. She notes that in the public health context, “[i]nterventions to reduce or remove risks in institutions and the environment are the norm rather than the exception;

\textsuperscript{14} Elise C. Boddie, \textit{Racial Territoriality}, 58 UCLA L. REV. 401 (2010) (drawing on insights from social science, Boddie examines how space and place have racial identity and meaning “based on socially engrained racial biases regarding the people who inhabit, frequent, or are associated with particular places and racialized cultural norms of spatial belonging and exclusion”).

\textsuperscript{15} For discussion of “Jane Crow,” see SERENA MAYERI, \textit{REASONING FROM RACE} (2014) (discussing Pauli Murray’s role in developing analytical rubric of “Jane Crow” based on the “Jim Crow” legal framework).

\textsuperscript{16} For a reflection on the centrality of privacy in feminist theory, see Carole Pateman, \textit{Feminist Critiques of the Public/Private Dichotomy, in PUBLIC AND PRIVATE IN SOCIAL LIFE 281, 281 (S.I. Benn & G.F. Gaus eds., 1983)} (“The dichotomy between the private and the public is central to almost two centuries of feminist writing and political struggle; it is, ultimately, what the feminist movement is about.”). \textit{But see KHIARA BRIDGES, THE POVERTY OF PRIVACY RIGHTS} (2017) (arguing that poor mothers are deprived of privacy rights).

the public or social aspects of the epidemic must be addressed in order to break the chain of infection”—an approach that could be adopted “to more effectively tackle discrimination and perhaps even eradicate it.”19 In light of the preexisting health as well as preexisting discrimination conditions, my Article builds on Solanké’s analogy, but more firmly locates its analysis at the intersection of race, gender, and economic insecurity. This approach recognizes and takes advantage of what I call the “viral convergence” of those affected and, thus, of the value of developing both universal and targeted legal solutions grounded in diverse coalitions.

Besides outlining the conceptual contours of the viral convergence idea, this Article seeks to explain what makes this moment potentially different, based on the diverse political movement that arose in the summer of 2020 in response to our pandemics of policing, poverty, and discrimination. In addition to offering a descriptive account of our interlinked pandemics of coronavirus and discrimination, I provide a prescriptive account identifying an “interest-convergence”19 toward building solutions—whether we conceive of these solutions in public health terms, as Solanké, or in justice terms, as Princeton sociology professor Ruha Benjamin, who calls for “viral justice”.20 At the same time, this Article builds on the work of scholars who have theorized about popular constitutionalism, including new important work on the entanglement of social movements and law.21

By focusing on the intersection of race, gender, and economic insecurity, this Article also honors and builds on the legacy of important scholars whose path-breaking work has established intersectionality as a methodological framework for law and related disciplines.22 In many ways, feminist theorists

19. See generally Bell, supra note 11.
have sought to “refashion both feminism and law to speak to the position of all peoples at the bottom, on the margins, and in the intersections, and not seek only the assimilation of privileged people at the top.” As historian Martha Jones reminds us, by “pivoting the center”—and centering our gaze on women of color—we can bring multiple voices into view and empower coalitions between people of color, Whites, women, and men.

Both historically and currently, race has been used to fracture women’s efforts at coalition politics and our understanding of women’s rights. Beyond dog whistles, during his time as president, Donald J. Trump used a bullhorn to mobilize raced and gendered tropes in multiple contexts—including, inter alia, immigration, criminal justice, welfare, voting rights, and housing, as well as in


25. For a more detailed account of this insight, see Powell & Rich, The “Welfare Queen” Goes to the Polls, supra note 22.


27. For a discussion of Trump’s use of race and gender stereotypes in the immigration and criminal justice context, see, e.g., Catherine Powell, Race, Gender, and Nation in an Age of Shifting Borders: The Unstable Prisms of Motherhood and Masculinity, 24 UCLA J. INT’L L. & FOREIGN AFF. 133 (2020), which examines how race and ethnicity have been used to justify restrictions on both female and male immigrants—at the intersection of race, ethnicity, and gender—in the context of the Trump Administration’s family separation, third-country asylum, and criminal justice (in the last case, by conflating immigration and the criminal justice system) policies. See also Leti Volpp, Protecting the Nation from “Honor Killings”: The Construction of a Problem, 34 CONST. COMMENT. 133, 136-37 (2019), which critiques the focus on “honor killings” in the Trump travel ban as a “cynical deployment of feminist concerns as a proxy for xenophobic exclusion[,]” where “[t]he project of ‘saving women’ is knitted into Islamophobia in the United States, with the literal barring of Muslims bodies from entering the United States in the name of purportedly protecting Muslim women from violence.”

For a discussion of Trump transplanting race and gender tropes from the welfare to voting rights contexts, see Powell & Rich, The “Welfare Queen” Goes to the Polls, supra note 22. For a foundational discussion of how race and gender were initially—and continue to be—mobilized to roll back welfare benefits for poor Black and Brown women, see Camille Gear Rich, Reclaiming the Welfare Queen: Feminist and Critical Race Theory Alternatives to Existing Anti-Poverty Discourse, 25 S. CAL. INTERD. L.J. 257, 264-70 (2016) (discussing how the racialized construct of the welfare queen has been strategically deployed by pundits to alienate Americans from political interests and rights claims that could challenge existing exploitative institutional arrangements in American democracy).

Trump additionally invokes race and gender in the context of housing through his false claim that fair housing rules and residential desegregation leads to more crime and lower housing values, though research
the context of pandemic-related economic recovery. To confront the use of race as a wedge issue to divide us, it is in the interest of all women—and all of us who value and benefit from the nation’s founding ideals—to work across our differences and secure new legal frameworks that support the most vulnerable and a more just, feminist future.

Part I examines how gender and racial justice paradoxes are built into the COVID economy as a rubric for understanding the intersectional nature of the linked crises we face. Because the current political, economic, and health challenges call for new legal paradigms, Part II provides a theoretical framework for the road ahead by proposing a new concept: “viral convergence.” Part III applies this theoretical framework to potential policy solutions geared toward our sense of shared vulnerabilities—and corresponding possibilities for shared solutions—while attuned to differential vulnerabilities, recognizing the needs of women of color and other marginalized groups at various intersections. In so doing, the Article envisions renewing our social contract, not necessarily to perfect our union, but, in the words of poet Amanda Gorman:

[W]e are far from polished, far from pristine, but that doesn’t mean we are striving to form a union that is perfect.

We are striving to forge a union with purpose.

To compose a country committed to all cultures, colors, characters and conditions of man.

We lay down our arms so we can reach out our arms to one another.

. . . Let the globe, if nothing else, say this it true.

That even as we grieved, we grew.
We must use this historic moment to grow. As Arundhati Roy suggests, we must both acknowledge the tragedy of COVID-19 while also utilizing this crisis for transformational change—by viewing the pandemic as a “portal” to a more just and equal world.33

I. RACE AND GENDER JUSTICE PARADOXES ARE BUILT INTO THE COVID ECONOMY

In this Part of the Article, I explore how the pandemics of race and gender inequality are magnified by COVID-19’s impact on the labor market. In a CNN opinion piece, Color of Covid: The Racial Justice Paradox of Our New Stay-at-home Economy,34 I coined the term “Color of Covid” to reveal how the COVID-19 pandemic lays bare underlying structural inequalities facing communities of color. Now it is time to further consider the “Gender of Covid”35 and how this intersects with the “Color of Covid.” The pandemic has had a significant impact on women, especially the participation of Black and Latinx women in the labor market. This convergence of race and gender disparities challenges our assumptions about the structure of work and reveals the paradoxes of our emerging stay-at-home economy: an economy in which women and people of color make up the majority of both essential workers and the unemployed.

Section A sketches out the “Color of Covid” in the labor market. Section B examines the “Gender of Covid” at the intersection of race and poverty.

A. The Color of COVID

As I discussed in Color of Covid,36 our emerging stay-at-home economy reveals a two-tiered society: “non-essential” workers, who can work from home, and “essential” workers. Essential workers include not only health care workers and other first responders, but also blue-collar workers, such as grocery clerks,


delivery workers, bus drivers, mail carriers, and warehouse workers.\textsuperscript{37} Within this new ecosystem, a “racial justice paradox”\textsuperscript{38} emerged early on in the pandemic. On the unemployment side of the coin, Blacks and Latinxs were more likely to suffer from job loss due to the impacts of the pandemic on the labor market. On the essential worker side of the coin, both of these groups were overrepresented among essential workers who had to stay in their jobs, particularly lower-skilled positions with greater risk of exposure to the virus.\textsuperscript{39}

In referring to “essential workers,” this Article utilizes the following industry groupings identified by James Brudney and other experts: (1) grocery, convenience, and drug store workers; (2) healthcare professionals and support personnel; (3) public transit workers; (4) janitors and building cleaners; (5) trucking, warehouse, and postal workers; and (6) childcare and social service workers.\textsuperscript{40}

In New York City, the initial epicenter of COVID-19 in the United States, data by zip code revealed that race and income were the strongest determinants of death rates from COVID-19,\textsuperscript{41} even when controlling for age.\textsuperscript{42} Smartphone location data further suggested that residents of the richest neighborhoods fled the City—as these residents were more likely to have second homes or family with extra space as a refuge.\textsuperscript{43}

The racially adverse impact of COVID-19 continues at the time of this writing. The \textit{New York Times} reports that, according to the Centers for Disease Control and Prevention (CDC), Latinxs “have been hospitalized at the highest rate, 4.2 times the rate of whites, with non-Hispanic American Indian or Alaska Native people hospitalized at 4.1 times the rate of whites and African-Americans at 3.9 times the rate of whites.”\textsuperscript{44} As the \textit{Times} article notes:

\begin{itemize}
  \item[\textsuperscript{40}] Brudney, \textit{supra} note 37 (identifying frontline essential workers as those who “produce, process, or deliver vital goods and services at their regular workplaces, interacting with patients, customers, clients, and fellow workers”).
The higher hospitalization rates have been linked to higher positivity rates, as nonwhite Americans are more likely to be essential workers with jobs in the food service industry or home health care, which cannot be carried out remotely and require interacting with the public. These jobs often don’t provide health insurance or paid time off, benefits that enable workers to stay home when sick.

Many people in these communities are also more likely to live in multigenerational households in densely populated communities, where infections spread quickly and easily.45

Native Americans across the country have experienced devastating effects due to crowded living conditions, in part resulting from poverty.46 As a result, COVID-19 has had a disproportionate impact on their health.47 The pandemic has also profoundly affected their livelihoods, as the tribal businesses many depend on for income have come to a complete halt.48

Initially, Asian Americans had not appeared to face disproportionate effects from the pandemic’s impact on the labor market. As of 2019, the unemployment rate for Asian Americans was only 2.8% — even lower than that of Whites.49 However, as National Public Radio reports:

Asian American unemployment soared to 15% in May [2020], and it was still 10.7% in August [2020]— well above the rate of 7.3% for whites and the Latino rate of 10.5%. Only African Americans had a higher jobless rate of 13%.50

In part, geography has played a role, as Asian Americans are concentrated in urban areas such as New York and major cities in California, where the virus has had a significant toll. Occupation is a factor as well. After all, “[n]early a quarter of the Asian American workforce is employed in industries such as restaurants, retail, and personal services such as nail salons.”51 Moreover, new evidence is constantly emerging regarding ways that particular subgroups have

shoulder-an-outsize-share [https://perma.cc/EAV8-XCB2] (reporting on CDC figures tabulated through the week ending Nov. 7, 2020).

45. Id.
50. Id.
51. Id.
been hard hit, such as Filipinos, who make up only 4 percent of nurses in America, yet account for one third of the nurses who have died from coronavirus in the United States.  

Furthermore, Trump’s repeated references to the “China” or “Wuhan” virus have paralleled a disturbing uptick in hate crimes against Asian Americans, particularly elderly and female Asian Americans. Los Angeles’s Chinatown experienced “an earlier and deeper drop in foot and vehicle traffic than the city’s other commercial neighborhoods,” and “[p]eople are avoiding these areas in part because of this myth that somehow Asian Americans are tied in with the spread of the coronavirus,” despite evidence that COVID-19 also came into the United States from Europe, which was the predominant entry point for the virus, at least for New York.  

As regards the focus of this Article, the core racial justice paradox is the duality experienced by Blacks and Latinx, who are both overrepresented on the unemployment rolls and overrepresented among essential workers who must stay at work (particularly in blue-collar jobs such as warehouse workers, Amazon couriers, mail carriers, or poultry plant workers). In the case of poultry plant assembly line workers, who are disproportionately Black and Latinx,

53. ADL, Reports of Anti-Asian Assaults, Harassment and Hate Crimes Rise as Coronavirus Spreads, ADL BLOG (June 18, 2020), https://www.adl.org/blog/reports-of-anti-asian-assaults-harassment-and-hate-crimes-rise-as-coronavirus-spreads [https://perma.cc/JA6R-HKGO] (noting incidents of “being told to ‘Go back to China,’” being blamed for “bringing the virus” to the United States, being referred to with racial slurs, spat on, or physically assaulted” and that “[s]tatements by public officials referring to COVID-19 as the ‘Chinese virus,’ ‘Kung Flu’ or ‘Wu Flu’ may be exacerbating the scapegoating and targeting of the [Asian American Pacific Islander] community.”); Cady Lang, Hate Crimes Against Asian Americans Are on the Rise. Many Say More Policing Isn’t the Answer, TIME (Feb. 18, 2021), https://time.com/5938482/anti-asian-attacks [https://perma.cc/SLN2-9L4C]; Kimmy Yam, There Were 3,800 Anti-Asian Racist Incidents, Mostly Against Women, In Past Year, NBC NEWS (Mar. 16, 2021); https://www.nbcnews.com/news/asian-america/there-were-3-800-anti-asian-racist-incidents-mostly-against-n1261257 [https://perma.cc/97SV-EXEH] (noting the targeting of female and elderly Americans, indicating “the coalescence of racism and sexism, including the stereotype that Asian women are meek and subservient, likely factors into this disparity,” and quoting Russell Jeung, professor of Asian American studies at San Francisco State University, “There is an intersectional dynamic going on that others may perceive both Asians and women and Asian women as easier targets.”); Nicole Chavez, A Woman’s Brutal Attack Exposed a Torrent of Anti-Asian Violence After the Atlanta Shootings, CNN (Apr. 1, 2021), https://www.cnn.com/2021/04/01/us/anti-asians-attacks/index.html [https://perma.cc/NZ92-YAT2] (discussing the recent shooting of Asian American women in Atlanta-based spas, as well as the stereotype of Asian American women being fetishized and hypersexualized).  
54. Horsley, supra note 49 (quoting Paul Ong of UCLA).  
Trump used his emergency powers by executive order, instructing Agriculture Secretary Sonny Perdue, “as he deems appropriate, … to ensure America’s meat and poultry processors continue operations[,]” claiming scarcity of meat and poultry. Further, under Trump, the Occupational Safety and Health Administration (OSHA) was weak in enforcing worker health and safety in these plants, which was devastating for these workers, as noted by former OSHA head, David Michaels, and Gregory Wagner. Jane Mayer indicates that this failure in enforcement and accountability in the poultry industry may have been based on Trump’s cozy relationship with donors in the poultry sector. In addition to failing to seriously enforce worker health and safety, the Trump administration was slow to promote availability of personal protective equipment (PPE), social distancing, or public education concerning the importance of wearing face masks, creating a perfect storm to make workers particularly vulnerable to COVID-19 outbreaks in these poultry plants. As for hazard pay, “A few large companies such as Amazon, Kroger, and Target initiated voluntary hazard pay policies in the first weeks of the pandemic[, but largely] discontinued the pay increases by the end of May.”

57. Id. (noting that closures of these plants “threaten the continued functioning of the national meat poultry supply chain, undermining critical infrastructure during the national emergency”). But see Daniel Hemel, No, Trump Didn’t Order Meat-Processing Plants to Reopen, WASH. POST (May 4, 2020), https://www.washingtonpost.com/outlook/2020/05/04/trump-meat-processing-order [https://perma.cc/J6SR-EU95], which points out that this Executive Order is actually a “paper-thin proclamation with limited legal effect,” as it does not actually order plants to stay open nor, or its own accord, order workers to show up to work, though it was broadly interpreted as such by commentators and non-lawyers who failed to parse the relatively toothless language carefully. Taking a jab at Trump’s notion of what constitutes a national emergency, Hemel notes, inter alia:

Section 101(b) [of the Defense Production Act] applies only to “scarce and critical material essential to the national defense.” While Trump reportedly relies on steak, cheeseburgers and meat loaf for his own sustenance, our service members, law enforcement officers and frontline health workers could defend the nation just fine on dairy, eggs and protein-rich legumes.

58. David Michaels & Gregory Wagner, Occupational Safety and Health Administration (OSHA) and Worker Safety During the COVID-19 Pandemic, 324 JAMA 1389-90 (2020) (noting the pandemic’s “devastating effect” impact on Blacks and Latinx, arguing that “OSHA and the Centers for Disease Control and Prevention have issued unenforceable recommendations for worker protection,” and further that “OSHA does not currently have the tools needed to address workplace-related risks of exposure to and infection with SARS-CoV-2.”), https://jamanetwork.com/journals/jama/fullarticle/2770890 [https://perma.cc/7N5M-BACB]. See also Brudney, supra note 37.
60. Id.
61. Brudney, supra note 37, at 28.
B. The Gender and Color of COVID

A similar duality has played out along gender lines. Within the COVID economy, a gender justice paradox has emerged: women are more likely to be unemployed due to the pandemic’s impacts on the labor market, but they are also overrepresented among essential workers, particularly in lower-skilled work positions. In the United States, one in every three jobs held by women has been deemed essential, and women of color are even more likely to have essential jobs. Often underpaid and undervalued, women dominate in frontline jobs ranging from “the cashier to the emergency room nurse to the drugstore pharmacist to the home health aide.” While part of an invisible workforce, women keep “the country running” and care for those most in need of assistance.

At the same time, while the 2008 recession was referred to as a “mancession,” economist C. Nicole Mason has dubbed the current one a “shecession.” The female unemployment rate rose faster than the male rate; female job losses were steep in part due to their significant representation in “high contact’ service sectors” such as leisure, hospitality, education, and some parts of our healthcare industry—with Black and Latinx women disproportionately affected. In addition, the child care sector, which is

64. Id.
65. Id.
66. Alisha Haridasani Gupta, Why Some Women Call This Recession a ‘Shecession,’ N.Y. TIMES (May 13, 2020), https://www.nytimes.com/2020/05/09/us/unemployment-coronavirus-women.html [https://perma.cc/NWX3-9XTX]. Dubbing the pandemic recession a “shecession,” the article credits C. Nicole Mason, president and chief executive of the Institute for Women’s Policy Research, with this term: I think we should go ahead and call this a “shecession,” said C. Nicole Mason, president and chief executive of the Institute for Women’s Policy Research, in a nod to the 2008 recession that came to be known as the “mancession” because more men were affected. Id.
68. Id.
virtually essential to gender equity in the workforce (and which is mainly staffed by women, particularly women of color), was shuttered by the pandemic.

Complicating matters, women seem to be shouldering the burden of supervising children who are attending school remotely from home. Even pre-pandemic, the disproportionate time women typically invested in child care was one reason for the gender pay gap and so-called mommy track phenomenon. As Claire Cain Miller, who reports on gender and the future of work, predicted at the start of the pandemic, women were spending even more time on child care chores because of the pandemic, and “the repercussions [for women] could worsen.” When children returned to school in September 2020, many attended through remote learning due to the ongoing pandemic. Miller confirmed:

There are about 1.6 million fewer mothers in the labor force this fall than would be expected without school closures, an analysis of employment data shows. While some fathers have left the labor force, there is no statistical association between fathers’ employment and school closures, according to the analysis.

Looking at the 2020 as a whole, women of color are at the center of the story of the pandemic’s impact on job loss. During “the first 10 months of the pandemic, women—particularly women of color—have lost more jobs than men as industries dominated by women have been hit the hardest.” In fact, “since

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February 2020, women as a group have lost over 5.4 million net jobs,\(^76\) roughly 1 million more in terms of net job losses than men.\(^77\) In the month of December 2020 alone, women lost 156,000 jobs, while men gained 16,000 jobs.\(^78\) For women of color, job losses have been especially devastating. In particular, the December 2020 job losses offer “a stark illustration of these trends: Black, Hispanic, and Asian women accounted for all of women’s [net] job losses that month, and 154,000 Black women dropped out of the labor force entirely.”\(^79\)

These disparities are also likely to have a lasting impact on the gender pay gap, which already had a disproportionate impact on Black, Native American, Latina women.\(^80\) While “[t]ypical recessions moderately decrease the gender wage disparity [by 2 percentage points] since they tend to have a greater impact on men . . . a pandemic recession widens the gap by 5 percentage points.”\(^81\)

For those of us in the academy, other reports suggest that male academics found a writer’s retreat in quarantine: their academic paper submissions went up an estimated 50 percent.\(^82\) Female academics did not finding the same writer’s paradise, submitting fewer papers than normal.\(^83\) As the pandemic has made all too clear, women disproportionately bear the professional consequences of child care breakdowns.\(^84\) But in addition to these structural challenges based on gender, because of additional stereotypes and bias based on race, women of color scholars face additional obstacles, including being perceived as “incompetent,”

\(^77\) Boesch & Phadke, *supra* note 75.
\(^78\) Ewing-Nelson, *supra* note 76.
\(^79\) Boesch & Phadke, *supra* note 75.
\(^81\) Jagnannathan, *supra* note 67. (“In the short and medium term, a pandemic recession erodes women’s position in the labor market, first through direct employment losses, and later through the loss in labor market experience brought about by low employment during the recession[]”). However, citing the authors of a working paper by the National Bureau of Economic Research, the article speculates: But in the long-term future, the authors contend, a pandemic recession can actually decrease labor-market gender gaps.
\(^82\) They point to the rise in husbands serving as primary child-care providers, as well as an increase in the amount of time fathers spend on child-care duties in a pandemic recession; these two factors, they say, will “erode social norms that underlie the unequal distribution of childcare between women and men, thus increasing the share of ‘modern’ couples with egalitarian social norms.” *Id.*
\(^84\) Birchfield & Mayshak, *supra* note 69.
as highlighted in the collection of essays in Presumed Incompetent (volume II of which was released during the pandemic).  

For single moms, who are disproportionately Black and Latinx, balancing work and parenting responsibilities at home can be especially challenging. Single parents often depend on extended networks—including grandparents—but are cut off from these circles of support during the pandemic. It took the story of a prominent single white woman, Congresswoman Katie Porter (D-CA), to garner attention to this problem. As the only single mother in Congress at the time, Porter spoke eloquently about the challenges of juggling distance learning for three school-age children at home, while assisting with the national response to the pandemic in Congress. Now that other single mothers have recently been elected to Congress (including a Black member, Rep. Cori Bush (Mo.)), it is beginning to look more like the rest of the country and these leaders are pushing for legislation that responds to single parents.  

An important body of research is emerging about how the pandemic reveals the multiple barriers women of color face. Known for popularizing the term “intersectionality,” Columbia University and UCLA law professor Kimberlé Crenshaw has hosted a series of webinars, “Under the Blacklight,” to expose the impact of the health crisis at various intersections. Along similar lines, University of Virginia law professor Naomi Cahn chose Mother’s Day in 2020 as an apt window to draw attention to the ways in which COVID-19 calls for a closer look at “the connections across gender, race, and class.”

85. See Presumed Incompetent: The Intersections of Race and Class for Women in Academia (Gabriella Gutiérrez y Muhs et al. eds., 2012); Presumed Incompetent II: Race, Class, Power, and Resistance of Women in Academia (Yolanda Flores Niemann et al. eds., 2020).  
II. Viral Convergence: Reconceiving Feminism in Light of Today’s Racial Reckoning

This Part of the Article argues that while Trump used race as a wedge issue, feminists have an interest qua feminists to work across our differences so that we can secure a more just future for all women. Even though this may sound perfectly reasonable in theory, in practice it is challenging. Section A examines these challenges in the context of threats to a politics of inclusion. Section B provides a preliminary sketch of my new concept, “viral convergence,” which is both descriptive of the current convergence of crises as well as prescriptive in theorizing a more cohesive politics of inclusion that bridges our sense of shared vulnerabilities, even as solutions are crafted to respond to differential vulnerabilities as well.

A. Threats to Inclusive Law and Politics: Disparate Impact and Other People’s Problems

While women as a group have been disproportionately impacted by the COVID economy, long before Trump, “race has been used to fracture women’s efforts at coalition politics and our understanding of women’s rights.” Elsewhere, Camille Gear Rich and I have illustrated how Trump deepened the potential for such divisions, by deploying race and gender tropes (such as “voter fraud” and other modern-day “welfare queen” narratives) to neutralize racially disparate impact rules—obscuring and reframing them as unfairly shifting legal accountability. For example, shortly before the 2020 presidential election, Trump tweeted messages ostensibly aimed at “reassuring” suburban (white) voters that they would “no longer be bothered” by a Obama-era disparate impact fair housing rule. As he gutted federal fair housing policy, Trump repeatedly used race to fracture potential allegiances, pointing to “the financial[ ] hurt [of] having low income housing built in your neighborhood.”

93. See Powell, supra note 3.
94. The subheadings from this Part of this Article draw inspiration from my recent co-authored article, Powell & Rich, The “Welfare Queen” Goes to the Polls, supra note 22.
95. Id. at 108.
96. Id. at 150.
98. Donald Trump (@realDonaldTrump), TWITTER (Jul. 29, 2020, 12:19 PM), https://twitter.com/realdonaldtrump/status/1288509568578777088 [https://web.archive.org/web/20200729162601https://twitter.com/realdonaldtrump/status/1288509568578777088] (“I am happy to inform all of the people living their Suburban Lifestyle Dream that you will no longer be bothered or financially hurt by having low income housing built in your neighborhood...”).
In another tweet, Trump again attacked the disparate impact rule and appealed to “the ‘suburban housewife’” whom he claimed “will be voting for me.”99 Weaving together stereotypes of race and crime, this tweet explained that these so-called suburban housewives “want safety & are thrilled that I ended the long running program where low income housing would invade their neighborhood.”100 The tweet further racialized this fearmongering, claiming that “Biden would reinstall [the disparate impact rule], in a bigger form, with Corey Booker in charge!”101 In fact, Trump reiterated this message at campaign rallies in battleground states (such as, Michigan), where he told “suburban” women that he was “getting their ‘husbands back to work.’”102

B. The Rise of Inclusive Law and Politics

However, such rhetoric seemed to have the opposite effect for numerous women. Self-identified suburban housewives mobilized against Trump, organizing and banding together in Facebook groups like “Suburban Housewives Against Trump” and “Red Wine and Blue” which started “after Trump’s sexist and racist pitches to female voters in the suburbs fell flat.”103 In the end, Trump’s loss to Joe Biden was in large part due to suburban voters104 and Black women in urban areas in battleground states.105 Exit polls demonstrated that Black women and suburban women of all races were critical to Biden’s coalition.106 While Trump sought to appeal to “his ‘base’ who equate the so-called ‘American dream’ to suburbs full of all white, middle-class families that exhibit traditional gender roles,”107 as historian Lily Geismer explains, “[t]he

101. Trump, supra note 100.
103. Id.
105. Carla Hall, Editorial, Black Women Got Biden Elected. Of Course They Did, L.A. TIMES (Nov. 25, 2020), https://www.latimes.com/opinion/story/2020-11-25/editorial-black-women-got-biden-elected-of-course-they-did [https://perma.cc/77SL-CPGR] (explaining that “Black women not only turned out in huge numbers in the states and cities that were crucial to Biden’s win, but also organized and delivered the turnout without which Biden and Harris would have lost.”).
106. Karlis, supra note 102.
107. Id.
suburbs have gone through a . . . tremendous transformation. . . . And one of the biggest trends [in the suburbs is] in their racial diversity.”

As one member of the Facebook group notes, she “joined the Facebook group to contribute to the ‘many faces, many colors’ that make up the suburbs today.”

Another signal of readiness for a more inclusive politics is the emergence of the cross-racial uprisings in support of Black Lives in the aftermath of George Floyd’s murder. Several developments are notable here. First and foremost, Black Lives Matter (BLM) was established as a Black women-led movement building initiative, by its three co-founders, Patrisse Cullors, Alicia Garza, and Opal Tometi, as a response to the acquittal of Trayvon Martin’s murderer, George Zimmerman. In outlining its founding narrative, BLM’s website centers intersections of race, gender, sexual orientation, and gender identity at its core:

Black liberation movements in this country have created room, space, and leadership mostly for Black heterosexual, cisgender men — leaving women, queer and transgender people, and others either out of the movement or in the background. . . . As a network, we have always recognized the need to center the leadership of women and queer and trans people . . . [W]e made a commitment to placing those at the margins closer to the center.

In a 2016 interview of the three founders, Alicia Garza notes her intention to “transform our future into something that is built on care, that is built on connection, and that is built on interdependence.” This way, Garza emphasizes both the feminist ethic of care and intersectional notion of interdependence as central to the BLM movement.

A related development is the “wall of moms” in Portland. The “wall of moms” started out as a group of white moms in Portland who “plac[ed] their

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108. Id.

109. Id. (quoting Facebook Group participant Miesha Tate Ander, “In [Trump’s] mind, there’s no such thing as a Black ‘suburban housewife’ . . . It’s not just white women who live in the suburbs.”).

110. Note that the police officer who kneedled on George Floyd’s neck for nearly nine minutes has been charged with second-degree murder. Brakpton Booker, George Floyd Case: Judge Drops 3rd-Degree Murder Charge Against Derek Chauvin, NPR (Oct. 22, 2020), https://www.npr.org/sections/live-updates-protests-for-racial-justice/2020/10/22/926627083/judge-drops-a-murder-charge-against-former-officer-who-kneedled-on-george-floyds [https://perma.cc/R5QB-HXJ2] (noting that “Chauvin, who was captured on cellphone video kneeling on Floyd’s neck for several minutes, still faces a higher charge of second-degree murder”). Chauvin has also been charged with manslaughter. Paul Walsh, Citing COVID, Prosecutors Seek 3-month Delay in Ex-Officers’ Trial Over George Floyd, STAR TRIBUNE (Jan. 1, 2021), https://www.startribune.com/citing-covid-prosecutors-seek-3-month-delay-in-the-george-floyd-trial/600005629 [https://perma.cc/S5HV-Z7JS].


112. Id.

bodies between federal officers and activists,” following the murder of George Floyd, at a moment when progressive white women and women of color were especially energized by the power of mothers speaking out. The “wall of moms” phenomenon itself quickly expanded from what was initially a predominantly white moms group to include at least some Black mothers and other mothers color and spread to other parts of the country. Of course, Black mothers themselves (as with other moms) have a long history of activism to protect their families and communities, including through groups such as Mothers of the Movement, “a group of Black women whose children have been killed by gun violence or police.” Expressing the awkwardness of the “Wall of Moms” moment, the Pulitzer Prize winning fashion editor of the Washington Post, Robin Givhan notes that in the “wall of moms,” white women used their white skin privilege to gain media attention and then eventually expand the spotlight to women of color and re-center to focus of the media on Black Lives Matter (BLM)—a challenging exercise of allyship. While the original version of the Wall of Moms collapsed, it was eventually reborn under the leadership of Black women as Moms United for Black Lives.

White liberal support grew for BLM, in the context of the George Floyd uprisings (at least in the short run), raising the possibility of cross-racial alliances on police misconduct. According to one large voter survey, one in five surveyed said the protests over police violence (as well as Trump’s “law and order” opposition to it) was the most important factor in their decision at the ballot box in the 2020 presidential election, likely helping contribute to the record breaking voter turnout that spawned support both for and against Trump


115. Drawing on the power of motherhood, one observer compared the Wall of Moms to Argentina’s Las Madres de la Plaza de Mayo (Mothers of the Plaza de Mayo, sometimes called “The Mothers of the Disappeared”), who protested the disappearance of their children in under the Argentine military junta in the late 1970s-early 1980s. See Anna Pedersen, Opinion, Portland has the Wall of Moms. Argentina has Las Madres de la Plaza de Mayo, STREET ROOTS (July 29, 2020), https://www.streetroots.org/news/2020/07/29/opinion-portland-has-wall-moms-argentina-has-las-madres-de-la-plaza-de-mayo [https://perma.cc/ZK49-66QU].


117. Id.

118. Givhan, supra note 114; see also Robin DiAngelo, WHITE FRAGILITY: WHY IT’S SO HARD FOR WHITE PEOPLE TO TALK ABOUT RACISM (2018) (interrogating why Whites struggle to discuss race and the dilemmas of white allyship).


in the 2020 election. The challenge at the moment is how to center the leadership and lives of Blacks, including Black women, when Whites often have greater access to media and influence, even in the context of activism for Black Lives.

C. “Viral Convergence”

The current interconnected crises cry out for new theoretical and legal frameworks that address the challenge of COVID-19 and the need for coalition building. In this Section, I sketch out my new concept: viral convergence. As a descriptive matter, the notion of convergence here helps explain the intersectional nature of the health, economic, and equality crises. As a prescriptive matter, the idea of convergence calls for new legal paradigms that bridge universal and targeted solutions in order that we might renew our social contract toward each other.

First, to establish a baseline, I summarize Iyiola Solanke’s analogy between the dual viruses of coronavirus and discrimination. Once I establish that link, I pivot to how these viruses are not only analogous, but intersect. These interlinked crises amplify and reinforce each other. Second, I turn to the notion of women of color as canaries in the coalmine as a potential foundation for alliance. Third, I pivot to ways Derrick Bell’s interest-convergence analysis is newly relevant. Fourth, I return to Martha Fineman’s vulnerability analysis. Last, I thread Bell’s analysis through Ruha Benjamin’s idea of viral justice to more fully drive home the conceptual pay off of the viral convergence idea.

1. Discrimination as a Virus

First, the concept of virality is helpful as a descriptive matter because of the ways in which both racism and sexism can be viewed as viral processes. As Iyiola Solanke reminds us, “Like a virus, you can’t see discrimination but victims recognize how it sounds and how it feels – they experience the results of the infection. Like a virus, discrimination affects the mind, body and the spirit.”

While a virus can infect one’s body, discrimination infects the body politic. Astutely drawing an analogy between both viruses—coronavirus and discrimination—Solanke notes:

[N]either can be seen with the naked eye yet . . . both are highly infectious and can pass from one person to another rapidly, often

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122. See also Powell, supra note 3.
123. Solanke, supra note 5 (emphasis added).
without recipients being aware that they have been infected; and both can maim and kill, having the potential to affect the life of a victim every day for a lifetime.\textsuperscript{124}

To better understand how discrimination is viral, Solanke identifies “six key elements in the chain of infection” for a virus, such as coronavirus, as a basis for the analogy:\textsuperscript{125}

[First,] the ‘infectious agent’ . . . is a virus. . . . [S]econd[,] the reservoir, or the place where the infectious agent grows and develops – [are] people[]. Third, . . . the ‘portal of exit’[is] bodily secretions. Fourth[,] the mode of transmission . . . is through airborne droplets. . . . [F]ifth . . . is the ‘portal of entry’ . . . the respiratory tract. [Sixth[,] . . . [identifying] the ‘susceptible host’ . . . [by] traits that individuals have which make them susceptible to infection and illness[—i]n th[is] case includes age, gender and possibly race and ethnicity.\textsuperscript{126}

Given both underlying and structural conditions in the U.S. context, Blacks, Latinx, and Native Americans suffer from higher rates of COVID-19 transmission and mortality. As Solanke notes in the U.K., “[t]he medical virus maps onto and magnifies the virus of racism.”\textsuperscript{127}

Mapping these elements in the chain of infection for coronavirus onto racial discrimination, Solanke points out:

[First, t]he infectious agent could be both words and images. . . . [Second, t]he reservoir, the place where the virus grows, could include locations such as educational curricula or television. . . . [Third, t]he portal of exit might be practices and policies. . . . [Fourth, t]he modes of transmission, or the way in which racism spreads . . . from person to person, as well as via social and traditional media. [Fifth, t]he portal of entry is likely to be multiple: verbal, visual and aural. For example, images that present black men as criminals rather than judges, entrepreneurs or astronauts. Finally, . . . a susceptible host . . . , the lack of organisational leadership and anti-racist policies [may] increase the likelihood of susceptibility to racist ideas.\textsuperscript{128}

Nonetheless, Solanke reminds us that there are, of course, important differences. After all, a medical virus, such as coronavirus, may only infect a person (and be prevalent in society) for a limited period of time before it is defeated, such as with the earlier SARS-CoV, which caused the Severe Acute Respiratory Syndrome (SARS) outbreak in 2002–2004. However, “the discrimination virus has the potential to affect the life of a person everywhere

\textsuperscript{124} Iyiola Solanke, Discrimination as a Virus, MICROBIOLOGY SOCIETY (July 6, 2020), https://microbiologyociety.org/blog/discrimination-as-a-virus.html [https://perma.cc/CQ87-ZFGJ].

Even before the COVID-19 pandemic, Solanke outlined the similarities between a virus, such as Ebola, and discrimination. Solanke, supra note 18.

\textsuperscript{125} Solanke, Discrimination as a Virus, supra note 124.

\textsuperscript{126} Id.

\textsuperscript{127} Id.

\textsuperscript{128} Id.
and every day for a lifetime.”¹²⁹ Further, the virus of discrimination “can claim a target at anytime, anywhere”¹³⁰ through different pathways than the pathways a medical virus uses to target individuals. Solanke deftly offers the example of the unsuspecting Central Park birdwatcher, Christian Cooper, who was innocently watching birds in New York City’s famous park “when a white woman unleashed the virus of racism. The reason: Mr. Cooper had asked her to put her dog on the leash, as per the rules in that area.”¹³¹ As Solanke points out:

In resentment and rage that a black man dare to police her behaviour, Amy Cooper (no relation) called the police, pretending that she was being threatened by a black man. However, her plan backfired and she became maimed by the virus [of discrimination] she aimed to spread.¹³²

Here, Solanke notes an important similarity between a medical virus and the virus of discrimination: “like a virus, discrimination hurts everybody. If discrimination is a virus, can it be tackled using public health approaches?”¹³³

As in the public health context, where fighting a virus depends on a “high level of co-ordination and co-operation with national authorities, between the public and private sectors, teaching hospitals, universities and volunteers,”¹³⁴ so too fighting discrimination will require analogous dedication and resources. As Solanke puts is, it is clear that “[t]ackling COVID-19 is everybody’s business – those who suffer are not left to overcome the virus by themselves – and the same applies to discrimination.”¹³⁵ In sum, “if discrimination is viewed as a virus, a public health style intervention,” focusing on breaking the chain of infection could “help us to more effectively tackle and perhaps eradicate it.”¹³⁶

While there are dangers to biologizing discrimination, Solanke uses the viral metaphor as well as the public health solution (i.e., attacking viruses on an institutional basis) as an analogy, rather than seeking to medicalize discrimination. Solanke’s analogy is elegant, but begs the question of how feminism can be reimagined to view race discrimination per se as a feminist issue. As Ruha Benjamin notes, “We say racism is socially constructed, but we fail to state the second part: that racism constructs. . . . It’s productive. . . . It’s viral.”¹³⁷ But, as discussed below, we can “recoup virality”¹³⁸ for justice.

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¹²⁹ Solanke, supra note 5.
¹³⁰ Id.
¹³¹ Id.
¹³² Id.
¹³³ Id.
¹³⁴ Id. (noting that “[i]nterventions are also joined up for maximum impact.”)
¹³⁵ Id.
¹³⁶ Id.
¹³⁷ See Benjamin & Harvard Carr Ctr. for Human Rights Policy, supra note 20.
¹³⁸ Id.
2. Miner’s Canary Analysis and Harnessing White Rational Self-Interest

As discussed in Part I, women of color face multiple challenges in the pandemic economy and are disproportionately susceptible to COVID-19 as well as economic (and, relatedly, housing and food) insecurity. Thus, women of color are classic canaries in the coalmine.  

Lani Guinier and Gerald Torres argued that a miner’s canary analysis would usher in a new era of progressive cross-racial politics.  

Miner’s canary analysis examines legal and social problems faced by the most vulnerable to identify broader social problems that generally threaten Americans.  

The miner’s canary approach has been celebrated for its brilliance because Guinier and Torres identified it as a strategy for incentivizing persons with racial privilege to be attentive to and motivated by addressing pain of individuals who are more vulnerable. White paternalism and benevolence alone are often insufficient to motivate political alliance to work for racial justice. The miner’s canary analysis offered by Guinier and Torres overcomes resistance to social change by harnessing white Americans’ rational self-interest.  

Guinier and Torres position people of color in an instrumentalist frame as potential warning lights for broader American interests. This approach offers both insight as a descriptive matter as well as a proposal of an innovative political strategy for bridge building.

However, as Gear Rich and I discuss elsewhere, there are reasons to question whether the instrumentalism of a miner’s canary analysis can genuinely help forge “the bonds of connection and community between racial groups as equals,” as Guinier and Torres had hoped. After all, if women of color are merely indicators of harm, “there is always a chance that white America will dismiss some of the issues minorities raise as de minimis or specific” to a minority group.  

Moreover, as Gear Rich and I note, if “pain is only acknowledged and addressed on the way to focusing on whites’ interests, the justice and dignitary interests of [women of color] may be given short shrift.” Additionally, the strategy developed for the broader group may “fail to address nuances of the problems targeted.”

Despite these shortcomings, in the context of COVID-19, as canaries in the coalmine, the experiences of women of color provide a signal for potential threats (and solutions for) white women, men of color, and even white men.

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139. See LANI GUINIER & GERALD TORRES, THE MINER’S CANARY: ENLISTING RACE, RESISTING POWER, TRANSFORMING DEMOCRACY 11 (2003). As Guinier and Torres remind us, “[t]hose who are racially marginalized are like the miner’s canary: their distress is the first sign of a danger that threatens us all.” A similar analysis applies to women and other subordinated groups.

140. Id. at 9-10.

141. Id. at 11–12.


143. Id.

144. Id.

145. Id.
Everyone is potentially susceptible to the pandemic—either in terms of the disease or the economic dislocation—even while women of color are disproportionately impacted.

3. Derrick Bell: Interest-Convergence Approach

Another approach for developing a politics of inclusion—to address structural inequalities unmasked by the pandemic—is to develop a strategy based on Derrick Bell’s interest-convergence model. Bell proposed the interest-convergence concept to highlight why cross-racial alliances for race equality are so tenuous. In positing that African American gains in civil rights only occur when they converged with Whites’ interests, Bell argues that progress in race equality is only achievable when it is relatively costless or creates relatively minor inconvenience. Demonstrating this convergence in the context of the 1950s–60s civil rights movement, Bell contends that Americans had a reputational interest in appearing as a beacon of democracy on the global stage, ostensibly in contrast to the communist Soviet Union. Thus, U.S. officials had an incentive to take at least symbolic steps to demonstrate the government’s commitment to formal equality. However, once some degree of symbolic victory was secured—for example, with Brown v. Board of Education—courts (and white Americans more generally) defected from meaningful support of civil rights progress.

In the COVID-19 context, the interests of women of color coincide with those of white women, men of color, and (again) even white men. Whites’ interests coincide with those of people of color in that all are potentially vulnerable to the twin crises of COVID-19 and economic distress, albeit women of color are disproportionately affected. However, because of the often temporal nature of interest convergence, sustaining such a convergence of interests beyond the pandemic is likely to be precarious.

The fragility of interest-convergence is apparent in the context of the pandemic of policing. Initially, the horror of witnessing Derek Chauvin place his knee on George Floyd’s neck for eight minutes and forty-six seconds—with indifference painted on his face as he stared straight into a cell phone camera—prompted 60% of Americans polled to describe Floyd’s death as murder.

146. Bell, supra note 11.
147. Id. at 524–25.
148. Id. at 523 (“The interest of blacks in achieving racial equality will be accommodated only when it converges with the interests of whites.”).
150. Bell, supra note 11, at 524–25.
Nonetheless, that number has now dropped to 36%.151 The cross-racial nature of the BLM protests, at least in the short run, may illustrate ways in which the interests of Whites align with those of Blacks—perhaps out of a sense of momentary horror, embarrassment, or a more enduring awakening to structural racism—unmasked undeniably and shockingly on camera for the world to see. Further, given the global nature of the protests and criticism by United Nations experts, many Americans were once again self-conscious of our image on the world stage.152 However, unless this convergence of interests can be sustained, Bell’s theory cautions that public support for the goals of BLM may be momentary.153

In prior work, Gear Rich and I have explored how ingredients exist in the voting rights context to move beyond the limitations of interest-convergence that Bell identified.154 Upon recognizing that Black women are the most reliable voters to support progressive candidates who support women’s rights,155 white women may realize that it is in their interest to build alliances with Black women and other women of color. Further, white women themselves are actually disadvantaged by voter suppression laws, which, while designed to suppress the Black vote, impact white women in often unintended ways.156 Thus, we argue that certain racial justice matters should also be seen as not only intersectional, but feminist concerns writ large—that all women might embrace, given their shared interests, in a more sustained way. This example provides an important


153. While the debate surrounding policing is not at the heart of this project, in searching ways of sustaining cross-racial solidarity in this context—to avoid the pitfalls Bell identifies—it may be useful for scholars to examine comparative approaches from abroad. Such comparative analysis may shed light on how alternative approaches to public safety might, in fact, be in the interests of many Whites—from budgetary, safety, or other perspectives. See, e.g., Amelia Cheatham & Lindsay Maizland, Backgrounder: How Police Compare in Different Democracies, COUNCIL ON FOREIGN REL. (Nov. 12, 2020) https://www.cfr.org/backgrounder/how-police-compare-different-democracies [https://perma.cc/CZW5-FL2C] (noting “The United States far exceeds most wealthy democracies in killings by police, and officers seldom face legal consequences.”); Amanda Taub, Police the Public, or Protect It? For a U.S. in Crisis, Hard Lessons From Other Countries, N.Y. TIMES (June 24, 2020), https://www.nytimes.com/2020/06/11/world/police-brutality-protests.html [https://perma.cc/56WX-V3ZR].


155. Id. at n.22 and accompanying text.

156. Id. at 160-61 (discussing how voter ID requirements make it harder for women who hyphenate or change their name upon marriage to vote as does Florida’s felon disenfranchisement restrictions, which effectively create a “poll tax” for former felons, disadvantaging not only Black voters, but women, as women earn less than similarly situated men, due to the gender pay gap, making it harder for women to pay off the “poll tax”).
precedent for sustaining shared interests in the post-pandemic economy based on vulnerability as a universal human condition, as Martha Fineman’s work helps reveal.

4. Martha Fineman and Vulnerability Analysis

Martha Fineman’s work explores vulnerability as a universal human condition.157 I use her work to theorize ways to bridge our shared and differential vulnerability in the COVID-19 pandemic. Fineman provides a new way of thinking—related to, but quite distinct from interest-convergence—using a wholly new theoretical framework (not specifically reliant on Bell) based on what she calls vulnerability analysis. She argues that “vulnerability is (and should be understood to be) universal and constant, inherent in the human condition.”158 Since vulnerability is a universal human condition—in that every individual depends on others at some point, whether at birth, near death, or along the way—a vulnerability analysis reveals the privilege “conferred . . . by the state and broader society through their institutions.”159 In this sense, Fineman’s approach recognizes both the universality of vulnerability, even while recognizing divergence in terms of how vulnerability affects each of us in our own life cycles (across time) as well as across populations (and across space and place). I utilize Fineman’s vulnerability analysis to argue for alliances that support a role for a more active state in addressing the interlocking pandemics and addressing the shared and differential vulnerabilities that COVID-19 so clearly lays bare.

The current moment reveals our shared vulnerability to coronavirus. However, as discussed in Part I, communities of color and women are disparately vulnerable—due in part to structural inequality.160 While recognizing that certain people and groups are differentially vulnerable, our shared vulnerability to the virus is a common thread for mobilizing across differences to demand support from a responsive state and, relatedly, to build resilience.161 In fact, the inherent, inevitable, universal vulnerability of the body

157. Fineman, The Vulnerable Subject, supra note 7.
158. Id. See also Fineman, Universality, Vulnerability, and Collective Responsibility, supra note 7, at 4 (“What does it mean to be human? – a vulnerability theorist would respond: ‘to be human is to be vulnerable.’ Vulnerability constitutes the human condition; human beings are universally, consistently, and constantly vulnerable.”).
159. Fineman, The Vulnerable Subject, supra note 7.
160. While Part I focuses primarily on labor market segregation and disparities, other forms of inequality increase vulnerability of people of color to COVID-19, including residential segregation and related inequalities in, for example, wealth accumulation and access to health care. However, these related forms of inequality are beyond the scope of this Article.
161. Fineman, Universality, Vulnerability, and Collective Responsibility, supra note 7, at 13 (theorizing through vulnerability theory, Fineman describes “resilience” by noting that the social relationships and institutional structures which “provide the resources that cumulatively give us the ability to adapt, adjust, survive, even thrive, given our vulnerability” are called “resilience.”); see also Naomi R.
(our “embodiment” as humans, as Fineman notes) prompts our need for social institutions—from the family to society and governing regimes. Our embodiment necessitates our social and institutional “embeddedness.”162 At the same time, we need to ask: “in whose interests do these intuitions and relationships as currently constituted act?”163 As Fineman provocatively asserts:

“[W]ith respect to the assets any one person possesses, it is not multiple identities that intersect to produce compounded inequalities, as has been posited by some theorists, but rather systems of power and privilege that interact to produce webs of advantages and disadvantages. Thus, where other theorists expand the traditional equal protection analysis to account for multiple intersecting identities, a vulnerability analysis provides a means of interrogating the institutional practices that produce the identities and inequalities in the first place.”164

Our current interlinking pandemics unveil this otherwise invisible institutional embeddedness of advantage and disadvantage. This moment of viral convergence unmask how we see and do not see race and gender. As Khiara Bridges points out, the “mainstream view of race discrimination as: discrete, easily identifiable, invariably intentional, always irrational acts, committed by bad actors” does not account for the “deadly systems and structures of institutionalized racism” and sexism.165

Fineman also focuses on the role of institutions in creating structural inequality, positing a way “to move . . . beyond the stifling confines of current discrimination-based models toward a more substantive vision of equality.”166 Arguing for an expansion in “current ideas about state responsibility,” she theorizes that “the ‘vulnerable subject’ must replace the autonomous and independent subject asserted in the liberal tradition.”167 Rejecting the “impoverished sense of equality [that] is embedded in our current legal doctrine” and idealized notion of contract and individual choice “that mask society’s role in perpetuating inequality[,]” Fineman contends that “[t]he fact that societal institutions play a significant role in maintaining and extending inequality is the very reason that we need a more active state, one that is responsive to that reality.”168


163. Id. at 17.

164. Fineman, The Vulnerable Subject, supra note 7.


166. Fineman, The Vulnerable Subject, supra note 7. Relatedly, for Fineman’s critique of this John Rawlsian liberal contract theory approach, “based on ideals of rationality and consent,” see also Fineman, Universality, Vulnerability, and Collective Responsibility, supra note 7, at 8-9.

167. Fineman, The Vulnerable Subject, supra note 7.

168. Id.
In this Article, I adapt this call for a “responsive” state—whose “foundation for its legitimacy is tied to its unique ability (and therefore, responsibility) to respond to human vulnerability”\(^{169}\)—to address both shared and differential vulnerabilities (in the latter case, by tackling underlying inequalities that have been unmasked by the pandemic). But how do we build support for laws that address both shared and differential vulnerabilities as we move to a post-pandemic economy, given the limitations discussed above in the context of the miner’s canary and interest-convergence analyses?

5. “Recouping Virality:” Viral Convergence of Crises and Potential Solutions

a. Bridging Interest-Convergence and Vulnerability Analysis

The idea I introduce in this Article—the notion of viral convergence\(^{170}\)—provides a new conceptual framework for understanding how the experience of the pandemic itself has nurtured cross-racial support for laws that address both shared and differential vulnerabilities as we strive toward a post-pandemic world. Thus, the idea of viral convergence, in effect, bridges Derrick Bell’s theory of interest-convergence\(^{171}\) and Martha Fineman’s vulnerability analysis.\(^{172}\)

Because the pandemic has left virtually no community untouched,\(^{173}\) more than perhaps any other experience in our lifetimes, it highlights vulnerability as a universal human condition. True, Trump initially dismissed the pandemic as a “hoax” and later downplayed its gravity, suggesting it would soon “disappear.”\(^{174}\) Further, many appeared to believe this rhetoric and have refused to wear face masks, socially distance, get vaccinated, and take other precautionary measures.\(^{175}\) But as the pandemic has raged through red and blue


\(^{170}\) For an initial brief introduction of this concept, see Powell, supra note 3.

\(^{171}\) See generally Bell, supra note 11.

\(^{172}\) Fineman, *The Vulnerable Subject*, supra note 7.


states, rural and urban communities alike, such denials have become harder to sustain.  

Research demonstrates that proximity to the pandemic increases the way we experience and respond to it. According to a Pew survey in August 2020, 39% of Americans reported knowing someone who had been hospitalized or died as a result of having COVID-19 (up from 20% in late April and early May 2020).  

While the percentage reporting this in August 2020 was still higher for Blacks (a majority, at 57%) and Latinxs (almost half, at 46%), differences narrowed among people in different regions of the country who reported knowing a person who had been hospitalized or died as a result of COVID-19.  

Such personal ties create empathy in a way that comprehending the abstract numbers of hospitalizations or deaths does not. While partisan divides may remain on COVID-19, the more proximate understanding of the dire impact of the virus among so many Americans is likely to enhance the sense of shared vulnerability—both concerning the disease and its economic fallout.

Further, even though different groups and individuals are differentially impacted by COVID-19, the spread of the virus among communities of color, essential workers, prisoners, the elderly, and other more vulnerable groups poses threats and hardships to everyone. After all, the virus cannot be contained in one

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178. The Pew report notes:
A majority of Black Americans (57%) say they personally know someone who has been hospitalized or died as a result of having COVID-19. Some 46% of Hispanic adults say the same, compared with about a third of White (34%) and Asian adults (32%). The share of Hispanic Americans who know someone who has been hospitalized or died due to COVID-19 has more than doubled since the spring survey, when 19% said this.

Id.

179. Noting regional shifts from spring to August 2020, the Pew report points out:
In the spring, Americans in the Northeast (31%) were more likely than those in the Midwest (22%), South (18%) and West (13%) to say they personally knew someone who had been hospitalized or died due to the virus. Now [in August], it is just as common for people in the South to know someone who has been hospitalized or died as it is for those in the Northeast to say this (43% vs. 46% — a statistical tie). In the August survey, about one-third (35%) of Midwesterners and 30% of those in the West say they personally know someone who has been hospitalized or died from COVID-19.

Id.

country, community, sector, prison or elder care facility. Thus, anyone who wants to visit elderly loved ones, return to restaurants and movies, and move about and travel more freely has an interest (at least a self-interest) in creating more sustainable and equitable solutions.

Given this viral convergence of interests, Bell’s interest-convergence theory is applicable. Bell points to overlapping, but distinct interests that converge in certain moments and diverge in others (as with the distinct interests Whites and Blacks had in formal equality during the Cold War). By contrast, my notion of viral convergence explains that with the pandemic, we are experiencing shared—rather than distinct—interests in our shared vulnerability to the pandemic, even while our collective experience of this pandemic reveals differential vulnerabilities. Thus, the idea of viral convergence threads aspects of Fineman’s vulnerability analysis\(^\text{181}\) through Bell’s theory of interest-convergence.\(^\text{182}\)

b. “Recouping Virality”

Finally, to understand how the twin health and economic crises can motivate new legal paradigms based on a more robust politics of inclusion, I turn to sociologist Ruha Benjamin’s idea of “viral justice.”\(^\text{183}\) To combat the viruses of inequality, economic insecurity, and injustice, Benjamin argues we must “recoup virality.”\(^\text{184}\) While virality can be destructive, it can also be productive. Benjamin points to the Movement for Black Lives as a vehicle for recouping virality—by using the virality of #BlackLivesMatter (BLM) to combat the viruses of racism and police violence.

More than a fleeting meme that goes viral, the virality of #BlackLivesMatter is not merely performative.\(^\text{185}\) With the rise of cross-racial support for BLM in the aftermath of George Floyd’s murder, the Floyd moment became a movement to make visible the many Blacks killed or maimed through abusive police tactics. The outrage that followed has led to meaningful calls for transformative change and entirely new legal paradigms in our approach to public safety at all levels of government.

Small, individual acts of using a hashtag need not be superficial virtue signaling,\(^\text{186}\) othering, or reliant on celebrity populism (as Kamari Clarke

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182. See generally Bell, *supra* note 11.
184. *Id.*
cautions). As Benjamin points out, “Small is not superficial. Creating spaces to breathe is not superficial. The #BlackLivesMatter hashtag is a perfect example of the accumulation of many, connected individual acts. For us to each do better and demand better.”

While calling for restraints on the state in the context of policing, Benjamin also calls for a more affirmative role for the state in, for example, providing social safety nets, labor and environmental regulation, and greater support for schools and affordable housing. Of our current interlocking crises, Benjamin explains, “If we were truly in this together, we would not be in this together.”

Pushing the state to play a more affirmative role requires a big movement—on and offline. The recent cross-racial uprisings in support of Black Lives demonstrate that largescale movement politics is possible and can be sustained over time and space. Demands for accountability and new laws have continued. And the protest went global, as 40,000 protesters took the streets in Paris alone and BLM murals appeared in Idlib, Syria.

Because police misconduct disproportionately affects Blacks and Latinxxs, the potentially momentary cross-racial nature of the BLM protests seems to illustrate Derrick Bell’s point about the more temporary nature of interest-convergence. At the same time, the epidemic of mass incarceration and over-policing in communities of color represents an economic and social drain on society as a whole as well as a misallocation of government resources that could


189. Benjamin, supra note 20.
190. Id. at 13:00.
192. See discussion supra Part II.A.
be potentially better invested in education and other human capital (as the “books not bars” and other campaigns illustrate). 193

Notably, racially disparate policing practices intersect with the COVID-19 pandemic in multiple ways, including the discrepancies in enforcement of coronavirus restrictions. 194 Indeed, with the pandemics of policing and coronavirus, the nation experienced a viral convergence of several crises, given the interconnected nature of our vulnerability to disease, economic dislocation, and the violence of state action (as well as violence of state inaction)—against the backdrop of an exhausted and damaged democracy (leading up to and in the aftermath of the 2020 election).

Ruha Benjamin’s idea about recouping virality provides a broad conceptual framework for sustaining a politics of inclusion that is necessary to bridge shared and differential vulnerabilities as we move to a post-pandemic world. Building on Benjamin’s notion of viral justice, my idea of viral convergence highlights the shared interests we have experienced (in our shared vulnerability to the pandemic), even while our collective experience of this pandemic reveals differential vulnerabilities. With the introduction of a variety of COVID-19 vaccines, there is still a risk of vaccine-resistant variants of coronavirus, ongoing mini-outbreaks of COVID-19, and other pandemics—limiting the possibility that the interests that have converged in this viral moment will diverge any time soon.

This recuperation project need not be only about carving out the cancer of inequality, but also healing the patient—healing our body politic. 195 Such a recuperative approach to virality in this way is the thread I use to weave Fineman’s notion of universal vulnerability through Bell’s insight on interest-convergence. Combining these approaches to virality, vulnerability, and converging interests, my idea of viral convergence—of shared and differential vulnerabilities—calls for adoption of transformative laws that sustain positive policy feedback loops for reinforcing the shared and unifying elements of our current crises while addressing differential vulnerabilities.

Public opinion frequently bifurcates universalist programs (such as the G.I. Bill and Social Security) from means-tested “welfare” programs, creating a dichotomy in public understanding of “deserving” and “undeserving.” **196 However, building a post-pandemic society that bridges universal and the vulnerable solutions may gain support based on the convergence and

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194. See discussion supra Introduction.
interconnectedness of the public health and economic crises and their solutions, which turn on building collective, herd immunity. Reverend William Barber II, co-chair of the Poor People’s Campaign, encapsulates this shared sense of vulnerability when he asks us to consider, “why are we still alive?” and explains:

    We can end any moment, be alone on a breathing machine with nobody able to come and see us. And many people have died like that. And in their name and in their memory, even with our pain, we must use every breath we have to turn things around, to push our political system to do right from the bottom up, with every breath we have left until we have no more breath in us. 197

    If we view this moment of viral convergence—of interlocking pandemics—as an inflection point to heal our body politic, then we might consider a public health approach to combat the virus of discrimination. 198 When utilizing a public health strategy, “[i]nfection control is just one form of action: it is equally vital to take a broader set of actions to halt the spread of the disease.” 199

    A similar principle should be applied in enlisting a public health approach to combat the virus of discrimination. Proactive interventions should be undertaken “to reduce or remove risks in institutions and the environment [as] the public or social aspects of the epidemic [of discrimination] must be addressed in order to break the chain of infection.” 200 But gaining support for such proactive interventions requires developing an inclusive politics and adopting an inclusive recovery plan as well as an inclusive post-pandemic economy.

III. VIRAL CONVERGENCE: PAVING THE WAY FOR A RACIALLY JUST, FEMINIST RECOVERY PLAN

    Inspired by calls for a “feminist recovery plan,” 201 I am calling for a *racially just* feminist recovery—a kin to the New Deal in breadth and ambition—that recognizes both universal as well as differential vulnerability. In this Part of the Article, I discuss how viral convergence illustrates the potential for building an inclusive recovery along these lines.

    The challenges are, of course, enormous. Amid a record number of unemployment claims filed during the pandemic, 202 the Trump administration lacked a comprehensive national plan to effectively combat either the health or

198. Solanke, supra note 18.
199. Solanke, supra note 5.
200. Solanke, supra note 18.
201. See, e.g., Cahn & McClain, supra note 161.
economic crises. As for the health and inequality pandemics, while doctors have developed COVID-19 vaccines, Black people “will continue to wait for a cure for racism,” 203 and women will continue to await a cure for sexism.

Women of color must be placed at the center of policy solutions, 204 which ultimately would benefit everyone. 205 More generally, since our nation depends upon the very people who face these multiple challenges—namely, essential workers— to not support them will hurt all Americans. With women of color located at the intersection of race, gender, and economic disparities, not surprisingly, these women are already important leaders in both national organizations and grassroots movements to forge solutions. 206

Rather than develop longer-term solutions to address underlying structural inequalities at these intersections, lawmakers initially focused on short-term solutions aimed at the immediate crises. In Section A, I summarize steps that were taken to provide short-term economic relief in 2020. In Section B, I explore what more can be done.

A. Short-Term Relief in the 2020 Pandemic Economy

While not intended to be comprehensive, this Section summarizes key elements of the initial stimulus relief packages adopted by Congress in 2020 through early 2021 to address the economically vulnerable during the first year of the pandemic. These stimulus packages offered critical emergency, temporary relief. As an example of my concept of viral convergence at work, because of the ways in which the pandemic economy hit multiple communities, these short-term stimulus packages were supported by coalitions of anti-poverty, women’s rights, and racial justice groups.


206. As mentioned, Black women founded Black Lives Matter. See supra note 106. Consider also the leadership of Fatima Goss Graves, President and CEO of the National Women’s Law Center, and Sherrilyn Ifill, Director-Counsel of the NAACP Legal Defense and Educational Fund.
As a result, under the Coronavirus Aid, Relief, and Economic Security Act (CARES Act) adopted in March 2020, the federal government provided extended jobless benefits to unemployed workers who had exhausted their state benefits as well as to others who were not normally eligible for state unemployment benefits. The CARES Act also provided supplemental unemployment insurance benefits to “top up” state benefits: $600/week from March 27 through July 31, 2020. The supplemental benefits were reduced to $300/week starting in August 2020 when a split emerged—largely along party lines—on extending these benefits through end of December 2020.

As particular benefits were set to expire toward year’s end, Congress adopted the Consolidated Appropriations Act, which was eventually signed into law at the end of December 2020, further extending the supplemental $300/week federal unemployment benefits (to “top up” state benefits) through March 14, 2021 (with a phase out through April 5, 2021). This relief package also bolstered aid for primary and secondary schools, colleges, childcare providers, and food assistance.

At the time of this writing, Joseph Biden has recently signed the American Rescue Plan into law. Importantly, the Plan extends federal supplemental unemployment benefits; provides an additional $1,400 stimulus check to those earning modest incomes (on top of two prior stimulus checks; and expands the child tax credit up to $3,600 per year (projected to cut child poverty in half and reduce poverty overall by one-third).


209. Id.


211. See Naomi Cahn & Linda McClain, Politics, Pandemic, and the Future of Poverty and Civil Rights Law: GENDER Presentation, 16-17 (2021) (on file with author) (noting the law “raises SNAP benefits by 15% for six months; provides money to families that receive food stamps to replace the free or reduced-price meals their children would have received through childcare or their K-12 school; and provides aid to food banks”).


213. Catherine Powell, Opinion, A Year Later, the ‘Color of Covid’ Still Matters, CNN (Mar. 26, 2021), https://www.cnn.com/2021/03/26/opinions/color-of-covid-biden-administration-powell/index.html [https://perma.cc/ESE3-DGMD] (critically analyzing the ongoing pandemics of race and gender inequality unmasked by COVID-19 and noting that “[t]he final bill represents one of the most significant plans to address economic precarity (along with President Barack Obama’s Affordable Care Act) since the Great Depression.”)

While these stimulus packages offered critical short-term assistance (targeted, but in ways that assist struggling white families as well as families of color), the aid provided has been only temporary, subject to periodic renewal, creating uncertainty for those in need of this assistance, in the midst of an economic crisis worse than any the country has experienced since the Great Depression. Beyond this, Biden’s “Build Back Better” slogan expresses a vision to build a more inclusive economy in a more sustained, long-term fashion. Rather than seeking a return to “normal,” the slogan recognizes the importance of creating a new, more inclusive future. And yet, the Biden administration must be pushed to address underlying structural inequalities, potentially disrupting the status quo.

B. What More Can Be Done?

The stimulus relief packages discussed in III.A have provided important, short-term relief, and may even lay the groundwork for longer-term change. However, these relief bills do not themselves address underlying structural inequality in an ongoing way. In this Section, I use my concept of viral convergence to argue that the coalescence of the twin health and economic crises poses an opportunity for new and transformative legal paradigms—perhaps within the context of Biden’s “Build Back Better” efforts. While different communities are differentially impacted, there is a shared vulnerability to health and economic precarity. Even the very wealthy are, at a minimum, inconvenienced by the constraints of the pandemic. As such, this moment of interconnected pandemics has motivated and accelerated innovative proposals, such as potentially expanding the child tax credit on a more permanent basis, raising the national minimum wage to a living wage, and extending labor protections and job security across an array of formal, informal, public, and private sectors.

More specifically, in this Section, I discuss two potentially transformative legal paradigms that reflect my notion of viral convergence. The interlocking pandemics of Covid-19, inequality, and economic fragility have paved the way

for (and strengthened) diverse, multi-racial coalitions that are demanding: (1) the adoption of an essential worker’s “bill of rights,” and (2) steps toward re-imagining the future of work in ways feminists have written about for decades, but are only now beginning to pierce the mainstream legislative debate. While the first objective is fairly universalist, the second one is more targeted to women—particularly women of color—though this effort, nonetheless, builds on a diverse coalition bridging various interests.

**Adopting an essential workers’ “bill of rights”:** Proposals for adoption of an essential workers’ “bill of rights” have emerged at the intersection of labor, poverty, and equality advocates—a powerful viral convergence of interests that provides the sort of visionary framework necessary to ensure dignity and equality for all workers. Because of race and gender segregation in the labor market, Blacks, Latinx, and women (including Black and Latinx women) are disproportionately represented in low wage jobs that are the least safe and have the fewest protections.\(^{219}\) In response, diverse, multi-racial coalitions have emerged to document the need for—and advocate for policies that address—worker rights and worker voice and power.\(^{220}\)

In tandem, Senator Elizabeth Warren (D-MA) and Representative Ro Khanna (D-CA) have urged Congress to adopt an essential workers’ “bill of rights” to support higher pay, safety protections, sick leave, and job security for all employees—including gig workers and independent contractors.\(^{221}\) Similar proposals for an essential worker’s “bill of rights” are under consideration in the New York City Council, where a multi-racial coalition has also been at

\(^{219}\) See, e.g., discussion *supra* Part I. See also Kimberly Adams & Maria Hollenhorst, *Here’s One Idea for Addressing Occupational Segregation*, *Marketplace* (Nov. 27, 2020), https://www.marketplace.org/2020/11/27/heres-one-idea-for-addressing-occupational-segregation [https://perma.cc/GL57-RNXM] (quoting National Employment Law Project (NELP) director Rebecca Dixon, “Almost 90% of occupations in the United States, even after you account for education, are racially segregated. The lowest-paying jobs that are most dangerous and most dirty, are filled by people of color, especially Black folks and Latinx folks.”).


work.\textsuperscript{222} In New York alone, people of color make up 75 percent of essential workers.\textsuperscript{223}

\textbf{Scrambling our assumptions about the future of work:} The racial and gender justice paradoxes of our emerging stay-at-home economy scramble our assumptions about the future of work. While people of color and women—and particular women of color—are overrepresented as essential workers, these workers have often been underpaid and not afforded the protections that all workers deserve. Ideally, these paradoxes lay the groundwork for us to challenge the low value associated with the work that women—especially women of color—disproportionately perform. To this end, I focus on the care economy as a prominent case study of the potential of feminists to reimagine work.

My idea of viral convergence highlights that while Black and socialist feminists have called for decades for greater recognition of care work (along with, more broadly, housework and other undervalued “women’s work”),\textsuperscript{224} it is only in this moment of interlocking pandemics that legislative proposals to support care workers are gaining serious momentum at the national level (and among mainstream women’s rights organizations). With diverse support from women’s rights groups, labor, and anti-poverty organizations, Biden is seeking to address the care sector through the American Rescue Plan\textsuperscript{225} as well as now through a set of interrelated proposals to support jobs, infrastructure, and the care economy (just as this Article is going to press).\textsuperscript{226} The pandemic and related


\textsuperscript{224} See Kisner, supra note 35 (noting “Public-policy experts and economists have pointed out in the last several years, the folly of excluding domestic work from economic measures like G.D.P., given the data showing that unpaid women’s work constitutes a huge slice of economic activity in every country.”). The \textit{New York Times} story recalls that in a 2019 speech, Marilyn Warning, a scholar and advocate of revising economic measures of productivity, “noted the absurdity of defining activities like caregiving for elderly relatives or newborns, shopping and cooking, as having no value, or as leisure. ‘You cannot make policy if the single largest sector of your nation’s economy is not visible[,]’” Id. \textit{See also} Eshe Nelson, \textit{The Economist Placing Value on Black Women’s Overlooked Work}, N.Y. TIMES (Feb. 5, 2021), https://www.nytimes.com/2021/02/05/business/black-women-economists-nina-banks.html [https://perma.cc/RDQ2-UWM8]; \textit{MARLYN WARING, IF WOMEN COUNTED: A NEW FEMINIST ECONOMICS} (Harper Collins 1990) (1988).


quarantine measures have had a devastating impact on both providers and consumers of care. With care workers forced to stay home—and working parents scrambling to supervise their own children in remote learning from home—a convergence of interests has emerged.

This “care crisis”227 sheds light on both the essential nature of the care economy as well as the fragility of this economy. Moreover, the gendered and raced structure of the care economy makes clear that if we merely support workers within the existing structure of work and labor markets, we will reify the underlying structural inequalities that pre-existed COVID-19.228 As Arundhati Roy suggests, we should view the pandemic as a “portal” to a more just and equal world.229

In recent years, many observers have referred to the “future of work” as the digital economy and have called for reskilling women and people of color (including women of color) for tech jobs.230 However, the pandemic reveals that it is necessary to imagine the future of work in broader terms. Another large component of the future of work is care work—jobs where women (particularly women of color) are already disproportionately represented. Thus, even while creating ladders of opportunity for women and people of color into the tech economy, green economy, and other sectors that are expanding, lawmakers should imagine ways to support less visible, but critical important, expanding sectors, such as the care economy.

Using the care economy as an example of how we can reenvision the future of work enables us to recognize that beyond the values of digitizing and greening the economy, it is necessary to acknowledge that (as is the case in other advanced economies), our workforce is aging. Given that baby boomers are aging, elder care is a growth sector and cannot be easily automated. As many have grown to appreciate during the pandemic, care workers are key to the provision of care for children, the elderly, the sick, and others in need. Yet the care worker sector has been particularly hard hit by the pandemic, particularly caregivers who work in the home. As a UN report notes of these domestic workers who provide care:

With COVID-19, many of these workers have been dismissed with no compensation or access to social protection. Those who continue to

228. See, e.g., supra Part I. See also Adams & Hollenhorst, supra note 219.
229. Roy, The Pandemic is a Portal, FIN. TIMES, supra note 33.
work report difficulties commuting to workplaces in contexts of lockdown, heavier workloads and limited protection from infection.\textsuperscript{231}

In addition to supporting those in need of care, caregivers allow many people to outsource care work responsibilities at home—particularly working mothers, and, thus, the care economy is a valuable engine of gender equality. On a broader level, caregiving jobs are job-enabling jobs: caregivers enable other workers (including working parents, adult children, spouses) to work. As such, caregivers provide a double benefit to the economy and their tremendous value should be recognized as such through coverage under labor laws affording them enhanced remuneration, health benefits, and other protections. The fact that care workers are largely excluded from many federal labor laws itself has roots in the fact that domestic workers, like farm workers, were predominantly Black, when the labor laws of the New Deal were adopted.\textsuperscript{232}

But beyond merely extending traditional labor protections to care givers, the pandemic has provided an opportunity for us to reimagine how we recognize and regulate work. Based on cross-racial alliances among feminists, labor organizers, and poverty advocates, a movement has emerged to spearhead the reimagining project and to support workers in the care economy—growing out of the viral convergence of the health and economic crises. The Care Infrastructure Campaign (spearheaded by Caring Across Generations and partnering organizations) deftly recognizes that caregiving affects many constituencies—children, working parents, older individuals, and those in need of health assistance. Martha Fineman’s vulnerability theory provides important insights, which help us understand how a sector such as the care economy supports many types of people and many forms of vulnerability. At a moment when there are bipartisan calls to improve bridges, tunnels, and other physical infrastructure, the Care Infrastructure Campaign highlights the need to invest in human infrastructure, namely our infrastructure of care.\textsuperscript{233} Just as investment in physical infrastructure creates literal bridges to enable commuting to work, so, too, investment in our care infrastructure is a critical bridge in connecting employees to work.

The shared vulnerabilities that both providers and consumers of care face—particularly given our current crisis of care work—highlight shared interests. At


\textsuperscript{233} See McCulloch & Poo, \textit{supra} note 69.
the same time, we should be attentive to the differential interests of care workers relative to consumers of care, as the former are more predominantly women of color and, often, economically precarious. Thus, the care economy is an important example of how we need to link the shared and differential interests of consumers and providers of care (rather than view these interests within a zero-sum framework), particularly given the economic, race, and gendered hierarchies that characterize this economy.

More broadly, the pandemic has dramatically restructured the workplace. Even with the introduction of the COVID-19 vaccine, we face the risk of ongoing mini-outbreaks of the pandemic, variants of coronavirus, and other health pandemics. Further, given that it is apparent that remote work can be structured in ways that lead to high productivity, greater flexibility, and lower costs, aspects of our stay-at-home economy will likely spill over into the post-pandemic economy.

Yet, while some workers can do their jobs from the relative safety of home, others cannot. It is time we stop treating essential workers and the unemployed as "disposable" people and start developing an improved law and politics of inclusion that better supports all of us—regardless of race, gender, and class. As the 2020 election demonstrates, Black and Latinx women are a political force, even given their relative law of power and marginalization. Regardless of party politics, all elected officials need to ensure that the concerns of women of color are placed at the center of the ongoing response to this crisis. Since “[o]ur economy relies on women of color as workers, consumers, breadwinners, and caregivers. . . . When we put women of color at the center, we all rise,”

CONCLUSION

As a bridge between and among multiple disenfranchised communities, women of color—such as the founders of the Movement for Black Lives—stitch together many different constituencies in our otherwise divided society and can pave the way for broader movements for change. While the convergence of the health crisis with the pandemics of inequality, economic insecurity, and injustice is immensely challenging, this viral convergence provides a portal to a more just


236. Derbigny & Frye, supra note 204.

society (as the Civil War did for the Reconstruction and the Great Depression did for the New Deal). As poet Amanda Gorman reminds us:

If we’re to live up to our own time, then victory won’t lie in the blade, but in all the bridges we’ve made.

That is the promise to glade, the hill we climb[.]238

Yet as Martin Luther King (and abolitionist Unitarian minister Theodore Parker before him) intuited, bending the arc of the moral universe toward justice requires political will.239 Political will depends on political engagement by “We the People”— as many of us as possible—to rescue the idea of equality. It is not only those infected with COVID-19 who are desperately ill and on the verge of death; the democratic ideal of equality itself will remain on life support until and unless we can resuscitate it.

238. Gorman, supra note 32.