

At the intersection of public and private morality: an ethical framework for aggressive COVID-19 policies

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ABSTRACT

Democracy in a federalist society should not allow the least reasonable laws to prevail when the fallout will cross state lines. Divisions in society and different preconceptions of what is moral can be resolved by appealing to the framework of the democratic system: use the least restrictive means to reach an articulated goal in an efficacious way and then restore any right that was temporarily suspended. The systemic reinstitution and lasting continuity of those rights must be a pillar of democratic systems. If the common good as projected in public policy could never trump rights, and the public does not engage in the private morality for the common good, then, as George Smith argues, the healthcare crisis could turn the constitution into "a suicide pact."

Keywords: morality, private morality, public morality, philosophy of bioethics, COVID-19, emergency powers, civil liberties, stay-at-home orders

INTRODUCTION

COVID-19 represents a crisis at the intersection of personal conviction and public policy. The pandemic challenges the essence of what it means to be a member of a society that highly values civil liberties, and is governed by traditions and social norms, as well as rules and regulations. When government acts decisively using the least restrictive methods to manage the crisis, it is essential that people act ethically and follow recommendations to avoid inviting government to abuse emergency powers. The people and policy makers both must strive for the common good. The power to enact stay-at-home orders,¹ which 42 states have issued, while technically justified by the mere fact that an emergency has arisen, must be backed up with reason and an appeal to morality. In accountable societies, an explicit ethical justification (usually necessity) for each emergency provision is necessary. Understanding the justification for uniform action as resting on a myriad of reasons reflecting diverse points of view should provide a basis for creating a better framework for the next national emergency.

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II. Public and private morality: Does COVID-19 response belong exclusively to either?

The sphere of private morality should compel behavior for the good of others. Yet people have vastly different views on what is good for others. To many, it is as reasonable to feel obligated to remain working in order to earn money and support a household as to stay at home to reduce the spread of disease at the risk of being unable to support a household. People both unreasonable (even in denial about the scope of the pandemic) as well as reasonable may have a valid reason not to stay at home. Liberal democracy supports variance in the view of what is reasonable. Emergencies cannot allow everyone who holds a reasonable opinion on how to proceed to proceed as they wish. Management of COVID-19 policy is properly in the public sphere where government must impose on the reasonable in society to be reasonable the same way and on the unreasonable to follow suit against their will. Private morality can overlap with government policy: many people who understand the gravity of COVID-19 will follow the orders as they would if the orders were mere recommendations, and the recommendations as if they were orders.

A private morality failure can occur when people do not want to sacrifice for the good of others. To achieve either the utilitarian goal of maximizing happiness or to take a humanistic approach maximizing social good while minimizing suffering, the people must follow the orders as long as the orders are reasonable.² Arguably, capitalist society relies on incentives, even greed, and people are not easily moved to make personal and financial sacrifices. If stay-at-home recommendations remained a private morality issue, COVID-19 would thrive due to differing points of view. Norms and social pressure were not enough to achieve social distancing where the government has not insisted on it. For example, in Florida, beaches, bars, and restaurants remained crowded until this week while in New York, orders that became stricter progressively did change behavior using the law. Those with preexisting conditions should stay at home for their own protection aligning their actions with best practices regardless of the motive, creating an opportunity for overlapping consensus.

The safety of healthcare workers is another moral impetus for individual's precautionary actions. A shortage of personal protective equipment is well established. Staying at home benefits healthcare workers just like using good judgment in recreational activities saves rescue workers. Fewer severe cases of COVID-19 would be safer for healthcare workers. Some people who do not want to stay home for other reasons might be compelled to out of respect for healthcare workers.

Private morality is intertwined with public morality. In California, the general population may have been more supportive of the measures than people in other states would be. Some governors did not fear that most of their constituents would not understand the need for action. While skeptics exist even in New York and California, and many do find the stay-at-home order too restrictive, the overall acceptance is shored up by a prevailing view that the order is aligned with the correct solution. Private morality eases the need for punishment in enforcement. In *Reshaping the Common Good in Times of Health Emergencies*, George Smith argues an educated electorate will understand the need for intrusive public health measures in emergencies.³ Arguably, even an undereducated electorate is certainly capable of understanding the necessity of staying home and limiting social contact. The scope of government action can be condensed by a broader willingness of the people to participate in the actions set forth in stay-at-home orders and recommendations.

Public morality also varies: Governors have overseen COVID-19 statewide actions differently. Some states took decisive action early while others have kept businesses open and made no statements about social distancing, staying home, or even encouraging recommended behaviors set forth by WHO and the CDC. California moved quickly to establish a stay-at-home order while some states' governors have still failed to act. (National Conference of State Legislatures and the National Association of Counties have maps showing state and county orders.⁴) Florida's new stay-at-home order does not prohibit religious groups from worship services, a known risk. Some states have been steadfast in their inaction for various reasons: their skepticism of action is fueled by misinformation about the severity of the pandemic; and, their governors and local officials fear the political cost of temporarily shutting down non-essential businesses, forcing non-essential workers to stay home, and limiting personal freedom. Their approaches are outside the scope of scientific reasoning and must be overridden. There is debate about the best course of action but the do-nothing approach is not within reason.

Governors of the eight states without an order, Arkansas, Iowa, Nebraska, North Dakota, South Carolina, South Dakota, Utah, and Wyoming reflect the prevailing views of their states' residents. Governor Noem of South Dakota argues people are responsible for their safety, absolving government of the public health responsibility. Most of the other governors assert that changing personal behavior through recommendations is more important than executing an order.⁵ If the people in those states were more willing to change their own behavior, more invested in making moral decisions within the scope of scientific reason for the common good, the governors would be proven right: urging behavior would be enough. However, the prevailing mindset in those states might be that because the government is not making a strict order, COVID-19 does not pose a major public health threat. The lack of orders also reflects a phenomenon: the public and the state governments do not really believe the science. If they did, reducing deaths through public policy would probably trump notions of freedom. The public policy makers are reflecting social norms that do not define the common good in an emergency appropriately and that ignore that government is the entity that should act for safety and the general welfare. A libertarian or small government tradition should not be an excuse for the unrealistic expectation that all people will converge to protect public health.

Idaho has a more severe local problem: a lapse in both public and private morality based specifically on the constitution and legal arguments regardless of the science. The governor, Brad Little, issued a stay-at-home order on March 25.⁶ Northern Idaho has representatives in its state legislature condoning and encouraging boycotting the order and drumming up enthusiasm for the idea that the constitution guarantees an unconditional right to assemble.⁷ Ammon Bundy, known for taking over a federal wildlife reserve in Oregon on similar anti-government grounds, spearheaded a movement to ignore the stay-at-home order encouraging people to attend meetings and even a 1,000 person church service on Easter. He aims to create a civilian militia to "physically stand in defense."⁸ While other states also have civil liberties extremists operating in a sphere well to the right of libertarians, the documented reasons to ignore a stay-at-home order or not issue them at all tend to have some link to advisors giving unscientific recommendations and people failing to believe the developing science supporting the high risk. The Bundy formula violates the US body of constitutional law that fully supports the exercise of emergency powers as well as the many noted exceptions to first amendment rights. The northern Idaho community's view is indifferent to the high risk of deaths from COVID-19 and values civil liberties decisively.

In a polarized political climate, it is easy to argue that the differences between states' reactions are political. In 2016, Trump won the eight states that are now without stay-at-home orders with a wide margin. However, just weeks ago, many New Yorkers were uncertain of what would be necessary to slow the spread of COVID-19. The virus had reached a nursing home in Washington state. New York may have taken action

sooner if the physical distance and the targeted age group of the first cluster of the virus were different. It did not hit close to home. Although schools and government officials did take action, many felt they overreacted at first. Now, information from WHO, other countries including Italy and South Korea, and states that have addressed COVID-19 can educate others about which policies are most likely to succeed. There are states and counties where the actions that are reasonable may vary but at this point it looks like even rural states are experiencing cases of COVID-19 which would spread through schools, social interactions, and businesses if not contained.

Emergencies that do not recognize state borders call for consensus in the action of government. Weather events, wildfires, mass shootings, and even terrorism are manageable because resources can be moved from state to state. The Army Corps of Engineers and FEMA can be instrumental in overseeing logistics of resource movement. Presidential power is at its greatest in times of an emergency⁹ yet the current president, after failing to act in a timely manner, has deferred to states to manage the virus. The balance of power is three-pronged: individuals, states, and the federal government vie for power yet the federal government is not promoting compelling public health orders. Without federal action, governors should agree on the best course of action for COVID-19. Without consensus, the states that fail to take action will undermine the measures taken in other states. The states failing to act may face worse economic conditions in the long run as COVID-19 spreads. Keeping businesses thriving longer now will come with a human cost soon. If states will not act, the president should act and his actions must be within "reason."¹⁰ In Germany, Angela Merkel's actions were decisive despite a fear of powerful governments stemming from her own communist East German upbringing. Yet her "appeal to reason" and her attributing "absolute necessity" as a justification were well received.¹¹

There are many government rationales for taking swift action that can be invoked to spark action by governors failing to act so far. David Fidler sees multiple rationales for government power in the public health sphere: health, international relations, national security, macroeconomics, and international trade, among others. He introduced two paradigms. The first, the "power paradigm" asserts governments have multiple completely different motives for power. The CIA, the World Trade Organization, and humanitarian organizations might all promote public health for international relations for different reasons. The second, "the paradise paradigm" sees public health policy as humanitarian, viewing "power in terms of health" rather than "health in terms of power," and is more likely to recognize health as a human right. Fidler finds it difficult to reach consensus. An "axis of illness" that recognizes combined causes for the spread of dangerous pathogens calls for some cohesive policies regardless of the many motives behind them. His axis calls attention to factors ranging from microbial resilience to social determinants of health.¹² Overlapping consensus among governors should help: if a governor does not care about the people's health, the governor might care about any one of the economic catastrophe, the effect of the virus on trade, savings accounts, the strain on the healthcare system, and jobs.

The government has the ability to regulate businesses and places as well as people's actions. Heavier regulation of businesses can alleviate the need to heavily regulate individuals. Closing places of employment, beaches, and public parks, and regulating how restaurants may serve people (takeout and delivery only), and changing the maximum number of people allowable in grocery stores (something fire codes already govern for many spaces) would encourage social distancing and staying home: having nowhere to go helps. The eight states resisting the best policy (stay-at-home orders) need to expand their limited policies and invoke regulatory powers more.

III. Clear Goals and Absolute Necessity: What is the common good and how do we achieve it?

The goals of the stay-at-home orders should be reducing deaths. Doctors and officials say to stay home to prevent the spread of COVID-19 and invoke the term “flatten the curve” referring to an effort to decrease the number of new diagnoses which would help hospitals handle patients slowing the number of cases with immediate needs. People may be less accepting of sacrifices for the public good when the public good is for the collective benefit rather than for the benefit of known individuals. Public schools benefit individuals and thus society as a whole while many environmental laws exist for the collective good but often do not benefit distinct predictable individuals.¹³ Similarly, social security has buy-in from the public because known predictable individuals benefit from it while healthcare reform has been fraught with controversy over how much some should subsidize the healthcare of others. COVID-19 stay-at-home orders fall in murky space between collective benefit (an interest in saving lives) and an unpredictable individual benefit. While high risk categories have been identified, it is impossible to predict who will contract the virus and what outcome they will have.

Utilitarianism in determining the goal in an emergency might not be the best framework to decide how the burden is shared. If maximizing happiness maximizes utility, and there is an assumption that the maximum happiness is happiness for the most people, then other important values could be inadvertently set aside. Strict utilitarianism could lead to every single person staying home regardless of personal risks, fairness, or justice. Wiggle room is needed even in an emergency. A goal of minimizing harm could focus differently on those at the most risk.¹⁴ The same action (staying home) would extend to the general public by appealing to people’s moral and ethical reasons for also wanting to protect the vulnerable and reduce suffering. John Locke expressed concern for executive overreach in emergencies partly because it could set a precedent that is abused later making it difficult for “people...[to] recover their original right.”¹⁵ If the goal is not only maximizing happiness, and reducing suffering, but also doing so as fairly and with as little intrusion into rights as possible, the goal might better represent the intersection of private and public morality. Buy-in is key to attaining success without relying on unlimited emergency powers, especially police power.

Stay-at-home orders have huge benefits to unknown individuals and a distinct collective benefit in society’s goal of preventing death. To justify the inconvenience, the loss of income, the sacrifice of freedom, an effort to convey the benefits should be more extensive. The public in some states clearly understands the risks and wants to do the recommended actions. Where there is not buy-in, justification must be delineated more clearly. Instead of dismissing each person weighing a right to work, to travel, and to socialize, a larger more important public health goal must be clear. Other people should not have to die for any one person’s right to work, to travel, or, especially, to socialize in person. Necessity is the appropriate excuse: there is no known solution that would impinge on freedom less so staying at home is an acceptable requirement. The life and death aspect should be exploited in a responsible way: governments must justify stay-at-home orders as necessary to reduce death.

IV. Efficacy and the Least restrictive means

In China, a single party decides everything and has no nationally expressed legal obligation to consider individual rights when it makes policies. In the US, elected officials are expected to act within the bounds of the constitution and in accordance with public morality but presidential power does extend to the temporary suspension of normally recognized rights for the sake of public health.¹⁶ The public should

understand the rationales for strong action to decrease the human cost of the COVID-19. There is also a human cost to closing schools and businesses. The appropriate policy must see public morality as able to address many types of human cost weighing the benefits and harms. Exceptions (even some unforeseen) to stay-at-home orders will be necessary. For example, domestic abuse victims must be permitted to join other households if they can. Stay-at-home orders do include exceptions for leaving the household to purchase food or medicines, for medical care, and to go outside for walks and exercise in public spaces as long as social distancing rules are followed. The exceptions recognize that orders that outstep the bounds of liberal society must be narrow and reasonable.

People should only be asked to sacrifice what might be their entire savings as well as their freedom to move about if stay-at-home orders actually prevent transmission of COVID-19. To argue stay-at-home orders are a necessity for the common good, leaders should demonstrate a “substantial relationship to the public health, the public morals, or the public safety.”¹⁷ ¹⁸Most stay-at-home orders allow people to be outdoors. Evidence of the efficacy of the US style restrictions is developing. Earlier action is best: South Korea¹⁹ followed a social distancing regimen without closing down schools and businesses to the extent of Italy which fared worse.

Italy and France have already fined people and some countries also threaten prison time for those violating quarantines. France has added police who are tasked with issuing fines if people leave their apartments without proper paperwork attesting to an allowable reason. The shift in power must be controlled. COVID-19 must not be an excuse for increasing centralized power that could be abused. The least restrictive means should not need to include imprisonment for violating quarantines. Many local mayors have made efforts not to detain people for minor offenses in order to decrease prison populations and prevent transmissions of COVID-19 in prisons. Populations in Europe so far seem amenable to sacrificing rights for the COVID-19 emergency orders: they want to save lives so they are willing to be subject (or to have others be subject to) to fines and imprisonment. In the US, we should take measures to protect democracy. Opposition to fines and imprisonment should remain strong. Instead, stay-at-home orders should be free of punitive measures that fall into criminal rather than civil actions. “Public health police powers are an expression of the civil, not criminal, authority of the state.”²⁰ For those in public and not social distancing very low fines should prevail or possibly future community service, not New York City’s proposed \$1,000 fines. Incentives to follow the orders should be strong enough to ensure new crimes are not written in criminal codes where they can be rehashed in lesser emergencies. Neighborhood watch programs should manage the stay-at-home orders ensuring that private morality is a driving force partnered with government orders that reflect the best public health recommendations.

V. Power Grabs with weak or no relationship to COVID-19 prevention

In New York, hospitals tried to forbid pregnant women from being accompanied by a partner or spouse while giving birth but New York’s governor overrode the measure. Texas is forbidding abortions during the COVID-19 pandemic unless they are to save the life or health of the mother. Most abortions in Texas are medical rather than surgical and the performance of medical abortions are not as complex and would not free up hospital beds or healthcare workers. A narrower restriction could be reasonable but even Ohio’s restriction on surgical abortions is unnecessarily restrictive. “The American College of Obstetricians and Gynecologists and the American Board of Obstetrics and Gynecology recently [issued a statement](#) saying that abortion should *not* fall into the category of procedures that can be delayed during the coronavirus outbreak, calling it “an essential component of comprehensive health care.””²¹ Ending the two visit

requirement imposed for abortions would help decrease transmissions if the Texas governor's motive were to decrease transmission of the virus.

The Justice department asked congress for the power to detain people without a trial in a move contrary to many localities trying to halt arrests in an effort to decrease the prison population.^{22 23} The Trump administration has also tried to violate *habeas corpus* rights by pausing judicial proceedings, yet the same result (closing courts that do arraignments) could be easily accomplished by choosing not to make an arrest. The ends do not justify the means when other options are available. Trump also looked to closing borders, restricting flights, and rejecting asylum seekers some of which may be substantially correlated to controlling the pandemic and should be priorities if there is a proven relationship to public health.

CONCLUSION

Democracy in a federalist society should not allow the least reasonable laws to prevail when the fallout will cross state lines. Divisions in society and different preconceptions of what is moral can be resolved by appealing to the framework of the democratic system: use the least restrictive means to reach an articulated goal in an efficacious way and then restore any right that was temporarily suspended. The systemic reinstatement and lasting continuity of those rights must be a pillar of democratic systems. If the common good as projected in public policy could never trump rights, and the public does not engage in the private morality for the common good, then, as George Smith argues, the healthcare crisis could turn the constitution into "a suicide pact."²⁴ Reason must be the basis of governmental public health decisions so that the skeptics cannot stand in the way of the solution and the government cannot outstep its powers. When a novel contagious pathogen appears in the world, absent presidential action, governors must agree on reasonable science-based action. Some technique to garner consensus or override governors that fail to act should be developed. Elections were the chance to decide who would make difficult decisions. A new paradigm could be in place in time for the next pandemic. It should not matter who the president is or which political party is in power in each state: the new paradigm must follow reason and public morality. Private morality must support a government that is acting within the bounds of reason, informed by renowned scientific organizations. The odd problem in the US remains a president not using his powerful post to take steps necessary to stop the virus but stealthily seeking to change other policies under the guise of necessity. Private and public morality call for the same goal: eradicating COVID-19 with rights intact.

¹ In this paper, stay-at-home orders, safer-at-home orders, and shelter-in-place orders are encompassed by the term stay-at-home orders. The varying specifics among the orders are discussed when relevant.

² Smith, George P., II. "Re-shaping the Common Good in Times of Public Health Emergencies: Validating Medical Triage," *18 Annals of Health Law* 1 (2009).

³ Joshua L. Friedman, *Emergency Powers of the Executive: The President's Authority When All Hell Breaks Loose*, *25 Journal of Law and Health*, Vol 25:265 (2012) at 296 quoting George P. Smith.
https://www.law.csuohio.edu/sites/default/files/academics/jlh/friedman_final_version_of_article-2.pdf

⁴ National Conference of State Legislators <https://www.ncsl.org/research/health/state-action-on-coronavirus-covid-19.aspx>
National Association of Counties map of counties <https://ce.naco.org/?dset=COVID-19&ind=Emergency%20Declaration%20Types>

⁵ <https://www.cnn.com/2020/04/04/politics/republican-governors-stay-at-home-orders-coronavirus/index.html>

⁶ <https://coronavirus.idaho.gov/statewide-stay-home-order/>

⁷ Some state representatives, including Heather Scott, a Republican from northern Idaho, argue people should ignore the order. A local sheriff, Darryl Wheeler, spreads the idea that the state can only legally restrict the movement of the sick. Tim Remington a pastor with a seat in the state legislature also claims the order violates constitutional rights. Baker, Mike. "A 'Liberty' Rebellion in Idaho Threatens to Undermine Coronavirus Orders." *New York Times*. April 7, 2020.

⁸ Baker.

⁹ Friedman, 267 quoting Alexander Hamilton, "The Federalist." "There can be no limitation of that authority which is to provide for the defense and protection of the community in any matter essential to its efficacy."

¹⁰ Friedman, 178 and 279. Friedman favors strong presidential powers but his analysis presupposes a president willing to take bold action.

¹¹ Rising, David and Moulson, Geir. (of Associated Press). "Germany's Merkel shines in virus crisis even as power wanes." PBS Newshour Online. Mar 29, 2020. [New York Times. April 4, 2020.](https://www.pbs.org/newshour/world/germanys-merkel-shines-in-virus-crisis-even-as-power-wanes?fbclid=IwAR0PoAMjUL6e_D7cTaHH97ZGedbdQzhF3Xqg_lz3Y0cBfAXbQHq_LwELBsk; Bennhold, Katrin.)

https://www.nytimes.com/2020/04/04/world/europe/germany-coronavirus-death-rate.html?smtyp=cur&smid=fb-nytimes&fbclid=IwAR2_U204R7GXuelAggtZ6A6etRo47rmux6Qs4BGDwnyrkfnlZcf8sdb_G-Q

¹² Fidler, David P., "Caught between paradise and power: public health, pathogenic threats, and the axis of illness." *McGeorge Law Rev*, 2004; 35(1):45-104.

¹³ Environmental laws can help individuals by removing pollution from their area or by imposing workplace protections but regulations to do with largescale items like carbon cap and trade or protection of endangered species are for the collective good. They tend to face more scrutiny without well defined beneficiaries although all benefit.

¹⁴ Smith, George P., 14. Smith favors a balanced approach recognizing society values actions based on fairness and justice not just maximum utility. Smith also professes a balance of public health benefit and civil liberties arguing in times of emergency the equilibrium shifts temporarily. Smith, 34.

¹⁵ Friedman, 269-70 quoting John Locke.

¹⁶ Friedman.

¹⁷ Friedman citing *Jacobson v. Massachusetts*, 197 US 11, 25 (1905).

¹⁸ Jonathan Smith, lecturer in Epidemiology of Microbial Diseases and Global Health Yale University School of public Health, argues to get the public health benefit of social distancing all members of the household must keep a distance from all nonmembers of the household. The smallest transgressions spread the virus. "If your son sneaks to see his girlfriend, and you later sneak to have coffee with a neighbor, your neighbor is now connected to the infected office worker that your son's girlfriend's mother shook hands with." Social distancing done early enough could break chains of viral transmission. Looking at each family as an individual unit and separating each unit from all others, as recommended by epidemiologists, should be achievable without mandatory government action. Ladra, "Epidemiologist explains why social distancing is #1 weapon vs COVID19."

Political Cortadito blog. March 24, 2020. <http://www.politicalcortadito.com/2020/03/24/epidemiologist-explains-why-social-distancing-is-1-weapon-vs-covid19/>

¹⁹ South Korea ramped up testing early and tracked cases more accurately allowing it to be less restrictive in its response. As a result of testing both the symptomatic and the asymptomatic, South Korea was able to quarantine large groups immediately. While quarantines are severely restrictive, South Korea never needed to have the entire population stay at home except for essential workers. The United States did not have enough tests to implement strategic quarantines. To slow the spreading virus, cities and states in the US had to issue orders to the general population. The less restrictive means used in North Korea required tests, fever testing, and spreading knowledge of how the asymptomatic may also be identified and quarantined. South Korea suggested young people who lose their sense of taste and smell should be tested for the virus and isolated. To address

COVID-19, the least restrictive way still must cover more people because of the lack of available tests.

<https://www.wired.com/story/a-south-korean-covid-19-czar-has-some-advice-for-trump/>

²⁰ Galva, Jorge, Christopher Atchison, and Samuel Levy, "Public Health Strategy and the Police Powers of the State." *Public Health Reports* (2005 Supplement) Vol. 120, p 25.

²¹ Bazelon, Emily. "The Coronavirus Becomes an Excuse to Restrict Abortions: Texas and Ohio say the procedures are nonessential and must yield to the pandemic." *New York Times*. March 26, 2020.

²² Politico <https://www.politico.com/news/2020/03/21/doj-coronavirus-emergency-powers-140023>

²³ <https://www.theatlantic.com/ideas/archive/2020/03/when-disease-comes-leaders-grab-more-power/608560/> citing this <https://www.latimes.com/world-nation/story/2020-03-18/israel-coronavirus-netanyahu>

²⁴ Smith, George P., citing *Terminiello v. Chicago*, 337 US 37 (1949) (Jackson, J., dissenting). Smith also refers to Posner, Richard A., *Not a Suicide Pact: The Constitution in a Time of National Emergency*, Oxford University Press (2006).