# War on All Fronts

## A Theory of Health Security Justice

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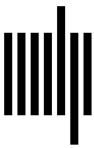

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# 7 The Ethics of Liberty-Limiting Measures

The orthodox view of public health ethics focuses on the ethics of specific public health interventions. Of particular interest to health security are "liberty-limiting measures," such as quarantine, mandatory vaccinations, curfews, civil commitments, and border closures.[1] While some have argued that the most extreme of these measures are antiquated and could plausibly be replaced by robust nonemergency public health,[2] liberty-limiting measures continue to be popular public health tools. If anything, over time states appear to have become more accustomed to dishing those measures out. I have already discussed how, in Australia during the COVID-19 outbreak, explicit curfews and restrictions on movement for the city of Melbourne were instituted using the police to enforce lockdowns. These limits exceeded the stay-at-home orders common to the United States (erroneously referred to as "lockdowns"), which rarely if ever escalated to being enforced with the force of law.[3] The Melbourne lockdowns were considerably more extreme: individuals were forbidden from traveling more than 5 kilometers (3.1 miles) from their homes except for approved purposes such as work in permitted industries or caregiving; were subject to an 8pm–5am curfew; and were forbidden visitors among other limitations; this applied not to a small group but to a city of 4.9 million.[4]

Arguably the most famous liberty-limiting attempt was the total closure of the 11-million-person city of Wuhan, the epicenter of the COVID-19 outbreak in humans.[5] Travel into and out of the province of Hubei, in which Wuhan is located, was also restricted to stop the spread of the virus to the rest of China and beyond. This particular strategy is concerning, in part because it exceeds the recommendations for handling the outbreak provided by WHO and set out by IHR, and thus raised questions about the role of international law in global health.[6]

This chapter examines what liberty-limiting measures look like as we think through a theory of just health security. Despite the flurry of war metaphors in the opening months of the pandemic, only one dealt with the unique features of military ethics and how they might play out if applied to public health in a global pandemic.[7] This is despite the legal and moral basis of armed conflict being considerably more developed, and considerably more ancient, than the ethics of public health.

In *in bello* considerations, we find the most tendentious and difficult question of military ethics: when an individual acting on behalf of the state can kill others. In this body of work lie the antecedents of the doctrines of necessity and proportionality that the orthodox view develops, albeit in a somewhat confused way. As I discussed earlier, there is death and misery on the line when we enact public health policies. Thus we have to think carefully about what kinds of responses are justified, and when, to particular kinds of threats.

In what follows, I first detail *in bello* considerations, and in particular how recent debates in military ethics have attempted to square international humanitarian law governing killing in war with human rights law. This is critical in marrying ongoing debates about global health governance and human rights with the theory of public health emergencies developed over the last few chapters.

I then turn, and take as a case example, the recent debate around social distancing in the COVID-19 pandemic as a means to explore the ethics of liberty-limiting measures. I choose this case as a methodological move because it seems, on the one hand, innocuous: COVID-19 is a public health emergency if ever there was one, and social distancing seems less invasive than other liberty-limiting measures like vaccine mandates or quarantine. I show how social distancing can be seriously liberty limiting, and by applying the previous work on harm and domination from the impersonal account of disease.

I then make the case for an ethical framework for liberty-limiting measures in public health emergencies that is on the one hand more expansive than the orthodox view on account of fewer criteria and greater latitude in accomplishing public health aims in an emergency; but more restrictive in terms of how it conceives of obligations toward citizens caught up in pandemic response. I do this through a reading of the criteria for *jus in bello* that clarifies necessity, proportionality, and discrimination principles as they apply to public health.

I conclude by linking ethical considerations within public health emergencies to those outside emergencies. I argue that the liability the necessity principle sets up for states requires them to prepare not just during, but before the onset of emergencies to support citizens in pandemic response. This entails practical ethical considerations for how we make plans about technology, staff, and healthcare funding, resolve the aftermath of health emergencies, and engage in global governance.

### *Jus in Bello*

Where *jus ad bellum* deals with the ethics of declaring war, *jus in bello* deals with the conduct of war itself. War can cause an almost incomprehensible amount of suffering. As such, an enormous body of literature deals with the ethics of armed conflict, international humanitarian law, and its intersection, with an eye toward the limits placed on suffering inflicted in the pursuit of war.

In general, there are three components to the ethics of conduct in war, compared to five of the orthodox view of public health ethics. The most critical of these is the principle of discrimination. This strongly demarcates combatants from noncombatants: civilians, the sick, the wounded, and humanitarian and aid groups in a war zone. The principle of discrimination prohibits the intentional targeting of civilians or civilian buildings as part of military operations, and holds that it is always worse to kill noncombatants than combatants.[8]

Next are necessity and proportionality. Military acts in war are permissible to the degree they are necessary to the objective of winning: ending war and restoring a lasting peace. This includes the killing of enemy combatants, and whether acts of war inflict suffering on the enemy unnecessary to the task at hand. Military acts, moreover, are only permissible to the degree that their benefits outweigh the harms caused by their enactment. Much like *ad bellum* considerations, *jus in bello* takes specific kinds of benefits and harms into consideration but does so around individual military actions rather than the war as a whole. And they are both justified along similar grounds: because harming individuals is always on its face wrong, it is not enough to have an absence of reasons not to harm someone—we must have a positive reason to do so.[9]

A number of internal debates in military ethics that seek to revise the basic tenets of just war theory are important to the analysis that comes next. First, there is debate about what kinds of costs must be incurred to prevent civilian harm. Especially in humanitarian interventions, say the defense of a people against a despotic government, there may be cases in which prolonging a war is worse for civilians than finishing it quickly, and provides a reason to impose additional risk on civilians so long as it is not excessive or greater than would be imposed by other tactics that may prolong the war.[10] However, there remain strong reasons for a state and soldiers to accept additional liability in order to ensure civilian lives are preserved in prosecuting a war.[11]

The second concerns what constitutes "necessity." Until recently, modern understanding of this principle was that acts satisfied this principle if they conformed to the overall aims of military action. This was a broad understanding of necessity in which discretion played a large role: as long as an act was seen as contributing to military success, necessity was satisfied. Yet this interpretation has changed in recent years. Larry May, in particular, has argued that necessity should be viewed in considerably more strict terms than previously thought, and uses the evolution of international humanitarian law to demonstrate this. The International Committee of the Red Cross's 2009 *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* recommended that "the kind and degree of force which is permissible against persons not entitled to protection against direct attack must not exceed what is *actually* necessary to accomplish a legitimate military purpose in the prevailing circumstances." In 2013, they further claimed it would "defy basic notions of humanity to kill an adversary or to refrain from giving him or her an opportunity to surrender where there is manifestly no necessity for the use of lethal force."[12] While these two claims cut across each other in some ways, May has shown that both point to the idea that *actual* necessity is required, rather than a presumed or loose sense of necessity. That is, a clear operational connection is needed to the aim of restoring a lasting peace through the conflict. He further notes that while this is incredibly demanding of military commanders, it also supports a broadly contingent pacifist position that starts from true pacifism and then works back to a demanding position on war.[13]

This change arises in the context of harmonizing human rights law with humanitarian law in recent decades. In 2005, the High Court of Israel

held that "a civilian taking part in direct hostilities cannot be attacked at such time as he is doing so, if a less harmful means can be employed." That is, civilians engaged in violent acts could not be engaged with lethal force unless actually necessary to protect citizens against imminent harm. This supports the 1996 International Court of Justice ruling against Israel that while civil and political rights might be temporarily overruled in time of national emergency, the right to life, and to not be deprived arbitrarily of one's life is non-derogable.[14] Both cases show increasing political consensus that human rights are not set aside during conflict, but rather must be consonant with conduct in war except in cases where there is genuine necessity on which the pursuit of the resolution of war depends.

A final controversy that is important for our discussion is the permissibility of killing in war and its relation to the declaration of war. Just war theory in its modern formulation holds that *ad bellum* and *in bello* considerations are independent. That is, unjust wars can be fought justly, and just wars can be fought unjustly. Recent work has challenged this, holding that unjust wars cannot be fought justly in principle, and that soldiers on an unjust side are liable to be killed where soldiers on the just side are not.[15]

The debate about revisionism in just war theory bears directly on health security, but with an important twist. In war, a sovereign nation has broken the peace, whereas the threat in a public health emergency, as in chapter 4, is primarily concerned with a response to a communicable disease. As one side—and typically the aggressor—is non-agential in virtue of being a virus, bacterium, fungus, or so on, questions of their liability to attack are not important. What is important is the general public during a public health emergency. Citizens not engaged in the institutional response to a public health emergency are, on this account, analogous to noncombatants. Their rights might be infringed upon in some cases, but only with a special justification. And the state ought to bear a cost in order to prevent those rights violations to begin with. The question, then, is: what cost? To understand that we turn to social distancing.

## Social Distancing

Social distancing is a term that exploded into the lexicon in 2020, but as a series of practices the use of measures that change the spatial and temporal dimensions of communities to influence how infectious diseases spread has

a long history. Frederick Law Olmsted, whose best-known work is New York's Central Park, described the park as "the lungs of the city," where individuals could inhabit open green space away from the crush of the rest of the city. While grounded in miasma theory, Olmsted's intuition is a testament to basic ideas of social distancing—that increasing the space between inhabitants of a community can reduce the spread of disease.[16] Similar effects can be found in the influence of tuberculosis on modernist architecture and public housing.[17]

Yet the term "social distancing" is not as well defined as other public health measures. While "quarantine" and "isolation" refer to the confinement of individuals who are suspected to be exposed to an infectious disease, or are clinically ill with that disease, respectively,[18] social distancing is a single name for a very broad set of acts, policies, and institutional choices. All these choices have at their core the aim of reducing the frequency of contact between individuals that may lead to the transmission of infectious disease.

Consider four paradigm cases of acts that might plausibly constitute social distancing. The first is guidance to wear masks, which may come in general recommendations for all members of a community, or for subsets (those who are symptomatic, in service work, on public transit, and so forth) of a community. This measure seeks to reduce the frequency of close contacts resulting in transmission by reducing the number of contacts that count as "close"; that is, reducing the incidence in which any contact results in the spread of respiratory droplets between individuals.

Next, closures of businesses or schools are a paradigm case of social distancing. These are broader forms of social distancing and achieve their effect by reducing the incidence of contacts within mass gathering settings. Business and school activities are necessarily ones in which individuals come into close contact, exchange materials that might carry infectious disease particulates (e.g., anything that can carry fomites), and are sites in which a number of communities might interact around a shared location, such as a big-box department store that services a number of towns. An indirect effect of this closure might be to reduce the incentives people have to leave their homes in the first place, which has secondary effects such as reduced sidewalk traffic or public transit use.

Background policy decisions may count as *de facto* social distancing policies. Mandated paid time-off policies are heterogeneous across the world, and even those that are in place are varied in the amount of time they allow,

under what circumstances, and for what category of worker. Nonetheless, paid time-off policies have been associated with up to 40 percent reductions in seasonal influenza cases, and thus an important platform policy to encourage social distancing during an infectious disease outbreak, especially among healthcare workers and other groups vulnerable to infection.[19] In virtue of breaking transmission, therefore, it could count as a kind of social distancing measure.

Finally, the architectural and landscape decisions by cities and even nations can count as social distancing if they are designed to reduce the transmission of infectious disease. While these can be background conditions to how cities or nations endure an infectious disease outbreak, they can also be choices made during particular outbreaks, such as the city of Bogotá's decision to open forty-seven miles of temporary bike lanes to improve air quality and reduce crowding on public transport during the COVID-19 outbreak.[20]

These cases allow us first to distinguish between practices that seek to reduce the number of potentially transmission-causing interactions that occur, and those practices that seek to reduce the conditional probability, given an interaction, that transmission will occur. Second, we can distinguish between public health policies or practices that are individually performed, and those that are performed by organizations or social institutions. Third, we can distinguish between policies and practices that maintain social distancing regardless of whether a public health emergency arises, and those that are implemented within (and perhaps only within) a public health emergency.

The COVID-19 outbreak demonstrates how diverse these practices can be. Across the globe a range of measures have been enacted, with different levels of severity, to prevent the transmission of COVID-19.[21] These include stay-at-home orders, bans on large gatherings, business closures or seating limits, school closures, mask mandates, cancellations of elective surgeries, and prohibition of visitors in care facilities. In addition to national variation, some vary their policies by substate region, restricting social distancing measures only to those regions that have the highest number of cases.

This diversity offers an opportunity, by examining social distancing as a class of practice, to think critically about the kind of burdens these different practices might impose on individuals and communities during pandemics, and thus the conditions under which different practices are permissible. In particular, it offers a view of social distancing that sees it as,

at times, a considerably invasive public health practice, but is in principle able to be designed in ways that mitigates some or even all of the infringements posed.

## Interference and Domination

A chief reason to consider social distancing, rather than, say, quarantine, is as follows: where quarantine is often seen as a straightforwardly liberty-limiting practice,[22] social distancing is somewhat more opaque. A preliminary concern is if this is really an issue. But an advantage to resolving this question in the positive is that it can give us an insight into what should be expected of liberty-limiting actions in terms of satisfying the demands of just health security.

As a preliminary move, I set aside certain questions of effectiveness of social distancing measures. These have been answered to varying degrees elsewhere,[23] but there is a considerable amount of normative work to be done even once we have established the expected effectiveness of social distancing measures. Rather, I wish to inquire whether, as a matter of moral theory, these are the kinds of acts we should be concerned about in a theory of just health security.

The first concern to address is whether social distancing measures are liberty limiting in the first place. Part of the uncertainty here comes from the breadth of the term. It is questionable if measures involving paid time off, whether enacted on an emergency or normal legislative basis, or of urban design, or of indoor versus outdoor dining, are liberty limiting in any substantive sense. Still other measures may be subject to reasonable disagreement. Take business closures. One might claim a business owner's liberty is infringed upon if they have a right to run their business in the first place, but that the state may have a compelling interest to enforce such a closure in the name of public health. It is less straightforward to claim that a *consumer's* liberty is infringed upon, much less by the state, if such closures arise. This can be seen most starkly when closures are voluntary or in response to guidance over mandates: when the state of Georgia "reopened" from stay-at-home orders in April 2020, some business owners elected to keep their businesses shut.[24] It is not clear that consumers, or employees, have their liberty violated any more than if violated by businesses that

remain closed on Sunday. It is also not immediately clear that employees had their liberty violated, any more than they have their liberties violated by not being able to work for their employers on Sunday. But I countenance that there may be some significant difference for a consumer's liberty rights between a store voluntarily closing due to a pandemic, either because of their own beliefs or in response to a public health agency's nonbinding recommendation, than if the shop is compelled to close by force of law.

The value at stake here is, I take it, liberty claims grounded in a voluntaristic, negative conception of liberty as noninterference. This is the sense used by the orthodox view, as Childress and Bernheim suggest, in thinking about what the authors of the orthodox view refer to as moral interests.[25] This conception of liberty is a strong presumption against direct interference in one's action by state power.

Yet I think this fails to capture two important senses in which social distancing measures can infringe upon liberty, albeit in less obvious ways. To understand, we can call upon the work up to the impersonal account of disease. Applied broadly enough, and for long enough, social distancing can damage our ability to form communities, and limit our opportunities in important ways. Freedom of movement and freedom of association are typically thought of in noninterference terms, such as when they are infringed upon through quarantine actions.[26] But the restrictions placed on individuals during social distancing can be conceived of in other terms, namely those that conceive of liberty as an exercise in nondomination.

Nondomination conceives of our rights not merely as the absence of interference in our activities, but in certain important assurances that those actions cannot be restricted in arbitrary and/or sudden ways. In particular, having such a right entails that you are generally free from some interference in making some sort of choice under certain circumstances; that those choices and circumstances are publicly salient and not at the mercy of the definitional sophistry of others; that you have a basis for believing you reliably enjoy this kind of freedom; and recourse if interference does occur.[27]

Unlike quarantine, in which individual freedoms are infringed upon in the obvious, noninterference sense and where that limitation is part of what quarantine entails, broader social distancing measures infringe on liberties in a slightly different way. They do this by infringing upon liberties as nondomination, disrupting life plans and breaking up communities—frequently

arbitrarily. They do this, moreover, in ways that are frequently exogenous to the practice of social distancing, where the limitations could be lessened or even obviated through supportive measures. Not everyone is dominated in the same way, or even at all, by some social distancing measures. Working from home is considerably easier for some than others. Technology, especially in 2022, mediates the harms and benefits of social distancing. And so it is partly the way that our social distancing measures are structured, tactically, that determines their harms.

This takes us to the next concern: a belief about social distancing measures is that their benefits frequently outweigh their harms, at least in cases of serious harms. The ongoing tragedy of COVID-19 seems to make this obvious, but we should carefully think through why that is. There are two axes on which harms could arise. These axes are first, whether harm is directly or indirectly a result of some social distancing measure; and second, whether those harms are proximate/short-term, or ultimate/long-term. These are logically independent, as we see below.

Direct and proximate harms arise because social distancing is hurting an individual in the here and now. A paradigm example of direct, proximate harms arising because of social distancing are individuals who can't access nonpandemic (in this case, non-COVID-19) medical care as a result of social distancing measures. This may occur because an individual cannot access routine acute care services because of social distancing; because offices are closed, not accepting new patients, are no longer accessible for patients with disabilities, have inadequate telemedicine services for patients' needs, or must close because they lack sufficient personal protective equipment to operate safely.[28] Here, the distancing itself causes harm.

But direct, proximate harms from social distancing are surely more widespread than this. Any individual who is dominated in the sense I described above may also be harmed by social distancing if that domination prevents them from avoiding harm.[29] This includes, for example, individuals who are now confined with abusive family members (including family members they *discover* are abusive in the context of a protracted stay-at-home order) for an extended period, and are unable to access shelters or simply leave the house for some other safe location. A parallel epidemic of domestic violence worldwide has tracked the implementation of social distancing measures and the shuttering of social services in response to COVID-19. Both a lack of social services and increased financial insecurity of inappropriately

enacted pandemic responses disproportionately affect women, particularly those who are acutely vulnerable to violence.[30]

Some individuals are indirectly and proximately harmed by social distancing arrangements right now. These include "essential personnel" expected to be physically present at their job in order to maintain community functions. Essential personnel are harmed indirectly by virtue of being required, perhaps under the threat of job loss, to be present at their work despite the additional risk. Obviously, this is sometimes justified and even required, such as healthcare workers. However, not all essential workers are essential in a justified sense. The US meat industry has continued during the pandemic as an "essential business," costing the lives of workers who are often vulnerable by virtue of poor working conditions, immigration status, and low wages.[31] We might take this two ways: either that the meat industry is not essential *simpliciter*, or that the meat industry is not so necessary that it shouldn't accept reduced productivity by incorporating appropriate social distancing measures within its activities to ensure worker safety. I leave aside which sense is true; in either case, this kind of harm arises because a particular social distancing measure or plan fails to protect individuals, and they may be injured or die as a result.

Individuals may be directly harmed by social distancing, but in a delayed fashion. Consider, for example, elective procedures or screening that may be put off by weeks or months as hospitals and medical centers seek to reduce appointments in order to prevent transmission of disease within their facilities. This raises a complex risk-benefit calculus: on the one hand, nosocomial transmission of COVID-19 is a definite risk; on the other, failure to conduct sufficient early screening for cancers, or perform preventative surgeries such as the removal of high-risk lesions, may cause delays in diagnosis that ultimately result in excess morbidity and mortality.[32] These individuals—and other individuals who are delayed in receiving diagnosis or treatment for some future risk—may not die for some time, but they may die sooner than otherwise because of social distancing measures today.

Finally, there are people who are indirectly harmed by social distancing over a long period. In addition to immediate financial harms to individuals as a result of social distancing practices, for example, there will be an aggregate toll that arises as folks caught up in long-term unemployment will be harmed. Recall that at its height, global unemployment was 9 percent, but considerably more for service workers, young people, people of color,

women, and people with disabilities. This is an "actual cause of death," in the sense McGinnis and Feoge would use it,[33] where the absolute and relative employment discrepancies are the cause of mortality. Those who suffer the most deprivation under social distancing, even if they ultimately survive this pandemic, may borrow against the end of their life to weather the current storm.[34] We have not begun to see, I suspect, this kind of harm because the pandemic is still too close.

None of these harms is trivial, and many are lethal. These harms often arise, moreover, at sites of existing structural injustice. These are the "collateral damage" of public health. Lack of access to healthcare, weak employment rights, or having to congregate in settings in which sufficient protections from infectious disease are already lacking, undocumented immigrant labor, job insecurity, and poverty are all areas where the weapons we use against COVID-19 disproportionately harm citizens. They are nontrivial harms, often inflicted on the already marginalized and vulnerable.[35] And like the public health crisis they stem from, but harder to track, they accrue to populations.

## Revised Criteria

Social distancing is thus not a mere inconvenience but can be a substantial violation of liberty. It is not harmless, and at times can even be fatal. How then, should we understand the permissibility of social distancing under just health security?

Let's start by going back to the orthodox view. The canonical example used in that work is surveillance. In that paper, the authors argue for the necessity of surveillance, but take the least infringement condition to do work in setting the scope of that surveillance, including whether it is active mandatory screening, active reporting from voluntary screening, or voluntary reporting and screening. The least infringement condition of the orthodox view, according to recent work by Allen and Selgelid, applies best when comparing measures that seek to accomplish the same subgoal in a public health strategy.[36] That is, where two or more measures accomplish the same subgoal, the least infringing measure ought to be used. Infringement, here, is taken broadly and not just in terms of liberty interests; so if opportunities can be preserved in enacting some public measure, they ought to be just so that the public health subgoal is preserved between these measures.

But I think just health security can do more than the orthodox view and replace the least restrictive means criteria with a more robust theory of action. Revising the *in bello* discrimination principle for public health, we can claim that human rights retain their force under a state of crisis: there is no *lex specialis*, or law governing a specific subject matter, of public health. This does not mean all liberty-limiting measures are perforce impermissible. Rather, we should resist them, and the actors that pursue these public health goals—in particular, the state—should accept liability in cases where these means become necessary to minimize their harms.

In the previous chapter I noted that proportionality and last resort were related in declaring a public health emergency because proportionality helps define the set of options over which we commit to a last resort. So too, proportionality and discrimination are related within a public health emergency. A revised discrimination version of the principle for health security holds

> *Discrimination*: the public should be spared harm or infringements on liberty when possible, and the state and its representatives have an obligation to accept the costs of sparing them that harm.

That means that, in a choice between alternative measures or different instantiations of measures combined with supportive measures, we should choose the option that least harms, dominates, or interferes with the liberty of individuals, and the state should accept significant liability for this action. These supportive measures may be, among others: compensatory such as replacing lost income; legal, in protecting individuals from eviction; or material, such as providing housing and food for citizens confined during lockdown. But the liability rests with the state, as the foundation of public health and the permissible use of force to enforce that health during an emergency. When the state does not implement these measures, it is acting unjustly. And importantly, it acts unjustly even if the means are proportionate and effective.

To understand why, consider that war allows for an extreme liberty-limiting measure—killing. However, it does not always allow for killing, and in particular when doing so would violate the rights of noncombatants. This is because noncombatants have not given up their rights in virtue of becoming threats that are liable to harm. But the story does not end there, because sometimes we perform acts in the pursuit of the just ends of war that do put civilians in harm's way. And it is always better to act in a way that imposes

less risk when engaging in violent acts, then it is more risk. Seth Lazar, in his work on sparing civilians, gives us an argument as to why:

1. Endangerment is wrong, even if the risks imposed do not lead to harm;
2. Endangerment that violates a right, even if it could lead to harm but does not, is still a violation of that right;
3. If 1 and 2 are correct for any kind of harm, then they are also true when someone is exposed to *wrongful* harm because another intends to act in a way that causes them harm.[37]

Lazar explains that what grounds these is that endangerment constitutes a loss of security, understood as the avoidance of unchosen risks and wrongful harm. This is intrinsically valuable, but it is also deeply instrumentally valuable to planning our lives and enjoying other goods. When I endanger you, even if I do not harm you, I cause you stress and anxiety; but I also may disrupt your ability to plan for the future.[38] Here then, acts that impose risks of harms, including those from domination, are worse when they are riskier than if they are not. From the perspective of health security, we act unjustly when we impose additional risks on those we subject to public health actions, and we are liable for the burden of preventing those additional risks.

Having considered the proportionality and discrimination conditions, what of necessity? The orthodox view holds that public health interventions are justified, all other things being equal, if they are effective and necessary to accomplish some public health goal. But under just health security, that criterion is strengthened. Necessity instead points to goals of a public health emergency that would see its resolution. It is thus not sufficient that a liberty-limiting measure promotes the public's health. It must instead be established that it promotes public health in a way that is operationally linked to the ending of the public health emergency, or in de-escalating the chance of an expected public health crisis in the *ad vim* case, where we act to prevent a future crisis. Some measures may help, but not in the right way: they may improve public health but get us no closer to the end of the emergency. Alternately, some may be overdetermined, such as when a public health actor may be guilty of throwing in the kitchen sink in the absence of a coherent public health strategy designed to resolve the emergency. But the reason why we have license in the first place to perform these public health acts is the emergency itself, and so our actions must be laser focused to ending it.

Taken together, this provides us with two insights into public health action. A strong principle of necessity may provide us with greater latitude to

act than the weaker principle hinted at by the orthodox view. If the aim of a public health emergency is to end the threat of a particular infectious disease, then lockdowns may be strongly necessary to achieve that aim, where a voluntary stay-at-home order is only weakly necessary to lower mortality but without ending the crisis. This means that even if the lockdown incurs greater harms or presents a greater rights infringement, it may be permissible just in case it satisfies an appropriate reading of the necessity condition where half measures do not. Put another way: there is no point in pursuing the proper aims of a justly declared public health emergency with half measures. If there is a positive reason to declare an emergency and act in a liberty-limiting way, then we should take measures that are necessary to fulfill that reason, and not some other reason (or no positive reason at all).

Second, replacing the least infringing measure criterion with a principle of discrimination entails that the state ought to incur significant liability for avoiding harms, including violations of liberty, on the public. This is not just a matter of proportionality, but because taking supportive measures that reduce risk respects agents as ends in themselves and promotes their personal security. This is true even if the person in question would not have ultimately been harmed by the risks we impose upon them.

What of public justification? Three answers are available to us here. The first is that the public has a right to engage in deliberations about liberty-limiting measures in proportion to their bargaining power, as under Moehler's scheme described in previous chapters. But public justification also forms part of a scheme of nondomination, where informing and involving the citizenry about public health measures before they need to be used is part of securing the relevant options to act in a nonarbitrarily restricted way. It also meets Lazar's criteria grounded in security, where it enables individuals to make sufficient revisions to their life plans consistent with a necessary public health action. This places the emphasis on public justification, importantly not just within a public health emergency, but preceding it.[39] Despite the prevalence of editorials and opinion pieces claiming we are "not ready for the next pandemic,"[40] what was almost never done in practice was the process of actually preparing individuals on whom risk would be imposed on a day-to-day basis for what the next pandemic would entail.

Finally, and perhaps inhering closest to the war metaphor, is the idea of hearts and minds. It has, for thousands of years, been an integral part of strategy that if you lay the moral ground of a people properly, then you will never

have cause to war with them.[41] Public justification gives rise to the possibility of a public that is cooperative and even enthusiastic about resisting a public health threat. Without it, the public will sour, and the battle becomes not just against the virus but a people who do not understand and even resent an imposition that diminishes their lives any way the dice fall. A just health security begins with communication as a strategy with which to create options for public health, and not as an afterthought once we know what we want to do.

## Evaluating Social Distancing Measures

How then, should we evaluate the ethics of different social distancing measures? Here, I describe three strategies for doing so. These strategies are not mutually exclusive, and there are reasons to engage in each. Importantly, they accomplish different goals. First and perhaps most obviously, we can evaluate social distancing measures in a decision-theoretic sense. That is, for proposed or enacted social distancing measures, we can ask: to what extent do these social distancing measures satisfy our ethical criteria?

There are a number of plans for enacting, continuing, and lifting social distancing measures we could evaluate here. It is not the purpose of my book to comprehensively evaluate all proposed measures, but some illustrative examples will help. The National Governors Association in 2020 listed seven major reports that contain recommendations for public health readiness and reopening, of which five explicitly addressed social distancing.[42] Of those five, however, only two addressed supportive measures during social distancing that may enhance opportunities or reduce the harms of social distancing on those subject to it, with mixed results. Vital Strategies' "Box It In" noted the essential nature of providing services and support to people under quarantine so that they will better adhere to quarantine requirements. This is consistent with CDC SARS recommendations for quarantine,[43] but Vital Strategies appears to be broader in its scope in virtue of its opening claim that "Although almost all of the U.S. population has been asked to shelter in place and otherwise observe physical distancing, compliance varies greatly among communities, illustrating challenges adhering to quarantine."[44] It is not clear, however, the degree to which Vital Strategies is committed to broader social supports during social distancing, or only for quarantine; that is, of individuals believed to be exposed to COVID-19, which does not describe most individuals under social distancing.

The report by Allen and colleagues for the Edmond J. Safra Center for Ethics at Harvard University, on the other hand, accounted for the infringement associated with social distancing. While the report's use of "supported isolation" including healthcare and financial supports only referred to essential personnel, it did so in two important ways. First, it proposed an expanded essential workforce as part of a large-scale mobilization, particularly in contact tracing, that sought to retrain workers for tasks pertaining to pandemic response. Second, it sought to use supported isolation not as a supplement to, but as a replacement for widespread collective quarantine as a method of disease control[45]—that is, it sought to limit the infringement on the public by focusing on a large-scale mobilization of resources, replacing what had been termed the suppression model of control with a containment model.[46]

So, of five high-level reports that deal with social distancing, it appears only two came close to interrogating how these measures could plausibly be designed to mitigate the infringement on individual liberties in the relevant sense; only one went so far as to suggest a (partial) ordering of how these measures ought to be undertaken. None, however, addressed the required social, educational, financial, and medical support needed if extreme social distancing measures were required—which they were. This is partial evidence that the majority of reports favored at a high level by governments and public health authorities would not satisfy the demands of just health security insofar as they deal with ranking and selecting the appropriate social distancing measures.

The second way we can evaluate social distancing measures is by assessing, often retrospectively, how they perform. Elsewhere, I have argued that the ethics of responses to biological disasters, including pandemics, can be evaluated in terms of how we prepare for, act during, and respond after a disaster.[47] We can do the same when we consider social distancing measures. Here, moreover, we can evaluate the suite of social distancing measures taken together and individually. This has been done in a preliminary fashion in empirical terms for a number of countries.[48] An open question remains about whether we should evaluate social distancing measures for their permissibility based on all three components taken together, or each separately. There are strong reasons to think that if the justification for some act rests on a number of separate justificatory components, then failing in one entails failing to justly/permissibly enact the measure altogether.[49] This mirrors ongoing discussions in the ethics of war, about whether it makes

sense to separate out the justness of a war's declaration, pursuit, and aftermath; or whether a war is only just if those three elements are all just.[50] This is a demanding standard but—if we are engaged in retrospective analysis of social distancing measures—will identify how, or how badly we failed to achieve our goals in meeting the standards of ethics during a pandemic.

The final way we could evaluate social distancing measures is by determining whether and how our basic institutions can satisfy our ethical standards in terms of social distancing. That is, we can ask how should our healthcare, education, economic, and other institutions be designed to deal with events such as pandemic disease. In evaluating the Republic of Korea's approach to COVID-19, for example, a consistent message is that the nation's experience with Middle Eastern respiratory syndrome coronavirus demonstrated important weaknesses in the country's capabilities to respond to the arrival of a novel infectious agent. The reason the Republic of Korea has succeeded to a greater degree than the US, and thus has adopted far less invasive and liberty-infringing social distancing measures, is partly in virtue of their institutions being prepared to respond to infectious disease.[51] Public health ethics can thus evaluate social distancing in terms of the structure of basic institutions as capable or incapable of responding to infectious disease in a proportionate, effective, necessary, minimally infringing, and publicly justifiable way.

## Just Health Security: Flexible but Demanding

This revised set of principles is flexible but demanding, more so than the orthodox view. It is flexible because it takes the state of a public health emergency as something we should resolve as quickly as possible, for the good of a community. And so it may allow for more stringent measures than the orthodox view just in case those measures are likely to be effective in ending a public health emergency. This is an extreme mandate, and may justify expansive powers.[52] However, it is extreme in the context of what, as discussed in the last chapter, a public health emergency is, and (as I discuss in chapter 9) what constitutes the end of an emergency.

However, the doctrine is also more demanding. It is demanding first because I have claimed that what it means for a liberty-limiting measure to be necessary is one that is *strongly* necessary to achieve the resolution of

a public health emergency. This is considerably more demanding than the standard provided by the orthodox view.

This doctrine is also more demanding because it places considerable burden on the state to select measures that reduce the risk or infringement on individuals at considerable liability to itself. It is not sufficient to institute a stay-at-home order if the order could be paired with a basic subsistence package and guarantee of housing. These are not optional extras to a public health response under just health security, any more than checking a building is free of civilians before throwing a grenade into it is an optional extra for soldiers. Failing to do so turns liberty-limiting measures into a form of collective punishment, a violation of individual rights, and a failure to respect individuals as agents (table 7.1).

One obvious objection is, why not just lock down a country every time? The answer to this is threefold. The first is that not all public health threats rise to the level of a public health emergency and using such a measure outside of responding to the kind of threat that invokes a declaration of one would likely escalate into a breakdown of the public state. The second is that even within a public health emergency it isn't always necessary to end the emergency through a large-scale lockdown when a small lockdown will do; or use some other measure entirely. Contact tracing and isolation, appropriately financed and carefully conducted, for example, are still by and large the best measures in public health. The third is that a repeat strong lockdown strategy is unlikely to be consented to under the state I envisaged in

**Table 7.1**
Comparison between just war theory and just health security (update 3)

| Temporal/contextual feature | Just war theory | Public health ethics |
|---|---|---|
| Before the crisis | Legitimate authority | Legitimate authority |
| | Last resort | Last resort |
| | Just cause | Reasonable aim |
| | Right intention | - |
| | Reasonable chance of success | - |
| | Proportionality | Proportionality |
| During the crisis | Necessity | Necessity |
| | Proportionality | Proportionality |
| | Discrimination | Discrimination |

chapter 5, by citizens within the negotiating power they actually have. We have already seen this in COVID-19 as nations that once had control of the outbreak unravel as the global pandemic shows no signs of slowing.

## Conclusion

In this chapter I covered the ethics of public health measures within a public health emergency. The principles of just health security, applied seriously, provide us with two novel findings. The first is that necessity may in fact demand more from us in aid of quickly resolving a public health emergency than the orthodox view admits. The second is that the demandingness of proportionality and discrimination criteria applied to public health mean that states are on the hook for considerably more resources in order to justify liberty-limiting measures. This follows from the strong interplay between human rights and the special regime of the emergency we have constructed.

This concludes the section of the book that deals with the two primary arms of classical just war theory and reconciles public health ethics with the normative structure it parallels. It provides a security-apt account of public health ethics that doesn't deny the relevance of securitization theory or criticisms of the orthodox view, but rather takes them as the starting point from which a coherent view of the ethics of public health security must derive.

The last two chapters extend insights from military ethics into less discussed, but still important aspects of the ethics of health security.


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