



LETTER/OP-ED

## Law and Ethics During a Public Health Crisis

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*Can the government do THAT? Can it shut down businesses, close schools, and limit travel? And what about our RIGHTS? Our rights to assembly, travel, religious freedom, and more?*

As experts in public health law, we have been inundated with questions like these—from colleagues, students, public health practitioners, the press, and others—about the scope of the government’s authority during the coronavirus disease (COVID-19) pandemic. The pandemic, and the government’s response to it, has upended all of our lives, albeit in different and unequal ways. The pandemic also has vividly highlighted the broad discretion the law grants to state governments to promote and protect the public health. This intersection of law and public health is far more nuanced than most people realize.

Beyond authorizing broad public health measures, laws at the local, state, federal, and even international level shape: (a) our nation’s capacity to detect new disease outbreaks locally and around the world; (b) the size, resources, and structure of the thousands of local health departments around the country that are now at the forefront of the emergency response; (c) conditions in congregate settings (such as nursing homes, prisons, churches, schools, and workplaces) that contribute to COVID-19’s spread; (d) the availability and quality of health care and health insurance; (e) the process by which new diagnostics, therapeutics, and vaccines are developed, authorized, and accessed; and so much more. This is not at all unique to COVID-19. Dig just below the surface of any public health topic and you will find a wide range of underlying legal and ethical issues.

Core to the field of public health law is balancing public health and individual rights. Even in emergency situations, individual rights must be respected, and restrictions must be based on the best available public health evidence. We have been troubled by governmental overreach during this pandemic, such as Ohio’s effort to prohibit virtually all abortions within the state, using the need to preserve personal protective equipment (PPE) as the justification. To date, the courts have blocked this rule from taking effect, recognizing that delaying abortions until later in pregnancy is likely to

result in procedures that are more dangerous and consume *more* PPE.<sup>1</sup>

At the same time, we have also been troubled by the use of “rights” language to express what are essentially policy objections to public health measures, not serious legal claims. Even our most cherished constitutional rights, including our freedoms of speech and religion, may face reasonable restrictions. For example, in refusing to block a California order limiting church attendance to prevent the spread of COVID-19, Chief Justice John Roberts recently explained that “[a]lthough California’s guidelines place restrictions on places of worship, those restrictions appear consistent with the Free Exercise Clause of the First Amendment.”<sup>2</sup> Claiming an unlimited “right” to refuse to wear a mask or to operate one’s business or organization in ways that endanger others does nothing to advance the serious and nuanced discussions we need to be having about what restrictions are appropriate and necessary under the circumstances. It instead exacerbates societal and political divisions.

In the seminal case of *Jacobson v. Massachusetts* (1905), the Supreme Court said:

There are manifold restraints to which every person is necessarily subject for the common good. On any other basis, organized society could not exist with safety to its members. . . . Real liberty for all could not exist under the operation of a principle which recognizes the right of each individual person to use his own, whether in respect of his person or his property, regardless of the injury that may be done to others.<sup>3</sup>

In other words, as Ohio’s pandemic-era slogan goes, we are all “In This Together.” Public health law has long recognized that individual rights are exercised in the context of populations, and the “freedom” to be harmed by others is an illusory freedom.

To be clear, a government’s exercise of its broad public health powers can infringe upon legally protected rights. But the application of constitutional and other legal constraints to particular cir-



cumstances is often subject to interpretation, and, especially in emergency contexts, this typically results in courts granting government decision makers a great deal of discretion. In the absence of clear legal guideposts, officials must exercise sound judgment to limit, as much as possible, untoward intrusions on individual liberties. The statement in the *Jacobson* case was used by the Supreme Court to permit forced sterilization and sanction eugenic policies during the first half of the 20th century, showing that courts have (and likely still do) uphold as legal that which is clearly unethical. Even today, the law does not specify what information officials must consider when enacting public health laws, either during a time of emergency or otherwise, leaving it to policymakers to exercise their own judiciousness.

Guidance on how best to balance benefits, burdens, and risks of specific activities may be found in fundamental tenets of public health ethics. These ethical principles include distributive justice (ensuring that burdens, risks, and benefits are distributed fairly amongst the population); necessity and least infringement (examining whether there are alternative ways to achieve the desired public health goals that infringe on the smallest possible number of people in the least possible way); proportionality (continuously monitoring restrictions to track whether the anticipated benefits are manifest and outweigh the infringed rights); and public justification (explaining to constituents in a transparent and clear fashion why infringements are necessary to achieve public health goals).<sup>4</sup> Taken together, although public health law allows for broad restrictions of individual liberties when disease poses an imminent threat to the public, the foundational principles of public health ethics help guide what restrictions are appropriate.

A contemporary synthesis of public health law and ethics must be mindful of public health's checkered history. For example, virtually every major infectious disease outbreak in our nation's history has been accompanied by racial, ethnic, or religious minorities being blamed for its introduction or spread. Public health officials have sanctioned research protocols that disproportionately impacted the poor, racial and ethnic minorities, and the disenfranchised. Groundbreaking vaccines—including vaccines to protect against polio, measles, and hepatitis—were tested on institutionalized children without obtaining informed consent. In far too many instances, the coercive power of the state has been used in punitive ways that did not advance—and often impeded—an effective public health response. These transgressions have caused long-lasting resentment and mistrust toward public health officials. Moreover, constitutionally permissible public health policies can stigmatize or otherwise harm certain populations—as was often seen, for

example, in the government's response to the AIDS epidemic. For policymakers, the question must always be “not can we but should we.”<sup>5</sup>

In our view, effectively advocating for public health requires meaningful training in public health law and ethics. Put simply, one's ability to advance population health outcomes will be limited without an understanding of the frameworks in which public health policy is made. The COVID-19 pandemic forced schools of public health across the country to quickly rework *how* they educate their students. We urge them to also take the opportunity to rethink *what* is being taught. We understand the difficulty in finding additional space in the curricula of undergraduate and graduate programs, but the overwhelming majority of public health practitioners whom we have talked to in recent months have remarked upon how they wish law and ethics had been a greater part of their education, because of its centrality to their work. Public health students do not need to be able to answer every legal or ethical question—they're training to be public health professionals, not lawyers and ethicists—but they need to know, in general terms, how law *can* be used to advance health, and how ethics and history inform the way that it *should* be used.

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