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Liberty and Health

Frank Griffin

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ABSTRACT

Liberty is the essence of human nature and is necessary for optimal health. During the COVID-19 pandemic, the government placed unprecedented restrictions on personal liberty in the name of public health, confining millions of Americans to their homes, forcing hundreds of thousands of businesses and parks to close, shuttering abortion clinics, heavily regulating churches, monitoring gatherings in private homes, restricting interstate travel, and shifting disease burdens onto protected populations. Personal liberty is sustenance for individual health. Medical principles of patient autonomy, patient privacy, and social justice are closely related to legal concepts of personal liberty, the liberty of constitutional privacy, and the liberty to be free from discrimination. This article defines liberties as active or passive for public health purposes. Active liberty is the liberty to do, and passive liberty is the liberty not to be done to. Restrictions on active liberties—like stay-at-

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home orders, business closures, and gathering size restrictions—tend to cause inactivity and lead to related side effects like social isolation, financial distress, and medical distancing. Restrictions on passive liberties—like quarantine, contact tracing, and intrusion into private homes—lead to more insidious health side effects related to discrimination and privacy-protective behaviors, in addition to social isolation, medical distancing, and financial distress. This paper examines how active and passive liberties were restricted during the COVID-19 pandemic and the side effects of those restrictions. This paper also advocates for a holistic approach to public health policy that incorporates the health effects of liberty and the side effects of restrictions of liberty into public health policy, following principles of the practice of medicine, which requires the artful application of science to disease in ways that account for human frailties. Often protecting liberty preserves health. Many medical research studies have found evidence of health side effects of the public health measures instituted throughout the pandemic, which are discussed here. Liberty is a fixed star in the American Constitutional constellation that is vital to the health of her citizens, and "no official, high or petty," should prescribe public health measures restricting active or passive liberties without recognizing and understanding their side effects.

I. INTRODUCTION

The warm glow of the great fireplace reflected off the bars of the picture window that provided me with a view inside the restaurant. From a designated parking space outside, I could see families and friends tired from the pandemic huddled *en masse* around bountiful tables, smiling and breathing freely without masks. Amidst the joyful hugs and laughter, the only evidence of the ongoing COVID-19 contagion were the waiters' masks, along with the masks worn by patrons entering and exiting the restaurant. As I yearned to join them inside, the gold-leaf door of the restaurant burst open and a bolt of light from inside crossed the parking lot to my spot. A masked woman with a tray mightily hoisted above her head traversed the darkness to curbside parking space #1, where I waited. I donned my mask. She slid the dinner tray through my truck window, thanking me with her mild eyes. After sanitizing my hands, I headed home, where my wife safely waited in exile, driving past our overflowing hospital along the way.[1]

1. Some of the wording in this paragraph is taken from the poem inscribed on the plaque at the base of the Statue of Liberty. The poem reads:

> "Not like the brazen giant of Greek fame,
> With conquering limbs astride from land to land;
> Here at our sea-washed, sunset gates shall stand
> A mighty woman with a torch, whose flame

My background as a physician makes me believe that the restaurant scene had deeper health implications than just denial or ignorance.[2] The facial expressions, gestures, and body language of the people in the restaurant provided a glimpse into the status of the population's health.[3] Subconscious survival instincts and evolutionary adaptive responses were not suspended during the pandemic.[4] So, in their minds, the restaurant patrons were consciously or subconsciously doing what they believed they needed to do to survive.[5]

> Is the imprisoned lightning, and her name
> Mother of Exiles. From her beacon-hand
> Glows world-wide welcome; her mild eyes command
> The air-bridged harbor that twin cities frame.
> "Keep, ancient lands, your storied pomp!" cries she
> With silent lips. "Give me your tired, your poor,
> Your huddled masses yearning to breathe free,
> The wretched refuse of your teeming shore.
> Send these, the homeless, tempest-tost to me,
> I lift my lamp beside the golden door!".

Emma Lazarus, *The New Colossus*, NAT'L PARK SERVICE, (Nov. 2, 1883), https://www.nps.gov/stli/learn/historyculture/colossus.htm.

2. Defiance of public health recommendations was a nationwide phenomenon during the COVID-19 pandemic. *See, e.g.*, Racheal Sharp, *Almost a Third of LA Residents are Defying Lockdown Orders as Hospitalizations Hit Record High*, DAILYMAIL ONLINE (Dec. 23, 2020), https://www.dailymail.co.uk/news/article-9082607/Almost-LA-residents-defying-lockdown-orders-hospitalizations-hit-record-high.html (reporting that thirty percent of Los Angeles residents were openly defying orders during a time when hospitals were in a clear crisis).

3. *See The Practice of Medicine*, *in* HARRISON'S PRINCIPLES OF INTERNAL MEDICINE 20TH EDITION 1, 2 (Dan L. Longo et al. eds., 20th ed. 2018) [hereinafter HARRISON'S PRINCIPLES OF INTERNAL MEDICINE] (describing the importance of observing patients' gestures, body language, and facial expressions for "important clues to patients' perception of their symptoms").

4. *See* Nigel Nicholson, *How Hardwired is Human Behavior?*, HARV. BUS. REV. (July–Aug. 1998), https://hbr.org/1998/07/how-hardwired-is-human-behavior (noting that "[y]ou can take the person out of the Stone Age, . . . but you can't take the S*tone* Age out of the person."); *see also* Leda Cosmides & John Tooby, *Evolutionary Psychology: A Primer*, UCSB CTR. FOR EVOL. PSYCHOL., https://www.cep.ucsb.edu/primer.html (observing that the brain evolved to solve "adaptive problems," which generally "have to do with how an organism makes its living: what it eats, . . . who it mates with, who it socializes with, . . . and so on," and that "[t]he *only* kind of problems that natural selection can design circuits for solving are adaptive problems.").

5. *See* Dean Mobbset al., *The Ecology of Human Fear: Survival Optimization and the Nervous System*, 9(55) FRONT. NEUROSCI. 1, 5, 23 (2015), https://www.ncbi.nlm.nih.gov/pmc/articles/pmc4364301/, (observing that "modern day humans . . . use sophisticated prediction (e.g., mental simulation) and learning strategies to avoid danger," like COVID-19, and describing enhanced features in human brains compared to other animals that improve survival instincts, including the ability to use prediction and prevention strategies to minimize interactions with dangers, such as avoiding face-to-face encounters with tigers because "the tiger always wins" in face-to-face encounters).

Humans are a social species.[6] Social ties improve health because they buffer against stress or anxiety, bolster self-esteem, and inhibit mental illnesses.[7] While eating, restaurant tablemates experience a variety of important social interactions like making conversation, experiencing affection, and sharing experiences.[8] In addition, humans need basic necessities only money can buy. Restaurant workers and business owners were earning financial means important for their own health and survival.[9]

The liberty to move about and be active is important for health. During my residency in orthopedic surgery, I was taught to treat femur fractures with surgery and early mobilization because inhibiting patients' liberty to move about (e.g., using traction and bed rest of the past) leads to blood clots, bedsores, and stiff joints as side effects.[10] Restricting the population's liberty to move has parallel side effects, like social isolation, financial distress, and medical distancing,[11]which may cause health-related complications.

This paper examines the entanglement of liberty with health. In going to the restaurant, customers exercised liberties like the right to leave home, stay out past dark, gather with friends and family, open a business, work, and earn money. The language of health care is intimately related to the language of liberty. Health care concepts like patient autonomy, patient privacy, and

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6. Nicholson, *supra* note 4 (describing humans as a social species, even in primitive times on the Savannah Plain by socially organizing into clans to protect each other and to divide labor).

7. Nicholas Rohde et al., *Estimating the Mental Health Effects of Social Isolation*, APPL. RES. QUAL. LIFE (May 2015), https://www.researchgate.net/profile/Nicholas_Rohde/publication/276485075_Estimating_the_Mental_Health_Effects_of_Social_Isolation/links/55668ba308aec22682ff1c77/Estimating-the-Mental-Health-Effects-of-Social-Isolation.pdf (noting that "social ties can provide a buffer against stress or anxiety . . . and inhibit mental illnesses such as schizophrenia and depression.").

8. Leah Curle & Heather Keller, *Resident Interactions at Mealtime: An Exploratory Study*, 7 EUR. J. AGEING 189, 189 (2010), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5547351/pdf/10433_2010_Article_156.pdf (describing important social contact during meals among tablemates, including "making conversation, providing assistance, sharing, humoring, showing appreciation and affection, and rebuffing/ignoring/excluding.").

9. *National Statistics: Restaurant Industry Facts at a Glance*, NAT'L RESTAURANT ASSOC. (2021) https://www.restaurant.org/research/restaurant-statistics/restaurant-industry-facts-at-a-glance (reporting the size, scope, and impact of restaurants in the U.S., with over 1 million locations nationwide projected to generate $899 billion in sales and employing 15.6 million employees in 2020 before the pandemic disruptions).

10. Marek Denisiuk & Alan Afsari, *Femoral Shaft Fractures*, STATPEARLS (Jan. 2021), https://www.ncbi.nlm.nih.gov/books/NBK556057/ (discussing how not moving can lead to muscle wasting, immobility, deep venous thrombosis, and pulmonary embolism among traction complications); Herwig Drobetz et al., *Skeletal Traction: Standard Operating Procedure,* MEDECINS SANS FRONTIERES 1, 5 (2019), https://bibop.ocg.msf.org/docs/8/L008SURM08E-E_Skeletal-Traction-SoP_2019.pdf (including joint stiffness and pressure sores among the most common complications of traction).

11. *See* Section II.B.3.

social justice[12] are related to constitutional and legal concepts like liberty, privacy, and freedom from discrimination. These connections may indicate that health played a role in the Founders' recognition of legal liberties as necessary to preserve health and well-being. Thomas Jefferson wrote that personal liberty is "necessary for . . . *sustenance,*" citing "the law of nature."[13] Isaiah Berlin, a philosopher and historian known for his writings on the concept of liberty, described liberty as the very "essence of human nature," so intertwined with the human spirit that it is "inalienable" and divinely endowed upon every person.[14]

First, health care's patient autonomy is closely related to the legal concept of personal liberty. One respected textbook of medicine defines patient autonomy as "the idea that people should have the right and freedom to choose, pursue, and revise their own life plans."[15] Similarly, the Supreme Court described the "heart of liberty" as "the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life."[16] Second, patient privacy, emphasized in treatises of medicine and the Hippocratic Oath, is related to legal privacy.[17] Protecting privacy improves health because it enhances the information given to physicians by building trust with individuals who would otherwise engage in "privacy-protective behaviors," like withholding information, thereby compromising patient care by forcing doctors to make decisions based on inaccurate or incomplete information.[18] Failure to protect the legal privacy of the population may similarly lead to other privacy-protective behaviors, like medical distancing or avoiding COVID-19 testing, leading to inaccurate or incomplete data from the

12. Lee Goldman & Andrew Schafer, *Medicine as a Learned and Humane Profession*, *in* GOLDMAN-CECIL MEDICINE 1 (26th ed. 2019) [hereinafter Goldman in CECIL'S TEXTBOOK OF MEDICINE]; *see also* HARRISON'S PRINCIPLES OF INTERNAL MEDICINE, *supra* note 3, at 6 (describing the main principles "physicians' contract with society" as including primacy of patient welfare, patient autonomy, and social justice).

13. Howell v. Netherland, 1770 WL 1, at *2 (Va. Gen. Ct. Apr. 1770) (determining that "[u]nder the law of nature, all men are born free, everyone comes into the world with a right to his own person, which includes the liberty of moving and using it at his own will. This is what is called personal liberty, and is given him by the author of nature, because necessary for his own *sustenance*.") (emphasis added).

14. Isaiah Berlin, *Two Concepts of Liberty*, FOUR ESSAYS ON LIBERTY 1, 5 (1969).

15. Ezekiel Emanuel, *Bioethics in the Practice of Medicine*, GOLDMAN-CECIL 2, 5 (26th ed. 2019) [hereinafter Emanuel in CECIL'S TEXTBOOK OF MEDICINE]; *see also* HARRISON'S PRINCIPLES OF INTERNAL MEDICINE, *supra* note 3, at 5–6 (stating that the "fundamental principles of medical ethics require physicians . . . [to] respect the patient's autonomy," and that it is important to "fulfill the priorities of the patient").

16. Planned Parenthood of Se. Pennsylvania v. Casey, 505 U.S. 833, 851 (1992).

17. *See e.g.*, Emanuel in CECIL'S TEXTBOOK OF MEDICINE, *supra* note 15, at 4 (noting that the Hippocratic Oath, "composed sometime around 400 BC," addresses "bioethical dilemmas," including "confidentiality," which is a part of privacy).

18. Sharyl Nass et al., *The Value and Importance of Health Information Privacy*, *in* BEYOND THE HIPAA PRIVACY RULE (2009), https://www.ncbi.nlm.nih.gov/books/NBK9579/.

health care system which compromises research, public health reporting, and outcomes analysis.[19] Privacy also encourages individuals to develop and maintain important social and interpersonal relationships and thereby reap the health benefits.[20] The Supreme Court found zones of privacy as a liberty and protected right in the Constitution.[21] Finally, social justice is emphasized in medicine; for example, Cecil's Textbook of Medicine says that the "physician has a responsibility to the individual patient and to broader society to promote access [and] to eliminate disparities in health and health care."[22] Likewise, freedom from discrimination is clearly protected by the Constitution.[23]

Here, for public health purposes, I introduce the terms "active liberty" and "passive liberty" as applied to personal liberties.[24] Liberty is a "majestic term" that is difficult to define with exactness because its meaning "cannot be 'reduced to any formula.'"[25] In his essay on liberty, Isaiah Berlin defined two "senses" of political liberty as positive and negative.[26] To Berlin, positive liberty was the sense of being governed by yourself, and negative liberty was the sense of being left alone to live life as you see fit without the coercion of others.[27] Active and passive liberty are related to Berlin's senses of political

19. *Id.*

20. *Id.*

21. Griswold v. Connecticut, 381 U.S. 479, 484 (1965) (finding that specific guarantees in the Constitution create zones of privacy, like the "right of association" and the "right of the people to be secure . . . against unreasonable searches and seizures").

22. Goldman in CECIL'S TEXTBOOK OF MEDICINE, *supra* note 12, at 1 ("The importance of social justice symbolizes that the patient-physician interaction does not exist in a vacuum. The physician has a responsibility to the individual patient and to broader society to promote access, to eliminate disparities in health and health care, and to bring science to even the most contentious political issues.").

23. U.S. CONST. amend. XIV.

24. Here, I am defining the terms "active liberties" and "passive liberties" for the first time in reference to *personal liberties*, *not political liberty*, and their effect on health; I have not found similar usages in the past. The terms "active liberty" and "passive liberty" have been used sparingly and parallel with Berlin's positive and negative political liberty definitions. For example, in Justice Stephen Breyer's book ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION (2005), he focuses on "the active liberty" of the ancients which he describes as "sharing of a nation's sovereign authority among that nation's citizens," (p. 9) or the right of citizens to participate in democratic self-governance, which parallels Berlin's positive sense of political liberty. I also located an article describing Justice Brennan's concept of the "passive 'right to be let alone'" and the rights of privacy as "passive liberties broadly conceived" especially relevant to search and seizure, which parallel Berlin's sense of negative liberty. *See* Stephen J. Friedman, *Mr. Justice Brennan: The First Decade*, 80 HARV. L. REV. 7, 8 (1966). The terms "active liberty" and "passive liberty," as used in this paper, are not meant to reference any theory of constitutional interpretation.

25. McDonald v. City of Chicago, Ill., 561 U.S. 742, 877–80 (2010) (Stevens, J., dissenting) (citing Poe v. Ullman, 367 U.S. 497, 54 (1961)).

26. Berlin, *supra* note 14, at 15.

27. *Id.* at 15, 19.

liberty.[28] *Active liberty* is the liberty *to do* as you wish. Active liberties include the freedom to leave your home, gather with friends and family, run your business, work, exercise, explore the outdoors, go to church, and travel across state lines. For public health purposes, restrictions of active liberties tend to lead to inactivity and inability to do things, and this type of restriction can have significant health consequences. *Passive liberty* is the liberty to be left alone by others (i.e., to not have things done to you by the government or *to not be done to*). Passive liberties include liberties like the right to be free from unjust government confinement, search and seizure, discrimination, and privacy intrusion (e.g., the right to an abortion). For public health purposes, infringement of passive liberties affects the individual directly, which can have significant health consequences.

Some restrictions can affect both active and passive liberties. For example, gathering size restrictions are mostly active liberty restrictions when applied to businesses and churches because they prevent people from doing things outside their homes. However, when applied to gatherings inside the home, they are passive because they intrude upon the individual's personal space in their home.

This paper does not analyze the constitutionality of unprecedented public health measures under existing law. Courts will undoubtedly conduct that analysis in the years to come. For example, the courts have not clearly defined liberties like the right to leave your home or gather with friends and family, though they could implicate a number of constitutional liberties. Economic liberties—like the freedom to use your property as you choose, liberty to contract, and freedom of occupation—have been less consistently defined, especially in the context of public health.[29] Instead of a legal analysis to adjudicate the constitutionality, the goal here is to assess the health value of liberty itself and give courts and policymakers something to consider as they decide public health cases and policy going forward.

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28. *See supra* note 24.

29. *See generally Developments in the Law — The Interpretation of State Constitutional Rights*, 95 HARV. L. REV. 1324, 1483–84 (1982); *See* Doss v. Morris, 642 F. App'x 443, 446–47 (5th Cir. 2016) (recognizing that "there is a liberty interest in 'operat[ing] a legitimate business, free from arbitrary deprivation . . . . '"); *see also* 4 Aces Enterprises, LLC v. Edwards, No. CV 20-2150, 2020 WL 4747660, at *11 (E.D. La. Aug. 17, 2020) (establishing that Lincoln Fed. Labor Union v. Northwestern Iron & Metal Co., 335 U.S. 525, 535–36 (1949) repudiated the Lochner-era freedom of contract cases and also noting the 5th Circuit rejected the notion of a fundamental "right to pursue a legitimate business" and the fundamental "right to do business"; also explaining, "In at least some states, there is evidence that certain economic liberties, such as freedom of occupation, are valued highly enough to warrant protection under substantive due process," ultimately finding "that the bar owners have a constitutionally protected property interest in the profits of their businesses"); *see also* San Jacinto Sav. & Loan v. Kacal, 928 F.2d 697, 702 (5th Cir. 1991) (recognizing a "right to have property and the benefits from it, as well as the liberty to operate a legitimate business, free from arbitrary deprivation . . . .").

In well-ordered societies, personal liberties are not absolute, whether active or passive. Ordered liberty in public health emergencies was described by the Supreme Court as based on a "fundamental principle of the social compact that the whole people covenants with each citizen, and each citizen with the whole people, that all shall be governed by certain laws for 'the common good. . .'"[30] For the sake of public health, the Supreme Court found that "the rights of the individual in respect of his liberty may at times, under the pressure of great dangers, be subjected to such restraint, . . . as the safety of the general public may demand."[31] Similarly, Berlin observed, "[w]e cannot remain absolutely free, and must give up some of our liberty to preserve the rest."[32] So in public health crises, "liberty secured by the Constitution . . . does not import an absolute right in each person to be at all times and in all circumstances, wholly freed from restraint."[33] Instead, "a community has the right to protect itself against an epidemic of disease which threatens the safety of its members."[34]

During past public health crises, public health authorities infringed individual liberties to protect public health using measures like quarantines, compulsory vaccination, and some business restrictions.[35] During the COVID-19 pandemic, public health authorities instituted unprecedented measures in the name of public health.[36] Stay-at-home orders quarantined large populations of uninfected individuals.[37] Public health officials placed restrictions on gathering sizes and to control behavior inside private homes.[38] Abortion clinics were

30. Jacobson v. Commonwealth of Massachusetts, 197 U.S. 11, 27 (1905).

31. *Id.* at 29.

32. Berlin, *supra* note 14.

33. *Jacobson*, 197 U.S. at 26.

34. *Id.* at 27.

35. *See* Hickox v. Christie, 205 F. Supp. 3d 579, 590–94 (D.N.J. 2016) (upholding the Federal Government's power to declare quarantine); *see also* Jacobson v. Commonwealth of Massachusetts, 197 U.S. 11, 31 (1905) (upholding State's rights to require compulsory vaccinations); *see also* Cty. of Butler v. Wolf, 486 F. Supp. 3d 883, 914–15 (W.D. Pa. 2020) ("On October 4, 1918, Pennsylvania Health Commissioner B. Franklin Royer imposed an order which closed all public places of entertainment, including theaters, moving picture establishments, saloons and dance halls.").

36. Calvary Chapel Dayton Valley v. Sisolak, 140 S.Ct. 2603, 2604 (2020) (Alito, J., dissenting) ("States and their subdivisions have responded to the pandemic by imposing *unprecedented restrictions on personal liberty*.") (emphasis added).

37. Alex Wigglesworth et al., *Stay at Home Order Will Be Imposed in Southern California and San Joaquin Valley*, L.A. TIMES (Dec. 5, 2020, 6:15 PM), https://www.latimes.com/california/story/2020-12-05/la-me-coronavirus-stay-home-order-sunday-southern-california-covid-19-highs (reporting that 33 million Californians representing eighty-four percent of the state's population were under the lockdown orders).

38. *See e.g.*, NEW MEXICO DEP'T OF HEALTH, PUBLIC HEALTH ORDER, Nov. 13, 2020, https://www.governor.state.nm.us/wp-content/uploads/2020/11/111320-PHO.pdf (stating that "all 'mass gatherings' are prohibited" and defining "mass gathering" as including "any . . . private gathering . . . that brings together more than five (5) individuals").

closed to preserve medical supplies.[39] Outdoor dining at restaurants was banned.[40] Church services were severely limited or shut down.[41] Interstate travel was severely restricted.[42] Quarantine of COVID-19 contacts was enforced with ankle monitors.[43] An NFL team's stadium was suddenly shut down without notice.[44] The list of examples could go on for pages, and courts will likely evaluate the consequences of these actions for years.

Public health measures that restricted liberties during the COVID-19 pandemic had significant side effects. At least one cardiac disease researcher suggested that "the effect of the COVID-19 pandemic on non-COVID related health of our population may be *even more devastating than COVID-19 itself*."[45] Only around sixty-five percent of "excess deaths" in the U.S. compared to prior years were attributable to COVID-19 during the early part of the pandemic, which means that up to thirty-five of excess deaths may have been caused by other pandemic-related causes like the health side effects of

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39. *See, e.g.*, *In re* Abbott, 954 F.3d 772, 779–80, 802 (5th Cir. 2020) (holding that the Texas executive order postponing non-essential surgeries was not in palpable conflict with the U.S. Constitution).

40. Lucas Manifredi, *Los Angeles Department of Public Health Admits No Science Link Between Outdoor Dining, COVID-19 Spike*, FOXBUSINESS (Nov. 24, 2020), https://www.foxbusiness.com/lifestyle/los-angeles-department-of-public-health-admits-no-science-to-back-up-link-between-outdoor-dining-and-covid-spike.

41. *See*, *e.g.*, NEW MEXICO DEP'T OF HEALTH, *supra* note 38. (limiting "houses of worship" to twenty-five percent of maximum occupancy or seventy-five individuals, whichever is lower).

42. *See, e.g.*, Jimmy Vielkind, *Cuomo Warns Thanksgiving Travelers About Quarantine Restrictions*, WALL ST. J. (Nov. 6, 2020), https://www.wsj.com/livecoverage/covid-2020-11-06/card/eXU0o2aqQAG3QkMpvfNy?mod=e2tw (warning that New York's governor "said he would send National Guard personnel to the state's airports" to stop families traveling for Thanksgiving to enforce the state's fourteen-day quarantine requirement for visitors).

43. Carolyn Crist, *KY Positive Test Results in Ankle Monitor Order*, WEBMD NEWS BRIEF (July 22, 2020), https://www.webmd.com/lung/news/20200721/ky-positive-test-results-in-ankle-monitor-order (describing the Kentucky Public Health Department's enforcement of a quarantine order with ankle monitors on a couple where the wife tested positive for COVID-19).

44. Wigglesworth, *supra* note 37.

45. Saqib Masroor, *Collateral Damage of COVID-19 Pandemic: Delayed Medical Care*, J. CARDIAC SURGERY 1, 1 (2020), https://onlinelibrary.wiley.com/doi/full/10.1111/jocs.14638 (publishing a case example of a dangerous complication in a heart patient due to a two-day delay in seeking care based on exaggerated concerns about COVID-19 and pointing out research that suggests that based upon statistics related to delayed cardiac care, collateral damage from the pandemic may be greater than direct COVID-19 damage); *see also* Bernhard Metzler et al., *Decline of Acute Coronary Syndrome Admissions in Austria Since the Outbreak of COVID-19: the Pandemic Response Causes Cardiac Collateral Damage*, 41 EUR. HEART J. 1852 (2020), https://academic.oup.com/eurheartj/article/41/19/1852/5820829; *see also* Precker, *infra* note 214.

the public health measures.[46] One researcher observed that "restrictions [on personal liberty] imposed by the pandemic (e.g., stay-at-home orders) could claim lives indirectly through delayed care for acute emergencies, exacerbations of chronic diseases, and psychological distresses (e.g., drug overdoses)."[47] In some states, like California, over half of the excess deaths were *not* due to COVID-19.[48] The Centers for Disease Control (CDC) noted that "[u]pward trends in other causes of death (e.g., suicide, drug overdose, heart disease) may contribute to excess deaths in some jurisdictions."[49]

In addition, some populations—like younger people, poor people, and racial/ethnic minorities—may have suffered a disproportionate increase in negative health effects related to the public health measures.[50] For example, only thirty-eight percent of excess deaths among young adults were caused by COVID-19, which may indicate that sixty-two percent of excess deaths among young adults were caused by the lockdowns.[51] Mental health was significantly impacted by public health measures. Amidst the pandemic, the incidence of serious psychological distress among adults *tripled* compared to the previous year, and almost two-thirds of those suffering from the distress "reported that pandemic-related *disruptions to education, employment, and finances* negatively affected their mental health."[52] COVID-19 Public health measures—like social isolation, financial distress, and medical distancing—had far-reaching side effects and are discussed at length in this paper.

Protecting liberty preserves health. Constitutional liberties "do not disappear during a public health crisis."[53] *Jacobson*, an outdated public health case from 115 years ago, says that courts will strike down a "statute purporting to have been enacted to [1] *protect the public health* [if it] . . .has *no real or substantial relation to those objects, or is,* [2] *beyond all question, a plain,*

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46. Steven Woolf et al., *Excess Deaths From COVID-19 and Other Causes, March – April 2020*, 324(5), JAMA 510, 510 (2020), https://jamanetwork.com/journals/jama/fullarticle/2768086.

47. *Id.*

48. *Id.* (noting fourteen states in which over half of excess deaths were *not* due to COVID-19).

49. CTRS. FOR DISEASE CONTROL & PREVENTION, NAT'L CTR. FOR HEALTH STATISTICS, *Excess Deaths Associated with COVID-19* (2020) [hereinafter CDC Excess Deaths], https://www.cdc.gov/nchs/nvss/vsrr/covid19/excess_deaths.htm.

50. *See infra* Section III.A.3.,III.B.E.

51. Jeremy Samuel Faust et al., *All-Cause Excess Mortality and COVID-19-Related Mortality Among US Adults Aged 25-44 Years, March – July 2020*, 325(8) JAMA 785, 785 (Dec. 16, 2020), https://jamanetwork.com/journals/jama/fullarticle/2774445.

52. Emma McGinty et al., *Psychological Distress and COVID-19-Related Stressors Reported in a Longitudinal Cohort of US Adults in April and July 2020*, 324(24) JAMA 2555, 2555 (Nov. 23, 2020) (emphasis added), https://jamanetwork.com/journals/jama/fullarticle/2773517.

53. *In re* Abbott, 954 F.3d 772, 782 (5th Cir. 2020).

palpable invasion of rights. . . ."[54] *Jacobson* is outdated because (1) its decision to uphold compulsory smallpox vaccination predated the modern tiers of scrutiny for constitutional review (e.g., strict scrutiny, rational basis), (2) the compulsory vaccination upheld was only punishable by a five dollar fine if refused, and (3) by the time the court decided *Jacobson*, smallpox vaccination was well-established as effective and safe and was widely in use throughout the U.S, thereby making compulsory vaccination of unquestioned public health a benefit at the time (unlike many of the unproven COVID-19 measures).[55]

Since courts were hesitant to get involved with public health decisions during COVID-19, the checks and balances of separation of powers was somewhat suspended. Indeed, three Supreme Court justices described one governor as "[c]laiming virtually unbounded power to restrict constitutional rights during the COVID–19 pandemic, . . ."[56] Chief Justice Roberts noted that the latitude of officials to enact public health laws to protect the population "in areas fraught with medical and scientific uncertainties . . . [is] especially broad."[57] Roberts noted that officials "should not be subject to second-guessing by an 'unelected federal judiciary,' which lacks the background, competence, and expertise to assess public health and is not accountable to the people."[58] However, the Supreme Court decided in a later case that "[it] should respect the judgment of [public health experts] . . . . But even in a pandemic, the Constitution cannot be put away and forgotten. . . . [W]e have a duty to conduct a serious examination of the need for . . . drastic measure[s]."[59]

The successful practice of medicine requires the artful application of science to patients' diseases in ways that account for human frailties and the complexities of the human psyche. Social determinants of health should be considered (e.g., unemployment, housing, local medical resources, food insecurity, race, and others).[60] Doctors are taught the bioethical concept of

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54. Jacobson v. Commonwealth of Massachusetts, 197 U.S. 11, 31 (1905).

55. Roman Catholic Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 71 (2020) (per curiam) (Gorsuch, J., concurring) (noting that some have "mistaken this Court's modest decision in *Jacobson* for a towering authority that overshadows the Constitution during a pandemic").

56. Calvary Chapel Dayton Valley v. Sisolak, 140 S. Ct. 2603, 2604–05 (2020) (Alito, J., dissenting).

57. S. Bay United Pentecostal Church v Newsom, 140 S. Ct. 1613, 1613–15 (2020) (citing Marshall v. United States, 414 U.S. 417, 427 (1974)).

58. *Id.* at 1614.

59. *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S.Ct. at 68.

60. Elizabeth H. Bradley & Lauren A. Taylor, THE AMERICAN HEALTH CARE PARADOX 12–13 (2013) (defining social determinants of health (SDH) as "socioeconomic, environmental, and behavioral factors that research over many decades has shown to be strong influences on health"); *see also* James Teufel et al., *Rural Health Systems and Legal Care: Opportunities for Initiating and Maintaining Legal Care After the Patient Protection and Affordable Care*

nonmaleficence, meaning that doctors should not knowingly harm or injure people with treatment; the mantra "*primum non nocere*" or "first do no harm" is recognized throughout the field of medicine as a doctor's primary obligation.[61] Some of the side effects of public health measures discussed below might suggest that this same mantra be applied to public health in the future.

Active liberty is the liberty to do. Passive liberty is the liberty not to be done to. This Article examines how active and passive liberties were restricted during the COVID-19 pandemic and the potential side effects of those restrictions. This paper advocates a holistic approach to public health policy that incorporates the health effects of liberty and side effects of restriction of liberty into public health policy considerations.

II. ACTIVE LIBERTY RESTRICTIONS AND HEALTH

Active liberty is the liberty to *do* as you wish.[62] Active liberties involve individuals doing things like leaving their home, gathering with friends and families, opening their business, worshiping at church, working at their job, exercising at a gym, exploring the outdoors, seeking medical care, and traveling across state lines. Some active liberties are protected by well-defined freedoms like freedom of association,[63] freedom of religion,[64] and the right to interstate travel.[65] Some active liberties are less well-defined by the legal system. Restriction of active liberties is sometimes used as a public health treatment during pandemics. As with any health treatment, side effects are possible.

A. Active Liberty Restrictions as Public Health Measures

Community-wide lockdowns of non-infectious individuals—via stay-at-home orders, business closures, gathering size restrictions, and travel restrictions—restricted active liberties during the COVID-19 pandemic. First, stay-at-home orders, previously unprecedented in the U.S., were

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Act, 35 J. LEGAL MED. 81, 82 (2014) (defining SDH as "economic and social factors that impact health both directly and through health-related behaviors . . . [including] social, human, and economic resources, and power structures and their distribution (e.g., income, wealth, education, social exclusion, employment, housing, and nutrition)").

61. Emanuel in CECIL'S TEXTBOOK OF MEDICINE, *supra* note 15, at 4–5.

62. *Supra* note 24.

63. Roberts v. U.S. Jaycees, 468 U.S. 609, 618–20 (1984) (noting that the Supreme Court expressed a "realization that individuals draw much of their emotional enrichment from close ties with others[,]" and therefore, the freedom of association garners special "constitutional protection").

64. U.S. CONST. amend. I.

65. U.S. CONST. art. I, § 8, cl. 3.

commonplace.[66] Stay-at-home orders, especially when paired with mandatory business closures and gathering size restrictions, restricted active liberties like dining out, socializing, worshiping, exercising, and shopping. The original goal of stay-at-home orders was to spread cases over a longer period (i.e., to "flatten the curve") to avoid overwhelming hospitals and health care resources and not necessarily to decrease the overall case or death toll.[67] Generally, stay-at-home orders were not aggressively enforced.[68] When they were aggressively enforced, with some states engaging law enforcement,[69] the orders functioned more like quarantines, which are discussed later in this paper.

Second, business and park closures restricted active liberties like shopping, dining out, socializing, exercising, working, running a business, earning a living, and enjoying outdoor recreation.[70] During the COVID-19 pandemic, businesses deemed "nonessential" often had to close or severely restrict their operations.[71] For example, public health officials often targeted bars and restaurants for closure partially because early data suggested a link between outbreaks and these businesses.[72] As another example, surfing and paddle-boarding on public beaches were criminalized.[73]

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66. The Associated Press, *A State-by-State Rundown of Stay-at-Home Orders and Business Re-openings*, FORTUNE (Apr. 28, 2020, 5:00 AM), https://fortune.com/2020/04/28/stay-at-home-shutdown-business-open-coronavirus/ (describing an "ever-changing patchwork" of stay-at-home orders and business closings).

67. Brandon Specktor, *Coronavirus: What Is 'Flattening the Curve' and Will It Work?*, LIVESCIENCE (Mar. 16, 2020), https://www.livescience.com/coronavirus-flatten-the-curve.html ("In epidemiology, the idea of slowing a virus' spread so that fewer people need to seek treatment at any given time is known as 'flattening the curve.'"); *In re* Approval of Judicial Emergency Declared in E. Dist. of California, 956 F.3d 1175, 1178 (9th Cir. 2020) ("By limiting person-to-person contact, the public may 'flatten' the epidemic curve of the COVID-19 outbreak."); Greg Ip, *New Thinking on COVID Lockdowns: They're Overly Blunt and Costly*, THE WALL ST. J. (Aug. 24, 2020, 11:16 AM), https://www.wsj.com/articles/covid-lockdowns-economy-pandemic-recession-business-shutdown-sweden-coronavirus-11598281419?mod=searchresults_pos3&page=1 (reporting that bending or flattening the curve "originally meant spreading infections over time so the daily peak never overwhelmed hospitals").

68. Wigglesworth, *supra* note 37 (explaining that in Orange County, "deputies will not be dispatched to enforce compliance with stay-at-home rules or those governing face coverings and social distancing . . . . Compliance with health orders is a matter of personal responsibility and not a matter of law enforcement").

69. Michelle Smith et al., *Oregon, New Mexico Order Lockdowns as Other States Resist*, AP NEWS (Nov. 13, 2020), https://apnews.com/article/virus-surge-officials-resist-restriction-f7995f3df600b3115fe7058db4b84435 (quoting Oregon's governor's threat to "engage law enforcement'").

70. *Id.*

71. *Id.*

72. *See, e.g.*, Ip, *supra* note 67 ("Bars, restaurants, and casinos accounted for 32% of infections traced to multiple-case outbreaks in Louisiana.").

73. Laylan Connelly, *California Surfer in Handcuffs After Enjoying Empty, Epic Waves*, THE MERCURY NEWS (Apr. 4, 2020, 10:13 AM),

Third, gathering size restrictions were implemented to restrict active liberties like socializing, worshiping, mourning, celebrating, and enjoying recreational activities.[74] Research shows that "super-spreader" events—especially dense indoor gatherings—disproportionately contributed to infections, so activities like religious services, sporting events, weddings, and funerals were targeted with gathering size restrictions.[75] For example, California limited attendance at religious services to "25% of building capacity or 100 attendees, whichever was lower."[76]

Finally, some states heavily restricted the active liberty of interstate travel. For example, New York's governor threatened to meet out-of-state visitors at the airport with the National Guard to stop families from traveling during Thanksgiving.[77]

Many of the active liberty restrictions implemented during the COVID-19 pandemic were unprecedented in the U.S.[78] There have been numerous epidemics in the U.S.[79] The Spanish Flu pandemic in 1918-20 was "by far the deadliest pandemic in American history."[80] During the Spanish Flu pandemic, officials placed some restrictions on businesses to limit social contact.[81] For example, Philadelphia and some other cities closed movie theaters, saloons, and dance halls for up to fifty days during the two years of the pandemic.[82] In addition, some cities "closed schools, churches and theaters, banned large gatherings and funerals, and restricted store hours."[83] However, "none imposed stay-at-home orders or closed all nonessential businesses."[84] In a 1919

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https://www.mercurynews.com/2020/04/03/malibu-sup-surfer-in-handcuffs-after-enjoying-empty-epic-waves/; Brie Stimson, *Malibu Paddleboarder Arrested for Violating Stay-at-Home Order*, FOXNEWS (Apr. 3, 2020), https://www.foxnews.com/us/malibu-paddleboarder-arrested-for-violating-stay-at-home-order.

74. *See*, *e.g.*, NEW MEXICO DEP'T OF HEALTH, *supra* note 38.

75. Ip, *supra* note 67 (discussing research showing "that 'super-spreader' events contribute disproportionately to infections, in particular dense indoor gatherings with talking, singing and shouting, such as at weddings, sporting events, religious services, nightclubs and bars").

76. CALIFORNIA DEPARTMENT OF PUBLIC HEALTH, *Covid-19 Industry Guidance: Places of Worship and Providers of Religious Services and Cultural Ceremonies* 3 (July 29, 2020).

77. Vielkind, *supra* note 42.

78. *See*, *e.g.*, Calvary Chapel Dayton Valley v. Sisolak, 140 S.Ct. 2603, 2604–05 (2020) (Alito, J., dissenting).

79. *See* Felice Batlan, *Law in the Time of Cholera: Disease, State Power, and Quarantines Past and Future,* 80 TEMP. L. REV. 53, 62–67 (2007).

80. Cty. of Butler v. Wolf, 486 F. Supp. 3d 883, 914 (W.D. Pa. 2020).

81. *See id.*; *see also* Ip, *supra* note 67, at 915.

82. *Id.* (reporting that on October 4, 1918, "Pennsylvania Health Commissioner B. Franklin Royer imposed an order which closed 'all public places of entertainment, including theaters, moving picture establishments, saloons and dance halls and prohibit[ed] all meetings of every description until further notice" that was lifted after 35 days, and that most other states lifted such orders within 50 days).

83. Ip, *supra* note 67, at 915 n.24.

84. *Id.*

Science article written after the Spanish Flu pandemic was subsiding and entitled "*The Lessons of the Pandemic*," one prominent author explained that "[c]omplete isolation is not feasible for entire cities, . . . It is not desirable to close theaters, churches and schools unless public opinion emphatically demands it."[85] The restrictions on active liberties were even less severe during the nation's next deadliest pandemic in 1957, when schools stayed open and no business closures were ordered.[86]

The recommendation for widespread use of stay-at-home orders and the closure of businesses did not come from the CDC during the COVID-19 pandemic.[87] Even for pandemics on the level of the Spanish Flu ("Very High Severity"), the pre-COVID-19 pandemic CDC recommendations were for only "voluntary home isolation of ill persons" and perhaps "voluntary home quarantine of exposed household members."[88]

In fact, courts have placed limits on broad lockdowns of large populations.[89] For example, in *Jew Ho v. Williamson*, the court found a 1900 order to be overbroad, reasoning that "sealing off an entire section of San Francisco to prevent the spread of bubonic plague was unreasonable, unjust and oppressive."[90] The court declared that "[s]uch an overbroad order," was "not in harmony with the declared purpose of preventing the spread of the disease."[91] Similarly, in 1895, the New York Court of Appeals found overbroad a "blanket quarantine of individuals who refused vaccination, when there was no reason to believe they had been infected or even exposed to that disease."[92]

It is likely too early to tell much about the effectiveness of active liberty restrictions in decreasing morbidity and mortality from COVID-19. Some will point to pre-pandemic predictions of death totals and hail the success of

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85. Major George A. Sopher, *The Lessons of the Pandemic*, XLIX (1274) SCIENCE 501, 503,505 (May 30, 1919), https://science.sciencemag.org/content/sci/49/1274/501.full.pdf.

86. Ip, *supra* note 67.

87. CTRS. FOR DISEASE CONTROL & PREVENTION, COVID-19 (updated Sept. 17, 2021), https://www.cdc.gov/coronavirus/2019-ncov/index.html.

88. Noreen Qualls et al., *Community Mitigation Guidelines to Prevent Pandemic Influenza — United States, 2017*, 66 CTRS. FOR DISEASE CONTROL & PREVENTION: MORBIDITY AND MORTALITY WEEKLY REPORT 1, 1, 2, 26, 32 (Apr. 2017), https://www.cdc.gov/mmwr/volumes/66/rr/rr6601a1.htm (recommending personal protective measures like staying at home when sick, hand washing, and routine cleaning and community level interventions including "temporary school closures and dismissals, social distancing in workplaces and the community, and cancellations of mass gatherings").

89. *See, e.g.*, *Jew Ho v. Williamson*, 103 F. 10 (N.D. Cal. 1900)) (holding that an overbroad quarantine order was oppressive); Hickox v. Christie, 205 F. Supp. 3d 579, 592 (D.N.J. 2016) (finding a blanket quarantine over unvaccinated persons to be overbroad).

90. *Hickox v. Christie*, 205 F. Supp. 3d at 592 (citing *Jew Ho v. Williamson*, 103 F. 10 (N.D. Cal. 1900)).

91. *Id.*

92. *Id.* (citing *In re Smith*, 146 N.Y. 68, 40 N.E. 497 (1895)).

the measures.[93] However, a better gauge of the success of the measures is comparing the cumulative cases and deaths from COVID-19 in states with different measures in place. "One of the happy incidents of the federal system" is that the U.S. is made up of fifty state laboratories in which each tried their own public health experiments during the COVID-19 pandemic, and those experiments can now be analyzed by researchers to determine safety, efficacy, and side effects of different policies.[94]

For example, New York and Michigan issued many of the most restrictive lockdown orders during the pandemic, while Texas and Florida implemented some of the least restrictive—yet the differences between those states in regards to cumulative cases and deaths from COVID-19 by the end of 2020 do not reveal clear benefits in the states with stricter measures.[95] After months of aggressive restrictions on active liberties, Michigan recorded cumulative COVID-19 cases in one in twenty-one people, the same rate as in Texas and only slightly better than Florida's one in nineteen.[96] New York's rate of one in twenty-five people was only slightly better.[97] At best, a questionable trend in lowering cumulative cases might be discernable in these two more restricted states, but their death rates were actually much higher.[98] The cumulative death rates from COVID-19 were much worse in New York and Michigan, with 1 in 546 and 1 in 893, respectively, compared to only 1 in 1,190 in

93. Neil Ferguson et al., IMPERIAL COLLEGE COVID-19 RESPONSE TEAM REPORT 9: IMPACT OF NON-PHARMACEUTICAL INTERVENTIONS (NPIS) TO REDUCE COVID-19 MORTALITY AND HEALTH CARE DEMAND, at 7 (Mar. 16, 2020), https://www.imperial.ac.uk/media/imperial-college/medicine/sph/ide/gida-fellowships/Imperial-College-COVID19-NPI-modelling-16-03-2020.pdf (predicting 2.2 million deaths in the U.S. in an unmitigated COVID-19 epidemic).

94. New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) ("It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").

95. These numbers are from December 14, 2020 (the day that the first vaccine (Pfizer) was distributed), to avoid the confounding factor of the vaccine's release. Selena Simmons-Duffin, *1st Shipments of Pfizer's COVID-19 Vaccine to be Delivered Monday*, NPR (Dec. 13, 2020, 8:00 AM), https://www.npr.org/2020/12/13/945989914/first-shipments-of-pfizers-covid-19-vaccine-to-be-delivered-monday (reporting that the first vaccine doses would be given on December 14, 2020); Donald L. Luskin, *The Failed Experiment of Covid Lockdowns*, WALL ST. J. (Sept. 1, 2020), https://www.wsj.com/articles/the-failed-experiment-of-covid-lockdowns-11599000890.

96. Dylan Moriarty et al., *Coronavirus Tracker, Charting the Spread of COVID-19*, WALL ST. J. (Dec. 14, 2020) https://www.wsj.com/articles/coronavirus-case-count-11594333471?mod=hp_listb_pos1; *see also* CENTERS FOR DISEASE CONTROL AND PREVENTION, *United States COVID-19 Cases and Deaths by State,* CDC COVID Data Tracker, https://covid.cdc.gov/covid-data-tracker/#cases_casesper100k and https://covid.cdc.gov/covid-data-tracker/#cases_deathsper100k.

97. Moriarty, *supra* note 96.

98. *Id.*

Texas and only 1 in 1,087 in Florida.[99] So, the states with lower death rates may arguably have implemented more effective death prevention measures.

Even inside individual states, where the public health measures were the same, cumulative case and death rates varied greatly. For example, in Florida, Miami-Dade County reported one in eleven people had been infected by December 14, 2020, versus only one in thirty-four people in Brevard County.[100] Death rates were also much different in those counties, with 1 in 680 Miami-Dade County residents dying versus only 1 in 1,266 in Brevard County.[101] Similarly, in California, 1 in 9 Imperial County residents had COVID-19, and 1 in 483 died, but across the state in Humboldt County, only 1 in 105 residents had COVID-19, and only 1 in 11,111 died.[102]

The causes of these findings and the overall effects of public health measures will take more sophisticated research to determine due to their complex and multifactorial nature. But, one thing is apparent: a clear pattern of beneficial effects of lockdowns on COVID-19 control is not readily discernable when comparing states, even before considering the side effects of those lockdowns.

Cumulative totals of COVID-19 cases and deaths may ultimately have more to do with social determinants of health and population demographics than mandatory orders, including resident's ability to follow basic CDC guidelines.[103] Death rates may have more to do with how states managed nursing homes, where thirty-eight percent of deaths occurred than with mandatory active liberty restrictions on average citizens.[104] After the Spanish Flu epidemic, one author noted that "of all the things which were done to stop the spread of influenza, nothing seems to have had any material effect upon it."[105] A serious review of state-by-state comparisons may lead to a similar conclusion for COVID-19.[106] This finding would fall in line with the original arguments that the lockdown measures were intended to "flatten the curve" and

99. *Id.*
100. *Id.*
101. *Id.*
102. *Id.*
103. Bradley, *supra* note 60, at 12–13; Teufel, *supra* note 60, at 82.
104. E. Tammy Kim, *This is Why Nursing Homes Failed so Badly*, N.Y. TIMES, (Dec. 31, 2020), https://www.nytimes.com/2020/12/31/opinion/sunday/covid-nursing-homes.html (identifying problems in nursing homes that contributed to the spread of COVID-19, like being "understaffed, poorly regulated and vulnerable to predation by for-profit conglomerates and private-equity firms").
105. Sopher, *supra* note 85, at 502.
106. Donald L. Luskin, *The Failed Experiment of Covid Lockdowns*, WALL ST. J. (Sept. 1, 2020),https://www.wsj.com/articles/the-failed-experiment-of-covid-lockdowns-115990008-90.

not necessarily change the cumulative case or death totals—so, it really should not be surprising.[107]

B. Side Effects of Active Liberty Restrictions

Restrictions on active liberties cause inactivity with resultant health consequences, including social isolation, financial distress, and medical distancing. Active liberties such as leaving home, gathering with friends and family, going to church, and interstate travel are important to human health.

1. *Social Isolation*

Social isolation is defined as an "objective deficit in the number of relationships with and frequency of contact with family, friends, and the community."[108] People need social contact to survive.[109] Strong interpersonal relationships protect against stress and anxiety, improve self-esteem, and limit mental illnesses like schizophrenia and depression.[110] Social connections are especially important during stressful times—like a global pandemic—because they help "people regulate emotions, cope with stress and remain resilient during difficult times."[111] Basic human psychological needs like love, belonging, security, and esteem are filled by social contact connected to intimate relationships and friendships.[112] Touch (e.g., hugs) associated with social contact can positively affect health by conveying compassion and concern.[113]

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107. Specktor*, supra* note 67.

108. Eve Escalante et al., *Social Isolation and Loneliness: Imperatives for Health Care in a Post-COVID World*, JAMA HEALTH FORUM (Dec. 29, 2020), https://jamanetwork.com/channels/health-forum/fullarticle/2774708.

109. Catherine Offord, *How Social Isolation Affects the Brain*, THESCIENTIST (July 13, 2020), https://www.the-scientist.com/features/how-social-isolation-affects-the-brain-67701 (quoting Stephanie Cacioppo of the University of Chicago who said, "we really need others to survive"); *See* Nicholson, *supra* note 4 (describing humans as a social species since primitive times); *see also* Roy F. Baumeister & Mark R. Leary, *The Need to Belong: Desire for Interpersonal Attachments as a Fundamental Human Motivation*, 117 PSYCHOL. BULL. 497 (1995), https://doi.apa.org/doiLanding?doi=10.1037%2F0033-2909.117.3.497 (stating that "the need to belong is a powerful, fundamental, and extremely pervasive motivation").

110. Rohde, *supra* note 7.

111. Jay J. Van Bavel et al., *Using Social and Behavioural Science to Support COVID-19 Pandemic Response*, 4 NAT. HUM. BEHAV. 460, 466 (2020), https://www.nature.com/articles/s41562-020-0884-z.

112. Saul McLeod, *Maslow's Hierarchy of Needs*, SIMPLYPSYCHOLOGY (Dec. 29, 2020), https://www.simplypsychology.org/maslow.html (describing Maslow's pyramidal hierarchy of human needs with love, belonging, and esteem as foundational psychological needs fulfilled by intimate relationships and friendships).

113. *See, e.g.*, Erica Cirino, *What are the Benefits of Hugging?*, HEALTHLINE (Apr. 11, 2018), https://www.healthline.com/health/hugging-benefits (describing multiple scientific studies regarding the benefits of touch); *see also* Dacher Keltner, *Hands on Research: The*

Active liberty restrictions implemented during the COVID-19 pandemic fundamentally reduced human contact, predictably leading to social isolation in the name of "social distancing."[114] Stay-at-home orders limited social interactions with family and friends by confining individuals to their homes. Gathering size restrictions and interstate travel restrictions limited the ability of families and friends to celebrate emotionally important life events—including holidays, births, weddings, birthdays, and funerals. The closure of "non-essential businesses" like restaurants, coffee shops, and bars limited venues for important social interactions with friends and family, as well as the opportunity to make new friends or to date.[115] Curfews limited the ability of people to travel at night to people in need of support, as well as the ability to go on dates to search for a partner.

During the COVID-19 pandemic, seventy-four percent of adults agreed that the pandemic "made it more difficult for them to connect with friends . . . ," and two-thirds of adults reported experiencing social isolation.[116] For perspective, the AARP found that only fourteen percent of adults aged fifty years or older in the U.S. were socially isolated in 2017 compared to sixty-one percent in August 2020 during the pandemic.[117]

Public health measures that restrict social contact have undeniable health side effects.[118] Social distancing "clashes with the deep-seated human instinct to connect with others."[119] Social isolation is a known public health risk factor and an "important upstream factor . . . impacting" the morbidity and mortality of diseases.[120] Scientists warn that "distancing . . . could produce negative

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Science of Touch, GREATER GOOD MAGAZINE (Sept. 29, 2010), https://greatergood.berkeley.edu/article/item/hands_on_research ("To touch is to give life.").

114. Daniella Genovese, *Coronavirus Lockdowns by State*, FOXNEWS, https://www.foxnews.com/us/here-are-your-state-by-state-restrictions; Van Bavel, *supra* note 111, at 466 ("Distancing threatens to aggravate feelings of loneliness and could produce negative long-term health consequences.").

115. *Association Statement on the Restaurants Act of 2020*, NAT'L RESTAURANT ASSOC. (June 18, 2020) https://www.restaurant.org/news/pressroom/press-releases/restaurants-act-of--2020 (establishing that restaurants are an important part of the American social experience"); *National Statistics: Restaurant Industry Facts at a Glance, supra* note 9; Barbara Fiese et al., *Reclaiming the Family Table*, XXII (IV) SOC. POLICY REP. 6 (2008), http://uconnruddcenter.org/files/Pdfs/ReclaimingFamilyTable.pdf (noting that Americans spent around forty-percent of their food dollars eating out in 2000).

116. AARP FOUNDATION, THE PANDEMIC EFFECT: A SOCIAL ISOLATION REPORT (Oct. 5, 2020), https://connect2affect.org/wp-content/uploads/2020/10/The-Pandemic-Effect-A-Social-Isolation-Report-AARP-Foundation.pdf.

117. Escalante, *supra* note 108.

118. *See generally* Leigh-Hunt, *infra* note 120, at 160.

119. Van Bavel, *supra* note 111.

120. N. Leigh-Hunt et al., *An Overview of Systemic Reviews on the Public Health Consequences of Social Isolation and Loneliness*, 152 PUB. HEALTH 157, 158 (2017), https://digital-wellbeing.org/wp-content/uploads/2020/03/An-overview-of-systematic-reviews-on-the-public-health-consequences-of-social-isolation-and-loneliness.pdf.

long-term health consequences" including "deleterious effects on mental, cardiovascular and immune health."[121] Researchers explain that "human beings have a basic need to establish and maintain connections to others and the deprivation of opportunities to do so has a range of deleterious consequences."[122]

Social isolation harms physical health.[123] Isolation and loneliness are linked to poor health (e.g., obesity, cardiovascular problems) and premature death.[124] Social isolation is specifically associated with cardiovascular disease, decreased immune system health, risk of early death, and death from all causes (i.e., "all-cause mortality").[125] Social isolation detriments health as much as smoking fifteen cigarettes per day or having an alcohol use disorder, and it is twice as detrimental to health as being obese.[126]

Social isolation also harms mental health.[127] Evidence consistently links social isolation to worse mental health outcomes.[128] Isolation disproportionately affects the elderly and other vulnerable populations, often with insidious effects lasting for years.[129] In addition, physical changes in the brain associated with social isolation are believed to be connected to cognitive decline, dementia, depression, and anxiety.[130]

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121. Van Bavel, *supra* note 111.

122. Craig Haney, *Restricting the Use of Solitary Confinement*, 1 ANN. REV. OF CRIMINOLOGY 285, 285 (2018), https://www.annualreviews.org/doi/full/10.1146/annurev-criminol-032317-092326 (noting that social contact is important to "psychological as well as physical well-being").

123. *See generally* Leigh-Hunt, *supra* note 120, at 160.

124. *Id.* at 160 (linking social isolation with all-cause mortality and cardiovascular disease); Offord, *supra* note 109 (noting that "isolation and loneliness are linked in with incidence of different types of disease [and] with premature mortality").

125. Julianne Holt-Lunstad et al., *Loneliness and Social Isolation as Risk Factors for Mortality: a Meta-Analytic Review*, 10(2) PERSPECT. PSYCHOL. SCI. 227, 227 (2015) (describing the association between social isolation and "increased risk for early mortality"); Leigh-Hunt, *supra* note 120, at 160 (linking social isolation with all-cause mortality and cardiovascular disease); Van Bavel, *supra* note 111, at 466 (establishing that social isolation can negatively impact cardiovascular and immune health); Offord, *supra* note 109 (connecting poor physical health, obesity, cardiovascular disease, depression, dementia, and anxiety with social isolation).

126. Amy Novotney, *The Risks of Social Isolation*, 50(5) AM. PSYCHOL. ASS'N 32, 33 (May 2019), https://www.apa.org/monitor/2019/05/ce-corner-isolation.

127. Rohde, *supra* note 7 ("The principle finding we have outlined is that there is strong empirical evidence that social isolation acts to harm mental health.").

128. *See* Leigh-Hunt, *supra* note 120, at 157; *see also* Van Bavel, *supra* note 111, at 466; Offord, *supra* note 109 (discussing how older people are particularly susceptible to mental health issues related to social isolation, with research revealing a "robust association between more engagement in social activity and better cognitive function in later life").

129. Offord, *supra* note 109 (stating, "social isolation acts in more insidious ways . . . often disproportionately affecting vulnerable members of the population, such as the elderly, and with effects accumulating slowly such that they may go unnoticed for many years, if not decades.").

130. *Id.* (describing anatomical changes in the brains of socially isolated people).

According to researchers, the COVID-19 pandemic was associated with massive increases in psychiatric disorders like anxiety, depression, and trauma or stress-related disorders—with social isolation likely playing a significant role in the uptick.[131] Serious psychological distress more than *tripled* during the COVID-19 pandemic.[132] The CDC reported that *half* of young adults reported either an anxiety disorder, depressive disorder, or trauma or stress-related disorder during the pandemic.[133] Almost two out of three adults suffering from severe psychological distress listed "*pandemic-related disruptions to education, employment, and finances"* as factors negatively impacting their mental health.[134] The prolonged severe psychological distress placed most of these individuals at risk for developing long-term psychiatric disorders.[135]

Psychiatrists established that the "unprecedented public health actions to curb the spread of [COVID-19]" increased the risk of suicide and thwarted the "national public health priority" of suicide prevention.[136] Suicide has been linked to a "lack of social connectedness within a community."[137] Amidst the pandemic, the CDC found that a startling 25.5% of eighteen to twenty-year-old adults had "seriously considered suicide" within the last thirty days before they took the survey at the end of June 2020.[138] The social connections associated with religion and spirituality are also important for mental health and suicide prevention.[139] Robust literature shows that frequently attending religious services "substantially lower[s] suicide risk among U.S. women."[140] One study showed that for 89,708 women, weekly attendance of religious

131. McGinty, *supra* note 52, at 2555.

132. *Id.* (noting 13.6% of U.S. adults reported serious psychological distress in April 2020 versus 3.9% in 2018).

133. Ipsit Vahia et al., *Older Adults and the Mental Health Effects of COVID-19*, 324(22) JAMA 2253, 2253 (2020), https://jamanetwork.com/journals/jama/fullarticle/2773479 (noting that "of the 731 participants aged 18 through 24 years, 49.1% reported anxiety disorder; 52.3%, depressive disorder; and 46%, TSRD").

134. McGinty, *supra* note 52, at 2555.

135. *Id.* (establishing that "persistent distress increases risk of psychiatric disorders").

136. Mark A. Reger et al., *Suicide Mortality and Coronavirus Disease 2019 — A Perfect Storm?*, 77(11) JAMA PSYCH. 1093, 1093 (2020), https://jamanetwork.com/journals/jamapsychiatry/fullarticle/2764584.

137. Rohde, *supra* note 7.

138. Mark E. Czeisler et al., *Mental Health, Substance Use, and Suicidal Ideation During the COVID-19 Pandemic — United States, June 24-30, 2020*, 69(32) CTRS. FOR DISEASE CONTROL & PREVENTION: MORBIDITY & MORTALITY WKLY. REP. 1049, 1049 (Aug. 14, 2020), https://www.cdc.gov/mmwr/volumes/69/wr/mm6932a1.htm.

139. Reger, *supra* note 136, at 1093 (noting the importance of "religious support" in preventing suicide).

140. Tyler J. VanderWeele et al., *Association Between Religious Service Attendance and Lower Suicide Rates Among US Women*, 73(8) JAMA PSYCH. 845, 849 (2016) ("Our results are consistent with other literature suggesting an inverse association between religious participation and suicide.").

services decreased suicide risk *five-fold*.[141] The Supreme Court recognized that loss of the First Amendment freedom of religion, "for even minimal periods of time, unquestionably constitutes irreparable injury" and explained that "remote viewing is not the same as personal attendance" because parishioners are unable to participate in important religious traditions like receiving communion.[142]

Alcohol abuse has also been linked to a "lack of social connectedness within a community."[143] Pandemic-related increases in "excessive alcohol use may lead to or worsen existing mental health problems, such as anxiety or depression, which may themselves [have increased] during COVID-19."[144] "[C]hanges in alcohol use and associated consequences" including a "range of negative physical health associations" were noted during the pandemic.[145] Overdose-related cardiac deaths *more than doubled* during the first few months of the lockdowns.[146] Researchers concluded that "the fallout from the COVID-19 pandemic—*perhaps especially social isolation*—is sharply accelerating fatal overdose trends."[147] Public health experts attribute the overdose trend to social isolation (i.e., "an increased proportion of individuals using substances alone") and medical distancing (i.e., "reduced access to treatment")—both of which are related to active liberty restrictions.[148]

During the pandemic, many elderly and vulnerable individuals likely lived in extreme isolation due to the lockdowns.[149] Even before COVID-19, millions of people were already socially isolated and "separated from society, with few personal relationships and little communication with the outside world."[150] So, some people, confined to small spaces or nursing homes with few social contacts, may have experienced extreme isolation due to social distancing measures.[151] Severe social isolation and reduced environmental stimulation can cause anxiety, depression, social withdrawal, self-harm, panic

141. *Id.* at 845.

142. Roman Catholic Diocese of Brooklyn v. Cuomo, 141 S.Ct. 63, 67–68 (2020) (per curiam).

143. Rohde, *supra* note 7.

144. Michael Pollard et al., *Changes in Adult Alcohol Use and Consequences During the COVID-19 Pandemic in the US*, 3(9) JAMA NETW. OPEN (Sept. 29, 2020), https://jamanetwork.com/journals/jamanetworkopen/fullarticle/2770975.

145. *Id.*

146. Joseph Friedman et al., *Overdose-Related Cardiac Deaths Observed by Emergency Medical Services During the U.S. COVID-19 Epidemic*, 78 JAMA PSYCH. 562, 563 (Dec. 3, 2020), https://jamanetwork.com/journals/jamapsychiatry/fullarticle/2773768 (stating that peak rates in May 2020 were "more than double the base-line" rates from 2018 and 2019).

147. *Id.*

148. *Id.*

149. *See generally* Van Bavel, *supra* note 111.

150. Offord, *supra* note 109.

151. *See* Van Bavel, *supra* note 111 (observing that older adults are particularly susceptible to isolation).

attacks, anger, obsessive thoughts, psychosis, hallucinations, inability to concentrate, memory problems, hypersensitivity, problems with impulse control, and many other symptoms.[152] These effects have been documented in "patients undergoing long-term immobilization in a hospital" and are similar to those seen in hostages and in prisoners in solitary confinement.[153] Severe social isolation, like that in solitary confinement in prisons, "increases the likelihood of death by 26-32%"[154] and "can be as clinically distressing as physical torture."[155]

Extreme isolation can also have deleterious effects on people of all ages.[156] Spaceship crews and scientists working in remote Antarctic research stations suffer "cognitive and mental effects of sensory and social deprivation" including confusion, personality changes, anxiety, and depression.[157] A French scientist shut himself in a cave in Texas for over six months as an experiment to determine the effects of self-isolation.[158] After a couple of months, he reported that "he could 'barely string thoughts' together."[159] After five months, he was desperate for companionship and tried to befriend a mouse, much like Tom Hanks befriending his soccer ball, "Wilson," in the movie *Castaway*.[160]

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152. *See* Madrid v. Gomez, 889 F. Supp. 1146, 1230 (N.D. Cal. 1995) ("Social science and clinical literature have consistently reported that when human beings are subjected to social isolation and reduced environmental stimulation, they may deteriorate mentally and in some cases develop psychiatric disturbances. These include perceptual distortions, hallucinations, hyperresponsivity to external stimuli, aggressive fantasies, overt paranoia, inability to concentrate, and problems with impulse control."); Offord, *supra* note 109 (including "obsessive thinking, . . . hallucinations and other psychotic symptoms, as well as longer term mental illness risks, and increased incidence of suicide[,]" among the risks); Jayne Leonard et al., *What are the Effects of Solitary Confinement on Health?*, MEDICALNEWSTODAY (Aug. 6, 2020), https://www.medicalnewstoday.com/articles/solitary-confinement-effects#mental-health-effects ("Humans require social contact. Over time, the stress of being isolated can cause a range of mental health problems, . . . [including]: anxiety and stress, depression and hopelessness, anger, irritability, and hostility, panic attacks, worsened preexisting mental health issues, hypersensitivity to sounds and smells, problems with attention, concentration, and memory, hallucinations that affect all of the senses, paranoia, poor impulse control, social withdrawal, outbursts of violence, psychosis, fear of death, self-harm or suicide.").

153. *Gomez*, 889 F. Supp. at 1230.

154. Holt-Lunstad, *supra* note 125.

155. Jeffrey L. Metzner & Jamie Fellner, et al., *Solitary Confinement and Mental Illness in U.S. Prisons*, 38 J. AM. ACAD. PSYCHIATRY LAW 104, 104 (2010).

156. Offord, *supra* note 109.

157. *Id.*

158. *Id.*

159. *Id.*

160. *Castaway* (20th Century Fox 2000).

Social isolation also leads to abuse, including intimate partner violence (IPV) and child abuse.[161] Researchers note that "[s]tay-at-home orders . . . left many IPV victims trapped with their abusers."[162] The trapped IPV victims lost the ability to "safely connect with services," lost economic independence that could help them out of the abusive relationship, and had "reduced access to alternative sources of housing."[163] Further, school and childcare facility closures decreased contact between abused children and mandated reporters (like teachers) adding stress to the home on top of balancing work, childcare, and supervision of the child's virtual education from home.[164]

2. *Financial Distress*

Active liberties like the freedom to go to work or open a business are important to health because they allow citizens to earn money for basic necessities to maintain health.[165] During the COVID-19 pandemic, unemployment reached 14.7% in April 2020, with an unprecedented 20.5 million jobs lost in one month.[166] Many of these job losses were permanent.[167] The Bureau of Labor and Statistics (BLS) attributed the losses to "the coronavirus (COVID-19) pandemic and *efforts to contain it*."[168] For comparison, the U.S. unemployment rate was 3.5% in February 2020, just before the COVID-19 pandemic.[169]

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161. Megan L. Evans et al., *A Pandemic Within a Pandemic — Intimate Partner Violence During COVID-19*, 383 N. ENGL. J. MED. 2302, 2302 (2020), https://www.nejm.org/doi/full/10.1056/NEJMp2024046?query=TOC.

162. *Id.*

163. *Id.*

164. *Id.*

165. Although not necessarily recognized as fundamental rights, going to work and opening a business are liberties, nonetheless. *See supra* note 24; see also *Developments in the Law — The Interpretation of State Constitutional Rights*, 95 HARV. L. REV. 1324, 1483–84 (1982) (discussing *Lochner*-era freedom of contract issues and the Supreme Court's repudiation of the *Allgeyer* line of cases regarding rejection of a fundamental right to do business).

166. U.S. DEPARTMENT OF LABOR, BUREAU OF LABOR STATISTICS, *The Employment Situation — April 2020* (May 8, 2020), https://www.bls.gov/news.release/archives/empsit_05082020.htm ("This is the highest rate and the largest over-the-month increase in the history of the series (seasonally adjusted data are available back to January 1948).").

167. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, THE EMPLOYMENT SITUATION — NOVEMBER 2020 (Dec. 4, 2020), https://www.bls.gov/news.release/archives/empsit_12042020.htm (reporting that the 3.7 million number of "permanent job losers" had increased by 2.5 million higher since February, 2020).

168. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, THE EMPLOYMENT SITUATION — APRIL 2020 (May 8, 2020), https://www.bls.gov/news.release/archives/empsit_05082020.htm (emphasis added).

169. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, THE EMPLOYMENT SITUATION — FEBRUARY 2020 (Mar. 6, 2020), https://www.bls.gov/news.release/archives/empsit_03062020.htm#.

The shutdown of restaurants alone resulted in substantial economic deprivation and unemployment among financially vulnerable individuals. COVID-19 restrictions on restaurants created eight million unemployed workers and losses of $120 billion in sales by June 2020.[170] By September 2020, the restaurant industry was expected to lose $240 billion in sales in 2020.[171] In Los Angeles County alone, the "Los Angeles Economic Development Corporation predicted that approximately 700,000 jobs in the food industry would be lost during the county's [November 2020] shutdown, and 75% of all projected job losses would affect people earning $50,000 or less."[172]

Unemployment has direct effects on medical care by increasing medical distancing.[173] Unemployed people "are less likely to get medical care or prescription drugs than people with jobs."[174] The CDC found that unemployed adults had "poorer mental and physical health" and were "less likely to receive needed medical care . . . [and] needed prescriptions due to cost.[175] In addition, 1.4 million jobs were lost in health care, including 243,000 jobs in offices of physicians and 205,000 jobs in offices of other health care practitioners, thereby contributing to medical distancing by decreasing availability.[176]

Unemployment itself is detrimental to health.[177] Reams of quantitative evidence demonstrate the health benefits of employment and the "detrimental

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170. *Association Statement on the Restaurants Act of 2020*, NAT'L RESTAURANT ASSOC. (June 18, 2020), https://www.restaurant.org/news/pressroom/press-releases/restaurants-act-of-2020.

171. *100,000 restaurants closed six months into the pandemic*, NAT'L RESTAURANT ASSOC. (Sept. 14, 2020, https://www.restaurant.org/news/pressroom/press-releases/100000-restaurants-closed-six-months-into-pandemic.

172. Manifredi, *supra* note 40.

173. *See infra* Section II.B.3.

174. Steven Reinberg, *Even With Insurance, Unemployed Have Worse Health Outcomes*, HEALTHDAY NEWS (Jan. 24, 2012), https://consumer.healthday.com/public-health-information-30/lack-of-insurance-news-418/even-with-insurance-unemployed-have-worse-health-outcomes-661028.html; *see also* Anne Driscoll & Amy Bernstein, *Health and Access to Care Among Employed and Unemployed Adults: United States, 2009-10,* CTR. FOR DISEASE CONTROL & PREVENTION 1, 3 (Jan. 2012), https://pubmed.ncbi.nlm.nih.gov/22617552/ ("Unemployed adults were more likely to have serious psychological distress than employed working-age adults, regardless of health insurance coverage.).

175. Driscoll & Bernstein, *supra* note 174, at 1.

176. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, THE EMPLOYMENT SITUATION — APRIL 2020 (May 8, 2020), https://www.bls.gov/news.release/archives/empsit_05082020.htm.

177. Frank Griffin, *Improving Health Outcomes and Lowering Costs: Attorneys as Proactive, Paid Providers Treating Social Determinants of Health*, 71 RUTGERS U. L. REV. 795, 808 (2019) [hereinafter Griffin SDH].

impacts of unemployment."[178] Employment provides "benefits and stability critical to maintaining proper health" well beyond those simply associated with earning a paycheck.[179] Work itself can be associated with substantial psychological health benefits.[180]

The financial insecurities—including housing insecurity, utility insecurity, and food insecurity—that arise from unemployment negatively impact "social determinants of health."[181] For example, unemployment may lead to unstable and substandard housing, which significantly impacts health.[182] In the U.S. over 38 million households are "cost-burdened" by their home and have limited funds to pay for basic necessities, let alone address health needs.[183] Confining people to substandard housing during "social distancing" creates health risks by contributing to respiratory disease, neurological disorders, psychological disorders, and behavioral dysfunction due to hazards inside the substandard housing.[184] "Exposure to poor indoor air quality, mold, lead, and rodent and cockroach infestations" can worsen or cause serious health issues like asthma and respiratory infections (like COVID-19).[185] Asthma alone affects over 4.6 million Americans and is worsened by dampness and mold exposure in homes.[186] Structural hazards and unsafe conditions—like leaking roofs, electrical deficiencies, and plumbing issues—in dilapidated buildings where people are confined for social distancing purposes can lead to mental stress, physical injuries, and illness.[187]

The housing instability caused by the public health measures during the COVID-19 pandemic may have an ongoing negative health impact beyond the pandemic. Some experts warn that the U.S. "may be facing the most

178. *Id.* at 808 (citing Nanette Goodman, *The Impact of Employment on the Health Status and Health Care Costs of Working-Age People With Disabilities*, LEADCENTER 1, 4 (Nov. 2015) http://www.leadcenter.org/system/files/resource/downloadable_version/impact_of_employment_health_status_health_care_costs_0.pdf).

179. *Id.* (citing Robert Wood Johnson Foundation, *How Does Employment, or Unemployment, Affect Health?* HEALTH POL'Y SNAPSHOT SER. (Mar. 12, 2013), https://www.rwjf.org/en/library/research/2012/12/how-does-employment--or-unemployment--affect-health-.html.

180. *Id.*

181. Bradley, *supra* note 60, at 12–13; Teufel, *supra* note 60, at 82.

182. Frank Griffin, *Administering Housing Law as Health Care: Attorneys as Healthcare Providers*, 71 S. C. L. REV. 349, 350 (2019) [hereinafter Griffin Housing].

183. *Id.*; ROBERT WOOD JOHNSON FOUNDATION, 2019 ANNUAL MESSAGE: OUR HOMES ARE KEY TO OUR HEALTH, https://www.rwjf.org/en/library/annual-reports/2019-annual-message.html (noting that "38.1 million households are 'cost-burdened,' spending more than 30% of their income on housing").

184. Griffin SDH, *supra* note 177, at 814.

185. Erwin De Leon & Joseph Schilling, *Urban Blight and Public Health: Addressing the Impact of Substandard Housing, Abandoned Buildings, and Vacant Lots*, THE URBAN INST. (Apr. 11, 2017).

186. Griffin Housing, *supra* note 182, at 351.

187. *Id.*

severe housing crisis in its history" with an estimated thirty to forty million people facing housing displacement after or during the COVID-19 pandemic.[188] The brewing crisis includes a "sharply increased risk of foreclosure and bankruptcy, especially among small property owners; long term harm to renter families and individuals; disruption of the affordable housing market; and destabilization of communities across the United States."[189] Experts say that in January 2021 alone, "an estimated $32 billion in back rent will come due, with up to 8 million tenants facing eviction filings."[190] And according to health experts, this round of displacements may create another large wave of COVID-19 infections "as the newly homeless are forced into shelters or tight quarters with friends and relatives, potentially exposing them to infection."[191]

Utility insecurity related to unemployment limits access to electricity, gas, and water necessary for good health. "Loss of utilities—like heat, air conditioning, and water—leads to poor health outcomes" due to dangerously cold or hot homes, poor hygiene, and/or dehydration.[192] Cold homes and fuel poverty are associated with negative health effects like pneumonia (particularly dangerous for COVID-19 patients), heart attacks, and mental illness.[193] Vulnerable populations with diabetes, circulatory disease, asthma, respiratory problems, depression, anxiety, and arthritis are especially vulnerable to cold.[194] In addition, the disabled, children, and the elderly are also especially vulnerable to cold temperatures.[195] Ironically, cold housing increases the incidence of colds and flu.[196] So, by placing vulnerable populations in financial crisis with resultant utility insecurity, officials may have actually increased their susceptibility to COVID-19.

Likewise, loss of running water contributes to the spread of infectious diseases by decreasing the opportunity for good hygiene (e.g., showering,

188. Emily Benfer et al., *The COVID-19 Eviction Crisis: an Estimated 30-40 Million People in America Are at Risk*, ASPENINSTITUTE (Aug. 7, 2020), https://www.aspeninstitute.org/blog-posts/the-covid-19-eviction-crisis-an-estimated-30-40-million-people-in-america-are-at-risk/ (citing the U.S. Census data and estimating that 30–40 million people in America could be at risk of eviction).

189. *Id.*

190. Michele Conlin et al., *Time's Up: After a Reprieve, a Wave of Evictions, Expected Across U.S.*, REUTERS (Oct. 19, 2020), https://www.reuters.com/article/us-usa-housing-eviction-insight/times-up-after-a-reprieve-a-wave-of-evictions-expected-across-u-s-idUSKBN27415U.

191. *Id.*

192. Griffin SDH, *supra* note 177, at 806–07.

193. *Id.* at 815.

194. *Id.*

195. *Id.*

196. *Id.*

bathing, and washing clothes).[197] Lack of running water has specifically been associated with respiratory illnesses (like COVID-19).[198]

Some public health orders even directly caused the loss of utilities during the pandemic.[199] For example, Los Angeles County's Department of Public Health issued a health officer order that "bans gatherings, including parties," and to enforce the ban, the Los Angeles mayor authorized the city's Department of Water and Power "to shut down utilities at locations that have hosted big gatherings."[200]

Unemployment leads to food insecurity, which impacts health.[201] During the COVID-19 pandemic, *Feeding America*, the United States' "largest anti-hunger organization," handed out over 4.2 *billion* meals from March through October 2020 alone and reported a "[sixty percent] average increase in food bank users during the pandemic" with "about 4 in 10" users being "first-timers."[202] AARP found that one-fifth of low-income adults over 50 years of age reported challenges accessing food during the pandemic.[203] Food insecurity is associated with health problems like heart disease, stroke, depression, suicidal ideation, diabetes, obesity, functional limitations, arthritis, asthma, kidney disease, cancer, lung disease, insomnia, diminished physical activity, peripheral artery disease, and osteoporosis.[204]

In addition, food insecurity can compound existing medical problems. Secretary Alex Azar of HHS observed, "How can someone manage diabetes if they are constantly worrying about how they're going to afford their meals each week?"[205] Ironically, diabetes is a risk factor for COVID-19,[206] so a person with diabetes who has to skip insulin dosing to buy food due to economic

197. *Id.* at 816.

198. Griffin SDH, *supra* note 177, at 816.

199. *See* Minyvonne Burke & Dennis Romero, *L.A. Threatens to Shut Off Utilities at Homes That Host Big Parties During the Pandemic*, NBC NEWS (Aug. 5, 2020), https://www.nbcnews.com/news/us-news/after-deadly-mansion-party-los-angeles-county-issues-legally-binding-n1235896.

200. *Id.*

201. Griffin SDH, *supra* note 177, at 816.

202. Sharon Cohen, *Millions of Hungry Americans Turn to Food Banks for the 1st Time*, APNEWS (Dec. 7, 2020), https://apnews.com/article/race-and-ethnicity-hunger-coronavirus-pandemic-4c7f1705c6d8ef5bac241e6cc8e331bb.

203. AARP FOUNDATION, *supra* note 116, at 48.

204. Griffin SDH, *supra* note 177, at 807.

205. Alex M. Azar II, Sec'y, U.S. Dep't of Health & Human Servs., *The Root of the Problem: America's Social Determinants of Health at the Hatch Foundation for Civility and Solutions* (Nov. 14, 2018) (emphasis added), https://www.acoexhibithall.com/articles/the-root-of-the-problem-americas-social-determinants-of-health/.

206. *How COVID-19 Impacts People With Diabetes*, AM. DIABETES ASS'N (2021), https://www.diabetes.org/coronavirus-covid-19/how-coronavirus-impacts-people-with-diabetes.

distress, caused by unemployment, is at a much higher risk of serious complications from COVID-19 precisely *because of* the public health measures.

Those with financial distress are susceptible to mental health issues. Researchers found that during the COVID-19 pandemic, over sixty percent of adults with serious psychological distress reported "disruptions to education, *employment*, and *finances* negatively impacted their mental health," particularly among young adults.[207] The "most common stressors" reported by people with serious psychological distress included "pandemic effects on employment (65.1% . . .) and finances (60.6% . . .)."[208] Numerous studies suggest that the "[l]onger-term economic effects [of COVID-19] will put people at risk of poor mental health outcomes (including suicide)."[209]

3. *Medical Distancing*

Public health measures during the COVID-19 pandemic caused a "massive behavioral overhaul" that disrupted medical care for people with serious medical conditions and prevented routine medical screening for dangerous health conditions by restricting the active liberty to seek medical attention.[210] According to the CDC in September 2020, "nearly one third of adult[s] . . . reported having delayed or avoided routine medical care, which might *reflect adherence to community mitigation efforts* such as stay-at-home orders, temporary closure of health facilities, or additional factors."[211] Researchers expressed concern that medical delays and missed appointments may ultimately be more devastating than COVID-19.[212] Doctors on the front lines said, "We are worried that there might be a higher death toll from neglect of other diseases than from COVID-19."[213] The problem was so serious that "an alliance of healthcare experts," including health insurers and pharmacies, launched a

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207. McGinty, *supra* note 52, at 2555 (emphasis added).

208. *Id.*

209. Jurjen J. Luykx et al., *Psychiatry in Times of the Coronavirus Disease 2019 (COVID-19) Pandemic*, 77(11) JAMA PSYCH. 1097, 1098 (2020) (citing several studies); *see also* Mayowa Oyesanya et al., *Systematic Review of Suicide in Economic Recession*, 5 WORLD J. OF PSYCHIATRY 243, 243 (2015) (reviewing thirty-eight studies and finding a "positive association between economic recession and increased suicide rates").

210. Lenny Bernstein & Frances Stead Sellers, et al., *Patients With Heart Attacks, Strokes, and Even Appendicitis Vanish From Hospitals*, WASH. POST (Apr. 19, 2020), https://www.washingtonpost.com/health/patients-with-heart-attacks-strokes-and-even-appendicitis-vanish-from-hospitals/2020/04/19/9ca3ef24-7eb4-11ea-9040-68981f488eed_story.html.

211. Mark Czeisler et al., *Delay or Avoidance of Medical Care Because of COVID-19-Related Concerns — June 2020*, 69 MMWR 1250, 1251 (Sept. 11, 2020) [hereinafter Czeisler Medical Distancing] (emphasis added), https://www.cdc.gov/mmwr/volumes/69/wr/mm6936a4.htm.

212. Bernstein & Sellers, *supra* note 210; Masroor, *supra* note 45, at 1.

213. Bernstein & Sellers, supra note 210.

"Stop Medical Distancing" ad campaign.[214] Concern over patients dying at home with neglected heart attacks and other health issues also led the American College of Cardiology to launch a "Cardiosmart" campaign to encourage people to get urgent care and to keep routine appointments during the COVID-19 pandemic.[215] In addition, the President of the American Heart Association (AHA) emphasized that "[t]here's no question the risk of untreated heart attack or stroke is higher than the risk of COVID-19."[216] The AHA made public service announcements entitled "Don't Die of Doubt," encouraging people to seek care for emergency medical conditions during the pandemic.[217]

The CDC estimates that overall, forty-one percent of U.S. adults "avoided medical care during the pandemic" including almost thirty-two percent who avoided routine care and twelve percent who avoided urgent care.[218] During the ten weeks after the COVID-19 national emergency was declared, emergency department visits decreased by twenty-three percent for heart attacks, twenty percent for strokes, and ten percent for diabetic hyperglycemic crisis.[219] Given the stress caused by the pandemic, doctors expected an increase in heart attacks and strokes, not a decrease. [220] Rather than a decrease, one prominent doctor observed, "[t]hat has to mean they are at home or *in the morgue*." [221] Research confirmed that "deaths [were] increasing from causes such as heart disease, stroke and diabetes—while emergency room visits for those conditions [were] down."[222] Researchers observed a "silent sub-epidemic of people who need[ed] care at hospitals but dare[d] not come in,"

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214. *Keep Social Distancing, Stop Medical Distancing*, STOPMEDICALDISTANCING.ORG, https://stopmedicaldistancing.org (2020); Michael Precker, *More People are Dying During the Pandemic — and Not Just from COVID-19*, AM. HEART ASS'N NEWS (July 10, 2020), https://www.heart.org/en/news/2020/07/10/more-people-are-dying-during-the-pandemic-and-not-just-from-covid-19.

215. Bernstein & Sellers, supra note 210.

216. Precker, *supra* note 214.

217. *Don't Die of Doubt*, AM. HEART. ASS'N, https://www.heart.org/en/health-topics/dont-die-of-doubt.

218. Czeisler Medical Distancing, *supra* note 211, at 1250.

219. Samantha Lange et al., *Potential Indirect Effects of the COVID-19 Pandemic on Use of Emergency Departments for Acute Life-Threatening Conditions — United States, January–May 2020*, 69 CTRS. FOR DISEASE CONTROL & PREVENTION: MORBIDITY AND MORTALITY WEEKLY REPORT 795, 795 (June 26, 2020), https://www.cdc.gov/mmwr/volumes/69/wr/mm6925e2.htm ("In the 10 weeks following declaration of the COVID-19 national emergency, ED visits declined 23% for heart attack, 20% for stroke, and 10% for hyperglycemic crisis.").

220. Bernstein & Sellers, *supra* note 210 ("Doctors say it's unlikely there has been a decline in most of these conditions, which suggests that at least a few people may be dying at home.").

221. *Id.* (emphasis added).

222. Precker, *supra* note 214.

including "people with inflamed appendixes, infected gall bladders, bowel obstructions and, more ominously, chest pains and stroke symptoms."[223]

The CDC noted that"[u]pward trends in other causes of death (e.g., suicide, drug overdose, heart disease) may contribute to excess deaths in some jurisdictions."[224] One study predicted approximately 34,000 excess cancer deaths in one year in the U.S. due to decreased chemotherapy and missed early diagnoses related to medical distancing.[225] Specifically, the study showed "significant falls in admissions for chemotherapy (45-66% reduction) and urgent referrals for early cancer diagnosis (70-89% reduction), compared to pre-emergency levels" in April 2020.[226]

Financial distress, closure of medical offices, stay-at-home orders, and similar liberty restrictions placed obstacles in the path of people seeking psychiatric care, resulting in severe psychological distress.[227] In one study, thirty-five percent of adults who reported serious psychological distress "cited inability to obtain health care as a contributing factor [to their serious distress]."[228]

Another form of medical distancing involves the loss of a healthy lifestyle, like exercising or being outdoors, and this can be triggered by restrictions on active liberties. The closure of gyms and parks increased sedentary behavior, which has been associated with a variety of physical and mental health issues.[229] Gyms were often closed as "nonessential" during the pandemic with resultant loss of healthy exercise. [230] Exercise reduces obesity and

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223. Bernstein & Sellers, *supra* note 210.

224. CDC Excess Deaths, *supra* note 49.

225. Alvina Lai et al., *Estimating Excess Mortality in People With Cancer and Multimorbidity in the COVID-19 Emergency*, RESEARCHGATE 1, 1 (Apr. 28, 2020), https://www.researchgate.net/publication/340984562_(estimating_excess_mortality_in_peoplewith_cancer_and_multimorbidity_in_the_COVID-19_emergency).

226. *Id.*

227. *See* McGinty, *supra* note 52, at 2555.

228. *Id.*

229. Leandro Fornias Machado de Rezende et al., *Sedentary Behavior and Health Outcomes: An Overview of Systematic Reviews*, 9(8) PLOS ONE 1, 1 (2014), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4140795/pdf/pone.0105620.pdf (linking prolonged sitting to diabetes, obesity, stroke, heart disease, and premature death).

230. *See, e.g.*, Associated Press, *Court Rules New Jersey Can Shut Down Gym That Defied Closure*, U.S. NEWS AND WORLD REPORT (July 24, 2020), https://www.usnews.com/news/best-states/new-jersey/articles/2020-07-24/court-rules-new-jersey-can-shut-down-gym-that-defied-closure (describing gyms being held in contempt and shut down, even though they required masks, ensured social distancing, and only operated at twenty-percent capacity); *see, e.g.*, Dick VanderHart, *Freeze, Oregon: Gov. Kate Brown Restricts Businesses Again as COVID-19 Cases Surge*, OREGON PUBLIC BROAD. NEWS (Nov. 13, 2020), https://www.opb.org/article/2020/11/13/oregon-governor-kate-brown-covid-19-restrictions/ (noting that the Oregon regulations close "gyms and other indoor recreational facilities, museums, and indoor entertainment like theaters[,] and also close "outdoor recreational facilities, [including] zoos, gardens, and entertainment venues").

its substantial negative health effects, including diabetes, a risk factor for severe COVID, and it also improves mental health and has other positive health effects.[231] In addition, the closure of parks and outdoor recreational facilities restricted healthy lifestyle habits.[232] Outdoor activities have been linked to improved mental health, lower blood pressure, decreased stress hormones, less anxiety and depression, and many other physical and mental health effects.[233] Lack of physical activity can "make it difficult to manage or prevent certain health conditions, such as diabetes, high blood pressure, and heart disease."[234] Immobility can lead to health problems like osteoporosis, muscle atrophy, and in severe cases, venous thromboembolic disease.[235]

Closing parks and beaches decreased the ability of people to get sunlight exposure, critical for vitamin D production. "[P]rolonged lack of sunlight can cause a vitamin D deficiency, which can put older adults at risk of fractures and falls," which are "among the leading causes of hospitalization and death for older adults."[236] Vitamin D deficiency was associated with a "3.7-fold increase in the odds of dying from COVID-19" in one study.[237] In addition,

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231. *See* CTRS. FOR DISEASE CONTROL & PREVENTION, THE HEALTH EFFECTS OF OVERWEIGHT AND OBESITY, https://www.cdc.gov/healthyweight/effects/index.html; *see also* CENTER FOR DISEASE CONTROL AND PREVENTION, BENEFITS OF PHYSICAL ACTIVITY, https://www.cdc.gov/physicalactivity/basics/pa-health/index.htm.

232. *See, e.g.*, NEW MEXICO DEP'T OF HEALTH, *supra* note 38. ("All outdoor recreational facilities must close.").

233. *See, e.g.*, Kevin Loria, *Being Outside can Improve Memory, Fight Depression, and Lower Blood Pressure — Here are 12 Science-Backed Reasons to Spend More Time Outdoors*, BUS. INSIDER (Apr. 22, 2018), https://www.businessinsider.com/why-spending-more-time-outside-is-healthy-2017-7 (observing that time spent outdoors can help short term memory, decrease mental fatigue and stress hormones, lower blood pressure, fight anxiety and depression, reduce inflammation, boost the immune system, and many other positive health effects); David G. Pearson, *The Great Outdoors? Exploring the Mental Health Benefits of Natural Environments*, 5 FRONT. PSYCHOL. 1, 1 (Oct. 21, 2014), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4204431/pdf/fpsyg-05-01178.pdf (noting "growing evidence to suggest that exposure to natural environments can be associated with mental health benefits"); Caroline Piccininni et al., *Outdoor Play and Nature Connectedness as Potential Correlates of Internalized Mental Health Symptoms Among Canadian Adolescents*, 112 PREVENTIVE MED. 168, 168 (2018), https://reader.elsvier.com/reader/sd/CA88EA0CBC6C6201169CDF78539CFC96980-037F641C6E69474032945CB809DE2B041A86C7595BF68800CCAA1C7D6EC82 (noting that "[e]xposures to outdoor environments have great potential to be protective factors for the mental health of young people").

234. Leonard, *supra* note 152, at *4.

235. CTRS. FOR DISEASE CONTROL & PREVENTION, BENEFITS OF PHYSICAL ACTIVITY, https://www.cdc.gov/physicalactivity/basics/pa-health/index.htm; CTRS. FOR DISEASE CONTROL & PREVENTION, HOSPITALIZATION AND BLOOD CLOTS, https://www.cdc.gov/ncbddd/dvt/hospitalization-infographic.html.

236. Leonard, *supra* note 152, at *4.

237. Becky McCall, *Vitamin D Deficiency in COVID-19 Quadrupled Death Rate*, MDEDGE: HEMATOLOGY AND ONCOLOGY (Dec. 11, 2020), https://www.mdedge.com/hematology-oncology/article/233376/coronavirus-updates/vitamin-d-deficiency-covid-19-

"numerous observational studies have shown that low vitamin D levels are a major predictor for poor COVID outcomes."[238]

III. Passive Liberty Restrictions and Health

Passive liberty is the liberty to be left alone and is akin to Berlin's negative sense of liberty.[239] When passive liberty restrictions are adopted, citizens have something *done to* them—like confinement, search and seizure, surveillance, and purposeful discrimination. Examples of passive liberty restrictions used during COVID-19 include quarantines, aggressive stay-at-home orders, gathering size restrictions upon private homes, contact tracing, curfews, privacy invasion, confinement without a trial, face mask mandates, and discrimination.

A. Passive Liberty Restrictions as Public Health Measures

1. *Restraint on Free Bodily Movement*

Quarantine, confinement, and isolation can infringe the passive liberty to be free from bodily restraint. Freedom from bodily restraint is clearly a core American liberty interest.[240] The fact that "all individuals possess a liberty interest in being free from physical restraint" is "self-evident."[241] In relation to COVID-19, the Pennsylvania Health Department defines quarantine as "the separation and restriction of movement of individuals who were exposed to a contagious disease to see if they become sick or while they are awaiting the results of a COVID-19 test."[242] It also defines isolation as "the separation of individuals with COVID-19 from individuals who do not have COVID-19"[243]

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quadrupled?ecd=wnl_evn_201211_mdedge_8pm&utm_source=News_MDedge_eNL_121120_F&utm_medium=email&utm_content=Vitamin+D+deficiency+in+COVID-19+quadrupled+death+rate&sso=true (describing vitamin D deficiency as "one of the most important risk factors to consider" for severe COVID-19).

238. *Id*.

239. Berlin, *supra* note 14, at 15.

240. Meyer v. Nebraska, 262 U.S. 390, 399–400 (1923) (liberty denotes more than "merely freedom from bodily restraint").

241. Greenholtz v. Inmates of Nebraska Penal & Corr. Complex, 442 U.S. 1 (1979) (Marshall, J., dissenting).

242. Pennsylvania Department of Health, Order of the Secretary of the Pennsylvania Department of Health for Mitigation Relating to Travel, Section 1, Nov. 20, 2020, https://www.governor.pa.gov/wp-content/uploads/2020/11/20201117-SOH-Travel-Mitigation-Order.pdf.

243. *Id.*

Stay-at-home orders that are rigorously enforced with fines and imprisonment function as passive liberty restrictions similar to quarantines.

Quarantines have long been a part of public health law and policy. During the Black Death in the 1300s, Venice imposed quarantines of forty days on travelers arriving on ships.[244] Quarantines have always been controversial, even triggering wars and urban riots in Europe in the 1600s and 1700s.[245] The first American quarantine law was passed by the Massachusetts Bay Colony in 1647 "as a precaution against plague carried by Caribbean ships."[246]

The federal government has the unquestioned power to quarantine "even an outwardly healthy individual entering the U.S."[247] The Supreme Court observed:

> An American citizen arriving at an American port on a vessel in which, during the voyage, there had been cases of yellow fever or Asiatic cholera, he, although apparently free from disease himself, may yet, in some circumstances, be held in quarantine against his will on board of such vessel or in a quarantine station, until it be ascertained by inspection, conducted with due diligence, that the danger of the spread of the disease among the community at large has disappeared.[248]

Federal authorities have broad discretion in quarantine decisions at the U.S. borders.[249]

In addition, in 1905, the Supreme Court recognized the "authority of a state to enact quarantine and health laws of every description" with similar broad discretion.[250] A state public health law will not be struck down unless it has "no real or substantial relation to the protection of the public health" or is, "beyond all question, a plain, palpable invasion of rights secured by [the Constitution]."[251] Courts have tended to give local officials the latitude to pursue a "better-safe-than-sorry" approach based on the idea that it is safer to detain an individual than risk exposing the population to them.[252]

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244. Batlan, *supra* note 79, at 62–63 (adding that the word quarantine is "derived from the Italian word *quarantina*, meaning forty-days").

245. *See id.* at 63.

246. *Id.*

247. Hickox v. Christie, 205 F. Supp. 3d 579, 590–94 (D.N.J. 2016).

248. *Id.* (quoting Jacobson v. Commonwealth of Massachusetts, 197 U.S. 11, 29 (1905)).

249. *Hickox*, 205 F. Supp. at 591 ("Within broad boundaries, the length of such detention is a judgment call, calling for the application of expertise; there is no bright-line statutory or constitutional rule.").

250. *Jacobson*, 197 U.S. at 25.

251. *Id.* at 31.

252. *Hickox*, 205 F. Supp. 3d at 590–94 (finding that a "better-safe-than-sorry determination was . . . entitled to deference, absent a 'reliable showing of error'").

During the COVID-19 pandemic, some states used aggressive quarantine tactics.[253] In Kentucky, for example, at least one couple was forced to wear ankle monitor bracelets to enforce home confinement when the wife tested positive for COVID-19.[254] Some states' stay-at-home orders resembled quarantines.[255] For example, Oregon's governor criminalized leaving home and directed law enforcement to enforce large fines and jail time.[256] In instituting these quarantine-like stay-at-home orders, officials confined large populations of individuals who posed no immediate public health threat of transmitting COVID-19 to their homes. For example, one stay-at-home order confined thirty-three million Californians representing eighty-four percent of the state's population to their homes, even though the vast majority of those confined posed no immediate threat of transmitting COVID-19.[257] Since courts have historically discarded overbroad quarantine orders, the broad quarantines of non-infectious people during the COVID-19 pandemic were unprecedented in the United States.[258]

Courts declared judicial emergencies nationwide during COVID-19, suspending speedy trial rules, leading to prolonged confinement without a trial for some prisoners.[259] One court noted that officials tended to ignore the rights of defendants awaiting trial.[260] The court added that "[m]any defendants [were] in pretrial detention" with a "cloud of unresolved criminal charges."[261]

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253. *See e.g.*, Crist, *supra* note 43.

254. *Id.*

255. *See, e.g.*, Smith, *supra* note 69; VanderHart, *supra* note 230 ("Violators could face up to 30 days in jail, up to $1250 in fines, or both.").

256. *See* VanderHart, *supra* note 230 ("Violators could face up to 30 days in jail, up to $1250 in fines, or both.").

257. Wigglesworth, *supra* note 37.

258. *Hickox*, 205 F. Supp. 3d at 590–94 (establishing that "[c]ourts have sometimes struck down quarantine orders, however, when they were found to be arbitrary and unreasonable in relation to their goal of protecting the public health," and citing, as examples of overbreadth, *Jew Ho v. Williamson*, citing *Jew Ho v. Williamson*, 103 F. 10 (N.D. Cal. 1900), where the court found that sealing off an entire section of San Francisco to prevent the spread of the bubonic plague was "unreasonable, unjust, and oppressive" and *In re Smith*, 146 N.Y. 68, 40 N.E. 497 (1895), (1895) where the court rejected blanket quarantine of individuals who refused vaccination when there was no reason to suspect infection or exposure of the individuals).

259. *See, e.g.*, *In re* Approval of Judicial Emergency Declared in E. Dist. of California, 956 F.3d 1175, 1177 (9th Cir. 2020) ("On March 17, 2020, Chief District Judge Kimberly J. Mueller declared a judicial emergency in the Eastern District of California pursuant to 18 U.S.C. § 3174(e). Finding no reasonably available remedy, the Judicial Council agreed to continue the judicial emergency for an additional one-year period and suspend the time limits of 18 U.S.C. § 3161(c). The continued judicial emergency will end on May 2, 2021.").

260. United States v. Royce, No. 4:20-cr-00116-DN-PK, 2020 WL 7059883, at *1 (D. Utah Dec. 2, 2020) ("Government officials who regulate health practices speak of the economy, new infections, hospital beds, and deaths, but at least in any reported remarks do not mention the denial of rights to defendants awaiting trial.").

261. *Id.* at *2.

In addition, "[v]ictims [were] denied their right to a day in court."[262] Trial dates were being left "undetermined" instead of "on a day certain" as required by the Speedy Trial Act due to the "unusual times."[263] Minority groups were particularly impacted in prisons, and the "high rates of incarceration among Black, Latino, and Native communities map[ped] closely with the demographic pattern of . . . COVID-19-related death."[264]

Mask mandates became a popular and highly politicized form of bodily restraint during COVID-19. Strangely, the issue was so politicized that at least one police department *forbade* officers and visitors from wearing face masks inside the precinct.[265] By December 2020, thirty-five states required face coverings in public.[266] Although they varied, most required masks in indoor public spaces and outdoor venues when maintaining physical distancing was not possible.[267] In one study, researchers found that "achieving universal mask use (95% mask use in public) could be sufficient to ameliorate the worst effect of epidemic resurgences in many states," and "[u]niversal mask use could save an additional 129,574 (85,284-170,867) lives from September 22, 2020, through the end of February 2021."[268] Some researchers noted that wearing a face mask may give people "a false sense of security," leading to inattention to other, more important, infection control measures, including social distancing and handwashing, compounded by the fact that many laypeople would wear their masks in ineffective ways.[269] One study found that mask wear may *increase* the risk of contracting COVID-19 by giving mask wearers a false sense of security and increasing the number of social contacts, which correlated more with an increased risk of COVID-19 infection.[270] Ultimately,

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262. *Id.*

263. *Id.*; *see also* Brennan, *infra* note 283 (pointing out that prisoners and parolees are due "some vestiges of human dignity," and indefinite periods of delay before trial may infringe that right).

264. Emily Wang et al., *COVID-19, Decarceration, and the Role of Clinicians, Health Systems, and Payers: A Report From the National Academy of Sciences, Engineering, and Medicine*, 324 JAMA 2257, 2257 (2020), https://jamanetwork.com/journals/jama/fullarticle/2773226.

265. Scott Neuman, *Florida Sheriff Orders Deputies and Staff Not to Wear Face Masks*, NPR (Aug. 15, 2020), https://www.nytimes.com/2020/08/12/us/fl-sheriff-billy-woods-bans-masks.html.

266. Peter Szekely, *As U.S. Pandemic Intensifies, North Dakota Becomes 35thState to Require Masks*, REUTERS (Nov. 14, 2020, 2:17 PM), https://www.reuters.com/article/us-health-coronavirus-usa-idUSKBN27U0P7.

267. *Id.*

268. *Id.*; IHME COVID-19 Forecasting Team, *Modeling COVID-19 Scenarios for the United States*, 27 NAT. MED. 94, (2020), https://www.nature.com/articles/s41591-020-1132-9.

269. Rapid Response, *Covid-19: Important Potential Side Effects of Wearing Face Masks That We Should Bear in Mind*, 369 BMJ 1, 3 (Apr. 20, 2020), https://www.bmj.com/content/369/bmj.m1435/rr-40.

270. Eline M. van den Broek-Altenburg et al., *Jobs, Housing, and Mask Wearing: Cross-Sectional Study of Risk for COVID-19,* 7 JMIR PUB. HEALTH & SURVEILLANCE, 1, 8 (2021).

data from the thirty-five states with mask mandates can be compared to data from the fifteen states without mask mandates to evaluate the effectiveness of the mandates.

2. *Privacy Intrusions*

Contact tracing can infringe on privacy and may lead to unintended behavior modifications known as "privacy-protective behaviors," like withholding information or avoiding activities where privacy is compromised.[271] Privacy-protective behaviors can compromise public health data and decision-making by creating an inaccurate or incomplete picture of the public health situation.[272] For example, people may forego COVID-19 testing to avoid having to deal with privacy intrusions.[273] Contact tracing is "a method used to find and follow up with people who have been in close contact with someone who tested positive for COVID-19."[274] To facilitate contact tracing, some state and local governments required business owners to collect patrons' personal information including names, addresses, phone numbers, and email addresses in a government logbook.[275] Some states placed the same requirements on private gatherings.[276]

Courts have generally not been particularly sympathetic to privacy complaints regarding contact tracing in public places. For example, a court upheld a Los Angeles County order instructing businesses to "collect contact information" including names, phone numbers, and email addresses from patrons.[277] The County planned to use contact tracing to isolate confirmed cases

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271. Nass et al, *supra* note 18, at 78.

272. *Id.*

273. *See* Karina Elwood & Cindy Krischer Goodwin, *More Than Just Health Concern at Coronavirus Testing Sites: Are You Exposing Your Personal Information to Security Risks?* SUNSENTINEL (June 12, 2020), https://www.sun-sentinel.com/coronavirus/fl-ne-coronavirus-test-delays-privacy-concerns-20200612-zcohi4d2abcnhdtfni2mjc6ieu-story.html.

274. *COVID-19 Terms Defined*, BAYLOR UNI. (Aug. 31, 2020), https://www.baylor.edu/coronavirus/news.php?action=story&story=220063.

275. Vt. Exec. Order. 01-20 Addendum 8 (Mar. 13, 2020), https://governor.vermont.gov/sites/scott/files/documents/ADDENDUM%208%20TO%20AMENDED%20AND-%20RESTATED%20EXECUTIVE%20ORDER%2001-20.pdf ("All restaurants and other public accommodations which host organized non-essential activities shall maintain an easily accessible, legible log of all employees, customers, members and guests and their contact information, including name, address, phone number and email address for 30 days in the event contact tracing is required by VDH. . . . this requirement applies to all employees and all guests in every party."); NAT'L ACAD. FOR STATE HEALTH POL'Y, *State Approaches to Contact Tracing During the COVID-19 Pandemic*, (Dec. 4, 2020) [hereinafter National Academy] https://www.nashp.org/state-approaches-to-contact-tracing-covid-19/.

276. National Academy, *supra* note 275.

277. Miura Corp. v. Davis, No. 220-cv-05497SVWADS, 2020 WL 5224348, at *1 (C.D. Cal. June 25, 2020).

of COVID-19 and "trace" people who were in contact with confirmed cases to quarantine them too.[278] The court found no "Fourth Amendment-protected privacy interest in any contact information that [the patron] voluntarily discloses to a business or organization covered by the Order" and noted that guests "lack any privacy interest of their own in [a] hotel's records."[279] The order was upheld partially because government access was subject to administrative review and a warrant.[280]

Some states extended contact tracing into private homes.[281] For example, gathering size restrictions limiting the size of gatherings to as few as five people, and two households sometimes required contact tracing records for anyone visiting the private home.[282]

3. *Discrimination*

Being free from purposeful discrimination is a passive liberty.[283] Passive liberty restrictions like shelter-in-place orders "do not inflict equivalent hardship on all people."[284] In fact, "inequities related to social determinants of health are magnified during a crisis."[285] Public health measures restricting liberties discriminate against populations by disproportionately positively impacting some groups at the expense of negative impacts to other groups.[286] Liberty restraints during the COVID-19 pandemic led to a shift of the pandemic's burdens from rich to poor, from old to young, and from white populations to non-white populations.[287]

First, liberty restrictions are discriminatory because they shifted the burden of COVID-19 from wealthier populations, who could afford to comply,

278. *Id.*

279. *Id.* at 4 (quoting Patel v. City of Los Angeles, 738 F.3d 1058, 1062 (2013)).

280. *Id.* at 5 (citing the "administrative search exception to the Fourth Amendment" and noting "in order for an administrative search to be constitutional, the subject of the search must be afforded an opportunity to obtain precompliance review before a neutral decisionmaker").

281. *See, e.g.*, Vt. Exec. Order, *supra* note 275 (restricting attendance at "all . . . private social [gatherings] . . . to participation with only members of a single household" and requiring maintenance of a "contact log" of all guests).

282. *See id.*

283. William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491 (1977) (noting the importance of 14th Amendment protections against "the peculiar disadvantage of politically powerless groups whose members have historically been subjected to purposeful discrimination").

284. Evans, *supra* note 161, at 2302.

285. *Id.*

286. *See infra* notes accompanying text at 286–326.

287. *See infra* notes accompanying text at 286–326.

to poor populations, who could not.[288] The liberty to give up liberty often only belongs to those with adequate financial means.[289] Even prior to the pandemic, many people were already cutting back on necessities like food, clothing, and transportation to afford rent.[290] Many Americans live paycheck-to-paycheck, so disruptions lead to disproportionate sacrifice of basic necessities among the poor.[291] While lockdown orders may have potentially decreased the risks of COVID-19 among wealthier individuals, poorer populations bore the increased burdens associated with poverty, including housing, food, and medication insecurity, as well as increased COVID-19 risk in crowded households.[292] In many cases, people in poor households may have been safer working at a job where workers were following guidelines than staying in close contact with others at home. Minority groups disproportionately represented among the poor likely bore a disproportionate share of this burden shift. The mental health impact of this burden shift was evident early.[293] For example, in July 2020, 20.2% of adults with incomes less than $35,000 per year reported serious psychological distress compared to thirteen percent of U.S. adults in general.[294]

Second, liberty restrictions are discriminatory because they shift the burden of COVID-19 from older populations onto younger populations. Aggressive public health measures essentially converted the disease burden of COVID-19 on older generations into a disease burden of financial distress, social isolation, and medical distancing on younger generations.[295] Older age groups were disproportionately affected by COVID-19.[296] The risk of death

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288. *See generally* Brian Root & Lena Simet, *United States: Pandemic Impact on People in Poverty*, HUMAN RIGHTS WATCH (Mar. 2, 2021, 6:00 AM), https://www.hrw.org/news/2021/03/02/united-states-pandemic-impact-people-poverty#.

289. *Id.*

290. Jenesse Miller, *Even Before the Pandemic, Struggling L.A. Renters Cut Back on Food, Clothes, and Transportation*, USC NEWS (Dec. 15, 2020), https://news.usc.edu/179928/los-angeles-rent-burdened-households-basic-needs-usc-research/ (citing researchers from USC's Sol Price Center for Social Innovation in stating that even prior to the pandemic, "[m]ore than 60% of renters reported cutting back on food, 45% on clothing and 33% on transportation in order to afford rent").

291. *See id.*

292. Zachary Madewell et al., *Household Transmission of SARS-CoV-2: A Systematic Review and Meta-analysis*, 13 JAMA NETWORK OPEN 1, 2 (Dec. 14, 2020), https://jamanetwork.com/journals/jamanetworkopen/fullarticle/2774102 (confirming that "households are and will continue to be important venues for transmission, even in areas where community transmission is reduced").

293. McGinty et al., *supra* note 52, at 2555.

294. *Id.*

295. *See generally* Kim, *supra* note 104.

296. *See, e.g.*, Fei Zhou et al., *Clinical Course and Risk Factors for Mortality of Adult Inpatients With COVID-19 in Wuhan, China: A Retrospective Cohort Study*, 395 LANCET 1054, 1054 (Mar. 28, 2020), https://www.thelancet.com/action/showPdf?pii=S0140-6736%2820%2930566-3; CTRS. FOR DISEASE CONTROL AND PREVENTION, *COVID-19 Weekly*

from COVID-19 is "highest among the oldest and lowest among the youngest populations," with age making a "major difference in mortality risk."[297] For example, people aged seventy-five to eighty-four years are 200 times more likely to die from COVID-19 than those aged eighteen to twenty-nine years, while those over eighty-five are 630 times more likely to die than those aged eighteen to twenty-nine years.[298] Nursing home and long-term care facility residents are particularly susceptible to COVID-19 and accounted for thirty-eight percent of deaths from COVID-19 even though they represented only five percent of the population.[299] For example, of around 300,000 deaths in the U.S. by December 14, 2020 (the day the vaccine was released), 106,000 (or over one-third) involved people in long-term care facilities.[300] In fact, in fourteen states "at least half of deaths have been linked to nursing homes," and in three states, over seventy percent of the deaths were linked to nursing homes.[301] Therefore, the stay-at-home measures were most likely to decrease deaths among the elderly, especially nursing home residents, and not younger people.[302]

Older populations also handled the lockdowns better psychologically.[303] Eight months into the pandemic, older adults appeared to be "less negatively affected by mental health outcomes than other age groups."[304] During the pandemic, multiple studies showed that older adults experienced less negative mental health outcomes (including substance use and suicidal ideation) than any other age group.[305] In addition, the CDC found significantly lower percentages of anxiety disorder, depressive disorder, and trauma or stress-related disorder (TSRD) among older adults compared to younger adults.[306]

Cases and Deaths Per 100,000 Population by Age, Race/Ethnicity, and Sex, https://covid.cdc.gov/covid-data-tracker/#demographics.

297. Howard Koh et al., *Deaths from COVID-19*, 325 JAMA NETWORK OPEN 133, 133 (Dec. 17, 2020), https://jamanetwork.com/journals/jama/fullarticle/2774464.

298. *Id.*

299. Kim, *supra* note 104 ("In the U.S., long-term care facilities account for 5 percent of all coronavirus cases and almost 40 percent of total deaths."); *see* Ip, *supra* note 67 ("Nursing homes account for 0.6% of the population but 45% of COVID fatalities.").

300. Koh et al., *supra* note 297, at 133.

301. *Id.*

302. *See* Ip, *supra* note 67 (noting that nursing homes account for forty-five percent of COVID fatalities); *see also* CDC Cases and Deaths, *supra* note 296.

303. Vahia et al., *supra* note 133, at 2253.

304. *Id.*

305. *Id.* (stating that "multiple studies have indicated that older adults may be less negatively affected by mental health outcomes than other age groups" eight months into the pandemic including "lower rates of new or increased substance use and suicidal ideation in the preceding 30 days").

306. Vahia et al., *supra* note 133, at 2253.

Young people were disproportionately negatively impacted by lockdown measures.[307] Lockdowns disproportionately harm the health of younger working populations by causing unemployment.[308] The vast majority of Americans over age sixty-five are no longer in the workforce.[309] Therefore, public health measures that cause unemployment disproportionately impact younger populations by converting COVID-19 risks in older people into financial distress risks in younger people, and these impacts showed.

In people younger than age thirty-five during the pandemic, "deaths from drug overdoses, transport accidents (e.g., motor vehicle fatalities), and suicides exceeded deaths from COVID-19."[310] Data from 2020 "show record overdose deaths," with over forty states reporting increased overdose deaths.[311] In addition, suicide rates, especially among youth, continued to rise as 2020 ended.[312] Younger adults were among groups found in June 2020 to have "experienced disproportionately worse mental health outcomes, increased substance abuse and elevated suicidal ideation."[313] In late June 2020, among young adults between the ages of eighteen through twenty-four years, 49.1% reported anxiety disorder, 52.3% depressive disorder, and forty-six percent reported trauma- or stress-related disorder.[314] In addition, 26.5% of adults aged eighteen to twenty-nine years reported serious psychological distress—compared to thirteen percent of U.S. adults in general.[315] Over sixty percent of those with serious distress reported that *pandemic-related disruptions to education, employment, and finances* negatively affected their mental health."[316] In addition, medical distancing was worse among young adults, who were 1.5 times more likely to avoid urgent or emergent medical care during the COVID-19 pandemic than older adults.[317]

The closure of schools has negative long-term effects on children.[318] For children and youth, "the relative risk of COVID-19 death is lower still."[319] The negative impacts on children in low-income populations may last for

307. Koh et al., *supra* note 297, at 133.

308. *See generally* Griffin SDH *supra* note 177.

309. Mark Mather et al., *Aging in the United States*, 70 POPULATION BULL. 1, 9 (Dec. 2015), https://www.prb.org/aging-unitedstates-fact-sheet/ (noting that only twenty-three percent of men and about fifteen percent of women aged sixty-five or older were still working in 2014).

310. Koh et al., *supra* note 297, at 133.

311. *Id.*

312. *Id.*

313. Czeisler et al., *supra* note 138, at 1049.

314. Vahia et al., *supra* note 133, at 2253.

315. McGinty et al., *supra* note 52, at 2555.

316. *Id.* (emphasis added).

317. Czeisler Medical Distancing, *supra* note 211, at 1250.

318. Ip, *supra* note 67 ("If schools don't reopen until next January, McKinsey & Co. estimates, low-income children will have lost a year of education, which it says translates into 4% lower lifetime earnings."); Koh et al., *supra* note 297, at 133.

319. Koh et al., *supra* note 297, at 133.

years, with one group estimating that one year of lost education among low-income children "translates into 4% lower lifetime earnings."[320]

Third, the restrictive public health measures favored White people over Black people and Hispanics.[321] As noted above, shifting the burden onto poorer populations was likely indirectly discriminatory against race and ethnicity. For example, people in racial and ethnic minority groups often work in essential settings, such as healthcare facilities, farms, factories, grocery stores, and public transportation."[322] Some of the workers in these settings had increased risk of being exposed to the COVID-19.[323] Housing factors may also have increased the burden shift because some "people from racial and ethnic minority groups live in crowded housing as compared to non-Hispanic White people and therefore may be more likely to be exposed to COVID-19," and family members of many generations may live in one household.[324]

Living circumstances and housing differences as a result of "long-standing structural inequities" may exacerbate health disparities caused by stay-at-home orders, which forced some populations to stay in substandard housing linked to significant health risks.[325] In other words, forcing people to stay indoors in substandard housing may have caused negative health effects that disproportionately affected Black and Hispanic populations. Further, disproportionate unemployment rates may have increased the risk of eviction and homelessness or shared housing.[326] Educational inequities may also have left "[p]eople with limited job options" and therefore "less flexibility to leave jobs that may put them at a higher risk of exposure to the virus that causes COVID-19."[327]

Compounding the problem is the fact that "people of color have about twice the death rate as White people" due to COVID-19.[328] In addition, Black people and Hispanic people have seen large increases in net worth between 2016 and 2019, partially due to "huge growth in business equity among Blacks (138%) and Hispanics (63%)."[329] Small business owners that

320. Ip, *supra* note 67.

321. *See generally* CTRS. FOR DISEASE CONTROL & PREVENTION, *Health Equity Considerations and Racial and Ethnic Minority Groups* (July 24, 2020), https://www.cdc.gov/coronavirus/2019-ncov/community/health-equity/race-ethnicity.html.

322. *Id.*

323. *Id*.

324. *Id.*

325. Czeisler Medical Distancing, *supra* note 211, at 1255.

326. CDC Cases and Deaths, *supra* note 296.

327. *Id.*

328. Koh et al., *supra* note 297, at 133.

329. Wall Street Journal Editorial Board, *The Restaurant Lockdown Massacre*, WALL ST. J. (Dec. 11, 2020), https://www.wsj.com/articles/the-restaurant-lockdown-massacre-11607730189 (noting that the "shutdowns are hitting minorities the hardest and increasing economic inequality").

"permanently shut down [lost] the equity" and "the result will be more socioeconomic inequality."[330]

The public health measures also have likely discriminated against people with disabilities.[331] People with disabilities were 1.3 times more likely to avoid urgent or emergent medical care during COVID-19.[332] Accessing medical services during the COVID-19 pandemic measures may have been difficult for people with disabilities due to disruptions of essential support services, leading to adverse health outcomes for people with disabilities compared to people without disabilities.[333] For example, accessible transportation, communication in accessible formats, and specialized services may not have been as available due to stay-at-home orders and the closure of "nonessential" businesses.[334]

B. Side Effects of Passive Liberty Restrictions

1. *Social Isolation, Financial Distress, and Medical Distancing*

When stay-at-home orders, gathering size restrictions, and curfews effectively reached the level of quarantines confining citizens to their homes, they became passive liberty restrictions by acting directly on citizens in the sanctity of their homes. For example, law enforcement visits to homes to break up small social gatherings of friends and family infringed passive liberty. Side effects of these infringements included social isolation, financial distress, and medical distance with the implications discussed above.

2. *Health and Privacy*

Intrusion into private decisions, limits on gatherings in private homes, quarantines, contact tracing, and other governmental intrusions into the "sanctity of [the] home and the privacies of life" may have health consequences.[335] Privacy is an "essential component of human well-being" because it promotes "ideals of personhood" like "personal autonomy, individuality, respect, dignity and worth as human beings," all of which are important to mental and

330. *Id.*
331. *See generally* Czeisler Medical Distancing, *supra* note 211.
332. *Id.*
333. *Id.* at 1253.
334. *Id.*
335. Griswold v. Connecticut, 381 U.S. 479, 484 (1965) (quoting Boyd v. United States, 116 U.S. 616, 630 (1886)).

physical health.[336] Privacy protects the principle that "[o]ur personhood must remain inviolate."[337] Laws that violate the right to privacy have been described as "intolerable."[338]

The Constitution's right to privacy includes the right to be free from government intrusion, to be able to make important personal decisions and to choose not to disclose important personal information.[339] The Supreme Court found that the Bill of Rights has "penumbras, formed by emanations from . . . [specific] guarantees" that create "zones of privacy" which include "protection against all governmental invasions of the sanctity of a man's home and the privacies of life."[340] These zones of privacy are essential components of human health and well-being because they promote ideals of personhood like individuality, respect, and dignity that are vital to mental and physical health.[341]

Loss of zones of privacy can damage health by causing stigma, ostracism, economic harm (e.g., job loss), embarrassment, bullying, and discrimination.[342] Privacy is important for health because it is "required for developing interpersonal relationships . . . [maintaining] a variety of social relationships", . . . and [providing] safety from embarrassment and ostracism.[343] Lack of privacy can inhibit the development of interpersonal relationships necessary for essential social contact and avoid the negative health consequences of social

336. Nass et al., *supra* note 18, at 77 (noting that some theorists "depict privacy as a basic human good or right with intrinsic value" and that others believe that privacy and autonomy are indicators of the "moral uniqueness" of humans).

337. Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737, 737 (1989).

338. *Id.* ("The right to privacy . . . supposes that the very order of things in a free society may on certain occasions render intolerable a law that violates no express constitutional guarantee.").

339. *Griswold*, 381 U.S. at 483–86 (1965) (discussing zones of privacy as a "penumbra" emanating from the Bill of Rights and other protections against governmental invasions of the "privacies of life").

340. *Id.* at 484 ("[T]he Bill of Rights have penumbras, formed by emanations from . . . [specific] guarantees that help give them life and substance. Various guarantees create zones of privacy." These zones include the right of association (U.S. CONST. amend. I), "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures" (U.S. CONST. amend. IV), and "protection against all governmental invasions 'of the sanctity of a man's home and the privacies of life'" (U.S. CONST. amend. IV, V)).

341. Nass et al., *supra* note 18, at 77.

342. *Id.*

343. *Id.* at 77–78 (noting that "without some assurance of privacy, people may be reluctant to provide candid and complete disclosures of sensitive information even to their physicians" due to the risk of "stigma, embarrassment, and discrimination," and that privacy promotes "more effective communication between physician and patient, which is essential for quality of care, enhanced autonomy, and preventing economic harm, embarrassment, and discrimination").

isolation described above.[344] Protecting privacy also enhances health data quality.[345] When "individuals avoid health care or engage in other privacy-protective behaviors, such as withholding information, inaccurate and incomplete data are entered into the health system."[346] Safeguarding personal privacy is part of the bioethical principle of nonmaleficence because "[b]reaches of privacy and confidentiality not only may affect a person's dignity, but can cause harm."[347]

Privacy includes the right to make important personal decisions about topics like contraception, marriage, and abortion, which are important for a core sense of personal autonomy, respect, and worth. During the COVID-19 pandemic, when some states closed abortion clinics as "nonessential businesses" to preserve personal protective equipment (PPE) for "essential" medical personnel,[348] the American College of Obstetricians and Gynecologists (ACOG), in advocating for women's health, asserted that access to abortion services, which have been connected with the right to privacy,[349] can have "profound consequences for [women's] self-determination and for economic, social, and political equality for women as a group."[350] Reproductive health professional groups, including ACOG, issued a statement against COVID-19 measures that canceled or delayed abortion procedures, pointing out that pandemic measures like quarantines and stay-at-home orders limit access to contraception, may increase sexual activity, and increase intimate partner violence—all of which can lead to unplanned pregnancies during times of financial hardship.[351] Research into the effects of Texas' COVID-19 public health restrictions on abortion showed a thirty-eight percent decrease in abortions in April 2020 when the order was in effect compared to April 2019.[352] Some data suggest that many Texas residents went out of state for abortions during the

344. Nass et al., *supra* note 18, at 78 (noting that "for example, people may share different information with their boss than they would with their doctor").

345. *Id.*

346. *Id.* at 77.

347. *Id.*

348. *See, e.g.*, Robinson v. Marshall, No. 2:19-cv-00365, 2020 WL 1659700 (M.D. Ala. Apr. 3, 2020) (holding that an Alabama gathering size order postponing any abortion that was not medically necessary to save the life or health of the mother likely violated the patients' right to privacy under 14th amendment).

349. *See* Roe v. Wade, 410 U.S. 113, 154 (1973) ("We, therefore, conclude that the right of personal privacy includes the abortion decision.").

350. Michelle Bayefsky et al., *Abortion During the COVID-19 Pandemic— Ensuring Access to an Essential Health Service*, 382 N. ENGL. J. MED. 47 (2020), https://www.nejm.org/doi/full/10.1056/NEJMp2008006.

351. *Id.*

352. Kari White et al., *Changes in Abortion in Texas Following an Executive Order Ban During the Coronavirus Pandemic*, 325 JAMA 691, 691 (Jan. 4, 2021), https://jamanetwork.com/journals/jama/fullarticle/2774731.

executive order.[353] In addition, after the executive order expired, abortions at greater than twelve weeks' gestation increased; although safe, abortions later during pregnancy are associated with increased health risks, so some women may have suffered complications related to the public health restrictions on abortion.[354]

Privacy also includes the right to protect certain personal information from disclosure, including most activities inside private homes, as well as protection of movements from governmental surveillance.[355] So, public health restrictions involving sending law enforcement into private homes to break up Thanksgiving meals involving close friends and families would harm human health by invading a protected zone of privacy and assaulting ideals of personhood like dignity, respect of private homes, and personal autonomy.[356] Raids like these would also damage health by disrupting important relationships and forcefully cutting family ties during a time of unprecedented adversity in the lives of many of the attendees. Indeed, the "sanctity of the family" is protected by the Constitution because "the institution of the family is deeply rooted in this Nation's history and tradition."[357]

Families provide many functions that are important to human health.[358] For example, families "inculcate and pass down many of our most cherished values, moral and cultural."[359] The "accumulated wisdom of civilization" supports the "concept of the family."[360] As the Supreme Court pointed out, "[e]specially in times of adversity . . . the broader family has tended to come together for mutual sustenance and to maintain or rebuild a secure home life."[361] Public health orders that impacted the sanctity of private homes may have been especially harmful to human health.

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353. *Id.* (reporting 947 out-of-state abortions for Texas residents in April 2020 versus only 157 in February 2020).

354. *Id.* at 692.

355. *See* Kyllo v. United States, 533 U.S. 27, 40 (2001) (holding that thermal imaging monitoring the heat radiation inside of a home taken from a public roadway is a search within the meaning of the Fourth Amendment).

356. Mike Rogoway, *Oregon Governor Kate Brown Says Large Parties Could Trigger Fines or Jail Time During Coronavirus 'Freeze'*, THE OREGONIAN, (Nov. 14, 2020, 2:51 PM), https://www.oregonlive.com/coronavirus/2020/11/oregon-gov-kate-brown-says-large-parties-could-trigger-fines-or-jail-time-during-coronavirus-freeze.html (reporting the Oregon governor's plan to "engage law enforcement" to enforce her "freeze" order).

357. Moore v. City of East Cleveland, 431 U.S. 494, 503–06 (1977).

358. *Id.* at 503.

359. *Id.*

360. *Id.* at 505.

361. *Id.*

Privacy includes the right to move about in your associations without unwarranted government surveillance.[362] Governmental intrusion into the privacies of life—like dating, meeting friends, going to the doctor, and other activities—may have health consequences. Congress enacted legislation like HIPAA to protect patient privacy during medical care.[363] Orders requiring businesses to collect the personal information of patrons for contact tracing purposes may have acted more as deterrents to those activities where people chose to avoid those activities (privacy-protective behaviors) where their movements were traced—like going to medical doctors (causing medical distancing), churches (inhibiting spirituality and its health effects), small gatherings in private homes (causing social isolation), gyms (diminishing exercise), and public gathering places like restaurants (causing social isolation).

3. *Health Inequities and Disparities*

Discrimination may lead to health inequities and disparities. During the COVID-19 pandemic, the young, poor, minorities, and disabled were disproportionately affected by public health measures that infringed passive (and active) liberties. In addition, the COVID-19 pandemic "underscored the deep inequities in our health care system" with "disproportionately high levels of COVID-19 cases, hospitalizations, and deaths among non-White racial groups."[364] These disparities likely reflected "poorer underlying health, housing, and job conditions among these minority groups, as well as an inequitable distribution of health resources and persistent gaps in insurance coverage."[365] People of color were twice as likely to die from COVID-19 as White people.[366] Also, "hospitalization rates [were] approximately five times higher among Black persons and four times higher among Hispanic persons than [were] those among White persons."[367]

Some disparities were demonstrably due to the lockdowns (or closures) themselves.[368] In Maryland, during the period of progressive lockdowns, suicide mortality among Black people doubled, while suicide mortality among

362. *Griswold v. Connecticut*, 381 U.S. 479, 483 (1965) (noting that the "freedom to associate and privacy in one's associations" was protected as a "peripheral First Amendment right").

363. 42 U.S.C. § 1320d (2009).

364. Stuart Butler, *Four COVID-19 Lessons for Achieving Health Equity*, 324 JAMA 2245, 2245 (2020), https://jamanetwork.com/journals/jama/fullarticle/2773670.

365. *Id.*

366. Koh et al., *supra* note 297, at 133.

367. Czeisler Medical Distancing, *supra* note 211, at 1253.

368. *See* Michael Bray et al., *Racial Differences in Statewide Suicide Mortality Trends in Maryland During the Coronavirus Disease 2019 (COVID-19) Pandemic*, 78 JAMA PSYCH. 444, 445 (Dec. 16, 2020), https://jamanetwork.com/journals/jamapsychiatry/fullarticle/2774107.

White people dropped to half compared to prior years.[369] Importantly, these trends did not occur before the lockdowns or as the lockdowns were lifted, suggesting that the closures themselves contributed to the disparity.[370] Racial and ethnic minorities were also among groups found in June 2020 to have "experienced disproportionately worse mental health outcomes, increased substance abuse, and elevated suicide ideation."[371] Hispanic people showed signs of disproportionately increased mental illness during the pandemic, with 19.2% of Hispanic individuals reporting severe psychological distress in July compared to thirteen percent of the general population.[372]

In addition, the lockdown measures likely worsened medical distancing among minority groups compared to Whites. Black and Hispanic adults were over 1.5 times more likely than Whites to avoid urgent or emergent medical care during the COVID-19 pandemic.[373]

VI. CONCLUSION

Liberty is the essence of human nature and is necessary for optimal health. Protecting liberty may preserve health. Active liberties allow people to do activities that are important to health, such as maintaining social connections, earning a living, and going to the doctor. Restricting active liberties can cause side effects related to inactivity, including social isolation, financial distress, and medical distancing. Passive liberties protect individuals from having unjust actions done to them by the government like confinement, bodily restraint, search and seizure, violation of the sanctity of the home, surveillance, and discrimination. Passive liberties are essential to well-being and health because they promote respect, dignity, autonomy, and self-worth. Passive liberties also reinforce the health benefits of active liberties. Restricting passive liberties can cause side effects like social isolation, financial distress, and medical distancing, just like restricting active liberties. In addition, restricting passive liberties can lead to more insidious side effects like health-harming privacy-protective behaviors, health disparities, and health inequities.

Without a doubt, the Constitution allows the nation to protect its population against an epidemic of disease with reasonable restrictions of personal liberties when it is "under the pressure of great dangers," and the measures are of "paramount necessity."[374] Part of determining the reasonableness of public health measures is recognizing the side effects of these measures and

369. *Id.*
370. *Id.*
371. Czeisler et al., *supra* note 138, at 1049.
372. McGinty, *supra* note 52, at 2555.
373. *See supra* Section II.B.3; Czeisler Medical Distancing, *supra* note 211, at 1255.
374. Jacobson v. Commonwealth of Massachusetts, 197 U.S. 11, 27, 29 (1905).

ensuring that liberty restrictions provide a proportionate benefit that outweighs their side effects. Sometimes "cures" for diseases can be fatal to patients. In my orthopedic surgical practice, a femur fracture would heal within a twelve-week lockdown of the fracture in bed in traction, but blood clots, bedsores, and permanently stiff joints were too often the side effects for the patient. So, today we treat femur fractures with surgical stabilization and early mobilization of the patient to avoid the side effects of a lockdown of the body in traction. Immobility has a price. In orthopedic surgery, that price is blood clots, bedsores, and stiff joints. In public health, that price is social isolation, financial ruin, and medical distancing with the resultant psychiatric and physical health consequences.

The clinical practice of medicine is about treating patients, not diseases. The practice of medicine is an "art" that incorporates qualities like common sense, experience, ethics, intuition, judgment, and compassion in ways that go beyond its scientific base.[375] Restoring health requires the artful application of science to disease in ways that account for unique human frailties. When these humanistic qualities are forgotten, "the application of the modern science of medicine is suboptimal, ineffective, or even detrimental."[376] The same can be said of public health. Public health is not just about curing one disease; it is about the health of the entire population.

Physicians use bioethical principles like respecting patient autonomy and privacy, beneficence/nonmaleficence, and social justice for medical dilemmas, and public health officials should do the same when adopting aggressive public health measures with potential side effects.[377] Patient autonomy and privacy are core principles of medical management today. Autonomy means that patients should have the liberty "to choose, pursue, and revise their own life plans," mirroring the legal principle that citizens should have the liberty "to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life."[378]

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375. HARRISON'S PRINCIPLES OF INTERNAL MEDICINE, *supra* note 3 ("[The] combination of medical knowledge, intuition, experience, and judgment defines the art of medicine, which is as necessary to the practice of medicine as is a sound scientific base."); *see also* Goldman in CECIL'S TEXTBOOK OF MEDICINE, *supra* note 12, at 1 ("Medicine is a profession that incorporates science and the scientific method with the art of being a physician.").

376. Goldman in CECIL'S TEXTBOOK OF MEDICINE, *supra* note 12, at 1.

377. Goldman in CECIL'S TEXTBOOK OF MEDICINE, *supra* note 12, at 1; *see also* HARRISON'S PRINCIPLES OF INTERNAL MEDICINE, *supra* note 3 (stating that the "fundamental principles of medical ethics require physicians . . . respect the patient's autonomy" and adding that it is important to "fulfill the priorities of the patient"); *see also* Emanuel in CECIL'S TEXTBOOK OF MEDICINE, *supra* note 15, at 2.

378. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851 (1992) ("At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life.").

Privacy promotes dignity, respect, personal autonomy, and self-worth, protecting our "inviolate personhood," which makes protecting privacy an "essential component of human well-being," including mental and physical health.[379] Loss of privacy can damage health by resulting in stigma, ostracism, economic harm (e.g., job loss), embarrassment, bullying, and discrimination—all of which can have negative health impacts.[380] Privacy also enhances individual and public health data quality, thereby improving decision-making for individual health care needs and for public health research needs because without privacy, individuals' privacy-protecting behaviors can lead to poor decisions by doctors and policymakers based on inaccurate or incomplete information.[381]

The principles of nonmaleficence and beneficence promote proportionality and efficacy standards in medical decision-making.[382] To honor the principle of "*primum non nocere*" or "first do no harm," central to the definition of nonmaleficence and at the core of medical practice,[383] decision-makers must first recognize and understand the side effects of their actions.[384] Reckless adoption of treatment schemes with disregard to potential side effects violates the basic tenets of medical practice such as "first do no harm." Similarly, adoption of public health measures with reckless disregard to their side effects is an abuse of the public health power.

In order to pursue the public's best interests under the principle of beneficence,[385] policymakers must first understand the efficacy of proposed treatment measures. When possible, public health measures should be based

379. Nass et al., *supra* note 18, at 77 (also noting that some theorists "depict privacy as a basic human good or right with intrinsic value" and "an essential component of human well-being," and that others believe that privacy and autonomy are indicators of the "moral uniqueness" of humans); Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737, 737–41 (1989).

380. Nass et al., *supra* note 18, at 77.

381. *Id.* at 78 (noting that when "individuals avoid health care or engage in other privacy-protective behaviors, such as withholding information, inaccurate and incomplete data are entered into the health system").

382. *See* Emanuel in CECIL'S TEXTBOOK OF MEDICINE, *supra* note 15, at 4–5.

383. *Id.* at 2 ("Nonmaleficence is the idea that people should not be knowingly harmed or injured. This principle is encapsulated in the oft-repeated phrase that a physician must 'first do no harm'—*primum non nocere*.").

384. Emanuel in CECIL'S TEXTBOOK OF MEDICINE, *supra* note 15, at 2.

385. *The Principle of Beneficence in Applied Ethics*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Feb. 11, 2019), https://plato.stanford.edu/entries/principle-beneficence/#ConcBeneBene (explaining that physicians have a moral obligation to act for the benefit of their patients, "helping them to further their important and legitimate interests, often by preventing or removing possible harms" under the bioethical principle of beneficence and that beneficence includes an obligation to pursue the goal of "benefiting or promoting the good of other persons"); *see also* Emanuel in CECIL'S TEXTBOOK OF MEDICINE, *supra* note 15, at 2 ("Beneficence is about the positive actions that physicians should undertake to promote the well-being of his or her patients.").

on proven results. By the time *Jacobson* was decided, the "extreme value" of the smallpox vaccine was so well accepted that "[n]early every state in the Union [had] statutes to encourage, or directly or indirectly to require, vaccination; and this [was] true of most nations of Europe."[386] In addition, the smallpox vaccine was almost unanimously accepted by doctors throughout the U.S. and in England, was backed by extensive statistical research, and was the only effective control measure available.[387] In contrast, many unproven and questionable public health measures were adopted during the COVID-19 pandemic. For example, after forcing restaurants to discontinue *socially-distanced*, *outdoor* dining, the Los Angeles County Department of Health "admitted during a Board of Supervisor's meeting . . . that there is no hard scientific evidence linking the recent COVID-19 surge to . . . outdoor dining."[388] Policy should evolve "as more medical and scientific evidence becomes available, and as States have time to craft policies in light of that evidence."[389]

Social justice is also an important component of medical practice because it emphasizes avoiding discrimination and addressing known health disparities and inequities. Public health officials who use liberty restrictions to shift disease burden from old to young, from rich to poor, and from white populations to non-white populations violate this principle. Converting COVID-19 from a disease that kills older people from respiratory illness into a disease that kills younger people from overdose, undertreated heart attacks, compromised cancer care, suicide, and other causes is unethical and wrong. Similarly, restricting liberties through lockdowns that shift disease burden onto poorer populations who must isolate in substandard housing with food, housing, and utility insecurities can be unethical and a violation of the public trust. Likewise, burden shifts based upon race and ethnicity are discriminatory and unethical violations of principles of public health care.

Courts must step up and do their part during public health crises. The function of courts in protecting the public from poor decision-making by officials is never more important than during public health crises. Public health questions can present complex dilemmas for officials that should be balanced by separation of powers. So, an unduly deferential judicial approach is problematic for population health.[390] Before allowing serious infringements on

386. Jacobson v. Commonwealth of Massachusetts, 197 U.S. 11, 31 n.1 (1905).

387. *Id.* (describing "statistical researchers" and doctors' opinions across the U.S. and Europe supporting the "extreme value" of the smallpox vaccine).

388. Manifredi, *supra* note 40.

389. Calvary Chapel Dayton Valley v. Sisolak, 140 S. Ct. 2603, 2604–05 (2020) (Alito, J., dissenting).

390. *Sisolak*, 140 S.Ct. at 2614–15 (2020) (Kavanaugh, J., dissenting) (stating that a public health emergency like COVID-19 is "not a blank check for a State to discriminate against . . . people" and a history of "jurisprudential mistakes . . . cautions . . . against unduly deferential judicial approach").

constitutional liberties that impact health, the courts "have a duty to conduct a serious examination of the need for such . . . drastic measure[s]."[391] James Madison wrote that separation of powers provides a foundational structure to "protect individual liberty."[392] Because liberty is so important to health, if courts abdicate their duty during a public health crisis, the outcome of the health crisis is likely to be worsened. Courts are experienced at balancing and assessing risks and benefits of policy.[393] So, while members of the Court are not public health experts, "even in a pandemic, the Constitution cannot be put away and forgotten."[394] Courts have a "duty to defend the Constitution, and even a public health emergency does not absolve [them] of that responsibility."[395]

Liberty was protected by our Founders—either consciously or subconsciously—because liberty is important to health and well-being of citizens. The health consequences of liberty restrictions discussed in this paper should be recognized and given serious consideration anytime restrictions of individual autonomy and personal liberty are implemented in the name of public health.

The COVID-19 pandemic inflicted incredible pain and suffering on the citizens of the United States. By the end of 2020, over 20 million cases and almost 350,000 deaths had been attributed directly to COVID-19 in the U.S.[396] It also caused "serious illnesses" with lasting complications in many people.[397] For most people who became infected, COVID-19 infections caused no symptoms or only mild flu-like symptoms.[398]

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391. Roman Catholic Diocese of Brooklyn v. Cuomo, 141 S.Ct. 63, 68 (2020) (per curiam).

392. *In re* Certified Questions From United States Dist. Court, No. 161492, 2020 WL 5877599, at *12 (W.D. Mich. Oct. 2, 2020); James Madison, THE FEDERALIST NO. 47, 301, 302 (James Madison) (Clinton Rossiter ed., 1961) (stating "checks and balances were the foundation of a structure of government that would protect liberty" and that "the accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few or many, . . . may justly be pronounced the very definition of tyranny").

393. *See, e.g.*, United States v. Carrol Towing Co., 159 F.2d 169, 173 (2d Cir. 1947); RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 2 cmt. d (1998).

394. *Cuomo*, 141 S.Ct. at 68.

395. *Sisolak*, 140 S.Ct. at 2604.

396. CTRS. FOR DISEASE CONTROL & PREVENTION, *United States COVID-19 Cases and Deaths by State*, https://covid.cdc.gov/covid-data-tracker/#cases_casesper100k.

397. CTRS. FOR DISEASE CONTROL & PREVENTION, *Symptoms of Coronavirus*, (Dec. 22, 2020), https://www.cdc.gov/coronavirus/2019-ncov/symptoms-testing/symptoms.html (reporting that COVID-19 caused "serious illnesses in some people").

398. Irene Peterson et al., *Three Quarters of People with SARS-CoV-2 Infection are Asymptomatic: Analysis of English Household Survey Data*, 12 CLINICAL EPIDEMIOLOGY 1039, 1039 (2020) (finding that 76.5% of people with positive COVID-19 tests were asymptomatic); CTRS. FOR DISEASE CONTROL & PREVENTION, *Symptoms of Coronavirus* (Dec. 22, 2020), https://www.cdc.gov/coronavirus/2019-ncov/symptoms-testing/symptoms.html (describing the similarities of COVID-19 with the flu).

The COVID-19 pandemic was not unprecedented in the U.S.[399] For example, in 1793, as the American liberty experiment was just beginning, many Philadelphians "got horribly sick, suffering from fever and chills, jaundiced skin, stomach pains and vomit tinged black with blood."[400] In September of 1793, Secretary of State Thomas Jefferson wrote called this disease "a yellow fever, but . . . like nothing known or read of by the Physicians."[401] During the 1793 yellow fever epidemic, nearly half of Philadelphia's citizens fled the city (the nation's capital at the time), and over five thousand died of the twenty thousand who remained in the city.[402] Alexander Hamilton and his wife, Eliza, both recovered from yellow fever.[403] Yellow fever was a "terrifying and mysterious threat that rivaled any disease of the era in its capacity to take lives and disrupt society," and it returned to Philadelphia seven times over the next twelve years.[404]

As another example, the Spanish Flu pandemic was "without precedent" in the world and the U.S. because it was so deadly and so widespread.[405] In the U.S. alone, 675,000 people died from the Spanish Flu, including mostly younger people, especially those in military camps.[406] One author wrote that floods, famines, earthquakes, and volcanic eruptions have all written their stories in terms of human destruction almost too terrible for comprehension, yet never before has there been a catastrophe at once so sudden, so devastating and so universal."[407]

But, in spite of these past public health tests of American liberty, many of the public health measures implemented during the COVID-19 pandemic were unprecedented in the U.S. For the first time, millions of noncontagious

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399. *See, e.g.*, *Yellow Fever Breaks Out in Philadelphia*, HISTORY (Nov. 13, 2009), https://www.history.com/this-day-in-history/yellow-fever-breaks-out-in-philadelphia.

400. *Id.*

401. *Id.*

402. Chief Editor, *When the Yellow Fever Outbreak of 1793 Sent the Wealthy Fleeing Philadelphia*, DAILY HINDNEWS (June 11, 2020), https://www.dailyhindnews.com/when-the-yellow-fever-outbreak-of-1793-sent-the-wealthy-fleeing-philadelphia/ (noting that the mass exodus included over 20,000 Philadelphians, "nearly half of the city's total population at the time"); Simon Finger, *Yellow Fever*, THE ENCYCLOPEDIA OF GREATER PHILADELPHIA, https://philadelphiaencyclopedia.org/archive/yellow-fever/ (noting that 5,000 died among those who stayed in the city).

403. *Yellow Fever Breaks Out in Philadelphia, supra* note 399.

404. *Id.*

405. Sopher, *supra* note 85, at 502 ("There have been more deadly epidemics, but they have been more circumscribed; there have been epidemics almost as widespread, but they have been less deadly.").

406. EQUAL EMP'T OPPORTUNITY COMM'N, *Pandemic Preparedness in the Workplace and the Americans with Disabilities Act* (2009), https://www.eeoc.gov/laws/guidance/pandemic-preparedness-workplace-and-americans-disabilities-act (including 50 million people worldwide).

407. Sopher, *supra* note 85, at 502.

Americans were confined to their homes and hundreds of thousands of businesses and parks vital to public health were forced to close. Many people suffered side effects from the public health measures as described in this paper. Instead of addressing the side effects, some policymakers engaged in "victim-blaming" by using law enforcement to engage people struggling to deal with the side effects of their edicts.

Looking back at the opening scene with me imprisoned in my truck gazing into the restaurant, I realize that those patrons likely were trying to survive a difficult time by nurturing social connections critical to their health, and the workers were similarly trying to survive by earning enough money to avoid financial ruin and its health consequences. While it is conceivable that a time might come when their decisions could be condemned, the math would probably not support such a position while it was happening. For example, at that time, the overall population risk for dying from COVID-19 was 1 in 3,490 for people aged forty-five to fifty-four years, and the people in the restaurant appeared to be younger, and therefore, at even lower risk overall.[408] At that time, only about one in twenty-five people in my state had experienced COVID-19, and the majority of those were either asymptomatic or had minimal symptoms.[409] In contrast, one in seven people were struggling with serious psychological distress, and one in two young adults (age eighteen to twenty-four years) were suffering from anxiety and depression with likely physical health consequences lingering.[410] In fact, one in four young adults were "seriously considering suicide."[411] The interactions that occurred in the restaurant that night might have even saved someone's life. So today, without further research into the long-term side effects of the pandemic's liberty restrictions, it is hard to blame people for taking care of their perceived personal health needs

408. At the time, around Thanksgiving 2020, only around one in twenty-five people in my area had contracted COVID-19 since the pandemic began, and the vast majority of those people's infections were either completely asymptomatic or only resulted in mild symptoms. Moriarty, *supra* note 96; At the time, around Thanksgiving 2020, only around one in twenty-five people in my area had contracted COVID-19 since the pandemic began, and the vast majority of those people's infections were either completely asymptomatic or only resulted in mild symptoms.; Peterson, *supra* note 398, at 1039 (finding that 76.5% of people with positive COVID-19 tests were asymptomatic); Avik Roy, *Estimating the Risk of Death from COVID-19 vs. Influenza or Pneumonia by Age*, THE FOUND. ON RESEARCH FOR EQUAL OPPORTUNITY, (May 18, 2020), https://freopp.org/estimating-the-risk-of-death-from-covid-19-vs-influenza-or-pneumonia-by-age-630aea3ae5a9 (At that time, the estimated *overall population risk*—NOT the case fatality rate for people diagnosed with COVID—of death from COVID-19 for people forty-five to fifty-four years of age was 286.5 per million or about 1 in 3,490 people.).

409. Sopher, *supra* note 85, at 502.

410. McGinty, *supra* note 52, at 2555 (reporting that 13.6% of people, or roughly one in seven, were experiencing serious psychological distress); Vahia et al., *supra* note 133, at 2253 (finding that 49.1% reported anxiety disorder and 52.3% reported depression).

411. Czeisler et al., *supra* note 138, at 1049 (reporting that a startling 25.5% of young adults aged 18 to 24 years were seriously considering suicide amidst the COVID-19 pandemic).

while violating unprecedented and unproven public health policies. One philosopher's observation in his famous essay on liberty that "[a]ll errors which [a man] is likely to commit against advice and warning, are far outweighed by the evil of allowing others to constrain him to what they deem his good" seems apropos.[412]

In conclusion, liberty is a fixed star in the American Constitutional constellation that is vital to the health of her citizens, and "no official, high or petty" should prescribe public health measures restricting active or passive liberties without recognizing and understanding their side effects.[413] Before public health officials deem restrictions of personal liberties as good, extensive research and evaluation of the side effects should be undertaken as soon as feasible. Improved decision-making can be achieved by public health officials following the basic principles of the practice of medicine including patient autonomy, beneficence, nonmaleficence, privacy, and social justice. Consciously or subconsciously, people try to preserve their own health, and all citizens should be given the liberty necessary to survive and maintain their individual health—even in the midst of a public health emergency.

412. JOHN STUART MILL, ON LIBERTY (1859).
413. West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).