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# AN ETHICS FRAMEWORK FOR THE COVID-19 REOPENING PROCESS

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## INTRODUCTION

As some political leaders are fond of saying, reopening society after months of social distancing is not like flipping a switch. Reopening is a process. It will extend over many, many months. Policy makers will need to continuously re-evaluate whether the guidance they have set for the next stage of reopening still makes sense. Also, for each stage, they will have to decide not only the when, but the how of each reopening decision. When public schools open in the fall, for example, how exactly should that happen? And, at any stage of the reopening process, if cases or hospitalizations exceed a concerning benchmark, decision makers will have to decide which social distancing policies should be re-imposed.

This document presents a framework for ethically evaluating the cascade of policy decisions that define the COVID-19 reopening process. These decisions will not and should not be made based on the science alone. Nor should they be driven by the economics alone. Rather, these decisions are best understood as a series of tradeoffs that reflect many shared values in our society, including not only our shared interests in health and economic flourishing, but also our shared interest in other aspects of well-being, and in liberty and justice. These values, and how to think about them in concert, are the subject of ethics.

### How to Use this Framework

This document provides a framework for ethical assessment of policy options. The framework has seven steps:

- **Step 1** identifies and assesses the feasibility of the policy or set of policies under consideration.
- **Steps 2-5** identify four broad moral values—well-being, liberty, justice, and legitimacy—and assess how implementation of the policy would promote or undermine these moral values.
- **Step 6** prompts an evaluation of how best to mitigate or remedy the negative effects of the policy.
- Finally, **Step 7** provides guidance on how to make an all-things-considered judgment about whether the policy or set of policies under consideration is ethically justified.

### Why Ethics?

#### When, and how, should social distancing measures be lifted, and what sorts of policies should replace them?

Answering these questions requires making ethical judgments—

judgments about what we should do in light of relevant moral and ethical values. Making these ethical judgments requires taking into account the potential benefits of various policies as well as the costs, noticing how these costs are distributed unequally across population groups, recognizing that there can be brutal trade-offs involved, and making these trade-offs thoughtfully in light of our underlying values and moral commitments.

Ethical analysis of potential policies is not about finding the perfect course of action. In the case of the COVID-19 pandemic, there is no perfect course of action. We must accept that any policy we adopt will have morally significant costs that can neither be ignored nor fully justified. Ethical analysis helps to identify the trade-offs inherent in policy choices, and to guides decisions which trade-offs to accept or reject. Such analysis also helps identify ways to modify policies to make them more ethically acceptable.

There is no guarantee that all people will be satisfied with the conclusions reached through even the most careful ethical analysis. **But even when there is not consensus, or perhaps especially when there is not consensus, ethical analysis is useful for three reasons:**

- Successfully engaging in ethical analysis can clarify the source and nature of the disagreement between different stakeholders.
- Ethical analysis helps a decision-maker to publicly explain or justify their decision to those who disagree.
- The clarity afforded by ethical analysis can help reveal alternative policy options that are more likely to be acceptable to those who objected to the initial policy.

### An Ethical Process Enables Ethical Outcomes

Policymakers face the daunting tasks of figuring out when and how to reopen, what additional public health measures to put in place, and what kinds of programs, structures, and investments will be needed to rebuild a society that has been unnaturally halted. An ethical assessment of the policies that decision-makers adopt must take into account the process they use to make these decisions. Step 5 of the framework provides tools for ethically assessing this process from the standpoint of the value of legitimacy. At this point, we emphasize that it is critical that decision-makers explain and justify their decisions to the public. As they do this, it is important to:

- **Establish mechanisms for public engagement and input.** The legitimacy and effectiveness of policy decisions require public understanding and acceptance of these decisions. Unilateral action, or action that is perceived as partisan or benefiting only a narrow special interest, may provoke misunderstanding and backlash that could ultimately undermine the effectiveness of the proposed solution. Instead, policymakers must foster the critical deliberation and input that generates public acceptance.
- **Seek the input of a diverse set of experts.** Decisions should be based on a critical appraisal of available evidence, and expert and constituent opinion from a wide range of fields, including public health, economics, education, transportation, and so on, as well as from relevant constituencies.
- **Communicate clearly with the public about the basis of policies.** This includes being clear about which data or models are being used to guide decisions and the level of uncertainty involved. It also includes being transparent with the public about the costs and benefits of the policies that are likely to be adopted and the justification for their adoption. Clear and honest communication helps to maintain public trust.
- **Reassess policies as the situation changes and evidence improves.** The ethical acceptability of social distancing or reopening policies may change over time. As we learn more about COVID-19 and learn about the effectiveness and unintended consequences of different policies, our assessment of policies will change. The framework is a tool that will need to be used and reused as the crisis and our response to it evolve over time.

## ETHICS FRAMEWORK

### Step 1: Select Policies and Consider Feasibility

#### a) Select Policies

The first step in the framework is to clearly identify the policies (or sets of policies) that are under consideration to be implemented. This step may seem obvious but given the rapidly changing conditions of COVID-19, it will often prove challenging to distinguish specific policy proposals.

The nation is months into the pandemic, and many policy choices have already been made; choosing to leave those

policies in place is itself a policy choice. Policy proposals sometimes include elements that are not actually feasible, or that cannot in practice be implemented in tandem. The process of identifying the universe of possible policies is a good moment for policymakers to include diverse sets of voices at the table.

The clear identification of policies requires not only an articulation of the suite of policies that are being considered to be taken in tandem but also the proposed timing, duration, and sequencing of different measures. For example, reopening businesses in three weeks or in six weeks would produce different results.

Some policies are synergistic, and considering them in tandem will capture this. For instance, reopening businesses and imposing new workplace safety requirements to reduce the risk of transmission, and will produce different effects than reopening without those safety requirements in place.

#### b) Consider Feasibility Issues

Consider the technological, economic, administrative, and political feasibility of the policy or set of policies.

For example, one proposed plan requires dramatically increasing testing capacity to test up to 35 million tests per day. Given current testing capacity, some have questioned the *technological feasibility* of this proposal—even though many believe it would be quite efficacious from an epidemiological perspective.<sup>1</sup>

Other policies may raise feasibility questions from a political perspective. For instance, one policy option provides return-to-work privileges for people who can demonstrate immunity to the virus. Political leaders may have real incentives to oppose such policies if they are unpopular with employers or out of work members of the public.

#### c) Recognize Salient Forms of Uncertainty

Important public policy decisions often have to be made in the context of considerable uncertainty about the effects of alternative courses of action. Decisions about the closing and reopening of society during this pandemic are no exception. For example, social distancing policies will reduce mortality from COVID-19, but there is significant uncertainty about how many lives will be saved by different social distancing policies, and over what period of time. There is also considerable uncertainty about the effectiveness of public health policies to contain the virus

as reopening occurs, such as utilizing mobile phone apps to conduct digital contact tracing, using surveillance data to better enforce self-isolation orders for newly infected patients, or ‘drafting’ individuals with immunity to perform various essential tasks. Although accumulating data and continuously revised models provide some parameters around the unknowns, uncertainty continues to abound about these effects, as well as the negative consequences of social distancing and public health interventions.

## **Step 2: Well-Being**

The second step requires an assessment of how the policies identified as feasible will impact the well-being of all people in society.

**Well-being, in the sense we have in mind, concerns the kinds of conditions that are needed for people to lead a decent life.** Health, economic well-being, and social connection are all central to well-being, for individuals and communities. For many people, spiritual experience and fellowship, meaningful work, or learning are central to their well-being.

Debates about closing and reopening are often premised on a trade-off between protecting public health (by maintaining distancing policies) and protecting economic well-being (by reopening). However, **both distancing and reopening policies can have significant public health and economic costs.** Social distancing has economic costs but also has negative effects on public health, such as increased rates of food insecurity and domestic violence. Reopening the economy not only risks an uncontrolled resurgence of COVID-19 cases, but it also risks economic harm if an exacerbation of the pandemic results and necessitates the reinstatement of strict social distancing measures.

An accurate assessment of the costs and benefits of a given policy requires a holistic evaluation of that policy’s effects on all aspects of well-being, including not only its effect on the spread of COVID-19, but also its effects on health outcomes generally, economic and educational opportunities, dignity and self-respect, family and friendship, and the ability to make our own important life choices. Both negative and positive effects, in the short- and long-term, should be considered.

### **a) Effects on the spread of COVID-19**

First, consider the effects of different policies on transmis-

sion, as well as hospitalizations and mortality. Shelter-in-place orders, for instance, are meant to greatly reduce the spread of COVID-19. Reopening will likely cause an increase in COVID-19 cases, depending on the pace and pattern of reopening, and what safeguards are put in place (e.g., the continued use of face masks in public). The impact of reopening on the spread of COVID-19 will also depend on the availability of additional public health measures such as widespread testing and follow-up contact tracing.

### **b) Economic effects**

Social distancing policies have severe economic costs. In the short term, unemployment claims have spiked. For workers already struggling to live paycheck to paycheck, the sudden loss of income means they struggle to pay their rent and feed their families. In terms of longer-term costs, the economic slowdown will (or already has) triggered a recession, with comparisons to 2008, or even to 1929, already being taken seriously.<sup>2</sup>

Proponents of reopening measures, such as loosening some social distancing restrictions (especially unshuttering businesses) while also maintaining others, claim that their policies yield significant economic benefits.<sup>3</sup> At the same time, there are economic costs associated with lifting social distancing policies and having a resurgence of COVID-19 cases. A key question, then, is whether lifting social distancing policies “too soon” will cause more economic harm than good.<sup>4</sup> One historical analysis suggests that, during the pandemic flu of 1918, areas of the country that enacted more aggressive social distancing policies actually recovered more quickly economically than areas that did not.<sup>5</sup> But, as the authors of that study have acknowledged, there are important differences between the 1918 economy and our economy, and the new coronavirus has different characteristics, too.<sup>6</sup>

The costs of public health measures, such as widespread testing or an increased public health workforce, should also be considered.

### **c) Other public health effects**

Relaxing social distancing policies will increase the burden of disease and death from COVID-19—especially if such relaxing occurs without also introducing safeguards, such as significantly increased testing and contact tracing.

This negative effect on public health may exacerbate the physical and emotional health toll on first responders and front-line medical staff, who are already working under extraordinarily stressful conditions. But leaving social distancing measures in place will also result in a range of negative public health effects, and thus not implementing reopening measures poses some public health risks. For example, in the short-term, there have been dramatic increases in demand at food banks and worries that more families are experiencing food insecurity<sup>7</sup>—especially families that depended on schools for meals. To give another example, there is significant concern that aggressive social distancing will exacerbate the already-catastrophic drug overdose epidemic. Although the DEA has relaxed strict requirements for in-person treatment<sup>8</sup> and support groups have moved online, there is no question that imposed social distance is the sort of disruption that can prevent or overturn the often-delicate nature of recovery.<sup>9</sup>

The impacts of social distancing on health may be far-reaching. Unemployment, poverty, inadequate education, and lack of access to healthy foods all cause disease, including diseases that cause death.<sup>10</sup> As a result, there's a real worry that social distancing may increase the rate of what have been called “deaths of despair”—those from drugs, alcohol, and suicide.<sup>11</sup> Other potential health costs may arise more directly from the lack of contact—social isolation can increase the risk of various diseases and death generally, and so it is worth considering whether it does so in the current context.<sup>12</sup> Additionally, the incidence of domestic violence has increased significantly since the implementation of various social distancing policies.<sup>13</sup> Finally, experts worry that the same stress and isolation is resulting in a similar increase in child abuse.<sup>14</sup>

#### **d) Harms to human development**

From an ethics perspective, childhood is a singularly important stage of life. Children are completely dependent on others for their well-being, and setbacks to well-being in childhood can have lifelong, often irreversible, negative effects. Schools are foundational to the welfare of all children. They are the primary vehicle through which children acquire the knowledge and cognitive skills necessary for a decent life, as well as many social skills. For many children, schools are also critical to their health (through the provi-

sion of meals and direct medical, counseling, and special education services) and their physical safety.<sup>15</sup>

School closures undoubtedly threaten the well-being of children. For instance, one study found that children lacking ‘steady instruction’ during school shutdowns might retain less than 50% of their annual math gains compared to a normal year.<sup>16</sup> Moreover, some families lack the requisite human and technological resources to assist their children in distance learning. School closures may also negatively affect the long-term development of many children; we need more work to determine the nature and extent of these effects. Reopening schools, holding summer school, and allowing summer camps to be held would offer obvious benefits to children—and some policymakers have endorsed some of these proposals.<sup>17</sup>

#### **e) Other effects on well-being**

Social distancing and reopening policies should also be evaluated in terms of their impact on other ethically relevant dimensions of well-being. These include the value we place on self and social respect, family and friendship, and the ability to make our own important life choices. Social distancing policies can undermine respect by undermining our ability to provide for our families and ourselves and by denying us the dignity that work affords. Unemployment payments and food banks, while welcome when the need arises, are experienced by many as visible assaults on their self-respect.

Distancing policies also make it more difficult to maintain connections with, and care for, family and friends. They make it hard to mark important communal life events like holiday celebrations, life cycle ceremonies, and the mourning of loved ones. These events can be central to traditions that define family connectedness and the ties of friendship.

More generally, distancing policies, especially when legally or normatively enforced, constrain choice. They narrow the range of effective options available to us so that we may not be able to act in accord with our own assessments of risk, benefits, and obligations. Put another way, we are constrained in deciding for ourselves what risks we are willing to assume, and for what reasons.

Relaxing social distancing can ease many of these negative effects, but, importantly, many of the measures



implemented elsewhere would not fully avoid them. For instance, in Sydney, only two guests are allowed into the home, and in Hong Kong, public gatherings are limited to four or fewer people.<sup>18</sup> Indeed, some policies may even exacerbate some of these costs. For example, the official opening of businesses and factories may constrain the

choices of employees who believe that it is in their health interests or the interests of those they live with to continue to socially isolate. These employees may now risk continued receipt of unemployment insurance payments or face the prospect of losing their jobs altogether.

**KEY TAKEAWAYS ABOUT WELL-BEING**

**1. The relationship between policy choices and well-being is complex.**

It is a mistake to assume that social distancing policies are the best way to promote public health, or that reopening policies are the best way to bolster the economy.

**2. A particular policy may have a variety of effects on many different dimensions of well-being—some good and some bad.**

For example, lifting shelter-in-place orders would provide many people with the opportunity to spend time with people they care about but would also inevitably risk an increase in COVID-19 cases and the accompanying harms to well-being—including death.

**3. A particular policy may have a variety of effects on the same dimension of well-being—some good and some bad.**

For example, reopening businesses could promote health to the extent that the beneficial economic impact will prevent illnesses and death caused by unemployment or poverty. But the same policy could undermine the health to the extent that returning to the workplace exposes them to increased risk of infection and COVID-19 disease.

To support decision-making, we have included a grid that can be used to assess different policies. Insert each policy

option and assess how it affects well-being along different dimensions.

**EFFECTS ON WELL-BEING**

	Effects of COVID-19 disease, including total cases, hospitalizations, and deaths	Economic effects	Other public health effects	Effects on human development/ children	Other effects on well-being
Policy A, implemented at time 1					
Policy A, implemented at time 2					
Policy B					
Set of policies C					

### Step 3: Liberty

Four kinds of fundamental liberties are particularly relevant to decisions about continuing, relaxing, or reinstating social distancing, and the public health measures under consideration:

**Freedom of movement and association**—individuals have a fundamental interest in being free to travel and to gather with others in public and private spaces;

**Freedom of religion**—individuals have a fundamental interest in gathering for religious worship;

**Privacy**—individuals have a fundamental interest in choosing whether others can have access to their personal information; and

**Political participation**—individuals have a fundamental interest in participating in democratic processes, such as voting and census reporting.

From an ethics perspective—independent of questions of constitutionality and legality—there must be a good reason to restrict these freedoms or violate privacy. This moral presumption in favor of liberty has been a source of contention in public health, more generally. Consider, for example, controversies about helmet laws, restrictions on smoking, and taxes on sugar-sweetened beverages. Some have raised similar concerns about social distancing policies or even appealed to the value of liberty to justify civil disobedience.<sup>19</sup>

The basic idea is that just as it is morally valuable to promote health and other core elements of well-being, it is also morally valuable to respect people's privacy, their freedom of association, their freedom of movement, and their political rights—among other liberties. So, how do these liberties relate to policies under discussion?

#### a) Freedom of Movement and Freedom of Association

Shelter-in-place orders impose severe restrictions on freedom of movement and freedom of association. Other forms of interference associated with social distancing include preventing individuals from associating in public and private spaces and shuttering businesses. In some cases, people who violate shelter-in-place orders are being charged with crimes and issued fines.<sup>20</sup> Were it not for the pandemic or some other severe crisis, such policies would not be ethically justified.

#### b) Freedom of Religion

Places of worship are deemed “nonessential” by most state governors who have issued social distancing and shelter-in-place orders. While restricting large gatherings clearly helps to slow the spread of COVID-19, the inability to gather in worship is a serious restriction on religious practice for many religious groups. An assessment of social distancing and reopening policies must account for this significant infringement on liberty. For example, as reopening policies begin to be implemented, places of worship should be given opportunities to design effective strategies for reopening while also limiting the risk of further spread.

#### c) Privacy

Some proposed public health measures to control COVID-19 raise distinct privacy concerns. As noted, some recent proposals call for mandatory testing for all citizens.<sup>21</sup> While far less disruptive to daily life than shelter-in-place orders, such widespread testing of otherwise healthy people is at least inconvenient, and it may require an intrusive invasion of privacy.

Other proposals recommend using mobile phone apps and user data to conduct instantaneous contact tracing.<sup>22</sup> If these measures are designed to give public health authorities access to the data collected, they involve significant expansions of government surveillance and raise questions about invasions of personal privacy. An additional concern is whether technology companies that design these apps will control them, who will own and be able to use the data collected, and whether this will amount to a broad and problematic expansion of their influence.

An important factor in evaluating any such plan is whether there are adequate institutional safeguards to protect us from potential violations of privacy and abuses of these greatly expanded surveillance powers. In evaluating the impact of a proposed plan on civil liberties, it is not sufficient to assume that best practices will be followed.

#### d) Political Participation

The COVID-19 pandemic and social distancing policies have also created serious concerns about people's right to equal participation around the country. The pandemic has the potential to affect procedures for holding

free and fair elections, conducting an accurate census, providing for ongoing public input on administrative and other procedures within government, and other forms of civic and political action. For example, sixteen states had to postpone scheduled elections because of concerns about the spread of COVID-19, but states like Wisconsin held elections as scheduled.<sup>23</sup> It is unclear when and how

voters in states with canceled elections will be able to contribute their voice to democratic decision-making, or whether COVID-19 will affect the federal election in November. Social distancing and reopening plans must be evaluated in light of their impact on voting in elections and other forms of political participation such as public speech.

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## WHEN ARE LIMITATIONS ON LIBERTY ETHICALLY JUSTIFIABLE?

When assessing whether a public health benefit justifies an infringement on liberty, it is often argued that the infringement must be genuinely necessary to achieve the public health benefit, and the public health gains must be proportionate to the infringement.<sup>24</sup> In other words, severe restrictions of freedom of association or movement (such as those in mandatory social distancing) or significant invasions of our privacy (such as tracking our movements) are justified only if they yield significant public health gains—gains proportionate to the significant loss of liberty or privacy, and if there are no other less restrictive or voluntary means to secure the desired public health outcome.<sup>25</sup>

Finally, a distinct set of issues arises because these policies may reshape what we expect and tolerate with regard to liberty from government at all levels. The social distancing measures being enacted are such a significant exercise of government authority that they might have long-lasting effects on our norms and expectations of government and thus long-lasting effects on our political system. A similar point applies to alternatives, such as “immunity passport.” Each of these proposals involves a dramatic departure from pre-pandemic norms, and raises concerns about how far the government will go to beat COVID-19, and whether government intrusions into our lives justified by the special circumstances of the pandemic will become normalized as we get used to them.

Thus, when we ethically assess social distancing and reopening policies, we should keep those potential downstream effects in mind. These potential downstream effects should also motivate looking for institutional safeguards to maintain checks and balances between competing interests and entities in society—both public and private. Whatever plans emerge, we should ensure there are appropriate institutional safeguards to maintain checks and balances between competing interests and entities in society, including things like limits on the authority of any one agency or body, watchdog agencies, public access to data to allow for public oversight and monitoring, trusted regulatory bodies, judicial protections of privacy, and so forth.

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## KEY TAKEAWAYS ABOUT LIBERTY

- 1. Social distancing measures place limits on fundamental liberties including freedom of movement, freedom of association, and freedom of religion.**
- 2. Surveillance and testing policies may raise privacy concerns about the expanding scope of governmental power.**
- 3. Our COVID-19 response must protect the right of individuals to participate in democratic politics, including, not but limited to, protecting their ability to vote in scheduled elections.**



To aid decision-making, the grid below allows you to insert different policies and assess how the policy affects the relevant liberties. If you find that a given policy limits one

or more of the relevant liberties, then it is worth noting as much in the grid.

<b>EFFECTS OF POLICY ON LIBERTY</b>				
	Freedom of movement and association	Freedom of religion	Privacy	Political participation
Policy A, implemented at time 1				
Policy A, implemented at time 2				
Policy B				
Set of policies C				

**Step 4: Justice**

The third broad moral value to consider is justice. **Justice**, in the sense we have in mind, *concerns whether the burdens and benefits of a policy are distributed fairly*. Justice, so understood, is often analyzed in terms of the differential impacts of policies on different, ethically relevant groups.

Importantly, when assessing the justness of a policy, we should also consider the benefits and burdens of *implementing or enforcing* that policy. For instance, when considering whether to implement a policy of issuing fines to those who do not wear masks in public, it is important to keep in mind the likely targets of enforcement. If such fines are likely to be issued disproportionately to people from some social groups—despite similar rates of non-compliance among other groups—then this would be problematic from the perspective of justice.

The groups of particular moral concern in this pandemic include people who are low-income, people of color (racial and ethnic minorities and native peoples), people in different stages of life, and essential workers. Other groups of moral concern include rural communities, people living in congregate facilities such as incarcerated populations and

some agricultural workers, and undocumented persons. We do not discuss all such groups, but we will discuss a few especially relevant categories.

**a) Income**

Social distancing policies are causing high rates of unemployment, furlough, and reduced wages. These burdens are falling disproportionately on lower-income families with less wealth and without a financial cushion. Also, lower-income families are more vulnerable to SARS-CoV-2 infection and COVID-19 illness, even under conditions of social distancing, for a variety of reasons:<sup>26</sup> they are more likely to be essential workers, exposed to circulating virus in the workplace while others are sheltering in place; they’re less likely to have jobs that can be performed remotely and so are more likely to become furloughed and lose their income, less likely to have paid sick leave, and have a greater financial need to work, all of which increases exposure to COVID-19. Low-income individuals, especially those in urban areas, are more likely to have more people living together in smaller quarters, magnifying the burdens of social distancing and minimizing the benefits. They may have more exposure in their daily lives, such as on public transportation. These individuals also have high-

er rates of the chronic health conditions associated with higher risk of severe illness from COVID-19.<sup>27</sup>

Similar issues arise for reopening policies. The benefits of reopening may be distributed unequally across different people, for example, if certain employment opportunities are open only for those who are able to demonstrate SARS-CoV-2 immunity or if infection control practices are less stringent in workplaces that employ lower-income people. These inequalities are especially unfair if they particularly affect lower-income workers who are unable to work from home.

### **b) Race and Ethnicity**

African American, Latinx, and Native American communities appear to be disproportionately harmed both by the disease and by aggressive social distancing policies intended to combat it.<sup>28</sup> Many in these communities are also low-income, and thus are subject to all the disadvantage factors described above. In addition, historical and continuing structural factors that have compromised the life prospects of members of these groups continue to complicate and compromise the impact of this pandemic and our responses to it for people of color. The stark fact remains—in the United States, Latinx individuals, and, especially, African American individuals are disproportionately likely to be hospitalized and die from COVID-19.<sup>29</sup>

At the same time, there is no guarantee that African American, Latinx, and Native American individuals will benefit fairly from reopening policies. Preliminary evidence suggests that high poverty communities of color are less likely to have access to testing opportunities that are being expanded in conjunction with reopening policies, presumably for some of the same underlying reasons these communities benefit less from social distancing. It is also unclear whether, as workplaces reopen, those that employ disproportionately low-income people of color will introduce as effective infection control practices as workplaces whose employees are higher income.

### **c) Stages of Life**

The benefits and burdens of social distancing also fall unequally across age groups. Although there is rising concern about pediatric multisystem inflammatory syndrome (PMIS) and its likely association with SARS-COV-2

infection, severe COVID-19 illness remains relatively rare in healthy children.<sup>30</sup> The risk of severe illness and death for adults stratifies progressively by age, with significant risk of morbidity and mortality for adults over 70.<sup>31</sup> Thus, the benefits of social distancing fall disproportionately to older adults whose very high risk is being mitigated by society-wide action. These benefits are not falling evenly across all older Americans, however. They appear to be experienced disproportionately by those living independently. Devastating clusters of infection continue in nursing homes and other elder congregate facilities, even under strict social distancing policies. Some of these facilities have been subject to social neglect for many years; until recently, these settings were not high priorities for testing or personal protective equipment. All too predictably, one-third of COVID-19 deaths are linked to nursing homes, and these deaths have fallen disproportionately on residents who are Latinx and African-American.<sup>32</sup>

That said, the burdens of social distancing accrue significantly on younger people. We have already noted the significant risk and harms to children that school closures impose. Here, too, the burdens are not evenly distributed, with poor children and children of color suffering the most serious and long-lasting setbacks.

People of working age also suffer more from the closure of nonessential businesses, and the attendant loss of income and employment, than people who are already retired. One analysis concludes that the poverty rate is likely to increase significantly, and that “working-age adults and children will face particularly large increases in poverty.”<sup>33</sup> People who depend on employer-sponsored health insurance are also more at risk of losing health care than those over 65 who are on Medicare. Of course, people of retirement age are also disproportionately impacted by short-term effects on the returns on retirement funds, which can significantly reduce their income, whereas younger workers will be able to ride out the impact of an economic recession on their investments.

What all of this means is that, although everyone shares in some central benefits from “flattening the curve” (they and loved ones will be protected from morbidity and mortality, or, if they do become ill, they are less likely to find an overwhelmed healthcare system), the benefits

and burdens are distributed unevenly by age. Conversely, the benefits and burdens of relaxing social distancing will also be distributed unevenly by age. Older Americans are likely to suffer disproportionately from the increases in COVID-19 illness and deaths expected as distancing

measures are relaxed. They are also likely to be among the last to see social restrictions lifted, and, as their family members return to work, they may experience increased isolation and loneliness, with all of its concomitant emotional and physical harms.

**KEY TAKEAWAYS ABOUT JUSTICE**

**1. The effects of social distancing and reopening policies are not equally distributed across relevant social and economic groups.**

For instance, reopening businesses will improve economic prospects for many younger people but will lead to a greater number of cases of COVID-19 than keeping them shuttered, which will likely lead to higher mortality among older people than younger people.

**2. It is a significant ethical problem that the burdens of social distancing and reopening policies have fallen disproportionately on already disadvantaged groups.**

For instance, while all children have suffered from school closures, low-income children have suffered the most. Depending on when and how schooling resumes, the gap in well-being between these and other children is likely only to widen.

Below is a grid that can be used to assess ethical concerns that arise for different policies in light of how they affect ethically relevant groups. If you find that a given policy is

disproportionately burdensome to some groups but not others, this raises concerns of justice.

**DISTRIBUTION OF BENEFITS AND BURDENS BY GROUP**

	Income	Race and Ethnicity	Age
Policy A, implemented at time 1			
Policy A, implemented at time 2			
Policy B			
Set of policies C			

**Step 5: Legitimacy**

The fourth moral value to consider is **legitimacy**. Legitimacy, in this context, refers to the *appropriate authority to make governing decisions, issue guidelines, make recommendations, and enforce rules*. Legitimacy is relevant to an evaluation of not only the content of a given social dis-

tancing policy or reopening plan, but also the process by which a policy decision is reached, the perceived authority of the decision-makers, and the ways in which the policy is implemented or enforced.

Below are four interconnected aspects of legitimacy that

are relevant to the ethical evaluation of any proposed plan or policy.

**a) Legitimacy of the Process**

In a representative democracy such as the United States, public input into governing decisions is essential to legitimacy. The legitimacy of a law or policy emerges in part from people's perceptions of the integrity of the process used to generate the decision. The integrity of the process depends on both the perceived authority of decision-makers and the fairness of the processes used to generate decisions. Given the widespread and severe impacts of policies regarding the pandemic, legitimacy requires that governments develop participatory decision-making procedures that offer alternatives to the current status quo, where the public is largely shut out of decisions that shape their lives and livelihoods.

At the most basic level, citizens of a representative democracy provide input into governing through the ballot box. As we noted in Step 3, which addressed liberty, social distancing policies and worries about infection raise concerns about national and subnational elections that are fast approaching. However, even if these elections proceed smoothly, they are insufficient for obtaining the public input necessary to establish the legitimacy of the pandemic response. Given the fast-evolving and extremely complex context of COVID-19, elections do not provide the kind of timely and nuanced public response that policymakers need. Other avenues must be developed, including mechanisms such as (virtual) town halls, community engagement events, participatory budgeting processes (such as those used elsewhere in the world), and partnerships with community-based institutions that can allow the public to provide a collective input into governing.

Government officials must also consider the downstream effects that their current decision-making processes will have on their ability to respond to future pandemics. Unfortunately, COVID-19 may not be a one-and-done. The cyclical nature of coronavirus outbreaks will likely require subsequent government interventions. To ensure that reservoirs of trust remain available for next time, it is especially important that decision-makers adhere to norms of legitimacy during our present crisis. Indeed, the COVID

crisis might present an opportunity to establish new norms that are more inclusive and equitable, and an opportunity to encourage direct public participation that is currently lacking in our political and economic system.

**b) Legitimacy of Knowledge and Expertise**

Policy decisions must be based on a solid empirical foundation, together with a fair assessment of what is known and what remains uncertain. The legitimacy of a policy depends in part on the quality of the information on which it is based. At a minimum, a decision-maker should elicit the input of unbiased experts from a variety of fields, paying special attention to any expert disagreements, both within and between fields, about the relevant evidence or its implications. Listening critically to the best available technical expertise is not by itself, however, sufficient. It is also important to listen carefully to a wide range of different people experiencing the ravages of the pandemic in varied ways. Given the massive uncertainty surrounding COVID-19, intellectual humility and an open and vigorous contestation of ideas are essential components of legitimacy. False certainty risks undermining the moral basis for any policy decision. For example, while both public health professionals and economists each have expertise that is essential to making good decisions about reopening, their specialized knowledge alone is often not sufficient to make all-things-considered judgments about which policy option is, on balance, best to pursue.

**c) Legitimacy as a Trusted Communicator**

Communicative legitimacy is the authority to broadcast information or recommendations that others can trust and rely upon. When careful attention is paid to process, expertise, and knowledge in the formation of policy, decision-makers are more likely to have this authority. Communicative legitimacy starts from a position of initial credibility, such as a government office or an academic institution. But communicative legitimacy must be cultivated and maintained over time. A crisis such as the current pandemic can quickly deplete available reservoirs of credibility if communication is misused. While the rhetoric of certainty and necessity may be effective to quickly achieve large-scale changes, without also acknowledging ambiguity and complexity, this strategy is likely to prove less effective over the long-run.

Effective communication is essential to the other aspects of legitimacy as well. Clear communication to the public from a trusted source is the least intrusive way to establish new patterns of social coordination and cooperation in the community. Because trusted leaders are more likely to achieve desired policy goals through recommendations and guidelines, the need to resort to coercive enforcement measures is reduced. Moreover, transparently providing the public with the same information as governmental leaders fosters informed debate and deliberation among the public and is essential to the participatory decision-making processes described above.

#### **d) Enforcement Legitimacy**

Finally, enforcement legitimacy is the appropriate authority to enforce rules on threat of coercive sanction. The legal authority of state governments to impose, modify, and rescind social distancing and other policies during a pandemic is generally established. But even where the legal authority to impose rules is clear, ethics questions remain about whether and how the legal power to enforce should be implemented. From an ethics perspective, decision-makers should aim to implement policies through noncoercive guidance and recommendations that citizens and stakeholders are willing to follow voluntarily. However,

some responses to COVID-19 may require coercive enforcement in order to be effective. For example, some jurisdictions have threatened to fine businesses that do not comply with shuttering policies.<sup>34</sup> And some experts have proposed mandating the use of digital contact tracing technology, once it is available.<sup>35</sup> As we have already noted, coercive enforcement raises serious concerns about liberty and justice, and they should be used only as a last resort. Decision-makers must assess whether a proposed plan or policy can be effectively implemented without enforcement — and where it cannot, must consider the need for enforcement to be a significant strike against the proposed plan.

Despite these important moral cautions, it is likely that coercive sanctions are and will be justifiable in some cases. It is important that decision-makers assess who, if anyone, has legitimate authority to enforce the plan. Enforcement legitimacy in this context would require, in part, safeguards to ensure due process for all affected persons and appropriate opportunities for the appeal or review of enforcement actions. State and local governments may need to establish new procedural safeguards tailored to their COVID-19 response.

### **KEY TAKEAWAYS ABOUT LEGITIMACY**

- 1. Legitimacy applies to both the policies themselves as well as the processes for making policy decisions.**
- 2. Decision-makers should establish mechanisms for public engagement and input, virtually if necessary.**
- 3. The input of a diverse set of experts and constituencies should inform policies.**
- 4. Clear and honest communication helps to maintain legitimacy and a reservoir of public trust.**
- 5. Enforcement of policies requires adequate due process protections and appeals processes.**

#### **Step 6: Mitigation and Remedies**

Once a policy has been identified and evaluated according to Steps 1-5, decision-makers must assess whether or to what extent it is feasible to blunt any of the negative impacts of policies still under consideration. To the extent this is possible, policies that are ethically problematic may become more ethically acceptable.

Any policy or set of policies adopted in response to

COVID-19 will have significant negative effects. These negative effects are likely to include increased health risks for some, loss of income for many, and lost opportunities of all sorts. Moreover, these negative impacts are often distributed unequally in ways that are unfair or that exacerbate existing injustice.

At this stage, it is especially important to prioritize those who suffer acute harms, those who are members of dis-

advantaged groups, and ways in which the policy exacerbates background or existing injustices. Any additional resources, when they become available, must be directed to those who are most negatively impacted by the policy decision.

Below are some examples of how the negative effects of social distancing and reopening policies can be mitigated or remedied.

- In making school reopening decisions, consider ways to mitigate the negative effects that school closures have had on all children by developing innovative ways to address significant losses in skills and readiness to learn when schools reopen. Pay particular attention to mitigating, in real-time, the disproportionate risks and harms that low-income children and their families have experienced. Consider prioritizing the reopening of schools serving disadvantaged communities and providing these students with additional resources.<sup>36</sup>
- For policies that negatively affect employment, provide financial support to the newly unemployed or under-employed in the short-term, and in the longer-term, consider implementing job training programs targeted at communities and industries that have been most negatively impacted.
- For policies that continue to require some workers to be at significantly increased risk of contracting SARS-CoV-2 in the workplace, take steps to ensure that their workplace is as safe as possible and that their other needs are met so they can continue to work (e.g., healthcare, childcare, transportation, and nutrition needs). For those workers who become ill with COVID-19 disease, consider providing them with additional sick-leave benefits, and a right to return to their prior jobs once they recover.
- Where social distancing policies have exacerbated urgent public health and safety problems, including mental health, addiction, and domestic violence, develop and implement interventions that mitigate these harms in real-time.
- For surveillance or contact-tracing programs policies that collect names or other personal data, consider developing measures, such as a “right to be forgotten,”

designed to protect the privacy of individuals.

In light of the different mitigation measures you’ve discussed, revise the well-being, liberty, and justice grids provided. For instance, if you determine that it’s feasible to add a measure like a “right to be forgotten” to mitigate concerns about privacy that arise with surveillance or contact-tracing, then note as much in that grid. If feasible, this addition aimed at mitigation will make the policy less worrisome from the perspective of privacy interests. Note as much in the liberty grid.

### **Step 7: Overall Assessment**

The final step in the framework requires decision-makers to reflect on the results from Steps 1–6 to determine which set of policies should be implemented. **Taking into account the full set of potential benefits and burdens, their distribution across groups, liberty concerns, legitimacy concerns, along with feasible remedies, which set of policies is most justifiable all things considered?**

Some ethics frameworks structure this “all-things-considered” question as a matter of balancing the four kinds of considerations we’ve been considering: well-being, liberty, justice, and legitimacy. A policy is ethically justifiable if it strikes a reasonable balance between well-being (how the policy promotes or undermines the well-being of individuals and groups), respect for liberty (how the policy limits various freedoms or violates privacy), justice (whether the benefits of the policy are fairly distributed, and whether the policy exacerbates or remedies background injustice), and legitimacy (whether the policymaking process has been inclusive, adequately informed by experts and citizen perspectives, with credible communication, and appropriate restraint in enforcement). If a policy burdens some groups more than others in an unfair way, this unfairness must be justifiable in light of the overall benefits achieved by the policy. Similarly, if a policy infringes on individuals’ liberty, this must also be justifiable in light of the overall benefits achieved by the policy.

When assessing a public health policy, the key question is often this: are the public health benefits of the policy (usually the only aspect of well-being under consideration) significant enough to justify any infringements on individual liberties and any respects in which the policy is unfair?



But in the context of this pandemic, the “all things considered” judgment is far more complicated than is typically the case in public health. At stake are multiple dimensions of well-being, not just health, engaging different liberty interests, affecting different groups of people differentially, with significant implications for how we function as a society, both now and in the future. The key issue is *which sets of policies will protect and promote our collective well-being, understood broadly to be inclusive of all these complex interests and rights*. For example: will maintaining some social distancing policies for another four weeks increase the collective well-being in our state, given the significant harms associated with these policies and the significant uncertainty about the magnitude of the public health benefits? At what point does maintaining social distancing policies undermine our collective well-being, even if it reduces COVID-19 mortality? Some worry that maintaining social distancing policies could be so harmful as to undermine the flourishing of society—for example, by causing economic carnage that cannot be reversed or adequately mitigated by relief bills and future policy efforts. Others worry that a rush to eliminate social distancing policies without appropriate safeguards and brakes risks too much, not only in terms of COVID illness and disease but also in terms of the continued disproportionate impact on our most disadvantaged communities. Subjecting both these frames to more detailed ethical analysis invites us to test our ethical reactions against conceptions of what it means for American society to flourish and our conceptions of our common good.

In light of this, how should policymakers go about reaching an all-things-considered judgment about whether policies are justifiable? Using the information gained in Steps 1-6, **we suggest that decision-makers consider the following set of questions about each plan or set of policies:**

- Has the public been given adequate opportunity to contribute to identification of policy options and policy design? If not, would it make sense to delay a decision to provide more opportunity for public input?
- Has an adequate range of experts and constituencies been consulted? If not, would it make sense to delay a decision to provide more opportunity for public input?

- Is it plausible that the policies under consideration would promote overall collective well-being as you understand it?
- Do the policies under consideration strike a reasonable balance between saving the most lives during the current pandemic and protecting the broader flourishing of society and promoting the common-good longer-term?
- Do the policies under consideration strike a reasonable balance between preventing deaths from COVID-19 and protecting economic opportunity?
- Is the set of policies unfair to certain groups, and is this reason enough to reject it? Or is even significant unfairness justifiable, given the potential magnitude of the benefits?
- If the policies under consideration restrict individual liberty or privacy, is this justifiable given the potential magnitude of the benefit? Social distancing measures severely restrict liberty; is this justifiable given the potential magnitude of the public health benefit achieved (i.e., the high number of lives that might be saved)? Using cell phone data to track people raises privacy concerns; is this justifiable because it will allow us to ease up on social distancing measures sooner and thereby have significant economic and other benefits?
- What might be the long-lasting effects of the policies on our norms and expectations of government, and the long-lasting effects on our political system? Are these effects acceptable?

At the end of this exercise, we suggest attempting to structure a sentence or paragraph of the following form, filling in the details about the plan you’re recommending: “Despite drawbacks a, b, and c, implementing Policy X at time T has the best chance of striking a reasonable balance of ethical considerations x, y, and z, because of its positive features 1, 2, and 3.” This kind of clear articulation of the ethical justification for a policy can be useful when communicating with the public—and the public is owed this kind of justification.

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